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COMPILED UNDER THE EDITORIAL SUPERVISION OF

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THE

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ENCYCLOPÆDIA OF LAW.

BAIL. (See also ARREST; CRIMINAL LAW; ESCAPE; FORFEITURE; HABEAS CORPUS; RECOGNIZANCE; SCIRE FACIAS; SHERIFF; and the several criminal-law titles generally.)

BAIL IN CRIMINAL CASES.—1. Definition.—Bail is a delivery of a person to his sureties, upon their giving, together with himself, sufficient security for his appearance; he being supposed to continue in their friendly custody, instead of going to jail.[1]

1. State *v.* McNab, 20 N. H. 161; People *v.* Kane, 4 Denio (N.Y.), 535; 1 Black. Com. 297.

Taking bail in personal actions was made compulsory upon sheriffs by the statute 23 Hen. VII. chap. 8; and this privilege was made more definite and secure by subsequent enactments. The statute Hen. VII. related to bail on mesne process only. The right of the sheriff to take bail for the appearance of defendants to answer a writ or process is said, in Dive *v.* Maningham, 1 Plowden, 67, to have existed before the statute at common law, although this is denied in Beawfage's Case, 10 Co. 426.

The statute required sheriffs to let to bail prisoners arrested in personal actions, upon their giving reasonable surety to keep their days, etc., and prescribed the form of the bond, and that it should be on condition that the prisoner appear at the day contained in the writ, etc., and in such place as the writ requires; and then followed the provision that if any sheriffs take any obligation in other form, by color of their offices, it should be void. This was the original of the statutory enactments found in this and most of the States prohibiting and making void bonds taken *colore officii*.

The statute of Hen. VII. was strictly construed by the English courts; and securities or agreements taken by sheriffs, not in strict conformity with its provisions, were held to be void. Scryven *v.* Dyther, Cro. Eliz. 672; Rogers *v.* Reeves, 1 Term R. 418; Fuller *v.* Prest, 7 Term R. 110.

These decisions have been followed in analogous cases in our courts. Sullivan *v.* Alexander, 19 Johns. (N.Y.) 233; Bank of Buffalo *v.* Boughton, 21 Wend. (N. Y.) 57; Barnard *v.* Viele, 21 Wend. (N. Y.) 88; People *v.* Meighan, 1 Hill (N.Y.), 298.

It is said by Blackstone (1 Bl. Com. 137) that if a man be lawfully arrested,

A recognizance is an obligation of record entered into before some court of record or magistrate, duly authorized, conditioned for the performance of some particular act. It is equal in solemnity to, and in some respects at common law takes priority over, an ordinary bond. A recognizance differs from a bond in this: that while the latter, which is attested by the signature and seal of the obligor, creates a fresh or new obligation, the former is an acknowledgment on record of an already existing debt. To be a recognizance it is essential not only that the instrument be in writing, but also that it be a matter of record.[1]

and, either to procure his discharge or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it. This principle of the common law has been applied in several cases, in actions upon agreements claimed to be void under the statute Hen. VII.; and it has been held that where the agreement to discharge a party from arrest was between the parties to the action, it could be enforced by the plaintiff, although it did not conform to the statute. It is competent for the parties, independently of the statute, to agree upon the terms and conditions upon which the discharge shall be had.

In Milward *v.* Clerk, Cro. Eliz. 190, the defendant having been arrested at the plaintiff's suit, in consideration that he should be permitted to go at large, and that the plaintiff would give his warrant to the bailiff to suffer him to go at large, promised the plaintiff to appear at the day of the return of the process, or pay him ten pounds. In an action upon this promise the defendant pleaded the statute 23 Hen. VII.; but the court said: "It is a good *assumpsit*, being made to the party who had authority to dispense with the appearance; but if the promise had been made to the sheriff, or to any one to his use, it had been within the equity of the statute."

In Hall *v.* Carter, 2 Mod. 304, the action was upon a bond executed by the defendant to the plaintiff, conditioned that if a third person (who had been arrested at the suit of the plaintiff) should give security for the payment of the plaintiff's debt, or should render his body to prison at the return of the writ, the obligation should be void. The defendant pleaded the statute, and the plaintiff demurred. The court sustained the demurrer, and gave judgment for the plaintiff, saying, "There is no law that makes the agreement of the parties void; and if the bond was not taken by such agreement, it might have been traversed."

The same principle was recognized and applied in Winter *v.* Kinney, 1 N. Y. 365. The court reversed the judgment below, on the ground that the question should have been submitted to the jury whether the agreement under which the plaintiff paid the money, which he sought to recover back, was made with the sheriff or with the party at whose suit he was arrested; the court saying the party may make such agreement or take such security as he pleases, on discharging his debtor from arrest. See Harp *v.* Osgood, 2 Hill (N. Y.), 216.

Bail by Strangers.—Strangers cannot become bail for a prisoner without his consent. The giving of bail constitutes a contract between the principal and his sureties, and the principal has a right to determine for himself whether he will assume the obligations of such a person or not. They cannot be imposed upon him against his will. People *v.* Davidson, 67 How. Pr. (N. Y.) 416.

1. State *v.* Crippen, 1 Ohio, St. 401; State *v.* Dailey, 14 Ohio, 91; King *v.* State, 18 Neb. 375.

A statutory undertaking for bail is not a recognizance; it is a simple promise to pay money on certain conditions. State *v.* Hays, 2 Oregon, 314.

In People *v.* Kane, 4 Denio (N. Y.), 535, Beardsley, J., says: "The definition of a recognizance would seem to import that it is necessarily a record as soon as entered into; but, strictly speaking, this is incorrect, for a recognizance is not a record until duly enrolled and filed. This rule is universal, for no proceeding can be regarded as matter of record before it has been enrolled and filed in a court of record." Again he says: "And the same principle applies to recognizances taken by a court or magistrate for the appearance of a party charged with a criminal offence; the recognizance, although complete, is not in strictness a record until made out in form and filed in a court of record."

In People *v.* Van Eps, 4 Wend. (N. Y.)

By the common law, all offences, including treason, are bailable, though the high crimes are so not of right but only in the discretion of the court.[1]

The giving and taking of bail is now limited, regulated, and controlled by statute. A bail bond partakes very little of the nature of a contract between the parties in whose names it is taken, but is rather a legal proceeding in the course of justice, the effect of which is regulated by statute.[2]

Both at common law and by statute, to refuse or delay to bail any person bailable is a misdemeanor in the magistrate.[3] But it has been held that the duty of a magistrate in respect of admitting to bail is a judicial duty; and therefore that not even an action can be maintained against him for refusing to admit to bail, where the matter is one as to which he may exercise his discretion.[4]

393, the action was upon a recognizance taken before the first judge of the common pleas court for the appearance of the recognizor at the next court of oyer and terminer. In discussing the subject of recognizances, the court said: "It does not, strictly speaking, become a recognizance or a debt of record until it is filed or recorded in the court in which it is returnable." See State *v.* Walker, 56 N. H. 176.

The case of People *v.* Huggins. 10 Wend. (N. Y.) 464. was an action upon a recognizance taken before two justices of the peace for the appearance of the recognizor at the next court of general sessions of the county. The court said: "It is undoubtedly necessary that it should appear that the recognizance was filed in or made a record of the court in which it is returnable."

The case of Bridge *v.* Ford, 4 Mass. 641. was an action on a recognizance taken before a justice of the peace, conditioned for the prosecution of an appeal to the court of common pleas. Chief Justice Parsons says: "The recognizance does not appear to have been delivered to and entered of record in the common pleas. Debt, as well as *scire facias*, will lie on a recognizance to a party; but this recognizance must be matter of record, and in debt upon it the defendant may plead *nul tiel record*. Whenever, therefore, a justice recognizes a party to appear at any court of record. it is his duty to transmit the recognizance to that court, that it may be entered of record."

State *v.* Smith. 2 Greenl. (Me.) 62, was a *scire facias* upon a recognizance entered into before a justice of the peace for the appearance of the recognizor at the court of common pleas. It was held that it must appear that the recognizance had been legally taken, and "returned to the court where the party recognizing is bound to appear, and such proceedings of that court as form the basis of the suit."

By the provisions of the Nebraska statute a recognizance taken by a justice of the peace, acting as an examining magistrate, becomes an obligation of record when returned by the justice of the peace to the clerk of the district court, and is by him entered of record. King *v.* State, 18 Neb. 375.

1. 1 Bac. Abr. 588–596; R. *v.* Barronet, Dears. C. C. 51; 1 Bish. Cr. Pr. § 256.

The bailing a person not bailable by law is punishable at common law as a negligent escape. Bac. Abr. (Bouvier's Ed.) 595; R. *v.* Brooke, 2 Term R. 190.

The constitutions of most of the States provide that all persons shall, before conviction, be admitted to bail upon giving sufficient sureties, except (where proof of their guilt is evident or the presumption great) for capital offences. Stimson's Stat. Law, § 122.

2. Crane *v.* Keating, 13 Pick. (Mass.) 342.

3. 3 Edw. 1, c. 15; 31 Car. 2, c. 2 (Habeas Corpus); 1 Wm. & M. st. 2, c. 1 (Bill of Rights); Evans *v.* Foster, 1 N. H. 374; State *v.* Campbell, 2 Tyler (Vt.), 177; Boyer *v.* Potts, 14 S. & R. (Pa.) 158; State *v.* Johnson, 2 Bay (S. Car.), 385; Lining *v.* Bentham. 2 Bay (S. Car.), 1; Gregory *v.* Brown, 4 Bibb (Ky.), 28.

4. Linford *v.* Fitzroy, 18 L. J. M. C. 108; R. *v.* Badger, 12 L. J. M. C. 66.

As bailing is a matter resting solely upon the discretion of the court, the decision of the court will not be interfered with on appeal unless the discretion has been evidently abused. Lester *v.* State, 33 Ga. 192.

2. Authority to take—Jurisdiction.—Bail may be taken by a magistrate who has power to issue a warrant for the arrest of the prisoner; by any justice of a court which has jurisdiction of the crime; by any justice who has power to issue the writ of *habeas corpus*, and by any justice of a court having appellate jurisdiction;[1] and also by such officers as may be designated by statute.

1. People *v.* Van Horne, 8 Barb. (N. Y.) 158; People *v.* Goodwin, 1 Wheel. Cr. (N. Y.) 434; Matter of Goodhue, 1 Wheel. Cr. (N. Y.) 427; People *v.* Jefferds, 5 Park. Cr. (N. Y.) 518; People *v.* Cole, 6 Park. Cr. (N. Y.) 695; People *v.* Hyler, 2 Park. Cr. (N. Y.) 570; People *v.* Cunningham, 3 Park. Cr. 520; *Ex parte* Tayloe, 5 Cow. (N. Y.) 39; State *v.* McNab, 20 N. H. 160; Young *v.* Shaw, 1 Chip. (Vt.) 224; State *v.* Rockafellow, 1 Halst. (N. J.) 332; Com. *v.* Keeper, etc., 2 Ashm. (Pa.) 227; Lynch *v.* People, 38 Ill. 494; Matter of Alexander, 59 Mo. 598; State *v.* Grant, 10 Minn. 39; Com. *v.* Salyer. 8 Bush (Ky.). 461; State *v.* Hill, 3 Brev. (S. Car.) 89; *Ex parte* Gilchrist, 4 McC. (S. Car.) 233; Street *v.* State, 43 Miss. 1; State *v.* Abbott, R. M. Charl. (Ga.) 244; Corbett *v.* State, 24 Ga. 391; Callahan *v.* State, 60 Ala. 65; *Ex parte* Chaney, 8 Ala. 424; U. S. *v.* Hamilton, 3 Dall. (U. S.) 17; U. S. *v.* Stewart, 2 Dall. (U. S.) 343; U. S. *v.* Davis, Chase's Dec. (U. S.) 1; U. S. *v.* Hamilton, 3 Dall. (U. S.) 17; U. S. *v.* Faw, 1 Cranch C. C. 486; R. *v.* Higgins, 4 Up. Can. O. S. 83; *In re* Barronet, 1 El. & Bl. 1; R. *v.* Lord Baltimore, 4 Burr. 2179; R. *v.* Barthelemy, Dears. C. C. 60; R. *v.* Morgan, 1 Bulst. 84; R. *v.* Wyndham, 1 Strange, 2; Mohun's Case, 1 Salk. 103; Herbert's Case, Latch, 12.

In some States the sheriff is authorized to take bail. Dickinson *v.* Kingsbury, 2 Day (Conn.), 1; Kearns *v.* State, 3 Blackf. (Ind.) 334; McCole *v.* State, 10 Ind. 50; Com. *v.* Reed, 3 Bush (Ky.), 516; McClure *v.* State, 56 Ga. 439; Kellogg *v.* State, 43 Miss. 57; Merrill *v.* State, 46 Ala. 82; State *v.* McKeown, 12 La. Ann. 596.

A sheriff making an arrest for misdemeanor under a *capias* is authorized to take bail of the accused either in termtime or in vacation of the court. Ellis *v.* State, 10 Tex. App. 324. *Compare* State *v.* Miller, 31 Tex. 564.

An order to the sheriff to take bail and approve the sureties of a party arrested for error, *held*, error. Jacquemine *v.* State, 48 Miss. 46.

Power to bail is incident to the power to try the offence. People *v.* Shattuck, 6 Abb. N. Cas. (N. Y.) 33; Bac. Abr. tit. Bail, 581.

A United States commissioner, as respects the taking of bail, has the same power as a State magistrate, and no greater. U. S. *v.* Horton, 2 Dill. (U. S.) 94; U. S. *v.* Rundlett, 2 Curt. (U. S.) 41. *Compare* U. S. *v.* Case, 8 Blatchf. (C. C.) 250.

Where the jurisdiction of a judge of the county court, or of a judge of the supreme Court, to take a recognizance is conferred by statute, it is special, and limited to those cases named in the statute. No intendment is to be made in favor of the jurisdiction of the tribunal in such cases; but the jurisdiction must appear from the record itself. Treasurer *v.* Merrill, 14 Vt. 64; State *v.* Lamoine, 53 Vt. 568; State *v.* Smith, 2 Me. 62; Dodge *v.* Kellock, 13 Me. 136; Bridge *v.* Ford, 4 Mass. 641.

The power to admit a prisoner to bail, pending an appeal taken by him from a judgment of conviction of felony, will not be exercised by the supreme court in the first instance, nor until after the determination upon its merits of an application for bail before the judge who tried the cause. People *v.* January, 11 Pac. Repr. (Cal.) 326.

In an action upon a recognizance, taken before a special justice, as security for one who had been arrested upon an execution for costs, upon a claim against him as administrator personally, no affidavit being required to justify an arrest upon the execution, and the arrest being warranted without special instruction,—*held*, that the special justice could take the recognizance at other times than the regularly appointed sessions of the court. Gibbs *v.* Taylor, 3 N. Eng. Repr. (Mass.) 304.

The power to admit a prisoner to bail after conviction, pending an appeal on writ of error, conferred by the Tenn. Code, sec. 5142, upon the trial court or the judge thereof, and upon the supreme court, can only be exercised by the supreme court while sitting in the grand division in which the case is to be tried, but may be exercised by the trial court, or the judge thereof, at any time when the supreme court is not sitting. Holcomb *v.* State, 6 Lea (Tenn.), 668.

Where a criminal cause, brought into court by appeal from a judgment of con-

A recognizance taken by a court without jurisdiction, or by an officer without authority, is void.[1]

Bail should only be taken in the territorial jurisdiction, where the crime was committed and must be tried;[2] but the prisoner

viction of felony, is reversed for an apparently fatal defect in the transcript of the record, and the defendant remanded to the court below for a new trial, that court has jurisdiction to provide for the safe-keeping of the prisoner, and a recognizance taken for his appearance will be good although upon a more perfect transcript the order of reversal of this court is afterwards, during the same term, set aside and the cause reinstated on the docket. Brewer *v.* State, 6 Lea (Tenn.), 198.

Bail taken by two justices, where but one had authority to act, is not invalid. Chase *v.* People, 2 Colo. 528.

Where a judge has jurisdiction, he may order a recognizance to be taken by two justices of the peace designated by him in a fixed sum. State *v.* Edney, 2 Wins. (N. Car.) 71.

The mere signing of an order for bail outside of his circuit for a prisoner of his circuit does not show that the judge heard the application beyond the limits of his own circuit. State *v.* Satterwhite, 20 S. Car. 536.

Under the Gen. Sts. c. 152, § 7, authorizing a justice of the peace to take the recognizance of a debtor "in any case where it might be taken before the clerk of the court," and § 2, providing that "the recognizance may be taken before the superior court in any county in term time, or before the clerk of the court in vacation," a justice of the peace has no authority to take such a recognizance on a day when the superior court stands adjourned to another day in the same term; and an execution issued on the recognizance is void. Brayman *v.* Whitcomb, 134 Mass. 525.

A bail commissioner may take bail during the session of the court which appointed him. Com. *v.* Merriam, 9 Allen (Mass.). 371.

Under the N. Y. Rev. Stat. a justice of the supreme court may admit the prisoner to bail although he is a justice in the county where the arrest is made and not in the county where the indictment was found, provided the court having cognizance of the offence and jurisdiction to try the same is not sitting at the time the application for bail is made. People *v.* Clews, 14 Hun (N. Y.), 90, 77 N. Y. 39.

1. State *v.* Winninger, 81 Ind. 51; Dickinson *v.* State, 29 N. W. Repr. (Neb.) 184; State *v.* Jones, 3 La. Ann. 10; State *v.* Harper, 3 La. Ann. 598; Gray *v.* State, 43 Ala. 41; Jacquemine *v.* State, 48 Miss. 46; Branham *v.* Commonwealth, 2 Bush (Ky.). 3; Com *v.* Roberts, 1 Duv. (Ky.) 199; Com. *v.* Fisher, 2 Duv. (Ky.) 376; Dugan *v.* Commonwealth, 6 Bush (Ky.), 305; Harris *v.* Simpson, 4 Litt. (Ky.) 165; s. c., 14 Am. Dec. 101; State *v.* McCoy, 57 Tenn. 111; Wallenweber *v.* Commonwealth, 3 Bush (Ky.), 68; Schneider *v.* Commonwealth, 3 Metc. (Ky.) 409; Tharp *v.* Commonwealth, 3 Metc. (Ky.) 411; Williams *v.* Shelby. 2 Oregon, 144; Blevins *v.* State, 31 Ark. 53; Cooper *v.* State, 23 Ark. 278; State *v.* Nelson, 28 Mo. 13; State *v.* Hays, 4 La. Ann. 59; State *v.* Vion, 12 La. Ann. 688; Holmes *v.* State, 44 Tex. 631; State *v.* Russell, 24 Tex. 505; State *v.* Berry, 8 Me. 179; Com. *v.* Loveridge, 11 Mass. 337; Com. *v.* Otis, 16 Mass. 198; Com. *v.* Canada, 13 Pick. (Mass.) 86; Powell *v.* State, 15 Ohio, 579; State *v.* Clark, 15 Ohio, 595; People *v.* McKinney, 9 Mich. 444. *Compare* State *v.* Cannon, 34 Iowa, 325; Furgison *v.* State, 4 Greene (Iowa), 302; Dennard *v.* State, 2 Ga. 137.

A recognizance for the appearance of an accused person to answer to an indictment for felony, taken before and approved by an officer or person unauthorized by law, or where, under the facts of the case, the taking thereof is unauthorized by law, so that the same fails to be binding under the statute, is void, and is also void as a common-law obligation. Dickinson *v.* State, 29 N. W. Repr. (Neb.) 184.

A court has no power to deputize its clerk to take bail. Morrow *v.* State, 5 Kan. 563; Butler *v.* Foster, 14 Ala. 323; Antonez *v.* State, 26 Ala. 81; Wallenweber *v.* Commonwealth, 3 Bush (Ky.), 68. *Compare* State *v.* Sewall, 3 La. Ann. 575; State *v.* Wyatt, 6 La. Ann. 701.

A justice of the peace cannot take bail in case of homicide. Com. *v.* Loveridge, 11 Mass. 337.

2. People *v.* Harris. 21 How. Pr. (N. Y.) 83; People *v.* Chapman, 30 How. Pr. (N. Y.) 202; Matter of Goodhue, 1 Wheel. Cr. (N. Y.) 427; Com. *v.* Jailer, 1 Grant's Cas. (Pa.) 218; Com. *v.* Taylor, 11 Phila. 386; State *v.* Woolery, 39 Mo. 525; *Ex parte* Erwin. 7 Tex. App. 288; R. *v.* MacIntosh, 1 Strange, 308; R. *v.* Leason,

may be bailed *de die in diem* pending the inquiry.[1]

When it appears that the presiding judge has acted, no other judge would be warranted in discharging the prisoner or admitting him to bail, unless it clearly appeared that the presiding judge had acted arbitrarily in the premises, and thereby abused his discretion.[2]

The official character of the magistrate taking the recognizance cannot be put in issue in a collateral proceeding.[3]

3. Who may Give.—In civil actions all persons are entitled to give bail to secure their release.[4] (See BAIL IN CIVIL CASES, *post*, p. 35.

In criminal cases the prisoner may of right give bail for his appearance, to answer the charge or indictment, except in capital offences, where the proof is evident or the presumption great. In these cases bail should be refused where a judge would sustain a capital conviction, if pronounced by a jury, on such evidence of guilt as is exhibited on the hearing for bail. If the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the offence has been committed, that the accused is the guilty agent, and that he would probably be punished capitally if the law be administered, bail is not a matter of right.[5]

1 Strange, 308; s. c., 1 Ld. Raymond, 61; R. *v.* Bishop, Fort. 102; R. *v.* Gates, Fort. 101.

Where by statute the jurisdiction of the court is coextensive with the limits of the State, a court in one county or district can bail a prisoner for an offence committed in another county or district. Parrish *v.* State, 14 Md. 238.

C. was arrested in Cortland County by virtue of an indorsed warrant issued in Seneca County, and was released from custody on giving bail in Cortland County, conditioned for his appearance at the next Seneca general sessions. He appeared accordingly, but the complainant did not appear, nor were any subsequent steps taken under the warrant. *Held*, that the recognizance was a nullity, and as C. still remained liable to be arrested under the warrant, he could not maintain an action for malicious prosecution. Clark *v.* Cleveland, 6 Hill (N. Y.), 344; Matter of Gorsline, 21 How. Pr. (N. Y.) 85.

1. *In re* Kaine, 14 How. (U. S.) 103, 134.

2. *Ex parte* Isbell, 11 Nev. 295; People *v.* McLeod, 25 Wend. (N. Y.) 483; People *v.* Restell, 3 How. Pr. (N. Y.) 251; Lester *v.* State, 33 Ga. 192; *Ex parte* Jones, 20 Ark. 9; *Ex parte* Osborn, 24 Ark. 185.

3. People *v.* Meacham, 74 Ill. 292; Compton *v.* People, 86 Ill. 176.

4. Richards *v.* Porter, 7 Johns. (N. Y.) 137.

5 *Ex parte* Foster, 5 Tex. App. 625; *Ex parte* Randon, 12 Tex. App. 145; *Ex parte* Beacom, 12 Tex. App. 318; Ruston *v.* State, 15 Tex. App. 324; *Ex parte* Coldiron, 15 Tex. App. 464; Moore *v.* State, 31 Tex. 572; Thomas *v.* State, 40 Tex. 6; McCoy *v.* State, 25 Tex. 33; Drury *v.* State, 25 Tex. 45; *Ex parte* Wray, 30 Miss. 673; Street *v.* State, 43 Miss. 1; Beall *v.* State, 39 Miss. 715; *Ex parte* Fortenberry, 53 Miss. 428; *Ex parte* Bridewell, 57 Miss. 39; *Ex parte* McAnally, 53 Ala. 495; s. c., 25 Am. Rep. 646; *Ex parte* Bryant, 34 Ala. 270; *Ex parte* Banks, 28 Ala. 89; *Ex parte* Hammock, 78 Ala. 414; *Ex parte* Vaughan, 44 Ala. 417; *Ex parte* Croom, 19 Ala. 561; *Ex parte* McCrary, 22 Ala. 661; *Ex parte* Johnson, 18 Ala. 414; State *v.* Wicks, R. M. Charl. (Ga.) 139; State *v.* Howell, R. M. Charl. (Ga.) 120; State *v.* Holmes, 3 Strob. (S. Car.) 272; State *v.* Arthur, 1 McMul. (S. Car.) 456; State *v.* Hill, 1 Treadw. (S. Car.) 242; State *v.* Brusle, 34 La. Ann. 61; State *v.* Brewster, 35 La. Ann. 605; *In re* Bennoit, 1 Mart. (La.) 142; *Ex parte* White, 9 Ark. 222; People *v.* Tinder, 19 Cal. 539; *Ex parte* Hoge, 48 Ala. 3; People *v.* Perdue, 48 Cal. 552; People *v.* Smith, 1 Cal. 9; Com. *v.* Semmes, 11 Leigh (Va.), 665; Com. *v.* Archer, 6 Gratt. (Va.) 705; Green *v.* Com., 11 Leigh (Va.), 677; Com. *v.* Keeper of Prison, 2 Ashm. (Pa.) 227; State *v.* Rockafellow, 1 Halst. (N. J.) 332; People *v.* Van Horne, 8 Barb. (N. Y.)

158; *Ex parte* Tayloe, 5 Cow. (N. Y.) 39; People *v.* Dixon, 4 Park. Cr. (N. Y.) 651; People *v.* Hyler, 2 Park. Cr. (N. Y.) 570; People *v.* Perry, 8 Abb. Pr. N. S. (N. Y.) 27; People *v.* Shattuck, 6 Abb. N. Cas. (N. Y.) 33; State *v.* McNab, 20 N. H. 160; State *v.* Summons, 19 Ohio, 139; Kendle *v.* Tarbell, 24 Ohio St. 196; Lumm *v.* State, 3 Ind. 293; *Ex parte* Walton, 79 Ind. 600; *Ex parte* Jones, 55 Ind. 176; *Ex parte* Colter, 35 Ind. 109; Foley *v.* People, 1 Ill. 32; Shore *v.* State, 6 Mo. 640; *In re* Alexander, 59 Mo. 599; Ullery *v.* Commonwealth, 8 B. Mon. (Ky.) 3; Ready *v.* Commonwealth, 9 Dana (Ky.), 38; U. S. *v* Hamilton, 3 Dall. (U. S.) 17; U. S. *v.* Jones, 3 Wash. C. C. 209; U. S. *v.* Stewart, 2 Dall. (U. S.) 343. *Compare* People *v.* Dixon, 4 Park. Cr. (N. Y.) 651.

In felonies not capital, bail under the common-law rules is more freely granted, yet still cautiously and not as of course. 1 Bish. Cr. Proc. (3d Ed.) § 256.

Where capital punishment has been abolished, the prisoner is entitled to be bailed. *In re* Perry, 19 Wis. 676.

If the guilt or innocence of the prisoner appear to be indifferent, he may be bailed. *Ex parte* Tayloe, 5 Cow. (N. Y.) 39; *Ex parte* Bridewell, 57 Miss. 39. See Tyler *v.* Greenlaw, 5 Rand. (Va.) 711.

The accused is entitled to the benefit of every reasonable doubt. *Ex parte* Bird, 24 Ark. 275.

It is a safe rule, where malicious homicide is charged, to refuse bail in all cases where a judge would sustain a capital conviction if pronounced by a jury on such evidence of guilt as was exhibited to him on the hearing of the application to admit to bail. Com. *v.* Keeper of Prison, 2 Ashm. (Pa.) 227; Matter of Troia, 64 Cal. 152; State *v.* Summons, 19 Ohio, 139. *Compare Ex parte* Bridewell, 57 Miss. 39.

It is only when the testimony of the material witnesses for the people, taken before a committing magistrate, is clearly shown to be false in a capital case that a prisoner should be discharged on *habeas corpus* with or without bail. *In re* Troia, 64 Cal. 152.

An indictment for murder duly returned implies *prima facie* that the parties indicted have no right to bail. *Ex parte* Jones, 55 Ind. 176; *Ex parte* Randon, 12 Tex. App. 145; *Ex parte* McGlawn, 75 Ala. 38; *Ex parte* Rhear, 77 Ala. 92; *Ex parte* Hammock, 78 Ala. 414.

The burden is upon appellants to show that the proof of their guilt is not evident, and that the presumption of their guilt is not strong. *Ex parte* Jones, 55 Ind. 176; *Ex parte* Heffren, 27 Ind. 87; *Ex parte* Kendall, 100 Ind. 599.

Appellant sued out *habeas corpus* for allowance of bail. At the hearing it appeared that he was in jail under a *capias* emanating from an indictment which charged him with murder in the first degree. He procured process for all the witnesses named on the indictment, and he examined such of them as appeared. The evidence tended to show that the deceased had been killed, but neither identified him as the man for whose murder the appellant was indicted nor connected the appellant with the homicide. *Held*, that the appellant should have been admitted to bail. *Ex parte* Randon, 12 Tex. App. 145.

Where the evidence shows that the crime is probably manslaughter, but the indictment is for murder, bail should be allowed. *Ex parte* Matlock, 18 Tex. App. 227; Brown *v.* State, 18 Tex. App. 326. See State *v.* Wicks, R. M. Charl. (Ga.) 139. *Compare Ex parte* Tayloe, 5 Cow. (N. Y.) 39.

The prisoner is not required to introduce the witnesses who were before the grand jury, although they are present in court; and if the evidence adduced by him leaves it doubtful whether the deceased came to his death by accident, by suicide, or by violence at the hands of another, no witnesses being introduced on the part of the prosecution, he is entitled to bail. *Ex parte* Hammock, 78 Ala. 414.

F., being under indictment for murder, applied by *habeas corpus* for release on bail. At the hearing of his application fourteen witnesses were examined for the State. The names of seven of them had been marked upon the indictment as witnesses for the State; and two others were said by counsel for the State to be important witnesses. There were marked upon the indictment the names of nineteen witnesses; twelve of whom were not examined. The testimony adduced failed to disclose any circumstance criminating F., but the chancellor refused to allow him to give bail. *Held*. that F. should have been admitted to give bail, unless the chancellor was led to believe that there was other procurable and important evidence, and then he should have postponed the further investigation of the matter until such evidence could be had. *Ex parte* Floyd. 60 Miss. 913.

On appeal, the court should consider the evidence without reference to the finding of the court below. *Ex parte* Sutherlin. 56 Ind. 595.

Where the evidence tended to show

4. After Indictment.—An indictment for a capital offence implies *prima facie* that the prisoner has no right to bail.[1]

Bail may sometimes be taken after indictment found in capital cases where no special and extraordinary circumstances exist; as where the public prosecutor admits that the evidence which he can produce will not warrant a conviction for a capital offence, or where he admits facts from which it is evident no such conviction can take place. So where upon trial the evidence for the prosecution and defence has been produced, and the jury have disagreed, or where, after verdict, a new trial has been granted for the insufficiency of the evidence to warrant a conviction. In such cases the court may allow bail in its discretion, without hearing other evidence as to the guilt or innocence of the accused. Independently of any consideration of the merits of the prosecution, circumstances frequently arise which will justify the allowance of bail after indictment found; as where the trial of the prisoner is unreasonably delayed, or where the trial is postponed from term to term, even upon sufficient reasons. So where any event has happened postponing indefinitely the further prosecution of the ac-

that the accused killed deceased in an altercation provoked and brought on by the deceased, *held*, that the accused was entitled to be let to bail. *Ex parte* Allen, 2 S. West'n Repr. (Tex.) 588.

Although the grand jury fails to indict, the accused is not of right entitled to bail, as a new bill may be brought against him. Fitch *v.* State, 2 Nott & McC. (S. Car.) 558. See Fleece *v.* State, 25 Ind. 384.

Murder in the second degree is not a bailable offence. *Ex parte* Colter, 35 Ind. 109.

Where the charge is assault and battery only, bail cannot be refused, although the person assaulted is in danger of death. Dunlap *v.* Bartlett, 10 Gray (Mass.), 282. *Compare Ex p.* Tayloe, 5 Cow. (N. Y.) 39

Bail being improperly refused, and the right to it being declared on review, additional evidence cannot be adduced by the prosecution, but the only open question is as to the amount of bail. *Ex parte* Hammock, 78 Ala. 414.

1. *Ex parte* Jones, 55 Ind. 176; *Ex parte* Randon. 12 Tex. App. 145; *Ex parte* McGlawn, 75 Ala. 38; *Ex parte* Rhear, 77 Ala. 92; *Ex parte* Hammock, 78 Ala. 414; People *v.* Van Horne, 8 Barb. (N. Y.) 158.

The presumption of guilt, created by the indictment, precludes further inquiry into the merits of the prisoner's defence on application for bail. State *v.* Brewster, 35 La. Ann. 605. *Compare* Com. *v.* Rutherford, 5 Rand. (Va.) 646; *Ex parte* Tayloe. 5 Cow. (N. Y.) 39.

The applicant must show that, though held to answer a charge of a capital offence, the proof is not evident. In this the prisoner must take the initiative. . . . The question whether he is guilty of murder in the first degree, and therefore not bailable should be determined without reference to whether the evidence was introduced by the applicant or by the State, and without reference to the *prima-facie* case which would, in the absence of proof, be made by the production of a *capias* and a valid indictment. Church on Habeas Corpus, § 404.

One duly committed upon a regular indictment for murder cannot be discharged upon *habeas corpus* by proving his innocence merely, however clear the proof may be; but must abide a trial by jury. People *v.* McLeod, 1 Hill (N. Y.), 377.

In *Ex parte* Vaughan, 44 Ala. 417, the court said: "On an application for bail by a prisoner who is shown to be under indictment for murder, he is presumed to be guilty of the charge in the highest degree, and that presumption must be overcome by proof."

If the evidence is conflicting, bail should be refused. *Ex parte* Beacom, 12 Tex. App. 318.

A prisoner charged with a capital felony, being entitled to bail as a matter of right, before conviction, except "when the proof is evident or the presumption great," should not be refused bail when the evidence against him is entirely circumstantial, unless it excludes to a moral certainty every reasonable hypothesis but that of his guilt. *Ex parte* Acree, 63 Ala. 234.

tion; as the repeal of the statute giving the jurisdiction to try the indictment (where such jurisdiction depends on statute) without provision for its transfer to any other tribunal. So where the law creating the offence charged has been repealed without a reservation of the penalty for past offences.[1]

1. People *v.* Tinder, 19 Cal. 539; Zembrod *v.* State, 25 Tex. 519; *Ex parte* Randon, 12 Tex. App. 146; *Ex parte* Mosby, 31 Tex. 566; *Ex parte* White, 9 Ark. 222; *Ex parte* Vaughan, 44 Ala. 417; *Ex parte* Bryant, 34 Ala. 270; *Ex parte* Carroll, 36 Ala. 300; *Ex parte* Croom, 19 Ala. 561; *Ex parte* Bridewell, 57 Miss. 39; *Ex parte* Floyd, 60 Miss. 913; Street *v.* State, 43 Miss. 1; *Ex parte* Wray, 30 Miss. 673; State *v.* Wicks, R. M. Charl. (Ga.) 139; State *v.* Abbott, R. M. Charl. (Ga.) 244; Lynch *v.* People, 38 Ill. 494; State *v.* Summons, 19 Ohio, 139; *Ex parte* Heffren, 27 Ind. 87; Lumm *v.* State, 3 Ind. 293; State *v.* Hill, 3 Brev. (S. Car.) 89; State *v.* Hill, 1 Const. R. (S. Car.) 242; Com. *v.* Lemley, 2 Pittsb. (Pa.) 362; State *v.* McNab, 20 N. H. 160; People *v.* Van Horne, 8 Barb. (N. Y.) 158; People *v.* Cole, 6 Park. Cr. (N. Y.) 695; People *v.* Hyler, 2 Park. Cr. (N. Y.) 70; People *v.* Perry, 8 Abb. Pr. N. S. (N. Y.) 27. *Compare* People *v.* McLeod, 1 Hill (N. Y.), 377; s. c., 25 Wend. (N. Y.) 483, 37 Am. Dec. 328.

The petitioner was indicted for murder, and the evidence showed that the death resulted from certain acts of the petitioner done with intent to procure an abortion, but there was no evidence to show actual intent to kill. *Held*, that the petitioner should be admitted to bail. *Ex parte* Wolff, 57 Cal. 94.

In Lumm *v.* State, 3 Ind. 293, it was held that after indictment the prisoner would be allowed bail upon his showing that he was guilty of a bailable offence, or upon his showing that the proof was not evident, or the presumption strong that he was guilty of a non-bailable offence. *Ex parte* Wray, 30 Miss. 673; State *v.* Summons, 19 Ohio, 139. See *Ex parte* Heffren, 27 Ind. 88.

In State *v.* Mills, 2 Dev. (N. Car.) 420, the court said: "After indictment found, a defendant is presumed guilty for most, if not all, purposes, except that of a fair and impartial trial before a jury. This presumption is so strong that in a capital felony the party cannot be let to bail."

In Lynch *v.* People, 38 Ill. 494, it was held that the mere fact that a grand jury has found an indictment for murder does not preclude an inquiry into the facts of the case to ascertain whether the offence may not be of such a grade as to entitle the prisoner to bail. The application in such case may be made upon motion in term time, or by *habeas corpus* in term time or vacation.

A prisoner under an indictment for murder cannot be admitted to bail under the writ of *habeas corpus*, as the provisions of the act regulating the same, so far as it provides for the hearing of original testimony concerning the detention, contemplates cases where no indictment has been found. Hight *v.* U. S., Morris (Iowa), 407; s. c., 43 Am. Dec. 111; People *v.* McLeod, 1 Hill (N. Y.), 377; s. c., 37 Am. Dec. 328.

In Street *v.* State, 43 Miss. 1, the court held that as regards all intermediate proceedings between indictment and trial, the indictment furnishes the strongest possible presumption of guilt.

In People *v.* Shattuck, 6 Abb. N. C. (N. Y.) 33, the court held that it would not look beyond the minutes of the grand jury; and if it there appears that the case was properly considered, bail would be refused.

Mere inability of the court to try the case promptly is not ground for granting bail. State *v.* Roger, 7 La. Ann. 382. See *Ex parte* Chaney, 8 Ala. 424.

Depositions taken before the committing magistrate cannot be looked into. People *v.* Dixon, 4 Park. Cr. (N. Y.) 651.

If it appears that the prisoner will probably be deemed insane, he is entitled to bail in cases of homicide. Zembrod *v.* State, 25 Tex. 519.

Evidence may be heard to show that an indictment for murder was procured by malice or mistake. State *v.* Hill, 3 Brev. (S. Car.) 89.

Where the evidence shows that the killing was not premeditated, and was the result of a sudden affray, bail may be taken. *Ex parte* Hock, 68 Ind. 206.

The court will not act on *ex-parte* affidavits taken by an unauthorized person. State *v.* Drew, 1 Taylor (N. Car.), 142.

Proof is evident if the evidence would suffice to sustain a verdict against the appellant of murder in the first degree. If the evidence is of less efficacy the proof is not "evident," and bail should be allowed. *Ex parte* Beacom,

5. After Conviction.—Admission to bail pending an appeal, after conviction of felony, is a matter of discretion merely; and in gen-

12 Tex. App. 318; *Ex parte* Foster, 5 Tex. App. 625; Com. *v.* Keeper of Prison, 2 Ashm. (Pa.) 227; State *v.* Summons, 19 Ohio, 139; Street *v.* State, 43 Miss. 1.

In *Ex parte* Floyd, 60 Miss. 913, the court said: "On hearing this application, seven of the witnesses, whose names are marked on the indictment, and two others said by the counsel for the State to be important and whose names are not on the indictment, and five others, were examined as witnesses for the State, and not a single circumstance criminating the appellant was disclosed. The names of nineteen witnesses are indorsed upon the indictment, and as seven of them and seven others failed to testify to anything inculpating the appellant, the chancellor should have admitted him to bail, or, if he was led to believe that there was other testimony procurable and important in the investigation, he should have postponed the further hearing of the matter until it could be had. There is nothing to suggest that witnesses not in attendance have any knowledge of the case not possessed by those examined, and, if not, the sooner the prosecution is abandoned the better."

Burden of Proof.—An indictment for murder implies *prima facie* that the accused has no right to bail, and the burden is upon him to show that the proof of his guilt is not evident, and that the presumption of his guilt is not strong. *Ex parte* Kendall, 100 Ind. 599; *Ex parte* Jones, 55 Ind. 176; *Ex parte* Scoggin, 6 Tex. App. 546; *Ex parte* Randon, 12 Tex. App. 145; *Ex parte* Vaughan, 44 Ala. 417.

Sickness.—Slight or even considerable sickness is not sufficient. There must be strong grounds for apprehending a fatal result or a permanent impairment of health. *Ex parte* Pattison, 56 Miss. 161; Com. *v.* Semmes, 11 Leigh (Va.), 665; Lester *v.* State, 33 Ga. 192; Harvey of Comb's Case, 10 Mod. 334; Kirk's Case, 5 Mod. 454. *Compare* Lester *v.* State, 33 Ga. 192; People *v.* Cole, 6 Park. Cr. (N. Y.) 695; Archer *v.* Commonwealth, 6 Gratt. (Va.) 705.

The ailment must be a present indisposition, arising from the confinement; a distemper incident to the family will not do. R. *v.* Wyndham, 1 Strange, 2; Lester *v.* State, 33 Ga. 192; U. S. *v.* Jones, 3 Wash. C. C. 224. In the last case the court said: "It is proved that the prisoners health is bad, his complaint pulmonary, and in the physician's opinion confinement during the summer might so far increase the disorder as to render it ultimately dangerous. It is not necessary in our view of the subject that the danger which may arise from his confinement should be either immediate or certain. If in the opinion of a skilful physician the nature of his disorder is such that confinement must be injurious and may be fatal, we think he ought to be bailed." See Com. *v.* Archer, 6 Gratt. (Va.) 705; Com. *v.* Semmes, 11 Leigh (Va.), 665; Street *v.* State, 43 Miss. 1; *Ex parte* Pattison, 56 Miss. 161; *Ex parte* Bridewell, 57 Miss. 39; People *v.* Cole, 6 Park. Cr. (N. Y.) 695.

What facts make out a case under the Texas Code determined. Thomas *v.* State, 40 Tex. 6.

Failure to Try.—If the prisoner is not promptly tried he is entitled to bail, unless the prosecution offers good reasons, such as the failure to procure the attendance of witnesses, or he assents to the postponement. *Ex parte* Simonton, 9 Port. (Ala.) 390; *Ex parte* Chaney, 8 Ala. 424; *Ex parte* Stiff, 18 Ala. 464; *Ex parte* Croom, 19 Ala. 561; State *v.* Buyck, 2 Bay (S. Car.), 563; Logan *v.* State, 3 Brev. (S. Car.) 415. See State *v.* Abbott, R. M. Charl. (Ga.) 244.

A single disagreement of the jury in a case of murder does not entitle the prisoner to bail. Webb *v.* State, 4 Tex. App. 167; *Ex parte* Cole, 4 Abb. Pr. N. S. (N. Y.) 280; State *v.* Summons, 19 Ohio, 139; *Ex parte* Pattison, 56 Miss. 161. See People *v.* Tinder, 19 Cal. 539; *Ex parte* McLaughlin, 41 Cal. 211; People *v.* Cole, 6 Park. Cr. (N. Y.) 695.

The failure to convict on one indictment where two were found does not entitle the prisoner to bail. Com. *v.* Summerfield, 2 Rob. (Va.) 767. *Compare* Green *v.* Com. 11 Leigh, (Va.) 67-.

After Trial and Failure to Convict.—A was tried twice for murder, but the jury disagreed in each trial. Subsequently the jail wherein he was confined was broken and other prisoners escaped, but A refused to go. *Held*, a proper case for allowing the privilege of bail. Petition of Alexander, 59 Mo. 598; s. c., 21 Am. Rep. 393.

In People *v.* Perry, 8 Abb. Pr. N. S. (N. Y.) 27, it was held that where the prisoner was tried twice for murder and the jury in each case disagreed, it was a proper case for exercising the power to bail. See State *v.* Summons, 19 Ohio, 139; *In re* Alexander, 59 Mo. 599.

eral should not be allowed, except where circumstances of an extraordinary character have intervened.[1]

1. Davis *v.* State, 6 How. (Miss.) 399; *Ex parte* Dyson, 25 Miss. 356; Lumm *v.* State, 3 Ind. 293; People *v.* Lohman, 2 Barb. (N. Y.) 450; People *v.* Folmsbee, 60 Barb. (N. Y.) 480; People *v.* Bowe, 58 How. Pr. (N. Y.) 393; State *v.* Satterwhite, 20 S. Car. 536; State *v.* Connor, 2 Bay (S. Car.), 34; State *v.* Frink, 1 Bay (S. Car.), 168; State *v.* Ward, 2 Hawks (N. Car.), 443; State *v.* Rutherford, 1 Hawks (N. Car.), 453; State *v.* Daniel, 8 Ired. (N. Car.) 21; Miller *v.* State, 15 Fla. 575; *Ex parte* Dyson, 25 Miss. 356; Corbett *v.* State, 24 Ga. 391; *Ex parte* Ezell, 40 Tex. 451; s. c., 19 Am. Rep. 32; *Ex parte* Voll, 41 Cal. 29; *Ex parte* Smallman, 54 Cal. 35; *Ex parte* Marks, 49 Cal. 681; *Ex parte* Hoge, 48 Cal. 3; People *v.* Perdue, 48 Cal. 552; *Ex parte* Brown, 9 Pac. Repr. (Cal.) 829. See *Ex parte* Longworth, 7 La. Ann. 247; R. *v.* Reader, 1 Strange, 531; R. *v.* Saltash, 2 Shower, 93. *Compare* Warnock *v.* State, 6 Tex. App. 450; State *v.* Connor, 2 Bay (S. Car.). 34; *Ex parte* Longworth, 7 La. Ann. 247; Governor *v.* Fay, 8 La Ann. 490; Davis *v.* State, 6 How. (Miss.) 399.

In People *v.* Lohman, 2 Barb. (N. Y.) 454, the court said: "On a question of bail, before indictment, the magistrate may inquire as to the guilt of the prisoner. After indictment he may, in cases not capital, look at the evidence upon which it was obtained. But at each step of the proceeding, the grounds upon which the prisoner can be let to bail diminish as the evidences of his guilt increase, because bail is not based on the grace or favor of the court, but solely on the doubt which may exist as to his guilt. After conviction and sentence his claims to be let to bail are further diminished; but, as he may still be innocent, as he may have something to urge against the legality of his sentence, he may apply to be bailed, and if it appear that his conviction was unjust, or there is a serious doubt of his guilt, his appplication may be granted. . . . But, at this stage of the proceeding, the legal doubts concerning the guilt of the prisoner ought to be considered as so well settled against him that the application for bail, if made to a judge at chambers, should be very cautiously entertained, and only granted in cases of great question and difficulty." State *v.* Daniel, 8 Ired. (N. Car.) 21; State *v.* Ward, 2 Hawks (N. Car.). 443; State *v.* Connor, 2 Bay (S. Car.), 34; State *v.* Hill, 3 Brev. (S. Car.) 89; Corbett *v.* State, 24 Ga. 391; *Ex parte* Dyson, 25 Miss. 356; Davis *v.* State, 6 How. (Miss.) 399; *Ex parte* Hoge, 48 Cal. 3; People *v.* Perdue, 48 Cal. 552.

Application for bail after conviction and pending appeal must be made in first instance to the judge who tried the case. People *v.* January, 11 Pac. Repr. (Cal.) 326.

A territorial statute which authorizes an appeal by a defendant in a criminal action from a final judgment of conviction; which provides that an appeal shall stay execution upon filing with the clerk a certificate of a judge that in his opinion there is probable cause for the appeal; and further provides that after conviction a defendant who has appealed may be admitted to bail as of right when the judgment is for the payment of a fine only, and as matter of discretion in other cases,—does not confer upon a defendant convicted and sentenced to pay a fine and be imprisoned the right, after appeal and filing of certificate of probable cause, to be admitted to bail except within the discretion of the court. Clawson *v.* U. S., 113 U. S. 143.

Where the appeal is not frivolous, and is taken in good faith, bail ought to be allowed. *Ex parte* Hoge, 48 Cal. 3; People *v.* Perdue, 48 Cal. 552.

A prisoner will not be admitted to bail pending a writ of error to reverse a judgment of conviction for larceny unless it is very clear there can be no conviction upon another trial. Bennett *v.* People, 94 Ill. 581. *Compare* State *v.* Levy, 24 Minn. 362.

Where, on an indictment for murder, the defendant has been convicted of manslaughter, and sentenced to two years in the penitentiary, it is error to release him on bail pending his appeal, on the grounds that he had a crop which needed his attention, and that he would be ruined financially by being confined, and that his wife was frail and delicate. Hill *v.* State, 1 Southn. Repr. (Miss.) 494.

In a criminal case "except for capital offences where the proof is evident or the presumption great" (Const. art. 1, § 9), after a verdict of guilty and before sentence, the court may, in its discretion, take a recognizance for the appearance of the prisoner to abide the judgment of the court. Hampton *v.* State, 42 Ohio St. 401.

After Sentence or Commitment.—The prisoner cannot ordinarily be bailed; for then punishment itself would fail, as in a case of commitment for contempt. And

6. Examination of Evidence.—After indictment found, the facts as to probable guilt may be inquired into on an application for bail.[1]

In cases previous to indictment the court will look into the deposition before the magistrate or coroner; and though the commitment be full and in due form, yet if the testimony proves no crime, the court will discharge on bail; and though the commitment be defective, yet if the depositions contain evidence of an offence not bailable, the prisoner will be remanded.[2]

7. Amount.—The national and the state constitutions provide that unreasonable bail shall not be required. But what is reasonable is necessarily left to the discretion of the officer who is empowered to fix it.[3] In fixing the amount of bail the pecuniary

the common-law doctrine seems to be that after the prisoner is committed in execution of the sentence he cannot have bail pending proceedings to have the sentence reversed. But in cases not capital, prisoners may now be allowed bail in England, under recent statutes, when they are taking such proceedings as in justice demand the acceptance of bail in the mean time. This is also the law in many of the States. Church on Hab. Cor. § 419; 1 Bish. Cr. Proc. (3d ed.) § 254; Corbett *v.* State, 24 Ga. 391; *Ex parte* Percy, 2 Daly (N. Y.). 530; People *v.* Lohman, 2 Barb. (N. Y.) 450; People *v.* Folmsbee, 60 Barb. (N. Y.) 480; Miller *v.* State, 15 Fla. 575.

1. 1 Bish. Cr. Proc. (3d Ed.) § 257; *Ex parte* Tayloe, 5 Cow. (N. Y.) 39; Com. *v.* Rutherford, 5 Rand. (Va.) 646; Lumm *v.* State, 3 Ind. 293; Lynch *v.* People, 38 Ill. 494; *Ex parte* Bramer, 37 Tex. 1; Street *v.* State, 43 Miss. 1.

2. 1 Bish. Cr. Proc. (3d Ed.) § 257; *Ex parte* Tayloe, 5 Cow. (N. Y.) 39; People *v.* Lohman, 2 Barb. (N. Y.) 454. See *In re* Troia, 64 Cal. 152. *Compare* Dunlap *v.* Bartlett, 10 Gray (Mass.), 282.

Before indictment the right of inquiry as to guilt or innocence is limited to the depositions or proofs on which the commitment was ordered. People *v.* McLeod, 1 Hill (N. Y.), 377.

3. 4 Cooley's Black. Com. 298, *note; Ex parte* Tayloe, 5 Cow. (N. Y.) 39; People *v.* Dixon, 4 Park. Cr. (N. Y.) 651; Smith *v.* Trawl, 1 Root (Conn.), 165; *Ex parte* Bryant, 34 Ala. 270; State *v.* Ward, 2 Hawks (N. Car.), 443; State *v.* Hill, 3 Ired. (N. Car.) 398; *Ex parte* Ryan, 44 Cal. 555; *In re* Perry, 19 Wis. 676.

The provision in the U. S. Constitution is not binding on the States. Com. *v.* Hitchings, 5 Gray (Mass.), 482.

Bail should not be fixed at a sum so large as purposely to prevent giving bail. U. S. *v.* Lawrence, 4 Cranch C. C. 518.

In fixing the amount of bail, the sole purpose which should guide the court or judge should be to cause the appearance of the accused to answer the charge against him. *Ex parte* Duncan, 54 Cal. 75.

Upon an application of a prisoner, after commitment upon a writ of *habeas corpus*, for reduction of bail, the court or judge before whom he is brought is not authorized to interfere unless the bail demanded is *per se* unreasonably great, and clearly disproportionate to the offence charged. A mere difference of opinion between the court or the judge and the committing magistrate or court is not sufficient to justify such interference. *Ex parte* Duncan, 54 Cal. 75.

An order may be made in advance fixing the amount of bail in all of a particular class of cases at a uniform sum, subject to modification in any case where the exercise of a discriminating judgment is by some means specially invoked, or some question is made upon the alleged injustice of its operation. Carmody *v.* State, 105 Ind. 547.

The authorities generally hold that if the accused has property obtained by the commission of the crime, the bail should be for a larger amount than the value of such property; otherwise the offender might make the crime itself an instrument for escape. This is rather indicating the minimum amount of bail to be required than determining that an amount greater than the value of the property obtained would be excessive in the sense forbidden by the constitution. It is said for the prisoner that at the time of the indictment the value of the forged stock was $29,860, and its present value $31,700, and that $113,000, the bail demanded, is therefore disproportionate to the sum taken by the prisoner. But if the inquiry is to be gone into in detail, it does not distinctly appear by the petition what was the sum involved in the indictment for grand larceny, nor what sum, if any, was

circumstances of the defendant should be considered.[1] The test to be adopted by the court is the probability of the accused ap-

realized by the prisoner by reason of the making of false returns as an officer of the Pioneer Land and Loan Association. Besides, it was suggested at the argument upon the part of the people that, in some way, $1,200,000 of the money of the depositors of the association had disappeared through the criminal mismanagement of the prisoner. *Ex parte* Duncan, 54 Cal. 75.

Prima facie, the sum of $500 is not an unreasonable or excessive amount to require as bail upon a charge of felony. *Ex parte* Hutchings, 11 Tex. App. 28.

Nor $10,000 under indictment for murder. McConnell *v.* State, 13 Tex. App. 390.

Nor $112,000 for ten distinct felonies, where the accused was charged as having secured that sum. *Ex parte* Duncan, 53 Cal. 410.

Nor $2000 for perjury. Evans *v.* Foster, 1 N. H. 374.

Nor $25,000 for embezzling $70,000. *Ex parte* Snow, 1 R. I. 360.

Nor $15,000 for attempt to kill. *Ex parte* Ryan, 44 Cal. 555.

A justice admitted to bail a person accused of an offence punishable by confinement in the penitentiary in a sum less than $500, contrary to statute. *Held*, the recognizance so taken was void. State *v.* McCown, 24 W. Va. 625.

In Waugh *v.* People, 17 Ill. 561, the circuit court made an order fixing the amount of bail to be taken by the sheriff at $100: and he admitted the accused to bail in the sum of $200. The appellate court held this recognizance as absolutely void and as not binding on the security. The court said: "The sheriff was ordered to take bail in the sum of $100, and this was his only authority for taking bail in any amount. This is no more authority for him to require bail in the sum of $200 than it was to require him to leave his right hand in pledge for his appearance at court. The sheriff was bound to pursue his authority strictly, and when he departed from it he acted without authority, and the recognizance was as void as if he had no authority whatever to require bail."

In State *v.* Buffum, 22 N. H. 267, it was decided: "Upon a complaint for stealing, a prisoner was ordered by a magistrate to recognize for his appearance at the court of common pleas in the sum of $400, with two securities in the sum of $200 each. He recognized in the sum of $400 with ten securities in the sum of $40 each. Upon *scire facias* it was held that the order of the magistrate was not complied with, and that the securities were not bound." The court said: "The securities are liable, in any case, only upon the ground that they have entered into a recognizance ordered by a tribunal having authority to act in the premises. . . . They have not recognized according to the order, and compliance with the order is the only ground upon which the validity of the recognizance can be placed." This cause was decided on a demurrer to the *scire facias;* the facts rendering invalid the recognizance appearing on its face.

Reduction of Bail.—Mitigation of unreasonable bail may be obtained by simple application to the court. Bunting *v.* Brown, 13 Johns. (N. Y.) 425; Beldens *v.* Cromelines, 1 Wend. (N. Y.) 107.

Or by *habeas corpus*. Evans *v.* Foster, 1 N. H. 374.

The judge of the district to whom application is made for a warrant of removal to another district for trial may, under sec. 1014 of the U. S. Rev. Stats., review, without a writ of *habeas corpus*, the action of the committing magistrate, and reduce the bail required by him, if it shall appear to be excessive. U. S. *v.* Brawner, 7 Fed. Repr. 86.

In *California* and *Texas* no appeal can be had from the ruling of the judge fixing the amount of bail. People *v.* Schuster, 40 Cal. 627; Miller *v.* State, 43 Tex. 579.

1. *Ex parte* Banks, 28 Ala. 89; U. S. *v.* Lawrence, 4 Cranch C. C. 518.

Whether excessive in fact depends largely upon the pecuniary condition of the accused. A sum which would be trivial to a wealthy man might be oppressive to a poor one. To authorize an appellate court to reduce an ostensibly reasonable amount of bail fixed by the court below, the pecuniary circumstances and ability of the applicant should be shown in the record. *Ex parte* Hutchings, 11 Tex. App. 28.

It is substantially a denial of bail, and a violation of the constitutional guaranty against excessive bail, to require a larger sum than, from his circumstances, the prisoner can be reasonably expected to give. U. S. *v.* Brawner, 7 Fed. Repr. 86.

When under all the circumstances of the case it clearly appears from the evidence that the defendant is unable to give such bail as the court believes sufficient to insure his appearance, the court will not merely for the sake of the reduc-

pearing to stand his trial. This probability is to be tested in part by the strength of the evidence against the defendant, in part by the nature of the crime charged, and by the severity of the punishment which may be imposed, and in part by the character and means of the defendant.[1]

If unreasonable bail is required, the magistrate or judge is liable to indictment or impeachment.[2]

8. Deposit of Money.—Money in lieu of bail is not to be taken,[3] unless authorized by statute. Where, in lieu of bail in a criminal action, money is deposited as authorized by statute, it is for the purposes of the action to be considered as the money of the defendant; and although it was in fact furnished by a third person, it may be applied in payment of any fine imposed upon the defendant.[4] Where money is deposited as bail, and default made, the court may treat the money as if it had been recovered upon a recognizance taken for the appearance of the prisoner.[5]

9. Character of Persons offered as Bail.—Where the crime charged is bailable, bail, if otherwise sufficient, ought not to be refused on account of the personal character or opinions of the party proposed.[6]

10. Validity.—A recognizance or bond must be taken before an officer duly authorized, and in its form and attending formalities it must fill the requirements of the statutes and unwritten law of the particular State or it will be void.[7] A bail bond, to be substantially in accordance with the statute of 23 Hen. VI. ch. 9, must be made to the sheriff in the name of his office, and not personally; and the condition must be for the appearance of the defendant at the return of the writ, and for that only. It must be sealed, and it is essential that it be executed after the condition has been filled up; it must include all the obligations imposed, and allow all the defences given by the statute; and it will not be void for a misnomer of the plaintiff, if there is a sufficient description by which he may be known.[8]

tion reduce the bail. People *v.* Town, 3 Scam. (Ill.) 19.

1. Whart. Cr. Pl. & Pr. (8th Ed.) § 76; People *v.* Cunningham, 3 Park. Cr. (N. Y.) 531; People *v.* Dixon, 4 Park. Cr. (N. Y.) 651; *Ex parte* Tayloe, 5 Cow. (N. Y.) 39.

2. Evans *v.* Foster, 1 N. H. 374.

3. U. S. *v.* Faw, 1 Cranch C. C. 486; State *v.* Lazarre, 12 La. Ann. 166. See Morrow *v.* State, 6 Kan. 222; Wash *v.* State, 3 Coldw. (Tenn.) 91; Dean *v.* Commonwealth, 1 Bush (Ky.), 20.

Unless authorized by statute, a sheriff cannot receive money for bail. Smart *v.* Cason, 50 Ill. 195.

4. People *v.* Laidlaw, 102 N. Y. 588.

5. Rock Island County *v.* Mercer County, 24 Ill. 35.

Where money is deposited, a recognizance in form cannot be exacted. Morrow *v.* State, 6 Kan. 222; Wash *v.* State, 3 Coldw. (Tenn.) 91.

6. R. *v.* Badger, 4 Q. B. 468; s. c., 1 Benn. & H. Cr. Cas. 236.

7. 1 Bish. Cr. Proc. (3d Ed.) § 264, and cases cited.

8. Murfree on Sheriffs, § 184.

A parol recognizance has no validity. 67 Ill. 278.

Informalities in a recognizance are immaterial after a party appears and has answered. Bookhout *v.* State, 28 N. W. Repr. (Wis.) 180.

Where a person accused of a crime is an infant, or a married woman, or is sick, or in jail, and therefore absent, a recognizance may be taken from a surety alone, without joining the accused. Schultze *v.* State, 43 Md. 295.

Some judgment should be entered, or memorandum made in writing, signed by the magistrate or justices, showing that an examining court was held, and that the defendant was admitted to bail. Morgan *v.* Commonwealth, 12 Bush (Ky.), 841.

The fact that persons offered as bail have received transfers of property without consideration, from friends of the defendant, to enable them to qualify, is not an objection to them. People *v.* Ingersoll, 14 Abb. Pr. N. S. (N. Y.) 23.

An infant is not liable on a recognizance when he signs as surety for another, unless he ratify and confirm it after attaining his majority, whether a recognizance be regarded as in the nature of a judgment or not. State *v.* Satterwhite, 20 S. Car. 536.

But an infant may be bound upon a recognizance when given to procure his own release. State *v.* Weatherwax, 12 Kan. 463; Weatherwax *v.* State, 17 Kan. 427; McCall *v.* Parker, 13 Metc. (Mass.) 372.

While it is the duty of the magistrate in all cases to strictly pursue the statute, it is by no means indispensable to the validity of a recognizance that the language of the act should be literally followed. If the time and place of appearance be shown with reasonable certainty, the statute in those particulars is complied with, and slight omissions and inaccuracies will not, ordinarily, affect the validity of the recognizance. Proseck *v.* State, 38 Ohio St. 606; Kellogg *v.* State, 43 Miss. 57; Dean *v.* State, 2 S. & M. (Miss.) 200; Mooney *v.* People, 81 Ill. 134; Brite *v.* State, 24 Tex. 219; Pickett *v.* State, 16 Tex. App. 648; State *v.* Bradley, 1 Blackf. (Ind.) 83; Com. *v.* Emery, 2 Binn. (Pa.) 431; State *v.* Wellman, 3 Ohio, 14; Williamson *v.* Hall, 1 Ohio St. 190; s. c., 9 Ohio St. 24; Clark *v.* Petty, 29 Ohio St. 452; R. *v.* Hodgson, Dears. 14; s. c., 7 Ex. 915.

If a condition prescribed by statute is omitted in the recognizance it is void, although the surety is benefited. Alexander *v.* Bates, 33 Ga. 125; State *v.* McCown, 24 W. Va. 625. *Compare* State *v.* Benton, 48 N. H. 551.

If conditions are inserted in the recognizance not authorized by statute, thus making it more burdensome, it is invalid. Turner *v.* State, 14 Tex. App. 168; Loyd *v.* McTeer, 33 Ga. 37. *Compare* State *v.* Edgerton, 12 R. I. 104.

If the recognizance is not authorized by law, or if the court had no authority to take it, it is void. Nicholson *v.* State, 2 Ga. 363; Keppler *v.* State, 14 Tex. App. 173; Cassaday *v.* State, 4 Tex. App. 96; Phelps *v.* Parks, 4 Vt. 488. See p. , note .

The recognizance may be either to appear and answer the particular charge set forth, or to appear and answer what shall be objected against the party. People *v.* Koeber, 7 Hill (N. Y.), 39.

A recognizance should state the ground on which it is taken, and show a case in which the court or magistrate was authorized to take bail. State *v.* Smith, 2 Me. 62; People *v.* Koeber, 7 Hill (N. Y.), 39; People *v.* Kane, 4 Denio (N. Y.), 531; Com. *v.* Downey, 9 Mass. 520; Com. *v.* Loveridge 11 Mass. 337; Com. *v.* Daggett, 16 Mass. 447; Com. *v.* Gordon, 15 Pick. (Mass.) 193; Com. *v.* McNeill, 19 Pick. (Mass.) 127; Kerns *v.* Schoonmaker, 4 Ohio, 331; Nicholson *v.* State, 2 Ga. 363; Com. *v.* West, 1 Dana (Ky.), 165; Simpson *v.* Commonwealth, 1 Dana (Ky.), 523. *Compare* Champlain *v.* People, 2 N. Y. 82.

If the offence is not made a crime by law, the recognizance is void. Montgomery *v.* State, 33 Tex. 179; Stroud *v.* State, 33 Tex. 650; Moore *v.* State, 34 Tex. 138; State *v.* Hotchkiss, 30 Tex. 162; Davis *v.* State, 30 Tex. 352.

The offence should be mentioned. People *v.* Rundle, 6 Hill (N. Y.), 506; Kerns *v.* Schoonmaker, 4 Ohio, 331; Goodwin *v.* Governor, 1 Stew. & P. (Ala.) 465; Simpson *v.* Commonwealth, 1 Dana (Ky.), 523; Com. *v.* West, 1 Dana (Ky.), 165; State *v.* Gibson, 23 La. Ann. 698; State *v.* Brown, 34 Tex. 146; Goldthwaite *v.* State, 32 Tex. 599; Stroud *v.* State, 33 Tex. 650; Patton *v.* State, 35 Tex. 92; Horton *v.* State, 30 Tex. 191; Payne *v.* State, 30 Tex. 397; Tierney *v.* State, 31 Tex. 40. *Compare* Gildersleeve *v.* People, 10 Barb. (N. Y.) 35; People *v.* Freeman, 20 Mich. 413; State *v.* Nicol, 30 La. Ann. pt. 1, 628.

It is not necessary in a criminal recognizance to describe the offence in detail, or to state facts in detail sufficient to show that a public offence was committed. All that is necessary is that the recognizance should either state or show that the defendant was charged with the commission of a public offence. Tillson *v.* State, 29 Kan. 452; State *v.* Randolph, 22 Mo. 474; State *v.* Rye, 9 Yerg. (Tenn.) 386; State *v.* Merrihew, 47 Iowa, 112; State *v.* Marshall, 21 Iowa, 143; State *v.* Brown, 34 Tex. 179; Tierney *v.* State, 31 Tex. 40; Vanwey *v.* State, 44 Tex. 112; State *v.* Tennant, 30 La. Ann. pt. 2, 852; U. S. *v.* Dennis, 1

Bond (U. S.). 103. *Compare* State *v.* Gibson, 23 La. Ann. 698; Com. *v.* West, 1 Dana (Ky.), 165.

If the name of the offence is indorsed upon the recognizance it is sufficient, although not named in the instrument. Tillson *v.* State, 29 Kan. 424.

Where the crime is recited as "for the offence of being a common gambler," it is sufficiently described. Chase *v.* People, 2 Colo. 528.

The offence should be so described as to be capable of being identified with the one named in the indictment. Vanwey *v.* State, 44 Tex. 112.

The offence named in the recognizance may be of a lower grade than that named in the indictment. State *v.* Tennant, 30 La. Ann. pt. 2, 852.

It is not sufficient that a bail bond named some offence known to the laws of the State. The offence named in it must be the offense of which the principal obligor stands charged. If it names a different one, the sureties may avail themselves of the variance. Smalley *v.* State, 3 Tex. App. 202, and authorities cited; McAdams *v.* State, 10 Tex. App. 317; Keppler *v.* State, 14 Tex. App. 168; Addison *v.* State, 14 Tex. App. 568; State *v.* Hotchkiss, 30 Tex. 162; Barrera *v.* State, 32 Tex. 644; Moore *v.* State, 34 Tex. 138; Duke *v.* State, 35 Tex. 424; State *v.* Rogers, 36 Mo. 138; Foster *v.* State, 27 Tex. 236; Gray *v.* State, 43 Ala. 41.

If the offence charged is not specifically named in the statutes, the recognizance must set out all its statutory ingredients. Morris *v.* State, 4 Tex. App. 554.

The degree of the crime need not be stated. Thompson *v.* State, 31 Tex. 166; State *v.* Tennant, 30 La. Ann. pt. 2, 852.

Where the statute defined the offence as "knowingly" passing, as true, a forged instrument, a recognizance which recites the crime to be "passing a forged instrument of writing" is invalid. Stancel *v.* State, 6 Tex. App. 460.

If the offence charged is substantially, although not technically, set forth, the recognizance is valid. People *v.* Blankman, 17 Wend. (N. Y.) 252; Browder *v.* State, 9 Ala. 58; Hall *v.* State, 9 Ala. 827; State *v.* Weaver, 18 Ala. 293; Cotton *v.* State, 7 Tex. 547; Thompson *v.* State, 31 Tex. 40; Goldwaite *v.* State, 32 Tex. 599; Barrera *v.* State, 32 Tex. 644; State *v.* Hotchkiss, 30 Tex. 162; Fowler *v.* Commonwealth, 4 T. B. Mon. (Ky.) 120; Wood *v.* People, 16 Ill. 171; Besimer *v.* People, 15 Ill. 439; State *v.* Marshall, 21 Iowa, 143; Daniels *v.* People, 6 Mich. 381; Hampton *v.* Brown, 32 Ga. 251; State *v.* Loeb, 21 La Ann. 599; Dillingham *v.* U. S., 2 Wash. C. C. 422; U.S. *v.* Dennis, 1 Bond (U. S.), 103. *Compare* Bailey *v.* State, 4 Tex. 417.

The recognizance need not contain every condition provided in the statute to be valid. It is good for the conditions found in the statute that are also embodied in the recognizance. Gallagher *v.* People, 91 Ill. 590.

Where no form is prescribed by statute it is not material what language is used, so that it appears that the officer took and accepted the recognizance for the purposes contemplated. Lawrence *v.* People, 17 Ill. 172.

A penalty and a condition are indispensable to constitute a recognizance. Caldwell *v.* Brindle, 11 Pa. St. 293.

A recognizance which states that the charge was preferred by a justice is invalid. Murphy *v.* State, 17 Tex. App. 100.

Where two persons are jointly accused and brought before a magistrate, bail should be taken of each for his individual appearance. Ferry *v.* Burchard, 21 Conn. 597.

A provision in a statute that "any officer authorized to execute a warrant in a criminal action may take the recognizance and approve the bail" does not confer upon a constable authority to take a recognizance in cases where there is no judicial order fixing the amount or directing that bail may be taken. State *v.* Wininger, 81 Ind. 51.

Where a party was arrested by the sheriff outside of his jurisdiction, a recognizance taken upon such arrest is void. Blevins *v.* State, 31 Ark. 53.

A justice of the peace has no authority to decline to try a misdemeanor, and bind the accused over to the circuit court for trial; and a bail bond taken by him in such case is void. Thomm *v.* State, 35 Ark. 327.

If the defendant is illegally arrested, bail given for his release is void. Brown *v* Way, 33 Ga. 190; Pauer *v.* Simon, 6 Bush (Ky.), 514.

A recognizance on an appeal from a justice's court cannot be said to have been given voluntarily when the judgment is void. People *v.* Carroll, 44 Mich. 371.

A recognizance is not invalid because one of the sureties is a married woman. Pickett *v.* State, 16 Tex. App. 648. *See* Mills *v.* Rodewald, 17 Hun (N. Y.), 297.

The fact that a bond was taken under

Gen. St. Ky. § 23, in open court, instead of before the judge in person, does not impair its obligatory force. Com. *v.* Wetzel, 2 S. Westn. Repr. (Ky.) 123.

Where the indictment is quashed the recognizance is void. State *v.* Lockhart, 24 Ga. 420.

A recognizance taken by an examining magistrate and signed by all the obligors is sufficient and will bind all, whether their names are entered in the body of the same or not, provided it complies with the law in other respects. Holmes *v.* State, 17 Neb. 73.

In such case the authority of a deputy to act for and in the name of the sheriff will be presumed. If in fact he had no authority to so act, it will constitute matter of defence. Carmody *v.* State, 105 Ind. 546.

A recognizance entered into and approved by the clerk of court, under the order of the judge, is in effect the taking of such recognizance by the judge himself, and is legal and binding. State *v.* Satterwhite, 20 S. Car. 536; Bodine *v.* Commonwealth, 24 Pa. St. 69.

Where there are two recognizances, one taken before and the other after the execution had been issued, only the first one, though defective, will be considered by the court; and parol evidence is admissible to prove that, after the sale on the execution, the defendant procured the magistrate to take and certify as a part of the record a new and enlarged recognizance. The recognizance must be taken before execution. Hill *v.* Warren, 54 Vt. 73.

A bond taken by the sheriff in a sum fixed by the court and made payable to the State, with condition to be void if the defendant make his personal appearance, etc., is valid as a recognizance. Where the defendant in such case failed to appear and judgment *nisi* was entered, and the sureties to the bond appeared in answer to a notice by *sci. fa.* and defended the action, *held*, that the judgment absolute rendered against them is not irregular. State *v.* Jones, 88 N. Car. 683.

The indorsement upon a bail bond of the approval of the officer taking it is not essential to its validity. Adler *v.* State, 35 Ark. 517.

When the offence of which the principal obligor is accused is named in the bail bond, and it appears therefrom that he is accused of an offence against the laws of this State, it is not necessary that the bond shall disclose the mode of the accusation—i.e., whether it is by indictment, information, or otherwise. McGee *v.* State, 11 Tex. App. 520.

It is no objection to a bond of recognizance when offered in evidence in a suit upon it, that it was written out, after the suit was brought by the clerk of the court who took it, from an entry made by him at the time on the docket of the court. Such a document is a record of the court and imports verity. It is also a complete record in itself, and not a part of the record of the judgment. And as it imports verity, evidence is not admissible on the part of the defendant, in a suit upon it, of a variance between the bond as extended and the original entry on the docket. It is enough that it was duly certified by the clerk of the court in which it was taken and was in the proper custody when it was produced at the trial. Bradley *v.* Vail, 48 Conn. 375.

Where several indictments are found for the same offence on the same day, it is not necessary that the recognizance in any one of them should specify to which one it refers. Devlin *v.* Court, 14 N. Y. Sup. Ct. 114.

A variance between the recognizance and the warrant of arrest will not invalidate it. State *v.* Rowe, 8 Rich. (S. Car.) 17.

A criminal recognizance requiring a person who has been charged with the commission of a felony and held to bail by an examining magistrate to appear before the district court, on a day certain, to answer the charge preferred against him, is a sufficient compliance with the criminal code, if the date fixed in the recognizance for the appearance of the accused is in fact the first day of the next term of said court. Holmes *v.* State, 17 Neb. 73.

When one is convicted of a crime by a justice and appeals, and in default of security for his appeal is committed to jail, and is then bailed, but his recognizance is conditioned only for his appearance at court, and not that he would prosecute his appeal with effect, no action can be sustained on the recognizance, if the case has never been entered in the county court. State *v.* Miller, 58 Vt. 21.

Where the statute requires two sureties, and only one executes the recognizance, it is no defence. State *v.* Benton, 48 N. H. 551.

Return Day.—If no day is fixed for the appearance of the accused, the recognizance is void. State *v.* Casey, 27 Tex. 111. See Brite *v.* State, 24 Tex. 219; State *v.* Allen, 33 Ala. 422; Wheeler *v.* State, 21 Ga. 153; Henry *v.* Common-

wealth, 4 Bush (Ky.), 427; Mooney *v.* People, 81 Ill. 134; Sheets *v.* People, 63 Ill. 78; State *v.* Bradley, 1 Blackf. (Ind.) 83; People *v.* Carpenter, 7 Cal. 402.

If a wrong day is named for the defendant to appear, the recognizance is void. State *v.* Sullivan, 3 Yerg. (Tenn.) 281; Com. *v.* Bolton, 1 S. & R. (Pa.) 328; Butler *v.* State, 12 Smed. & M. (Miss.) 470; Thurston *v.* Commonwealth, 3 Dana (Ky.), 225. *Compare* Curry *v.* State, 39 Miss. 511.

When the Defendant is not in Legal Custody.—After the examining magistrate had adjudged upon a preliminary examination that an offence had been committed, that there was probable cause to believe the defendant guilty, and had fixed the amount of bail required of the defendant for his appearance at the trial court, without issuing a warrant of commitment or taking bail, upon the word of his father and with the consent of the constable, he permitted the defendant to go with his father, promising that he would release him upon his giving a good bond. Within five days thereafter the magistrate accepted and approved a bond signed by the father of the defendant and four other sureties, to the effect that the defendant would appear before the district court for trial for the offence alleged against him. *Held*, that the permission to the defendant to go with his father did not oust the justice of jurisdiction, or release the defendant; and the recognizance having been accepted and approved with the understanding of the parties that by reason thereof the accused was to be discharged, such bond is not invalid or void on the ground that the defendant was not legally in custody at the time it was given and accepted. State *v.* Terrell, 29 Kan. 563.

Amount—Being committed by a justice of the peace on a charge of bailable felony, the bail of the accused was fixed by the justice at $1000, but subsequently the State's counsel and the acccused agreed that the sheriff should release the accused on a bond for $500; which being executed by the present appellants, the accused was released. In defence to *scire facias* on the forfeiture of the bond the appellants contend that it was void because taken by the sheriff in a sum different from that fixed by the justice. But *held* that appellants are estopped. Such agreements, however, are highly reprehensible on the part of officials representing the State, and especially so on the part of the officer having the custody of the accused. Peters *v.* State, 10 Tex. App. 302.

The order for bail conditioned that it should be for $400, given by two sureties for $200 each. *Held*, that bail taken in two sureties for $40 each was contrary to the condition, and consequently invalid. State *v.* Buffum, 22 N. H. 267; U. S. *v.* Goldstein, 1 Dill. (U. S.) 413; Cooper *v.* Commonwealth, 13 Bush (Ky.), 654. *Compare* Com. *v.* Porter, 1 A. K. Marsh. (Ky.) 44.

An order for bail fixed the amount at $100, but a recognizance was taken for $200. *Held*, that the recognizance was void. Waugh *v.* People, 17 Ill. 561; Neblett *v.* State, 6 Tex. App. 316.

Where a statute provided that bail should not be less than $500, and the prisoner was admitted to bail for a less sum, *held*, that the recognizance was void. State *v.* McCown, 24 W. Va. 625.

Where the sheriff, after an arrest had been made, under an order which specified, as prescribed by the Code of Procedure (§ 183), the sum for which defendant should be held to bail, and after declining to accept a bond executed by one instead of by two or more sufficient bail as prescribed by said Code (§ 187), did agree, at defendant's solicitation, to take to plaintiff's attorneys an undertaking executed by one in double the amount specified in the order, and if it should be approved and accepted by them that defendant should be discharged, the latter agreeing that if they should decline to accept he would, on being notified, give a new undertaking, as prescribed by the Code, and in the mean while should remain in the custody of his bail, and where said attorneys accepted the undertaking so executed,—*held*, that the undertaking, when thus accepted, might be regarded as an agreement made between the parties to the action, and not as an undertaking taken by the sheriff under claim or in the exercise of official authority; and that, so considered, it became operative and binding, though not as a statutory obligation. Toles *v.* Adee, 84 N. Y. 223.

Where the purported indictment was a presentation to a grand jury composed of thirteen persons, it was in fact no indictment at all, and conferred no jurisdiction upon the trial court, or its officers, to require a bail bond or recognizance of the defendant, and hence the recognizance and other proceedings based upon the purported indictment were void. Wells *v.* State, 2 S. Westn. Repr. (Tex.) 806.

Change of Terms.—The circuit courts of

Illinois have the power to regulate the terms of court, and to set aside certain terms for civil and criminal business, respectively; and a *scire facias* requiring the accused and his surety to appear "on the first day of the then next term" must be taken to mean that they shall appear "at the first or next term" at which, under the law and rules of court, the accused could be lawfully tried. Petty *v.* People, 8 N. Eastn. Repr. (Ill.) 304.

Where the recognizance is for the next term of court, and the date of the term is changed, the bail will not be invalidated. Walker *v.* State, 6 Ala. 350.

"Term"—What Is.—The word "term" means the period of time prescribed by law during which the court is to be held, unless the business is sooner disposed of, and not the time during which the court may actually be in session. *Ex parte* Croom. 19 Ala. 561.

Adjournment—A postponement of the trial without the knowledge and consent of the sureties renders the recognizance void. Reese *v.* U. S., 9 Wall. (U. S.) 13. *Compare* State *v.* Smith, 66 N. Car. 620.

An adjournment of the term, without a committal of the prisoner, or measures being taken to secure his appearance, releases his sureties. State *v.* Mackey, 55 Mo. 51.

Where one arrested on a charge of bastardy has given the bond for appearance, and after examination is begun the hearing is adjourned, his sureties are liable if he does not appear on the adjourned day. It seems that a different rule might apply when, before the commencement of the examination, a postponement to a later day is made. People *v.* Millham, 3 N. Eastn. Repr. (N. Y.) 196.

Where a statute requires that the time, place, and court when, where, and before which the defendant is bound to appear must be stated, a recognizance binding him to appear "at the next term of this court and there remain," etc., is invalid. Williamson *v.* State, 12 Tex. App. 169.

A statute of Missouri provided that a magistrate may adjourn the examination of a prisoner for a period not exceeding ten days at one time. At the request of a prisoner charged with violating the revenue law, a U.S. commissioner adjourned the examination for nineteen days, and took bail for his appearance at the end of that time. *Held*, that the recognizance was invalid. U. S. *v.* Horton, 2 Dill. (U. S.) 94.

The time of appearance is sufficiently specified when the recognizance requires the defendant to appear *instanter*. Fentress *v.* State, 16 Tex. App. 79.

A recognizance to appear upon a day on which no term of court can be legally held is invalid. Burnett *v.* State, 18 Tex. App. 283.

Description of the Court.—Where the condition of a recognizance is that the accused shall appear at a named time "before the *criminal* court" of a specified county, and, under the law, there is no such court, but the *circuit* court of the said county is alone vested with jurisdiction of the offence with which the accused is charged, there is a sufficient notification in the recognizance of the court at which the accused is bound to appear. Petty *v.* People, 8 N. Eastn. Repr. (Ill.) 304.

If the court at which the defendant is to appear is not stated in the recognizance, it is void. State *v.* Rye, 9 Yerg. (Tenn.) 386. *Compare* People *v.* Carpenter, 7 Cal. 402.

A mistake in the designation of the court invalidates the recognizance. Sherman *v.* State, 4 Kan. 570.

Where the defendant was recognized by a justice of the peace to appear at the next term of oyer and terminer, and a term of a court of sessions is held in the same county at a prior day, the recognizance is invalid. People *v.* Mack, 1 Park. Cr. (N. Y.) 567.

A condition for the appearance of the prisoner before the court of common pleas, "on the first day of the next term thereof, to wit, on the 10th day of February, 1868," does not render the instrument invalid, although it was executed during the term of the court of common pleas which began October 15th and finally adjourned January 27th, 1868. Millikin *v.* State, 21 Ohio St. 635.

A recognizance cannot be made returnable before a judge at chambers; it must be returnable in court. Corlies *v.* Waddell, 1 Barb. (N. Y.) 355.

A recognizance which binds the prisoner to appear at a term of court not authorized by law is invalid. Thomas *v.* State, 13 Tex. App. 496.

Sunday.—A recognizance taken on Sunday is valid. Watts *v.* Commonwealth, 5 Bush (Ky.), 309; Salter *v.* Smith, 55 Ga. 244; Johnson *v.* People, 31 Ill. 469; Hammons *v.* State, 59 Ala. 164; State *v.* Wyatt, 6 La. Ann. 701.

A recognizance taken on Sunday to prosecute an appeal in a criminal case is void. State *v.* Suhur, 33 Me. 539.

Bond Signed in Blank.—Where a bail bond is signed in blank and subsequently filled up, it is void. Com. *v.* Ball, 6 Bush

(Ky.), 291. *Compare* Madden *v.* State, 10 Pac. Repr. (Kan.) 469.

In an action upon a forfeited recognizance the defendant, by a verified answer, averred that he signed the instrument when it was yet incomplete and what is commonly known as a "blank recognizance"—the blank spaces left therein for the name of the county, the offence charged, the amount in which the prisoner was held, and the court before which he was required to appear, being left unfilled—and that he attached his name to it upon the condition that another person should join him in signing the recognizance, and, when so signed, the blanks should be filled out by the co-surety, and the instrument delivered, and that, unless it was so executed, he was not to become liable thereon. He also alleged that the recognizance was not signed or completed by the other party, and therefore that he was not liable thereon. *Held*, that this answer was in substance and effect a denial that the recognizance sued on had been executed by him, and a verified reply by the plaintiff denying the allegations of the answer was unnecessary. Madden *v.* State, 10 Pac. Repr. (Kan.) 469.

Where several criminal recognizances were to be given, and the same surety agreed to sign all of them, and did so, some of them being filled out at the time, and some of them having the name of the obligee and the amount blank, and the surety instructed the sheriff to fill such blanks, knowing the amount and the obligee, and thereupon left, and the blanks were filled accordingly, the bond was not invalid, but was binding on the surety. Brown *v.* Colquitt, 73 Ga. 59.

Escrow.—A bail bond cannot be delivered as an escrow to the obligee. Brown *v.* State, 18 Tex. App. 326.

Seal.—Where a county judge, acting as an examining magistrate, requires the accused to enter into a recognizance for his appearance at the next term of the district court, and such recognizance is given with sureties which are approved by such county judge, the indorsement of such approval upon the recognizance is not required to be attested by the seal of the county judge. Holmes *v.* State, 17 Neb. 73; Kearns *v.* State, 3 Blackf. (Ind.) 336; Grinestaff *v.* State, 53 Ind. 238; Slaten *v* People, 21 Ill. 28; Hall *v.* State, 9 Ala. 827; State *v.* Foot, 2 Mill (S. Car.), 123.

Execution—Signatures.—An acknowledgment signed and sealed by the accused and two others, at the foot of which the judge wrote the words "attested and approved," is not a recognizance, but is unauthorized and void. Where no discharge followed the taking of such a paper, although it was filed, and the judge, disregarding that acknowledgment, proceeded to take a recognizance in form, the latter was not invalidated by the mistake or inadvertence of the judge in taking and filing the former. State *v.* West, 3 Ohio St. 510.

Where the name of the surety is signed to the recognizance, the omission to mention it in the instrument will not render it invalid. Cunningham *v.* State, 14 Mo. 402; Hall *v.* State, 9 Ala. 827; Badger *v.* State, 5 Ala. 21. *Compare* U. S. *v.* Pickett, 1 Bond (U. S.), 123.

At common law it was never necessary for any person to sign the recognizance; and under the statutes it is necessary only for those to sign the recognizance who are to be bound thereby; and it is never necessary under the statutes for the accused to sign the recognizance, unless the statutes absolutely require the same to be done. Tillson *v.* State, 29 Kan. 452; Ingram *v.* State, 10 Kan. 630.

It is essential to the validity of a bail-bond that it be signed or executed by the principal himself or in his name by some one authorized by him. The facts that his attorney wrote out the bond, setting forth in the body of it his (the principal's) name, and procured sureties to sign and execute it, do not constitute a valid execution of the bond by the principal, notwithstanding he obtained his liberty by virtue of it. Price *v.* State, 12 Tex. App. 235.

The defendant Masterson, being arrested in pursuance of a complaint, and being brought before the justice, and being in legal custody, the case was continued; and thereupon the defendant Masterson was discharged upon the following recognizance, to wit: "The State of Kansas, Plaintiff, *v.* Philip Masterson, Defendant.—Before George M. Everline, Justice of the Peace of Monroe Township, Anderson County, Kansas.—Whereas, the above-entitled action is this 29th day of July, 1881, continued to the 6th day of August, 1881, now, therefore, I, the undersigned, bind myself to the State of Kansas in the sum of three hundred dollars for the appearance of the said Philip Masterson, defendant, before the above-named justice of the peace, on said last-named date, at 9 o'clock A.M., for examination in said cause. William S. Tillson.—Approved by me, this 29th day of July, 1881. George M. Everline,

J. P." This recognizance contained the following, among other indorsements: "Assault with intent to commit rape." *Held*, that the recognizance is not void as to Tillson, because the defendant Masterson did not himself sign the recognizance. Tillson *v* State, 29 Kan. 454.

A recognizance executed by the sureties alone, and giving only the initials of the principal's name, is valid. Ingram *v.* State, 10 Kan. 630. The signature may be by marks or initials. Hammons *v.* State, 59 Ala. 164. *Compare* Dresser *v.* Fifield. 12 R. I. 24.

Where a recognizance had been executed by the sureties, and subsequently another surety executes it, but his name was not written in the instrument, *held*, that he cannot be joined with the other sureties in a suit upon the recognizance. U. S. *v.* Pickett, 1 Bond (U. S.), 123.

A bail bond present in the record was executed before a clerk, who wrote at the foot of it, "Signed, sealed, and acknowledged, and approved by," signing his name thereto. It did not appear from the bond or otherwise that the defendant was brought before the clerk for examination and bail as a magistrate. The court was in session that day. *Held*, that it would be presumed to have been taken by the clerk under the immediate direction of the court. U. S. *v.* Evans, 2 Fed. Repr. 147.

Where a recognizance was executed before the clerk of the district court of one county for the appearance of the defendant before the court of another county wherein the indictment is pending and where the bond is filed, *held*, not invalid. State *v.* Wells, 36 Iowa, 238.

Where a recognizance was taken in open court, and entered on the order book, but was not signed or sealed by any of the cognizors, *held* valid. Grinestaff *v.* State, 53 Ind. 238.

Alteration.—Where the amount after signature was altered from $1000 to $2000, *held*, that the recognizance was not thereby rendered invalid. Com. *v.* Henry, 13 Phila. 451.

Where alterations were alleged to have been made in a recognizance, but proof was not given to sustain the charge, *held*, that the recognizance was valid. Harris *v.* State, 54 Ind. 2.

Clerical Errors — Surplusage, etc. — A material mistake in a bail bond cannot be corrected in equity. Wallen *v.* State, 18 Tex. App. 414; State *v.* Loeb, 21 La. Ann. 599.

Inaccurate language is not to be strictly construed. If it will admit of a legal construction it will receive it. Hendee *v.* Taylor. 29 Conn. 448; Smith *v.* State, 36 Tex. 317.

That the offence for which bail was taken was described in the bond as "assault and attempt to murder," while the indictment, when found, described the offence as being assault with intent to murder, did not render the recognizance void as a voluntary bond. Colquitt *v.* Bond, 69 Ga. 351. See Wills *v.* State, 4 Tex. App. 613.

Where a statute, in prescribing the terms and conditions of a recognizance, requires that the accused shall be bound to appear at the *next* term, a recognizance omitting the word "next," but strictly pursuing the statute in all other respects, will not be deemed invalid for such omission. Proseck *v.* State, 38 Ohio St. 606. See also Williamson *v.* State, 12 Tex. App. 169.

Following a judgment in the usual form against the defendant in bastardy, there was a recognizance of replevin bail, not attested or approved by the clerk, but in the form prescribed by statute, save that the word "security" was used instead of "bail." *Held*, that it was made good by sec. 1221, R. S. 1881, and applied to the judgment in gross. McAllister *v.* State, 81 Ind. 256.

A mistake in the year by which no one could have been misled, will not vitiate a recognizance. People *v.* Welch, 47 How. Pr. (N. Y.) 420.

The indictment charged the theft of certain cattle, the property of "J. P. and A. C." The bail bond described them as the property of J. P. *Held*, a fatal variance. McAdams *v.* State, 10 Tex. App. 317.

The condition of a bail bond stipulated that the principal obligor should make his appearance before the proper court at its next ensuing term, and should there remain from day to day and from term to term until discharged, but omitted to stipulate that he should answer the accusation against him. *Held*, that the omission does not impair the validity of the bond. Gray *v.* State, 11 Tex. App. 527.

Including in the condition of a recognizance more than the order of the court required is void of legal effect; the part added is mere surplusage. State *v.* Cobb, 71 Me. 198. See Howie *v.* State, 1 Ala. 113; McCarty *v.* State, 1 Blackf. (Ind.) 338.

In a recognizance to appear and answer, the words "in case said party was legally imprisoned on said charge" are surplusage. State *v.* Wellman, 3 Ohio, 14.

When a recognizance has a condition for the doing of some act for which such an obligation may be properly taken, and the tribunal or magistrate taking it has authority in cases of that general description, it will be *prima facie* valid, even though it

I. and others entered into a recognizance, signed by the parties before M., for the appearance of I. The recognizance was stated to be in the sum of "three hundred," and was certified by M. as J. P. *Held*, that the signatures did not vitiate the instrument, but that the failure to designate the denomination of the debt, and the official character of the officer certifying the recognizance, rendered the same void. Irwin *v.* State, 10 Neb. 325. *Compare* Shattuck *v.* People, 5 Ill. 477.

A bail bond was conditioned for the payment of "$500 five hundred ———," and its validity is contested on the ground that it expresses no sum of money. But *held* that the dollar-mark and figures sufficiently express the amount. Roberts *v.* State, 11 Tex. App. 26. *Compare* Townsend *v.* State, 7 Tex. App. 74.

An immaterial addition to the title of the court may be rejected as surplusage. People *v.* Hawkins, 5 How. Pr. (N.Y.) 1.

The omission of the word "unlawful" where the charge was for "unlawfully carrying a pistol," invalidates the recognizance. Massey *v.* State, 4 Tex. App. 580.

In an action on a forfeited criminal recognizance where everything appears regular and in form, except a supposed irregularity which appears from the following words indorsed on the recognizance, to wit: "Taken and acknowledged before me, this 3d day of August, 1880. Webb McNall, notary public.—Approved by me, this 4th day of August, 1880. Jerry Brisbin, sheriff; Benjamin F. Closson, under-sheriff;" and the petition sets forth and alleges everything that is necessary to be set forth or alleged, and among other things that the "recognizance was duly taken and approved by the sheriff," and that the principal recognizor, for whose benefit the recognizance was entered into, was duly discharged "by reason of the acceptance of said recognizance," *held*, that the petition states facts sufficient to constitute a cause of action, and that the words above quoted as being indorsed on the recognizance do not render the recognizance illegal or void. State *v.* Kurtz, 27 Kan. 223.

Where the word "appear" was omitted in the condition and recognizance, *held*, to be fatally defective. Carroll *v.* State, 6 Tex. App. 463.

Where the name of the magistrate before whom the accused is to appear is omitted, the recognizance is invalid. Crowder *v.* State, 7 Tex. App. 484.

A recognizance which recites the defendant's name, but omits it in the clause "Now if the above bounden ——" is not invalid. Gorman *v.* State, 38 Tex. 112; s. c., 19 Am. Rep. 29.

If the name of the prisoner differs slightly in the indictment and recognizance, it does not release the sureties. People *v.* Eaton, 41 Cal. 657; Steen *v.* State, 27 Tex. 86. See State *v.* Rhodius, 37 Tex. 165.

"Little" for "Lytle" *held* an immaterial variance. Lytle *v.* People, 47 Ill. 422.

An error in stating the Christian name of the defendant will not invalidate the recognizance. State *v.* Rhodius, 37 Tex. 165; Bulson *v.* People, 31 Ill. 409.

Where the indictment was for selling liquor in quantities "less" than one gallon, a recognizance to answer for selling in quantities "larger" than one gallon is void. Reese *v.* People, 11 Ill. App. 346.

Where the date of the recognizance was omitted, *held*, that the date of approval cured the omission. Ake *v.* State, 4 Tex. App. 126.

An omission to state the day, year, and term at which the indictment was found is immaterial. Mooney *v.* People, 81 Ill. 134.

An alteration of the figure denoting the year, as changing "180" to "1880," will not invalidate the recognizance. Gragg *v.* State, 18 Tex. App. 295. Nor writing 1873 instead of 1874 where the bail was taken in December, 1873. People *v.* Welch, 47 How. Pr. (N. Y.) 420.

The omission to state the year, the recognizance being otherwise regular, is not a fatal defect. Kellogg *v.* State, 43 Miss. 57.

A recognizance to appear and testify is not vitiated by the addition of the words "as well to the grand as the petit jury, and not depart the said court without leave." People *v.* Millis, 5 Barb. (N. Y.) 511.

Where the recognizance states that the crime was committed in the county different from that to the court of which the bail is taken, it is not invalid. Dean *v.* State, 2 Smed. & M. (Miss.) 200.

If the offence is differently charged in

does not set forth all the particular facts required to give jurisdiction, for the reason that giving a recognizance is a voluntary act, and it may therefore be presumed that it would not have been

the bail bond and the indictment, the recognizance is void. Duke *v.* State, 35 Tex. 424; Pack *v.* State, 23 Ark. 235.

Where a recognizance imposed a condition not required by law, *held*, that the condition might be rejected as surplusage. State *v.* Edgerton, 12 R. I. 104; State *v.* Crowley, 60 Me. 103; Howie *v.* State, 1 Ala. 113. *Compare* Turner *v.* State, 14 Tex. App. 168; Loyd *v.* McTeer, 33 Ga. 37. See for particular facts People *v.* Millis, 5 Barb. (N. Y.) 511; Underwood *v.* Clement, 16 Gray (Mass.), 169, State *v.* Hatch, 59 Me. 410; State *v.* Eastman, 42 N. H. 265; Hill *v.* State, 15 Tex. App. 530; Heath *v.* State, 14 Tex. App. 213; Gorman *v.* State, 38 Tex. 112; Patton *v.* State, 35 Tex. 92; Doughty *v.* State, 33 Tex. 1; State *v.* Glaevicke, 33 Tex. 53; Smith *v.* State, 36 Tex. 317; State *v.* Crowley, 60 Mo. 103; State *v.* Marshall, 21 Iowa, 143; State *v.* Patterson, 23 Iowa, 575; State *v.* Davidson, 20 Miss. 212; Kellogg *v.* State, 43 Miss. 57; State *v.* Adams, 3 Head (Tenn.), 259; People *v.* Freeman, 20 Mich. 413; State *v.* Hiney, 24 Ind. 381; U. S. *v.* Evans, 2 Fed. Repr. 147.

Waiver.—A surety signed a blank bail bond and delivered it to his principal to be filled up with the penal sum of $300. The principal, being required to give bail in $1000, presented the blank bond with the surety's signature, and the examining magistrate filled it with the sum of $1000, conditioned for the appearance of the principal. The principal failed to appear and the bond was forfeited, and the surety, in defence to the *scire facias*, alleged the facts and pleaded *non est factum* to the bond. *Held*, that the act of the surety in signing and delivering the blank bond, knowing its purpose, made him liable for the amount inserted in it by the examining magistrate, who accepted it in ignorance of any limit to the surety's authorization. See the opinion *in extenso* on the question. Gray *v.* State, 11 Tex. App. 527.

A recognizance of bail in error defective in form may derive validity from the consent, express or implied, of the parties intended to be affected thereby. Allen *v.* Kellam, 94 Pa. St. 253.

Ambiguity.—Where the names of the sureties are similar, their identity may be established from the whole tenor of the recognizance. State *v.* Cherry, Meigs (Tenn.), 232.

Where the name in the condition of a recognizance differs from any of the names in the obligatory part, evidence is admissible to identify the party. Gay *v.* State, 7 Kan. 394.

Where the justice affixed "J. P." to his signature, *held*, that these characters were well understood to mean "Justice of Peace." Shattuck *v.* People, 4 Scam. (Ill.) 477. *Compare* Irwin *v.* State, 10 Neb. 325.

Although it would generally be better for a recognizance itself to state and show in definite and explicit terms the nature and character of the offence with which the accused is charged, yet where the recognizance fails to do so, but still shows, though indefinitely, obscurely, and inferentially only, that the recognizance was given in a criminal case, and in a case in which the defendant was charged with the commission of a public offence, the recognizance will not be held to be fatally defective and void merely because of its indefiniteness in this respect, and especially so where the previous portions of the record show definitely, explicitly, and in detail the nature and character of the offence with which the accused was charged. Tillson *v.* State, 29 Kan. 452.

Identity of Persons.—The records of the circuit court showed that on the 8th day of October, 1875, Roach Millsaps was arrested on a charge of stealing certain property described in the warrant; that on the 20th day of October, 1875, Pharris Millsaps, Jr., as principal, with others as sureties, entered into a recognizance for the appearance of said Pharris Millsaps, Jr., at the next January term of the circuit court to answer to the charge of larceny; that at the January term Roach Millsaps was indicted for the larceny of the property described in the warrant, and that at a subsequent day of the same term a forfeiture was ordered of the recognizance of Pharris Millsaps, Jr. On appeal from a judgment on a demurrer to a *scire facias* issued on the recognizance, *held*, first, that this court would presume in favor of the acts of the circuit court that Roach Millsaps and Pharris Millsaps, Jr., were one and the same person; second, but at any rate, since this was a matter of fact and not of law, a demurrer would not lie. State *v.* Millsaps, 69 Mo. 359.

given unless the facts were such as would authorize it to be taken.[1]

When an indictment is quashed for insufficiency and the defendant ordered to answer to a new indictment, his bail is bound for his appearance to the new indictment, though it be for a higher offence, if it includes the offence described in the bail bond, or grows out of the same act or transaction.[2]

A recognizance proper is not signed. But where it is, and duly certified by the officer before whom it is taken as having been taken and acknowledged before him, the signatures of the obligors may be treated as surplusage and the recognizance held valid.[3]

11. Amendment.—The magistrate before whom are cognizance is taken may, by leave of court, amend the one returned or make a

1. People *v.* Kane, 4 Denio (N.Y.), 530; Champlain *v.* People, 2 N. Y. 82; Gildersleeve *v.* People, 10 Barb. (N. Y.) 35; State *v.* Edgerton, 12 R. I. 104; People *v.* Dennis, 4 Mich. 609; State *v.* Hamer, 2 Ind. 371; Gallagher *v.* People, 91 Ill. 590; State *v.* Grant, 10 Minn. 39; State *v.* Williams, 17 Ark. 371; U. S. *v.* George, 3 Dill. (U. S.) 431.

The recital in a bail bond that the defendant was in custody when it was executed cannot be contradicted by his bail. Hortsell *v.* State, 45 Ark. 59.

2. Hortsell *v.* State, 45 Ark. 59; Pack *v.* State, 23 Ark. 235; Adams *v.* Governor, 22 Ga. 417.

3. Irwin *v.* State, 10 Neb. 325; Madison *v.* Commonwealth, 2 A. K. Marsh. (Ky.) 131; Com. *v.* Mason, 3 A. K. Marsh. (Ky.) 456; State *v.* West, 3 Ohio St. 509; State *v.* Patterson, 23 Iowa, 575. *Compare* State *v.* Doax, 19 La. Ann. 77; State *v.* Taylor, 19 La. Ann. 145; Cunningham *v.* State, 14 Mo. 402; Shattuck *v.* People, 4 Scam. (Ill.) 477. Littleton *v.* State, 46 Ark. 413.

In Com. *v.* Emery, 2 Binn. (Pa.) 434, it is said: "The manner of taking a recognizance is, that the magistrate repeats to the recognizors the obligation into which they are to enter, and the condition of it at large, and asks them if they are content. He makes a short memorandum, which it is not necessary that they should sign, although a custom has lately taken place for the recognizors to sign their names. From this short minute the magistrate may afterwards draw up the recognizance in full form and certify it to the court. This is the most regular and proper way of proceeding."

In the case of State *v.* West, 3 Ohio St. 515, an instrument purporting to be a recognizance concluded as follows: "In testimony whereof we have hereunto set our hands and seals this twentieth day of April, A.D. 1850.

"JOHN M. WEST, [L.S.]
"S J. MCCLURE, [L.S.]
"D. WEST. [L.S.]

"Attested and approved.

"JOHN A. LAZELLE, Associate Judge."

A recognizance in proper form was afterwards taken, which it was claimed was invalid for want of power in the judge to take a second recognizance. The court said: "Was the supposed recognizance in the declaration invalid by reason of the taking of the acknowledgment, bond, or obligation, signed and sealed by these defendants, and filed with the clerk as a recognizance? In other words, was the first writing a valid recognizance? And did the powers of the judge exhaust themselves when he 'attested and approved' it? We think not. The first was not a recognizance; it was a mere bond, such as the judge had no power to take. All his authority to take bail is expressed by a provision of law, in which he is empowered 'to admit such person to bail by recognizing such person,' etc. The paper which he (the judge) is to sign is a recognizance which, when it comes before the court of which he is a member, becomes completely what its name imports—an acknowledgment of record. All its solemnity and authenticity depend upon his own certificate that the acknowledgment it sets forth was made openly before him by the parties in person. No parol proof can vary, enlarge, or explain it. Having a high legal character, it must be so framed as to be certain, and must show itself to have all the qualities which warrant courts in acting on it as a record not to be contradicted. No such loose words as 'attested and approved' can give it these characteristics. . . . The first pa-

new one, so as to set out more accurately and fully the contract of the parties recognizing.[1]

12. Rights and Liabilities of Bail.—When a surety indorses a writ of attachment as bail, the statute makes it the duty of the officer to deliver out a bail-piece. But this is a matter between the surety and the officer, and the surety must see to it that he has a bail-piece if he desires one, and its non-delivery will not discharge him. The indorsement of the process is, in effect, the recognizance of bail, and goes into court, and constitutes the ground of liability; while the bail-piece goes into the hands of the surety, and is merely evidence of the obligation he has assumed, whereby he is enabled to obtain a warrant for the arrest of his principal. Bail thus given answers the purposes of bail below and bail above at common law, though the obligation it imposes is substantially like that imposed by a recognizance of bail by bill in the King's Bench when taken before judgment.[2]

The liability of sureties on a recognizance is limited to the precise terms of their contract, and any change in the contract made by the principals without the assent of the sureties discharges them; nor does it matter how trivial the change, or even that it may be of advantage to the sureties.[3] If the bail is unauthorized or illegally taken, the sureties are not bound.[4]

The sureties are liable severally as well as jointly, whether the recognizance expressly so stipulates or not.[5]

If the recognizance was extorted from the accused upon any illegal compulsion, he may set it up by way of defence.[6]

It is an implied condition of a bail bond that the State through her peace officers will arrest the principal, if within the State, when the bail shall desire it to be done. If this is not done when the surety makes the effort, under the statute he is released.[7]

per, then, was not a valid recognizance—and we have seen, if it was a mere bond, the judge could not take it, and it was a nullity."

1. Wright *v.* Blunt. 74 Me. 92; State *v.* Young, 56 Me. 219; Ingalls *v.* Chase, 68 Me. 113; Com. *v.* Field, 11 Allen (Mass.), 488.

A defective recognizance may be amended by the prothonotary of the supreme court. Hosie *v.* Gray, 73 Pa. St. 502.

2. 1 Tidd's Pr. 250; Darling *v.* Cutting, 57 Vt. 218.

3. Reese *v.* U. S., 9 Wall. (U. S.) 13.

Where the sheriff, after the prisoner had been duly bailed, but the bond was not as yet returned to the clerk's office, entered into a stipulation with the sureties that other sureties should be added to the bond, *held*, that this stipulation and a failure on the part of the sheriff to comply with it does not constitute a defence. McClure *v.* Smith, 56 Ga. 439.

4. Governor *v.* Fay, 8 La. Ann. 490; State *v.* Vion, 12 La. Ann. 688. *Compare* Littleton *v.* State, 46 Ark. 413. See p. 5, n. 1.

5. Mathena *v.* State, 15 Tex. App. 460. See Hildreth *v.* State, 5 Blackf. (Ind.) 80; Ellison *v.* State, 8 Ala. 273; Madison *v.* State, 2 A. K. Marsh. (Ky.) 131.

6. Champlain *v.* People, 2 N. Y. 82. *Compare* Huggins *v.* People, 39 Ill. 241.

In the absence of allegations of duress or constraint, it will be presumed that the principal and sureties desired to enter into the recognizance to which their names are found attached, and the execution of which is admitted. Carmody *v.* State, 105 Ind. 546.

It is no defence to an action on the bond against the bail that the accused was illegally in custody at the time it was taken. Littleton *v.* State, 46 Ark. 413.

7. Com. *v.* Overby, 80 Ky. 208; s. c., 44 Am. Rep. 471.

If the principal is unable to appear by act or fault of the obligee, the bail will be exonerated.[1]

In all bail bonds there is an implied obligation on the part of the commonwealth that the bail shall not be hindered by any authority within the limits of the State from surrendering his principal at any time before forfeiture. Where one has been arrested and given bond to answer for a criminal offence, the sureties on such recognizance are not discharged by the subsequent arrest of their principal on another charge, and the giving of a bond, with other sureties, to answer therefor. If the State should keep him in continued custody, so as to render his production easy for it, but impossible for the sureties, they would be relieved; but the mere temporary restraint, prior to the giving of the second bond, would not work a discharge.[2]

1. Reese *v.* U. S., 9 Wall. (U. S.) 13; Steelman *v.* Mattix, 38 N. J. 247; Buffington *v.* Smith, 58 Ga. 341.

Sureties on bail bond or recognizance are relieved from liability by a second arrest, and bail or recognizance of their principal, on the same indictment. Roberts *v.* State, 2 S. Westn. Repr. (Tex.) 622; Peacock *v.* State, 44 Tex. 11; Lindley *v.* State, 17 Tex. App. 120.

Upon a recognizance being entered into in a criminal cause, there is an implied covenant on the part of the government that it will not in any way take proceedings with the principal which will increase the risks of the sureties or affect their remedies against the principal. State *v.* Spear, 54 Vt. 503; Reese *v.* U. S., 9 Wall. (U. S.) 13.

The fact that a party who has forfeited his bail bond could not appear without danger of losing his life by mob-violence will not exonerate the bail, unless the proper authorities were applied to and were unable or unwilling to extend to the accused the protection necessary to enable him to appear. Weddington *v.* Commonwealth, 79 Ky. 582.

A stipulation to postpone the trial until after the final disposition of other cases, without the consent of the sureties, is inconsistent with the condition of the recognizances, and discharges the sureties. Reese *v.* U. S., 9 Wall. (U. S.) 13.

The failure on the part of the government to hold the term of court at which the accused is required to appear does not discharge the sureties. State *v.* Brown, 16 Iowa, 314.

2. West *v.* Colquitt, 71 Ga. 559; s. c., 51 Am. Rep. 277. In this case the court said: "The meaning of the fundamental provisions in the organic laws of the American Union and of this state is, that a party accused of any and every bailable offence shall have the inestimable privilege of giving security for his attendance at court, and shall not be imprisoned if he can give security in a reasonable sum of money for his appearance. The guarantee is not that he may give such security for one or for two offences, but for every offence he may commit, so long as he has friends who are willing to bind themselves and their property to assure his presence for trial. But if the re-arrest and the new trial on a second offence discharged the sureties on the first bond, no court or sheriff or other officer of the law could ever permit, in justice to the State, a second bond which would thus annihilate the first. Especially would he not do so if the first were a bond to answer for a heinous offence, in a correspondingly large sum of money as penalty, and the second in a trifling bond, for a trivial offence. Nor is the answer a good one, that the officer must bring all parties before him and renew all the bonds by having all the sureties before him. Such proceeding would take time; sureties might be scattered, and before they could all be got together the defendant would be in jail, and his constitutional right would be annulled to the extent of that imprisonment. If it be answered, again, that no officer dare delay accepting bail when tendered under these constitutional provisions, and the right to give bail would still exist in full force and be unimpaired, then see how disastrous the operation would be for the interests of the State and the people. Whenever one was bailed to answer for a grave crime, in a heavy penalty, all he would have to do would be to commit a light offence and give bail to answer that in a small sum—for it must not be excessive, under the constitutions, but proportionate to the offence—and, *ipso facto*, the

bail for the grave offence are discharged, and the principal is beyond seas, having only to pay a small trifle. The law is sense, and this result is nonsense. It cannot be law, any more than nonsense can be sense, so far as the American and Georgia constitutions are of force. When the bail agree to produce their principal at court, they do so in full view of the fact that the principal may commit another offence, and may give bail for that, under another arrest; and that, because they have agreed to produce his body to answer for the first offence, the State does not bargain with them not to arrest him if he sins again, and then that her highest law guarantees to him the right to give other bail to answer that. The state does an act perfectly lawful when she so arrests him for a second offence. If she should keep him in her own custody, of course the bail in the first case would be discharged; because she could produce him, but they could not; and it would be against all reason to punish the sureties for what she did, and by so doing prevent them from keeping their bargain with her, and when all reason for the bail ceased, because she had the man in her own jail or her own penitentiary. But when, under a right the man exercised, other people had enough faith in him to bail him for another offence to be answerable to court then two sets of sureties contract with the State to produce him for two offences. If they conflict, and one is tried and imprisoned by the State, then the sureties are discharged, because the State has the principal in her own custody, and can produce him and try him on the other offence, if she wishes to do so. And whichever case is tried first, if it result in imprisonment, the sureties for the other are discharged; but so long as the State has not the man in her custody, the bail in each case is bound. The mere arrest, discontinued by the bail in the second case, does not annul the first bond. The moment the principal is released on other bail, that bond is operative again. Momentarily it may have been stunned by the second arrest, and would remain insensible as long as that arrest lasted, but the instant the principal breathed free breath again, under the great constitutional guarantees of easy bail, that which he gave before to be free revives by the new breath of the second bail, and as both gave him liberty, both are bound for the exercise of that liberty, on the terms each bargained for, and nothing short of the continued custody of the State can relieve either, and that only so long as it continues." See Hartley *v.* Colquitt, 72 Ga. 351; Buffington *v.* Smith, 58 Ga. 341; Smith *v.* Kitchens, 51 Ga. 158; State *v.* Burnham, 44 Me. 278; Taintor *v.* Taylor, 36 Conn. 242; s. c., 4 Am. Rep. 58; Bigelow *v.* Johnson, 16 Mass. 218; Way *v.* Wright, 5 Metc. (Mass.) 380; People *v.* Bartlett, 3 Hill, 571; Cathcart *v.* Cannon, 1 Johns. Cas. (N. Y.) 28; Loflin *v.* Fowler, 18 Johns. (N. Y.) 335; People *v.* Manning, 8 Cow. (N. Y.) 297; People *v.* Stager, 10 Wend. (N. Y.) 431; Steelman *v.* Mattix, 9 Vroom (N. J.), 247; s. c., 20 Am. Rep. 389; Canby *v.* Griffin, 3 Harr. (Del.) 333; Caldwell *v.* Commonwealth, 14 Gratt. (Va.) 698; State *v.* Allen, 2 Humph. (Tenn.) 258; Devine *v.* State, 5 Sneed (Tenn.), 629; State *v.* Adams, 3 Head (Tenn.), 260; Medlin *v.* Commonwealth, 11 Bush (Ky.), 605; Brown *v.* People, 26 Ill. 28; Ingram *v.* State, 27 Ala. 17; Peacock *v.* State, 44 Tex. 11; Wheeler *v.* State, 38 Tex. 173; Cooper *v.* State, 5 Tex. App. 215; s. c., 32 Am. Rep. 571; Taylor *v.* Taintor, 16 Wall. (U. S.) 366. *Compare* State *v.* Merrihew, 47 Iowa, 112; s. c., 29 Am. Rep 464; Lindley *v.* State, 17 Tex. App. 120.

It does not matter that the sureties on the second bond advised the principal to flee the country. Hartley *v.* Colquitt, 72 Ga. 351.

Whether relief will be granted by bringing up the principal on *habeas corpus*, or by extending the time for surrender, or by granting a discharge on motion, will depend upon the fact whether the one mode will be more beneficial to the plaintiff than the other. Steelman *v.* Mattix, 9 Vroom (N. J.), 247; s. c., 20 Am. Rep. 389.

In an action on a bail bond for the appearance of an indicted person, it is a good defence that the person was in prison in another county in the same State, on conviction for another offence. Cooper *v.* State, 5 Tex. App. 215; s. c., 32 Am. Rep. 571; Buffington *v.* State, 58 Ga. 341. *Compare* State *v.* Merrihew, 47 Iowa, 112; s. c., 29 Am. Rep. 464.

K. was charged with assault to kill; he gave bail, but was subsequently indicted and arrested again upon a bench warrant, and brought into court for trial, whence he escaped. *Held*, that the bail was discharged by the arrest upon the bench warrant. Smith *v.* Kitchens, 51 Ga. 158; s. c., 21 Am. Rep. 232; State *v.* Orsler, 48 Iowa, 343. *Compare* Chappell *v.* State, 30 Tex. 613.

H., as principal, with W. and S., as sureties, entered into a recognizance before an examining court, conditioned "that the said H. shall be and appear at

If the principal is allowed by his bail to go into another State,

said March term of said district court, on the first day thereof, and not depart said court without leave, and shall abide the order of said court," etc. The said H. appeared at said court on the first day thereof, and was indicted for the crime for which he was bound over. Thereupon the district attorney procured a warrant in due form for his arrest to answer to said indictment, and placed the same in the hands of the sheriff, who arrested H. thereon. Thereupon, almost immediately, the said H. applied to the court to be discharged from arrest, on the ground that he was under bond, etc. Thereupon the court ordered his discharge, and notified the sheriff that such arrest was illegal, etc. The securities, W. and S., were present, and made no objection to the discharge. Upon the case being reached for trial, and the said H. called, he did not answer, and was defaulted. *Held*, that the securities were discharged from liability. Smith *v.* State, 12 Neb. 309.

W., who was confined in the G. county jail, under a *mittimus* from the district court of C. county, was allowed bail and gave the required bond with sureties approved by the sheriff of G. county, who accepted the bond and sent it to the clerk of said court, as directed by the order allowing the bail. Meanwhile the said sheriff had received a *capias* from the district court of B. county for the arrest of W. to answer a different charge there pending, and without setting W. at large, arrested and detained him by virtue of the *capias* until the sheriff of B. county conveyed him to the jail of that county, and he subsequently escaped therefrom. At the next term of the district court of L. county, to which the venue had been changed, W. failed to appear, and judgment *nisi* was entered against him and his sureties on the bond; and in defence to the *scire facias* the sureties pleaded that the bond had never become operative or binding, because their principal had not been set at liberty or placed in their custody, but was continuously detained by the State until he made his escape. But *held*, that the plea sets up no defence. Inasmuch as the bail bond took effect from its delivery and acceptance, and W. was not thereafter detained by virtue of the *mittimus* from C. county, but by virtue of the *capias* from B. county, and inasmuch as he was not in custody at all when he forfeited his bond, his arrest and detention by virtue of the *capias* had no effect on the validity of the bond or the liability of the sureties. The case would be different if, notwithstanding the allowance of bail and acceptance of the bond, W. had been held in custody under the *mittimus* from C. county, or if, at the time the bond was forfeited, the State prevented his appearance by detaining him on any charge, or if the sureties had surrendered him, as they could have done notwithstanding his detention on the *capias*. Stafford *v.* State, 10 Tex. App. 46.

Where the defendant, subsequent to the execution of the recognizance, was arrested, tried and convicted for another crime, but escaped, *held*, that the sureties were not released. Wheeler *v.* State, 38 Tex. 173.

Where a defendant who has been arrested under a *capias ad respondendum* in a civil suit, and has given bail to the sheriff, is afterwards, and before the return-day of the process, arrested on a criminal charge, and is afterwards indicted and convicted and sentenced to the State prison, the bail to the sheriff may obtain an exoneration of their liability on the bail bond by first filing special bail and then surrendering the principal by means of a *habeas corpus*, while the principal is in jail under commitment upon the criminal charge, or by motion after he is put under sentence. Atkinson *v.* Prine, 41 N. J. 28.

In Alguire *v.* The Commonwealth, 3 B. Mon. (Ky.) 349, there was an attempt to excuse by the act of the State. The principal failed to appear in the circuit court of Kenton county, as required by the recognizance. The plea of the surety to the *scire facias* on the forfeiture was, that on the day the principal was required to appear, he was arrested for a felony in Louisville, and imprisoned there. The plea was held bad. The court said it was the duty of the surety to see that the principal was at Kenton circuit court and not at Louisville, on the appearance day, when he was arrested at the latter place; and, moreover, that the surety should have made known the arrest to the court at the appearance term, and obtained its process for the principal, and for respite of the recognizance, etc. See Mix *v.* People, 26 Ill. 32; Brown *v.* People, 26 Ill. 28. *Compare* Ingram *v.* State, 27 Ala. 17.

Bail in a criminal case are discharged from liability by the arrest of the principal upon the same charge, in the same State, by the federal authorities, and his incarceration in another State. Com. *v.*

and while there is arrested and imprisoned under the laws of that State, the bail is not released.[1]

If the arrest is made after the forfeiture, the sureties are not discharged.[2]

Where the defendant obtains a change of venue and he is committed to the custody of the sheriff to be transmitted to the custody of the sheriff of the county to which the venue is changed, the right of the bail to the custody of the defendant is impaired and the liability is at an end.[3]

Where the performance of the condition of the recognizance is rendered impossible by the act of God, such as sickness, death, etc., a default is excused.[4]

Overby, 80 Ky. 208; s. c., 44 Am. Rep. 471; Peacock *v.* State, 44 Tex. 11.

Where the principal was arrested by the federal authorities but escaped, *held*, that the bail was not released, but it was assumed that if he had not escaped the bondsmen would have been discharged. State *v.* McAllister, 54 N. H. 156. *Compare* Com. *v.* House, 13 Bush (Ky.), 679.

In Com. *v.* Terry, 2 Duvall (Ky.), 383, it was held by this court that, in a proceeding against the surety upon a forfeited recognizance, it was a sufficient defence that the defendant, being a soldier in the federal army, was refused a furlough, and by reason thereof was unable to appear in discharge of the recognizance. *Compare* Huggins *v.* People, 39 Ill. 241.

Where the principal was arrested as a deserter, *held*, that the surety was not discharged. Shook *v.* People, 39 Ill. 443.

C. was arrested on a criminal charge in the State court and was bailed. He was subsequently arrested and imprisoned for another crime by the military authorities of the United States, and could not be produced in the State court according to the terms of the recognizance. *Held*, that the sureties were discharged. Belding *v.* State, 25 Ark. 315; s. c., 4 Am. Rep. 26; Com. *v.* Webster, 1 Bush (Ky.), 576.

1. Taylor *v.* Taintor, 16 Wall. (U. S.) 366; State *v.* Horn, 70 Mo. 466; s. c., 35 Am. Rep. 437; Devine *v.* State, 5 Sneed (Tenn.), 623; Withrow *v.* Commonwealth, 1 Bush (Ky.), 17; King *v.* State, 18 Neb. 375; State *v.* Scott, 20 Iowa, 63; Harrington *v.* Dennie, 13 Mass. 92; U. S. *v.* Van Fossen, 1 Dill. (U. S.) 406

A. was arrested in Connecticut and gave bail. He then went to New York, and while there was arrested and taken to Maine, and imprisoned for a crime committed there. *Held*, that the bail were not released. Taintor *v.* Taylor, 36 Conn. 242; s. c., 4 Am. Rep. 58.

Where the government has consented that the principal might depart out of the territory of the United States to a foreign country, beyond the reach of his bail, and remain abroad for an indefinite time, without the concurrence or even knowledge of the sureties, they are released. Reese *v.* U. S., 9 Wall. (U. S.) 13.

Enlistment of Principal.—If the principal enlists in the military service of the United States, and is taken out of the State and prevented by his officers from appearing, it is a circumstance to be considered in exoneration of his bail. People *v.* Cushney, 44 Barb. (N. Y.) 118; People *v.* Cook, 30 How. Pr. (N. Y.) 110. *Compare* Gingrich *v.* People, 34 Ill. 448; Huggins *v.* People, 39 Ill. 241; Shook *v.* People, 39 Ill. 443; Winninger *v.* State, 23 Ind. 228.

2. State *v.* Emily, 24 Iowa, 24.

3. State *v.* Jones, 29 Ark. 127.

4. State *v.* Traphagen, 45 N. J. 134; Steelman *v.* Mattix, 9 Vroom (N. J.), 247; s. c., 20 Am. Rep. 389; State *v.* McNeal, 18 N. J. 333; Bigelow, *v.* Johnson, 16 Mass. 218; Way *v.* Wright, 5 Metc. (Mass.) 380; Parker *v.* Bidwell, 3 Conn. 84; People *v.* Manning, 8 Cow. (N. Y.) 297; People *v.* Bartlett, 3 Hill (N. Y.), 570; People *v.* Tubbs, 37 N. Y. 586; Scully *v.* Kirkpatrick, 79 Pa. St. 324; s. c., 21 Am. Rep. 62; Caldwell *v.* Commonwealth, 14 Gratt. (Va.) 698; Com. *v.* Craig, 6 Rand. (Va.) 731; Pynes *v.* State, 45 Ala. 52; State *v.* Cone, 32 Ga. 663; McLelland *v.* Chambers, 1 Bibb (Ky.), 366; State *v.* Allen, 2 Humph. (Tenn.) 258; Woolfolk *v.* State, 10 Ind. 532; Brown *v.* People, 26 Ill. 28; State *v.* Scott, 20 Iowa, 62; Chase *v.* People, 2 Colo. 481; Taylor *v.* Taintor, 16 Wall. (U. S.) 366; U. S. *v.* Van Fossen, 1 Dill. (U. S.) 406. *Compare* State *v.* Edwards, 4 Humph. (Tenn.) 226; Piercy *v.* People, 10 Bradw. (Ill.) 219.

Where the bail on recognizance in a criminal case could not reasonably anticipate and prevent a default, and with proper diligence find and surrender his

Whatever judicial act in a case deprives a defendant's bail of the right to arrest and surrender him discharges the bail; and so where an indictment is quashed upon demurrer and the defendant discharged, the bond is discharged, and a reversal of the judgment by the appellate court does not revive it.[1]

On a verdict of acquittal the bail is *ipso facto* discharged;[2] so also by the quashing of the indictment;[3] so also by the entry of a *nolle prosequi* upon the record.[4] If the court before which the principal obligor is bound to appear has not authority to require him to answer the charge against him, it has no power to adjudge a forfeiture of his bail bond.[5] It is no defence that the principal was indicted for a crime different from that for which he was bailed,[6] or that he was convicted of a lesser offence than that

principal after default, before death intervened to prevent it, a proper case is made for the court, in its discretion, to relieve the surety, on petition. State *v.* Traphagen, 45 N. J. 134. See U. S. *v.* Van Fossen, 1 Dill. (U. S.) 406; State *v.* Cone, 32 Ga. 663.

In State *v.* Traphagen, 45 N. J. 134, the court said: "It is within the powers of the court, incidental to its general jurisdiction in criminal causes, to grant relief to bail where the default was caused by the sickness or death of the accused before forfeiture, and where the death of the principal occurs after forfeiture, when the bail is fixed. It is, in either case, an appeal to the discretion of the court, which will be exercised where justice to the bail demands it, and public justice and policy do not prohibit it."

Principal confined for Insanity in another State.—That the defendant, at the time he was required by the conditions of his bail bond to appear to an indictment, was insane, and had been taken out of the State and confined in an insane asylum of another State, to be treated for his insanity, is no defence for his sureties, in a prosecution on the bond. Adler *v.* State, 35 Ark. 517; s. c., 37 Am. Rep. 38; Bowerbank *v.* Payne, 2 Wash. C. C. 464.

1. State *v.* Glenn, 40 Ark. 332; Butler *v.* Bissell, 1 Root (Conn.), 102; Lyons *v.* State, 1 Blackf. (Ind.) 309; People *v.* Felton, 36 Barb. (N. Y.) 429.

2. Mills *v.* McCoy, 4 Cow. (N. Y.) 406; People *v.* Felton, 36 Barb. (N. Y.) 429; Lafleur *v.* Mouton, 8 La. Ann. 489; Butler *v.* Bissell, 1 Root (Conn.), 102; Lyons *v.* State, 1 Blackf. (Ind.) 309; State *v.* Glenn, 40 Ark. 332.

3. People *v.* Felton, 36 Barb. (N. Y.) 429; State *v.* Mathis, 3 Ark. 84.

4. State *v.* Langton, 6 La. Ann. 282. *Compare* State *v.* Hackett, 3 Hill (S. Car.), 95.

5. State *v.* Winninger, 81 Ind. 51; McGee *v.* State, 11 Tex. App. 520.

6. Pack *v.* State, 23 Ark. 235; Duke *v.* State, 35 Tex. 424.

A recognizance given in the lower court to appear before the superior court to answer to a complaint for the crime of adultery is forfeited by the departure of the principal without leave of court, although he was in fact indicted in the superior court, not for adultery, but for lewd and lascivious cohabitation. Com. *v.* Teevens, 9 N. Eastn. Repr. (Mass.) 524. In this case the court said: "The recognizance bound the principal to appear before the superior court to answer to a complaint for the crime of adultery. He was not in fact indicted in the superior court for that crime, but for lewd and lascivious cohabitation. Had an indictment been substituted for the complaint for the same offence as that therein described? The argument of the defendant contends that, as the principal could not have been tried in the superior court upon the complaint (the offence being one of an indictable character), the lower court had no authority to require the defendant to answer thereto, but should have required him to answer an indictment for the offence, and that the recognizance is therefore invalid. This contention cannot be maintained. The cases of Com. *v.* Slocum, 14 Gray, 395, and Com. *v.* Butland, 119 Mass. 317, are quite decisive that a recognizance in this form is valid and sufficient, and binds the defendant to appear and answer any indictment for the same offence charged in the complaint. Nor should we be prepared to say that if the recognizance was limited to appearing and answering to a specified offence, it did not equally bind the defendant to appear and answer to any

charged in the indictment,[1] or that the criminal charge in the case in which it was taken was not sufficient,[2] or that the indictment against the principal was bad.[3] The loss of the indictment[4] or the failure to find an indictment is no defence.[5]

The fact that an indictment was found against a respondent and properly presented in open court at one term, but not entered upon the docket until the succeeding term, is not a cause for discharging his bail.[6] It is no defence that the grand jurors were disqualified.[7] It is a defence that the recognizance was taken by an officer who had no authority.[8] Where the principal and bail are jointly bound, the release of the principal from his liability does not discharge his surety.[9] If the bond recites no crime against the law, it is void.[10] Where the principal is required to give bail in separate and distinct sums, a single bond covering the aggregate amount is void.[11]

Bail are discharged where the sheriff has released defendant from custody on plaintiff's refusal to pay the expenses of his board and keeping in advance.[12]

Failure to present the indictment at the next term of court after execution of the bond will release the bail.[13] It is not a defence

offence which might substantially be included in the offence described in the complaint, even if of less grade, as in the case at bar, if the defendant were charged in the indictment with lewd and lascivious cohabitation with the same person with whom he was alleged in the complaint to have committed adultery."

Bail bond described the offence as an "assault with intent to rob." It is urged that this expression designates no offence under the law of the State, because not tantamount to "assault with intent to commit the offence of robbery." But *held* that the designation used in the bond is correct. Robinson *v.* State, 11 Tex. App. 309.

1. Campbell *v.* State, 18 Ind. 375.

2. Friedline *v.* State, 93 Ind. 366.

3. Reeve *v.* State, 34 Ark. 610; Brown *v.* State, 6 Tex.App. 188; Com. *v.* Skeggs, 3 Bush (Ky.), 19; Little *v.* Commonwealth, 3 Bush (Ky.), 22; U. S. *v.* Reese, 4 Sawy. (U. S.) 629.

4. Crouch *v.* State, 25 Tex. 755.

5. State *v.* Cocke, 37 Tex. 155; State *v.* Stout, 6 Halst. (N. J.) 124; Pack *v.* State, 23 Ark. 235. *Compare* Brown *v.* State, 6 Tex. App. 188.

6. State *v.* Spear, 54 Vt. 503.

7. Sharpe *v.* Smith, 59 Ga. 707.

8. State *v.* Winninger, 81 Ind. 51; Com. *v.* Roberts, 1 Duvall (Ky.), 199. *Compare* Pack *v.* State, 23 Ark. 235.

9. State *v.* Davidson, 20 Miss. 212.

10. Foster *v.* State, 27 Tex. 236; Nicholson *v.* State, 2 Ga. 363. *See* Robinson *v.* State, 11 Tex. App. 309.

11. U. S. *v.* Goldstein, 1 Dill. (U. S.) 413; State *v.* Buffum, 2 Fost. (N. H.) 267.

12. Prior *v.* Bodrie, 49 Mich. 200; *Ex parte* Badgley, 7 Cow. (N. Y.) 472; Johnson *v.* Smith, 1 Root (Conn.), 373.

Under the Texas Code the expense of keeping prisoners indicted within its limits devolves upon each county notwithstanding any change of venue, and as a recompense for this the amount collected on a forfeited bail bond should be paid to such county. Galveston *v.* Noble, 56 Tex. 575.

13. State *v.* Rhodius, 37 Tex. 165.

Plaintiff in error was surety for one S. on the latter's bond for appearance in the county court to answer the State on a charge of theft. Indictment was subsequently found in the district court against S. for petty theft, but neither it nor an information was presented in the county court at its first term after the execution of the bond, nor did the State's attorney show cause and obtain an order of court preventing the lapse of the bond, as provided in article 592, Code of Procedure. Nevertheless, forfeiture of the bond was entered in the county court and such further proceedings had as resulted in final judgment against the plaintiff in error as surety. *Held*, that the sureties on the appearance bond were discharged from liability by reason of the non-presentment of an indictment or information against their principal at the first term of the county court after the execution of the bond. Jones *v.* State, 11 Tex. App. 412.

that the bail was given under duress.[1] An undertaking for bail entered into on Sunday during vacation is a case of necessity and valid.[2] Where the judgment of forfeiture is erroneous, the bail is not forfeited.[3] Where the principal is not served with the process after indictment and as a consequence does not appear, the bail is not forfeited.[4]

The failure of an officer to deliver a bail-piece will not discharge the bail.[5]

If the name in the recognizance differs immaterially from the name in the indictment, it is no defence.[6] Where the name in the condition differs from that in the obligatory part of the bond, extrinsic evidence is admissible to identify them.[7]

If the bail bond contains conditions which are not required by statute, it is no defence.[8]

If the office of the justice is changed after bail is given and before the time set for appearance, and the parties, without any knowledge of such change, innocently appear at the former place, the bail is thereby released.[9]

Where a defendant appears before a justice of the peace for examination for a felony at a time fixed by his temporary bail bond, and the justice from press of other business postpones the examination to an unfixed day, and tells the defendant that he will have him notified of the day when fixed, he cannot afterwards appoint a day and forfeit the bond without giving the defendant the promised notice.[10]

Where the bail was raised and a new order of arrest issued, and the accused, hearing of the proceedings through the negligence of the officers, absconded, it was held that the bail was not released.[11]

13. Appearance of Principal.—The principal is bound to appear not only at the term mentioned in the recognizance, but at each succeeding term thereafter until acquitted, or otherwise legally discharged, or, if guilty, until sentence is passed upon him, if not permitted to depart sooner by leave of the court. If he fails to do so, his sureties are bound to produce him, and in event of their failure so to do the bail is forfeited.[12]

Failure to enter the indictment at the term at which it was found will not discharge the bail. State *v.* Spear, 54 Vt. 503.

1. Archer *v.* Commonwealth, 10 Gratt. (Va.) 627; Toles *v.* Adee, 84 N. Y. 222. *Compare* People *v.* Shaver, 4 Park. Cr.(N. Y.) 45.

2. Hammons *v.* State, 59 Ala. 164; s. c., 31 Am. Rep. 13; Watts *v.* Commonwealth, 5 Bush (Ky.), 309; Rice *v.* Commonwealth, 3 Bush (Ky.), 14; Johnson *v.* People, 31 Ill. 469.

3. People *v.* Budd, 57 Cal. 349. *Compare* People *v.* Wolf, 16 Cal. 385.

4. People *v.* Slayton, 1 Ill. 257.

5. Darling *v.* Cutting, 57 Vt. 218.

6. People *v.* Eaton, 41 Cal. 657.

7. Gay *v.* State, 7 Kan. 394. See p. 21 note CLERICAL ERRORS, etc.

8. State *v.* Crowley, 60 Me. 103.

9. Hannum *v.* State, 38 Ind. 32.

10. Flynn *v.* State, 42 Ark. 315.

11. People *v.* Eaton, 41 Cal. 657.

12. Gentry *v.* State, 22 Ark. 544; Moore *v.* State, 28 Ark. 480; State *v.* Ryan, 23 Iowa, 406; Lee *v.* State, 51 Miss. 665; State *v.* Smith, 66 N. Car. 620; Chase *v.* People, 2 Colo. 528. *Compare* Townsend *v.* People, 14 Mich. 388.

A appeared as recognized, plead to the indictment, and was by order of the court placed in custody of the sheriff, but escaped during his trial. *Held*, that the bail was discharged. Com. *v.* Cole-

The departure of the defendant without leave of court is a distinct breach of the recognizance. The provision of a statute that

man, 2 Metc. (Ky.) 382; Askins *v.* Commonwealth, 1 Duvall (Ky.), 275.

The court at which the prisoner is to appear must be mentioned in the recognizance. State *v.* Rye, 9 Yerg. (Tenn.) 386. See Grigsby *v.* State, 6 Yerg. (Tenn.) 354; Crowder *v.* State, 7 Tex. App. 484.

The date on which the defendant is to appear must be stated in the recognizance. If a wrong date is given, and the court is not in session upon that day, the recognizance is void. State *v.* Sullivan, 3 Yerg. (Tenn.) 281; Com. *v.* Bolton, 1 S. & R. (Pa.) 328.

A condition in a recognizance that the principal shall be and appear before the court on the first day of the term, etc., and then and there answer and abide the order and judgment of said court, etc., is sufficiently broad to require his appearance from time to time, and from term to term, until the case is disposed of. Gallagher *v.* People, 91 Ill. 590.

Accused failed to appear at the first term in discharge of the bail bond, and under the Criminal Code it was the duty of the court to direct that the fact be entered of record, and thereupon his bond was, as a matter of law, forfeited. His trial and conviction afterwards did not affect the forfeiture of the bond. Walker *v.* Commonwealth, 79 Ky. 292.

Where the condition in a criminal recognizance was that a principal should appear at a particular term of court, but it contained no provision as to appearing from term to term, or other like provision, the appearance of the principal at the specified term was a compliance with the condition, and her failure to appear at a subsequent term to which the case was continued would not subject the sureties to a forfeiture. Colquitt *v.* Smith, 65 Ga. 341.

In Gentry *v.* State, 22 Ark. 544, it was ruled that a recognizance to appear at the next term of court and not to depart thence without leave binds the conusor to appear not only at that time, even if no term of court is held and no notice is given, but at each succeeding term until acquitted or otherwise legally discharged, or, if found guilty, until sentence is passed on him, unless he is permitted to depart sooner by leave of the court.

If the principal appears and the court does not order him into custody, the bail is discharged. Com. *v.* Coleman, 2 Metc. (Ky.) 382; Billings *v.* Avery, 7 Conn. 235.

A recognizance conditioned "that the prisoner appear at the next term and thereafter from day to day," etc., binds the surety for the appearance of the prisoner during the first term of court only, and if the court adjourns without making any order the sureties are discharged. Swank *v.* State, 3 Ohio St. 429; Keefhaver *v.* Commonwealth, 2 Pa. St. 240; State *v.* Mackey, 55 Mo. 51; Smith *v.* People, 1 Park. Cr. (N. Y.) 317.

The bail is not released by the commencement of the trial. A surrender or re-arrest is necessary. People *v.* McCoy, 39 Barb. (N. Y.) 73; State *v.* Brown, 16 Iowa, 314.

Judgment Nisi.—The principal in a bail bond appeared according to its terms, and was placed upon his trial, but the jury failed to agree upon a verdict and was discharged. The court proceeded with the regular call of the docket, but before the call was completed recalled the case against the defendant, without previous order for its recall as prescribed by statute. He failing to appear, judgment *nisi* was entered against him and his sureties. *Held*, that the judgment *nisi* was without the authority of law and void. Johnson *v.* State, 12 Tex. App. 415; Lyons *v.* State, 1 Blackf. (Ind.) 309.

Misdemeanors.—The defendant having failed to appear and plead to an indictment for misdemeanor, his recognizance may then be estreated, before trial, sentence, and issue of bench warrant. State *v.* Minton, 19 S. Car. 280.

In this case the court said: "It is conceded that in misdemeanors, unlike felonies, the defendant may be tried in some cases in his absence, and as the object of the recognizance is to secure his presence so as to receive sentence, it has been unusual, if not unknown, in this State, before this case, for the bond to be adjudged forfeited till after conviction and failure to appear for sentence evidenced by bench warrant and a return of *non est inventus*. The question, however, is not what has been the custom and practice, but what is the law on the subject. We have been unable to find any case in our own reports bearing directly on this point. In the case of State *v.* Rowe, 8 Rich. (S. Car.) 21, Judge Glover, in delivering the opinion of the court, said: 'In misdemeanors, the defendant's obligation compels appearance on the first day of the term, and *de die in diem* until he has been discharged or until he has pleaded. After he has pleaded he appears by his

the conusor shall not depart without leave is separate and distinct from those which bind him to answer to the specified charge, and to stand to and abide the final order and decree of the court; its object is that he may be held to answer any charge which may be alleged against him, even if it be different from the specific charge originally made.[1]

attorney, and his recognizance will not be estreated although he should fail to appear at each succeeding term, provided that after conviction he be present to receive the sentence.' But that question was not directly involved in the case then before the court, as that was a case of felony. These remarks, therefore, though falling from the lips of a learned judge, cannot be recognized as controlling authority, as they were merely *obiter*. Nor have we been able to find any decisions in our sister States, except in the State of Kentucky. In that State, in the case of Walker *v.* Commonwealth, 79 Ky. 292, the precise question was made and adjudged, the court holding that trial and conviction was not necessary in order to forfeit bail in a misdemeanor, and that the liability of the surety was fixed when the defendant failed to appear."

In Walker *v.* Commonwealth, 79 Ky. 292, the court said: "The law governing the question is in this language: 'If the defendant fail to appear for trial or judgment, or at any other time when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered on the record, and thereupon the bail bond, or the money deposited in lieu of bail, is forfeited.' The conditions of the bond of the accused, which conforms to the Code, are that he should appear at the first term of the court after his examining trial, to answer the charge, and to render himself amenable to the orders and process of the court in the prosecution of the charge against him; and if convicted render himself in execution thereof. The accused has not complied with a single condition of his bail bond, and for his failure to perform any of its conditions his sureties became bound for its amount. He did not appear at the first term of the criminal court. When the time for hearing the trial came, the court ordered the accused to be called into its presence to stand his trial; but he failed to appear, although his presence in court was lawfully required. And when he thus failed to appear for trial, the section of the Code quoted made it the court's duty to direct the fact to be entered on the record, and thereupon his bail was, as matter of law, forfeited."

A surety cannot plead to the indictment and offer to pay the fine and costs to save a forfeiture. Warren *v.* State, 19 Ark. 217.

Under the *California* Code it is held that the defendant in a charge of misdemeanor is not required to be personally present at the trial; and therefore a failure to be personally present in court when his case is called is not a breach of the condition of the undertaking of his bail. People *v.* Budd, 57 Cal. 349.

1. In Com. *v.* Teevens, 3 New Eng. Repr. (Mass.) 350, the court said: "The condition of the recognizance is in the form provided by Pub. Stat. chap. 212, § 43, and the provision that the conusor shall not depart without leave of court is very ancient and has been many times held to be separate and distinct from those which bind him to answer to the specified charge, or to all matters which may be alleged against him (a clause which is found in many recognizances), or to stand to and abide the final order and decree of the court thereon. Even if the principal would be entitled to discharge on indictment being found against him, he has no right to decide the question for himself, even if his decision is such as the court would have made. He must apply to the court, or wait until, by proclamation at the end of the term—which is the custom of some tribunals—or in some other mode, he is informed that he has leave to depart. Crown Cir. Comp. 46. To hold otherwise, as said Chief Justice Ewing in State *v.* Stout, 6 Halst. (N. J.) 124, 'is to substitute cause for effect, a ground of discharge for the actual discharge, a reason for absolving him from the recognizance for the absolution itself. Again, the object of the provision that the conusor shall not depart without leave of court is that he may be held to answer any charge which may be alleged against him, even if it be different from the specific charge originally made. As bail is substituted for imprisonment, the court still retains over the party giving bail the same rights which it would have had even in actual custody. It was formerly urged that if the conusor, being brought into court, should stand mute, his sureties

BAIL IN CIVIL CASES.—1. Definition.—The persons into whose custody or keeping a defendant under arrest is supposed to be delivered upon their becoming sureties for his appearance, and in case he be condemned in the action that he shall pay the amount recovered against him, or render himself a prisoner, or that they will do it for him.[1]

The term is also frequently applied to the undertaking or obli-

were liable.' In answer to this view it is said (Bacon Abr. title Bail): 'If a man's bail, who are the jailers of his own choosing, do as effectually secure his appearance and put him as much under the power of the court as if he had been in the custody of the proper officer, they seem to have answered the end of the law.' It is said by Mr. Chitty: 'If, however, the sureties are bound by recognizance that a defendant shall appear the first day of such term to answer to a particular information against him, and not to depart until he shall be discharged by the court, and afterwards the attorney-general enters a *nolle prosequi* as to that information, and exhibits another on which the defendant is convicted and refuses to appear in court after personal notice, the recognizance is forfeited by the default; for, being express that the party shall not depart till he be discharged by the court, it cannot be ratified unless he be forthcoming and ready to answer to any information exhibited against him before he receives his discharge, as much as to that which he was particularly bound to answer.' Chitty. Cr. L. 10 Mod. 152; Hawkins, P. C. book 2, chap. 15, § 84; Bacon Abr. title Bail. This rule has been repeatedly followed. Indeed, it would seem that if the only object of the clause that defendant should not depart without leave was to detain a party who had been properly held to bail to answer a specific charge, so far as that charge is concerned it would be unnecessary. It is necessary because, having been held to bail, the defendant is deemed to be as much in the custody of the court as if actually imprisoned. See also People *v.* Stager, 10 Wend. (N. Y.) 433; People *v.* Clary, 17 Wend. (N. Y.) 374; Keefhaver *v.* Commonwealth, 2 Pen. & W. (Pa.) 240; Starr *v.* Commonwealth, 7 Dana (Ky.), 243. If the provision that the conusor shall not depart without leave is a substantive part of the recognizance, in an action upon it for forfeiture by reason of such departure it is not an answer to say that defendant might have obtained his discharge from the court either because nothing was alleged against him by indictment, or because he was not indicted for the same offence as that upon which he had been bound over. Certainly, had the conusor been in actual imprisonment, he would not have been released when other offences were alleged against him by indictment without recognizing to answer the same; nor, under similar circumstances, when brought into court by his bail or appearing there in person, would leave to depart have been given except upon similar terms. We are therefore of opinion that the superior court correctly ruled that by the default of the conusor the recognizance was forfeited, as he was bound not only to appear and answer the specific charge, but also not to depart without leave."

In People *v.* Felton, 36 Barb. (N. Y.) 429, it was ruled that quashing the indictment which the accused had given bail to appear and answer was a discharge of the obligation, released the surety, and authorized the prisoner's departure from court without special leave.

1. Bouvier's Law Dict. (15th Ed.); Tomlins' Law Dict.; 3 Blackstone Com. 290; Burrill's Law Dict.; Bac. Abr., tit. Bail; 4 Inst. 178.

Bail Below.—Sureties taken by the sheriff for the defendant's appearance in court at a place and time certain. This kind of bail is obsolete.

Bail Above.—See SPECIAL BAIL.

Bail to the Action.—Same as SPECIAL BAIL.

Civil Bail.—That taken in civil actions. Bouvier's Law Dict.

Common Bail.—Fictitious sureties. Entering common bail is tantamount to entering an appearance.

The bail bond is invariably taken by the sheriff, and in modern practice is conditioned not only for defendant's appearance, but also that he will abide the judgment of the court, thus answering the purpose both of *bail above* and *bail below* at common law, so that all species of bail in civil actions are virtually reduced to one, to wit, *special bail to the action*. Hale *v.* Russ, 1 Maine, 336; Hamilton *v.* Dunklee, 1 N. H. 173; Pierce *v.* Read, 2 N.H. 360; Noyes *v.* Leonard, 2 Mass. 484; Fetler *v.* Bryson, 6 W. & S. (Pa.) 566; Freeman *v.* Hayes, 2 Clark (Pa.), 253.

gation entered into by the bail; although this is more properly designated as a *bail bond* or recognizance.

2. In What Actions Required.—Since imprisonment for debt has been abolished by legislative enactments both in the United States and England, the actions in which bail is required to be furnished by the defendant are very few. The power to arrest a defendant in a civil action has been greatly abridged and is now almost entirely regulated by statute and rules of court.

It is only in actions *ex delicto* or for *torts* in no wise connected with a contract that the defendant may be arrested and held to bail.[1]

A *capias* or warrant of arrest may issue and defendant be held to bail in actions for libel, slander,[2] malicious prosecution,[3] conspiracy,[4] deceit,[5] false imprisonment,[6] trover and conversion,[7] criminal conversation,[8] trespass *vi et armis*.[9]

In many of the States a warrant of arrest may issue upon an order granted by a judge with the same force and effect as a *capias ad respondendum* and defendant held to bail.

This is the method employed in cases where there has been fraud in contracting an indebtedness, or where defendant fraudulently conceals his property, or disposes of it with a view of defrauding his creditors, or when he is about to abscond with the purpose of cheating his creditors.

Factors, brokers, and agents, as well as all other persons acting in a fiduciary capacity, may be arrested and held to bail.

1. Whenever it appears that the debt or obligation has arisen out of a contractual relation between the parties, the *capias ad respondendum* is prohibited, and the defendant will be discharged on common bail, or in case an order of arrest has been issued, the same will be vacated. Hammer *v.* Ladner, 41 Leg. Int. (Pa.) 376; Bowen *v.* Burdick, 3 Clark (Pa.), 227; New York Code, sec. 179; Donovan *v.* Cornell, 13 Daly's Rep. (N.Y.) 339.

2. In actions for libel and slander special damage must be shown to have been sustained by the plaintiff, otherwise defendant will be discharged on common bail, or the order for his arrest will be vacated on motion. McCawley *v.* Smith, 4 Yeates (Pa.), 193; Life Insurance Co. *v.* Ecclesine, 6 Abb. Pr. N. S. (N. Y.) 23.

A defendant is held to bail in an action by a trader who shows that by reason of certain libellous and slanderous reports he has been deprived of customers and has thus sustained special damages. Scott *v.* Crum, 1 Pearson (Pa.), 196.

3. Dempsey *v.* Lepp, 15 How. Pr. (N. Y.) 11; Orton *v.* Noonan, 32 Wis. 220.

4. Troub. & H. Pr. 172.

5. Redfield *v.* Frear, 9 Abb. Pr. N. S. (N. Y.) 449.

6. In an action for deceit defendant was held to bail, and in judgment upon such action he is not entitled to the benefit of the statutes exempting property from execution for debt, and if he has no property he may be arrested and imprisoned. Cox *v.* Highley, 100 Pa. St. 252.

7. In actions for trover and conversion defendant may be held to bail. Arnold *v.* Thomas, 1 How. Pr. (N. Y.) 246; Duguin *v.* Edwards, 17 How. Pr. (N. Y.) 290; Lopeman *v.* Henderson, 4 Pa. St. 232.

The defendant, a lady broker, being charged with having fraudulently converted to her own use certain money and stocks left with her for investment, was arrested and held to bail, and a motion to discharge her on common bail was refused because it was held that the relations between the parties was not a contractual one. Emerson *v.* Dow, 11 W. N. C. (Pa.) 270.

8. Also in an action for *crim. con.* Dyott *v.* Dunn, 2 Chit. Rep. 72; Petersdorff on Bail, 38.

9. Defendant may be held to bail in action for damages for an assault and battery, but the assault must be an outrageous one. Davis *v.* Scott, 15 Abb. Pr. 127; 1 Tidd's Pr., 172 (9th Lond. Ed.); Roberts *v.* Slingsby, Sid. 307; Moll *v.* Witmer, 11 W. N. C. (Pa.) 498.

3. Special Bail.[1]—These must be responsible persons able to justify in double the amount of bail required,[2] residents of the county or district,[3] and freeholders. Two or more persons are usually required, although the number as well as the sufficiency of bail, unless fixed by statute, is a matter for the discretion of the court. Their undertaking is joint and several and conditioned that the principal shall satisfy the judgment and costs or render his body in execution, or that they will do it for him.[4]

4. Liability of.—Bail under the common law were regarded as the jailers of their principal, whom they were supposed to have in charge, for the reason stated by Lord Coke—"because the court of justice doth deliver him unto them to be safely kept."[5] It has also been quaintly said that "Bail have their principal on a string, and may pull the string whenever they please, and render him in their own discharge."[6] This being the relationship existing between the principal and his bail, the latter can at any time surrender the former into the custody of the sheriff, or other proper officer in discharge of their liability.[7] In order to hold bail liable

1. The obligation of *special bail* is contingent and not the same as that of a surety. Neither is a surety of a principal who has discharged the obligation of the principal entitled to an assignment of the bail bond, if such payment was made before a *ca. sa.* had been issued and the bail had become fixed by a return of *non est inventus*. Creager *v.* Brengle, 5 Harr. & J. (Md.) 241.

2. Special bail must each justify in double the amount demanded. Chapin *v.* White, 2 How. Pr. (N. Y.) 105; Petersdorff on Bail, 276.

3. Special bail should reside in the county where the action is brought. People *v.* New York C. P., 19 Wend. (N.Y.) 132.

4. Petersdorff on Bail, 267.

5. 4 Inst. 178.

6. Anonymous, 6 Mod. 231; Toles *v.* Adee, 84 N. Y. 240.

7. Nicolls *v.* Ingersoll, 7 Johns. Rep. (N. Y.) 145, is one of the leading cases on the rights of the bail over the principal. The court say: "Bail have a right to surrender the principal in their own discharge whenever they please. They may take him up even on a Sunday and confine him until the next day, and then surrender him. It is the constant language of courts (Lord Hardwicke in *Ex parte* Gibbons, 1 Atk. 237) that bail are their principals' jailers, and that it is upon this notion that they have an authority to take them. and in case a man absconds and his bail cannot find him, they shall have a warrant to take him out of any pretended place of privilege in order to surrender him, because he is a prisoner to the court, and they may call him at pleasure . . . It will thus be seen that as between the bail and his principal the controlling power of the former over the latter may be exercised at all times and in all places." To the same effect are Parker *v.* Bidwell, 3 Conn. 84; Koch *v.* Coots, 43 Mich. 30; Com. *v.* Brickett, 8 Pick. (Mass.) 140; Johnson *v.* Boyer, 3 Watts (Pa.), 378; Ruggles *v.* Correy, 3 Conn. 421; Respublica *v.* Gaoler, 2 Yeates (Pa.), 263.

The executor of bail may surrender the principal. Meadowscraft *v.* Sutton, 1 Bos. & Pull. 62.

Bail may recover from his principal the expenses of sending after him to take him for the purpose of making a surrender. Fisher *v.* Fellows, 5 Esp. Cas. 171.

Bail may delegate their power to arrest the principal to another who may act with the same force and effect that the bail could have done. Nicolls *v.* Ingersoll, 7 Johns. Rep. (N. Y.) 146; Holsey *v.* Trevillo, 6 Watts (Pa.), 402; Parker *v.* Bidwell, 3 Conn. 84.

An agent thus deputed by bail went to the principal's house in a neighboring State, about 12 o'clock at night while the principal and his family were in bed, and demanded the house to be opened or that he would break it open, and soon after broke open the outer door and entered, and found the principal rising and commanded him to dress. He was immediately hurried along the river and pushed into a boat. On demanding the cause of such rough treatment, he was informed that he was

upon their undertaking, the proceedings must not only be regular and conform in every respect to the statutory requirements,[1] but the recognizance itself must also be such as the law defines, and any material variation will render the bond void and discharge the bail as bail, although they may be held liable on the undertaking as a voluntary agreement.[2]

But bail cannot discharge themselves by surrendering their principal after default made unless permitted to do so by some statutory enactment or by rule of court.[3] The death of the principal after a return to a *ca. sa.* fixes definitely the liability of the bail, but a principal's death before bail is legally fixed discharges their obligation.[4]

arrested on a bail-piece. *Held*, that special bail have a right to enter by force into the house of the principal after a reasonable demand of entrance and refusal, and the party making the arrest would not be liable in an action for damages unless for undue force or unnecessary severity. Nicolls *v.* Ingersoll, 7 Johns. (N. Y.) 147; Pease *v.* Burt, 3 Day (Conn.). 485.

The rights of bail in civil and criminal cases are the same. Taylor *v.* Taintor, 16 Wall. (U. S.) 366; Harp *v.* Osgood, 2 Hill (N. Y.), 218.

If the principal is surrendered by the bail before the bail is fixed, the latter may be discharged on motion, and is entitled to have an *exoneretur* entered on the bail-piece. Ruggles *v.* Correy, 3 Conn. 421.

Bail may doubtless permit the principal to go beyond the limits of the State within which he is to answer, but it is unwise and imprudent so to do; and if any evil ensue, they must bear the burden of the consequences, and cannot cast them upon the obligee. Devine *v.* State, 5 Sneed. 625; Taylor *v.* Taintor, 16 Wall. (U. S.) 366.

Bail may surrender his principal by procuring a certified copy of the bail bond and delivering it to the sheriff, and have him to arrest the principal. The actual arrest by the sheriff is equivalent of a delivery of the principal by the bail, and releases the bail from liability. Sternberg *v.* State, 42 Ark. 127.

The power of bail to arrest the defendant and keep him imprisoned is derived from the right of the plaintiff to have satisfaction of the body, and ceases with it. But a temporary stay of execution by agreement of plaintiff, in consideration of a confession of judgment by the defendant, will not exonerate the special bail in the action. Johnson *v.* Boyer, 3 Watts (Pa.), 376.

Bail are discharged where there are long delays in the prosecution of a suit, and where the cause of action in the amended declaration differs from that stated in the affidavit to hold to bail. Fish *v.* Barbour, 43 Mich. 19.

In an action against special bail, it is for the court to determine whether the declaration in the original suit set up grounds of action not covered by the affidavit for bail. Wilkinson *v.* Nichols, 48 Mich. 354.

An undertaking containing any material alteration from the order of arrest is void, as having been taken by the sheriff *colore officii* and incapable of enforcement against the bail. Cook *v.* Freudenthal, 80 N. Y. 202; Toles *v.* Adee, 84 N. Y. 232.

2. The sureties on a bail bond, reciting that the principal was in custody by virtue of a writ of *capias ad respondendum*, are discharged when as a matter of fact the principal was in custody by virtue of a writ of *capias ad satisfaciendum*. Bail are entitled to a strict construction of the obligation creating their responsibility and measuring its extent. Gunn *v.* Geary, 44 Mich. 615.

The sheriff must take a bond in conformity with the order of arrest, otherwise it is void as a statutory obligation, and cannot be enforced as such against the bail, although if the sureties have agreed to the form and manner of the obligation as taken by the sheriff, it may be enforced as a common-law agreement, and the estate of such deceased surety will be liable. Toles *v.* Adee, 84 N. Y. 232.

3. In case a *scire facias* issue against special bail, they have until the *quarto die post* to surrender their principal, and have an *exoneretur* entered on the bail-piece. Cowles *v.* Brawley, 4 Watts (Pa.), 358; McClurg *v.* Bowers, 9 S. & R. (Pa.) 24.

1. Ruggles *v.* Berry, 76 Me. 262.

4. Olcott *v.* Lilly, 4 Johns. (N. Y.) 407;

As a rule, bail can only be discharged from liability by the performance of the conditions of the recognizance entered into by them unless that becomes impossible by the act of God, or of the law, or of the obligee.[1]

BAILIFF.—A person put in charge of something; a sheriff's officer;[2]

White *v.* Blake, 22 Wend. (N. Y.) 612; Petersdorff on Bail, 389.

1. Kelly *v.* Henderson, 1 Pa. St. 495; Gillespie *v.* Hewlings, 2 Pa. St. 492; Newton *v.* Tibbetts, 7 Ark. 150; Beers *v.* Haughton, 9 Peters (U. S.), 358; Mannin *v.* Partridge, 14 East, 599.

It is a well-settled principle that whereever the law takes the principal out of the custody of his bail, either by the operation of an insolvent or bankrupt law, or otherwise, so as to prevent his surrendering, it is tantamount to a surrender. The moment the plaintiff loses his right to take or hold the principal, the bail is discharged, for the latter cannot *keep* where the former cannot *take* the body. Bail for some purposes are said to be fixed by the return of *non est inventus* upon the *capias ad satisfaciendum;* but if they have by the indulgence of the court time to render the principal until the appearance day of the *scire facias* against them, they cannot be considered as completely and definitely fixed until that period. And so much are proceedings against bail deemed a matter subject to the regulations and practice of courts that they will not hesitate to relieve them in a summary manner and direct an *exoneretur* where justice seems to demand it. Where bail are entitled to be discharged *ex debito justitiæ*, they may not only apply for an *exoneretur* by way of summary proceedings, but they may plead the matter as a bar to a suit in their defence. But where the discharge is matter of indulgence only, the application is to the discretion of the court, and an *exoneretur* cannot be insisted on except by way of motion. Where a principal would be entitled to an immediate and unconditional discharge if he had been surrendered there, the bail are entitled to relief by entering an *exoneretur* without any surrender. Beers *v.* Haughton, 9 Peters (U. S.), 355. See also note to the above case in Book 9, U. S. S. C. 145.

But otherwise if liability of bail was fixed before principal was entitled to be discharged under the insolvent laws of a State. Lyon *v.* Auchencloss, 12 Pet. (U. S.) 234.

The allowance of bail to surrender the principal after the return of a *capias ad satisfaciendum* is considered as a matter of favor and indulgence, and not of right. But courts will allow bail to surrender the principal within a limited period after the return of the *scire facias* against them as matter of favor. In certain cases even a formal surrender has not been required where the principal was living and capable of being surrendered, and an *exoneretur* would be entered and the principal discharged immediately upon the surrender. But this rule has never been applied to cases where the principal dies before the return of the *scire facias*. In such a case the bail is considered as fixed by the return of the *ca. sa*, and his death afterwards does not entitle the bail to an *exoneretur*. Davidson *v.* Taylor, 12 Wheat. (U. S.) 604; Dowlin *v.* Standifer, Hempst. (Md.) 290; Hamilton *v.* Dunklee, 1 N. H. 172; Noyes *v.* Leonard, 2 Mass. 484.

2. Bailiff signifies an officer concerned in the administration of justice in a certain province. Coke Lit. 168 b. Thus, the sheriff is called the king's bailiff. 1 Black. Com. 344.

Bailiffs or sheriff's officers are either bailiffs of hundreds or special bailiffs. Bailiffs of hundreds are officers appointed over their respective districts by the sheriff, to perform various duties therein. The sheriff being answerable for the misdemeanors of these bailiffs, they are therefore usually bound in an obligation with sureties for the due execution of their office, and thence are called "bound bailiffs." 1 Black. Com. 345.

Special Bailiffs are officers appointed by the sheriff, at the application of a party in a civil suit and named by such party, for the purpose of executing some particular process therein. Whenever a party thus chooses his own officers, it is held to discharge the sheriff from all responsibility for what is done by them in the execution of the process. 2 Stephen's Com. 633. See Ford *v.* Leche, 6 Ad. & El. 699; Balson *v.* Megat, 4 Dowl. 557; Alderson *v.* Davenport, 13 M. & W. 42; Botten *v.* Tomlinson, 16 L. J. C. B. 138.

Where an act provided that the judges of certain courts should appoint "bailiffs" who alone, and no others, should execute the process, and enacted that no suit should be brought against such bailiff for anything done in pursuance of his duty,

a person who has the care and custody and management of lands or goods for the benefit of their owner.[1]

BAILMENT. (See also AUCTIONEERS; BILLS OF LADING; CARRIERS; CHATTEL MORTGAGES; CONDITIONAL SALES; INNKEEPERS; SALES; WAREHOUSEMEN; WHARFINGERS.)

1. **Definition.**—A bailment is a transfer of the possession of personal property from one person to another without a transfer or the ownership of it.[2]

it was *held*, that one who *de facto* executes the process of the court, under the sergeant-at-mace, but who has not been appointed by the judge of said court, is not a "bailiff" within the statute, so as to be entitled to the notice prescribed by the act. Tarrant *v.* Baker, 5 Scott, 199.

In the United States, the officer corresponding to a bailiff is generally called a deputy-sheriff. There are two kinds of deputies of a sheriff: a general deputy, or under-sheriff, who by virtue of his appointment has authority to execute all the ordinary duties of the office of sheriff; and a special deputy, who is an officer, *pro hac vice*, to execute a particular writ on some certain occasion. The former is bound to take an oath of office and file his appointment, but the latter is not. Allen *v.* Smith, 7 Halst. (N. J.) 159.

No deputy can transfer his general powers, but he may constitute a servant or bailiff to do a particular act; hence an under-sheriff may depute a person to serve a writ. Hunt *v.* Barrel, 5 Johns. (N. Y.) 137.

The sheriff is liable for the acts of his deputies, and it is not necessary to show a particular warrant to his officer, nor that the sheriff adopts the deputies' acts. Hazard *v.* Israel, 1 Binney (Pa.), 240.

This liability extends to all acts done under color of his office. Wilbur *v.* Strickland, 1 Rawle (Pa.), 458. See Satterwhite *v.* Carson, 3 Ired. (N. Car.) 549; Knowlton *v.* Bartlett, 1 Peck (Tenn.), 271.

But for personal torts, though committed while about the execution of official duties, the deputy alone is liable. Smith *v.* Joiner, 1 Chip. (New Brunswick) 62. See Harrington *v.* Fuller, 6 Shep. (Me.) 277.

On admissions and declarations of a deputy as affecting the sheriff, see State *v.* Allen, 5 Ired. (N. Car.) 36; Wheeler *v.* Hambright, 9 S. & R. (Pa.) 390.

1. By bailiff is understood a servant that hath administration and charge of lands, goods, and chattels, to make the best benefit for the owner. Coke on Litt. 172 a.

A bailiff is defined to be one who has charge of lands, goods, and chattels of another to make the best profit for the owner, and to have his reasonable charges and expenses deducted; and is accountable for the profits he reasonably might have had. Bredin *v.* Kingland, 4 Watts (Pa.), 420. See Barnum *v.* Landon, 25 Com. 137, 149; Elwell *v.* Burnside, 44 Barb. (N. Y.) 447, 453; Huff *v.* McDonald, 22 Ga. 131, in which last case it was decided that a bailiff must pay interest, as he is bound to his principal for the *actual profits*.

2. For a collection of various defini-

nitions of bailment, see Story Bailm. (9th Ed.) § 2 and note 2.

A bailment is distinguished from a sale by the fact that in the former only the right of possession and not the title to the article delivered is transferred. Benjamin on Sales (4th Am. Ed.), §§ 1 and 2 and note p. 6; *Ex parte* White, L. R. 6 Ch. App. 397; South Australian Ins. Co. *v.* Randall, L. R. 3 P. C. 101.

Grain in Elevator.—In many cases it is difficult to determine whether a given transaction is a bailment or a sale. Thus, in the case of grain stored in an elevator, where the understanding of the parties is that the grain is to be mingled with other grain, and it is not contemplated that the keeper of the elevator shall return the identical grain stored, but only that he shall return an equal amount of grain of the same kind and grade, the courts have not been unanimous as to whether the transaction is a bailment or a sale. The following cases held that the transaction was a sale: South Australian Ins. Co. *v.* Randall, L. R. 3 P. C. 101; Chase *v.* Washburn, 1 Ohio St. 244; Lonergan *v.* Stewart, 55 Ill. 44; Richardson *v.* Olmstead, 74 Ill. 213; Bailey *v.* Bensley, 87 Ill. 556; Johnston *v.* Beaver, 37 Iowa, 200; Nelson *v.* Brown, 44 Iowa, 455; Carlisle *v.* Wallace, 12 Ind. 252; Rahilly *v.* Wilson, 3 Dill. (U. S. C. C.) 420.

The following cases, on the contrary, held the transaction to amount to a bailment: Sexton *v.* Graham, 53 Iowa, 181; Nelson *v.* Brown, 53 Iowa, 555; Ledyard *v.* Hibbard, 48 Mich. 421; Andrews *v.* Richmond, 34 Hun (N. Y.), 20. See 6 Am. Law Rev. 450.

The theory upon which the transaction is sustained as a bailment is that the depositors of grain stored in any particular bin became tenants in common of the entire mass of grain contained in that bin, with the right to sever their undivided interests at any time. See 6 Am. Law Rev. 450; Andrews *v.* Richmond, 34 Hun (N. Y.), 20.

In November, 1882, one K., a miller and warehouseman, received of W. five hundred bushels of wheat, and agreed verbally to store such wheat until July 1, 1883; that before that date W. might sell the wheat when he pleased, or that wheat would be returned if called for. The wheat was mingled with other wheat purchased by K., in his flouring-mill, which ground, when running, about two hundred bushels of wheat per day, and thereafter, until March 3, 1883, ran about one half of the time. In February, 1883, W. received from K. a writing in evidence of the aforesaid verbal contract. On March 3, 1883, K. ceased to run the mill, and between that date and July 1, 1883, he executed to the defendant S. and others a chattel mortgage on all the wheat in the mill, amounting at the time to nineteen hundred bushels. On June 30, 1883, W. demanded of K. the wheat or the money on his contract, but received neither; and on July 3, 1883, W. demanded of the defendants S. *et al.*, while they were removing the wheat from the mill, that they should leave five hundred bushels thereof in the mill for him, which they refused to do, and afterwards converted all the wheat, and the proceeds thereof, to their own use. *Held*, upon the foregoing facts, that the contract of K. with W., verbal or written, was not a *mutuum* or exchange, nor a sale of the wheat, but that it was a contract of bailment, pure and simple. *Held*, also, that, under such contract, K. and W. became and were tenants in common of the nineteen hundred bushels of wheat remaining in the mill, W. to the extent of his five hundred bushels, and K. as to the residue; and that K. could not sell or mortgage W.'s wheat to the defendants, so as to divest the plaintiff's title thereto, or to authorize its removal from the mill, after W.'s demand that it should be left there. *Held*, also, that when, after such demand, the defendants removed the wheat from the mill and converted the same to their own use, they became and were liable in damages to the plaintiff, as the owner of the wheat so converted, for its fair value. Schindler *v.* Westover, 99 Ind. 395.

When grain is delivered to a warehouseman, and a miller also, and it is understood that the grain is to be deposited with other grain in one bin, and that the miller is to have the right to draw from that bin for the purpose of grinding. *held*, that the transaction is a sale. Andrews *v.* Richmond, 34 Hun (N. Y.), 20.

The written receipt given by the elevator owner to the depositor is often decisive as to whether the transaction shall be deemed a bailment or a sale, the courts refusing to admit any evidence for the purpose of altering the effect of the writing. Sexton *v.* Graham, 53 Iowa, 181; Nelson *v.* Brown, 53 Iowa, 555, and 44 Iowa, 455; Wadsworth *v.* Alcott, 6 N. Y. 64.

Delivery of Goods for Manufacture.—In general, raw materials delivered to be manufactured are bailed and not sold. Foster *v.* Pettibone, 7 N. Y. 433.

Where raw materials are delivered to be manufactured, the manufacturer to have a share of the product for his com-

pensation, *held*, that the transaction is a bailment, not a sale, and the owner retains title until the division of the product is actually made. Gregory *v.* Stryken, 2 Den. (N. Y.) 628.

Plaintiff sent wheat to a miller to grind, he to receive a barrel of flour for every five bushels of wheat furnished. *Held*, a bailment, not a sale of the wheat. Seymour *v.* Brown, 19 Johns. (N. Y.) 44; Slaughter *v.* Green, 1 Rand. (Va.) 3; Mallory *v.* Willis, 4 N. Y. 76.

When A delivered to B cotton yarn to be manufactured into cloth, B to find the filling, and to weave so many yards of cloth, at an agreed price per yard, as was equal to the value of the yarn at 65 cents a pound, *held*, that this was a sale of the yarn to B, and not a mere bailment. Buffum *v.* Merry, 3 Mason (U. S. C. C.), 478.

Mutuum.—A loan of things to be used in consumption, such as corn, oil, etc., where the borrower was to return, not the specific thing borrowed, but an equal quantity of the same kind of thing, was, in the Roman law, called a *mutuum*. It differed from a gratuitous loan in that the title to the specific thing borrowed passed to the borrower. Story Bailm. (9th Ed.) §§ 47, 228

Goods Delivered to be Paid for in Futuro.—A contract read: "Received of G. one sewing-machine, which I agree to safely keep and carefully use, and not remove from W. county, and at the end of three months return the same free of charge and unincumbered: provided, always, and it is expressly understood, that if, on or before the expiration of the above time, I shall pay to the said G. the sum of $60, then this receipt shall be null and void." *Held*, a contract of bailment, not of sale. Dunlap *v.* Gleason, 16 Mich. 158. See Sargent *v.* Gile, 8 N. H. 325; Porter *v.* Pettengill, 12 N. H. 299; Clark *v.* Jack, 7 Watts (Pa.). 375; Whitney *v.* McConnell, 29 Mich. 12; Kohler *v* Hayes, 41 Cal. 455; Partridge *v.* Philbrick, 60 N. H. 556.

An hotel was leased for five years. At the same time the lessor agreed "to furnish to the lessee, with the said hotel, under this lease, all the stock and furniture therein, and upon payment therefor, in full, to execute to him a bill of sale therefor, the title thereto to be and to remain in the lessor until the said payment." Under this agreement $4000 had been paid on account of the price of the furniture. *Held*, that the transaction amounted to a bailment only, and not a conditional sale, and that no title passed to the lessee which could be levied upon by his creditors. App. of Edwards, 105 Pa. St. 103.

Miscellaneous Cases.—The Weir Plow Co. made an agreement in writing with H., by the terms of which it was to manufacture and furnish to him certain farming implements; it also agreeing not to sell such implements to any one else in a designated county for the year 1876. H. was to sell the implements at a certain price, and to have a certain fee or commission for every sale; was required, when he sold on credit, to take notes of a particular character payable to the company, to which notes he was to add his own guaranty of payment; was to keep the notes of the company and business separate, and to remit the cash received by him each month for each implement sold for cash, and to hold himself ready for settlement by the 1st of July, 1876, or any time thereafter, when called upon by the company. It was further provided that if H. failed or neglected to sell all the implements so delivered to him, he was to settle for those remaining on hand by paying for them in notes, or to store them subject to the order of the company, whichever method of disposition the company might choose to accept, the whole agency being subject to revocation upon the failure of said H. to discharge his duties. *Held*, that the unsold implements did not vest in H., and that the contract as to them was one of bailment and not of sale, unless the company chose to make him vendee upon his offering his paper for their price, and did not choose to order the implements on storage for the future disposition of the company. Weir Plow Co. *v.* Porter, 82 Mo. 23.

A leased to B certain machinery for one year at a specified rental. He agreed to sell to B the said machinery at the expiration of the lease for a stipulated price, and B agreed to purchase it at that time. B further agreed that at any time, on thirty days' notice from A, he would purchase the machinery for the said price; that if he failed to do so A might sell the machinery at any time thereafter, and should the proceeds of such sale be less than the price aforesaid, B would pay A the amount of the deficiency. B entered into possession, and C, one of his creditors, levied on the machinery as his property. In a feigned issue between A and C to determine their respective rights in said property, *held*, that the agreement constituted a bailment and not a conditional sale; that in the absence of collusion between A and B it was not void as against C under the Statute of Fraudulent Conveyances; that

2. Kinds of Bailment.—Bailments are ordinarily classified into *Deposits, Mandates, Gratuitous Loans, Bailments for hire,* and *Pledges* or *Pawns.*

(*a*) DEPOSIT.—A deposit is a bailment of goods to be kept without reward and delivered according to the object or purpose of the original trust.[1]

(*b*) MANDATE.—A mandate is similar to a deposit. Like the deposit, it is a bailment without compensation to the bailee.[2] But while the storage of the goods is the chief object of a de-

A was therefore entitled to recover. Dando *v.* Foulds. 20 Fla. 74.

A delivered to B two colts, under a contract that B should safely keep and sell them, if possible, for A, he fixing a minimum price, before a certain date; and if not, to return them in good condition. *Held,* that this was not a sale, but a bailment. Middleton *v.* Stone, 111 Pa. St. 589.

Where it is agreed that the goods delivered are to be returned, or other goods of the same kind, this is not a bailment, but a sale. Hurd *v.* West, 7 Cow. (N. Y.) 752; Marsh *v.* Titus, 6 Th. & C. (N. Y.) 29.

A consignment of cotton to defendant *held* to import a bailment, not a sale. Furlow *v.* Gillian, 19 Tex. 250.

Where property is delivered by A to B to sell, pay a debt owing from C to B, and return the surplus, the transaction is a bailment, not a sale. Bourg *v.* Lopez, 36 La. Ann. 439.

Where a sale is made on a void consideration, no contract of bailment can be implied. Green *v.* Hollingsworth, 5 Dana (Ky.), 173.

A vendor who agrees to store the goods sold in consideration of the purchase-money is a bailor. Oakley *v.* State, 40 Ala. 372.

Loan—Special Deposit.—A special deposit is a deposit of money with another upon the understanding that the identical money is to be returned. Story Bailm. (9th Ed.) § 84.

A deposit for "safe-keeping" of a certain number of gold coins "to be returned whenever called for" is presumptively a special deposit, and not a loan. Wright *v.* Paine, 62 Ala. 340.

Where gold coin was originally bailed as a special deposit, and subsequently the parties agree that the bailee shall pay interest, the special deposit is presumptively changed into a loan. Howard *v.* Roeben, 33 Cal. 399.

The privilege granted to a bailee of gold-dust of converting it into coin does not change his liability into that of debtor to the consignee. Goodenow *v.* Snyder, 3 G. Greene (Iowa), 599.

Where money of A is left by him for safe-keeping with B, with the understanding, not that the identical money shall be kept for and returned to him, but only that a like sum shall be repaid him by B, this is not a bailment or special deposit, but a general deposit, in the nature of a loan; and B is absolutely liable to A, in *assumpsit,* for an equal sum, although the money may have been lost without his fault. Shoemaker *v.* Hinze, 53 Wis. 116.

A merchant who receives money subject to call, without reward, and keeps it separate from his own, is not liable for a theft of the deposit without his fault or negligence, although he has permission, of which he never avails himself, to use it, and his book-keeper, with the depositor's acquiescence, and the merchant's, occasionally withdraws for a short time small amounts to make change. Caldwell *v.* Hall, 60 Miss. 330; s. c., 45 Am. Rep. 410.

1. Story Bailm. (9th Ed.) § 4.

The principal object of a deposit is the keeping or storage of the thing delivered. Story Bailm. (9th Ed.) § 56.

The custody must be gratuitous. Story Bailm. (9th Ed.) § 57.

Title-deeds and instruments evidences of debts may be the subject of a deposit. Story Bailm. (9th Ed.) § 51.

A depositary may terminate the bailment by giving the bailor notice and a reasonable opportunity to remove the goods. If the bailor then neglects to remove the goods, the depositary may put them out upon the sidewalk. Roulston *v.* McClelland, 2 E. D. Smith (N. Y.), 60.

A deposit of money for the benefit of another may be countermanded by the depositor at any time before the money has been actually appropriated. Winkley *v.* Foye, 33 N. H. 171.

2. Story Bailm. (9th Ed.) §153; Wilson *v.* Wilson, 16 La. Ann. 155; Thorne *v.* Deas, 4 Johns. (N.Y.) 84; McGee *v.* Bast, 6 J. J. Marsh. (Ky.) 453.

posit,[1] in the case of a mandate the object of the bailment is to give the bailee possession in order that he may perform some acts upon or in reference to the bailed goods.[2]

(*c*) GRATUITOUS LOAN.—A gratuitous loan (*commodatum*) is a bailment of an article for a certain time, to be used by the borrower without paying for the use.[3]

To constitute a bailment a gratuitous loan, its chief object must be that the bailee may have the use of the bailed article.[4]

(*d*) BAILMENT FOR HIRE.—Bailments for hire comprise all those classes of bailments where the bailee hires the use of the bailed article,[5] and also those where the bailor hires the bailee to

1. Story Bailm. (9th Ed.) § 56.

2. Story Bailm. (9th Ed.) §§ 5, 137, and 140.

A mandate being without consideration, the mandatary cannot be compelled to perform the act for the purpose of which the goods were delivered to him. Thorne *v.* Deas, 4 Johns. (N. Y.) 84; McGee *v.* Bast, 6 J. J. Marsh. (Ky.) 453; Story Bailm. (9th Ed) §§ 166–169. A mandatary may, however, be held liable in tort for a misfeasance. Story Bailm. (9th Ed.) § 170; Ferguson *v.* Porter, 3 Fla. 27.

In a mandate, the act to be done must be lawful and not against sound morals. Story Bailm. (9th Ed.) § 158.

He must render his mandator a full account of his proceedings. Story Bailm. (9th Ed.) § 191. He may recover his actual disbursements and expenses about the thing bailed. Story Bailm. (9th Ed.) §154. And may credit himself in his account with all necessary expenses and charges. Story Bailm. (9th Ed.) §§ 193, 197. A mandatary may bind his mandator by all contracts necessary to the performance of the mandate. Story Bailm. (9th Ed.) § 198. He is entitled to be remunerated for all losses incidental to the mandate. Story Bailm. (9th Ed.) § 200.

3. Story Bailm. (9th Ed.) §§ 220, 6.

A gratuitous loan may be put an end to at any time by the lender. Story Bailm. (9th Ed.) § 258; Orser *v.* Storms, 9 Cow. (N. Y.) 687.

In the case of a gratuitous loan, the borrower has no right to let any third person use the borrowed article. Story Bailm. (9th Ed.) § 235.

A borrower is bound to return the article in a "reasonable time" if no time is fixed. Green *v.* Hollingsworth, 5 Dana (Ky.), 173.

The borrower (without compensation) must bear all expenses which he is put to in using the borrowed article. Story Bailm. (9th Ed.) § 256. But not extraordinary expenses not connected with the use of the borrowed article. Story Bailm. (9th Ed.) §§ 256, 273.

A lender of a chattel is responsible for defects in it with reference to the use for which the loan is accepted, of which he is aware, and owing directly to which the borrower is injured. Blakemore *v.* Bristol, etc., R. Co., 8 El. & Bl. 1035. See MacCarthy *v.* Young, 6 H. & N. 329.

4. Story Bailm. (9th Ed.) § 226.

A gratuitous loan must, as its name indicates, be without compensation. Story Bailm. (9th Ed.) §§ 6, 220.

5. Story Bailm. (9th Ed.) §§ 370, 383.

Where A delivers cattle to B, which B promises to redeliver within one year, with the natural increase, and paying for such as were lost, this is a letting for a valuable consideration. Putnam *v.* Wiley, 8 Johns. (N. Y.) 432.

Where the bailee takes a horse to take care of, he to have the use of the horse in consideration of his keep, this is a bailment for the mutual benefit of both parties. Chamberlain *v.* Cobb, 32 Iowa, 261.

Property bailed for hire for a specific term is not subject to attachment for debts of the bailor during the term. Hartford *v.* Jackson, 11 N. H. 145.

The lettor is bound to allow the hirer the unobstructed use of the thing let during the time for which it is let. Story Bailm. (9th Ed.) § 385.

The lettor may, it is said, take possession of it during the time in order to make necessary repairs. Story Bailm. (9th Ed.) § 385.

A lettor of an article to be put to a particular use impliedly warrants that it is fit for that use. Story Bailm. (9th Ed.) § 390.

Where a horse hired to perform a certain journey and return becomes disabled by lameness while on the return, without hirer's fault, and hirer has to procure other means of returning and incur expenses in consequence thereof, he may recoup such expenses against the bailor's

store or carry the bailed article or perform some work or act upon it.[1]

(*e*) PLEDGE.—A pledge or pawn is a bailment of goods by one person to another to secure the performance of some legal obligation.[2]

claim for hire. Harrington *v.* Snyder, 3 Barb. (N. Y.) 380.

A livery-stable keeper is liable for an injury caused by the unsuitableness of the horse for the purpose for which he was hired. Horne *v.* Meakin, 115 Mass. 326.

Where a hirer is by inevitable casualty deprived of the use of the thing during the term for which it was let, it seems that the price to be paid for hire must be apportioned. Wilkes *v.* Hughes, 37 Ga. 361; Muldrow *v.* Wilmington, etc., R. Co., 13 Rich. (S. Car.) L. 69. See Story Bailm. (9th Ed.) §§ 417, 418.

The hirer is bound to provide food for the hired animal. Story Bailm. (9th Ed.) § 393.

Whether the lettor or the hirer is bound to keep the hired article in repair depends upon the special facts of the hiring. Story Bailm. (9th Ed.) §§ 388, 392.

The lettor is liable to the hirer for all extraordinary expenses necessarily incurred upon the thing let. Story Bailm. (9th Ed.) § 389.

A lettor of goods for hire is, in the absence of agreement to the contrary, bound to deliver the goods to the borrower. Story Bailm. (9th Ed.) § 384.

1. Story Bailm. (9th Ed.) §§ 370, 421, 422.

One engaging to perform work upon goods impliedly warrants that he possesses and will exercise the degree of skill necessary to perform the work in a workmanlike manner. Story Bailm. (9th Ed.) § 43.

2. Story Bailm. (9th Ed.) §§ 7, 286, 300.

It is of the essence of the contract that the goods should be delivered as security for some debt or engagement. Story Bailm. (9th Ed.) § 300. But the engagement need not necessarily be to pay money. Story Bailm. (9th Ed.) § 300.

A pledge cannot be recovered back on the ground of illegal consideration, where the plaintiff is a party to the illegal consideration. Taylor *v.* Chester, L. R. 4 Q. B. 309.

A pledge made to secure a contract, legal because made on Sunday, is valid. King *v.* Green, 6 Allen (Mass.), 139.

Goods pledged to secure a usurious loan cannot be recovered without a tender of the amount actually due. Causey *v.* Yeates, 8 Humph. (Tenn.) 605. *Compare* Beecher *v.* Ackerman, 1 Abb. Pr. N. S. (N. Y.) 141.

A pledge may be given to secure advances of money to be made in the future. Wolf *v.* Wolf, 12 La. Ann. 529; Macomber *v.* Parker, 14 Pick. (Mass.) 497; Badlum *v.* Tucker, 1 Pick. (Mass.) 398; Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 448.

Property pledged to secure future advances cannot be held to secure a prior debt. Robinson *v.* Frost, 14 Barb. (N. Y.) 536. See St. John *v.* O'Connel, 7 Port. (Ala.) 466; Gilliat *v.* Lynch, 2 Leigh (Va.), 493; Mahoney *v.* Caperton, 15 Cal. 313; Baldwin *v.* Bradley, 69 Ill. 32.

Pledge Distinguished from Mortgage — A pledge differs from a mortgage in that the title to the goods does not pass to the person secured in the case of the pledge, but does in the case of the mortgage. Story Bailm. (9th Ed.) § 287; Sims *v.* Canfield, 2 Ala. 555; Eastman *v.* Avery, 23 Me. 248; Day *v.* Swift, 48 Me. 368; Ward *v.* Sumner, 5 Pick. (Mass.) 59; Homes *v.* Crane, 2 Pick. (Mass.) 607; Walker *v.* Staples, 5 Allen (Mass.), 34; Kimball *v.* Hildreth, 8 Allen (Mass.), 167; Cortelyou *v.* Lansing, 2 Cai. Cas. (N. Y.) 200; Brown *v.* Bement, 8 Johns. (N. Y.) 197; M'Lean *v.* Walker, 10 Johns. (N. Y.) 471; Lewis *v.* Stevenson, 2 Hall (N. Y.), 63; Fletcher *v.* Howard, 2 Aik. (Vt.) 115; Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 449.

A bill of sale absolute upon its face, but intended only as collateral security, amounts only to a pledge, which is lost on giving up possession of the property. Walker *v.* Staples, 5 Allen (Mass.), 34; Kimball *v.* Hildreth, 8 Allen (Mass.), 167.

A transaction in form a sale may actually be merely a pledge. Bright *v.* Wagle, 3 Dana (Ky.), 252.

In the case of a pledge of shares of capital stock of a corporation, the legal title passes to the pledgee. Wilson *v.* Little, 2 N. Y. 443. A pledgee of shares is not regarded as owner so as to be entitled to notice of meetings. McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274.

An indorsement of a note *held* merely intended as a pledge and not as a mortgage. M'Lean *v.* Walker, 10 Johns. (N. Y.) 471.

Delivery.—Delivery is essential to the creation of the pledge.[1]

Loss of Possession Defeats.—Where possession of the goods is given up to the pledgor the pledge is defeated.[2]

Sale.—A pledgee has an implied power to sell the pledged goods after a default by the pledgor.[3]

1. Story Bailm. (9th Ed.) § 297; First, etc., Bank *v.* Nelson, 38 Ga. 391; Nevan *v.* Roup, 8 Iowa 207; Foltier *v.* Schroder, 19 La. Ann. 17; Walcott *v.* Keith, 22 N. H. 196 Propst *v.* Roseman, 4 Jones (N. Car.), 130; Owens *v.* Kinsey, 7 Jones (N. Car.), 245; Thompson *v.* Andrews, 8 Jones (N. Car.), 453.

A pledge obtained by false pretences, although unredeemed, vests no interest in the pledgee. Mead *v.* Bunn, 32 N. Y. 275.

When the goods are already in the possession of the pledgee, they may be pledged by a mere verbal arrangement without any further delivery. Van Blarcom *v.* Broadway Bank, 9 Bosw. (N. Y.) 532; Tibbetts *v.* Flanders, 18 N. H. 284.

Delivery of possession may be to a third person for the benefit of the pledgee. This third person may even be a servant of the pledgor. Sumner *v.* Hamlet, 12 Pick. (Mass.) 76.

One who has a contract for a pledge ineffectual for want of delivery of the goods may obtain a subsequent delivery, and thus validate the pledge, even as against an intermediate creditor. Parshall *v.* Eggert, 54 N. Y. 18.

Constructive Delivery.—Where an actual delivery cannot be had there may be a constructive delivery. Story Bailm. (9th Ed.) § 297.

According to the law of *Louisiana*, nothing can be pledged save what is susceptible of a delivery actual, fictitious, or symbolical. Caffin *v.* Kirwan, 7 La. Ann. 221.

A savings-bank deposit may be pledged by a delivery of the pass-book. Boynton *v.* Payrow, 67 Me. 587.

Goods in a warehouse may be pledged by a delivery of the warehouse receipt unindorsed when there is a general custom to transfer possession of goods in this manner. Whitney *v.* Tibbets, 17 Wis. 359.

Indorsement is not requisite to a valid pledge of a bill of exchange. Sanders *v.* Davis, 13 B. Mon. (Ky.) 432; Petitt *v.* First, etc., Bank, 4 Bush (Ky.), 334.

In order to pledge shares of stock there should be such a delivery of possession as the thing is capable of. The pledgee must be clothed with all the usual indicia of ownership. Pinkerton *v.* Manchester, etc., R. Co., 42 N. H. 424.

A pledge may be created by a written transfer where the property is not capable of manual delivery and possession, as in the case of shares of stock. Wilson *v.* Little, 2 N. Y. 443; Brewster *v.* Hartley, 37 Cal. 15.

The delivery of the certificate with a blank power of attorney as collateral security will constitute a pledge and not a mortgage. And this is probably true of a transfer on the books, absolute in form, but intended in fact as collateral security; because, although a transfer is absolute in form, parol evidence can be introduced in equity to show that it was, in fact, intended only as collateral security. Lowell Transfer of Stocks, § 53. citing Brick *v.* Brick, 98 U. S. 514; Ginz *v.* Stumph. 73 Ind. 209; Newton *v.* Fay, 10 Allen (Mass.), 505; McMahon *v.* Macy, 51 N. Y. 155.

In *New York* it is held that the legal title passes to the pledgee. Wilson *v.* Little, 2 N. Y. 443; Hasbrouck *v.* Vandervoort, 4 Sandf. (N. Y.) 74; Hill *v.* Newichawanick Co., 48 How. Pr. (N. Y.) 427; Brewster *v.* Hartley, 37 Cal. 15.

2. Story Bailm. (9th Ed.) § 364; Barret *v.* Cole, 4 Jones (N. Car.), 40; Smith *v.* Sasser, 4 Jones (N. Car.), 43; Bodenhammer *v.* Newson, 5 Jones (N. Car.), 107; Casey *v.* Cavaroc, 96 U. S. 467.

Where the pledgee is deprived of possession by the pledgor, equity will compel a redelivery. Coleman *v.* Shelton, 2 McCord Ch. (S. Car.), 126.

Loss of possession defeats the pledge. But where the pledgee delivers back the property to the owner for a temporary purpose, and is to receive the goods again when that purpose is accomplished, the pledge is not defeated. Story Bailm. (9th Ed.) § 299; Hays *v.* Riddell, 1 Sandf. (N. Y.) 248; Thayer *v.* Dwight, 104 Mass. 254; Hutton *v.* Arnett, 51 Ill. 198; Babcock *v.* Lawson, 5 Q. B. D. 284.

Where goods are pledged by the vendee while in the vendor's warehouse, and subsequently the vendor removes them to another warehouse with the vendee's consent, *held*, the pledge is not destroyed. Jones *v.* Baldwin, 12 Pick. (Mass.) 316.

3. Story Bailm. (9th Ed.) § 308; Pigot *v.* Cubley, 15 C. B. N. S. 701; Mauge *v.*

Heringhi, 26 Cal. 577; Parker *v.* Brancker, 22 Pick. (Mass.) 40; Washburn *v.* Pond, 2 Allen (Mass.), 474; Wilson *v.* Little, 1 Sandf. (N. Y.) 351; Wheeler *v.* Newbould, 5 Duer (N.Y.), 29; Milliken *v.* Dehors, 10 Bosw. (N. Y.) 325; Haskins *v.* Patterson, 1 Edm. Sel. Cas. (N. Y.) 120; Gennet *v.* Howland, 45 Barb. (N. Y.) 560; Lewis *v.* Graham, 4 Abb. Pr. (N.Y.) 106; Mowry *v.* Wood, 12 Wis. 413; Stevens *v.* Hurlburt Bank, 31 Conn. 146; Hyatt *v.* Argenti, 3 Cal. 151. Davis *v.* Funk, 39 Pa. St. 243; Diller *v.* Brubaker, 52 Pa. St. 498; Conyngham's Appeal, 57 Pa. St. 474; Brightman *v.* Reeves, 21 Tex. 70.

The pledgee may also effect a sale by virtue of foreclosure proceedings. Story Bailm. (9th Ed.) § 310.

A pledgee is liable to the pledgor if he sells more than enough of the pledged goods to pay his debt. Fitzgerald *v.* Blocher, 32 Ark. 742; Conyngham's Appeal, 57 Pa. St. 474.

The power of sale is a right, not a duty. A pledgee is not obliged to sell, and is not liable for the depreciation of the pledged property while unsold in his hands. Rozet *v.* McClellan, 48 Ill. 345; Badlam *v.* Tucker, 1 Pick. (Mass.) 400; Granite Bank *v.* Richardson, 7 Metc. (Mass.) 407; Robinson *v.* Hurley, 11 Iowa, 410; Richardson *v.* Ins. Co., 27 Gratt. (Va.) 749; Williamson *v.* McClure, 37 Pa. St. 402.

A court of equity will in some cases interfere and compel the sale by the pledgee of the pledged goods. Story Bailm. (9th Ed.) § 320; Kemp *v.* Westbrook, 1 Ves. 278.

A court will not order the sale of deposit at a bank pledged for a debt, but will appoint an officer to receive the deposit and make a proper disposition of it. Boynton *v.* Payrow, 67 Me. 587.

The subsequent bankruptcy of the pledgor does not deprive pledgee of his right to sell. Jerome *v.* McCarter, 94 U. S. 734.

Notice.—A pledgee may sell after the debt has become due without judicial process, but must first demand payment of the debt, and give notice of the time and place of the sale. Mauge *v.* Heringhi, 26 Cal. 577; Parker *v.* Brancker, 22 Pick. (Mass.) 40; Washburn *v.* Pond, 2 Allen (Mass.), 474; Wilson *v.* Little, 1 Sandf. (N. Y.) 351; Wheeler *v.* Newbould, 5 Duer (N. Y.), 29; Milliken *v.* Dehon, 10 Bosw. (N. Y.) 325; Haskins *v.* Patterson, 1 Edm. Sel. Cas. (N. Y.) 120; Gennet *v.* Howland, 45 Barb. (N. Y.) 560; Lewis *v.* Graham, 4 Abb. Pr. (N. Y.) 106; Mowry *v.* Wood, 12 Wis. 413; Stevens *v.* Hurlburt Bank, 31 Conn. 146; Hyatt *v.* Argenti, 3 Cal. 151; Davis *v.* Fink, 39 Pa. St. 243; Diller *v.* Brubaker, 52 Pa. St. 498; Conyngham's Appeal, 57 Pa. St. 474; Brightman *v.* Reeves, 21 Tex. 70.

Pledgee must demand debt and give notice of sale before he is authorized to sell. Bryan *v.* Baldwin, 52 N. Y. 232; Wilson *v.* Little, 2 N. Y. 443; France *v.* Clark, L. R. 22 Ch. D. 830; Diller *v.* Brubaker, 52 Pa. St. 498; Conyngham's Appeal, 57 Pa. St. 474.

But it seems that no demand is necessary where there is a stipulated day for payment and the pledgor makes default. Pigot *v.* Cubley, 15 C. B. N. S. 701.

A pledgee has no right to sell without notice to pledgor. McNeil *v.* Tenth National Bank, 55 Barb. (N. Y.) 59; Strong *v.* National, etc., Banking Assoc., 45 N. Y. 718; City Bank of Racine *v.* Babcock, 1 Holmes (U. S. C. C.), 180; Gay *v.* Moss, 34 Cal. 125; Alexandria, etc., R. Co. *v.* Burke, 22 Gratt. (Va.) 254.

Where shares are pledged with a stock-broker under a written agreement which states that the pledgee is to have the right to sell on default of payment without notice, *held*, that the pledgee, who had sold the shares before the debt became due, could not prove a custom among stock-brokers to sell pledged stock at any time, returning to the pledgor an equal amount of the same stock on payment of the debt, such a custom being contrary to the express terms of the written contract. Allen *v.* Dykers, 3 Hill (N. Y.), 593, and 7 Hill (N. Y.), 497. See also Lawrence *v.* Maxwell, 53 N. Y. 19.

Where, by the terms of the agreement, the pledgee is given authority "to use, transfer, or hypothecate the stock at his option," and is not required to return the specific shares deposited, but only an equal amount of the same stock, *held*, that the pledgee could sell the pledged shares before the maturity of the debt. Ogden *v.* Lathrop, 65 N. Y. 158.

Notice of the time and place of the sale may be waived by the express terms of the contract of pledge. Maryland, etc., Ins. Co. *v.* Dalrymple, 25 Md. 242; Baltimore, etc., Ins. Co. *v.* Dalrymple, 25 Md. 269.

A private sale, without notice, of pledged bonds cannot be sustained even where the owner could not be found for the purpose of making a demand or giving notice. Strong *v.* National, etc., Banking Assoc., 45 N. Y., 718.

Where it becomes impossible to give notice of sale to the pledgor, the neces-

Power to Collect.—A pledgee of commercial paper has implied power to collect the same at maturity.[1]

Redemption.—A pledgor has the right to redeem goods pledged for a debt at any time before they are sold.[2]

sity of notice is waived. City Bank of Racine *v.* Babcock, 1 Holmes (U. S. C. C.). 180.

Notice of sale must be given even when the debt is payable *in futuro.* Stearns *v.* Marsh, 4 Den. (N. Y.) 227.

In case of a sale of pledged stock the pledgee need not give notice of the place of sale to the pledgor. Worthington *v.* Tormey, 34 Md. 182.

Notice to redeem a pledge must allow a reasonable time for redemption. Gennet *v.* Howland, 45 Barb. (N. Y.) 560; Gay *v.* Moss, 34 Cal. 125.

Notice of the time and place of the sale is not necessary if the pledgor has actual knowledge thereof. Alexandria, etc., R. Co. *v.* Burke, 22 Gratt. (Va.) 254.

A broker buying stocks on margin is liable for a conversion if he sells the shares before default and without notice. Read *v.* Lambert, 10 Abb. Pr. N. S. (N. Y.) 428; Markham *v.* Jaudon, 41 N.Y.235.

The pledgee has no right to sell at private sale. Baltimore, etc., Ins. Co. *v.* Dalrymple, 25 Md. 269; Rankin *v.* McCullough, 12 Barb. (N. Y.) 103. Unless by express agreement. Bryson *v.* Rayner, 25 Md. 424.

The proper place for a sale of stock is at the broker's board. Baltimore, etc., Ins. Co. *v.* Dalrymple, 25 Md. 269. See Rankin *v.* McCullough, 12 Barb. (N. Y.) 103.

The pledgee cannot himself purchase the pledge at the sale. Stokes *v.* Frazier, 72 Ill. 428; Bank of Old Dominion *v.* Dubuque, etc., R. Co., 8 Iowa, 277; Lewis *v.* Graham, 4 Abb. Pr. (N. Y.) 106; Baltimore, etc., Ins. Co. *v.* Dalrymple, 25 Md. 269; Bryson *v.* Rayner, 25 Md. 424.

Stock pledged as collateral and wrongfully sold for non-payment without proper notice, cannot be pursued in the hands of a *bona-fide* purchaser for value without the clearest proof of notice that the shares were pledged. Little *v.* Barker, 1 Hoffm. (N. Y.) 487.

Where the pledge is sold for the debt of the pledgor, the pledgee may recover the value of the goods and not merely the value of his lien. Soule *v.* White, 14 Me. 436.

Where a pledgee purchases at his own sale, and such sale is invalid by reason of defective notice, the sale is a mere nullity, and does not affect the relation of the parties. Bryan *v.* Baldwin, 7 Lans. (N. Y.) 174.

1. Story Bailm. (9th Ed.) § 321; Nelson *v.* Wellington, 5 Bosw. (N. Y.) 178; Brookman *v.* Metcalf, 5 Bosw. (N. Y.) 429, 445. *Compare* Lewis *v.* Varnum, 12 Abb. Pr. (N. Y.) 305; Richards *v.* Davis, 5 Clark (Pa.). 471.

An express authority to sell does not take away the pledgor's implied authority to collect. Nelson *v.* Wellington, 5 Bosw. (N. Y.) 178; Brookman *v.* Metcalf, 5 Bosw. (N. Y.) 429, 445.

The pledgee not only has the right to collect, but it is his duty to do so May *v.* Sharp, 49 Ala. 140; Burrows *v.* Bangs, 34 Mich. 304; Reeves *v.* Plough, 41 Ind. 204; Goodall *v.* Richardson, 14 N. H. 567; Cardin *v.* Jones, 23 Ga. 175; Word *v.* Morgan, 5 Sneed, 79; Hanna *v.* Holton, 78 Pa. St. 334.

A pledgee of a note must sue on it when due, and is liable in damages for failure to do so. He may, however, excuse himself by showing that the parties to the note were insolvent. Grove *v.* Roberts, 6 La. Ann. 210.

In Wheeler *v.* Newbould, 16 N. Y. 392, it was held that the pledgee of negotiable paper had no power to sell it, but must collect it and apply the proceeds upon his debt. See also Fletcher *v.* Dickinson, 7 Allen (Mass.), 23; Nelson *v.* Edwards, 40 Barb. (N. Y.) 279; Lamberton *v.* Windom, 12 Minn. 232; Story Bailm. (9th Ed.) § 321, note 4. In Wheeler *v.* Newbould, 16 N. Y. 392, the negotiable paper had but a short time to run. In Fraker *v.* Reeve, 36 Wis. 85, it was held that pledged negotiable paper could be sold. In that case the note was not to mature till long after the debt became due. This distinction is pointed out in Story Bailm. (9th Ed.) § 321, note 4, and seems to reconcile the two cases.

2. Story Bailm. (9th Ed.) §§ 345, 346; Huntington *v.* Miller, 2 Barb. (N. Y.) 538; White Mountains R. Co. *v.* Bay State Iron Co., 50 N. H. 57; Jones *v.* Thurmond, 5 Tex. 318.

A pledgor may redeem a pledge in equity after default and before sale. The fact that he may sue in trover for the goods, after a tender of the amount due and demand, does not deprive equity of jurisdiction. White Mountains. R. Co. *v.* Bay State Iron Co., 50 N. H. 57.

Extinguishment of.—A pledge is extinguished by payment of the debt,[1] or the recovery of a judgment for the debt,[2] or by the destruction of the pledged goods.[3]

Suit on Debt.—A creditor who has a pledge may sue upon the debt without relinquishing the pledge or selling it.[4]

Levy.—Pledged goods cannot be levied upon in an action by a third person against the pledgor.[5]

Warranty.—By giving a pledge the pledgor impliedly warrants his title to the pledged goods.[6]

Trover will not lie against the pledgee for goods pledged to secure a note payable upon a fixed day, unless the pledgor tendered the amount of the note upon the day fixed. Butts *v.* Burnett, 6 Abb. Pr. N. S. (N. Y.) 302.

The right to redeem passes to the personal representatives of the pledgor. Story Bailm. (9th Ed.) § 348.

A pledgor's right to redeem at any time before sale cannot be cut off by an agreement between the parties. Story Bailm. (9th Ed.) §§ 318, 345; Lucketts *v.* Townsend, 3 Tex. 119.

Property pledged may be redeemed, at any time after default, until sold, but property mortgaged cannot be redeemed after the Statute of Limitations has run from the time of default. Huntington *v.* Mather, 2 Barb. (N. Y.) 538.

The Statute of Limitations does not run against the right to redeem a pledge until the pledgee shows by some act that he has put an end to the relation of pledgor and pledgee. Jones *v.* Thurmond, 5 Tex. 318.

Where a pledgor leaves the pledged goods in the hands of the pledgee for many years after default, and long after the debt they were given to secure is barred by the Statute of Limitations, an abandonment of the goods to the pledgee will be assumed, and a court of equity will refuse to allow the pledgor to redeem. Waterman *v.* Brown, 31 Pa. St. 161. But see Hancock *v.* Franklin Bank, 114 Mass. 155.

The maker of a note, who has pledged goods to secure it, is not entitled to a return of the goods when the Statute of Limitations has run upon the note. Jones *v.* Merchants' Bank, 6 Robt. (N. Y.) 162. See Story Bailm. (9th Ed.) § 362.

Pledgors of bonds secured by mortgage may redeem the bonds, if still in the possession of the pledgee, although the mortgage has been foreclosed. White Mountains R. Co. *v.* Bay State Iron Co., 50 N. H. 57.

In a pledge of stock, the identical stock need not be returned, as between pledgor and pledgee. Thompson *v.* Toland, 48 Cal. 99; Hawks *v.* Hinchliff, 17 Barb. (N. Y.) 492; Prall *v.* Tilt, 27 N. J. Eq. 393; Berlin *v.* Eddy, 33 Mo. 426. *Compare* Langton *v.* Waite, L. R. 6 Eq. 165.

A demand for a return of an equal number of shares of stock pledged must be made during the existence of the company, or no damages can be recovered for a failure to comply with the demand. Fosdick *v.* Greene, 27 Ohio St. 484.

1. Story Bailm. (9th Ed.) § 359.

A payment of a part of the debt does not release any part of the pledge. Story Bailm. (9th Ed.) § 301.

2. Story Bailm. (9th Ed.) § 361.

An attachment by the pledgee of the goods pledged to enforce his lien and as a mode of sale does not defeat the pledge. Arendale *v.* Morgan, 5 Sneed (Tenn.), 703.

A pledgee suing upon the debt secured may attach other property of the pledgor without returning the pledged goods. Beckwith *v.* Sibley, 11 Pick. (Mass.) 482; Taylor *v.* Cheever, 6 Gray (Mass.), 146.

A pledge is not released by the pledgor's committing the debtor's body to prison upon an execution for the debt. Morse *v.* Woods, 5 N. H. 297.

3. Where the pledged property has undergone transmutations without the consent of the pledgee it is still subject to the pledge. Story Bailm. (9th Ed.) § 363.

4. Story Bailm. (9th Ed.) § 315; Whitwell *v.* Brigham, 19 Pick. (Mass.) 117.

A pledgor, in an action by the pledgee to recover his debt, cannot recoup damages to the pledge by the pledgor's want of diligence. May *v.* Sharp, 49 Ala. 140.

5. Story Bailm. (9th Ed.) § 353; Coggs *v.* Bernard, 2 L. D. Raym. 909; Badlam *v.* Tucker, 1 Pick. (Mass.) 389.

In Stief *v.* Hart, 1 Comst. (N. Y.) 20, it was held that the right of the pledgor in the pledged goods was subject to levy and sale.

6. Story Bailm. (9th Ed.) § 354; Mairs *v.* Taylor, 40 Pa. St. 446.

A pledgor of goods that he does not

Alienation.—The pledgee may alienate his right to possession of the pledged goods.[1]

3. Lien.—A lien is a right, arising by operation of law and not by agreement of the parties, to hold possession of goods to secure the payment of a debt.[2]

own cannot set up a subsequently-acquired title to defeat the pledge. Goldstein *v.* Hort, 30 Cal. 372.

1. Story Bailm. (9th Ed.) § 324; Bullard *v.* Billings, 2 Vt. 309; Belden *v.* Perkins, 78 Ill. 449; Allen *v.* Dykers, 3 Hill (N.Y.), 593; Read *v.* Lambert, 10 Abb. Pr. N. S. (N.Y.) 428.

Where the pledgee before default attempts to alienate more than his special property in the goods, his act amounts to a conversion, and the pledgor may immediately sue him in trover. Story Bailm. (9th Ed.) § 322.

The pledgee may, however, recoup the amount of his debt. Story Bailm. (9th Ed.) § 315; Fant *v.* Miller, 17 Gratt. (Va.) 187; Brightman *v.* Reeves, 21 Tex. 70; Lane *v.* Bailey, 47 Barb. (N. Y.) 395; Johnson *v.* Stear, 15 C. B. N. S. 330. *Compare* Cortelyou *v.* Lansing, 2 Cai. Cas. (N. Y.) 200; Dykers *v.* Allen, 7 Hill (N. Y.), 497; Wilson *v.* Little, 2 N. Y. 443; Lewis *v.* Graham, 4 Abb. Pr. (N. Y.) 106.

The purchaser or pledgee from the pledgee is also liable in trover, although he was ignorant of the pledge. Story Bailm. (9th Ed.) § 323; Newsom *v.* Thornton, 6 East, 17; Martini *v.* Coles, 1 M. & Selw. 140; Shipley *v.* Kymer, 1 M. & Selw. 484; Pickering *v.* Busk, 15 East, 38; Queiroz *v.* Trueman, 3 B. & Cr. 342.

The purchaser may, in such a case, if he purchased in ignorance that the goods were pledged, hold as against the original pledgor, until the original debt is paid. Story Bailm. (9th Ed.) § 327; Jarvis *v.* Rogers, 15 Mass. 389; Donald *v.* Suckling, L. R. 1 Q. B. 585; Halliday *v.* Holgate, L. R. 3 Exch. 299.

Where a pledgee is allowed to retain possession after a tender of the amount due, the pledgor is estopped to claim the goods as against a *bona-fide* purchaser from the pledgee who was ignorant of the pledge. Bradley *v.* Parks, 83 Ill. 169.

A, a dealer in whiskeys, bought a lot of whiskeys through B, another dealer, and suffered B to keep the goods as apparent owner. B pledged the goods to C, his creditor, still retaining possession of them, but giving C a receipt stating that he held the goods as bailee for C. The goods were subsequently delivered to A by a clerk of B in B's absence. *Held*, C could not assert his pledge as against A. Geddes *v.* Bennett, 6 La. Ann. 516.

2. Every bailee for hire who by his labor or skill imparts additional value to the goods has a lien thereon for his charges. Morgan *v.* Congdon, 4 N. Y. 552; King *v.* Humphreys, 10 Pa. St. 217; Eaton *v.* Lynde, 15 Mass. 242; Burdict *v.* Murray, 3 Vt. 302.

One who has bailed goods to an artisan to have work done upon them may reclaim them before the work is completed, and the artisan has a lien only for what he has done. Lilley *v.* Barnsley, 2 M. & Rob. 548.

Where goods are delivered to have work performed on them, which is to be paid for at a future day, the bailee has no lien upon the goods bailed. Tucker *v.* Taylor, 53 Ind. 93.

The lien for work performed upon a chattel is lost by a delivery of the chattel to a common carrier for the owner. Morse *v.* Androscoggin R. Co., 39 Me. 285.

No lien can be imposed upon bailed property without the bailor's consent. Small *v.* Robinson, 69 Me. 425.

A person having a lien on a chattel for a debt cannot add to the debt the expense of keeping the chattel until the debt is paid. Somes *v.* British Empire Shipping Co., 8 H. L. C. 338.

An agister has, in the absence of special agreement, no lien for care and feeding. McDonald *v.* Bennett, 45 Iowa, 456.

Wharfingers have a general lien for the balance of their accounts. Naylor *v.* Mangles, 1 Esp. 109; Spears *v.* Hartley, 3 Esp. 81; Rushforth *v.* Hadfield, 6 East, 519; 7 East, 224; Moet *v.* Pickering, L. R. 8 Ch. D. 372; Rex *v.* Humphrey, M'Clel. & Y. 173; Grant *v.* Humphrey, 3 F. & F. 162.

An innkeeper has a lien on all goods brought by the guest, although they turn out to be the property of a third party. Snead *v.* Watkins, 1 C. B. N. S. 267; Johnson *v.* Hill, 3 Stark. 172; Mulliner *v.* Florence, L. R. 3 Q. B. D. 484.

A common carrier, on the contrary, does not appear to have a lien, as against the true owner, on goods delivered to him by one who does not own them. Fitch *v.* Newberry, 1 Mich. 1; Robinson *v.* Baker, 5 Cush. (Mass.) 137; Stevens *v.*

Sale.—One having a lien upon goods has no right to sell them after default in the payment of the debt.[1]

4. Contract.—A bailment is often, though not invariably, accompanied by a contract express or implied.[2]

But in the absence of, and independently of, any contract, the law imposes certain duties upon the parties.[3]

Thus the duty of taking proper care of the bailed goods devolves upon the bailee, even where there is no contract of bailment.[4]

5. Degree of Care.—The degree of care of the bailed goods required of the bailee is fixed by the provisions of the contract of bailment, if there are any provisions upon the subject.[5] In the

Railroad Co., 8 Gray (Mass.), 262; Clark *v.* Railroad Co., 9 Gray (Mass.), 231; Gilson *v.* Gwinn, 107 Mass. 126; Travis *v.* Thompson, 37 Barb. (N. Y.) 236.

An innkeeper who accepts security from his guest for the payment of hotel charges does not, in general, waive thereby his common-law lien upon the goods of the guest for the amount of such charges. Angus *v.* McLachlan, L. R. 23 Ch. D. 330.

A finder has no lien at common law for his reasonable expenses in the case of the found article. But it seems he has an action for them against the owner. Story Bailm. (9th Ed.) § 121.

The finder of an article who deposits the same for safe-keeping has an action against his bailee for a loss of the same through negligence. Tancil *v.* Seaton, 28 Gratt. (Va.) 601.

1. Story Bailm. (9th Ed.) § 311.

2. In the case of a deposit or mandate it would seem that generally there is no contract, for the reason that there is no consideration. Story Bailm. (9th Ed.) §§ 5, 137, 140, 166–169; also n. 4 to § 2; Thorne *v.* Deas, 4 Johns. (N. Y.) 84; McGee *v.* Bast, 6 J. J. Marsh. (Ky.) 453.

The delivery of the goods is, no doubt, a sufficient consideration for a contract by the depositary or mandatary, if accepted by him as such. McDaniels *v.* Robinson, 26 Vt. 316; McCauley *v.* Davidson, 10 Minn. 418.

But, inasmuch as he is to receive no benefit from the delivery of the goods, it would seem that the presumption is against his having intended to accept the delivery as an exchange or consideration for any promise, expressed or implied. The contract of bailment, where there is one, fixes the rights and duties of the bailor and bailee. Story Bailm. (9th Ed.) §§ 31 *et seq.*

3. Story Bailm. (9th Ed.) § 10.

4. Story Bailm. (9th Ed.) § 10.

One who hires a horse under a contract, void because made on Sunday, is liable in tort for an injury caused to the animal by misuse or carelessness. Stewart *v.* Davis, 31 Ark. 518; Frost *v.* Plumb, 40 Conn. 111; Fisher *v.* Kyle, 27 Mich. 454; Hall *v.* Corcoran, 107 Mass. 251.

5. The legal responsibility of a bailee may be narrowed or enlarged by contract. Story Bailm. (9th Ed.) § 33; Mariner *v.* Smith, 5 Heisk. (Tenn.) 203.

A bailee cannot by contract exonerate himself from liability for losses caused by his own *fraud*, but he may from those arising from his own negligence, even gross. Story Bailm. (9th Ed.) § 32.

A clause in a lease of furniture binding the lessee to return the property in as good a condition as reasonable use and wear thereof would permit, does not vary the duty imposed by the law of bailments; and therefore a loss by fire, without fault on the part of the hirer, falls upon the owner. Hyland *v.* Paul, 33 Barb. (N. Y.) 241. One hiring a piano and agreeing to return it "in as good order as when received, customary wear and tear excepted," is liable for an injury to the piano caused by inevitable accident. Harvey *v.* Murray, 136 Mass. 377; Drake *v.* White, 117 Mass. 10; and see Story Bailm. (9th Ed.) § 36.

A barge was hired by a steamboat under an agreement that the barge should be given up on notice "in good order, the usual wear and tear excepted." The barge was destroyed by the ice in the Mississippi without fault by the hirer. *Held*, that the hirer was not liable under the terms of the contract for the value of the barge. McEvers *v.* Steamboat Sangamon, 22 Mo. 187.

By agreement between two railroad companies, the first was to forward loaded cars of the second to certain points on its road, paying the second road for the use of the cars, both roads to share profits. The first road agreed to return the cars to the second in as good condition as when received, ordinary wear and tear by use excepted. *Held*, the first

absence of such provisions, the degree of care imposed by law upon the bailee depends upon the circumstances of the case.[1] Where the bailment is solely for the benefit of the bailor, the bailee is, in general, held to only a slight degree of diligence in the care of the bailed article.[2]

road was not liable for injury to cars caused by inevitable accident. St. Paul, etc., R. Co. *v.* Minneapolis, etc., R. Co. 26 Minn. 243; s. c., 37 Am. Rep. 404.

1. Story Bailm. (9th Ed.) § 239.

A bailee is not, in general, liable for losses resulting from inevitable accident, such as losses by earthquake, storms, etc., or from irresistible force, such as robbery. Story Bailm. (9th Ed.) § 25; Conwell *v.* Smith, 8 Ind. 530; Mein *v.* West, T. U. P. Charlt. (Ga.) 170.

Seizure of the bailed goods by the military forces of the government without the fault of the bailee exonerates the latter from liability. Watkins *v.* Roberts, 28 Ind. 167. See Levy *v.* Bergeron, 20 La. Ann. 290; also James *v.* Greenwood, 20 La. Ann. 297. So does attachment for the bailor's debt. Perley *v.* Brawn, 18 N. H. 404.

A loss by theft is not by inevitable accident, and whether it excuses the bailee or not depends upon whether the bailee was guilty of negligence or not. Story Bailm. (9th Ed.) §§ 27, 407. A bailee of goods for hire is not responsible if they are stolen by his servants without negligence on his part. Story Bailm. (9th Ed.) § 407; Finucane *v.* Small, 1 Esp. 315.

Defendant owned a building in the city of New York, used and occupied as a storehouse. Under an agreement with plaintiff, who desired to store for safe-keeping certain household furniture, a space was allotted to her in said building, and defendant assured her that her goods would be safe, and would be guarded day and night. The allotted space was inclosed by wooden partitions with a door, upon which were two locks, the key of one of which was kept by plaintiff. When money was paid by plaintiff it was receipted for, generally as paid for storage. Most of the property was stolen by those in charge of the building. In an action to recover damages the court charged, in substance, that the contract was one of bailment; that defendant, if liable at all, was liable as a warehouseman, and bound to exercise ordinary care and prudence. *Held*, no error. Jones *v.* Morgan, 90 N. Y. 4; s. c., 43 Am. Rep. 131.

Bonds gratuitously deposited in a bank to be kept without reward, were placed in a fire-proof safe where the bank kept its own valuable securities, and no one but the cashier and the authorities of the bank had access thereto. The cashier was a man who was highly respected by the community, and had the entire confidence of the directors. *Held*, that there was no evidence of such negligence on the part of the bank as to make it liable for a loss through the dishonesty of the cashier. Comp *v.* Carlisle Deposit Bank, 94 Pa. St. 409.

A bailee of goods to perform work upon them is bound to exercise ordinary care to protect them from depredations by his servants. Story Bailm. (9th Ed.) § 429; Clarke *v.* Earnshaw, Gow. 30; Halyard *v.* Dechelman, 29 Mo. 459.

A depositary is not liable for losses occasioned by theft without negligence. Story Bailm. (9th Ed.) §§ 68–72. Giblin *v.* McMullen, L. R. 2 P. C. 317; Scott *v.* National Bank of Chester Valley, 72 Pa. St. 471.

Inn-keepers and common carriers are, at common law, held liable for damage to the goods, even where caused by inevitable casualty, unless such damage results from an act of God. See INN-KEEPERS and CARRIERS.

A public miller is not liable, like a common carrier or an inn-keeper, but he is bound to exercise a high degree of care in respect of grain left in his custody. Wallace *v.* Canaday, 4 Sneed (Tenn.), 364.

2. Story Bailm. § 23; Coggs *v.* Bernard, 2 Ld. Raym. 909; Chase *v.* Mayberry, 3 Harr. (Del.) 266; Gulladge *v.* Howard, 23 Ark. 61; Dart *v.* Lowe, 5 Ind. 131; Dougherty *v.* Posegate, 3 Iowa, 88; Johnson *v.* Reynolds, 3 Kan. 257; Green *v.* Hollingsworth, 5 Dana (Ky.), 173; Mechanics' Bank *v.* Gordon, 5 La. Ann. 604; Dunn *v.* Branner, 13 La. Ann. 452; Hills *v.* Daniels, 15 La. Ann. 280; Foster *v.* Essex Bank, 17 Mass. 500; Whitney *v.* Lee, 8 Metc. (Mass.) 91; McKay *v.* Hamblin, 40 Miss. 472; Eddy *v.* Livingston, 35 Mo. 487; Edson *v.* Weston, 7 Cow. (N. Y.) 278; Patterson *v.* McIver, 90 N. Car. 493; Monteith *v.* Bissell, Wright (Ohio), 411; Spooner *v.* Multoon, 40 Vt. 300; Carrington *v.* Ficklin's Exec., 32 Gratt. (Va.) 670.

Deposit.—A depositary is held only to a slight degree of care of the bailed goods. Story Bailm. (9th Ed.) § 62.

In fixing the degree of care required of a depositary, the law does not regard the capacity of the particular depositary, but requires such degree of care as the average man would exercise in the premises. Story Bailm. (9th Ed.) § 66.

Where the depositor knowingly intrusts his goods to a depositary notoriously weak or infirm of judgment, the depositary will not be held responsible for as high a degree of care as is ordinarily required of depositaries. Story Bailm. (9th Ed.) § 66.

The fact that the depositary took no better care of goods of his own similar to the bailed goods will not exonerate him from liability if grossly negligent in respect to both. Story Bailm. (9th Ed.) §§ 63, 64, and 64a; Giblin *v.* McMullen, L. R. 2 P. C. 317; Doorman *v.* Jenkins, 4 N. & M. 170. But see Bland *v.* Womack, 2 Murph. (N. Car.) 373.

The plaintiff delivered to the defendant bank $4000 of U. S. bonds, and received this writing: "Received of J. D. Whitney four thousand dollars, for safe-keeping as a special deposit. S. M. Waite, C." *Held*, that it was a naked deposit without reward; that the defendant would not be liable for the robbery or larceny of the bonds, unless there was complicity or bad faith; that it was answerable only for fraud or for gross negligence; that the law demands good faith and the same care of the plaintiff's bonds as defendant took of its own of like character. Whitney *v.* First Nat. Bank, 55 Vt. 154; s. c., 45 Am. Rep. 598.

Where one engaged to collect rents for another without reward, except the use of the money, collects it in the daytime and puts it in the money-drawer of his store-room at night, and the next morning the room and the money were destroyed by an accidental fire, he is not bound to exercise more than ordinary care, and is liable for gross negligence only. In such case, proof that the money collected was placed in the money-drawer, among the money and accounts of the defendant, was proper. Bronnenburg *v.* Charman, 80 Ind. 475.

A ticket-agent who, for the convenience of passengers, receives and stores their baggage is not liable except for losses of such baggage occasioned by his want of ordinary care. Green *v.* Birchard, 27 Ind. 483.

Goods received at the cloak-room of a railway company are not received by them in the capacity of carriers, but simply as bailees for hire. Van Toll *v.* South East. R. Co., 31 L. J. C. P. 241; 12 C. B. N. S. 75.

A man lent a flag to his employer, helped him to hoist it, and left it flying when he went away. It was afterwards damaged by a hail-storm. *Held*, that the employer was not liable for the damage done, without proof, at least, that he had failed to take due care of it. A borrower of property is not an insurer of it, even when it is gratuitously lent. An action does not lie for the value of property gratuitously lent, on a showing merely that the lender had sent for it and had not received it back; it is not presumable without proof that the borrower wrongfully withheld it. Beller *v.* Schultz, 44 Mich. 529; s. c., 38 Am. Rep. 280.

In an action for negligently keeping the plaintiff's goods, the report of an auditor stated that the defendant was the proprietor of a building which he let in suites to tenants for housekeeping purposes, furnishing them with attendance, heat, and water; that the plaintiff had a lease of one of the suites, and desired more room for storing trunks; that the defendant told him there was a general store-room in which he might put them; that the assistant janitor slept there, and he thought they would be safe; that he had employed a competent man, who would guard the goods; that the plaintiff afterwards put his trunks there; that afterwards the assistant janitor went away and did not return; and that then the contents of the plaintiff's trunks were found to have been stolen. The report further stated that the auditor found that, on these facts, the defendant was not an innholder, and was not guilty of gross negligence; and that the plaintiff could not maintain his action. *Held*, that no error of law appeared. Davis *v.* Gay, 141 Mass. 531.

S., being a guest of N., deposited with him for safe-keeping, without reward or profit, four United States coupon bonds of the value of $1000 each, and a bond of the value of $500. N. agreed to take care of the bonds solely for the accommodation of S.; he placed them in a box in which he kept his own valuable papers, and locked it, and put the box in a bureau drawer in his bedroom, and locked the drawer. This disposition of the bonds was made with the knowledge and consent of S. Some time afterward, S., being desirous of obtaining the coupons then due, went to the house of N., where he had ceased to reside, and they going upstairs together, N. unlocked the bureau drawer, took out the box, unlocked it, and handed the bonds to S., who cut off the coupons and returned the bonds to N., who replaced them in

Where the bailment is for the sole benefit of the bailee, he is held to a very high degree of diligence.[1] When it is for the mutual benefit of both parties, he is held to an ordinary degree of diligence.[2]

the box and locked it, and put the box in the bureau drawer, and then locked the drawer. Subsequently a female thief entered the house of N., "went upstairs and found the doors open, went first into the front room and found the bureau drawers open, then went into the adjoining room and found the second drawer of the bureau in that room locked; she broke the lock, and took out the box, broke the lock of the box, and took out the four $1000 bonds of S., and the papers of N., and left the house without seeing any one." Some time before the theft N., without the knowledge of S., had withdrawn the $500 bond and deposited it with certain brokers as collateral security for money borrowed by a friend, whose note he had indorsed. He subsequently, however, paid to S. $526.25, the amount due on the face of the bond with interest to date. An action was brought by S. against N. to recover the value of the bonds. The *narr.* contained three counts—one in trover, and two in case for negligence. *Held*, that the evidence offered by the plaintiff was not legally sufficient to warrant a jury in finding that the bonds were lost by the actionable negligence of the defendant. Schermer *v.* Neurath, 54 Md. 491; s. c., 39 Am. Rep. 397.

A finder of goods is held to the same degree of care as a gratuitous loan. Story Bailm. (9th Ed.) § 87.

Mandatary.—A mandatary is liable for gross negligence only. Story Bailm. (9th Ed.) § 174; Nabb *v.* Lockhart, 18 Ga. 495; Skelley *v.* Kahn, 17 Ill. 170; Kemp *v.* Farlow, 5 Ind. 462; Connor *v.* Winton, 8 Ind. 315; Jourdan *v.* Reed, 1 Iowa, 135; Sodowsky *v.* McFarland, 3 Dana (Ky.), 204; Storer *v.* Gowen, 18 Me. 174; Lampley *v.* Scott, 24 Miss. 528; McLean *v.* Rutherford, 8 Mo. 109; Beardslee *v.* Richardson, 11 Wend. (N. Y.) 25; Anderson *v.* Foresman, Wright (Ohio), 598; Tompkins *v.* Saltmarsh, 14 Serg. & R. (Pa.) 275; Bland *v.* Wormack, 2 Murph. (N. Car.) 373.

Bailees of money without recompense are liable for its loss during transmission by mail or private conveyance to the owners, where the owners have not authorized its transmission in such manner. Stewart *v.* Frazier, 5 Ala. 114.

One gratuitously undertaking to convey money is guilty of gross negligence in giving it to another to convey for him, and will be liable if the money is stolen from the latter person. Colyar *v.* Taylor, 1 Coldw. (Tenn.) 372.

1. Story Bailm. (9th Ed.) § 23; Coggs *v.* Bernard, 2 Ld. Raym. 909; Doorman *v.* Jenkins, 4 N. & M. 170.

A borrower without compensation is bound to take extraordinary care of the borrowed article. Story Bailm. (9th Ed.) § 237.

More than ordinary care is required of a borrower. Green *v.* Hollingsworth, 5 Dana (Ky.), 173.

One who borrows a horse is held to a higher degree of care of the animal than one who merely hires a horse. Howard *v.* Babcock. 21 Ill. 259; Bennett *v.* O'Brien, 37 Ill. 250; Hagebush *v.* Ragland, 78 Ill. 40.

A borrower is responsible for injury arising from neglect on his part, however slight, but not for an injury occurring wholly without his default. Wood *v.* McClure, 7 Ind. 155; Scranton *v.* Baxter, 4 Sandf. (N.Y.) 5.

2. Story Bailm. (9th Ed.) § 23; Coggs *v.* Bernard, 2 Ld. Raym. 909; Bakewell *v.* Talbot, 4 Dana (Ky.), 217; Fulton *v.* Alexander, 21 Tex. 148.

A hirer is only bound to exercise ordinary diligence in the care of the hired article. Story Bailm. (9th Ed.) § 379; Mayor of Columbus *v.* Howard, 6 Ga. 213; Swigert *v.* Graham, 7 B. Mon. (Ky.) 661; Jackson *v.* Robinson, 18 B. Mon. (Ky.) 1; Brown *v.* Waterman, 10 Cush. (Mass.) 117; Millon *v.* Salisbury, 13 Johns. (N. Y.) 211; Angus *v.* Dickerson, 1 Meigs (Tenn.), 459.

The hirer of a horse is liable for want of reasonable care and skill in driving him. Mooers *v.* Larry, 15 Gray (Mass.), 451.

One hired to drive horses is liable similarly to a bailee for hire. Newton *v.* Pope, 1 Cow. (N. Y.) 109.

One taking a horse on trial, to purchase if satisfactory, is only liable for ordinary care. Colton *v.* Wise, 7 Bradw. (Ill.) 395; Laborde *v.* Ingraham, 1 Nott & McC. (S. Car.) 419.

Agisters of cattle are bound to exercise ordinary care. Umlauf *v.* Bassett, 38 Ill. 96; Hally *v.* Murkel. 44 Ill. 225; McCarthy *v.* Wolfe, 40 Mo. 520; Eastman *v.* Patterson, 38 Vt. 146.

A livery-stable keeper taking care of

Other circumstances besides the nature of the bailment affect the degree of diligence required of a bailee. The nature of the article bailed, and other facts surrounding the bailment, may also be important factors in determining the degree of care required of him.[1]

horses and carriages for hire is bound to take only reasonable care of the bailed property. He is bound to take care that any building in which the property is kept should be reasonably safe and proper for the purpose. But where he employs a competent contractor to build a shed in which carriages are stored, he is not liable for an injury caused to them by the shed being blown down owing to defective construction. Searle *v.* Laverick, L. R. 9 Q. B. 122.

The liability of one who negligently receives goods not directed to him is the same as that of a bailee for hire. Newhall *v.* Paige, 10 Gray (Mass.), 366.

An overseer is held to such care of the property intrusted to him as an ordinarily prudent man would exercise over his own property. McCracken *v.* Hair, 2 Spears (S Car.), 256.

The master of a vessel is liable to the owner for loss of boats belonging to the vessel only in case of gross negligence. Burrows *v.* Reeves, 1 Nott & McC. (S. Car.) 427.

A bailee of property to be worked upon is liable for ordinary neglect. McCaw *v.* Kimbrel, 4 McCord (S. Car.), 220.

Where A received post notes to collect if possible and credit the amount upon the debt of the owner to A, and, if not collected, to return to said owner, A must seasonably present the notes for payment and notify the owner of non-payment. Medomack Bank *v.* Curtis, 24 Me. 36.

1. Story Bailm. (9th Ed.) §§ 182, 186; Kirtland *v.* Montgomery, 1 Swan (Tenn.), 452; Griffith *v.* Zipperwick, 28 Ohio St. 388.

The division of negligence into three classes, gross, ordinary, and slight, has been much criticised by eminent judges.

In Wilson *v.* Brett, 11 M. & W. 113, Baron Rolfe said that he could see no difference between negligence and gross negligence; that gross negligence was the same thing as negligence with the addition of a vituperative epithet.

In Hinton *v.* Dibbin, 2 Q. B. 661, Lord Denman said: "It may well be doubted whether between gross negligence and negligence merely, any intelligible distinction exists."

In Lord *v.* Midland R. Co., L. R. 2 C. P. 344, Wills, J., said: "Any negligence is gross in one who undertakes a duty and fails to perform it. The term 'gross negligence' is applied to a gratuitous bailment." It would seem that negligence was a negative term, meaning simply want of due care—a failure to exercise that degree of care which the law imposes upon the person deemed negligent. If so, any bailee who has been guilty of negligence, i.e., failure to exercise the degree of care which the law requires of him, is answerable in damages for injuries resulting from his want of care, whether the bailment be gratuitous or not. It cannot be said that such a bailee is answerable only for gross negligence, unless negligence and gross negligence mean the same thing. The degree of care which the law requires of bailees doubtless depends upon the circumstances of the case, and varies with particular facts. Story Bailm. § 11. The fact that the bailment was without benefit to the bailee, is an important factor in fixing the degree of care required of the bailee, a less degree of care being required than when the bailment is wholly or partly for his benefit. When the courts say that a gratuitous bailee is only responsible for gross negligence, the meaning seems to be that he is only answerable for a failure to exercise that lesser degree of care which the law requires of a gratuitous bailee.

It is competent to show a usage of trade to qualify a bailee's liability. Kelton *v.* Taylor, 11 Lea (Tenn.), 264; s. c., 47 Am. Rep. 284.

A party riding a horse at the request of the owner, for the purpose of exhibiting him for sale, without any compensation, is bound to exercise such care and skill as he possesses. Wilson *v.* Brett, 11 M. & W. 113.

The fact that the owner knew and acquiesced in the kind and degree of care exercised by the bailee, will not excuse the latter for failure to exercise a proper degree of care. Conway Bank *v.* American Express Co., 8 Allen (Mass.), 512. *Compare* Knowles *v.* A. & St. L. R. Co., 38 Me. 55.

The measure of the bailee's responsibility is to be determined in each case by a comparison with the conduct of classes of men, not of individuals. First Nat. Bank *v.* Graham, 79 Pa. St. 106.

6. Duty of Restitution Independent of Contract.—The duty of the bailee to make restitution of the bailed goods is one which the law imposes, and does not depend on the existence of any contract.[1]

7. Bailee Must Account for Profits.—The obligation of the bailee to account for and return all increase and profits of the bailed goods is also one that exists independently of any contract.[2]

8. Use of Bailed Article.—The right of the bailee to use the bailed article depends upon the special facts of the bailment.[3]

9. Restitution: To whom Made.—Where the bailment is made by several jointly, the bailee is not justified in returning the goods to one of them.[4]

Where the bailor has sold the goods during the bailment, the bailee is not obliged to return the goods to the vendee.[5]

10. Restitution: How Made.—The duty of the bailee as to the time, manner, and place of return is governed largely by the special circumstances of each particular case.[6]

1. A bailee who wrongfully refuses to deliver up goods upon demand to his bailor is liable in an action of tort. Hill *v.* Wiggin, 31 N. H. 292; Brown *v.* Cook, 9 Johns. (N. Y.) 361; Phelps *v.* Bostwick, 22 Barb. (N. Y.) 314; West *v.* Murph. 3 Hill (S. Car.), 284; Jackman *v.* Partridge, 21 Vt. 558.

Where the bailee contracts to restore the goods at a fixed time and fails to do so, he becomes liable in an action of tort (detinue). Lay *v.* Lawson, 23 Ala. 377; Clapp *v.* Nelson, 12 Tex. 370.

2. Story Bailm. (9th Ed.) §§ 99, 194, 260, 339, 343; Geron *v.* Geron, 15 Ala. 558; Hunsacker *v.* Sturgis, 29 Cal. 142; Houton *v.* Holliday, 2 Murph. (N. Car.) 111; Gilson *v.* Martin, 49 Vt. 474. See ANTICHRESIS.

3. Story Bailm. (9th Ed.) §§ 89, 90, 329, 330; Thompson *v.* Patrick, 4 Watts (Pa.), 414.

In the case of a gratuitous loan or a hiring for use, the use of the article is, of course, the object of the bailment. See GRATUITOUS LOAN and BAILMENT FOR HIRE, p. 44.

In the case of deposits and persons, the right to use the bailed article depends (in the absence of express agreement) upon the nature of such article. If it is of such a nature that a user of it will benefit it, a right of user will be implied; otherwise where the use of it would involve risk or cause deterioration. Story Bailm. (9th Ed.) §§ 89, 90, 329, 330.

Where the care of the bailed article is the object of the bailment, the right of user is restricted by the terms of the contract of bailment, express or implied. Story Bailm. (9th Ed.) §§ 232, 413.

4. Story Bailm. (9th Ed.) § 114; Harper *v.* Godsell, 5 L. R. Q. B. 422; May *v.* Harvey, 13 East, 197; Brandon *v.* Scott, 7 El. & Bl. 234.

Where the bailment was by two and subject to their joint order, both must join in a possessory action against the bailee. Rand *v.* State National Bank, 77 N. Car. 152.

In Brandon *v.* Scott, 7 El. & Bl. 234, it was held that although a bailee of goods received from several bailors jointly had no right to deliver the goods to one of them, yet that such a delivery barred an action of *assumpsit* brought in the names of all the bailors. It was stated that the other bailors would have a remedy in equity against the bailee.

5. Story Bailm. (9th Ed.) § 103. But see Hodges *v.* Hurd, 47 Ill. 363; Willner *v.* Morrel, 40 N. Y. Super Ct. 222.

It seems a purchaser of the lender may maintain detinue against the borrower. Story Bailm. (9th Ed.) § 282.

Where goods are in the possession of a bailee, notice of a pledge thereof by the owner, in order to render the bailee liable to the pledgee, in trover and conversion, for delivering the goods to a *bona-fide* purchaser from the pledgor who took title discharged of the pledge, must be such as to convey information to the bailee or his authorized agent that the pledgee had loaned or would certainly loan money on the security of the goods. People's Bank *v.* Etting, 108 Pa. St. 258.

Where a deposit is made to a party in a special character, as in the character of guardian, etc., then, if the trust has terminated, the delivery should be to the party entitled to the property. Story Bailm. (9th Ed.) § 109.

6. Story Bailm. (9th Ed.) §§ 117, 415.

11. Term of Bailment.—In the case of mandates, deposits, and gratuitous loans, the bailee has no right to possession as against his bailor. The latter may determine the bailment at any time by a demand.[1] In the case of a bailment for hire for use the bailee is given the right to possession of the bailed goods for a specified time.[2]

12. Detinue.—The common-law remedy peculiarly appropriate in a case where the bailee wrongfully refused to make a restitution of the bailed goods was the action of detinue.[3]

In general the borrower should return the goods to the lender at his house. This, however, depends largely upon the circumstances of the case. Story Bailm. (9th Ed.) § 261.

In June A loaned his carriage to B, the carriage then being stored at a stable. In December following B returned the carriage to the same stable, the stable-keeper having ceased to be A's agent. *Held*, that B should have returned it at A's residence, and that he was guilty of a conversion. Esmay *v.* Fanning, 9 Barb. (N. Y.) 176.

A demand for delivery must be made at a reasonable and proper time. Story Bailm. (9th Ed.) § 120.

A bailee instructed not to deliver save on bailor's written order has no authority to deliver to bailor's wife. Kowing *v.* Manly, 49 N. Y. 192.

Although by original agreement with bailor bailee is not bound to deliver goods except upon written order, he must deliver them upon verbal demand to any person succeeding to the ownership. Willner *v.* Morrel, 40 N. Y. Super. Ct. 222.

A naked bailee cannot be held answerable for delivering the goods held by him to the wrong person, if the agent of the person properly entitled thereto has given him to understand they were for the one to whom they were delivered. Brant *v.* McMahon, 56 Mich. 498.

A bailment terminates when its objects are accomplished; it then devolves upon the bailee to return the goods without waiting for a demand. Lay *v.* Lawson, 23 Ala. 377. *Accord*, Story Bailm. (9th Ed.) § 414; Syeds *v.* Hay, 4 T. R. 260.

No demand is necessary where the goods are to be returned at a fixed time which has passed. Clapp *v.* Nelson, 12 Tex. 370.

Where there has been a mere temporary exchange of articles of property, the owner of the one article is not required to return the article borrowed before he can maintain trover for his own article. Hoell *v.* Paul, 5 Jones (N. Car.), 75.

The town of Forsyth issued $30,000 in bonds, bearing two per cent interest. It entered into a contract with P. & Son, brokers, to give them the use of bonds of the nominal value of $7500, provided they would keep $7500 more at par as a circulating medium in the town, and redeem them when presented; when the town by taxation should redeem $7500, the other $7500, were to be delivered up to be cancelled. P. & Son became bankrupts, having on hand $4900 of the bonds. The town claimed that these should be delivered up for cancellation; the assignees claimed them as assets. *Held*, that the contract created a trust in the nature of a bailment, and when it became impossible for the bankrupts to comply with their contract, the town was entitled to recover the bonds. Cabaniss *v.* Ponder, 65 Ga. 134.

Where no time for the return of the goods is specified in the contract, a "reasonable" time is understood, and this is for the jury to fix. Cobb *v.* Wallace, 5 Coldw. (Tenn.) 539.

1. Story Bailm. (9th Ed.) §§ 93–93h, 150, 279, 280; McLain *v.* Huffman, 30 Ark. 428; Montgomery *v.* Evans, 8 Ga. 178; Carle *v.* Bearce, 33 Me. 337; Hill *v.* Wiggin, 31 N. H. 292; Brown *v.* Cook, 9 Johns. (N. Y.) 361; Phelps *v.* Bostwick, 22 Barb. (N. Y.) 314; West *v.* Murph, 3 Hill (S. Car.), 284; Jackman *v.* Partridge, 21 Vt. 558; Cranch *v.* White, 1 Bing. N. C. 414; Wilson *v.* Anderton, 1 B. & Ad. 450; Gunton *v.* Nurse, 2 Brod. & B. 447; Verrall *v.* Robinson, 2 Cr. M. & R. 495.

A depositary may also determine the bailment by giving the bailor reasonable notice to remove the goods. Roulston *v.* McClelland, 2 E. D. Smith (N. Y.), 60.

2. Story Bailm. (9th Ed.) §§ 368, 372, 395.

Where no time for the return of loaned goods is specified, a "reasonable" time is understood, and this is for a jury to fix. Cobb *v.* Wallace, 5 Coldw. (Tenn.) 539.

3. Bac. Abr. tit. Detinue; Bouvier Law Dict. tit. Detinue.

13. A Conversion Terminates Bailment.—A wrongful conversion by the bailee of the bailed goods determines the bailment instantly, and makes the bailee's possession wrongful.[1] Thus, where a bailee assumes to pledge or sell the bailed goods as his own, such act amounts to a conversion, and the bailor may immediately bring replevin or trover.[2] But a pledgee or a hirer of chattels may

Where the bailee contracts to return the goods, a refusal to do so of course renders him liable in *assumpsit*. McEvers *v.* Steamboat Sangamon, 22 Mo. 187; Harvey *v.* Murray, 136 Mass. 377; Drake *v.* White, 117 Mass. 10; Hyland *v.* Paul, 33 Barb. (N. Y.) 241.

The action of detinue was largely superseded by the more practical and less technical action of trover. Bouvier Law Dict. tit. Detinue. There are, however, certain classes of cases where detinue is the only remedy. The theory on which trover lies is that the refusal of the bailee to restore the goods amounts to a conversion of them. A refusal to restore the goods is no doubt evidence of a conversion of the goods when they are in the bailee's possession at the time of the refusal; but not, it would seem, where the goods have been converted or have been lost or destroyed owing to the bailee's negligence prior to the time of refusal. In such a case detinue and not trover would seem to be the bailor's remedy. Williams *v.* Archer, 5 C. B. 318; Reeve *v.* Palmer, 5 C. B. N. S. 84; Williams *v.* Gesse, 3 Bing. N. C. 849; Wilkinson *v.* Verity, L. R. 6 C. P. 206. See Stewart *v.* Frazier, 5 Ala. 114.

In Wilkinson *v.* Verity, L. R. 6 C. P. 206, the bailee had converted the bailed goods, and the Statute of Limitations had run upon such conversion. The bailor then made a demand upon the bailee, and upon his refusal to restore the goods brought an action of detinue. The court held that the action would lie notwithstanding the fact that the Statute of Limitations had run upon the original conversion at the time the demand was made, for the reason that the conversion and the refusal or omission, without proper excuse, to return the goods were separate causes of action.

Demand.—Ordinarily no action of tort lies for the failure to return the bailed goods until after a demand by the bailor. Cothran *v.* Moore, 1 Ala. 423; Spencer *v.* Morgan, 5 Ind. 146; Smith *v.* Stewart, 5 Ind. 220; Alden *v.* Pearson, 3 Gray (Mass.) 342; Hill *v.* Wiggin, 31 N. H. 292; Brown *v.* Cook, 9 Johns. (N. Y.) 361; Phelps *v.* Bostwick, 22 Barb. (N. Y.) 314; West *v.* Murph, 3 Hill (S. Car.), 284; Jackman *v.* Partridge, 21 Vt. 558.

Where the bailee contracts to return the bailed goods at a fixed time and fails to do so, he becomes liable in tort, as well as in *assumpsit*, without a demand. Lay *v.* Lawson, 23 Ala. 377; Clapp *v.* Nelson, 12 Tex. 370.

Where, by the terms of the contract, the goods are to be returned at a particular place, a general refusal to return the goods amounts to a conversion, although the demand was made in another place. Dunlap *v.* Hunting, 2 Den. (N. Y.) 643.

1. Cothran *v.* Moore, 1 Ala. 423; Warner *v.* Dunnavan, 23 Ill. 380; Spencer *v.* Morgan, 5 Ind. 146; Smith *v.* Stewart, 5 Ind. 220; Alden *v.* Pearson, 3 Gray (Mass.), 342; Setzar *v.* Butler, 5 Ired. (N. Car.) 212; Morse *v.* Crawford, 17 Vt. 499.

Where the bailee denies the bailor's right to the goods, no tender of storage is necessary. Long Island Brewery Co. *v.* Fitzpatrick, 18 Hun (N. Y.), 389.

A declaration made by the bailee to the bailor that the former claims the property in his own right will not, in all cases, instantly terminate the bailment and render the bailee's possession adverse. Green *v.* Harris, 3 Ired. (N. Car.) 210.

Possession by a bailee adverse to his bailor can only be shown by some unequivocal act known to the bailor. Knight *v.* Bell, 22 Ala. 198.

2. Story Bailm. (9th Ed.) §413; Sargent *v.* Gile, 8 N. H. 325; Lovejoy *v.* Jones, 10 Fost. (N. H.) 164; Bailey *v.* Colby, 34 N. H. 29; King *v.* Bates, 57 N. H. 446; Swift *v.* Moseley, 10 Vt. 208; Dunham *v.* Lee, 24 Vt. 432; Crump *v.* Mitchell, 34 Miss. 449; Cooper *v.* Willomat, 1 C. B. 672; Marner *v.* Bankes, 16 W. R. 62; Bryant *v.* Wardell, 2 Exch. 479; Fenn *v.* Bittleston, 7 Exch. 152.

A sale by a bailee is a conversion, and the Statute of Limitations begins to run from that time. Crump *v.* Mitchell, 34 Miss. 449.

If a bailee for hire for a limited term, with a right to purchase the goods upon payment of a certain price, sells the goods without having completed payment therefor, the bailment is thereby

assign his right of possession to another. Such assignment is not a conversion.[1]

In some cases an unauthorized user of the bailed article may amount to a conversion.[2]

14. Actions by Bailor against Bailee.—A bailor may maintain an action of tort against the bailee when the latter has converted the goods.[3] Detinue and, in most cases, trover will lie in case of a refusal by the bailee to return the goods after a demand.[4]

15. Negligence: Burden of Proof.—Where goods are destroyed or injured while in the possession of a bailee, it seems that the bailor, in order to recover against the bailee, must prove that the loss or injury was owing to the bailee's negligence.[5]

Where the bailee detains the bailed goods, or puts them to an

ended, and the owner may maintain replevin for the goods. Partridge *v.* Philbrick, 60 N. H. 556.

1. Story Bailm. (9th Ed.) § 350; Baily *v.* Colby, 34 N. H. 29. See ALIENATION, *ante*, p. 50, n. 1.

2. Wentworth *v.* McDuffie, 48 N. H. 402; Frost *v.* Plumb, 40 Conn. 111; Fisher *v.* Kyle, 27 Mich. 454; Wheelock *v.* Wheelwright, 5 Mass. 104; Hall *v.* Corcoran, 107 Mass. 251; Stewart *v.* Davis, 31 Ark. 518; Schenck *v.* Strong, 4 N J. L. 87; M'Neills *v.* Brooks, 1 Yerg. (Tenn.) 73; Murphy *v.* Kaufman, 20 La. Ann. 559.

One who hires a horse is liable in trover for wilful immoderate fast driving by which the horse is injured. Wentworth *v.* McDuffie, 48 N. H. 402.

Receiving back a horse from the hirer that has been injured by hard driving does not waive the right of action for the injury. Austin *v.* Miller, 74 N. Car. 274.

3. Cothran *v.* Moore, 1 Ala. 423; Warner *v.* Dunnavan, 23 Ill. 380; Spencer *v.* Morgan, 5 Ind. 146; Smith *v.* Stewart, 5 Ind. 220; Alden *v.* Pearson, 3 Gray (Mass.), 342; Sezar *v.* Butler, 5 Ired. (N. Car.) 212; Morse *v.* Crawford, 17 Vt. 499.

4. See DETINUE, *ante*, p. 57.

A depositary is not held liable for the full value of articles deposited, where such value is far in excess of what, from the circumstances of the case, he was justified in assuming their value to be. Story Bailm. (9th Ed.) § 78.

A warehouseman is liable for damage to goods resulting from his negligence, although the goods are subsequently destroyed by fire without his fault, and although the goods would in any event have been destroyed by such fire. Powers *v.* Mitchell, 3 Hill (N. Y.), 545.

5. Story Bailm. (9th Ed.) §§ 278, 410; Harrington *v.* Snyder, 3 Barb. (N. Y.) 380. See Boies *v.* Hartford, etc., R. Co., 37 Conn. 272.

Where property bailed in a good condition is returned in a damaged condition, it is said that this affords a presumption of negligence. Logan *v.* Mathews, 6 Pa. St. 417; Bennett *v.* O'Brien, 37 Ill. 250; Cumins *v.* Wood, 44 Ill. 416; Funkhouser *v.* Wagner, 62 Ill. 59; Goodfellow *v.* Meegan, 32 Mo. 280; Wiser *v.* Chesley, 53 Mo. 547; Boies *v.* Hartford, etc., R. Co., 37 Conn. 272; Collins *v.* Bennett, 46 N.Y. 490; Brown *v.* Waterman, 10 Cush. (Mass.) 117. *Compare* Lamb *v.* Western R., 7 Allen (Mass.), 98; Runyon *v.* Caldwell, 7 Humph. (Tenn.) 134.

But where there is any evidence to rebut such presumption, the plaintiff must fail in his action unless the jury believe that the evidence showing negligence on the part of the bailee preponderates.

A went to the shop of B, a tailor, to try on a suit of clothes which he had ordered to be made for him. He was directed by a clerk of B to a closet in which to hang up the clothes he was wearing and put on the new suit. This closet was used by the clerks of the shop as a place in which to hang up their coats, and as a dressing-room for customers. A hung up his clothes in the closet, put on the new suit, and went to a mirror about thirty feet distant and in the farther end of the room therefrom, to have his suit fitted, no one being present in the room but A and the clerk. A then returned to the closet, meeting a person coming out as he entered it, and found that his pocket-book, watch, and other personal property, which he had left in his clothes hanging in the closet, had been stolen. A brought an action against B to recover the value of the property so stolen. The judge, who tried the case without a jury, found and ordered judgment for the defendant.

unauthorized use, he is liable in damages for any injury which may happen to them after the time when the goods should have been returned or during the unauthorized user, although such injury may result from inevitable casualty.[1]

16. Action by Bailor against Third Person.—A bailor cannot maintain an action of trover or replevin against a third person during the existence of the bailment.[2] But where the bailment has been determined by a sale or pledge of the bailed article by the bailee, the bailor may maintain trover against the purchaser or pledgee.[3]

A bailor may, during the continuance of the bailment, recover against a third person, in a special action upon the case, for a permanent injury done to the bailed goods.[4]

Held, that no error of law appeared. Rea *v.* Simmons, 141 Mass. 561.

1. Story Bailm. (9th Ed.) §§ 188, 254, 413, 413c, 413d; Lewis *v.* McAfee, 32 Ga. 465; Rotch *v.* Hawes, 12 Pick. 136; Pattison *v.* Wallace, 1 Stew. (Ala.) 48.

Where the misuser or detention amounts to a conversion, the bailee is of course liable in trover for the full value of the goods, because of the conversion. It is wholly immaterial, as far as the question of damages is concerned, what becomes of the goods after the conversion. If the goods were returned to the bailor after the conversion, this fact would go in mitigation of damages. But if the bailee does not return the goods after the conversion of them, the mere fact that he was prevented from so doing by the destruction of the goods through inevitable casualty, is immaterial. Story Bailm. (9th Ed.) § 413; Wheelock *v.* Wheelwright, 5 Mass. 104; Homer *v.* Thwing, 3 Pick. (Mass.) 492; Lane *v.* Cameron, 38 Wis. 603; Fisher *v.* Kyle, 27 Mich. 454.

Where the misuser or detention does not amount to a conversion, it seems that the bailee is liable for any loss or injury resulting from the misuser or detention as a proximate cause, but not for a loss or injury only remotely connected with the misuser or detention. Pattison *v.* Wallace, 1 Stew. (Ala.) 48; Jones *v.* Gilmore, 91 Pa. St. 310; Cullen *v.* Lord, 39 Iowa, 302; Martin *v.* Cuthbertson, 64 N. Car. 328.

In Pattison *v.* Wallace, 1 Stew. (Ala.) 48, it was held that a bailee *in mora* was liable for the destruction by fire of the bailed goods.

In Jones *v.* Gilmore it was held that where bailed property is not seasonably returned, owing to the negligence of the bailee, and is afterwards destroyed by an extraordinary and wholly unforeseen cause, the bailee will not be liable. Jones *v.* Gilmore, 91 Pa. St. 310. See *In re* United Service Co., *Ex parte* Johnson, L. R. 6 Ch. App. 212; First Nat. Bank *v.* Ocean National Bank, 60 N. Y. 278.

The defendant contracted to warehouse goods in a particular warehouse; instead of that he warehoused them in another place, where they were destroyed by inevitable casualty. *Held*, that the defendants were liable on their contract for the value of the goods. Lilley *v.* Doubleday, 7 Q. B. D. 510.

A bailee agreeing to forward goods to New Orleans is liable if he ships them to Charleston, instead, and they are lost, without negligence, while on the voyage to the latter place. Ferguson *v.* Porter, 3 Fla. 27.

2. Clarke *v.* Poozer, 2 McMull. (S. Car.) 434; Steele *v.* Williams, Dudley (S. Car.), 16; Railroad *v.* Kidd, 7 Dana (Ky.), 245; Drake *v.* Redington, 9 N. H. 243; Swift *v.* Moseley, 10 Vt. 208; Mears *v.* London, etc., R. Co., 11 C. B. N. S. 850.

3. Sargent *v.* Gile, 8 N. H. 325; Cooper *v.* Willomat, 1 C. B. 672; Marner *v.* Bankes, 16 W. R. 62.

Where a note is delivered in escrow, an action may be maintained upon it by the payee upon performance of the condition, although the escrowee wrongfully refuses to deliver up the note. Chase *v.* Gates, 33 Me. 363.

Where the property in the possession of the bailee was seized and tortiously sold, and was returned to him immediately after such tortious sale, while the bailor might perhaps maintain an action of trespass against the person who seized and sold it, and recover therein at least nominal damages, he cannot, without proof of actual damage, maintain an action against such third person as for a conversion, and recover even nominal damages therein. Enos *v.* Cole, 53 Wis. 235.

4. Mears *v.* London & S. W. R. Co., 11 C. B. N. S. 850; Howard *v.* Farr, 18 N. H. 457; White *v.* Griffen, 4 Jones (N. Car.) 139; Railroad *v.* Kidd, 7 Dana (Ky.), 245.

17. Bailee against Third Person.—A bailee may maintain trover against a third person for a conversion of the goods.[1]

A bailee may maintain a special action upon the case against a third person for negligently injuring the bailed goods, where the bailee is thereby made liable to respond in damages to the bailor.[2]

The measure of damages in an action of trover or in a special action on the case by a bailee against a third person is the actual value of the goods, not the value of the bailee's possessory interest in them.[3]

18. Bailee vs. Bailor.—A bailee entitled to the possession of the bailed goods for a specific time may recover in trover against the bailor for a wrongful retaking of them.[4]

1. Story Bailm. (9th Ed.) §§ 280, 303; 2 Black. Com. 453; Bac. Abr. Trover, c. Waterman *v.* Robinson, 5 Mass. 303; Ludden *v.* Leavitt, 9 Mass. 104; Warren *v.* Leland, 9 Mass. 265; Com. *v.* Morse, 14 Mass. 217; Hurd *v.* West, 7 Cow. (N.Y.) 752; Barker *v.* Miller, 6 Johns. (N.Y.) 195; Moran *v.* Portland Steam Packet Co., 35 Me. 55; Hyde *v.* Noble, 13 N. H. 494; Hopper *v.* Miller, 76 N. Car. 402; Nicholls *v.* Bastard, 2 Cr. M. & R. 659; Burton *v.* Hughes, 2 Bing. 173; Gordon *v.* Harper, 7 T. R. 9; Sutton *v.* Buck, 2 Taunt. 302.

Some authorities distinguish between the right of possession which a gratuitous bailee has prior to a demand by his bailor, and the right of possession which a hirer or pledgee has before the expiration of the term of bailment or the payment of the debt. It is said that the gratuitous bailee has a mere right of possession, while the hirer or pledgee has a "special property" in the bailed goods; and that a gratuitous bailee cannot maintain an action of replevin, the plaintiff being required to have a special property in order to maintain that action. See Story Bailm. (9th Ed.) §§ 93–93i. See also Waterman *v.* Robinson, 5 Mass. 303; Ludden *v.* Leavitt, 9 Mass. 104; Warren *v.* Leland, 9 Mass. 265; Com. *v.* Morse, 14 Mass. 217; Brownell *v.* Manchester, 1 Pick. (Mass.) 232.

It seems to be conceded that a depositary may maintain trover. Story Bailm. (9th Ed.) §§ 93c, 93d; Waterman *v.* Robinson, 5 Mass. 303; Giles *v.* Grover, 6 Bligh, 277; Sutton *v.* Buck, 2 Taunt. 302; Burton *v.* Hughes, 2 Bing. 173; Moran *v.* Portland Steam Packet Co., 35 Me. 55; Hyde *v.* Noble, 13 N. H. 494.

In some States it is held that a receiptor for goods from an officer who has levied upon them is a mere servant of the officer and has no possession of the goods independent of that of his master. Story Bailm. (9th Ed.) § 133; Ludden *v.* Leavitt, 9 Mass. 104; Warren *v.* Leland, 9 Mass. 265; Com. *v.* Morse, 14 Mass. 217; Dillenback *v.* Jerome, 7 Cow. (N. Y.) 294.

In others it is held that the receiptor is a bailee, and that his possession is therefore independent of the officers, and that therefore he may sue in trover for their conversion by a third person. If a chattel, while in the possession of a bailee for hire, is injured by the negligence of a third person, and is repaired by the bailor, and the cost of the repairs is charged to the bailee, at his request, the latter, although he has not paid such cost, may maintain an action of tort against the person causing the damage. Brewster *v.* Warner, 136 Mass. 57; s. c., 49 Am. Rep. 3.

A bailee has no such control over the property that if he consents to the larceny of it the act ceases to be criminal. Oakley *v.* State, 40 Ala. 372.

A bailee of money may charge an embezzlement of it as his own money. Fireman's Ins. Co. *v.* McMullen, 29 Ala. 147.

2. Such an action will lie although the third person has not been guilty of a conversion. Bliss *v.* Schaub, 48 Barb. (N.Y.) 339; Woodman *v.* Nottingham, 49 N. H. 387; Rindge *v.* Colerain, 11 Gray (Mass.), 157; Hare *v.* Fuller, 7 Ala. 717; McGill *v.* Monette, 37 Ala. 49.

3. 2 Hilliard on Torts, 571; Rindge *v.* Colerain, 11 Gray (Mass.), 157; Woodman *v.* Nottingham, 49 N. H. 387; King *v.* Dunn, 21 Wend. (N. Y.) 253; Stanley *v.* Gaylord, 1 Cush. (Mass.) 536; Barron *v.* Cobleigh, 11 N. H. 557; Littlefield *v.* Biddeford, 29 Me. 320.

4. Burdict *v.* Murray, 3 Vt. 302; Angus *v.* McLachlan, L. R. 23 Ch. D. 330.

Where a bailee sues his bailor in trover, he can only recover the value of his special property in the goods; but where he sues a stranger, he can recover their whole value and hold the balance above his special interest in trust for his bailor. Benjamin *v.* Stremple, 13 Ill. 466.

19. **Jus Tertii.**—A bailee cannot, in general, set up title in a third person in defence to an action by the bailor to recover possession of the bailed goods.[1] But where the bailor is not the owner of the goods and the owner demands them from the bailee, the claim of the true owner, thus asserted, justifies the bailee in refusing to return the goods to the bailor.[2]

A delivery by the bailee to his bailor after notice of the claim of the real owner renders the bailee liable to the real owner in trover.[3]

Where a third person asserts a title in the bailed goods adverse to that of the bailor, the bailee is justified in refusing to deliver the goods to either party until he has had a reasonable time to ascertain which of the two is entitled.[4]

Where a third person claims the goods in the bailee's possession,

A sheriff seizing pledged goods under a valid writ against the pledgor, will be liable only for the value of the special property. Treadwell *v.* Davis, 34 Cal. 601.

1. Story Bailm. (9th Ed.) §§ 52, 230, 266; Vosburgh *v.* Huntington, 15 Abb. Pr. (N. Y.) 254; Lund *v.* Seamen's Savings Bank, 37 Barb. (N. Y.) 129; Estes *v.* Boothe, 20 Ark. 583; Simpson *v.* Wren 50 Ill. 222; Maxwell *v.* Houston, 67 N. Car. 305; Barnard *v.* Kobbe, 3 Daly (N. Y.), 35.

A depositary must deliver up the goods to the vendee of the bailor, although the sale was in defraud of creditors. Brown *v.* Thayer, 12 Gray (Mass.), 1; Hendricks *v.* Mount, 5 N. J. L. 738.

Where a warehouseman has attorned to an indorser of the warehouse receipts, he is estopped to dispute the indorsee's title. Holl *v.* Griffen, 10 Bing. 246; Stonard *v.* Dunkin, 2 Camp. 344.

Where a receiptor takes property from the sheriff, it is no excuse in an action by the sheriff that the title to the goods was not in the defendant named in the writ. Clark *v.* Gaylord, 24 Conn. 484; Foltz *v.* Stevens, 54 Ill. 180.

A receiptor for property taken on attachment is discharged from his obligation if the attachment is dissolved by an assignment of the debtor's property. Butterfield *v.* Converse, 10 Cush. (Mass.) 317.

The officer cannot demand restitution of the goods from the receiptor when discharged from all liability to either the debtor or the creditor. Story Bailm. (9th Ed.) § 126.

2. Story Bailm. (9th Ed.) §§ 102, 340; Thorne *v.* Tilbury, 3 H. & N. 534; Biddle *v.* Bond, 6 B. & S. 225; Batut *v.* Hartley, L. R. 7 Q. B. 594.

A bailee may not set up the claim of the true owner when the true owner has abandoned such claim. Betteley *v.* Reed, 7 E. & D. 561.

A bailee cannot, in an actinn brought against him by his bailor, set up the title of a third person except by the authorization of that person. Dodge *v.* Meyer, 61 Cal. 405.

One borrowing property on promise to return it cannot release himself from his promise by purchasing a title adverse to that of the lender. Nudd *v.* Montayne, 38 Wis. 511.

Where a bailee is sued in trover by the real owner and compelled to pay the value of the goods, he may assert the title thus acquired in defence to an action of his bailor. Cook *v.* Holt, 48 N. Y. 275.

A bailee is not permitted to dispute the title of his bailor, but he may show that the bailor has assigned his title to another since the property was intrusted to him. If legally assigned, and the bailee has notice of the fact, the bailee must account to the assignee. The rule that a bailee should not attorn to a stranger does not apply; the assignee is not a stranger. Roberts *v.* Noyes, 76 Me. 590.

Although in certain cases a bailee may set up the *jus tertii*, yet if he accepts the bailment with full knowledge of an adverse claim, he cannot afterwards set up the existence of such a claim as against his bailor. *Ex parte* Davies, *In re* Sadler, L. R. 19 Ch. D. 86.

3. Batut *v.* Hartley, L. R. 7 Q. B. 594.

A bailee of goods who returns them to his bailor according to the terms of the bailment is not liable to a third person of whose claims he had no notice during the bailment. Dickson *v.* Chaffee, 34 La. Ann. 1133.

4. Story Bailm. (9th Ed.) § 120; Tuttle *v.* Gladding, 2 E. D. Smith (N. Y.), 157.

A wrongful levy by a sheriff upon goods in the hands of a bailee does not warrant the bailee in refusing to deliver the goods to his bailor on demand. Rogers *v.* Weir, 34 N. Y. 463.

the bailee may interplead such claimant with his bailor if his claim is under a title derived from that of the bailor, but not where he claims under a title adverse to that of the bailor.[1]

BAITING.—To bait is to attack with violence; to provoke and harass.[2]

BALANCE.—Excess of one thing over another when the two are compared; that which is wanting to make the two sides of an account even;[3] the remainder of anything.[4]

1. Pom. Eq. Jur. §§ 1326, 1327, and § 1327. n. 2; Story Bailm. (9th Ed.) § 110; First Nat. Bank *v.* Bininger, 26 N. J. Eq. 345; U. S. *v.* Vietor, 16 Abb. Pr. (N. Y.) 153; Crawshay *v.* Thornton, 2 My. & Cr. 1.

2. Where a match took place between the owners of two dogs, as to which could kill the greatest number of rabbits by running after them, and the match took place in a field containing an area of three acres, walled in so that the rabbits could not escape, it was *held* that this was not "baiting" animals within the meaning of the statute 12 and 13 Vict. c. 92, s. 3, prohibiting such baiting. In this case the court said, by Cockburn, C. J.: "I am clearly of the opinion that the pursuit of rabbits by dogs is not 'baiting' animals. That term is usually applied when an animal is tied to a stake, or confined so that it cannot escape;" and by Quain, J.: "The facts stated do not amount to baiting, but to hunting rabbits. I find that in Johnson's Dictionary the word 'bait' is said to mean 'to attack with violence,' or 'to harass by the help of others; as, we bait a boar with mastiffs, but a bull with bull-dogs.' This conviction cannot be sustained." Pitts *v.* Millar, L. R. 9 Q. B. 380.

3. Where a statute authorizing a mechanics' lien required to be filed "a just and true account of the demand," it was held insufficient to file a claim for a "balance" thereby, without stating the antecedent elements of the demand; the court, Currier, J., saying: "There is a broad distinction between an account and the mere 'balance' of an account, resembling the distinction in logic between the premises of an argument and the conclusions drawn therefrom. A balance is but the conclusion or result of the debit and credit sides of an account. It implies mutual dealings and the existence of debit and credit, without which there could be no balance. What the legislature evidently intended was that the lienor should exhibit his demand fully, giving debit and credit where the two elements existed in the lien claim, and thereby show the balance sought to be imposed as a lien. In other words, it was intended that the lienor should file an account, and not the mere result, 'balance,' or conclusion of an account." McWilliams *v.* Allan, 45 Mo. 573.

The "balance" due on a general account by a correspondent is, in mercantile language, a fund in his hands. And where one has authorized his agent to draw bills and throw them on the market, but limits the agent in his purchases to the funds in his hands, if the agent overdraws his account the principal is justified in not accepting his bills. Parsons *v.* Armor, 3 Peters (U. S.). 413, 430.

Net Balance.—As applied to the proceeds of the sale of stock, the phrase "net balance" means, in commercial usage, the balance of the proceeds after deducting the expenses incident to the sale. Evans *v.* Wales, 71 Pa. St. 69.

Balance of Probabilities.—Where in a civil case the jury were instructed that the burden of proof was upon the plaintiff, and was sustained "if upon the whole proof there was a preponderance of evidence, that is to say, a balance of the probabilities of the case, in his favor," it was held that the explanation was indefinite, and tended to mislead the jury; the court, Bigelow, J., saying: "The 'weight' or 'preponderance of proof' is a phrase constantly used, the meaning of which is well understood and easily defined. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. But the phrase 'balance of probabilities,' used by the judge in his instructions as equivalent to the words 'preponderance of proof,' has no well-settled or clearly-defined meaning. It is at best a vague and indefinite phrase, and would rather lead the jury to infer that they might form their verdict on a guess at the truth, gathered from the evidence, than on a real solid conviction of it founded on a careful scrutiny and examination of the proof." Haskins *v.* Haskins, 9 Gray (Mass.), 390.

4. A plaintiff in ejectment, claiming

BALE.—A bundle, as of goods.[1]

BALLAST. (See also DUNNAGE.)—Material used for trimming a ship and bringing it down to a draught of water proper and safe for sailing.[2]

BALLET.—A theatrical representation of actions, characters, sentiments, and passions by means of mimic movements and dances, accompanied by music. It consists of three parts—the entry, the figure, and the retreat.[3]

A theatrical exhibition or pantomime in which a story is told, or actions, characters, and passions are represented, by gestures, accompanied by characteristic or illustrative music, dancing, decorations, etc.[4]

under a deed conveying "the balance of a tract of land," must show what the balance is, and where situate, or he cannot recover; for said the court, Boyle, C. J.: "The term 'balance' has, in law, no technical signification. It is, however, a word which is in popular use. In its literal import it is, perhaps, only applicable to weights; but it is frequently, in a figurative sense, applied to other things. In this sense we speak of the balance of an account; and we may, no doubt in the same sense, and with the same propriety, speak of the balance of a tract of land. But the word, when thus used, evidently does not signify the whole thing of which we speak. It always implies that there is something to be deducted or subtracted; and it is only applied to signify what remains after the deduction or subtraction is made. Nor is the term 'balance' ever used to signify any precise quantity or definite proportion of a thing. It is equally applicable to a small as to a large quantity or proportion." Taylor *v.* Taylor, 3 A. K. Marsh. (Ky.) 18; s. c., 5 Wheeler's Am. Common Law, 14.

Balanced.—In an action for money had and received, the defendant gave in evidence a memorandum written and signed by the plaintiff as follows: "Balanced up to this day, as per cash book, S. F., 19th Nov." This memorandum was on the back of a receipt which was ruled out of evidence because unstamped. The memorandum was admitted, although the plaintiff claimed that it also was inadmissible, for want of a stamp, as an admission by the plaintiff against himself. On verdict for defendant a new trial was moved for, but refused; the court, Wilde, C. J., saying: "Balanced is an ambiguous word. It is sometimes used to denote an ascertained state of accounts, but more often in the sense of all being cleared off and adjusted between the parties. It was the province of the jury to say in which of these senses the word was to be taken here. And, accordingly, the learned judge left it to them, and the inference they drew was that 'balanced' meant 'all is settled and adjusted between us.'" Finney *v.* Tootell, 5 C. B. 504. 508.

1. This word has in the course of trade acquired special meanings which are applied in construing contracts. Thus in an action on a charter-party where the words used were "cotton in bales," the court left the meaning of these words to the jury, who found that a "bale" meant a compressed bale and not a bag. Taylor *v.* Briggs, 2 C. & P. 525.

So also evidence is admissible to show that in the gambier trade a "bale" means a compressed package weighing about 2 cwt. Gowissen *v.* Perrin, 2 C. B. N. S. 681.

2. Insurance Co. *v.* Ihwing, 13 Wall. (U. S.) 672. This case will be found cited fully under the word DUNNAGE.

It has been held that the owner of a vessel who had agreed to load for the charterer a full and complete cargo of teas might take merchandise as "ballast" and receive freight therefor, provided it occupied no more room than other ballast would have done. Towse *v.* Henderson, 4 Exch. 890.

3. Worcester's Dictionary.

4. Webster's Dictionary.

Where a summons was issued under the act for the regulation of theatres, 6 and 7 Vict. c. 68, §§ 2, 23, against the respondent for representing at a place of public entertainment in London called the Alhambra, which was licensed only for music and dancing under the act 25 Geo. II. c. 36, an entertainment called a *ballet divertissement*, the police magistrate submitted a case stated for the opinion of the court under the 20 and 21 Vict. c. 43, and found the

following facts: "There is an orchestra with a full band of musical performers, a stage and proscenium lighted by foot and side lights, a curtain, side-scenes, drops, and flies. There are various platforms so supported and inclined as to enable persons to come down from a considerable height at the back of the building to the stage, painted to represent rocks, with a cascade of water falling among them from a place thirty feet high. On the wings and at the scenes at the back are painted palm-trees, the whole representing an oriental landscape. From sixty to seventy females in the ordinary costume of theatrical ballet-dancers came through a large opening at the top of the platform painted as rocks and danced down them to the stage. Those who first descended danced on the stage in a serpentine figure so as to occupy the whole front of the stage till all had come down. When all were down they defiled to the right and left. Four were placed on each side in front of the proscenium, with sham musical instruments in their hands, supposed to be played by them to the dancers. The dancers began to dance the *Pas des Poignards* (a dance which was originally brought out at Drury Lane Theatre in an Egyptian scene), each female armed with two daggers, charging through each other's ranks, striking right and left with the daggers in mimic warfare, then in front as far as the footlights. This performance of the dagger-dance ended in several of the females standing over others as if in triumph and retiring, when others came forward, holding palm-leaves in their hands, and danced, waving them, and formed an avenue, as if expecting an arrival; then a female dancer, who at regular theatres would be called a *première danseuse*, passed down the avenue formed by the other dancers, who retired while she performed a *pas seul* with gestures." Upon these facts it was held that the court could not, as matter of law, hold that the performance thus described was an "entertainment of the stage" within the 23d sectionof the 6 and 7 Vict. c. 68. The majority of the court, however, thought that, if they were dealing with it as a matter of fact, it would be. In this case the police magistrate found among the facts the following: "This performance is in the theatrical profession called a *ballet divertissement*, and could not be represented as such without the stage accessories. Without them it would be a mere rehearsal. A witness from the Lord Chamberlain's office, called a reader of plays, styled it 'an entertainment of the stage.' A *ballet d'action* has a story; a *ballet divertissement* has none, but cannot be performed without pantomimic action and gestures. It is not confined to the steps of the dancers. Dancing quadrilles on the stage would be without such gestures. Also, a *ballet divertissement* can be described so as to enable a copy of the directions for it to be sent to the Lord Chamberlain according to the 6 and 7 Vict. c. 68, s. 12. The ballet of 'Ondine' with all its details has been so described." The respondent claimed that it was not every entertainment of the stage that the statute was intended to apply to, but only such as fall within the fair and legitimate definition of stage-plays. This, by the 23d section, is to be taken to include 'every tragedy, comedy, farce, opera, burletta, interlude, melodrama, pantomime, or other entertainment of the stage," *ejusdem generis*. That the only word within which this *ballet divertissement* could be suggested to come is *pantomime*. But a representation is not a pantomime merely because it involves some action and gestures. In each case it must be a question of degree. Upon this the court, Erle, C. J., said: "The magistrate uses two terms of art, viz., *ballet d'action* and *ballet divertissement*. The former, it is said, has a story; the latter has none. I rather incline to think that the line is to be drawn between the two. The *ballet divertissement* involves no consecutive train of ideas, but consists merely of poses and evolutions by a number of persons elegant in shape and graceful in action. On the other hand, the *ballet d'action* has a regular dramatic story which may give rise to all manner of emotions incident to tragedy, comedy, or farce, accompanied by elegance of form and grace of motion. With the highest possible respect for the learned magistrate, if I were called upon to decide, as a matter of law, whether or not that which he has described as a *ballet divertissement* and as not coming up to his notion of a *ballet d'action* came within the meaning and definition of a stage-play in the statute, I could not come to the conclusion that it was, even if I had gone to see the performance. But upon the description here given of the entertainment I am unable to say that the point at which the authority of the music and dancing license stops has been overstepped." The other three judges, viz., Willes, Byles, and Keating, agreed with the chief justice upon the question of law, but stated that were the matter of fact before them to decide

BALLOTS. See ELECTIONS.

BALL-ROOM.—A room for assemblies or balls; a hall for dancing. Not necessarily a place where a ball or dancing is actually going on.[1]

BALUSTRADE.—A range of balusters joined by a rail on the top.[2]

upon the statement, they would draw the inference that this was an entertainment of the stage within the statute. Wigan *v.* Strange, L. R. 1 C. P. 175.

1. An indictment which charges that the defendant "did unlawfully and wilfully go into a ball-room, being at Mrs. Simpson's, where an assembly was then and there congregated for social purposes," and specifically negatives that the accused was then and there within any of the exceptions defined in the act of 1871 "to regulate the carrying and bearing of deadly weapons," was held good; the court, White, J., saying: "The indictment was good in the charge, either that the offence was committed in 'a ball-room' or at 'a social gathering,' and it was not necessary, as is contended, to allege that a ball or dance was going on in the room, or that the social gathering was composed of men and women, or of human beings as contradistinguished from other animals—these things being matters of proof. The indictment simply followed the statute in defining the offence, and ordinarily that has been held sufficient. It would scarcely be contended by any one, we imagine, that the act of carrying a pistol into 'a ball-room,' when no persons were present there would *per se* constitute an offence any more than to carry the pistol into any other unoccupied house or room. The intention was specially to inhibit the act when persons were assembled at the places or for the purposes named in the law." Owens *v.* State, 3 Texas App. 404.

2. Where a statute authorized cities to "make such rules and regulation for the erection and maintenance of balustrades, or other projections upon the roofs or sides of buildings therein, as the safety of the public requires," it was held that such a statute did not give power to pass an ordinance prohibiting the erection and maintenance of doorsteps in the highway without the permission of the mayor and aldermen. In this case the court, Endicott, J. said: "We are of opinion that these statutes did not authorize Charlestown to pass such an ordinance. The power conferred by the Gen. Sts. ch. 9, § 13, is limited to 'balustrades or other projections upon the roofs or sides of buildings;' and undoubtedly, under this provision, they may be allowed or forbidden as each city may determine. The words 'balustrades or other projections,' as applied to the roof of a building, would seem to refer to those additions or structures upon the roof which might under certain circumstances render a highway unsafe for travellers; but it is unnecessary in this case to determine precisely what projections on a roof are included in these words. As applied to the sides of a building, which is the only matter to be considered here, the words 'other projections' clearly refer to those portions of, or attachments to, the sides which are near the line of a highway, or which project over and therefore, in one sense, into the highway, such as balconies, canopies, windows, cornices, gutters, signs, or other additions supported by the building itself, which do not obstruct the travel on the highway. These may project so far as to be insecure, or by reason of the use to which they may be put, or through want of proper repair, may fall and endanger the safety of travellers; and the legislature might well consider them a proper subject of regulation by the authorities of cities. But the words of the statute are not broad enough to authorize cities to make rules and regulations for the erection and maintenance of doorsteps within the actual limits of a highway. Such doorsteps, though connected with and a part of the building, are not necessarily supported by it, and are not, properly speaking, projections on the side of it, but are rather structures erected in and occupying a part of the highway itself. The fair construction of the language of this section is that it intends to deal with those parts of a building which may project near or over the line of a highway, and which, if not properly constructed and maintained, may endanger the safety of the public; and that it does not attempt to deal with those additions to or parts of a building which may occupy the highway itself, or obstruct travel thereon, and thus constitute a nuisance in the highway, if not authorized by law. In

BANKRUPTCY. (See also ASSIGNMENT FOR BENEFIT OF CREDITORS; INSOLVENCY.)

1. Definition.—Bankruptcy is the state or condition of being a bankrupt.[1] It is a proceeding or suit in its nature equitable—a sequestration of a debtor's property that the creditors may resort to, instead of an ordinary suit at law or equity.[2] It is the condition following upon the commission of certain acts defined by law.[3]

Voluntary bankruptcy is where the debtor is financially in such a condition that upon his own petition he can be declared a bankrupt. Involuntary bankruptcy is where the debtor has committed some such act, or is financially in such condition, that he may be declared a bankrupt on the petition of a creditor.

2. United States Bankrupt Laws.—(A) POWER OF CONGRESS TO PASS.—It is provided in the constitution of the United States that "Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States."[4] The power to enact a bankrupt law implies the power to make it effi-

other words, cities are authorized to regulate the erection and maintenance of such projecting parts of a building standing upon or near the line of a highway which do not in any way obstruct the use of the highway, or constitute a defect therein, although under some circumstances they may endanger the safety of the public but they are not authorized to regulate the erection and maintenance of permanent structures or additions to a building which stand in the way itself, or create an obstruction therein." Cushing *v.* City of Boston, 128 Mass. 330.

1. 1 Bouv Dict., 188.

2. *In re* Weitzel, 7 Biss. (C. C.) 290.

In a looser sense it is an inability to pay one's debts; the stopping and breaking up of business because a man is insolvent and utterly unable to carry it on. Burrill Law Dict. vol. i. p. 191.

The words "insolvent" and "insolvency" are not synonymous with the words "bankrupt" and "bankruptcy." Insolvency means an inability to pay debts in the ordinary course of business. Bankruptcy means a particular legal status to be ascertained by judicial decree. *In re* Black & Secor, 1 B. R. 353; s. c., 2 Ben. (D. C.) 196; Morse *v.* Godfrey, 3 Story (C. C.), 507.

3. 2 Steph. Com. 191, 192.

In common parlance the term bankruptcy is distinguished from insolvency in that an act of the former releases the debtor from all future liability for his then debts, while an act of the latter does not.

4. Const. U. S. art. 1, sec. 8.

"The word bankruptcy is employed in the constitution and in the plural, and as a part of the expression 'the subject of bankruptcies.' The ideas attached to this word in this connection are numerous and complicated; they form a subject of extensive and complicated legislation. Of this subject Congress has general jurisdiction, and the true inquiry is, To what limits is that jurisdiction restricted? I hold it extends to all cases where the law causes to be distributed the property of the debtor among his creditors. This is its least limit. Its greatest is a discharge of the debtor from his contracts. And all intermediate legislation affecting substance and form, but tending to further the great end of the subject—distribution

cient. The end implies the means.[1] And Congress may establish a system of voluntary as well as involuntary bankruptcy.[2] It not only has the power to establish uniform laws on the subject of bankruptcies, but also to commit the execution of the system to such federal courts as it may select, and to prescribe such modes of procedure and means of administering the system as it may deem best suited to carry the law into successful operation.[3] Congress may define what and how much of the debtor's property shall be exempt from the claims of his creditors.[4] It also has the power to pass a law which will have the effect to make void an assignment which is valid under the State laws.[5] And it is not intended by the framers of the constitution that the power is to be limited to any particular class of persons in the application of an act of bankruptcies.[6] But the law must be uniform throughout the United States. A law which prescribes one rule in one district and a different one in another cannot be regarded as uniform.[7]

(B) ACT OF 1800.—Congress has, at different times, passed three bankrupt acts,[8] the first being the act of 1800, which was in force only until 1803.

and discharge—are in the competency and discretion of Congress." (Justice Catron) *In re* Klein, 1 How. (U. S.) 227.

The grant is a grant of plenary power over "the subject of bankruptcies." The subject of bankruptcies includes the distribution of the property of the insolvent debtor among his creditors, and the discharge of the debtor from his contracts and legal liabilities, as well as the intermediate and incidental matters tending to the accomplishment or promotion of these two principal ends. Congress has full power over this subject, with the one qualification that its laws must be *uniform* throughout the United States. *In re* Silverman, 4 B. R. 523; *In re* Reiman & Friedlander, 11 B. R. 21.

The peculiar terms of the grant certainly deserve notice. Congress is not authorized merely to pass laws the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States. Sturges *v.* Crowninsheild, 4 Wheat. (U. S.) 193.

1. Russell *v.* Cheatham, 16 Miss. 703.

2. Kunsler *v.* Kohans, 5 Hill (N. Y.), 317; Lalor *v.* Wattles, 8 Ill. 225; Morse *v.* Hovey, 1 Sandf. Ch. (N. Y.) 187; Thompson *v.* Alger, 53 Mass. 428; State Bank *v.* Wilborn, 6 Ark. 35; Keene *v.* Mould, 16 Ohio. 12; Rowan *v.* Holcomb, 16 Ohio, 463; Hasting *v.* Fowler, 2 Ind. 216; Reed *v.* Vaughan, 15 Mo. 137.

3. Goodal *v.* Tuttle, 3 Biss. (C. C.) 219; Mitchell *v.* Mfg. Co., 2 Story (C. C.), 648.

4. *In re* Reimen & Friedlander, 11 B. R. 21; s. c., 13 B. R. 128; s. c., 7 Ben. (D. C.) 445; s. c., 12 Blatchf. (C. C.) 562.

5. *In re* Brenneman, Crabbe (U. S.), 456.

6. Morse *v.* Hovey, 1 Sandf. (N. Y.) 187.

7. Kittridge *v.* Warren, 14 N. H. 509.

8. History of U. S. Bankrupt Law.

This law was the first enactment of a bankrupt law by the general government. The colonies had, on several occasions prior to this, enacted such laws. The act was passed on April 4, 1800, and was limited to five years, but was repealed on Dec. 19, 1803. For the reason, as Pres. Adams explains: "As this law authorized a majority of the creditors to discharge a bankrupt trader from all his preceding debts, it was regarded by many of the other classes of men as an invidious privilege to the mercantile community, especially in the Southern States, where the agricultural pursuits are predominant; and as it was found that by the power of making discriminations in favor of some creditors, and in fact of making surreptitious creditors, there was no difficulty in obtaining the sanction of the requisite majority for the debtor's discharge, the law was condemned as affording but too much encouragement to fraud, waste, and a rash spirit of adventure." These reasons, perhaps, caused its repeal. In 1840 an effort was again made to pass a bankrupt law, but was violently opposed, and for that session the measure was de-

(C) ACT OF 1841.[1]—This act was for voluntary and involuntary bankruptcy,[2] and provided that certain payments and conveyances were void;[3] that preferences prevented a discharge;[4] that the property of the bankrupt vested in the assignee;[5] that the court might appoint or remove assignee;[6] that the assignee had certain duties to perform;[7] that a discharge might be granted;[8] that only certain persons were entitled to discharge;[9] that creditors should share *pro rata* in dividends;[10] that the discharge would relieve debtor from certain liabilities;[11] that laborers, etc., were entitled to preference;[12] that mutual set-offs were to be allowed;[13] that corporations might become bankrupts;[14] that district courts should have original jurisdiction,[15] and should adopt rules;[16] that proceedings should be held in the district in which the debtor resides;[17] how debts should be proved;[18] how property of bankrupt to be disposed;[19] that a second discharge should not be granted;[20] that partners might become bankrupts;[21] and in what manner the assets should be distributed.[22]

(D) ACT OF 1867.—(*a*) *Jurisdiction.*—This act provided that the United States district courts should be courts of bankruptcy, and always be open for the transaction of business, with power to sit anywhere in the district;[23] and that the circuit courts should have a general superintendence and jurisdiction of all questions arising under the act, and should have concurrent jurisdiction with the district court in certain cases.[24] That in each congressional district registers in bankruptcy should be appointed to assist the

feated. Its friends, however, were not discouraged by defeat, and renewed the effort and were successful. But the measure did not meet that degree of popularity which insured it long life, and the entire statute was defeated on March 3, 1843, having been in full operation but little over 13 months. The next was that which, through the indefatigable efforts and industry of Representative Jenks, resulted in the law of 1867. In 1874 it was amended and considerably changed in minor matters, and in 1879 the law was repealed. There have been several attempts to pass new laws on the subject but so far all have failed. In the last Congress (1887) Mr. Seney (of Ohio) introduced a measure which was somewhat different from the former laws, in that it gave the State courts jurisdiction of matters arising under it instead of the United States district or circuit courts. This met with some favor, but did not pass.

1. This act was passed Aug. 19, 1841, went into effect Feb. 1, 1842, and was repealed March 3, 1843. 5 Story, 2829.
2. Sec. 1.
3. Sec. 2.
4. Sec. 2.
5. Sec. 3.
6. Sec. 3
7. Sec. 3.
8. Sec. 4.
9. Sec. 4.
10. Sec. 5.
11. Sec. 4.
12. Sec. 5.
13. Sec. 5.
14. Sec. 5.
15. Sec. 6.
16. Sec. 6.
17. Sec. 7.
18. Sec. 7.
19. Sec. 9.
20. Sec. 12.
21. Sec. 14.
22. Sec. 14.
23. Sec. 7, Rev. Stat. U. S. 4974 (Act 1841, § 6).
24. Sec. 2, Rev. Stat. 4984 (Act 1841, § 8).

An appearance and answer do not waive any question affecting the jurisdiction of the court, for no voluntary act of the defendant can give jurisdiction, and it is never too late at any stage of the cause to consider it. Jobbins *v.* Montague, 6 B. R. 509; Marsh *v.* Armstrong, 11 B. R. 125; People *v.* Brennen, 12 B. R. 567.

The circuit court may enjoin State courts from proceeding in cases involv-

United States district judge to attend to his duties under the act.[1] That this register should have the power to receive the surrender of the bankrupt, to make adjudications of bankruptcy, etc.,[2] and should attend at such places as the district judge might direct, to receive applications, proof of debts, etc.[3] That appeals and writs of error might be taken from the district courts to the circuit court in all cases in equity, and where the amount exceeded $500;[4] and that an appeal or writ of error could not be taken to the United States supreme court unless the amount exceeded $2000[5] (amended to $5000). That the justices of the supreme court might make rules and orders regulating the duties of the various officers under the act.[6]

(*b*) *Voluntary.*—That any person owing $300 and being a denizen of the United States might file a petition for voluntary bankruptcy.[7] The register should preside at the first meeting of the

ing the administration of the bankrupt law. McLean *v.* Lafayette Bank, 3 McLean (C. C.), 185.

The circuit court may review the whole case and decide on it, or it may assume jurisdiction of any particular question arising in the progress of the case. This jurisdiction can only arise and be exercised over proceedings in bankruptcy already pending in the district court. Ruddick *v.* Billings, 3 B. R. 61; *In re* Alexander, 3 B. R. 29; Bill *v.* Beckworth, 2 B R. 241; Littlefield *v.* Del. & Hud. Canal Co., 4 B. R. 77.

1. Sec. 3, Rev. Stat. 4993.

2. Sec. 4, Rev. Stat. 4998.

A register cannot delegate to his clerk any authority to take and pass upon proofs, or determine the sufficiency of schedules, or do any other act than such as is purely clerical. *Ex parte* Binswanger, East. Dist. Missouri.

In proper case the register may appoint a watchman to take charge of the property. *In re* Bogert *et al.*, 2 B. R. 585.

The proceedings before a register are to be conducted by him with the exercise of proper legal discretion, and, subject to that rule, are entirely within his control. If a party refuses to proceed, the case must proceed without him. *In re* Hyman, 2 B. R. 333; s. c., 36 How. Pr. (N. Y.) 282.

3. Sec. 5, Rev. Stat. 5001; *In re* Sherwood, 1 B. R. 334.

4. Sec. 8, Rev. Stat. 4980 (Act 1841, § 7); *In re* York & Hoover, 4 B. R. 479; Samson *v.* Blake, 6 B. R. 401.

Questions of fact cannot be re-examined on a writ of error. Cragin *v.* Thompson, 12 B. R. 8.

And no writ will lie from the district to the circuit court when the case is tried before the court without the intervention of a jury. Blair *v.* Allen, 3 Dill. (C. C.) 101; Strain *v.* Gourdin, 11 B. R. 156; Babbitt *v.* Burgers, 7 B. R. 561.

5. Sec. 9, Rev. Stat. 4989.

An appeal lies only from a final decree, and no appeal lies from a decree of the circuit court rendered in the exercise of its special supervisory jurisdiction. Morgan *v.* Thornhill, 5 B. R. 1; s. c., 11 Wall. 65; Hall *v.* Allen, 9 B. R. 6; s. c., 12 Wall. 452; *In re* William Christy, 3 How. (U. S.) 292; Buckingham *v.* McLean, 13 How. (U. S.) 151; Crawford *v.* Points, 11 How. (U. S.) 185.

6. Sec. 10, Rev. Stat. 4990; *In re* Glaser, 1 B. R. 336; s. c., 2 Ben. (D. C.) 180; s. c., 1 L. T. B. 57; *In re* Dean, 1 B. R. 249; *In re* Robinson, 1 B. R. 285.

7. Sec. 11, Rev. Stat. 5014 (Act 1841, § 1).

Resident aliens may take the benefit of the act. *In re* Goodfellow, 3 B. R. 452.

It not only embraces those who resided in the United States at the time when the bankrupt law was passed, but such as at any subsequent period became resident in the United States. Cutter *v.* Folsom, 17 N. H. 139; Kuntzler *v.* Kohans, 5 Hill (N. Y.), 317.

An infant may file a petition in his own name. *In re* Samuel Book, 3 McLean (C. C.), 317; *In re* Samuel S. Cotton, 2 N. Y. Leg. Obs. 370

If a person, while sane, has committed an act of bankruptcy, he may be made bankrupt after he has become lunatic. The rights of a bankrupt will be fully protected by his guardian. *In re* Pratt, 6 B. R. 276.

A *feme covert* who is a sole trader may apply for the benefit of the law. *In*

creditors,[1] at which a majority in amount and in number of the creditors who had proved their debts should select an assignee; and if there were no selection, the register should appoint one, unless there were opposing interests, in which case the appointment should be made by the judge.[2]

As soon as the assignee was appointed, the register or judge should convey all the estate of the bankrupt to him, and such assignment should relate back to the commencement of the proceedings, and should vest all the title of all the bankrupt's property in said assignee; except household furniture not to exceed $500 in value, and exemptions allowed by the laws of the State in which the bankrupt resides.[3]

re Harriet E. Collins, 10 B. R. 335; La-Vie *v.* Phillips, 1 W. Black, 570.

But married women, generally speaking, are not liable to become bankrupt. Marshall *v.* Rutton, 8 T. R. 545.

A surety on the bond of a public officer is within the act, and is entitled to a discharge. United States *v.* Davis, 3 McLean (C. C.), 483.

"Residence" is a fact easily ascertained; "domicile," a question difficult of proof. It is true the two terms are often used as synonymous, but in law they have two distinct meanings. Proceedings in bankruptcy should be instituted with reference to the actual residence of the party or his place of business, and not with reference to his domicile. *In re* Watson, 4 B. R 613; Styles *v.* Lay, 9 Ala. 795; *In re* Israel Kinssman, 1 N. Y. Leg. Obs. 307.

1. Sec. 12, Rev. Stat. 5033.

2. Sec. 13, Rev Stat. 5034; *In re* J. O. Smith, 1 B. R. 243.

Corporations may vote by their officers or any person specially authorized. *Ex parte* Bank of Eng., 1 Swanst. 10.

One partner may prove and vote or authorize another to vote. *Ex parte* Mitchell, 14 Ves. 597.

An opposing interest which precludes the register from appointing an assignee is not merely an interest contending by vote, but an interest in opposition to the power of appointment by the register; and when the register announces that he has the right to appoint an assignee unless there is an opposing interest, distinct disclosures should be made if there is any opposing interest. *In re* Geo. Jackson, 14 B. R. 449.

3. Sec. 14, Rev. Stat. 5044 (Act of 1841, sec. 3.)

The expression "estate of a bankrupt" means such property and rights of property of the bankrupt as the bankrupt act vests in the assignee. *In re* Hambright, 2 B. R. 498.

The words "all the estate, real and personal," are broad enough to cover every description of vested right and interest attached to and growing out of property. Comegys *v.* Vasse, 1 Pet. (U. S.) 193.

The title to real estate situated in a foreign country does not vest in the assignee, for a statutory conveyance can have no extraterritorial effect upon real estate. Oakey *v.* Bennett, 11 How. (U. S.) 33; Barnett *v.* Pool, 23 Tex. 517.

Assignees in bankruptcy do not, like heirs and executors, take the whole legal title in the bankrupt's property. They take such estate only as the bankrupt had a beneficial, as well as legal, interest in, and which is to be applied for the payment of his debts. Rhoades *v.* Blackiston, 106 Mass. 334; Blinn *v.* Pierce, 20 Vt. 25; Ontario Bank *v.* Mumford, 2 Barb. Ch. (N. Y.) 596; Hynson *v.* Burton, 5 Ark. 492.

The interests and rights of the bankrupt under contracts are transferred to the assignee. Whatever the rights are the assignee can claim and enforce. It is not the purpose of the bankrupt law to interfere with or avoid contracts made by the bankrupt with other parties or prevent their execution. Foster *v.* Hackley, 2 B. R. 406.

The assignee succeeds to the rights of the creditors as well as to those of the bankrupt, and may contest the validity of a conveyance, even though the bankrupt could not. He may institute a suit to recover property conveyed in fraud of creditors, as well as to recover property or its value which has been transferred in fraud of the bankrupt act. *In re* Metzer, 2 B. R. 355; Foster *v.* Hackley, 2 B. R 406; Bradshaw *v.* Klein, 1 B. R. 542; Buckingham *v.* McLean, 3 McLean (C. C.), 185.

The assignee is not entitled to any of the exempted property, and it is no concern of his who may have the right to it.

(*c*) *Powers of Assignee.*—Such assignee should have the right to defend and prosecute suits at law;[1] and should sell all property of said bankrupt,[2] and should deposit the money derived from

Upon the death of the bankrupt the title to such property vests in the executor or administrator. *In re* Hester, 5 B. R. 285.

A sale made after the filing of the petition in bankruptcy, of property exempt both by the bankrupt act and the State law, under a levy made prior to the commencement of the proceedings in bankruptcy, will be set aside. *In re* Griffin, 2 B. R. 254.

Property cannot be exempted to the prejudice of a creditor who holds a valid vendor's lien thereon. The lien must prevail. Congress did not intend that the bankrupt act should override cases of that nature. *In re* Perdue, 2 B. R. 183; *In re* Whitehead, 2 B. R. 599; *In re* Brown, 3 B. R. 250.

The bankrupt cannot claim any exemption in property conveyed by him prior to the commencement of the proceedings in bankruptcy in fraud of his creditors, and afterward recovered to the estate. The sale is good as against him, and in attempting to place his property beyond the reach of his creditors he has placed his exemption beyond his own reach. *In re* Graham, 2 Biss. (C. C.) 449; Keeting *v.* Keefer, 5 B. R. 133. *Compare* Bartholemew *v.* West, 8 B. R. 82; s. c., 2 Dill. (C. C.), 29; Mc. Farland *v.* Goodman, 1⅞ Am. L. Reg. 697.

The system of bankruptcy is, in a relative sense, uniform throughout the United States, since the assignee takes in each State whatever would have been available to the recourse of execution creditors if the bankrupt law had never been passed. Though the States vary in the extent of their exemptions, yet what remains the bankrupt law distributes equally among the creditors. The bankrupt law does not in any way vary or change the rights of the parties. All contracts are made with reference to existing laws, and no creditor could recover from his debtor more than the unexempted part of his assets. *In re* Beckford, 4 B. R. 203; *In re* Jordan, 8 B. R. 180; *In re* Appold, 1 B. R. 621; *In re* Ruth, 7 Am. L. Reg. 157.

Congress, in the enactment of a bankrupt law, has the power to make exemptions embracing past as well as future debts. *In re* Wylie, 5 L. T. B. 330; *In re* Smith, 8 B. R. 401.

When Congress chooses to add to its own list of exemptions further exemptions under the State laws, it refers the federal courts in their action thereupon to the State laws. A statute consists not merely of its terms, but of the judicial expositions thereof. If a law has been construed by the highest authority of the State, the federal courts are bound by that construction. *In re* Wylie, 5 L. B. 330.

1. Sec. 14, Rev. Stat. 5047 (Act 1841, sec. 11).

In proceedings in bankruptcy the legal title vests in the assignee under the assignment. Whatever right the bankrupt had is assigned to and vests in the assignee, who thereby becomes, for the purpose of maintaining or defending suits, possessed, as if of his own property, of the estate assigned to him. It is true, he holds the title of the property when recovered in trust for certain purposes specified in the statute; but as between him and a stranger, he holds the title, and may assert it in the same form of action as though he owned the fee. Dambman *v.* White, 12 B. R. 438; s. c., 48 Cal. 439.

A bankrupt has the exclusive right to sue for trespass committed upon the exempt property prior to the commencement of proceedings in bankruptcy. Seiling *v.* Gunderman, 35 Tex. 345.

The words he "may prosecute" are permissive. It only becomes a duty for an assignee to prosecute when the interest of the estate demands it, of which the assignee is in the first instance the judge. Reade *v.* Waterhouse, 10 B. R. 277; s. c., 52 N. Y. 587; s. c., 35 N. Y. Sup. 78; Traders' Bank *v.* Campbell, 3 B. R. 498; s. c., 14 Wall. (U. S.) 87.

Neither the bankrupt nor his attorney has the power or authority to settle a suit in the name of a bankrupt after the commencement of the proceedings in bankruptcy. Home Ins. Co. *v.* Hollis, 53 Ga. 659.

If the adjudication of bankruptcy is established, the appointment of an assignee may be presumed. Morris *v.* Swartz, 10 B. R. 305; Jones *v.* Beach, 1 Mich. N. P. 94.

2. Sec. 14 and 15, Rev. Stat. 5046 (Act 1841, sec. 15).

The assignee has the authority to sell unincumbered assets without an order from the court. *In re* White, 1 B. R. 218.

An assignee in one State can sell real estate lying in another State. Oakey *v.* Corry, 10 La Ann. 502.

such sale.[1] That the court might remove such assignees upon notice and hearing,[2] or said assignee might resign with the consent of the judge,[3] and such vacancies be filled by appointment or election, at the discretion of the judge.[4]

All debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing, might be proved against the bankrupt.[5]

Rent might be apportioned and approved,[6] and unliquidated damages assessed and approved.[7]

That mutual debts and credits between debtor and creditor should be stated, and one debt set off against the other.[8]

A creditor proving a debt could not maintain an action at law or in equity on the debt against the bankrupt,[9] and pending suits and unsatisfied judgments were discharged.

Resident creditors were to prove their claims before a register

If an assignee makes a sale of property, but refuses to deliver the possession thereof, he may be sued at law if the sale has never been brought to the attention of the bankrupt court nor in any manner acted on by it. Ives *v.* Tregent, 29 Mich. 390.

The bankrupt may purchase property at an assignee's sale. Arnold *v.* Leonard, 20 Miss. 258.

A purchaser of a note at an assignee's sale takes it subject to a prior lawful transfer thereof by the bankrupt. Converse *v.* Sorley, 39 Tex. 515.

1. Sec. 17, Rev. Stat. 5059 (Act 1841, sec. 9).

If the assignee does not deposit the money in bank within the time fixed by statute, he is charged with interest if he has not a reasonable excuse. *In re* Thorp, 4 N. Y. Leg. Obs. 337.

2. Sec. 18, Rev. Stat. 5039 (Act 1841, secs. 3 and 8); *Ex parte* Binswanger, E. D. Mo.; Blodgett *v.* Sanford, 5 B. R. 427; *In re* Blodgett & Sanford, 5 B. R. 472; *In re* Mallory, 4 B. R. 153.

3. Sec. 18, Rev. Stat. 5038.

4 Sec. 18, Rev. Stat. 5040, 5041.

5. Sec. 19, Rev. Stat. 5067 (Act 1841, sec. 5).

The time of the adjudication of the bankruptcy is the time of filing the petition. *In re* Patterson, 1 B. R. 125; Bailey *v.* Loeb, 11 B. R. 271; 2 Cent. Law J. 42.

Equitable debts are within the scope of the act. *In re* Blandin, 5 B. R. 39.

6. Sec. 19, Rev. Stat. 5071.

7. Sec. 19, Rev. Stat. 5068.

A claim for damages for purely personal injury is not provable unless liquidated and transmitted into a legal debt by judgment obtained before the adjudication of bankruptcy. *In re* Hennocksburgh & Black, 7 B. R. 37; Black *v.* McClelland, 12 B. R. 481.

Where the claim is for unliquidated damages, there must be an assessment of the damages by the court before the claim can be proved. *In re* Clough, 2 B. R. 151.

8. Sec. 20, Rev. Stat. 5073 (Act 1841, sec. 5). This section was not intended to enlarge the doctrine of set-off or to enable the party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it. The debts must be mutual and must be in the same right. Sawyer *v.* Hoag, 17 Wall. (U. S.) 610.

The term "mutual credits" in the bankrupt act is more comprehensive than the term "mutual debts" in the statutes relating to set-off. The term "credit" is synonymous with "trust," and the trust or credit need not be of money on both sides. Where a creditor has goods or choses in action of the bankrupt put in his hands before the bankruptcy, by a valid contract by the terms of which the deposit will result in a debt, as if they are deposited for sale or collection, the case of mutual credit has arisen within the meaning of the bankrupt act. Murray *v.* Riggs, 15 Johns. (N. Y.) 571; *Ex parte* Caylus, Lowell, 550; Marks *v.* Barker, 1 Wash. (C. C.) 178; Tucker *v.* Oxley, 5 Cranch (U. S.), 34.

9. Sec. 21, Rev. Stat. 5105 (Act 1841, sec. 5).

The proof of the debt does not extinguish the action, but merely suspends the right. Hamlin *v.* Hamlin, 3 Jones Eq. (N. Car.) 191; Cook *v.* Coyle, 113 Mass. 252; Smith *v.* Dispatch A., 35 N. J. 60; Brendon Mfg. Co. *v.* Frazer, 13 B. R. 362.

of the district in which they reside.[1] Such claim must be verified, and no claim could be allowed unless it appeared to be true.[2] The court might on application of the assignee or any creditor, or without application, examine upon oath the person presenting the claim, or any other person, in reference thereto.[3]

Claims presented at the first meeting were suspended until after the election of an assignee.[4]

Creditors might act at all meetings by attorneys.[5]

No suit could be maintained against the assignee by any person claiming an adverse interest in property transferable to such as-

1. Sec. 22, Rev. Stat. 5076 (Act 1841, sec. 5).

The section was amended in 1874 so that the oath could be administered by a notary public. Rev. Stat. 5076a, June 22, 1874.

2. Sec. 22, Rev. Stat. 5077 (Act 1841, sec 7).

The statement of the debt in the schedule is not a proof of it. It may be stated in fraud, and may not exist. The bankrupt may have made payments or may have counterclaims and offsets. The debt must be proved by the oath of the creditor. This applies to lien creditor as well as unsecured creditors. Davis, Assignee of Bittel, 2 B. R. 392.

The proof of a debt against a firm should state that the firm or company, describing it by its firm-name and the individuals who compose it, was indebted to the creditor, and how and for what amount. It should not be uncertain whether the demand is a firm debt or a joint claim against the individuals who compose the firm. *In re* Walton, 1 Deady (C. C.), 510.

The proof should contain at least one full Christian name of the creditor as well as his surname. *In re* Valentine, 4 Biss. (C. C.) 317.

It is the policy of the act to do equal and exact justice between the estate of the bankrupt and creditors. The court has ample power to investigate a claim at any stage of the proceedings, and to make any correction equity and justice demand, not only to reduce the amount if it is too large, but also to increase it if, through inadvertence, it is smaller than by right it should be. Questions of amendment address themselves to the equitable consideration of the court, and great discretion is exercised in disposing of them. *In re* Montgomery, 2 B. R. 429; 3 Ben. (D. C.) 565. *In re* Elder, 3 B. R. 670.

3. Sec. 22, Rev. Stat. 5081.

Under this clause the court has at all times full control of all proofs of the debts, and the right to entertain objections to the validity of the debts or the proofs thereof. *In re* Patterson, 1 B. R. 100. *In re* Jones, 2 B. R. 59.

The court has the power to pass an order requiring a creditor to show cause why proof should not be vacated and annulled. The register cannot make such order. Comstock *v.* Wheeler, 2 B. R. 561. *In re* Lathup, 3 B. R. 413.

A proof of a judgment which is subsequently set aside should be expunged. *In re* Cosmore G. Bruce, 6 Ben. (D. C.) 515.

4. Sec. 23, Rev. Stat. 5083.

A claim of questionable character and in dispute should be postponed. *In re* Jones, 2 B. R. 59; *In re* Stevens, 4 B. R. 367.

The claim of a creditor who has accepted a preference should be postponed. *In re* Walton, 1 Deady (C. C.), 442; *In re* Herman, 3 B. R 618.

In order to justify the postponement of a claim until after the election of an assignee, it is not necessary that the register shall be satisfied or have before him the positive evidence that the claim is invalid, or that the creditor has the right to prove it. *In re* George Jackson, 14 B. R. 449.

5. Sec. 23, Rev. Stat. 5095.

In order to vote for an assignee, the attorney must be an attorney in fact, and must be appointed by a power of attorney. *In re* Purvis, 1 B. R. 163; s. c., 1 L. T. B. 19.

The statement of an attorney in regard to his authority must be taken as conclusive, unless proof to the contrary is shown. Ala. B. R. Co. *v.* Jones, 5 B. R. 97.

The register cannot at the instance of the bankrupt inquire into the authority given to an attorney at law who has been admitted to practice in the circuit or district court. *In re* W. H. Hill, 1 B. R. 16.

signee, unless brought within two years of the accruing of the right of action against the assignee.[1]

The bankrupt might at all times be examined as to his property and his business,[2] and upon refusal or neglect might be fined for contempt.[3]

Creditors whose debts had been proved, shared *pro rata* without preference,[4] except in case of wages due clerks, operatives, and house-servants, not exceeding $50.[5]

At the expiration of six months a meeting should be called at which a final dividend was declared.[6]

(*d*) *Discharge.*—The bankrupt might apply for his discharge any time after six months from adjudication of bankruptcy;[7] but no discharge will be granted[8] if he had sworn falsely as to petition,[9] schedules, or on his examination, or concealed any part of his estate,[10] been guilty of fraud or negligence in care or delivery to assignee of his property, or permitted waste thereof,[11] or removed,

1. Sec. 24, Rev. Stat. 5057. This is a separate and independent provision, and has no connection with any State statute on the subject. It may extend or it may contract the time provided in the State Statute of Limitations. Thus if at the time of the appointment of the assignee but a few days remain to complete the bar, the time will be extended; or if the statute has just commenced running, and under the State law would have ten years to run, it would be complete in ten years. Freelander *v.* Holloman, 9 B. R. 331.

2. Sec. 26, Rev. Stat. 5086 (Act 1841, sec. 4); *In re* Adams. 2 B. R 272; s. c., 36 How. Pr. (N. Y) 270; *In re* Gilbert, 3 B. R. 152; s. c., Lowell, 340.

3. Sec. 26, Rev. Stat. 5104; *In re* Carpenter, 1 B. R. 299; *In re* Salkey & Gibson, 11 B. R. 423.

4. Sec. 27, Rev. Stat. 5091 (Act 1841, secs. 5, 10); *In re* Byrne, 7 Am. L. Reg. 499.

5. Sec. 27, Rev. Stat. 5101. This section does not refer to any part of the estate derived from the sale of property on which creditors may have a specific lien. Operatives cannot therefore claim a priority over lien creditors in the distribution of such fund. *In re* William Connell, 9 B. R. 387.

6. Sec. 28, Rev. Stat. 5096, 5097, 5098 (Act 1841, sec. 10).

7. Sec. 29, Rev. Stat. 5108 (Act 1841, sec. 4).

If there are no assets within sixty days, the six months is to be computed from the date of adjudication, not from the date of the filing the original petition. *In re* Bodenheim, 2 B. R. 419; *In re* D. K. Holmes, 14 B. R. 209.

8. Sec. 29, Rev. Stat. 5110 (Act 1841, sec. 4); *In re* Goodfellow, 3 B. R. 452; s. c., Lowell (D. C.), 510.

9. Sec. 29, Rev. Stat. 5110 (Act 1841, sec. 4).

The specification must aver that the false oath was wilful. Omissions in the schedule must be alleged to be intentional. A false oath on examination must be alleged to have been wilful and in regard to a material fact. *In re* Rathbone, 1 B. R. 324; *In re* Beardsley, 1 B. R. 304; *In re* Wyatt, 2 B. R. 288; *In re* Sidle, 2 B. R. 220; *In re* Robt. Shoemaker, 4 Biss. 245; *In re* Wm. Achenbaum, 12 B. R. 17.

10. Sec. 29, Rev. Stat. 5110 (Act 1841, sec. 4).

The specification should state with some particularity what property has been concealed. *In re* Mawson, 1 B. R. 437; *In re* Rathbone, 1 B. R. 324; *In re* Freeman, 4 B. R. 64.

The term "concealment" implies something wilful, intentional. One cannot be said to conceal property unless he knows that he owns it, but unless he also intentionally, not inadvertently, conceals the same from his assignees or creditors. The act of concealment must be shown to be intentional. *In re* George Wilson, 6 Law Rep. 272; *In re* Mark Banks, 1 N. Y. Leg. Obs. 274; Dresser *v.* Brooks, 3 Barb. (N. Y.) 429; *In re* Renslow S. Parker, 4 Biss. (C. C.) 501.

An omission of property by mistake will not prevent discharge. Loud *v.* Pierce, 25 Me. 233; Suydam *v.* Walker, 16 Ohio, 122; Steene *v.* Aylesworth, 18 Conn. 244.

11. Sec. 29, Rev. Stat. 5110 (Act 1841, sec. 4); *In re* Rogers, 3 B. R. 564; *In re*

or caused to be removed, his property out of the district with intent to defraud creditors,[1] or given fraudulent preference, or fraudulent gift or credit,[2] or lost property by gaming,[3] or admitted false debts,[4] or had not kept proper books,[5] or had procured assent of creditor by pecuniary consideration,[6] or in contemplation of bankruptcy had made any preference, or had disposed of property to prevent it from coming to the assignee,[7] or had been convicted of a misdemeanor under the act, or been guilty of fraud contrary thereto.[8]

A person having once been discharged under this act could not be discharged a second time unless his estate paid 70 per cent dividend.[9]

If a bankrupt conformed to his duty under the act, he was entitled to a discharge;[10] but no discharge was granted unless 30 per

Rosenfield. 2 B. R. 117; 8 Am. L. Reg. 44; *In re* Michael Finn, 8 B. R. 525.

1. Sec. 29, Rev. Stat. 5110 (Act 1841, sec. 4); *In re* Hammond & Coolidge, 3 B. R. 273; s. c., Lowell (D. C.), 381.

2. Sec. 29, Rev. Stat. 5110.

By the term "fraudulent preference" is meant a preference contrary to the provisions of this act. *In re* Rosenfield, 8 Am. Law Reg. 44; *In re* Aspinwall, 3 Penn. L. J. 212; *In re* Perry & Allen, 20 Pitts. L. J. 184; *In re* Warner, 5 B. R. 414.

An assignment exacting a release as a condition of receiving a dividend is a ground for refusing a discharge, because it is a preference. *In re* Aspinwall, 3 Penn. L. J. 212. *Contra*, *In re* Chas. W. Holmes, 1 N. Y. Leg. Obs. 211.

3. Sec. 29, Rev. Stat. 5110; *In re* Marshall, 4 B. R. 106; s. c., Lowell (D. C.), 462.

4. Sec. 29, Rev. Stat. 5110.

In order to bar the discharge, the debt must be falsely admitted in proceedings under the act. Merely giving a preference to a fictitious debt in an assignment is not sufficient. *In re* Chas. H. Delaven, 5 Law Rep. 370.

The language of the statute does not embrace a claim admitted to be just in its origin, but against which the bankrupt insists upon the rights of set-off or assets that it has been satisfied. The distinction is between fabricating a debt where none exists in fact, and stating a debt unquestionably outstanding with the claim of defence to it. *In re* Mark Banks, 1 N. Y. Leg. Obs. 274; *In re* Orcutt, 4 B. R. 538.

5. Sec. 29, Rev. Stat. 5110.

The intent of the non-keeping of the books is of no importance. The mere omission is the thing plainly interdicted. Such omission prevents a discharge whether the intention is fraudulent or not. *In re* Solomon, 2 B. R. 302; *In re* Shumpert, 8 B. R. 415; *In re* George & Procter, Lowell (D. C.), 409.

A cash account is necessary to understand a trader's business; and where one has not been kept, a discharge will be refused. *In re* Gay, 2 B. R. 358; *In re* Littlefield, 3 B. R. 57; s. c., Lowell (D. C.), 331.

The question is whether the bankrupt did all that a prudent business man, intending to keep his accounts accurately, would do. A temporary omission in good faith and for a reasonable time to make entries would not be a failure to keep books. But neglect to keep them on purpose for a reasonable time would. *In re* Hammond & Coolidge, 3 B. R. 273; s. c., Lowell (D. C.), 381.

6. Sec. 29 Rev. Stat. 5110; *In re* Freeman, 4 B. R. 64; s. c., 4 Ben. (D.C.) 245; Coates *v.* Blush, 55 Mass. 564; Chamberlain *v.* Griggs, 3 Denio (N. Y.), 9; Fox *v.* Paine, 10 Ala. 523; *In re* Palmer, 14 B. R. 432; *In re* Whitney, 14 B. R. 1.

7. Sec. 29, Rev. Stat. 5110.

An assignment for the benefit of creditors by a party in contemplation of becoming bankrupt is good ground for refusing a discharge in a case of voluntary bankruptcy. The fact that the assignment is one of all the debtor's property and creates no preference among his creditors makes no difference. It is as repugnant to the act as if he had assigned a part of his property or had created preferences. *In re* Goldsmith, 3 B. R. 165; s. c. 3 Ben. (D. C.) 379.

8. Sec. 29, Rev. Stat. 5110.

9. Sec. 30, Rev. Stat. 5116 (Act 1841, sec. 12).

10. Sec. 32, Rev. Stat. 5114.

cent dividend was paid, unless a majority in value and number of creditors assented in writing.[1]

This discharge, if duly granted, discharged or released the bankrupt from all debts which were provable; and creditors might contest at any time within two years.[2]

1. Sec. 30, Rev. Stat. 5112.

2. Sec. 34, Rev. Stat. 5119 (Act 1841, sec. 4).

It is competent for Congress to declare what shall be the force and effect of a discharge. Reed *v.* Vaugh, 15 Mo. 137.

Where the discharge is pleaded, the court will presume that the requirements of the law were complied with. Lathrop *v.* Stuart, 5 McLean (C. C.), 167.

The certificate of discharge is a bar only to debts and demands which were or might have been proved, but not as against personal covenants and engagements which were not provable. If the demand is not provable, it is not barred by the certificate. This is the just and settled rule. Murray *v.* DeRottenham, 6 Johns. Ch. (N. Y.) 52.

Debts due the United States are not within the law. U. S. *v.* King, Wall. Sr. (C. C.) 12.

A discharge does not release the bankrupt from his liability as surety for money paid on a judgment rendered against them both, after the granting of the discharge. Leighton *v.* Atkins, 35 Me. 118.

As affecting sureties, see Kerr *v.* Hamilton, 1 Cranch (C. C.), 546; Loring *v.* Kendall, 67 Mass. 305; Fowler *v.* Kendall, 44 Me. 448; Pogue *v.* Joiner, 6 Ark. 141; Fullwood *v.* Bushfield, 14 Pa. St. 90; Tobias *v.* Rodgers, 13 N. Y. 59; Mace *v.* Wells, 17 Vt. 503.

A discharge releases the bankrupt from all judgments rendered against him prior to the commencement of the proceedings in bankruptcy, for a judgment is a debt of record. Blake *v.* Bigelow, 5 Ga. 437.

It also releases the bankrupt from a judgment for a provable debt entered after the commencement of the proceedings in bankruptcy and before the granting of a discharge. Harrington *v.* McNaughton, 20 Vt. 293; Dresser *v.* Brooks, 3 Barb. (N. Y.) 429; McDonald *v.* Ingraham, 30 Miss. 389; Clark *v.* Rowling, 3 N. Y. 216. *Compare* Bradford *v.* Rice, 102 Mass. 472; Ellis *v.* Ham, 28 Me. 385; Roden *v.* Jaco, 17 Ala. 344.

Other cases affecting judgments: Levitt *v.* Baldwin, 4 Edw. Ch. (N. Y.) 289; Rees *v.* Butler, 18 Mo. 173; Haggerty *v.* Armory, 89 Mass. 458; Hollister *v.* Abbott, 31 N. H. 442; Stewart *v.* Colwell, 24 Pa. St. 97; Wilkins *v.* Warren, 27 Me. 438; Comstock *v.* Grout, 17 Vt. 512; Alling *v.* Egan, 11 Rob. (La.) 244.

A discharge in bankruptcy bars a foreign as well as a domestic creditor. Ruiz *v.* Eickerman, 12 Cent. L. J. 60; Murray *v.* De Rottenham, 6 Johns. Ch. (N. Y.) 52; McMenony *v.* Murray, 3 Johns. Ch. (N. Y.) 435; Pattison & Co. *v.* Wilbur, 12 B. R. 193. *Compare* McDougal *v.* Carpenter, 17 Cent. L. J. 476.

A discharge constitutes no defence to an action to foreclose a mortgage, but no judgment can be rendered against the bankrupt for any deficiency. This applies to mortgage of personal as well as real property. Pierce *v.* Wilcox, 40 Ind. 70; City Bank *v.* Walton, 5 Rob. (La.) 158; Stewart *v.* Anderson, 10 Ala. 504; Roberts *v.* Woods, 38 Wis. 60.

It does not affect the lien of a judgment. McCance *v.* Taylor, 10 Gratt. (Va.) 580; McColloch *v.* Caldwell, 5 Ark. 237; Jones *v.* Lellyett, 39 Ga. 64.

There is no law that requires a new promise to pay a debt discharged by proceedings in bankruptcy to be made in writing to be valid; therefore such a promise may be proved by parol, and when proved is binding. Barron *v.* Benedict, 44 Vt. 518; Hill *v.* Robbins, 22 Mich. 475; Appersen *v.* Stewart, 27 Ark. 619.

The new promise must be distinct, clear, and unequivocal. There must be an expression by the debtor of a clear intention to bind himself to the payment of the debt. Allen *v.* Furgeson, 18 Wall. (U. S.) 1; Fraley *v.* Kelley, 67 N. Car. 78; Stern *v.* Nusbaum, 47 How. Pr. (N. Y.) 489.

There is no precise form of words required. The true test is, did the party mean that he would pay the debt? If he did, and the words used by him were susceptible of no other construction, then they amount in law to an express promise. Evans *v.* Carey, 29 Ala. 99; Bennett *v.* Everartt, 3 R. I. 152; Meech *v.* Lamm, 103 Ind. 515; s. c., 53 Am. Rep. 540; Elwell *v.* Cumner. 136 Mass. 102; Hubbard *v.* Farrell, 87 Ind. 215 (believed to be overruled by Meech *v.* Lamm, 103 Ind. 515); Bolton *v.* King, 105 Pa. St. 78; s. c., 18 Cent. L. J. 458; Bigelow *v.* Norris, Mass. Sup. C. 1886.

The new promise must be express and unconditional, and must be absolute.

Any fraudulent preference made in contemplation of insolvency or by an insolvent within four months before the filing of the petition was void; and if the purchaser or person to be benefited had reasonable cause to believe such person to be insolvent, etc., such property could be recovered by the assignees.[1] Or if

Mason *v.* Haughart, 9 B. Mon. (Ky.) 480; Samuel *v.* Cravens, 10 Ark. 380; Sherman *v.* Hobart, 26 Vt. 60; Taylor *v.* Nixon, 4 Sneed (Tenn.), 352; La Tourette *v.* Price, 28 Miss. 702.

It is not necessary that the new promise be made to the creditor or his authorized agent. It may be made to a third person. Haines *v.* Stauffer, 13 Pa. St. 541; Evans *v.* Carey, 29 Ala. 99.

The Statute of Limitations only commences to run from the time of the new promise. Horner *v.* Speed, 2 Pat. & H. (Va.) 616.

If the words are capable of being construed as a promise, it is for the jury to determine whether the bankrupt, by the words, intended to promise to pay the debt. Pratt *v.* Russell, 61 Mass. 462; Bennett *v.* Everartt, 3 R. I. 152.

The mere payment of interest on a note does not revive the debt. Cambridge Institution *v.* Littlefield, 60 Mass. 210.

Neither are partial payments on a debt in law a new promise to pay the debt, nor do they constitute evidence from which a jury may infer a new promise to pay the debt. Stark *v.* Stimson, 23 N. H. 259; Viele *v.* Ogilvie, 2 Greene (N. J.), 326.

The State court does not lose jurisdiction of the person of the defendant by his being adjudicated a bankrupt; and if he does not plead his discharge, a judgment can be rendered against him. Manwarring *v.* Kouns, 55 Tex. 171; Seymour *v.* Browning, 17 Ohio St. 362; Stewart *v.* Green, 11 Paige (N. Y.), 535; Fellows *v.* Hall, 3 McLean (C. C.), 487; Horner *v.* Spellman, 78 Ill. 206.

A plea of a discharge in bankruptcy is sufficient if it sets out a discharge duly authenticated. Lathrop *v.* Stewart, 5 McLean (C. C.), 167; White *v.* How, 3 McLean (C. C.), 291; McNeil *v.* Knott, 11 Ga. 142; Rowan *v.* Holcomb, 16 Ohio St. 463; Downer *v.* Chamberlain, 21 Vt. 414.

A garnishee cannot plead the discharge of the defendant. Frazier *v.* Banks, 77 La. Ann. 31.

1. Sec. 35, Rev. Stat. 5128 (Act 1841, sec. 2).

It is the intention of the bankrupt act to prevent all preferences by an insolvent person, and, as far as possible, to insure the equal distribution of his property to all his creditors. It differs in a material point from the act of 1841. By the second section of that act, to render a transfer void it must have been made "in contemplation of bankruptcy." The present act only requires "insolvency or contemplation of insolvency." *In re* Arnold, 2 B. R. 168; Foster *v.* Hackley & Sons, 2 B. R. 406; *In re* Kingsbury, 3 B. R. 318.

Facts Required.—To make a transfer void, the following facts must concur: (1) the debtor making the transfer must be insolvent; (2) if the transfer gives a preference, it must be made with a view to give a preference to the creditor; (3) in any event, the person receiving the transfer must at the time have reasonable cause to believe the person making the transfer to be insolvent; (4) must also know that such transfer was in fraud of the provisions of the bankrupt act; (5) and the payment, pledge, assignment, transfer, or conveyance must be made within four months before the filing of the petition by or against the bankrupt. Toof *v.* Martin, 13 Wall. (U. S.) 45; Forbes *v.* Howe, 102 Mass. 427; Dow *v.* Sargent, 15 N. H. 115; Rice *v.* Melendy, 41 Iowa, 395.

If the debtor did not intend to give a preference, and the creditor did not have reasonable cause to believe the debtor to be insolvent, the transfer is valid, although the debtor was then insolvent. Mays *v.* Fritton, 20 Wall. (U. S.) 414; Clark *v.* Iselin, 21 Wall. (U. S.) 360.

Intent to Prefer.—When a debtor is insolvent, and knows it, any payment then made by him to a creditor in full must be made with an intent to prefer, as the intention of the parties is to be judged from the legal effect of their acts. Traders' Nat'l Bank *v.* Campbell, 14 Wall. (U. S.) 87; *In re* Gregg, 4 B. R. 456; Rison *v.* Knapp, 4 B. R. 349.

A mortgage of all the property of a trader, or of so much as will make him insolvent, when given for a pre-existing debt is such an apparent preference that it would be almost impossible to explain it away. *In re* McKay & Aldus, 7 B. R. 230; s. c., Lowell (D. C.), 561.

The mere omission by an insolvent debtor, when he is sued for a just debt, to file a petition in bankruptcy is not suffi-

payment or conveyance, etc., were made within six months to any person knowing the same to be made for the purpose of prevent-

cient evidence of an intent to prefer or defeat the operation of the act. Wilson *v.* City Bank, 17 Wall. (U. S.) 473.

A preference within the meaning of the act is an advantage in the payment of the debt due him, acquired by one creditor over the other creditors of the debtor. *In re* Joseph Horton, 5 Ben. (D. C.) 562.

A mortgage is not a preference where the debt is secured by a prior mortgage covering goods subsequently acquired, where both mortgages cover the same goods. Brett *v.* Carter, 14 B. R. 301.

The preference at which the law is directed can only arise in case of an antecedent debt. The giving of security where the debt is created is not within the law; and if the transaction is free from fraud in fact, the party who loans the money can retain it until it is paid. Tiffany *v.* Boatmans, 4 B. R. 691; s. c., 18 Wall. (U. S.) 376; Clark *v.* Iselin, 21 Wall. (U. S.) 360.

A transfer of property to a factor with intent to give him a preference by enabling him to claim a factor's lien thereon is void. Nudd *v.* Burrows, 91 U. S. 420.

Likewise a transfer of property within the United States to prefer an alien creditor. Olcott *v.* McLean, 50 How. Pr. (N. Y.) 455.

A transfer of firm property with the intent to prefer an individual creditor may be set aside. Encker *v.* Levy, 3 Stob. Eq. (S. Car.) 197; Collins *v.* Hood, 4 McLean (C. C.), 186.

The word "conveyance" in the bankrupt act is a generic term, including all proceedings to dispose of or incumber property in derogation of the equality of creditors, with intent by such disposition to give a preference or to defeat or delay the operation of the act. Bingham *v.* Frost, 6 B. R. 135.

Testimony of the parties as to their intention is inexpressibly weak, and can rarely avail against stronger proof which the transaction itself affords. Oxford Iron Co. *v.* Slafton, 14 B. R. 280.

Insolvency.—Insolvency, as used in the bankrupt act, does not mean an absolute inability to pay one's debts, at a future time, upon a settlement and winding up of all a trader's concerns; but a trader may be said to be in insolvent circumstances when he is not in the condition to pay his debts in the ordinary course of business, as persons carrying on trade usually do. Sawyer *v.* Turpin, 91 U. S. 114; Wager *v.* Hall, 16 Wall. (U. S.) 584; Toof *v.* Martin, 13 Wall. (U. S.) 40.

The words "in contemplation of bankruptcy," as used in the bankrupt law, mean a contemplation of a state of bankruptcy merely, and not an intention to take the benefit of the bankrupt law, and this means more than an inability to pay debts promptly. It contemplates a thorough breaking up of business. McLean *v.* Lafayette, 3 McLean (C. C.), 587; Everett *v.* Stone, 3 Story (C. C.), 446.

The commission of an act of bankruptcy is considered as a test of insolvency, showing conclusively the inability of the debtor to pay his debts. Shawhan *v.* Wherritt. 7 How. (U. S.) 627.

The question whether or not the preference was made at a time when the bankrupt was insolvent is a question for the jury. Pierce *v.* Evans, 61 Pa. St. 415.

Judgments.—Merely allowing a creditor to obtain a judgment by default in an action for a debt to which there is no defence does not, as a conclusion of law, raise an implication of a motive or intent to prefer. Wilson *v.* City Bank, 17 Wall. (U. S.) 473; Haughy *v.* Altin, 2 B. R. 399; Ballow *v.* Minard, 2 Brewst. (Pa.) 560; Clark *v.* Piet, 3 McLean (C. C.). 494. *Compare* Catlin *v.* Hoffman, 9 B. R. 342; Linkman *v.* Wilcox, 1 Dill. (C. C.) 161.

The mere entry of a judgment by virtue of a warrant of attorney given when the debtor was solvent is not such a preference as the statute avoids, although it is entered just before the commencement of the proceedings in bankruptcy and when the creditor knows that the debtor is insolvent, and though it is followed by an execution. Clark *v.* Iselin, 21 Wall. (U. S.) 360; Sleek *v.* Turner, 76 Pa. St. 142; Watson *v.* Taylor, 21 Wall. (U. S.) 378; Buckingham *v.* McLean, 13 How. (U. S.) 157; Love *v.* Love, 21 Pitts. L. J. 101. *Compare* Hood *v.* Harper, 5 B. R. 358; *In re* Terry *v.* Cleaver, 4 B. R. 126; s. c., 2 Biss. (C. C.) 356.

There is no distinction in this respect between a voluntary and an involuntary bankruptcy. Haskell *v.* Ingalls, 5 B. R. 205; *In re* C. A. Davidson, 3 B. R. 418.

What may be Recovered.—The amount which the assignee is entitled to recover from a creditor who has received a preference by means of a judgment is the gross amount obtained on execution, without any deduction for the costs and expenses of the creditor. Traders' Nat'l Bank *v.* Campbell, 3 B. R. 498; s. c., 14 Wall. (U. S.) 27; Street *v.* Dawson, 4 B. R. 207.

When the proceedings are in the nature

ing the same from falling into the hands of the assignee, it could be recovered by the assignee.[1]

of equity proceedings, the court may, in its discretion, make a decree for the net instead of the gross amount received. Brock *v.* Terrell, 2 B. R. 643; Wilson *v.* Brinkman, 2 B. R. 468. Other authorities: Rohrer's Appeal, 62 Pa. St. 498; Clarion Bank *v.* Jones, 21 Wall. (U. S.) 325; Anderson *v.* Strausburger, 6 Ben. (D. C.) 372; Winslow *v.* Clark, 47 N. Y. 261.

Reasonable Cause.—The bankrupt act does not require that the party receiving the transfer shall know, etc., but that he shall have reasonable cause to believe, such reasonable cause as would induce the belief in the mind of an intelligent, capable business man. Otis *v.* Hadley, 112 Mass. 100; Graham *v.* Stark, 3 B. R. 357.

"Reasonable cause to believe" means a state of facts and circumstances which would lead any prudent man to make inquiries. It will not do to ask protection on account of ignorance, when a small amount of inquiry would have given all the necessary information. *In re* J. B. Wright, 2 B. R. 490; White *v.* Raftery, 3 B. R. 221.

The proposition of "reasonable cause to believe" is one of fact to be found by the jury. Forbes *v.* Howe, 102 Mass., 427.

The existence of a financial crisis constitutes of itself a reasonable cause for believing doubtful men insolvent. *In re* Clark & Dougherty, 10 B. R. 21.

A creditor may be affected by rumors which he has heard about the debtor's embarrassment. Post *v.* Corbin, 5 B. R. 11; Golson *v.* Nichoff, 5 B. R. 56.

Where an execution must necessarily stop the debtor's business, the execution in general is reasonable cause to believe the debtor to be insolvent. Hood *v.* Karper, 5 B. R. 358; Zahm *v.* Fry, 9 B. R. 546.

The debtor's remonstrance, that the giving of the security will injure his business, is sufficient to put the creditor upon inquiry. Wager *v.* Hall, 5 B. R 181; s. c., 16 Wall. (U. S.) 584; Hyde *v* Corrigan, 9 B. R. 466.

Bona-fide Purchaser.— Morse *v.* Godfrey, 3 Story (C. C.), 364; *In re* Kansas City Mfg. Co., 9 B. R. 76; Rison *v.* Knapp, 4 B. R. 22; s. c., 1 Dill. C. C. 186; Zahm *v.* Fry. 9 B. R. 546.

Voidable Transfer.—Atkins *v.* Spear, 49 Mass. 490; Everart *v.* Stone, 3 Story (C. C.), 446; Whipps *v.* Ellis, 7 Bush (Ky.), 268; Avery *v.* Hackley, 20 Wall. (U. S.) 407; Burnbisel *v.* Firmen, 22 Wall. (U. S.) 170; Nudd *v.* Montange, 38 Wis. 511; Hathaway *v.* Brown, 18 Minn. 414; Frenzel *v.* Miller, 37 Ind. 1.

1. Sec. 35, Rev. Stat. 5129 (Act 1841, sec. 2). This and the preceding sections differ mainly in their application to two different classes of recipients of the bankrupt's property or means. The preceding section is limited to a creditor or person having a claim against the bankrupt, and who receives the money or property by way of preference, and this section applies to the purchase of the property of the bankrupt by a person who has no claim against him and is under no liability for him. Bean *v.* Brookmire, 4 B. R. 196; s. c., 1 Dill. (C. C.) 24.

The preceding section was intended to refer to the past, and this section to the present. Gibson *v.* Warden, 14 Wall. (U. S.) 244. And the two sections must be construed together, and a scope of operation given to each, if possible. Hubbard *v.* Allaire, Works, 4 B. R. 623; Babbitt *v.* Walbrun & Co., 4 B. R. 121.

A sale made by a debtor will be fraudulent if the following facts occur: (1) if the debtor is insolvent or contemplates insolvency or bankruptcy; (2) if the purchaser has, when he buys the goods, reasonable cause to believe the debtor to be insolvent or to be acting in contemplation of insolvency; (3) and knows that the sale was made by the debtor with a view to prevent, etc., defeat, etc., or evade, etc., the provisions of the bankrupt act. Sales so made are void and in fraud of creditors and their right under the bankrupt act; and as against the immediate vendee and actual participators, such sales, if made off the usual and ordinary course of business,—as where an insolvent merchant sells out all his stock and property.—are *prima-facie* evidence of fraud; that is, of the foregoing elements constituting a fraudulent sale. But it is only *prima facie*, and the presumption may be rebutted by evidence *aliunde* to be produced by the vendee. Andrews *v.* Graves, 5 B. R. 279; s. c., 1 Dill. (C. C.) 108.

An assignment is only voidable, and cannot be impeached unless proceedings in bankruptcy are commenced within six months after its execution. Maltbie *v.* Hotchkiss, 5 B. R. 485; s. c., 38 Conn. 80; Reed *v.* Taylor, 4 B. R. 710; s. c., 32 Iowa, 209; Thrasher *v.* Bentley, 59

Contracts made to induce creditors to forbear opposing discharge were void.[1]

(*e*) *Corporations and Partnership.*—Corporations and joint-stock companies by a vote of a majority of the incorporators could be declared bankrupt.[2] And partnerships might be adjudged bankrupt upon petition of any member of the firm or any creditor.[3]

N. Y. 649; Weiner *v.* Farnum, 2 Pa. St. 146.

If it should turn out on examination that the transfer was made by the bankrupt in good faith for the honest purpose of discharging his indebtedness, and in the confident expectation that by so doing he could continue his business, it will be upheld. Tiffany *v.* Lucas, 5 B. R. 437; s. c., 15 Wall. (U. S.) 410.

A fair exchange may be made at any time, even if one of the parties to the transaction is insolvent. The bankrupt's dealings will stand if they leave his estate in as good plight and condition as previously. Cook *v.* Tullis, 9 B. R. 433; s. c., 18 Wall (U. S.) 332.

1. Sec. 35, Rev. Stat. 5131.

The payments which the law makes void are those which reduce the means of the debtor to pay his debts ratably. O'Conner *v.* Parker, 4 B. R. 713; s. c., 23 Mich. 22; Noble *v.* Schofield, 44 Vt. 281; Dalrymple *v.* Hallenbrand; 62 N. Y. 5; Rice *v.* Maxwell, 21 Miss. 289. Claflin *v.* Tolina, 55 Mo. 369.

2. Sec. 37, Rev. Stat. 5122 (Act 1841, sec. 14); Rankin & Pullen *v.* Florida, Atlantic & G. C. R. Co., 1 B. R. 647; s. c., 1 L. T. B. 85.

Only such portions of the bankruptcy system as are expressly or impliedly adopted by this section are applicable to corporations or joint-stock companies. New Lamp Chimney Co. *v.* Ansonia Brass & Copper Co., 13 B. R. 109; s. c., 53 N. Y. 123; s. c., 91 U. S. 656.

Railways are included. Sweet *v.* Boston R. Co., 5 B. R. 234; Ala. & Chat. R. *v.* Jones, 5 B. R. 97; *In re* Cal. Pacific R., 11 B. R. 193; s. c., 1 Cent. Law Jour. 582.

Also insurance companies. *In re* Merchants' Ins. Co., 6 B. R. 43; s. c., 3 Biss. 162.

But not national banks. Smith *v.* Manuf. Nat'l Bank, 9 B. R. 122.

Voluntary Petition.—No other petition on behalf of the corporations can be recognized under the act than one which has been duly authorized by a vote of a majority of the corporators at a legal meeting called for the purpose. A "corporator," as understood both in the law respecting corporations and in common speech, is one who is a member of the corporation; that is to say, one of the constituents or stockholders of the corporation. New Lamp Chimney Co. *v.* Brass & Copper Co., 91 U. S. 656; *In re* Lady Bryan Mining Co., 4 B. R. 144, 394; Davis *v.* Railroad, 12 B. R. 258; Newman *v.* Fisher, 37 Md. 259.

Effect of Bankruptcy.—A corporation for all essential purposes is as effectually dissolved by the commencement of the proceedings in bankruptcy as if a solemn judgment were pronounced to that effect. It is such a dissolution as will afford creditors a remedy against the individual shareholders where they are made liable upon the dissolution of the corporation. State Savings Assoc. *v.* Kellogg, 52 Mo. 583.

3. Sec. 36, Rev. Stat. 5121 (Act 1841, sec. 14). The provisions of this section clearly contemplate that persons who are copartners may be adjudged bankrupts on three descriptions of petitions: (1) the petition of all copartners; (2) the petition of one of the copartners; (3) the petition of a creditor of one of the copartners. The proceeding by the petition of all the copartners is purely voluntary, and where they all unite the jurisdiction of the court over all of them, either by residence or by carrying on the business, must appear in the petition. The proceeding by the petition of a creditor of the copartners is a purely involuntary proceeding, and requires the adjudication to proceed on the commission of some act of bankruptcy. The proceeding by the petition of one of two or more of the copartners to have such copartners adjudicated bankrupt is a proceeding which necessarily is partly voluntary and partly involuntary. So far as the petition is concerned it is voluntary; so far as the copartners not petitioning are concerned it is not involuntary within sec. 39, Rev. Stat. 5021, unless the adjudication is asked for on the ground of the commission of an act of bankruptcy, although it may be involuntary in the sense of not being voluntary under sec. 11, Rev. Stat. 5014. Where it is not involuntary in the sense of sec. 39, Rev. Stat. 5021, the adjudication may be asked on the ground that the members of the

copartnership are unable to pay all their debts, and no allegation that an act of bankruptcy has been committed either by the firm or by the copartners who are proceeded against is necessary. A partner may also petition to have himself adjudged bankrupt because of his inability to pay his debts, and to have his copartners adjudged bankrupts because of the commission by them of an act to which he was not a party. *In re* Joseph Noonan, 10 B. R. 331; s. c., 2 Biss. (C. C.) 491; *In re* Penn. *et al.*, 5 B. R. 30; s. c., 5 Ben. (D. C.) 89.

No number less than the whole of a firm can file a voluntary petition. *In re* Moritz *v.* Plummer, 5 Law Rep. 325.

Partners are not liable to be adjudged bankrupt upon the petition of their creditors upon the mere proof of their insolvency without other proof of the commission of an act of bankruptcy. *In re* Ralph Johnson, 1 N. Y. Leg. Obs. 166.

Assignee of Individual Partner.—Upon the bankruptcy of one partner his private property and his interest in the firm pass to the assignee. Harrison *v.* Sterry, 5 Cranch (U. S.), 289.

The partnership property cannot be taken and administered by the bankrupt court unless all the persons who have an interest as copartners in such property are adjudged bankrupt. An assignee of the individual and separate estate of one partner has no title to call third persons to an account for partnership property. *In re* T. S. Shepherd, 3 B. R. 172; s. c., 3 Ben. (D. C.) 347; Amsinck *v* Bean, 10 Blatchf. (C. C.) 361; s. c., 22 Wall. (U. S.) 395.

Where one partner becomes bankrupt his assignee can only take that portion of the partnership assets which would belong to the bankrupt after payment of all the partnership debts, and the solvent partners have a lien upon the partnership assets for all the partnership debts, and also for their own shares. Parker *v.* Muggsidge, 2 Story (C. C.), 334; Buckner *v.* Calcote, 28 Miss. 432; Murray *v.* Murray, 5 Johns. Ch. (N. Y.) 60.

Distribution of Assets.—If the partners conduct business in two different places under different names, the two firms, in the distribution of the assets, will be treated as one, and no notice will be taken of the indebtedness of one firm to another. Buckner *v.* Calcote, 28 Miss. 432; *In re* Theo. H. Vetterlein *et al.*, 4 B. R. 599; s. c., 5 Ben. (D. C.) 311.

If any surplus remains after the individual creditors are paid, it must be distributed *pro rata* among all the creditors who have proved their claims and to whom the partner was liable either as a member of the bankrupt firm or any other firm. *In re* R. K. Dunkerson, 12 B. R. 391; s. c., 4 Biss. 323.

The firm creditors cannot have recourse to the separate estate for goods advanced by the firm to one of the partners. *In re* McEwen & Son, 12 B. R. 11; s. c., 6 Biss. (C. C.) 294.

Real estate purchased with the intention that it shall be held as partnership property will be deemed to be personalty as far as creditors are concerned, and will be applied to pay firm debts, even as against individual creditors who have obtained judgments which would otherwise be liens thereon. Marrett *v.* Murphy, 11 B. R. 131; s. c., 1 Cent. Law J. 554; Hiscock *v.* Green, 12 B. R. 507, Osborn *v.* McBride, 11 Pac. Law R. 105.

Where there are partnership assets the partnership creditors cannot share the individual estate, although the partners were declared bankrupts on separate petitions. *In re* Edward P. Morse, 13 B. R. 376.

A creditor holding a judgment against one partner acquires no lien upon the firm property transferred to that partner at a time when the firm was insolvent. *In re* Cook *v.* Gleason, 3 Biss. 122. See Thenson *v.* Spittle, 102 Mass. 207; Taylor *v.* Rash, 5 B. R. 399; Tucker *v.* Oxley, 5 Cranch (U. S.), 34; Collins *v.* Hood, 4 McLean (C. C.), 186.

Discharge.—Upon an application for a discharge there are in reality two cases, and the petition of each partner for a discharge, and the objection made to it, must be considered severally. Each bankrupt must stand or fall by his own acts. Those of his copartner committed without his knowledge will not affect him, excepting that a neglect to do what the law positively requires, such as keeping proper books, will affect both, though it should actually be the neglect of one. *In re* George & Prostor, Lowell (D. C.), 409; *In re* George M. Garwood, Crabbe (D. C.), 516.

Specifications which apply to one partner alone will not prevent the discharge of the other parties. The discharge is to be granted or refused to them the same as it would be if the defaulting partner were not a party to the proceedings. *In re* Schofield *et al.*, 3 B. R. 551

Involuntary Bankruptcy.—Sec. 39, Rev. Stat. 5021 (Act 1841, sec. 1). This section is highly remedial and should be liberally construed. It is not to be construed strictly as if it were an obscure or special penal enactment. The act establishes a system and regulates in all their

(*f*) *Involuntary.*—The act declared that any person owing debts[1] as aforesaid who after the passage of this act shall depart from the State of which he is an inhabitant with intent to defraud his creditors, or being absent shall conceal himself with such intent to avoid the service of legal process,[2] or shall conceal or remove any of his property to avoid its being attached, etc.,[3] or shall make any assignment, gift, or sale of his property with intent to hinder, delay, or defraud his creditors,[4] or who has been arrested

details the relative rights and duties of debtor and creditor. It does not attempt to punish the bankrupt, but to distribute his property fairly and impartially, and between his creditors to whom in justice it belongs. It is remedial and seeks to protect the honest creditor from being overreached and defrauded by the unscrupulous. It is intended to relieve the honest but unfortunate debtor from the burden of liabilities which he cannot discharge, and allow him to commence the business of life anew. Such an act must be construed according to the fair import of its terms, with a view to effect its objects and to promote justice. *In re* Locke, 2 B. R. 382; s. c., Lowell (D. C.) 293: *In re* Silverman, 4 B. R. 523; s. c., 7 Sawyer (C. C.), 410; *In re* Wm. Ellis, 1 N. Y. Leg. Obs. 85.

But that part of the statute which enumerates the acts of bankruptcy is in the nature of a penal statute and must be strictly construed. Jones *v.* Sleeper, 2 N. Y. Leg. Obs. 131. See Wilson *v.* City Bank, 5 B. R. 270; s. c., 17 Wall. (U. S.) 489; Wadsworth *v.* Tyler, 2 B. R. 316; s. c., 2 L. T. B. 28; Perry *v.* Langley, 1 B. R. 559.

1. The language "owing debts as aforesaid" has reference to the following words in Rev. Stat. 5014: "owing debts provable in bankruptcy exceeding the amount of $300." From this the following conclusions must be deduced: (1) the foundation of voluntary proceeding is indebtedness due and payable under the act against the debtor; (2) whatever debts may be proved in a voluntary may be proved in an involuntary case; (3) whenever an indorser's liability becomes fixed, such liability constitutes a debt due and payable from the indorser which may be made the foundation of an involuntary as well as voluntary proceeding in bankruptcy. Of course there must be shown in an involuntary case, in addition to such indebtedness, at least one of the acts of bankruptcy enumerated in this section. *In re* Nickodemus, 3 B. R. 230; s. c., 16 Pitts. Law J. 233.

2. Concealment from a denial of service to creditors is not an act of bankruptcy if it does not prevent the service of summons or process. Barnes *v.* Bellington, 1 Wash. (C. C.) 29; s. c., 4 Day (Conn.), 81 *n.*

An order for examination of a debtor upon the proceedings supplemental to an execution is a legal process within the meaning of the act. Brock *v.* Hoppick, 2 B. R. 7.

3. Procuring an attachment upon a fictitious debt in order to prevent an attachment by a creditor comes fairly within the language of this clause; because the words mean not only the physical removal or concealment, but the concealment of the actual title and position of the property of whatever kind. *In re* Williams & Co., 3 B. R. 286; s. c., Lowell (D. C.), 406.

The secrecy and concealment of goods which constitutes an act of bankruptcy distinct from a fraudulent conveyance of them must be an actual, not a constructive, concealment of them by the bankrupt himself, or by his procurement, while they continue, in his intention, his own goods. Livermore *v.* Bagley, 3 Mass. 487; Fox *v.* Eckstein, 4 B. R. 373.

4. **Fraudulent Conveyances.—The** "intent" means an actual design in the mind and must be proved as a question of fact. Perry *v.* Langley, 2 B. R. 596; s. c., 8 Am. Law Reg. 427.

The question of intent to hinder, delay, or defraud creditors must be solved by looking at what the debtor says or does and the effect thereof. Ecfort *v.* Greeley, 6 B. R. 433; *In re* Thomas Ryan, 2 Sawy. (C. C.) 411.

Allowing property to be taken upon a false and fictitious judgment is a transfer with intent to hinder, delay, or defraud creditors. *In re* Schick, 7 B. R. 177.

If an insolvent firm is dissolved and the assets transferred to one of the partners, who immediately executes a mortgage to secure a separate debt, the mortgage may be charged as a conveyance to hinder and delay creditors. *In re* Waite *et al.*, Lowell (D. C.), 407. See *In re* Picton, 11 B. R. 420; s. c., 2 Dill. (C. C.) 548; *In re* W. B. Alexander, 4 B. R. 178;

or held in custody under or by virtue of mesne process or execution issued in any United States, State, district, or Territorial court, etc.,[1] or who being a bankrupt or insolvent, or in contemplation of bankruptcy, shall make any payment, gift, etc.,[2] with intent to give a preference to one or more of his creditors,[3] or with the

s. c., Lowell (D. C.), 470; *In re* Williams & Co., 3 B. R. 286; s. c., Lowell (D. C.), 406.

To make a general assignment for the benefit of creditors an act of bankruptcy within the meaning of this clause, it must be made with the intent to delay, defraud, or hinder creditors within the meaning of the statute of 13 Eliz. as exemplified in Twyne's case and other subsequent decisions following it. It becomes a question of fact. The innocence or guilt of the act depends on the mind of him who did it, and it is not fraud within the meaning of the bankrupt act unless it was meant to be so. Perry *v.* Langley, 1 B. R. 559; s. c., 8 Am. Law Reg. 427; Wells *et al.*, 1 B. R. 171; s. c., 7 Am. Law Reg. 163.

1. The arrest and imprisonment are both necessary to constitute the act of bankruptcy. Either alone is insufficient. Both do not exist until the term limited for that purpose has expired. Nelson *v.* Pugh, 1 Murph. (N. Car.) 149. See *In re* Davis, 3 B. R. 339; s. c., 3 Ben. (D. C.) 482; Hunt *v.* Pooke, 5 B. R. 161.

2. Mere insolvency is not, of itself, ground for voluntary bankruptcy; for a man actually insolvent may continue his business for years by renewals and extensions and indulgences on the part of his creditors, and ultimately not only pay all indebtedness with interest, but achieve success. Doan *v.* Compton & Doan, 2 B. R. 607.

The words "in contemplation of bankruptcy" mean in contemplation of committing what is made by the act of bankruptcy, or of voluntarily applying to be decreed a bankrupt. *In re* Craft, 1 B. R. 378; s. c., 2 Ben. (D. C.) 214; Jones *v.* Howland, 49 Mass. 377; Buckingham *v.* McLean, 13 How. (U. S.) 151.

Inability to pay one's debt in the ordinary course of business is sufficient. The ordinary "course of business" does not mean an inability to turn out goods, or bills receivable, or assets or securities to pay that one particular debt at the same time, leaving other debts which are certain to become due unprovided for, and not leaving sufficient assets in the hands of the debtor to meet them when they become due. That is an extraordinary course of business. Driggs *v.* Morse, 3 B. R. 602; s. c., 1 Abb. C. C. 440; *In re* Dibble *et al.*, 2 B. R. 617; s. c., 3 Ben. (D. C.) 283. See Curran *v.* Munger, 4 B. R. 295; s. c., 6 B. R. 33; Miller *v.* Keyes, 3 B. R. 224; Farran *v.* Crawford, 2 B. R. 602; *In re* Or. Printing Co., 13 B. R. 503; s. c., 3 Cent. Law J. 515; *In re* Thomas Ryan, 2 Sawy. (C. C.) 411; *In re* Craft, 1 B. R. 378; s. c., 6 Blatchf. (C. C.) 177.

3. In an act of bankruptcy under this clause there are the following ingredients, to wit: (1) the debtor must be either insolvent or contemplate insolvency; (2) he must make a conveyance or transfer of money or property, or he must procure his property to be taken in legal process; (3) he must do this with intent, on his own part, to defeat or delay the operation of the act. *In re* Dibble *et al.*, 2 B. R. 617; s. c., 3 Ben. (D. C.) 283.

Mere honest inaction, when the creditor seeks to make a just debt by law, is not of itself an act of bankruptcy. The debtor's failure through inability to go into voluntary bankruptcy when he was sued is not of itself an act of bankruptcy. Wright *v.* Filley, 4 B. R. 611; s. c., 1 Dill. (C. C.) 171; Love *v.* Love, 21 Pitts L. J. 101.

There is a clearly-recognized distinction between procuring and suffering. The word "suffer" is different from the word "procure." "Suffer" implies passive condition, so to speak, as to allow, to permit; not a demonstrative, active course like the word "procure." *In re* Black & Secor, 1 B. R. 353; Traders' Nat'l Bank *v.* Campbell, 3 B. R. 498; s. c., 14 Wall. (U. S.) 87.

As to what acts will constitute an act of bankruptcy under the section, see Jones *v.* Sleeper, 2 N. Y. Leg. Obs. 131; Fisher *v.* Currier, 1 Penn. L. J. 270; *In re* Isaac Scull, 10 B. R. 165; *In re* A. B. Gallinger, 4 B. R. 729; *In re* Leeds, 1 B. R. 521; 7 Am. Law Reg. 693; Hilton *v.* Telegraph Co., 1 Cent. Law J. 75.

Intent to Prefer.—The definition of a preference is a payment or transfer to one creditor which will give him an advantage over the others, or which may possibly do so. *In re* Hapgood *et al.*, 7 Am. Law Reg. 664.

Where the probable consequence of an

intent by such disposition of his property to defeat or delay the operation of this act,[1] or who being a banker, broker, merchant, trader, manufacturer, or miner, has stopped or suspended payment and not resumed payment within forty days of his commercial paper,[2] or who being a banker shall fail for forty days to pay any depositor upon demand of payment lawfully made, shall be

act is to give a preference, the debtor will be conclusively presumed to have intended to give such preference. *In re* Drummond, 1 B. R. 231; *In re* Wells, 3 B. R. 371; Curran *v.* Munger, 6 B. R. 33.

The intent is an element of the objectionable transaction according to the letter of the law; and though a person is presumed to intend the natural results of his acts, the intent is essential and must be shown by his acts and the circumstances. Miller *v.* Keyes, 3 B. R. 224.

And this intent must be upon the part of the debtor. *In re* Dibble, 2 B. R. 617.

The intent of the debtor to prefer, coupled with an attempt to do it, is an act of bankruptcy, although the instrument is so defective as to be void. *In re* S. Mendelsohn, 12 B. R. 533; s. c., 9 Pac. L. R. 193.

If there is a preference, it is an act of bankruptcy, no matter how small the amount or meritorious the creditor. *In re* J. A. & H. W. Shouse, Crabbe (D. C.). 482.

If a debtor is insolvent at the time of making a payment he is presumed to know it until the contrary appears. *In re* Silverman, 4 B. R. 523; s. c., 1 Sawy. (C. C.) 410.

1. The motives of the debtor in committing the act are immaterial. It is no defence that other considerations were the moving cause. Motive should not be confounded with intent. When he intends to do a thing which necessarily hinders and defeats the act, he, in judgment of law, knows, when he does it, that it will have that effect. Knowing the effect, he must intend to produce it when he voluntarily chooses to do the act. Whatever his motive is, he acts voluntarily in choosing, and therefore in intending all the legal results which flow from his actions in the matter. Hardy *v.* Binninger, 4 B. R. 262; s. c., 7 Blatchf. (C. C.) 262.

And it is immaterial that he had in contemplation the provisions of the bankrupt act. Foster *v.* Hackley & Sons, 2 B. R. 406; Haughey *v.* Albin, 2 B. R. 399.

2. **Who is a Trader.**—The commercial deposition of a trader is one who makes it his business to buy and sell merchandise or other things ordinarily the subject of traffic. Love *v.* Love, 21 Pitts. L. J. 101.

A livery-stable keeper is not. Hall *v.* Cooley, 3 N. Y. Leg. Obs. 282.

A person who merely sells the produce of his own land is not. *In re* Chandler, 4 B. R. 213; s. c., Lowell (D. C.), 478.

Or of his own labor. Wakeman *v.* Hoyt, 5 Law Rep. 309.

Neither is a manufacturer and vendor of sleighs, carriages, etc. *In re* Rufus Hoyt, 1 N. Y. Leg. Obs. 132.

Who is a Manufacturer.—The publisher of a newspaper is. *In re* Kenyon & Teuton, 6 B. R. 238.

Also a person who works up lumber. *In re* Chandler, 4 B. R. 213; s. c., Lowell, 478.

The words "stopped or suspended" are sometimes used to denote not only the act of stopping, but also not resuming payment; and if they were the only words used in the statute they would express both ideas. The words "stopped" and "not resumed" have distinct significations. There cannot be a condition of non-resumption without a previous stopping of payment, but the words as used have a different relation as to the time in the transaction. A fraudulent stopping of payment is an immediate act of bankruptcy, and no subsequent resumption will free the fraudulent debtor from an adjudication of bankruptcy, if proceedings are commenced within six months. Mendenhall *v.* Carter, 7 B. R. 320.

The term "commercial paper" is used in the bankrupt act to denote bills of exchange, promissory notes, and negotiable bank checks,—paper governed by those rules which have their origin in and are established upon the custom of merchants in their commercial transactions known as the law merchant. Such paper is usually denominated commercial paper, and it should be presumed that Congress used the term in its common acceptation, rather than in its restricted sense. *In re* Chandler, 4 B. R. 218; s. c., Lowell (D. C.), 478; *In re* Carter, 6 B. R. 299; s. c., 3 Biss. (C. C.) 195; *In re* Clemens, 8 B. R. 279; s. c., 2 Dill. (C. C.) 534.

deemed to have committed an act of bankruptcy; and upon the petition of one or more of his creditors, who shall constitute one fourth thereof in number, and whose debts provable under the act shall aggregate one third,[1] an adjudication of bankruptcy may be made. The court might by injunction prevent the debtor and any other person in the mean time from making transfer or disposition of the goods.[2]

(*g*) *Superseded by Arrangement.*—The bankrupt proceedings might be superseded by arrangement. By agreement of three fourths of the creditors who had proved their claims the estate might be settled by trustees, under the direction of a committee of creditors. This had to be determined upon at the first meeting of the creditors.[3]

(*h*) *Criminal Liability.*—The act provides that if any debtor,

1. The petition must show affirmatively that the requisite creditors in number and amount have united therein. *In re* J. Young Scammon, 10 B. R. 146; s. c., 1 Cent. Law J. 328; *In re* James R. Keeler, 20 I. R. R. 82; *In re* Isaac Scull, 10 B. R. 232; s. c., 7 Ben. (D. C.) 371.

The verification is no part of the petition. *In re* Solomon Simmons, 10 B. R. 253; s. c., 1 Cent. Law J. 440.

The same number and amount of creditors must join in a proceeding to force a corporation into bankruptcy as are required for an individual. *In re* Leavenworth Savings Bank, 14 B. R. 92; *In re* Oregon B. & P. Co., 10 Pac. L. R. 103.

Involuntary proceedings in bankruptcy are not in any sense proceedings merely for the collection or security of the particular debt of the petitioning creditors. They are for the benefit of all the creditors. The fact that the petitioning creditor has a provable debt to the requisite amount is necessary to be shown, for two purposes: (1) to show that the alleged debtor occupies that relation; (2) to show that the petitioner has the requisite qualifications to commence the proceedings. Its office is then exhausted. *In re* Daniel Sheehan, 8 B. R. 345.

A creditor who has taken the property of a debtor upon a legal process can throw him into bankruptcy for that act. Coxe *v.* Hale, 8 B. R. 562; 10 Blatchf. (C. C.) 56.

2. Sec. 40, Rev. Stat. 5024 (Act 1841, sec. 1).

The injunction is temporary only, and is intended to restrain the disposition of the goods and property of the debtor until an adjudication can be had and an assignee appointed to take charge of the assets for the benefit of the creditors. Creditors *v.* Cozzens, 3, B. R. 281; Irving *v.* Hughes, 2 B. R. 62; s. c., 7 Am. Law Reg. 209.

But it continues until vacated by order of the court. *In re* Findley, 10 B. R. 21; s. c., 1 Cent. L. J. 433. See *In re* Bloss, 4 B. R. 147; Blackburn *v.* Stannard, 5 Law Rep. 250; *In re* Muller *v.* Bretano, 3 B. R. 359; s. c., 1 Deady (C. C.), 513.

3. Sec. 43, Rev. Stat. 5103.

The creditors may avail themselves of the provisions of this section either at the first meeting or at any time subsequent to the first meeting. *In re* Jones, 2 B. R. 59.

The title vested in the trustee chosen under this section is the same in all respects as the title vested in the assignee regularly appointed in proceedings in bankruptcy. *In re* Williams, 2 B. R. 229; s. c., Quar. L. Rev. 374.

If the committee exercise their discretion *mala fide* they may be controlled, but in the absence of fraud their direction to the trustee in regard to the settlement of the estate is conclusive. Certainly the discretion vested in them cannot be controlled by any meeting of the creditors called after their appointment. *In re* Jay Cooke & Co., 11 B. R. 7; s. c., 1 Cent. Law J. 580.

The trustees, under the direction of the committee, may, if so ordered by the court, proceed to settle the estate just as if there had been no adjudication of the bankruptcy, and the bankrupt was managing his own affairs, taking care always to secure legal protection to each of the creditors. If, under such a general order, the interposition of the court is needed for the examination of witnesses under oath, etc., the application therefor may be made to the register or judge. *In re* Darby, 4 B. R. 211, 309; *In re* Zinn, 4 B. R. 436; s. c., 40 How. Pr. (N. Y.) 461.

after the passage of the act,[1] secretes or conceals his property,[2] or mutilates or destroys it, or disposes or removes it with the intent to prevent it from coming into the hands of the assignee, or makes any payment, gift, etc., with like intent,[3] or spends any part of his estate in gaming, or fraudulently conceals property from his assignee, or if any fictitious debt be proved to be known to the bankrupt and he does not disclose the fact to the assignee, or if he attempts to account for property by fictitious losses or expenses, or within three months before commencement of proceedings he obtains credit by false pretences with intent to defraud,[4] or fraudulently pawns, etc., goods bought on credit and not paid for,[5] he shall be deemed guilty of a misdemeanor, and upon conviction be punished by imprisonment.

3. Effect upon State Laws.—All laws of the State which come within the provisions of the act passed by Congress are suspended during the existence of such act of Congress.[6]

The passage of such law by Congress does not repeal State laws, and on repeal of the federal law the State law is revived and need not be re-enacted.[7]

State insolvent laws are suspended even as between citizens of the same State.[8]

But if a State court has acquired jurisdiction, under a State law, of a case in insolvency, and is engaged in settling the debts and distributing the assets of the insolvent before or at the date at which the act of Congress upon the same subject takes effect, the State court may nevertheless proceed with the case to its final conclusion, and its action in the matter will be as valid as if no law upon the subject had been passed by Congress.[9]

1. Sec. 44, Rev. Stat. 5132.

2. *In re* Brooks, 5 Pac. L. R. 191; U. S. *v.* Smith, 13 B. R. 61.

3. U.S. *v.* Latorre. 8 Blatchf.(C.C.) 134.

4. To constitute the offence the accused must (1) obtain goods and chattels from some person or persons on credit, under the false pretence of carrying on business and dealing in the ordinary course of trade (2) such credit must be obtained within three months before the commencement of proceedings in bankruptcy; (3) such goods and chattels must be obtained on credit as aforesaid with intent to defraud. The obvious purpose of the statute is to prevent persons from obtaining goods on credit with the expectation on the part of those who give the credit that they will be disposed of in the ordinary course of business. U. S. *v.* Geary, 4 B. R. 534; U. S. *v.* Thomas, 7 B. R. 188; U. S. *v.* Penn., 13 B. R. 464.

5. The scope of this act is to punish frauds on creditors generally, and not on the particular creditor who sold the goods; and an indictment which charges fraud on one creditor only cannot be sustained. If the goods were obtained upon credit with the intent of disposing of them to raise money, the fraud on the seller would be the most obvious one; but the object of the statute seems to be to punish frauds on creditors generally, and it does not refer the intent to the time of disposing of the goods out of the usual course of trade, and at that time the fraud would not be of one creditor more than the rest. U. S. *v.* Clark, 4 B. R. 59; U. S. *v.* Penn., 13 B. R. 464.

The intent to defraud may be established by facts and circumstances. U. S. *v.* Smith, 13 B. R. 61; U. S. *v.* Bayer, 13 B. R. 88.

6 Commonwealth *v.* O'Hara, 1 B. R.; s. c., 6. A. L. Reg. 765; Perry *v.* Langley, 1 B. R. 559; s. c., 7 Am. L. Reg. 429; Van Nostrand *v.* Carr, 30 Md. 128; Martin *v.* Berry, 37 Cal. 208; Griswold *v.* Pratt, 49 Mass. 16; Rowe *v.* Page, 54 N. H. 190.

7. Lavender *v.* Gosnell, 12 B. R. 282.

8. Cassard *v.* Kroner, 4 B R. 569.

9. Longis *v.* Creditors, 20 La. Ann. 15; Martin *v.* Berry, 37 Cal. 208.

But the United States bankrupt act does not *ipso facto* supersede State laws for the collection of debts.[1] Nor does it supersede the State laws relating to the insolvent estates of lunatics, spendthrifts, or deceased persons.[2]

A law allowing assignments for the benefit of creditors is not superseded.[3] Neither is an insolvent law which merely protects the person from imprisonment.[4]

The law did not deprive State courts of jurisdiction over suits brought to decide rights of property between the bankrupt and his assignee and third persons.[5]

4. Power of States to Pass Bankrupt Laws.—Since the adoption of the Constitution of the United States, a State has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts within the meaning of the United States Constitution, art. 1, sec. 10, and provided there be no act of Congress in force to establish a uniform system of bankruptcy, conflicting with such law.[6]

But such laws can have no effect on contracts made before their enactment or beyond their territory.[7]

Nor do they apply to contracts made within the State between the citizen of that State and a citizen of another State.[8]

A discharge granted in one State has no effect over debts contracted in another State or by a citizen of such State.[9]

In Sanford *v.* Sanford, 58 N. Y. 241; s. c., 14 Am. R. 206, it was held that where, after the recovery of a judgment in the New York Supreme Court and an appeal to the General Term, the defendant was declared a bankrupt on his own application, the defendant could sustain a further appeal to the Court of Appeals.

1. Chandler *v.* Siddle, 10 B. R. 236; s. c., 3 Dill. (C. C.) 477.

2. Hawkins *v.* Learned, 54 N. H. 333; Mayer *v.* Hillman, 91 U. S. 496; Beck *v.* Backer, 65 Pa. St. 262; Maltbie *v.* Hotchkiss, 38 Conn. 80.

3. Cook *v.* Rodgers, 31 Mich. 391; s. c., 14 Am. L. Reg. 603.

4. Sullivan *v.* Haskell, Crabbe (D. C.), 525; s. c., 4 Penn. L. J. 171.

5. In Eyster *v.* Gaff, 91 U. S. 521, the court said: "The debtor of the bankrupt, or the man who contests the right to real or personal property with him, loses none of these rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not directed these courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not divest that of the State courts." These propositions are supported by the following cases decided by this court. Smith *v.* Mason, 14 Wall. (U. S.) 419; Marshall *v.* Knox, 16 Wall. (U. S.) 551; Mays *v.* Fritton, 20 Wall. (U. S.) 414; Doe *v.* Childress, 21 Wall. (U. S.) 642; See also Bishop *v.* Johnson, Woolw. (C. C.) 324.

6. See opinions of C. J. Marshall in Sturges *v.* Crowninshield, 4 Wheat. (U. S.), 196, and of J. Clifford in Baldwin *v.* Hale, 1 Wall. (U. S.) 222.

7. Cook *v.* Moffat, 5 How. (U. S.) 308.

8. Baldwin *v.* Hale, 1 Wall. (U. S.) 243; 2 Sto. Const. sec. 1390; Boyle *v.* Zacharie 6 Pet. (U. S.) 643.

9. Ogden *v.* Saunders, 12 Wheat. 213; Clay *v.* Smith, 3 Pet. (U. S.) 411.

A debt contracted and payable in England to one domiciled there has been held not to be affected by a colonial discharge. Bartley *v.* Hodges, 1 Best & Sm. 375.

Authorities for Bankruptcy.—Avery & Hobbs, Bankrupt Law of 1867; James, Bankrupt Law of 1867; Owen on Bankruptcy; Bump's Bankruptcy; 2 Kent Com.; 2 Black. Com.; Story on Constitution; Chitty on Bankruptcy.

BANKS AND BANKING. (See also AGENCY; BILLS AND NOTES; CHECKS; CORPORATIONS; NATIONAL BANKS; OFFICERS, PRIVATE CORPORATIONS; SAVINGS BANKS.)

1. Definition.—A bank is an institution, generally incorporated, authorized to receive deposits of money, to lend money, and to issue promissory notes,—usually known by the name of bank-notes,—or to perform some one or more of these functions.[1]

2. The Franchise and Powers thereunder.—At common law, the right of banking belongs to individual citizens and may be exercised by them at their pleasure, until restrained by legislative enactment.[2] This right may, however, be regulated and restrained by legislation, and the business of banking be made a corporate

1. Bouvier's Law Dict.

In 1866 the Congress of the United States thus defined a bank or banker: "Every incorporated or other bank, and every person, firm, or company having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or as a banker." Revised Statutes, sec. 3407, p. 669. And in Warren *v.* Shook, 91 U. S. 704, Mr. Justice Hunt says: "Having a place of business where deposits are received and paid out on checks, and where money is loaned upon security, is the substance of the business of a banker." See also Selden *v.* Equitable Trust Co., 94 U. S. 419.

In Curtis *v.* Leavitt, 15 N. Y. 9, 166, the court say: "Borrowing money to lend again is a part of the legitimate business of banking. A banker is a dealer in capital, an intermediate party between the borrower and lender. He borrows of one party and lends to another, and the difference between the terms at which he borrows and lends is the source and measure of his profits." The principal attributes of a bank are said to be the right to issue negotiable notes, discount notes, and receive deposits. People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 390; N. Y. Firemen's Ins. Co. *v.* Ely, 2 Cow. (N. Y.) 678; Bank for Savings *v.* The Collector, 3 Wall. (U. S.) 495. See also Phila. Loan Co. *v.* Towner, 13 Conn. 249; People *v.* The Railroad, 12 Mich. 389; Pratt *v.* Short, 79 N. Y. 440.

In Oulton *v.* Savings Institution, 17 Wall. (U. S.) 109, 118, Mr. Justice Clifford says: "Banks in the commercial sense are of three kinds, to wit, (1) of deposit, (2) of discount, (3) of circulation. Strictly speaking, the term 'bank' implies a place for the deposit of money, as that is the most obvious purpose of such an institution. Originally the business of banking consisted only in receiving deposits, such as bullion, plate, and the like, for safe-keeping until the depositor should see fit to draw it out for use; but the business, in the progress of events, was extended, and bankers assumed to discount bills and notes and to loan money on mortgage, pawn, or other security, and at a still later period to issue notes of their own intended as a circulating currency and a medium of exchange instead of gold and silver. Modern bankers frequently exercise any two or even all three of those functions, but it is still true that an institution prohibited from exercising any more than one of those functions is a bank in the strictest commercial sense."

2. Bank of Augusta *v.* Earle, 13 Pet.

franchise.[1] When laws upon the subject have been passed, the business must be conducted strictly in accordance with the provisions thereof.[2] Banking powers to be exercised by corporations must be expressly granted,[3] and only those powers can be exercised which are specifically granted by the act of incorporation or are necessary to carry into effect the powers expressly granted.[4]

(U. S.) 519, 596; Nance *v.* Hemphill, 1 Ala. 551. *Compare* Anderson *v.* Alexander, 7 Am. Law Reg. 173.

1. Atty.-General *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 596.

2. Curtis *v.* Leavitt, 15 N. Y. 9, 52; People *v.* Bartow, 6 Cow. (N. Y.) 290; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358.

Generally, banks come into existence either under a charter or special act of incorporation, or under a general organic law. See State *v.* Helmes, 2 Penn. (N. J.) 764; Anderson *v.* Alexander, 7 Am. Law Reg. 173; Commonwealth *v.* U. S. Bank, 2 Ashm. (Pa.) 349; Farrington *v.* Tennessee, 95 U. S. 679; Bank of the State *v.* Smith, 33 Mo. 364; Robinson *v.* Bank of Attica, 21 N. Y. 406.

3. State *v.* Washington Social Library Co., 11 Ohio, 96; State *v.* Stebbins, 1 Stewart (Ala.), 299; State *v.* Granville Alexandrian Society, 11 Ohio, 1.

A grant of power, in an act of incorporation, "to hold any estate, real or personal, and the same to sell, grant, or dispose of, or bind by mortgage, or in such other manner as they shall deem most proper, for the best interest of the corporation," does not confer upon such corporation banking privileges. State *v.* Granville Alexandrian Society, 11 Ohio, 1.

4. State *v.* Stebbins, 1 Stewart (Ala.), 299; Barnes *v.* Ontario Bank, 19 N. Y. 152; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358; Duncan *v.* Maryland Sav. Inst., 10 Gill & J. (Md) 299.

In Weckler *v.* First Nat'l Bank, 42 Md. 581, 590, Miller, J., says: "In deciding whether a corporation can make a particular contract, it must be considered, in the first place, whether its charter or some statute binding upon it forbids or permits it to make such a contract; and if the charter and valid statutory law are silent upon the subject, in the second place, whether the power to make such a contract may not be implied on the part of the corporation as directly or incidentally necessary to enable it to fulfil the purpose of its existence; or whether the contract is entirely foreign to that purpose; a corporation has no other powers than such as are specifically granted, or such as are necessary for the purpose of carrying into effect the powers expressly granted."

It has been held not to be incidental to the banking business, nor an implied power pertaining to a bank, to purchase State or other stocks for the purpose of selling them for profit. Talmage *v.* Pell, 3 Seld. (N. Y.) 328; Sackett's Harbor Bank *v.* Lewis County Bank, 11 Barb. (N. Y.) 213; Weckler *v.* First Nat'l Bank, 42 Md. 581. See, however, Farmers & Mechanics' Bank *v.* Champlain Trans. Co., 18 Vt. 131. But it may take and hold them as collateral security for a loan or debt, and sell them if necessary to save the debt. Third Nat'l Bank of Baltimore *v.* Boyd, 44 Md. 47; Talmage *v.* Pell, 3 Seld. (N. Y.) 328; Dearbourn *v.* Union Nat'l Bank, 53 Me. 273; Scott *v.* Crews, 2 S. Car. 522.

In First Nat'l Bank of Charlotte *v.* Nat'l Exch. Bank of Baltimore, 39 Md. 600, 611, the court say: "If, instead of purchasing the stocks in question for speculation or as an investment, the plaintiff acquired them by way of a compromise of a claim of $55,000, alleged to be due the defendant, and for the purpose of averting an apprehended loss on account of said claim, there is nothing either in the letter or spirit of the banking act to prevent, under such circumstances, a transfer of the stocks to the plaintiff."

A bank, chartered under the laws of the State of New York, has no implied power to subscribe for railroad stock. Nassau Bank *v.* Jones, 95 N. Y. 115; s. c., 47 Am. Rep. 14.

A bank empowered to discount negotiable notes has no power to purchase such notes. Farmers & Mechanics' Bank *v.* Baldwin, 23 Minn. 198; First Nat'l Bank of Rochester *v.* Pierson, 24 Minn. 140; s. c., 16 Alb. L. J. 319; Niagara County Bank *v.* Baker, 15 Ohio St. 68.

In Farmers & Mechanics' Bank *v.* Baldwin, 23 Minn. 298, the bank was authorized "to carry on the business of banking by discounting bills, notes, and other evidences of debt, by receiving deposits, by buying and selling gold and silver bullion, foreign coin, and foreign and inland bills of exchange, by loaning money on real and personal securities,

and by exercising such incidental powers as may be necessary to carry on such business." In a suit by the bank upon a promissory note, the defence was that the bank had no title in the note, since it had purchased it outright, instead of discounting it. *Held*, that the bank had no capacity to purchase promissory notes, and the attempted act of purchase was *ultra vires* and conferred no rights whatever. The court distinguish between purchasing and discounting, and say: "The power 'to carry on the business of banking, by discounting notes, bills, and other evidences of debt,' is only an authority to loan money thereon, with the right to deduct the legal rate of interest in advance. This right can be fully enjoyed without the possession of the unrestricted power of buying and dealing in such securities as choses in action and personal property. Though, as is urged by plaintiff, the bank acquires a title to discounted paper, and hence may, in a certain sense, be said to have purchased it, yet it is a purchase by discount —which is permitted—and does not involve the exercise of a power of purchase in any other way than by discount." The term "discounting" has, however, in other cases, been held to include purchase as well as loan, and the purchase of negotiable notes by a bank empowered to discount notes has been sustained. Pape *v.* Capitol Bank of Topeka, 20 Kans. 440; s. c., 27 Am. Rep. 183; Smith *v.* Exchange Bank, 26 Ohio St. 141. See also Fleckner *v.* Bank of United States, 8 Wheat. (U. S.) 338.

In Smith *v.* Exchange Bank, 26 Ohio St. 141, the defence was that the bank—a national bank—purchased the paper of the payees, and that it had no authority to make such purchase. But the court say: "It seems to be the idea of counsel making the objection, that negotiable paper, perfect and available in the hands of the holder, is not the subject of purchase by a national bank at any rate of discount. This view we think entirely erroneous. We see nothing in the act of Congress, nor in reason, why a borrower may not obtain the discount by a bank of the existing notes and bills of others of which he is the holder, as well as of his own paper, made directly to the bank."

In Fleckner *v.* Bank of United States, 8 Wheat. (U. S.) 338, the bank purchased from another bank a note which had passed to it through several parties from the original holder. The bank was forbidden by the ninth rule of the fundamental articles to deal or trade in anything except bills of exchange, gold or silver bullion, or to purchase any public debt whatsoever, or take more than six per cent on its loans or discounts. It was claimed that the purchase of this note was *ultra vires*, but the court held that such purchase was but a discount. Mr. Justice Story said: "The very clause now under consideration recognizes the power of the bank to make loans and discounts and restricts it from taking more than six per cent on such loans or discounts. But in what manner is the bank to loan? What is it to discount? Has it not a right to take an evidence of the debt, which arises from the loan? If it is to discount, must there not be some chose in action, or written evidence of a debt, payable at a future time, which is to be the subject of the discount? Nothing can be clearer than that by the language of the commercial world, and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon its advances or loans of money, upon negotiable paper, or other evidences of debt, payable at a future day, which are transferred to the bank. . . If, therefore, the discounting of a promissory note according to the usage of banks be a purchase, within the meaning of the ninth rule above stated (upon which serious doubts may well be entertained), it is a purchase by way of discount, and permitted by necessary inference, from the last clause in that rule."

Banks have implied power to borrow money, when necessary, in the prosecution of their business, and may issue the usual evidences of debt therefor. Curtis *v.* Leavitt, 15 N. Y. 9, 53; Barnes *v.* Ontario Bank, 19 N. Y. 152; Bank of Australasia *v.* Breillat, 6 Moore's P. C. C. 152, 194; Magee *v.* Mokelumne Hill, etc., Co., 5 Cal. 258.

In Rockwell *v.* Elkhorn Bank, 13 Wis. 653, the plaintiff sued the bank as the maker of a note given to him to secure a balance due for moneys deposited and for his salary as one of its officers. The defence was that the note was void because the bank had no authority to make and issue it. *Held*, that the bank was liable. Dixon, C. J., said: "It is a universally accepted principle that corporations authorized generally to engage in a particular business have, as an incident to such authority, the power to contract debts in the legitimate transaction of such business, unless they are restrained by their charters, or by statute, from doing so It is likewise an equally well acknowledged rule that the right to con-

Discounting and Usury.—Discounting or loaning money, with a deduction of the interest in advance, is a part of the general business of banking, and may be done even without specific authority conferred in the incorporating act.[1] And although a bank

tract debts carries with it the power to give negotiable notes or bills in payment or security for such debts, unless the corporations are in like manner prohibited. These positions are abundantly sustained by the authorities cited."

Dealing in checks, whether payable to bearer or to order, is also a part of the usual business of banking and is within the general powers of a bank without special mention. First Nat'l Bank *v.* Harris, 108 Mass. 514. And a bank has power to appoint an agent to transact the business which it may lawfully do. Bates *v.* Bank of State of Alabama, 2 Ala. 451; Planters', etc., Bank *v.* Andrews, 17 Ala. 404.

Banking Hours.—A banking house may prescribe reasonable rules and hours of business, within which its peculiar business with the public shall be done; but the reception or delivery of packages is not a matter peculiar to the banking business, and a bank has no right to declare that it will not receive packages from a common carrier after what it pleases to call "banking hours," and thereby thrust upon him a further continuance of his extraordinary responsibility. Marshall *v.* American Express Co., 7 Wis. 1: s. c., 73 Am. Dec. 381.

Power to Select Customers.—A bank is not bound to receive on deposit the money and funds of every person who offers, but may arbitrarily select its customers from among those that apply. Thatcher *v.* Bank of State, 5 Sandf. (N. Y.) 121.

Power to Hold Real Estate.—A bank is usually authorized by its charter to acquire, hold, and sell real estate that may be necessary for its banking purposes, or conveyed to it in satisfaction of a debt contracted in the course of its dealings, or purchased by it at a sale under a mortgage held by the bank. See Thomaston Bank *v.* Stimpson, 21 Me. 195; Jackson *v.* Brown, 5 Wend. (N. Y.) 590. But the holding, acquiring, and selling to any greater extent or for any other purpose than is therein set forth is illegal. Metropolitan Bank *v.* Godfrey, 23 Ill. 579; Morse on Banking (2d Ed.), 9.

The power to convey real estate includes the power to mortgage it; and the power to purchase real estate involves the power of subsequently selling it. Jackson *v.* Brown, 5 Wend. (N. Y.) 590.

In The Banks *v.* Poitiaux, 3 Rand. (Va.) 136, a bank authorized to hold as much real property as might be requisite for its immediate accommodation was held to have the right to buy up the land in the neighborhood of its banking house, to erect fire-proof buildings thereon, for the greater security of its own building, and then to sell these out to third persons.

In Baird *v.* Bank of Washington, 11 Serg. & Rawle (Pa.), 411, a bank was empowered to hold "such lands as are *bona fide* mortgaged or conveyed to it in satisfaction of debts previously contracted in the course of its dealing." *Held*, that the bank had a general power to commute debts really due for real estate, and was not limited to cases where any doubt existed as to the perfect safety of the debt.

Location.—As a general rule, a bank can only carry on its business in the place where it is authorized to do so by its charter. City Bank of Columbus *v.* Beach, 1 Blatchf. (U. S. C. C.) 425. In this case the court say: "It is essential to the convenience and security of the public that every bank should have a fixed, known, and permanent place of business, where it is bound to fulfil all its engagements, and where those who have dealings with it may safely resort for the purpose of fulfilling theirs. Bank charters, moreover, are not granted for the benefit of stockholders, but for the sake of those engaged in the productive and in mercantile pursuits; and though a bank may be wanted at one place, it may be unnecessary in another."

But it seems that agencies for specific purposes, such as the purchase of bills of exchange and the redemption of bills, may be established in other places. City Bank of Columbus *v.* Beach, 1 Blatchf. (C. C.) 425; Tombigbee R. R. Co. *v.* Kneeland, 4 How. (U. S.) 16.

In Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519, it was held that a bank incorporated by the State of Georgia and established in that State at Augusta, having power under its charter to deal in bills of exchange, could lawfully buy bills of exchange in the State of Alabama, through an agent employed there for that purpose.

1. Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338. See Bank of Savings *v.* The

is no more exempt from the operation of the usury laws than an individual, yet taking the legal interest upon loans in advance is not usurious.[1]

3. Depositors and Customers.—*Deposits, General and Special.*—Deposits made with bankers are either general or special.[2] A special deposit is the placing of something in the charge or custody of the bank, of which specific thing restitution must be made.[3] A deposit is deemed general unless there are circumstances to show it was meant to be special.[4] In the case of a general deposit the depositor parts with the title to his money and loans it to the bank, and the latter, in consideration of the loan and the right to use the money for its own profit, agrees to refund the same amount, or any part thereof, on demand.[5] As regards general deposits, the relation of banker and customer is that of debtor

Collector, 3 Wall. (U. S.) 495; State *v.* Boatmen's Sav. Inst., 48 Mo. 189.

1. Maine Bank *v.* Butts, 9 Mass. 49; Bates *v.* State Bank, 2 Ala. 451; N. Y. Firemen's Ins. Co. *v.* Ely, 2 Cow. (N.Y.) 678.

In Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, it was held that the bank, on discounting notes and bills, had a right to deduct the legal interest from the amount of the note or bill at the time it is discounted. Mr. Justice Story said: "The sole objection is the deduction of the interest from the amount of the note at the time it was discounted; and this, it is said, gives the bank at the rate of more than six per cent upon the sum actually carried to the credit of the Planters' Bank. If a transaction of this sort is to be deemed usurious, the same principle must apply with equal force to bank discounts generally, for the practice is believed to be universal; and probably few, if any, charters contain an express provision authorizing in terms the deduction of the interest in advance upon making loans or discounts. It has always been supposed that an authority to discount or make discounts did, from the very force of the terms, necessarily include an authority to take the interest in advance. . . Indeed, we do not know in what other sense the word 'discount' is to be interpreted. Even in England, where no statute authorizes bankers to make discounts, it has been solemnly adjudged that the taking of interest in advance by bankers upon loans in the ordinary course of business is not usurious."

The provision in the charter of a bank that it may discount notes and lend money "upon such terms and rates of interest as may be agreed upon" does not authorize the bank to charge more than the legal rate for money loaned. Simonton *v.* Lanier, 71 N. Car. 498. See also Creed *v.* Commercial Bank, 11 Ohio, 489; Seneca Co. Bank *v.* Lamb, 26 Barb. (N. Y.) 595.

Calculating interest upon the principle that ninety days are the fourth of a year and three days the tenth of a month, and discounting a note upon such a calculation, has been held usurious. That this principle of calculation was the one in general or universal use among banks cannot alter the law of the case. N. Y. Firemen's Ins. Co. *v.* Ely, 2 Cow. (N.Y.), 678, 704. See also Niagara Co. Bank *v.* Baker, 15 Ohio St. 68.

A bank, in discounting drafts at the highest rate allowed by law, may also charge the current rate of exchange as a compensation for collecting the drafts, provided this is not resorted to as a device to evade the statute against usury. Central Bank of Wisconsin *v.* St. John, 17 Wis. 157. See also Merchants' Bank *v.* Lassee, 33 Mo. 350; Bank of the United States *v.* Davis, 2 Hill (N. Y.), 451.

2. In Keene *v.* Collier, 1 Metc. (Ky.), 417, the court say: "Deposits of money with banking corporations, or with bankers, are either general or special. A special deposit is where the specific money, the very gold or silver coin, or bills deposited, are to be restored, and not an equivalent. A general deposit is said to amount to a mere loan, and the bank is to restore, not the same money, but an equivalent sum, whenever it is demanded."

3. Morse on Banking, 66.

4. Brahm *v.* Adkins, 77 Ill. 263; In the Matter of the Franklin Bank, 1 Paige Ch. (N. Y.) 249; s. c., 19 Am. Dec. 413.

5. Marine Bank *v.* Fulton Bank, 2 Wall. (U. S.) 256, per Mr. Justice Miller, who also says: "It is every-day busine-

and creditor, and not that of trustee and *cestui que trust.*[1] But in the case of a special deposit, the bank is merely the bailee of the depositor, has no authority to use the thing deposited, and

for bankers, who have vaults and safes, to receive on special deposit small packages of valuables, and even money, until the owners call for them."

1. Commercial Bank of Albany *v.* Hughes, 17 Wend. (N. Y.) 94; Marsh *v.* Oneida Central Bank, 34 Barb. (N. Y.) 298; Curtis *v.* Leavitt, 15 N. Y. 9; Ætna National Bank *v.* Fourth National Bank, 46 N. Y. 82; Foster *v.* Essex Bank, 17 Mass. 479; Bullard *v.* Randall, 1 Gray (Mass.), 605; Downes *v.* Phœnix Bank, 6 Hill (N. Y.), 297; Bank of the Republic *v.* Millard, 10 Wall. (U. S.) 152; Bank of Northern Liberties *v.* Jones, 42 Pa. St. 536; Crosskill *v.* Bower, 32 Beav. 86; Carr *v.* Carr, 2 Meriv. 541; Pott *v.* Clegg, 16 M. & W. 321; Sims *v.* Bond, 6 Barn. & Ad. 392.

In Foley *v.* Hill, 2 H. of L. Cas. 28, it was held that a bill in equity would not lie in favor of the depositor, against the banker, to adjust the account between them, when such account was neither long nor complicated, because there was no fiduciary relation between the parties. Lord Chancellor Cottenham said: "Money, when paid into a bank, ceases altogether to be the money of the principal. It is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit out of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal, but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands. That has been the subject of discussion in various cases, and that has been established to be the relative situation of banker and customer. That being established to be the relative situation of banker and customer, the banker is not an agent or factor, but he is a debtor."

So, in Bank of the Republic *v.* Millard, 10 Wall. (U. S.) 152, Mr. Justice Davis says: "It is no longer an open question in this court, since the decision in the cases of the Marine Bank *v.* The Fulton Bank, 2 Wall. (U. S.) 252, and of Thompson *v.* Riggs, 5 Wall. (U. S.) 663, that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it."

The money becomes the property of the depositary, and the depositor's claim is a mere *chose in action.* Marsh *v.* Oneida Central Bank, 34 Barb. (N. Y.) 298; Lund *v.* Seaman's Bank, 37 Barb. (N. Y.) 129; Chapman *v.* White, 6 N. Y. 412.

It is impressed with no trust in favor of the depositor, and there is no relation of *cestui que trust* and trustee between him and the banker. Carr *v.* National Security Bank, 107 Mass. 45; Farm Oil Co. *v.* Woodman, 1 Hun (N. Y.). 639; *In re* Bank of Madison, 5 Biss. (C. C.) 515.

A testator's bequest "of all my debts," meaning all debts owing to him, carries the balance standing to his credit with his banker. Carr *v.* Carr, 1 Mer. 541 n.

But a bank balance, although a simple contract debt, has been treated as equivalent to cash in hand, and a bequest of the testator's "money," or "money in hand," or "ready money," has been held to carry his balance at his banker's. Parker *v.* Marchant, 1 Y. & Coll. C. C. 290: affirmed, 1 Phil. C. C. 356; Varsey *v.* Reynolds, 5 Russ. 12; Beck *v.* Gillis, 9 Barb. (N. Y.) 35; Mann *v.* Mann, 1 Johns. Ch. (N. Y.) 231; Fryer *v.* Ranken,

must return it *in individuo* to the depositor.[1] Where a bank receives a special deposit, without compensation, it is bound only for slight care, and is responsible only for gross negligence.[2] But

11 Sim. 55; *In re* Powell's Trusts, 5 Jur. N. S. 331.

1. Story on Bailments (9th Ed.), § 88; Dawson *v.* The Real Estate Bank, 5 Ark. 283; Boyden *v.* Bank of Cape Fear, 65 N. C. 13; Marine Bank of Chicago *v.* Rushmore, 28 Ill. 463.

2. Foster *v.* Essex Bank, 17 Mass. 479; s. c., 9 Am. Dec. 168; Smith *v.* First Nat Bank, 99 Mass. 605; Chattahoochee Nat. Bank *v.* Schley, 58 Ga. 369; National Bank of Lyons *v.* Ocean Nat. Bank, 60 N. Y. 279; Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82; Lancaster Co. Bank *v.* Smith, 62 Pa. St. 47; Scott *v.* Nat. Bank of Chester Valley, 72 Pa. St. 471; First. Nat. Bank *v.* Graham, 79 Pa. St. 106; De Haven *v.* Kensington Nat. Bank, 81 Pa. St. 95; First Nat. Bank of Allentown *v.* Rex, 89 Pa. St. 308; First Nat. Bank of Carlisle *v.* Graham, 85 Pa. St. 91; Hale *v.* Rowallie, 8 Kans. 137; Manry *v.* Coyle, 34 Md. 235; Ray *v.* Bank of Kentucky, 10 Bush (Ky.), 344; Dunn *v.* Kyle, 14 Bush (Ky.), 134; Giblin *v.* McMullin, L. R. 2 P. C. App. 317; Whitney *v.* First Nat. Bank of Brattleboro, 55 Vt. 154; s. c., 3 Am. & Eng. Corp. Cas. 266.

In Foster *v.* Essex Bank, 17 Mass. 479, a cask of gold doubloons was deposited with the bank and weighed in the presence of the president and cashier, who gave a receipt therefor which stated that it was "Left at Essex Bank for safe-keeping." It had been the practice of the bank to receive special deposits, but no statement of special deposits was ever made by the cashier to the directors. The money was kept in the bank vaults, and with the same care with which the funds and property of the bank were kept. But the cashier of the bank, with the connivance of a subordinate clerk, stole a considerable amount of the money. *Held*, that the bank, being a gratuitous bailee, was not liable for the loss. The court said: "If this contract amounts only to a naked bailment, without reward and without any special undertaking, which in the civil and common law is called *depositum*, the bailee will be answerable only for gross negligence, which is considered equivalent to a breach of faith, as every one who receives the goods of another in deposit impliedly stipulates that he will take some degree of care of it. The degree of care which is necessary to avoid the imputation of bad faith is measured by the carefulness which the depositary uses towards his own property of a similar kind. . . . This was a mere naked bailment for the accommodation of the depositor, and without any advantage to the bank which can tend to increase its liability beyond the effect of such a contract. No control whatever of the chest, or of the gold contained in it, was left with the bank or its officers." The court further said that from such special bailments, even of money, in packages for safe-keeping, no consideration can be implied. The bank cannot use the deposit in its business, and no such profit or credit from the holding of the money can arise as will convert the bank into a bailee for hire or reward of any kind. The bailment in such case is purely gratuitous and for the benefit of the bailor, and no loss can be cast upon the bank for a larceny, unless there has been gross negligence in taking care of the deposit.

In Scott *v.* National Bank of Chester Valley, 72 Pa. St. 471, a bank received bonds on special deposit for safety from one of its customers and at his risk, and placed them in a safe with similar deposits from others, and with its own securities. The bonds were stolen by a teller who absconded, and it was then discovered that his accounts were false, and that he had robbed the bank during two years. *Held*, that the bank was a gratuitous bailee, and, not having been guilty of gross negligence, was not liable. Agnew, C. J., said: "This teller was both clerk and teller, but the taking of the bonds was not an act pertaining to his business as either clerk or teller. The bonds were left at the risk of the plaintiffs, and never entered into the business of the bank. Being a bailment merely for safe-keeping for the benefit of the bailor and without compensation, it is evident the dishonest act of the teller was in no way connected with his employment. Under these circumstances, the only ground of liability must arise in a knowledge of the bank, that the teller was an unfit person to be appointed or to be retained in its employment. So long as the bank was ignorant of the dishonesty of the teller, and trusted him with its own funds, confiding in his character for integrity, it would be a harsh rule that would hold it liable for an act not in the course of the business of the bank, or of the employment of the officer. There was no undertak-

if the bank receives compensation for the care and custody of the deposit, then its duties are those of an ordinary bailee for hire,

ing to the bailor that the officers should not steal. Of course there was a confidence that they would not, but not a promise that they should not. The case does not rest on a warranty or undertaking, but on gross negligence in care taking. Nothing short of a knowledge of the true character of the teller, or of reasonable grounds to suspect his integrity, followed by a neglect to remove him, can be said to be gross negligence without raising a contract for care higher than a gratuitous bailment can create." But see Leach *v.* Hale, 31 Iowa, 69, where a bank received on deposit United States bonds of one class, under an agreement to exchange them for those of another, and was held liable to the depositor for the value of the bonds on its refusal to deliver them, although acting without compensation.

In Whitney *v.* First National Bank of Brattleboro, 55 Vt. 154; s. c., 3 Am. & Eng. Corp. Cas. 266, the plaintiff delivered to the defendant bank $4000 of U. S. bonds and received this writing: "Received of J. D. Whitney $4000 for safekeeping as a special deposit. S. M. Waite, C." *Held*, that it was a naked deposit without reward; that the defendant would not be liable for the robbery or larceny of the bonds unless there was complicity or bad faith; that it was answerable only for fraud or for gross negligence; that the law demands good faith, and the same care of the plaintiff's bonds as defendant took of its own property of like character. The facts that the safe was left open during the transaction of business, that there was no gate in the passage-way from the rear of the banking-room behind the counter, that only one person was left in charge of the bank about noon each day, *held*, not to constitute gross negligence.

In an action against a bank for the loss of property intrusted to it as a gratuitous bailee, evidence of independent acts of negligence, not connected with the loss, is inadmissible. First Nat. Bank of Lyons *v.* Ocean Nat. Bank, 60 N. Y. 278.

In Lancaster Co. Nat. Bank *v.* Smith, 62 Pa. St. 47, the plaintiff, a stranger and unknown to the officers of the bank, left bonds in care of the bank, retaining a list of minute description. The bonds were inclosed in an envelope, indorsed with his name and residence, and put into a vault with valuable securities of the bank and others. Some time afterwards a stranger, representing himself to be the plaintiff, demanded the bonds from the teller, describing the bonds, giving the name and address accurately, but produced no other evidence of his identity. The teller delivered the bonds to him. The jury found a verdict for the plaintiff. *Held*, that the bank was liable upon proof of gross negligence or want of ordinary care, and that the question whether there was want of ordinary care was for the jury.

In First Nat. Bank of Carlisle *v.* Graham, 85 Pa. St. 91, a special deposit of bonds was left by a customer with the cashier of a bank for safe-keeping, with the knowledge of its directors, and the cashier gave a receipt therefor. The bonds were subsequently stolen, and the bank offered no satisfactory explanation of the manner of the theft. *Held*, that there was sufficient evidence of gross negligence to be submitted to the jury.

If a bank be accustomed to take special deposits of valuables, and this is known and acquiesced in by the directors, and the property deposited is lost by the gross carelessness of the bank, a liability ensues as though the deposit had been authorized by the terms of its charter. Foster *v.* Essex Bank, 17 Mass. 479; Lancaster Co. Nat. Bank *v.* Smith, 62 Pa. St. 47; First Nat. Bank of Carlisle *v.* Graham, 79 Pa. St. 106; Turner *v.* First Nat. Bank of Keokuk, 26 Iowa, 562; Smith *v.* First Nat. Bank of Westfield, 69 Mass. 605. But see Willey *v.* First Nat. Bank, 47 Vt. 546; Whitney *v.* First Nat. Bank, 50 Vt. 389.

And it is now well settled that national banks may receive such deposits, either gratuitously or otherwise. Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82; First Nat. Bank of Carlisle *v* Graham, 100 U. S. 699; Chattahoochee Nat. Bank *v.* Schely, 58 Ga. 369.

In Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82, Rapallo, J., says: "A reference to the history of banking discloses that the chief, and in some cases the only, deposits received by the early banks were special deposits of money, bullion, plate, etc., for safe-keeping, to be specifically returned to the depositor; that such was the character of the business done by the Bank of Venice (the earliest bank) and the old Bank of Amsterdam, and that the same business was done by the Goldsmiths of London and the Bank of England, and we know of none of the earlier banks where it was not done. . . And although in modern times the business of

and it is bound to use ordinary care, and is liable for ordinary negligence.[1]

Lien of Bank on Funds of Depositor.—The bank has a general lien on all moneys, funds, and paper securities of a depositor in its possession for the amount of the general balance.[2] But no

receiving general deposits has constituted the principal business of the banks, it cannot be said that the receiving of special deposits is so foreign to the banking business that corporations authorized to carry on that business are incapable of binding themselves by the receipt of such deposits. The numerous cases in the books relating to special deposits in banks disclose how extensively, even in modern times, this business has been and is carried on, and the general understanding in respect to it." In the case last cited, plaintiff delivered to the bank for safe keeping a package of railroad bonds, which the evidence tended to show were stolen in the daytime, when the bank was open. They were kept in a safe so situated as to be accessible to a person entering the bank from the street, while those in the bank were so placed that at times the safe was not in their view, and sometimes the door of the safe was left open. *Held*, that leaving the property thus exposed was gross negligence, and the fact that property of the bank was stolen at the same time from the same place was not conclusive against the allegation of gross negligence.

It is not negligence for a bank to intrust its cashier to select, hire, and pay out of his salary all the clerks and other servants employed in the banking-room, no negligence being shown in the selection of the cashier. Smith *v.* First Nat. Bank, 99 Mass. 605.

Where an employee of a bank occupies a position of trust and great importance, it is gross negligence in his employers not to discharge him when they discover that he has been engaged in speculating in stocks and grain. Prather *v.* Kean (C. C.), 26 Am. Law Reg. (N. S.) 92 (not yet reported).

1. Second Nat. Bank of Erie *v.* Ocean Nat. Bank, 11 Blatchf. (C.C.) 362; Prather *v.* Kean (C. C.), 26 Am. L. Reg. N. S. 92 (not yet reported); Story on Bailm. (9th Ed.) § 398.

In Second Nat. Bank of Erie *v.* Ocean Nat. Bank, 11 Blatchf. (C. C.) 362, the plaintiff, a bank, applied to the defendant, another bank, to perform the service of loaning some money for it, requesting that a proper charge be made to it for the service. As the plaintiff kept a large balance with the defendant, the latter decided to make no charge for the service, but did not communicate to the plaintiff the fact that it declined compensation. The loan was made on a deposit of securities with the defendant bank, which, while in its custody, were stolen from it. *Held*, that the latter bank was not a gratuitous bailee of the securities. Shipman, J., said: "As the plaintiff coupled the request to transact the business with a promise to pay a reasonable charge therefor, and the defendant accepted the agency without communicating to the plaintiff the fact that it declined compensation, the plaintiff had a right to assume that it accepted the position of an agent for hire. It is too late, after the enterprise has miscarried, for the defendant to repudiate this relation, and set up the claim that it was a mere voluntary or gratuitous service which it undertook to perform, and thus shelter the miscarriage under the rule of inferior duty which the law applies to agents who act without compensation."

Deposits as Collateral.—Where valuables are deposited as collateral for a loan, the bank is only bound to take ordinary care of them, and will accordingly not be held liable where burglars break in and steal the securities. Jenkins *v.* National Village Bank, 58 Me. 275; Fleming *v.* Northampton Bank, 62 How. Pr. (N. Y.) 177. But see Third Nat. Bank *v* Boyd, 44 Md. 47.

2. Ford *v.* Thornton, 3 Leigh (Va.) 695; McDowell *v.* Bank of Wilmington, 1 Harring. (Del.) 369; Beckwith *v.* Union Bank, 4 Sandf. (N. Y.) 604; Commercial Bank *v.* Hughes, 17 Wend. (N. Y.) 94; Marsh *v.* Oneida Bank, 34 Barb. (N. Y.) 298; State Bank *v.* Armstrong, 4 Dev. (N. Car.) 519; Bank of U. S. *v.* Macalester, 9 Pa. St. 475; National Bank *v.* Insurance Co., 104 U. S. 54; Scott *v.* Franklin, 15 East, 428; Bank of Metropolis *v.* New England Bank, 17 Pet. (U. S.) 174.

In Davis *v.* Bowsher, 5 Term R., 492, Lord Kenyon stated the general rule to be "that no person can take any paper securities out of the hands of his banker without paying him his general balance, unless such securities were delivered under a particular agreement which enables him so to do."

But in Fourth Nat. Bank *v.* City Nat.

lien arises on securities deposited with a bank for a special purpose. Such special purpose is inconsistent with the existence of a general lien.[1]

Bank, 68 Ill. 398, a banker's lien was said not to extend to the money left on deposit with him, but is confined to securities and valuables which may be in the banker's custody as collateral.

In *Louisiana* a banker cannot apply funds on deposit to the payment of the debts of the depositor without the latter's consent. Gordon *v.* Müchler, 14 Repr. 520; Morgan *v.* Lathrop. 12 La Ann. 257.

Right of Set-off against a Deposit.—A bank has the right of set-off as against a deposit only where the individual who is both depositor and debtor stands in both these characters alike in precisely the same relation toward the bank. Hence an individual deposit cannot be set off against a partnership debt. International Bank *v.* Jones, 7 Westn. Repr 693 (Sup. Ct. Ill.). See also Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145.

1. Bank of U. S. *v.* Macalester, 9 Pa. St. 475; Jarvis *v.* Rogers, 15 Mass. 397; Davis *v.* Bowsher. 5 T. R. 492; Brandao *v.* Barnett, 12 Cl. & Fin. 787. See also Grant on Bankers and Banking (4th Ed.) 244.

In Bank of United States *v.* Macalester, 9 Pa. St. 475. the bank received funds from the State of Illinois for the special purpose of paying the principal and interest of the debt contracted for constructing the Illinois and Michigan Canal. *Held*, that the bank could not refuse to apply the money to the holders of coupons issued by the State on the credit of the fund on the ground of a prior undischarged indebtedness of the State to the bank. The court say: "As long as the deposit is permitted to remain in their hands, they are the agents of the holders of the coupons to the amount of the fund set apart for their payment. It would be a culpable breach of trust to appropriate the fund to any other purpose, and especially to apply it to their own use." So in England a banker's lien does not attach on securities placed in his hands for a special purpose.

Where a customer deposited with his bankers a deed comprising two distinct properties, giving to them at the same time a memorandum pledging one of the properties as a security for a specific sum advanced, and also for his general balance, it was held that as the deposit of the deed was for a special purpose of giving a security upon one property only, the bankers could not claim a general lien, by virtue of the custom of bankers, on the other property. Wylde *v.* Radford, 33 L. J. Ch. 51.

And a banker has no lien on securities left with him by mistake or casually. Thus, where a lease was left with a banker as security for a further loan which was applied for but refused, no lien attached. Lucas *v.* Dorrien, 7 Taunt. 279.

So a bank upon declining to discount a note has no right to retain it for a general balance of account arising out of previous dealings with the customer. Petrie *v.* Myers, 54 How. Pr. (N. Y.) 513.

And a customer's security, specifically stated to be for the amount "which shall or may be found due on the balance of his account," was held to be security for the then existing balance only, and not to be applicable upon the subsequent floating balance. *In re* Medewe, 26 Beav. 588.

And it seems that in England bankers have no lien for the balance of their account against a customer on his plate deposited in his chest with them for safe custody. *Ex parte* Eyre, 1 Phillips Ch. 235; Brandao *v.* Barnett, 12 Cl. & Fin. 809; O'Connor *v.* Majoribanks, 4 M. & G. 435; Grant on Bankers and Banking (4th Ed.). 246.

And the banker has no lien upon property subject to a trust and improperly left with him by the trustee without notice of the trust, unless the *cestui que trust* has been guilty of such negligence as will deprive him of his right to the trust fund. Manningford *v.* Toleman, 1 Collyer, 670; Stackhouse *v.* Countess of Jersey, 30 L. J. Ch. 421; Locke *v.* Prescott, 32 Beav. 261; Murray *v.* Pinkett, 12 Cl. & Fin. 764.

Bankers have no lien upon railway stock deposited or pledged with them by a customer after notice that the stock is the property of another person. Locke *v.* Prescott, 32 Beav. 261.

Where trust funds were invested in shares of a banking company in the name of one of the trustees, who agreed to assign some of the shares standing in his name to the banking company, as security for repayment of advances which had been made to him by them, but no formal transfer was made. He afterwards became bankrupt. *Held*, that the banking company had no lien on any of the shares which had been held in trust. The Lord

If the depositor is credited for the amount deposited as so much money, the bank is liable to respond for that amount, although the funds deposited have in the mean time depreciated; and bills similar to those received, or even the identical ones, cannot be forced upon the customer in payment. The indebtedness can only be discharged in funds which the law makes a legal tender.[1]

Chancellor said: "The bank say 'you are a shareholder in this concern in respect of these shares, but we have advanced you money, not as a shareholder, not as a partner, but as a person borrowing money of the bank; and because you owe us money we insist upon retaining these shares standing in your name to repay the balance which is due from you to the bank.' Whether that might or might not prevail if these shares belonged to him individually is another matter; but is that to prevail on the assumed fact, which is now established, that he had not these shares beneficially, but that he was a trustee of them for others? The doctrine would be this, that if property be vested in a person in trust, if that property in any way comes under the control of persons to whom he is indebted, those persons can pay the trustee's debt out of the trust money!" Murray *v.* Pinkett, 12 Cl. & Fin. 764, 785.

But if the trust property consist of bills or notes payable to bearer, or other negotiable instruments which pass by delivery and come into the banker's hands *bona fide* and without notice of the trust, and without being appropriated to any special purpose, the general lien of the banker attaches. Barnett *v.* Brandao, 6 M. & G. 630; s. c., 12 Cl. & Fin. 787; Collins *v.* Martin, 1 Bos. & Pull. 648; Rumball *v.* Metropolitan Bank, L. R. 22 Q. B. D. 194.

In Barnett *v.* Brandao, 6 M. & G. 666, Lord Denman, C. J., says: "Negotiable securities, the title to which is transferred by delivery to a *bona-fide* holder for value, . . are to be deemed, with respect to such holders, and to the extent of the rights acquired by them by the transfer, as the property of the person transferring, whether the transfer be express or implied; and the *bona-fide* holder acquires a title which did not belong to the person who gave it to him. The same rule which prevails as to bills or notes payable to bearer, placed in the hands of a banker to be received, would apply to exchequer bills transferable to bearer: in both, if the banker is a creditor on a general balance, and *bona fide* receives them as the property of the customer, he is entitled to a lien."

And in Rumball *v.* Metropolitan Bank, L. R. 2 Q. B. D. 197, the court recognized the general principle that "if a party possessed of a security purporting on the face of it to be transferable by delivery chooses to leave such security in the hands of a third party, and the latter makes it over to a *bona-fide* holder for value, the true owner must be taken to have brought about his own loss, and cannot recover it back."

No lien will attach on funds of a depositor until some indebtedness is actually in existence and matured. Thus, if a bank holds the note of a depositor, which it discounted for him, it has no valid lien until the note matures. Beckwith *v.* Union Bank, 4 Sandf. (N. Y.) 604; Giles *v.* Perkins, 9 East, 12, per Lord Ellenborough; Jordan *v.* National Bank, 12 Hun (N. Y.), 512.

But in Ford's Admr. *v.* Thornton, 3 Leigh (Va.), 695, the bank had discounted a note of a depositor who died before its maturity. At the time of his death the amount of his deposit exceeded the amount of the note. *Held*, that upon proof of danger of insolvency of the estate the bank had a right in equity to retain enough of the deposit to meet the note.

After a lien has been established, the bank will lose it by taking security for the debt payable at a distant day. Hewison *v.* Guthrie, 2 Bing (N. Car.) 755; Cowell *v.* Simpson, 16 Ves. Jr. 278.

1. Thompson *v.* Riggs, 5 Wall. (U. S.) 663; Corbit *v.* Bank of Smyrna, 2 Harring. (Del.) 235; Marine Bank of Chicago *v.* Chandler, 27 Ill. 525; Marine Bank of Chicago *v.* Birney, 28 Ill. 90; Marine Bank of Chicago *v.* Rushmore, 28 Ill. 463; Willetts *v.* Paine, 43 Ill. 433; Levy *v.* Bank of United States, 1 Binn. (Pa.) 27.

Where a bank undertakes to collect for a customer, and upon receipt of the funds mixes them with the general funds of the bank, the money collected becomes a deposit to the credit of the customer, and if the funds become depreciated the bank must suffer the loss. Marine Bank of Chicago *v.* Rushmore, 28 Ill. 463.

In Bank of the Commonwealth of Kentucky *v.* Wister, 2 Pet. (U. S.) 318, the deposit was made in bills of the bank itself, which were at the time greatly

Deposits in Forged Bills or Base Coin.—A deposit in forged bills or base coin creates no indebtedness, although credited to the depositor's account; for payment in such material could not discharge a debt and cannot create one.[1]

But a bank is bound to know its own notes; and where it receives and gives credit for notes purporting to be its own, it cannot, after the lapse of a reasonable time, repudiate them on the ground that they were forged or fraudulently altered.[2]

depreciated, and a certificate given that so much money had been deposited. When the certificate was presented to the bank, the cashier offered to pay the amount in the notes of the bank, which offer was refused. The act of incorporation provided that the bank should pay its bills in gold or silver. *Held*, that payment must be made in full in lawful money of the United States.

The right of the depositor is not, however, necessarily to be paid in gold or silver, but only in such money as is by the law of the land legal tender at the time. Carpenter *v.* Northfield Bank, 39 Vt. 46; Sandford *v.* Hays, 52 Pa. St. 26; Gumbel *v.* Abrams, 20 La. Ann. 568.

In Sandford *v.* Hays, 52 Pa. St. 26, a certificate of deposit of gold, payable "in like funds with interest," was held to be redeemable in treasury notes of the United States.

1. Bank of United States *v.* Bank of Georgia, 10 Wheat. (U. S.) 333; Markle *v.* Hatfield, 2 Johns. (N. Y.) 455; Willson *v.* Foree, 6 Johns. (N. Y.) 110; Corbit *v.* Bank of Smyrna, 2 Harring. (Del.) 235; Gloucester Bank *v.* Salem Bank, 17 Mass. 33; Young *v.* Adams, 6 Mass. 182; Jones *v.* Ryde, 5 Taunt. 488.

2. Bank of United States *v.* Bank of Georgia, 10 Wheat. (U. S.) 333; Gloucester Bank *v.* Salem Bank, 17 Mass. 33.

In Bank of U. S. *v.* Bank of Georgia, 10 Wheat. (U. S.) 333, notes of the Bank of Georgia which had been fraudulently altered were presented to it by the Bank of the United States, the *bona-fide* holders. The notes were received as genuine, and placed to the general account of the Bank of the United States. The forgery was not discovered until nineteen days afterwards, when notice thereof was given, and a tender of the notes made and refused. *Held*, that the Bank of the United States was entitled to recover the amount of this deposit. Mr. Justice Story said: Under such circumstances, the receipt by a bank of forged notes, purporting to be its own, must be deemed an adoption of them. It has the means of knowing if they are genuine; if these means are not employed, it is certainly evidence of a neglect of that duty which the public have a right to require. And in respect to persons equally innocent, where one is bound to know and act upon his knowledge, and the other has no means of knowledge, there seems to be no reason for burthening the latter with any loss in exoneration of the former. There is nothing unconscientious in retaining the sum received from the bank in payment of such notes, which its own acts have deliberately assumed to be genuine. If this doctrine be applicable to ordinary cases, it must apply with greater strength to cases where the forgery has not been detected until after a considerable lapse of time. The holder, under such circumstances, may not be able to ascertain from whom he received them, or the situation of the other parties may be essentially changed."

In Gloucester Bank *v.* Salem Bank, 17 Mass. 33, forged notes of the latter bank had been paid to the former, and upon a subsequent discovery the amount was sought to be recovered back, but no notice of the doubtful character of the notes was given until fifteen days after their receipt. *Held*, that by receiving and paying the notes the plaintiffs had adopted them as their own and could not recover. The court said: "The true rule is that the party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not, he is negligent; and negligence will defeat his right of action. This principle will apply in all cases where forged notes have been received, but certainly with more strength when the party receiving them is the one purporting to be bound to pay. For he knows better than any other whether they are his notes or not; and if he pays them, or receives them in payment, and continues silent, after he has had sufficient opportunity to examine them, he should be considered as having adopted them as his own."

Right of Depositor to Inspect Books.—In Union Bank *v.* Knapp, 3 Pick. (Mass.) 108, the court say: "We are of opinion

Repayment of Deposits.—The customer cannot maintain an action for his deposit without a previous demand for its repayment either by check or otherwise.[1]

that the books are to be open for the several depositors, and that the bank is bound to produce them on all proper occasions. The officers of the bank having the charge of the books are to be so far considered as agents for both parties." See also Watson *v.* Phœnix Bank, 8 Metc. (Mass.) 221. And the state of the customer's account must not be disclosed, except on a reasonable and proper occasion.

Hardy *v.* Veasey, L. R. 3 Exch. 107. In this case the plaintiff had an overdrawn account at the bank of the defendants, who had in their hands certain checks of the plaintiff's, which there were no assets to meet. The defendant's manager communicated with the plaintiff, who promised before the evening of that day to deposit a sufficient sum to meet the checks, but failed to do so. The manager afterwards, without the plaintiff's authority, communicated to one Mutton, a money-lender of the neighborhood, the state of the account, with a view of obtaining assistance for the plaintiff. The court below stated to the jury that the question for them was, "whether the communication to Mutton of the state of the plaintiff's account was an officious and unjustifiable one," and added: "If it was made with a reasonable hope and an honest intention of getting assistance for the plaintiff, I should doubt whether the action is maintainable." *Held*, that the question whether the disclosure was made upon a reasonable and proper occasion was rightly left to the jury, and that they had not been misdirected.

Where a check is presented for payment, and there are not sufficient assets of the drawer's in the banker's hands, the banker has no right to disclose the amount of the deficiency, but cannot go further than say, "Not sufficient assets." Foster *v.* Bank of London, 3 Foster & Finlason, 214.

It has been doubted, however, whether an action will lie at all against a banker, unless the customer has been injured by the act of disclosure. Hardy *v.* Veasey, L. R. 3 Exch. 107.

But a banker as a witness must declare what the balance of his customer was at any given date, as the knowledge cannot be regarded as a "confidential communication." Loyd *v.* Freshfield, 2 C. & P. 325. See also Forbe's Case, 41 L. J. Ch. 467.

1. Downes *v.* The Phœnix Bank, 6 Hill (N. Y.), 297; Adams *v.* Orange Co. Bank, 17 Wend. (N. Y.) 514; Johnson *v.* Farmers' Bank, 1 Harring. (Del.) 117; Girard Bank *v.* Bank of Penn. Township, 39 Pa. St. 92; Union Bank *v.* Planter's Bank, 9 Gill & J. (Md.) 439; Bellows Falls Bank *v.* Rutland Co. Bank, 40 Vt. 377; Branch *v.* Dawson, 23 N. Westn. Repr. 552.

In Branch *v.* Dawson, 33 Minn. 399, the court say: "By universal understanding on the part of bankers and depositors there is a condition attached to the undertaking of the bank. It is not its duty, as it is that of an ordinary debtor, to seek the creditor and pay him wherever found; it does not undertake to pay without respect to place,—to pay absolutely and immediately. But its engagement is to pay at its banking-house, when payment shall be called for there. Everybody understands that to be what it assumes to do. . . . This being the understanding upon which the deposit is made, it is parcel of the bank's contract to repay that, as a condition precedent to its duty to repay, the depositor shall call upon it to do so at its banking-house, and there is no default of the bank until such call is made."

In Downes *v.* The Phœnix Bank, 6 Hill (N. Y.), 297, it was held that where a bank receives money on deposit in the ordinary way from one of its customers, the latter cannot maintain an action for it without a previous demand either by check or otherwise. The court say: "We are reminded that where the promise is to pay on demand, the bringing of the action is a sufficient request. If that were a new question I think the courts would not again fall into the absurdity of admitting that there must be a demand, and still holding that a suit may be commenced without any prior request. They would either say that no demand was necessary, or else that it was a condition precedent to the right of action. It is an anomaly in the law that the breach of the defendant's contract should be made out by the very fact of suing him upon it. In all other cases there must be a breach before suit brought. The rule ought not to be extended to cases which do not fall precisely within it. Here the contract to be implied from the usual course of the business is that the banker shall keep the money until it is called for."

The Statute of Limitations runs against the indebtedness of the banker like any other debt.[1]

Bank books.—The entry in the bank-book by the proper officer of the amount and date of the deposit is *prima-facie* evidence that the bank received the amount, and binds the bank like any other

But where the bank suspends payment and closes its doors against its creditors, it waives the necessity of a demand, and a depositor may maintain an action to recover the mount of his deposit without first making a demand of payment. Watson *v.* Phœnix Bank, 8 Metc. (Mass.) 217. In this case the court say: "When money is deposited in a bank to be drawn at the pleasure of the depositor, the bank is not liable to an action without a previous demand. The request is parcel of the contract, and must be proved. The bank agrees to pay to the order of the depositor; but if it were liable to a suit without previous demand, it would be under the necessity of refusing all deposits, or of making special contracts in every case. The duties of the parties are reciprocal; the one to pay on demand, the other to make such demand before a right of action accrues. But where the bank has suspended payment and closed its doors, and refuses to admit its creditors, there a demand would be unavailing, and the bank, by its acts, has waived the necessity of a demand." See also Cooper *v.* Mowry, 16 Mass. 7.

And notice by the bank to the depositor that his claim will not be paid—Farmers & Mechanics' Bank *v.* Planter's Bank, 10 Gill & J (Md.) 422—and rendering him an account claiming the money as its own—Bank of Mo. *v.* Benoist, 10 Mo. 519—and discontinuing banking operations with knowledge thereof by the depositor—Planter's Bank *v.* Farmers & Mechanics' Bank, 8 Gill & J. (Md.) 449—have been held to be acts on the part of the bank which waive demand by the depositor.

The bank has authority to pay its customers' bills, notes, and acceptances drawn on or made payable at the bank. Kymer *v.* Laurie, 18 L. J. (Q. B.) 218; Thatcher *v.* Bank, 5 Sandf. (N. Y.) 121; Griffin *v.* Rice, 1 Hilt. (N. Y.) 184; Mandeville *v.* Union Bank, 9 Cranch (U. S.), 9.

The customer may draw out his funds in such sums as he may find convenient. Munn *v.* Burch, 25 Ill. 35.

In Chicago Ins. Co. *v.* Stanford, 28 Ill. 168. Caton, C. J., says: "But until the account is thus closed the agreement to pay in parcels continues, and each check drawn *bona fide* and not for the mere purpose of creating separate demands does create a separate demand for which a separate action may be brought by the holder of the check whether that holder be the depositor or another as distinct and separate from the general account as would be separate promissory notes for the same amounts. Where there is a real controversy as to the account between the bank and the depositor, and the latter for the mere purpose of vexation and not in the regular course of business should draw small checks that he might commence separate suits upon them, the courts would no doubt find an efficient remedy."

1. Branch *v.* Dawson, 33 Minn. 399; Pott *v.* Clegg, 16 M. & W. 321.

But when the statute begins to run is not conclusively settled. The weight of authority seems to be that it begins to run only from the time the depositor has demanded payment, when his right of action accrues, or until some act of the depositor or some act of the bank made known to the depositor has dispensed with such demand. Girard Bank *v.* Bank of Penn. Township, 39 Pa. St. 92; Planter's Bank *v.* Farmers and Mechanics' Bank, 8 Gill & J (Md.) 449; Farmers and Mechanics' Bank *v.* Planter's Bank, 10 Gill & J. (Md.) 422; Branch *v.* Dawson, 33 Minn. 399.

It has been held, however, that it begins to run from the date of the last balancing of accounts. Union Bank *v.* Knapp, 3 Pick. (Mass.) 96. See also Pott *v.* Clegg, 16 Mee. & W. 321; Bridgman *v.* Gill, 24 Beav. 302.

In Adams *v.* Orange County Bank, 17 Wend. (N. Y.) 514, the publication of a list of unclaimed deposits, in pursuance of a statute requiring such publication, was held to be an acknowledgment of indebtedness to the depositors therein named from which a new promise could be implied to prevent the running of the Statute of Limitations; and the court added that the defendants, not having accompanied their published statement with notice of any defence, must be deemed to have waived it.

In case of the suspension of the bank, the statute runs from the time the suspension is known to the depositors Union Bank *v.* Planter's Bank, 9 Gill & J. (Md.) 439.

form of receipt.[1] But the entry is only a receipt, and is open to explanation by evidence *aliunde*, and if shown to be a mistake is no longer binding upon the bank.[2]

The receipt is also open to correction in favor of the depositor, if it be erroneous.[3]

1. Asher *v.* Park Bank, 7 Alb. L. J. 43; Shaw *v.* Dartnall, 6 B. & C. 57; Commercial Bank *v.* Rhind, 1 Macq. H. L. Cas. 643; Union Bank *v.* Knapp, 3 Pick. (Mass.) 96.

2. Shaw *v.* Picton, 4 B. & C. 715; Mechanics and Farmers' Bank *v.* Smith, 19 Johns. (N. Y.) 115.

Where a mistake is alleged to have been made in a customer's bank-book by the banker's clerk, the question is for the jury upon the evidence. Snead *v.* Williams. 9 L. T. (N. S.) 115.

But in Manhattan Co. *v.* Lydig, 4 Johns. (N. Y.) 377, 389, the court say: "If the dealer's book accompany the deposits, and the credit be then given when the deposit is made, it becomes an original entry, and would be conclusive on the bank; if, however, the book is sent to be written up afterwards, it is not an original entry, and may be examined into."

3. In Mechanics & Farmers' Bank *v.* Smith, 19 Johns. (N.Y.) 115, the teller had entered in plaintiff's bank-book the sum of $123.18 as the amount of the deposit, which was the sum mentioned on the deposit slip, but plaintiff claimed $100 more had actually been deposited. A rule of the bank was: "All payments made or received at the bank must be examined at the time." *Held*, that the entry of the teller was not conclusive, and that the rule of the bank did not prevent the depositor from showing afterwards that there had been a mistake. See also Anderson *v.* Leverick (Sup. Ct. Iowa), 30 N. Westn. Repr. 39.

In Weisser *v.* Denison, 10 N. Y. 68, checks forged by the confidential clerk of the depositor were paid by the bank, charged to the depositor in his pass-book, the book balanced, and, with the forged vouchers among others, returned to the clerk, who examined the account at the request of the depositor and reported it correct. The depositor did not discover the forgeries until several months afterwards, when he immediately made them known to the bank. *Held*, in an action to recover the balance of the deposit, that the bank could not retain the amount of the forged checks. Johnson, J., said: "The entry of debits for payments made in a bank-book and striking a balance is undoubtedly a statement of the account, and the delivery of it to the dealer and his retention of it without objection, as in other cases of accounts rendered, gives to this statement of accounts the character of a stated account. But a stated account is liable to be opened by evidence of fraud or of mistake; and when the payments represented by the checks in question were sworn by Weisser's representatives not to have been made to him or by his order or authority, the proof of payment afforded by the stated account was overthrown and Weisser's right to the money remained unaffected. . . . He was under no contract with the bank to examine with diligence his returned checks and bank-book. In contemplation of law the book was balanced and the checks returned for his protection, not for theirs, and when he failed to examine it the whole consequence was that the burden of proof was shifted. He became bound to show that the account was wrongly stated. This right he preserved so long as his claim was not barred by the Statute of Limitations."

In Manufacturers' National Bank *v.* Barnes, 65 Ill. 69, a depositor's clerk who had a power of attorney to draw checks against the depositor's account for fifteen days only continued to draw checks without the knowledge of the depositor after the time had expired, all of which were honored by the bank. The bank-book was several times written up and returned to the depositor, who did not detect the fraud until several months afterwards. *Held*, that the bank was liable for the amount of the checks drawn by the clerk after his agency ceased. It was urged that the bank was only liable for the amount checked out by the clerk before the bank-book of the plaintiff was written up the first time, as from that date the bank had a right to presume the clerk had authority to draw checks But the court said: "The bank knew, by a document in its own possession, and which had been made the subject of a special conversation with one of its officers, that the clerk had authority to draw checks only for fifteen days. . . . The bank was guilty of great negligence in paying checks of the clerk drawn after that period, and cannot be excused merely because the plaintiff failed to examine the returned checks, which he had a right to

Certificates of Deposit.—A certificate of deposit is the written acknowledgment of the bank that it has received from a certain person a certain sum on deposit.[1] Ordinarily it is a simple receipt of the bank, in negotiable form, for so many dollars, and has been held to be in fact equivalent to a promissory note.[2]

presume had been drawn by himself alone." See also Welsh *v.* German American Bank, 73 N. Y. 424.

In Williamson *v.* Williamson, L. R. 7 Eq. 542, a depositor had largely overdrawn his account, and the banker, in writing up the bank-book at the end of six months, had made certain charges for interest and commissions on his advances, which were explained to the agent of the depositor, who was sick at the time. *Held*, that the lapse of several months without complaint on behalf of the depositor was conclusive evidence of his acquiescence in the charges made.

Deposit Ticket.—A deposit ticket or memorandum stating the amount deposited with and assumed to be received by the bank is only *prima-facie* evidence of the fact it recites, and may be contradicted by parol evidence. Weisinger *v.* Bank of Gallatin, 10 Lea (Tenn.), 330; s. c., 3 Am. & Eng. Corp. Cas. 248.

1. Morse on Banks and Banking, 63.

2. Leavitt *v.* Palmer, 3 Comst. (N. Y.) 19; Barnes *v.* Ontario Bank, 19 N. Y. 152; Bank of New Orleans *v.* Merrill, 2 Hill (N. Y.), 295; Pardee *v.* Fish, 60 N. Y. 265; Cate *v.* Patterson, 25 Mich. 191; Craig *v.* State of Missouri, 4 Pet. (U. S.), 433; Miller *v.* Austen, 13 How. (U. S.) 218; Kilgore *v.* Bulkley, 14 Conn. 362; Cushman *v.* Ill. Starch Co., 79 Ill. 281; Nat. State Bank *v.* Ringel, 51 Ind. 393; Johnson *v.* Henderson, 76 N. Car. 227; Lindsey *v.* McClelland, 18 Wis 481; White *v.* Franklin Bank, 22 Pick. (Mass.) 181.

In Poorman *v.* Mills, 35 Cal. 118, the court say: "A certificate of deposit, issued by a bank or other depositary to a depositor upon his paying to the former a sum of money on general or, as it is sometimes called, irregular deposit, stating that the depositor has deposited that sum payable to himself or order on demand, or on return of the certificate properly indorsed, is a promissory note." And in Miller *v.* Austen, 13 How. (U. S.) 218, 228, Catron, J., says: "The established doctrine is that a promise to deliver or to be accountable for so much money is a good bill or note. Here the sum is certain and the promise direct. Every reason exists why the indorser of this paper should be held responsible to his indorsee, that can prevail in cases where the paper indorsed is in the ordinary form of a promissory note."

It has, however, been held in some cases that a certificate of deposit is not a promissory note so as to make an indorser liable on his indorsement to the holder, but is a special agreement to pay the deposit to any one who should present the certificate and the depositor's order. Patterson *v.* Poindexter, 6 W. & S. (Pa.) 227; Chamley *v.* Dulles, 8 W. & S. (Pa.) 353; Lebanon Bank *v.* Mangan, 28 Pa. St. 452; O'Neill *v.* Bradford, 1 Pinney (Wis.), 390; s. c., 42 Am. Dec. 574; Talladega Ins. Co. *v.* Woodward, 44 Ala. 287; Sibree *v.* Tripp, 15 M. & W. 23.

In Patterson *v.* Poindexter, 6 W. & S. (Pa.) 227, an action was brought against an indorser upon a certificate worded as follows: "No. 716. Mississippi Union Bank, Jackson, Miss., July 2, 1839. I hereby certify that C. S. Tarply has deposited in this bank, payable twelve months from 1st May, 1839, with five per cent interest till due per annum, $3,691.63 for the use of R. Patterson & Co., and payable only to their order upon the return of this certificate. C. W. Clifton, Ass't Cashier." *Held*, that the certificate was not a promissory note. "Nothing is a promissory note," said Gibson, C. J., "in which the promise to pay is merely inferential; or as Mr. Justice Bosanquet expressed it in Home *v.* Redfearn, 6 Scott, 267, in which there is 'no more than a simple acknowledgment of the debt, with such a promise to pay as the law will imply.' . . . That the instrument before us is not a commercial one is decisive of the cause. For purposes of transfer merely, it was payable to order; for purposes of commercial responsibility, it was not negotiable. It was a special agreement to pay the deposit to any one who should present the certificate and the depositor's order."

In Miller *v.* Austen, 13 How. (U. S.) 218, the certificate was similarly worded, but the court reached a different conclusion. The weight of authority, accordingly, is that making a certificate of deposit payable to bearer or order denotes an intention that the obligation shall be negotiable, which can only be carried into effect by treating it as a promissory note. It was held in Curran *v.* Witter

Where the certificate is in the nature of a promissory note, it is subject to the same rules that control other negotiable paper.[1]

(Wis.), 31 N. Westn. Repr. 705, that a certificate of deposit issued by a banker in the ordinary form of such instrument is in substance and legal effect a negotiable promissory note. Gregg *v.* Union County Bank, 87 Ind. 238; Brown *v.* McElroy, 52 Ind. 404; Kilgore *v.* Bulkley, 14 Conn. 362; Lynch *v.* Goldsmith, 64 Ga. 42; Cassidy *v.* First Nat'l Bank of Fairbault, 30 Minn. 86; Thayer *v.* Briggs, 1 Clarke (Iowa), 434; B. R. *v.* Maryland, 2 Hilton (N. Y.), 295. See also Jacquin *v.* Warren, 40 Ill. 459; Cummings *v.* Freeman, 2 Humph. (Tenn.) 143; Fleming *v.* Burge, 6 Ala. 373; Hart *v.* Life Assoc., 54 Ala. 495. And in Lang *v.* Straus, 7 N. Eastn. Repr. 763. it was held that a certificate of deposit contains, by implication of law, a promise to repay the depositor his money, and is a written contract for the payment of money. See also First Nat'l Bank *v.* Clark, 42 Hun (N. Y), 16.

1. Johnson *v.* Henderson, 76 N. Car. 227; Pardee *v.* Fish, 60 N. Y. 265; Poorman *v.* Mills, 35 Cal. 118; Hunt *v.* Divine, 37 Ill. 137.

A certificate of deposit is negotiable, if expressed in negotiable words. Nat. Bank *v.* Ringel, 51 Ind. 393; Johnson *v.* Henderson, 76 N. Car. 227; Bank of Peru *v.* Farnsworth, 18 Ill. 563; Laughlin *v.* Marshall, 19 Ill. 390; Carey *v.* McDougald, 7 Ga. 84; Drake *v.* Markle, 21 Ind. 433.

A certificate of deposit in the usual form, payable to the depositor's order, "in current bank-notes," is negotiable, and the indorser thereof is liable as upon a note. Pardee *v.* Fish, 60 N. Y. 265. The court said the phrase "current bank-notes" meant "notes or bills used in general circulation as money, and constituted the general currency of the country recognized by law at the time and place where payment was to be made and demanded." But it has been held that if the certificate be payable "in current funds" it is not negotiable, because it is not made payable in money, but in that which at the time of payment may or may not be money. National State Bank *v.* Ringel, 51 Ind. 393; Johnson *v.* Henderson, 76 N Car. 227; Platt *v.* Bank, 17 Wis. 223; Lindsey *v.* McClelland, 18 Wis. 481. So, if payable in "United States six-per-cent interest-bearing bonds," it is a mere contract to deliver such bonds, and not negotiable. Easton *v.* Hyde, 13 Minn. 90. And a certificate of deposit payable to order "in currency" is not negotiable. Ford *v.* Mitchell, 15 Wis. 304; Huse *v.* Hamblin, 29 Iowa, 501. But in Klauber *v.* Biggerstaff, 47 Wis. 551, a certificate of deposit payable "in currency" was held to be negotiable, and Ford *v.* Mitchell, 15 Wis. 304, was explained and criticised. Ryan, C. J., said: "Almost all civilized countries, including this country, have a mixed circulation of coin and bank-notes. These constitute the currency of the country — its money; and the general term 'currency' includes both. Currency, therefore, means money—coined money and paper money equally. But it means money only; and the only practical distinction between paper money and coined money, as currency, is that coined money must generally be received, paper money may generally be specially refused, in payment of debt; but a payment in either is equally made in money—equally good. . . . In the use of the term, currency does not necessarily include all bank-notes in actual circulation, for all bank-notes are not necessarily money. In this use of the term, currency includes only such bank-notes as are current *de jure et de facto* at the *locus in quo;* that is, bank-notes which are used for circulation by authority of law, and are in actual and general circulation at par with coin, as a substitute for coin, interchangeable with coin; bank-notes which actually represent dollars and cents, and are paid and received for dollars and cents at their legal standard value. Whatever is at a discount—that is, whatever represents less than the standard value of coined dollars and cents at par—does not properly represent dollars and cents, and is not money; is not properly included in the word 'currency.' In this sense, national bank-notes, which are not legal tender, are now as much currency as treasury notes, which are legal tender. This construction of the term 'currency' might, perhaps, properly be extended to the term 'current funds.' It must extend to the latter term whenever it is used in the legal sense of money." So, in Drake *v.* Markle, 21 Ind. 433, the certificate stated that "J. M. has deposited in this bank $7584, payable to the order of himself, in currency, on return of this certificate." *Held*, that the instrument was a promissory note and negotiable by indorsement.

In Nat. Bk. of Fort Edward *v.* Washington Co. Nat. Bk., 5 Hun (N. Y.), 605, a bank issued a certificate of deposit

4. Usages and Customs.—Reasonable and long-established usages and customs of banks enter into and constitute a part of contracts

payable on its return properly indorsed, on which it made a payment to the original holder, who transferred it for value to the plaintiff without knowledge or notice on his part of said payment. *Held*, that the bank was liable for the full amount of the certificate, notwithstanding the payment to the original depositor. The court said: "It was urged by the defendants that the certificate was payable forthwith; that after the lapse of an unreasonable time (in this case seven years) it was presumed to be dishonored, and therefore that the assignee took it subject to all equities. We think not. The very nature of the instrument and the ordinary modes of business show that a certificate of deposit, like a deposit credited in a pass-book, is intended to represent moneys actually left with the bank for safe-keeping, which are to be retained until the depositor actually demands them. Such a certificate is not dishonored until presented." But in Tripp *v.* Curtenius, 36 Mich. 494, it was held that certificates of deposit are not intended for long circulation or for more than a temporary convenience, and that no one can become a *bona-fide* purchaser who does not take them within some reasonably short period; and the court declined to follow the doctrine laid down in Nat. Bank of Fort Edward *v* Washington Co. Nat. Bk., 5 Hun (N. Y.), 605.

A certificate of deposit being evidence of an indebtedness, in the nature of a receipt, parol evidence is admissible to explain it. Hotchkiss *v.* Mosher, 48 N. Y. 478. *Compare* Lang *v.* Straus, 7 N. E. Rep. 763, where Hotchkiss *v.* Mosher is said not to be a well-considered case, "for no authorities are cited in support of the conclusion announced."

Demand of Payment before Suit.—Upon the question whether demand of payment must be made before an action can be brought upon a certificate of deposit, made payable "on return of this certificate" or "on presentation of this certificate," the decisions are conflicting. It has been held, on the one hand, that the holder is not obliged to demand payment of the certificate before suit is brought upon it, because it is a promissory note payable on demand, and the bank like any maker of such a note is obliged to find out the payee and pay the certificate. Hunt *v.* Divine, 37 Ill. 137; Cate *v.* Patterson, 25 Mich. 191; Tripp *v.* Curtenius, 36 Mich. 495; Brummagim *v.* Tallant, 29 Cal. 503; Curran *v.* Witter (Wis.), 26 Am. Law Reg. (N. S.) 272.

In Hunt *v.* Divine, 37 Ill. 137, it was held that the words "on return of this certificate" do not change the legal effect of the undertaking or require the holder to present the note at the banking-house of the makers. The court say: "This instrument being a promissory note, it must be governed by the rules and principles applicable to that class of paper. What did the makers of it engage to do? They engaged to pay Chase 280$\frac{50}{100}$ dollars three months after the date of the certificate. It is not payable at any particular place nor on demand, but three months after date at no particular place. Now do the words 'on return of this certificate' change the legal effect of this undertaking or require the holder to present it at the banking-house of the makers? There is no promise to pay at the banking-house, consequently no obligation rested on the holder to present it there. The rule is, in regard to this kind of paper, that the maker is to find his paper and take it up. The demand is by the maker on the holder, which, when made, will be the time to return the certificate. . . . The fact that it is payable at a certain time, is for a certain sum, and payable to a certain person, gives it its character of a promissory note—it comes up to all the conditions required of such paper. A promissory note payable on demand, as against the maker, can be prosecuted to judgment without averring or proving any demand."

In Brummagim *v.* Tallant, 29 Cal. 503, a certificate of deposit and promissory note were said to be in substance and legal effect the same, and it was held that the Statute of Limitations begins to run against a certificate of deposit, payable on demand, from the date of the same, and no special demand is necessary to put it in motion. And in Tripp *v.* Curtenius, 36 Mich. 499, the court approve the decision in Brummagim *v.* Tallant, 29 Cal. 503, and say: "We think this is the safer and better doctrine, and is correct in principle. To hold such instruments to be in legal effect promissory notes payable on demand, and yet not apply the principles applicable to demand promissory notes, either because of the peculiar form of the instrument or because issued by a firm engaged in the business of banking, would be to create a distinction unsound in principle and one not warranted by any reason or necessity that

made with, and are binding on, persons dealing with them, whether known to such persons or not.[1] But to give a usage of

we can discover." On the other hand, the certificate has been considered so far like an ordinary deposit that no cause of action accrues to the holder until payment thereof has been demanded. Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377; Payne *v.* Gardiner, 29 N. Y. 146; Pardee *v.* Fish, 60 N. Y. 265; Smiley *v.* Fry, 100 N. Y. 262; Fells Point Savings Inst. *v.* Weedon, 18 Md. 320.

In Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377, the certificate was payable "on the presentation of the certificate properly indorsed." *Held*, that no action could be maintained thereon until a special demand had been made. The court say: "The provisions of the instrument constitute an agreement to pay the money when Clark, or his indorsee, presents the certificate to the bank for payment, properly indorsed. The time when the instrument is due, by its terms, is ascertainable only by an actual presentation of it to the defendant's bank, properly indorsed, and call for the money. There is nothing in the transaction to distinguish it from a naked bailment, for the exclusive benefit of the depositor, and in such cases a demand is generally necessary to perfect a right of action against the depositary. In this case it is clear, upon principle, that no action should be allowed against the defendants without a previous demand, and we think this view of the subject will give operation to the instrument according to its legal effect and the obvious intention of the parties."

In Smiley *v.* Fry, 100 N. Y. 262, the certificate read: "Due S. K. Ashton, M. D., Trustee, $4000, returnable on demand. It is understood this sum is especially deposited with us, and is distinct from the other transactions with said Ashton." In an action upon the same wherein the Statute of Limitations was set up as a defence, *held*, that it was in the nature of a certificate of deposit, not a promissory note; that no cause of action arose thereon until a demand was made for the sum deposited, and as no demand was made until 1880, the action was not barred by the statute. Miller, J., said: "The word 'due' does not import an obligation or promise which can be enforced without a demand, for it is expressly limited to the time when demanded. . . . As the instrument in question was not a promissory note but a certificate of deposit, the defence of the Statute of Limitations, interposed by the defendant, was not available for the reason that a demand of the money deposited was not made prior to six years before the commencement of the action."

And in Howell *v.* Adams, 68 N. Y. 314, the court say: "The fact that a certificate is given on a deposit being made, payable on the return of the certificate, instead of leaving the deposit subject generally to check or draft, does not change the reason of the rule that the banker must first be called upon for payment before an action can be maintained." So, in *Maryland*, it has been held that on a certificate of deposit "payable with interest, on demand, on the return of the same," the Statute of Limitations begins to run only from the time of demand actually made. Fells Point Savings Inst. *v.* Weedon, 18 Md. 320.

1. Mills *v.* Bank of the United States, 11 Wheat. (U. S.) 431; Bank of Washington *v.* Triplett, 1 Pet. (U. S.) 25; Dorchester Bank *v.* New England Bank, 1 Cush. (Mass.) 177; Warren Bank *v.* Suffolk Bank, 10 Cush. (Mass.) 582. See also Lincoln & Kennebeck Bank *v.* Page, 9 Mass. 155; Smith *v.* Whiting, 12 Mass. 6; Chicopee Bank *v.* Eager, 9 Metc. (Mass.) 583; Bank of Columbia *v.* Fitzhugh, 1 H. & G. (Md.) 239; Hartford Bank *v.* Stedman, 3 Conn. 489; Lawson on Usages and Customs, 53; Gindrat *v.* Mechanics' Bank of Augusta, 7 Ala. 324.

In Mills *v.* Bank of the United States, 11 Wheat. (U. S.) 431, the question arose whether the usage and custom of the bank, not to make demand of payment of a note until the fourth day of grace, bound the defendant, an indorser, unless he had personal knowledge of that usage and custom. Mr. Justice Story said: "There is no doubt that, according to the general rules of law, demand of payment ought to be made on the third day, and that it is too late if made on the fourth day of grace. But it has been decided by this court, upon full consideration and argument, in the case of Renner *v.* The Bank of Columbia, 9 Wheat. Rep. 582, that where a note is made for the purpose of being negotiated at a bank, whose custom, known to the parties, it is to demand payment and give notice on the fourth day of grace, that custom forms a part of the law of such contract, at least so far as to bind their rights. In the present case, the court is called upon to take one step farther; and, upon the principles and reasoning of the former case, it has come to the conclusion that

a bank, the force of law requires an acquiescence and notoriety

when a note is made payable or negotiable at a bank whose invariable usage it is to demand payment, and give notice on the fourth day of grace, the parties are bound by that usage whether they have a personal knowledge of it or not. In the case of such a note, the parties are presumed by implication to agree to be governed by the usage of the bank at which they have chosen to make the security itself negotiable." But in Peirce *v.* Butler, 14 Mass. 303, it is said that the usage of the bank is sufficient to bind the customer if he is conversant with it. And in Central Bank *v.* Davis, 19 Pick. (Mass.) 373, 375, the court say: "An established usage of a bank, known to its customers, would be evidence against them. All who transact business at a bank must be presumed to agree to conform to their modes of doing business, so far as they are known to them. They incorporate its known usages into, and make them a part of, their contracts." See also Jones *v.* Fales, 4 Mass. 252.

The usages of banks as to demand and notice govern and make valid acts otherwise invalid. Lawson no Usages and Customs, 206; Planters' Bank *v.* Markham, 5 How. (Miss.) 397; s. c., 37 Am. Dec. 162; Commercial, etc., Bank *v.* Hamer, 7 How. (Miss.) 448; s. c., 40 Am. Dec. 80; Boston Bank *v.* Hodges, 9 Pick. (Mass.) 420; Godden *v.* Shipley, 7 B. Mon. (Ky.) 579; Bridgeport Bank *v.* Dyer, 19 Conn. 136; Isham *v.* Fox, 7 Ohio St. 317.

Thus, by usage, a notice by mail, where the party resides in the same town, is sufficient. Gindrat *v.* Mechanics' Bank, 7 Ala. 325; Bell *v.* Hagerstown Bank, 7 Gill (Md.), 227; Gunnan *v.* Walker, 9 Iowa, 426. Or a demand of payment on the fourth instead of the third day after due. Renner *v.* Bank of Columbia, 9 Wheat. (U. S.) 582: Mills *v.* Bank of United States, 11 Wheat. (U. S.) 431; Patriotic Bank *v.* Farmers' Bank, 2 Cranch (C. C.), 560; Rabnrg *v.* Bank of Columbia, 1 Harr. & G. (Md.) 231. Or a demand on a day preceding a day which is not a holiday, as Commencement-day at Harvard. City Bank *v.* Cutler, 3 Pick. (Mass.) 414.

In Ellis *v.* Ohio Life Ins. & Trust Co., 4 Ohio St. 628, plaintiffs sued to recover money paid by them to defendants on a check drawn upon plaintiffs payable to the order of S. T. & Co. or bearer. The check was presented to defendants by a stranger, who was paid without being questioned as to his identity or right to the check, which was afterwards discovered to be a forgery. Evidence was introduced of a custom in Cincinnati for the cashier or teller of a bank to whom a check drawn upon another bank was presented, and payment or purchase requested by an unknown bearer, to take means to assure himself that all was right, and for the drawee bank, upon receiving a check through another bank, to assume, relying upon the custom, that such inquiries had been made. *Held*, that under these facts the plaintiffs were entitled to recover. The court say: "If this custom, in both its branches, was established to the satisfaction of the jury, the fair presumption arising would be that the defendants had been negligent in failing to comply with an established custom of the business, necessary not only to their own security, but also to that of the bank upon which the check was drawn, and that the plaintiffs, not being informed to the contrary, paid the check upon the supposition that the custom had been observed. . . . The custom which the plaintiffs sought to establish seems to have been one of the most reasonable character. It is a great error to suppose that the drawee of a bill or check is bound to rely alone upon his knowledge of the handwriting of his customer or correspondent. The testimony in the case, as well as every day's experience, shows this alone to be an insufficient security when dealing with strangers and in large amounts against the ingenuity with which forgeries are now committed. The next most effective precaution is that of requiring the holder to furnish some reliable information of himself, and of his right to the paper. But when another bank intervenes and takes the check, this cannot be resorted to by the drawee. As between the banks, therefore, the observance of the custom becomes a matter of mutual protection, and saves to the drawee the benefit of this precaution." On the other hand, in individual cases, usages and customs inconsistent with the rules of law have been rejected by the courts. Thus, the rule of law that negotiable paper not payable instantly is entitled to days of grace cannot be altered by evidence of a different custom. Woodruff *v.* Merchants' Bank, 25 Wend. (N. Y.) 673; s. c., 6 Hill (N. Y.), 172; Morrison *v.* Bailey, 5 Ohio St. 13. In the latter case the paper was in this form: "$300. Cleveland, O., June 30, 1853. Wicks, Otis & Brownell: Pay to L. F. Burgess on the 13th day of July, '53, or order,

from which an inference may be drawn that it is known to the

three hundred dollars. R. B. Bailey." The testimony of a number of bankers showed a uniform custom on their part in Cleveland to regard drafts in this form as checks, and not entitled to days of grace. But the court held that "any supposed usage of banks in any particular place to regard drafts upon them, payable at a day certain after date, as checks, and not entitled to days of grace, is inadmissible to control the rules of law." *Compare* Bowen *v.* Newell, 2 Duer (N. Y.), 584, and Champion *v.* Gordon, 70 Pa. St. 476, where Sharswood, J., says: "The usage of the banks in the commercial metropolis of the State ought to have great weight in determining a question of this character." The rule of law that where a bank receives a sum on a general deposit it is bound to respond to the depositor when called on for a like sum, in good money, cannot be altered by evidence of a different custom. Marine Bank of Chicago *v.* Chandler, 27 Ill. 526; Thompson *v.* Riggs, 5 Wall. (U. S.) 663. In Marine Bank of Chicago *v.* Chandler, 27 Ill. 526, Walker, J., said: "Nor can the special custom of banks in a particular locality change the laws of the land regulating the value of the currency and fixing the standard value of the current coins. That parties may contract to receive any commodity in lieu of money, in payment of indebtedness, is undeniably true. This can only be done by special agreement and not by usage. No custom can compel a creditor, in the absence of a special agreement, to receive anything but the constitutional currency of the country. The fact that the business men of a particular place have been in the habit of receiving depreciated paper money in payment of their demands by no means proves that all creditors in that locality have agreed to receive the same, much less a person residing hundreds of miles distant. To have such an effect, a special agreement must be proved." So the rule that the holder of a bank bill who has voluntarily cut it in two for the purpose of transmitting it by mail with greater safety, whereby one part is lost, may recover the full amount from the bank upon presenting the one half and proving the loss of the other, cannot be affected by a custom of the bank to pay one half to the holder of a half-note. Bank of United States *v.* Sill, 5 Conn. 106; s c., 13 Am. Dec. 44; Allen *v.* State Bank, 1 Dev. & Bat. Eq. (N. Car.) 3. See also Armat *v.* The Union Bank, 2 Cranch (C. C.), 180.

In Vermilye *v.* Adams Express Co., 21 Wall. (U. S.) 139, a usage of brokers in opposition to the rule of law that the purchaser of negotiable paper past due takes it subject to the equities of other parties was set up, but without success. Mr. Justice Miller said: "Bankers, brokers, and others cannot, as was attempted in this case, establish by proof a usage or custom in dealing in such paper which, in their own interest, contravenes the established commercial law. If they have been in the habit of disregarding that law, this does not relieve them from the consequences nor establish a different law." So also the rule that money paid under a mistake of fact can be recovered back cannot be affected by a custom among banks generally that no mistakes shall be rectified in the receipt or payment of money, unless the mistake is discovered before the person paying or receiving departs. Gallatin *v.* Bradford, 1 Bibb (Ky.), 209. In this case the court say: "If such a custom does exist, it is contrary to law, and ought not to meet with the sanction of a court of justice. The law declares that money received through mistake shall be refunded; and this rule of law is founded in morality, which makes part of the law of the land. Would it not be as immoral and unjust, if a mistake were made in the receipt or payment of money at a bank, to hold the money obtained by such mistake, although not discovered until after the person paying or receiving had got out of the door, as if the mistake had before been discovered? There surely can be no difference in morality; and the law makes none." See also Mechanics & Farmers' Bank *v.* Smith, 19 Johns. (N. Y.) 115. A custom of banks to pay the occasional overdrafts of customers whose standing is good is unreasonable. Oakland Bank of Savings *v.* Wilcox, 60 Cal. 126. In Lancaster Bank *v.* Woodward, 18 Pa. St. 357, 362, the court say: "Such a custom should be abolished. *Malus usus abolendus est.* . . . That the practice of paying overdrafts has prevailed to some extent is quite likely; and it may be true that boards of directors have in some instances sanctioned it; but it has no authority in sound usage or in law."

In Mahaiwe Bank *v.* Douglass, 31 Conn. 170, it was held that if any custom prevails among banks regarding erasures of *printed* matter in negotiable paper as no evidence of an unauthorized alteration, when the same erasures of *written* matter would be so, it has not existed so

public, and especially to those who do business at the bank.[1] Particular and local usages of banks will not be judicially noticed by the courts, but must be proved like other facts.[2]

long, or become so general, as to be a part of the law merchant; and the defendant would not be affected by it, unless he was shown to have known of the custom and to have acquiesced in it. Sanford, J., observed: "It seems more in accordance with principle and with reason to hold that the effect of apparent erasures and alterations in exciting distrust and 'putting upon inquiry' depends more upon the significance and importance of the words erased than upon the way in which they were first impressed upon the paper; and such, we are satisfied, is the rule of law."

By-laws affecting the Rights of Third Parties.—By-laws of a bank cannot affect the rights and interests of third persons. A by-law, therefore, that all payments made or received at the bank must be examined at the time does not prevent a party dealing with the bank from showing afterwards that there was a mistake in his account of deposits and receipts. Mechanics & Farmers' Bank *v.* Smith, 19 Johns. (N. Y.) 115. See also Gallatin *v.* Bradford, 1 Bibb (Ky.), 209; Central Bank *v.* Davis, 19 Pick. (Mass.) 373; Samuels *v.* Central, etc., Exp. Co., McCahon (Kans.), 214; Seneca County Bank *v.* Lamb, 26 Barb. (N. Y.) 595; Driscoll *v.* Mfg. Co., 59 N. Y. 96, 102.

A by law, authorized by the charter of a bank, requiring every depositor when demanding any payment of his deposit to produce the original pass-book, and assented to by the depositor by signing the rules and regulations of the bank, is not unreasonable and is binding. Warhus *v.* Bowery Savings Bank, 5 Duer (N. Y.), 67; s. c., 21 N. Y. 543. See also Heath *v.* Savings Bank, 46 N. H. 78; Levy *v.* Franklin Savings Bank, 117 Mass. 448.

1. Adams *v.* Otterback, 15 How. (U. S.) 539.

In this case a certain practice had been adopted by the bank but two years, and in that time only four instances under it had occurred, and it was held that the requisite notoriety was wanting. The court say: "In the case before us the usage relied on, and under which notice to the indorser was given, had been adopted by the bank two years before the note in question was discounted, but it seems only four cases had occurred under it. No public notice was given at the time of its adoption, and no presumption can arise from the facts stated that the indorser could have had notice of the usage. It is said if a bank may establish a usage it may change it, and that there must be a beginning of acts under it. This may be admitted, but it does not follow that a usage is obligatory from the time of its adoption. To give it the force of law it requires an acquiescence and a notoriety from which an inference may be drawn that it is known to the public, and especially to those who do business with the bank. It is unnecessary to consider whether a usage adopted might acquire force from public notices generally circulated. No such notice was given in this case. But to constitute a usage it must apply to a place rather than to a particular bank. It must be the rule of all the banks of the place or it cannot consistently be called a usage. If every bank could establish its own usage, the confusion and uncertainty would greatly exceed any local convenience resulting from the arrangement." See also Duvall *v.* The Farmers' Bank of Maryland, 9 G. & J. (Md.) 31.

In Citizens' Bank of Baltimore *v.* Grafflin, 31 Md. 507, the court say: "To permit usage to govern and modify the law in relation to the dealings of the parties, it must be uniform, certain, and sufficiently notorious to warrant the legal presumption that the parties made their contract with reference to the usage and not according to the general and established law applicable to the case. The evidence for such purpose should be very strong and conclusive to authorize the usage, to regulate and control the contract between the parties, in derogation of the established law."

In Smith *v.* Wright, 1 Caines, 43, the true test of a commercial usage is said to be its having existed long enough to have become generally known and to warrant a presumption that contracts are made in reference to it.

2. Planter's Bank *v.* Farmers', etc., Bank, 8 Gill & J. (Md.) 449; Bank of Columbia *v.* Fitzhugh, 1 Harr. & Gill (Md.), 239; Renner *v.* Bank of Columbia, 9 Wheat. (U. S.) 582. See also Eager *v.* Atlas Ins. Co., 14 Pick. (Mass.) 141; Gordon *v.* Little, 8 Serg. & Rawle (Pa.), 557; Ward *v.* Everett, 1 Dana (Ky.), 429.

General customs of the country, however, will be noticed by the courts *ex*

5. Collections.—Power to make collections upon business paper is incidental to the banking business and need not be expressly conferred.[1] The bank, upon accepting the agency, is bound to exercise reasonable care and diligence in the discharge of its assumed duties.[2] The measure of damages resulting from its

officio. Thus, "the usage of making the demand on the third day of grace has become so general that courts of justice will notice it *ex officio*." Renner *v.* Bank of Columbia, 9 Wheat. (U. S.) 582, per Mr. Justice Thompson. And the usage of "banking hours," it seems, has been judicially noticed. See Hare *v.* Henty, 10 C. B. (N. S.) 65; Parker *v.* Gordon, 7 East, 385; Salt Springs Nat. Bank *v.* Burton, 59 N. Y. 430; Morse on Banking, 434. And the usage of banks to allow their depositors to withdraw their funds in parcels. Munn *v.* Burch, 25 Ill. 35. In the last case cited the court say: "Such customs and usages as are universally known to exist enter into and form a part of every contract to which they apply, although not mentioned nor alluded to in the terms of the contract Some of these commercial customs the courts will take notice of as a matter of law, and others have to be proved as matters of fact. Where a custom is so universal and of such antiquity that all men must be presumed to know it, courts will not pretend to be more ignorant than the rest of mankind, but will recognize and act upon it. Such is the custom governing checks on bankers. The general rule is that the creditor cannot divide up his demand against the debtor and require the latter to pay it in parcels. But everybody knows, and courts no less than commercial men, that an exception to this rule exists as to deposits in bank."

In Bank of Columbia *v.* Fitzhugh, 1 Harr. & Gill (Md.), 239, Earle, J., says: "A usage of universal prevalence becomes a part of the existing law, and is to be noticed *ex officio* by the courts of justice; but a particular usage has a circumscribed and limited application, and must be supported by proof," and special usages were held to control and govern the general law repugnant to them.

As to the objection that receiving proof of a particular usage is, in effect, altering and varying by parol evidence the written contract of the parties, the court say, in Renner *v.* Bank of Columbia, 9 Wheat. (U. S.) 582: "If this is the light in which it is to be considered, there can be no doubt that it ought to be laid entirely out of view. . . . Evidence of usage or custom is, however, never considered of this character, but is received for the purpose of ascertaining the sense and understanding of parties by their contracts, which are made with reference to such usage or custom; for the custom then becomes a part of the contract, and may not improperly be considered the law of the contract, and it rests upon the same principle as the doctrine of the *iex loci*." But in Piscataqua Exchange Bank *v.* Carter, 20 N. H. 246, it was held that, the contract between the indorser and indorsees of negotiable paper being a written contract, parol evidence of a usage of a bank was not admissible to vary it. See also Central Bank *v.* Davis, 19 Pick. (Mass.) 373.

1. Tyson *v.* State Bank, 6 Blackf. (Ind.) 225; Smedes *v.* Bank of Utica, 20 Johns. (N. Y.) 372; Jockusch *v.* Towsey, 51 Tex. 129.

Where the payee of a note which is made payable at a bank indorses the same and deposits it with the bank for collection, the bank becomes the agent of the payee, and not of the maker; and after the note has been paid, no misapplication of the money by the bank can prejudice the maker, he being, by such payment, absolutely discharged from the debt. Smith *v.* Essex County Bank, 22 Barb. (N. Y.) 627; Ward *v* Smith, 7 Wall. (U. S.) 447; Alley *v.* Rogers, 19 Grat. (Va.) 366.

Where, on receiving a check for collection, the amount is credited to the depositor in his pass-book, if it is not paid the check may be returned and the credit cancelled. National Gold Bank, etc., Co. *v.* McDonald, 51 Cal. 64; Freeholders of Middesex *v.* State Bank, 32 N. J. Eq. 467.

Banks sometimes charge a commission for collection; but the probable temporary use of the money when collected and the advantages arising from business association are a sufficient consideration for the undertaking to collect it. Smedes *v.* Utica Bank, 20 Johns. (N. Y.) 372; Bank of Utica *v.* McKinster, 11 Wend. (N. Y.) 475; Mechanics' Bank *v.* Merchants' Bank, 6 Metc. (Mass.) 13; Hall *v.* Bank of State, 3 Rich. (S. Car.) 366; Titus *v.* Mechanics' Nat. Bk., 6 Vroom (N. J.), 588.

2. Nat. Bank of Commerce *v.* Mer-

chants' Nat. Bank, 91 U. S. 92, 104; Fabens *v.* Mercantile Bank, 23 Pick. (Mass.) 330; Warren Bank *v.* Suffolk Bank, 10 Cush. (Mass.) 582; Pahquoque Bank *v.* Bethel Bank, 36 Conn. 325.

In Fabens *v.* Mercantile Bank, 23 Pick. (Mass.) 330, Shaw, C. J., said: "When a bank receives a note for collection, it is bound to use reasonable skill and diligence in making the collection, and for that purpose is bound to make a seasonable demand on the promisor, and in case of dishonor, to give due notice to the indorsers, so that the security of the holder shall not be lost or essentially impaired by the discharge of indorsers." The bank must use due diligence in taking all necessary steps, by presentment, demand, protest, and notice, to fix the liability of all the parties to whom its principal has a right to resort for payment; and if the bank fail in any of these duties, it becomes liable in damages. Bank of Mobile *v.* Huggins, 3 Ala. 206; Merchants' Nat. Bk. *v.* Stafford Nat. Bk., 44 Conn. 567; Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215; Montgomery Co. Bank *v.* Albany City Bank, 7 N. Y. 460; First Nat. Bk. *v.* Fourth Nat. Bk., 77 N. Y. 320; Blanc *v.* Mutual Nat. Bk., 28 La. Ann. 921. And it will be no defence that the bank was unaccustomed to undertake collections, and that its error arose from ignorance of the ordinary course of proceedings. Ivory *v.* Bank of State, 36 Mo. 475. See also Georgia Nat. Bk. *v.* Henderson, 46 Ga 493.

Instructions given to the bank taking the note or bill for collection, where the collection is to be made in a distant place, must be transmitted to its correspondent. Borup *v.* Nininger, 5 Minn. 523.

Demand of Payment.—Neglect by a bank having a note for collection to make demand of payment, whereby the indorser is discharged, renders the bank liable. Durnford *v.* Patterson, 12 Am. Dec. 514; Thompson *v.* Bank of S. Car., 3 Hill (S. Car.), 77; s. c., 30 Am. Dec. 354; Branch Bank *v.* Knox, 1 Ala. 148. See also Bank of Delaware Co. *v.* Broomhall, 38 Pa. St. 135; Georgia Nat. Bk. *v.* Henderson, 46 Ga. 487; s. c., 12 Am. Rep. 590.

If a note is payable at the bank to which it is indorsed for collection, no demand is necessary. Goodloe *v.* Godley, 13 Smed. & M. (Miss.) 233.

Bank's Liability for Money Collected.—After collection, the bank may either keep the money separate from its other funds, as a special deposit, for which it will be liable as a mere bailee, after notice to the owner—Marine Bank *v.* Fulton Bank, 2 Wall. (U. S.) 252—or it may place the amount to the depositor's credit, and mingle it with its other funds, when it will be liable to the holder as a simple contract debtor. Tinkham *v.* Heyworth, 31 Ill. 519; Jockusch *v.* Towsey, 51 Tex. 129; *In re* West of England Bank, L. R., 11 Ch. Div. 772.

Liability of Banks for the Defaults of their Correspondents.—How far the bank is liable for the negligence of a correspondent bank to which it has sent commercial paper to be collected is a question upon which there is a great conflict of authority. It is held, on the one hand, that the bank first receiving the paper is answerable for the neglect, omission, or other misconduct of the bank or agent it may employ, following the general rule of law that an agent is liable for the acts of a sub-agent employed by him. This is the doctrine established by the decisions of the Supreme Court of the United States, the courts of New York, New Jersey, Ohio, Indiana, and several other States, and the courts of England. Exchange Nat. Bank *v.* Third Nat. Bank, 112 U. S. 276; Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215 (reversing s. c., 15 Wend. 482); s. c., 34 Am. Dec. 289; Smedes *v.* Utica Bank, 20 Johns. (N. Y.) 384; Montgomery Bank *v.* City Bank, 7 N. Y. 459; Commercial Bank *v.* Union Bank, 11 N. Y. 203; Ayrault *v.* Pacific Bank, 47 N. Y. 570; Titus *v.* Mechanics' Nat. Bank, 6 Vroom (N. J.), 588; Reeves *v.* State Bank, 8 Ohio St. 465; Tyson *v.* State Bank, 6 Blackf. (Ind.) 225; Abbott *v.* Smith, 4 Ind. 452; Kent *v.* Dawson Bank, 11 Blatchf. (C. C.) 237; Van Wart *v.* Woolley, 3 Barn. & Cress. 439; Mackersy *v.* Ramsays, 9 Cl. & Fin. 818.

In Exchange Nat. Bank *v.* Third Nat. Bank, 112 U. S. 276, a bank in Pittsburg sent to a bank in New York for collection a number of unaccepted drafts bearing different dates, payable in four months, drawn on Walter M. Conger, Secretary Newark Tea Tray Co., Newark, N. J. The New York bank sent them for collection to a bank in Newark, and in its letter of transmission recognized them as drafts on the company. The Newark bank took acceptance from Conger individually on his refusal to accept as secretary, but no notice of that fact was given to the Pittsburg bank until after the first draft had matured. At that time the drawers and an indorser had become insolvent, having been in good credit when the Pittsburg bank discounted the drafts. *Held*, that the New York bank was liable for the negligence of its agent, the Newark bank. Mr. Justice Blatchford said: "The bank is not merely appointed an

attorney, authorized to select other agents to collect the paper. Its undertaking is to do the thing, and not merely to procure it to be done. In such case the bank is held to agree to answer for any default in the performance of its contract; and whether the paper is to be collected in the place where the bank is situated, or at a distance, the contract is to use the proper means to collect the paper, and the bank, by employing sub-agents to perform a part of what it has contracted to do, becomes responsible to its customer."

In Titus *v.* Mechanics' Nat. Bank, 6 Vroom (N. J.), 588, 596, Chancellor Zabriskie says: "A dealer who deposits a draft on a distant city, in a bank in his own town, has no choice of their agent or correspondent. It is the business of a bank to provide proper agents or correspondents for this service, when they adopt it, as most banks do, as part of their regular business. If they have no such correspondent, they should refuse to take paper for collection, and then the holder could choose whether he would leave it for transmission. He would then be led to inquire about the agent to whom it would be transmitted. The English and New York rule is much better adapted to the convenient dispatch of business. It is no hardship on the bank; it can always look to its correspondent bank to which transmission is made for indemnification from its neglect."

But it is held, on the other hand, that the liability of a bank taking a note or bill for collection which is payable at a distance extends merely to the selection of a suitable and competent agent at the place of payment, and to the transmission of the paper to such agent with proper instructions, and that the correspondent bank is the agent of the holder, and that the transmitting bank is not liable for the defaults of its correspondent when selected with due care.

This doctrine has been adopted by the courts of *Massachusetts*, *Connecticut*, *Pennsylvania*, *Illinois*, *Louisiana*, *Missouri*, and several other States. Fabens *v.* Mercantile Bank, 23 Pick. (Mass.) 330; Dorchester & Milton Bank *v.* New England Bank, 1 Cush. (Mass.) 177; East Haddam Bank *v.* Scovil, 12 Conn. 303; Lawrence *v.* Stonington Bank, 6 Conn. 521; Mechanics' Bank *v.* Earp, 4 Rawle. (Pa.) 384; Bellemire *v.* United States Bank, 1 Miles, 173; 4 Whart. (Pa.) 105; Ætna Ins. Co. *v.* Alton City Bank, 25 Ill. 243; s. c., 79 Am. Dec. 328; Baldwin *v.* Bank of Louisiana, 1 La. Ann. 13; s. c., 45 Am. Dec. 72; Daly *v.* Butchers' & Drovers' Bank, 56 Mo. 94. See also Guelich *v.* National Bank, 56 Iowa, 434; Stacy *v.* Dane Co. Bank, 12 Wis. 629; Bank of Louisville *v.* First Nat. Bank, 8 Baxter (Tenn.), 101; Jackson *v.* Union Bank, 6 Harr. & J. (Md.) 146.

In Fabens *v.* Mercantile Bank, 23 Pick. (Mass.) 330, Shaw, C. J., says: "It is well settled that when a note is deposited with a bank for collection which is payable in another place, the whole duty of the bank so receiving the note in the first instance is seasonably to transmit the same to a suitable bank or other agent at the place of payment."

In East Haddam Bank *v.* Scovil, 12 Conn. 303, 313, the court say: "The bill was payable in the city of New York. It was necessary that it should be transmitted to the latter place for collection. These were facts known to the defendant, who also must have known that the plaintiffs could do no more than transmit to the city of New York to a reputable correspondent, and according to their usual course of business, to be collected. All this was done by the plaintiffs. Under such circumstances it cannot justly be claimed that the plaintiffs should have become insurers against the defaults of their correspondents. Such a doctrine would be as inequitable as it might be oppressive and ruinous to banks, who are merely the medium through which the holders of bills and drafts payable in other States transmit them for collection. If they act in good faith in the selection of an agent to protect the interests of the holder of the bill, in cases where it is obvious an agent must be selected for that purpose, what principle of justice or commercial policy requires that they should be held liable for any neglect of duty on the part of such agent?"

Mr. Morse, in his work on Banks, approves the latter doctrine, while Mr. Daniel, in his work on Negotiable Instruments, prefers the former. See Morse on Banks (2d Ed.), 414; 1 Daniel on Negotiable Instruments (3d Ed.), sec. 342.

Liability of Banks for the Defaults of their Notaries.—The weight of authority is that banks are not liable for the default of the notaries whom they employ, provided they use due negligence in their selection. Warren Bank *v.* Suffolk Bank, 10 Cush. (Mass.) 582; Citizens' Bank *v.* Howell, 8 Md. 530; Britton *v.* Nicolls, 104 U. S. 757; Baldwin *v.* Bank of Louisiana, 1 La. Ann. 13; Bellmire *v.* Bank of U. S., 4 Whart. (Pa.) 105. *Compare* Miranda *v.* City Bank, 26 Am. Dec. 493; Thompson *v.* Bank of South Carolina, 3

neglect of duty will be the amount of actual loss the party interested has sustained.[1]

6. Bank Officers.—The officers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of business of such institutions, and their acts, within the scope of such usage, practice, and course of business, bind the bank in favor of third persons, having no knowledge to the contrary.[2]

Directors.—The directors of a bank have the general control and government of its affairs and constitute the corporation.[3]

Hill (S. Car.), 77; s. c., 30 Am. Dec. 354; Geerhardt *v.* Savings Inst., 38 Mo. 60; Ayrault *v.* Pacific Bank, 47 N. Y. 570.

The ground upon which some of these decisions rest is that the notary is a public officer in whose competency and integrity the bank has a right to trust. Hyde *v.* Planters' Bank, 17 La. 560; Baldwin *v.* Bank of La., 1. La. Ann. 13; Agricultural Bank *v.* Commercial Bank, 7 Smed. & M. (Miss.) 592.

In *New York* a distinction appears to be made between the official and non-official acts of the notary, and the bank is held liable for the default of its notary in any matter which is not part of his official duty. Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215. See also Ayrault *v.* Pacific Bank, 47 N. Y. 570.

In Bowling *v.* Arthur, 34 Miss. 41, it was held that it was not sufficient proof of a notary's unfitness to show that he was a man of habitually dissipated character, but that it must be shown "that he was drunk at the time he took the note." See also Agricultural Bank *v.* Commercial Bank, 7 Smed. & M. (Miss.) 592.

1. Bank of Washington *v.* Triplett, 1 Pet. (U. S.) 25; Tyson *v.* State Bank, 6 Blackf. (Ind.) 225; McKinster *v.* Bank of Utica, 9 Wend. (N. Y.) 46; s. c., 11 Wend. (N. Y.) 473; Bank of Mobile *v.* Huggins, 3 Ala. 206; Merchants' Bank *v.* Stafford Bank, 44 Conn. 567.

It is not within the scope of the collecting bank's agency to bring suit upon paper left with it for collection. Crow *v.* Mechanics', etc., Bank, 12 La. Ann. 692. See also Wetherill *v.* Bank of Pa., 1 Miles (Pa.), 399

2. Story on Agency (8th Ed.), sec. 114; Minor *v.* Mechanics' Bank, 1 Pet. (U. S.) 46, 70; Fleckner *v.* Bank of United States, 3 Wheat. (U. S.) 360; Frankfort Bank *v.* Johnson, 24 Me. 490; Cooke *v.* State Nat. Bank, 52 N. Y. 96.

3. Burrill *v.* Nahant Bank, 2 Metc. (Mass.) 163; United Society of Shakers *v.* Underwood, 9 Bush (Ky.), 609, 616. See also McDougald *v.* Bellamy, 18 Ga. 411.

In Bank of Pittsburgh *v.* Whitehead, 10 Watts (Pa.), 397; s. c., 36 Am. Dec. 186, Gibson, C. J., says: "The government of a bank resides in a select body, called president and directors; and no matter how the duties of its individual members may be parcelled out among themselves, it is still the president and directors in the aggregate with whom strangers have to do, and by whom all corporate acts are to be performed."

The directors may delegate an authority to a committee of their own number to mortgage the real estate of the bank to secure a debt. Burrill *v.* Nahant Bank, 2 Metc. (Mass.) 163. And may authorize the president and cashier to borrow money or obtain discounts for the use of the bank. Ridgway *v.* Farmers' Bank, 12 Serg. & R. (Pa.) 256; Fleckner *v.* Bank of United States, 8 Wheat. (U. S.) 338.

All discounts are made under the authority of the directors, and it is for them to fix any conditions which may be proper in loaning money. An agreement, therefore, by the president and cashier of a bank that the indorser of a promissory note should not be liable on his indorsement does not bind the bank. Bank of United States *v.* Dunn, 6 Pet. (U. S.) 51.

The bank is bound by the action of a majority of the board of directors, expressed in the usual mode which they adopt in the transaction of the business of the board. Bank of Middlebury *v.* Rutland & Washington R. Co., 30 Vt. 159, 169. In this case, Redfield, C. J., observes: "The case shows the express assent of the majority of the board of directors. And the directors, in the absence of restrictions in the charter or by-laws, have all the authority of the corporation itself in the conduct of its ordinary business. And it is not important that this authority be conferred at an assembly of the directors, unless that is the

They are bound to exercise ordinary skill and diligence, and are liable for losses resulting from mismanagement of the affairs and business of the bank;[1] but for excusable mistakes concerning the

usual mode of their doing such acts. If they adopt the practice of giving a separate assent to the execution of contracts by their agents, it is of the same force as if done at a regular meeting of the board. If this were not so it would lead to very great injustice, for it is notorious that the transaction of the ordinary business of railways, banks, and similar corporations in this country is without any formal meetings or votes of the board." But in Elliot *v.* Abbot, 12 N. H. 549, it was held that the separate assent of a majority of the directors, without any meeting, is not sufficient to confer upon the cashier authority to do an act which without their authority would be invalid. Parker, C. J., says: "There seems to be no sufficient evidence on which to sustain an indorsement through the acts of the directors. A majority of them assented, it is said, but this was at no regularly notified meeting, nor in fact at a meeting of those who did assent, although that would not have been sufficient to have given it the character of an act of the board. There should have been either the act of all (and it is not settled whether that would be sufficient, unless they met together), or there should have been a stated or regularly notified meeting, at which all might have been present, in which case the act of a majority of a quorum might have been good."

The relationship existing between the directors and the stockholders is that of trustees and *cestuis que trustent*. Butts *v.* Wood, 38 Barb. (N. Y.) 181; Cumberland Coal & Iron Co. *v.* Parish, 42 Md. 598; Commissioners, etc., *v.* Reynolds, 44 Ind. 509; Eupropean, etc., R. Co. *v.* Poor, 59 Me. 277. And the directors can only use the funds of the bank for legitimate banking purposes. Frankfort Bank *v.* Johnson, 24 Me. 490, 502; Bedford R. Co. *v.* Bowser, 48 Pa. St. 29; Bank of Australasia *v.* Breillatt, 6 Moore P. C. C. 197.

Directors, apprehensive of a suit from the stockholders dissatisfied with their conduct, cannot legally appropriate money of the bank to the employment of counsel in their defence. Percy *v.* Millandon, 3 La. 568.

The directors of a bank have authority to make a settlement with the cashier whose accounts exhibit a deficit in the funds. Frankfort Bank *v.* Johnson, 24 Me. 490.

1. United Society of Shakers *v.* Underwood, 9 Bush (Ky.), 609; Dunn *v.* Kyle, 14 Bush (Ky.), 134; Brinckerhoff *v.* Bostwick, 88 N. Y. 52; Chester *v.* Halliard, 34 N. J. Eq. 341; Spering's App., 71 Pa. St. 11.

In United Society of Shakers *v.* Underwood, 9 Bush (Ky.), 609, an action was brought against the former directors of an insolvent bank to hold them individually liable for the loss of certain bonds placed on special deposit with the bank and abstracted and sold by its officers, and the proceeds used in the business of the bank. *Held*, that if the deposit was lost by reason of the gross negligence or wilful inattention of the directors, they were liable; and further, that if they could have had notice of the conversion of the bonds by the use of the most ordinary diligence and investigation, they were liable; and that paying out the proceeds in the shape of dividends to the stockholders, including themselves, was a ratification of the conversion. The court say: "Bank directors are not mere agents, like cashiers, tellers, and clerks. They are trustees for the stockholders; and as to their dealing with the bank, they not only act for it and in its name, but, in a qualified sense, are the bank itself. It is the duty of the board to exercise a general supervision over the affairs of the bank, and to direct and control the action of its subordinate officers in all important transactions. The community have the right to assume that the directory does its duty, and to hold them personally liable for neglecting it. Their contract is not alone with the bank. They invite the public to deal with the corporation, and when any one accepts their invitation he has the right to expect reasonable diligence and good faith at their hands. . . . It is the duty of bank directors to use ordinary diligence to acquaint themselves with the business of the bank, and whatever information might be acquired by ordinary attention to their duties they may, in controversies with persons transacting business with the bank, be presumed to have. They cannot be heard to say that they were not apprised of facts shown to exist by the ledgers, books, accounts, correspondence, reconcilements, and statements of the bank, and which would have come to their knowledge except for their gross neglect or inattention. . . . If it shall

law, and for errors of judgment when acting in good faith, they are not liable.[1]

turn out upon the trial of these actions that the ledgers, books, etc., of the bank showed that the special deposits of these appellants were being sold, and that this fact would have been discovered by appellees by the use of ordinary diligence, then the presumption of actual knowledge will arise." The decision in this case has been criticised in Zinn *v.* Mendel, 9 W. Va. 580, 597, and by Mr. Redfield in 13 Am. Law Reg. N. S. 218.

In an action under a statute providing that an officer of a bank receiving a deposit with knowledge of its insolvent condition shall be personally liable therefor, it is only necessary to prove that the bank was insolvent. The burden of proof of the want of knowledge of insolvency is on the officer sued. Dodge *v.* Mastin, 17 Fed. Repr. 660.

Discretionary Powers.—Where the charter leaves it to the discretion of the board of directors to require security or not from the officers, and in the exercise of their discretion they omit to take security from the president and a loss is sustained as the result, the directors are not liable. Williams *v.* Hilliard, 38 N. J. Eq. 373.

1. Spering's App., 71 Pa. St. 11; Dunn *v.* Kyle, 14 Bush (Ky.), 134; Godbold *v.* Branch Bank at Mobile, 11 Ala. 191; Hodges *v.* New England Screw Co., 1 R. I. 312.

Where the directors have acted in good faith and exercised ordinary diligence, they are not liable to the stockholders for losses sustained by the bank by the fraud and default of the cashier; the directors do not insure the fidelity and honesty of those employed by them. Dunn *v.* Kyle, 14 Bush (Ky.), 134, 140. The court say: "The experience of life with reference to the selection of directors in banks, and particularly the character of directors now under consideration, is that the directors are selected from the stockholders more on account of their proximity to the banking-house, or the amount of capital invested, than their fitness for the office, and this conclusion is certainly warranted from the facts in this case. The stockholders knew their qualifications for the place, and therefore when the directors undertook to act they agreed to discharge their duties faithfully to the extent of their ability. . . . Bad faith or gross negligence is certainly necessary to render the director liable to a stockholder in a case like this. The directors were interested in the bank as shareholders. Their own interests prompted them to use at least ordinary diligence, and when trusting to the honesty and fidelity of their cashier, and at the same time exercising that character of vigilance that is usual and customary with bank-directors, it cannot be said that there was nevertheless an absence of ordinary care and such bad faith on their part as made them liable to the appellants."

In Godbold *v.* Branch Bank at Mobile, 11 Ala. 191, it was held that the giving compensation to one of the directors for extra services as an agent of the bank, though unlawful, is not such an act as will expose the directory to liability, if done in good faith and with the honest intention of benefiting the bank. Referring to the responsibility of directors, the court said: "The undertaking implies a competent knowledge of the duties of the agency assumed by them, as well as a pledge that they will diligently supervise, watch over, and protect the interests of the institution committed to their care. They do not in our judgment undertake that they possess such a perfect knowledge of the matters and subjects which may come under their cognizance that they cannot err, or be mistaken, either in the wisdom or legality of the means employed by them. . . . The inevitable tendency of such a rule would be hostile to the end proposed by it, as no man of ordinary prudence would accept a trust surrounded by such perils."

In Spering's App., 71 Pa. St. 13, 24, Sharswood, J., in considering the responsibilities of the directors to the stockholders, states, as the result of all the cases, that "while directors are personally responsible to the stockholders for any losses resulting from fraud, embezzlement, or wilful misconduct or breach of trust for their own benefit and not for the benefit of the stockholders, for gross inattention and negligence by which such fraud or misconduct has been perpetrated by agents, officers, or co-directors, yet they are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they are honest and provided they are fairly within the scope of the powers and discretion confided to the managing body."

Directors are not personally responsible for a violation of the charter, where such violation resulted from a mistake as to their powers, provided such mistake did

President.—The president, by virtue of his office, has authority to take charge of the litigation of the bank, and may answer and defend suits against it, and employ counsel in its behalf.[1] His admissions, relative to matters within the scope of his authority, bind the bank.[2]

not proceed from a want of ordinary care and prudence. Hodges *v.* New England Screw Co., 1 R. I. 312.

1. Savings Bank of Cincinnati *v.* Benton, 2 Metc. (Ky.) 240; American Ins. Co. *v.* Oakley, 9 Paige Ch. (N. Y.) 496; Oakley *v.* Benevolent Society, 2 Hilt. (N. Y.) 487; Mumford *v.* Hawkins, 5 Denio (N. Y.). 355. But see Citizens' Bank *v.* Keim, 16 Phila 311.

Powers of the President.—In the absence of authority, the president cannot dispose of the cash or credits of the bank for the purpose of settling the demands of its creditors. Gibson *v.* Goldthwaite, 7 Ala. 282. See also Hoyt *v.* Thompson, 1 Seld. (N. Y.) 320. And he cannot, by virtue of his office, surrender or release any claims of the bank against any one. Olney *v.* Chadsey, 7 R. I. 224. See also, as to his powers generally, National Bank *v.* Bennett, 33 Mich. 520; Spyker *v.* Spence, 8 Ala. 333; Turnpike Road Co. *v.* Looney, 1 Metc. (Ky.) 550.

Where, however, the president is sometimes permitted by the directors to do acts not within the sphere of his official duties, and is thus held out to the public as having authority to do such acts, the bank will be bound on the ground of implied authority. Hoyt *v.* Thompson 1 Seld. (N. Y.) 320, 333; Parker *v.* Donnally, 4 W. Va. 648; Dougherty *v.* Hunter, 54 Pa. St. 380. And where a usage is shown for the president to draw checks when the cashier is absent, his exercise of the power will be upheld, even though a cashier *pro tem.* has been chosen. Neiffer *v.* Bank of Knoxville. 1 Head (Tenn.). 162. See also Fulton Bank *v.* Canal Co., 4 Paige Ch. (N.Y.) 127.

2. Spalding *v.* Bank, 9 Pa. St. 28.

He has authority to receive a deposit and issue a certificate, and his statements and representations made when transacting the business are binding upon the bank. Hazleton *v.* Union Bank of Columbus, 32 Wis. 34, 49.

Compensation of the President.—In the absence of a provision for compensation, either by contract or by a vote of the directors, it is presumed that the services of the president are gratuitously performed. Sawyer *v.* The Pawners' Bank, 6 Allen (Mass.), 207; Holland *v.* Lewiston Falls Bank, 52 Me. 564; Olney *v.* Chadsey, 7 R. I. 224.

In Sawyer *v.* The Pawners' Bank, 6 Allen (Mass.), 209, the court say they know of no instance "in which the president of a bank has recovered, or even attempted in a suit at law to recover, compensation for his official services, where there was neither a special contract nor some vote of the corporation or of its directors providing for its payment. Such officers are undoubtedly often paid for such services, but always, we believe, under the sanction of some express agreement or some vote of the directors allowing or assenting to it. In the absence of any such provision the presumption would therefore be that the service was gratuitously performed."

Where a statute provides that the directors shall make the president such compensation "as they think reasonble," and no compensation is fixed, he cannot recover pay for his services upon a *quantum meruit.* Holland *v.* Lewiston Falls Bank, 52 Me. 564.

Liabilities of the President.—Where the charter provides that the bank shall not at any time be indebted in excess of its paid-up capital, the president is personally liable for the amount of a bill which he indorses when the bank is indebted in excess of that amount. The court, speaking of the president, say: "While there is no evidence of *mala fides* upon his part, and while no motive of personal gain can be imputed to him, yet he was not only a director, but the chief officer of the company, and a higher degree of diligence is required of the president of a bank than of the other directors. He is expected to exercise a more constant and immediate supervision over its affairs than one who is merely a director. . . If he did know its condition and the provision in its charter and created the indebtedness, then he is certainly liable; and if he did not have such knowledge, then there was such a want of information as was absolutely necessary to the proper performance of his duty, and he is responsible for assuming to act without it." Brannin *v.* Loving (S. C. Ky.), 6 Ky. Law. Rep. 328, 331; s. c., 20 Cent. L. J. 57. But in Dunn *v.* Kyle, 14 Bush (Ky.), 142, the liability of the president was placed upon the same footing as that of the directors, and the court say that he should not be held "to a stricter account than the use of ordinary care."

Cashier.—The cashier is the chief executive officer through whom the whole financial operations of the bank are conducted.[1] His acts within the scope of the general usage, practice, and course of business conducted by the bank will bind the bank in favor of third persons possessing no other knowledge.[2] The

The ostensible president of a bank not legally constituted is liable for money lost through the cashier's mismanagement, and cannot escape this liability by showing that he supposed himself the president of a legally constituted bank if he has contributed the influence of his reputation to give undeserved credit to a spurious corporation. Hauser *v.* Tate, 85 N. Car. 81.

The president is liable for overdrafts which he has directed or allowed. Oakland Bank of Savings *v.* Wilcox, 60 Cal. 126. And for a loss caused by his permitting a customer to take away for inspection securities of the bank deposited as collateral; and evidence that such was the usual custom among banks, and that the president in so doing acted honestly and with competent skill. is inadmissible. Citizens' Bank *v.* Wiegand, 12 Phila. Rep. (Pa.) 496.

1. Merchants' Bank *v.* State Bank, 10 Wall. (U. S.) 604, 650; Fleckner *v.* Bank of United States, 8 Wheat. (U. S.) 338; Caldwell *v.* Mohawk, etc., Bank, 64 Barb. (N. Y.) 333; Bissell *v.* First Nat. Bank of Franklin, 69 Pa. St. 415.

He has charge of all its property, money, securities, and valuable papers. Wild *v.* Bank of Passamaquoddy, 3 Mason (C. C.), 505; Franklin Bank *v.* Steward, 37 Me. 519. And the superintendence of its books of accounts. Sturges *v.* Bank of Circleville, 11 Ohio St. 153; Baldwin *v.* Bank of Newbury, 1 Wall. (U. S.) 234.

In Morse *v.* Mass. National Bank, 1 Holmes (C. C.), 209, 211, Shepley, J., says: "The ordinary duties of a cashier are well known. They are to keep the funds, notes, bills, and other *choses in action* of the bank to be used from time to time for the exigencies of the bank; to receive directly, and through subordinate officers, all moneys and notes of the bank; to surrender notes and securities upon payment; to draw checks; to withdraw funds of the bank on deposit; and generally to transact as the executive officer of the bank the ordinary routine of business."

2. Minor *v.* Mechanics' Bank, 1 Pet. (U. S.) 46, 70; Matthews *v.* Mass. National Bank, 1 Holmes (C. C.), 396, 405; Burnham *v.* Webster, 19 Me. 232; Wakefield Bank *v.* Truesdell, 55 Barb. (N. Y.) 602.

In Lloyd *v.* West Branch Bank, 15 Pa. St. 172, 174, the court say: "The officers of a bank are held out to the world as having authority to act according to the general usage, practice, and course of the business of such institutions. If it were otherwise there would be no safety for the public in doing business with any one of such institutions; because their charters differ in some respects, and individuals cannot be presumed to carry these documents in their pockets as a *vade mecum*. Their acts, therefore, within the scope of such usage, practice, and course of business, will bind the corporation in favor of third persons transacting business with them and who did not know at the time that the officer was acting beyond and above the scope of his authority."

And in Merchants' Bank *v.* State Bank, 10 Wall. (U. S.) 650, Mr. Justice Swayne says: "The directors may limit his (the cashier's) authority as they deem proper, but this would not affect those to whom the limitation was unknown."

So in Caldwell *v.* National Mohawk Valley Bank, 64 Barb. (N. Y.) 342, Morgan, J., says: "Any verbal understanding between the cashier and the directors will not avail to limit his authority when the acts of the cashier are performed over the counter of the bank, and are of a public character and numerous and long continued. In such a case it is reasonable to presume that they are in conformity with the instructions of the directors." See also Clarke National Bank *v.* Bank of Albion, 52 Barb. (N. Y.) 592; Case *v.* Bank, 100 U. S. 446, 454.

But in State of Mississippi *v.* Commercial Bank, 6 Smed. & M. (Miss.) 218, 237, the court make a distinction between the acts of a bank officer and a mere private agent in this that persons dealing with a bank are presumed to know the extent of the agency, because it is limited by the charter or by the proceedings of the directors, which are subject to the inspection of every one.

Powers of the Cashier.—To Collect Debts.—The cashier has authority to take such measures for the security and eventual collection of debts owing to the bank as he may deem proper. Bridenbecker *v.* Lowell, 32 Barb. (N. Y.) 9; Badger *v.* Bank of Cumberland, 26 Me. 428; Corser

admissions and declarations of the cashier in relation to matters

v. Paul, 41 N. H. 24; Bank of Pennsylvania *v.* Reed, 1 W. & S. (Pa.) 101. And may release a debt secured by a mortgage. Ryan *v.* Dunlap. 17 Ill. 40. But in the absence of special authority he has no power to discharge the surety on a note. Savings Association *v.* Sailor, 63 Mo. 24. See also Merchants' Bank *v.* Rudolf. 5 Neb. 527; Bank *v.* Haskell, 51 N. H. 116. And the cashier, except by special authority or estabilshed usage, has no power to compromise claims due to the bank. This is a power which belongs to the board of directors. Chemical Nat. Bank of N. Y. *v.* Kohner, 8 Daly (N.Y.), 530.

In the last-cited case the court say: "A cashier is the business officer of a bank, but only in the sense of one who transacts and not of one who regulates or controls its affairs. His duty has reference to daily routine business and not to matters involving discretionary authority, which belongs. unless delegated, to the board of directors; as has been quaintly said, 'they are the minds and he is the hands of the corporation.' . . . It will not be disputed that where a special authority is conferred upon him, or where he acts in conformity with a general usage or an established acquiescence of his board of directors, the bank will be responsible for such acts, though beyond the ordinary scope of his duties. Elwell *v.* Dode, 33 Barb. (N. Y.) 336; City Bank of New Haven *v.* Perkins, 4 Bosw. (N. Y.) 420. But where is the proof in this case of authority to compromise a debt, either by resolution, parol. or usage? Such a power, it is said, 'is discretionary, calling oftentimes for the exercise of considerable reflection and a high degree of judgment. It is simply a sacrifice at least of nominal property of the bank, and is a function of the board of directors and not of an executive officer.'" *Compare* Bank of Pennsylvania *v.* Reed, 1 W. & S. (Pa.) 101, 106.

To Borrow Money.—The cashier has authority to borrow money in the ordinary course of the daily business of the bank, and may bind the bank by a promissory note executed therefor. Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120; Sturges *v.* Bank of Circleville, 11 Ohio St. 153; Barnes *v.* Ontario Bank, 19 N. Y. 152

Other Powers of Cashier.—And to draw checks or drafts upon the funds of the bank deposited elsewhere. Mechanics' Bank *v.* Bank of Columbia. 5 Wheat. (U. S.) 326; United States *v.* City Bank of Columbus, 21 How. (U. S.) 356; Chemical Nat. Bank *v.* Kohner, 8 Daly (N. Y.), 534; Northern Bank *v.* Johnson, 5 Coldw. (Tenn.) 88.

The cashier has, also, full charge and control over the specie, notes, bills, and other personal property of the bank. Wild *v.* Bank of Passamaquoddy, 3 Mason (C. C.),505; Franklin Bank *v.* Steward.37 Me. 519. And has authority to indorse its negotiable paper and securities. State Bank *v.* Wheeler, 21 Ind. 90; City Bank *v.* Perkins, 29 N.Y. 554; Elliott *v.* Abbott, 12 N. H. 549; Cooper *v.* Curtis, 30 Me. 488; Pratt *v.* Topeka Bank, 12 Kans. 570. And transfer its shares of stock. Smith *v.* Northampton Bank, 4 Cush. (Mass.) 1; Commercial Bank of Buffalo *v.* Kortright, 22 Wend. (N. Y.) 348. And conduct its correspondence. New Hope, etc., Bridge Co. *v.* Phœnix Bank, 3 Comst. (N. Y.) 166; Branch Bank *v.* Steele, 10 Ala. 915.

The cashier is the proper officer to accept or refuse the account of one who wishes to become a depositor in the bank. Thatcher *v.* Bank of State of New York, 5 Sandf. (N. Y.) 121.

He has, also, authority to certify checks drawn on the bank by its customers. Clarke National Bank *v.* Bank of Albion, 52 Barb. (N. Y.) 592; Farmers', etc., Bank *v.* Butchers & Drovers' Bank, 16 N. Y. 125; Cooke *v.* State Nat. Bank, 52 N. Y. 96. *Compare* Mussey *v.* Eagle Bank, 9 Metc. (Mass.) 306.

He may also deliver notes to an attorney for collection, and bind the bank for the costs of suit. Eastman *v.* Coos Bank, 1 N. H. 23. And may employ an attorney to collect a claim, without any resolution of the board of directors, although the board has appointed an attorney to attend to its legal affairs. Root *v.* Olcott, 42 Hun (N. Y.), 536.

The cashier cannot, however, transfer non-negotiable paper without special authority from the directors. Holt *v.* Bacon, 25 Miss. 567; Barrick *v.* Austin, 21 Barb. (N. Y.) 241.

Thus, in Holt *v.* Bacon, 25 Miss. 567, it was held that he could not transfer a judgment belonging to the bank without special authority. And he has no unplied authority to bind the bank by an official indorsement of his individual note. Savings Bank *v.* Shawnee Co. Bank, 95 U. S. 557; s. c., 3 Dill. (C. C.) 403.

Neither can he appear and defend suits on behalf of the bank, and consequently he cannot answer even where

within the scope of his ordinary duties bind the bank.[1] He is bound to exercise reasonable skill and ordinary care and diligence in the performance of his duties.[2]

the bank is summoned as garnishee. Branch Bank *v.* Poe, 1 Ala. 396. Nor can he execute a mortgage on the real estate of the bank. Leggett *v.* N. J., etc., Banking Co., 1 Saxton Ch. (N. J.) 541. Nor certify *post*-dated checks. Clarke Nat. Bank *v.* Bank of Albion, 52 Barb. (N. Y.) 592. Nor bind the bank to indemnify an officer for levying upon property on an execution in favor of the bank. Watson *v.* Bennett, 12 Barb. (N. Y.) 196.

1. Sturges *v.* Bank of Circleville, 11 Ohio St. 153; Haughton *v.* First Nat. Bank, 26 Wis. 663; Gould *v.* Cayuga County Nat. Bk., 56 How. Pr. (N. Y.) 505. See also Franklin Bank *v.* Stewart, 37 Me 519; Bank of Monroe *v.* Field, 2 Hill (N. Y.), 445; Bank of Metropolis *v.* Jones, 8 Pet. (U. S.) 12.

Thus, in Cochico Nat. Bank *v.* Haskell, 51 N. H. 116. where the cashier, on inquiry, informed the surety on one of its notes that the same had been paid, with the intention that he should rely upon it, and the surety did so, and was prejudiced thereby, it was held that the bank was estopped to deny that the note was paid.

But the declarations of the cashier not within the scope of his ordinary duties are not binding upon the bank. Merchants' Bank *v.* Marine Bank, 3 Gill (Md.), 96; United States *v.* City Bank of Columbus, 21 How. (U. S.) 356; Mapes *v.* Second Nat. Bank of Titusville, 80 Pa. St. 163.

Thus, his mere admissions of the legality of void debts or the genuineness of forged bills do not bind the bank. Merchants' Bank *v.* Marine Bank, 3 Gill (Md.), 96; Salem Bank *v.* Gloucester Bank, 17 Mass. 1.

And where the indorser, before indorsing the note, was told by the cashier that he considered the maker, for whose accommodation the indorsement was made, perfectly good financially, and that he would be safe in indorsing, by which statements the indorsement was procured, it was held that although wilfully false, they did not bind the bank. Mapes *v.* Second Nat. Bank of Titusville, 80 Pa. St. 163.

If the directors, through inattention or otherwise, suffer him to pursue a particular line of conduct for a considerable period, without objection, the bank will be bound by his acts. Caldwell *v.* Mohawk, etc., Bank, 64 Barb. (N. Y.) 333; City Bank *v.* Perkins, 4 Bosw. (N. Y.) 420.

2. Austin *v.* Daniels, 4 Denio (N. Y.), 299; Commercial Bank *v.* Ten Eyck, 48 N. Y. 305.

Liabilities of the Cashier.—If he fails to exercise reasonable skill and ordinary care and diligence, and the bank suffers in consequence, he is liable. Commercial Bank *v.* Ten Eyck. 48 N. Y. 305.

Where the condition of the cashier's bond is that he shall ' well and truly" execute the duties of his office, it includes not only honesty, but reasonable skill and diligence. If the duties are performed negligently or unskilfully, the condition of his bond is broken, and his sureties are liable. Minor *v.* Mechanics' Bank, 1 Pet. (U. S.) 46; Barrington *v.* Bank of Washington, 14 S. & R. (Pa.) 405; Batchelor *v.* Planters' Nat. Bank, 78 Ky. 435; American Bank *v.* Adams, 12 Pick. (Mass.) 303. *Compare* Union Bank *v.* Clossey, 10 Johns. (N. Y.) 271.

Where a loss occurs to the bank through the cashier's permitting overdrafts, his sureties are liable, although the directors knew of and sanctioned the overdrafts. The directors have no power to sanction overdrafts. Market Street Bank *v.* Stumpe, 2 Mo. App. 545. See also. as to liabilities of his sureties, Huntsville Bank *v.* Hill. 1 Stew. (Ala.) 201; Graves *v.* Lebanon Nat. Bank, 10 Bush (Ky.), 23; Taylor *v.* Bank of Kentucky, 2 J. J. Marsh. (Ky.) 568.

A cashier is not liable for erroneous information, given in good faith to a party, respecting the amount of money deposited to his credit by a third person, which mistake causes him a loss. Herrin *v.* Franklin Co. Bank, 32 Vt. 274.

And where the duty is imposed upon the cashier of carrying on the bank's business, he cannot be held responsible for a neglect of duty in not consulting other officers of the bank or committees whom by the by-laws he is required to consult in making discounts, where such committees hold no meetings, and the officers systematically absent themselves from the performance of their duties. Second Nat. Bank of Oswego *v.* Burt, 93 N. Y. 233.

Tellers.—Where there is a receiving as well as a paying teller, the former alone has any authority from the bank, by vir-

BAR. (See also ATTORNEYS; COURTS; FINES; PLEADING.)—This word has several meanings. At law, its most common use is in reference to the railing which incloses the place which counsel occupy in courts of justice.[1] In pleading, a special plea constituting a sufficient answer to an action at law.[2] This word is also used in various meanings in common language.[3]

tue of his office, to receive deposits. Thatcher *v.* Bank of State of New York, 5 Sandf. (N. Y.) 121; Manhattan Co. *v.* Lydig, 4 Johns. (N. Y.) 377. But in East River Nat. Bank *v.* Gove, 57 N. Y. 597, the bank employed a paying and a receiving teller, the general duty of the latter being to receive money paid to or deposited in the bank. In his absence other officers or clerks acted in his place. Defendant, having overdrawn his account by mistake, received a letter from the paying teller requesting him to call; he went to the bank, and at the request of the paying teller paid him over the counter the amount required to rectify the error; this was not entered on the books of the bank. It did not appear that the receiving teller was in the bank. In an action to recover the amount overdrawn, *held*, that the bank was bound by the payment. The court limit and distinguish the cases of Manhattan Co. *v.* Lydig, 4 Johns. (N. Y.) 377, and Thatcher *v.* Bank of State of N. Y., 5 Sandf. (N. Y.) 121, and say: "Banks must be held responsible for the conduct of their officers within the scope of their apparent authority. When one goes into a bank and finds behind the counter one of its officers employed in its business, and upon his demand pays a debt due the bank in good faith, without any knowledge that the officer's authority is so limited that he has no right to receive it, he must be protected, and the bank must be bound by the payment."

A bond for the "faithful" performance of the duties of a teller of a bank is a security for competent skill and ordinary diligence, as well as for integrity in the discharge of the duties of the office. American Bank *v.* Adams, 12 Pick. (Mass.) 303.

Authorities for Banks and Banking.—Morse on Banks and Banking (2d Ed.); Boone on Corporations; Lawson on Usages and Customs; Powers of Bank Cashiers (L. K. Mihills), 20 Cent. Law. Jour. 126; Personal Liabilities of Bank Officers (L. K. Mihills), 23 Cent. Law. Jour. 172; Responsibility of Banks for their Correspondents and Notaries (Francis B. Patten), 20 Am. Law. Rev. 889; Certificates of Deposit (A. J. Donner), 24 Cent. Law. Jour. 196.

1. Hence the expressions "at bar," "call to the bar," "admitted to the bar," to denote the court itself and the operation of being admitted to practice therein. R. & L. Law Dict. *sub voce.* The members of the legal profession collectively are figuratively called "the bar" from the place which they usually occupy in court. Burrill's Law Dict. *sub voce.* So also a case "at bar" is a case presently before the court; a case under argument. See Bresnen *v.* Bristol, 66 Me. 354, 356.

2. **Plea in Bar.**—In the old books "bar" frequently means a "plea in bar," and is so called "because it barreth the plaintiff of his action." Co. Litt. 303 b.

A "bar," in a legal sense, is a plea or peremptory exception of a defendant, sufficient to destroy the plaintiff's action. Norton *v.* Winter, 1 Oreg. 47.

Where a New Jersey statute has defined a "plea in bar" as a "plea that the action is illegal," it was held to limit the general construction given to it in the books of English practice, and not to include the "general issue." Austin *v.* Nelson, 1 Halst. (N. J.) 381.

3. **Saloon and Bar.**—The jury doubtless understood the words "saloon and bar," taken in their connection, as meaning dram-shop or grocery. Brockway *v.* State, 36 Ark. 629, 636.

Barkeeper.—The wages of a "barkeeper" in a tavern are to be considered as servant's wages, and are entitled to a preference, as such, under the intestate act of 19th April, 1794. Boniface *v.* Scott, 3 S. & R. (Pa.) 351.

Crossing the Bar.—On a question of boundary lines it was held "crossing the bar," etc., means passing clear across the width of the bar on the line of low water, and when the western edge or limit of the bar on the line of low water is reached, then a straight line from that point "to the first-mentioned bound" is the true line. Bresnen *v.* Bristol, 66 Me. 354.

Bar-iron.—Under a policy on all iron, effected on "808 bundles of rods," which provided that insurer should not be liable for any partial loss on bar-iron, the court, Ames, C. J., held that the question was for the jury whether bundles of rods are "bar-iron," saying: "Bar-iron

BARE.—Mere; unaccompanied; naked; nothing more.[1]

BARGAIN.—Arrangement of terms upon which one party buys and another sells anything; any agreement or stipulation.[2]

is a term of trade, including, it may be, what those out of the trade would not deem to be 'bars of iron,' and excluding, it may be, what they would. At all events, this is a question of facts, and as such could not properly be decided by the court. If, as terms of trade, 'bar-iron' and 'bundles of rods' meant, in general, different forms of iron, it was certainly not for the court to say that in the clause in question the one nevertheless included the other, because it was within the same reason. The court, as a matter of law, cannot know that they are within the same reason; and if the judge did, as a matter of fact, he must nevertheless leave it to the jury." Evans *v.* Commercial Mut. Ins. Co., 6 R. I. 47, 53. See U. S. *v.* Sarchet, Gilpin (U. S.), 273, 292.

1. **Bare Trustee.**—Jessel, M. R., after commenting on the opinions as to the meaning of the words "bare trustee" in the act of Parliament expressed by Messrs. Dart and Barber in their book (5th Ed. 517), and by Vice-Chancellor Hall in Christie *v.* Ovington, said that his own conclusion on the meaning of the expression was different. He should have thought, from the analogy of the bankruptcy, that the term "bare trustee" meant a trustee without a beneficial interest. Whether trustees who had active duties to perform were or were not "bare trustees" it was unnecessary to decide; but his lordship was clear in his opinion that a trustee who had a beneficial interest was not a "bare trustee" within the meaning of the act. The present case was one of an unpaid vendor, who was not bound to convey until he had been paid the purchase-money, and who had a lien on the estate for that money. It was impossible that such a man could be properly described as a "bare trustee" within section 48 of the Land Transfer Act, 1875, and his lordship should decline so to hold. Morgan *v.* Swansea Urban Sanitary Authority, 27 Weekly Reporter, 283.

The opinion of Messrs. Dart and Barber cited above is as follows: The act does not define what is meant by a "bare trustee" in §§ 5 and 6 of the 37 and 38 Vict. c. 78; and the term is generally considered to be ambiguous; but it will probably be held to mean a trustee to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trustent*, be compellable in equity to convey the estate to them or by their direction, and has been requested by them so to convey it. Dart on Vendors and Purchasers (5th Ed.), 517.

The opinion of Vice-Chancellor Hall cited above is as follows: "Where there is a trustee to convey, and the time has arrived for conveyance by him, the person to convey is a 'bare trustee,' whether considered in reference to the Vendor and Purchaser Act of 1874 or the Land Transfer Act of 1875." Christie *v.* Ovington, 24 Weekly Reporter, 204; s. c., L. R. 1 Ch. Div. 279.

Bare Naked Lie.—In a case in which the court held that a false affirmation made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit, Judge Buller said: "But it is contended that this is a 'bare naked lie;' that as no collusion is charged, it does not amount to a fraud; and if there were any fraud, the nature of it is not stated. And it was supposed by the counsel who originally made the motion [in arrest of judgment] that no action could be maintained, unless the defendant, who made this false assertion, had an interest in so doing. I agree that an action cannot be supported for telling a 'bare naked lie;' but that I define to be, saying a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat, or deceive another person." Parley *v.* Freeman, 3 Term Reports (Durnford and East), 51, 56.

2. A memorandum signed by the defendants whereby they agreed to give so much for goods was held to take the case out of the 17th section of the Statute of Frauds, 29 Car. 2, c. 3, which reads: "No contract for the sale of any goods, etc., shall be allowed to be good except the buyer shall accept, etc., or give something in earnest to bind the bargain;" the court, Ellenborough, C. J., observing that the words of the statute were satisfied if there were "some note or memorandum in writing of the bargain signed by the parties to be charged by such contract." And this was a memorandum of the bargain, or at least of so much of it as was sufficient to bind the parties to be charged therewith, and whose signatures to it is

all that the statute requires. Egerton *v.* Matthews *et al.*, 6 East, 307. This case was distinguished from one under the 4th clause of the same statute, in which it was held that no person can by the Statute of Frauds be charged upon any promise to pay the debt of another unless the agreement upon which the action is brought, or some note or memorandum thereof, be in writing, in the 17th clause the word "bargain" being used, and in the 4th "agreement;" by which word "agreement" must be understood the consideration for the promise as well as the promise itself. Wain *v.* Walters, 5 East, 10.

The difficulty of reconciling these two cases has not been allowed to pass in silence. Thus in a Massachusetts case Chief Justice Parsons says: "These two decisions are not easily to be reconciled. A 'bargain' is a contract or agreement between two parties, the one to sell goods or lands, and the other to buy them. A contract of this sort is void in law unless made on sufficient consideration. And the consideration of a 'bargain' seems to be as necessary a part of it as of any other contract or agreement; and there is the same danger of perjury in proving the consideration of a 'bargain' by parol as of any other agreement. But if the word 'agreement' may be understood in the popular sense, as intending the undertaking the party charged, and as not necessarily including the consideration for it, we may approve of the decision in the latter case, while we may doubt as to the former case." Hunt, Admr., *v.* Adams, 5 Mass. 358.

In commenting on these cases Parker, C. J., said: "If the word 'agreement' imports a mutual act of two parties, surely the word 'bargain' is not less significative of the consent of two. In a popular sense the former word is frequently used as declaring the engagement of one only. A man may agree to pay money or to perform some other act; and the word is then used synonymously with 'promise' or 'engage.' But the word 'bargain' is seldom used unless to express a mutual contract or undertaking. If, then, the technical meaning of the word 'agreement' made it necessary to insert the consideration in a collateral promise to pay, why not the word 'bargain' also, as Lord Ellenborough at first supposed? But the court, Lord Ellenborough consenting, overruled the decision at *nisi prius*, and decided that a contract for the sale of goods was valid without any consideration expressed in the contract. Packard *v.* Richardson *et al.*, 17 Mass. 122, 131; s. c., 9 Am. Dec. 123.

So in a Connecticut case Hosmer, C. J., after discussing at large the meaning of the word "agreement," says: "In the case of Egerton *v.* Matthews *et al.*, 6 East, 307, it became necessary to fix the meaning of the term 'bargain' in the 17th section of the Statute of Frauds: and, with Lord Ellenborough at their head, the court determined that this word was not coextensive with 'agreement,' and that the consideration of the contract need not be in writing. To this opinion I cannot accede. The word 'bargain' is equivalent to the expression 'mutual agreement;' and if I were disposed to make a diversity of signification between the two words under consideration, I should be inclined to say that the term 'bargain' more prominently brings into view the mutuality of contract between parties than the word 'agreement.' If the determination in Egerton *v.* Matthews was right, I am persuaded that the decision in Wain *v.* Walters was wrong." Sage *v.* Wilcox, 6 Conn. 81, 91.

Corrupt Bargain.—On a petition that the applicant might be substituted as petitioner for the petitioners in each of two election cases, and that the deposit made in each case might remain "as security" for any costs that might be incurred by him as directed by the Controverted Elections Act of 1874, sec. 54, and ch. 10, sec. 2, of the act of 1875, supported by affidavits that the petitioners were about to withdraw by reason of a corrupt "bargain" or consideration, which affidavits were denied by the affidavits of the petitioners in answer, the court, Wilson, C. J., said: "Upon the facts stated in the affidavits filed on behalf of the parties who showed cause to the rule that the parties made an agreement by which the petitions 'shall be allowed to lapse,' each petitioner withdrawing the charges by him respectively preferred, was an illegal 'bargain.' They were public prosecutions, not private suits, and the parties after originating them on behalf of the public have no longer any personal control over their final settlement. In law, whatever the motives and intentions of the parties may have been, such a bargain would be esteemed a 'corrupt bargain.' But that is not all which we would have to consider. The statute does not say that any agreement to compound or withdraw from an election petition shall, for the purpose of retaining the deposit money to enable the petition to be carried on by the substituted party, be deemed to be a corrupt bargain, although *prima facie* it certainly would be so; but that the deposit money may be ordered

BARGAIN AND SALE. See SALE.

BARGE.—A large boat for pleasure or for state occasions; a flat-bottomed boat for burdens.[1]

to remain for the benefit of the substituted party 'if the proposed withdrawal is, in the opinion of the court, induced by any corrupt bargain or consideration.' That is, it is left to the court to inquire into and determine what the motives and intent of the parties were, as a matter of fact, in making such an arrangement, and not to deal with the motives and intent as a matter of presumption and inference of law which cannot be rebutted. If the parties have violated the general law, they may be made to answer for it; but before their money can be taken from them and delivered over to another to disport with it as he pleases, the fact of a 'corrupt bargain' must be proved and not inferred from the mere act itself." *In re* Kingston Election Case, 30 N. C. C. P. 389.

Bargain For.—A power of attorney "to sell, dispose of, contract, and bargain for land, etc., and to execute deeds, contracts, and bargains for the sale of the same," did not authorize a relinquishment of the land in question to the State of Kentucky under an act of the legislature which allowed persons who held lands subject to taxes to relinquish and disclaim their title thereto; because, says the court, Story, J.: "The language here used is precisely that which would be used in cases of intended sales or contracts of sale of the land for a valuable consideration to third persons in the ordinary course of business. In the strict sense of the term a relinquishment of the lands to the State under the act of 1794 is not a sale." Clarke's Lessee *v.* Courtney, 5 Pet. (U. S.) 319, 347.

Close the Bargain.—A broker who is empowered to "close the bargain" for the sale of real estate is not authorized to sign the name of his principal to a contract for the sale of property. In this case the court, Mitchell, J., says: "In dealing in real estate the authority to sign the contract is never understood to be granted from a mere authority to make a bargain." Coleman *v.* Garrighes, 18 Barb. (N. Y.) 60.

Contracts, Bargains, and Agreements.—These words used in the charter of an insurance company by which "all contracts, bargains, agreements, policies, and other instruments" are required to be in writing and signed by the president, etc., have reference only to executed contracts or policies of insurance, and not to the initial or preliminary arrangements for insurance which precede the execution of the formal instrument by the officers of the company. Insurance Company *v.* Colt, 20 Wall. (U. S.) 560.

1. Where a limited-liability act which provided for a limitation of the liability of the owners of vessels, as common carriers, for injuries to passengers or merchandise, had this restriction (U. S. Rev. Stat. 4289): "This act shall not apply to the owners of any canal-boat, *barge*, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation:" it was held that this act only applied to vessels engaged in what is ordinarily known as maritime commerce, and therefore the owners of a small steam pleasure yacht, engaged in navigating the Detroit river, running in and out of the port of Detroit, was not entitled to the benefits of the act. For, said the court, Brown, D. J.: "The act is limited by the intention of Congress in enacting it, which was to encourage commerce and to enable American vessels to compete with those of other maritime nations, whose laws extended a like protection to shipowners." "The exceptions in the act itself indicate the intention of Congress to restrict its benefits to what is generally known as maritime commerce, though it may also happen to be commerce between the States. They are: (1) "Canal-boats." These are ordinarily, though not always, used upon artificial waters, within the limits of a single State. (2) "Barges" were defined by Webster in his dictionary of 1851, the year the act was passed, as (*a*) "pleasure boats, or boats of state, furnished with elegant apartments, canopies, and cushions, equipped with a band of rowers, and decked with flags and streamers used by officers or magistrates;" and (*b*) "a flat-bottomed vessel of burden for loading and unloading of ships." In the latter sense it was undoubtedly used by Congress, and in that sense barges are synonymous with lighters, and are used wholly in local navigation. In later years the word has been used to designate a class of large vessels, sometimes costing from $15,000 to $50,000, carrying large cargoes, and depending for their motive power wholly or in part upon steamers to which they are attached by tow-lines, and employed to a very large extent in interstate commerce upon the lakes. Whether the owners of such large barges would not be entitled

BARLEY.—A kind of grain or corn.[1]

to the benefit of the limited-liability act is an open question. Undoubtedly they are within the letter of the exception, but as they are a class of vessels which were unknown at the time the act was passed, it would seem they are not within its spirit. I see no reason in principle why they are not as much within the act as the propellers which furnish them their motive power. It is possible, however, that the use of the word 'barges' in the Revised Statutes of 1873 may indicate an intention on the part of Congress to extend the exemption to this class of vessels, etc." The Mamie, 5 Fed. Repr. 813.

Where a marine policy upon a vessel described as a "steam barge" was warranted by the assured "to be free from any contribution by jettison of property laden on deck of any sail vessel or barge," and there was nothing else in the policy as to the vessel insured carrying a deck load, it was held that the barge mentioned in the policy did not mean the insured vessel, nor did it refer to a steam barge. Steinhoff *v.* Royal Canadian Ins. Co., 42 N. C. Q. B. 307.

A canal boat laden with coal for transportation, having on board the master with his family, is not a "barge carrying passengers" within the meaning of section 4492 of the Revised Statutes, which requires that such a barge, while in tow of a steamer, shall be provided with fire-buckets, axes, life-preservers, and yawls. Transportation Line *v.* Cooper, 99 U. S. 79.

1. Where an indictment, under the statute of 7 and 8 Geo. IV. c. 30. s. 17, in which the words creating the offence are "any stack of corn or grain," charged a party with setting fire to a stack of barley, the indictment was held good; the court, Patteson, J., saying: "The only question is whether I am bound to take judicial notice that barley is either corn or grain." Rex *v.* Swakkies, 4 C. & P. 548, 552. Appended to this case is the following note: "It may be proper to observe that barley is mentioned as corn in several acts of Parliament which relate to the importation of corn; for example, by the stat. 55 Geo. III. c. 26. s. 3, it is enacted that foreign corn, meal, or flour may be imported for home consumption, 'whenever the average prices of the *several sorts of British corn* made up and published in the manner now by law required *shall be at or above the prices hereafter* mentioned, that is to say, whenever wheat shall be at or above the price of eighty shillings per quarter; whenever rye, peas, and beans shall be at or above the price of fifty-three shillings per quarter; when-*barley, beer, or bigg* shall be at or above the price of forty shillings per quarter; and whenever oats shall be at or above the price of twenty-seven shillings per quarter.'" See also Robinson *v.* U. S., 13 Wall. 363

Prime Barley.—In a contract for the delivery of barley, the quality called for may be ascertained by mercantile usage of the terms employed; and the parties are presumed to use them according to the meaning attached to them by the mercantile community. This case was on a contract for the delivery of 3000 bushels of "prime barley." The main question before the court and jury was in relation to the words "prime barley." There was testimony tending to show the distinctions used among merchants in the quality of barley. These were choice, prime, good, fair, and inferior. The proof showed that the first quality was called choice, the next prime, etc. These distinctions were clearly shown by the testimony of merchants who had been in the habit for years of trading in this and other grains. There also was some evidence on the part of the brewers which tended to show that they used the word "prime" in relation to "barley" as the first quality. Upon this evidence the court left the question to the jury, who found for the plaintiff, holding that "prime barley" was not first-quality barley. Whitmore & Pegram *v.* Coats, 14 Mo. 9.

Seed Barley.—In an action for a breach of warranty in a sale of certain seed barley, the plaintiff contended that "seed barley" implied such a description of barley as when sown would produce a crop of barley available for malting purposes. The defendant contended that "seed barley" implied no more than that the barley when sown would produce a crop. The learned judge, Pollock, C. B., was of opinion that there was no evidence; that "seed barley" meant any particular kind of barley, and nonsuited the plaintiff. A rule taken to set aside the nonsuit was discharged, Martin, B., saying: "I think that 'seed barley' means barley ordinarily sown by farmers and which will produce seed." Bramwell, B.: "The ordinary meaning of 'seed barley' is barley which will germinate. If by a custom in the trade 'seed barley' means anything more, viz., barley used for malting purposes, that ought to have been proved." And finally, Pol-

BARN.—A building for containing grain, hay, and other produce of a farm, and also for stabling cattle.[1]

lock, C. B., said: "At the trial I was of opinion, and still think, that if a party seeks to make out that certain words used in a contract have a different acceptation from their ordinary sense, either for the purposes of trade, or within a certain market or a particular county, he must prove it; not by calling witnesses, some of which say it is one way and some the other, and then leaving it to the jury to say which they believe, but by clear, distinct, and irresistible evidence." Carter *v.* Crick, 4 H. & N. 412.

1. The cases in which this word has been construed have been chiefly those arising upon an indictment for arson, wherein decisions have been given as to whether the building burned was or was not a *barn*.

Thus upon an indictment for the felonious burning of a *barn* with grain or corn in it, it was held that a prisoner cannot be convicted upon proof that he burnt a *crib* with corn in it; and a new trial was granted. State *v.* Laughlin, 8 Jones Law (N. Car.), 354. At the second trial the jury found a special verdict as follows: "That the prisoner did burn a house sitting on blocks, built of logs and roofed in, with good floor, and door fastened with padlock, seventeen feet long by twelve feet wide, with two rooms, one about three times as large as the other—the small room used for storing the nubbins or refuse corn, the other used for storing the peas, oats, or other products of the farm." It was held that this was not a barn within the meaning of the statute, Rev. Code (N. Car.), chap. 34, sec. 2, the burning of which is made a felony. In this case the court, Battle, J., said: "Our statute upon which the indictment in the present case is founded is as highly penal as any known to our law, and must therefore receive a construction which will prevent the possibility of the prisoner's losing his life for an offence not within the contemplation of the legislature. He is charged with burning a barn, and the special verdict finds that he burnt a house of the description therein particularly set forth. If such a house be a barn, he is guilty; if not, he is not guilty. In Webster's Dictionary, a barn is said to be 'a covered building for securing grain, hay, flax, and other productions of the earth.' Bouvier, in his Law Dictionary, defines it to be 'a building on a farm, used to receive the crop, the stabling of animals, and other purposes.' The house described in the special verdict certainly does not come within the meaning of either of these definitions; but it does come within the meaning of a crib, which, according to Webster, is a term used in the United States to signify 'a small building, raised on posts, for storing Indian corn,' or a granary, which, according to the same authority, is 'a store-house or depository of grain, after it is threshed; a corn-house.'" State *v.* Laughlin, 8 Jones Law (N. Car.), 455. Following this it was held by the same judge, Battle, J., that a house eighteen feet long, built of logs notched up, the cracks covered inside with rough boards, roofed with rough boards, with a good plank floor, and a door about four feet high, containing, at the time of the burning, a quantity of corn, peas, and oats, though the only building on the farm used for storing the crop, is not a *barn* within the meaning of the statute. Rev. Code, chap. 34, sec. 2; State *v.* Jim (a slave), 8 Jones Law (N. Car.), 459.

A building intended for, and constructed as, a dwelling-house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural implements, was held not to be a house, out-house, or *barn* within the meaning of the statute 9 Geo. I. c. 22, s. 7, so as to entitle the owner to maintain an action against the hundred for an injury sustained by him in consequence of malicious setting fire to the same. Elsinore *v.* Inhabitants of the Hundred of St. Briavells, 8 B. & C. 461.

Barn of Another.—Under a statute which made it arson to set fire to the dwelling-house or *barn* of another, it was held that the burning of an unfinished house or barn in process of construction which had never been actually occupied or used for the purposes for which it was being erected was not included. State *v.* Wolfenberger, 20 Ind. 242.

On the other hand, a building of hewn logs (twenty-six feet by fifteen), divided by a partition of the same, upon one side of which were horses, and upon the other corn, oats, and wheat (threshed and unthreshed), also hay, fodder, etc., having sheds adjoining, under which were wagons and other farming utensils, is a *barn* within the meaning of that word in the Rev. Code, chap. 34, sec. 2, punishing with death the burning of barns having grain in them. In this case the court, Pearson, C. J., said: "The building described by the witness is a barn, both according to the legal acceptation of the

BARRATRY.—Criminal Law.—A barrator is defined to be a common mover, exciter, or maintainer of suits or quarrels either in courts or in the country, and it is said not to be material whether the courts be of record or not, or whether such quarrels relate to a disputed title or possession or not; but that all kinds of disturbances of the peace, and the spreading of false rumors and calumnies, whereby discord and disquiet may grow amongst neighbors, are as proper instances of barratry as the taking or keeping possession of lands in controversy. But a man is not a barrator in respect of any number of false actions brought by him in his own right, unless, as it seems, such actions should be entirely

word and also its popular meaning. Ask any man if this building is a *barn*. He will reply: 'If it is not one, I don't know what you would call a barn.' The circumstance that a part of the building was used as a stable does not affect its character as a barn. Indeed that is usually the case in the middle and western parts of the State. Some people are not fortunate enough to have a *barn;* as an old out-house used to keep shucks, peas, and nubbins in does not rise to the dignity of a *barn* in legal acceptation or in common parlance. Laughlin's Case, 8 Jones L. (N. Car.) 454. But in our case there was a substantial building, large enough to hold the horses, and the hay and grain, in the straw and after it was threshed, and also the wagons and other utensils of the farm. It matters not whether the house was built of logs or of stone, or was a frame-house and weather-boarded; such a building is a *barn* and is under the protection of the law." State *v.* Cherry, 63 N. Car. 493.

Under the *Iowa* statute which punishes the wilful and malicious burning of any "*barn*, stable, out-house, or any building whatever" of another (Rev. Stats. 4226), the court, Wright, J., was of opinion that to constitute a *barn* within the meaning of this statute it was not necessary that it should be designed or used, in whole or in part, for the storage of hay, corn, or produce of any kind, and at any rate, since the indictment described the property burned as a "certain building there situate called a *barn*," it might be shown that the structure burned, though but an out-building used solely for sheltering cattle, was in fact called and known as a barn by people in that vicinity; and on such proof the indictment would be sustained. State *v.* Smith, 28 Iowa, 565.

In *Ohio* it has been held that a tobacco-house, a building erected upon a farm for the purpose of storing and drying tobacco, and used for that purpose, may be the subject of burglary under the act defining that crime, and may be described in the indictment as a *barn;* the court saying: "The fact, the building was used for the purpose of storing products of the farm, we think, entitles it to that statutory designation." Ratekin *v.* State, 26 Ohio, 420.

Contained in a Barn.—Where a policy of insurance covered a phaeton described as "contained in a frame barn," and the phaeton was destroyed by fire while at a carriage-shop undergoing repairs, it was held that the words describing the location of the phaeton constituted a warranty that it would be "contained in a barn" when not absent therefrom for temporary purposes incident to the use and enjoyment of the property. In this case the court said: "The words which are used must be construed with reference to the property to which they are applied. Carriages which are kept for sale and are insured as contained in a certain warehouse could not be removed to a different warehouse without avoiding the policy. There is nothing in the nature of the property to indicate that they will be removed, and the insurance is not made with reference to such fact. But where a person procures a policy upon his horses, harness, buggy, and phaeton, as contained in a certain barn, the presumption must be that they are in use, and that the policy is issued with reference to such use. This doctrine was held substantially not only by this court in Peterson *v.* Miss. Valley Ins. Co., 24 Iowa, 494, but in Massachusetts in Fitchburg R. Co. *v.* Charlestown Mut. Fire Ins. Co., 7 Gray (Mass.), 64." McCluer *v.* Girard Fire & Marine Ins. Co., 43 Iowa, 349.

Demise of a Barn.—A demise or conveyance of a *barn*, without other words being superadded to extend its meaning, will pass no more land than is necessary for its complete enjoyment. Bennet *v.* Bittle *et al.*, 4 Rawle (Pa.), 339; s. c., 6 Wheeler's Am. Common Law, 408.

groundless and vexatious, without any manner of color. Nor is an attorney a barrator in respect of his maintaining his client in a groundless action, to the commencement of which he was in no way privy.[1]

Shipping.—Any act of the master or of the mariners of a ship which is of a criminal or fraudulent nature, tending to the prejudice of the owners of the ship, without their consent or privity, as by running away with the ship, sinking her, deserting her, or embezzling the cargo. (See SHIPPING.)

BARRATRY, IN MARITIME LAW. See SHIPPING.

BARTER.—A contract by which the parties exchange goods.[2]

1. Hawk. P. C. b. 1, c. 81, §§ 1–4; 1 Russ. Cr. (5th Ed.) 362; Com. *v.* Davis 11 Pick. (Mass.) 432; Com. *v.* McCulloch, 15 Mass. 227; R. *v.* Urlyn, 2 Saund. 308 and note.

Common barratry is the practice of exciting groundless judicial proceedings. N. Y. Penal Code, § 132.

Barratry is a cumulative offence, and the party must be charged as a common barrator. It is, therefore, insufficient to prove the commission of one act only. Hawk. P. C. b. 1, c. 81, § 5. These instances seem necessary. See State *v.* Chitty, 1 Bailey (S. Car.), 379; Com. *v.* Pray, 13 Pick. (Mass.) 359; Com. *v.* Davis, 11 Pick. (Mass.) 432; Com. *v.* Tubbs, 1 Cush. (Mass.) 2; Com. *v.* Mohn, 52 Pa. St. 243; Lucas *v.* Pico, 55 Cal. 126; Voorhees *v.* Dorr, 51 Barb. (N. Y.) 580; N. Y. Penal Code, § 134. For this reason the prosecutor is bound, before the trial, to give the defendant a note of the particular acts of barratry intended to be insisted on, without which the trial will not be permitted to proceed. Hawk. P. C. b. 1, c. 81, § 13. The prosecution will be confined by these particulars. Goddard *v.* Smith, 6 Mod. 262.

The punishment of this offence is fine and imprisonment and being held to good behavior, and in persons of any profession relating to the law the further punishment is added of being disabled to practise for the future. Hawk. P. C. b. 1. c. 81, § 14; 34 Edw. III. c. 1; State *v.* Chitty, 1 Bailey (S. Car.), 379.

Common barratry is a misdemeanor. N. Y. Penal Code, § 133.

By the 12 Geo. I. c. 29, § 4, if any person convicted of common barratry shall practise as an attorney, solicitor, or agent, in any suit or action in England, the judge or judges of the court where such suit or action shall be brought shall, upon complaint or information, examine the matter in a summary way in open court, and if it shall appear that the person complained of has offended, shall cause such offender to be transported for seven years. This act was revived and made perpetual by 21 Geo. II. c. 3, which is repealed, but the above enactment is now made perpetual by the repeal of the section which provided for its expiration, viz., the last section of the act.

There must be a corrupt or malicious intent to vex and annoy. N. Y. Penal Code, § 134; Voorhees *v.* Dorr, 51 Barb. (N. Y.) 580; Com. *v.* McCulloch, 15 Mass. 227.

Information of an outstanding title to land, in the adverse possession of another, constitutes a good consideration for a promissory note, and the sale of such information is not barratrous. Lucas *v.* Pico, 55 Cal. 126.

Where one purchased three promissory notes made by the same person, and left them with an attorney for collection, and the attorney brought three several suits thereon before a justice of the peace (any two of the notes amounting to more than $20), when they might have been joined in one action if brought to the court of common pleas; and the creditor afterwards took the executions, and caused them to be levied under circumstances that indicated a disposition to oppress the debtor, and received the money thereon,—it was held that this conduct, though it constituted an indictable offence, did not make the creditor a common barrator. Com. *v.* McCulloch, 15 Mass. 229.

A justice of the peace may be indicted as a common barrator for exciting prosecutions for offences; and it is not a sufficient defence that the prosecutions were not groundless, if he excited them with a view of exacting fees for afterwards suppressing them. State *v.* Chitty, 1 Bailey (S. Car.), 379.

2. Speigle *v.* Meredith, 4 Biss. (U. S.) 123.

The term is not applied to contracts concerning land, but to such only as relate to goods and chattels.[1]

BASE FEE.—A base or qualified fee is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end, as in the case of a grant to A and his heirs, *tenants of the manor of Dale.* In this instance, whenever the heirs of A cease to be tenants of that manor, the grant is entirely defeated.[2]

BASIN.—A part of the sea inclosed in rocks.[3]

BASTARDY. (See also PARENT AND CHILD; POOR AND POOR LAWS.)

1. **Definition.**—Bastards are persons born out of wedlock, lawful or unlawful, or not within competent time after termination of coverture, or if born out of wedlock, whose parents do not afterwards intermarry and the father acknowledges them, or who are born in wedlock when procreation by the husband is impossible.[4]

1. Speigle *v.* Meredith, 4 Biss. (U. S.) 123.

Barter and Sell.—In an indictment, an averment that the defendant did unlawfully "barter and sell" certain intoxicating liquor for the price of ten cents was held to import a sale and not a barter, and the word "barter" was regarded as surplusage. Massey *v.* State, 74 Ind. 368.

A *sale* differs from a *barter* in this, that in the latter the consideration instead of being paid in money is paid in goods or merchandise susceptible of a valuation. Com. *v.* Davis, 12 Bush (Ky.), 241.

2. Wiggins Ferry Co. *v.* O. & M. Ry. Co., 94 Ill. 93, quoting Bl. Com.

3. U. S. *v.* Morel, 13 Am. Jur. 286.

4. Smith *v.* Perry, 80 Va. 563.

A child born out of lawful wedlock. This definition includes all those born of parties under disability; *e.g.*, slaves, who cannot exercise the freedom of consent essential to the contract. Timmins *v.* Lacy, 30 Tex. 115, 135.

The presumption of law is in favor of legitimacy of children, but it will not be made where the question to be determined is one of fact. Blackburn *v.* Crawford. 3 Wall. (U. S.) 175; s. c., Bk. 18, L. C. P. 186. See Strode *v.* Magowan, 2 Bush (Ky.), 621; Canjolle *v.* Ferrie, 26 Barb. (N. Y.) 177; Dinkins *v.* Samuel, 10 Rich. L. (S. Car.) 66; Vaughan *v.* Rhodes, 2 McC. (S. Car.) 227; s. c., 13 Am. Dec. 713.

The law presumes legitimacy where husband recognizes the child as his, and impossibility of procreation is not established. Smith *v.* Perry, 80 Va. 563.

The civil law declares that marriage legitimizes children born before marriage. The common law is different: a subsequent marriage does not legitimize such children. Brock *v.* State, 85 Ind. 397.

In many of the States the subsequent marriage of the parents and acknowledgment works by statute the legitimacy of the child. *Ark.:* Gresley *v.* Jackson, 38 Ark. 487; *Ga.:* Adams *v.* Adams, 36 Ga. 236; *Ind.:* Brock *v.* State, 85 Ind. 397; *Ky.:* Dannelli *v.* Dannelli, 4 Bush (Ky.), 51; *La.:* Succession of Caballero, 24 La. Ann. 573; Talbot *v.* Hunt, 28 La. Ann. 3; *Md.:* Hawbecker *v.* Hawbecker, 43 Md. 516; *Mass.*. Ross *v.* Ross, 129 Mass. 243; *N. H.:* Morgan *v.* Perry, 51 N. H. 559; *Pa.:* Brightly's Purdon's Dig. 1004, § 9; *Texas:* Carroll *v.* Carroll, 20 Tex. 731; *Va.:* Sleigh *v.* Strider, 5 Call (Va.), 439.

A prosecution for bastardy cannot be afterwards instituted and maintained, though the marriage was entered into by the father in bad faith, merely to escape a pending prosecution for bastardy, and then to abandon the mother. Brock *v.* State, 85 Ind. 397.

A husband is not bound to support a child born before marriage. Overseers *v.* Cox, 7 Cow. (N. Y.) 235; People *v.* Volksdorf, 112 Ill. 292.

Law of Domicile.—When an illegitimate child has, by the subsequent marriage of his parents, become legitimate by virtue

of the laws of the State or country where such marriage took place and the parents were domiciled, it is thereafter legitimate everywhere, and entitled to all the rights flowing from that status, including the right to inherit. Miller *v.* Miller, 91 N. Y. 315; s. c., 43 Am. Rep. 669; Van Voorhis *v.* Brintnall, 86 N. Y. 18; s. c., 40 Am. Rep. 505; Ross *v.* Ross, 129 Mass. 243; Smith *v.* Kelly, 23 Miss. 170; Scott *v.* Key, 11 La. Ann. 232; *In re* Goodman's Trust, L. R. 17 Ch. 266. *Compare* Lingen *v.* Lingen, 45 Ala. 410; Smith *v.* Derr, 34 Pa. St. 126; Barnum *v.* Barnum, 42 Md. 251.

Plaintiff was born illegitimately in Würtemberg, in 1845, where his parents then resided; they removed, with plaintiff, to the State of Pennsylvania, and his father there became a naturalized citizen. In 1853, while domiciled in said State, the parents were married. In 1857 a law was passed by the legislature of that State legitimizing children, born out of wedlock, of parents who shall thereafter marry, which act, by an act of 1858, was made applicable to all cases arising prior to 1857, save where some interest had become vested. In 1862 plaintiff removed, with his parents, to New York; his father thereafter became owner of certain real estate, and in 1875 died seized thereof, and intestate. In an action of ejectment, *held*, that the provision of the Revised Statutes (1 R. S. 754, § 19) disinheriting illegitimate children did not apply; and that plaintiff was entitled to inherit equally with the children of the deceased born in wedlock. Miller *v.* Miller, 91 N. Y. 315; s. c., 43 Am. Rep. 669.

The status of any person, with the inherent capacity of succession or inheritance, is to be ascertained by the law of the domicile which creates the status, at least when the status is one which may exist under the laws of the State in which it is called in question, and when there is nothing in those laws to prevent giving full effect to the status and capacity acquired in the State of the domicile. Ross *v.* Ross, 129 Mass. 243.

In this case Gray, C. J., said: "By the rule of the common law, which is the law of England to this day, and formerly prevailed throughout the United States, a child not born in lawful matrimony is not deemed the child of his father, although the parents subsequently intermarry, but is indelibly a bastard. By the rule of the civil law, on the other hand, which has been adopted in Scotland, as well as in France, Germany, and other parts of Europe, and more recently in many States of the Union, such a child may become legitimate upon the subsequent marriage of his parents.

"The leading case in Great Britain on this subject is Shedden *v.* Patrick, briefly reported in Morison's Dict. Dec. Foreign, Appx. I. No. 6, and more fully in 5 Paton, 194, which was decided by the House of Lords, on appeal from the Scotch Court of Session, in 1808, and in which a Scotchman, owning land in Scotland, became domiciled in New York, and there cohabited with an American woman, had a son by her, and afterwards married her, and died there; and the son was held not entitled to inherit his land in Scotland. Two questions were argued: 1st. Whether the plaintiff, being by the law of the country where he was born, and where his parents were domiciled at the time of his birth and of their subsequent marriage, a bastard, and not made legitimate by such marriage, could inherit as a legitimate son in Scotland, the law of which allows legitimation by subsequent matrimony. 2d. Whether, being a bastard, and therefore *nullius filius* at the time of his birth in America, he was an alien and therefore incapable of inheriting land in Great Britain; the act of Parliament of 4 Geo. II. c. 21 making only those children, born out of the ligeance of the British crown, natural-born subjects, whose fathers were such subjects 'at the time of the birth of such children respectively.' The Court of Session decided the case upon the first ground. In the House of Lords, after full argument of both questions by Fletcher and Brougham for the appellant and by Romilly and Nolan for the respondent, Lord Chancellor Eldon, speaking for himself and Lord Redesdale, said that, 'as it was not usual to state any reasons for affirming the judgment of the court below, he should merely observe that the decision in this case would not be a precedent for any other which was not precisely the same in all its circumstances,' and thereupon moved that the judgment of the Court of Session should be affirmed, which was accordingly ordered. On a suit brought forty years afterwards by the same plaintiff against the same defendant to set aside that judgment for fraud in procuring it, the House of Lords in 1854, without discussing the first point except so far as it bore upon the question whether there had been any fraudulent suppression of facts relating to the father's domicile, held that the plaintiff was an alien at the time of his birth, and could not be afterward naturalized except by act of Parliament. Shedden *v.* Patrick, 1 Macq. 535.

"But the remark of Lord Eldon, above

quoted, in moving judgment in the original case, and the statements made in subsequent cases by him, by Lord Redesdale, who concurred in that judgment, and by Lord Brougham, who was of counsel in that case, clearly show that the judgment in the House of Lords, as well as in the Court of Session, went upon the ground that the child was illegitimate because the law of the foreign country in which the father was domiciled at the time of the birth of the child and of the subsequent marriage of the parents did not allow legitimation by subsequent matrimony. Lord Eldon's judgment in the Strathmore Peerage Case, 4 Wils. & Sh. Appx. 89–91, 95; s. c., 6 Paton, 645, 656, 657, 662. Lord Redesdale's judgment in s. c., 4 Wils. & Sh. Appx. 93; 94, and 6 Paton, 660, 661; expounded by Lord Lyndhurst, in the presence and with the concurrence of Lord Eldon, in Rose *v.* Ross, 4 Wils. & Sh. 289, 295–297, 299; s. c. nom., Munro *v.* Saunders, 6 Btigh N. R. 468, 472–475, 478. Lord Brougham in Doe *v.* Vardill, 2 Cl. & Fin. 571, 587, 592, 595, 600; s. c., 9 Bligh N. R. 32, 75, 80, 83; in Munro *v.* Munro, 7 Cl. & Fin. 842, 885; s. c., 1 Robinson H. L. 492, 615; and in Shedden *v.* Patrick, 1 Macq. 622.

"That decision is wholly inconsistent with the theory that upon general principles, independently of any positive rule of law, the question whether a person claiming an inheritance in real estate is the lawful child of the last owner is to be determined by the *lex rei sitæ;* for, if that law had been applicable to that question, the plaintiff must have been held to be the legitimate heir; and it was only by trying that question by the law of the domicile of his father that he was held to be illegitimate. The decision receives additional interest and weight from the fact that the case for the appellant (which is printed in 1 Macq. 539–552) was drawn up by Mr. Brougham, then a member of the Scotch bar, and contained a very able statement of reasons why the *lex rei sitæ* should govern.

"In later cases in the House of Lords, like questions have been determined by the application of the same test of the law of the domicile. In the case of the Strathmore Peerage, 6 Paton, 645, which was what is commonly called a Scotch peerage, having been such a peerage before the union of the two kingdoms, the last peer was domiciled in England, had an illegitimate son there by an Englishwoman, and married her in England; and it was held that by force of the law of England the son did not inherit the peerage. So in Rose *v.* Ross, 4 Wils. & Sh. 289, where a Scotchman by birth became domiciled in England, and had a son there by an Englishwoman, and afterwards went to Scotland with the mother and son, and married her there, retaining his domicile in England, and then returned with them to England and died there, it was held that the son could not inherit the lands of the father in Scotland, because the domicile of the father, at the time of the birth of the child and of the subsequent marriage, was in England. On the other hand, where a Scotchman, domiciled in Scotland, has an illegitimate son born in England, and afterwards marries the mother, either in England, whether in the Scotch or in the English form, or in Scotland, the son inherits the father's land in Scotland, because, the father's domicile being throughout in Scotland, the place of the birth or marriage is immaterial. Dalhouse *v.* McDouall, 7 Cl. & Fin. 817; s. c., 1 Robinson H. L. 475; Munro *v.* Munro, 7 Cl. & Fin. 842; s. c., 1 Robinson H. L. 492; Aikman *v.* Aikman, 3 Macq. 854; Udny *v.* Udny, L. R. 1 H. L. Sc. 441.

"In the well-known case of Doe *dem.* Birtwhistle *v.* Vardill, 2 Cl. & Fin. 571, it was indeed held by the Court of King's Bench in the first instance, and by the House of Lords on a writ of error, after two arguments, at each of which the judges attended and delivered an opinion, that a person born in Scotland, and there legitimate by reason of the subsequent marriage of his parents in Scotland, they having had their domicile there at the time of the birth and of the marriage, could not inherit land in England. 5 B. & C. 438; 8 D. & R. 185; 2 Cl. & Fin. 571; 9 Bligh N. R. 32; 7 Cl. & Fin. 895; 6 Bing. N. C. 385; 1 Scott N. R. 828; West H. L. 500.

"One curious circumstance connected with that case is, that, under the English usage which allows counsel in a cause, if raised to the bench during its progress, to sit as judges in it, Chief Justice Tindal, who had argued the case for the plaintiff in the King's Bench, gave the opinion of the judges in the House of Lords in accordance with which judgment was finally rendered for the defendant; and Lord Brougham, who had taken part as counsel for the defendant in the first argument in the House of Lords, was most reluctant, for reasons which he stated with characteristic fulness and power, to concur in that judgment. 5 B. & C. 440; 2 Cl. & Fin. 582–598; 7 Cl. & Fin. 924, 940–957.

"But that case as clearly appears by the opinions of Chief Justice Abbott and his associates in the King's Bench, as

well as by that of the judges, delivered by Chief Justice Tindal, and those of Lord Brougham and Lord Cottenham, after the rehearing in the House of Lords, was decided upon the ground that, admitting that the plaintiff must be deemed the legitimate son of his father, yet, by what is commonly called the Statute of Merton, 20 Hen. III. c. 9, the Parliament of England, at a time when the English Crown had possessions on the Continent in which legitimation by subsequent matrimony prevailed, had, although urged by the bishops to adopt the rule of the civil and canon law, by which children born before the marriage of their parents are equally legitimate as to the succession of inheritance with those born after marriage, positively refused to change the law of England as theretofore used and approved. The *ratio decidendi* is most clearly brought out by Mr. Justice Littledale and by Chief Justice Tindal.

"Mr. Justice Littledale said: 'One general rule applicable to every course of descent is that the heir must be born in lawful matrimony. That was settled by the Statute of Merton, and we cannot allow the comity of nations to prevail against it. The very rule that a personal status accompanies a man everywhere is admitted to have this qualification, that it does not militate against the law of the country where the consequences of that status are sought to be enforced. Here it would militate against our statute law to give effect to that status of legitimacy acquired by the lessor of the plaintiff in Scotland. He cannot, therefore, be received as legitimate heir to land in England.' 5 B. & C. 455.

"Upon the first argument in the House of Lords, Chief Baron Alexander, adopting the sentiment and the language of Sir William Scott in Dalrymple *v.* Dalrymple, 2 Hagg. Consist. 58, 59, 'varied only so far as to apply to a question of legitimacy what was said of a question respecting the validity of a marriage,' said, in the name of all the judges who attended at that argument: 'The cause being entertained in an English court must be adjudicated according to the principles of English law applicable to such a case; but the only principle applicable to such a case by the law of England is that the status or condition of the claimant must be tried by reference to the law of the country where the status originated; having furnished this principle, the law of England withdraws altogether, and leaves the question of status in the case put to the law of Scotland.' The learned Chief Baron added: 'The comity between nations is conclusive to give to the claimant the character of the eldest legitimate son of his father, and to give him all the rights which are necessarily consequent upon that character.' 2 Cl. & Fin. 573–575. The grounds upon which, notwithstanding this, he undertook, without alluding to the Statute of Merton and the practice under it, to maintain that, by the rules of inheritance and descent which the law of England had impressed upon all land in England, the plaintiff could not recover, were so unsatisfactory to the Lords, that Lord Brougham, at that stage of the case, declared that he entertained a very strong opinion that the case was wrongly decided in the court below, and Lord Lyndhurst and Lord Denman concurred in his motion that the case should be reargued. 2 Cl. & Fin. 598–600.

"In delivering the opinion of the judges after the second argument, Chief Justice Tindal said: 'The grounds and foundation upon which our opinion rests are briefly these: That we hold it to be a rule or maxim of the law of England with respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother; that this is a rule *juris positivi*, as are all the laws which regulate succession to real property, this particular rule having been framed for the direct purpose of excluding, in the descent of land in England, the application of the rule of the civil and canon law, by which the subsequent marriage between the father and mother was held to make the son born before marriage legitimate; and that this rule of descent, being a rule of positive law annexed to the land itself, cannot be allowed to be broken in upon or disturbed by the law of the country where the claimant was born, and which may be allowed to govern his personal status as to legitimacy, upon the supposed ground of the comity of nations.' 7 Cl. & Fin. 925.

"The Chief Justice then proceeded to make an elaborate statement of the provisions of the Statute of Merton, and of the circumstances under which it was passed, particularly dwelling upon the facts that at the time of its passage Normandy, Aquitaine, and Anjou were under the allegiance of the king of England, and those born in those dominions were natural-born subjects and could inherit land in England, and that many of the peers who attended appeared to have been of foreign lineage if not of foreign birth, and were, at all events, well acquainted with the rule of law which was then so strongly contested, 'yet, notwithstand-

ing the rule of the civil and canon law prevailed in Normandy, Aquitaine, and Anjou, by which the subsequent marriage makes the *antenatus* legitimate for all purposes and to all intents; and notwithstanding the precise question then under discussion was whether this rule should govern the descent of land locally situate in England, or whether the old law and custom of England should still continue as to such land, under which the *antenatus* was incapable to take land by descent,—there is not the slightest allusion to any exception in the rule itself as to those born in the foreign dominions of the Crown, but the language of the rule is, in its terms, general and universal as to succession of land in England.' And he fortified his position that no such exception was intended, by referring to the forms of writs before and after the passage of the statute, and to Glanville, Bracton, and other early authorities. 7 Cl. & Fin. 926–933.

"It was upon the 'very great new light' thus thrown upon the question, and the 'very important additions' thus made to the former arguments, that Lord Brougham, though not wholly convinced, waived his objections to judgment for the defendant. 7 Cl. & Fin. 939, 943–946, 956. And Lord Cottenham, the only other law lord present, in moving that judgment, said: 'I am extremely satisfied with the ground upon which the judges put it, because they put the question on a ground which avoids the difficulty that seems to surround the task of interfering with those general principles peculiar to the law of England, principles that at first sight seem to be somewhat at variance with the decisions to which the courts have come.' 7 Cl. & Fin. 957. And see Lord Brougham, Lord Cranworth, and Lord Wensleydale in Fenton *v.* Livingstones, 3 Macq. 497,532, 544,550.

"In the case of Don's Estate, 4 Drewry, 194, Vice-Chancellor Kindersley declared that the general principle was that 'the legitimacy or illegitimacy of any individual is to be determined by the law of that country which is the country of his origin; if he is legitimate in his own country, then all other countries, at least all Christian countries, recognize him as legitimate everywhere;' and that the ground of the decision in Doe *v.* Vardill was, that, admitting the personal status of legitimacy, the law of England attached to land certain rules of inheritance which could not be departed from. And he therefore held that, assuming that a son born in Scotland before the marriage of his parents domiciled there, and there legitimate in consequence of their subsequent marriage, was legitimate all over the world, at any rate in England, yet, as he could not inherit land in England from his father or from any other person, so no other person could succeed to him by inheritance except his own issue.

"So in Shaw *v.* Gould, L. R. 3 H. L. 55, 70. Lord Cranworth said of Doe *v.* Vardill: 'The opinions of the judges in that case, and of the noble lords who spoke in the House, left untouched the question of legitimacy, except so far as it was connected with succession to real estate. I think they inclined to the opinion that for purposes other than succession to real estate, for purposes unaffected by the Statute of Merton, the law of the domicile would decide the question of status. No such decision was come to, for no question arose except in relation to heirship to real estate. But the opinions given in the case seem to me to show a strong bias towards the doctrine that the question of status must, for all purposes unaffected by the feudal law, as adopted and acted on in this country, be decided by the law of the domicile.'

"In Skottowe *v.* Young, L. R. 11 Eq. 474, the proceeds of lands in England were devised by a British subject domiciled in France, in trust to sell and to pay the proceeds to his daughters born of a Frenchwoman before marriage, but afterwards legitimated according to the law of France; and it was held by Vice-Chancellor Stuart, in accordance with a previous dictum of Lord Chancellor Cranworth, in Wallace *v.* Attorney-General, L. R. 1 Ch. 1, 8, that the daughters were not 'strangers in blood' within the meaning of the English legacy duty act. The Vice-Chancellor observed that in Doe *v.* Vardill the claimant was admitted to have in England the status of the eldest legitimate son of his father, and failed in his suit only because he could not prove that he was heir according to the law of England in which the land was; that this will was that of a domiciled Frenchman, and his status and that of his children must be their status according to the law of France, which, according to Doe *v.* Vardill, constituted their English status; and that 'the status of these ladies being that of daughters legitimated according to the law of France by a declaration of the father, it is impossible to hold that they are for any purpose strangers in blood, on the mere ground that, if they had been English, and their father domiciled in England, they would have been illegitimate.'

"It may require grave consideration, when the question shall arise, whether the legitimacy of a child, depending upon marriage of its parents or other act of acknowledgment after its birth, should not be determined by the law of the domicile at the time of the act which effects the legitimation, rather than by the law of the domicile at the time of the birth, or even of the marriage, when some other acknowledgment is necessary. See Sir Samuel Romilly's argument in Shedden *v.* Patrick, 5 Paton, 205; printed more at length in 1 Macq. 556–558; Lord Brougham in Munro *v.* Munro, 7 Cl. & Fin. 882; s. c., 1 Robinson H. L. 612; Lord St. Leonards in Shedden *v.* Patrick, 1 Macq. 641; Stevenson *v.* Sullivant, 5 Wheat. 207, 259; 2 Toullier Droit Civil (5th Ed.), 217; Savigny's Private International Law, § 380; (Guthrie's Ed.) 250 and note, 260.

"These authorities do not appear to have been considered in those English cases in which, under a bequest in an English will to 'the children' of an Englishman who afterwards became domiciled in a foreign country, and there married the mother of his illegitimate children born there, whereby they became legitimate by the law of that country, Vice-Chancellor Wood (afterwards Lord Hatherley) and Vice-Chancellor Stuart were of opinion that those children born before the change of domicile could not take, and differed upon the question whether those born after the change could take, Vice-Chancellor Stuart holding that they could, and Vice-Chancellor Wood holding that they could not. Wright's Trust, 2 K. & J. 595; s. c., 25 L. J. (N. S.) Ch. 621; 2 Jur. (N. S.) 465; Goodman *v.* Goodman, 3 Giff. 643; Boyes *v.* Bedale, 1 Hem. & Mil. 798; Lord Hatherley in Udny *v.* Udny, L. R. 1 H. L. Sc. 441, 447. See also Kindersley, V. C., in Wilson's Trusts, L. R. 1 Eq. 247, 264–266; Lord Chelmsford in s. c., nom. Shaw *v.* Gould, L. R. 3 H. L. 55, 80. But those opinions proceeded upon the construction of wills of persons domiciled in England; and Vice-Chancellor Wood appears to have admitted that if the father had never been domiciled in England the rule would have been different. Wright's Trust, 25 L. J. (N. S.) Ch. 632; s. c., 2 Jur. (N. S.) 472; citing Ashford *v.* Tustin, before Parker, V. C., reported only in Lovell's Monthly Digest, 1852, p. 389; Udny *v.* Udny, L. R. 1 H. L. Sc. 448.

"The dictum of Vice-Chancellor Wood in Boyes *v.* Bedale, 1 Hem. & Mil. 805, and the decision of Sir George Jessel, M. R., in the case of Goodman's Trusts, 14 Ch. D. 619, that the word 'children' in the English statute of distributions means only children according to the law of England, and that therefore children born in a foreign country, and legitimated by the law of that country upon the subsequent marriage of their parents there, could not take by representation under that statute as children of their father, although he was domiciled in that country at the time of their birth and of the subsequent marriage, can hardly, as it seems to us, be reconciled with the general current of judicial opinion in England, as shown by the cases already referred to.

"The most accomplished commentators on the subject, English and American, are agreed that the decision in Doe *v.* Vardill, which has had so great an influence with English judges, does not rest upon general principles of jurisprudence, but upon historical, political, and constitutional reasons peculiar to England. Westlake's Private International Law (ed. 1858), §§ 90–93, (ed. 1880) intro. 9, §§ 53, 168; 4 Phillimore's International Law (2d Ed.), § 538, note; Dicy on Domicile, 182, 188, 191, pref. iv; 2 Kent Com. 117, note *a*, 209, note *a*; 4 Kent Com., 413, note *d*; Story Confl. §§ 87, 87 *a* and note, 93 *i*, 93 *m*; Redfield, in Story Confl. § 93 *w* and note; Whart. Confl. § 242. Upon questions of comity of States, considerations derived from the feudal law, from an act of Parliament of the time of Henry III., and from the constitution and policy of the English government, have no weight in Massachusetts at the present day.

"Almost fifty years ago the legislature of this commonwealth enacted that children born before the marriage of their parents and acknowledged by their father afterwards, and legitimate children of the same parents, should inherit from each other as if all had been born in lawful wedlock; but did not make such illegitimate children capable of inheriting from their father. St. 1832, c. 147. Whether this was accidental or designed, the commissioners on the revision of the statutes in 1835 reported to the legislature that they had no means to conjecture, not knowing the reasons on which the statute itself was founded, 'the whole of it being an innovation upon the law as immemorially practised and transmitted to us by our ancestors;' and therefore proposed a section making no change in this respect, but only expressing what they supposed to have been the intention of the framers of that statute; 'leaving it to the wisdom of the legislature, if they should think fit to continue this law in

force, to modify it in such manner as shall be thought proper.' Report of Commissioners on Rev. Sts. c. 61, § 4 and note.

"The legislature solved the doubt of the learned commissioners by making the statute more comprehensive, and enacting it in this form: 'When, after the birth of an illegitimate child, his parents shall intermarry, and his father shall, after the marriage, acknowledge him as his child, such child shall be considered as legitimate to all intents and purposes, except that he shall not be allowed to claim, as representing either of his parents, any part of the estate of any of their kindred, either lineal or collateral.' Rev. Sts. c. 61, § 4.

"In Loring *v.* Thorndike, 5 Allen, 257, a testator domiciled in this commonwealth, by a will admitted to probate before the Revised Statutes were passed, bequeathed a sum in trust to pay the income to his son for life, and the principal at his death 'to his lawful heirs.' After the Revised Statutes took effect, the son, whose domicile always was and continued to be in this commonwealth, had two illegitimate children in Germany by a German woman, and afterwards married her there in a form authorized by the law of the place, and there acknowledged them as his children. This court held that by the Rev. Sts. c. 61, § 4, such children must be deemed legitimate for all purposes, except of taking by inheritance as representing one of the parents any part of the estate of the kindred, lineal or collateral, of such parent; and that the children took directly under the will of their grandfather, and not as the representatives of their father; and were therefore not within the exception of the statute, but were entitled to the benefit of the bequest.

"Still greater changes in the rules of the law of England as to the descent of real estate have been made by subsequent legislation in this commonwealth. If the parents of an illegitimate child marry, and the father acknowledges him as his child, the child is to be deemed legitimate for all purposes whatsoever, whether of inheritance or settlement or otherwise. St. 1853, c. 253; Gen. Sts. c. 91, § 4; Monson *v.* Palmer, 8 Allen, 551.

"In Smith *v.* Kelly, 23 Miss. 167, it was held that the status or condition of a person as to legitimacy must be determined by reference to the law of the country where such status or condition had its origin, and that the status so ascertained adhered to him everywhere; and therefore that where, at the time of the birth of an illegitimate child and of the subsequent marriage of its parents, they were domiciled in South Carolina, in which such marriage did not make the child legitimate, and afterwards removed with the child to Mississippi, by the law of which State subsequent marriage of the parents and acknowledgment of the child by the father would legitimate it, and the child was always recognized by the father as his child, yet the child, having had the status of illegitimacy in South Carolina, retained that status in Mississippi, and could not inherit or succeed to either real or personal property in Mississippi. That decision is a strong application of the law of the domicile of origin, and perhaps did not give sufficient effect to the father's recognition of the child in Mississippi after they had established their domicile in that State.

"In Scott *v.* Key, 11 La. Ann. 232, while a father and his illegitimate son, whose mother he never married, were domiciled in the Territory of Arkansas, the legislature of that Territory passed a special statute enacting that the son should be made his father's legal heir and representative in as complete a manner as though he had been such from his birth, and should be as capable of inheriting his father's estate in a full and complete manner as if his father had been married to his mother at the time of his birth, and should be known and called by his father's name; and the father and son afterwards removed to Louisiana. The majority of the court held that the heritable quality of legitimacy, which the son had received from the legislature of the State of his residence, accompanied him when he changed his domicile, and that he was entitled to inherit his father's immovable property in Louisiana, to the exclusion of the father's brothers and sisters. Chief Justice Merrick dissented, but only upon the ground that to allow such an act to have an extraterritorial effect would be to allow another State to provide a new class of heirs for immovables and successions in Louisiana; and that, in order that personal statutes should be enforced in another country, there must be something in common between the jurisprudence of the two countries; and, speaking of the conflicting rules of the civil law and the common law in regard to legitimation by subsequent matrimony, said: 'The doctrine of the civil law ought to be enforced, doubtless, in those cases where our own statute recognizes a mode of legitimation by acknowledgment by notarial act and subsequent marriage, although the form in which it

If a child is born after the marriage, no matter how soon, it will

had been done in another State differs from our own.' 11 La. Ann. 239. And see 4 Phillimore, § 542; Savigny (Guthrie's Ed.) 258, 260, 264, and note.

"In Barnum *v.* Barnum, 42 Md. 251, on the other hand, it was said, in the opinion of the majority of the court, that a special statute of the legislature of Arkansas, enacting that one person be constituted the heir of another, both of whom had a domicile there, making no reference to any marriage, and not even depending on the one being the child of the other, could have no extraterritorial operation whatever. See pp. 305, 307, 325. But the point decided was that the former was not an "heir" of the latter, within the meaning of the will of the latter's father, who, nine years before the passage of the Arkansas statute, died domiciled in Maryland, the law of which does not appear to have permitted the creation of an heir in that manner.

"The cases on this topic in other States, so far as they have come to our notice, afford little assistance. The decision in Smith *v.* Derr, 34 Pa. St. 126, that a child born out of wedlock, and legitimated by the law of another State where the father and child were domiciled, could not inherit land in Pennsylvania in 1855, was, as the court said, covered by the principle decided in Doe *v.* Vardill; for the Statute of Merton was then in force in Pennsylvania, although since repealed there. See Report of the Judges, 3 Binn. 595, 600; Purd. Dig. (10th Ed.) 1004. The decision in Harvey *v.* Ball, 32 Ind. 98, allowing a bastard child of parents who at the time of its birth and of their subsequent intermarriage, and until their death, had their domicile in Pennsylvania, to inherit land in Indiana under a statute of Indiana enacting that "if any man shall marry a woman who has, previous to the marriage, borne an illegitimate child, and after marriage shall acknowledge such child as his own, such child shall be deemed legitimate to all intents and purposes," was put exclusively upon the meaning attributed by the court to that statute, without regard to general principles or cases decided elsewhere; and upon any other ground would be inconsistent with the decision in the leading case of Shedden *v.* Patrick, before cited. In Lingen *v.* Lingen, 45 Ala. 410, in which it was held that a child, born in France of parents who never intermarried, and there acknowledged by his father according to the forms of the French law, and so made legitimate by that law, could not take a share in the father's estate in Alabama, the father's domicile was always in Alabama, and the child had not been legitimated in any manner allowed by the laws of that State."

The *Virginia* statute providing that "if a man having had offspring by a woman shall afterwards intermarry with her, such offspring, if recognized by him before or after the marriage, shall be deemed legitimate," and that "the issue of marriages deemed null in law, or dissolved by a court, shall, nevertheless, be legitimate," does not apply to and legitimate the offspring of a cohabitation in this State between a white person and a negro, when the parents subsequently have celebrated between them a ceremony of marriage, outside of this State, in some place where marriage between such persons is lawful. Greenhow *v.* James, 80 Va. 636.

Gen. St. Ky. c. 31, § 6, providing that if a man, having had a child by a woman, shall afterwards marry her, such child, or its descendants, if recognized by him before or after marriage, shall be deemed legitimate, does not apply to the children of a married man begotten and born of another woman than his wife during his wife's life. Sams *v.* Sams, 3 S. Westn. Repr. (Ky.) 593.

The laws of most of the States on the continent of Europe admit legitimation generally, though with distinctions in respect of certain illegitimate children, or in respect of the form of the acknowledgment by the parents. It is also the law in the Isle of Man, Guernsey and Jersey, in Lower Canada, St. Lucia, Trinidad, Demerara, Berbice, at the Cape of Good Hope, Ceylon, Mauritius, as well as some of the United States (see *post*). In Ireland, England, and those of its dependencies in the West Indies and North America which have not been named, as well as in the other United States (not named *post*), legitimation by subsequent marriage is not admitted at all. Dicey on Domicile, 182.

Child Born on the High Seas.—According to the rule that a ship on the high seas is part of the territory of the State to which she belongs, a bastard child of which a woman has been delivered on board an English ship is to be deemed born in England, and the mother is entitled to an order of affiliation against the putative father resident in England, under 8 and 9 Vict. c. 101. Marshall *v.* Murgatroyd, 6 Q. B. 31.

be presumed to be legitimate,[1] and children born in wedlock are

Marriage of Colored Persons—Legitimacy of Children.—Under a statute to legalize marriage of colored persons living together as husband and wife at the time of its passage, children of such persons are deemed legitimate whether born before or after the passage of said act, and whether any sort of marriage ceremony had taken place between the parents or not. In such cases the question of bastardy must be considered as in any case where bastardy is alleged as to a child born during coverture, or born before and recognized afterwards. Smith *v.* Perry, 80 Va. 563.

1. Rhyne *v.* Hoffman, 6 Jones Eq. (N. Car.) 335; State *v.* Wilson, 10 Ired. (N. Car.) 131; State *v.* Herman, 13 Ired. (N. Car.) 502; Stegall *v.* Stegall, 2 Brock. (U. S.) 256; State *v.* Romaine, 58 Iowa, 46; Doyle *v.* State, 61 Ind. 324; Moran *v.* State, 73 Ind. 208; Brock *v.* State, 85 Ind. 397; Bowles *v.* Bingham, 2 Munf. (Va.) 442, 3 Munf. (Va.) 599; s. c., 5 Am. Dec. 497; Hargrave *v.* Hargrave, 9 Beav. 552; R. *v.* Luffe, 8 East, 198; Dennison *v.* Page, 29 Pa. St. 420; s. c., 72 Am. Dec. 644; Wilson *v.* Babb, 18 Shand (S. Car.), 59.

Although he may have been begotten while his parents were unmarried, yet if afterward they married together, and he is born during the coverture, or after it shall have been determined, he is legitimate. Bouvier's Inst. 322.

Where a man marries a woman knowing that she is already with child by another man, he is held to adopt the child into his family, and the law holds him liable for its support as one standing *in loco parentis*. State *v.* Shoemaker, 62 Iowa, 343; s. c., 49 Am. Rep. 196; Miller *v.* Anderson, 3 N. Eastn. Repr. (Ohio) 605; Miller *v.* Anderson, 43 Ohio St. 473; Tioga Co. *v.* South Creek, 75 Pa. St. 433. See Bracy *v.* Kibbe, 31 Barb. (N. Y.) 273. *Compare* Keniston *v.* Rowe, 16 Me. 38; Hyde *v.* Chapin, 2 Cush. (Mass.) 77; Raby *v.* Batiste, 27 Miss. 731; Austin *v.* Pickett, 9 Ala. 102; O'Neal *v.* State, 2 Sneed (Tenn.), 218; Roth *v.* Jacobs, 21 Ohio St. 646.

The supreme court of *Iowa*, in State *v.* Romaine, 58 Iowa, 48, lays down the rule that "if a woman be pregnant at the time of the marriage, and if the pregnancy be known to the husband, he should be conclusively presumed to be the father."

In *North Carolina* the supreme court held that "a child born in wedlock, though born within a month or a day after marriage, is legitimate by presumption of law; and where the mother was visibly pregnant at the marriage, it is a presumption *juris et de jure* that the child was the offspring of the husband." Rhyne *v.* Hoffman, 6 Jones Eq. 335. The court quoted with approval a quotation from 1 Rolls Abr. 358 and 2 Bac. Abr. 84, as follows: "That if a woman, big with child by A, marry B, and then the child be born, it is the legitimate child of B." It has been held in a large number of cases, both in England and America, that the wife is not a competent witness to prove non-access of the husband, whether the child was begotten before or after marriage.

In Rex *v.* Reading, Lee Temp. Hardw. 83, Lord Hardwicke said: "It must be of very dangerous consequence to lay it down in general that a wife should be a sufficient *sole* evidence to bastardize her child, and to discharge her husband of the burden of its maintenance."

Similar language is used by Lord Ellenborough in King *v.* Luffe, 8 East, 193, and in various English authorities. The reason for this rule is stated in Tioga Co. *v.* South Creek Tp., 75 Pa. St. 433, in the following language: "That issue born in wedlock, though begotten before, is presumptively legitimate, is an axiom of law so well established that to cite authorities in support of it would be mere waste of time. So the rule that the parents will not be permitted to prove non-access for the purpose of bastardizing such issue is just as well settled. Many reasons have been given for this rule. Prominent among them is the idea that the admission of such testimony would be unseemly and scandalous, and this not so much from the fact that it reveals immoral conduct upon the part of the parents as because of the effect it may have upon the child, who is in no fault, but who must nevertheless be the chief sufferer thereby. That the parents should be permitted to bastardize the child is a proposition which shocks our sense of right and decency, and hence the rule of law that forbids it." This doctrine is recognized in Parker *v.* Way, 15 N. H. 45; Davis *v.* Houston, 2 Yeates (Pa.), 289; Page *v.* Dennison, 1 Grant Cas. (Pa.) 377; s. c., 29 Pa. St. 420; and in the last case the court, in addition, hold that "whether the child is begotten in or out of wedlock, if marriage precedes the birth, the presumption of paternity is the same, and can only be bastardized by proof of non-access. The wife is not a

competent witness to prove non-access on the part of her husband, and that her child, begotten before, but born during, wedlock, was not begotten by him." On the same point, see State *v.* Wilson, 10 Ired. (N. Car.) 131, and State *v.* Herman, 13 Ired. (N. Car.) 502, in both of which cases the pregnancy preceded the marriage. The cases are collected on this point in 1 Phil. Ev. 87, note, and the reason of the rule stated in the text as follows: "This rule is established, independently of any possible motives of interest in the particular case, upon principles of public policy and decency."

The court, in Roth *v.* Jacobs, 21 Ohio St. 646, held that after a woman pregnant with child had filed her sworn complaint in bastardy, charging the defendant with the paternity of her unborn child, her subsequent marriage with another did not necessarily work a discontinuance of the action, for the reason, as the court say, that it cannot be conclusively presumed that the man who marries a pregnant woman is the father of the child. He may not have known that she was in that condition when he married her, and therefore, if born alive, it *may* be a bastard. There was no suggestion in that case of what the result would have been had the marriage been contracted by a man with full knowledge of the pregnancy.

In Howorth *v.* Gill, 30 Ohio St. 627, it was attempted to make a defendant liable under the bastardy act, by showing that while complainant was the wife of another he became the father of her unborn child. After the child was born, the complainant procured a divorce from her former husband, and the court held that, to make defendant liable, the delivery and pregnancy, as well as the making of the complaint, must be predicated as of an unmarried woman. The court in that case suggestively say: "But no complaint could have been made in this case, either during pregnancy or for eight months after delivery. The child was, during all this time, the innocent and honest child of a married woman; and in any proceeding under this act would have been conclusively presumed to be legitimate. The subsequent divorce of the mother may have changed her status, but not that of her child. It dissolved the marital relation, but did not bastardize the issue begotten and born during its continuance."

The declaration of a man that he begot before marriage a child, which was born after marriage, is not sufficient to rebut the presumption that the husband was the father. Montgomery *v.* Montgomery, 3 Barb. Ch. (N. Y.) 132.

Presumptions.—"It is a *præsumptio juris et de jure* that a child born after wedlock, of which the mother was, even visibly, pregnant at the time of marriage, is the offspring of the husband. So every child born during wedlock, where the married parties are neither *infra nubiles annos* nor physically disqualified for sexual intercourse, is presumed legitimate, according to the maxim, "*Pater est quem nuptiæ demonstrant*,"—a presumption which holds even when the parties are living apart by mutual consent, but not when they are separated by a sentence pronounced by a court of competent jurisdiction, in which case obedience to the sentence of the court will be presumed. In very ancient times this presumption of legitimacy was only *præsumptio juris*, but it was subsequently raised into a conclusive presumption, if the husband was within the four seas at any time during the pregnancy of the wife. In later times, however, this has been very properly relaxed; and it is now competent to negative the fact of sexual intercourse between the parties during the time, when, according to the course of nature, the husband could have been the father of the child. But if the fact of sexual intercourse between the husband and wife within that time has been established to the satisfaction of the tribunal, the presumption cannot be rebutted by proof of adultery, as the law will not, in that case, allow a balance of evidence as to who was most likely to be the father of the child." Best on Ev. (Chamberlayne's Ed.) 349.

A child born eight months after marriage will be presumed to be legitimate, although, when born, it has all the physical appearances of a full-grown and natural child; and the proof of a statement by the mother that she had no connection with her husband before marriage, and that her reputation for chastity was bad at the time of her marriage, and that for some months previously thereto she had been intimate with other men, if competent, is sufficient to rebut this presumption. Phillips *v.* Allen, 2 Allen (Mass.), 453.

A child born three months after the mother's marriage is presumed legitimate, but this presumption may be rebutted in either a civil or criminal case by evidence of non-access or other proof. Wright *v.* Hicks, 12 Ga. 155; s. c., 56 Am. Dec. 451, 15 Ga. 160; s. c., 60 Am. Dec. 687; Sullivan *v.* Hugley, 32 Ga. 316; Baker *v.*

presumed to be legitimate;[1] but a child born during marriage may be proved a bastard, by evidence of the husband's impotence, by proof of non-access to his wife, or by proof that it was born during her open cohabitation with another man.[2]

Baker, 13 Cal. 87; Wilson *v.* Babb, 18 Shand (S. Car.), 59.

Husband or wife is incompetent witness to prove non-access in order to establish the illegitimacy of a child born in wedlock but begotten before. Dennison *v.* Page, 29 Pa. St. 420; s. c., 72 Am. Dec. 644; Bowles *v.* Bingham, 2 Munf. (Va.) 442; s. c., 5 Am. Dec. 497; Legge *v.* Edmonds, 25 L. J. Chan. 125; Cope *v.* Cope, 5 C. & P. 604. *Compare* Barnum *v.* Burnum, 42 Md. 251; Wright *v.* Hicks, 12 Ga. 155; s. c., 56 Am. Dec. 45 1,15 Ga. 160; s. c., 60 Am. Dec. 687.

1. Hemmenway *v.* Towner, 1 Allen (Mass.), 209; Phillips *v.* Allen, 2 Allen (Mass.), 453; Page *v.* Dennison, 1 Grant (Pa.), 377; Senser *v.* Bower, 1 Pa. 450; Van Aernan *v.* Van Aernan, 1 Barb. Ch. (N. Y.) 378; Strode *v.* Magowan, 2 Bush (Ky.), 621; Remington *v.* Lewis, 8 B. Mon. (Ky.) 611; Cannon *v.* Cannon, 7 Humph. (Tenn.) 410; Dinkins *v.* Samuel, 10 Rich. L. (S. Car.) 66; Vaughan *v.* Rhodes, 2 McC. (S. Car.) 227; s. c., 13 Am. Dec. 713; Wilson *v.* Babb, 18 S. Car. 59; Gurvin *v.* Cromartie, 13 Ired. L. (N. Car.) 174; s. c., 53 Am. Dec. 406; Eloi *v.* Mader, 1 Rob. (La.) 581; s. c., 38 Am. Dec. 192; Stegall *v.* Stegall, 2 Brock. (U. S.) 256; Patterson *v.* Gaines, 6 How. (U. S.) 550; Gaines *v.* Hennen, 24 How. (U. S.) 553; Sullivan *v.* Hugley, 32 Ga. 316; Illinois Land Co. *v.* Bonner, 75 Ill. 315; Stoke *v.* Worthington, 23 Minn. 528; Herring *v.* Goodson, 43 Miss. 392.

Where a certified copy of a birth and baptism record containing a statement of illegitimacy is produced, together with evidence of general reputation, nothing further is required to justify a finding of such illegitimacy. App. of Goerman, 1 Atl. Repr. 446. See Canjolle *v.* Ferrié, 23 N. Y. 90.

Whenever, upon an issue of bastardy, a question arises concerning the existence of a marriage between the parents of the alleged bastard direct proof of a marriage in fact, as contradistinguished from one inferrible from circumstances, is not required. State *v.* Worthingham, 23 Minn. 528; Canjolle *v.* Ferrié, 23 N. Y. 90.

A child born within the wedlock of a regular marriage, which, for any reason (as that the woman has another husband living), is null in law, is nevertheless the legitimate child and heir of both parents. Watts *v.* Owens, 62 Wis. 512. See Dyer *v.* Brannock, 66 Mo. 391; Lincecum *v.* Lincecum, 3 Mo. 441; Glass *v.* Glass, 114 Mass. 563; Hartwell *v.* Jackson, 7 Tex. 576; Graham *v.* Bennet, 2 Cal. 503; Hiram *v.* Pierce, 45 Me. 367; Earle *v.* Dawes, 3 Md. Ch. 230; Brower *v.* Bowers, 1 Abb. App. Dec. (N. Y.) 214; Harrington *v.* Barfield, 30 La. Ann. pt. 2, 1297; Pratt *v.* Pratt, 5 Mo. App. 539.

Presumptions in favor of the legitimacy of children will not be made where the question is to be determined as one of fact and not of law. Blackburn *v.* Crawford, 3 Wall. (U. S.) 175; s. c., Bk. 18, L. C. P. Co. 186. See Gaines *v.* Relf, 12 How. (U. S.) 534; Viall *v.* Smith, 6 R. I. 417.

The legitimacy of a child born in wedlock cannot be contested by either the mother or her heirs, nor by the child himself. The right to such a contest abides only with the putative father. Eloi *v.* Mader, 1 Rob. (La.) 581; s. c., 38 Am. Dec. 192.

2. Com. *v.* Stricker, 1 Browne (Pa.) Appx. 47; State *v.* Britt, 78 N. Car. 439; Wilson *v.* Babb, 18 S. Car. 59; Herring *v.* Goodson, 43 Miss. 392; Hargrave *v.* Hargrave, 9 Beav. 552; Banbury Peerage Case, 1 Sim. & S. 153. See Sharboro's Estate, Myr. Probate (Cal.), 255; Bussom *v.* Forsyth, 32 N. J. Eq. 277; Haworth *v.* Gill, 30 Ohio St. 627; Sale *v.* Crutchfield, 8 Bush (Ky.), 636, 647; Kleinert *v.* Ehlers, 38 Pa. St. 439; Van Aernan *v.* Van Aernan, 1 Barb. Ch. (N. Y.) 378; Shuler *v.* Bull, 15 Shand (S. Car.), 421; Canjolle *v.* Ferrié, 23 N. Y. 90.

The fact that at the time of the conception of the child the husband and wife did not cohabit with each other is a negative fact which cannot be established directly alone. It is established indirectly by proving the impossibility of a contrary fact. For example, it cannot be proved directly that the husband and wife did not cohabit; but if proved that the wife was in the United States at the time of conception, and that the husband was travelling in Europe for two years immediately before the birth of the child; if it be proved that the wife was free, and the husband was in prison and remained unseen by the wife, the fact of non-access will be made out by the proof of the absence or the imprisonment. Bouvier's Inst. 308.

Any competent testimony bearing upon this question is admissible, and, if it satisfies the mind, is sufficient. Wilson *v.* Babb, 18 S. Car. 59; Shuler *v.* Bull, 15 S. Car. 421.

The most clear and conclusive evidence of non-access is required. Watts *v.* Owens, 62 Wis. 512; Egbert *v.* Greenwalt, 44 Mich. 245; Boykin *v.* Boykin, 70 N. Car. 262; Chamberlain *v.* People, 23 N. Y. 88; Sullivan *v.* Kelly, 3 Allen (Mass.), 148; Cross *v.* Cross, 3 Paige (N. Y.), 39; s. c., 23 Am. Dec. 778; State *v.* Shumpert, 1 Shand (S. Car.), 85; Wright *v.* Hicks, 12 Ga. 155; s. c., 56 Am. Dec. 450, 15 Ga. 160; s. c., 60 Am. Dec. 687. Shuler *v.* Bull, 15 S. Car. 421; Kleinert *v.* Ehlers, 38 Pa. St. 439; Herring *v.* Goodson, 43 Miss. 392; Phillips *v.* Allen, 2 Allen (Mass.), 453; Wilson *v.* Babb, 18 Shand (S. Car.), 59; Gaines *v.* Hennen, 24 How. (U. S.) 553; s. c., Bk. 16, L. C. P. 770.

Neither husband nor wife is a competent witness to give evidence of non-access so as to bastardize a child. Mink *v.* State, 60 Wis. 583; Watts *v.* Owens, 62 Wis. 512; Tioga *v.* South Creek Township, 75 Pa. St. 436; Dennison *v.* Page, 29 Pa. St. 420; s. c., 72 Am. Dec. 644; Boykin *v.* Boykin, 70 N. Car. 262; State *v.* Pettaway, 3 Hawks (N. Car.), 625; Chamberlain *v.* People, 23 N. Y. 88; People *v.* Overseers, 15 Barb. (N. Y.) 286; Cross *v.* Cross, 3 Paige (N. Y.), 39; s. c., 23 Am. Dec. 778; Hemmenway *v.* Towner, 1 Allen (Mass.), 209; Phillips *v.* Allen, 2 Allen (Mass.), 453; Carson *v.* Carson, 44 N. H. 587; Egbert *v.* Greenwalt, 44 Mich. 245; Goodright *v.* Moss, Cowper, 591; R. *v.* Book, 1 Wils. 340; R. *v.* Luffe, 8 East, 203; R. *v.* Kea, 11 East, 132; R. *v.* Mansfield, 1 Q. B. 444; R. *v.* Sourton, 5 Ad. & E. 180; Wright *v.* Holdgate, 3 C. & K. 158; Anonymous *v.* Anonymous, 22 Beav. 481, 23 Beav. 273. *Compare* Barnum *v.* Barnum, 42 Md. 251. See Cross *v.* Cross, 3 Paige (N. Y.), 139; s. c., 23 Am. Dec. 778; Com. *v.* Shepherd, 6 Binn. (Pa.) 283; s. c., 6 Am. Dec. 449; Parker *v.* Way, 15 N. H. 45; Vernon *v.* Vernon, 6 La. Ann. 242; Viall *v.* Smith, 6 R. I. 417.

Sexual intercourse will be presumed when personal access is not disproved. Cross *v.* Cross, 3 Paige (N. Y.), 139; s. c., 23 Am. Rep. 778. See Legge *v.* Edmonds, 25 L. J. Chan. 125.

It is not necessary to prove non-access impossible; if the evidence places the non-access beyond all reasonable doubt it is sufficient. Van Aernan *v.* Van Aernan, 1 Barb. Ch. (N. Y.) 375. See R. *v.* Luffe, 8 East, 193; R. *v.* Mansfield, 1 Q. B. 444.

Where the husband lived in New York, and the wife near Philadelphia, the parties having separated some years before, *held*, evidence of non-access. Com. *v.* Shepherd, 6 Binn. (Pa.) 283; s. c., 6 Am. Dec. 449. See Queen *v.* Inhabitants, etc., 1 Q. B. 444; Barony of Saye & S., 1 H. L. Cas. 507; Morris *v.* Davies, 5 C. & F. 163; Heathcote's Divorce Bill, 1 Macq. H. L. Cas. 535; R. *v.* Maidstone, 12 East, 550; Sibbet *v.* Ainsley, 3 L. T. N. S. 583.

Where husband and wife have been in such a situation that access may have taken place, the presumption of law is in favor of the issue, but may be rebutted on strong evidence. If access is proved, no inquiry can be made whether the husband or any other person be the parent. Morris *v.* Davies, 5 C. & F. 163. *Compare* R. *v.* Mansfield, 1 Q. B. 444; Sibbet *v.* Ainsley, 3 L. T. N. S. 583.

Where the established non-intercourse between husband and wife was for more than a year, continuing until a period within five months of the birth, *held*, to establish bastardy. Dean *v.* State, 29 Ind. 483.

Where the husband has access, the impotence must be clearly proved. Com. *v.* Wentz, 1 Ashm. (Pa.) 269. See Moody *v.* Goode, 10 Ired. L. (N. Car.) 49; State *v.* Broadway, 69 N. Car. 411; Legge *v.* Edmonds, 25 L. J. N. S. Ch. 125; Hargrave *v.* Hargrave, 9 Beav. 552.

Where the husband was absent from his wife from January, 1864, until June, 1865, and the child was born in November, 1865, *held*, sufficient to establish its illegitimacy. Dean *v.* State, 29 Ind. 483.

The presumption, thus established by law, is not to be rebutted by circumstances which only create doubt and suspicion, but it may be wholly removed by showing that the husband was, first, incompetent; secondly, entirely absent, so as to have no intercourse or communication of any kind with the mother; thirdly, entirely absent at the period during which the child must, in the course of nature, have been begotten; fourthly, only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse. Such evidence as this puts an end to the question, and establishes the illegitimacy of a child of a married woman. Hargrave *v.* Hargrave, 9 Beav. 552.

But the illegitimacy of a child born of a married woman is established beyond all dispute by evidence of her living in adultery at the time when the child was begotten, and of her husband then residing in another part of the kingdom, so as

2. Child Born after Divorce.—Where a married woman becomes pregnant, during coverture, of a child, which is born less than eight months from the time she obtains a divorce, the presumption is that her husband is its father, especially in the absence of proof of no cohabitation by him within the proper period to beget the child.[1]

to make access impossible. Barony of Saye & S., 1 H. L. Cas. 507.

The presumption of law arising from the fact of husband and wife sleeping together is irresistible as to the legitimacy of a child of the wife, unless there is clear and satisfactory evidence that some physical incapacity existed. Legge *v.* Edmonds, 25 L. J. Chan. 125.

Where such physical incapacity is satisfactorily made out according to the opinions of the medical witnesses, evidence of the adultery of the wife is still an important ingredient in determining the legitimacy of the child; because, if the wife were of irreproachable character, it would go far to modify the opinions as to the husband's incapacity. Legge *v.* Edmonds, 25 L. J. Chan. 125.

Non-access of the husband need not be proved during the whole period of the wife's pregnancy; it is sufficient if the circumstances of the case show a natural impossibility that the husband could be the father, as where he had access only a fortnight before the birth. R. *v.* Luffe, 8 East, 193.

If there was an opportunity of access, but the wife was notoriously living in adultery, it does not necessarily follow that a child begotten while such opportunity existed was not the husband's. R. *v.* Mansfield, 1 Q. B. 444.

Husband and wife, after living together for ten years, and having one child, agreed to separate. They accordingly afterwards lived apart, but within such distance as afforded them opportunities of sexual intercourse, the husband not being impotent. *Held*, that the presumption of law in favor of the legitimacy of a child begotten and born of the wife during the separation may be rebutted, not only by evidence to show that the husband had not sexual intercourse with her, but also by evidence of their conduct; such as that the wife was living in adultery, that she concealed the birth of the child from the husband, and declared to him that she never had such a child; that the husband disclaimed all knowledge of the child, and acted, up to his death, as if no such child was in existence; and also that the wife's paramour aided in concealing the child, reared and educated it as his own, and left it all his property by his will. Morris *v.* Davies, 5 C. & F. 163; 1 Jur. 911.

When husband and wife have been in such a situation that access may have taken place, the presumption of law is in favor of the issue, but may be rebutted on strong evidence. If access is proved, no inquiry can be made whether the husband or any other person be the parent. Lord Coke's doctrine of *inter quatuor maria* is exploded. Morris *v.* Davies, 5 C. & F. 163; 1 Jur. 911.

Where a husband, after a long absence, did not rejoin his wife till the 24th November, 1849, and when she, nevertheless, produced a full-grown child on the 18th May, 1850, *held*, that he could not have been the father. Heathcote's Divorce Bill, 1 Macq. H. L. Cas. 535.

A was summoned under 5 Geo. IV., c. 83, s. 3, for wilfully refusing to maintain his child. He and his wife had lived separately for about three years before the birth of the child, though in the same town; she led a disreputable and profligate life, and he always avoided her, and she had been seen as a prostitute in company with several men, and the child was born in jail. The justices dismissed the summons, holding that the legal presumption that the husband was the father of the child was rebutted by this evidence. *Held*, that they came to a right conclusion. Sibbet *v.* Ainsley, 3 L. T. N. S. (Q. B.) 583.

If a husband is found to have gone beyond seas above two years before the birth of a child borne by his wife, she remaining at home, the conclusion is irresistible that such child is a bastard. R. *v.* Maidstone, 12 East, 550.

Where the child is a mulatto, and the husband and wife are white persons, evidence is admissible to prove that the child of white parents cannot be a mulatto. Watkins *v.* Carlton, 10 Leigh (Va.), 560.

The presumption is, in the absence of proof of guilt or wrong conduct, that a child born in wedlock is legitimate. Fox *v.* Burke, 31 Minn. 319; State *v.* Worthingham, 23 Minn. 528; Viall *v.* Smith, 6 R. I. 417.

1. Drennan *v.* Douglas, 102 Ill. 341.

3. Children of Void Marriages.—At common law the issue of marriages rendered null and void are illegitimate,[1] but by statute in most of the States the issue of such marriages when entered into in good faith are made legitimate.[2]

4. Custody and Control.—The mother of a bastard has the right of custody and control.[3] If the mother be dead, then her right passes to the putative father.[4]

At common law the duty to support and control is upon the mother; the putative father cannot be held liable to contribute except by proceedings under statute.[5]

5. Inheritance.—A bastard *in esse*, whether born or unborn, is competent to be a devisee or legatee of real or personal estate. The only question in such a case is whether, when *in esse*, the bastard is sufficiently designated as the object of the bequest.[6]

As to the status of children born after divorce partial or complete, little can be stated from the books; for such divorces hardly existed at the common law. They are probably illegitimate *prima facie* if born of the divorced mother within an unreasonable time after separation. Schouler Dom. Rel. (3d Ed.) § 227. See Patchett *v.* Holgate, 15 Jur. 308. *In re* Rideout, L. R. 10 Eq. 41.

1. Harrison *v.* State, 22 Md. 468; Zule *v.* Zule, 1 N. J. Eq. 96; Daniel *v.* Sams, 17 Fla. 487; Plant *v.* Taylor, 7 Hurl. & N. 211.

2. Stimson's Stat. Law, § 6115. See Lee *v.* Smith, 18 Tex. 141; Hartwell *v.* Jackson, 7 Tex. 576; Harrington *v.* Barfield, 30 La. Ann. pt. 2, 1297; Greene *v.* Greene, 2 Gray (Mass.), 361; Glass *v.* Glass, 114 Mass. 563; Hiram *v.* Pierce, 45 Me. 367; Graham *v.* Bennet, 2 Cal. 503; Allen *v.* Maclellan, 12 Pa. St. 328; Eubanks *v.* Banks, 34 Ga. 407; Dyer *v.* Brannock, 66 Mo. 391; Crouch *v.* Crouch, 30 Wis. 667; Watts *v.* Owens, 62 Wis. 512; Brower *v.* Bowers, 1 Abb. App. Dec. (N. Y.) 214; Earle *v.* Dawes, 3 Md. Ch. 230; Gaines *v.* New Orleans, 6 Wall. (U.S.) 642; Gaines *v.* Hennen, 24 How. (U. S.) 553.

Kentucky act 1796, providing that "the issue of a marriage deemed null and void in law shall nevertheless be legitimate," applies to issue of marriage with a man who had a former wife living and undivorced. Workman *v.* Harold, 2 S. Westn. Repr. (Ky.) 679.

The only exceptions to the provision of Gen. St. Ky. c. 52, art. 1, § 3, that "the issue of an illegal or void marriage shall be legitimate," are found in that section, and they are the issue of incestuous marriages, and of marriages between a white person and a negro or mulatto. The provision in section 4 that "where the marriage is contracted in good faith, and with the belief of the parties that a former husband or wife, then living, was dead, the issue of such marriage, born or begotten before notice of the mistake, shall be legitimate issue of both parents," not specifically declaring that issue born after notice shall be illegitimate, issue born both before and after notice are legitimate. Harris *v.* Harris, 2 S. Westn. Repr. (Ky.) 549.

3. People *v.* Landt, 2 Johns. (N. Y.) 375; Carpenter *v.* Whitman, 15 Johns. (N. Y.) 208; People *v.* Kling, 6 Barb. (N. Y.) 366; Canajoharie *v.* Johnstown, 17 Johns. (N. Y.) 41; Wright *v.* Wright, 2 Mass. 109; Petersham *v.* Dana, 12 Mass. 429; Hudson *v.* Hills, 8 N. H. 417; Com. *v.* Fee, 6 Serg. & R. (Pa.) 255; App. of Pote, 106 Pa. St. 574; s. c., 51 Am. Rep. 540; Lower Augusta *v.* Selinsgrove, 64 Pa. St. 166; Nine *v.* Starr, 8 Oregon, 49. *Compare* Bethlem *v.* Roxbury, 20 Conn. 298; Smith *v.* State, 1 Houst. Cr. Cas. (Del.) 107.

The marriage of the mother of an illegitimate child to one not the father will not render him liable for its support. People *v.* Volksdorf, 112 Ill. 292; Overseers *v.* Cox, 7 Cow. (N. Y.) 235.

If the father has legitimated the child under statute, the custody still remains in the mother. Lawson *v.* Scott, 1 Yerg. (Tenn.) 92.

4. Com. *v.* Anderson, 1 Ashm. (Pa.) 55. See Wright *v.* Wright, 2 Mass. 109.

5. Overseers *v.* Cox, 7 Cow. (N. Y.) 235; Carpenter *v.* Whitman, 15 Johns. (N. Y.) 208; People *v.* Landt, 2 Johns. (N. Y.) 375; People *v.* Kling, 6 Barb. (N. Y.) 366; Robalina *v.* Armstrong, 15 Barb. (N. Y.) 247; Simmons *v.* Bull, 21 Ala. 501; Nine *v.* Starr, 8 Oregon, 49; Wiggins *v.* Keizer, 6 Ind. 252.

6. Gaines *v.* Hennen, 24 How. (U. S.) 553. See LAW OF DOMICILE, *ante*, p. 129.

"The most important disability of an illegitimate child at the common law is that he has no inheritable blood; that he is incapable of becoming heir either to his putative father or to his mother or to any one else; that he can have no heirs but those of his own body. This was likewise the doctrine of the civil law; the language of the Institutes as to spurious offspring, *patrem habere non intelliguntur*, dealing rather more gently with a fact so extremely delicate and painful. At the old canon law a bastard was treated as also disqualified from holding dignities in the church. . . . The civil law, while offering in certain cases a hope of legitimation, made a distinction between spurious offspring born of promiscuous intercourse, and such as were conceived or born during the marriage of one of the natural parents; presuming that while the former might be rendered legitimate, the latter never could become so. And the rule was more severe with one class than the other. This principle is to be traced in the provisions of the Louisiana Code; children whose father is unknown, and adulterous or incestuous children, having no right of inheritance, while other natural or illegitimate children succeed to the estate of their mother in default of lawful children or descendants, and under certain conditions to the estate of the father who has acknowledged them. The well-settled American rule, however, differs considerably from that of both civil and common law. Legitimation by subsequent marriage is a principle admitted very generally in the legislation of the different States. So, too, are there various statutes which permit even bastard children to inherit from the father under certain restrictions; while the generally recognized doctrine is *partus sequitur ventrem*, and that the illegitimate child and his mother shall mutually inherit from each other." Schouler Dom. Rel. (3d Ed.) § 277.

The mother of illegitimate children, by the Pa. act of 1855, is rendered competent to inherit from them as though they were legitimate. The act does not render the children legitimate for any other purpose than to take and transmit the real and personal estate so taken and inherited according to the intestate laws of the State. O'Neil's App., 92 Pa. St. 193.

The will of a testator contained the following clause: "Item second, I give and bequeath to my following named illegitimate sons by M. E. C. as follows: to H. C. C., A. C., and J. C., all my real and personal property, to be equally divided among them, after reserving property enough to rent or hire yearly for the sum of one hundred and fifty dollars, for the support of M. E. C. during her lifetime, or so long as she lives a life of a virtuous woman, and all my just debts are paid. I also make this provision in my will, that in case one or more, or all, of the above-named children should die before deceased shall arrive at the age of maturity, or after they have arrived at the age of maturity, and die without issue or lawful heirs, the property, both real and personal, belonging to the deceased one to be equally divided among the other two surviving children; and in case that one more should die before he arrived of age, or without issue or lawful heirs, the surviving child to have all of the two deceased ones' property, both real and personal; and I furthermore provide, that if all the children named in this will shall die without heirs, then the property contained in this will I devise and bequeath to the heirs of John C. Estep and the heirs of Margaret P. Shaw, to be equally divided among them, share and share alike." The will was dated the 6th day of August, 1861, and was admitted to probate on the 13th day of April, 1864. *Held*, that H. C. C. was entitled to the real estate, he being the son of the testator and of the said M. E. C., and only heir-at-law of the survivor of the three devisees, his brothers. Estep *v.* Mackey, 52 Md. 593.

A limitation of an estate to illegitimate children of the grantee thereafter to be begotten is void as against good morals and public policy. Kingsley *v.* Broward, 19 Fla. 722.

An illegitimate child, claiming title to real estate of its father, must prove that he died intestate, without heirs resident in the United States. Cox *v.* Rash, 82 Ind. 519.

A bastard in the State of Illinois cannot inherit from its father unless he shall have married the mother and acknowledged the child as his own; but the child may, under the statute, inherit from its mother. Although a bastard may be entitled in Germany, where born, to inherit from his father, he cannot inherit real estate from him situate in Illinois. Stoltz *v.* Doering, 112 Ill. 234.

Mother's Estate—No Lawful Issue.—In *New York* and *New Jersey* illegitimate children are heirs of the mother, and inherit real and personal estate in default of lawful issue. In *North Carolina* they inherit real property only. Stimson's Stat. Law, § 3151.

Mother's Estate — Lawful Issue.—In

6. Abatement.—Where an action was properly begun, but the child was afterwards born dead, the action should be dismissed.[1] The death of the mother does not abate a proceeding commenced during her life;[2] nor does the birth of twins,[3] nor the marriage of the prosecutrix with another man.[4]

8. Evidence.—The weight of authority declares the action to be a civil proceeding.[5] It is therefore governed by its

Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Pennsylvania, Ohio, Indiana, Illinois, Michigan, Wisconsin, Minnesota, Iowa, Kansas, Nebraska, Missouri, Maryland, Virginia, West Virginia, North Carolina, Kentucky, Tennessee, Arkansas, Texas, California, Oregon, Nevada, Washington Ter., Dakota, Idaho, Montana, Wyoming, Utah, Arizona, New Mexico, Georgia, Alabama, Mississippi. and *Florida,* the illegitimate children inherit the mother's estate with the legitimate children, share and share alike. Stimson's Stat. Law, § 3151 (B).

From Mother's Kin.—In *Massachusetts, Rhode Island, Pennsylvania, Ohio, Indiana, Illinois, Virginia, West Virginia, Arkansas, Texas, Mississippi,* and *Florida* the illegitimate children both inherit from the mother and represent her so as to inherit from her kin share and share alike with the legitimate children. But in *Maine, Michigan, Wisconsin, Minnesota, Nebraska, North Carolina, Kentucky, California, Oregon, Nevada, Arizona,* and *Louisiana* bastards do not represent the mother so as to claim any intestate estate from the kindred, either lineal or collateral, though in Washington Ter., Dakota, Idaho, and Montana they may do so if legitimated before the death of the person from whom such estate descends. Stimson's Stat. Law, § 3151 (C) (D).

A bastard cannot inherit through his mother from her ancestors. Jackson *v.* Jackson, 80 Ky. 390; *In re* Mericlo, 63 How. Pr. (N. Y.) 62. *Compare* Dickinson's App., 42 Conn. 491.

By and from Bastards.—In *North Carolina, Ohio, Maryland, Kentucky,* and *Georgia* bastards inherit from each other children of the same mother as if legitimate. Stimson's Stat. Law, § 3153.

Subsequent Marriage of Parents.—An illegitimate child, made legitimate by the subsequent marriage of his parents, according to the law of the State or country of the marriage and the parents' domicile, is thereafter legitimate everywhere and entitled to inherit. Miller *v.* Miller, 91 N. Y. 315; s. c., 43 Am. Rep. 669.

A, the natural child of B and C, was born April 4, 1883; on August 7, 1883, B made his will, in which he gave nothing to A; on August 9, 1883, C was married to B; on December 14, 1883, B died. *Held,* A could not be regarded as an after-born child within the purview of the act of *Pennsylvania,* April 8, 1833, section 15—in connection with the act of May 14, 1857—and, therefore, be entitled to a child's share of the real and personal estate of B. App. of McCulloch, 10 Eastn. Repr. (Pa.) 251.

1. State *v.* Beatty, 61 Iowa, 307. See Mobley *v.* State, 83 Ind. 92. *Compare* Satterwhite *v.* State, 32 Ala. 578; Hinton *v.* Dickinson, 19 Ohio St. 583.

The defendant is not liable for the lying-in expenses. State *v.* Beatty, 61 Iowa, 307. Nor for costs of suit where plaintiff causes its discontinuance by reason of miscarriage. Eagen *v.* Bergen, 56 Vt. 589.

An action for the support of a bastard child, during its life, may be brought after the death of the child. Meredith *v.* Wall, 14 Allen (Mass.), 155; Smith *v.* Lint, 37 Me. 546; Maxwell *v.* Campbell, 8 Ohio St. 265; Hauskins *v.* People, 82 Ill. 193; Evans *v.* State, 58 Ind. 587.

2. People *v.* Nixon, 45 Ill. 353. *Compare* Rollins *v.* Chalmers, 49 Vt. 515.

3. Connelly *v.* People, 81 Ill. 379.

4. Roth *v.* Jacobs, 21 Ohio St. 646; McFadden *v.* Frye, 13 Allen (Mass.), 472; State *v.* Wilson, 16 Ind. 134; Allen *v.* Davidson, 16 Ind. 416.

5. Millet *v.* Baker, 42 Barb. (N. Y.) 215; Mahoney *v.* Crowley, 36 Me. 486; Smith *v.* Lint, 37 Me. 546; Mariner *v.* Dyer, 2 Me. 165; Low *v.* Mitchell, 18 Me. 372; Robie *v.* McNiece, 7 Vt. 419; Coonies *v.* Knapp, 11 Vt. 543; Spears *v.* Forrest, 15 Vt. 435; Marston *v.* Jenness, 11 N. H. 156; Parker *v.* Way, 15 N. H. 45; Harris *v.* County, 15 N. H. 81; State *v.* Bowen, 14 R. I. 165; Hinman *v.* Taylor, 2 Conn. 357; Glenn *v.* State, 46 Ind. 368; Byers *v.* State, 20 Ind. 47; Harper *v.* State, 101 Ind. 109; State *v.* Brown, 44 Ind. 329; Carter *v.* Krise, 9 Ohio St. 402; Lewis *v.* People, 82 Ill. 104; People *v.* Christman, 66 Ill. 162; Pease *v.* Hubbard, 37 Ill. 257; Mann *v.* People, 35 Ill. 467; McFarland *v.* People, 72 Ill. 368;

rules,[1] and is within the statutes allowing amendment,[2] and depositions,[3] and compelling parties in civil proceedings to testify.[4] The paternity of the child may be established by a preponderance of evidence.[5] The evidence of the mother should be corroborated,

Willets *v.* Jeffries, 5 Kan. 470; Baker *v.* State, 65 Wis. 50; Altschuler *v.* Algaza, 16 Neb. 631; State *v.* Snure, 29 Minn. 132; Com. *v.* Turner, 4 Dana (Ky.), 513; Francis *v.* Commonwealth, 3 Bush (Ky.), 6; State *v.* McIntosh, 64 N. Car. 607; State *v.* Crouse, 86 N. Car. 617; People *v.* Harty, 49 Mich. 490; People *v.* Phalen, 49 Mich. 492. *Compare* Van Tassel *v.* State, 59 Wis. 351; Baker *v.* State, 56 Wis. 568; Bake *v.* State, 21 Md. 422; Paulk *v.* State, 52 Ala. 427; Hill *v.* Wells, 6 Pick. (Mass.) 101. Hyde *v.* Chapin, 2 Cush. (Mass.) 77; Smith *v.* Hayden, 6 Cush. (Mass.) 111; Cummings *v.* Hodgdon, 13 Metc. (Mass.) 246.

Imprisonment may be had for debt in bastardy proceedings. Paulk *v.* State, 52 Ala. 427; State *v.* Becht, 23 Minn. 1; Musser *v.* Stewart, 21 Ohio St. 353; *Ex parte* Cottrell, 13 Neb. 193; *In re* Wheeler, 34 Kans. 96; Lower *v.* Wallack, 25 Ind. 68. *Compare* Holmes *v.* State, 2 Green (Iowa), 501.

The requirement that a jury must be satisfied beyond a reasonable doubt of the guilt of the accused before they can convict does not apply to bastardy cases. Semon *v.* People, 42 Mich. 141.

1. Wilbur *v.* Crane, 13 Pick. (Mass.) 284.

2. Bailey *v.* Chesley, 10 Cush. (Mass.) 284.

3. State *v.* Hickerson, 72 N. Car. 421; Richardson *v.* People, 31 Ill. 170.

4. Booth *v.* Hart, 43 Conn. 480.

5. Lewis *v.* People, 82 Ill. 104; McFarland *v.* People, 72 Ill. 368; People *v.* Starr, 50 Ill. 50; Allison *v.* People, 45 Ill. 37; People *v.* Christman, 66 Ill. 162; Malony *v.* People, 38 Ill. 62; Mann *v.* People, 35 Ill. 467; Harper *v.* State, 101 Ind. 109; Semon *v.* People, 42 Mich. 141; State *v.* Romaine, 58 Iowa, 46; State *v.* Bowen, 14 R. I. 165; Richardson *v.* Burleigh, 3 Allen (Mass.), 479; State *v.* Rogers, 79 N. Car. 609; Satterwhite *v.* State, 28 Ala. 65; Stovall *v.* State, 9 Baxt. (Tenn.) 597; Robbins *v.* Smith, 47 Conn. 182. *Compare* Van Tassel *v.* State, 59 Wis. 351.

In a bastardy proceeding the mother and the defendant are not of equal credibility as witnesses, the latter having a pecuniary interest in denying the paternity of the child. McClellan *v.* State, 66 Wis. 335.

Where the mother swears that the defendant is the father, and the defendant swears that he is not, and they are of equal credibility, the one offsets the other, and unless there is other testimony given, or circumstances proved which give the preponderance to the plaintiff, the defendant should be acquitted. McFarland *v.* People, 72 Ill. 368. *Compare* State *v.* Rogers, 79 N. Car. 609; McClellan *v.* State, 66 Wis. 335.

The uncorroborated testimony of complainant was held insufficient to sustain a verdict against the defendant, who denied the paternity, and was supported in his evidence by the testimony of others. McCoy *v.* People, 65 Ill. 439

The relatrix may prove that the defendant was frequently in her company. Marks *v.* State, 101 Ind. 353.

Letters of the defendant written before the child was begotten referring to indelicate liberties, and expressing a desire for sexual intercourse thereafter, are admissible. Walker *v.* State, 92 Ind. 474. See Beers *v.* Jackman, 103 Mass. 192.

Under the *Iowa* Code, the unsupported evidence of the mother is sufficient to convict. State *v.* McGlothlen, 56 Iowa, 544.

A bastardy proceeding is *quasi* criminal, and the defendant must be proved beyond a reasonable doubt to be the father of the child before he can be compelled to contribute to its support. A finding by the court, in such a case, that the defendant is guilty "upon a preponderance of the evidence, but not beyond a reasonable doubt," is equivalent to an acquittal. Van Tassel *v.* State, 59 Wis. 351.

Admissions of Relatrix.—In a prosecution for bastardy, admissions of the relatrix are not competent evidence, except to impeach her in a proper case. Houser *v.* State, 93 Ind. 228.

Evidence of a rumor that the mother had been improperly intimate with the defendant is inadmissible. Saint *v.* State, 68 Ind. 128. Also a rumor that the child was illegitimate. Haddock *v.* Boston, etc., R. Co., 3 Allen (Mass.), 298.

The record of a judgment in an action for seduction by the relatrix against the defendant is not admissible to prove the fact of sexual intercourse. Glenn *v.* State, 46 Ind. 368. Nor that she had had at a previous time a child by the defendant. Boyle *v.* Burnett, 9 Gray (Mass.), 251. But sexual intercourse had three years

in some material particular, by other testimony,[1] but the charge previous to the time of the alleged intercourse when the child was begotten is admissible, as tending to show the intimacy and relation of the parties to each other at the time the child was conceived. Thayer *v.* Davis, 38 Vt. 163.

Evidence as to who was the father of an illegitimate child born some fourteen months before the birth of the second child, with whose paternity the defendant is charged, is admissible as tending to corroborate his testimony denying that he is the father. State *v.* Woodworth, 65 Iowa, 141.

1. Whar. Cr. Ev. (9th Ed.) § 388.

Corroborative Evidence.—Mr. Saunders in his work on Affiliation (8th Ed.), 55, says: "Supposing no preliminary objection to be taken, the woman will have to substantiate her complaint by proving that the defendant is the father of the child. This proof she must give not only by her own direct and positive testimony, but by some corroborative evidence, in some material particular, apart from herself. In Reg. *v.* Armitage, 27 L. T. 41; L. R. 7 Q. B. 773, it was held that the evidence of the mother cannot be dispensed with. As the corroborative evidence thus required is to be given merely to the satisfaction of the justices, and as what will satisfy some minds will make little impression upon others, it is impossible to lay down any general rules upon the subject; but it will occur to almost every one that if the woman swear positively to the fact of the defendant being the father of the child, and give her evidence circumstantially, that evidence will be corroborative in a material particular which shows that the defendant has been seen with the woman under very suspicious circumstances indicating close and indecent intimacy between them at or about the time when the sexual intercourse must have taken place. So, too, evidence by other parties of conversations between the woman and the man, in which he has been treated as the father, which he has not denied, or any admission on the part of the defendant that he has had connection with the woman, unless, indeed, her habits in life are notoriously lewd, in which case the latter evidence would be of little weight. Justices will, however, do well to bear in mind that the corroborative evidence is to be of some material particular, guiding their minds to the belief of the fact that the man's being the father of the child: direct evidence of intercourse by such testimony cannot reasonably be expected (indeed, this evidence is supplied by the mother), but the corroboration should be of that nature as, when coupled with the previous evidence of the mother, to lead their minds to the reasonable conclusion that the man is the father of the child. Upon the question of what is sufficient corroborative evidence to justify the justices in making an order, the decision of the Court of Queen's Bench in the case of The Queen *v.* Pearcy, 16 Jur. 193, Q. B.; 18 L. T. 238; 17 Q. B. 902, note, is in point. There, upon an appeal to the sessions against an order of affiliation, the corroboration consisted of the evidence of the woman's sister (one J. M.), who deposed to a conversation between herself and the defendant, when the latter, in answer to an observation of the mother that he was the father of the child and he must keep it, replied 'he should not, and he would rather go to America.' Upon a case reserved the second question was, whether the evidence given by the said A. M. was or was not corroborated in some material particular by the other witness, the said J. M., who was called on behalf of the said respondent. In giving judgment upon this part of the case, Lord Campbell said: 'As to the question whether there was evidence in corroboration of the mother, the 3d section of the stat. 7 & 8 Vict. c. 101 requires that the evidence of the mother be corroborated in some material particular by other testimony to the satisfaction of the justices. Looking at the evidence set out, we may well suppose that it did corroborate the evidence of the mother to their satisfaction;' and Mr. Justice Patteson remarks, 'Secondly, the evidence of the mother is to be corroborated in some material particular to the satisfaction of the justices, not to our satisfaction.' The corroborative evidence in this case, it must be admitted, was exceedingly slender; still, there may have been circumstances to have given it a weight and an importance beyond what it would appear to be entitled to upon the face of the case as it then stood. But, as Mr. Justice Patteson very truly put it, the statute merely requires the corroboration to be to the satisfaction of the justices; and it was not for the Court of Queen's Bench, therefore, to interfere and say what ought or ought not to have satisfied them. See also Lawrence *v.* Ingmire, 20 L. T. 391.

"Upon this subject reference may be made to the case of Bessela *v.* Stern, L. R. 2 C. P. D. 265; 46 L. J. C. P. 467; 42 J. P. 197, in the Court of Appeal.

This was an action for breach of promise of marriage, and the question was whether or not there was coroborative evidence of the promise, the 32 & 33 Vict. c. 68, s. 2, providing 'that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise.' Upon the trial the plaintiff gave evidence that the defendant, who had seduced her, had given her a promise of marriage. To corroborate her evidence her sister was called, who deposed, among other things, that on one occasion she had overheard a conversation between the plaintiff and the defendant, in which the plaintiff had said to the defendant, 'You always promised to marry me, but you never kept your word,' and that the defendant had neither denied nor admitted the promise, but offered the plaintiff money, asking her how much she would take to go away. The jury having found for the plaintiff, and on a motion in the court below to enter the verdict for the defendant on the ground that there was no corroborative evidence, and the court having made the rule absolute, Cockburn, C.J., in reversing such judgment in the Court of Appeal, said: 'I think there was corroborative evidence here. The corroboration need not go to the extent of establishing the contract, that is for the principal witness; but it must be something to show that the story told by the principal one is a probable one. Here the plaintiff's sister gives evidence of a conversation overheard between the plaintiff and the defendant, in which the plaintiff says: "You always promised to marry me, and you do not keep your promise," saying it either as a matter of reproach, or to induce the defendant to fulfil the promise. To this assertion there appears to have been no contradiction, but the defendant asked the plaintiff how much money she would take to go away. The jury seem to have believed the plaintiff's sister. If that conversation took place, no doubt it is not conclusive; for a man might not think it worth while to contradict the assertion of the promise, and raise a dispute. On the other hand, it might be said he made no reply to the accusation because he could not with truth deny it. . . . All we have to decide is, whether there was confirmatory evidence, and we can only say that there was, for there was evidence that the woman had taxed the man with the promise, and he had not denied it.' Bramwell, L.J., also said: 'I rather fancy that it has somewhere been said that the word "material" makes no difference in the meaning of the section; and I can only say that, if this is not evidence of some sort, we should get rid of a great mass of evidence daily received in all the courts, and in all kinds of actions for goods sold and delivered, and everything else, namely, evidence that a claim was made under circumstances in which the defendant could have denied the truth of it, and he did not deny it. If in such a case it would not have been natural to deny it, it is no evidence of an admission that he does not. But if a denial is what one would naturally expect, it is strong evidence of an admission, and must be considered as corroboration of the claim set up.' Brett, L. J., also expressed himself in the following words: 'The first question is, Did the jury believe the witness? If they did, the next question is, Would it have been natural at the time when the woman made the statement that the man should have contradicted it? If so, the jury had a right to consider 'his not denying it' evidence of the truth of what she said. This is a kind of evidence which is admitted every day, and if it is admitted here, it is corroborative evidence of the promise of marriage.' It will be observed that in this case the only question was as to whether or not there was in fact corroborative evidence, not whether or not such evidence ought to have been deemed to be conclusive, it being for the jury, as in the case of an affiliation summons it would be for the justices, to estimate the value and weight of such evidence.

"In dealing with the question of the existence and effect of corroborative evidence, the justices will not be confined to the consideration of facts which occurred at or about the time when the child must have been begotten; but they may consider any circumstances, though long antecedent to such time, if they are of opinion that they lead to a moral conviction of their corroborating the woman's evidence. Upon this subject the recent case of Cole (appellant) *v.* Manning (respondent), 46 L. J. M. C. 175, is of considerable value. This case was one stated by a metropolitan police magistrate upon a refusal by him to make an order of affiliation upon the ground of a want of corroborative evidence. In his statement of facts he set out that at the hearing it was proved that the appellant had been delivered of a bastard child on the 10th October, 1875, and that she swore that the respondent was the father of such child, the connection having taken place at his house on an evening in January,

1875; that of that meeting and that intercourse there was no corroborative evidence. But it was proved to his entire satisfaction that during the summer of 1874, several months before the child could have been begotten, the parents of the appellant, with whom previously to that date the respondent had been on terms of trust, friendship, and intimacy, refused him the house, and quarrelled with him, owing to their suspicions with regard to his conduct towards the appellant; that they deposed that they surprised the appellant and respondent together on more than one occasion; that the door of the parlor where they were was closed for a minute or two against them; that the appellant sat on the knee of the respondent; and to other circumstances which would have had great effect on his (the magistrate's) judgment, had they occurred at or about the time when the child might have been begotten; that the appellant was rather of weak intellect, but that there was no evidence of any similar misconduct on her part with other men than the respondent. The magistrate stated that, after taking time to consider, he was of opinion that he was not at liberty so to interpret the words of the statute, "if the evidence of the mother be corroborated in some material particular," as to include evidence of facts long antecedent and having no direct relation to the actual begetting of the child, however strong might be the moral conviction such facts might convey to his mind, but that the word 'material' must be taken to imply a closer connection of the 'particular' in question than was in this case apparent with occurrences at or about the time when the child must have been begotten, or with subsequent words or actions of respondent tending to fix the paternity. In his judgment, Mellor, J., said: 'I think the magistrate was mistaken here. It was within his competency to receive the evidence, and to consider it. And, if I rightly understand him, he would, if he had thought himself at liberty to entertain this evidence at all, have found in favor of the complainant. There is no rule of law that he could not consider evidence of this character, though anterior to the time of the conception of the child, yet to show as a probability that sexual intercourse might have taken place. Nothing appears to show that the statements of what occurred in the summer of 1874 were not *bona fide*. Indeed, the magistrate says they satisfied him as to the facts to which they related. The effect then of such evidence on the question of paternity was entirely for him. If he thinks it did materially corroborate the mother's statement, he was entitled to receive and act upon it; and the case must be remitted to him.' Also Field, J., said: 'I also think that the case should be remitted to the magistrate to hear and determine; and he is quite at liberty to consider the evidence of the facts proposed to be given before him as corroborating the mother's statement. The object of the act of Parliament was to give to a woman the right to have her bastard infant maintained by the father; but on account of the danger of setting the evidence of a woman singly against that of a man singly in reference to a transaction which always takes place in secret, the act said that her evidence must be corroborated in some material particular. It is admitted that evidence of these facts would be material if they had occurred at a different time. The magistrate thinks so, and any reasonable person would say the same. Those facts are, that the appellant is a woman of weak intellect, and the respondent, being very intimate with her parents, was found taking advantage of her, and was forbidden the house in consequence. All such evidence must be entirely for the magistrate to consider the weight of. There is no rule of law that, because the circumstances took place some months before, they are not to be considered in the light of corroboration. I am very clearly of opinion that they ought.'

"When the summons is taken out more than twelve months from the birth of the child, it will be a necessary part of the applicant's proof that the putative father has, within such twelve months, paid money for the maintenance of the child; and such proof will be corroborative evidence, if given by testimony other than that of the woman. Reg. *v.* Berry, 28 L. J. M. C. 86, in which case Lord Campbell, C. J., said: 'As to the second objection, we never entertained the smallest doubt, clearly thinking that it was necessary to prove at the hearing the payment of money by the defendant as alleged; and further, that his payment of money for the maintenance of the child was corroborative evidence of the paternity.' It is not, however, necessary that this proof of the payment of money, if given by the mother, should be corroborated in order to give jurisdiction. Hodges *v.* Bennett, 29 L. J. M. C. 224.

"When the application has not been made within the twelve months after the birth of the child, in consequence of the man having ceased to reside in England within such twelve months, though made

need not be established beyond a reasonable doubt.[1] The mother is a competent witness to prove her own adultery,[2] but the evidence of a married woman is not admissible to prove non-access by her husband.[3] Evidence of the mother's reputation for chas-

within the twelve months next after his return, the woman must give some affirmative evidence of these facts, and if unable to prove them by other testimony she may call the man himself as a witness to prove them.

"The putative father himself may be called as a witness for the complainant (14 and 15 Vict. c. 99, s. 2), though for obvious reasons it will generally be undesirable for her to run the risk of the testimony he may give."

Where the mother swears that the defendant is the father of the child, and he denies it, it is not necessary, in order to warrant a verdict of guilty, that the other evidence, by itself and independent of the mother's testimony, should satisfy the jury beyond a reasonable doubt. McClellan *v.* State, 66 Wis. 335; State *v.* Rogers, 79 N. Car. 609. *Compare* McFarland *v.* People, 72 Ill. 368.

A complaint under the Massachusetts bastardy act need not allege that the complainant, during travail, accused the defendant of being the father of her child, or that she had continued constant in that accusation; and, without such allegation, the fact may be shown to corroborate her testimony at the trial. Bowers *v.* Wood, 9 N. Eastn. Repr. (Mass.) 534.

Declarations made by the complainant to her mother, before the birth of the child, as to its paternity, in which she was constant in her accusation of the defendant as the father, were admissible in corroboration of her testimony. Robbins *v.* Smith, 47 Conn. 182.

1. Maloney *v.* People, 38 Ill. 62; Young *v.* Makepeace, 103 Mass. 50; People *v.* Cantine, 1 Mich. N. P. 140; Semon *v.* People, 42 Mich. 141. *Compare* Baker *v.* State, 47 Wis. 111; Van Tassel *v.* State, 59 Wis. 351.

2. Scott *v.* Ely, 4 Wend. (N. Y.) 555; Com. *v.* Wentz, 1 Ashm. (Pa.) 269; Baxter *v.* Columbia, 16 Ohio, 56; State *v.* Adams, 1 Brev. (S. Car.) 279; State *v.* Barrow, 3 Murph. (N. Car.) 121.

The testimony of the wife that a man other than her husband is the father is not admissible. Stegall *v.* Stegall, 2 Brock. (U. S.) 257; Dennison *v.* Page, 29 Pa. St. 420; s. c., 72 Am. Dec. 644; Com. *v.* Shepherd, 6 Binn. (Pa.) 283; s. c., 6 Am. Dec. 449.

The mother has an interest in the result, which may be considered by the jury in weighing her evidence. Keating *v.* State, 44 Ind. 449.

At a trial of a complaint under the bastardy act, testimony of the complainant's accusation of the defendant is competent, where it appears that the accusation was made after the child was born, but before the umbilical cord was cut. Tacey *v.* Noyes, 9 N. Eastn. Repr. (Mass.) 830.

3. Mink *v.* State, 60 Wis. 583; Watts *v.* Owens, 62 Wis. 512; Dennison *v.* Page, 29 Pa. St. 420; s. c., 72 Am. Dec. 644; Tioga *v.* South Creek, 75 Pa. St. 436; Com. *v.* Shepherd, 6 Binn. (Pa.) 283; s. c., 6 Am. Dec. 449; Boykin *v.* Boykin, 70 N. Car. 262; State *v.* Pettaway, 3 Hawks (N. Car.), 625; State *v.* Wilson, 10 Ired. (N. Car.) 131; Chamberlain *v.* People, 23 N. Y. 88; People *v.* Overseers, 15 Barb. (N. Y.) 286; Cross *v.* Cross, 3 Paige (N. Y.), 139; s. c., 23 Am. Dec. 778; Hemmenway *v.* Towner, 1 Allen (Mass.), 209; Corson *v.* Corson, 44 N. H. 587; Parker *v.* Way, 15 N. H. 45; Egbert *v.* Greenwalt, 44 Mich. 245.

"Great difficulties often arise in proving the non-access of the husband, since, notwithstanding the woman is a competent witness to prove her own adultery, she is not such to prove the non-access of her husband. The testimony of the husband or wife that, though living together, they have had no connection, and that therefore the offspring is spurious, has, on the general ground of decency, morality, and policy, been uniformly rejected. Goodright *v.* Moss, 2 Cowp. 594; Cope *v.* Cope, 1 Moo. & Rob. 269; 2 C. & P. 604; R. *v.* Mansfield, 1 Q. B. 444; Corn *v.* Shepherd, 6 Bing. 283. And that rule excludes not only all direct questions, but all questions which have a tendency to prove or disprove that fact unless they are put with a view to prove a different point in the case. R. *v.* Sourton, 5 Ad. & Ell. 180; Wright *v.* Holdgate, 3 Car. & Kir. 158. Nor is it affected by the circumstance that at the time of the examination of one of the parents the other is dead, because the rule has been established not simply on the ground that the tendency of such evidence is to promote connubial dissension, but on the broad basis of general public policy. R. *v.* Kea, 11 East, 132. If, therefore, it is necessary to prove non-access, such as that arising from the fact of the husband being abroad, imprisoned, or ill in a hos-

pital or the wife living notoriously separate from her husband and in a state of abandoned prostitution at the time when the child must have been conceived, such evidence must be given by other testimony than that of either the husband or the wife.

"When a married woman has a child, the presumption is in favor of its legitimacy. Formerly, indeed, the presumption was that if the husband continued within the four seas, and was alive at the child's birth, such child would not be a bastard. But now the law allows inquiry, the rule, however, being that those who dispute the fact of the child's legitimacy are bound to make out the contrary. Per Creswell, J., in Wright *v.* Holdgate, 3 Car. & Kir. 158. In Hargrave *v.* Hargrave, 9 Beav. 552, Lord Langdale, M. R., said: 'A child born of a married woman is in the first instance presumed to be legitimate. This presumption thus established by law is not to be rebutted by circumstances which only create a doubt and suspicion; but it may be wholly removed by showing that the husband was, first, incompetent; second, entirely absent so as to have had no intercourse or communication of any kind with the mother; thirdly, entirely absent at the period during which the child must, in the course of nature, have been begotten; fourthly, only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse. Such evidence as this puts an end to the question, and establishes the illegitimacy of the child of a married woman.' In Saye and Sele Barony, 1 Ho. Lords Cas. 507, it was held that the illegitimacy of a child born of a married woman is established beyond all dispute by evidence of her living in adultery at the time when the child was begotten, and of her husband then residing in another part of the kingdom, so as to make access impossible. In Cope *v.* Cope, 5 C. & P. 604; 1 Moo. & Rob. 269, Alderson, B., said: 'If a husband have access, and others at the same time are carrying on a criminal intimacy with his wife, a child born under such circumstances is legitimate in the eye of the law. But if the husband and wife are living separate, and the wife is notoriously living in open adultery, although the husband have an opportunity of access, it would be monstrous to suppose that under these circumstances he would avail himself of such opportunity.' See also Morris *v.* Davies, 5 Cl. & Fin. 163; 3 C.& P. 215; Rex *v.* Luffe, 8 East, 193; Gurney *v.* Gurney, 32 L. J. Ch. 456; 8 L. T. 380. In Plowes *v.* Bossey, 31 L. J. 681, Ch.; 7 L. T. 306, Vice-Chancellor Kindersley thus clearly enunciates the law upon the subject. He says: 'A child born of a married woman is presumed, *prima facie*, to be legitimate—that is, to have been procreated by the husband—and our law respects and supports the legitimacy of such child; and although it does not prohibit any person interested from making out the illegitimacy, it throws the *onus probandi* entirely upon such person. If the case is that the husband and wife never were together within the period during which, according to the law of nature, they must have been to make the child the child of both, or that they were together either in company with others or under circumstances making the fact impossible, the *onus* is on the person alleging such a fact to prove it. . . . And further, when a person alleges the illegitimacy of the child of a married woman, and brings forward evidence to show that such child was not procreated by the husband, the law will not allow the presumed status of the child to be taken away merely on the balance of probability. The evidence must, on the contrary, not only be such as to raise in the mind of a judge or jury strong doubts, but it must be such as to produce a judicial conviction that the child was not procreated by the husband.' See also Atchley *v.* Sprigg, 33 L. J. 345, Ch.; 10 L. T. 16; also the recent cases of Hawes *v.* Draeger, L. R. 23 Ch. D. 173; 31 W. R. 576; 48 L. T. 518; 52 L. J. Ch. 449; Inglis *v.* Inglis, 16 L. T. 775." Saunders on Affiliation (8th Ed.), 66.

On the question of the legitimacy of her children, the wife cannot give evidence, even as to collateral facts, tending to show non-access of her husband during the time in which they must have been begotten. Mink *v.* State, 60 Wis. 583. In this case the court said: "Asking the prosecutrix 'who came with her from Iowa,' where she had lived with her husband, included her husband, and implied the inquiry whether he came with her; and the answer, 'I came alone,' established the fact that he did not come with her. The question, 'Where was your husband at any particular time,' whether during the time within which the child was begotten or not, was held in King *v.* Inhabitants, etc., 5 Ad. & El. 180, to be a collateral fact directly connected with the main fact, and objectionable. The second of the above questions comes directly within this decision. 'Where was your husband when you came from Iowa?' and her answer, 'I don't know where he was,' implied that

tity is admissible;[1] it is competent to prove that she had intercourse with other men about the time the child was begotten.[2]

they were estranged from each other, or that they had permanently separated; or, at least, that they were not together or near each other. By the rule of evidence in ordinary cases such a condition of their relations as husband and wife would be presumed to have continued to that time, the contrary not being proved. The last of the above questions, and the answer, were positive and direct proof that the husband had had no access to her during the time in which the child must have been begotten. 'Have you ever had connection with any other man?' 'No, sir; I never did.' This question was understood to refer to the time within which some other man might have begotten the child, and 'any other man' embraced all men, including the husband, except the defendant. All these questions were very strongly objectionable, and the answers more so." Dennison *v.* Page, 29 Pa. St. 420; s. c., 72 Am. Dec. 644; People *v.* Overseers, 15 Barb. (N. Y.) 286; Com. *v.* Shepherd, 6 Binn. (Pa.) 283; State *v.* Pettaway, 3 Hawks (N. Car.), 625; Cope *v.* Cope, 1 Moo. & R. 269; King *v.* Inhabitants, etc., 5 Ad. & El. 180.

1. Short *v.* State, 4 Harr. (Del.) 568; Com. *v.* Moore, 3 Pick. (Mass.) 194; Sword *v.* Nestor, 3 Dana (Ky.), 453; State *v* Coatney, 8 Yerg. (Tenn.) 210; Walker *v.* State, 6 Blackf. (Ind) 1; Rawles *v.* State, 56 Ind. 433; Duffries *v.* State, 7 Wis. 672; Fall *v.* Overseers, 3 Munf. (Va) 495; State *v.* Karver, 65 Iowa, 53. See Morse *v.* Pineo, 4 Vt. 281; State *v.* Pratt, 40 Iowa, 631. *Compare* Sidelinger *v.* Bucklin, 64 Me. 371; Eddy *v.* Gray, 4 Allen (Mass.), 435; Bookhout *v.* State, 66 Wis. 415.

In a bastardy proceeding, especially where the complainant claims to have been ravished, where the only question is that of paternity, and the circumstances are such as not to preclude the possibility that one other than the defendant may be the father of the child, it is proper to show the unchaste conduct of the woman with such other person, and that, on account of such conduct, trouble arose between her and the family of defendant, thus showing a motive on her part for falsely charging the defendant. State *v.* Karver, 65 Iowa, 53.

2. Bowen *v.* Reed, 103 Mass. 46. See Kinner *v.* State, 45 Ind. 175; Walker *v.* State, 6 Blackf. (Ind.) 1; Whitman *v.* State, 34 Ind. 360; State *v.* Pratt, 40 Iowa, 631; State *v.* Wilson, 16 Ind. 134; O'Brian *v.* State, 14 Ind. 469; Ginn *v.* Commonwealth, 5 Litt. (Ky.) 300; Paull *v.* Padelford, 16 Gray (Mass.), 263; Knight *v.* Moore, 54 Vt. 432; Holcomb *v.* People, 79 Ill. 409; State *v.* Britt, 78 N. Car. 439. See State *v.* Read, 45 Iowa, 469. *Compare* State *v.* Bennett, 75 N. Car. 305.

On cross-examination she may be required to answer if she had connection with other men about the time the child was begotten. Walker *v.* State, 6 Blackf. (Ind.) 1; Benham *v.* State, 91 Ind. 82; Ginn *v.* Commonwealth, 5 Litt. (Ky.) 300; Duffries *v.* State, 7 Wis. 672; U. S. *v.* Collins, 1 Cranch C. C. 592. *Compare* Low *v.* Mitchell, 18 Me. 372; Sterling *v.* Sterling, 41 Vt. 80; State *v.* Parish, 83 N. Car. 613; State *v.* Bryan, 83 N. Car. 611.

Although she may, on cross-examination, answer without objection questions as to lewd conduct with other men outside of the time in which the child might have been begotten, this does not render admissible evidence to discredit her answers. Sterling *v.* Sterling, 41 Vt. 80.

Evidence of her intercourse with other men within the period in which she might become pregnant with the child in controversy is admitted, because it would show that she could not know who was the father of the child; but if the defendant admitted that he also had intercourse with her about the same time, the proof may be rejected. Fall *v.* Overseers, 3 Munf. (Va.) 495.

If the alleged acts occurred more than ten months prior to the birth they cannot be shown, unless it be also proved that the period of gestation was longer than usual. Duck *v.* State, 17 Ind. 210; Eddy *v.* Gray, 4 Allen (Mass.), 435; Sabin *v.* Jones, 119 Mass. 167; Parker *v.* Dudley, 118 Mass. 602; Bowen *v.* Reed, 103 Mass. 46; Knight *v.* Morse, 54 Vt. 432.

The acts must have occurred between the first of the tenth month and first of the sixth month before the birth of the child. Crawford *v.* State, 7 Baxt. (Tenn.) 41. See State *v.* Smith, 61 Iowa, 538; Benham *v.* State, 91 Ind. 82; O'Brian *v.* State, 14 Ind. 469.

Evidence that the mother had intercourse with a man other than the respondent, less than seven and a half months before the birth of the child, is inadmissible in the absence of evidence that the birth was premature. Ronan *v.* Dugan, 126 Mass. 176.

The usual period of gestation is nine calendar months, but there is very com-

Declarations of a deceased mother that her child was born before her marriage, and corroborating statements by her of the circumstances and history of her life, are competent evidence to prove that the child was illegitimate.[1]

Evidence tending to show the motive of complainant in charging upon the defendant the paternity of a child which should have been charged upon another is admissible.[2] She may testify that the defendant had procured medicines for her for the purpose of procuring an abortion.[3] Declarations made by the mother, before the birth of the child, are admissible;[4] also,

monly a difference of one, two, or three weeks. For some cases of an extraordinarily long period see Com. *v.* Hoover, cited in Am. Jour. of Med. Sci., No. 24 (N. S.), Oct. 1846, p. 535; Lewis Cr. L. 50.

If a doubt is raised as to the paternity by reason of the mother's connection with other men at about the time it was begotten, other facts may be shown sufficient to satisfy the jury that the accused is the father. Altschuler *v.* Algaza, 16 Neb. 631; State *v.* Pratt, 40 Iowa. 631.

Where a complainant testifies that the defendant had sexual intercourse with her at a certain time and is the father of her bastard child, and two witnesses swear that they had connection with her about the same time, it is not error for the court to refuse to give an instruction that if they believe the last witnesses they should find for the defendant. Altschuler *v.* Algaza, 16 Neb. 631.

The defendant in a bastardy proceeding may ask the relatrix whether she has had sexual connection with others about the time the child was begotten, and when the relatrix testifies that she had connection with him at several different times within four or five days of each other, about a certain time, and a fully developed child is born in less than nine months thereafter, the court should not limit the time within which such inquiry may be made to two weeks preceding the time she thinks the child was begotten. Benham *v.* State, 91 Ind. 82.

Evidence contradicting the mother's statements denying her intercourse with other men is admissible for the purpose of affecting her credibility before the jury. Altschuler *v.* Algaza, 16 Neb. 631; State *v.* Read, 45 Iowa, 469; McCoy *v.* People, 65 Ill. 439.

Evidence that the prosecutrix slept with her son, who might have been the father of the child, is admissible to impeach her testimony. State *v.* Reed, 45 Iowa, 469.

Evidence that the mother kept company with other men at a time when the child might have been begotten is not competent for the defendant, though she has denied the fact, unless it is offered for the purpose of proving sexual connection with such men. Houser *v.* State, 93 Ind. 228. *Compare* State *v.* Read, 45 Iowa, 469.

The time of the alleged intercourse with another man must be fixed. Meyncke *v.* State, 68 Ind. 401.

Where it appeared that the prosecutrix had had intercourse with two men within such short time as to make it doubtful as to which caused the pregnancy, *held*, that her positive testimony as to the paternity should not control. Baker *v.* State, 47 Wis. 111.

Where the complainant was the mother of another bastard child, born some fourteen months prior to the one in question, it was competent, under the facts of this case (see opinion), to ask her, when on the stand, who the father of the first child was. State *v.* Woodworth, 65 Iowa, 141.

1. Haddock *v.* Boston, etc., R. Co., 3 Allen (Mass.), 298.

2. State *v.* Karver, 65 Iowa, 53; S. C., 5 Am. Cr. Rep. 88.

3. McIlvain *v.* State, 80 Ind. 69. See Young *v.* Makepeace, 103 Mass. 50; Sweet *v.* Sherman, 21 Vt. 23.

The defendant cannot show that the mother endeavored to procure an abortion. Sweet *v.* Sherman, 21 Vt. 23.

The fact that during the woman's pregnancy, which was well known in the neighborhood, defendant made inquiries and offers to pay for the means of making a woman miscarry is relevant and competent evidence against him, though he professed to make such inquiries and offers for another person. Nicholson *v.* State, 72 Ala. 176. See Marston *v.* Jenness, 11 N. H. 156; Davis *v.* State, 6 Blackf. (Ind.) 494.

4. Robbins *v.* Smith, 47 Conn. 182; Fuller *v.* Hampton, 5 Conn. 417; Manye *v.* Holmes, 7 Allen (Mass.), 136. See Reed *v.* Haskins, 116 Mass. 198.

Declarations made by the relatrix out

declarations made at the time of travail.[1] The father of the mother who is a minor is a competent witness.[2] Statements and acknowledgments of the putative father as to the relation he sustained to the mother are competent.[3]

The resemblance of the child to the putative father is not admissible to show paternity.[4] The health of the child and mother and the wealth of the father should be considered in awarding the amount of judgment.[5] Impotence of the putative father may be proved as a defence.[6] The declaration of the putative father that the child was illegitimate is competent evidence.[7]

The defendant's reputation for morality cannot be admitted in evidence in a bastardy prosecution, where he has not been impeached as a witness.[8]

of court are competent evidence. Welch *v.* Clark, 50 Vt. 386.

1. Hauser *v.* Gustin, 2 Allen (Mass.), 402; Reed *v.* Haskins, 116 Mass. 198; Robbins *v.* Smith, 47 Conn. 182; Wilson *v.* Woodside, 57 Me. 489. See Booth *v.* Hart. 43 Conn. 480. *Compare* Richmond *v.* State, 19 Wis. 307; Sidelinger *v.* Bucklin. 64 Me. 371.

She will not be allowed to prove that she has been constant in an accusation which she never made in travail. Ray *v.* Coffin, 123 Mass. 365; Sidelinger *v.* Bucklin, 64 Me. 371.

2. Smith *v.* State, 1 Houst. Cr. Cas. (Del.) 107.

The defendant may prove them for the purpose of impeaching her testimony. Tholke *v.* State, 50 Ind. 355.

3. Woodward *v.* Shaw, 18 Me. 304; Sale *v.* Crutchfield, 8 Bush (Ky.), 647. See Walker *v.* State, 6 Blackf. (Ind.) 1.

In a prosecution for bastardy, letters of the defendant, written before the child was begotten, stating the intimacy of their relations, referring to the fact that he had taken indelicate liberties with her person, and expressing a desire for sexual intercourse thereafter, are proper evidence against him. Walker *v.* State *ex rel.*, 92 Ind. 474.

4. People *v.* Carney, 29 Hun (N. Y.). 47; Young *v.* Makepeace, 103 Mass. 50; Eddy *v.* Gray, 4 Allen (Mass.), 435; State *v.* Danforth, 48 Iowa, 43. See Keniston *v.* Rowe, 16 Me. 38; U. S. *v.* Collins, 1 Cranch C. C. 592; Paulk *v.* State, 52 Ala. 427; Petrie *v.* Howe, 4 N. Y. Sup. Ct. 85. *Compare* State *v* Britt, 78 N. Car. 439; Finnegan *v.* Dugan, 14 Allen (Mass.), 197; Gilmanton *v.* Ham, 38 N. H. 108.

In State *v.* Smith, 54 Iowa, 104; s. c., 37 Am. Rep. 192, the court said: "The child in this case was two years and one month old. The defendant claims that any resemblance, if it should be thought to exist, between such a child and a man alleged to be its father is too unreliable to constitute legal evidence of the alleged paternity. It is a well-known fact that resemblances often exist between persons who are not related, and are wanting between persons who are. Still, what is called family resemblance is sometimes so marked as scarcely to admit of a mistake. We are of the opinion, therefore, that a child of the proper age may be exhibited to a jury as evidence of alleged paternity. Precisely what should be deemed the proper age we need not determine. . . . A child which is only three months old has that peculiar immaturity of features which characterizes an infant during the time it is called a babe. A child two years old or more has to a large exent put off that peculiar immaturity. In allowing a child of that age to be exhibited we think the court did not err."

It seems that it is proper to show on behalf of the defendant that the child resembles a third person who has had opportunity for illicit intercourse with the mother, but not that it resembles a man who had been seen with the prosecutrix. Paulk *v.* State, 52 Ala. 427; s. c., 1 Am. Cr. Rep. 67.

Evidence of the color of the child's eyes is not admissible to show its paternity. People *v.* Carney, 29 Hun (N. Y.), 47.

5. Mills *v.* Hamaker, 11 Iowa, 206.

6. State *v.* Broadway, 69 N. Car. 411. See Com. *v.* Wentz, 1 Ashm. (Pa.) 269; Hargrave *v.* Hargrave, 9 Beav. 552.

7. Barnum *v.* Barnum, 42 Md. 251. *Compare* Bowles *v.* Bingham, 2 Munf. (Va.) 442; s. c., 5 Am. Dec. 497.

8. Houser *v.* State, 93 I. S. 228.

Entry in a baptismal register is competent to prove only the fact and date of baptism.[1]

The testamentary recognition of a child as legitimate is of the highest legal authority. All presumptions are to be taken in favor of such a declaration.[2]

When bastardy proceedings are instituted by the mother, proof that the child is likely to become a public charge is not necessary to support a judgment against the defendant.[3]

1. Blackburn *v.* Crawford, 3 Wall. (U. S.) 175. See Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521; Clark *v.* Trinity Church, 5 W. & S. (Pa.) 266; Kennedy *v.* Doyle, 10 Allen (Mass.), 161; Whitcher *v.* McLaughlin, 115 Mass. 167. *Compare* App. of Goerman, 1 Atl. Repr. (Pa.) 446; Canjolle *v.* Ferrie, 23 N. Y. 90; Morris *v.* Davies, 3 C. & P. 215.

2. Gaines *v.* Hennen, 24 How. (U. S.) 553.

3. Baker *v.* State, 65 Wis. 50.

Defences.—The gist of the offence of bastardy is the refusal of the putative father to give bond for the support of the child. A prosecution for bastardy is a species of protective measure to prevent counties becoming chargeable with pauper bastards. Therefore the county to which the bastard is likely to become chargeable has jurisdiction of a bastardy case, and not the county in which the child was begotten or born. Williams *v.* State, 67 Ga. 187; s. c., 4 Am. Cr. Rep. 65.

If it can be proved that, at the time of the supposed connection, the man was under fourteen years of age, the case cannot be supported, the law presuming that up to that age the man is impotent; and upon this point the law as applicable to rapes is strictly analogous, under which it has been frequently held that no infant under the above age can be indicted for this offence, even though evidence can be adduced of his competency. 1 Hale, 620, 630; Reg. *v.* Bromilow, 2 Moo. C. C. 122; Reg. *v.* Groombridge, 7 C. & P. 582; Reg. *v.* Jordan, 9 C. & P. 118.

Death of a bastard child pending the prosecution of the reputed father does not abate the action. Hinton *v.* Dickinson, 19 Ohio St. 583. *Compare* State *v.* Beatty; 61 Iowa. 307. Nor does the marriage of the mother. Roth *v.* Jacobs, 21 Ohio St. 646.

Proof that the reputed father is impotent is a complete defence. State *v.* Broadway, 69 N. Car. 411.

To an indictment for bastardy, N. pleaded: 1st. Not guilty; 2d. That the prosecution was not commenced within a year from the commission of the offence as alleged in the indictment; 3d. That the prosecution was not commenced within a year from the birth of the child; 4th. That the warrant issued by the justice was not a proper warrant; 5th. That he was arrested on a warrant issued by one O. J. M., justice, and was tried by one J., another justice, and judgment was rendered against him, from which he appealed to the circuit court, and was indicted, and the indictment quashed; that he was arrested again and taken before O. J. M., justice, and judgment was again rendered against him, from which he appealed; and that he now appeared to answer to the indictment found on this appeal. The State demurred to the second, fourth, and fifth pleas, and joined issue upon the first and third pleas. *Held*, that the second plea was bad; a good plea would have alleged that the prosecution was not begun within a year from the birth of the child; that the fourth and fifth pleas were also bad; that the fifth plea, if intended as a plea to the jurisdiction of the court, was bad, because it showed that all that was required to give jurisdiction to the court was done, and that having jurisdiction, the regularity or irregularity of the proceedings before the justice did not affect the questions at issue upon the indictment; and that if the fifth plea was intended as a plea of former acquittal, it was defective because it did not allege that N. had been tried and acquitted, and the quashing of the indictment did not operate as an acquittal, nor did it prevent N. from being again indicted. Neff *v.* State, 57 Md. 385.

A statute providing for the maintenance of bastard children does not apply to the case of a child which is still-born, and which, if born alive, would be a bastard. Schramm *v.* Stephan, 133 Mass. 559; Canfield *v.* State, 56 Ind. 168.

Where, in a prosecution for bastardy, the relatrix introduces evidence tending to prove efforts on the part of the defendant, after knowledge of her pregnancy, to induce the marriage of the relatrix to another man, the defendant may prove that he, in fact, discouraged such marriage. Beaver *v.* Bottorff, 82 Ind. 538.

Where an action was properly begun against the defendant for bastardy, but the child was afterwards born dead, the action should have been dismissed. The defendant is not liable for the lying-in expenses of the mother, and a judgment against defendant, even for costs, was erroneous. State *v.* Beatty, 61 Iowa, 307.

It is not proper to join the mother of a bastard child with the State in a proceeding to fix the paternity upon the putative father. State *v.* Collins, 85 N. Car. 511.

A prosecution for bastardy must be commenced within two years from the birth of the child, notwithstanding the relatrix is an infant. State *v.* Pavey, 82 Ind. 543.

In March, 1874, the respondent in a bastardy process was adjudged to be the father of the child and ordered to pay the mother seventy-five cents a week for its support. In September, 1878, the town where such child had a legal settlement applied to the court praying that an execution might issue for the amount due under the order. *Held*, that an execution cannot issue in such a case. Madison *v.* Gray, 72 Me. 254.

Period of Gestation.—A defence very frequently set up is that, notwithstanding the defendant has had sexual intercourse with the applicant at some time, none has taken place which could have led to the conception of the child. This defence is often productive of great difficulty, since it not uncommonly occurs that the woman is unable to speak with certainty to the exact time when the connection occurred which she alleges resulted in her pregnancy; and in all such cases where the intercourse has been upon one occasion only, or at long intervals, serious embarrassments may arise in tracing it back to the period when conception must have taken place. The uncertainty, too, of the natural length of the period of gestation presents in many cases very great difficulties in the way of coming to a correct decision. By the common consent and experience of mankind the term of gestation is considered to be ten *lunar* months or forty weeks (280 days), equal to nine *calendar* months and a week. Beck's Med. Jour. 356. This period has been adopted because general observation in cases which allowed of accurate observation has proved its correctness. It is not to be denied, however, that differences of one or two weeks often occur. The shortest period at which gestation may terminate consistently with the life of the child has not been precisely ascertained. There are satisfactory cases on record in which, from the degree of development of the infant at birth, as well as from other circumstances, it may be certainly known not to have attained twenty-six or twenty-seven weeks, and in which by careful treatment the infant was reared in a condition of health and vigor. Gestation may be occasionally prolonged for one or two, even three, weeks beyond the ordinary period. Carpenter's Man. Phys. 478. The Prussian civil code declares that an infant born 302 days after the death of the husband shall be considered legitimate; and by the Code Napoleon it is declared that "The legitimacy of a child born 300 days after the dissolution of marriage may be disputed." The ordinary period, therefore, of gestation being forty weeks, the justices will naturally look with great suspicion at evidence of paternity which dates the intercourse said to have produced conception at a period some weeks beyond or within that time. If the period exceeds by three weeks the ten lunar months (forty weeks), they may fairly reject the proof; but, on the contrary, if the period be two or three months within it, they will hardly be justified in such a course, though they may fairly require evidence on the part of the mother showing that the birth was in fact premature.

Where the time between the alleged intercourse, as testified to by the prosecutrix, and the birth of the child, was only about seven months, it was error to instruct the jury that evidence tending to show that the child was prematurely born was corroborative of the testimony of the prosecutrix that defendant was the father of the child. The most that should have been said was, that the premature birth was not inconsistent with such testimony. State *v.* Smith, 61 Iowa, 538.

In a prosecution under the bastardy act it appeared that the time intervening between the date at which the mother testified the child was begotten by the defendant and the date of its birth was forty days less than the usual period of gestation. The physician who attended at its birth having testified that he thought the child was not fully developed, because, among other things, it had no hair and its finger and toe nails were not fully developed, other physicians, examined as experts on behalf of the defendant, were asked if a scientific medical opinion as to the maturity or immaturity of a child could be based on the lack of hair, eyebrows, toe nails, etc. An objection to the question was sustained. *Held*, error. Daegling *v.* State, 56 Wis. 586.

The following table may assist the inquiry.

PERIODS OF GESTATION.

IF THE DATE OF BIRTH BE	1	2	3	4
	9 Cal. Mos. or 10Lnr.Mos. 40 weeks, or 280 days previously would be	8 Cal. Mos. or 9 Lnr. Mos. 36 weeks, or 252 days previously would be	7 Cal. Mos. or 8 Lnr. Mos. 32 weeks, or 224 days previously would be	6 Cal. Mos. or 7 Lnr. Mos. 28 weeks, or 196 days previously would be
1st Jan.	27th Mar	24th Apr.	22d May	18thJune
10th "	9th April	4th May	1st June	28th "
20th "	16th "	14th "	11th "	8th July
1st Feb.	27th Apr.	25th May	22d June	20thJuly
10th "	7th May	4th June	2d July	30th "
20th "	17th "	14th "	12th "	9th Aug.
1stMar.	25th May	22d June	20thJuly	17thAug.
10th "	4th June	2d July	30th "	27th "
20th "	14th "	12th "	9th Aug.	6th Sept.
1st Apr.	25thJune	23d July	20thAug.	17thSept.
10th "	5th July	2d Aug.	30th "	27th "
20th "	15th "	12th "	9th Sept.	7th Oct.
1st May	25thJuly	22d Aug.	19thSept.	17th Oct.
10th "	3d Aug..	1st Sept.	29th "	27th "
20th "	13th "	11th "	9th Oct.	6th Nov.
1stJune	25thAug.	22d Sept.	20th Oct.	17th Nov.
10th "	4th Sept.	2d Oct.	30th "	27th "
20th "	14th "	12th "	9th Nov.	7th Dec.
1st July	24th Sep.	22d Oct.	19thNov.	17th Dec.
10th "	4th Oct.	1st Nov.	29th "	27th "
20th "	14th "	11th "	9th Dec.	7th Jan.
1stAug.	25th Oct.	22d Nov.	20th Dec.	17th Jan.
10th "	4th Nov.	2d Dec.	30th "	27th "
20th "	14th "	12th "	9th Jan.	6th Feb.
1st Sept	25thNov.	23d Dec.	20thJan.	17th Feb.
10th "	5th Dec.	2d Jan.	30th "	27th "
20th "	15th "	12th "	9th Feb.	9th Mar.
1st Oct.	25th Dec.	22d Jan.	19th Feb.	19thMar.
10th "	4th Jan.	1st Feb.	1st March	29th "
20th "	14th "	11th "	11th "	9th April
1stNov.	25th Jan.	22d Feb.	22d Mar.	19th Apr.
10th "	4th Feb.	4th March	1st April	29th "
20th "	14th "	14th "	11th "	9th May
1st Dec.	24th Feb.	24th Mar	21stApril	19th May
10th "	6th March	3d April	1st May	29th "
20th "	16th "	13th "	11th "	8th June

Practice.—The entry of a plea of not guilty upon the refusal of the accused to plead to a complaint in bastardy, though unauthorized and unnecessary, is not ground for a reversal of the judgment. Informalities in a recognizance to answer the complaint in bastardy proceedings are immaterial after the party has appeared and been tried. Bookhout *v.* State, 66 Wis. 415.

In bastardy proceedings if no new recognizance is entered into, the one taken before the magistrate continues in full force, and is held as a security that the defendant shall perform the orders of the county court in the premises. Nor will a surrender of the principal in court, after judgment has been rendered against him, discharge such surety. Garvin *v.* Walsh, 54 Vt. 367.

The defendant in a prosecution for bastardy escaped from the constable who had arrested him, before the warrant had been returned; whereupon the justice, without any appearance by the defendant, tried the cause and certified it up to the circuit court, where, without the issuance of any summons, warrant, or notice, and without any appearance by the defendant, except specially to move to dismiss the cause, the court defaulted the defendant, tried the cause, found the defendant guilty, assessed a recovery for the maintenance of the child, and ordered that, on failnre of the defendant to replevy the judgment, a warrant be issued by the clerk, to the sheriff, for his arrest and commitment. *Held,* on a special finding of the foregoing facts, made on a petition by the defendant against the sheriff for release from commitment on such warrant, that the judgment was unlawful and the commitment illegal. Patterson *v.* State, 70 Ind. 94.

Where a defendant in a bastardy case has been arrested and escapes, and the case certified to the circuit court, the defendant may thereafter be arrested though more than four years have elapsed since the institution of the proceedings before the justice. Patterson *v.* State, 91 Ind. 364.

The fact that the defendant in a bastardy proceeding has no property, and no means of obtaining money except by his labor, will not justify the reversal of a judgment of five hundred dollars, payable in instalments, for the support of the child. Scott *v.* State, 102 Ind. 277.

In bastardy proceedings under the statute, when the plaintiff causes the suit to be discontinued by reason of miscarriage, the defendant is not entitled to costs. Eagen *v.* Bergen, 56 Vt. 589.

The recovery in bastardy proceedings is allowed, not for the benefit of the mother, but for that of the child. State *v.* Wing, 75 Ind. 142.

In a complaint under the law relating to bastardy, it should be stated, affirmatively on oath, that the mother of the bastard child is a single or unmarried woman. The recital by the magistrate is not sufficient. E. P. D. *v.* State, 18 Fla. 175.

Complaint during pregnancy, and before delivery of the child, can only be made by an unmarried woman; but after delivery while she is single, the subsequent marriage of the mother will not prevent her from making complaint against the reputed father of the child. People *v.* Wilmers, 112 Ill. 292.

An affidavit made by the complainant in a case of bastardy, alleging that she is a single woman, has been delivered of a child, which by law is held a bastard, and that the person charged is the father, is sufficient under the statute to authorize the issuing of the process provided thereby. It is not necessary to allege that she was a single woman prior to such delivery; that is a matter for proof upon the trial. W. H. T. *v.* State, 18 Fla. 883.

BATTERY. See ASSAULT AND BATTERY.

BATTURE.—In the law of Louisiana, a marine term used to denote a bottom of sand, stone, or rock mixed together and rising towards the surface of the water; derived from *battre*, to beat, because it is beaten by the water; an elevation of the bed of a river under the surface of the water, since it is rising towards it; sometimes, however, used to denote the same elevation of the bank when it has risen above the surface of the water, or is as high as the land on the outside of the bank.[1] In this latter sense it is synonymous with alluvion, which is defined to be an insensible increment brought by the water. It means, in common-law language, land formed by accretion.[2]

BAWD.—One who procures opportunities for persons of opposite sexes to cohabit in an illicit manner,—who may be, while exercising the trade of a bawd, perfectly innocent of committing in his or her own proper person the crime either of adultery or of fornication.[3]

BAWDY-HOUSE. See DISORDERLY HOUSE.

BAY.—An opening into the land where the water is shut in on all sides except at the entrance;[4] a bending or curving of the shore, of the sea, or of a lake; derived from an Anglo-Saxon word, signifying to bow or bend. For a similar reason, the word "bay" is in Latin termed *sinus*, which expresses a curvature or recess in the coast.[5]

A recognizance conditioned that defendant appear at the next term of the district court to answer the complaint, and not depart without leave, and abide the judgment and orders of such court, is not satisfied when the defendant appears at the court and remains in attendance during the trial, but requires that he comply with and perform the judgment that shall be rendered against him. Jackson *v.* State, 30 Kan. 88.

The Connecticut bastardy act provides that the justice before whom a complaint under it is brought, if he find probable cause, shall order the defendant to become bound with surety to the complainant to appear before the higher court and abide its order, and on his failing to give such bonds shall commit him to jail. The defendant in a suit under the act had entered into a recognizance with surety on an adjournment of the court to appear before the court and abide its order, and was present in court when the justice ordered the bond to be given on the binding over. This bond the defendant refused to give. *Held* not to constitute a forfeiture of his recognizance to appear and abide the order of the justice court. The only course allowed the justice by the statute in such a case is to commit the defendant to jail. Naugatuck *v.* Bennett, 51 Conn. 497.

When the defendant in bastardy proceedings has given a recognizance for his appearance in the circuit court to stand trial, that court has jurisdiction both of his person and of the subject-matter, and if he fails to appear the trial may proceed to judgment without his presence. Baker *v.* State, 65 Wis. 50.

In order to justify a judgment against the reputed father, it is not necessary in a proceeding instituted by the mother to prove that the illegitimate child is likely to become a public charge, as it is when the State prosecutes. Baker *v.* State, 65 Wis. 50.

1. Morgan *v.* Livingston, 6 Mart. (La.) 216. See also Municipality No. 2 *v.* Orleans Cotton Press, 18 La. R. 122; 3 Kent Com. 428, n. *b;* Hollingsworth *v.* Chaffe, 33 La. Ann. 551.

2. City of New Orleans *v.* Morris, 3 Woods (U. S.), 117.

3. Dyer *v.* Morris, 4 Mo. 216.

4. U. S. *v.* Morel, 13 Am. Jur. 286.

5. State *v.* Gilmanton, 14 N. H. 477.

Bay or Harbor.—A conveyance of land "bounded westerly by the beach" does not include the space between ordinary high- and low-water mark. "Had the

BAY-WINDOW.—A bay- or bow-window, both in the ordinary and technical acceptation of the word, indicates the formation of a bow or bay in the room to which it is attached, and which to that extent enlarges the capacity of the room.[1]

BE—BEING.—The word "be" is of the widest import. Thus, a commercial traveller may in one sense be said to "be" in every county or parish through which he travels in the performance of his duties. But the legislator no doubt (in the Assessed Taxes Act, requiring lists to be delivered to the assessor by every person where he shall "reside or be") considered that this word would receive a judicial construction founded upon what was reasonable. The true mode of interpreting it is, where a man shall "be" or "abide" so as to be liable to duty. If the word "be" has any meaning, it must include that abiding which consists in the occupation of a shop for the purposes of business.[2]

"Shall be," in a charter providing that "no person or persons who are not free white citizens, etc., shall be" stockholders, means "shall become," "shall be made to be."[3]

term been . . . 'bay or harbor,' it might have . . . carried the beach or flats, if the grantor owned it." Niles *v.* Patch, 13 Gray (Mass.), 257.

Bays and Inlets.—In construing a statute authorizing a railroad company to build drawbridges over bays and inlets in a river, it was said: "The word 'inlet' seems to be used by the statute to denote the indentation in the shore at the mouth or outlet of a navigable stream falling into the Hudson River, and the word 'bay' to describe an indentation or curve where there is no such stream." Tillotson *v.* Hudson River R. Co., 5 Seld. (N. Y.) 580.

1. Com. *v.* Harris, 10 Weekly Notes Cases (Pa.), 13. The court says: "We think in all the acts referred to the word 'jut window' was considered the equivalent of 'bay' or 'bow' window. They are 'encroachments of mere pleasure or fancy,' as distinguished from 'bulk-windows,' which are 'shop-windows,' erections for purposes of business, and not for mere convenience or adornment."

2. Pollock, C. B., in Atty.-Gen. *v.* M'Lean, 1 H. & C. 760. Martin, B., adds: "A man is not in Fleet Street within the meaning of this act simply because he walks from Temple Bar to St. Paul's; but a man who is staying, abiding, and to be found there, so that if any one desired to see him on business he would go there to see him, must be said to 'be' there. That would, both according to ordinary good sense and the meaning of this section of the act, be the place where he resided."

3. Boisdere & Goule *v.* Bank, 9 La. 511; s. c., 29 Am. Dec. 453.

Being in Advance, as the consideration for the giving of a guarantee, does not necessarily mean "in advance at the time of giving the guarantee." It may possibly be intended as prospective. Haigh *v.* Brooks, 10 Ad. & Ell. 309.

Being at One Half the Expense.—Where a contract in writing executed by one party only stipulated to convey part of certain lands, the other party "being at one half the expense in land or otherwise for procuring a title to the same," this constitutes payment of the expenses a condition precedent to be paid as incurred or right perfected. Hutcheson *v.* Heirs, 1 Ohio, 14.

Being of Sound Wind and Limb and Free from all Disease, in the bill of sale of a slave, are an averment of a fact and import an agreement. They are not used as a mere description, but amount to an express, not an implied, covenant; to a warranty of the soundness of the slave. Cramer *v.* Bradshaw, 10 Johns. (N. Y.) 484.

Being Married, in a statute, implied a perfect and binding marriage. The Queen *v.* Allen, L. R. 1 C. C. R. 371.

Being Surveyors, in an indictment, was held a sufficient averment that they were so. Rex *v.* Royal, 2 Ld. Ken. 552. See also Rex *v.* Moor, 2 Mod. 128, 130.

Being, in an indictment, will rather relate to the time thereof than to that of the offence, unless necessarily connected with some other matter. 1 Bish. Crim. Proc. § 410.

BEACH.—The shore or strand; the space between high- and low-water mark.[1] Land washed by the sea and its waves,—synonymous with shore.[2] Land lying between the lines of high water and low water over which the tide ebbs and flows. This is a fixed and definite meaning of the word "beach" when used in reference to places anywhere in the vicinity of the sea or the arms of the sea,[3] but not inflexibly so.[4] A devise of a "beach for driftwood and timber" is limited by that line of shore inward from the sea to which seaweed and driftwood are usually carried by the sea in ordinary seasons by the highest winter floods, and which is usually marked on the land by the line of such sea-drift. But it will not include lands occasionally covered by sea-water by extraordinary inundations.[5]

BEACON.—A light-house or sea-mark formerly used to alarm the country in case of the approach of an enemy, but now used for the guidance of ships at sea by night as well as by day.[6]

BEACONAGE.—Money paid as the expenses of maintaining a beacon or signal-light.[7]

BEAR. See ARMS.

BEARER. (See also BILLS AND NOTES.)—The bearer of a challenge is a third person who carries a challenge for his friend, and not the challenger himself.[8]

BEARING. See ARMS; BEARING INTEREST;[9] BEARING THE SURNAME.[10]

BEAST.—A general designation of the four-footed land animals which are of use or value for work, food, or sport.[11] A horse is a beast;[12] and so a cow,[13] and a hog.[14] A dog was held not to be

1. Cutts *v.* Hussey, 15 Me. 241; Niles *v.* Patch, 13 Gray (Mass.), 257.

2. Littlefield *v.* Littlefield, 28 Me. 184.

3. Hodge *v.* Boothby, 48 Me. 71; Doane *v.* Willcut, 5 Gray (Mass.), 335. In the latter case it is said: "The term 'beach,' however, is usually applied to this part of the coast when not covered with water when the tide is out."

4. Merwin *v.* Wheeler, 41 Conn. 14; s. c., 14 Am. L. Reg. (N. S.) 606.

5. Brown *v.* Lakeman, 17 Pick. (Mass.) 447.

Bounded by the Cliff or Beach.—Land so conveyed was held to extend to high-water mark. East Hampton *v.* Kirk, 6 Hun (N. Y.), 259. See also Niles *v.* Patch, 13 Gray (Mass.), 257, where a conveyance of land "bounded westerly by the beach" was held not to include the land between high- and low-water mark. "Had the term been 'sea' or 'salt water' or 'bay or harbor,' it might have . . . carried the beach or flats if the grantor owned it. We would not say that there might not be such terms in the deed as connected with the term 'beach' would indicate an intention to include the beach; and such intent, if anywhere manifest in the deed, would govern its construction and convey the beach. But in this deed there is no such qualification."

6. Whart. Law Lex.

7. Abb. L. Dict.

8. State *v.* Gibbons, South. (N. J.) 49.

9. **Bearing Interest.**—Under these words in a bill of exchange, the plaintiff is entitled to recover interest from the date of the bill, since without any such words he would be entitled to interest from the time when the bill became due. Kennerly *v.* Nash, 1 Stark. 453.

10. **Bearing the Surname.**—A bearing *de facto*, though by voluntary assumption, was held sufficient to satisfy the general and ordinary meaning of the words "bearing the surname" in a devise. Doe *dem.* Luscombe *v.* Yates, 5 B. & Ald. 544.

11. Abb. L. Dict.

12. State *v.* Pearce, Peck (Tenn.), 66; Winfrey *v.* Zimmerman, 8 Bush (Ky.), 587.

13. Taylor *v.* State, 6 Humph. (Tenn.) 285.

14. State *v.* Enslow, 10 Iowa, 115.

a "beast" within the meaning of a statute providing for the punishment of persons for wilfully killing "horses, cattle, or other beasts of another person."[1] An unnatural connection with an animal of the fowl kind is not sodomy, a fowl not coming under the term "beast."[2] (See also ANIMALS; CATTLE.)

BEAT—BEATING.—The "beating" of a horse by a man refers to the infliction of blows.[3] On an indictment for "wilfully, maliciously, and cruelly beating a horse," the distinction was made between that chastisement which is really administered for purposes of training and discipline and the beating and needless infliction of pain which is dictated by a cruel disposition, by violent passions, a spirit of revenge, or reckless indifference to the sufferings of others.[4] Pulling a man to the ground and holding him there is not a "beating."[5]

BECOME.—"Shall become an inmate" was held to mean "shall be an inmate," in a statute giving a remedy to the commonwealth for the support of "any pauper who shall become an inmate of the State alms-houses."[6]

BED.—I. The bed of a river is that soil so usually covered by water as to be distinguishable from the banks by the character of the soil or vegetation or both, produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation, as well as in respect to the nature

1. U. S. *v.* Gideon, 1 Minn. 292. The court says: "It may be difficult to determine in all respects what animals the term 'beasts' as used in the statute includes; but it may be fairly assumed, as it seems to me, that all such as have, in law, no value were not intended to be included in that general term. Horses and cattle have an intrinsic value which their names import, and it is but reasonable to suppose that the intention of the law was, in using the term 'beasts,' to include such other animals as may properly come under the name of beasts, and as have an intrinsic value in the same sense that there is value in horses, oxen, and cows. The term 'beasts' may well be intended to include asses, mules, sheep, swine, and perhaps some other domesticated animals, but it would be going quite too far to hold that dogs were intended."

2. 1 Russ. Cr. & M. 938.

3. Com. *v.* McClellan, 101 Mass. 35.

4. State *v.* Avery, 44 N. H. 396. See also Com. *v.* Lufkin, 7 Allen (Mass.), 579.

Maim, Beat, or Torture.—Tying brush and boards to the tail of an animal does not come within the meaning of this expression in an indictment, unless an averment is made declaring the effects of the act to have been pain and torture. State *v.* Pugh, 15 Md. 511.

5. Reg. *v.* Hale, 2 C. & H. 327.

6. Com. *v.* Inhab. of Dracut, 8 Gray (Mass.), 458.

Rent to become Due.—This expression in a condition to "pay all rent due and to become due, and all intervening damages and costs," was held to mean "intervening rent." Martin *v.* Campbell, 120 Mass. 130.

Shall have become an Habitual Drunkard, in a statute allowing a divorce for this cause, means that the defendant must have become an habitual drunkard after the marriage. Porritt *v.* Porritt, 16 Mich. 141.

of the soil itself.[1] That portion of the soil of a river which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn.[2]

II. Matrimonial connection; marriage; lawful cohabitation.[3] A divorce *a mensa et thoro*—from bed and board—signifies a separation by which the right of sexual intercourse and the conjugal relations are suspended.

BEEF.—sometimes is used meaning an animal of the cow species, and not beef prepared for market or for use as meat.[4]

BEER.—I. A fermented liquor made from any malted grain, with hops and other bitter flavoring matters.

II. A fermented extract of the roots and other parts of various plants, as spruce, ginger, sassafras, etc. Beer has different names, as small beer, ale, porter, brown stout, lager beer, etc., according to its strength or other qualities.[5] Lager beer is a malt liquor of the lighter sort, and differs from ordinary beers or ales not so much in its ingredients as in its processes of fermention.[6] Strong beer is a malt inebriating liquor, and Dutch beer is another, not differing substantially from strong beer, thus understood, in the kind of materials used or the mode of its manufacture, but only in its strength, being less intoxicating.[7] (See also INTOXICATING LIQUORS.)

BEER-HOUSE.—A place where beer is sold to be consumed on the premises.[8]

BEER-SHOP.—I. A beer-shop means a place where beer is sold

At the Time he becomes Bankrupt, in a statute empowering the commissioners to dispose of goods in the possession of the bankrupt as reputed owner, has reference to the act of bankruptcy and not to the time of the commission or *fiat*. Fawcett *v.* Fearne, 6 Q. B. 28.

1. Howard *v.* Ingersoll, 13 How. (U. S.) 427.

2. Luco *v.* U. S., 23 How. (U. S.) 515.

The bed of a river is the space contained between its banks. Pulley *v.* Munic. No. 2, 18 La. 282.

In all cases the bed of a river is a natural object, and is to be sought for not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being part land, on which vegetation appropriate to such land in the particular locality grows wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged in water. Howard *v.* Ingersoll, 13 How. (U. S.) 428.

3. Web. Dict

To go to bed with is "to be in bed with" and in the language of the law, as well as by universal usage, these words, except as between man and wife, significantly impute illicit intercourse, and are actionable. Walton *v.* Singleton, 7 S. & R. (Pa.) 452.

4. Davis *v.* The State. 40 Tex. 135.

Beef is not included in the expression "produce of a farm" in a statute. The ox is the produce of the farm; beef is the produce of the slaughter-house and the shambles. Mayor *v.* Davis, 6 W. & S. (Pa.) 279.

5. 6 West. Rep. (Ill.) 329.

6. State *v.* Goyette, 11 R. I. 592; Watson *v.* State, 55 Ala. 160.

7. People *v.* Wheelock, 3 Park. Cr. C. (N. Y.) 15.

8. Holt *v.* Collyer, 16 Ch. Div. 721; 44 L. T. (N. S.) 214.

by retail, and it does not matter whether the beer is consumed on the premises or not.[1] II. A place where beer is sold to be consumed off the premises.[2]

BEES. See ANIMALS.

BEFORE.—I. Anterior to; preceding. II. In the presence of.[3]

1. London & Sub. L'd and B'g Co. *v.* Field, 16 Ch. Div. 648.

2. Holt *v.* Collyer, 16 Ch. Div. 721; Bishop of St. Albans *v.* Battersby, 3 Q. B. D. 362; 26 W. R. 679.

3. **Before Conviction.**—One who is charged with an offence, breaks jail, and is afterwards acquitted is guilty of the offence of escaping from jail "before conviction." State *v.* Lewis, 19 Kan. 265.

Before Me, in a commissioner's certificate as to the swearing of witnesses and taking of depositions, is equivalent to "by me." Ludlam *v.* Broderick, 3 C. C. Greene (N. J.), 274.

Before Said Court.—The fact that a certificate attached to a complaint is made by a clerk and recites that the complaint was sworn to "before said court" gives rise to the presumption that this was done *in court.* Tacey *v.* Noyes, 3 New Eng. Repr. (Mass.) 524.

At Least Fourteen Days Before the First Day of the Court, in a rule as to service of notice, excludes the first day of the court. Small *v.* Edrick, 5 Wend. (N. Y.) 137; Columbia T. R. *v.* Haywood, 10 Wend. (N. Y.) 424.

Ten Days Before the First Day of the Term, as the time within which an appeal is allowed, is not to be reckoned as exclusive of both days. "When, as in the present case, it is said that an act is to be done a certain number of days before a given date, we do not think that, in the plain meaning of the phrase, it is intended that both the date named and the day of doing the act should be excluded. What is to be done one day before the tenth of the month, according to the plain, ordinary meaning of the phrase, is to be done on the day before,—that is, on the ninth. But, as is said by Sir William Grant in Lester *v.* Garland, 15 Ves. Ch. 256, it is not necessary to lay down a general rule (as to excluding the day of the act); and whichever way the rule should be laid down, cases would occur the reason of which would require an exception to be made. It is impossible to reconcile the cases as to the computation of time. . . . What seems to us clear is that where a time is limited to do an act before a date named, where nothing in the reason of the thing plainly requires the exclusion both of the day of the act and of the day before which the act is to be done, the meaning of the legislature will not be taken to be that both the days shall be excluded." Bailey *v.* Lubke, 8 Mo. App. 60. *Compare* O'Connor *v.* Towns, 1 Tex. 107, where a requirement that process be served "five days before the return day" was held to mean that five full days should elapse between the day of service and the return day.

Before the Sheriff and Suitors.—A declaration stating the court to have been held as above. *held,* bad on special demurrer. "The words 'before such and such persons,' I think, necessarily imply that the cause was heard before the persons who were the lawfully constituted judges of the court; the words 'before the sheriff and suitors,' therefore, imply that the sheriff is a judge of the county court, which certainly is not the case." Jones *v.* Jones, 5 M. & W. 526.

Before Trial.—These words have been uniformly held to mean "before plea pleaded." Winship *v.* People, 51 Ill. 298.

"The application for removal must be made, and the law of Congress be fully complied with by the party, before trial. This means before the trial has begun. . . . The calling of the jury is a part of the trial. In this case, when the trial commenced, the defendant had not complied with the law of Congress." St. Anthony, etc., Co. *v.* King, etc., Co., 23 Minn. 188.

A statute authorizing an offer to confess judgment, to be made at "any time before trial," is not to be construed to include time before the commencement of the suit. Horner *v.* Pilkington, 11 Ind. 442.

"On or before" a Certain Day, as the time when a payment is to be made, means that the payment may be made at any *indefinite* time, no matter how long *before* that time, and necessarily implies that the ground or cause of payment, the consideration or indebtedness, was, prior to the limit, complete. People *v.* Walker, 21 Barb. (N. Y.) 644.

A promise to pay "on or before" a day named states the time of payment with sufficient certainty for the purposes of a promissory note. "It is payable

BEG—BEGGING.—The act of a cripple in passing along the sidewalk and silently holding out his hand and receiving money from passers-by is "begging for alms or soliciting charity" within the meaning of a statute.[1]

BEGIN—BEGINNING.—To "begin" a military expedition or enterprise is to do the first act which may lead to the enterprise; i.e., any overt act which shall be a commencement of the expedition, though it should not be prosecuted.[2] "Beginning to demolish" a house is rightly charged only when the ultimate object of the accused persons was to demolish the house and when, if they had carried their intentions into full effect, they would, in point of fact, have demolished it.[3]

BEGOTTEN.—The words "to be begotten," in wills and settlements, mean the same as "begotten," embracing all those whom the parent shall have begotten during his life, *quos procreaverit.*[4] "Shall be begotten," in a settlement, extends to a child *in esse* at the time the settlement was made.[5] "Shall have lawfully begot-

certainly, and at all events, on a day particularly named; and at that time, and not before, payment might be enforced against the maker. . . . True, the maker may pay sooner if he shall choose, but this option, if exercised, would be a payment in advance of the legal liability to pay, and nothing more." Mattison *v.* Marks, 31 Mich. 423; s. c., 18 Am. Rep. 197.

1. *In re* Haller, 3 Abb. N. C. (N.Y.) 65. The court says: "There is nothing in either of these statutes that necessarily requires proof of spoken words to constitute begging for alms or soliciting charity, although such words might in many instances be the best evidence of the offence. The act of begging alms or soliciting charity is the offence condemned by the law, in whatever form the act may be committed, and in many instances words are far less effective to accomplish the end than simple acts. The deaf and dumb man, real or pretended, who stands with a placard on the breast, and with extended hat or hand, is a solicitor of charity as completely as though he spoke to the passers-by. And so is every one whose diseased or crippled condition appeals to sympathy if he places himself in a position to attract attention, or passes along the street calling attention by sign, act, or look to his unhappy condition, and receives from those who observe him the charity which he is obviously seeking. Indeed, the class of silent beggars who exhibit deformities, wounds, or injuries which tell plainer than words their needy and helpless condition are the most successful solicitors for charity, and especially is this so when the object of alms is a young and helpless child. . . . The poor boy in this case, while creeping through the throng of people on Broadway and Wall Street, and raising his hand to receive their alms, was accomplishing the purpose of begging in a mode far more effective than to have sat at a corner and cried out to every passer-by for charity."

The widow of a medical man, dependent on charity, going to a house for pecuniary aid, although with a general letter of introduction, is a "beggar." Mrs. Arthur's Case, Eng. County Ct., 1881, cited in Browne's Jud. Interp. of Com. Wds. & Phr., "Begging."

2. Charge to Grand Jury, 5 McLean (U. S.), 307.

3. Rex *v.* Thomas, 4 C. & P. 238. The court adds: "Now here that is not so, for they come and do a great deal of mischief and then go away, having manifestly completed their purpose and done all the injury they meant to do." See also Rex *v.* Batt, 6 C. & P. 329.

4. Doe *v.* Hallett, 1 Man. & Sel. 135; Cook *v.* Cook, 2 Vern. 545.

"The words 'begotten' and 'to be begotten,' *procreatis* and *procreandis*, have always been held to have the same import, unless a contrary intent plainly appears." Wager *v.* Wager, 1 S. & R. (Pa.) 377.

5. Slingsby *v.* ———, 10 Mod. 398. The Lord Chancellor declared that "the futurity meant by the settlement did not relate to the time of the birth of the daughters, but to the death of the husband."

ten at the time of her death," in a will, was held synonymous with "shall have lawfully *borne* in her lifetime."[1]

BEHALF.—A witness who is called by a party, but whose testimony proves unfavorable to that party's cause, is nevertheless his witness testifying "in his behalf."[2] A contract made by one "on behalf of" another *prima facie* imports that the former made the contract only as agent.[3] A statute which limits an attorney's right to recover for "appearing or acting on behalf of any other person" does not make any distinction between his right to recover from the opposite party and from his own client.[4]

BEHAVIOR.—Conduct; personal carriage and demeanor; one's whole manner of deporting one's self.[5] The expression "a breach of good behavior," for which a clerk can be removed, cannot be confined to *official* or *legal* misdemeanors. A gross breach of *moral* good behavior (unequivocally evincing an absolute dereliction of principles, the extinction of the moral sense or the absence of that integrity of mind without which one cannot hope to enjoy public confidence) satisfies the words of the constitution.[6] (See also LEWD; LASCIVIOUS.)

BEHIND.—In a devise to A, his heirs and assigns, and if he die "leaving no issue *behind him* then over," the limitation "over" is good by way of executory devise. The above words necessarily import that the testator meant "no issue living at the time of A's death."[7]

BELIEF—BELIEVE.—*Belief* is the conviction of the mind, founded on evidence, that a fact exists; that an act was done; that a statement is true. And when one says, I *believe* that a fact exists, or that an act was done by another, he must be understood to assert that there is present to his mind evidence sufficient to convince him that the fact does in reality exist, or that the act was done. The evidence may be more or less; it may be of one kind or another—the evidence of the senses, hearsay, or of circumstances.[8] The word "belief," in its ordinary sense, means an actual conclusion, drawn from information. There is a clear distinction between positive knowledge and mere belief, and they cannot both exist together.[9] The difference between "knowledge" and "belief" is nothing more than in the degree of certainty. With regard to things which make not a very deep im-

1. Doe *v.* Provost, 4 Johns. (N. Y.) 64.

2. Richerson *v.* Sternburg, Admx., 65 Ill. 274.

3. Lewis *v.* Nicholson, 18 Q. B. 512.

4. *In re* Clipperton, 12 Q. B. 693. "We are further of opinion that the words 'acting on behalf of any other person' in the county court include everything that is done by the attorney in regard to a suit in that court, whether before, or at, or after the hearing."

5. Abb. L. Dict.

6. 2 Mart. N. S. (La.) 700. Procuring the means of producing an abortion was held a sufficient breach in this case.

7. Porter *v.* Bradley, 3 Term, 143.

8. Giddens *v.* Mirk, 4 Ga. 369.

9. Humphreys *v.* McCall, 9 Cal. 62. "The belief of a witness is a conclusion from facts. The witness should state facts, and the conclusion to be drawn from them rests with the jury." Ventress *v.* Smith, 10 Pet. (U. S.) 171.

pression on the memory, it may be called "belief." "Knowledge" is nothing more than a man's firm belief.[1]

In most jurisdictions, a pleading required to be sworn to may be verified either on knowledge or partly on knowledge and partly on "knowledge and belief;" i.e., that as to the matters stated in the pleading upon information and belief, the affiant believes the pleading to state the truth.[2]

BELLIGERENT.—In the law of nations, a nation engaged in war, as distinguished from a neutral.[3] To create belligerent rights it is not necessary that there should be war between separate and independent powers. They may exist between the parties to a civil war.[4] It is, however, a contradiction in terms to speak of a citizen of a loyal State, remaining in such State, and not engaged in the war, as a belligerent. A belligerent is a subject of the hostile power, and his character, in that regard, depends upon that of the community to which he belongs. This is the settled doctrine: that the status of any person, as to the question of belligerency, depends upon his citizenship or nationality. The late rebellion grew to such consistency and magnitude that our own as well as foreign governments recognized the people of the rebel States as belligerents; but the citizen and resident of a Northern State did not become a belligerent, whatever may have been his sympathies, or however wicked his plots.[5]

1. Hatch *v.* Carpenter, 9 Gray (Mass.), 274.

Best of his Belief.—One who makes a statement to the "best of his belief" imports that he is entitled to entertain the belief he expresses, and that we must not take him to mean that the "best" of his belief is no belief at all. A man's belief and the best of a man's belief are really the same things. Roe *v.* Bradshaw, L. R. 1. Ex. 108–9.

"Find" and "Believe."—An instruction to the jury beginning, "If you believe from the evidence," is not erroneous, the word "believe" in this connection being synonymous with "find." State *v.* O'Hagan, 38 Iowa, 505.

Firmly Believe.—A statute requiring an affidavit that a party "firmly believes" is not satisfied by one that he "believes." "I have a *firm* belief that the moon revolves around the earth. I may believe, too, that there are mountains and valleys in the moon; but this belief is not so strong, because the evidence is weaker. I *firmly* believe that Bonaparte is in the island of St. Helena; but as to the state of his health, I may have my belief, but it cannot be called firm, because the evidence is not clear." Thompson *v.* White, 4 S. & R. (Pa.) 137.

"Imagine" and "Believe."—It imports a more certain and fixed conviction to say I *believe* than it does to say I *imagine*. Giddens *v.* Mirk, 4 Ga. 370.

"Suppose and "Believe."—In an instruction that "if the plaintiff supposed he had a good cause of action," etc., a compromise resulting constituted a good consideration for a note. The word "supposed" was held to mean substantially the same thing as "believed," or, at all events, so nearly so that a jury could not be misled by its use. *Suppose* (citing Webster's Dict.) means "to imagine, believe, receive as true;" and *believe*, "to think, to suppose." Parker *v.* Enslow, 102 Ill. 277.

"Suspect" and "Believe."—To authorize the issuing of a warrant, the complainant must swear that "he believes;" it is not sufficient to state that "he has reasonable cause to suspect, and does suspect." "Suspecting is not believing. That may be a ground for suspicion which will not induce belief." Com. *v.* Lottery Tickets, 5 Cush. (Mass.) 374.

2. Rap & Law. Law Dict.

3. Burr. L Dict.

4. Swinnerton *v.* Col. Ins. Co., 37 N. Y. 178.

5. Johnson *v.* Jones, 44 Ill. 151–2.

BELONGED—BELONGING—BELONGS.—The verb *to belong* denotes property, or conveys the idea of relation or connection;[1]

1. Where a testator devised his manor of Barrow Minchin with the mansion-house called Barrow Court thereunto belonging, and the park, and also all his freehold messuages, lands, tenements, and hereditament, *thereunto belonging*, it was held, it appearing manifestly from the whole of the will that the testator's intention was to dispose thereby of all his real estate, that a certain farm and premises which adjoined to and were in some parts intermixed with the Barrow estate passed by the devise, although purchased by the testator only shortly before his death while the estate had been in the family for several generations; the court, Tenterden, C. J., saying: "It will therefore be proper to consider in what sense the words 'thereunto belonging' are to be understood in this will: and the sense that will best accord with the intention of the testator, as it may be collected from other circumstances and other parts of the will, is the sense that ought to prevail. These words are, in common speech, of different import, according to the subject of which they are spoken. If we speak of a farm or a field with reference to the ownership, we say it *belongs* to such a one, meaning thereby that it is the property of that person; if with reference to any estate of a particular name, we say it *belongs* to such an estate, as to the Britton Ferry estate, meaning that it is a parcel of that estate; if with reference to its locality, we say it *belongs* to such a parish or township, meaning that it is situate in and a part of that parish or township; and so with reference to a manor, we say it *belongs* to such a manor, meaning that it is situate in or part of that manor, in the ordinary or popular sense of the word 'part' and not in the strict legal sense, as part of the demesnes of the manor, or as holden of the manor or of the lord thereof." Doe *d.* Gore *v.* Langton, 2 B. & Ad. 680, 692.

Points where a highway comes in contact with a navigable stream are not parts of the highway, unless the highway is laid out to navigable water, and there terminates, in which last case the point of contact would become a public landing as an incident to a public highway. Therefore the statute (Rev. Stat. tit. 38, § 3) which provides that no person shall acquire title by adverse possession to land "belonging" to a highway does not apply to those cases in which a highway running from place to place incidentally comes in contact with tide-water and runs along the beach for a considerable distance, so as to prevent the owner of the soil from appropriating any part of the shore to his own purposes. Burrows *v.* Gallup, 32 Conn. 493.

Where A and B submitted a controversy between them respecting the title of a piece of land to arbitrators, who found and awarded that such piece of land *belonged* to A. it was held that the import of the award was that A had the whole interest or estate in the land; the court, Williams, C. J., saying: "It was further urged that the award was not operative, because it found no fact, or did not find it in such a manner as ought to be regarded. The submission was of a controversy respecting the title to a piece of land. The arbitrators find and award that said land 'belongs' to the plaintiffs, and award it to them accordingly. Now their award is as broad as the submission; and the question arises, can we ascertain with sufficient certainty what these parties intended to submit? The ancient strictness in construing submissions is passed away; and they are now to be construed according to the true intent of the parties. When these parties submitted the title to this property, they must have intended to use the word in its ordinary sense—the right to, or ownership in, this land. When these parties were contesting as to the title or ownership of this farm, they must have meant precisely what the arbitrators meant when they found to whom it *belonged.*" Shelton *v.* Alcox, 11 Conn. 240, 249.

So on a submission to arbitrators to determine whether a pew "legally *belongs* to the estate of a testatrix, to those who claim under her, or to the defendant," and if they shall determine that it "legally *belongs* to the estate of the testatrix or to those who inherited said estate, then the defendant is to deliver to the plaintiff a proper deed of conveyance of all his present interest, right, title, or estate in and to the same," and the award was that the pew "*belonged* to and was the property of the testatrix at the time of her decease: the arbitrators do therefore award that the defendant shall deliver to the plaintiff a proper deed of conveyance of all his present interest, right, title, and estate in and to the same," it was held that the award followed substantially the submission, and that it was sufficient. Spear *v.* Hooper, 22 Pick. (Mass.) 144.

to appertain to; to be a part of.[1] It also signifies to have a legal

The act 14 Geo. III. c. 96, which was passed for improving the navigation of certain rivers and provided that "if any person or persons shall wilfully throw any soil . . . into any part of the said rivers . . . or of any drains, trenches, or water-courses *thereunto belonging*, every such person shall for every such offence forfeit" a certain sum of money, only applies in the words "drains, trenches, or water-courses thereunto belonging" to artificial streams made for the purpose of improving the navigation of the rivers, and not to natural streams. Smith *v.* Barnham, L. R. 1 Ex. Div. 419.

An insurance policy on a building used for many years as a place for public exhibitions, and also upon certain property in the building, as "belonging" to exhibitors, was held not to be vitiated by the introduction into the building of certain articles declared as hazardous in the policy, but which formed part of contents necessary for an exhibition, inasmuch as the insurance company must have been acquainted with the business to which the building was appropriated. Mayor, etc., *v.* Hamilton Fire Ins. Co., 10 Bosw. (N. Y.) 537.

Where a person appointed for the State for the county of New London gave a bond with surety to the State treasurer, conditioned that such attorney should annually account for and pay over, according to law, all moneys *belonging* to the State which he might receive as such attorney; and in an action on such bond against the surety it appeared that the moneys received by such attorney on all bonds made payable to the State treasurer had been properly accounted for, but that on bonds and fines by law made payable to the county treasurer certain sums received by him were not accounted for; it was held that moneys arising from bonds taken in criminal prosecutions and payable to the county treasurer, and from forfeitures and fines imposed by the county court, were moneys *belonging to the State*, within the meaning and terms of the bond, and consequently that the surety defendant was liable. Gilbert *v.* Isham, 16 Conn. 525.

The act 4 Geo. II. c. 32 enacted that "every person who shall steal, rip, cut, or break, with intent to steal, any lead, iron bar, iron gate, iron palisade, or iron rail whatsoever, being fixed to any dwelling-house, out-house, coach-house, stable, or other building used or occupied with such dwelling-house, or thereunto *belonging*, or to any building, whatsoever or fixed in any garden, orchard, court-yard fence, or outlet *belonging* to any dwelling-house or other building, shall be deemed to be guilty of felony. In an indictment for stealing certain lead under this statute, it appeared that the lead stolen consisted of three images, which at the time they were taken by the prisoners were standing on three pedestals, to which they were fastened with irons, and the pedestals were fixed in the ground. The images were standing near a brick building, called the Temple of Pan, which was erected in an inclosed field belonging to the Earl of Clarendon, about half a mile from his dwelling-house and without the park palings, from which it was separated by a public road. The Temple of Pan was occasionally used by Lord Clarendon as a tea-drinking place. The building had doors and windows, which were kept shut when the family of Lord Clarendon were not using it. The doors opened into the place where the images stood. The only other building within the enclosure was an open building, which was once a barn, but it was then only used as a coach-house when the family came to the Temple of Pan. On this evidence it was held that the stealing of lead situate as these images were was not a felony, *this being no outlet or garden belonging to any house or building.* Rex *v.* Richards, Russ & Ry. C. C. 28.

1. In the case of Barlow *v.* Rhodes, 3 Tyrw. Ex. 280, the Duke of Devonshire, in 1825, put up to sale by auction, in separate lots, certain property, including the *locus in quo*, in the town of Wetherby, where he was the owner, and lot 20 was purchased by the plaintiff and lot 24 by the defendant. The conveyance to the defendant, after describing the premises purchased by him as bounded on the north by lot 20, contained the usual words, "together with all ways, paths, passages, etc., thereunto appurtenant or belonging." Lots 20 and 24 had been formerly in the occupation of the same person, and the passage in question, which had been previously used with lot 24, although now comprised in the conveyance of lot 20, led from the defendant's house to an ash-hole. For the defendant it was urged at the trial that, the way having been formerly used with the same premises, the right of it now passed under the general words "appurtenant or belonging;" but the learned judge, Bolland, B., who tried the cause, being of a different opinion, the plaintiff obtained a verdict.

A rule having been obtained for setting aside this verdict, it was contended before the Court of Exchequer for the defendant, on the case of Morris *v.* Edginton, 2 Bingham 76, in the Common Pleas, that the defendant was entitled to a verdict, for that the word "belonging" clearly gave the right of way in question. But the court held, Lyndhurst, Ch. B., that neither the words "appurtenant" nor "belonging," which were synonymous, were sufficient to pass the right of way, unless, indeed, it were a way of necessity, which was the case in Morris *v.* Edginton; and there they held the plaintiff entitled to judgment, and discharged the rule. See 1 Chitty's Gen. Prac. 157, 475, note; Maitland *v.* MacKinnon, 1 H. & C. 607.

Where the plaintiff assigned to the defendant, by bill of sale, "all and singular the 104 power looms, and other effects and things *belonging thereto*, now being in, upon, or about the mill, particularly set forth in the schedule," and the schedule was as follows, "Looms made by S.," it was claimed, in an action of trover for "healds, reeds, beams, and weaving utensils and pieces of machinery for weaving, and articles belonging thereto and strapping, that these goods had passed by the bill of sale. At the trial it appeared that the looms were in use at the date of the execution of the bill of sale; that healds, reeds, weft, and waste-cans are attached to the looms when in use, and the looms are not complete for the purpose of weaving till they are supplied, but that they form no part of the looms as they come from the makers. They are made and often sold at sales separately from the looms. Different healds and reeds are used in weaving cloth of different degrees of fineness. They do not ordinarily belong to any particular loom, but can be detached and used with any loom indifferently. For the plaintiff it was contended that "belonging thereto" meant necessarily and permanently belonging thereto; and that the schedule which specified "looms" only governed the construction of the bill of sale. The defendant claimed that by "looms" the bill of sale meant, not the mere framework, but all that is necessary for weaving; that if the word "looms" was not sufficient to include these matters, the bill of sale contained the words "effects and things belonging thereto, now being in, upon, or about the mill;" that in Bacon's Abridgment, tit. Grant, I-4, it is said: "If a man grant his saddle with all things *thereunto belonging*, stirrups, girths, and the like do pass. So if a man grant his viol, the strings and bow will pass," citing Price *v.* Braham, Vaugh. 109. "So by the grant of a mill *cum pertinentiis*, a kiln at the end of the close whereon the mill stood would pass, if the kiln was necessary to the mill;" citing Archer *v.* Bennett, 1 Lev. 131. The court held, Bramwell, B., that the meaning of the words "all effects and things belonging thereto" must be construed with reference to the extrinsic facts. The articles in question, though separate from the looms, were attached to them when the looms were in use, so that an ordinary observer would say that they *belonged* to the looms. A reasonable meaning would not be given to the language of the deed unless they were held to pass by it. Cort *v.* Sagar, 3 H. & N. 370.

S. and C. entered into an agreement in writing by which S. agreed to sell to C. his house, farm, and premises, etc., all the tools belonging to the saw-mill, all the apparatus belonging to the grist-mill, "together with all the fixtures *belonging* to the fulling mill and carding-machine, together with every article attached to the freehold." It was proved that a building on the farm which had been used in the wool-carding and cloth-dressing business was called and known, at the date of the contract, as the fulling-mill and carding-machine. But the building had not been used for that business for several years, and the carding-machine itself had been taken from the building and stored in the grist-mill. Upon the evidence it was held that S. intended to sell and C. to purchase, by the contract, not only the fulling-mill and carding-machine building, but all the machinery on the farm which had been used in such building as fixtures; and that such machinery was what they meant by the words "fixtures belonging to the fulling-mill and carding-machine." Said the court, Balcolm, J.: "The meaning of the contract cannot be satisfactorily ascertained without the aid of extrinsic evidence; and such evidence establishes, or at least strongly tends to establish, that the words 'fulling-mill and carding machine' were used in the contract to designate the building in which the carding-machine in question and the fulling-mill had been situated and used; and that the former had been removed and stored in the grist-mill upon the same farm prior to the making of the contract; and by assuming that the words 'fulling-mill and carding-machine' were employed to designate the building I have mentioned, the presumption is that the phrase 'fixtures belonging to the fulling-mill and carding-machine,' as used in the

residence or inhabitancy[1] in the sense which would imply a home or domicile.

BELOW.—Inferior;[2] in a lower place; under.[3]

BENCH.—The elevated seat on which the judges sit, and hence the court itself.[4]

BENEFICIAL.—Receiving, or entitled to have or receive, advantage, use, or benefit: advantageous; profitable. In its technical legal sense this word does not always have the idea of a benefit or profit.[5]

contract, means the carding-machine itself and other machinery that had been used in the carding-machine and fulling-mill building, and belonged therein when in their proper place." Martin *v.* Cope, 28 N. Y. 180.

Under a devise of the rectory or parsonage of M., with the messuages, lands, etc., *thereunto belonging*, it was held that lands passed which had been acquired by the owners of the rectory between the fifth year of James I. and 1632, and had always afterwards been occupied with the rectory. Ongley *v.* Chambers, 1 Bingham, 483. In commenting on this case, Cockburn, C. J., says: "There is a marked distinction between the expressions 'thereunto belonging' and 'thereunto adjoining.'" Josh *v.* Josh. 5 C. B. N. S. 454.

1. The town to which a slave "belongs," within the meaning of the statute, tit. 150, c. 1, s. 11, is that alone in which he has a legal settlement. Columbia *v.* Williams, 3 Conn. 467.

The Maine Revised Statutes, c. 14, c. 1, provides for furnishing nurses and necessaries to an infected person, at his charge . . . if able, otherwise that of the town to which he belongs. *Held*, that the phrase "at the charge of the town to which he belongs" means the town where he has his pauper settlement, and not the town where he might happen to reside at the time. Hampden *v.* Newburgh, 67 Me. 370. See Kennebunk *v.* Alfred, 19 Me. 221; Reading *v.* Westport, 19 Conn. 561; Waterbury *v.* Bethany, 18 Conn. 425.

2. Used in the expressions "court below," "bail below," i.e., to the sheriff; denoting a lower or subordinate tribunal, and a bail bond given to a subordinate officer. See Rap. & Law. Law Dict., *sub voce*.

3. **Below High-water Mark.**—A proprietary grant in 1680 of "a piece of land *below* high-water mark to set a shop upon, not exceeding forty feet in width," was construed to extend to low-water mark, although there had been considerable addition to the shore by alluvion since that time. Adams *v.* Frothingham, 3 Mass. 352.

4. **Bench and Bar.**—Used of the judges and lawyers to denote the whole legal profession.

Benchers.—The members of an Inn of Court (which see), to whom is committed the government thereof.

Bench Warrant.—A warrant issued by or from a "bench" or court. A process for the arrest of a party against whom an indictment has been found. Burrill's Law Dict., *sub voce*.

In the case of Shaw *v.* Com., 1 Duvall (Ky.), 1, it was held, under the Criminal Code, §§ 140, 141, that upon an indictment being found, if the defendant is not in custody or on bail, the court should forthwith order process, either a "bench warrant" or a summons; but until such order be made the clerk has no authority to issue process; and if he does, it will confer on the sheriff no authority to arrest the defendant or to take bail.

Where one was arrested and gave bond to appear, and upon the finding of a true bill the judge issued a "bench warrant" under which he was arrested and continued in the custody of the sheriff until the trial, during the progress of which he escaped from the custody of the sheriff, it was held that the securities of the bond taken by the magistrate were discharged by the subsequent arrest under the "bench warrant," and are not liable on their bond. Smith *v.* Kitchens, 51 Ga. 158. *Contra* where the arrest was under a *capias* issued by the clerk of the court and not under a "bench warrant." Chappell *v.* State, 30 Tex. 613.

A "bench warrant" directed to the sheriff cannot be executed by one having only verbal authority from the sheriff, and such an arrest does not discharge the recognizance. People *v.* Moore, 2 Doug. (Mich.) 1.

A "bench warrant" is bad which does not direct that the party shall be brought before some judge or justice. Queen *v.* Downey & Jones, 7 Q. B. 281.

5. Thus in deciding that governors of the poor hiring a house without their district for the purpose of setting their own paupers to work there, and using it

for that purpose only, are ratable in the parish in which the house is, as occupiers, whether the employment of the paupers there be profitable or not, Denman, C. J., said: "The absence of 'beneficial occupation' was also much insisted upon; and it was contended that that is the true criterion to ascertain whether property be ratable or not. It is not to be denied but that the phrase 'beneficial occupation' has been in frequent use; and, generally speaking, it serves tolerably well to convey rather a popular notion than to give a certain rule for deciding the question of ratability in every instance. Because if by 'beneficial' is meant *profitable* or anything like it, the expression is obviously fallacious; and upon this point all discussion is superfluous, because the case of an unprofitable and losing occupation (expressly so found) of a coal-mine has been held no exemption from ratability (see Rex *v.* Parrot, 5 T. R. 593) a coal-mine, by the words of stat. 43 Eliz. c. 2; s. 1, being subject to a rate." Bristol Poor *v.* Wait, 5 Ad. & El. 1. So again in Queen *v.* Vauge, 3 Ad. & El. N. S. 242, the same judge says: "We will only here again observe that 'beneficial' and 'profitable,' in the ordinary sense of the words are not convertible terms; that a party holding property in its nature ratable is not discharged from his legal liability because he does it at a loss"

Beneficial Powers.—The Revised Statutes of New York, sec. 79, define a beneficial power as follows: "A general or special power is *beneficial* when no person other than the grantee has by the terms of its creation any interest in its execution." In construing a clause of a will, which was, "I give full power and authority and control to sell my property in Brooklyn to my sister," where there was nothing in the will indicative of an intent on the part of the testator that any other person should have the proceeds of sale, it was held that the clause created a valid *beneficial* power of sale; the court, Earl, J., saying, "The meaning of sec. 79 is plain. If, by the terms of the creation of the power, no other person than the donee has an interest in its execution, then it is *beneficial;* or to the same purpose, if the instrument creating the power does not by its terms give an interest in its execution to any one else, the donee is the sole beneficiary. It is claimed, however, that this section must be read as if it provided that when, by the terms of the creation of the power, the donee has an interest in its execution, and no other person has such interest, then it is beneficial. If this had been the meaning of the section, why were other persons named and such bungling phraseology used? It would have been much more direct and natural simply to have provided that 'a general or special power is beneficial where the donee thereof is, by the terms of its creation, the sole person interested in its execution.' The other form was used because it was intended to make the power *beneficial* both when by its terms the donee was solely interested in its execution and when it was entirely silent as to the beneficiary; and the language was the most apt and sententious to express such intention. It is said that, according to this construction, the words 'by the terms of its creation' have no meaning and were unnecessary. This is a mistake. Persons may become interested in the execution of a power in many ways after its creation, or by virtue of other instruments than that creating the power. Although there are such interested in its execution, the power is still *beneficial.* It is only deprived of that character when such persons take their interest by the terms of the instrument creating the power." Jennings *v.* Conboy, 73 N. Y. 230. See Cutting *v.* Cutting, 20 Hun (N. Y.), 360; s. c., 86 N. Y. 522.

Beneficial Enjoyment.—In construing the 21st section of the Succession Duty Act, 16 and 17 Vict. c. 51, which provides that the succession duty shall be calculated at the value of an annuity equal to the annual value of the property, and shall be paid in eight equal half-yearly instalments, the first to be paid twelve months next after the successor has become entitled to the 'beneficial enjoyment' of the real property, the court, Wensleydale, said: "The *beneficial enjoyment* means no more than in his own right and for his own benefit, not as trustee for another." Atty.-Gen. *v.* Earl of Sefton, 3 H. & C. 1023, 1030; s. c., 11 H. L. Cas. 256.

Beneficial Owner.—A party named as a promisee in a contract for payment of money, and having the instrument in his possession, may maintain an action and recover thereon in his own name, although another has a half-interest in the contract. The promisee, having possession and the legal title, may receive payment, and give an acquittance to the debtor, and is therefore the 'beneficial owner' within the meaning of § 2523 of the Revised Code. Hirschfelder *v.* Mitchell, 54 Ala. 419.

Beneficial Devise.—The General Stat-

BENEFICIAL OR BENEVOLENT ASSOCIATIONS. (See also AMOTION; CHARITIES; CORPORATIONS; DISFRANCHISEMENT; INSURANCE.)

1. Definition.—Associations of individuals, few or many, for the purpose of mutual benefit or advantage either to the members themselves or to those dependent on them. The purposes for which such associations are usually organized are to provide against sickness, loss by fire, storm, or theft, and to care for widows and orphans of deceased members. They are distinguished from charities in that they are maintained and supported exclusively by the members thereof; neither are they organizations for purely business purposes. A beneficial organization usually provides social advantages to its membership, and this is one of the peculiar features of these organizations as distinguished from those whose purposes are similar but in which the pecuniary benefits are received by the officers or managers alone.

utes of Massachusetts, c. 92, § 10, which provide that "all *beneficial* devises, etc., made or given in any will to a subscribing witness thereto shall be wholly void unless there are three other competent witnesses to the same, will not make a wife a competent witness to a will containing a devise to her husband, on the ground that a devise to her husband is a 'beneficial' devise to her, and that therefore the devise is void, leaving her a competent attesting witness to the will, and the will itself valid in all other respects. Sullivan *v.* Sullivan, 106 Mass. 474; s. c., 8 Am. Rep. 356. See, on this subject, Jackson *v.* Woods, 1 Johns. Cas. (N. Y.) 163; Jackson *v.* Durland, 2 Johns. Cas. (N. Y.) 314; Winslow *v.* Kimball, 25 Me. 493, where a contrary doctrine is upheld.

Beneficially.—By an act 22 Geo. III. c. 56, trustees for the parish of St. Luke were empowered to purchase land in the parish of St. Leonards, Shoreditch, for the purpose of building a work-house thereon for their own parish; and (by sec. 11) the land and any work-house to be built thereon were not to be rated more highly to the poor, while used and occupied for the above purpose, than the lands and hereditaments to be purchased were rated at the time of purchase. Land was taken accordingly, and a work-house built thereon. By stat. 48 Geo. III. chap. 17, § 1, the former act was repealed; but a later section (74) enacted that all work-houses, etc., should be vested in, etc., under this act as fully, *beneficially*, etc., and to all intents and purposes whatsoever, as the former trustees were entitled to or possessed of the same; and it was held that, notwithstanding the general words of repeal, the 74th section of that act kept alive the exemption from increased rating; the court, Patteson, J., saying: 'The word *beneficially* alone might not have the effect of preserving the exemption, but coupled with the words 'to all intents and purposes whatsoever' we think that they may fairly be considered to have that effect." Queen *v.* St. Leonards, 13 Q. B. 964.

Beneficially Interested.—A tax-payer is a party *beneficially* interested in having all the property in the district assessed, and is therefore a proper party to make the affidavit for the issuance of the writ of *mandamus* to the assessor to compel him to assess property subject to assessment. Hyatt *v.* Allen, 54 Cal. 353.

A person who brings and prosecutes a suit in the name of another, under an agreement with the nominal party to carry on the suit at his own expense and have a portion of the expected recovery, is a person "beneficially interested" in a recovery sought to be had in the name of another, and is liable for the costs recovered against the nominal party, under 2 Rev. Stat. (N. Y.) 619, sec. 44. Giles *v.* Halbert, 12 N. Y. 32.

2. Formation.—They are formed by the voluntary association of individuals for certain definite purposes usually set forth in the constitution or fundamental law of the organization to which the members severally subscribe. They are either incorporated or unincorporated bodies.

(*a*) *Incorporated Societies.*—The method of incorporation is regulated by statutory enactments in the several States and the rules of court where the society or its main office is located. The articles of incorporation must state fully and clearly the objects of the organization, and public notice of an application for a charter is usually required.[1]

(*b*) *Unincorporated Societies* may be formed in any manner agreeable to the promoters. The organization may be quite informal, provided the purposes of the association be sufficiently well defined.

3. Constitution and By-laws.—It is customary in all societies to adopt a constitution and by-laws which set forth the objects of the society, the qualifications for membership, designate the number and character of its officers, and contain such other rules and regulations as may be necessary or may be deemed convenient for the management of its affairs. These, together with the charter in cases of incorporated societies, constitute its fundamental law, and are the source and limit of its life and authority. In their construction the same principles of law are applicable that govern and control other kinds of corporations and associations. A society will not be permitted to do that which is either expressly or

1. **English Statutes.**—The laws now in force in England relating to benevolent and beneficial associations are collated in the Friendly Societies Act, 18 & 19 Vict. c. 63 Such societies may be formed for the following purposes: (1) For insuring a sum of money to be paid on the birth of a member's child, or the death of a member, or for the funeral expenses of the wife or child of a member; (2) for the relief or maintenance of the members, their husbands, wives, children, brothers or sisters, nephews or nieces, in old age, sickness, or widowhood; or the endowment of members, or nominees of members, at any age; (3) for any purpose which shall be authorized by any of Her Majesty's principal secretaries of state, as a proper purpose to which the powers and facilities of the act ought to be extended. In order to establish such a society the promoters should frame and agree upon a set of rules for its regulation, government, and management, in which provision should be made for a general committee of management, upon whom shall be conferred all the powers granted to such societies by the aforesaid act. These rules should also set forth the name of the society and its place of meetings; the whole purpose for which the society is to be established; the objects to which its funds shall be applicable; the conditions under which the benefits shall be payable, and the fines and forfeitures which may be imposed upon the members; the manner of making, altering, amending, or rescinding the rules; provisions for the appointment and removal of the trustees or committee of management, or officers of the society; provisions for the investment of the society's funds and a periodical audit of its accounts; the manner in which disputes between the members and the society, or any person claiming under the rules or through the members, shall be settled. A copy of these rules must be signed by three of the members and the secretary of the society, and transmitted to a registrar, who will, provided the rules be in proper form and the purposes of the society be approved by a secretary of state, issue a certificate of the formation of the society, which shall thereupon be invested with the rights and powers and charged with the responsibilities of a friendly society.

impliedly prohibited by its charter and by-laws, and any effort so to do will be restrained by injunction at the instance of any one interested.[1] The charter or constitution may not be altered, amended, or rescinded, except with the consent of all the members of the association, in the absence of any agreement or provision of law to the contrary.[2]

By-laws should contain only such regulations as are necessary for the good government and support of the association and in accord with its charter or constitution and the purposes of its formation. If they go beyond this they are invalid ;[3] they must be reasonable ;[4] they must not be unlawful, nor opposed to public policy, nor inconsistent with the charter of the association.[5] By-

1. The members of a subordinate lodge may not dissolve and divide its property, where the charter provides that on dissolution the property should go to the superior lodge. State Council *v.* Sharp, 6 Am. & Eng. Corp. Cas. 620. And if they attempt to do so, they may be restrained by injunction. Abeles *v.* McKeen, 18 N. J. Eq. 462; Torrey *v.* Baker, 1 Allen (Mass.), 120.

Society may be restrained by injunction from illegally expelling a member. Luch *v.* Committee of Board of Brokers, 2 Brewst. (Pa.) 571; Olery *v.* Brown, 51 How. Pr. (N. Y.) 92; Smith *v.* Smith, 3 Des. (S. Car.) 557; Thomas *v.* Ellmaker, 1 Pars. Sel. Cas. (Pa.) 98; Hall *v.* Sup. Lodge K. of H., 24 Fed. Repr. 450; Altman *v.* Berry, 27 N. J. Eq. 331.

2. Livingston *v.* Lynch, 4 John Ch. (N. Y.) 573; Smith *v.* Smith, 3 Des. (S. Car.) 557.

3. An incorporated association had a by law which made it an offence subject to expulsion for one member to "vilify" another. The court reinstated a member who had been expelled for violating this by-law, upon the ground that such a law was not necessary for the good government and support of the corporation, saying: "The right of membership is valuable, and is not to be taken away without an authority fairly derived either from the charter or the nature of corporate bodies. . The offence of vilifying a member or a private quarrel is totally unconnected with the affairs of the society, and taking cognizance of such offences will have the pernicious effect of introducing private feuds into the bosom of the society and interrupting the transaction of business." Commonwealth *v.* St. Patrick's Benevolent Society, 2 Binney (Pa.), 448.

A by-law imposing dues greatly in excess of the object for which demanded and not in proportion to the requirements of the society is invalid. Pulford *v.* Detroit F. D., 31 Mich. 458.

4. A by-law changing the rates of dues from twelve and a half cents to two dollars per month was decided to be unreasonable, and a member who did not assent thereto was not bound to pay them. Whether a by-law is reasonable or not is a question for the court solely. But its unreasonableness should be demonstrably shown. Courts in construing by-laws will interpret them reasonably and will not scrutinize their terms for the purpose of making them void and invalid, in case every particular reason for them does not appear. Hibernia Fire Engine Co. *v.* Harrison, 93 Pa. St. 264; Angell & Ames on Corp. sec. 357; Commonwealth *v.* Worcester, 3 Pick. (N. Y.) 462.

By-law authorizing expulsion of member without notice is unreasonable. Fritz *v.* Muck, 62 How. Pr. (N. Y.) 69.

Regulating right of member to sue is valid. Bauer *v.* Samson Sup. Lodge K. of P., 13 Am. & Eng. Corp. Cas. 618; Osceola Tribe *v.* Schmidt, 57 Md. 98; S. Council *v.* Garrigan, 1 W. R. 562. That member not entitled to benefits allowed in case of sickness, where sickness result of drunkenness, debauchery, etc., is reasonable. Harrington *v.* Workingmen's Soc., 6 Am. & Eng. Corp. Cas. 651; Black & White, etc., Soc., *v.* Vandyke, 2 Whart. 309; St. Mary's Ben. Soc. *v.* Burford, 70 Pa. St. 321. Forbidding member to trade in neighborhood of Chamber of Commerce, reasonable, as tending to preserve quiet and keep access to building free. State *v.* Milwaukee Ch. of Com., 47 Wis. 685. For expulsion of member who violates his contracts is reasonable Dickinson *v.* Mil. Ch. of Com., 29 Wis. 45.

5. By-law of workingmen's association forbidding member to take the place of another discharged by his employer for upholding the rules of society, void, be-

laws are to be reasonably construed, except where they involve a forfeiture or suspension of the rights of a member, in which case they are to be strictly construed.[1]

4. Beneficial Associations Distinguished from Charities.—Where the exemption of property from taxation is involved, this distinction is sharply drawn. Laws of exemption are to be strictly construed. A charity is held to mean a public charity—one whose benefits are extended to needy persons generally, without regard to their relation to the members of the society, or to the fees paid. A beneficial society whose beneficence is confined to the members, their families, dependents, or friends, and depends upon the contributions made, is not a charity, but a private institution for the mutual advantage of the members. The property of such a society is therefore not exempt from taxation, under a law exempting the property of charities.[2] Where, however, the right of taxation is not involved, the line is less sharply drawn. It has been held that a member of a benevolent society is not disqualified to served on a jury in a case involving the property of the society, because it is a charity, and therefore the members have no pecuniary interest in the suit;[3] also that the property of a benevolent society may not be divided among the members, after a vote to dissolve, on the ground that the funds of a charity may not be diverted to a use which is not charitable.[4] On the other hand, it was held that a devise which would have been void if made to a charitable use is yet good if made to a society organized for the relief of indigent and distressed worthy masons, their widows or orphans.[5]

5. Distinguished from Insurance Companies.—The distinction between certain classes of benevolent societies and mutual insurance companies is by no means clear. It is important as determining whether or not such societies come within the operation of the

cause against public policy. Doyle *v.* New York Ws. Soc., 3 Hun (N. Y.), 360. Forbidding member to bring suit at law against the society in any event, void. Bauer *v.* Samson, etc., 13 Am. & Eng. Corp. Cas. 618.

1. Sup. Lodge *v.* Abbott, 82 Ind. 1; Georgia Mas Lodge *v.* Gibson, 52 Ga. 640; Folmer's Appeal, 87 Pa. St. 133; Berlin Ben. Soc. *v.* March, 82 Pa. St. 166

Where rule provides that notice should be given verbally or by circular, a member may not be suspended unless the notice was received. Costner *v.* Farmers', etc., 15 N. Westn. Repr. Mich. 452. *Compare* Gregir *v.* McLin, 78 Ky. 233; Schunck *v.* Gw. & W. Fund, 44 Wis. 369; Scheu *v.* Grand Lodge, 17 Fed. Repr. 214; McNumay *v.* K. of H., 5 Am. & Eng. Corp. Cas 616; Bauer *v.* Samson, etc., 13 Am. & Eng. Corp. Cas. 618.

2. Gorman *v.* Russell, 14 Cal. 536; Babb *v.* Reed, 5 Rawle (Pa.), 158; Morning Star Lodge *v.* Hayslip, 23 Ohio St. 144; Bangor *v.* Mas. Lodge 73 Me. 429; County of Hennepin *v.* Brotherhood, etc., 38 Am. Rep. 298, and note; Saltonstall *v.* Sanders, 11 Allen (Mass.). 470; Donohue's Ap., 86 Pa. St. 306; Delaware Co. Inst. *v.* Delaware Co., 94 Pa. St. 163; Humphries *v.* Little Sisters. 29 Ohio St. 205; Thomas *v.* Ellmaker, 1 Pars. S. Cas. (Pa.) 98. *Compare* City of Petersburg *v.* Mechanics' Assoc., 8 Am. & Eng. Corp. Cas. (Va) 484; Indianapolis *v.* G. M., 25 Ind. 518; Mayor, etc., of Savannah *v.* Solomon's Lodge, 53 Ga. 93; State *v.* Addison, 2 S. Car 499.

3. Bardine *v.* Grand Lodge, 37 Ala. 478.

4. Duke *v.* Fuller, 9 N. H. 536; Penfield *v.* Skinner, 11 Vt. 296.

5. Swift *v.* Easton Ben. Assoc., 73 Pa. St. 362; Clark's Trust, 16 Eng. Rep. Moak, 624.

statutes of the various States requiring insurance companies to deposit securities, etc., for the protection of policy-holders. Where the whole purpose of the association is the mutual insurance of the members, and no qualifications are required for membership, except that the applicant should be in a certain condition of health and within a certain age, the society is an insurance company, and must conform to the laws governing such associations. The mere fact that the amount payable by the society on the death of a member is not fixed, but dependent upon the number of members at the date of the death, does not change the character of the company; nor does the fact that there is no obligation on the part of a member enforceable in a court of law to pay any sum by way of premium.[1] It is equally true that a society formed for the purpose of rendering assistance to members or their families in case of sickness, and to insure the payment of a certain sum to the widow or dependents of a member at death, is not an insurance company.[2] It has been held that certificates of membership in mutual-aid associations are, in effect, life-insurance policies, and governed by the rules thereof as to insurable interest.[3] The question depends more upon the laws of the various States, and the evils against which they are directed, than upon the professed purposes of associations.

6. Rights and Responsibilities of Members, with relation to third persons, depend upon the character of the association. If the society has been incorporated the members are not personally responsible for its obligations, in the absence of a law to the contrary. The powers of the members depend upon the powers of the corporation. A majority, or even the whole number, cannot do an act *ultra vires*.[4] Members of unincorporated societies are usually treated as individuals, and have the same powers and responsibilities so far as others are concerned. But the members of unincorporated benevolent associations have for certain purposes the capacity of acting as bodies politic, and enjoy some of the privileges and immunities which belong to corporations. They are not personally liable for the debts of the society, unless the debts have been contracted with their consent,[5] and they may take gifts

1. State *v.* Browner, 15 Mo. Ap. 597; Commonwealth *v.* Weatherbee, 105 Mass. 160; State *v.* Merchants' Ex. Soc., 72 Mo. 146. *Compare* People *v.* Nelson, 46 N. Y. 477.

2. State *v.* Mut. Pro. Assoc., 26 Ohio St. 19; Commonwealth *v.* Nat. Mut. Aid Assoc., 94 Pa. St. 481; Com. League *v.* People, 90 Ill. 166; Chosen Friends *v.* Fairman, 62 How. Pr. (N. Y.) 386; State *v* Iowa Mut. Assoc. 12 N. Westn. Repr. 782.

3. Elkhart Mut. Aid Assoc. *v.* Houghton, 98 Ind. 149.

4. See notes 1 and 2, p. 173.

5. Park *v.* Spaulding, 10 Hun (N. Y.), 131; Coldicot *v.* Griffiths, 22 Eng. L. & Eq. 527; Cockerell *v.* Ancompte, 40 Eng. L. & Eq. 284; Ferris *v.* Thaw, 72 Mo. 446; Volger *v.* Ray, 131 Mass. 439; Sizer *v.* Daniels, 66 Barb. (N. Y.) 429; Downing *v.* Mann, 3 E. D. Smith (N. Y.), 36; Ridgley *v.* Dobson, 3 Watts & S. (Pa.) 118.

A partnership involves "community of profit and loss, and the right of one partner to bind the rest." Flemgorg *v.* Hector, 2 M. & W. 172. "Community of interest for business purposes." Ash *v.* Gine, 97 Pa. St. 493. "Trade and profit." Lafond *v.* Deems, 81 N. Y. 514.

which would be void for uncertainty if made to individuals by the same description.[1] The mutual rights of members of both incorporated and unincorporated societies depend upon the constitution and by-laws, which have the effect of a contract whose provisions are equally binding upon all. Members must take notice of these laws and act accordingly.[2] A usage to the contrary cannot be relied on.[3] An officer cannot suspend a law in favor of a member without the consent of the society.[4] These laws not only control but protect the rights of members. The society is bound by them. If a right guaranteed by them to a member is denied, he may resort to the courts and compel satisfaction.[5] If, however, the laws of the society provide a tribunal for the determination of controversies, a member cannot sue in a court of justice unless he can show that the proceedings against him were irregular.[6] A majority of the members of a beneficial association cannot change nor depart from the constitution or charter of the society unless the authority to do so is given to them in the charter.[7] By-laws, however, may be altered, amended, or rescinded at the pleasure of a majority, provided the charter contain nothing to the contrary, and the principles already indicated, which control the adoption of such laws, be observed.[8] Most of the adjudicated questions affecting the rights of members grow out of ambiguities existing in the laws of particular societies. No general rule may be affirmed with reference to them. The rules of construction have already been set forth.[9]

7. Beneficiaries.—A beneficiary is one entitled to the benefit of

In re St. James Club, 13 Eng. L. & Eq. 589. *Compare* Gorman *v.* Russell, 15 Cal. 536; Cockburn *v.* Thompson, 16 Ves. 321; Babb *v.* Reed, 5 Rawle (Pa.), 158; Beaumont *v.* Meredith, 3 Ves. & B. 180; Pierce *v.* Riper, 17 Ves. 15; Elison *v.* Reynolds, 2 Jac. & W. 511.

1. Beatty *et al. v.* Kurtz, 2 Pet. (U.S.) 566; Swansey *v.* Am. Ben. Soc., 57 Me. 523; Banks *v.* Phelan, 4 Barb. Sup. Ct. R. (N. Y.) 80.

2. Bauer *v.* Samson Lodge K. of H., 13 Am. & Eng. Corp. Cas. 618; Madeira *v.* Merchants' Ex. Soc., 16 Fed. Repr. 749; Mitchell *v.* Lycoming Mut. Ins. Co., 51 Pa St. 402; Walsh *v.* Ætna, etc., 30 Iowa, 145; Treadway *v.* Hamilton, 29 Conn. 68; Penfield *v.* Skinner, 11 Vt. 296; Karcher *v.* Knights of Honor Sup. Lodge, 137 Mass. 368.

3. Thompson *v.* Knickerbocker L. Ins. Co., 104 U. S. 252.

4. Where at date of death a member was under rules of society suspended for non-payment of dues, beneficiary cannot show that an officer of the society had continued to treat him as a member in good standing. Borgraefe *v.* Knights of H., 22 Mo. Ap. 263. *Compare* Folmer's Ap., 87 Pa. St. 133; Scheu *v.* Grand L., 17 Fed. Repr. 214.

5. Dolan *v.* Court G. M., etc., 128 Mass. 439; Birmingham *v.* Gallagher, 112 Mass. 190; Olery *v.* Brown, 51 How. Pr. (N. Y.) 92; Fritz *v.* Muck, 62 How. Pr. (N. Y.) 69. *Compare* Foram *v.* Howard B. Assoc., 4 Pa. St. 519.

6. Bauer *v.* Samson Lodge K. of P., 13 Am. & Eng. Corp. Cas. (Ind.) 618; Leech *v.* Committee Board of Brokers, 2 Brewst. (Pa.) 571; Oseeola Tribe *v.* Schmidt, 57 Md. 98; Black and White Soc. *v.* Vandyke, 2 Whart. (Pa.) 308; Anacosta Tribe *v.* Murbach, 13 Md. 91; Harrington *v.* Workingmen's Assoc., 27 Alb. L. J. 438.

7. Livingston *v.* Lynch, 4 John. Ch. (N. Y.) 573; Abeles *v.* McKeen, 18 N. J. Eq. 462; Torrey *v.* Baker, 1 Allen (Mass.), 120; State Council *v.* Sharp, 6 Am. & Eng. Corp. Cas. 620; Smith *v.* Smith, 3 Des. (S. Car.) 557: Thomas *v.* Ellmaker, 1 Pars. Sel. Cas. (Pa.) 98; Duke *v.* Fuller, 9 N. H. 536; Hall *v.* Sup. Lodge K. of H., 24 Fed. Repr. 450; Altman *v.* Berry, 27 N. J. Eq. 331.

8. Field on Corp. § 305.

9. Note 1, p. 174.

the society. No one who is not of the class for whose benefit the association was formed can be a beneficiary.[1] The right to the benefit depends upon the rules of the society, and is usually, but not necessarily, evidenced by a certificate or beneficiary policy, the effect of which is determined by these rules. Beneficiaries are either members of the society or those nominated by or dependent upon members. The rights of beneficiaries not members are governed by the same principles as those of members, so far as they depend upon the adoption, amendment, rescission, and interpretation of rules.[2] One nominated as a beneficiary by a member has no vested right in the benefit by virtue of such nomination. The member may at any time substitute another person or class of persons, unless restrained by the rules of the association.[3] Moreover, if the beneficiary dies before the member, the beneficiary's representatives have no interest in the benefit, even though the member die without making another nomination.[4] A beneficiary

1. Ky. Mas. Mut. Life Ins. Co. *v.* Miller, 13 Bush (Ky.), 489; McClure *v.* Johnson, 56 Iowa, 620; Elkhart Mut. Aid Assoc. *v.* Houghton, 10 Am. & Eng. Corp. Cas. 587; Nat. Aid Soc. *v.* Gouser, 10 Am. & Eng. Corp. Cas. 594. *Compare* Folmer's App., 87 Pa. St. 133; Gundlach *v.* Germania Assoc., 4 Hun (N. Y.), 339.

2. Benefit payable to widow, children, mother, father, etc., of deceased member vests in beneficiaries in order named if members fail to name beneficiary. Arthur *v.* O. F. B. Assoc., 29 Ohio St. 557.

Where benefit payable to "devisees of member," and he dies intestate, his administrator is not entitled to it. It belongs to society. Worley *v.* Nat. Mas. Aid Soc., 3 McCrary U. S. C. C. (Iowa) 53.

Benefit payable to "heirs of member" payable to his widow, children, etc., for whose benefit society formed, rather than administrator, representing his creditors. Ky. M. M. L. Ins. Co. *v.* Miller, 13 Bush (Ky.), 489.

Benefit payable to "widow, children, or devisee" does not go to *residuary* legatee, but to widow, etc. Wiel *v.* Trafford, 3 Tenn. Ch. 108; Greene *v.* Greene, 23 Hun (N. Y.), 481; Smith *v.* Covenant Mut. Benefit Assoc., 24 Fed. Repr. 685.

Where the certificate entitled beneficiary to one dollar for "each contributing member," *held*, that amount realized from an assessment, and one dollar for each member of the society, was payable by society. Nerskin *v* N. W. E. L. Assoc., 15 N. W. R. 683; Burland *v.* N. W. B. Assoc., 47 Mich. 424.

Where, under rule, benefit payable to person whose name entered for that purpose by a member in the books of the society, yet if member enter a name and afterward by will leave benefit to some one else, the latter is entitled to benefit. Sup. Council *v.* Priest, 46 Mich. 429.

Where, by rule, widow of member allowed $25 for funeral expenses, she is not entitled to benefit when her husband was buried by some one else during her absence at his own expense. Berlin Ben. Assoc. *v.* March, 82 Pa. St. 166.

On whole subject see Hirschl on Fraternities: Forfeiture.

3. Dolan *v.* Court Good Sam., 128 Mass. 437; Mas. Mut. Ben. Assoc. *v.* Burkhart, 7 W. Rep. 527; Exp. Aid Soc. *v.* Lewis, 9 Mo. Ap. 415; Gambs *v.* Ins. Co., 50 Mo. 48; Gentry *v.* Knights of Honor Supreme Lodge, 23 Fed. Repr. 718.

In Highland *v.* Highland, 109 Ill. 366, a member of a voluntary benevolent association named his sister as the person whom he desired to receive the benefit due on his death. *Held*, that his subsequent marriage and written notification to his wife that he desired her to have all his effects did not operate to divest the sister of her right to the amount.

In Raub *v.* Masonic Mut. Relief Assoc., 3 Mackey (Dist of Col.), 68, a by-law of a mutual-benefit society prohibited the change of the beneficiary without the approval of the directors. The charter provided for payment, among others, "to assigns or legatees." *Held*, that the by-law was contrary to the provisions of the charter, and that the appointment of a new beneficiary by will was valid. See also Stephenson *v.* Stephenson, 64 Iowa, 534; Daniels *v.* Pratt (Mass.), 10 N. Eastn. Repr. 166.

4. Exp. Aid Soc. *v.* Lewis, 9 Mo. Ap.

has, however, a vested right when the event upon which the benefit was made to depend has happened; and this right may not be impaired by a change in the rules of the society.[1] A beneficiary, like a member, may sue for a benefit wrongfully withheld from him.[2]

8. Dissolution.—A beneficial association may be dissolved as provided in its charter or constitution. In the absence of any provision on the subject, it cannot be dissolved except by the unanimous consent of its members;[3] and if the association is charitable in its nature, even the unanimous vote of the members will not authorize a dissolution, provided it involve a diversion and division of the funds of the society.[4]

415; Mas. Mut., etc., Soc. *v.* McAulay, 2 Mackey (D. C.), 70.

1. Where, under by-law in force at death of a member, his widow entitled to $4 a month during widowhood, she may not be deprived of this monthly allowance by change in by-law substituting lump sum for periodical payments. Gundlach *v.* Germania Assoc., 49 How. Pr. (N. Y.) 190. *Compare* Fugure *v.* Mut. Soc. St. J., 46 (Vt.) 326.

2. Knights of Honor *v.* Sup. Lodge, 82 Ind. 1.

3. Altman *v.* Berry, 27 N. J. Eq. 331; State Council *v.* Sharp, 6 Am. & Eng. Corp. Cas. 629; Thomas *v.* Ellmaker, 1 Pars. Sel. Cas. (Pa.) 98. *Compare* Gowland *v.* De Faria, 17 Ves. 19.

4. Fund accumulated "for good of craft and relief of indigent worthy masons, their widows and orphans," may not be divided among members of society. Duke *v.* Fuller, 9 N. H. 536.

Forfeiture.—The right to the beneficiary fund is lost by failing to pay the requisite dues or assessments at the times fixed by the rules, charter, or by-laws of the association. The members of such a society are absolutely bound by the rules thereof, although they may be ignorant of their terms, and although there may be a usage and custom contrary thereto. Thus, if by the rules payments are to be made at certain fixed times, and that the company is not required to make any further demand for them or give any further notice that they are due, if a member fails to make payment he will be deemed in default, and will lose his insurance, although the association usually sent a notice informing member that such payment was due, but failed to do so at this time. Mutual Fire Ins. Co. *v.* Miller Lodge, 58 Md. 463; Thompson *v.* Knickerbocker L I. Co., 104 U. S. Rep. 252.

Where a rule provides that if a member fails to pay within thirty days after publication of notice of assessment his policy is forfeited, such rule has been held to be valid, for, "stringent as are the rules in ordinary life policies, they should be more rigidly applied in mutual associations." Madeira *v.* Merchants' Society, 16 Fed. Repr. 749.

An association cannot assert the existence of a custom against a member; thus it was held that payments made to the treasurer or collector outside the lodge were valid, though there was a custom that they should be made in the lodge meeting, and though the officers of theorder had decided that they must be so made. Munson *v.* Grand Lodge A. O. U. W., Minn., 16 N. W. R. 395; Walsh Ætna, 31 Iowa, 145.

Where a charter provides that members should be notified of assessments, "either by a circular or verbal notice," before they should be in default for non-payment, it is necessary for the association to prove not only that the notice was mailed to, but also received by, such member. Castner *v.* Farmers' M. F. I. A., 15 N. W. R. 452.

Where the only means which a subordinate lodge or a member of a beneficial association has of knowing when an assessment is due to the supreme lodge is by a notice from the supreme lodge, unless notice is given no rights are lost. Hall *v.* Knights of Honor Sup. Lodge, 24 Fed. Repr. 450.

Where a member transmitted money in payment of all his dues and the amount was insufficient, the association cannot, for the first time, after the member's death, claim a forfeiture of the policy by reason of the dues not being paid in full. Georgia Masonic Co. *v.* Gibson, 52 Ga. 640.

An association knowing that certain statements in an application for membership are false if it continues to receive assessments from the assured will not be permitted afterwards to declare the policy forfeited for this reason. Excelsior M. A. O. *v.* Riddle, 16 Cent. Law Jo. (Ind.) 407; Illinois Masonic, etc., *v.*

BENEFICIARY. (See also CESTUI QUE TRUST.)—A word proposed by Chief Justice Story to denote the equitable or beneficial owner of property, the legal title to which is in another.[1]

BENEFIT.—Advantage; gain; profit; use.[2]

Baldwin, 86 Ill. 482; Masonic, etc., *v.* Beck, 77 Ind. 203.

A mutual-relief society organized under New York Laws 1875, ch. 267, for rendering relief to members and their families, cannot, after having issued a certificate in favor of one not belonging to the family of a member, contend that it was without power to pay him according to the terms of the certificate. Massey *v.* Rochester Mut. Relief Soc., 34 Hun (N. Y.), 254.

An association having issued its policy to a member, wherein he was declared to be in good standing, and having assessed him twice, will not be permitted to invalidate the policy by reason of the nonpayment of a portion of the preliminary fees. Roswell *v.* Equitable Aid Union, 13 Fed. Repr. 840.

The lower lodge is usually the agent of the supreme lodge for the purpose of collecting assessments and transmitting the same, and a member who has paid to a lower lodge will be protected, although the money was never sent to the supreme or higher lodge. Schunck *v.* Wittwen & Waisen Fund, 44 Wis. 369; Erdman *v.* Mutual Ins. Co., 44 Wis. 376.

At the time of a member's death his assessments were not all paid, and by the rules of the association his insurance was forfeited, but afterwards the unpaid assessments were paid to the lodge, and by it remitted to the higher lodge; this was declared to be a waiver of the forfeiture on the part of the association. Erdman *v.* Mutual Ins. Co., 44 Wis. 376.

Assignment.—Insurance in a mutual-benefit association taken out, under the rules, in favor of an heir or a beneficiary cannot be divested by sale or assignment. Basye *v.* Adams, 81 Ky. 368. *Compare* Briggs *v.* Earl, 139 Mass. 473.

1. "The phrase *cestui que trust*," says the Chief Justice, "is a barbarous Norman-French law phrase; and is so ungainly and ill adapted to the English idiom that it is surprising that the good sense of the English legal profession has not long since banished it and substituted some phrase in the English idiom furnishing an analogous meaning. In the Roman law the trustee was commonly called '*hæres fiduciarius*;' and the *cestui que trust* '*haeres fidei commissarius*,' which Dr. Halifax has not scrupled to translate 'fide-committee.' Halifax Anal. of Civil Law, ch. 6, § 16, p. 34. I prefer 'fide-commissary' as at least equally within the analogy of the English language. But *beneficiary*, though a little remote from the original meaning of the word, would be a very appropriate word, as it has not yet acquired any general use in a different sense." Story's Eq. Juris. (13th Ed.) sec. 321 *n*.

2. Where C., a musical composer, assigned by deed his copyright in two musical compositions, together with all property and *benefit* therein, the right to exclusive performance thereof passed; the said right having been made the property of the composer by the act 5 and 6 Vict. c. 45. *Ex parte* Hutchins, L. R. Q. B. Div. 483.

A policy of insurance which contained the following clause, "Warranted free from all average and without *benefit* of salvage, but to pay loss on such part as shall not arrive," was held void under the act 19 Geo. II. c. 37, sec. 1, which enacts that "No assurance, etc., shall be made on any ship, etc., interest or no interest, or without further proof of interest than the policy, or by way of gaining or wagering, or without *benefit* of salvage to the assurer; and every such assurance shall be null and void to all intents and purposes," on the ground that such an insurance confers upon the insured a right to more than an indemnity. Atkins *v.* Jupe, 2 L. R. C. P. Div. 375.

Benefit of Children.—The Customs Annuity and Benevolent Fund was established by act of Parliament in the nature of an insurance fund for the benefit of the widows, children, etc., of officers of the customs. One of the rules provided that of the portion payable on the death of a subscriber two thirds, or the whole if be left no widow, "should be applied or paid in any manner or proportion which he might propose for the *benefit* of his children, relatives, or his nominees who should have been duly admitted by the directors." A subscriber appointed his share of the fund to the trustees of his daughter's marriage settlement, and directed the trusts to be for his daughter for life, with remainder for her husband for life, with remainder for their issue. He afterwards sent in the names of the trustees as his nominees for admission by the directors;

but neither they nor the husband were formally admitted. It was held that the settlement on the daughter, her husband and issue was a valid application of the fund "for the *benefit* of his daughter" within the meaning of the rules, and that no admission of the trustees or the husband as nominees, nor any consent by the directors to the settlement, was necessary. *In re* Pocock's Policy, L. R. 6 Ch. Ap. 445.

Where a father had made certain marriage settlements for his daughter during his lifetime upon trusts to the daughter for life, and after her death to her husband for life, and after the decease of the survivor to the children, and if there should be no children then to such person as the daughter should appoint; and in default of appointment then to her next of kin; and by his will made a further provision for them in the following terms: "to be held and disposed of by them upon the same trusts in all respects for the *benefit* of my daughter and her children and grandchildren as thereby declared as to the property thereby settled."—it was held that these words were to be construed as words of reference incorporating the trusts of the settlements in the will; and that the trusts for the husband were not excluded, and therefore that a legacy duty was payable thereon; the court, Pollock, C. B., saying: "The question is whether these words are words of reference only, or whether their operation is to create different trusts from those in the settlement. The language admits of no doubt; it is only by an ingenious construction that any doubt has been suggested. The testator, 'in addition to the property settled,' gives 'the further sum of £8000 to the trustees of the settlement,' and 'for the *benefit* of my daughter.' The word 'benefit' is not a technical word, but a general expression. The gift, therefore, may well be read: Whereas certain moneys were settled by means of trustees for the *benefit* of my daughter and her children, I give an additional sum of £8000 upon the same trusts in all respects. The settlement was in effect for the *benefit* of the wife and children." *In re* Palmer, 3 H. & N. 26.

Benefit of Wife.—A conveyed to B one half of certain capital stock "in trust for the sole *benefit* of the wife of C and her children;" also one half of the profits arising from the stock "to be applied by B for the *benefit* of C's wife and her children." *Held*, that this language was sufficient to exclude C's marital right to the profits, although the words "sole and separate use" are omitted. Clark *v.* Maguire, 16 Mo. 302.

To constitute a conveyance to a trustee for a married woman one for her "sole and separate use," no technical language is necessary. Where a conveyance was made to a trustee in trust "for the entire use, *benefit*, profit, and advantage" of the *feme covert*, *held*, that by these words a "sole and separate" estate in the property was conveyed to her. Heathman *v.* Hall, 3 Ired. Eq. (N. Car.) 414. See Adamson *v.* Armitage, 19 Ves. Jr. 416.

But a legacy to a married woman "to and for her own use and *benefit*" does not give a separate estate where, in the same will, in respect to another gift to the same person, the testator has appointed a trustee and expressly directed the application of it to her "sole and separate use." Wills *v.* Sayers, 4 Mad. Ch. 409; Roberts *v.* Spicer, 5 Mad. Ch. 491.

By a devise to a testator's wife of all the *benefits* of his real estate until his children come of age, grain growing in the ground at the time of the testator's death passes to the widow. Appeal of Grubb's Ex., 4 Yeates (Pa.), 23.

Where a testator gave the character of heirlooms to a part of his household furniture, namely, his pictures, and then bequeathed to trustees all household goods, furniture, etc. (except his family pictures), to sell such parts as they should think proper, and then as to his family pictures, and such of his effects as should remain unsold, in trust for L. if living, for his own proper use and *benefit*,—it was held that the family pictures were heirlooms, but that L. was absolutely entitled to the remaining personalty; Plumer, M. R., saying: "The form of gift to R. Lumley is too clear to admit of doubt. The words "for his own use and benefit" are the common language to express the largest right that can be given over personal property, and are used throughout the will when rents and profits are to be enjoyed absolutely. Saville *v.* Earl of Scarborough, 1 Swanst. Ch. 537, 547.

Benefit of Survivorship.—A testator gave a fund to trustees upon trust to pay the income to A during his life, and after the decease of A, leaving issue, upon trust to pay, apply, assign, and transfer both principal and interest to and amongst all and every the child and children of A, equally to be divided between them, and if but one, then to such only child, to be paid to them, if sons at twenty-one, and if daughters at that age or marriage, "with benefit of survivorship," etc. A

had eight children, of whom three died infants in their father's lifetime, two attained twenty-one and died in his lifetime, and three attained twenty-one and survived him. It was held that the words "with benefit of survivorship" referred to the period when the shares became absolutely vested and not to the time of payment, and therefore the two children who attained twenty-one and died in their father's lifetime took vested interests, and that their representatives were entitled to share in the fund along with the children who survived their father. Cornect *v.* Wadman, L. R. 7 Eq. Cas. 80.

Person for whose Immediate Benefit.—A person who is interested in the event of a suit, in that he is bound to pay half the damages and costs in the case of a recovery by plaintiff, is not "a person for whose *immediate benefit*" the action is defended, and consequently is a competent witness. Laumier *v.* Francis, 23 Mo. 181.

Nor is a "stockholder" of a corporation rendered incompetent for it where he is not named as a party to the action. Pack *v.* The Mayor of N. Y., 3 Comst. (N. Y.) 489, 493; Washington Bank *v.* Palmer, 2 Sandf. Sup. Ct. (N. Y.) 686; N. Y. & Erie R. Co. *v.* Cook, 2 Sandf. Sup. Ct. (N. Y.) 732; Montgomery County Bank *v.* Marsh, 3 Selden (N. Y.), 481.

But one who has indemnified the sheriff for taking property by virtue of an execution is not a competent witness for the sheriff in defence to a suit against him for such taking. The person indemnifying the sheriff in such case is the "person for whose *immediate benefit* the suit is defended." Howland *v.* Willetts, 5 Selden (N. Y.), 170.

The child or next of kin of an intestate is a competent witness for the administrator in an action brought by the latter to recover a demand claimed to be due the estate. Such a person is not a party for whose *immediate benefit* the action is prosecuted. Butler *v.* Patterson, 13 N. Y. 292.

In a suit upon a promissory note the party for whose accommodation the note was made and indorsed is not a competent witness, since the suit is defended for his *immediate benefit*. Gildersleeve *v.* Martine, 19 N. Y. 321.

Benefit of Herself, her Family, or her Estate.—A note made by a married woman and her husband for a loan of money procured and used to pay his creditors under a compromise is not a contract for the "*benefit* of herself, her family, or her estate." National Bank of New England *v.* Smith, 43 Conn. 327. See Smith *v.* Williams, 43 Conn. 409.

Nor is a contract made by a married woman to sell her land. Gore *v.* Carl, 47 Conn. 291.

Public Use or Benefit.—The owners and occupiers of grist-mills are not required by the statutes of Vermont to receive grain for grinding against their wills; therefore the exercise of a claim of right to overflow lands for the *benefit* of a grist-mill under the Flowage Acts of 1866–7–9 is not a taking for public use within the meaning of the Constitution. Tyler *v.* Beacher, 44 Vt. 648; s. c., 8 Am. Rep. 398.

In opening streets in the city of New York, property-owners can only be assessed for the *benefit and advantage* which they will derive from the improvement, over and above their *loss and damage*. Matter of Fourth Avenue, 3 Wend. (N. Y.) 452.

The owner of property taken for public streets is entitled to a full compensation for the damage he sustains thereby; but if the taking of his property for the public improvement is a *benefit* rather than an injury to him, he certainly has no equitable claim to damages. Livingstone *v.* Mayor of New York, 8 Wend. (N. Y.) 85, 101.

In proceedings under the act relative to streets in the city of Albany, if in the opinion of the jury the damages or recompense to which the owners of ground required for an improvement *exceeds the benefit* which will accrue to the owners or occupants of such houses and lots of ground as in their judgment ought to be assessed, the jury must so certify, and all further proceedings will be suspended. Canal Bank of Albany *v.* Mayor of Albany, 9 Wend. (N. Y.) 244.

An incorporated company who own a lot in the vicinity of a public improvement are not liable to be assessed for *benefits*, if by the terms of the grant by which the lot is held it can be appropriated only to a *specific use*, which by possibility cannot be rendered more advantageous by the opening of a street or square in its neighborhood; but the company may be assessed for *benefit* to adjoining grounds not so restricted. Owners of Ground *v.* Corp. of Albany, 15 Wend. (N. Y.) 374.

Benefit of Law.—A Massachusetts statute (Stat. 1818, c. 113) provided "that no person should be entitled to the *benefit of law* for the recovery of any debt or fee accruing for his professional services," unless properly licensed. In an action by an unlicensed physician, after the re-

BENEVOLENCE.—In old European law, an extraordinary aid granted by freemen to their sovereign as a voluntary gratuity;[1] good-will; kindness; humanity;—a word of wider meaning than *charity*, with which, however, it is often found.[1]

BENEVOLENT. See CHARITABLE; HUMANE; KIND.[2]

peal of the statute for services rendered before the repeal, it was held by Shaw, C. J.: "Taking the terms together, the word 'recovery' with that of '*benefit of law*,' the construction, we think, is '*benefit* of legal proceedings,' including all words in which payment of a debt may be obtained by process of law. It results from this that the policy of the statute was intended to be reached and effected, not by providing that a debt should not accrue, by force of the common law, from services done on request, but that the debt should not be enforced by legal proceedings of any kind. It therefore affected the remedy, but not the right." Hewitt *v.* Wilcox, 1 Metc. (Mass.) 154.

Benefit of Exemption.—The constitutional provision relating to the exemption of a homestead to the head of a family residing in Florida, providing that "this exemption shall accrue to the heirs of the party having enjoyed or taken the *benefit* of such exemption," is operative to secure to the heirs the *benefit* of the homestead exemption, notwithstanding that the deceased head of the family had not resorted to the statutory method of defining and placing on record the description of the property he intended should constitute his homestead. Baker *v.* State, 17 Fla. 406.

1. Burrill's Law Dict., *sub voce;* 1 Robertson's Chas. V., Appendix, note 38.

2. In construing a bequest in aid of objects and purposes of *benevolence* or charity, the court, Gray, J., said: "Whatever, therefore, may be the meaning, in the law of Massachusetts, of the word *benevolence* by itself, there can be no doubt that when used in connection with 'charity,' as in this will, it is synonymous with it; and the connecting 'or' must be taken in the sense of defining and limiting the nature of the charity intended, and of explaining one word by the other." Saltonstall *v.* Sanders, 11 Allen (Mass.), 446, 470.

3. In the case of Norris *v.* Thomson's Ex., 19 N. J. (Eq.) 307, the court, Zabriskie, Ch., said: "The word *benevolent* is certainly more indefinite and of far wider range than *charitable* or *religious;* it would include all gifts prompted by good-will or kind feeling towards the recipient, whether an object of charity or not. The natural and usual meaning of the word would so extend it. It has no legal meaning separate from its usual meaning. The word 'charitable' has acquired a settled limited meaning in law which confines it within known limits. In all the decisions on this subject it has been held that a devise or bequest in England for *benevolent* objects, or in trust to give to such objects, is too indefinite and therefore void, and not being within the scope of the statute of Elizabeth is not saved by it." See Thomson's Ex. *v.* Norris, 20 N. J. (Eq.) 489; Williams *v.* Kershaw, 5 Cl. & Fin. 111; Ellis *v.* Selby, 1 Myl. & Craig, 286; Williams *v.* Williams, 5 Law Journal; 2 Roper on Leg. 1237; Babb *v.* Reed, 5 Rawle (Pa.), 151; James *v.* Allen, 3 Merivale, 17; Morice *v.* Bishop of Durham, 9 Ves. Jr. 399; Vezey *v.* Jameson, 1 Sim. & Stew. 69; Kenall *v.* Granger, 5 Beav. 300.

In the case of Chamberlain *v.* Stearns, 11 Mass. 267, Gray, C. J., said: "The question presented by this case is whether a devise in trust to be applied solely for *benevolent* purposes in the discretion of the trustees creates a public charity. And we are all of the opinion that it does not. The word *benevolent* of itself, without anything in the context to qualify or restrict its ordinary meaning, clearly includes not only purposes which are deemed charitable by a court of equity, but also any acts dictated by kindness, good-will, or a disposition to do good the objects of which have no relation to the promotion of education, learning or religion, the relief of the needy, the sick or the afflicted, the support of public works or the relief of public burdens, and cannot be deemed charitable in the technical and legal sense. The only difference of opinion in the adjudged cases on this subject has been upon the question how far the word *benevolent* when used to describe the purposes of a trust could be deemed limited in its meaning by being associated with other words more clearly pointing to a strictly charitable disposition of the fund."

And in Adye *v.* Smith, 44 Conn. 60; s. c., 26 Am. Rep. 424, it was said by Loomis, J.: "While it is true that there is no charitable purpose which is not also a *benevolent* purpose, yet the con-

BEQUEATH. (See also BEQUEST.)—The word *bequeath*, which in its primary legal signification is applicable to personal property only, may be shown by the context of the will to be used synonymously with *devise* or *devise and bequeath*, and in that sense it must be interpreted in giving a construction to the instrument.[1]

BEQUEST. See DEVISE; LEGACY.

BERRIES.—An exemption from duty of "berries used principally in dyeing or composing dyes" applies to the berries in their native state and not after they are transmuted, by manufacture, into a substance which takes a different denomination in trade and commerce.[2]

BESOT.—"To besot" is to stupefy; to make dull or senseless; to make to dote: and "to dote" is to be delirious, silly, or insane.[3]

BEST.—Things may be "best" in the sense of ranking in the very first class, without being superior to each other—one thing being best for one purpose, and another for another.[4]

verse is not equally true, for there may be a *benevolent* purpose which is not charitable in the legal sense of the term. But if the character of a gift can be definitely determined and it appears that it is charitable in a legal sense, the use of terms which would, if unexplained, render the gift void, will not defeat the donor's purpose. Thus a bequest of "the residue of my estate to the North Reformed Church of Newark, in trust, that they may use the same to promote the religious interests of the said church and to aid the missionary, educational, and *benevolent* enterprises to which said church is in the habit of contributing," is a good charitable bequest. De Camp *v.* Dobbins, 29 N. J. Eq. 36.

1. Dow *v.* Dow, 36 Me. 216; Laing *v.* Barbour, 119 Mass. 525; Lasher *v.* Lasher, 13 Barb. (N. Y.) 109; Ladd *v.* Harvey, 21 N. H. 528; O'Toole *v.* Browne, 3 El. & Bl. 584.

So of "bequeathment." Blackwell *v.* Blackwell, 3 C. E. Greene (N. J.), 389.

The expression "property and effects not otherwise herein bequeathed" was held to signify a disposition by will, and to show that the instrument in which it was contained was a will and not a deed. Jordan *v.* Jordan's Admr., 65 Ala. 307.

2. Schneider *v.* Lawrence, 3 Blatchf. (C. C.) 116.

3. Gates *v.* Meredith, 7 Ind. 441.

4. Whittemore *v.* Weiss, 33 Mich. 354.

Best Endeavors.—Where one covenants to use his "best endeavors," there is no breach if he has been prevented by causes wholly beyond his control and without any default on his part. Vickers *v.* Overend, 7 H. & N. 92. *Compare* BEST OF HIS ABILITY *infra*.

Best Evidence.—The term "best evidence" is confined to cases where the law has divided testimony into primary and secondary. And there are no degrees of evidence except where some document or other instrument exists, the contents of which should be proved by an original rather than by other testimony, which is open to danger of inaccuracy. Elliott *v.* Van Buren, 33 Mich. 53.

Nothing more is intended by the rule which requires the production of the best evidence than that evidence which is merely substitutionary in its nature shall not be received so long as the original evidence can be had. It does not allow secondary evidence to be substituted for that which is primary. It will not permit the contents of a deed or other written instrument to be proved by parol when the instrument itself can be produced. It has nothing to do with the choice of witnesses. It never excludes a witness upon the ground that another is more credible or reliable. State *v.* McDonald, 65 Me. 467. See also EVIDENCE.

Best Information.—Under a statute authorizing the assessors to make out a list of the taxpayer's property where the latter fails to do so, and which requires them to act upon "the best information they can obtain," *held*, that they may obtain this information by inquiring of those who would be likely to know, and from their own judgment upon the facts of the case, and that it is sufficient if they ascertain enough to found upon it an honest belief that the taxpayer has taxable property

which he keeps back from taxation. "If they get at the property thus concealed by using their best judgment in the matter, and by inquiries that bring them to an honest belief on the subject, the taxpayer is, in the circumstances, in no position to make a reasonable complaint if they misjudge in the matter." Town of Hartford *v.* Champion, 3 New Eng. Repr. (Conn.) 543.

Best of His Ability.—The words "to the best of his ability" in an officer's bond were held not to protect his bondsmen from their liability for non-fulfilment of the terms of the bond occasioned by inevitable accident. "It would indeed be an extraordinarily liberal construction of these words that would discover in them a condition exempting the officer from performance of his duty on the ground of accident or inability brought about by accident . . . Without the words it must be admitted that defendants would be liable for the money, though it were destroyed by inevitable accident. Certainly the words express no condition restricting such liability." Dist. Tp. of Union *v.* Smith, 39 Iowa, 9.

Best of his Belief. See BELIEF.

Best Oil.—On a sale of "50 tons best palm oil," with allowance for "wet, dirty, and inferior oil, if any," in an action for not accepting, *held*, that oral evidence was admissible to show an established usage in the trade as to what proportions will satisfy a contract to deliver "best" palm oil. Lucas *v.* Bristow, El., Bl. & El. 907.

Best Picture.—Where prizes for oil-paintings were offered by an institution in a circular in which a "jury of awards" were also announced, and at the time of the exhibition the jury found that no picture merited the first or second prizes and awarded the third prize to the plaintiff, and the latter thereupon brought suit for the amount of the first prize as painter of the "best picture," *held*, that the jury of awards constituted the tribunal to pass upon the merits of the paintings, and that unless a prize were awarded by them none was demandable. Trego *v.* Pa. Academy of Fine Arts, 18 Weekly Notes Cases (Pa.), 98.

Best Rent.—In a lease for lands for which the lessor is bound to reserve the best rent that can be got, he must reserve the best rent that can be got at the time the lease is made. Doe *ex dem.* Griffiths *v.* Lloyd, 3 Esp. 79. *Semble*, that "best rent" means the best rack-rent that can *reasonably* be required by a landlord, taking into account all the requisites of a good tenant for the permanent benefit of the estate. Doe *ex dem.* Lawton *v.* Radcliffe, 10 East, 278. See Hood & Challis Co. *v.* Acts (2d Ed.), 151.

Best you Can.—In an order to buy cotton, "best you can," at not more than a certain price, the above phrase was held a "form of expression which apparently left to them the largest possible discretion to buy as opportunities should offer, at prices not exceeding the prescribed limit." Marland *v.* Stanwood, 101 Mass. 477.

Where butter was put into the hands of an agent on his way to a certain place for sale, with instructions to do the "best you can with it," it was held that the judge was not authorized to inform the jury that it was to be sold at that place and not elsewhere. "We cannot but see that the plaintiff intended to give the defendant a very large discretionary power." McMorris *v.* Simpson, 21 Wend. (N. Y.) 189.

For the Best.—A letter stating that the writer had sold the Knabe pianos "for the best" was held not to warrant a construction which would make of it an admission that he had sold them as superior to the Steinway pianos. "One piano may be best for one purpose, and another for another." Whittemore *v.* Weiss, 33 Mich. 354.

If it is Deemed Best.—A power given to executors to sell a house "if it is deemed best," means that the house shall be sold if in the course of the administration of the estate it should be found necessary or advisable to take that course. Chandler *v.* Rider, 102 Mass. 271.

Seem Best.—A power given to trustee, in a will, to be exercised "as to them shall seem best," was held to mean, in other words, according to *their* discretion and not that of the *cestuis que trustent*. "Suppose the trustees had carefully examined the facts in relation to the purchase of the furniture, and had come to the conclusion, perfectly satisfactory to their minds, that such purchase *was not best* for their sister and her children, and therefore should refuse their approbation of the purchase, can a court of equity review their decision, and reverse it if they find it to be wrong? We think the court has no such power." Leavitt *v.* Beirne, 21 Conn. 10. *Compare* THINK BEST, *infra*.

Think Best.—A clause in a deed of trust authorizing the trustee to sell the premises "entire, without division, or in parcels," as he may "think best," will not prevent the owner from insisting that it was the trustee's duty to offer the property in parcels; and when it is shown that a sale in parcels would have been

BESTIALITY.—A connection between a human being and a brute of the opposite sex.[1] (See SODOMY.)

BET—BETTING. (See also GAMING; WAGER.)—A bet or wager is ordinarily an agreement between two or more that a sum of money or some valuable thing, in contributing which all agreeing take part, shall become the property of one or some of them, on the happening in the future of an event at the present uncertain.[2] A bet is a wager; and the betting is complete when the offer to bet is accepted.[3] One person alone cannot be guilty of the offence of betting. There must be always at least two parties engaged in it. It is a joint act; and when the chance of gain and the chance of loss are created, it matters not how those chances are distributed between the parties, there exists all that is necessary to constitute a bet.[4] Bet and wager are synonymous terms, and are applied both to the contract of betting and wagering, and to the thing or sum bet and wagered. For example, one bets or wagers, or lays a bet or wager of so much upon a certain result. But these terms cannot properly be applied to the act to be done or event to happen upon which the bet or wager is laid.[5] Betting

more advantageous, and that the trustee was requested to offer the property in parcels, a sale *en masse* will be set aside, on bill by the grantor in the trust deed. "The power given, by its very terms, implies that the trustee assumed the duty of thinking on the subject, and that he should adopt that course which he should think would be best to secure a good price. It does not mean that the trustee may do as he may please, or that he may do that which should be the most convenient for him. . . . When it is shown that the attention of the trustee was called to the true condition of this property, and that he was requested to offer it in separate parcels, and suggestions were made that purchasers desired an opportunity to bid on certain parts of the property, we cannot doubt that it was his duty to have offered the property in separate parcels." Cassidy *v.* Cook, 99 Ill. 388.

1. Ausman *v.* Veal, 10 Ind. 356.

2. Harris *v.* White, 81 N. Y. 539.

3. State *v.* Welch, 7 Port. (Ala.) 465. "The placing of money, or, as in this case, what is its representative, on the gaming-table is such an offer; and if no objection be made by the player or owner of the table or bank, it is an acceptance of the offer, and the offence against the statute is complete although from any cause whatever the game should never be played out, and the stake be neither lost nor won. The offence which the act designed to punish is betting, not the winning or losing."

4. Shumate's Case, 15 Gratt. (Va.) 661. "It is true that a bet does imply risk, but it does not necessarily imply risk in both parties. There must be between them a chance of gain and a chance of loss; but it does not follow that each of the parties to the bet must have both these chances. If, from the terms of the engagement, one of the parties may gain but cannot lose, and the other may lose but cannot gain, and there must be either a gain by the one or a loss by the other, according to the happening of the contingency, it is as much a bet or wager as if the parties had shared equally the chances of gain and of loss. The amount bet by them is the amount which the one may win and the other may lose."

5. Woodcock *v.* McQueen, 11 Ind. 16.

Betting of Money.—Where parties bet upon a game of cards with the understanding that the loser shall pay the bill of the company, it is in effect a "betting of money." Bachellor *v.* State, 10 Tex. 258. So, also, where bets on an election were made to be paid by a present of a coat by the losing party, but money was actually paid. Cane *v.* State, 13 Sm. & M. (Miss.) 456.

Bet and Premium.—A premium offered by a corporation that a horse shall make the best time is not a bet or wager. "There is a clear distinction between a wager or bet and a premium or reward. In a wager or bet there must be two parties, and it is known before the chance or uncertain event upon which it is laid is accomplished who are the parties who must either lose or win. In a premium or re-

is the putting at hazard of a certain sum ascertained, and a bet is a wager, though a wager is not necessarily a bet.[1]

BETTER EQUITY.—The right which in a court of equity a second encumbrancer has who has taken securities against subsequent dealings to his prejudice which a prior encumbrancer neglected to take although he had an opportunity.[2]

BETTERMENT.—An improvement made upon an estate more expensive in its nature than a mere repair; also applied to express the additional value of property occasioned by the making of some public improvement on, by, or near thereto. (See IMPROVEMENT.)

BETWEEN.—Of space: I. *Between* indicates an intermediate space, which excludes and cannot include that to which it refers. If land is granted between one township and another, both are excluded from the grant. If land is conveyed lying between lot number one and lot number three, it could not be pretended that either of these lots passed by the deed.[3] II. In common use, *between* does not always exclude the places to which it relates. A grant of power to construct a railroad "between" two places would very clearly include the right of carrying such road into each place.[4]

ward there is but one party until the act or thing or purpose for which it is offered has been accomplished. A premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event. In a premium it is known who is to give before the event; in a wager it is not known till after the event. The two need not be confounded." Alvord *v.* Smith, 63 Ind. 62. *Compare* Comley *v.* Hillegass, 94 Pa. St. 132, in which such a premium was held a wager.

Betting on Elections.—A promissory note payable provided a certain officer is elected, otherwise to be null and void, is a bet on an election. Gordon *v.* Casey, 23 Ill. 70. See also Guyman *v.* Burlingame, 36 Ill. 203; Sipe *v.* Finarty, 6 Iowa, 394.

It is not necessary to constitute "betting on an election" that the accused person should have bet on the success of any particular candidate. It is sufficient if he bet that a candidate would receive a certain number of votes. Com. *v* Kirk, 4 B. Mon. (Ky.) 1. Or that the bet was made upon the event of the election. State *v.* Cross, 2 Humph. (Tenn.) 301. Or that one candidate would beat some other. Com. *v.* Pash, 9 Dana (Ky.), 31.

The deposit of an entrance-fee to enable the depositor to compete for a prize in an athletic contest is not a bet. Costello *v.* Curtiss, N. Y. Sup. Ct. 1881, cited in Browne's Jud. Int. of Com. Wds. & Phr. 516.

1. Cassard *v.* Hinman, 1 Bosw. (N. Y.) 212.

2. Bouv. L. Dict.

3. State *v.* Godfrey, 12 Me. 366, where it was held that by a charter to erect a dam "between the fort of Rose's or Treat's Falls in Bangor and McMahon's Falls in Eddington" the latter falls were excluded and an erection above their foot was a nuisance. "That which lies between one given place and another is something distinct from the place given on either side." Where a highway is described as leading "between Guildford and Oakingham," both places are necessarily excluded. 2 Saund. 158 b, n. 6.

The words in a deed "between A and B" are necessarily exclusive of the termini mentioned in the deed. Revere *v.* Leonard, 1 Mass. 93.

4. Morris & Essex R. Co. *v.* Central R. Co. of N. J., 31 N. J. L. 212, where it was held that a charter to build a road "between Phillipsburg and Elizabethport" did not exclude the termini, but authorized the line to be laid *in* Phillipsburg.

A grant of the wagon way "between the houses" in a deed, where the way had been described as extending to the whole depth of the lot, will not be confined to that part of the way

Of time: If an act is to be done between two certain days, it must be performed before the commencement of the latter day. In computing the time in such a case, both the days named are to be excluded.[1] *Between* in a will constitutes

which lies between the houses. If the phrase "between the houses, etc.," used in the description of the alley, were designed as a strict limitation of the extent of the grant, the position is sound. But the phrase, it is obvious, may have been used either by way of limiting the grant, or as a mere description of the thing granted, as words of limitation or of description. The grant of the use of the "wagon alley between the houses" will include the whole extent of the alley, and not that part of it merely lying directly between the buildings. Dunn *v.* English, 3 Zab. (N. J.) 126.

1. Richardson *v.* Ford, 14 Ill. 333, where an offer to deliver on September 1 was held not to be in accordance with a contract to deliver "between the date of the contract and the 1st of September then next."

"'Between,' when properly predicable of time, is intermediate, and strictly does not include, in this case, either the 7th of December or 1st of March. 'Between two days' was exclusive of both." Bunce *v.* Reed, 16 Barb. (N. Y.) 352.

Under a contract to purchase merchandise to be delivered at seller's option *between* the date of the contract and a specified day, the last day for the delivery is the day before the specified day. Fowler *v.* Rigney, 5 Abb. Pr. N. S. (N. Y.) 182.

A policy of insurance on goods to be shipped between two certain days does not cover goods shipped on either of those days. Atkins *v.* Boylston Ins. Co., 5 Metc. (Mass.) 439. The court say: "It is undoubtedly true that the word 'between' is not always used to denote an intermediate space of time or place. . . We speak of a battle between two armies, a combat, a controversy, or a suit at law between two or more parties; but the word thus used refers to the actions of the parties, and does not denote locality or time. But if it should be said that there was a combat between two parties between two buildings, the latter word would undoubtedly refer to the intermediate space between the buildings, while the former word would denote the action of the parties. But it was agreed that the word 'between' is not always used as exclusive of the termini, when it refers to locality. Thus we speak of a road between one town and another, although the road extends from the centre of one town to the other; and this, in common parlance, is a description sufficiently intelligible, although the road in fact penetrates each town. But if all the land between two buildings or between two other lots of land be granted, then certainly only the intermediate land between the two lots of land, or the two buildings, would pass by the grant. And we think the word 'between' has the same meaning when it refers to a period of time from one day, month, or year to another. If this policy had insured the plaintiff's property to be shipped between February and the next July, it would clearly not cover any property shipped in either of those months. So we think the days mentioned in the policy are excluded." See also Kendall *v.* Kingsley, 120 Mass. 95.

A stipulated to deliver to B fifty hogs at any time "between the 10th and 20th of November" that B might choose to call for them. *Held*, that a demand by B on the 19th for the delivery of the hogs on the 20th of November was not sufficient under the contract. "The word 'between,' where it occurs in the present agreement, does not possess any technical import. It must therefore be taken in the sense in which it is used in ordinary parlance, and that being done, the intent expressed by the words 'between the 10th and 20th' seems to be sufficiently plain and explicit. To say that the words just quoted include either the 10th or 20th would be equivalent to saying that the month of July included June and August, because it lay between them." Cook *v.* Gray, 6 Ind. 335.

Where there are to be "ten days *between* the day of service and the first day of the next term," ten *clear* days are meant. "The clear language is that there must be ten days *between* the day of service and the first day of the term to which the notice is returnable, and that in counting that time we are not to include the first day of the term. Time *between* two days is that which is intermediate, without computing any part of either of those days to make the same. And it would do great violence to the language used to say that ten days are left between the service and the term, and yet count one of those days to make the intermediate time. . . . These ten

a tenancy in common,[1] and strictly implies but two parties to the division.[2]

For other uses of the word and phrases in which it occurs see the note.[3]

days are to be complete, and are not to be added to, nor diminished by, the day of the acts done, nor yet by the first day of the term to which the process is returnable." Robinson *v.* Foster, 12 Iowa, 186.

1. Lashbrook *v.* Cock, 2 Meriv. 70, where testator devised to his two daughters "all his right in B and C between them." See also Morley *v.* Bird, 3 Ves. 631; Atty.-Gen. *v.* Fletcher, L. R. 13 Eq. Cas. 128.

2. Haskell *v.* Sargent, 113 Mass. 343. But in Ward *v.* Tomkins, 30 N. J. Eq. 3, it was held that evidence of an intention to confine the gift to two children existing at the time of the testator's death—drawn from the fact that he had used the word "between"—was "too slight to be of any value."

Equally to be Divided Between Them ordinarily means an equal division *per capita*. Purnell *v.* Culbertson, 12 Bush (Ky.), 370, and comments therein on Lachland *v.* Downing, 11 B. Mon. (Ky.). In Louisiana such a legacy is a conjoint one, and if but one of the legatees survives the testator, he is entitled to the whole, by accretion. Mackie *v.* Story, 93 U. S. 589.

3. **Between Two Counties.**—Where a bridge is constructed over navigable waters, and connects two opposite shores lying in different counties, such a bridge is "between" two such counties and they are jointly answerable for its maintenance, even though the counties, as respectively containing the townships between the shores of which the current flows, reach to the middle of the water and are divided only by the invisible, untraceable line called *medium filum aquæ*. Harold *v.* Corp. County Simcoe, 18 U. C. C. P. 13. Van Koughnet, C., says in his dissenting opinion: "These two counties embrace certain townships which touch and adjoin one another, separated only by a geographical line, unsubstantial and invisible. They are not divided by any bridge, and strictly speaking nothing does or can lie between them. When you speak of something lying between two other places or things, you mean, in the accurate use of language, something lying between the boundaries or limits of the other two places or things; something dividing them, or within the borders of that which does divide them. You don't in such a case employ the word 'between' as meaning something common to two parties or places, as when you speak, in the common ordinary terms of a well or a stable as in use between two parties, or common to both, and which, consistently with the meaning of the words thus employed, may be wholly on the premises of one of the parties. . . . The legislature here, I think, show clearly that what is meant is a road or bridge running along or between the borders of two counties."

Between Two Days, which are specified is, *in an indictment*, an inadequate allegation of the time when the offence was committed. 1 Bish. Crim. Proc. §. 396. But see U. S. *v.* Smith, 2 Mas. (U. S.) 143.

Between Two Cities.—Where an act was passed to protect the business of a company "between the cities of New York and Philadelphia," it was held to protect only the through business *from city to city* and not between intermediate places and over any and every part of the route between the said cities. "The ambiguity of the enactment is occasioned by the various senses in which the word 'between' is appropriately used. It may mean *in the intermediate space*, without regard to distance, or it may mean *extending or passing from city to city*. The prohibition, therefore, may be limited to the through business alone, or it may extend to transportation over any and every portion of the route. . . I am of opinion that the grant of exclusive privileges made by the legislature to the the complainants operates to protect only the through business from city to city against competition. Del. & Rar. Can. Co., etc., *v.* Rar., etc., Co., 16 N. J. Eq. 321, 368.

Between Two Rivers.—The territory lying *between two rivers* is the whole country from their sources to their mouths; and if no fork of either of them has acquired the name, in exclusion of another, the main branch to its source must be considered as the true river. Doddridge *v.* Thompson, 9 Wheat. (U. S.) 473.

Between Points within the State.— A statement of gross earnings made by the use of cars "between points within the State" means a statement only of earnings derived from the use of the cars

BEVERAGE.—Sales of liquor to be used as a "beverage" signify sales of liquor to be drunk for the pleasure of drinking, as distinguished from sales of liquor to be drunk in obedience to doctor's advice.[1]

BEYOND THE SEAS.—In *England*, before the union, the meaning of this expression was, "out of the realm of England." Since the union Ireland was held to be "beyond seas" within the meaning of the Statute of Limitations of 21 Jac. I. ch. 16.[2] But now by stat. 3 & 4 William IV. c. 27, no part of the United Kingdom of Great Britain and Ireland, nor the Isle of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of Her Majesty), are to be regarded as "beyond the seas."

The words generally occur in this country in the provisos of Statutes of Limitations. They have been variously interpreted in the different States. They have been decided to mean "without the limits of the jurisdiction of the State in which the statute was enacted" in *New Hampshire*,[3] *Maryland*,[4] *South Carolina*,[5] *Georgia*,[6] *Indiana*,[7] *Ohio*,[8] *Alabama*,[9] *Arkansas*,[10] and in the Supreme Court of the United States.[11] On the other hand, they

in transporting passengers who both get on and off at points within the State. "The words 'between points within the State' are not apt words to describe the crossing of the State from an adjoining State on one side into an adjoining State on another side; nor does it aptly describe the act of going from a point within the State to a point outside thereof, nor from a point outside to a point within the State." State *v.* Pullman's Palace Car Co., 64 Wis. 99.

An Account Between Two Persons.—A plea stating that an "account in writing was made out and stated between this defendant and A" does not allege that A was present when the account was made out and stated, or that he ever saw or examined it, or, in short, that A and the defendant "made up, stated, and settled an account in writing." Meeker *v.* Marsh, 1 Saxt. Ch. (N. J.) 203.

1. Com. *v.* Mandeville, 7 East. Rep. (Mass.) 383.
2. Lane *v.* Bennett, 1 M. & W. 70.
3. Galusha *v.* Cobleigh, 13 N. H. 86.
4. Pancoast *v.* Addison, 1 Harr. & J. (Md.) 353.
5. Forbes *v.* Foot, 2 McCord (S. C.), 333: s. c., 13 Am. Dec. 732.
6. Denham *v.* Holeman, 26 Ga. 182.
7. Stephenson *v.* Doe, 8 Blackf. (Ind.) 515.
8. Richardson's Admrs. *v.* Richardson's Admrs., 6 Ohio, 126; West *v.* Hymer, 7 Ohio, pt. ii. 235; Smith *v.* Bartram, 11 Ohio St. 691.
9. Thomason *v.* Odum, 23 Ala. 486.
10. Wakefield *v.* Smart, 8 Ark. 489, in which the expression was held to apply to "persons beyond the jurisdiction of the State, as well as to foreigners who have never come within the jurisdiction, as to our own citizens who may be absent, and against whom the statute never commenced running."
11. Bank of Alexandria *v.* Dyer, 14 Pet. (U. S.) 145, in construing the Maryland statute; Piatt *v.* Vattier, 1 McLean (U. S.), 157, on the Ohio statute; Faw *v.* Roberdeau's Exr., 3 Cranch (U. S.), 177; Murray *v.* Baker, 3 Wheat. (U. S.) 545, on the Georgia statute; Shelby *v.* Guy, 11 Wheat. (U. S.) 368, in which the court say: "It was this consideration, as well as the obvious absurdity of applying the terms 'beyond seas' in their literal signification, that induced this court, and has induced so many State courts, to give it the meaning of *beyond the commonwealth*."

In Davie *v.* Briggs, 97 U. S. 637, a case on the North Carolina statute, the court say, quoting 6 Pet. 291: "But suppose the same question should be brought before this court from a State where the construction of the same words had been long settled to mean literally 'beyond seas,' would not this court conform to it? The question was answered by saying that 'an adherence by the federal courts to the exposition of the local law, as given by the courts of the State, will greatly tend to preserve harmony in the

have been held to mean "without the limits of the United States" in *North Carolina*,[1] *Illinois*,[2] *Missouri*,[3] and *Pennsylvania*,[4] and as to the Supreme Court of the United States, see note 11, p. 189, and note 1, *infra*.

BIAS. (See also JURY AND JURY TRIALS; WITNESS.)—A state of mind in either a juryman or a witness which in the one case disqualifies him to act as a juror, and in the other tends to discredit the evidence he has given.[5]

exercise of the judicial power in the State and federal tribunals.' The decision in this case was founded, in fact, on such an interpretation, following the North Carolina cases."

1. State *v.* Harris, 71 N. Car. 176. And see Davie *v.* Briggs, 97 U. S. 637, and n. 11, p. 189.

2. Mason *v.* Johnson, 24 Ill. 159, a decision on the Statute of Wills limiting the time within which claims could be presented against the estates of deceased persons.

3 Fackler *v.* Fackler, 14 Mo. 433. "The term or the words 'beyond seas' in that statute, to our minds, clearly mean 'without the United States.'" See also Keeton's Heirs *v.* Keeton's Admr., 20 Mo. 543. "It is now settled that the term *beyond seas* in the act of 1825 does not mean out of the limits of the State; consequently if a person is absent from this State in one of the United States he is not within the exception of the statute."

4. Ward *v.* Hallam, 2 Dall. (Pa.) 217; s. c., 1 Yeates (Pa.), 331; Thurston *v.* Fisher, 9 S. & R. (Pa.) 291; Gonder *v.* Estabrook, 9 Cas. (Pa.) 375, in which it is said: "This phrase has the same meaning in both acts. With us it has always been understood to mean outside of the United States."

A person in Alexandria County, D. C., is not "beyond seas" in regard to persons residing in Washington County. Suckley *v.* Slade, 5 Cranch C. C. (U. S.) 617.

But the State of Delaware is "beyond seas." Ferris, etc., *v.* Williams, 1 Cranch C. C. (U. S.) 475.

Beyond Sea, without any of the United States, is not applicable to a citizen of another State who has never been in this commonwealth. Whitney *v.* Goddard, 20 Pick. (Mass.) 304. See also 6 Wheel. Am. C. L. 496, and Bishop on Stat. Cr. §. 261 b.

Beyond the Cape of Good Hope.—These terms, in an act regulating duties on imports, are employed as descriptive of the locality of certain countries, not their relative position with respect to ports of import. They are equivalent to "east of the cape," and indicate the locality of certain countries with reference to the position of the law-makers at the national capital. Hadden *v.* Collector, 5 Wall. (U. S.) 113.

Beyond the Life of the Offender, as the limitation of the period of forfeiture, means that the proceedings for condemnation and sale shall not affect the ownership of the property after the termination of the offender's natural life. Wallach *v.* Van Riswick, 92 U. S. 209.

5. In Willis *v.* State, 12 Ga. 444, the court, Nisbet, J., says: "A disqualifying prejudice, then, is a judgment or opinion as to the guilt or innocence of a criminal of the crime with which he is charged, no matter how attained. It ought to be a fixed opinion—a present conviction of the mind,—not an indistinct floating impression. *Bias* is not synonymous with *prejudice;* and by the use of this word, the legislature intended to describe another and somewhat different ground of disqualification. A man cannot be prejudiced against another without being biased against him; but he may be biased without being predjudiced. I find no definition of *bias* more satisfactory than the following, by Bouvier: 'A particular influential power which sways the judgment; the inclination of the mind towards a particular object.' It is not to be supposed that the legislature expected to secure in the juror a state of mind absolutely free from all inclination to one side or the other. This would be expecting what in many instances could not be attained. But they did intend to exclude from the jury box every man who could not bring to the hearing of the case a mind fully open to any conviction which evidence might produce; a moral and intellectual capacity to decide according to the evidence delivered upon oath. I cannot say that such capacity may not exist when there is some leaning, before the evidence is heard, to the one side or the other. Practical tests were what it was the purpose of the legislature to apply. And they have declared, according to the views

BICYCLE. (See also CARRIAGE.)—A two-wheeled velocipede, the fore and hind wheels of which are in a line with each other. The fore wheel is driven and made to revolve by the pressure of the foot upon a treadle attached to the axle.[1]

BID—BIDDER—BIDDING. See AUCTIONS; CONTRACTS.

BIENNIAL—BIENNIALLY.—Biannually, or every two years.[2]

BIG.—Great; large in bulk.[3]

thus given of *bias* and *prejudice*, that if a juror has formed a judgment for or against the prisoner before the evidence is heard on the trial, and entertains that judgment at the trial, he shall not try his cause; and further, that if he is under such an influence as so sways his mind to the one side or the other as to prevent his deciding the cause according to the evidence, then, also, he is incompetent." On this subject generally, see Bishop's Crim. Procedure, vol. i. §§ 901–919.

On the interest of a witness as affecting his credibility, see Wharton on Evid. § 408.

1. Cook on Highways, cited in 24 Alb. L. J. 282, says: "The use of the *bicycle* as a means of travel is so recent that in this State (N. Y.) there is as yet no adjudication as to the rights of travellers employing it upon the highway. In England it has been held that one riding a bicycle on the highway at such a pace as to be dangerous to passers-by may be convicted of furiously driving a 'carriage,' under a statute forbidding such an act. Taylor *v.* Goodwin, L. R. 4 Q. B. Div. 228. The right to use a bicycle in a proper manner upon the highway was not questioned in the case, and the court by its decision indirectly admits such right. In the absence of any legislative enactment forbidding them, riders of bicycles would seem to have the same right upon highways as those using any other vehicles; and the validity of any municipal ordinance prohibiting the use of bicycle in those parts of the public streets where carriages may go would be very doubtful."

The decision in Taylor *v.* Goodwin, L. R. 4 Q. B. Div. 228, was put on the fact that a bicycle was a carriage within the mischief of the act 5 and 6 Will. IV. c. 50, viz., to prevent people being hurt by furious driving of vehicles. But where one was riding a bicycle through a toll-gate and toll was demanded of him, and, on his refusal to pay, the bicycle was detained until the toll was paid, it was held that a bicycle was not a carriage within the act which gave a right to levy "for every carriage, of whatever description and for whatever purpose, which shall be drawn or impelled or set or kept in motion by steam or by any other power or agency than being drawn by any horse or horses, or other beast or beasts of draught, any sum not exceeding 5*s*." Williams *v.* Ellis, L. R. 5 Q. B. Div. 175; s. c., 42 Law Times Rep. 249.

2. Where a statute provided (Gen. Stat. 1865, p. 109) that an officer appointed "shall serve as such until the next *biennial* appointment of officers of registration," the court, Wagner, J., said: "The law seems very clear, and there is no room left for construction. The word *biennial* is derived from the Latin words *bis*, twice, and *annus*, year, meaning the happening or taking place of anything once in two years." State *ex rel.* Shields *v.* Smith, 42 Mo. 506.

"Biennially does not, in its ordinary and proper use, signify duration of time, but defines a period for the happening of some event." Bockes, J., in People *v.* Tremain, 9 Hun (N. Y.), 573. See People *v.* Kilbourn, 68 N. Y. 479.

3. In an action of slander, the words "all W.'s girls are *big*," without a *colloquium* by which any other than the ordinary meaning can be given to them, will not warrant an *innuendo* that *big* means big with child. Watts *v.* Greenlee, 2 Dev. Law. (N. Car.) 115.

Big with Child.—In the criminal law, apart from any statute, there is a difference between a woman being *big with child*, or pregnant, and being *quick with child*, and it is not a punishable offence at common law to perform an operation upon a pregnant woman with her consent for the purpose of procuring an abortion, and thereby to effect such purpose, unless the woman be quick with child. Com. *v.* Parker, 9 Metc. (Mass.) 263.

But the distinction between a woman being *pregnant* or *big with child* and being *quick with child* is applicable mainly, if not exclusively, to criminal cases, and does not apply to cases of descents, devises, and other gifts. **Hall *v.* Hancock, 15 Pick. (Mass.) 255; s. c., 26 Am. Dec. 598.**

BIGAMY—POLYGAMY.

1. **Definition.**—Bigamy consists in going through the ceremony of marriage with another while a former husband or wife is still alive and not divorced, knowing at the time, or reasonably believing, that such former consort is still alive.[1]

2. **Accessories.**—Accessories who aid and abet the commission of bigamy are guilty as principals.[2]

3. **Marriage in Another State.**—A marriage sufficient in form to be valid under the laws of the State where the offence is prosecuted, though celebrated in another State, will be presumed to be sufficient under the laws of that State when there is no evidence to the contrary.[3]

1. Brown's Law Dict.

The offence of having a plurality of wives at the same time is more correctly denominated polygamy. Originally this offence was considered as of ecclesiastical cognizance only; and though the 4 Edw. I. stat. 3, c. 5, treated it as a capital crime, it appears still to have been left of doubtful temporal cognizance, until the 1 Jac. I. c. 11 declared that such offence should be felony. 1 Russell on Crimes (9th Am. Ed.) 268.

Bigamy, in its proper signification, is said to mean only being twice married, and not having a plurality of wives at once. According to the canonists, bigamy consisted in marrying two virgins successively, one after the death of the other; or in once marrying a widow. 4 Black Com. 163, note b.

The expression "being married" means being legally married. The word "marries" means, goes through a form of marriage which the law of the place where such form is used recognizes as binding, whether the parties are by that law competent to contract marriage or not, and although by their fraud the form employed may, apart from the bigamy, have been insufficient to constitute a binding marriage

Illustrations.—A marries B, a person within the prohibited degrees of affinity, and during B's lifetime marries C. A has not committed bigamy.

A marries B, and during B's lifetime goes through a form of marriage with C, a person within the prohibited degrees of affinity. A has committed bigamy.

A marries B in Ireland, and during B's lifetime goes through a form of marriage with C in Ireland, which is invalid because both A and C are Protestants, and the marriage is performed by a Roman Catholic priest. A commits bigamy.

A, married to B, marries C in B's lifetime by banns; B (the woman) being married, for purposes of concealment, under a false name. A has committed bigamy.

A, married to B, marries C in B's lifetime, in the colony of Victoria. In order to show that A committed bigamy, it must be proved that the form by which he was married was one recognized as a regular form of marriage by the law in force in Victoria. Stephen's Dig. Cr. L. (Am. Ed.) 193. 194.

The offence is complete although there be immediate separation, without cohabitation at all. Gise *v.* Commonwealth, 81 Pa. St. 428; State *v.* Patterson, 2 Ired. (N. Car.) 346.

If a plea in abatement would be admissible at any time, in a proceeding in bastardy, it is not admissible after the defendant has recognized to appear in the circuit court and answer to the complaint. People *v.* Smith, 8 Westn. Repr. (Mich.) 99.

Advice of counsel that there is no impediment to a second marriage is no defence. People *v.* Weed, 29 Hun (N. Y.), 628. State *v.* Hughes, 58 Iowa, 165.

It is no defense that the defendant's religion authorized polygamous marriage. Reynolds *v.* U. S., 98 U. S. 145; Miles *v.* U. S., 103 U. S. 104.

The offence of cohabitating with more than one woman, created by § 3 of the act of Congress of March 22, 1882, c. 47, 22 Stat. 31, is a continuous offence, and not one consisting of an isolated act. *In re* Snow, 120 U. S. 274.

2. Boggus *v.* State, 34 Ga. 275.

3. State *v.* Nadal, 29 N. Westn. Repr.

4. Void Marriages.—If the former marriage is void, then a subsequent marriage by one of the parties to a third person is not bigamous.[1] Though a second marriage may be void, yet the offence is complete.[2]

5. Marriage after Divorce.—Where the statute prohibits one who has been divorced from marrying again "until the death of the complainant," and also declares that "every person having a husband or wife living" who shall marry again shall, except in specified cases, be adjudged guilty of bigamy, a person against whom a divorce has been obtained is regarded as having a husband or wife living, so long as the party obtaining the divorce lives. A person, therefore, so divorced who marries again, within the State, in violation of said prohibitory provision, is guilty of the crime of bigamy.[3]

(Iowa) 451. See State *v.* Sloan, 55 Iowa, 217.

1. Halbrook *v.* State, 34 Ark. 511; s. c., 36 Am. Rep. 17; State *v.* Goodrich, 14 W. Va. 834; People *v.* Chase, 27 Hun (N. Y.), 256; Shafher *v.* State, 20 Ohio, 1; Breakey *v.* Breakey, 2 Up. Can. Q. B. 353.

Where a marriage is voidable on account of the parties not being of legal age, and such marriage is not confirmed by the parties after arriving at the legal age, a subsequent marriage by either party is not bigamous. Shafher *v.* State, 20 Ohio, 1. See Begg *v.* State, 55 Ala. 108; Cooley *v.* State, 55 Ala. 162; People *v.* Slack, 15 Mich. 193; Lewis *v.* People, 37 Mich. 518; R. *v.* Gordon, Russ. & R. 48.

Where A married B, and afterward during B's life marries C, and still afterward, when B is divorced, but during C's life, marries D, the last marriage is not bigamous, because the second was void. Halbrook *v.* State, 34 Ark. 511; s. c., 36 Am. Rep. 17; State *v.* Goodrich, 14 W. Va. 834.

If an unmarried man attempt, by one ceremony, to become the husband of two women, he becomes the husband of neither, and a woman married by him subsequently becomes his lawful wife, the same as if the first ceremony had never taken place. U. S. *v.* Snow (Utah), 9 Pac. Repr. 501; s. c., 120 U. S. 274.

Positive evidence of non-assent to a marriage ceremony that had been irregularly performed weighs against the presumption of its validity. Kope *v.* People, 43 Mich. 41.

The former marriage must be void, and not merely voidable. State *v.* Barefoot, 2 Rich. (S. Car.) 209; R. *v.* Jacobs, 1 Moody C. C. 140.

A civil marriage performed under a license irregularly issued, and under such circumstances that all concerned must be presumed to know that it gave no authority, cannot furnish ground for a prosecution for bigamy if not based on the voluntary consent of both parties, or followed by cohabitation or some recognition of a marriage entered into in good faith. Kope *v.* People, 43 Mich. 41.

2. People *v.* Brown, 34 Mich. 339; s. c., 1 Am. Cr. Rep. 72. *Compare* R. *v.* Fanning, 10 Cox C. C. 411.

It is no defence that the second marriage was between persons forbidden by statute to intermarry, as between a negro and a white woman. People *v.* Brown, 34 Mich. 339; s. c., 22 Am. Rep. 531. See R. *v.* Brown, 1 C. & K. 144; R. *v.* Penson, 5 C. & P. 412. *Compare* R. *v.* Fanning, 10 Cox C. C. 411.

In R. *v.* Brown, 1 C. & K. 144, the court said: "It is the appearing to contract a second marriage, and the going through the ceremony, which constitutes the crime of bigamy; otherwise it never could exist in ordinary cases, as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the lifetime of the other."

Bigamy is committed in marrying a woman under an assumed name, though by law such a marriage between persons capable of contracting would be void. R. *v.* Penson, 5 C. & P. 412.

Even if a marriage between persons of color in December, 1865, was illegal, which is by no means apparent, yet, if they were living together as man and wife at the date of the act of 1866, the marriage relation was thereby established, and bigamy could be predicated thereon. Kirk *v.* State, 65 Ga. 159.

3. People *v.* Faber, 92 N. Y. 146; s. c., 44 Am. Rep. 357.

6. Marriage after Supposed Death of Legal Wife.—One who remarries, not having a reasonable belief of his first wife's death, or if he honestly believes her to be dead, the statutory time not having elapsed, is guilty of bigamy, without other proof of intent.[1] (See ABSENCE, vol. 1, p. 38, note.)

Marriage in another State.—The wife of M, a resident of New York, procured a divorce from him on account of his adultery; the judgment forbade him from marrying again. He thereafter went into the State of New Jersey, and there married during the life of his first wife, returning with his second wife to New York and continuing to reside there. The statute law of New Jersey declares that "all marriages, where either of the parties shall have a former husband or wife living at the time of such marriage, shall be invalid, . . . and the issue thereof shall be illegitimate." In an action to test the right of plaintiff, a son born of the second marriage, to inherit, as the lawful heir of M., *held*, that at the time of the second marriage the latter had no former wife living within the meaning of said statute; that the laws of New York and the provision of the judgment prohibiting marriage had no effect, and M. had a right to marry in another State whose laws did not prohibit a second marriage by one divorced; and that plaintiff was legitimate and so entitled to inherit. Also *held*, that as there were statutory provisions on the subject, there was no presumption that the rule of the common law still existed in New Jersey; that the statute superseded and took the place of such rule. After the dissolution of the first marriage M. and his first wife were again married, but in an action brought by her it was adjudged that the second marriage was prohibited by the statutes of New York, and was void; after the entry of this judgment the marriage in New Jersey took place. It was urged here that such remarriage was valid. *Held*, that the judgment not having been reversed, and having been made by a competent court having jurisdiction of the parties and subject-matter, was conclusive. Moore *v.* Hegeman, 92 N. Y. 521; s. c., 44 Am. Rep. 408; Van Voorhis *v.* Brintnall, 86 N. Y. 18; s. c., 40 Am. Rep. 505; Thorp *v.* Thorp, 90 N. Y. 602; State *v.* Weatherby, 43 Me. 258; Putnam *v.* Putnam, 8 Pick. (Mass.) 433; Com. *v.* Lane, 113 Mass. 458; Reed *v.* Hudson, 13 Ala. 570; Dickson *v.* Dickson, 1 Yerg. (Tenn.) 110.

Under a statute which provides that a divorced person "who is the guilty cause of such divorce" shall be deemed guilty of bigamy if he marries again during the lifetime of his divorced wife, such a one cannot be convicted of bigamy under an indictment which merely charges bigamy in the ordinary manner. In such a case the indictment must allege the divorce, and that the defendant was the guilty cause thereof. Com. *v.* Richardson, 126 Mass. 34; s. c., 2 Am. Cr. Rep. 612.

If the defendant relies upon a divorce as a justification of a second marriage, it is incumbent on him to prove it. Com. *v.* Boyer, 7 Allen (Mass.), 306.

An honest belief that there has been a valid divorce is no defence. Davis *v.* Commonwealth, 13 Bush (Ky.), 318; s. c., 2 Am. Cr. Rep. 163; State *v.* Whitcomb, 52 Iowa, 85; State *v.* Goodenow, 65 Me. 30; Hood *v.* State, 56 Ind. 263; s. c., 2 Am. Cr. Rep. 165; Com. *v.* Mash, 7 Metc. (Mass.) 472; People *v.* Smith, 20 Hun (N. Y.), 414. See People *v.* Dawell, 25 Mich. 247. *Compare* Squire *v.* State, 46 Ind. 459.

1. Dotson *v.* State, 62 Ala. 141; s. c., 34 Am. Rep. 2; Valleau *v.* Valleau, 6 Paige (N. Y.), 207; Kenley *v.* Kenley, 2 Yeates (Pa.), 207; People *v.* Feilen, 58 Cal. 218; s. c., 41 Am. Rep. 258; Com. *v.* Mash, 7 Metc. (Mass.) 472; Davis *v.* Commonwealth, 13 Bush (Ky.), 318; s. c., 2 Am. Cr. Rep. 163. *Compare* Yates *v.* Houston, 3 Tex. 433; Squire *v.* State, 46 Ind. 459.

An honest belief that a husband who has been absent less than the statutory period is no defence. Com. *v.* Mash, 7 Metc. (Mass.) 472; in this case sentence was suspended and the party was subsequently pardoned); Jones *v.* State, 67 Ala. 84.

It is necessary to show that the first wife is alive at the time of the second marriage. Although a statute sanctions a presumption that a person who has not been heard of during seven years is dead, yet there is no presumption of *law* that when a person has been seen within seven years he is alive, and he must be shown to be alive as a matter of *fact* from the circumstance of the case. R. *v.* Lumley, L. R. 1 C. C. R. 196; 38 L. J. M. C. 86. See Phené's Trust., L. R. 5 Ch. 150.

The prisoner was indicted for bigamy in 1880. It was proved that he was mar-

ried to Charlotte Lavers in 1879, and that his wife was alive. It was held that this must be presumed (or rather should be inferred by the jury) to be a good marriage. But the prisoner showed that in 1864 he had married Ellen Earle, and that at all events in 1868 she was alive. Therefore there were two conflicting inferences: 1st. That the marriage in 1879 was a good one; 2d. That it was not a good marriage, as Ellen Earle might be presumed to have been still alive. It was held to be a question for the jury which inference should have the greater weight. Reg. *v.* Willshire, 6 Q. B. D. 366; 50 L. J. M. C. 57.

Proof after Statutory Absence.—Where the wife is proved to have been continually absent for the statutory period it is for the prosecution to show not only that the wife is alive, but that the prisoner knew it at the time he contracted the second marriage. Johnson *v.* Johnson, 114 Ill. 611; Gibson *v.* State, 38 Miss. 313; R. *v.* Curgerwen, L. R. 1 C. C. R. 1; 35 L. J. M. C. 58; R. *v.* Jones, 11 Cox C. C. R. 358. But the law laid down in R. *v.* Curgerwen does not apply in the absence of evidence that the parties were continually absent. R. *v.* Jones, 11 Q. B. D. 118; 52 L. J. M. C. 96.

In an action by one town against another for the support of a female pauper, the agreed facts on which the case was submitted stated that the pauper contracted a valid marriage with a person in a town in another State, where they both resided, and they lived there as husband and wife for three years, when he left his home and family, and had not been heard from by her since; that, in the next month after he left her, she removed to the defendant town, where, five years and eight months afterwards, she married a person who had a legal settlement therein, and they lived together as husband and wife in the plaintiff town, where he soon after deserted her and removed out of the commonwealth. *Held*, that the agreed facts did not warrant a finding that the pauper's first husband was dead when she contracted her second marriage. Hyde Park *v.* Canton, 130 Mass. 505. In this case the court said: "If a man leaves his home and goes into parts unknown, and remains unheard from for the space of seven years, the law authorizes, to those that remain, the presumption of fact that he is dead; but it does not authorize him to presume therefore that any one of those remaining in the place which he left has died. This is well illustrated in the case of Commonwealth *v.* Thompson, which was before this court twice, 6 Allen, 591, and 11 Allen, 23. In 6 Allen, 591, it appeared that, under the instructions of the judge of the Superior Court, the defendant had been convicted of adultery by reason of his cohabitation, under the forms of marriage, with one whom, in good faith, he supposed to be a widow, whose husband had absented himself from her and had been in parts unknown, and had not been heard from for more than seven years. The court held such conviction erroneous, and ordered a new trial. Upon the second trial of the case it appeared, not that the husband had deserted the wife for the space of seven years, but that the husband 'was of dissipated habits and neglected to provide for her, in consequence of which she left him and lived in various places until her marriage with the defendant; that before her second marriage she read in a newspaper of the killing of William B. Carlton' (her husband's name) 'in a drunken row in Billerica in this commonwealth, and believed it to be her husband; that she had no knowledge that he was alive, and had not seen or heard from him for more than eleven years.' The Chief Justice of the Superior Court instructed the jury 'that when a wife departs from her husband and remains absent and distant from him, as in the present case, without knowledge or inquiry respecting him, no presumption of his death arises from the fact that she had not heard from him for seven years;' and this ruling was approved by this court. These decisions are both based upon well-recognized principles."

Mr. Roscoe says (Ros. Cr. Ev. (10th Ed.) 34: "The prisoner may prove that the other party to the first marriage has been continually absent from home for the space of seven years last past, and was not known to be living within that time. The question whether a prisoner setting up this defence ought to show that he has used reasonable diligence to inform himself as to the other party being alive, and whether, if he neglects the palpable means of availing himself of such information, he will stand excused, was, until lately, an undecided point. See R. *v.* Cullen, 9 C. & P. 681; R. *v.* Jones, Carr. & M. 614; R. *v.* Briggs, Dears. & B. C. C. 98. But where the wife was absent for seven years, it was decided that the burden of proving that the prisoner did know that his wife was alive within the seven years is on the prosecution, and that in the absence of evidence to that effect he must be acquitted. R. *v.* Curgerwen, L. R. 1 C. C. R. 1. The mere fact that there are no circumstances lead-

7. Evidence.—The first marriage may be proved by the admissions of the defendant,[1] or by his admissions, together with evidence of

ing to the inference that the absent party has died does not raise a presumption of law that such party is alive. The prosecution must satisfy the jury that as a matter of fact such party is alive, and it is a question entirely for them. Where the only evidence is that the party was alive more than seven years ago, then there is no question for the jury, and it is a presumption of law that he is dead. R. *v.* Lumley, L. R. 1 C. C. R. 196; 38 L. J. M. C. 86. It is submitted that it is good defence that the prisoner at the time of the second marriage honestly and *bona fide* believed that his first wife was dead, and had reasonable grounds for so believing. Per Cleasby, B., in R. *v.* Hoxton, 11 Cox C. C. 670, following Martin, B., in R. *v.* Turner, 9 Cox C. C. 145; but although these two decisions were cited, Brett, J., after consulting Willes, decided the contrary in R. *v.* Gibbons, 12 Cox C. C. 237; and see R. *v.* Jones, 11 Cox C. C. R. 358. In the case of R. *v.* Moore, reported in 13 Cox C. C. 544, tried at Lincoln before Mr. Justice Denman, the learned judge, after taking time to consider the above authorities, and after consulting Amphlett, J. A., said that if he had intended to inflict any punishment he should reserve a case; and that he and his brother judge were of opinion that a reasonable belief was a good defence. In this case evidence was given of a letter having been received announcing the death of the prisoner's first husband. In a still more recent case (Reg. *v.* Bennett, 14 Cox C.C. 45) Bramwell, L. J., ruled the other way; but it should be noticed the case Reg. *v.* Moore, 13 Cox C.C. 544, was not cited, and the prisoner was also found guilty of forgery and false pretences, so that no doubt his belief on the subject of his first wife's death did not appear to be very material. It is immaterial for how long or how short a time the first wife has been absent, except in so far as length of absence may tend to show the reasonablesness of the belief. It is remarkable that in the elaborate judgment of Brett, J. A., in R. *v.* Prince, L. R. 2 C. C. 154, in which he maintained the doctrine *actus non facit reum nisi mens sit rea*, that learned judge does not allude to his reported ruling in R. *v.* Gibbons, 12 Cox C.C. 237. The doctrine would seem to be even more applicable in the latter case, because the act of marriage is in itself innocent, but in abduction the act itself is wrong. It has been suggested, however, that in R. *v.* Gibbons it was not clearly shown that the prisoner reasonably believed in the death, but it seems she was simply ignorant on the subject. See Stephen's Dig. of Crim. Law, p. 21."

The only evidence to show the life of the first wife was testimony showing that she was alive about three years prior to the second marriage. *Held*, to be insufficient to sustain a verdict of guilty. People *v.* Feilen, 58 Cal. 218; s. c., 41 Am. Rep. 258.

The statute does not render legal a marriage contracted after the statutory period of absence; it merely purges the felony. Fenton *v.* Reed, 4 Johns. (N. Y.) 52; Williamson *v.* Parisien, 1 Johns. Ch. (N. Y.) 389; Glass *v.* Glass, 114 Mass. 563.

Where the evidence as to the first wife showed only that she was alive three years before the second marriage, *held*, that there could be no conviction. People *v.* Feilen, 58 Cal. 218; s. c., 41 Am. Rep. 258.

An absence of either husband or wife for the statutory period, the party absent not being heard from, will exonerate the party remaining if he or she marries again. The period is limited to two years in *Pennsylvania;* to five years in *Alabama*, *Arkansas*, *California*, *Georgia*, *Illinois*, *Louisiana*, *Michigan*, *Mississippi*, *New Jersey*, *New York*, *Ohio*, *Texas;* to seven years in *Maine*, *Maryland*, *Massachusetts*, *Minnesota*, *North Carolina*, *Vermont*, *Virginia*, *Wisconsin*, and *England*. See R. *v.* Jones, 1 C. & M. 614; Barber *v.* State, 50 Md. 161; Gise *v.* Commonwealth, 81 Pa. St. 428; Jones *v.* State, 67 Ala. 84; Com. *v.* Mash, 7 Metc. (Mass.) 472.

Divorce Decree as Evidence of Life of Divorced Party.—In a prosecution for bigamy, a decree divorcing from the accused his former wife, rendered after the alleged bigamous marriage, and awarding to her the custody of their infant child, is *prima-facie* evidence that she was living at the time of the bigamous marriage. State *v.* Ashley, 37 Ark. 403.

1. Squire *v.* State, 46 Ind. 459; State *v.* Seals, 16 Ind. 352; Stanglein *v.* State, 17 Ohio St. 453; Wolverton *v.* State, 16 Ohio, 173; O'Neal *v.* Com., 17 Gratt. (Va.) 582; Warner *v.* Com., 2 Va. Cas. 95; State *v.* Britton, 4 McC. (S. Car.) 256; State *v.* Hilton, 3 Rich. (S. Car.) 434; Finney *v.* State, 3 Head (Tenn.), 544; Arnold *v.* State, 53 Ga. 574; Cook *v.* State, 11 Ga. 53; Brown *v.* State. 52 Ga. 574; Langtry *v.* State, 30 Ala. 536: Williams *v.* State.

cohabitation.[1] A certificate of marriage is competent evidence, although it does not show on its face that the person whose name is subscribed thereto was a person authorized to celebrate marriage.[2] It must be shown that the first marriage was valid by the law of the place where it was contracted.[3] If the first marriage was in a foreign country, it may be proved by a properly authen-

44 Ala. 24; Cameron *v.* State, 14 Ala. 546; State *v.* Abbey, 29 Vt. 60; Cayford's Case, 7 Me. 57; Ham's Case, 2 Fairf. (Me.) 391; State *v.* Hodgskins, 19 Me. 155; State *v.* Libby, 44 Me. 469; Forney *v.* Hallacher, 8 S. & R. (Pa.) 159; Com. *v.* Murtagh, 1 Ashm. (Pa.) 272; Com. *v.* Henning, 10 Phila. (Pa.) 209; Com *v.* Jackson, 11 Bush (Ky.), 679; s. c., 21 Am. Rep. 225; State *v.* McDonald, 25 Mo. 176; State *v.* Nadal, 28 N. W. Repr. (Iowa) 451; Arnold *v.* State, 53 Ga. 574; Miles *v.* U. S., 103 U. S. 304. *Compare* Clayton *v.* Wardell, 4 N. Y. 230; People *v.* Humphrey, 7 Johns. (N. Y.) 314; State *v.* Roswell, 6 Conn. 446; Com. *v.* Littlejohn. 15 Mass. 163; Tucker *v.* People, 117 Ill. 88.

The date of the lawful marriage is immaterial and need not be stated in the indictment. State *v.* Hughes, 58 Iowa, 165.

Identity.—Where the first wife was known by two names, the question to be considered by the jury is the identity of the woman, and not her name, and it is proper for the court to so instruct the jury. Taylor *v.* State, 52 Miss. 84; s. c., 2 Am. Cr. Rep. 13.

1. State *v.* Gonce, 79 Mo. 600; Cameron *v.* State, 14 Ala. 546; Langtry *v.* State, 30 Ala. 536; Williams *v.* State, 54 Ala. 131; s. c., 25 Am. Rep. 665; Squire *v.* State, 46 Ind. 459; State *v.* Seals, 16 Ind. 352; Wolverton *v.* State, 16 Ohio, 173; Carmichael *v.* State, 12 Ohio St. 553; Stanglein *v.* State, 17 Ohio St. 453; Halbrook *v.* State, 34 Ark. 511; s. c., 36 Am. Rep. 17; Com. *v.* Murtagh, 1 Ashm. (Pa.) 272; Forney *v.* Hallacher, 8 S. & R. (Pa.) 159; Com. *v.* Henning, 10 Phila. (Pa.) 109; State *v.* Britton, 4 McC. (S. Car.) 256; State *v.* Hilton, 3 Rich. (S. Car.) 434; Warner *v.* Commonwealth, 2 Va. Cas. 95; O'Neale *v.* Commonwealth, 17 Gratt. (Va.) 582; Langtry *v.* State, 30 Ala. 536; Brown *v.* State, 52 Ala. 340; Williams *v.* State, 44 Ala. 24; Cook *v.* State, 11 Ga 53; Moore *v.* State, 7 Tex. App. 608; Steward *v.* State, 7 Tex. App. 326; Gorman *v.* State, 23 Tex. 646; Dumas *v.* State, 14 Tex. App. 464; s. c., 46 Am. Rep. 241; Jackson *v.* People, 3 Ill. 231; State *v.* Sanders, 30 Iowa, 582; West *v.* State, 1 Wis. 209; Finney *v.* State, 3 Head (Tenn.), 544; State *v.* Hughes, 35 Kan. 626; State *v.* Abbey, 29 Vt. 60; State *v.* Libby, 44 Me. 469; Com. *v.* Jackson, 11 Bush (Ky.), 679; s. c., 21 Am. Rep. 225; Robinson *v.* Commonwealth, 6 Bush (Ky.), 309; Case *v.* Case, 17 Cal. 598; Breakey *v.* Breakey, 3 Up. Can. Q. B. 165; R. *v.* Smith, 14 Up. Can. Q. B. 567; R. *v.* Creamer, 10 Low. Can. 404. *Compare* State *v.* Roswell, 6 Conn. 446; Gahagan *v.* People, 1 Park. Cr. (N. Y.) 378; People *v.* Humphrey, 7 Johns. (N. Y.) 314; Clayton *v.* Wardell, 4 N. Y. 230; Hayes *v.* People, 25 N. Y. 390; State *v.* Johnson, 12 Minn. 476; People *v.* Lambert, 5 Mich. 349; Cayford's Case, 7 Me. 58; Com. *v.* Littlejohn, 15 Mass. 163.

To prove first marriage evidence was given that the defendant and the woman lived together and held themselves out to the world as man and wife for years; that they had a family of children living with them as their children; that she had signed and acknowledged deeds as his wife; and that after the bigamous marriage she had sued for a divorce, he had answered, and the court had granted her a divorce. *Held*, that this evidence was all competent. State *v.* Gonce, 79 Mo. 600.

A defendant cannot be convicted of bigamy where the only evidence of the first marriage is proof of the cohabitation of the parties as man and wife, and their statements that such marriage had taken place. People *v.* Lambert, 5 Mich. 349.

2. Moore's Case, 9 Leigh (Va.), 639. See Carmichael *v.* State, 12 Ohio St. 553; Robinson *v.* Commonwealth, 6 Bush (Ky.), 309; Taylor *v.* State, 52 Miss. 84; s. c., 2 Am. Cr. Rep. 13.

It is improper to charge the jury that "a marriage was good without any ceremony, and by mere consent of the parties, if the parties intended marriage, and that intent sufficiently appears." It is deficient in not adding that such consent and intent must be followed up by actual cohabitation thereunder as man and wife. Taylor *v.* State, 52 Miss. 84; s. c., 2 Am. Cr. Rep. 13. See Hayes *v.* People, 25 N. Y. 390.

3. Weinberg *v.* State, 25 Wis. 370; Bird *v.* Commonwealth, 21 Gratt. (Va.)

ticated copy of the foreign registry.[1] A decree of divorce, granted upon notice to the defendant, is evidence of the marriage.[2]

Evidence of the unchaste character of the complaining witness, with whom the illegal marriage is alleged to have been contracted, is inadmissible to discredit her testimony.[3]

The legal wife is not a competent witness against the defendant.[4] The testimony of the woman with whom the illegal marriage is alleged to have been contracted, corroborated by proof of cohabitation, raises a presumption of the marriage.[5] Where the marriage is complete, proof of cohabitation is unnecessary.[6]

8. Jurisdiction.—The offence must be prosecuted in the county of the second marriage or cohabitation;[7] but by statute the

800. *Compare* State *v.* Hughes, 58 Iowa, 165.

1. Squire *v.* State, 46 Ind. 459; State *v.* Dooris, 40 Conn. 145; Bird *v.* Commonwealth, 21 Gratt. (Va.) 800; Stanglein *v.* State, 17 Ohio St. 453.

The marriage may be proved by persons who were present. Murphy *v.* State, 50 Ga. 150; Arnold *v.* State, 53 Ga. 574; Taylor *v.* State, 52 Miss. 84; s. c., 2 Am. Cr. Rep. 13; Warner *v.* Commonwealth, 2 Va. Cas. 95; Com. *v.* Putnam, 1 Pick. (Mass.) 136; State *v.* Clark, 54 N. H. 456; Wolverton *v.* State, 16 Ohio, 173; People *v.* Calder, 30 Mich. 85; State *v.* Williams, 20 Iowa, 98.

A transcript of the record or registry of a marriage in a foreign country, however well authenticated the same may otherwise be, is not competent *prima-facie* evidence of the marriage therein declared and recorded, without proof of the laws of such foreign country requiring that such record or registry be made and kept. Stanglein *v.* State, 17 Ohio St. 453.

A prior marriage in another State may be sufficiently proved by the defendant's admissions, without production of the record or other evidence, if the jury believed that the prisoner admitted the validity of such marriage. Williams *v.* State, 54 Ala. 131; s. c., 25 Am. Rep. 665.

On the trial of one for bigamy, the prosecution, to prove the second marriage in another State, offered in evidence a certificate of a clerk of the district court of such State that there was in his office a record of a marriage license and certificate of marriage, giving a copy thereof, to which was attached a certificate of the judge of the court that the clerk's attestation was in due form, which the court admitted, over the defendant's objection. *Held*, in the absence of proof that such entries were required to be kept by some law of the State from which they came, the certificate and exemplification were not admissible in evidence. Tucker *v.* People, 117 Ill. 88.

2. Halbrook *v.* State, 34 Ark. 511; s. c., 36 Am. Rep. 17; State *v.* Gonce, 79 Mo. 600.

Parol evidence is admissible to show that a paper offered as a certified copy of a decree is a forgery. State *v.* Gonce, 79 Mo. 600.

3. State *v.* Nadal, 29 N. Westn. Repr. (Iowa) 451.

4. Whart. Cr. Ev. (9th Ed.) § 397; Williams *v.* State, 44 Ala. 24; State *v.* McDavid, 15 La. Ann. 403; State *v.* Patterson, 2 Ired. L. (N. Car.) 346; Wilson *v.* Hill, 13 N. J. Eq. 143; R. *v.* Madden, 14 Up. Can. Q. B. 588; R. *v.* Tubbee, 1 Up. Can. P. R. 103. *Compare* State *v.* Sloan, 55 Iowa, 217; State *v.* Hughes, 58 Iowa, 165; Dumas *v.* State, 14 Tex. App. 464; s. c., 46 Am. Rep. 241.

5. State *v.* Nadal, 29 N. W. Repr. (Iowa), 451.

6. Gise *v.* Commonwealth, 81 Pa. St. 428; State *v.* Patterson, 2 Ired. (N. Car.) 346; Begg *v.* State, 55 Ala. 108.

In a prosecution for bigamy, it is not necessary to allege in the information or indictment the exact time and place of the first marriage. It is sufficient in that respect to allege and prove that the marriage relation existed between the accused and his first wife at the time of the second marriage. State *v.* Hughes, 35 Kan. 626.

7. Williams *v.* State, 44 Ala. 24; Brewer *v.* State, 59 Ala. 101.

An indictment for bigamy, when the unlawful marriage was contracted in Missouri, is cognizable only in the courts of the county where it was contracted, not where the parties may have afterward cohabited. State *v.* Fitzgerald, 75 Mo. 573.

Place where Void Marriage took Place.—An allegation in an indictment for bigamy which charges that a void marriage

offence may be prosecuted wherever the party was married the second time.[1]

Where the second marriage takes place in another State, the courts of the State where the first marriage was celebrated have not jurisdiction unless conferred by statute.[2]

BIJOU. See JEWELRY.

BILAN.—A term used in Louisiana, derived from the French. A book in which bankers, merchants, and traders write a statement of all they owe and all that is due them; a balance-sheet.[3]

BILATERAL. (See also CONTRACTS.)—A term used chiefly in the civil law to designate a contract in which both the contracting parties are bound to fulfil obligations reciprocally towards each other; a contract executory on both sides; as a contract of sale, where one becomes bound to deliver the thing sold, and the other to pay the price of it.[4]

BILL OF COSTS. See COSTS.

BILL OF CREDIT. See MONEY.

BILL OF DISCOVERY. (See also EQUITY; EVIDENCE; WITNESSES.)

1. Nature and Scope of.—*Discovery and Relief.*—A bill of discovery is a bill in equity, filed for the sole purpose of obtaining discovery to be used in another and independent judicial controversy.[5] It differs from a bill of relief in that it seeks no relief.[6]

was celebrated in a particular place in another State need not be proven as laid. State *v.* Nadal, 29 N. Westn. Repr. (Iowa) 451.

1. State *v.* Palmer, 18 Vt. 570; Com. *v.* Bradley, 2 Cush. (Mass.) 553; Collins *v.* People, 4 Thomp. & C. (N. Y.) 77; People *v.* Mosher, 2 Park. Cr. (N. Y.) 195; State *v.* Johnson, 12 Minn. 476. *Compare* Begg *v.* State, 55 Ala. 108; Scroggins *v.* State, 32 Ark 205; Walls *v.* State, 32 Ark. 565.

A person may be indicted for bigamy in the county where the unlawful marriage took place, or in a county where he cohabited under the marriage. State *v.* Hughes, 58 Iowa, 165.

It is not necessary that an information for bigamy should state at what place the defendant was first married. People *v.* Giesea, 61 Cal. 53.

2. State *v.* Barnett, 83 N. Car. 615; Begg *v.* State, 55 Ala. 108; Williams *v.* State, 44 Ala. 24; Walls *v.* State, 32 Ark. 565; Scroggins *v.* State, 32 Ark. 205.

3. Dauphin *v.* Soulie, 3 Mart. (La.) N. S. 446.

4. Abbott's Law. Dict., *sub voce.*

5. Hare on Discovery, p. 111; Story Eq. Jur. § 1483; 1 Pom. Eq. Jur. § 191.

6. 2 Dan. Ch. Pr. 1556; Bispham's Equity, § 557; 1 Pom. Eq. Jur. § 191.

In some States a court of equity, upon bill of discovery being filed in aid of a cause of action, purely legal in its nature, will assume jurisdiction over the

It consequently contains no prayer.[1] It may, however, pray an injunction of the trial of the cause until the discovery sought can be obtained and made available.[2] It may pray that the defendant may abide by such order as the court may enter.[3] But if it prays that the defendant may abide by such decree as the court may enter, it will be regarded throughout as a bill for relief, although in all other respects it is properly framed for a bill of discovery.[4]

cause of action for purposes of relief, as well as of discovery. Warner *v.* Daniels, 1 Wood & Min. (U. S. C. C.) 90, 111; Traip *v.* Gould, 15 Me. 82; Lyons *v.* Miller, 6 Gratt. (Va.) 427, 438; Sims *v* Augherty, 4 Strobh. Eq. (S. Car.) 102, 121; Holmes *v.* Holmes, 36 Vt. 525; Laight *v.* Morgan. 1 John. Cas. 429; Le Roy *v.* Veeder, 1 John. Cas. 417; Le Roy *v.* Servis, 2 Caines Cas. (N. Y.) 175; Livingston *v.* Livingston, 4 Johns. Ch. 294; Long *v.* Beard, 2 Murph. (N. Car.) 337.

This practice is clearly opposed to principle, and to the established English practice. Fry *v.* Penn, 2 Bro. C. C. 280; Price *v.* James, 2 Bro. C. C. 319; Collis *v.* Swayne, 4 Bro. C. Cas. 480; Hodgkin *v.* Longden, 8 Ves. 2; Mellish *v.* Richardson, 12 Price, 530; 1 Pom. Eq. Jur. § 143. Although it seems to have been in vogue in England at an early period. 1 Pom. Eq. Jur. § 192; 4 Coke Inst. 84, 85. Some American authority is also opposed to it. Peck *v.* Ashley, 12 Metc. 478; Mitchell *v.* Green, 10 Metc. 101.

It seems to have arisen from a misapplication of the maxim, that a court of equity, having assumed jurisdiction of a cause for one purpose, will retain jurisdiction to grant complete relief. 1 Story Eq. Jur. (13th Ed.) p. 78, note on Jurisdiction for Discovery.

As this practice would enable the transfer of all legal causes of action into equity, the following limitations have been imposed upon it. *First*, that the bill must contain an allegation, verified by affidavit, that the discovery sought is indispensable to the plaintiff in the bill in proving his case. Gelston *v.* Hoyt, 1 John. Ch. 543; Merchants' Bank *v.* Davis, 3 Kelly (Ga.), 112; Emerson *v.* Staton, 3 T. B. Mon. 116. 118; Bullock *v.* Boyd, 2 A. K. Marsh. 322; Stacy *v.* Pearson, 3 Rich. Eq. (S. Car.) 148, 152; Lyons *v.* Miller, 6 Gratt. 427, 438; Sims *v.* Augherty, 4 Strobh. Eq. 102, 121. This limitation, applied at first to all bills of discovery, has been abandoned as to those that do not seek to transfer a merely legal cause of action into equity. Story Eq. Jur. (13th Ed.), note to pp. 78, 80. *Second*, if a court of law has already taken jurisdiction of the cause of action, a court of equity will not assume jurisdiction of it on bill of discovery. No relief can be had on a bill for discovery unless relief is prayed. Dixon *v.* Campbell, 3 Dana (Ky.), 603.

Where the transfer of a legal cause of action into equity is sought on a bill for discovery, and an answer is filed denying all the material averments of the bill, the court of equity will not retain jurisdiction and hear evidence to disprove the answer, but will dismiss the suit and leave plaintiff to his legal remedy. Ferguson *v.* Waters, 3 Bibb (Ky.), 303; Russell *v.* Clarke's Execrs., 7 Cranch, 69; Robinson *v.* Gilbraith, 4 Bibb (Ky.), 183; Nourse *v.* Gregory, 3 Litt. (Ky.) 378.

1. Adams Eq. 20; Langdell Eq. Pl. § 170.

2. 2 Dan. Ch. Pr. 1557; Langdell Eq. Pl. § 195; 1 Pom. Eq. Jur. § 191; Lovell *v.* Galloway, 17 Beav. 1; Garle *v.* Robinson, 3 Jur. N. S. 633; Lloyd *v.* Adams, 4 K. & J. 467; Mollett *v.* Enequist, 25 Beav. 609; Harris *v.* Collett, 26 Beav. 222.

3. Baker *v.* Bramah, 7 Sim. 17; Southeastern Ry. Co. *v.* Submarine Tel. Co., 18 Beav. 429; Langdell Eq. Pl. § 195; Story Eq. Pl. §§ 313, 314, 315, 316.

4. Rose *v.* Gannel, 3 Atk. 439; Ambury *v.* Jones, Younge, 199; James *v.* Herriott, 6 Sim. 428; Little *v.* Cooper, 10 N. J. Eq. 273; Langdell Eq. Pl. § 195; Story Eq. Pl. §§ 313, 314, 315, 316.

Hence a bill in all respects properly framed for a bill of discovery, but containing a prayer for a decree, must stand or fall as a bill of relief. It cannot be sustained as a bill of discovery by ignoring the prayer; nor can the plaintiff claim discovery on a demurrer being sustained to the prayer of the bill. Langdell Eq. Pl. § 195; Story Eq. Pl. § 312; Fry *v.* Penn, 2 Bro. Ch. Cas. 280; Price *v.* James, 2 Bro. C. C. 319; Collis *v.* Swayne, 4 Bro. C. C. 480; Hodgkin *v.* Longden, 8 Ves. 2; Mellish *v.* Richardson, 12 Price, 530; Reddington *v.* Lanahan, 59 Md. 429; Pool *v.* Lloyd, 5 Metc. (Mass.) 525; Preston *v.* Smith, 26 Fed. Repr. 884.

In Schroeppel *v.* Redfield, 5 Paige (N. Y.), 245, it was held that the inadvertent

The common and most important use of a bill of discovery is in aid of an action at law.[1] It may be filed by either a plaintiff or a defendant to an action at law.[2] It may be filed in aid of a case arising at any stage of the pleadings at law. It may be filed by a plaintiff to aid in proving his declaration or replication, or by a defendant to aid in proving his plea or rejoinder. It may also be filed in aid of a negative case, as by a defendant to disprove a declaration, or by a defendant to disprove a plea.[3] A bill of discovery may also be filed in aid of an answer to a bill in equity. Such a bill is called a cross-bill.[4]

2. When Bill of Discovery will not Lie.—A bill of discovery will not lie in aid of a criminal proceeding.[5] A bill of discovery will not lie in aid of any jurisdiction which could originally (without the aid of statute) compel discovery. Hence equity will not grant discovery in aid of proceedings in an ecclesiastical court.[6] Nor will it lie in aid of proceedings in an inferior court;[7] nor in aid of proceedings before arbitrators,[8] unless compulsory;[9] nor

insertion of the word "decree" into the prayer for process did not convert a bill of discovery into one for relief.

In some cases it has been held that where relief is sought on a bill, otherwise a proper bill of discovery, a demurrer sustained to the relief did not relieve from the necessity of giving the discovery sought. Higginbotham *v.* Burnet, 5 John Ch. 184; Livingston *v.* Story, 9 Pet. 632; Wright *v.* Dame, 1 Metc. (Mass.) 237, 241; Conant *v.* Warren, 6 Gray (Mass.), 562; Brockway *v.* Copp, 3 Paige (N. Y.), 539; Atwill *v.* Ferrett, 2 Blatch. (U. S. C. C.) 39; Metler's Admrs. *v.* Metler, 3 C. E. Greene (N. J.), 270; Metler *v.* Metler's Admrs., 4 C. E. Greene (N. J.), 457.

Regarding a bill of discovery but praying relief, as one for relief, only such discovery as is incidental to the relief sought can be compelled. Langdell Eq. Pl. § 195; Story Eq. Pl. § 312.

1. 2 Dan. Ch. Pr. 1556.

The common law had no means of compelling discovery, and furthermore the parties to an action could not testify as witnesses. Hence a party to an action at law had no means of availing himself of the knowledge of his adversary of facts favorable to his case. Again, the common law had no adequate means of compelling the production of documents in the possession of a party. It was to mitigate these hardships of the common law that equity assumed jurisdiction to compel discovery by means of a sworn answer, and the production of documents. 1 Pom. Eq. Jur. § 190; 1 Spence Eq. Jur. 677; Com. Dig. Ch. 3, B.; Langdell Eq. Pl. § 167.

2. 1 Pom. Eq. Jur. §§ 191, 198; Langdell Eq. Pl. § 170.

3. Langdell Eq. Pl. § 170; Atlantic Ins. Co. *v.* Lunar, 1 Sandf. (N. Y.) Ch. 9.

4. 2 Dan. Ch. Pr. 1553; 1 Pom. Eq. Jur. §§ 191, 196; Langdell Eq. Pl. § 171.

Owing to the existence, in most jurisdictions, of statutory methods of compelling discovery on motion on filing of interrogatories, cross-bills of discovery have become unusual. 2 Dan. Ch. Pr. 1553.

5. Hare on Disc. 116; 1 Pom. Eq. Jur. § 197.

Quære: Will it lie in aid of a civil action based on a wrong punishable criminally? The following authorities hold that it will: Hare on Disc. 116; Thorpe *v.* Macaulay, 5 Mad. 218; 230; Wilmot *v.* Maccabe, 4 Sim. 263; Macauley *v.* Shakell, 1 Bligh. N. S. 96. But *contra*, see 1 Pom. Eq. Jur. § 197.

It would seem on principle that a bill would lie in such a case, but that discovery could not be compelled of such facts as would tend to criminate the defendant. See Story Eq. Jur. § 1494, and note; Story Eq. Pl. §§ 553 (and n. 4) and 597, and notes; Leggett *v.* Postley, 2 Paige (N. Y.) Ch. 599; Glynn *v.* Houston, 1 Keen, 329.

6. Hare on Disc. 119; Adams Eq. 18 and 19; 2 Dan. Ch. Pr. 1556; 1 Pom. Eq. Jur. § 197.

7. Hare on Disc. p. 120; Story Eq. Jur. § 1495; Story Eq. Pl. § 555; Dunn *v.* Coates, 1 Atk. 288; Anon., 2 Ves. (Sen.) 451.

8. Story Eq. Jur. § 1495; 1 Pom. Eq. Jur. § 196; Adams Eq. 18.

9. British Empire Shipping Co. *v.*

in aid of an issue directed by a court of bankruptcy.[1] It is doubtful if discovery will be compelled in aid of a foreign jurisdiction.[2]

3. Discovery, How Obtained.—Discovery is compelled on bills of discovery in the same way as on bills of relief, i.e., by compelling the defendant to answer under oath the material allegations and interrogatories in the bill, and to produce such documents in his control as he admits to be relevant to the case in the bill.[3] The answer, when filed, can be used as the admission of the party making it, in the trial in aid of which the discovery was sought.[4] The answer, when offered in evidence in a court of law, is regarded as a single admission; consequently the whole of it must be read.[5]

The legality of evidence obtained by bill of discovery must be determined at the trial at law.[6] The answer need not be used in evidence at the trial.[7]

Averments in the answer favorable to defendant's case are evidence in his behalf if responsive to the bill.[8] A defendant must use all means within his power to obtain the information necessary to enable him to give the required discovery.[9] The object of a bill of discovery being to obtain an answer under oath, as soon as a complete answer is filed the suit comes to an end—there is no hearing or decree.[10] On filing a full and satisfactory answer, the defendant is entitled to costs.[11]

4. Essential Parts of Bill—Necessary Averments.—The bill of discovery does not differ, as to its essential parts, from a bill for relief, except that it has no prayer.[12] Like the bill of relief, it contains a statement of the case in aid of which discovery is sought, and averments of fact or interrogatories (or both) in support of the case stated.[13]

As a bill of relief must state a good case for relief in equity, so a bill of discovery, if filed in aid of a case at law, must state a good case at law, or, if in aid of a defence, a good legal defence.[14]

Somes, 3 K. & J. 433; Fuller *v.* Ingram, 7 W. & R. 302; 1 Pom. Eq. Jur. § 196.

1. Cooke *v.* Marsh, 18 Ves. 209.

2. Crowe *v.* Del Rio *et al.*, cited in Ld. Rede's Tr. 186 n. q.; Daubigny *v.* Davallon, 2 Anst. 467, 468; Mitchell *v.* Smith, 1 Paige (N. Y.), 287; Dykers *v.* Wilder, 3 Edw. (N. Y.) 496, hold that it will. *Contra*, see Bent *v.* Young, 9 Sim. 180; Reiner *v.* Marquis of Salisbury, 2 Ch. Div. 378.

3. 1 Pom. Eq. Jur. § 191; Bispham Eq. § 557; Langdell Eq. Pl. § 167.

4. Langdell Eq. Pl. § 167.

It cannot be used in evidence against a co-defendant. Dykers *v.* Wilder, 3 Edw. (N. Y.) 496; 3 Phillips Evidence, 931, note.

5. Adams Eq. 21; Langdell Eq. Pl. § 200; 1 Pom. Eq. Jur. § 208; Brown *v.* Thornton, 1 My. & Cr. 243; Hart *v.* Freeman, 42 Ala. 567; Fant *v.* Miller, 17 Gratt. 187; Strawn *v.* Norris, 23 Ark. 542. This does not apply to an answer to a bill of relief. Adams Eq. 21.

6. Price *v.* Tyson, 3 Bland (Md.), 392.

7. Conway *v.* Turner, 8 Ark. 356; Kidder *v.* Barr, 35 N H. 235. But see Hadley *v.* Upshaw, 27 Tex. 547.

8. Jones *v.* Cunningham, 7 W. Va. 707.

9. Green *v.* Carey, 12 Ga. 601; Beall *v.* Blake, 10 Ga. 449.

10. Story Eq. Jur. § 1483; Mitford Eq. Pl. 16; Langdell Eq. Pl. § 175; 2 Dan. Ch. Pr. 1558; 1 Pom. Eq. Jur. § 191; Townsend *v.* Odam, 1 Walk. (Miss.) 356; Dennis *v.* Riley, 21 N. H. 50. But see Pryor *v.* Adams, 1 Call (Va.), 382.

11. 2 Dan. Ch. Pr. 1558; Adams Eq. 389, 22; Langdell Eq. Pl. § 175.

12. See DISCOVERY AND RELIEF, p. 199.

13. Langdell Eq. Pl. § 170; Wigram on Disc. 5, 6.

14. Story Eq. Jur. § 1493, *a*; Cal. Cas. Langdell Eq. Pl. § 170; Debigge *v.* Ld.

It is not necessary to aver in the bill that, without the discovery sought, the plaintiff will be unable to prove his case.[1] Except where a transfer of the legal cause of action into equity is sought on a bill for discovery,[2] in which case the bill must aver that the discovery will be indispensable to plaintiff in proving his case.[3] The bill must also aver the indispensability of the discovery, when filed in aid of a defence at law, and an injunction is asked until the discovery can be had.[4] The bill need not be sworn to,[5] unless relief is sought on the ground of the necessity of discovery.[6]

If a bill of discovery is filed by a plaintiff in aid of a legal title to real estate, he must state in his bill a present legal title in himself. A mere possibility of a future title will not entitle the plaintiff to any discovery.[7]

5. Extent of Discovery Obtainable.—As to the extent of the discovery obtainable, a bill of discovery follows strictly the analogy of a bill of relief. As in the case of a bill of relief, the defendant may be compelled to give discovery as to all facts stated in the bill and all interrogatories therein relevant to the plaintiff's case.[8] But the plaintiff cannot compel discovery as to the defendant's case.[9] Nor as to immaterial matters.[10]

6. Parties.—Only parties to the proceeding or contemplated proceeding in aid of which the bill of discovery is filed, are proper parties to the bill.[11] Except where one of the parties against

Howe, cited in Mitford Eq. Pl. 187; Newkerk *v.* Willett, 2 Johns. Ch. (N. Y.) 296; Wallis *v.* Duke of Portland, 3 Ves. Jr. 494; Williams *v.* Harden, 1 Barb. Ch. (N. Y.) 298; Lord Kensington *v.* Mansell, 13 Ves. 240; Macauley *v.* Shackell, 1 Bligh (N. S.), 120; Thomas *v.* Tyler, 3 Y. & Coll. 255.

In Hinckle *v.* Currin, 1 Humph. (Tenn.) 74, it was held that the pleadings need not be set out, but merely the issue stated. Where a bill of discovery is in aid of a replication at law, plaintiff must state a good original case at law, as well as a good replication, since, if the declaration is bad, the plaintiff must lose on demurrer even though the replication be good. Similarly, a bill in aid of a rejoinder must state a good defence. Langdell Eq. Pl. § 170.

1. 2 Story Eq. Jur. § 1483 (cf. 1 Story Eq. Jur. § 74); Marsh *v.* Davidson, 9 Paige (N. Y.), 580; Peck *v.* Ashley, 12 Met. 478; Continental Ins. Co. *v.* Webb, 54 Ala. 697; Many *v.* Beekman Ins. Co., 9 Paige, 188.

2. See note 6, pp. 199, 200.

3. Bullock *v.* Boyd, 2 A. K. Marsh. (Ky.) 322; Emerson *v.* Staton, 3 T. B. Mon. (Ky.) 116, 118; Stacy *v.* Pearson, 3 Rich. Eq. (S. Car.) 148, 152; March *v.* Davidson, 9 Paige (N. Y.), 580; Continental Ins. Co. *v.* Webb, 54 Ala. 688, 697; Laight *v.* Morgan, 1 Johns. Cas. 429.

If the bill omits such averment where a transfer of the cause of action into equity is sought, the defendant may demur as to the relief sought, but must answer and give discovery. March *v.* Davidson, 9 Paige (N. Y.), 580.

4. March *v.* Davidson, 9 Paige, 580; Turner *v.* Dickerson, 1 Stockt. (N. J. Eq.) 140; cf. Appleyard *v.* Seton, 16 Ves. 223.

5. Buckner *v.* Ferguson, 44 Miss. 677.

6. Story Eq. Pl. §§ 288, 313, 314.

7. Story Eq. Jur. § 1490; Story Eq. Pl. § 318; 1 Pom. Eq. Jur. § 198; Brownsword *v.* Edwards, 2 Ves. Sen. 243, 247; Baxter *v.* Farmer, 7 Ired. Eq. 239; Turner *v.* Dickerson, 1 Stockt. (N. J.) Ch. 140.

8. 1 Pom. Eq. Jur. § 204, and note 2, p. 204, and cases there cited; Primmer *v.* Patten, 32 Ill. 528.

9. 1 Pom. Eq. Jur. § 201; Nigilby *v.* Shufte, 9 Jur. N. S. 1141.

10. Dickenson *v.* Lewis, 34 Ala. 638; 2 Story Eq. Jur. § 1497.

11. Story Eq. Jur. § 1499; Mitf. Eq. Pl. (Jeremy's Ed.) 188; 2 Dan. Ch. Pr. 1558; 1 Pom. Eq. Jur. § 199; Newman *v.* Godfrey, 2 Bro. Ch. Cas. 332, 334; Cookson *v.* Ellison, 2 Bro. Ch. Cas. 252; Fenton *v.* Hughes, 7 Ves. 287.

which discovery is sought is a corporation, in which case an officer of the corporation may be joined as a party defendant.[1] Therefore no discovery can be compelled against a person who, by reason of some disability, cannot be a party to an action, e.g., an infant or a lunatic without committee.[2] Non-joinder of parties defendant is no defence to a bill of discovery.[3] An amendment to add parties to a bill of discovery will not ordinarily be allowed.[4]

7. Time when Obtainable.—Discovery in aid of a case at law may be obtained either before or after action is brought, and without reference to the state of the pleadings.[5] It will not lie in aid of a defence till the plea is filed.[6] It will not lie after judgment.[7] An answer could not be compelled to a cross-bill of discovery until after the plaintiff had answered in the original suit, although the cross-bill could be filed before then.[8]

8. Defences.—Defences to a bill of discovery may be divided into two classes—defences to the case in aid of which discovery is sought, and defences to the discovery itself. If the bill does not state a good case in aid of which discovery is sought, or if the defendant has a good defence to the case stated, discovery may be avoided.[9] But even where a valid cause of action is stated, and the defendant has no defence to it, equity will not necessarily grant the discovery sought. Thus where discovery is sought to impeach defendant's legal title, a plea of purchaser for value and without notice is a complete defence.[10] So also it seems that

A party in interest, though not of record, may be joined. Carter *v.* Jordan, 15 Ga. 76.

1. Story Eq. Jur. § 1501; Adams Eq. 20; 1 Pom. Eq. Jur. § 199; Langdell Eq. Pl. § 78; Glasscott *v.* Company of Copper Miners, 11 Sim. 305, 314.

Former officers of the corporation may also be joined. Fulton Bank *v.* Sharon Canal Co., 1 Paige (N. Y.), 219. The reason for this exception lies in the fact that a corporation cannot be subjected to the pains and penalties of perjury for false swearing. The oath of the officers is therefore added to give the answer an increased sanction.

In certain cases an agent may be joined as party defendant with his principal where the principal is not a corporation. Ballin *v.* Ferst, 55 Ga. 546.

An officer of a corporation may be joined for discovery only as to matters coming to his knowledge while acting in his official capacity. McComb *v.* Chicago, etc., R. Co., 19 Blatchf. (U. S. C. C.) 69.

2. 1 Pom. Eq. Jur. § 199; Hare on Disc. 121.

3. Hare on Disc. 124; 1 Dan. Ch. Pr. 290; Sangosa *v.* East India Co., 2 Eq. Cas. Abr. 170, Pl. 28.

This is because the discovery obtained is only the admission of the party answering. Adams Eq. 20.

But it would seem that the non-joinder, as plaintiffs, of all persons properly plaintiffs to the action at law is a good defence.

4 Dan. Ch. Pr. 495.

5. Story Eq Jur. § 1495. But see Story Eq. Jur. § 1483; Langdell Eq. Pl. § 169; 1 Pom. Eq. Jur. § 197; Wolf *v.* Wolf, 2 Harr. & G. (Md.) 382.

But the bill must state that the discovery sought is in aid of judicial proceedings pending, or contemplated or threatened.

6. Harris *v.* Galbraith, 43 Ill. 309.

7. McCullum *v.* Prewitt, 37 Ala. 573; Powell *v.* Stewart, 17 Ala. 719; Norris *v.* Denton, 2 Cal. 378. Lansing *v.* Eddy, 1 Johns. Ch. 49; Faulkner *v.* Harwood, 6 Rand. (Va.) 125.

8. 2 Dan. Ch. Pr. 1551; Langdell Eq. Pl. § 173; Harris *v.* Harris, T. & R. 165; Van Valtenburg *v.* Alberry, 10 Iowa, 264.

9. Langdell Eq. Pl. § 176; Story Eq. Pl. § 319.

10. Story Eq. Jur. § 1502; 1 Pom. Eq. Jur. § 200; Cooper Eq. Pl. ch. 5, p. 300; Langdell Eq. Pl. § 188; McNeil *v.* Magee, 5 Mason, 269, 270; Stanhope *v.* Earl of Varney, 2 Eden, 81; Bassett *v.* Nosworthy, 2 White & Tud. L. C. in Eq. 1;

equity will not grant discovery in aid of a good legal cause, unless in attainment of an object which the court approves.[1] Discovery cannot be compelled against a defendant incompetent as a witness for any other reason than interest.[2]

The foregoing defences are defences to the whole of the discovery. There are also defences as to the whole or some part of the discovery. Thus the defendant may refuse to answer any allegations or interrogatories which he could refuse to answer if called as a witness. Hence discovery may be refused if it would tend to criminate the defendant or subject him to a penalty or forfeiture.[3]

9. Defences—How Taken.—*Demurrer.*—If the bill omits material averments or discloses a defence upon its face, it is demurrable.[4]

Where the defendant wishes to take advantage of his privilege as a witness as to a part or the whole of the discovery, he may do so by demurrer.[5]

Plea.—Any ground of defence, not apparent on the face of the bill, may be taken advantage of by plea.[6] The plea may be either affirmative, i. e., setting up new matter in answer to the case made by the bill, or negative, i. e., traversing material averments of the bill. Negative pleas are sometimes styled anomalous pleas, and affirmative pleas, pure pleas.[7] Anomalous pleas are required to be supported by answers giving discovery as to the averments traversed, and all averments of fact and interrogatories in their support.[8]

Burlace *v.* Cook, 2 Freem. 24; Pennington *v.* Beechy, 2 Sim. & Stu. 282; Jerrard *v.* Saunders, 2 Ves. 187; Wallwyn *v.* Lee, 9 Ves. 24.

1. 1 Pom. Eq. Jur. § 202; Jeremy Eq. Jurisd. 268; King *v.* Burr, 3 Meriv. 693; Cousins *v.* Smith, 13 Ves. 542; Rejah *v.* East India Co., 35 Eng. L. & Eq. 283; Lansing *v.* Starr, 2 Johns. Ch. (N. Y.) 150.

2. 2 Story Eq. Jur. § 1496; Cooper Eq. Pl. ch. 5, § 3, p. 196; Le Texier *v.* Margrave of Anspach, 5 Ves. 322; s. c., 15 Ves. 159; Barron *v.* Grillard, 3 V. & Beam. 165; Cartwright *v.* Green, 8 Ves. 405, 408.

3. Hare on Disc. 131; Adams Eq. 3; Livingston *v.* Tompkins, 4 Johns. Ch. (N. Y.) 432; United States *v.* Twenty-eight Packages, Gilpin, 306; Livingston *v.* Harris, 3 Paige Ch. (N. Y.) 528; Skinner *v.* Judson, 8 Conn. 528; Hayes *v.* Caldwell, 5 Gil. (Ill.) 33; Ocean Ins. Co. *v.* Fields, 2 Story, 59; Union Bank *v.* Barker, 3 Barb. Ch. 358; Marshall *v.* Riley, 7 Ga. 367; Poindexter *v.* Davis, 6 Gratt. 481.

If the plaintiff in the bill of discovery be solely entitled to take advantage of the penalty or forfeiture, he may, by waiving the right in his bill, obviate the objection to the discovery and compel the defendant to answer. Hare on Disc. 137; Skinner *v.* Judson, 8 Conn. 528; Brand *v.* Cumming, 22 Vin. Abr. 315, pl. 4; Mason *v.* Murray cited 3 Bro. C. C. 40.

The mere fact that the discovery sought would tend to make defendant infamous is no excuse for not answering. Hare on Disc. 132; Story Eq. Pl. § 595; Glyn *v.* Houston, 1 Keen, 229.

4. Story Eq. Pl. § 605; 1 Dan. Ch. Pr. § 542. But see Langdell Eq. Pl. § 129.

5. Story Eq. Pl. § 575; Langdell Eq. Pl. § 97.

It seems he may do so even though the objection to the discovery does not appear on the face of the bill. Langdell Eq. Pl. §§ 97, 69 and note; Bolton *v.* Liverpool, 3 Sim. 467.

In such case the demurrer must state why and how the discovery would subject him to a penalty. Sharp *v.* Sharp, 3 Johns. (N. Y.) Ch. 407.

6. Story Eq. Pl. §§ 605, 647; Langdell Eq. Pl. § 176.

7. Story Eq. Pl. § 651.

8. Story Eq. Pl. § 670; Langdell Eq. Pl. § 102; Bains *v.* Goldey, 35 Pa. St. 51.

Answer.—The answer being the object of a bill of discovery, and being the means by which discovery is obtained, defences to bills of discovery are never taken by answer.

Pro Confesso.—In the absence of statutes, bills of discovery were not taken *pro confesso.*[1]

10. Statutory Provisions on the Subject of Discovery. *In England.*—In England the matter of discovery was regulated by the Judicature Act, 36 and 37 Vict. ch. 66, Schedule Rules 25, 26, and 27.[2]

Rule 25 provides that either party to an action may exhibit interrogatories to and obtain discovery from the other party.

Rule 26 provides that either party must allow his adversary the right to inspect and copy any document referred to by him in his pleadings or affidavits, unless he shall satisfy the court that it relate wholly to his own title.

Rule 27 provides that the court or judge during the pendency of any action may order the production "by any party upon oath of such documents in his possession or power, relating to any matter in question in such suit or proceeding, as the court or judge shall think right; and the court may deal with such documents when produced in such manner as shall appear just."

In the United States.—The majority of our States and Territories have statutory provisions regulating discovery and the production of documents, similar in their general object and scope to those of the English Judicature Act. These statutes, while they present little variety in the results they accomplish, do present a certain variety in the methods they adopt. Subjoined is a classification of all statutory provisions in the States and Territories relating to discovery and the production of documents, all statutory provisions which are substantially identical being included in a class, the substance of the provisions of some one State in each class being first given as the type of its class.

NEW YORK.—The Code of Civil Procedure, §§ 870, 872, and 873, provides for the taking of depositions on oral interrogatories, at any time prior to the trial, of a party to a pending action, or of one who expects to be a party to an action to be brought, at his own instance or that of an adverse party. The party desiring to take the deposition must present an affidavit setting forth, among other things, the nature (or probable nature) of the action pending or to be brought, and that the discovery sought is material and necessary. Sections 803 to 807 make provision for compelling a party to a pending action to give his adversary an inspection with the right to make copies of any documents in his possession relating to the merits of the action or defence.

1. Langdell Eq. Pl. § 180; 2 Dan. Ch. Pr. 1559.

In Nancy *v.* Trammel, 3 Mo. 306, it was held that a demurrer to a bill of discovery amounted to an actual admission of the truth of the averments of the bill.

2. The rules contained in the schedule have been annulled by the Supreme Court Rules of 1883; but it is believed that these new court rules are not materially different from the rules for discovery as provided in the schedule of the Judicature Act.

The following States and Territories have statutory provisions relating to discovery and the production of documents similar to the provisions of the New York Code, with this important difference—that they do not provide for discovery where an action has not yet been begun:

Arizona.—Comp. Laws 1877, ch. 48 (Civil Code), §§ 430 *et seq.*, 448.

California.—Code Civil Procedure, §§ 2021 *et seq.*, 1000.

Colorado.—Code 1884, §§ 367 *et seq.*, 381.

Dakota.—Code of Civil Procedure, §§ 439 *et seq.*, 437.

Idaho.—Rev. Laws 1875, ch. 30, §§ 646 *et seq.*, and 475.

Montana.—Code of Civil Procedure, §§ 656 *et seq.*, 535a; Laws 1881.

Nebraska.—Comp. Laws 1873, §§ 1468 *et seq.*, 1487 *et seq.*

Nevada.—Comp. Laws 1873, §§ 1468 *et seq.*, 1487.

North Carolina.—Code of Civil Procedure (Tourgee), §§ 333, 334, 331.

Oregon.—Civil Code, §§ 804 *et seq.*, 511.

South Carolina.—Code Civil Procedure, §§ 392 *et seq*, 389.

Utah.—Comp. Laws 1876, title xx. (Civil Practice Act), §§ 405 *et seq.*, 424.

Wisconsin.—Rev. Statutes, §§ 4096 *et seq.*, 4183.

MASSACHUSETTS.—Publ. Statutes, ch. 167, §§ 49 *et seq.*, provide that the plaintiff, at any time after beginning suit, and the defendant at any time after filing his answer, may file written interrogatories for the discovery of facts and documents material to the support or defence of the suit, to be answered on oath by the adverse party. The interrogatories must be accompanied by an affidavit that the discovery will be of material benefit. The answer to the interrogatories must be in writing.

Arkansas.—Statutes 1884, §§ 5089 *et seq.*, § 2843.

Connecticut.—Gen. Statutes 1875, title 19, ch. 11, § 30.

Florida.—McClellan's Digest (1881), ch. 101, §§ 14, 18.

Indiana.—Rev. Stats. 1881, §§ 359, 480.

Iowa.—Rev. Code, §§ 2693, 3685.

Louisiana.—Code of Practice, §§ 140, 347.

Texas.—Rev. Stats. 1879, §§ 2238 *et seq.*

Virginia.—Code (1873), ch. 172, §§ 44, 45.

Washington Ty.—Code, §§ 428, 403 *et seq.*, 428.

Wyoming Ty.—Civil Code, §§ 365, 162 *et seq.*

ALABAMA.—Code 1876, § 3084, provides for discovery on filing written interrogatories pending the action. But there appears to be no provision made for compelling a production or inspection of documents.

New Mexico.—Compiled Laws 1884, § 2094.

NEW JERSEY.—Revision, "Practice:" § 155 provides for discovery on written interrogatories filed in the action. § 159 provides for the oral examination of a party to an action pending the action, but before trial. §§ 157, 158 provide for compelling an inspection of documents.

OHIO.—Rev. Stats. 1886: § 4293 provides an action of discovery similar to the common-law suit for discovery, when necessary to enable the party filing it to prepare his pleadings in some other action brought or to be brought. § 5099 provides for discovery on interrogatories annexed to the pleadings. § 5289 provides for the production of documents in all cases and under all circumstances where compellable by the ordinary rules of chancery proceeding. § 5290 provides for inspection of documents pending the action.

Mississippi.—Rev. Code 1880, §§ 1643 and 1644, provides for discovery and production of documents at law by petition "whenever, by the rules of equity, a discovery would be compelled in a court of chancery."

Maryland.—Code of Procedure, article 70, § 18.

Tennessee.—Code 1884, §§ 4649 *et seq.*

GEORGIA.—Code (1882), part ii. title ix. ch. ii., provides for discovery by bill filed in equity. It practically re-enacts or reaffirms the common law of bills of discovery.

New Hampshire.—Gen. Laws (1878), ch. 209, § 1, give the Supreme Court jurisdiction to compel discovery.

Michigan.—Howell's Statutes (1882), §§ 6, 411 *et seq.*, provide that the Supreme Court may assume jurisdiction to compel discovery of documents in suits pending therein. There appear to be no other statutory provisions relating to discovery.

ILLINOIS.—Starr. & Curt. Stats. ch. 51, § 9, provide that courts may compel parties to pending actions to give their adversaries inspection of documents, with the right to make copies. There is no statute relating to discovery by parties of facts lying within their knowledge.

Delaware.—R. S. 1874, ch. 598, vol. ii. § 1, p. 652.

Kansas.—Comp. Laws 1881, ch. 80, § 368.

Missouri.—Code of Procedure, § 3644 *et seq.*

Pennsylvania.—Brightly's Purdon's Digest, "Evidence," 1.

Rhode Island.—Publ. Stats. ch. 214, § 45.

West Virginia.—Amended Code, 1884, ch. 130, § 43.

In MAINE, MINNESOTA, and VERMONT there appear to be no statutes relating to discovery or production or inspection of documents.[1]

1. **Discovery under Statutes.**—It is to be noticed in regard to these various statutes, that they affect the means and instrumentality of compelling discovery rather than the principles of discovery itself. They all recognize and are based on the theory that a party to an action has a right to compel an admission from his adversary of facts within his adversary's knowledge favorable to his case. They all enforce discovery by compelling the party from whom it is sought to answer questions or interrogatories under oath. They all recognize the right of a party to have the discovery prior to the trial. At common law discovery could be obtained by a plaintiff prior to commencing action, and, in general, without regard to the state of the pleadings. Statutes relating to discovery do not ordinarily provide for discovery except pending the action, and generally not until after the party seeking discovery has filed his pleadings. *Vide* "Statutory Provisions on the Subject of Discovery," *supra.*

The chief difference between the different statutes is as to the mode of interrogating the party from whom discovery

11. When Bill of Discovery is Abrogated by Statutory Provisions for Discovery.—The question whether the jurisdiction of equity to compel discovery has been abrogated by the various statutes relating to discovery, is often one of much difficulty. In some States and Territories the action or bill of discovery is abolished by express statutory provision. This is the case in *Arizona, Dakota, New York, Montana, North Carolina, South Carolina,* and *Wisconsin.*[1]

In *Arkansas* and *Iowa* the action of discovery is abolished by statute, except against a contractor to discover the names and addresses of his co-contractors.[2]

In jurisdictions where there are no statutes regulating the matter of discovery, the existence of statutes enabling a party to an action to call an adverse party as a witness probably does not deprive equity of jurisdiction to compel discovery on bill of discovery.[3]

is sought, some statutes providing for an examination on oral interrogatories, others for an examination on written interrogatories.

Inspection of Documents — Statutory Provisions.—To obtain a production of documents on a bill of discovery, it is not necessary for the plaintiff to describe or specify the documents which he desires the defendant to produce, or to state what he expects to prove by them. The bill need only aver that the defendant possesses documents relevant to the plaintiff's case as made in his bill, and defendant is thereupon required, by answer, to admit or deny the charge of possession of relevant documents, and, unless he can deny the charge *in toto*, he must schedule and produce all relevant documents. Combe *v.* Corporation of London, 15 L. J. Ch. 80; 2 Dan. Ch. Pr. 1819.

To obtain inspection of documents under statutory provisions, the party desiring inspection is ordinarily required to file an affidavit describing with some particularity the documents he desires to inspect, and stating that the inspection is necessary to enable him to file his pleadings or prepare for trial. This statement must show what evidence the document is supposed to contain. Pegram *v.* Carson, 10 Abb. Pr. (N. Y.) 340; Walker *v.* Granite Bank, 44 Barb. (N. Y.) 39; Opdyke *v.* Marble, 44 Barb. (N. Y.) 64; Bolles *v.* Duff, 17 Abb. Pr. (N. Y.) 448.

It is evident, therefore, that production could be compelled by bill of many documents of which an inspection under statutory provisions could not be obtained because of the inability of the party desiring inspection to describe the document and its contents. British Empire Shipping Co. *v.* Somes, 3 K. & J. 433.

It is to be noticed that inspection alone does not take the place of production. Inspection is had prior to the trial and enables the party obtaining it to ascertain the documents in the possession of his adversary which he desires to have produced at the trial. The production at the trial is accomplished by serving the party in possession of the documents with a *subpœna duces tecum* to produce them at the trial.

1. Comp. Laws Ariz. 1877, § 2855; Code Civ. Pr. of Dakota (1877), § 438; Code Civ. Pr. of New York (1885), § 1914; Code of Montana, 1873, § 647; Code Civ. Pr. North Car. (Tourgee) ch. v. § 332; Code Civ. Pr. South Car. § 390; Rev. Stats. of Wis. § 4096.

2. Arkansas Stats. 1884, §§ 4921, 4922; Iowa Revised Code § 2523.

3. There is a conflict of authority on this point. Riopelle *v.* Doellner, 26 Mich. 102; Phillips *v.* Kern, 6 Phila. (Pa.) 9; Milne's Appeal, 2 Atl. Rep. 534; Bond *v.* Worley, 26 Mo 253; Heath *v.* Erie R. Co., 9 Blatchf. 316; Hurd *v.* Duchess Co. Bank, 1 Morr. (Ia.) 291, are against the statement of the law in the text. Elliston *v.* Hughes, 1 Head (Tenn.), 225; Cannon *v.* McNab, 48 Ala. 99; Millsaps *v.* Pfeiffer, 44 Miss. 805; Russell *v.* Dickeschied, 24 W. Va. 61, support it. See also Nussbaum *v.* Heilbron, 63 Ga. 312; Hoppock *v.* United States, etc., R. Co., 27 N. J. Eq. 286.

The cases holding that the jurisdiction of equity over bills of discovery is abrogated, proceed upon the ground that a court of equity will not compel discovery

Even where some statutory provision is made for obtaining discovery, but such provision does not afford as full and adequate means of compelling discovery as a bill of discovery would afford, it is probable that a bill of discovery will lie.[1]

But where the intention of the statute is evidently to cover the entire ground of discovery, it is probable that discovery cannot be compelled except under the provisions of the statute, even though the statute does not, in point of fact, provide for all cases which could be reached by a bill of discovery.[2]

12. Principles of Discovery by Bill Applicable to Discovery under Statutes.—All the principles of the law of discovery not modified or abrogated by statute remain in full force, even where the bill of discovery has been abolished by statute.[3]

Thus the principles of equity procedure in regard to the nature and extent of the discovery and production of documents that can be compelled are ordinarily applicable to proceedings for discovery under statutory provisions.[4]

BILL IN EQUITY. (See also BILL OF DISCOVERY; BILL OF PEACE; BILL QUIA TIMET; BILL TO PERPETUATE TESTIMONY; BILL TO REMOVE CLOUDS; BILL TO TAKE TESTIMONY DE BENE ESSE; CREDITOR'S BILLS; EQUITY; FRAUD; INJUNCTION; MORTGAGE; TRUSTS; PARTNERSHIP; RECEIVER; SPECIFIC PERFORMANCE.)

1. Definition.—A complaint in writing addressed to the chancellor, containing the names of the parties to the suit, both com-

in aid of a tribunal which can itself compel the discovery. But it would seem that the jurisdiction to compel discovery in aid of an action at law, having become established at a time when parties were incompetent as witnesses, the mere enactment of statutes removing the disability of parties as witnesses should not by implication abrogate this jurisdiction. Moreover, allowing a party to be examined as a witness at the trial does not supply the place of the bill of discovery, since by bill the discovery would be obtained before trial.

It would seem, however, that the jurisdiction assumed by courts of equity in some States to grant relief on bills of discovery has been by implication abrogated by the statute enabling parties to testify. Since, in order to invoke the aid of a court of equity for purposes of relief, the plaintiff must aver and prove that the discovery sought is absolutely indispensable to enable him to prove his case, and this can rarely, if ever, be the case where the plaintiff can call the adverse party as a witness. Kearney *v.* Jeffries, 48 Miss. 343. But see Continental Life Ins. Co. *v.* Webb, 54 Ala. 688.

1. Shotwell's Admx. *v.* Smith, 20 N. J. Eq. 79; British Empire Shipping Co. *v.* Somes, 3 K. & J. 433.

2. This is probably the case in those jurisdictions which have statutory provisions for compelling discovery, by interrogatories or otherwise, prior to or pending the action, and also for ordering an inspection of documents pending the trial, and a production at the trial by means of the process of *subpœna duces tecum*. See 1 Pom. Eq. Jur. § 193.

3. Shoe and Leather Reporter Assoc. *v.* Bailey, 49 N. Y. Super. Ct. 385; Anderson *v.* Bank of Br. Columbia, L. R. 2 Ch. Div. 644; Cashin *v.* Craddock, L. R. 2 Ch. Div. 140; Hoffman *v.* Postill, L. R. 4 Ch. 673.

4. 1 Pom. Eq. Jur. § 194.

plainant and defendant, a statement of the facts on which the complainant relies, and the allegations which he makes, with an averment that the acts complained of are contrary to equity, and a prayer for relief and proper process.[1]

2. General Nature of the Bill.—It is analogous to a declaration in an action at law, and is in the nature of a petition, setting forth the material facts and concluding with a prayer for relief or other thing required, and for process to compel defendants to appear and make answer.[2] Whatever the object of the bill, it must state a case within the appropriate jurisdiction of a court of equity, and a failure to do so is a fatal error.[3] It should state the right, title, or claim of plaintiff with accuracy and clearness, the injury complained of and the relief asked.[4] All facts should be positively averred by the plaintiff in the bill.[5]

3. Component Parts of the Bill.—A bill formerly consisted of (1) the address; (2) the introduction; (3) the statement; (4) the confederacy clause; (5) the charging clause; (6) the jurisdiction clause; (7) the interrogating clause; (8) the prayer for relief; (9) the prayer for process.[6] As generally framed now, however, the bill consists merely of the statement, the charges, the interrogatories, the prayer for relief, and the prayer for process.[7]

Statement.—The statement begins with a heading addressing the bill to the proper court, and gives the name and residence of the plaintiff;[8] it then proceeds to narrate plaintiff's case for relief. As its object is to show plaintiff's right to relief, it must state his case in direct terms and with reasonable certainty.[9] If there are several plaintiffs, their claims must be consistent.[10]

1. Bouvier's Law Dict.

2. Story's Eq. Pl. § 7.

3. Story's Eq. Pl. §§ 10, 32; 2 Anstr. R. 543.

4. Story's Eq. Pl. § 241; East India Co. *v.* Henchman, 1 Ves. Jr. 287; Cresset *v.* Milton, 1 Ves. Jr. 449; Wormald *v.* De Lisle, 3 Beav. 18; Houghton *v.* Reynolds, 2 H. R. 264; Balls *v.* Margrave, 3 Beav. 284; Armisted *v.* Durham, 11 Beav. 422; Frietas *v.* Dos Santos, 1 Y. & J. 574.

5. Egremont *v.* Cowell, 5 Beav. 620; Cameron *v.* Abbott, 30 Ala. 416; Lucas *v.* Oliver, 34 Ala. 626; Wells *v.* Bridgeport Hydraulic Co., 30 Conn. 316; Campbell *v.* Paris R. Co., 71 Ill. 611.

A complainant who wishes to avail himself of material facts in the records of previous cases must state in his bill the facts he relied upon. Ramsey *v.* Temple, 3 Lea (Tenn.), 252.

6. Story's Eq. Pl. §§ 26–44.

7. Adams Eq. *302.

8. Howe *v.* Harvey, 8 Paige (N. Y.), 73.

In Sterrick *v.* Pugsley, 1 Flip. (U. S.) C. C. 350, the address "To the circuit court in chancery sitting" *held* sufficient.

9. Adams Eq. *303.

To allege that a sale is simulated and if not simulated is fraudulent may be consistent, but it is not certain. Socola *v.* Grant, 15 Fed. Repr. 487.

A complaint to annul a contract on account of mental unsoundness and incapacity to transact business of the contracting party need not allege the kind of unsoundness or the kind of business. Fulweider *v.* Ingels. 87 Ind. 414.

If a description of a deed is material, the omission in the bill of the grantee's name renders it defective. Natron *v.* Cameron, 2 Dak. 347.

Fraud must be specifically charged; a general allegation of fraud is not sufficient. Story's Eq. Pl. § 251; Palmer *v.* Mure, 2 Dick. 489; Munday *v.* Knight, 3 Hare, 497; Gilbert *v.* Lewis, 1 De G. J. & S. 38; Hallows *v.* Fernie, L. R. 3 Ch. 467; Bryan *v.* Spruill, 4 Jones Eq. (N. Car.) 27; Nicholls *v.* Rogers, 139 Mass. 146; McHan *v.* Ordway, 76 Ala. 347; Jackson *v.* Reeve, 44 Ark. 496.

10. Adams Eq. *302; Cholmondeley *v.* Clinton, T. & R. 117; King of Spain *v.* Machado, 4 Russ. 215; Lambert *v.* Hut-

It is not requisite to state matters of which the court takes judicial notice, as statutes, general customs, etc.[1]

Charges.—The charges are used for meeting the defence by matter in avoidance,[2] or by inquiries to sift its truth; for giving notice of evidence which might otherwise operate as a surprise;[3] and for obtaining discovery as to matters of detail which could

chinson, 1 Beav. 277; Richardson *v.* McKinson, Litt. Sel. Cas. 320; Ferrill *v.* Craig, Halst. Dig. 223; Thurman *v.* Shelton, 10 Yerg. (Tenn.) 383; Mix *v.* Hotchkiss, 14 Conn. 32; Swayze *v.* Swayze, 1 Stockt. (N. J.) 273; Ellicott *v.* Ellicott, 2 Md. Ch. 468.

Unconnected parties with a common interest in the point at issue may unite in one bill. Comstock *v.* Rayford, 1 Sm. & M. (Miss.) 423; Armstrong *v.* Athens Co., 10 Ohio, 235; Ohio *v.* Ellis, 10 Ohio, 456; Dawson *v.* Lawrence, 13 Ohio, 543; Tilford *v.* Emerson, 1 A. K. Marsh. (Ky.) 483; Scrimeger *v.* Buckhannon, 3 A. K. Marsh. (Ky.) 219; Tilman *v.* Searcy, 5 Humph. (Tenn.) 487; Morris *v.* Dillard, 4 Sm. & M. (Miss.) 636; Wood *v.* Barringer, 1 Dev. Eq. (N. Car.) 67.

Proper averments of facts are those of such matters as must be established by evidence to enable a court to act. Canal Co. *v.* Railroad Co., 4 Gill & J. (Md.) 1; Shepard *v.* Shepard, 6 Conn. 37; Lingan *v.* Henderson, 1 Bland (Md.). 249. 255; Russ *v.* Hawes, 5 Ired. Eq. (N. Car.) 18; Caton *v.* Willis, 5 Ired. Eq. (N. Car.) 355; Salmon *v.* Clagett, 3 Bland (Md.), 134; Townsend *v.* Duncan, 2 Bland (Md.), 45; Fowler *v.* Saunders, 4 Call (Va.), 361; Yancy *v.* Fenwick, 4 Hen. & Munf. (Va.) 423; Cruger *v.* Halliday, 11 Paige (N. Y.). 314; Hobart *v.* Frisbie, 5 Conn. 592; Davis *v.* Harrison, 4 Litt. (Ky.) 262; Harding *v.* Handy. 11 Wheat. (U. S.) 103; Knox *v.* Smith, 4 How. U. S. 298; Spence *v.* Duren, 3 Ala. 251.

1. Adams Eq. *303; Story Eq. Pl. § 24; Wormald *v.* De Lisle, 3 Beav. 18; Edwards *v.* Edwards, Jac. 335; Seddon *v.* Connell, 10 Sim. 79; Williams *v.* Earl of Jersey, C. & P. 91; 1 Dan. Ch. P. 303–310, 346–9; Walburn *v.* Ingilby, 1 M. & K. 61.

Thus in a case under the Statute of Frauds it is not necessary to allege that the contract was in writing. Otherwise in *Georgia*. Logan *v.* Bond, 13 Ga. 192.

Where on the face of the bill the Statute of Limitations would be a bar to the claim, the facts relied on to take the case out of the statute must be stated. Wisner *v.* Barnet, 4 Wash. C. C. 631; Dunlap *v.* Gibbs, Yerg. (Tenn.) 94; Humbert *v.* Rector Trin. Ch., 7 Paige (N. Y.), 197; 24 Wend. (N. Y.) 595; Maxwell *v.* Kennedy, 8 How. (U. S.) 210; Field *v.* Wilson, 6 B. Monr. (Ky.) 479; Ingraham *v.* Regan, 23 Miss. 213; Bank of U. S. *v.* Biddle, 2 Pars. Eq. (Pa.) 31; Pratt *v.* Northam, 5 Mason (U. S.), 95; Williams *v.* Presb. Soc., 1 Ohio St. N. S. 478; Nimmo *v.* Stewart, 21 Ala. 682.

Material matters are not necessarily impertinent, because they are such as the court may judicially take notice of. Wells *v.* Oregon Ry. & Nav. Co., 15 Fed. Rep. (U. S.) 561.

2. Adams Eq. *303; McCrea *v.* Purmont, 16 Wend. (N. Y.) 460; Stafford *v.* Brown, 4 Paige (N. Y.), 88.

A false statement in the charging part of a sworn bill constitutes perjury. Smith *v.* Clark, 4 Paige (N. Y.), 368. Under Rule 21 of the U. S. courts, the charging part is unnecessary.

3. It is not necessary to set out the evidence in detail, since the facts proved, not the evidence, constitute the case for relief. Russ *v.* Hawes, 5 Ired. Eq. (N. Car.) 18; Dilly *v.* Heckrotte, 8 Gill & J. (Md.) 171; Jackson's Assignees *v.* Cutright, 5 Munf. (Va.) 314; Boone *v.* Chiles, 10 Pet. (U. S.) 177; White *v.* Yaw, 7 Vt. 357; Crocker *v.* Higgins, 7 Conn. 342; Skinner *v.* Bailey, 7 Conn. 496; Hayward *v.* Carroll, 4 Harr. & J. (Md.) 518; Parker *v.* Carter, 4 Munf. (Va.) 273; Miller *v.* Furse, 1 Bailey Eq. (S. Car.) 187; Lingan *v.* Henderson, 1 Bland (Md.), 236; Townsend *v.* Duncan, 2 Bland (Md.), 45; Anthony *v.* Leftwich, 3 Rand. (Va.) 263; Morrison *v.* Hart, 2 Bibb (Ky.), 4; Lemaster *v.* Burkhart, 2 Bibb (Ky.), 26; Bank of U. S. *v.* Schultz. 3 Hamm. (Ohio) 62; Lovell *v.* Farrington, 50 Me. 239; Camden, etc., R. *v.* Stewart. 4 C. E. Greene (N. J.), 343.

Evidence of confessions, conversations, or admissions of defendant is receivable to prove a fact put in issue by a bill, although they are not expressly charged in the bill as evidence of the fact. Smith *v.* Burnham, 2 Sumner (U. S. C. C.), 612; Jenkins *v.* Eldredge, 3 Story (U. S. C. C.), 183; Cannon *v.* Collins, 3 Del. Ch. 132.

It is not necessary to file as an exhibit to a bill a paper which is only evidence of

not be conveniently introduced in the statement,[1] to which they are supplemental.

The statement and charges include all material allegations. Any matter alleged, which is not material, is impertinent, and may be struck out of the bill on application to the court.[2] Likewise if criminatory of the defendant or any other person it may be struck out as scandalous, though not if material.[3]

Interrogatories.—The interrogatories are a series of questions directed to facts previously stated or charged, and accompanied with a prayer that defendant may, if he can, show why plaintiff is not entitled to the relief asked, and may answer the questions on oath.[4]

The defendant was formerly obliged only to answer the allegations of the bill, but the interrogatories were added to prevent by specific inquiries and misapprehension or evasion by the defendant. The interrogatories must be founded on the matters contained in the bill, since the defendant is not obliged to answer an interrogatory not warranted by something in the prior part of the bill.[5] In the *United States* courts and in *Pennsylvania* the interrogatories are filed separately from the bill.[6]

Prayer for Relief.—The prayer for relief is the next part of the bill, and is a statement by the plaintiff of the relief required.[7] Formerly the bill only contained a prayer for general relief, and the special statement was added to acquaint the defendant with the use to be made by the plaintiff of the facts stated in the bill. The general prayer, however, cannot safely be omitted, since if the plaintiff should in his special prayer mistake the due relief, it may be given under the general prayer, if consistent with what is actually prayed.[8]

an admission by defendant. Trapnall *v.* Byrd, 22 Ark. 10.

1. Adams Eq. *305.

2. Adams Eq. *306; Hawley *v.* Wolverton, 5 Paige (N. Y.), 522; Hood *v.* Inman, 4 Johns. Ch. (N. Y.) 437; Williams *v.* Sexton, 19 Wis. 42; Wells *v.* Oregon Ry. & Nav. Co., 15 Fed. Rep. 561.

3. Disparaging or abusive words are not scandalous unless they are also impertinent. Henry *v.* Henry, Phill. (N. C.) Eq. 334.

An unnecessary allegation bearing cruelly on one's moral character is scandalous and impertinent. Ralston *v.* Ralston, 13 Phila. (Pa.) 175.

4. Adams Eq. *307.

5. Story's Eq. Pl. § 36; Adams Eq. *308; Langdell's Eq. Pl. § 64; Mechanics' Bank *v.* Lynn, 1 Pet. 376; McDonald *v.* McDonald, 16 Verm. 630; Morris *v.* Parker, 3 Johns. Ch. (N. Y.) 297; Smith *v.* Lasher, 5 Johns. Ch. (N. Y.) 247; Pettit *v.* Candler, 3 Wend. (N. Y.) 618; Phillips *v.* Prevost, 4 Johns. Ch. (N. Y.) 205.

6. Adams Eq. *308.

7. Adams Eq. *308; Story's Eq. Pl. § 40.

8. Adams Eq. *309; Story's Eq. Pl. § 40; Colton *v.* Ross, 2 Paige (N. Y.), 396; Wilkin *v.* Wilkin, 1 Johns. Ch. (N. Y.) 111; Allen *v.* Coffman, 1 Bibb (Ky.), 469; Brown *v.* McDonald, 1 Hill's Ch. (S. Car.) 302; Barr *v.* Haseldon, 10 Rich. Eq. (S. Car.) 53; Kelly *v.* Paine, 18 Ala. 371; Thomas *v.* Ellmaker, 1 Pars. Eq. (Pa.) 99; Stone *v.* Anderson, 6 Foster (N. H.), 506.

The relief must be agreeable to the case made by the bill. Chalmers *v.* Chambers, 6 Harr. & J. (Md.) 29; Franklin *v.* Osgood, 14 Johns. (N. Y.) 527; English *v.* Foxall, 2 Pet. (U. S.) 595; McCosker *v.* Brady, 1 Barb. Ch. (N. Y.) 329; Smith *v.* Trenton Falls Co., 3 Green Ch. (N. J.) 305; Danforth *v.* Smith, 23 Vt. 247; Hillary *v* Hurdle, 6 Gill (Md.), 105; Dunnock *v.* Dunnock,

If the plaintiff doubts his title to the relief he wishes to pray, he may frame his bill with a double aspect, to have either one relief or the other, as the court may decide.[1] The prayer should point out with reasonable clearness the relief sought, and should not be multifarious, i.e., combine distinct claims against the same defendant or unite in the same suit several defendants, some of whom are unconnected with a great portion of the case.[2] The objection to a misjoinder of claims is that the defendant would be compellable to unite unconnected matters in his answer, and the proofs applicable to each would be liable to confusion; delays would be caused, and different decrees might be required. The rule, however, is for convenience merely, and may be dispensed with if the claims are so connected that a single suit is more con-

3 Md. Ch. 140; Hitch *v.* Davis. 3 Md. Ch. 266; Land *v.* Cowan, 19 Ala. 297; Cawley *v.* Poole, 1 Hen. & M. (Va.) 50; Cloud *v.* Whitman, 2 Del. Ch. 23; Appeal of Passyunk Bdg. Assoc., 83 Pa. St. 44; Lingan *v.* Henderson, 1 Bland (Md.), 251; McGlothlin *v.* Hemery, 44 Mo. 350; Kirksey *v.* Means, 42 Ala. 426; Miltenberger *v.* Morrison, 39 Mo. 71; Bailey *v.* Burton, 8 Wend. (N. Y.) 339; Slemmer's App., 8 Smith (Pa.), 155. See also Pensacola R. *v.* Spratt, 12 Fla. 26.

In Galloway *v.* Galloway, 58 Tenn. 328, it was held that an account might be granted under the prayer for general relief, though not prayed for specifically.

1. Adams Eq. *309; Story Eq. Pl. § 42; Strange *v.* Watson, 11 Ala. 324; Colton *v.* Ross, 2 Paige (N. Y.), 396; Foster *v.* Cook, 1 Hawks (N. C.), 509; Lingan *v.* Henderson, 1 Bland Ch. (Md.) 252; McConnell *v.* McConnell, 11 Vt. 290; Pensenneau *v.* Pensenneau, 22 Mo. 27; Foulkes *v.* Davies, L. R. 7 Eq. 42; Collins *v.* Knight, 3 Tenn. Ch. 183; Polhemus *v.* Emson, 29 N. J. Eq. 583; Terry *v.* Rosell, 32 Ark. 478; Gordon *v.* Ross, 63 Ala. 363.

If the kind of relief depends upon the existence of a fact of which complainant is ignorant, the prayer may be framed so as to obtain the appropriate relief as the fact shall appear at the hearing. Lloyd *v.* Brewster, 4 Paige (N. Y.), 537; McCosker *v.* Brady, 1 Barb. Ch. (N. Y.) 329; Durling *v.* Hammar, 20 N. J. Eq. 220.

2. Adams Eq. *309; Story Eq. Pl. §§ 271–286.

The determination of the question rests in the judicial discretion, and depends on the circumstances of each case. Lewis *v.* St. Albans Steel Co., 50 Vt. 477; Warren *v.* Warren, 56 Me. 360; Eastman *v.* Savings Bank, 58 N. H. 421.

A bill is multifarious where there is a misjoinder of distinct and independent causes of action. Brady *v.* McCosker, 1 Comst. (N. Y.) 221; Carmichael *v.* Browder, 3 How. (Miss.) 252; Savage *v.* Benham, 17 Ala. 119; Marshall *v.* Means, 12 Ga. 61. See also Canley *v.* Lawson, 5 Jones Eq. (N. C.) 132; Allen *v.* Miller, 4 Jones Eq. (N. C.) 146; Hughes *v.* Cook, 34 Beav. 407; Bent *v.* Yardley, 2 Hem. & M. 602; Taylor *v.* King, 32 Mich. 42; Bonck *v.* Bonck, L. R. 2 Eq. 19; Cumberland Valley R.'s Appeal, 62 Pa. St. 218.

In Daniel *v.* Morrison's Ex'r, 6 Dana (Ky.), it was held that unconnected demands against different estates could not be united in the same bill against the executor of both estates. See also Griffin *v.* Morrell, 10 Md. 364; Carter *v.* Treadwell, 3 Story (C. C.), 25; Bryan *v.* Blythe, 4 Blackf. (C. C.) 249; Davone *v.* Fanning, 4 Johns. Ch. (N. Y.) 196; May *v.* Smith, 1 Busb. Eq. (N. C.) 196; Carter *v.* Balfour, 19 Ala. 814.

In Arnold *v.* Arnold, 11 W. Va. 449, a bill by four of the children of a deceased grantor to set aside six deeds of property made by their father at one time to his six other children, alleged to have been procured by undue influence, *held* not multifarious.

The fact that the bill is filed to obtain the direction of the court will not authorize the joining of defendants for relief as to independent transactions with which many of them have no necessary connection or interest. Clay *v.* Gurley, 62 Ala. 14.

In Stuart *v.* Blair, 8 Baxter (Tenn.), 141, a bill for an account of expenditure of taxes under order of court, and for an injunction to prevent the removal of the county seat under an unconstitutional act, *held* multifarious. See also State *v.* Brown, 58 Miss. 835; Bobb *v.* Bobb, 8 Mo. App. 257; Robinson *v.* Robinson, 73 Me. 170.

venient.[1] The question whether a prayer is multifarious by reason of joining as defendant in the suit a person who is unconnected with a large portion of the case is also within the discretion of the court.[2]

Prayer for Process.—The prayer for process is the last part of the bill, and asks that a *subpœna* may issue directed to the defendant, and requiring him to appear and answer the bill, and to abide by the decree when made. Any other writ wanted, e.g., of injunction or of *ne exeat regno*, is asked for in the prayer for process, which is followed by a note specifying the interrogatories which each defendant is required to answer.[3]

Signing.—The bill should be signed by counsel.[4]

1. Adams Eq. *309-10.

In Hinton *et al.* Exr's *v.* Cole, 3 Humph. (Tenn.) 656, a bill by executors against a devisee charged that they had disbursed their private funds in the payment of the debts of the estate, that they had improved the estate, and that they had claims against the devisee, and prayed an adjustment of these matters and a sale of the real estate for the satisfaction of the debts due themselves and others. *Held*, not multifarious. See also Whitney *v.* Whitney, 5 Dana (Ky.), 327; Carroll *v.* Roosevelt, 4 Edw. Ch. (N. Y.) 211; Dunn *v.* Cooper, 3 Md. Ch. 46.

In Sanderson *v.* Sanderson, 17 Fla. 820, a bill by distributors against two administrators for mismanagement on the part of one, and an account from both, embracing in the demand a debt alleged to be due the estate by one of the defendant, *held* not multifarious.

In Goodwin *v.* Goodwin, 69 Mo. 617, a bill to compel a trustee to account, to remove him, and appoint a new one, *held* not multifarious. See also Sapp *v.* Phelps, 92 Ill. 588; Miller *v.* Balt. Co. Marble Co., 52 Md. 642; Petty *v.* Fogle, 16 W. Va. 497; Simpson *v.* Wallace, 83 N. C. 477; Woodruff *v.* Young, 43 Mich. 548.

In Baird *v.* Jackson, 98 Ill. 78, a bill praying a partition of parcels of land held by different claimants, and to have forged deeds in plaintiff's name set aside, *held* not multifarious.

2. Adams Eq. *310; Oliver *v.* Piatt, 3 How. (U. S.) 333; Marshall *v.* Means, 12 Ga. 61; Butler *v.* Spann, 27 Miss. 234; Fogg *v.* Rogers, 2 Coldw. (Tenn.) 290.

In Fleming *v.* Gilmer, 35 Ala. 62, a bill filed by a married woman against the executor and sole legatee of her deceased trustee, seeking from the executor an account of the hire and profits of the trust property during his own possession and that of his testator, and from the legatee an account of the hire and profits during his possession, with the property itself, and also the appointment of another trustee, was held not multifarious. See also Warren *v.* Warren, 56 Me. 368.

In Chase *v.* Searles, 45 N. H. 520, a bill by an execution creditor against his debtor and several persons to whom he had conveyed distinct parcels of land, out of which plaintiff sought satisfaction of his debt, was held not multifarious. See also on this point Newland *v.* Rogers, 3 Barb. Ch. (N. Y.) 432; Ryan *v.* Shawneytown, 14 Ill. 20; Stuart's Heirs *v.* Coalter, 4 Rand. (Va.) 74; Coe *v.* Turner, 5 Conn. 86; Boyd *v.* Hoyt, 5 Paige (N. Y.), 65; Swift *v.* Eckford, 6 Paige (N. Y.), 22; Jackson *v.* Forrest, 2 Barb. Ch. (N. Y.) 566; Silcox *v.* Nelson, 1 Ga. Decis. 24; Johnson *v.* Brown, 2 Humph. (Tenn.) 327; Clamorgan *v.* Guisse, 1 Miss. 141; Ingersoll *v.* Kirkby, Walk. Ch. (Mich.) 65; Nail *v.* Mobley, 9 Ga. 278; Felder *v.* Davis, 17 Ala. 418; Ayers *v.* Wright, 8 Ired. Eq. (N. C.) 229; New England Bank *v.* Newport Steam Factory Co., 6 R. I. 154; Williams *v.* Neel, 10 Rich. Eq. (S. C.) 338; Hunton *v.* Platt, 11 Mich. 264; Brinkerhoff *v.* Brown, 6 Johns. Ch. (N. Y.) 139; Metcalf *v.* Cady, 8 Allen (Mass.), 587; Waller *v.* Taylor, 42 Ala. 297; Kennebec R. *v.* Portland, 54 Me. 173; Wilson *v.* Castro, 31 Cal. 420; Oliva *v.* Bonaforza, 31 N. J. Eq. 395.

3. Adams Eq. *311.

A prayer for process "against the said defendants," without naming any person, if it does not appear elsewhere in the bill who are referred to, is defective. Howe *v.* Robins, 36 N. J. Eq. 19.

A bill is not necessarily defective because it does not contain a prayer for process. Alley *v.* Quinter, 4 MacArthur (D. C.), 390.

4. Story Eq. Pl. § 47; Rules of Eq., U. S., Rule 24; Carey *v.* Hatch, 2 Edw. Ch. (N. Y.) 190.

A bill purporting to be brought by ten persons, named as plaintiffs, but signed

4. The Different Kinds of Bills.—Bills are divided into (1) original bills, which relate to some matter not before litigated in the court by the same persons standing in the same interests; (2) bills not original, which relate to some matter already litigated in the court by the same persons, and which are either an addition to or a continuance of an original bill, or both.[1] Original bills are divided into those which pray relief, i.e., seek a decision upon the whole merits of the case as set forth by the plaintiff, and a decree which shall ascertain and protect present rights or redress past wrongs. All other bills, asking aid against possible future injury or to support or defend a suit in another court of ordinary jurisdiction, are bills not for relief.[2] Original bills praying relief are of three kinds: (1) Those which pray a decree touching some right claimed by the plaintiff in opposition to some right claimed by the defendant or touching some wrong done in violation of the plaintiff's right; (2) bills of interpleader, which pray a decree touching the rights of plaintiff and defendant, for the safety of the plaintiff; (3) bills of *certiorari*, praying a writ of *certiorari* for the removal of a cause from an inferior to a superior court of equity: this bill is rarely used.[3] Original bills not praying relief are: (1) bills to perpetuate testimony or to examine witnesses *de bene esse;* (2) bills of discovery.[4] Bills not original are (1) an addition to or continuance of an original bill, which are divided into (*a*) supplemental bills, (*b*) bills of revivor, (*c*) bills of revivor and supplement, and (2) bills for the purpose of cross litigation, or of controverting, suspending, or reversing some decree or order of court, or carrying it into execution; which are divided into (*a*) cross-bills, (*b*) bills of review, (*c*) bills to impeach a decree on the ground of fraud, (*d*) bills to suspend the operation of a decree or to avoid it on the ground of matter arisen subsequent to it, (*e*) bills to carry a former decree into execution, (*f*) bills in the nature of one or more of these bills.

5. Who are Proper Parties to a Bill.—As a general rule, all persons interested in the relief sought, who are not already joined as plaintiffs, should be made defendants, since a decree is asked which shall be a final settlement of the controversy.[6] The interests requiring joinder of those who are incidentally connected with the relief asked against others are of three kinds: (1) Interests in the subject-matter which the decree may affect, and for the protection of which the owners are joined;[7] concurrent claims with the

only by two, is the bill of the two only. Chapman *v.* Banker & Tradesman Pub. Co , 128 Mass. 478. See also Stinson *v.* Hildrup, 8 Biss. (U. S.) Cir. Ct. 376; Eveland *v.* Stevenson, 45 Mich. 394.

A bill will not be dismissed as not signed where the signature of counsel appears on its back. Litton *v.* Armstead, 9 Baxter (Tenn.), 514.

1. Story Eq. Pl. § 16.

2. Story Eq. Pl. § 17.

3. Story Eq. Pl. § 18.

4. Story Eq. Pl. § 19.

5. Story Eq. Pl. §§ 20, 21; 1 Dan. C. P. 405–408.

6. Adams Eq. *312.

7. Adams Eq. *314.

All cotenants of land are necessary parties to a bill for partition. Borah *v.* Archer, 7 Dana (Ky.), 176; Newman *v.*

plaintiff, which, if not bound by the decree, may be afterwards litigated;[1] and (3) liability to exonerate the defendant, or to contribute with him to the plaintiff's claim.[2] In case the persons interested are too numerous or indefinite to be individually joined, the rule is modified so that one or more members of a class may sue or be sued on behalf of the whole, provided the interests of the absent members are identical with those of the members before the court.[3] Where persons interested are out of the jurisdiction of the court, the fact should be stated, and if substantiated at the hearing, their appearance will be dispensed with.[4]

Kendall, 2 A. K. Marsh. (Ky.) 234. So also as to chattels. Ramey *v.* Green, 18 Ala. 771.

In Young *v.* Bilderback, 2 Green Ch. (N. J.), it was held that all the heirs must be parties to a bill by an heir to avoid the deed of the ancestor.

In Moore *v.* Murrah, 40 Ala. 573, it was held that in a bill for specific performance of a contract for the sale of land made by a deceased person his heirs must be made parties. To a bill for foreclosure and sale of mortgaged premises, all encumbrances or persons having an interest existing at the commencement of the suit, subsequent as well as prior in date to the plaintiff's mortgage must be made parties. Haines *v.* Beach, 3 John's Ch. (N. Y.) 459; Porter *v.* Clements, 3 Ark. 364; Huggins *v.* Hall, 10 Ala. 283. See also Youngman *v.* Elmira & W. R., 65 Pa. St. 278.

1. Adams Eq. *317.

This is illustrated by cases in which plaintiff sues on an equitable title, and the legal title is vested in a trustee for him. The trustee must be made a party, since he has a legal right against the defendant, which would not otherwise be bound. Malin *v.* Malin, 2 Johns. Ch. (N. Y.) 238; Cassiday *v.* McDaniel, 8 B. Monr. (Ky.) 519; Carter *v.* Jones, 5 Ired. Eq. (N. C.) 196; Everett *v.* Winn, 1 Sm. & M. Ch. (Miss.) 67; McKinley *v.* Irwin, 13 Ala. 681; Swan *v.* Dent, 2 Md. Ch. 111; Sayre *v.* Sayre, 2 Green (N. J.), 349.

The assignor of a debt or other chose in action must be joined as a party in a suit therenn by the assignee. Walburn *v.* Ingilby, 1 M. & K. 61. See also Thompson *v.* McDonald, 2 Dev. & Bat. Eq. (N. C.), 463; Hopkins *v.* Hopkins, 4 Strob. Eq. (S. C.) 207; Montague *v.* Lobdell, 11 Cush. (Mass.) 111; Bell *v.* Schrock, 2 B. Monr. (Ky.) 29; Beals *v.* Cobb, 51 Me. 348.

The assignor of a judgment is a necessary party to a bill by the assignee thereof. McKinney *v.* Rutherford, 1 Dev. & Bat. Eq. (N. C.) 14; Elliott *v.* Waring, 5 Monr. (Ky.) 338. See also Morey *v.* Forsyth, Walk. Ch. (Miss.) 465.

The assignor of a note in controversy who has no interest in it and against whom no relief is prayed, is not a necessary party. Everett *v.* Winn, 1 Sm. & M. Ch. (Miss.) 67. See also Polk *v.* Gallant, 2 Dev. & Bat. Eq. 395; James River Co. *v.* Littlejohn, 18 Gratt. (Va.) 53; Cole *v.* Lake Co., 54 N. H. 242; Walker *v.* Brooks, 125 Mass. 241; Jameson *v.* Myles, 7 W. Va. 311; Omohundro *v.* Henson, 26 Gratt. (Va.) 511)

2. Adams Eq. *319.

Co-obligors on a bond are all necessary parties in a suit thereon. Bland *v.* Winter, 1 S. & S. 246. See also Pollard *v.* Collier, 8 Ham. (Ohio) 43.

Formerly a bill could not be filed against a surety without joining the principal, but, now, if plaintiff's demand be several as well as joint, he may proceed against both or either. See 32d order of August, 1841, and Rules of Eq. U. S. Courts, Rule 51; Roane *v.* Pickett, 2 English (Ark.), 510; Hart *v.* Coffee, 4 Jones Eq. (N. C.) 322; Vilas *v.* Jones, 1 Comst. (N. Y.) 284

3. Adams Eq. *320; Clements *v.* Bowes, 1 Drewr. 684; McBride *v.* Lindsay, 9 Hare, 574; Long *v.* Storie, 22 L. J. Ch. 200; Salomons *v.* Laing, 12 Beav. 377; Harmer *v.* Gooding, 3 De G. & Sm. 407; Carey *v.* Hoxey, 11 Ga. 645; Putnam *v.* Sweet, 1 Chand. (Wis.) 287; Hill *v.* Commissioners, 1 Pars. Eq. (Pa.) 501; Smith *v.* Swormstekt, 16 How. U. S. 288; Whitney *v.* Mayo, 15 Ill. 251; Thornton *v.* Hightown, 17 Ga. 1; Stimson *v.* Lewis, 36 Vt. 91; Hendrix *v.* Money, 1 Bush (Ky.). 306; Davis *v.* Clabaugh, 30 Md. 508; Douglass Co. *v.* Walbridge, 38 Wis. 179.

4. Adams Eq. *322; Burton *v.* Eggington, 1 Hare, 488; Munoz *v.* De Mastet,

BILL OF EXCEPTIONS. (See also APPEAL; AUDITA QUERELA; CERTIORARI; ERROR; JUDGMENT; NEW TRIAL.)

1. Definition.—A bill of exceptions is a statement in writing of an objection made by a party to the decision of the court on a point of law, clearly stating the objection, with the facts and circumstances upon which it is founded, and, in order to attest its accuracy, signed and sealed by the judge or court who made the decision; the object thereof being to put the decision objected to upon record for the information of the court having cognizance of the cause in error.[1]

2. History.—At common law the only objections that could be taken to errors in law were to those which appeared on the face of the record proper, consisting ordinarily of the process, pleadings, verdict and judgment. The evidence and the rulings on questions relating thereto not appearing on the record, no objections as to admissibility, competency, the charge, etc., could be considered. But by Stat. Westm. 2 (13 E. I. c. 31) it was provided that "when one impleaded before any of the justices alleges an exception praying they will allow it; and if they will not, if he that alleges the exception writes the same, and requires the justices will put to their seals, the justices shall so do; and, if one will not, another shall; and if, upon complaint made of the justice, the king cause the record to come before him, and the exception be not found in the roll, and the plaintiff show the written exception, with the seal of the justices thereto put, the justice shall be commanded to appear at a certain day, either to confess or deny his seal; and if he cannot deny his seal, they shall proceed to judgment according to the exception, as it ought to be allowed or disallowed."[2] Bills of exceptions are a part of the procedure in all States governed in their jurisprudence by the principles of the common law.[3] But they have been abolished in England.[4]

3. Where it Lies.—It lies generally, as has been said, to errors of law alleged by the counsel taking the exceptions to have been made during the course of the trial or in relation thereto by the

1 Beav. 109; Spivey *v.* Jenkins, 1 Ired. Eq (N. C.) 126; Milligan *v.* Milledge, 3 Cranch (U. S.) 220; Lainhart *v.* Reilly, 3 Dessaus. (S. C.), 590; Rule 47, U. S. Courts in Eq.; Eller *v.* Bergling, 3 MacArthur (D. C.), 189.

Authorities for Bill in Equity.—Story's Equity Pleading; Langdell's Equity Pleading; Adams' Equity.

1. Powell on App. Proc. 211.
2. Bac. Abr., tit. "Bill of Exc."
3. Endicot *v.* Petitioner, 24 Pick. 339; Courser *v.* Vermont Central R. Co., 25 Vt. 476; Ohio Code, §§ 291–295; Wheeler *v.* Winn, 53 Pa. St. 122; Seibright *v.* State, 2 W. Va. 591.
4. By the Sup. Ct. of Judic. Act, 1873, 36 and 37 Vict. c. 66.

judge in deciding incidental questions or in his charge to the jury, and, in some of the States, by statute or rule of law, to the decision of the court on a motion for a new trial.[1] The errors are such as may have been made in deciding as to the admissibility and competency of evidence;[2] in orders made upon incidental matters unfavorable to the party excepting;[3] in instructions to or refusing to instruct the jury;[4] in accepting or rejecting witnesses,[5] etc.

4. Where it Does Not Lie.—It does not lie, or at least is unnecessary, where the record itself shows the matter and the decision of the court thereon, as to judgment upon a demurrer or on certain motions founded upon the record.[6] Nor will it lie to a decision on a matter discretionary with the court;[7] nor to the finding of a court on questions of fact submitted to it;[8] nor

1. Johnson *v.* State, 43 Ark. 391; Allen *v* Levy, 59 Miss. 613; Munde *v.* Lambie, 125 Mass. 367. *Compare* Eidemiller *v.* Kump, 61 Mo. 340. But see Com. *v.* Morrison, 134 Mass. 189; Burke *v.* Young, 2 S. & R. (Pa.) 383.

2. Clemson *v.* Kruper, 2 Ill. (1 Breese) 62; Storer *v.* White, 7 Mass. 448; Foster *v.* Mackay, 7 Metc. (Mass.) 531; Keyes *v.* Throop, 2 Aik. (Vt.) 276.

Where the refusal of evidence is excepted to, and the evidence is afterwards admitted, the rejection ceases to be a ground of objection. Massey *v.* Walker, 10 Ala. 288; Ligget *v.* Bank of Penn., 7 S. & R. (Pa.) 219.

The admission of immaterial testimony is no ground of exceptions. Flint *v.* Rogers, 15 Me. 67; Fowler *v.* Middlesex, 6 Allen (Mass.), 92.

3 Purple *v.* Clark, 5 Pick. (Mass.) 206.

As where a nonsuit is ordered. Feyler *v.* Feyler, 2 Greenl. (Me.) 310. See also, Heffron *v.* State, 8 Fla. 73; Syme *v.* Butler, 1 Call (Va.), 123.

4. Douglass *v.* M'Allister, 3 Cranch (U. S.), 300; Fletcher *v.* Howard, 2 Aik. (Vt.) 115; *Exp.* Bailey, 2 Cow. (N. Y.) 479; Gilmore *v.* McNeil, 45 Me. 399; Sowerwein *v.* Jones, 7 Gill & J. (Md.) 335; Com. *v.* Packard, 5 Gray (Mass.), 101; Forest *v.* Crenshaw, 81 Ky. 51. But see McKinsey *v.* McKee (Ind.), 9 N. E. Rep. 771.

But not where they operate in favor of the party excepting. March *v.* Portsmouth, etc., R. Co., 19 N. H. 372; Bailey *v.* Campbell, 2 Ill. (1 Scam.) 47.

The entry of the clerk on the order-book that the court instructed the jury to return the following verdict (setting it out) will not take the place of a bill of exceptions. Hall *v.* Durham (Ind.), 9 N. E. Rep. 926.

5. Marquand *v.* Webb, 16 Johns. (N.Y.) 89; Powell *v.* Waters, 8 Cow. (N. Y.) 669.

6. Hamlin *v.* Reynolds, 22 Ill. 207; Com. Bank *v.* Buckingham, 12 Ohio St. 402. But see Fox *v.* Monticello, 83 Ind. 483; Powell on App. Pro. 211, 215.

Nor where the record shows fatal error, as want of jurisdiction. Fields *v.* Maloney, 78 Mo. 172.

7. Reynard *v.* Brecknell, 4 Pick (Mass.) 302; Moody *v.* Henckley, 34 Me. 200; Thayer *v.* Elliott, 16 N. H. 102; Jenkins *v.* Brown, 21 Wend. (N. Y.) 454; Edwards *v.* Hopkins, 5 R. I. 138; Fairfield *v.* King, 41 Vt. 611.

As to the granting or refusing of amendments. Bruce *v.* Fairbanks, 12 Cush. (Mass.) 273; Binney *v.* Spring, 42 Barb. (N. Y.) 470.

Or the refusal of a nonsuit. Ballentine *v.* White, 77 Pa. St. 20.

But refusal to set aside a judgment of compulsory nonsuit is in Pennsylvania the subject of exception. Act 11, Mar. 1875, P. L. 6.

So also a refusal to order a judgment for want of a sufficient affidavit of defence. Act Apr. 18, 1874, 6 P. L. 64.

To questions of continuance. People *v.* Colt, 3 Hill (N. Y.), 432; Caldwell *v.* Cole, 13 Me. 120. But see Murphy *v.* Simonds, 14 La. Ann. 322; Harrison *v.* Cotton, 25 Tex. 53.

To matters having reference to the conduct of the trial, as the order in which witnesses are called or the number of them. Cushing *v.* Billings, 2 Cush. (Mass.) 158.

8. Lansing *v.* Wiswall, 5 Den. (N. Y.) 213; Emerson *v.* Young, 18 Vt. 603; Kettell *v.* Foote, 3 Allen (Mass.), 212; Doe *v.* Shraggins, 2 Ill. (1 Scam.) 330;

to comments upon evidence not involving direction in matter of law.[1]

5. What it should Contain.—It should set forth the facts on which the adjudication to be reviewed is founded, and only those to which the decision applies,[2] except in special cases, on questions depending upon the evidence, as where the exception is to the overruling of a motion for a new trial on the ground that the verdict was contrary to the evidence.[3] On these cases the whole evidence must be set out with an averment that it is *all* the evidence.[4] The error must be set forth distinctly, and must appear to be prejudicial to the party excepting.[5] Exceptions should not be made to the judge's charge generally, if any portion thereof is correct, but the special portions objected to should be specified.[6] Documents referred to in the bill, an understanding of which is essential to the court of appeal in coming to a decision on the errors excepted to, should be annexed to the bill and made a part thereof, or else so particularly described as to render their identity conclusive.[7]

6. When it must be Taken.—Technically speaking, it should be

Fletcher *v.* Clarke, 29 Me. 485; Norwich, etc., R. Co. *v.* Kay, 22 Conn. 603. *Compare* Stearns *v.* Fiske, 18 Pick. (Mass.) 24.

1. Loud *v.* Pierce, 25 Me. 233; Donnelly *v.* State, 26 N. J. L. 463; Curl *v.* Lowell, 19 Pick. (Mass.) 25; Sawyer *v.* Phaley, 33 Vt. 69; Crawford *v.* Wilson, 4 Barb. (N. Y.) 504.

2. Wallace *v.* Boston, 10 Mo. 660; Muirhead *v.* Muirhead, 16 Miss. 211; Hamilton *v.* Moore, 4 W. & S. (Pa.) 570. See Pennock *v.* Dialogue, 2 Pet. (U. S.) 15.

3. Hopkins *v.* Dowd, 11 Ark. 627; Swain *v.* Cawood, 2 Cam. (Ill.) 505; Buckmaster *v.* Cool, 12 Ill. 74; Lurton *v.* Carson, 8 Blackf. (Ind.) 464.

4. Nay *v.* Byers, 13 Ind. 412; Barnes *v.* Blackistow, 2 Harr. & J. (Md.) 376; Fuller *v.* Ruby, 10 Gray (Mass.), 285; Snowden *v.* Warder, 3 Rawle (Pa.), 101; Ballentine *v.* State (Ark.), 2 S. W. Rep. 340; Fellenzer *v.* Van Valzah, 95 Ind. 128.

In the absence of such an averment, the appellate court may indulge any reasonable presumption that other evidence was given, of a character to support the decision or verdict. Pullen *v.* Lane, 4 Coldw. (Tenn.) 249; Southern, etc., Ins. Co. *v.* Holcombe, 35 Ala. 327; Ingram *v.* State, 7 Mo. 293; Wolf *v.* Hanver, 1 Gill (Md.), 84; Louisville, etc., R. Co. *v.* Murdock, 82 Ind. 381.

And the averment will be disregarded where an omission is apparent. Collins *v.* Collins, 100 Ind. 266; Cosgrove *v.* Cosby, 86 Ind. 511.

5. Taylor *v.* Flint, 35 Ga. 124; Hoyt *v.* Williams, 41 Mo. 270; State *v.* Cowan, 7 Ired. L. (N. Car.) 239; Armstrong *v.* Clark, 17 Ohio, 495; Webster *v.* Calden, 55 Me. 165; Fry *v.* Bennett, 3 Bosw. (N. Y.) 200; Holmes *v.* Gayle. 1 Ala. 517; Tipper *v.* Com., 1 Metc. (Ky.) 6; State *v.* Bennett, 75 Me. 590.

6. Cronk *v.* Canfield, 31 Barb. (N. Y.) 171; Reynolds *v.* Boston, etc., R. Co., 43 N. H. 580; Oliver *v.* Philips, 21 N. J. L. 597; Mobile & Mont'y R. Co. *v.* Jurey, 111 U. S. 584.

This is especially provided for in Rules of Sup. Ct. U. S. r. 4, p. 8.

A general exception is of no effect if any portion of the charge be correct. Cooper *v.* Schesinger, 111 U. S. 148; Smith *v.* Sweeney, 69 Ala, 524.

7. Taylor *v.* Spears, 8 Ark. 429; Keith *v.* Hirschberg Optical Co. (Ark.), 2 S. W. Rep. 777; Quigley *v.* Campbell, 12 Ala. 58; Pearce *v.* Clements, 73 Ala. 256; M'Laughlin *v.* Walsh, 3 Scam. (Ill.) 185; Humphrey *v.* Burge, 1 Greene (Iowa), 223; Reed *v.* Hubbard, 1 Greene (Iowa), 153; Walrath *v.* Viley. 1 Bush (Ky.), 266; Wright *v.* Bank of Ala., 14 Miss. 251; Stafford *v.* Stafford, 27 Pa. St. 144; Vaughn *v.* Mills, 18 B. Mon. (Ky.) 633; Acheson *v.* Sutliff, 18 Ohio, 122; Fish *v.* Benson (Cal.), 12 Pac. Rep. 454; Joyner *v.* Van Alstyne (Neb.), 30 N. W. Rep. 944; Shimer *v.* Butler Un'y, 87 Ind. 218.

presented to the judge at the time of the decision excepted to,[1] but usually it is in time if reduced to form at any time during the trial term.[2] In practice, the judge is requested to note down the exception at the time the decision is given, and afterwards the bill is made out and handed to him for any corrections or amendments he may suggest at some time during the term.[3]

7. Formal Requisites.—The bill, if a proper one, should be signed and sealed by the trial judge,[4] and he may be compelled thereto in case of refusal by *mandamus*.[5] The time within which this and the subsequent filing and serving may be done depends to a great extent on statute or rule of court in the different States.[6]

8. Waiver.—It has been decided in some of the States that a party waives his bill of exceptions by subsequently moving for a new trial and not inserting his exceptions in the motion.[7] But in

1. Low *v.* Goldsmith, R. M. Charlt. (Ga.) 288; Armstrong *v.* Mock, 17 Ill. 166; Joannes *v.* Underwood, 6 Allen (Mass.), 241; Croft *v.* Ferrell, 21 Ala. 351; Vance *v.* Cowing, 13 Ind. 460; Baltimore, etc., R. Co. *v.* Risley, 14 Md. 424; Mattingville *v.* Moranville, 11 Mo. 604.

If reduced to form after the trial it should be signed *nunc pro tunc*, and purport on its face to be the same as if actually reduced to form and signed during the trial. Walton *v.* U. S., 9 Wheat. (U. S.) 651.

2. Byrd *v.* Tucker, 3 Ark. 451; Wilcox *v.* Mitchell, 5 Miss. 272; Ligget *v.* Bank of Pa., 7 S. & R (Pa.) 219; Camp *v.* Tompkins, 9 Conn. 545; Walton *v.* U. S., 9 Wheat. (U. S.) 651; Brown *v.* Clarke, 4 How. (U. S.) 4; Sweet *v.* Perkins, 24 Fed. Rep. 777; Marye *v.* Strouse, 6 Sawy. C. Ct. (U. S.) 204. See Nyce *v.* Shaffer (Neb.), 30 N. W. Rep. 943; Huff *v.* Brantley, 66 Ga. 599.

3. Powell on App. Proc. 222; State *v.* Powers, 14 Ga. 388; Shepard *v.* Hull, 42 Me. 577; Busby *v.* Finn, 1 Ohio St 409; State *v.* Laliyer, 4 Minn. 368; Longworth *v.* Higham, 89 Ind. 352; Holle *v.* Foltz, 74 Ind. 54; Terre Haute, etc., R. Co. *v.* Bond, 13 Ill. App. 328. *Compare* Dean *v.* Gridley, 10 Wend. (N. Y.) 254; Ash *v.* Marlow, 20 Ohio, 119; Frasier *v.* Laughlin, 6 Ill. 185.

After sealing by the court and adjournment the bill cannot be altered or amended by the judge. Branch Bank *v.* Kinsey, 5 Ala. 9; Dudley *v.* Chilton Co., 66 Ala. 593.

4. If the bill contain matter false or untruly stated the judges are not obliged to affix their seals, for that would be to command them to attest a falsity. Bull, N. P. 316; 3 Bl. Com. 362. See, as to signing and sealing, Morse *v.* Evans, 6 How. Pr. (N. Y.) 445; Donnelly *v.* State, 2 Dutch. (N. J.) 463; Gordon *v.* Browne, 3 H. & M. (Va.) 219; Clark *v.* Johnson, 19 Johns. (N. Y.) 246; Darling *v.* Gill, Wright (O.), 73; Thompson *v.* Backenstos, 1 Oreg. 17; Riker *v.* Scofield, 6 W. 367.

5. People *v.* Judges of Wash'n, 1 Caines (N. Y.), 511; 2 Caines (N. Y.), 96. See, *contra*, Conrow *v.* Schloss, 55 Pa. St. 28, where it was held that the remedy was by a special writ on the Stat. West. 2, setting forth the circumstances of the case, and commanding the judge, if they be true, to affix his seal; if in his return he confess the fact and seal the bill the exceptions become a part of the record; if he deny them, the party has his action for a false return.

6. See Wood *v.* Brown, 8 Ala. 563; Truluck *v.* Peeples, 1 Ga. 1; Bush *v.* Keaton, 65 Ga. 296; Ill. R. Co. *v.* Palmer, 24 Ill. 43; People *v.* Blades, 10 Ill. App. 17; *Ex parte* Gwartney, 27 Ind. 189; Joseph *v.* Mather (Ind.), 10 N. Eastn. Repr. 78; Colee *v.* State, 75 Ind. 511; Corlev *v.* Evans, 4 Bush (Ky.), 499; Meaux *v.* Meaux, 81 Ky. 475; Nesbitt *v.* Dallam, 7 Gill & J. (Md.) 494; Brown *v.* Bissell, 1 Dougl. (Mich.) 273; Gray *v.* Thomas, 12 Smed. & M. (Miss.) 111; Hassinger *v.* Pye, 10 Mo. 156; Givens *v.* Van Studdiford, 13 Mo. App. 168; Spencer *v.* St. Louis, etc., R. Co., 79 Mo. 500; Agnew *v.* Campbell, 2 Harr. (N. J. L.) 291; Sikes *v.* Ransom, 6 Johns. (N. Y.) 279; Kirkpatrick *v.* Lex, 49 Pa. St. 122; State *v.* Gale, 7 Wis. 693; Burdick *v.* Briggs, 11 Wis. 124; Clement *v.* State (Tex.) 2 S. W. Rep. 379; Farrar *v.* Bates, 55 Tex. 193.

7. Bixby *v.* State, 15 Ark. 395; Ferguson *v.* Ehrenberg, 39 Ark. 420; Sec-

other States a motion for a new trial is no waiver of the bill.[1] A bill will not be sustained where the party's subsequent course is inconsistent with his prior exceptions, nor where the proceedings excepted to took place by his request or with his assent.[2]

9. Effect of.—The bill of exceptions does not of itself operate as a stay of proceedings.[3] It draws into examination only the specific points to which the attention of the court is directed by their having been subjects of exception.[4] It is conclusive evidence as between the parties, but in that particular suit only, of the facts stated therein;[5] but the omission of facts which should have appeared upon the record cannot be remedied by a bill of exceptions afterwards filed in the case.[6]

10. Construction of.—Error must be made to appear affirmatively by the bill,[7] and where there are two possible constructions that one will be taken which is most favorable to the validity of the judgment in the court below;[8] and it is a general principle that the bill will be taken most strongly against the party taking the exceptions.[9]

11. In Criminal Cases.—Formerly the right to a bill of exceptions did not exist in criminal proceedings, except in cases of misdemeanor which did not amount to treason or felony.[10] The right to a bill on the part of the defendant now, however, exists in most of the States, though not generally on the part of the State.[11]

BILL OF EXCHANGE. See BILLS AND NOTES.

BILL OF INFORMATION. See CRIMINAL LAW; INDICTMENT; INFORMATION.

BILL OF INTERPLEADER. See INTERPLEADER.

comb *v.* Prov. Ins. Co., 4 Allen (Mass.), 152.

1. West *v.* Cunningham, 9 Port. (Ala.) 104; U. S. *v.* Hodge, 6 How. (U. S.) 279.

2. Nixon *v.* Hammond, 12 Cush. (Mass.) 285; Davis *v.* Winslow, 51 Me. 264; Random *v.* Toby, 11 How. (U. S.) 493; Merriman *v.* McManus, 102 Pa. St. 102.

3. Seymour *v.* Slocum, 18 Wend. (N. Y.) 509; Holcombe *v.* Roberts, 19 Ga. 588; Irwin *v.* Jackson, 34 Ga. 101.

4. Frier *v.* Jackson, 8 Johns. (N. Y.) 495; Bull N. P. 316.

5. Law *v.* Merrills, 6 Wend. (N. Y.) 276; Shotwell *v.* Hamblin, 23 Miss. 156; Bingham *v.* Cabbot, 3 Dall. (U. S.) 38.

6. Bowen *v.* State of Indiana, 6 West. Rep. 897, where the record, failing to disclose that a plea to an indictment had been entered, was held to show on its face a mistrial, and not to be helped by a recital in the bill of exceptions that "not guilty" was pleaded.

7. Robin *v.* State, 40 Ala. 72; Poultney *v.* Glover, 23 Vt. 328; Bingham *v.* Cabbot, 3 Dall. (U. S.) 38; Doebler *v.* Waters, 30 Ga. 344; Higgins *v.* Downs, 75 Me. 346.

8. McReynolds *v.* Jones, 30 Ala. 101.

9. Thompson *v.* Drake, 32 Ala. 99; Rogers *v.* Hall, 3 Scam. (Ill.) 5.

10 1 Bac. Abr. 528; Hill. N. Trials, 93 §§ 6 and 6a; Com. *v.* Cummings, 3 Cush. (Mass.) 212.

11. 3 Whart. Cr. L. § 3050; 1 Bish. Cr. L. §§ 840–1; U. S. *v.* More, 3 Cranch (U. S.), 174; State *v.* Johnson, 2 Iowa, 549; State *v.* Jones, 7 Ga. 422; People *v.* Coming, 2 Comst. (N. Y.) 1; Com. *v.* Cummings, 3 Cush. (Mass.) 212. But see Fife *v.* Com., 29 Pa. St. 429; State *v.* Buchanan, 5 Harr. & J. (Md.) 317. See in general Powell on Appellate Proceedings, chap. 5; Bacon's Abr., "Bill of Exceptions;" Troub. & Hal. Pr. §§ 694–701

BILL OF LADING. (See also ACT OF GOD; CARRIERS; CONTRACTS; NEGLIGENCE; SALES; STOPPAGE IN TRANSITU; SHIPPING.)

(For the topics Freight, Stoppage in transitu, Delivery to Consignee, Delivery to Carrier, Connecting Carriers, Negligence, and Actions against Carriers, etc., etc., see CARRIERS.)

1. **Definition.**—A bill of lading has been judicially defined to be "a written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported, on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated."[1] Again, it has been defined to be "a formal acknowledgment of the receipt of goods, and an engagement to deliver them to the consignee or his assigns."[2] The Indian Stamp Act, 1 of 1879, sec. 3, cl. 3, defines a bill of lading to be

1. The Delaware, 14 Wall. (U. S.) 579, opinion of Clifford, J.

2. Cope *v.* Cordova, 1 Rawle (Pa.), 203. For other judicial definitions, see Empire Transportation Co. *v.* Wallace, 68 Pa. St. 302; Merchants' Bank *v.* Hewitt, 3 Iowa, 93; Covill *v.* Hill, 4 Denio (N. Y.), 323.

"any instrument signed by the owner of a vessel or his agent, acknowledging the receipt of goods therein described, and undertaking to deliver the same at a place and to a person therein mentioned or indicated." [1]

2. The Bill of Lading as a Receipt.—A bill of lading is a receipt for the goods shipped; and, as between the original parties to it, is *prima-facie* evidence of the truth of the statements contained in it. Its recitals are, however, susceptible of explanation, modification, and contradiction by parol proof.[2] It is competent for the carrier to show that the shipper had no such goods as those receipted for, or that, having the goods, they were never delivered to the carrier.[3]

Receipt Evidence of Actual Delivery.—The bill is *prima-facie* evidence of the actual delivery of the goods to the carrier.[4] If a bill of lading, through inadvertence or otherwise, be signed before the goods are actually shipped, and afterwards certain goods are delivered to the carrier as and for the goods receipted for, the bill will operate on these goods as between the shipper and the carrier by way of relation and estoppel.[5]

Receipt for Goods Improperly Described.—When a misdescription of the goods covered by the bill injuriously affects the rights of the parties, the consequences must ordinarily fall upon him who has made the misdescription.[6]

1. A "clean" bill of lading is one issued for the transportation of goods by water, which is silent as to the mode of stowing the goods. Such a bill imports that the goods are to be carried under deck, and has the same effect as an express agreement that they shall be so carried. The Delaware, 14 Wall. (U. S.) 579; Creery *v.* Holly, 14 Wend. (N. Y.) 26.

2. Cox *v.* Peterson, 30 Ala. 608; Wayland *v.* Mosely, 5 Ala. 430; Myer *v.* Peck, 28 N. Y. 590; O'Brien *v.* Gilchrist, 34 Me. 554; Cafiero *v.* Welsh, 8 Phil. Rep. (Pa.) 130; Steamer Wisconsin *v.* Young, 3 Green (Iowa), 268; The Lady Franklin, 8 Wall. (U. S.) 325; Glass *v.* Goldsmith, 22 Wis. 488; Wood *v.* Perry, 1 Wright (Ohio), 240; Witzler *v.* Collins, 70 Me. 290; Kirkman *v.* Bowman, 8 Rob. (Ala.) 246; White *v.* Van Kirk, 25 Barb. (N. Y.) 16; The J. W. Brown, 1 Bissell (C. C.), 76; Fitzhugh *v.* Wyman, 9 N. Y. 558; Fowler *v.* Stirling, 3 L. C. Jurist, 103. See also, *contra*, Peck *v.* Dinsmore, 4 Porter (Ala.), 212.

3. Berkley *v.* Watling, 7 Adolphus & Ellis, 29; The Schooner Freeman *v.* Buckingham, 18 Howard (U. S.), 182; The Delaware, 14 Wallace (U. S.), 579; Hubbersty *v.* Ward, 8 Ex. 330; Sears *v.* Wingate, 3 Allen (Mass.), 103; Baltimore, etc., R. Co. *v.* Wilkins, 44 Md. 11, The Lady Franklin, 8 Wall. (U. S.) 325; Ferne *v.* Richardson, 12 La. Ann. 752; Fragano *v.* Long, 4 B. & C. 219; Hunt *v.* M. C. R. Co. 29 La. Ann 446.

4. Flower *v.* Downs, 12 Rob. (La.) 101; Southern Express Co. *v.* Hess, 53 Ala. 19; Southern Express Co. *v.* Craft, 49 Miss. 480; Jones *v.* Walker, 5 Yerger (Tenn.). 427; Northern Trans. Co. *v.* McClary, 66 Ill. 233; Graham *v.* Penna. Insurance Co. 2 Wash. (C. C.) 113. The bill is not objectionable as evidence because it acknowledges the receipt of other goods besides those forming the subject-matter of the suit. Wallace *v.* Vigus, 4 Blackf. (Ind.) 260.

5. Rowley *v.* Bigelow, 12 Pick. (Mass.) 307; The Delaware, 14 Wall. (U. S.) 579; The Idaho, 3 Otto (U. S.), 575; The Brig Edwin, 1 Sprague (R. I.) 477.

6. Fassett *v.* Ruark, 3 La. Ann. 694; C. & A. R. Co. *v.* Shea, 66 Ill. 471; B. C. R. & N. R. Co. *v.* McCune, 52 Iowa, 600; N. J. R. & Trans. Co. *v.* P. R. Co., 3 Dutcher (N. J.), 100; Southern Exp. Co. *v.* Womac, 1 Heisk. (Tenn.) 256.

For cases in which goods have been improperly described, see C. & A. R. Co. *v.* Thompson, 19 Ill. 578; Amer. Exp. Co. *v.* Perkins, 42 Ill. 458; C. & A. R. Co. *v.* Shea, 66 Ill. 471; B. C. R. & N. R. Co. *v.* McCune, 52 Iowa. 600; Southern Exp. Co. *v.* Crook, 44 Ala. 468; McCoy *v.* E. & W. T. Co., 42 Md. 499.

Receipt for Specific Quantity and Weight.—Where the bill receipts for a specific quantity or specific weight, it is *prima-facie* evidence that the carrier received the quantity or weight named.[1]

Receipts for Goods of Specified Value.—As a general rule, the statement of value of a cargo in a bill of lading (without fraud) is conclusive between the owner of the cargo and the owner of a ship, in the adjustment of general average at the home port.[2] There is no obligation upon the shipper, when tendering goods for transportation, to inform the carrier of their value, unless he is asked to do so.[3]

Also, Hyde *v.* N. Y. & N. O. S. S. Co., 17 La. Ann. 29.

Baggage does not embrace samples of merchandise, or money, carried in a trunk, or other articles not usually carried as baggage. Hawkins *v.* Hoffman, 6 Hill (N. Y.), 586; But bank-bills have been held to be goods. Allen *v.* Sewell, 2 Wend. (N. Y.) 327. See BAGGAGE.

Misdescription of the goods by the carrier is not binding on the shipper, and the carrier cannot, in such a case, shield himself behind the strict letter of the recital, where he recites generally, but with a knowledge of the contents. Harmon *v.* N. Y. & E. R. Co., 28 Barb. (N. Y.) 323; Bancroft *v.* Peters, 4 Mich. 619.

1. McLain *v.* Fleming, 2 L. T. N. S. 317; Hall *v.* G. T. R. Co., 34 Up. Can. Q. B. 517.

Such an acknowledgment is not, however, conclusively binding as between the original parties. Steamboat Wisconsin *v.* Young, 3 Green (Iowa), 268; Myer *v.* Peck, 28 N. Y. 590; Abbe *v.* Eaton, 51 N. Y. 411; Kirkman *v.* Bowman, 8 Rob. (La.) 246; Erb *v.* Keokuk Packet Co., 43 Mass. 53; The J. B. Brown, 1 Biss. 76; Goodrich *v.* Norris, Abbott's Adm. 196; L. R. & F. S. R. Co. *v.* Hall, 32 Ark. 669; Hall *v.* Mayo, 89 Mass. 454; Dean *v.* King, 22 Ohio State, 119; Manchester *v.* Milne, 1 Abbott's Adm. 115; Strong *v.* G. T. R. Co., 15 Mich. 206; Blanchet *v.* Powells Colliery Co., 9 L. R. Exch. 74; Bates *v.* Todd, 1 Moody & Rob. 106; Glass *v.* Goldsmith, 22 Wis. 488; Naugatuck R. Co. *v.* Beardsley Scythe Co., 33 Conn. 218; Lane *v.* B. & A. R. Co., 112 Mass. 455.

The *onus* of rebutting the presumption raised by the statement of quantity or weight rests upon the carrier. McLean *v.* Fleming, 2 L. T. N. S. 317; McCready *v.* Holmes, 6 Am. Law Reg. 229.

A custom to treat statement of quantity as conclusive has been held to be unreasonable and void. Strong *v.* G. T. R. Co., 15 Mich. 206.

But the statement may be made conclusive by the use of the words "Quantity guaranteed." Bissell *v.* Campbell, 54 N. Y. 353; Burne *v.* Weeks, 7 Bosw. (N. Y.) 372.

The use of the words "more or less" indicates that the carrier does not intend to be bound by the statement of quantity or weight, and that it is to be regarded as an estimate rather than an exact measurement. Kelley *v.* Bowker, 11 Gray (Mass.), 428; O'Brien *v.* Gilchrist, 34 Maine, 554; Shepherd *v.* Naylor, 5 Gray (Mass.), 591; Dean *v.* King, 22 Ohio St. 119; Winterport G. & B. Co. *v.* Schooner Jasper, 1 Holmes (C. C.), 99; Peebles *v.* B. & A. R. Co., 112 Mass. 498.

2. Putnam, J., in Tudor *v.* Macomber *et al.*, 31 Mass. 34.

Where the carrier, knowing the value of the goods, fails to enter it in his receipt, he cannot rely upon a stipulation contained therein, limiting his liability to a specific amount (in reality less than the true value of the goods), because the value has not been declared by the shipper. Kember *v.* So. Exp. Co., 22 La. Ann. Rep. 158; So. Ex. Co. *v.* Newby, 36 Ga. 635; Stoneman *v.* Erie R. Co., 52 N. Y. 429.

3. Levois *v.* Gale, 17 La. Ann. Rep. 302; Phillips *v.* Earle, 25 Mass. 182; Brooke *v.* Pickwick, 4 Bing. 218; So. Exp. Co. *v.* Crook, 44 Ala. 468; Gorham Manuf. Co. *v.* Fargo, 45 How. Pr. 90; C. & A. R. Co. *v.* Baldeauf, 16 Pa. St. 67; Relf *v.* Rapp, 3 W. & S. (Pa.) 21; Baldwin *v.* L. & G. W. S. S. Co., 74 N. Y. 125; Parmelee *v.* Lowitz, 74 Ill. 116; Warner *v.* West. Transp. Co., 5 Rob. (La.) 490; Merchants' Dispatch Trans. Co. *v.* Bowles, 80 Ill. 473.

If he be asked, he must answer truly. See foregoing authorities, and Boskowitz *v.* Adams Exp. Co., 5 Cent. Law Jour. 58; Green *v.* So. Exp. Co., 45 Ga. 305; Little *v.* Boston, etc., R. Co., 66 Maine, 239.

A concealment or a misleading answer may absolve the carrier from liability. Muser *v.* Amer. Exp. Co., 1 Fed. Rep. 382;

Receipt "in Good Order and Condition."—The acknowledgment in the bill that the goods have been received "in good order and condition" refers to the external or to the apparent condition of the goods.[1] The statement of condition is not conclusive as between the original parties, but may be explained or contradicted by parol evidence.[2] The bill is, however, *prima-facie* evidence that, so far as the goods were visible, and open to inspection,

Hopkins *v.* Westcott, 6 Blatch. (C. C.) 64; Mather *v.* Amer. Exp. Co., 2 Fed. Rep. 49; H. & T. C. R. Co. *v.* Burke, 55 Tex. 323; Cole *v.* Goodwin, 19 Wend. (N. Y.) 251; Fish *v.* Chapman, 2 Ga. 349; Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234.

The shipper must not deceive the carrier by concealing the value of the goods, nor delude him by a careless treatment of them, nor by the manner of shipping them. C. & A. R. Co. *v.* Thompson, 19 Ill. 578; H. & T. C. R. Co. *v.* Burke, 55 Tex. 323; Cooper *v.* Berry, 21 Ga. 526; Great Nor. R. Co. *v.* Shepherd, 14 Eng. Law and Equity Rep. 367; Lebeau *v.* Gen. Steam Nav. Co., 8 L. R. C. P. 88; Orndorff *v.* Adams Exp. Co., 3 Bush (Ky.), 194; Amer. Exp. Co. *v.* Perkins, 42 Ill. 458; Ernest *v.* Exp. Co., 1 Wood, 579; Coxe *v.* Heisley, 19 Pa. St. 243; Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234; Everett *v.* So. Exp. Co., 46 Ga. 303; C. & C. R. Co. *v.* Marcus, 38 Ill. 219; Orange Co. Bank *v.* Brown, 9 Wend. (N. Y.) 85.

Thus, the shipper must not mislead by sending a check indorsed in blank, in an ordinary letter. Hayes *v.* Wells, 23 Cal. 185.

By sending money in a package by an express company, whose rules the shipper knew required money to be put up and indorsed, and sealed in a particular way. St. John *v.* Exp. Co., 1 Woods, 612.

By sending money concealed in a bag of hay. Gibbons *v.* Paynton, 4 Burr, 2298.

Or in a box with articles of no value. C. & A. R. Co. *v.* Thompson, 19 Ill. 578; Magnin *v.* Dinsmore, 62 N. Y. 35; Ernest *v.* Exp. Co., 1 Woods, 573; Belger *v.* Dinsmore, 51 N. Y. 166.

Or by sending valuable jewelry or other merchandise as property of apparently small value. Everett *v.* So. Exp. Co., 46 Ga. 303; Everett *v.* So. Exp. Co., 37 Ga. 688; Oppenheimer *v.* U. S. Exp. Co., 69 Ill. 62; Pardee *v.* Drew, 25 Wend. (N. Y.) 459.

Where money is transported under a bill containing the statement "Said to contain" a given amount, the recital is not even *prima-facie* evidence that the amount stated was received by the carrier. Fitzgerald *v.* Adams Exp. Co., 24 Ind. 447. See Weil *v.* Exp. Co., 7 Phila. Rep. (Pa.) 88.

1. Hastings *v.* Pepper, 11 Pick. (Mass.) 41; Nelson *v.* Woodruff, 1 Black (U. S.), 156; The Delaware, 14 Wall. 579; The Prosperino Palasso, 29 L. T. N. S. 622; West *v.* Steamer Berlin, 3 Iowa, 532; Currell *v.* Johnson, 12 La. 290; Moore *v.* Harris, 2 Que. L. Rep. 147; The Peter der Grosse, 34 L. T. N. S. 749; Vaughn *v.* 630 Casks Sherry Wine, 7 Bened. (C. C.) 506; Blaine *v.* Moller, 2 Cape of Good Hope, 133; Porter *v.* Robinson, 2 Cape of Good Hope, 16.

External appearance is not a true test of internal condition. Carson *v.* Harris, 4 Greene (Iowa), 516. And the clause of the bill can be applied to the latter only so far as may be inferred from the former. Keith *v.* Amende, 1 Bush. (Ky.) 455.

2. Mitchell *v.* U. S. Exp. Co., 46 Iowa, 214; Barrett *v.* Rogers, 7 Mass. 297; The Adriatic, 16 Blatchf. C. C. 424; Neilson *v.* Woodruff, 1 Black (U. S.), 156; Clark *v.* Barnwell, 12 How. (N. J.) 272; Hastings *v.* Pepper, 11 Pick. (Mass.) 41; C. & A. R. Co. *v.* Benjamin, 63 Ill. 283; Bradstreet *v.* Heron, 1 Abbott's Adm. 209; Richards *v.* Doe, 100 Mass. 524; Choate *v.* Crowninshield, 3 Cliff. (C. C.) 184; Ellis *v.* Willard, 9 N. Y. 529; Wetzler *v.* Collins, 70 Maine, 290.

It is competent to show by evidence *aliunde* that the goods were not in good order when shipped. Kimball *v.* Brander, 6 La. 711; Ship Howard *v.* Wiesman, 18 How. (U. S.) 231.

Or show that they were damaged before the carrier received them. O'Brien *v.* Gilchrist, 34 Maine, 554; Bissell *v.* Price, 16 Ill. 408.

Whether that damage was done by the shipper, or by any previous carrier. G. W. R. Co. *v.* McDonnald, 18 Ill. 172.

Or show that the casks in which liquids were shipped were unsound, or badly made, so as to cause leakage. Nelson *v.* Stephenson, 5 Duer (N. Y.), 538.

Or even that the carrier wished to receipt for the goods as in poor condition, but was not allowed to do so. Tierney *v.* N. Y. C. & H. R. Co., 67 Barb. (N. Y.) 538.

they were in good order and condition when shipped. The presumption thus raised throws the burden on the carrier of showing that the goods were not in the condition stated in his bill.[1]

Receipt Modified by Words "Contents Unknown" or Similar Phraseology.—If the carrier guards his acknowledgment of the receipt of the goods by saying "Contents unknown," he does not charge himself with the receipt of any goods in particular, and the bill is not evidence of the quantity or weight of the goods.[2]

Receipt and its Effect in Hands of Assignee for Value.—Generally speaking, where the bill of lading has come into the hands of a *bona-fide* assignee for a valuable consideration, and without notice, its recitals as to the quantity and quality of the goods shipped, their condition, the payment of freight, and the like, are conclusive upon the carrier signing it, and the terms of the bill may not be contradicted; the ground being that the superior equity is with the *bona-fide* assignee, who has parted with his money upon the faith of the recitals contained in the bill of lading.[3]

1. I. C. R. Co. *v.* Cowles, 32 Ill. 116; Tarbox *v.* East. S. B Co., 50 Me. 339; Breed *v.* Mitchell, 48 Ga. 533; Montgomery *v.* Ship Abbey Pratt, 6 La. Ann. 410; Hart *v.* Ship Jane Ross, 5 La. Ann. 264; Ship Rappahannock *v.* Woodruff, 11 La. Ann. 698; Whitney *v.* Gauche, 11 La. Ann. 432; Austin *v.* Talk, 20 Tex. 164; Richards *v.* Doe, 100 Mass. 524; Arend *v.* Liverpool S. B. Co., 64 Barb. (N. Y.) 118; Nelson *v.* Woodruff, 1 Black (U. S.), 156; The Adriatic, 16 Blatchf. (C. C.) 424; M. & W. P. R. *v.* Moore, 51 Ala. 394; Archer *v.* The Adriatic, 9 Cent. Law J. 201; Carson *v.* Harris, 4 G. Green, 516; Mitchell *v.* U. S. Exp. Co., 46 Iowa, 214; West *v.* The Berlin, 3 Iowa, 532; The Freedom, L. R. 3 P. C. 594; The Olbers, 3 Ben. 148; Vaughn *v.* 630 Casks, 7 Ben. (C. C.) 506; Price *v.* Powell, 3 N. Y. 322; C. & A. R. Co. *v.* Benjamin, 63 Ill. 283; The Ship Black Hawk, 9 Ben. (C. C.) 207; The Pacific, Deady, 17.

The insertion of the word "apparent" in regard to the good order and condition, does not change the legal effect of the clause. The Oriflamme, 1 Sawyer (C.C.), 176; Ill. Cent. R. Co. *v.* Cobb, 72 Ill. 148; Blade *v.* C., St. P. & F. du L. R. Co., 10 Wis. 4.

2. Haddow *v.* Parry, 3 Taunton, 303.

He is, however, responsible for such goods as he may have received. Fassett *v.* Ruark, 3 La. Ann. 694; Levois *v.* Gale, 17 La. Ann. 302.

For the effect of the words "contents unknown" upon the clause "good order and condition," see Clarke *v.* Barnwell, 12 How. (U. S.) 272; The Colombo, 3 Blatchf. (C. C.) 521; Baxter *v.* Leland, Abbott's Adm. Rep. 348; Vernardo *v.* Hudson, 3 Sumn. (C. C.) 405.

For the effect of the words "contents and gauge unknown," see Nelson *v.* Stephenson, 5 Duer (N. Y.), 538.

For the effect of the words "contents and value unknown," see Miller *v.* H. & St. J. R. Co., 24 Hun (N. Y.), 607; The California, 2 Sawyer (C. C.), 12.

For the effect of the words "weight unknown," see Sheppard *v.* Naylor, 5 Gray (Mass.), 591.

For the effect of the words "contents and weight unknown," see The Andover, 3 Blatchf. (C. C.) 303; The Colombo, 3 Blatchf. (C. C.) 521; Wentworth *v.* Ship Realm, 16 La. Ann. 18; The Energie, 2 Asp. Mar. Law Cases, 296; Brig May Queen, Newbyth's Adm. 464.

For the effect of the words "quantity and quality unknown," see Campart *v.* S. S. Prior, 2 Fed. Rep. 819; The Prosperino Palasso, 29 L. T. N. S. 622; The Ida, 32 L. T. N. S. 541; Tully *v.* Terry, L. R. 8 C. P. 684.

For the effect of the words "contents, weight, and value unknown," see Nickel *v.* Cassel, 9 Bom. H. C. Rep. 321; Jessel *v.* Bath, 2 L. R. Exch. 267; English *v.* Ocean S. S. Co., 2 Blatchf. (C. C.) 425; The Peter der Grosse, 34 L. T. N. S. 749; Lebeau *v.* Ocean S. Nav. Co., 42 L. J. C. P. 1.

3. Dickerson *v.* Seelye, 12 Barb. (N. Y.) 99; Bradstreet *v.* Heran, 2 Blatchf. (C. C.) 116; Backus *v.* Schooner Marengo, 6 McLean, 487; Miller *v.* H. & St. J. R. Co., 24 Hun (N. Y.), 607; Byrne *v.*

3. Bill of Lading as a Contract.—GENERAL RULES FOR ITS INTERPRETATION AND CONSTRUCTION.—The bill of lading is a contract to transport certain goods to a specified place, and there to deliver them to a person named in the bill. Parol evidence is inadmissible to vary its terms or legal import, when free from ambiguity.[1]

A bill of lading, expressing the terms and conditions of transportation in the absence of proof of fraud or mistake, is to be taken as the sole evidence of the final agreement of the parties, and by it their duties and liabilities must be regulated. Resort cannot be had to prior or contemporaneous parol negotiations and agreements to vary its terms. They are regarded as merged in the written contract.[2]

Parol evidence may, however, be received in explanation of the terms of the contract, where they are ambiguous.[3]

Weeks, 4 Abb. Dec. 657; Howard *v.* Tucker, 1 Barn. & Adolph. 712; Armour *v.* M. C. R., 65 N. Y. 111; Valieri *v.* Boyland, 1 L. R. C. P. 382; Berkeley *v.* Watling, 7 Adol. & Ellis, 29.

Section 32, Bills of Lading Acts, 18 and 19 Vic. c. 111, enacts that in the hands of a consignee, or indorsee for value (without notice), bills of lading shall be conclusive evidence against the master, or other person signing them, that the goods were shipped, though in fact they were not shipped, "provided that the master, etc., may exonerate himself in respect to such misrepresentation by saying that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom he claims." See Meyer *v.* Dresser, 33 L. J. C. P. 289.

Where, however, advances were made on the faith of the bill of lading, but without any intention of acquiring property in, or ownership of the goods shipped, the Supreme Court of the United States has held that the statement in the bill of lading of the condition of the goods is not conclusive upon the carrier. Nelson *v.* Woodruff, 1 Black (U. S.), 156.

1. The Delaware, 14 Wall. (U. S.) 579, and cases cited; Bank *v.* Shaw, 8 W. N. C. (Pa.) 221; Wayland *v.* Mosley, 5 Ala. 430; C. N. W. R. Co. *v.* N. L. Packet Co., 70 Ill. 217; Lawrence *v.* McGregor, Wright (Ohio), 193; Knowles *v.* Dabney, 105 Mass. 437; Wallace *v.* Matthews, 39 Ga. 617; Wilde *v.* Mer. Dis. Trans. Co., 47 Iowa, 272; Collander *v.* Dinsmore, 55 N. Y. 200; Sprout *v.* Donnell, 26 Me. 187; I. & C. R. Co. *v.* Remmy, 13 Ind. 518; Arnould *v.* Jones, 26 Tex. 335; Wayne *v.* The Gen. Pike, 16 Ohio, 421.

Parol evidence is not admissible to show with whom the contract of carriage is made. Centre *v.* Torrey, 8 Mart. La. Rep. 206; Pecks *v.* Dinsmore, 4 Porter (Ala.), 212. But see McTyer *v.* Steele, 26 Ala. 487.

2. The Delaware, 14 Wall. (U. S.) 579; Long *v.* N. Y. C. R. Co., 15 N. Y. 76; O'Bryan *v.* Kinney, 74 Mo. 125; The Lady Franklin, 8 Wall. (U. S.) 325; I. & C. R. Co. *v.* Remmy, 13 Ind. 518; Cox *v.* Peterson, 30 Ala. 608; May *v.* Babcock, 4 Ohio, 334; Shaw *v.* Gardner, 12 Gray (Mass.), 488; Arnould *v.* Jones, 26 Tex. 335.

The parties are presumed to have written all that they deemed necessary to give full expression to their intention. Thus where it was not claimed that there was anything on the face of the instrument which required the master of the vessel to take the inside rather than the outside route from New York to Baltimore, there could be no proof allowed of a preliminary conversation to establish such an obligation. White *v.* Van Kirk, 25 Barb. (N. Y.) 16; White *v.* Ashton, 51 N. Y. 280.

But a bill of lading containing a modification of a verbal contract previously made by the parties and accepted by the shipper without noticing the changes does not supersede the prior verbal contract, which may be proved by the shipper in an action against the carrier. M. P. R. Co. *v.* Beeson, 30 Kan. 298.

In a Pennsylvania case it has been held that where a bill was signed in the usual form, and certain verbal arrangements as well were made at the same time, both should be submitted to a jury from which to discover the contract. Union T. Co. *v.* Riegel, 23 P. F. Smith (Pa.), 72. And see Atwell *v.* Miller, 11 Md. 357.

3. The Delaware, 14 Wall. (U. S.) 579.

Parol evidence is admissible to prove the meaning of "C.O.D." (to be collected

The contract evidenced by the bill must be gathered from the whole instrument, in order to determine the true intent of the parties.[1]

Where the bill refers in terms to a charter-party or other instrument as a completion of itself, the provisions of the former become part of the bill of lading.[2]

Where there are written and printed clauses in the bill, which are at variance with each other, the written portions must prevail, and only so much of the printed matter in the blank form as is consistent therewith is to have effect; all the rest is to be rejected.[3]

EXECUTION OF THE BILL.—The bill of lading is signed only by the carrier or some one on his behalf, and is usually handed to the shipper on the delivery of the goods to the carrier. Where a shipper with knowledge of the contents of the bill assents to it, or accepts its terms, it is a binding contract, and defines the rights and liabilities of the parties;[4] and cannot be contradicted by parol proof.[5]

Where the bill is printed or made out by himself, the shipper's assent will be presumed.[6]

In most of the States, in the absence of fraud, deceit, or mistake, the acceptance of the bill is conclusive evidence of assent to its terms.[7]

on delivery). Am. Exp. Co. *v.* Lesem, 39 Ill. 312.

While parol evidence is admissible to exolain the meaning of "C.O.D.," additional words, not technical, but ordinary and well-defined in meaning, cannot be explained or varied. Collender *v.* Dinsmore, 55 N. Y. 200.

1. Robinson *v.* M. D. T. Co., 45 Iowa, 470; Stewart *v.* Same, 47 Iowa, 229; Ashmore *v.* Penna. S. Trans. Co., 4 Dutcher (N. J.), 180; Lawrence *v.* McGregor, Wright (Ohio), 193; Heineman *v.* G. T. R. Co., 31 How. Pr. (N. Y.) 430.

Thus the caption of the bill was held to be a part of the instrument, and to be construed in determining the effect of the contract. See Robinson *v.* Merch. D. T. Co., and Stewart *v.* Same, *supra.* Examine also U. S. *v.* Kimball, 13 Wall. 636.

2. Certain Logs of Mahogany, 2 Sumner C. C. 589; Cobb *v.* Blanchard, 11 Allen (Mass.), 409; Russell *v.* Wieman, 17 C. B. N. S. 163; Bags of Linseed, 1 Black (U. S.), 108.

3. Babcock *v.* L. S. M. R. Co., 49 N. Y. 491; Miller *v.* H. & St. J. R. Co., 24 Hun (N. Y.). 607; Elkins *v.* Emp. Trans. Co., 2 Weekly Notes Cases (Pa.), 403; Lebeau *v.* Gen. S. Nav. Co., 42 L. J. C. P. 1, 8 L. R. C. P. 88.

4. M. D. T. Co. *v.* Leysor, 89 Ill. 43; U. S. Exp. Co. *v.* Hames, 67 Ill. 137; Falconer *v.* Fargo, 3 Jones & Sp. (N. Y. Sup. Ct.) 332.

5. C., H., D. & M. R. Co. *v.* Pontius, 19 Ohio, 221.

6. Lawrence *v.* N. P. B. R. Co., 36 Conn. 63.

7. Steele *v.* Townsend, 37 Ala. 247; The Emily *v.* Karney, 5 Kansas, 645; Milligan *v.* Ill. R. Co., 36 Iowa, 181; Robinson *v.* M. D. T. Co., 45 Iowa, 470; Hoadly *v.* N. T. Co., 115 Mass. 305; C., H., D. & M. Co. *v.* Pontius, 19 Ohio, 221; Dillard *v.* Louisv. R. Co., 2 Lea (Tenn.), 288; Farnham *v.* C. R. Co., 55 Pa. St. 53; Maghee *v.* C. & A. R. Co., 45 N. Y. 514; Germania Fire Ins. Co. *v.* M. & C. R. Co., 72 N. Y. 90; Newman *v.* Smoker, 25 La. An. 303.

In *Massachusetts*, assent must be shown. Buckland *v.* Adams Exp. Co., 97 Mass. 124; Perry *v.* Thompson, 98 Mass. 249.

In *Wisconsin*, possession by the shipper of the receipt restricting the liability of the carrier is only *prima-facie* evidence of his assent. Boorman *v.* Exp. Co., 21 Wis. 152. White *v.* G. T. Co., 46 Wis. 493.

In *Illinois*, the assent to the terms of the bill must be affirmatively shown. M. D. T. Co. *v.* Joesting, 89 Ill. 152.

Bill Executed by Agent of Shipper.—Generally the agent of the shipper has power to make a special contract with the carrier limiting the latter's responsibility.[1]

In those States, however, in which the assent of the shipper to limitations of the liability of the carrier by the terms of the bill must be affirmatively shown, the knowledge and assent of the agent of the shipper to such terms are not always sufficient to free the carrier from liability; and a drayman, who was intrusted by the shipper with the delivery of the goods to the carrier, has been held to be a mere bailee for hire to take the package to the wharf and obtain a receipt.[2]

A carrier, however, contracting with a party as agent of the consignor, cannot afterwards deny such agent's authority as against such consignor.[3]

By Agent of Consignee.—Where the consignor who is the vendor,[4] or the bailee of goods, or a forwarding carrier, ships goods at the direction of the consignee, he acts as the agent of the consignee for the purpose of obtaining transportation, and as such agent has authority to make such a contract with the carrier as in the honest exercise of his discretion he sees fit. But where there has been a previous contract between the consignee and the carrier, the consignor, acting as the agent of the consignee, has no authority to vary that contract.[5]

By Agent of Carrier by Land.—A carrier, whether by water or rail, is bound by all acts or contracts done or made by its agents within the scope of their authority and by the knowledge of its agents obtained in the course of the transaction.[6] Carrier's agents are therefore authorized to sign and issue bills

(See also legislation of the State of Illinois.)

So in *Georgia*. Wallace *v.* Sanders, 42 Ga. 486.

And *Michigan*. 7 Am. Law Reg. (O. S.) 352; M. C. R. Co. *v.* Hale, 6 Mich. 244.

In *Maryland*, agreement to the terms of the bill must be proven. B. & O. R. Co. *v.* Brady, 32 Md. 333; McCoy *v.* E. & W. T. Co., 42 Md. 498.

In *Mississippi*, where, if it is merely doubtful whether the consignor intended to waive his legal rights, it was held that public policy requires that the waiver should be presumed and upheld. Mobile & Ohio R. Co. *v.* Weimer, 49 Miss. 725; Southern Exp. Co. *v.* Moon, 10 George (Miss.), 822.

In *Ohio*, assent to the limitation of liability must be expressed. Gaines *v.* U. T. Co., 28 Ohio, 418.

1. Knell *v.* U. S. & Brazil SS. Co., 1 Jones & Spencer (23 N. Y. Sup. Ct.), 423. See also Nelson *v.* Hudson Riv. R. Co., 48 N. Y. 498; McCan *v.* B. & O. R. Co., 20 Md. 202; York Co. *v.* Central R. Co., 3 Wall. (U. S.) 107; Grace *v.* Adams, 100 Mass. 505; Dows *v.* Green, 16 Barb. (N. Y.) 72.

2. Falvey *v.* N. T. Co., 15 Wis. 129; The Pacific, Deady (D. C.), 17; M. D. T. Co. *v.* Joesting, 89 Ill. 152; Buckland *v.* Adams Exp. Co., 97 Mass. 124; Gaines *v.* U. T. Co., 28 Ohio, 418; American Trans. Co. *v.* Moore, 5 Mich. 368; Fillibrown *v.* Grand Tr. R. Co., 55 Maine, 462. See also Ames *v.* St. P. R. Co., 12 Minn. 412; Patterson *v.* Clyde, 67 Pa. St. 500; N. J. S. N. Co. *v.* Merchants' Bank, 6 Howard (U. S.), 344.

3. Baker *v.* Steamboat Milwaukee, 14 Iowa, 214.

4. Wiggins *v.* Erie R. Co., 5 Hun (N. Y.), 185; Gordon *v.* Ward, 16 Mich. 360; Squire *v.* N. Y. C. R. Co., 98 Mass. 239; Patterson *v.* Clyde, 67 Pa. St. 500; Shelton *v.* M. D. T. Co., 59 N. Y. 258; Robinson *v.* M. D. T. Co., 45 Iowa, 470. See, *contra*, Am. Trans. Co. *v.* Moore, 5 Mich. 368; M.T.Co. *v.* Joesting, 89 Ill. 152.

5. Wiggins *v.* Erie R. Co., 5 Hun (N. Y.), 185.

6. Harmon *v.* N. Y. & E. R. Co., 28 Barb. (N. Y.) 323.

of lading;[1] and in the absence of fraud or imposition the receipt so delivered by the agent of the carrier to the shipper must be held to be the contract between the parties.[2] The agents of the carrier, however, are only authorized to issue bills of lading for goods actually received.[3] The agents of carriers are not only authorized to receive goods and to contract for transportation simply, but it is within the scope of their authority to make special contracts modifying the ordinary relations between the shipper and the carrier. Thus the agents of express companies and railroad companies may contract to collect on delivery,[4] or to deliver in covered cars.[5]

By the Master of a Vessel.—It is presumed, from the nature of his employment, that the master of a vessel which is a common carrier is authorized to make contracts for the carriage of freight.[6] The terms of a bill signed by the master, therefore, constitute an engagement or contract of the owner[7] wholly irrespective of the ownership of the vessel, or whether the master is the agent of the general or the special owner.[8]

The master of the ship has no authority to sign the bill of lading for goods not actually put on board; and therefore the owner of the ship is not responsible to parties taking or dealing with, or making advances on the faith of such an instrument, which is untruthful in reciting that certain goods have been shipped.[9]

1. Rawle *v.* Deshler, 42 N. Y. 572; Putnam *v.* Tillotson, 13 Metc. (Mass.) 517.

2. Huntingdon *v.* Dinsmore, 4 Hun (N. Y.), 66; Scoville *et al. v.* Griffith, 12 N. Y. (Ct. of App.) 509.

3. Union, etc., R. Co. *v.* Yeager, 34 Ind. 1; Ryder *v.* Hall, 7 Allen (Mass.), 456; B. & O. R. Co. *v.* Wilkins, 44 Md. 11; Dean *v.* King, 22 Ohio St. 119; Kirkman *v.* Bowman, 8 Robinson (La.), 246; The Lady Franklin, 8 Wall. (U. S.) 325.

For the law relating to bills of lading issued for goods never received by the carrier, when such bill has passed into the hands of one who has made advances upon it in good faith and without notice, see *post* this article, under caption THE BILL AS A MUNIMENT OF TITLE.

4. American Exp. Co. *v.* Lesen, 39 Ill. 312; Minter *v.* Pac. R. Co., 41 Mo. 503.

5. G. T. R. *v.* Fitzgerald, 5 Duval (Can.), 204.

Contract for immediate delivery of goods made by a station agent binds the company. Deeming *v.* G. T. R. Co., 48 N. H. 455.

An agreement to transport goods in a certain time is within the scope of the employment of the carrier's agent. Strohn *v.* D. & M. R. Co., 23 Wis. 126.

But a mere promise of the agent without additional consideration to forward freight then *en route* by an earlier train than was usual, is not binding upon the carrier. Railroad Co. *v.* Reeves, 10 Wall. (U. S.) 176.

6. Bell *v.* Wood, 1 Dana (Ky.), 146; Moseley *v.* Lord, 2 Conn. 389.

7. Ferguson *v.* Cappeau, 6 Harr. & J. (Md.) 394.

8. The Schr. Freeman *v.* Buckingham, 18 How. (U. S.) 182.

It is not necessary that the bill should be signed in the name of the owner; for while it is the general rule that to make a party personally liable on a written contract made by his agent it should be executed in his own name, and appear to be his own contract, a bill of lading signed by the master in his own name in the usual course of the employment of the ship will bind the owner. McTyer *v.* Steele, 26 Ala. 487.

When he signs as master of the vessel he is considered as signing as the agent of the owners. Slark *v.* Broom, 7 La. Ann. 337.

Nor is it necessary that he should write himself down as master if in fact he fills that position, or if he is described in the body of the contract as master. Fox *v.* Holt, 36 Conn. 558.

9. B. & O. R. Co. *v.* Wilkins, 44 Md. 11; Sears *v.* Wingate, 85 Mass. 103; Fel-

CONDITIONS AND EXCEPTIONS.—The bill of lading is a contract for a limited liability. It contains a list of cases and causes of loss for which the carrier shall not be held liable. These are enumerated in the bill under the head of "Conditions" or "Exceptions." These exceptions have been the subject of judicial interpretation.

Act of God. (See title ACT OF GOD.)

The Public Enemy.—Carriers are not liable at common law for loss or damage caused by the public enemy. It is, however, customary to make it one of the expressed exemptions from liability for loss written in the bill. "The king's enemies," "the queen's enemies," "the enemies of the state," are equivalent phrases, and include all those with whom the state is at open war.[1]

Restraint of Princes—of People.—Restraint of princes has been defined to be the forcible interference of the state or government of the country taking possession of the goods *manu forti*.[2]

Restraint by Legal Process.—A carrier is not liable for goods attached in his custody he cannot give them up to the assignee taken out of his hands by legal process; and when goods are while the attachment is pending, and this without regard to the provisions of the bill of lading.[3]

lows *v.* Steamer R. W. Powell, 16 La. Rep. 316; The Delaware, 14 Wall. (U. S.) 579; Schooner Freeman *v.* Buckingham, 18 How. (U. S.) 182; The Brig Edwin, 1 Sprague, 477; Hubbersty *v.* Ward, 8 Exch. 330; Coleman *v.* Riches, 16 C. B. 104; Lickbarrow *v.* Mason, 2 T. R. 63.

For further discussion of the responsibility on bills of lading signed by the master for goods not received, when the bill has passed into the hands of a *bona-fide* assignee for value, see *post*, BILL OF LADING AS A MUNIMENT OF TITLE.

1. Story on Bills, § 99; Angell on Carriers, § 200.

Pirates are covered by the phrase. Gage *v.* Tirrel, 9 Allen (Mass.), 299; Barton *v.* Wolliford, Comb. 56. So are privateers. Schouler on Bailments, § 408. So are hostile tribes of Indians. Holliday *v.* Kennard, 12 Wall. (U. S.) 254. So also the Confederate insurgents, with whom the Federal government is waging war. Hubbard *v.* Express Co., 10 R. I. 244; Lewis *v.* Ludwick, 6 Cold. (Tenn.) 368; McCranie *v.* Wood, 24 La. Ann. 406; Philadelphia, etc., R. Co. *v.* Harper, 29 Md. 330; Thornington *v.* Smith, 8 Wall. (U. S.) 1.

Damage or loss by mob, however numerous—Story on Bills, § 526; Angell on Carriers, § 200—by thieves or robbers—Sutton *v.* Mitchell, I. T. R. 18; Kemp *v.* Coughtry, 11 Johns. (N. Y.) 107; Hall *v.* Cheney, 36 N. H. 26—or by embezzlement—Watkinson *v.* Laughton, 8 Johns. N. Y. 164; Schieffelin *v.* Harvey, 6 Johns. N. Y. 170—or by rioters or insurgents—Forward *v.* Pittard, 1 T. R. 27; Pittsburgh, etc., R. Co. *v.* Hallowell, 65 Ind. 188; Boon *v.* The Belfast, 40 Ala. 184—is not within the exception.

2. Findlay *v.* Liverpool Steamship Co., 23 L. T. N. S. Exch. 251.

Embargo, blockade, neutral edicts, and laws may come within the exception. Geipil *v.* Smith, L. R. 7 Q. B. 404.

The mere information by a belligerent to a neutral vessel of the blockade has been said not to be a restraint. Richardson *v.* Maine, etc., Ins. Co., 6 Mass. 102.

The meaning of the words "restraint of people" differs in no material way from that of "restraint of princes." See Nesbitt *v.* Lushington, 4 Term Rep. 783.

3. Stiles *v.* Davis, 1 Black (U. S.), 101; Bliven *v.* Hudson, etc., R. Co., 36 N. Y. 403; Van Winkle *v.* U. S. Mail Co., 37 Barb. (N. Y.) 122; Burton *v.* Wilkinson, 18 Vt. 186; Ohio, etc., R. Co. *v.* Yohe, 51 Ind. 181.

If the language of Findlay *v.* Liverpool, etc., Steamship Co., 23 L. T. N. S. Exch. 251, is authoritative, a stipulation releasing the carrier from the restraint of courts of law or by legal procedure should be contained in the bill of lading. When the seizure is made under process of law, the carrier must assure himself that the proceedings are regular and valid. Bliven *v.* R. Co. 35 Barb. (N. Y.) 188. And he must immediately notify the assignor of the fact of seizure. Scrantom *v.* Farm-

Perils of the Sea.—This phrase has been judicially defined. It has been said that "by dangers of the sea are meant unavoidable accidents from which common carriers by the general law are not excused, unless they arise from the act of God." [1] And again, as those accidents "peculiar to navigation that are of an extraordinary character, or arise from an irresistible force or from overwhelming power which cannot be guarded against by the ordinary exercise of human skill and prudence." [2]

Dangers of the Roads.—The phrase is somewhat ambiguous. It has been said that the word "roads" in this connection is ordi-

ers' Bank, 24 N. Y. 424. But he is not bound either to litigate for his bailor or to show that the decision of the court issuing the process is correct, or to assert the title of the bailor, or to follow the goods. See cases just cited.

1. Dibble *v.* Morgan, 1 Woods, 406.

2. Stevens Trans. Co. *v.* Tuckerman, 33 N. J. 543.

The following have been held to be within the exception Perils of the sea (or its equivalents): The unavoidable stranding of the vessel. Hahn *v.* Corbitt, 2 Bing. 205; Phœnix Ins. Co. *v.* E. & W. T. Co., 10 Biss. (C. C.) 18. The running upon an unknown rock. Fletcher *v.* Ingliss, 2 B. & Ald. 315. Or upon a hidden obstruction in a river, such as a tree recently fallen. Hibernia Ins. Co. *v.* St. Louis Trans. Co., 5 McCrary (C. C.), 397. Or a snag recently carried into the channel. The Favorite, 2 Biss. (C. C.) 502; Redpath *v.* Vaughn, 52 Barb. (N. Y.) 489; Steele *v.* McTyer's Admrs., 31 Ala. 667. Storm or stress of weather. The Neptune, 6 Blatchf. (C. C.) 193. A sudden squall. Slocum *v.* Fairchild, 19 Wend. (N. Y.) 329; The Lady Pike, 2 Bis. (C. C.) 141. The tossing of the ship in tempestuous weather. Gebay *v.* Lloyd, 3 B. & C. 793. The shipping of water in a storm. Lemaitre *v.* Merle, 2 Robinson (La.) 402; Letchford *v.* The Golden Eagle, 17 La. Ann. 9. The necessary jettison of the cargo in a storm. Lawrence *v.* Mintern, 17 How. (U. S.) 100; Ins. Co. *v.* Sherwood, 14 How. (U. S.) 351. Delay caused by storm. U. S. *v.* Hall, 2 Wash. C. C. 366; Louis *v.* The Success, 18 La. Ann. Rep. 1; The Portsmouth, 9 Wall. (U. S.) 682. Piracy. Barton *v.* Walliford, Comb. 56. The wilful but not the barratrous act of the crew. Dixon *v.* Sadler, 9 L. T. Exch. 48. The sweating of the cargo. Clark *v.* Barnwell, 1 How. (U. S.) 272; The Star of Hope, 9 Wall. (U. S.) 203. Dampness, caused by the changes of climate. Rich *v.* Lambert, 12 How. (U. S.) 347. The accidental sinking of the ship. Kirk *v.* Folsome, 23 La. Ann. 584. The breaking of tackle. Laurie *v.* Douglass, 15 M. & W. 745. Collision. Plaisted *v.* B. & K. Nav. Co., 27 Me. 132; Peters *v.* W. Ins. Co., 14 Peters (U. S.), 99; Daggett *v.* Shaw, 3 Mo. 189; Hays *v.* Kennedy, 3 Grant (Penn.), 351. The deflection of the needle of the compass. The Rocket, 1 Biss. (C. C.) 354. The "blowing" of a vessel. Crosby *v.* Grinnell, 9 N. Y. Legal Obs. 281. The opening of the seams of the ship, caused by the strain in rough weather. Rich *v.* Lambert, 12 How. (U. S.) 347. But see Bearse *v.* Ropes, 1 Sprague, 331.

The following have been held not to fall within the exception of Perils of the sea (and its equivalents): Loss by fire. Garrison *v.* Memphis Ins. Co., 19 How. (U. S.) 312; Cox *v.* Peterson, 30 Ala. 608. By rats. Kay *v.* Wheeler, 2 L. R. C. P. 302; The Isabella, 8 Ben. 139. By vermin. The Miletus, 3 Blatchf. (C. C.) 335. By worms destroying the ship's bottom. Rohl *v.* Parr, 1 Esp. 445. Embezzlement. King *v.* Shepherd, 3 Story (C. C.), 349. By theft or robbery, which is not piracy. King *v.* Shepherd, 3 Story (C. C.), 349. By barratry. The Chasca, L. R. 4 Adm. 446; s. c., 44 L. T. Adm. 19 (1875). The Gold Hunter, 1 Blatchf. & H. 300. By the injurious effects of other goods. The Freedom, L. R. C. P. 594. By the shifting of a buoy. Reeves *v.* Waterman, 2 Speers, 197. By the desertion or insubordination of seamen. The Ethel, 5 Ben. (C. C.) 154. By the explosion of the boiler of a steamboat. The Mohawk, 8 Wall. (U. S.) 153; Bark Edwin *v.* Naumkeag, etc., Co., 1 Cliff. (C. C.) 222. But see Adams Exp. Co. *v.* Fendrick, 38 Ind. 150. By the plundering of the ship by the custom-house officers while in charge of it. Schieffelin *v.* Harvey, 6 Johns. (N. Y.) 170. By the depredations committed on the ship's stores or cargo by the passengers and crew, in consequence of a scarcity of provisions during a long voyage. The Gold Hunter, 1 Blatchf. & H. 300.

narily to be construed to mean marine roads or harbors; but where it is applied to land carriage it may mean such dangers as are immediately caused by the condition of highways on land, as the overturning of carriages in rough or precipitous places.[1]

Fire.—The exception that the carrier shall not be liable for loss or damage by fire is found in all modern bills of lading. Such a loss is not within the exception Act of God, except in the one case of fire caused by lightning.[2] Nor is loss by fire included in the exceptions Unavoidable dangers,[3] Perils of the sea,[4] or Perils of the river.[5] The effect of the exception is to release the carrier from liability in all cases of loss by fire, except for such loss as is directly traceable to his own or his servants' negligence.[6] Fire originated by the explosion of the boiler of the engine of a steamboat,[7] or by an explosion among the cargo,[8] is within the exception. Where, however, fire is merely an incident of loss by other means, the exception does not apply; as where the proximate cause of the loss was a collision, and after the collision the wreck took fire.[9] Where the carrier excepts himself from liability for loss by fire, and damage is caused secondarily or primarily by his own or his servants' negligence, the exception has no application. It is not sufficient that negligence be merely shown; it must be shown to have been the proximate cause of loss.[10] It must be shown to have caused, or at least contributed, to the injury.[11] The exception Fire is to be strictly interpreted.[12]

1. De Rothschild *v.* Royal Mail Steam Packet Co., 21 L. J. Exch. 273. As applying to such as are incident to roadsteads or harbors, the addition of the phrase to the ordinary excepted perils of the bill of lading seems unnecessary. See Trans. Co. *v.* Downer, 11 Wall. (U. S.) 129

2. Forward *v.* Pittard, 1 T. R. 27; Hyde *v.* Trent Nav. Co., 5 T. R. 389; Parsons *v.* Monteath, 13 Barb. (N. Y.) 353; Hall *v.* Cheney, 36 N. H. 26; Moore *v.* Mich. Cent. R. Co., 3 Mich. 23; Cox *v.* Peterson, 30 Ala. 608; Chevallier *v.* Straham, 2 Tex. 115.

Fire started by the bursting of a steam boiler is not within the Act of God. Bulkley *v.* Naumkeag Cotton Co., 24 How. (U. S.) 386. Neither is fire caused by machinery of vessel. Hale *v.* N. J. Steam Nav. Co., 15 Conn. 539. Or by the bursting of a cask containing chloride of lime. Brousseau *v.* The Hudson, 11 La. Ann. 427.

3. Union Mutual Ins. Co. *v.* Indianapolis R. Co., 1 Disn. (Ohio) 480.

4. Merrill *v.* Arey, 3 Ware (U. S. D. C.), 215.

5. Cox *v.* Peterson, 30 Ala. 608; Gilmore *v.* Carman, 1 Sm. & M. (Miss.) 279; Garrison *v.* Memphis Ins. Co., 19 How. (U. S.) 312; The N. J. Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344.

6. York Co. *v.* Central R. Co., 3 Wall. (U. S.) 107; Muser *v.* Holland, 17 Blatchf. (C. C.) 412; Ins. Co. *v.* St. L. R. Co., 3 McCrary (C. C.), 233; Farnham *v.* Camden R. Co., 55 Pa. St. 53; Grace *v.* Adams, 100 Mass. 505; Erie R. Co. *v.* Wilcox, 84 Ill. 239; Mich. S., etc., R. Co. *v.* Heaton, 37 Ind. 448; Montgomery, etc., R. Co. *v.* Edmonds, 41 Ala. 667; New Orleans Mut. Ins. Co. *v.* New Orleans R. Co., 20 La. Ann. 302.

7. Bulkley *v.* Naumkeag Cotton Co., 24 How. (U. S.) 386.

8. Brosseau *v.* The Hudson, 11 La. Ann. 427.

9. The City of Norwich, 3 Ben. (C. C.) 575.

10. Chalk *v.* Charlotte, etc., R. Co., 85 N. Car. 423.

11. Cochran *v.* Dinsmore, 49 N. Y. 249.

Where the fire is the work of strikers, formerly employees of the company, the fact that the loss was actually due to the acts of the defendant's servants must be shown. Wertheimer *v.* Penna. R. Co., 17 Blatchf. (C. C.) 421.

12. Where the goods were sent by the carrier over a line necessitating carriage both by rail and by water, and the bill excepted "dangers of navigation, fire,

The exception does not entitle the carrier to freight on the goods destroyed, but simply protects him from liability for their loss.[1] The exception, however, is coextensive with the liability; it is coextensive in point of time.[2]

Jettison.—Jettison is the heaving overboard of goods or cargo in order to save the ship.[3] Every water-bill of lading contains a limitation of liability for goods lost by jettison. It is probable that the loss would be covered by the exception Perils of the sea; but its presence in the bill necessarily adds to the safety of the carrier. In case of jettison, the shipper, though deprived of his remedy against the carrier by the exceptions of the bill, has, nevertheless, a right to compel contribution from the owners of the ship and cargo under the principle of general average. General average, however, does not apply to the jettison of a deck-load, unless the other parties have assented to such stowage.[4]

Collision.—This clause only protects the carrier from loss by unavoidable collision, to which his negligence has in no way contributed.[5]

Sweat.—By sweat or sweating of the hold is meant that damage done to goods in transit by the dampness which invariably, in greater or less degree, pervades ships. If injury is caused by sweating, the carrier is protected under the limitation of liability

and collision on the lakes and river, and on the Welland Canal," it was held that the limitations did not extend to loss by fire on the railroad. Barter *v.* Wheeler, 49 N. H. 9.

1. N. Y. Cent. & H. R. Co. *v.* S. O. Co., 20 Hun (N. Y.), 39.

2. The master of a vessel transporting goods under a bill exempting him from liability for loss by fire, and landing them at a port of discharge, is, so long as the goods remain in his custody after being landed, protected by the exception in the bill. Hong Kong, etc., Corp. *v.* Bake, 7 Bom. H. C. Rep. 207.

In England the Merchants' Shipping Act, 1854, provides (17 & 18 Vict. c. 104, sec. 503): "That no owner of any sea-going ship or share therein shall be liable to make good any loss or damage that may happen, without his actual fault or privity of or to any of the following things, that is to say: I. Of or to any goods, merchandise, or other things whatsoever taken or put on board any such ship by reason of any fire happening on board said ship."

The Act of Congress of March 3, 1851 (c. 43, sec. 1, p. 635, Rev. Stats. U. S. p. 827, sec. 4282), substantially follows the British statute. "No owner of any vessel shall be liable to answer for or make good to any person any loss or damages which may happen to any merchandise which shall be shipped, taken in, or put on board any such vessel by reason of or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

The effect of these acts would seem to be to superadd to the exceptions existing at common law the exceptions contained in the statute, and as a contract is supposed to be made with a view to the general law relating to the subject-matter, such an exception is to be regarded as written into all contracts to carry to which the statutes apply. See Walker *v.* Transportation Co., 3 Wall. (U. S.) 150, where it is held that the act relieves owners from responsibility for the negligence of their officers or agents in which the former have not directly participated.

3. The Neptune, 16 L. T. Adm. 36. See Kent's Com. vol. iii. p. 233.

4. Smith *v.* Wright, 1 Caines, 43; Lenox *v.* Ins. Co., 3 Johns. (N. Y.) Cas. 178. See also Chappel *v.* Comfort, 31 L. T. C. P. 58; Johnson *v.* Chapman, 35 L. J. C. P. 23.

5. Smith *v.* Scott, 4 Taunt. 125; The Kathleen, 43 L. T. Adm. 39; Plaisted *v.* Boston, etc., S. Nav. Co., 27 Maine, 132; Hays *v.* Kennedy, 3 Grant (Pa.), 351; Peters *v.* Warren Ins. Co., 14 Peters (U. S.), 99. See also Mutual Ins. Co. *v.* Miss. Trans. Co., 4 McCrary (C. C.), 636.

in his bill, provided it is not caused by his carelessness or negligence.[1]

Rust.—The exception Rust has, like Leakage and breakage, reference to the direct injury to goods, and will not cover an indirect injury to them from the rusting of other goods; and the exception is no protection to the carrier where the rust is due to negligence or unskilfulness in stowing.[2]

Leakage and Breakage.—The word *leakage* refers to loss by the leaking of the goods themselves. It does not include damage done to other packages by the escaping liquid. So breakage does not cover the injury done to other goods by the cutting or rubbing of the broken article.[3]

Leakage and breakage within the meaning of the exception is not mere average leakage and breakage.[4]

The general rule may be thus stated: The exceptions include all such leakage and breakage as reasonable care and diligence on the part of the carrier could not prevent.[5]

Freezing.—The general rule is that the freezing of perishable articles is not, when it might have been prevented by the exercise of due diligence and care, such an intervention of *vis major* as excuses the carrier.[6]

Perishable Goods—Inherent Defect—Deterioration—Decay.—At common law, a carrier could not be held for such loss as was the result of the nature, vice, or defect inherent in the goods carried, and not of his own negligence.[7]

Perishable property has been defined to be "that which from its nature decays in a short space of time, without reference to the

1. Mendelsohn *v.* The Louisiana, 3 Wood's Rep. 46.

Sweat or sweating would probably be included in the general exception Perils of the sea, and kindred phrases. See Star of Hope, 9 Wall. (U. S.) 203; McKinlay *v.* Morrish, 21 How. (U. S.) 343; Clark *v.* Barnwell, 12 How. (U. S.) 272. But see Baxter *v.* Leland, 1 Abb. Adm. 348.

2. Dedekim *v.* Vose, 3 Blatchf. (C. C.) 44. See also The Martha, Olcott's Adm. 140.

The exception does not cover loss by such chemical precipitates as are not properly rust, and are not produced in the same way. McKinnon *v.* Taylor, Com. Ca. 514. See also Krohn *v.* Nurse, 5 Buch. (Cape of Good Hope) 85.

3. Thrift *v.* Youle, 46 L. J. C. P. 402.

Where the accumulation of molasses drainage upon the floor of the hold of the vessel was so deep that certain casks of sugar were half submerged in it, and were thereby caused to heat, it was held that this did not come within the exception "Not liable for leakage." The Neptune, 38 L. J. Adm. 63.

4. The Invincible, 1 Lowell Decisions, 225. In some cases, however, the bill excepts "average leakage and breakage." In such cases the burden rests upon the claimants to show that the leakage is greater than the average. 630 Casks of Sherry Wine, 14 Blatchf. (C. C.) 517.

5. Phillips *v.* Clark, 2 C. B. N. S. 156; Oriflamme, 1 Sawyer (C. C.), 176: The David and Caroline, 5 Blatchf. (C. C.) 266; Vitrified, etc., Sewer Pipes, 5 Ben. (C. C.) 402; Carey *v.* Atkins, 6 Ben. (C. C.) 562; Thompson *v.* C. & N. W. R. Co., 27 Iowa, 561; M. V. R. Co. *v.* Caldwell, 8 Kansas, 244.

6. Wolf *v.* Am. Exp. Co., 43 Mo. 421; Read *v.* St. L., etc. R. Co., 60 Mo. 199.

Where the bill of lading read "not accountable for freezing" and "to be delivered without delay," and the goods were delayed and frozen, the carrier was held liable. Whicher *v.* Steamboat Ewing, 21 Iowa, 240; Pittsburgh, etc., R. Co. *v.* Hazen, 84 Ill. 36. But the delay must be unreasonable and unnecessary. Mich. Central R. Co. *v.* Curtis, 80 Ill. 324.

7. Story on Bailments, § 492a.

care it receives. Of that character are most varieties of fruit, some kinds of liquors, and numerous vegetable productions." [1]

The exoneration of the exception does not, however, extend to a loss to which the carrier's own negligent acts or misconduct have contributed.[2]

To determine what is to be expected of the carrier, regard must be had to the character of the goods and the circumstances of each case.[3]

Escapes—Viciousness—Injuries to Unruly Animals.—Carriers of live animals have been held in England,[4] Kentucky,[5] and Michigan[6] not to be common carriers. Elsewhere in the United States they are regarded as subject to the common-law liability.[7]

Whichever way the liability may be held to apply, the insertion of the exception as to escapes, etc., is additional protection to the carrier, and the limitation is sustainable on the principle that he is not to be liable for inherent defects.[8]

Heat—Suffocation—Fermentation.—Loss or damage occasioned

1. Merchantable corn was held not to be within the exception. Ill., etc., R. Co. *v.* McClellan, 54 Ill. 58.

2. The decay of fruit or grain, though ordinarily within the exceptions, will not excuse the carrier, if he has failed to secure proper ventilation for the goods. Davidson *v.* Gwynne, 12 East, 381; The America, 8 Ben. (C. C.) 491. And the loss of meat will not be within the relief of the exception "decay," in the event of the failure of the carrier to provide sufficient ice to keep it during the voyage. Sherman *v.* Inman SS. Co., 26 Hun (N. Y.), 107.

3. If the goods have become wet, and are liable to be injured thereby, he should, if possible, unpack and dry them. Chouteau *v.* Leech, 18 Pa. St. 224; The Niagara *v.* Cordes, 21 How. (U. S.) 7; Blocker *v.* Whittenburg, 12 La. Ann. 410.

If a cargo of hides is liable to be destroyed by worms, he should have the skins beaten and ventilated. The Brig Gentleman, Olcott's Adm. 110; Rogers *v.* Murray, 3 Bosw. (N. Y.) 357; s. c., 1 Blatchf. (C. C.) 196.

If a horse be left in the carrier's custody, he is bound to feed it, though he may recover from the owner the cost of its keep. Great Northern R. Co. *v.* Swaffield, L. R. 9 Exch. 132.

But the carrier is not bound either to repair goods or to delay the voyage for the sake of saving them. The Lynx *v.* King, 12 Mo. 272; Notara *v.* Henderson, L. R. 5 Q. B. 346.

4. Palmer *v.* Grand Junction R. Co., 4 M. & W. 749; Kendall *v.* L. & S. W. R. Co., 7 Exch. 373; Pardington *v.* South Wales R. Co., 38 Eng. L. & Eq. Rep. 432.

5. Louisville, etc., R. Co. *v.* Hedger, 9 Bush (Ky.), 645; Hall *v.* Renfro, 3 Metc. (Ky.) 51.

6. Lake Shore, etc., R. Co. *v.* Perkins, 25 Mich. 329; Michigan, etc., R. Co. *v.* McDonough, 21 Mich. 165.

7. Cragen *v.* N. Y., etc., R. Co., 51 N. Y. 61; Conger *v.* Hudson River R. Co., 6 Duer (N. Y.), 375; Powell *v.* Penn. R. Co., 32 Pa. St. 414; Wilson *v.* Hamilton, 4 Ohio St. 722; Evans *v.* Fitchburg, etc., R. Co., 111 Mass. 142; Ohio, etc., R. Co. *v.* Dunbar, 20 Ill. 623; Kimball *v.* Rutland R. Co., 26 Vermont, 247; Rixford *v.* Smith, 52 N. H. 355; S. & N. A. R. Co. *v.* Henlein, 56 Ala. 368; East Tenn. R. Co. *v.* Whittal, 27 Ga. 535.

8. Rhoads *v.* Louisville, etc., R. Co., 9 Bush (Ky.), 688. Loss "by viciousness of the animals" was included among the exceptions in the bill of lading, but it was held that the proof of viciousness would not exonerate the carriers if the cars in which the animals were placed were defective.

In Gill *v.* Manchester, etc., R. Co., L. R. 8 Q. B. 186, the carrier was by contract released from liability for loss or injury in the delivery of the cow shipped by the plaintiff, occasioned by kicking, plunging, or restiveness. When the cow arrived at the place of destination, a servant of the defendants was about to unfasten the car, when he was warned not to do so. He persisted, and the animal ran out, and after rushing about the yard violently for some time, ran upon the railway tracks and was killed by a passing train. Here the court held that the carrier was liable.

by heat, suffocation or fermentation, under this exception, does not fall upon the carrier, unless his negligence has contributed to the loss or damage.[1]

Loading and Unloading.—Where the carrier stipulates in the bill that loading and unloading shall be done at the shipper's risk, the stipulation puts upon the shipper all risk of damages to the goods in loading them upon or unloading them from the vessel, car, carriage, stage, or other vehicle of transit.[2] It clearly has, however, no application to damage to goods while being transported. Nor to personal injuries to the shipper received in loading them.[3]

Pirates and Rovers.—Loss by pirates has been held to fall under each of the exceptions Perils of the sea and The king's enemies,[4] but is generally set out as one of the expressed exceptions in the bill.[5]

Robbers and Thieves.—Prior to the reign of Elizabeth, it would seem that loss by robbery was not included within the common-law exception. In that reign it was said, "If the carrier be robbed of the goods delivered to him he shall answer for the value of them."[6]

The exception is now usually included among those set forth in the bill. It is, however, to be construed strictly and most favorably to the shipper.[7]

The term "robbers" means loss by violence. Mere removal without force is not within the exception.[8]

Authorities differ as to whether the term "thieves" is restricted

1. Ill., etc., R. Co. *v.* Adams, 42 Ill. 474; Sturgeon *v.* St. Louis, etc., R. Co., 65 Mo. 569; Lewis *v.* Dudgeon, L. R. 3 C. P. 17 N.; Mendelsohn *v.* The Louisiana, 3 Woods, 46.

2. Indianapolis R. Co. *v.* Allen, 31 Ind. 394.

3. Stinson *v.* N. Y. Central R. Co., 32 N. Y. 333.

Where, in loading, the bottom of the car furnished by the railroad company dropped out, and a loss thus occurred, the carrier was held liable. Hawkins *v.* G. W. R. Co., 17 Mich. 57; G. W. R. Co. *v.* Hawkins, 18 Mich. 427.

4. See, *supra*, PERILS OF THE SEA and THE PUBLIC ENEMY.

5. Robbery on a river where the tide ebbs and flows is not piracy within the terms of a bill of lading, even though it be punishable as such under the laws. Boon *v.* The Belfast, 40 Ala. 184.

The following cases have been held to come under the exception:

Where a vessel was taken out of her course by the crew and the goods were seized and part of them sold. Dixon *v.* Reid, 5 B. & Ald. 597.

Where emigrant coolie passengers murdered the captain and part of the crew, took possession of the vessel, and ran her ashore, whereby the goods were destroyed. Palmer *v.* Naylor, 23 L. J. Exch. 323.

Where a ship or a vessel laden with a cargo of corn was forced by the stress of weather into a harbor where the people came on board, took the control of the ship from the captain, drove the vessel aground, and would not leave her until they had compelled the captain to sell the corn to them at a very low price. Nesbitt *v.* Lushington, 4 T. R. 783.

6. 1 Inst. 89a; Mo. 462; 1 Rs. Abr. 2, cited Jones on Bailments, p. 103.

7. Taylor *v.* L. & G. W. R. Co., 43 L. J. Q. B. 205.

8. De Rothschild *v.* Royal Mail Steam Packet Co., 21 L. J. Exch. 273.

Where the carrier received a parcel of goods to be carried from London to Dover, under contract to deliver them next day, "fire and robbery excepted," and the parcel was deposited by the defendants in a desk in their office in London, and was afterwards missing, it was held that this was not a loss within the exception. Latham *v.* Stanbury, 3 Stark. 143.

to theft by parties who are not directly connected with the ship, or applies equally to theft committed by one of the crew or by a passenger.[1]

Barratry.—Barratry has been defined by a learned author to be "any wrongful act of the master, officers, or crew done against the owner," and the bill usually contains an exemption from liability for loss of goods due to this cause.[2]

Riots, Strikes, and Stoppages of Labor.—This exception is modern, and has not been fairly before the courts for interpretation. Some light may be thrown upon the subject by the cases cited in the note.[3]

Accidents to Machinery; to Boiler; to Engine—Steam.—The presence of this exception in the bill does not give immunity to the carrier from liability for loss occurring within the letter of the exception, but in reality by his negligence.[4]

Risk of Boats.—The necessities of trade in certain ports require that goods shall be transferred from the vessel in which they have been carried and landed in boats, barges, or lighters. The best

1. Taylor *v.* Liverpool, etc., S. Co., 9 L. R. Q. B. 546; Spinetti *v.* Atlas S. S. Co., 80 N. Y. 71.

2. Parsons on Marine Ins., vol. i., c. xxii., sec. 6.

The following acts have been held to be barratrous: Attempting to run a blockade. Robinson *v.* Ewer, 1 T. R. 127. An attempt to recapture a vessel illegally taken. Dederer *v.* Del. Ins. Co., 2 Wash. C. C. 61; Wilcox *v.* Un. Ins. Co., 2 Binn. (Pa.) 574. Collusion between the master and the captain of a privateer as to the capture of the ship. Arcangelo *v.* Thompson, 2 Camp. 620. Smuggling. Stone *v.* National Ins. Co., 19 Pick. (Mass.) 34; Haverlock *v.* Hancill, 3 T. R. 277. Stealing the cargo by mariners. Am. Ins. Co. *v.* Dunham, 12 Wend. (N. Y.) 463. Delay for fraudulent purposes. Ross *v.* Hunter, 4 T. R. 33. Wilfully running the ship ashore. Lawton *v.* Sun Mut. Ins. Co., 2 Cush. (Mass.) 500.

Barratry may be committed by the master in respect to the cargo, though the owner of the cargo is at the same time owner of the ship, and though the master is also the supercargo or consignee for the voyage. Cook *v.* The Commercial Ins. Co., 11 Johns. (N. Y.) 43.

A master who is an owner cannot commit barratry. Nutt *v.* Bourdieu, 1 T. R. 323.

3. An action was brought for delay in the carriage of certain potatoes. It was shown that the engineers in the employ of the railroad company had abandoned their engines for the purpose of compelling the company to rescind certain regulations. It did not appear that the officers of the company were in fault. It was held that the company was liable. Blackstock *v.* N. Y. & E. R. Co., 20 N. Y. 48.

In Reed *v.* St. L., etc., R. Co., 60 Mo. 199, it was said by the court: "We think the court (below) declared the law accurately in requiring that in order to amount to an excuse for delay the obstruction to the running of trains should have been the work of persons other than the employees or servants of the road. The company will be responsible for damages resulting from a delay to transport freight in the usual time, when it is caused by its servants suddenly and wilfully refusing to work. Because the employees refuse to work or perform their usual employments will not release the company or the carrier from the responsibility of his contract."

In Pittsburgh, etc., R. Co. *v.* Hazen, 84 Ill. 36, the company offered to show that the sole cause of a certain delay was the obstruction to the passage of trains resulting from the irresistible violence of numbers of lawless men, some of whom had been previously employed by the company, but had been discharged. This evidence was held, on appeal, to be admissible. See also Pittsburgh, etc., R. Co. *v.* Hallowell, 65 Ind. 188; Bartlett *v.* R. Co., 18 Am. & Eng. R. R. Cas. 549, and note.

4. C. *v.* Gen. Steam Nav. Co., 37 L. T. 37 C. P. 3.

Ordinarily, however, the leaking of a boiler by which goods are injured, where negligence cannot be shown on the part of the carrier, is within the exception. Moosum *v.* Brit. Ind. Steam Nav. Co., 8 Cal. W. R. C. R. 35.

opinion would seem to be that no greater liability exists when goods are in such boats, than when in the hold of the ship.[1]

Rats—Vermin.—This exception would seem to be necessary for the protection of the carrier, since it has been repeatedly decided that damage by rats does not fall within the meaning of the phrase "perils of the sea."[2]

Obliteration of Marks.—The carrier is not responsible for the misdelivery of goods consequent upon their being improperly marked.[3]

Goods carried on Deck solely at Shipper's Risk.—The presumption in every contract for carriage by water is that the goods shall be stowed below decks.[4] Deck stowage is, therefore, *prima facie* negligence on the part of the carrier, unless authorized by the bill of lading.[5]

4. **Bill of Lading as a Muniment of Title to the Goods.**—A bill of lading is the means of securing to the owner his title to goods while the ownership and the actual possession are severed during transportation. The bill represents the goods, and as effective a transfer of ownership and of right to possession may be made by the transfer of the bill as can be made by a physical delivery of the goods themselves. The bill is a representative of the goods, and may be made the vehicle of the transfer of title so long as they are in transit.[6] Where a bill is issued by an agent of a carrier for goods never received for transportation, the carrier cannot be held by a holder of the bill for the goods receipted for.[7]

1. Johnson *v.* Benson, 4 Moore, 90; Leggett on Bills of Lading, p. 218.

2. Dale *v.* Hall, 1 Wis. 281; Hunter *v.* Potts, 4 Camp. 203; Laveronia *v.* Drury, 8 Exch. 166; The Bark Carlotta, 3 Asp. Mar. Law Cas. (N. S.) 456; 3 Kent Com. 300.

A loss by vermin is not within the exception Perils of the sea.

In The Miletus, 3 Blatchf. (C. C.) 335, it was shown that the labels on an invoice of tea had been eaten by cockroaches, thus occasioning loss to the shippers. The court held that this was not the result of perils of the sea. Numerous cases have decided that the destruction of the bottom of the vessel by worms is not within the exception Perils of the sea. Rohl *v.* Parr, 1 Esp. 444; Martin *v.* Salem Marine Ins. Co., 2 Mass. 420; 1 Phillips on Ins., § 1101; Hazzard *v.* New England Marine Ins. Co., 1 Sumn. (C. C.) 218 See vol. 1, p. 84. ACCIDENTS.

3. Angell on Carriers, sec. 136, and note.

Where the bill properly describes the consignee, the carriers, it would seem, are then bound to see that the goods are properly marked, and to deliver them to the proper consignee. Bradley *v.* Dumpace, 1 H. & C. 521; The Huntress, Davies, 82. See Leggett on Bills of Lading, 255.

4. The Neptune, 16 L. T. Admr. 36.

5. The Peyton, 2 Curtis, 21; The Delaware, 14 Wall. 579; Barber *v.* Brace, 3 Conn. 9. See *supra*, JETTISON.

6. Meyerstein *v.* Barber, L. R. 4 H. L. 317; Blackburn on Sales, 297; Hatfield *v.* Phillips, 9 M. & W. 649.

Where goods are to be transported over several lines of railroad or water carriers the bill may by custom or contract remain in force during the whole transit. Forbes *v.* B. & L. R. Co., 133 Mass. 154.

7. This is based upon the principle that the agent has authority to sign bills of lading for goods actually received for transportation only, and if he sign for goods not received, he exceeds his authority, and the carrier is not liable for his acts. Grant *v.* Norway, 10 C. B. 665; Coleman *v.* Riches, 16 C. B. 103; McLean *v.* Fleming, L. R. 2 H. L. S. & D. App. 128; Jessel *v.* Bath, L. R. 2 Ex. 267; Berkeley *v.* Watling, 7 Ad. & Ellis, 29.

The doctrine laid down in Grant *v.* Norway, 10 C. B. 665, has been followed.

5. Negotiability of the Bill.—A bill of lading is not a negotiable instrument in the same sense that a promissory note or bill of exchange is negotiable.[1] It represents specific goods, and not money value. Rights and duties arise by reason of the possession of the goods themselves, as well as by the holding or transfer of their representative, the bill of lading. The effect of the indorsement and delivery of a bill of lading is to transfer to the indorsee or holder such right to or property in the goods represented by it as it was the intention of the parties to pass, and the intention is to be gathered from all the circumstances attending the indorsement and delivery.[2]

Bills Issued in Sets.—Where bills are issued in sets of two or more, and the several parts of the bill are transferred to different parties who respectively make advances upon the faith of the bill, the property in the goods passes to the first transferee, unless a subsequent transferee has a superior equity to that of being like the first—a *bona-fide* transferee for value.[3]

in many of the State courts and in the courts of the United States. See The Schooner Freeman *v.* Buckingham, 18 How. 182; Pallard *v.* Vinton, 105 U. S. 7; Sears *v.* Wingate, 3 Allen (Mass.), 103; Stone *v.* W., St. L. & P. R. Co., 9 Bradwell (Ill.), 48; Dean *v.* King, 22 Ohio, 118; B. & O. R. Co. *v.* Wilkens, 44 Md. 11; Hurst *v.* M. C. R. Co., 29 La. Ann. 446; Louisiana Bank *v.* Laveille, 52 Mo. 380.

A contrary view seems to obtain in others of the States. Brooke *v.* N. Y., L. E. & W. R. Co., 16 Weekly Notes of Cases (Pa.), 514; Armour *v.* M. C. R. Co., 65 N. Y. 111; Wichita Bank *v.* A., T. & S. R. Co., 20 Kan. 519; S. C. & P. R. Co. *v.* First Nat. Bank, 10 Neb. 556.

In some of the States legislation has provided that bills of lading shall be conclusive evidence of the receipt of goods. Maryland, 1876, c. ii. s. 1; Rev. Code, 1878, p. 298; Pennsylvania Act, 1866, P. L. 1363; Pur. Dig. 115; Missouri R. S. 1879. s. 557, p 88; Wisconsin R. S. 1878, s. 4424; New York R. S., vol. iii. (7th Ed.) p. 2259; L. 1858, c. 326.

In England the Bill of Lading Act (18 and 19 Vict. c. cxi. s. 3) provides "that every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped unless such holder of the bill of lading shall have had actual notice at the time of receiving the same, that the goods had not been in fact laden on board, provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part and wholly by the fraud of the shipper or some person under whom the holder claims." For the construction of this act, see Jessel *v.* Bath, L. R. 2 Ex. 267; Brown *v.* Powell Coal Co., L. R. 10 C. P. 562; Hubbersty *v.* Ward, 8 Ex. 330.

1. In several of the States statutes have been enacted with a view to making bills of lading absolutely negotiable or *quasi*-negotiable. *California:* Civ. Code, §§ 2127, 2128. *Maryland:* 1876, c. 262, § 1; Rev. Code 1878, p. 298. *Missouri:* R. S. 1879, §§ 558, 559, p. 88. *New York:* R. S. vol. iii. (7th Ed.) p. 2260; L. 1858, c. 326, § 6, as amended by L. 1859, c. 553. *Pennsylvania:* Purd. Dig. p. 160; pl. 6, act of April 5, 1849. *Wisconsin:* R. S. 1878, §§ 4194, 4424. These statutes have been subjected to judicial construction in the following cases: Shaw *v.* Railroad Co., 101 U. S. 557, construing the Pennsylvania statute; Tiedman *v.* Knox, 53 Md. 612, construing the Maryland statute. See also B. & O. R. Co. *v.* Wilkens, 44 Md. 27.

2. Sewell *v.* Burdick, 52 L. T. 445, and cases therein discussed.

3. Meyerstein *v.* Barber, L. R. 44 L. 317; Fearon *v.* Bowers, 1 H. Bl. 364; Kent's Comm. 308; Skilling *v.* Bollman, 6 Mo. App. 76; Glynn *v.* E. & W. India Dock Co., L. R. 7 App. 600.

In Sanders *v.* McLean, 11 Q. B. Div. 327, it was held that a purchaser of goods to be paid for on delivery of the bills of lading is bound to pay upon the tender

Transfer of the Bill by one having Ownership in the Goods.—A bill of lading cannot, generally speaking, represent the goods which it purports to represent, unless it has been issued to their true owner.[1] If the carrier be compelled by legal proceedings to deliver the goods to their true owner, such a delivery is a complete justification for a failure to deliver according to the directions of the bailor.[2]

Bill as Evidence of Title in Consignee.—Where goods are consigned without reservation on the part of the consignor the *prima-facie* legal presumption is that the consignee is the owner.[3]

The fact of consignment does not vest an absolute title in the consignee. His title is not complete until the bill of lading comes into his hands.[4]

of a duly indorsed bill which is effective to pass the property, notwithstanding that the bill was drawn in triplicate, and that all the copies were not tendered or accounted for.

1. The Idaho, 3 Otto (U. S.), 575; Blossom *v.* Champion, 37 Barb. (N. Y.) 554; Dows *v.* Perrin, 16 N. Y. 325; Moore *v.* Robinson, 62 Ala. 537; Saltus *v.* Everett, 20 Wend. (N. Y.) 267; Traders' Bank *v.* F. & M. Bank, 60 N. Y. 40; Richardson *v.* Smith, 33 Ga. Suppl. 95; Union Trans. Co. *v.* Yeager, 34 Ind. 1; Craven *v.* Ryder, 6 Taunt. 433.

2. Bliven *v.* Hudson Riv. R. Co., 36 N. Y. 403; King *v.* Richards, 6 Whart. (Pa.) 418; Bates *v.* Stanton, 1 Duer (N. Y.), 79; Hardman *v.* Wilcock, 9 Bing. 382; Biddle *v.* Bond, 6 Best. & S. 225; Cheeseman *v.* Exall, 6 Exch. 341.

"The modern and best-considered cases treat as a matter of no importance the question how the bailor acquired the possession he has delivered to his bailee, and adjudge that if the bailee has delivered the property to one who had the right to it as the true owner, he may defend himself against any claim of his principal." The Idaho, 3 Otto, 575.

A special agent authorized to deliver a bill of lading only upon payment of a bill of exchange drawn against the goods and attached to the bill of lading cannot bind his principal by a delivery of the bill made without such payment, and a party obtaining possession of the bill with the assent of such agent, but without the assent of the principal, acquires no title to the goods as against the latter. Stollenwerck *v.* Thatcher, 115 Mass. 224.

Where, however, the owner causes a bill to be issued in the name of another, for the purpose of clothing the latter with an apparent ownership, a *bona-fide* purchaser will be protected. Saltus *v.* Everett, 20 Wend. (N. Y.) 267; Pickering *v.* Buck, 15 East, 44.

3. Congar *v.* C. & G.U. R. Co., 17 Wis 477; Griffith *v.* Ingledew, 6 S. & R. (Pa.) 429; McCaulley *v* Davidson, 13 Minn. 162; Lawrence *v.* Minturn, 17 How. (U.S.) 100; Krulder *v.* Ellison, 47 N. Y. 36; Watkins *v.* Paine, 57 Ga. 50; Merchants', etc., Co. *v.* Smith, 76 Ill. 542; Sedgwick *v.* Cottingham, 54 Iowa, 512; Torrey *v.* Corliss, 33 Me. 333; Arnold *v.* Prout, 51 N. H. 587; Schlessinger *v.* Stratton, 9 R. I. 578.

Such a shipment vests in the consignee a right to bring suit against the carrier for any breach of the latter's duty in respect of the goods, even through the consignor has paid the carrier for the transportation. See Griffith *v.* Ingledew, and other cases cited *supra*, and Fowler *v.* Cooper, 3 La. 215; Madison, etc., R. Co. *v.* Whitesel, 11 Ind. 55; Vallé *v.* Carré, 36 Mo. 575; Butler *v.* Smith, 6 George, 457.

Where the consignee has parted with his bill, as by indorsing it to one making an advance upon it, its reindorsement to him upon his repaying the advance will reinvest him with his right under the original contract, to bring suit against the carrier. Short *v.* Simpson, L. R. 1 C. P. 248.

4. Bruce *v.* Andrews, 36 Mo. 593; Hauseman *v.* Nye, 62 Ind. 485; Mitchell *v.* Ede, 11 Ad. & Ellis. 260; Conard *v.* Atlantic Ins. Co., 1 Peters (U. S.), 444; Pratt *v.* Parkman, 24 Pick. (Mass.) 42; Bank *v.* Jones, 4 N. Y. 497; Bank *v.* Crocker, 111 Mass. 163; Taylor *v.* Turner, 87 Ill. 296.

Where the consignee does not accept the consignment, and disclaims interest in it, the title is held to be revested in the consignor. Ezell *v.* English, 6 Porter (Ala.), 311; Chapin *v.* Clark, 31 La. Ann. 846; Ela *v.* Express Co., 29 Wis. 611; Audenreid *v.* Randall, 3 Cliff. (C. C.) 99.

Where the bill is indorsed in blank, and sent to the consignee to fill up the blank,

Bill Drawn to Shipper's Order.—Where the bill makes the goods deliverable to the vendor's order it is strong *prima-facie* evidence of the vendor's intention to reserve to himself the *jus disponendi*, and prevent title to the goods shipped from passing to the vendee.[1]

Where a bill is drawn to the order of the consignor and assigned by him to one who discounts a draft drawn against the consignment, it is a clear presumption that the consignor intended that no title to the goods should pass to the vendee until the acceptance or payment of the draft.[2]

Bill as Collateral Security.—Where a bill is transferred or delivered as collateral security the rights of the pledgee thereunder are the same as those of an actual purchaser of the goods for value, so far as the exercise of those rights is necessary for the holder's protection.[3] The rights under the bill may be transferred by the person to whom it is issued to another by indorsement,[4] and where there is clear evidence of an intention to pass title by the delivery of the bill, the title under it will not be invalidated by the mere omission of a formal indorsement or other written assign-

the consignment can vest property in no one until the blank is filled. Chandler *v.* Sprague, 46 Mass. 306.

1. Mason *v.* Great Western R. Co., 31 Up. Can. Q. B. 73; Alderman *v.* Eastern R. Co., 115 Mass. 233; Security Bank *v.* Luttgen, 29 Minn. 363; Jenkyns *v.* Brown, 14 Q. B. 496; Elleshaw *v.* Magniac, 6 Ex. 569; Ogg *v.* Shuter, L. R. 1 C. P. 47.

The same construction is given where the goods are made deliverable to an agent of the consignor. The St. Joze Indiano, 1 Wheat. 208; Dows *v.* Nat. Exchange Bank, 1 Otto (U. S.), 618.

2. Dows *v.* Nat. Exchange Bank, 1 Otto (U. S.), 618; Alderman *v.* Eastern R. Co., 115 Mass. 233; Stollenwerck *v.* Thatcher, 115 Mass. 224; Security Bank *v.* Brown, 14 Q. B. 496; Mason *v.* Great Western R. Co., 31 U. Can. Q. B. 73; People's Nat. Bank *v.* Stewart, 3 P. & B. (New Bruns.) 268.

But in Dows *v.* Nat. Exchange Bank, 1 Otto (U. S.), 618, it is said "that where a bill of lading has been taken containing a stipulation that the goods shipped shall be delivered to the order of the shipper or to some person designated by him other than the one on whose account they have been shipped, the inference that it was not intended the property in the goods should pass except by subsequent order of the person holding the bill, may be rebutted, though it is held to be almost conclusive: and we agree that where there are circumstances pointing both ways, some indicating an intent to pass the ownership immediately, notwithstanding the bill of lading,—in other words, where there is anything to rebut the effect of the bill—it becomes a question for the jury whether the property has passed." See also Joyce *v.* Swan, 17 C. B. N. S. 83; Hobart *v.* Littlefield, 13 R. I. 341.

Where a shipment is made by an owner to his factor, the title to the goods is in the consignee only as agent of the shipper. The consignee, so far as third parties are concerned, may, however, be dealt with as the owner.

Where a bill of lading is delivered to a factor, having a balance of account in his favor it is equivalent to actual possession of the goods. Rice *v.* Austin, 17 Mass. 197; Vallé *v.* Carré, 36 Mo. 575; Davis *v.* Aubin, 24 Vt. 55; Wade *v.* Hamilton, 30 Ga. 450.

The claim of a consignee for advances is preferred to that of an attaching creditor, when the former receives the bill previous to the levy. Vallé *v.* Carré 36 Mo. 575; Park *v.* Porter, 2 Robinson, 342.

But it must be affirmatively shown that he did receive before the levy. Hyde *v.* Smith, 12 La. 144.

3. Dows *v.* National Exchange Bank, 1 Otto. 618; Tilden *v.* Minor, 45 Vt. 195; F. & M. Bank *v.* Logan, 74 N. Y. 568; Marine Bank *v.* Wright. 48 N. Y. 1.

The pledgee is entitled to maintain an action of replevin for the possession of the goods. Fifth Nat. Bank *v.* Bayley, 115 Mass. 228; Bank Green Bay *v.* Dearborn, 115 Mass. 219.

4. The Thames, 14 Wall. (U. S.) 98, and cases cited in the opinion of Mr. Justice Strong.

ment.[1] The insertion of the consignee's name in the bill gives him no right to the goods which can be asserted against the superior equity of a *bona-fide* advance to the consignor upon the security of the bill, even though the consignor be indebted to the consignee upon a general account in a sum greater than the value of the goods.[2] A bill of lading attached and forwarded with a time draft for the price of the goods is, in the absence of special conditions, a security for the acceptance of the draft rather than for its payment, and the consignee is entitled to the possession of the bill on the acceptance of the draft.[3]

The Title of the Holder of the Bill and the Right of Stoppage in Transitu.—The right of stoppage of the goods *in transitu* inheres in a consignor who is an unpaid vendor, and is exercisable in the case of the insolvency of the vendee. This right of stoppage may be defeated by a transfer of the bill to a *bona-fide* indorsee for value.[4]

BILL OF PARTICULARS. (See also ACCOUNT; ASSUMPSIT; DEBT; LIBEL; SET-OFF; TORT.)

1. Definition.—A bill of particulars is a written statement of the

1. Bank of Green Bay *v.* Dearborn, 115 Mass. 219; Bank of Rochester *v.* Jones, 4 N. Y. 497; Holmes *v.* Germ. Sec. Bank, 87 Pa. St. 525; Campbell *v.* Alford, 57 Tex. 159; M. C. R. Co. *v.* Phillips, 60 Ill. 190; Davenport Bank *v.* Homeyer. 45 Mo. 145; Jeffersonville, etc., R. Co. *v.* Irvin, 46 Ind. 180; Fowler *v.* Meikleham, 7 Low. Can. 367; Glidden *v.* Lucas, 7 Cal. 26.

In California it is provided by statute (Civ. Code, § 2128) that when a bill of lading is made to "bearer," or in equivalent terms, a simple transfer thereof by delivery conveys the same title as an indorsement.

2. Bank of Rochester *v.* Jones, 4 N. Y. 497; Allen *v.* Williams, 12 Pick. (Mass.) 297; First Nat. Bank *v.* Crocker, 111 Mass. 163.

3. Nat. Bank Commerce *v.* Merchants' Nat. Bank. 1 Otto, 92; Shepherd *v.* Harrison, L. R. 4 Q. B. 493; Coventry *v.* Gladstone, L. R. 4 Eq. 493.

4. Lickbarrow *v.* Mason, 2 T. R. 63; 1 H. Bl. 357; 6 East, 21, is the leading case upon this principle, decided 1793. See also Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386; Becker *v.* Hallgarten, 86 N. Y. 167; Lee *v.* Kimball, 45 Me. 172; Schumacher *v.* Eby, 24 Pa. St. 521; Relyea *v.* N. H. Rolling Mill Co., 42 Conn. 579; Newhall *v.* C. P. R. Co., 51 Cal. 345; Halliday *v.* Hamilton, 11 Wall. (U. S.) 560.

The transfer must be for value and without fraud. Rosenthal *v.* Dessau, 11 Hun (N. Y.), 49.

Proof that the assignee of the bill from the original vendee had knowledge at the time of the transfer of the latter's insolvency is admissible in a contest with the vendor to show that the bill was not transferred in good faith. Loeb *v.* Peters, 63 Ala. 243; Ilsley *v.* Stubbs, 9 Mass. 65; Seymour *v.* Newton, 105 Mass. 275; Kitchen *v.* Spear. 30 Vt. 545.

One who makes a temporary advance to the vendee, taking the bill as his security, or one who by any similar transaction becomes a technical purchaser for value, has the same rights as a buyer of the goods. Becker *v.* Hallgarten, 86 N. Y. 167; Dows *v.* Rush, 28 Barb. 157; Dows *v.* Greene, 24 N. Y. 638.

A transfer of the bill in payment of an antecedent debt destroys the consignor's right of stoppage. Leash *v.* Scott, L. R. 2 Q. B. 376; Lee *v.* Kimball, 45 Me. 172. See also Chartered Bank *v.* Henderson, L. R. 5 P. C. 501.

To defeat the right of stoppage, the bill must not only be assigned or indorsed, but actually delivered to the purchaser of the goods, the assignee of the bill. *Ex parte* Golding Davis. L. R. 13 Ch. 628. See also Kemp *v.* Falk, 7 App. Cas. 582.

details of the claim [1] or defence in an action at law,[2] expressed informally,[3] but with greater particularity than is usual in pleadings, and furnished by one party to the other in compliance with a statute, or a rule or special order of court.[4]

2. Under what Circumstances Required.—In some States bills of particulars must be furnished with the pleadings or on request in certain classes of actions. Apart from such provisions, a court's discretionary power to order such a bill extends to all descriptions

1. This word is used in the broadest sense, as in Orvis *v.* Dana, 1 Abb. N. C. (N. Y.) 268, 281.

2. The practice of requiring a bill of particulars, a thing unknown to the early common law (Dempster *v.* Purnell, 3 Man. & Gr. 375), was necessitated by the use of the common counts in actions of debt and *assumpsit*, but has been extended "to all descriptions of actions where the circumstances are such that justice demands that a party should be apprised of the matters for which he is put on trial with greater particularity than is required by the rules of pleading." Tilton *v.* Beecher, 59 N. Y. 176. See also 3 Chitty's Gen. Prac. 612.

The practice is strictly confined to common-law actions, whether under the old forms of pleading, or those of a modern code of procedure. It has no place in suits in equity. In a suit against a surviving partner and the representatives of a deceased partner to recover the amount of notes due by the partnership, and the balance of an account, the suit being brought in equity because of the surviving partner's insolvency, a bill of particulars was asked for, but Walworth, C., said: "I have not been able to find any case in which the court of chancery has made an order for a specification of the complainant's demand in the nature of a bill of particulars at law. Upon the first view of this case I was inclined to think this was a case in which the defendants were entitled to a specification of the definite amount and particular nature of each item of the account claimed against them under the general charges in the bill, on the same principle which governs courts of law in requiring the plaintiffs to furnish a particular of his demand upon a general declaration. But upon further examination and reflection, I am satisfied that such a course is not necessary for the attainment of justice, and that the adoption of such a practice would in many cases lead to great and unnecessary delay and expense. The forms of pleading in this court are such as to furnish the defendant in most cases all the information as to the particular nature of the claim made against him, which can be necessary to enable him to meet it by an appropriate defence. And if, as in this case, the complainant seeks to recover a book account against the defendant upon a general allegation of indebtedness in the bill, and without a specification of the items, the court at the hearing will not undertake to settle the account. It will in that case be referred to a master with liberty to the defendant to introduce new testimony or to make any legal or equitable defence which he may have to each and every item thereof." Cornell *v.* Bostwick, 3 Paige (N. Y.), 160.

3. That is, without the technical formality of pleadings, but it must not be vague or unspecific. See note 1, p. 246.

4. By the New York Code of 1877, § 531, the items of an account alleged in a pleading need not be set out therein, but within ten days after a written demand by the other party a verified copy of the account must be furnished him; otherwise the account cannot be given in evidence. This form of a bill of particulars is obtained as of course only in cases of an account in the strict sense of the term, i.e., an entry of debits and credits in a book, or upon paper, of things bought and sold, or services performed, with date and price or value. Dowdney *v.* Volkening, 37 N. Y. Super. Ct. 313.

And the fact that the plaintiff has furnished a bill, without an order of court, in a case where the code did not require this, does not affect the court's discretionary power to order another bill. Langdon *v.* Brown, 51 N. Y. Super. Ct. 367.

See the various State codes, which in general conform to that of New York in making the bill essential in suits founded on accounts.

In *Pennsylvania*, a rule for a bill of particulars under the common counts is of course, but in all other cases it requires a special *allocatur*. Mitchell on Motions and Rules, 17, 40. Except that the respondent in divorce can always have a rule on the libellant to furnish a bill of the particulars of the cause of action, in default of which a judgment of *non-pros.* will be entered thirty days after service

of actions, and may be exercised as well in behalf of the plaintiff as of the defendant.[1]

A bill will be ordered on the defendant's motion whenever the complaint or declaration is too general, not stating the cause of action with sufficient fulness to enable him to prepare his defence.[2]

of notice of the rule. Act of 25th May, 1878; 1 Purd. Dig. 615, pl. 14.

1. U. S. *v.* Tilden, 10 Ben. (U. S. D. C.) 547; Commonwealth *v.* Giles, 1 Gray (Mass.), 466; Blackie *v.* Neilson, 6 Bos. (N. Y.) 681; Schile *v.* Brokhahne, 9 J. & Sp. (N. Y.) 353; Moore *v.* Belloni, 10 J. & Sp. (N. Y.) 184; Fullerton *v.* Gaylord, 7 Rob. (N. Y.) 551; Ives *v.* Shaw, 31 How. (N. Y.) 54; Claflin *v.* Smith, 66 How. (N. Y.) 168; Tilton *v.* Beecher, 59 N. Y. 176; Dowdney *v.* Volkening, 37 N. Y. Super. Ct. 313; Powers *v.* Hughes, 39 N. Y. Super. Ct. 482; Clegg *v.* American Newspaper Un., 7 Abb. N. C. (N. Y.) 59; Butler *v.* Mann, 9 Abb. N. C. (N. Y.) 49; McDonald *v.* Barnhill, 58 Ia. 669.

The right to call for a bill of particulars does not affect the right to demur for insufficiency in the pleading. Wolf *v.* Schofield, 38 Ind. 175.

2. McCarney *v.* McCamm, 2 Bro. (Pa.) 40; Tilton *v.* Beecher, 59 N. Y. 176.

"Whenever the form of the declaration is so general as not to apprise the defendant of the nature, character, and extent of the claim set up against him, he may demand a bill of particulars. Such a bill is not only proper by way of limiting the plaintiff in his proof to the specific demands made by him, but is essential to enable the defendant to prepare fully his defence, and to guard him against surprise. The right is not only sanctioned by authority, but by reason and propriety." Brown *v.* Calvert, 4 Dana (Ky.), 219.

For example, in an action on a policy of marine insurance, a bill of particulars of the articles destroyed or damaged will be ordered. Cockcroft *v.* Ins. Co., 9 Bos. (N. Y.) 681.

So in an action against a collecting agent, particulars of the claims which he had negligently failed to collect. Wetmore *v.* Jennys, 1 Barb. (N. Y.) 53.

So in an action on a bond with collateral conditions, there being a general averment of non-compliance. Bancroft *v.* Freeman, 5 Weekly Notes (Pa.). 98.

So in an action for a fraudulent conspiracy to procure money on false vouchers, particulars of the false accounts and the bills alleged to have been paid. Mayor *v.* Marrener, 49 How. (N. Y.) 36.

So in an action for damages for conspiring to withhold evidence in a previous action, particulars of the evidence withheld, stating the names of the witnesses and what they would have testified to, the documents suppressed, etc. Leigh *v.* Atwater, 2 Abb. N. C. (N. Y.) 419.

Particulars may be called for in real actions. Vischer *v.* Conant, 4 Cow. (N. Y.) 396. And also in mixed actions, as ejectment. Den *v.* Phillips, 21 N. J. L. 436.

Even where there are special counts, if they are not more precise than the usual common counts, the defendant is entitled to particulars. Norris *v.* Hanson, 1 Weekly Notes (Pa.), 507; Wetmore *v.* Jennys, 1 Barb. (N. Y.) 53.

In a criminal case, a bill of particulars is required when the indictment fails to give notice of the special matters intended to be proved. Williams *v.* Commonwealth, 91 Pa. 493. As in a general indictment for embezzlement. People *v.* McKinney, 10 Mich. 54.

The information sought must be necessary. Hence, if the claim be fairly described in the pleadings, no bill of particulars will be ordered. Vila *v.* Weston, 33 Conn. 42; Bangs *v.* Ocean Bank, 53. How. (N. Y.) 51; Nevitt *v.* Rabe, 6 Miss. 653; Tierney *v.* Duffy, 59 Miss. 364.

The defendant must satisfy the court that he has no knowledge of the case the plaintiff intends to set up at the trial, and no means of knowledge without the aid of the court. It is not enough merely that his defence is embarrassed by the want of such knowledge. Brown *v.* G. W. R., 26 L. Times, 398; s. c., 20 Weekly R. 585.

Some special ground for the demand must be shown. Horlock *v.* Lediard, 10 Mee. & W. 677; s. c., 12 L. Jour. Ex. 33; Orvis *v.* Dana, 1 Abb. N. C. (N. Y.) 268.

The particulars required are those of the matter in dispute only, and not of collateral matters. Hence, in a suit on an agreement, the consideration for which was stated to be 'sums of money, pieces of property, and accounts, no particulars of these could be ordered. Crane *v.* Crane, 82 Ind. 459.

So in an action for a false representation of the credit of a third party, the defendant was refused particulars of the dealings between the plaintiff and the third party. Luck *v.* Handley, 4 Wels. H. & G. 486.

So, if the defence be indefinite the plaintiff has a right to call for particulars,[1] and this most frequently happens in cases of set-off.[2]

Where the defendant's means of ascertaining the items of the claim are as good as the plaintiff's, no bill of particulars will be ordered,[3] and the same is true where from the nature of the case the items of the claim or the details of the defence cannot be expected to be given with certainty.[4]

While a bill may now be ordered in an action of tort,[5] this happens much less frequently than in cases of contract, the general rule in tort being that if a pleading is not sufficiently specific the remedy is by demurrer.[6]

Only particulars of matters of fact can be obtained, not of matters of law. Roberts *v.* Rowlands, 3 Mee. & W. 543.

1. Diossy *v.* Rust, 46 N. Y. Super. Ct. 374.

2. For example, Reed *v.* Church, 7 Weekly Notes (Pa.), 79; Mercer *v.* Sayre, 3 John. (N. Y.) 248.

Where the defendant, an administrator, put in a cross-claim for services rendered the plaintiff by the intestate, particulars were ordered. Mason *v.* Ring, 10 Bos. (N. Y.) 598.

3. Butler *v.* Mann, 9 Abb. N. C. (N. Y.) 49; Young *v.* De Mott, 1 Barb. (N. Y.) 30; Blackie *v.* Nelson, 6 Bos. (N. Y.) 681; Powers *v.* Hughes, 39 N. Y. Super. Ct. 482; Hayes *v.* Davidson, 15 Abb. N. C. (N. Y.) 85; 33 Hun (N. Y.), 446; U. S. *v.* Tilden, 10 Ben. (U. S. D. C.) 547; Heft *v.* Jones, 9 Weekly Notes (Pa.), 541.

In a suit for an account, between partners after dissolution, it was held that unless the claim was for moneys contributed to or paid for the firm, not evidenced by or intelligible from the entries upon the books of the firm, one partner was presumed to have as much knowledge of the details as the other, and a bill of particulars was refused. Depew *v.* Leal, 5 Du. (N. Y.) 663.

4. U. S. *v.* Tilden, 10 Ben. (U. S. D. C.) 547. This action was for arrears of income-tax, the amounts to be recovered depending upon the amount of the defendant's income, of which the plaintiff had not yet had discovery.

So in an action for damages to a house by an explosion in the defendant's oil works, it was said: "This is not a case where the plaintiff should be required to furnish particulars. The action is for damages which the plaintiff cannot specify with certainty; the amount will depend on proof to be furnished after examination of the injuries, and may well consist of the testimony of experts." Muller *v.* Bush Mfg. Co., 15 Abb. N. C. (N. Y.) 88.

In an action for breach of warranty of a horse, particulars of the unsoundness complained of will not be required. Pylie *v.* Stephen, 6 Mee. & W. 814. Nor when the cause of action is work done in a series of acts, and there is no mode of measuring the compensation for each. Johnson *v.* Mallory, 2 Rob. (N. Y.) 681.

Where the defendant, by inducing his confederates to destroy the books and papers from which the bill of particulars would have been prepared, has made the preparation impossible to a great extent, he is not entitled to call for it. People *v.* Tweed, 63 N. Y. 194.

So where the items are, if in existence at all, in the public documents of a municipal corporation or the private books and papers of the defendant's confederates. People *v.* Tweed, 63 N. Y. 194.

In a suit against a railway company for overcharges on many items, it was held that the defendant must first furnish a copy of the tariff and charges before he could call for particulars. Sutton *v.* G. W. R., 10 Weekly Rep. 563.

In an action by a member against a stock exchange for expulsion, the answer relied on the provision of the constitution of the exchange, authorizing expulsion for "obvious fraud." The plaintiff was held not entitled to particulars of the fraud. Solomon *v.* McKay, 49 N. Y. Super. Ct. 138.

5. Tilton *v.* Beecher, 59 N. Y. 176; Orvis *v.* Dana, 1 Abb. N. C. (N. Y.) 268, 280; Lagan *v.* Gibson, 9 Ir. R. C. L. 507.

6. Furbush *v.* Phillips, 2 Weekly Notes (Pa.) 198; Peters *v.* City, 12 Weekly Notes (Pa.), 51.

In an action for consequential damages resulting from a sheriff's illegal seizure of merchandise, whereby the plaintiff became unable to fulfil his contracts, the court refused to order a bill of particulars of the contracts. People *v.* Marquette Circ. Judge, 39 Mich. 437.

In an action for negligence which caused the death of the plaintiff's intes-

The application to the court must always be accompanied by an affidavit of the necessity of the particulars sought.[1] The pendency of an order for a bill of particulars is not a stay of proceedings unless so expressed and served on the other party.[2]

3. Time of Moving For.—A bill of particulars may usually be moved for at any time before trial, even before appearance entered,[3] or after issue joined,[4] or a reference to arbitrators.[5] At the trial it is too late,[6] and if a party delay to move for a bill, it should be at his own costs.[7]

4. Form and Contents.—A bill of particulars must be specific, so as fairly to apprise the other party of the nature of the claim or defence made, and of the evidence to be offered.[8] It is

tate, particulars of the damage suffered were refused. Murphy *v.* Kipp, 1 Du. (N. Y.) 659.

So with particulars of the pretences, in an indictment for obtaining goods by false pretences. U. S. *v.* Ross, 1 Morr. (Ia.) 164.

In an action for slander or libel, the plaintiff may be required to furnish particulars of the facts constituting his right of action. Clark *v.* Munsell, 6 Metc. (Mass.) 373. And of the persons to whom the defendant had communicated, and the occasions when he had uttered the slander. Wood *v.* Jones, 1 Fost. & Fin. 301; Slator *v.* Slator, 8 L. Times, N. S. 856.

So if justification is pleaded, particulars of the facts on which the defendant relies may be ordered. Wren *v.* Weild, L. R. 4 Q. B. 213; Jones *v.* Bewicke, L. R. 5 C. P. 32; Commonwealth *v.* Snelling, 15 Pick. (Mass.) 321. But in these and like cases special ground for the motion must be shown. Horlock *v.* Lediard, 10 Mee. & Well. 677; Lagan *v.* Gibson, 9 Ir. R. C. L. 507.

1. Willis *v.* Bailey, 19 John. (N. Y.) 268.

2. Roberts *v.* Roe, 10 Mee. & W. 691; s. c., 14 L. Jour. Ex. 101; Wilson *v.* Hunt, 1 Chitty, 641; Academy *v.* Landon, 2 Wend. (N. Y.) 620. But in Pensylvania the rule either for a bill or a more specific bill works a stay during its pendency. Mitchell on Motions and Rules, 41; Pfaelzer *v.* Car Co., 2 Weekly Notes (Pa.), 324.

3. Derry *v.* Lloyd, 1 Chit. 724; Roosevelt *v.* Gardenier, 2 Cow. (N. Y.) 463.

In such case, a plea to the jurisdiction may be made after the bill is obtained, for the moving for it is not such an appearance as would prevent this. Watkins *v.* Brown, 5 Ark. 197; Forbes *v.* Smith, 10 Wel. H. & G. 717; s. c., 24 L. Jour. Ex. 167.

On the other hand, a request for particulars can be deferred until after discovery is had. Young *v.* De Mott, 1 Barb. S. C. (N. Y.) 30.

4. Marcus *v.* Boling, 5 Weekly Notes of Cases (Pa.), 542.

So late an application is, in any case, looked on with suspicion. Andrews *v.* Cleveland, 3 Wend. (N. Y.) 437.

In Florida the statutory right to a bill of particulars is held waived by pleading, so that it then becomes discretionary with the court to order it. Waterman *v.* Mattair, 5 Fla. 211.

In Indiana a failure to demur or move for a bill is a waiver of the right to do so. Chamness *v.* Chamness, 53 Ind. 301.

After a judgment for the plaintiff had been opened by the court of appeals so far as to allow the defendant, as administrator, to introduce a cross-claim for services rendered by his intestate, particulars of these were ordered. Mason *v.* Ring, 10 Bos. (N. Y.) 598.

5. Weller *v.* Weller, 4 Hun (N. Y.), 195.

But not to interrupt a trial actually proceeding before a referee. Cadwell *v.* Goodenough, 28 How. (N. Y.) 479.

Under the old English practice it was too late after a reference, as that took the case out of the court. Ashworth *v.* Heathcote, 4 Moo. & Pay. 396; s. c., 6 Bing. 596; but this is not the modern rule. Gibbs *v.* Knightly, 2 Hur. & N. 34.

6. Preston *v.* Neale, 12 Gray (Mass.), 222; Finlay *v.* Stewart, 56 Pa. 183.

If a further bill is necessary, it should be ordered before the trial. Kellogg *v.* Paine, 8 How. (N. Y.) 329.

7. Casterline *v.* Day, 26 Kan. 306.

8. Prichard *v.* Nelson, 16 Mee. & W. 771; Gilpin *v.* Howell, 5 Pa. 41; C., St. L., etc., R. *v.* Provine, 16 Miss. 288; M., K. & T. R. *v.* Brown, 14 Kan. 557; Drake *v.* Thayer, 5 Rob. (N. Y.) 694; Brown *v.* Williams, 4 Wend. (N. Y.) 368; Smith *v.* Hicks, 5 Wend. (N. Y.) 48; Bangs *v.* Bank, 53 How. (N. Y.) 51; Tillow *v.* Hutchinson, 15 N. J. L. 178;

important that the date,[1] as well as the amount,[2] and the gen-

Stothoff *v.* Dunham, 19 N. J. L. 121; McVane *v.* Williams, 50 Conn. 548; Moore *v.* Estes, 23 Ark. 152; Canal Co. *v.* Knapp, 5 Pet (U. S.) 541.

If the plaintiff's bill do not give as much information as a declaration, it will be insufficient, and ground for a nonsuit unless leave to amend is obtained. Babcock *v.* Thompson, 3 Pick. (Mass.) 446; s. c., 15 Am. Dec. 235.

But it need not show a cause of action, as the complaint (or declaration) must do that. Stead *v.* Kehrman, 16 Phila. (Pa.) 79.

A mistake in a bill of particulars, not calculated to deceive, is immaterial, and it is sufficient if it indicate the transaction out of which the demand arose, without specifying a technical description of the right of action. Jacobi *v.* Pfar, 25 Ark. 4.

The adverse party cannot object to the particulars, or move to strike out any items, for any other cause than a failure to give him due information. "The plaintiff has a right to present his case according to his own view of the facts. The responsibility of proving the items rests with him, and he is entitled to an opportunity of so doing." Matthews *v.* Hubbard, 47 N. Y. 428.

1. Quin *v.* Astor, 2 Wend. (N. Y.) 577; Kellogg *v.* Paine, 8 How. (N. Y.) 329; Humphry *v.* Cortelyou, 4 Cow. (N. Y.) 54; Wetmore *v.* Jennys, 1 Barb. S. C. (N. Y.) 53; Goodwin *v.* Walls, 52 Ind. 268.

It is not sufficient to lay the time with a *videlicet*. Livingston *v.* Enochs, 2 Weekly Notes (Pa.), 244.

But the date may be stated as "on or about a certain day," and in that case the plaintiff is not restricted to proof of that special day. Duncan *v.* Ray, 19 Wend. (N. Y.) 530.

Where the claim is for work and labor done, an omission to state the time has been held not fatal. Mugan *v.* Haley, 16 Kan. 68.

An error in the date is unimportant, if it do not mislead. Millwood *v.* Walker, 2 Taunt. 224.

2. Where the items were given as "damages, $5000; balance due on settlement, $5000; money received at New Orleans on account of plaintiff, $5000," and without dates, this was held an insufficient bill. Wetmore *v.* Jennys, 1 Barb. S. C. (N. Y.) 53.

A bill is sufficiently definite if it set forth the foundation of the claim, and apprise the other party of the evidence to be offered, so that there can be no mistake as to the preparation to be made to resist the claim. Hence where the bill stated $605 as due, a recovery of $644 was allowed for $605. Smith *v.* Hicks, 5 Wend. (N. Y.) 48.

The bill should state the sums claimed, when and how they arose, and the items of the demand. They should not be stated as "amount claimed." Moran *v.* Morrissey, 18 Abb. (N. Y.) 131; s. c., 28 How. (N. Y.) 100.

A statement, "1873, Aug. 30. To merchandise, $114.50;" has been held a sufficient bill of particulars. Hays *v.* Samuels, 55 Tex. 560.

An item of "balance from former account" is insufficient. Buckner *v.* Meredith, 1 Brew. (Pa.) 306.

So is a bill stating a claim "for cash" (but not stating whether it was lent or paid by the plaintiff, or received by the defendant), also on several notes but without describing them, and on certain items of goods sold, giving dates and sums with particularity, but adding, "The same items as above in every respect in each year and on every day of the same (Sundays and 4th of July excluded) from Sept. 1, 1838, to Jan. 1, 1840." Stanley *v.* Millard, 4 Hill (N. Y.), 50.

So is a bill in this form:—"A. W. to C. B., Dr. To moneys received by the said W. for and belonging to the said B. at different times during the years 1840, 1841, . . . and in various sums, viz., $200, $100, . . . in all amounting to $1400, . . . but in what particular months or on what particular days of such months the said B. is unable to state, as he kept no account of the days, nor is he able to ascertain the same, but he believes the said W. well knows the dates at which the said sums were respectively received as he left the said W. to keep the accounts, being himself unable to read or write." Bates *v.* Wotkyns, 2 How. (N. Y.) 18.

In an action for money had and received, the bill specified certain bank-bills, but described the rest as "bank-bills current in this commonwealth amounting to $500," and included a claim on "two checks on Boston banks, amounting to $250." This was held wholly insufficient, and ground for a nonsuit. Babcock *v.* Thompson, 3 Pick. (Mass.) 446.

In a suit on notes, the bill of particulars usually states the money due on them and describes them, but it may

eral character[1] of each item be given with all the exactness attainable; but no claims not made in the pleadings should be included,[2] and, as a general rule, credits need not be stated.[3]

Where the pleadings are required to be sworn to, the bill of particulars must be verified in like manner.[4]

5. Use and Effect.—The object of a bill of particulars is to amplify a pleading and to indicate specifically the claim set up.[5] It

give copies of the notes. Stowits *v.* Bank, 21 Wend. (N. Y.) 186.

If a copy of the note be filed with the declaration or complaint, no bill of particulars is necessary. Tebbetts *v.* Pickering, 5 Cush. (Mass.) 83; People *v.* Pearson, 2 Ill. 458, 473; Galloway *v.* Trout, 2 Ia. 595.

But this does not entitle the plaintiff to disregard an order for a bill of particulars unless the note is expressly stated to be the only demand. Reynolds *v.* Woods, 22 Wend. (N. Y.) 642; Garrett *v.* Teller, 22 Wend. (N. Y.) 643.

Where an item is for cash paid on a draft, no copy need be added. Howard *v.* Bohn, 27 Ga. 174.

In an action for the balance of a bank-account, a schedule of the dates and amounts of the deposits is sufficient. Insurance Co. *v.* Bank, 12 Weekly Notes (Pa.), 251.

A charge for interest need not be stated. Lanning *v.* Swarts, 9 How. (N. Y.) 434.

And a bill stating that certain notes were "with interest," did not prevent a recovery on notes proved to be due without interest. McNair *v.* Gilbert, 3 Wend. (N. Y.) 344.

Where the damages are unliquidated, it is enough to state the damages claimed. Dean *v.* White, 5 Clarke (Ia.), 266.

In cases of contract, precision as to values and amounts can be readily acquired; *aliter* in cases of tort. Hence, in trespass, a bill giving the gross amount of each of five classes of damage was sufficient. Schile *v.* Brokhahne, 4 N. Y. Super. Ct. 354.

1. It is enough that the bill be as full as is customary among merchants when they have previously sent invoices. Frechling *v.* Ketchum, 39 Mich. 299.

On a claim for a way-going crop, the bill of particulars should state the kind of crop and the number of acres cultivated. O'Connell *v.* Summers, 5 Weekly Notes (Pa.), 149.

A bill of particulars for work done and materials furnished to a building need not specify the time when each piece of work was done, but should specify the parts of the building to which the work was done. Nichols *v.* Edwards, 8 Weekly Notes (Pa.), 470.

A statement of work as done "per contract" is not too indefinite. Johnson *v.* Cummiskey, 8 Weekly Notes (Pa.), 357; Newlin *v.* Armstrong, 8 Weekly Notes (Pa.), 255.

A bill of particulars of a physician's claim for services need state only the number and dates of the visits. Van Bibber *v.* Merritt, 12 Weekly Notes (Pa.), 272.

2. Drake *v.* Thayer, 5 Rob. (N. Y.) 694; People *v.* Monroe Common Pleas, 4 Wend. (N. Y.) 200.

A bill of particulars in an action for wages cannot include a claim for money returned to the defendant as a loan after it had been received in payment of wages. Judd *v.* Burton, 51 Mich. 74.

In an action for the non-delivery of cotton shipped in Nov. 1879, and March 1881, it was held that the bill of particulars could not be amended so as to include a charge for cotton lost "during the cotton season of 1879–80." C., St. L. etc., R. *v.* Provine, 61 Miss. 288.

Where the complaint contained only the common counts, with a bill of particulars as follows: "1882, Feb. 6, to cash lent and money had and received, $350;" it was held that there could be no recovery for money paid under duress. McVane *v.* Williams, 50 Conn. 548.

3. Ryckman *v.* Haight, 15 John. (N. Y.) 222.

Nor any set-offs. Williams *v.* Shaw, 4 Abb. (N. Y.) 209; Giles *v.* Betz, 15 Abb. (N. Y.) 285.

Where the action is for the balance of an account, credits are essential to show what the claim is, and must be stated. Adlington *v.* Appleton, 4 Camp. 410.

In England, since the judicature acts, the plaintiff must give particulars of credits, if required. Godden *v.* Corsten, L. R. 5 C. P. D. 17; s. c., 41 L. Times, 527.

4. Objection to non-verification is waived by delay. Paine *v.* Smith, 32 Wis. 335. And must in any event be made before the trial. Dennison *v.* Smith, 1 Cal. 437.

5. Landon *v.* Sage, 11 Conn. 302;

restricts the proof and limits the demand,[1] but it is not intended to disclose to the adverse party the evidence relied on.[2] It is

Dean *v.* Mann, 28 Conn. 352; People *v.* Monroe, C. P. 4 Wend. (N. Y.) 200; Matthews *v.* Hubbard, 47 N. Y. 428; Melvis *v.* Wood, 4 Abb. N. S. (N. Y.) 438; Higenbotam *v.* Green, 25 Hun (N. Y.), 214; Davis *v.* Freeman, 10 Mich. 188.

Its object is to inform the adverse party of the nature of the claim, and to limit the proof to the amount therein mentioned. Dempster *v.* Purnell, 3 Man. & Gr. 375.

It is intended to furnish "that information which a reasonable man would require respecting the matters against which he is called upon to defend himself. Rennie *v.* Beresford, 15 Mee. & W. 78; s. c., 15 L. Jour. Ex. 78.

But it cannot enlarge, alter, or amend the pleading. Pickering *v.* De Rochemont, 45 N. H. 67.

1. Brown *v.* Williams, 4 Wend. (N. Y.) 368; Bowman *v.* Earle, 3 Du. (N. Y.) 691; Melvin *v.* Wood, 4 Abb. N. S. (N. Y.) 438; Com'th *v.* Giles, 1 Gray (Mass.), 466; Williams *v.* Sinclair, 3 McL. (U. S. C. C.) 289; Hall *v.* Sewell, 9 Gill (Md.), 146; Harding *v.* Griffin, 7 Blackf. (Ind.) 462.

A bill of particulars for "money advanced" restricts the plaintiff to proof of a technical loan of money. Steinman *v.* Slaymaker, 1 Weekly Notes (Pa.), 132.

Where there were counts in *assumpsit* for the price of certain horses sold, and also for money had and received, the bill of particulars comprised claims for a balance of an account stated, and for the price of horses sold and delivered. The plaintiff sought to introduce evidence of a sale by the defendant as agent for the plaintiff under the count for money had and received. Lord Eldon *held* that the plaintiff had limited his claim by the bill of particulars, which was not sufficiently large to let in the evidence. Holland *v.* Hopkins, 2 Bos. & Pul. 243.

The plaintiff can, however, recover all that appears due on the defendant's evidence. Williams *v.* Allen, 7 Cow. (N. Y.) 316; D & H. C. Co. *v.* Dubois, 15 Wend. (N. Y.) 87.

In an undefended action, the verdict cannot be for a larger amount than that claimed in the bill of particulars. Walker *v.* Wadsworth, 1 Fos. & Fin. 397.

A defendant is likewise restricted to proof of the items of the particulars of his set-off. Harding *v.* Griffin, 7 Blackf. (Ind.) 462.

Adding the words "per agreement" to the items of a charge, does not, however, limit the plaintiff to a recovery on an agreement for a specific sum. Robinson *v.* Weil, 45 N. Y. 810.

The fact that a bill of particulars has been given does not operate to exclude evidence of matters not stated therein, but collateral to the main issue. Thus a debt not stated in the bill can be proved to show that a credit claimed was specifically appropriated. Wilson *v.* Deacon, 9 Weekly Notes (Pa.), 47.

So in a suit charging certain physicians with conspiracy in putting the plaintiff in an insane asylum, a bill of particulars of the plaintiff's actions, conduct, and habits upon which the defendants had based their opinion was called for. It was held that evidence of matters justifying their opinion, but occurring after the incarceration, and therefore not in the bill, could not be excluded. Higenbotam *v.* Green, 25 Hun (N. Y.), 214.

Variances between the bill of particulars and the proof which are not calculated to mislead are, however, disregarded. Substantial conformity is the requisite. Barney *v.* Seeley, 2 Wend. (N. Y.) 481; McNair *v.* Gilbert, 3 Wend. (N. Y.) 344; Brown *v.* Williams, 4 Wend. (N. Y.) 368; Hayes *v.* Wilson, 105 Mass. 21.

The plaintiff may even recover an amount greater than that stated in his bill of particulars, if the defendant has not been misled, but has had a full opportunity to contest the amount of the claim. Dubois *v.* D. & H. C. Co., 12 Wend. (N. Y.) 334; Bell *v.* Puller, 2 Taunt. 285.

If the bill specify documentary evidence on which the party relies, including a will, he is not restricted to proof of title by devise, but may prove by parol title by descent. Not so, if he specify title by devise. Graham *v.* Whitely, 26 N. J. L. 254.

After a bill has been furnished under order of court, a second one, given without order of court, cannot include any claim not made in the first bill. Brown *v.* Watts, 1 Taunt. 353.

If the specifications do not accord with the facts, or omit essential matters, the other party can take advantage of this on the trial. Matthews *v.* Hubbard, 47 N. Y. 428.

2. It is neither given nor required for the purpose of disclosing to an adverse party the case relied upon, nor the proof to substantiate the same. Higenbotam *v.* Green, 25 Hun (N. Y.), 214.

It is not its office to furnish a defendant with the facts whereon to found an

now usually regarded as a part of the pleading to which it belongs, but is not a part of the record.[1]

It has been held that a bill of particulars is admissible in evidence to explain the pleading to which it relates,[2] and in England,[3] but not in America,[4] even as against the party who furnished it.

6. More Specific Bill.—If the party to whom a bill of particulars is furnished think it insufficient, he may call for a more specific or further bill.[5] The party making it may himself move for permission to amend his bill.[6]

affirmative defence in his behalf. Fullerton *v.* Gaylord, 7 Rob. (N. Y.) 551.

It need not state the grounds on which the plaintiff claims, but only items and particulars. Seaman *v.* Low, 4 Bos. (N. Y.) 338.

Hence, as already seen, it need not show a cause of action. See note 1, p. 246.

1. Originally it was regarded as neither a part of the pleading nor a part of the record. Hence where the declaration stated a demand exceeding forty shillings, it was held that the bill of particulars could not be resorted to to show that the demand was really under that amount and within the jurisdiction of the county court. Dempster *v.* Purnell, 3 Man. & Gr. 375.

And in Davis *v.* Hunt, 2 Bail. (S. Car.) 412, it was held to follow that where the evidence fully sustains the count, it is immaterial that it does not agree with the bill of particulars. See also Blunt *v.* Cooke, 4 Man. & Gr. 458; Vidal *v.* Clark, 2 Rich. (S. Car.) 359; Lapham *v.* Briggs, 27 Vt. 26.

In Fleurot *v.* Durand, 14 John. (N. Y.) 329, however, it was deemed a part of the declaration so far as to be ground for a judgment of *non pros.* if not furnished; and in Dibble *v.* Kempshall, 2 Hill (N. Y.), 124, it was held that the defendant could not treat the bill as separate from the declaration and plead to it. The same principle was applied to the code practice in Kreiss *v.* Seligman, 8 Barb. S. C. (N. Y.) 439, and in both that case the prior case of Starkweather *v.* Kittle, 17 Wend. (N. Y.) 20, and the later one of Melvin *v.* Wood, 4 Abb. N. S. (N. Y.) 438, it was distinctly stated that the bill was a part of the pleading to which it was annexed or belonged. For the same rule in other States see Benedict *v.* Swain, 43 N. H. 33; McDonald *v.* Barnhill, 58 Ia. 669.

In Kreiss *v.* Seligman, 8 Barb. S. C. (N. Y.) 439, and Orvis *v.* Dana, 1 Abb. N. C. (N. Y.) 268, the bill was, however, stated not to be part of the record.

2. Buckmaster *v.* Meiklejohn, 8 Wels. H. & G. 634; McCreary *v.* Hood, 5 Blackf. (Ind.) 316.

3. Colson *v.* Selby, 1 Esp. 452; Rymer *v.* Cook, Moo. & Mal. 86. The latter decision seems inconsistent with Short *v.* Edward, 1 Esp. 374; Miller *v* Johnson, 2 Esp. 602; and Harrington *v.* MacMorris, 5 Taunt. 228; but was approved in Burkett *v.* Blanchard, 3 Wels. H. & G. 89. In that case, however, it was held that a bill of particulars of a set-off could not be put in evidence to take the case out of the statute of limitations.

4. Brittingham *v.* Stevens, 1 Hall (N. Y.) 379; Hartell *v.* Seybert, 1 Trou. & Ha. Prac. § 475.

The bill cannot be used as evidence against the party in another suit. Starkweather *v.* Kittle, 17 Wend. (N. Y.) 20.

5. Hunter *v.* Burnham, 1 Weekly Notes (Pa.), 74; Winpenny *v.* Winpenny, 1 Weekly Notes (Pa.), 90; O'Connell *v.* Summers, 5 Weekly Notes (Pa.), 149; Schile *v.* Brokhahne, 41 N. Y. Super. Ct. 354; Goodrich *v.* James, 1 Wend. (N. Y.) 289; Goodwin *v.* Walls, 52 Ind. 268.

A defective bill cannot be treated as a nullity without a call for a more specific one. Providence Tool Co. *v.* Prador, 32 Cal. 634; McCarthy *v.* Mooney, 41 Ill. 300.

The objection must be taken by a motion for a more specific bill, not by a demurrer. Bartholomew Co. *v.* Ford, 25 Ind. 17.

The order for a more specific bill should show the points in respect of which further specification is required. Kellogg *v.* Paine, 8 How. (N. Y.) 329; Conner *v.* Hutchinson, 17 Cal. 279.

6. Hartell *v.* Seybert, 1 Trou. & Ha. Prac. § 473; Phillips *v.* Negus, 2 Weekly Notes (Pa.), 508; Babcock *v.* Thompson, 3 Pick. (Mass.) 446.

The plaintiff cannot amend it without leave of court. Wager *v.* Chew, 15 Pa. 323.

Where the plaintiff framed his bill of particulars from an account rendered by the defendant, he was allowed, after a suspension of proceedings during his ten

7. Proceedings on Failure to Furnish it.—If the plaintiff do not furnish a bill of particulars as required by statute or order of court, the defendant may refuse to plead,[1] and, in general, an appropriate remedy (as by motion for judgment or to dismiss the action) is given by statute or rule of court, if either party be in default.[2]

BILL OF PEACE. (See also BILL QUIA TIMET; BILL TO REMOVE CLOUD FROM TITLE; BILL TO PERPETUATE TESTIMONY.)

1. Definition.—A bill of peace is a bill in equity which prays an injunction to restrain repeated attempts to litigate the same right.[3]

2. Nature of the Remedy.—The principle on which this equitable remedy is based is that courts of equity will grant relief in order to (*a*) suppress useless litigation, (*b*) prevent multiplicity of suits, (*c*) restrain oppressive litigation, and (*d*) prevent irreparable mischief.[4] It bears a close resemblance to bills *quia timet* and to remove clouds from title, but it may be distinguished from them, generally, in this, that while they are used to prevent wrongs and mischiefs anticipated before the actual commencement of proceedings at law, bills of peace are only allowed after legal proceedings which will affect the right sought to be preserved have begun.[5]

years' absence beyond seas, to amend his bill by inserting fresh items discovered after the defendant's account had been rendered. Staples *v.* Holdsworth, 4 Bing. N. C. 717; s. c., 6 Sc. 605.

1. Davis *v.* Hunt, 2 Bail. (S. Car.) 416; Whittle *v.* Vauch, 3 N. J. L. 636.

2. See May *v.* Richardson, 4 Cow. (N. Y.) 56; 1 Tron. & Ha. Prac. (Pa.) § 476; Kimball *v.* Kent, 3 Ill. 217.

3. Bispham's Equity (3d Ed.), § 415.

4. Bond *v.* Little, 10 Ga. 395, 400.

5. It is frequently stated that bills of peace are founded on the equity that if the right be established at law, it is entitled to adequate protection. This is clearly erroneous, as the prior establishment of the right at law is not necessary to prevent multiplicity of suits, and courts of equity exercised jurisdiction to prevent multiplicity of suits some years before they prevented the further litigation of a claim which had already been unsuccessfully prosecuted at law, as will appear later in the text. That the right need not be first established at law is well illustrated in a case where A contracted to sell certain lots of land to B in payment of certain debts due by A to B. At the time the contract was made A had not received the patents to the land, so it was agreed that the deeds should be made on request after he had received the patents. Creditors of A having levied on the lands in B's possession, B filed a bill in equity against A, and these execution creditors praying a specific performance by A and an injunction to restrain the sale of the lands by the execution creditors. The bill was allowed, Collier, J., saying: "Now each of these [lots of land] may be purchased by different persons, and the complainants subjected to an action at the suit of each purchaser to try the title. In this point of view the case is clearly within the principle on which chancery entertains bills of peace. . . . It is no objection in such case to the interference of chancery that the complainant has not established at law the right which the bill seeks to quiet; if the parties who controvert it are so numerous as to render an issue indispensable, to save multiplicity of suits chancery will entertain a bill." Morgan *v.* Morgan, 3 Stewart (Ala.), 383.

3. Division into Classes.—Bills of peace are, strictly speaking, of two kinds, and are filed either, first, to prevent the vexatious recurrence of litigation by a numerous class insisting upon the same right, or, second, to prevent the same individual from reiterating an unsuccessful claim.[1]

4. Jurisdiction in Cases of the First Class.—This equitable jurisdiction was evidently well established in England in 1681, when in a dispute between the lord of a manor and his tenants, as to a grant of *free warren*, a bill of peace was expressly allowed to prevent multiplicity of suits.[2] This remedy was of frequent application in England in the seventeenth and eighteenth centuries in controversies of the same or a similar nature.[3] In all such cases courts of equity having the power to bring all parties before them will at once proceed to the ascertainment of the general right, if necessary by an action or issue at law, and then make a decree finally binding upon all the parties.[4] This remedy will be allowed whether one claims or defends a right against many, or many claim or defend a right against one.[5] But it must be clear that there is a right claimed which affects many persons, and that a suitable number of parties in interest are brought before the court; for if the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will be dismissed, for it cannot then conclude any persons but the very defendants.[6] The complainant must in all

See also Mitf. Eq. Pl. (5th Ed. by Smith) §§ 146, 147; Hodges *v.* Griggs, 21 Vt. 280.

1. Bispham's Equity (3d Ed.), § 415; Adams' Equity, § 199; Story's Equity, vol. ii. §§ 854, 859.

2. How *v.* Bromsgrove, 1 Vernon, 22. See also Fitton *v.* Macclesfield, 1 Vernon, 287, 293 (1684), and Brown *v.* Vermuden, 1 Ch. Ca. 272 (1677).

3. Thus in controversies between the lord of a manor and his tenants see Pawlet *v.* Ingres, 1 Vernon, 308; Weeks *v.* Staker, 2 Vernon, 301; Arthington *v.* Fawkes, 2 Vernon, 356; Conyers *v.* Abergavenny, 1 Atkyns, 285; Poore *v.* Clark, 2 Atkyns, 515; Chaffin *v.* Gawden, Freem. 191; Cowper *v.* Clerk, 3 P.Wms. 155, 157.

So in controversies between a parson and his parishioners. Brown *v.* Vermuden, 1 Ch. Ca. 272; Rudge *v.* Hopkins, 2 Eq. Abridg. 170, pl. 27; Mayor of York *v.* Pilkington, 1 Atkyns, 282.

It was also held to lie by a party in interest to establish a toll due by custom. Duke of Norfolk *v.* Myers, 4 Madd. Ch. Rep. 83. The right to the profits of a fair, there being several claimants. Emeline Hospital *v.* Andover, 1 Vernon, 266. And the right to a fishery. Mayor of York *v.* Pilkington, 1 Atkyns, 282; New River Co. *v.* Graves, 2 Vernon, 431. *Compare* Tenham *v.* Herbert, 2 Atkyns, 483.

4. Story's Eq. vol. ii. § 854; Trustees of Huntington *v.* Nicoll, 3 Johns. Rep. (N. Y.) 566, 589–591. 595, 601–603; Woods *v.* Monroe, 17 Mich. 238; Crews *v.* Burcham, 1 Black (U. S.), 352.

5. Conyers *v.* Abergavenny, 1 Atkyns, 285.

6. Story's Eq. vol. ii. § 857. See Fines *v.* Cobb, 2 Vernon, 116; Whitchurch *v.* Hide, 2 Atkyns, 391; Tenham *v.* Herbert, 2 Atkyns, 483; Welby *v.* Duke of Rutland, 2 Br. Par. Ca. (Tomlin) 39; Disney *v.* Robertson, Bunb. 41; Weller *v.* Smeaton, 1 Br. Ch. Rep. 572.

Kent, C. J., says in Eldridge *v.* Hill, 2 Johns. Ch. (N. Y.), 281: "No case goes so far as to stop these continued suits between two single individuals so long as the alleged cause of action is continued, and there has been no final or satisfactory trial and decision at law upon the merits." See also Woodward *v.* Seely, 11 Ill. 157; s. c., 50 Am. Dec. 445; Moses *v.* Mobile, 52 Ala. 198; Nevitt *v.* Gillespie, 1 Howard (Miss.), 108; s. c., 26 Am. Dec. 696.

While the language used in the text expresses the well-established equitable rule on this subject, and is supported by the weight of authority, yet Lord Redes-

cases file his bill in behalf of himself and of all the other persons whose rights are involved.[1] The right of these different persons must be one common to all, and therefore a bill of peace will not lie against independent trespassers having no common claim to distinguish them from the rest of the community.[2] This jurisdiction will not be exercised by a court of equity in a case where a

dale is careful to say that "a bill can scarcely be sustained where a right is disputed between two persons only, until the right has been tried and decided upon at law." Mitf. Eq. Pl. (5th Ed. by Smith) § 146. And in a case where a municipality had brought numerous actions against the same defendant to recover penalties for the breach of one particular ordinance, they were restrained from prosecuting more than one action. Third Avenue R. Co. *v.* New York, 54 N. Y. 159.

1. Phillips *v.* Hudson, L. R. 2 Ch. Ap. 243.

But certain inhabitants of a town cannot file a bill in behalf of themselves and all others who may come in and contribute to the expense of the suit, or in behalf of the town, to try or establish the rights of the town in regard to its common property. The town corporation must itself proceed. Denton *v.* Jackson, 2 Johns. Ch. (N. Y.) 320. See also Miller *v.* Grandy, 13 Mich. 540; Mt. Zion *v.* Gillman, 9 Bissell (U. S. C. C.), 479; s. c., 14 Fed. Repr. 123.

2. Adams' Eq. §§ 200, 201; Bispham's Eq. (3d Ed.) § 417.

So it has been decided that the bill will not lie where the rights and responsibilities of the several defendants neither arise from, nor depend upon, nor are in any way connected with each other. Dilly *v.* Doig, 2 Vesey, 486; Weale *v.* West Middlesex Water-works, 1 Jac. & W. 358; Cutting *v.* Gilbert, 5 Blatchf. (U. S. C. C.) 259; Wilkerson *v.* Walters, 1 Idaho (N. S.), 564; Lapeer County *v.* Hart, 1 Harr. Ch. (Mich.) 157; Miller *v.* Grandy, 13 Mich. 540; Marselis *v.* The Morris Canal, etc., Co., Saxton (N. J.), 31; McHenry *v.* Hazard, 45 Barb. (N. Y.) 75; Randolph *v.* Kinney, 3 Rand. (Va.) 394.

Lord Redesdale, however, says that the bill may be brought "where one general legal right is claimed against several distinct persons." Mitf. Eq. Pl. (5th Ed. by Smith) § 145. And recent cases have clearly made the distinction that where the rights, though not strictly identical, are similar, and all involve the decision of one particular question, the bill is allowable. Thus where a county treasurer, having authority to issue county obligations to the amount of $20,800.44, actually issued 73 notes to 53 different persons, amounting to $138,631, and 31 of the holders of these notes had brought separate suits thereon, a bill of peace on behalf of the board of supervisors of the county and against all the holders of these notes was allowed, so that the respective rights of the holders of the notes and the liability of the county could be determined in one action. Board of Supervisors of Saratoga County *v.* Deyoe, 77 N. Y. 219; s. c., 57 How. Pr. 134.

And in another case where a railroad company was sued by a number of persons in different actions to recover land damages, a bill was allowed to settle the rights of all parties in one case and prevent multiplicity of suits. Guess *v.* Stone Mt., etc., R. Co., 67 Ga. 215.

To the same effect are New York and New Haven R. Co. *v.* Schuyler, 17 N. Y. 592; Schley *v.* Dixon, 24 Ga. 273; Sheffield Water-works *v.* Yeomans, L. R. 2 Ch. Ap. 8; Powell *v.* Powis, 1 Younge & Jervis, 159.

It has been expressly decided in one case that a bill of peace would lie though there was no privity or connection between the defendants. Morgan *v.* Morgan, 3 Stewart (Ala.), 383. See Hodges *v.* Griggs, 21 Vt. 280.

This question has been considered at great length by Mr. Pomeroy, and probably the true rule is the one laid down by him as the result of his investigations, to wit, that "the weight of authority is simply overwhelming that the jurisdiction [of courts of equity to prevent multiplicity of suits] may and should be exercised either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no 'common title,' nor 'community of right,' or of 'interest in the subject-matter' among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body." Pomeroy's Eq. Jur. vol. i. § 269.

court of law can give relief by an order consolidating the actions,[1] nor where repeated suits have already been brought and judgments obtained thereon.[2]

5. Jurisdiction in Cases of the Second Class.—The right of a court of equity to restrain a suitor from reiterating an unsuccessful claim was first recognized in 1709, when, after five trials in ejectment, and a verdict each time in favor of the defendant, the House of Lords decreed a perpetual injunction against the plaintiff, on the application of the defendant, restraining any further proceedings at law.[3] The principle is now thoroughly established that when the right of the complainant has been satisfactorily established at law he is entitled to this relief.[4] No fixed number of trials is necessary to establish the right.[5] It is, however, necessary that there should be an actual trial and decision at law.[6] The institution of any number of actions, if they are all abandoned before trial, is not sufficient.[7] Not only must the claimant have satisfactorily established his title at law, but he must also be in actual possession of the land or some part of it.[8] Bills of peace of this class are

1. Peters *v.* Prevost, 1 Paine (U. S. C. C.), 64.

But in a case where a court of law could not give such relief a bill was allowed. Third Avenue R. Co. *v.* New York, 54 N. Y. 159. *Compare* Lapeer County *v* Hart, 1 Harr. Ch. (Mich.) 157.

2. Mt. Zion *v.* Gillman, 9 Bissell (U. S. C. C.), 479; s. c., 14 Fed. Repr. 123. In this case one Gillman owned certain bonds issued by the town of Mt. Zion. Some coupons having fallen due thereon, he brought suit. The town contested the case, but Gillman obtained judgment. Afterwards he brought four other suits on other coupons as they fell due, and obtained judgment by default. Certain taxpayers of the town then filed a bill alleging that one of these judgments was paid and the others remained unpaid, and praying an injunction against the judgments obtained and for quieting the title of the complainants, whose property was liable to be taxed to pay these judgments. The petition was dismissed.

3. Earl of Bath *v.* Sherwin, Prec. Ch. 261; s. c., 10 Mod. 1; s. c., 4 Br. Par. Ca. (Tomlin) 373. This right was a few years later exercised by the court of chancery in a similar case in Barefoot *v.* Fry, Bunb. 158.

4. Nicoll *v.* Trustees of Huntington, 1 Johns. Ch. (N. Y.) 166; Trustees of Huntington *v.* Nicoll, 3 Johns. Rep. (N. Y.) 566, 589–591, 595, 601–603; Alexander *v.* Pendleton, 8 Cranch, 462; Morris *v.* Boley, 1 Weekly Notes of Cases (Pa.), 303; Primm *v.* Raboteau, 56 Mo. 407; Douglass *v.* McCoy, 5 Ohio, 522.

5. Two were held sufficient in Leighton *v.* Leighton, 1 P. Wms. 671; s. c., 4 Br. Par. Ca. (Tomlin) 378; Marsh *v.* Reed, 10 Ohio, 347. One in Hanner *v.* Gwynne, 5 McLean (U. S. C. C.), 313; Patterson & Hudson R. R. Co. *v.* Jersey City, 1 Stockt. (N. J.) 434.

6. Eldridge *v.* Hill, 2 Johns. Ch. (N. Y.) 281; Woodward *v.* Seely, 11 Ill. 157; s. c., 50 Am. Dec. 445; Lyerly *v.* Wheeler, Busbee's Eq. (N. Car.) 267; s. c., 59 Am. Dec. 596; Lowe *v.* Lowry, 4 Ohio, 77; s. c., 19 Am. Dec. 585.

Where, however, a right appears on record as in case of letters patent, of copyrights, etc., it is not necessary to establish the right at law before filing the bill Mitf. Pl. (5th Ed. by Smith) 147; Hill *v.* Thompson, 3 Merivale, 622; Ogle *v.* Ege, 4 Wash. C. C. (U. S.) 584; Universities *v.* Richardson, 6 Ves. (Sumner's Ed.) 689 and note *a*.

7. Patterson *v.* McCamant, 28 Mo. 210; Marmaduke *v.* Hannibal & St. Joe R. Co., 30 Mo. 545; Knowles *v.* Inches, 12 Cal. 212; Bond *v.* Little, 10 Ga. 395; Gunn *v.* Harrison 7 Ala. 585.

Where, however, the city of New York brought 77 actions against a railroad company to recover penalties for running cars without license, they were restrained from prosecuting more than one of said actions until that one could be finally heard and determined. Third Avenue R. Co. *v.* New York, 54 N. Y. 159. But *compare* Eldridge *v.* Hill, 2 Johns. Ch. (N. Y.) 281; Woodward *v.* Seely, 11 Ill. 157; s. c., 50. Am. Dec. 445.

8. Herrington *v.* Williams, 31 Tex. 448; Orton *v.* Smith, 18 Howard (U. S.), 263;

practically obsolete in many of the States where the proceeding in such cases has been controlled by statute.[1] But the provision of a State statute that a certain number of verdicts shall be conclusive in any proceeding will not interfere with the right of United States courts sitting within that State to entertain a bill of peace in any such proceeding within its jurisdiction without regard to the number of trials.[2]

6. Jurisdiction in Analogous Cases.—By analogy to bills of peace, courts of equity will entertain bills praying relief in a variety of other cases. Thus they will restrain further litigation of a boundary line when satisfactorily established at law,[3] or entertain jurisdiction to establish the line in the first instance.[4] Trespasses also will be restrained to prevent multiplicity of suits.[5] So where mines and collieries would be ruined before the right can be established at law, equity will interfere.[6]

7. When Equity Will Not Exercise Jurisdiction.—In addition to the cases already referred to,[7] this remedy will be refused by a court of equity where the bill seeks to establish a private right in contradiction to and in derogation of the rights of the public.[8] And the fundamental principle that equity will not interfere where the complainant has a plain, speedy, and adequate remedy at law applies as well to bills of peace as to all other equitable remedies.[9]

8. Costs.—Where the defendants in a bill of peace asserted in good faith a title in themselves which appeared by the records to be valid, they were awarded their costs, though a decree was

1. Pomeroy's Eq. Jur. vol. iii. § 1396 and notes.

2. Craft *v.* Lathrop, 2 Wall. Jr. (U. S. C. C.) 103.

But the courts of the United States will not entertain a bill of peace upon a title in actual litigation in a State court. Orton *v.* Smith, 18 How. (U. S.) 263.

3. Primm *v.* Raboteau, 56 Mo. 407.

4. The bill will be only entertained to prevent multiplicity of suits, or where the title to the soil is in question. Kinder *v.* Jones, 17 Vesey, 110; Wake *v.* Conyers, 1 Eden, 331. 335; Kilgannon *v.* Jenkinson, 51 Mich. 240; Parish of St. Luke *v.* Parish of St. Leonard, 1 Br. Ch. Rep. 40.

Where the boundary is alleged to have been established in a partition proceeding. the partition proceeding must have been completed. Kennedy *v.* Kennedy, 43 Pa. St. 443; s. c., 82 Am. Dec. 574.

Where the court exercises jurisdiction it may effectuate its decree by requiring a disputed boundary to be surveyed and marked in a permanent manner. Primm. *v.* Raboteau, 56 Mo. 407. See also BOUNDARIES.

5. Hanson *v.* Gardiner, 7 Vesey, 305; Livingston *v.* Livingston, 6 Johns. Ch. (N. Y.) 497.

Also interference with or obstruction of water-courses. Corning *v.* Troy Iron and Nail Factory, 39 Barb. (N. Y.) 311; s. c., affirmed, 40 N.Y. 191; Scheetz's Appeal, 36 Pa. St. 88. See also INJUNCTIONS; TRESPASSES; WATER-COURSES.

6. Story's Eq. vol. ii. § 860.

7. See text *infra* and note 6, p. 254; nn. 1, 2, p. 255; nn. 1, 2, 6, 7, 8, p. 256; nn. 2, 3, p. 257.

8. Because that would be contrary to public policy. Story's Eq. vol. ii. § 858. Where, however, a private individual has been granted by law the exclusive privilege of exercising what would otherwise be a public right, violations of this franchise may be restrained by bills of peace, e.g. in the case of ferry franchises. McRoberts *v.* Washburne, 10 Minn. 23; Letton *v.* Goodden, L. R. 2 Eq. 123.

9. Ritchie *v.* Dorland, 6 Cal. 33; Lapeer County *v.* Hart, 1 Harr. Ch. (Mich.) 157; Bouverie *v.* Prentice; 1 Br. Ch. Rep. 200; Cutting *v.* Gilbert, 5 Blatchf. (U. S. C. C.) 259; Gunn *v.* Harrison, 7 Ala. 585.

entered against them owing to the record being proved to be defective.[1]

BILL QUIA TIMET. (See also BILL TO PERPETUATE TESTIMONY; BILL TO REMOVE CLOUDS FROM TITLE; DEBTOR AND CREDITOR; EQUITY; INDEMNITY; INJUNCTION; RECEIVERS; SPECIFIC PERFORMANCE; SURETY.)

1. **Definition.**—Bills *quia timet* are bills in equity entertained to guard against possible or prospective injuries and to preserve the means by which existing rights may be protected from future or contingent violations: differing from injunctions in that the latter correct past and present or imminent and certain injuries.[2] These bills will not lie where a statutory remedy is provided.[3]

2. **When Maintainable.**—(*a*) *Covenants to Indemnify.*—They lie for the specific performance of a general covenant to indemnify, though sounding only in damages,[4] but not where a purchaser takes land

1. Woods *v.* Monroe, 17 Mich. 238. But on their appealing unsuccessfully from that decree, no costs in the appellate court were given to either party. See also Nicoll *v.* The Trustees of Huntington, 1 Johns. Ch. (N. Y.) 166.

2. Bispham's Equity, § 568.

History.—These bills are analogous to the *brevia anticipantia* of common law. Coke says: "There be six writs in law that may be maintained, *quia timet*, before any molestation, distress, or impleading. As: (1) a man may have a writ of *mesne* (whereof Littleton here speaks) before he be distrained; (2) a *warrantia chartæ* before he be impleaded; (3) a *monstraverunt* before any distress or vexation; (4) an *audita querela* before any execution sued; (5) a *curia claudenda* before any default of inclosure; and (6) a *ne injuste vexes* before any distress or molestation." Co. Litt. 100a.

Complainant's title to have an instrument cancelled as relief must be clearly shown beyond all reasonable doubt. Shotwell *v.* Shotwell, 24 N. J. Eq. 378.

Unless there is danger that the plaintiff will be subjected to loss by the neglect, inadvertence, or culpability of another, the remedy will not lie. Randolph *v.* Kinney, 3 Rand. (Va.) 394; Green *v.* Hawkinson, Walker (Mich.), 487; Sanderson *v.* Jones, 6 Fla. 430; Tipping *v.* Eckersley, 3 K. & J. 264.

A bill *quia timet* should state facts showing wrongs or anticipated mischiefs which should be forestalled and prevented. Bailey *v.* Briggs, 56 N. Y. 407.

3. Buchanan *v.* Noel, 35 Leg. Int. (Pa.) 490.

4. In Ranelaugh *v.* Hayes, 1 Vern. 189, the assignee of three shares of the Irish excise covenanted with the assignor to save him harmless touching the payments to the king and other matters. The assignor having been sued for money which the assignee should have paid, and the former having then filed his bill, the court decreed specific performance, with reference to a master, directing him to report *toties quoties* any breach should happen, and that the assignee should clear the assignor of all suits or incumbrances in a reasonable time. See also Hemming *v.* Maddick, L. R. 7 Ch. 395.

Where the administrators of a vendee of land assigned a contract for the purchase of land to defendants, who covenanted to take up the contract and indemnify and save harmless the administrators from all damages which they might sustain by reason of the contract, *held*, that the administrators were entitled to specific performance, and that the defendants could not set up a want of personal assets. Champion *v.* Brown, 6 Johns. Ch. (N. Y.) 406.

Where defendant had executed to an executor a bond of indemnity for all loss on account of the hire of certain slaves

subject to an incumbrance of which he is aware, and against which he has taken the vendor's covenant.[1]

of executor's decedent, defendant having taken by agreement said slaves to keep until they and their hires should be called for by the persons entitled, on petition filed by next of kin against the executor, *held*, that he could file his bill *quia timet*, without waiting to sue on the bond when it should become due. Burroughs *v.* McNeill, 2 Dev. & Bat. Eq. (N. C.) 297.

Where one partner of a firm assumes the liabilities of the firm, having bought out the business, but has not paid off such liabilities, a bill *quia timet* will lie against him by the others to specifically perform his contract. Griffin *v.* Orman, 9 Fla. 58.

A court of equity will be extremely tender in exercising this jurisdiction, because it materially varies the agreement of the parties at the time of the transaction. Flight *v.* Cook, 2 Ves. 620.

As a general rule, no preference is given to the covenant against incumbrances over any of the other covenants for title, and relief will not be granted on mere apprehension of damage. Tallman *v.* Green, 3 Sandf. (N. Y.) 437. See Rector of Trinity Church *v.* Higgins, 4 Rob. (N. Y.) 372; Tinte *v.* Miller, 10 Ohio, 382; Watkins *v.* Owen, 2 J. J. Marsh. (Ky.) 142; Barnett *v.* Montgomery, 6 Monr. (Ky.) 327.

1. Where a purchaser contracted to buy land on which there was a mortgage, of which he was aware, for the amount of the owner's indebtedness, not ascertained, as a shareholder in an insolvent bank, payments to be made by instalments, the owner binding himself to convey "by a good and sufficient deed, with general warranty of title," after last instalment, and on presentation of such a deed refused to accept, alleging the existence of the mortgage as a ground, and filed his bill praying that the title be examined and the incumbrance removed or effectual indemnity given him against it; *held*, that the purchaser must rely upon his remedy at law under the covenant of warranty. Refeld *v.* Woodfolk, 22 How. (U. S.) 318.

Where the only covenants in the deed are those for quiet enjoyment or of warranty, and so long as there has been no eviction, actual or constructive, equity will, as a general rule, refuse to entertain a bill to enjoin the collection of purchase-money. Busby *v.* Tredwell, 24 Ark. 457; Barkhamsted *v.* Case, 5 Conn. 528; Whitworth *v.* Stuckey, 1 Rich. Eq. (S. C.) 408; Beale *v.* Seiveley, 8 Leigh (Va.), 658; Clanton *v.* Burges, 2 Dev. Eq. 15; Merritt *v.* Hunt, 4 Ired. Eq. (N. C.) 406; Wilkins *v.* Hogue, 2 Jones Eq. (N. C.) 479; Henry *v.* Elliott, 6 Jones' Eq. (N. C.) 175; Miller *v.* Long, 3 Marsh. (Ky.) 334; Rawlins *v.* Timberlake, 6 Marsh. (Ky.) 233; Percival *v.* Hurd, 5 J. J. Marsh. (Ky.) 670; Hall *v.* Priest, 6 Bush (Ky.), 14; Young *v.* Butler, 1 Head (Tenn.), 646; Middlekauff *v.* Barrick, 4 Gill (Md.), 290; Timms *v.* Shannon, 19 Ind. 296; Harris *v.* Ransom, 24 Miss. 234; Glenn *v.* Whipple, 1 Beasley's Ch. (N. J.) 50; Akerly *v.* Vilas, 21 Ohio, 88; Weaver *v.* Wilson, 48 Ill. 128; Rawle on Covenants for Title (4th Ed.), 681.

A court of equity will grant relief when a purchaser would be entitled at law to defend from payment of purchase-money either whole or partially, and has had no opportunity of doing so. Where judgment was obtained on a bond given for payment of a residue of purchase-money, and the vendor had, before the execution of the deed, which contained covenants for right to convey and of warranty, become surety upon a judgment, under which, after the execution of the deed, the use of the property for seven years was levied on and sold, and possession recovered by the sheriff's vendee, the court, upon bill, answer, and exhibits, having by a writ of inquiry ascertained the damages which complainant had sustained by reason of the incumbrance, decreed a perpetual injunction against the judgment to the amount of the assessments and costs. Selby *v.* Marshall, 1 Blackf. (Ind.) 385.

In some cases, exceptional, although the prosecution of the adverse title may not of itself be a sufficient ground to entitle the purchaser to relief, yet such prosecution, when coupled with the insolvency or non-residence of the party bound by the covenants, will bring the case within the *quia timet* jurisdiction of equity. Where a purchaser's personal representatives filed a bill against the vendor to enjoin a collection by him of a judgment obtained for a balance of purchase-money due by their intestate, on the ground that a judgment had been recovered against them by a subsequent alienee on the covenants of their intestate, and that the vendor was insolvent, the relief was granted. Jones *v.* Waggoner, 7 J. J. Marsh. (Ky.) 144.

(*b*) *Agent or Trustee.*—Where property in the hands of a trustee or agent for specific uses, express or implied, is in danger of misuse to the prejudice of any one having a present or future fixed title, such a bill will lie.[1]

(*c*) *Sureties.*—In cases of sureties against debtors and others.[2]

(*d*) *Life Estates.*—In cases where personal property is limited for life, with remainders over, where there is danger of injury from the life-tenant,[3] but not merely to declare future rights, un-

1. Allegations that complainants fear the removal of property bequeathed by a will alleged to be void does not give jurisdiction in the absence of allegations that complainants have applied or will apply for letters of administration. Watson *v.* Bothwell, 11 Ala. 650.

Under a devise of land to be sold for debts, the surplus to the heir, a bill to perfect title cannot be filed unless with an allegation that the debts have been paid or there will be a surplus if the title is cleared. Blalock *v.* Hardy, 37 Miss. 615.

A bill *quia timet*, or for the performance of a contract for the sale of lands by an administrator with the will annexed under a power given by the will, should not be entertained where the allegations of the bill show that the title of complainant is either good or void, there being in either case an adequate remedy at law. Camp *v.* Elston, 48 Ala. 81.

An executor whose acts showed an unequivocal disposition to convert the assets of the testator to his own use, and who had no property, was restrained from further intermeddling with the estate as a coexecutor. Elmendorf *v.* Lansing, 4 Johns. Ch. (N. Y.) 562. See Rous *v.* Noble, 2 Vern. 249; Batten *v.* Earnley, 2 P. Wms. 163; Taylor *v.* Allen, 2 Atk. 313; Utterson *v.* Mair, 4 Bro. Ch. 277; Middleton *v.* Dodswell, 13 Vesey, 266.

Under the N. Y. Revised Statutes, if the circumstances of the executor are such as not to afford adequate security for the faithful discharge of his trust, and objection is made by an interested party, security may be required from the executor, though the testator had knowledge of the responsibility of the executor. Wood *v.* Wood, 4 Paige Ch. (N. Y.) 299.

Where there is no danger, however, to the trust funds, even if the executor does not possess property to the value of the estate, he cannot be required to give security. Mandeville *v.* Mandeville, 8 Paige Ch. (N. Y.) 475. See Shields *v.* Shields, 60 Barb. (N. Y.) 56.

2. A surety, the debt being due, and apprehending loss or injury from the creditor's delay to enforce the debt against the principal debtor, may bring his bill to compel the debtor to discharge his debt. Cox *v.* Tyson, 1 Turn. & Russ. 395; Nisbet *v.* Smith, 2 Bro. Ch. 579.

Or the creditor may be compelled to sue the debtor, the surety indemnifying him against the delay and expense. Where a creditor who held a bond and mortgage taken in New Jersey, where all the parties resided, as security for a note indorsed by the plaintiff and transferred by B. to the creditor on an usurious loan, instead of resorting to the mortgage or the principal debtor, sued the plaintiff while in New York as an indorser, an injunction was granted to stay the suit at law until the creditor had pursued his remedy on the mortgage. Hayes *v.* Ward, 4 Johns. Ch. (N. Y.) 123. See Stephenson *v.* Taverners, 9 Gratt. (Va.) 398; King *v.* Baldwin, 2 Johns. Ch. 561; Wright *v.* Simpson, 6 Ves. 734; Rees *v.* Berrington, 2 Ves. Jr. 540.

A indorsed for B notes given in part payment for a steamer. B. to secure A, mortgaged the boat and agreed to insure and assign the policy to A. B failing, assigned all his estate to C. A filed a bill against B and C alleging the assignment, B's insolvency and neglect to insure and assign; that the assignee claimed the boat exclusively. *Held*, that equity could intervene on the principle *quia timet*, though neither of the notes was due. Walker *v.* Miller 11 Ala. 1067.

3. Gibson *v.* Jayne, 37 Miss 164; Collins *v.* Barksdale, 23 Ga. 602; Champlain *v.* Champlain, 4 Edw. Ch. (N. Y.) 228; Pattison *v.* Gilford, L. R. 18 Eq. 259; Clark *v.* Clark, 8 Paige, 152; 2 Story Eq. Jur. § 843; Emmons *v.* Cairns, 2 Sandf. Ch. 369; Covenhaven *v.* Shuler, 2 Paige, 123; James *v.* Scott, 9 Ala. 579; Flight *v.* Cook, 2 Ves. Sr. 619.

The remedy for children who are remaindermen after a marriage settlement, fearing a waste of their property, is a bill *quia timet*. Sanderson *v.* Jones, 6 Fla. 430.

A remainderman cannot maintain a bill against a life-tenant to prevent his denying the former's interest in the es-

less occurring in the construction of a will or direction of the court as to disposition of property by executors or trustees.[1]

(*e*) *Pendente Lite.*—Property claimed by several parties may be protected in equity from an apprehended danger by one, or from irreparable mischief.[2]

(*f*) *To Perpetuate Testimony.* See BILL TO PERPETUATE TESTIMONY.

(*g*) *To Remove Clouds from Title.*[3] See BILL TO REMOVE CLOUDS FROM TITLES.

tate, and from making leases extending beyond the term of his natural life. Preston *v.* Smith, 23 Fed. Repr. 737.

Where an agreement was made by an uncle with the father of his infant nephew that he should adopt the nephew and leave him all his property at the death of himself and wife, and the uncle subsequently conveyed to another on the consideration of support for the rest of his life, the court decreed the grantee to hold in trust for the infant, the complainant, and to account at the death of the uncle. Vanduyne *v.* Vreeland, 1 Beasl. (N. J.) 142.

Where there are reasons to apprehend that a remainder in slaves will be defeated or its value impaired by the misconduct of the owner of the particular estate, a court of chancery will interpose for the protection of the rights of the remaindermen. McDougal *v.* Armstrong, 6 Humph. (Tenn.) 428; Bowling *v.* Bowling, 6 B. Monr. (Ky.) 31; McNeill *v.* Bradley, 6 Jones Eq. (N. C.) 41.

Where a husband created a trust fund for his wife on separation from her, providing that a portion was to be kept invested for her during her life, and that she should have power to will any unexpended balance, it was held that the husband had sufficient legal and equitable interest in the trust fund to intervene by an action against the wife and trustees, if there was any reason to fear its diversion from the purpose for which it was provided. Cranston *v.* Plumb, 54 Barb. (N. Y.) 59.

1. A bill *quia timet* to have rights declared, and an act requiring certain clerks to pay over an excess of fees above a fixed amount, construed and pronounced unconstitutional, will not lie. Black *v.* Fleece, 2 Lea (Tenn.), 566.

A cross-bill filed by heirs at law as against devisees, for the purpose of having their rights declared, will not be sustained. Cross *v.* DeValle, 1 Wall. 14.

Bills may be filed, however, for the construction of a will, and the direction of the court as to the disposition of the property by executors or trustees. In such cases, from necessity, the courts are compelled to settle questions as to the validity and effect of contingent limitations in a will, even to persons not *in esse*. Lorillard *v.* Coster, 5 Paige, 172; Hawley *v.* James, 5 Paige, 442.

A bill *quia timet* will not lie by the heirs at law where the decedent has bequeathed the income of property in trust primarily for one object, and any surplus to others, to have the surplus awarded to them in anticipation, on the ground that the other trusts were incapable of execution, there having been no surplus at the time. Girard *v.* Philadelphia, 7 Wall. 1. See Grove *v.* Bastard, 2 Phillips, 621; Langdale *v.* Briggs, 39 Eng. Law & Eq. 214; 8 De G., M. & G. 391.

A bill in equity cannot be maintained to establish simply the facts of a trust, no other relief being sought, and even if its existence be denied. The court will entertain the bill, and declare the trust, if proved, if the trustee is about to leave the jurisdiction, so no relief can be had. Perry on Trusts, § 17; Baylies *v.* Payson, 5 Allen (Mass.), 473; Price *v.* Minot, 107 Mass. 62.

2. A petition will lie to enjoin cutting timber on land claimed by both parties, and seeking reparation for former cutting and conversion under equity's *quia timet* jurisdiction. Peak *v.* Hayden, 3 Bush (Ky.), 125.

A purchaser of a property sold at sheriff's sale made an agreement with the holder of a prior mortgage that he would pay it off. His counsel read a notice of the prior mortgage at the sheriff's sale, and purchased at a low price in consequence. After the sale it was alleged that the lien of such mortgage was discharged. The court enjoined the purchaser from alienating until the suit on the mortgage was determined. Build'g Assoc. *v.* Ashmead, 7 Phila. (Pa.) 272.

3. This jurisdiction is not confined to the cancellation of void or voidable instruments, but is applicable where justice requires that the title of a party in

(*h*) *To Establish Wills.*[1]

3. Relief.—The relief depends upon the circumstances. The general forms are: (*a*) By the appointment of a receiver[2] (see RECEIVER); (*b*) By payment of money into court;[3] (*c*) By giving security;[4] (*d*) By injunction (see INJUNCTION).

BILL OF REVIEW. (See also APPEAL; DECREE; EQUITY; FRAUD; REHEARING.)

1. Definitions.—A bill of review[5] is a bill in the nature of a writ of error, intended to procure the examination and consequent re-

possession must be quieted, and the evidence of such title is clear. Alexander *v.* Pendleton, 8 Cranch (U. S.), 462; Alsop *v.* Eckles, 81 Ill. 424.

Equity will not try conflicting titles. Handy *v.* Noon, 51 Miss. 166; Phelps *v.* Harris, 51 Miss. 789.

Some equity must be apparent, or a cloud would otherwise exist against the title of complainant. Eckman *v.* Eckman, 58 Pa. St. 269; Haines' Appeal, 73 Pa. St. 169; Orton *v.* Smith, 18 How. (U. S.) 263; Munson *v.* Munson, 28 Conn. 582; Gamble *v.* Loop, 14 Wis. 465; Farnham *v.* Campbell, 34 N. Y. 480.

1. Dursley *v.* Fitzhardinge, 6 Ves. 251; Dorset (Duke of) *v.* Girdler, Prec. Ch. 531; Angell *v.* Angell, 1 Sim. & Stu. 83; Beavan *v.* Carpenter, 11 Sim. 22; Wright *v.* Tatham, 2 Sim. 459.

A devisee in possession may file such a bill against an heir who has brought no action of ejectment, though there are no trusts and the court of chancery is not needed in the administration. Boyse *v.* Rossborough, Kay, 71; 3 De G., M. & G. 817; s. c., Colclough *v.* Boyse, 6 A. L. Cas. 1.

The same relief will be afforded against parties claiming under another will. Lovett *v.* Lovett, 3 K. & J. 1.

2. It is a matter resting in the discretion of the court, subject to certain well-defined rules, as follows: (1) The power is a delicate one, to be exercised with great caution. (2) The claimant must have a title to the property, and the court must be satisfied by affidavits that a receiver is necessary to preserve the property. (3) That a receiver is never appointed because he can do no harm. (4) Fraud or imminent danger must be clearly shown if the intermediate possession should not be taken by the court. (5) Unless absolutely necessary, the defendant will be heard before appointment. Blondheim *v.* Moore, 11 Md. 364. See Verplank *v.* Caines, 1 Johns. Ch. 57; Skip *v.* Harwood, 3 Atkinson, 564; Voshell *v.* Hynson, 26 Md. 83; Tomlinson *v.* Ward, 2 Conn. 391; Orphan Asylum *v.* McCarter, Hopkins, 429; Maynard *v.* Bailey, 2 Nev. 313; Crawford *v.* Ross, 39 Ga. 44; Chappell *v.* Akin, 39 Ga. 177.

3. There must usually be danger shown, but the order has been made without any reason being given to show any abuse or danger—Rothwell *v.* Rothwell, 2 Sim. & Stu. 217; Clarkson *v.* DePeyster, Hopk. Ch. (N. Y.) 274; Mandeville *v.* Mandeville, 8 Paige (N. Y.), 475—where a court takes upon itself the settlement of an estate.

4. Security is not required unless there is danger that the life-tenant may waste or otherwise lose the property to the remainderman. Covenhoven *v.* Shuler, 2 Paige (N. Y.), 122; Henderson *v.* Vaulx, 10 Yerg. (Tenn.); Kinnard *v.* Kinnard, 5 Watts (Pa.), 109; Lippincott *v.* Warder, 14 Serg. & R. (Pa.) 118; Smith *v.* Ostrand, 5 N. Y. S. C. 664.

5. Bills of review of the three kinds here treated of belong strictly to the old chancery practice, and are therefore only now employed in courts where that system of practice is in its essential features still retained. Where, as in England and many of our States, modern codes have supplanted both common law and equity systems of procedure, the object of bills of review is usually attained by other means. See Durant *v.* Philpot, 16 S. Car. 116.

In some States the term "bill of review" is used in another sense from that to which it was originally confined, and designates a mode of proceeding applicable to all cases where the defendant has not been afforded an opportunity of making a defence. See Sequin *v.* Maverick, 24 Tex. 526. The nature and uses of bills

versal, alteration, or explanation of a final decree in equity which has been signed and enrolled.[1]

Besides bills of review proper, there are other species of bills intended for a similar purpose, but appropriate to different circumstances.[2]

A supplemental bill in the nature of a bill of review is one which is brought before the decree is enrolled.[3]

The term "original bill in the nature of a bill of review" is used in two senses:

(*a*) A bill brought by one who is injuriously affected by a decree made in a suit to which he was not a party.[4]

(*b*) A bill to impeach a decree on the ground of fraud.[5]

2. Parties.—Bills of review can only be brought by persons who have been aggrieved by the decree,[6] and a bill of review proper or a supplemental bill only by parties to the original suit, or their privies in representation.[7] Other parties in interest and

of review as they are employed where the old procedure is retained, and not those of the modern substitutes for them, are here treated.

1. It does not constitute a part of the original cause, and, though it has reference to it, is an independent proceeding. The filing of it cannot make that a "cause depending" which was at the time of filing a determined cause, over which the jurisdiction of the court had ended. Hence such a bill was not affected by a statute transferring all cases belonging to a certain district, and then undetermined, to a new court. Cole *v.* Miller, 32 Miss. 89, 101.

The object sought by such a bill is to reverse the decree as far as it is erroneous, and to retry the cause. McCall *v.* McCurdy, 69 Ala. 65.

The filing of such a bill does not deprive the party of the rights that he would have had on a rehearing. The only distinction is that rehearing precedes and review follows enrolment. Mickle *v.* Maxfield, 42 Mich. 304.

It is always founded on equitable principles, and proceeds according to them, and is never allowed to stand on strict law and against equity. Stevenson's Ex'r's App., 32 Pa. 318; Yeager's App., 34 Pa. 173.

2. As these other species of bills resemble bills of review proper, both in their object and their form, they are all best treated together, the differences, where they exist, being noted.

3. See *supra*, I.

4. Adams Eq. *419; Kidd *v.* Cheyne, 18 Jur. 348.

5. Story Eq Pl. § 426; Mussell *v.* Morgan, 3 Bro. Ch. 79; *Ex parte* Smith, 34 Ala. 455; Edmondson *v.* Mosely's Heirs, 4 J. J. Marsh. (Ky.) 497; Person *v.* Nevitt, 32 Miss. 180; Eliott *v.* Balcom, 11 Gray (Mass.), 286; Adair *v.* Cummin, 48 Mich. 375.

6. McCall *v.* McCurdy, 69 Ala. 65; Lindley *v.* Kline, 25 W. Va. 208.

A bill of review cannot be brought for a matter of form by which the party has not been injured. George *v.* George, 67 Ala. 162.

A bill brought for error in the decree can only be brought by parties aggrieved by the particular errors assigned, however injuriously the decree may affect the rights of third persons. Thomas *v.* Harvies, 10 Wheat. (U. S.) 146; Whiting *v.* Bank of U. S., 13 Pet. (U. S.) 6.

"No person can file a bill of review who has no interest in the question intended to be presented by such bill, or who cannot be benefited by the reversal or modification of the former decree." Walworth, C., in Webb *v.* Pell, 3 Paige (N. Y.), 368.

7. "None but parties and privies, as heirs, executors, or administrators, can have this bill of review, since nobody else can be aggrieved by such decree, because it can only be revived upon such privies." Gilbert's For. Rom. (Am. Ed. 1874) 182.

A devisee is not in privity to a decree against his testator, and therefore cannot bring a bill of review. Slingsby *v.* Hale, 1 Ch. Cas. 122.

A minor is bound by a decree against his next friend, and cannot bring a bill of review on the ground that the next friend was not a guardian *ad litem*, unless the latter has acted fraudulently. Watkins *v.* Lawton, 69 Ga. 671.

privies as to title or estate can maintain a bill in the nature of a bill of review, as far as concerns their own interest.[1]

All parties to the original bill, and all those who have become interested in the subject-matter, ought to be made parties to a bill of review.[2]

3. Under what Circumstances Brought.—Bills of review proper, and original bills of that nature, are brought after a final[3] decree has been signed and enrolled (or deemed to be enrolled[4]) and (in the case of bills of review proper) complied with,[5] on account of error

If the record shows a defence by one acting as a guardian *ad litem*, it is no ground for review that he was not really such. McCall *v.* McCurdy, 69 Ala. 65.

In *Pennsylvania* the act of Oct. 13, 1840, § 1 (2 Pur. Dig. 1286, pl. 61), provides for a petition of review for certain purposes in the Orphans' Court by the "executor, administrator, or guardian, or their legal representatives, or by any person interested." This would seem to abolish the distinction between bills of review proper and original bills of the nature of bills of review in the cases to which the act applies. Under this act therefore, the sureties of an administrator may have a bill of review, where he has charged himself with the proceeds of the realty; and this after distribution decreed, and suits brought against them by creditors. Zinn's App., 10 Pa. 469; Hartz's App , 2 Gr. (Pa.) 83. So where the administrator has been charged in the account with claims which are not assets, and in other cases. Shallcross's Est., 35 Leg. Intell. (Pa.) 456; Smith's Est., 5 Weekly Notes (Pa.), 495.

A ward who excepts to a decree confirming a testamentary guardian's account as executor should petition for a review. Bessinger's Est., 5 Weekly Notes (Pa.), 320.

1. "Thus, if a decree is made against a tenant for life, a remainderman in bail or in fee cannot defeat the proceedings except by a bill showing the error in the decree, the incompetency in the tenant for life to sustain the suit, and the accrual of his own interest, and thereupon praying that the proceedings in the original cause may be reviewed, and that for that purpose the other party may appear to and answer this new bill, and the rights of the parties may be properly ascertained." Adams Eq. *419; Story Eq. Pl. § 409: Singleton *v.* Singleton, 8 B. Mon. (Ky.) 340.

Where a defendant in foreclosure retains part of the property in suit, and is responsible on his covenants for other portions, he is interested in having the mortgage foreclosed according to its terms, and if it is not he is a proper complainant in a bill to review the decree. Mickle *v.* Maxfield, 42 Mich. 304.

2. Bank of U. S. *v.* White, 8 Pet. (U. S.) 262; Singleton *v.* Singleton, 8 B. Mon. (Ky.) 340.

The reason is that "it is a principle of natural justice that no one ought to be affected by any decree without his first being heard." Story Eq. Pl. § 420. Mackay *v.* Bell, 2 Munf. (Va.) 523; Ellzay *v.* Lane, 2 Hen. & Munf. (Va.) 529.

3. It has been said that a bill of review could perhaps be brought where the decree, though interlocutory, could not be superseded. Clark *v.* Garrett, 6 Lea (Tenn.), 262. But in the same case it was held that a bill to review a decree of partition could not be brought when the suit was still pending as to matters of account, though partition had been made

A decree in a creditor's suit ascertaining amounts and priorities of all the debts sought to be established as liens on the real estate, and ordering the sale of the property for payment of the debts, is a final decree to which a bill of review will lie. Core *v.* Strickler, 24 W. Va. 689.

4. In *England* the actual enrolment of the decree was always essential to a bill of review proper. Gilbert's For. Rom. 179; Cooper's Eq. Plead. 91; Story's Eq. Plead. § 403.

In the first of Lord Bacon's Ordinances in Chancery, respecting bills of review, it is declared that "No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review." Beames' Ord. in Ch. 1.

In the *United States* all decrees in equity are matters of record and deemed to be enrolled, whether actually enrolled or not. Dexter *v.* Arnold, 5 Mas. (C. C. U. S.) 303.

Under the old *New York* practice, the filing of a copy of the decree in the register's office thirty days after it was pronounced took the place of the old enrolment. Wiser *v.* Blachly, 2 John. Ch. (N. Y.) 488.

5. Partridge *v.* Usborne, 5 Russ. 195.

in law apparent on the face of the record,[1] or of new matter

While the rule is that the decree must first be performed, a bill may be maintained on an uncontradicted affidavit of ability to perform. Davis *v.* Speiden, 104 U. S. 83.

Where the party seeking a review is in execution for the non-payment of the money and costs awarded to be paid by him, and which he is unable to pay, leave to file a bill of review will not be refused on the mere ground of non-performance. Livingston *v.* Hubbs, 3 John. Ch. (N. Y.) 124.

So where he is insolvent. Stalling *v.* Goodloe, 3 Murph. (N. Car.) 159. Or has given security for the performance. Stalling *v.* Goodloe, 3 Murph. (N. Car.) 159; Taylor *v.* Pearson, 2 Hawks (N. Car.), 298.

1. That is, the bill, answer, and other pleadings, and the decree, but not the evidence.

In *England* the rule always was that the error must appear on the face of the decree. The difference between the English and American rules was only formal, however, and is thus explained by Story, J.: "In England the decree always recites the substance of the bill and answer and pleadings, and also the facts on which the court founds its decree. But in *America* the decree does not ordinarily recite either the bill, or answer, or pleadings; and, generally, not the facts on which the decree is founded. But with us the bill, answer, and other pleadings, together with the decree, constitute what is properly considered as the record. And, therefore, in truth, the rule in each country is precisely the same in legal effect; although expressed in different language, viz., that the bill of review must be founded on some error apparent upon the bill, answer, and other pleadings, and decree; and that you are not at liberty to go into the evidence at large in order to establish an objection to the decree, founded on the supposed mistake of the court in its own deductions from the evidence." Whiting *v.* Bank of U. S , 13 Pet. (U. S.) 6, 14. For authorities on the American rule, see also Dexter *v.* Arnold, 5 Mas. (C. C. U. S.) 303; Putnam *v.* Day, 22 Wall. (U. S.) 60; Davis *v.* Speiden, 3 McA. (D. C. U. S.) 283; Brown *v.* White, 16 Fed. Repr. 900; Saum *v.* Stingley, 3 Cl. (Ia.) 514; Webb *v.* Pell, 3 Paige (N. Y.), 368; Ludlow *v.* Kidd. 20. 372; Stevens *v.* Hey, 15 Ohio, 313; Holman *v.* Riddle, 8 Ohio St. 384; Riddle's Est., 19 Pa. 431; Given's Est., 6 Weekly Notes (Pa.), 434; Cremer's Est., 7 Weekly Notes (Pa.). 544; Burdine *v.* Shelton, 10 Yerg. (Tenn.) 41.

Whether there is evidence to support the decree or whether the court has misjudged the evidence cannot be considered on a bill of review. Bank *v.* Dundas, 10 Ala. 661; Ashford *v.* Patton, 70 Ala. 479; Eaton *v.* Dickinson, 3 Sneed (Tenn.), 397.

Instances.—A decree against the statute law is a subject for a bill of review, e.g., a decree directing the legacy belonging to a child who had died an infant, intestate, without wife or children, to be distributed among his mother, brothers, and sisters equally, whereas by the Statute of Distributions it vested entirely in the father, who had survived the child. Story Eq. Plead. § 405.

So is a decree against a person who, on the face of it, appears to have been an infant at the time. Story Eq. Plead. § 405.

It is ground for a bill of review that the decree was not warranted by the allegations in the bill. Goodhue *v.* Churchman, 1 Barb. Ch. (N.Y.) 596

If a solicitor enter an appearance for a defendant without authority, and a decree be rendered against him, without any service, a bill of review may be brought. Griggs *v.* Gear, 3 Gil. (Ill.) 2.

Where a foreclosure decree has been made contrary to the terms of the mortgage, and an application for the correction of the error, made within a reasonable time, has been refused, a bill of review may be brought. Mickle *v.* Maxfield, 42 Mich. 304.

Instances where such Bill is not Allowed.—A bill of review is not needed to correct an error in figures in a decree. Massie *v.* Graham, 3 McL. (C.C. U.S.) 41.

But where the purpose of the original suit is to declare and enforce a lien on realty and recover an interest therein, a bill of review cannot be maintained by minor heirs, on the ground that the claim was barred by the Statute of Non-claim, because, the claim not being within the influence of the statute, it was not error in law to sustain it. And where a bill of review for error in law is brought, it is the court's duty to presume everything in favor of the rulings of the court in the original suit which are not disproved by the bill. George *v.* George, 67 Ala. 190.

The error in law must arise on the facts admitted in the pleadings, or stated as facts in the decree. If the error be in the determination of the facts, such error can be corrected only on appeal. Rawlings *v.* Rawlings, 75 Va. 71.

which has arisen or been discovered since the decree,[1] or (in the case of some original bills) where the decree has been obtained by fraud.[2] In the first and third cases they are matters of right,[3] but in the second they require special leave of court.[4] The new evidence must be relevant and material, and such as could not sooner have been discovered.[5] Bills of review for error in law

The matters must appear in the decree itself. Where a fact is mistaken, it should be rectified by rehearing before enrolment. Combs *v.* Proud, 1 Ch. Cas. 54.

Neither errors in the regularity of the proceedings nor erroneous deductions from the evidence call for a bill of review. Ward *v.* Kent, 6 Lea (Tenn.), 128.

Neither does the fact that the plaintiff is old and feeble and mentally infirm, he being represented by counsel, and there being no imputation of fraud or mismanagement of which the court can take notice. Carmichael *v.* Snodgrass, 6 Lea. (Tenn.) 183.

Nor can such a bill be brought when the relief sought is such as could have been obtained in the suit, if proper. Clark *v.* Garrett, 6 Lea (Tenn), 262.

The plaintiff's laches in bringing suit is no ground for a bill of review where no defence has been set up. Putnam *v.* Day, 22 Wall. (U. S.) 60.

1. Lord Bacon's Ordinance, referred to above, also provided that "No bill of review shall be admitted except it contain either error in law, appearing in the body of the decree without further examination of matters of fact, or some new matter, which hath arisen in time after the decree, and not any new proof, which might have been used when the decree was made. Nevertheless, upon new proof, that is come to light after the decree was made, which could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise." Beames Ord. in Ch. 1. In Norris *v.* Le Neve, 3 Atk. 26, Lord Hardwicke said of these ordinances, "Lord Bacon's rules have never been departed from since the making of them;" and in Massie *v.* Graham, 3 McL. (C. C. U. S.) 41, it was said, "The ordinances of Lord Bacon still govern bills of review." See also Taylor *v.* Sharp, 1 P. Wms. 371; Davis *v.* Bluck, 6 Beav. 393; Dexter *v.* Arnold, 5 Mas. (C.C.U.S.) 310; Putnam *v.* Day, 22 Wall. (U.S.) 60; Irwin *v.* Meyrose, 7 Fed. Repr. 533; Wiser *v.* Blachly, 2 John. Ch. (N.Y.) 488; Greenwich Bank *v.* Loomis, 2 Sand. Ch. (N. Y.) 70; Edwardson *v.* Maseby, 4 J. J. Marsh. (Ky.) 500; Hollingsworth *v.* McDonald, 3 Harr. & John. (Md.) 230; Iler *v.* Routh, 3 How. (Miss.) 276; Foy *v.* Foy, 25 Miss. 207; Bledsoe *v.* Carr, 10 Yerg. (Tenn.), 55; Hill *v.* Maury, 21 W. Va. 162.

The two causes may properly be joined in the same bill. Winchester *v.* Winchester, 2 Head (Tenn.). 460.

2. Story's Eq. Plead. § 426. See the cases cited under the definition.

3. Perry *v.* Phelips, 17 Ves. 178; Gould *v.* Tancred, 2 Atk. 534; Denson *v.* Denson, 33 Miss. 560.

The same is true of an original bill in the nature of a bill of review. Nor. Ill. Coal Co. *v.* Young, 11 Biss. (C. C. U. S.) 331; Webb *v.* Pell, 1 Pai. (N. Y.) 564; Edwardson *v.* Maseby, 4 J. J. Marsh. (Ky.) 500; Bleight *v.* McIlroy, 4 Mon. (Ky.) 145.

4. Story's Eq. Plead. § 412; Riddle's Est., 19 Pa. St. 431; Hartman's App., 36 Pa. St. 70; Green's App., 59 Pa. St. 235; Hamill's App., 88 Pa. St. 363; Fidelity Co. *v.* Gould, 12 Weekly Notes (Pa.), 63.

If it do not appear on the face of the bill that leave was granted, it should be struck from the files, not demurred to. Webster *v.* Diamond, 36 Ark. 532.

5. Standish *v.* Radley, 2 Atk. 178; Gilbert's For. Rom. (Am. Ed. 1874) 186; Simpson *v.* Downs, 5 Rich. Eq. (S. Car.) 421; Reese's Est., 37 Leg. Intell. (Pa.) 15.

The new matter must be not only new, but also relevant and material, such as, if known before, might probably have produced a different determination of the suit. Dexter *v.* Arnold, 5 Mas. (C. C. U. S.) 303; Hatcher *v.* Hatcher, 77 Va. 600.

Matter which merely goes to impeach the character of witnesses examined in the original suit is insufficient Livingston *v.* Hubbs, 2 John. Ch. (N. Y.) 124.

After a decree of sale in a foreclosure suit, new matter relating to proceedings in making the sale is insufficient. Shelton *v.* Van Kleeck, 106 U. S. 532.

It was formerly held that the new evidence must go to prove what was in issue, not to prove a title which was not in issue. Patterson *v.* Slaughter, Amb. 293; Dexter *v.* Arnold, 5 Mas. (C.C.U.S.) 303.

cannot be brought in the court below after the decree has been affirmed in the court of last resort.[1]

A supplemental bill in the nature of a bill of review is brought before the enrolment and on account of new matter only.[2] It also requires leave of court and should always be accompanied by a petition for a rehearing.[3] As to the character of the new matter, it is governed by the rules given above.[4]

4. Time for Bringing.—A bill of review for error apparent on the record must be brought within the time in which a writ of error could be brought at common law.[5] The allowance of a bill of

But it is now established that matter discovered after a decree has been made, though not capable of being used as evidence of anything previously in evidence in the cause, but constituting an entirely new issue, may be the subject of a bill of review or of a supplemental bill of that nature. Partridge *v.* Usborne. 5 Russ. 195; Massie *v.* Graham, 3 McL. (C. C. U. S.) 41.

The matter must have been in existence when the decree was rendered, but not known to the party till afterwards. Bledsoe *v.* Carr, 10 Yerg. (Tenn.) 55; Winchester *v.* Winchester, 1 Head (Tenn.), 460.

The matter must be such as the party, by the use of reasonable diligence, could not have known before the decree was made. Ord *v.* Noel, 6 Mad. Ch. 127; Young *v.* Keighly, 16 Ves. 348; Dexter *v.* Arnold, 5 Mas. (C.C.U.S.) 312; Massie *v.* Graham, 3 McL. (C. C. U. S.) 41; Jenkins *v.* Brewitt, 7 Blackf. (Ind.) 329; Robinson *v.* Sampson. 26 Me. 11; Hughes *v.* Jones, 2 Md. Ch. Dec. 293; Pendleton *v.* Fay, 3 Paige (N. Y.). 204; Stevens *v.* Hey, 15 Ohio, 313; Milligan's App., 82 Pa. 389; McDowell *v.* Morell, 5 Lea (Tenn.), 278; Hatcher *v.* Hatcher, 77 Va. 600.

The discovery of the whereabouts of a material witness is insufficient if his existence and materiality were known before. Putnam *v.* Clark, 36 N. J. Eq. 33.

Where a deed material to the evidence had been sent to the solicitor, but had been overlooked by him on account of its not having been indorsed, this was held sufficient to support a bill of review. *Ex parte* Vandersmissen, 5 Rich. Eq. (S. Ca.) 519.

Where fraud in suppressing evidence is the ground of a bill of review, it must appear in addition that there was a legal obligation to reveal it and that artifice was used to conceal it. Maddox *v.* Apperson, 14 Lea (Tenn.), 596.

So is the after-discovery of an instrument in writing, where no proof of the contents was offered at the time nor any evidence presented of a diligent search for it. Conrad *v.* Conrad, 9 Phila. (Pa.) 510.

1. Southard *v.* Russell. 16 How. (U. S.) 547; Watkins *v.* Lawton, 69 Ga. 671; Calmes *v.* Ament, 1 A. K. Marsh. (Ky.) 342; Stafford *v.* Bryan, 2 Paige (N. Y.). 46; Dennison *v.* Goehring, 6 Pa. 402; Haskell *v.* Doane, 1 McCord Ch. St. (S. Car.) 29; Cox. *v.* Breedlove, 2 Yerg. (Tenn.) 499.

This is so even where the affirmance was by dismissal of the writ of error for want of proper parties. Rice *v.* Carey, 4 Ga. 558.

It has been held in *Pennsylvania* that a bill of review does not lie in the Orphan's Court to review an account which had been contested before an auditor, and confirmed by the court after a full hearing. Cunningham's App., 2 Pitts. (Pa.) 177.

Under the Pennsylvania statute providing for petitions of review in the Orphans' Court (2 Pur. Dig. 1286, pl. 61, ed. of 1885) it is held that the Orphans' Court can entertain such a petition for error even after the supreme court has affirmed the decree. Parker's App., 61 Pa. St. 478.

2. Young *v.* Keighly, 16 Ves. 350; Wortley *v.* Birkhead, 3 Atk. 809; Singleton *v.* Singleton, 8 B. Mon. (Ky.) 340; Pendleton *v.* Fay, 3 Paige (N. Y.), 204; Greenwich Bk. *v.* Loomis, 2 Sand. Ch. (N. Y.) 70; Dansman *v.* Hooe, 3 Wis. 466.

If the ground of complaint be error of law alone, it may be corrected on a rehearing before enrolment, and a supplemental bill is unnecessary. Adams' Equity, *419.

3. Story's Eq. Plead. § 422; Moore *v.* Moore, 2 Ves. Sr. 596; Phelps *v.* Phelps, 17 Ves. 176; Pendleton *v.* Fay, 3 Paige (N. Y.), 204.

4. Spill *v.* Celluloid Mfg. Co., 22 Fed. Repr. 94.

5. Smith *v.* Clay, Amb. 645; Lytton *v.*

review for after-discovered matter is wholly within the discretion of the court as to time, as well as in other respects. As a general rule, it clearly ought not to be allowed after the time allowed for a writ of error has elapsed since the evidence was discovered.[1]

5. Form and Contents.—A bill of review must contain a statement of the original bill in the cause, the proceedings thereon, the decree, the matters in which the party considers himself aggrieved by it,[2] and the error in law[3] or new matter discovered upon which he seeks to impeach it.[4] If the decree has not been carried into execution, the bill of review may pray simply for a review of the decree and a reversal of the point complained of. If it has been carried into execution, the bill may also pray for a further decree which shall place the party in the situation in which he would have been had the decree been unexecuted.[5] A bill to set aside a decree for fraud must also state the circumstances of fraud.[6]

A supplemental bill in the nature of a bill of review should state positively that the decree has not been enrolled.[7]

The prayer of a bill of review proper is that the decree be reviewed and reversed; that of a supplemental bill in the nature of a bill of review, that the cause be reheard.[8]

6. Other Matters of Practice.—Leave to file a bill of review for

Lytton, 4 Bro. Ch. 441; Taylor *v.* Charter Oak Ins. Co., 3 McCr. (C. C. U. S.) 484; s. c., 17 Fed. Repr. 566.

The time is computed from the date when the decree becomes final. Hence, in the case of service by publication on absent defendants, not till a year after it is pronounced. Beach *v.* Mosgrove, 16 Fed. Repr. 305.

By the Pennsylvannia act of Oct. 13, 1840, § 1 (2 Pur. Dig. 1286, pl. 61, Ed. 1885) a petition of review may be presented in the Orphans' Court within five years after a decree confirming an account of an executor, administrator, or guardian. In a case where this act did not apply it was followed by analogy, and thirteen years held too great a lapse of time, though during a minority. Littleton's App., 93 Pa. St. 177.

1. The point was left undecided in Thomas *v.* Harvie, 10 Wheat. (U. S.) 146.

To impeach a decree on the ground of fraud, a bill of review must be brought within the time for a writ of error, unless there be some very cogent reason for delay. Sloan *v.* Sloan, 102 Ill. 581.

The objection on account of delay is waived by appearance and demurrer. Hyde *v.* Lamberson, 1 Idaho N. S. 539.

In the case of bills to impeach a decree on the ground of fraud, of course the time is computed from the date of the discovery of the fraud. See FRAUD, LIMITATIONS.

2. Story's Eq. Pl. § 420.

The decree must be fully set forth, or appended as an exhibit, and not merely referred to as a paper on file in the court. Groce *v.* Field, 13 Ga. 24.

The bill should not merely recite the decree, but must state the proceedings in the original suit. Hatcher *v.* Hatcher, 77 Va. 600.

It should not attempt to state the evidence on which the court found the facts on which the decree was rendered. Goldsby *v.* Goldsby, 67 Ala. 560.

3. The error must be specified, and not charged generally. Rodgers *v.* Dibirell, 6 Lea (Tenn.), 69; Kachlein's App., 5 Pa. 95; Yeger's App., 34 Pa. 173; Russell's App., 34 Pa. 258.

Where there has been a decree of foreclosure and a personal judgment at the same time, the validity of both must be denied or the bill will be demurrable. Shoaf *v.* Joray, 86 Ind. 70.

4. Story's Eq. Pl. § 420.

The bill should describe the new evidence distinctly and specifically, state when it was discovered, and its effect on the decree. Dexter *v.* Arnold, 5 Mas. (C. C. U. S.) 303; Massie *v.* Graham, 3 McL. (C. C. U. S.) 41.

5. Story's Eq. Pl. § 420.

6. Story's Eq. Pl. § 428.

7. Story's Eq. Pl. § 425.

8. Perry *v.* Phelips, 17 Ves. 173, 178; Story's Eq. Pl. § 425.

after-discovered matter is sought by a petition,[1] verified by affidavit[2] containing a statement of the new matter and an allegation that it could not sooner have been discovered.[3] Counter-affidavits are sometimes admitted at the hearing on the petition.[4]

The usual defence to bills of review is by demurrer.[5]

At the hearing of a bill of review for error apparent, the facts determined by the decree are supposed to have been sufficiently proved.[6]

BILL OF REVIVOR. (See also EQUITY; PARTIES; REVIVAL OF ACTIONS.)

1. **Definition.**—A bill of revivor is a continuance of an original bill in equity, to bring some new party before the court when, by death or otherwise, the original party has become incapable of prosecuting or defending the suit and it is abated, that is, suspended in its progress.[7]

1. Boucher *v.* Boucher, 3 McA. (D. C. U. S.) 453.

After the decree has been entered in the court above, and the record remitted, the application should be to the court below. Putnam *v.* Clark, 35 N. J. Eq. 145.

2. Dexter *v.* Arnold, 5 Mas. (C. C. U. S.) 503.

3. See § 3, p. 264. There is no practice authorizing rights accruing after the decree to be introduced into the controversy, except by some affirmative pleading in the shape of an original or supplemental bill bringing the new parties into court. Mickle *v.* Maxfield, 42 Mich. 304.

4. Norris *v.* LaNeve, 3 Atk. 35; Livingston *v.* Hubbs, 3 John. Ch. (N. Y.) 124.

The counter-affidavits are admitted, "not for the purpose of investigating or absolutely deciding upon the truth of the statements in the petition, but to present, in a more exact shape, some of the circumstances growing out of the original proceedings, which may assist the court in the preliminary hearing whether leave ought to be granted to file the bill of review. This course, though not very common, is, as I conceive, perfectly within the range of the authority of the court, and may be indispensable for a just exercise of its functions in granting or withholding the review." Story, J., in Dexter *v.* Arnold, 5 Mas. (C. C. U. S.) 453.

The finding of facts by the court on the petition is not conclusive at the hearing of the bill. Elliott *v.* Balcom, 11 Gray (Mass.), 286.

5. Irwin *v.* Meyrose, 2 McCr. (C. C. U. S.) 244. The decree may also be pleaded, but this is unnecessary. 2 Daniell's Ch. Pl.*

The demurrer does not admit the truth of the matters alleged in a bill for error apparent. Shelton *v.* VanKleeck, 106 U. S. 532.

6. Wallamet Bridge Co. *v.* Hatch, 19 Fed. Repr. 347.

Authorities for Bill of Review.—Gilbert's Forum Romanum (Am. Ed. 1874), pp. 179, 186; Story's Equity Pleading (9th Ed. 1879), §§ 403, 428; 2 Daniell's Chancery Pleading and Practice (5th Am. Ed. 1879), pp. 1575, 1585; Adams' Doctrine of Equity (7th Am. Ed. 1881), pp. 416–420; Cooper's Equity Pleading (Am. Ed. 1813); Mitford's Equity Pleading (Tyler's Am. Ed. 1876).

7. Story's Equity Pleadings, § 20; Mitford's Chancery Practice, 129; Cooper's Equity Pleading, 62.

It is not the commencement of a new suit, but the mere continuance of an old one. Fitzpatrick *v.* Domingo, 14 Fed. Repr. 216; Marlatt *v.* Smith, 4 C. E. Greene (N. J.), 446; Clarke *v.* Mathewson, 12 Pet. (U. S.) 164. In the last case it was held to be error to dismiss a bill of revivor for want of jurisdiction be-

2. When a Suit in Equity Abates.—Abatement in equity does not amount, as at law, to a determination of the suit, but only to a present suspension of the proceedings from the want of proper parties capable of proceeding therein.[1] A suit becomes abated when, by some event subsequent to the filing of the original bill, there is no person before the court by whom, or against whom, the suit in whole or in part can be prosecuted.[2] The death of one of the original parties and the death of a female plaintiff are the most common causes of the abatement of a suit in equity.[3] The death of a party does not always abate a suit, but only when his interest or that which he represents survives. If the decedent is a sole plaintiff or defendant, and his interest dies with him, there is an end to the suit.[4] There is likewise no abatement where the decedent's whole interest survives to other parties in the suit, or the surviving parties have sufficient interest to sustain a suit without the decedent.[5] But if the husband of a female plaintiff, suing in her right, dies, the bill is considered abated.[6]

Upon the marriage of a female defendant, the proceedings do

cause the plaintiff in the bill of revivor was a citizen of the same State as the defendant. Hone *v.* Dillon, 29 Fed. Repr. 465.

1. Story's Eq. Pl. § 354; Clarke *v.* Mathewson, 12 Pet. (U. S.) 164; Zoellner *v.* Zoellner, 46 Mich. 513.

2. Story's Eq. Pl. § 328.

The death of one of several plaintiffs or defendants causes an abatement as to him only, and the suit continues as to the rest. Williamson *v.* Moore, 5 Sandf. (N. Y.) 647. But if anything is to be done by or against his interest, the proper representative must be brought before the court. Story's Eq. Pl. § 369; Neale *v.* Hagthrop, 3 Bland (Md.), 599.

A suit does not abate by the death of a relator. Waller *v.* Hanger, 2 Bulstr. 154; 1 Swanst. 305 n. But the court suspends further proceedings until a new relator is appointed. Atty.-Genl. *v.* Powell, 1 Dick. 355.

3. Story's Eq. Pl. § 354; Glenn *v.* Clapp, 11 Gill & J. (Md.) 1; Boynton *v.* Boynton, 21 N. H. 246; Peer *v.* Cookerow, 1 McCar. (N. J.) 361; Douglass *v.* Sherman, 2 Paige (N. Y.), 358; Feemster *v.* Markham, 2 J. J. Marsh. (Ky.) 303; Stephenson *v.* Prescott, 2 Hay. (N. Car.) 163.

In many of the States it is provided by statute that a suit in equity shall not abate by the death or marriage of any of the parties. Mass. Pub. Sts. c. 165, § 24; Md. Code of 1878, art. 65, §§ 12 and 24; Neb. Code, § 45.

4. Story's Eq. Pl. § 356.

5. Story's Eq. Pl. § 357. There is no abatement where one of two defendant's trustees dies, and the whole power and trust survive to the co-trustee. Buchanan *v.* Malins, 1 Beav. 52; Shaw *v.* Railroad Co., 16 Gray (Mass.), 407. Nor on the death of one of several creditors suing in behalf of themselves and other creditors. Boddy *v.* Kent, 1 Meriv 364. Nor where the bill is against husband and wife in her right, and he dies under circumstances which allow of no demand by or against his personal representatives. Nor where the decedent is one of several joint tenants, parties to the bill; but otherwise of tenants in common. Boddy *v.* Kent, 1 Meriv. 364; Fallowes *v.* Williamson, 11 Ves. 306. Nor where one of several partners who are parties dies. Pingree *v.* Coffin, 12 Gray (Mass.), 288; *contra*, Wilson *v.* Seligman, 10 Repr. (U. S.) 651. Nor where one plaintiff was a life tenant, and the second tenant in fee of an undivided third of an estate, and the defendants were adverse claimants, and the first plaintiff died. Wilson *v.* Wilson, L. R. 9 Eq. 452. Nor where one of several residuary legatees, co-plaintiffs in an administration suit, dies. Hinde *v.* Morton, 2 H. & M. 368. Nor where one of several joint heirs dies, leaving the others as his heirs. Shields *v.* Craig's Admr., 6 Mon. (Ky.) 374. But *contra* in *New York*, where it is necessary to revive as to a deceased defendant whose interest passes to surviving defendants. Harrington *v.* Decker, 2 Barb. Ch. 75.

6. Story's Eq. Pl. § 361. But she need not proceed if she does not choose, and she is not liable for the costs.

not abate, although the husband ought to be named in the subsequent proceedings.[1]

3. In what Cases a Simple Bill of Revivor is Necessary for the Continuance of a Suit.—If the suit abates by death and the decedent's interest is transmitted to a representative given or ascertained by law, so that the title cannot be disputed, at least in a court of chancery, and the person of the representative is the sole fact to be ascertained; or if the suit abates by the marriage of a female plaintiff and no act is done to affect the rights of the party except the marriage, and the person of the husband is the sole fact to be ascertained, the suit may be continued by bill of revivor merely. The purpose of the bill is to substitute the person in whom the decedent's interest has vested as a party to the suit. It is founded on privity of blood, or representation by operation of law.[2]

A suit brought merely for discovery cannot be revived after answer and discovery.[3] Nor can a suit be revived for costs merely, unless they are taxed and report thereof made in the lifetime of the party.[4]

4. A Bill in the Nature of a Bill of Revivor is necessary where there are other facts which may be brought into litigation besides the mere question of the identity of the new party. Where on the abatement of a suit there is such a transmission of the interest of the incapacitated party that the title to it, as well as the person entitled, may be the subject of litigation in a court of chancery, the suit cannot be continued by a mere bill of revivor, but an original bill upon which the title may be litigated must be filed.

1. Story's Eq. Pl. § 354.

And if a female plaintiff marries pending suit, but the husband dies before revivor, there is no abatement. Story's Eq. Pl. § 361.

2. Story's Eq. Pl. § 364; 2 Dan. Ch. Pr. 1501; Duval *v.* McLoskey, 1 Ala. 708; Bowie *v.* Minter, 2 Ala. 412; Cullum *v.* Batre, 2 Ala. 415; Price *v.* Sanders, 39 Ark. 386; Grace *v.* Neel, 41 Ark. 163; Feemster *v.* Markham, 2 J. J. Marsh. (Ky.) 303; Meek *v.* Ealy, 2 J. J. Marsh. (Ky.) 29; Putnam *v.* Putnam, 4 Pick. (Mass.) 139; Glenn *v.* Clapp, 11 Gill & J. (Md.) 1; Green *v.* Hibbs, 17 Md. 260; Hawkins *v.* Chapman, 36 Md. 83; Webster *v.* Hitchcock, 11 Mich. 56; Zoellner *v.* Zoellner, 46 Mich. 513; Fox *v.* Abbott, 12 Neb. 328; Boynton *v.* Boynton, 21 N. H. 246; Ross *v.* Hatfield, 1 C. E. Greene (N. J.) 363; Peer *v.* Cookerow, 1 McCar. (N. J.) 361; Douglass *v.* Sherman, 2 Paige (N. Y.), 358; Campbell *v.* Browne, 5 Paige (N. Y.), 34; Randolph *v.* Dickerson, 5 Paige (N. Y.), 517; Pell *v.* Elliot, 1 Hopk. (N. Y.) 186; Stephenson *v.* Prescott, 2 Hay. (N. Car.) 163; Thompson *v.* Hill, 5 Yerger (Tenn.), 418; Curtis *v.* Hawn, 14 Ohio, 185.

If a suit abates by the death of the defendant, the plaintiff may revive or file a new original at his election. Spencer *v.* Wray, 1 Vern. 463; Anon., 3 Atk. 485; Lyle *v.* Bradford, 7 B. Mon. (Ky.) 112; doubted in Nicholl *v.* Roosevelt, 3 Johns. Ch. (N. Y.) 60.

Where a defendant dies after service, but before appearance, his personal representatives must be brought in by a new original. Hardy *v.* Hull, 14 Sim 21. But in *Massachusetts* an executor may be brought in by bill of revivor although his testator was not served. Heard *v.* March, 12 Cush. 580.

Where suit is brought by husband and wife in her right and she dies, he must revive as her personal representative. Brook *v.* Jones, 5 Lea (Tenn.), 244.

The principle applies to the demise of a public corporation. Where, pending a suit against a levee board, the legislature abolished the board, and devolved their duties and liabilities upon the State treasurer and auditor, the plaintiffs may maintain a bill of revivor against these latter. Hemingway *v.* Stansell, 106 U. S. 399.

3. Horsbury *v.* Baker, 1 Pet. (U.S.) 232.

4. Jenour *v.* Jenour, 10 Ves. 562; Dodson *v.* Juda, 10 Ves. 31; Troup *v.* Troup,

This bill is founded on privity of estate or title by the act of the party. And the nature and operation of the whole act by which the privity is created is open to controversy.[1] By this bill a devisee or legatee may obtain the benefit of original proceedings by his testator.[2] This is also the proper bill to bring in an administrator *de bonis non* when an administrator party dies;[3] and also it has been held to bring in an assignee in bankruptcy or insolvency.[4]

5. Parties to the Bill.—If any property or right in litigation, vested in a plaintiff, be transmitted to another, he is entitled to continue the suit; and if any such property or right, vested in a defendant, be transmitted to another, the plaintiff is entitled to continue against that other.[5] Therefore, if a party die, a bill of revivor lies only by or against his proper representatives, who are, if the subject of the suit is personalty, his executors or administrators; if realty, his heirs.[6] And a bill in the nature of a bill of

18 L. T. 178; Travis *v.* Waters. 1 Johns. Ch. (N. Y.) 85; Johnson *v.* Thomas, 2 Paige (N. Y.), 377.

But this is a hard rule, whose enforcement courts have always tried to evade. Johnson *v.* Peck, 2 Ves. 465; Morgan *v.* Scudamore, 3 Ves. 195; Flenham *v.* Stutwell, 1 Dick. 14. It was rejected in Owing's Case, 1 Bland (Md.), 409. In *Alabama* it has been abrogated by the legislature. Rule 101, R. C. 838.

Where there are an original and a cross bill there must be a revivor of each, except in regard to an account where there has been a decree, in which case one bill will revive both. Story's Eq. Pl. § 363.

1. Story's Eq. Pl. §§ 378–380; Jones *v.* Jones, 3 Atk. 217; Douglass *v.* Sherman, 2 Paige (N. Y.). 358; Atty.-Genl. *v.* Foster, 2 Hare, 82; Peer *v.* Cookerow, 1 McCarter (N. J.). 361; Slack *v.* Walcott, 3 Mason (C. C.). 508.

2. Brady *v.* McCosker, 1 N. Y. 214; Slack *v.* Walcott, 3 Mason (U. S.). 508; Russell *v.* Craig, 3 Bibb (Ky.). 377; Anderson *v.* McNeal, 4 Lea (Tenn.), 303.

In such a bill the heir and devisee must both be made parties, in order to give the former an opportunity to dispute the validity of the will. Peer *v.* Cookerow, 1 McCar. (N. J.) 361; Lyons *v.* Piper, 11 C. E. Greene (N. J.), 337; McCardy *v.* Agnew, 4 Hal. Ch. (N. J.) 727.

In *Tennessee* a devisee is made a party by means of a supplemental bill. Thompson *v.* Hill, 5 Yerg. 418.

3. Phelps *v.* Sproule, 4 Sim. 318; Huggins *v.* York Bldgs. Co., 2 Eq. Abr. 3, p. 14.

In Whyte *v.* Gibbes, 20 How. (U. S.) 541, an administrator *de bonis non* was brought in by bill of revivor, but the question was not raised.

4. Harrison *v.* Ridley, Com. 589. Lord Eldon in Randall *v.* Mumford, 18 Ves. 424, speaks of the bill by which an assignee is made a party as "a bill of revivor or supplemental bill in the nature of a bill of revivor." See Lowrey *v.* Morrison, 11 Paige, 327.

"Perhaps it may be more appropriately termed an original bill in the nature of a bill of revivor and supplement. It is an original bill in the nature of a bill of revivor in so far as it seeks to revive or continue the former proceedings in the name of a new complainant upon whom the right to continue is not cast by the operation of law merely, but one upon which an alleged act of the former complainant, the validity of which may be controverted by the defendant. And it certainly is supplemental in its nature as far as it seeks to supply defects in a suit," etc. Sedgwick *v.* Cleveland, 7 Paige, 289; Webster *v.* Hitchcock, 11 Mich. 56; Griggs *v.* Railroad Co., 10 Mich. 117; Brewer *v.* Dodge, 28 Mich. 359.

It has been held, however, that bankruptcy only renders a suit defective, but does not abate it, and that consequently it is to be continued by a supplemental bill. Bank *v.* Fowler, 42 Md. 393; Lee *v.* Lee, 1 Hare, 617; Robinson *v.* Southgate. 5 Hare, 223; Johnson *v.* Fitzhugh, 3 Barb. Ch. (N. Y.). See note 6, p. 274.

5. Story's Eq. Pl. § 330.

6. Story's Eq. Pl. § 355; Price *v.* Sanders, 39 Ark. 386; Grace *v.* Neel, 41 Ark. 163; Martin *v.* Tyree, 41 Ark. 314; Green *v.* Hibb's Admr., 17 Md. 260; Hawkins *v.* Chapman, 36 Md. 83; Putnam *v.* Putnam, 4 Pick. (Mass.) 139;

revivor can be brought only by one who claims in privity with the party in the original bill.[1] Where there are several plaintiffs or defendants, some may revive, but all should be made parties.[2] It was originally laid down that a defendant could revive only after a decree to account. But the principle has been extended to every case in which he has an interest and can derive a benefit from further proceedings.[3]

6. Form and Contents.—The bill should state the original bill, the parties to it, its object or prayer, the several proceedings, and the abatement.[4] It should show the plaintiff's title to revive,[5] and contain such new matter and no more as is requisite to show how the plaintiff becomes entitled to revive, and to charge that the cause ought to be revived, and must pray that it be revived accordingly. The bill in the nature of a bill of revivor should further charge the validity of the transmission of interest and state the rights acquired by it.[6]

7. The Defence.—The sole questions before the court on a bill of revivor are the competency of the parties to revive and the correctness of the frame of the bill.[7] A demurrer will accordingly

Kincart *v.* Sanders, 2 A. K. Marsh. (Ky.) 26; Lannin *v.* Cole, 2 Hal. Ch. (N. J.) 102.

If a suit affecting both real and personal property abates, it may be revived by either the heirs or the personal representatives to the extent of their interest, or by both. Owing's Case, 1 Bland (Md.), 409; Grace *v.* Neel, 41 Ark. 163. Or as to part by one bill by the heirs, and as to the rest by another by the personal representatives. Ferrers *v.* Cherry, 1 Eq. Abr. 4, p. 11.

1. Oldham *v.* Eboral, 1 Cooper Sel. Cas. 27; Rylands *v.* Latouche, 2 Bligh, 566; Tonkin *v.* Lethbridge, Cooper, 43.

Where, on revivor against an assignee in bankruptcy, the validity of the discharge is to be disputed, the assignee and bankrupt should both be made parties; but if the object is only to charge the property in the hands of the former, the bill should be against him alone. Penniman *v.* Norton, 1 Barb. Ch. (N. Y.) 246.

2. Buchanan *v.* Malins, 11 Beav. 52.

If surviving plaintiffs will not join in reviving, they should be made defendants. Finch *v.* Winchelsea, 1 Eq. Abr. 2, p. 7; Boddy *v.* Kent, 1 Meriv. 364; Fallowes *v.* Williamson, 11 Ves. 306.

A bill for the revivor of a joint judgment should itself be joint. Fox *v.* Abbott, 12 Neb. 328.

3. Devaynes *v.* Morris, 1 Myl. & Cr. 213; Williams *v.* Cooke, 10 Ves. 406; Griffin *v.* Spence, 69 Ala. 393; Ridgely *v.* Bond, 18 Md. 433; Peer *v.* Cookerow, 2 Beas. (N. J.) 136; Thompson *v.* Hill, 5 Yerg. (Tenn.) 418; Ried *v.* Stuart, 20 W. Va. 384.

Where a sole plaintiff or defendant dies after decree, either party may revive. Benson *v.* Woolverton, 1 C. E. Greene (N. J.), 110.

The right of a defendant to revive is not limited to cases in which he might himself file an original bill. Devaynes *v.* Morris, 1 Myl. & Cr. 213.

4. By U. S. S. C. Eq. Rule 58 it is not necessary "to set forth any of the statements in the original suit, unless the special circumstances of the case require it." 49th of Eng. orders of 1841: Griffiths *v.* Ricketts, 3 Hare, 476. A similar provision is contained in Rule 98, R. C. of Ala. 838.

5. Phelps *v.* Sproule, 4 Sim. 318; Vigers *v.* Audley, 9 Sim. 72.

6. Story's Eq. Pl. § 386. For forms see Eq. Draft. 413 sq.

It sometimes becomes necessary in a bill of revivor to call for an answer, as in the case of an executor or administrator, to ascertain whether he has assets to pay the complainant's demand. Story's Eq. Pl. 374; Browlow *v.* Duke of Chambers, Vern. & Scriv. 109; Douglass *v.* Sherman, 2 Paige (N. Y.), 361. So the bill should pray an answer to the original bill, where it remains unanswered, or, where it has been answered and exceptions have been filed, to so much of it as the exceptions extend to, or, where it has been amended, to so much of it as the unanswered amendments require. Story 375; Eq. Draft. 415.

7. Story's Eq. Pl. §§ 374. 377; Bettes *v.* Dana, 2 Sumn. (C. C.) 383; Fretz *v.*

lie to such a bill (1) for want of privity, (2) for want of sufficient interest in the party seeking to revive, or (3) for some imperfection in the frame of the bill.[1] If the bill be brought without sufficient cause, and this is not apparent on the face of the bill so that the defendant cannot demur, he may plead the matter necessary to show that the plaintiff is not entitled to revive against him; or if the plaintiff have no title to revive, but a title is stated in the bill, objection may be taken by plea.[2] Defence may also be made by answer; but allegations therein which raise a defence not set up in the original bill are impertinent and cannot be used as evidence for the defendant.[3] If the person entitled to revive does not proceed in due time, he is barred by the Statute of Limitations.[4]

8. The Effect of a bill of revivor is to substitute for the incapacitated party in the original proceedings the person to whom his interest is transmitted, and the latter then is equally bound by and has advantage of those proceedings. The same is the case of a bill in the nature of a bill of revivor when the validity of the alleged transmission of interest has been established.[5]

9. Bill of Revivor and Supplement.—This bill lies where not only an abatement has taken place in a suit, but defects are to be supplied, or new events are to be stated which have arisen since the commencement of the suit. It is a compound of a bill of revivor and a bill of supplement, and its separate parts are governed by the same rules as those bills themselves.[6]

Stover, 22 Wall. (U. S.) 198; Grant *v.* Chambers, 3 Hal. Ch. (N. J.) 223.

1. Griffith *v.* Ricketts, 3 Hare, 476; Metcalf *v.* Metcalf, 1 Keen, 74.

Although the defendant does not demur, yet if the plaintiff does not show title to revive, he will take nothing by his suit at the hearing. Nanney *v.* Totty, 11 Price, 117; Harris *v.* Pollard, 3 P. Wms. 348.

2. Story's Eq. Pl. § 829; Fallowes *v.* Williamson, 11 Ves. 306; Merriwether *v.* Mellish, 13 Ves. 435; Gould *v.* Barnes, 1 Dick. 133.

3. Fretz *v.* Stover, 22 Wall. (U. S.) 198.

Where a bill of revivor is filed after decree, the merits of the decree cannot be disputed in an answer, and matter which existed before the decree or which has arisen since, if stated, will be treated as impertinent. Arnold *v.* Styles, 2 Blackf. (Ind.) 391; Devaynes *v.* Morris, 1 Myl. & Cr. 213.

A formal replication is not necessary to avoid the effect of the answer as evidence. Fretz *v.* Stover, 22 Wall. (U. S.) 198.

4. Hollinshead's Case, 1 P. Wms. 551; Perry *v.* Jenkins, 1 Myl. & Cr. 118; Murray *v.* The Co., 5 B. & A. 204; Ala. Code of 1876, § 2908. *Contra*, Lyle *v.* Bradford, 7 B. Mon. (Ky.) 115.

5. Story's Eq. Pl. §§ 376, 380; Douglass *v.* Sherman, 2 Paige (N. Y.), 361.

Where the bill is brought after decree, it merely substantiates the suit and brings before the court the parties necessary to see to the execution of the decree.

6. Merriwether *v.* Mellish, 13 Ves. 161; Bampton *v.* Bichall, 1 Phill. 568; Bowie *v.* Minter, 2 Ala. 412; Westcott *v.* Cady, 5 Johns. Ch. (N. Y.) 342; Pendleton *v.* Fay, 3 Paige (N. Y.), 204; Eastman *v.* Batchelder, 36 N. H. 141; Manchester *v.* Mathewson, 2 R. I. 416.

Where in addition to the fact that the transmission of interest is not by operation of law, but by act of the party, there are also defects to be supplied, a bill in the nature of a bill of revivor and supplement is the proper proceeding. Kennedy *v.* Bank, 8 How. (U. S.) 586.

This is the proper bill where on marriage the wife's property becomes vested in trustees, or any third persons are made interested in it. Merriwether *v.* Mellish, 13 Ves. 161. And in *New York* to bring in a devisee. Brady *v.* McCosker, 214.

Where the subject matter of the suit is

10. Modern Substitutes.—The practice by bill of revivor has in many places been found inconvenient and expensive, and has been replaced, through statutory enactments, by orders of revivor, revivor by motion, by petition, by *scire facias*, and by amendment.[1] The object of these is chiefly formal simplification; and the substantial part of the law relating to bills of revivor is applicable to them, except where modified or changed by statute.[2] As these statutory substitutes are seldom applicable to all cases of revivor, the bill of revivor, and more particularly the bill in the nature of a bill of revivor, though rare, is not entirely obsolete, where these substitutes prevail.[3]

BILL OF RIGHTS. See CONSTITUTIONAL LAW.

BILL OF SALE. (See also CHATTEL MORTGAGES; CONDITIONAL SALES: SALES.)

1. **Definition.**—A bill of sale is a written agreement under seal, by which one person transfers his right to or interest in goods and personal chattels to another.[4]

assigned, the assignee must revive by a bill in the nature of a bill of revivor and supplement. Perkins *v.* Perkins, 16 Mich. 162; Van Hook *v.* Throckmorton, 8 Paige (N. Y.), 33. See note 4, p 272.

A bill to revive may be joined with one to enforce a decree, where, in addition to abatement, the rights of parties have been so embarrassed by neglect to proceed that no ordinary process of the court will serve to enforce the decree. Griffin *v.* Spence, 69 Ala. 393.

1. By 15 and 16 Vict. c. 86, § 52, on the abatement of a suit by death, marriage, or otherwise, an order of revivor may be obtained from the court as of course. For the practice under this act see Pemberton on Revivor and Supplement, and Dan. Ch. Pr. c. xxxiii. Similar provisions have been adopted in the following States: *Ala.*, Rule 96, R. C. 837 sq.; *Ark.*, Mansf. Dig. § 5240 sq.; *Ky.*, Code of Prac. § 500 sq.; *Mich*, Howell's Stats. § 6656 sq.; *Neb.*, Code, §§ 458–72; *N. J.*, R. S., Abatement, 4–7. In *New York* orders were introduced in certain cases by 2 R. S. 184, § 107 sq., but the whole subject is rendered obsolete in that State by the adoption of the Code of Civ. Procdr.

The object of a bill of revivor is accomplished by a suggestion on the record and a summons subpœna or notice to bring in the substituted parties in the following States: *Ill.*, R. S. of 1882, p. 94, §§ 9–13; *Md.*, Code of 1878, art. 65, § 13 sq.; *Mass.*, Pub. Stats. c. 165, § 19.

The bill of revivor is superseded by *scire facias* in *Tenn.*, Code of 1884, §§ 5170–73; *Va.*, Code of 1873, c. 167, § 4; *W. V.*, Code, c. 127, § 4. In *Rhode Island* the court may by general rule or special order provide for accomplishing the purpose of a bill of revivor by amendment. Pub. Stats. tit. xxv. c. 192, § 14. The same practice prevails in *Pennsylvania*, S. C. Eq Rule 54.

2. The statute has not changed the practice except by a more expeditious mode of proceeding. Benson *v.* Woolverton, 1 C. E. Greene (N. J.), 110; Russell *v.* Craig, 3 Bibb (Ky.), 377.

3. The bill of revivor may generally be used if it is preferred to the statutory proceeding, but this is seldom the case. *Md.*, Code of 1878, act 65, § 23; *N. J.*, R. S., Abatement, 9; *Tenn.*, Code of 1884, § 1574; Reid *v.* Stuart, 20 W. Va. 392. In this case it was held that the statutory provision did not prevent the use of a bill of revivor, if the party desired it. Bock *v.* Bock, 24 W. Va. 586.

Authorities for Bills of Revivor.—Story's Eq. Pl. §§ 328–87; Daniell's Ch. Pr. c. xxxii.i; Mitford's Pl. & Pr. in Eq. 166–177; Cooper's Pl. 63–73; Ld. Redesdale's Treatise upon Equity Pleading; White on Revivor and Supplement (1843); Pemberton's Practice by Way of Revivor and Supplement (Lond. 1867).

4. Bouvier's Law Dict.

In the English practice a bill of sale used to transfer the title to a ship at sea was called a *grand* bill of sale, as distinguished from those in vogue for ordinary purposes; but there is no such distinction recognized in this country. Portland Bank *v.* Stacey, 4 Mass. 661.

In England.—Under the English "Bills

2. Form, Contents, and Effect.—A bill of sale is presumed to have been executed on the day of its date.[1] It is in general sufficient if it contains the names of the parties, the consideration, and a description of the property conveyed, and is signed by the vendor and dated.[2] A bill of sale implies a warranty of the vendor's title without any express covenant to that effect.[3] Bills of sale, if absolute in form, are not generally required to be recorded, whatever may be the purposes for which they are intended, except where they are properly construed as chattel mortgages.[4]

of Sale Acts" of 1878 and 1882, an extensive body of learning has grown up in reference to conveyances of this character. By § 4 of the act of 1878, the term is made to include bills of sale proper, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt attached, receipts for purchase-money of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred. The subject is fully discussed in Benjamin on Sales (4th Am. Ed.), 648 *et seq.* These acts cover practically the same classes of transactions as are provided for in this country by the legislation concerning chattel mortgages. See CHATTEL MORTGAGES, *infra.*

The general rule in America is, that upon a sale of personal property the title passes to the purchaser by a delivery of the goods sold, and no bill of sale or other conveyance in writing is necessary. But such evidence of the purchase is not improper or illegal in itself, nor is the fact that a witness may be called to attest it; such precautions are of frequent occurrence and cannot be deemed badges of fraud. Kane *v.* Drake, 27 Ind. 29.

An instrument which acknowledges the payment of the consideration for certain personal property therein described, though in form a receipt, is in effect a bill of sale. Bush *v.* Bradford, 15 Ala. 317.

1. Scott *v.* Winship, 20 Ga. 429.

The fact that the date of the acknowledgment of a bill of sale is long subsequent to the date of its execution raises no presumption that the instrument was antedated. Thomas *v.* Hillhouse, 17 Iowa, 67.

A bill of sale is not necessarily the best evidence of the time when a sale was made that is alleged to be in fraud of creditors. Osen *v.* Sherman, 27 Wis. 501.

2. See Md. Rev. Code, art. 44, § 46. A general bill of sale purporting to transfer all the assignor's interest in all the assets belonging to his partnership suffices to pass an item of assets the existence of which was unknown to the parties. Cram *v.* Bank, 1 Abb. App. Dec. (N. Y.) 461.

Description of Property—An uncertainty in the description of the property sold forms no objection to the admissibility of the bill of sale in evidence. Carpenter *v.* Featherston, 15 La. Ann. 235.

A bill of sale covering the whole of the vendor's stock of general merchandise, but reserving goods to the amount exempted by statute, *held* to convey no title to any part of the goods until the vendor should have selected the portion reserved as exempt. Block *v.* Maas, 65 Ala. 211.

Where a purchaser of property takes a bill of sale in the name of a third person without the previous assent, authority, or knowledge of such person, or any delivery of the bill of sale or property to him, actual or constructive, no title passes to the person named in the bill of sale. Dudley *v.* Deming, 34 Conn. 169.

Consideration.—A bill of sale absolute on its face, which was given in consideration that the vendee should pay a debt of the maker, is founded upon a sufficient consideration to vest the title in the vendee. Hackley *v.* Cooksey, 35 Mo. 398; Richardson *v.* Kimball, 28 Me. 463.

3. Miller *v.* Van Tassel, 24 Cal. 458.

But this presumption may be rebutted by parol evidence. Miller *v.* Van Tassel, 24 Cal. 458.

A person holding chattels under a bill of sale has a good title, which cannot be impeached for fraud by the vendor or any one claiming under him, except a *bona fide* creditor having a legal lien. Evans *v.* Herring, 3 Dutch. (N. J.) 243.

4. Knight *v.* Nichols, 34 Me. 208. *Compare* Neeley *v.* Wood, 10 Yerg.

BILL TO PERPETUATE TESTIMONY. (See also BILL IN EQUITY; BILL TO TAKE TESTIMONY DE BENE ESSE; EQUITY; EVIDENCE; WITNESSES. As to Notice, Service, Publication, Costs, etc., see BILL TO TAKE TESTIMONY DE BENE ESSE.)

1. **Definition.**—Perpetuating testimony is the taking of evidence provisionally under the order of some competent court, and reducing it to writing in order that it may be preserved and read in evidence in some suit or legal proceeding to be thereafter instituted, in the event that the witness whose evidence is taken shall be out of the country, ill, or otherwise unable to attend court, or be dead.[1]

2. **Object.**—The object of all bills to perpetuate testimony is to secure and preserve such testimony as may be in danger of being lost before the matter to which it relates can be made the subject of judicial investigation,[2] and thereby to assist other courts, as well as prevent future litigation.[3]

(Tenn.) 486. See CHATTEL MORTGAGES, *infra*.

Authorities for Bills of Sale.—Benjamin on Sales; Indermaur on Bills of Sale; Jones on Chattel Mortgages.

1. 1 Bouv. L. Dict. (14th Ed.) 326; 1 Whart. Ev. sec. 181.

2. Cooper Eq. Pl. 52; 2 Story Eq. Jur. (11th Ed.) sec. 1505; Com. Dig. tit. Chancery.

Judge Story says (Eq. Jur. sec. 1505), that "bills of this sort are obviously indispensable for the purpose of public justice, as it may be utterly impossible for a party to bring his rights presently to a judicial decision; and unless in the intermediate time he may perpetuate the proofs of those rights, they may be lost without any default on his side. The civil law adopted similar means of preserving testimony which was in danger of being otherwise lost." Domat. b. 3, tit. 6, sec. 3; Dig. Lib. 9, tit. 2, l. 40; Nov. 90, ch. 4; Gilb. For. Roman, ch. 7, pp. 118, 119; Mason *v.* Goodburne, Rep. *temp.* Finch, 391; 1 Whart. Ev. sec. 181.

Although this jurisdiction seems to be indispensable for the purposes of public justice, it has been said to be open to grave objections because "it leads to a trial on written depositions, which is deemed (at least in courts of common law) to be much less favorable to the cause of truth than the *viva-voce* examination of witnesses. But what is still more important, inasmuch as the depositions can never be used until after the death of the witnesses, and are not indeed published until after their death, it follows that whatever may have been the perjury committed in those depositions, it must necessarily go unpunished. The testimony, therefore, has this infirmity, that it is not given under the sanction of those penalties which the general policy of the law imposes upon the crime of perjury. It is for these reasons that courts of equity do not generally entertain bills to perpetuate testimony for the purpose of being used on a future occasion, unless where it is absolutely necessary to prevent failure of justice." Angell *v.* Angell, 1 Sim. & S. 83; Duke of Dorset *v.* Girdler, Prec. Ch. 531, 532; Cann *v.* Cann, 1 P. Wms. 723, 729.

3. Cooper Eq. Pl. 52; Barton, Suit in Eq. 53, 54; Story Eq. Pl. (8th Ed.) sec. 300.

The origin of this practice has been traced to the canon law, which, taking hold of men's consciences, extended its right to all cases in which it was important in the interest of justice to register testimony which would otherwise be lost. Ch. 5, X. ut. *lite non cont.*, Bockmer, n. 4; 8 Toullier, n. 422; c. 34, 41. 43, X. *De test.* (II. 20); 2 Bouv. L. Dict. (14th Ed.) 326.

There are statutes in most of the States regulating taking testimony *in perpetuam*

3. When Lies.—Where the subject-matter is likely to be litigated in the future, but cannot be made the subject of immediate judicial investigation,[1] and there is testimony in existence which

rei memoriam, and the examination of witnesses *de bene esse*. 2 Bouv. L. Dict. (14th Ed.) 236; Stim. Stat.

Federal Statutes.—R. S. U. S. sec. 866. See note 2, p. 279.

Maine Statutes.—The provisions of the Maine Rev. Stat. ch. 170, secs. 26, 27, and 28, authorize the issuing of commissions by the supreme judicial court for the taking of depositions in other States or foreign countries, but do not limit the power of the court to issue these commissions to cases where some one or more of the persons supposed to be adversely interested reside within the State. The commission may issue though all the adverse parties reside out of the State. Ocean Ins. Co. *v.* Bilger, 72 Me. 469.

Depositions taken *in perpetuam rei memoriam* by a notary public under Maine Statute of 1821, ch. 101, sec. 4, must be recorded in the registry of deeds. Winslow *v.* Mosher, 19 Me. 151.

Massachusetts Statutes. — The Mass. Gen. Stats. ch. 131, secs. 54–58, provide that "depositions to perpetuate testimony of witnesses within or without the State, to be used as evidence against all persons, may be taken upon a commission to be issued after public notice by the supreme judicial or superior court. The court shall, in addition . . . require the applicant to state upon oath or otherwise all persons known or supposed to be interested in the case, and shall direct that the commissioner publish in such newspapers within or without the State as the court may consider most effectual, such notice of the time and place of taking the deposition, and the subject-matter thereof, as the court may think proper. This notice shall be addressed specially by name to all persons known or supposed to be interested in the case, and to all other persons generally, that they may attend and cross-examine the witnesses. The court may also direct personal notice of the time and place of taking, and the subject-matter thereof, to be given to such persons and in such manner as, under all the circumstances, seem proper." India Mut. Ins. Co. *v.* Bigler, 132 Mass. 171.

An application for a commission to take depositions *in perpetuam* of a witness residing out of the State can, if the only persons adversely interested also reside without the State, only be made under Mass. Gen. Stat. ch. 131, secs. 52–58. The notice required by these sections should be given, and not that required by secs. 46–51, and the court has no discretionary power to grant an application to issue under the latter sections. India Mut. Ins. Co. *v.* Bigler, 132 Mass. 171.

New York Statutes.—In New York bills to perpetuate testimony are seldom resorted to in the present day, since the Rev. Stats. have given a much cheaper and more expeditious method of proceeding to accomplish the object by a summary application to an officer authorized for that purpose. 2 Rev. Stat. 398, art. 5 of tit. 3, ch. 7, pt. 3.

The Code containing no provision respecting bills to perpetuate testimony, the provisions of the Rev. Stat. are therefore still in force, and furnish a sufficient remedy in most cases. Where a case occurs in which they do not, the party may still have recourse to a bill to perpetuate testimony. 2 Barb. Ch. Pr. (2d) 144.

It is said in Paton *v.* Westervelt, 5 How. Pr. (N. Y.) 399, that under the provisions of 2 Rev. Stat. art. 5, tit. 3. ch. 8, it must be made to appear to the officer before whom an application is made for the examination of witnesses *in perpetuam* that the object is in good faith to perpetuate testimony. The court say that "the officer must have some discretion, and may require the party on whose application the examination is made to explain the nature of the litigation so far as to enable him to judge whether such applicant is proceeding in good faith to perpetuate testimony against the adverse party, or is under that pretence only fishing for testimony to be used against the witness, or for other purposes." See to same effect *In re* Kip, 1 Paige Ch. (N. Y.) 601, 608. Courts will not tolerate fishing for testimony. See Booker *v.* Booker, 20 Ga. 777.

Virginia Statutes —In Virginia formerly, on application by bill to take depositions *in perpetuam*, the plaintiff was required to obtain an order or commission authorizing him to take the deposition, and afterwards another perpetuating it. Smith *v.* Grosjean, 1 Patt. & H. (Va.) 109. But by the act of 1849, p. 666, sec. 34, a new and simpler mode was provided.

1. Bills to perpetuate testimony can be maintained only when no present suit can be brought at law by the party seeking the aid of the court. See Cooper

is in danger of being lost before the matter to which it relates can be brought to trial, a bill in equity lies to preserve and perpetuate such testimony in order to prevent the hardship which might occur to a party from an investigation at a remote period when he was deprived of his evidence by the death or removal of his witnesses;[2] and this is true whether the title or claim is to real

Eq. Pl. 57; Story Eq. Pl. (8th Ed.) secs. 303, 307; 2 Story Eq. Jur. (11th Ed.) sec. 1513; 2 Barb. Ch. Pr. (2d Ed.) 145.

In every case in which a complainant has a vested interest in a matter which is likely to become the subject-matter of litigation, however small or contingent, and it cannot be investigated in a court of law or equity either from the party's inability from legal causes to institute a suit if he should be the plaintiff; or, having sued, he is impeded by act of the other party from prosecuting his suit, and his interest may be endangered if the evidence in support of it be lost,—he is entitled to have the testimony of the witness perpetuated. Booker *v.* Booker, 20 Ga. 777, 782.

Where it is possible, however, for the matter in controversy to be made the subject of immediate judicial investigation by the party who seeks to perpetuate testimony, a bill will not lie because, under such circumstances, the party "has it fully in his power to terminate the controversy by commencing the proper action; and, therefore, there is no reasonable ground to give the advantage of deferring his proceedings to a future time, and to substitute thereby written depositions for *viva-voce* evidence." 2 Story Eq. Jur. (11th Ed.) sec. 1508.

1. **The Commission**, although usually granted almost as a matter of course without a stay of proceedings, does not issue as a matter of strict right. Ring *v.* Mott, 2 Sand. 683. And the court may impose such terms as to it shall seem just. See Clayton *v.* Yarrington, 16 Abb. Pr. (N. Y.) 273 n.; Abton *v.* Barbey, 1 N. Y. Leg. Obs. 154.

In New York the commission should be sealed. Ford *v.* Williams, 24 N. Y. 359; Tracy *v.* Suydam, 30 Barb. (N. Y.) 110; Whitney *v.* Wyncoop, 4 Abb. Pr. (N. Y.) 370. And should contain the names of the witnesses. Renwick *v.* Renwick, 10 Paige Ch. (N. Y.) 420.

A commission issued under statute will be sufficient if it contain the substance of what is provided for in that statute. Hall *v.* Barton, 25 Barb. Ch. (N. Y.) 274.

The Decretal Order of the court granting the commission to take the testimony directs that the depositions, when taken, shall remain to perpetuate the memory thereof, and to be used as there shall be occasion in case of the death or absence of the witnesses, or their inability to travel. Mason *v.* Goodburne, Rep. *temp.* Finch, 391, 392.

The order directing a commission to issue must be drawn up in writing, naming the commissioners and also the witnesses, in all cases where their names can be ascertained. Wright *v.* Jessup, 3 Duer (N. Y.), 642.

An order granted by a judge out of court, in which the witnesses are not named, is said to be of doubtful regularity. Renwick *v.* Renwick, 10 Paige Ch. (N. Y.) 420. But it seems that if the order be made by the court, it has power to dispense with this general rule. Nicol *v.* Alison, 10 Q. B. 1006.

2. Angell *v.* Angell, 1 Sim & S. 83, 89.

Delaware.—Where plaintiff was in possession of lands of his deceased wife, claiming as tenant by courtesy, it was held that he was entitled to a bill to perpetuate evidence of his title resting exclusively in the knowledge of two witnesses, notwithstanding the heirs at law were contesting his title, and had brought ejectment, although the witnesses were neither aged nor infirm. Hall *v.* Stout, 4 Del. Ch. 269.

Federal.—Under U. S. Rev. Stat., sec. 866, wherein it is provided that "any circuit court, upon application to it as a court of equity, may, according to the usage of chancery, direct depositions to be taken *in perpetuam rei memoriam* if they relate to any matters that may be cognizable in any court of the United States," it has been held that a bill will be sustained to obtain a direction that the testimony of a witness be taken *in perpetuam* where the plaintiff alleges that he is employing or applying a process to the use of which the defendant claims an exclusive right under a patent; that the patent is void for want of novelty; that in case the defendant sues the plaintiff for infringment of said patent the plaintiff relies, for his defence, on the testimony of a certain witness; that the witness had made public use in the United States of the said process for upwards of twelve years before said patent was issued; that

estate or personal property, or to mere personal demands, and whether the testimony is to be used in support of an action or as matter of defence to repel it.[1] A bill *in perpetuam* will be granted in cases of private penalty or forfeiture without waiving it where it may be waived, or in cases of waste or of the forfeiture of a lease, and also in cases of public penalties.[2] But one will not be granted after judgment, to preserve and perpetuate testimony which the party might lose by the death or absence of the witnesses, in the event of a reversal of the judgment and a new trial being ordered.[3] A bill to perpetuate testimony lies against a *bona fide* purchaser.[4]

4. What Bill Must Show.—In order to maintain a bill *in perpetuam*, it is necessary to state on its face all the material facts which are necessary to confer jurisdiction.[5] It must show that a

said witness is upwards of ninety years of age, and that the defendant does not sue the plaintiff for infringement, and that the plaintiff cannot bring his rights to a judicial determination. The New York & Baltimore Coffee Polishing Co. *v.* The New York Coffee Polishing Co., 20 Blatchf. (U. S.) 174; s. c., 62 How. Pr. (N. Y.) 485.

If the attorney-general has power to institute a suit to annul the patent for want of novelty (see Atty.-Gen. *v.* Rumford Chemical Works, 9 Off. Gaz. 1062), this fact in no wise affects the right to maintain the bill, because the matter rests entirely in the discretion and control of the attorney-general. Mowry *v.* Whitney, 14 Wall. (U. S.) 441. And if he were to institute such an action, he is not obliged to call the plaintiff's witness. The New York & Baltimore Coffee Polishing Co. *v.* The New York Coffee Polishing Co., 20 Blatchf. (U. S.) 174; s. c., 62 How Pr. (N. Y.) 485.

1. Earl of Suffolk *v.* Green, 1 Atk. 450.

In order to be preserved, such testimony must be of an ephemeral character; and the rule applies not only to witnesses whose death may be looked forward to at any time, and whose testimony cannot be otherwise produced, but also to all proofs equally ephemeral. This principle is acted on by our courts when they direct particular articles, such as instruments of crime, which are liable to perish, to become lost or be spirited away, to be impounded and placed under the custody of the court; also when steps are taken under the direction of a competent officer to secure measurements and photographs of the *locus delicti*, and of all indications of guilt on soil or buildings where a crime has been committed. 1 Whart. Ev. sec. 181.

The canon law recognizes, in addition, the right of a party who has interests dependent upon a writing in process of decay or obliteration, to have such writing judicially perpetuated by exemplification. Ch. 4, xii. 6.

2. Earl of Suffolk *v.* Green, 1 Atk. 450.

Justice Blackstone says that bills of this kind are "most frequent where lands are devised by will away from the heir at law; and the devisee, in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in chancery against the heir, and sets forth the will *verbatim* therein, suggesting that the heir is inclined to dispute its validity; and then, the defendant having answered, they proceed to issue as in other cases, and examine the witnesses to the will; after which the case is at an end, without proceeding to any decree, no relief being prayed by the bill; but the heir is entitled to his costs, even though he contests the will. This is what is usually called proving a will in chancery." 2 Black. Com. 450.

3. McCall *v.* Sun Mut. Ins. Co., 34 N. Y. Sup. Ct. 310.

4. Dursley *v.* Fitzhardinge, 6 Ves. 263, 264; Gordon *v.* Close, 2 Bro. Parl. Cas. 473, 477, 479.

5. Story Eq. Pl. (8th Ed.) § 300.

Subject-matter.—It must, in the first place, state the subject-matter, touching which the plaintiff is desirous of giving evidence. Mitf. & Tyl. Pl. & Pr. in Eq. 149.

Facts in Pais.—If the object of the bill is to perpetuate the evidence of witnesses as to facts *in pais*, it is not sufficient to state generally that they can give evidence to certain facts; but the bill must state specially what those facts are. Knight *v.* Knight, 4 Madd. 8, 10.

Witness to Deed.—If the object is to perpetuate the testimony of witnesses to

suit at law cannot be brought by the party filing the bill;[1] or that before the facts can be investigated in a court of law the evidence of a material witness is liable to be lost by his death or departure from the country.[2] It must show the matter touching which the plaintiff is desirous of giving evidence, so that it may point the proper interrogatories on both sides to the true merits of the controversy, and must show that the party has some interest in the subject.[3]

a deed to real estate, the deed should be properly described, and the names of the witnesses who are to prove the same set forth. See Mason *v.* Goodburne, Rep. *temp.* Finch, 391.

Witness to Will.—Where the bill seeks to perpetuate testimony of witnesses to a will, it is not only advisable, but the better practice, to set forth in the bill the whole will *in hæc verba.* Wyatt Pr. Reg. 74; Story Eq. Pl. (8th Ed.) § 305.

Right of Common, etc.—In Cresset *v.* Milton, 1 Ves. Jr. 449; s. c., 3 Bro. Ch. 481, where the object of the bill was to perpetuate testimony of witnesses respecting a right of common and of way, it was alleged that the tenants, owners and occupiers of the said messuage and lands, etc., *in right of or otherwise,* from time to time, etc., and of right ought to have common pasture in and upon a certain waste or common called Brownbee, for their horses, etc., and also a way or road for themselves, etc. Upon demurrer the bill was held bad because the charges were too general and not sufficiently descriptive of any particular right; because the manner in which the right of common was claimed was not set forth with any certainty, not having been set forth as common appurtenant or as common appendant, but as that "or otherwise," which simply amounted to no specification at all, and left any sort of right open to proof. There must be something substantial set forth in the bill; the party must claim something.

Supplemental Bill.—Upon a bill to perpetuate testimony, the examination of witnesses having been completed, and the commission closed, the plaintiff cannot file a supplemental bill to perpetuate the testimony of witnesses, on the ground of facts discovered since the filing of the original bill, without stating what those facts are. Knight *v.* Knight, 4 Madd. 1, 10.

1. Cox *v.* Colley, 1 Dick. 55; Dew *v.* Clarke, 1 Sim. & S. 114.

Ordinarily, the bill must set forth that the facts to which the testimony relates cannot be immediately investigated in a court of law; or if they can, that the sole right of the action belongs to the opposite party, or that such party has interposed obstacles to prevent the institution of an action. Booker *v.* Booker, 20 Ga. 777. See Commonwealth *v.* Stone, Thach. C. C. (Mass.) 604; Smith *v.* Grosjean, 1 Patt. & H. (Va.) 109; North *v.* Gray, 1 Dick. 14; Cox *v.* Colley, 1 Dick. 55; Duke of Dorset *v.* Girdler, Prece. Ch. 530.

The bill will be demurrable if it fails to state that the matter cannot be made the subject of immediate investigation. Angell *v.* Angell, 1 Sim. & S. 89; Dew *v.* Clarke, 1 Sim. & S. 114. Because where the plaintiff is entitled to bring an action, he is at most only entitled a commission under given circumstances to examine witnesses *de bene esse.* Angell *v.* Angell, 1 Sim. & S. 90.

2. Mitf. & Tyl. Pl. & Pr. in Eq. 150.

3. Mason *v.* Goodburne, Rep. *temp.* Finch, 391; Smith *v.* Attorney-General, cited in 6 Ves. 260.

Care should always be taken in drawing a bill of this kind not to mix up in it other matters, which may require very different decretal orders. Drew *v.* Clarke, 1 Sim. & S. 108. Otherwise the bill will be demurrable. Story Eq. Pl. (8th Ed.) § 306.

As the object of this jurisdiction is to assist the courts of law, and by preserving evidence to prevent future litigations, there are few cases in which courts of equity will decline to exercise it. Mitf. & Tyl. Pl. & Pr. in Eq. 241. And demurrers to bills seeking it will seldom lie. Earl of Suffolk *v.* Green, 1 Atk. 451; Philips *v.* Carew, 1 P. Wms. 117; Tirrell *v.* Co., 1 Roll. Abr. 383; Mendis *v.* Barnard, 1 Dick. 65; Lord Dursley *v.* Fitzhardinge, 6 Ves. 251–256. *Compare* Earl of Belfast *v.* Chichester, 2 Jac. & W. 439.

Where a bill sought a discovery, prayed relief, and asked to perpetuate testimony, the court held that although the defendant might demur to the discovery sought and the relief prayed, that he could not demur to so much of the bill as sought to perpetuate the testimony of witnesses. Earl of Suffolk *v.* Green, 1 Atk. 450,

(*a*) *Plaintiff's Interest.*—The bill should show that the plaintiff has some interest[1] in the subject-matter which may be endangered if the testimony in support of it be lost; for unless he has some interest he cannot maintain the bill.[2]

(*b*) *Defendant's Interest.*—The bill should show that the defendant has, or that he pretends to have, or that he claims, an interest to contest the title of the plaintiff in the subject of the proposed testimony.[3]

(*c*) *Ground of Necessity.*—The bill must show ground of necessity for perpetuating the evidence.[4] The rule is not to sustain a bill

Thorpe *v.* Macauley, 5 Madd. 218; Shackell *v.* Macaulay, 2 Sim. & S. 79. But where the case made by the bill appears to be such that the jurisdiction of the court does not arise.—as for instance if the matter to which the required testimony is alleged to relate can be immediately investigated in a court of law, and the witnesses reside within the jurisdiction of the court,—the demurrer will lie. North *v.* Gray, 1 Dick. 14; Angell *v.* Angell, 1 Sim. & S. 89.

1. The court will not protect every interest, however, by perpetuating the evidence sustaining it; and where the interest is such a one that it may be immediately barred by the party against whom the bill is brought, the court will not sustain the bill, because it would be a fruitless exercise of power. Dursley *v.* Fitzhardinge, 6 Ves. 261–263; Belfast *v.* Chichester, 2 Jac. & W. 451, 452.

2. May *v.* Armstrong, 3 J. J. Marsh. (Ky.) 260; Mason *v.* Goodburne, Rep. *temp.* Finch, 391; Dursley *v.* Fitzhardinge, 6 Ves. 261, 262; Belfast *v.* Chichester, 2 Jac. & W. 449, 451.

A mere expectancy, however strong, is not sufficient to entitle plaintiff to maintain a bill; he must have a positive interest. Sackville *v.* Ayleworth, 1 Vern. 105, 106; s. c., 1 Eq. Abridg. 234.

It has been said that even where the party seeking to perpetuate the testimony is next of kin of a lunatic, although the lunatic be intestate and in the most helpless state, and his recovery a physical impossibility, even if he were *in articulo mortis*, and the bill was filed at that instant, the plaintiff would not have such an interest in the subject of the suit as would qualify him to maintain the bill. Dursley *v.* Fitzhardinge, 6 Ves. 260; Sackville *v.* Ayleworth, 1 Vern. 105; s. c., 1 Eq. Abridg. 234; Smith *v.* Atty.-Gen., cited in 6 Ves. 260; Allan *v.* Allan, 15 Ves. 135, 136. But if the heir had entered into any contract with respect to his expectancies and possibilities, he might, upon the strength of such contract, maintain a bill to perpetuate testimony. Dursley *v.* Fitzhardinge, 6 Ves. 260, 261; Cooper Eq. Pl. 53, 54. For such a bill may be maintained where there is any vested interest, however, slight or trifling in value; whether it be absolute or contingent, whether it be present or remote and future in enjoyment, and dependent upon the most remote and improbable contingency, is wholly immaterial; it is a present estate, although with reference to chances it may be worth little or nothing. Allan *v.* Allan, 15 Ves. 135, 136; Belfast *v.* Chichester, 2 Jac. & W. 451; Dursley *v.* Fitzhardinge, 6 Ves. 251.

3. Dursley *v.* Fitzhardinge, 6 Ves. 251.

Unless the defendant has or claims some interest it is utterly fruitless to perpetuate the testimony, since it can have no operation or effect upon those who are the real parties in interest. Story Eq. Pl. (8th Ed.) sec. 302.

It has been said that "it will be sufficient to bind all the parties in interest to bring before the court those who are judicially held to represent them all; as, for instance, the first tenant in tail, who represents all the subsequent interests." Finch *v.* Finch, 1 Ves. 534; Lloyd *v.* Johnes, 9 Ves. 37, 52–59; Cockburn *v.* Thompson, 16 Ves. 326; Reynoldson *v.* Perkins, Ambl. 565; Giffard *v.* Hort, 1 Sch. & Lefr. 408, 409, 411.

4. Such as that the facts, to which the testimony of the witnesses whom it is proposed to examine relates, cannot be immediately investigated in a court of law; or if these facts can be so investigated, that the sole right of action belongs exclusively to the other party; or that the other party has interposed some impediment, such as an injunction, to an immediate trial of the right in the suit at law. See Booker *v.* Booker, 20 Ga. 777; Commonwealth *v.* Stone, Thach. C. C. (Mass.) 604; Smith *v.* Grosjean, 1 Patt. & H. (Va.) 109; North *v.* Gray, 1 Dick. 14; Cox *v.* Colley, 1 Dick. 55; Dorset *v.* Girdler, Prece. Ch. 530.

if it is possible that the matter can, by the party exhibiting the bill, be made the subject of an immediate judicial investigation, because then there is no ground of necessity.[1]

5. Prayer.—The prayer to the bill should ask leave to examine witnesses touching the matter stated, to the end that testimony may be preserved and perpetuated.[2] It should also ask for a subpœna,[3] but not for relief.[4] If the bill prays relief, it is demurrable, and may be dismissed for this cause.[5]

6. Who May Maintain.—Any one interested may maintain a bill *in perpetuam rei memoriam.*[6] The right of action may be either in the plaintiff or the defendant in equity,[7] and may be maintained by a plaintiff out of possession as well as by one in possession, if he has no present right of action.[8] But the bill will not lie at the suit of the defendant in a pending action.[9]

7. Where Testimony to be Taken.—Examinations *in perpetuam*

1. The New York & Baltimore Coffee Polishing Co. *v.* The New York Polishing Co., 20 Blatchf. (U. S.) 174, 176; s. c., 62 How. Pr. (N. Y.) 485.

Where the facts can be immediately investigated in a court of law, the bill must allege the specific facts on which the plaintiff puts his case. Mason *v.* Goodburne, Rep. *temp.* Finch, 391 Such as that he has no present right to maintain an action; or where he has a title in remainder or reversion only after a present existing estate or life. Dursley *v.* Fitzhardinge, 6 Ves. 260, 261. Or he is himself in actual possession of the property or in the present possession of the rights he seeks to perpetuate by proofs. See Angell *v.* Angell, 1 Sim. & S. 83; Dorset *v.* Girdler, Prece. Ch. 531; Dew *v.* Clarke, 1 Sim. & S. 114; Com. Dig. tit. Chancery.

2. Cooper Eq. Jur. 52.

3. Story Eq. Pl. (8th Ed.) sec. 306.

4. Because that would turn it into a bill for relief, which is inconsistent with the nature of a bill to perpetuate testimony. Rose *v.* Gannel, 3 Atk. 439; Vaughan *v.* Fitzgerald, 1 Sch. & Lefr. 316.

5. Dalton *v.* Thompson, 1 Dick. 97; Rose *v.* Gannel, 3 Atk. 439; Vaughan *v.* Fitzgerald, 1 Sch. & Lefr. 316.

Where a bill prays to perpetuate testimony and also for relief, the court may allow the plaintiff to amend by striking out the prayer for relief, even after the testimony has been taken under it, and thus give effect to such testimony. Vaughan *v.* Fitzgerald, 1 Sch. & Lefr. 316.

6. Angell *v.* Angell, 1 Sim. & S. 89.

English Statute.—According to statute 5 and 6 Vict. Ch. 69, any person who would, under the circumstances alleged to exist, become entitled upon the happening of any future event to any honor, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, shall be entitled to file a bill in chancery to perpetuate any testimony which may be material for establishing such claim or right. See Starkie on Ev. (10th Ed.) 428.

Before this statute, upon petition of right, a commission issued, and an inquiry was thereupon found and returned to chancery. Before any other proceedings the suppliant filed a bill against the attorney-general to perpetuate testimony, reciting the petition and a commission to examine witnesses issued thereon *ex parte*, the crown declining to join. The crown traversed the inquisition, and the record was sent to the Queen's Bench. The court *held* that the depositions taken under this commission were taken in a proceeding substantially the same, and were admissible, the witness being out of the jurisdiction of the court. Baron de Bode's Case, 8 Q. B. 208; s. c., 55 Eng. C. L. 208.

7. Angell *v.* Angell, 1 Sim. & S. 89.

8. Booker *v.* Booker, 20 Ga. 777, 781.

The bill to perpetuate testimony, strictly so called, could formerly be filed only by persons who were in possession under their title, and therefore could not sue at law; if the testimony were required by persons out of possession, it was obtainable only by bill to take testimony *de bene esse*, and the latter could be filed only when an action was actually pending. Starkie Ev. (10th Ed.) 428; 1 Story Eq. Jur. (11th Ed.) sec. 664.

9. Spencer *v.* Peek, L. R. 3 Eq. 415.

should be had in the county where the witness resides, but may be taken elsewhere if the witness chooses to submit thereto.[1]

8. Defences.—In bills to perpetuate testimony the defendant may allege any facts going to show that there is no occasion to perpetuate the testimony; and this may be done by way of plea, based either upon the ground that there exists no such dispute or controversy as alleged in the bill, or that the plaintiff has no such interest in it as will justify his application to perpetuate the testimony.[2]

9. Hearing.—A bill to perpetuate testimony is never brought to a hearing;[3] relief not being prayed by the bill,[4] the suit is terminated by the examination of the witnesses,[5] or is at least suspended until the anticipated action is brought; and then, at a suitable period, an order for the publication thereof may be obtained from the court upon a proper case made, such as the death or absence of the witnesses, or their inability from sickness or other cause to attend the trial.[6]

10. Statutory Requirements.—Statutes authorizing the taking of depositions are in derogation of the common law,[7] are to be strictly

1. Jackson *v.* Leek, 12 Wend. (N. Y.) 105.

Examination of Witnesses.—The proceeding must, as far as practicable, be carried on in conformity with the ordinary laws of evidence. See Heffter Inst. 528; 1 Whart. Ev. sec. 181.

The witnesses are to be examined according to the rules and practice of courts of law in reference to witnesses going abroad. Tyler Ev. sec. 490.

The witness is obliged to give his evidence under commission *in perpetuam* in the same cases and to the same extent as he would were he called as a witness upon the trial of the cause. *In re* Kip, 1 Paige Ch. (N. Y.) 601.

Evidence of Defendant.—Where it is desirable to perpetuate the testimony of the defendant in regard to a matter in which his interest is adverse to that of the plaintiff, the proper mode of examination is the same as that of examining all other witnesses for the same purpose, and it is only by so examining him that his deposition can be made evidence at any future period, in another suit. Ellice Roupell, 9 Jur. (N. S.) 530.

2 Ellice *v.* Roupell, 9 Jur. (N. S.) 530.

Judge Story says that "if the defendant make answer to the bill as first presented, he cannot, after the same is amended and new points of inquiry presented, plead to the amended bill, that since the filing of the original the plaintiff had instituted another suit in equity, in which he had made the several matters raised by the amended bill the subject of judicial investigation; for although such a plea might be good to the original bill, the defendant having consented to answer, cannot afterwards plead to the amended bill." But it seems that if the amended bill change the nature of the original bill from one to perpetuate testimony so as to combine it with a claim for discovery from the defendant, that the defendant will not be bound to make further answer. Story Eq. Pl. (8th Ed.) sec. 306a.

Where testimony has been perpetuated on a bill against a *feme covert*, with respect to her lands, to which her husband is not a party, it is too late to make the objection when the testimony is offered to be read. Couch *v.* Sutton, 1 Gr. (Pa.) 114.

3. Vaughan *v.* Fitzgerald, 1 Sch. & Lefr. 316.

If the case should be improperly brought to a hearing, it would be dismissed; but this dismissal will not affect the depositions, which may still be used as evidence. Hall *v.* Hodderdon, 2 P. Wms. 162, 163; Anon., 2 Ves. Sr. 497; Anon, Ambl. 237; Acland *v.* Gaisford, 2 Madd. 37, note; Vaughan *v.* Fitzgerald, 1 Sch. & Lefr. 316; Rose *v.* Gannel, 3 Atk. 439.

4. Dalton *v.* Thomson, 1 Dick. 97.

5. Morrison *v.* Arnold, 19 Ves. 670; Vaughan *v.* Fitzgerald, 1 Sch. & Lefr. 316; Anon., Ambl. 237; Anon., 2 Ves. Sr. 497; Hall *v.* Hodderdon, 2 P. Wms. 162.

6. Morrison *v.* Arnold, 19 Ves. 671; Teale *v.* Teale, 1 Sim. & S. 385; Abergavenny *v.* Powell, 1 Meriv. 433.

7. Graham *v.* Whitely, 26 N. J. L. 254;

construed,[1] and their requirements must be minutely complied with;[2] and this fact must appear on the face of the deposition.[3]

BILL TO TAKE TESTIMONY DE BENE ESSE. (See also BILL TO PERPETUATE TESTIMONY; EQUITY; EVIDENCE; WITNESSES.)

1. **Nature.**—Where a suit is already pending, a bill to perpetuate testimony is of a different character, to wit, a bill *de bene esse*,[4]

Winooskie Turnpike Co. *v.* Ridley, 8 Vt. 404.

1. Shutte *v.* Thompson, 15 Wall. (U. S.) 151; Bell *v.* Morrison, 1 Pet. (U. S.) 351; The Patapsco Ins. Co. *v.* Southgate, 5 Pet. (U. S.) 604; Carrington *v.* Stimson, 1 Curt. C. C. (U. S.) 437.

2. Dunkle *v.* Worcester, 5 Biss. C. C. (U. S.) 102; Jones *v.* Neale, 1 Hughes C. C. (U. S.) 268; Wilson Sewing Machine Co. *v.* Jackson, 1 Hughes C. C. (U. S.) 195; Patterson *v.* Fagan, 38 Mo. 70; Tayon *v.* Hordman, 23 Mo. 539; Wallace *v.* Mease, 4 Yeates (Pa.), 520; Bascom *v.* Bascom, Wright (Ohio), 632; Bradstreet *v.* Baldwin, 11 Mass. 229, 233; Davis *v.* Allen, 14 Pick. (Mass.) 313; Welles *v.* Fish, 3 Pick. (Mass.) 74; Fabyan *v.* Adams, 15 N. H. 371; Brighton *v.* Walker, 35 Me. 132; Parsons *v.* Huff, 38 Me. 137; Winooskie Turnpike Co. *v.* Ridley, 8 Vt. 404.

Where a party at whose request a deposition *in perpetuam* was taken omitted in his application for a commission to state that he was desirous of perpetuating the testimony of the witnesses, as prescribed by Mass. R. S. ch. 94, sec. 34, but no objection was made to it, for that reason, at the time of taking the deposition, and the notice of the magistrate to the defendant and the certificate to the instrument showed that the depositions were taken *in perpetuam*, it was held that the depositions were not from that cause inadmissible. Commonwealth *v.* Stone, Thach. C. C. (Mass.) 604.

3. Dye *v.* Bailey, 2 Cal. 383; Williams *v.* Chadbourne, 6 Cal. 559.

Authorities for Bills to Perpetuate Testimony.—Story Eq. Pl. (8th Ed.) §§ 299–311; 1 Barb. Ch. Pr. (2d Ed.) 269–277; 2 Barb. Ch. Pr. (2d Ed.) 145–147; Mitf. & Tyl. Pl. & Pr. in Eq. 149, 241–243; Graham's Pr. (2d Ed.) 584–603; 2 Wait's Pr. 675–710.

4. **Definition.**—The phrase *de bene esse* is a term applied to such acts or proceedings as are done or permitted to take place in an action, but the validity or effect of which depends upon some subsequent act or fact, matter or proceeding. An examination of witnesses *de bene esse* is an examination of them out of court, before the trial, subject to the contingency of their death, removal, or inability to attend the trial; in which event such examination is good, and the deposition may be read in evidence on the trial; otherwise not. Graham Pr. 584; 1 Burr. L. Dict. (2d Ed.) 212, 447.

"The precise literal meaning of this very old, but still common technical expression (the practical import of which is well enough understood), seems to have been a matter of uncertainty and difficulty ever since the time of Cowell, who observes that '*de bene esse* are common Latin words, but their meaning something more dark.' This obscurity has doubtless principally arisen from the peculiar structure of the phrase itself, which has rendered a literal translation into English a matter of so much difficulty that most interpreters follow Cowell's example, having contented themselves with expressing the same sense in terms of as close approximation as was supposed practicable." 1 Burr. L. Dict. (2d Ed.) 427.

The same author says that the phrase

to take the testimony of the witnesses.[1] Bills to examine witnesses *de bene esse* bear a close analogy to bills to take testimony *in perpetuam rei memoriam*, and though often confounded with them, stand upon distinct considerations.[2] The general rules regulating bills *in perpetuam* are for the most part applicable to bills to examine witnesses *de bene esse*.[3]

2. **Object.**—The object of a bill *de bene esse* is to take the testimony of witnesses for the trial at law, where the testimony may otherwise be lost.[4]

3. **Who May Issue.**—By common law[5] courts of law have no authority to issue commissions to examine witnesses *de bene esse* in any case,[6] but courts of equity have ever exercised the authority to issue such commissions in aid of a trial at law, where the subject-matter admits of present judicial investigation, and a suit is at the time pending in some court.[7]

4. **When Lies.**—Bills to examine witnesses *de bene esse* can be brought only where an action is at the time pending.[8]

was not originally a Latin one, but a very literal translation of the law French *del bien estre*. This is assumed from the circumstance that the phrase is not to be found in Bracton,—the great source of most of the technical Latin of the English law,—while "in the law French of Britton it not only occurs in form, but its component words are constantly used in connections which throw an important light upon its meaning."

1. Angell *v.* Angell, 1 Sim. & S. 83, 90; Dew *v.* Clarke, 1 Sim. & S. 108; Parry *v.* Rogers, 1 Vern. 441; Brandlyn *v.* Ord, 1 Atk. 571; Dursley *v.* Fitzhardinge, 6 Ves. 260.

An examination of witnesses *de bene esse* is not only incidental to every suit at law or in chancery, but may even be incidental to a suit to perpetuate testimony, where there is danger that the evidence of the witnesses whose testimony is intended to be perpetuated will be lost before the suit for perpetuating it is ripe for a regular examination. Frero *v.* Green, 19 Ves. 319; 1 Barb. Ch. Pr. (2d Ed.) 270.

Where the witness is a party to the action it seems his testimony may be taken *de bene esse*, but not otherwise, before issue joined. Norton *v.* Abbott, 28 How. Pr. (N. Y.) 388; Bell *v.* Richmond, 50 Barb. (N. Y.) 571; s. c., 4 Abb. Pr. N. S. (N. Y.) 44. *Compare* Fullerton *v.* Gaylord, 7 Rob. (N. Y.) 551; McVickar *v.* Greenleaf, 4 Rob. (N. Y.) 657; s. c., 30 How. Pr. (N. Y.) 61; Duffy *v.* Lynch, 36 How. Pr. (N. Y.) 509.

2. 3 Bl. Com. 438; Gilb. For. Roman. 140; Story Eq. Pl. (8th Ed.) §§ 303, 307; 2 Story Eq. Jur. (11th Ed.) § 1513; 2 Barb. Ch. Pr. (2d Ed.) 145.

3. Story Eq. Pl. (8th Ed.) § 252; 2 Barb. Ch. Pr. 145.

New York Practice.—Bills to take testimony *de bene esse* are but rarely filed in New York, as the testimony of the witnesses may be taken in a much cheaper and simpler manner upon a summary application to an officer under provisions of the statute. See 2 Rev. Stat. 391, art. 1; 398, art. 5; 3 Rev. Stat. 673, § 1.

4. As where the witnesses are aged, infirm, ill, about to leave the country, or reside abroad. See Dicher *v.* Power, 1 Dick. 112; Shelley *v.* ——, 13 Ves. 56; Rowe *v.* ——, 13 Ves. 260.

5. In *England* authority is now conferred by statute upon courts of common law to take the depositions of witnesses broad. See Stat. 13, Geo. III. ch. 63, §§ 40, 44; and Stat., 1 Will. IV. ch. 22; Starkie Ev. (10th Ed.) 275, 276.

In *America* this defect has long since been cured, "and, indeed, the authority given to our courts of common law to take the depositions of witnesses both at home and abroad has been carried to an extent far beyond what has been exercised by courts of equity." 2 Story Eq. Jur. (11th Ed.) § 1514, note 1.

6. McCotter *v.* Hooker, 8 N. Y. 497; Macaulay *v.* Shackell, 1 Bligh N. S. 119, 130.

7. Brown *v.* Southworth, 9 Paige Ch. (N. Y.) 351; Macaulay *v.* Shackell, 1 Bligh N. S. 119.

Lord Eldon said in Macaulay *v.* Shackell, 1 Bligh, 119, that "both the court of chancery and of exchequer, as courts of equity, have always entertained these bills as belonging to one of their great sources of jurisdiction to grant relief against such accidents as are beyond the power of courts of law to aid."

8. Howard *v.* Folger, 15 Me. 447; Angell *v.* Angell, 1 Sim. & S. 83.

Where it is certain or probable that the personal attendance of a witness cannot be procured at a trial, an examination *de bene esse* is proper, and should be encouraged.[1]

Examinations of witnesses *de bene esse* may be had at any stage of the cause,[2] before answer, provided the necessity for taking testimony is satisfactorily shown by affidavit,[3] before an issue of fact joined [4] and while a demurrer is pending and undetermined;[5]

The early case of Phillips *v.* Carew, 1 P Wms. 117, seems to hold that a bill for the examination of witnesses *de bene esse* may be brought where the plaintiff's witnesses are aged and infirm, although no action has been commenced and is at the time pending, but merely in contemplation of an action. In the later case of Angell *v.* Angell, above cited, the court say respecting that decision that "the principle of that case, supposing it to be correctly reported, is not very satisfactory. Written depositions, on account of the infirmity above referred to, are never to be received, where, with reasonable diligence, *viva voce* testimony may be had, and the circumstances that the witnesses are aged and infirm should rather be a reason for the action being immediately brought, to give the better chance of their living till the trial, than a reason for permitting the action to be indefinitely delayed at the pleasure of plaintiff. Whenever such a case occurs again, the principle of Phillips *v.* Carew, 1 P. Wms. 117, will come to be reconsidered."

New York.—A practice sprang up in New York at an early date of taking testimony *de bene esse* in civil suits, which was afterwards read in evidence on proof of the death or absence of the witness. People *v.* Restell, 3 Hill (N. Y.), 289, 295; Mumford *v.* Church, 1 John. Cas. (N. Y.) 147; Sanford *v.* Russell, Anth. N. P. (N. Y.) 184; Jackson *v.* Kent, 7 Cow. (N. Y.) 59; Packard *v.* Hill, 7 Cow. (N. Y.) 489.

This practice has since been sanctioned by legislative enactment. 2 Rev. Stat. 391, art 1.

The New York statute governing the examination of witnesses *de bene esse* directs that whenever an action is pending in any court of law, being a court of record, shall have been commenced by the actual service of process, or where the defendant shall have appeared in the action, either party may have the testimony of any witness taken conditionally, to be used in the cause under the circumstances prescribed. See 3 Rev. Stat. (5th Ed.) 673, § 1.

In Criminal Cases.—But the present New York statute does not, nor did the former practice in that State, extend to criminal cases. See People *v.* Restell, 3 Hill (N. Y.), 289, 295.

The provisions of the Arkansas statute authorizing the taking of depositions of witnesses residing or about to move out of the State, extended so as to confer that privilege on defendants in criminal cases. Giboney *v.* Rogers, 32 Ark. 462.

Neither is there any authority at common law for taking depositions in criminal cases out of court, without the consent of the defendant. People *v.* Restell, 3 Hill (N. Y.), 289. See *Ex parte* Harkins, 6 Ala. 63.

But it seems that by the consent of the prisoner such testimony may be received in evidence against him, for he is bound by any explicit waiver of his constitutional privilege to be confronted with the witnesses. Wightman *v.* People, 67 Barb. (N. Y.) 44.

1. Jackson *v.* Kent, 7 Cow. (N. Y.) 59; Mumford *v.* Church, 1 John. Cas. (N. Y.) 147.

2. But an order for a commission to examine a foreign witness before issue joined will not be issued. Jackson *v.* Bankcraft, 3 John. (N. Y.) 259. Nor after the trial and judgment in the action, on the ground that the evidence, which is material, may be otherwise lost to the party in the event that the case should be reversed and a new trial ordered. McColl *v.* Sun Mut. Ins. Co., 34 N. Y. Super. Ct. Rep. 310.

3. Fort *v.* Ragusin, 2 John. Ch. (N. Y.) 146; Conner *v.* Mackey, 20 Tex. 747; Bagnold *v.* Green, 1 Dick. 2; s. c., Carey's Rep. 48; Byrne *v.* Byrne, 2 Moll. 440; Brown *v.* Greenly, 2 Dick. 504.

4. Packard *v.* Hill, 7 Cow. (N. Y.) 489; Concklin *v.* Hart, 1 John. Cas. (N. Y.) 103; Odivene *v.* Hills, 1 Wend. (N. Y.) 18.

5. Packard *v.* Hill, 7 Cow. (N. Y.) 489. The court say in this case that "one important object of these examinations *de bene esse* is to enable the party to secure evidence at any time in the progress of the case, to be used on the trial if the witness shall happen then to be without the jurisdiction of the court, or unable to obey its process. The rule will be of little use if confined to any particular stage of the case. It is generally applied to

or even before appearance, where the witness is ill, aged, or the only one.[1]

a. Witness Aged.—A court of equity will sustain a bill to examine *de bene esse* an aged witness.[2] And where an aged witness is examined on the trial of a cause, it is sometimes provided in granting a new trial that the judge's notes of such witness' evidence shall be read upon such new trial.[3]

(*b*) *Witness Infirm or Ill.*—If a witness is infirm or in ill-health, to an extent likely to endanger or destroy his life, or to prevent his attendance at the trial, his testimony may be taken at any age.[4]

secure the testimony of transient or foreign witnesses, who are here accidentally, or come for the purpose of being examined, at the request of the party. The deposition may be taken before there is an issue of any kind."

1. Dew *v.* Clarke, 1 Sim. & S. 108. See also Convey *v.* Athill, 1 Dick. 355; Pritchard *v.* Gee, 5 Madd. 364.

Where the defendant has not yet appeared in the action, he will be entitled to a notice of the examination in order that he may have an opportunity to cross-examine the witness or witnesses. Tompkins *v.* Harrison, 6 Madd. 315; Loveden *v.* Milford, 4 Bro. C. C. 540; Rowe *v.* ——, 13 Ves. 261.

It seems that while the defendant may equally with the plaintiff examine witnesses *de bene esse*, yet until he has appeared and answered he is not entitled to a commission for that purpose. Sherward *v.* Sherward, 2 Ves. & B. 116; Williams *v.* Williams, 1 Dick. 92; Woodmar *v.* Warner, 2 Fowl. Ex. Pr. 131. *Compare* Brown *v.* Child, 3 Sim. 457.

2. Rowe *v.* ——, 13 Ves. 261; 2 Story Eq. Jur. (11th Ed.) § 1514.

A witness is not considered as being aged within the rule until he has attained the age of seventy years, when the commission issues, as a matter of course. Fitzhugh *v.* Lee, Ambl. 65; Prichard *v.* Gee, 5 Madd. 364; Shelley *v.* ——, 13 Ves. 56; Rowe *v.* ——, 13 Ves. 261.

But it seems that on the trial it will not be sufficient to admit the deposition as evidence to show simply the witness' extreme old age; his inability to attend the trial must be shown. Jackson *v.* Rice, 3 Wend. (N. Y.) 180.

3. Shillitoe *v.* Claridge, 2 Chit. 426.

In the case of Wright *v.* Doe *dem.* Tatham, 1 Ad. & E. 19; s. c., 28 Eng. C. L. 191, a witness having died before the second trial of the action, his evidence given on the former trial was held admissible on the second, although there were other parties plaintiff, and some of the defendants in the former suit were not parties in the second. And in Doe *v.* Derby, 1 Ad. & E. 791; s. c., 28 Eng. C. L. 791, where the parties and the title were the same, although the lands sought to be recovered were different, the testimony of a witness on a former trial was received at a subsequent one. Yet the identity of title and of one of the parties is not sufficient, the other party not being the same or privy to him. Doe *v.* Derby, 1 Ad. & E. 791; s. c., 28 Eng. C. L. 791.

It seems that the testimony must be proven unless by agreement, by the judge's notes, or by a person present, who can prove what the witness said. Mayor of Doncaster *v.* Day, 3 Taunt. 262; Strutt *v.* Bovingdon. 5 Esp. 56; King *v.* Joliffe, 4 T. R. 290.

4. Phillips *v.* Carew, 1 P. Wms. 117; Fitzhugh *v.* Lee, 1 Ambl. 65; Shelley *v.* ——, 13 Ves. 56; Rowe *v.* ——, 13 Ves. 261; Bellamy *v.* Jones, 8 Ves. 31; Shirley *v.* Earl Ferrers, 3 P. Wms. 77; Palmer *v.* Aylesbury, 15 Ves. 176; Andrews *v.* Palmer, 1 Ves. & B. 21; Corbett *v.* Corbett, 1 Ves. & B. 335; Atkins *v.* Palmer, 5 Madd. 19; Drew *v.* Clarke, 1 Sim. & S. 108; Jepson *v.* Greenaway, 2 Fowl. Ex. Pr. 103.

English Practice.—Under the chancery practice in England, where the testimony of a material witness is likely to be lost by death or departure from the realm, a bill to perpetuate the testimony is granted to take the deposition of such witness. See Gresley Eq. Ev. 129; 1 Smith Ch. Pr. 765.

In 1842 the writ *de bene esse* was extended so as to enable any person, who, under the circumstances alleged by him to exist, would be entitled to certain legal remedies on the happening of a specified future event, though not before, to file a bill in chancery to perpetuate.

New York Practice.—See 2 Fay's Stats. div v., pp. 8–10.

Sickness in Family.—The deposition of a woman who had a sick child she could not leave admitted in Avery *v.* Woodruff, 1 Root (Conn.), 76.

(*c*) *Witness the Only One.*—Where a material witness is the only one[1] to the point, he may be examined *de bene esse*, although neither aged, infirm, or ill, nor going beyond the jurisdiction of the court.[2]

(*d*) *Witness About to Leave Jurisdiction.*—A commission will issue to examine a witness *de bene esse* who is material, and who is about to go beyond the jurisdiction of the court,[3] although only into another State or country, under the same general govern-

Pregnant Woman.—Deposition taken *de bene esse* of a woman in an advanced state of pregnancy, and who had probably been delivered about the time of the trial, held to be admissible in evidence in Barton *v.* Morphis, 4 Dev. L. (N. Car.) 240; Clarke *v.* Dibble, 16 Wend. (N. Y.) 601. Yet under the English statute, providing for and regulating the examination of witnesses *de bene esse*, which is identical with that of New York, and similar to those of most of the other States, it has been doubted whether advanced pregnancy or imminent delivery be a cause for the examination of a witness *de bene esse*. Abraham *v.* Newton, 8 Bing. 274; s. c., 1 Moore & S. 384; 1 Dowl. Pr. Cas. 266. But it was there intimated that such a state of facts might be a sufficient cause, if the affidavit of a competent person were produced showing that the delivery would probably happen about the time of the trial.

1. Where a man was in possession of lands of his deceased wife, claiming as tenant by courtesy, and the evidence of his title rested exclusively in the knowledge of two witnesses, it was held that he was entitled to a bill perpetuating their testimony pending an action of ejectment brought by the wife's heirs, and that age and infirmity of the witnesses were not necessary. Hall *v.* Stout, 4 Del. Ch. 269.

2. May *v.* May, 28 Ala. 141; Angell *v.* Angell, 1 Sim. & S. 83, 92, 93; Shirley *v.* Ferrers, 3 P. Wms. 77, 78; Pearson *v.* Ward, 1 Cox, 177; s. c., 2 Dick. 648; 6 Madd. 315; Bridges *v.* Hatch, 1 Cox, 423; Hankin *v.* Middleditch, 2 Bro. Ch. 640; Cholmondeley *v.* Oxford, 4 Bro. C. C. 157.

It has been held that the rule does not extend to cases where there is more than one witness to the same fact, unless upon the ground of the age or infirmity of the witness; and where one of two surviving witnesses to a will was neither seventy nor in a state of dangerous illness, but was in prison charged with a capital felony, an application for a commission to examine him *de bene esse* was not granted. Anon., 19 Ves. 321.

But a bill for the examination of a single witness has been sustained where his evidence was of the utmost importance, and he was the only witness to the point, apparently upon the single ground that he was the only witness, because of the uncertainty of life, there being danger of losing all evidence of the matter before it could be given in a court of law. Pearson *v.* Ward, 2 Dick. 648; Shirley *v.* Ferrers, 3 P. Wms. 77; Bellamy *v.* Jones, 8 Ves. 32.

Upon a suggestion merely, there being no affidavit, that if certain persons should die, their death would be prejudicial to the plaintiff's title, a commission issued to examine witnesses *de bene esse* on the part of the defendant, although he had not answered. Bagnold *v.* Green, 1 Dick. 2; s. c., Corey's Rep. 48.

But it is held that a court of law will not grant a commission to examine a witness *de bene esse* on the ground that he is the only witness having knowledge of a fact material to the defence, it not being stated that he was sick or infirm; the practice of the English Chancery, in this particular, having never been adopted by the courts of law in this country. Carloss *v.* Colclough, 1 Brev. (S. Car.) 462.

3. Byrne *v.* Byrne, 2 Moll 440; Shirley *v.* Ferrers, 3 P. Wms. 77; Palmer *v.* Aylesbury, 15 Ves. 176; Andrews *v.* Palmer, 1 Ves. & B. 21; Corbett *v.* Corbett, 1 Ves. & B. 335; Atkins *v.* Palmer, 5 Madd. 19; Dew *v.* Clarke, 1 Sim. & S. 108; Botts *v.* Verelst, 2 Dick. 454.

English Practice.—Under the English chancery practice, where the testimony of a material witness is likely to be lost by departure from the realm, a bill to perpetuate his testimony is granted to take his deposition. 1 Smith Ch. Pr. 765; Gresley Eq. Ev. 129; 1 Whart. Ev. sec. 181.

A commission will issue to take the deposition of an officer who is a material witness, and expects to be ordered away. Cardall *v.* Wilcox, 9 Johns. (N. Y.) 266.

It has been held that under the New Jersey statute the deposition of a witness about to leave the State may be taken by a justice of the peace before whom a

ment;[1] but not if it is in the power of the complainant to detain him until after the trial.[2]

A commission to examine witnesses *de bene esse* may be executed after the witness has left the State or jurisdiction.[3]

(*e*) *Witness Resides Abroad.*—A court of chancery will, upon a proper bill, grant a commission to examine material witnesses to the merits of the cause who reside or are abroad,[4] even though domiciled in the State.[5] Issuance of a commission to take testimony out of State is not of strict right,[6] and will be refused after trial and judgment.[7] Commissions to examine *de bene esse* wit-

cause is pending. Burley *v.* Kitchell, 20 N. J. L. 305.

1. Botts *v.* Verelst, 2 Dick. 454.

In the United States, from one State to another. 2 Story Eq. Jur. (11th Ed.) sec. 308.

2. East India Co. *v.* Naish. Bunb. 320.

3. Boston *v.* Bradley, 4 Harr. (Del.) 524.

In *Arkansas* the provision of law authorizing the taking of depositions of a witness residing or about to remove out of the State extended so as to confer that privilege on defendant in criminal case. Giboney *v.* Rogers, 32 Ark. 462.

New York Practice.—It has been the practice in New York and elsewhere from an early period, when a witness was about to depart the State, and there was no probability of his returning so as to appear at the trial, to allow his testimony to be taken *de bene esse* upon application verified by affidavit and motion for that purpose, without previous notice of such motion. Rockwell *v.* Folsom, 4 Johns. Ch. (N. Y.) 165. And this practice has ever received the sanction of the courts as tending to prevent unnecessary delay or the loss of evidence. Wait *v.* Whitney, 7 Cow. (N. Y.) 69; Mumford *v.* Church, 1 Johns. Cas. (N. Y.) 147, 150; Sandford *v.* Burrell, Anth. N. P. (N. Y.) 184.

This practice grew up without any statutory provision, and from analogy to the practice in English courts of examining witnesses, when going abroad, upon interrogatories provided the parties consented, and which has recently been incorporated into the statutes of that country. 1 Chit. Archb. 297; Grah. Pr. 584.

4. Brackett *v.* Dudley, 1 Cow. (N. Y.) 209; Brockway *v.* Stanton, 2 Sandf. (N. Y.) 640; Matthews *v.* Dare, 20 Md. 248; Thorpe *v.* Macauley, 5 Madd. 218; Devis *v.* Turnbull, 6 Madd. 232; Cock *v* Donovan, 3 Ves. & B. 76; Angell *v* Angell, 1 Sim. & S., 83 93; Mendizabel *v.* Machado, 2 Sim. & S. 483; Mondalay *v.* Morton, 1 Bro. Ch. 469; Bowden *v.* Hodge, 2 Swanst. 258; Cheminaut *v.* De la Cour, 1 Madd. 208; Baskett *v.* Toopsey, 6 Madd. 261. See Block *v.* Hass, 8 Abb. Pr. (N. Y.) 335; Bigelow *v.* Mallory, 17 How. Pr. (N. Y.) 427; McCarty *v.* Edwards, 24 How. Pr. (N. Y.) 236.

5. Pooler *v.* Maples, 1 Wend. (N. Y.) 65.

This power is said to be inherent in courts of equity, independent of any power conferred by statute. Brown *v.* Southworth, 9 Paige Ch. (N. Y.) 351. But courts of common law possess it only so far as given them by statute. M'Cotter *v.* Hooker, 8 N. Y. 497.

6. Ring *v.* Mott, 2 Sandf. 683.

An affidavit that some of the witnesses of the plaintiff reside out of the limits of the State, not sufficient to authorize a commission to take depositions *de bene esse*. Lesne *v.* Pomphrey, 4 Ala. 77.

It has been held that an order for a commission to take testimony out of the State will not be granted before issue joined in the cause. Jackson *v.* Bankcraft, 3 Johns. (N. Y.) 259. And not at all on supplementary proceedings. Graham *v.* Colburne 6 Duer (N. Y.), 618; s. c., 14 How. Pr. (N. Y.) 52.

7. McColl *v.* Sun Mut. Ins. Co., 34 N. Y. Super. Ct. Rep. 310.

A commission to take testimony *de bene esse* will not be denied because the opposite party makes oath that he is not interested; that question will be determined on the trial of the cause. Graves *v.* Delaplaine, 11 Johns. (N. Y.) 200.

Court will not grant a commission to examine foreign witnesses *de bene esse*, directing that their examination be oral, and not by interrogatories. It has ever been the uniform practice to annex interrogatories. Bank of Silver Creek *v.* Browning, 16 Abb. Pr. (N. Y.) 272; Deshon *v.* Packwood, 16 Abb. Pr. (N. Y.) 272, note. *Compare* Clayton *v.* Yarrington, 16 Abb. Pr. (N. Y.) 273, note.

If the witness be found within the State where the commission was granted, his deposition may be taken. Cox *v.* Cox, 2 Port. (Ala.) 533.

nesses residing abroad, while grantable in civil actions only,[1] yet are not confined to cases purely *ex contractu*, or involving the rights of property, but are granted in cases of suits for torts, although such torts may be indictable.[2]

5. Who May Bring.—Like bills *in perpetuam*. bills *de bene esse* may be brought by persons having an interest in the subject-matter to which the evidence relates, whether they be in possession or out of possession,[3] in aid of the trial at law.[4]

6. What the Bill Must Show.—The bill must set forth all the material facts upon which the right to maintain it depends, whether it be the age or infirmity of witnesses, the fact that the witnesses are about to leave the country, or that there is but one witness to the fact[5] and that a suit is pending.[6]

7. Affidavit to Bill.—There should be an affidavit annexed to the bill showing the circumstances by which the evidence, intended to be perpetuated, is in danger of being lost by death, departure from the country, or otherwise.[7] Where the object is to

It has been held in Indiana that depositions *de bene esse* may be taken where the witness is out of the State, in an action pending in the mayor's court of a city. Reeves *v.* Allen, 42 Ind. 359.

It is said that in Michigan a probate court has power under Rev. Stat. 435, secs. 28, 30; 385, secs. 6, 7, to issue a commission to take the deposition of witnesses to a will, who reside out of the State. High, Appellant, 2 Doug. (Mich.) 515.

Under a law authorizing testimony of parties to an action to be taken, the testimony of one living out of the State may be taken by commission issuing by order of court. Huggins *v.* Caster, 7 Ala. 630.

It has been said by the Supreme Court of South Carolina that no witness residing within the State can be examined *de bene esse* by common law; and that there is no statute authorizing an examination of a witness residing within forty miles of the place of trial merely because he is president of a branch bank. English *v.* English, 2 McCord L. (S. Car.) 238.

1. See note 8, p. 286. CRIMINAL CASES.

At common law, a commission to take the deposition of a non-resident witness cannot issue at the instance of the defendant in a criminal case. *Ex parte* Harkins, 6 Ala. 63.

The provision of the laws in Arkansas authorizing taking the deposition of a foreign witness, have been extended to defendants in criminal trials. Giboney *v.* Rogers, 32 Ark. 462.

2. Macaulay *v.* Shackell, 1 Bligh N. S., 96, 126, 127, 129.

Thus it has been held that a commission would be granted to take the testimony of witnesses abroad, for the purpose of establishing a justification in a civil suit for libel, notwithstanding the fact that the justification involves a criminal charge against the plaintiff, and also that the bill may be the subject of indictment. Macaulay *v.* Shackell, 1 Bligh N. S., 96. 126, 127. 129.

3. It has been said that the broad distinction between bills *de bene esse* and bills *in perpetuam* is that "the latter are and can be brought by persons only who are in possession under their title, and who cannot sue at law, and thereby have an opportunity to examine their witnesses in such suit." 2 Story Eq. Jur. (11th Ed.) sec. 1513.

4. Cooper Eq. Pl. 57; 1 Mad. Ch. Pr. 153; Jeremy Eq. Jur. 277; 2 Story Eq. Jur. (11th Ed.) sec. 1513; Story Eq. Pl. (8th Ed) sec. 307.

5. 2 Barb. Ch. Pr. 145; Story Eq. Pl. (8th Ed.) sec. 309.

6. Angell *v.* Angell. 1 Sim. & S. 83.

A bill for a commission to examine witnesses abroad in aid of a trial at law, where a present action might be brought. is held to be demurrable unless it averred that an action was pending. Angell *v.* Angell, 1 Sim. & S. 91. *Compare* Moodaley *v.* Morton, 2 Dick. 652; s. c., ——— ———, 1 Bro. P. C. 469; Angell *v.* Angell, 1 Sim. & S. 91.

7. Angell *v.* Angell, 1 Sim. & S. 83, 89; Phillips *v.* Carew, 1 P. Wms. 117; Andrews *v.* Palmer, 1 Ves. & B. 23; Shirley *v.* Ferrers, 3 P. Wms. 77; Suffolk *v.* Green, 1 Atk. 450.

It has been said that the principle on which it is required in these cases to an-

examine witnesses *de bene esse* as well as to take depositions *in perpetuam rei memoriam*,[1] the affidavit should be positive as to the material facts and circumstances of the case,[2] but need not specify in detail the particular facts which it is sought to be proved by the witness.[3] It should also state the place of residence and description of witnesses to be examined,[4] as well as give their names where with reasonable diligence they can be ascertained.[5] The affidavit may be made before the clerk of the court where the cause is pending[6] by an agent,[7] or an attorney in fact, or any other person, cognizant of the facts, where no stay is desired,[8] without showing any excuse for its not being made by

nex to the bill an affidavit of the circumstances which render the examination of witnesses proper in a court of equity seems to be the same as that on which the practice of annexing an affidavit of the loss or want of an instrument to a bill seeking to obtain in a court of equity the mere legal effect of the instrument is founded, namely that the bill has a tendency to change the jurisdiction of the subject-matter, from a court of law to a court of equity, which ought not to be permitted on the bare allegation of the plaintiff in the bill. Mitf. & Tyl. Pl. & Prin. Eq. 242, 243; Cooper Eq. Pl. 57.

Judge Story says (Equity Pl. 8th Ed. sec. 309) that this reason is "not quite satisfactory; because the aim of the bill is in no sort to change the forum in which the merits ot the cause are to be heard and tried, but merely to prevent the loss of the testimony at the trial. A better ground would seem to be, that the bill has a tendency to create delays, and may be used as an instrument unduly to retard the trial, and therefore an affidavit that the bill is well founded is required." See Angell *v.* Angell, 1 Sim. & S. 83, 92.

1. See Angell *v.* Angell, 1 Sim. & S. 83; Phillips *v.* Carew, 1 P. Wms. 117; Shirley *v.* Ferrers, 3 P. Wms. 77.

2. Infirm or Ill, etc., Witness. — As where the witness is seventy years old, or in a dangerous state of health, or about to leave the country. Ballamy *v.* Jones, 8 Ves. 31.

One Witness.—Where the bill is for the purpose of taking the testimony of a single witness who is the only one to a material fact, the affidavit annexed to the bill must state that the particular witness knows the fact, as well as the particular points to which his evidence is meant to apply. Pearson *v.* Ward, 1 Cox, 177; s. c., 2 Dick. 648. And that he is the only person who does know it; mere information or belief on the part of the party making the affidavit is not sufficient. Rowe *v.* ——, 13 Ves. 261. He must set forth grounds for his belief that the witness is the only one to the fact. Rowe *v.* ——, 13 Ves. 261.

Where the application is made by the defendant, it may be expedient, although it is not required, to swear to merits. Baddeley *v.* Gilmore, 1 M. & W. 55; Westmoreland *v.* Huggins, 1 Dowl. (N. S.) 800.

Non-Residence of Witness.—An affidavit to show that a witness lives out of the State, to procure a commission to take his deposition, need not be taken on notice. Den *v.* Wood, 10 N. J. L. 62. The affidavit must show that the witness is material, and out of the jurisdiction of the court. Brackett *v.* Dudley, 1 Cow. (N. Y.) 209; Franklin *v.* United Ins. Co., 2 John. Cas. (N. Y.) 285; Lansing *v.* Mickels, 1 How. Pr. (N. Y.) 248. But the affidavit has been said to be sufficient if it shows "to a common intent" that the witness is a non-resident. Boardman *v.* Ewing, 3 Stew. & P. (Ala.) 293.

An affidavit of non-residence made five months before the commission issued is sufficient, because continued non-residence will be presumed until the contrary is shown. Pharr *v.* Bachelor, 3 Ala. 237.

3. Hynes *v.* McDermott, 7 Daly (N. Y.), 513, 520; s. c., 55 How. Pr. (N. Y.) 263.

4. O'Ferrell *v.* O'Ferrell, 2 Moll. 364.

5. Wright *v.* Jersup, 3 Duer (N. Y.), 642; Shaffer *v.* Wilcox, 2 Hall (N. Y.), 502.

It has been held to be sufficient if a part only of witnesses are named if the application appears to be in good faith. Beresford *v.* Easthope, 8 Dowl. P. C. 294; Dimond *v.* Vallance, 7 Dowl. P. C. 590.

6. Wolfe *v.* Palmer, 18 Ala. 441.

7. Johnson *v.* Lynch, 15 How. Pr. (N. Y.) 199.

8. Demar *v.* Van Zandt, 2 Johns. Cas. (N. Y.) 69.

the party himself.[1] The affidavit need not state that without such evidence the party cannot safely proceed to trial.[2]

8. Modes of Examination.—There are two methods of taking the testimony of witnesses examined *de bene esse* in most if not all of the States, to wit, (1) under order of the court, upon special application therefor; and (2) by summary proceedings under the statute.[3]

9. Defences.—The adverse party, by way of defence to the application, may show cause against such examination by proof of want of due notice or showing other irregularity,[4] by casting doubt upon or discrediting the good faith of the application,[5] by showing that the expense of the commission will be more than the amount involved,[6] or by showing that the witness is not about to depart from the State, or that he is not sick or infirm, or that the application for his examination is made collusively, to avoid his being examined on the trial; and upon any such cause being shown, the application will be dismissed. Or where it is made to appear that the application has been delayed until a very short time before the departure of the witness with a sinister intention to prevent

1. Murray *v.* Kirkpatrick, 1 Cow. (N. Y.) 260; Eaton *v.* North, 7 Barb. (N. Y.) 631; s. c., 3 Code Rep. (N. Y.) 234.

An order was made for a commission to issue to examine witnesses *de bene esse*, where the witness himself made affidavit that he was a mariner with his home at Havanna, that he was about to return home, that the complainant was out of the State, and that he was informed by the complainant's attorney that his evidence was material. Fort *v.* Ragussin, 2 John. Ch. (N. Y.) 146.

2. Brackett *v.* Dudley, 1 Cow. (N. Y.) 209.

But if the party making the application wishes a stay of proceedings, he must make the usual affidavit of merits. Meech *v.* Calkins, 4 Hill (N. Y.), 534; Dreshan *v.* Hoyt, 1 Wend. (N. Y.) 27.

New York Practice.—In a proceeding under the New York Act to perpetuate the testimony of witnesses, it is not necessary to state in the affidavit, on which the order for examination is founded, the probable inability of the witness sought to be examined to attend the trial. Jackson *v.* Perkins, 2 Wend. (N. Y.) 308, 316. As to what affidavit shall contain, see N. Y. Code Civil Proc. secs. 872, 873.

3. 1 Barb. Ch. Pr. (2d Ed.) 270.

Under Order of Court.—The ancient mode of examining witnesses *de bene esse* was by a commission under the order of the court. 1 Barb. Ch. Pr. (2d Ed.) 270, 274. See Linau *v.* Henderson, 1 Bland, 283.

Form of Commission.—The form of the commission to examine witnesses *de bene esse* is about the same as that to examine witnesses in chief, except that the former specifies the particular witnesses to be examined, and does not authorize the examination of witnesses generally. 1 Barb. Ch. Pr. (2d Ed.) 274.

Manner of Examination.—The manner of examination of witnesses *de bene esse* is the same as that of witnesses in chief before an examiner, or commissioner, or in a court of law. Ward *v.* Whitney, 8 N. Y. 442; Mallory *v.* Perkins, 9 Bosw. 572. See Brooks *v.* Schultz, 5 Rob. (N. Y.) 656; s. c., 3 Abb. Pr. N. S. (N. Y.) 124. And must be made upon notice to the opposite party, that he may have an opportunity to appear and cross-examine. Lovenden *v.* Milford, 4 Bro. C. C. 540; Heinde Pr. 313; 2 Barb. Ch. Pr. (2d Ed.) 275. See also, *infra*, 3. NOTICE.

Under Statute.—The examination of witnesses *de bene esse* by summary proceedings under statutory provisions is regulated in each case by the particular statute under which the examination is had.

4. Starbuck *v.* Hall, 1 How. Pr. (N. Y.) 58; La Farge *v.* Luce, 2 Wend. (N. Y.) 242.

5. See Vandervoost *v.* Columbia Ins. Co., 3 John. Cas. (N. Y.) 137; Rogers *v.* Rogers, 7 Wend. (N. Y.) 514; Lloyd *v.* Key, 3 Dowl. P. C. 253; Adams *v.* Carfield, 28 L. J. (Exch.) 31.

6. Mitchell *v.* Montgomery, 4 Sandf. (N. Y.) 676.

the cross-examination of the witness, this would seem to be a sufficient cause for dismissing the application.[1]

10. Statute Must be Strictly Pursued.—Bills to examine witnesses *de bene esse* being, like bills *in perpetuam*, in derogation of the common law,[2] are to be strictly construed and minutely complied with.[3]

11. Notice.—In all cases of depositions to perpetuate testimony both in bills *in perpetuam rei memoriam* and bills to examine witnesses *de bene esse*, whether under statutory provisions or in the ordinary equity practice, all parties interested must have due or reasonable notice of the time and place of examination,[4] and will be compelled to appear and answer.[5]

(*a*) *Service.*—The rule as to the service of notice is not uniform throughout the States. In some cases it is held that the notice must be personally served,[6] while in others it is said that such

1. Pirie *v.* Iron, 8 Bing. 143; s. c., 1 Moore & S. 232; 1 Dowl. Pr. Cas. 252.

2. See STATUTORY REQUIREMENTS, p. 284.

3. Jackson *v.* Hobby, 2 John. (N. Y.) 361; Winooskie Turnpike Co. *v.* Ridley, 8 Vt. 404; Wallace *v.* Mease, 4 Yeates (Pa.), 520.

The power conferred by the commission cannot be delegated to another. Cappeau *v.* Baker, 1 Harr. & G. (Md.) 154. But the mere writing of the deposition may be done by a clerk, employed by and done under the direction of the commissioner. Keene *v.* Meade, 1 Pet. (U. S.) 1; MacDonald *v.* Garrison, 9 Abb. Pr. (N. Y.) 35; s. c., 18 How. Pr. (N. Y.) 249.

4. Dearborn *v.* Dearborn, 10 N. H. 473; Welles *v.* Fish, 3 Pick. (Mass.) 74; Faunce *v.* Gray, 21 Pick. (Mass.) 243; Underwood *v.* Lacapere, 10 La. Ann. 766; Moses *v.* Gunn, 1 Root (Conn.), 307; Whiting *v.* Jewel, Kirby (Conn.), 1; Brooks *v.* Schultz, 3 Abb. Pr. N. S. (N. Y.) 124; Wait *v.* Whiting, 7 Cow. (N. Y.) 69; Middleton *v.* Taylor, 1 N. J. L. 445; Arnold *v.* Renshaw, 11 N. J. L. 317; Dambmann *v.* White, 48 Cal. 439.

If depositions are taken *ex parte*, without notice, they will be suppressed. Loveden *v.* Milford, 4 Bro. C. C. 540.

The New York Statute authorizing the examination of witnesses *de bene esse* (2 R. S. 392), and the subsequent amendment thereto (2 R. S. 398, § 8), must, it has been held, be construed as requiring such notice to be given as will enable the party to be present at the examination either in person or by attorney. Elverson *v.* Vanderpoel, 41 N. Y. Super. Ct. Rep. 257.

Under the California Statute.—Upon an application for a commission to take depositions of foreign witnesses, the only notice required is a service upon the opposite party of the order of the court requiring the party to show cause on the day named in the commission. Dambmann *v.* White, 48 Cal. 439.

In Massachusetts—In Faunce *v.* Gray, 21 Pick. (Mass.) 243, prior to the commencement of an action against an administrator, his deposition was taken *in perpetuam*, at the instance of the plaintiff, in relation to facts which came to his knowledge before he was appointed administrator; but notice was not given to him as a party interested, and the court held that the deposition was not admissible in evidence, *as a deposition*, in an action by the heir against such administrator, because such notice was not given.

Federal Practice.—It has been said that in taking depositions under the Federal Judiciary Act (R. S. § 866), notice is to be given by the magistrate and not by the party. Young *v.* Davidson, 5 Cr. C. C. (U. S.) 515.

5. Ellice *v.* Roupell, 2 New Rep. 3, 150; s. c., 32 Beav. 299, 308, 318.

The complaint compels the appearance and answer of the defendant, and the suit is proceeded with in the usual way, by filing a replication and issuing a commission or subpœna for the examination of witnesses. 1 Smith Ch. Pr. 135; Welf. Eq. Pl. 147; 2 Barb. Ch. Pr. (2d Ed.) 143.

6. Carrington *v.* Stimson, 1 Curt. C. C. (U. S.) 437; McEwer *v.* Morgan, 1 Stew. (Ala.) 190.

Service of notice upon one partner, in an action against copartners, is a sufficient service. Cox *v.* Cox, 2 Port. (Ala.) 533.

service is not necessary.[1] And it has been held that service by leaving copy of notice at place of abode is not sufficient,[2] where the party swears that he did not receive it.[3]

(*b*) *Must be Reasonable.*—The notice should be reasonable; and what is reasonable notice will depend upon the circumstances a each particular case.[4]

(*c*) *What Should Contain.*—The notice must indicate the time and place of the examination, the name of magistrate or officer, and the parties to the action.[5]

1. Elverson *v.* Vanderpoel, 41 N. Y. Super. Ct. Rep. 257. This case was governed by New York statute regulating service of notice. See 2 Rev. Stat. 392, 398, § 8.

2. Carrington *v.* Stimson, 1 Curt. C. C. (U. S.) 437.

Manner of Service.—On the other hand, it has been held that service by leaving copy of notice at party's residence is sufficient. Kennedy *v.* Fairman, 1 Hayw. (N. C.) 404.

But proof that notice was left at the party's house, without stating that it was left with any person, it seems, is not sufficient evidence of service. Crozier *v.* Gano, 1 Bibb (Ky.), 257.

Service by reading notice is sufficient if no copy is demanded. Brewington *v.* Endersby, 4 Greene (Iowa), 263.

And even a verbal notice has been held to be good where the fact of notice was not denied. Milton *v.* Rowland, 11 Ala. 732.

Service of notice cannot be shown by parol evidence. Barnes *v.* Ball, 1 Mass. 73. And the oath of a party is not admissible to prove service of notice. Lockwood *v.* Adams, 10 Ohio, 397.

On Attorney.—The rule as to service of notice upon attorney of record of the party is conflicting. In some cases it is held that notice personally served upon such attorney is sufficient, even though he may have appeared without authority. Smith *v.* Bodwitch, 7 Pick. (Mass.) 137. Or has withdrawn from the case, and even though the party serving the notice was apprised of that fact before making the service. Herrin *v.* Libby, 36 Me. 350. And even where required by statute to be given to the party personally. Hunt *v.* Crane, 33 Miss. 669.

Other cases hold that notice served on the attorney of the party is irregular, and not sufficient service. See Middleton *v.* Taylor, 1 N. J. L. 445; Arnold *v.* Renshaw, 13 N. J. L. 317; Buddicum *v.* Kirk, 3 Cr. (U. S.) 293; Wheaton *v.* Love, 1 Cr. C. C. 429; Leipes *v.* Bickley, 1 Cr. C.C. (U. S.) 29. Where the party resides in the State. Williams *v.* Gilchrist, 3 Bibb (Ky.), 49. Though sufficient where he is a non-resident. Pettis *v.* Smith, 2 A. K. Marsh. (Ky.) 194.

But it is said that notice directed to the party may be served upon his attorney. Barrel *v.* Limington, 4 Cr. C. C. (U. S.) 70.

3. Hill *v.* Norvell, 3 McLean (U. S.), 583.

4. Atwood *v.* Fricot, 17 Cal. 37; Ellis *v.* Jaszynsky, 5 Cal. 444.

One day's notice to take depositions in a place to a person residing two miles away, *held* to be reasonable in McGinley *v.* McLaughlin, 2 B. Mon. (Ky.) 302.

Notice to examine witness in the place where the notice was served at eight o'clock in the evening of same day on which the notice was served, where witness was going to leave the State the following morning, *held* good in Mumford *v.* Church, 1 John. Cas. (N. Y.) 147.

Five days' notice to take depositions eighty-three miles away *held prima facie* reasonable in Dean *v.* Tygert, 1 A. K. Marsh. (Ky.) 172.

Any notice requiring exertion beyond usual mode of travelling is not reasonable. Shropshire *v.* Dickinson, 2 A. K. Marsh. (Ky.) 20; Waters *v.* Harrison, 4 Bibb (Ky.), 87; Kincaid *v.* Kincaid, 1. J. J. Marsh. (Ky.) 100.

In a commission to take depositions on omission to designate what notice shall be given, will not exclude the deposition, where it is made to appear that sufficient or reasonable notice was given. Parker *v.* Haggerty, 1 Ala. 632; Brahan *v.* Debrell, 1 Stew. (Ala.) 14; Lesne *v.* Pomphrey, 4 Ala. 77.

5. Kingsbury *v.* Smith, 13 N. H. 109.

A notice will not be sufficient if it omits the place where the depositions are to be taken. Hunter *v.* Fulcher, 5 Rand. (Va.) 126.

The notice should also contain the names of the witnesses whose depositions are to be taken. Robertson *v.* Campbell,

(*d*) *Defective—Waiver.*—Appearance, in person or by attorney, at the examination, without objection, is a waiver of all defects in or of want of notice, and all irregularities,[1] but does waive want of *didimus*.[2]

(*e*) *Sufficiency—Indefiniteness.*—The notice will be sufficient if it is in substance according to the form prescribed by the statute.[3]

12. Publication.—The publication of depositions taken *in perpetuam* is a matter resting in the sound discretion of the court, controlled by the special circumstances surrounding each case;[4] but, as a rule, publication will not be made while the witness is yet living,[5] or capable of attendance at court, and in support of an action.[6]

1 Overt. (Tenn.) 172; Minot *v.* Bridgewater, 15 Mass. 492; Barnes *v.* Ball, 1 Mass. 73. But need not state the residences of the witnesses. Hays *v.* Borden, 6 Ill. (1 Gilm.) 46.

Some cases also hold that the notice should state when the court, where the case is pending, is to be held. Eastman *v.* Coos Bank, 1 N. H. 23; Great Falls Mfg. Co. *v.* Mathes, 5 N. H. 574.

1. Martin *v.* Brown, 8 Blackf (Md.) 443; Connersville *v.* Wadleigh, 6 Blackf. (Ind.) 297; Nevan *v.* Roup, 8 Iowa, 207; Talbot *v.* Bradford, 2 Bibb (Ky.), 316; George *v.* Nichols, 32 Me. 179; Crooker *v.* Appleton, 25 Me. 131; Ragan *v.* Cargill, 24 Mass. 540; Goodfellow *v.* Landis, 36 Mo. 168; Taylor *v.* Ladew, 33 Mo. 205; Seymour *v.* Farrell, 51 Mo. 95; Jackson *v.* Perkins, 2 Wend. (N. Y.) 308; Jackson *v.* Kent, 7 Cow. (N. Y.) 59; Rushmore *v.* Hall, 12 Abb. Pr. (N. Y.) 420; Kea *v.* Robinson, 5 Ired. (N. Car.) Eq. 373; Shutte *v.* Thompson, 15 Wall. (U. S.) 151; Miller *v.* McDonald, 3 Wis. 673.

2. Seymour *v.* Farrell, 51 Mo. 95.

3. Dorrance *v.* Hutchinson, 22 Me. 357.

Actual notice is said to be sufficient notice under Michigan Rev. Stat. 1838, tit. 2, ch. 4; Pickard *v.* Polhemus, 3 Mich. 185.

Service of a copy of the order to show cause on day named in the commission, *held* to be a sufficient notice to take the depositions of foreign witnesses, under the California statute. Dambmann *v.* White, 48 Cal. 439.

Notice to take depositions on a given day, and if not on that day, two weeks subsequent, *held* to be a legal notice in Moore *v.* Humphreys, 2 J. J. Marsh. (Ky.) 54.

So is notice to take depositions on the fifth or sixth of a designated month. Kennedy *v.* Alexander, 1 Hayw. (N. C.) 25.

But a notice to take upon two successive days is irregular. Carmalt *v.* Post, 8 Watts (Pa.), 406.

And a notice to take depositions on fourth, fifth, and sixth days of a specified month, or on one or more of them, is indefinite and insufficient. Humphries *v.* McCraw, 5 Ark. 61; Caldwell *v.* McNicar, 9 Ark. 364; Reardon *v.* Farrington, 7 Ark. 364; Harris *v.* Hill, 7 Ark. 452.

A notice to take depositions on a particular day of each week for three successive months is not good. Bedell *v.* State Bank, 1 Dev. L. (N. C.) 483.

Notice to take depositions on Sunday is not good. Sloane *v.* Willford, 3 Ired. L. (N. C.) 307. But a notice to take depositions on the Fourth of July, that day not being a legal holiday, is good. Rogers *v.* Brooks, 30 Ark. 612.

4. Harris *v.* Cotterell, 3 Meriv. 678, 680.

To obtain an order to publish depositions, a notice of motion must be served, supported by an affidavit that they are necessary to be made use of in the complainant's behalf, or that the witnesses are dead, or so infirm that they cannot attend and give evidence at the trial without danger of life; or that they are, or will be at the time of the trial, out of the State. 1 Smith Ch. Br. 336; 2 Barb. Ch. Pr. 144.

5. There are very few cases in which publication has been ordered during the lifetime of the witnesses. Barnsdall *v.* Lowe, 2 Russ. & Myl. 142. And as to some in which it has been ordered, doubts have been expressed. Barnsdall *v.* Lowe, 2 Russ. & Myl. 142.

The publication of depositions for the purpose of perfecting the title to an estate will not be allowed, even where the witnesses are dead. Teale *v.* Teale, 1 Sim. & S. 385.

6. Wequelin *v.* Wequelin, 2 Curt. C. C. (U. S.) 263; Morrison *v.* Arnold, 19

Rules.—The true rules of publication seem to be: First. In the examination of witnesses to a will *per testes*, none but subscribing witnesses being examined, and the question of the sanity or insanity of the testator being merely incidental, they stand upon distinct grounds, and publication is made as a matter of course.[1] Second. In the ordinary examination *in perpetuam* publication is not allowable until after the death of the witness, because of the dangers incident thereto, there being no limit respecting the points as to which the witnesses are examined.[2] Third. In examinations *de bene esse* the depositions will not be published, but by the consent of the parties, or on a strong case made to the court.[3]

13. Costs.—Where the devisee under a will exhibits a bill in chancery to perpetuate the testimony of the witnesses thereto, the heir is entitled to his costs, if he only cross-examines the witnesses,[4] but if he contests the will and uses the bill as a bill to perpetuate testimony on his part, he will not be entitled to his costs.[5] The costs of perpetuating the testimony of witnesses to a will have been allowed to a purchaser.[6]

The court will not impose upon a party applying for a commission to examine witnesses out of State the terms of payment of costs to his adversary.[7]

Ves. 670; Attorney-General *v.* Ray, 2 Hare, 518.

By the English practice the court will not allow a deposition taken under a bill *in perpetuam* to be published, except in support of a suit or action; and then only after the death of the witness, or in case of his being sick, or incapable of travelling, or being prevented by accident from attending to be examined. Morrison *v.* Arnold, 19 Ves. 669; Barnsdale *v.* Lowe, 2 Russ. & Myl. 142.

Depositions taken *de bene esse* are never used except for the purpose of supplying the want of an examination in chief, and where a witness who has been examined *de bene esse* testifies differently on an examination in chief in open court, the deposition cannot be introduced to show the contradiction. Cann *v.* Cann, 1 P. Wms. 567.

1. Harris *v.* Cotterell, 3 Meriv. 678–680.

2. Barnsdale *v.* Lowe, 2 Russ. & Myl. 142.

3. Harris *v.* Cotterell, 3 Meriv. 680; Gilb. For. Roman. 140.

If it is shown to the satisfaction of the court that the witness has died since the taking of his deposition, or is unable from any cause to attend the trial at law, the deposition will be ordered to be published. Webster *v.* Pawson, 2 Dick. 540; Price *v.* Bridgeman, 1 Dick. 144; Bradley *v.* Crackenthorp, 1 Dick. 182; Gason *v.* Wordsworth, 2 Ves. Sr. 336, 337; Dow *v.* Clarke, 1 Sim. & S. 108; Gilb. For. Roman. 140. But where the witnesses are living at the time of the trial, are within the jurisdiction of the court, and capable of attending the trial, they must be examined over in open court. Gilb. For. Roman. 140, 141; 2 Story Eq. Jur. (11th Ed.) sec. 1516, note 2.

When the deposition of one witness or any number of witnesses less than the whole number is to be published, the officers of the court will be directed not to publish the depositions of the other witnesses. 1 Smith Ch. Pr. 336; 2 Barb. Ch. Pr. (2d Ed.) 144.

Where depositions taken on a bill to perpetuate testimony are required to be used in a trial at law, not under the control of the court, the depositions are published and an officer of the chancery court attends and produces to the court of law the record of the whole proceedings, that the parties may make such use of them as they can. Attorney-General *v.* Ray, 2 Hare, 518

4. Vaughan *v.* Fitzgerald, 1 Sch. & Lefr. 316; Bemey *v.* Eyre 3 Atk. 387.

5. Fouldes *v.* Midgley, 1 Ves. & B. 138; Vaughan *v.* Fitzgerald, 1 Sch. & Lefr. 316; Bemey *v.* Eyre, 3 Atk. 387.

6. Mackrell *v.* Hunt, 2 Madd. 34, 37, note; Acland *v.* Gaisford, 2 Madd. 28, 37, note.

7. Roumage *v.* Mechanics' Ins. Co., 12 N.J. L. 95.

BILL TO REMOVE CLOUDS FROM TITLE. (See also BILL QUIA TIMET; CANCELLATION; EQUITY; INJUNCTION; RESCISSION.)

1. **Definition.**—A cloud upon title is a title or encumbrance apparently valid, but in fact invalid.[1]

2. **When Maintainable.**—Whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately maintain or protect his right by any course of proceedings at law, a court of equity will afford relief by directing the instrument to be delivered up and cancelled, or by making any other decree which justice or the rights of parties may require.[2]

1. A party cannot maintain a suit to remove a cloud upon the title to land in which he has no interest, and upon the sole ground that he has warranted the title. Equity interferes to remove clouds upon titles because they embarrass the owner of the property clouded and tend to impede his free sale and disposition of it. Bissell *v.* Kellogg, 60 Barb. (N. Y.) 617; Huntingdon *v.* Allen, 44 Miss. 654; Lyon *v.* Hunt, 11 Ala. 295; Anderson *v.* Hooks, 9 Ala. 704; Sanxay *v.* Hungar, 42 Ind. 44; Harford *v.* Chipman, 21 Conn. 488.

What is a Cloud.—A title which, if asserted by action and put in evidence, would compel the production of defendant's title as a defence, is a cloud which the latter can call upon equity to remove. Lick *v.* Ray, 43 Cal. 83.

2. Martin *v.* Graves, 5 Allen (Mass.), 661; Dull's Appeal, 113 Pa. St. 510.

Deed, Lease, etc.—(*a*) *Non-joinder of Husband or Wife.*—Where a husband during coverture abstains from managing or claiming in any way his wife's property, but constantly declares it to be hers, he is deemed to have waived his marital rights, and equity will interfere to remove a cloud from his widow's title growing out of an exchange during coverture of one tract of her land for another tract. Barclay *v.* Henderson, 44 Ala. 269.

Where a wife does not join in a conveyance of a homestead, such conveyance is absolutely void, so far as it abridges her homestead rights, and she may by her next friend file a bill to remove the cloud, though she has never parted with the possession or occupancy. Williams *v.* Williams, 7 Baxter (Tenn.), 116.

(*b*) *Fraud.*—Where judgment creditors who have redeemed land sold under a power in a mortgage asked that an action of ejectment brought against them by alienees of the mortgagor claiming under a prior deed, not recorded till three months after execution, be enjoined, and the deed cancelled as fraudulent, there is ground for equitable relief, notwithstanding the pendency of the action by which their respective titles could be ascertained. Lehman *v.* Shook, 69 Ala. 486.

A court of equity has jurisdiction to remove the cloud cast over complainant's title by decreeing that alleged fraudulent grants to defendants should be delivered up and cancelled, as well as to prevent a multiplicity of suits growing out of titles to lots held under said grants in a city. Dart *v.* Orme, 4 Ga. 376.

(*c*) *Non-acceptance.*—A and B being tenants in common of land, A made a deed of his undivided half to C, which was recorded, but which C refused to accept.

A and B afterwards executed releases to each other, and B conveyed a certain interest to defendants. Defendants afterwards obtained a deed from the heirs of C, but his agent was notified by one of the heirs that their ancestor never owned the property. *Held*, that the deeds to C and from C's heirs should be cancelled. Jennings *v.* Dixey, 36 N. J. Eq. 490.

(*d*) *Forgery.*—An occupant of one part of a house has a remedy in equity against one who with plaintiff's permission has entered another part, remains there, and claims title to the whole house under a deed alleged by plaintiff to be a forgery. Sullivan *v.* Finnegan, 101 Mass. 447. See Bunce *v.* Gallagher, 5 Blatch. (C. C.) U. S.) 481.

(*e*) *Record—Delivery*, etc.—A bill will lie to set up and establish an unrecorded deed which has been destroyed by grantor, notwithstanding there is a remedy at law, that not being fully adequate as long as the record title is in grantor. Allen *v.* Waldo, 47 Mich. 516.

A deed executed but never delivered constitutes a cloud. Brewton *v.* Smith, 28 Ga. 442; Eckman *v.* Eckman, 55 Pa. St. 269; Pratt *v.* Pond, 5 Allen (Mass.), 593.

A deed held *in escrow*, but accidentally placed upon record without being delivered, is a cloud upon title. Stanley *v.* Valentine, 79 Ill. 544.

(*f*) *Conditions Unfilled.*—Where a deed to a man and wife was made on condition that the wife should live with the husband; if not, then to the husband absolutely; and the wife having deserted the husband, who obtained a divorce,—it was held that the clause was a valid conditional limitation, and the deed was such a cloud upon his title as equity would cancel. Smith *v.* Smith, 23 Wis. 176.

A lease made and recorded by a purchaser during the pendency of a contract for sale of land, conditioned upon the payment of a draft upon a third party, the draft not being paid the contract to be void, and the draft not having been paid, is a cloud removable by bill. Skinner *v.* Baker, 79 Ill. 496.

Action.—Unless an action would be sustainable on a conveyance in the absence of proof to overthrow it, such conveyance cannot be said to be a cloud. Davidson *v.* Seegar, 15 Fla. 671.

Judgment.—Equity will set aside a regular conveyance made to the execution creditor after an execution sale on a satisfied judgment. Cowan *v.* Lapp, 74 Ala. 44.

A bill seeking to cancel a sheriff's deed as a cloud on the ground that the judgment under which the sale was made was rendered by a court not having jurisdiction, is not without equity. Graham *v.* Hall, 68 Ga. 354.

A judgment against one who has previously made a general assignment for creditors without preferences, recovered before an assignee in bankruptcy has procured the assignment to be set aside, is not a cloud on the title of the assignee under the general assignment. Belden *v.* Smith, 16 Bankr. Reg. 302.

Equity will retain jurisdiction to order cancellation of a judgment as a cloud upon title. Smith *v.* Hickman, 68 Ill. 314.

A judgment rendered against a defendant who has died previous to the commencement of the action, though void, is such a cloud upon the title to the real estate of decedent as may be set aside on motion of his heir at law having an interest therein. Blodget *v.* Blodget, 42 How. Pr. (N. Y.) 19. See Foot *v.* Dillaye, 65 Barb. (N. Y.) 521.

A plaintiff showing that he has a right in certain lands may maintain an action to remove, as a cloud upon his title, a judgment determining that defendant has a hostile right therein asserted in a *lis pendens*. Brown *v.* Goodwin, 75 N. Y. 409.

Where a party obtained judgment by *scire facias* on the foreclosure of a mortgage given to secure notes which had been paid by taking new notes and mortgage, and purchased the mortgaged premises, a portion of which he had previously released from the lien of his mortgage, the execution of a deed to him was enjoined, and the judgment set aside as a cloud upon the title of a subsequent purchaser. Tucker *v.* Conwell, 67 Ill. 553.

Act Establishing Interest.—Where an act *in pais* of itself, without concurring facts and circumstances, proved *aliunde*, does not establish any interest in or title to the premises, it is not such a cloud as equity will interfere with. Mulligan *v.* Baring, 3 Daly (N. Y.), 75.

Contracts for Sale, etc.—The recording of an agreement for the exclusive sale and option of purchase of land for sixty days upon certain conditions, without notification of acceptance or compliance with conditions, constitutes a cloud for which a bill will lie. Sea *v.* Morehouse, 79 Ill. 216.

An unrecorded contract for the exchange of lands is not a cloud upon the title. Howe *v.* Hutchison, 105 Ill. 501.

An agreement for the sale of land, not accepted in reasonable time, but after-

wards accepted and recorded, is a cloud. Larmon *v.* Jordan, 56 Ill. 204.

A recorded executory contract for the sale of land by one claiming to act as agent for the owner, or even if executed by the owner, is not a cloud. Washburn *v.* Burnham, 63 N. Y. 132.

Where a bond has been executed to give a deed, and the agreement to sell had been rescinded, but the bond never returned, the owner is entitled to a decree quieting his title. Smith *v.* Campen, 40 Iowa, 411; Dahl *v.* Pross, 6 Minn. 89.

There being no allegation of fraud, accident, or mistake, a bill to set aside an agreement to convey as a cloud, will not lie. Meck's Appeal, 97 Pa. St. 313.

Levy.—A levy having been made on land the title to which is in a fraudulent grantee, a bill to clear the title is permissible. Harman *v.* May, 40 Ark. 146.

Under a void levy, as of one made thirty days after rendition of justice's judgment, a sale is a nullity, and will be set aside as a cloud in favor of one who has purchased under a valid levy under another judgment, which sale is void only for want of notice to debtor in possession, and this though such relief is not specifically prayed for. Shannon *v.* Erwin, 11 Heisk. (Tenn.) 337.

A title claimed under a sale and a deed in pursuance of a void levy will be relieved against. Stout *v.* Cook, 37 Ill. 283; Anderson *v.* Talbot, 1 Heisk. (Tenn.) 407.

Sale.—A sale made under power of sale in mortgage after payment of the debt, the purchaser being in possession, will be set aside and reconveyance decreed. Redmond *v.* Packenham, 66 Ill. 434.

The rule that the sale of land as the property of one from whom the owner in no way derives his title does not constitute a cloud, is applicable to the sale of a wife's separate estate under judicial process against the husband. Rea *v.* Longstreet, 54 Ala. 291.

A bill will lie to restrain in case of an actual or threatened sale to another. Guy *v.* Hermann, 5 Cal. 73; Burt *v.* Cassity, 12 Ala. 734; Thompson *v.* Lynch, 29 Cal. 189; Norton *v.* Beaver, 5 Ohio, 178. Or a void decree for sale of real estate. Johnson *v.* Johnson, 39 Ill. 215.

It is discretionary with a court to enjoin a sheriff's sale because it will cast a cloud upon the title. Goldstein *v.* Kelly, 51 Cal. 301. See Key, etc., *v.* Munsell, 19 Iowa, 305; Bell *v.* Greenwood, 21 Ark. 249; Pixley *v.* Huggins, 15 Cal. 127; Groves *v.* Webber, 72 Ill. 606.

So where it is under a judgment against a former owner which never became a lien. Goodell *v.* Blumer, 41 Wis. 436.

A court of equity will enjoin a sheriff's sale under a mechanic's claim, in which the owner is not named, and who had no notice of the proceedings, as it may cast a cloud upon his title. Houston's Appeal, 6 W. N. C. (Pa.) 162.

Where a sheriff's sale is had of property, there being notice either actual or constructive of a *bona-fide* sale to another before the lien of the judgment, the owner can have the sheriff's sale set aside as a cloud upon his title. Phillips *v.* Pitts, 78 Ill. 72.

Where a sheriff's sale will not pass title to the purchaser, such sale will not be enjoined, on the ground that it might cast a cloud on a title. Drake *v.* Jones, 27 Mo. 428.

Under Wisconsin Statute.—Where land owned and possessed by plaintiff was levied on and sold to defendant by the sheriff under an execution against a third person, a certificate of sale delivered and duplicate filed, that defendant must be regarded as "setting up a claim" within the meaning of Wis. Rev. Stat. ch. 141, § 29.

Plaintiff cannot split up his case in a bill to quiet title, and if he omits to set forth all the grounds of his right or his adversary's want, he cannot bring another suit on the portion omitted. Starr *v.* Stark, 1 Sawyer, 270.

Patent.—An invalid patent for land may be set aside as a cloud. Danforth *v.* Morical, 84 Ill. 456.

Lunacy.—A vendee may have his title established when the vendor has been declared a lunatic, though after the passing of the title. Younger *v.* Skinner, 14 N. J. Eq. 389.

Lien.—A party having failed to answer to a petition enforcing a mechanic's lien and praying discovery of his interest, and is thereby defaulted, cannot complain because a lien was given on the premises generally, though a cloud on his title. Gould *v.* Garrison, 48 Ill. 258.

Devise.—A devise by a wife of her land in trust for another during her husband's life constitutes a cloud upon the title of the tenant by courtesy which equity will remove. Coit *v.* Grey, 25 Hun (N. Y.), 444.

Inadequacy of Price.—Gross inadequacy of price will justify a court in refusing to aid in removing clouds upon the title. Huntingdon *v.* Allen, 44 Miss. 654.

Mortgages. — The purchaser of the equity of redemption of real estate on which there are mortgage liens of different priorities if in possession under such

purchase, may maintain an action to quiet his title against the junior mortgagee without alleging that he has paid the senior. Holton *v.* Commissioners of Lake Co., 55 Ind. 194.

A deed made without authority, or an unsatisfied mortgage, will be decreed a cloud and relief granted. Carter *v.* Taylor, 3 Head (Tenn.), 30; Clouston *v.* Shearer, 99 Mass. 209.

The mortgagee refused to execute a release of a mortgage debt paid before maturity unless other mortgages on other lands, but insufficient securities, should be paid. *Held*, that he could be compelled to execute such release in order to avoid the cloud on mortgagor's land. Brown *v.* Stewart, 56 Md. 421.

The assignee of a satisfied mortgage may be enjoined from foreclosing the mortgage in a suit to quiet title. Matheson *v.* Thompson, 20 Fla. 790.

The holder of a certificate of a mortgage sale, as a favor and for the purpose of permitting a redemption, accepted the amount due on it, and indorsed and delivered it to the owner of the equity of redemption, who had applied to him for leave to redeem after twelve months. *Held*, his so doing rendered the certificate *functus officio*, and it might be cancelled as a cloud. Frederick *v.* Eurig, 82 Ill. 363.

A mortgage made by a transferee of the franchises and property of a corporation, after the transfer has been set aside as having been made without authority, may be declared a cloud, the holders of bonds issued by the transferee and secured by the mortgage having notice of the want of authority. Knoxville *v.* Knoxville & Ohio R., 22 Fed. Rep. 758.

Where a vendor of land who has received payment by notes and is under bond to give a deed executes a mortgage to a third person, who has constructive notice before doing so, the purchaser can have the mortgage cancelled as a cloud. Doolittle *v.* Cook, 75 Ill. 354.

Where at a mortgage sale representations were made that nothing existed against the property by one who had at the time pending a petition to enforce a lien, and the mortgagor, the only party summoned, had been defaulted, the vendor can maintain a bill against the one so representing, to remove the cloud against his title. Hinchley *v.* Greany, 118 Mass. 595.

An outstanding mortgage, given without consideration and negotiated to one who had no knowledge of the facts, will be decreed to be cancelled as a cloud upon the title of a purchaser of the land at sheriff's sale. Clark *v.* Gibson, 10 W. N. C. (Pa.) 522.

A mortgage made by husband and wife of wife's property, which the husband without the wife's knowledge, after execution, altered so as to make another person mortgagee, and upon which he obtained loans, the transaction never having been ratified by the wife, and the defence being that the wife's title was derived through a deed from her husband in fraud of creditors, was set aside as a cloud. Smith *v.* Fellows, 41 N. Y. Sup. Ct. 37.

Attachment. — An attachment upon land sold before registration of the debtor's deed, with a decree *pro confesso* against the former holder of the legal title, under whose title the vendor claims, is such a cloud upon the title as will entitle the purchaser to rescission. Mullins *v.* Aiken, 2 Heisk. (Tenn.) 535.

An attachment on land which had been conveyed, but the deed for which had not been recorded, does not constitute a cloud on the grantee's title, the attachment being against the grantor. Wilson *v.* Kelly, 31 Hun (N. Y.), 75.

Claims.—A paper recorded with the register of deeds claiming that certain real estate is subject to a trust, and any title sought to be given would be disputed, is not a cloud. Nickerson *v.* Loud, 115 Mass. 94.

A claim by vendor of land for unpaid purchase-money is not a cloud upon the title of a judgment creditor of the purchaser who has obtained a decree that the purchaser holds the land as trustee for said judgment creditor. Bennett *v.* Hotchkiss, 17 Minn. 89.

Other Cases. — Where defendant is throwing suspicion on complainant's title by demanding rent of his tenants, and an action cannot be brought because claimant has not been dispossessed, such bill will lie. Polk *v.* Rose, 25 Mo. 153.

A court of equity will not intervene where such interference would be unnecessary, vexatious, or expensive, the instrument being void on its face or having been adjudged void. Hartford *v.* Chipman, 21 Conn. 488; Hotchkiss *v.* Elting, 36 Barb. (N. Y.) 38; Butler *v.* Viele, 44 Barb. (N. Y.) 166; Kay *v.* Scates, 37 Pa. St. 31.

Where one is in possession of land against another who though as to him is dispossessed and disseised, but asserts an adverse title under a mortgage, the validity of which is disputed, a bill to remove the cloud may be instituted. Clouston *v.* Shearer, 99 Mass. 209.

Ejectment is the proper remedy for one

3. Extent of Danger.—The danger must be more than speculative.[1]

4. Jurisdiction.—Equity has jurisdiction of a bill to remove a cloud upon the plaintiff's title.[2] An action will lie to prevent a cloud being cast upon a title to real estate, as well as to remove one already created.[3] The question of title must be settled in a court of law where that of plaintiffs has long been claimed adversely by defendants.[4]

who claims title to lands by mesne conveyances from a former owner against one claiming title from a receiver appointed in supplementary proceedings against such owner. Bocker *v.* Lansing, 20 N. Y. Sup. Ct. 38.

Where a mortgagor released his equity of redemption to a mortgagee, and a purchaser from the latter brought a bill to prevent a cloud upon his title and to enjoin a sale of the supposed interest of the mortgagor upon an execution issued or a judgment rendered against him prior to the release, *held*, that the question whether the mortgagee had lost his security by taking a deed from the mortgagor in payment of the mortgage debt, and releasing the mortgage on record, was not within the proper scope of the bill. Walters *v.* Defenbaugh, 90 Ill. 241.

Where ejectment can be had equity will not aid. Odle *v.* Odle, 73 Mo. 289.

An adequate remedy in law bars a suit in equity. Greenwalt *v.* Duncan, 16 Fed. Repr. 35.

1. Sanders *v.* Village of Yonkers, 63 N. Y. 489.

A bill stating a pretended title in respondent, and asking relief on ground of an apprehended injury, cannot be maintained. Torrent *v.* Booming Co., 22 Mich. 354. See Cox *v.* Clift, 2 N. Y. 118; Farnham *v.* Campbell, 34 N. Y. 480.

Such relief will not be granted as a matter of course upon a state of facts showing an apprehended injury to title. An adequate remedy at law may be had where the only cloud on a title is the prior record of a deed made after petitioner's deed with notice, petitioner's deed not having been sooner recorded under an agreement with the grantor. Munson *v.* Munson, 28 Conn. 582.

When the bill discloses no more than an "unquiet and unfounded apprehension as to the validity" of complainant's title to lands of which he has possession, and "a false and clamorous assertion of a hostile title" by defendants, founded on supposed defects in a deed executed by their trustee to complainant's vendor, equity will not interfere. March *v.* England, 65 Ala. 275.

A purchaser of land who has paid part of the purchase-money, and given a mortgage for the residue, will not be relieved against the security given on the mere ground of a defect of title, where there is no allegation of fraud in the sale and he has not been evicted. He will be remitted to his remedy at law upon his covenants in his deed. As a general rule, unless the circumstances are such as to sustain an action for slander of title, the law regards the injury too speculative to warrant the interference of a court of equity, and the party affected must wait until the pretended title is asserted. Ryerson *v.* Willis, 81 N. Y. 277.

2. See Radcliffe *v.* Rowley, 4 Edw. Ch. (N. Y.) 646; Low *v.* Staples. 2 Nev. 209; Standish *v.* Dow, 21 Iowa, 363; Walker *v.* Peay, 22 Ark. 103.

Setting up a trust, fraud, spoliation of deeds, imposition on a minor, and inability to bring a common-law action. Kelly's Appeal, 38 Leg. Int. (Pa.) 350.

This jurisdiction is independent of any relation of trust, or of fraud, accident, mistake, account, or other head of equitable jurisdiction. Dull's Appeal, 113 Pa. St. 510.

The jurisdiction of equity to quiet title is intended to reach persons out of possession, who cannot be compelled to defend their rights at law. Barron *v.* Robbins, 22 Mich. 42.

Jurisdiction does not extend to entertaining a bill which seeks to keep redemption open until a judgment can be had removing all clouds from the titles of the property held for redemption. Alexander *v.* Colcock, 58 Tenn. 282.

Jurisdiction extends to the cancellation of a deed which is a cloud upon title, though there is a remedy at law. Hall *v.* Fisher, 9 Barb. 17, 24; Almony *v.* Hicks, 3 Head (Tenn.), 39. See Lehman *v.* Shook, 69 Ala. 486; Allen *v.* Waldo, 47 Mich. 516.

3. Mann *v.* Utica, 44 How. (N. Y.) Prac. 334; McPike *v.* Pen, 51 Mo. 63; Petit *v.* Shepherd, 5 Paige, 493. See Scott *v.* Onderdonk, 14 N. Y. 9; Lounsbury *v.* Purdy, 18 N. Y. 515.

4 Cowman *v.* Colquhoun, 60 Mo. 127.

Where the main transaction has be-

5. Validity of Title.—There must be an apparently valid title to constitute a cloud. A deed, valid on its face, accompanied with a claim of title, under such circumstances that a court of equity can see that the deed is likely to work mischief to the real owner, is sufficient.[1]

6. Possession.—Complainant must have possession to maintain a bill to remove a cloud, unless the title is an equitable one, incapable of effectual assertion at law, or in some States unless the land is vacant.[2]

come involved in the obscurities of time, so that there is no explanation why conflicting muniments of title from the same source are outstanding, each party will be left to make such use of his deed in a court of law as he can. To cancel as a cloud a deed that was on record forty years before the filing of the bill, it must appear that his is the better title in equity as well as in law. Jones *v.* Georgia R. Co., 62 Ga. 718.

1. Fonda *v.* Sage, 48 N. Y. 173; Scott *v.* Onderdonk, 14 N. Y. 9; Allen *v.* City, etc., 39 N. Y. 390; March *v.* City, etc., 59 N. Y. 280. See also Moore *v.* Cord, 14 Wis. 213; Dunklin Co. *v.* Clark, 51 Mo. 60: 14 Wis. 213; Gamble *v.* Loop, 14 Wis. 465.

An apparently valid but really invalid lease may constitute a cloud on title to land which a court may order removed. Townshend *v.* Williams, 50 N. Y. Super. Ct. 394.

The title alleged to constitute the cloud must be valid on its face. Where it requires extrinsic evidence to prove its validity equity will not interfere on the ground that the facts which are essential to sustain the pretended claim do not exist, but will leave the party in possession to his defence. Lehman *v.* Roberts, 86 N. Y. 232.

The title must be such that the defect only appears by extrinsic evidence. Crooke *v.* Andrews, 40 N. Y. 549.

A bill in equity will not be sustained to remove a cloud when the instrument constituting such cloud is void on its face. Briggs *v.* Johnson, 71 Me. 235.

A deed being void on its face, equity will not interfere to cancel as a cloud, because plaintiff is an infant in present need of money and the lot unproductive. Cohen *v.* Sharp, 44 Cal. 29. See Crooke *v.* Andrews, 40 N. Y. 547; Weller *v.* St. Paul, 5 Minn. 95; Herd *v.* James, 13 Wis. 641; Meloy *v.* Dougherty, 16 Wis. 269.

When complainant's title is based on judicial proceedings shown to be void for want of jurisdiction, a bill will not be sustained. Griswold *v.* Fuller, 33 Mich. 268.

While doubtful if equity extends its jurisdiction to the removal of an instrument void on its face, and therefore working no harm, the New Jersey act to quiet title confers jurisdiction and is applicable to a sale of land, *ultra vires* and void, but detracting from the market value of the land. Bogert *v.* City of Elizabeth, 27 N. J. Eq. 568.

If a trust be void under statute there is no ground for a claim by the grantor in the trust deed for the interposition of equity. Levy *v.* Hart, 54 Barb. (N. Y.) 248.

A bill to remove a cloud and restrain a sale of land conveyed by deeds, whose description is not sufficiently comprehensive to cover the land referred to, cannot be maintained. St. Louis Bridge Co. *v.* Curtis, 103 Ill. 410.

The cancellation of a deed alleged to be void on its face as having an uncertain description of the land, will not be decreed as a cloud. Busbee *v.* Macy, 85 N. C. 329. *Cf.* Busbee *v.* Lewis, 85 N. C. 332.

Rule.—Where a defect in a claim to an interest in land can only be made to appear by extrinsic evidence, it presents a case for a court of equity. Sanxay *v.* Hunger, 42 Ind. 44; Longley *v.* City of Hudson, 4 Thomp. & C. (N. Y.) 453; Marsh *v.* Brooklyn, 4 Thomp. & C. (N. Y.) 413; 59 N. Y. 280; Douglass *v.* Nuzum, 16 Kan. 515; Daniel *v.* Stewart, 55 Ala. 278; Alden *v.* Trubee, 44 Conn. 455.

2. Thomas *v.* White, 2 Ohio St. 540; Bryan *v.* Winburn, 43 Ark. 28; Matthews *v.* Marks, 44 Ark. 436; Gage *v.* Schmidt, 104 Ill. 106; Kilgannon *v.* Jenkinson, 51 Mich. 240; Coolidge *v.* Forward, 11 Or. 118; Dyer *v.* Krackauer, 14 Mo. App. 39; O'Brien *v.* Creig, 10 Kan. 202; Woods *v.* Monroe, 17 Mich. 238; Bunce *v.* Gallagher, 5 Blatch. (C. C. U. S.) 48.

Plaintiff must be in possession when he brings his suit unless his title is an equitable one. He must proceed on the strength of his own title, and not the

weakness of his adversary's. Lawrence *v.* Zimpleman, 37 Ark. 643. Also title of adversary must be good on its face, and require extrinsic testimony to establish its invalidity. Under the Minnesota statute authorizing an action to quiet claims, it must be alleged and proved either (1) that plaintiff is in possession, or (2) that the land was unoccupied. Conklin *v.* Hinds, 16 Minn. 457.

The remedy at law being inadequate, and other grounds of equitable jurisdiction being present, equity will take jurisdiction to remove a cloud on a title, notwithstanding the defendant is in possession. Sale *v.* McLean, 29 Ark. 612.

An equitable claimant of land who is not in possession cannot invoke the aid of a court to quiet his title and remove the cloud cast upon such title by other claimants. Herrington *v.* Williams, 31 Tex. 448. See Apperson *v.* Ford, 23 Ark. 746; Polk *v.* Pendleton, 31 Md. 118; Haythorn *v.* Margarew, 7 N. J. Eq. 324; Lake Bigler Road Co. *v.* Bedford, 3 Nev. 399; Almony *v.* Hicks, 3 Head (Tenn.), 39.

Where the title to an unused railroad track is in dispute, and neither party to the controversy is in actual physical possession, equity will not interfere in a suit to quiet title by appointing a receiver or by injunction, even where defendant has attempted to take forcible possession, until his right was established by law. St. Louis, Kansas City, etc., R. *v.* Dewers, 23 Fed. Rep. 519, 691.

A party in quiet, peaceable possession has such an interest, that though with a defective title he may maintain an action to quiet title against one who has a weaker title or none at all. Giltenan *v.* Lemert, 13 Kans. 476.

Where in an action to remove a cloud from title to land it is found that neither party has title, neither is entitled to judgment as against the other. Mere possession will not entitle to judgment. San Diego *v.* Allison, 46 Cal. 162.

In order to defeat plaintiff's title where plaintiff is in actual possession, in a bill to remove a cloud, defendant must show a paramount title in himself, not in a third party. Brenner *v.* Bigelow, 8 Kans. 496.

One in actual possession of land for three years may maintain an action to compel the determination of claims thereto, and evidence of possession is sufficient to compel defendant to show his title; but if he shows only possession under an unfounded claim of title, evidence of actual possession and occupation by defendant prior to the entry by plaintiff is a sufficient defence. Ford *v.* Belmont, 69 N. Y. 567.

Equity will not entertain a bill to quiet title against defendants in actual possession acquired by force, but will leave parties to their legal remedies. Gould *v.* Stemburg, 105 Ill. 488.

Under *Oregon* Code of Procedure it must appear that the party in possession has some legal or equitable interest in the property before bringing suit to quiet title. King *v.* Sawyer, 2 Sawyer (C. C. U. S.), 441.

In *Alabama*, possession is necessary. Land adversely held under color title must be recovered at law. Daniel *v.* Stewart, 55 Ala. 278.

Complainant cannot bring his bill unless in possession, and especially when there is a suit at law regarding possession. Page *v.* Montgomery, 46 Mich. 51.

Under the *Oregon* Code, a person to bring a suit must be in possession, and not an intruder or trespasser. Tichenor *v.* Knapp, 6 Oregon, 205. But one owning wild lands, which he holds by deed from one seized by deed, is in such possession as to enable him to bring a suit in equity to remove a cloud from the title under the Oregon Code, § 500. Thompson *v.* Woolf, 8.Or. 454.

One in possession and claiming title has sufficient estate to maintain proceedings to determine conflicting claims thereto. Schroeder *v.* Gurney, 17 N. Y. Sup. Ct. 413.

Under the *New Jersey* statute, certainty to a common intent in the pleading is all that is required. An allegation that complainant is owner in fee, and that he is in possession, sufficiently states that he is "in peaceable possession claiming to own the land." The claim which defendant is said to make need not be stated. Ludington *v.* Elizabeth, 32 N. J. Eq. 159.

Quiet occupation, under claim of title, entitles the occupant to an issue at law to try the validity of an adverse claim under the New Jersey "act to compel the determination of claims to real estate in certain cases, and to quiet the title to the same." Such occupation is peaceable possession within the meaning of the act, and the fact that the adverse claimant is a tenant in common does not qualify the possession or affect the right to an issue. Powell *v.* Mayo, 42 N. J. Eq. 178.

Under *Wis.* Rev. St., the plaintiff must be alleged to be in possession. Shaffer *v.* Whelpley, 37 Wis. 334.

Plaintiff must be in possession at time of commencing his action. Campbell *v.* Allen, 61 Mo. 581.

7. Plaintiff's Title.—A bill to remove a cloud from title must set forth the plaintiff's title[1] and show in some way that defendant is setting up a cloud on it.[2]

A bill to quiet title to land unoccupied and unimproved is demurrable in not showing that complainant is in possession. Gage *v.* Griffin, 103 Ill. 41.

Under the *Minnesota* statute to quiet title, the defeated party, not having been in possession of the premises in controversy, is not entitled to any relief on account of having paid taxes on such property. Dawson *v.* Gerard Life Ins. Co., 27 Minn. 411.

Proper Remedy.—A party not in possession cannot obtain the aid of a court of equity to supply a defect in his title, e.g., a lost deed. His proper remedy is ejectment. Burton *v.* Gleason, 56 Ill. 25; Clark *v.* Ins. Co., 52 Mo. 272.

Ejectment is the proper remedy where lands are improved and occupied by the adverse party. Gage *v.* Abbott, 99 Ill. 366; Oakley *v.* Hurlbut, 100 Ill. 204.

Sufficient Possession.—Merely securing and holding property as a homestead without inhabiting it, is not sufficient proof of actual possession. Byrne *v.* Hinds, 16 Minn. 521.

An allegation that plaintiff is in peaceable possession presumes that he is in the actual possession which need not be alleged. Cartwright *v.* McFadden, 24 Kan. 662; Douglass *v.* Hahn, 24 Kan. 766.

A statute enabling a person not in possession to sue to remove a cloud does not dispense with the necessity of showing that he has the legal title, and is entitled to possession. Emery *v.* Cochran, 82 Ill. 65; State *v.* Sioux City, etc., R. Co., 7 Neb. 357.

When Possession Unnecessary.—A person out of possession, whose land has been sold on execution, and where the infirmity of purchaser's title can only appear by extrinsic evidence, can maintain a bill to set aside the deed. Beeble *v.* Meade, 81 Mo. 297.

A person out of possession of realty may maintain an action in equity to quiet his title, and at the same time pray to recover possession. Lees *v.* Wetmore, 58 Iowa, 170. See Barrow *v.* Robbins, 22 Mo. 42; O'Brien *v.* Creig, 10 Kans. 202.

1. Parker *v.* Stevens, 59 N. H. 203.

2. Jenks *v.* Hathaway, 48 Mich. 536.

Where in the bill the alleged cloud seems supported by an equitable right in the defendant, the bill cannot be sustained. Torrent *v.* Booming Co., 22 Mich. 21.

The deed under which defendant claims and which plaintiff seeks to have set aside, need not be set out in the complaint. Stribling *v.* Brougher, 79 Ind. 328.

A complaint asking that a mortgage be satisfied of record, and to quiet title to real estate, need not set out a copy of the mortgage and notes secured thereby, or of a decree of partition mentioned therein. Heilman *v.* Schneck, 40 Ind. 93.

A bill alleging complainant to be the true and equitable owner of land by purchase must set forth the title of his vendor. If it shows that he once had the right to subject the land as his vendor's creditor, it must show that the right is still his. Harrill *v.* Robinson, 61 Miss. 153.

A complaint under the *N. Y.* Code, § 449. must state specially every fact necessary to enable the court to judge whether the plaintiff has a cause of action arising under the statute, and that the plaintiff has been in actual possession of the lands or tenements for three years, and that both parties claim an estate in fee for life or for a term not less than ten years. Austin *v.* Goodrich, 49 N. Y. 266.

Under the *California* statutes plaintiff can only obtain relief on the grounds alleged in his bill. If he alleges title in fee and possession in himself and an adverse claim, and his evidence fails as to his title and possession, he can have no relief, nor on such allegations can he have a decree of trust or a conveyance. Burton *v.* Le Roy, 5 Sawyer C. Ct. 510.

Under the *New Jersey* statute an allegation that every step of the proceeding under which the adverse title was claimed was without warrant of law, is not a sufficient allegation that they were taken under a void law. Bellows *v.* Wilson, 32 N. J. Eq. 481.

Where, because of an alleged breach of a condition subsequent contained in a conveyance of real estate, the heir of the deceased grantor seeks to recover possession of and quiet his title to such real estate, the complaint should allege that such grantor at the time of making such conveyance was seized in fee-simple of such real estate. The complaint in such action should also allege an entry upon or claim to the real estate made by the plaintiff prior to bringing the suit. Clark *v.* Holton, 52 Ind. 564.

Where complainant in a bill to remove

8. Defendant's Title.—Some color of title must be shown in defendant.[1]

9. By Whom Maintainable.—An innocent purchaser where the cloud is caused by a levy, a sale after condemnation under order by a circuit court, a purchase by the execution plaintiff, and a sheriff's deed;[2] a grantor of land in parcels to numerous parties with warranty, the cloud being a deed of the same land to a third

a cloud from his title alleged every fact necessary to constitute seizin in the defendant except delivery, *held* that the presumption arose that defendant failed to acquire seizin through want of delivery of deed alone. Smith *v.* Dennett, 15 Minn. 81.

A complaint alleging that a conveyance of land with full covenants was made to plaintiff, who took possession; that defendant asserted title under a subsequent conveyance made under a sale by a State auditor on a mortgage executed to State treasurer by a prior owner to plaintiff's grantor; that though the mortgage had been recorded in the county before said grantor purchased the land, it had never been acknowledged or properly proved, and plaintiff had no notice—was held sufficient. Watkins *v.* Brunt, 53 Ind. 208.

A complaint to quiet title alleging that plaintiff held its title through "the Indianapolis Warm Air Co." is not bad, as such companies may sometimes hold land. Gabe *v.* Root, 93 Ind. 256.

An allegation that plaintiff as a corporation sole was seized in fee of land in which defendant claimed an interest, *held* to be sufficient to maintain an action to quiet title. Mora *v.* Le Roy, 58 Cal. 8.

Equity will not give relief to one having no title or a doubtful title. Ross *v.* Young, 5 Sneed (Tenn.), 627; Huntingdon *v.* Allen, 44 Miss. 654; West *v.* Schnebley, 54 Ill. 523.

Statutory Requirement, Mississippi.—A bill under Miss. Code 1880. § 1833, to remove a cloud from title, need not set forth the complainant's claim, but the particular evidence of title sought to be cancelled should be described as known to him. On failure of such description the defendant cannot demur, but must plead his right to answer. Cook *v.* Friley, 61 Miss. 1.

Where Repayment of Purchase money, etc., Necessary.—A minor representing himself of age conveyed land, and subsequently after coming of age conveyed to another person. *Held*, that the latter could have a decree quieting his title without restoring the consideration paid by the former. Nettleton *v.* Morrison, 5 Dillon C. Ct. 503.

Offer should be made in bill seeking to divest a legal title obtained in good faith to reimburse defendant for money spent in improvements, etc. Cravens *v.* Moore, 61 Mo. 178.

Caveat emptor applies to a purchaser at a sale under an execution against a former owner, and repayment of the purchase-money need not be required of the owner seeking to have the cloud on his title removed. Nor is there need of a decree to convey. The removal of the deeds complained of is sufficient. Conwell *v.* Watkins, 71 Ill. 488.

What May be Included.—One who has a right to file a bill to quiet title may properly include parcels of land contracted to others and in their possession. Eaton *v.* Trowbridge, 38 Mich. 454. So also a bill to quiet title will lie even when an action of ejectment is pending against part of the land, if judgment for defendant therein would still leave the title in dispute.

1. A bill simply averring that defendant had conveyed away the lands without showing that he had a title to convey, is bad. Dunklin Co. *v.* Clark, 51 Mo. 60.

What is Sufficient.—The defendant's title need not be accurately described in Indiana. Marat *v.* Germania Bldg., etc., Assoc., 54 Ind. 37.

Complainant need not show that the defendant's claim is one which would be *prima facie* good at law; nor set out the ground upon which defendant asserts the validity of his title. Holbrook *v.* Winsor, 23 Mich. 394.

A complaint that defendant is making an unfounded claim of title to land, and allegation that plaintiff owns it in fee, shows sufficiently that defendant claims "adversely" to plaintiff. Gillett *v.* Carshaw, 50 Ind. 381.

A bill claiming that defendants have taken possession of land under a false and fictitious title, without stating such title, is bad. There is an adequate remedy at law. Speigle *v.* Meredith, 4 Biss. 120.

2. Anderson *v.* Talbot, 1 Heisk. (Tenn.) 407. See Stout *v.* Cook, 37 Ill. 283.

party;[1] a remainderman before the termination of the life estate;[2] a vendee where the vendor in possession claims the deed to be a mortgage;[3] one who has bought land from an executor having power under will to sell for heir's benefit, as against one who has purchased the land at a sale on an execution against the heir;[4] by a mortgagee;[5] by one getting title from Statute of Limitations to remove record title;[6] by a judgment creditor to enforce his judgment;[7] by a widow and heirs of a decedent upon whose estate no administration has been taken out and the homestead never set aside to them, to remove a cloud from said homestead.[8]

10. By Whom Not.—A judgment creditor, the lien of whose judgment has expired by statute, to remove a cloud from his debtor's land.[9] A grantee of an undivided third, the cloud being a claim by a third party to an undivided third of the same land.[10] A grantor cannot ask the grantee of part of his land who has set up an adverse title to the whole to surrender his title of that part.[11] One who has conveyed his interest cannot have his title thereto quieted on grounds existing prior to the conveyance.[12]

11. Defendants.—The necessity of making an infant a defendant will not prevent a decree setting aside an instrument as a cloud.[13] A claimant to title in land alleged to be a street cannot maintain an action to quiet the same against the street commissioner who is a mere agent of the city.[14]

1. Ely *v.* Wilcox, 26 Wis. 91; Chamblin *v.* Schlichter, 12 Minn. 276.

2. Aiken *v.* Suttle, 4 Lea (Tenn.), 103.

3. Unless he has the legal title and no intervention of equity renders the remedy at law incomplete. Hays *v.* Norton, 48 Ill. 100; Rich *v.* Doane, 35 Vt. 124.

4. The sheriff is a necessary defendant in order to prevent the execution of his deed. Haddon *v.* Hemingway, 39 Mich. 615.

5. Polk *v.* Reynolds, 31 Md. 106; Wofford *v.* Board of Police, etc., 44 Miss. 579.

6. Marston *v.* Rowe, 39 Ala. 722; Arrington *v.* Liscomb, 34 Cal. 365; Moody *v.* Holcomb, 26 Tex. 714.

7. Stowell *v.* Haslett, 5 Lans. (N. Y.) 380.

8. Sassaman *v.* Powell, 21 Tex. 664.

9. Partee *v.* Matthews, 53 Miss. 141.

10. Hartmann *v.* Reed, 50 Cal. 485.

11. Dalton *v.* Hamilton, 50 Cal. 422.

12. Page Co. *v.* Burlington, etc., R. Co., 40 Iowa, 520.

13. Mutual Life Ins. Co. *v.* Holloday, 13 Abb. N. Cas. (N. Y.) 16.

14. Leet *v.* Rider, 48 Cal. 623.

A party in possession of land claiming a fee-simple estate cannot maintain an action under section 557 of the Ohio Code which makes possession alone instead of legal title and possession a basis for such proceeding to quiet his title against persons claiming a remainder therein contingent upon the death of plaintiff without issue. There being no adverse present interest, the essential elements of a bill *quia timet* are wanting, for litigation would be impracticable. Collins *v.* Collins, 19 Ohio St. 468.

Who May be Intervened.—Where land is sold under an execution or a judgment whose lien has been lost, and a deed of trust executed by defendant which is foreclosed and the title passes to a *bona-fide* purchaser, the defendant in the execution and the person secured by the trust deed are not indispensable parties to a bill by the purchaser under the deed of trust to set aside the sale on execution as a cloud on his title. St. Joseph Manuf. Co. *v.* Daggett, 84 Ill. 556.

In an action to quiet title to distinct lots of land mortgagees of the land may properly ask to be made parties, and by cross-petition may seek a decree of foreclosure and the grantee of a purchaser at a subsequent tax sale alleged to be fraudulent may also be joined, and the validity of the tax sale determined therein. Switz *v.* Black, 45 Iowa, 597.

A sole legatee of her husband who has conveyed all his interest in lands which had previously been sold under a trust deed cannot intervene in an action by

12. Executors—Administrators.—No action for the purpose of removing a cloud from the real estate of a decedent can be brought by an executor or administrator, before a license to sell has been obtained from the probate court.[1]

A sale of land by an administrator without an order of a probate court, or under a void order, has been held not a cloud, while an unauthorized administration has been decided to be one.[2]

13. Cross-bill.—Defendant in a suit to remove a cloud has a right to file a cross-bill, and if found to have a superior title, a decree in his favor.[3]

14. Answer.—An answer showing a plausible title in defendant may cure a deficiency in complaint in not showing such color of title in defendant as would throw a cloud.[4]

15. Statutory Abolition.—Unless there has been a statutory abolition of the equitable remedy to remove a cloud, equity has jurisdiction, though there is also a legal remedy.[5]

16. Procedure.—The jurisdiction of courts of equity to remove

the purchaser to quiet his title, and ask that the sale be set aside. Ingler *v.* Jones, 43 Iowa, 286.

1. Paine *v.* First Division of St. Paul, etc., R. Co., 14 Minn. 65; Gridley *v.* Watson, 55 Ill. 186; Shoemaker *v.* Lockridge, 53 Ill. 503. But see Laverty *v.* Sexton, 41 Iowa, 435, where it was held that executors having control and possession of real estate may maintain an action to quiet the title thereto.

Sufficient Title.—An order of a probate court directing a sale of land upon petition of administrator of deceased owner, for the payment of debts and distribution, the administrator's deed, the acquiescence and ratification of the heirs, and occupancy by complainant and his grantor undisturbed for ten years, show sufficient title to maintain the suit, and a citation to parties interested is presumed. Wilson *v.* Matheson, 17 Fla. 630.

A mere right to sell land for purposes of administration or distribution does not give sufficient title whereon to base a bill. Robinson *v.* Joplin, 54 Ala. 70.

2. A sale of land by an administrator without an order of a probate court or under an order void for want of jurisdiction, is not a cloud which equity will interfere to remove. Florence *v.* Paschal, 50 Ala. 28.

An unauthorized administration of an estate by the widow and another *held* a cloud on the title of the heirs. Damouth *v.* Klock, 29 Mich. 289.

3. Greenwalt *v.* Duncan, 16 Fed. Rep. 35, 612.

Upon a bill by vendee in possession of land under agreement to purchase, seeking to set aside the contract of sale as a cloud upon his title, the defendant vendor cannot, without cross-bill, have a decree for specific performance of the contract. Sandford *v.* Cloud, 17 Fla. 557.

4. Davis *v.* Hare, 32 Ark. 386.

Sufficiency of Answer.—An answer setting out that the deed under which plaintiff claims is merely a deed made to plaintiff, a tenant in common, for purposes of sale, and that grantor subsequently conveyed to defendant an undivided three fifths of the premises, contains a defence sufficient to prevent plaintiff from obtaining judgment on the pleadings. Garvey *v.* Willis, 50 Cal. 619.

Provided defendant has not denied making the claim in his answer, though he does not affirmatively set up a title, he is entitled to have the question of possession tried. Babe *v.* Phelps, 65 Mo. 27.

An answer disclaiming all adverse interest, estops defendant from denying the title, and the court should not enter upon the trial. Jordan *v.* Stevens, 55 Mo. 361.

An answer setting up title in a defendant, and praying award of the possession of the premises, does not contain such a counter-claim as prevents plaintiff from dismissing the action. Moyle *v.* Porter, 51 Cal. 639.

5. Harrington *v.* Utterback, 57 Mo. 519.

The provision of Miss. Code 1871, § 975, providing for the removal of a cloud upon titles, only enlarged the jurisdiction of the chancery court in the matter of bills *quia timet*. Carlisle *v.* Tindall, 49 Miss. 229.

a cloud from title is of common-law origin, independent of State statutes, but these may regulate the mode of proceeding and form of decree.[1]

17. Taxes, etc.—Equity will remove a cloud from a title occasioned by a void tax deed or certificate or other proceeding where it is apparently valid and endangers the owner's title,[2] and in some States where either it or the tax is illegal.[3]

1. Lamb *v.* Farrell, 21 Fed. Rep. 5.

Under 2 Ind. Rev. St. 1876, p. 254, § 612, the same rules apply to actions to quiet titles as to actions to recover possession of real estate. Green *v.* Glynn, 71 Ind. 336.

Pleadings and proceedings under the Iowa statute must be according to equity pleading and procedure. Balmear *v.* Otis, 4 Dill. 558.

Under the New Jersey act to quiet title where a claim is made to a lien on lands under an execution, equity can be invoked without waiting till after the land is sold and the deed delivered. Holmes *v.* Chester, 26 N. J. Eq. 79.

2. A lien must be apparently valid and endanger the owner's title to constitute a cloud. If a tax be unconstitutional, its invalidity will always appear. Townsend *v.* New York, 77 N. Y. 542. See also Crevier *v.* Mayor, etc., 12 Abb. N. S. (N. Y.) 340; Newell *v.* Wheeler, 48 N. Y. 486; Lee *v.* Ruggles, 62 Ill. 427; Hamilton *v.* Fond du Lac, 25 Wis. 490; Taylor *v.* Rountree, 28 Wis. 391; Loud *v.* Charlestown, 99 Mass. 208; Hunnewell *v.* Charlestown, 106 Mass. 350.

Equity will interfere where an illegal assessment for taxes has been made, a pretended sale had, a certificate given, and the comptroller threatens to give a deed. N. Y., Ontario, etc., R. Co. *v.* Worcester, 65 How. Prac. (N. Y.) 484.

A bill will lie to remove a cloud occasioned by a judgment in ejectment founded upon a void tax deed. The facts showing the validity as well as the invalidity of the instrument stated to be a cloud should be set out. Hibernia S. & L. S. *v.* Ordway, 38 Cal. 679.

Equity will relieve a party in possession, claiming to be owner, from a claim arising from a collector's deed or a sale for taxes, which have in fact been paid before the sale. Gage *v.* Rohrbach, 56 Ill. 262; Gage *v.* Billings, 56 Ill. 268; Gage *v.* Chapman, 56 Ill. 311.

Under Wis. Laws 1861, ch. 240, a mortgagee of land, though not in possession, may maintain an action to prevent a cloud upon the title by restraining the issue of a tax deed thereof upon an illegal, void, or cancelled tax certificate; and this right continues after a judgment foreclosing his mortgage, and prior to a sale. Horn *v* Garry, 49 Wis. 464.

A treasurer's deed, valid on its face but shown by parol evidence to have been made under an invalid sale, was decreed to be cancelled as a cloud, though no adverse title had been asserted by the grantee, otherwise than by his answer in the case. Dull's Appeal, 113 Pa. St. 510.

Where a municipality has attempted to sell land for taxes after the expiration of the three years during which a lien exists, and within which time alone a sale may be lawfully made, equity will entertain a bill to quiet title. Field *v.* West Orange, 37 N. J. Eq. 434.

Where Held not Clouds.—A void tax deed not declared by statute *prima-facie* evidence of the regularity of the assessment and sale, is not such a cloud as equity would interfere to remove. Minturn *v.* Smith, 3 Sawyer, 142; Crane *v.* Randolph, 30 Ark. 579; Curtis *v.* East Saginaw, 35 Mich. 508.

As two years must pass after a tax sale before a deed can be executed and a six months' notice to redeem must be given, no cloud exists one month after the sale sufficient to justify an action. Clark *v.* Davenport, 30 Hun (N.Y.), 161.

An assignment of a State interest acquired at a tax sale held under a tax judgment by a court without jurisdiction is not a cloud, the assignment not being even *prima-facie* evidence of the regularity of antecedent proceedings. Gilman *v.* Van Brunt, 29 Minn. 271.

A tax deed does not necessarily constitute a cloud unless the statute authorizing the sale and conveyance has been strictly complied with. Eastman *v.* Thayer, 60 N. H. 408.

Courts of chancery will not take jurisdiction to try the validity of tax titles on the ground that they are a cloud. Springer *v.* Rosette, 47 Ill. 223.

3. Scofield *v.* Lansing, 17 Mich. 437; McPike *v.* Pen, 51 Mo. 63.

An illegal tax deed is a cloud upon the title of the owner of land in possession. Lee *v.* Ruggles, 62 Ill. 427.

A certificate issued by the State comptroller upon sale of land for taxes ille-

(*a*) *Tender of Taxes Paid, Costs, etc.*—As a rule, tax deeds or other instruments or proceedings in their nature will not be removed as a cloud unless there is a tender of the amount expended by defendant in payment of taxes, costs, or charges.[1]

gally laid does not constitute a cloud. Clark *v.* Davenport, 95 N.Y. 477.

Sufficiency of Title.—A minor who one year after he is twenty-one redeems land from a tax sale, for which deeds have been executed and recorded, is entitled to have such deeds cancelled, though he had only performed such slight acts of ownership as selling grass cut thereon. Taylor *v.* Rountree, 28 Wis. 391.

Where land conveyed by tax deed remains unoccupied until after the lapse of five years from the recording of the deed, a holder of the title under it may maintain an action to quiet the title. Lewis *v.* Soule, 52 Iowa, 11.

In an action to quiet the title to lands purchased at a delinquent tax sale, defendant filed a counter-claim alleging that he was the owner and in possession of the lands, and that plaintiff by virtue of the pretended deed or by some other writing, the character and nature of which was unknown, claimed an unfounded title and one which was a cloud upon defendant's, and asked to have his title quieted against plaintiff's. *Held* sufficient on demurrer under 2 Ind. Rev. St. 1876, § 611; Cooper *v.* Jackson, 71 Ind. 245.

Nor does a complaint averring title merely under a tax sale and deed, without further describing the proceedings under which the sale was made, show title upon which a decree can be based. Keepfer *v.* Force, 86 Ind. 81.

No prior tax deed where all tax deeds recite the date of levy, no matter when executed or recorded, stand in the way of title acquired by subsequent levy. Truesdale *v.* Rhodes, 26 Wis. 215.

Other Cases.—One cannot have an action to quiet title against one claiming no interest but that of purchaser at a tax sale. Porter *v.* Mitchell, 82 Ind. 214.

A trustee to whom land has been conveyed in trust for the payment of debts may, in order to remove a cloud upon the title of such land, file a bill in equity to set aside and have declared void a tax deed made under the provisions of the Va. Code 1849, ch. 37. Burlew *v.* Quarrier, 16 W. Va. 108.

A levy having been made on personal property, it is presumed satisfied, and a bill will not lie to restrain further proceedings to enforce a tax upon lands, as a bill to remove a cloud. Henry *v.* Gregory, 29 Mich. 68.

1. A bill will not lie where the invalidity of a tax title is involved without tender or offer to pay the tax interest and charges, if such tender is required by Me. St. 1874, ch. 234, when the deed is void on its face. Briggs *v.* Johnson, 71 Me. 225.

All taxes justly chargeable must be tendered before an action can be maintained to have a tax deed declared void as a cloud, on account of irregularities in the assessment. Boeck *v.* Merriam, 10 Neb. 199.

A lot-owner who has not offered to pay the taxes legally assessed cannot, after a legal levy and sale, maintain an action to quiet title against the holder of the tax-sale certificate. Knox *v.* Dunn, 22 Kan. 683.

A grantee from the real owner of land under an act of Congress cannot have his title quieted until he has tendered the amount of taxes paid by one who supposed himself an owner under another act. American Emigrant Co. *v.* Iowa R. Land Co., 52 Iowa, 323.

A decree quieting the title to one holding a patent title to land against the owner of a tax title will not be granted without payment of taxes paid by latter on the land. Crumb *v.* Davis, 54 Iowa, 25.

Where a party in possession brings a bill to cancel an invalid tax title and certificate of purchase, the court will require him to pay the purchase-money at the tax sale, and taxes subsequently paid, with interest, as condition to granting the relief sought; and the court should not require the holder of the tax title to release his title to complainant. Barnett *v.* Cline, 60 Ill. 205.

Unless the statute of limitations has run, one who tenders enough to cover all legal taxes and costs may obtain a decree quieting his title to land which has been sold for taxes part of which are illegal. Herzog *v.* Gregg, 23 Kan. 726.

Claimants having neglected to pay taxes, and a sale having been had and deed made, can only have relief as from a cloud by payment of taxes paid by party claiming under tax sale to him. Reed *v.* Tyler, 56 Ill. 288.

Before bringing action against a party claiming under a tax deed, the plaintiff is not bound to tender the amount of taxes and costs paid by defendant. Courtwright *v.* McFadden, 24 Kan. 662.

(*b*) *Remedy.*—The remedy may be taken away by statute. The owner is protected by the constitution only when the pretended lien is sought to be enforced by the taking of his property.[1]

(*c*) *Evidence.*—The burden of proof is on complainant, and he must show invalidity of tax deed which he complains of as a cloud.[2]

18. Assessments.—An assessment, a sale thereunder, or a certificate thereof, really invalid but apparently regular, so that proof *aliunde* must be made to obtain relief, may be set aside as a cloud.[3]

19. Evidence.—Plaintiff must establish his title,[4] and if a

1. Lennon *v.* Mayor, etc., 55 N. Y. 361; Astor *v.* Mayor, etc., 7 Jones & Sp. (N. Y.) 120; 62 N. Y. 580; Rae *v.* Mayor, etc., 7 Jones & Sp. (N. Y.) 192.

2 The only evidence being the tax deed under which plaintiff claims title, judgment cannot be recovered by him. Douglass *v.* Bishop, 24 Kan. 749.

Plaintiff is not bound to show that the recitals in a tax deed offered in evidence, under which he alleges defendant to make his adverse claim, are untrue before he can recover. Douglass *v.* Huhn, 24 Kan. 766.

Decree.—The proper decree against the holder of a void tax title in the absence of a contract, trust, or some equitable ground for requiring a conveyance, is to perpetually enjoin the assertion of the same. Reed *v.* Reber, 62 Ill. 241.

3. Clark *v.* Dunkirk, 19 N. Y. Sup. Ct. 181; S. P. Lewis *v.* Buffalo, 1 Buff. (N. Y.) Superior Ct. 80; Carroll *v.* Brown, 28 Gratt. (Va.) 79. See Kock *v.* Hubbard, 85 Ill. 533.

Either the present owner of land in possession or a grantor with warranty and full covenants may have an assessment, the invalidity of which is not a matter of record, set aside as a cloud. Pier *v.* Fond du Lac Co., 53 Wis. 421.

A certificate of sale on a void assessment may be cancelled, the defect not appearing on the face of the proceedings. Newell *v.* Wheeler, 48 N. Y. 486.

A sale of land under a void assessment is a cloud which equity will relieve. Chaffee *v.* Detroit, 53 Mich. 573.

A sale of land under an assessment for municipal purposes, apparently valid, though as a matter of fact void, by reason of an omission not appearing of record, will be adjudged void as a cloud. Rumsey *v.* Buffalo, 97 N. Y. 114.

Sales of lands under municipal assessments based on an unconstitutional statute, and sales for taxes to the city for a term of years exceeding that limited by the charter, are clouds on title. Ludington *v.* Elizabeth, 34 N. J. Eq. 357.

An assessment roll and tax certificate void for uncertainty of description do not create a cloud. Shepardson *v.* Milwaukee Co., 28 Wis. 593.

An assessment laid under an unconstitutional act is void on its face, and does not constitute a cloud. Wells *v.* Buffalo, 80 N. Y. 253.

Judicial intervention to remove the lien of an assessment or set aside an assessment sale as a cloud on title is not authorized where the record or conveyance is void on its face, or where the defects relied on to render it valid would necessarily be exposed by the proof required from one claiming under it, in proceedings to establish his claim. Guest *v.* Brooklyn, 69 N. Y. 507.

A bill to remove a cloud of an assessment and sale illegal because under an unconstitutional law, will not lie where by law a reassessment may be had. Newark *v.* Schut, 34 N. J. Eq. 262.

Jurisdiction.—The New Jersey statute compelling determination of claims to real estate and quieting title thereto does not warrant the filing of a bill to contest the legality of an assessment for municipal improvements on the ground of its being an incumbrance on land. Jersey City *v.* Lembeck, 31 N. J. Eq. 255.

Where the owner of land seeks to have a sale made on a municipal assessment where the lien has expired by lapse of the time within which the assessment should have been enforced, adjudged void, equity cannot compel the payment of the assessment, nor does the statute providing that assessments shall not be set aside for irregularities affect the case. Field *v.* West Orange, 39 N. J. Eq. 60.

Defect.—An averment that an assessor did not make any valid assessment does not point out a specific defect, nor is averment that he had no authority one of fact, or give any information of real ground of complaint. Gamble *v.* East Saginaw, 43 Mich. 369.

4. The plaintiff, in an issue at law under a bill to quiet title, must establish his

deed constitutes the cloud on it, he must show clearly its hostility.[1]

20. Relief.—The relief depends upon the circumstances and rests generally in the discretion of the court.

It is given on the *quia timet* principle, and includes the cancellation of deeds and other instruments constituting clouds, as well as injunction, spoken of above. (See sec. 4.)[2]

title, and if the issue allows him two, his selection of one is binding. Powell *v.* Mayo, 27 N. J. Eq. 440.

On bill to set aside a contract of sale and conveyance of land as a cloud on title, on the ground that the contract and deed are forgeries, or made by some one personating the complainant and assuming his name, the complainant must show title in himself when that fact is put in issue. The admission that a party of the same name, under whom defendant claims, was owner, is not an admission of complainant's ownership. Wing *v.* Sherrer, 79 Ill. 200.

1. Proofs must show clearly the hostility of a deed sought to be set aside as a cloud to the title. Hartman *v.* Reed, 50 Cal. 485

What is Admissible.—Only record evidence will be allowed in aid of a lien claim alleged to be a cloud. Raymond *v.* Post, 25 N. J. Eq. 447.

In an action by a fraudulent grantee to quiet the title against a subsequent purchaser for value, evidence of the fraudulent character of the prior conveyance is admissible, as is also the contract of purchase between the grantor and the subsequent purchaser. Hurley *v.* Osler, 44 Iowa, 642.

Where the answer does not deny allegations of petition, it is error to admit evidence of any other than the title pleaded. Where there is such denial, any legal evidence, such as plaintiff's voluntary deed, sheriff's or tax deed, tending to show that plaintiff is not owner as alleged, whether specifically set out in answer or not, is admissible. Morrill *v.* Douglass, 14 Kan. 293.

Variance.—Where both parties to a bill have treated a deed as applying to the specific lots in question, it is no variance that the deed should omit to state the county and State in the description. Smith *v.* Brown, 34 Mich. 455.

Unless there is an objection to evidence or surprise is pleaded at trial of issue directed under a bill to quiet title, a new trial will not be granted on the ground that the title differs from that set up in the answer, though otherwise it would be as a matter of course. Powell *v.* Mayo, 20 N. J. Eq. 120.

Burden of Proof.—The burden of proof is on him who asks that deeds of his ancestor, which he claims were never delivered, be set aside. Salisbury *v.* Salisbury, 49 Mich. 306.

Plaintiff having alleged that defendant had notice of a deed to plaintiff, though unrecorded, the burden of proof is on defendant to show himself a purchaser for a valuable consideration, without notice. Nolan *v.* Grant, 53 Iowa, 392.

The burden of proof is on complainant to show an original entry as claimed, and, failing this, he is not entitled to relief where his complaint is that he entered one tract, while the records, as far as undestroyed, show that he entered another, and he brings his action to quiet his title to the latter: White *v.* Chicago, etc., R., 46 Iowa, 222.

Where the complainant is in possession under a deed which he alleges defendant gave to him, but afterwards destroyed without recording, it must be shown by a preponderance of evidence that such a deed was executed, acknowledged, and delivered by defendants, or with their consent. Eiden *v.* Eiden, 41 Wis. 460.

2. Hamilton *v.* Cummins, 1 Johns. Ch. (N. Y.) 517; Leigh *v.* Everhart's Exrs., 4 T. B. Mon. (Ky.) 380; Apthorp *v.* Comstock, 2 Paige (N. Y.), 482; Petit *v.* Shepherd, 5 Paige (N. Y.), 493; Burt *v.* Cassety, 12 Ala. 734; Hall *v.* Fisher, 9 Barb. (N. Y.) 17; Kimberly *v.* Fox, 27 Conn 307; Tucker *v.* Keniston, 47 N. H. 267. 270.

Authorities for Bill to Remove Clouds.—Bispham's Principles of Equity; Story's Eq. Pl. & Jur.

BILLS OF EXCHANGE AND PROMISSORY NOTES. (See also AGENCY; ALTERATION OF INSTRUMENTS; BANKS AND BANKING; CHECKS; CONTRACTS; DEVISE AND LEGACY; FORGERY; GUARANTY; INTEREST; ORDERS; PARTNERSHIP; PAYMENTS; SURETY; USURY.)

1. Definitions.—A bill of exchange 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.[1]

A promissory note is a written engagement by one person to pay another, therein named, absolutely and unconditionally a certain sum of money at a time specified therein.[2]

2. Origin and History.—The date of the invention of bills of exchange cannot be fixed, nor can their development be accurately traced. Mr. Justice Story has collected all the speculations of the older writers on this subject,[3] which are fairly embodied in the opinion of Cockburn, C. J., that "bills of exchange are known to be of comparatively modern origin, having been first brought into use, so far as at present known, by the Florentines in the twelfth, and by the Venetians in the thirteenth century. The use of them gradually found its way into France, and still later, but slowly, into England."[4]

The name (French—*billet de change*) reveals clearly the country from which they came to England,[5] but the date cannot be more definitely fixed than some time prior to 1381.[6]

Promissory notes are supposed to be more ancient than bills of exchange, and have been identified with the *chirographa* of the Roman law.[7]

Negotiable notes, however, are of later origin than bills,[8] and in the opinion of Lord Holt were unknown in England until the last half of the seventeenth century.[9]

Bills were held assignable and negotiable by the custom of merchants, as recognized and enforced by the common law, from the time of their introduction into England;[10] but negotiability having been denied to promissory notes in Buller *v.* Crips, 6 Mod. 29, the statute of 3 and 4 Anne, c. 9, expressly conferred it upon notes to order or bearer.[11] Upon this statute the negotiability of notes has generally been supposed to rest;[12] but the contrary opinion that

1. 3 Kent Com. 74.

This definition, taken by Chancellor Kent from Justice Bayley's work on Bills of Exchange (5th Ed., p. 1), is thought by Story incomplete in not mentioning negotiability as a characteristic of bills. Story on Bills, p. 3. But inasmuch as this is not a necessary characteristic, the definition has been recognized as sufficient. Pope *v.* Luff, 7 Hill (N. Y.), 577.

In *California* it would seem that negotiability is essential, since a bill is defined by statute as "an instrument negotiable in form, by which one, called the drawer, requests another, called the payee, to pay a specified sum of money." Civil Code, § 3171.

2. Story on Promissory Notes, p. 2.

"A written promise for the payment of money at all events." 3 Kent Com. 74.

Here, again, the general law is that words of negotiability are not essential. Smith *v.* Kendall, 6 T. R. 123; Bates *v.* Butler, 46 Me. 387. But the rule, in *California* is different by statute, a note being defined as "an instrument negotiable in form, whereby the signer promises to pay a specified sum of money." Civil Code, § 3244.

3. Story on Bills, p. 5. See Encyc. Britannica (9th Ed.), art. Exchange.

4. Goodwin *v.* Robarts, L. R. 10 Ex. 347.

5. Edwards on Bills, p. 1.

6. Daniel on Neg. Inst., p. 4.

7. Story on Notes, p. 8.

8. Story on Notes, p. 9.

9. Buller *v.* Crips, 6 Mod. 29.

10. 2 Black. Com. 467.

11. See 1 Parsons on Notes and Bills, p. 9, for the text of this famous act, with a full history of the difficulties that led to its passage.

12. Edwards on Bills, etc., p. 54.

notes were negotiable at the common law, of which 3 and 4 Anne was merely declaratory, has been most ably supported by great authority,[1] and some States of the Union where this statute had never been adopted have judicially held the same view.[2]

3. **Kinds of Bills of Exchange.**—Bills of exchange are either *foreign* or *inland*,—the latter often called *domestic*, and both kinds indifferently alluded to as *drafts*.

A foreign bill is one drawn in one State or country upon a foreign State or country, while inland or domestic bills are drawn and payable in the State or country whose jurisdiction is invoked.[3]

4. **Technical Terms.**—The *drawer* of a bill of exchange is the person making it; the *drawee*, the person upon whom it is drawn; and the person in whose favor it is, the *payee*.

The same person may be *drawer* and *drawee*, or *drawer* and *payee*. The *acceptance* of a bill is the drawee's promise to "pay it according to its terms,"[4] and upon making such promise the drawee becomes the *acceptor*.

If the payee transfers the bill by indorsement he becomes an indorser; and one in no way connected with the bill originally may become liable as *guarantor* or *surety* by putting his name upon it, or make himself *acceptor supra protest*, by promising payment after the drawee has refused.

Bills often contain a reference to persons who will pay if the drawee will not; such individuals are said to be designated *au besoin*, i.e., *in case of need*.

The act of offering the bill for acceptance or payment is termed *presentment;* and refusal of acceptance or payment is *dishonor*, which is usually attested by *protest*, i.e., a formal notarial certificate attesting such dishonor.[5]

Notice (usually in writing) of dishonor is in most cases necessary to fix the liability of all parties to a bill, and is often given by a *notarial certificate* contained in the protest and forwarded to the parties entitled to it.

The *maker* of a promissory note is the person who gives it, and the *payee* the one indicated as the recipient of the promised amount.

Indorsement is the transfer of any negotiable instrument by a

1. Cranch, J., in Appendix to 1 Cr. Rep., p. 367.

2. Irvin *v.* Maury, 1 Mo. 194; Dunn *v.* Adams, 1 Ala. 527.

3. Story on Bills, § 22; Randolph on Com'l Paper, § 3.

What States and countries are foreign to each other has been the subject of much controversy. For purposes of exchange, however, it is now settled that, despite the acts of union, England, Scotland, and Ireland are separate countries, and bills drawn in one on another foreign bills. Bayley on Bills, p. 26; Mahoney *v.* Ashlin, 2 B. & A. 478. So also it is well settled that for this purpose the States of the Union are foreign to each other. Buckner *v.* Finley, 2 Pet. 586; Bank of U. S. *v.* Daniel, 12 Pet. 32; Phœnix Bank *v.* Hussey, 12 Pick. 483; Ocean Nat'l Bank *v.* Williams, 102 Mass. 141.

4. Bonnell *v.* Mawha, 8 Vr. (N. J.) 200.

5. Byles on Bills, 262; Benj. Chal. Dig. § 176.

"Protest in a more popular sense includes all steps after the dishonor of negotiable paper necessary to charge a party to it." Ocoll Bank *v.* Hughes, 2 Coldw. 52.

writing on the paper itself, or upon an attached piece of paper called an *allonge*. It may be either *blank* or *full*. The former is effected by the holder's merely writing his name upon (usually) the back of the instrument to be transferred, while a *full* or *special* indorsement directs payment to the order of a particular person.[1]

An indorsement may be either *absolute*, e.g., "protest waived," or *qualified*, e.g., "without recourse;" *conditional*, ordering payment only upon a contingency, or *restrictive* as to the use to be made of the indorsed instrument, e.g., "pay A to the use of B."

Negotiation is the transfer of a bill or note in the manner prescribed by the law merchant.[2]

Holder is a title applicable to any one in actual or constructive possession of a note or bill, and entitled by law to sue and recover upon it.[3]

A *bona-fide* holder for value is a possessor of the negotiable paper in question who has paid value for it "really and truly without notice of any facts which, if known, would defeat his title to the note or bill."[4]

An *accommodation* party to a note or bill is one who has signed as drawer, maker, indorser or acceptor, without receiving value, and for the purpose of lending his name to some other person as a means of credit.[5]

The *maturity*, or due date, of a note or bill is usually given by the text of the instrument; if payable *on demand* it is instantly due, except in some States, where by statute the maturity of such bills and notes is fixed at a certain number of months.

Days of grace, usually three in number, are in most countries allowed by custom or statute as an addition to the time which the bill or note has to run according to its terms. Such days are now regarded as of right.[6]

Re-exchange is the loss resulting from the dishonor of a bill of exchange in a country different from that in which it was drawn or indorsed,[7] and is a part of the damages recoverable by the holder of a dishonored bill.

Foreign bills are sometimes drawn at so many *usances*, i.e., periods for payments fixed by custom at the place of drawing and payment. This term is now unknown in Anglo-American commercial usage.

5. Forms.—The ordinary form of a foreign bill of exchange is as follows:

Exchange for £500. NEW YORK, Jan. 2, 1886.

Six months after date of this first of exchange (second and third of

1. Indorsement is the "transfer of a negotiable note or bill by the indorsement of some person who has a right to indorse." 2 Parsons, N. & B. 1. As to the place for indorsement see. 2 Bish. Crim. L. §570 a; Clark *v.* Sigourney, 17 Conn. 511; Com. *v.* Buttrick, 100 Mass. 12; Com. *v.* Spilman, 124 Mass. 327; Higgins *v.* Bullock, 66 Ill. 37.

2. Benj. Chal. Dig. § 106.

3. Byles on Bills, 2.

4. Benj. Chal. Dig. § 85.

5. Benj. Chal. Dig. § 90; *cf.* Dunn *v.* Weston, 71 Me. 270; Lord *v.* Ocean Bank, 20 Pa. St. 384.

6. Ferris *v.* Saxton, 1 South. (N. J.) 17.

7. Benj. Chal. Dig. § 221; Story on Bills, § 400.

same date and tenor unpaid) pay to the order of I. S. five hundred pounds value received. A. B.

To C. D. Bank, London, England.

It is unusual to draw inland bills in triplicate, the dangers of transmission being thought so slight. An ordinary form is:

$500. NEW YORK, Jan. 2, 1886.

Ten days after sight pay to I. S. or order five hundred dollars value received, and charge to the account of A. B.

To the First National Bank of Phila., Pa.

The common method of acceptance is to write the word "Accepted" across the paper over the acceptor's signature. A sufficient acceptance *supra protest* is, "Accepted S. P., John Smith."

The protest of a bill cannot be too carefully drawn. The usual form is (for non-acceptance):

United States of America,
State of New York, } *ss.:*
City and County of New York,

On the 2d day of January, 1886, at the request of [the *holder*], I, James Burr, a notary public of the State of New York, duly commissioned and sworn, did present the original bill of exchange hereto annexed [*or*, of which a copy is hereto annexed] to [*drawee*] at his place of business in the city of New York [street and number usually given] and demanded acceptance, who refused to accept the same [reasons for refusal may be here inserted].

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do solemnly and publicly protest, as well against the drawer and indorsers of the said bill as against all others whom it may concern for exchange, re-exchange, and all costs, damages, and interest already incurred and to be hereafter incurred for want of acceptance of the same.

Thus done and protested at New York City in the county aforesaid, in the presence of John Doe and Richard Roe, witnesses.

JAMES BURR, Notary Public.

[L.S.] *In testimonium veritatis.*

Notice of protest should be sent by the notary in the form following:

To A. B.:

Please take notice that a bill of exchange drawn by C. D. upon E. F. for $500, dated Jan. 2, 1886, payable one month after sight in favor of G. H., and by you indorsed, has been presented by me to said E. F. at his place of business, 17 Broadway, New York City, and acceptance being duly demanded was refused, whereupon by direction of the holder the same has this day been duly protested for such non-acceptance, and you are held liable therefor. JAMES BURR, Notary Public.

New York City, Feb. 15, 1886.

The notary's certificate of notice, which by the laws of most countries is evidence of protest and notice, may be as follows:

United States of America,
State of New York, } *ss.:*
City and County of New York,

I, James Burr, a notary public of the State of New York, duly commissioned and sworn, do hereby certify that on the 15th day of February, 1886, due notice of the protest of the annexed bill of exchange [*or*, of which a copy is hereunto annexed] was served upon the drawer C. D. personally at [state place exactly], and upon the indorser A. B. by [e. g.] putting the same into the post-office directed to him at Crestline, Ohio, said place being the re-

puted residence of the said A. B. and the post-office nearest thereto, the said notice being mailed at New York City, and the postage prepaid.

Witness my hand and official seal at New York City, this 15th day of February, 1886.

[L. S.] JAMES BURR, Notary Public.

These forms, *mutatis mutandis*, are equally applicable to protest for *non-payment*, and notice and certificate of dishonor of inland bills where formal protest is unnecessary.

Where the drawer has not been served with notice, the certificate should show just what diligent search has been made for him.

Almost any written promise of reimbursement will be regarded as a promissory note, but a prudent and orderly form is:

$500. BROOKLYN, N. Y., Jan. 2, 1886.

Thirty days after date I promise to pay to the order of I. S. five hundred dollars value received. Payable at the Long Island Bank. A. B.

6. Essential Requisites of Notes and Bills.—(*a*) *Materials and Signature.*—It has never been doubted that a note or bill must be in writing;[1] a verbal note is a contradiction in terms.

Ink, however, is not the only medium of script; a pencilled note is good,[2] and printing, at least in the body of the instrument,[3] is a species of writing.

Though paper or parchment are the only substances for writing purposes which the courts have ever noticed, there is no reason to suppose that they are the only legal materials; the question has never been mooted.

Signature, i.e., a person's name written by himself or with his authority, is in general necessary to the completeness of a note or bill.[4]

Even where sureties have signed, the note is inchoate until the principal's signature is affixed.[5]

Even where a bill "to my order," though accepted, was unsigned by the drawer, it has been held invalid for any purpose.[6]

But the signature need not be full; initials are sufficient,[7] and the mark of a person unable to write is undoubtedly good.[8]

1. Thomas *v.* Bishop, 2 Stra. 955.

2. Geary *v.* Physic, 5 B. & C. 234; followed in Closson *v.* Stearns, 4 Vt. 11; Brown *v.* Butcher's, etc., Bank, 6 Hill (N. Y.), 443; Reed *v.* Roark, 14 Tex. 329.

3. Story on Notes, § 11.

A printed memorandum is part of a note. Zimmerman *v.* Rote, 75 Pa. St. 188. Even if on the back of the note. Farmer's Bank *v.* Ewing, 78 Ky. 264. And a *fac simile* autograph is a good signature to a coupon. Pennington *v.* Baehr, 48 Cal. 565.

4. The statutes of some States require that negotiable instruments be signed by the person to be holden thereby. *Indiana*, 1 R. S. c. 177, § 1; *Iowa*, R. C. § 2082; *Nevada*, 1 Comp. L. c. 5, § 9; *New Jersey*, Pat. Rev. p. 342, § 4; *New York*, 2 R. S. (Ed. 1875) p. 1160, § 1.

5. Knight *v.* Hurlbut, 74 Ill. 133.

So held where A signed but with agreement not to be held unless B "signed ahead of him." Miller *v.* Gambie, 4 Barb. 148. But this defence is unavailable against a *bona fide* holder for value. Smith *v.* Moberly, 10 B. Mon. 266.

6. Stoessiger *v.* S. E. R. Co., 3 El. & Bl. 553; Goldsmid *v.* Hampton, 5 C. B N. S. 108. *Sed contra*, Harvey *v.* Cane, 24 W. Repr. 400; Whitmore *v.* Nickerson, 125 Mass. 496.

7. Merchant's Bank *v.* Spicer, 6 Wend. (N. Y.) 443; Palmer *v.* Stephens, 1 Denio (N. Y.), 479; Weston *v.* Myers, 33 Ill. 424.

The intent being clearly shown, the figures 1, 2, 8 have been held a signature. Brown *v.* Butcher's, etc., Bank, 6 Hill (N. Y.), 443.

8. George *v.* Surrey, 1 Mood. & M.

A seal is not the equivalent for a signature except in the case of a corporation note or bill,[1] but a hand-stamp is probably sufficient.[2]

The position of the signature is immaterial; the intent governs,[3] and this intent may be proved by parol.[4] The signatures of maker or drawer may even be on the back of the instrument,[5] or upon an *allonge* attached to it.[6]

An averment that A "made" a note is a sufficient allegation that he signed it,[7] but the execution must be proved as a fact;[8] the maker's admission of signature, however, is sufficient proof.[9]

The attestation of witnesses is not usual or desirable, unless required by statute, as in the case of parties who cannot write.[10]

(*b*) *The Effect of a Seal.*—There is no statute in any State of the Union requiring or prohibiting the sealing of bills or notes.

In many States, however, the distinction between specialties and simple contracts has been done away with by statute,[11] at least as far as commercial paper is concerned.

In these States a seal can confer neither benefit nor detriment upon the instrument bearing it.

In other jurisdictions absolute negotiability has been conferred upon sealed bills,[12] and in still others they are made assignable by indorsement subject to equities existing at the date of assignment against the assignor.[13]

516; Willoughby *v.* Moreton, 47 N. H. 205; Hilborn *v.* Alford, 22 Cal. 482; Shank *v.* Butsch, 28 Ind. 19; Handyside *v.* Cameron, 24 Ill. 588.

The *Alabama* statute requires a witness. Flowers *v.* Bitting, 45 Ala. 448. So in *California*. Civ. Code, § 5014.

1. Crouch *v.* Credit Foncier L. R., 8 Q. B. 382.

2. Randolph on Com'l Paper, § 64.

3. Thus "I, A. B., promise" has been held a good signature. Taylor *v.* Dobbins, 1 Stra. 399. But two persons signing in different corners are not *prima facie* joint makers. Steininger *v.* Hoch, 39 Pa. St. 263.

4. Watkins *v.* Kirkpatrick, 2 Dutch. 84.

5. Nat. Pemberton Bank *v.* Lougee, 108 Mass. 373; Rodocanachi *v.* Buttrick, 125 Mass. 134; Palmer *v.* Grant, 4 Conn. 389; Quinn *v.* Sterne, 26 Ga. 223; Schmidt *v.* Schmaelter, 45 Mo. 502.

6. Heister *v.* Gilmore, 5 Phila. 62; French *v.* Turner, 15 Ind. 59.

7. Elliot *v.* Cooper, 2 Ld. Ray. 1376.

8. Colbath *v.* Jones, 28 Mich. 280.

9. Hilborn *v.* Alford, 22 Cal. 482; Nichols *v.* Allen, 112 Mass. 23; Willoughby *v.* Moreton, 47 N. H. 205; Mauri *v.* Heffernan, 13 Johns. 57; Casco Bank *v.* Keene, 53 Me. 103.

But the admission must be explicit. "A note to B" is not sufficient. Shaver *v.* Ehle, 16 Johns. 201.

10. As in *Alabama;* Code, 2707, requiring also two witnesses to the transfer of a note by a *feme covert*. Walker *v.* Struve, 70 Ala. 167.

11. *Kansas*, Comp. L. 1879, c. 21, § 6; *Nebraska*, Gen. Stats. 1873, c. 71, § 1; *Tennessee*, Comp. Stats. 1871, § 1804; *Arkansas*, Constitution, art. 15, § 16; *California*, Civ. Code, § 6629; *Indiana*, 2 Rev. Stat. 1876. § 273, p. 146; *Kentucky*, Gen. Stats. 1877, c. 22, § 2; *Michigan*, Comp. L. §§ 5367–5384; *New York*, 1875, 1 R. S. 768. § 1; *Ohio*, Rev. Stat. 1880, §§ 3171–72; *Texas*, Pasch. Dig. § 5087.

12. *Colorado*, 1877, Gen. L. 110, § 91; *Dakota*, 1877, Rev. Code § 1829; *Illinois*, 1880, Rev. Stats. c. 98, §§ 3, 4; *Massachusetts*, 1859, G. S. s. 53, § 6; *Missouri*, 1 R. S. 1879, c. 10, § 547; *Nevada*, 1873, C. L. c. 5, § 9; *Georgia*, Code 1873, § 2776.

13. *Alabama*, 1876, Code, § 2100; *Dist. Col.*, Laws Md. 1763, c. 23, § 9; *Florida*, 1870, Code Civ. Proc., part 2, tit. 3, §§ 62–3; *Iowa*, 1880, Rev. Code, §§ 2084–2546; *Maryland*, 1878, Rev. Code, 594, § 43; *Minnesota*, 1878, G. S. c. 66, § 27; *Mississippi*, 1871, Rev. Code, § 2228; *New Jersey*, 1874, Rev. 850; *Pennsylvania*, Purd. Dig. 1872, p. 161, § 1; *South Carolina*, 1873, R. S. §§ 134, 135, p. 594;

Aside from statute, however, a sealed bill or note is not a negotiable instrument.[1] If payable to bearer they are transferable by delivery,[2] otherwise by regular assignment, and in any case are subject to existing equities. A mere blank indorsement of a sealed bill confers no title at all.[3]

(*c*) *The Date.*—A date has been said to be necessary to "the free and uninterrupted negotiability"[4] of a bill or note, but no date at all is necessary by common law,[5] though common prudence will dictate its invariable insertion.

A date left blank may be filled up,[6] and the note in this way even antedated by a *bona-fide* holder.[7]

Notes take effect only on delivery,[8] yet when payable so many days after date the time begins to run from the expressed date regardless of delivery;[9] but the time of payment of such notes when no date is expressed is calculated from the day of delivery,[10] as shown by parol evidence if necessary.[11]

The expressed date is *prima-facie* evidence of the date of delivery, but as between immediate parties it may be shown to have occurred on any other day.[12]

But as against an innocent holder for value, the apparent date cannot be changed by parol to his disadvantage.[13]

Virginia, 1873, Code, c. 141, § 17; *West Virginia*, 1879, R. S. c. 12, § 14; *Wisconsin*, 1878, R. S. §§ 2605, 2606.

1. Brown *v.* Lockhart, 1 Mo. 289; Clark *v.* Farmers' Mfg. Co., 15 Wend. (N. Y.) 256; Foster *v.* Floyd, 4 McCord (S. Car.), 159; Frevall *v.* Fitch, 5 Whart. (Pa.) 325; Brown *v.* Jordhal, 32 Minn. 135; Burden *v.* Southerland, 70 N. Car. 528; Glyn *v.* Baker, 13 East, 509.

2. Merritt *v.* Cole, 9 Hun (N. Y.), 98; Porter *v.* McCollum, 15 Ga. 528.

3. Speer *v.* Post, Penn. (N. J.), 1032; Conine *v.* Junction, etc., R., 3 Houst. (Del.) 288.

That a note concludes with the phrase "witness our hand and seal" does not make it a sealed instrument; the words merely call attention to the attestation. Willhelms *v.* Partoine, 72 Ga. 898.

4. Mitchell *v.* Culver, 7 Cow. (N. Y.) 336.

5. Giles *v.* Bourne, 6 M. & S. 73; Vandervere *v.* Ogburn, Penn. (N. J.) 67; Seldonridge *v.* Connable, 32 Ind. 375; Pierce *v.* Richardson, 37 N. H. 306; Dean *v.* De Lezardi, 24 Miss. 424.

6. Androscoggin Bank *v.* Kimball, 10 Cush. 373; Lennig *v.* Ralston, 23 Pa. St. 137; Shultz *v.* Payne, 7 La. Ann. 222; Witte *v.* Williams, 8 S. Car. 290; Fullerton *v.* Sturges, 4 Ohio St. 529.

7. Page *v.* Morrell, 3 Keyes, 417. But not if such holder knows the real date. Emmons *v.* Meeker, 55 Ind. 321; Goodman *v.* Simonds, 19 Mo. 106.

8. They are to be considered "as made or drawn when delivered." Lansing *v.* Gaine, 2 Johns. 303; Chamberlain *v.* Hopps, 8 Vt. 94; Clough *v.* Davis, 9 N. H. 500; Flanagan *v.* Meyer, 41 Ala. 132; Hill *v.* Dunham, 7 Gray (Mass.), 543; Hilton *v.* Houghton, 35 Me. 143; Fritsch *v.* Heisler, 40 Mo. 555; King *v.* Fleming, 72 Ill. 21.

9. Powell *v.* Waters, 8 Cow. (N. Y.) 669; Luce *v.* Shoff, 70 Ind. 152. Even if postdated a year. Bumpass *v.* Timms, 3 Sneed (Tenn.), 1856.

10. Richardson *v.* Ellett, 10 Tex. 190; Kenner *v.* Creditors, 10 Mart. (La.) 17.

11. Which, however, cannot be used to show that an undated indorsement was made on Sunday. Greathead *v.* Walton, 40 Conn. 226.

12. Cowing *v.* Altman, 71 N. Y. 435; Aldridge *v.* Branch Bank, 17 Ala. 45; Drake *v.* Rogers, 32 Me. 521; Dean *v.* De Lezardi, 24 Miss. 424; Buck *v.* Steffy, 65 Ind. 58; McSparran *v.* Neely, 91 Pa. St. 17. Even if such evidence shows that a note was actually delivered on a Sunday, although dated on a week day. Bank of Cumberland *v.* Mayberry, 48 Me. 198; Allen *v.* Deming, 14 N. H. 133.

13. Thus a note dated Monday but really executed and delivered on Sunday is good in the hands of a *bona fide* holder. Clinton Nat. Bank *v.* Graves, 48 Iowa, 228; Cranson *v.* Goss, 107 Mass. 439; Greathead *v.* Walton, 40 Conn. 226; State

Post- or ante-dating notes and bills throws no suspicion upon the good faith of the taker.[1] Even if one of the parties to a post-dated note dies before the date day, the obligation remains valid.[2]

The place at which a note or bill is dated is *prima facie* the place of residence of the drawer or maker,[3] and may be used as evidence in the absence of any other proof of the place where it is payable.[4]

Indorsements are usually undated, but *prima facie* their date is that of the note or bill upon which they are made.[5]

The real date of indorsement may be proven by parol,[6] as may also the real date of an acceptance, which if undated is presumed to be of the same day as the drawing of the bill.[7]

The alteration of a date, as of any other material part of a note or bill, avoids it.[8]

(*d*) *The Promise or Order must be Positive.*—Although no set form of words is necessary,[9] a note must in legal effect promise, and a bill order, the payment of money.[10]

Words of politeness, e. g., "Please let bearer have money," do not deprive the instrument of its commercial character.[11]

Bank *v.* Thompson, 42 N. H. 369; Knox *v.* Clifford, 38 Wis. 651; Vinton *v.* Peck, 14 Mich. 287; Ball *v.* Powers, 62 Ga. 757.

1. Brewster *v.* McCardel, 8 Wend. (N. Y.) 479,—providing it be not done for an illegal purpose, e.g. evade a prohibitory law,—Bayley *v.* Taber, 5 Mass. 286,—in which case the note is void.

2. Passmore *v.* North, 13 East. 517.

3. Duncan *v.* McCullough, 4 S. & R. (Pa.) 480; Sasscer *v*, Whitely, 10 Md. 98; Branch Bank *v.* Pierce, 3 Ala. 321; Taylor *v.* Snyder, 3 Denio (N. Y.), 145. It has been held, however, that this simply shows the place of drawing. Lightner *v.* Will, 2 W. & S. (Pa.) 140.

4. Moodie *v.* Moorall, 1 Mill (S. Car.), 307.

5. Smith *v.* Nevlin, 89 Ill. 193; Canal Bank *v.* Templeton, 20 La. Ann. 141; Collins *v.* Gilbert, 4 Otto, 753; Gray *v.* Brown, 49 Me. 544; Meadows *v.* Cozart, 76 N. Car. 450; Nat'l Pemberton Bank *v.* Longee, 108 Mass. 373; Patterson *v.* Carrell, 60 Ind. 128. But it has also been held that the presumption is merely that the indorsement was made before maturity. Sullivan *v.* Violett, 6 Gill (Md.), 181; Rahm *v.* Bridge Co., 16 Kans. 530; Rea *v.* Owens, 37 Ia. 362; Rhode *v.* Alley, 27 Tex. 443.

6. Anderson *v.* Weston, 6 Bing. N. Car. 296; Clendenin *v.* Southerland, 31 Ark. 20; Baker *v.* Arnold, 3 Caines (N.Y.), 279, and cases last cited. But evidence of delivery before and indorsement after dishonor will not overcome the presumption of indorsement before maturity. Ranger *v.* Cary, 1 Metc. (Mass.) 369. Nor will a payee's declarations. Hearson *v.* Grandine, 87 Ill. 115.

7. 2 Parsons N. & B. 489, 488 n.; Roberts *v*, Bethell, 12 C. B. 778.

8. Heffner *v.* Wenrich, 32 Pa. St. 423; Hamilton *v.* Wood, 70 Ind. 306; Le May *v.* Williams, 32 Ark. 166.

Thus if the date of maturity of a bill be changed, the acceptor is discharged. 6 Wall. 80.

9. Byles on Bills, 78; Story on Prom. Notes, § 12; Brooks *v.* Elkins, 2 M. & W. 74; Partridge *v.* Davis, 20 Vt. 499. Thus a note may be in form a bond. Woodward *v.* Genet, 2 Hilt. 526; Hitchcock *v.* Cloutier, 7 Vt. 22. And an order of payment indorsed on an account has been held a bill of exchange. Leonard *v.* Mason, 1 Wend. 522. Though not negotiable. Hoyt *v.* Lynch, 2 Sandf. 328; Falkenburg *v.* Clark, 11 R. I. 278. *Sed contra* Platzer *v.* Norris, 38 Tex. 1.

A lumberman's order in this form: [Date and address] Pay to the order of H. F. the sum of ten dollars, and charge the same to Camp 8. [Signature], is in essentials a draft, and must be accepted before it will sustain an action. Finan *v.* Babcock, 58 Mich. 301.

10. Daniel on Neg. Inst. § 35.

11. Bresenthal *v.* Williams, 1 Duvall (Ky.), 329; Gillilan *v.* Myers, 31 Ill. 525; Knowlton *v.* Cooley, 102 Mass. 233. But "we authorize"—Hamilton *v.* Spottiswoode, 4 Exch. 200—and "I allow"—Harmon *v* James, 7 Ind. 263—have been held insufficient.

But a mere due bill, or I O U, is not a note, for it does not promise payment.[1]

Some cases there are, however, holding that mere statements of indebtedness are promissory notes,[2] while the addition of the words "on demand," "payable on demand," "to be paid May 5th," have all been pronounced sufficient to convert due bills into notes.[3]

In accordance with the doctrine that makes a promissory note of any document that by fair intendment contains a promise to pay, *certificates of deposit* have been held notes, the necessary promise being inferred from the nature of the instrument,[4] and if payable to A "or bearer" they are considered negotiable promissory notes payable to the holder.[5]

Receipts for money when containing a promise of repayment are negotiable,[6] and interest coupons are practically notes payable to bearer.[7]

(*e*) *The Promise or Order must be Unconditional.*—It has often been held that notes and bills to be negotiable must be payable "at all events;" and however valid as contracts, if their currency is

1. Fesenmayer *v.* Adcock, 16 M. & W. 449; Gould *v.* Combs, 1 C. B. 543; Carson *v.* Lucas, 13 B. Mon. (Ky.) 213; Garland *v.* Scott, 15 La. Ann. 143; Currier *v.* Lockwood, 40 Conn. 349; Brenzer *v.* Wightman, 7 W. & S. (Pa.) 264; Biskup *v.* Oberle, 6 Mo. App. 583. But in some States the rule is doubted. Russell *v.* Whipple, 2 Cow. (N. Y.) 536; Huyck *v.* Meador, 24 Ark. 191; Cummings *v.* Freeman, 2 Humph. (Tenn.) 143; Bacon *v.* Bicknell, 17 Wis. 523; Hussey *v.* Winslow, 59 Me. 170; McDonald *v.* Yeager, 42 Ind. 388. In these cases, however, the sum is admitted due to bearer or order, and an intent to pay is inferred, which is said to be the test as to whether the instrument is or is not a note. Daniel on Neg. In. § 37.

2. "Due B. $150." Brady *v.* Chandler, 31 Mo. 28. "Due W. $525." Jacquin *v.* Warren, 40 Ill. 459; Fleming *v.* Burge, 6 Ala. 373; Brewer *v.* Brewer, 6 Ga. 588.

3. Smith *v.* Allen, 2 Day, 337; Kimball *v.* Huntington, 10 Wend. (N. Y.) 675; Mitchell *v.* Railroad Co. 17 Ga 574; Pepoon *v.* Stagg, 1 Nott & McC. (S. Car.) 102; Waithman *v.* Elzee, 1 C. & K. 35. But it is impossible to lay down a national rule on this point. See Smiley *v.* Fry, 1 Cent. Repr. 510, where "Due A. B. $4000, returnable on demand," was held not negotiable, and a mere evidence of special deposit in distinction from other transactions with A. B.

4 Miller *v.* Austin, 13 How. (U. S.) 218; Bank of Orleans *v.* Merrill. 2 Hill (N.Y.), 295; Pardee *v.* Fish, 60 N. Y. 265; Hart *v.* Life Assoc., 54 Ala. 495; Hunt *v.* Divine, 37 Ill. 137; Fells Point Savings Inst. *v.* Weedon, 18 Md. 320; Poorman *v.* Mills, 35 Cal. 118; Kilgore *v.* Bulkley, 14 Conn. 362; Fultz *v.* Walters. 2 Mont. 165; Howe *v.* Hartness, 11 Ohio St. 449; Gregg *v.* Union Co. Bk., 87 Ind. 238; Laughlin *v.* Marshall, 19 Ill. 390; Hazleton *v.* Union Bk., 32 Wis. 51; Tripp *v.* Curzenius, 36 Mich. 494. But *contra* London, etc., Soc. *v.* Hagerstown Sav. Bk., 36 Pa. St. 498; Patterson *v.* Poindexter, 6 W. & S. (Pa.) 227.

And a *bank-book* is not even a due bill, much less a negotiable note. Mechanics Bank *v.* Railroad Co., 13 N. Y. 599.

5. Maxwell *v.* Agnew, 21 Fla. 1154.

6. Green *v.* Davies, 4 B. & C. 235.

So held of receipt for money to be "returned when called for." Woodfolk *v.* Leslie, 2 Nott & McC. (S. Car.) 585. But otherwise when the receipt is merely for money "held subject to order." Roman *v.* Terna, 40 Tex. 306. Or "to be accounted for." Tomkins *v.* Ashby, 6 B. & C. 541.

7. Thompson *v.* Perrine, 16 Otto (U. S.), 589; Haven *v.* Railroad Co., 109 Mass. 108; Beaver Co. *v.* Armstrong, 44 Pa. St. 63; Burroughs *v.* Commissioners, 65 N. Car. 234; Evertsen *v.* Nat'l Bk., 66 N. Y. 14.

But a receiver's certificate is not. Turner *v.* Railroad Co., 95 Ill. 1889; Union Trust Co. *v.* Railroad Co., 7 Fed. Repr. 513. Nor municipal or county warrants. Dillon on Mun. Corp. § 406; People *v.* Johnson, 100 Ill. 537.

clogged by conditions, the qualities of commercial instruments are denied them.[1]

A somewhat similar doctrine is held as to documents not clearly conditional, but so encumbered with directions as to method of payment as to be clearly unsuited for business negotiation. Thus a promise to pay "all fines according to the rule," though unconditional, is not a note at all,[2] and a writing giving the maker the choice of paying a certain judgment or losing what had been already paid is no better.[3]

An absence of directions as to payment is as fatal as too great particularity.[4]

But if a time of payment must surely come, though the particular day is not mentioned, nor perhaps ascertainable at the inception of the contract, the note or bill is good and negotiable.[5]

Some notes containing statements of the time of payment which taken literally would enable the maker to refuse payment forever have been held to be due a *reasonable* time after their date.[6]

That a note payable at a certain date permits payment before maturity is no objection to it;[7] nor is a recital that on payment

1. Tradesmen's Nat'l Bk. *v.* Green, 57 Md. 602; Mast *v.* Matthews, 30 Minn. 441; Overton *v.* Tyler, 3 Pa. St. 346; Kingsbury *v.* Wall, 68 Ill. 311; Van Steenwyk *v.* Sackett, 17 Wis. 645; Carnahan *v.* Pell, 4 Col. 190; Third Nat'l Bk. *v.* Armstrong, 25 Minn. 531; Conover *v.* Stillwell, 5 Vroom (N. J.), 54; Worley *v.* Harrison, 3 Ad. & E. 699; Cook *v.* Satterlee, 6 Cow. (N. Y.) 108.

Thus promises to pay "on or before two years after date," but if within one year no interest to be due—Story *v.* Lamb, 52 Mich. 525—"provided he proceed to sea"—Loftus *v.* Clark, 1 Hilt. 310—"provided a certain mortgage be paid and cancelled"—Hays *v.* Gwin, 19 Ind. 19—when maker's "old mill is sold"—Blake *v.* Coleman, 22 Wis. 415—"Interest only unless principal necessary for support" of payee—Light *v.* Scott, 88 Ill. 239—"After my advances are paid"—54 Miss. 716—and a bill payable "ninety days after sight or when realized"—Alexander *v.* Thomas, 16 Q. B. 333—are all bad as notes and bills, though good contracts.

2. Ayrey *v.* Fearnsides, 4 M. & W. 168.

Neither is a written order to pay a conditional note. Noyes *v.* Gilman, 65 Me. 589. Nor an order to pay "in accordance with a resolution of the police jury." Jenkins *v.* Caddo, 7 La. Ann. 559.

3. Draper *v.* Fletcher, 26 Mich. 164.

4. Thus an agreement to pay in instalments which does not state when the instalments fall due is not a promissory note. Moffatt *v.* Edwards, Car. & M. 16. But if the promise is to pay when the payee requires any instalment it is a good demand note. White *v.* Smith, 77 Ill 351.

5. So held of notes payable a certain time after a man's death. Bristol *v.* Warner, 19 Conn. 7; Conn *v.* Thornton, 46 Ala. 588.

In Capron *v.* Capron, 44 Vt. 412, where the promise was to pay in one year "if enough realized by good management," if not, to have more time "in the manufacture of the plaster bed on Stearn's land," the additional period was held to mean a *reasonable* time. To the same effect Ubsdell *v.* Cunningham, 22 Mo. 124.

"As soon as realized" and "to be paid during the coming season" occurring in same note and read together have been held not a condition, as payment must be due before the close (in this case) of harvest. Cota *v.* Buck, 7 Metc. (Mass.) 588.

6. "When convenient." Works *v.* Hershey, 35 Iowa, 340. "When I sell my place." Crooker *v.* Holmes, 65 Me. 195.

7. Thus a note at 12 mos. "or sooner if made out of a certain sale" is perfectly good. Ernst *v.* Steckman, 74 Pa. St. 13; Walker *v.* Woolen, 54 Ind. 164; Palmer *v.* Hammer, 10 Kans. 464.

Nor does "the right to pay this note before maturity in instalments." etc., destroy negotiability. Riker *v.* Sprague Mfg. Co., 14 R. I. 402; s. c., 51 Am. Rep. 416. And the same is true of the phrase, "This note shall become due imme-

the payee shall sell a machine to the maker;[1] nor reservation of the right to pay in United States bonds.[2]

The words "payable on the return of this certificate," inserted in the document, if a condition at all, constitute a lawful one, being merely a demand for the surrender of the evidence of indebtedness.[3] Nor does a provision for attorney's fees in case of suit destroy negotiability.[4]

Conditions to affect negotiability must appear on the face of the written instrument,[5] and when not so appearing cannot be proven by parol.[6]

Where the condition expressed has been performed, an action will lie on a note containing it,[7] but its negotiability is not thereby restored.[8]

During the War of the Rebellion notes were common payable a certain time "after peace," or the "ratification of peace" between the United States and Confederate States. In some States these obligations have been held actionable upon the cessation of hostilities;[9] in others the view has prevailed that they were wagers on the success of insurrection and therefore void.[10]

(*f*) *Indicated Mode of Payment regarded as a Condition.*—It has been stated as a general rule that instruments made payable expressly or by implication out of a particular fund are not negotiable bills or notes, because their payment is conditioned upon the sufficiency of that fund.[11]

diately upon W. delivering possession to me" of certain land, when the note also states a fixed due day. Dobbins *v.* Oberman, 17 Neb. 163.

1. Hawley *v.* Bingham, 6 Or. 76.

2. Dinsmore *v.* Duncan, 57 N. Y. 573.

3. Smilie *v.* Stevens, 39 Vt. 316; Fells Point Sav. Inst. *v.* Weedon, 18 Md. 320; Frank *v.* Wessels, 64 N. Y. 155.

4. Houghton *v.* Francis, 29 Ill. 244: Trader *v.* Chidester, 41 Ark. 242. Yet the same court holds that such an agreement is not enforceable. Boozer *v.* Anderson, 42 Ark. 167; and see 50 Am. Rep. 451. In other States the agreement is valid, but destroys the negotiability of the note containing it. Sweeney *v.* Thickstun, 77 Pa. St. 131; Cayuga Co. National Bank *v.* Purdy, 56 Mich 6; First National Bank *v.* Larsen, 60 Wis. 206; Johnson *v.* Speer, 92 Pa. St. 227; First National Bank *v.* Bynum, 84 N. Car. 24.

5. Evansville R. Co. *v.* Dunn, 17 Ind. 603; Goddard *v.* Cutts, 11 Me. 440; Richards *v.* Richards, 2 B. & Ad. 447.

"This note given on condition" written in a note are immaterial words and may be erased. Palmer *v.* Sargent, 5 Neb. 223.

6. Cunningham *v.* Wardwell, 12 Me. 466; Brown *v.* Wiley, 20 How. (U. S.) 442; McSherry *v.* Brooks, 46 Md. 103; Gliddons *v.* Harrison, 59 Ala. 481; Jones *v.* Shaw, 67 Mo. 667; Rodgers *v.* Rosser, 57 Ga. 319; Rockmore *v.* Davenport, 14 Tex. 602; McGrath *v.* Barnes, 13 S. Car. 328.

7. As where the note was payable if certain banks resumed payment, as they did do. Walters *v.* McBie, 1 Lea (Tenn.), 364; Gordon *v.* Casey, 23 Ill. 70; Shackleford *v.* Hooker, 54 Miss. 716; Nagle *v.* Horner, 8 Cal. 353; Grimison *v.* Russell, 30 N. Westn. Repr. (Neb.) 249.

8. Hill *v.* Halford, 2 B. & P. 413; White *v.* Smith, 77 Ill. 351.

9. Brewster *v.* Williams, 2 S. Car. 455; Mostee *v.* Edwards, 20 La. Ann. 236; Knight *v.* McReynolds, 37 Tex. 204.

10. Harris *v.* Lewis, 5 W. Va. 576; McNinch *v.* Ramsey, 66 N. Car. 229.

11. Wadlington *v.* Covert, 51 Miss. 631.

Thus an order to pay "out of any funds belonging to me" is not a bill of exchange, for there may be no funds. Averett's Admr. *v.* Booxer, 15 Gratt. (Va.) 165. But one for "$450 amount due me for carrying the mail" has been held an absolute and unconditional draft not drawn upon any particular fund. Defee *v.* Smith, 43 Ark. 221. For the

If, however, the person having possession of the fund drawn upon accept the bill so drawn, the negotiability of the instrument is at once established,[1] and as between drawer and payee it operates even before acceptance as an equitable assignment of the fund it refers to.[2]

An instrument, however, in form a bill of exchange, drawn upon a fund named in the writing, may be either an assignment or a bill according as the fund designated is referred to as the "means of reimbursement or the measure of liability:" if the former, it remains a bill of exchange; if the latter, it is payable only if the fund prove large enough, and can be regarded only as an assignment.[3]

(*g*) *Payment in Money only Must be Promised.*—It is believed to be perfectly well settled that money is the only thing that a note or bill may require payment of, unless this rule at the common law is changed by statute.[4] Promises to pay in work or goods have therefore uniformly been held bad as promissory notes, though in all other respects drawn in proper form.[5] Words of description prefaced to the word "money" have been held not to vitiate the instrument containing them,[6] and notes payable in

general rule see Richardson *v.* Carpenter, 47 N. Y. 661; Corbett *v.* State, 24 Ga. 287; West *v.* Forman, 24 Ala. 400; Mills *v.* Kuykendale, 2 Blackf. (Ind.) 47; Harriman *v.* Sanborn, 43 N. H. 128; Strader *v.* Batchelor, 8 B. Mon. (Ky.) 168; Turner *v.* Peoria, etc., R. Co., 95 Ill. 134; Tradesmen's National Bank *v.* Green, 57 Md. 602; Andrews *v.* Harvey, 39 Tex. 123; Dyer *v.* Covington Twp., 19 Pa. St. 200.

A draft for a certain sum, drawn by one person upon another, payable at sight to the order of a bank named, and containing the direction to charge the same to a certain account, is a negotiable bill of exchange, not payable out of a particular fund, and does not constitute an assignment of the fund. Whitney *v.* Eliot National Bank, 137 Mass. 351; s. c., 50 Am. Rep. 316.

1. State Bank *v.* Gilson, 5 Duer (N.Y.), 574; Lambert *v.* Jones, 2 Pat. & H. (Va.) 144; Mandeville *v.* Welch, 5 Wheat. (U. S.) 277.

2. Gibson *v.* Cooke, 20 Pick. 15.

But if only a portion of the fund be drawn on, it is not even an assignment until accepted. Harris *v.* Clark, 3 N. Y. 115; Wemslock *v.* Bellwood, 12 Bush (Ky.), 139; Robins *v.* Bacon, 3 Greenl. (Me.) 346; Hopkins *v.* Beebe, 2 Casey (Pa.), 85.

3. This distinction made as stated in Munger *v.* Shannon, 61 N. Y. 258, where the fund was the prospective profit of a business, has been recently applied in Schmittler *v.* Simon, 2 Cent. Repr. (N. Y.) 498, s. p., Macleod *v.* Snee, 2 Stra. 762; Redman *v.* Adams, 51 Me. 433; Corbett *v.* Clark, 45 Wis. 403; Early *v.* McCart, 2 Dana (Ky.), 414; Griffin *v.* Weatherby, L. R. 3 Q. B. 753.

4. Hosstatter *v.* Wilson, 36 Barb. (N. Y.) 307.

5. Thus a written promise to pay in a given time "J. S. or bearer one ounce of gold" is in a sense a promissory note. Roberts *v.* Smith, 58 Vt. 492; s. p., Scudder *v.* Clarke, 1 Col. 192; Auerbach *v.* Pritchet, 58 Ala. 451; Hyland *v.* Blodgett, 9. Or. 166; Brown *v.* Richardson, 20 N.Y. 472; May *v.* Lansdown, 6 J. J. Marsh. (Ky.) 165; Gwinn *v.* Roberts, 3 Ark. 72; McClellan *v.* Coffin, 93 Ind. 456; Lawrence v. Dougherty, 5 Yerg. (Tenn.) 435; Mingo *v.* McDowell, 8 Rich. L. (S. Car.) 446; Reynolds *v.* Richards, 14 Pa. St. 206; Clark *v.* King, 2 Mass. 524; Bailey *v.* Simond, 6 N. H. 159; Griffith *v.* Hanks, 46 Tex. 217; Perry *v.* Smith, 22 Vt. 361; Farnum *v.* Virgin, 52 Me. 578; Matthews *v.* Houghton, 11 Me. 377.

Even the indorsement "this note payable in wheat" has been held part of the note, making it a merchandise note. Polo Mfg. Co. *v.* Parr, 8 Neb. 379.

6. "Current money." Bainbridge *v.* Owen, 2 J. J. Marsh. (Ky.) 463; Miller *v.* McKinney, 5 Lea (Tenn.), 93. "Lawful current money." Wharton *v.* Morris, 1 Dall. 124. "Good current money of this State." 5 Ark. 261. "Lawful money." 1 Yeates (Pa.), 349. "Good

"gold" or "specie" fulfil every requirement of the law, it being the obvious intention to pay them in money only.[1]

Under the present ruling of the Supreme Court of the United States it makes no difference that a note is expressed to be payable in some particular kind of money, as gold or silver; if to be paid in money at all, every obligation can be discharged by legal-tender notes of the United States.[2]

The words "current funds" and "currency" have been held to mean money, but the question is undecided.[3] Promises to pay bank-notes are obviously not agreements for money, and notes so drawn are not negotiable.[4]

Whatever the written note or bill promises to pay the holder will be bound to; parol evidence is not admissible to vary it.[5]

(*h*) *The Time of Payment must be Certain.*—If it is impossible to extract from a note any statement of the time of its maturity, the instrument loses its negotiable character;[6] but this rarely happens,

solvent cash notes." Smith *v.* Folwell, 21 Tex. 466; Grant *v.* Burleson, 38 Tex. 214; *sed contra*, Williams *v.* Sims, 22 Ala. 512. And when the prefixed words clearly indicate that some circulating medium which is not money, though so called, is meant, the notes will be bad as commercial paper; e.g., "Tennessee money." Taylor *v.* Neblett, 4 Heisk. (Tenn.) 491; *contra*, Wilburn *v.* Greer, 6 Ark. 255. "New York funds." Hasbrook *v.* Palmer, 2 McL. 10. "Brandon money." Gordon *v.* Parker, 2 Sm. & M. (Miss.) 495. "Canada Money." Thompson *v.* Sloan, 23 Wend. (N. Y.) 71, where the note was made in the U. S.

1. Chrysler *v.* Renois, 43 N. Y. 209; Wood *v.* Bullen, 6 Allen (Mass.), 516. "Specie or its equivalent" means money. Rhyne *v.* Wacaser, 63 N. Car. 36.

2. "The obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made." Strong, J. Legal Tender Cases, 12 Wall. 457. For the full history of this point, which is rather political than legal, *cf.* Griswold *v.* Hepburn, 2 Duv. (Ky.) 20; Hepburn *v.* Griswold. 8 Wall. 603; Juilliard *v.* Greenman, 110 U. S. 449.

Yet it is impossible to reconcile this decision with the unreversed case of Trebilcock *v.* Wilson, 12 Wall. 687, holding that a note payable in specie must be paid in coin, which doctrine has met with approval in Poett *v.* Stearns, 31 Cal. 78; Phillips *v.* Dugan, 21 Ohio St. 466; Smith *v.* Wood, 37 Tex. 616; Bowen *v.* Darby, 14 Fla. 202; Churchman *v.* Martin, 54 Ind. 380; McCalla *v.* Ely, 64 Pa. St. 254.

3. That notes payable in "current funds" are money notes. Emigrant Co. *v.* Clark, 47 Iowa, 671; White *v.* Richmond, 16 Ohio, 5; Wood *v.* Price, 46 Ill. 435; *contra*, Platt *v.* Sauk Co. Bank, 17 Wis. 222; Nat'l State Bank *v.* Ringel, 51 Ind. 393; Johnson *v.* Henderson, 76 N. Car. 227; Haddock *v.* Woods, 46 Iowa, 433; Wright *v.* Hart, 44 Pa. St. 454; Hasbrook *v.* Palmer, 2 McLean, 10.

That notes payable in "currency" are negotiable. Klauber *v.* Biggerstaff, 47 Wis. 551; Swift *v.* Whitney, 20 Ill. 144. So of "paper currency." Fank *v.* Wessels, 64 N. Y. 155. "Greenback currency." Burton *v.* Brooks, 25 Ark. 215. And of State currencies. Ehle *v.* Chittenango Bank, 24 N. Y. 548; Lampton *v.* Haggard, 3 T. B. Mon. (Ky.) 149; Black *v.* Ward, 27 Mich. 191. *Contra*, Bank of Mobile *v.* Brown, 42 Ala. 108; Huse *v.* Hamblin, 29 Iowa, 501; Warren *v.* Brown, 64 N. Car. 381.

4. Gray *v.* Donahoe, 4 Watts (Pa.), 400; Little *v.* Phœnix Bank, 2 Hill (N. Y.), 425; McDowell *v.* Keller, 4 Coldw. (Tenn.) 258. "Current bills." Collins *v.* Lincoln, 11 Vt. 268. "Current bank-notes." Fry *v.* Rousseau, 3 McLean, 106. "North Carolina bank bills." Patton *v.* Hunt, 64 N. Car. 163.

5. Bradley *v.* Anderson, 5 Vt. 152; Linville *v.* Holden, 2 McArth. (D. C.) 329; Burns *v.* Jenkins, 8 Ind. 147; Taylor *v.* Turley, 33 Md. 500. Thus "current funds" cannot be shown to mean bank-bills. Marine Bank *v.* Berney, 28 Ill. 90. But the phrase may be shown to mean lawful money. Emigrant Co. *v.* Clark, 47 Iowa, 671. The latter phrase, however, cannot be changed by parol to lawful *silver* money. Alsop *v.* Goodwin, 1 Root, 196.

6. First Nat'l Bank *v.* Bynum, 84 N. Car. 24, where the note stated that pay-

for indefinite expressions will be so construed as to sustain the note or bill,[1] while if absolutely nothing is said as to maturity it is by legal construction payable on demand, and valid and negotiable as a demand note.[2]

When, however, the time of payment is expressed, it must be pleaded and proved; failure so to do is a fatal variance.[3]

If a blank is left for the time, any *bona fide* holder has an implied authority to fill it up.[4]

Parol evidence is sometimes admitted to explain peculiar methods of stating time,[5] but a really careful examination of the instrument itself is usually sufficient.[6]

Bills and notes payable "on demand" are due immediately without grace, unless the rule is changed by statute.[7]

It is not necessary to express the time of payment by a date; a reference to any event, as death, certain to occur, is enough.[8]

ment might be demanded "at any time they (the payees) may deem this note insecure, even before the maturity of the same."

1. Thus "at sight, on demand" means on showing and demanding payment of the instrument. Dixon *v.* Nuttall, 6 C. & P. 320. "*By* Nov. 1st" means *on* that date. Preston *v.* Dunham. 52 Ala. 217; Massie *v.* Belford, 68 Ill. 290. So also does "on or before." Bates *v.* Leclair, 49 Vt. 229; Helmer *v.* Krolick, 36 Mich. 371; Jordan *v.* Tate, 19 Ohio St. 586; Curtis *v.* Horn, 58 N. H. 504.

2. Libby *v.* Nikelborg, 28 Minn. 38; Salinas *v.* Wright, 11 Tex. 572: Davenport Bank *v.* Price, 52 Iowa, 570; Meador *v.* Dollar Sav. Bank, 56 Ga. 604; Dodd *v.* Denny, 6 Oregon, 156; Keyes *v.* Fenstermaker, 24 Cal. 329; Huyck *v.* Meador, 24 Ark. 191; Porter *v.* Porter, 51 Me. 376; Jones *v.* Brown, 11 Ohio St. 601; Pindar *v.* Barlow, 31 Vt. 529; Cornell *v.* Moreton, 3 Denio (N. Y.), 12; Burthe *v.* Donaldson, 15 La. 382; Down *v.* Halling, 4 B. & C. 333.

A lost note is presumed to have been payable on demand. Tucker *v.* Tucker, 119 Mass. 79. But a postdated note silent as to maturity is not due until the date day. Mohawk Bank *v.* Broderick, 10 Wend. (N. Y.) 304; 13 Wend. (N. Y.) 133.

3. Sebree *v.* Dorr, 9 Wheat. 558; McCreary *v.* Newberry, 25 Ill. 496.

4. Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11; McGrath *v.* Clark, 56 N. Y. 34.

Thus the insertion of the bracketed word has been upheld in Deshon *v.* Leffler, 7 Mo. App. 595. "Ninety (days) after date." Nichols *v.* Frothingham, 45 Me. 220. Six (months) after date. In these last cases recovery might have been had without filling the blanks at all. Pearson *v.* Stoddard, 9 Gray (Mass.), 199.

5. Kelsey *v.* Hibbs, 13 Ohio St. 340, holds that "payable on the 6/9 Jan." may be shown to mean that grace ended on the 9th. "Dec. next" has been explained as "Dec. instant." McCrary *v.* Caskey, 27 Ga. 54. And a trade term, as "when the lumber is run to market," is said to be explainable. Lamon *v.* French, 25 Wis. 37.

6. Thus the courts have said that "1 yr. Aug. 15 after date" means a year from the 15th of August next after the date of the note. Washington Co. Bank *v.* Jerome, 8 Mich. 490. Cf. Henschel *v.* Mahler, 3 Denio (N. Y.), 428; Wade *v.* Darrow, 15 Ind. 212.

7. Palmer *v.* Palmer, 36 Mich. 487; Caldwell *v.* Rodman, 5 Jones (N. Car.), 139; Wheeler *v.* Warner, 47 N. Y. 519.

"When called for"—Bilderback *v.* Burlingame, 27 Ill. 338—"On request"—Howland *v.* Edmonds, 24 N. Y. 307—"At such times as A may need for her support"—Corbett *v.* Stonemetz, 15 Wis. 187—are expressions equivalent to "on demand." And some phrases seeming to give the debtor an option as to paying at all have been similarly construed. "When both parties shall agree." Ramot *v.* Schotenfels, 15 Iowa, 457. "When convenient." Works *v.* Hershey, 35 Iowa, 340. "When my circumstances will admit." Salinas *v.* Wright, 11 Tex. 572.

8. Cooke *v.* Colehan, 2 Stra. 1217; Conn *v.* Thornton, 46 Ala. 587. Marriage, however, being uncertain is insufficient as a date. Beardsley *v.* Baldwin, 2 Stra. 1151. And the same is true of a person's coming of age, for he may die a minor. Goss *v.* Nelson, 1 Burr. 226.

A note is valid though payable in instalments,[1] and it is a valid proviso that the whole note fall due upon the maker's failure to pay a single instalment.[2]

A memorandum at the foot of a note or bill fixing the time of payment is a binding part of the contract,[3] and an indorsement may have the same effect;[4] but whether fixed in the body of the instrument or by indorsement or memorandum, no parol evidence is admissible to vary the written date of payment.[5]

(*z*) *The Place of Payment Should be Certain.*—Though it is usual to express in a note or bill the place where payment is to be made, it is not by common law essential to the negotiability or completeness of the instrument, and has been said to be "modal, forming no essential part of the contract."[6]

If, however, no place of payment is named, it is understood to be the place of residence of the maker or drawer,[7] who also is liable at that place if default is made at the place named in the note or bill.[8]

The place of payment is often expressed at the foot of the instrument by a memorandum which is considered no part of it, being merely for the holder's information;[9] and if a blank be left for the place of payment, a *bona fide* holder has implied authority to fill it up to suit his convenience.[10]

Though a place of payment may be agreed upon by parol,[11] that such agreement was omitted from the instrument by mistake and fraud cannot be so shown.[12]

It cannot be presumed that the place of payment is the place of date,[13] though some cases hold that in the absence of any express provision on this point the intent was *prima facie* to pay where the note was made.[14]

1. Wright *v.* Irwin, 33 Mich. 32; Rideout *v.* Woods, 30 N. H. 375.

2. Carlon *v.* Kenealy, 12 M. & W. 139; German Mut. Ins. Co. *v.* Franck, 22 Ind. 364. But no such proviso can be proven by parol. Blakemore *v.* Wood, 3 Sneed (Tenn.), 470. Cf. Mayor *v.* City Bank, 48 Ga. 584; Sea *v.* Glover, 1 Bradw. (Ill.) 335.

3. Thus a mem. stating "one half to be paid in 12 months, balance in 24 months" will control, though the note be drawn at one day. Heywood *v.* Perrin, 10 Pick. (Mass.) 228. Cf. Franklin Sav. Inst. *v.* Reed, 125 Mass. 365; McCalla *v.* McCalla, 48 Ga. 503.

4. Round *v.* Donnel, 5 Kans. 54.

5. Eaton *v.* Emerson, 14 Me. 335; Graves *v.* Clark, 6 Blackf. (Ind.) 183; Self *v.* King, 28 Tex. 552; Walker *v.* Clay, 21 Ala. 797.

6. Wolcott *v.* VanSantvoord, 17 Johns. 254; Blodgett *v.* Durgin, 32 Vt. 361; Craig *v.* Price, 23 Ark. 633; Holtz *v.* Boppe, 37 N. Y. 634; Kendall *v.* Galvin, 15 Me. 131.

7. Mitchell *v.* Baring, 10 B. & C. 4; 4 C. & P. 35.

8. Freese *v.* Brownell, 6 Vr. (N. J.) 285. So also of an indorser. Prentiss *v.* Savage, 13 Mass. 20; Hicks *v.* Brown, 12 Johns. 142.

9. American National Bank *v.* Bangs, 42 Mo. 450.

Yet the intention with which such memorandum was made is for the jury's consideration. Tuckerman *v.* Hartwell, 3 Me. 147. And its addition has been held an alteration discharging an accommodation indorser. Woodworth *v.* Bank of America, 19 Johns. 391; Simpson *v.* Stackhouse, 9 Pa. St. 186; McCoy *v.* Lockwood, 71 Ind. 319.

10. McGrath *v.* Clark, 56 N.Y. 34; Marshall *v.* Drescher, 68 Ind. 359; Shepard *v.* Whetstone, 51 Iowa, 457.

11. Pearson *v.* Bank of Metropolis, 1 Pet. (U. S.) 89; Meyer *v.* Hibsher, 47 N. Y. 265.

12. Spitler *v.* James, 32 Ind. 202; Specht *v.* Howard, 16 Wall. 564.

13. Taylor *v.* Snyder, 3 Denio (N. Y.), 145; Blodgett *v.* Durgin, 32 Vt. 361; Pierce *v.* Whitney, 29 Me. 188.

14. Bullard *v.* Thompson, 35 Tex. 313,

If a note is payable at two or more places the choice is with the maker,[1] but when expressly payable at "any bank," or "either bank," in a given city, the holder may lawfully demand payment at the institution he selects.[2]

(*j*) *The Amount to be paid Must be Certain.*—It is necessary that a negotiable note or bill state with certainty the amount to be paid upon it. Thus a promise to account for proceeds[3] is not a good note, nor an order for "whatever you may collect for me" a good bill.[4]

A promise to pay a fixed sum, subject "to deductions" for some cause stated in the writing, is uncertain,[5] and a note stating on its face that it was collateral to a certain draft has been held within the rule and therefore not negotiable.[6]

If, however, the amount to be paid can be certainly ascertained, it is enough,[7] nor will mere clerical errors vitiate.[8]

While it is usual to express the amount payable both in letters and figures, the common law does not require it.

If there is a difference between the written amount and the figures, the writing controls;[9] and if figures only are used, with the place for the written amount blank, the holder can fill up the blank to correspond with the figures.[10]

7. Lex Loci Contractus.—Bills and notes, being merely written evidences of contracts, are in general governed by the law of the place where they are made, unless it is against the morals or policy of the *forum* to enforce such law.[11]

The liability of the maker of a note[12] or the drawer of a

Orcutt *v.* Hough, 54 N. H. 472; Picketts *v.* Pendleton, 14 Md. 320.

But even if a note be "negotiable and payable" at a given place, it may be negotiated elsewhere. Schoharie Co. Bank *v.* Bevard, 51 Iowa. 257.

1. Wilcox *v.* Williams, 5 Nev. 206; Nomack *v.* Jenkins, 17 Ind. 137.

2. Allen *v.* Avery, 47 Me. 287; Boit *v.* Carr, 54 Ala. 112; Brickett *v.* Spalding, 33 Vt. 107.

3. Fiske *v.* Witt, 22 Pick. (Mass.) 83.

4. Legro *v.* Staples. 16 Me. 252. To the same effect, Stillwell *v.* Craig, 58 Mo. 24; Gaar *v.* Louisville Banking Co., 11 Bush (Ky.), 180; Hasbrook *v.* Palmer, 2 McL. (U.S.) 10; Jones *v.* Simpson, 2 B. & C. 318.

5. Barlow *v.* Broadhurst, 4 Moore, 471; Cushman *v.* Haynes, 20 Pick. 132.

So, too, is a note payable by a sum smaller than its face, if such sum is offered before a given time. Fralick *v.* Norton, 2 Mich. 130. See *contra*, Green *v.* Austin, 7 Iowa, 521.

6. American National Bank *v.* Sprague, 14 R. I. 410.

7. As where the promise was to pay a certain amount per acre for land. Smith *v.* Clopton, 4 Tex. 109; Knight *v.* Jones, 21 Mich. 161.

8. As "fife hundret" for five hundred. Ohm *v.* Young, 63 Ind. 432. Or the omission of a currency designation, as "dollars" or "pounds." Harman *v.* Howe, 27 Gratt. (Va.) 677; McCoy *v.* Gilmore, 7 Ohio, 268; Coolbroth *v.* Purinton, 29 Me. 469; Morrill *v.* Handy, 17 Mo. 406; Northrop *v.* Sanborn, 22 Vt. 433; Beardsley *v.* Hill, 61 Ill. 354; Petty *v.* Fleishel, 31 Tex. 169.

9. Payne *v.* Clark, 19 Mo. 152; Mears *v.* Graham, 8 Blackf. (Ind.) 144.

But the question was left to the jury as one of intention in Riley *v.* Dickens, 19 Ill. 30.

10. Norwich Bank *v.* Hyde, 13 Conn. 279; Henderson *v.* Bondurant, 39 Mo. 369; Boyd *v.* Brotherson, 10 Wend. (N. Y.) 93.

11. 1 Daniel on Neg. Inst. 721; Story Conf. of Laws, § 242.

Thus a mortgage given to secure a debt arising in New York, incurred in violation of the New Jersey statutes against stock-gambling, will not be enforced by a New Jersey court. Flagg *v.* Baldwin, 11 Stew. (N. J.) 219; 1 Randolph on Com. Paper, § 21.

12. Davis *v.* Clemson, 6 Mc. L. (U. S.) 622.

bill,[1] the formalities attending the execution of either,[2] and their validity[3] and effect[4] when completed, all depend upon the *lex loci contractus.*

In like manner the law of the place of acceptance or indorsement governs the rights and liability of an acceptor[5] or indorser.[6]

The application of these rules is difficult, because it is often hard to ascertain what the place of the contract is.[7]

It may, however, be asserted as settled that the place of a contract evidenced by a note or bill depends not upon where it is written, signed, or dated, but upon the place where it is delivered as consummating the bargain.[8]

From the date of a note, however, the place of delivery and therefore of the contract is often inferred.[9]

1. Thorp *v.* Craig, 10 Iowa. 461.

2. Hyde *v.* Goodnow, 3 N. Y. 266; Evans *v.* Anderson, 78 Ill. 558.

3. Woodruff *v.* Hill, 116 Mass. 310; Armour *v.* McMichael, 7 Vr. (N. J.) 92.

4. Kanaga *v.* Taylor, 7 Ohio St. 134.

5. Scudder *v.* Union Nat. Bank, 1 Otto (U. S.), 406.

And a parol acceptance if good where made is good everywhere. Mason *v.* Dousay, 35 Ill. 424. Even if the drawee residing in a State where such acceptance is not good accepts by an agent in a State where it is. Bank of Rutland *v.* Woodruff, 34 Vt. 89; Bissell *v.* Lewis, 4 Mich. 450.

6. Trimbey *v.* Vignier, 1 Bing. N. C. 15, where a blank indorsement, invalid in France, where it was made, was refused recognition in England.

7. What will be regarded as the place of a given contract depends upon the facts of each particular case. An agreement to sell liquor made in Massachusetts, the liquor to be delivered in New Hampshire, has been held a contract of the latter State. Nelson *v.* Stratton, 47 Me. 120. But a contract made in New Jersey for the sale of personalty then situated in another State is to be interpreted by the laws of New Jersey. Dacosta *v.* Davis, 4 Zab. (N. J.) 319.

That a note given in New Hampshire is secured by a mortgage in another State makes no difference. Chase *v.* Dow, 47 N. H. 405. See DeWolf *v.* Johnson, 10 Wheat. (U. S.) 367.

Notes duly accepted in one State and discounted in another in violation of the usury laws of the latter State are contracts of that latter State. Akers *v.* Demond, 103 Mass. 318; and see Sands *v.* Smith, 1 Neb. 108; Bank of Ga. *v.* Lewin, 45 Barb. (N. Y.) 340.

But notes signed and made payable in Kentucky, but delivered by mail to the payees in Boston, are Kentucky contracts. Shoe & Leather Nat. Bk. *v.* Wood, 8 N. Eastn. Repr. (Mass.) 753.

8. 1 Daniel Neg. Inst. 724; Jewell *v.* Wright, 30 N. Y. 259; Bell *v.* Packard, 69 Me. 105; Gallaudet *v.* Sykes, 1 McArth. (D. C.) 489; Lawrence *v.* Bassett, 5 Allen (Mass.), 140; Gay *v.* Rainey, 89 Ill. 221.

Thus a note drawn and dated in Maryland but handed to a vendor of goods in New York in payment for the goods is a New York contract. Cook *v.* Moffat, 5 How. (U. S.) 295.

So a note signed in blank and sent to a foreign State to be filled up is a contract of the State where it is completed. Fant *v.* Miller, 17 Gratt. (Va.) 47.

But sureties and accommodation indorsers who sign *after* the completion of a note in another State than that where the note was finished will be bound according to the law of the latter State. Stanford *v.* Prueb, 27 Ga. 243; Davis *v.* Clemson, 6 McL. (U. S.) 622; Young *v.* Harris, 14 B. Mon. (Ky.) 556; Dickinson *v.* Edwards, 77 N.Y. 573; Tilden *v.* Blair, 21 Wall. U. S. 241.

9. Longer *v.* Washburn, 16 N. H. 134.

A bill dated in Philadelphia with day and year blank was sent abroad and the blanks there filled. *Held*, that the intention to make it a Pennsylvania contract was shown by the date. Lennig *v.* Ralston, 23 Pa. St. 137. *Compare* Tillotson *v.* Tillotson, 34 Conn. 335.

Where a note was really written in a State different from that of its date, and prescribed a rate of interest usurious in the State where written, the place of the contract was held to be that of the date, *ut res valeat.* Bullard *v.* Thompson, 35 Tex. 313. *Compare* Second Nat. Bank *v.* Smoot, 2 McArth. (D. C.) 371.

And as against the place of date it cannot be shown to defeat a *bona fide* holder

8. Lex Loci rei Sitae.—Since a mortgage is merely a collateral security for money loaned, a note is not necessarily governed by the law of the State containing the land mortgaged to secure the note,[1] but "when the money is employed on the land" the rule is reversed.[2]

Interest, however, is computed by the *lex rei sitae*,[3] no matter where the written contract was executed or delivered.[4]

9. Lex Loci Salutionis.—If any contract is expressly or by implication to be performed in a place other than that of the contract, the *lex loci salutionis* governs.[5]

Since payment of a note or bill is performance of the contract evidenced thereby, the instrument is governed by the law of the place where it is payable.[6]

The place of payment once ascertained, the law of that place will govern the indorsement[7] of notes and bills, the days of grace,[8]

that the note or bill was usuriously negotiated in another State. Towne *v.* Rice, 122 Mass. 67; Barker *v.* Sterne, 9 Exch. 684.

And in general the place of date will be presumed to be the maker's or drawer's residence and the place of their contracts, unless the contrary is affirmatively shown. Hefflebower *v.* Detrick, 27 W. Va. 16.

And against an innocent holder the maker of a note will not be permitted to aver or prove that it was not made at the place of its date. Quaker City Nat. Bank *v.* Showacre, 26 W. Va. 48.

1. Cotheal *v.* Blydenburgh, 1 Halst. Ch. (N. J.) 17; Chase *v.* Dow, 47 N. H. 405; Newman *v.* Kershaw, 10 Wis. 333; Coke *v.* Alden, 53 Barb. (N. Y.) 350.

2. DeWolf *v.* Johnson, 10 Wheat. (U. S.) 367; Story Conf. Laws, §§ 305-510.

3. A note held in Wisconsin and secured by mortgage of lands there may lawfully provide interest at a rate usurious in New York, where the note is payable. Lyon *v.* Ewings, 17 Wis. 63; Arnold *v.* Potter, 22 Iowa, 194; Goodrich *v.* Williams, 50 Ga. 425.

4. Chapman *v.* Robertson, 6 Paige (N. Y.), 627. *Sed contra*, Sands *v.* Smith, 1 Neb. 108.

5. "The general principle as to contracts made in one place to be performed in another is well settled; they are to be governed by the law of the place of performance." Per Taney, C. J., Andrews *v.* Pond, 13 Pet. (U. S.) 65; Allen *v.* Bratton, 47 Miss. 119; Fordyce *v.* Nelson, 91 Ind. 447.

When in a note by a resident of one State to a resident of a different State the place of payment was left blank, the question what was the place of performance was left to the jury. Shillito *v.* Reineking, 30 Hun (N. Y.), 345. But the place of performance once fixed, all parties are presumed to know that law. Freese *v.* Brownell, 6 Vr. (N. J.) 287.

6. Story on Prom. Notes, § 172; Murphy *v.* Collins, 121 Mass. 6; Allen *v.* Bratton, 47 Miss. 119; Hunt *v.* Standart, 15 Ind. 33; Campbell *v.* Nichols, 4 Vr. (N. J.) 81; Bright *v.* Judson, 47 Barb. (N. Y.) 29.

But by stipulation of parties either the law of the place of making a payment may govern. Arnold *v.* Potter, 22 Ia. 194; Pomeroy *v.* Ainsworth, 22 Barb. (N. Y.) 118; and Vliet *v.* Camp, 13 Wis. 198, where the rate of interest of the place of making, which was usurious by the law of the expressed place of payment, was agreed upon and upheld.

If parts of the contract are to be performed in different States, each portion may be governed by its own law; e.g., the maker's liability was ruled by the law of the place where he made the note payable, and that of an accommodation indorser for the payee by the law of the place of indorsement, in Greathead *v.* Walton, 40 Conn. 226. See also Young *v.* Harris, 14 B. Mon. (Ky.) 556.

7. Lebel *v.* Tucker, L. R. 3 Q. B. 77.

Even though after indorsement the note be sent to a foreign State to be delivered in payment for merchandise. Lee *v.* Selleck, 33 N. Y. 615; and see Woodruff *v.* Hill, 116 Mass. 310.

8. Smith *v.* Muncie Nat. Bank, 29 Ind. 158.

and interest [1] to be allowed upon them, and the currency[2] in which they must be paid.

In like manner, the necessity of notices of dishonor,[3] and the sufficiency of such notices if sent, depend on the *lex loci salutionis.*

If the place of payment of a note or bill is mentioned in the instrument itself, no parol evidence is admissible to show that some other place was really agreed upon ;[4] but if it is not mentioned, the presumption as to notes is that the place of date is the place of payment ; [5] and as to bills, that the drawee's address [6] or residence [7] is such place.

10. Lex Fori.—It is perfectly well settled that the remedy for the enforcement of all contracts, including of course those evidenced by notes and bills, is governed by the law of the *forum* invoked.[8]

The *lex fori* also determines the proper person to bring the suit,[9] the competency of the witnesses produced,[10] and the admissibility of all evidence [11] offered, as well as the time within which the action must be begun.[12]

1. Jewell *v.* Wright, 30 N. Y. 259; Arnold *v.* Potter, 22 Iowa, 194; Bank of Illinois *v.* Brady, 3 McL. 268; Campbell *v.* Nichols, 4 Vr. (N. J.) 81.

Thus a bill may be drawn on a place where the rate of interest is such as would be usurious at the place of making, yet the higher rate be enforced at the place of drawing. Lines *v.* Mack, 19 Ind. 223. But a mere cover for usury, as a bill void where made, will be held void everywhere. Mix *v.* Madison Ins. Co., 11 Ind. 117; Tilden *v.* Blair, 21 Wall. 241. But in *New York* the place where the note or bill is negotiated, and therefore has its inception, governs. Dickinson *v.* Edwards, 77 N. Y. 573.

2. Benners *v.* Clemens, 58 Pa. St. 24.

3. Horne *v.* Rouquette, L. R. 3 Q. B. 514.

But an indorser will not be discharged by a notice bad in France, where given, but good in New York, the place of the indorser's residence. Aymar *v.* Sheldon, 12 Wend. 439.

4. Frazier *v.* Warfield, 9 Sm. & M. (Miss.) 220. *Sed contra,* Blodgett *v.* Durgin, 32 Vt. 361.

5. Short *v.* Trabue, 4 Metc. (Ky.) 299; Backhouse *v.* Selden, 29 Gratt. (Va.) 581; Thompson *v.* Ketcham, 4 Johns. (N. Y.) 285.

6. Lizardi *v.* Cohen, 3 Gill (Md.). 430; Worcester Bank *v.* Wells, 8 Metc. (Mass.) 107.

Upon a general acceptance, the place of actually making it governs. Musson *v.* Lake, 4 How. (U. S.) 262.

7. Don *v.* Lippman, 5 Cl. & Fin. 12.

8. Thus, whether "debt" or *assumpsit* is the proper action—Bank of U. S. *v.* Donnally, 8 Pet. (U. S.) 361—whether arrest is proper or not—Shaw *v.* Harvey, M. & M. 526—and generally all questions of practice and procedure, are settled by the law of the place where suit is brought. See, generally, Bulger *v.* Roche, 11 Pick. (Mass.) 36; Porter *v.* Munger, 22 Vt. 191; Scoville *v.* Canfield, 14 Johns. (N. Y.) 338; Taberrer *v.* Brentnall, 3 Harr. (Md.) 262; Goodman *v.* Munks, 8 Port. (Ala.) 84; Armour *v.* McMichael, 7 Vr. (N. J.) 92.

That citizens of different States are involved makes no difference. Williams *v.* Haines, 27 Ia. 251. And every court will decide for itself as to its own jurisdiction. Hunt *v.* Hunt, 72 N. Y. 217. And the extent to which it will afford relief. Steele *v.* Curle, 4 Dana (Ky.), 381; Porter *v.* Munger, 22 Vt. 191.

9. Thus, at the place of the contract, the real party in interest may be the proper plaintiff, e.g., a transferee without indorsement, while the law of the forum may compel the transferror to sue as use plaintiff. Foss *v.* Nutting, 14 Gray (Mass.), 484; Pearsall *v.* Dwight, 2 Mass. 84.

10. Bain *v.* White Haven, etc., R. Co., 3 H. L. Cas. 1.

Thus, a convict may be admitted to testify, though disqualified where the note in suit was made or payable. Sims *v.* Sims, 75 N. Y. 466.

11. Downer *v.* Cheesebrough, 36 Conn. 39, where the intent of a blank indorsement was shown by parol, in violation of the law of New York, where the note was payable.

12. McElmoyle *v.* Cohen, 13 Pet. (U. S.) 312; Atwater *v.* Townsend, 4 Conn.

11. Manner of Execution.—(*a*) *Drawer or Maker must be Clearly Indicated.*—It must appear from the note or bill itself by whom the instrument is drawn or made; the usual and proper method of effecting this is by signature at the foot, but at common law signing, though in the body of the instrument, is enough.[1]

(*b*) *By Partners.*—A partnership note should be signed by the firm name if the firm is to be bound;[2] if signed by the partners with their individual names it is no evidence of a partnership debt.[3]

But since every partner has *prima facie* equal power, a note signed with the firm name, though made by a single partner, is presumably a firm note.[4]

That the firm name does not contain all the partners' names makes no difference; all alike are bound.[5]

A partner may sign so as to bind the firm, though he vary slightly from the ordinary method of signature.[6] The question has been said to be simply one of intent.[7]

(*c*) *By Agents and Officials.*—The rule is generally that unless the principal for whom the agent acts appears upon the face of the instrument which the agent signs, the agent executing it will be held individually liable as upon his own contract,[8] while the

47; Ruckmaboye *v.* Mottichund, 8 Moo. P. C. 4.

Suit may even be brought after the Statute of Limitations of the place of contract or payment has barred an action there. Putnam *v.* Dike, 13 Gray (Mass.), 535; Power *v.* Hathaway, 43 Barb. (N. Y.) 214; Brown *v.* Parker, 28 Wis. 21. Or it may be barred, though where the note was made there was no Statute of Limitations at all. Nicolls *v.* Rodgers, 2 Paine (U. S.), 437, holding that U. S. courts will apply the statute of the State where they are sitting. But some courts hold that the law of the debtor's domicile will govern the *forum*, if proved as a fact. Wernse *v.* Hall, 101 Ill. 423; Goodman *v.* Munks, 8 Port. (Ala.) 84.

1. Thus "I, A. B., promise" has been upheld. May *v.* Miller, 27 Ala. 515.

Though an assumed name signed to a note—Melledge *v.* Boston Iron Works, 5 Cush. (Mass.) 158—or an initial signature —*vide ante* § 5 (*a*)—will bind the real maker, such a subscription as "A. B. or else B. C." will not make a note at all, for it leaves the real maker uncertain, yet clearly indicates that two are not to be held. Ferris *v.* Bond, 4 B. & Ald. 679.

2. 1 Randolph on Comm. Paper, p. 177; 1 Daniel Neg. Inst. p. 291.

3. Gay *v.* Johnson, 45 N. H. 587.

But slight evidence will rebut the *prima facie* presumption that it is not a firm note. Richardson *v.* Huggins, 23 N. H. 106; McGregor *v.* Cleveland, 5 Wend. (N. Y.) 475. But if men about to form a partnership sign a note jointly and then actually become partners, the instrument becomes a firm note. Littner *v.* Whitlock, 88 Ill. 513.

4. Whitaker *v.* Brown, 16 Wend. (N. Y.) 507; Carrier *v.* Cameron, 31 Mich. 373; Hamilton *v.* Summers, 12 B. Mon. (Ky.) 1851; Manning *v.* Hayes, 6 Md. 5; Adams *v.* Ruggles, 17 Kans. 237.

So with a firm indorsement. Morehead *v.* Gilmore, 77 Pa. St. 118. And even when there is no partnership, B.'s signing a note "A. & Co." with A.'s knowledge will bind both. Smith *v.* Hill, 45 Vt. 90.

5. Voorhees *v.* Jones, 5 Dutch. (N. J.) 270.

For many partners may use one man's name for the firm style. Lloyd *v.* Ashby, 2 B. & Ad. 29; Macklin *v.* Crutcher, 6 Bush (Ky.), 401.

6. Thus "A. B. for A. B. C. & Co." has been held a firm signature. *In re* Clarke, 14 M. & W. 469. And that a partnership name concludes a note beginning "I promise" makes the instrument none the less a firm promise. Doty *v.* Bates, 11 Johns. (N. Y.) 544. But the signature "J. B. & Co." has been held invalid to bind the firm of J. B. Kirk *v.* Blurton, 12 L. J. Ex. 117; and see Norton *v.* Seymour, 3 C. B. 792; Faith *v.* Richmond, 11 Ad. & E. 339.

7. Stephens *v.* Reynolds, 5 H. & N. 513; Brannon *v.* Hursell, 112 Mass. 63; Sherwood *v.* Snow, 46 Iowa, 481.

8. Thus a vendor's agent took a note payable to himself for merchandise sold,

principal will not be liable, though he admits the agent's authority.[1] (See title AGENCY, vol. 1, p. 388 *et seq.*)

The rule as to public officers is that, in whatever way they sign obligations in their official capacity, they are not individually liable, the credit being presumably given to the government they represent. It is even unnecessary to add any title to the officer's signature.[2]

Though, where the principal is unrevealed, the mere addition to an agent's signature of the word "agent" will not avail to relieve him of personal liability;[3] an exception to the rule is made in favor of the custom of banks in using the word "cashier." A cashier is an agent of the bank employing him, but paper indorsed to or payable to "A. B., Cashier" is the property of the bank.[4]

A note or bill signed by an individual who adds to his name the title "administrator," "executor," or "guardian" will be considered his personal contract, and the addition a mere *descriptio personæ*.[5]

indorsed it to his principal, and was held on the indorsement. Henback *v.* Mollman, 2 Duer (N. Y.), 227.

The knowledge of all parties that the maker of a note is merely an agent makes no difference. French *v.* Price, 24 Pick. (Mass.) 13; s. p., Bult *v.* Morrell, 12 Ad. & El. 750; Bars *v.* Randall, 1 Minn. 404; Graham *v.* Campbell, 56 Ga. 258; Hancock *v.* Fairfield, 30 Me. 299; Snelling *v.* Howard, 51 N. Y. 373; Stackpole *v.* Arnold, 11 Mass. 27.

Though the agent had express authority to make the note or bill—Bradlee *v.* Boston Glass Co., 16 Pick. (Mass.) 347—and the moving consideration be solely for the principal's benefit—Snow *v.* Goodrich, 14 Me. 235; Crum *v.* Boyd, 9 Ind. 289—the agent is still liable unless the principal's name appear.

1. Brown *v.* Parker, 7 Allen (Mass.), 337.

But if he ratifies the agent's act he may be held *on the note*. Paul *v.* Berry, 78 Ill. 158; First Nat. Bank *v.* Gay, 63 Mo. 33. And Judge Parsons thinks at all events on the *original contract*. 1 Pars. Notes & Bills, 93; and see Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. (U. S.) 326, where parol evidence was admitted to reveal and hold to liability the principal.

2. Amison *v.* Ewing, 2 Coldw. (Tenn.) 366; Hodgson *v.* Dexter, 1 Cr. (U. S.) 345; Gidley *v.* Palmerstone, 7 Moo. 91.

Fraud, however, will render the official liable. Freeman *v.* Otis, 9 Mass. 272. And so will exceeding his authority in attempting to bind his government. Savage *v.* Rix, 9 N. H. 263.

3. Manufacturers' Bank *v.* Follett, 11 R. I. 92; Bartlett *v.* Hawley, 120 Mass. 92; Anderton *v.* Shoup, 17 Oh. St. 125; Bank *v.* Cook, 38 Ohio St. 442; Pentz *v.* Stanton, 10 Wend. (N. Y.) 271; Hall *v.* Bradbury, 40 Conn. 32.

The rule is the same as to the words "treasurer," "trustee," "secretary," etc. Trustees *v.* Rautenberg, 88 Ill. 219; Conn *v.* Scruggs, 5 Baxt. (Tenn.) 567.

Each word cited is merely *descriptio personæ*, and may be erased without material alteration. Thackera *v.* Hanson, 1 Cal. 365. But a promise "*as* trustees and *not* individually" has been held to convey no personal liability. Shoe, etc., Bank *v.* Dix, 123 Mass. 148

4. First Nat. Bank *v.* Hall, 44 N. Y. 395; Folger *v.* Chase, 18 Pick. (Mass.) 63.

5. So held where the signature was "E. F. A., executrix of the estate of J. S. A." Higgins *v.* Driggs, 21 Fla. 103; s. p., Livingston *v.* Taussen, 21 La. Ann. 286; Yerger *v.* Foote, 48 Miss. 62; Christian *v.* Morris, 50 Ala. 585; Kessler *v.* Hall, 64 N. Car. 60; Plimpton *v.* Goodell, 126 Mass. 119; Harrison *v.* McClelland, 57 Ga. 531; Comthwaite *v.* First Nat'l Bank, 57 Ind. 276; Hostetter *v.* Hoke, 17 Kans. 81; McGrath *v.* Barnes, 13 S. Car. 328; Gregory *v.* Leigh, 33 Tex. 813; Tassey *v.* Church, 4 W. & S. (Pa.) 346; Nelson *v.* Serle, 4 M. & W. 799.

And the estate represented by the signer is not liable, though the executor may claim to be reimbursed upon the settlement of his accounts. Peter *v.* Beverly, 10 Pet. (U. S.) 532.

If, however, the promise to pay is expressly "out of the estate" represented,

If a note intended to bind a corporation or association be signed with the principal's name, it is the contract of the principal, though the name of the agent also appear;[1] but the mere insertion of the principal's name either in the body of the instrument or the signature will not make the contract even *prima facie* that of the principal.[2]

Courts, however, have been acute to discover an intent to bind the principal in such cases. It has often been inferred from the use of a corporate seal,[3] or of paper marked with a corporate name or place of business,[4] or because the promise was "on behalf of"[5] or "on account of" a company or association.[6]

(*d*) *Joint and Several Notes.*—A note signed by several makers

the rule is otherwise. Studebaker Mfg. Co. *v.* Montgomery, 74 Mo. 101.

And a promise *as* executor or guardian will not bind the signer personally. East Tenn. Iron Mfg. Co. *v.* Gaskell, 2 Lea. (Tenn.), 742; Ashby *v.* Ashby, 7 B. & C. 446.

1. Thus a note signed "St. bt. 'Ben Lee' & Owners, by W. R., Capt." will bind the owners. Sanders *v.* Anderson, 21 Mo. 402. And "for the M. Iron Works, A. B. Prest., C. D. Sec'y," is the signature of the Iron Works. Roney *v.* Winter, 37 Ala. 277. *Cf.* Aiken *v.* Marine Bank, 16 Wis. 713; May *v.* Hewitt, 33 Ala. 161; Castle *v.* Belfast Foundry Co., 72 Me. 167; Walker *v.* Bank of State of N. Y., 9 N. Y. 582; Whitney *v.* Stowe, 111 Mass. 368.

While unless the agent's name distinctly appears as a party to the instrument, he cannot be held liable upon it and is not even a necessary party to a suit upon it. Texas Land & Cattle Co. *v.* Carroll, 63 Tex. 48.

Of course this rule does not affect the principal's right to repudiate the authority of the agent to sign. Hall *v.* Auburn Turnpike Co., 27 Cal. 255.

2. But it cannot be said that the authorities are uniform. In Barker *v.* Mechanics' Ins. Co., 3 Wend. (N. Y.) 94, the promise was by "I, J. F., President of the M. I. Co.;" in Powers *v.* Briggs, 79 Ill. 493, "We, the Trustees of the P. Church;" in Dutton *v.* Marsh, L. R. 6 Q. B. 361, "We, the Directors of the A. B. Co.:" and in each case the signers, who had subscribed nothing but their names, were held personally liable. S. p., Packard *v.* Nye, 2 Metc. (Mass.) 47; Davis *v.* England, 141 Mass. 587; Check *v.* Trevett, 20 Me. 462; Hypes *v.* Griffin, 89 Ill. 134. In Mears *v.* Graham, 8 Blackf. (Ind.) 144, the signers were held individually though they *made* and *signed* as "Trustees of the M. E. Church." *Sed contra*, Newmarket, etc., Bank *v.* Gillet, 100 Ill. 254; Simpson *v.* Garland, 72 Me. 40; Bingham *v.* Stewart, 13 Minn. 106.

And where a note was signed "A., B., Trustees of the B. Society," the mention of the society did not prevent A. and B. being personally held. Brockway *v.* Allen, 17 Wend. (N. Y.) 40. Though the consideration flowed directly to the company or association the signers acted for. Fiske *v.* Eldridge, 12 Gray (Mass.), 474; Hayes *v.* Brubaker, 65 Ind. 27; Fowler *v.* Atkinson, 6 Minn. 578; Chamberlain *v.* Pacific Wool, etc., Co., 54 Cal. 103; Scott *v.* Baker, 3 W. Va. 285; Sumwalt *v.* Ridgway, 20 Md. 107; McClellan *v.* Robe, 93 Ind. 298, 1 Pars. Notes and Bills, 168, maintains the opposite rule, citing Safford *v.* Wyckoff, 4 Hill (N. Y.), 442; but see 1 Rand. Com. Paper, p. 195.

3. Means *v.* Swormstedt, 32 Ind. 87, where the note began "We promise," was signed "A. B., Sec'y," and was held to bind the company whose seal was attached, and whose secretary A. B. was. See Hood *v.* Hallenbeck, 7 Hun (N. Y.), 362; Aggs *v.* Nicholson, 1 H. & N. 165.

4. Carpenter *v.* Farnsworth, 106 Mass. 561, where one signed as treasurer on paper bearing the name "Ætna Mills." See Olcott *v.* Tioga R. Co., 40 Barb. (N. Y.) 179 and 27 N. Y. 546.

5. "On behalf of D. M. Co. I promise," signed "A. B., Supt." Jones *v.* Clark, 42 Cal. 180.

6. Lindus *v.* Melrose, 3 H. & N. 177. In Texas Land & Cattle Co. *v.* Carroll a distinction is taken between negotiable and non-negotiable instruments, holding that in suits on the latter signed by an agent parol evidence is admissible to show that the liability was incurred in the principal's business, and that he alone, therefore, should be held liable.

For a remarkably full citation of cases on agents' signatures, see title AGENCY, vol. 1, p. 385 *et seq.*, and 1 Rand. Com. Paper, pp. 204-222.

is a joint note unless otherwise indicated;[1] but if beginning "I promise," several persons signing it, it is joint and several;[2] nor does the addition of the word "surety" to the signature of some make any difference in their liability to the holder.[3]

(*e*) *The Payee should be Named or Indicated.*—While it is better to plainly name the payee of a note, if the person to whom the amount promised is due can be learned it is enough;[4] and a renewal note made after the payee's death has been held enforceable by his estate, though plainly a valid promise cannot be made to one deceased.[5]

Though no person or corporation be named at all to receive payment, notes have been sustained upon parol evidence showing the persons meant.[6]

That the payee or drawee is identical with the maker or drawer does not invalidate a note or bill;[7] nor does the fact that it is payable to several persons.[8]

If several persons are jointly named as payees the note or bill can only be negotiated by the indorsement of all;[9] but commercial paper payable in the alternative to one or some of many payees is not allowed.[10]

A note or bill is *prima facie* the property of the person named as payee, no matter what suffix or title may be added to that

1. Johnson *v.* King, 20 Ala. 270.

2. Rees *v.* Abbot, Cowp. 832; First Natl. Bank *v.* Fowler, 36 Ohio St. 524; Monson *v.* Drakeley, 40 Conn. 559; Ladd *v.* Baker, 26 N. H. 76; Maiden *v.* Webster, 30 Ind. 317; Ely *v.* Clute, 19 Hun (N. Y.), 35; Chaffee *v.* Jones, 19 Pick. (Mass). 263.

3. Keller *v.* McHuffman, 15 W. Va. 64; Dart *v.* Sherwood, 7 Wis. 523.

4. Thus, "Rec'd from A. B. $100, which I will repay," is a good note to A. B. as payee. Chitty on Bills, 161, 179; Ashby *v.* Ashby, 3 Moo. & P. 186; Cummings *v.* Gassett, 19 Vt. 308. And a new promise naming no one written on an old note sufficiently indicates the payee of the old note as the person to whom the money is due. Commonwealth Ins. Co. *v.* Whitney, 1 Metc. (Mass.) 23; Leonard *v.* Mason, 1 Wend. (N. Y.) 522.

5. Van Etten *v.* Hemann, 35 Mich. 513; Murray *v.* East India Co., 5 B. & Ald. 204.

6 An "I O U." Kinney *v.* Flynn, 2 R. I. 329. A note to "Steamboat Inda and owners or order." Moore *v.* Anderson, 8 Ind. 18. Payees thus loosely described may always be identified by parol. Robertson *v.* Sheward, 1 Man. & G. 511; Buck *v.* Merrick, 8 Allen (Mass.), 123; Knight *v.* Jones, 21 Mich. 161; Adams *v.* King, 16 Ill. 109; Moody *v.* Threekeld, 13 Ga. 55; Cox *v.* Betzhoover, 11 Mo. 142.

7. Wildes *v.* Savage, 1 Story C. C. 29; Miller *v.* Weeks, 22 Pa. St. 89; Witte *v.* Williams, 8 S. Car. 290.

But such notes are incomplete until indorsed. Roby *v.* Phelon, 118 Mass. 541; Kayser *v.* Hall, 85 Ill. 513.

8. But if made, say, by A to A, B, and C, an action upon must run in the names of the co-payees only. Quisenbury *v.* Artis, 1 Duv. (Ky.) 30.

9. Ryhmir *v.* Feickert, 92 Ill. 305.

But the survivor may sue. Allen *v.* Tate, 58 Miss. 585. Yet not when payees were man and wife, and husband dying first made provision for his wife by will. The note then was held to belong to his estate. Sanford *v.* Sanford, 45 N. Y. 723.

One partner may, of course, indorse the firm name, but if that name is the name of a single man the note is *prima facie* his. Boyle *v.* Skinner, 19 Mo. 82.

10. A note to "A or B" is not a good promissory note. Carpenter *v.* Farnsworth, 106 Mass. 561; Walrad *v.* Petrie, 4 Wend. 575. In such cases "or" is sometimes construed "and," the note then being held joint. Parker *v.* Carson, 64 N. Car. 563; Knight *v.* Jones, 21 Mich. 161. And any payee may begin a joint suit. Westgate *v.* Healy, 4 R. I. 523; Spaulding *v.* Evans, 2 McL. (U. S.) 139; Willoughby *v.* Willoughby, 5 N. H. 244.

name ;[1] but the rule in the United States may be said to be that the real party in interest may sue on proving that the payee was his agent or officer.[2]

There is a difference, however, between public officers and private agents, when regarded as payees or indorsers, like that already stated when they are makers or drawers. A note to "A. B., Executor" may be sued on by A. B., the title being merely descriptive ;[3] but one to A. B., "Treasurer of the United States" must be sued out by the nation.[4]

Notes and bills are often made payable to bearer or "A. B. or bearer." Such instruments are *prima facie* the property of the holder,[5] are transferable by delivery, and if transferred by indorsement the indorsement need not be proved.[6]

An instrument payable to a fictitious name is in law payable to bearer,[7] and this although unintentionally the name of a real person has been used.[8]

1. Tooke *v.* Newman, 75 Ill. 215. And he may sue though described as "A. B., Agent." Toledo Agricultural Works *v.* Heisser, 51 Mo. 128; Walcott *v.* Standley, 62 Ind. 198; Anstell *v.* Rice, 5 Ga. 472; Whitcomb *v.* Smart, 38 Me. 264.

2. The corporation represented may sue on a note payable to "A. B., Treasurer." Babcock *v.* Beman, 11 N. Y. 200. "Or A. B., Agent." Bean *v.* Dolliff, 67 Me. 228; Natl. Life Ins. Co. *v.* Allen, 116 Mass. 398; Black *v.* Enterprise Ins. Co., 33 Ind. 223; Eastern R. *v.* Benedict, 5 Gray (Mass.), 561. And the corporation intended may be shown by parol. Lovejoy *v.* Citizens' Bank, 23 Kans. 331.

"A. B., Cashier" is synonymous with the bank of which A. B. is that officer, and the bank may always sue. Bank of the State *v.* Muskinghum Branch, 29 N. Y. 619; Nave *v.* Hadley, 74 Ind. 155; Pratt *v.* Topeka Bank, 12 Kans. 570; Lacy *v.* Cent. Natl. Bank, 4 Neb, 179; Commercial Bank *v.* French, 21 Pick. (Mass.) 486; Stamford Bank *v.* Ferris, 17 Conn. 259. And the cashier may also sue. Johnson *v.* Catlin, 27 Vt. 87; Garton *v.* Union City Natl. Bank, 34 Mich. 279.

3. Moss *v.* Witcher, 35 Tex. 388; Carter *v.* Saunders, 2 How. (Miss.) 851; Speelman *v.* Culbertson, 15 Ind. 441; Cravens *v.* Logan, 7 Ark. 103; Thomas *v.* Rufe, 9 Mo. 373.

4. Dugan *v.* U. S., 3 Wheat. (U. S.) 172. And see Crowell *v.* Osborne, 14 Vr. (N. J.) 335.

An assignee is regarded as a public officer, not personally liable on his indorsement. Bowne *v.* Douglass, 38 Barb. (N. Y.) 312.

Notes payable to persons named as officials give notice of the fiduciary character of the payees, and an indorsee may find himself confronted with equitable defences. Renshaw *v.* Mills, 38 Mo. 201; Third Natl. Bank *v.* Lange, 51 Md. 138; Shaw *v.* Spencer, 100 Mass. 382. *Sed contra*, Bush *v.* Peckard, 3 How. (Del.) 385; Fletcher *v.* Shaumberg, 41 Mo. 501.

5. Ellis *v.* Wheeler, 3 Pick. (Mass.) 18; Eddy *v.* Bond, 19 Me. 461; McDonald *v.* Harrison, 12 Mo. 447.

6. Willbour *v.* Turner, 5 Pick. (Mass.) 526.

Nor need such a note be first delivered to the person named in it. Gage *v.* Sharp, 24 Ia. 15.

A note may even be made "to —— or bearer," and the blank need not be filled. Rich *v.* Starbuck, 51 Ind. 87. But one payable to "to A. B. bearer" is not negotiable and is payable to A. B. only. Warren *v.* Scott, 32 Iowa, 22.

7. Kohn *v.* Watkins, 26 Kans. 691; Farnsworth *v.* Drake, 11 Ind. 101; Phillips *v.* Im. Thurn, L. R. 1 C. P. 463.

So of a draft for "bills payable." Mechanics' Bank *v.* Straiton, 3 Keyes (N. Y.) 365. And a note payable to "1658." Willets *v.* Phœnix Bank, 2 Duer (N. Y.), 121.

8. Foster *v.* Shattuck, 2 N. H. 446.

The holder may indorse the fictitious name. Blodgett *v.* Jackson, 40 N. H. 21. But a fraudulent indorsement is forgery. Chitty on Notes and Bills, 182; Callis *v.* Emmett, 1 H. Bl. 313.

The holder may aver and prove himself the person intended by the fictitious name, but the burden is upon him to do so. Lane *v.* Krekle, 22 Iowa, 399; Chenot *v.* Lefevre, 8 Ill. 637.

That a payee's name is misspelled is immaterial,[1] and generally any erroneous misstatement of name may be corrected by parol.[2] If several persons have the same name, and the note be payable to that name, possession of the instrument will confer *prima-facie* title.[3]

12. Negotiability and Manner of Transfer.—(*a*) *Words of Negotiability.*—In its proper commercial sense a "negotiable" instrument is one the assignee of which may bring action in his own name subject to no equities between prior parties.[4] In this sense negotiable is opposed to "non-negotiable," and it is now well settled that bills and notes may be either;[5] nor is there any presumption in favor of either class; and if suit is brought on a lost note, it lies upon the plaintiff to prove affirmatively to which class it belonged.[6]

The customary method of indicating negotiability is by the words "or order," "or bearer."[7] "To the order of A" is also common and valid.[8]

Notes payable to "A or bearer" are in most States transferable by delivery,[9] but in some by indorsement only.[10]

The character of an instrument may be changed by indorsement,

1. Colson *v.* Arnot, 57 N. Y. 253.

2. Taylor *v.* Strickland, 37 Ala. 642; Medway Cotton Mfg. Co. *v.* Adams, 10 Mass. 360; Jester *v.* Hopper, 13 Ark. 43.

Thus held where "Willis" was written for "Willison." Willis *v.* Barrett, 2 Stark. 29. "Charles V. Jacobs" for "Charles B. Jaques." Jacobs *v.* Benson, 39 Me. 132. And see Patterson *v.* Graves, 5 Blackf. 593; Hall *v.* Tufts, 18 Pick. (Mass.) 455. And a corporation may show by parol that it has changed its name since a note was made to it, and sue by its new name. Cumberland College *v.* Ish, 22 Cal. 640.

3. Stebbing *v.* Spicer, 8 C. B. 827.

If, however, it be intended to give a note to, say, "John P." and the name "Joseph P." (that of a real person) be inserted, "John P." cannot explain the matter by parol and sue on the note. Bolles *v.* Stearns, 11 Cush. (Mass.) 320. *Cf.* Rives *v.* Marrs, 25 Ill. 315.

A fraudulent indorsement by the person rightly named but not intended is forgery. Camp *v.* Tompkins, 9 Conn. 545.

4. And out of the assignment of negotiable paper grows "an orderly commercial relation and liability between the holder and all persons whose names are on the paper" 1 Rand. Com Paper, 265; Odell *v.* Gray, 15 Mo. 337.

5. Coursin *v.* Ledlie, 31 Pa. St. 506; Duncan *v.* Md. Sav. Bank, 10 Gill & J. (Md.) 299.

And non-negotiable instruments between original parties are perfectly valid. Smith *v.* Kendall, 6 T. R. 123. And may be sued on as notes or bils. Downing *v.* Backenstoes, 3 Cai. (N. Y.) 137. They are assignable, subject to defences between original parties. Dyer *v.* Horner, 22 Pick. (Mass.) 253; Wiggins *v.* Damrell, 4 N. H. 539. Even at law. Maxwell *v.* Goodrum, 10 B. Mon. (Ky.) 286. And in *Georgia* the assignee may sue in his own name. Goodman *v.* Fleming, 57 Ga. 350.

6. Yingling *v.* Kohlhass, 18 Md. 148.

7. But no particular words are necessary, and any equivalent for those given will be held sufficient. Raymond *v.* Middleton, 29 Pa. St. 529; Sinclair *v.* Johnson, 85 Ind. 527; Parker *v.* Riddle, 11 Ohio, 102; Bank of Sherman *v.* Apperson, 4 Fed. Rep. (U. S.) 25. "A or holder" is enough. Putnam *v.* Crymes, 1 McMull. (S. Car.) 9. And "executors, administrators, and assigns." Dutchess Co. Ins. Co. *v.* Hatchfield, 1 Hun (N. Y.), 675. *Sed contra, In re* Blakely Ordnance Co., L. R. 3 Ch. 154.

8. Huling *v.* Hugg, 1 W. & S. (Pa.) 419; Howard *v.* Palmer, 64 Me. 86.

9. Cobb *v.* Duke, 36 Miss. 60.

Being exactly equivalent to those drawn to "bearer" simply. Bullard *v.* Bell 1 Mas. (U. S.) 252. Though early cases held them non-negotiable as containing no warrant to assign. Hopkins *v.* Seymour, 10 Tex. 202; Matthews *v.* Hall, 1 Vt. 317; Hutchings *v.* Low, 1 C. E. Greene (N. J.), 246; Tillman *v.* Ailles, 5 Sm. & M. (Miss.) 373.

10. Garvin *v.* Wiswall, 83 Ill. 215; Avery *v.* Latimer, 14 Ohio, 542; Sprowl *v.* Simpkins, 3 Ala. 515.

e.g., a note payable to "order," if indorsed to "bearer," becomes transferable thereafter by delivery,[1] but the negotiable character of a note cannot be destroyed in the indorsement of a non-negotiable guaranty.[2]

Notes and bills are often expressed to be payable and negotiable at some specified bank. This phrase has no effect upon the commercial negotiability of the instrument.[3]

(*b*) *Words expressing Consideration.*—The phrase "value received," usually found in notes and bills, certainly imports a valid consideration;[4] but unless required by statute[5] they may be omitted, for the mere delivery of the instrument implies a consideration.[6]

But whether this usual phrase is employed or not, want of consideration may be always shown as between the original parties.[7]

(*c*) *Power to Fill Blanks.*—The delivery of a note or bill containing blanks impliedly authorizes the holder to fill them as he pleases, unless restrained by the instrument itself.[8] And this authority extends to all parts of the document delivered. E.g., the signature of the drawer after blank acceptance,[9] the drawee's name,[10] the payee's name,[11] the date,[12] the time of pay-

1. Shelton *v.* Sherfey, 3 Ia. 108.

But an indorsement "to A B" will not deprive a note of its negotiable character. Leavitt *v.* Putnam, 3 N. Y. 494. Otherwise of the indorsement, "This note not transferable." Friedman *v.* Wagner, 1 Tex. App. 734.

2. Upham *v.* Prince, 12 Mass. 14.

Nor can a guaranty be made negotiable by any indorsement. Leggett *v.* Raymond, 6 Hill (N. Y.), 639; Tuttle *v.* Bartholomew, 12 Metc. (Mass.) 452; McDoal *v.* Yeomans, 8 Watts (Pa.) 361.

3. 1 Edw. Notes & B. § 195.

They are simply payable by the bank out of makers' funds without set-off. Mandeville *v.* Union Bank, 9 Cr. (U. S.) 9. But in *Kentucky* no note is negotiable unless made payable at a bank. Stapp *v.* Anderson, 1 A. K. Marsh. (Ky.) 398. And in *Pennsylvania* a note "payable and negotiable without defalcation at the K. Bank" has been held negotiable only at that bank. Raymond *v.* Middleton, 29 Pa. St. 529.

4. Delano *v.* Bartlett, 6 Cush. (Mass.) 364; Hill *v.* Todd, 29 Ill. 101; Sawyer *v.* Vaughn, 25 Me. 337; Thompson *v.* Armstrong, 5 Ala. 383.

5. As in *Missouri*. Lowenstein *v.* Knopf, 2 Mo. App. 159.

6. Hughes *v.* Wheeler, 8 Cow. (N. Y.) 83; Hook *v.* Pratt, 78 N. Y. 371; Kendall *v.* Galvin, 15 Me. 131; People *v.* McDermott, 8 Cal. 288; Hanley *v.* Lang, 5 Port. (Ala.) 154; Murry *v.* Clayborn, 2 Bibb (Ky.), 300.

Even where the note was left in an envelope to be opened after his death, and was intended as a gift to the payee. Dean *v.* Carruth, 108 Mass. 242. *Sed contra*, Harris *v.* Clark, 3 N. Y. 93. And that the intent to make the amount promised a gift destroyed the note. Williams *v.* Forbes, 114 Ill. 169.

7. Hill *v.* Buckminster, 5 Pick. (Mass.) 391; Schoonmaker *v.* Roosa, 17 Johns. (N. Y.) 301; Snyder *v.* Jones, 38 Md. 542; Sawyer *v.* Vaughn, 25 Me. 337; Raymond *v.* Sellick, 10 Conn. 479; Russel *v.* Hall, 10 Mart. (La.) 288.

8. Goodman *v.* Simonds, 20 How. (U. S.) 343; Androscoggin Bank *v.* Kimball, 10 Cush. (Mass.) 373; Redlich *v.* Dall, 54 N. Y. 234; Young *v.* Ward, 21 Ill. 223; Abbott *v.* Rose, 62 Me. 194; Lisle *v.* Rogers, 18 B. Mon. (Ky.) 537; Witte *v.* Williams, 8 S. Car. 290; Armstrong *v.* Harshman, 61 Ind. 52.

9. Moiese *v.* Knapp, 30 Ga. 492; Harvey *v.* Cane, 34 L. T. (N. S.) 64.

10. Wheeler *v* Webster, 1 E. D. Sm. (N. Y.) 1.

11. Even after indorsement. Armstrong *v.* Harshman, 61 Ind. 52. Or where there was an agreement to insert some other name than the one actually written in. Dinsmore *v.* Duncan, 57 N. Y. 573; Sittig *v.* Birkestack, 38 Md. 158; Weston *v* Myers, 33 Ill. 424; Van Etta *v.* Evenson, 28 Wis. 33; Brummel *v.* Enders, 18 Gratt. 873; Seay *v.* Bank of Tenn., 3 Sneed (Tenn.), 558; Schooler *v.* Tilden, 71 Mo. 580; Aiken *v.* Cathcart, 3 Rich. (S. Car.) 133.

12. Mich. Ins. Co. *v.* Leavenworth, 30

ment,[1] the rate of interest,[2] the place of payment,[3] and the amount to be paid.[4] The power to fill blanks, however, does not extend to making additions[5] or erasures.[6] See ALTERATION OF INSTRUMENTS, vol. I, p. 515 *et seq.*

Blanks must be filled, if at all, within a reasonable time, and what time is reasonable is a question for the jury.[7] But instruments completed after indorsement,[8] maturity,[9] and maker's insolvency,[10] or any time before judgment,[11] have been upheld.

Blank indorsements are valid, and confer an implied authority to fill in any legal expression of the indorser's liability.[12]

(*d*) *Agreements of Even Date.*—Notes and bills are sometimes construed with reference to contemporaneous but separate agreements.[13] But such separate agreement, to be admissible, must have been made between the same parties.[14]

(*e*) *Memoranda and Unusual Stipulations.*—Memoranda when made at or before the completion of a note or bill are generally

Vt. 11; Fullerton *v.* Sturges, 4 Ohio St. 529; Mich. Bank *v.* Eldred, 9 Wall. (U. S.) 544; Page *v.* Morrell, 3 Keyes (N.Y.), 117; Schultz *v.* Payne, 7 La. Ann. 222.

1. McGrath *v.* Clark, 56 N. Y. 34; Conner *v.* Routh, 7 How. (Miss.) 176.

2. Visher *v.* Webster, 8 Cal. 109.

3 Redlich *v.* Dall, 54 N. Y. 234; Marshall *v.* Drescher, 68 Ind. 359; Shepard *v.* Whetstone, 51 Ia. 457.

4. Frank *v.* Lillienfried, 33 Gratt. (Va.) 377; Bank of Commonwealth *v.* Curry, 2 Dana (Ky.), 142; Griggs *v.* Howe, 31 Barb. 100

And as against a *bona fide* holder it is no defence that the authority has been exceeded and too large an amount inserted. Huntington *v.* Bank of Mobile, 3 Ala. 186; Waldron *v.* Young, 9 Heisk. (Tenn.) 777; Joseph *v.* Nat'l Bank, 17 Kans. 256; Abbott *v.* Rose, 62 Me. 194; Wilson *v.* Kinzie, 49 Ind. 35; Chemung Canal Bank *v.* Bradner, 44 N. Y. 680; Barker *v.* Stearne, 9 Exch. 684.

5. E.g., inserting "with interest" in the body of the note. Waterman *v.* Vose, 43 Me. 504. Adding "after maturity" to the interest clause. Coburn *v.* Webb, 56 Ind. 100.

The printed words "with interest at" found in a note do not create a blank, and to fill out the phrase is a material alteration. Holmes *v.* Trumper, 22 Mich. 427; s. p., Johnston *v.* Speer, 92 Pa. St. 227; Franklin Life Ins. Co. *v.* Courtney, 60 N. Y. 134; Mahaime Bank *v.* Douglass, 31 Conn. 170.

6. Fontaine *v.* Gunter. 31 Ala. 258.

7. Temple *v.* Pullen, 8 Exch. 389.

8 Armstrong *v.* Harshman, 61 Ind. 52.

9. Farmers', etc., Bank *v.* Horsey, 2 Houst. (Del.) 385.

10. Fetters *v.* Muncie Nat'l Bank, 34 Ind. 251.

11. Rees *v.* Conococheague Bank, 5 Rand. (Va.) 326; Croskey *v.* Skinner, 44 Ill. 321.

But the authority to fill blanks terminates, it is said, with the maker's life. Canal, etc., R. Co. *v.* Armstrong, 27 La. Ann. 433; Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11.

12. Sweetser *v.* French, 13 Metc. (Mass.) 262.

But the insertion of a guaranty is not permissible. Hall *v.* Newcomb, 7 Hill (N. Y.), 426; Howe *v.* Merrill, 5 Cush. (Mass.) 80. *Contra*, Worden *v.* Salter, 90 Ill. 160; Chandler *v.* Westfall, 30 Tex. 475; Fuller *v.* Scott, 8 Kans. 25; Rivers *v.* Thomas, 1 B. J. Lea (Tenn.), 649. But the unauthorized guaranty will not release the indorser from his proper liability. Beattie *v.* Brown, 64 Ill. 360.

13. Thus a collateral mortgage will be construed as one instrument with the note it secures. Dobbins *v.* Parker, 46 Ia. 357. So of a trust deed securing notes. Brownlee *v.* Arnold, 60 Mo. 79; s. p., Meyer *v.* Graeber, 19 Kans. 165; Parks *v.* Cooke, 3 Bush (Ky.), 168; Richardson *v.* Thomas, 28 Ark. 387; Elliott *v.* Deason, 64 Ga. 63; Treadwell *v.* Archer, 76 N. Y. 196; Hill *v.* Huntres, 43 N. H. 480; Polo Mfg. Co. *v.* Parr, 8 Neb. 379; Goodwin *v.* Nickerson, 51 Cal. 166; Third Nat'l Bank *v.* Armstrong, 25 Minn. 531; Lawrence *v.* Griswold, 30 Mich. 410; Munro *v.* King, 3 Cal. 238; Rodgers *v.* Broadnax, 24 Tex. 538.

14. Thus a note by a contractor to his creditor cannot be construed with the written contract of the maker. Levally

held to be a part of the instrument.[1] By such memorandum the time of payment may be fixed,[2] and the place of payment is very frequently indicated,[3] while the kind of currency[4] and rate of interest[5] intended are sometimes so stated. Memoranda stating that collaterals have been deposited to secure the note upon which the memorandum is written, or that the note itself is collateral, are in the U. S. part of the note, which may be rendered non-negotiable by them.[6]

A request to "charge" the amount of a draft to the drawer,[7] or a direction that a certificate of deposit be *returned* to the person issuing it, are immaterial additions which do not affect the negotiability of the instruments.[8]

Nor will a full statement of the consideration of the note or bill destroy its negotiability, if the consideration is executed.[9]

Stipulations to pay an attorney's fee in case suit is brought upon the instruments containing them are not uncommon, and no general rule can be laid down as to their effect.[10]

Rather from lack of authority than contradiction in cases the same doubt surrounds the effect of a warrant to confess judgments embodied in a note.[11]

v. Harmon, 20 Ia. 533; McDonald *v.* Elfes, 61 Ind. 279.

1. Dinsmore *v.* Duncan, 57 N. Y. 573; Shaw *v.* M. E. Soc., 8 Metc. (Mass.) 223; Falkenburgh *v.* Clark, 11 R. I. 278; Farmers' Bank *v.* Ewing, 78 Ky. 264; Corgan *v.* Frew, 39 Ill. 31; Krouskop *v.* Shontz, 51 Wis. 204.

2 Thus the memorandum "not to compel payment but to receive when convenient" will control the written due date. Barnard *v.* Cushing, 4 Metc. (Mass.) 230. Otherwise of a memorandum on the envelope containing the note. Central Bank *v.* Willard, 17 Pick. (Mass.) 151.

3. "Payable at the bank of A" written on the margin is part of the note. Woodworth *v.* Bank of America, 19 Johns. 391.

4. "To be paid in wheat, etc.," indorsed on the note is part of it, though it destroys the instrument as commercial paper. Polo Mfg. Co. *v.* Parr, 8 Neb. 379.

5. A note having "with lawful interest" written in the corner bears such interest. Warrington *v.* Early, 2 El. & B. 763.

6. Costelo *v.* Crowell, 127 Mass. 293; Benedict *v.* Cowden, 49 N. Y. 396.

In England a statement that collateral to the note has been put up is not considered a part of the note. Fancourt *v.* Thorne, 9 Q. B. 312.

7. Cornell *v.* Barnes, 26 Wis. 473; Petillon *v.* Lorden, 86 Ill. 361; Planters' Bank *v.* Evans, 36 Tex. 592.

8. Frank *v.* Wessels. 64 N. Y. 155; Cate *v.* Patterson, 25 Mich. 191.

So of words of thankfulness for the loan embodied in a note. Ellis *v.* Mason, 2 Hill (N. Y.), 295 n.

9. Wells *v.* Brigham, 6 Cush. (Mass.) 6, where a bill was drawn for an amount "due me for a wagon bought last spring." *Cf.* Shenton *v.* James, 5 Q. B. 199; Wright *v.* Irwin, 33 Mich. 32.

But otherwise when the consideration is executory, e.g. the future purchase of a machine. Hodges *v.* Hall, 5 Ga. 163.

10. Such agreements are valid and do not destroy negotiability. Davidson *v.* Vorse, 52 Iowa, 384; Hubbard *v.* Harrison, 38 Ind. 323; Gaar *v.* Louisville Banking Co., 11 Bush (Ky.), 180; Nickerson *v.* Sheldon, 33 Ill. 372; Peyser *v.* Cole, 19 Cent. L. J. (Oreg.), 236.

They do destroy negotiability. First Nat'l Bk. *v.* Jacobs, 73 Mo. 35; Johnston *v.* Speer, 92 Pa. St. 227; Maryland Fertilizing Co. *v.* Newman, 60 Md. 584; First Nat'l Bk. *v.* Larser, 18 Cent. L. J. (Wis.) 399; Jones *v.* Radatz. 27 Minn. 240; First Nat'l Bk. *v.* Bynum, 84 N. Car. 24.

They are even void as against public policy, being mere covers for usury. Bullock *v.* Taylor, 39 Mich. 137; Myer *v.* Hart, 40 Mich. 517; State *v.* Taylor, 10 Ohio, 378; Dorr *v.* Updike, 11 Neb. 95; Boozer *v.* Anderson, 42 Ark. 167.

11. It destroys negotiability. Sweeney *v.* Thickstun. 77 Pa. St. 131; First Nat'l Bk. *v.* Marlow, 71 Mo. 618. But a waiver of stay and exemption laws, etc., does not. Zimmerman *v.* Rote, 75 Pa. St. 188.

13. Delivery.—*Generally.*—A note or bill, however complete in appearance, takes effect only on delivery,[1] and the same is true of indorsement[2] and acceptance.[3]

While delivery will in general be presumed from possession,[4] no hard and fast rule can be laid down as to what will constitute a valid and sufficient delivery;[5] it is often a question of intent.[6]

Since the intent to deliver is necessary, if, for instance, the person named as payee should violently carry off the note given him for examination,[7] or the possessor of a sheet of paper bearing another's signature should fill it up as a note,[8] the apparent makers would not be liable.

Delivery to an agent of the payee or indorsee is sufficient,[9] even though such agent be an unauthorized one;[10] but to a mere stranger, e.g., one who discounts paper in which he is not named or intended as payee, a good delivery cannot be made.[11]

Bills and notes like other written contracts take effect from the time of delivery only,[12] which, however, is *prima facie* their date.[13] So an indorsement is presumed to have been made before maturity.[14]

A note or indorsement made and delivered on Sunday is, like any other Sunday contract, void; and it has been held that such

And so of a power to issue execution on non-payment. Fort *v.* Delee. 22 La. Ann. 181. While in *Ohio* the note remains negotiable, but not so the attached warrant of attorney; the payee only can take advantage of that. Osborn *v.* Hawley, 19 Ohio, 130. *Cf.* Cushman *v.* Welsh, 19 Ohio St. 536.

1. Howe *v.* Oned, 28 Gratt. (Va.) 1; Curtis *v.* Gorman, 19 Ill. 141; Thomas *v.* Watkins, 16 Wis. 549; Prather *v.* Zulauf, 38 Ind. 155.

2. Dana *v.* Norris, 24 Conn. 333; Richards *v.* Darst, 51 Ill. 140.

So, where a payee indorsed in blank and died, one taking the note from among his effects acquires no title. Foglesang *v.* Wickard, 75 Ind. 258.

3. Therefore an acceptance may be cancelled after it is written on the bill, and the acceptor will not be bound. Cox *v.* Troy, 5 B. & Ald. 474.

4. Kidder *v.* Horrobin, 72 N. Y. 150.

And when the paper was issued to bearer, the want of valid delivery will not be admitted as a defence as against a *bona fide* holder. Kinyon *v.* Wohlford, 17 Minn. 239.

5. It can be said, however, that physically handing it to some person is not necessary; mailing is sufficient. Kirkman *v.* Bk. of America, 2 Coldw. (Tenn.) 397; Mitchell *v.* Byrne, 6 Rich. (S. Car.) 171. But intrusting it to an agent of the maker for delivery to payee—Muller *v.* Pondir, 55 N. Y. 325—or leaving it on the payee's desk—Kinne *v.* Ford, 52 Barb. 194—is not sufficient, unless the payee actually receives the note.

6. Worth *v.* Case, 42 N. Y. 362; Grimm *v.* Warner, 45 Iowa. 106.

7. Carter *v.* McClintock, 29 Mo. 464.

Or stolen from the maker. Hall *v.* Wilson, 16 Barb. 548—or obtained from him by any fraud—Taylor *v.* Atchison. 54 Ill. 196—unless he was guilty of negligence. Chapman *v.* Rose, 56 N. Y. 137.

8. Caulkins *v.* Whistler, 29 Iowa, 495; Shipley *v.* Carroll, 45 Ill. 285.

And because the intent must be that of the maker, no valid delivery can be made after the maker's death. Clark *v.* Sigourney, 17 Conn. 511. Nor in case of a partnership note after the dissolution of the firm. Gale *v.* Miller, 54 N. Y. 536.

9. Lysaght *v.* Bryant, 9 C. B. 46; Richardson *v.* Lincoln, 5 Metc (Mass.) 201; Bodley *v.* Higgins, 73 Ill. 375.

10. Bringing suit is a ratification. Ancona *v.* Marks, 7 H. & N. 686.

11. Prescott *v.* Brinley, 6 Cush. (Mass.) 233; First Nat. Bank *v.* Strang, 72 Ill. 559.

12. Baldwin *v.* Freydendall, 10 Bradw. (Ill.) 106; Lovejoy *v.* Whipple, 18 Vt. 379; Hill *v.* Dunham. 7 Gray (Mass.), 543.

13. Anderson *v.* Weston, 6 Bing. (N. Car.) 296.

14. Smith *v.* Edgeworth, 3 Allen (Mass.), 233.

instrument could not afterwards be ratified.[1] But a note dated on Sunday may always be shown to have been delivered on a week-day.[2]

There is no doubt that notes may be delivered conditionally[3] or in escrow,[4] and the maker held only upon the happening of the contingency; but the defence of an improper delivery or failure of the contingency under these circumstances, though good against the payee,[5] will not avail against a *bona-fide* holder for value.[6]

The defence of breach of condition or of escrow in delivery of the note may be proved by parol.[7]

(*b*) *Of Sets of Bills.*—All the parts of a set should be delivered together,[8] but the indorsement of one part transfers them all,[9] though if the parts be all indorsed to different parties, the indorser is liable on each,[10] nor does the payment of one part to an innocent holder under a forged indorsement relieve the acceptor from a second payment to the lawful holder of the other parts.[11]

14. Restrictions upon the Right of Making Notes and Bills.—(*a*) *Civil Restrictions.*—Any person who can lawfully make a contract may make a note or draw a bill, and rules regulating the validity of contracts generally are applicable to the interpretation of commercial paper.[12]

1. Day *v.* McAllister, 15 Gray (Mass.), 433. *Contra*, Love *v.* Wells, 25 Ind. 503; Clough *v.* Davis, 9 N. H. 500; Smith *v.* Case, 2 Or. 190. And see Winchell *v.* Carey, 115 Mass. 560.

2. Aldridge *v.* Branch Bank, 17 Ala. 45. And if delivered on Sunday, though dated on a week day, it is valid in the hands of a *bona-fide* holder. Cranson *v.* Goss, 107 Mass. 439; Clinton Nat. Bank *v.* Graves, 48 Iowa, 228; Vinton *v.* Peck, 14 Mich. 287. If signed on Sunday, but delivered on a week day, it is valid in the payee's hand. King *v.* Fleming, 72 Ill. 21; Fretsch *v.* Heislen, 40 Mo. 555; Hilton *v.* Houghton, 35 Me. 143; Lovejoy *v.* Whipple, 18 Vt. 379. A note dated on Sunday is *prima facie* a Sunday contract. Sayre *v.* Wheeler, 31 Iowa, 112.

3. Benton *v.* Martin, 52 N. Y. 570; Sweet *v.* Stevens, 7 R. I. 375.

4. Couch *v.* Meeker, 2 Conn. 302; Taylor *v.* Thomas, 13 Kans. 217.

But not to the payee himself or his agent. Massmann *v.* Holscher, 49 Mo. 87; Johnson *v.* Branch, 11 Humph. (Tenn.) 521.

If a promissory note placed in escrow, to be delivered upon the performance of conditions by the payee, is surrendered to him without the performance of the conditions, such surrender will not constitute a valid delivery. Stringer *v.* Adams, 98 Ind. 539.

5. Watkins *v.* Nash, L. R. 20 Eq. Cas. 262; McLean *v.* Nugent, 33 Wis. 353; Daniels *v.* Gower, 54 Ia. 319.

6. Vallett *v.* Parker, 6 Wend. (N. Y.) 615; Fearing *v.* Clark, 16 Gray (Mass.), 474; Clarke *v.* Johnson, 54 Ill. 296. *Contra*, Chipman *v.* Tucker, 38 Wis. 43.

7. Watkins *v.* Bowers, 119 Mass. 383; Ricketts *v.* Pendleton, 14 Md. 320; Benton *v.* Martin, 52 N. Y. 570; Mosher *v.* Rogers, 20 Cent. L. J. (Ill.) 316.

And the declarations of the deceased depositary are evidence. Goodson *v.* Johnson, 35 Tex. 622. But some cases have rejected parol evidence even between the original parties, when the note was absolute in form. Massman *v.* Holscher, 49 Mo. 87; Roche *v.* Roanoke Seminary, 56 Ind. 198.

8. Story on Bills, § 67

9. Benj. Chalm. Dig. § 27; Walsh *v.* Blatchley, 6 Wis. 413.

10. 1 Daniel on Neg. Inst. 123; Wright *v.* McFall, 8 La. Ann. 120; Holdsworth *v.* Hunter, 10 B. & C. 449.

11. Cheap *v.* Harley, 3 T. R. 127.

12. The custom and convenience of merchants being the origin of exchange, it was formerly thought that none but traders could bind themselves by notes and bills. In England, this idea was early exploded. Fairley *v.* Roch Lutw. 891 (A.D. 1687). And in America it is doubtful if it ever prevailed. In many countries, however, the right of creating promissory paper is confined to the trad-

Those persons who from considerations of public policy are deemed civilly or politically incapable of making a valid contract are alien enemies, and to some extent felons, bankrupts, and governmental officers.

An alien enemy is "every resident of a hostile place or country, even though a subject" of the country of the forum.[1]

The war which gives rise to the relation of alien enemy need not be waged between independent nations. "A war may exist where one of the belligerents claims sovereign rights as against the other."[2] The principles of law on this point therefore apply in full force to the late Civil War in the United States.[3]

The general rule is that all contracts between alien enemies are void during the state of war,[4] although there are some exceptions, sustained by the necessity of every State protecting its own citizens.[5]

These principles are fully applicable to notes and bills, and the fact that the drawer,[6] payee or indorsee[7] of an instrument is an alien enemy will invalidate the paper, though not perhaps in the hands of an innocent holder for value.[8]

ing classes. See 1 Rand. Com. Paper, pp. 366–7.

Once made, however, the person drawing the bill or making the note is thereby estopped from contesting the capacity of the payee to receive and indorse the instrument. Goodrich *v.* Reynolds, 31 Ill. 490; Camp *v.* Byrne, 41 Mo. 525; Nashua Fire Ins. Co. *v.* Moore, 55 N. H. 48; Brown *v.* Donnell, 49 Me. 421; Nightingale *v.* Withington, 15 Mass. 272. Even when the payee was fictitious. Lane *v.* Krekle, 22 Ia. 399. Or a foreign corporation doing business in defiance of a State statute. Shook *v.* Singer S. M. Co., 61 Ind. 520.

1. Wharton Conf. Laws, § 737 (a).

Thus an American domiciled in England is to home-keeping Americans an alien enemy during a war with England. The Francis, 1 Gall. (U. S.) 614. And so, as to Englishmen, is a British subject naturalized in a neutral State, but residing in a country at war with Great Britain. The Indian Chief, 3 C. Rob. 12; O'Mealey *v.* Wilson, 1 Camp. 482.

A corporation may be a alien enemy as well as an individual. Society for Propagation of the Gospel *v.* Wheeler, 1 Gall. (U. S.) 132.

2. *Per* Grier, J., in the Prize Cases, 2 Black (U. S.), 667.

3. Sanderson *v.* Morgan, 39 N.Y. 231; Montgomery *v.* United States, 15 Wall. (U. S.) 395; Hennen *v.* Gilman, 20 La. Ann. 240; Lacy *v.* Sugarman, 12 Heisk. (Tenn.) 354.

The war ended June 13, 1865, the day of the President's proclamation. Semmes *v.* City Ins. Co., 36 Conn. 543. But in South Carolina not until April 1st, 1866. Gooding *v.* Varn, Chase's Dec. 286.

But the act of attempted secession did not render citizens of the seceding States aliens before their endeavor; their alienage was reckoned only forward from that date. U. S. *v.* Boxes of Arms, 1 Bond, 446.

4. Scholefield *v.* Eichelberger, 7 Pet. (U. S.) 586; The Reform, 3 Wall. (U. S.) 617; Furtado *v.* Rogers, 3 Bos. & P. 191; Noblom *v.* Milbourne, 21 La. Ann. 641; Graham *v.* Merrill, 5 Coldw. (Tenn.) 622.

But a contract made to extend over a term of years is suspended, not annulled, by war for a shorter time. Hanger *v.* Abbott, 6 Wall. 540.

5. For example, contracts by a prisoner-of-war for necessaries. Story on Bills, § 101. Or a contract to pay for a license to prevent capture. Coolidge *v.* Ingler, 13 Mass. 26.

A special license to deal with alien enemies is valid, but must be affirmatively proved. *In re* Onachita Cotton, 6 Wall. (U. S.) 531.

6. Woods *v.* Wilder, 43 N. Y. 164, where the bill was drawn by a Georgian upon a New-Yorker after the outbreak of hostilities. Tarleton *v.* Southern Bank, 49 Ala. 229.

7. Craft *v.* United States, 12 Ct. Cl. 178; Billgerry *v.* Branch, 19 Gratt. (Va.) 393; Russell *v.* Russell, 1 McArth. (D. C.) 263.

8. Lacy *v.* Sugarman, 12 Heisk.

Felons and bankrupts have been regarded as incapable at least of taking or passing title by indorsement.[1] Their power to make notes and bills seems barely to have been considered.

The powers of governmental officers and agents are considered matters of public notoriety. The law defining those powers governs, no matter what the innocence of the taker and holder of apparently governmental notes or bills.[2] And such laws are strictly construed.[3]

(*b*) *Natural Restrictions.*—The property of idiots, imbeciles, lunatics, and even drunkards is preserved by the doctrine of law which pronounces their contracts certainly voidable, and in some cases absolutely void.

Generally the contracts of a lunatic are voidable merely,[4] but after inquisition duly found he can make no valid promise whatever.[5]

Yet as against an innocent holder for value, an inquisition finding the maker of a note to have been insane when he made it cannot be set up.[6]

An inquisition is not conclusive proof of insanity upon persons not parties to the proceedings,[7] but it is certainly strong evidence,

(Tenn.) 354. permits the innocent holder to hold the instrument entirely free from its original taint, but Williams *v.* Mobile Savings Bank, 2 Woods (U.S.), 501, allows only the recovery of the amount actually paid. And see Morrison *v.* Lovell, 4 W. Va. 346.

But the making of an indorsement; though made in the enemies' lines is good, if it involves no transfer of funds to the enemies' country, but is a means of getting money into, e.g., the United States. Haggard *v.* Conkwright, 7 Bush (Ky.). 16; Morris *v.* Poillon, 50 Ala. 403. And a promise to pay made after the cessation of hostilities may be good. Ledoux *v.* Buhler, 21 La. Ann. 130.

1. Bullock *v.* Dodds, 2 B. & Ald. 258. But this case rests rather on the common-law doctrine of felony, involving forfeiture of goods.

A bankrupt may complete by indorsement a transfer made before petition filed. Hersey *v.* Elliot, 67 Me. 526.

But a bankrupt's check made but not presented before petition becomes void when the petition is filed. First Nat'l Bank *v.* Gish, 72 Pa. St. 13.

2. Floyd Acceptances, 7 Wall. (U. S.) 666, where an acceptance by "J. B. F., Sec'y of War" was held not to bind the United States.

3. Thus an authority to sell State bonds gives no right to sell on credit. State of Illinois *v.* Delafield, 8 Paige (N. Y.), 527.

4. Arnold *v.* Richmond Iron Works, 1 Gray, 434; Lilly *v.* Wagoner, 27 Ill. 395; Crouse *v.* Holman, 19 Ind. 30; Elston *v.* Jasper, 45 Tex. 409; Hovey *v.* Hobson, 53 Me. 451; Ingraham *v.* Baldwin, 9 N. Y. 45.

But on showing the lunacy a *guardian* may avoid the contract. Gibson *v.* Soper, 6 Gray (Mass.), 279. Or an heir or personal representative. Breckinridge *v.* Ormsby, 1 J. J. Marsh. (Ky.) 236.

5. Nichol *v.* Thomas, 53 Ind. 42; Wadsworth *v.* Sharpsteen, 8 N. Y. 388.

6. Lancaster Co. Bk. *v.* Moore, 78 Pa. St. 407; Moore *v.* Hershey, 90 Pa. St. 196.

Yet the insanity of a surety is a defence against a *bona fide* holder. Van Patton *v.* Beals, 46 Iowa, 1877. And the least taint of fraud in the inception of the note will extend the defence to the maker. Sentance *v.* Poole, 3 C. & P. 1.

Even a *bona fide* holder cannot sustain an action against a lunatic accommodation indorser. Wisebach *v.* First Nat'l Bank, 97 Pa. St. 543. Or an imbecile who has indorsed for a wholly inadequate compensation. Jeneson *v.* Jeneson, 66 Ill. 259; Seaver *v.* Phelps, 11 Pick. 304.

It has even been held that a sane maker, as a defence to a suit by an indorsee, can set up the indorser's insanity. Burke *v.* Allen, 29 N. H. 106; Peaslee *v.* Robbins, 3 Metc. (Mass.) 164; Hannahs *v.* Sheldon, 20 Mich. 278.

7. Osterhout *v.* Shoemaker, 3 Hill (N. Y.), 516; Den *v.* Clark. 5 Halst. (N. J.) 217. But *compare* White *v.* Palmer, 4

and throws the burden of proving sanity upon the other side,[1] although usually sanity being the rule is presumed, and the burden is upon him who alleges lack of it.[2]

Drunkenness, unless of a kind far beyond occasional intoxication, is no defence to an action on a note or bill.[3]

But the fact that commercial paper has been made or transferred by one intoxicated will always cause the instrument to be viewed with suspicion, and be regarded as strong evidence of fraud.[4]

Where, however, the drunkenness is "excessive and absolute, so as to suspend the reason and create impotence of mind at the time of entering into the contract," [5] the drunkard with returning reason may avoid the effect of his promise.[6]

Habitual drunkards so found by inquisition are subject to the same rules of law as persons in like manner adjudged *non compotes mentis*.[7]

The burden of proving drunkenness is upon the party alleging it,[8] although as in the case of lunacy proof that the drunkard has been so found by inquisition is presumptive proof, and will shift the burden.[9]

(*c*) *Legal Restrictions.*—For the advantage of the persons restrained infants and married women are generally incapable of freely contracting and therefore of issuing valid and binding notes and bills, while corporations are subject to somewhat similar restraints, that their irresponsible power may be kept within limits.

As to infants, the rule is that their notes are voidable only,[10] and

Mass. 150; Leonard *v.* Leonard, 14 Pick. (Mass.) 283; Wadsworth *v.* Sharpsteen, 8 N. Y. 388.

1. Hicks *v.* Marshall, 8 Hun (N. Y.), 327; Rogers *v.* Walker, 6 Pa. St. 371; McGinness *v.* Commonwealth, 74 Pa. St. 245; Ellars *v.* Mossbarger, 9 Bradw. (Ill.) 122.

But merely finding one insane creates no presumption that he was so when he made a certain note, the inquisition not alluding to that note. Smith *v.* Davis, 45 N. H. 566.

2. Jackson *v.* King, 4 Cow. (N. Y.) 207.

But common report may rebut that presumption of sanity. Jackson *v.* Van Dusen, 5 Johns. (N. Y.) 144; Rogers *v.* Walker, 6 Pa. St. 371.

3. Miller *v.* Finley, 26 Mich. 249; Bates *v.* Ball, 72 Ill. 108; Johns *v.* Fritchey, 39 Md. 258

4. Samuel *v.* Marshall, 3 Leigh (Va.), 567; Prentice *v.* Achorn, 2 Paige (N. Y.), 30; French *v.* Hickox, 8 O. 214; Pitt *v.* Smith, 3 Campb. 33.

And the fraud once established, the instrument so obtained is void even in the hands of a *bona fide* holder for value and before maturity. Gregory *v.* Frazer, 3 Campb. 454; Barrett *v.* Buxton, 2 Aik. (S. Car.) 167. *Sed contra* as to *bona fide* holders. Northam *v.* La Touche, 4 C. & P. 145; McSparran *v.* Neeley, 91 Pa. St. 17.

5. Cavender *v.* Waddingham, 5 Mo. App. 457.

It must temporarily resemble idiocy or insanity. Harbison *v.* Lemon, 3 Blackf. 51.

6. The contract is voidable only, not void. Joest *v.* Williams, 42 Ind. 565. *Contra*, Berkley *v.* Canon, 4 Rich. (S. Car.) 136.

It can be ratified or rejected by the promisor when sober. L. R. 8 Exch. 132.

7. L'Amoureux *v.* Crosby, 2 Paige (N. Y.), 427; Clark *v.* Caldwell, 6 Watts (Pa.), 139.

8. Pitt *v.* Smith, 3 Campb. 33.

9. McGinness *v.* Commonwealth, 74 Pa. St. 245; Menkins *v.* Lightner, 18 Ill. 282.

Held conclusive in Devin *v.* Scott, 34 Ind. 67.

The question of drunkenness and its degree is always for the jury. Cummings *v.* Henry, 10 Ind. 109.

10. Trustees of La Grange Inst. *v.* An-

may therefore be either avoided or ratified,[1] but without ratification such notes, even when given for necessaries, are no more than evidence of the value of the necessaries furnished.[2]

The acceptance of an infant is upon similar principles invalid,[3] and after action brought cannot be ratified,[4] though it may before.[5]

The indorsement of an infant is voidable,[6] but the liability of other parties to the instrument is not affected by the infant's personal disability.[7]

The defence of infancy is personal to the infant.[8] No one but himself and his representatives can raise it, and even his own false representations as to his age cannot take it from him.[9]

It has been shown that an infant's promises being voidable are capable of ratification, but that such ratification may be sufficient in law it must be "a promise to a party in interest or his agent, or at least an explicit admission of an existing liability from which a promise may be implied."[10]

Unless the new promise made after the infant comes of age amounts to an absolute promise to pay, it will not generally be considered a ratification.[11]

The ratification of an infant's note or other contract need not be in writing,[12] unless that formality be required by statute.[13]

derson, 63 Ind. 367; Thing *v.* Libbey, 16 Me. 55; Aldrich *v.* Graves, 10 N. H. 194; Font *v.* Cathcart, 8 Ala. 725; Everson *v.* Carpenter, 17 Wend. (N. Y.) 419.

1. Lawson *v.* Lovejoy, 8 Me. 405; Cheshire *v.* Barrett, 4 McCord (S. Car.), 241.

2. Morton *v.* Steward, 5 Bradw. (Ill.) 533; Ayers *v.* Burns, 87 Ind. 245.

But Bradley *v.* Pratt, 23 Vt. 378, holds that in such case a recovery may be had directly on the note.

3. Williamson *v.* Watts, 1 Campb. 552.

4. Thronton *v.* Illingworth, 2 B. & C. 824.

5. Hunt *v.* Massey, 5 B. & Ad. 902.

6. Semple *v.* Morrison, 7 T. B. Mon. (Ky.) 298.

7. Frasier *v.* Massey, 14 Ind. 382; Hastings *v.* Dallarhide, 24 Cal. 195.

But when the maker knows that an indorsee has wittingly derived title through a minor, and pays the indorsee, he has no defence to an action by the minor's guardian. Briggs *v.* McCabe, 27 Ind. 327. *E converso*, payment to the guardian will not be a defence against an innocent indorsee. Nightingale *v.* Withington, 15 Mass. 272.

8. Even a co-maker cannot use it. Taylor *v.* Dansby, 42 Mich. 82.

9. Fitts *v.* Hall, 9 N. H. 441; Jennings *v.* Rundall, 8 T. R. 335.

Unless by statute, as in Iowa R. C. 1880, § 2239.

But even then, if the other party was not misled by the infant's false statements, the plea of infancy is good. Bellar *v.* Marchant, 30 Iowa, 350.

10. Goodsell *v.* Myers, 3 Wend. (N.Y.) 479.

11. A promise to pay "as fast as he got able." Chandler *v.* Glover, 32 Pa. St. 509. Or "to take care that it was paid." Mawson *v.* Blane, 10 Exch. 206. Or to give "it attention, but not my first attention." Wilcox *v.* Routh, 12 Conn. 550. Are all insufficient. And see Smith *v.* Mayo, 9 Mass. 62; Hale *v.* Gerrish, 8 N. H. 374. But an absolute promise to "remit," without mentioning the amount, may be enough. Hartley *v.* Wharton, 11 Ad. & El. 934. And conduct often amounts to a ratification. E.g., sending an agent to get the note. Orvis *v.* Kimball, 3 N. H. 314. Retaining the goods for which it was given. Boyden *v.* Boyden, 9 Metc. (Mass.) 519. And an administration of an infant by retaining the goods his decedent bought may ratify the note given for them. Shropshire *v.* Burns, 46 Ala. 108.

12. Reed *v.* Boshear, 4 Sneed (Miss.) 118; West *v.* Penny, 16 Ala. 186.

13. As it is by *New Jersey* (1874, Rev. 446, § 7), *Virginia* (1873, Code, c. 140, § 1), *Missouri* (1879, R. S. § 2516), *Maine* (1871, R. S. c. 111, § 2), *Kentucky* (1881, G. S. c. 22, § 1). While in *England* the law

If the contract be disaffirmed when the infant comes of age, he must return if possible the consideration he received,[1] but this has been said not to be absolutely necessary.[2]

Though an infant may not make, he may take and sue on a note,[3] and if he is of a firm that own a note may sue with his partners.[4]

By common law the note or bill of a married woman is not merely voidable, but absolutely void.[5]

This rule has not been greatly relaxed in the United States, where most of the married women's acts have been construed to enable wives to hold and enjoy their separate property, and not to facilitate its transfer, at least by commercial contracts.[6] Therefore not only is a *feme covert's* accommodation note void,[7] but any promissory paper not made for the benefit of her separate property,[8] and that it was so made will not be inferred from the mere fact of her having a separate property.[9]

If husband and wife unite in giving a note, it is void as to the wife, if it would have been so had she signed alone.[10] There are decisions, however, giving women in the management of their

now makes infants' contracts void, and incapable of ratification. 37 and 38 Vict. c. 62.

1. Heath *v.* West, 28 N. H. 101; Kilgore *v.* Jordan, 17 Tex. 341; Badger *v.* Phinney, 15 Mass. 359; Kitchen *v.* Lee, 11 Paige (N. Y.), 107; Bailey *v.* Bainberger, 11 B. Mon. (Ky.) 113.

2. Dill *v.* Bowen, 54 Ind. 204; Briggs *v.* McCabe, 27 Ind. 237.

3. Holliday *v.* Atkinson, 5 B. & C. 501.

4. Slocum *v.* Hooker, 13 Barb. (N. Y.) 536.

And it has been said that if such firm made the note, he must be joined as a defendant *pro formâ*. Gibbs *v.* Merrill, 3 Taunt. 307.

5. Dandistel *v.* Beninghof, 71 Ind. 389; Kenton Ins. Co. *v.* McClellan, 43 Mich. 564; Griffith *v.* Clark, 18 Md. 457; Howe *v.* Wildes, 34 Me. 566; Pippen *v.* Wesson, 74 N. Car. 437; Hodges *v.* Price, 18 Fla. 342; Fry *v.* Hamner, 50 Ala. 52; Robertson *v.* Bruner, 24 Miss. 242; Bloomingdale *v.* Lisberger, 24 Hun (N. Y.), 355; Byles on Bills, 65.

Nor does the fact that the note was put in circulation under false representations that the maker was a spinster or widow confer upon it any validity. Cannam *v.* Farmer, 3 Exch. 698; Lowell *v.* Daniels, 2 Gray (Mass.), 161; Keen *v.* Coleman, 39 Pa. St. 399; Scudder *v.* Gori, 3 Robt. (N. Y.) 661. Nor does the fact that the note is given for land conveyed to her. Dunning *v.* Pike, 46 Me. 461; Carpenter *v.* Mitchell, 50 Ill. 470; Dollner *v.* Snow, 16 Fla. 86; Pemberton *v.* Johnson, 46 Mo. 342.

6. In *Kansas* married women may carry on business with entire contractual freedom. 1881, Comp. L. § 3139. So in *Mississippi*. 1880, Rev. Code, § 1167. The following States permit the same liberty, either upon the order of the court, or after the insanity, desertion, or imprisonment of the husband: *Indiana*. 1861, P. L. 182. *Tennessee*. 1871, Comp. S. § 2486. *Maine*. 1871, R. S. 491, § 10. *Connecticut*. 1875, G. S. 187. *North Carolina*. 1873, Bat. Rev. 590, § 24. *W. Virginia*. 1879, R. S. c. 122, § 13. *Pennsylvania*. 1872, Purd. Dig. 701, § 22. *Ohio*. 1880, R. S. § 3111. *Vermont*. 1880, R. S. §§ 2328, 2334. *Kentucky*. 1881, G. S. 520, § 5. *Missouri*. 1879, R. S. 3284. *California*. 1876, Civ. Code, § 11, 811. *Alabama*. 1876, Code, § 2731. *Michigan*. 1872, Comp. L. 1474, § 4; 1477, § 25. *Louisiana*. 1876, R. S. § 1713.

7. Scudder *v.* Gori, 3 Robt. (N. Y.) 661.

8. Conner *v.* Abbott, 35 Ark. 365; Mahon *v.* Gormley, 24 Pa. St. 80; Burr *v.* Swan, 118 Mass. 588; Dibrell *v.* Carlisle, 48 Miss. 691; Estabrook *v.* Earle, 97 Mass. 302.

9. Bass *v.* Bean, 16 How. Pr. (N. Y.) 93.

10 Nelson *v.* Miller, 52 Miss. 410; Brown *v.* Orr, 29 Cal. 120; Wiley *v.* Hunter. 2 La. Ann. 806; Kimm *v.* Weippert. 46 Mo. 532; Thatcher *v.* Cannon, 6 Bush (Ky.), 541; Conrad *v.* Le Blanc, 29 La. Ann. 123.

These cases are often interpretations of statutes since superseded, but the principle is general.

separate property almost absolute liberty.[1] But in no State can a married woman obtain property by giving her worthless note, and then retain what she received; if she obtained land it is subject to a vendor's lien,[2] and restitution of any property will be compelled by a court of equity.[3]

A married woman is not liable at common law on her indorsement,[4] nor did it even effect a transfer of the paper.[5]

At the present time the right to indorse must rest on the same statutes that have created the right to make notes and bills.

So complete is the disability of coverture, that after the death or divorce of the husband a promise to pay a note made before such event is without consideration.[6]

No one but the woman herself or her representative can set up the defence of coverture, it being a purely personal incapacity.[7]

In many States the fact that a note or bill is drawn for the benefit of the married woman's separate estate must appear upon the face of the instrument,[8] yet this statement will not affect the negotiability of the paper.[9]

But other authorities hold that an intention to charge her

1. Thus in *Massachusetts* a woman's note given to raise money to lend her husband is good, though the payee knew the object with which it made. Wilder *v.* Richie, 117 Mass. 382.

She may be held on a partnership note, her husband not being a partner. Plumer *v.* Lord, 5 Allen (Mass.), 760. And so in *New Jersey*. Merritt *adv.* Day, 9 Vroom (N. J.), 32. On her acceptance of a bill of exchange. Pierce *v.* Kittredge, 115 Mass. 374. And in *New York* if it be affirmatively shown that the woman acted as a *feme sole* trader, for her separate benefit or that of her estate, she may be held as if unmarried. Hallock *v.* Demum, 2 T. & C. (N. Y.) 350. And so much as is shown to be for her benefit she may be held for and the rest disallowed. Spencer *v.* Humiston, 9 Hun (N. Y.), 71.

She is the judge of what is for her benefit, and an accommodation indorsement for her husband expressly charging her separate estate will bind her. Frecking *v.* Rolland, 53 N. Y. 422.

2. McDuff *v.* Beauchamp, 50 Miss. 531; Farr *v.* Wright, 27 Tex. 96.

3. Hendrick *v.* Foote, 57 Miss. 117.

4. Barlow *v.* Bishop, 3 Esp. 266.

5. Tillinghast *v.* Holbrook, 7 R. I. 230. *Sed contra*, Harding *v.* Cobb, 47 Miss. 599; Moreau *v.* Branson, 37 Ind. 195; Way *v.* Pierce, 51 Vt. 326.

And this is probably the modern doctrine irrespective of statute. Even at common law, if the wife was the payee and the husband consented, her indorsement was good. Nimes *v.* Bigelow, 45 N. H. 343; McClain *v.* Weidemeyer, 25 Mo. 364; Mudge *v.* Bullock, 83 Ill. 22; Stevens *v.* Beals, 10 Cush. 291; Smith *v.* Marsack, 6 C. B. 486.

6. Thus a note given by a widow for goods purchased during coverture is void. Goulding *v.* Davidson, 28 Barb. 438; Hetherington *v.* Hixon, 46 Ala. 297. *Secus* of a promise to renew a note given for antenuptial debts. Parker *v.* Cowan, 1 Heisk. (Tenn.) 518.

The rule after divorce is exactly the same. Watkins *v.* Halstead, 2 Sandf. (N. Y.) 311. *Contra*, that a promise after divorce will be enforced. Hemphill *v.* McClimans, 24 Pa. St. 367.

7. The maker's coverture cannot avail the indorser as against his indorsee. Prescott Bank *v.* Caverly, 7 Gray, 217; Erwin *v.* Downs, 15 N. Y. 575; Archer *v.* Shea, 14 Hun (N. Y.), 493; Leitner *v.* Miller, 49 Ga. 489.

8. Koontz *v.* Nabb, 16 Md. 549; Kirby *v.* Miller, 4 Coldw. (Tenn.) 3; Williams *v.* Huguenin, 69 Ill. 214; Vanderheyden *v.* Mallory, 1 N. Y. 452.

9. Loomis *v.* Ruck, 14 Abb. Pr. N. S. (N. Y.) 385, which case also holds that a false statement that the note is for the benefit of her separate estate, obtained from her by duress, will avoid the instrument utterly.

A woman, by stating in a note that she charges her separate estate when she has none, cannot become personally bound for another's debt. Wilson S. M. Co. *v.* Fuller, 60 How. Pr. (N. Y.) 480.

separate estate will be inferred from the delivery of the note or bill,[1] when the consideration moves to her, for there is no such presumption in favor of her accommodation indorsement, or note of hand for her husband's debts.[2]

It follows from the doctrines previously stated, that at common law a note by husband to wife or wife to husband was a nullity,[3] and even under the married woman's acts the rule cannot be said to be absolutely changed.[4]

The marriage of maker and payee of a note will not avoid it,[5] and after divorce a wife may sue her former husband on a note given her during coverture.[6]

Since a note or bill is a chose in action, the title to which was by common law vested in the husband,[7] a married woman cannot sue on a note belonging to her in her own name, unless expressly enabled so to do by statute.[8]

Wherever a husband is still regarded as having the right to reduce to possession his wife's choses in action, it follows that payment to him of the amount of a note due her is a perfect bar to

1. Dallas *v.* Head, 32 Ga. 604; Bachelder *v.* Sargeant, 47 N. H. 262; Coats *v.* Robinson, 10 Mo. 757; Chapman *v.* Foster, 6 Allen (Mass.), 136; Barnes *v.* De France, 2 Col. 294; Pope *v.* Hooper, 6 Neb. 178; Lillard *v.* Turner, 16 B. Mon. (Ky.) 374.

Even though executed in blank. Morrison *v.* Thistle, 67 Mo. 596. Rule same as to indorsement. Bill *v.* Kellar, 13 B. Mon. (Ky.) 381; Frank *v.* Lilienfeld, 34 Gratt. 377. *Contra*, Staley *v.* Hamilton, 19 Fla. 275.

2. Frecking *v.* Rolland, 53 N. Y. 422; Saulsbury *v.* Weaver, 59 Ga. 254; Bartington *v.* Bradley, 16 La. Ann. 310; Levi *v.* Earl, 30 Oh. St. 147.

But in Kansas under the statute an intent to charge separate estate will be inferred even when the note is given for a husband's debts. Wickes *v.* Mitchell, 9 Kans. 80.

3. Garner *v.* Sheriff, 26 La. An. 375; Sweat *v.* Hall, 8 Vt. 187, hold such a note incapable of ratification by the subsequent promise of the maker. Nor can the husband's indorsement pass a valid title to the wife's note. Gay *v.* Kingsley, 11 Allen (Mass.), 345; Seyfert *v.* Edison, 16 Vr. (N. J.) 393. Both the making and the indorsement are void. Roby *v.* Phelon, 118 Mass. 541. The rule is the same when the husband makes the note and the wife indorses it. Hooker *v.* Boggs, 63 Ill. 161; C. F. Jackson *v.* Parks, 10 Cush. (Mass.) 550; Phillips *v.* Frye, 14 Allen (Mass.) 361; and Ingham *v.* White, 4 Allen (Mass.), 412, where the note was payable to the wife or bearer.

4. Until the statute law expressly provides that husband and wife are legal strangers to each other, it is only possible to cite decided cases as exceptions to the general rule above stated.

It has been held that a transfer of a third person's note by husband to wife in consideration of a debt due her is good as against his creditors. Clough *v.* Russell, 55 N. H. 280.

A wife's note to her husband will bind her separate estate in the hands of an innocent holder for value. Morrison *v.* Thistle, 67 Mo. 596.

A wife may indorse for accommodation the firm note of her husband's firm. Kenworthy *v.* Sawyer, 125 Mass. 28. And even lend her husband money, or his note for it, and hold his estate after his death. Logan *v.* Hall, 19 Ia. 491; Bryant *v.* Bryant, 3 Bush (Ky.), 155. and even sue him in life on the note by statute in Nebraska. May *v.* May, 9 Neb. 16; G. S. 528 § 31.

5. Wright *v.* Wright, 59 Barb. (N.Y.) 505. *Sed contra*, Abbott *v.* Winchester, 105 Mass. 115; Chapman *v.* Kellogg, 102 Mass. 246; Govan *v.* Moore, 30 Ark. 667.

6. Webster *v.* Webster, 58 Me. 139.

7. Gaters *v.* Madely, 6 M. & W. 423.

8. Kimbro *v.* First Nat'l Bank, 1 MacArth. (D. C.) 61; Arnould *v.* Revoult, 4 Mo. 70; Sutton *v.* Warren, 10 Metc. (Mass.) 451, holding that the husband may sue alone, or conjointly with his wife.

The Kansas statute enables the wife to sue alone. Hadley *v.* Brown, 2 Kans. 416.

any action by her,[1] and by parity of reasoning that in a suit by both on a note to the wife any defence or set-off good against the husband can be sustained.[2]

Although it was at one time supposed that without special permission granted in their charters corporations could contract only over their corporate seals,[3] and could therefore not execute simple contracts like notes and bills, it is now established that such bills and notes as are incident to the business of incorporated companies they may execute without any special grant of such power.[4]

The test of this corporate power is said to be the right of the company to incur debts, for this presupposes the privilege of creating obligations for their repayment "in any form not expressly forbidden by law."[5]

A corporation may receive notes and bills for debts due,[6] and by consequence transfer them.[7]

Even where the act of indorsement was illegal the transfer is effectual to pass title, though the corporation cannot be held on its indorsement.[8]

But it cannot be incident or necessary to the business of a corporation to give accommodation paper; notes so given, therefore, are illegal and void.[9]

1. Thrasher *v.* Tuttle, 22 Me. 335. And such payment will be a bar even since the recent statutes if the note was made to the wife at the husband's request when the money was really due him. Dunn *v.* Hornbeck, 7 Hun (N. Y.), 629; Towle *v.* Towle, 114 Mass. 167; Long *v.* Walker, 47 Tex. 173. *Secus* when this fact is not shown. Carver *v.* Carver, 53 Ind. 241.

But such payment made after divorce will not bar a wife's action. Legg *v.* Legg, 8 Mass. 99.

2. Vance *v.* McLaughlin, 8 Gratt. (Va.) 289. *Contra* under statutes, Stannus *v.* Stannus, 30 Ia. 448; McCarty *v.* Mewhinney, 8 Ind. 514.

3. Angell & Ames on Corp. § 236; Byles on Bills, 70; Copper Mines Co. *v.* Fox, 16 Q. B. 229; Murray *v.* East India Co., 5 B. & Ald. 204.

4. Union G. M. Co. *v.* Rocky Mt. Nat'l Bank, 2 Col. 248; McCullough *v.* Moss, 5 Den. (N. Y.) 577; Davis *v.* West Saratoga Bldn'g Union, 32 Md. 285; Bank of Chillicothe *v.* Chillicothe, 7 Ohio, 354; Came *v.* Brigham, 39 Me. 35; Oxford Iron Co. *v.* Spradley, 46 Ala. 98.

And notes may be considered incident to the business of a mill company. Smith *v.* Eureka Mills Co., 6 Cal. 1. A mining company. Moss *v.* Averell, 10 N. Y. 449. A turnpike company. Lebanon, etc., Road Co. *v.* Adair, 85 Ind. 244. A religious society. Davis *v.* Universalist Society, 8 Metc. (Mass.) 321.

5. Stratton *v.* Allen, 1 C. E. Greene (N. J.), 233.

Thus an officer who can purchase materials for a corporation may give the note of the corporation for them. Castle *v.* Belfast Foundry Co., 72 Me. 167. *Cf.* Cattron *v.* First Universalist Society, 46 Ia. 108; Auerbach *v.* Le Sueur Mill Co., 28 Minn. 291; Barnes *v.* Ontario Bank, 19 N. Y. 156; Hays *v.* Galion G. L. Co., 29 Ohio St. 330; Hamilton *v.* New Castle R. Co., 9 Ind. 359; Fay *v.* Noble, 12 Cush. (Mass.) 1.

6. Frye *v.* Tucker, 24 Ill. 180; Hardy *v.* Merriwether, 14 Ind. 203; German Congregation *v.* Stegner, 21 Ohio St. 488.

Even though expressly prohibited from "trading" in notes. John *v.* Farmers' Bank, 2 Blackf. (Ind.) 267.

7. Savage *v.* Walshe, 26 Ala. 631.

8. Brown *v.* Donnell, 49 Me. 421; Smith *v.* Johnson, 3 H. & N. 222.

And a foreign corporation, though prohibited by statute from doing business in a State, may there receive. Bartlett *v.* Chouteau Ins. Co., 18 Kans. 369. And *semble* indorse. Clark *v.* Farrington, 11 Wis. 321. A note given for a stock subscription. If the company complies with the State laws, suit may be brought on the note obtained before compliance. American Ins. Co. *v.* Wellman, 69 Ind. 413.

9. Bank of Genesee *v.* Patchin Bank, 13 N. Y. 309; Ætna Nat'l Bank *v.* Charter Oak Ins. Co., 50 Conn. 167.

These doctrines have been applied to municipal corporations, and their right to bind themselves by notes upheld,[1] but the question cannot be considered settled, and in view of the fact that any debt unlawfully contracted cannot bind a municipality,[2] and that even an innocent purchaser for value is not secure from the defence of unlawful issue,[3] it is of small importance. The charter privileges of the city or town in question must be carefully studied before the rules of commercial instruments can be applied.

15. **Execution or Transfer.**—(*a*) *By Agents.*—No special form is necessary in appointing an agent to make and issue commercial paper,[4] though in some States particular methods are pointed out by statute.[5]

Under a general parol authority an agent may also indorse a bill or note[6] even if it is sealed.[7]

But where the delegation of power is by several persons, the agent's authority only extends to rendering them jointly liable,[8] unless the further power of binding them severally is expressly stated.

When the power is delegated to several persons, they must all unite in its exercise or the principal will not be bound.[9]

It is a general rule that no agent can delegate his authority;[10]

Even in indorsee's hands. Smead *v.* Indianapolis R., 11 Ind. 109. Nor can they be ratified. Hall *v.* Auburn Turnpike Co., 27 Cal. 255.

1. Keeley *v.* Mayor, etc., 4 Hill (N. Y.), 263; Commonwealth *v.* Pittsburgh, 34 Pa. St. 496; Williamsport *v.* Commonwealth, 84 Pa. St. 487; Dillon on Mun. Bonds, § 6; 1 Dan. on Neg. Inst. 394.

2. Bradley *v.* Ballard, 55 Ill. 413.

3. Lindsay *v.* Rottaken, 32 Ark. 619; Chisholm *v.* City of Montgomery, 2 Woods (U. S.), 584; Cagwin *v.* Town of Hancock, 84 N. Y. 532.

4. Parol is sufficient. Trundy *v.* Farrar, 32 Me. 225; Harrison *v.* Jackson, 7 T. R. 209; Handyside *v.* Cameron, 21 Ill. 588; Humphreys *v.* Wilson, 44 Miss. 328. Even in appointing the agent of a corporation. Fleckner *v.* Bank of U. S., 8 Wheat. (U. S.) 338; Odd Fellows *v.* First National Bank, 42 Mich. 461; Hoag *v.* Lamont, 60 N. Y. 101; Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324. Or the resolution of the board of directors appointing the agent may be orally proved. Preston *v.* Missouri, etc., Lead Co., 51 Mo. 43.

5. *Oregon.* 1872, G. L. p. 718, c. 48, § 2. *New York.* 2 R. S. Ed. 1875, p. 1160, § 2. *New Jersey.* 1874. Rev. p. 897. § 1. *Nevada.* 1873, 1 Comp. L. c. 5, § 10. *Michigan.* 1871. 1 Comp. L. p. 515, § 2. *Idaho.* 1875, Rev. L. p 652. § 2.

6. Woodbury *v.* Woodbury, 47 N. H. 11; Haven *v.* Hobbs, 1 Vt. 238.

So one of two payees may sign for both by parol authority. Cooper *v.* Bailey, 52 Me. 230.

7. Bailey *v.* Rawley, 1 Swan (Tenn.), 295. *Sed contra*, Ruffin *v.* Mebane, 6 Ired. Eq. (N. Car.) 507.

8. In Bank of U. S. *v.* Beirne, 1 Gratt. (Va.) 234, 539, the agent had indorsed all his principals' names in succession. *Held*, that he had exceeded his authority; they could be held jointly only.

Nor can an agent to draw a bill draw one himself jointly with his principal. Bryan *v.* Berry, 6 Cal. 394; Stainback *v.* Read, 11 Gratt. (Va.) 281.

9. Ducarry *v.* Gill, 4 C. & P. 121; Rollins *v.* Phelps, 5 Minn. 463.

Thus one of several liquidators of a corporation cannot make a valid acceptance of a bill. *In re* London, etc., Bank, L. R. 5 Ch. 567.

10. Emerson *v.* Providence Hat Mfg. Co., 12 Mass. 237.

Yet the mere act of signature may be delegated. Coles *v.* Trecothick, 9 Ves. 234.

And where B was the agent of A, and directed his clerk C to sign a note "A by C," it was held that since B had authority to make the note A was bound by the signature. Weaver *v.* Carnall, 35 Ark. 198.

and whatever the terms of that authority may be, they will be strictly construed by the courts.[1]

Where express written authority has been given, the scope of the agent's power must be gathered from that writing alone,[2] and the right to issue commercial paper will rarely be implied from any other expressly given power.[3]

Whenever this power is inferred, it must be by necessary implication,[4] either from the very nature of the agency in question, e.g. a factorship or general agency, where the factor is the *alter ego* of the principal in all things,[5] or from the official rank or station of the agent, e.g. the cashier of a bank is *virtute officii* the proper officer or agent to execute or transfer commercial instruments belonging to the bank.[6]

1. Rossiter *v.* Rossiter, 8 Wend. 494, where an authority to do "all other acts" was held to confer no power to draw a bill of exchange.

2. Byles on Bills, 33.

An agent to manage a store and purchase goods for it has no power to bind his principal by a note given for a loan. Perkins *v.* Boothby, 71 Me. 91.

An authority to "sign my name where expedient in the transaction and conduct of such business as to my attorney shall seem meet" covers a note given by the agent. Dollfus *v.* Frosch, 1 Denio (N. Y.), 367. Yet a power "to use and sign my name" will not cover a note with a stipulation for attorney's fee in case of non-payment. First National Bank *v.* Gay, 63 Mo. 33.

But where one said he would stand "whatever arrangement was made" by his agent, he was held bound by a note given by that agent. Tanner *v.* Hastings, 2 Bradw. (Ill.) 283.

And a power to transact "all the business" of the principal in a certain place has been thought to warrant the indorsement of a note. Newland *v.* Oakley, 6 Yerg. (Tenn.) 489. *Cf.* Frost *v.* Wood, 2 Conn. 23; Hurd *v.* Marple, 2 Bradw. (Ill.) 402; Layet *v.* Gano, 17 Ohio, 466; Merchants' Bk. *v.* Griswold, 72 N. Y. 472.

3. It cannot be implied from a general power to transact business and receive and pay debts. Murray *v.* East India Co., 5 B. & Ald. 204; Beach *v.* Vandewater, 1 Sandf. (N. Y.) 277. Nor from an authority to pay a bill of exchange. Gould *v.* Norfolk Lead Co., 9 Cush. (Mass) 338. Nor authority to indorse a check from a power to receive rents, though the check was given for rent. Robinson *v.* Chemical National Bank, 86 N. Y. 407.

An agent to make a note payable at a particular bank can make it in no other way. Morrison *v.* Taylor, 6 T. B. Mon. (Ky.) 82. And if authorized to make a note at six months, he cannot give one at a shorter time. Batty *v.* Carswell, 2 John. (N. Y.) 48. *Sed contra*, Adams *v.* Flanagan, 36 Vt. 412. And *semble* that he may make the time longer. Bank of the State *v.* Herbert, 4 McCord (S. Car.), 89. And see generally, on this point, Tripp *v.* Swanzey Paper Co., 13 Pick. 291; Nash *v.* Mitchell, 71 N. Y. 199; Bank of Deer Lodge *v.* Hope Mining Co., 3 Mont. 146; School Directors *v.* Sippy, 54 Ill. 287; State of Wisconsin *v.* Torinus, 24 Minn. 332; Grant *v.* Strutzel, 53 Iowa, 512; Templeton *v.* Poole, 59 Cal. 286; Goodfellow *v.* Landis, 36 Mo. 168.

But certainly nothing except the clearest authority will enable an agent to indorse for accommodation and bind his principal. Stainer *v.* Tysen, 3 Hill (N. Y.), 279; German National Bk. *v.* Studley, 1 Mo. App. 260.

4. As where an agent gave a draft for goods purchased and the principal received the goods with full knowledge of the transaction, the right to give the draft was inferred from the admitted power of purchasing the goods. Nutting *v.* Sloan, 59 Ga. 392. This is an extreme case. *Cf.* New York Iron Mine *v.* Citizens' Bk., 44 Mich. 344; Temple *v.* Pomroy, 4 Gray (Mass.), 128; Hogarth *v.* Whirley, L. R. 10 C. P. 630; Murrel *v.* Jones, 40 Miss. 565; Streeter *v.* Poor, 4 Kans. 412.

5. Tappan *v.* Bailey, 4 Metc. (Mass.) 529.

6. Safford *v.* Wyckoff, 4 Hill (N. Y.), 442; Northern Bank *v.* Johnson, 5 Coldw. (Tenn.) 88; Potter *v.* Merchants' Bank, 28 N. Y. 641; Folger *v.* Chase, 18 Pick. (Mass.) 63; Burkham *v.* Webster 19 Me. 232; Houghton *v.* First Nat. Bk. 26 Wis. 663; Kimball *v.* Cleveland, 4 Mich. 606; Harper *v.* Calhoun, 7 How. (Miss.) 203; Smith *v.* Lawson, 18 W. Va. 212.

Yet he has no power to put the bank's

Whether an agent's act was originally within the scope of his authority or not, a subsequent ratification by the principal will render it perfectly valid.[1]

What amounts to a ratification depends upon the circumstances of each particular case. It is certain that where an agent buys goods and gives a note for them without authority, that acceptance of the goods ratifies the note on the principal's part,[2] and that in any case long-continued silence on the part of the principal after acquaintance with all the facts will estop him from impugning the authority of the one who acted as his agent.[3]

An agent making a note, or accepting a bill without authority,[4] and in excess of his authority,[5] thereby becomes liable to payee and indorsees upon the instrument which he has wrongfully put in circulation.[6]

If a bill be drawn by an agent on his principal, the latter is not

name on accommodation paper. West St. Louis Bk. *v.* Shawnee Bk., 5 Otto (U. S.), 557.

The president of a corporation is held to have the same powers. With the approval of the directors his note or acceptance will bind the company. Libby *v.* Union Nat'l Bk. 99 Ill. 622; Ferris *v.* Thaw, 72 Mo. 446. He can indorse for the company. State Bank of Ohio *v.* Fox, 3 Blatchf. (U. S.) 431. And authority so to do is inferred from his official position. Aspinwall *v.* Meyer, 2 Sandf. (N. Y.) 180.

In fact an indorsement by an officer of a corporation is *prima facie* the act of the company. Frye *v.* Tucker, 24 Ill. 180.

Where the company received the proceeds the indorsement of an ex-president has been held sufficient. Patten *v.* Moses, 49 Me. 255.

The power of making a valid acceptance, however, will not be inferred from the official position of an assistant cashier. Pope *v.* Bank of Albion, 57 N. Y. 126.

Nor does a treasurer, whose duty is to pay debts, possess the implied power of issuing promissory notes with which to pay them. Torry *v.* Dustin Mont. Association, 5 Allen (Mass.), 327. Nor of indorsing a note belonging to the company. Brandlee *v.* Warren, etc., Sav. Bk., 127 Mass. 107.

Other offices have been held not to confer upon their incumbents the privilege of acting as agents for the corporations appointing them: A secretary. Neale *v.* Turton, 4 Bing. 149; First Nat'l Bk. *v.* Hogan, 47 Mo. 472; Blood *v.* Marcuse, 38 Cal. 590. A general managing agent. N Y.. etc., Mine *v.* Negaunee Bank, 39 Mich. 644; Culver *v.* Leovy, 19 La. Ann. 202. The pastor and deacons of a church. Jefts *v.* York, 10 Cush. (Mass.) 1852.

1. Hatch *v.* Taylor, 10 N. H. 538; Bigelow *v.* Dennison, 23 Vt. 564; Lysle *v.* Beals, 27 La. Ann. 274. But the principal must know all the circumstances. Nixon *v.* Palmer, 8 N.Y. 398. A ratification so made needs no new consideration to support it. First Nat'l Bank *v.* Gay, 63 Mo. 33. And may extend even to a forged signature. Greenfield Bank *v.* Crofts, 4 Allen (Mass.), 477; Dow *v.* Spurney, 29 Mo. 386. *Contra*, Marks *v.* King, 6 Alb. L. J. (N. Y.) 193.

An admission of the genuineness of a signature made to save the forger from indictment will not bind the principal making it. *Ex parte*. Edwards, 5 Jurist, 706.

2. Moss *v.* Rossie Lead Mining Co., 5 Hill (N. Y.), 137; Gilbert *v.* Dent, 46 Ga. 238; Warden *v.* Partee, 57 Iowa, 515.

3. But what length of time is necessary cannot be stated. Two years held enough. De Land *v.* Nat'l Bank, 20 Cent. L. J. (Ill.) 196. Three years. Wardrop *v.* Dunlop, 1 Hun (N. Y.), 325. Seventeen days, that being the time between knowledge and the maturity of the note wrongfully given by the agent. Nat'l Bank of Orleans *v.* Fassett, 42 Vt. 432.

4. Lewis *v.* Nicholson, 18 Q. B. 509; Barry *v.* Pike, 21 La. Ann. 221.

5. Roberts *v.* Button, 14 Vt. 195.

6. Polhill *v.* Walter, 3 B. & Ad. 114.

But the lack of authority must be made to affirmatively appear. Wilson *v.* Barthrop, 2 M. & W. 863.

He may be personally liable although he signed the principal's name as his own, so that his own name does not appear on the instrument at all. Baker *v.* Deming, 8 Ad. & El. 94; Jewett *v.*

liable as drawer,[1] nor is the agent himself if he disclose his principal at the time of drawing the bill, and properly describe himself as an agent in the instrument itself.[2]

So when the drawer of the bill is agent of the payee, e.g., when the drawee has purchased goods from the drawer, the agent-drawer is not personally liable.[3]

An agent who in pursuance of his duty indorses a note or bill cannot become thereby liable to his principal.[4]

Upon a note made by an agent without or in excess of authority the principal cannot be held; it is to all intents a forgery.[5]

When the agent receives from his principal a note or bill to be negotiated by indorsement for some special purpose, and he diverts it from that use, the conduct of the agent will not avail his principal as against a *bona fide* holder for value;[6] but against one having knowledge of the agent's dereliction in duty,[7] or holding for a usurious consideration, the defence is valid.[8]

(*b*) *By Partners.*—The general rule is that each partner in a mercantile firm has power to make or draw, transfer, and accept notes and bills in the firm name and about the firm business.[9]

As to indorsements the rule is the same.[10]

Persons who hold themselves out as partners, although not so *inter sese*, will be bound by a note on which their names appear as constituting a firm.[11]

A note signed with a firm name by an active partner will

Whalen, 11 Wis. 124; Merchants' Bank *v.* Spicer, 6 Wend. (N. Y.) 443.

1. Ducarry *v.* Gill, 4 C. & P. 121.

2. Roberts *v.* Austin, 5 Whart. (Pa.), 313; Newhall *v.* Dunlap, 14 Me. 180; Mayhew *v.* Prince, 11 Mass. 54.

3. Jones *v.* Lathrop, 444 Ga. 398; Mechanics' Bank *v.* Earp, 4 Rawle (Pa.) 390.

4. Byers *v.* Harris, 9 Heisk. (Tenn.) 652; Kimmel *v.* Bittner, 62 Pa. St. 203. Unless he procured and indorsed to his principal worthless paper, when instructed to procure and transmit good bills. Leverick *v.* Meigs, 1 Cow. (N. Y.) 645.

5. Fenn *v.* Harrison, 3 T. R. 757; Hotchkiss *v.* English, 4 Hun (N.Y.), 369; Ladd *v.* Town of Franklin, 37 Conn. 53. But notes signed by the principal upon agent's request cannot be avoided by evidence that the maker did not know his agent had been disobeying instructions, which if obeyed would have obviated the necessity for the note. Beall *v.* January, 62 Mo. 434.

6. Raphael *v.* Bank of England, 17 C. B. 161; Bird *v.* Daggett, 97 Mass. 494; Herbert *v.* Hine, 1 Ala. 18; Fullerton *v.* Sturges, 4 Ohio St. 529.

7. Attwood *v.* Munnings, 7 B.& C. 278. And if they know that the agent is acting for another they are bound to examine into his authority. East India Co. *v.* Tritton, 3 B. & C. 280. The use of such phrases as "per" and "pro"—Alexander *v.* McKenzie, 6 C. B. 766—is quite enough to put one on inquiry. *Cf.* Paulette *v.* Brown, 40 Mo. 52; Sigourney *v.* Lloyd, 8 B. & C. 622.

8. Kentgen *v.* Parks, 2 Sandf. (N. Y.) 60; Culver *v.* Bigelow, 43 Vt. 249; Bastable *v.* Poole, 1 Cr. M. & R. 410.

9. Drennen *v.* House, 41 Pa. St. 30; Stimson *v.* Whitney, 135 Mass. 591; Sherwood *v.* Snow, 46 Iowa, 481; Williams *v.* Conner, 14 S. Car. 621; Wells *v.* Masterman, 2 Esp. 731; *Ex parte* Bonbonus, 8 Ves. 542; Story on Prom. Notes, § 72; Byles on Bills, 44. Even where the partnership articles deny to a partner the right to issue commercial paper, a note given by him to settle a debt of the firm will bind it. Langan *v.* Hewett, 13 Sm. & M. (Miss.) 122.

10. Walker *v.* Kee, 14 S. Car. 142; Barrett *v.* Russell, 45 Vt. 43; Mohawk Nat'l Bank *v.* Van Slyck, 29 Hun (N. Y.), 188.

11. Thus a note signed "A. & B." will bind both the persons named as partners, though they do not do business together. Smith *v.* Hill, 45 Vt. 90; Dickenson *v.* Valpy, 10 B. & C. 141.

bind a dormant partner or one having a special interest in the firm.[1]

A new partner coming into a firm does not become liable on the firm's paper already out.[2]

A partner's power to bind his firm by notes or bills in their name is, like his other contractual powers, limited to the business operations of the firm;[3] but the presumption is that the instrument in question, if signed with the firm name, was given about the firm's business.[4]

If a partner exceeding his lawful privileges issues paper in the firm name, but not in their business, the partnership is nevertheless bound at the suit of a *bona fide* holder.[5]

In all matters outside of firm business partners deal with each other as strangers, and the note, e.g., of one partner so given to another is enforceable by the usual methods.[6]

The rule that one partner may sign the firm name to notes and bills and thereby bind his copartners is limited to partnerships engaged in trade and commerce.[7]

The fact that a note is made payable to several persons jointly,

1. Swan *v.* Steele, 7 East, 210; Gurney *v.* Evans, 27 L. J. Ex. 166.

Though given for a debt of an old firm to which he did not belong. Lloyd *v.* Ashby, 2 B. & Ad. 23; Bradshaw *v.* Apperson, 36 Tex. 133.

That the taker of the note did not know of the dormant partner when note was negotiated to him makes no difference. *Ex parte* Norfolk, 19 Ves. 455, Etheridge *v.* Binney, 9 Pick. 272.

2. Shirreff *v.* Wilks, 1 East, 57.

But an obligation after he joins for the old firm's debt will bind him. Osborn *v.* Osborn, 36 Mich. 48; Saville *v.* Robertson, 4 T. R. 720.

Where A. and B. were intending to form a partnership, and one of them gave a note signed with the intended firm's name, got the money and used it in the partnership business, it was held nevertheless that the note was not a partnership note. Baxter *v.* Plunkett, 4 Houst. (Del.) 450.

3. Atlantic State Bk. of Brooklyn *v.* Savery, 82 N. Y. 291; Graves *v.* Kellenberger, 51 Ind. 66; Stegall *v.* Coney, 49 Miss. 761; Norton *v.* Thatcher, 8 Neb. 186, Newman *v.* Richardson, 9 T. R. 865.

4. Moorehead *v.* Gilmore, 77 Pa. St. 118; Sherwood *v.* Snow, 46 Iowa, 481; Lindh *v.* Crowley, 29 Kans. 756; Whitaker *v.* Brown, 16 Wend. 507; Thurston *v.* Lloyd, 4 Md. 283; Holmes *v.* Porter, 39 Me. 157.

5. Silverstein *v.* Atkinson, 45 Miss. 81; Sedgwick *v.* Lewis, 70 Pa. St. 217; First Nat'l Bk. *v.* Morgan, 73 N. Y. 593.

But one partner cannot sign the name of another partner and so bind him individually. McCauley *v.* Gordon, 64 Ga. 221.

6. Chamberlain *v.* Walker, 10 Allen (Mass.), 429; Jemison *v.* Walsh, 30 Ind. 167.

But in firm business they together make but one, so that a defence good against one partner affects the firm; as, e.g., where a note was made for the accommodation of one partner and he transferred it to his firm, *held*, that as the single partner could not have recovered, the firm could not. Jones *v.* Yates, 9 B. & C. 539; Sandilands *v.* Marsh, 2 B. & Ald. 673.

7. Thus it has been held that a firm of attorneys will not be bound by one partner's signing the firm name to a note without the express authority of the others. Garland *v.* Jacomb, L. R. 8 Ex. 219; Smith *v.* Sloan, 37 Wis. 285; Friend *v.* Duryee, 17 Fla. 111.

So held also of a firm of physicians. Crosthwait *v.* Ross, 1 Humph. (Tenn.) 23. Brokers. Third Nat'l Bank *v.* Snyder, 10 Mo. App. 211. Tavern-keepers. Cocke *v.* Branch Bank, 3 Ala. 175; Farmers. Prince *v.* Crawford, 50 Miss. 344; Hunt *v.* Chapin, 6 Lans. (N. Y.) 139.

But where the firm has knowingly received and used the goods for which the note was given, it will be considered a ratification. Jones *v.* Clark, 42 Cal. 180. *Cf.* Huguley *v.* Morris, 65 Ga. 666; Levy *v.* Payne, C. & M. 453; McCrary *v.* Slaughter, 58 Ala. 230.

does not render such payees partners *pro hac vice*, and an indorsement by one cannot bind the others.[1]

The powers of a partner do not extend to binding his firm by paper given or indorsed for the accommodation of others,[2] although if the firm consent, expressly or impliedly, to such use of their name, the partnership will be held.[3]

The dissolution of a partnership in general terminates the power of the individuals composing it to bind one another;[4] and when such dissolution is known, no partnership paper can be lawfully issued,[5] and the only person bound by it is the ex-partner who actually signs,[6] unless of course authority has

1. Even if the joint payees are executors. Johnson *v.* Mangum, 65 N. Car. 146; Sanders *v.* Blain, 6 J. J. Marsh. (Ky.) 446. And see Wood *v.* Wood, 1 Harr. (N. J.) 428.

But one joint payee may make a valid indorsement with the consent of the others. Cooper *v.* Bailey, 52 Me. 230.

Upon the same principle joint ownership of property does not confer on one joint owner authority to bind those in interest with him by notes or bills. *Ex parte* Peale, 6 Ves. 604; Williams *v.* Thomas, 6 Esp. 18.

2. Stall *v.* Catskill Bank, 18 Wend. (N. Y.) 466; Bloom *v.* Helm, 53 Miss. 21; Chenowith *v.* Chamberlain, 6 B. Mon. (Ky.) 60; Rollins *v.* Stevens, 31 Me. 454; Heffron *v.* Hanaford, 40 Mich. 305; Sweetser *v.* French, 2 Cush. 309; Vredenburg *v.* Lagan, 28 La. Ann. 941.

But this rule does not apply where a partner accepted for A in his firm's name, in consideration of A's accepting for his firm. Gano *v.* Samuel, 14 Ohio, 592.

3. Wilson *v.* Williams, 14 Wend. (N. Y.) 146; First Nat. Bank *v.* Breese, 39 Iowa, 640.

A subsequent promise to pay is a sufficient consent and ratification by the firm. Butler *v.* Stocking, 8 N. Y. 408. And even a statement that the note "would have to take its course and be disposed of like other indebtedness" may go to the jury on the question of liability. First Nat. Bank *v.* Carpenter, 34 Iowa, 433.

And while the burden of proof to show consent or ratification on the part of the firm is on the holder of the note, such consent may be inferred from the course of business of the partnership. Sweetser *v.* French, 2 Cush. (Mass.) 309; Spurck *v.* Leonard, 9 Bradw. (Ill.) 174. But it cannot be inferred from blanks having been left for date and rate of interest, which the partner negotiating the instrument filled up. Wait *v.* Thayer, 118 Mass. 473; Hendrie *v.* Berkowitz, 37 Cal. 113. Nor from the firm's having given or indorsed accommodation paper before. Earley *v.* Reed, 6 Hill (N. Y.), 12.

4. But this does not affect a firm liability incurred before dissolution. Gulick *v.* Gulick, 1 Harr. (N. J.) 186. And the holder of a note, in ignorance of a dissolution after the note was made, may take a renewal note from one partner after dissolution and hold the old firm. Miller *v.* Miller, 8 W. Va. 542.

An agreement between the partners of a firm going out of business that one of them shall pay the firm debts cannot affect the holder of a partnership note; all the partners are liable to him. Chogelin *v.* Westhoff, 33 Tex. 788.

5. Bank of Montreal *v.* Page, 98 Ill. 109; Curry *v.* White, 51 Cal. 530; Ransom *v.* Loyless, 49 Ga. 471; Haddock *v.* Crocheron, 32 Tex. 276; Woodworth *v.* Downer, 13 Vt. 522; Mitchell *v.* Ostrom, 2 Hill (N. Y.), 520; Hurst *v.* Hill, 8 Md. 399.

Where a note is given in the name of a firm by one of the members, after dissolution, to one who extends credit to the firm and who has had no notice of such dissolution, and where no notice of any kind has been given, such note binds the firm notwithstanding the dissolution. The notice which a creditor must have is actual. The world would be bound by such notice as a publication in a public gazette. Ewing *v.* Trippe, 72 Ga. 776.

As to what constitutes "dissolution," see text-books on Partnership *passim*.

6. Robb *v.* Mudge, 14 Gray (Mass.), 534.

So held even where the debts of the dissolved firm had been assumed by a new firm containing one of the partners of the firm in dissolution, and he gave the note signing the old firm name. Brown *v.* Broad, 52 Miss. 536. And see Le Roy *v.* Johnson, 2 Pet. (U. S.) 186; Brown *v.* Chancellor, 61 Tex. 437.

But it has also been held that partnership continues until the firm affairs are wound up, so that a note given by one

been properly conferred upon him,[1] or his act be subsequently ratified.[2]

But mere power to settle and close up the business of a partnership given to the liquidating partner does not include the right to issue notes or bills.[3]

If the cause of the dissolution of the firm is the death of a partner, a survivor cannot bind the estate of the deceased by a note made in the firm name.[4]

The rule is the same as to indorsements, and after dissolution partners cannot be held upon the indorsement of one member of the dissolved firm.[5]

(*c*) *Personal Representatives.*—A note or bill given by an executor or administrator does not bind the estate of his decedent,[6] nor has his acceptance of a draft any greater effect;[7] such instruments or acceptances are his individual acts for which he is personally liable.[8]

Similarly, instruments payable to "A, Executor" are the property of A individually, and the title is regarded as mere *descriptio personæ.*[9]

But the personal representatives of a holder of notes or bills are entitled, and are the only proper persons, to transfer such paper after his death, either by indorsement or delivery as may be proper.[10]

partner to close up business will bind all, without any express authority. Robinson *v.* Taylor, 4 Pa. St. 242; Ward *v.* Tyler, 52 Pa. St. 393; McCowin *v.* Cubbison, 72 Pa. St. 358; Siegfried *v.* Ludwig, 102 Pa. St. 547.

1. Randoelph *v.* Peck, 1 Hun (N. Y.), 125.

2. Draper *v.* Bissel, 3 McL. (U. S.) 275.

An acknowledgment of liability and promise to pay is a ratification. Peets *v.* Riley, 26 La. Ann. 712. So is a payment on account. Eaton *v.* Taylor, 10 Mass. 54; Chase *v.* Kendall, 6 Ind. 304.

3. National Bank *v.* Norton, 1 Hill (N. Y.), 572; Lockwood *v.* Comstock, 4 McL. (U. S.) 383; Myatts *v.* Bell, 41 Ala. 222; Brown *v.* Chancellor, 61 Tex. 437. But compare the Pennsylvania rule, *supra.*

4. Bank of Port Gibson *v.* Baugh, 9 Sm. & M. (Miss.) 290; Floyd *v.* Miller, 61 Ind. 224; Carleton *v.* Jenness, 42 Mich. 110.

5. Thomason *v.* Frere, 10 East, 418; Bank of New Orleans *v.* Matthews, 49 N. Y. 12.

But the indorsing partner will be individually liable. Fassin *v.* Hubbard, 55 N. Y. 465; White *v.* Union Ins. Co., 1 Nott & McC. (S. Car.) 561. And title to the paper transferred, though there can be no recourse to the firm whose name is upon it. King *v.* Smith, 4 C. & P. 108; Cony *v.* Wheelock, 33 Me. 366; Pitcher *v.* Barrows, 17 Pick. 361.

But after the death of a partner, the survivor has been held empowered to indorse and transfer notes belonging to the firm. Bredow *v.* Mutual Sav. Inst., 28 Mo. 181; Johnson *v.* Berlizheimer, 84 Ill. 54.

6. Dunne *v.* Deery, 40 Iowa, 251; Gregory *v.* Leigh, 33 Tex. 813; Curtis *v.* Nat. Bank, 39 Ohio St. 579; Kirkman *v.* Burham, 28 Ala. 501; Lynch *v.* Kirby, 65 Ga. 279.

7. Even though it be for the drawer's distributive share of the estate in the acceptor's hands. Wisdom *v.* Becker, 52 Ill. 342.

8. Christian *v.* Morris, 50 Ala. 585; Rittenhouse *v.* Amerman, 64 Mo. 197; Beatty *v.* Tete, 9 La. Ann. 129; Harrison *v.* McClelland, 57 Ga. 531.

9. Cravens *v.* Logan, 7 Ark. 103; Thomas *v.* Reefe, 9 Mo. 373.

Therefore he may sue on it in his own name. Carter *v.* Saunders, 2 How. (Miss.) 851. But suit in his representative capacity is also proper; even his successor, the administrator, *d. b. n.*, may sue if the individual right of property is not asserted. Leach *v.* Lewis, 38 Ind. 155; Catherwood *v.* Chabaud, 1 B. & C. 150; Hemphill *v.* Hamilton, 11 Ark. 425.

10. Clark *v.* Moses, 50 Ala. 326; Make-

Therefore, even where the decedent had transferred the note by delivery, his administrator may indorse it and bind the estate.[1]

Cases relating to the powers of executors and administrators are applicable also to guardians and trustees.[2]

16. Consideration Generally.—In general every contract set forth in a note or bill, whether that of the maker, indorser, drawer, acceptor, or surety, requires a valid consideration to support it.[3]

The necessary consideration need not, however, move solely to the party who is to be bound;[4] nor need it be given by the party originally promising it.[5]

Where no fraud is alleged the adequacy or inadequacy of the consideration is perfectly immaterial.[6]

peace *v.* Moore, 10 Ill. 474; Cahoon *v.* Moore, 11 Vt. 604; Hamrick *v.* Craven, 39 Ind. 241; Owen *v.* Moody, 29 Miss. 79; Rawlinson *v.* Stone, 3 Stra. 1260.

1. Malbon *v.* Southard, 36 Me. 147.

But where the decedent had indorsed but not delivered a note his administrator cannot complete the transfer by delivery; he must indorse *qua* administrator. Clark *v.* Boyd, 2 Ohio, 57; Bromage *v.* Lloyd, 1 Exch. 32. Nor can he make a valid transfer by the mere delivery of a note payable to his decedent's order. Taylor *v.* Surget, 14 Hun (N. Y.), 116.

2. Thus the maker of a note does not escape personal liability by signing as "guardian." Forster *v.* Fuller, 6 Mass. 58; McGavock *v.* Whitfield, 45 Miss. 452. Though if it be really given for the ward's benefit he may after paying it charge the amount paid to the estate. Poole *v.* Williams, 42 Ga. 539.

In like manner he may sue in his own name upon a note made to him as guardian. Bingham *v.* Calvert, 13 Ark. 389; Zachary *v.* Gregory, 32 Tex. 452.

He may transfer such notes and give good title. Fountain *v.* Anderson, 33 Ga. 372; Thornton *v.* Rankin, 19 Mo. 193.

3. But the consideration or the lack of it between one party and his immediate assignor cannot in general concern the maker or other remote party sued; therefore it is no defence to a maker that the note on which he is sued was given for purposes of suit to the plaintiff. Shane *v.* Lowry, 48 Ind. 205; McWilliams *v.* Bridges, 7 Neb. 419; Frederick *v.* Winans, 51 Wis. 472.

In the case of accommodation paper the loan of credit is the consideration, and binding except at the suit of the party accommodated. Hawkins *v.* Neal, 60 Miss. 256; Harris *v.* Bradley, 7 Yerg. 310; Cady *v.* Shepard. 12 Wis. 713.

The contracts of an indorser in waiving protest upon agreeing to an extension of a note, or of a surety in consenting to a change in the note on which he is surety, require no fresh consideration. Pelton *v.* Prescott, 13 Iowa, 567; Sheldon *v.* Horton, 43 N. Y. 93.

4. Thus a joint note may be supported by debts due jointly and severally. Hapgood *v.* Polley, 35 Vt. 649. Or the consideration may be a debt by one only of two joint makers. Hoxie *v.* Hodges, 1 Or. 251.

5. Where the consideration of a transferable aid-note given to a railroad company is the benefit to be derived from the construction of its road, it is immaterial whether the road is built by one company or another so long as it is built over substantially the line originally laid out. Toledo, etc., R. Co. *v.* Johnson, 55 Mich. 456.

6. Heath *v.* Silverthorn Mining, etc., Co., 39 Wis. 146; Rooker *v.* Rooker, 29 Ohio St. 1.

Clearly, where the moving consideration is service rendered or an agreement performed, the smallest service will support the largest promise, in the absence of fraud; e.g., a promise to pay $10,000 for labor as a housekeeper is binding on the promisor. Earl *v.* Peck, 64 N. Y. 596.

Mere inadequacy is no defence. Tricky *v.* Larne, 6 M. & W. 278; Miller *v.* McKenzie, 95 N. Y. 595; Wheelock *v.* Barney, 27 Ind. 462.

It has been said, however, that where the consideration is money it will support a promise only to the extent of the money paid. Sawyer *v.* McLouth, 46 Barb. 353.

If a note specify the number of dollars to be paid, that number must be forthcoming at maturity though they amount to more than the real debt, the note having been made with reference to a depreciated Confederate currency. Williams *v.* Boozeman, 18 La. Ann. 532.

Natural love and affection is not a sufficient consideration for a bill or note, and instruments so given are not enforceable against their makers.[1]

17. Pecuniary Considerations. — The ordinary consideration for notes and bills is an existing debt,[2] or a loan made at the time of issuing the bill or note.[3]

These considerations are clearly good, and even if paper is issued as collateral for a contemporaneous loan, the holder of it is *prima facie* a holder for value,[4] who may transfer it as collateral for a debt of his own.[5]

Credit given upon an unsettled account is a valid pecuniary consideration, and a note so given is enforceable,[6] and so is one

It has been held that, upon a note given for the purchase of land, failure of title to the land is not a good defence. 1 Parsons N. & B. 210; Hoy *v.* Taliaferro, 8 Sm. & M. (Miss.) 727; Perkins *v.* Bumford, 3 N. H. 522; Vining *v.* Lieman, 45 Ill. 248. But more authorities hold that it is a good defence, there having been a complete failure of consideration. Scudder *v.* McAndrews, 2 McL. (U. S.) 464; Frisbee *v.* Hoffnagle, 11 John. (N. Y.) 50; Fowler *v.* Shearer, 7 Mass. 22; Cook *v.* Mix, 11 Conn. 432.

Upon similar grounds notes given for perfectly worthless goods have been held without consideration. Sué *v.* Rood, 15 Johns. (N. Y.) 230; Snyder *v.* Hargus, 26 Kans. 416; Arnold *v.* Wilt, 86 Ind. 367; Kelley *v.* Holderman, 11 Mich. 248. But very slight values have defeated this defence; e.g., a lottery ticket which had drawn a blank where purchased by the note in suit. Barnum *v.* Barnum, 8 Conn. 469. And see Johnson *v.* Titus, 2 Hill (N. Y.), 606; Lester *v.* Webb, 5 Allen, 569.

Notes given for worthless patent rights are also without consideration, and therefore not binding on their makers. National Bank *v.* Peck, 8 Kans. 661; Snyder *v.* Kurtz, 61 Iowa, 593; Dunbar *v.* Marden, 13 N. H. 317; Jolliffe *v.* Collins, 21 Mo. 338.

Aliter where the patent is valid though useless. Nash *v.* Lull, 102 Mass. 60; Myers *v.* Turner, 17 Ill. 179. *Contra*, Rowe *v.* Blanchard, 18 Wis. 441; Mooklar *v.* Lewis, 40 Ind. 1; Clough *v.* Patrick, 37 Vt. 423; Lester *v.* Palmer, 4 Allen (Mass.), 145; Moore *v.* Moore, 39 Ia. 461.

The same rules apply to the contract of indorsement, and mere inadequacy of consideration does not invalidate a transfer otherwise good. Brown *v.* Penfield, 36 N. Y. 473. But an indorsee can recover from his immediate indorser only the amount actually paid by him for the note. Braman *v.* Hess, 13 Johns. (N. Y.) 52; Faut *v.* Miller, 17 Gratt. (Va.) 77.

1. Thus of a note by father to son. Fink *v.* Cox, 18 John. (N. Y.) 145. By son to mother. Kirkpatrick *v.* Taylor, 43 Ill. 207. So of a note made to a stranger by a son for necessaries furnished his father. Edwards *v.* Davis, 16 John. (N. Y.) 282. And see Foust *v.* Board of Publication, 8 B. J. Lea (Tenn.), 552; West *v.* Cavins, 74 Ind. 265; Rice *v.* Rice, 68 Ala. 216; Halliday *v.* Atkinson, 5 B. & C. 501.

There is an exception, however, in favor of notes given in aid of subscriptions to public charities, and such notes are held enforceable. Trustees *v.* Fleming, 10 Bush (Ky.), 234; Roche *v.* Roanoke Seminary, 56 Ind. 198; Wesleyan Seminary *v.* Fisher, 4 Mich. 515; Amherst Academy *v.* Cowles, 6 Pick. 427; Simpson College *v.* Bryan, 50 Iowa, 293; Roberts *v.* Cobb, 31 Hun (N. Y.), 158. But they must be made to persons duly authorized to receive such subscriptions. Pratt *v.* Trustees of Baptist Soc., 93 Ill. 475; Boutell *v.* Cowdin, 9 Mass. 254;

2. Bostwick *v.* Dodge, 1 Doug. (Mich.) 413; Harrell *v.* Tenant, 30 Ark. 684.

3. Money taken by an executor from the funds of the estate under his charge is a loan, and will support a note given by him to the estate for the money so taken. Faulkner *v.* Faulkner, 73 Mo. 327.

That an agent loaned out his principal's money in his own name is no defence to one who got some of the money, and gave the agent his note for it. Estes *v.* Simpson, 13 Nev. 472.

4. Curtis *v.* Mohr, 18 Wis. 645; Savings Ass'n *v.* Hunt, 17 Kans. 532; Griswold *v.* Davis, 31 Vt. 390.

5. Rowe *v.* Haines, 15 Ind. 445.

6. Griffiths *v.* Parry, 16 Wis. 231.

Even when the account is swelled by

given as collateral for a balance due but unliquidated.[1]

A note given by a principal to his surety to indemnify the latter against his obligation of suretyship will be upheld as being for a valid consideration.[2]

The surrender of one negotiable instrument in consideration of receiving another in lieu of it is a sufficient consideration to support the new note or bill.[3]

Forbearance of suit, as where the holder surrendered a note upon which he might have brought an action, and received instead other paper indorsed to him by his debtor, is a valid pecuniary consideration, and the creditor in this instance was held to be a *bona fide* holder for value.[4]

It has been held that a debt due from one person was no consideration for a note by another to the creditor,[5] but there are certainly numerous exceptions.[6]

fraudulent charges the note is good for the amount actually due. Haycock *v.* Rand, 5 Cush. (Mass.) 26; Coburn *v.* Ware, 30 Me. 202. *Sed contra*, that the note is void for the fraud. Brown *v.* North, 21 Mo. 528.

But the deposit of a stolen note in bank, where it is credited to the depositor but not drawn against, does not make the bank a holder for value. Fulton *v.* Phœnix Bank, 1 Hall (N. Y.), 619. Nor does a deposit for collection in a bank having a balance against the depositor. McBride *v.* Farmers' Bank, 26 N. Y. 450.

1. Richards *v.* Macey, 14 M. & W. 484; Bank of Metropolis *v.* New England Bank, 17 Pet. (U. S.) 174.

2. Little *v.* Little, 13 Pick. (Mass.) 426.

But the recovery will be limited to the amount actually paid by the surety. And see Blankenship *v.* Nimmo, 50 Ala. 506; Woodrow *v.* O'Conner, 28 Vt. 776.

3. Mechanics' Bank, *v.* Crow, 60 N. Y. 85; Cowing *v.* Altman, 71 N. Y. 435.

E.g., a note secured by mortgage was given up on condition of receiving a new note in O'Keefe *v.* Handy, 31 La. Ann. 832.

The rule is the same where the surrendered note was entirely unsecured. Dunn *v.* Weston, 71 Me. 270. Or was overdue. Pratt *v.* Coman, 37 N. Y. 440; Clary *v.* Surrency, 58 Ga. 83.

Where, in a sale of land, the agent of the seller executes to the buyer a receipt for the amount of his commission, to operate as part payment of the purchase-money, a promissory note executed by the buyer to the agent, in consideration of such receipt, is valid. Barcus *v.* Elliott, 95 Ind. 601.

In a suit upon a note payable in bank, brought by an assignee in good faith before maturity, the fact that the consideration of the note was the assignment by the payee to the maker of a forged note, is no defence. McCauley *v.* Murdock, 97 Ind. 229.

4. Muirheid *v.* Kirkpatrick, 21 Pa. St. 237.

So the renewal of a note, that being really a forbearance of suit, is a good consideration. Howard *v.* Hinckley Iron Co., 64 Me. 93; Gates *v.* Union Bank, 12 Heisk. (Tenn.) 325.

But if the original note was upon an insufficient consideration, or has really been paid, the renewal note can have no greater validity than its original. Smith *v.* Taylor, 39 Me. 242.

The obligation of an acceptor, even before he has paid anything, is sufficient to support a note given for the amount of his acceptance. Hodge *v.* First Nat'l Bank, 22 Gratt. (Va.) 51.

So is the release of a drawer from his liability for damages on dishonor. Pesant *v.* Pickersgill, 56 N. Y. 650.

5. Bingham *v.* Kimball, 17 Ind. 396.

And so held of a note by a married woman for her husband's debt. Alger *v.* Scott, 54 N. Y. 14; Williams *v.* Walker, 18 S. Car. 577.

6. Where the note given extinguishes the debt, the detriment to the creditor is thought to be enough to support the note, as where an action against the maker's brother was settled by the note in suit. Smith *v.* Richards, 29 Conn. 232. And see Crofts *v.* Beale, 11 C. B. 172; Leonard *v.* Duffin, 94 Pa. St. 218; Lines *v.* Smith, 4 Fla. 47.

But where the debt supposed to be extinguished did not really exist, the note was held void. Bullock *v.* Ogburn, 13 Ala. 346.

Where an executor or administrator gives his own note for a debt due by his decedent, such note is generally void as given for the debt of another.[1]

These rules have been applied to notes given by a widow for the debts of her husband.[2]

But the note of the committee of a lunatic for a debt of the estate was held good, the release of the lunatic himself being the consideration.[3]

Forbearance of suit or release of other securities by the creditor, will certainly validate a note given for the debt of another.[4]

18. Considerations other than Pecuniary.—It is obvious that the transfer of other things than money may lawfully move a man to execute a note or bill.

Notes for the purchase-price of land, even though encumbered by a mortgage, are valid;[5] nor does an agreement that title to the land is not to pass until the price is actually paid affect the note.[6]

1. Bank of Troy *v.* Topping, 9 Wend. (N. Y.) 273; Rucker *v.* Wadlington, 5 J. J. Marsh. (Ky.) 238.

But where the executor has assets of the estate when he makes the note, the consideration has been held sufficient. Stevenson *v.* Edwards, 27 La. Ann. 302; McGrath *v.* Barnes, 13 S. Car. 328; Byrd *v.* Holloway, 6 Sm. & M. (Miss.) 199.

Forbearance of suit by a creditor of the estate held enough in Rittenhouse *v.* Amerman, 64 Mo. 197; Thompson *v.* Maugh, 3 Ia. 342.

If assets exist, the fact that the debt was barred by the Statute of Limitations makes no difference. Wheaton *v.* Wilmarth, 13 Metc. (Mass.) 422; Didlake *v.* Robb, 1 Woods (U. S.), 680.

2. Williams *v.* Nichols, 10 Gray (Mass.), 83.

And a note by her in renewal of another on which she was her husband's surety is void, the estate of the husband being insolvent. Hetherington *v.* Hixon, 46 Ala. 297.

Even the possession of assets held not to validate her note for his debt. Watson *v.* Reynolds, 54 Ala. 192; Maull *v.* Vaughn, 45 Ala. 134.

3. Thacher *v.* Dinsmore, 5 Mass. 299.

So of the note of a guardian in extinguishment of his ward's debt. Wren *v.* Hoffman, 41 Miss. 616; Coleman *v.* Davies, 45 Ga. 489.

4. Thus where A gave B his note in consideration of B surrendering C's note to him (B), this inconvenience or detriment to B will render A liable on the note he gave for C's debt. Sherwood *v.* Archer, 10 Hun (N. Y.), 73; Carpenter *v.* Murphree, 49 Ala. 84; Railroad *v.* Chamberlain, 44 N. H. 497.

One who indorsed the note of his partner and brother-in-law, and afterwards, on condition that this note should be cancelled, indorsed another, and when the last note was about to outlaw joined the maker in admitting liability thereon and promising payment in order to save a suit, could not claim that such admission and promise were without consideration. Parsons *v.* Frost, 55 Mich. 230.

So if A gives his note to B in consideration of the latter's releasing an attachment he has levied against the goods of C, the note will be enforced. Bradbury *v.* Blake, 25 Me. 397. *Cf.* Compton *v.* Blair, 27 Mich. 397; Maine Mut. Ins. Co. *v.* Blunt, 64 Me. 95.

If the creditor of a corporation forbear suit in consideration of the note of a stockholder, the latter will be held. Mechanics', etc., Bank *v.* Nixson, 42 N. Y. 438.

So forbearance of suit against a principal has been held a sufficient consideration for a surety's indorsement. Chaddock *v.* Vanness, 6 Vr. (N. J.) 518; Hall *v.* Clapton, 56 Miss. 555.

And see generally, as to forbearance, Munson *v.* Adams, 89 Ill. 450; Thompson *v.* Gray, 63 Me. 228; Abbott *v.* Fisher, 124 Mass. 414; Silvis *v.* Ely, 3 W. & S. (Pa.) 420.

5. Hoyt *v.* Bradley, 27 Me. 242; Fitzgerald *v.* Barker, 13 Mo. App. 192; Ervin *v.* Morris, 26 Kans. 664.

So of a note given for a quit claim deed. Bonney *v.* Smith, 17 Ill. 531; Bachelder *v.* Lovely, 69 Me. 33.

6. McMath *v.* Johnson, 41 Miss. 439.

Notes may also be given for the transfer of personal property.[1]

The exchange of notes, i.e., A giving B his note in consideration of B giving his to A, is a lawful transaction, and both notes will be upheld; each note being the consideration for the other.[2]

This is true, though the notes may be for different amounts.[3]

Contracts or agreements to do almost any legal act whereby the maker will be benefited or the payee suffer detriment have been held to sustain a note given to carry out such contract or agreement.[4]

The compromise of even a doubtful claim,[5] or the withdrawal

1. Fenby *v.* Pritchard, 2 Sandf. (N. Y.) 151. Or as collateral to the sale of goods. Fenby *v.* Pritchard, 2 Sandf. (N. Y.) 151. Or the good-will of a business. Searing *v.* Tye, 4 E. D. Sm. (N. Y.) 197. For a policy of insurance. Franklin Life Ins. Co. *v.* Caldwell, 65 Ind. 138. Though the goods (whiskey) may have been sold under penalty of statutory punishment. Rahter *v.* First Nat. Bank, 92 Pa. St. 393.

2. Backus *v.* Spaulding, 116 Mass. 418; Cobb *v.* Titus, 10 N. Y. 198; Byrne *v.* Schwing, 6 B. Mon. (Ky.) 199; Savage *v.* Ball, 6 C. E. Greene (N. J.), 142; Williams *v.* Banks, 11 Md. 198; Trustees *v.* Hill, 12 Iowa, 462; Rose *v.* Sims, 1 B. & Add. 521.

3. Higginson *v.* Gray, 6 Metc. (Mass.) 212.

In such transactions the makers are not sureties for each other. Stickney *v.* Mohler, 19 Md. 506. Nor are the notes mere accommodation paper; it may be proved in bankruptcy. *In re* London, etc., Bank, L. R. 9 Ch. App. 686.

4. Thus a mere contract to deliver a deed or to convey land at some future time has been held enough. Carman *v.* Pultz, 21 N. Y. 547; Trask *v.* Vinson, 20 Pick. (Mass.) 105; Chapman *v.* Eddy, 13 Vt. 205; Bank of Salem *v.* Caldwell, 16 Ind. 469.

So of an agreement to sell a machine. Hawley *v.* Bingham, 6 Or. 76. Or to do work. Walker *v.* Walker, 29 N. Y. 375.

An agreement on the part of the payee to take the pledge of total abstinence. Lindell *v.* Ropes, 60 Mo. 249.

The payees promise to emancipate a slave. Thompson *v.* Thompson, 4 B. Mon. 502.

Information furnished the maker in a suit brought by him. Chandler *v.* Mason, 2 Vt. 193.

The promise of the payee to resign his office of president of a bank. Peck *v.* Requa, 13 Gray (Mass.), 407.

Services rendered in obtaining a pardon for a convict. Meadow *v.* Bird, 22 Ga. 246; McGill *v.* Burnet, 7 J. J. Marsh. (Ky.) 640.

For other instances see Barthe *v.* Lacroix, 29 La. Ann. 326; Easton *v.* Easton, 112 Mass. 438; Eastman *v.* Brown, 32 Ill. 53; Barcus *v.* Elliott, 95 Ind. 661; Lucas *v.* Pico, 55 Cal. 126; Knowles *v.* Parker, 7 Metc. (Mass.) 30; Cowles *v.* Gridley, 24 Barb. (N. Y.) 301; First Nat. Bank *v.* Hendrie, 49 Iowa, 402; Day *v.* Cutler, 22 Conn. 625; Dean *v.* Skiff, 128 Mass. 174; Roberts *v.* Frisby, 38 Tex. 319; Hogan *v.* Crawford, 31 Tex. 633; Banfield *v.* Rumsey, 2 Hun (N. Y.), 112; Paddleford *v.* Thacher, 48 Vt. 574; Wright *v.* Wright, 54 N. Y. 437; Anstell *v.* Rice, 5 Ga. 472.

5. Boone *v.* Boone, 58 Miss. 822; Richard *v.* Comstock, 21 Ark. 68; Stephens *v.* Spiers, 25 Mo. 386; Callisher *v.* Bischoffsheim, L. R. 5 Q. B. 449

Whether the claim was good or not makes no difference. Keefe *v.* Vogle, 36 Iowa, 87.

A market-house company, incorporated for *twenty* years, with power to purchase, hold, and convey any real or personal estate necessary to enable it to carry on its business, built a market-house on land owned by it in fee simple, and sold by public auction leases for *ninety-nine* years, renewable forever, of stalls therein at a specified rent. The highest bidder for one of the stalls gave the corporation several promissory notes in part payment for the option of that stall, received such a lease, and took and kept possession of the stall; and afterwards gave it a note for a less sum, in compromise of the original notes, and upon express agreement that if this note should not be paid at maturity, the corporation might surrender it to the maker, and thereupon the cause of action on those notes should revive. *Held*, that the new note was upon a sufficient legal consideration; and that the corporation, holding and suing upon all the notes, could recover upon this note only. Northern Liberty Market Co. *v.* Kelly, 113 U. S. 179.

of some proceeding which threatened the maker with liability,[1] furnishes a perfectly valid consideration for a note given to obtain a settlement or release.

Merely moral considerations have not generally been recognized as sufficient to uphold commercial paper,[2] but the cases are not uniform.[3]

19. Consideration of Accommodation Paper.—It has been said that accommodation paper is without consideration.[4]

That no legal benefit or detriment inures to the accommodating party is true, and the consideration to support the contract must be found, if at all, among the other parties to the note or bill.[5]

As between the parties accommodated and accommodating, the latter can be under no liability to the former, whatever the relation in which they are placed on the paper;[6] but as to third parties,

Therefore it is the settlement of the claim, and not any recognition of its validity, that gives life to the note. Russell *v.* Cook, 3 Hill (N. Y.), 504; Taylor *v.* Patrick, 1 Bibb (Ky.). 168.

Yet where the note was extorted for a wholly unfounded demand, the maker may show that he could not possibly have been liable. Gunning *v.* Royal, 59 Miss. 45; Ormsbee *v.* Howe, 34 Vt. 182; Briscoe *v.* Kinealy, 8 Mo. App. 26.

So held of a note given in compromise (*sic*) of a paid mortgage. Smith *v.* Boruff, 75 Ind. 412. And upon a promise to pay a note to which the maker's name had been signed without authority. Owsley *v.* Phillips, 78 Ky. 517.

1. A note in consideration of a release from damages for an assault is valid. Wallbridge *v.* Arnold, 21 Conn. 425. *Secus* where the sole consideration is the tort of a third person. Conmey *v.* Macfarlane, 97 Pa. St. 361.

That the damages demanded were grossly excessive is immaterial. Whitenack *v.* Ten Eyck, 2 Gr. Ch. (N. J.) 249.

So held of a note for the discontinuance of an action. Jones *v.* Rittenhouse, 87 Ind. 348. And generally of claims that might be pressed by legal action. Byington *v.* Simpson, 134 Mass. 145; Lyons *v.* Stephens, 45 Ga. 141; Prescott *v.* Ward, 10 Allen (Mass.), 203; Moody *v.* Leavitt, 2 N. H. 171; Friermood *v.* Rouser, 17 Ind. 461; Cràas *v.* Hunter, 28 N. Y. 389; Bender *v.* Pryor, 31 Tex. 341; Lea *v.* Cassen, 61 Ala. 312; Stewart *v.* Hidden, 13 Minn. 43; Seaman *v.* Seaman, 12 Wend. (N. Y.) 381.

Settlements of mutual accounts by "accord and satisfaction" resemble compromises, and will sustain notes given for the balance agreed upon. Phelps *v.* Younger, 4 Ind. 450.

2. A son's accommodation note for his father's debt is invalid. Murphy *v.* Keyes, 7 J. & S. (N. Y.) 18.

So held of a son's note for necessaries furnished the father. Cook *v.* Bradley, 7 Conn. 57. *Cf.* Potter *v.* Earnest, 45 Ind. 416; Rowland *v.* Harris, 55 Ga. 141.

3. A father's note discharging his son's debt has been enforced. Seymour *v.* Prescott, 69 Me. 376. And so has a note to cover a son's defalcation. Popple *v.* Day, 123 Mass. 520. And to take up another note of an insolvent son. Myers *v.* Van Wagoner, 56 Mo. 115.

4. An accommodation party is one "who puts his name to a note or bill without any consideration, with the intention of lending his credit to the accommodated party." 1 Parsons N. & B. 195; Lenheim *v.* Wilmarding, 55 Pa. St. 75.

5. The benefit accruing to the drawer in case of an accommodation acceptance, or to the holder in case of an accommodation indorsement, is the consideration which supports the note or bill. Yeaton *v.* Bank of Alexandria, 5 Cr. (U. S.) 49.

An accommodation indorser's liability on a note is sufficient consideration to support a new note of his own to take up the first one. Spencer *v.* Ballou, 18 N. Y. 327.

6. Thompson *v.* Clubley, 1 M. & W. 212; Macy *v.* Kendall, 33 Mo. 164; Patten *v.* Pearson, 55 Me. 39.

Even if the party accommodated has released another indorser upon obtaining the accommodation indorsement the relation of parties is not changed. Larned *v.* Ogilby, 20 Iowa, 410.

But a deposit of money to cover the possible liability of the accommodating party deprives him of the character of an accommodator, and he becomes liable as

any man who loans his credit on commercial paper must rest under the obligations of acceptor, indorser, etc., that he has himself assumed.[1]

But where an accommodation party is obliged to take up the note or bill he may recover from the persons accommodated by him the amount he has paid.[2]

Before the paper passes into the hands of a holder for value the accommodation may be revoked by the party giving it,[3] and his death is itself a revocation unless rights under such paper have accrued to a *bona fide* holder.[4]

Accommodation paper may be pledged,[5] but only the amount actually advanced upon it can be recovered from the party accommodating.[6]

The accommodation character of a note or bill is no defence at the suit of a holder for value,[7], though it has been diverted from the purpose for which the accommodation was given;[8] nor does mere knowledge of the accommodation on the part of a *bona fide* taker of the paper furnish a defence.[9]

20. Illegal Considerations.—If the consideration of a note or bill be against public policy or in contravention of some express statute, the instrument is void between the parties.[10]

Contracts with an alien enemy have been already considered,[11]

an ordinary party. Parker *v.* Lewis, 39 Tex. 394.

1. But as against persons not *bona fide* holders for value before maturity the defence of accommodation party may be made. 2 Rand. Com. Paper, 41; and see *infra.*

2. Such recovery was had by drawer against acceptor and indorser in Lewis *v.* Williams, 4 Bush (Ky.), 678. By maker against payee. Owens *v.* Miller, 29 Md. 144. By acceptor against drawer. Pomeroy *v.* Tanner, 70 N. Y. 547.

3. May *v.* Boisseau, 8 Leigh (Va.), 184; Dogan *v.* Dubois, 2 Rich. Eq. (S. Car.) 85.

4. Smith *v.* Wyckoff, 3 Sandf. Ch. (N. Y.) 77.

But a *bona fide* holder who took the note of an accommodation maker after his death, but without knowledge of that, was held entitled to recover. Clark *v.* Thayer, 105 Mass. 216; Williams *v.* Bossor, 11 Ohio, 66.

5. Appleton *v.* Donaldson, 3 Pa. St. 386; Washington Bank *v.* Krum, 15 Iowa, 53; Ransom *v.* Turley, 50 Ind. 273.

6. Gordon *v.* Boppe, 55 N. Y. 665; Atlas Bank *v.* Doyle, 9 R. I. 76; Buchanan *v.* International Bank, 78 Ill. 500.

7. Monument Nat. Bank *v.* Globe Works, 101 Mass. 57; Mechanics' Banking Assoc. *v.* White Lead Co., 35 N. Y. 505; Bank of Ireland *v.* Beresford, 6 Dowl. 237.

8. Brooks *v.* Hay, 23 Hun (N.Y.), 372.

9. Fentum *v.* Pococke, 5 Taunt. 193; Grant *v.* Ellicott, 7 Wend. (N. Y.) 227; Arnold *v.* Sprague, 34 Vt. 402; Washington Bank *v.* Krum, 15 Iowa, 53; Thatcher *v.* West River Nat. Bank, 19 Mich. 196.

Thus where a bill was accepted for the accommodation of the drawer, and the payee knew that fact, *held*, that he could recover against the acceptor. Israel *v.* Ayer, 2 S. Car. 344; Spurgin *v.* McPheeters, 42 Ind. 527.

Where an accommodation note is diverted from the purpose for which it was given, one who takes it with knowledge of that fact cannot recover of the accommodation party. Small *v.* Smith, 1 Denio (N. Y.), 583.

Nor can one who takes an over due note. Chester *v.* Dorr, 41 N. Y. 279.

10. Baker *v.* Collins, 9 Allen (Mass.), 253; Webster *v.* Sanborn, 47 Me. 471.

It must clearly appear that a commercial instrument is against public policy to render it void. Byles on Bills, 138; Richardson *v.* Mellish, 2 Bing. 229.

11. *Ante*, § 14. (a). The American cases on this subject have arisen out of the late Civil War, to which the rule of "alien enemy" could scarcely be rigidly ap-

and notes evidencing such contracts are void, as calculated to injure the nation in times of special peril.

It is clearly to the detriment of the State that public offices should be bought or sold, and many commercial instruments made for the furtherance of the maker's desire for office have been declared utterly void, as against public policy.[1]

The composition of a felony has long been recognized as highly

plied; but these have been held void, as against public policy.

Notes to procure substitutes for the Confederate army. Pickens *v.* Eskridge, 42 Miss. 114; Heidenreich *v.* Leonard, 21 La. Ann. 628; Critcher *v.* Holloway, 64 N. Car. 526; Chancely *v.* Bailey, 37 Ga. 532; Kingsbury *v.* Fleming, 66 N. Car. 524.

Notes for horses for the Confederate service. McMurtry *v.* Ramsey, 25 Ark. 350; Martin *v.* McMillan, 63 N. Car. 486. And for arms and other materials of war. Tatum *v.* Kelly, 25 Ark. 209. And even partly for such purposes with knowledge on the part of the payee and vendor. Hanauer *v.* Doane, 12 Wall. (U. S.) 342.

But the rulings in *Tennessee* have been exactly opposite on all these points. Puryear *v.* McGavock, 9 Heisk. (Tenn.) 461; Bank of Tennessee *v.* Cummings, 9 Heisk. (Tenn.) 465.

Such notes are good in the hands of a *bona fide* holder. Glenn *v.* Farmers' Bank, 70 N. Car. 191. And see, generally, Heard *v.* Swift, 32 Tex. 515; McKesson *v.* Jones, 66 N. Car. 258; Oxford Iron Co. *v.* Spradley, 51 Ala. 171; Ruddell *v.* Landers, 25 Ark. 328; Wallace *v.* Lark, 12 S. Car. 576; Ruckman *v.* Lightner, 24 Gratt. (Va.) 19; Hanauer *v.* Woodruff, 15 Wall. (U. S.) 439.

If the plaintiff hired a person of full age to the defendant, and received from him the note in suit for the services of the person so hired, this was an illegal transaction, and the note so given was void, as being contrary to public policy, and in violation of the thirteenth amendment to the constitution of the United States, and of par. 17 of the bill of rights in the constitution of Georgia. Pitts *v.* Allen, 72 Ga. 69.

Upon the ground that Confederate currency was a device to subvert the Union, notes payable therein have been held absolutely void. George *v.* Terry, 26 Ark. 160; Scudder *v.* Thomas, 35 Ga. 364; Willis *v.* Johnson, 38 Tex. 303; Peltz *v.* Long, 40 Mo. 532; Hale *v.* Huston, 44 Ala. 134; Durbin *v.* McMichael, 22 La. Ann. 132; Robertson *v.* Shores, 7 Coldw. (Tenn.) 468. But other authorities hold that private contracts made within the lines of the *de facto* Confederate government and evidenced by notes payable in the only currency there obtainable were valid and enforceable. Simpson *v.* Lauderdale Co., 56 Ala. 64; Rivers *v.* Moss, 6 Bush (Ky.), 600; McMath *v.* Johnson, 41 Miss. 439; Gist *v.* Gans, 30 Ark. 285.

It has been held that unless expressly payable in Confederate currency national currency would be intended. Taylor *v.* Turley, 33 Md. 500; Dieltz *v.* Sadler, 37 Tex. 137. On the other hand, that parol evidence was admissible to show that Confederate funds were intended. Donley *v.* Tindall, 32 Tex. 43.

1. Blackford *v.* Preston, 8 T. R. 93; Layng *v.* Paine, Willes, 571; Commissioners of Johnson Co. *v.* Milliken, 7 Blackf. (Ind.) 301; Ferris *v.* Adams, 23 Vt. 136.

In this regard an administratorship is a public office. Porter *v.* Jones, 52 Mo. 399.

A note to procure the payee's influence in favor of the maker at election time is tainted with this fault. Swayze *v.* Hull, 3 Halst. (N. J.) 54. And one to induce the payee to resign and have the maker appointed in his stead is also void. Meacham *v.* Dow, 32 Vt. 721.

A note to a lobbyist in payment of services in securing legislation desired by the maker is invalid for similar reasons. Clippinger *v.* Hepbaugh, 5 W. & S. (Pa.) 315; Trist *v.* Child, 21 Wall. 441; Herman *v.* Edson, 9 Neb. 152.

A *bona fide* holder for value before maturity may, however, enforce a note given to influence the fixing of the county seat in a particular town. Thorne *v.* Yentz, 4 Cal. 321.

Contracts with a public officer to induce him to neglect his duty are void. Denny *v.* Lincoln, 5 Mass. 385 So held of a note to a sheriff for favors generally. Rogers *v.* Reeves, 1 T. R. 418. For delaying a sale or levy. Ashby *v.* Dillon, 19 Mo. 619; Goodale *v.* Holdridge, 2 Johns. (N. Y.) 193. And of a note to procure payment of money to a contractor with a city before he was lawfully entitled. Devlin *v.* Brady, 36 N. Y. 531.

opposed to public policy, and notes given for that purpose are illegal and void.[1]

But private misdemeanors, for which an indictment might be brought, e.g., assault and battery, may be compounded, and a note which is really a release of damages for the civil action which might be brought will be upheld.[2]

Marriage being a domestic relation peculiarly favored by the law, notes the consideration of which are the prevention of marriage[3] or the procurement of divorce are void.[4]

So also are notes given in restraint of trade.[5]

1. Galton *v.* Taylor, 7 T. R. 475; Kirk *v.* Strickwood, 4 B. & Ad. 421; Hinesborough *v.* Sumner, 9 Vt. 23; Clark *v.* Ricker, 14 N. H. 44; Steuben Co. Bk. *v.* Matthewson, 5 Hill, 249; Sumner *v.* Summers, 54 Mo. 340; Breathwit *v.* Rogers, 32 Ark. 758; Collier *v.* Waugh, 64 Ind. 456; Wynne *v.* Whisenant, 37 Ala. 46; Gardner *v.* Maxey, 9 B. Mon. (Ky.) 90.

Even a note partly given to secure the acquittal of one prosecuted for a felony cannot be enforced. Ricketts *v.* Harvey, 106 Ind. 564. *Cf.* Haynes *v.* Rudd, 102 N. Y. 372.

Nor can a note to prevent the attendance of witnesses before the grand jury, and the consequent finding of an indictment for a felony. Henderson *v.* Palmer, 71 Ill. 579; Gardner *v.* Maxey, 9 B. Mon. (Ky.) 90.

No action can be maintained upon a promissory note, given by a person while under arrest on a complaint for larceny of property exceeding in value $100, to the owner of the property alleged to have been stolen, under an agreement that the complaint shall be placed on file, the plaintiff having received the note with notice of the circumstances; and the question of the guilt or innocence of the accused person is not open in such action. Gorham *v.* Keyes, 137 Mass. 583.

Even without an agreement to prevent any prosecution a note given to procure a discharge from arrest for theft is illegal and void. McMahon *v.* Smith, 47 Conn. 223; Bowen *v.* Buck, 28 Vt. 308; Ozarne *v.* Haber, 30 La. Ann. 384; Couderman *v.* Hicks, 3 Lans. (N. Y.) 108. Or one to prevent the prosecution for forgery of the son of the maker. National Bank of Oxford *v.* Kirk, 90 Pa. St. 49.

A promissory note, given to secure the restoration of stolen property, is void if a part of its consideration is an agreement not to search the house of the thief for the property before the next day, pending negotiations for a settlement of the matter. Merrill *v.* Carr, 60 N. H. 114.

The money for which the note was given may be actually due the payee, as in case of an embezzlement; but if the consideration for the note is even in part the abandonment or prevention of criminal proceedings, the instrument is illegal and void. Godwin *v.* Crowell, 56 Ga. 566; Taylor *v.* Jaques, 106 Mass. 291; Buck *v.* First Nat'l Bk., 27 Mich. 293.

But if there is no agreement to cheat the criminal law, and the money is really due, the note is good. Cohoes *v.* Cropsey, 55 N. Y. 685; Von Windisch *v.* Klaus, 46 Conn. 433.

2. Coppock *v.* Bower, 4 M. & W. 361; Price *v.* Summers, 2 South. (N. J.) 578.

But where a father took a note in settlement of an assault on his daughter, for which he had no private action, the note was held void as wholly without consideration. Loomis *v.* Cline, 4 Barb. (N. Y.) 453.

And where the public has an interest, as in the opening of a road, a note for the withdrawal of opposition to the measure was held illegal. Smith *v.* Applegate, 3 Zab. (N. J.) 352.

And the public always has an interest in the fair trial of causes, so that notes in furtherance of agreements to suppress testimony are void. Fallows *v.* Taylor, 7 T. R. 475; Swan *v.* Chandler, 8 B. Mon. (Ky.) 97; Hoyt *v.* Macon, 2 Col. 502.

3. E.g., the acceptance of a bill on condition that the widowed drawer shall not marry again. Baker *v.* White, 2 Vern. 215; Sterling *v.* Sinnickson, 2 South. (N. J.) 756.

4. So held of a note for the withdrawal of a defence to a divorce suit. Stoutenburgh *v.* Lybrand, 13 Ohio St. 228; Adams *v.* Adams, 25 Minn. 72; Sayles *v.* Sayles, 21 N. H. 312.

But a note in consideration of procuring the marriage of the maker is also void. Roberts *v.* Roberts, 3 P. Wm. 66.

5. Chitty on Notes, etc., 99.

As to what contracts are in restraint of trade, see that title.

Gambling may be said now to be universally prohibited, and notes given upon gaming considerations to be void upon the broadest grounds of public policy.[1]

It may be asserted broadly that a note given for any purpose clearly opposed to sound morals is void, independent of any statutory prohibition.[2]

A fortiori notes issued in contravention of a statute are void even in the hands of a *bona fide* holder,[3] and the prohibition may be implied from the terms of the statute.[4]

Statutes passed for the collection of the revenue and the regulation of banking have furnished the most common examples of this species of illegal consideration.[5]

1. A promissory note given in a gambling transaction is void, although negotiable in form and in the hands of an innocent holder for value. Harper *v.* Young, 112 Pa. St 419; Traders' Bank *v.* Alsop, 64 Iowa, 97.

So is a note given by one loser to another for a share of the loss. Whitesides *v.* McGrath, 15 La. Ann. 401. *Sed contra*, Boggess *v.* Lilly, 18 Tex. 200.

And a note for money loaned to bet with at a horse-race. Ruckman *v.* Bryan, 3 Denio (N. Y.), 340.

Money so loaned cannot be recovered. Cannan *v.* Bryce, 3 B. & Ald. 179.

Stock-jobbing transactions, and the like, have been regarded as mere bets in some jurisdictions, and notes given to settle differences treated accordingly.

Thus "contracts for the purchase and sale of cotton futures are gaming contracts. They are immoral, illegal, and contrary to public policy; and all evidences of debt executed on such consideration are void in the hands of any person, even though it be a *bona fide* purchaser before due and without notice." Cunningham *v.* The National Bank of Augusta, 71 Ga. 400.

And a note given a broker for services in a gambling transaction in grain is utterly void. Barnard *v.* Backhaus, 52 Wis. 593.

Similar decisions on notes to cover operations in stocks are: Fareira *v.* Gabell, 89 Pa. St. 89; Brua's Appeal, 55 Pa. St. 294.

Cf. Hawley *v.* Bibb, 69 Ala. 52; Tenney *v.* Foote, 4 Bradw. (Ill.) 594; Shaw *v.* Clark, 49 Mich. 384; Sawyer *v.* Macauley, 18 S. Car. 543; Third Nat'l Bk. *v.* Tinsley, 11 Mo App. 498; Third Nat'l Bk. *v.* Harrison, 3 McCrary (U. S.), 316.

2. For example, a note for the rent of a house taken for purposes of prostitution is invalid even in the hands of a *bona fide* holder. Jennings *v.* Throgmorton, Ry. & M. 251. See 1 Parsons N. & B. 214; Story on Prom. Notes, § 198.

But a note by the father of an illegitimate child for its support is good, as being upon a meritorious consideration. Maxwell *v.* Campbell, 8 Ohio St. 265. Even if a part of the agreement be that bastardy proceedings be dropped. Jackson *v.* Finney, 33 Ga. 512.

So, too, is a note by a seducer to the parents or parent of the girl seduced. Merritt *v.* Fleming, 42 Ala. 234; Cutter *v.* Collins, 12 Cush. 233; Harter *v.* Johnson, 16 Ind. 271.

3. Nerot *v.* Wallace, 3 T. R. 17.

So held of a bill of credit issued by a State in violation of the constitution of the United Sates. Craig *v.* State of Missouri, 4 Pet. (U. S.) 410.

4. Story on Prom. Notes, § 189.

"In order to render a negotiable security void, by reason of its consideration being illegal, in the hands of an innocent holder for value, without notice, and before due, the statute which makes such contract illegal and void must also make the same a crime, or the act itself must be immoral and *contra bonos mores*." Rhodes *v.* Beall, 73 Ga. 641.

If the statute prescribe a penalty for doing any act, and a note be issued in consideration of the prohibited act, it is void. 1 Parsons N. & B. 213; Griffith *v.* Wells, 3 Denio (N. Y.), 226

5. Thus where banks were forbidden by statute to issue promissory notes, "post notes" were held illegal and void. Reynolds *v.* Nichols, 12 Iowa, 399; Brown *v.* Tarkington, 3 Wall. (U. S.) 377.

So, too, was an insurance company's note for an unauthorized loan. Utica Ins. Co. *v.* Caldwell, 3 Wend. (N. Y.) 296.

Notes the consideration of which involved smuggling are utterly void. Biggs *v.* Lawrence, 3 T. R. 454; Hodgson *v.* Temple, 5 Taunt. 181; Taylor *v.* Crowland Gas Co., 10 Exch. 293.

The repeal of a statute which invalidated a note does not legalize a note made before such repeal,[1] and renewal notes are affected by the illegality of the original consideration.[2]

When part of the consideration is lawful and part illegal the whole instrument is in general void.[3]

21. Absence and Failure of Consideration.—Consideration may be wholly lacking for a note or bill, or it may fail either totally or partially. In each case a defence to the instrument is furnished, as against some at least of the parties to it.

Such defences are in general good between the original parties.[4]

But they are not admissible against a *bona fide* holder for value before maturity, and without notice.[5]

An acceptance to secure payment of moneys expended or received at an unlicensed theatre is also void. Sugars *v.* Brinkworth, 4 Camp. 46. But see Good *v.* Allen, 15 Bradw. (Ill.) 663. So is a note for the services of an unlicensed physician. May *v.* Williams, 27 Ala. 267. *Sed contra* of the services of an unlicensed auctioneer. Gunnaldson *v.* Nyhus, 27 Minn. 44.

The liquor laws have furnished many and diverse decisions. All instruments founded on a violation of them have been held void. Hubbell *v.* Flint, 13 Gray (Mass.), 277; Brigham *v.* Potter, 14 Gray (Mass.), 522; Griffith *v.* Wells, 3 Denio (N. Y.), 226; Caldwell *v.* Wentworth, 14 N. H. 431. So is a note in consideration of the assignment of a non-transferable license to sell liquor. Sanderson *v.* Goodrich, 46 Barb. 616.

But a note for liquor sold without a United States license has been upheld in Pennsylvania; the statute not making such sales expressly void Rahter *v.* First Nat'l Bank, 92 Pa. St. 393.

And a note for liquor sold in violation of statute is good in the hands of a *bona fide* holder, the burden being on him to prove his *bona fides*, according to Paton *v.* Coit, 5 Mich. 505; Cattle *v.* Cleaves, 70 Me. 256; Doolittle *v.* Lyman, 44 N. H. 608.

1. Bauchor *v.* Mansel, 47 Me. 58; Gorsuth *v.* Butterfield, 2 Wis. 237.

2. Chapman *v.* Black, 2 B. & Ald. 588; Southall *v.* Rigg, 11 C. B. 481.

3. Taylor *v.* Pickett, 52 Iowa, 467; Hoyt *v.* Macon, 2 Col. 502; Everhart *v.* Puckett, 73 Ind. 409; Cotten *v.* McKenzie, 57 Miss. 418; Wisner *v.* Bardwell, 38 Mich. 278; Carleton *v.* Woods, 28 N. H. 290; Saratoga Bank *v.* King, 44 N. Y. 87; Perkins *v.* Cummings, 2 Gray, 258; Woodruff *v.* Hinman, 11 Vt. 592; Potts *v.* Gray, 3 Coldw. (Tenn.) 468; Scott *v.* Gilmore, 3 Taunt.. 226.

But a renewal of a note, given partly for a valid consideration, for the valid part only is good. Boulton *v.* Coghlan, 1 Bing. N. C. 640; Hav *v.* Ayling, 20 L. J. Q. B. 171; s. c., 16 Q. B. 423.

And a partial payment made on a note partly for a valid consideration may be retained and appropriated to the payment of that part. Cruikshanks *v.* Rose, 5 C. & P. 19. *Contra*, Gammon *v.* Plaisted, 51 N. H. 444.

Where, too, the valid part can be distinguished from the illegal, a recovery can be had for that portion. Guild *v.* Belcher, 119 Mass. 257; McGuiness *v.* Bligh, 11 R. I. 94; Clopton *v.* Elkin, 49 Miss. 95; Brou *v.* Becnel, 20 La. Ann. 254; Merritt *v.* Merle, 22 La. Ann. 257. Although in general money paid on a note void for its illegal consideration may be recovered. Knowlton *v.* Spring Co., 57 N. Y. 518; Howson *v.* Hancock, 8 T. R. 575.

4. Thus a payee who has been accommodated by the maker or acceptor cannot recover. Darnell *v.* Williams, 2 Stark. 166; Patten *v.* Pearson, 55 Me. 39; Eastman *v.* Shaw, 65 N. Y. 522.

An acceptor may show as against the drawer that his acceptance was for too large a sum by mistake. Third Nat. Bank *v.* Harrison, 3 McCrary (U. S.), 316.

And on a note made to an agent such defence is good against his principal. Boyt *v.* Whitehead, 50 Ga. 76; Puget de Bras *v.* Forbes, 1 Esp. 117. And may be set up by the executor of the maker. Capp *v.* Sawyer, 6 N. H. 386.

5. Rahm *v.* Bridge Co., 16 Kans. 530; Scott *v.* Seely, 27 La. Ann. 95; Hawkins *v.* Neal, 60 Miss 256; Matthews *v.* Crosby. 56 N. H. 21; Polhemus *v.* Ann Arbor Sav. Bank, 27 Mich. 44; Daniels *v.* Wilson, 21 Minn. 530; Harris *v.* Bradley, 7 Yerg. (Tenn.) 310; Chicopee Bank *v.* Chapin, 8 Metc. (Mass.) 40.

Even if the note was originally issued as a mere gift. Whitaker *v.* Edmonds, 1 Ad. & E. 638; Disher *v.* Disher, 1 P.

Passing from the persons against whom defences relating to consideration may be set up, the character of such defences is limited only by the variety of contracts and services for which men may issue notes or bills.

It is well settled that total failure of consideration is a good defence.[1]

Partial failure is generally a good defence *pro tanto*,[2] and may

Wms. 204; Heydon *v.* Thompson, 3 Nev. & M. 319.

So a check for a greater amount than the depositor's balance certified by the bank-teller can be enforced by a *bona fide* holder, although the teller had no right to make such certification. Farmers', etc., Bank *v.* Butchers' Bank, 16 N.Y. 125.

The rule is just as stringent where the consideration has failed. Leather *v.* Simpson, L. R. 11 Eq. 398; Cowing *v.* Allman, 71 N. Y. 435; Blackmer *v.* Phillips, 67 N. C. 340; Hancock *v.* Hale, 17 Fla. 808; Morris *v.* White, 28 La. Ann. 855; Stone *v.* Young, 5 Kans. 229; Smith *v.* Rawson, 61 Ga. 208; Mobile Sav. Bank *v.* Supervisors, 22 Fed. Rep. (U. S.) 580; Bearden *v.* Moses, 7 Lea (Tenn.), 459.

Therefore it cannot, as against such a holder, be shown that a commercial instrument was given for a bill of lading which proved a forgery. Robinson *v.* Reynolds, 2 Q. B. 196; Craig *v.* Sibbett, 15 Pa. St. 238. Or for a patent which proved worthless or even void. Smith *v.* Hiscock, 14 Me. 449. Or for goods which were but partly delivered. Baldwin *v.* Killian, 63 Ill. 550. Or for a vessel which was falsely represented to be seaworthy. Davis *v.* McCready, 17 N. Y. 230.

In some States *bona fide* holders are protected against such defences by statute. *Colorado.* 1877, G. L. § 112. *Georgia.* 1873, Code, § 3471. *Illinois.* 1880, Hurd's R. S. 727. *Indiana.* 1876, Davis, R. S. vol. ii. p. 76. *Iowa.* McClain's Stats. § 2114. *Texas.* 1879, R. S. art. 272.

Although in *Vermont*, where the statute provides for the defence of partial failure of consideration, it has been held not to affect *bona fide* holders. Farrar *v.* Freeman, 44 Vt. 63.

Even the defence of illegal consideration does not avail against a *bona fide* holder. So held of a note given for a wager. Shirley *v.* Howard, 53 Ill. 455; or to aid rebellion. Glenn *v.* Farmers' Bank, 70 N. Car. 191.

But if by statute the illegality has rendered the note absolutely void, then not even a *bona fide* holder can recover upon it. Tilden *v.* Blair, 21 Wall. (U. S.) 241; Great Falls Bank *v.* Farmington, 41 N. H. 32; Knox *v.* White, 20 La. Ann. 326; Smith *v.* Columbus State Bank, 9 Neb. 31; Hill *v.* Northrup, 4 T. & C. (N. Y.) 120.

Therefore when a statute declares that "no action shall be maintained . . . for the value" of liquor, a note for liquor sold cannot be sued on by a *bona fide* holder. Streit *v.* Sanborn, 47 Vt. 702. Though the general rule as to liquor notes is just the reverse. Doe *v.* Burnham, 31 N. H. 426; Taylor *v.* Page, 6 Allen (Mass.), 86.

So the statutes against gaming have prevented recoveries by *bona fide* holders in Craig *v.* Andrews, 7 Iowa, 17; Mordecai *v.* Dawkins, 9 Rich. (S. Car.) 262; Tenney *v.* Foote, 4 Bradw. (Ill.) 594.

If the first indorsee takes the paper with notice of the absence or failure of consideration, this will not deprive a second indorsee who has no such knowledge of the character of a *bona fide* holder. Masters *v.* Ibberson, 8 C. B. 100; Hascall *v.* Whitmore, 19 Me. 102.

But in general no holder will be protected beyond the price paid by him. Wiffen *v.* Roberts, 1 Esp. 261; DeWitt *v.* Perkins, 22 Wis. 451; Anderson *v.* Nicholas, 28 N. Y. 600.

1. Starr *v.* Torrey, 2 Zab. (N. J.) 190; Wells *v.* Hopkins, 5 M. & W. 7; Jackson *v.* Warwick, 7 T. R. 121. Even on a renewal note. Hooker *v.* Hubbard, 102 Mass. 239.

But it may be waived by the note having been given upon settlement of an account. Carruth *v.* Carter, 26 La. Ann. 331. Or by giving a new note upon the payee's promise to make good the consideration of the original note. Griffith *v.* Trabue, 11 Heisk. (Tenn.) 645.

Where the consideration expressed in a promissory note was "for value received," in a suit thereon, the defendant might plead and prove by parol that the consideration was a contract of hiring which had failed, according to its own terms, by reason of the death of the person; *aliter*, if the consideration had been stated in the note. Pitts *v.* Allen, 72 Ga. 69.

2. Jeffries *v.* Austen, Stra. 647; Wyck-

consist of almost any act or omission of the promisee tending to the injury of the promisor.[1]

off *v.* Runyon, 4 Vr. (N. J.) 107; Black *v.* Ridgway, 131 Mass. 80; Morgan *v.* Fallenstein, 27 Ill. 31; Petillo *v.* Hopson, 23 Ark. 196; Gamble *v.* Grimes, 2 Ind. 392.

1. That part of a note was for a firm debt contracted before the maker became a member of the firm, is a good partial defence. Guild *v.* Belcher, 119 Mass. 257.

So is the non-performance of part of the agreement, which was the consideration for the note. Payne *v.* Cutler, 13 Wend. (N. Y.) 605; Coburn *v.* Ware, 30 Me. 202; Francis *v.* Miller, 8 Md 274; Bar *v.* Baker, 9 Mo. 840; Holzworth *v.* Koch, 26 Ohio St. 33; Stacy *v.* Kemp, 97 Mass. 166.

But at common law the unliquidated partial failure of consideration is no defence, even against the payee. Evans *v.* Williamson, 79 N. Car. 86; Stone *v.* Peake, 16 Vt. 218; Drew *v.* Towle, 27 N. H. 455.

So held where the note had been given for land, and a mortgage appeared, or the title partly failed; the purchaser-maker being left to the covenants in his deed. Chase *v.* Weston, 12 N. H. 413; Greenleaf *v.* Cook, 2 Wheat. (U. S.) 13; Thompson *v.* Mansfield, 43 Me. 490; Reese *v.* Gordon, 19 Cal. 147; Martin *v.* Foreman, 18 Ark. 249.

But by statute such a defence may be pleaded in *Texas* (1879, R. S. p. 47, art. 272); *Iowa* (McC. Stat., § 2114); *New Hampshire* (1878, G. L. 509, § 13); *Indiana* (2 Dav. R. S. 1876, p. 76, § 81); *Illinois* (1880 R. S., p. 727, § 9); *Georgia* (1873, Code, § 3471); *Florida* (1850, P. L. 125); *Colorado* (1877, G. L. p. 112, § 97).

Where the amount of money called for by the expressed consideration is not fully paid, this is clearly a partial defence. McCord *v.* Crooker, 83 Ill. 556; Exchange Bank *v.* Butner, 60 Ga. 654.

But where the note is for goods sold, and they prove partly worthless—O'Neal *v.* Bacon, 1 Houst. (Del.) 215; Obbard *v.* Betham, M. & M. 483—or inferior in quality—Morgan *v.* Richardson, 1 Camp. 40 n.—these facts furnish no defence; the maker must resort to his cross-action.

Yet where the goods proved wholly valueless, as where a note was given for a supposed slave who was really free, this amounts to a total failure of consideration, and furnishes a defence. Livingston *v.* Bain, 10 Wend. (N. Y.) 384; Johnson *v.* Titus, 2 Hill (N. Y.), 606; French *v.* Gordon, 10 Kans. 370. And the worthlessness may arise from the failure to deliver *all* the goods contracted for. Agra, etc., Bank *v.* Leighton, L. R. 2 Ex. 56. But this of course is a pure question of fact.

Where the consideration for a note is a patent, and it proves worthless, the failure is total, and affords a defence. Clough *v.* Patrick, 37 Vt. 421; Bierce *v.* Stocking, 11 Gray (Mass.), 174; Earl *v.* Page, 6 N. H. 477. *Sed contra*, Wilson *v.* Hentges, 26 Minn. 288. But that it turns out of less value than anticipated is no defence. Day *v.* Nix, 9 Moo. 159.

A good partial defence is furnished by a failure of part of consideration, in quantity, as where the note was for a lot of twenty-six acres of land, and it turned out to contain a less quantity. Hamilton *v.* Conyers, 28 Ga. 276. *Cf.* Marlow *v.* King, 17 Tex. 177.

Where the title to land for which a note has been given fails utterly, that is clearly a defence. Wright *v.* McDonald, 44 Ga. 452; Curtis *v.* Clark, 33 Mass. 509; Heaton *v.* Myers, 4 Cal. 59; Stewart *v.* Insall, 9 Tex. 397; Garrett *v.* Crosson, 32 Pa. St. 373. At least where the promisee has been evicted, and is therefore unable to fulfil his contract. Rice *v.* Goddard, 14 Pick. (Mass.) 293; Wilson *v.* Jordan, 3 Stew. & P. 92. But it has also been held that no eviction is necessary. Sumter *v.* Welsh, 1 Brev. (S. Car.) 539.

But a mere litigated claim of title to the land furnishes no defence whatever. Baldridge *v.* Cook, 27 Tex. 565.

These cases are aside from any question of fraud, for a false assertion of seizing and possession on the part of the promisee will, of course, avoid the note. Stone *v.* Fowle, 22 Pick. (Mass.) 166; Coburn *v.* Haley, 57 Me. 346.

As to personal property, although inferiority of quality, has been held generally to furnish no defence. See *supra*, and Detrick *v.* McGlone, 46 Ind. 291; Bryant *v.* Pember, 45 Vt. 487; Richards *v.* Betzer, 53 Ill. 466.

Yet where there has been a warranty, as of a hedge to last five years—Edwards *v.* Pyle, 23 Ill. 354—or of a machine to do certain work—Thompson *v.* Wheeler Mfg. Co., 29 Kans. 476; Aldrich *v.* Stockwell, 9 Allen (Mass.), 45—a failure to fulfil the warranty will furnish a defence total or partial, as the case may be.

The consideration of a note or bill is often an executor's agreement to do or abstain from doing a certain thing, and when this agreement is not carried out, a defence at once arises, as where the

It is to be observed that there is a presumption of consideration in favor of all negotiable instruments,[1] and that therefore it is not necessary in the first instance either to aver or prove actual consideration,[2] the burden of proof being on him who denies it.[3]

goods for which the note was given were never delivered. Mitchell *v.* Stinson, 80 Ind. 324. Or the balance of work on a contract for which an acceptance was made, never performed. Trickey *v.* Larne, 6 M. & W. 278.

When one note was given in consideration of the surrender of another, failure to make the surrender is a defence. Jeffries *v.* Lamb, 73 Ind. 202.

Failure to deliver possession of premises for the rent of which a note has been given is a defence to the note. Andrews *v.* Woodcock, 14 Iowa, 397. So is failure to deliver a policy of insurance for which a premium note has been given. Lawrence *v.* Griswold, 30 Mich. 410.

Where the discontinuance of a pending suit was the consideration, neglect to discontinue is a defence. Bookstaver *v.* Jayne, 60 N. Y. 145.

On a note given for services, a receipt in full subsequently given for the same services shows that the consideration has failed. Pope *v.* Hays, 19 Tex. 170. And see generally, Little *v.* Thurston, 58 Me. 86; Tillotson *v.* Grapes, 4 N. H. 444; Dubois *v.* Baker, 40 Barb. (N. Y.) 556; Scotten *v.* Randolph, 96 Ind. 581.

But where the agreement, the failure to perform which is complained of, is entirely distinct from, or merely collateral to, the making of the note or acceptance, such failure is not a defence.

Therefore, when a note was given towards the endowment of a college, and an agreement made not to diminish the college funds, non-performance of that agreement furnishes no defence to the note; for the principal intent was to benefit the college. Simpson Centenary College *v.* Bryan, 50 Iowa, 293.

And where a note was given for the purchase-price of bonds, the seller agreeing to get them indorsed by a certain company, failure to procure the indorsement is no defence to the note, for the bonds which were the real consideration were delivered as agreed. Stanton *v.* Maynard, 7 Allen (Mass.), 335. And see on this point, Jones *v.* Council Bluffs Bank, 34 Ill. 313; Crawford *v.* Robie, 42 N. H. 162; Bourland *v.* Gibson, 91 Ill. 470; Henshaw *v.* Dutton, 59 Mo. 139; Howe Machine Co. *v.* Reber, 66 Ind. 498; Lester *v.* Fowler, 43 Ga. 190; Hodgkins *v.* Moulton, 100 Mass. 309.

It sometimes happens that after the consideration has been received, but before the maturity of the paper given, an apparent failure of consideration arises, as where a note was given for an animal which died before maturity; but this furnishes no defence, there having been no warranty. Winslow *v.* Wood, 70 N. Car. 430.

So the destruction by fire of premises for the rent of which a note has been given does not constitute a defence. Diamond *v.* Harris, 33 Tex. 634; Brooks *v.* Cutter, 119 Mass. 132.

So held also where the note was for the good-will of a business, which financial panic destroyed. Smock *v.* Pierson, 68 Ind. 405. Or for a patent which a patent subsequently granted rendered valueless. Crow *v.* Eichinger, 34 Ind. 65. *Cf.* Clark *v.* Smith, 21 Minn. 539. These are merely hard cases. See to the same effect Woodruff *v.* Webb, 32 Ark. 612; Dowling *v.* Blackman, 70 Ala. 303; Button *v.* Clark, 16 Ohio, 297; Kerchner *v.* Gettys, 18 S. Car. 521; Cook *v.* Whitfield, 41 Miss. 541.

1. Ingersoll *v.* Martin, 58 Md. 67; Campbell *v.* McCormac, 90 N. Car. 491; Caples *v.* Branham, 20 Mo. 244; Harris *v.* Cato, 26 Tex. 338; Matteson *v.* Morris, 40 Mich. 52; Hartman *v.* Shaffer, 71 Pa. St. 312; Townsend *v.* Derby, 3 Metc. (Mass.) 363; Holliday *v.* Atkinson, 5 B. & C. 501.

"Value received" is unnecessary; the presumption exists without such words. Kendall *v.* Galvin, 15 Me. 131.

This presumption is in favor of negotiability, therefore non-negotiable notes do not import a consideration. Buckleback *v.* Wilkins, 20 Pa. St. 26; Bristol *v.* Warner, 19 Conn. 7; Wingo *v.* McDowell, 8 Rich. (S. Car.) 446. But it may be otherwise by statute. Rogers *v.* Maxwell, 4 Ind. 243.

2. Caples *v.* Branham, 20 Mo. 244; Friedman *v.* Johnson, 21 Minn. 12; Wilson *v.* Codman, 3 Cr. (U. S.) 195; James *v.* Scott, 7 Port. (Ala.) 30.

3. Trustees *v.* Hill, 12 Iowa, 462; Sawyer *v.* Vaughn, 25 Me. 337; Nevins *v.* Chapman, 15 La. Ann. 353; Martin *v.* Tucker, 35 Ark. 279; James *v.* Chalmers, 6 N. Y. 209; Brown *v.* Kinsey, 81 N. Car. 245; Robins *v.* Maidstone, 4 Q. B. 815; Pixley *v.* Boynton, 79 Ill. 351.

Proof is necessary to overcome this presumption, and a mere denial in the

22. Acceptance of Bills of Exchange.—(*a*) *Presentment.*—Although acceptance is in general the only means by which the holder of a bill can gain any rights against the drawee, no presentment for that purpose is necessary upon bills payable on demand or upon a day named.[1]

By waiver of acceptance also, presentment is waived.[2]

And where the drawee cannot legally accept, e.g., being an infant, or cannot be found, it is unnecessary.[3]

The usual and proper manner of making presentment is by exhibiting[4] the bill and unequivocally demanding acceptance.[5]

The proper person to make presentment is the lawful holder or his agent,[6] and the person to whom it must be made the drawee or his agent.[7]

The time within which presentment must be made is said to be a reasonable time,[8] and where the facts are undisputed the question of diligence is one of law,[9] to be decided by the courts upon the admitted or proven facts of each particular case.[10]

pleadings is not enough. Gutwillig *v.* Stumes, 47 Wis. 428; Trustees *v.* Fleming. 10 Bush (Ky.), 234; Greer *v.* George, 8 Ark. 131; Long *v.* Spencer, 78 Pa. St. 303. *Sed contra*, Goodenough *v.* Huff, 53 Vt. 482.

1. Philpot *v.* Bryant, 3 C. & P. 244; Fall River Union Bank *v.* Willard, 5 Metc. (Mass.) 216; Townsley *v.* Sumrall. 2 Pet. (U. S.) 170; House *v.* Adams, 48 Pa. St. 261; Plato *v.* Reynolds, 27 N. Y. 586; Glasgow *v.* Copeland, 8 Mo. 268; Carmichael *v.* Bank of Pa., 4 How (Miss.) 567.

But a bill payable on a day certain may be presented at any time before that day. Bachellor *v.* Priest, 12 Pick. (Mass.) 399.

2. Carson *v.* Russell, 26 Tex. 452; Liggett *v.* Weed, 7 Kans. 273; Denegre *v.* Milne, 10 La. An. 324.

But waiver of protest does not waive presentment. Drinkwater *v.* Tibbetts, 17 Me. 16.

3. So provided by statute in *California* (1880, 1 Hitt. Codes, § 8218); *Dakota* (1877, Rev. C. §§ 1911, 1912); *Utah* (1882, Laws, 62, § 88).

But where the drawer and drawee are one person it is still necessary. Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15. So too, where the drawee has been instructed by the drawer not to accept. Hill *v.* Heap, Dow & R. 57; Byles on Bills, 185.

4. Fall River Union Bank *v.* Willard, 5 Metc. (Mass.) 216.

Though this is said not to be absolutely necessary. Fisher *v.* Beckwith, 19 Vt. 31.

5. So that taking the bill away and agreeing to call again with it is no presentment. Case *v.* Burt, 15 Mich. 82.

6. Story on Bills, § 229.

Agency ends with death, and a presentment after the holder's death is invalid. Gale *v.* Tappan, 12 N. H. 145.

The ordinary agent in such cases is a notary, and in some States a notary's clerk may make the presentment. Lee *v.* Buford, 4 Metc. (Ky.) 7; Schuchardt *v.* Hall, 36 Md. 590.

7. Wiseman *v.* Chiapella, 23 How. (U. S.) 368.

Parol evidence may prove the agency. Nelson *v.* Fotterall, 7 Leigh (Va.), 179.

But presentment to any person found on the drawee's premises is not enough. Cheek *v.* Roper, 5 Esp. 175.

If the drawees are partners presentment to one is enough. Mt. Pleasant Branch Bank *v.* McLaran, 26 Pa. St. 306; Gates *v.* Beecher, 60 N. Y. 518. *Aliter* if they are not. Union Bank *v.* Willis, 8 Metc. (Mass.) 504.

Where the firm has gone out of business presentment at their former office is bad. Fourth Nat. Bank *v.* Henschen, 52 Mo. 207.

8. Prescott Bank *v.* Caverly, 7 Gray (Mass.), 217; Nichols *v.* Blackmore, 27 Tex. 586; Phœnix Ins. Co. *v.* Allen, 11 Mich. 501; Knott *v.* Venable, 42 Ala. 186; Aymar *v.* Beers, 7 Cow. (N. Y.) 705.

9. Chambers *v.* Hill, 26 Tex. 472.

But generally, the facts being disputed, the question goes to the jury under the instructions of the court. Walsh *v.* Dart, 23 Wis. 334; Salisbury *v.* Renick, 44 Mo. 554; Mellish *v.* Rawdon, 9 Bing. 416.

10. The distance of the place of acceptance from that of drawing is sometimes the test, and two and a half months' delay in presentment on a bill drawn in Geor-

The place where presentment for acceptance is to be made is usually mentioned in the bill itself, and presentment at the place so named is sufficient, unless to the knowledge of the holder the drawee's office or residence is in another place.[1]

Where the drawee has changed his residence since the drawing of the bill, it is incumbent on the holder to seek him with due diligence.[2]

(*b*) *When and by Whom Made.*—Since it is only by the act of acceptance that a drawee can in general incur any liability to a holder,[3] the means of creating this liability should be and are carefully guarded.

The drawee himself,[4] therefore, or his authorized agent[5] is the only person to give an acceptance.

gia on New York has been held reasonable. Robinson *v.* Ames, 20 Johns. (N. Y.) 146. And five months on one drawn in Rio Janeiro on London. Mellish *v.* Rawdon, 9 Bing. 416.

But six years, when all parties reside in the same State, is unreasonable. Eling *v.* Brinkerhoff, 2 Hall (N. Y.), 459. And fourteen days in forwarding a sight draft from Wisconsin to New York has been so held. Walsh *v.* Dart, 23 Wis. 334. And see Vantrot *v.* McCulloch, 2 Hilt. (N. Y.) 272; Dumont *v.* Pape, 7 Blackf. (Ind.) 367; Olshausen *v.* Lewis, 1 Biss. 419; Allen *v.* Suydam, 20 Wend. (N. Y.) 321.

More time is allowed on a bill put in circulation than when it is retained by the payee. Wallace *v.* Agry, 4 Mason (U. S.), 336; Richardson *v.* Fenner, 10 La. Ann. 599; Straker *v.* Graham, 4 M. & W. 721.

And all the circumstances will be considered even when the payee himself superintends the collection, as where a bill was received by the corporation payee in due course of mail two days before their treasurer returned from an absence. On his arrival he at once forwarded it to the place of payment, where it was received three days later and presented two days later still. Yet it was held that due diligence had been used and the drawer liable, though the drawee failed the day of the bill's arrival at his place of business. Muncy Borough School District *v.* Commonwealth, 84 Pa. St. 464.

Valid excuses also for delay in presentment are: The outbreak of war. Dunbar *v.* Tyler, 44 Miss. 1. Loss of the original bill. Aboon *v.* Bosworth, 1 R. I. 401. Or the sudden illness of the holder. Aymar *v.* Beers, 7 Cow. (N. Y.) 705. And generally, by some statutes, unavoidable circumstances over which the holder has no control. *California*, Code, § 8219; *Utah*, P. L. 1882, 62, § 89; *Dakota*, Rev. Code, §§ 1911–12—acts doubtless merely declaratory of the common law.

1. Wolfe *v.* Jewett, 10 La. 383.

So, though London is named and the drawee lived in Liverpool, presentment in Liverpool is good. Mason *v.* Franklin, 3 Johns. (N. Y.) 202.

2. Hine *v.* Allely, 4 B. & Ad. 624; Bateman *v.* Joseph, 12 East, 433.

Diligence is for the jury. Smith *v.* Bank of N. S. Wales, 41 L. J. P. C. 26.

But where the drawee has absconded or cannot be found presentment at his last known residence is enough. Ratcliff *v.* Planters' Bank, 2 Sn. (Miss.), 425, and cases *supra*.

3. Wharton *v.* Walker, 4 B. & C. 163; Bailey *v.* South Western Bank, 11 Fla. 266; De Liquero *v.* Munson, 11 Heisk. (Tenn.) 15; New York, etc., Bank *v.* Gibson, 5 Duer (N. Y.), 574.

Nor does the fact that the drawee is indebted to the drawer create any obligation to accept. Grant *v.* Austen, 3 Price, 58; 1 Daniel on Neg. Inst. 442.

Nor is the drawee liable to the holder in damages for non-acceptance. New York, etc., Bank *v.* Gibson, 5 Duer (N. Y.). 574.

4. Davis *v.* Clarke, 6 Q. B. 16; May *v.* Kelly, 27 Ala. 497.

If a stranger accepts it, it may be regarded as his promissory note. Fielder *v.* Marshall, 9 C. B. 606.

Where no drawee is named, but merely the place of payment, one who writes "accepted" on the bill will admit himself to be meant, and be held as the acceptor. Wheeler *v.* Webster, 1 E. D. Smith (N. Y.), 1; Gray *v.* Milner, 3 Moore, 91; s. c., 8 Taunt. 739.

5. But on demand he must show his authority to accept. Sayer *v.* Kitchen,

If the bill is drawn on a firm, an acceptance by one partner is sufficient.[1]

The reasonable time within which acceptance must be made after presentment is twenty-four hours;[2] but after refusal, if the holder chooses to again present it, the drawee may change his mind and accept.[3]

The law merchant does not require that an acceptance be dated;[4] but when the bill is payable a time certain after sight it should be, although if omitted the real date may be shown by parol.[5]

(*c*) *Methods.*—There is no special form of words necessary to create acceptance;[6] it may even be implied from the conduct of the drawee.[7]

Perhaps the most common method is by writing the word "accepted" across the face of the bill.[8]

1 Esp. 209. And if he do so without authority he binds himself personally. West London, etc., Bk. *v.* Kitson, L. R. 13 Q. B. D. 360. *Contra,* Heenan *v.* Nash, 8 Minn. 407.

1. Even if he sign his individual name. Mason *v.* Rumsey, 1 Camp. 384.

2. Case *v.* Burt, 15 Mich. 82; Connelly *v.* McKean, 64 Pa. St. 113; Overman *v.* Hoboken City Bank, 2 Vr. (N.J.) 563; Wilcox *v.* Beal, 3 La. Ann. 404.

And if the drawee within twenty-four hours neglects to make any answer it becomes the holder's duty to protest for non-acceptance. Ingram *v.* Foster, 2 J. P. Smith, 243.

3. Exchange Bank of St. Louis *v.* Rice, 98 Mass. 288; Wynne *v.* Raikes, 5 East, 514.

An acceptance may be made after transfer of a bill. Bank of Louisville *v.* Ellery, 34 Barb. (N. Y.) 630. Or after maturity. Grant *v.* Shaw, 16 Mass. 341. Or the death of the drawer. Cutts *v.* Perkins, 12 Mass. 206; Hammonds *v.* Barclay, 2 East, 227.

4. 1 Parsons Notes and Bills, 282.

A date affixed to the drawee's signature even in a different handwriting is presumptive evidence of the time when the acceptance was made. Glassop *v.* Jacob, 4 Camp. 227.

5. Kenner *v.* Creditors, 1 La. 120.

The presumption is merely that acceptance was after the date of the bill. Roberts *v.* Bethell, 12 C. B. 778.

6. Billings *v.* De Vaux, 3 M. & G. 565; Story on Bills, § 251.

7. As where A purchased goods for B, made advances on them and drew on B for the amount of the advances, who received the goods and their proceeds but refused the bill, it was held that an acceptance should be implied from his conduct. Nutting *v.* Sloan, 57 Ga. 392. And see Hoare *v.* Dresser, 7 H. L. Cas. 290; Rees *v.* Warwick, 2 B. & Ald. 113.

8. This certainly is sufficient at common law. Corlett *v.* Conway, 5 M. & W. 653; Spear *v.* Pratt, 2 Hill (N. Y.), 582; Kaufman *v.* Barringer, 20 La. Ann. 419. Though now bad in England, under 41 and 42 Vict. c. 13.

"Excepted" ignorantly written for "accepted" has been held enough. Miller *v.* Butler, 1 Cr. C. C. (U. S.) 470.

Any equivalent of "accepted," e.g. "seen" or "presented," if the intention was to accept, would be enough. 1 Parsons N. & B. 282. *Cf.* Corlett *v.* Conway, 5 M. & W. 653.

"This is my signature and I will pay" amounts to an acceptance. Edson *v.* Miller, 22 N. H. 183; Leach *v.* Buchanan, 4 Esp. 226. But "the bill shall have my attention" does not. Rees *v.* Warwick, 2 B. & Ald. 113. And see Cook *v.* Baldwin, 120 Mass. 317; Block *v.* Wilkinson, 42 Ark. 253*.

The acceptor need not see the bill. First Nat'l Bk. *v.* Hatch, 78 Mo. 13. So that if he write saying "I am prepared to pay"—Billings *v.* De Vaux, 3 M. & G. 565—or, "the bill is correct and shall be paid"—Ward *v.* Allen, 2 Metc. (Mass.) 53—his letter amounts to acceptance.

But indefinite expressions, as "I will have to pay it"—Martin *v.* Bacon, 2 Mills 132—or, "it is all right"—Powell *v.* Jones, 1 Esp. 17—are not acceptances, for no promise to pay can be inferred.

Nor is part payment an acceptance, unless a promise to pay the rest be shown. Hunter *v.* Cobb, 1 Bush (Ky.), 239; Bassett *v.* Haines, 9 Cal. 260; Cook *v.* Baldwin, 120 Mass. 317.

Nor after once refusing acceptance will the drawee's promise "to try and save the amount" for the holder—Parkhurst *v.* Dickinson, 21 Pick. (Mass.) 307—

But by common law it is not necessary to signify acceptance in writing; a verbal acceptance is valid.[1]

Many recent statutes, however, require acceptances to be in writing.[2]

But where there is no statute to the contrary, the acceptance of bill will even be inferred from an authority given the drawer to draw it,[3] or an agreement made beforehand that it shall be accepted when presented.[4]

or to "arrange to have it satisfactorily provided for"—Webb *v.* Mears, 45 Pa. St. 222—create acceptances.

If the drawee of a bill of exchange does anything with or to the bill, or writes anything thereon which does not clearly negative an intention to accept it, then he will be charged as an acceptor; but the words "Kiss my foot," written on the bill by the drawee and signed by him, can have no other meaning than a decided and contemptuous refusal to accept it, and on such words he cannot be holden as an acceptor. Norton *v.* Knapp, 64 Iowa, 112. And see, further, McEowen *v.* Scott, 49 Vt. 376; National Bank *v.* Second National Bank, 69 Ind. 479; Pridgen *v.* Cox, 13 Tex. 257; Gallagher *v.* Black, 44 Me. 99; Petersen *v.* Hubbard, 28 Mich. 197; Shaver *v.* W. U. Tel. Co., 57 N. Y. 459; Brinkman *v.* Hunter, 73 Mo. 172; Sturges *v.* Fourth Nat. Bk., 75 Ill. 595; Spaulding *v.* Andrews, 48 Pa. St. 411; Hatcher *v.* Stalworth, 26 Miss. 376.

1. Ward *v.* Allen, 2 Metc. (Mass.) 53; Bird *v.* McIlvaine, 10 Ind. 40; Dull *v.* Bricker, 76 Pa. St. 255; Phelps *v.* Northrup, 56 Ill. 156; Walters *v.* G. H., etc., Co., 1 Tex. App. 753; Jarvis *v.* Wilson, 46 Conn. 90; McCutcheon *v.* Rice, 56 Miss. 455; Whilden *v.* Merchants', etc., Bank, 64 Ala. 1; Mason *v.* Dousay, 35 Ill. 424; Arnold *v.* Sprague, 34 Vt. 402; Hunter *v.* Cobb, 1 Bush (Ky.). 239; Sproat *v.* Mathews, 1 T. R. 182; Walker *v.* Lide, 1 Rich. (S. Car.) 249.

2. *Alabama.* 1876, Code, § 2101. *Arizona.* 1877, C. L. §§ 3469–71. *Dist. Col.* 1857, R. C. 134. *Dakota.* 1877, Rev. Code, § 1875. *Idaho.* 1874, R. L. 653. *Kansas.* 1879, Ch. c. 14, § 8. *Maine.* 1871, R. S. c. 32, § 10. *Michigan.* 1871, 1 C. L. 516, §7. *Minnesota.* 1878, G. S. 316, § 13. *Mississippi.* 1880, Rev. C. § 1133. *Nevada.* 1872, G. L. 718, § 7. *Pennsylvania.* P. L. 1881, 17. *Utah.* P. L. 1882, 60. § 73. *Washington.* 1881, Code, §§ 2302–2306. *Wisconsin.* 1878, R. S. § 1681.

3. Such authority, if explicitly referring to the bill actually drawn, amounts to an acceptance. Bayard *v.* Lathy, 2 McL. (U. S.) 462; Coolidge *v.* Payson, 2 Wheat. (U. S.) 66; Ulster Co. Bank *v.* McFarlan, 3 Denio (N. Y.), 553; Gates *v.* Parker, 43 Me. 544; Lathrop *v.* Harlow, 23 Mo. 209; Merchants' Bank *v.* Griswold, 72 N. Y. 472.

Authority to draw for advances on grain in sums that may be necessary, "and on such terms as you may make advantageously for us," amounts to an unconditional acceptance of drafts for advances. Bissell *v.* Lewis, 4 Mich. 450. And power "to value against us for any cotton he may ship to us" is an unconditional acceptance of drafts for the price of cotton so shipped. Johnson *v.* Blakemore, 28 La. Ann. 140.

But the authority must be known to the holder of the bill, and relied on by him in purchasing it. Goodrich *v.* Gordon, 15 Johns. (N. Y.) 6; Lewis *v.* Kramer, 3 Md. 265; Gates *v.* Parker, 43 Me. 544. *Contra*, that the mere existence of the authority is enough. Read *v.* Marsh, 5 B. Mon. (Ky.) 8.

Parol evidence showing lack of funds, and contradicting an authority given and relied upon, is inadmissible. Pollock *v.* Helm, 54 Miss. 1. But death—Michigan State Bank *v.* Leavenworth, 28 Vt. 209—or bankruptcy—Ogden *v.* Gillingham, 1 Baldw. 38—will terminate such authority.

4. Schimmelpennich *v.* Bayard, 1 Pet. (U. S.) 264; Savannah Bank *v.* Hoskins, 101 Mass. 370; Wakefield *v.* Greenhood, 29 Cal. 597.

Such agreements have all the force of acceptances, e.g., writing to one that "any drafts you may draw we guarantee to be paid," is the exact equivalent of actually accepting a bill drawn on the faith of the letter. Evansville National Bank *v.* Kaufmann, 24 Hun (N. Y.), 612.

But the holder must take the bill relying on the drawee's promise. Steman *v.* Harrison, 42 Pa. St. 49; Bank of Michigan *v.* Ely, 17 Wend. (N. Y.) 508; Clarke *v.* Cock, 4 East. 57.

The promise need not be in writing; a telegram has been held sufficient. Central Savings Bank *v.* Richards, 109 Mass. 413; Molson's Bank *v.* Howard, 8 J. &

If a drawee to whom a bill has been presented for acceptance detain it beyond the reasonable time allowed him to decide whether to accept or not, he may be held as an acceptor by reason of the delay.[1]

(*d*) *Qualified Acceptances.*—If absolute acceptance of a bill be refused, the holder may protest it;[2] he cannot be compelled to accept a qualified or conditional acceptance.

If he does so, he must notify all prior parties to the paper.[3]

S. (N. Y.) 15. And verbal promises upheld. Scudder *v.* Union Nat'l Bank, 1 Otto (U. S.), 406; Spaulding *v.* Andrews, 48 Pa. St. 411. And a letter promising payment *ex vi termini* includes a promise to accept. Wynne *v.* Raikes, 5 East, 514.

A, who held wool of the value of less than $4000, consigned to him by B for sale, in reply to a demand for an advance, telegraphed to B as follows: "Draw fifteen hundred." B replied by telegraph as follows: "Will you accept draft two thousand dollars?" To this A responded as follows: "Think we can get fourteen cents for ninety-nine bales very best. If you decide to sell, draw twenty-five hundred dollars on demand; if not, draw not over fifteen hundred." B sent the following telegram in reply: "Sell ninety-nine bales, fourteen cents." On receiving the first telegram, B took it to a bank, and obtained the discount of his draft on A for $1500, but did not notify A that he had drawn the draft. On receiving the last telegram sent by A, B took it to the bank, and asked to have his draft, at sight, on A for $2500 discounted. In reply to the question whether B had authorized the sale of the wool proposed in that telegram, B answered that he had, and showed the last telegram from him to A; and the bank then discounted the draft. Afterwards the draft for $1500 was presented for payment, and paid by A. Upon presentation of the draft for $2500, A, who had not been previously notified that it had been drawn, refused acceptance and payment; and it was protested for non-payment, and returned to the bank. B drew out of the bank his entire balance before the bank had notice of the dishonor of the draft. *Held*, in an action on the draft by the bank against A that the telegrams did not authorize B to draw more than $2500 in all; and that the action could not be maintained. Nevada Bank *v.* Luce, 139 Mass. 488.

That the bill has not been drawn when a written promise is given makes no difference. Pillans *v.* Van Milrop, 3 Burr. 1669. Nor need the drawee have funds to be held upon his agreement. De Tastett *v.* Cronsillatt, 2 Wash. C. C. (U. S.) 132. But verbal promises to accept for accommodation have been held to be within the Statute of Frauds, and therefore void. Flato *v.* Mulhall, 4 Mo. App. 476; Pike *v.* Irwin, 1 Sandf. (N. Y.) 14. And such promises to accept bills not yet drawn have been denied the force of acceptances in Mercantile Bank *v.* Cox, 38 Me. 500; Bank of Ireland *v.* Archer, 11 M. & W. 383. *Contra*; Townsley *v.* Sumrall, 2 Pet. (U. S.) 170. But by statute verbal promises have been held invalid in Brinkman *v.* Hunter, 73 Mo. 172; Blakiston *v.* Dudley, 5 Duer (N. Y.), 373.

A drawee will be held on his promise, although when he made it the bill was not only drawn but dishonored. Wynne *v.* Raikes, 5 East, 514.

If it be obtained by fraud, none but a *bona fide* holder for value can hold him to it. Pillans *v.* Van Milrop, 3 Burr. 1669.

The acceptance until delivery is incomplete; writing an acceptance on a bill without the holder's knowledge is not enough. Dunaven *v.* Flynn, 118 Mass. 537.

1. *Alabama.* 1876, Code, § 2105. *Arizona.* 1877, C. C. § 3474. *Arkansas.* 1874, R. S. § 554. *Idaho.* R. L. 653. § 11. *Dist. Col.* 1857, Rev. C. 135, § 11. *Kansas.* 1879, Ch. c. 14, § 13. *Nevada.* 1873, 1 Ch. c. 5, § 11. *Missouri.* 1879, 1 R. S. § 538. *New York.* 1882, 3 R. S. 2243, § 11. *Washington.* 1881, Code, § 2307. *California.* 1880, 1 Hitt. Cod. § 8186. *Dakota.* 1877, Rev. C. § 1891. *Utah.* P. L. 1882, 59, § 68.

So held aside from statute in Hall *v.* Steele, 68 Ill. 231.

But not if detained for ten days awaiting promised funds. Mason *v.* Barff, 2 B. & Ald. 26. And six days' delay held not to be acceptance in Colorado Nat'l Bank *v.* Boettcher, 5 Col. 185; and *cf.* Yates *v.* Eno, 4 Hun (N. Y.), 96; Koch *v.* Howell, 6 W. & S. (Pa.) 350.

2. Ford *v.* Angelrodt, 37 Mo. 50; Sebag *v.* Abithal, 4 M. & S. 466; Parker *v.* Gordon, 7 East, 387; Story on Bills, § 240.

3. Paton *v.* Winter, 1 Taunt. 422; Story on Bills, § 240.

It is therefore important to observe

The condition of the acceptance need not be indorsed on the bill, but may be contained in a separate instrument.[1] In such case the burden of proving it is on the acceptor,[2] and it will not be admitted to defeat a *bona fide* holder without knowledge ;[3] but with these exceptions the acceptance binds all parties,[4] and the drawer can only be rendered liable by the acceptor's failure to pay according to his qualified undertaking.[5]

A drawee may accept for a part only of the bill.

A holder cannot be compelled to take such acceptance, and if he does should promptly protest for the balance of the bill.[6]

(*e*) *Liability of Acceptor.*—By acceptance the drawee becomes, as to all parties other than the drawer, the principal debtor,[7] and if his acceptance has been given for value, this is true even as to the drawer.[8]

Acceptance is held to admit the genuineness of the drawer's signature [9] and his right to draw the bill.[10]

what acceptances are qualified or conditional. "Payable when house is ready" —Cook *v.* Wolfendale, 105 Mass. 401— "when in cash" from the cargo of a vessel—Julian *v.* Shobrooke, 2 Wils 9— "when collected"—Swanzey *v.* Breck, 10 Ala. 633—have all been held expressions rendering acceptances containing them conditional. *Cf.* Hoagland *v.* Erck, 11 Neb. 580; Newhall *v.* Clark, 3 Cush. (Mass.) 376.

But adding the word "administrator" does not. Tassey *v.* Church, 4 W. & S. (Pa.) 346. Nor is an absolute acceptance rendered conditional by the order being to "pay if in funds." Kemble *v.* Lare, 3 McL. (U. S.) 272.

1. Gibbon *v.* Scott, 2 Stark. 286; Bowerbank *v.* Monteiro, 4 Taunt. 844.

2. Mason *v.* Hunt, Dougl. 296; Ford *v.* Angelrodt, 37 Mo. 50.

3. United States *v.* Bank of the Metropolis, 15 Pet. (U. S.) 377, and cases *supra.*

4. Wintermute *v.* Post, 4 Zab. (N. J.) 423; McCutcheon *v.* Rice, 56 Miss. 455; Green *v.* Raymond, 9 Neb. 295; Smith *v.* Abbot, 2 Stra. 1152.

5. Campbell *v.* Pettengill, 7 Me. 126; Gallery *v.* Prindle, 14 Barb. (N. Y.) 186.

6. Wegerslosse *v.* Keene, 1 Stra. 214.

The rules of conditional acceptances have been applied also to a drawee's promise to pay in instalments. Rice *v.* Ragland. 10 Humph. (Tenn.) 545. Or provided the bill be renewed. Russell *v.* Phillips. 14 Q. B. 891; Clarke *v.* Gordon, 3 Rich (S. Car.) 311.

Nor can a holder be obliged to take an acceptance making the bill payable at a place different from that named. Niagara Dist. Bank *v.* Fairman Mfg. Co., 31 Barb. (N. Y.) 403. But a particular bank in the town or city named may be specified. Troy City Bank *v.* Lanman, 19 N. Y. 477; Myers *v.* Standart, 11 Ohio St. 29.

7. Philpot *v.* Bryant, 4 Bing. 720; Fentum *v.* Pocock, 5 Taunt. 192; Fuller *v.* Leonard, 27 La. Ann. 635.

Even after failure of consideration. Marsh *v.* Low, 55 Ind. 271.

But if the acceptance has been for the drawer's accommodation, the drawee is the principal debtor only as to subsequent holders. Byers *v.* Franklin Coal Co., 106 Mass. 131; Anderson *v.* Anderson, 4 Dana (Ky.), 352; First Natl. Bank *v.* Morris, 1 Hun (N. Y.), 680.

8. Simmonds *v.* Parminter, 1 Wils. 185.

And if the accommodation acceptor subsequently receives funds to meet the bill, he becomes a debtor to the drawer as if he had originally received value. Parker *v.* Lewis, 39 Tex. 394; Darnell *v.* Williams, 2 Stark. 145.

9. Bank of Commerce *v.* Union Bank, 3 N. Y. 230; Williams *v.* Drexel, 14 Md. 566; Bank of U. S. *v.* Bank of the State of Ga., 11 Wheat. (U. S.) 333; Ellis *v.* Ohio Life Ins., etc., Co., 4 Ohio St. 628; Peoria, etc., R. Co. *v.* Neill, 16 Ill. 269; Hoffman *v.* Bank of Milwaukee, 12 Wall. (U. S.) 181; Beeman *v.* Duck, 11 M. & W. 251.

Therefore an acceptor who has paid a forged bill to an innocent holder for value cannot recover the amount so paid. Price *v.* Neal, 3 Burr. 1354. *Cf.* Horstman *v.* Henshaw, 11 How. (U. S.) 177.

But paying upon one forgery will not bind the acceptor to honor other similarly forged paper. Morris *v.* Bethell, L. R. 5 C. P. 47; Byles on Bills, 203.

10. Thus acceptance of a bill drawn by

But acceptance does not admit that the whole bill is genuine.[1]

A drawee, not being supposed to have the same familiarity with the signature of an indorser that he has with that of the drawer, does not by his acceptance admit the genuineness of an indorsement.[2]

Consideration moving to the acceptor is always presumed,[3] and after dishonor by the acceptor, the drawer, having paid the bill, may sue on the acceptance.[4]

An acceptance, or agreement to accept, may be revoked at any time before delivery,[5] but once delivered it can be extinguished only by payment, or its equivalent.[6]

an agent admits his agency. Robinson *v.* Yanow, 7 Taunt. 455. By a firm, admits the partnership. Bass *v.* Clive, 4 M. & S. 13.

A drawee who accepts the bill of an infant cannot set up infancy against the bill. Taylor *v.* Croker, 4 Esp. 187. Nor coverture after acceptance of a married woman's draft. Smith *v.* Marsack, 6 C. B. 486. *Cf.* Aspmaie *v.* Wake, 10 Bing. 51; Halifax *v.* Lyle, 3 Exch. 446; Ashpitle *v.* Bryan, 3 B. & S. 474.

1. So where the bill had been raised by the drawer's agent, the drawee was held not to have admitted the larger amount to be correct by his acceptance. Young *v.* Grote, 4 Bing. 253; Ward *v.* Allen, 2 Metc. (Mass.) 53.

The drawee, who, without notice of any forgery, has paid a draft to the holder to whom it was negotiated by the forged indorsement of the payees' names, may recover of the holder the money paid upon the draft. The Star Fire Insurance Co. *v.* The New Hampshire National Bank, 60 N. H. 442.

But where the acceptor's negligence has given currency to a bill drawn for an excessive amount, he will for this reason be estopped from setting up the fraud as against a *bona fide* holder. Young *v.* Lehman, 63 Ala. 519.

2. Holt *v.* Ross, 54 N. Y. 472; Tucker *v.* Robarts, 16 Q. B. 560; Horstman *v.* Henshaw, 11 How. (U. S.) 177. Neither as to handwriting. Smith *v.* Chester, 1 T. R. 654. Nor authority to indorse. Prescott *v.* Flinn, 9 Bing. 19.

3. Jarvis *v.* Wilson, 46 Conn. 90; Kendall *v.* Galvin, 15 Me. 131; Eastin *v.* Osborn, 26 La. Ann. 153; Vere *v.* Lewis, 3 T. R. 183.

Even if the order is to pay "if in funds." Kemble *v.* Lull, 3 McL. (U. S.) 272.

But the presumption does not apply to a letter requesting but not ordering payment. Gillilan *v.* Myers, 31 Ill. 525.

As between drawer and acceptor it may be rebutted. Hidden *v.* Waldo, 55 N. Y. 294. But in favor of *bona fide* holders it is conclusive. Kelly *v.* Lynch, 22 Cal. 661; Boggs *v.* Lancaster Bank, 7 W. & S. (Pa.) 331.

Debts due by the acceptor to either the drawer or payee form a sufficient consideration. Fisher *v.* Beckwith, 19 Vt. 31; Walker *v.* Sherman, 11 Metc. (Mass.) 170. And if the acceptance was for the drawer's accommodation to the knowledge of the payee, the latter may still recover from the acceptor, for the intent of the acceptance was to induce the payee to take the bill. Miggett *v.* Baum, 57 Miss. 22.

4. Davis *v.* McConnell, 3 McL. (U. S.) 391; Gage *v.* Kendall, 15 Wend. (N. Y.) 640.

But not so, of course, when the acceptance was for the drawer's accommodation. Thurman *v.* Van Brunt, 19 Barb. (N. Y.) 409. Or even for that of the payee, the acceptor agreeing to look to him only for reimbursement. Thurman *v.* Van Brunt, 19 Barb. (N. Y.) 409.

An acceptance made upon goods of the drawer in the acceptor's possession is for a valid consideration, yet if the goods turn out insufficient in value to cover the bill, the acceptor may recover from the drawer the amount of his loss. Hidden *v.* Waldo, 55 N. Y. 294; Gihon *v.* Stanton, 9 N. Y. 476.

5. Trimmer *v.* Oddy, 6 East, 200; First Nat. Bank *v.* Clark, 61 Md. 401; Cox *v.* Troy, 5 B. & Ald. 474; Ilsley *v.* Jones, 12 Gray (Mass.), 260.

6. Bacon *v.* Searles, 1 H. Bla. 88.

The payment must be made after maturity. Stark *v.* Alvord, 49 Tex. 260.

A release from the party to whom the acceptor is liable is a discharge as valid as payment. Byles on Bills, 199. And so is a waiver of all claim against the acceptor by such party, if it amount to "an unconditional renunciation." Whatley *v.* Tricker, 1 Camp. 35. And such waiver may be by parol. Wintermute *v.* Post, 4 Zab. (N. J.) 420.

23. Indorsement—(*a*) *Generally.*—By the law merchant, indorsement is the only recognized method of transferring title to bills and notes.[1]

The rules before stated limiting the capacity of some persons to make or draw notes and bills are in general applicable to their power to indorse.[2]

Upon the death of the owner of a note or bill, the only proper method of transferring title, even to a specific legatee of the paper, is by the indorsement of the executor or administrator.[3]

An indorsement may be made at any time; before the creation of the note or bill,[4] when it is partly completed, blanks being left in it,[5] before or after acceptance,[6] after refusal to accept,[7] or after maturity.[8]

An indorsement after maturity is equivalent to drawing a new bill payable on demand,[9] which must be made within a reasonable

1. Chitty on Bills, 258; Byles on Bills, 235; Story on Bills, § 201; Story on Prom. Notes, § 120.

But it is obvious that a forged indorsement can pass no title. Indiana Nat. Bank *v.* Holtshaw, 98 Ind. 85; Rodgers *v.* Ware, 2 Neb. 29.

And if the indorsement be by one of the same name as the payee or owner, it is a nullity, and parol evidence is admissible to show the fraud. Mead *v.* Young, 4 T. R. 28.

2. See *ante*, §§ 14, 15.

Therefore several joint payees must unite in indorsing. Carrick *v.* Vickery, Dougl. 653. *Contra*, if they are joint owners, the indorsement of one will pass title. Snelling *v.* Boyd, 5 T. B. Mon. (Ky.) 172. But the indorsement "A and B," on a note to those two persons who are not partners is good. Cooper *v.* Bailey, 52 Me. 230.

As one partner may execute firm paper, so he may indorse it Burnham *v.* Whittier, 5 N. H. 334.

An unauthorized indorsement by an agent is void. Wilcox *v.* Turner, 46 Ga. 218. Unless ratified. Coykendall *v.* Constable, 1 East. Rep. (N. Y.) 166. And the instrument indorsed may be recovered by the principal.

But lack of authority in the payee's agent to make the indorsement is no defence to a maker, at the suit of a *bona fide* holder for value before maturity. City Bank of New Haven *v.* Perkins, 29 N. Y. 554.

An infant or corporation may make a valid indorsement of a note or bill payable to them, although they would not have had power to issue any such paper. Story on Bills, § 196; Smith *v.* Johnson, 3 H. & N. 222.

3. Stagg *v.* Linnenfelser, 59 Mo. 336; Peltier *v.* Babillion, 45 Mich. 384; Auerbach *v.* Pritchett, 58 Ala. 451.

If the owner die leaving the note indorsed in blank, his executor or administrator may sue upon it in his own name. Barlow *v.* Myers, 24 Hun (N. Y.), 286; Barrett *v.* Barrett, 8 Me. 353. But he cannot confer title upon another by mere delivery. Clark *v.* Sigourney, 17 Conn. 511; Clark *v.* Boyd, 2 Ohio, 57.

An indorsement to a deceased person is void, and will not vest title in his estate. Valentine *v.* Halloman, 63 N. Car. 475.

4. In which case the indorser is liable for any amount for which the instrument is subsequently drawn. Mitchell *v.* Culver, 7 Cow. (N. Y.) 336; Putnam *v.* Sullivan, 4 Mass. 45; Schultz *v.* Astley, 2 Bing. N. C. 544.

5. Such an indorsement creates an indefinite letter of credit, and the indorsee is liable as in the preceding case. Russell *v.* Langstaffe, 2 Dougl. 514; Usher *v.* Dauncey, 4 Camp. 97.

6. Byles on Bills, 167.

7. If the payee presents for acceptance, is refused, fails to give notice to the drawer, and then indorses to an innocent purchaser, both he and the drawer are liable to such purchaser. O'Keefe *v.* Dunn, 5 M. & S. 282. *Cf.* Andrews *v.* Pond. 13 Pet. (U. S.) 65.

8. Leavitt *v.* Putnam, 3 N. Y. 494; Brown *v.* Hull, 33 Gratt. 23; Boehm *v.* Stirling, 7 T. R. 423.

9. Colt *v.* Barnard, 18 Pick. (Mass.) 260; Tyler *v.* Young, 30 Pa. St. 143; Brown *v.* Hull, 33 Gratt. (Va.) 23; Smith *v.* Caro, 9 Oreg. 278; Van Hoesen *v.* Van Alstyne, 3 Wend. (N. Y.) 75; Goodwin *v.* Davenport, 47 Me. 112.

It is an indorsement, and the indorser liable as such, though the note was pay-

time,[1] and the indorsee is bound to make such demand, and give his indorser notice of dishonor.[2]

The rights conferred by an indorsement after maturity are exactly those which the indorser had.[3]

There is a presumption that an undated indorsement was made at the time of making the note or bill,[4] or at least before maturity.[5]

able to bearer. Allwood *v.* Haseldon, 2 Bailey (S. Car.) 437.

1. Leavitt *v.* Putnam, 3 N. Y. 494.

2. Graul *v.* Strutzel, 53 Iowa, 712; Dwight *v.* Emerson, 2 N. H. 159; Swartz *v.* Redfield, 13 Kans. 550; Beche *v.* Brooks, 12 Cal. 308; Berry *v.* Robinson, 9 Johns. (N. Y.) 121; Levy *v.* Drew, 14 Ark. 334.

As to the question what is a reasonable time, *vide* PRESENTMENT, *infra*.

3. Texas *v.* Hardenberg, 10 Wall. (U. S.) 68; Darling *v.* Osborne, 51 Vt. 148; Clark *v.* Dederick, 31 Md. 148; Diamond *v.* Harris, 33 Tex. 634; Williamson *v.* Doby, 30 Ark. 689; Bissell *v.* Gowdy, 31 Conn. 47.

If the indorser was a *bona fide* holder so is the indorsee. Woodman *v.* Churchill. 52 Me. 58; Peabody *v.* Rees, 18 Iowa, 571; Bradley *v.* Marshall, 54 Ill. 173; Miller *v.* Talcott, 54 N. Y. 114.

The right of the indorser to sue is the test of his right to do so. Wilson *v.* Mechanics' Savings Bank, 45 Pa. St. 488. Even if he takes with notice of the defence which is afterwards urged against him. Stamper *v.* Hayes, 25 Ga. 546.

But even equitable defences good against the indorser are good against the indorsee after maturity. Rothschild *v.* Corney, 9 B. & C. 391; Crippo *v.* Davis, 12 M. & W. 159; Smith *v.* Lawson. 18 W. Va. 212; Glasscock *v.* Smith, 25 Ala. 474; Wheeler *v.* Barret, 20 Mo. 573; Miller *v.* Bingham, 29 Vt. 82; Lord *v.* Favorite, 29 Ill. 149; Bower *v.* Hastings, 36 Pa. St. 285; Thomas *v.* Kinsey, 8 Ga. 421; Davis *v.* Bradley, 20 La. Ann. 555; Sprague *v.* Graham, 29 Me. 160; Sargent *v.* Southgate, 5 Pick. (Mass.) 312; Odiorne *v.* Howard, 10 N. H. 343; Green *v.* Louthaine, 49 Ind. 139; Stannus *v.* Stannus. 30 Iowa, 448; O'Callaghan *v.* Sawyer. 5 Johns. (N. Y.) 118.

But this rule does not apply to equities between the intermediate parties, as where the plaintiff's indorser (who indorsed after maturity) had agreed with the first indorser who was sued not to pursue him on the note, *held*, no defence. Hill *v.* Shields, 81 N. Car. 250. *Cf.* Etheridge *v.* Gallagher, 55 Miss. 458; Way *v.* Lamb, 15 Iowa, 79; Hayward *v.* Stearns, 39 Cal. 58.

Since accommodation paper is really a loan of credit, it has been thought that the loan expired at maturity, and that therefore an indorsement by the party accommodated after maturity left the indorsee open to the defence of want of consideration. Diamond *v.* Harris, 33 Tex. 634; Battle *v.* Weems, 44 Ala. 105; Whitwell *v.* Crehore, 8 La. 540; Coghlan *v.* May. 17 Cal. 515; Hoffman *v.* Foster, 43 Pa. St. 137; Simons *v.* Morris, 53 Mich. 155; Chester *v.* Dorr, 41 N. Y. 279. But other authorities place such paper on the same basis as ordinary commercial instruments. and unless the purpose of the accommodation has been disregarded the indorsee after maturity, even with knowledge of its accommodation character, may recover. Charles *v.* Marsden, 1 Taunt. 224; Lazarus *v.* Cowie, 3 Q. B. 459; *Ex parte* Swan, L. R. 6 Eq. 358; Seyfert *v.* Edison, 16 Vr. (N. J.) 393; Dunn *v.* Weston, 71 Me. 270.

The defences mentioned in §§ 14–21, *supra*, may, of course, be urged against the indorsee after maturity when they could have been used against his indorser; and it may be added that payment before such indorsement is a bar—Kellogg *v.* Schnaake, 56 Mo. 136; Schuster *v.* Marden, 34 Iowa, 181; Elgin *v.* Hill, 27 Cal. 372; Reichart *v.* Koerner, 54 Ill. 306; Halsay *v.* Lange, 28 La. Ann. 248—whether the indorsee knew it or not,—Capps *v.* Gorham, 14 Ill. 198,—or the note was for accommodation or value,—Blenn *v.* Lyford, 70 Me. 149,—because the payment of a negotiable instrument at maturity destroys its negotiability. Bartrum *v.* Caddy, 9 A. & E. 275; Pray *v.* Maine, 7 Cush. 253; Hopkins *v.* Farwell, 32 N. H. 425.

A release has the same effect as payment. Thoroughgood *v.* Clark, 2 Stark. 251.

But payment and subsequent indorsement, both before maturity, constitute no defence against a *bona fide* holder. Byles on Bills, 173.

4. Batch *v.* Onion, 4 Cush. (Mass.) 559; Good *v.* Martin, 5 Otto (U. S.), 90; Burnham *v.* Wood, 8 N. H. 334; Parker *v.* Tuttle, 41 Me. 349; Smith *v.* Ferry, 69 Mo. 142; White *v.* Weaver, 41 Ill. 409; Hayward *v.* Munger, 14 Iowa, 516; Bates *v.* Prickett, 5 Ind. 22; Watson *v.* Flanagan, 14 Tex 354.

5. Parkin *v.* Moon, 7 C. & P. 408;

The real date, however, may be shown by parol.[1]

If a person having an equitable title to a note or bill begin suit upon it, an indorsement to him even at the trial is sufficient.[2]

To complete an indorsement delivery is necessary;[3] so also is a consideration,[4] though *prima facie* every indorsement is upon consideration.[5]

(*b*) *Form.*—Indorsement is "the writing of one's name upon (a note or bill) with intent to incur the liability of a party who warrants payment, provided it is duly presented to the principal at maturity not paid by him, and such failure is duly notified to the indorser."[6]

The usual words of indorsement are "pay," "pay to," or "pay to the order of" the indorsee—but no especial words are necessary to make the act valid.[7]

Leland *v.* Farnham, 25 Vt. 553; Dickerson *v.* Burke, 25 Ga. 225; Hopkins *v.* Kent, 17 Md. 113; Mason *v.* Noonan, 7 Wis. 609; Rahm *v.* Bridge Co., 16 Kans. 530; Bearden *v.* Moses, 7 B. J. Lea (Tenn.), 429; Treadwell *v.* Blount, 86 N. Car. 33; Andrews *v.* Chadbourne, 19 Barb. (N. Y.) 147. See 1 Dan. Neg. Inst. 665, and 2 Rand. of Com. Paper, where this view is preferred.

1. Clendenin *v.* Southerland, 31 Ark. 20; Mobley *v.* Ryan, 14 Ill. 51; Anderson *v.* Weston, 6 Bing. N. C. 296.

2. Brown *v.* McHugh, 35 Mich. 50; Hudson *v.* Morris, 55 Tex. 595; Ober *v.* Goodridge, 27 Gratt. (Va.) 878.

And the transfer of a note pending suit on it terminates the suit. Curtis *v.* Bemis, 26 Conn. 1; Vila *v.* Weston, 33 Conn. 42.

3. Denton *v.* Peters, L. R. 5 Q. B. 475; Wulschner *v.* Sells, 87 Ind. 71; Kettle *v.* Delamater, 3 Neb. 325.

The rules as to delivery of notes after execution apply. See § 13, *ante.* As to notes payable to bearer or under a blank indorsement of any note or bill, delivery is all that is necessary to pass title. Hutchings *v.* Low, 1 Gr. (N. J.) 246; Hall *v.* Allen, 37 Ind. 541; Cobb *v.* Drake, 36 Miss. 60; Poorman *v.* Mills, 35 Cal. 118; Story on Prom. Notes, § 118. And notes payable to a fictitious person are considered as payable to bearer. Foster *v.* Shattuck, 2 N. H. 446.

4. Craig *v.* Kittredge, 46 N. H. 57; Weston *v.* Hight, 17 Me. 287.

5. Lafayette Savings Bank *v.* Stoneware Co., 4 Mo. App. 276; Luning *v.* Wise, 64 Cal. 410; Frederick *v.* Winans, 51 Wis. 472.

But it cannot affect the maker of a note that it was indorsed without consideration; he is liable at all events. Therefore an indorsee who received a note as a gift or for collection may maintain suit on it. McPherson *v.* Weston 64 Cal. 275.

6. 1 Daniel on Neg. Inst. 593.

It can only be in writing. Mott *v.* Wright, 4 Biss. (U. S.) 53. But a mark is sufficient if intended as a signature. George *v.* Surrey, Moo. & M. 516. So are the indorser's initials. Story on Prom. Notes, § 121.

The signature may be in pencil. Closson *v.* Stearns, 4 Vt. 11. And it may be on the face of the instrument instead of the back. Haines *v.* Dubois, 1 Vr. (N. J.) 259; Herring *v.* Woodhull, 29 Ill. 92. Or on an *allonge*. Folger *v.* Chase, 18 Pick. (Mass.) 63; French *v.* Turner, 15 Ind. 59.

Delivery of negotiable paper without indorsement does not amount to a transfer of the title thereto unless by way of equitable assignment; and as such an assignment is not, like a negotiable transfer, discharged of equities any person in possession thereby cannot confer by delivery any better title than he owns, and is not authorized to sue on the paper in his own name. Minor *v.* Bewick, 56 Mich. 491.

7. Thus "Pay A on account of B" is a good indorsement to B. First Nat. Bank *v.* Smith, 132 Mass. 227.

"I this day sold to B the within note" is likewise a good indorsement to B. Adams *v.* Blethea, 66 Me. 19.

An assignment written on the note has a like effect. Dixon *v.* Clayville, 44 Md. 573; Henderson *v.* Ackelmire, 59 Ind. 540; Vanzant *v.* Arnold, 31 Ga. 210; Sears *v.* Lantz, 47 Iowa, 658. So has a guaranty of collection. Judson *v.* Goodwin, 37 Ill. 286; Russell *v.* Klink, 53 Mich. 161; Bissell *v.* Gowdy, 31 Conn. 47. So has a promise to pay damages on his honor. Blakely *v.* Grant, 6 Mass. 386. So has a statement that the note

A blank indorsement which consists merely of the indorser's name written upon the instrument renders it transferable by delivery,[1] and confers the title and right to sue upon the holder,[2] who may also fill the blank and make the indorsement special.[3]

Indorsements unnecessary to the holder's title may be stricken out by him.[4]

Where an indorser regains possession of a note or bill, he can of course maintain no action against any prior party who could have sued him on his original indorsement.[5]

was given for value, and that there is no defence to it. Dunning *v.* Heller, 19 Cent. L. J. (Pa.) 96.

And see Richards *v.* Frankum, 9 C. & P. 222; Walker *v.* Krebaum, 57 Ill. 252; Trust Company *v.* National Bank, 11 Otto, 68; Robinson *v.* Lair, 31 Iowa, 9; Pickering *v.* Cording, 92 Ind. 306.

1. Murrell *v.* Marshall, 60 Ill. 289; McDonald *v.* Bailey, 14 Me. 101.

Further indorsement may be made if desired. Melton *v.* Gibson, 97 Ind. 158.

A blank indorsement may follow several special indorsements, and the instrument will thereafter be transferable by delivery. Story on Prom. Notes, § 139.

2. Burnap *v.* Cook, 32 Ill. 168; Brush *v.* Scribner, 11 Conn. 388; Habersham *v.* Lehman, 63 Ga. 380.

Any holder, however remote under such indorsement, may maintain suit in his own name. Emerson *v.* Cutts, 12 Mass. 78; Coy *v.* Stiner, 53 Mich. 42; Rich *v.* Starbuck, 51 Ind. 87. And cannot be compelled to show in what capacity he holds the note. Mauran *v.* Lamb, 7 Cow. (N. Y.) 174.

He need not fill up the blank. Moore *v.* Pendleton, 16 Ind. 481. Possession is presumptive proof of title and right to sue. Palmer *v.* Nassau Bank, 78 Ill. 380; New Orleans Bk'g Co. *v.* Bailey, 18 La. Ann. 676; Hays *v.* Hathorn, 74 N. Y. 486; International Bk. *v.* German Bk., 71 Mo. 183; Robertson *v.* Dunn, 87 N. Car. 191.

3. Evans *v.* Gee, 11 Pet. (U. S.) 80; Chesley *v.* Taylor, 3 Gill (Md.), 251; Lovell *v.* Evertson, 11 Johns. (N. Y.) 52; Maxwell *v.* Vanzant, 46 Ill. 58; Andrews *v.* Simms, 33 Ark. 771.

But he cannot write in a guaranty. Blatchford *v.* Milliken, 35 Ill. 434; Seymour *v.* Mickey, 15 Ohio St. 515; Clouston *v.* Barbiere, 4 Sneed (Tenn.), 336, unless it was so agreed by the indorser, Leech *v.* Hill, 4 Watts (Pa.), 448; Windheim *v.* Ohlendorf, 3 Bradw. (Ill.) 436. Nor can he insert a waiver of demand and notice. Allen *v.* Coffil, 42 Ill. 293.

Even an equitable holder may fill up the blank. Moore *v.* Maple, 25 Ill. 341. Or the personal representative of a deceased holder. Lucas *v.* Bryne, 35 Md. 485.

Where there have been special indorsements following the blank one, a holder may fill up the blank and derive title from that, not regarding the subsequent special ones. Kiersted *v.* Rogers, 6 H. & J. (Md.) 282; 2 Rand. Com. Paper, 349.

A holder may fill in his own name, or that of some other person to whom he wishes to make title. Treuttel *v.* Barandon, 8 Taunt. 100; Fairfield *v.* Adams, 16 Pick. 381; Skinner *v.* Church, 36 Iowa, 91; Farwell *v.* Meyer, 36 Ill. 510. And may do so at any time. Hunt *v.* Armstrong, 5 B. Mon. (Ky.) 399; Nelson *v.* Dubois, 13 Johns. (N. Y.) 175.

4. As where one has indorsed for collection and the note was dishonored and returned, the owner may strike out his own indorsement. Nevins *v.* De Grand, 15 Mass. 436. And this affords no ground for suspicion that he is not the *bona fide* owner. Bank of Montreal *v.* Denar, 6 Bradw. (Ill.) 294

But indorsements cannot be stricken out and the indorsers held also. Bartlett *v.* Benson, 14 M. & W. 733.

Nor unless one is the equitable owner of the paper can he strike out the name of a special indorsee and substitute his own. Porter *v.* Cushman, 19 Ill. 572; Morris *v.* Poillon, 50 Ala. 403. E.g., a bank may strike out the name of its cashier as special indorsee and substitute its own, the corporation being the real owner. Mechanics' Bk. *v.* Valley Packing Co., 4 Mo. App. 210.

And see Williams *v.* Potter, 72 Ind. 354; Merz *v.* Kaiser, 20 La. An. 377; Reading *v.* Beardsley, 41 Mich. 123; Witherell *v.* Ela, 42 N. H. 295; Pilmer *v.* Branch Bk., 19 Iowa 112; Chatauqua Co. Bk. *v.* Davis, 21 Wend. (N. Y.) 584; Dugan *v.* U. S., 3 Wheat. (U. S.) 172.

5. Bishop *v.* Hayward, 4 T. R. 470; Naglee *v.* Lyman, 14 Cal. 451; Bond *v.*

An ordinary method of transferring title without liability is by an indorsement "without recourse."[1]

Indorsers often facilitate their own liability by adding the words "protest waived" or the like,[2] or, on the other hand, may render their indorsements conditional.[3]

So they may restrict their indorsements, making the instrument indorsed payable to whom they please, and him only.[4]

(*c*) *Effect.*—Whatever the interest of the indorser may be, it is transferred by his indorsement to the indorsee.[5]

The negotiable qualities of the paper are transferred with it,[6] and the right of bringing suit in his own name vested in the indorsee.[7]

Upon indorsement a new contract arises governed by the law of the place where it is made.[8]

Storrs, 13 Conn. 412; Penny *v.* Innes, 5 Tyrw. 107; Morris *v.* Walker, 15 Q. B. 589.

1. Such an indorsement is equivalent to transfer by delivery; it passes title completely without *commercial* liability. Craft *v.* Fleming, 46 Pa. St. 140; Waite *v.* Foster, 33 Me. 424; Rayne *v.* Ditto, 27 La. Ann. 622; Welch *v.* Lindo, 7 Cr. (U. S.) 159. But it warrants that the paper is genuine and valid. Hannum *v.* Richardson, 48 Vt. 508. Not usurious. Challis *v.* McCrum, 22 Kans. 157. Nor paid off. Ticonic Bk. *v.* Smiley, 27 Me. 225. If any of these warrantees fail, an action for money had and received will lie against the indorser. Watson *v.* Cheshire, 10 Iowa, 202.

2. Chitty on Bills, 270.

3. Such indorsements do not affect negotiability. Tappan *v.* Ely, 15 Wend. (N. Y.) 362.

4. But omitting the usual words "or order" or "to the order of" will not restrict the negotiability of the instrument indorsed. Leavitt *v.* Putnam, 3 N. Y. 494; Atcheson *v.* Fonntain, 1 Stra. 557.

"Pay A only" is a good restrictive indorsement which stops the negotiability of the note. Byles on Bills, 159; Edie *v.* East India Co., 2 Burr. 1227. So are all indorsements for collection. First Nat. Bk. *v.* Gregg, 79 Pa. St. 384; Sweeny *v.* Easter, 1 Wall. (U. S.) 166; Cecil Bk. *v.* Farmers' Bk., 22 Md. 148.

"Payable to A for me" is an indorsement for collection. Williams *v.* Potter, 72 Ind. 354. So in effect is "Pay A for my use." Brown *v.* Jackson, 1 Wash. C. C. (U. S.) 512.

Such indorsements pass title as against prior parties, but do not render the indorser liable to subsequent holders; yet it has been held that one who indorsed "for account of" himself could no longer sue without proving his actual ownership of the note. Lawrence *v.* Fussell, 77 Pa. St. 460.

And see Fawsett *v.* National Life Ins. Co., 97 Ill. 11; Leland *v.* Parriott, 35 Iowa, 454; Mechanics' Bk. *v.* Valley Packing Co., 70 Mo. 643; Third Nat'l Bk. *v.* Clark, 23 Minn. 263; McDonald *v.* Bailey, 14 Me. 101; Carrillo *v.* McPhillips, 55 Cal. 130.

It may be noted of indorsements as of other written contracts, that they are incomplete until delivery, but once delivered become irrevocable. Dogan *v.* Dubois, 2 Rich. Eq. (S. Car.) 85; Williams *v.* Smith, 21 Mo. 419; Beeson *v.* Lippman, 52 Ala. 276; Best *v.* Nokomis Nat'l Bk., 76 Ill. 608.

5. Hance *v.* Miller, 21 Ill. 636; Meriden Steam Mill *v.* Guy, 40 Conn. 163; Fay *v.* Sears, 111 Mass. 154.

6. Epler *v.* Funk, 8 Pa. St. 468.

And if collateral security was given for the note, that also is transferred. Vandercook *v.* Baker, 48 Iowa, 199; Woodruff *v.* King, 47 Wis. 261; Kansler *v.* Ford, 47 Miss. 289; Kurtz *v.* Sponable, 6 Kans. 395; Logan *v.* Smith, 62 Mo. 455.

7. Guilfort *v.* Parish of Ascension, 28 La. Ann. 413; Pitcher *v.* Burrows, 17 Pick. 361; Heywood *v.* Wingate, 14 N. H. 73.

Even if the indorsement is but for collection. Mayo *v.* Moore, 28 Ill. 428; McWilliams *v.* Bridges, 7 Neb. 419.

8. The indorsement of a bill is in effect a new bill by the indorser upon the acceptor in favor of the indorsee. Smallwood *v.* Vernon, 1 Stra. 479; Ballingalls *v.* Gloster, 3 East, 482; Van Staphorst *v.* Pearce, 4 Mass. 258; Kilgore *v.* Bulkley, 14 Conn. 362. And the indorsement of a note in effect the drawing of a bill

Indorsers are liable *prima facie* in the order in which they have signed,[1] but this order may be varied even by parol.[2]

By indorsement the indorser promises that he will discharge the note according to its tenor upon due presentment and notice,[3] that the instrument itself and all prior signatures are genuine,[4] that he has the right to transfer it,[5] and that it is valid.[6]

by the indorser on the maker. 2 Parsons, N. & B. 25. Brown *v.* Harraden, 4 T. R. 149.

The contract of indorsement may be valid though the note indorsed was void as given to an alien enemy. Morrison *v.* Lovell, 4 W. Va. 346.

Or it may be void when the note is valid, as where a married woman's note was indorsed in a way invalid at the place of indorsement, though good where the note was made. Clanton *v.* Barnes, 50 Ala. 260. *Compare* Greathead *v.* Walton, 40 Conn. 226; Huse *v.* Hamblin, 28 Iowa, 501.

1. Camp *v.* Simmons, 62 Ga. 73.

And this is true even of accommodation indorsers. Shaw *v.* Knox, 98 Mass. 214; Pomeroy *v.* Clark, 1 McArth. 606. Or upon a renewal note. Hacket *v.* Lenares, 16 La. Ann. 204.

2. But a special agreement for a different order must be shown. McIntire *v.* Darley, 15 Mo. App. 583.

But if it is proven, apparent indorsers may be held, e.g., as co-sureties. Stillwell *v.* How, 46 Mo. 589; McCarty *v.* Roots, 21 How. (U. S.) 437; Hogue *v.* Davis, 8 Gratt. (Va.) 4; Kirschner *v.* Conklin, 40 Conn. 81.

A mistake in the order of signing, as of the second indorser writing his name over that of the payee, may be shown to vary the apparent liability. Brockway *v.* Comparee, 11 Humph. (Tenn.) 355. And see Cahal *v.* Frierson, 3 Humph. (Tenn.) 411; Slagle *v.* Rust, 4 Gratt. (Va.) 274.

3. Morley *v.* Boothby, 3 Bing. 107.

And the indorser of a bill undertakes also to pay damages upon dishonor. Ballingalls *v.* Gloster, 3 East, 481; Byles on Bills, 153.

But an indorser is not a surety unless he indorse for accommodation. Ross *v.* Jones, 22 Wall. (U.S.) 576; Armstrong *v.* Harshman, 61 Ind. 52.

But if he add "surety" to his signature he is liable both as indorser and surety. Bradford *v.* Corey, 5 Barb. (N.Y.) 461.

Nor is he a guarantor at common law. Trust Co. *v.* Nat. Bank, 11 Otto (U. S.), 68.

Nor does he warrant the solvency of parties prior to himself. Smith *v.* Mercer, L. R. 3 Exch. 51; Mulliken *v.* Chapman, 75 Me. 306; Hurst *v.* Chambers, 12 Bush (Ky.), 155.

But he does undertake that he has no knowledge of any facts which show the note or bill valueless. If he has such knowledge and does not reveal it he is liable for the fraud. Fenn *v.* Harrison, 3 T. R. 757; Brown *v.* Montgomery, 20 N.Y. 287.

4. Heylyn *v.* Adamson, 2 Burr. 669; Aldrich *v.* Jackson, 5 R. I. 218; Williams *v.* Tishomingo Sav. Inst., 57 Miss. 633; Turnbull *v.* Bowyer, 40 N. Y. 456; Cochran *v.* Atchison, 27 Kans. 728.

That a prior indorsement was forged is therefore enough to fix the liability of an indorser. Chambers *v.* Union Nat. Bank, 78 Pa. St. 205.

Even if he be an agent acting for an undisclosed principal, and knowledge of the forgery be brought to him after he had paid over the money received to his principal. Canal Bank *v.* Bank of Albany, 1 Hill (N. Y.). 287.

But an accommodation indorser, known as such to his indorsee, has been held not liable for a draft raised without his knowledge. Susquehanna Valley Bank *v.* Loomis, 85 N.Y. 207.

This warranty applies even to indorsers "without recourse." Dumond *v.* Williamson, 18 Ohio St. 515.

And to persons transferring bills and notes by delivery merely. Giffert *v.* West, 37 Wis. 115; Smith *v.* McNair, 19 Kans. 330; Terry *v.* Bissell, 26 Conn. 23; Thompson *v.* McCullough, 31 Mo. 224; Swanzey *v.* Parker, 50 Pa. St. 441; Bankhead *v.* Owen, 60 Ala. 457; Snyder *v.* Reno, 38 Iowa, 329; Allen *v.* Clark, 49 Vt. 390.

5. Fish *v.* First Nat. Bank, 42 Mich. 203; Lake *v.* Hayes, 1 Atk. 281.

So one who indorsed "without recourse" a note that had been stolen, was held. Frazer *v.* D'Invilliers, 2 Pa. St. 200.

6. If the note is void for illegality the indorser is liable without notice. Copp *v.* McDougal, 9 Mass. 1. *Compare* Huston *v.* First Nat. Bank, 85 Ind. 21; Tompkins *v.* Little Rock R. Co., 15 Fed. R. 6.

The indorsement guarantees the capac-

24. Nature of Indorser's Liability.—The distinguishing feature of an indorser's liability is that it is contingent upon due presentment for payment and notice of dishonor.[1]

The holder, therefore, is bound to make demand and give notice in order to hold any indorser to liability, but it is not his duty to notify all the indorsers; if he notify his own immediate indorser that is sufficient to hold the latter, who must protect himself by notifying prior parties.[2]

Where the indorser receives due notice of dishonor it is his duty to pay the note or bill at once, and then proceed against parties prior to himself.[3]

The indorser, however, even after notice given, may be exonerated from all obligation to pay by the conduct of the holder, e.g., in giving to the maker a definite and binding extension of time wherein to pay.[4]

ity of the maker or acceptor. Prescott Bank *v.* Caverly, 7 Gray (Mass.), 217; Erwin *v.* Downs, 15 N.Y. 575.

And that the instrument is not usurious as to its consideration. Hazzard *v.* Citizens' State Bank, 72 Ind. 130; Stewart *v.* Bramhall, 74 N. Y. 85.

This rule applies also to the transfer of paper by delivery. Watson *v.* Cheshire, 18 Iowa, 202.

And all these incidents of indorsement are in *California* prescribed by statute. 1 Hitt. Codes, § 8116.

1. Suse *v.* Pompe, 8 C. B. (N. S.) 538; Lawrence *v.* Langley, 14 N. H. 70; Ray *v.* Smith, 17 Wall. (U. S.) 411; Chapman *v.* McCrea, 63 Ind. 360; Winston *v.* Richardson, 27 Ark. 34; Whitten *v.* Wright, 34 Mich. 92; Cammack *v.* Gordon, 20 La. Ann. 213; Flowers *v.* Bitting, 45 Ala. 448; Selover *v.* Snively, 24 Kans. 672; Shields *v.* Farmers' Bank, 5 W. Va. 254.

2. Struthers *v.* Blake, 30 Pa. St. 139.

3. He cannot require the holder to sue the maker first. Faulkner *v.* Faulkner, 73 Mo. 327. And therefore failure to bring such suit is no discharge of the indorser. Allen *v.* Brown, 124 Mass. 78; State Bank *v.* Wilson, 1 Dev. 484; Ross *v.* Jones, 22 Wall. (U. S.) 576. Nor delay in such suit after the indorser is fixed with due notice of dishonor. Moore *v.* Britton, 22 La. Ann. 64; Powers *v.* Waters, 17 Johns. (N. Y.) 176; Cherry *v.* Miller, 7 Lea (Tenn.), 305. Nor taking collateral security for payment from the maker. Sterling *v.* Marietta, etc., Co., 11 S. & R. (Pa.) 179. Nor the fact that at maturity the maker had property that might have been seized in execution. Violett *v.* Patton, 5 Cr. (U. S.) 142.

For a comparison of existing State statutes regulating indorser's liability, see 2 Rand. Com. Paper, §§ 759–765.

4. Chitty on Bills, 472; Story on Prom. Notes, § 413; Smith *v.* Knox, 3 Esp. 47.

An extension to the first and last indorsers will discharge all intermediate indorsers. Hall *v.* Cole, 4 Ad. & El. 577. But giving time to an indorser will not discharge prior parties. Claridge *v.* Dalton, 4 M. & S. 232; Whiting *v.* Western Stage Co., 20 Iowa, 555.

To discharge an indorser the agreement with the maker must be upon a valid consideration, and without the indorser's consent. Kittle *v.* Wilson, 7 Neb. 76. It must be for a definite time. Globe Mut. Ins. Co. *v.* Carson, 31 Mo. 218. "Twenty or thirty days" is a definite time. Hamilton *v.* Prouty, 50 Wis. 592.

When the extension is agreed upon, whether before or after maturity is immaterial. Veazie *v.* Carr, 3 Allen (Mass.), 14; Moore *v.* Folsom, 14 Minn. 340. And so is the question whether time was given upon a note for the principal debt, or merely collateral to it. Pomeroy *v.* Tanner, 70 N. Y. 547.

If, however, in giving time to the maker the holder expressly reserves his rights against the indorser the latter is not thereby discharged. Morse *v.* Huntington, 40 Vt. 488; Hagey *v.* Hill, 75 Pa. St. 108. And an indorser who has been discharged by an extension given the maker or acceptor may, upon learning the facts, promise to pay, nevertheless, and be held upon his promise. Hazard *v.* White, 26 Ark. 155.

The question frequently arises, what is an "extension" within the rule, and it has been held that mere indulgence or delay is not. Powers *v.* Waters, 17 Johns. (N. Y.) 176. Nor is an agreement

An indorser may also be discharged by the release of a party prior to himself,[1] or by payment of the note or bill by such prior party.[2]

But even an accommodation indorser cannot require a holder to

to "carry" a note for a certain time with a view to get it renewed. Second Nat'l Bank *v.* Poucher, 56 N. Y. 348. Nor is payment of interest in advance. St. Joseph, etc., Ins. Co. *v.* Hauck, 71 Mo. 465. But payment of interest after maturity, before such interest has accrued, is an extension given by the holder receiving it. Randolph *v.* Fleming, 59 Ga. 776. So is taking the note of a third person to hold as security until the maker pays the original note. Greene *v.* Bates, 74 N. Y. 333; Pomeroy *v.* Tanner, 70 N. Y. 547. Or taking as collateral before maturity securities that would not be due until after the due date of the note in question. Robertson *v.* Allen, 59 Tenn. 233.

As has been stated, the extension must be upon a valid consideration; if it is usurious it is invalid, and the indorser is not discharged. Williams *v.* Smith, 48 Me. 135. But the holder cannot show such usury; he is estopped after receipt of the usurious consideration. Billington *v.* Wagoner, 33 N. Y. 31.

Part payment before maturity is a valid consideration. Rigsbee *v.* Bowler, 17 Ind. 167. But not a payment already due. Stuber *v.* Shack, 83 Ill. 191. And an extension in consideration of payment of a higher rate of interest than was originally agreed upon has been upheld. Royal *v.* Lindsay, 15 Kans. 591.

1. Thus the release of the maker or acceptor of course ends the liability of all parties. Byles on Bills, 384; Story on Prom. Notes, § 416. So, too, the release of a maker who was coindorser with another person. Farmers' Bank *v.* Blair, 44 Barb. (N. Y.) 641.

And releasing any indorser releases all subsequent indorsers. Newcomb *v.* Raynor, 21 Wend. (N. Y.) 108. And the cancellation of an indorsement amounts to releasing the person who made it. Bank of Tennessee *v.* Johnson, 1 Swan (Tenn.), 217.

Where after judgment against a maker the holder withdrew a good and sufficient levy upon his property, this was held a release of the indorser. Priest *v.* Watson, 75 Mo. 310. *Cf.* Commonwealth *v.* Miller, 8 S. & R. (Pa.) 457.

Discharging the maker from arrest on a writ of *capias* issued in a suit on the note has the same effect. McFadden *v.* Parker, 4 Dall. (U. S.) 275.

The surrender of the note to the maker upon receiving part payment discharges all parties. Streever *v.* Bank of Fort Edward, 34 N. Y. 413. And this is true, though prior to such surrender the holder proved the note against the estate of an insolvent indorser. Dearth *v.* Hide, etc., Nat. Bank, 100 Mass. 540.

Signing a composition deed as a creditor of the drawer of a bill will release the indorser from all liability to the holder who signed. Eggerman *v.* Henschen, 56 Mo. 123.

But the release of a maker with an express reservation of rights against the indorser will not discharge the latter. Stewart *v.* Eden, 2 Cai. Cas. (N. Y.) 121; Kenworthy *v.* Sawyer, 125 Mass. 28. And if a release be given with the indorser's consent, he will still be held. Gloucester Bank *v.* Worcester, 10 Pick. 527; Bruen *v.* Marquand, 17 Johns. (N. Y.) 58; Ludwig *v.* Iglehart, 43 Md. 39.

The involuntary discharge in bankruptcy of one party does not affect the liability of others. Pine River Bank *v.* Swazey, 47 N. H. 154. And if the note is not proved against his estate, an indorser may be voluntarily discharged by his creditors and subsequent parties not relieved from liability. Pratt *v.* Chase, 122 Mass. 262.

Obviously, the release of any party cannot release other parties prior to himself. Knight *v.* Dunsmore, 12 Iowa, 35; Bank of Kentucky *v.* Floyd, 4 Metc. (Ky.) 159; Love *v.* Brown, 38 Pa. St. 307. But where the first indorser was a mere surety, the surrender of the note to the second indorser was held to discharge him. Shelton *v.* Hurd, 7 R. I. 403.

2. Hayling *v.* Mulhall, 2 W. Bla. 1235; Macdonald *v.* Bovington, 4 T. R. 825.

But payment by a subsequent party will not release an indorser. Kennion *v.* McRea, 7 Port. (Ala.) 175.

An agreement with the maker by the holder to take pay in work, which was not carried out owing to the holder's default, has been held to discharge the indorser. Roberts *v.* Wilkinson, 34 Mich. 129. *Cf.* Cox *v.* Mobile, etc., R. Co., 44 Ala. 611.

But where the holder held two notes of a certain person, and requested that a tendered payment be applied upon the first, this was held not to discharge the indorsers of the second. Second Nat. Bank *v.* Poucher, 56 N. Y. 348.

exhaust any collateral security he may hold, before having recourse to such indorser.[1]

In suits against either acceptors, drawers, makers, or indorsers, it is at common law necessary to aver all the indorsements requisite to complete title in the plaintiff,[2] and the burden of proving such indorsements is upon him.[3]

Where a note is payable to bearer, title will be inferred from possession,[4] even though special indorsements have been put upon it.[5]

The rule is the same where the note or bill has been indorsed in blank.[6]

1. First Nat. Bank *v.* Wood, 71 N. Y. 405. Though such security may be a vendor's lien. Sayre *v.* McEwen, 41 Ind. 109; Rogers *v.* Blum, 56 Tex. 1.

But where the holder permitted the collateral he held to become barred by the Statute of Limitations, it was decided that the indorser was thereby discharged. Fennell *v.* McGowan, 58 Miss. 261. And the surrender of the collateral to the maker has the same effect. Union Nat. Bank *v.* Cooley, 27 La. Ann. 202. So has an improper sale of the collateral and wrongful appropriation of the proceeds by the holder. Sitgreaves *v.* Farmers', etc., Bank, 49 Pa. St. 359. And it has been held that where a banker held a note, and had at its maturity a deposit by the maker sufficient to pay it, and failed to appropriate the deposit to that purpose, he thereby discharged the indorsers. Commercial Natl. Bank *v.* Henninger, 105 Pa. St. 496.

The discharge of the indorser of a collateral note will discharge the indorser of the note it secures. Stallings *v.* Bank of America. 59 Ga. 701. But a holder who merely ignores his collateral in proceedings against the maker does not thereby release his indorsers. Merchants' Natl. Bank *v.* Comstock. 55 N. Y. 24.

2. Chitty on Bills, 643; Bishop *v.* Hayward, 4 T. R. 471. But indorsements subsequent to the one to the plaintiff may be disregarded. Bank of America *v.* Senior, 11 R. I. 376.

An allegation of indorsement implies a transfer for sufficient consideration. Clay *v.* Edgerton, 19 Ohio St. 549. The date of indorsement need not be averred. Caldwell *v.* Lawrence, 84 Ill. 161.

3. Even where local law excuses their averment. Keeth *v.* Champer, 69 Ind. 477.

In a suit against a maker, the general issue puts the plaintiff to the proof of all the indorsements under which he holds. Wallace *v.* Reed, 70 Ind. 263; Stern *v.* Tallis, 24 La. Ann. 118; Blakely *v.* Grant, 6 Mass. 386.

One who sues his own immediate indorser need not prove the making of the note nor its transfer to the defendant. Woodward *v.* Harbin, 1 Ala. 104.

The method of proving indorsements is the same as that of proving any writing of the indorser, as by persons who have seen other signatures properly identified. Empire Mfg. Co. *v.* Stuart, 46 Mich. 482. Or have written letters to the indorser and received answers from him. Chaffee *v.* Taylor, 3 Allen (Mass.), 598.

4. Beekman *v.* Wilson, 9 Metc. (Mass.) 434; Jewett *v.* Cook, 81 Ill. 260; Booty *v.* Cooper, 18 La. Ann. 365; Rider *v.* Duvall, 28 Tex. 622; Crosthwait *v.* Misener, 13 Bush. (Ky.) 543; Texas Banking Co. *v.* Turnley, 61 Tex. 365; Lachance *v.* Loeblein, 15 Mo. App. 460.

5. Rider *v.* Taintor, 4 Allen (Mass.), 356.

6. Palmer *v.* Gardner, 77 Ill. 143; Bedell *v.* Carll, 33 N. Y. 581; Rubey *v.* Culbertson. 35 Iowa, 264; Hyde *v.* Lawrence, 49 Vt. 361; Eggan *v.* Briggs, 23 Kans. 710; Metcalf *v.* Yeaton, 51 Me. 198.

But this presumption of title may be rebutted. Hays *v.* Hathorn, 74 N. Y. 486; Herrick *v.* Swomley, 56 Md. 439; Hesser *v.* Doran, 41 Iowa, 468. Evidence of fraud in the inception or transfer of the instrument will put the holder to the proof of his title. Merchants' Bank *v.* Masonic Hall, 62 Ga. 271. And the plaintiff's suit may be abated by evidence that he obtained title after suit brought. Hovey *v.* Sebring, 24 Mich. 232.

Under a blank indorsement the holder may sue in his own name, irrespective of the character in which he received the note or bill. Baker *v.* Stinchfield, 57 Me. 363; Ricard *v.* Harrison, 19 La. Ann. 181.

Where a note payable to a firm and indorsed with its name was found among the papers of a deceased partner, it was held *prima facie* evidence of title in the

It is generally held that even blank indorsements cannot be explained or varied by parol,[1] but the authorities are not uniform.

In accordance with the weight of authority, it has been held that even at the suit of his immediate indorsee an indorser cannot show that his apparently absolute indorsement was really "without recourse," [2] or merely for the purpose of transfer.[3]

But an indorser may show as against his indorsee that his blank indorsement was merely for collection,[4] and any indorsement procured by fraud may of course be avoided by the indorser when sued by the indorsee.[5]

decedent. Birkey *v.* McMakin, 64 Pa. St. 343.

The fact that the holder of a note or bill has indorsed it himself while retaining possession does not impair his title. Abbott *v.* Joy, 47 Me. 177; Leitner *v.* Miller, 49 Ga. 486; Mendenhall *v.* Banks, 16 Ind. 284; Dallfus *v.* Frosch, 1 Den. (N. Y.) 367; Chaffee *v.* Taylor, 3 Allen (Mass.), 598. But it has also been held that a holder must explain why his own and perhaps subsequent indorsements are found upon a note remaining in his possession. Hart *v.* Windle, 15 La. 265; Gorgerat *v.* McCarty, 2 Dall. (U. S.) 144.

1. Beattie *v.* Brown, 64 Ill. 360; Roberts *v.* Masters, 40 Ga. 461; Barnard *v.* Goslin, 23 Minn. 192; Skelton *v.* Dustin, 92 Ill. 49; Woodward *v.* Foster, 18 Gratt. (Va.) 200; Charles *v.* Denis, 42 Wis. 56; Barry *v.* Morse, 3 N. H. 132; Crocker *v.* Getchell, 23 Me. 392; Preslin *v.* Ellington, 74 Ala. 133; Doolittle *v.* Ferry, 20 Kans. 230; Johnson *v.* Ramsey, 14 Vr. (N. J.) 279; Gist *v.* Drakely, 2 Gill (Md.), 330; Stack *v.* Beach, 74 Ind. 571; Smith *v.* Caro, 9 Or. 278, where the indorsement was after maturity.

That as between the original parties a blank indorsement may be explained by parol is held by Castrigue *v.* Buttigieg, 10 Moo. P. C. 94: Susquehanna Bridge Co. *v.* Evans, 4 Wash. C. C. (U. S.) 480; Ross *v.* Espy, 66 Pa. St. 481; Mendenhall *v.* Davis, 72 N. Car. 150; Taylor *v.* French, 2 Lea (Tenn.), 257; Smith *v.* Morrill, 54 Me. 48.

Indorsements of non-negotiable notes may certainly be thus explained. Jacques *v.* McKnight, 2 Dutch. (N. J.) 92 n.

2. Martin *v.* Cole, 14 Otto (U. S.), 30; Mason *v.* Burton, 54 Ill. 349; Skinner *v.* Church, 36 Iowa, 91; Kern *v.* Von Phul, 7 Minn. 426; Campbell *v.* Robbins, 29 Ind. 271. *A fortiori* is this true at the suit of *bona fide* holders without notice. Bank of U. S. *v.* Dunn, 6 Pet. (U. S.) 51; Hill *v.* Shields, 81 N. Car. 250.

Any endeavor to show that the indorsement was not to hold the indorser is inadmissible. Courtney *v.* Hogan, 93 Ill. 101; First Nat'l Bank *v.* Nat'l Marine Bank, 20 Minn. 63.

On the other hand, it has been held that as between the immediate parties to any indorsement it might be explained by parol. Hays *v.* May, Wright (Ohio), 80; Lewis *v.* Williams, 4 Bush (Ky.), 678; Drummond *v.* Gager, 10 Bradw. 380. And that subsequent holders with notice might also be met with parol evidence. Van Valkenburgh *v.* Stupplebeen, 49 Barb. (N. Y.) 99.

Agreements between indorsee and indorser that the latter should not be sued upon his indorsement were upheld upon parol evidence as between the parties to the agreement, in Pike *v.* Pike, M. & M. 226; Bruce *v.* Wright, 3 Hun (N. Y.), 548; Breneman *v.* Furniss, 90 Pa. St. 186.

But such agreements can certainly not be shown as against a subsequent *bona fide* holder. Lewis *v.* Dunlap, 72 Mo. 174. See, further, Davis *v.* Brown, 4 Otto (U. S.), 423; Dale *v.* Gear, 39 Conn. 89; Dunn *v.* Ghost, 5 Col. 134; Beal *v.* Wood, 5 Mo. App. 591.

3. Lee *v.* Pile, 37 Ind. 107; Day *v.* Thompson, 65 Ala. 369. *Contra*, Patterson *v.* Todd, 18 Pa. St. 426; Patten *v.* Pearsen, 57 Me. 428; Commissioners, etc., *v.* Wasson, 82 N. Car. 308; Lynch *v.* Goldsmith, 64 Ga. 42.

But a *bona fide* holder without notice is secure from this defence. Meador *v.* Dollar Sav. Bank, 56 Ga. 605.

4. 2 Parsons N. & B. 24; McWhirt *v.* McKee, 6 Kans. 412; Downer *v.* Chesebrough, 36 Conn. 39. *Contra*, Chaddock *v.* Vanness, 6 Vroom (N. J.), 521.

But in the face of a written indorsement for collection, the indorsee cannot prove that the transfer was absolute. White *v.* Miners' Bank, 12 Otto (U. S.), 658; Rock Co. Bank *v.* Hollister, 21 Minn. 385; Leary *v.* Blanchard, 48 Me. 269. *Contra*, First Nat'l Bank *v.* McCann, 4 Bradw. (Ill.) 250.

5. Hamburger *v.* Miller, 48 Md. 317;

As between the immediate parties to an indorsement, a parol waiver of demand and notice may be proven according to most authorities,[1] but there are cases the other way.[2]

25. Bona Fides.—(*a*) *Elements of.*—To constitute a *bona fide* holder of a note or bill, it must be obtained for value,[3] before the real or apparent maturity of the paper,[4] and in the due course of business and in good faith.[5]

It follows therefore that one may be a *bona fide* holder, despite bad faith on the part of his indorser.[6]

To make one a *bona fide* holder indorsement is necessary,[7] unless the paper is transferable by mere delivery.[8]

Van Buskirk *v.* Day, 32 Ill. 260; Hill *v.* Ely, 5 S. & R. (Pa.) 363.

So it is a good defence against an indorsee or subsequent holder with notice that an indorsement was delivered in escrow only. Goggerly *v.* Cuthbert, 2 B. & P. N. R. 170; Ricketts *v.* Pendleton, 14 Md. 320.

But at the suit of *bona fide* holder for value before maturity and without notice an indorser cannot even show that the blank left by him was fraudulently filled with too large a sum. Diercks *v.* Roberts, 13 S. Car. 338.

1. Barclay *v.* Weaver, 19 Pa. St. 396; Fuller *v.* McDonald, 8 Me. 213; Boyd *v.* Cleveland, 4 Pick. (Mass.) 525; Taunton Bank *v.* Richardson, 5 Pick. (Mass.) 436; Andrews *v.* Simms, 33 Ark. 771; Wright *v.* Latham, 3 Murphy, 298.

But a waiver of *notice* is not a waiver of *demand* also. Burnham *v.* Webster, 17 Me. 50.

2. Rodney *v.* Wilson, 67 Mo. 123; Heidenheimer *v.* Blumenkron, 56 Tex. 308; Bank of Albion *v.* Smith, 27 Barb. (N. Y.) 489; Barry *v.* Morse, 3 N. H. 132.

3. See §§ 4, 6.

4. See § 26.

5. One taking with knowledge of facts amounting to a defence stands in the position of the payee. Zabriskie *v.* Spielman, 17 Vr. (N. J.) 35. While a purchaser of coupons from a thief may act with perfect good faith and be protected as a *bona fide* holder. Spooner *v.* Holmes, 102 Mass. 503.

6. Thus the purchaser of a bill of exchange from a pledgee who had no right to dispose of it, is a *bona fide* holder. Merchants' Bank *v.* Comstock, 55 N. Y. 24.

Conversely, if the indorser is really a *bona fide* holder, one who has knowledge of defects in the paper may take it from such holder, provided he pays value, and himself be regarded as a holder in good faith. Commissioners of Marion Co. *v.* Clark, 4 Otto (U. S.), 278; Woodman *v.* Churchill, 52 Me. 58; Bassett *v.* Avery, 15 Ohio St. 299; Boyd *v.* McCann, 10 Md. 118; Riley *v.* Schwacker, 50 Ind. 592; Simon *v.* Merritt, 33 Iowa, 537; Glenn *v.* Farmers' Bank, 70 N. Car. 191; Kinney *v.* Kruse, 28 Wis. 183; Bank of Sonoma Co. *v.* Gove, 63 Cal. 355; Hogan *v.* Moore, 48 Ga. 156; Watson *v.* Flanagan, 14 Tex. 354; Shaw *v.* Clark, 49 Mich. 384.

In like manner, one who purchases after maturity from a holder who obtained the paper *bona fide* before maturity, will have all his vendor's rights. Cook *v.* Larkin, 19 La. Ann. 507; Peabody *v.* Rees, 18 Iowa, 571; Thomas *v.* Ruddell, 66 Ind. 326; Smith *v.* Hiscock, 14 Me. 449.

But the payee, by purchase from a *bona fide* holder, cannot obtain that holder's rights. Kost *v.* Bender, 25 Mich. 515.

7. Mills *v.* Porter, 5 T. & C. (N. Y.) 63; Losee *v.* Bissell, 76 Pa. St. 459; Bilderbach *v.* McConnell, 48 Mich. 345; Sturges *v.* Miller, 80 Ill. 241; Boody *v.* Bartlett, 42 N. H. 558; Allum *v.* Perry, 68 Me. 232.

And indorsement must be accompanied by delivery; as that the assignment of a bill of exchange expected by steamer, though for value, does not make the assignee a *bona fide* holder. Muller *v.* Pondir, 55 N. Y. 325. Nor is one who takes as collateral a receipt for a bill such a holder. Evans *v.* Smith, 4 Binn. (Pa.) 366. And see Hull *v.* Swarthout, 29 Mich. 249; Peck *v.* Bligh, 37 Ill. 317.

8. But notes that are payable to bearer, though indorsed, continue to pay by delivery; the indorsement is unnecessary, and does not affect the *bona fides* of the holder. Smith *v.* Rawson, 61 Ga. 208; Lane *v.* Krekle, 22 Iowa, 399; Cone *v.* Baldwin, 12 Pick. (Mass.) 545.

Persons receiving notes or bills by legal order or process, as assignees [1] or receivers,[2] are not *bona fide* holders.

The effect of the nature or amount of consideration paid by the holder, as affecting his *bona fides*, has been already considered; [3] but it may be restated that mere inadequacy of consideration is wholly immaterial, except as evidence of bad faith.[4]

It is said that the mere fact of purchasing a bill from the acceptor,[5] or a note from the maker,[6] raises such a presumption of payment or bad faith on the vendor's part, that the vendee cannot be a *bona fide* holder.

That a holder obtained paper by way of pledge,[7] or as collateral security for advances,[8] does not affect his *bona fides;* but he can recover only the amount of the debt secured.[9]

In general, a *bona fide* holder may recover the amount he or some prior indorser through whom he claims title paid for the note or bill,[10] but as against an accommodation party he can obtain only the amount actually paid by himself,[11] and a bank which obtains a note by discounting for the indorser, and crediting it on

1. Billings *v.* Collins, 44 Me. 271; Fraker *v.* Collum, 21 Kans. 555.

Or as trustees to collect assets and pay creditors. Roberts *v.* Hall, 37 Conn. 205.

2. Briggs *v.* Merrill, 58 Barb. (N. Y.) 389; Litchfield Bank *v.* Peck, 29 Conn. 384.

3. *Ante*, §§ 16, 18, 19, 20.

4. Tod *v.* Wick, 36 Ohio St. 370; Lay *v.* Wissman, 36 Iowa, 305; Hereth *v.* Merchants' Nat. Bank, 34 Ind. 380.

The facts of the sale go to the jury; and where a $300 note was offered for sale for $5, that fact was held conclusive evidence that the purchaser could not be a *bona fide* holder. De Witt *v.* Perkins, 22 Wis. 451.

Where the note of a solvent maker was offered at a large discount, it was left to the jury to say whether reasonable inquiry would not have shown that it was given without consideration. Gould *v.* Stevens, 43 Vt. 125.

Where a note was sold for one eighth of its face, this was held to amount to notice of existing defences. Jones *v.* Gordon, L. R. 2 App. Cas. 617; affirming *In re* Gomersall, L. R. 1 Ch. D. 142.

Cf. Hunt *v.* Sandford, 6 Yerg. (Tenn.) 387; Boyce *v.* Geyer, 2 Mich. N. P. 71. *In re* Hook, 11 N. B. R. 282.

A discount of 3 per cent just before maturity, however, is no evidence at all of bad faith. Murray *v.* Beckwith, 81 Ill. 43. And one of 50 per cent has been held insufficient to prove it. Cannon *v.* Canfield, 11 Neb. 506. *Contra*, Baily *v.* Smith, 14 Ohio St. 396.

At a sheriff's sale, a purchase for one fifth of the face value is enough to make the purchaser a *bona fide* holder. Irby *v.* Blain, 31 Kans. 716.

Cf. Sully *v.* Goldsmith, 32 Iowa, 397; Vinton *v.* Peck, 14 Mich. 287; Brown *v.* Penfield, 36 N. Y. 473; Tilden *v.* Blair, 21 Wall. (U. S.) 241.

5. Central Bank *v.* Hammett, 50 N. Y. 158.

But the rule in England is the other way. Morley *v.* Culverwell, 7 M. & W. 174. And in South Carolina. Witte *v.* Williams, 8 S. Car. 304.

6. Hendrie *v.* Berkowitz, 37 Cal. 113.

7. Fisher *v.* Fisher, 98 Mass. 303.

8. Miller *v.* Boykin, 70 Ala. 469; Brown *v.* Callaway, 41 Ark. 418; Belmont, etc., Bank *v.* Hoge, 35 N. Y. 65; Curtis *v.* Mohr, 18 Wis. 616; Miller *v.* Pallock, 99 Pa. St. 202.

9. Stoddard *v.* Kimball, 6 Cush. (Mass.) 469; Smith *v.* Hiscock, 14 Me. 449; Stevens *v.* Campbell, 13 Wis. 419; Bealle *v.* Southern Bank of Georgia, 57 Ga. 274.

10. Dekay *v.* Hackensack Water Co., 11 Stew. (N. J.) 163; Huff *v.* Wagner, 63 Barb. (N. Y.) 215; Petty *v.* Hannum, 2 Humph. (Tenn.) 102. And see 2 Rand. Com. Paper, § 452.

11. Wiffen *v.* Roberts, 1 Esp. 261; Holeman *v.* Hobson, 8 Humph. (Tenn.) 107; Buckner *v.* Jones, 1 Mo. App. 538.

So where an accommodation note has been fraudulently diverted from its intended use, a purchaser in good faith can recover only his actual payment. Williams *v.* Smith, 2 Hill (N. Y.), 301.

his account, is held not to have paid or parted with anything, and cannot recover at all.[1]

(*b*) *Transfer in Consideration of Existing Debt.*—The general rule now is that one who takes a note or bill in payment of an existing debt is a *bona fide* holder for value.[2]

But it cannot be affirmed that this rule is universal, and many cases have required something in addition to the old debt to constitute a *bona fide* holder.[3]

Thus if upon the indorsement of a note or bill, in payment of the indorser's debt, the indorsee surrender collateral which he had held to secure such debt, this is clearly enough to render him a *bona fide* holder;[4] and if an agreement to forbear proceedings against the original debtor be added, the rule is still more plain.[5]

But in some States, New York especially, the opposite rule prevails, and a holder in consideration of an existing debt is open to all defences good against his indorser.[6]

In some cases the distinction has been taken, that although a transfer in consideration of an existing debt does not render the indorsee a *bona fide* holder where he still retains all his previous rights against his debtor, yet if he accepts the paper in complete *extinguishment* of his claim, this is a sufficient parting with value

1. Scott *v.* Ocean Bank, 23 N. Y. 289; Mann *v.* Second National Bank of Springfield, 30 Kans. 412.

But where the amount so credited is checked out before notice of defence, the bank becomes a *bona fide* holder. Southwick *v.* First National Bank, 84 N. Y. 420; Fox *v.* Bank of Kansas City, 30 Kans. 441.

2. Swift *v.* Tyson, 16 Pet. (U. S.) 1; Oates *v.* National Bank, 10 Otto (U. S.), 239; Currie *v.* Misa, L. R. 10 Ex. 153; Homes *v.* Smyth, 16 Me. 177; Knox *v.* Clifford, 38 Wis. 651; Hodges *v.* Black, 76 Mo. 537; Stevenson *v.* Heyland, 11 Minn. 198; Dixon *v.* Dixon, 31 Vt. 450; Draper *v.* Cowles, 27 Kans. 484; Russell *v.* Hadduck, 8 Ill. 233; Reddick *v.* Jones, 6 Ired. (N. Car.) 107; Bridgeport City Bank *v.* Welch, 29 Conn. 479; Bush *v.* Peckard, 3 Harr. (Del.) 385; Carlisle *v.* Wishart, 11 Ohio, 172; Ives *v.* Farmers' Bank, 2 Allen (Mass.), 236; Russell *v.* Splater, 47 Vt. 273; Bardsley *v.* Deep, 88 Pa. St. 420; Farmers' Bank *v.* Willis, 7 W. Va. 31; Blum *v.* Loggins, 53 Tex. 121; Outhwite *v.* Miner, 13 Mich. 533; Smith *v.* Lockridge, 8 Bush (Ky.), 423.

A fortiori where the existing debt was but part of the consideration. Riggs *v.* Hatch, 16 Fed. Rep. 838.

3. See 2 Rand. Com. Paper, §§ 461–465 for a full collection of cases on this point.

4. Justh *v.* National Bank of the Commonwealth, 56 N. Y. 478; First National Bank *v.* Bentley, 27 Minn. 87; Stevens *v.* Campbell, 13 Wis. 375; Allaire *v.* Hartshorn, 1 Zab. (N. J.) 665; Le Breton *v.* Peirce, 2 Allen (Mass.), 8; Knox *v.* Clifford, 38 Wis. 651; Emanuel *v.* White, 34 Miss. 56.

So held also where the indorsee upon receiving the note surrendered collateral of little or no value. Park Bank *v.* Watson, 42 N. Y. 490.

5. Kingsland *v.* Pryor, 33 Ohio St. 19.

The rule is the same if the new paper be also taken as collateral. Worcester National Bank *v.* Cheeney, 87 Ill. 602.

And where the debt in question is due, the agreement for forbearance will be inferred from taking paper payable in the future. Holzworth *v.* Koch, 26 Ohio St. 33; York *v.* Pearson, 63 Me. 587.

6. Rosa *v.* Brotherson, 10 Wend. (N. Y.) 86; Jones *v.* Schreyer, 49 N. Y. 674; Rhea *v.* Allison, 3 Head (Tenn.), 176; Union Bank *v.* Barber, 56 Iowa, 559; Comstock *v.* Hier, 73 N. Y. 269; Turner *v.* Treadway, 53 N. Y. 650; De La Chaumette *v.* Bank of England, 9 B. & C. 208. But see as to England, Percival *v.* Frampton, 2 C. M. & R. 180; Foster *v.* Pearson, 5 Tyrw. 255.

But even in New York "the surrender by a creditor of the past-due notes of a debtor, upon receiving from him in good faith, before maturity, the note of a third person in place of the note surrendered constitutes the creditor a holder for value of the note thus taken." Phœnix Insur-

to protect him from equitable defences and make him really a *bona-fide* holder.[1]

Since the indorsee has at least recourse upon the paper to his debtor, the indorser, this distinction seems more ingenious than solid, and late authorities certainly hold that the "transfer before maturity of negotiable paper as *security* for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument," makes the indorser a *bona fide* holder unaffected by equities between prior parties of which he had no notice.[2]

(*c*) *Negligence and Bad Faith.*—An innovation in the law of commercial paper known as the rule in Gill *v.* Cubitt was introduced by Lord Tenterden in 1824, and caused an uncertainty of law which has hardly yet been dissipated.

It was held in that case that circumstances which ought to excite the suspicion of a prudent and careful man about to receive a note or bill rendered inquiry on his part necessary, and if he failed to make such inquiry he was guilty of negligence, which destroyed his character as a *bona fide* holder. Whether the circumstances were such as to render inquiry necessary was left for the jury's determination.[3]

In England this rule was overturned by the judgment of Lord Denman, in 1834, in the case of Goodman *v.* Harvey, declaring that even gross negligence would not deprive one of the character of *bona fide* holder unless the carelessness amounted to bad faith on his part, and this doctrine is now generally accepted by American courts.[4]

ance Co. *v.* Church, 81 N. Y. 225, a case containing a review of the New York doctrine on this subject.

1. 3 Kent's Com. 81 n.; Smith *v.* Van Loan, 16 Wend. (N. Y.) 659; Williams *v.* Little, 11 N. H. 66; Barney *v.* Earle, 13 Ala. 106; Bond *v.* Central Bank, 2 Ga. 92; Robinson *v.* Lair, 31 Iowa, 9; Cecil Bank *v.* Heald, 25 Md. 562; Bardley *v.* Delp, 88 Pa. St. 420. *Cf.* Stedman *v.* Carstairs, 97 Pa. St. 234; Royer *v.* Keystone Nat'l Bank, 83 Pa. St. 248. And see the notes upon Swift *v.* Tyson in 1 Amer. Cas. Bills and Notes, 650, for complete lists of cases.

2. Railroad Co. *v.* National Bank, 12 Otto (U. S.), 14.

To the same effect, Maitland *v.* Citizens' Nat'l Bank, 40 Md. 540; Giovanovich *v.* Citizens' Bank, 26 La. Ann. 15; Wormer *v.* Waterloo Agric. Works, 50 Iowa, 262; Harrison *v.* Pike, 48 Miss. 46; Mix *v.* National Bank of Bloomington, 91 Ill. 20.

3. Gill *v.* Cubitt, 3 B. & C. 466.

American cases adopting this rule are: Roth *v.* Calvin, 32 Vt. 125; Nicholson *v.* Patton, 13 La. 213; Greer *v.* Yosti, 56 Mo. 307; Beltzhoover *v.* Blackstock, 3 Watts (Pa.), 20; Russell *v.* Hadduck, 8 Ill. 233; Safford *v.* Wyckoff, 1 Hill (N. Y.), 11; Hall *v.* Hale, 8 Conn. 33; Cone *v.* Baldwin, 12 Pick. (Mass.) 545; Nutter *v.* Stover, 48 Me. 163; Merritt *v.* Duncan, 7 Heisk. (Tenn.) 156; Steinhart *v.* Boker, 34 Barb. (N. Y.) 436.

Yet where such inquiry was made as opportunity afforded, and nothing wrong discovered, it was held that the taker was a *bona fide* holder. Williamson *v.* Brown, 15 N. Y. 354.

4. Goodman *v.* Harvey, 4 Ad. & El. 870; Murray *v.* Lardner, 2 Wall. (U. S.) 110; Hamilton *v.* Vought, 5 Vr. (N. J.) 191; Phelan *v.* Moss, 67 Pa. St. 59; Comstock *v.* Hannah, 76 Ill. 550; Farrell *v.* Lovett, 68 Me. 326; Trustees *v.* Hill, 12 Iowa, 474; Fox *v.* Bank of Kansas City, 30 Kans. 441; Golson *v.* Arnot, 57 N. Y. 253; Bank of Sherman *v.* Apperson, 4 Fed. Rep. 25; Frank *v.* Lilienfield, 33 Gratt. (Va.) 377; Schoen *v.* Houghton, 50 Cal. 528.

But in Vermont the rule in Gill *v.* Cubitt is still adhered to. Gould *v.* Stevens, 43 Vt. 125.

Under the modern rule, therefore, negligence is only so far important as implying bad faith.[1]

It is obvious that taking a note or bill in the face of notice express or implied of defences to it is an act of bad faith.[2]

1. And the fact that railroad bonds had been stolen and sold for ten per cent of their face value has been held not to warrant a finding of bad faith in the purchaser, default having been made upon them at the time of purchase, and they having no known market value. Smith *v.* Harlow, 64 Me. 510.

But the purchase of a neighbor's note for a trifle from a stranger who was peddling patent rights has been held negligence amounting to bad faith. Taylor *v.* Atchison, 54 Ill. 196.

Mere knowledge on the purchaser's part of dishonest business methods on the seller's has been held evidence of bad faith. Ormsbee *v.* Howe, 54 Vt. 182. But knowledge of former usurious dealings by the payee from whom a note was purchased has been considered no evidence at all. Sherman *v.* Blackman, 24 Ill. 345.

Nor is it bad faith to take a note the maker of which is known to the purchaser to be a liquor-dealer, although that fact might raise the suspicion that the note was for liquors sold, and therefore illegal. Bottomley *v.* Goldsmith, 36 Mich. 27. Nor to purchase the note of a maker known to deal in options, though that fact might induce a similar suspicion. Mitchell *v.* Catchings, 23 Fed. Rep. 710.

The question of bad faith is for the jury, and evidence of honesty and good faith is always admissible. Skidmore *v.* Clark, 47 Conn. 20; Dutchess Co. Ins. Co. *v.* Hachfield, 73 N. Y. 226.

See generally, as to bad faith, Auten *v.* Gruner, 90 Ill. 300; London, etc., Bank *v.* Groome, L. R. 8 Q. B. D. 288; Edwards *v.* Thomas, 66 Mo. 468; Citizens' Nat. Bank *v.* Hooper, 47 Md. 88.

That banks are held to no greater care than individuals. Bedell *v.* Burlington Nat. Bank, 16 Kans. 130.

2. But such notice must be received before purchase; notice after purchase cannot avail as a defence. Swan *v.* Steele, 7 East, 210; Perkins *v.* White, 36 Ohio St. 530.

Notice while the purchase is incomplete, e.g., before payment of consideration, is, however, sufficient. Delaware Co. Bank *v.* Duncombe, 48 Iowa, 488; De La Chaumette *v.* Bank of England, 9 B. & C. 208; Dresser *v.* Missouri, etc., Ry., 3 Otto (U. S.), 92.

Notice may be inferred from the note or bill itself, e.g., from marks upon it showing it had been offered for discount at a bank and refused. Brown *v.* Taber, 5 Wend. 566. Also from the fact of long arrears of interest, e.g., three years being due at the time of transfer. Bilderback *v.* McConnell, 48 Mich. 345. But one year's arrears of interest has been held not to amount to notice. Kelley *v.* Whitney, 45 Wis. 110, overruling Hart *v.* Stickney, 41 Wis. 630.

Notice cannot be implied from an indorsement without recourse. Epler *v.* Funk, 8 Pa. St. 468; Stevenson *v.* O'Neal, 71 Ill. 314.

A sealed note with payee's name blank, and negotiated for a different consideration from that specified in it, is so peculiar that any taker is affected with notice of defences to it. Mills *v.* Williams, 16 S. Car. 593. So too is a sealed note secured by a mortgage referred to in the note. Jewett *v.* Tucker, 1 East. Rep'r (Mass.), 430.

The words "to be held as collateral" written across a note have been held to import notice. Gibson *v.* Hawkins, 69 Ga. 355.

And an official signature, e.g., that of the Secretary of War, is notice that the government represented can only be held so far as the officer's authority extends. The Floyd Acceptances, 7 Wall. (U. S.) 666.

Knowledge that a note signed with a firm name was made after the dissolution of the partnership is notice destroying the *bona fides* of one taking the note. Booth *v.* Quinn, 7 Price, 193. And knowledge that a firm note is given or renewed for the individual debt of a partner has a like effect. Eastman *v.* Cooper, 15 Pick. (Mass.) 276; Mecutchen *v.* Kennady, 3 Dutch. (N. J.) 230; Gansevoort *v.* Williams, 14 Wend. (N. Y.) 133.

But the fact that a note made and indorsed by a partner individually bears also the indorsement of his firm cannot affect the indorsee. Redlon *v.* Churchill, 73 Me. 146.

Knowledge that a note was given for a patent does not affect a purchaser's *bona fides*. Miller *v.* Finly, 26 Mich. 249; Gerrish *v.* Bragg, 55 Vt. 329; Woolen *v.* Ulrich, 64 Ind. 120; Sackett *v.* Kellar, 22 Ohio St. 554. But where a note was obtained by fraud, and the purchaser was told that it would be good if the consider-

But no purchaser of a note or bill is presumed to have acted in bad faith. The presumption is always in favor of *bona fides*.[1]

This presumption may of course be rebutted, and evidence of illegality or fraud in the inception of the paper will compel the holder to prove his good faith.[2]

ation "had not been misrepresented," this information was held to amount to notice of defence. Studebaker Mfg. Co. *v.* Dickson, 70 Mo. 272.

Knowledge that the indorser held the note indorsed as a pledge is notice of lack of power to sell. Goldsmidt *v.* First Methodist Church, 25 Minn 202.

While the purchaser of a note or bill may know that it is accommodation paper, and be nevertheless a *bona fide* holder,—Smith *v.* Knox, 3 Esp. 46; Thatcher *v.* West River Nat. Bank, 19 Mich. 196,—if he knows that the accommodating party lent his name for a special purpose which has not been fulfilled, he cannot be, for such knowledge is said to amount to notice of diversion. 1 Daniel Neg. Inst. 740.

The payee may be fictitious,—Lane *v.* Krekle, 22 Iowa, 399,—the maker dead, —Clark *v.* Thayer, 105 Mass. 216,—or the indorser an infant.—Nightingale *v.* Withington, 15 Mass. 272,—to the knowledge of a purchaser, and these facts will not be notice to him of defences; but knowledge of the maker's insanity is notice. McClain *v.* Davis, 77 Ind. 419.

An indorsee is not affected with notice by the pendency of a suit at law,—County of Cass *v.* Gillett, 10 Otto, 585; Board of Supervisors *v.* Paxton, 56 Miss. 679; Sawyer *v.* Phaley, 33 Vt. 69,—nor by newspaper articles or advertisements,—Kellogg *v.* French, 15 Gray, 354; Hagen *v.* Bowery Nat. Bank, 6 Lans. (N. Y.) 490; Clark *v.* Ricker, 14 N. H. 44.—unless knowledge of the suit or advertisement is fixed upon him.

1. Solomons *v.* Bank of England, 13 East, 135; Carpenter *v.* Longan, 16 Wall. (U. S.) 271; Harger *v.* Worrall, 69 N. Y. 370; Dingman *v.* Amsink, 77 Pa. St. 114; National Bank of North America *v.* Kirby, 108 Mass. 497; Chicago, etc., R. *v.* Edson, 41 Mich. 673; Sperry *v.* Spaulding, 45 Cal. 544; Perkins *v.* Prout, 47 N. H. 387; Johnson *v.* McMurray, 72 Mo. 278; Shreeves *v.* Allen, 79 Ill. 553; Atlas Bank *v.* Doyle, 9 R. I. 76; Pugh *v.* Grant, 86 N. Car. 39; Liddell *v.* Crain, 53 Tex. 549; Ecton *v.* Harlan, 20 Kans. 452; Habersham *v.* Lehman, 63 Ga. 380; Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567; Wyman *v.* Colorado Natl. Bank, 5 Col. 30. And see 2 Rand. Com. Paper, § 1024, for further cases.

2. Bailey *v.* Bidwell, 13 M. & W. 73; Smith *v.* Sac County, 11 Wall. 139; Chambers *v.* Faulkner, 65 Ala. 448; Wright *v.* Brosseau, 73 Ill. 381; Mitchell *v.* Tomlinson, 91 Ind. 167; Sullivan *v.* Langley, 120 Mass. 437; Exchange Natl. Bank *v.* Savings Inst., 4 Vr. (N. J.) 170; Crampton *v.* Perkins, 4 East. Repr. (Md.) 653; Meadows *v.* Cozart, 76 N. Car. 450; Battles *v.* Laudenslager, 84 Pa. St. 446, and cases cited in preceding note.

Proof of duress upon the drawer of a bill compels the holder to prove his *bona fides*. Duncan *v.* Scott, 1 Camp. 100; Clark *v.* Pease, 41 Vt. 414. So does proof that the paper was delivered in escrow. Vallett *v.* Parker, 6 Wend. (N. Y.) 615. Or that it is accommodation paper and has been fraudulently diverted from its purpose. Nickerson *v.* Ruger, 76 N. Y. 279. And it has been held that a mere allegation of fraud will have the same effect. Roberts *v.* Lane, 64 Me. 108; Reamer *v.* Bell, 79 Pa. St. 292. And so held of an averment of fraud, and notice of it at the time of purchase, in Totten *v.* Bucy, 57 Md. 446.

But the mere allegation that the paper was for accommodation does not shift the burden of proof. Harger *v.* Worrall, 69 N. Y. 370.

Proof of want of consideration for the paper at its inception has the same effect as proof of fraud. Ross *v.* Drinkard, 35 Ala. 434; Emerson *v.* Burns, 114 Mass. 248.

A plea that a note was given without consideration to the knowledge of the plaintiff has been held to put the burden of proof upon the latter. Zook *v.* Simonson, 72 Ind. 83. But in Ohio it was ruled that after proof of lack of consideration in the making of a note, and proof also of a purchase for value, the burden still rested on the defendant to show notice of the defence to the plaintiff. Davis *v.* Bartlett 12 Ohio St. 541.

But evidence of a failure of consideration, either total or partial, will not compel a holder to prove himself a *bona fide* holder for value. Mechanics', etc., Bank *v.* Crow, 60 N. Y. 85; Winstead *v.* Davis, 40 Miss. 785; Dingman *v.* Amsink, 77 Pa. St. 114.

26. Maturity.—When no time is specified at which a note or bill is to mature, it is considered to be payable on demand.[1]

Where a time is given, in terms of months, calendar months are understood.[2]

The due date of a note may be a public holiday, in which case maturity is regulated by the law of the place of payment.[3]

In reckoning time the date day is excluded;[4] but from that day, and not the day of delivery, the computation of time begins.[5]

The day of payment is included as the last of the currency of the note or bill,[6] so that a suit begun on that day is premature.[7]

For the same reason the Statute of Limitations does not begin to run until the day after the day of payment.[8]

A demand note is payable instantly,[9] but for purposes of trans-

1. 3 Rand. Com. Paper, 1; Herrick *v.* Bennett, 8 Johns. 189; Freeman *v.* Ross, 15 Ga. 252; First Natl. Bank *v.* Price, 52 Iowa, 570; Keyes *v.* Fenstermacher, 24 Cal. 329; Thrall *v.* Mead, 40 Vt. 540.

2. Byles on Bills, 208; 1 Dan. Neg. Inst. 556; Webb *v.* Fairmaner, 3 M. & W. 473; McMurchey *v.* Robinson, 10 Ohio, 496; Campbell *v.* Lane, 25 Tex. Sup. 93.

Thus a note dated Aug. 29th, at six months, matures (without grace) on Feb. 28th. Wood *v.* Mullen, 3 Rob. (La.) 595. And one dated Jan. 31st, at one month, is due the same day. Byles on Bills, 208.

But a note dated impossibly as Sept. 31st begins to run from the last day of September. Wagner *v.* Kenner, 2 Rob. (La.) 120.

The 29th of February is not counted. February can have but 28 days by the *lex mercatoria*. Kohler *v.* Montgomery, 17 Ind. 220.

3. Commercial Bank *v.* Barksdale, 36 Mo. 563.

The general rule is that paper maturing on Sundays and holidays must be presented on the day preceding. Bussard *v.* Levering, 6 Wheat. (U. S.) 102; Barlow *v.* Planters' Bank, 6 How. (Miss.) 129; Reed *v.* Wilson, 12 Vr. (N. J.) 29. But where grace is not allowable, the rule is just the reverse—the paper matures the succeeding day. Avery *v.* Stewart, 2 Conn. 69; Kuntz *v.* Tempel, 48 Mo. 71; Barrett *v.* Allen, 10 Ohio, 426.

4. Ammidown *v.* Woodman, 31 Me. 580; McCoy *v.* Farmer, 65 Mo. 244; Roehner *v.* Knickerbocker, etc., Ins. Co., 63 N. Y. 160.

Although payable in a certain number of days. Henry *v.* Jones, 8 Mass. 453.

When payable within a time certain or "on or before" a certain day, maturity does not arrive until the expiration of the time or arrival of the day. Helmer *v.* Krolick, 36 Mich. 371; Mattison *v.* Marks, 31 Mich. 421

5. Powell *v.* Waters, 8 Cow. (N. Y.) 669; Luce *v.* Shaff, 70 Ind. 152; McSparran *v.* Neeley, 91 Pa. St. 17; Raefle *v.* Moore, 58 Ga. 94.

6. Young *v.* Van Benthuysen, 30 Tex. 762; Daly *v.* Proetz, 20 Minn. 411; Church *v.* Clark, 21 Pick. 310.

And after refusal to pay on that day, protest may be made at any hour, though the acceptor may make payment at an hour later still. King *v.* Holmes, 11 Pa. St. 456.

A transfer on the day of payment is before maturity. Continental Natl. Bank *v.* Townsend, 87 N. Y. 8.

7. Rudder *v.* Price, 1 H. Bl. 547; Gordon *v.* Parmlee, 15 Gray (Mass.). 413; Oothout *v.* Ballard, 41 Barb. 33; Bell *v.* Sackett, 38 Cal. 407; Walkins *v.* Willis, 58 Tex. 521; Benson *v.* Adams, 69 Ind. 353.

Some cases hold that after an express refusal to pay on that day, or where the paper is payable at bank, after banking hours, action may be brought at once. Holland *v.* Clark, 32 Ark. 697; Veazie Bank *v* Paulk, 40 Me. 109; Vandesaude *v.* Chapman, 48 Me. 262.

8. Blackman *v.* Nearing, 43 Conn. 56; Cornell *v.* Moulton, 3 Denio (N. Y.), 12, and cases *supra*.

9. Hirst *v.* Brooks, 50 Barb. (N. Y.) 334; Hill *v.* Henry, 17 Ohio, 1; Darling *v.* Wooster, 9 Ohio St. 517.

A note payable "at any time called for" is a demand note. Bowman *v.* McChesney, 22 Gratt. (Va.) 609. So is one payable "on demand after date." Hitchings *v.* Edmands, 132 Mass. 338.

Upon such notes interest accrues, and the Statute of Limitations runs from date. Darling *v.* Wooster, 9 Ohio St. 517; Lavallette *v.* Wendt, 75 N. Y. 579; Pres-

fer its maturity does not occur until a reasonable time after its date.[1]

Paper transferred after maturity becomes thereby due on demand in a reasonable time.[2]

Notes may be made payable in instalments, and as each instalment falls due an action may be brought for it without precipitating the maturity of the note.[3]

Interest upon notes so drawn does not become due until the note itself is due, unless the contrary is expressly provided.[4]

If payment of a note is conditional, maturity arrives upon the performance of the condition.[5]

27. Grace.—Though often expressly conferred by statute, grace is now generally recognized as a common-law right.[6]

The allowance of days of grace is regulated by the law of the place of payment,[7] and the presumption is that three days of

brey *v.* Williams, 15 Mass. 193. *Sed contra*, that the statute only runs from demand, which must be made within a reasonable time. Thrall *v.* Mead, 40 Vt. 540.

1. Poorman *v.* Mills, 39 Cal. 345.

What is a reasonable time is for the court. Carll *v.* Brown, 2 Mich. 401; Sylvester *v.* Crape, 15 Pick. (Mass.) 92; Sice *v.* Cunningham, 1 Cow. (N. Y.) 397. For the jury. Barbour *v.* Fullerton, 36 Pa. St. 105. A mixed question of law and fact. Salmon *v.* Grosvenor, 66 Barb. 160; Seaver *v.* Lincoln, 21 Pick. (Mass.) 267; Goodwin *v.* Davenport, 47 Me. 112; Woodruff *v.* Plant, 41 Conn. 344; Lindsey *v.* McClelland, 18 Wis. 481; Muncy School District *v.* Commonwealth, 84 Pa. St. 464.

As to the length of time which is reasonable no rule can be laid down; each case depends on its own facts. Where a draft ordered payment in "a few days," four months was held unreasonable. Chamberlyne *v.* Delarive, 2 Wils. 253. While a note given with mortgage security and transferred two years after its date was held to have been transferred before maturity. Tomlinson Carriage Co. *v.* Kinsella, 31 Conn. 268. See generally, for instances, Dennett *v.* Wyman, 13 Vt. 485; Stewart *v.* Smith, 28 Ill. 396; Seaver *v.* Lincoln, 21 Pick. (Mass.) 267; Herrick *v.* Woolverton, 41 N. Y. 581; La Due *v.* First Nat'l Bank, 31 Minn. 33; Carlton *v.* Bailey, 27 N. H. 230; Atlantic De Laine Co. *v.* Tredick, 5 R. I. 171; Cromwell *v.* Abbott, 1 S. & R. (Pa.) 180; Jameson *v.* Jameson, 72 Mo. 640; Gregg *v.* Union Nat'l Bank, 87 Ind. 238.

2. Colt *v.* Barnard, 18 Pick. (Mass.) 260; Libbey *v.* Pierce, 47 N. H. 309.

So a note signed after maturity by one as maker is a demand note as to such maker. Frech *v.* Yawger, 18 Vr. (N. J.) 157. So a note delivered before, but indorsed after maturity, is a demand note as to such indorser. Clark *v.* Whitaker, 50 N. H. 474.

3. Tucker *v.* Randall, 2 Mass. 283; Bush *v.* Stowell, 71 Pa. St. 208.

A condition that upon non-payment of any instalment the whole shall become due is legal. Carlon *v.* Kenealy, 12 M. & W. 139; German Mutual Fire Ins. Co. *v.* Franck, 22 Ind. 364.

4. Tanner *v.* Dundee Land Imp. Co., 12 Fed. Repr. 646.

But if the note is drawn with "interest annually," suit may be brought for the amount of the interest without waiting for the maturity of the note. Greenleaf *v.* Kellogg, 2 Mass. 568.

5. Henry *v.* Coleman, 5 Vt. 402.

Upon a note payable "six months after peace declared between the U. S. & C. S." it was held that such time never arrived, and the note never became payable. Brewster *v.* Williams, 2 S. Car. 455; McNinch *v.* Ramsey, 66 N. Car. But a note to be paid "Jan. 1st, 1865, or when Tennessee banks resume specie payments," is due at any time after the date given at the option of the holder. Walters *v.* McBee, 1 Lea (Tenn.), 364. See Frisbie *v.* Moore, 51 Cal. 516; Glancy *v.* Elliott, 14 Ill. 456.

6. State Bank *v.* Smith, 3 Murph. (N. Car.) 70; Barlow *v.* Gregory, 31 Conn. 261; Brown *v.* Harraden, 4 T. R. 148.

For a collection of the statutes of the various States see 3 Rand. Com. Paper, §§ 1063-1066.

7. Bank of Washington *v.* Triplitt, 1 Pet. (U. S.) 25; Skelton *v.* Dustin, 92 Ill. 49; Thorp *v.* Craig, 10 Iowa, 461; Bowen *v.* Newell, 8 N. Y. 190; Bryant *v.* Edson, 8 Vt. 325.

grace are allowed by the laws of all the United States, until the contrary is proven.[1]

A special local custom as to grace, as, e.g., to allow four days instead of three, is good if proven.[2]

Originally grace was allowable on foreign bills only,[3] but now also on orders for money,[4] inland bills[5] and promissory notes,[6] but non-negotiable notes,[7] and checks (unless payable at a future day[8]), are not entitled to grace.

Grace has been allowed on a note at one day,[9] or at twelve months,[10] or even on a day certain named therein,[11] but a note drawn payable on the "1st day of May next fixed" excludes all idea of grace.[12]

Sight bills are entitled to grace, whether inland or foreign,[13] and the same has been held of a bill at one day after sight,[14] but demand notes are not.[15]

28. Demand.—(*a*) *When Necessary.*—The drawer of a bill or in-

1. Reed *v.* Wilson, 12 Vt. (N. J.) 29; Wood *v.* Corl, 4 Metc. (Mass.) 203.

2. Renner *v.* Bank of Columbia, 9 Wheat. (U. S.) 581; Jackson *v.* Henderson, 3 Leigh (Va.), 196; Adams *v.* Otterback, 15 How. (U. S.) 539.

And may bind even persons having no knowledge of it. Mills *v.* Bank of U. S., 11 Wheat. (U. S.) 431.

And such custom may be shown to have been abandoned. Cookendorfer *v.* Preston, 4 How. (U. S.) 317.

3. Byles on Bills, 210; Tassel *v.* Lewis, 1 Ld. Raym. 743.

4. Strader *v.* Batchelor, 8 B. Mon. (Ky.) 168.

5. Brown *v.* Harraden, 4 T. R. 148.

6. Since statute 3 and 4 Anne. Byles on Bills, 211; Shepard *v.* Hall, 1 Conn. 329; Chambliss *v.* Matthews, 57 Miss. 306; Burchell *v.* Slocock, 2 Ld. Raym. 1545.

7. Backus *v.* Danforth, 10 Conn. 297; Fletcher *v.* Thompson, 55 N. H. 308; Luce *v.* Shaff, 75 Ind. 152. So held of a due bill. McLain *v.* Rutherford, Hempst. C. C. (U. S.) 47. And a sealed note. Skidmore *v.* Little, 4 Tex. 301.

But in *England* notes not to order or bearer are still entitled to grace. Smith *v.* Kendall, 6 T. R. 123.

8. Georgia Nat'l Bank *v.* Henderson, 46 Ga. 487; Cutler *v.* Reynolds, 64 Ill. 321; Ivory *v.* Bank of Missouri, 36 Mo. 475; Morrison *v.* Bailey, 5 Ohio St. 13; Minturn *v.* Fisher, 4 Cal. 35; Brown *v.* Lusk, 4 Yerg. (Tenn.) 210; Bowen *v.* Newell, 8 N. Y. 190. So post notes of banks are entitled to grace. Mechanics' Bank *v.* Merchants' Bank, 6 Pick. (Mass.) 13; Perkins *v.* Franklin Bank, 21 Pick. (Mass.) 483.

9. Alexander *v.* Parsons, 3 Lans. (N. Y.) 333.

10. Thomas *v.* Shoemaker, 6 W. & S. (Pa.) 179; Turk *v.* Stahl, 53 Mo. 437; Wooley *v.* Clements, 11 Ala. 220; Goddin *v.* Shipley, 7 B. Mon. (Ky.) 575; Sheppard *v.* Spates, 4 Md. 400; McMurchey *v.* Robinson, 10 Ohio, 496.

Contra as to a note payable "12 mos. from date." Ponsonby *v.* Nicholson, 4 Harr. & McH. 72.

11. Story on Prom. Notes, § 224; Story on Bills, § 342.

12. Durnford *v.* Patterson, 7 Mart. (La.) 460.

Grace may be waived by the party bound, e.g., refusing a tender before last day of grace on other grounds. Wyckoff *v.* Anthony, 90 N. Y. 442.

13. Hart *v.* Smith, 15 Ala. 807; Thornburg *v.* Emmons, 23 W. Va. 325; Knott *v.* Venable, 42 Ala. 186.

So by statute in England. Bills of Exch. Act, 1882, § 14.

Contra, Trask *v.* Martin, 1 E. D. Smith (N. Y.), 505; Commercial Bank *v.* Varnum, 49 N. Y. 269; Dalton City Bank *v.* Haddock, 54 Ga. 584.

14. Craig *v.* Price, 23 Ark. 634.

15. Story on Prom. Notes, § 224; First Nat'l Bank *v.* Price, 52 Iowa, 570; Crammer *v.* Harrison, 2 McC. (S. Car.) 246; Brown *v.* Chancellor, 61 Tex. 437.

Contra by statute in *California*. Bell *v.* Sackett, 38 Cal. 407.

It may be added that in reckoning days of grace the due date is excluded. Wiffen *v.* Roberts, 1 Esp. 261.

See MATURITY, *ante*, for effect of Sundays and holidays, and time of beginning action.

dorser of a bill or note is in general liable only after a formal demand of payment made upon the acceptor or maker.[1]

One who indorses after maturity is nevertheless entitled to a demand upon the maker,[2] but a drawer or indorser for whose accommodation the paper has been drawn is liable without demand.[3]

Failure to make demand gives rise to a presumption of injury to the indorser or drawer, which is not rebutted even by proof that he is solvent and uninjured.[4]

But as against an acceptor or maker no demand is necessary; suit is a sufficient demand.[5]

It is said, however, that where a demand is averred it must be proven to hold a maker.[6]

There is no difference between foreign and inland bills, so far as the necessity of demand is concerned;[7] but as to non-negotiable paper the cases vary.[8]

1. Story on Prom. Notes, §§ 198, 492; Munroe *v.* Easton, 2 Johns. Cas. (N. Y.) 75; Magruder *v.* Union Bank, 3 Pet. (U. S.) 87; Duncan *v.* McCullough, 4 S. & R. (Pa.) 480; Brandt *v.* Mickle, 28 Md. 436; Winston *v.* Richardson, 27 Ark. 34.

An allegation that a drawee has often refused to pay though requested will not dispense with the necessity of a formal demand. Treadway *v.* Nicks, 3 McC. (S. Car.) 195.

An indorser merely for security can only be fixed by demand. Nicholson *v.* Gouthitt, 2 H. Bl. 609.

Upon a note payable in instalments demand upon each instalment is necessary to hold the indorser. Eastman *v.* Furman, 24 Cal. 379.

The law of the place of payment governs. Vanderdonckt *v.* Thellusson, 8 C. B. 812.

2. Swartz *v.* Redfield, 13 Kans. 550; Dwight *v.* Emerson, 2 N. H. 159; Graul *v.* Strutzel, 53 Iowa, 712; Bemis *v.* Mackenzie, 13 Fla. 553; Patterson *v.* Tod, 18 Pa. St. 426; Dixon *v.* Clayville, 44 Md. 573; Berry *v.* Robinson, 9 John. (N. Y.) 121; Beebe *v* Brooks, 12 Cal. 308; Branch Bk. *v.* Gaffney, 9 Ala. 153.

But where a protest was attached to the note when indorsed it was held that no further demand was necessary. Williams *v.* Matthews, 3 Cow. (N. Y.) 252.

The fact that the note indorsed was non-negotiable is immaterial. Hunt *v.* Wadleigh, 26 Me. 271.

3. Beveridge *v.* Richmond, 14 Mn. App. 405; Shriner *v.* Keller, 25 Pa. St. 61; Black *v.* Fizer, 10 Heisk. (Tenn) 48.

4. Carter *v.* Flower, 16 M. & W. 743. *Cf.* Smith *v.* Miller. 43 N. Y. 171; Manney *v.* Cort, 80 N. Car. 300.

5. Rhodes *v.* Gent, 5 B. & Ald. 244; Johnson *v.* Packer, 13 Conn. 342; Blair *v.* Bank of Tenn., 11 Humph. (Tenn.) 83; Yeaton *v.* Berney, 62 Ill. 61; State Bk. *v.* Fox, 3 Blatch. (U. S.) 431.

But where the bill is payable at or after sight, no action will lie until demand has been made. Byles on Bills. 219; Dixon *v.* Mittall, 1 C M. & R. 307. And to hold an acceptor *supra protest* demand on the drawee is necessary. Schofield *v.* Taylor. 3 Wend. (N. Y.) 488.

Readiness to pay is a defence only so far as to reduce damages. Caldwell *v.* Cassidy, 8 Cow. (N. Y.) 271.

Even on a demand note, suit is a sufficient demand. Norton *v.* Ellam, 2 M. & W. 461; Hill *v.* Henry, 17 Ohio, 1; Bell *v.* Salkett, 38 Cal. 407; Collins *v.* Trotter, 81 Mo. 275; Middleton *v.* Boston Locomotive Works, 26 Pa. St. 257.

6. Conn *v.* Gano, 1 Ohio, 483.

7. 2 Edwards N. & B., § 667; Wood *v.* Surrells, 89 Ill. 107.

Whether the bill or note is payable to order or bearer is immaterial. Galpin *v.* Hard, 3 McC. (S. Car.) 394.

8. *Held* unnecessary as to the indorser of non-negotiable note. Plimley *v.* Westley, 2 Bing. N. Cas. 249. Drawer of a sealed bill. Force *v.* Craig, 2 Halst. (N. J.) 272. Or order for goods. Platzer *v.* Morris, 38 Tex. 1. Or order on a corporation where the drawer was one of its own officers. Lyell *v.* Supervisors, 6 McL. (U. S.) 446.

But held necessary as to drawer of an order for cotton Fromme *v.* Kaylor, 30 Tex. 754. And an order upon a town treasurer, where the drawer was a selectman of the same town. Pease *v.* Cornish, 19 Me. 191.

Where a demand is necessary an indorser is entitled to strict proof of it,[1] but a subsequent promise to pay,[2] or waiver of notice of dishonor,[3] on his part is *prima facie* evidence of a sufficient demand.

(*b*) *By and to Whom Made.*—Either the holder[4] of a bill or note or his lawfully authorized agent[5] may make presentment for payment; and indorsement to the agent is not in general necessary to enable him to make the demand.[6]

An executor[7] or assignee[8] is regarded as the agent of the decedent or bankrupt for the purpose of making presentment.

It has been held that a foreign bill must be presented by a notary; who cannot procure a clerk or subordinate to make the demand, and then protest the bill himself.[9]

The obvious persons upon whom to make demand are the acceptor or maker; but upon an acceptance for honor, payment should be demanded both of the drawee and acceptor for honor.[10]

Upon a bill payable at a bank, demand upon the clerk in charge during banking hours is good;[11] and when the maker or acceptor

1. Martinis *v.* Johnston, 1 Zab. (N. J.) 239.

2. Brennan *v.* Lowry, 4 Daly (N. Y.), 253.

3. Matthey *v.* Gally, 4 Cal. 63; Camp *v.* Bates, 11 Conn. 487.

So, too, a letter by a drawer asking indulgence and promising payment. Tibbetts *v.* Dowd, 23 Wend. 379. And confessing a judgment to the holder. Richter *v.* Selin, 8 S. & R. (Pa.) 425.

Even where a notarial certificate is made evidence by statute a drawer may be held by his own admission of liability or that of a co-drawer. Dickerson *v.* Turner, 12 Ind. 223.

The evidence of a bank clerk that he finds a memorandum of demand in his handwriting in the bank books, wherefore he believes he made a demand, that being his duty, although he has forgotten the incident entirely, is admissible in proof of demand. Shove *v.* Wiley, 18 Pick. (Mass.) 558. So is the memorandum of a deceased bank clerk coupled with proof of usage. Sheldon *v.* Benham, 4 Hill (N. Y.), 129. *Cf.* Knickerbocker Life Ins. Co. *v.* Pendleton, 115 U. S. 339.

4. Sussex Bank *v.* Baldwin, 2 Harr. (N. J.) 487.

5. Coore *v.* Callaway, 1 Esp. 115.

Possession is *prima-facie* proof of authority when note indorsed in blank. Cone *v.* Brown, 15 Rich. (S. Car.) 262. But not so of a non-negotiable note. Story on Prom. Notes, § 247.

A notary public is a public agent and a proper person to make demand for a holder. Bank of Utica *v.* Smith, 18 Johns. (N. Y.) 230. But any private person may also act as agent. Cole *v.* Jessup, 10 N. Y. 96.

6 Hartford Bank *v.* Barry, 17 Mass. 93.

But where the presentor is an early indorser to whom the note has not been reindorsed, possession is not enough. Welch *v.* Lindo, 7 Cr. (U. S.) 159. Such reindorsement must be made or subsequent indorsements stricken out. Dollfuss *v.* Frosch, 1 Denio (N. Y.), 367. But the blank indorsement of the owner will not prevent his making demand and receiving payment. Sprigg *v.* Curry, 7 Mart. N. S. (La.) 253.

7. 2 Edwards on N. & B. § 675.

8. Story on Bills, § 360; Hill *v.* Reed, 16 Barb. 280.

9. Bank of Cape Fear *v.* Steinmetz, 1 Hill (S. Car.), 44; Ocean Nat'l Bank *v.* Williams, 102 Mass. 141; Chenowith *v.* Chamberlain, 6 B. Mon. (Ky.) 60; Commercial Bank *v.* Barksdale, 36 Mo. 563; Donegan *v.* Wood, 49 Ala. 242; Locke *v.* Huling, 24 Tex. 311.

But a usage for a notary to make demand by his clerk is good, and if proven will be good even against an indorser who did not know of it. Commercial Bank *v.* Varnum, 49 N. Y. 269.

It seems that an inland bill may be presented by the notary's clerk and protested by the notary himself. Gawtry *v.* Doane, 51 N. Y. 90.

10. Mitchell *v.* Baring, 10 B. & C. 4; Hoare *v.* Cazenove, 16 East, 391; Williams *v.* Germaine, 7 B. & C. 468.

11. Crenshaw *v.* McKiernan, Minor, 295.

But not a demand after bank hours on

cannot be found at his office or residence, the person in charge is deemed an agent of the maker or acceptor for purposes of demand.[1]

If the maker or acceptor is dead, his personal representative is the proper person upon whom to make demand;[2] if a lunatic, his guardian;[3] but if he is a bankrupt, demand should still be made upon him, not his assignee.[4]

If demand is to be made upon a firm, it may be made of any partner.[5]

(*c*). *When Made.*—So far as the maker or acceptor are concerned, a demand may be made at any time before suit,[6] but drawers or indorsers are entitled to have a demand made on the day of maturity.[7]

A demand before maturity is ineffectual for any purpose;[8] while delay in making it, without excuse or waiver, discharges drawers and indorsers.[9]

Payment may be made at any time on the day of maturity, but after a refusal the maker or acceptor cannot expect a fresh demand; he must seek the holder and offer payment.[10]

a clerk who had no authority to pay. Newark, etc., Co. *v.* Bishop, 3 E. D. Sm. (N. Y.) 48.

1. Matthews *v.* Haydon, 2 Esp. 509.

Thus there have been held good demands upon the clerk in charge of the drawee's counting-room. Draper *v.* Clemens, 4 Mo. 52. A bookkeeper. Branch Bank *v.* Hodges, 17 Ala. 42. A servant "accustomed to pay money" for the acceptor. Bank of England *v.* Newman, 12 Mod. 241.

Where the maker could not be found on the premises designated as the place of payment, a demand upon any one who could be found there was held good. Buxten *v.* Jones, 1 M. & G. 83. At least the burden is upon such maker or acceptor to show that he was ready to pay at the place and time. Foden *v.* Sharp, 4 Johns. (N. Y.) 183. See, further, Sanford *v.* Norton, 17 Vt. 285; Kleekamp *v.* Meyer, 5 Mo. App. 444; Casco Bank *v.* Mussey, 19 Me. 20; Whaley *v.* Houston, 12 La. Ann. 585; Hunt *v.* Maybee, 7 N. Y. 266.

2. 1 Parsons N. & B. 364; Price *v.* Young, 1 Nott & McC. 438; McGruder *v.* Union Bank, 3 Pet. (U. S.) 87; Groth *v.* Gyger, 31 Pa. St. 271.

If no personal representative can be found, presentment should be made at the late residence of the maker or acceptor. Simon *v.* Reynaud, 10 La. Ann. 506; Bank of Washington *v.* Reynolds, 2 Cr. C. C. (U. S.) 289.

3. 1 Parsons N. & B. 365.

4. Armstrong *v.* Thurston, 11 Md. 148.

5. Greatlake *v.* Brown, 2 Cr. C. C. (U. S.) 541; Mt. Pleasant Bank *v.* McLevan, 26 Iowa, 306.

But if several sign as makers not being partners, presentment should be to all. Willis *v.* Green, 5 Hill (N. Y.), 232; Bank of Red Oak *v.* Orvis, 40 Iowa, 332; Nave *v.* Richardson, 36 Mo. 130.

6. Metzger *v.* Waddell, 1 N. Mex. 400.

Sed quære whether suit is not a sufficient demand. Meads *v.* Merchants' Bank, 25 N. Y. 143, and see *ante*.

7. Wilson *v.* Senier, 14 Wis. 380; i.e., if grace is allowed, on the last day of grace. Lenox *v.* Roberts, 2 Wheat. (U. S.) 373; Wooley *v.* Clements, 11 Ala. 220.

On a note payable one day after grace, demand should be made upon the fourth day after its date. Plato *v.* Reynolds, 27 N. Y. 586.

The time of making demand is governed by the law of the place where it is made. Pierce *v.* Indseth, 106 U. S. 546. But a note dated in Vermont, and payable generally, is governed by the law of that State, no matter where it is presented to the maker. Blodgett *v.* Durgin, 32 Vt. 361.

8. Wiffen *v.* Roberts, 1 Est. 261; Walsh *v.* Dart, 12 Wis. 635; Kobler *v.* Montgomery, 17 Ind. 220; McMurchey *v.* Robinson, 10 Ohio, 496.

9. Groton *v.* Dallheim, 6 Me. 476. Though presented the day after maturity. Anderton *v.* Beck, 16 East, 248. Or any time after that date. Bailey *v.* Bodenham, 16 C. B. (N. S.) 288; Estell *v.* Vanderveer, 2 South. (N. J.) 782; Freeman *v.* Boynton, 7 Mass. 483.

10. 1 Parsons N. & B. 374, 414.

Upon paper payable at a bank, demand should be made during banking hours;[1] upon other notes and bills during business hours.[2]

Presentment of instruments payable on demand or at or after sight, must be made within a reasonable time after their date.[3]

(*d*) *Where and How Made.*—If the bill or note to be presented names a place of payment, demand at that place is always sufficient.[4]

1. But presentment after hours is good if the officers of the bank are there to answer. Salt Springs Natl. Bank *v.* Benton, 58 N. Y. 431; Flint *v.* Rogers, 15 Me. 67; First Natl. Bank *v.* Owens, 23 Iowa, 185; Crook *v.* Jadis, 6 C. & P. 191; Shepherd *v.* Chamberlain, 8 Gray (Mass.), 225. But not if made to the cashier on the street. Swan *v.* Hodges, 3 Head (Tenn.), 251. And see Elford *v.* Teed, 1 M. & S. 28.

Generally, a demand at any time during bank hours is good. *Ex parte* Moline, 19 Ves. 216. But in Mississippi the note or bill must be left in bank till the close of such hours. Harrison *v.* Crowder, 6 Sm. & M. (Miss.) 464.

2. Or at all events before bedtime, Skelton *v.* Dustin, 92 Ill. 49; Nelson *v.* Fotterall, 7 Leigh (Va.), 179.

Three P.M. is a business hour. Stivers *v.* Prentice, 3 B. Mon. (Ky.) 461. So is 8 P.M. Barclay *v.* Bailey, 2 Campb. 527 And 9 A.M. Etheridge *v.* Ladd, 44 Barb. 69. But 11 P.M., the maker being in bed, is not. Dana *v.* Sawyer, 22 Me. 244. Yet where the maker got out of bed at 9 P.M., and refused payment, the demand being made to him personally, it was held good. Farnsworth *v.* Allen, 4 Gray (Mass.), 453.

3. Bull *v.* First Natl. Bank, 14 Fed. Rep. 612; Phœnix Ins. Co. *v.* Gray, 13 Mich. 191; Thrall *v.* Mead, 40 Vt. 540; Merritt *v.* Todd, 23 N. Y. 28. So, too, must an order for money expressing no time for payment. Brower *v.* Jones, 3 Johns. (N. Y.) 230.

Upon a bill payable in the same place where it is drawn or transferred, demand must be made during the next day after its receipt. Holme *v.* Barry, 1 Stra. 415. Piner *v.* Clary, 17 B. Mon. 645; Dyas *v.* Hanson, 14 Mo. App. 363.

But if the bill is *intended* for circulation, it need not be presented with such promptitude. Richardson *v.* Fenner, 10 La. Ann. 599. And the intent may be shown by parol. Hudson *v.* Wolcott, 39 Ohio St. 618; Tomlinson Carriage Co. *v.* Kinsella, 31 Conn. 268.

That a demand note bears interest raises a presumption that immediate presentment was not intended. Wethey *v.* Andrews, 3 Hill (N. Y.), 582. But a delay of three years has been held fatal even on an interest note. Crim *v.* Starkweather, 88 N. Y. 339. *Cf.* Perry *v.* Green, 4 Harr. (N. J.) 61.

In order to hold an indorser even of a time note after its maturity, demand must be made within a reasonable time. Prior *v.* Bowman, 38 Iowa, 92; Light *v.* Kingsbury, 50 Mo. 331; Sanborn *v.* Southard, 25 Me. 409; Union Bank *v.* Ezell, 10 Humph. (Tenn.) 385; Gray *v.* Bell, 3 Rich. (S. Car.) 71.

To decide, therefore, what is a reasonable time is important. See *ante*, MATURITY, and the following cases, where it was held that delay until two of three joint and several makers were discharged by the Statute of Limitations was not reasonable. Shutts *v.* Fingar, 3 East. Repr. (N. Y.) 110. Nor was five years. Thillman *v.* Gueble, 32 La. Ann. 260. Nor periods varying from eighteen months to four years. Perry *v.* Green, 4 Harr. (N. J.) 61; Mudd *v.* Harper, 1 Md. 110; Dixon *v.* Clayville, 44 Md. 573; Chambers *v.* Hill, 26 Tex. 472. Nor thirty days on a sight draft drawn in West Virginia on New York. Thornburg *v.* Emmons, 23 W. Va. 325.

Each case depends on the opportunity and difficulty of making the demand, as shown by its own state of facts. Darnall *v.* Morehouse, 45 N. Y. 64; Prescott Bank *v.* Caverly, 7 Gray (Mass.), 217; Lindsey *v.* McClelland, 18 Wis. 481; Nutting *v.* Burked, 48 Mich. 241; National, etc., Banking Co. *v.* Second Natl. Bank, 63 Pa. St. 404; Goodwin *v.* Davenport, 47 Me. 112; Montelius *v.* Charles, 76 Ill. 303; Nichols *v.* Blackmore, 27 Tex. 586; Chartered Bank *v.* Dickson, L. R. 3 P. C. 574.

4. Saunderson *v.* Judge, 2 H. Bl. 509; Gillett *v.* Averill, 5 Denio (N. Y.), 85. No matter where the maker or acceptor resides. Lawrence *v.* Dobyns, 30 Mo. 190. Or where he actually is when demand is made. Pierce *v.* Struthers, 27 Pa. St. 249, 30 ib. 139.

Refusal by the person in charge of the place is enough. New Orleans, etc., R. *v.* McKelvey, 2 La. Ann. 359. If it is closed, presentment at the door is suffi-

Where the place named for payment is uncertain, as "any bank in Boston," the holder may select the bank, and demand there is sufficient.[1]

A maker of a note, however, being liable at all events, cannot complain that no demand has been made even where a place for payment has been named in the note.[2]

Where no place for presentment is specified, personal demand upon the maker or acceptor is always good, as against all parties.[3]

cient. Hine *v.* Allely, 4 B. & Ad. 624.

If a bank is the place named, demand there is good. Freese *v.* Brownell, 6 Vr. (N. J.) 285. If a city where the drawee has an office but does not reside, demand at the office is sufficient. Cox *v.* National Bank, 10 Otto, 704.

If the bank is closed, that is dishonor. Ocoll Bank *v.* Hughes, 2 Coldw. (Tenn.) 52. Or presentment at another bank in same town will hold indorser. Spann *v.* Baltzell, 1 Fla. 301; Central Bank *v.* Allen, 16 Me. 41. See Seneca Co. Bank *v.* Neass, 5 Denio (N. Y.), 329; Swan *v.* Hodges, 3 Head (Tenn.), 251.

1. North Bank *v.* Abbot, 13 Pick. (Mass.) 465; Langley *v.* Palmer, 30 Me. 467; Malden Bank *v.* Baldwin, 13 Gray (Mass.), 154.

Nor is notice of selection necessary. Page *v.* Webster, 15 Me. 249.

If the place of payment is uncertain by misnomer or mistake, presentment at the place actually intended is good. Worley *v.* Waldran, 3 Sneed (Tenn.), 548.

2. Bank of U. S. *v.* Smith, 11 Wheat. (U. S.) 173; Hills *v.* Place. 48 N. Y. 520; Howard *v.* Boorman, 17 Wis. 459; Lyon *v.* Williamson, 27 Me. 149; Reeve *v.* Pack, 6 Mich. 240; Yeaton *v.* Berney, 62 Ill. 61; Montgomery *v.* Tutt, 11 Cal. 307; Connerly *v.* Planters', etc.. Ins. Co., 66 Ala. 433; Fitler *v.* Beckley, 2 W. & S. (Pa.) 458; Hall *v.* Allen, 37 Ind. 541; Otis *v.* Barton, 10 N. H. 433; Letchford *v* Starns, 16 La. Ann. 252; Robinson *v.* Lair, 31 Iowa, 9; Armistead *v.* Armistead, 10 Leigh (Va.), 512; Mahan *v.* Waters, 60 Mo. 167.

But if by the failure of the holder to make demand at the place and time specified the maker has been injured, this is a defence to the extent of the damages proved, and the burden is upon the maker to prove such damage. Wallace *v.* O'Connell, 13 Pet. (U. S.) 136; Caldwell *v.* Cassidy, 8 Cow. (N. Y.) 271; Baltzer *v.* Kans. R. Co., 3 Mo. App. 574; Thiel *v.* Conrad, 21 La. Ann. 217; Cook *v.* Martin, 5 Sm. & M. (Miss.) 379; and cases cited *supra*.

Even where money was deposited at the place named to meet the note, and after its maturity withdrawn by the insolvency or fraud of the person with whom deposited, this is no defence to the maker. Ward *v.* Smith, 7 Wall. (U. S.) 447; Adams *v.* Hackensack Co., 15 Vr. (N. J.) 638; Wood *v.* Merchants', etc., Sav. Co.. 41 Ill. 267; Williamsport Gas Co. *v.* Pinkerton, 95 Pa. St. 62. But exactly the opposite conclusion is reached in Bank of Charleston *v.* Zorn, 14 S. Car. 444; Lazier *v.* Horan, 55 Iowa, 75; and see 1 Daniel Neg. Inst. 574.

3. Burrowes *v.* Hannegan, 1 McL. 309; Penn *v.* Watts, 11 La. Ann. 205; Herring *v.* Sanger, 3 Johns. Cas. (N. Y.) 71.

If not objected to, personal demand is good even where a place of payment is designated. Baldwin *v.* Farnesworth, 10 Me. 414; King *v.* Crowell, 61 Me. 244.

The usual place to seek the maker or acceptor is at his place of business, and in his absence during business hours demand may properly be made there. Story on Prom. Notes, § 235; Williams *v.* Brailsford, 25 Md. 126; Branch Bank *v.* Hodges, 17 Ala. 42. Even if it is closed. Shed *v.* Brett, 1 Pick. (Mass.) 413; Bank of La. *v.* Salterfield, 14 La. Ann. 80.

But demand at the residence is also proper. Specht *v.* Howard, 16 Wall. 564; Gillett *v.* Averill, 5 Denio (N.Y.), 85; Sussex Bank *v.* Baldwin, 2 Harr. (N. J.) 487; Oakey *v.* Beauvais, 11 La. 487; Sanford *v.* Norton, 17 Vt. 285. Yet the maker or acceptor should be sought for at both office and residence. Union Bank *v.* Fowlkes, 2 Sneed (Tenn.), 555.

If he has no office, then his residence is the only proper place. Jarvis *v.* Garnett, 39 Mo. 268; Talbot *v.* Commonwealth Bank, 129 Mass. 67.

After the dissolution of a firm presentment at the residence of one partner is sufficient. Greatlake *v.* Brown, 2 Cr. C. C. (U. S.) 541.

Where it is proper to make presentment at a residence, and that residence is known, the fact that it is abroad will not excuse demand. Bank of New Orleans *v.* Whittemore, 12 Gray (Mass.), 469; Gest *v.* Lybrand, 3 Ohio, 307; Gil-

Though no place of payment be named on the face of the note or bill, such place may be fixed upon by agreement between the parties, and presentment should be made there.[1]

It is obvious that diligence is incumbent upon a holder in discovering the residence or office of the party upon whom demand is to be made.

Whether diligence has been used depends upon the circumstances of each case, and is therefore a mixed question of fact and law;[2] but where the facts are undisputed it is for the court only.[3]

When demand is made it should be by actually producing the note or bill, or offering to do so,[4] and insisting upon immediate payment.[5]

A note or bill cannot be properly presented by mailing it to the acceptor or maker;[6] but when payable at a specified bank it is enough if the instruments are lodged at maturity in the bank, ready to be surrendered when paid.[7]

more *v.* Spies, 1 Barb. 158. But the contrary was held where such foreign residence was acquired after the making of the note. Wheeler *v.* Field, 6 Metc. (Mass.) 290.

1. 1 Daniel Neg. Inst. 563; Pearson *v.* Bank of the Metropolis. 1 Pet. (U. S.) 89; Eason *v.* Isbell, 42 Ala. 456; West *v.* Brown, 6 Ohio St. 542.

Demand at a place agreed upon by maker and holder will bind the indorser. Meyer *v.* Hibscher, 47 N. Y. 265. *A fortiori* will it when the indorser is a party to the agreement. State Bank *v.* Hurd. 12 Mass. 172.

2. Story on Bills, § 299; Story on Prom. Notes, § 240; Oxnard *v.* Varnum, 3 East. Repr. (Pa.) 718.

3. Wheeler *v.* Field, 6 Metc. (Mass.) 290.

Where the maker removed to new place of residence which is known, inquiry at his old abode is not diligence. Anderson *v.* Drake, 14 Johns. (N. Y.) 114; Louisiana Ins. Co. *v.* Shamburgh, 2 Mart. N. S. (La.) 511. Nor is mere inquiry at the place of the date of the note. Specht *v.* Howard, 16 Wall. (U. S.) 564; Smith *v.* Fisher, 24 Pa. St. 222; Hartford Bank *v.* Green, 11 Iowa, 476. Nor looking up the maker in a city directory. Ayrault *v.* Pacific Bank, 47 N. Y. 570.

But inquiry at maker's last place of business, and learning there that he was "out West," is sufficient. Adams *v.* Leland, 30 N. Y. 309. So is inquiry at his boarding-house eliciting the information that he was "down the river," to be gone "some days." Belmont Bank *v.* Patterson, 17 Ohio, 78. But failure to inquire for the maker's residence on learning that he was a steamboat captain and absent on his boat is negligence, and discharges the indorser. Mitchell *v.* Young, 21 La. Ann. 279.

And see further, Hultz *v.* Boppe, 37 N. Y. 634; Central Bank *v.* Allen, 16 Me. 41; Galpin *v.* Hard, 3 McCord (S. Car.). 394; Nailor *v.* Bowie, 3 Md. 251; Porter *v.* Judson, 1 Gray (Mass.), 175.

4. Hansard *v.* Robinson, 7 B. & C. 90; Musson *v.* Lake, 4 How. (U. S.) 242; Arnold *v.* Dresser, 8 Allen (Mass.), 435; Bank of Vergennes *v.* Cameron, 7 Barb. (N. Y.) 143; Farmers' Bank *v.* Duvall, 7 G. & J. (Md.) 78.

If the certificate of protest duly sets out a demand, it is *prima facie* evidence of production of the paper. Bank of Vergennes *v.* Cameron, 7 Barb. (N. Y.) 143.

If the note has been lost a copy should be produced. Hinsdale *v.* Miles, 5 Conn. 331; Story on Bills, § 348; 2 Edwards Notes and Bills, §§ 672, 697.

5. Merely taking a note to maker's residence is not a demand. Mechanics' Bank *v.* Lynn, 2 Cr. C. C. (U. S.) 217. Nor presenting it to the maker's administrator "for allowance." Chase *v.* Evoy, 49 Cal. 467.

6. 1 Daniel Neg. Inst. 583; 1 Parsons N. & B. 371; Parker *v.* Stroud, 31 Hun (N. Y.), 578; Halls *v.* Howell, Harp. 426.

Yet a bill may be left in the acceptor's hands for payment early on the due day, to be called for and paid later. Turner *v.* Mead, 1 Stra. 416. And leaving a note at a maker's house which next day was returned with a distinct refusal to pay, has been held a sufficient demand. Woodin *v.* Foster, 16 Barb. (N. Y.) 146.

7. Bank of U. S. *v.* Carneal, 2 Pet. (U. S.) 543; Gillett *v.* Averill, 5 Den.

A custom, common in some New England States, of sending word to the maker by mail in what bank his note was, and requiring him to come and pay it, has been held good, at least when known and consented to by the parties.[1]

(*e*) *On Paper of Absconding Debtors.*—The fact that before the maturity of a note or bill the maker or acceptor has departed from his residence, even for the purpose of avoiding his creditors, does not render presentment unnecessary; demand must be made at his last known residence or office, if with diligence it can be found.[2]

29. Protest.—The solemn declaration on the part of the holder of a bill of exchange against any loss sustained by him by reason of the non-payment or non-acceptance of the bill in question is known as protest.[3]

The proper person to make the protest is the notary who presented the bill,[4] but if no notary is obtainable, any private

(N. Y.) 85; Jenks *v.* Doylestown Bank, 4 W. & S. (Pa.) 505; Lawrence *v.* Dobyns, 39 Mo. 196; Huffaker *v.* National Bank of Monticello, 13 Bush (Ky.), 644; State Bank *v.* Napier, 6 Humph. (Tenn.) 270.

But where the note was lost in a crack in a desk, so that it was not known to be in bank on the day of maturity, it was held insufficient. Chicopee Bank *v.* Philadelphia Bank, 8 Wall. (U. S.) 641.

1. 1 Parsons N. & B. 369; Jones *v.* Fales, 4 Mass. 245; Shove *v.* Wiley, 18 Pick. (Mass.) 558; Maine Bank *v.* Smith, 18 Me. 99.

The knowledge of the maker will bind the indorsers. Warren Bank *v.* Parker, 8 Gray (Mass.), 221. So that presentment good against the maker is good against the indorser. Whitwell *v.* Johnson, 17 Mass. 449. *Contra*, Pierce *v.* Whitney, 29 Me. 188.

The presumption is that the general custom of all the banks in the place where the note is payable is known to the parties to it. 2 Edwards N. & B. § 700; Grand Bank *v.* Blanchard, 23 Pick. (Mass.) 305.

2. McGruder *v.* Bank of Washington, 9 Wheat. (U. S.) 598; Taylor *v.* Snyder, 3 Den. (N. Y.) 145; Anderson *v.* Drake, 14 Johns. (N. Y.) 114.

But where the holder learned, by inquiry at the last place of business of a firm, that they had failed and left town, and thereupon gave notice of dishonor, this was held insufficient. Granite Bank *v.* Ayres, 16 Pick. (Mass.) 392.

When the fact of absconding has been ascertained, and the holder learns that the absconder has left no attachable property, he must still go through the form of presentment. Pierce *v.* Cate, 12 Cush. (Mass.) 192.

Nor does notice by the maker to holder that demand would be useless, excuse presentment. Lee Bank *v.* Spencer, 6 Metc. (Mass.) 308.

But where neither the maker or acceptor, nor his residence, family, or office can be discovered, presentment is impossible, and therefore unnecessary. Lehman *v.* Jones, 1 W. & S. (Pa.) 126; Plahto *v.* Patchin, 26 Mo. 389; Ratcliff *v.* Planters' Bank, 2 Sneed (Tenn.). 425; Galpin *v.* Hard. 3 McC. (S. Car.) 394.

3. 2 Dan. Neg. Inst. 4; Walker *v.* Turner, 2 Gratt. (Va.) 536.

But in its popular sense protest includes all the steps necessary to fix the liability of a drawer or indorser. Coddington *v.* Davis, 1 N. Y. 186; Townsend *v.* Lorain Bank, 2 Ohio St. 345.

Protest is only necessary upon foreign bills. Union Bank *v.* Hyde, 6 Wheat. (U. S.) 372; Smith *v.* Curlee, 59 Ill. 221; Ocean Nat'l Bk. *v.* Williams, 102 Mass. 141; Bank of U. S. *v.* Leathers, 10 B. Mon. (Ky.) 64.

Therefore, though it is customary to protest both promissory notes and inland bills, the cost of protest can only be recovered upon foreign bills. 1 Parsons N. & B. 646; Johnson *v.* Bank of Fulton, 29 Ga. 260.

4. Cribbs *v.* Adams, 13 Gray (Mass.), 597; Sacriber *v.* Brown, 3 McL. (U. S.) 481.

Presentment by the notary's clerk and protest by the notary himself is improper unless authorized by statute. Commercial Bank *v.* Varnum, 49 N. Y. 269; Commercial Bank *v.* Barksdale, 36 Mo. 563.

person of the place of dishonor,[1] which should be the place of protest,[2] may draw it up.

The act of protesting is said to comprise three steps, viz.: (1) presentment and demand; (2) noting; and (3) extending the protest.[3]

The protest completed, it is authenticated by the signature and seal of the notary.[4]

Although the form of protests already given[5] is the usual and proper one, if the facts are sufficiently set forth the words used are immaterial.[6]

A protest is evidence of all the statements properly contained in it,[7] but it is *prima facie* evidence only,[8] and any legal testimony may be offered to rebut it.

But at common law it is not part of a notary's duty to give notice of dishonor; therefore, unless by statute, a protest is not evidence of notice.[9]

1. Burke *v.* McKay, 2 How. (U. S.) 66; Read *v.* Bank of Kentucky, 17 B. Mon. (Ky.) 91.

2. Benj. Chalm. Dig. 175; Chitty on Bills, 170; Story on Bills, § 282.

3. 2 Danl. Neg. Inst. 10.

Although it has been said that noting, as distinguished from protest, "is unknown to the law,"—Leftly *v.* Mills, 4 T. R. 170,—it is now a well settled practice to make a "note" or minute of the dishonor on the very day when it occurs, from which the "extended" or formal protest may be drawn off at any future time. Bailey *v.* Dozier, 6 How. (U. S.) 23; Cayuga Co. Bk. *v.* Hunt, 2 Hill (N. Y.), 635.

But delay in noting will invalidate the protest. Dennistoun *v.* Stewart, 17 How. (U. S.) 606.

4. Of which seal the courts take judicial notice. Townsley *v.* Sumrall, 2 Pet. 170; Bank of Ky. *v.* Pursley, 3 T. B. Mon. (Ky.) 240; Bradley *v.* Northern Bank, 60 Ala: 258.

If the seal be omitted or the protest be by a private person, the document must be proved by any legal evidence. Carter *v.* Burley, 9 N. H. 558; Chanoine *v.* Fowler, 3 Wend. (N. Y.) 173.

5. See *ante*, § 5.

6. The essentials of a protest are the time, place, and manner of presentment, demand, and dishonor; the person by whom and to whom presentment was made. 2 Danl. Neg. Inst. 16.

A protest stating a demand before maturity is void. Walmsley *v.* Acton, 44 Barb. (N. Y.) 312.

Where a bill is payable at a bank the protest must state a demand made there. People's Bank *v.* Brooke, 31 Md. 7.

A statement of presentment only is insufficient. Nave *v.* Richardson, 36 Mo. 130. But demand includes presentment. Nott *v.* Beard, 16 La. 308 *Contra*, Musson *v.* Lake, 4 How. (U. S.) 262.

Where demand is made at the office of the drawer or acceptor, in his absence, the person on whom demand was actually made may be described as the clerk or person in charge. Stainback *v.* Bank of Va., 11 Gratt. (Va.) 260.

7. Townsley *v.* Sumrall, 2 Pet. (U. S.) 170; Chase *v.* Taylor, 4 H. & J. (Md.) 54.

But this is true only of protests recognized by common law, i.e., those of foreign bills; for if a statute provide for protest of inland bills, and make such protests evidence, they still cannot be received by the courts of any other State or country. Dutchess Co. Bank *v.* Ibbottson, 5 Denio (N. Y.), 110.

8. Howard Bank *v.* Carson, 50 Md. 27; Spence *v.* Crockett, 5 Baxter (Tenn.), 576; Dickens *v.* Beal, 10 Pet. (U. S.) 582.

9. Miller *v.* Hackley, 5 Johns. (N. Y.) 384; Bank of Rochester *v.* Gray, 2 Hill (N. Y.), 231; Walker *v.* Turner, 3 Gratt. (Va.) 534.

But even where by statute the protest is admitted as evidence of notice, its statements as to notice are strictly construed, and it has been held that where the protest showed a notice sent to an indorser at N. A. it was insufficient, there being no presumption that the indorser lived at N. A.; the protest should have stated that N. A. was the indorser's residence. Turner *v.* Rogers, 8 Ind. 140. *Cf.* Stiles *v.* Inman, 55 Miss. 472; Sprague *v.* Tyson, 44 Ala. 340; Bradshaw *v.* Hedge, 10 Iowa, 402.

30. Notice of Dishonor.—(*a*) *When Necessary.*—When acceptance[1] of a bill or payment[2] of either a note or bill has been refused, though protest has been made or noted, the liability of the drawer or indorser is generally not complete unless notice of dishonor is sent to him.

If this notice is neglected, the indorser or drawer is discharged,[3] even if they are accommodation parties.[4]

The time when the indorsement is made, whether before or

But in Bank of U. S. *v.* Smith, 11 Wheat. (U. S.) 171, it was left for the jury to decide whether the place to which notice was sent was or was not the indorser's residence.

1. Rogers *v.* Stephens, 2 T. R. 713; Long *v.* Stephenson, 72 N. Car. 569; Leggett *v.* Weed, 7 Kans. 273.

But where a bill has been dishonored for non-acceptance, it is not necessary afterwards to make presentment for payment and serve another notice of dishonor. De La Torre *v.* Barclay, 1 Stark. 7; Whitehead *v.* Walker, 9 M. & W. 506.

2. If payable in instalments, notice of non-payment of each instalment must be served. Fitchburg Ins. Co. *v.* Davis, 121 Mass. 121.

3. Ogden *v.* Saunders, 12 Wh. (U. S.) 213; Hall *v.* Davis, 41 Ga. 614; Grieff *v.* Kirk, 15 La. Ann. 320,—as to drawers. Bridges *v.* Berry, 3 Taunt. 130; Magruder *v.* Union Bank, 3 Pet. (U. S.) 87; Stewart *v.* First Nat. Bank, 40 Mich. 348; Cayuga Co. Bank *v.* Warden, 1 N. Y. 413; Webber *v.* Matthews, 101 Mass. 481; Winston *v.* Richardson, 27 Ark. 34; Shields *v.* Farmers' Bank, 5 W. Va. 254, —as to indorsers.

Though the bill be drawn in payment for goods—Allen *v.* King, 4 McL. (U. S.) 128—or for an antecedent debt—Penn *v.* Pommeirat, 2 Mart. N. S. (La.) 541—the drawer is still entitled to notice.

Wherever the bill is drawn with authority, he is entitled to such notice. Walker *v.* Rogers, 40 Ill. 278; Johnson *v.* Flanagan, 26 La. Ann. 289. Or drawn against funds, actual or expected, in the drawee's hands. Blum *v.* Bidwell, 20 La. Ann. 153. Otherwise not. Lewis *v.* Parker, 33 Tex. 121.

And where the drawer and drawee are one and the same person to all intents and purposes, as where one officer of a corporation drew on another, notice is necessary. Warrensburg, etc., Assoc. *v.* Zoll, 20 C. L. J. (Md.) 36.

So, too, where drawer and drawee were the same persons carrying on business in two places under different partnership names. Hill *v.* Planters' Bank, 3 Humph. (Tenn.) 670. *Cf.* Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15; Bailey *v.* Southwestern Bank, 11 Fla. 266; Roach *v.* Ostler, 1 M. & Ry. 120.

In suits against both drawers and indorsers, notice must be averred and proven. Disborough *v.* Vanness, 3 Hals. (N. J.) 284; Treadway *v.* Nicks, 3 McC. (S. Car.) 195.

That a note is payable to bearer so that indorsement was unnecessary makes no difference; an indorser is still entitled to notice. Galpin *v.* Hard, 3 McC. (S. Car.) 394.

But where the name of the maker is forged, or the maker had no right to make the note, e.g., being an infant, notice is not necessary. Turnbull *v.* Bowyer, 40 N. Y. 456; Perkins *v.* White, 36 Ohio St. 530.

Nor is the indorser of a non-negotiable note entitled to notice. Ford *v.* Mitchell, 15 Wis. 334; Billingham *v.* Bryan, 10 Iowa, 317; Stix *v.* Matthews, 75 Mo. 96; Sutton *v.* Owen, 65 N. Car. 123; Seymour *v.* Vanslyck, 8 Wend. (N. Y.) 403; Plimley *v.* Westley, 2 Bing. N. C. 249.

4. Cory *v.* Scott, 3 B. & Ald. 619; Bank of Louisiana *v.* Morgan, 13 La. Ann. 598,—as to drawers. Turner *v.* Samson, L. R. 2 Q. B. D. 23; Sawyer *v.* Brownell, 13 R. I. 141; Rea *v.* Dorrance, 18 Me. 137; Bradley *v.* Buchanan, 21 Kans. 274; Field *v.* New Orleans Newspaper Co., 21 La. Ann. 24,—as to indorsers.

Notice is necessary though both indorser and acceptor be accommodation parties. Foster *v.* Parker, L. R. 2 C. P. D. 18. Or the drawer be insolvent. Jackson *v.* Richards, 2 Caines (N. Y.), 343.

It has been held, however, that where a drawer is himself the party accommodated, he will not be discharged by lack of notice. Norton *v.* Pickering, 8 B. & C. 610; Legge *v.* Thorpe, 12 East, 171; Fulton *v.* McCracken, 18 Md. 528; Evans *v.* Norris, 1 Ala. 511; McLaren *v.* Marine Bank, 52 Ga. 131. Unless he prove damages from lack of such notice. New Orleans Bank *v.* Harper, 12 Rob. 231; Nicolét *v.* Gloyd, 18 La. 417.

after maturity, is immaterial; the indorser is still entitled to notice.[1]

Persons indorsing negotiable paper before its delivery have been variously regarded as indorsers, and therefore of course entitled to notice,[2] or as guarantors or co-makers, and consequently not so entitled.[3]

It may be added that the maker of a note,[4] even though an accommodation party,[5] and the acceptor of a bill [6] have no right to notice of dishonor.

(*b*) *Requisites of Notice.*—The sufficiency of the notice sent is determined by the law of the place of payment, if such place is specified in the instrument dishonored.[7]

If it is not mentioned, the law of the place of indorsement governs,[8] and the home of the indorser is *prima facie* the place of his indorsement.[9]

While it is desirable that notice should be in writing,[10] this is not necessary; verbal notice is sufficient.[11]

1. Shelby *v.* Judd, 24 Kans. 161; Stockman *v.* Riley, 2 McC. (S. Car.) 398; McCall *v.* Witkouski, 10 La. Ann. 179; Dwight *v.* Emerson, 2 N. H. 159; Tyler *v.* Young, 30 Pa. St. 143; McKeever *v.* Kirtland, 33 Iowa, 348; Beebe *v.* Brooks, 12 Cal. 308; Berry *v.* Robinson, 9 Johns. (N. Y.) 121; Smith *v.* Caro, 9 Oreg. 278.

One who indorses a demand note eight months after its date comes within the rule. McKinney *v.* Crawford, 8 S. & R. (Pa.) 351. And in *Vermont* it has been extended to the indorser of an overdue non-negotiable note. Aldis *v.* Johnson, 1 Vt. 136.

But in *North Carolina* an indorser at maturity is a co-maker and not entitled to notice. Baker *v.* Robinson, 63 N. Car. 191.

2. Hooks *v.* Anderson, 58 Ala. 238; Bronson *v.* Alexander, 48 Ind. 244; Taylor *v.* McCune, 11 Pa. St. 460; Bradford *v.* Pauly, 18 Kans. 216; Richards *v.* Warring, 1 Keyes (N. Y.), 576.

In Massey *v.* Turner, 2 Houst. (Del.) 79, such indorser was held entitled to notice, though the consideration for the note was received by him.

Notice is required by statute in *Massachusetts.* Cook *v.* Googins, 126 Mass. 410.

3. Perkins *v.* Barstow, 6 R. I. 505; Manufacturers' Bank *v.* Follett, 11 R. I. 92; Hardy *v.* White, 60 Ga. 454; Iser *v.* Cohen, 1 Baxt. (Tenn.) 421; Sibley *v.* Van Horn, 13 Iowa, 209. See articles on GUARANTY and SURETYSHIP.

4. Byles on Bills, 292; Pearse *v.* Pemberthy, 3 Camp. 261; Hays *v.* Northwestern Bank, 9 Gratt. (Va.) 127.

5. Hansbrough *v.* Gray, 3 Gratt. (Va.) 356.

6. Blair *v.* Bank of Tennessee, 11 Humph. (Tenn.) 84.

Lack of notice to the acceptor cannot therefore avail the drawer as a defence. Edwards *v.* Dick, 4 B. & Ald. 212.

Though the drawee accepts payable at a specified bank, he is still not entitled to notice of non-payment. Smith *v.* Thatcher, 4 B. & Ald. 200; Sebags *v.* Abithal, 4 M. & S. 462.

For a full statement of the statutes of the various States as to notice of dishonor, see 3 Rand. Com. Paper, §§ 1212–1217.

7. Benj. Chalm. Dig. 202; Smith *v.* Hall, U. C. 3 Q. B. 315.

8. Story on Bills, § 285; Story on Prom. Notes, § 177.

9. Simpson *v.* White, 40 N. H. 540.

All questions relating to sufficiency of notice are for the court only. Hutchinson *v.* Bowker, 5 M. & W. 542; Ricketts *v.* Pendleton, 14 Md. 320; Remer *v.* Downer, 23 Wend. (N. Y.) 620; Townsend *v.* Lorain Bank, 2 Ohio St. 345; Routh *v.* Robertson, 11 Sm. & M. (Miss.) 382.

10. 2 Daniel Neg. Inst. 33; Story on Prom. Notes, § 348.

But a written notice need not be in any set form of words; a letter is sufficient. Shepard *v.* Hall, 1 Conn. 329; Howland *v.* Adrian, 1 Vr. (N. J.) 41. Provided it contain all the necessary information. Hartley *v.* Case, 4 B. & C. 339.

11. Phillips *v.* Gould, 8 C. & P. 355; Smith *v.* Mullett, 2 Camp. 208; Butt *v.* Hoge, 2 Hilt. 81; McKeever *v.* Kirtland, 33 Iowa, 348; Linville *v.* Welch, 29 Mo. 203; Thompson *v.* Williams, 14 Cal. 160; Stephenson *v.* Primrose, 8 Port. (Ala.)

A notice, however, when written, as is usual, should be signed by the party or person giving it;[1] should be addressed to the party to be notified;[2] should state, at least by fair implication, that the holder looks to such party for payment;[3] should contain an intelligible and sufficient description of the instrument dishonored;[4] should clearly state the facts of demand and dis-

155; Payne *v.* Winn, 2 Bay (S. Car.), 374.

Leaving word at the drawer's or indorser's office has been held enough. Crosse *v.* Smith, 1 M. & S. 545. But *notice* of some kind is necessary. The fact that the drawer or indorser really knew that the bill or note had been dishonored does not amount to notice. Miers *v.* Brown, 11 M. & W. 372; Juniata Bank *v.* Hall, 16 S. & R. (Pa.) 160; Lane *v.* Bank of West Tennessee, 9 Heisk. (Tenn.) 419.

1. Walker *v.* Bank of the State, 8 Mo. 704; Walmsley *v.* Acton, 44 Barb. (N. Y.) 312.

But a statement by the messenger delivering the notice to the party notified, giving the name of the person from whom it came, has been held sufficient. Armstrong *v.* Christiani, 5 C. & B. 687. So has a notice unsigned but written on paper bearing a bank's letter-heading, the jury having found that the indorser notified was not misled. Maxwell *v.* Brain, 10 Jur. N. S. 777.

A printed signature is sufficient. Sussex Bank *v.* Baldwin, 2 Harr. (N. J.) 487.

2. Where a notice addressed at its foot to the wrong party was inclosed in an envelope correctly addressed, it was held insufficient. Remer *v.* Downer, 23 Wend. (N. Y.) 620. Yet where the only address given was upon the envelope, and that was correct, it was held a good notice. Denegre *v.* Hiriart, 6 La. Ann. 100.

But where the indorser's illegible signature is shown to be the cause of indistinctness or incorrectness of address, he will still be bound. Hewitt *v.* Thompson, 1 Moo. & R. 543; Manufacturers' Bank *v.* Hagard, 35 N. Y. 226. But this must be clearly shown. Davey *v.* Jones, 13 Vr. (N. J.) 28.

A notice sent after an indorser's death may be addressed to any one of his executors. Carolina Nat'l Bank *v.* Wallace, 13 S. Car. 347. Or simply to his "legal representatives"—Pillow *v.* Hardeman, 3 Humph. (Tenn.) 538; Boyd *v.* Savings Bank, 13 Gratt. (Va.) 501; Chrismas *v.* Fluker, 7 Rob. (La.) 13—when their names cannot be discovered. Smalley *v.* Wright, 11 Vr. (N. J.) 471.

A notice directed to the decedent himself has been held good when all information as to his estate was unobtainable. Barnes *v.* Reynolds, 4 How. (Miss.) 114; Mospero *v.* Pedesclaux, 22 La. Ann. 227. But a notice so addressed, yet sent to the person who was afterwards appointed administrator, is bad. Mathewson *v.* Strafford Bank, 45 N. H. 104.

A notice addressed "to the estate" of the deceased, without any inquiry, shows lack of diligence, and is therefore bad. Massachusetts Bank *v.* Oliver, 10 Cush. (Mass.) 557.

3. Townsend *v.* Lorain Bank, 2 Ohio St. 345; Burgess *v.* Vreeland, 4 Zab. (N. J.) 71.

Yet courts have refused to draw this implication from the statement that the bill "had been presented and not taken up." East *v.* Smith, 4 D. & L. 744. And made such inference from the words "please let me hear from you"—Clark *v.* Eldridge, 13 Metc. (Mass.) 96—and the statement that the indorser was looked to for "non-payment, interest, and costs." Fitchburg Bank *v.* Perley, 2 Allen (Mass.), 433.

But it is now held, at least by the best text-books, that the fact of the holder's sending notice implies that he looks for payment to the party notified. 2 Dan. Neg. Inst. 45; Story Prom. Notes, § 353; 3 Rand. Com. Paper. § 1222, citing Cooke *v.* French, 10 Ad. & El. 131; Chard *v.* Fox, 14 Q. B. 200; Bank of U. S. *v.* Carneal, 2 Pet. (U. S.) 542.

4. Housatonic Bank *v.* Laflin, 5 Cush. (Mass.) 546; Kilgore *v.* Bulkley, 14 Conn. 393; Saltmarsh *v.* Tuthill, 13 Ala. 390; Burkam *v.* Trowbridge, 9 Mich. 209; Young *v.* Bennett, 7 Bush (Ky.), 474.

A misdescription that does not mislead is immaterial. Thompson *v.* Williams, 14 Cal. 160; Wood *v.* Watson, 53 Me. 300; Youngs *v.* Lee, 12 N. Y. 55; Bromage *v.* Vaughn, 9 Q. B. 608. And the burden of proving that he was misled is upon the person alleging the misdescription. Hartley *v.* Case, 4 B. & C. 339; Byles on Bills, 277; 2 Dan. Neg. Inst. 34.

Thus an error in calling a bill a note, or *vice versa*, is immaterial. Messenger *v.* Southey, 1 Man. & G. 76; Stockman *v.* Parr, 11 M. & W. 809. And parol evidence is admissible to identify the in-

honor;[1] and, as a matter of form, it ought to be dated,[2] and con-

strument as the one described in the notice. Johnson *v.* Cocks, 7 Eng. (Ark.) 672.

Where the error consisted in the omission of the name of the drawee, it was considered immaterial. Maine *v.* Spurlock, 9 Rob. (La.) 161. Otherwise where the maker's name was omitted. Home Ins. Co. *v.* Green, 19 N. Y. 518. But stating that a note was made by "S. H., Treasurer" when it was also signed by another officer has been held an immaterial omission, there being no other note to which the notice could refer. Hodges *v.* Shuler, 22 N. Y. 114.

An error caused by an illegible signature is excusable after diligence in trying to learn the indorser's real name; failure to inquire at a bank where the note was payable is negligence. McGeorge *v.* Chapman, 16 Vr. (N. J.) 395 *Cf.*, as to mistakes in names, Underwood *v.* Huddlestone, 2 Cr. C. C. (U. S.) 93; Moorman *v.* Bank of Alabama, 3 Port. (Ala.) 353; Smith *v.* Whiting, 12 Mass. 6; Sasscer *v.* Farmers' Bank, 4 Md. 409.

Errors of amount in describing the note or bill can only discharge a drawer or indorser when he proves to the satisfaction of a jury that he was thereby misled. Bank of Rochester *v.* Gould, 9 Wend. (N. Y.) 279; McKnight *v.* Lewis, 5 Barb. (N. Y.) 681; Snow *v.* Perkins, 2 Mich. 238; Bank of Alexandria *v.* Swann, 9 Pet. (U. S.) 33; Rowan *v.* Odenheimer, 5 Sm. & M. (Miss.) 44. And the same rule has been applied to mistakes as to the date or maturity of the instrument. Cayuga Bank *v.* Warden, 1 N. Y. 413; Mills *v.* Bank of U. S., 11 Wheat. (U. S.) 431; Ross *v.* Planters' Bank, 5 Humph. (Tenn.) 335.

Where the description of the notice applied equally well to two notes, one of which had been overdue for some months, it was held to refer with sufficient certainty to the other. Davenport *v.* Gilbert, 4 Bosw. (N. Y.) 532.

Whenever the notice containing the error of date cannot refer to any other instrument than the one to which it was intended to refer, the mistake is immaterial. Knopfel *v.* Seufert, 11 N. Y. Leg. Obs. 184; Tobey *v.* Lennig, 14 Pa. St. 483.

1. A legal demand upon the maker must be stated. Arnold *v.* Kinlock, 50 Barb. (N. Y.) 44; Page *v.* Gilbert, 60 Me. 485.

That the bill was "duly presented" is enough. *Ex parte* Lowenthal, L. R. 9 Ch. App. 591. So is presented "at the office of the maker," without stating to whom in that office. Wallace *v.* Crilley, 46 Wis. 577.

From a statement that the instrument was presented at a bank, it will be inferred that demand was made during bank hours. Henry *v.* State Bank, 3 Ind. 216.

But a notice showing on its face an illegal demand, e.g., before or after maturity, on a Sunday or holiday, is insufficient, no matter when the demand was really made. De La Hunt *v.* Higgins, 9 Abb. Pr. 422; Tevis *v.* Wood, 5 Cal. 393; Ransom *v.* Mack, 2 Hill (N. Y.), 587.

Dishonor is sufficiently shown by stating that the bill or note is unpaid, and that the person notified is looked to for payment. Wolf *v.* Lauman, 34 Mo. 575; Hunter *v.* Van Bomhorst, 1 Md. 504; Armstrong *v.* Christiani, 5 C. B. 687. But simply stating that the instrument is unpaid is insufficient. Dale *v.* Gold, 5 Barb. (N. Y.) 490; Fish *v.* Morse, 16 N. H. 271.

To say that the bill or note has been "protested" sufficiently states dishonor Burgess *v.* Vreeland, 4 Zab. (N. J.) 71; Youngs *v.* Lee, 12 N. Y. 55; Stephenson *v.* Dickson, 24 Pa. St. 148; Reynolds *v.* Appleman, 41 Md. 615. And a copy of the protest need not be sent to the person notified. Goodman *v.* Harvey, 4 Ad. & El. 870; Linville *v.* Welch, 29 Mo. 203; Dennistoun *v.* Stewart, 17 How. (U. S.) 606.

Adding to a statement of non-payment a threat of "proceedings" makes the notice good. Warthan *v.* Blackwell, 6 Jur. 738; Robson *v.* Curlewis, 2 Q. B. 421; Davis *v.* Burt, 7 Iowa, 56.

Writing that the paper has been "dishonored" or "returned and dishonored" sufficiently states demand and refusal. Edmonds *v.* Cates, 2 Jur. 183; King *v.* Bickley, 2 Q. B. 419; Lewis *v.* Gompertz, 6 M. & W. 400.

2. But this is not necessary. 3 Rand. Com. Paper, § 1221.

Where a notice was dated ahead of the time of its actual delivery, being in other respects good, the error was held immaterial. Tobey *v.* Lennig, 14 Pa. St. 483; Byles on Bills, 417.

But one with no date, stating a presentment "this day" made, is bad. Wynn *v.* Alden, 4 Denio (N. Y.), 163. So is one making the same statement, and dated before maturity. Etting *v.* Schuylkill Bank, 2 Pa. St. 355; Routh *v.* Robertson, 11 Sm. & M. (Miss.) 382.

tain the name of the holder[1] and the place where the note is to be found.[2]

(*c*) *By and to Whom Given.*—Notice of dishonor may always be given by the lawful holder of the note or bill in question,[3] and where several persons are joint holders, any one of them may give the notice.[4] But a mere stranger to the instrument cannot give a valid notice of dishonor.[5]

It is the duty of every party, upon receiving notice, to himself notify his own indorser without delay.[6]

Notice need not be given by the holder personally; his agent, either special[7] or general,[8] may give it, and in his (the agent's) own name.[9]

1. But this is not necessary. Reid *v.* Reid, 11 Tex. 585; Harrison *v.* Ruscoe, 15 M. & W. 231.

2. Nor is this necessary. Byles on Bills, 281; Rowlands *v.* Springett, 14 M. & W. 7; Bradley *v.* Davis, 26 Me. 45; Mills *v.* Bank of U. S., 11 Wheat. (U. S.) 431.

3 2 Dan. Neg. Inst. 46; Cromer *v.* Platt, 37 Mich. 132; Payne *v.* Patrick, 21 Tex. 680.

Any lawful possessor, being a competent witness to prove the notice, can give it. Jex *v.* Tureaud, 19 La. Ann. 64.

One who holds the note as collateral can give notice. Cowperthwait *v.* Sheffield, 1 Sandf. (N. Y.) 416; Peacock *v.* Pursell, 14 C. B. (N. S.) 728.

4. Story on Prom. Notes, § 304.

The guardian of an infant is the proper person to give notice for such infant. Story on Prom. Notes, § 306.

5. The rule is said to be that "a party to the instrument who is at least contingently liable on it, although not the holder at the time of giving notice," is the only person other than the actual holder or his agent who may give notice. 3 Rand. Com. Paper, § 1234, citing Chapman *v.* Keane, 3 Ad. & El. 193; Lysaght *v.* Bryant, 9 C. B. 46; Jameson *v*, Swinton, 2 Taunt. 224; Haslett *v.* Poultney, 1 Nott & McC. (S. Car.) 466.

But even a party if he has been discharged from liability at the time of giving notice cannot give a valid notice. Byles on Bills, 290. *Cf.* Miers *v.* Brown, 11 M. & W. 372; Smith *v.* Mullett, 2 Camp. 208.

It has been held that a maker may himself give notice of dishonor. Johnson *v.* Harth, 1 Bail. (S. Car.) 482. *Cf.* First Nat'l Bank *v.* Ryerson, 23 Iowa, 508. And that an acceptor may do the same. Byles on Bills, 291; Rosher *v.* Kieran, 4 Camp. 87. But see Stanton *v.* Blossom, 14 Mass. 116; Tindal *v.* Brown, 1 T. R. 167.

6. Wilson *v.* Swabey, 1 Stark. 34; Edwards *v.* Dick, 4 B. & Ald. 212.

Yet, if the holder has notified all parties, the notice so given inures to the benefit of all, and a first indorser who has received notice from the holder may be sued by the second indorser, who has taken up the note, and give no notice of his own. Stafford *v.* Yates, 18 Johns. (N. Y.) 327; Marr *v.* Johnson, 9 Yerg. (Tenn.) 1; Palen *v.* Shurtleff, 9 Metc. (Mass.) 581; Brailsford *v.* Williams, 15 Md. 150; 2 Dan. Neg. Inst. 46.

So, too, the notice given by any indorser to his own indorser inures to the benefit of parties subsequent to them both. E.g., the third indorser may sue the first upon notice given by the second. Story on Prom. Notes, § 302; Newen *v.* Gill, 8 C. & P. 367; Bank of U. S. *v.* Goddard, 5 Mason (U. S.), 366. But this is not true where the second indorser was himself discharged by lack of due notice. *Ex parte* Barclay, 7 Ves. 597.

7. Story on Prom. Notes, § 301.

A collecting agent of the holder is specially authorized to give notice. Rowe *v.* Tipper, 13 C. B. 249; Bank of Mobile *v.* Huggins, 3 Ala. 206. And where a bank holds the paper for collection, its notary is the agent of the owner for this purpose. Tiernan *v.* Commercial Bank, 7 How. (Miss.) 648. So that the bank is not liable for such notary's negligence after due care exercised in selecting him. Agricultural Bank *v.* Commercial Bank, 7 Sm. & M. (Miss.) 592.

8. McNeil *v.* Wyatt, 3 Humph. (Tenn.) 125.

But such agent must be a competent witness to prove sending the notice. Walker *v.* Bank of the State, 8 Mo. 704. Where one bank is the agent of another bank in collecting a note indorsed by the cashier of the latter, its duty ends in giving notice to the indorsing bank, unless specially instructed to notify all parties. Phipps *v.* Millbury Bank, 8 Metc. (Mass.) 79

9. Woodthorpe *v.* Lawes, 2 M. & W. 109.

Notice must be given to all parties to whom the holder looks for payment, but he need not give notice to any other person.[1]

If he fails to give notice to any indorser, he thereby discharges all prior parties,[2] unless they receive due notice from some other party.[3]

One to whom paper is indorsed for collection is regarded as a holder, and his principal as an indorser entitled to notice.[4]

Joint indorsers are all entitled to notice unless they are partners;[5] but notice to one member of a partnership is sufficient.[6]

Upon the bankruptcy of an indorser, and before the appointment of an assignee, the bankrupt himself is the proper person to notify;[7] but the assignee when appointed should receive all notices of dishonor.[8]

The personal representative of a deceased indorser should receive all notices intended for his decedent;[9] and an agent if in-

1. Story on Prom. Notes, § 299; Peyroux *v.* Dubertrand, 11 La. 32; Westfall *v.* Farwell, 13 Wis. 563; Marsh *v.* Maxwell, 2 Camp. 210.

Thus the holder may choose to look only to some remote indorser, and notify him accordingly, and such notice binds that indorser though no other party be notified. Meyers *v.* Standart, 11 Ohio St. 29.

2. Story on Prom. Notes, § 334; Turner *v.* Leech, 4 B. & Ald. 451.

The holder satisfies the law merchant if he notify his own immediate indorser; it is the latter's duty to pass the notice on to prior parties. West River Bank *v.* Taylor, 34 N. Y. 128; Shelburne Falls Nat'l Bank *v.* Townsley, 102 Mass. 177; Struthers *v.* Blake, 30 Pa. St. 39; Seaton *v.* Scoville, 18 Kans. 433; Van Brunt *v.* Vaughn, 47 Iowa, 145; Renshaw *v.* Triplett, 23 Mo. 213.

Notice to the last indorser, however, does not fix any liability on prior parties. Stix *v.* Matthews, 63 Mo. 371.

3. Therefore a holder may sue an early indorser on a notice given by an intermediate indorser. Struthers *v.* Blake, 30 Pa. St. 139.

4. Robson *v.* Bennett, 2 Taunt. 388; Warren *v.* Gilman, 17 Me. 360; Butler *v.* Duval, 4 Yerg. (Tenn.) 264; Howard *v.* Ives, 1 Hill (N. Y.), 263; First National Bank *v.* Smith, 132 Mass. 227.

Thus a collection agent upon the dishonor of a note on Saturday may notify his principal on Monday; and if he in turn notifies his indorser in time, the latter will be held. Farmers' Bank *v.* Vail, 21 N. Y. 485.

5. Sayre *v.* Frick, 7 W. & S. (Pa.) 383; Boyd *v.* Orton, 16 Wis. 495; Miser *v.* Trovinger, 7 Ohio St. 281; Gantt *v.* Jones, 1 Cr. C. C. (U. S.) 210.

The omission to notify one joint indorser will discharge those notified. Peoples' Bank *v.* Keech, 26 Md. 521. *Cf.* Willis *v.* Green, 5 Hill (N. Y.), 235.

Contra that notice to one joint indorser binds all. Higgins *v.* Morrison, 4 Dana (Ky.), 100.

6. Bignold *v.* Waterhouse, 1 M. & S. 259; Bouldin *v.* Page, 24 Mo. 594; New York, etc., Co. *v.* Selma Sav. Bank, 51 Ala. 305.

So, too, is notice to one of the surviving partners after the firm is dissolved by the death of one partner. Slocumb *v.* Lizardi, 21 La. Ann. 355. And notice to the liquidating agent upon an indorsement of "B. & H., old firm in liquidation." Fassin *v.* Hubbard, 55 N. Y. 465.

But notice sent to the trustees of a dissolved partnership when the ex-partners lived in same city where they had carried on business is bad. Howard Bank *v.* Carson, 50 Md. 18.

7. *Ex parte* Moline, 19 Ves. 216; *Ex parte* Tremont National Bank, 2 Lowell (U. S.), 409.

8. Camidge *v.* Allenby, 6 B. & C. 373; *Ex parte* Chappel, 3 Deac. 298.

If the assignee's appointment is unknown to the holder, notice to the bankrupt is good. Donnell *v.* Lewis County Sav. Bank, 80 Mo. 165.

Yet it has been held that the insolvent is absolutely entitled to notice, so that notice to the assignee will not bind the estate in insolvency. House *v.* Vinton National Bank, 43 Ohio St. 346.

9. Oriental Bank *v.* Blake, 22 Pick. (Mass.) 206; Hallett *v.* Branch Bank, 12 Ala. 193.

Notice to one of several executors is good. Lewis *v.* Bakewell, 6 La. Ann. 359; Beals *v.* Peck, 12 Barb. (N. Y.) 245. Or notice to an executor named in the

trusted with the general conduct of an indorser's business[1] is a proper person upon whom to serve notice of dishonor.

The nature of some persons' employment, or their relationship to or residence with the indorser, have been held to make them proper persons upon whom to serve notice of dishonor, without proof of any agency whatever.[2]

(*d*) *Time for Giving.*—The time when an indorser was notified should be stated in an action against him;[3] the burden of proof is upon the holder to show that he was notified in due time;[4] and what is due time is determined by the law of the place where the note or bill is payable.[5]

It is generally said that a holder is allowed a reasonable time within which to give notice to his indorser;[6] and this rule allows whatever time is necessary for making diligent inquiry for the indorser's residence,[7] and the reasonable time may be extended by

will who afterwards refused to act. Goodnow *v.* Warren, 122 Mass. 179.

If the indorser's death is unknown, notice sent to that name at the decedent's usual post-office is good. Lindeman *v.* Guldin, 34 Pa. St. 54; Mathewson *v.* Strafford Bank, 45 N. H. 104; Weaver *v.* Penn, 27 La. Ann. 129; Barnes *v.* Reynolds, 4 How. (Miss.) 114. But not so where the fact of death was known. Cayuga Co. Bank *v.* Bennett, 5 Hill (N. Y.), 236.

1. Byles on Bills, 294; Story on Prom. Notes, § 307; Crosse *v.* Smith, 1 M. & S. 545.

2. Thus notice for a bank is well served on the cashier. Caffman *v.* Bank of Kentucky, 41 Miss. 212. And for an indorser having an office by delivery, to the clerk in charge of it. Mercantile Bank *v.* McCarthy, 7 Mo. App. 318; Lord *v.* Appleton, 15 Me. 270; Smalley *v.* Wright, 11 Vr. (N. J.) 471; Jones *v.* Mausker, 15 La. 51.

Notice to a member of the indorser's family, given at his residence in his absence, is sufficient. Housego *v.* Cowne, 2 M. & W. 348; Moodie *v.* Morrall, 1 Mill (S. Car.), 367; Calms *v.* Bank of Tennessee, 4 Baxt. 422.

Notices delivered to an indorser's son —Westfall *v.* Farwell, 13 Wis. 563— daughter—Bank of Kentucky *v.* Duncan, 4 Bush (Ky.), 294—fellow-boarder—Bank of U. S. *v.* Hatch, 1 McL. (U. S.) 92 —and landlady—Stedman *v.* Gooch, 1 Esp. 3—have all been held to be "personally" served.

But giving the notice to the indorser's brother upon the latter's promise to deliver it—Paterson Bank *v.* Butler, 7 Halst. (N. J.) 268—or to a son-in-law when the indorser's own family were still in town, though he himself absent—Bank of New Orleans *v.* Millaudon, 25 La. Ann. 280—or to a servant in the indorser's house with instructions not to open the sealed envelope containing it until the indorser's return—Paine *v.* Edsell, 19 Pa. St. 178—is insufficient.

In *Virginia*, however, it seems notices must, in the indorser's absence, be delivered to a white servant over sixteen years of age. McVeigh *v.* Bank of the Old Dominion, 26 Gratt. (Va.) 785.

3. Halsey *v.* Salmon, 2 Penn. (N. J.) 916.

4. Lawson *v.* Sherwood, 1 Stark. 314; Cooley *v.* Shannon, 20 La. Ann. 548; Early *v.* Preston, 1 Patt. & H. (Va.) 228; Whiteford *v.* Burckmyer, 1 Gill (Md.), 127.

5. Rothschild *v.* Curry, 1 Q. B. 43; Snow *v.* Perkins, 2 Mich. 238.

6. Byles on Bills, 285; Benj. Chal. Dig. § 195; Haynes *v.* Birks, 3 B. & P. 611, Bryden *v.* Bryden, 11 Johns. (N. Y.) 187; Bank of North America *v.* Vardon, 2 Dall. (U. S.) 78; Noble *v.* Bank of Ky., 3 A. K. Marsh. (Ky.), 262.

When the facts are undisputed, what is a reasonable time is for the court. Smith *v.* Poillon, 87 N. Y. 590; Walker *v* Stetson, 14 Ohio St. 89; Brenizer *v.* Wightman, 7 W. & S. (Pa.) 264; Whitwell *v.* Johnson, 17 Mass. 449.

7. Thus if a note be dishonored on Saturday, and the notary spends Monday in discovering the indorser's address, sending the notice on Tuesday, it is in time. Smyth *v.* Hawthorn, 3 Rawle (Pa.), 355.

Where the indorser had no settled residence, and the holder gave the notice personally the next time he saw him, some months after dishonor, it was held enough. Blodgett *v.* Durgin, 32 Vt. 361.

Where the holder could not find the post-office address of the indorser, who

war or disturbances impeding the usual channels of communication.[1]

There have been great fluctuations of opinion among judges as to what is the reasonable time within which notice must be given,[2] but the modern rule clearly is that the next day after maturity is the latest for that purpose,[3] and it may be given on the day of dishonor after payment or acceptance has been refused.[4]

"Next day," however, means next business day; so that if the day after that of dishonor is a legal holiday, the day succeeding is the proper one upon which to send notice.[5]

Each indorser upon whom notice has been served has a day after its receipt within which to notify parties prior to himself;[6] and he has no longer time on account of the service upon himself being made sooner than was necessary.[7]

If notice is served at an indorser's office, it must be done during

was removing to another State, and procured the notice to be delivered to him on his arrival in such State, the notice was held good. Fugitt *v.* Nixon, 44 Mo. 295. *Cf.* Chapcott *v.* Curlewis, 2 M. & R. 484; Bateman *v.* Joseph, 12 East, 433; Browning *v.* Kinner, Gow, 81.

1. Where there was absolutely no mail communication between New Orleans and Pittsburg from the outbreak of the war until July 1, 1862, and it was then uncertain, notice received in Pittsburg on July 14, 1862, was held good. House *v.* Adams, 4 Pa. St. 261. But a delay of two years after the close of hostilities is fatal. Harp *v.* Kenner, 19 La. Ann. 63. *Cf.* Farmers' Bank *v.* Gunnell, 26 Gratt. 131; Morgan *v.* Bank of Louisville, 4 Bush (Ky.), 82.

2. See 3 Rand. Com. Paper, §§ 1254–1258, for a review of the old cases on reasonable time.

3. 2 Dan. Neg. Inst. 90; 2 Edw. Notes & B. § 829; Langdale *v.* Trimmer, 15 East. 293; Chick *v.* Pillsbury, 24 Me. 458; Knott *v.* Venable, 42 Ala. 186; Grand Bank *v.* Blanchard, 23 Pick. (Mass.) 305; First Nat'l Bank *v.* Wood, 51 Vt. 471; Troy City Bank *v.* Grant, Hill & D. (N. Y.) 119; McKeever *v.* Kirkland, 33 Iowa, 348; Worden *v.* Mitchell, 7 Wis. 167.

4 Hine *v.* Allely, 4 B. & Ad. 624; Lindenberger *v.* Beall, 6 Wheat. (U. S.) 104; McFarland *v.* Pico, 8 Cal. 626; Shed *v.* Brett, 1 Pick. (Mass.) 401; Simpson *v.* White, 40 N. H. 540; King *v.* Crowell, 61 Me. 244.

But notice sent before dishonor is always bad, though the error arose from a mistake in calculating the maturity of the paper. Kohler *v.* Montgomery, 17 Ind. 220.

5. Haynes *v.* Birks, 3 B. & P. 599; Farmers' Bank *v.* Vail, 21 N. Y. 485; Hartford Bank *v.* Stedman, 3 Conn. 489; Carter *v.* Burley, 9 N. H. 558; Commercial Bank *v.* Barksdale, 36 Mo. 563.

Notice sent on Sunday is void. Chrisman *v.* Tuttle, 59 Ind. 155; Rheem *v.* Carlisle, etc., Bank, 96 Pa. St. 132. *Contra* that it may be sent on Sunday. Deblieux *v.* Bullard, 1 Rob. (La.) 66.

6. Benj. Chal. Dig. 196; Hilton *v.* Shepherd, 6 East, 14; Seaton *v.* Scovill, 18 Kans. 433; Mead *v.* Engs, 5 Cow. (N. Y.) 303; Renshaw *v.* Triplett, 23 Mo. 213.

A notice directed to first indorser by holder and sent to second indorser on account of ignorance of the former's address, and at once forwarded by the second indorser to the first, will bind the first indorser to both holder and second indorser. Palen *v.* Shurtleff, 9 Metc. (Mass.) 581.

In general if one holds a bill or note for collection, and on dishonor notifies his principal, the latter has a day within which to give notice to prior parties. Byles on Bills, 288; 2 Dan. Neg. Inst. 51; Mead *v.* Engs, 5 Cow. (N. Y.) 303; Church *v.* Barlow, 9 Pick. (Mass.) 547; Myers *v.* Courtney, 11 Phila. 343; Hill *v.* Planters' Bank, 3 Humph. (Tenn.) 670. But this has been doubted *obiter—In re* Leeds Banking Co., L. R. 1 Eq. Cas. 1 —and held inapplicable where the agent was a branch of the principal (bank). Prince *v.* Oriental Bank Corporation. L. R. 3 App. Cas. 325. *Contra*, McNeill *v.* Wyatt, 3 Humph. (Tenn.) 125.

7. Story on Prom. Notes, § 332; Farmer *v.* Rand, 16 Me. 453.

E converso, he has no shorter time because notice was delayed, e.g., by a storm. Linn *v.* Horton, 17 Wis. 151; Horne *v.* Rouquette, L. R. 3 Q. B. D. 514.

business hours;[1] if at his residence, at any reasonable hour before the house closes for the night.[2]

Where notice is sent by mail, if it is posted on the day after dishonor or receipt, in time to go by a mail of that day which leaves within a reasonable time after the beginning of business hours, it is sufficient.[3]

Notice sent to one indorser to be forwarded to another must be remailed at once; and, if the other indorser lives in the same place, must be so mailed as to reach him the same day, in order to bind him to the original sender.[4]

If the notice of dishonor is to be sent to a foreign country, the sender may wait for the next regular mail vessel,[5] unless by such waiting he delays an unreasonable time, and might have availed himself of some ship bound to that country.[6]

(*e*) *Place Where Given.*—If the party to be notified actually receives in time the notice sent him, it is wholly immaterial where it was directed;[7] but ordinarily the burden is on the holder to show where it was sent,[8] and that it was directed to the proper place.[9]

1. 2 Edwards Notes and Bills, § 829; Adams *v.* Wright, 14 Wis 442; Stephenson *v.* Primrose, 8 Port. (Ala.) 155.

2. Adams *v.* Wright, 14 Wis. 442; Bonner *v.* City of New Orleans, 2 Woods (U. S.), 135.

Nine P.M. is reasonable. Jameson *v.* Swinton, 2 Taunt. 224. So is ten P.M. when a member of the family actually received the notice. Hallowell *v.* Curry, 41 Pa. St. 322.

3. 2 Dan. Neg. Inst. 90–92; Sussex Bank *v.* Baldwin, 2 Harr. (N. J.) 487; Deminds *v.* Kirkman, 1 Sm. & M. (Miss.) 644; Minehart *v.* Handlin, 37 Ark. 276.

It has been said without limitation that the next day's mail is sufficient—Darbishire *v.* Parker, 6 East. 8; Seaton *v.* Scovill, 18 Kans. 433—if there is one on that day. Williams *v.* Smith, 2 B. & Ald. 500; Lenox *v.* Roberts, 2 Wheat. (U. S.) 373. If there is none it must be sent by the next mail that leaves. Townsley *v.* Springer, 1 La. 122, 515.

Some cases hold that *any* mail of that next day is sufficient. Robinson *v.* Ames, 20 Johns. (N. Y.) 146; Housatonic Bank *v.* Laflin, 5 Cush. (Mass.) 546; Manchester Bank *v.* White, 30 N. H. 456; Bell *v.* Hagerstown Bank, 7 Gill (Md.), 216. Other courts have declared that the notice must go by the *first* mail of the next day. Bank of U. S. *v.* Merle, 2 Rob. (La.) 117; Goodman *v.* Norton, 17 Me. 381. Or by the earliest practicable one. Haskell *v.* Boardman, 8 Allen (Mass.), 38. Or the first one in the usual course of business. Mitchell *v.* Cross, 2 R. I. 437.

A delay by the holder of one mail (four hours), occasioned by his seeking legal advice, will not discharge the indorser, the notice being actually mailed during the next day. Smith *v.* Poillon, 87 N. Y. 590. See also West *v.* Brown, 6 Ohio St. 542; Davis *v.* Hanley, 12 Ark. 645; Curry *v.* Bank of Mobile, 8 Port. (Ala.) 360.

4. Shelburne Falls Bank *v.* Townsley, 102 Mass. 177; Freeman's Bank *v.* Perkins, 18 Me. 292; Ohio Life Ins. Co. *v.* McCague, 18 Ohio, 54.

But such a notice served the day after it is received will bind the recipient to the indorser serving it. Stephenson *v.* Dickson, 24 Pa. St. 148.

5. Stainback *v.* Bank of Virginia, 11 Gratt. (Va.) 260.

He may, however, send the notice by any vessel which may be fairly expected to arrive before or as soon as the mail vessel. Byles on Bills, 284; Muilman *v.* D'Eguino, 2 H. Bl. 565.

6. Waiting four months for a mail vessel to Europe *held* unreasonable in 1804. Flemming *v.* McClure, 1 Brev. (S. Car.) 428.

7. 2 Daniel Neg. Inst. 60; Bradley *v.* Davis, 26 Me. 45; First National Bank *v.* Wood, 51 Vt. 471; Dicken *v.* Hall, 87 Pa. St. 379.

8 Money *v* Casse, 20 La. Ann. 419; Carter *v.* Burley, 9 N. H. 558.

9. Turner *v.* Rogers, 8 Ind. 139; Stiles *v.* Inman, 55 Miss. 469.

The place named in the notary's certificate as the indorser's residence is presumed to be so until the contrary is

Notice may be served either at the residence[1] or office[2] of an indorser, or at the former office of a firm in dissolution if there is any one there representing the partnership.[3]

If the notice is sent by mail, addressing it to the post-office of the town in which he resides is enough;[4] in general the address should be to the post-office nearest the indorser's home.[5]

Notice sent the drawer of a bill at the place of date of the bill is *prima facie* good, the presumption being that that is his place of residence.[6]

Similarly it is presumed that a party has continued to reside in the same place as he did when he signed the note or bill dishonored.[7]

shown. Linkon *v.* Hall, 27 Gratt. 668; Walmsley *v.* Rivers, 34 Iowa, 463; Yeatman *v.* Erwin, 5 La. 264. *Contra* that actual proof of residence is necessary on the part of the holder. Crawford *v.* Branch Bank, 7 Ala. 206.

1. Byles on Bills, 284; Grinnan *v.* Walker, 9 Iowa, 426.

2. The office is preferable. 1 Parsons Notes & Bills, 487.

The place where the indorser will get the notice most promptly should be chosen. Bank of Commerce *v.* Chambers, 14 Mo. App. 152.

If the indorser resides in one town and does business in another, notice may be sent to either. Sullivan *v.* Godwin, 20 La. Ann. 33.

An office for the purpose of serving notice is any place where the indorser does business, e.g., a room in a hotel. Howe *v.* Bradley, 19 Me. 31. A desk in a custom-house where the indorser has employment. Bank of the Commonwealth *v.* Mudgett, 44 N. Y. 514.

And see further, on this point, Davenport *v.* Gilbert, 4 Bosw. (N. Y.) 532; Kleinman *v.* Boernstein, 32 Mo. 311; Bank of U. S. *v.* MacDonald, 4 Cr. C. C. (U. S.) 624; Bank of West Tenn. *v.* Davis, 5 Heisk. (Tenn.) 436; Commercial Bank *v.* Strong, 28 Vt. 316.

3. For example, a liquidating agent. Bliss *v.* Nichols, 12 Allen (Mass.), 443. Or trustee of an insolvent firm. Bank of North America *v.* Shaw, 7 East Rep. (Mass.) 779.

4. Lafitte *v.* Perkins, 21 La. Ann. 171; Fowler *v.* Warfield, 4 Cr. C. C. 71.

5. Union Bank of Louisiana *v.* Stoker, 1 La Ann. 269.

Where the indorser was in the habit of receiving mail at a post-office in another town from that in which he lived, but the sender did not know it, a direction to the town of his residence was held sufficient. Seneca County Bank *v.* Neass, 3 N. Y. 442. But where he habitually got his mail at two post-offices, one in the town of his residence and the other not, a notice directed to the latter office is bad without proof that the indorser actually received it. Shelburne Falls National Bank *v.* Townley, 107 Mass. 444.

Notice sent to a post-office discontinued is bad, at least when there was another nearer the indorser. Tyson *v.* Oliver, 43 Ala. 455.

If there are two places of the same name in different States, the name of the State must be given in the address Beckwith *v.* Smith, 22 Me. 125. And see Woods *v.* Neeld, 44 Pa. St. 86; Rogers *v.* Jackson, 19 Wend. (N. Y.) 383.

6. Certainly so where inquiry by the holder fails to reveal any other address. Byles on Bills, 282; Clark *v.* Sharpe, 3 M. & W. 166; Pierce *v.* Struthers, 27 Pa. St. 249; Page *v.* Prentice, 5 B. Mon. (Ky.) 7.

If no inquiry is made, and the drawer does not live there, the notice is bad. Sprague *v.* Tyson, 44 Ala. 338; Carroll *v.* Upton, 3 N. Y. 272; Fisher *v.* Evans, 5 Binn. (Pa.) 541.

If after diligent inquiry the indorser's residence cannot be found, notice addressed to him at the place of the date of a note is good. Sasscer *v.* Whitely, 10 Md. 98; Godley *v.* Goodloe, 6 Sm. & M. (Miss.) 255.

7. Benj. Chal. Dig. § 193, n.; Requa *v.* Collins, 51 N. Y. 148; *Ex parte* Baker, L R. 4 Ch. Div. 795; Harris *v.* Memphis Bank, 4 Humph. 518.

Thus a notice sent to Troy, the indorser's old residence, was held good, though he had some time before removed to New York City; his name was not in the directory of the latter city, though he had advertised his entry into a partnership there. Bank of Utica *v.* Davidson, 5 Wend. (N. Y.) 587.

So, too, of notice sent to indorser's old place of business, his name still being

But a holder who has any notice of the removal of his indorser must make reasonable inquiry for his new address, or notice sent to the old one will be invalid.[1]

Notice sent to an indorser at his residence during his temporary absence is good.[2]

There is no presumption in favor of the holder's having made diligent inquiry for the indorser's proper address; the burden of proving diligence is upon him.[3]

When facts are in dispute, the question of diligence is for the jury;[4] but when they are undisputed, it is for the court alone.[5]

Where all that can be discovered concerning the indorser is that he lives in a given county, notice sent to the county seat is good;[6]

on the sign. Reier *v.* Strauss, 54 Md. 278.

1. Barker *v.* Clark, 20 Me. 156; Planters' Bank *v.* Bradford, 4 Humph. (Tenn.) 39; Bank of Utica *v.* Phillips, 3 Wend. (N. Y.) 408.

Where the indorser was a neighbor and had gone away to join the Confederate army, it was held that the circumstances were so notorious as to amount to notice of departure to the holder. McVeigh *v.* Bank of the Old Dominion, 26 Gratt. (Va.) 785; McVeigh *v.* Allen, 29 Gratt. (Va.) 588.

2. Curtis *v.* State Bank, 6 Blackf. (Ind.) 312; Hager *v.* Boswell, 4 J. J. Marsh. (Ky.) 61; Manadue *v.* Kitchen, 3 Rob. (La.) 261; Planters' Bank *v.* White, 2 Humph. (Tenn.) 112.

Thus notice sent to a Congressman's home during his absence in Washington is good. Marr *v.* Johnson, 9 Yerg. (Tenn.) 1. But notice sent to Washington during the session of Congress is also good. Graham *v.* Sangston, 1 Md. 59; Walker *v.* Tunstall, 2 Sm. & M. (Miss.) 638. Otherwise if sent during adjournment. Bayly *v.* Chubb, 16 Gratt. (Va.) 284.

3. Eaton *v.* McMahon, 42 Wis. 484; Miller *v.* Whitefield, 16 La. Ann. 10.

Diligence having been proven, the fact that notice was sent to the wrong address will not discharge the indorser. Carroll *v.* Upton, 3 N. Y. 272; Garner *v.* Downie, 33 Cal. 176. Nor does subsequent correct information affect the question. Brighton, etc., Bank *v.* Philbrick, 40 N. H. 506.

4. Hilton *v.* Shepherd, 6 East, 14, n.; Winans *v.* Davis, 3 Harr. (N. J.) 276; Thompson *v.* Bank of the State, 3 Hill (S. Car.), 77; Walker *v.* Stetson, 14 Ohio St. 89.

5. Bank of Utica *v.* Bender, 21 Wend. (N. Y.) 643; Whitridge *v.* Rider, 22 Md. 548; Linville *v.* Welch, 29 Mo. 203.

It has been held that notice sent after inquiry of the indorser's immediate indorsee, when no other channel of information appeared, was sufficient. Ransom *v.* Mack, 2 Hill (N. Y.), 587.

Inquiry should be made of other parties to the paper, and several days may be occupied in doing so. Hill *v.* Varrell, 3 Me. 233; Wolf *v.* Burgess, 49 Mo. 583.

And asking the officers of the bank holding the note and consulting the city directory is clearly insufficient. Gilchrist *v.* Donnell, 53 Mo. 591.

But inquiry of the holder and the postmaster, and looking in the directory, has been held enough. Staylor *v.* Ball, 24 Md. 183.

Notice given by a notary upon information furnished by the cashier of the bank holding the note for collection has been held sufficient. Herbert *v.* Servin, 12 Vr. (N. J.) 225; s. p., Harris *v.* Robinson, 4 How. (U. S.) 336; Bartlett *v.* Isbell, 31 Conn. 296.

Notices sent upon positive though incorrect information furnished by the maker of the note have been held good in Sturgess *v.* Derrick, Wight. 96; Gawtry *v.* Doane, 51 N. Y. 84; Winans *v.* Davis, 3 Harr. (N. J.) 276.

Inquiry of a near relative of the indorser's is reasonable diligence. Requa *v.* Collins, 51 N. Y. 144.

Notice addressed to the indorser generally, at a large city, after inquiry of the maker and holder and consulting the city directory, is good, though the indorser lived a few miles out of town and had an office in the city. Sanderson *v.* Reinstadler, 31 Mo. 483. See, further, Saco Natl. Bank *v.* Sanborn, 63 Me. 340; Lambert *v.* Ghiselin, 9 How. (U. S.) 552; Phipps *v.* Chase, 6 Metc. (Mass.) 491; Barnwell *v.* Mitchell, 3 Conn. 101; Lawrence *v.* Miller, 16 N. Y. 238; Earnest *v.* Taylor, 25 Tex. 37.

6. Even if there be a nearer office. Bank of Manchester *v.* Slason, 13 Vt. 334; Cabot Bank *v.* Russell, 4 Gray (Mass.), 167; Rand *v.* Reynolds, 2 Gratt.

but if the sender knows the post-office at which the indorser usually receives his mail, he must be addressed at that place.[1]

If a drawer or indorser designates a place as his address, notice sent there is good, without regard to his place of residence or business.[2]

(*f*) *Methods of Service.*—Notice may be served personally by leaving it at the indorser's or drawer's residence or office, by mail or special messenger;[3] and if it is duly received, the particular method employed is wholly immaterial.[4]

As between persons living in different places, mailing is the usual and proper method.[5]

An indorser or drawer living in the place where the bill or note is protested or made payable is, however, entitled to personal notice; the mail cannot be used except by statute.[6]

(Va.) 171. But not if the holder has had previous communication with the indorser at a nearer post-office. Roberts *v.* Taft, 120 Mass. 169.

Notice directed simply to Boston has been held good, though indorser's name was in city directory. Tone *v.* Collins, 3 Allen (Mass.), 438.

1. 1 Parsons Notes and Bills, 498; 2 Daniel Neg. Inst. 76.

If the notice is sent to the *usual* post-office, it is immaterial whether it is the *nearest.* Mercer *v.* Lancaster, 5 Pa. St. 160; Sherman *v.* Clark, 3 McL. (U. S.) 91; Farmers' Bank *v.* Battle, 4 Humph. (Tenn.) 85. The presumption is that it is the nearest. Bank of Columbia *v.* Magruder, 6 H. & J. (Md.) 172; Gist *v.* Lybrand, 3 Ohio, 307.

In a city having branch post-offices, a direction to the general post-office of that city is sufficient. Bank of Commerce *v.* Chambers, 14 Mo. App. 152.

2. Crowley *v.* Barry, 4 Gill (Md.), 194; Catskill Bank *v.* Stall, 15 Wend. (N.Y.) 364.

And such designation holds good until changed by the indorser. Eastern Bank *v.* Brown, 17 Me. 356.

An address written after the drawer's or indorser's signature is a sufficient designation. Burmester *v.* Barron, 17 Q. B. 828; Farmers' Bank *v.* Battle, 4 Humph. (Tenn.) 86; Tomeny *v.* German Natl. Bank, 9 Heisk. (Tenn.) 493.

When such address was a street and number in New York City, it was held that notice directed to the indorser at "N. Y. City" merely was good. Bartlett *v.* Robinson, 39 N. Y. 187. But this was upon the construction of the statute of that State.

3. Story on Prom. Notes, § 340.

If the manner of service does not appear, personal service is presumed. Rives *v.* Parmley, 18 Ala. 255.

4. Ben. Chalm. Dig. § 193; Terbell *v.* Jones, 15 Wis. 278; Grinman *v.* Walker, 9 Iowa, 426.

Where the notice was put into a wrong post-office, and the indorser denied ever having received it, evidence that he had received it was accepted, and a verdict against him sustained, in Hill *v.* Norvell, 3 McL. (U. S.) 583.

5. Esdaile *v.* Sowerby, 1 East, 117; Bussard *v.* Levering, 6 Wheat. (U. S.) 102; Manchester Bank *v.* White, 30 N. H. 456; Bell *v.* Hagerstown Bank, 7 Gill (Md.), 216.

But where an indorser lived in an unsettled country a long distance from any post-office, it was held that special messenger was the only method of service. Fish *v.* Jackman, 19 Me. 467.

Nor is mailing proper when postal facilities are stopped by war. Harden *v.* Boyce, 59 Barb. (N. Y.) 425; James *v.* Wade, 21 La. Ann. 548; Farmers' Bank *v.* Gunnell, 26 Gratt. (Va.) 131.

A notice is mailed or posted by handing it properly inclosed and post-paid to a postmaster's clerk. Mount Vernon Bank *v.* Holden, 2 R. I. 467. Or a letter-carrier. Pearce *v.* Langfit, 101 Pa. St. 507. Or by putting it in a lamppost-box. Greenwich Bank *v.* DeGroot, 7 Hun (N. Y.), 210; Wood *v.* Callaghan, 28 N. Westn. Repr. (Mich.) 162.

Once mailed, the sender's duty is at an end. He is not responsible for delays if the envelope is properly addressed. Woodcock *v.* Houldsworth, 16 M. & W. 124; Lord *v.* Appleton, 15 Me. 270; Washington Banking Co. *v.* King, 2 C. E. Greene (N. J.), 45; Renshaw *v.* Triplett, 23 Mo. 213; Wilson *v.* Richards, 28 Minn. 337; U. S. Natl. Bank *v.* Burton, 58 Vt. 426.

6. Cabot Bank *v.* Warner, 10 Allen (Mass.), 522; Sheldon *v.* Benham, 4 Hill

But where there are several post-offices in the same town or city, notice may be sent by mail.[1]

The residence of the collection agent or notary who actually sends the notice, and not that of the owner of the paper, is considered in deciding whether or not the mail can be used.[2]

While a special messenger always may,[3] and, as has been shown, sometimes must, be employed to serve notice, if the messenger does not serve it on or before the day when it might reasonably have been expected to arrive by mail, it is bad.[4]

31. Waiver or Excuse of Demand and Notice.—Delay in making demand or giving notice may be excused by any circumstances over which the holder has no control, and which therefore cannot be attributed to his negligence.[5]

(N. Y.), 129; Tavis *v.* Gowen, 19 Me. 447; Hogatt *v.* Bingaman, 7 How. (Miss.) 505; Vance *v.* Collins, 6 Cal. 435; Swayze *v.* Britton, 17 Kans. 625; Miller *v.* Whitfield, 16 La. Ann. 10.

If the indorser is temporarily away, it should be served at the residence. Wilcox *v.* McMutt, 2 How. (Miss.) 776.

And if the notary finds the indorser's office closed, and thereupon mails the notice without trying to find him at his residence, it is bad. John *v.* City National Bank, 57 Ala. 96.

It has been held, however, that notice mailed after learning that the indorser was out of town during an epidemic of yellow fever, and that his house was locked, was good. Ogden *v.* Cowley, 2 Johns. (N. Y.) 274.

Clearly, however, notice, though sent by mail improperly, which is received in due time is good. Ireland *v.* Kip, 11 Johns. (N. Y.) 231; Scott *v.* Lifford, 9 East, 347; Hyslop *v.* Jones, 3 McL. (U. S.) 96; Spaulding *v.* Krutz, 1 Dillon (U. S.), 414; Carolina National Bank *v.* Wallace, 13 S. Car. 347.

1. 2 Edwards Notes & Bills, § 813.

Thus the mail may be used in notifying an indorser living at Kingsbridge of the dishonor of a note in New York, although the city limits extend beyond that place. Paton *v.* Lent, 4 Duer (N. Y.), 231.

And in cities having the carrier-delivery system it has been held that the mail may be used where the notice should be delivered on the day of its deposit in the post-office. Shoemaker *v.* Mechanics' Bank, 59 Pa. St. 79; Walters *v.* Brown, 15 Md. 285.

2. Story on Prom. Notes, § 312; Greene *v.* Farley, 20 Ala. 322; Wynn *v.* Schappert, 6 Daly, 558. *Contra*, Philipe *v.* Harberlee, 45 Ala. 597.

Where notary, holder, and indorser all lived in Brooklyn, and the note was protested in New York, where the notary had an office, it was held that he might mail a notice in Brooklyn to the indorser, it being shown that that was the quickest way to reach him. Price *v.* McGoldrick, 2 Abb. N. C. 69.

But a notary who, by taking a notice home with him from the place where he had protested the note and mailing it, instead of serving the indorser at the place of protest, caused a delay of three days, was held to have discharged the indorser. Fahnestock *v.* Smith, 14 Iowa, 561.

3. Jarvis *v.* St. Croix Mfg. Co., 23 Me. 287.

4. 1 Parsons Notes & B. 479; Darbishire *v.* Parker, 6 East, 3.

It is suggested that notice by telegraph or telephone would be good in 3 Rand. Com. Paper, § 1308.

5. Benj. Chalm. Dig. §§ 169, 201.

For example, the parties living in different towns with no postal communications. Haddock *v.* Murray, 1 N. H. 140. Or the bills being accepted, payable "out of any surplus realized," and the holders not knowing the exact time of funds becoming available. Gay *v.* Haseltine, 18 N. H. 530.

But a holder cannot delay in order to learn what funds to take in payment. Phœnix Ins. Co. *v.* Gray, 13 Mich. 191.

War or riot obstructing communication between the parties is an excuse for the time being. Apperson *v.* Bynum, 5 Coldw. (Tenn.) 341; Bond *v.* Moore, 3 Otto (U. S.), 593. See *ante*, § 14 (a); and 3 Rand. Com. Paper, §§ 1324–5, for a full collection of cases relating to the American Civil War.

The yellow-fever epidemic in New York City was held a good excuse for delay in giving notice in Tunno *v.* Lague, 2 Johns. Cas. (N. Y.) 1.

Error or mismanagement of the public

A drawer who has drawn a bill without having funds in the drawee's hands wherewith to pay, and without reasonable expectation that such funds will be provided at or before maturity, cannot expect that his bill will be presented, or that he will receive notice of its dishonor.[1]

Where the facts are undisputed, the question of what is a reasonable expectation is for the court.[2]

postal service is also an excuse for delay. Windham Bank *v.* Norton, 22 Conn. 213; Pier *v.* Heinrichshoffen, 67 Mo. 163; Jones *v.* Wardell, 6 Watts & S. (Pa.) 399.

The sickness or death of the holder will permit demand and notice to be made as soon as possible after recovery or the appointment of a personal representative. White *v.* Stoddard, 11 Gray (Mass.), 258; Duggan *v.* King, 1 Rice (S. Car.), 240; Smith *v.* Mullett, 2 Camp. 208. But, on the other hand, even mortal illness has been held not to excuse due presentment at maturity. Purcell *v.* Allemong, 22 Gratt. (Va.) 739; Wilson *v.* Senier, 14 Wis. 380.

If the place of payment named in a note or bill is found closed, presentment is unnecessary. Rahm *v.* Phila. Bank. 1 Rawle (Pa.), 335; Howe *v.* Bowes, 16 East, 112.

So notice is unnecessary if the indorser's office and residence are closed and no one can be found to answer for him. Howe *v.* Bradley, 19 Me. 31; Shed *v.* Brett, 1 Pick. (Mass.) 413.

If with reasonable diligence a party cannot be found, demand or notice, as the case may be, are thereby excused. Bateman *v.* Joseph, 2 Campb. 463; Cooley *v.* Shannon, 36 La. Ann. 548; Walker *v.* Stetson, 14 Ohio St. 89; Blodgett *v.* Durgin, 32 Vt. 361. As to diligence generally, see NOTICE OF DISHONOR AND DEMAND, *ante*, §§ 28, 30.

Where the note or bill in question is void for any reason, demand is useless, and therefore unnecessary; and indorsement becomes a warranty upon which the indorser may be sued without notice. 2 Dan. Neg. Inst. 152; 1 Parsons Notes & B. 444; Copp *v.* McDugall, 9 Mass. 1.

So held where the note was forged. Perkins *v.* White, 36 Ohio St. 530. *Cf.* Turnbull *v.* Bowyer, 40 N. Y. 456; Morrison *v.* Lovell, 4 W. Va. 346.

If with diligence the holder cannot decipher the signature of a party, presentment or notice is impossible, and hence unnecessary. Hewitt *v.* Thompson, 1 Moo. & R. 543; Manufacturers' Bank *v.* Hazard, 35 N. Y. 226. But if the notary negligently misnames the indorser, he is discharged. McGeorge *v.* Chapman. 16 Vr. (N. J.) 395.

1. 2 Daniel Neg. Inst. 117; Byles on Bills, 220; Benj. Chal. Dig. § 168; Kimball *v.* Bryan, 56 Iowa, 632; Blum *v.* Bidwell, 20 La. Ann. 43.

The presumption is that all bills are drawn against funds to meet them. Bickerdike *v.* Bollman, 1 T. R. 406; Thompson *v.* Stewart, 3 Conn. 171.

And refusal to accept does not rebut the presumption. Galladay *v.* Bank of Union, 2 Head (Tenn.), 57. Nor does the insolvency of the drawee. Cole *v.* Wintercost, 12 Tex. 118.

Nor does mere absence of funds show that the drawer had not a reasonable expectation that funds would be provided; but it does shift the burden of proof to the drawer to show what his expectation was. 2 Daniel Neg. Inst. 128; Story on Bills, § 312; Walker *v.* Rogers, 40 Ill. 278; Dunbar *v.* Tyler, 44 Miss. 1; Baxter *v.* Graves, 2 A. K. Marsh. (Ky.) 152; Carson *v.* Alexander, 34 Miss. 528.

But if it finally appear that he had no funds nor a reasonable expectation of any, demand and notice are excused. Terry *v.* Parker, 6 Ad. & El. 502; Dickens *v.* Beal, 10 Pet. (U. S.) 572; Miser *v.* Trovinger, 7 Ohio St. 281; Oliver *v.* Bank of Tenn., 11 Humph. (Tenn.) 74; McRail *v.* Rhodes, 22 Ark. 315; Wood *v.* McMeans, 23 Tex. 481; Harness *v.* Davis, etc., Assoc., 46 Mo. 357; Wollenweber *v.* Ketterlinus, 17 Pa. St. 389; Shaw *v.* Stone, 1 Cush. (Mass.) 228; Knickerbocker Life Ins. Co. *v.* Pendleton, 112 U. S. 696; Compton *v.* Blair, 46 Mich. 1.

Want of authority to draw the bill is equivalent to lack of funds or expectation of them. Aborn *v.* Bosworth, 1 R. I. 401; Armendiaz *v.* Terna, 40 Tex. 291.

The holder must prove want of authority. Adams *v.* Darby, 28 Mo. 162.

2. Cathell *v.* Goodwin, 1 Harr. & G. (Md.) 468; 1 Parsons Notes & Bills, 538.

A drawer has been held to have a reasonable expectation of funds when he has a running account with his drawee. Gardiner *v.* McDaniel, 26 La Ann. 472. Even when there was no balance to his credit when the bill was drawn. Urquhart

Though an accommodation indorser is usually entitled to notice,[1] yet if he indorse for the accommodation of the drawer of a bill or a later indorser, knowing that the paper will not be paid, he thereby excuses the holder from giving him notice.[2]

An express waiver of demand and notice made by the indorser in his indorsement is usual and valid, but waiver may also be inferred from a promise to pay made with full knowledge of facts amounting to a discharge.[3]

BILLIARDS.—In a statute making it an indictable offence for the owner of a billiard-table to allow a minor to play "billiards" thereon, the word "billiards" is not to be regarded as a generic term, broad enough to cover any game that may be played upon a billiard-table, but should be construed in its ordinary sense as it is commonly understood, and not to include a game commonly known, not by that name, but by another. "Pool" is not, in this sense, a game of billiards, as the former is played with fifteen balls, while billiards is played with three or four balls only.[4]

v. Thomas, 24 La. Ann. 95. When he has any, though insufficient, funds with the drawee. Robinson *v.* Ames, 25 Johns. (N. Y.) 146. When he believes he has funds, but is mistaken. Welch *v.* Taylor, 82 Ill. 579. When he had sent funds that had miscarried. Edwards *v.* Moses, 2 Nott & McC. (S. C.) 433. When he had authority to draw given expressly by the drawee, although the latter had no funds of his. Austin *v.* Rodman, 1 Hawks, 194. When he had deposited title deeds with the drawee as security for the bill. Walwyn *v.* St. Quentin, 2 Esp. 515. When he has drawn before the arrival of the goods against a consignment and a bill of lading forwarded to the drawee. Robins *v.* Gibson, 3 Campb. 334; Orear *v.* McDonald, 9 Gill (Md.), 350; Shuchardt *v.* Hall, 36 Md. 590; Joseph *v.* Solomon, 19 Fla. 623.

On the other hand, it has been held that a drawer had no reasonable expectation of funds who drew his individual bill on one who owed him money *qua* executor. Yongue *v.* Ruff, 3 Strobh. 311. Or who, being utterly insolvent, drew upon an equally insolvent drawee. Mobley *v.* Clark, 28 Barb. 390. Or who drew expecting his bill to be paid without his providing funds, because similar previous bills had been paid. Dollfus *v.* Frosch. 1 Denio (N. Y.). 307.

Upon promissory notes demand and notice are necessary although the maker declares before maturity he will not pay. Applegarth *v.* Abbott, 64 Cal. 439. Or the indorser with a letter stating that the maker will be unable to do so. Hart *v.* Eastman, 7 Minn. 74.

1. Holland *v.* Turner, 10 Conn. 308; Carter *v.* Flower, 16 M. & W. 751.

2. Farmers' Bank *v.* Van Meter, 4 Rand. (Va.) 553.

3. Tebbetts *v.* Dowd, 23 Wend. (N. Y.) 379.

Or the promise to pay may be regarded as evidence for the jury of the receipt of due notice, but in either view the indorser is held to liability. S. p., Loose *v.* Loose, 36 Pa. St. 538; Myers *v.* Standart, 11 Ohio St. 29; Hibbard *v.* Russell, 16 N. H. 410; Mense *v.* Osbern, 5 Mo. 544; McPhetres *v.* Halley, 32 Me. 72; Lewis *v.* Brehme, 33 Md. 412; Robbins *v.* Pinckard, 5 Sm. & M. (Miss.) 51; Kilby *v.* Rochussen, 18 C. B. 357.

Authorities for Bills and Notes.—Of the innumerable text-books on this subject, Randolph on Commercial Paper (3 vols., 1886) and Daniel on Negotiable Instruments (2d Ed., 2 vols., 1882) are the latest and most valuable original works.

Books still standard are Byles on Bills (7th Am. Ed. 1883), Chalmers on Bills, Notes, and Checks (Benjamin's Am. Ed. 1881), Story on Promissory Notes (7th Ed. 1878), Story on Bills of Exchange (4th Ed. 1860), and Parsons on Promissory Notes and Bills of Exchange (2d Ed., 2 vols., 1879).

A treatise on Bills of Exchange, Promissory Notes, etc., by Isaac Edwards (3d Ed., 2 vols., 1882), is a work especially useful to practitioners in New York and States of similar procedure.

For a most valuable collection of references to articles on special topics see Abbott's National Digest, vol. 1, p. 390.

4. Squier *v.* State, 66 Ind. 318.

BILLIARD-TABLE.—Where a statute forbids the keeping of any "kind of gaming-table (billiard-tables excepted) at which faro or any other game of chance shall be played for money," it does not authorize the keeping of billiard-tables for the playing of faro for money; but the moment they are so appropriated they *ipso facto*, *pro hac vice*, lose the immunities conferred on them by the exception, and cease to be billiard-tables in the eye of the law.[1]

BIND. (See also BOUND.)—To bring under legal obligations, as those of a bond or covenant.[2]

BIND OUT.—To place under legal obligation to serve; as, to *bind out* an apprentice.

BIND OVER.—To require an accused person to enter into a bond or give bail to appear at the trial; to demand security of one complained against to keep the peace, etc., or of a witness to appear at court.

BIPARTITE.—In two parts; having two corresponding parts, as a deed or other instrument executed by two parties, one part for each.

BIRTH. — (See also ABORTION; BORN; CONCEALMENT OF BIRTH.) Being born must mean that the whole body is brought into the world; and it is not sufficient that the child respires in the progress of birth;[3] and there must be independent circulation;[4] the whole body of the child must have come forth from the body of the mother,[5] but the umbilical cord need not have been separated.[6]

BISHOP.—In English ecclesiastical law, the chief of the clergy

1. State *v.* Price, 12 Gill & J. (Md.) 263.

Erects and Keeps a Billiard Table.—A tax to which every man is liable who "erects and keeps a billiard table" applies in the same way to a table kept merely for purpose of amusement as to one used for gaming purposes. Sears *v.* West. 1 Murph. (N. Car.) 291.

2. **Bind such Debts in his Hands.**—Under the Common Law Procedure Act, the service of an order on a garnishee by a judgment creditor "shall bind such debts in his (the garnishee's) hands;" this renders the creditor one "having security for his debt" within the meaning of the Bankrupt Law Consolidation Act, but it does not give a lien, and consequently the judgment creditor cannot prevail against the assignees. "We construe the word 'bind' as not changing the property or giving even an equitable property, either by way of mortgage or lien, but as putting the debt in the same situation as the goods when the writ was delivered to the sheriff. We take the word 'bind' to mean that the debtor, or those claiming under him, shall not have power to convey or do any act as against the right of the party in whose favor the debt is bound; and we construe it as not giving any property in the debt in the nature of a mortgage or lien, but a mere right to have the security enforced; in other words, we think that the very distinction contemplated between securities and liens applies, and that the present is an instance of that species of security mentioned in the act as not being a lien." Holmes *v.* Tutton, 5 El. & Bl. 80.

Bindings, in 4 U. S. Stat. at Large, 584, imposing a duty on "mits, gloves, bindings, blankets, hosiery, and carpets and carpeting," refers exclusively to articles of that description when composed wholly or in part of wool. Chester *v.* Curtis, 1 Blatchf. (U. S.) 499.

3. Rex *v.* Poulton, 5 C. & P. 329.

4. Rex *v.* Enoch, 5 C. & P. 539.

5. Rex *v.* Crutchley, 7 C. & P. 814. In this and the two cases above the question was whether the child was "born alive" so that killing it constituted murder. As to child *en ventre sa mère*, see BORN.

6. Regina *v.* Reeves, 9 C. & P. 25.

in his diocese or jurisdiction in England, Wales, or Ireland, and the archbishop's suffragan or assistant.[1]

BISHOPRIC.—A diocese or see of a bishop.

BISSEXTILE. See LEAP YEAR.

BITCH.—The word "bitch," when applied to a woman, does not, in its common acceptation, import whoredom in any of its forms.[2]

BLACK.—In a statute providing that "no black or mulatto person or Indian shall be allowed to give evidence in favor of or agains a white man," "black person" must be taken as contradistinguished from "white," and necessarily excludes all races other than the Caucasian."[3] (See also COLORED.)

BLACKLEG.—A person who gets his living by frequenting race-courses and places where games of chance are played, getting the best odds and giving the least he can, but not necessarily cheating.[4]

BLACKMAIL. See THREATS.

BLANC SEIGN.—In Louisiana a *blanc seign* is a paper signed at the bottom by him who intends to bind himself, give acquittance, or compromise, at the discretion of the person whom he intrusts with such *blanc seign*, giving him power to fill it with what he may think proper, according to agreement, which power is personal, and, as all other powers, dies with the attorney.[5]

BLANK.—I. A void space on paper or in any written instrument. II. A paper containing the substance of a legal instrument, as a deed, release, writ, or execution, with vacant spaces left to be filled with names, date, descriptions, etc.[6]

BLANK ACCEPTANCE—INDORSEMENT. See BILLS AND NOTES.

BLANKS. See ALTERATION OF INSTRUMENTS, vol. 1, p. 497.

BLASPHEMY. (See also LIBEL.)—Blasphemy is an oral or written reproach maliciously cast upon God, his name, attributes, or re-

1. Whart. Law Lex.

In a statute the word "bishop" was made applicable to an archbishop with a view to cases where the archbishop would have to proceed in his own diocese; and in such case he is within the provisions affecting bishops. Reg. *v.* Archbishop of Canterbury, 6 El. & Bl. 562.

Bishop of Norwich, in the statute *Circumspecte Agatis* (13 Edw. I.) was put for an example, the act extending to all bishops. 2 Inst. 487; Bishop Stat. Cr. § 190, b, n. 3.

2. Schurick *v.* Holliman, 50 Ind. 336; K—— *v.* H——, 20 Wis. 242.

But the words "she is a bitch," when alleged in the complaint to have been spoken at a time and place where they were understood to mean, and did mean, an imputation of whoredom, are actionable. Logan *v.* Logan, 77 Ind. 558. And used in connection with other words, such as "bad woman" and "whore," they may of their own force import to the ordinary hearer the charge of want of chastity, or of the crime of adultery. Riddell *v.* Thayer, 127 Mass. 490.

3. People *v.* Hall, 4 Cal. 404.

4. Barnett *v.* Allen, 3 H. & N. 379.

5. Musson *v.* Bank U. S., 6 Mart. (La.) 718. The court says: "It is not to be expected that much may be found in law books upon this very unusual mode of transacting business which now and then, when men, in the simplicity of their manners, could rely on each other's honesty, was indulged in."

6. Webs. Dict.

ligion.[1] In general, blasphemy may be described as consisting in speaking evil of the Deity with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God. It is purposely using words concerning God calculated and designed to impair and destroy the reverence, respect, and confidence due to him as the intelligent creator, governor, and judge of the world. It embraces the idea of detraction when used towards the Supreme Being, as "calumny" usually carries the same idea when applied to an individual. It is a wilful and malicious attempt to lessen men's reverence of God by denying his existence, or his attributes as an intelligent creator, governor, and judge of men, and to prevent their having confidence in him as such.[2]

1. 2 Bish. Cr. L. (7th Ed.) § 76.

2. Com. *v.* Kneeland, 20 Pick. (Mass.) 206, 218.

Statutes punishing blasphemy are constitutional. Com. *v.* Kneeland, 20 Pick. (Mass.) 206; People *v.* Ruggles, 8 Johns. (N. Y.) 289; s. c., 5 Am. Dec. 335; State *v.* Chandler, 2 Harr. (Del.) 553; State *v.* Steele, 3 Heisk. (Tenn.) 135; State *v.* Graham, 3 Sneed (Tenn.), 134.

The two common-law offences of blasphemy and profaneness differ only in this, that blasphemy is the word of larger meaning, embracing more than the other. Our statutes do not much distinguish between them. 2 Bish. Cr. L. § 73.

Christianity being recognized by the law, therefore profanity, blasphemy against God, and profane ridicule of Christ or the Holy Scriptures are punishable at common law. Accordingly, where one uttered the following words, "Jesus Christ was a bastard, and his mother must be a whore," it was held a public offence, punishable by the common law. People *v.* Ruggles, 8 Johns. (N. Y.) 289; s. c., 5 Am. Dec. 335. See State *v.* Chandler, 2 Harr. (Del.) 553; Updegraph *v.* Commonwealth, 11 Serg. & R. (Pa.) 394; Goree *v.* State, 71 Ala. 7; State *v.* Graham, 3 Sneed (Tenn.), 134; State *v.* Steele, 3 Heisk. (Tenn.) 135; State *v.* Ellar, 1 Dev. L. (N. Car.) 267; State *v.* Jones, 9 Ired. L. (N. Car.) 38; State *v* Pepper, 68 N. Car. 259; s. c., 12 Am. Rep. 637; State *v.* Powell, 70 N. Car. 67; Barker *v.* Commonwealth, 19 Pa. St. 412; Com. *v.* Pray, 13 Pick. (Mass.) 359; Com. *v.* Kneeland, 20 Pick. (Mass.) 206.

The utterance of the name of God is not necessary to constitute profane swearing. Gaines *v.* State, 7 Lea (Tenn.), 410; s. c., 40 Am. Rep. 64; Holcomb *v.* Cornish, 8 Conn. 375.

Any words importing an imprecation of future divine vengeance may constitute profane cursing. Holcomb *v.* Cornish, 8 Conn. 375. See Com. *v.* Spratt, 14 Phila. (Pa.) 365; Odell *v.* Garnett, 4 Blackf. (Ind.) 549.

Public swearing is a nuisance at common law, but to be indictable it must be in a public place and an annoyance to the public. State *v.* Jones, 9 Ired. L. (N. Car.) 38. See State *v.* Kirby, 1 Murph. (N. Car.) 254; State *v.* Ellar, 1 Dev. L. (N. Car.) 267; State *v.* Pepper, 68 N. Car. 259; s. c., 12 Am. Rep. 637; State *v.* Powell, 70 N. Car. 67; State *v.* Brewington, 84 N. Car. 783; State *v.* Graham, 3 Sneed (Tenn.), 134; State *v.* Steele, 3 Heisk. (Tenn.) 135; Bell *v.* State, 1 Swan (Tenn.), 42; Barker *v.* Commonwealth, 19 Pa. St. 412; State *v.* Chandler, 2 Harr. (Del.) 553.

A single act of profane swearing is generally not indictable as a nuisance. Gaines *v.* State, 7 Lea (Tenn.), 410; s. c., 40 Am. Rep. 64. See Goree *v.* State, 71 Ala. 7; State *v.* Powell, 70 N. Car. 67; State *v.* Jones, 9 Ired. L. (N. Car.) 38.

Profane swearing in a public place and in the hearing of citizens, continued for five minutes, although only on a single occasion, is an indictable nuisance. State *v.* Chrisp, 85 N. Car. 528; s. c., 39 Am. Rep. 713.

It is not necessary that the language used should be heard by a large portion of the community; it is sufficient if three or four persons were present and heard the words uttered. Goree *v.* State, 71 Ala. 7.

The words used need not be set forth in the indictment. *Ex parte* Foley, 62 Cal. 508: State *v.* Ratliff, 10 Ark. 530. *Compare* Young *v.* State, 10 Lea (Tenn.), 165.

Drunkenness is no defence. People *v.* Porter, 2 Park. Cr. (N. Y.) 14.

The offence must be proved; the de-

BLENDED FUND. See CONVERSION.

BLOCK. See note 1, *infra.*

BLOCKADE.—A blockade is a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place; and a neutral is no more at liberty to assist the traffic of exportation than of importation.[2] The modern practice does not require that the place should be invested by land, as well as by sea, in order to constitute a legal blockade; and if a place be blockaded by sea only, it is no violation of belligerent rights for the neutral to carry on commerce with it by inland communications.[3] A blockade only exists where the forces of one nation encompass the ports of another. A third nation then standing by which takes no part in the war has certain rights of communication and trade which are allowed by the belligerents. A blockade interrupts this trade and communication.[4] A simple blockade may be established by a naval officer, acting upon his own discretion or under direction of superiors, without governmental notification; while a public blockade is not only established in fact, but is notified by the government directing it to other governments.[5] (See INTERNATIONAL LAW.)

fendant's admission that he used the profanity charged is not sufficient. People *v.* Porter, 2 Park. Cr. (N. Y.) 14.

It is an indictable offence at common law to publish a blasphemous libel of and concerning the Old Testament. R. *v.* Hetherington, 5 Jur. 529.

A publication stating Jesus Christ to be an impostor and a murderer in principle is a libel at common law. R. *v.* Waddington, 1 B. & C. 26. See Cowan *v.* Milbourn, 2 L. R. Exch. 230; Odell *v.* Garnett, 4 Blackf. (Ind.) 549; State *v.* Jones, 9 Ired. L. (N. Car.) 38; State *v.* Ratliff, 10 Ark. 530; Johnson *v.* Barclay, 16 N. J. L. 1; State *v.* Kirby, 1 Murph. (N. Car.) 254; State *v.* Ellar, 1 Dev. L. (N. Car.) 267; People *v.* Porter, 2 Park. Cr. (N. Y.) 14; Foland *v.* Johnson, 16 Abb. Pr. (N. Y.) 235.

1. **Ten Tenement Frame Block.**—A building so described in a policy of insurance is not "unoccupied" if two of the tenements are in actual use and occupation as residences. "There does not appear to be more than one building; or, if the phrase 'block' imports a separation into divisions, it does not of its own force import a separation into more than two divisions. The phrase 'tenement block' gives but slight indication of what portions of the block the tenements consist, whether a single room, a floor, or flat, or suite of rooms. It imports only of necessity that the building is designed for the accommodation of various families." Harrington *v.* Fitchburg Ins. Co., 124 Mass. 129.

2. The Vrouw Judith, 1 Rob. Adm. 151.

3. 1 Kent Com. 147.

4. U. S. *v.* The Wm. Arthur, 3 Ware (U. S.), 281. It was there held that the declaring by the U. S., by acts of July 13 and Aug. 6, 1861, of ports of entry and delivery and the placing armed ships before them were mere municipal regulations and not the establishing of a blockade.

5. The Circassian, 2 Wall. (U. S.) 150.

Blockaded Port.—Where a policy of insurance contained the clause, "The insurers take no risk of a blockaded port," it was held that such clause extended to every loss happening by reason of a blockaded port, whether such blockade was strictly legal or not. Radcliff *v.* Unit. Ins. Co., 7 Johns. (N. Y.) 38, 45.

Where an insurance was "against all risks, blockaded ports and Hispaniola excepted," a vessel sailing ignorantly for a blockaded port was held to be covered by the policy. "Hispaniola is excepted absolutely from the policy; but other ports are within the terms of the voyage insured, if they be not blockaded. It is their character as blockaded ports which excludes them from the insurance. Their being excepted by this character is thought to justify the opinion that it is the risk attending this character which produces the exception, and which is the

BLOOD.—The word "blood" in its technical and in its natural sense includes the half-blood;[1] and where none can inherit who are not "of the blood of the ancestor," those words exclude those only who have none of the blood, without reference to proportion or quantity: such, however, as have none of the blood are entirely excluded.[2] To be "of the blood" of a person is to be descended from him, or from the same common stock, or the same couple of ancestors.[3] "Next of kin" and "next of blood" are synonymous in the language of the law.[4]

risk excepted. The risk of a blockaded port, as a blockaded port, is the risk incurred by breaking the blockade. This is defined by public law. Sailing from Tobego for Curaçoa, knowing Curaçoa to be blockaded, would have incurred this risk; but sailing from that port, without such knowledge, did not incur it," Yeaton *v.* Fry, 5 Cranch (U. S.), 342.

1. Baker *v.* Chalfant, 5 Whar. (Pa.) 481.

In Gardner *v.* Collins, 2 Pet. (U. S.) 87, in interpreting the R. I. statute of descents, Justice Story says: "We think that the phrase 'of the blood' in the statute includes the half-blood. This is the natural meaning of the word 'blood' standing alone and unexplained by any context. A half brother or sister is of the blood of the intestate, for each of them has some of the blood of a common parent in his or her veins. A person is with the most strict propriety of language affirmed to be of the blood of another who has any, however small a portion, of the same blood derived from a common ancestor. In the common law, the word 'blood' is used in the same sense. Whenever it is intended to express any qualification, the word 'whole' or 'half' blood is generally used to designate it, or the qualification is implied from the context or known principles of law."

See also Beebee *v.* Griffing, 14 N. Y. 241, where the court say: "If one individual can be said to be of the half-blood of his brother and another to be of the whole blood to him, they both can with propriety be said to be of the blood of him; the term 'of the blood' does not indicate the quantity, but simply that there is some of that blood, whether the whole or the half, or a smaller portion. . . . In a treatise on descent by the common law, where the rule is imperative to exclude the half-blood, and to allow the estate to escheat rather than to admit them to the inheritance, the briefer expression 'the blood' might be used to denote those of the whole blood only, because the general rule excluding the half-blood would be assumed to be properly understood. But in a statute adopting new rules of descent materially changing the common law, and expressly intended to admit the half-blood on a par with the whole, except in a single case, no such inference could be drawn."

2. Cutter *v.* Waddingham, 22 Mo. 263, and cases cited in previous note.

3. Den *v.* Jones & Searing, 3 Halst. (N. J.) 346. "Again, they are of the blood of an ancestor, who, with the exception of the father and mother (whose exclusion in England is peculiar to the laws of that realm, 2 Bl. Com. 210, and is founded on feudal principles and policy, *ibid.* 211), are capable of taking by descent from such ancestor, because the law forbids from taking by descent, but those who are of the blood of the ancestor. This definition it will be perceived comprehends not only those on whom under actual circumstances a descent must be cast, as, for example, a son on the death of his father, but all on whom under other circumstances the descent may or might be cast, as the grandson who would take if his father were dead, and the uncle who would take at common law on failure of lineal descendants. In short, all are of the blood of an ancestor who may in the absence of other and nearer heirs take by descent from that ancestor. . . . The terms 'of the blood' and 'heir' are by no means convertible or synonymous, nor does the former naturally or *ex vi termini* mean next of blood. A grandson during the life of his father is of the blood, yet not heir, nor next of blood of his grandfather. A nephew is of the blood of his uncle, yet not heir, nor next of blood, if the uncle have a child or descendant of a child alive. . . . And if in the consideration of the proviso the quality of half-blood be not disregarded, as in my opinion it never should be, then the exposition which would make these terms of the same import might be safely indulged, for if the inheritance be given to the next of blood of the ancestor among the half-blood the design of the legislature will be accomplished."

4. Cooper *v.* Denison, 13 Sim. 295.

BLOOD-STAINS. See EVIDENCE.

BLOW WITH. See note 1, *infra.*

BLUDGEON. See OFFENSIVE WEAPONS.[2]

BOARD.—I. Meals furnished for a stipulated sum.[3]

But not "next of blood" and "of the blood." See previous note.

The devise of a house to three brothers, "provided always that the house be not sold but go unto the next of blood that are males," constitutes an estate tail to each successively. Chapman's Case, Dyer, 333 b.

Of My Name and Blood —A devise to the "first and nearest of my kindred being male and of my name and blood" was thus construed: "In a general sense the being of a man's kindred is being of his blood, as the word 'consanguinity,' which is the same as 'kindred,' imports; but when in addition to being of his kindred a testator requires that the object of his bounty shall be of *his blood*, he must be understood as speaking of that blood which with some propriety may be called *his;* namely, that which in tracing an heir is considered as the blood of the most dignity and worth." "Name" was understood as intended to exclude the female line of the stock or family described by "blood." Leigh *v.* Leigh, 15 Ves. 107.

Kindred of the Whole and the Half Blood.—A statute providing that "in no case shall there be a distinction between kindred of the whole and the half blood" is not confined to cases where the ancestor from whom the estate is derived leaves children by different mothers. "Surely those who are children of a common mother but have different fathers are no less brothers and sisters of the half-blood than those who are children of a common father but have different mothers. Had it been designed that only those were intended who were of the same blood as the ancestor from whom the estate descended, why was it not so said?" Oglesby Coal Co. *v.* Pasco, 79 Ill. 166

Relations by Blood or Marriage, in a will, was confined to the Statute of Distributions and those who have married persons entitled under that statute. Devinne *v.* Mellish, 5 Ves. 529.

Spitting of Blood, in the application for a policy of insurance, means literally spitting blood, whether from the teeth, gums, or lungs, but it would be absurd to hold that it was used in that sense. Evidence is properly admissible to show in what sense it was used, but without such evidence "the court might properly have instructed the jury that 'spitting of blood' in consequence of a drawn tooth or a cut on the gums was not meant by that term." Singleton *v.* St Louis Mut. Ins. Co., 66 Mo. 76.

1. The owner of a water power and of a furnace and mills devised "the furnace and the privilege of using water to blow with." In an action against the devisee for using the water not only for blowing the bellows of the furnace, but also for drilling and grinding castings, it was held that the devisee gave only the right to use the power to blow the bellows of the furnace, and that evidence given of an understanding among furnace men that by "blow with" was meant all the operations of the furnace, and not merely to blow the blast, was not sufficient to enlarge the meaning of the expression. "The language of the will in its ordinary acceptation plainly relates to the mere blowing of the bellows, and not to the other operations mentioned, in which there is no blowing; and a usage among furnace men, and furnace men only, to adopt a wider signification in their conversations among themselves cannot be presumed to have been adopted by other persons." Lincoln *v.* Lincoln, 110 Mass. 449.

2. "What a 'bludgeon' is I do not know. It is a thick stick, and where the degree of thickness begins which makes it a bludgeon I cannot tell." Reg. *v.* Sutton, 13 Cox C. C. 649.

3. Where an indictment charged that the defendant "by false pretences did obtain *board* of the goods and chattels of the prosecutor," it was held insufficient and bad, the term "board" being too general; the court, Draper, C. J., saying: "It may well be doubted whether if the indictment had charged the defendant with having by false pretences obtained a dinner of the goods and chattels of the prosecutor, it would not be too general. But the term 'board' is more general still. It implies a succession of meals obtained from day to day, or from week to week, or from month to month, etc., etc., and it may be said that each meal obtained under false pretences is a distinct offence. The case of the Queen *v.* Gardner, 1 Dears. & B. 40, reported also in 2 Jur. N. S. 598, contains a form of indictment more suitable to the offence intended to be charged." Queen *v.* McQuarrie, 22 U. C. Q. B. 600.

In the Queen *v.* Gardner, cited above, although the indictment enumerated in

II. A number of persons who have the management of some public or private business.[1]

detail the items furnished as board, where the prisoner, by falsely pretending that he was a naval officer, induced the prosecutrix to enter into a contract with him to lodge and board him at a guinea a week, and under this contract he was lodged and supplied with various articles of food, it was held that a conviction for obtaining the articles of food by false pretences could not be sustained, as the obtaining of the food was too remotely the result of the false pretence. Queen *v.* Gardner, 1 Dears. & B. 40.

Under the 17th section of the act of March 11, 1834, which provides "that every inn-keeper shall keep good entertainment for man and horse," it was held that a tavern- or inn-keeper may recover from a guest the amount of his bill for *boarding*, although the 23d section of the same act forbade the recovery of "tavern reckonings *as aforesaid*," which the court held to refer only to such tavern reckonings as were mentioned in the previous section of the act, viz., debts for liquors and debts contracted by apprentices, etc. For said the court: "The plain meaning of the 17th section is that the price of board at an inn or tavern is not prohibited as to its recovery. The term *board* includes the ordinary necessaries of life, and must be considered as being synonymous with the word 'entertainment' in the act." Scattergood *v.* Waterman, 2 Miles (Pa.), 323.

It has been held that an account for *board*, washing, mending, and finding a room may be filed by way of set-off, under statutes authorizing the filing of accounts by defendants in actions on simple contract; the court saying: "*Board* and lodging, washing, etc., are all included within the meaning of goods delivered and services performed." Witter *v.* Witter, 10 Mass. 223.

In *Indiana*, where a statute authorized the county commissioners to make an allowance to the sheriff for all accounts chargeable against the county, it was held that this included fuel furnished by him for the county jail, and that this provision was not repealed by the act fixing the sheriff's *per diem* compensation for *boarding* prisoners; for said the court, Worden, J.: "The word 'boarding' does not in its ordinary sense, or as used in the statute, include the furnishing of fuel." Board of Comm'rs *v.* Reissher, 58 Md. 260.

1. **County Board.**—Section 10, article 10, of the Illinois Constitution of 1870, provides that the *county board* shall fix the compensation of all county officers, etc. In construing this section, the court, Sheldon, J., said: "Now what is the proper construction of the phrase 'county board' as used in section 10, article 10, of the constitution? It evidently is not to be confined to any one particular body of persons. It will be acknowledged that it embraces both the 'board of supervisors' and the 'board of county commissioners,' bodies very differently constituted. Is it to be confined to those two particular bodies, or may it not also embrace the county court, in counties not under township organization, which in such counties was to be superseded by the board of county commissioners, and until so superseded would in such counties be the body for the transaction of the county business? The more natural construction no doubt would be that the term 'county board' referred to the above-named boards, as they were the only two bodies of county officers to whom, in such connection, the term 'board' had been applied by the constitution and the laws, or by usage; and that might well be held as the proper construction, were the county court to continue as a coexisting tribunal, or were it indifferent, as respects results, which one exercised the power given. But the adoption of this construction would lead to this consequence, that section 10, article 10, would take effect in the counties under township organization before it did in the counties not under such organization. The system of a fixed compensation of county officers would be in force in the former counties for a year or more, while in the latter counties the fee system would be prevailing." And farther on: "We perceive no such necessity as limits the term 'board' to the board of supervisors and the board of county commissioners, and excludes its application to the county court which then existed in counties not under township organization. Webster in his dictionary, gives this as one of the definitions of the term 'board:' 'A body of men constituting a *quorum*; a court or council, as a board of trustees, a board of officers.' Under this signification may well be embraced as the *county board* this county court, composed of a county judge and two designated justices of the peace—the body of officers which

III. The deck of a ship, as in the phrase "on board."[1]

BOARD OF HEALTH. (See also HOSPITALS; NUISANCES; OFFICERS, MUNICIPAL CORPORATIONS; QUARANTINE.)

1. Definition.—A board or commission directly or indirectly charged and invested by sovereign authority with certain duties and powers for the protection and improvement of the public health.

The powers and duties imposed are advisory, ministerial, in-

existed in a county not under township organization, and which was by the law of February 12, 1849, constituted to sit as a county court for the transaction of county business." Broadwell *et al. v.* The People, etc., 76 Ill. 554. See Hughes *et al. v.* The People, 82 Ill. 78.

Where an agreement was entered into by B, a managing director of an insurance company, with the board of directors of the said company by which B was to be allowed to resign, and at the same time the board were jointly to relieve him of his shares and guarantee him against all calls thereon, this agreement having been made at a meeting of the board at which only four members out of a total of seven were present, it was held that an action was maintainable for a breach of the agreement against the four defendants who had assented to it, though it was not shown by the plaintiff that the remaining members of the board were bound; the court, Watson, B., saying: "The board of management of this company was composed of seven members. Four only (the defendants) were present when these resolutions were made. The term 'board' has two meanings: the 'board' consisting of all the members, or a 'board' consisting of a *quorum*. If it means the latter, no question can arise. If the whole board, then, inasmuch as the defendants in their communications held out that it was the agreement of the 'board' and 'the directors' to give their guarantee and were parties to the agreement, they were estopped from saying that only four were parties to the agreement. Indeed the four have been parties to this agreement under the name of 'the board,' and if they cannot give a guarantee they are liable in damages." Barker *v.* Allan, 5 H. & N. 61.

1. On Board.—In construing a policy of insurance which read "on freight on board ship Herald," etc., the court, Shaw, C. J., said: "The question is, what was intended by the words 'on board.' The sentence is obviously elliptical, considering 'freight' as the hire or price to be paid for the use of the vessel; 'freight on board' is unmeaning. Something must be supplied. The defendants insist that we must understand it freight of property when laden 'on board.' But this is certainly not the necessary or most probable meaning. It may as well mean freight of property 'expected or intended to be put on board' or 'agreed to be put on board,' as in the case of a charter-party. . . . It may be said that the words 'on board' have, upon this supposition, no effect, and mean the same as freight of ship Herald. We think the meaning is nearly or wholly the same." Robinson *v.* Manufacturers' Ins. Co., 1 Metc. (Mass.) 143.

Where a contract for the conveyance of goods from Liverpool to Australia contained a clause as follows, "Goods to be taken *on board* at Liverpool at ship's expense," it was held that a declaration averring that, although the goods were in the care and custody of the defendants for the purpose of their being taken on board, and the defendants took them on board at the ship's expense, yet, by their wrongful act, neglect, and default, certain of them were damaged, etc., disclosed a breach of duty arising out of the contract for which the defendants were liable. Cook *v.* Wilson, 1 C. B. N. S. 153.

quisitorial, or executive, as the statute law in each case may provide.

2. Classification.—In the United States boards of health may be classified as national,[1] State, and local; and the fundamental law in each instance can only be arrived at by consulting the statutes of the United States or of the particular State.

In England.—Such boards are the creations of Parliament, and their powers and duties are defined by various acts.[2]

3. State Boards of Health.—State boards of health have been created by the legislatures of most of the States. The members are appointed by the governor, and serve for a term of years. The statutory provisions vary in the different States, but a uniformity of purpose is apparent. Such boards are charged with the general supervision of the interests of the health and lives of the citizens, and are directed especially to study vital statistics. They are frequently invested with the supervision of the State system of registration of births, marriages, and deaths, are charged with inquiry concerning prevalent diseases, and are required to make annual reports to the governor. They are authorized to make investigations, to make a collection of vital statistics, and to advise legislation on sanitary matters. The qualification of membership frequently prescribes that there be at least a certain proportion of members selected from the medical profession, and sometimes that at least one member shall be a civil engineer. As a rule, they are not invested with any enlarged executive duties which are usually relegated to the local boards.[3]

4. Local Boards.—*Constitution of.*—In England and most of the United States local boards are now provided for by general laws. Many towns and cities have boards of health established either by special enactment or by virtue of their charters or incorporating acts.[4]

1. The act of Congress of March 3, 1879, 20 Stat. L. 484, R. S. Suplt. ch. 202, 480, creates a national board of health, to consist of seven persons, to be appointed by the President, with one medical officer from the army, one from the navy, one from the Marine Hospital, and one officer from the Department of Justice.

It meets at Washington or elsewhere, at the call of its president, and frames rules to carry out this act. Its duties are to obtain information upon all matters affecting the public health, to advise the several departments, the executives of the several States, and commissioners of the District of Columbia on all questions submitted by them, or whenever in the opinion of the board such advice may tend to the preservation and improvement of the public health. It was also made its duty to prepare and report to Congress a plan for a national health organization; special attention to be given to all quarantine matters. A temporary act to remain in force for four years was passed June 2, 1879, 21 S. L. 5, R. S. Supplt. p. 485, giving certain enlarged powers and specified duties to the national board of health.

2. The foundation Public Health Act in England is 11 and 12 Vict. c. 63, amended by numerous subsequent acts, which were consolidated and amended in 1875 by 38 and 39 Vict. c. 55.

3. For the exact details of the health laws of any particular State it will be necessary to consult the statute law of such State. The statute law of *Massachusetts*, Rev. Stat. chap. 79; *New York* Laws, 1880, chap. 322; Laws, 1885, chap. 270, are very full; and the *Pennsylvania* act, June 3, 1885, P. L. 56, is perhaps the latest on this subject, and is fully and carefully drawn.

4. Chap. 270, Laws 1885 (N. Y.) repealing all acts inconsistent therewith,

Sometimes the county commissioners are created *ex officio* a board of health for the county and invested with certain executive duties.

The judicial construction of the powers, duties, limitations, and liabilities of boards of health can be best considered under such heads respectively.

5. Police Powers of a Municipality.—Among what are known as the police powers of the State, comes the authority to suppress nuisances, preserve health, and prevent fires. Such powers are conferred upon a municipality either directly or by implication as an essential and primary object of their constitution.[1] The power to preserve the health and safety of the inhabitants is one of the chief purposes of local government, and reasonable by-laws in relation thereto have been sustained in England as within the incidental authority of corporations to ordain.[2]

and requiring the common council of every city and the trustees of every incorporated village in the State, with certain specified exceptions, in which there was not then a board of health to appoint such a board for such city or village once in each year, repeals the provision in the charter of a village making the board of trustees the board of health of such village. The exceptions intended refer to villages in which there were boards constituted as separate bodies from the board of trustees. And when the board of trustees of a village fails to appoint a board of health as required by the act of 1885, any citizen and taxpayer of said village may institute proceedings to compel them to do so by *mandamus*. People *ex rel.* Boltzer *v.* Daley, 22 N. Y. W. Digest, 171.

Boards of health established by ordinance improperly passed may be a *de-facto* board, and its acts valid. Smith *v.* Treas. of Cuyahoga, 29 Ohio, 261.

The several acts of the *New Jersey* legislature relating to boards of health considered in relation to the board of health of Newark. Lozier *v.* Newark, 19 Vr. (N. J.) 453.

A board of health is legally organized if there has been a substantial compliance with the requirements of the law; although the statute provides that the board shall be nominated for a term of not less than three years; the fact that two of its members can hold office under the city charter for but one year will not constitute the board illegal. Hutchinson *v.* State, 39 N. J. Eq. 569.

The New Jersey law of 1880, and a supplement passed thereto in 1885, relative to local boards of health, provide the number of members, how appointed, and term of office of the members thereof. The Newark board of health being constituted by virtue of an ordinance in conformity to the above act, which changes the term of office, number of members, and methods of election or appointment, is illegal, and the board constituted thereby cannot exercise the powers intended to be conferred by the legislature referred to. State *v.* Board of Health, Newark, N. J., 2 Atlantic Repr. 815.

The board of health has not the capacity to sue or to be sued. Neither has it power to purchase and hold real estate for a hospital. People *v.* Supervisors of Monroe, 18 Barb. (N. Y.) 567.

No penalty can be imposed for the violation of a special order of the board of health; the statute only extends to violations of the sanitary code. Health Department *v.* Knoll, 70 N. Y. 530; Health Department *v.* Pinckney, 7 Daly (N. Y.), 260.

1. Laws and ordinances relating to the comfort, health, convenience, and general welfare of the inhabitants, are generally styled police laws and regulations.

2. Dillon on Mun.Cor. (3d Ed.) §§ 141, 369.

A city may adopt measures of police to preserve the health and promote the convenience and general welfare of the inhabitants. So it may abate a manufactory as injurious to the public health. Kennedy *v.* Phelps, 10 La. Ann. 227.

As to the power of municipal corporations to make ordinances and regulations to preserve the public health and to prevent and remove nuisances, see Harrison *v.* Baltimore, 1 Gill (Md.), 264; Livingston *v.* Pippin, 31 Ala. 542; Baker *v.* Boston, 12 Pick. (Mass.) 184; Salem *v.* R. Co., 98 Mass. 431; Dingley *v.* Boston, 100 Mass. 544; Ureford *v.* People, 14 Mich. 41; Roberts *v.* Ogle, 30 Ill. 459,

Where a city government has the power, it is bound, so far as it can, to abate every nuisance dangerous to the public health.[1] The conference of power on a municipality to make quarantine regulations is not a delegation of legislative power. But it has been frequently decided that a mere failure on the part of a municipality to provide proper remedies for the prevention of nuisances and other annoyances to health and bodily comfort will not result in liability to the town or city.[3]

6. Powers and Limitations.—Powers conferred on a board of health are to be liberally construed.[4] Their functions are held to be executive, but not legislative;[5] the question whether a thing is or is not a nuisance is a jurisdictional fact, and a board cannot declare that to be a nuisance which is not such at common law.[6] The power to enact sanitary regulations which shall have the force of law, and for which a criminal prosecution will lie, may be conferred on a board by the legislature.[7]

State *v.* Jersey City, 5 Dutch. (N. J.) 170; Slaughter-house Cases, 16 Wall. 36; Dillon M. C. §§ 308, 309.

The power to relieve the indigent sick, especially in time of epidemic, is inherent in every municipal corporation. Vinet *v.* First Municipality, 4 La. Ann. 42.

1. Kennedy *v.* Phelps, 10 La. Ann. 227.

2. Such powers have been sustained as not contravening either the constitution of *Missouri* or of the United States. Metcalf *v.* St. Louis, 11 Mo. 102.

3. Roberts *v.* Chicago, 26 Ill. 249; Wilson *v.* New York, 1 Denio (N. Y.), 595; Mills *v.* Brooklyn, 32 N. Y. 489; Carr *v.* Northern Liberties, 35 Pa. St. 324; Detroit *v.* Michigan, 34 Mich. 125; Delphi *v.* Evans, 36 Ind. 90; Cotes *v.* Davenport, 9 Iowa, 227; Lamber *v.* St. Louis, 15 Mo. 610; White *v.* Yazoo, 27 Miss. 357.

4. Powers granted for so important an object as the preservation of the public health should receive a liberal construction for the advancement of the ends for which they were bestowed. Gregory *v.* New York, 40 N. Y. 273.

While the court of chancery has jurisdiction to enjoin action of township boards, yet these boards having large discretionary power, the exercise of such discretion will not be interfered with except in a clear case. Upjohn *v.* Board of Health, 46 Mich. 542.

5. A resolution passed by a *New Jersey* board of health declaring a certain tannery to be a nuisance, was held void. State Marshall *v.* Trenton, 7 Vr. (N. J.) 283.

6. The question whether a nuisance exists cannot be settled conclusively except in the regular courts of law or equity. Hutton *v.* City of Camden, 10 Vr. (N. J.) 122; Coe *v.* Schultz, 47 Barb. (N. Y.) 64; Weil *v.* Schultz, 33 How. Pr. (N. Y.) 7; Hoffman *v.* Schultz, 31 How. Pr. 385; Schuster *v.* Met. Board of Health, 49 Barb. (N. Y.) 450.

7. Polinsky *v.* People, 11 Hun (N. Y.), 390; People *v.* Special Sessions, 7 Hun (N. Y.), 214.

The board of health have final jurisdiction in determining the fact of a nuisance which they order to be removed. Kennedy *v.* Board of Health, 2 Pa. St. 366.

The license of a county board of health and vital statistics in New Jersey, to manufacture fertilizers and materials, cannot be pleaded in bar of an indictment for causing a noxious, offensive, and unwholesome nuisance by such manufacture. Garrett *v.* State of New Jersey, 7 Atl. Repr. 29.

In all actions against the mayor, aldermen, and commonalty of the city of New York, in which any action, order, regulation, ordinance, or proceeding of the board of health shall be called in question, the board of health shall be a necessary party. Bell *v.* New York, 53 How. Pr. (N. Y.) 23, 334.

By the act of June 30, 1885, P. L. 250, the board of health of cities of the first class in *Pennsylvania* were authorized to make and promulgate suitable rules and regulations for the construction of house drainage, and the disregard of such rules made a misdemeanor punishable with fine and imprisonment. In the case of Com. *v.* Lambrecht, decided in the Quarter Sessions for Philadelphia County (not.

The *Massachusetts* act relative to boards of health, which is explicit and carefully drawn, has received considerable judicial construction.[1]

General Powers.—The powers of boards of health have been recognized and defined in a number of cases in the different States. Where a business is so carried on in the city as to be a public nuisance *per se*, the board of health has power to abate it.[2] They have powers to pass laws prohibiting the sale of impure milk

reported), May 6, 1887, the constitutionality of this act was called in question. The defendant was indicted for violating the provisions of the act, and demurred to the indictment on the ground that the act was unconstitutional, because it delegated the law-making power to a department of the municipality. The court held: "After a careful consideration of the matter, I am unable to find any conflict between the constitution and the act of June 30, 1885, authorizing the board of health in cities of the first class to regulate house drainage, the registration of master plumbers, and the construction of cesspools. The argument of the counsel of the defendants that the act delegates the law-making power to a department of the municipality is not well founded. By a public statute it is enacted that 'the boards of health in cities of the first class are authorized and directed to adopt and promulgate suitable rules and regulations for the construction of house drainage and cesspools, and to provide for the registration of master plumbers and persons engaged in the plumbing business in said cities.' The boards 'shall also establish a system of inspection and supervision over all house drainage and cesspools, and ventilation of the same.' Fine or imprisonment, or both, at the discretion of the court, may be imposed upon any person who shall refuse or neglect to comply with the requirements of said rules and regulations when promulgated. Thus it will be seen that the offence and the punishment are prescribed by the statute. The boards of health can do no more than to adopt and promulgate the rules and regulations, and by inspection and supervision see that the requirements thereof shall be complied with."

A city ordinance giving the board of health a general supervision over the health of the city *held* to include power to rent a building to be used as a hospital to protect the city from cholera. Aull *v.* Lexington, 18 Mo. 401.

1. It has been held that the Mass. stat. 1882, chap. 181, providing for placing neglected children under fourteen years of age in charge of the State board of health, lunacy, and charity is not a penal statute, and not contrary to the bill of rights. Farnham *v.* Pierce, 2 N. E. Repr. 225.

Selectmen as board of health may, without notice, forbid an offensive trade. Belcher *v.* Farrar, 8 Allen (Mass.), 325.

The order of selectmen to abate need not be served by an officer. The court may in its discretion refuse to enforce an order, and the selectmen may bring a bill in the name of the town. Winthrop *v.* Farrar, 11 Allen (Mass.). 398.

A board of health may give an order to remove a nuisance without previous notice. The order need not prescribe the mode of removal, and the owner is not restricted to the mode if prescribed. Salem *v.* R. Co., 98 Mass. 431.

A board of health may bring a bill in the city's name. City of Taunton *v.* Taylor, 116 Mass. 254.

The statute intended a summary abatement of a local nuisance. Cambridge *v.* Monroe, 126 Mass. 502.

A later case holds that an order undertaking to prescribe removal is void; also without previous notice. Watuppa Reservoir *v.* MacKensie, 132 Mass. 71.

The board may act by a committee in abating a nuisance Grace *et al. v.* Board of Health, 135 Mass. 490.

Keeping swine is held to be an employment entitling owner to notice by the board. Com. *v.* Young, 135 Mass. 526.

A person aggrieved by an order of the State board of health may appeal to a jury, and the jury may alter the order. Sawyer *v.* State Board of Health, 125 Mass. 182.

Notice must be given to the board of an appeal from its order. Pebbles *v.* Boston, 131 Mass. 197.

A woman, by statute 1879, c. 291, § 2, is eligible as a member of the State board of health. Opinion to Governor and Council, 136 Mass. 578.

2. The board may abate a nuisance *per se* after notice to show cause has been duly served and disregarded. Weil *v.* Schultz, 33 How. Pr. (N. Y.) 7; Westheimer *v.* Schultz, 33 How. Pr. (N Y.) 11.

and to appoint a milk inspector. The power to regulate implies the power to restrict; and where a city has the power to regulate slaughter-houses it has the power of total prohibition.[2] It has the same rights as any other citizen to abate a public nuisance.[3]

They have power to fence a lot if necessary for the abatement of a nuisance.[4] Their action in fixing the compensation of a physician whom they were empowered to employ is conclusive.[5]

In *New Jersey* the board may proceed in the name of the State to procure an injunction to restrain a nuisance prejudicial to health without the intervention of the attorney-general.[6] Discretionary power, where given, will not be controlled.[7] Where a ministerial duty is imposed it must be exercised in a proper manner.[8]

Persons aggrieved by an order of the board of health are entitled to an appeal to the jury.[9] The boards of health may recover the expenses of healing sick passengers.[10] They may under certain restrictions take charge of the premises occupied by persons afflicted with an infectious disease.[11]

Limitations and Restrictions.—While a board of health may have power to declare a particular thing a nuisance as dangerous to

1. With power to seize and destroy such as is below the standard quality. Blazier *v.* Miller, 10 Hun (N. Y.), 435.

2. Board *v.* Heister, 37 N. Y. 66; Tugman *v.* Chicago, 78 Ill. 405.

3. The Metropolitan board of health having ordered a manufacture of poudrette to be discontinued until it could be made without allowing the odor or fumes to escape into the external air, the owner appealed for an injunction. *Held*, that such a manufacture was a public nuisance which the board had the same right as any other citizen to abate. Coe *v.* Schultz, 47 Barb. (N. Y.) 64.

4. Wistar *v.* Addicks, 9 Phila. 145.

5. Williamsport *v.* Richter, 81 Pa. St. 508.

6. Hutchinson *v.* Board of Health, 39 N. J. Eq. 569.

7. Under a statute regulating the practice of medicine and surgery, an applicant for leave to practise, who has a diploma, must furnish the State board of health satisfactory evidence that it was granted by some legally chartered institution in good standing. *Held*, that the granting of leave by the board is discretionary, and will not be enforced by *mandamus*. State *v.* Gregory, 83 Mo. 123.

The authority of the corporation of New Orleans to prevent nuisances is of a very extensive character, and a strong case of abuse must be shown to induce the court to interfere with its exercise. Milne *v.* Davidson, 5 Mart. (La.) 410.

The court will not interfere to prevent a removal of a nuisance unless the complainant's rights are illegally threatened. In this case the city council acted as a board of health. Ferguson *v.* Selma, 43 Ala. 398.

8. The board of health of New York is bound to exercise in proper manner the power to record births conferred upon it. *Ex parte* Lauterzing, 16 J. & Sp. (N. Y.) 308.

9. Although the Mass. statute does not expressly give to a person aggrieved by an order of the State board adjudging his business a nuisance a right of appeal therefrom to the jury, yet he has such right. Sawyer *v.* Board of Health, 125 Mass. 182.

Notice must be given, however, to the State board of an appeal from an order of that board. Pebbles *v.* Boston, 131 Mass. 197.

10. The expenses of sick passengers may be recovered though ordered to the hospital before the oath is made. Board of Health *v.* Cope, Purd. Dig. (11th Ed.) 1555.

11. A member of a town board of health has no authority without a warrant to take charge of premises where there is a case of small-pox to the exclusion of the owner thereof, or the person entitled to the lawful possession, even when the person is too sick to be removed; but he may subject the premises and the use thereof to stringent regulations to prevent the spread of the disease. Brown *v.* Murdock, 3 N. E. Repr. 208.

To similar effect is Haverty *v.* Bass, 66 Me. 71.

public health and order its removal, it may not assume in advance that a certain class of things, as privies and sinks, are or will become nuisances and bind the city by contract for their removal;[1] nor may it absolutely prohibit the carrying on of a lawful business.[2]

A town board cannot summarily execute its orders as to the abatement of a nuisance by going outside of the town for that purpose.[3]

Where the legislature has regulated the standard of petroleum and the mode of storage thereof it is not competent for a board of health under its general powers to impose further restrictions.[4]

It is only where a regulation of a board of health has been made and published that a person can be convicted of a misdemeanor for its violation.[5]

The regulations of a board of health may not conflict with powers conferred upon quarantine officers.[6]

A city cannot recover the expense of filling up lowlands of a citizen by the adoption of a resolution of a board of health and subsequent notification to the owner to do so.[7]

The principle of law applying to the exercise of summary powers on the part of boards of health, if at all capable of being summarized, is simply that boards of health are strictly confined to and by the statutory provisions of the acts by which they are created.[8]

1. Gregory *v.* Mayor, 40 N. Y. 273.

2. The board of health of the city of Newark in the legitimate exercise of its functions cannot absolutely prohibit the carrying on of a lawful business not necessarily a nuisance, but which may be conducted without injury or danger to the public health and without public inconvenience. They will be confined in their interference with the lawful business of any individual to such interruptions as may be reasonably necessary to enable them to abate any nuisance he may create in conducting it. Weil *v.* Ricord, 9 C. E. Greene (N. J.), 169.

3. Gould *v.* City of Rochester, 105 N.Y. 46. But where a city permits its sewage to be discharged upon its premises in an adjoining town, and the board of health of the town pass a resolution declaring such discharge of sewage to be a nuisance, orders it to be suppressed, and authorizes the commencement of an action to restrain the violation of the resolution, and a copy of the resolution was served upon the city authorities, the delivery being made in the city, *held*, that the action was maintainable, that the order related to a matter within the town and within the jurisdiction of the board. Gould *v.* Rochester, 39 Hun, 79; reversed 105 N. Y., 46.

4. Metropolitan Board of Health *v.* Schmades, 3 Daly (N. Y.), 283.

5. Reed *v.* People, 1 Park. (N. Y.) 481.

6. People *v.* Roff, 3 Park. (N. Y.) 216.

7. Hutton *v.* Camden, 10 Vroom (N. J.), 122.

8. The Massachusetts statutes in conferring on town boards of health power to provide for persons sick with infectious diseases in the houses where they may be, if they cannot be removed without danger, and to treat such houses as hospitals, do not authorize a board to take possession of such a house and its furniture to the exclusion of the owner and against his consent, and to use the house as a hospital for one found sick therein, and the owner of the house so taken has no claim against the town for use and occupation. Spring *v.* Hyde Park, 137 Mass. 554.

An order of a board of health declaring certain premises a nuisance, and ordering it to be abated under a penalty, is void as to the order, unless passed at a hearing appointed and on notice given. Rogers *v.* Barker, 31 Barb. (N. Y.) 447.

An order of the board of health of a city under Mass. Gen. St. ch. 26, § 8, directing the owner to remove a nuisance in a specific manner is void. Watuppa Reservoir Company *v.* MacKensie, 132 Mass. 71.

The power of the board of health does not extend to the removal of tenants

4. Municipal Liability for Acts of.—A municipality seems to be liable for the acts of the board of health not *ultra vires* when it is a department of the municipal government.[1]

5. Individual Liability.—Members of a board of health, upon which has been conferred extended powers of abating nuisances, etc., are not liable for their action in removing that which in the exercise of reasonable caution they deemed injurious to the public health;[2] but the rule is otherwise when they are guilty of gross negligence.[3]

and the closing up of their houses, unless justified by the existence of a pestilential disease. Eddy *v.* Board of Health, 30 Leg. Int. (Pa.) 392; s. c., 5 Leg. Gaz. 381.

To obtain a valid lien for the removal of a nuisance, the board of health must strictly pursue the provisions of the act of 1818; there must be a complaint of two householders, and a warrant from a justice. Baugh *v.* Sheriff, 7 Phila. 82.

A resolution declaring that a nuisance exists on lots north and south of Master, between Broad and Thirteenth streets will not sustain a claim against a lot at the Southwest corner of Thirteenth and Master streets. Philadelphia *v.* Houseman, 2 Phila. 349.

What will justify the hauling of a vessel to the wharf, before being visited by the port physician. Board of Health *v.* Miercken, Purd. Dig. (10th Ed.) 1326.

Neither the board of health nor any other department of the city of Philadelphia can make a debt or contract binding the city, unless an appropriation to pay the same has previously been made by councils.

By the procurement of the board of health certain nuisances were removed for the public good. There was not a sufficient appropriation to pay for the work done under the contract. Assessments were made on the property, and about one half thereof were paid into the city treasury. *Held*, that in equity the money belonged to the contractor, and that he had the right to recover the same from the city on the ground that the money was received for his use. Parker *v.* City of Philadelphia, 92 Pa. St. 401.

1. The board of health of a city has power to bind the county to pay for materials used in constructing a pest-house. Stoples *v.* Plymouth Co., 62 Iowa, 364.

Where a city charter requires common council to take measures for the preservation of the public health, and the statute makes the council the board of health, where no other board was appointed, a nurse employed by the council to care for a small-pox patient is entitled to compensation from the city, notwithing the patient was of sufficient ability to pay for the services himself. Such individual liability of the patient as between the city and himself does not affect the liability of the city in the first instance. Rae *v.* Flint City, 51 Mich. 526; s. c., 2 Am. & Eng. Corp. Cas. 201.

Where a board of health was constituted a separate body by the charter of a city, and authorized generally to make and enforce sanitary regulations for the care and preservation of health, *held*, that the city was not liable for the acts and negligence of such board in the discharge of its duties, the same being public, governmental, and not corporate in their character. And it is not material whether its members derive their appointment directly from the State, or are appointed by the city government. Bryant *v.* St. Paul, 33 Minn. 289; s. c., 8 Am. & Eng. Corp. Cas. 340.

An action was brought against the city to recover the value of rags destroyed by order of the board of health. *Held*, that the city was not liable in any event. Bamber *v.* City of Rochester, 63 How. Pr. (N. Y.) 103.

A sanitary commission appointed by a board of health cannot recover for services rendered when that board had no authority to establish a commission. If they acted as agents for the city, the law presumes that their services were rendered gratuitously; if they acted as officers for the city, they then accepted a public trust to which neither fees nor emoluments were attached by any ordinance of the city. Barton *v.* New Orleans, 16 La. Ann. 317; Ferguson *v.* Selma, 43 Ala. 398; Mayor *v.* Toney, 4 Am. & Eng. Corp. Cas. 400.

2. Raymond *v.* Fish, 51 Conn. 80.

3. While the board of health and the municipal officers may remove from the city infected persons, they are liable for negligence in doing so, and for removing them in stormy weather and putting them in an unsafe and unprotected tent, whereby they are so exposed that death ensues. Aaron *v.* Broiles, 64 Tex. 316.

BOARD OF SUPERVISORS. (See also COUNTY COMMISSIONERS.)—A county board under a system existing in certain States, to whom the fiscal affairs of the county are intrusted, composed of delegates representing the several organized towns or townships of the county.[1]

This body performs in New York, Michigan, Illinois, Wisconsin, and Iowa equivalent fiscal duties to those exercised by county commissioners in many other States, and is vested with like authority; and it can be most satisfactorily treated under the same head.[2]

BOARDER. (See also GUEST; LODGER.)—One who has food or diet and lodging in another's family for reward.[3] Boarder and guest distinguished.[4]

1. Bouvier's Law Dict.

2. Haines Township Laws of Michigan; Haines Town Laws of Illinois and Wisconsin.

3. Ambler *v.* Skinner, 7 Robt. (N. Y.) 561. In this case there was a lease containing a covenant that the lessee would not assign the lease, nor let or underlet the whole or any part of the premises without the written consent of the lessor. By the said lease the whole of the first floor was reserved to the lessor, with a privilege or use to him, for the reception of company, of the front parlor, in common with the lessee; and it was held that even if, by the proper construction of the covenant against underletting, the lessee had a right to take *boarders*, yet the right to carry on a business was not included in a mere right to lodge and be fed, and that the lessor might have an injunction to restrain one claiming to be a boarder of the lessee from using the front parlor for the purpose of carrying on his business as a dentist.

The article 739 of the Texan Penal Code (Pasc. Dig. art. 2372), which provides that "an entry into a house for the purpose of committing theft, unless the same is effected by the actual breaking, is not burglary when the same is done by a domestic servant or other inhabitant of such house, and a theft committed by such person after entering a house is only punishable as simple theft," has been held not to apply to *boarders* in a boarding-house; for said the court, Ector, P. J.: "While our statute intended to deal more leniently with 'domestic servants and other inhabitants' of a house when guilty of a theft from the house occupied by them than with other persons, because of their generally recognized right freely to enter any part of the house at all times, the *boarder* has no such recognized and unlimited right of entry. He has the right to enter his own particular room at any time, day or night, but no such right of entry to the private room of a fellow-boarder. Except to the occupant and the domestic servants, or inhabitants of the house whose duties may require them to enter it, the private room of a *boarder* is, or should be, as sacred and as much protected by law from the intrusive entry of a fellow-boarder as from a stranger, or as would be his private residence." Ulman *v.* State, 1 Tex. App. 220.

4. "The distinction between a *guest* and a *boarder* seems to be this: 'The guest comes without any bargain *for time*, remains without one, and may go when he pleases, paying only for the actual entertainment which he receives; and it is not enough to make a *boarder* and not a *guest* that he has stayed a long time in the inn in this way.' 2 Parsons on Contracts, 162; Story on Bailments, § 447." By Beck, J., in Shoecraft *v.* Bailey, 25 Iowa, 553. See Berkshire Woolen Co. *v.* Procter, 7 Cush. (Mass.) 417.

Boarded.—On a demurrer to an answer in replevin that the answer stated facts which avoided the cause of defence in setting out that the plaintiff as a boarder *boarded* and lodged with the defendant as an hotel-keeper, the court overruled the demurrer; Day, J., saying: "The allegation of the answer is *that the plaintiff 'boarded' with defendant.* 'Boarded' is the imperfect tense of the verb 'board,' which means to receive food as a lodger, or without lodging, for a compensation. A lodger is one who lives at board or in a hired room, or who has a bed in another's house for a night. Webs. Dict. The allegation that plaintiff boarded with defendant is merely an averment that he received food from defendant for a compensation. The answer does not state whether he received this food as a *boarder* or as a *guest.* Under

BOARDING-HOUSE. See INNKEEPER.

BOAT. (See also SHIPPING.)—A small vessel or water craft, usually open, and generally moved by oars, but sometimes by sails or steam.[1]

the allegations of the answer he may have received it in either capacity; and the answer being thus uncertain might have been vulnerable to a motion for a more specific statement. But as it does not appear upon the face of the answer that the plaintiff was entertained as a *boarder*, the answer does not state facts which avoid the cause of action, and the demurrer was properly overruled." Pollock *v.* Landis, 36 Iowa, 651.

1. In deciding that an open boat is not a ship or vessel, within the United States statutes of 1820, chap. 122, and 1823, ch. 150, which prohibited commercial intercourse from the British colonies, and that notwithstanding those statutes open British boats might visit the United States, if not destined for trade, Story, J., said: "The argument of the district-attorney is, that the boat falls within the general description of the statutes, and is a 'vessel' within its terms and meaning; and that she is 'owned by a subject or subjects of his Britannic Majesty.' And if so, she is excluded from entry into our ports. There can be no doubt that in a general sense a *boat* is a *vessel*, for it is a 'vehicle in which men or goods are carried on the water,' which is one of the definitions of a vessel given in our lexicographies; and one of the definitions of a boat, given in like manner, is, that it is 'a vessel to pass the water in,' or 'a ship of small size.' In a nautical sense, it more usually designates an open vessel, without decks. Whether the word is used in the one sense or the other in a particular statute must depend upon the context and objects of the statute itself, which may and often do narrow down the general import to specific classes of cases. . . . I am not aware that in any of our laws respecting shipping the word 'vessel' is applied to any description of *boats* like the present. . . . There are, also, provisions in our laws, which contemplate importations from foreign countries in vessels of a smaller description. But in such cases the general term 'vessel' is not alone employed, but a more specific description is added. Thus by the 105th section of the act of 1799, ch. 128, importations are allowed on the northern and northwestern boundaries of the United States 'in vessels or *boats* of any burthen;' and the next section (§ 106) goes on to provide 'that all vessels, *boats*, rafts, and carriages of what kind or nature soever, arriving in the district aforesaid, containing goods, etc., shall be reported to the collector, etc.' A distinction between *boats* and *vessels* is here taken; and a distinction does in fact exist in common parlance and maritime usage. The term 'vessel' is never, or at least very rarely, used to designate any water craft without a deck; but the term 'boat' is constantly used to designate such small vehicles of this nature, as are without a deck. In Mortimer's Commercial Dictionary a boat is defined to be 'a small *open* vessel, commonly wrought by oars.' He says that the term 'ship' is 'a general name for all large vessels.' And it appears to me that the general sense in which the word 'vessel' is used in our laws is in contradiction to an *open boat*, and excluding the latter. Such is its meaning in the act of 1815, ch. 246, where it is declared lawful 'for any collector, etc., to enter on board, search and examine, *any ship, vessel, boat or raft*, etc.' And when the word is found in our laws without anything in the context to explain or enlarge its meaning, it appears to me a sound rule of interpretation to construe it as used in that sense, which is its most common sense in maritime usage. Especially ought it to receive such an interpretation when it interferes with no known policy of the legislature, and a different course would involve general inconvenience." U. S. *v.* An Open Boat, 5 Mason (U. S.), 120, 134.

Where a bond was taken in a proceeding under the statute authorizing the attachment of ships and vessels on account of liens for work, materials, etc., (2 R. S. 493, tit. 8), it was held that a *canal-boat*, navigating the canal between Albany and Troy, was not within the statute; the court, Bronson, J., saying: "The present statute is substantially like the former ones. It only applies to ships and vessels which navigate the ocean, and such as are required to have a coasting license under the laws of the United States. If this were a new question, I should be of that opinion. In common parlance, a *canal-boat* is not a 'ship or vessel.' But it is enough that the question is decided." Many *v.* Noyes, 5 Hill (N. Y.), 34.

In an action of trespass against magis-

trates, for taking and detaining a vessel, under the act 2 Geo. III. c. 28, called the Bumboat Act, which authorized the seizure of any *boat* suspected of having on board anything stolen or unlawfully procured from or out of any ship or vessel in the river Thames, it was claimed that the vessel in question, which was decked and of the burthen of thirteen tons, was unlawfully seized, inasmuch as the said vessel was not a *boat* within the meaning of the act; but the court would not admit evidence of the character of the vessel, and held that the conviction by the magistrates under this act was conclusive evidence that the vessel was a boat within the meaning of the act; Dallas, C. J., saying: "Now allowing, for the sake of argument, that 'boat' is a word of technical meaning, and somewhat different from a vessel; still it was a matter of fact to be made out before the magistrate, and on which he was to draw his own conclusion;" and Park, J.: "In the present case the whole argument has turned on that which, under the circumstances, it was impossible to give in evidence, namely, that the vessel in question was not a boat; but supposing that this point might have been entered into at the trial, has anything been stated to show that the vessel was not a boat? Upon such a point as this dictionaries are certainly good authority, and Dr. Johnson calls a boat 'a ship of small size, as a passage-boat, advice-boat, fly-boat.' Falconer's Marine Dictionary says, 'a boat is open or decked according to the purpose for which it is intended.'" Brittain *v.* Kennaird, 1 Brod. & B. 432, 438, 441.

In a *Missouri* case under the statute concerning "boats and vessels" against a *barge* for services rendered on board said boat as watchman, the court, Scott, J., said: "Another question in the cause is the liability of a boat of the character of the barge to the proceedings under the act 'concerning boats and vessels.' The words of the act are sufficiently comprehensive to embrace vessels of the class sued in this case. The statute does not say every steamboat, or all steamboats, but *every boat or vessel* navigating the waters of this State shall be liable to attachment. The barge is clearly within the letter of the law, and, there being no reason why it should not be subject to the same proceedings as a steamboat, it cannot be said that the General Assembly contemplated its exemption from this remedy." The Barge Resort *v.* Brooke, 10 Mo. 531.

The statute 7 and 8 Geo. IV. c. 75. empowering the court of Mayor and Aldermen of London to make by-laws for regulating "the *boats*, vessels, and other craft to be rowed or worked" between Windsor and Yantlet Creek has been held to extend to steamboats. Tisdell *v.* Combe, 7 Ad. & Ell. 788.

So in *Virginia* the words "bay or river craft or other *boat*," in § 17, ch. 95, of the Code, edition of 1860, was held to embrace steamboats of 500 tons burthen. Steamboat Wenonah *v.* Bragdon, 21 Gratt. (Va.) 685.

Where an act of the State of New York of May 6th, 1870 (Session Laws of 1870, p. 1696), fixed certain new rates of wharfage, with the exception "that all canal-boats engaged in navigating the canals in this State, and vessels known as North River barges, shall pay the same rates as before," it was held that a vessel propelled by steam power, for the sole purpose of towing boats on the canals, was a canal-boat within the meaning of the exception above stated; but as she occupied the wharf while in the process of construction only, she was not then engaged in navigating the canals, and was therefore liable to pay wharfage at the rate prescribed by the act of 1870. The Steamboat Vermont, 6 Benedict (U. S.), 112.

But canal-boats do not become steamboats, or anything but canal-boats, by being pulled or pushed by a steam-tug, or by performing a part of their voyage over tidal waters. Buckley *v.* Brown, 3 Wall. Jr. 199.

In an action to recover for certain materials furnished for the construction of the hull of a steam-tug, it was held that a boat or vessel named in the lien law (in section 17, chap. 13, page 656, Mis. Laws) is one that is complete and capable of being used to carry freight or passengers. The hull of a boat, without the other parts necessary to its use, is not a boat within the meaning of the statute, to which a lien could attach. Northup *v.* The Pilot, 6 Oreg. 297.

But a "wharf-boat" attached to the soil savors of the realty, and is subject to the mechanic's statutory lien. In this case Gregg, J., said: "When the term 'boat' is used, we are likely to catch the idea of locomotion—of passing, or transportation from one point to another—without hesitating to inquire whether that term is ever applied to other structures which have no power of locomotion, no propelling force, by which they can move or be moved from point to point. It may be said the fastenings are easily cut, and a wharf-boat can be readily towed or floated away. So may a house

BODY. (See also CORPORATIONS; HABEAS CORPUS; HEIRS; SEPULTURE.)—I. The main part or frame of anything, in distinction from parts subordinate or less important; as of a man, in opposition to his head and limbs,[1] or of places.[2]

be placed on rollers and speedily hauled upon other lands, but no one doubts a house being a fixture simply because it is capable of being removed. The riparian owner has a just claim to all the soil composing the bank of a stream, and no one can hold or use such soil upon the margin of a river, whether navigable or not, for the purpose of fastening or making safe any structure or building, against the will of such owner; and should any one attempt to so lodge such building upon the private soil of another, forcibly and against his consent, we suppose no attorney would deny but such a one might be ejected therefrom. The location and maintaining of a 'wharf-boat' must depend upon its attachments to the soil. Such *boat* or building has no power to retain its position except its bank fastenings. It cannot be severed from the soil without destroying the structure—at least its present local utility. Cut such structure loose from its moorings—from its connections—and it is as effectually ruined for all practical purposes as is a house rolled away from its business location. To this extent it appertains to the realty. It rests against the bank. It supports upon the realty, and unlike vessels that 'plough the waters' it has no mobility—no apparatus to change place, or power to retain position, other than land fastenings. It is in fact but a floating business house, or rather a business house upon the surface of the water, and stationed by its cables. It is a building—a structure commonly used to facilitate the landing of boats, and the storing of freight, and it may have sleeping apartments, may be dwelt in, and it is embraced within the spirit and meaning of our statute declaring that such liens may be held on 'any building, edifice, or tenement.' Gould's Dig., sec. 1, p. 768." Galbreath *v.* Davidson, 25 Ark. 490.

In an action on a policy of insurance in the usual form on ship, *boat*, etc., evidence of a usage that the underwriters never pay for the loss of boats on the outside of the ship, slung upon the quarter, was held inadmissible, as contradicting the contract, not explaining it. Blackett *v.* Royal Exchange Assur. Co., 2 C. & J. 244; S. C. Lawson on Usages and Customs, 413.

Where a bill of lading contained the following clause of exception, "the act of God, etc., and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, *save risk of boats, so far as ships are liable thereto*, excepted," it was held that the ship owner was not liable for a loss incurred by the wreck of a boat which was carrying the goods to shore, according to the custom of the West India trade, as the saving clause only extended to the same risks as if the goods had been on board the ship. Johnston *v.* Benson, 4 Moore 90.

In a bill of sale of a vessel with its appurtenances, the *boat* does not pass. Starr *v.* Goodwin, 2 Root (Conn.), 71.

The words "house of ill-fame," as used in the statute punishing the keeping thereof as a nuisance, properly includes a boat on the river, when used as a habitation for such purposes. State *v.* Mullen, 35 Iowa, 199.

1. In deciding that in an indictment for murder the place of the mortal wound is sufficiently indicated by the allegation that it was "upon the body," the court, Welles, J., said: "The indictment, in my opinion, is sufficiently certain in this respect. By the word 'body,' in this connection, is to be understood the trunk of the man, in distinction from his head and limbs. This is the doctrine of the books on the subject." Long's Case, Coke's R. pt. 5, 120; Sanchez *v.* People, 22 N. Y. 147.

2. Body of the County.—In an indictment for an assault under the United States statute (Stat. of 1825, ch. 276, § 22) as follows: "If any person or persons upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of any particular State, on board of any vessel, etc., shall with a dangerous weapon, or with intent to kill, etc., commit an assault on another, such person shall," etc.,—it was held that the circuit courts of the United States had no jurisdiction under the said statute when the place in which the assault was committed was within the *body of the county;* the court, Story, J., saying: "But to bring the case within the purview of the present statute it is not sufficient that the place where the offence is committed is

II. A collection of individuals united for some common purpose.[1]

within the admiralty jurisdiction of the United States, whether it be an arm of the sea, creek, or bay, etc., but it must by the very words of the statute also be a place 'out of the jurisdiction of any particular state.' And it is out of the jurisdiction of the State, in the sense of this statute, if it be not within the *body* of some county within the State. This leads one to consider what is the proper boundary of counties bordering on the sea-coast, according to the established course of the common law, for to that I shall feel myself bound to conform on the present occasion, whatever might have been my doubts if I were called to decide upon original principles. The general rule, as it is often laid down in the books, is that such parts of rivers, arms and creeks of the sea are deemed to be within the *bodies of counties* where persons can see from one side to the other. Lord Hale uses more guarded language, and says, in the passage already cited, that the arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the *body of a county*. Hawkins (Pl. Cr. b. 2, ch. 9, § 14) has expressed the rule in its true sense, and confines it to such parts of the sea where a man standing on the one side may see what is done on the other. And this is precisely the doctrine which is laid down by Stanton, J., in the passage in Fitz. Abridge. Corone, 399, 8 Edw. II., on which Lord Coke and the common lawyers have laid so much stress as furnishing conclusive authority in their favor." U. S. *v.* Grush, 5 Mason, 290, 300.

Where an indictment stated that the grand jury were "inquiring in and for the county of D," it was held sufficient without the words "for the body of the county." In this case the court, Cole, J., said: "The next objection seems to us equally untenable as the one we have just considered. It is that it does not appear from the indictment that the grand jury were sworn and charged as a grand jury to inquire for the *body* of the county of Dodge, or that they were a grand jury sworn to inquire for the body of the county. The caption recites that the grand jury were sworn and charged 'inquiring in and for the county of Dodge.' The words 'body of the county' are omitted. It is claimed that these words have a fixed legal meaning, importing or signifying the county at large, as distinguished from any particular locality within it, and that they cannot be supplied by intendment. The county of Dodge is a civil division or a portion of the State of Wisconsin, organized as a body politic and corporate for certain judicial and political purposes; and a statement in the caption of the indictment that the grand jury were sworn to inquire 'in and for the county' certainly implies that they were making inquisitions for the entire county and not for some portion of it. Our statute provides that no indictment shall be deemed invalid by reason of any defect or imperfection in matters of form which shall not prejudice the defendant (sec. 13, c. 179); and it must be obvious that the omission of the words 'body of the county' in the caption was, at most, the merest informality, which could have prejudiced no one." Fizell *v.* State, 25 Wis. 364.

Body of Water.—In construing the act, General Laws 1878, c. 48, § 1, as follows: "Timber logs and lumber lying in or upon any *body of water* in this State, outside the boundary or limits of any town therein, shall be taxed its full value in the town nearest and opposite such property," the court, Bingham, J., said: "A river has been defined as a natural stream of water flowing betwixt banks or walls in a bed of considerable depth and width, being so called whether its current sets always one way or flows and reflows with the tide (2 Bouvier L. Dict. 487), and as water flowing in a channel between banks more or less defined. Rex *v.* Orfordshire, 1 B. & Ad. 289; State *v.* Gilmanton, 14 N. H. 467, 478. A river is a *body of water* in an ordinary sense, and there is nothing to show that it is not a *body of water* within the meaning of the act of 1878." Berlin Mills Co. *v.* Wentworth's Location, 60 N. H. 156.

1. **Body Corporate or Politic.**—It has been held in New York that the provision in the constitution of that State requiring the assent of two thirds of the members elected to each branch of the legislature to every bill creating, continuing, altering, or renewing any *body corporate or politic* does not apply to public corporations; it applies solely to private corporations, such as banking institutions and the like. Therefore laws affecting public corporations, such as cities and villages, may be passed by mere majority votes. People *v.* Morris, 13 Wend. (N. Y.) 325.

But associations organized under the

General Banking Law, and in conformity with its provisions, are not "bodies politic *and corporate*" within the spirit and meaning of the constitution. Warner *v.* Beers, 23 Wend. (N. Y.) 103.

In this last case Senator Verplanck said, p. 141: "What, then, is the strict definition of the phrase 'bodies politic and *corporate*'? . . . Strict and essential definitions can generally be given of the terms of positive jurisprudence, and particularly so in the extreme technical and artificial system of the ancient English law. This is remarkably the case, for instance, in regard to our common-law terms of real estate, as fee, lease, warranty, grant, covenant, reversion, remainder, etc., all of which are defined precisely and essentially, not explained by mere attributes. *Bodies corporate* belong to that system, and thence do we immediately derive them. What, then, is a *body corporate?* What is its necessary and *essential* meaning? 'It is called a *body corporate*,' says Lord Coke, 'because the persons composing it are made into one body.' 'It is only *in abstracto*, and rests only in contemplation of law.' 10 R. 50. So again he says, 1 Inst. 202, 250, 'persons capable of purchasing are of two sorts—persons natural created of God and persons created by the policy of man, as persons incorporated into a *body politic*.' If, leaving the quaint scholastic teaching of the father of English law, we come to the clearer and directer sense of our own Marshall, we find the same prevailing idea. 'A *body corporate* is an artificial being, invisible, intangible, existing only in contemplation of law. Being the creature of law, it possesses only the properties conferred upon it by its charter. Among the most important of these are immortality, and, if the expression may be allowed, *individuality*.' 4 Wh. R. 636, 1 Peters R. 46. Again: 'It is precisely what the act of incorporation makes it; derives all its powers from that act, and is capable of exerting its faculties only in the manner which that act authorizes.' 'Within the limits of the properties conferred by its charter it can,' says Blackstone, 'do all acts as natural persons may.' 'In corporations,' says Prof. Woodeson, 'individuals are invested by the law with a political character and personality wholly distinct from their natural capacity.' 'A corporation,' says Kyd on Corporations, 'is not a mere capacity, but a political person in which many capacities reside.' Thus, then, the essential legal definition that covers the whole ground and expresses the very essence of a *body corporate* is this: 'It is an artificial legal person, a succession of individuals, or an aggregate body considered by the law as a single continuous person, limited to one peculiar mode of action, and having power only of the kind and degree prescribed by the law which confers them.' Such is the established notion of our common law. Such, too, as far as I can trace it, is the doctrine of the modern civil law, as modified by the jurisprudence of the European continent. 'Communities that are lawfully established (i.e., corporations),' says Domat, one of the great teachers of the ante-revolutionary French civil law, 'are in the place of *persons*, and their union, which renders common all their interest, makes them to be considered as *one single person*.' Domat Civil Law, lib. 1, tit. 15. To the same effect a somewhat older Italian civilian speaks, Oldradus De Ponte, as quoted by Sir Robert Sawyer in his very able and learned argument in the case of the City of London, 8 St. Tr. 1175: '*Licet non habent veram personam, habent personam fictione juris.*' So the older German jurisprudence, as founded on the Roman law, also held the idea of personality as essential to corporations. Heineccius, one of the most distinguished civilians in the last century, in his instructive essay on the legal history of the corporate *guilds* or societies of trade so common in Germany, speaks of this personality as an attribute of all corporations: '*Universitates et contrahere possunt et delinquere, quippe quae moraliter unam representant personam.*' *De Collegiis Opificum*, in Germania, cap. 77, § 19. This doctrine of the modern civilians of France, Italy, and Germany may be traced up even to the jurists of the Code and Pandects. '*Personae vice fungitur municipium et decuria.*' Pan. 1, 22, *de fide jus.* I do not cite the secivilians as direct authorities, but mainly to show how deeply and generally this pervading idea of legal personality and artificial individuality entered into and formed the characteristic of all corporate bodies in those systems of law which might indirectly affect or govern our own, or tend to influence even the popular use of our legal terms."

It has been held in *Pennsylvania* that a school district is not a *body corporate* within the meaning of the act of March 31, 1860, Criminal Code, § 118, making it a misdemeanor for a director, etc., to falsify papers, etc., of such body corporate, inasmuch as school districts are not strictly municipal corporations, having neither seal nor legislative powers,

BOGUS.—False; spurious; counterfeit.[1]

BOHEA.—A term of commerce, used in the expression "bohea tea." It is not usually a distinct and simple substance, but is a compound made up in China of various kinds of the lowest-priced *black* teas.[2]

BOILING.—A condition produced by heat.[3]

but, like counties and townships, are quasi-corporations. Com. *v.* Beamish, 81 Pa. St. 389.

1. A note or order given by any one which is signed by himself does not come within the meaning of the words "false or *bogus* checks," as used in the Illinois criminal code (R. S. 1874, § 98, page 366) entitled "confidence game," as it is genuine. Any one taking either does so upon the faith of the signature alone. Pierce *v.* People, 81 Ill. 98.

2. In reversing a decree of forfeiture of certain teas imported and entered as *bohea* which, it was claimed by the United States, differed in quality from the entry, the court, Story, J., said: "The argument on behalf of the United States is that the two hundred chests of tea now in controversy are in reality simple congo tea, and not *bohea;* that the latter is pure and unmixed tea, entirely distinct from congo, and known in China by an appropriate name; that it is to this pure and unmixed *bohea* tea that the successive acts of Congress refer, and not to any other mixed tea, though known by the common denomination of 'bohea.' If we were to advert to scientific classifications for our guide on the present occasion, it is most manifest, from the works cited at the bar, that 'bohea' is a generic term, including under it all the black teas, and not merely a term indicating a specific kind. But it appears to us unnecessary to enter upon this inquiry, because, in our opinion, Congress must be understood to use the word in its known commercial sense. The object of the duty laws is to raise revenue, and for this purpose to class substances according to the general usage and known denominations of trade. Whether a particular article were designated by one name or another in the country of its origin, or whether it were a simple or mixed substance, was of no importance in the view of the legislature. It did not suppose our merchants to be naturalists or geologists or botanists. It applied its attention to the description of articles as they derived their appellations in our own markets, in our domestic as well as our foreign traffic. And it would have been as dangerous as useless to attempt any other classification than that derived from the actual business of human life. 'Bohea tea,' then, in the sense of all our revenue laws, means that article which, in the known usage of trade, has acquired that distinctive appellation. And even if the article has undergone some variations in quality or mixture during the intermediate period from 1789 to 1816, when the last act was passed, but still retains its old name, it must be presumed that Congress in this last act referred itself to the existing standard, and not to any scientific or antiquated standard. The true inquiry, therefore, is whether, in a commercial sense, the tea in question is known and bought, and sold and used, under the denomination of 'bohea' tea. We think the evidence on this point is altogether irresistible. It establishes that the 'bohea' tea of commerce is not usually a distinct and simple substance, but is a compound made up in China of various kinds of the lowest priced black teas, and the mixture is of higher or lower quality according to the existing state of the market. Indeed, from the uniformity of its price in the midst of great fluctuation in the prices of all other teas, it seems rather to indicate the lowest quality of black teas than any uniform compound. It is accordingly in proof that old congo teas are often sold as 'bohea,' and have sometimes been imported into our market under that denomination. In short, whenever black teas are deteriorated by age, or are of the lowest price, they are mixed up to form 'bohea' for the market, and are suited to the demand and wishes of the purchasers. It is not meant to affirm that there is no such simple and distinct tea known as 'bohea.' All that the evidence justifies us in saying is that this is not the common 'bohea' of commerce. The latter may or may not be a simple substance, according to circumstances. The generic name 'bohea' comprehending under it all the varieties of black teas, whenever they are at the cheapest price in the market, or are of a very inferior quality, or are mixed up for sale, they lose their specific names and sink into the common denomination." Two Hundred Chests of Tea, 9 Wheat. (U. S.) 430, 438.

3. **Boiling Water.**—Where a woman,

BOLT. (See also BAR.) Used in phrase "bar or bolt iron." [1]

BONA. (See also PURCHASE; SALES.)—Goods; property. In common law confined to movable property; a more comprehensive term, however, than goods as comprehending chattels, real as well as personal. The word also occurs in several phrases, for examples of which see the notes.[3]

while her husband was asleep, under the influence of jealousy boiled a quart of water in a coffee-pot and poured it over his face and into one of his ears, and ran off boasting she had boiled him in his sleep, whereby the man was for a time deprived of his sight and permanently lost the hearing of one ear, it was held that *boiling water* is a "destructive matter within the 5th section of the stat. 1 Vict. c. 85, which imposes a penalty upon him 'whosoever shall cast, etc., upon any person any corrosive fluid or other destructive matter,'" and the woman was convicted of a felony under the statute. Regina *v.* Crawford, 2 Car. & K. 129; s. c., 1 Den. C. C. 100.

1. U. S. *v.* Sarchet, Gilpin (U.S.), 273.

2. **Goods, Biens, "Bona,"** includes all chattels, as well real as personal. *Chattels* is a French word, and signifies goods, which by a word of art we call *catalla*. Now, goods or chattels are either personal or real. Personal, as horses and other beasts, household stuff and such like; called personal because for the most part they belong to the person of a man, or else for that they are to be recovered by personal actions. Real because they concern the realty, as terms for years of lands or tenements, etc. But by the common law no estate of inheritance or freehold is comprehended under these words *bona* or *catalla*. Co. Lit. 118, b.

3. **Bona et Catalla.**—Goods and chattels; movable property. This expression includes all personal things that belong to a man. Knight *v.* Barber, 16 Mee. & W. 66.

Bona Mobilia.—Where one devised all his goods, on the question whether a debt by bond passed to the devisee it was held by Lord Chancellor Cowper that it did; that these words seemed at common law to pass a bond, and to extend to all the personal estate; but this being in the case of a will—and a will relating to personal estate, too—it ought to be construed according to the rules of the civil law. Now the civil law makes *bona mobilia* and *bona immobilia* the *membra dividentia* of all estates: *bona immobilia* are lands; *bona mobilia* are all movables, which must extend to bonds: and therefore by the devise of all the testator's goods a bond must pass. Anon., 1 P. Wms. 267.

But bonds (as a species of choses in action) admit of no locality, and therefore a devise of goods and chattels *in a particular place* will not pass bonds which happen to be in that place at the death of the testator. Chapman *v.* Hart, 1 Vesey, 273.

Bona Fide.—In good faith; honestly; with sincerity; a Latin expression frequently used to denote that some one has acted or something has been done "in good faith" in ignorance of any right or claim of a third party. As examples of its use we have:

Bona Fide Purchaser.—This Wilson. C. J., defines as "one without notice of a prior lien or incumbrance." Robinson *v.* Rowan, 3 Scam. (Ill.) 499. And Hand, J., as "one who purchases for a valuable consideration paid or parted with, and in the belief that the vendor had a right to sell, and without any suspicious circumstances to put him upon inquiry." Merritt *v.* Northern R. Co., 12 Barb. (N. Y.) 605.

In Jewett *v.* Palmer, 7 Johns. Ch. (N. Y.) 65, Kent, Ch., held that to support the plea of a "*bona fide* purchaser," without notice, the defendant must aver and prove not only that he had no notice of the plaintiff's rights before his purchase but that he had *actually paid the purchase-money* before such notice. See DeMott *v.* Starkey, 3 Barb. Ch. (N. Y.) 403; Blight's Heirs *v.* Bank, 6 T. B. Mon. (Ky.) 192; s. c., 17 Am. Dec. 137; Jackson *v.* McChesney, 7 Cow. (N. Y.) 360; s. c., 17 Am. Dec. 521.

So, when a party has obtained the legal title, if he has paid but a part of the consideration or value of the property he is entitled to be considered a "*bona fide* purchaser" *pro tanto* only. Peabody *v.* Fenton, 3 Barb. Ch. (N. Y.) 498; Stalker *v.* McDonald, 6 Hill (N. Y.), 93; s. c., 40 Am. Dec. 389; Pickett *v.* Barron, 29 Barb. (N. Y.) 505.

A *bona fide* purchaser must have received his purchase upon some new consideration, or must have relinquished some security for a pre-existing debt due him. Webster *v.* Van Steenbergh, 46 Barb. (N. Y.) 211.

In Alden *v.* Trabee, 44 Conn. 455,

Park, C. J., quotes Perry on Trusts, p. 218, as follows: "A '*bona fide* purchaser' is defined to be one who, at the time of his purchase, advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside." See Spicer *v.* Waters, 65 Barb. (N. Y.) 227; Kimball *v.* Hutchins, 3 Conn. 450; Jackson *v.* Cadwell, 1 Cowen (N. Y.), 622; Root *v.* French, 13 Wend. 570.

The term "*bona fide* purchaser" is borrowed from equity jurisprudence, and must be interpreted accordingly; and it is well settled that a grantee or incumbrancer who does not advance anything at the time takes the interest conveyed subject to any prior equity attaching to the subject. Wood *v.* Robinson, 22 N. Y. 564.

A good consideration in a general sense is not sufficient. Weaver *v.* Borden, 49 N. Y. 286.

Neither is a past consideration—as a precedent debt—when there is no change in the debt, surrender of securities, or the like. Cary *v.* White, 52 N. Y. 138.

Mere security to pay the purchase-price is not a purchase for a valuable consideration. Hardingham *v.* Nicholls, 3 Atk. 304; Maundrell *v.* Maundrell, 10 Vesey, 246-271.

Nor is an executory consideration to be paid on performance in the future. Wormly *v.* Wormly, 8 Wheat. 421; Dixon *v.* Hill, 5 Mich. 404; Worms *v.* Whittaker, 6 Mich. 133; Blanchard *v.* Tyler, 12 Mich. 339; Stone *v.* Welling, 14 Mich. 514.

Value must be paid at the time on the faith of the purchase or the security. Wells, Fargo & Co. *v.* Smith, 2 Utah, 39, 52.

A *bona fide* purchaser of land for a valuable consideration without notice is one who is the purchaser of the legal title or estate; and a purchaser of a mere equitable estate is not embraced in the definition. Wailes *v.* Cooper, 24 Miss. 208.

Nor is an assignee in bankruptcy who takes only the estate which the bankrupt had; nor can a purchaser from the assignee who succeeds only to his interest claim the protection which is accorded in equity to a "*bona fide* purchaser." Smith *v.* Perry, 56 Ala. 266.

Where a Georgia statute on marriage settlements declared, "If any such instrument be not recorded within the time prescribed by this act, the same shall not be of any force or effect against a *bona fide* purchaser without notice, or *bona fide* creditor without notice, or *bona fide* surety without notice, who may purchase, or give credit, or become surety before the actual recording of the same" Cobb's Dig. 180, 1847, the court, Benning, J., said: "The purchaser, creditor, surety, are to be without notice, and also *bona fide*. They are to be something more, then, than mere real purchasers, creditors, sureties, without notice. They are also to be something to adapt them to the '*bona fide*.' What is there, to be that additional thing, except this: that they are to purchase, give credit, become sureties, relying '*bona fide*'—'in good faith'—on the property contained in the marriage settlement? We see nothing. Therefore, not to hold that this is what was meant by the words '*bona fide*' would seem to be equivalent to rejecting those words, or, at least, equivalent to rendering them inoperative and useless." Cloud *et al. v.* Dupree, 28 Ga. 170.

So, under the Georgia Revised Code, section 3525, which provides that where claimants have bought lands, subject to the lien of a judgment *bona fide* and for a valuable consideration, and have been in possession thereof for four years before the levy of the *fi. fa.*, the lien of the judgment is discharged. The court, Lochrane, C. J., held that the term *bona fide* in this statute meant one who in the commission or participation of no fraud pays a full price for property which he continuously and openly holds in possession for four years after the sale, and that his actual notice of an existing judgment against the vendor at the time of his purchase is not sufficient, *per se*, to charge him with fraud, so as to render his title impotent for his protection, when he otherwise stands within the provisions of the law. Sanders *v.* McAffee, 42 Ga. 250.

In affirming a judgment in favor of the defendant in an action for the recovery of purchase-money paid at an illegal tax sale, the court, Niblack, J., said: "Cooley in his work on Taxation, at p. 328, says: 'A tax sale is the culmination of proceedings which are matters of record; and it is a reasonable presumption of law that, where one acquires rights which depend upon matters of record, he first makes search of the record in order to ascertain whether anything shown thereby would diminish the value of such rights or tend in any contingency to defeat them.' A tax purchaser, consequently, cannot be in any strict technical sense a *bona fide* purchaser, as that term is understood in the law, because a *bona fide* purchaser is one who buys an apparently good title, without notice of anything

calculated to impair or affect it; but the tax purchaser is always deemed to have such notice when the record shows defects. He cannot shut his eyes to what has been recorded for the information of all concerned, and, relying implicitly on the action of the officers, assume what they have done is legal because they have done it. It is, indeed, a presumption of law that official duty is performed, and this presumption stands for evidence in many cases; but the law never assumes the existence of jurisdictional facts, and throughout the tax proceedings the general rule is that the taking of any one important step is a jurisdictional prerequisite to the next; and it cannot therefore be assumed, because one is shown to have been taken, that the officer performed his duty in taking that which should have preceded it. These general principles, and the cases supporting them, have led many of the courts to hold, and we think correctly, that a purchaser at a tax sale comes strictly within the rule *caveat emptor*. Hamilton *v.* Valiant, 30 Ind. 139; Jenks *v.* Wright, 61 Pa. St. 410; People *v.* Auditor-General, 30 Mich. 12. If his title fails, he has no remedy against the officer who made the sale. Hamilton *v.* Valiant, 30 Ind. 139. Neither can he demand indemnity from the corporation for the benefit of which the sale was made. Lynde *v.* Melrose, 10 Allen (Mass.), 49. See also Stevens *v.* Williams, 70 Ind. 536." Worley *v.* The Town of Cicero (Sup. Ct. of Ind.), 9 Western Rep. 50.

The following are late cases showing various circumstances under which a vendee, etc., has been held to be a *bona-fide* purchaser: Barber *v.* Richardson, 57 Vt. 408; Puffer *v.* Reeve, 35 Hun (N. Y.), 480; Wailes *v.* Couch, 75 Ala. 134; Sadler *v.* Lewers, 42 Ark. 148; Andrews *v.* Cox, 42 Ark. 473; s. c., 48 Am. Repr. 68; Frank *v.* Ingalls, 41 Ohio St. 560; Curnie *v.* Rauh, 100 Ind. 247; Brausen *v.* Oregonian R., 11 Oregon, 161; Western Land & Cattle Co. *v.* Plumb, 27 Fed. Repr. 598; Bradley *v.* Whitney, 108 Pa. St. 362; Dias *v.* Chickering, 64 Md. 348; s. c., 54 Am. Rep. 770; Kingsland Ferguson Mfg. Co. *v.* Culp, 85 Mo. 548; Hutchinson *v.* Oswald, 17 Ill. App. 28; Perkins *v.* Anderson, 65 Iowa, 398; McNeil *v.* Finnegan, 33 Minn. 375; Hollis *v.* Smith, 64 Tex. 280; Mason *v.* Black, 87 Mo. 329; Fish *v.* Benson (Cal.) 12 Pacific Repr. 454; Maybee *v.* Moore (Mo.), 2 S. Westn. Repr. 471; Briggs *v.* Hodgdon (Me.), 7 Atlantic Repr. 387; Bryant *v.* Buckner (Tex.), 2 S. Westn. Repr. 452; Pancake *v.* Cauffman (Pa.), 7 Atlantic Repr. 67; Lamoreaux *v.* Meyer (Wis.), 31 N. Westn. Repr. 331; Hanold *v.* Owen (Mich.), 31 N. Westn. Repr. 420; Chicago, etc., R. *v.* Hay (Ill.), 10 N. Eastn. Repr. 29; Phillips *v.* South Park Comm'rs (Ill.), 10 Eastn. Repr. 230; Word *v.* Box (Tex.), 3. S. Westn. Repr. 93; Cable *v.* Ellis (Ill.), 11 N. Eastn. Repr. 188; Rush *v.* Mitchell (Iowa), 32 N. Westn. Repr. 367; McAdow *v.* Black (Mont.), 13 Pacific Repr. 377; People's Savings Bank *v.* Bates, 7 Sup. Ct. Repr. 679; Campbell *v.* Indianapolis, etc., R. (Ind.), 11 N. Eastn. Repr. 482; Hagerman *v.* Sutton (Mo.), 4 S. Westn. Repr. 73; Garrison *v.* Crowell (Tex.), 4 S. Westn. Repr. 69; Hegenmyer *v.* Marks (Minn.), 32 N. Westn. Repr. 785.

Bona Fide Possessor.—In a Texan case where suit was brought for the recovery of land, and the defendant claimed compensation for improvements on the ground that he had honestly settled thereon through a mistake in the boundary-line and was therefore a *bona fide possessor*, the court, Hemphill, C. J., in refusing his claim because he had been notified by the plaintiff that he was improving on his land, but had taken no legal steps to ascertain the true boundaries, said: "Mr. Sedgwick, in his learned treatise on the Measure of Damages, defines a *bona fide possessor* to be one who not only supposes himself to be the true owner of the land, but who is ignorant that his title is contested by any person claiming a better right to it (2d Ed. p. 126). This definition is supported by the authority to which he refers, viz., Bright *v.* Boyd, 1 Story (U. S.), 478. But if it be construed to restrict the quality of good faith to cases only where the tenant is ignorant that his title is contested by one who claims the land under a better right, I apprehend that it does not embrace all the elements which may constitute good faith, and that it would fail to secure rights which our statutes intended to protect. No doubt the definition, so far as it goes, is sound, and that a possessor holds in good faith who is justifiably ignorant of the rights of the true owner. But he may also have good faith where he makes an innocent mistake in point of law; for instance, as to the construction of a demise, the due execution of a power, and the like, where, though aware of the opposing claim, he may have entered in full confidence of the validity of his title. Adams on Eq. p. 386, referring to B. N. P. p. 88. Of course, when the

tenant is cognizant of the claims of another, he must have reasonable and strong grounds to believe in the soundness of his own title, otherwise he cannot claim as a holder in good faith." Sartain *v.* Hamilton, 12 Tex 219. See Houston *v.* Sneed, 15 Tex. 307; Saunder *v.* Wilson, 19 Tex. 194; Dorn *v.* Dunham, 24 Tex. 366; Green *v.* Biddle, 8 Wheat. (U. S.) 1; McLaughlin *v.* Barnum, 31 Md. 425; Morrison *v.* Robinson, 31 Pa. St. 456; Dormer *v.* Fortescue, 3 Atk. 124; Hicks *v.* Sallitt, 3 DeG. M. & G. 782, 813. 18 Jur. 915; The Lord Advocate *v.* Drysdale, L. R. 2 Sc. App. 368; Stuart *v.* Baldwin, 41 U. C. Q. B. 446.

Bona Fide Debts.—In construing the fourth clause of the treaty between the United States and Great Britain, which was as follows: "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery in the full value in sterling money of all *bona fide* debts,"—in a suit upon a bond dated 7th July, 1774, the court, Chace, J., said: "Of all *bona fide* debts, that is, debts of every species, kind, or nature, whether by mortgage, if a covenant therein for payment, or by judgments, specialties, or simple contracts. But the debts contemplated were to be *bona fide* debts, that is, *bona fide* contracted before the peace, and contracted with good faith, or honestly, and without covin, and not kept on foot fraudulently. *Bona fide* is a legal technical expression, and the law of Great Britain and this country has annexed a certain idea to it. It is a term used in statutes in England and in acts of Assembly of all the States, and signifies a thing done *really*, with a *good faith*, without *fraud* or *deceit*, or *collusion* or *trust*. The words *bona fide* are restrictive, for a debt may be for a valuable consideration and yet not *bona fide*. A debt must be *bona fide* at the time of its commencement or it never can become so afterwards. The words *bona fide* were not prefixed to describe the nature of the debt at the date of the treaty, but the nature of the debt at the time it was contracted." Ware *v.* Hilton, 3 Dallas (Pa.), 199, 241

Bona Fide Mistake.—Under Order XVI. rule 2, of the Rules of Court, 1875, as follows: "Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the court or judge may, if satisfied that it has been so commenced through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as seem just,"—the court, Jessel, M. R., held that the words "*bona fide* mistake" included a mistake of law as well as of fact. Duckett *v.* Gover, L. R. 6 Ch. Div. 82.

Bona Fide Paid.—Where A agreed with B to build a house according to certain specifications on land then belonging to B, in consideration of which undertaking, and of an annual rent charge of 25s., a lease of the land for three lives was to be granted; and the house was built by A according to the specifications, at the cost of £85, whereupon the lease was granted,—the grant of the rent charge and the erection of the house on the land conveyed being together of the pecuniary value to the grantor at the time of the conveyance of more than £30,—it was held that A hereby acquired a settlement under the act 9 Geo. I. c. 7, s. 5, as follows: "No person or persons shall be deemed, adjudged, or taken to acquire or gain any settlement in any parish or place for or by virtue of any purchase of any estate or interest in such parish or place whereof the consideration for such purchase doth not amount to the sum of £30 *bona fide* paid," etc.; the court, Wrightman, J., saying: "The consideration was the building a house that cost £85, and therefore, unless to satisfy the statute, nothing but a *pecuniary* consideration in the strict sense, and money value is not enough, our judgment must be for the respondents. The decision which seems most in point is The Overseers of Wendron *v.* The Overseers of Stithians, 4 E. & B. 147 (E. C. L. R. vol. 82), which was in effect that if the value of £30 had there been paid for the purchase of the lease, the statute would apply; if not, it would not; and the only question appears to have been, had there been a payment, either pecuniary, or by what was equivalent to pecuniary or was the consideration for the lease mere love and affection? It was taken for granted there that an equivalent to money would have sufficed; and may not the building the house, in this case, at the expense of £85, be fairly taken as an equivalent to that sum?" Queen *v.* Belford, 3 B. & S. 662.

BONDS. (See also ALTERATION OF INSTRUMENTS; ATTACHMENT; BAIL; INJUNCTION; MORTGAGES; MUNICIPAL AID BONDS; OFFICERS, MUNICIPAL CORPORATIONS; OFFICERS, PRIVATE CORPORATIONS; PRINCIPAL AND SURETY, etc.)

1. Bonds in General.—1. DEFINITION.—A bond is a sealed obligation to pay money, either absolutely or conditionally.[1]

1. Coke Litt. (*a*); Cautey *v.* Duren, Harper, 434; Taylor *v.* Glaser, 2 Serg. & R. (Pa.) 502; Harman *v.* Harman, 1 Baldw. C. C. 129; Skinner *v.* McCarty, 2 Port. (Ala.) 19; Deming *v.* Bullitt, 1 Blackf. (Ind.) 241; Denton *v.* Adams, 6 Vt. 40; Wood *v.* Willis, 110 Mass. 454; Hargroves *v.* Cooke, 15 Ga. 321; State *v.* Thomson, 49 Mo. 188; Gilbert *v.* Anthony. 1 Yerg. (Tenn.) 69; s. c., 24 Am. Dec. 439.

"However complicated may be the condition or contingency, and however alien from pecuniary considerations may seem the inducements to its execution, or the circumstances surrounding the parties, a bond will always be found to resolve itself into an obligation to pay money sooner or later, either absolutely or upon some condition, or on the happening of some future event." Murfree on Official Bonds, § 1; Bouvier's Law Dict. (12th Ed.) 212.

2. FORM AND CONTENTS OF BOND.—At common law a bond must be written, sealed, and delivered.[1] But no certain form is necessary. Any form of words in writing, under seal, acknowledging a debt and naming an obligee, is as obligating as the most formal writing.[2] The name of the obligor need not appear in the bond if it is signed and sealed by him.[3]

3. PARTIES.—(*a*) *Obligor.*—All persons *sui juris* who have sufficient capacity to contract,[5] not including *femes covert*, unless their

1. Gilbert *v.* Anthony, 1 Yerg. (Tenn.) 69; s. c., 24 Am. Dec. 439.

A party who signs a bond impliedly waives defects in form. State *v.* Winfree, 12 La Ann. 643; Peshon *v.* Griggs, 4 Ark. 141; Phelps *v.* Call, 7 Ired. L. (N. Car.) 262.

2. Examples held binding: "I, A. B., have borrowed 10*l.* of C. D." See Sawyer *v.* Mawgridge, 11 Mod. 218; Watson *v.* Snaed, Vent. 238; Bedows' Case, 1 Leon. 25.

The clause *in cujus rei* is not necessary to constitute an instrument a bond in *Arkansas*. Dardenne *v.* Bennett, 4 Ark. 458.

The date of a bond is not essential. It may be erroneous without affecting the validity of the bond. Pierce *v.* Richardson, 37 N. H. 306; Fournier *v.* Cyr, 64 Me. 32.

A statutory bond must be conditioned and executed according to all the statutory requirements. Howard *v.* Brown, 21 Me. 385.

3. Pequawkett *v.* Mathes, 7 N. H. 230; Martin *v.* Dorch, 1 Stew. (Ala.) 479; Williams *v.* Greer, 4 Hayw. (Tenn.) 239; Campbell *v.* Campbell, Brayt. (Vt.) 38; Stone *v.* Wilson, 4 McCord (S. Car.), 203; Joyner *v.* Cooper, 2 Bailey (S. Car.) 199; Fulton's Case, 7 Cow. (N. Y.) 484; Bartley *v.* Yates, 2 Hen. & M. (Va.) 398; Smith *v.* Crooker, 5 Mass. 538; Beale *v.* Wilson, 4 Munf. (Va.) 380; Van Hook *v.* Barnett, 4 Dev. L. (N. Car.) 272; Blakey *v.* Blakey, 2 Dana (Ky.), 463.

In chancery the names of parties executing a bond need not be recited in the body of it in order to bind them. Keeton *v.* Spradling, 13 Mo. 321; Johnson *v.* Steamboat Lehigh, 13 Mo. 539.

4. **Bond of Femes Covert.**—By the common law, a married woman cannot during coverture bind herself by a bond. Lewis *v.* Lee, 3 B. & C. 291; Marshall *v.* Rutter, 8 T. R. 545. Her bond is *ipso facto* void. Bac. Abr., Obligations, "D." See Concord Bank *v.* Bellis, 10 Cush. (Mass.) 276.

All questions growing out of personal qualities and disabilities are governed by the law of the place where the act is done or contract made. 2 Kent's Com. 455; Walker *v.* Witters, 1 Doug. 6; Thompson *v.* Ketchum, 3 Simon, 44.

A statute diminishing the disabilities of a *feme covert*, or infant, to the same extent validates a bond executed by such person.

The United States enforces the common law as the law of the State in which the action originates. United States *v.* Gurlinghouse, 4 Benedict C. C. 194, 199. And consequently, where a person under disability is relieved therefrom by a State, the United States may contract with such person by means of an official bond, providing it falls within the terms of the relieving or enabling statute. United States *v.* Gurlinghouse, 4 Benedict C. C. 194, 199. See also United States *v.* Haurell, 4 Wash. C. C. 620; United States *v.* Tingey, 30 U. S. (5 Pet.) 115; United States *v.* Bradley, 35 U. S. (10 Pet.) 343; United States *v.* Linn, 40 U. S. (15 Pet.) 290; Tyler *v.* Hand, 48 U. S. (7 How.) 573; United States *v.* Maurice, 2 Brock. C. C. 96.

Sureties on Bond of a Feme Covert.—The bond of a married woman, though void at common law, is valid as against the sureties. "The general rule is that the extent of the liability of the surety is measured by that of the principal, but it is not of universal application, and exceptions to it may arise when the matter of defence, pleaded by the principal, is wholly of a personal character, as coverture or infancy. The coverture of the principal, at the time a note or bond is given, may be interposed as a bar to a recovery against her, but it alone cannot effect the discharge of the surety; the surety, in such case, standing, in a certain sense, as a principal promissor." Weed & Co. *v.* Maxwell, 63 Mo. 486; Smiley *v.* Head. 2 Rich. (S. Car.) 590; Foxworth *v.* Bullock. 44 Miss. 457; Stillwell *v.* Bertrand, 22 Ark. 375: Davis *v.* Statts, 43 Ind. 103; Jones *v.* Crosthwaite, 17 Iowa, 395; Kimball *v.* Newell, 7 Hill (N. Y.), 116.

Infants.—The bond of an infant is void at law, though he represent himself of age. Colcock *v.* Ferguson, 3 Desau. (S. Car.) 482; Conroe *v.* Birdsall, 1 John.

disability has been removed, infants, partners, persons *non compos mentis*, etc., and not being under duress at the time,[1] may bind themselves by a bond.

Cas. (N. Y.) 127. May be confirmed after coming of age, but must be by an instrument of as high authority as the bond. Baylis *v.* Dineley, 3 Maule & Selw. 477.

If an infant *feme covert* enter into a bond with a stranger who is under no disability, the stranger is bound although the bond is void as to the infant. Bac. Abr., Obligations, "D."

The law governing contracts of infants is not well settled. The rule laid down by Mr. Justice Story in United States *v.* Bainbridge, 1 Mason C. C. 71, 82, (citing Keane *v.* Boycott, 2 H. Blackst. 511, is as follows: "Where the court can pronounce that the contract is for the benefit of the infant, as for necessaries, then it shall bind him; when it can pronounce it to be to her prejudice, it is void; and where this is of an uncertain nature, as to benefit or prejudice, it is voidable; and it is at the election of the infant to affirm it or not." See also The King *v.* Sheerfield, 14 East, 541; Zouch *v.* Parsons, 2 Burr. 1794; Burgess *v.* Merrill, 4 Taunt. 468.

Bastardy Bond.—An infant is bound upon a bastardy bond. "The statute also obliges an infant to indemnify the city, town, or county against the expenses of supporting his illegitimate child, and makes it necessary for him to enter into a bond with sureties, as the only means by which he can obtain a discharge from arrest (1 R. S. 645, §§ 14, 15), and I think the statute has given him a legal capacity to make a binding obligation." People *v.* Moores, 4 Denio (N. Y.), 518; McCall *v.* Parker, 13 Metc. (Mass.) 372; Garvin *v.* Beston, 8 Ind. 69.

Infants are bound by all acts which they are bound by law to do. Baker *v.* Lovett, 6 Mass. 80; s. c., 4 Am. Dec. 88.

An infant may enter into a recognizance to answer a criminal charge, or become principal in a bail-bond (but not surety). State *v.* Weatherwax, 12 Kan. 462.

Bonds of Partners and Partnership.—It is a general rule of the common law that one partner cannot bind another by a bond or obligation under seal, even though the obligation be contracted in the ordinary course of partnership business. Snyder *v.* May, 19 Pa. St. 235; Henry Co. *v.* Gates, 26 Mo. 315; Remington *v.* Cummings, 5 Wis. 138; Cummings *v.* Parish, 39 Miss. 412. See also Hoskinson *v.* Elliot, 62 Pa. St. 393; McNaughten *v.* Partridge, 11 Ohio, 223; s. c., 38 Am. Dec. 741.

Authority to execute such an instrument can only be given under seal, and the fact that the articles of copartnership are under seal does not authorize one partner to bind the other by an instrument under seal. Particular power for that purpose must be given. Harrison *v.* Jackson, 7 Term, 207, 210.

One partner may bind another by a bond by parol authority where both are present at the time of its execution and consent to the signing. Ball *v.* Dunsterville, 4 Term, 313; Williams *v.* Walsby, 4 Esp. 229; Brulton *v.* Burton, 1 Chitty, 707; Swan *v.* Stedman, 4 Metc. (Mass.) 548.

In many States this rule has been modified so as to permit partners who do not execute a bond to ratify it by parol, and authority to execute a bond or deed may be given in the same manner. Swan *v* Stedman, 4. Metc. (Mass.) 548; Johns *v.* Battin, 30 Pa. St. 84; Smith *v.* Kerr, 3 N. Y. 144; Gwin *v.* Rooker, 24 Mo. 291; Ely *v.* Hair, 16 B. Mon. (Ky.) 230; Crady *v.* Sheperd, 11 Pick. (Mass.) 400; Skinner *v.* Dayton, 19 Johns. (N. Y.) 513; s. c.. 5 Am. Dec. 286; Gram *v.* Seaton, 1 Hall (N.Y.), 262; Bond *v.* Aitkin, 6 Watts & S. (Pa.) 165; s.c., 40 Am. Dec. 550; McDonald *v.* Eggleston, 26 Vt. 154; Drumright *v.* Philpot, 16 Ga. 424; Russell *v.* Annable, 109 Mass. 72; Holbrook *v.* Chamberlins, 116 Mass. 155; Gunter *v.* Williams, 40 Ala. 561; Gibson *v.* Warden, 81 U. S. (14 Wall.) 244. See also Cunningham *v.* Lamar, 51 Ga. 574; Mann *v.* Ætna, etc., Co. 40 Wis. 549; Kasson *v.* Brocker, 47 Wis. 79; Williams *v.* Gillies, 75 N.Y. 197; Hawkins *v.* Nat. Bank, 1 Dill. C. C. 462.

Persons Non Compos Mentis.—The bond of a person who is *non compos mentis* is void. Gate *v.* Boen, 2 Stra. 1104; Long *v.* Whidden, 2 N. H. 435; Rice *v.* Peet, 11 John. 503; Emery *v.* Hoyt, 46 Ill. 258.

Intoxication.—A bond may be avoided because of excessive intoxication at time of execution. Cole *v.* Robins, Bull. N. S. 172; Gare *v.* Gibbins, 13 M. & W. 625. *Compare* Hyman *v.* Moore, 3 Jones L. (N. Car.) 416; Cummings *v.* Henry, 10 Ind. 109; Caulkins *v.* Fry, 35 Conn. 170; Wilson *v.* Bigger, 7 Watts & S. (Pa.) 111. But if the party retain the consideration after becoming sober he confirms the bond. Williams *v.* Inabnet, 1 Bailey (S. Car.), 343; Guy *v.* McLean, 1 Dev. (N. Car.) 47; Seymour *v.* Delancy, 3 Conn. 454; Mathews *v.* Borter, L. R. 8 Ex. 132; Joest *v.* Williams, 42 Ind. 565.

1. **Duress of Persons.**—A bond entered

(*b*) *Obligee.*—Any person, whether *sui juris* or not,[1] other than the obligor,[2] and having legal identity,[3] may become the obligee in a bond.

4. BLANKS.—A bond may be executed in blank and afterwards filled up, provided it be done by the express authority of the obligor; and the authority to fill blanks is also authority to redeliver the instrument.[4] But a bond written above the signature of a party without his express authority is void,[5] unless he afterward deliver it or adopt it.

into while the obligor is restrained of his liberty, running to the person who caused the restraint, may be avoided for duress of imprisonment. Thompson *v.* Lockwood, 15 John. (N. Y.) 256; Gonenor *v.* Williams, Dudley (Ga.), 424; Eddy *v.* Herrin, 17 Me. 338.

A bond executed through fear of unlawful imprisonment may be avoided on account of duress. Whitefield *v.* Longfellow, 13 Me. 146.

A joint obligor cannot take advantage of the fact that his co-obligor executed the bond while under duress. Spaulding *v.* Crawford, 27 Tex. 155.

A bond variant from that prescribed by law, extorted from the principal obligor and his sureties, under color of office, as the condition of his remaining in office, is void. United States *v.* Tingey, 5 Pet. (U. S.) 129. See also Woolwich *v.* Forest, 2 N. J. L. 118.

A bond given to obtain discharge from an unlawful imprisonment is void. Bowker *v.* Lowell, 41 Me. 429.

Duress of Goods.—Under some circumstances a bond may be avoided for duress of goods. Collins *v.* Westbury, 2 Bay (S. Car.), 211; Sasportos *v.* Jennings, 1 Bay (S. Car.), 470; Sparets *v.* Barrett, 57 Ill. 289; s. c., 11 Am. R. 10. See Skeats *v.* Beal, 11 Ad & El. 983; Alte *v.* Backhouse, 3 Mees. & W. 650; Nelson *v.* Suddarth, 1 Hen. & Munf. (Va.) 350; Foshay *v.* Ferguson, 5 Hill (N. Y.), 158. See Giddy *v.* S., 1 Dev. Eq. (N. Car.) 476.

1. An infant, an idiot, or a *feme covert* may be the obligee in a bond; also an alien, "for since he is allowed to trade with us, it is but reasonable to give him the necessary security for his contracts." Co. Litt. 129, B; Wells *v.* Williams, 1 Ld. Raymond, 228.

2. A person cannot be bound to himself. Smith *v.* Lasher, 5 Conn. 688, 909. Even in connection with others. Davis *v*, Somerville, 4 Dev. L. (N. Car.) 382; Justices *v.* Bonner, 3 Dev. L. (N. Car.) 289. *Compare* Daniel *v.* Crooks, 3 Dana (Ky.), 64.

3. At common law a *feme covert* can be neither obligor nor obligee to her husband, they being but one person. Bac. Abr., Obligations, "D."

A bond given by a man to his intended wife before marriage, conditioned to pay money to her after his death, is not extinguished by coverture. Such bonds may be enforced against the heirs of the husband. Coge *v.* Acton, 1 Ld. Raymond, 515; Millbourn *v.* Ewart, 5 T. R. 381.

A bond to a municipal corporation, made payable to the mayor, alderman, and commonalty agreeable to statute, is valid, although the corporate name is "the mayor and commonalty." Fowle *v.* Common Council, 3 Pet. (U. S.) 398. See Tevis *v.* Randall, 6 Cal. 632.

A bond to the President of the United States and his successors is not a compliance with a statute requiring a bond to be given to the United States. The acceptance of such bond by the proper judge is not an acceptance by the United States. Jackson *v.* Simonton, 4 Cranch C. C. 255.

A deputy sheriff, appointed by a decree in chancery to sell certain property, may take a bond for the purchase money running to himself as deputy sheriff. Leavitt *v.* Goggin, 11 B. Mon. (Ky.) 229.

4. Gibbs *v.* Frost, 4 Ala. 720.

Where a judgment debtor went with his proposed sureties to the clerk's office for the purpose of executing a *supersedeas* bond in order to obtain a writ of error, and executed it in blank and instructed the clerk to fill up the form, the direction was held to be an express authority on the part of the sureties as well as the principal. Gibbs *v.* Frost, 4 Ala. 720. See Bell *v.* Keefe, 13 La. Ann. 524; Spencer *v.* Buchanan, Wright (Ohio), 583; Newhen *v.* Beard, 6 W. Va. 110.

5. Gilbert *v.* Anthony, 1 Yerg. (Tenn.) 69; Perminter *v.* McDaniels, 1 Hill (S. Car.), 267; Byers *v.* McClanahan, 6 Gill & J. (Md.) 250; Boyd *v.* Boyd, 2 Not. & M. (S. Car.) 125; Ayers *v.* Harness, 1 Ohio, 368; —— *v.* Governor, 1 Yerg. (Tenn.) 149. *Compare* Wiley *v.* Moore, 17 Serg. & R. (Pa.) 438. See, generally, Sigfried *v.* Levar, 6 Serg. & R. (Pa.) 308;

When blank spaces are left to be filled after execution, the consent of the party executing that they shall be afterwards filled is to be implied.[1]

A person taking a bond in blank must prove the authority to fill it up and deliver it, and the slightest unauthorized alteration avoids it.[2] And this is a question of fact for the jury.[3]

But it has been held that a redelivery must be an act equal to the making of a new bond.[4]

The general rule is that a bond with the name of the obligee left blank is void unless afterwards filled in by express authority, and such authority cannot be given by parol.[5]

Franklin Bank *v.* Bartlett, Wright (Ohio), 742; Bartlett *v.* Board, 59 Ill. 364.

1. Wiley *v.* Moore, 17 Serg. & R. (Pa.) 438; Smith *v.* Crooker, 5 Mass. 538; Duncan *v.* Hodges, 4 McCord (S. Car.), 239; Jordan *v.* Neilson, 2 Wash. (Va.) 164; Boardman *v.* Gore, 1 Stew. (Ala.) 517; Bank *v.* Curry, 2 Dana (Ky.), 142.

2. C. *v.* Hastings, 5 Harr. (Del.) 408; Church *v.* Noble, 24 Ill. 291; People *v.* Organ, 27 Ill. 27; Graham *v.* Halt, 3 Ired. L. (N. Car.) 300.

3. Richmond Mfg. Co. *v.* Davis, 7 Blackf. (Ind.) 412.

But it has been held that where a party, with the intention of entering into an obligation, signs the paper in blank entirely, there is an implied authority to any holder to fill it up, and that the name of a new obligor might be inserted without vitiating it, especially if the first signer is intended to be only a surety. Comeo Bank *v.* McCord, 4 Dana (Ky.), 491.

When a bond is executed in blank and given to a co-obligor to use, he may fill the blank with the amount. Spencer *v.* Buchanan, Wright (Ohio), 583.

4. So held where an obligor asked to see a paper signed by him in blank, and upon seeing it said: "There is my note —there it is," handed it back to the custodian after taking a memorandum of it. These circumstances were held to constitute neither an acknowledgment nor a redelivery such as would bind him. McNutt *v.* McMann, 1 Head (Tenn.), 98, citing Turbeville *v.* Ryan, 1 Humph. (Tenn.) 113; s. c., 34 Am. Dec. 622; Smith *v.* Dickinson, 6 Humph. (Tenn.) 261; s. c., 34 Am. Dec. 306; Mosby *v.* Arkansas, 4 Sneed (Tenn.), 324.

5. Upton *v.* Archer, 41 Cal. 85; s. c., 10 Am. Rep. 266; Barden *v.* Southerland, 70 N. Car. 128; Sacra *v.* Hudson, 59 Tex. 207.

In Preston *v.* Hall, 23 Gratt. (Va.) 600, decided in 1873. the question was squarely raised. M., as principal, and P., as surety, signed and sealed a bond to pay to —— $600. M. borrowed the money from H., and inserted his name in the bond and delivered it to him. The debt was not paid on maturity, and upon suit being brought P. pleaded *non est factum*. The court said: "A bond is a deed whereby the obligor promises to pay a certain sum of money to another at a day appointed. An obligor and obligee are essential to the existence and constitution of such an instrument. It is not indispensable that the party to whom the promise is made should be mentioned *ad nomine*—that his name at baptism and surname should be given; but he must be in some unmistakable manner designated in the instrument. A writing, though executed with all the solemnities of a deed, without such an obligee is a mere nullity. It imposes no obligation upon the party issuing it; it imposes no rights upon him who receives or holds it. It is not simply an imperfect deed; it is no deed at all. It only becomes a deed when the name of the obligee is inserted and delivery made by the obligor or some one legally authorized by him. His act binds a principal not before bound; it creates a contract having no previous existence. It is followed by all the consequences resulting from the execution of the most solemn instrument. . . . The stream can never be higher than its source. If the act of the agent is the execution and delivery of a deed, his authority must be by deed. It does not matter how much of the instrument may have been written by the principal, it is a mere nullity when it leaves his hands, and only becomes operative by act of the agent. Upon every principle of sound legal reasoning the result must inevitably be the same. Whenever the agent undertakes to bind his principal by an act, his authority must be coequal with the act." The court asks: "If the name of the obligee may be inserted, why may not the sum also; and if these may be sup

A bond with blanks for the amount and name of the obligor is not made valid by part payment.[1]

5. CONSIDERATION.—At common law, want of consideration was no defence to an action on a sealed instrument. The seal created a conclusive presumption of consideration.[2] But in some States this

plied, why not the mere formal parts of the deed? If we once depart from the rule, how is the line to be drawn consistently with the preservation of any rule at all? If we say that the name or sum may be inserted by the agent, will it not lead us inevitably to the doctrine that the entire deed may be executed by the agent also?"

Conflicting Decisions — Missouri. — In Field *v.* Stagg, 52 Mo. 534 (citing Drury *v.* Foster, 2 Wall. (69 U. S.) 24; Burnsides *v.* Wrayman, 49 Mo. 365), the question presented by the record was "whether a deed regularly executed in other respects, with blank left therein for the name of the grantee, and placed in that condition in the hands of a third party, with verbal authority (but no authority under seal) from the person who executed it to fill up the blanks in his absence, and deliver the deed to the person whose name should be inserted as grantee, and when said deed was so filled up and delivered, whether the same was valid." The court held that the deed was valid, quoting the language of Mr. Justice Nelson in Drury *v.* Foster, 2 Wall. (69 U. S.) 24: "Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is that the power is sufficient."

In Massachusetts.—The power of an agent acting under a parol authority is limited to making *immaterial* alterations in a sealed instrument. Such alterations will not invalidate, if not fraudulent, though made by the party claiming under it. But the court said: "The case is not within those in which it is held that blanks in a deed constituting a material part of the instrument itself cannot, in the absence of the maker, be filled by parol authority, because authority to make a deed must be given by deed." Vose *v.* Dolan, 108 Mass. 158; Brown *v.* Pinkham, 18 Pick. (Mass.) 172; Commonwealth *v.* Emigrant Sav. Bank, 98 Mass. 12; Chessman *v.* Whittemore, 23 Pick. (Mass.) 231; Adams *v.* Frye, 3 Metc. (Mass.) 103.

In Maryland.—It is held that "the name is a material part of the deed, and delivery in blank is an insufficient delivery unless recognized after the blank is filled. This is the general principle. There are some exceptions to it, but none of them applicable to the case before us." Edelin *v.* Sanders, 8 Md. 118, 387.

In Wisconsin.—A case where a note and mortgage, with blanks for names of payee and mortgagee, was given to an agent with parol authority to borrow money and fill the blanks. The court held the authority sufficient, and said: "The great weight of authority undoubtedly is that effect will be given to the plain intention of the parties notwithstanding the instrument may be under seal, and notwithstanding the rules of the early common law with respect to the execution and delivery of such instruments. If it be manifest that it was the intention of the party by whom the instrument was executed, at the time of the execution, that the name of the payee or mortgagee should be afterwards supplied and written in by the person to whom the instrument was delivered, then the rule of law is that the name may be so supplied and written in, and complete effect given to the instrument according to such intention." Van Etta *v.* Evenson, 28 Wis. 33, 38; Vliet *v.* Camp, 13 Wis. 221.

In Tennessee.—A constable's bond with blanks for name of constable and fact of his election was held valid. "The record shows that the bond of the constable was acknowledged in open court, and his oath of office is indorsement on the same, and he has been inducted into office on the faith of it. Having received the money by virtue of this bond, it is now too late to object to a mere verbal defect in it. The matter of the blanks thus filled up was not probably material anyway, as we think a recovery could well be had on the bond (which was otherwise complete) by proper averments, even if the blanks had never been filled." Rader *v.* Davis, 69 Tenn. (5 Lea) 536

1. Barden *v.* Southerland, 70 N. Car. 528.

2. Vrooman *v.* Phelps, 2 John. (N. Y.) 177; Dorr *v.* Munsell, 13 John. (N. Y.) 430; Lester *v.* Sachary, 1 Law R. (N. Car.) 380; Roper *v.* Stone, Cooke (Tenn.), 499; Cross *v.* Gobean, 1 Bailey (S. Car.), 213; Guy *v.* McLean, 1 Dev. L. (N. Car.) 46; Cayle *v.* Fowler, 3 J. J. Marsh. (Ky.) 473; Holdridge *v.* Allen, 2 Root (Conn.),

rule has been relaxed and the presumption may be overcome by sufficient evidence of want of consideration.[1] It is always competent to show that the consideration for a bond is illegal, immoral, or against the policy of the law.[2] No consideration need

139; Harrell *v.* Watson, 63 N. Car. 454; Parker *v.* Flora, 63 N. Car. 474; Harris *v.* Harris, 23 Gratt. (Va.) 737.

1 McCarthy *v.* Beach, 10 Cal. 461.

A bond given in 1865 for the hire of slaves during that year is not subject to reduction owing to failure of consideration. Woodfin *v.* Suder, Phil. L. (N. Car.) 200; Mathew *v.* Dunbar, 3 W. Va. 138.

It is no consideration for a bond that it was taken for the cancelling of a deed of real estate given in payment of a former bond for which there was no consideration. McDaniels *v.* Grace, 15 Ark. 465.

An agreement by a State to locate the capital at a certain city provided the inhabitants would give their bond to raise a certain sum of money is a good consideration for such bond. Carpenter *v.* Mather, 4 Ill. 374.

An order of court, and issuance of a writ of *supersedeas* in accordance therewith, on condition that the party execute a bond, is a good consideration for such bond. Bosley *v.* Bruner, 24 Miss. 427.

If a note is given by A to B as the consideration of a bond from B to A, and before the note matures the bond is assigned to C, B cannot set up want of consideration. Cornish *v.* Bryan, 10 N. J. Eq. 146.

2. A bond given to a woman as a premium in consideration of future cohabitation is void. Trovinger *v.* McBurney, 5 Cow. (N.Y.) 253; Lady Cox's Case, 3 P. Wms. 339; Walker *v.* Perkins, Burr. 1568; Walker *v.* Gregory, 36 Ala. 180; Singleton *v.* Bramer, Harper (S. Car.), 108. Otherwise if the bond be given in consideration of past cohabitation. See Howel *v.* Fountain, 3 Ga. 176; Winnebeimer *v.* Weisiger, 3 T. B. Mon. (Ky.) 35; Bunn *v.* Winthrop, 1 John. Ch. L. 329; Given *v.* Driggs, 1 Cai. (N. Y) 450. Although the obligor be a married man during the period of cohabitation. Nye *v.* Mosby, 6 Barn. & C. 133; Lady Cox's Case, 3 P. Wms. 339. So a bond for the support of the mother of an illegitimate child and the child, is good. Bunn *v.* Winthrop, 1 John. Ch. (N. Y.) 329; Brua *v.* Lee. 4 John. (N. Y.) 411; Trustees *v.* Gallatin, 4 Cow. (N. Y.) 340; Morton *v.* Fletcher, 2 A. K. Marsh. (Ky.) 138.

Void because of Illegal Consideration. —Bonds given for money won at play. Davidson *v.* Givins, 2 Bibb (Ky.), 200; Jones *v.* Jones, Yerm. (N. Car.) 110. For the price of tickets in an authorized lottery. Morton *v.* Fletcher, 2 A. K. Marsh. (Ky.) 138. Bond for money to be given for the sale of an office concerning the administration of justice. Davis *v.* Hull, 1 Litt. (Ky.) 9; Lewis *v.* Knox, 2 Bibb (Ky.), 1453. To indemnify an officer for permitting an escape. Lawery *v.* Barney, 2 D. Chip. (Vt) 11. To induce an officer to perform his duty. Mitchell *v.* Vance, 5 T. B. Mon. (Ky.) 529. To indemnify an officer for not returning an execution. Greenwood *v.* Colcock, 2 Bailey (S. Car.), 67.

A bond given an officer in consideration of an act that he had no legal authority to do. Moore *v.* Allen, 3 J. J. Marsh. (Ky.) 621; Anderson *v.* Farns, 7 Blackf. (Ind.) 343; s. p., Sampton *v.* Taylor, 6 Litt. (Ky.) 273; Marsh *v.* Gould, 2 Pick. (Mass.) 285.

To suppress a prosecution for malicious mischief. Cameron *v.* McFarland, 2 Car. L. Rep. 415.

A bond given in consideration of an obligee's withdrawing opposition to an insolvent debtor's discharge. Bruce *v.* Lee, 4 John. (N. Y.) 411; Uxbury *v.* Miller, 19 John. L. 311; Goodwin *v.* Blake, 3 T. B. Mon. (Ky.) 106. But see Price *v.* Summers, 5 N. J. L. 253.

A bond exacted by an officer when he had no authority to require it is void. Benedict *v.* Bray, 2 Cal. 251.

An involuntary bond to procure prison liberties is void. Kavanaugh *v.* Saunders, 8 Me. 422.

A bond to indemnify a person who signs a draft made in violation of law is void. Hayden *v.* Davis, 3 McL. (U.S.) 276.

A bond executed in Michigan which relates to a New York transaction, void by the law of that State, is void. Hayden *v.* Davis, 3 McLean, (U. S.), 276.

A bond which shows an illegal consideration is void. Greathouse *v.* Dunlop, 3 McLean, (U. S.), 303.

A bond given to a constable to induce him to sell exempt property is void. Renfro *v.* Heard, 14 Ala. 23; s. p., Buffendean *v.* Brooks, 28 Cal. 641.

A bond given in accordance with an unconstitutional requirement of a statute is without consideration and void. Byers *v.* State, 20 Ind. 47; Cassel *v.* Scott, 17 Ind. 514.

pass between the obligee of a bond and the surety; the consideration which supports principal will support the surety.[1]

6. SEAL AND SIGNATURE.—At common law there cannot be a valid bond without a seal. The term "bond," or "obligation," or "writing obligatory," *ex vi termini* imports a sealed instrument.[2] The seal distinguishes a bond from an ordinary written contract, and imparts to it the presumption of a valid consideration.[3] The

A bond for ease and favor is void. To constitute such bond it must be given to the officer who makes the arrest as obligee. Kavanaugh *v.* Saunders, 8 Me. 422; Winthrop *v.* Dockerdorff, 3 Me. 156; Baker *v.* Haley, 5 Me. 240; Morse *v.* Hodsdon, 5 Mass. 317; Clap *v.* Cofran, 7 Mass. 101; Clasen *v.* Shaw, 5 Watts (Pa.). 468.

A bond conditioned that the obligee will not appear as prosecutor or as a witness against defendant in a criminal proceeding is null and void. Vanover *v.* Thompson, 4 Jones L. (N. Car.) 436; s.p., Gray *v.* Seigler, 2 Strobh. (S. Car.) 117.

A bond given as a pretext to enable one person to claim the property of another so as to defraud the creditors of that other is void even between the parties. Powell *v.* Minor, 8 Jones L. (N. Car.) 436; s. p., Goudy *v.* Gebhart, 1 Ohio St. 262.

A bond taken by the bank of the State of South Carolina is not illegal because not secured by mortgage. Bank *v.* Hammond, 1 Rich. (S. Car.) 281.

A bond given by an infant to his father in consideration of permission to leave home is not valid. Geist *v.* Geist, 2 Pa. St. 441.

Prior to Va. act of 1792, a bond to a deputy sheriff in consideration of purchase of the benefit of his office was not legal. Noel *v.* Fisher, 3 Call (Va.), 215.

Against Public Policy.—Bonds in restraint of trade are void; as, not to carry on or be concerned in the business of founding iron. Alger *v.* Thaleton, 19 Pick. (Mass.) 51. That vendor or his assigns will not sell marl on adjoining lands. Brewer *v.* Marshall, 19 N. J. Eq., 537. Otherwise if the condition be not to trade within certain reasonable limits. McClurg's Appeal, 58 Pa. St. 51; Noble *v.* Bates, 7 Cow. (N. Y.) 307; Reese *v.* Hendricks, 1 Leg. Gaz. R. (Pa.) 79; Thompson *v.* Means, 19 Miss. 604. As, not to engage in business within sixty miles of Calais. Whitney *v.* Slayton, 40 Me. 224.

The rule that contracts in restraint of trade are void does not apply at a time when the policy of the law is to impose restrictions on trade and commerce; thus an embargo bond, made while the embargo laws were in force, would be binding as a common-law bond. Dixon *v.* United States, 1 Brock. (U. S.) 177.

A bond executed for the purpose of securing the creditors of the obligor is invalid and cannot be enforced as a voluntary bond. Lequeux *v.* Oliver, 3 Desau. (S. Car.) 535.

A bond given to a third party for the purpose of influencing the action of an alderman in the discharge of his duties is void. Cook *v.* Shipman, 24 Ill. 614.

A bond given by a debtor to induce a creditor to sign a release is voidable. McFarland *v.* Garber, 10 Ind. 157.

A bond not to sell intoxicating liquors within the limits of a town is not void as in restraint of trade, because the course of legislation shows that the settled policy of the law is to discourage such traffic. Harrison *v.* Lockhart, 25 Ind. 112.

A bond given for her support to a married woman who was separated from her husband, by her brother, is not invalid as being in contravention of good morals and tending to impair the obligation of the marriage covenant. Farnum *v.* Bartlett, 52 Me. 570.

A bond given by a sheriff to his deputy to pay the sheriff more than the statutory portion of the fees is invalid. Farrar *v.* Burton, 5 Mass. 395.

A bond taken in the name of the commissioners of highways of a town, *virtute officii*, for the benefit of the town in its corporate capacity, intended to relieve the taxable inhabitants from the payment of a tax for a public improvement, is illegal as against the general policy of the law. Webb *v.* Albertson, 4 Barb. (N. Y.) 57.

1. Robinson *v.* Finley, 31 Mo. 384.

2. Cauty *v.* Duren, Harper (S. Car.), 334; Tayler *v.* Glaser, 2 Serg. & R. (Pa.) 502; Denton *v.* Adams, 6 Vt. 40; Denning *v.* Bullett, 1 Blackf. (Ind.) 241; Skinner *v.* McCarty, 2 Port. (Ala.) 19; Harmon *v.* Harmon, 1 Baldw. (C. C.) 129.

3. Harrel *v.* Watson, 63 N. Car. 454; Parker *v.* Flora, 66 N. Car. 474; Page *v.* Frufaut, 2 Mass. 159; s. c., 3 Am. Dec. 41; Dorr *v.* Munsell, 13 John. (N. Y.) 430; Harris *v.* Harris, 23 Gratt. (Va.) 737.

mere attaching of a seal or scroll after the signature to an instrument will not, without some recital in the body of the instrument, make it a writing under seal; nor are the words "witness my hand and seal" in a printed blank sufficient.[1]

By a seal was meant an impression upon wax, or wafer, or some other tenacious matter capable of receiving an impression.[2] In some of the United States an impression on the paper,[3] or a mere scroll, or "scroll by way of seal," is sufficient.[4] In some States no seal is required.[5] Several obligors may adopt one seal or scroll.[6] The seal, or signature, is what fixes the liability of the obligor.

1. Brooks *v.* Kiser, 69 Ga. 762. As to seal generally, see State *v.* Thompson, 49 Mo. 188; Turner *v.* Field, 44 Mo. 382; Pease *v.* Lawson, 33 Mo. 36.

2. Warren *v.* Lynch, 5 John. (N. Y.) 239; Coit *v.* Milligan, 1 Denio (N. Y.), 376.

3. Allen *v.* Sullivan R., 32 N. H. 446.

4. Throsher *v.* Everhart, 3 Gill & J. (Md.) 234, 246; Force *v.* Craig, 2 Halst. (N. J.) 272; Jones *v.* Sorgwood, 1 Wash. (Va.) 42; Alexander *v.* Jameson, 5 Binn. (Pa.) 238; Vaublaricum *v.* Yeo, 2 Blackf. (Ind.) 322; Hardin *v.* Webster, 29 Ga. 427; Pease *v.* Lawson, 33 Mo. 35.

The word "seal" printed between brackets on an attachment bond and adopted by the parties as their seal or scroll is a sufficient sealing of the instrument. Underwood *v.* Dallins, 47 Mo. 259; Ralph *v.* Gist, 4 McCord (S. Car.), 267.

5. *Mich.* Comp. Laws, § 4550, give to an unsealed instrument all the force and effect of a sealed instrument. McKinney *v.* Miller, 19 Mich. 142; Fish *v.* Brown, 17 Conn. 343.

By statute of 1838, *Tenn.* (Act of 1850, ch. 20, § 1, code, 1804), under this statute abolishing private seals, a bond is a deed, signed and delivered.

In *Alabama* an instrument purporting on its face to be sealed and duly signed *is* sealed although the actual seal is omitted. Bancroft *v.* Stanton, 7 Ala. 351.

In *Illinois* the absence of the actual seal or scroll is not cured by the words "sealed with my seal," etc., in the instrument. Chilton *v.* People, 66 Ill. 501; s. p., State *v.* Humbird, 54 Md. 327.

A bond without a seal has been held good by the supreme court of the United States. United States *v.* L——, 15 Pet. (U. S.) 290, 315. See Harmon *v.* Harmon, 1 Baldw. C. C. 129, 131.

By statute 1812, all instruments for payment of money, or for the performance of any act or duty, are placed on the same footing as other sealed instruments containing like conditions. Hughes *v.* Park, 4 Bibb (Ky.), 60; Handley *v.* Rankin, 4 T. B. Mon. (Ky.) 556

In Redwood *v.* Tower, 28 Minn. 45, 48, where the question was upon the effect of a paper purporting to be a bond, but which was without seals, the court said: "The instrument attached to the complaint is in the form of a bond, but it has no seal of any of the parties executing it. It is therefore not a bond. The statute requires a bond (Gen. Stat. 1878, ch. 8, § 145). But that there must be a seal to a bond is a mere technical requirement—a thing which does not affect the substance of the instrument; and we think that where parties assume to comply with the statute in such a case, it does not lie with them to object that they have omitted some mere matter of form. The substance of the instrument being what the statute requires, they ought not to be permitted to say that by reason of their neglect in matter of form it does not come under the technical designation given by statute. The liability of defendants on it is the same as though it had a seal." "All very reasonable and sensible, but nevertheless a trifle legislative," is Mr. Murfree's comment on this decision. Official Bonds, § 7. "The world is outgrowing the observance of the days when men used seals because they could not write their names; and the special obligations attaching to sealed instruments are gradually giving way under the influence of reason and commonsense. In this case, however, the judiciary is a little ahead of the legislature." Murfree on Official Bonds, § 7.

6. Hullis *v.* Pond, 7 Humph. (Tenn.) 222; Martin *v.* Dorth, 1 Stew. (Ala.) 479.

A bond signed by "A [L. s.] for B, C, D." is sufficiently executed as the bond of B, C, and D, although one seal is used. Martin *v.* Dorth, 1 Stew. (Ala.) 479. But a bond signed in the name of a

7. EXECUTION.—There can be no objection to the manner or form in which an obligor makes his signature to a bond, provided it appears that he made it for the purpose of binding himself.[1] It is not necessary that the party should himself write his name and affix his seal, if he afterwards acknowledge it to be his act and deed.[2] But he is not bound by a bond to which his name was obtained by fraud or misrepresentation,[3] although the obligee was not aware of the fraud.[4]

An instrument purporting to be the joint bond of a principal and sureties, but signed by the latter only, is invalid,[5] as it is presumed that each undertook to become liable only if the other did.[6] But where two persons execute a bond, one as principal and the other as surety, they are equally bound to the obligee,[7]

firm with one seal only is the bond of the one partner only. Bulton *v.* Thompson, Wright (Ohio), 93; Russell *v.* Annable, 109 Mass. 72.

By signing a bond which contains the usual allegation "signed with our seals," after it has been already signed by one or more obligors without affixing a new seal, a subsequent obligor adopts the seal already affixed. Pequawkett *v.* Waiters, 7 N. H. 230; Northumberland *v.* Cobleigh, 59 N. H. 250.

The *onus* is on the plaintiff to show that the party adopted the seal. Hullis *v.* Pond, 7 Humph. (Tenn.) 222.

1. Hinsaman *v.* Hinsaman, 7 Jones L. (N. Car.) 510.

The fact that a man seals and delivers a bond as his in which he is named as surety, with the intent to become a party to it, is sufficient to justify a verdict that it is his bond, although his name is signed in the proper place for a witness. Richardson *v.* Boynton, 12 Allen (Mass.), 138. See also Algenbright *v.* Campbell, 3 Hen. & Mun. (Va.) 144.

So where the party signs in the space between the penal part of the bond and the condition. Reed *v.* Drake, 7 Wend. (N. Y.) 345; Fournier *v.* Cyr, 64 Me. 35.

2. Hill *v.* Scales, 7 Yerg. (Tenn.) 401; Delins *v.* Cawthorne, 2 Dev. L. (N. Car.) 90; Rhode *v.* Louthain, 8 Blackf. (Ind.) 413; Mayer *v.* Hutchinson, 7 Ill. 265; Ingraham *v.* Edwards, 64 Ill. 526.

Acknowledging his signature on being inquired of without intimating that he had not considered himself bound is sufficient to bind the party so signing and sealing. Byers *v.* McClanahan, 6 Gill & J. (Md.) 250. See Manpin *v.* Whiting, 1 Call (Va.), 224.

A witness need not see the party sign; it is sufficient if he acknowledge it in the presence of the witness. Pequawkett *v.* Mathes, 7 N. H. 230; s. c., 26 Am. Dec. 737.

When the name of a party appears in the body of a bond, but is not subscribed to it, he cannot be held to have executed the bond by adopting the name in the body of the bond as a signing of it, although the name is written there by him. Wildcat Branch *v.* Ball, 45 Ind. 213.

3. Green *v.* North Buffalo Township, 56 Pa. St. 110. See Williams *v.* Inabet, 1 Bailey (S. Car.), 343. (Intoxicated.)

4. Sceiler Co. *v.* Copley, 5 Ohio St. 256. See Spaulding *v.* Crawford, 27 Tex. 155.

Where a bond is executed jointly and severally by three persons, and an alteration is made in it by consent of two in the absence of the third, and the obligee afterwards erases the signature and seal of the third without the consent of the others, the bond is void. Lane *v.* Shoape, Walk. (Ala.) 508; Dewey *v.* Bradbury, 1 Tyler (Vt.), 186.

5. Cutter *v.* Whittemore, 10 Mass. 442; Adams *v.* Bean, 12 Mass. 139; Wood *v.* Washburn, 2 Pick. (Mass.) 24; Sacramento *v.* Dunlop, 14 Cal. 421.

6. Sacramento *v.* Dunlop, 14 Cal. 421. See Sharp *v.* United States, 4 Watts (Pa.). 21; Hoskins *v.* Lombard, 16 Me. 140; Dair *v.* United States, 16 Wall. (U. S.) 1; Johnson *v.* Weatherwax, 9 Kans. 75; Loen *v.* Stocker, 68 Pa. St. 226; People *v.* Kneeland, 31 Cal. 288.

7. Wilson *v.* Campbell, 2 Ill. 493.

Where a bond is written as if two sureties were to execute it and one only does so, it will not bind him unless it be proved that he dispensed with the execution by the other. Sharp *v.* United States, 4 Watts (Pa.), 21; s. c., 28 Am. Dec. 676.

A bond executed by the sureties only, and not by the party named as principal, does not bind the sureties. Wood *v.* Washburn, 2 Pick. (Mass.) 24; Bean *v.* Parker, 17 Mass. 591.

A bond executed by nine persons, on certain conditions and terms, and after-

although the parties signed at different times before delivery and not in the presence of each other.[1] A bond may be executed by an attorney lawfully authorized under seal.[2] The authorized act of such an attorney can be ratified only by an instrument under seal.[3]

8. DELIVERY.—Delivery is essential to the validity of a bond.[4] No general definition of delivery can be given ;[5] it is a question of intention, which must be that the instrument shall be operative.[6]

wards delivered by five of them without the consent of the other four, does not bind the latter. Levett *v.* Adams, 3 Wend. (N. Y.) 380.

Where it appears in the body of the bond that it was contemplated by the parties that several should sign it, and only one signs and seals it, annexing a condition that it shall not be binding upon him unless executed by the others, he will not be bound without their execution; but if he make no such condition he will be bound, though it is not executed by the others. Hoskins *v.* Lombard, 16 Me. 140.

A bond appearing to be duly executed by all whose names appear in it, and perfect upon its face, delivered by the several obligors without stipulation, reservation,or condition, cannot be avoided by the sureties, on the ground that they signed it only on the condition that it should not be delivered unless it should be executed by other persons, who did not execute it, when it appears that the obligee had no notice of such condition, and nothing to put him upon inquiry as to the manner of execution, and also that he was induced upon the faith of such bonds to act to his own prejudice. State *v.* Beck. 53 Me, 284.

Under the laws of *Kentucky*, a surety in a judgment debt who signed a bond by which the judgment was replevied is a principal in such bond. Miliken *v.* Dinning. 6 Bush (Ky.), 646.

1. Rundell *v.* La Fleur, 6 Allen (Mass.), 480.

2. McCordish *v.* Hopkins, 6 Call (Va.), 208; Delins *v.* Cawthorne, 2 Dev. L. (N. Car.) 90; McNutt *v.* McMahon, 1 Head (Tenn.), 98.

In the absence of proof to the contrary, a power of attorney to execute a bond will be presumed to have been executed on the day of its date. Roger *v.* Hutchinson, 7 Ill. 265.

3. Ingraham *v.* Edwards, 64 Ill. 526.

4. Wildcat Branch *v.* Ball, 45 Ind. 213; McPherson *v.* Meek, 30 Mo. 345; Stone *v.* Myers, 9 Minn. 303; Fournier *v.* Cyr, 64 Mo. 32.

As to what constitutes delivery, see Ward's Appeal, 35 Conn. 161.

A bond signed on Sunday and delivered on Monday is valid. Commonwealth *v.* Kerdig, 2 Pa. St. 448; Prather *v.* Harlin, 6 Bush (Ky.), 185.

A bond delivered conditionally is a valid bond from the day of its delivery, upon the performance of the condition. Seymour *v.* Van Slyck, 8 Wend. (N. Y.) 414.

5. "To constitute delivery, the instrument must either pass into the power of the grantee or so as to be beyond the control of the grantor, or the grantor shall unequivocally indicate his intention that it shall take effect." Martindale on Conveyancing, 175; Fisher *v.* Hall, 41 N. Y. 416; Duer *v.* James, 42 Md. 492; Huey *v.* Huey, 65 Mo. 689

6. Steel *v.* Miller, 40 Iowa, 402; Burkholder *v.* Casad, 47 Ind. 418.

The delivery of a refunding bond to the clerk of the court of chancery, on the street, is a good delivery. It need not be in his office, nor is it necessary that all the signers be present and acknowledge it before him. Hansard *v.* Bank of Tennessee, 5 Humph. (Tenn.) 53.

A delivery with a material part in blank, unless recognized after the blank is filled, is insufficient. Edelin *v.* Sanders, 8 Md. 118.

Where a bond was delivered to one who has no authority to deliver it to the obligee, the obligee cannot maintain an action upon it. Fay *v.* Richardson, 7 Pick. (Mass.) 91; Fitts *v.* Green, 3 Dev. L. (N. Car.) 291; Whitsel *v.* Mebane, 64 N. Car. 345.

A bond delivered to a third person to be delivered to the obligee is not binding. State *v.* Oden, 2 Harr. & J. (Md.) 108, n.

Where the terms of a bond have been assented to and the consideration paid, its delivery is complete as soon as placed in public conveyance, or in the hands of a third person to be delivered to the obligee. Alcalda *v.* Morales, 3 Nev. 132.

If the obligor after signing and sealing

A delivery to a third person for the use of the obligee is good unless repudiated by the obligee.[1] A bond may be delivered as an escrow; it cannot, however, be so delivered to the obligee, to one of several obligees, or to a member of a partnership.[2] A bond may be delivered to the principal obligor by the sureties as an escrow, subject to the condition that it shall be signed by other parties, and parol evidence is admissible to show that such was the intention.[3] The possession of a bond by the obligee is *prima-facie* evidence of delivery.[4] When a bond is once

a bond holds it out in his hand and says to the obligee, "Here is your bond; what shall I do with it?" this is a good delivery, though it never came into the hands of the obligee. Fally *v.* Vantuyl, 9 N. J. L. 153. See Ward's Appeal, 35 Conn. 161.

A delivery of bonds by the obligor to a stranger, with instructions to deliver them to his (the obligor's) sons, in whose favor they run, in case the obligor died without a will, is not a delivery to the obligee, and they create no debt until the obligor dies intestate, and then only as testamentary papers. Carey *v.* Dennis, 13 Md. 1. See Brown *v.* Murdock, 16 Md. 521.

A delivery will be inferred from the acknowledgment of the execution of a bond which is presented to him by the agent of the obligee for approval, after certain blanks are filled. Blackwell *v.* Lane, 4 Dev. & B. L. (N. Car.) 113.

A bond was executed for the purpose of raising money on loan, and made payable to A, who refused to advance the money. One of the obligors afterwards sold it to B. *Held*, that these facts amounted to no evidence of a delivery to A. The delivery of a bond to a stranger, to become the delivery to a party, must be a delivery for the use and benefit of that party; and the fact that this bond was afterwards partly described in a deed of trust made to A as trustee, and signed by him, the object of which was to secure creditors, of which B was one, is no evidence that it was ever delivered to A or to B for his benefit. Whichard *v.* Jordan, 6 Jones L. (N. Car.) 54.

1. Fewell *v.* Kessler, 30 Ind. 195; Hatch *v.* Bates, 54 Me. 136; Hatch *v.* Hatch, 9 Mass. 307; s. c., 6 Am. Dec. 67; Turner *v.* Whidden, 22 Me. 121; Guest *v.* Beesen, 2 Houst. (Del.) 246; Morrison *v.* Kelly, 22 Ill. 610. See Whichard *v.* Jordan, 6 Jones L. (N. Car.) 54.

2. Moss *v.* Riddle, 5 Cranch (U. S.), 351; Blume *v.* Bowman, 2 Ired. L. (N. Car.) 338; State *v.* Chrisman, 2 Ind. 126; Perry *v.* Patterson, 5 Humph. (Tenn.) 133.

If a bond is perfect on its face, it cannot be delivered to the obligee, as an escrow, to be valid upon another person executing it. It is valid although the condition is not complied with. Miller *v.* Fletcher, 27 Gratt. (Va.) 405, citing 1 Shepherd's Touchstone, 58, 59; 4 Comyn, 276, 4 (A), *fait;* Coke Litt. (36 a); Simonston's Estate, 4 Watts (Pa.), 180; Duncan *v.* Pope, 47 Ga. 445; Cincinnati, etc., Co. *v.* Iliff, 13 Ohio St. 235; Ward *v.* Lewis, 4 Pick. (Mass.) 518; Currie *v.* Donald, 2 Wash. (Va.) 59; Brackett *v.* Barney, 28 N. Y. 333; Worral *v.* Munn, 5 N. Y. (1 Seld.) 229; Jackson *v.* Catlin, 2 John. (N. Y.) 248; s. c., 3 Am. Dec. 415; Black *v.* Shreve, 13 N. J. Eq. 456; Herdman *v.* Bratton, 2 Harr. (Del.) 396; Madison, etc., Co. *v.* Stevens, 10 Ind. 1; Brown *v.* Reynolds, 5 Sneed (Tenn.). 639; Gibson *v.* Partee, 2 Dev. & B. (N. Car.). 530; Granes *v.* Tucker, 10 S. & M. (Miss.) 9; Fireman's, etc., Co. *v.* McMillan, 29 Ala. 147, 161. *Compare* Stuart *v.* Livesay, 4 W. Va. 45, 46; Newlin *v.* Beard, 6 W. Va. 110.

3. Pawling *v.* United States, 4 Cranch (U. S.) 219; Fertig *v.* Bucher, 3 Pa. St. 308; Crawford *v.* Foster, 6 Ga. 202.

If a surety can show that he signed a bond and delivered it to the principal obligor on condition that it should not become obligatory until signed by another surety, and it was delivered to the obligee, who had notice of the condition, the instrument is an escrow as to such surety. United States *v.* Hammond, 4 Biss. C. C. 283, 285, citing Pepper *v.* State, 22 Ind. 399; Pawling *v.* United States, 8 U. S. (4 Cranch) 219; United States *v.* Liffler, 36 U. S. (11 Pet.) 86; Johnson *v.* Baker, 4 Barn. & Ald. 440; Leof *v.* Gibbs, 4 Carr. & P. 466. See, generally, Foy *v.* Blackstone, 31 Ill. 533; Furness *v.* Williams, 11 Ill. 229; Neely *v.* Lewis, 10 Ill. 31; White *v.* Bailey, 14 Conn. 210; Coe *v.* Turner, 5 Conn. 92; Jackson *v.* Rowland, 6 Wend. (N. Y.) 666.

4. Clarke *v.* Ray, 1 Harr. & J. (Md.) 323; Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324; Grim *v.* School Directors, 51 Pa. St.

delivered to the obligee or his agent it is absolute and cannot be affected by parol.[1] A delivery to one obligee is a delivery to all.[2] The validity and operation of a bond is governed by the laws of the place where delivered.[3] There may be a constructive delivery of a bond, though it remain in the possession of the obligor.[4] The mere fact that the name of a party appears in the body of the bond as one of the obligors but is not signed to the bond is not sufficient to show that the parties who did sign did so conditionally.[5] Whether an instrument was delivered as an escrow is a question for a jury.[6]

9. ACCEPTANCE.—It is essential to the validity of a bond that it be accepted by the grantee.[7] There is no delivery without acceptance.[8] Signing, sealing, and delivery is *prima-facie* evidence of acceptance and approval.[9]

10. CONSTRUCTION AND EFFECT—GENERAL RULES.—A simple bond will be construed strongly against the obligor, but a condition, being for the benefit of the obligor, will be construed in his favor.[10] Statutory bonds taken by court officers will be liberally construed.[11] In order to ascertain the true construction of a bond, the whole language of the condition must be considered.[12] Courts will look

219. See Keyser *v.* Keen, 17 Pa. St. 327; Blakeman *v.* Vallejo, 15 Cal. 638. *Compare* Whitsell *v.* Meebane, 64 N. Car. 345.

1. Madison, etc., Co. *v.* Stevens, 10 Ind. 1.

If an obligee accepts a bond he cannot afterwards disagree to it so as to render it void. Bank *v.* Pugh, 1 Hawk. (N. Car.) 196; Pequawket *v.* Mathes, 8 N. H. 139.

2. Moss *v.* Riddle, 5 Cranch (U.S.), 351.

3. Alcalda *v.* Morales, 3 Nev. 132.

4. Folly *v.* Vantuyl, 9 N. J. L. 153.

5. Towns *v.* Kellet, 11 Ga. 286, citing Blume *v.* Bowman, 2 Ired. L. (N. Car.) 338; Elliott *v.* Mayfield, 4 Ala. 417.

6. State *v.* Bodley, 7 Blackf. (Ind.) 355.

If the signer of a bond expressly stipulates that it shall not be delivered up until twelve names are obtained to it and the agent of the other party so promises, the bond is an escrow in the hands of the agent. Fertig *v.* Bucher, 3 Pa. St. 308.

Where B executes a bond as surety for A and delivers it as an escrow on condition that C shall execute it as co-surety, and C executes it and delivers it as an escrow on condition that D shall also join as co-surety, but D does not unite in the bond, neither B nor C are liable in law or equity. King *v.* Smith, 2 Leigh (Va.), 157; s. p., Tindal *v.* Bright, Minor (Ala.), 103.

A surety who executes a bond and delivers it to a stranger, or co-obligee as an escrow, on condition that another join in the bond, is not bound unless the condition is fulfilled. Ward *v.* Churn, 18 Gratt. (Va.) 801.

In the absence of all evidence of a condition, 'the presumption of law for the obligee's possession of the bond is that the sureties executing it consented to its delivery without the other signatures. Ward *v.* Churn, 18 Gratt. (Va.) 801. See Whitsell *v.* Meebane, 64 N. Car. 345.

Instances of conditional delivery. Bibb *v.* Reid, 3 Ala. 88; Hoboken City Bank *v.* Phelps, 34 Conn. 92; Carter *v.* Turner, 5 Sneed (Tenn.), 178.

7. Commonwealth *v.* Jackson, 10 Bush (Ky.), 424; Woodbury *v.* Fisher, 20 Ind. 387; Cooper *v.* Jackson, 4 Wis. 537; Comer *v.* Baldwin, 16 Minn. 172; Mitchell *v.* Ryan, 3 Ohio St. 377.

When a bond upon its face is exclusively for the use of the State, an express acceptance by an agent of the State need not be shown. State *v.* Myram, 5 Ired. L. (N. Car.), 441.

8. State *v.* Ogden, 2 Harr. (Del.), 108, note.

9. Wilson *v.* Ireland, 4 Md. 444.

Proper depository of bond of Canal Co. under its charter. Sheldon D. H. & C. Co., 29 N. Y. 634.

10. Bennthan *v.* Webb, 6 Ired. L. (N. Car.) 57.

11. Clayton *v.* Anthony, 18 Gratt. (Va.) 578.

12. Bank *v.* Willard, 10 N. H. 210.

Particular Words and Phrases.—The words "jointly and severally" in a bond must be construed distributively, so as

to the meaning of the parties as collected from the instrument itself, and when the meaning is evident will reject or transpose in-

to apply as well to the obligors as to their heirs. "We bind ourselves" makes them join obligors. "We bind our heirs, executors, administrators" binds them jointly, and "we bind each and every of them" binds them severally. Mitchell *v.* Darricott, 3 Brev. (S. Car.) 145. See People *v.* Love, 25 Cal. 520.

A bond beginning "I hereby bind myself," but signed by several, is the joint obligation of all the signers or the several obligation of each. Knisely *v.* Shenberger, 7 Watts (Pa.), 193; and see Leith *v.* Bush, 61 Pa. St. 395; Short *v.* Lancaster, 17 Ohio, 96; Willey *v.* State, 3 Ind. 500; Supervisors *v.* Coffenbury, 1 Mich. 355.

A condition that the parties shall perform the decree of "the court" means that the court shall ultimately decide the cause. Archer *v.* Hart, 5 Fla. 234; United States *v.* Little Charles, 1 Brock. C. C. 381.

A bond to devise "all my personal estate of every description, as well what I now have in possession as what I may receive at the death of my mother," the obligor to remain in possession during his life, is not void for uncertainty. Jenkins *v.* Stetson, 9 Allen (Mass.), 128.

In a bond to A. B., administrator, "or" C. D. administratrix, the word "or" means "and." Brittin *v.* Mitchell, 4 Ark. 92. See Parker *v.* Carson, 64 N. Car. 563. The name "Wheeler" as obligor of a bond construed to mean "Woodward," where it appeared upon the face of the whole instrument to be a mistake. Richmond *v.* Woodward, 32 Vt. 833.

But where defendant's name was Thomas B. Hanly, a bond for costs to "Thomas B. Han," was held insufficient. Hanly *v.* Campbell, 4 Ark. 562.

Where the condition in a bond for plaintiff's maintenance requires the obligor to furnish the obligee "money necessary for him to spend, whenever he thinks proper to visit his friends," he must furnish the money whenever, in the exercise of a fair and honest judgment, and not wantonly and capriciously, the obligee thinks proper to make such visits. Berry *v.* Harris, 43 N. H. 376.

The words "the amount to be paid in notes on the Bank of K." written across the end of the bond constitutes a part of the bond. Osborne *v.* Fulton, 1 Blackf. (Ind.) 234.

The words "in these respects" in Code of Iowa, § 2506, refer to the person or body to whom the bond is made payable. Collins *v.* Ripley, 8 Iowa, 128.

A senseless condition, as "if the obligor *do not* pay," will not be allowed to affect the true intent of the bond. Stockton *v.* Turner, 7 J. J. Marsh. (Ky.) 192.

Under a bond to perform the order or decree of *a court of chancery*, the condition is not broken by a failure to perform the decree of a county court sitting as a court of equity. Morgan *v.* Morgan, 4 Gill & J. (Md.) 395.

A bond to pay a sum of money "in gold or silver coin of the standard by which the coins of the United States were regulated by the laws existing May 26, 1846," is a contract to pay a certain sum of money in a certain commodity at a certain valuation. Such contract gives the obligee no right to enforce payment in the commodity, but merely gives the obligor the option to pay in that way. Murray *v.* Harrison, 47 Barb. (N. Y.) 484.

A bond dated April 23, 1850, was conditioned to pay "$300, that is to say, $150 in one year from this date, and the remaining sum of $150 on the 23d day of April, 1852, together with the lawful interest." *Held*, that the term, "together with the lawful interest" referred to the main condition, and that the whole sum drew interest from the date of the bond. Lanning *v.* Cole, 8 How. Pr. (N. Y.) 148.

A bond to pay "$71 in current bank money" means current bank bills calling on their face for $71. Lackey *v.* Miller, Phil. L. (N. Car.) 26.

A bond to pay a certain sum for a gold-mine on or before a certain day conditioned that "should the mine prove valueless the bond to be null and void, otherwise of full effect," becomes absolute on the day named unless it had been ascertained before that time that the mine was valueless. Gamble *v.* Beeson, 5 Jones L. (N. Car.) 128.

On the dissolution of a partnership, a bond was given conditioned that one partner "should pay all debts and demands against the company contracted by him in the name of the company." *Held*, (1) that said condition did not cover debts which had been previously adjusted and a joint and several note in the name of the firm given for the same; (2) that debts jointly contracted by the members of the firm did not come within the condition. Raymond *v.* Bigelow, 11 N. H. 466.

sensible words and supply accidental omissions.[1] The *whole* language of a bond must be taken into consideration.[2] In construing a bond, papers referred to therein must be considered as a part of the bond.[3] An indorsement on a bond, if made at the same time, must be considered in construing the instrument.[4] But a subsequent indorsement is not part of the deed, but a new contract.[5] The true intent of a bond is not affected by a repugnant condition, as when the condition was that "if the obligor do *not* pay."[6]

11. PENALTY.—Where a bond contains a condition that it shall be void upon the performance or non-performance of a certain act, the presumption is that the sum of money mentioned is intended as security and not as liquidated damages.[7] This presumption can only be controlled by very strong evidence to the contrary. But this rule is to some extent controlled by the question whether

A stipulation in a bond to secure rent that the lessee shall "put the house in order and put up the fence" is not a condition precedent. Watters *v.* Smaw, 10 Ired. L. (N. Car.) 292.

"Or" construed as "and" in a bond payable "to Squire Parker or Thomas Parker." Parker *v.* Carson, 64 N. Car. 563.

Construction of Particular Bonds.—A bond conditioned for the payment of a sum certain, without specifying any time of payment, the money is due immediately, without demand, and bears interest from date. Purdy *v.* Phillips, 1 Duer (N. Y.) 369; affirmed, 11 N. Y. 406. See Omohundro *v.* Omohundro, 21 Gratt. (Va.) 626.

A bond to to pay money at the death of the obligor, unconditionally delivered, drawn in absolute terms, take effect as a present obligation, and is irrevocable. Mack's Appeal, 68 Pa. 231.

A bond to appear and abide by a judgment secures payment of the judgment. Cole *v.* Reilly, 28 Ga. 431. A bond joint and several in form, but signed by one party only, is a several bond, and the obligor cannot change the effect by signing the names of others without their authority. Wood *v.* Ogden, 16 N. J. L. 453.

1. Coles *v.* Hulme, 8 Barn. & Cr. 568.

Surplusage will be rejected provided the remaining words are sufficient to make it sensible. Iredell *v.* Barbee, 9. Ired. L. (N. Car.) 250; Fitts *v.* Green, 3 Dev. L. (N. Car.) 291; Vanhook *v.* Barnett. 4 Dev. L. (N. Car.) 268.

Necessary words obviously omitted by mistake will be inserted. DeSoto *v.* Dickson, 31 Miss. 150; Gully *v.* Gully, 1 Hawk. (N. Car.) 20; Whitsell *v.* Warnock, 8 Ala. 466.

2. New Hampshire Bank *v.* Willard, 10 N. H. 210.

3. United States *v.* Maurice, 2 Brock. C. C. 96.

4. Hughes *v.* Sanders, 3 Bibb (Ky.), 360. Williams *v.* Handley, 3 Bibb (Ky.), 19; Shermer *v.* Beale, 1 Wash. (Va.) 11; Nichols *v.* Douglass, 8 Mo. 49.

5. Williams *v.* Handley, 3 Bibb (Ky.), 10; Cook *v.* Remington, 6 Mod. 237; Nichols *v.* Douglas, 8 Mo. 49.

6. Stockton *v.* Turner, 7 J. J. Marsh. (Ky.) 192. See Gibbs *v.* Halstead, 24 N. J. L. 366.

7. Davis *v.* Gillett, 52 N. H. 126; Astley *v.* Weldon, 2 Bos. & P. 346; Street *v.* Rigley, 6 Ves. Jr. 815; Price *v.* Green, 16 Mees. & W. 346; Davies *v.* Penton, 6 Barn. & C. 216; Higginson *v.* Weld, 14 Gray (Mass.), 165; Smith *v.* Wainright, 24 Vt. 97; Richards *v.* Edick, 17 Barb. (N. Y.) 260. See Swift *v.* Crow, 17 Ga. 609; Hargroves *v.* Cooke, 15 Ga. 321; Lyon *v.* Clark, 8 N. Y. 148; Griffith *v.* Hardenburg, 41 N. Y. 464.

The rule is thus stated by Chief Justice Marshall: "In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated damages; and it will be incumbent on the party who claims them as such to show that they were so considered by the contracting parties." Tayloe *v.* Sandeford, 20 U. S. (7 Wheat.) 13. See also, to same effect, Wallis *v.* Carpenter, 13 Allen (Mass.), 19, 25; Shute *v.* Taylor, 5 Metc. (Mass.) 61; Fisk *v.* Gray, 11 Allen (Mass.), 132.

the contingency is single or to perform several things, or pay the sum of money mentioned. In the former case it is held that in the absence of words evincing an intention that the sum shall be viewed as a penalty, it may be recovered as liquidated damages.[1]

If the contract is to perform several acts or pay the sum specified, that sum will be considered as a penalty and not liquidated damages.[2]

Where the sum specified is unjust and extortionate, the court will refuse to enforce it as a penalty even though it must disregard the intention of the parties. But where, from the nature of the case, the damages are uncertain, and only the parties are competent to compute them, the law will permit them to do so, and fix the amount as liquidated damages. The court will adopt their estimate of the damages. In such a case, if the parties mean *liquidated damages*, the court will so hold, although they use the words "penalty," "forfeit," "forfeiture," in the instrument.[3]

12. THE CONDITION.—The condition of a bond is the statement of the circumstances and contingencies upon which the bond shall become void. It must necessarily be in the alternative. At common law a bond may be absolute, contingent, or void by reason of the terms of the condition and character of the consideration. "If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law which is merely positive, or be uncertain and insensible, the condition alone is void, and the bond shall stand single and unconditional; for it is the folly of an obligor to enter into such an obligation from which he can never be released. If it be to do a thing that is *malum in se*, the obligation itself is void; for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards become impossible by the act of God, the act of the law, or

1. Swift *v.* Crow, 17 Ga. 609; Leighton *v.* Wales, 3 Mees. & W. 545. See also Saniter *v.* Ferguson, 7 Mann Gr. & Se. 716.

2. Swift *v.* Crow, 17 Ga. 609; Astley *v.* Weldon, 2 Bos. & P. 345; Kemble *v.* Farren, 6 Bing. 141; Davies *v.* Parton, 6 Barn. & C. 2101; Nuir *v.* Rossman, 18 Barb. (N. Y.) 50; Catheal *v.* Talmage, 9 N. Y. 551.

3. Jaquith *v.* Hudson, 5 Mich. 123, 138, citing Saniter *v.* Ferguson, 7 Mann. Gr. & S. 716; Jones *v.* Green, 3 Y. & Jer. 299; Pierce *v.* Fuller, 8 Mass. 223; s. c., 5 Am. Dec. 102; Noble *v.* Bates, 7 Cow. (N. Y.) 307; Fletcher *v.* Dycke, 2 Term, 32. See generally, as to this subject, Atkins *v.* Kinnier, 4 Exch. 776; Davies *v.* Penton, 6 Barn. & Cr. 216; Boyce *v.* Ancell, 5 Bing. N. C. 390; Shiell *v.* McNitt, 9 Paige (N. Y.) 101; Heard *v.* Bowers, 23 Pick. (Mass.) 455; Lampman *v.* Cochran, 16 N. Y. 275; Jackson *v.* Baker, 2 Edw. Ch. (N. Y.) 471; Lynde *v.* Thompson, 2 Allen (Mass.), 456. 458; Beckman *v.* Drake, 8 Mees. & W. 846, 853; Homer *v.* Flintoff, 9 Mees. & W. 678; Gower *v.* Saltmarsh, 11 Mo. 271; Reilly *v.* Jones, 1 Bing. N. C. 302; Lange *v.* Werk, 2 Ohio St. 419, 534; Esmond *v.* Van Benschoten, 12 Barb. (N. Y.) 366; Beale *v.* Hayes, 5 Sandf. (N. Y.) 640; Randall *v.* Everest, 1 Moo. & M. 41; s. c., 1 Car. & P. 577; Penkerton *v.* Casslon, 2 Barn. & Ald. 704; Shute *v.* Taylor, 5 Metc. (Mass.) 61; Cirhsdee *v.* Bolton, 3 Car. & P. 240; Smith *v.* Coe, 1 Jones & Spencer (N. Y.) 480; Sloson *v.* Beadle, 7 John. (N. Y.) 72; Pearson *v.* Williams, 24 Wend. (N. Y.) 240; Gray *v.* Crosby, 18 John. (N. Y.) 219; Upham *v.* Smith, 7 Mass. 265; Dwinel *v.* Brown, 54 Me. 468; Whitefield *v.* Levy, 35 N. J. L. 149.

the act of the obligee himself, there the penalty is saved; for no prudence or foresight could guard against such a contingency."[1]

13. RECITALS.—A recital in a bond is conclusive upon the parties as an admission of the facts recited, and may restrain and limit words in the condition implying a greater liability. The general words must be restrained by the particular recital.[2]

But a recital of matter immaterial to the object of the bond works no estoppel against the party executing it.[3] Nor is the party bound estopped by a recital of fact which is not founded on the instrument, but is collateral to it.[4]

2. Joint or Joint and Several Bonds.—A bond may be joint or joint and several. A bond is joint if its language distinctly shows it to be joint; it is joint and several if it so appears to be beyond a reasonable doubt. It must be determined primarily from the terms of the instrument and not its execution and delivery, and especially by the provision which it makes for its own satisfaction.[5] If the terms of the instrument are ambiguous it is joint or joint and several according to the interests of the parties.[6] With reference to covenantees the rule is somewhat different. "Where there is an obligation to pay money or perform a duty to two or more obligees the character of the instrument as joint, or joint and several, depends upon the interest of the covenantees."[7] But

1. 2 Blackstone Com. 340, 341. See criticism of this distinction, Murfree on Official Bonds, § 130. See, generally, Taylor *v.* Mason, 22 U. S. (9 Wheat.) 345; Mitchell *v.* Reynolds, 1 P.Wms. 181; Page *v.* Trufant, 2 Mass. 159; s. c., 3 Am. Dec. 41; Trustees *v.* Gallatin, 4 Cow. (N. Y.) 340; Davidson *v.* Givens, 2 Bibb (Ky.), 200; Lewis *v.* Knox, 2 Bibb (Ky.), 453; Tuxbury *v.* Miller, 19 John. (N.Y.) 311; Waite *v.* Harper, 2 John. (N.Y.) 386; Bruce *v.* Lee, 4 John. (N.Y.) 410; Mitchell *v.* Vance, 5 T. B. Mon. (Ky.) 529; s. c., 17 Am. Dec. 96.

2. Payler *v.* Homesham, 4 Maule & S. 425; Pearsall *v.* Summersett, 4 Taunt. 523; Bennehan *v.* Webb, 6 Ired. L. (N. Car.) 57; Bell *v.* Bruen, 1 How. (U. S.) 169; Carpenter *v.* Buller, 8 M. & W. 209; Fletcher *v.* Jackson, 23 Vt. 581; and see Hoke *v.* Hoke, 3 W. Va. 561.

3. Reed *v.* McCourt, 41 N. Y. 435.

4. Carpenter *v.* Buller, 8 Mees. & W. 209; Reed *v.* McCourt, 41 N. Y. 435.

A recital in a bank cashier's bond that he was appointed cashier by the directors is conclusive in an action on the bond against the sureties. Lionberger *v.* Krieger (Mo.), 14 Am. & Eng. Corp. Cas. 87.

5. Hankinson *v.* Sandilaus, Croke Jac. 322.

6. The rule for distinguishing between a joint and a joint and several bond is thus stated in Sheppard's Touchstone, 375: "If two, three, or more bind themselves in an obligation thus, *obligamus nos*, and say no more, the obligation is and shall be taken to be joint only, and not several; but if it be thus, *obligamus nos et etrumque nostrum*, the obligation is both joint and several."

It was held in some of the old cases that the interest controlled the construction. Thus in James *v.* Emery, 5 Price (Exch.), 553, it was said: "Wherever the interest of the parties is separate the action may be several, notwithstanding the terms of the covenant on which it is founded may be joint; and where the interest is joint the action must be joint, although the covenant in language purports to be joint and several." But the true rule is stated by Mr. Preston: "By express words clearly indicative of the intention, a covenant may be joint, or joint and several to or with the covenantors, or covenantees, notwithstanding the interests are several." Sheppard's Touchstone (Preston's Ed., note), p. 166; Robinson *v.* Walker, 1 Salk. 393. "So they may be several although the interests are joint." Eccleston *v.* Clipsham, 1 Saund. 154, notes, and cases cited.

7. Murfree on Official Bonds, § 236.

An obligation to pay one sum of money *in solido* to several obligees is joint and must be jointly enforced. Lane *v.* Drinkwater, 1 Crompt. M. & K. 613; May *v.* May, 1 Carr. & P. 44; English *v.* Blun-

where there are a number of obligees each entitled to a specific sum, as in a composition deed of debtor to creditors, each beneficiary is entitled to his separate action for the sum due him. The obligee in a joint and several bond may proceed against any one of the obligors without prejudice to subsequent legal proceedings against the other obligors, provided he fails to satisfy the demand from the first judgment; and he has the same remedy against the heirs or executor of a deceased obligor.[1] The liability of the obligors in a joint bond is aggregate, and a failure to join all such joint obligors is good ground for a plea in abatement. But if this plea is not interposed, judgment may be rendered against the defendant, the effect of which is to discharge all the obligors not joined in the action from all liability at law upon the bond.[2]

There is no legal remedy against the heirs or executors of a deceased joint obligor (principal or surety), and a failure to join them in an action is not ground for a plea in abatement. The remedy as against the estate is lost.[3] In equity, however, the rule is different. The representatives of a deceased principal obligor, who was under a moral obligation to perform the condition or pay the penalty, can be held in equity to perform the same obligation. But where the deceased was a surety under no moral obligation, and the bond joint only, he is bound only by the terms of the bond, and equity will not interfere to charge his estate. A surety who pays the debt of his insolvent principal cannot enforce the debt against the estate of his deceased co-surety, as his only right is to subrogation to the rights of the creditor.[4] The estate of a deceased obligor is not necessarily released by the legal extinction of the bond, as by the intermarriage of the obligor and obligee.[5]

dell, 8 Carr. & P. 332; Osborn *v.* Harper, 5 East, 229.

1. Lay *v.* Mottram, 19 C. B. N. S. 479, 485; Gresty *v.* Gibson, L. R. 1 Exch. 112.

2. Higgins' Case, 6 Coke, 45; Lechmere *v.* Fletcher, 1 Crompt. & Mees. 623.

Pleading—Parties in Action on Joint Bond.—If, however, the party crave oyer and demur, the court will presume that the other alleged obligor did not seal the bond. The defect is strictly matter in abatement. Gilbert *v.* Bait, 1 Strange, 503. If by craving oyer the bond is spread on the record and it appears thereby that the obligors were bound severally as well as jointly, a defect in the declaration is thereby cured. Newman *v.* Graham, 3 Munf. (Va.) 187; Meredith *v.* Duval, 1 Munf. (Va.) 76.

3. Tower *v.* Moore, 2 Vern. 98.

Before the heir of one of two joint obligors (both principals) can be held answerable he must be sued as heir, and it must be shown that he promised to pay the debt, and that he has inherited from his ancestor real estate of sufficient value to meet the demand. Preston *v.* Preston, 1 Harr. & J. (Md.) 366. "In other words, the cause of action upon which he can be charged at law is not the bond at all, for that merely becomes matter of inducement." Murfree on Official Bonds, § 239.

4. Walter *v.* Riley, 2 Harr. & Gill (Md.). 305.

5. Acton *v.* Pierce, 2 Vern. 480.

Grounds for Granting Relief in Equity to the Obligee of a Joint Bond against the Heir and Executor of Deceased Joint Obligors. — Lord Hardwick in Bishop *v.* Church, 2 Ves. Sr. 100, 371 (citing Acton *v.* Pierce, 2 Vern. 480; Probart *v.* Clifford, 2 Atkyns, 440), places this jurisdiction of equity upon the ground that although by the death of the obligor the obligation and penalty have become void at law, the *condition*, being "an agreement to pay money, and an agreement

Where two or more executors or administrators execute a joint bond they stand towards each other in the relation of principal

under hand and seal," is obligatory against the heir or executor. But this is not sustained by reason or authority. "The truth is that although it is undoubtedly the law that the executor and heir of a deceased principal obligor of a joint bond are liable for the debt or duty secured by it, it is because courts of equity have so held them to be, and not upon any principle derived from the character of their obligation. Courts of law for technical reasons will not enforce these obligations; courts of equity will do so to compel the performance of a moral duty: and it is only in view of duties of that character that courts of equity have by a long series of rulings assumed the power of enforcing these among other imperfect obligations. That it is the moral obligation, and that only, upon which courts of equity base this jurisdiction is obvious from the fact that they will not enforce a bond of this character against the representatives of a surety." Murfree on Official Bonds, § 243.

Joint Bonds considered Joint and Several.—Another ground for such jurisdiction is that of *mistake*. A contract for a joint loan is presumed in equity to be joint and several, although the form of the obligation is strictly joint. In order that there may be equality of obligation, the court will presume "from slender premises or no premises at all" that a mistake has been made, and that from ignorance or want of skill on the part of the scrivener the bond was made joint instead of joint and several. See on this subject Thomas *v.* Frazier, 3 Ves. Jr. 399, 402; Thorpe *v.* Jackson, 2 Younge & Coll. Exch. 553; Wilkinson *v.* Henderson. 1 Mylne & K. 582; Richardson *v.* Horton, 6 Beav. 185; Weaver *v.* Shryock, 6 Serg. & R. (Pa.) 262; *Ex parte* Kendall, 17 Ves. 525; *Ex parte* Halkett. 19 Ves. 475; Burn *v.* Burn, 3 Ves. Jr. 573; *Ex parte* Symonds, 1 Cox, 200; Simpson *v.* Vaughn, 2 Atkyns, 30; Ball *v.* Storie, 1 Sim. & Stu. 210; Card *v.* Jaffray, 2 Sch. & Lef. 374; Summer *v.* Powell, 2 Meriv. 30; Gray *v.* Chiswell, 9 Ves. Jr. 118, 125; Underhill *v.* Harwood, 10 Ves. Jr. 218, 225, 227.

The presumptions which apply when it is sought in equity to have a joint bond considered as being joint and several are stated as follows in Weaver *v.* Shryock, 6 Serg. & R. (Pa.) 262, 264: "In the first place, then, it is a fair presumption, in the absence of all evidence to the contrary, that every man understands what he is doing, and that these obligors understood the long and well-established difference between a joint and joint and several obligation. But this presumption may be rebutted by circumstances; and one circumstance on which courts of equity have laid great stress is that the money for which the bond was given was borrowed by, or came to the use of, both obligors. In such case the very act of borrowing does, in itself, amount to a contract antecedent to their entering into a bond, that each and both should be bound to pay. When, therefore, the bond is afterwards so drawn as to constitute only a joint obligation, there is a reasonable presumption that either through fraud, ignorance, or inadvertence the meaning of the parties has not been carried into effect. Such has been the reasoning of those judges who have decided on points of this kind; and it must be confessed that this is carrying the matter far enough in favor of the obligee."

When not so Construed.—All the cases in which courts have construed joint bonds as joint and several and sustained them against the representatives of a deceased obligor have turned upon actual or presumed mistakes in drawing the instruments. Hunt *v.* Rousmanier, 21 U. S. (8 Wheat.) 212, 213, 214; Simpson *v.* Vaughn, 2 Atkyns, 33; Underhill *v.* Horwood, 10 Ves. Jr. 209, 227. A court of equity will not interfere in behalf of an obligee unless it be established that the true consideration for a joint bond was a joint original debt or liability. The presumptions and inferences adequate to establish the fact may be overcome by evidence. It has been held that although a mistake of fact will be presumed in every case in which a joint bond has been given, and a benefit received by the obligor, yet the relief will not be granted unless there was equity antecedent to the obligation. "When," says Sir William Grant, in Sumner *v.* Powell, 2 Meriv. 35, 36, "the obligation exists only by virtue of the covenants, its extent can be measured only by the words in which it is conceived. . . . So where a joint bond has in equity been considered as several, there has been a credit previously given to the different persons who have entered into the obligation. It is not the bond that first created the liability." Underhill *v.* Horwood, 10 Ves. Jr. 227; Thorpe *v.* Jackson, 2 Younge & Coll. Exch. 553.

and surety, each being considered as principal for his own acts

Ex parte Kendall, 17 Ves. Jr. 525; Cowell *v.* Sykes, 2 Russ. 191.

Presumptions in Favor of Joint Bonds being Joint and Several do not apply as against Sureties.—To charge the sureties on a bond there must be actual proof of an express agreement by them that the bond shall be several as well as joint. Weaver *v.* Shryock, 6 Serg. & R. (Pa.) 262. An obligee in a joint and several bond who elects to consider the bond as joint and takes a joint judgment upon it cannot invoke the aid of a court of equity to enforce a several liability against the representatives of a deceased surety who originally incurred a several liability on the bond. "Where an obligee takes a joint and several bond," says Mr. Justice Grier in United States *v.* Price, 50 U. S. (9 How.) 83, 951, "he has nothing to ask of equity; his remedy is wholly at law. If he elects to take a joint judgment he voluntarily repudiates the several contract, and is certainly in no better situation than if he had originally taken a joint security only. Equity gives relief, not on the bond, for that is complete at law, but upon the moral obligation antecedent to the bond, when the creditor could have had no remedy at law. An obligee who has a joint and several bond, and elects to treat it as joint, may sometimes act unwisely in so doing, but his want of prudence is no sufficient plea for the interposition of a chancellor. Nor can the conscience of a mere surety be affected who, having tendered to the obligee his choice of holding him jointly or severally liable, has been released at law by the exercise of such election." Wright *v.* Russell. 3 Wills. 530; Waters *v.* Riley, 2 Harr. & J. (Md.) 310; Harrison *v.* Field, 2 Wash. (Va.) 135; Weaver *v.* Shryock, 6 Serg. & R. (Pa.) 262; Sheehy *v.* Mandeville, 10 U. S. (6 Cranch) 253; United States *v.* Cushman, 2 Sum. C. C. 426; Lechmere *v.* Fletcher, 1 Crompt. & M. 623.

Joint Bond.—*Discharge of Estate of Deceased Surety.*—In Pickergill *v.* Lahan, 82 U. S. (15 Wall.) 140, 146; s.c., 4 Myers Fed. Dec. § 550, the Supreme Court of the United States (following United States *v.* Price, 50 U. S. (9 How.) 83, 108), *held*, if one of two joint obligors dies, the debt is distinguished as against his representatives; that, the remedy at law being gone, as a general rule a court of equity will not afford relief; that the court will vary the legal effect of the instrument only when it is clearly made to appear that it was intended by the parties to be several as well as joint, or in case of fraud or mistake; that this will be done only where there is a previous equity on the ground of a moral obligation on the part of the deceased to pay his debts; that a mere surety incurs no moral obligation, and that if a surety die before his principal his legal representatives cannot be sued at law or charged in equity. Simpson *v.* Field, 2 Ch. Cas 22; Sumner *v.* Powell, 2 Meriv. 30; s. c., 1 Turn. & R. 423; Weaver *v.* Shryock, 6 Serg. & R. (Pa.) 262; Hunt *v.* Rousmanier, 21 U. S. (8 Wheat.) 212.

Cases of Actual Mistake.—The mistake we have been considering is mostly a presumption of law seized upon in order to do substantial justice. Where there is an actual mistake of fact in consequence of which a bond which should have been joint and several is made joint, a court of equity will relieve against the consequences of such mistake as fully against sureties and guarantors as against the principal obligor. Wiser *v.* Blackly, 1 John. Ch. (N. Y.) 607. "No doubt," says Lord Hardwicke in Henkel *v.* Royal, etc., Co., 1 Ves. Sr. 317, "but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts. There is therefore no reason upon principle why an actual mistake in the language of the bond will not be relieved against, although the party be a surety. It is the *mistake* that gives the jurisdiction, not the merit of the parties. The object of the court in all such cases and the effect of its decrees is not to do justice or relieve hardship, but to place the parties precisely where they intended to be, and would have been but for the mistake."

In the absence of any statute authorizing a limitation of liability, a joint and several bond is not rendered several only by a stipulation on the part of sureties that they shall be liable only for an amount written after their signatures. This precaution is unavailing as against the obligee, unless the *joint* characteristic be wholly eliminated from the bond and it be made only a *several* obligation. People *v.* Slocum, 1 Idaho, 62.

A Joint Bond not Executed by the Principal is Invalid.—The absence of the signature of the principal obligor is not a defect which can be cured. People *v.* Hartley, 21 Cal. 585, citing Sacramento *v.* Dunlap, 14 Cal. 423; Bean *v.* Parker, 17 Mass. 591; Wood *v.* Washburn, 2 Pick. (Mass.) 24; Sharp *v.* United States, 4 Watts (Pa.). 21; s. c., 28 Am. Dec. 676;

and surety for those of the others.[1] This is true although the execution of the bond was purely voluntary, as when the will exempted the executors from giving any bond. But having given a bond they are bound by its terms, and it cannot be affected by a mere order of court reciting its execution.[2]

Partnership contracts are usually joint, but one partner cannot execute a joint bond which will bind his copartners without sufficient previous authority. Such a bond will bind the partner executing it only.[3]

In some States the subject of joint bonds has been regulated by statute.[4]

3. Negotiable Bonds.—1. IN GENERAL.—It is now well settled that coupon bonds of municipal and business corporations are negotiable, and that this extends to the coupons, which may be detached and sued on separately after the bond has been satisfied. Such bonds are protected and governed by the same principles as negotiable notes and bills.[5] Such bonds now stand not only

Fletcher *v.* Austin, 11 Vt. 447; s. c., 34 Am. Dec. 698; Johnson *v.* Erskine, 9 Tex. 1; Cutter *v.* Whittemore, 10 Mass. 442; Adams *v.* Bean, 12 Mass. 139; s. c., 7 Am. Dec. 44; s. c., 26 U. S. (1 Pet.) 16; Harrison *v.* Field, 2 Wash. (Va.) 136; Kennedy *v.* Carpenter, 2 Whart. (Pa.), 344; Octer *v.* Iveson, 3 Drewry, 177; Jones *v.* Beach, 2 DeGex & S. 886; Wilmer *v.* Curry, 2 DeGex & S. 347; Waters *v.* Riley, 2 Harr. & Gill (Md.), 311; Dorsey *v.* Dorsey, 2 Harr. & J. (Md.) 480, note; Bradley *v.* Burwell, 3 Denio (N. Y.), 65; Richardson *v.* Horton, 6 Beav. 85; Wilkinson *v.* Henderson, 1 Myl. & K. 582; Rawstone *v.* Parr, 3 Russ. 539.

The same principles apply when the bond is one given in the course of judicial proceedings, as to obtain an injunction. Where the statute is silent the bond will be joint or joint and several in the discretion of the court. There is no principle of equity by which a contract of indemnity can be construed so as to charge an estate, and an engagement to pay money may receive a contrary construction. Murfree on Official Bonds, § 255; Pickergill *v.* Lahen, 82 U. S. (15 Wall.) 140, 146; s. c., 4 Myers Fed. Dec. § 551.

1. Cosker *v.* Harrison, 76 Va. 85; s. c., 3 Am. Prob. R. 309, 316; Morrow *v.* Peyton, 8 Leigh (Va.), 54; Boyd *v.* Boyd, 3 Gratt. (Va.) 112; Cox *v.* Thomas, 9 Gratt. (Va.) 319; Green *v.* Hansborough, 2 Brock. C. C. 166; Seddens *v.* Robertson, 2 Brock. C. C. 402.

2. Cosker *v.* Harrison, 76 Va. 85; s. c., 3 Am. Prob. R 309, 317; Cecil *v.* Early, 10 Gratt. (Va.) 188; Franklin *v.* Depriest, 13 Gratt. (Va.) 257; Wanlath *v.* Comm'rs, 15 Gratt. (Va.) 157.

3. Green *v.* Beals, 2 Caines (N. Y.), 254.

A partnership can have no seal; and if a partner signs the firm note and affixes a seal, it is his seal. "The obligation declared on was executed by one of the partners in the partnership name. Such instrument obliges only the person who signs and seals it; it is his act and deed and not that of his copartners. . . . A case might exist where the individual seal of one of several obligors was used by each, which would be good against each, because when so used it was the seal of each, but that is not this case." Button *v.* Hampson, 1 Wright (Ohio), 93.

4. In *Tennessee* it has been enacted that all bonds which at common law would have been joint shall be held to be joint and several. Th. & Steg. Code Tenn., §§ 2789 *et seq.*; Claiburne *v.* Goodloe. Cooke (Tenn.), 391.

In 1818 it was enacted in Alabama "that every joint bond shall be deemed and construed to have the same effect in law as a joint and several bond, and it shall be lawful to sue out process and proceed to judgment against any one or more of the obligors." Whitsett *v.* Womack, 8 Ala. 482, citing Clay's Digest, 323, § 61.

5. White *v.* Vermont & M. R. Co., 21 How. (U. S.) 577; County of Beaver *v.* Armstrong, 44 Pa. St. 63; Thompson *v.* Lee Co., 3 Wall. (U. S.) 227; Mever *v.* Muscatine, 1 Wall. (U. S.) 384; Gelpecke *v.* Dubuque, 1 Wall. (U. S.) 175; Marcer *v.* Hacket, 1 Wall. (U. S.) 83; Murray *v.* Lardner, 2 Wall. (U. S.) 110; City *v.*

equal before the law to the negotiable paper pertaining to the commercial business of the country and to our circulating medium, but they are also, for their greater advantage, and for the purpose of causing them to be acceptable as desirable investments, regarded as chattels.[1] By the later English cases such bonds are held to be either promissory notes, or else analogous to the letter of credit.[2] Only the maker of a bond can supply an accidental omission the effect of which is to render it non-negotiable.[3]

2. RIGHTS OF A BONA-FIDE HOLDER.—The purchaser of negotiable bonds in good faith for value is unaffected by want of title in the vendor, and is presumed to act in good faith.[4] The burden of proof is on the party denying the right of the possessor.[5] He acquires a good title although the bonds were stolen from their true owner by his vendor.[6] Negligence alone, however gross on the part of the purchaser, will not impair his title.[7] Said Lord Denman: "I believe we are all of opinion that gross negligence only would not be a sufficient answer, where the party has given a consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine; where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title."[8] He is not obliged to make a critical exam-

Lamson, 9 Wall. (U. S.) 477; Blake *v.* Livingston, 61 Barb. (N. Y.) 149; Langston *v.* S. C. R. Co., 2 S. Car. 248; Craig *v.* City of Vicksburg, 31 Miss. 217; Clark *v.* City, 10 Wis. 140; Johnson *v.* County, 24 Ill. 92; Arents *v.* Com., 18 Gratt. (Va.) 750; Spooner *v.* Holmes, 102 Mass. 503; Nat. Exch. Bank *v.* H. R. Co., 8 R. I. 375; s. c., 5 Am. Rep. 582. But see Diamond *v.* Lawrence Co., 37 Pa. St. 353; Myer *v.* Cum. R. Co., 43 Me. 239.

Interest warrants or coupons in a negotiable form draw interest after payment is unjustly neglected and refused. Mills *v.* Jefferson, 20 Wis. 50; San Antonio *v.* Lane, 32 Tex. 405; Aurora City *v.* West, 7 Wall. (U. S.) 82; North Pa. R. *v.* Adams, 54 Pa St. 94; Brainard *v.* N. Y. & Harlem R. Co, 25 N. Y. 469; Conn. Mut. Life Ins. Co. *v.* Cleveland, etc., R. Co., 44 Barb. (N. Y.) 9; 10 Bosw. (N. Y.) 332; New Albany Plank-road Co. *v.* Smith, 23 Ind. 353; 26 How. Pr. (N.Y.) 180; Canal, etc., Co. *v.* Lewis, 12 N. J. Eq. 323.

1. See Griffith *v.* Burden, 35 Iowa, 138. The doctrine of negotiability of bonds is of recent date. See Myers *v.* York & Co., 43 Me. 239. decided in 1857, and Diamond *v.* Lawrence Co., 37 Pa. St. 353–8, decided in 1861, holding strongly to contrary doctrine.

2. See *In re* Imperial Land Co. of Marseilles, L. R. 11 Eq. 478; *In re* General Estates Co., L. R. 3 Ch. App. 758.

3. Ledwich *v.* McKim, 53 N. Y. 307; Parsons *v.* Jackson, 99 U. S. 434.

4. Keeney *v.* Chiles, 4 Greene (Iowa), 416; Murray *v.* Gardner, 2 Wall. (U. S.) 110; Carpenter *v.* Rommell, 5 Phila. (Pa.) 34; Peacock *v.* Rhodes, 4 Doug. (Mich.) 633, language of Lord Mansfield. Miller *v.* Race, 1 Burr. 452; Grant *v.* Vaughn, 3 Burr, 1516; Anon., 1 Salk. 126.

5. Murray *v.* Gardner, 69 U. S. (2 Wall.) 110, 121.

Plaintiff claiming bonds from such a passenger must establish (1) that the bonds belong to him; (2) that the circumstances under which the defendant purchased them were not such as to protect his title. Birdsall *v.* Russell, 29 N. Y. 220.

6. Carpenter *v.* Rommell, 5 Phila. (Pa.) 34. See, generally, Leavitt *v.* Dabney, 7 Robt. (N. Y.) 350; s. c., 37 How. Pr. 264; s. c., 3 Abb. Pr. N. S. (N. Y.) 469; Spooner *v.* Holmes, 102 Mass. 503; s. c., 3 Am. Rep. 491; State *v.* Wells, 15 Cal. 36; Texas *v.* White, 74 U. S. (7 Wall.) 700; s. c., 25 Tex. 465.

7. Welch *v.* Sage, 47 N. Y. 143; s. c., 7 Am. Rep. 423; Goodman *v.* Harvey, 4 Ad. & El. 870.

8. Crook *v.* Juelis, 5 Barn. & Ad. 909; Blackhouse *v.* Harrison, 5 Barn. & Ad. 1098.

The same rule prevails in the United States. See Murfree on Official Bonds,

ination in order to escape the imputation of bad faith.[1] He has a right to presume that bonds payable to bearer were issued as agreed between the original parties.[2]

A purchaser of government bonds after the time for redemption takes them subject to equities.[3]

"As a general rule, a *bona-fide* holder of commercial paper is not bound to make a critical examination of the title to such paper; his rights are not impaired by negligence unmixed with fraud or bad faith.[4] If, however, he deals with a corporation for its negotiable bonds, or deals in such bonds at second or third hand, he must take notice of the organic law of that corporation and its powers under it. If he deals with an agent of the government or of a corporation, he is charged with knowledge of the authority of such agent.[5] He has a right to presume, when a corporation is vested with a power to issue negotiable bonds, that such power has been duly exercised by its accredited agents; and if upon their face they import a compliance with the law, he is not bound to look further.[6] He is, however, charged with knowledge as well

§ 104; Swift *v.* Tyson, 41 U. S. (16 Pet.) 1; Goodman *v.* Simonds, 61 U. S. (20 How.) 343; Bank *v.* Neal, 63 U. S. (22 How.) 96. *Compare* Lawson *v.* Weston, 4 Esp. 56; Gill *v.* Cubit, 3 Barn. & Cr. 466.

1. Birdsell *v.* Russell, 29 N. Y. 220; Welch *v.* Sage, 47 N. Y. 143; s. c., 7 Am. Rep. 423.

The wrongful putting in circulation of the bonds of a foreign government, payable to bearer and transferable by delivery by an agent of the obligor having them in custody, will not invalidate the title of a purchaser in good faith without notice. Leavitt *v.* Morgan, 7 Robt. (N. Y.) 350; s. c., 37 How. (N. Y.) 264; 3 Abb. Pr. N. S. (N. Y.) 469.

An action for conversion will not lie against an agent who, in good faith, received and sold stolen coupons of United States bonds, and turned the money over to his principal. Spooner *v.* Holmes, 102 Mass. 503; s. c., 3 Am. Rep. 491; and see State *v.* Wells, 15 Cal. 336.

2. Commonwealth *v.* Pittsburg, 34 Pa. St. 496.

A party who in good faith advances money to a corporation for a particular purpose is under no obligation to see that it is so applied. Mills *v.* Gleason, 11 Wis. 493.

3. Texas *v.* White, 74 U. S. (7 Wall.) 700; s. c, 25 Tex. 465.

4. Welch *v.* Sage, 47 N. Y. 143; s. c., 7 Am. Rep. 423; Seybel *v.* National, etc., Bank, 54 N. Y. 288.

5. Selliman *v.* Fredericksburg, etc., Co, 2 Gratt. (Va.) 119. 130; Pearce *v.* Madison & Co., 43 U. S. (21 How.) 441; Zabriskie *v.* Cleveland & Co., 64 U. S. (23 How.) 381; The Floyd Acceptances, 74 U. S. (7 Wall.) 666; Clark *v.* Des Moines, 19 Iowa, 199.

6. Bonds of municipalities have been invested with certain immunities to which the ordinary rules of law for testing the rights and liabilities of parties to commercial paper do not apply. See, generally, Bissell *v.* Jeffersonville, 65 U. S. (24 How.) 287; Maran *v.* Miami Co., 67 U. S. (2 Blackf.) 722; Woods *v.* Lawrence Co., 66 U. S. (1 Blackf.) 386; Mercer Co. *v.* Hackett, 68 U. S. (1 Wall.) 83; Gelpcke *v.* Dubuque, 68 U. S. (1 Wall.) 175; Meyer *v.* Muscatine, 68 U. S. (1 Wall.) 384; Lexington *v.* Butler, 81 U. S. (14 Wall.) 282; Grand Chute *v.* Winegar, 82 U. S. (15 Wall.) 355; St. Joseph *v.* Rogers, 82 U. S. (16 Wall.) 644.

"When a corporation has power under any circumstances to issue negotiable securities, the *bona-fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper." Gelpcke *v.* Dubuque, 68 U. S. (1 Wall.) 384, *per* Mr. Justice Swayne, citing Commissioner *v.* Aspinwall, 62 U. S. (21 How.) 539; Royal, etc., Bank *v.* Farquand, 6 Ellis & Bl. 327; Farmers, etc., Co. *v.* Curtis, 7 N. Y. 466; Stoney *v.* A. L. I. Co., 11 Paige (N. Y.), 635; Morris & Co. *v.* Fisher, 1 Stockton Ch. (N. J.) 667; Wilemarth *v.* Crawford, 10 Wend. (N. Y.) 343; Alleghany City *v.* McCluskan, 14 Pa. St. 83; Lexington *v.* Butler, 81 U. S. (14 Wall.) 296.

of the statute to which the bonds refer as to the recitals of the bonds themselves.[1] He is bound only by the law as it stood when the bonds were issued, and not by *ex post facto* adjudications.[2] He must risk the authenticity of the bonds and their due execution by accredited officers.[3] He is not charged with notice of collateral matters, such as the financial condition of the county.[4] He must, however, at his peril, see that the bonds were issued under a valid power.[5] In short, he must verify the powers and pretentions of the corporation in whose securities he deals, and the authority of all agents who profess to represent it; and if he fails to do this, and loss or injury results, he can blame nobody but himself.[6]

3. INDORSEMENT.—A bond cannot, at its inception, be made payable to some certain obligee or bearer like a note or bill. But after it is complete it may be transferred by indorsement so as to become payable to bearer.[7]

A bond given in one State may be indorsed out of the State so as to give a right of action in the State where given, though there is no statute making bonds negotiable in the State where the indorsement was made.[8]

Recitals. — "We have decided that where the bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further." Mercer Co. *v.* Hackett, 1 Wall. (U. S.) 93, *per* Mr. Justice Grier. Under these rulings it would seem that a purchaser need not go back of the recitals in the bond. Miller *v.* Berlin, 13 Blatchf. C. C. 245, 249. But in a later case, McClure *v.* Oxford, 94 U. S. (4 Otto) 129, these rulings were modified. "To be a *bona fide* holder," said Mr. Chief Justice Waite, "one must be himself a purchaser for value without notice, or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by reasonable diligence. Every dealer in municipal bonds which, upon their face, refer to the statute under which they were issued is bound to take notice of the statute and all its requirements." And presumably he must see that the statute itself is constitutional.

1. McClure *v.* Oxford, 94 U. S. (4 Otto) 129.

2. Douglass *v.* Pike Co., 101 U. S. (11 Otto) 677, citing Fairfield *v.* Gallatin Co., 100 U. S. (10 Otto) 47; Rowan *v.* Runnell, 46 U. S. (5 How.) 134; Ohio, etc., Co. *v.* Debolt, 57 U. S. (16 How.) 416; Supervisors *v.* United States, 85 U. S. (18 Wall.) 71.

As to the relation of the Federal judiciary to the statute law of the States, see Rowan *v.* Runnell, 46 U. S. (5 How.) 134, language of Chief Justice Taney.

3. Anthony *v.* Jasper Co., 101 U. S. (11 Otto), 693.

4. S. C., etc., Co. *v.* Osceola Co., 52 Iowa, 26. See 45 Iowa, 168.

5. Lippincott *v.* Town of Pana, 92 Ill. 24; Farce *v.* Batavia, 61 Ill. 100; Williams *v.* Town of Roberts, 88 Ill. 13.

6. Murfree on Official Bonds, § 116.

7. Marsh *v.* Brooks, 11 Ired. L. (N. Car.) 409.

A bond payable to A., or to A. or order, is transferable only by indorsement. Fairly *v.* McLean, 11 Ired. L. (N. Car.) 158.

8. Groce *v.* Hannah, 6 Jones L. (N. Car.) 94.

Liability of Indorser.—The indorser of a single bill for the accommodation of the principal obligor is not, without a special contract to that effect, liable to contribute as a co-surety with one who signed the bill as a co-obligor with the principal. The indorser in such case is to be taken only as a supplementary surety, and not liable to be called upon for contribution by the primary surety. Dawson *v.* Pettway, 4 Dev. & B. L. (N. Car.) 396.

An indorsement of a bond by the obligee in the form "A. B., for 60 days, 19 Nov. 1858," imposes no obligation on the indorser after 60 days. Johnson *v.* Olive, 1 Win. (N. Car.) No. 1, 215.

The liability of an indorser of a nego-

4. Official Bonds.—1. Construction and Effect.—(*a*) ***In General.***—Every bond which is required or authorized by statute to be executed by an officer is an official bond.

(*b*) ***Execution and Delivery.***—A bond complete upon its face at the time of its delivery by the principal obligor to the obligee is a valid and binding instrument, though the sureties executing it may have delivered it to the principal obligor with the understanding that it was not to be delivered to the obligee until signed by other persons or another person. The failure of such other person or persons to sign will not affect the validity of the bond unless the conditional delivery was known to the obligee or he was guilty of fraud or rashness in accepting the bond.[2] It is not necessary that the names of the parties be recited in the bond. If they subscribe their names and acknowledge it to be their act and deed in the presence of witnesses, or otherwise comply with the requirements of the law, it is sufficient.[3]

(*c*) ***Form and Essentials.***—Statutes usually prescribe the form of official bonds. These rules must be substantially conformed to.[4] But it is not necessary that the bond follow the exact words of the statutory form, unless the statute expressly declares it shall. It is sufficient if it include in substance all the material require-

tiable State bond when fixed as to principal is also fixed as to the interest coupons attached. No new demand and protest is required. Lane *v.* E. T., Va. & Ga. R. Co., 13 Lea (Tenn.), 547.

1. Commonwealth *v.* Adams, 3 Bush (Ky.), 41, 46.

A bond given by a public officer for the faithful performance of his duties is an official bond although not in the form prescribed by statute. Hubert *v.* Mendheim, 64 Cal. 213.

The bond of a deputy not prescribed by statute is a common-law bond, and should be made payable to the person for whose benefit it is executed. Lucas *v.* Shepherd, 16 Ind. 368.

2. Lyttle *v.* Cozad, 21 W. Va. 183, 199; Nash *v.* Fugate, 24 Gratt. (Va.) 202; Smith *v.* Moberly, 10 B. Mon. (Ky.) 266; Millett *v.* Parker, 2 Metc. (Ky.) 608; Deardorf *v.* Foresman, 24 Ind. 481; State *v.* Pepper, 31 Ind. 76; Passumpsic Bank *v.* Goss, 31 Vt. 318; State *v.* Peck, 53 Me. 284; State *v.* Potter, 63 Mo. 212; Dair *v.* U. S., 83 U. S. (16 Wall.) 1.

3. Howell *v.* Parsons, 89 N. Car. 230; Vanlook *v.* Barnett, 4 Dev. L. (N. Car.) 268; Moore *v.* McKinley, 60 Iowa, 367, 370; Pequawkett *v.* Mathes, 7 N. H. 230; s. c., 26 Am. Dec. 737.

Official Bond Executed in Blank.—Sureties, by executing an official bond in blank and delivering it to the principal, make him their agent and are bound by his acts and omissions. Mutual, etc., Co. *v.* Wilcox, 8 Biss. C. C. 197, 203; s. c., 4 Myers Fed. Dec. § 635, citing Dair *v.* United States, 83 U. S. (16 Wall.) 1; Butler *v.* United States, 88 U. S. (21 Wall.) 272.

To Whom an Official Bond should be Made Payable.—A bond payable to the wrong person cannot be good as an official bond. A replevin bond payable to the officer instead of the defendant was held void as a statutory bond because it did not conform to the statute, and as a common-law bond because its effect was to aid and abet a trespass. Purple *v.* Purple, 5 Pick. (Mass.) 226.

But where such a bond does not promote a violation of law or contravene public policy, it is good as a common-law bond. Johnston *v.* Meriwether, 3 Cal. 523.

In Supervisors, etc., *v.* Coffenbury, 1 Mich. 355, 358, citing United States *v.* Tingey, 30 U. S. (5 Pet.) 115, it was held that where the law required a treasurer's bond to be made payable to the county commissioner, and this office was superseded by that of supervisor, the bond should be made payable to the latter.

Where the statute requires a bond to be executed to the clerk of court "by his name of office as obligee," a bond running to "A., clerk," etc., meets the requirements. Bates *v.* Simmons, 62 Wis. 69; McNair *v.* Rewey, 62 Wis. 167.

4. Tevis *v.* Randall, 6 Cal. 632.

ments of the law. The liabilities imposed must not be in excess of those prescribed by the statute.[1]

(*d*) *General Rules of Construction.*—The general rule is that the law of the place where a contract is made governs its construction, unless the intention of the parties is that it shall be executed elsewhere.[2] But the official bond of a United States officer will always be construed as if it was executed and to be performed at Washington.[3] The liability of the obligors in an official bond is measured by its terms.[4] General terms used in an official bond must be construed with reference to the subject-matter of the bond.[5] So the conditions of a bond are limited and contracted by the recitals, although such conditions are expressed in general terms.[6] Particular words cannot be construed by the general terms set forth in the condition.[7] The construction of a bond must be reasonable.[8]

(*e*) *Approval.*—The necessity for the approval of an official

1. United States *v.* Morgan, 3 Wash. C. C. 10; Stewart *v.* Lee, 3 Cal. 364.

The addition of superfluous words, such as "shall *well* and *truly*, *faithfully*, *firmly*, and *impartially* execute and perform," for the statutory words "faithful performance of his duties" will not impose upon the principal other conditions than for the faithful performance of the duties of his office. The court held these words merely redundant, and said: "It is an error to suppose that the agreement to perform the duties of the office faithfully means merely that the incumbent will not wilfully do any wrong act. It has a stretch beyond this and is broken by a neglect, or by carelessness in discharge of the official duty, as well as by an intentional misfeasance." Mayor, etc., *v.* Evans, 31 N. J. L. 342.

Effect of Conditions More Onerous than Required by Law.—If a person voluntarily gives to an officer a bond with obligations greater than required by law, he is bound by it; but if such a bond is required by an officer of an inferior officer as a condition precedent to allowing him to enter into office, it is void so far as it imposes unlawful liabilities. Slutter *v.* Kirkendall, 100 Pa. St. 307, 312; People *v.* Reeder, 25 N. Y. 302; Burrall *v.* Acker, 23 Wend. (N. Y.) 606; s. c., 35 Am. Dec. 582. See Kings County Charities Comm'rs *v.* Hammill, 33 Hun (N. Y.), 348.

Rule where Bond does not Contain all the Statute Requires.—A bond does not lose its character as an official bond, if it contains nothing unauthorized, because it does not contain *all* that it requires. Governor *v.* Miller, 3 Dev. & Batt. (N. Car.) 55.

Irregular Expressions and Omissions.—Through omission to fill blank, obligee held as principals *and* sureties. See Cox *v.* Thomas, 9 Gratt. (Va.) 312, 316, citing Morrow *v.* Peyton, 8 Leigh (Va.), 54; Kerby *v.* Turner, 1 Hopkins Ch. (N. Y.) 309; Brazer *v.* Clark, 5 Pick. (Mass.) 96; Towne *v.* Ammidown, 20 Pick. (Mass.) 535; Clark *v.* Williams, 6 Gill. & J. (Md.) 288; Liddersdale *v.* Robinson, 2 Brock. C. C. 160; Green *v.* Hanbury, 2 Brock. C. C. 403; Luster *v.* Middlecoff, 8 Gratt. (Va.) 54; Berry *v.* Homon, 8 Gratt. (Va.) 48.

2. Hunter *v.* Potter, 4 Term, 182; Smith *v.* Smith, 2 Johns. (N. Y.) 241; Thompson *v.* Ketcham, 4 Johns. (N. Y.) 285.

3. Cox *v.* United States, 31 U. S. (6 Pet.) 172, 204.

4. Fuller *v.* Calkins, 22 Iowa, 301, 304.

5. United States *v.* Barnhardt, 17 Fed. Repr. 579.

6. Sanger *v.* Baumberger, 51 Wis. 592, citing Bell *v.* Bruen, 42 U. S. (1 How.) 169; Arlington *v.* Merricke, 2 Saund. 403; Liverpool, etc., Works *v.* Atkinson, 6 East, 507; Wardens *v.* Bostock, 2 Bos. & Pul. 175; Leadley *v.* Evans, 2 Bing. 32; Peppin *v.* Cooper, 2 Barn. & Ald. 431.

7. Crumpler *v.* Governor, 1 Dev. L. (N. Car.) 52, 59.

8. United States *v.* Lent, 1 Paine C. C. 417, 421.

Where a bond is given to secure the performance of a written contract which is attached to the bond, the bond and contract can be read together in determining the liability of the obligor. Jordan *v.* Kavanaugh, 63 Iowa, 152.

bond must be found in the statute. In some States an official approval is required as a condition precedent to its validity and to the title of the principal to his office. Such an approval is a condition required for the protection of the public, and its omission can in no instance inure to the benefit of the obligors.[1] Attempts to invalidate bonds for such reasons have usually failed.[2]

The approval or rejection of an official bond is a ministerial, not a judicial, duty, although it be coupled with discretion.[3] It is the duty of such officer to use ordinary care and prudence to protect the security and to see that the bond is valid.[4]

The approval of the bond of an officer of a private corporation must be proved like any other fact. "The fact of the possession by the bank of such a bond (cashier's bond) in due form, legally executed, and complete in every respect, the officer having been allowed to enter on his duties, is evidence which of itself will suffice to authorize a suit upon it as having been delivered, accepted, and approved with all requisite formality."[5]

(*f*) *Justification of Sureties.*—Provisions for the justification of sureties are governed wholly by local statutes. No general principle can be evolved. "The nearest approximation to such a result is that when two or more sureties are required by the law or order controlling the subject, and a sum is fixed in which the sureties are severally to justify, each of the sureties offered must swear that he is worth that sum after payment, etc.; and if one of two sureties is worth much more than the prescribed amount, his sur-

1. Mendocino Co. *v.* Morris, 32 Cal. 145; People *v.* Evans, 29 Cal. 436; People *v.* Edwards, 9 Cal. 286; McCracken *v.* Todd, 1 Kans. 148; State *v.* Shirley, 1 Ired. L. (N. Car.) 597, 606; State *v.* Wall, 2 Ired. L. (N. Car.) 267; State *v.* Pool, 5 Ired. L. (N. Car.) 105, 117.

In Young *v.* State, 7 Gill & J. (Md.) 253, 261, the court said: "Was the prescribed attestation designed for their benefit? Did it form any inducement to their entering into the contract? Assuredly not. The requisition was made solely for the benefit of others; not to limit or impair the liability of the sheriff and his securities, but to multiply the facilities by which their liability would be rendered certain. There is nothing in the nature of the contract nor in reason or justice which would give to the omission of this ceremony the effect of annihilating this bond."

2. Jones *v.* State, 7 Mo. 81, 85; s. c., 37 Am. Dec. 180. See Moore *v.* State, 9 Mo. 334.

In *Arkansas*, where it is the duty of the State treasurer to present his bond to the governor for approval, a failure to do so will not release him and his sureties from liability in case he obtains his commission and is inducted into office. Its approval is not a condition precedent to the validity of the bond. Auditor *v.* Woodruff, 2 Ark. 73; s. c., 33 Am. Dec. 368; Taylor *v.* Auditor, 2 Ark. 174.

3. Oliver *v.* Martin, 36 Ark. 134; State *v.* Lafayette County Court, 41 Mo 221.

Such discretion is confined to an examination of the sufficiency of the security offered, and is a *legal* discretion. It must not be exercised in an arbitrary or capricious manner. State *v.* Lafayette Co. Court, 41 Mo. 221.

In some States the action of the proper officer in approving or rejecting an official bond is considered a judicial act. Bay Co. *v.* Brock, 44 Mich. 45; Van Deusen *v.* Newcomer, 40 Mich. 90, 135; Raynsford *v.* Phelps, 43 Mich. 342. See Held *v.* Bagwell, 58 Iowa, 139.

4. Bracken Co. *v.* Daum, 80 Ky. 388 (erasures); Blakey *v.* Johnson, 13 Bush Ky.), 197; Hall *v.* Smith, 14 Bush (Ky.), 604; Chamberlain *v.* Breever, 3 Bush (Ky.), 561.

5. Bostwick *v.* Van Voorhis, 91 N. Y. 353; Bank of United States *v.* Dandridge, 25 U. S. (12 Wheat.) 64; Graves *v.* Lebanon Bank, 10 Bush (Ky.), 50; Morse on Banking (2d. Ed.), 235, and cases cited.

plus cannot be made available to supply the deficit of his co-surety." [1]

(*g*) *When an Official Bond becomes Operative.*—An official bond, like a deed, becomes operative from the time of its delivery.[2]

(*h*) *The Law as Part of the Contract.*—The existing law enters into and forms a part of every bond, and it has been held that the obligors in an official bond enter into their obligations in view of the possible modifications of their liability by the legislature.[3]

But the responsibility of sureties is much more limited than that of the principal. "Any substantial addition by law to the duties of the obligor of a bond after the execution of the instrument, materially enlarging his liabilities, will not impose an additional obligation upon his sureties, unless the words of the bond by a fair and reasonable construction bring such subsequently imposed duties within its provisions." But this rule has been very much weakened by judicial construction.[4]

(*i*) *Object of an Official Bond.*—The object of an official bond is to secure indemnity against the misuse of an official position. The principal and his sureties are liable for misconduct done under color of office.[5]

1. Murfree on Official Bonds, § 178; Trask *v.* Annett, 1 Demarest, 172.

2. Bryant *v.* Wood, 11 Lea (Tenn.), 327; Eberhardt *v.* Wood, 6 Lea (Tenn.), 467; s. c., 2 Tenn Ch. 490, 494; Johnson *v.* Harney, 84 N. Y. 363.

In Butler *v.* United States, 88 U. S. (21 Wall.) 272, 275, the Supreme Court of the United States held that a bond delivered to the obligee for acceptance and afterwards accepted takes effect from the date of the delivery. "A bond may not be a complete contract until it has been accepted by the obligee; but if it has been delivered to him to be accepted if he should choose to do so, that is not a conditional delivery which will postpone the obligor's undertaking to the time of its acceptance, but an admission that the bond is then binding upon him, and will be so from that time if it should be accepted."

Deeds speak from their delivery—*traditio loqui facit chartam.* Clayton's Case, 1 Coke, 1; Ozkey *v.* Hicks, Cro. Jac. 263; Steele *v.* Mart, 4 Barn & C. 272.

When Delivered.—A postmaster's bond speaks from the time of its approval by the postmaster-general. United States *v.* LeBaron, 60 U. S. (19 How.) 73, 79; s. c., 4 Myers Fed. Dec. §§ 256, 257, 261.

A sheriff's bond takes effect when approved by the county court. Bruce *v.* State, 11 Gill & J. (Md.) 382.

An exception is found in the case of a collector's bond, which is deemed to be delivered when put in course of transmission to the controller of the treasury. Broome *v.* United States, 56 U. S. (How. 15) 143.

3. United States *v.* Gunssen, 2 Woods C. C. 99; s. c., 4 Myer's Fed. Dec. § 279. See Postmaster-General *v.* Munger, 2 Paine C. C. 189; Boody *v.* United States, 1 Woodb. & M. 150; Pybus *v.* Gebb, 6 El. & Bl. 903; s. c., 88 Eng. Com. Law, 910; People *v.* Vilas, 36 N. Y. 459; Broome *v.* United States, 56 U. S. (15 How.) 157; Converse *v.* United States, 62 U. S. (21 How.) 463.

4. United States *v.* Powell, 81 U. S. (14 Wall.) 493; White *v.* Fox, 22 Me. 341; People *v.* Vilas, 36 N. Y. 459; United States *v.* Hodson, 77 U. S. (10 Wall.) 406; Lionberger *v.* Krieger (Mo.), 14 Am. & Eng. Corp. Cas. 87.

5. People *v.* Treadway, 17 Mich. 480.

What is an Official Act.—See McNutt *v.* Livingston, 15 Miss. (16 Smed & M.) 641.

An action can be sustained against a sheriff on his official bond only for causes arising out of the performance or non-performance of ministerial duties. No such action can be maintained for a failure to protect the plaintiff from the violence of a mob. South *v.* Maryland, 59 U. S. (18 How.) 396, 403, citing Entick *v.* Carrington, 19 State Trials, 1062.

Acts Done under Color of Office.—The sureties on the bond of an officer are not liable for money obtained from a party by the officer on the pretence of having an execution when he had not. This

(*j*) *Cumulative Bonds.*—In some States officers whose terms of office extend over several years are required to give a new bond

was held not an act done under color of office. Commonwealth *v.* Cole, 7 B. Mon. (Ky.) 250.

Seizing goods of a surety without having used proper exertions to get the money from the principal, as required by law to do, is an act done under color of office, for which the sureties on the official bond of the officer are liable. State *v.* Drnly, 3 Ind. 431.

Where a constable seized goods under color of process which he had no legal right to execute, the sureties were held responsible. The court said: "He therefore took the goods *colore officii*, and though he had no sufficient warrant for taking them, yet he is responsible to third persons, because such taking was a breach of his official duty." City of Lowell *v.* Parker, 10 Metc. (Mass.) 309, 314; s. c., 43 Am. Dec. 436; Grinnell *v.* Philips, 1 Mass. 530.

Sureties held for money collected by a tax collector which the taxpayers were under no obligation to pay. Fuller *v.* Calkins, 22 Iowa, 301, citing Gilbert *v.* Isham, 16 Conn. 525; Warren Co. *v.* Ward, 21 Iowa, 84.

The whole question of the liability of officers and their sureties on official bonds for acts done under color of office was fully discussed in Lammon *v.* Feusier, 111 U.S. 17, 22; s.c., 4 Sup. Ct. Rep. 286. This was an action on the bond of a United States marshal for attaching the property of one person for the debt of another. Mr. Justice Gray said: "The marshal in serving a writ of attachment on mesne process which directs him to take the property of a particular person acts officially. His official duty is to take the property of that person, and of that person only, and to take only such property of his as is subject to be attached, and not property exempt by law from attachment. A neglect to take the attachable property of that person and a taking upon the writ of the property of another person, or of property exempt from attachment, are equally breaches of his official duty. The taking of the attachable property of the person named in the writ is rightful; the taking of property of another person is wrongful; but each, being done by the marshal in executing the writ in his hands, is an attempt to perform his official duty, and is an official act. A person other than the defendant named in the writ, whose property is wrongfully taken, may indeed sue the marshal, like any other wrongdoer, in an action of trespass to recover damages for the wrongful taking; and neither the official character of the marshal nor the writ of attachment affords him any defence to such an action. Day *v.* Gallup, 2 Wall. (U. S.) 97; Buck *v.* Colbath, 3 Wall (U.S.) 334. But the remedy of a person whose property is wrongfully taken by the marshal in officially executing his writ is not limited to an action against him personally. His official bond is not made to the person in whose behalf the writ is issued, nor to any other individual, but to the government for the indemnity of all persons injured by the official misconduct of himself or his deputies (United States *v.* Moore, 2 Brock. C. C. 317), and his bond may be put in suit by and for the benefit of any such person. When a marshal upon a writ of attachment on mesne process takes property of a person not named in the writ the property is in his official custody and under the control of the court, whose officer he is and whose writ he is executing; and according to the decisions of this court the rightful owner cannot maintain an action of replevin against him nor recover the property specifically in any way except in the court from which the writ issued. Freeman *v.* Howe, 24 How. (U. S.) 450; Krippendorf *v.* Hyde, 110 U. S. 276. The principles upon which those decisions are founded is, as declared by Mr. Justice Miller in Buck *v.* Colbath, 3 Wall. (U. S.) 341, above cited, 'that whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered as in the custody of the court and under its control for the time being; and that no other court has a right to interfere with that possession unless it be some court which may have a direct supervisory control over the court whose process has first taken possession or some superior jurisdiction in the premises.' Because the law had been so settled by this court the plaintiff in the case failed to maintain replevin in the courts of the State of Nevada against the marshal for the very taking which is the ground of this action. Feusier *v.* Lammon, 6 Nev. 209. For these reasons the court is of opinion that the taking of goods upon a writ of attachment into the custody of the marshal, as the officer of the court that issues the writ, is, whether the goods are the property of the defendant in the writ or of

annually. These new bonds operate as additional security for new duties, and do not relieve the sureties on the previous bonds from liability as originally intended.[1]

(*k*) *Successive Bonds—Substitute Bonds.*—Sureties are not liable for the default of their principal before the execution of their bond; but when an officer is reappointed and gives a new bond his sureties are liable for the amount of money shown by his

any other person, an official act, and therefore, if wrongful, a breach of the bond given by the marshal for the faithful performance of the duties of his office. Upon the analogous question whether the sureties upon the official bond of a sheriff, a coroner, or a constable are responsible for his taking, upon a writ directing him to take the property of one person, the property of another, there has been some difference of opinion in the courts of the several States. The view that the sureties are not liable in such a case has been maintained by the supreme courts of *New York*, *New Jersey*, *North Carolina*, and *Wisconsin*, and perhaps receives some support from decisions in *Alabama*, *Mississippi*, and *Indiana*. *Ex parte* Reed, 4 Hill (N. Y.), 572; People *v.* Schuyler, 5 Barb. (N. Y.) 166; State *v.* Conover, 4 Dutch. (N. J.) 224; Sate *v.* Long, 8 Ired L. (N. Car.) 415; State *v.* Brown, 11 Ired. L. (N. Car.) 141; Gerber *v.* Ackley, 32 Wis. 233; s. c., 37 Mo. 43; s.c., 19 Am. Rep. 751; Governor *v.* Hancock, 2 Ala. 728; McElhaney *v.* Gilleland, 30 Ala. 183; Brown *v.* Mosely, 11 S. M.& Marsh. (Miss.) 354; Jenkins *v.* Lemonds, 29 Ind. 294; Carey *v.* State, 34 Ind. 105. But in People *v.* Schuyler, 4 N. Y. 173, the judgment in 5 Barb 166 was reversed, and the case of *Ex parte* Reed, 4 Hill (N.Y.), 572 overruled by the majority of the New York Court of Appeals, with the concurrence of Chief Justice Bronson, who had taken part in deciding Reed's case. The final decision in People *v.* Schuyler has been since treated by the Court of Appeals as settling the law upon this point. Mayor, etc., of New York *v.* Sibberns, 3 Abb. App. Dec. 266; s. c., 7 Daly (N.Y.), 436; Cummings *v.* Brown, 43 N. Y. 514; People *v.* Comstock, 93 N. Y. 585. And the liability of the sureties in such cases has been affirmed by a great preponderance of authority, including decisions in the highest courts of *Pennsylvania*, *Maine*, *Massachusetts*, *Ohio*, *Virginia*, *Kentucky*, *Missouri*, *Iowa*, *Nebraska*, *Texas*, and *California*, and in the Supreme Court of the *District of Columbia*. Cormack *v.* Commonwealth, 5 Binn. (Pa.) 184; Bennett *v.* McKee, 6 W. & S. (Pa.) 513; Archer *v.* Noble, 3 Greenl. (Me.) 418; Harris *v.* Hanson, 2 Fairf. (Me.) 243; Greenfield *v.* Wilson, 13 Gray (Mass.), 384; Tracy *v.* Goodwin, 5 Allen (Mass.), 409; Sangester *v.* Commonwealth, 17 Gratt. (Va.) 124; Commonwealth *v.* Stockton, 5 T. B. Mon. (Ky.) 192; Jewell *v.* Mills, 3 Bush (Ky.), 72; State *v.* Moore, 19 Mo 369; State *v.* Fitzpatrick, 64 Mo. 185; Charles *v.* Haskins, 11 Iowa, 329; Turner *v.* Killian, 12 Neb. 580; Hollimon *v.* Carroll, 27 Tex. 23; Van Pelt *v.* Littler, 14 Cal. 194. In State *v.* Jennings, 4 Ohio St. 418, Chief Justice Thurman said: 'The authorities seem to us quite conclusive that the seizure of the goods of A under color of process against B is official misconduct in the official making the seizure, and is a breach of the condition of his official bond where that is that he will faithfully perform the duties of his office. The reason for this is that the trespass is not the act of a mere individual, but is perpetrated *colore officii*. If an officer under color of a *fi. fa.* seizes property of the debtor which is exempt from execution, no one, I imagine, would deny that he had broken the condition of his bond. Why should the law be different if, under color of the same process, he takes the goods of a third person? If the exemption of the goods from the execution in the one case make the seizure official misconduct, why should it not have the same effect in the other? True, it may sometimes be more difficult to ascertain the ownership of the goods than to know whether a particular piece of property is exempt from execution; but this is not always the case, and if it were it would not justify us in restricting to litigants the indemnity afforded by the official bond, thus leaving the rest of the community with no other indemnity against official misconduct than the responsibility of the officer might furnish.'" See People *v.* Lucas, 93 N. Y. 585, reversing People *v.* Lucas, 25 Hun (N. Y.), 610.

1. Poole *v.* Cox, 9 Ired. L. (N. Car.) 65, 71, citing Oats *v.* Bryan, 3 Dev. L. (N. Car.) 451; Bell *v.* Jasper, 2 Ired. Eq. (N. Car.) 597.

books to be on hand. He is presumed to have the amount charged to him, and the burden of proving the contrary is upon the sureties.[1]

(*l*) *Bond of De Facto Officer.*—If a party who is ineligible to an office nevertheless gets appointed, gives a bond, and enters upon the performance of the duties of the office, his sureties are responsible for his acts as upon a common-law bond.[2]

(*m*) *Liability of an Officer for Public Money.*—A receiver of public money is liable, *virtute officii*, in the absence of contract, only as an ordinary bailee. But if he executes a penal bond in which he binds himself to perform the duties of his office without exception, he becomes an insurer. The contract, not the law, makes such an officer an insurer.[3]

The rule making the depositary of public money who has given a bond an insurer has been materially modified by excepting

1. Bruce *v.* United States, 58 U. S. (17 How.) 437, 443; s. c., 4 Myers Fed. Dec. § 522; United States *v.* Stone, 106 U. S. (16 Otto) 525; United States *v.* Eckford, 42 U. S. (1 How.) 250.

Whether new bonds required by statute are supplemental, cumulative, and additional, or substitutes for old bonds, is often a difficult question. It depends chiefly on the language of the statute. Where from a fair construction the intent seems to be to furnish a substitute for the old bond, the sureties on the old bond are released by the execution of the new. United States *v.* Wardwell, 5 Mason C. C. 82, 85.

Apportionment of Payments.—It is a well-settled rule that where there are several different accounts the debtor may elect to which account he will apply payments; if he fails to do so, the creditor has a like option; and if he fails to act, the law will adjust the several payments. It has been held by the Supreme Court of the United States that this rule did not apply to the case where the receiver is a public officer, where the payments are indiscriminately made, and where there are different sureties liable under distinct obligations. "It will be generally admitted that moneys arising, due, and collected subsequently to the execution of the second bond, cannot be applied to the discharge of the first bond without manifest injury to the surety on the second bond, and *vice versa*." United States *v.* January, 11 U. S. (7 Cranch) 575. See United States *v.* Nicholl, 25 U. S. (12 Wheat.) 505; Myers *v.* United States, 1 McLean C. C. 493, 498. *Compare* United States *v.* Wardwell, 5 Mason C. C. 82, 87, citing Clayton's Case, 1 Meriv. 572, 604, 608; Bodenham *v.* Purchos, 2 Barn. & Ald. 39; Simson *v.* Cooke, 1 Bing. 452; Simson *v.* Ingham, 2 Barn. & Cr. 65.

It is the failure to perform his duty, not the receipt of money, which fixes the liability of the sureties on an official bond. Commissioners *v.* McCormick, 4 Montana, 115.

Where there is no evidence of when the default occurred the court will apportion the loss among the sureties for each year in proportion to the sums of money collected that year. Inhabitants of Phipsburg *v.* Dickinson (Me.), 7 Atl. Repr. 9.

2. Commonwealth *v.* Teal, 14 B. Mon. (Ky.) 29; Green *v.* Wardwell, 17 Ill. 278; Corbett *v.* Carroll, 5 Ala. 315; State *v.* Cooper, 53 Miss. 615; Jones *v.* Scanland, 6 Humph. (Tenn.) 195; s.c., 44 Am. Dec. 300, citing State *v.* Maurice, 2 Brock. C. C. 97, 113. See also State *v.* Wells, 8 Nev. 105; State *v.* Rhoades, 6 Nev. 352. See Ford *v.* Clough, 8 Me. 334.

"An officer *de facto* is one who has the reputation of being the officer he professes to be, but is not a good officer in point of law." Parker *v.* Kelt, 1 Ld. Raymond, 658; The King *v.* Corporation of Bedford Level, 6 East, 368.

In a suit upon the bond of a *de facto* officer neither he nor his sureties can be heard to allege that he was not an officer *de jure;* they are estopped to deny their liability on the bond. Lionberger *v.* Krieger (Mo.), 14 Am. & Eng. Corp. Cas. 87; Commonwealth *v.* Teal, 14 B. Mon. (Ky.) 29; Sprowl *v.* Lawrence, 33 Ala. 674; Williamson *v.* Woolf, 37 Ala. 296.

3. Boyden *v.* United States, 80 U. S. (13 Wall.) 17, 25; The Harriman, 76 U. S. (9 Wall.) 161; United States *v.* Dashiel, 71 U. S. (4 Wall.) 182; United States *v.* Prescott, 44 U. S. 578; Muzzy *v.* Shattuck, 1 Denio (N. Y.), 233; Common-

cases arising from overruling force or the act of a public enemy.[1]

(*n*) *Liability for Stolen Money.*—In many States officers charged with the custody of public funds are held to the same liability as a bank which receives a deposit. They become debtors from the receipt of the money, and the loss of the fund by robbery is no excuse for non-payment.[2]

But in other States the officer may prove as a defence to an action on his bond that the money was stolen from him without any fault or negligence on his part.[3]

(*o*) *Retrospective and Retroactive Laws.*—The acts of an officer cannot be made official by a statute passed after the acts are performed, although it may purport to explain an antecedent law.[4]

(*p*) *Bond of an Annually Appointed Officer.*—The sureties on the official bond of an officer appointed annually are liable only for his official acts during the year.[5]

2. OFFICIAL BONDS OF WHICH THE UNITED STATES IS THE BENEFICIARY.—(*a*) *Power of the United States to Require Bonds from its Officers and other Persons.*—The United States may be

wealth *v.* Comly, 3 Pa. St. 372; State *v.* Harper, 6 Ohio St. 607.

1. United States *v.* Thomas, 82 U. S. (15 Wall.) 337; s. c., 4 Myers Fed. Dec. 337, citing the following authorities: It is no defence to an action on an official bond that the money was stolen. United States *v.* Prescott, 44 U. S. (3 How.) 578; United States *v.* Dashiel, 71 U. S. (4 Wall.) 182. Or that the money was lost by shipwreck during lawful transportation. United States *v.* Humason, 6 Sawy. C. C. 199. Or that it was taken from him by force. Bevans *v.* United States, 80 U. S. (13 Wall.) 56. Or that it was lost through the failure of a bank in which he had deposited it, although the bank may have been selected by the government. United States *v.* Freeman, 1 Woodb. & M. C. C. 45. Or that it was paid to a creditor of the government, that not being part of his official duty. United States *v.* Keehler, 76 U. S. (9 Wall.) 83.

2. Com. Bank *v.* Hughes, 17 Wend. (N. Y.) 100; Muzzy *v.* Shattuck, 1 Denio (N. Y.), 233; Supervisors *v.* Door, 7 Hill (N. Y.), 584, note; United States *v.* Prescott, 44 U. S. (3 How.) 578.

3. Ross *v.* Hatch, 5 Iowa, 149.

4. McKee *v.* Griffin, 66 Ala. 211.

5. Moss *v.* State, 10 Mo. 338, 339.

Where a sheriff who gave a bond as such was *ex officio* tax collector, and was required to give bond annually as such, it was held that the bond as tax collector fell within the principle which limits the responsibility of sureties of officers elected annually; that the liability on the bond as tax collector, although the words of the condition were general, could not be extended beyond the year. Moss *v.* State, 10 Mo. 338.

Liability of Sureties when Principal Holds Office until his Successor is Elected.—The sureties of an officer who is chosen annually and to hold office until his successor is "chosen and qualified in his stead" are bound only for the year for which he was chosen, and for a time reasonably sufficient for the election and qualification of his successor. Chelmsford Co. *v.* Demarest, 7 Gray (Mass.), 1; Bigelow *v.* Bridge, 8 Mass. 275; Welch *v.* Seymour, 28 Conn. 387; County of Wappello *v.* Bingham, 10 Iowa, 40; Dover *v.* Twombly, 42 N. H. 59; Moss *v.* State, 10 Mo. 338; State Treasurer *v.* Mann, 34 Vt. 371; Mayor *v.* Horn, 2 Harr. (Del.) 190; Insurance Co. *v.* Smith, 2 Hill (S. Car.), 590; s. c., Society *v.* Johnson, 1 McCord (S. Car.), 41; s. c., 10 Am. Dec. 644; Committee, etc., *v.* Greenwood, 1 Desau. (S. Car.) 450; Insurance Co. *v.* Clark, 33 Barb. (N. Y.) 196; Patterson *v.* Inhabitants of Freehold, 38 N. J. L. 255; Harris *v.* Babbitt, 4 Dill. C. C. 185, 194; s. c., 4 Myers Fed. Dec. §§ 588, 589. *Compare* State *ex rel. v.* Berg, 50 Ind. 496; Thompson *v.* State, 37 Miss. 518; Placer Co. *v.* Dickerson, 45 Cal. 12; State *v.* Daniels, 6 Jones L. (N. Car.) 444. See Murfree on Official Bonds, § 225. As to meaning of "qualified," see Fresno Enterprise Co. *v.* Allen (Cal.), 10 Am. & Eng. Corp. Cas. 344, 346.

a party to a negotiable bond, and it may, in its official capacity, without an enabling statute, take a bond from any person dealing with it for the faithful discharge of his duties.[1] The "United States, being a body politic, may within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which these powers are confided, enter into contracts not prohibited by law and appropriate to the just exercise of those powers." But such a bond must be voluntarily given; for if a bond which is not required by law is demanded by a superior officer from an inferior as a condition precedent to entering upon his duties, it is extorted under color of office and is illegal and void.[2]

(*b*) *Of whom Bonds are Required by the United States.*—No bonds are required from political, military, naval, or judicial officers, except in the case of military and naval officers who have control of public property or money, such as paymasters, quartermasters, and pursers.[3] All officers charged with the collection, care, and disbursement of the public money, such as collectors of customs, naval officers (customs), naval storekeepers, and all officers who may become indebted to the United States, must give bond with approved sureties.[4] The same is true of all ministerial officers of justice, such as marshals and clerks of federal courts;[5] of all treasurers and subtreasurers charged with the disbursement of the public money;[6] all collectors of internal revenue, gaugers, and storekeepers;[7] all postmasters, whether male or female, married or single;[8] registers and receivers of land offices;[9] surveyor gen-

1. Postmaster-General *v.* Rice, Gilp. (U. S.) 554.

The irregularity of an officer's appointment does not in any way absolve him from legal obligation to account for public money in his hands. United States *v.* Maurice, 2 Brock. C. C. 96.

2. United States *v.* Tingey, 30 U. S. (5 Pet.) 115, 128; s. c., 4 Myers Fed. Dec. §§ 183, 184, 191, 200, 632. See Dugan *v.* United States, 16 U. S. (3 Wheat.) 172.

The Postmaster-General may take bonds from his deputies to secure the faithful performance of their duties. Postmaster-General *v.* Early, 12 Wheat. (U. S.) 136.

The United States may take a common-law bond and enforce the same. United States *v.* Linn, 40 U. S. (15 Pet.) 290; United States *v.* Hodson, 77 U. S. (10 Wall.) 395. See Jessup *v.* United States, 106 U. S. 147.

Execution, Delivery, and Acceptance.—All bonds in which the United States is the beneficiary are supposed to be executed at Washington. The law of the *lex loci* in this respect is immaterial; consequently State laws as to seals cannot affect such bonds. By the custom and usage of the goverment a scrawl for a seal is sufficient. United States *v.* Stephenson, 1 McLean C. C. 462, 466; s. c., 4 Myers Fed. Dec. § 233; Cox *v.* United States, 31 U. S. (6 Pet.) 172, 204; Duncan *v.* United States, 32 U. S. (7 Pet.) 435, 452.

The same rules govern the signing, delivery, and acceptance of bonds given to the United States as like bonds given to private persons. Acceptance may be presumed, but it is a fact for a jury. Postmaster-General *v.* Norvill, Gilpin (U. S.), 105.

3. U. S. Rev. Stat. 191; United States *v.* Kirkpatrick, 22 U. S. (9 Wheat.) 720; United States *v.* Van Zandt, 24 U. S. (11 Wheat.) 184; Dox *v.* Postmaster-General, 26. U. S. (1 Pet.) 325; United States *v.* Linn, 40 U. S. (15 Pet.) 290.

4. U. S. Rev. Stat. §§ 2619, 1415.

5. U. S. Rev. Stat. §§ 783, 794. See Gwin *v.* Breedlove, 43 U. S. (2 How.) 29; Gwin *v.* Barton, 47 U. S. (6 How.) 7.

6. U. S. Rev. Stat. §§ 302, 3600.

7. U. S. Rev. Stat. §§ 3143, 3156, 3153.

8. U. S. Rev. Stat. § 3834.

9. U. S. Rev. Stat. § 2236.

erals and deputy surveyor-generals of land ;[1] and generally all persons connected with the United States government, except political, judicial, military, and naval officers, with the exceptions above enumerated, must give bond for the faithful performance of their duties. This includes all who have pecuniary transactions with the government. Importers of foreign merchandise must give bonds for the delivery at a foreign port for goods imported and re-exported.[2] Frauds against the internal revenue are guarded against by requiring bonds from brewers, distillers, tobacco manufacturers, and others.[3]

(*c*) *Extraneous Matter.*—Official bonds are void in so far as they contain conditions in excess of the requisitions of the statute. Consequently the bond of a collector of public money which includes the pre-existing indebtedness of the collector to the United States, the terms of the statute being prospective, is void as to such extraneous matter.[4]

(*d*) *Retroactive Clauses.*—The general rule is that a retroactive clause in a bond, not authorized by statute, is void.[5] But there are exceptions to the rule.[6]

(*e*) *Laches.*—Immunity against *laches* is a prerogative which operates in favor of the United States, except in those cases where it has been limited by special statutes. There are numerous statutes limiting the period within which actions may be maintained on official bonds payable to the United States.[7] The United States government is not responsible for the *laches* of its officers to whom the enforcement of its obligations is intrusted. "The utmost vigilance would not save the public from the most serious losses, if the doctrine of *laches* can be applied to its transactions. It would in effect work a repeal of all its sureties."[8]

(*f*) *Priority of Payment by Debtor.*—Debts due the United States are entitled to priority of payment out of the estate of a deceased or insolvent debtor.[9] "The same right of priority which belongs to the government attaches to the claim of an individual who, as surety, has paid money to the government."[10]

1. U. S. Rev. § 2216.

2. U. S. Rev. Stat. §§ 4145, 4306, 4317, 4320, 4328.

3. U. S. Rev. Stat. §§ 3260, 3336, 3355; United States *v.* Hodson, 77 U. S. (10 Wall.) 395; United States *v.* Powell, 81 U. S. (14 Wall.) 493.

4. Armstrong *v.* United States, 1 Pet. C. C. 46.

5. United States *v.* Brown, Gilpin (U.S.), 155; Purple *v.* Purple, 5 Pick. (Mass.) 226.

6. 1 Stat. at Large (U. S.), 705; 5 Stat. at Large, 661; United States *v.* Ellis, 4 Sawy. C. C. 590, 592.

The sureties on the bond of a postmaster are responsible for his obedience to all laws enacted, and all orders issued, relating to his duties up to the last day of his term. Boody *v.* United States, 1 Woodb. & M. C. C. 150, 171. See United States *v.* Powell, 81 U. S. (14 Wall.) 493.

7. Suits for penalties or forfeitures, U. S. Rev. Stat. § 1047; on bond of postmaster, U. S. Rev. Stat. § 3838; marshal's bond, U. S. Rev. Stat. § 786.

8. Dox *v.* Postmaster-General, 26 U. S. (1 Pet.) 318, citing United States *v.* Van Zandt, 24 U. S. (11 Wheat.) 184; United States *v.* Kirkpatrick, 22 U. S. (9 Wheat.) 720.

9. U. S. Rev. Stat. §§ 3466, 3468.

10. Hunter *v.* United States, 30 U. S. (5 Pet.) 173. See also United States *v.* Boyd, 46 U. S. (5 How.) 29.

Construction of Priority Statutes.—United States *v.* Fisher, 6 U. S. (2 Cranch) 358; United States *v.* Hooe, 7 U. S. (3

(*g*) *Set-offs against the United States in Actions on Official Bonds.*—No claims, credits, or set-offs can be used as defences to an action by the United States against a public debtor, except such as have been duly presented for allowance to the proper officers and rejected by them.[1]

3. BONDS OF STATE, COUNTY, AND MUNICIPAL OFFICERS.—The ministerial and executive officers of States, counties, townships, and municipalities are almost universally required to give bond for the faithful discharge of their duties. Statutes providing for the execution of such bonds are usually directory only, and a failure to furnish the bond immediately as provided by the statute does not work a forfeiture of the office.[2]

Cranch) 73; Prince *v.* Bartlett, 12 U. S. (8 Cranch) 431, 434; United States *v.* Howland, 17 U. S. (4 Wheat.) 108; Conard *v.* Atlantic, etc., Co., 26 U. S. (1 Pet.) 386; United States *v.* Hack, 33 U. S. (8 Pet.) 271.

Existing Liens Superior to the Priority of Payment in Favor of the United States.—Brent *v.* Bank of Washington, 35 U. S. (10 Pet.) 596.

Bankrupt Law as Affecting Priority.—Lewis *v.* United States, 92 U. S. (2 Otto) 618.

Demands of the United States against insolvent national banks are not entitled to priority. Daviess *v.* Fairbairn, 44 U. S. (3 How.) 636; United States *v.* Tynen, 78 U. S. (11 Wall.) 88; Cook County National Bank *v.* United States, 107 U. S. (17 Otto) 445.

1. United States *v.* Lent, 1 Paine C. C. 417; United States *v.* Smith, 1 Bond C. C. 68; United States *v.* Giles, 13 U. S. (9 Cranch) 212; Cox *v.* United States, 31 U. S. (6 Pet.) 172; Halliburton *v.* United States, 80 U. S. (13 Wall.) 63.

This rule does not apply where the claim is for payment made by a surety after the death of his principal, as part satisfaction of the default sued upon. Cox *v.* United States, 31 U. S. (6 Pet.) 172

Jurisdiction.—The proper place for bringing an action on a bond given to the United States is the federal courts. Wetmore *v.* Rice, 1 Biss. C. C. 237; Sperring *v.* Taylor, 2 McLean C. C. 362. See also Adler *v.* Newcomb, 2 Dill. C. C. 45.

Liability of Sureties.—A surety on an official bond is not discharged by fraud on the part of the principal or negligence on the part of the government. Ryan *v.* United States, 86 U. S. (19 Wall.) 514; Osborn *v.* United States, 86 U. S. (19 Wall.) 577.

Sureties are not liable for past defaults unless made so by the terms of the bond. They are liable only for money in the hands of the principal at the time the bond became operative. Farrar *v.* United States, 5 Pet. (U. S.) 373. The responsibility is limited only to such money as is actually received by the principal or his authorized agent during the life of the bond. Bryan *v.* United States, 66 U. S. (1 Black) 140. See United States *v.* Spencer, 2 McLean C. C. 265.

2. Smith *v.* Cronkhite, 8 Ind. 134; State *v.* Finley, 10 Ohio, 51.

Failure to file bond may, by provision of statute, create *ipso facto* a vacancy. People *v.* Taylor, 57 Cal. 620. A statute making the filing of a bond a condition precedent to entering upon an office is constitutional. Cooley Const. Lim. (5th Ed.) 78; Sprowl *v.* Lawrence, 33 Ala. 674; Hyde *v.* State, 52 Miss. 665.

The failure on the part of a person who has been elected to an office to file an official bond under the time required by statute does not of itself and *ipso facto* vacate the office. It is a cause of forfeiture, but not a forfeiture. A vacancy must be declared by the proper officers and in the proper manner. State *v.* Laughton (Nev.), 9 Am. & Eng. Corp. Cas. 79, note; Knottman *v.* Ayer, 3 Strob. (S. Car.) 92; People *v.* Hopson, 1 Denio (N. Y.), 574; Weeks *v.* Ellis, 2 Barb. (N. Y.) 320; Cronin *v.* Gundy, 16 Hun (N. Y.), 520; Foote *v.* Stiles, 57 N. Y. 399; Sprowl *v.* Lawrence, 33 Ala. 674. But see Beebe *v.* Robinson, 52 Ala. 71; State *v.* Toomer, 7 Rich. (S. Car.) 216; Treasurer *v.* Stevens, 2 McCord (S. Car.), 107. See also Crawford *v.* Howard, 9 Ga. 314.

The State may waive the cause of forfeiture arising from failure to file bond. State *v.* Toomer, 7 Rich. (S. Car.) 216.

An officer cannot legally act in his official capacity until he has qualified as required by statute. Rounds *v.* Mans-

Judicial officers are generally exempt from the necessity of giving a bond, but in some of the States justices of the peace are required to execute a bond.[1] A justice is not, however, liable upon his bond as a judicial officer, but he and his sureties are liable for fraud, negligence, or other misdemeanor in any part of his duty which is of an executive or ministerial nature.[2]

Suits on bonds executed by an officer of a State are usually brought in the name of the State "upon the relation of" or "to the use of" the party injured. It is not necessary to obtain the permission of the State before bringing suit on an official bond payable to the State, but there "is no doubt that it is incumbent on the party suing on the bond to show that he has an interest in it before he could recover in a regular trial prosecuted to verdict."[3]

4. BONDS REQUIRED IN COURSE OF JUDICIAL PROCEEDINGS. —Bonds of this class differ from ordinary official bonds in that they are intended for the benefit of the particular person named, and not for the public generally. They are more definite in their terms, conditions, and operation. They are made for the particular occasion, and are rarely of a continuing character.[4]

field, 38 Me. 586; Rounds *v.* Bangor, 46 Me. 541. His salary does not begin to run until he is legally qualified. Jump *v.* Spence, 28 Md. 1.

1. Rev. Stat. Ind. (1881) § 1421; Laws of Iowa (1873), §§ 674, 678; Th. & S. Code (Tenn.), § 5004.

2. Murfree on Official Bonds, § 314; Kress *v.* State, 65 Ind. 106.

Liability of Justices of the Peace on their Official Bond.—It was held in *Indiana* in 1852 that a justice of the peace who acted in an oppressive, illegal, and corrupt manner was liable on his bond to injured party. State *v.* Flinn, 3 Blackf. (Ind.) 72. See also Poulk *v.* Slocum, 3 Blackf. (Ind.) 421; State *v.* Littlefield, 4 Blackf. (Ind.) 129; Barkeloo *v.* Randall, 4 Blackf. (Ind.) 476; s. c., 32 Am. Dec. 46; Noel *v.* State, 6 Blackf. (Ind.) 523; Weaver *v.* State, 8 Blackf. (Ind.) 563.

In Dietrichs *v.* Schaw, 43 Ind. 175, which was an action for false imprisonment, it was held that judicial officers "are not liable for mistakes of judgment or erroneous decisions; but they are liable for trespasses committed under color of judicial authority, where they have no jurisdiction over the parties in the subject-matter."

In Widener *v.* State, 45 Ind. 244, it was held that an action could be sustained on the official bond of a justice for money received by him in payment of a note where no suit was commenced.

In *Iowa* the primary object of a justice's bond is to secure the proper application of money which may come into his hands. Latham *v.* Brown, 16 Iowa, 118. But it has been held in that State that a justice and his sureties are liable for wrongs done under color of office through favor, fraud, or partiality. Cowing *v.* Cowgill, 12 Iowa, 495.

3. State *v.* Norwood, 12 Md. 177.

"The laws which provide for the execution of bonds similar to the one before us do not require them for the purpose of protecting the rights of the State alone. They are also designed to secure the faithful performance of official duties, in the discharge of which individuals and corporations have a deep interest, and therefore they should have the privilege of suing upon such bonds for injuries sustained by them through the negligence and mal-conduct of the officers." State *v.* Norwood, 12 Md. 177. See also Kersted *v.* State, 1 Gill & J. (Md.) 248; McMechen *v.* Mayor, etc., 2 Harr. & J. (Md.) 41; Ing *v.* State, 8 Md. 294; State *v.* Dorsey, 3 Gill & J. (Md.) 75; Laureson *v.* State, 7 Harr. & J. (Md.) 339; Corporation *v.* Young, 10 Wheat. (U. S.) 406.

4. "They are all required by positive law; their substance, if not their form, is prescribed by statute; they are executed either by the express orders and under the actual supervision of a court of record, or else under the requisition of an officer of the law; their custody is under the control of the court; their sufficiency is adjudicated in the manner prescribed by statute; if not technically, they are practically a part of the record; their beneficiaries are either parties to

(*a*) *Attachment Bonds.*—In most of the States the plaintiff is required to give a proper bond before an attachment will be issued, conditioned that he will prosecute his suit with effect, or pay all damages which the defendant may suffer by reason of the wrongful suing and of the attachment. It is not necessary in an action on an attachment bond to show that the process was sued out maliciously; it is sufficient if it was wrongful and unwarranted by the law under the actual circumstances of the case.[1]

In an action on an attachment bond, the measure of damages is the actual loss or injury suffered, including all costs and expenses.[2]

An attachment bond inures only to the benefit of the defendant, and no action will lie on it for the benefit of a stranger.[3] Several obligees in an attachment bond may maintain a joint

the cause in which they are filed, or officers of the courts." Murfree on Official Bonds, § 409.

1. Wilson *v.* Outlaw, Minor (Ala.), 367; Tallant *v.* Burlington & Co., 37 Iowa, 261; Seay *v.* Greenwood, 21 Ala. 491; Dunning *v.* Humphrey, 24 Wend. (N. Y.) 31; Williams *v.* Hunter, 3 Hawks (N. Car.), 545; s. c., 14 Am. Dec. 507.

In *Alabama* it has been held that where an attachment was issued upon just grounds and afterwards vacated for informality, damages could not be recovered in an action on the bond. Sharpe *v.* Hunter, 16 Ala. 765.

An abandonment or failure to prosecute the action with effect is not of itself sufficient cause for an action on the bond; the process must have been wrongfully procured. Smith *v.* Story, 4 Humph. (Tenn.) 169; Pettitt *v.* Mercer, 8 B. Mon. (Ky.) 51.

In *Louisiana*, "if the plaintiff in an attachment voluntarily abandon it, he renders himself and his sureties responsible in damages; and if it be set aside by order of the court, it is *prima-facie* evidence that it was wrongfully issued, and that damages to some extent have been sustained." Cox *v.* Robinson, 2 Rob. (La.) 313, 318.

In *Indiana* it is held that "if the attachment proceedings are wrongful and oppressive, that gives the defendant a right of action, whether the plaintiff has a good cause for his main action or not, or whatever may be the result of the principal action." Harper *v.* Keys, 43 Ind. 220.

The sureties upon a bond to dissolve an attachment conditioned that the defendant will perform the judgment of the court in the action in which the attachment issued are absolutely liable without reference to the question whether the attachment was rightfully or wrongfully issued. Ferguson *v.* Glidewell (Ark.), 2 South. Rep. 711.

In an attachment suit the officer released the property from custody upon a bond in the following language: "We, J. B., as principal, and J. H., as surety, bind ourselves to pay F. & B. $492, unless the said J. B. shall satisfy any judgment which may be recovered against him by the said F. & B. in their attachment suit against the said J. B. for $2150, returnable before the circuit court of W. Co., Miss., on the 1st day of December, 1881." This was held not a bond for the forthcoming of the property, but a bond discharging the attachment as to the property released, under § 2428, Code of 1880. Forbes *v.* Narva, 63 Miss. 1.

2. Donnell *v.* Jones, 13 Ala. 490; Dunning *v.* Humphrey, 24 Wend. (N. Y.) 31; Johnson *v.* Bank, 4 Bush (Ky.), 283; Munnerlyn *v.* Alexander, 38 Tex. 125; Wilson *v.* Root, 43 Ind. 486; Haydon *v.* Sample, 10 Mo. 215. See also Moore *v.* Stanley, 51 Mo. 315; Hughes *v.* Brooks, 36 Tex. 379.

Remote damages and those of speculative character cannot be recovered. Pettitt *v.* Mercer, 8 B. Mon. (Ky.) 51; State *v.* Thomas, 19 Mo. 613; Myers *v.* Farrell, 47 Miss. 281; Floyd *v.* Hamilton, 33 Ala. 235; Plumb *v.* Woodmansee, 34 Iowa, 116; Campbell *v.* Chamberlain, 10 Iowa, 337.

Malice and bad faith will aggravate damages. Renkert *v.* Elliott, 11 Lea (Tenn.), 235.

3. Davis *v.* Commonwealth, 13 Gratt. (Va.) 139; Raspellier *v.* Brownson, 7 La. 231.

Plaintiff may give a new undertaking in attachment if first is defective or insufficient. Pierse *v.* Miles, 5 Mont. 549; Langstaff *v.* Miles, 5 Mont. 554.

action on the bond although the damages were several.[1] No action for damages can be sustained until the original suit has been determined and the attachment discharged.[2]

(*b*) *Injunction Bonds.*—The object of an injunction bond is to reimburse a defendant for an illegal interference with his rights and property. Statutes which require a bond as a condition precedent to issuing an injunction are mandatory.[3] An order for an injunction is ineffectual until a proper bond is executed.[4] An injunction bond takes effect from the time it is filed in the proper

1. Boyd *v.* Martin, 10 Ala. 700; Gayle *v.* Martin, 3 Ala. 593; Hill *v.* Wood, 4 Ala. 214.

The obligees who have been injured may sue without regard to the others who have not been injured. Alexander *v.* Jacoby, 23 Ohio St. 358.

2. Nolle *v.* Thompson, 3 Metc. (Ky.) 121; Bettick *v.* Wilkins, 8 Heisk. (Tenn.) 307. See Kerr *v.* Reece, 27 Kans. 469.

In some States an action must be ineffectually prosecuted against the principal personally before an action can be brought upon the attachment bond. Holcomb *v.* Foxworth, 34 Miss. 265; Sledge *v.* Lee, 19 Ga. 411; Penney *v.* Hishfield, 1 Montana, 367; Tarpey *v.* Shillenberger, 10 Cal. 390. *Compare* Churchill *v.* Abraham, 22 Ill. 455; Herndon *v.* Farney, 4 Ala. 243; Dickinson *v.* McCraw, 4 Rand. (Va) 158.

The sureties on an attachment bond may be liable although the attachment has not been formally vacated, it being in effect vacated by the judgment. Lee *v.* Homer, 37 Hun (N. Y.), 634.

One who gives a bond that property attached in his hands in a suit against another person shall be forthcoming cannot be allowed to interplead after judgment against defendant. McElfatrick *v.* Macauley, 15 Mo. App. 102.

A sued B and C, C being a non-resident, and gave an attachment bond payable to "defendants" for all damages "he" may sustain. The goods seized were owned by B and C, as partners; and on trial there was judgment for B and C. *Held*, that C had no right of action on the bond. Faulkner *v.* Brigel, 101 Ind. 329.

If in violation of law (Neb. Comp. St. § 14) the clerks allows an attorney to become surety on an attachment bond, and approves the bond, the surety is bound. Tessier *v.* Crowley, 17 Neb. 207.

3. Miller *v.* Parker, 73 N. Car. 58.

Such bonds cannot be affected by laws passed subsequent to their execution. Mix *v.* Vail, 86 Ill. 40.

In the absence of a statute the terms and condition of the bond rest in the judicial discretion of the chancellor. Newell *v.* Partee, 10 Humph. (Tenn.) 325. See Foster *v.* Shephard, 33 Tex. 687.

It is error to grant an injunction without requiring a bond. Miller *v.* Parker, 73 N. Car. 58.

An injunction bond need not specify any particular sum as penalty. N. Car. G. A. Co. *v.* N. Ca. O. D. Co., 79 N. Car. 48.

It is proper but not necessary that the approval of the court be indorsed on the bond. Griffin *v.* Wallace, 66 Ind. 410.

4. Pell *v.* Lander, 8 B. Mon. (Ky.) 554.

The court may at any time require additional bond. Crawford *v.* Paine, 19 Iowa, 172.

Insufficiency of the bond alone is not in the first instance ground for dissolving an injunction. Drake *v.* Phillips, 40 Ill. 388.

The plaintiff should have a reasonable time in which to file a new bond. Beauchamp *v.* Kankakee, 45 Ill. 274; Gamble *v.* Campbell, 6 Fla. 347; Chesapeake & Co. *v.* Patton, 5 W. Va. 234.

It is not correct practice to perpetuate an injunction upon condition that the plaintiff within a limited time file such a bond as shall meet the case. Downes *v.* Monroe, 42 Tex. 307.

Injunction bonds must be construed *ut res magis valeat quam pereat.* It will be enforced as to the conditions required by statutes which it contains. Holliday *v.* Myers, 11 W. Va. 276.

Additional matter when not against the law or in violation of public policy will be regarded as surplusage. Johnson *v.* Vaughn, 9 B. Mon. (Ky.) 217.

If the terms of the bond bind the obligor to pay the debt unless the suit is successfully prosecuted, the bond will be strictly enforced if the injunction is dissolved. Hunt *v.* Scobie, 6 B. Mon. (Ky.) 469. See Hanley *v.* Wallace, 3 B. Mon. (Ky.) 184.

Injunction bond of an executor, see Mahan *v.* Tydings, 10 B. Mon. (Ky.) 351.

office.[1] All parties to the suit who are affected by the injunction are entitled to the benefit of the bond.[2] An action cannot be sustained upon an injunction bond until the final termination of the suit in which the injunction issued.[3] The Statute of Limitations begins to run from the time the cause of action accrues.[4]

(*c*) *Appeal Bonds.*—The conditions of an appeal bond are controlled by the character of the judgment from which the appeal is taken. Where the appeal operates as a *supersedeas* the bond should secure the debt, damages, and costs. An irregular appeal bond is good as far as it goes, if the cause proceeds upon the faith of such bond. The word "damages" in an appeal bond means the damages in consequence of the appeal; that is, the interest at the rate fixed by statute upon the amount of the judgment below, from the date of its rendition to the time of entering the judgment above; and the damages are recoverable against the surety whenever the appeal is not prosecuted with effect; that is to say, where the final recovery is for the same or a larger amount than the judgment below.[5]

(*d*) *Indemnity Bonds.*—It is customary for an officer, when required in the course of his business to seize property the ownership of which is in dispute, to demand an indemnity bond from the party in whose behalf the seizure is made. Under such bonds the officer is entitled to be reimbursed for any damages he may suffer if he proves to be a trespasser. But the act must not be illegal or against the policy of the law. The officer is not entitled to indemnity if he knows that the seizure will be a trespass.[6] The officer is presumed to know the law, and an indemnity bond against the peace and policy of the law is void.[7] The breach of an in-

1. Lothrop *v.* Southworth, 5 Mich. 437.

2. Cumberland, etc., Co. *v.* Hoffman, etc., Co., 39 Barb. (N. Y.) 16.

3. Goodbar *v.* Dunn, 61 Miss. 624; Penny *v.* Holberg, 53 Miss. 567; Hansard *v.* Gray, 47 Miss. 75; Gray *v.* Veirs, 33 Md. 159; Bemis *v.* Gannett, 8 Neb. 236; High on Injunctions, § 1649.

Until the suit is disposed of it cannot be known that the injunction was wrongfully sued out. Thompson *v.* McNair, 64 N. Car. 448.

When an injunction is dissolved and the suit in which it was granted terminated, the breach of the injunction bond is complete and an action can be maintained upon it. Dowling *v.* Polack, 18 Cal. 625, overruling Gelston *v.* Whitesides, 3 Cal. 309, citing Loomis *v.* Brown, 16 Barb. (N. Y.) 325.

4. Pickett *v.* Boyd, 11 Lea (Tenn.), 498. See this case as to injunction bond from sister State.

5. Mason *v.* Smith, 11 Lea (Tenn.), 69; Gohlson *v.* Brown, 4 Yerg. (Tenn.) 496; Jones *v.* Parsons, 2 Yerg. (Tenn.) 321; Matlock *v.* Banks, 7 Yerg. (Tenn.) 95; Bank *v.* Williams, 3 Coldw. (Tenn.) 579; Nunnellee *v.* Morton, Cooke (Tenn.), 21; Dodson *v.* Dodson, 6 Heisk. (Tenn.) 110; Sharp *v.* Pickens, 4 Coldw. (Tenn.) 268; Hutchinson *v.* Fulghum, 4 Heisk. (Tenn.) 550; Banks *v.* McDowell, 1 Coldw. (Tenn.) 85; Mason *v.* Anderson, 12 Heisk. (Tenn.) 38; Mason *v.* Metcalf, 4 Baxt. (Tenn.) 440; Nichols *v.* McComb, 2 Yerg. (Tenn.) 83; Banks *v.* Brown, 4 Yerg. (Tenn.) 198.

The State need not give an appeal bond. State *v.* Co. of Coahoma (Miss.), 1 South. Rep. 501.

A county auditor need not give a bond when appealing in his official capacity. Scheerer *v.* Edgar (Cal.), 9 Am. & Eng. Corp. Cas. 153.

As to right of contribution and subrogation between surety on an appeal bond and surety on original debt, see Briggs *v.* Hinton, 14 Lea (Tenn.), 233; s. c., 9 Am. & Eng. Corp. Cas. 159, and note on rights and liabilities of sureties.

6. Porter *v* Stapp, 6 Colo. 32; Stone *v.* Hooker, 9 Cow. (N. Y.) 155.

7. Porter *v.* Stapp, 6 Colo. 32; Har-

demnity bond arises when the injured party recovers judgment against the officer. Such bond may be assigned to the claimants, who may maintain an action against the indemnitors on the bond so assigned.[1] Under a bond to save harmless, a judgment against the obligee fixes the obligor's liability, and the obligor may pay it without waiting for execution.[2]

5. BONDS OF PERSONS ACTING UNDER JUDICIAL CONTROL.—(*a*) *Executors.*—In the absence of statutes, an executor is regarded as a mere trustee, and, like any other trustee, will be required to give bond before he will be permitted to execute the trust.[3] Where a testator provides that no bond shall be required from his executor, a court is not justified in requiring a bond from the mere insolvency or poverty of the executor. There must be in addition some fraud or danger of loss from maladministration.[4] In most of the States the statutes require executors to give bond before letters testamentary can be issued to them, and only the express will of the testator as expressed in the will can justify an exception.[5] In other States bonds are required from executors only when it appears to be necessary for the proper care of the estate.[6] At any time when the security is deemed insufficient an executor or administrator who has given a bond may be required to give additional security.[7] The sureties on an executor's bond are liable only for assets within the State.[8]

desty *v.* Price, 3 Colo. 558; Purple *v.* Purple, 5 Pick. (Mass.) 226; Cumpston *v.* Lambert, 18 Ohio, 81; Nelson *v.* Cook, 17 Ill. 443.

1. McBeth *v.* McIntyre, 57 Cal. 49; Jones *v.* Childs, 8 Nev. 121; Chace *v.* Hinman, 8 Wend. (N. Y.) 452; Challoner *v.* Walker, 1 Burr. 574. See Negus's Case, 7 Wend. (N. Y.) 499; Rockfeller *v.* Donnelly, 8 Cow. (N. Y.) 623; Jones *v.* Cooper, 2 Aik. (Vt.) 54; Ramsey *v.* Gervais, 2 Bay (S. Car.), 145.

An obligor who is bound to save the obligee harmless against a certain engagement is bound to secure him for incurring any expense by virtue of the engagement. Sparks *v.* Martindale, 8 East, 593.

As to amount recoverable, see Lyon *v.* Clark, 1 E. D. Smith (N. Y.), 250; s. c., 8 N. Y. 148.

2. Creamer *v.* Stephenson, 15 Md. 211; Jones *v.* Childs, 8 Nev. 121. See Tate *v.* Booe, 9 Ind. 13; Given *v.* Driggs, 1 Caines (N. Y.), 450; Turk *v.* Ridge, 41 N. Y. 201.

The word "judgment" in an indemnity bond does not refer solely to a judgment obtained by adverse litigation. Conner *v.* Reeves (N. Y.), 9 N. E. Repr. 439.

3. Raus *v.* Noble, 2 Vern. 249; Batten *v.* Earnley, 2 P. Wms. 136; Stanning *v.* Style, 3 P. Wms. 336.

4. Fairbairn *v.* Fisher, 4 Jones Eq. (N. Car.) 390; Wilson *v.* Whitfield, 38 Ga. 269; Wilkins *v.* Harris, 1 Wins. (N. Car.) 41; Clark *v.* Niles, 42 Miss. 460; Bowman *v.* Wootton, 8 B. Mon. (Ky.) 67; Shields *v.* Shields, 60 Barb. (N. Y.) 56. *Compare* Atwell *v.* Helm, 7 Bush (Ky.), 504.

The statutes of *New York* give the court power to require a bond where the circumstances are "precarious." See Grigsby *v.* Cocke's Ex'rs (Ky.), 3 S. Westn. Repr. 518.

5. Cowling *v.* Justices, 6 Rand. (Va.) 349; Webb *v.* Dietrich, 7 Watts & S. (Pa.) 401; Cohen's Appeal, 2 Watts (Pa.), 175; Bankhead *v.* Hubbard, 14 Ark. 298; Holbrook *v.* Bentley, 32 Conn. 502.

6. Mandeville *v.* Mandeville, 8 Paige Ch. (N. Y.) 475; Wood *v.* Wood, 4 Paige Ch. (N. Y.) 299; s. c., 38 Am. Dec. 451; Colegrove *v.* Horton, 11 Paige (N. Y.), 261; Holmes *v.* Cock, 2 Barb. (N. Y.) 426; McKennan's Appeal, 27 Pa. St. 237; Powell *v.* Thompson, 4 Desau. (S. Car.) 162; Shields *v.* Shields, 60 Barb. (N. Y.) 56.

7. Kelcrease *v.* Kelcrease, 7 How. (Miss.) 311; Ellis *v.* McBride, 27 Miss. 155; Hannan *v.* Day, 105 Mass. 38; National Bank *v.* Slanton, 116 Mass. 438.

8. Fletcher *v.* Weir, 7 Dana (Ky.),

An executor who voluntarily gives a bond is, with his sureties, liable upon it.[1] Where an executor has given a bond without sureties and in all other respects has complied with the statute, his bond is an executor's bond, and entitles him to the defence of the Statute of Limitations.[2]

(*b*) *Administrators.*—Administrators are universally required to give bonds for the due performance of their duties. Administrators are not chosen by the deceased, and stand in no fiduciary relation to him. They are mere officers of the law.[3]

(*c*) *Bond of Guardian.*—A guardian may be appointed by will and exempted from the necessity of giving a bond. Because of the trust imposed on a testamentary guardian, security will not be primarily required, but under certain circumstances the courts will interpose in order to protect the interests of the parties and require proper security.[4] The jurisdiction of courts to appoint guardians is almost wholly regulated by statute.[5] Such bonds

349; Govenor *v.* Williams, 3 Ired. L. (N. Car.) 152; s. c., 38 Am. Dec. 712; Normand *v.* Grognard, 17 N. J. Eq. 423.

1. Ames *v.* Armstrong, 106 Mass. 15.

2. Wells *v.* Child, 12 Allen (Mass.), 330, citing Laughton *v.* Atkins, 1 Pick. (Mass.) 547; Marcy *v.* Marcy, 6 Metc. (Mass.) 367; Arnold *v.* Sabin, 1 Cush. (Mass.) 530; Abercrombie *v.* Sheldon, 8 Allen (Mass.), 532.

Bond to Pay Debts.—In some States if the executor is also the residuary legatee he may give bond conditioned to pay debts and legacies only. Such bond admits assets sufficient to pay all debts and legacies. Colwell *v.* Alger, 5 Gray (Mass.), 67; Jones *v.* Richardson, 5 Metc. (Mass.) 247; Clark *v.* Tufts, 5 Pick. (Mass.) 337; Stebbins *v.* Smith, 4 Pick. (Mass.) 97; Morgan *v.* Dodge, 44 N. H. 262; Duval *v.* Snowden, 7 Gill & J. (Md.) 430. The same rule applies to administrator with will annexed. 1 Mass. Stat. 1870, ch. 285.

In some States an administrator with the will annexed must give the ordinary bond of an administrator; in others his bond corresponds with that of an executor. See *Ex parte* Brown, 2 Bradf. Sur. (Pa.) 22; Commonwealth *v.* Rogers, 53 Pa. St. 470; McKennan's Appeal, 27 Pa. St. 237; Small *v.* Commonwealth, 8 Pa. St. 101; Johnson's Appeal, 12 Serg. & R. (Pa.) 317.

The sureties on an official bond are not liable for debts owing the estate which the executor, without fault on his part, could not collect. Lyons *v.* Osgood (Vt.), 7 Atl. Repr. 5.

3. Murfree on Official Bonds, § 344.

The allegation that an administrator who has resigned has failed to pay to his successor the amount found due on the settlement of his accounts is a sufficient assignment of a breach of the condition of his bond "to administer according to law" the assets of the estate. Slagle *v.* Entrekin (Ohio), 10 N. E. Repr. 675.

Section 1987, Code of 1880 (Miss.), which provides that an executor or administrator must give bond "in such penalty as will be equal to the full value of the estate, at least," relates to the rights, powers, and duties of an executor or an administrator with the will annexed. The term "estate" in the statute must be construed with reference to the will, and must mean such estate, real or personal, as may be committed thereby to the executor or administrator. Section 1995, Code of 1880 (Miss.), relates to an administrator without the will annexed. Ellis *v.* Witty, 63 Miss. 117.

4. Green's Estate, 7 Phila. 202; Estate of Stanton, 13 Phila. 213.

The bond required in such case is a continuing bond. State *v.* Howarth, 48 Conn. 207. As to what constitutes a breach of a continuing bond, see Commonwealth *v.* Gracey, 96 Pa. St. 70; Lee *v.* Lee, 67 Ala. 406.

5. Earl *v.* Crum, 42 Miss. 165; Stewart *v.* Morrison, 38 Miss. 417; *Ex parte* Atkinson, 40 Miss. 17.

Appointment without Jurisdiction.—In Crum *v.* Wilson, 61 Miss. 233, 236, the court said: "When no action is maintainable against the principal because of the inherent nullity of the alleged obligation sued on, no action can be maintained against sureties on such obligation, for a surety is only bound for the acts of his principal, and if there were no

are to be liberally construed as to defects of form.[1] Like other bonds they will be held good as far as they comply with the law, and void as to unauthorized portions.[2] As a general rule the penalty of the bond of a guardian should be double the value of the estate.[3] The authority of a guardian to act is derived from his appointment and bond and not from the letters.[4] The execution, delivery, and approval of the bond is a condition precedent to the appointment of a guardian.[5] In Virginia the approval of a guardian's bond is held to be a judicial act.[6] The sureties on official bonds may be released from obligation by making the proper application.[7] Sureties of guardians may be subrogated to the rights of the ward.[8] A guardian's bond is a continuing bond, and he is not in default until he has been denuded of his trust and required by the court to pay over the trust fund, and has failed to do so. The cause of the action against the sureties then accrues.[9]

(*d*) *Receivers.*—The obligation of a receiver to give security is founded upon the general practice of equity, and it is within the power of the court to dispense with security when unnecessary.[10]

principal there could be no surety. Even after judgment against sureties they are entitled to be relieved if their principal is discharged for some cause going to the original transaction and not merely personal to him." See Brown *v.* Bradford, 30 Ga. 927; Beall *v.* Cochran, 18 Ga. 38; Hempstead *v.* Coste, 36 Mo. 437; Ames *v.* Maclay, 14 Iowa, 281; Dickson *v.* Bell, 13 La. Ann. 249; Miller *v.* G——, 1 Smedes & M. Ch. (Miss.) 524; Boyd *v.* Swing, 38 Miss. 182.

1. Probate Court *v.* Strong, 27 Vt. 202; State *v.* Martin, 69 N. Car. 175; Brunson *v.* Brooks, 68 Ala. 248. See Alston *v.* Alston, 34 Ala. 15.

2. Pratt *v.* Wright, 13 Gratt. (Va.) 175.

3. Bennett *v.* Byrne, 2 Barb. Ch. (N. Y.) 216.

Where the estate is very large, courts of chancery have relaxed this rule. Matter of Hedges, 1 Edw. Ch. (N. Y.) 59.

4. Moxsom *v.* Sawyer, 12 Ohio, 195.

5. Carpenter *v.* Sloane, 20 Ohio, 327.

6. Page *v.* Taylor, 2 Munf. (Va.) 492.

In *Kentucky* a judge may become personally liable for misconduct in accepting a guardian's bond. The judge must have personal knowledge of the sufficiency of the sureties, or must institute an investigation into the circumstances. Colter *v.* McIntyre, 11 Bush (Ky.), 565.

7. In *Mississippi* the chancellor may, of his own motion, summon a guardian to appear and give a new bond. McWilliams *v.* Norfleet, 60 Miss. 987.

Liability of sureties on guardian's bond. See McWilliams *v.* Norfleet, 63 Miss. 183.

8. Adams *v.* Gleaves, 10 Lea (Tenn.), 367.

Neither an original creditor nor a subrogated creditor can enforce any claim to homestead or exempt property. Christian *v.* Clark, 10 Lea (Tenn.), 630.

9. Moore *v.* Nichols, 39 Ark. 145; Connelly *v.* Weatherby, 33 Ark. 658; Moody *v.* State, 84 Ind. 432.

A contract between a guardian and the administrator of his predecessor by which the administrator is to retain the fund charged against his predecessor, paying interest therefor, is void and will not release the sureties from liability. Neel *v.* Commonwealth (Pa.), 7 Atl. Repr. 74.

10. Banks *v.* Potter, 21 How. Pr. (N.Y.) 469.

It was early established in the English court of chancery that a receiver was required to enter into a recognizance with two sureties. Mead *v.* Orrery, 3 Atk. 235. And it was held that the security could not be dispensed with. Manners *v.* Furze, 11 Beav. 30. But if the parties agreed upon a receiver to be appointed at their own instance, no security was necessary. Manners *v.* Furze, 11 Beav. 30; Ridout *v.* Earl of Plymouth, Dick. 68.

Where a receiver was appointed without salary no bond was required. Gardner *v.* Blune, 1 Hare, 381.

In the Irish Court of Chancery, a receiver, even those chosen by the parties, must give security. Bailie *v.* Bailie, 1 Ir. Eq. 413.

Failure to execute a bond in due form is good ground for a nonsuit in an action brought by a receiver in his official capacity. Johnson *v.* Martin, 1

The title and authority of a receiver depend upon his giving a proper bond according to the terms of his appointment.[1]

6. BONDS UNDER CHARTERS AND BY-LAWS OF CORPORATIONS. —(*a*) *Power of Corporation to Exact Official Bonds.*—We must look to the charter of a corporation in order to ascertain its powers. They may be either express or implied. Among the express or implied powers are those of making contracts within the general scope of the business of the corporation, and of enacting by-laws. These by-laws generally provide for taking bonds from the officers and employees of the corporation. "The by-law which authorizes the exaction of a bond is, in effect, a delegation by the legislature of a portion of the legislative power of the State, and to this extent, and for this special purpose, the exaction of such a bond is an exercise of the sovereign power of the State."[2] By-laws must not be contrary to the organic law of the nation, State, or charter of the corporation.[3]

(*b*) *Delivery, Acceptance, and Approval.*—Generally, form, manner of delivery, acceptance, and approval of bonds of private corporations are governed by the same rules of law as other official bonds. The provisions of the charters and by-laws of corporations have been held to be merely directory. The fact of delivery, acceptance, and approval must be proved like any other fact.[4]

(*c*) *Corporation may accept its own Members as Sureties on Official Bonds.*—In the absence of a prohibitory statute an officer of a corporation may become a surety on the bond of a subordinate which he is required to approve. "A corporation is an artificial person in law, distinct from all the individuals composing it, capable of contracting and bringing suits, and may contract with its own members, or have suits against them, as well as against other persons."[5]

Thompson & C. (N. Y. S. Ct.), 504. As ground for reversing a decree, see Schulte *v.* Hoffman, 18 Tex. 678.

The mere informality of a receiver's bond cannot be taken advantage of in an action against third parties. Morgan *v.* Potter, 17 Hun (N. Y.), 403.

Where a creditor of the defendant levies upon the property which is the subject-matter of the receivership, between the date of the appointment and the giving of the required bond, there is no disturbance of the possession of the receiver. Defries *v.* Creed, 34 L. J. N. S. Eq. 607; Edwards *v.* Edwards, 2 Ch. D. 291, reversing s. c., 1 Ch. D. 454. *Compare Ex parte* Evans, 13 Ch. D. 252.

1. Johnson *v.* Martin, 1 Thompson & C. (N. Y. S. Ct.) 504; Defries *v.* Creed, 34 L. J. N. S. Eq. 607; Edwards *v.* Edwards, 2 Ch. D. 291, reversing s. c., 1 Ch. D. 454. *Compare Ex parte* Evans, 13 Ch. D. 252. See, generally, High on Receivers (2d Ed.), §§ 118–308.

2. Murfree on Official Bonds, § 411; Lionberger *v.* Krieger (Mo.), 14 Am. & Eng. Corp. Cas. 87.

3. Kearney *v.* Andrews, 10 N. J. Eq. 70; Carr *v.* St. Louis, 9 Mo. 191; State *v.* Curtiss, 9 Nev. 325; Kennebec & Co. *v.* Kendall, 31 Me. 470; *In re* Butchers' Beneficial Assoc., 35 Pa. St. 151.

4. Bank of United States *v.* Dandridge, 25 U. S. (12 Wheat.) 64; Lexington & Co. *v.* Elwell, 8 Allen (Mass.), 371; Dedham Bank *v.* Chickering, 3 Pick. (Mass.) 335; Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324; Graves *v.* Lebanon Bank, 10 Bush (Ky.), 23; Engler *v.* People, etc., Co., 46 Md. 322; State Bank *v.* Chetwood, 8 N. J. L. 1; Amherst Bank *v.* Root, 2 Metc. (Mass.) 522.

Written approval of bond of bank cashier is not necessary. Bostwick *v.* Van Voorhis, 91 N. Y. 352; s. c., 1 Am. & Eng. Corp. Cas. 337.

5. Amherst Bank *v.* Root, 2 Metc.

(Mass.) 522, 534, *per* Shaw, C. J. See Morawetz on Corporations (2d Ed.), ch. 1.

When an officer of a bank is prohibited by law from becoming surety on the bond of a subordinate he cannot evade the law by indemnifying other sureties by giving them a mortgage on his property. In such a case the obligation of indemnity and the mortgage are void. Jose *v.* Hewett. 50 Me. 248, 251.

If the officer who becomes surety resigns before the acceptance of the bond, the obligation becomes valid. Franklin Bank *v.* Cooper, 36 Me. 179; s. c., 39 Me. 542. See Morawetz on Private Corporations (2d Ed.), ch. 1.

Sureties—How affected by Increase of Principal's Duties.—The sureties upon an official bond are not discharged by the imposition of new duties which are distinct and separable from those protected by the bond, unless they impede or render impossible the duties guaranteed against.

In Mayor, etc., *v.* Kelly, 98 N. Y. 467; s. c., 9 Am. & Eng. Corp. Cas. 303, the court says: "Where the new employment is separate and distinct and in no respect essentially interferes with the duty covered by the bond, the imposition of such added duty is wholly a matter between the employer and servant with which the sureties have no concern. For misconduct as to the new employment the bondsmen are in no manner responsible, and have no right to complain so long as the added and separable duties do not prevent or tend to prevent the proper and just performance of those which are guaranteed. In such case, if misconduct occurs, the sole question is whether it was a violation of the duties guaranteed, or of those outside of the bond and its protection."

In People *v.* Vilas, 36 N. Y. 459, it was held that the sureties upon the bond of a public officer are not discharged by the imposition upon the principal of new duties of a similar nature and character by the legislature. To the same effect see Commonwealth *v.* Holmes, 25 Gratt. (Va) 771; Hatch *v.* Inhabitants of Attleborough, 97 Mass. 533; United States *v.* Kilpatrick, 9 Wheat. (U. S.) 720; White *v.* Fox, 9 Shepley (Me.), 341; Colter *v.* Morgan, 12 B. Mon. (Ky.) 278; German American Bank *v.* Auth, 87 Pa. St. 416; Kindle *v.* State, 7 Blackf. (Ind.) 586; Rochester City Bank *v.* Elwood, 21 N. Y. 88.

In Gaussen *v.* United States, 97 U. S. (7 Otto) 584, the court says: "If it be conceded, as it may be, that the addition of duties different in their nature from those which belong to the office when the officer's bond was given will not impose upon the obligor in the bond, as such, additional responsibilities, it is undoubtedly true that such addition of new duties does not render void the bond of the officer as security for the performance of the duties as first assumed. It will still remain a security for what it was originally given to secure." *Compare* Pybus *v.* Gibbs, 6 Ell. & B. (88 Eng. C. L.) 902; Bonar *v.* McDonald, 3 N. L. Cas. 226; Bartlett *v.* Atty.-Gen., Parker, 277; Napier *v.* Bruce, 8 C. & F. 470.

The increase of the stock of a bank will not release the sureties on the bond of the cashier. Lionberger *v.* Krieger (Mo.), 14 Am. & Eng. Corp. Cas. 87.

In Eastern R. Co. *v.* Loring, 138 Mass. 381; s.c., 19 Rep. 436, the bond was conditioned for the faithful performance of the duties of a ticket agent "which are or may be imposed upon him under this or any future appointment." The agent's salary was increased from $1000 to $1300 a year. The stock of the company was increased from $2,853,400 to $4,667,600, and the business was extended from 1040 miles to 2250 miles. Notwithstanding these changes the sureties were held not discharged, for the reasons that there was no change in the office, that the nature of the duties remained the same, and that the increase of business was fairly contemplated in the bond, looking at the character of the position which the agent held. Railroad Co. *v.* Goodwin, 3 Wels. Hurl. & C. 320; Morris Canal *v.* Van Vorst, 21 N. J. L. 100; Strawbridge *v.* B. & O. R. Co., 14 Md. 360.

Change of Statutory Duties.—The sureties of an official are generally liable for the faithful performance by him of all duties imposed by statute, whether before or after the execution of the bond, provided they are within the scope of the office. Governor *v.* Ridgway, 12 Ill. 14; Compher *v.* People, 12 Ill. 290; People *v.* Leet, 13 Ill. 261; Smith *v.* Peoria Co., 59 Ill. 412; People *v.* Tompkins, 74 Ill. 482; People *v.* Vilas, 36 N. Y. 459; Mayor of New York *v.* Silberns, 3 Abb. Pr. New Cas. (N. Y.) 236; Commonwealth *v.* Holmes, 25 Gratt. (Va.) 771; Commonwealth *v.* Galbert's Admr., 5 Bush (Ky.), 438; United States *v.* Gaussen, 2 Woods (U. S.), 92; Postmaster-General *v* Munger, 2 Paine (U. S.), 189; King *v.* Nichols, 16 Ohio St. 80; State *v.* Bradshaw, 10 Ired. L. (N. Car.) 229; Dawson *v.* State, 38 Ohio St. 1; Board of Supervisors *v.* Clark, 2 Am. & Eng. Corp. Cas. 405; s.c., 92 N.Y. 391.

But a total change of the functions of

(*a*) *Official Bond designed to effect an Illegal Purpose.*—An official bond executed in furtherance of an illegal purpose is void. An omission to comply with the provisions of a directory statute will not render void the bond of an agent transacting the business.[1]

(*e*) *Action in Name of Corporation.*—In accordance with the general rule that where a contract is made with an agent who has no beneficial interest in the transaction suit must be brought in the name of the principal, it is held that when a bond is made to the "directors" of a corporation suit may be brought upon it by the corporation in the corporate name.[2]

7. IMPERFECT OFFICIAL BONDS.—Official bonds are entitled to the special remedies and processes granted by statute, while common-law or voluntary bonds stand upon the same footing as ordinary contracts.[3] A voluntary bond not being illegal or against the policy of the law may be good as a common-law bond, although through some defect it is not a good statutory bond.[4] If

the office may discharge the sureties. Van Epps *v.* Walsh, 1 Woods C. C. 598; Fielden *v.* Lahens, 6 Blatchf. C. C. 524; Romans *v.* Peters, 2 Rob. (La.) 479; Denio *v.* State, 60 Miss. 949.

As to when sureties will be held liable for special fund collected by authority of a particular law, see State *v.* Hathorn, 36 Miss. 491; McGuire *v.* Bry, 3 Rob. (La.) 196; State *v.* Rhoades, 7 Nev. 434; State *v.* Watson, 38 Ark. 96.

The imposition upon the county treasurer of the duty of keeping large sums of money in addition to the usual and ordinary duties of the office does not discharge the sureties upon his bond. Board of Supervisors *v.* Clark, 92 N. Y. 391; s. c., 2 Am. & Eng. Corp. Cas. 405.

Sureties upon bond of a municipal officer are not liable for money received by the principal outside the line of his duty. United States *v.* White, 4 Wash. C. C. 414; People *v.* Pennock, 60 N. Y. 421; Saltonberry *v.* Laucks, 8 La. Ann. 95; State *v.* White, 10 Rich. L. (S. Car.) 442; Nolly *v.* Calloway Co. Ct., 11 Mo. 447.

The sureties on bond of a receiving-teller of a bank are liable for his defalcations while acting as general teller. Detroit Sav. Bank *v.* Zeigler (Mich.), 1 Am. & Eng. Corp. Cas. 332, 335.

The sureties on bond of a cashier are not discharged because at the time the bond was given the cashier was a defaulter and the bank failed to ascertain and disclose the fact. Brown *v.* Mt. Holly Nat. Bank (N. J. L.), 3 Am. & Eng. Corp. Cas. 339; s. c., 45 N. J. L. 360; Bostwick *v.* Van Voorhes, 91 N. Y. 353; s. c., 1 Am. & Eng. Corp. Cas. 337.

1. Washington, etc., Co. *v.* Colton, 22 Conn. 42, 50

Where a bank establishes an agency in a State and takes a bond from the agent in charge of it, the sureties on the bond may set up the illegality of the bond in an action against them for the penalty. Bank of Newberry *v.* Stegall, 41 Miss. 142; Thorne *v.* Travellers, etc., Co., 80 Pa. St. 15.

An express company which had not complied with the law was not allowed to recover on the bond of an agent, although the court intimated that as between the company and the agent the latter might be held liable as upon an implied *assumpsit* to pay over the money. Daniels *v.* Barney, 22 Ind. 207.

2. Bayley *v.* Onondaga, etc., Co., 6 Hill (N. Y.), 476; Pigott *v.* Thompson, 3 Bos. & P. 147; Gilmore *v.* Pope, 5 Mass. 491; Taunton, etc., *v.* Whiting, 10 Mass. 327; s. c., 6 Am. Dec. 124; Commercial Bank *v.* French, 21 Pick. (Mass.) 486; s. c., 32 Am. Dec. 280.

3. Sprowl *v.* Lawrence, 33 Ala. 674.

4. Lane *v.* Kasey, 1 Metc. (Ky.) 410; Rowlet *v.* Eubank, 1 Bush (Ky.), 477; State *v.* Thompson, 49 Mo. 188; Gathwright *v.* Calloway Co., 10 Mo. 663; Freeman *v.* Davis, 7 Mass. 200; Burroughs *v.* Lowder, 8 Mass. 373; Morse *v.* Hodsdon, 5 Mass. 314; Howard *v.* Brogan, 21 Me. 358; Kavanagh *v.* Saunders, 8 Me. 482; Winthrop *v.* Dockendorff, 3 Me. 378; McGowen *v.* Deyo, 8 Barb. (N. Y.) 340; Classen *v.* Shaw, 5 Watts (Pa.), 468; Williams *v.* Shelby, 2 Oreg. 144; Fellows *v.* Gilman, 4 Wend. (N. Y.) 414.

A bond required by the selectmen of a town from a tax collector without the

a bond be drawn so as to include all the obligations imposed by statute and to allow every defence given by law, it is valid although slightly variant from the prescribed form.[1] But if the condition of a bond be contrary to the statute it is void.[2] If a part be in pursuance of the statute and another part otherwise, it will not avoid the bond altogether unless the statute so enacts.[3]

A statutory bond is vitiated by the omission of a material condition required by the statute.[4] But a superadded condition unauthorized by the statute will be regarded as mere surplusage and rejected.[5] No breach can be assigned in such part of the condition.[6] Upon a common-law bond there can be but one recovery, and bonds intended to be official but which fall short of the requirements of the statute are not entitled to the privileges accorded to official bonds.[7]

An official bond in which the conditions are less onerous than required by statute is good as a common-law bond, and the obligors are bound to the full extent of its terms.[8] In Illinois the filing of an insufficient bond by a justice of the peace does not entitle him to induction into office.[9]

The bond of an officer is valid as a common-law bond when regular in other respects, although payable to an obligee other than as required by statute.[10]

sanction of any statute will not be regarded as a voluntary bond. Montville *v.* Henghler, 7 Conn. 543; Monell *v.* Sylvester, 1 Me. 248.

1. Commissioner *v.* Way, 3 Ohio, 103; Skellinger *v.* Yendes, 12 Wend. (N. Y.) 306.

2. "The statute is a tyrant—when he comes he makes all void; but the common law is like a nursing father—makes void only that part where the fault is, and preserves the rest." Maleverer *v.* Redshaw, 1 Mod. 35.

3. State *v.* Layton, 4 Harr. (Del.) 512; Justices *v.* Winn, Dudley (Ga.), 22; Central Bank *v.* Kendrick, Dudley (Ga.), 66; U. S. *v.* Brown, Gilp. 155; Justices *v.* Smith, 2 J. J. Marsh. (Ky.) 473; Hay *v.* Rogers, 4 T. B. Mon. (Ky.) 225; Cobb *v.* Curtis, 4 Litt. (Ky.) 235; Speck *v.* Comw., 3 Watts & S. (Pa.) 324.

4. Dixon *v.* United States, 1 Brock. C. C. 177; United States *v.* Ginder, 1 Brock. C. C. 190; United States *v.* Morgan, 3 Wash. C. C. 10; United States *v.* Gordon, 7 Cranch (U. S.), 287.

Statutory bonds may be valid although not strictly complying with the terms of the statute, if the object of the statute is not defeated thereby. Nunn *v.* Goodlett, 10 Ark. 89.

5. United States *v.* Ginder, 1 Brock. C. C. 195; Dixon *v.* U. S., 1 Brock. C. C. 177; Walker *v.* Chapman, 22 Ala. 116; Wood *v.* State, 10 Mo. 698; Shunk *v.* Miller, 5 Pa. St. 256.

6. Hall *v.* Cushing, 9 Pick. (Mass.) 404; Sanders *v.* Rives, 3 Stew. (Ala.) 109.

7. Stephens *v.* Crawford, 3 Ga. 499. See Stephens *v.* Crawford, 1 Ga. 574; s. c., 44 Am. Dec. 680; Crawford *v.* Howard, 9 Ga. 314.

8. People *v.* Slocum, 1 Idaho, 62.

9. 8 Ill. 57.

10. Governor *v.* Humphreys, 7 Jones (N. Car.), 258; Williams *v.* Ehringhaus, 3 Dev. L. (N. Car.) 297; Iredell *v.* Barbee, 9 Ired. L. (N. Car.) 250; United States *v.* Maurice, 2 Brock. C. C. 115.

Bonds Payable to Wrong Obligee.—Where no form is prescribed, a bond to the selectmen is a bond to the town. Horn *v.* Whittier, 6 N. H. 88; Moore *v.* Graves, 3 N. H. 408.

Where a bond purporting to be official is made payable to official persons whom the statute does not authorize to become the obligees, the successors of such obligees cannot maintain an action on the bond. Stevens *v.* Hay, 6 Cush. (Mass.) 229; Overseers, etc., *v.* Sears, 22 Pick. (Mass.) 126; Cutts *v.* Parsons, 2 Mass. 440; White *v.* Quarles, 14 Mass. 451; Jansen *v.* Ostrander, 1 Cow. (N. Y.) 670; Kennell *v.* Etheridge, 3 Ired. L. (N. Car.) 360; Pickering *v.* Pearson, 6 N. H. 559; Governor *v.* Twitty, 1 Dev. L. (N. Car.) 153; Jones *v.* Wiley, 4 Humph. (Tenn.) 146; Calhoun *v.* Sunford, 4 Porter (Ala.) 345; Hibbetts *v.* Canada, 10 Yerg. (Tenn.) 465; Stuart *v.* Lee, 3 Call (Va.), 364.

A voluntary bond is, between the parties, both in law and equity, a gift of the money secured by it.[1] Such a bond when entered into by competent parties, founded on a good consideration and for a lawful purpose, is good and valid at common law.[2]

8. PENALTY AND BREACH OF CONDITION OF OFFICIAL BONDS. —If no specific penalty is inserted in an official bond the sureties are nevertheless liable for the loss or injury sustained, where their obligation is otherwise explicit.[3] That the penalty is for an amount in excess of the amount required by statute does not impair its validity.[4] While it is a general rule that in all conditional bonds the sum stipulated to be paid upon a breach will be construed as a penalty, yet, if the penalty or forfeiture is prescribed by statute, courts of equity will not mitigate the forfeiture because it would be in contravention of the legislative will.[5]

"Cases of agreements and conditions of the party and of the law are certainly to be distinguished. You can never say that the

A bond which is not a probate bond made payable to a probate judge and his successor cannot be sued on by his successors. White *v.* Quarles, 14 Mass. 451.

Public officers can maintain action as successors only when expressly provided by statute. Overseers, etc., *v.* Sears, 22 Pick. (Mass.) 126; Governor *v.* Twitty, 1 Dev. L. (N. Car.) 153; Jones *v.* Wiley, 4 Humph. (Tenn.) 146; Hibbetts *v.* Canada, 10 Yerg. (Tenn.) 465; Calhoun *v.* Lundsford, 4 Porter (Ala.), 345; Stuart *v.* Lee, 3 Call (Va.), 364. *Compare* Horn *v.* Whittier, 6 N. H. 88; Tyler *v.* Hand, 7 How. (U. S.) 573.

But all such bonds are good as common-law bonds, and may be enforced by suit in the name of the obligees or their personal representatives. Sweetser *v.* Hay, 2 Gray (Mass.). 49; Thomas *v.* White, 12 Mass. 369; Horn *v.* Whittier, 6 N. H. 88; Governor *v.* Allen, 8 Humph. (Tenn.) 176; Van Hook *v.* Barnett, 4 Dev. L. (N. Car.) 268; Justices *v.* Smith, 2 J. J. Marsh. (Ky.) 472.

Where a statute requires a bond to be made payable to a township and instead was made payable to the "people of the State of Michigan," the township cannot maintain an action on the bond. It is payable to a different political organization. Town of La Grange *v.* Chapman, 11 Mich. 499.

Who may Bring Suit on Irregular Official Bond.—In *Tennessee* it is held that when a statute directs bonds for the public benefit to be made payable to an officer having legal succession, it is payable to the officer, and the successor, whether described in the statute or bond by name or not, may maintain an action. Polk *v.* Plummer, 2 Humph. (Tenn.) 500; s. c., 37 Am. Dec. 566.

An action on an official bond should be brought in the name of the obligee, or, when payable to a State or official personage, in the name of such person "to the use" of the party in interest. In Alabama when a bond is made payable to the wrong obligee and the officer has acted under it the "person aggrieved" has, by statute, all the remedies which he might have maintained on a regular statutory bond. Rev. Code Ala (1876), § 171, 181; Sprowl *v.* Lawrence, 33 Ala. 674; Lewis *v.* Lee Co., 66 Ala. 480.

Where an officer takes a bond from an agent or deputy, and delegates to him a part of his official duties, such bond is in no sense an official bond, and suit must be brought in the name of the obligee and not the State. Galbreath *v.* Gaines, 10 Lea (Tenn.), 568.

1. Handy *v.* Phila., etc., R. Co., 1 Phila. 31.

2. Archer *v.* Hart, 5 Fla. 234.

A bond voluntarily given by a son for the debt of his father is good. Murrell *v.* Greenland, 1 Desau. (S. Car.) 332.

A voluntary bond payable immediately after the death of the obligor is a valid debt against the estate of the deceased obligor, except as against the creditors, and it will be preferred in preference to a will previously made. Isenhart *v.* Brown, 2 Edw. (N. Y.) 341; Candor's Appeal, 27 Pa. St. 119.

3. Noble *v.* Hime, 12 Neb. 193.

4. *In re* Read, 34 Ark. 239; Graham *v.* Commr's Jefferson Co., 66 Ind. 386.

5. Clark *v.* Barnard, 108 U. S. 457.

law has determined hardly, but you may that the party has made a hard bargain."[1]

Where a penalty is a fixed forfeiture for the violation of public law it is not to be taken as fixing the maximum of damages.[2]

When an officer receives trust funds and deposits them in bank to his own credit, or mixes such funds with his own money, and it is lost, there is a breach of his bond.[3] A failure to pay over money due from an officer to the government when required by law so to do is a breach of his bond, and an action can be commenced at once without waiting to obtain a judgment against the delinquent officer.[4]

The death of the principal obligor in a bond has been held to be such a breach as to subject his sureties to liability on it.[5] The bond of a constable conditioned simply that he "shall faithfully perform all the duties of a constable in the service of all civil process that may be committed to him" is not broken by a failure to pay over money paid to the officer after the service of process and before the rendition of judgment.[6]

There is no breach of an official bond where there is no violation of duty.[7] Where the obligation is to do a certain thing or to save the obligee from a liability, there is a breach whenever there is a failure to do the stipulated thing or the liability becomes fixed. But if the undertaking is to indemnify against damages, there is no breach until actual damage is suffered.[8] Where an officer refuses or fails to perform the condition of his bond within a reasonable time,[9] a breach occurs. A surety cannot be held liable for any extra-official act of the principal, and such act cannot constitute a breach of an official bond.[10] Sureties on official bonds are ordinarily responsible only for defaults of their principal in the nature of misfeasance in office, and not generally for malfeasance.[11]

In Massachusetts a town-treasurer is liable as an insurer for money actually received. "His obligation is not regulated by the

1. Peachy *v.* Duke of Somerset, 1 Strange, 447, 453.

Where bonds are given not to defraud the revenue a breach is considered a crime, and "this court," says Lord Hardwicke, "will not relieve for that reason." Benson *v.* Gibson, 3 Atk. 395. See also Treasurer *v.* Patten, 1 Root (Conn.), 260; Keating *v.* Sparrow, 1 Ball. & B. 367.

By relieving from penalties and forfeitures incurred in violation of the revenue laws the court would virtually repeal a statute. Powell *v.* Redfield, 4 Blatchf. C. C. 45.

The penalty in a bond given pursuant to an act of Congress is a forfeiture inflicted by the sovereign for a breach of its laws. United States *v.* Montell, Taney Dec. C. C. 47.

2. Clark *v.* Barnard, 108 U. S. 436.

3. State *v.* Roberts, 21 Ark. 260; Wren *v.* Kirton, 11 Ves. 380; Draper *v.* Joiner, 9 Humph. (Tenn.) 614.

4. United States *v.* Babbitt, 95 U. S. (5 Otto) 334.

5. Allen *v.* State, 6 Blackf. (Ind.) 252.

6. City of Boston *v.* Moore, 3 Allen (Mass.), 126.

7. Turpin *v.* McKee, 7 Dana (Ky.), 301.

8. Gilbert *v.* Wiman, 1 N. Y. 550; Rockfellow *v.* Donnelly, 8 Cow. (N. Y.) 623; Chace *v.* Hinman, 8 Wend. (N. Y.) 452; Kip *v.* Brigham, 7 John. (N. Y.) 168; Thomas *v.* Allen, 1 Hill (N. Y.), 145; Churchill *v.* Hunt, 3 Denio (N. Y.), 321; Warwick *v.* Richardson, 10 Mees. & W. 284; Cutler *v.* Southern, 1 Saund. 116, note.

9. Mills *v.* Sugg, 3 Ired. L. (N. Car.) 77.

10. Governor *v.* Perrine, 23 Ala. 807.

11. Governor *v.* Hancock, 2 Ala. 728.

law of bailments. . . . He is a debtor, an accountant bound to account for and pay over the money he has collected. The loss of his money, therefore, by theft or otherwise is no excuse for nonperformance. This is founded on the nature of his contract and considerations of public policy." [1]

In Minnesota the loss of public funds by robbery is a breach of the official bond of the custodian, however innocent he may be.[2] Loss occasioned by a deviation from the ordinary routine of official duty at the request of the party to be benefited by the act is not a breaeh of the officer's bond.[3] A sheriff and the sureties on his official bond are liable for the acts and omissions of the former's deputies, but the liability is purely civil.[4] "An officer who begins the execuion of final process must complete it." Consequently a deputy of an outgoing sheriff is responsible on his bond for money part of which was collected before the termination of his principal's term of office, and part afterwards, the deputy having been retained by the sheriff's successor.[5] A public officer is liable only to the person to whom he owes a particular duty.[6] A sheriff is liable for his neglect in a pending suit only to the plaintiff or defendant in that suit.[7] When the condition of a bond is possible when the bond is executed, but before it can be performed it becomes impossible by the act of God or of the

1. Inhabitants of Hancock *v.* Hazzard, 12 Cush. (Mass.) 112; Inhabitants of Colerain *v.* Bell, 9 Metc. (Mass.) 499; United States *v.* Prescott, 3 How. (U. S.) 578.

2. County of Redwood *v.* Tower, 28 Minn. 45; County of Hennepin *v.* Jones, 18 Minn. 199; County of McLeod *v.* Gilbert, 19 Minn. 218.

3. Skinner *v.* Wilson, 61 Miss. 90; Simms *v.* Quinn, 58 Miss. 221.

An officer may defend an action for not returning an execution by showing that he acted according to the instructions of the plaintiff. Robinson *v.* Coker, 11 Ala. 466; Norris *v.* State, 22 Ala. 524; Kennedy *v.* Smith, 7 Yerg. (Tenn.) 472; Robinson *v.* Harrison, 7 Humph. (Tenn.) 489; Granberry *v.* Crosby, 7 Heisk. (Tenn.) 579; Bassett *v.* Bowmar, 3 B. Mon. (Ky.) 325.

Where a deputy-marshal allowed the name of an obligor in a replevin bond to be erased under the instructions of plaintiff's attorney, it was held that no action could be maintained on the official bond of the principal. Rogers *v.* The Marshal, 1 Wall. (68 U. S.) 644, 654; s. c., 4 Myers, Fed. Dec. §§ 309, 310.

Strict compliance will be required with the terms of a statute which renders a sheriff liable for failing to return an execution which was irregular and wrongful. Moore *v.* McClief, 16 Ohio St. 50; Bank, etc., *v.* Domigan, 12 Ohio, 220; s. c., 40 Am. Dec. 475; Duncan *v.* Drakely, 10 Ohio, 47; Conklin *v.* Parker, 10 Ohio St. 28; Langdon *v.* Sunmers, 10 Ohio St. 77.

4. State *v.* Nichols, 39 Miss. 318; Foote *v.* Van Zandt, 34 Miss. 40.

5. Larned *v.* Allen, 13 Mass. 295.

6. State *v.* Harris, 89 Ind. 363.

7. Harrington *v.* Ward, 9 Mass. 251; Compton *v.* Pruitt, 88 Ind. 171; Gardner *v.* Heartt, 3 Denio (N. Y.). 232; Bank of Rome *v.* Mott, 17 Wend. (N. Y.) 554.

A recorder who gives an erroneous certificate is responsible only to the person to whom he gives it. Wood *v.* Ruland, 10 Mo. 143.

The publisher of the newspaper having the largest circulation could recover damages from the postmaster for denying to him the publication of the list of letters uncalled for, although it was the duty of the postmaster to give the printing to the paper having the largest circulation. Strong *v.* Campbell, 11 Barb. (N. Y.) 135.

"The law does not attempt to give full reparation to all parties injured by a wrong committed. . . . It is only the proximate injury that the law endeavors to compensate; the more remote comes under the head of *damnum absque injuria*." Dale *v.* Grant, 34 N. J. L. 142.

obligee, or performance becomes unlawful, the obligation is discharged.[1]

9. SUMMARY REMEDIES ON OFFICIAL BONDS.—In many States judgment may be rendered on an official bond on motion. All such statutes which tend to abbreviate the ordinary course of procedure are in derogation of the common law and must be strictly construed.[2] Such statutes are not unconstitutional as infringing the right to a trial by jury. The existing law enters into and becomes a part of a bond; and if the law authorizes summary proceedings at the time the bond is executed, the parties are liable to the operation of the law.[3] The foundation of the summary proceedings is the default or misfeasance of the officer, and not the bond. But the motion cannot be sustained unless the bond is valid. "For assuredly if the sheriff and his sureties could not be made liable in an action on the bond by reason of its invalidity, they could not be held liable in this summary mode of proceeding if the bond were void."[4] In some States it is provided that notice of such motion need be served on the officer only, and that such service will warrant a judgment against the sureties. If the sureties do not appear, the fact of suretyship must be proved.[5]

1. Badlam *v.* Tucker, 1 Pick. (Mass.) 287; U. S. *v.* Dixey, 3 Wash. 15; U. S. *v.* Mitchell, 3 Wash. C. C. 93; Baylies *v.* Fettyplace, 7 Mass. 338; Blake *v.* Niles, 13 N. H. 459; Oline *v.* Alter, 14 Mo. 185; Mounsey *v.* Drake, 10 John. (N. Y.) 27.

The condition of a bond is not impossible when it may be performed by the aid of the obligee. If the obligee neglect or refuse to act, the obligation is saved. Pindar *v.* Upton, 44 N. H. 358.

2. Dawson *v.* Shaver, 1 Blackf. (Ind.) 204; Hasbrogs *v.* Hastings, 1 Salk. 212.

3. Lewis *v.* Garrett, 5 How. (Miss.) 434; Wells *v.* Caldwell, 1 A. K. Marsh. (Ky.) 441; Burk *v.* Levy, 1 Rand. (Va.) 2; Van Zant *v.* Waddell, 2 Yerg. (Tenn.) 260; Tipton *v.* Harris, Peck (Tenn.), 414; McWhorter *v.* Marrs, 1 Stew. (Ala.) 63; Johnson *v.* Atwood, 2 Stew. (Ala.) 225; Bank of Columbia *v.* Okley, 4 Wheat. (U. S.) 235.

4. Paddleford *v.* Moore, 32 Miss. 622.

5. Reid *v.* Planters' Bank, 3 Ala. 712; Harris *v.* Bradford, 4 Ala. 214.

In *Mississippi* notice must be served on both principal and sureties. If they desire to deny their liability as sureties they must crave oyer of the bond and plead *non est factum*. Hamblin *v.* Foster, 4 Smed. & M. 139; Lewis *v.* Garrett, 5 How. (Miss.) 434.

The plaintiff may enter a motion against an officer and all his sureties on a joint and several bond, or dismiss as to part of the sureties. McCrosky *v.* Riggs, 12 Smed. & M. (Miss.) 712.

The liability of the officer must be first fixed unless he has died, been removed, or cannot be found. Code of Miss. (1880) § 325.

In *Tennessee*, in Rice *v.* Kirkman, 3 Humph. (Tenn.) 415, it was held that a judgment by motion against a sheriff and four sureties out of five was void on the ground that "a judgment on motion being in derogation of common law must be strictly taken. As a consequence of this rule, it has always been held that a statute giving a remedy by motion has no latitude of construction. The statute gives judgment on motion against a sheriff and his securities. If the judgment be taken against less than the number of the securities, are the terms of the statute complied with? Is it against his securities? Surely not. A judgment is given by motion against two. Upon what principle shall you have it against one? If it be done, it must be by construction, and that a very dangerous construction." This ruling was followed in Fay *v.* Britton, 2 Heisk. (Tenn.) 606.

A *nol pros* as to one of the sureties is fatal to the entire motion. Chairman *v.* Sawyers, 1 Thompson Cases (Tenn.), 55.

If one of the sureties is dead, a motion will lie against the principal and the surviving sureties. Rice *v.* Kirkman, 3 Humph. (Tenn.) 418; Houston *v.* Dougherty, 4 Humph. (Tenn.) 505; Hearn *v.* Ewin, 3 Coldw. (Tenn.) 399. But otherwise if it is the principal who is dead. Gibson *v.* Martin, 7 Humph. (Tenn.) 127.

5. Actions on Bonds.—(*a*) *In General—Upon What State of Facts.*—Where a money bond is payable in instalments, debt will lie thereon after all the instalments have become due, but not to recover the amount of one instalment.[1] Separate actions will not lie where more than one instalment is due.[2] Where all the instalments have become due the remedy is by action for breach of covenant.[3]

An obligee in a bond to indemnify him for having given a receipt to an officer for goods attached is damaged by an attachment of his property in a suit on his receipt, and may thereupon bring an action on his bond.[4]

Where covenants are secured by a penalty, the obligee may sue, at common law, in debt for the penalty, or bring an action on the covenants. In covenant he may recover as often as the breach arises, even beyond the penalty. But having elected to proceed in debt on the penalty, he cannot then go on the covenant.[5]

The right of action on a bond to indemnify against "liability" is complete when the obligee becomes legally liable,[6] as by a judgment.[7] Action may be brought on a bond payable on demand without demand.[8]

The omission of the name of one of the sureties by mistake will not invalidate a judgment rendered against the principal and the other sureties. Jones *v.* Henderson, 1 Thompson Cases (Tenn.), 53. See Th. & St. Code of Tenn. § 2789.

Against whom Summary Proceedings may be Taken.—This varies according to the different statutes. In *Virginia* the summary remedy is allowed against sheriffs, sergeants, coroners, collectors, their deputies, and the sureties on their respective bonds. Code of Va. ch. 49, §§ 45, 46, 47, 48, p. 479, and under certain circumstances against constables and sureties. Code of Va. (1873) ch. 147, § 12, p. 1006.

In *Alabama* in proper cases against sheriffs, coroners, and other executive officers; against clerks of court, registers, and prosecuting officers; against judges of probate, tax-collectors, tax assessors, treasurers, and other persons receiving money belonging to the county, and against defaulters of school money. Code of Ala. (1876), title 2, ch. 3, p. 763. See Armstrong *v.* Holley, 29 Ala. 305; Marion Co. *v.* Brown, 43 Ala. 112.

1. State *v.* Scoggin, 10 Ark. 326.

2. See Hopkins *v.* Deaves, 2 Brown (Pa.), 93; Black *v.* Caruthers, 6 Humph. (Tenn.) 87; Warwick *v.* Matlock, 7 N. J. L. 163.

3. State *v.* Scoggin, 10 Ark. 326.

4. Otis *v.* Blake, 6 Mass. 336. And see Murrell *v.* Johnson, 1 Hen. & M. (Va.) 450; Kip *v.* Brigham, 7 John. 168. See, generally, Heralson *v.* Mason, 53 Mo. 211; Western B. *v.* Sherwood, 29 Barb. (N. Y.) 383; Howard *v.* Farley, 18 Abb. Pr. (N. Y.) 260; Spear *v.* Stacy, 26 Vt. 61; Stickney *v.* Stacy, 1 Fost. (N. H.) 61; Cottle *v.* Payne, 3 Day (Conn.), 289; Chapman *v.* Lathrop, 39 Mo. 431; Hoxie *v.* Weston, 19 Me. 322; McNinch *v.* Ramsey, 66 N. Car. 229; Garlington *v.* Priest, 13 Fla. 559; Haughton *v.* Meroney, 65 N. Car. 124; Thorrington *v.* Smith, 8 Wall. (U. S.) 1.

As to fact necessary to sustain an action on a bond given to relieve a party from arrest on mesne process, see Webster *v.* Bailey, 56 Me. 364.

5. New Holland Turn. Co. *v.* Lancaster Co., 71 Pa. St. 442; Perkins *v.* Lyman, 11 Mass. 83; McLaughlin *v.* Hutchins, 3 Ark. 207.

6. Bancroft *v.* Winspear, 44 Barb. (N. Y.) 209; Chase *v.* Hinman, 8 Wend. (N. Y.) 452.

7. Jones *v.* Childs, 8 Mo. 121.

8. Husbands *v.* Vincent, 5 Harr. (Del.) 268.

A bond payable "with interest from date, the interest payable annually," is due and payable from date, and no demand is necessary before suit. Knight *v.* Bradswell, 70 N. Car. 709.

Where the obligor in a bond for the conveyance of land has conveyed the land to a third person by deed of warranty made "subject to the incumbrance created by the bond," no demand for a conveyance need be made on the obligor

In an action on a bond payable on a day certain at a place named, it is not necessary to allege demand of payment at the time and place mentioned.[1]

(*b*) *Official Bonds.*—Official bonds are designed to secure the interests of private individuals as well as the public. Suit must be brought in the name of the obligor, and no suit can be instituted for the benefit of any person other than the obligor without the consent of the obligor. When the object of the suit is to protect private interests it is usually brought in the name of the obligee "for the use of" or "at the relation" of the real party in interest. In Maine it is provided by statute that when suit has been instituted on an official bond, any person who has a cause of action arising out of the bond may file an additional declaration and become a co-plaintiff. This statute does not take away the right to institute more than one action on the bond.[2] In some States the action must be wrought in the name of the real party in interest, but an exception is made in the case of bonds payable to the State.[3] But the general rule is that the right of action on a bond belongs to the party having the legal interest, and suit must be brought in the name of the obligee.[4] In an action of debt on a bond the amount of the penalty and not damages laid in the declaration gives jurisdiction.[5] Only the courts of the State where

prior to the commencement of an action on the bond. McCarthy *v.* Mansfield, 56 Me. 538.

1. Langston *v.* S. C. R., 2 S. Car. 248; Truman *v.* McCollum, 20 Wis. 379. See Bulkley *v.* Finch, 37 Conn. 71.

The maker of a bond has the whole day on which it falls due in which to pay it. Bachery *v.* Brown, 17 Ark. 442.

2. White *v.* Wilkins, 24 Me. 299.

Official statutes cannot be made available to protect private interests without a statutory provision to that effect. In State *v.* Nichols, 8 Heisk. (Tenn.) 657, the court says: "The bond is given to the State; is intended to enforce the performance of official duties, and to indemnify the public against official delinquency. Such is the plain meaning of its terms, and from the nature of the case, unless otherwise directed by statute, would be its object. It certainly was not intended to be operative in favor of individual citizens for any wrong done to them by the officer." This was a case in which the officer overdid his duty. For the neglect of duty is assigned. See Crews *v.* Taylor, 56 Tex. 461; Fox *v.* Thibault, 33 La. Ann. 32. (Both cases under statute.)

3. Carmichael *v.* Moore, 88 N. Car. 29.

In *Arkansas* bonds for the payment of costs are made payable to the defendant, and are designed to protect the officers of the court for fees as well as the defendant. In cases the bond may be put in suit by the person entitled to the fees, without the consent of the obligee. Boyd *v.* Crutchfield, 7 Ark. 149.

4. Inhabitants of Northampton *v.* Elwell, 4 Gray (Mass.), 81; Sanders *v.* Filley, 12 Pick. (Mass.) 554; Johnson *v.* Foster, 12 Metc. (Mass.) 167; Millard *v.* Baldwin, 3 Gray (Mass.), 484; Fuller *v.* Fullerton, 14 Barb. (N. Y.) 59; Jansen *v.* Ostrander, 1 Cow. (N. Y.) 670; Armine *v.* Spencer, 4 Wend. (N. Y.) 406; Lawton *v.* Erwin, 9 Wend. (N. Y.) 233; Skellinger *v.* Yendes, 12 Wend. (N. Y.) 306.

A county treasurer entitled to receive the funds may maintain a suit against his predecessor and the sureties on his official bond for a balance due the county. Hunnicutt *v.* Kirkpatrick, 39 Ark. 172; Haynes *v.* Butler, 30 Ark. 69; Jones *v.* State, to use, etc., 14 Ark. 170.

The auditor cannot bring suit in his own name and official character for demands claimed by the State. See Taylor *v.* Auditor, 2 Ark. 174.

An action cannot be brought by an official obligee after his retirement from office. It should be by his successor. Bagby *v.* Baker, 18 Ala. 653.

The real party in interest must show his interest before he can recover. Ing *v.* State, 8 Md. 287.

5. Sims *v.* Harris, 8 B. Mon. (Ky.) 57; State *v.* Rousseau, 71 N. Car. 194; Stone

an official bond is authorized to be executed have jurisdiction in an action on such bond.[1] In an action on a bond for the payment of money or for the performance of official duties judgment will be rendered for the amount of the penalty to be discharged by the payment of the amount found due.[2] The person who first sues on a bond is entitled to the whole of the penalty if his demands amount to so much.[3] The State cannot maintain an action on a sheriff's bond for a breach from which no damage resulted.[4] A judgment against the officer individually is not a necessary preliminary to an action on his official bond.[5] An action cannot be maintained on an official bond for money received by the officer which he had no authority to receive, although such authority was afterwards conferred upon him by statute.[6] A judgment for the

v. Murphy, 2 Iowa, 35; Boomer *v.* Saine, 10 Wend. (N. Y.) 525.

1. Pickering *v.* Fish, 6 Vt. 102.

Suit cannot be sustained in *Ohio* on an official bond executed in Indiana so as to charge the obligor with the Indiana statutory penalties for misfeasance in office. "The penal laws of one State can have no operation in another State, or be enforced by the courts of another. Penal laws are strictly local, and affect nothing more than they can reach." Indiana, to use, etc., *v.* John, 5 Ohio, 218; Falliott *v.* Ogden, 1 H. Blkst. 135.

In Pickering *v.* Fish, 6 Vt. 102, the court says that "whenever a bond, although taken in pursuance of a statutory provision, is left, as to its operation and effect, to be governed by common-law rules, there can be no obstacle to enforcing it anywhere, like any other instrument of the kind. What we decide is this: when an official bond is, by the law of the State where it is executed, to have effect only in a particular way, and to be enforced only in a particular mode pointed out by those laws, the enforcing it in that mode is the exclusive province of the tribunals of that State."

2. State *ex rel. v.* Luckey, 51 Miss. 528; Harrison *v.* Park, 1 J. J. Marsh. (Ky.) 174.

In *Iowa* it was held that a justice of the peace had jurisdiction where the amount claimed was $100 and the penalty of the bond was $300. The amount claimed, not the penalty, was the criterion. Stone *v.* Murphy, 2 Iowa, 35; Boomer *v.* Laine, 10 Wend. (N. Y.) 525.

In *Illinois* a distinction is made between official bonds and other bonds on condition. On the latter a justice has no jurisdiction when the penalty exceeds $100. Snowhook *v.* Dodge, 28 Ill. 63.

In *North Carolina*, on the contrary, the penalty is held to be the sum demanded, which controls jurisdiction. State *ex rel. v.* Porter, 69 N. Car. 140; State *ex rel. v.* Rousseau, 71 N. Car. 194.

In some States the question of jurisdiction is affected by the form of action. Sims *v.* Harris, 8 B. Mon. (Ky.) 55; Wetherill *v.* Inhabitants, 5 Blackf. (Ind.) 357.

3. Dallas *v.* Chaloners, 3 Dall. (3 U. S.) 501, note; Christman *v.* Commonwealth, 17 Serg. & R. (Pa.) 381. See also Lea *v.* Yard, 4 Dall. (U. S.) 95, note; McKean *v.* Shannon, 1 Binn. (Pa.) 370.

4. Commonwealth *v.* Reed, 3 Bush (Ky.), 516.

Loss or damage to the plaintiff is essential to the maintenance of an action on a bond. Jones *v.* Biggs, 1 Jones (N. Car.), 364.

Two Bonds Given by Same Officer.—Where an officer has given two bonds, one general and one special, parties having a cause of action for a breach of one bond cannot seek redress by an action on the other. State *v.* Felton, 59 Miss. 402; State *v.* Mayes, 54 Miss. 417.

5. State *v.* Leeds, 31 N. J. L. 185; Douglass *v.* Howland, 34 Wend. (N. Y.) 35; McKellar *v.* Bowell, 4 Hawks. (N. Car.) 34; Colter *v.* Morgan, 12 B. Mon. (Ky.) 278; Governor *v.* White, 4 Stew. & P. (Ala.) 441; s.c., 24 Am. Dec. 763. *Compare* Comm'rs *v.* Newby, 1 McCord (S. Car.). 184; Bailey *v.* Butterfield, 14 Me. 112; People *v.* Easton, 2 Wend. (N. Y.) 297 (left to the discretion of the court).

The plaintiff may elect either to sue the officer alone as for trespass or to join his sureties as defendants. Charles *v.* Hoskins, 11 Iowa, 329.

6. "For acts not within the line of official duty and authority, not under color of office, he may incur personal, not official, responsibility, and in that personal responsibility the sureties on his

penalty of a bond on account of one breach does not prevent suit and recovery for a subsequent breach.[1]

BONUS.—A premium given for a loan or other privilege;[2] an

official bond are not involved." McKee *v.* Griffin, 66 Ala. 211; Coleman *v.* Ormond, 60 Ala. 328; Brewer *v.* King, 63 Ala. 511; Drake *v.* Webb, 63 Ala. 596; Morrow *v.* Wood, 56 Ala. 1; Kelly *v.* Moore, 51 Ala. 364; Moore *v.* Madison Co., 38 Ala. 670; McElhaney *v.* Gilleland, 30 Ala. 183.

1. Ahl *v.* Ahl, 60 Md. 207.

2. Where by the provisions of an act chartering a railroad company the counties through which it ran were authorized to aid in its construction by sale or mortgage of the swamp lands within each county, before any such sale, however, the sense of the qualified voters being first taken; and the county of Wayne in the State of Illinois held such an election, in which the question was thus proposed to the voters: "For appropriating the swamp lands of Wayne county as a *bonus* to any company for building a railroad through said county; Against the same," on the question as to the validity of the mortgage made in accordance with the vote taken, it was held by the court, Hunt, J.: "The objection to the word 'bonus' in the proposition submitted to the voters of Wayne county is not valid. This submission, in connection with the general subject of a failure to comply with the requisites prescribed by the statutes, has been already discussed. Upon its individual merits we are also of the opinion that the objection is not valid. It is a verbal criticism merely—an objection to the words and not to the substance of the submission. A proposition was submitted to the voters, of which the affirmative was in these words: 'For appropriating the swamp lands of Wayne county as a *bonus* to any company for building a railroad through said county.' It is said that the word 'bonus' condemns the submission; that this word means a gratuity, a voluntary donation, a gift, and that a town or county cannot, although it have the direct authority of the legislature, give away its property. When this question is properly before us it will be disposed of. It does not, however, arise in this case. In the first place, if it be assumed that the word is correctly defined as a gift or gratuity, that meaning is controlled and limited by the connection in which it is here used, to wit, that in consideration of it the company receiving the lands will undertake to build a railroad through the county. It is not simply a *bonus*, but a bonus to any company who shall undertake the great task, which, it is loudly complained, has not yet been performed by any one. But, secondly, the meaning of the word 'bonus' is not that given to it by the objection. It is thus defined by Webster: 'A premium given for a loan or charter or other privilege granted to a company; as, the bank paid a *bonus* for its charter; a sum paid in addition to a stated compensation.' It is not a gift or gratuity, but a sum paid for services, or upon a consideration in addition to or in excess of that which would ordinarily be given." Kenicott *v.* Supervisors, 16 Wall. 452, 470.

Where an act providing for the establishment of savings and building associations, passed in 1850, authorized such associations "to receive for such loan or loans, in addition to the legal rate of interest, such a *bonus* as the parties in each case may agree upon," it was held that a promissory note given by a member to the association for the payment of $6000 with interest, and a *bonus* of three fourths of one per cent per month, in addition to the interest, both interest and bonus payable monthly in advance, though not entirely void, was usurious, both in respect to that part of it denominated a 'bonus' and to the interest; the court, Waite, C. J., saying: "It is apparent that the legislature intended to authorize an association formed under the statute to receive a compensation, in addition to the legal rate of interest, for a loan of money made to one of their members. But did they intend to exonerate all contracts made with their members from the operation of the usury laws? We think not. Had they so intended, they would have used language more appropriate for such purpose. They naturally would have said that such associations might loan money to their members at such rates of interest, or upon such terms, as the parties might agree. This language would have been plain, intelligible, and liable to no misconstruction. But they have simply authorized the receipt of a *bonus* for the loan in addition to the legal interest. By that expression we think that they meant something definite; something distinct and independent of the interest in the acceptation of that term: a definite sum

extra dividend given to the members of a joint-stock company out of accumulated profits.[1]

BOOK. (See also COPYRIGHT.)—A printed literary composition.[2]

for a loan for a specified time, and not anything which the parties, in their contract, might choose to denominate a 'bonus.'" Mut. Savings Bank and Building Assoc. *v.* Wilcox, 24 Conn. 147, 154.

1. The word "bonus" is often used in this sense in those cases in which the question has arisen as to whether the extra dividend so declared is capital or interest, and should belong to the life-tenant or the remainderman. For examples see Paris *v.* Paris. 10 Ves. Jr. 185; Witts *v.* Steere, 13 Ves. Jr. 363, where it was held that distribution by the Bank of England of extraordinary profit beyond the regular dividend, not by way of increased dividend, but as *bonus*, is to be taken as capital. Norris *v.* Harrison, 2 Mad. Ch. 268; Vaughan *v.* Wood, 1 Myl. & K. 403. But where there is merely an increase in the dividend and no express declaration of an extraordinary distribution, it is not a bonus, and belongs to the life-tenant. Barclay *v.* Wainewright, 14 Ves. Jr. 66.

So in Brander *v.* Brander, 4 Ves. Jr. (Sumner's Ed.) 800, note, where it is said: "It is now well settled, by a long series of decisions, that whenever a question on the subject arises between a tenant for life of bank stock and a remainderman, any extraordinary division of profits by the bank amongst the proprietors, unless such *bonus* is clearly and distinctly made as dividend only, must be considered as an accretion of capital; to the interest upon which, however (and to the interest only), the tenant for life will be entitled." Clayton *v.* Cresham. 10 Ves. Jr. 290; Hooper *v.* Rossiter, 1 McClel. 536.

2. In deciding that a musical composition published on a single sheet of paper is privileged as a *book* within the statute of 8 Anne, c. 19, § 1, the court, Ellenborough, C. J., accepted the argument of Erskine in Hime *v.* Dale, sitting after May term, 1803, as follows: "There is nothing in the word 'book' to require that it shall consist of several sheets bound in leather or stitched in a marble cover. 'Book' is evidently the Saxon *boc*, and the latter term is from the *beech tree*, the rind of which supplied the place of paper to our German ancestors. The Latin word *liber* is of a similar etymology, meaning originally only the bark of a tree. 'Book' may therefore be applied to any writing, and it has often been so used in the English language. The *horn book* consists of one small page, protected by an animal preparation, and in this state it has universally received the appellation of a 'book.' So in legal proceedings the copy of the pleadings after issue joined, whether it be long or short, is called the paper *book* or the demurrer *book*. In the Court of Exchequer a roll was anciently denominated a 'book,' and so continues in some instances to this day. An oath as old as the time of Edward I. runs in this form: 'And you shall deliver into the Court of Exchequer a *book* fairly written,' etc. But the 'book' delivered into court in fulfilment of this oath has always been a roll of parchment." Clementi *v.* Golding, 2 Campbell, 25, and notes; s c., 11 East, 244; White *v.* Geroch, 2 B. & Al. 298; Clayton *v.* Stone, 2 Paine (U. S.), 382. See also Drury *v.* Ewing, 1 Bond (U. S.), 540: Scoville *v.* Toland, 6 West L. J. 84.

The act of 5th and 6th Vict. c. 45, § 2, declares that a *book* "shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music or dramatic piece;" under which it was held that a newspaper was not a "book" within the said act. Cox *v.* Land and Water Journal Co., L. R. 9 Eq. Cas. 324.

The University of Cambridge has concurrent authority with the King's Printer to print acts of Parliament and abridgments thereof under a grant of authority to print *omnes et omnimodos libros*. Basket *v.* Cambridge University, 1 Wm. Bl. 105.

A periodical or magazine is a book within the meaning of 5 and 6 Vict. c. 45. § 24. Henderson *v.* Maxwell, L. R. 4 Ch. Div. 163.

A *part* of a work published at uncertain intervals, of which thirty copies only are printed, twenty-six of which are subscribed for, the principal costs of publication being defrayed by funds devised by a testator for that purpose, is not a "book" demandable by the public libraries under 53 Geo. III. c. 156. Trustees of the British Museum *v.* Payne, 2 Y. & J. 166.

BOOKS AS EVIDENCE. (See also ALMANAC; EVIDENCE.)

1. **Principles Governing Admission.**—These principles may be stated as follows: (*a*) Records of judicial or legislative proceedings or other matters of a public nature are admitted in evidence at the common law on the ground that they have been made by authorized and accredited agents appointed for the purpose, and also because of their publicity. (*b*) Semi-public records, public as to a certain part of the community because they proceed from an authority which it recognizes, but private as to the rest of the community, are admissible, as between persons to whom they are such, on the same grounds as wholly public records. (*c*) Declarations or entries against the interest of the party making them are admissible as secondary evidence and as likely to be true. The best evidence is the testimony of the party making such entries. (*d*) Entries made in the usual course of business by one whose duty it was to make them are admissible for the reason that, being made in the usual routine of business, they are part of the *res gestæ*. (*e*) Original entries have been made admissible in many of the different States either by modifications of the rules of the common law by the courts or by act of legislature on the ground of necessity.

2. **What Books Admissible.**—The books which under these principles are generally admitted as evidence may be classified as follows: 1. Books containing statutes, official registers, judicial records, histories, books of science or art; 2. Account-books, memorandum-books, corporation-books, letter-books; 3. Books of original entries.

1. STATUTE BOOKS—PAMPHLET LAWS—DIGESTS.—The Supreme Court of the United States and the courts of many of the States have held that a printed volume purporting on its face to contain the laws of a sister State is admissible as *prima-facie* evidence to prove the statute laws of that State.[1]

1. Young *v.* Bank of Alexandria, 4 Cranch (U. S.), 384; Thompson *v.* Musser, 1 Dall. (U. S.) 458; Biddis *v.* James, 6 Binn. (Pa.) 321; Muller *v.* Morris, 2 Barr (Pa.), 85; Raynham *v.* Canton, 3 Pick. (Mass.) 293; Kean *v.* Rice, 12 S. & R. (Pa.) 203; State *v.* Stade, D. Chipm. (Vt) 303; Comparet *v.* Jernegan, 5 Blackf. (Ind.) 375; Taylor *v.* Bank of Illinois, 7 B. Mon. (Ky.) 585; Taylor *v.* Bank of Alexandria, 5 Leigh (Va.), 471; Clarke *v.* Bank of Mississippi, 5 Eng. (Ark.) 516; Allen *v.* Watson, 2 Hill (S. Car.), 319; Hale *v.* Rose, 2 Penning-

2. JOURNALS OF EITHER HOUSE.[1]

3. OFFICIAL REGISTERS.—These books are only evidence of such facts as are required to be recorded in them.[2]

So parish registers, registers of baptisms or births, prove only those facts of marriage or baptism.[3]

Registers kept at the navy office are admissible to prove the death of a sailor, the date thereof, the ship he belonged to, and the wages due him.[4]

ton (N. J.), 591; Eagan *v.* Connelly, 107 Ill. 458. *Contra*, Van Buskirk *v.* Mulock, 3 Harr. (N. J.) 185.

Some States have expressly enacted this rule. *Connecticut*, Rev. Stat. 1849, title 1, § 131; *Michigan*, Rev. Stat. 1846, c. 102, § 78; *Mississippi*, Hutchins. Dig. 1848, c. 60, art. 10; *Missouri*, Rev. Stat. 1845, c. 59, §§ 4–6; *Wisconsin*, Rev. Stat. 1849, c. 98, § 54; *Maine*, Rev. Stat. 1840, c. 133, § 47; *Massachusetts*, Rev. Stat. 1836, c. 94, § 59; *New York*, Stat. 1848, c. 312; *Florida*, Thomp. Dig. p. 342; *North Carolina*, Rev. Stat. 1837, c. 44, § 4.

The common law of a sister State may be shown by books of reports of adjudged cases accredited in that State. Inge *v.* Murphy, 10 Ala. 885.

Such copies are admitted in *Massachusetts* if purporting to be published under the authority of the State government or if commonly admitted as evidence in the courts of that State. Pub. Stat. c. 169, § 71; Ashley *v.* Root, 4 Allen (Mass.), 504.

Other States have similar statutes. Clanton *v.* Barnes, 50 Ala. 260; Martin *v.* Payne, 11 Tex. 292; Merrifield *v.* Robins, 8 Gray (Mass.), 150.

A copy purporting to be printed by "order of the governor" was admitted, the statute providing for admission of copies printed by authority of the State government of another State. Wilt *v.* Cutler, 38 Mich. 189. *Cf.* Pac. Pneumatic Gas Co. *v.* Wheelock, 44 N. Y. Super. Ct. 566.

Experts or books of decisions may prove the unwritten law of another State in *Massachusetts*. Pub. St. c. 169, § 72; Penobscot & C. R. Co. *v.* Bartlett, 12 Gray (Mass.), 244; Craigin *v* Lamkin, 7 Allen (Mass.), 395; Ames *v.* McCamber, 124 Mass. 90.

Provisions of Congress for the authentication of the acts of the legislatures of the several States are not regarded as exclusive of any other which the States may respectively adopt. Lothrop *v.* Blake, 3 Barr (Pa.), 483. See Grant *v.* H. Clay Coal Co., 80 Pa. St. 208.

Under the act of Congress, the seal of the State is a sufficient authentication without the attestation of any officer or other proof, and the seal will be presumed *prima facie* to have been affixed by the proper officer. U. S. *v.* Amady, 11 Wheat. (U. S.) 392; U. S. *v.* Johns, 4 Dall. (U. S.) 412; State *v.* Carr, 5 N. H. 367.

A book of statutes printed by a private printer is not admissible as evidence of the statutes of another State. Bostwick *v.* Bogardus, 2 Root (Conn.), 250; Canfield *v.* Squire, 2 Root (Conn.), 300.

Books of a township trustee are public records in *Indiana*. Anderson School Township *v.* Thompson, 92 Ind. 556.

The bank of Alabama and its branches being public property, its books are public writings of which sworn copies may be produced wherever the books themselves would be evidence. Crawford *v.* Branch Bank at Mobile, 8 Ala. 79.

1. Jones *v.* Randall, Cowp. 17; Root *v.* King, 7 Cowen (N. Y.), 613; Spangler *v.* Jacoby, 14 Ill. 299.

2. Fitler *v.* Shotwell, 7 W. & S. (Pa.) 14; Brown *v.* Hicks, 1 Pike (Ark.), 232; Haile *v.* Palmer, 5 Mo. 403.

3. A parish register is evidence only of the time of the marriage. Doe *v.* Barnes, 1 M. & Rob. 386.

A register of baptism is only evidence of that fact. Rex *v.* North Petherton, 5 B. & C. 508; Clark *v.* Trinity Church, 5 W. & S. (Pa.) 266. Nor is the mention of the child's age in the register of christenings proof of the day of his birth to support a plea of infancy. *In re* Wintle, L. R. 9 Eq. 373. Nor the date of the birth, made in a registry of births kept under a law which requires the register to enter all births in his parish, except so far as it shows the birth of the person before the date of the entry. *In re* Wintle, L. R. 9 Eq. 373.

4. Wallace *v.* Cook, 5 Esp. 117; Barber *v.* Holmes, 3 Esp. 190; Rex *v.* Fitzgerald, 1 Leach Crim. Cas. 24; Rex *v.* Rhodes, 1 Leach Crim. Cas. 29.

Records kept by employees of the signal service are evidence of what it was their duty to record. Evanston *v.* Gunn, 99 U. S. 660. So lighthouse records. The Maria Das Donas, 32 L. J. Adm. 163.

The prison calendar, to prove the commitment and discharge and date thereof of a prisoner.[1]

Books of assessment of public taxes, to prove the assessment of the taxes upon the individuals or the property therein mentioned.[2]

A ship's logbook, required to be kept by law, is an official register as to all required to be kept in it,[3] and *prima-facie* evidence thereof.[4]

Requisites.—It is sufficient that the book be directed by the proper authority to be kept, and that it be kept according to such directions to give it the character of an official register.[5]

4. JUDICIAL RECORDS.—Books containing records of judicial proceedings, when obtainable, are always admissible whenever the proceeding, the record of which is contained therein, is admissible, and when not obtainable exemplifications or sworn copies thereof.[6] (See also JUDGMENT, VERDICT, etc.)

Copies.—Immediate copies of contents of all books, themselves evidence when produced, if duly verified, will be admitted.[7]

5. HISTORIES.—Any approved public and general history may prove remote transactions of a general and public nature, but not particular facts or customs.[8]

1. Salte *v.* Thomas, 3 B. & P. 188; Rex *v.* Aickles, 1 Leach Crim. Cas. 435.

2. Doe *v.* Seaton, 2 Ad. & El. 178; Doe *v.* Arkwright, 2 Ad. & El. 182; Rex *v.* King, 2 T. R. 234; Ronkendorff *v.* Taylor, 4 Peters, 349; Com. *v.* Heffron, 102 Mass. 148. Also *prima facie* of domicile. Doe *v.* Cartwright, Ry. & M. 62; 1 C. & P. 218.

3. Abbott on Shipping, p. 468, *n.*; Orne *v.* Townsend, 4 Mason C. C. 544; Cloutman *v.* Tunison, 1 Sumner C. C. 373; U. S. *v.* Gibert, 2 Sumner C. C. 19, 78; The Sociedade Felix, 1 W. Rob. 303.

4. **Ship's Registry** is not of the nature of a public register, and is therefore only *prima-facie* evidence of ownership, and only when that is incidental and is no evidence at all when in favor of the person claiming. Weston *v.* Penniman, 1 Mason C. C. 306; Bixby *v.* Franklin Ins. Co., 8 Pick. (Mass.) 86; Colson *v.* Bensey, 6 Greenl. (Me.) 474.

Logbook of man-of-war, but not of merchant vessel, may prove time of sailing.

Logbook kept by mate is not evidence on an indictment against the crew for a revolt and confining the master. U. S. *v.* Sharp, Peter's C. C. Rep. 119.

5. The records of the alcade are evidence of that officer's acts. Kyburg *v.* Perkins, 6 Cal. 674.

Whenever the written record of the transactions of a public officer is an appropriate mode of discharging the duties of the office, it is his duty to keep that record, whether required by law or not, and such record is a public record. Coleman *v.* Com., 25 Gratt. (Va.) 865.

The register in these cases must be required by law and kept in the manner required. Newham *v.* Rathby, 1 Phillim. 315; Read *v.* Passer, 1 Esp. 213; Cood *v.* Cood, 1 Curt. 755.

An authenticated copy of a foreign register, legally kept, is admissible in the United States. Kingston *v.* Lesley, 10 S. & R. (Pa.) 383.

6. "The records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States by the attestation of the court and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the State from whence said records are or shall be taken." Afterwards extended to courts of Territories within the jurisdiction of the United States. 1 U. S. Stat. at Large (L. & B.'s Ed.). 122; 2 U. S. Stat. at Large (L. & B.'s Ed.), 298.

7. Lynch *v.* Clerke, 3 Salk. 154.

The handwriting of the recording or attesting officer is *prima facie* presumed genuine. Bryan *v.* Wear, 4 Mo. 106.

8. Morris *v.* Harmer, 7 Peters (U. S.).

6. BOOKS OF SCIENCE OR ART.—These are usually inadmissible.[1]

7. FAMILY BIBLES—BIRTH, BAPTISM, AND BURIAL REGISTERS.—The law resorts to hearsay evidence in cases of pedigree on the ground of the interest of the declarants knowing the connections of the family. On this ground these books are admitted.[2]

8. BOOKS OF ACCOUNT.—All books in which entries are made in the usual course of the business of the person making them whose duty it was to do so or against whose interest the entries are.

554; Case of Warren Hastings, 30 St. Tr. 492; Com. *v.* Alburger *et al.*, 1 Wharton (Pa.). 469; Gregory *v.* Baugh, 4 Rand. (Va.) 611.

Appleton's Cyclopedia was not allowed to prove that an island was known among merchants and insurers as a guano island. Whiton *v.* Alb. City Ins. Co., 109 Mass. 24.

The Northampton tables, however, are good evidence on the probable duration of life. Schell *v.* Plumb, 55 N. Y. 592. As also the Carlisle tables. Donaldson *v.* Miss., etc., R., 18 Iowa, 280.

Upon the question of the existence of a foreign law, it is proper to read to the jury from printed books of decisions and history. Charlotte *v.* Chouteau, 33 Mo. 194.

Matters of history are evidence in certain cases, but must be shown if the history is not admitted. Woods *v.* Banks, 14 N. H. 101.

Admitted with great caution to establish possession one hundred and forty years previous. Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 633.

1. Such books are not to be read before a jury, either as evidence or argument. Com. *v.* Wilson, 1 Gray (Mass.), 337; Washburn *v.* Cuddihy, 8 Gray (Mass.), 430; Ashworth *v.* Kittredge, 12 Cush. (Mass.) 193.

Medical works by authors admitted or proven standard are admissible with proper explanation of technicalities. Stoudenmeier *v.* Williamson, 29 Ala. 558; Meckle *v.* State, 37 Ala. 139; s. c., Ala. Sel. Cas. 45; Bowman *v.* Woods, 1 Greene (Iowa), 441. *Contra*, Carter *v.* State, 2 Ind. 617.

A book on diseases of a horse inadmissible on a trial of whether a horse had a certain disease at a particular time. Harris *v.* Panama R. Co., 3 Bosw. (N. Y.) 7; Fowler *v.* Lewis, 25 Tex. 380.

The court in its discretion may prohibit the reading of medical or scientific books to the jury as a matter of evidence or authority. Luning *v.* State, 1 Chand. (Wis.) 178; Wale *v.* Dewitt, 20 Tex. 398. *Cf.* Washburn *v.* Cuddhy, 8 Gray (Mass.), 430.

Scientific books may not be given in evidence nor read to the jury except to contradict an expert who bases his opinion upon them. Bloomington *v.* Schrock, 110 Ill. 219; s. c., 51 Am. Rep. 678.

Extracts from medical books may not be read in evidence. Epps *v.* State, 102 Ind. 529.

Books of science and art are *prima-facie* evidence of fact, of general notoriety and interest, by Cal. Code, § 1936; but a medical work is not evidence of the nature of injuries. Gallagher *v.* Market St. R. Co., 67 Cal. 13.

2. Entries in registers of burial, birth, and baptism, and in a family Bible, of the death, birth, or baptism of a member of a family are evidence to show the time of a person's decease, birth, or baptism. Lewis *v.* Marshall, 5 Pet. (U. S.) 469; Blackburn *v.* Crawford, 3 Wall. (U. S.) 175; Woodard *v.* Spiller, 1 Dana (Ky.), 179; Greenwood *v.* City of New Orleans, 12 La. Ann. 426; Berry *v.* Aring, 2 Harr. & G. (Md.) 103; Kennedy *v.* Doyle, 10 Allen (Mass.), 161; Jackson *v.* King, 5 Cow. (N. Y.) 237; Hunt *v.* Johnson, 19 N. Y. 279; Arms *v.* Middleton, 23 Barb. (N. Y.) 571.

A statement of age of person may be corroborated by record in family Bible. Wiseman *v.* Cornish, 8 Jones L. (N. Car.) 218.

Previous entries by a father in a book must be accounted for before a copy therefrom into the family Bible by a son can be admitted. Curtis *v.* Patton, 6 S. & R. (Pa.) 135.

An entry of birth in a baptism register is not evidence of the birth. Clark *v.* Trinity Church, 5 W. & S. (Pa.) 266.

Where better evidence is obtainable these entries are not admissible, such as father or mother or one who testifies from recollection. Taylor *v.* Hawkins, 1 McC. (S. Car.) 164; Campbell *v.* Wilson, 23 Tex. 252.

Entries in a family Bible are admissible, even without proof of having been made

Entries made in the usual course of the business or duty of the party making them, charging himself, need not be against his interest.[1]

Entries by which receivers, stewards, bailiffs, and other agents charge themselves with the receipt of money are in general admissible to prove the facts entered.[2]

Evidence going to show that the party making the entry had knowledge of the fact is unnecessary.[3]

9. MEMORANDA.—Memoranda of acts by a person who is dead and whose duty it was, in the course of the business he had undertaken, to do the acts and make the memoranda of them can be adduced upon proof of handwriting and death to prove that the acts were done.[4]

by a parent or relative. Weaver *v.* Leiman, 52 Md. 708.

1. State *v.* Shinborn, 46 N. H. 497; Augusta *v.* Windson, 1 Appleton, 317; Brewster *v.* Doane, 2 Hill (N. Y.), 537; Gale *v.* Norris, 2 McLean (U. S.), 469; Kendall *v.* Field, 2 Shepley, 30; Doe *v.* Sawyer, 28 Me. 463; Thomson *v.* Porter, 4 Strobh. Eq. (S. Car.) 58; Arms *v.* Middleton, 2 Barb. (N. Y.) 571; Chase *v.* Smith, 5 Vt. 558; Thompson *v.* Stevens, 2 Nott & McCord (S. Car.), 493.

2. An entry by an agent in his own favor, unconnected with other entries charging himself, is not evidence. Knight *v.* Marquis of Waterford, 4 Y. & C. 284; Doe *dem.* Kinglake *v.* Beviss, 7 C. B. (62 E. C. L. R.) 456. But the mere fact of a balance in his favor will not affect the admissibility of entries charging himself. Williams *v.* Greaves, 8 C. & P. 592; Rowe *v.* Brenton, 3 M. & R. 268.

Entries in parish books of receipt of portion of church rates from another township—Outram *v.* Morewood, 5 T. R. 121; s. c., 3 Wood. 332—in private books of collector of taxes as against his surety—Middleton *v.* Melton, 10 B. & C. (21 E. C. L. R.) 317—in executor's and trustee's books—Spiers *v.* Morris, 9 Bing. (23 E. C. L. R.) 687—have all been held admissible.

3. Crease *v.* Barrett, 1 C. M. & R. 919, where it was said that the absence of such knowledge goes to the weight.

4. Welsh *v.* Barrett, 15 Mass. 380; Nicholls *v.* Webb, 8 Wheaton (U.S.), 326.

A magistrate's book of accounts, the magistrate being dead, containing charges for taking acknowledgments, was admitted to show that a deed purporting to have been acknowledged before and witnessed by him could not have been so acknowledged. Nourse *v.* McCay, 2 Rawle (Pa.), 70.

Books of a bank have been admitted to show receipts and payments against a depositor who has overdrawn, and upon proof of clerk's handwriting if dead or insane. Union Bank *v.* Knapp, 3 Pick. (Mass.) 96.

Two undated receipts, with the dated letters which inclosed them, to prove payment; entries in account books of parties for whom payment was made, to prove date and agency of person who paid, said parties being away and the clerk who made the entries being dead, with proof of his death and handwriting, all admitted. Beaver *v.* Taylor, 1 Wall. (U. S.) 637.

The party's own books are not evidence in his favor though in the handwriting of a deceased clerk, unless containing the original entry. Fendall *v.* Billy, 1 Cranch C. C. 87; Owen *v.* Adams, 1 Brock. (U. S.) 72.

All entries made by a person in the regular course of his business before his decease are admissible. So also those by a clerk since dead. But the books must be produced; copies are inadmissible. Gale *v.* Norris, 2 McLean (U. S.), 469; Bunting *v.* White, 3 Houst. (Del.) 551.

So a private book of entries of a marshal's official sales, kept by himself as evidence of a particular sale. Linthicum *v.* Remington, 5 Cranch C. C. 546.

The books of a tax-commissioner out of the State were admitted on proof of handwriting to prove tax-list, without proof that the list was given in on oath. Sutton *v.* Floyd, 7 B. Mon. (Ky.) 3.

The proof of the handwriting of the deceased clerk who made the original entries will be admitted to substantiate the book of accounts. James *v.* Wharton, 3 McLean (U. S.), 492; Hodge *v.* Higgs, 2 Cranch C. C. 552.

Proof also that decedent was correct

Such entries or memoranda are usually only admitted when the person making them is dead,[1] but it has been urged that the fact of death is not material to the admissibility.[2]

If the party who made the entries can be brought into court it is generally decided to be the better course, though many States have held such books to be independent and primary evidence.[3]

10. CORPORATION BOOKS.—The books of a corporation containing a record of its acts are evidence between members or against the body,[4] but not against strangers.[5] They are evidence

and accurate in making charges. Everly *v.* Bradford, 4 Ala. 371; Grant *v.* Cole, 8 Ala. 519.

Books of account in which entries were made in the regular course of business by one who would at the time have been a competent witness, since deceased, are admissible; and, the original being lost, a copy supported by oath of person making it is evidence. Bank of Montgomery *v.* Plannett, 1 Ala. 178; Bute *v.* Simpson, 4 Ala. 305.

A book of accounts kept by plaintiff in which there were some pencil entries made by defendant's intestate is only evidence as far as the pencil entries. Rembert *v.* Brown, 14 Ala. 360.

The ordinary rules are not dispensed with because no clerk is kept. Scott *v.* Coxe, 20 Ala. 294.

Proof that the entries are in handwriting of party is *prima facie* sufficient. Holliday *v.* Butt, 40 Ala. 178.

1. State *v.* Phair, 48 Vt. 366; Whitcher *v.* McLaughlin, 115 Mass. 167; Augusta *v.* Windsor, 19 Me. 317; Mulhall *v.* Keenan, 18 Wall. (U. S.) 342; Bartholomew *v.* Farwell, 41 Conn. 107.

The death of the treasurer of a corporation must be proved before the corporation books, shown to have been kept by the treasurer in the corporation business and in his handwriting, can be admitted. Chenango Bridge Corporation *v.* Lewis, 63 Barb. (N. Y.) 111.

One who has been out of the State a long time and cannot be procured as a witness has been held as if dead in Connecticut. New Haven, etc., Co. *v.* Goodwin, 42 Conn. 230.

But the entry must be in the course of the person's duty and against his interest. Webster *v.* Webster, 1 T. & F. 401.

The entry of a baptism contemporaneously made by a Roman Catholic priest in the discharge of his duty is evidence after his death of the date of the baptism, the book being produced from the proper custody. Kennedy *v.* Doyle, 10 Allen (Mass.). 161. So the temperature on a given day was proved by a record kept at the State insane asylum. De Armond *v.* Neasmith, 32 Mich. 231.

2. 1 Greenleaf's Ev. §.

3. Copy of original entries may be admitted upon proof by the agent or clerk who made them. Vinal *v.* Gilman, 21 W. Va. 301.

Entries made by a clerk which would be admissible were he dead are equally so if he is a foreigner and supposed to be in Australia. Reynolds *v.* Manning, 15 Md. 510.

Entries made by clerks in the usual course of business, if he be deceased, are admissible, otherwise if he is not out of the jurisdiction of the court. Brewster *v.* Doane, 2 Hill (N. Y.), 537.

Entries being made by a clerk, he should be called; or if dead or out of the State, his handwriting may be proved. Sterrett *v.* Bull, 1 Binn. (Pa.) 234; Stiles *v.* Homer, 21 Conn. 507.

4. Books of a corporation proved to be such are evidence of its acts and proceedings. Owings *v.* Speed, 5 Wheat. (U. S.) 420; Highland Turnpike Co. *v.* McKean, 10 Johns. (N. Y.) 154.

All members of a corporation are chargeable with a knowledge of the entries made by their agent in the course of his business, and the true meaning thereof. Allen *v.* Coit, 6 Hill (N. Y.), 318.

Entries made by a clerk in books of trustees who are a corporation are not evidence in a cause in which they are interested. Jackson *v.* Walch, 3 Johns. (N. Y.) 226; Farmers & Mechanics' Bank *v.* Boraef, 1 Rawle (Pa.), 152; Owings *v.* Speed, 5 Wheat. (U. S.) 420; Lane *v.* Brainerd, 30 Conn. 565; Jefferson *v.* Stewart, 4 Harr. (Del.) 82; Fitch *v.* Pinckard, 5 Ill. 69; Meadow Co. *v.* Shrewsbury Church, 22 N. J. L. 424; Hamilton Plank Road Co. *v.* Rice, 7 Barb. (N. Y.) 157; Bavington *v.* Pittsburg, etc., R. Co., 34 Pa. St. 358; McHose *v.* Wheeler, 45 Pa. St. 32; Corp. of Columbia *v.* Harrison, 2 Mill Const. (S. Car.) 213.

5. Com. *v.* Woelper, 3 S. & R. (Pa.) 29; Highland Tpk. Co. *v.* McKean, 10

of the elections of their officers and other corporate acts and proceedings therein recorded.[1] They are evidence not only in the character of account books, etc., but as semi-public records.

Requisites to Admission.—Before corporation books can be admitted as evidence they must be shown to have been publicly kept as such, and that the entries were made by the proper officer or some one authorized to make them during his necessary absence.[2]

11. LETTER-BOOKS.—The letter-book of a party to the cause, it being his habit to keep such book, is evidence.[3]

12. BANK-BOOKS, ETC.—The books of the messenger of a bank and of a notary public, to prove demand of payment from the maker and notice to the indorser of a promissory note, are evidence on the ground of the contemporaneous character of entries made in the ordinary course of business.[4]

13. BOOKS OF ORIGINAL ENTRIES.—Entries made by the parties themselves in books of shopkeepers and others have been received in nearly all the States as evidence in a greater or less de-

Johns. (N. Y.) 154; Merchants' Bank *v.* Rawls, 21 Ga. 334; Union Bank of Florida *v.* Call, 5 Fla. 409.

1. Rex *v.* Martin, 2 Campb. 100; Halleck *v.* Boylston, 117 Mass. 469; Chase *v.* Sycamore, etc., R., 38 Ill. 215; Wheeler *v.* Walker, 45 N. H. 355; New Eng. Mfg. Co. *v.* Van Dyke, 9 N. J. Eq. 498; Union Canal Co. *v.* Loyd, 4 W. & S. (Pa.) 393; Graff *v.* Pittsburg, etc., R., 31 Pa. St. 489.

The stock book is not admissible to prove a party a stockholder in an action by a creditor of the company against him. Mudgett *v.* Horell, 33 Cal. 25.

The books of a corporation as against a member are not evidence of his private contracts or dealings with it. Haynes *v.* Brown, 36 N. H. 545. Nor the minutes thereof of an agreement by stockholders as individuals not intended to bind the company. Black *v.* Shreve, 13 N. J. Eq. 455.

Entries in the books of a corporation are, as a rule, competent evidence of the proceedings of the corporation, but such entries are not notice to third persons. Wetherbee *v.* Baker, 35 N. J. Eq. 501.

2. Highland Turnpike Co. *v.* McKean, 10 Johns. (N. Y.) 154.

Proof that the books are in the handwriting of a person stated to be secretary in the books themselves is not sufficient; he must be otherwise shown to be the proper officer. Highland Turnpike Co. *v.* McKean, 10 Johns. (N. Y.) 154.

Copies.—A copy of an entry in a corporation book is not authenticated by the seal of the corporation; an examined copy must be produced. Stoever *v.* Lessee, etc., 6 Binney (Pa.), 416.

Seal.—An original corporation book though not under corporate seal is good evidence in a suit by the corporation against one of its members. Fleming *et al. v.* Wallace, 2 Yeates (U. S.), 120. The seal of a private corporation must be proved by testimony. Dea *v.* Vreelandt, 2 Halst. Rep. (N. J.) 352; Leasure *v.* Hillyers, 7 S. & R. (Pa.) 313; Foster *v.* Shaw, 7 S. & R. (Pa.) 156; Jackson *v.* Pratt, 10 Johns. (N. Y.) 381.

A copy of the proceedings of an incorporated banking company certified to by the secretary is not evidence in Massachusetts unless sworn to, he not being a certifying officer. Hallowell & Augusta Bank *v.* Hamlin, 14 Mass. 178; Rust *v.* Boston Mill Corp., 6 Pick. (Mass.) 158.

It is sufficient to show that the seal is the official seal of the corporate body. Moises *v.* Thornton, 8 T. R. 307; Chadwick *v.* Bunting, Ry. & M. (21 E. C. L. R.) 306.

3. Pritt *v.* Fairclough, 3 Campb. 305; Hagedorn *v.* Reid, 3 Campb. 377.

The letter-book is evidence that letters copied into it have been sent. But it is not evidence of any other letter in it than those which the adverse party has been required to produce. Sturge *v.* Buchanan, 2 P. & D. 573; s. c., 10 Ad. & El. 598.

4. Nicholls *v.* Webb, 8 Wheat. (U. S.) 326; Welsh *v.* Barrett, 15 Mass. 380; Poole *v.* Dicas, 1 Bing. N. C. 649; Hallidy *v.* Martinet, 20 Johns. (N. Y.) 168; Butler *v.* Wright, 2 Wend. (N. Y.) 369; Hart *v.* Wilson, 2 Wend. (N. Y.) 513; Nichols *v.* Goldsmith, 7 Wend. (N. Y.) 160; New Haven Co. Bank *v.* Mitchell, 15 Conn. 206; Sheldon *v.* Benham, 4 Hill (N. Y.), 129.

gree, governed by legislation or decision, to prove the sale and delivery of goods, and the performance of work and labor, and the price for the same.

It is the usual rule that such evidence must be supported by the oath of the party plaintiff, that the book is his book of original entries, that the goods so charged were actually sold and delivered and the services performed, that the items were entered by him at the time of the delivery of the goods or performance of the services or immediately afterwards.

The rules governing the admission of this class of evidence have been more or less modified by statutes making parties competent witnesses or otherwise changing the rules of evidence, and as nearly all the States differ in the application of this principle or in the extent to which it is carried, the law of each State, as nearly as possible, has been stated in the accompanying note.[1]

1. **Alabama.**—By statute, oaths of a party as to claims not exceeding $20 are received. Code (Ed. 1876), p. 809, § 3616.

Original entries made in the usual course of business contemporaneously by one having personal knowledge of the facts, corroborated by testimony of party if living or by proof of his handwriting, if dead, insane, or out of the jurisdiction. Dismukes *v.* Tolson, 67 Ala. 386.

Arkansas.—Original books of entries are inadmissible in merchant's favor. Jeffrey *v.* Schlasinger, Hempst. 12; Bun *v.* Byers, 10 Ark. 398.

California.—A book of original entries, made at their dates, sworn to by owner, is admissible. Landis *v.* Turner, 14 Cal. 573. Even to prove money loaned where evidence showed that goods procured had been charged as money loaned. Le Franc *v.* Hewitt, 7 Cal. 186. Plaintiff's book of accounts is evidence to prove the delivery of goods therein charged when better evidence is not obtainable, though not to render liable as a defendant and co-partner one with whom plaintiff had no direct dealing. Severance *v.* Lombardo, 17 Cal. 57. The original being lost, the ledger with newspapers containing advertisements may show what items of the advertisement were for benefit of an attorney and what for client. Caulfield *v.* Sanders, 17 Cal. 569.

Connecticut.—Books of parties containing daily accounts of their business transactions and made in the regular course of their business, are admissible in evidence in their favor in actions of *assumpsit* and book debt. Smith *v.* Law, 47 Conn. 431. General Statutes, Revision of 1875, p. 471.

The book is not admissible where money was sent to be applied to a note, and was not so applied, the right to recover arising from subsequent events to the delivery. But only where the right to charge exists at the time of and arises in consequence of the delivery. Bradley *v.* Goodyear, 1 Day (Conn.), 104.

So where the delivery is in pursuance of special agreement from which the right of action arises. Terrill *v.* Beecher, 9 Conn. 344; Green *v.* Pratt, 11 Conn. 205. Nor in case of property loaned and not returned, or for torts, or for a claim for use and occupation. Beach *v.* Mills, 5 Conn. 493.

The entries are admissible to recover of a father charges against a son, provided he be legally bound for them. Bryan *v.* Jackson, 4 Conn. 289. For money lent. Clark *v.* Savage, 20 Conn. 258. For a due bill assigned. Hunt *v.* Pierpont, 27 Conn. 301.

Charges for goods, services, and money are admissible in case of death. Dwight *v.* Brown, 9 Conn. 84.

The circumstances in which an entry was made, so long as it was made in the regular course of business, affect only its weight as evidence. 47 Conn. 431.

Colorado.—Books of original entry are admissible upon oath that the same are books of original entries, which were made by himself, just and true, "or by a deceased person, or by a disinterested person non-resident of the State at the time of the trial, and that they were made in the usual course of trade, and of his duty or employment to persons so testifying." General Laws, § 2953. See Farrington *v.* Tucker, 6 Col. 557.

Delaware.—Book entries, with the plaintiff's oath, are evidence for goods sold and delivered, and other things properly chargeable in an account. Revised Statutes, Ed. 1874, p. 653, § 11. The

party shall be subject to cross-examination touching the same.

Cash items; a horse; tollage; tavern expenses; wheat on ground. Townsend *v.* Townsend, 5 Harr. (Del.) 125. Plans of an architect; the erection of a building. Sloan *v.* Grimshaw, 4 Houst. (Del.) 326, are not proper items of charge.

The subscription to a newspaper being established by other proof, the annual subscription price may be the subject of a book entry. Ward *v.* Powell, 3 Harr. (Del.) 379. So lottery tickets are proper items. Bailey *v.* McDowell, 1 Harr. (Del.) 346. So sawing lumber. Conoway *v.* Spicer, 5 Harr. (Del.) 425.

Plaintiff may prove books kept by his clerk or agent as well as by himself. Webb *v.* Pendergrass, 4 Harr. (Del.) 439; Fredd *v.* Eves, 4 Harr. (Del.) 385.

Florida.—Original entries are admitted under a statute, the credibility going to the jury at law and court in equity. McClellan's Dig. p. 516, § 15.

The entries must be original and contemporaneous, fairly kept erasures and interlineations accounted for, supported by oath that the articles were delivered, the labor and services actually performed, the entries original, and sums charged not been paid. Hooker *v.* Johnson, 6 Fla. 730.

Georgia.—The code provides for the admission of the books of account of any merchant, shopkeeper, blacksmith, physician, or other person doing a regular business, and keeping entries thereof upon the conditions: 1. That no clerk was kept, or else the clerk was dead or inaccessible. 2. Upon proof of the party's oath being sufficient that the book tendered is his book of original entries. 3. Upon proof by customers that he usually kept correct books. 4. Upon inspection by the court. Code, p. 665, § 3777.

Not evidence of cash items. Petit *v.* Teal, 59 Ga. 145. Nor the book of a journeyman shoemaker for boots and shoes mended. Schale *v.* Eisner, 58 Ga. 190.

Witness's statement that he considered his accounts reasonable with the admission that he had never examined the items, and could not say that services charged were actually rendered, is no compliance with requirement that customers should prove books to be kept correctly. Bower *v.* Smith, 8 Ga. 74.

Transcript inadmissible. Creamer *v.* Shannon, 17 Ga. 65. *Contra*, Fielder *v.* Collier, 13 Ga. 496.

The evidence is only secondary. Slade *v.* Nelson, 20 Ga. 365. So the sales clerk of the party offering the books being alive and accessible, no account can be proved by the books. Bracken *v.* Dillon, 64 Ga. 243.

Book entries, properly admitted, are evidence to charge parties, there being no rebutting proof, with the addition of "per Pate" to the entries. Chastain *v.* Brown, 31 Ga. 346.

Illinois.—Admitted by statute upon oath of any party or interested person that the books are books of original entries made by himself or by a disinterested person, deceased or out of the State, in the usual course of trade, or of the duty and employment to the person so testifying. Hurd's Rev. Stat., p. 506, § 3.

The statute was declaratory of the existing law, except that it permitted the testimony of an interested person. Taliaferro *v.* Ives, 51 Ill. 247; Kibbe *v.* Bancroft, 77 Ill. 18.

Substantial compliance with the terms of the statute is sufficient. Presbyterian Church *v.* Emerson, 66 Ill. 269.

Testimony that the account books of a decedent were the only ones kept by him is equivalent to evidence that they were his books of original entry. Patrick *v.* Jack, 82 Ill. 81.

A single entry does not make an account book. Kibbe *v.* Bancroft, 77 Ill. 18.

The fact that goods were charged to the person to whom they were delivered is not conclusive as to whom credit was given. Baird *v.* Hooker, 8 Ill. App. 306.

Books of account are admissible when copied once a month from a slate, and a careful comparison subsequently made. Redlich *v.* Bauerley, 98 Ill. 134; s. c., 38 Am. Rep. 876.

Indiana.—Plaintiff's books of accounts in which he has charged the items on which he sues are not competent evidence. De Camp *v.* Vandegrift, 4 Blackf. (Ind.) 272.

Entries in private books made in the usual course of business, not being public records or *res gestæ*, are inadmissible. Pittsburg, etc., R. Co. *v.* Noel, 77 Ind. 110.

Iowa.—Books of account containing entries made in the usual course of business are admissible on the following conditions: 1. The books must show continuous dealings, or several charges against the other party at different times in the same set of books. 2. Party must swear that they are his books of original entries. 3. That the charges were contemporaneous with or near the time of the transactions unless satisfactory reasons appear for not so showing. 4.

Must be verified by party or clerk making them, unless sufficient reason is shown for not verifying. Code, p. 566, § 3658.

The admissibility is for the court, the degree of credit for the jury. Eyre *v.* Cook, 9 Iowa, 185.

A payment or loaning of money must come within the ordinary business of the party who offers his books to prove them. Veiths *v.* Hagge, 8 Iowa, 163; Lyman *v.* Bechtel, 55 Iowa, 437; Cummins *v.* Hall, 35 Iowa, 253; Sloan *v.* Ault, 8 Iowa, 229. Nor can small sums of cash be proved. Young *v.* Jones, 8 Iowa, 219; Sloan *v.* Ault, 8 Iowa, 229. Nor a special agreement or delivery thereunder, or delivery to a third person. Lyman *v.* Bechtel, 55 Iowa, 437. Nor an item of an account, "four months' work, $300." Karr *v.* Stivers, 34 Iowa, 123.

The book must be a registry of business actually done and not of orders, executory contracts, and things to be done subsequently. So a book seeming to be a memorandum or stock book, containing occasional charges, among others one, "Bo't of Livingston's, 25 fat hogs. 12 head delivered immediately, balance when fattened, p'd $15," was not admitted. Hart *v.* Livingston, 29 Iowa, 217; Whisler *v.* Drake, 35 Iowa, 103.

Charges made alternatively are admitted after preliminary proof. Burnell *v.* Dunlop, 11 Iowa, 446.

A single entry will not make a book of original entries. Fitzgerald *v.* McCarty, 55 Iowa, 702.

Books of account are admissible, though not between parties to the suit, to refute witnesses who have referred to them in their testimony, and especially when they state they only know such matters from having seen them in the books. Davenport *v.* Cummings, 15 Iowa, 219.

Entries made by a deceased person of his own transactions are admissible in a criminal case only when against interest. State *v.* Wooderd, 20 Iowa, 541.

Kansas.—Entries are admitted with the usual oath, or on proof of handwriting of deceased maker, or one absent from the State. Comp. Laws, p. 652, § 387; Barons *v.* Brown, 25 Kan. 410; Rice *v.* Hodge, 26 Kan. 164.

Kentucky.—A party may testify for himself as to the correctness of original entries made by him against persons who are under no disability other than coverture or infancy and coverture combined in an account book according to the usual course of business, even against a lunatic or decedent, but must produce the book. Bullitt's Codes, p. 125. § 7.

The day-book of the vendor was admitted to prove on whose credit the goods were charged, as sold in an action against one for goods furnished to a third party at his direction. Leisman *v.* Otto, 1 Bush (Ky.), 228.

Louisiana.—A merchant's books are not evidence in his favor, nor in favor of his creditors, especially where no fraud or collusion between merchant and debtor is shown. Porche *v.* Le Blanc, 12 La. Ann. 778.

A book-keeper who can only swear that he kept the ledger correctly from the entries furnished him by the partners and other clerks made no original entries himself, and saw no goods purchased, has not sufficiently proven the accounts of his employer. White *v.* Wilkinson, 12 La. Ann. 359.

Books annually examined by an employer who has also the balance sheets embracing the disputed items semi-annually furnished him are *prima-facie* evidence for a clerk against the employer. Rayne *v.* Taylor, 12 La. Ann. 765.

Though the entries in a pass-book have been made by a merchant or his clerk, yet it is evidence against the owner, who is presumed to have examined it, provided he has made no objection to its contents. Succession of McLaughlin, 14 La. Ann. 398. *Cf.* Didier *v.* Ange, 15 La. Ann. 398.

Where defendant offers in evidence the credit side of an account copied from a merchant's books, the whole amount must be taken together, but particular items may be shown incorrect. White *v.* Jones, 14 La. Ann. 681. Entries on the books of an insolvent shown to be in good faith, at the time stated within the knowledge of the witnesses, are sufficient to correct an error in the syndic's tableau of distribution. Hernandez *v.* Creditors, 15 La. Ann. 87.

Maine.—Books are competent evidence to prove work done, goods delivered, and cash charges to the amount of forty shillings ($6.67). Kelton *v.* Hill, 58 Me. 114.

They must be supported by oath as given, and in handwriting of owner. Witherell *v.* Swan, 32 Me. 247; Towle *v.* Blake, 38 Me. 95; Hooper *v.* Taylor, 39 Me. 224.

It has been held that books are not proof of delivery of articles whose bulk makes them susceptible of other proof. Leighton *v.* Manson, 14 Me. 208; Mitchell *v.* Belknap, 23 Me. 482. Nor delivery to defendant as agent, and an agreement by him to sell on account. Dunn *v.*

Whitney, 10 Me. 9. Otherwise where the agency is proved *aliunde*. Soper *v.* Veazie, 32 Me. 122. Nor by books in handwriting of deceased partner. Godfrey *v.* Codman, 32 Me. 162. Though the sale can be proved in favor of surviving partners on proof of handwriting. Amee *v.* Wilson, 22 Me. 116; Mitchell *v.* Belknap, 23 Me. 482.

Plaintiff can only present his books, verified by a suppletory oath, against the estate of a decedent. The entries unless intelligible in themselves are inadmissible; the explanation must be made by other witnesses than the plaintiff. He cannot testify that charges apparently against third persons were actually against deceased. Nor can defendant give his counter-entries of work done, or prove by his books the rate of wages. Silver *v.* Worcester, 72 Me. 322.

Maryland.—Entries of things properly chargeable, sworn by the creditor before a justice to be just and true, and that no payment, security, or satisfaction other than is credited has been received, is *prima-facie* evidence. Stat. 1729, c. 20, s. 9. Limited to accounts not exceeding £10 in the course of a year. Stat. 1785, c. 46, s. 6; Code (Ed. 1878), p. 759, § 43.

Plaintiff's entries and oath are inadmissible beyond this. Owings *v.* Low, 5 Gill & J. (Md.) 134. Nor are they conclusive evidence of credit given. Elder *v.* Warfield, 7 Harr. & J. (Md.) 391; King *v.* Madduse, 7 Harr. & J. (Md.) 467; Owings *v.* Henderson, 5 Gill & J. (Md.) 142.

The rule has not been changed by the act rendering witnesses competent without regard to interest. Romer *v.* Jaecksch, 39 Md. 585.

Entries in the day-book of an agent who contracted in his own name are admissible to prove that the contract was made on behalf of plaintiff. Oelrichs *v.* Ford, 21 Md. 489.

Entries will not prove that a bill of sale was conditional by a vendee, defendant in a suit for repairs of a carriage. Rogers *v.* Severson, 2 Gill (Md.), 385.

Massachusetts.—Evidence of articles delivered, and work and labor done. They must be supported by oath, may be in ledger form, and the jury judge of their credit. Prince *v.* Smith, 4 Mass. 455; Coggswell *v.* Dolliver, 2 Mass. 217; Faxon *v.* Hollis, 13 Mass. 427; Ball *v.* Gales, 13 Metc. (Mass.) 49; Pratt *v.* White, 132 Mass. 478.

They are evidence of money charges to the amount of $6.66. Union Bank *v.* Knapp, 3 Pick. (Mass.) 109; Burns *v.* Fay, 14 Pick. (Mass.) 8; Davis *v.* Sanford, 9 Allen (Mass.), 216; Turner *v.* King, 9 Cush. (Mass.) 512. And of articles delivered to any amount. Shillaber *v.* Bingham, 3 Dane's Abr. (Mass.) 321. Their competency is for the court, and "must be determined by the appearance and character of the book and all the circumstances of the case, indicating that it has been kept honestly and with reasonable care and accuracy, or the reverse." Mathes *v.* Robinson, 8 Metc. (Mass.) 269.

The charge of a commission on the books of a ship-broker is not admissible. Winsor *v.* Dillaway, 4 Metc. (Mass.) 221. Nor an item of $308 for seven gold watches. Bustin *v.* Rogers, 11 Cush. (Mass.) 346. Nor to show amount, in a suit for money paid by mistake, received by defendant. Townsend Bank *v.* Whitney, 3 Allen (Mass.), 454; Maine *v.* Harper, 4 Allen (Mass.), 115. Nor a book of credits, to show that plaintiff did not work on certain days by defendant's omission to give credit therefor. Morse *v.* Potter, 4 Gray (Mass.), 292.

Entries made from memorandum brought home by servants of a painter were admitted, the servants also testifying. Morris *v.* Briggs, 3 Cush. (Mass.) 342. And by a wife by her husband's direction and in his presence, proved by her. Littlefield *v.* Rice, 10 Metc. (Mass.) 287. So also entries made by one partner, though the goods were delivered by another, supported by oaths of both. Harwood *v.* Mulry, 8 Gray (Mass.), 250. Though where the entries were copied from the delivery book of a drayman, the drayman not being produced, they were rejected. Kent *v.* Garvin, 1 Gray (Mass.), 148.

There need be no measure, weight, or quantity given in connection with a decedent's book, as far as its admissibility is concerned. Pratt *v.* White, 132 Mass. 478.

A book in the ledger form belonging to a blacksmith, such being the customary form for country mechanics, was admitted. Faxon *v.* Hollis, 13 Mass. 427. See also Gibson *v.* Bailey, 13 Metc. (Mass.) 537, where it was held that there was no objection to entries in pencil. But where the ledger did not appear to be the book of original entries, it was rejected. Stetson *v.* Wolcott, 15 Gray (Mass.), 545.

The ledger should be produced where an account has been transferred to it from a day-book, that the other party may have advantage of any credits. The oath must be taken in court and not by a commission. Frye *v.* Barker, 2 Pick. (Mass.) 65.

A transcript proved by the witness

who transcribed it is admissible in case the ledger and day-book have been accidentally destroyed by fire, and the items actually stood in the book and were correctly transcribed. Holmes *v.* Marden, 12 Pick. (Mass.) 169; Prince *v.* Smith, 4 Mass. 455.

A charge for three months' labor is inadmissible. Henshaw *v.* Davis, 5 Cush. (Mass.) 146. So a gross charge for putting up stair, some of the work having been done a year before, though not finished till just before the charges. Earle *v.* Sawyer, 6 Cush. (Mass.) 142.

The oath of an administrator or executor is sufficient to the books of a decedent. Pratt *v.* White, 132 Mass. 478. Or a guardian of a lunatic. Holbrook *v.* Gay, 6 Cush. (Mass.) 215.

A charge on books of account to a person is competent but not conclusive evidence that a contract was made with him or to his credit. James *v.* Spaulding, 4 Gray (Mass.), 451; Swift *v.* Pierce, 13 Allen (Mass.), 136; Allen *v.* Fuller, 118 Mass. 402; Holmes *v.* Hunt, 122 Mass. 505. *Compare* Somers *v.* Wright, 114 Mass. 171, where it was held that plaintiff's books of account were inadmissible to prove a promise of payment by defendant.

Field *v.* Thompson, 119 Mass. 151, was decided on the authority of Somers *v.* Wright, 114 Mass. 171, and a book of accounts was not admitted to show that articles were charged to defendant and credit given to him alone. See Keith *v.* Kibbe, 10 Cush. (Mass.) 35; Banfield *v.* Whipple, 10 Allen (Mass.), 27; Swift *v.* Pierce, 13 Allen (Mass.) 136.

Meals furnished from day to day to one and his servants are a proper subject of book charge. Tremain *v.* Edwards, 6 Cush. (Mass.) 414.

The freight books of a railroad corporation, supported by the testimony of the clerk who made them, that he had no doubt of their correctness, though having no personal recollection thereof, are admissible. Briggs *v.* Rafferty, 14 Gray (Mass.), 525. So a plaintiff's time-book, kept in a tabular form, is evidence of his apprentice's as well as his own labor. Mather *v.* Robinson, 8 Metc. (Mass.) 269. *Compare* Morse *v.* Potter, 4 Gray (Mass.), 292.

Michigan.—The New York rule is recognized. To render books of account kept by the party himself, he must show that he had no clerk; that some of the articles charged have been delivered; that the books produced are his account-books, and that he keeps fair and honest accounts by the testimony of those who have dealt and settled accounts with him. Jackson *v.* Evans, 8 Mich. 476.

A servant who keeps a slate of sales of brick made during the day, reporting them to his employer at night, who makes entries thereof in his books, is not a clerk, and his books are books of original entries. Jackson *v.* Evans, 8 Mich. 476.

Mississippi.—"Where the party introduces evidence satisfactory to the presiding judge, showing that the books are books of account, containing entries contemporaneous with the transactions under investigation, and the books themselves are unobjectionable and perfectly fair, they may be admitted." Bookout *v.* Shannon, 59 Miss. 378. See Moody *v.* Roberts, 41 Miss. 74; Hunter *v.* Wilkinson, 44 Miss. 721.

Copies are inadmissible. Moody *v.* Roberts, 41 Miss. 74.

One who makes entries must have personal knowledge of the facts. Chicago, St. Louis, etc., R. *v.* Provine, 61 Miss. 474.

Missouri.—Books of original entries are not admissible. Hinrick *v.* McPherson, 20 Mo. 310.

New Hampshire.—If the party who offers his books of account as evidence with his oath shows upon examination that better evidence can be adduced, that the charges are in the handwriting of another, or the article was delivered to or by a third person, the book is to be rejected. Eastman *v.* Moulton, 3 N. H. 156; Cummings *v.* Nichols, 13 N. H. 421; Webster *v.* Clark, 30 N. H. 245.

The books are competent evidence to prove payments of money not exceeding $6.67. Bassett *v.* Spofford, 11 N. H. 167; Rich *v.* Eldridge, 42 N. H. 153. But not to show that they were made on any particular debt. Bailey *v.* Harvey, 60 N. H. 152. And not to prove collateral facts. Woods *v.* Allen, 18 N. H. 28; Woodes *v.* Dennett, 12 N. H. 510; Brown *v.* George, 17 N. H. 128; Batcheldor *v.* Sanborn, 22 N. H. 325; Putnam *v.* Goodall, 31 N. H. 419.

The rule has not been changed by the statutes allowing parties to testify in chief. Swain *v.* Cheney, 41 N. H. 234.

No particular form is needful. Bassett *v.* Spofford, 11 N. H. 167; Cummings *v.* Nichols, 13 N. H. 421. The charges should be separate and special. Swain *v.* Cheney, 41 N. H. 234. Entry may be in lead-pencil. Stone *v.* Sprague, 24 N. H. 310; True *v.* Bryant, 32 N. H. 241. May be in ledger form. Wells *v.* Hatch, 43 N. H. 246.

Book of intestate, with administrator's

oath, is admissible. Dodge *v.* Morse, 3 N. H. 232. But a memorandum-book, of which all the charges, save the one against defendant, were of money paid and received, is not. Richardson *v.* Emons, 23 N. H. 220. Nor charges on loose sheets of paper. 21 N. H. 219.

A charge of the goods upon plaintiff's books to the third person may not be conclusive that the goods were sold on his credit; but it may be shown that they were so charged for the convenience and at the request of defendant. Walker *v.* Richards. 41 N. H. 388.

New Jersey.—The party's books and handwriting having been proved by a witness, they are evidences of work done and articles delivered.

A book exhibiting no mutual dealings between the parties, and containing a single charge of cash lent, is inadmissible to sustain a demand for money lent. Carman *v.* Dunham, 11 N. J. L. 189; Inslee *v.* Prall, 23 N. J. L. 457; affirmed, 1 Dutch. 665. In the latter case a book containing charges for cash, interspersed with charges of a proper kind against other persons in regular order as to date and sum through a course of some years; though two of the charges agreed with the indorsements on the notes, others with credits on defendant's own books, and there was evidence as to the correctness of others. See Craven *v.* Shaird, an earlier case, 7 N. J. L. 345, where it was held that a party's book is evidence of money lent, but not conclusive. See also Bonnell *v.* Mawha, 37 N. J. L. 198.

The charges should be original entries, contemporaneous or as nearly so as usual; prices should be stated, and appear in the course of business, not on the last page of a book with blank leaves intervening between it and other accounts, but dated at the same time as they. Wilson *v.* Wilson, 6 N. J. L. 95; Hagaman *v.* Case, 4 N. J. L. 370; Swing *v.* Sparks, 7 N. J. L. 59.

The entry need not be on the same day, and two or three days' services may be entered at once. Bay *v.* Cook, 22 N. J. L. 343.

Accounts kept as a ledger, if the usual mode of the party, are admissible. The credit is for the jury. Wilson *v.* Wilson, 6 N. J. L. 95; Jones *v.* De Kay, 3 N. J. L. 955.

The admission of a tradesman's day-book, without his ledger, admitted to be kept, is no error of itself, especially when the objection is first made on appeal. Tindall *v.* McIntyre, 24 N. J. L. 147.

Nor will a single erroneous charge destroy the credibility of account-books. Rodenbough *v.* Rosebury, 34 N. J. L. 491.

Entries against one may be given against another on proof, *aliunde*, of the things being ordered by the latter. Tenbrooke *v.* Johnson, 1 N. J. L. 288; Townley *v.* Wooley, 1 N. J. L. 377; Jones *v.* Brick, 8 N. J. L. 269.

New York.—Books of account are not evidence of money lent; nor in the case of a single charge, there being no regular dealings between the parties; nor when the party has a clerk; nor unless there is proof, (*a*) of the delivery of some of the articles charged; (*b*) that the books are the account-books of the party; and (*c*) by those who have dealt and settled with him that he keeps fair and honest accounts. Under these restrictions they are evidence. Vosburgh *v.* Thayer, 12 Johns. (N. Y.) 461; Larne *v.* Roland, 7 Barb. (N. Y.) 108; Tomlinson *v.* Borst, 30 Barb. (N. Y.) 42; Conklin *v.* Stamler, 2 Hilt. (N. Y.) 422; Foster *v.* Coleman, 1 E. D. S. (N. Y.) 85; Houptman *v.* Catlin, 1 E. D. S. (N. Y.) 729; Morrill *v.* Whitehead, 4 E. D. S. (N. Y.) 239.

The rule can never apply to a charge for cash lent. Case *v.* Potter, 8 Johns. (N. Y.) 211; Low *v.* Payne, 4 N. Y. 247. *Cf.* Burke *v.* Wolfe, 38 Sup. Ct. (N. Y.) 263.

The rule being complied with, the books are competent, if but by the testimony of a single witness. Linnell *v.* Sutherland, 11 Wend. (N. Y.) 568; Beattie *v.* Qua, 15 Barb. (N. Y.) 132.

Where plaintiff had clerks the books were not his general books of daily account, and where the charges were for something done under a supposed special contract, but which afterwards became matter of account by operation of the law in consequence of a rescission of the contract, check-rolls to show the number of days men employed by plaintiff worked were held inadmissible as books of account. Merrill *v.* I., etc., R., 16 Wend. (N. Y.) 587.

All the books of account must be given in evidence. Larne *v.* Rowland, 7 Barb. (N. Y.) 107.

The rule has not been affected by statutes making parties competent. Tomlinson *v.* Borst, 30 Barb. (N. Y.) 42; Stroud *v.* Tilton, 4 Abb. App. (N. Y.) 324. Except that having had no clerk, or the clerk being dead, the preliminary proof of the correctness of the books may be made by the party. Burke *v.* Wolfe, 38 Sup. Ct. (N. Y.) 263. Though not where one of the parties is dead, the rule being still the same. Knight *v.* Cunnington, 6 Hun (N. Y.), 100.

Entries in books of account making charges against a particular person are not conclusive that the credit was given to such person. Fiske *v.* Allen, 40 Sup. Ct. (N. Y.) 76; Peck *v.* Von Keller, 76 N. Y. 604.

Books of account, once admitted, are evidence of all the matters that may be properly proved from them. Winants *v.* Sherman, 3 Hill (N. Y.). 74; Low *v.* Payne, 4 N.Y. 247; Dewey *v.* Hotchkiss, 30 N. Y. 497.

Entries in books of accounts kept by his clerk, and made up from small books kept by workmen, and memoranda made by plaintiff and clerk when goods went out, are admissible. Taggart *v.* Fox, 11 Daly (N. Y.). 159.

Nevada.—*Held*, that a stockbroker's ledger is not a book of original entries, and is not competent to prove an original transaction or purchase. Cahill *v.* Hirschman, 6 Nev. 57.

Nebraska.—The statute follows that of Iowa. Comp. Stat. (Ed. 1881), p. 576, § 346. In Martin *v.* Scott, 12 Neb. 42, plaintiff, seeking to recover for medical services against a decedent, was excluded, but was allowed to prove his charges in his account-book by his wife.

Account-books are admissible as evidence in an action only where they contain charges by one party against another. Masters *v.* Marsh, 19 Neb. 458.

Minnesota.—It is provided by statute that account-books proved to be party's books of account, kept for that purpose; to contain original entries of charges for moneys paid or goods delivered, or work or other services performed, or materials furnished, made contemporaneously in the handwriting of some person having authority to make them, and to be just and true, witness being subject to cross-examination, are admitted subject to all just exceptions to their credibility. Stat. (Ed. 1878), p. 803, § 70.

Person who made temporary memorandum on a slate, board, or paper must prove that about the time the charges were made, articles were delivered or work performed of a character similar to those charged. Paine *v.* Sherwood, 21 Minn. 225.

Account-books of a partnership containing charges made by both partners may be evidence of all the sales charged, although one partner only verifies the books, and is unable to identify particular sales. Webb *v.* Michener, 32 Minn. 48.

Books are admissible in evidence when the charges are against one for goods delivered to him on another's promise to pay. Which one was given credit may be considered. Winslow *v.* Dakota Lumber Co., 32 Minn. 237.

North Carolina.—By statute, in debt and *assumpsit*, the declaration being general and copy of the account being filed with it—likewise when a set-off is pleaded—the plaintiff swearing that the matter in dispute is a book account, that his book is his only means of proof, and a true account of his dealings with the other, or of the last settlement of accounts, that the articles were delivered, and all just credits given, the book and oath are good evidence of all articles delivered within two years and not amounting to more than $60. This is true of accounts of decedents accruing not more than two years previous to their death, and suit being brought within one year subsequent. Copies are evidence unless the original is demanded. Battle's Rev. Ed. (1873), p. 225, § 343 *a*.

A party can prove his debt under the old book-debt law, when his opponent is dead, notwithstanding the restriction that a party cannot testify in his own behalf under such circumstances. Leggett *v.* Glover, 71 N. Car. 211.

Book entries of a party as a general rule are inadmissible. 65 N. Car. 372.

Ohio.—Books of account are admitted under a statute removing disqualification of interest, and providing that in suits against guardians of deaf, dumb, or insane persons, or of a decedent's child, or against an executor or administrator, or heir, grantee, assignee, devisee, or legatee of deceased persons, the party cannot testify except "if the claim or defence be founded on a book account a party may testify that the book is his account-book, that it is a book of original entries, that the entries therein were made by himself, a person since deceased, or a disinterested person, non-resident of the county," whereupon the book shall be competent evidence, and such book may be admitted as evidence in any case without regard to the parties, upon like proof by any competent witness. Rev. Stat. (Ed. 1880), p. 1279, § 5242.

Such books are not conclusive evidence in a suit by an administrator, but may be strengthened by other evidence, that he had no clerks, kept fair books, etc. Bentley *v.* Hollenback, Wright (Ohio), 169; Horn *v.* Brady, Wright (Ohio), 451.

Oregon.—The rule laid down in Tomlinson *v.* Borst, 30 Barb. (N. Y.) 42, seems to have been followed. Ladd *v.* Sears, 9 Oregon, 244.

Pennsylvania.—Books of original entries made by the party and verified by

his oath, are competent evidence of goods sold and delivered and work done, and of the prices, but not of money lent or paid. Ducoign *v.* Schreppel, 1 Yeates (Pa.), 347.

But they are not competent to prove any collateral matter, as that a third party assumes to pay, or that a certain person was a partner in a house charged, or to prove an agency, or a delivery of goods under a special contract. Poultney *v.* Ross, 1 Dall. (Pa.) 238; Juniata Bank *v.* Brown, 5 S. & R. (Pa.) 226; Baisch *v.* Hoff, 1 Yeates (Pa.), 198; Murphy *v.* Cress, 2 Whart. (Pa.) 33; Lonergan *v.* Whitehead, 10 Watts (Pa.), 249; Nickle *v.* Baldwin, 4 W. & S. (Pa.) 290; Alexander *v.* Hoffman, 5 W. & S. (Pa.) 382; Eshleman *v.* Hamish, 76 Pa. St. 97; Petriken *v.* Baldy, 7 Pa. St. 429; Phillips *v.* Tapper, 2 Pa. St. 323; Fitler *v.* Eyre, 14 Pa. St. 392.

A book may be admitted in a suit in relation to a foreign mercantile transaction for articles furnished and money expended from the necessity of the case. Seagrove *v.* Redman *et al.*, 2 Yeates (Pa.), 254; Himes *v.* Barnitz, 8 Watts (Pa.), 39.

The house being the defendant, a book of entries may prove the materials to have been furnished on the credit of the house in *sci. fa. sur* mechanic's lien. McMullen *v.* Gilbert, 2 Whart. (Pa.) 277. So a charge against a steamboat is *prima facie* evidence against the owners. Blackstock *v.* Leidy, 19 Pa. St. 335. In these cases charges against the owner or contractor individually are competent to show the amount of materials furnished, and the liability of the building may be proved *aliunde*. Church *v.* Davis, 9 Watts (Pa.), 304. So if it is proved *aliunde* that another than the one charged is really liable as to the principal debtor, the books can show the amount and price of the things for which he is shown to be liable. Quin *v.* Naglee, 4 Whart. (Pa.) 92; Hartley *v.* Brookes, 6 Whart. (Pa.) 189.

Entries must be made in course of dealing and about time of transaction. Walter *v.* Bollman, 8 Watts (Pa.), 544; Curren *v.* Crawford, 4 S. & R. (Pa.) 3. Article sold must be in line of business. Shoemaker *v.* Kellog, 11 Pa. St. 310. Must be in a regular and usual account-book. Thompson *v.* McKelvey, 13 S. & R. (Pa.) 126; Carroll *v.* School, 2 Phila. (Pa.) 260; Hough *v.* Doyle, 4 Rawle (Pa.), 291.

Undecipherable entries in a physician's book cause rejection of book. Gorman's Est., 14 W. N. C. (Pa.) 192.

They should be with intent to charge, and an invoice-book was rejected. Cooper *v.* Morel, 4 Yeates (Pa.), 341. A defendant's entries of work done for him by plaintiff are therefore inadmissible Summers *v.* McKim, 12 S. & R. (Pa.) 405; Keim *v.* Rush, 5 W. & S. (Pa.) 377. So where no charges appear. Hough *v.* Doyle, 4 Rawle (Pa.), 291; Fairchild *v.* Dennison, 4 Watts (Pa.), 258; Phillips *v.* Tapper, 2 Pa. St. 323; Rogers *v.* Old, 5 S. & R. (Pa.) 404.

The book should be original, but is so though taken from memoranda intended to serve only as notes. Ingraham *v.* Bockins, 9 S. & R. (Pa.) 285; Patton *v.* Ryan, 4 Rawle (Pa.), 408; Hoover *v.* Gehr, 62 Pa. St. 136. Must be the day-book, not the ledger. Hamill *v.* O'Donnell, 2 Miles (Pa.), 101. But may be in ledger form, if an original. Thomson *v.* Hopper, 1 W. & S. (Pa.) 467; Rehrer *v.* Ziegler, 3 W. & S. (Pa.) 258; Odell *v.* Cuthbert, 9 W. & S. (Pa.) 66; Hoover *v.* Gehr, 62 Pa. St. 136. Not original if the entries are transcribed from time to time, as the party had time from a counter book or blotter. Breinig *v.* Mertzler, 23 Pa. St. 156.

The fact that some entries are not original will not affect those proved by the parties' oath to be so. Ives *v.* Niles, 5 Watts (Pa.), 323; Wollenweber *v.* Ketterlinus, 17 Pa. St. 389. Nor does it injure entries should they be written in lead-pencil. Hill *v.* Scott, 12 Pa. St. 168.

Entry must be made after delivery, and an arbitrary mark affixed to items to show actual delivery does not help the matter, if it appear not to charge the defendant but to warn the porter against a double delivery. Rhoads *v.* Gaul, 4 Rawle (Pa.), 404; Fitler *v.* Eyre, 14 Pa. St. 392; Thompson *v.* Bullock, 2 Miles (Pa.), 269; Parker *v.* Donaldson, 2 W. & S. (Pa.) 9; Kunzig *v.* Haedrick, 2 W. N. C. (Pa.) 228. A copy from memorandum, not registering the transaction as a sale and delivery, is inadmissible. Fairchild *v.* Dennison, 4 Watts (Pa.), 258. *Contra*, Kaughley *v.* Brewer, 16 S. & R. (Pa.) 133. See also as to time of entry Keim *v.* Rush, 5 W. & S. (Pa.) 377; Koch *v.* Howell, 6 W. & S. (Pa.) 350; Benners *v.* Maloney, 3 Phila. (Pa.) 57.

The entries must not be too long after delivery, they must be a memorandum of transactions as they occur. Curren *v.* Crawford, 4 S. & R. (Pa.) 3; Jones *v.* Long, 3 Watts (Pa.), 325. Entries copied from a card the evening of the next day admitted. Potter *v.* Ryan, 4 Rawle (Pa.), 408. Not so when copied by party from

entries by a journeyman on a slate inside of two weeks. Kessler *v.* McConachy, 1 Rawle (Pa.), 435. But where the man who first made the entries testified as well as the plaintiff, admitted. McCoy *v.* Lightner, 2 Watts (Pa.), 347. Not admitted when made up from loose scraps of paper and carried from one to four days. Vicary *v.* Moore, 2 Watts (Pa.), 451.

The entry must be made within a reasonable time; it is better if made within one day. Jones *v.* Long, 3 Watts (Pa.), 325. See Yearsley's App., 48 Pa. St. 531; Forsythe *v.* Norcross, 5 Pa. St. 432; Cook *v.* Ashmead, 2 Miles (Pa.), 268; Walter *v.* Bollman, 8 Watts (Pa.), 544; Hartley *v.* Brookes, 6 Whart. (Pa.) 189; Van Swearingen *v.* Harris, 1 W. & S. (Pa.) 356.

Where the evidence is not conflicting, the competency is for the court. Churchman *v.* Smith, 9 Whart. (Pa.) 146; Curren *v.* Crawford, 4 S. & R. (Pa.) 3.

Entries need not be made from party's own knowledge. Ingraham *v.* Bockius, 9 S. & R. (Pa.) 285; Jones *v.* Long, 3 Watts (Pa.), 325. Nor that he should be without clerks or porters.

Entries to which a party swears must be in his own handwriting. Van Swearingen *v.* Harris, 1 W. & S. (Pa.) 356; Alter *v.* Berghaus, 8 Watts (Pa.), 79; Odell *v.* Culbert, 9 W. & S. (Pa.) 66; Hoover *v.* Gehr, 62 Pa. St. 136.

A party having been absent from the country for seven years and could not be found, on proof of his handwriting the book of original entries was admitted. Bear *v.* Trexler, 3 W. N. C. (Pa.) 214.

Reputation of plaintiff as to keeping correct or incorrect books may be shown. Weamer *v.* Inart, 29 Pa. St. 257; Funk *v.* Ely, 45 Pa. St. 444.

The person who makes the entry need not have delivered the goods. Kline *v.* Gundrum, 11 Pa. St. 243.

Plaintiff is not concluded by his books, and may prove his claim in another way. Adams *v.* Columbia S. B. Co., 3 Whart. (Pa.) 75; Fitler *v.* Beckley, 2 W. & S. (Pa.) 458.

Plaintiff is not rendered incompetent by act of 1869 from supporting his book entries by a suppletory oath. White's Est., 32 Leg. Int. (Pa.) 430.

Under act of 1869 enabling interested parties to become witnesses, the parties are enabled to use the books as mere memoranda and testify themselves, rendering questions as to book entries less important. Barnet *v.* Steinback, 1 W. N. C. (Pa.) 335; Nichols *v.* Haynes, 78 Pa. St. 174.

A notary public's claim for half-day's labor in taking depositions is not a proper subject of book account. Harbison *v.* Hawkins, 81 Pa. St. 142.

South Carolina.—Books of accounts are admitted on the oath of the party. Clough *v.* Little, 3 Rich. (S. Car.) 353. They are evidence beyond a year for goods sold, work done, and articles furnished. Lamb *v.* Hart. 1 Brev. (S. Car.) 105.

Where other evidence can be produced this is not allowed. Thomas *v.* Dyott. 1 Nott & McC. (S. Car.) 186.

They prove the delivery of an article or work done and nothing more. St. Philip's Church *v.* White, 2 McMull. (S. Car.), 306. Nothing collateral. Gage *v.* McIlwain, 1 Strobh. (S. Car.) 135. Nor are they evidence to prove or contradict a special contract. Pritchard *v.* McOwen, 1 Nott & McC. (S. Car.) 131; Deas *v.* Darby, 1 Nott & McC. (S. Car.) 436; Brown *v.* Kinloch, 2 Spear (S. Car.), 284; Kinloch *v.* Brown, 1 Rich. (S. Car.) 223.

In Venning *v.* Hacker, 2 Hill (S. Car.), 584, plaintiff was held incompetent to prove entries made up from memoranda of defendants, and it was also held that plaintiff's books could only prove delivery by himself, and entries made up from representations by a slave were incompetent. Gage *v.* McIlwain, 1 Strobh. (S. Car.) 135.

In McBride *v.* Watts, 1 McC. (S. Car.) 384, a physician was allowed to prove by his books both the service rendered to the sailors, and that it was at the instance of the captain of the vessel. The books must have been regularly kept, and the entries made in the usual course of business and in the regular order in which the transactions occurred. Lynch *v.* McHugo, 1 Bay (S. Car.), 33; Thayer *v.* Deen, 2 Hill (S. Car.), 677. If regularly kept and composed of original entries, they are admissible, though not day-books but kept by double or single entry. Toomer *v.* Gadsden, 4 Strobh. (S. Car.) 193.

Charges must be specific and particular. Lynch *v.* Petrie, 1 Nott & McC. (S. Car.) 130; Hughes *v.* Hampton, 3 Brev. (S. Car.) 544; Lance *v.* McKenzie, 2 Bailey (S. Car.), 449.

The books offered must be produced in court for defendant's inspection. Furman *v.* Play, 2 Bailey (S. Car.), 394. The party proving is subject to cross-examination. Clough *v.* Little, 3 Rich. (S. Car.) 353.

Some entries being incompetent and undistinguishable from the others, the book is inadmissible. Venning *v.* Hacker, 2 Hill (S. Car.), 584.

Entries should be proved by oath of

the party who made them; but if one of two partners, plaintiffs, who has made the entries is dead or has moved out of the State, the other partner may be allowed to prove his handwriting. Foster *v.* Sinkler, 1 Bay (S. Car.), 40; White *v.* Murphy, 3 Rich. (S. Car.) 369.

Third parties were permitted to prove a physician's books, he having moved out of the State. Spence *v.* Sanders, 1 Bay (S. Car.), 119.

The books of a carpenter or a bricklayer are evidence. Lynch *v.* Petrie, 1 Nott & McC. (S. Car.) 130; Slade *v.* Teasdale, 2 Bay (S. Car.), 172. Or other mechanic. Lamb *v.* Hart, 2 Bay (S. Car.), 362. Or of a ferryman. Frazier *v.* Drayton, 2 Nott & McC. (S. Car.) 471. Of a physician. McBride *v.* Watts, 1 McC. (S. Car.) 384; Lance *v.* McKenzie, 2 Bailey (S. Car.), 449. Of a miller, to show quantity of lumber delivered. Gordon *v.* Arnold, 1 McCord (S. Car.), 517. Or of meal delivered. Exam *v.* Davis, 10 Rich. (S. Car.) 357. Of a printer to show charges for advertising and delivering a paper. Thomas *v.* Dyott, 1 Nott & McC. (S. Car.) 186. For proof of advertisement, however, the file of papers is better evidence. Richards *v.* Howard, 2 Nott & McC. (S. Car.) 474. Of a seinemaker. 2 Mill Const. R. (S. Car.) 220.

A schoolmaster's book is not evidence to prove an account for instruction. Pelzer *v.* Cranston, 2 McC. (S. Car.) 328. Nor a jailer's, to prove length of confinement. Walker *v.* McMahon, 3 Brev. (S. Car.) 251. Nor a scrivener's, to prove commissions on money received. Watson *v.* Bigelow, 2 Brev. (S. Car.) 127. Nor were farmers' or planters' books until made by statute evidence in all trials in which the business or transactions of their farms or plantations should be called in question, as between the farmer or planter and his employees. Rev. Stat. (Ed. 1873) p. 517, § 32. Nor the memorandum books of a peddler. Thayer *v.* Deen, 2 Hill (S. Car.), 677. Nor of a billiard-table keeper. Boyd *v.* Ladson, 4 McC. (S. Car.) 76.

Account books of tavern-keepers or other dealers in spirituous liquors are not admitted as evidence of any debt contracted or money due for spirituous liquors sold in less quantity than a quart. Rev. Stat. (Ed. 1873) p. 517, § 33.

Tennessee.—The statute making books admissible on plaintiff's oath has become obsolete since the statute 1869–70, making parties competent witnesses in their own behalf. King's Tennessee Dig. 27.

Texas.—Books appearing to the court regularly, chronologically, and honestly kept, without erasures or interlineations, are admissible. Burleson *v.* Goodman, 32 Tex. 229. With the suppletory oath and proof *aliunde* that the party kept correct accounts, and after the best testimony has been exhausted. Townsend *v.* Coleman, 18 Tex. 418; s. c., 20 Tex. 821; Werbiskie *v.* McManus, 31 Tex. 116.

In the absence of evidence establishing liability of plaintiffs in a book account produced by defendants as a set-off, the books cannot be admitted to the jury without definite explanation of the use to be made of them by the jury. Compton *v.* Young, 26 Tex. 644.

Proof must be made of the correctness of items in memorandum- or cash-books of occasional entry. Kotwitz *v.* Wright, 37 Tex. 82.

Copies are inadmissible. Flats *v.* Brod. 37 Tex. 734.

Vermont —By statute the action of account is brought on book account, and after judgment *quod computet* the auditor has power to examine all the parties to the suit on oath in relation to the account or any item of it, and call for the original books if there are any; and in an action before a justice where a book account is sued on or used as a set-off, the justice has similar powers to examine the parties on oath. Laws (Ed. 1880), p. 277, § 1202.

This action can be maintained whenever either the contract is implied or has been maintained on the plaintiff's side, but not where the plaintiff sues for damages specially for non-performance of a contract. Way *v.* Wakefield, 7 Vt. 223.

The credit, not the competency, of the book is affected by erasures or alterations. Sargeant *v.* Pettibone, 1 Aik. (Vt.) 355.

The entries need not be specific nor made at the time. Read *v.* Barlow, 1 Aik. (Vt.) 145; Leach *v.* Shephard, 5 Vt. 363; Newell *v.* Keith, 11 Vt. 214.

The account may be made up from memory in court, and no books need be kept; the only requisites are that the charges should be of a proper kind for book charges, and an examination of both parties should show the claim just. Bell *v.* McCan, 3 Vt. 185.

The whole practice rests upon the statute, and under it it is not the book of evidence supported by the parties' oath, which is evidence; it is the oath of the party affected as to its credibility by the appearance of his account-book, or the fact that he kept no books, that is the substantive evidence received. See 1 Smith's Ldg. Cases, p. 585.

Virginia.—The original entries in a merchant's book are competent evidence for him. An account charging defendants is evidence on the question whether

3. What Constitutes a Book.—A slate, a card, scraps of paper, shingles, or whatever may seem to the court *bona-fide* accounts have been received, usually on the condition that the contents have been copied into regular books within a reasonable time.[1]

4. Character of Book.—With but few exceptions the book must be unattended by suspicious circumstances or facts, such as alterations or additions calculated to throw discredit on it.[2]

goods were sold by plaintiffs to defendants or to a third person. Downer *v.* Morrison, 2 Gratt. (Va.) 250.

The oath and books of plaintiff cannot be allowed to charge defendant with goods delivered to a third person on his order, unless otherwise proved. Kerr *v.* Love, 1 Wash. (Va.) 172.

Wisconsin.—"Such books are by statute admitted as presumptive evidence of the charges contained therein upon oath of the party that the books are his account-books containing original entries; said entries being just and true and in his own handwriting and made at or about the time of delivery or performance. The party is subject to cross-examination under the same rules as any other witness." Rev. Stat. (Ed. 1878) p. 1010, § 4186.

Statutes also provide that where a book has marks which show that the items have been transferred to a ledger, the ledger must be produced. Rev. Stat. p. 1010, § 4188. And the oath of an agent, servant, or clerk is equally competent; but no item of money, in any event, exceeding five dollars at one time shall be admitted, or money paid to third persons, or charges for rent. § 4187.

Verified copies of bank-books are received. Act of 1881, April 2, P. L. 414.

The account-book having been received, plaintiff's character for veracity cannot be shown. Winne *v.* Nickerson, 1 Wis. 1; Nickerson *v.* Morin, 3 Wis. 243.

The books must be verified as required by statute. Marsh *v.* Case, 30 Wis. 531; Winner *v.* Bauman, 28 Wis. 563.

Mistakes which can be fairly explained do not affect the competency of the entries. Schettler *v.* Jones, 20 Wis. 412.

While goods may be charged to "E. Transportation Co." in a running account, and not under the individual name of E., the defendant, it may be explained by testimony that the credit was originally given to defendant. Hannan *v.* Engelman, 49 Wis. 278.

1. Entries made on a slate and transferred within a reasonable time are no less original entries. Landis *v.* Turner, 14 Col. 573; Jefferies *v.* Urmy, 3 Hous. (Del.) 653; Redlick *v.* Bauerlee, 98 Ill. 134; Hall *v.* Glidden, 39 Me. 445. When the time was from two to four weeks, there being no occasion for a more frequent transfer. Faxon *v.* Hollis, 13 Mass. 427; Barker *v.* Haskell, 9 Cush. (Mass.) 218; Jackson *v.* Evans, 8 Mich. 476; McGoldrick *v.* Traphagen, 88 N. Y. 334; Kessler *v.* McConachy, 1 Rawle (Pa.), 435; McCoy *v.* Lightner, 2 Watts (Pa.), 347; Forsythe *v.* Norcross, 5 Pa. St. 432; Yearsley's Appeal, 48 Pa. St. 531; Van Swearingen *v.* Harris, 1 W. & S. (Pa.) 356. Unless plaintiff live out of the State, when sworn copies are admitted unless the other side object. Craig & Sergeant *v.* Russel, 2 Harr. (Del.) 353; Fitzgibbon's Admr. *v.* Kinney, 3 Harr. (Del.) 317; Grady *v.* Hugpin, 6 Fla. 668.

A notched stick—Rowland *v.* Barton, 2 Harr. (Del.) 288—scraps of paper—Smith *v.* Smith's Exrs., 4 Harr. (Del.) 532; Hall *v.* Field, 4 Harr. (Del.) 533; Hooper *v.* Taylor, 39 Me. 229—have been admitted as books.

A shingle. Kendall *v.* Field, 14 Me. 230.

Entries from chalk scores on side of delivery cart. Smith *et al. v.* Sandford, 12 Pick. (Mass.) 139.

From boards and slips of papers if truly copied. Davison *v.* Powell, 16 How. Pr. (N. Y.) 467; Paine *v.* Sherwood, 21 Minn. 225.

Scraps containing various other memoranda are not allowed in *Pennsylvania*. Thompson *v.* McKelvey, 13 S. & R. (Pa.) 126; Hough *v.* Doyle, 4 Rawle (Pa.), 29.

2. Fraudulent appearances, such as material and gross alterations, false additions, etc., make the book inadmissible. Caldwell *v.* McDermit, 17 Cal. 464; Cheever *v.* Brown, 30 Ga. 904; Doster *v.* Brown, 25 Ga. 24; Cogswell *v.* Dolliver, 2 Mass. 217; Davis *v.* Sandford, 9 Allen (Mass.), 216; Larue *v.* Rowland, 7 Barb. (N. Y.) 107. Unless explained by plaintiff. Churchman *v.* Smith, 6 Whart. (Pa.) 146; Kline *v.* Gundrum, 11 Pa. St. 249.

BOOKSELLER.—A dealer in books.[1]

BOOM COMPANIES. (See also CORPORATIONS; WATERS AND WATER-COURSES.)

1. Definition.—A boom is an inclosure formed upon the surface of a stream or other body of water, by means of spars, for the purpose of collecting or storing logs or timber.[2]

Booms are usually formed by extending a series of spars for some distance at right angles to the shore and then continuing them up stream parallel to the shore, leaving the upper end open. As the logs float down stream, they are guided into the boom and there arrested.[3]

A booming company is a company formed for the purpose of improving streams for the floating of logs, by means of booms and other contrivances, and for the purpose of running, driving, booming, and rafting logs.[4]

1. Boosellers, dealing in such stock as is usually kept in a retail bookstore, who buy and sell, in connection with their other business, and as incidental thereto, second-hand books, are not "dealers in second-hand goods" within the meaning of an ordinance requiring dealers in second-hand goods to procure a license, and declaring that "any person who keeps a store, office, or place of business for the purchase or sale of second-hand clothing or garments of any kind, or second-hand goods, ware, or merchandise, is hereby declared to be a dealer in second-hand goods." Eastman *v.* City of Chicago, 79 Ill. 178.

In a number of cases it has been held that evidence of buying a libel in the shop of a known "bookseller" is sufficient *prima facie* evidence to convict him of publication. The leading case is Rex *v.* Almon, 5 Bur. 2686. See also Rex *v.* Walter, 3 Esp. 21; Rex *v.* Gutch, Moody & M. 433; Attorney-Gen. *v.* Sidon, 1 Cromp. & J. 220; Attorney-Gen. *v.* Riddle, 2 Cromp. & J. 493.

2. 10 Am. & Eng. Corp. Cas. 399.

3. 10 Am. & Eng. Corp. Cas. 399.

4. 1 How. Ann. Stats. (Mich.) §§ 3896, 3899, 3904 *et seq.* The *Michigan* statutes, being the general acts of 1855 and 1864 for the organization of booming companies, give the companies express powers to run, drive, boom, and raft logs, timber, and lumber; also to construct all proper and necessary rollways, booms, piers, etc. The Revised Statutes of 1878 of *Wisconsin*, § 1777, contain similar provisions.

The *Pennsylvania* statute (act June 22, 1883, Pamph. Laws, 156) provides for the formation of corporations for the purpose of driving and floating saw-logs, lumber, and timber, § 1; to use streams not exceeding twenty miles in length, § 1; may clear out streams, purchase and erect dams, deepen crib, widen streams, etc., § 2; not to obstruct navigation by rafts and boats, § 2; majority of stock to be held at all times by persons owning lands drained by such streams, § 2; improvements made to be for public benefit, subject to reasonable tolls, but under the control of the corporation, § 3; compensation to be made to owners of streams before operations are commenced, § 4; in case of disagreement damages to be assessed, § 4; proceedings regulated, § 4; bond to be filed and approved by the court before entry upon or control over the stream, § 5; property not to be taken for private use, § 6; pending suits at law or equity not to be affected by act, § 6.

2. Right to Float Logs.—The general public has an easement of floating logs down any stream which is capable of floating them.[1]

The right to float exists although the stream is not capable of floating logs the entire year round. It is enough if the stream is capable of floating logs for periods long enough and occurring often enough to make the stream useful to the public for purposes of "floatage."[2]

3. Right to Improve Stream for Purposes of Floatage.—Any person interested in the use of a stream for the purpose of floating logs may put into the stream any contrivances necessary or convenient for utilizing the stream for that purpose. Thus a riparian owner or other person may construct booms to arrest or store logs.[3]

But the use of streams for purposes of floatage is not paramount to, but concurrent with, its use for other purposes.[4]

Hence no person may put into the stream any boom or other contrivance which will unduly interfere with the use of the river for supplying water power to mills,[5] or with its use for naviga-

1. Moore *v.* Sanborn, 2 Mich. 519; Weise *v.* Smith, 3 Oreg. 445; Shaw *v.* Oswego Iron Co., 10 Oreg. 371; Whisler *v.* Wilkinson, 22 Wis. 572; Sellers *v.* Union Lumbering Co., 39 Wis. 525; Olsen *v.* Merrill, 42 Wis. 203; Shaw *v.* Crawford, 10 Johns. (N. Y.) 236; Morgan *v.* King, 35 N. Y. 459.

According to the English law the public had no easement of navigation in non-tidal waters except by custom or long user. In this country it is otherwise: the public has an easement of user in every stream that is capable of being put to any public use. In a community in which logging and lumbering is an important industry, any stream which is capable of floating logs is subject to a public easement for that purpose. Moore *v.* Sanborn, 2 Mich. 519.

A stream capable, in its natural condition, of being profitably used for floating rafts or logs, though it be private property and not navigable for other purposes, is subject to a public easement for that purpose. Weise *v.* Smith, 3 Oreg. 445.

A stream is "navigable" although it is usual or convenient to aid the passage of logs or craft by manual help from the banks. Olsen *v.* Merrill, 42 Wis. 203.

Where the public have used a stream twenty-six years for the purpose of floating rafts of logs, it becomes subject to a public easement for that purpose, although not navigable in the common-law sense of the word. Shaw *v.* Crawford, 10 Johns. (N. Y.) 236.

Where a stream is capable of being used by a very limited number of persons only, for the purpose of floating logs, it is not subject to a public easement for that purpose. This was held in the case of a stream which in thirty years had not been used for floating logs by more than twelve persons, and not by more than six in any one year. The user did not exceed six days in any one year. The stream was only five miles long, and flowed for two miles through private land. Meyer *v.* Phillips, 97 N. Y. 485.

2. Moore *v.* Sanborn, 2 Mich. 519; Shaw *v.* Oswego Iron Co., 10 Oreg. 371; Olsen *v.* Merrill, 42 Wis. 203.

3. Brig City of Erie *v.* Canfield, 27 Mich. 479; Stevens Point Boom Co. *v.* Reilly, 44 Wis. 295; s. c., 46 Wis. 237.

The right to erect booms in a river capable of floating logs rests upon the same principle by which the construction of wharves and piers upon waters generally navigable is allowed. Stevens Point Boom Co. *v.* Reilly, 44 Wis. 295, 305.

4. Buchanan *v.* Grand River Log Co., 48 Mich. 364; Middleton *v.* Flat River Booming Co., 27 Mich. 533; Woodin *v.* Wentworth, 57 Mich. 278; Stevens Point Boom Co. *v.* Reilly, 44 Wis. 295.

An owner of logs engaged in driving them may blockade the stream with them, but he has no right to blockade a stream by storing his logs in it. McPheeters *v.* Moose R. L. D. Co., 5 Atl. Repr. (Me.) 270.

An action lies at the suit of any one injured thereby for needlessly obstructing the use of a navigable stream by keeping logs therein longer than necessary for floating them. Gifford *v.* McArthur, 55 Mich. 535.

5. Attorney-General *v.* Evart Booming Co., 34 Mich. 462; Middleton *v.* Flat

tion or other purposes,[1] or with the property right of riparian owners.[2]

4. Nature of Boom Companies.—Booming companies are organized to carry on, on a large scale and under one management, the business of driving and rafting logs which would otherwise have to be done by individuals. They are intended to supply facilities for the driving of logs to the general public, and are *quasi*-public corporations.[3]

Booming companies being *quasi*-public corporations, the legis-

River Booming Co., 27 Mich. 533; Buchanan *v.* Grand River Log Co., 48 Mich. 364.

A booming company has no right to erect dams in a river in order to store up water for the purpose of floating logs at a period when the river in its natural state would not be capable of floating them; and it is liable to a riparian mill-owner whose water supply is cut off by reason of the dam. Thunder Bay River Booming Co. *v.* Speechley, 31 Mich. 336; Middleton *v.* Flat River Booming Co., 27 Mich. 533.

In Buchanan *v.* Grand River Log Co., 48 Mich. 364, the court state that persons interested in the floating of logs may, under some circumstances, dam the stream for the purpose of flooding; that this right is included in the general right to use the stream for the floating of logs. But this right is not paramount to the right of a riparian owner to use the water of the stream for water power, and must not be exercised so as unduly to interfere with it. Both rights are concurrent, and each modifies the other to some extent.

The rights of the riparian owner to dam the stream are not paramount to the right to use the stream for floating logs. The owner has no right to build a dam which will unduly interfere with the floating of logs. Beliveau *v.* Levasseur *et al.*, 1 Revue Legale (Quebec), 720.

A sued B for an injury to his raft caused by the improper state of B's dam. *Held*, that the circumstance that the river would not have been navigable for a raft of logs of the size of those composing A's raft except for the existence of the dam was no defence to the action. Volk *v.* Eldred, 23 Wis. 410.

The question of lawfulness in the action of a booming company in inclosing part of a stream for its own purposes, whether by permanent structures or otherwise, depends upon whether the general public, desirous of availing themselves of the navigable rights, are or are not more inconvenienced than accommodated thereby. Attorney-General *v.* Evart Booming Co., 34 Mich. 462.

1. Brig City of Erie *v.* Canfield, 27 Mich. 479.

Raftsmen have no right to moor their rafts in navigable streams in such a manner as to interfere with navigation. Harrington *v.* Edwards. 17 Wis. 586.

2. White River Log, etc., Co. *v.* Nelson, 45 Mich. 578; Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308.

In Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308, it was held that the right to use a stream for the purpose of floating logs did not include the right to cause an overflow of the land of a riparian owner by such use of the stream. In that case it appeared that a booming company every year, by means of its boom, detained a large number of logs in the stream which formed a jam, and caused the overflow of the land of a riparian owner. It also appeared that the detention of the logs was necessary for the purpose of sorting them. It was, nevertheless, held that the company was liable in damages to the riparian owner, and that it had no right to injure the land of a riparian owner, even though such injury was an inevitable result of the operation of its boom.

A boom company is not responsible for damage by flooding caused by a jam of logs when it took all reasonable precautions to prevent the jam. Anderson *v.* Thunder Bay River Boom Co., 28 N. Westn. Repr. (Mich.) 518.

One floating logs down a navigable stream is not responsible to a riparian proprietor for damage caused by the stranding of his logs, if he uses all reasonable efforts to keep them in the stream. Carter *v.* Thurston, 58 N. H. 104.

One owning a boom may fasten it to the land of a riparian owner if it is necessary to do so in order to successfully operate the boom. Weise *v.* Smith, 3 Oreg. 445.

3. Osborne *v.* Knife Falls Boom Co., 32 Minn. 412; s.c., 49 Am. Rep. 590; Cohn *v.* Wausau Boom Co., 47 Wis. 314; Duluth Lumber Co. *v.* St. Louis Boom and Improvement Co., 17 Fed. Repr. 419.

Land on the banks of a navigable

lature may give them the exclusive right to maintain booms or to drive logs in any stream.[1]

So the legislature may authorize a booming company to construct a boom which shall entirely obstruct navigation in a navigable stream.[2]

5. Right of Boom Company to Maintain Booms.—The right of a booming company to construct and maintain booms is generally defined and restricted by the provisions of its charter or of the general act under which it is organized. The nature of the boom which the company is authorized to build depends entirely upon such charter or statutory provisions.[3]

stream may be condemned for boom purposes; such a use is a public one. Cotton *v.* Mississippi & Rum River Boom Co., 22 Minn. 372.

1. Cohn *v.* Wausau Boom Co., 47 Wis. 314; Duluth Lumber Co. *v.* St. Louis Boom & Improvement Co., 17 Fed. Repr. 419; South Bay Boom Co. *v.* Jewett, 5 Allen (N. B.), 267.

A statute giving to a boom company the exclusive right to maintain a boom upon a navigable stream, and to collect and control all logs within certain limits, and to charge boomage for its services, is not in violation of a constitutional provision that the stream shall be free, and that no tax, duty, or impost shall be charged for its use. The boom company is a *quasi*-public corporation, and its operations are for the benefit of public navigation, and hence it may be authorized to charge a fee or tax for boomage. Osborne *v.* Knife Falls Boom Co., 32 Minn. 412; s. c., 14 Am. & Eng. Corp. Cas. 203.

A statute declared all navigable waters leading into two great rivers to be common highways and free forever to all persons without tax or impost. *Held*, not to prohibit the legislature from permitting a company incorporated to improve the navigation of a stream only partly navigable from charging toll. Wisconsin River Imp. Co. *v.* Manson, 43 Wis. 255.

In general it is provided that the right to run, drive, boom, and raft logs shall not be exclusive in the boom company, but that private persons may also exercise that right. How. Ann. (Mich.) St. §§ 3900, 3917.

2. Heerman *v.* Beef Slough Mfg. Co., 8 Biss. (U. S. C. C.) 334; Edwards *v.* Wausau Boom Co., 30 N. Westn. Repr. 716; Enos *v.* Hamilton, 24 Wis. 658.

3. Enos *v.* Hamilton, 24 Wis. 658.

Where a boom company constructs its boom properly and in accordance with statutory or charter requirements, it will not be liable when, by reason of a freshet, the boom causes lands to be overflowed. Lawler *v.* Boom Co., 56 Me. 443; Anderson *v.* Thunder Bay, etc., Co., 13 Am. & Eng. Corp. Cas. 98.

But a boom company is liable in damages for the delay or detention of rafts caused by its exceeding its charter powers in the construction of its boom. Plummer *v.* Penobscot Lumbering Assoc., 67 Me. 363.

A boom company is liable in tort for an injury caused to a riparian owner by the unauthorized and improper construction of its works. Hackstack *v.* Keshena Improvement Co., 66 Wis. 439.

The State cannot authorize a boom company to construct a boom the necessary effect of which will be to cause a flowage of land of a riparian owner, unless provision is made for compensation for the flowage. Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308.

The respondent brought action for damages caused to his vessel by a boom which appellant had constructed in the river St. Francis. *Held*, confirming the judgment of the court below, that the appellant was liable, notwithstanding the statute which authorized the construction of these booms in such a way as not to obstruct the navigation of the river, required that the plan and proposed site of the booms shall first be submitted to and approved by the governor in council, and that the plan and site of the boom had been actually approved of by the governor in council, where the evidence established that these booms did really form an obstruction to the navigation of the river. Pierreville Steam Mills Co. *v.* Martineau, 20 Low Can. Jur. 225.

Where the charter provided that if any person should suffer damages by the exercise of powers granted to a boom company, his damages should be assessed in a certain way, *held*, that the statute covered the case of damages caused by an overflow resulting from the

6. Compensation and Lien.—It is commonly provided in the charters of booming companies or the general act of incorporation that they may charge reasonable tolls or fees for the use of their booms and for their services in rolling, driving, and rafting logs, etc.[1]

Apart from statutory regulation, the matter of compensation rests wholly in contract.[2] Booming companies are commonly

obstruction of the river by logs accumulated by defendant's boom. Bald Eagle Boom Co. *v.* Sanderson, 81 Pa. St. 402.

1. R. S. Wis. § 1777; 1 How. Ann. Stats. (Mich.) § 3917.

Booming companies being *quasi*-public corporations, the State has a right to regulate the prices they may charge for their services. Androscoggin Side Boom Co. *v.* Haskell, 7 Me. 474.

In fixing the reasonableness of a boom company's charges, the value of the company's real estate used for booming purposes may be considered; but the value must be the general market value, not its value for booming purposes, since that would be greater than the charge for booming. Pere Marquette Boom Co. *v.* Adams, 44 Mich. 403.

Boom companies given the right by charter to collect toll upon logs taken care of by them have no right to charge toll for rafts of lumber intended to pass down the river, but accidentally and against the owner's wishes stopped by the boom. Chase *v.* Dwinal, 7 Me. 134.

A statute prohibiting an existing toll company from receiving any tolls for logs, unless such logs, after having been rafted out, had first been surveyed by an official surveyor appointed by the selectmen of a town, is not unconstitutional. Proprietors of Side Booms, etc., *v.* Haskell, 7 Me. 474. *Compare* Merritt *v.* Knife Falls Boom Co. (Minn.), 14 Am. & Eng. Corp. Cas. 201.

Where the charter of a boom company provided that its boomage charges, at a given rate per 1000 feet, should become due and payable as soon as the amount of lumber was ascertained, *held*, that an actual measurement was not necessary before a right of action to recover boomage charges accrued. Wausau Boom Co. *v.* Plumes, 49 Wis. 115.

It is a question whether a booming company must not tender delivery of the logs before having any right to demand the legal charges thereon. Johnson *v.* Cranage. 45 Mich. 4.

Boomage Charges Constitutional.—Such charges do not conflict with clauses of a constitution making streams "forever free . . . without tax, duty, impost, or toll therefor." They are not made for the use of the river, but to compensate the company for its outlay in erecting and maintaining works which are improvements of and aids to navigation. Osborne *v.* Knife Falls Boom Corporation, 32 Minn. 412; s. c., 14 Am. & Eng. Corp. Cas. 203; Benjamin *v.* Manistee River Imp. Co., 42 Mich. 628; Duluth Lumber Co. *v.* St. Louis Boom Co., 17 Fed. Repr. 419; Nelson *v.* Sheboygan Slack-water Nav. Co., 44 Mich 7; Manistee River Imp. Co. *v.* Sands (Mich.), 19 N. Westn. Repr. 199; Cooley's Cons. Lim. 592; Gould on Waters, sec. 143. See also Cotton *v.* Miss. & Rum River Boom Co., 22 Minn. 372; Weaver *v.* Miss. & Rum River Boom Co., 28 Minn. 534; Stevens Point Boom Co. *v.* Reilly, 44 Wis. 295; Cohn *v.* Wausau Boom Co., 47 Wis. 314; Watts *v.* Tittabawassee Boom Co.. 52 Mich. 203; Duluth Lumber Co. *v.* St. Louis Boom Co., 17 Fed. Repr. 419; Pound *v.* Turck, 95 U. S. 459; Black River Imp. Co. *v.* La Crosse B. & T. Co., 54 Wis. 659.

2. A *Michigan* statute provided that the boom company should post a list of all log-marks of all members of the company, and of all persons whose logs they have contracted to run, and also provided that any other person may furnish and have posted a list of his marks, and shall be entitled to 30 days' notice of the sale of any of his logs on which the company has a lien. *Held*, that the furnishing of a list under the last clause did not imply a contract by the person furnishing it to have his logs run. Ames *v.* Port Huron Log Driving and Booming Co., 6 Mich. 266.

The defendants were the lessees of the plaintiff's boom and appurtenances at the rent of nine cents for every 1000 feet of logs passing through the same. *Held*, that an increased rent could not be charged, although a portion of the logs were twice rafted before they passed through the plaintiff's booms. Penobscot Boom Co. *v.* Penobscot Lumbering Assoc., 61 Me. 533.

Where the boom company has rafted logs and well secured them below its boom it has earned its boomage, and is entitled to the same although some of the logs are subsequently lost, if the loss was not caused by its negligence. Penobscot Boom Co. *v.* Baker, 16 Me. 233.

In an action to recover boomage for

given a lien upon enough of the logs driven for any person to secure the amount of its compensation due from him.[1]

7. Power to Drive Logs of Non-consenting Owners.—Booming companies are commonly authorized and empowered by the law under which they are organized to drive the logs of non-consenting third persons, wrongfully left to obstruct the stream, and which actually hinder the company in its lawful use of the stream,[2] and to collect from the owner a reasonable compensation for such service.[3]

The company is invariably given a lien, with power of sale, upon enough of the logs thus driven to cover its compensation.[4]

one parcel of logs, the defendant cannot recoup damages for the loss of logs out of another parcel. Penobscot Boom Corporation *v.* Wadleigh, 16 Me. 235; Proprietors of Side-Booms, etc., *v.* Weld, 6 Me. 105.

1. How. Ann. Stat. (Mich.) § 3917; R. S. Wis. 1878, § 1777.

Where a boom company is empowered by statute to sell logs to pay toll due upon them, a purchaser obtains a good title although the sale was irregular and defective. Hunter *v.* Perry, 33 Me. 159.

A boom company waives its lien upon logs when it takes time acceptances in payment of its claim. Au Sable River Boom Co. *v.* Sanborn, 36 Mich. 358.

2. 1 How. Ann. Stats. (Mich.), §§ 3929, 3901; R. S. Wisconsin, 1878. § 1777; Anderson *v.* Maloy, 32 Minn. 76.

A boom company cannot drive the logs of a third person and charge for so doing when the owner himself is using all reasonable means to drive his logs. Butterfield *v.* Gilchrist, 55 Mich. 22.

The right of a boom company to take charge of and run the logs of a non-consenting owner is one for the jury to determine, under the facts and circumstances of the case. Sturgeon River Boom Co. *v.* Nester, 55 Mich. 113.

A statute authorized boom companies to run and boom logs of third persons put into the stream without a sufficient force to prevent their forming jams, and gave the company a lien for its services. *Held*, that the statute authorized the company to take charge of logs of third persons even when such logs did not obstruct its own use of the stream, and that, therefore, it was unconstitutional, as giving general police powers to persons not public officers. *Held also*, that, the right of interference being in the discretion of the company, the act virtually gave a private company a judicial function, and was unconstitutional for that reason. Ames *v.* Port Huron Log Driving and Booming Co., 11 Mich. 139.

There appears to be no statute upon the subject of boom companies in Maine. R. S. Maine, 1883, title 3, ch. 42, § 6, however, provides that any person whose logs in any waters are so intermixed with those of another that they cannot conveniently be separated may drive all the logs and may charge a reasonable compensation for driving the logs of such other person, and have a lien on them therefor.

A person may recover, under Gen. St. Mich. 1878, ch. 32, § 78, for driving the logs of another person, even where the logs have become intermingled by consent. Walker *v.* Bean, 26 N. Westn. Repr. 232.

Under ch. 32, § 78, Gen. Stats. Minn. 1878, which provides that when one person drives the logs of another which have become intermingled with his own he shall have a lien on such logs for his services, *held*, that the plaintiff was entitled to his lien where, owing to the absence of means natural or artificial for separating logs at the point at which defendant wished his logs delivered, the plaintiff was compelled to drive them to a point beyond. Chesley *v.* De Graff, 29 N. Westn. Repr. 167.

The existence of a custom to treat as gratuitous services authorized by statute in driving intermingled logs cannot affect the statutory right to recover. Osborne *v.* Nelson Lumber Co., 33 Minn. 285.

3. R. S. Wis. 1878, § 1777; How. Ann. Stats. (Mich.) § 3917.

4. R. S. Wis. 1878, § 1777; How. Ann. Stats. (Mich.) §§ 3901, 3929. See R. S. Maine, 1883, title 3, ch. 42. § 6.

Boom companies have, under the general act relating to logging, a lien for their services in breaking jams and driving logs where the owners have not put on a sufficient force to do it. Hall *v.* Tittabawassee Boom Co., 51 Mich. 377.

The fact that the Booming Companies Act gives booming companies a lien for their services upon the logs of non-consenting owners driven by them under

8. Nature of Property in Booms.—It has been held that boom property is taxable as real estate.[1]

9. Liability of Boom Companies—Degree of Care.—Booming companies are not liable, like common carriers, for the safe-keeping of the logs.[2]

They are bailees for hire, and are held only to an ordinary degree of diligence in the care of logs of which they nave charge.[3]

10. Constitutional Law.—Booming companies, being *quasi*-public corporations, may be empowered to condemn land.[4]

For the same reason they may be given the right to make improvements in streams, and to charge a toll upon all logs floated therein.[5]

A statute giving a boom company general police powers in a stream capable of floating logs is unconstitutional.[6]

11. Miscellaneous Cases.—For a collection of miscellaneous cases relating to booming companies, see the note hereto appended.[7]

the provisions of the act does not imply that an action of *assumpsit* may not be maintained to recover for those services. Chapman *v.* Keystone Lumber and Salt Co., 20 Mich. 358.

1. Hall *v.* Inhabitants of Benton, 69 Me. 346.

Where a boom is attached to the land, an injury caused by it to a vessel is not a marine injury, and could not be redressed in equity. Brig City of Erie *v.* Canfield, 27 Mich. 479.

The sale upon execution of a boom does not embrace the land inclosed by the piers, chains, and logs. Rollins *v.* Clay, 33 Me. 132.

Where one owning the right of fastening a boom to shore of an adjoining owner, and exercising that right in connection with his booms along his own shore, conveys his land "together with all booms and piers thereto appertaining as heretofore used by me," the right of fastening the boom as enjoyed by the grantor passes to the grantee. Hoskins *v.* Brown, 76 Me. 68.

2. Mann *v.* White River Log and Booming Co., 46 Mich. 38.

3. Weld *v.* Proprietors of Side Booms, 6 Me. 93.

4. Cotton *v.* Mississippi & Rum River Boom Co., 20 Minn. 378.

A statute giving a boom company the right to maintain a boom, the necessary effect of which will be to cause a flowage of the land of a riparian owner, is unconstitutional, unless provision is made for compensation. Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308.

5. Where the constitution provides that a stream shall be forever free, the legislature may nevertheless authorize a booming company to improve the stream and to charge a toll upon all logs floated in it. Osborne *v.* Knife Falls Boom Co., 32 Minn. 42; s. c., 49 Am. Rep. 590; Wisconsin River Impr. Co. *v.* Munson, 43 Wis. 255.

6. The *Michigan* statute of 1855, for the forming of boom companies, in so far as it authorized the companies to assume control of logs of non-consenting parties, without any necessity arising from the obstruction of their own business, is unconstitutional, first, because it gives a police power to persons not elected or appointed; second, because it deprives persons of their property without due process of law. Ames *v.* Port Huron Log Driving and Booming Co., 11 Mich. 139.

7. A boom company was authorized by statute to maintain two booms, but was only required to collect and care for logs which came into the lower boom. A declaration averred that plaintiff drove logs into the limits of said boom, which it was defendant's duty to collect, secure, and deliver, "as provided in said act." *Held*, sufficient, on demurrer, without express averment that the boom referred to was the lower boom. Nelson *v.* St. Croix Boom Co., 52 Wis. 647.

Where the charter of a boom company requires it to start its main drive each year "as early as practicable." *held*, that the company performed its duty under the statute by appointing skilled lumbermen to take charge of the starting of the drive. Patterson *v.* Penobscot Log Driving Co., 71 Me. 44.

Where the charter of a boom company provided that the company *might* drive *all* logs and other timber in a certain

BOOTH.—A house or shelter built of slight materials for temporary purposes.[1]

BOOTS.—Covering for the feet.[2]

river, the company is under no obligation to drive *any* logs; but if the privilege of the charter is accepted and the company undertakes to drive any logs, it must drive *all*. Weymouth *v.* Penobscot Log Driving Co., 71 Me. 29.

A statute granting the right to collect toll to any person or corporation who should make boom improvements at a prescribed expense, in a certain river, was held void for not vesting the franchise in some particular person or corporation. Sellers *v.* Union Lumbering Co., 39 Wis. 525.

Where a shore owner has rented his land every year to a boom company, and a city erects a dam which injures the value of his land for booming purposes, he may recover damages for such injury. Barrett *v.* Bangor, 70 Me. 335.

The possession of logs by a boom company for booming purposes only is that of the owner, and hence is no obstacle to a change of possession or delivery to a purchaser or mortgagee. Sheldon *v.* Warner, 26 Mich. 403.

One booming company cannot abate a mere private nuisance maintained by another booming company by an information filed in the name of the attorney-general. Attorney-General *v.* Evart Booming Co., 34 Mich. 462.

Where the charter provided for the survey of logs by the surveyor-general of Bangor, there being no officer of that title, it was held that a survey by the surveyor-general for the county of Penobscot, residing at Bangor, was a sufficient compliance with the provisions of the act. Penobscot Boom Corp. *v.* Lamson, 16 Me. 224.

Consolidation of two boom companies *held* not a consolidation of booms. Brown *v.* Susquehanna Boom Co., 10 Am. & Eng. Corp. Cas. 383.

Construction of Minnesota statute, and charter provisions of boom company. Missisippi, etc., Boom Co. *v.* Prince, 10 Am. & Eng. Corp. Cas. 391.

1. A permanent building used and slept in only for a short time, for the purpose of a fair, may be treated as the dwelling-house of the person so occupying it, in an indictment for burglary, though unoccupied the rest of the year. Rex *v.* Smith, 1 Moo. & R. 256.

But burglary cannot be committed in a mere tent or *booth* erected in a market or fair. 4 Bl. Com. 225; 1 Hale P. C. 557; 1 Haw. c. 38, s. 17.

Where the offence alleged in an indictment consists of selling intoxicating liquors in a *booth* or other like place named in the statute, the indictment must specify it, and a mere allegation of a sale in the county is not sufficient; "for," said Marshall J., "in the description of the offence contained in the various statutes, place is always introduced as a part of the definition; as in the 4th section of the act of 1793 (Stat. Law. 1499), if any person shall sell, etc., in any house, *booth*, arbor, etc.; and in the 5th section of the act of 1820, page 1502, any person who shall sell, etc., in any *booth*, arbor, etc. So that if the place did not affect the grade of the offence, it might still be material to its proper specification. But, second, there is a difference in the penalty inflicted for selling by retail in different places. The first of the sections above referred to subjects the offence of selling in the places therein referred to, to a penalty of £3 or $10. The second imposes a penalty of twenty dollars. Upon comparing them it is seen that the last does not enumerate all the places mentioned in the first, and the consequence is that for selling in any place embraced in the first and not in the second of the sections, the penalty is $10, while for selling in any of the places mentioned in the other it is $20, so that there is a substantial ground of discrimination; and as the last statute, in effect, repeals the first as to the places named in the last, the designation of place in the presentment is necessary, in order to show under what statute the offence is charged, and to what penalty it is subject." Grimme *v.* Com., 5 B. Mon. (Ky.) 263.

2. **One Pair of Boots.**—Where the defendant was indicted for stealing "one pair of boots" and the proof was that he stole two boots mismatched, being the right boot of two pair, it was held that the proof did not sustain the indictment, the court saying: "The object of certainty in an indictment is to inform the defendant plainly and precisely of what offence he is charged. This certainty must be not merely to a common intent, but to a certain intent in general, which requires that things shall be called by their right names, at least by such as they are usually known by. 'One pair of

BOOTY. See CAPTURE.

BORN. (See also BIRTH.)—It is now settled, according to the dictates of common-sense and humanity, that a child *en ventre sa mère*, for all purposes for his own benefit, is considered as absolutely *born*.[1]

boots' means two boots paired, matched or suited to be used together." State *v.* Harris, 3 Harr. (Del.) 559.

Good Custom Cow-hide Boots.—In an action on a promissory note of the following tenor: "For value received of Parly Fairbanks, I promise to pay him or his order the sum of one hundred and ninety dollars of 'good custom cow-hide boots' at four dollars per pair; said boots to be delivered at my shop in Wardsboro' in two years from the first day of January instant, one half of said boots to be horse-hide legs, and one half of the other to be good kip-skin legs,"—it was held that said note was ambiguous, and parol proof was admissible to show the agreement and understanding of the parties in relation to the kind, quality, and worth of the boots intended; there being no definite meaning attached to the words "good custom cow-hide," etc. Wait *v.* Fairbanks, Brayton (Vt.). 77.

1. Swift *v.* Duffield, 5 S. & R. (Pa.) 40. "He takes by descent, under the Statute of Distributions; is entitled to the benefit of a charge for raising portions for children; may be executor; have a guardian assigned; in executory devises is a life in being; may be vouched in a common recovery. In a devise to children or grandchildren the *prima-facie* intention will include a child *en ventre sa mère*, unless it appears by particular expressions in the will that the testator intended the contrary and confines it to children then born." See to the same effect McKnight *v.* Read, 1 Whart. (Pa.) 220 (in which case, however, the infant was not considered as *born*, it not being *for his own benefit* to take under the will in question); Marsellis *v.* Thalhimer, 2 Paige Ch. (N. Y.) 35, where it was decided that if the infant were born dead or in such an early stage of pregnancy as to be incapable of living, it is to be considered as never *born*, so far as the rights of others claiming through it are concerned. Harper *v.* Archer, 4 Sm. & Mar. (Miss.), 108, in which the court say: "It is now settled both in England and in this country that from the time of conception the infant is *in esse* for the purpose of taking any estate which is for his benefit, whether by descent, devise, or under the Statute of Distributions: provided, however, that the infant be born alive and after such a period of fœtal existence that its continuance in life might be reasonably expected. A premature birth would not be regarded as of a character to give completeness to the inchoate right." Doe *dem.* Clarke *v.* Clarke, 2 H. Black, 401; 1 Bl. Com. 130.

Born and to be Born.—A legacy was left in trust for the children of testator's son "born and to be born," interest to be paid them during their minorities, and the principal as they respectively came of age. *Held* that none were entitled to take who were not born at the period prescribed for distribution. "It is certain that slight indications of an intent to the contrary, such as the words 'born or to be born' will be insufficient to found an exception. To prevent an indisputable violation of the intention on the one hand, these words must, on the other, be taken to have been used in reference to the period of distribution, by which means each part of the testator's direction may be made consistent with the whole." Heisse *v.* Markland, 2 Rawle (Pa.), 275.

Born or to be Born.—A testator by a settlement made on the marriage of his daughter covenanted with trustees to leave an equal child's share of certain freehold property to the use of her husband for his life or until insolvency, with remainder to her use for life, remainder to the issue of the marriage, with specified limitations; and if there should be no issue, or, there being issue, all should die under 21 years of age, then to the use of her heirs "as if she had died sole and unmarried." His will recited the settlement, and the limitations contained in the will substantially coincided with those in the settlement. The ultimate limitation was as follows: "And in case every child born or to be born shall die under the age of 21 years and without leaving issue, to the use of the heirs and assigns of E. A. V. (the daughter), as if she had continued sole and unmarried," with remainder to the testator's right heirs. There were three children born of the marriage. Two died in infancy and previous to the date of the will; one was alive at that time and lived until the age of twenty-three. He died before the tes-

BOROUGHS. (See also MUNICIPAL CORPORATIONS.)—**1. Definition.**—The name given to incorporated towns or villages of a less grade than city in the States of *Connecticut*, *New Jersey*, and *Pennsylvania*.

In *England* the term "borough" implied a town or village having the right to send members to Parliament.

2. History.—Boroughs existed in *England* from the earliest times.[1] Edward I. first summoned the towns to send representatives to Parliament, and that right became afterward an incident to all boroughs. About the time of Henry VI. municipalities began to be generally incorporated. The corporation at first consisted of a head or heads, one or more definite classes, and an indefinite class consisting of the general body of the freemen or burgesses.[2] This indefinite class was also known as the commonalty.

The common council or corporate meeting consisted at first of the definite classes and of as many of the freemen as chose to attend; in the course of time, however, the common council became also a select or definite class, and municipalities became close corporations,[3] and continued till the reform act of 1835.

tator, who died in 1849. E. A. V.'s husband became insolvent in the following year, and E. A.V. died in 1868. In ejectment by one who filled the double character of heir-at-law of the testator and of E. A. V. against an assign of E. A. V., *held*, that the ultimate limitation never took effect, and the plaintiff was entitled to recover as heir of the testator. Brookman *v.* Smith, L. R. 6 Ex. 291.

"The words actually used are 'born or to be born.' There is, in the first place, this obvious objection to reading these words as if they were used at the death, viz., that if so used they would require the additional words 'and now alive' to be added to them so as to make the words 'born and now alive, or to be born,' otherwise the limitation could not come in at all; for the word 'born' cannot be rejected, and the limitation is to take effect in case a child born or to be born died under twenty-one and without issue. But a child had been born and attained twenty-one, so that the condition upon which the estate was to go over failed altogether; and in order to give effect to those words as if they were used at the death, other words, 'and now alive' must be added, importing an additional condition, and this of itself seems an almost insuperable objection to reading them as so used. If the words were 'now born or to be born,' there can be no doubt that they must refer to the date of the will; or if they were 'born or to be born hereafter,' they must equally refer to the date of the will. . . . The words of the settlement are, 'And if there shall be no child of the marriage, or if,' etc. Now, at the time of making the will the testator could not use these words, because there was then one son living, and no one can doubt that this fact caused the altered language of the will. It was having regard to that fact that the words in the will are, 'child born or to be born.' It seems to follow from this that the testator had in his mind the existence of one of the class to take, and having that in his mind, he used the words 'born or to be born.' The case then is rather one of an omission of the testator to provide for a lapse than of a class contemplated not coming into existence." Affirmed in L. R. 7 Ex. 271.

1. Firma Burgi by Thomas Modox.

2. The burgesses were the permanent free inhabitants, performing their duties and enjoying their privileges as free inhabitant householders, paying scott and bearing lot, presented, sworn, and enrolled in the court leet. Merewether & Stevens Hist. of Boroughs, p. v. Introd.

3. The right of participation in the corporate meetings and elections was regarded rather as an inconvenience than a privilege, and the supineness of the commonalty permitted the administration of affairs to devolve upon the select classes—a condition of affairs of which the crown was quick to take advantage in order to control more surely the elections to Par-

In *America* the charters of Baltimore and Penn empowered them to incorporate towns into boroughs: but in *Maryland* there were never any boroughs erected. In *Virginia* the term "borough" was applied to certain districts made up of hundreds, and plantations having representation in the House of Burgesses; but boroughs proper, as incorporated towns, obtained no footing in that State.[1] In *New Jersey* boroughs date back to the early part of the eighteenth century, but they were erected by special acts, and without uniformity of purpose or system till 1818, when a general borough act was passed.[2] In *Connecticut* boroughs are erected by act of legislature. The present boroughs were enumerated in 1875.[3] In *Pennsylvania* few boroughs were erected by the proprietary, but after the Revolution numerous special charters were granted by the legislature. In 1834 a general system was provided whereby the court of quarter sessions, with concurrence of the grand jury, might erect certain territory with its inhabitants into boroughs.[4] This act is strictly construed, and was prospective only in its effect.[6]

3. Constitution and Powers.—Boroughs have the common-law powers strictly incidental to municipal corporations, and such other powers only as their special charters, or the general acts under which they are created, confer.[7]

The general powers, duties, liabilities, and privileges held by boroughs in common with other municipalities will be best considered under the title of MUNICIPAL CORPORATIONS.

liament. This usurpation secured its first legal sanction in the famous case of corporations, 4 Rep. 77 b. See also Willcock on Corporations; Merewether & Stephens Hist. of Boroughs, Introd.; Philadelphia, 1681–1887, pp. 15, 16; Allinson & Penrose; Report on English Municipal Corporations, vol. 1, note B; 5 & 6 Will. IV. c. 76.

1. Hist. of Va. 161, Virginia Local Institutions; Johns Hopkins University Studies, Third Series, Nos. 2, 3.

2. Act April 5, 1878; Laws of 1878, p. 403. By this act, by the petition and vote of the inhabitants of any township or part thereof embracing an area not exceeding 4 square miles and containing a population not to exceed five thousand may become a borough. The petition is presented to the freeholder, who calls the election. Each borough elects a mayor and six councilmen, who serve without compensation.

3. Revised Statutes, p. 2, title 2. The charters cannot be altered on petition by the assembly without due advertisement of said petition. Rev. Stats. of 1875, title 6, § 7, p. 79; Southport *v.* Ogden, 23 Conn. 130.

4. Pennsylvania Boroughs, by Halcome; Johns Hopkins University Studies, Fourth Series, No. 4; Act April 1, 1834, P. L. 163; Act April 3, 1851, P. L. 320; Brightly's Purd. Dig. (Pa.) 125.

5. The *Pennsylvania* act of 1834 does not authorize the incorporation into a borough of two or more villages, together with a tract of open farming country. Borough of West Philadelphia, 5 W. & S. (Pa.) 281. No more than the village itself with its proper territory can be thus incorporated. Borough of Little Meadows, 28 Pa. St. 256; Borough of Sewickley, 36 Pa. St. 80.

6. Com. *v.* Montrose, 52 Pa. St., 391.

As to *Ohio:* In an indictment a description of a municipality as an "organized borough and village" was held a good description of an "organized village." "The words 'borough and village' are to be understood as duplicate or cumulative names of the same thing. . . . Whether a borough is a village, and whether we have any boroughs in Ohio, the questions argued by counsel, we need not now decide." Brown *v.* State, 18 Ohio St. 507.

7. Borough of York *v.* Forscht, 23 Pa. St. 391; Northern Liberties *v.* Gas Co., 12 Pa. St. 320; Carlisle *v.* Baker, 1 Yeates (Pa.), 471; Respublica *v.* Duquet, 2 Yeates (Pa.), 493; Stiles *v.* Jones, 3 Yeates (Pa.), 491; Douglass *v.* Com., 2 Rawle (Pa.), 263; Mayor *v.* Davis, 6 W. & S. (Pa.)

BOROUGH-ENGLISH.—A custom that prevails in some ancient boroughs that the youngest son shall inherit the estate in preference to all his elder brothers—so named in contradistinction (as it were) to the Norman customs.[1]

BORROW. (See also LOAN.)—I. The idea of a borrowing is not filled out unless there is in the agreement therefor a promise or understanding that what is borrowed will be repaid or returned—the thing itself, or something like it of equal value, with or without compensation for the use of it in the mean time. To borrow is the reciprocal action with to lend; and to lend or to loan, say the dictionaries, is the parting with a thing of value to another for a time fixed or indefinite, yet to have some time an ending, to be used or enjoyed by that other; the thing itself, or the equivalent of it, to be given back at the time fixed or when lawfully asked for, with or without compensation for the use as may be agreed upon.[2]

II. The word "borrow" in its broader sense implies a contract for the use of money. The terms of the contract are within the control of the contracting parties so long as they keep within the law and there is no legal objection to a perpetual loan. Such contract implies the voluntary advance of a sum of money, repayment of which is not to be demanded, presumably for some benefit or advantage to the lender. Such transactions are common in England, and are not unknown in this country.[3]

269; Manayunk *v.* Davis, 2 Pars. (Pa.) 289; Wartman *v.* Phila., 33 Pa. St. 202; Staats *v.* Borough of Washington, 44 N. J. L. 605; Weed *v.* Borough of Greenwich, 45 Con. 170.

1. 1 Bl. Com. 75; 2 Bl. Com. 83; 1 Steph. Com. 54, 211.

2. Kent *v.* Quicksilver Mining Co., 78 N. Y. 177.

"'Borrowed' necessarily imports an *obligation* to return the thing borrowed if it be loaned for use, or to return its kind and value if it be loaned for consumption." Hart *v.* Burton, 7 J. J. Marsh. (Ky.) 324.

3. P. & R. R. Co. *v.* Stichter, 11 W. N. C. (Pa.) 327–8, where a railroad company proposed to raise funds by issuing irredeemable bonds at a large discount which were not to be entitled to interest until after the common stock had received a dividend of six per cent, were then to take all revenues up to six per cent, and were then to rank *pari passu* with the common shares for further dividend, and it was held that the right to issue such bonds was within the implied power of the corporation to "borrow money and issue obligations therefor." The court (three judges dissenting) say: "It is urged, however, that this transaction is not a borrowing of money within the implied powers of the company; that the meaning of the word 'borrow' as applied to moneyed transactions involves an obligation to return the sum or thing borrowed. This is a narrow view of the subject. It is true we often use this word in the sense of returning the thing borrowed in specie, as to borrow a horse. But it is not limited to this sense. Among the definitions given by Webster are the following: 1st, 'to take or receive from another on trust, with the intention of returning or giving an equivalent for;' and, 2d, 'to take from another for one's use; to adopt from a foreign source; to appropriate; to assume.' We need not give the apt illustrations with which the learned lexicographer adorns his text. While the borrowing of money is usually accompanied with a contract for the return of the principal at a stated time, it is not always nor necessarily so. The object of loaning money is to obtain a return in the way of interest. The interest is the consideration for the loan, the hire or price which is paid for the use of it. If I agree to pay $60 for the use of $1000 for one year, it is a borrowing of money. It is equally so if I contract at the same rate for the use of it for ten years. Is it any the less so when the contract is perpetual and the loan irredeemable? The equivalent is paid an-

BORROWER—within the meaning of the N. Y. usury law (1 R. S. 772, § 8; § 4, chap. 430, Laws of 1837), enabling any "borrower" to sue in equity for a discovery as to usury without tender of principal or interest—includes any person who is a party to the original contract, or in any way liable to pay the loan.[1] It was held not to be confined to the person to whom the original loan was made, but to embrace his sureties,[2] such as accommodation indorsers;[3] but not a subsequent grantee of premises covered by a usurious mortgage;[4] nor the general assignee of an insolvent

nually in the shape of interest. We do not think trading corporations any more than individuals are restricted in their moneyed transactions to the narrow meaning of the word 'borrow.'"

Borrowed.—The word "borrowed" in a writing under seal imports an acknowledgment by the maker that he has agreed to refund the amount borrowed, or is under a legal obligation to do so, and amounts to an express covenant to pay it at the time designated. Hart *v.* Burton, 7 J. J. Marsh. (Ky.) 324.

The word "borrow" imports in itself a promise to pay as strongly as the word "due," and the written acknowledgment that a party, has "borrowed" money is as clearly a note for the direct payment of money as is the written acknowledgment that money is due. Harrow *v.* Dugan, 6 Dana (Ky.), 341.

All Borrowed Money, in a deed of composition with creditors, includes in ordinary popular sense all sums of money loaned by a creditor to a debtor without regard to the mode or the existence of any security or evidence of indebtedness, and it is incumbent on one alleging a different meaning to establish by clear, satisfactory proof that the terms used have acquired and were used in a technical or peculiar sense. Murray *v.* Spencer, 24 Md. 524.

Borrowing of Money.—A contract made by a city to pay a sum of money with interest to a person who has assumed the payment of interest on some of the city's debt—as well interest to become due as interest already due—is not a "borrowing of money," but is a contract for the payment of a debt. Gelpcke *v.* City of Dubuque, 1 Wall. (U. S.), 221. *Compare* Reg. *v.* St. Michaels, 6 El. & Bl. 807, where an agreement by churchwardens to treat a sum due to contractors as a loan from them was, under the circumstances, held to constitute a "borrowing." "It was further objected that the power was to borrow money on the rates, whereas the power exercised was to charge a debt on the rates. But it appears to me that the effect of the transaction as stated in the bonds is the same as it would have been if . . . had lent the money to the churchwardens, and they had given the bonds for the loan, and had then paid the debt due for work by returning the money to those who lent it. When parties agree that a transaction shall have the same result as would exist if money had passed and repassed from one to the other, it has been decided that this agreement is to be carried out by the law."

Receiving Deposits, as understood in the practice of banking, is different from "borrowing money" in the ordinary acceptation of that term, and agreeing to allow interest on moneys deposited with a bank and giving notes or certificates or any other evidences of debt therefor does not constitute the doing so an act of borrowing; hence the power of receiving deposits does not necessarily include the power of borrowing. Leavitt *v.* Yates, 4 Edw. (N. Y.) 165.

1. National Bank *v.* Lewis, 75 N. Y. 523; Leavitt *v.* De Launey, 4 Sand. Ch. (N. Y.) 281.

2. Cole *v.* Savage, 10 Paige Ch. (N. Y.) 590; Livingston *v.* Harris, 11 Wend. (N. Y.) 336; Post *v.* Boardman, Clarke (N. Y.), 527; Perrine *v.* Striker, 7 Paige Ch. (N. Y.) 602

3. Hungersford's Bank *v.* Dodge, 30 Barb. (N. Y.) 627; Hungersford's Bank *v.* Potsdam, etc., R. Co., 10 Abb. Pr. (N. Y.) 25. But see, *contra*, Allerton *v.* Belden, 49 N. Y. 37, in which the court say: "It may be difficult to assign any good reason why the legislature should not have extended to a surety, in such a case, the same privilege which they have afforded to the principal debtor; but as they have in terms confined the benefits of the provision to the borrower, we cannot remedy this supposed defect by giving to the word 'borrower' a construction of which it is not justly susceptible."

4. Post *v.* Pres't of Bank, 7 Hill (N. Y.), 391; Schemerhorn *v.* Tallman, 14 N. Y. 127; Rexford *v.* Widger, 2 Comst. (N. Y.) 131 and 3 Barb. Ch. (N. Y.) 641.

debtor;[1] nor a legatee, devisee, or executor.[2] The limited meaning of the word seems to have prevailed, however; sureties are now excluded;[3] and "the tendency of judicial opinion to limit the application of the word 'borrower' to the person who borrowed the money and was at the time a party to the contract, and who continued to stand in the position of borrower, is very marked."[4]

BOSTON.—The term "port" or "harbor" of Boston as used in the pilotage acts is not satisfied by restricting its meaning and application to the city of Boston, and to vessels entering its docks and lying at its wharves, or in the stream between them and the inner islands of the harbor. It is a term or designation which clearly includes all those ports which use the several channels leading to the city of Boston itself; and this embraces the mouths of the various rivers which empty into the harbor.[5] It includes the opposite shore of Chelsea.[6]

BOTH. See note 7.

BOTTLES.—An averment in an indictment alleging larceny of a number of "bottles" of whiskey and of brandy is not sustained by proof that the defendant drew the liquor from casks into bottles which he took with him for the purpose.[8]

A *demijohn* is not a *bottle*, within the meaning of a statute

1. Wright *v.* Clapp, 28 Hun (N. Y.), 7, following Wheelock *v.* Lee, 64 N. Y. 242.

2. Buckingham *v.* Corning, 64 How. Pr. (N. Y.) 503, affirmed in 91 N. Y. 525.

3. Buckingham *v.* Corning, 91 N. Y. 525.

4. Buckingham *v.* Cooning, 91 N. Y. 525, where the cases are reviewed.

5. Martin *v.* Hilton, 9 Metc. (Mass.) 378.

6. Young *v.* The Orpheus, 119 Mass. 185. See also 1 Bish. Crim. Law, § 147.

7. **Or of Both.**—A statute enacting that no person should acquire a settlement in any parish by reason of dwelling in a rented tenement unless such tenement should consist of "a dwelling-house or building or of land within such parish, or of both," applies to a dwelling-house *and building*. "But then it is said the statute requires that the tenement shall consist of a dwelling-house *or* building, or of land, or of *both*, and that the word 'both' can apply only to two of the things previously mentioned, and that it must be referred to a dwelling-house and land, or a building and land, but not to a dwelling-house *and building*. The word 'both' is improperly used in this sentence. But as no good reason can be assigned why a tenement (in order to confer a settlement) should not consist of a dwelling-house and building, as well as a dwelling-house and land, I think we are not bound by the inaccurate use of the word 'both' to hold, in this case, that the legislature meant to confine the meaning of the word 'tenement' to a dwelling-house and land, or to a building and land. I think it includes a dwelling-house *and building*, as well as a building and land, and that it may even apply to all three." Rex *v.* Inhab. of Tadcaster, 4 B. & Ad. 710.

8. Com. *v.* Gavin, 121 Mass. 54; s. c., 23 Am. Rep. 255. "It was unnecessary to allege that the liquors were contained in bottles, but the language of the indictment admits of no other construction than that it charges the larceny of bottles containing, or filled with, the liquors described. . . . It was suggested in the argument that the larceny of a bottle of whiskey means merely the larceny of the whiskey contained in the bottle. But as bottles are not of a uniform size, the term 'bottle' has no recognized and established meaning as a measure of quantity. In this view of the case, the indictment would be reduced to a mere charge of stealing a quantity of whiskey and a quantity of brandy, without naming any definite quantity of either. We hardly need say that such an indictment could not be sustained. 2 Hale P. C. 182."

requiring bottles of spirituous liquors to be packed in packages of one dozen each.[1]

BOTTOMRY. (See also ADMIRALTY; HYPOTHECATION; MARITIME LIEN; RESPONDENTIA BOND; SHIPPING INSURANCE.)

1. Definition.—An agreement entered into by the owner of a ship or his agent, whereby, in consideration of a sum of money advanced for the use of his ship, the borrower undertakes to repay the same, with a high rate of interest, upon the condition that the ship terminates her voyage successfully, and binds or hypothecates the ship to performance of his contract; the debt being lost in the event of the non-arrival of the ship at her destination.[2]

The freight and cargo, as well as the ship, may be included in the agreement.[3]

2. General Nature.—The form of the instrument is usually, but not invariably, that of a bond.[4] The contract must be in writing, and, whatever be its form, it must contain in substance all the necessary terms.[5] As creatures of necessity and distress, bonds may be expected to assume different shapes,[6] they are favored instruments,[7] and must be construed without recourse to extrin-

1. U. S. *v.* Ninety Demijohns of Rum, 8 Fed. Repr. 487.

2. Rapalje & Lawrence's Law Dict. 145, "Bottomry."

3. When the cargo alone is hypothecated the agreement is called a *respondentia* bond. Williams & Bruce's Ad. p. 31.

The contract of hypothecation was unknown to the common law: it varies essentially from both a pledge and a mortgage; it neither transfers property nor is it dependent upon possession; it simply confers a right, to be enforced through the medium of legal process, by the arrest of the *res*. Maclachlan's Law of Merchant Shipping. 47, 48.

4. Rapalje & Lawrence's Law Dict., "Bottomry."

5. It should state that the vessel is hypothecated, the sum for which she is hypothecated; the rate of interest agreed to be paid, the voyage on which she is about to proceed, and the fact that payment of the loan is dependent upon the safe arrival of the vessel at her destination. Will. & Br. Adm. Jur. 50, 51.

6. Which cannot be limited except by the condition of a faithful and benevolent discharge of the authority exercised in granting them. The Kennesley Castle, 3 Hagg. Adm. 78.

7. When once the transaction is proved to have been clearly and indisputably that of bottomry, that is, when the distress is admitted or established and the want of personal credit is beyond question, and the bond in all essentials apparently correct; then, under such circumstances, the strong presumption of law is in favor of its validity, and it will not be impugned, save when there is clear and conclusive evidence of fraud, or when it is proved beyond doubt that, though purporting in form to be a bottomry transaction, the money was in truth advanced upon a different consideration. The Gratitudine, notes thereto; Tud. Cas. Merc. Law, 75.

The conduct of third parties will not

sic evidence;[1] they may be good in part and bad in part.[2] Being *choses in action*, they were not formerly assignable at law; but in admiralty the rule is otherwise.[3] They are negotiable instruments,[4] and may be given at the same time with and as collateral security for bills of exchange.[5] The master cannot by a bottomry bond hypothecate the vessel and by the same instrument pledge the personal credit of his owners as well.[6] The owners'

affect the validity of the bond if the bondholder have no privity therewith. The Zodiac, 1 Hagg. Adm. 326; The Atlantic Insur. Co. *v.* Conard, 4 Wash. R. (C. C.) 662.

In a well-founded claim the court will not enter upon a minute examination of the bond or regard any defect in the formality thereof. The Alexander, 1 Dods. 280.

1. The Emancipation, 1 W. Rob. 128; The Brig Atlantic, 1 Newb. (D. C.) 522.

Proof of the intention of the parties will not be admitted to supply a deficiency affecting the validity of the bond. The Edmund Albro, 10 Ben. (D. C.) 668.

Bottomry bonds are to be liberally construed, so as to carry into effect the intentions of the parties. Pope *v.* Nickerson, 3 Sto. (C. C.) 465.

But the court is powerless to vary the stipulations of the contract merely for the purpose of administering equitable relief. The Brig Atlantic, 1 Newb. (D. C.) 517.

2. The Augusta, 1 Dods. 283; The Hunter, 1 Ware (D. C.), 249.

And though bad as a bottomry bond it may be good as a mortgage. Greeley *v.* Smith, 3 Wood. & M. (C. C.) 236.

And whilst valueless as an express lien it may be evidence of an implied lien. The William & Emmeline, Blatchf. & H. (D. C.) 66.

Where the valid amount is small, and the total amount of the bond large, it does not follow that the court will, as of course, pronounce even for the valid portion of the bond. The Osmanli, 14 Jur. 96.

3. Burke *v.* The M. P. Rich. 1 Clif. (C. C.) 312.

4. Abbot Ship. 154.

But it is not a negotiable instrument in the broad sense in which that term is employed as applied to bills of exchange and promissory notes. Thompson *v.* Downing, 14 M. & W. 406.

But a bond may be transferred and sued upon by the assignee in his own name, or it seems also in that of the assignor. Burke *v.* The M. P. Rich, 1 Clif. (C. C.) 313.

The assignee takes subject to whatever legal infirmities were incident to the instrument whilst it was possessed by the former owner The Onward, 4 L. R. Adm. & Ecc. 53.

The lien is not lost by the assignment. The Belle of the Sea, 15 Int. Rev. Rec. (C. C.) 104.

Nor are the rights of the assignee, of necessity, affected by reason of the fact that he is also a mortgagee. Burke *v.* The M. P. Rich, 1 Clif. (C. C.) 308.

The fact that he is also a mortgagee. Burke *v.* The M. P. Rich, 1 Clif. (C. C.) 308.

5. The Jane, 1 Dods. 466; The William & Emmeline Blatchf. & H. (D. C.) 66.

But the bill must share the fate of the bond. The Brig Atlantic, 1 Newb. (D. C.) 514.

When a bill is drawn and a bond given for the same consideration, the owner is not bound to honor the bill; at least not before the safe arrival of the vessel and the end of the risk. For it does not appear that anything will ever be due until the happening of the event on which the bond becomes payable, and then the payment of one security extinguishes both. The Brig Hunter, 1 Ware (D. C.), 252.

The bondholder may sue upon the bond notwithstanding the fact that there has not been such a dishonor of the bill as might have been necessary to give a right of action against a drawee or indorsee thereof; it is sufficient if reasonable efforts have been made for the purpose of getting the bill accepted and paid. The Staffordshire, L. R. 4 P. C. 194.

The bondholder's lien is not affected by the bill of exchange. The Hilarity, Blatch. & H. (D. C.) 90.

The bondholder has his option: he may, if the debt is not paid, sue upon the bill of exchange or upon the bond. The Lord Cochrane, 2 W. Rob. Adm. 336.

6. Stainbank *v.* Sheppard, 13 C. B. 418; Stainbank *v.* Fenning, 11 C. B. 51.

But the shipowner may hypothecate ship and freight and bind himself personally, or he may by express instructions authorize the master to do the same.

liability is limited to the value of the property hypothecated.[1] Actual total loss of the property, by the described perils, extinguishes the bondholder's right of recovery, but so long as the vessel exists in specie in the hands of her owners she continues subject to the hypothecation.[2] Underwriters and lenders on bottomry stand on a different footing,[3] as do also lenders on bottomry and lenders on ordinary loans.[4]

3. Maritime Risk.—It is essential to the contract itself that it should be founded on maritime risk, and that payment of the loan should be made contingent upon the safe arrival of the vessel.[5] If the risk has once commenced and the voyage or adventure be voluntarily broken up by the borrower, in any manner whatever, the bond is forthwith payable.[6]

Willis *v.* Palmer, 7 C. B. N. S. 340, 360, 361.

If the agreement binds the owners personally to payment at all events, it is not a contract of bottomry, and in the absence of the express sanction of the owners cannot be sustained either at law or in admiralty. The Virgin, 8 Pet. (U. S.) 554; Stainbank *v.* Sheppard, 13 C. B. 418; Stainbank *v.* Fenning, 11 C. B. 51.

1. They cannot in general be made personally liable if the fund realized turns out to be inadequate. They are liable, however, so far as the same comes into their hands. The Virgin, 8 Pet. (U. S.) 538.

And they are liable also under the circumstances set forth in rule U. S. S. C. Admiralty Rules, Rule 18.

2. And this is true though she may require repairs greater than her value. The Insurance Co. *v.* Gossler, 96 U. S. 645.

3. Wilmer *v.* The Smila, 2 Pet. Ad. (D. C.) 295.

The doctrine of constructive total loss has no applicability to contracts of this character. Thompson *v.* The Royal Exchange Assn. 1 M. & S. 30.

Unless the property hypothecated be actually destroyed, it is not a total loss within the meaning of the contract of bottomry. The Catharine, 1 Eng. L. & Eq. 697; Thompson *v.* Royal Exchange Assoc., 1 M. & S. 30.

4. The essential difference between a bottomry loan and a simple loan is that in the latter case the money is at the risk of the borrower, and must be paid at all events; in the former it is at the risk of the lender during the voyage, and his right to payment is dependent upon the safe arrival of the vessel. The Brig Atlantic, 1 Newb. (D. C.) 516.

5. The Nelson, 1 Hagg. Adm. R. 169; Stainbank *v.* Sheppard, 13 C. B. 442; The Robert L. Lane, 1 Low. (D. C.) 390.

But it is not absolutely necessary that the condition should be stated in express terms. It is sufficient if it may be inferred from the contents of the instrument. The Emancipation, 1 W. Rob. Adm. 128; The Nelson, 1 Hagg. Ad. R. 169; The Edmund Albro, 10 Ben. (D. C.) 668.

Extrinsic evidence is inadmissible for this purpose. The Emancipation, 1 W. Rob. Ad. R. 128; The Edmund Albro, 10 Ben. (D. C.) 668.

But the existence of a marine risk cannot be inferred from the rate of interest charged or from the mere use of the word hypothecate. The Emancipation, 1 W. Rob. Adm. 130.

Whilst the absence of an agreement to pay maritime interest is a significant circumstance in determining whether the loan was made upon the hazard of the voyage, it is not conclusive proof that no maritime risk was assumed. Free *v.* Ship Pride of the Ocean, 3 F. R. (D. C.) 164.

6. A sale or transfer of the vessel is sufficient. The Draco, 2 Sum. (C. C.) 157.

As is a voluntary abandonment of the voyage. Pope *v.* Nickerson, 3 Sto. (C. C.) 465.

Or a voluntary ending of the voyage at some intermediate port. The Great Pacific, L. R. 2 Adm. & Ecc. 381.

But the bond is not violated if the master is driven to proceed to a port without the limits of the voyage for the purpose of repairs. The Armadillo, 1 W. Rob. Adm. 256.

But it is otherwise if the deviation be caused for the purpose of making repairs, the result of a collision, occasioned by

4. Maritime Interest.—In consequence of the maritime risk incurred by the lender, he is permitted to charge a rate of interest which under other circumstances would be usurious. The rate of interest thus charged is known as maritime interest.[1] It is not necessary to the validity of the bond that it should carry maritime interest,[2] but when it does not appear clearly upon the face of the instrument that the contract is subject to marine risk, the circumstance that a low rate of interest was taken raises a suspicion that a sea risk was not intended, and that the contract, therefore, is not one of bottomry.[3] If the voyage is defeated before the risk is run, only legal interest can be recovered.[4] When the bond provides for neither marine interest nor marine risk, and its condition is a mere pledge to recover a debt and simple interest, it is not valid as a contract of bottomry.[5]

5. Who May Execute.—A bottomry bond may be executed and the vessel and freight money hypothecated by the owner and by the master as well. The owner may resort to a loan on bottomry at any time, at any place, and for any lawful purpose.[6] Circumstances which do not restrain the power of the owner limit the authority of the master.[7] With respect to cargo, the power and authority of both vessel-owner and master are subject to certain definite restrictions.[8]

the fault of the borrower. Force *v.* Ship Pride of the Ocean, 3 F. R. 164.

But a fraudulent refusal to prosecute the voyage is sufficient. Joyce *v.* Williamson, 3 Douglass, 164.

If, however, the ship has not been exposed to the risk, the lender must be content to forego the marine interest and to accept instead thereof ordinary interest. Deguilder *v.* Depeister, 1 Vern. 263.

If a total loss happens by capture the lender cannot recover; but if the ship is only detained by capture the bond is not forfeited. Joyce *v.* Williamson, 1 Doug. 164.

1. The William & Emmeline, 1 Blatch. & H. (D. C.) 66.

When the premium is clearly excessive the court will order it to be reduced. This power is exercised with great caution, and after a consideration of all of the circumstances of the case. The Cognac, 2 Hagg. Ad. 377; The Brig Hunter, 1 Ware (D. C.), 249.

2. Force *v.* Ship Pride of the Ocean, 3 Fed. Rep. (D. C.) 162; The Emancipation, 1 W. Rob. Adm. 130.

3. The Royal Arch, Swabey R. 269.

But whilst the absence of an agreement for maritime interest is a significant circumstance, it is not conclusive. Force *v.* Ship Pride of the Ocean, 3 F. R. (D. C.) 162.

4. Greeley *v.* Smith, 3 Wood. & M. (C. C.) 236; The Atlas, 2 Hagg. Adm. 49.

5. The William & Emmeline, 1 Blatchf. & H. (D. C.) 66; The Ann C. Pratt, 18 Howard (U. S.), 63.

6. When made at the home port they are frequently made on time. When made abroad they are generally made for the next voyage. Wilmer *v.* The Smilax, 2 Pet. Adm. (D. C.) 295; The Draco, 2 Sum. (C. C.) 157; The Jane, 1 Dods. Ad. R. 461.

When the contract is made with the owner, it is not necessary that the money borrowed should be advanced for the vessel's necessities. The Draco, 2 Sum. (C. C.) 157.

Nor is the concurrence of the master requisite when the bond is made by the owner. The Duke of Bedford, 2 Hagg. Ad. 294.

Before the passage of the judicature acts contracts of bottomry made by the owners themselves when in English port could not be enforced in the Admiralty Court. The Royal Arch, Swabey, 277.

But from the time a ship enters a foreign port all expenses necessary to enable her to prosecute her voyage for which the owner or master is liable are expenses for which a bottomry bond may be given by the owner. The Edmund, 29 L. J. Adm. 76.

7. Will. & Br. Adm. Jur. 32.

8. Will. & Br. Adm. Jur. p. 32.

6. What Justifies the Master in Executing.—In the absence of express authority[1] the master should not, in consequence of the high rate of interest usually charged, resort to a loan on bottomry excepting when impelled to do so by absolute necessity.[2] His duty, in the first instance, when destitute of funds, is to endeavor to obtain them on the personal credit of the vessel-owner. Hence, if the owner be without known personal credit in the port of distress, the master's first duty is to endeavor to communicate with his principal and endeavor to ascertain whether or not funds can be raised by recourse to the personal credit of the latter, and whether or not he shall resort to a loan on bottomry.[3] With regard to the cargo the duty of the master is, at least, equally imperative. Whenever communication is practicable the owner of the cargo must be communicated with.[4] When the master is dealing with the cargo for the benefit of the voyage he must endeavor to hold the balance evenly between his two principals; he must not sacrifice the ship to the cargo or the cargo to the ship.[5] Assuming that the master has no other means of procuring funds and has not been able to communicate with the owners,

1. If acting under express authority, the limit of the master's powers depends upon his instructions. Communication with the owner in such a case may be unnecessary. The Bonaparte, 3 W. Rob. Adm. 298.

The express authority may be sufficient to enable the master to do what the owner himself might do, if present. The Royal Arch, Swab. 276.

2. The necessity must be absolute. The absence of necessity will lead to the undoing of the bond. The Lord Nelson, 1 Hagg. Ad. 169.

Necessity creates the law, whatever is reasonable and just is legal. The Gratitudine, 3 C. Rob. 266; The Circassian, 3 Ben. (D. C.) 416.

3. Tud. Cas. Mer. & Mar. Law, p. 67.

When practicable, the owner should be communicated with, however bad his credit may be, unless he has been judicially declared insolvent. Baron *v.* Stewart, 3 L. R. P. C. C. 199.

The communication must state both the necessity for the expenditure and the necessity of resorting to a loan on bottomry therefor. The Panama, L. R. P. C. C. 199; The Onward, 4 L. R. Adm. & Eccl. 38, 55; The Guilio, 27 Fed. Rep. (D. C.) 318.

The concurrence of the owner is important, as evidence of the existence of necessity. The Royal Arch, Swab. R. 269.

When communication is practicable and is not resorted to or excused, payment of the bond will be denied. The Circassian, 3 Ben. (D.C.) 398; The Guilio, 27 Fed. Rep. (D. C.) 318.

But if the master be unable to communicate with the owner within a time commensurate with the necessities of the ship, communication may be dispensed with. Wallace *v.* Fielden, 7 Moore's P. C. C. 398.

When great delay and uncertainty of the transmission of letters exist want of communication may be excused. The Lizzie, 2 L. R. Ad. & Eccl. 264.

After waiting for a reasonable time the receipt of an answer, the master is justified, in the event of its non-arrival, in exercising his own discretion. The Carnac, 2 Law Rep. P. C. C. 505; The Gratitudine, 3 C. Robinson, 240.

4. The Casa Maritima, 2 App. Cas. 156.

The necessity of resorting to hypothecation by bottomry should be sufficiently stated in the communication. The Onward, 4 L. R. Adm. & Eccl. 38, 55.

When it is not practicable to communicate with the owner of the cargo communication with the shipper will be sufficient. The Bonaparte, 3 W. Rob. Adm. 298.

When there would be great delay and uncertainty in the transmission of letters want of communication may be excused. The Lizzie. 2 L. R. Ad. & Eccl. 254; The Gratitudine, 3 C. Rob. Adm. 240, 261.

5. If the repairs to the ship produce no benefit, or prospect of benefit, to the cargo, the latter cannot be hypothecated

or that, in the event of communication, he has failed to obtain sufficient help or instructions from them, he[1] may, in case of absolute necessity,[2] for proper purposes, when in a foreign port,[3] resort to a loan for the payment of which ship, freight and cargo may be hypothecated. The master cannot hypothecate if he has funds of the owner within his reach,[4] but he is not bound to take money on board which belongs to the shipper before resorting to bottomry.[5] When the master can procure funds on the owner's credit,[6] or by advances on freight or passage money, he is not authorized to borrow on bottomry.[7] It is said that if he has funds of his own they must first be exhausted.[8] This, however, is not free from doubt.[9] A loan on bottomry, when made by the master, in the presence of the owner, is only valid by reason of his implied assent.[10] The master has no power to borrow on bottomry if a consignee or agent of the owner be present with funds.[11]

It is necessity alone that supports bottomry bonds; the absence

therefor. The Amelie, 6 Wall. (U. S.) 18–27.

The cargo cannot be bottomried in any event before it is laden on board. The Jonathan Goodhue, Swab. 355.

The master has no authority to pledge the cargo without the consent of the shipper or consignee when it appears from the port where the vessel entered in distress that the cargo could have been forwarded by another vessel, and that it was for the interest of the shipper that it should have been forwarded instead of being hypothecated. The Julia Blake, 107 U. S. 426.

1. As a general rule, any person acting as master may, under suitable circumstances, exercise this authority. The Jane, 1 Dods. Ad. 464.

Even though he be not the registered master. The Orelia, 3 Hagg. Adm. 81.

One appointed master as a measure of necessity by the agent of the underwriters or by the consignee of the cargo may have the requisite authority. The Kennesley Castle, 3 Hagg. Adm. R. 1; The Alexander, 1 Dods. Ad. 278.

Or if appointed by an English or American consul. The Zodiac, 1 Hagg. Adm 320; Cowan *v.* The Jackmel Packet, 2 Ben. (D. C.) 107.

2. Necessity creates the law, it supersedes rules, and whatever is reasonable and just is likewise legal. The Gratitudine, 3 C. Rob. Adm. 240, 266; The Circassian, 3 Ben. (D. C.) 416.

That is a sufficient necessity which would induce an owner to so act, if on the spot. The Fortitude, 3 Sum. (C. C.) 228, 246.

If the master acts *bona fide* and with reasonable care, the rights of the parties are bound by his acts, although it should be afterwards found that he had committed an error of judgment, and might have acted more beneficially in another manner. The Ship Packet, 3 Mason (C. C.), 255.

If the loan be indispensable, and if it be incurred on the credit of the vessel, it is no objection to its validity that it was executed after the repairs were made or supplies furnished. The Yuba, 4 Blatch. (C. C.) 352.

3. The ports of each State are for this purpose considered foreign to the other. Burke *v.* The M. P. Rich, 1 Clif. (C. C.) 308.

It may be given at the port of destination as well as at any other foreign port. Reed *v.* Com. Ins. Co., 3 Johns. (N. Y.) 352.

4. The William & Emmeline, 1 Blatch. & H. 73.

5. The Packet, 3 Mason (C. C.), 225.

6. Waldon *v.* Chamberlain, 3 Wash. (C. C.) 290; The Fortitude, 3 Sum. (C. C.) 257.

7. The Hunter, 1 Ware (D. C.), 254; The Aurora, 1 Wheaton (U. S.), 96; Burke *v.* The M. P. Rich, 1 Cliff. (C. C.) 314.

8. The Packet, 3 Mason (C. C.), 255, 263.

9. The William & Emmeline, 1 Blatch. & H. 73.

10. The Ship Panama, Olcott, 348.

Unless it be given in a case of stringent necessity and the owner withholds his assent unreasonably. 3 Kent, 172.

11. Tunno *v.* The Ship Mary, 1 Bee (D. C.), 120; Putnam *v.* The Polly, 1 Bee (D. C.), 157. Rucher *v.* Conyngham. 2 Pet. Adm. (D. C.) 295.

of necessity is their undoing.[1] The necessity for funds may arise in various ways: to supply money with which to make repairs,[2] if in a foreign port,[3] when repairs are absolutely necessary to enable the ship to prosecute her voyage or to procure supplies for the subsistence of passengers or crew[4] or to pay the wages of the crew,[5] but a personal debt of the master is not a sufficient necessity.[6] But the circumstance that the ship is detained for a debt at a foreign port will, in some cases, justify the master in hypothecating to defray expenses to meet which he would have no authority to raise money by bottomry were it not from the fact of ship's liability to arrest therefor.[7]

7. Who May Loan.—A bond cannot be ordinarily given to a person who is indebted to the owners in respect to the ship.[8] A part owner is debarred from loaning on bottomry,[9] but under certain circumstances an agent or consignee[10] of the vessel or the owner

1. The Lord Nelson, 1 Hagg. Adm. 169.

And when the necessity is clear the court will not examine minutely into the particulars of repairs or rigidly examine small items of expenditure. The Royal Arch., Swab. R. 279.

2. The Aurora, 1 Wheat. R. (U. S.) 96.

But not to secure prior advances if made without any reliance whatever on the vessel's credit. The Packet, 3 Mason (C. C.), 255.

But though executed after the advance was made the bond will be valid if its execution was the result of an agreement made at the time of the advance. The Edward Albro, 10 Ben. (D. C.) 668; The Karnak, 2 L. R. Adm. & Ecc. 301.

3. The ports of each State are for this purpose foreign to the other. Burke *v.* The M. P. Rich, 1 Cliff. (C. C.) 308.

4. The Cognac, 2 Hagg. Ad. 392.

5. If due at the time the bond was given, but if not due until the completion of the voyage, a bottomry bond cannot be given therefor. The Cognac, 2 Hagg. Ad. R. 393.

6. Not even if it be necessary for him to resort to such a measure in order to free himself from arrest. The Prince George, 4 Moore, P. C. C. 21.

7. The Edmund, Lush. 57, 211.

But it is not every debt for which a ship is liable to be detained that will justify this course. The Osmanli, 7 Notes of Cas. 327.

The fact that the *lex loci* sanctions arrest for advances made to a vessel will not convert into a bottomry transaction advances made on personal credit. The Laurel, 1 Lush. R. 17.

Actual arrest for an antecedent arrest debt is a sufficient cause if the debt be a lien by *lex loci*, but not a mere fear or threat of arrest. The Circassian, 3 Ben. (D. C.) 398; The Aurora, 1 Wheat. (U. S.) 96; The Yuba, 4 Blatch. R. (C. C.) 352.

However great be the apparent necessity of procuring the release of the vessel, hypothecation by bottomry is not to be resorted to except to discharge debts incurred in some way or other in respect to the voyage in which she is engaged. The Edmund, Lush. R. 25; The Laurel, 33 L. J. 17; The Osmanli, 3 W. Rob. R. 198.

The master cannot hypothecate for a debt due for general average contribution on the outward cargo, but the expenses of unloading the outward cargo, if absolutely necessary, may be provided for by hypothecation, because the unloading of the outward cargo is necessary to enable the ship to earn the freight on the homeward voyage. The Edmund, Lush. R. 58, 211.

8. If, however, the debt be less than the sum advanced, the bond is valid to the extent of the surplus. The Hebe, 2 W. Rob. Adm. 146.

9. Patton *v.* The Schooner Randolph, Gilpin (D. C.), 457.

But the owner may give a bond to the master to secure repayment of advances made by the latter. Miller *v.* Rebecca, Bee (D. C.), 151.

10. Some of the earlier American cases absolutely prohibit the consignee from becoming a lender on bottomry under any circumstances.

But the later cases sustain the doctrine that whilst it is wise to discourage bonds of this character, they are not necessarily invalid. Rucher *v.* Conyngham, 2 Pet. Adm. (D. C.) 307; Ship Lavinia *v.* Barclay, 1 Wash. (C. C.) 49.

An agent cannot loan on bottomry when in possession of a sufficient fund

of the cargo[1] may execute a bond. When the lender on bottomry is the agent of the vessel the court watches the transaction with the utmost vigilance.[2]

8. Requirements of the Lender.—It is incumbent upon the lender, for his own security, to make due inquiries and to endeavor to ascertain that there exists both a necessity for the advance and a necessity for resorting to a loan on bottomry therefor.[3] The utmost good faith is another requirement; but if the loan be made in good faith and upon sufficient inquiry the lender is not called upon to enter into a minute investigation of details,[4] nor is he called upon to see to the application of the money.[5] It is sufficient if the lender acts with good faith and does not wilfully co-operate in any unnecessary expenditure.[6] If the lender in any way connives at any fraud of the master, this avoids the bond *in toto*, and his lien is lost for the entire amount of the advance.[7] But the fraud of the borrower will not have this effect if the lender were neither participant in nor cognizant of it.[8] If the lender connives with the master to send the ship on a new and different voyage from that authorized by the owner, his action will be regarded as a fraud on the owner, and his bond will be avoided in consequence.[9] But if there be no collusion the rule is otherwise.[10]

A lender on bottomry has an insurable interest in the safety of the ship, provided that the bond is made to depend on the safe arrival of the vessel.[11] But an insurance on goods only does not

belonging to his principal. Hurry *v.* Hurry, 1 Wash. (C. C.) 293.

A consignee, who is bound to advance freight, is in a similar position, and he must give notice of his intention of doing so before lending money on bottomry. 3 Kent's Com. 60; The Augusta, 1 Dods. Adm. 283; The Jane, 1 Dods. Adm. 461.

1. Ross *v.* The Active, 2 Wash. (C. C.) 226.

2. The Royal Stewart, 2 Spink's Ec. & Ad. R. 260.

The master should first be given an opportunity of borrowing elsewhere on the owner's credit. The Staffordshire L. R. 4 P. C. C. 194.

3. The Jane, 1 Dods. Adm. 464; The Ship Fortitude, 3 Sum. 228.

The lender is chargeable with notice of the facts on which the master relies for his justification for resorting to bottomry, and must make inquiries and judge for himself and at his own risk whether the owner, if present, would do what the master is undertaking to do for him. The Julia Blake, 107 U. S. 418.

4. The Yuba, 4 Blatchf. (C. C.) 353.

There must exist a necessity for the loan and a necessity for resorting to bottomry. Ins. Co. *v.* Gossler, 24 Int. Rev. Rec. 353.

5. The Grape Shot, 9 Wall. (U. S.) 141; The Ship Fortitude, 3 Sum. (C. C.) 228; The Lulu, 10 Wall. (U. S.) 192.

But he must show that the advances were necessary or believed to be necessary to effectuate the objects of the voyage. The Virgin, 8 Pet. (U. S.) 538. And that they were reasonable, or appeared to be so. Ross *v.* The Ship Active, 2 Wash. (C. C.) 226; The Ship Fortitude, 3 Sum. (C. C.) 247.

He must show the items of the advance. The Bridgewater, Olcott's R. (D. C.) 33; The Aurora, 1 Wheat. (U. S.) 96.

6. If mere fictitious items inserted, with intent to defraud, the bond cannot be enforced. Carrington *v.* Pratt, 18 How. (U. S.) 63.

7. The Nelson, 1 Hagg. Ad. 169; The Tarton, 1 Hagg. Ad. 14.

8. Atlantic Ins. Co. *v.* Conard, 4 Wash. (C. C.) 662.

9. The Virgin; 8 Pet. (U. S.) 538; The Reliance, 3 Hagg. Adm. 66.

10. The Virgin, 8 Pet. (U. S.) 538; The Hunter, 1 Ware (D. C.), 249, 253.

11. Stainbank *v.* Fenning, 11 C. B. 51; Stainbank *v.* Sheppard, 13 C. B. 418.

But whilst the lender may insure, the borrower may not. Glover *v.* Black, 2

cover a bottomry interest.[1] The lender must show the various items of the advance, and have proofs to sustain them in order that they may be separately weighed and considered.[2]

9. Burden of Proof.—Before there can be a recovery in a suit on the bond, the lender must show that the circumstances were such as to make it apparently proper for the master to do what he has already done. To this extent the burden of proof is on the lender.[3] The creditor must also show the existence of actual necessity for repairs and supplies, and if actual necessity is not proven, evidence of due inquiry and of reasonable ground for belief that the necessity was real and pressing.[4] When the necessity for repairs and supplies is shown to exist, the burden of proof is on those who resist the bond to show that the money could have been obtained in some other way.[5]

10. When Payable.—Generally speaking, money advanced on bottomry becomes due and payable when the vessel arrives in safety at her port of destination.[6] It also becomes due if a sale or transfer of the vessel takes place, or the voyage is broken up in any manner, by the borrower, by reason of his own fault or misconduct.[7] It becomes payable when the voyage or adventure is broken up by a third party,[8] or by deviation,[9] capture, condemnation, and sale.[10] A loss not strictly total cannot, by abandonment, be turned into a technical total loss so as to excuse the borrower from payment.[11] There is no average or salvage on bottomry bonds.[12]

11. What is Payable.—The practice is to consider the sum lent and the maritime interest as principal, and to allow common interest on that sum from the day when payment was due.[13] No terms of the contract can render the owners liable for more than the value of the vessel or the value of the fund pledged.[14] The loss beyond the amount of the fund pledged is to be borne by the lenders.[15]

12. What is Bound.—A bottomry on the ship and freight binds

Burr. 1394; Simmons *v.* Hodgson, 3 B. & Ad. 50.

1. Glover *v.* Black, 3 Burr. 1394.

2. The Bridgewater, Olcott (D. C.), 33; The Aurora, 1 Wheat. (U. S.) 96.

3. The Julia Blake, 107 U. S. 428.

4. The Grapeshot, 9 Wall. (U. S.) 130.

5. The Grapeshot, 9 Wall. (U. S.) 130; The Barkentine Kathleen, 2 Ben. (D. C.) 461.

6. The Great Pacific, 2 L. R. Ad. & Eccl. 384.

7. The Draco, 2 Sum. (C. C.) 157.

Or by that of his agent. Pope *v.* Nickerson, 3 Story (C. C.), 465; Greeley *v.* Smith, 3 Wood. & M. (C. C.) 258.

8. Greeley *v.* Smith, 3 Wood. & M. 236.

9. Wilmer *v.* Smila, 2 Pet. Ad. (D. C.) 294.

But not by a deviation from necesity. The Armadillo, 1 W. Rob. Ad. 251.

10. Appleton *v.* Crowning Shield, 3 Mass. 441.

But if the ship is captured and restored to the owner, it is a detention and not a loss. Joyce *v.* Williamson, 3 Doug. 164.

11. Even though the expense of repairing the ship exceeds her value. Pope *v.* Nickerson, 3 Story (C. C.), 465.

12. Joyce *v.* Williamson, 3 Dougl. 164.

13. The Packet, 3 Mas. (C. C.) 255.

The premium, if exorbitant, may be moderated. The Packet, 3 Mas. (C. C.) 255; The Virgin, 8 Pet. (U. S.) 538.

14. The Virgin, 8 Pet. R. (U. S.) 538; The Irma, 6 Ben. (D. C.) 7; Naylor *v.* Baltzell, Taney (C. C.), 55.

15. The Virgin, 8 Pet. (U. S.) 538.

ship and freight only.[1] Where the ship and cargo belong to different persons, the bond is to be first satisfied out of the proceeds of the ship, but if they belong to the same person the holder of the bond may resort to either.[2] The contract for its operation and validity is dependent upon the law of the flag.[3]

13. Lien—Waiver—Laches.—The lien is a *jus in re* without possession or any right of possession.[4] It accompanies the property into the hands of a *bona-fide* holder,[5] and can be executed or divested only by a proceeding *in rem*.[6] Having once attached, it follows the property or its proceeds into the hands of an assignee,[7] and the lien is not divested by the assignment.[8] Unreasonable delay in the enforcement of the lien is discountenanced. The bond must be put in suit with all reasonable diligence.[9]

14. Priority of.—As a general rule, a bottomry bondholder is to be preferred to all other creditors.[10] But sailors' wages are an exception to this rule.[11] A bottomry bond given subsequent to salvage expenses is entitled to priority,[12] but if the salvage expenses be the last incurred they will take precedence.[13] A bottomry bond given at the beginning of a voyage may be post-

1. The Zephyr, 3 Mas. (C. C.) 331.

2. Welsh and Cabot, 39 Penn. 342.

Both ship and freight are liable before the cargo, and this is true although the cargo is given on cargo alone. The Packet, 3 Mas. (C. C.) 255, 267; The Constancia, 4 Notes of Cas. 385.

3. Pope *v.* Nickerson, 4 Story, 465.

But the *lex fori* controls questions of evidence and procedure. The Bonaparte, 4 Moore P. C. 459.

4. Vandewater *v.* Mills, 19 How. (U. S.) 90; The Young Mechanic, 2 Cur. (C. C.) 404; The Nester, 1 Sum. (C. C.) 73; The H. D. Bacon, Newberry (D. C.), 274.

5. Ramsey *v.* Allegre, 12 Wheat. (U. S.) 611; The Avon, 1 Brown's Ad. R. (C. C.) 178.

6. Vandewater *v.* Mills, 19 How. (U. S.) 90; The Young Mechanic, 2 Cur. (C. C.) 404.

7. Cutler *v.* Rae, 7 How. (U. S.) 729; The George Prescott, 1 Ben. (D. C.) 6.

8. The Belle of the Sea, 15 Int. Rev. Rec. (C. C.) 104.

So long as the vessel exists in specie, she continues subject to the hypothecation. The Ins. Co. *v.* Gossler, 96 U. S. 645.

9. Blaine *v.* The Charles Carter, 4 Cranch (U. S.), 382; The Rebecca, 5 Robinson Adm. 105.

The claim may be prejudiced or altogether defeated by laches.

Where money is advanced under an agreement for a bottomry bond, and the ship is permitted to go to sea without any attempt to enforce the agreement, the party who thus waives his right cannot be permitted, at a subsequent time and under a change of circumstances, to reinstate himself in his former position. The Aurora, 1 Wheat. (U. S.) 104.

But the laches of the bondholder cannot be set up by the mortgagee, unless the mortgagee's position has been thereby prejudiced. The Helgoland, Swabey, 500.

A valid bond will, if there is no laches, be sustained as against the *bona-fide* purchaser for value without notice. The Draco, 2 Sum. (C. C.) 157.

Where proceedings are taken within a reasonable time, the mere departure of the vessel from the return port does not of itself affect the lien, whether it be with or without notice to the holder of the bond. Burke *v.* M. P. Rich, 1 Cliff. 308.

But if the obligee permits the vessel to make several voyages without asserting his lien, it is deemed as waived as against execution creditors. Blaine *v.* The Charles Carter, 4 Cranch (U. S.), 328.

10. The Onlia, 3 Hagg. Adm. 83; The Madonna P. Ira, 1 Dods. Adm. 40.

11. Blaine *v.* The Charles Carter, 4 Cranch (U. S.), 328; The Virgin, 8 Pet. (U. S.) 538.

And this is true whether earned before or after the execution of the bond. The Aline, 1 W. Rob. Adm. 111.

12. The Selina, 2 Notes of Cas. 18.

13. The William F. Safford, Lush, 69.

poned to the claim arising out of a subsequent collision,[1] but if the damage was done before the bond was given, and if the holder of the bond is a stranger who has made the advance in good faith, it seems that he has a lien to the extent of the increased value of the vessel by reason of the betterments growing out of his advance, and is to that extent entitled to precedence over the claim for damage.[1] As between two bonds, the last executed must be paid first.[2] Bottomry bondholders will be permitted to pay off prior charges of small amount and be substituted for them.[4] The lien of a bottomry bond takes priority in distribution over a claim for general average,[5] but sums advanced on account of freight must be deducted in preference to bottomry.[6]

15. **Procedure.**—The method of procedure ordinarily is *in rem* against the property hypothecated or its proceeds,[7] but the bondholder may also, under certain conditions, proceed *in personam* against the master or owner.[8] When the ship and cargo belong to different owners, the bond is first to be satisfied out of the ship, and the cargo is only secondly liable;[9] but when the ship and cargo belong to the same person, the creditor may resort to either for the payment of his bond.[10] Freight is considered as an incident to the ship, and in the marshalling of assets the rules which regulate ship and cargo apply equally to freight.[11] It is not necessary for the maintenance of a proceeding *in rem* that the officers should actually find the property upon which to make service, and actually take it into possession.[12] A monition served upon the holder of the property or its proceeds is sufficient.[13] Whilst the construction of the contract must for its validity depend upon the

1. The Pride of the Ocean, 3 Fed. 162.

2. The Aline, 1 W. Rob. Adm. 111.

3. The Sidney Crow, 2 Dods. Adm. 1; The Ronolo, 8 Jur. 462.

And this it seems is the rule though they be given at the same port. The Eliza, 3 Hagg. Adm. 89.

But if the second bondholder have notice of the existence of the prior bond, or if in point of fact they are practically contemporaneous, there will be no priority. The Cynthia, 5 Irish Jur. 317.

4. Fair Haven L. R., 1 Ad. & Ecc. 67.

5. The Anna, 9 Am. Law Reg. N. S. 475.

6. The Freight Money of Brig Anastasia, 1 Ben. (D. C.) 188.

For further information on this head the reader is referred to the following English authorities: Abbott on Shipping; Maclachlan's Merchant Shipping; Williams & Bruce's Admiralty; Tudor's Leading Cas. in Mercantile and Maritime Law; Pritchard's Admiralty Digest; and also to the following American authorities: Parsons' Shipping and Admiralty; Desty's Shipping and Admiralty; Abbott's Digest and Rapalje's Fed. Decision. A brief summary of the Continental decisions will be found in Pritchard's Admiralty Digest (Eng.).

7. Rule 18, Sup. Court U. S. Adm. Rules; Sheppard *v.* Taylor, 5 P. T. (U. S.) 710.

8. Rule 18, Sup. Court U. S. Adm. Rules; The Virgin, 8 Pet. (U. S.) 538; The Bark Irma, 15 Int. Rev. Rec. (D. C.) 130.

9. The Ship Packet, 3 Mason (C. C.), 255, 267.

The property of the ship-owner, both ship and freight, are liable before that of the owner of the cargo. The Ship Packet, 3 Mason (C. C.), 255, 267; The Constancia, 4 Notes of Cas. 285.

10. Welsh *v.* Cabot, 39 Penn. 356.

But sums advanced on account of freight must be deducted. Freight Money of the Anastasia, 1 Ben. (D. C.) 188; The Catharine, Swab. 264.

11. Welsh *v.* Cabot, 39 Penn. 356.

12. Snow *v.* 180 Tons of Scrap Iron, 11 Fed. Rep. (D. C.) 517.

13. Snow *v.* 180 Tons of Scrap Iron, 11 Fed. Rep. (D. C.) 517.

law of the flag, the *lex fori* is supreme on questions of evidence and procedure.[1]

BOUGHT. See BUY.[2]

BOUND. See BIND; BOND.[3]

1. Pope *v.* Nickerson, 3 Sto. (C. C.) 465

2. An act required a return to be made regularly by all persons who "deal in or purchase" British corn of the amount "bought" by them, the object of the act being to ascertain from time to time the average prices of British corn with a view to the proportionment of duties on the importation of foreign corn. *Held*, that one who entered into a contract not binding under the Statute of Frauds was yet liable to conviction under the penal section of the act for not making a return goods "bought." "The question . . is whether the word 'bought' is to be understood in the popular sense or in the strictly legal sense? . . . The object of the legislature here was to impose a duty on the importation of corn, which duty is to be in proportion to the price of British corn. The object, therefore, was to ascertain that price, and for that purpose a general average is directed to be given of the preceding six weeks. Such being the object, it is clear that it will be best attained by having the price which the parties, by their bargain, *stipulated* to pay inserted in the account from which the six weeks' average is to be calculated, for that is the sale or purchase which the legislature have in view. . . . It appears to me, therefore, that we must understand the word 'bought' in its ordinary sense." Rex *v.* Townrow, 1 B. & Ad. 479.

All Goods Bought.—A commission agent was employed by a manufacturer to sell goods on the terms contained in the following letter: "We sell at your terms, and have no further interference with the account beyond forwarding the order and references. We give you all the information we possess, and you treat the order as coming direct from the buyer. We expect to receive our commission *on all goods bought* by houses whose accounts are opened through us." *Held*, that he was entitled to a commission where an order had been given *and accepted* by the manufacturer, though in consequence of the latter's inability to supply the goods they were not ultimately delivered to the buyer. "The learned judge . . . was of opinion that the words 'goods bought' might extend to goods in respect of which an order had been given and accepted, and that the commission was payable although no goods had been actually delivered. I think . . . [he] was quite right in the construction which he put upon the letter. . . . It seems to me that the letter itself shows clearly that a person giving an order in the capacity of a buyer was to be considered as a buyer." Lockwood *v.* Levick, 8 C. B. N. S. 608.

3. The terms "bind," "bound," "binding effect," "obligation," are used often by the most respectable jurists without meaning to have them applied to *bond*, in the technical language of the law. Stone *v.* Bradbury, 14 Me. 193, citing Union Bank *v.* Hyde, 6 Wheat. (U. S.) 572, where a request by the indorser of a promissory note that his notes should not be protested, "as I will consider myself *bound* in the same manner as if the said notes had been or should be legally protested," was held ambiguous as to whether it amounted to a waiver of demand and notice, and parol proof was admissible on that point; the court remarking: "What effect is to be given to the word 'bound'? It must be to pay the debt, or it means nothing. But to cast on the indorser of a foreign bill an obligation to take it up, protest alone is not sufficient; he is still entitled to a reasonable notice in addition to the technical notice communicated by the protest. To bind him to pay the debt all these incidents were indispensable and may therefore be well supposed to have been in contemplation of the parties, when entering into this question. . . . If this course of reasoning should not be held conclusive, it would at least be sufficient to prove the language of the undertaking equivocal; and that the sense in which the parties used the words in which they express themselves may fairly be sought in the practical exposition furnished by their own conduct, or the conventional use of language established by their own customs or received opinions."

Bound to Convict.—On a question whether a magistrate was *bound to convict* or had a discretion, the court said: "We think the magistrate ought to have convicted, and that is the only meaning we can put on the words '*bound* to convict;' and therefore we affirm the conviction." Marshall *v.* Fox, L. R. 6 Q. B. 373.

BOUNDARIES. (See also ADVERSE POSSESSION; DEED; EVIDENCE; MINES AND MINING; SURVEYS AND SURVEYORS; WATERS AND WATER-COURSES.)

1. Definition.—A boundary may be defined to be the delineation of the limits of a tract of land, or "the separation, natural or artificial, which marks the confines or line of division of two contiguous estates."[1] These limits may be pointed out and ascertained by reference to a variety of things having some relation with the land and indicating its extent.

2. Description.—In consequence of the requirement of the Statute of Frauds that all conveyances of lands or of any interest therein, except leases for a short period, should be in writing signed by the grantor, it is an invariable rule of law in all of the United States and England that every conveyance should contain a sufficiently accurate description of the land and of its boundaries to be conveyed in order that it may be identified and its

Bound with Surety.—An act directing that the defendant who appeals from the judgment of a justice of the peace *shall be bound with surety* in the nature of special bail is satisfied by his finding surety, without joining in the recognizance. "In order, therefore, to effectuate the true intent of the legislature, the expressions 'he shall be bound with surety,' etc., are to be construed, he shall be bound by surety, etc., or, he shall find surety. It is more analogous to special bail that the defendant should not be bound himself, for he never joins in a recognizance of special bail." Cavence *v.* Butler, 6 Binn. (Pa.) 52.

Held and firmly Bound.—"The obligation in question, though not technically, is substantially in the form of the common-law recognizance. In the one, the party acknowledges that he is held and firmly bound to pay; in the other, that he owes and is indebted. This language, though variant in form, has the same force and meaning." Shattuck *v.* The People, 4 Scam. (Ill.) 480.

Persons Bound as Security for Another.—Within the meaning of a statute enacting that such persons may, at any time after action has accrued on the bond, bill, or note, require the person having the right of action forthwith to commence suit against the principal debtor, on penalty of such security being exonerated, "undoubtedly includes sureties proper in a bond, bill, or note, but it would be extending the words of the statute beyond their reasonable meaning to hold that it includes an indorser whose liability is fixed by the required notice of the dishonor of the bill or note." Ross *v.* Jones, 22 Wall. (U. S.) 591.

Shall Remain Bound as Now, in a stipulation entered into by a corporation, "neither by its terms nor intent imposes any new obligation; nor does it furnish any new remedy. Before the contract was made the duty of the defendants to maintain the roads and bridges existed, and for neglect of the duty they were liable to indictment. The contract makes no new agreement on the subject. It merely recites that it is understood that the defendants are to remain bound as before; that is to say, they are not discharged by any of the provisions of the agreement from their existing obligations in this behalf." The corporation was, therefore, held not liable in an action of contract for not keeping bridges, etc., in repair upon an agreement for the exchange of lands which contained the above stipulation with reference to repairing. Com. *v.* Boston & Roxbury Mill Corp., 8 Allen (Mass.), 296.

1. Hunt's Law of Boundaries, 1; Bouvier's Law Dict.

limits ascertained. Parol evidence is not admissible to supply the inaccuracies of description appearing on the face of the deed or other writing. But when the written description is certain, so far as it goes, but there are two or more distinct tracts of lands which may easily fall within the description, parol evidence is admissible to explain away this ambiguity which arises outside of the deed.[1]

If a description is hopelessly uncertain, the deed of conveyance will be void and no title passes.[2]

But a deed will not be declared void for uncertainty as long as it is possible by any reasonable rules of construction to ascertain from the deed what property was intended to pass.[3]

In construing a deed very little attention is paid to the punctuation of the description, and it is disregarded altogether if this is necessary to remove the ambiguity.[4]

A rational intention must be sought after, and the construction must be consistent with reason and common-sense;[5] and where the language of the deed admits of two reasonable constructions, that one which is more favorable to the grantee will be preferred, particularly in a deed-poll, on the assumption that the deed is in the language of the grantor, and therefore he is in fault if there be any uncertainties or inconsistencies in the description.[6]

Where the deed, upon a reasonable construction, conveys other property than the parties intended, or is void for uncertainty or ambiguity, the courts, more particularly those of equity, are authorized, either by statute or under the equitable jurisdiction, to reform it so that it will conform to the intention of the parties.[7]

1. 3 Washb. on Real Prop. 397; Tiedeman on Real Prop. § 827; Doe *v.* Martin, 4 T. R. 65; Shore *v.* Wilson, 9 Cl. & Fin. 556; Burton *v.* Dawes, 10 C. B. 261; s. c., 19 L. J. C. B. 302; Ewing *v.* Burnett, 11 Pet. (U. S.) 54; Eaton *v.* Smith, 20 Pick. (Mass.) 150; Bond *v.* Fay, 12 Allen (Mass.), 88; Putnam *v.* Bond, 100 Mass. 58; Cole *v.* Lake Co., 54 N. H. 278; Hannum *v.* West Chester, 70 Pa. St. 372; Hall *v.* Davis, 36 N. H. 569; Lippett *v.* Kelley, 46 Vt. 516; Caldwell *v.* Fulton, 31 Pa. St. 489; Hildebrand *v.* Fogle, 20 Ohio, 147; Stanley *v.* Green, 12 Cal. 162; Morrison *v.* Wilson, 30 Cal. 347; Hoffman *v.* Riehl, 27 Mo. 554. See Boyle *v.* Mulholland, 10 Ir. Com. Law Rep. 150; Smith *v.* Ridgway, L. R. 1 Exch. 46, 331; Read *v.* Read, 15 W. R. 164; Harman *v.* Gurner, 35 Beav. 478.

2. 3 Washb. Real Prop. 381; Tiedeman on Real Prop. § 827; Presbrey *v.* Presbrey, 13 Allen (Mass.) 283; United States *v.* King, 3 How. (U. S.) 773; Bailey *v.* White, 41 N. H. 337; Walters *v.* Breden, 70 Pa. St. 238; Wofford *v.* McKinna, 23 Tex. 45; Campbell *v.* Johnson, 44 Mo. 247; Shackleford *v.* Bailey, 35 Ill. 391.

3. Abbott *v.* Abbott, 51 Me. 582; Bond *v.* Fay, 12 Allen (Mass.), 88; Crafts *v.* Hibbard, 4 Metc. (Mass.) 452; Stone *v.* Stone, 116 Mass. 279; Harvey *v.* Mitchell, 31 N. H. 575; Kruse *v.* Wilson, 79 Ill. 233; Andrews *v.* Murphy, 12 Ga. 431. See also Mulford *v.* La Frame, 26 Cal. 88; Stevens *v.* Mayor, etc., 14 J. & S. (N. Y.) 274; Wendell *v.* Jackson, 8 Wend. (N. Y.) 183; s. c., 22 Am. Dec. 635; Bass *v.* Mitchell, 22 Tex. 285; Bosworth *v.* Sturtevant, 2 Cush. (Mass.) 392; Newson *v.* Pryor, 7 Wheat. (U. S.) 7; Hart *v.* Hawkins, 3 Bibb (Ky.), 502; s. c., 6 Am. Dec. 666.

4. 3 Washb. on Real Prop. 387; Tiedeman on Real Prop. § 827; Doe *v.* Martin, 4 T. R. 65; Ewing *v.* Burnett, 11 Pet. (U. S.) 54.

5. Lyman *v.* Arnold, 5 Mason (U. S.), 198; Day *v.* Adams, 42 Vt. 510; Magoon *v.* Harris, 46 Vt. 271.

6. Worthington *v.* Hylyer, 4 Mass. 205; Clough *v.* Bowman, 15 N. H. 504; Sanborn *v.* Clough, 40 N. H. 330; Marshall *v.* Niles, 8 Conn. 469; Carroll *v.* Norwood, 5 Har. & J. (Md.) 155; Dodge *v.* Walley, 22 Cal. 228; Vance *v.* Fore, 24 Cal. 446.

7. Metcalf *v.* Putnam, 9 Allen (Mass.),

The reformation will not be ordered unless the uncertainty is hopeless and cannot be removed by construction.[1]

Contemporanea Expositio est Optima et Fortissima in Lege.—In the endeavor to ascertain the limits or boundary of the land which the grantor intended to convey, the courts will ascertain, if possible, all the circumstances surrounding and connected with the parties and the land at the time of the conveyance, since parties are presumed to refer to the condition of the land at that time, and the meaning of the terms used in the description can only be ascertained by a knowledge of the relative positions of themselves and of the land. The adoption of this rule will eliminate all doubts and ambiguities which may arise from a subsequent change in the position or character of the parties or of the land.[2]

Falsa Demonstratio non Nocet.—The description of a deed should be so construed, if possible, that no part be rendered inoperative.[3]

Where it is the plain intention of the parties that all of the elements of description should be necessary to the identification of the property, the conveyance will be void if no lands of the grantor can be found which will correspond with every part of the description.[4]

97; Canedy *v.* Marcy, 14 Gray (Mass.), 373; Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 317; Adams *v.* Stevens, 49 Me. 362; Prescott *v.* Hawkins, 16 N. H. 122; Brown *v.* Lamphear, 35 Vt. 260; Crame *v.* Burton, 60 Barb. (N. Y.) 225; Andrews *v.* Gillespie, 47 N. H. 487; Gray *v.* Hornbeck, 31 Mo. 400.

1. White *v.* White, L. R. 15 Eq. 247; Andrews *v.* Spurr, 8 Allen (Mass.), 416; Caldwell *v.* Fulton, 31 Pa. St. 484; Clement *v.* Youngman, 40 Pa. St. 344; Keene's Appeal, 64 Pa. St. 274; Mills *v.* Lockwood, 42 Ill. 111. See Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 317; Glass *v.* Hulburt, 102 Mass. 44; Canedy *v.* Marcy, 13 Gray (Mass.), 373; Hutchings *v.* Huggins, 59 Ill. 32.

2. Tiedeman on Real Prop. § 828; Dunklee *v.* Wilton R., 24 N. H. 489; Richardson *v.* Palmer, 38 N. H. 218; Connery *v.* Brooke, 73 Pa. St. 84; Adams *v.* Frothingham, 3 Mass. 372; Commonwealth *v.* Roxberry, 9 Gray (Mass.), 493; Rider *v.* Thompson, 23 Me. 244; Abbott *v.* Abbott, 51 Me. 581; Lane *v.* Thompson, 43 N. H. 324; Pollard *v.* Maddox, 28 Ala. 325; Karmuller *v.* Kratz, 18 Iowa, 356; Stanley *v.* Greene, 12 Cal. 148.

Thus where the grant was made of a farm by a general description without any particular description of the parcels of land which were intended to be included, it was held that all those parcels would pass under the grant which were at the time of the conveyance used and cultivated together. Bell *v.* Woodward, 46 N. H. 337.

So, likewise, it was held in another case where at the time of conveyance the grantor held, in addition to the title of certain lands, a right of entry for the breach of a condition in other lands in the same place, the breach of which had not then occurred, but did subsequently, and he acquired the title to them that these latter lands did not pass under a mortgage of all his rights and interests in lands in C., because the right of entry was not assignable at common law, and he had no other title to these lands when the mortgage was delivered. Richardson *v.* Cambridge, 2 Allen (Mass.), 118; s. c., 79 Am. Dec. 767.

On the other hand, where the channel of a stream, passing through a tract of land, had been changed by the owner, and he subsequently divided up the land into parcels in such a manner that the stream as changed was altogether within the boundaries of one of the parcels when these parcels were sold to different persons, it was held that the grantee of the parcel containing the stream could not restore the stream to its old channel and inundate the other parcels. Roberts *v.* Roberts, 55 N. Y. 275; 3 Washb. on Real Prop. 384.

3. Herrick *v.* Hopkins, 23 Me. 217; Walters *v.* Breden, 70 Pa. St. 238; Lane *v.* Thompson, 43 N. H. 320.

4. 3 Washb. on Real Prop. 400; Tiedeman on Real Prop. § 829; Brown *v.*

But if it does not appear to be necessary to satisfy all the elements of description, or if parts of the description are inconsistent with other parts, and enough of them are sufficiently reasonable, in order to locate the land which the parties desire to be conveyed, the repugnant elements of the description will be rejected, and the deed will be construed to pass those lands which will fall within the consistent elements of the description.[1]

But if there are lands in the possession of the grantor which will comply with all the particulars of the description, only such lands will pass by the deed, although it may be shown by parol evidence that the parties intended other parcels to pass also which fall within only a part of the description.[2]

In determining what is the *falsa demonstratio* which may be rejected in order that the rest of the description may be given effect, it must be remembered that a particular or special description will always control a general or implied description, in whatever order they may appear.[3] But if the particular description is in any degree uncertain or obscure, then the general description will prevail and the particular description be rejected as false.[4] The first part of the description usually prevails over the latter part, if both appear in the premises of the deed; and if one part is written and the other is printed, the former will prevail.[5] And it is said that, where the two inconsistent parts of the de-

Saltonstall, 3 Me. 423; Warren *v.* Coggswell, 10 Gray (Mass.), 76.

1. Corbin *v.* Healey, 20 Pick. (Mass.) 514; Bond *v.* Fay, 8 Allen (Mass.), 212; Parker *v.* Kane, 22 How. (U. S.) 1; Crosby *v.* Bradbury, 20 Me. 61; Parks *v.* Loomis, 6 Gray (Mass.), 467; Jackson *v.* Clark, 7 Johns. (N. Y.) 223; Presbrey *v.* Presbrey, 13 Allen (Mass.), 283; Doane *v.* Wilcutt, 16 Gray (Mass.), 371; Lush *v.* Druse, 4 Wend. (N. Y.) 313; Morrow *v.* Willard, 30 Vt. 118; Abbott *v.* Abbott, 53 Me. 360; Scofield *v.* Lockwood, 35 Conn. 428; Law *v.* Hempstead, 10 Conn. 23; Spiller *v.* Scribner, 36 Vt. 246; Johnson *v.* Simpson, 36 N. H. 91; Bosworth *v.* Sturtevant, 2 Cush. (Mass.) 392; Peck *v.* Mallams, 10 N. Y. 532; Bass *v.* Mitchell, 22 Tex. 285; Tubbs *v.* Gatewood, 26 Ark. 128; Hathaway *v.* Juneau, 15 Wis. 264; Fancher *v.* De Montegre, 1 Head (Tenn.), 40; Dodge *v.* Walley, 22 Cal. 224; Beal *v.* Gordon, 55 Me. 482; Anderson *v.* Boughman, 7 Mich. 69; Wade *v.* Deray, 50 Cal. 376; Raymond *v.* Coffey, 5 Oreg. 132; Shewalter *v.* Pirner, 55 Mo. 218; Thayer *v.* Torrey, 37 N. J. L. 339; Wendell *v.* Jackson, 8 Wend. (N. Y.) 183; s. c., 22 Am. Dec. 635; Doe *v.* Galloway, 5 B. & Ad. 43; Taylor *v.* Parry, 1 M. & G. 604, 623; Boyle *v.* Mulholland, 10 Ir. Com. Law Rep. 157; Travers *v.* Blundell, 6 Ch. Div. 436; Loomis *v.* Jackson, 19 Johns. (N. Y.) 449; Austen *v.* Nelms, 1 H. & N. 225; Doe *v.* Ashley, 10 Q. B. 663; Doe *v.* Hubbard, 15 Q. B. 236; Goodtitle *v.* Southern, 1 M. & S. 299; Dyne *v.* Nutley, 14 C. B. 122; Rand *v.* Green, 9 C. B. N. S. 477; Manning *v.* Fitzgerald, 29 L. J. Ex. 24; White *v.* Birch, 35 L. J. Ch. 174; Llewellyn *v.* Earl of Jersey, 11 M. & W. 183.

2. Brown *v.* Saltonstall, 3 Me. 423; Morrell *v.* Fisher, 4 Exch. 591; Warren *v.* Coggswell, 10 Gray, 76; Griffithes *v.* Penson, 1 H. & Colt. 862; Llewellyn *v.* Jersey, 11 M. & W. 183; Pedley *v.* Dodds, L. R. 2 Eq. 819; Smith *v.* Ridgway, L. R. 1 Ex. 46, 331; Webber *v.* Stanley, 16 C. B. N. S. 698; Sheppard's Touchstone, 29.

3. Smith *v.* Strong, 14 Pick. (Mass.) 128; Whiting *v.* Dewey, 15 Pick. (Mass.) 428; Winn *v.* Cabot, 18 Pick. (Mass.) 553; Dana *v.* Middlesex Bank, 10 Metc. (Mass.) 250; Howell *v.* Saule, 5 Mason (U. S.), 410; Barney *v.* Miller, 18 Iowa, 466; Jones *v.* Smith, 73 N. Y. 205; Gans *v.* Aldridge, 27 Ind. 294; McEowen *v.* Lewis, 26 N. J. L. 451.

4. Ela *v.* Card, 2 N. H. 175; s. c., 9 Am. Dec. 46; Haley *v.* Amestoy, 44 Cal. 132; Sawyer *v.* Kendall, 10 Cush. (Mass.) 241; Barney *v.* Miller, 18 Iowa, 460.

5. Webb *v.* Webb, 29 Ala. 606; McNear *v.* McComber, 18 Iowa, 17.

scription are equally balanced, the grantee may choose that which is most favorable to him.[1]

The Elements of Description.—A comprehensive description will contain, as data for the determination of the boundaries, an enumeration of the monuments, the courses and distances, and the quantity of land conveyed. The relative value of them is in the order in which they are named, in accordance with the common-sense rule of construction that, in all cases of contradiction between the elements of description, that element will control about which there is the least likelihood of mistake. Therefore the monuments will control the courses and distances, and the courses and distances control the quantity of land.[2]

But this is not an cast-iron rule without exceptions; and when the deed bears internal evidence of the fact that the recognition of the ordinarily inferior element of description, as controlling the construction, will best carry out the intention of the parties, the rule will give way, and under such circumstances courses and distances will control the monuments.[3]

But very rarely will the quantity of land be allowed to control either of the elements of description, and only when the intention is very clear to convey only the quantity mentioned in the deed and no more.[4]

3. Monuments, Natural and Artificial.—Natural monuments are

1. Esty *v.* Baker, 50 Me. 331; Melvin *v.* Proprietors, etc., 8 Metc. (Mass.) 27.

2. Brown *v.* Huger, 21 How. (U. S.) 305; Powell *v.* Clark, 5 Mass. 355; Llewellyn *v.* Jersey, 11 Mees. & W. 183; Hall *v.* Davis, 36 N. H. 569; Jackson *v.* Defendorf, 1 Caines (N. Y.), 493; Mann *v.* Pearson, 2 Johns. (N. Y.) 37; Drew *v.* Swift, 46 N. Y. 207; Hall *v.* Mayhew, 15 Md. 551; Snow *v.* Chapman, 1 Root (Conn.), 528; Murphy *v.* Campbell, 4 Pa. St. 485; Ufford *v.* Wilkins, 33 Iowa, 113; Mackentill *v.* Savoy, 17 Serg. & R. (Pa.) 164; Dalton *v.* Rust, 22 Tex. 133; Wright *v.* Wright, 34 Ala. 194; Commissioners *v.* Thompson, 4 McCord (S. Car.), 434; Miller *v.* Cherry, 3 Jones Eq. (N. Car.) 29; Miller *v.* Bentley, 5 Sneed (Tenn.), 671; Stanley *v.* Green, 12 Cal. 148; Colton *v.* Seavey, 22 Cal. 496; Coburn *v.* Coxeter, 51 N. H. 158; Melvin *v.* Proprietors, etc., 5 Metc. (Mass.) 28; Esty *v.* Baker, 50 Me. 311; Ferris *v.* Coover, 10 Cal. 628; Falwood *v.* Graham, 1 Rich. (S. Car.) 491; Kalbfleisch *v.* Standard Oil Co., 43 N. J. L. 259; Galvin *v.* Collins, 128 Mass. 525; Woodward *v.* Nims, 130 Mass. 70; Yates *v.* Van De Bogert, 56 N. Y. 526; West *v.* Shaw, 67 N. Car. 489; Dickson *v.* Wilson, 82 N. Car. 487; Keenan *v.* Cavanaugh, 44 Vt. 268; Welder *v.* Aunt, 34 Tex. 44; Johnston *v.* Preston, 9 Neb. 474; Grand Trunk Railway Co. *v.* Dyer, 49 Vt. 74; Opdyke *v.* Stevens, 28 N. J. L. 83; Chinoweth *v.* Haskell, 3 Pet. (U. S.) 96; Bryan *v.* Beckley, Litt. Sel. Cas. (Ky.) 91; s. c., 12 Am. Dec. 276; Wendell *v.* Jackson, 8 Wend. (N. Y.) 183; s. c., 22 Am. Dec. 635; Clark *v.* Scammon, 62 Me. 47; Erskine *v.* Moulton, 66 Me. 276; Heaton *v.* Hodges, 14 Me. 66; s. c., 30 Am. Dec. 731, 741, note; Fuller *v.* Carr, 33 N. J. L. 157; Peay *v.* Briggs, 2 Mill (S. Car.), 98; s. c., 12 Am. Dec. 656; Birmingham *v.* Anderson, 48 Pa. St. 253; Hoffman *v.* Riehl, 27 Mo. 554; Kennebec Purchase *v.* Tiffany, 1 Me. 219; s. c., 10 Am. Dec. 60; Wolfe *v.* Scarborough, 2 Ohio St. 361; Powers *v.* Jackson, 50 Cal. 429; Winans *v.* Cheney, 55 Cal. 267.

3. Davis *v.* Rainsford, 17 Mass. 207; Higginbotham *v.* Stoddard, 72 N. Y. 94; Johnson *v.* McMillan, 1 Strob. (S. Car.) 143; Newhall *v.* Ireson, 8 Cush. (Mass.) 595; s. c., 54 Am. Dec. 790; Haynes *v.* Young, 36 Me. 557; Hamilton *v.* Foster, 45 Me. 32; White *v.* Luning, 93 U. S. 515; Jones *v.* Bargett, 46 Tex. 484; Den *v.* Graham, 1 Dev. & B. Eq. (N. Car.) 76; s. c., 27 Am. Dec. 226; Mizell *v.* Simmons, 79 N. Car. 182.

4. Pierce *v.* Faunce, 37 Me. 63; Kirkland *v.* Way, 3 Rich. (S. Car.) 4; s. c., 45 Am. Dec. 752.

those natural objects which are found on the land in the place where they were placed by nature, and whose location is decidedly permanent. Such would be trees, walls and fences,[1] streams of all kinds,[2] ponds and lakes,[3] beaches and shores,[4] streets and highways,[5] and the like.[6]

The adjoining lot or farm may also be referred to as a monument in the description of a tract of land.[7]

Artificial monuments are those which are erected by man, such as surveyors' stakes and corner-stones.[8] If the artificial monuments are referred to in a deed when they do not exist, they may be erected subsequently; and when erected will control courses and distances, even though it may be shown that the artificial monuments as placed do not show the true line, provided that the parties have jointly agreed upon or assented to their location.[9]

1. Bradford *v.* Cressey, 45 Me. 9; Boston *v.* Richardson, 13 Allen (Mass.), 154; Warner *v.* Southworth, 6 Conn. 471; Child *v.* Starr, 4 Hill (N. Y.), 369.

2. Arnold *v.* Elmore, 16 Wis. 509; Stanford *v.* Mangin, 30 Ga. 355; Wheeler *v.* Spinola, 54 N. Y. 385; Primm *v.* Walker, 38 Mo. 94; Hicks *v.* Coleman, 25 Cal. 142.

3. Waterman *v.* Johnson, 13 Pick. (Mass.) 261; West Roxbury *v.* Stoddard, 7 Allen (Mass.), 167; Nelson *v.* Butterfield, 21 Me. 229; Manton *v.* Blake, 62 Me. 38; Canal Com'rs *v.* People, 5 Wend. (N. Y.) 446; Wheeler *v.* Spinola, 54 N. Y. 377; Jakeway *v.* Barrett, 38 Vt. 323; Austin *v.* Rutland R. Co., 45 Vt. 215; Bradley *v.* Rice, 13 Me. 198; Lowell *v.* Robinson, 16 Me. 357; Phinney *v.* Watts, 9 Gray (Mass.), 269; s. c., 69 Am. Dec. 288; Hathorn *v.* Stinson, 12 Me. 183; s. c., 28 Am. Dec. 167; Wood *v.* Kelley, 30 Me. 47; Paine *v.* Woods, 108 Mass. 170; Mill River, etc., Co. *v.* Smith, 34 Conn. 462; State *v.* Gilmantown, 9 N. H. 461.

4. Hodge *v.* Boothby, 48 Me. 71; East Hampton *v.* Kirk, 6 Hun (N. Y.), 257; s. c., 84 N. Y. 215; Hathaway *v.* Wilson, 123 Mass. 361; Littlefield *v.* Maxwell, 31 Me. 134; s. c., 50 Am. Dec. 653; McCullough *v.* Wainwright, 14 Pa. St. 171; Yates *v.* Van de Bogert, 56 N. Y. 531; Teschemacher *v.* Thompson, 18 Cal. 21; Dana *v.* Jackson St. Wharf, 31 Cal. 120; Martin *v.* O'Brien, 34 Miss. 21.

5. Berridge *v.* Ward, 10 C. B. N. S. 400; Falls *v.* Reis, 74 Pa. St. 439; Gove *v.* White, 20 Wis. 432; Dunham *v.* Williams, 37 N. Y. 251; Chatham *v.* Brainard, 11 Conn. 60; Smith *v.* Howden, 14 Com. B. N. S. 398; Tibbetts *v.* Estes, 52 Me. 566; Stevens *v.* Mayor, etc., 14 Jones & S. (N. Y.) 274; Johnson *v.* Anderson, 18 Me. 76; Cottle *v.* Young, 59 Me. 105; O'Linda *v* Lothrop, 21 Pick. (Mass.) 298; Parker *v.* Framingham 8 Metc. (Mass.) 267; Fisher *v* Smith, 9 Gray (Mass.), 441; Banks *v.* Ogden, 2 Wall. (U. S.) 57; Read *v.* Leeds, 19 Conn. 187; Winter *v.* Peterson, 24 N. J. L. 527; s. c., 61 Am. Dec. 678; Canal Trustees *v.* Havens, 11 Ill. 557; Kimball *v.* Kenosha, 4 Wis. 331; Dubuque *v.* Maloney, 9 Iowa, 458; s. c., 74 Am. Dec. 358.

6. Hoffmann *v.* Armstrong, 48 N. Y. 201; Stapleford *v.* Brinson, 2 Ired. (N. Car.) 311; Patton *v.* Alexander, 7 Jones L. (N. Car.) 603.

7. Cate *v.* Thayer, 3 Me. 71; Sayers *v.* City of Lyons, 10 Iowa, 249; Flagg *v.* Thurston, 13 Pick. (Mass.) 145; Northrup *v.* Sumner, 27 Barb. (N. Y.) 196; Rutherford *v.* Tracy, 48 Mo. 325; Powers *v.* Jackson, 50 Cal. 429.

8. Call *v.* Barker, 12 Me. 320; White *v.* Williams, 48 N. Y. 344; Fleischfresser *v.* Schmidt, 41 Wis. 223.

9. Kennebec Purchase *v.* Tiffany, 1 Me. 219; s. c., 10 Am. Dec. 60; Knowles *v.* Toothacker, 58 Me. 175; Corning *v.* Troy Co., 40 N. Y. 208; Makepeace *v.* Bancroft, 12 Mass. 469; Waterman *v.* Johnson, 13 Pick. (Mass.) 261; Cleveland *v.* Flagg, 4 Cush. (Mass.) 81, Blaney *v.* Rice, 20 Pick. (Mass.) 62; Hathaway *v.* Evans, 108 Mass. 270; Lerned *v.* Morrill, 2 N. H. 197; Rockwell *v.* Baldwin, 53 Ill. 22; Purinton *v.* N. Ill. R. Co., 46 Ill. 300; Smith *v.* Hamilton, 20 Mich. 433; Emery *v.* Fowler, 38 Me. 99.

And it may always be shown by parol evidence that the parties have agreed to the location of the monuments. Waterman *v.* Johnson, 13 Pick. (Mass.) 267. See Kellem *v.* Smith, 65 Pa. St. 86. Kincaid *v.* Dormey, 47 Mo. 337.

Although parol evidence is not admissible to control the boundaries of land in a deed, yet, when the monuments are lost or have been moved, parol evidence is admisible to show where they originally stood.[1]

In consequence of the more permanent character of the natural monument and of its location, it is always to be preferred to the artificial monument in cases of contradiction, unless it is clearly shown in any particular case that the artificial monument is the more reliable as an index of the boundary.[2]

If one side of a tract of land be described as running from one monument to another, it is always a straight line between the two monuments; and if three or more monuments are referred to, the boundary lines must be laid out straight from one monument to another successively.[3] So, also, if a line described as running from a given point to a natural object, like a highway or stream, unless the length or course of the line is given, the shortest line that can be drawn between the two objects must be held to have been intended, and therefore the line must be laid out at right angles with the stream or highway.[4] And when the line is described as running "between" two objects, or "from" one object "to" another, the objects, as well as the land lying between them, are excluded from the grant.[5]

Artificial Monuments in the United States Surveys.—At the close of the American revolution, when the present Constitution and general government were established, the different States which claimed title, under their charters from the crown of England, to large tracts of lands beyond the inhabited portions of their territory, and extending into the then unexplored West, ceded these lands to the United States; and all other lands to which Great Britain claimed title by the right of discovery, and which lay outside of the colonies, also became the property of the United States under the treaty which brought the revolution to a successful close. Since then there have been purchases and cessions of

1. Stone *v.* Clark, 1 Metc. (Mass.) 378; s. c., 35 Am. Dec. 370; Waterman *v.* Johnson, 13 Pick. (Mass.) 267; Abbott *v.* Abbott, 51 Me. 581; Opdyke *v.* Stephens, 28 N. J. L. 90; Frost *v.* Spalding, 19 Pick. (Mass.) 445; s. c., 31 Am. Dec. 150; Claremont *v.* Carlton, 2 N. H. 369; s. c., 9 Am. Dec. 88; Gratz *v.* Beates, 45 Pa. St. 504; Middleton *v.* Perry, 2 Bay (S. Car.), 539; Ferris *v.* Coover, 10 Cal. 624; Colton *v.* Seavey, 22 Cal. 496.

2. Lincoln *v.* Wilder, 29 Me. 169; Cox *v.* Freedley, 33 Pa. St. 124; Higinbotham *v.* Stoddard, 72 N. Y. 94; Fulwood *v.* Graham, 1 Rich. (S. Car.) 491; Bolton *v.* Lann, 16 Tex. 96; Ogden *v.* Porterfield, 34 Pa. St. 196; Behan *v.* Stapleton, 13 Gray (Mass.), 427; Ferris *v.* Coover 10 Cal. 624; Brown *v.* Huger, 21 How. (U. S.) 305; McIver *v.* Walker, 4 Wheat. (U. S.) 444; Newsom *v.* Pryor, 7 Wheat. (U. S.) 7; Shelton *v.* Maupin, 16 Mo. 124; Duren *v.* Presberry, 25 Tex. 512.

3. Allen *v.* Kingsbury, 16 Pick. (Mass.) 235; Jenks *v.* Morgan, 6 Gray (Mass.), 448; Hovey *v.* Sawyer, 5 Allen (Mass.), 585; Nelson *v.* Hall, 1 McLean (U. S.), 519; Caraway *v.* Chancy, 6 Jones L. (N. Car.) 364; Baker *v.* Talbott, 6 B. Mon. (Ky.) 179; McCoy *v.* Galloway, 3 Ohio, 382.

4. Bradley *v.* Wilson, 58 Me. 360; Van Gorden *v.* Jackson, 5 Johns. (N. Y.) 474; Craig *v.* Hawkins, 1 Bibb (Ky.), 64; Caraway *v.* Chancy, 6 Jones L. (N. Car.) 364; Hicks *v.* Coleman, 25 Cal. 142.

5. Bonney *v.* Morrill, 52 Me. 256; Revere *v.* Leonard, 1 Mass. 91; Hatch *v.* Dwight, 17 Mass. 289; s. c., 9 Am. Dec. 145; Carbrey *v.* Willis, 7 Allen (Mass.), 370; Millett *v.* Fowle, 8 Cush. (Mass.) 150; Wells *v.* Jackson Iron Co., 48 N. H. 491.

other lands from other nations, notably Louisiana, Florida, and the large tracts of territory ceded by Mexico at the close of the Mexican war. To all the lands included in this vast territory the United States claimed the title; and all private property in them, which was not acquired before the cessions to the United States, is derived by conveyance from the Federal government. These lands of the general government have been by official survey divided into townships and sections, and the latter again subdivided into fractions of a section—halves, quarters, and eighths. When these lands were sold by the government to private persons they were described by giving the number of the township, section, and subdivision of a section. The boundaries of these sections and fractions of a section were usually marked by artificial monuments,—corner-stones, as they are called,—which pointed out the corners of the tracts of land. If, therefore, a deed calls for a certain fraction of a certain section in a certain township, the location of the land and of its exact boundaries can, in most cases, be easily ascertained by referring to the maps and field notes of the surveyor. Maps and surveys are generally considered admissible evidence to determine boundaries;[1] and the United States statutes make the field notes and plats of the original surveyor the primary and best evidence of boundary.[2]

Ordinarily these field notes and maps call for artificial monuments to designate the corners of the tract of land, and if they are actually found upon an investigation of the land, the boundary is definitely determined by them in most cases, since artificial monuments will control courses and distances in government surveys as well as in ordinary cases.[3]

If the deed calls for natural monuments, as well as describes the land by a reference to the number of township, section, and fraction of a section, in accordance with the general rule that natural monuments will control both artificial monuments and the courses and distances, the boundaries would be determined by the natural monuments, although the plats and field notes would indicate a a different location.[4]

Sometimes it happens, in cases where there is no other description but a reference to the number of the township, section, and fraction

1. Haring *v.* Houten, 22 N. J. L. 61; Alexander *v.* Lively, 5 T. B. Mon. (Ky.) 159; s. c., 17 Am. Dec. 50; Bruce *v.* Taylor, 2 J. J. Marsh. (Ky.) 160; Steele *v.* Taylor, 3 A. K. Marsh. (Ky.), 226; s. c., 13 Am. Dec. 151; Madison City *v.* Hildreth, 2 Ind. 274; Tate *v.* Gray, 1 Swan (Tenn.), 73; Carmichael *v.* Trustees, 4 Miss. 84; McClintock *v.* Rogers, 11 Ill. 279.

2. U. S. Rev. Stat. sec. 2396: "The boundary lines actually run and marked in the surveys returned by the surveyor-general shall be established as the proper boundary lines of the sections or subdivisions for which they were intended." Bruce *v.* Taylor, 2 J. J. Marsh. (Ky.) 160; Steele *v.* Taylor, 3 A. K. Marsh. (Ky.) 226; McClintock *v.* Rogers, 11 Ill. 279.

3. Robinson *v.* Moore, 4 McLean (U. S.) 279; Hunt *v.* McHenry, Wright (Ohio), 599; Bayless *v.* Rupert, Wright (Ohio), 634; Bruckner *v.* Lawrence, 1 Dougl. (Mich.) 19; Climer *v.* Wallace; 28 Mo. 556.

4. Brown *v.* Huger, 21 How. (U. S.) 305; McIver *v.* Walker, 4 Wheat. (U. S.) 444; Newsom *v.* Pryor, 7 Wheat. (U. S.) 7; Shelton *v.* Maupin, 16 Mo. 124; Duren *v.* Presberry, 25 Tex. 512.

of a section, that upon an investigation of the land one or more of the corners are discovered to be lost. Wherever the natural and artificial monuments cannot be ascertained by proper evidence, the courses and distances will determine the location of the boundary.[1]

But when there is a variance between the monuments and the courses and distances as elements of description, before the courses and distances can be permitted to determine the boundaries all means for ascertaining the location of the monuments must first be exhausted, and parol evidence, even *hearsay* evidence, and evidence of general reputation, are admissible to establish their location.[2]

If the courses and distances noted by the government surveys were accurate, and corresponded exactly with the actual location of the corners, a reference to these courses and distances would give one the exact location of the lost corners; but, in making these measurements on such an extensive scale, the chains used by the surveyors were gradually stretched beyond the standard length, so that the courses and distances would call for less land than what was actually included within the established corners. Following the analogies of the general rules for the determination of the boundaries hereinbefore set forth, if there is no other way for establishing the lost corners but by reference to the courses and distances of the field notes, and the courses and distances of the two contiguous tracts of land, between which the boundary is to be ascertained, would include less land than what is found within the two known corners, the surplus of land must be divided between the two tracts of land in proportion to their respective lines in the plats.[3]

In *Missouri* it has been erroneously decided that the courses and distances according to the field notes must be measured off from the known corner on the eastern line of the township or section, throwing the surplus of land into the western section or fraction of a section.[4]

The *Missouri* rule is properly applicable under the United States statutes only to those cases in which the corners had not been established at all in the original survey.[5]

1. Heaton *v.* Hodges, 14 Me. 66; s. c., 30 Am. Dec. 731; Budd *v.* Brooke, 3 Gill (Md.), 198; s. c., 43 Am. Dec. 321; Bruckner *v.* Lawrence, 1 Dougl. (Mich.) 19; Calvert *v.* Fitzgerald, 6 Litt. (Ky.) 391.

2. Boardman *v.* Reed, 6 Pet. (U. S.) 341; Jackson *v.* McCall, 10 Johns. (N.Y.) 377; Lay *v.* Neville, 25 Cal. 545; Smith *v.* Shackleford, 9 Dana (Ky.), 452; McCoy *v.* Galloway, 3 Ohio, 288; Nixon *v.* Porter, 34 Miss. 697; Smith *v.* Prewitt, 2 A. K. Marsh. (Ky.) 158; Morton *v.* Folger, 15 Cal. 275; Stroud *v.* Springfield, 28 Tex. 649; Yates *v.* Shaw, 24 Ill. 367.

3. This rule is recognized and adopted in Jones *v.* Kimble, 19 Wis. 429, and constituted one of the printed instructions, issued by the United States land office to the United States deputy and county surveyors; and these instructions are by statute made a part of every contract for surveying land. U. S. Rev. Stat. sect. 2399.

4. Knight *v.* Elliott, 57 Mo. 322; Vaughn *v.* Tate, 64 Mo. 491; Major *v.* Watson, 73 Mo. 665.

5. See Tiedeman on Real Prop. § 832, for a more complete discussion of this question.

4. Navigable and Non-Navigable Streams.—As a general rule, where land is described as bounding on a non-navigable stream, the boundary line is the centre line of the stream, the *filum aquæ;* and this line changes its course with the gradual and natural changes in the current of the stream.[1]

But the thread of the stream is not always the boundary line, when the stream is referred to as a monument. If the stream is referred to, as the boundary, in general terms; or the land is described as "bounding on" or "running along" a stream; or the deed describes the line along the stream as extending from one object on the banks to another, for example, as "bounding on" the river and "extending from" one tree or other object on the shore to another, the stream will be considered the monument, and the thread or centre line of the stream the boundary. The *termini* of the boundary will be ascertained by drawing straight lines, at right angles with the shore, from these objects of description to the *filum aquæ*.[2]

But when the land is described as bounding "on the bank or shore" of the stream, then the bank or shore is the monument instead of the stream, and the low-water mark on the shore will be the boundary line.[3]

Where the stream or shore is referred to as the boundary, the boundary line follows its meanderings, and if the distance along the bank or stream is given, instead of referring to some objects on the shore to indicate the *termini* of the boundary, the *termini* are ascertained by reducing the irregular lines of the shore to a straight line, and the given distance measured off in that manner.[4]

Where land is bounded by a common-law navigable stream, i.e., in which the tide ebbs and flows, the boundary is the high-water mark on the shore.[5]

But in those States in which the large rivers are held to be

1. Morrison *v.* Keen, 3 Me. 474; Hatch *v.* Dwight, 17 Mass. 289; s. c., 9 Am. Dec. 145; People *v.* Canal Appraisers, 13 Wend. (N. Y.) 355; Commissioners *v.* Kempshall, 26 Wend. (N. Y.) 404; People *v.* Platt, 17 Johns. (N. Y.) 195; s. c., 8 Am. Dec. 382; Morgan *v.* Reading, 3 Smed. & M. (Miss.) 366; Browne *v.* Kennedy, 5 Har. & J. (Md.) 195; Hayes *v.* Bowman, 1 Rand. (Va.) 417; Lynch *v.* Allen, 4 Dev. & B. (N. Car.) 62; State *v.* Gilmanton, 9 N. H. 461; Arnold *v.* Elmore, 16 Wis. 514; Love *v.* White, 20 Wis. 432.

2. Lunt *v.* Holland, 14 Mass. 150; Commonwealth *v.* Alger, 7 Cush. (Mass.) 97; Cold Springs Iron Works *v.* Tolland, 9 Cush. (Mass.) 492; Newhall *v.* Ireson, 13 Gray (Mass.), 262; Railroad *v.* Schurmeier, 7 Wall. (U. S.) 286; Luce *v.* Carley, 24 Wend. (N. Y.) 451; s. c., 35 Am. Dec. 637; Varick *v.* Smith, 9 Paige (N. Y.), 547; Browne *v.* Chadbourne, 31 Me. 9; Robinson *v.* White, 42 Me. 218; Newton *v.* Eddy, 23 Vt. 319; Cox *v.* Freedley, 33 Pa. St. 129; McCulloch *v.* Aten, 2 Ohio, 425.

3. Bradford *v.* Cressey, 45 Me. 9; Child *v.* Starr, 4 Hill (N. Y.), 369; Halsey *v.* McCormick, 13 N. Y. 296; Babcock *v.* Utter, 1 Abb. Pr. (N. Y.) 27; Dunlap *v.* Stetson, 4 Mason (U. S.), 349; Daniels *v.* Cheshire R. Co., 20 N. H. 85; Martin *v.* Nance, 3 Head (Tenn.), 650; Watson *v.* Peters, 26 Mich. 516.

4. Calk *v.* Stribling, 1 Bibb (Ky.), 122; Hicks *v.* Coleman, 25 Cal. 142; People *v.* Henderson, 40 Cal. 32.

5. Canal Comrs. *v.* People, 5 Wend. (N. Y.) 423; Wheeler *v.* Spinola, 54 N. Y. 377; East Haven *v.* Hemingway, 7 Conn. 186; Niles *v.* Patch, 13 Gray (Mass.), 254; Stewart *v.* Fitch, 30 N. J. L. 20; Middleton *v.* Pritchard, 4 Ill. 520.

navigable, although the tide does not ebb and flow in them, the boundary line on those rivers is held to be at low-water mark.[1]

In both cases, as appurtenant to his land, the proprietor has a right, subject to government supervision for the benefit of the public, to erect wharves and piers, extending to low-water mark or into the channel of the stream.[2]

In determining the exact location of the low or high-water mark, reference is always had to the ordinary rise and fall of the water.[3]

The same rule applies to land bounded by the sea or by arms of the sea. The boundary is the high-water mark.[4]

In *Massachusetts* the common-law rule has been changed by statute, and non-riparian owners on navigable streams, and on arms of the sea, own up to low-water mark.[5]

What is a Navigable Stream.—According to the English common-law rule, all streams in which the tide ebbed and flowed were navigable streams, and all others were non-navigable.[6]

In *England* this rule is not so arbitrary and misleading as it could be if applied to the streams of this country. In England all tidal waters, and no others except the Thames above tide-water, are actually navigable by boats. But in the United States there are tidal streams which are too shallow to be navigable, and very many large, actually navigable, rivers, in which the tide does not ebb and flow. The common-law rule is therefore inapplicable to this country, and it is still a difficult matter to determine what is a navigable stream. The courts are at variance on all points, except one, viz., that where a stream is actually navigable by boats used in the prosecution of commerce and agriculture the public has a right to use them as highways, notwithstanding they are not tidal streams.[7]

1. Stover *v.* Jack, 60 Pa. St. 339; Wood *v.* Appal, 63 Pa. St. 221; Wainwright *v.* McCullough, 63 Pa. St. 66; Ryan *v.* Brown, 18 Mich. 196; Martin *v.* Evansville, 32 Ind. 85; Ensminger *v.* People, 47 Ill. 384; People *v.* Canal Comrs., 33 N. Y. 461; Edder *v.* Burrus, 6 Humph. (Tenn.) 367; Martin *v.* Nance, 3 Head (Tenn.), 650.

2. Ensminger *v.* Davis, 47 Ill. 384; Ryan *v.* Brown, 18 Mich. 196; Yates *v.* Milwaukee, 10 Wall. (U. S.) 497; Weber *v.* Harbor Comrs., 18 Wall. (U. S.) 64.

3. Stover *v.* Jack, 60 Pa. St. 339; Tinnicum Fishing Co. *v.* Carter, 61 Pa. St. 21; Wood *v.* Appal, 63 Pa. St. 221; Commonwealth *v.* Alger, 7 Cush. (Mass.) 63; Commonwealth *v.* Roxbury, 9 Gray (Mass.), 451; Martin *v.* O'Brien, 32 Miss. 21; City of Galveston *v.* Menard, 23 Tex. 349; Teschemacher *v.* Thompson, 18 Cal. 21.

4. Storer *v.* Freeman, 6 Mass. 435; s. c., 4 Am. Dec. 155; Commonwealth *v.* Roxbury, 9 Gray (Mass.), 492; Niles *v.* Patch, 13 Gray (Mass.), 254; Pollard *v.* Hogan, 3 How. (U. S.) 230; Goodtitle *v.* Kibbe, 9 How. (U. S.) 477; Hodge *v.* Boothby, 48 Me. 71; Cortelyou *v.* Van Brandt, 2 Johns. (N. Y.) 362; Ledyard *v.* Ten Eyck, 36 Barb. (N. Y.) 125; Mather *v.* Chapman, 40 Conn. 382; Dana *v.* Jackson St. Wharf, 31 Cal. 120.

5. Boston *v.* Richardson, 105 Mass. 353; Paine *v.* Woods, 108 Mass. 168; Valentine *v.* Piper, 22 Pick. (Mass.) 94.

6. Washb. on Real Prop. 413; People *v.* Tibbetts, 19 N. Y. 523; Commonwealth *v.* Chapin, 5 Pick. (Mass.) 199.

7. The Daniel Ball, 10 Wall. (U. S.) 557; The Montello, 20 Wall. (U. S.) 439; Spring *v.* Russell, 7 Me. 273; Brown *v.* Chadbourne, 31 Me. 9; s. c., 50 Am. Dec. 641; Ingraham *v.* Wilkinson, 4 Pick. (Mass.) 268; s. c., 16 Am. Dec. 342; Commonwealth *v.* Alger, 7 Cush. (Mass.) 53; Canal Commissioners *v.* People, 5 Wend. (N. Y.) 423; People *v.* Platt, 17

But the public may have the right to use the stream the title to whose bed is in the riparian proprietors. The courts are unanimous that the title to the beds of tidal streams is ordinarily in the State, the boundary lines of riparian properties being at high-water mark.[1] But it would be absurd to apply this rule to tidal streams so shallow that they cannot float boats of the lightest draught, and so it has been held that the title to salt-water creeks which are not actually navigable is in the riparian proprietors, and the boundary line is the centre of the creek.[2]

In respect to the title to the beds of fresh-water streams the courts are divided; some holding that the title is in the State, like the tidal streams,[3] while others hold that the title to the bed of those fresh-water streams which are open to the use of the public is in the riparian proprietors, a distinction being drawn between *public* and *navigable* streams.[4]

It will require further adjudication or legislation to bring about a unanimity of legal opinion on this subject in all the States.[5]

5. Ponds and Lakes.—If the pond or lake is natural, the boundary line is along the edge at low-water mark.[6] If it be artificial, the

Johns. (N. Y.) 195; Palmer *v.* Mulligan, 3 Caines (N. Y.), 307; s. c., 2 Am. Dec. 275; Claremont *v.* Carlton, 2 N. H. 369; s. c., 9 Am. Dec. 88; O'Fallon *v.* Daggett, 4 Mo. 343; s. c., 29 Am. Dec. 640; Middleton *v.* Pritchard, 4 Ill. 510; s. c., 38 Am. Dec. 112; Morgan *v.* Reading, 3 Smed. & M. (Miss.) 366; Cates *v.* Waddington, 1 McCord (S. Car.), 580; s. c., 10 Am. Dec. 699; Gavit *v.* Chambers, 3 Ohio, 495; Blanchard *v.* Porter, 11 Ohio, 138; Home *v.* Richards, 4 Call (Va.), 441; s. c., 2 Am. Dec. 574; Shrunk *v.* Schuylkill Co., 14 Serg. & R. (Pa.) 71; McManus *v.* Carmichael, 3 Iowa, 1; Commissioners, etc., *v.* Withers, 29 Miss. 29.

1. Commonwealth *v.* Chapin, 5 Pick. (Mass.) 199; s. c., 16 Am. Dec. 385; People *v.* Tibbetts, 19 N. Y. 523; Smith *v.* Levinus, 8 N. Y. 472; Keyport Steamboat Co. *v.* Farmers' Transp. Co., 18 N. J. Eq. 13; Cobb *v.* Davenport, 32 N. J. L. 369; Flanagan *v.* Philadelphia, 42 Pa. St. 219.

2. Rowe *v.* Granite Bridge Corp., 21 Pick. (Mass.) 344; Glover *v.* Powell, 10 N. J. Eq. 211. See State *v.* Gilmantown, 14 N. H. 467; Wilson *v.* Forbes, 2 Dev. L. (N. Car.) 30; Am. River, etc., Co. *v.* Amsden, 6 Cal. 443.

3. Barney *v.* Keokuk, 94 U. S. 324; Carson *v.* Blazer, 2 Binn. (Pa.) 475; Shrunk *v.* Schuylkill Co., 14 Serg. & R. (Pa.) 71; Houghton *v.* Chicago, etc., R. Co., 47 Iowa, 370; McManus *v.* Carmichael, 3 Iowa, 1; Tomlin *v.* Dubuque, etc., R. Co., 32 Iowa, 106; Stover *v.* Jack, 60 Pa. St. 339; Wainwright *v.* McCullough, 63 Pa. St. 66; Martin *v.* Evansville, 23 Ind. 85; People *v.* Canal Com'rs, 33 N. Y. 461; Benson *v.* Morrow, 61 Mo. 345; Bullock *v.* Wilson, 2 Port. (Ala.) 436; Martin *v.* Nance, 3 Head (Tenn.), 650; Wilson *v.* Forbes, 2 Dev. L. (N. Car.) 30.

4. Steamboat Magnolia *v.* Marshall, 39 Miss. 109; Canal Appraisers *v.* People, 17 Wend. (N. Y.) 595; Adams *v.* Pease, 2 Conn. 481; Ingraham *v.* Wilkins, 4 Pick. (Mass.) 268; Commonwealth *v.* Alger, 7 Cush. (Mass.) 53; People *v.* Platt, 17 Johns. (N. Y.) 195; Palmer *v.* Mulligan, 3 Caines (N. Y.), 307; s. c., 2 Am. Dec. 270; Claremont *v.* Carlton, 2 N. H. 369; s. c., 9 Am. Dec. 88; O'Fallon *v.* Daggett, 4 Mo. 343; s. c., 29 Am. Dec. 640; Houck *v.* Yates, 82 Ill. 179; Bay City Gaslight Co. *v.* Industrial Works, 28 Mich. 182; Morgan *v.* Reading, 3 Smed. & M. (Miss.) 366; Blanchard *v.* Porter, 11 Ohio, 138; Braxon *v.* Bressler, 64 Ill. 488; Rhodes *v.* Otis, 33 Ala. 578; Berry *v.* Snyder, 3 Bush (Ky.), 266; Schurmeier *v.* St. Paul, etc., R. Co., 10 Minn. 82; Walker *v.* Public Works, 16 Ohio, 540; Ryan *v.* Brown, 18 Mich. 196; Lorman *v.* Benson, 8 Mich. 18; Ensminger *v.* People, 47 Ill. 384.

5. See Tiedeman on Real Prop. § 835, in which suggestions are offered looking to a reconcilement of the authorities.

6. Waterman *v.* Johnson, 13 Pick. 261; West Roxbury *v.* Stoddard, 7 Allen, 167; Nelson *v.* Butterfield, 21 Me. 229; Manton *v.* Blake, 62 Me. 38; Canal Com'rs *v.* People, 5 Wend. 446; Wheeler *v.* Spi-

boundary is through the centre.[1] If a natural pond or lake is raised and enlarged by artificial means, the boundary line will continue at the low-water mark in its natural condition; so that if the dam or trench be removed, allowing the water to return to its original basin, it has been held that the land thus left bare will belong to the riparian owners.[2] The conversion of a fresh-water pond into a salt one by an artificial trench or channel from the sea will not change the boundary. But the boundary will vary with the ordinary natural change in the low-water mark.[3]

6. Highways and Parks.—Where land is bounded by a highway or street, the location of the boundary line will in the first place depend upon the character of the public right to the road or street. If the State or municipality owns the bed of the road, the boundary line of the abutting land is the nearer edge of the roadway.[4] But if the public only have a right of way over the land, and not a title to the soil, then the location of the boundary line depends upon the intention of the grantor, as manifested by the language of the deed, and the same rules of construction apply as are found in practical use in the case of non-navigable streams. If the land is described as "bounding on," "running along," the highway, and the like, the boundary line is the centre of the highway, although the dimensions of the lot would exclude the highway; and in all cases of doubt the presumption is always in favor of the boundary being in the centre of the road.[5] But if the land is described as bounded by "the side" of the street, or the intention

nola, 54 N. Y. 377; Jakeway *v.* Barrett, 38 Vt. 323; Austin *v.* Rutland R. Co., 45 Vt. 215; Primm *v.* Walker, 38 Mo. 99.

1. Bradley *v.* Rice, 13 Me. 198; s. c., 29 Am. Dec. 501; Lowell *v.* Robinson, 16 Me. 357; Waterman *v.* Johnson, 13 Pick. (Mass.) 261; Phinney *v.* Watts, 9 Gray (Mass.), 269; Wheeler *v.* Spinola, 54 N. Y. 377.

2. Hathorn *v.* Stinson, 12 Me. 183; Bradley *v.* Rice, 13 Me. 200; s. c., 29 Am. Dec. 501; Waterman *v.* Johnson, 13 Pick. (Mass.) 261.

But the position here taken in these cases has been qualified in later decisions to this extent, viz., that unless the deed bears internal evidence that the grantor had in mind the natural condition of the pond when he was describing the land, the boundary will be the low-water mark of the pond at the time when the conveyance was made. See Wood *v.* Kelley, 30 Me. 47; Paine *v.* Woods, 108 Mass. 170.

3. 3 Washb. on Real Prop. 417; Wheeler *v.* Spinola, 54 N. Y. 377.

4. White *v.* Godfrey, 97 Mass. 472; Dunham *v.* Williams, 37 N. Y. 251; Falls *v.* Reis, 74 Pa. St. 439; Kings County Fire Ins. Co. *v.* Stevens, 87 N. Y. 287.

5. Berridge *v.* Ward, 10 C. B. N. S. 400; Johnson *v.* Anderson, 18 Me. 76; Cottle *v.* Young, 59 Me. 105; O'Linda *v.* Lothrop, 21 Pick. (Mass.) 298; Parker *v.* Framingham, 8 Metc. (Mass.) 267; Fisher *v.* Smith, 9 Gray (Mass.), 441; Harris *v.* Elliott, 10 Pet. (U. S.) 53; Banks *v.* Ogden, 2 Wall. (U. S.) 57; Morrow *v.* Willard, 30 Vt. 118; White *v.* Godfrey, 97 Mass. 47; Wallace *v.* Fee, 50 N. Y. 694; Milhau *v.* Sharp, 27 N. Y. 624; Jackson *v.* Hathaway, 15 Johns. (N. Y.) 454; Sherman *v.* McKeon, 38 N. Y. 271; Child *v.* Starr, 4 Hill (N. Y.), 369; Read *v.* Leeds, 19 Conn. 187; Winter *v.* Peterson, 24 N. J. L. 527; Paul *v.* Carver, 24 Pa. St. 207; Cox *v.* Freedley, 33 Pa. St. 124; Witter *v.* Harvey, 1 McCord (S. Car.), 67; Trustees *v.* Louder, 8 Bush (Ky.), 680; Canal Trustees *v.* Havens, 11 Ill. 557; Kimball *v.* Kenosha, 4 Wis. 331; Weisbrod *v.* C. & N. W. R. Co., 18 Wis. 43; Dubuque *v.* Maloney, 9 Iowa, 458; Gear *v.* Barnum, 37 Conn. 229; Oxton *v.* Groves, 68 Me. 371; s. c., 28 Am. Rep. 75; Low *v.* Tibbetts, 72 Me. 92; s. c., 39 Am. Rep. 303; Stark *v.* Coffin, 105 Mass. 328; Salter *v.* Jonas, 10 Vroom, 469; 23 Am. Rep. 229. See Hoboken Land Co. *v.* Kerrigan, 30 N. J. L. 16; Palmer *v.* Dougherty, 33 Me. 507.

to exclude the soil of the street is indicated in any other manner, the boundary will be the nearer edge of the roadway.[1]

And where there has once been such a conveyance, excluding the soil of the street, since the grantee of such a conveyance owns only to the edge of the street, he cannot in any subsequent conveyance by any words of description extend the boundary of the land to the centre of the highway.[2] Where the highway is referred to as the boundary, the actual line, as it is laid out, will be taken as the true line of the street. Although encroachments by abutting owners do not become legalized by lapse of time, it seems that if a fence is maintained on a certain line for twenty years, or whatever is the statutory period of limitation in respect to actions for the recovery of lands, the fence will be considered the true line, if the real boundary cannot be ascertained from the records.[3]

But the rule is different in respect to parks as monuments. If the land is described as bounded by a park, the boundary will be the exterior line of the park, and not the centre.[4]

7. **Courses and Distances.**—Where courses and distances are given in a deed, conveying a city lot of comparatively small dimensions, they are very much relied upon in the ascertainment of the boundaries. And where there are no monuments, parol evidence will not be permitted to control or vary them, even though the admeasurements are given as so many feet, "more or less."[5] When the course is described as "northerly" or "southerly," the line is always understood to be "due" north or south, but the direction of the line is always ascertained by a reference to the magnetic meridian.[6]

8. **Quantity.**—The quantity of land conveyed is sometimes given; but, except when there is a covenant as to the quantity, it is seldom resorted to for the purpose of determining the boundary, and it is very rarely, if ever, permitted to control courses and distances.[7]

1. Salisbury *v.* G. N. R. Co., 5 C. B. N. S. 174; Sibley *v.* Holden, 10 Pick. (Mass.) 249; s. c., 20 Am. Dec. 521; Smith *v.* Slocomb, 9 Gray (Mass.), 36; s. c., 69 Am. Dec. 274; Brainard *v.* Boston, etc., R. Co., 12 Gray (Mass.). 410: Morrow *v.* Willard, 30 Vt. 118; Hoboken Land Co. *v.* Kerrigan, 30 N. J. L. 16.

2. Brainard *v.* Boston, etc., R. Co., 12 Gray (Mass.), 410; Church *v.* Meeker, 34 Conn. 426; Dunham *v.* Williams, 37 N. Y. 251.

3. Hallenbeck *v.* Rowley, 8 Allen (Mass.), 475; Fisher *v.* Smith, 9 Gray (Mass.), 441; Lozier *v.* N. Y. Cent. R. Co., 42 Barb. (N. Y.) 468; Bissell *v.* N. Y. Cent. R. Co., 23 N. Y. 61; Cross *v.* Morristown, 18 N. J. Eq. 305.

4. Perrine *v.* N. Y Cent. R. Co., 40 Barb. (N. Y.) 65; Hanson *v.* Campbell, 20 Md. 223.

5. Drew *v.* Swift, 46 N. Y. 209; Chadbourne *v.* Mason, 48 Me. 391; Bagley *v.* Morrill, 46 Vt. 94; Flagg *v.* Thurston, 13 Pick. (Mass.) 145; Blaney *v.* Rice, 20 Pick. (Mass.) 62; s. c., 32 Am. Dec. 204; Block *v.* Pfaff, 101 Mass. 538; Cherry *v.* Slade, 3 Murph. (N. Car.) 82; Welch *v.* Phillips, 1 McCord (S. Car.), 215.

6. Brandt *v.* Ogden, 1 John. Cas. (N. Y.) 158; Gordon *v.* Jackson, 5 Johns. (N. Y.) 473; Jackson *v.* Reeves, 3 Caines (N. Y.), 293; Wells *v.* Company, 47 N. H. 235; Bosworth *v.* Danzien, 25 Cal. 296.

7. Mann *v.* Pearson, 2 Johns. (N. Y.) 37; Jackson *v.* Defendorff, 1 Caines (N. Y.), 493; Powell *v.* Clark, 5 Mass. 355; s. c., 4 Am. Dec. 67; Snow *v.* Chapman,

9. Fences.—A fence is "an enclosure about a field; especially an enclosing structure of wood, iron, or other material, intended to prevent intrusion from without or straying from within." (Webster.)

The common law required the owner of domesticated animals to prevent their straying upon the lands of others, even though the lands were not enclosed. The law did not require the owners of lands to protect themselves by fences against estrays. But in consequence of the abundance of waste lands in the United States, it was considered wise to abrogate the common law in this respect more or less, so that the waste lands could be conveniently utilized for grazing. There is some difference in the scope of the modifying statutes of the different States. In some of the States, particularly the Eastern States, the common law was retained, so far as it made it unlawful for animals to roam at large upon the highway, imposing no obligation upon the owner of land to construct and maintain an *outside* fence, as a protection against cattle going at large upon the highways; but in these States it is now required that owners of land shall erect and maintain fences between adjoining properties, called *division* fences, and all right of action for trespass *damage feasant* is denied to the owner of land who does not comply with the law in maintaining a proper lawful fence.[1] In the Western States, as a general rule, cattle are allowed to roam at large, and the owner of land is required to fence the land on all sides.[2] But while, under the American statute law, the owner of land is denied all right of action for the trespass of cattle if he does not maintain a lawful fence, it is not permitted to owners of stock to drive them on another's land, and if they do so they are liable for trespass in any case.[3]

Although the statutes require a certain kind of fence to be constructed between adjoining tracts of land, the adjoining proprietors may agree upon some other kind of fence, and as between themselves the agreement constitutes a waiver of statutory rights.[4]

There is a difference in the matter of obligation between the *outside* and *division fences*. The owner of land is not obliged under any circumstances to construct and maintain an *outside* fence; if he fails to do so, he simply loses his right of action

1 Root (Conn.), 528; Commissioners *v.* Thompson, 4 McCord (S. Car.), 434; Hall *v.* Mahew, 15 Md. 551; Miller *v.* Bentley, 5 Sneed (Tenn.), 671; Wright *v.* Wright, 34 Ala. 194; Dutton *v.* Rust, 22 Tex. 133; Ufford *v.* Wilkins, 33 Iowa, 113; Ward *v.* Crotty, 4 Metc. (Ky.) 103; Stanley *v.* Green, 12 Cal. 148; Llewellyn *v.* Jersey, 11 Mees. & W. 183.

1. Stackpole *v.* Healey, 16 Mass. 36; Weymouth *v.* Gile, 72 Me. 446; Wells *v.* Howell, 19 Johns. (N. Y.) 385; Lord *v.* Wormwood, 29 Me. 282; Lyman *v.* Gibson, 18 Pick. (Mass.) 422; Mills *v.* Stark, 4 N. H. 512 (17 Am. Dec. 444).

2. Seeley *v.* Peters, 5 Gilm. (Ill.) 130; Wells *v.* Beal, 9 Kans. 597.

3. Melody *v.* Read, 4 Mass. 471; Delany *v.* Errickson, 11 Neb. 533; Logan *v.* Gedney, 38 Cal. 579; Caulkins *v.* Matthews, 5 Kans. 191; U. P. R. Co. *v.* Rollins. 5 Kans. 167; Dent *v.* Ross, 52 Miss. 188.

4. Albright *v.* Bruner, 14 Ill. App. 319; Dent *v.* Ross, 52 Miss. 188; Milligan *v.* Wehinger, 68 Pa. St. 235; Stone *v.* Wait, 50 Vt. 663; Miner *v.* Deland, 18 Pick. (Mass.) 266. Such an agreement need not be in writing. Bills *v.* Belknap, 38 Iowa, 225.

against the owners of trespassing cattle. But where the law requires a division fence, it gives to one adjoining proprietor the right and power to compel the other to do his part towards the erection of the fence.[1] The statutes vary somewhat in detail, but they generally require the owners of lands to contribute towards the maintenance of a division fence, as soon as his land ceases to be a common, or when it is enclosed, or otherwise improved.[2] A division fence should be constructed directly on the boundary line; but a worm or zigzag fence may be so constructed as to cross the line from side to side, one half of the fence being on each side of the line.[3] But if more than half of the fence is placed on one man's land, he may remove it to its proper location.[4] If a division fence is not placed upon the true line, he who constructs it cannot compel the other to contribute towards its cost, unless he assents to it by acquiescence or previous agreement.[5]

The statutes usually describe what are the qualities of a lawful fence, and there must be a substantial compliance with these requirements, in order that the landowner may claim damages for the trespass of cattle.[6]

The statutes provide for the joint contribution of the adjoining proprietors towards the cost of the division fence, and if one should refuse to contribute, he may be compelled to contribute his one half of the cost, even though the fence that has been erected was not as economical a fence as might have been constructed.[7] Ordinarily the owner of the land is the one liable to contribution, but if the land is leased, the lessee may be compelled to contribute.[8] Unless there is a special agreement between the parties in respect to fencing, the statutory remedy must be pursued, for the recovery of the contribution.[9] In the absence of a special statutory pro-

1. Mann *v.* Williamson, 70 Mo. 661; Chase *v.* Chase, 15 Nev. 259; Oil *v.* Rowley, 69 Ill. 469; Aylesworth *v.* Harrington, 17 Mich. 417; Morris *v.* Fraker, 5 Col. 425; Clark *v.* Stipp, 75 Ind. 114; Kerwhacher *v.* Railroad Co., 3 Ohio St. 172.

2. Perkins *v.* Perkins, 44 Barb. 134; Jones *v.* Perry, 50 N. H. 134; Rohrer *v.* Rohrer, 18 Pa. St. 367; Palmer *v.* Silverthorn, 32 Pa. St. 65; Talbot *v.* Blacklege, 22 Iowa, 572; Otis *v.* Morgan, 61 Iowa, 712; Chase *v.* Jefts, 58 N. H. 280; Slate *v.* McMinn, 81 N. Car. 585; State *v.* Perry, 64 N. Car. 305; Hoenig *v.* Hornberg, 24 Minn. 367.

3. Ferris *v.* Buskirk, 18 Barb. (N. Y.) 397; Patterson *v.* Lancy, 48 Mo. 380; Newell *v.* Hill, 2 Metc. (Mass.) 180.

4. Sparhawk *v.* Twitchell, 1 Allen, 450; Sims *v.* Field, 74 Mo. 139; Jeffries *v.* Burgin, 57 Mo. 327; State *v.* Watson, 86 N. Car. 626.

5. Oxboro *v.* Boesser, 30 Minn. 1; Avary *v.* Searcy, 50 Ala. 54; Robb *v.* Brachman, 24 Ohio St. 3; Kennedy *v.* Owen, 131 Mass. 431.

6. Scott *v.* Buck, 85 Ill. 334; Scott *v.* Wirshing, 64 Ill. 102; Allen *v.* Tobias, 77 Ill. 169; Runyan *v.* Patterson, 87 N. C. 343; Hilliard *v.* Railroad Co., 37 Iowa, 442; Phillips *v.* Oyster, 32 Iowa, 257; Race *v.* Snyder, 10 Phila. (Pa.) 583; State *v.* Land, 8 Ired. L. (N. Car.) 229; Lamb *v.* Hicks, 11 Met. (Mass.) 496; Canefox *v.* Crenshaw, 24 Mo. 199; Adams *v.* McKinney, Add. (Pa.) 258; Barnum *v.* Vandusen, 15 Conn. 200; Moore *v.* White, 45 Mo. 206; Kerwhacker *v.* R. Co., 3 Ohio St. 172; Jones *v.* Witherspoon, 7 Jones L. (N. Car.) 555; Soule *v.* Barlow, 48 Vt. 132; Tripp *v.* Hazell, 1 Strobh. (S. Car.) 173.

7. Rohrer *v.* Rohrer, 18 Pa. St 367; Hewitt *v.* Jewell, 59 Iowa, 37; Hall *v.* Andrew, 75 Ill. 252; Brawner *v.* Laughton, 57 Mo. 516.

8. Tewsbury *v.* Bucklin, 7 N. H. 578.

But not a mere foreman or agent of the landowner. State *v.* Taylor, 69 N. Car. 543.

9. Burr *v.* Hames, 12 Neb. 483.

vision to the contrary, the ordinary courts will have jurisdiction over all disputes arising out of the construction and maintenance of division fences. But in some of the States the statutes provide a special judicial tribunal, called *fence-viewers*, for the hearing of all such disputes.[1] Their proceedings are not very formal, and the rules of procedure are as irregular as those of the courts of justices of the peace, care only being required that all the parties are summoned before the court and are given an opportunity in their own defence, in conformity with the fundamentals of our constitutional law.[2] Their judgments are conclusive upon the parties or not, according to the provision of the statute; they are not conclusive, unless it is so provided by the statute.[3] The decision need not be in writing.[4]

The division fence is the joint property of the adjoining proprietors, and it cannot be removed or otherwise interfered with, without the consent of all parties.[5]

10. Party-walls.—A party-wall is one which is erected between two lots for the common benefit of the owners thereof in supporting the beams of their adjoining buildings. They are not tenants in common of the entire wall. Each has the title in severalty to one half, with an easement for support in the other half. Each of the owners can do whatever he pleases with his own half, provided he does not weaken the support of the other half. And if he tears down his half, he does it at the risk of rendering himself liable for any injuries sustained by the remaining portion of the wall.[6] But it is not every wall which is common between two houses that has the characteristics of a party-wall. But every such wall by constant use as a common wall for the statutory period of limitation will become a party-wall by prescription.[7] Party-walls are generally erected by express agreement of the parties, each paying his share of the expenses. The mere erection by one of a common

1. McKeever *v.* Jencks, 59 Iowa, 300; Oxboro *v.* Boeser, 30 Minn. 1; Bills *v.* Belknap, 38 Iowa, 225; Sanborn *v.* Fellows, 22 N. H. 473; Thompson *v.* Batson, 78 Ill. 277.

2. See Talbott *v.* Blacklege, 22 Iowa, 312; Briggs *v.* Haynes, 68 Me. 535; Tabbs *v.* Ogden, 46 Iowa, 134; Fox *v.* Beebs, 24 Conn. 271; Hale *v.* Andrews, 75 Ill. 252; Holliday *v.* Swailes, 1 Scam. (Ill.) 515; Harris *v.* Sturdivant, 29 Me. 366; Lockhardt *v* Wessels, 45 Iowa, 81; Scott *v.* Dickinson, 14 Pick. (Mass.) 276; Shriver *v.* Stephens. 20 Pa. St. 138; Fairbanks *v.* Childs, 44 N. H. 458; Lambs *v.* Hicks, 11 Metc. (Mass.) 497; Bailey *v.* Bryan, 3 Jones L. (N. Car.) 357; Sears *v.* Charlemonte, 6 Allen (Mass.), 437; Shaw *v.* Gilfillan, 22 Vt. 565; Talcott *v.* Stillman, 29 Conn. 193.

3. Bills *v.* Belknap, 38 Iowa, 225; Baker *v.* Lakeman, 12 Metc. (Mass.) 195; Nelson *v.* Stewart, 2 Murph. (N. Car.) 298; Robb *v.* Brachman, 24 Ohio St. 3; Butler *v.* Barbour, 2 Wis. 107; Miller *v.* Sanborn, 54 Vt. 532; Grey *v.* Edrington, 29 Kans. 208; Beschange *v.* Mueller, 50 Iowa, 237.

4. Tubbs *v.* Ogden, 46 Iowa, 134.

5. Walker *v.* Watrous, 8 Ala. 493; Drees *v.* State, 37 Ark. 122; Sayles *v.* Bemis, 57 Wis. 315; Stallcup *v.* Bradley, 3 Coldw. (Tenn.) 406; McCormick *v.* Tate, 20 Ill. 335; Holliday *v.* Marsh, 3 Wend. (N. Y.) 142; s.c., 20 Am. Dec. 578. But the fence may be taken down for the purpose of repair, or for the purpose of rebuilding with other materials. Burrell *v.* Burrell, 11 Mass. 294.

6. Matts *v.* Hawkins, 5 Taunt. 20; Sherred *v.* Cisco, 4 Sandf. (N. Y.) 480; Bubois *v.* Beaver, 25 N. Y. 127; Brooks *v.* Curtis, 50 N. Y. 639; s.c., 10 Am. Rep. 545; Orman *v.* Day, 5 Fla. 385.

7. Eno *v.* Del Vecchio, 4 Duer, 53; Dowling *v.* Hennings, 20 Md. 179. But

wall between them will not subject the other to liability for one half the expenses of erection, even though he derives as much benefit from it as the one who caused its construction.[1] Party-walls are generally, though not necessarily, erected one half on each of the contiguous estates.[2] See PARTY-WALLS.

BOUNDED. See BOUNDARIES.

BOUNTY. See MILITARY LAW; PENSIONS; WAR.

BOYCOTT—BOYCOTTING. (See also CONSPIRACY.)—In a criminal sense, a conspiracy formed and intended directly or indirectly to prevent the carrying on of any lawful business, or to injure the business of any one by wrongfully preventing those who would be customers from buying anything from, or employing, the representatives of said business, by threats, intimidation, or other forcible means.[3]

see Mitchell *v.* Mayor, 49 Ga. 19; s.c., 15 Am. Rep. 669; Napier *v.* Bulwinkle, 5 Rich. (S. Car.) 311.

1. Richardson *v.* Tobey, 121 Mass. 457; s.c, 23 Am. Rep. 283; Sherred *v.* 4 Sandf. 480; Dole *v.* Hughes, 54 N. Y. 444; s.c., 13 Am. Rep. 611; Orman *v.* Day, 5 Fla. 385.

One part owner may be sued on his covenant for his share of the expenses. Day *v.* Caton, 115 Mass. 513; s.c., 20 Am. Rep. 347; Rindge *v.* Baker, 57 N. Y. 207; s.c., 15 Am. Rep. 475. But a covenant to build a party-wall is executory and personal in its nature, and does not run with the land, so as to bind the assigns of the covenantors. Cole *v.* Hughes, 54 N. Y. 444; s.c., 13 Am. Rep. 611.

2. See Cubitt *v.* Porter, 8 B. & C. 257; Wiltshire *v.* Sidford, 8 B. & C. 259; Bradley *v.* Christ's Hospital, 4 Mann. & G. 761; Brondage *v.* Warner, 2 Hill (N. Y.). 145; Partridge *v.* Gilbert, 15 N. Y. 601; Evans *v.* Jayne, 23 Pa. St. 36; Dowling *v.* Hennings, 20 Md. 179.

3. Opinion of Atkins, J., in Com. *v.* Shelton, 11 Va. Law Jour. 329. The definition in the text is not advanced in the opinion as such, but is presented as applicable to a "boycott" so far, at any rate, as that falls within legal censure or prohibition.

In State *v.* Glidden, 8 Atl. Repr. 890, Conn. (reported also in 35 Alb. L. Jour. 348; 1 R. & Corp. L. Jour. 386; 3 New Eng. Repr. 858), it is said: "We will also notice that it is alleged that the conspiracy contemplated boycotting as a means to the end sought. That word is not easily defined. It is frequently spoken of as passive merely—a let-alone policy; a withdrawal of all business relations, intercourse, and fellowship. If that is its only meaning, it will be difficult to find anything in it criminal. We may gather some idea of its real meaning, however, by a reference to the circumstances in which the word originated. Those circumstances are thus narrated by Mr. Justin H. MacCarthy, an Irish gentleman of learning and ability, who will be recognized as good authority. In his work entitled 'England under Gladstone' he says: 'The strike was supported by a form of action, or rather inaction, which soon became historical. Captain Boycott was an Englishman, an agent of Lord Earne, and a farmer of Lough Mask, in the wild and beautiful district of Connemara. In his capacity as agent he had served notices upon Lord Earne's tenants, and the tenantry suddenly retaliated in a most unexpected way, by, in the language of schools and society, sending Captain Boycott to Coventry in a very thorough manner. The population of the region for miles round resolved not to have anything to do with him, and, as far as they could prevent it, not to allow any one else to have anything to do with him. His life appeared to be in danger; he had to claim police protection. His servants fled from him as servants flee from their masters in some plague-stricken Italian city. The awful sentence of excommunication could hardly have rendered him more helplessly alone for a time. No one would work for him; no one would supply him with food. He and his wife had to work in their own fields themselves, in most unpleasant imitation of Theocritan shepherds and shepherdesses, and play out their grim eclogue in their deserted fields, with the shadows of armed constabulary ever at their heels. The Orangemen of the north heard of Captain Boycott and his sufferings, and the way in

BRANCH.—A particular line of descent, as distinguished from other lines having the same common ancestor.

The definition of a "branch" railroad does not "depend either upon its length or direction. If the projection of a completed road for one square is too short for a branch, then what distance will be required to allow the use of this term? The question involves in itself its own absurdity. The mistake is found in giving too narrow a definition to the word 'branch.' According to Worcester it may mean 'any distinct article or portion; a section; a subdivision.' But if for the word 'branch' we use 'section,' the subject under discussion is relieved of all possible obscurity. In like manner are we delivered from hesitancy in the matter of direction; that is, whether we are to regard the word 'branch' as merely an offshoot of the main road, or whether we may apply it to a direct extension from the terminus, since the substitution of the word 'section' dissipates anything like doubt on this score." [1]

which he was holding his ground, and they organized assistance and sent him down armed laborers from Ulster. To prevent civil war, the authorities had to send a force of soldiers and police to Lough Mask, and Captain Boycott's harvests were brought in and his potatoes dug by the armed Ulster laborers, guarded always by the little army.' If this is a correct picture, the thing we call a boycott originally signified violence, if not murder. If the defendants, in their handbills and circulars, used the word in its original sense in its application to the Carrington Publishing Company, there can be no doubt of their criminal intent. We prefer, however, to believe that they used it in a modified sense. As an importation from a foreign country, we may presume that they intended it in a milder sense—in a sense adapted to the laws, institutions, and temper of our people. In that sense it may not have been criminal. But even here, if it means, as some high in the confidence of the trades-union assert, absolute ruin to the business of the person boycotted unless he yields, then it is criminal. . . . From these considerations it is apparent that the purpose of this conspiracy, or the means by which it was to be accomplished, or both, were not only unlawful, but, as some authorities express it, 'were in some degree criminal.'"

In Reg. *v.* Barrett, 18 L. R. Jr. 430; s. c., 8 Crim. L. Mag. 574, it is said: "In the present case the traverser has knowingly published a notice which wrongfully and without legal authority requires the traders of Loughrea to abstain from doing what they have a legal right to do, viz., to supply their goods to persons with whom they are entitled to deal; and the same notice contains a threat to interfere with, and endeavor to ruin, their trade if they exercise such right, for this is the well-known meaning of the threat 'to boycott them.' . . . The traverser threatened that he and the other members of the League (and the resolution was passed at a large meeting) would boycott any person who sold goods to the caretakers. It was said that boycotting is not a legal term, and that an innuendo should have been added, 'meaning thereby, and so forth;' but we are not dealing with an action of libel, and special demurrers, but with facts and conduct. The jury would thoroughly understand the meaning of the term; they would not perhaps understand the meaning of the word 'ostracizing,' a classical word of ancient origin. Boycotting is a term of modern invention, but has become emphatic, unmistakable. Many words are of modern origin—'to burke,' 'to guillotine.' They would not perhaps be found in Johnson's or Webster's dictionaries, but their meaning is not the less known. The threat to boycott these traders in case they supplied the goods seems to threaten very serious injury and damage, at least to the property and trade of these traders—such an injury and damage as would tend to the deprivation of some considerable portion of the business in which they were engaged. This injury seems to me entirely to flow from the acts threatened to be done." In a dissenting opinion it is said: "The words in the section are, 'violence, injury, or damage,' and a threat of being 'boycotted' would not, in my opinion, in the ordinary acceptation of the word, amount to a threat of violence, injury, or damage within the terms of the section."

1. McAboy's Appeal 107 Pa. 548,

The character of a road as a "branch" is in no sense affected by the incident that to reach its objective point it makes a *détour* that increases its length over that of the main line.[1]

The main branch of a river is not necessarily that in whose channel water might be found at all seasons of the year, at the point farthest removed from its mouth. The largest volume of water is certainly one criterion of the main stream; the length of the stream is another.[2]

In constitutional provisions respecting the legislature, the terms "branch" and "house" are used indiscriminately to mean the same thing,—one division of the legislature.[3]

BRAND.—To brand, in common parlance and according to common acceptance at this day, means to mark. To brand has become an equivalent expression with to stamp, and to mark.[4]

BRASS is an alloy of copper and tin, or copper and zinc, and

where the building of a short elevated railroad from the terminus of the old railroad was held authorized by an act allowing the railroad company to construct "branches of railroad."

1. Vollmer's Appeal, 8 Atl Rep. 224 (Pa.), where such road was held a "branch" and not an "extension." "The relative importance of the main line and the branch are not to be measured by their length, respectively, under the peculiar circumstances of the case. As a branch, it clearly comes within the provisions of the ninth section of the act of 1868."

Future Extensions or Branches, in a contract between two connecting railroad corporations for a division or drawback of freights and fares over their roads, "or any future extensions or branches of the same," must not be construed, in their general sense, to apply to extensions then unauthorized by the legislature, where there were unexhausted powers in the charter and supplements at the time of the contract to build other extensions or branches sufficient to meet the requirements of the words. Morris & Essex R. Co. *v.* Sussex R. Co., 20 N. J. Eq. 542.

2. Reynolds *v.* M'Arthur, 2 Pet. (U. S.) 440. "If one branch of a small river has by consent retained the name of the main river, in exclusion of the others, that branch must be considered, in the absence of other circumstances, as the true boundary intended by the parties in a deed which calls for the stream by its name."

3. Green *v.* Weller, 32 Miss. 679. "From these and other provisions it is evident that the term 'house' means one branch of the legislature as contradistinguished from the other branch, and that a majority of the entire members composing the body constitute in legal contemplation the *house* or *branch* of the legislature."

4. Dibble *v.* Hathaway, 11 Hun (N. Y.), 575, where it was held that the use of the word "brand," in a statute forbidding the alteration or defacement of the brand required by that act to be placed by the manufacturers upon all butter-tubs, only meant that the name and weight should be marked upon it in a legible and distinct manner, e.g., by a stencil-plate and a chisel, and it was not necessary that they should be actually burned into the tubs. Learned, P. J., says in his dissenting opinion: "The word 'brand' itself shows its meaning. It is a piece of wood burning or partly burnt; hence, a mark made by burning with a hot metal. Excluding the poetical and figurative use of the word, I find no definition which does not include the idea of burning. See Webster's Dictionary and Richardson's Dictionary. In modern times the branding of articles has, to some extent, given place to the marking them by means of a stencil-plate. But neither such marking nor the cutting of characters with a chisel is branding. . . In my opinion, then, the stencilled name was not a 'brand,' and more plainly the chisel-cuts, supposed to indicate weight, were not 'brands.'"

The provision in a statute that "no *brands* . . . shall be recognized in law as any evidence of ownership of the cattle, horses, or mules upon which the same may be used" was held not to include *marks*, and the prohibition, therefore, not to be applicable to marks. Johnson *v.* State, 1 Tex. App. 345.

not, in a scientific sense, a metal. Where, however, Congress has described as metals gold, silver, brass, copper, pewter, steel, etc., and speaks of them as "these metals," thus specifically saying they are metals, the declarations are as clear and distinct as if they read thus: "We, the Congress of the United States, hereby declare that in these statutes we regard copper as a metal, and also brass as a metal." [1]

BRASS KNUCKLES signifies a certain weapon, used for offence and defence, worn upon the hand to strike with, as if striking with the fist. This weapon when first known and used was commonly made of brass, but is still known and called "brass knuckles," no matter what it is made of. "Brass knuckles" is the name of the particular weapon, the word "brass" being used to designate the weapon, not to specify the metal of which it must be made.[2]

BRAWLS.—The popular meanings of the words "brawls" and "tumults" are substantially the same and identical. They are correlative terms, the one employed to express the meaning of the other, and are so defined by approved lexicographers. Legally, they mean the same kind of disturbance to the public peace, produced by the same class of agents, and can be well comprehended to define one and the same offence.[3] Brawling is the offence of quarrelling or creating a disturbance in the church or churchyard.[4]

BREACH OF THE PEACE. (See also ARREST.)—A violation of public order; the offence of disturbing the public peace. One guilty of this offence may be held to bail for his good behavior. An act of public indecorum is also a breach of the peace.[5]

1. U. S. *v.* Ullman, 4 Benedict (U.S.), 556, where "Dutch metal" was held a "manufacture of brass," and not a "manufacture of which copper was a component of chief value."

2. Harris *v.* State, 3 S. W. Repr. 477, (Tex.), where the fact that the weapon was made of steel was held immaterial. See also Patterson *v.* State, 3 Lea (Tenn.), 575, where the weapon is called "brass knucks," but in this case was made of lead or pewter. "It is called 'brass knucks.' because originally (as is now frequently done) it was made of brass. 'Brass knucks' is used as the name of the weapon. without reference to the metal of which that weapon is made."

3. State *v.* Perkins, 42 N. H. 465.

4. Whar. Law Lex.

A clergyman who without any just cause or provocation, in the course of divine service, addresses himself with a loud voice and quarrelling manner to one by whom no offence had been committed is guilty of "brawling." Cox *v.* Goodday, 2 Hagg. Cons. Rep. 138. So is one who endeavors to force his way violently into church past a churchwarden who is trying to preserve order. Asher *v.* Calcraft, 56 L. J. R. (N. S.) Mag. Cas. 57. See also 4 Bl. Com. 146; 4 Steph. Com. 253.

One who in his own dwelling-house is in the habit of using loud and violent language, consisting of opprobrious epithets and exclamations, in such a manner as to attract crowds of persons passing and living in the neighborhood, on Sundays as well as other days, and in the night as well as in the daytime, is a disturber of the public peace by railing and brawling, and is rightly indicted as a "common railer and brawler." Com. *v.* Foley, 99 Mass. 498.

5. Bouvier's Law Dict.; Galvin *v.* State, 6 Coldw. (Tenn.) 283. See also, U. S. *v.* Hart, 3 Wheel. C. C. (N. Y.) 304; State *v.* Huntley, 3 Ired. (N. Car.) 418; Higgins *v.* State, 7 Ind. 549.

What Constitutes.—Besides actual breaches of the peace, anything that tends to provoke or excite others to break it is an offence of the same denomination. 4 Black. Com. 150.

It is not essential that the act committed amounts to an assault at com-

2. Surety to Keep the Peace.—As a restraint on the commission of crime in the nature of a breach of the peace, the court has power to bind a person in a penal bond to the State, conditioned that such person will keep the peace of the State as to all its citizens, and especially as to the one at whom the threatened breach of the peace appears to have been pointed. The order is made either upon affidavit or proof of the necessity of the same, to protect an individual or the community. This can be done although the party has not been indicted, tried, or convicted. It constitutes a part of the preventive power of the court in the administration of the criminal law.[1]

mon law. State *v.* Farrall, 29 Conn. 72.

If a man stops before the door of a dwelling-house or shop, applying abusive and opprobrious epithets to the inmates, and attracts a crowd, and refuses to desist when requested, he commits a breach of the peace. Cohen *v.* Huskisson, 2 M. & W. 482. *Compare* State *v.* Schuermann, 52 Mo. 165.

So, also, if he uses loud and violent language in his own dwelling-house, and addressed only to persons with whom he has an altercation, if the disturbance is such as to attract a gathering of persons outside the house. Com. *v.* Foley, 99 Mass. 497. Or if he uses the language in a public place. McCandless *v.* State, 2 S. W. Repr. (Tex.) 811.

The use of grossly indecent, profane, and abusive language towards another person upon the public street and in the presence of others is a breach of the peace. Davis *v.* Burgess, 54 Mich. 514; s. c., 52 Am. Rep. 828. In this case the court said: "Now, what is understood by 'a breach of the peace'? By 'peace,' as used in the law in this connection, is meant the tranquillity enjoyed by the citizens of a municipality or community where good order reigns among its members. It is the natural right of all persons in political society, and any intentional violation of that right is 'a breach of the peace.' It is the offence of disturbing the public peace, or a violation of public order or public decorum. Actual personal violence is not an essential element in the offence. If it were, communities might be kept in a constant state of turmoil, fear, and anticipated danger from the wicked language and conduct of a guilty party, not only destructive of the peace of the citizens but of public morals, without the commission of the offence. The good sense and morality of the law forbid such a construction."

Consent to engage in a boxing match is not a defence to an indictment for a breach of the peace. It is for the jury to determine from the nature of the contest whether it was a breach of the peace, under proper instructions as to what constitutes such a breach. Nor was evidence admissible to prove that such matches are common and harmless amusements, practised in the colleges of this country. Nor was there error in refusing to allow the jury to examine the boxing gloves used by the respondent. State *v.* Burnham, 56 Vt. 445; s. c., 48 Am. Rep. 801.

The wanton discharge of a firearm in the public street of a city is a breach of the peace. People *v.* Bartz, 53 Mich. 493.

Where an offensive denunciation calculated to provoke a breach of the peace is addressed to a company of men, and intended to apply to all of them, it may be charged as having been made to all or any one or more of them. Hearn *v.* State, 34 Ark. 550.

On trial of an indictment for disturbing a collection of persons met together in a school-house as a singing school, evidence that the defendant was one of a group of persons outside, from whom came the noises which disturbed the meeting, but not connecting him with any of the disturbances, is insufficient to sustain a conviction. Miller *v.* State, 83 Ind. 334.

Accessories.—All the parties engaged are liable as principals. 1 Bish. Cr. L. (7th Ed.) § 685.

Breach of the Peace "in the Presence of an Officer."—A breach of the peace is committed "in the presence of an officer," though done at some distance from him, and in the dark, if he can detect the act, and could see the person doing it if it were light. People *v.* Bartz, 53 Mich. 493. See ARREST, vol. 1, p. 730.

1. Malone's Cr. Briefs, 336; 4 Black. Com. 251; R. *v.* Dunn, 12 A. & E. 590; Doyle's Case, 19 Abb. Pr. (N. Y.) 269.

A menace or threat is a malicious declaration of an intention to do an injury

unlawfully to another, such as sending a threatening letter to another and informing him that unless he does certain things the writer will commit an injury to his person, his relative rights, or his property. This is a misdemeanor, for which the party aggrieved may cause the wrong-doer to give security to keep the peace. Bouvier's Inst. (Gleason's Ed.) § 2234.

Grounds for Requiring Giving of Surety to Keep the Peace.—The power of justices to require sureties to keep the peace is derived from the commission of the peace, and it is confined to cases where a party makes it appear to the justices that he goes in fear and in danger of personal violence from another, by reason of threats employed by him, or by reason of looks, gestures, and conduct; but the party applying for protection must himself draw the inference that he is in fear of personal violence. R. *v.* Dunn, 1 Arn. & H. 21; 5 Jur. 721; 12 A. & E. 59.

It is sufficient ground for articles of the peace that the complainant has been accustomed to go to a particular place, rightfully, as he alleges, for the transaction of business, and has been threatened with violence if he goes there again. R. *v.* Mallinson, 16 Q. B. 367.

The court granted an attachment upon articles of the peace where the threat of further violence was conditional on the exhibitant writing again to a member of the defendant's family, although it did not appear that the exhibitant had written again or was under any necessity of doing so. R. *v.* Tollemache, 2 L. M. & P. 401.

H. had written a letter to a young lady, a relative of T.; T. afterwards, in consequence of his writing the letters, violently assaulted H., and said: "If you write again I will flog you within an inch of your life." On a subsequent occasion T., meeting H., said to him: "Remember what I said to you; I am determined to put a stop to your proceedings." The court permitted H. to exhibit articles of the peace against T. Hulse, *Ex parte*, 21 L. J. M. C. 21.

A threat of bodily injury, coupled with a condition of the performance of a professional duty by the threatened party, if so made as to lead a cautious man to expect fulfilment of the threat, is sufficient cause for placing the threatener under bonds to keep the peace. Richey *v.* Davis, 11 Iowa, 124.

To constitute an offence under a statute which provides that "no person shall address to another, or utter in the presence of another, any words . . . having a tendency to create a breach of the peace," the words must be uttered in the presence of the person whom they tend to provoke to such breach of the peace. *Ex parte* Kearny, 55 Cal. 212.

Controverting Facts Stated.—Where a person exhibits articles of the peace, and swears that her life is in danger, the truth of the facts cannot be controverted. Lord Vane's Case, 13 East, 172, n.

There ought to be a reasonable foundation on the face of the articles, to induce a fear of personal danger, before the court will require sureties of the peace. Lord Vane's Case, 13 East, 172, n.

The facts stated in the articles are to be considered as true till the contrary appears upon a proper prosecution. Lord Vane's Case, 13 East, 172, n.

One against whom articles of the peace are exhibited is not entitled to read affidavits on his behalf, in contradiction of the facts sworn to against him in such articles. R. *v.* Doherty, 13 East, 171. See Deloohery *v.* State, 27 Ind. 521.

Where articles of the peace have been filed, and an attachment issued for the purpose of bringing in the defendant to find sureties, the court will not entertain an application to discharge the articles and to award costs under 21 Jac. I. c. 8. s. 2, on the ground of alleged insufficiency of the articles, though notice of such application has been given to the prosecutor. R. *v.* Mallinson, 16 Q. B. 367; 15 Jur. 746.

A party against whom articles of the peace have been exhibited in the court cannot call upon the prosecutor to show cause why the articles should not be discharged. R. *v.* Mallinson, 16 Q. B. 367; 15 Jur. 746.

Affidavits are not admissible for the purpose of supplying facts said to have been suppressed by the complainant, as, the contents of a correspondence alluded to in the articles. Nor is it an objection to the articles that such correspondence is not set out, if it does not contain any part of the menace relied upon. R. *v.* Mallinson, 16 Q. B. 367; 15 Jur. 746.

When articles of the peace are exhibited against any person, the person against whom they are exhibited may not give evidence before the justices in contradiction of the facts stated in the articles. If it appears on oath, to the satisfaction of the justices, that the complainant has been threatened, it is their duty to require recognizances to be entered into to keep the peace. Lort *v.* Hutton, 45 L. J. M. C. 95; 34 L. T. N. S. 730—Q. B. Div.

Powers of Magistrates and of Courts; and Requisites of Commitments.—A justice

of the peace is not authorized to require a party to find sureties to keep the peace for an unlimited time. Prickett *v.* Gratrex. 2 New Sess. Cas. 429; 8 Q. B. 1021; 10 Jur. 566; 15 L. J. M. C. 145.

It is not necessary that a commitment for want of sureties should mention the sum in which the party and his sureties are to be bound. Prickett *v.* Gratrex, 2 New Sess. Cas. 429; 8 Q. B. 1021; 10 Jur. 566; 15 L. J. M. C. 145.

A warrant of commitment in substance stated that whereas the plaintiff had been brought before the defendant (who was a justice), charged on the oath of T. P. with having written on the pavement in a lane the offensive words reflecting on the character of R. T. W., "Donkey Watt, the railway jackass;" and it having been stated to the defendant on the oath of T. P. that the continued writing for some time past of the offensive words was calculated to produce a breach of the peace, and T. P. prayed that the plaintiff might be required to find sureties to keep the peace, he, the defendant, ordered and adjudged that the plaintiff should enter into his own recognizances in 20*l.*, with two sufficient sureties in 15*l.* each, to keep the peace for three calendar months. The warrant stated that the plaintiff had refused to enter into such recognizances and find such sureties, and commanded that the plaintiff should be conveyed to prison and there kept for the space of three months, unless the plaintiff in the mean time entered into such recognizance with such sureties. This warrant was afterwards quashed on motion, and an action of trespass brought against the defendant who granted it. *Held*, first, that the warrant put in by the plaintiff was evidence of the information recited in it. *Held*, secondly, that it must be taken that the sureties for defendant intended to require good behavior, notwithstanding the words "sureties of the peace" in the warrant. *Held*, thirdly, that a justice of the peace has jurisdiction to require sureties for good behavior in some cases of libel against private individuals, and that therefore the defendant had jurisdiction in the matter out of which the cause of action arose, and within 11 & 12 Vict. c. 44, s. 1, and consequently was not liable to an action of trespass. Haylocke *v.* Sparke, 1 El. & Bl. 471; 17 Jur. 731; 22 L. J. M. C. 67.

Articles of the peace were exhibited against A. at the quarter sessions of the county of H., and he was by that court ordered to enter into recognizance before one or more justices of H. to keep the peace for six calendar months thence ensuing. Under the warrant of two justices of H., A. was brought before two justices of the same county, to show cause why he should not enter into the recognizance, and he then refused to do so, whereupon the justices last mentioned committed him to the county jail for the then residue of six calendar months from the date of the order of quarter sessions, unless he should in the mean time enter into the recognizance. *Held*, that the justices had no power to commit, and that the prisoner was entitled to be discharged on *habeas corpus*. Ashton or Aston, *In re*, 1 New Sess. Cas. 581; 7 Q. B. 169; 9 Jur. 727; 14 L. J. M. C. 99.

A justice of the peace may commit to the house of correction, under 6 Geo. I, c. 19, s. 2, for want of sureties to keep the peace. Aston, *In re*, 1 New Sess. Cas. 73; 12 M. & W. 456, 8 Jur. 293.

In a warrant of commitment for want of sureties to keep the peace, in consequence of having used language threatening bodily harm to an individual, it is not necessary that the warrant should show the nature of the bodily harm threatened, or when the language was used. Aston, *In re*, 1 New Sess. Cass. 73; 12 M. & W. 456, 8 Jur. 293.

Upon articles of the peace exhibited, the court has power of requiring bail for such a length of time as they think necessary for the preservation of the peace, and are not confined to a twelvemonth. R. *v.* Bowes, 1 T. R. 696.

The court will, if it sees ground, require sureties of the peace, although justices have refused to do so on the same complaint. R. *v.* Mallinson, 16 Q. B. 367.

Where articles of the peace appeared malicious and untrue, the court stayed process on them, and committed the exhibitant for perjury. R. *v.* Parnell, 2 Burr. 806.

The court cannot interfere to reduce the amount of security which the magistrates require a party to give for the preservation of the peace. R. *v.* Holloway, 2 D. P. C. 525.

A party gave information on oath before a magistrate that, from certain language used towards him, he was in bodily fear from another, and the magistrate upon hearing the complaint, required the latter to enter into recognizances to keep the peace. On motion to discharge the recognizances, on the ground that the language was used in a metaphorical sense only, the court refused to interfere, because it was for the magistrates to judge in what sense the language was used. R. *v.* Tregarthen, 5 B. & Ad. 678; 2 N. & M. 379.

Where a peer had been arrested by a

warrant of two justices, and bound by recognizances with two sureties to keep the peace, the court refused an application for a *certiorari* to bring up the recognizances (on the ground of the justices having no jurisdiction), as the applicant was not in custody; and, in the event of its being necessary to enforce the recognizances, their validity could be tried in another way. Gifford (Lord), *Ex parte*, 1 New Sess. Cas. 490.

Where articles of the peace were returned by *certiorari*, and affidavits made by others than the exhibitant were subjoined on the same parchment, and the whole ended with the following jurat: "sworn by the several deponents," etc.,—*held* that it sufficiently appeared that the articles had been exhibited on oath. R. *v.* Dunn, 12 A. & E. 599; 4. P. & D. 415; 1 Arn. & H. 21; 5 Jur. 721.

On *habeas corpus* bringing up a party committed by justices for not finding sureties of the peace, the court will not hear affidavits controverting facts alleged in the articles of the peace. R. *v.* Dunn, 12 A. & E. 599; 4 P. & D. 415; 1 Arn. & H. 21; 5 Jur. 721; s. p., R. *v.* Stanhope, 12 A. &. E. 620, n.

The court of Queen's Bench has authority to examine the allegations contained in articles of the peace when they are brought up by *certiorari*, and to quash the articles if no sufficient offence is alleged to justify the justices in ordering the defendant to give sureties of the peace. R. *v.* Dunn, 12 A. & E. 599; 4 P. & D. 415; 1 Arn. & H. 21; 5 Jur. 721; s. p., R. *v.* Stanhope. 12 A. & E. 620, n.

A prosecution under the statute for surety of the peace is a criminal proceeding to prevent the commission of a crime, but is not a prosecution for a crime. Fisher *v.* Hamilton, 49 Ind. 341. See State *v.* Cooper, 90 Ind. 575; Arnold *v.* State 92 Ind. 187.

The constitutional provision which protects one from a second jeopardy for the same offence does not apply to a prosecution for surety of the peace. State *v.* Vankirk, 27 Ind. 121.

On an application to a magistrate for sureties of the peace, there must be a formal complaint in writing and upon oath, besides the examination in writing required by the statute, to justify the magistrate in issuing a warrant against the party complained of; it is not enough that the complaint is embraced in the examination. Bradstreet *v.* Furgeson, 23 Wend. (N. Y.) 638.

In cases where the person whose life or person is in danger is disqualified by law from taking the oath required to obtain a peace warrant, the natural protector of such person may take the oath and conduct the proceedings to obtain it. State *v.* Tooley, 1 Head (Tenn.). 9.

A husband may demand surety of the peace in behalf of his wife, and take the oath, and conduct the proceedings to obtain the warrant, she being incapable of so doing. State *v.* Tooley, 1 Head (Tenn.), 9.

While the affidavit in proceedings for surety of the peace must state that it is made "only to secure the protection of the law and not from anger or malice," yet the only issue for trial is whether the complainant had just cause for the fears stated, when the affidavit was filed; and if it be found affirmatively in the circuit court, surety must be required though such cause may then have ceased. Stone *v.* State, 97 Ind. 345.

A proceeding for surety of the peace is not a prosecution for crime, the doctrine of reasonable doubt does not apply to it, nor are the jury the judges of the law, but they must take the law from the judge. Arnold *v.* State, 92 Ind. 187.

Where a person is charged with wilfully disturbing the peace and quiet of another person and his family, and the county attorney relies for a conviction upon the conduct of the defendant on a particular day, previous conduct of the defendant of a similar character, in connection with other facts, may be shown for the purpose of showing that the conduct of the defendant on the particular day was wilful. State *v.* Burns. 35 Kan. 387.

The question as to just cause of fear relates to the time of the institution of the proceedings and not to the time of the trial. If, on the final trial of the proceeding, it is found that the fears have, since the commencement of the proceeding, ceased to exist, this fact may be considered by the court in determining the time and the amount of the recognizance to be entered into by the defendant; but it will not entitle him to an unconditional discharge, at the costs of the relator. State *v.* Sayer, 35 Ind. 379; State *v.* Steward, 48 Ind. 146.

An affidavit for surety of the peace alleged that the complainant verily believed and actually feared, etc., that A. B. would kill him, or do him great bodily injury, or procure others to do so, etc. *Held*, that the charge was bad for being in the alternative. Steele *v.* State, 4 Ind. 561. *Compare* Collins *v.* State. 11 Ind. 312; Conklin *v.* State, 8 Ind. 458; State *v.* Bridegroom, 10 Ind. 170.

A justice of the peace can only require

In all cases of misdemeanor the court has from the common law authority, to be exercised or not as a sound discretion may dictate, to require, as a part of the sentence, that the defendant give bonds to keep the peace and be of good behavior.[1]

BREACH OF PROMISE (OF MARRIAGE). (See also CONTRACT; HUSBAND AND WIFE.)

1. Definition.—When two persons have agreed or promised to marry each other and one of them refuses to carry out the agreement or promise, the other may bring a suit for damages. Such suits are called "breach of promise suits." The failure to carry out any kind of a contract is in reality a breach of promise, but this appellation has been limited by custom to broken promises of marriage.

2. The Contract.—The contract is the *mutual agreement* of a man and a woman to marry each other, or become husband and wife in the future, and must satisfy the legal requirements as to parties, consideration, etc., as other contracts must. (See CONTRACTS.)

(*a*) *The Offer and Acceptance.*—There must be an *offer* of marriage or promise to marry by the one party made known to the other; a mere intention to marry, communicated to third persons out of the other party's presence, is no offer or promise at all.[2] The offer may, however, be made through a friend or agent.[3] It need not be made in express words.[4] It need only appear that both parties understood it to be an offer of marriage.[5] And there must be an *acceptance* of the offer or a promise in return; both parties

one to find sureties of the peace until the next court. Com. *v.* Morey, 8Mass. 78; Com. *v.* Ward, 4 Mass. 497.

Proof that the defendant had been informed that the complainant had slandered his wife on the same day of, and just prior to, the menacing conduct which gave rise to the proceeding, is not admissible for the defendant. Arnold *v.* State, 92 Ind. 187.

The proceeding may be brought in the name of the State without any relator. State *v.* Carey, 66 Ind. 72.

An action can be maintained for a malicious prosecution for surety of the peace without probable cause. Fisher *v.* Hamilton, 49 Ind. 341.

No appeal is permitted on behalf of the State *ex rel.* State *v.* Long, 18 Ind. 438. Nor from an order discharging, without further security, one who was bound to keep the peace, and who had appeared according to his recognizance. Com. *v.* Oldham, 1 Dana (Ky.), 468.

1. 1 Bish. Cr. L. (7th Ed.) § 945; Bish. Cr. Proc. (3d Ed.) § 229; Dun *v.* Reg, 12 Q. B. 1026. *Compare* Estes *v.* State, 2 Humph. (Tenn.) 496.

2. Cole *v.* Cottingham, 8 Car. & P. 77; Lawrence *v.* Cooke, 56 Me. 187; Roper *v.* Clay, 18 Mo. 383.

3. Prescott *v.* Guyler, 32 Ill. 323.

4 Cole *v.* Holliday, 4 Mo. App. 94.

5. Homan *v.* Earle, 53 N. Y. 267, 279; Vanderpool *v.* Richardson, 52 Mich. 336.

If one uses equivocal language and allows the other party to take it and act on it as an offer of marriage, he is bound. Homan *v.* Earle, 53 N. Y. 267. As when he says that he cannot live without her and will make a good home for her. Button *v.* McCauley, 1 Abb. Dec. 282.

are bound or neither is; the contract must be *mutual*.[1] The acceptance like the offer may be made through a friend or agent,[2] and need not be in express words,[3] but may be inferred from the promisee's conduct.[4] But it must appear that the acceptance was made known to the other party,[5] and evidence which goes to show an acceptance is not competent to prove the offer.[6] The acceptance must be made within a reasonable time after the offer.[7] The accepted promise must be certain, and either absolute or upon contingencies which are legal and which must occur within a reasonable time;[8] thus a promise to marry "perhaps" could not be the foundation of a suit;[9] and a man's promise to marry a

1. Vineall *v.* Veness, 4 Fost. & F. 344; Espy *v.* Jones, 37 Ala. 379; Morgan *v.* Yarborough, 5 La. Ann. 321; Kelley *v.* Riley, 106 Mass. 339; Allard *v.* Smith, 2 Metc. (Ky.) 297; Standiford *v.* Gentry, 32 Mo. 477; Cole *v.* Holliday, 4 Mo. App. 94; Wells *v.* Podgett, 8 Barb. (N.Y.) 324; Homan *v.* Earle, 53 N. Y. 267; Conrad *v.* Williams, 6 Hill (N.Y.), 444; Weaver *v.* Zachert, 2 Pa. St. 80; Ellis *v.* Guggenheim, 20 Pa. St. 287.

2. See Gough *v.* Farr, 2 Car. & P. 631; Prescott *v.* Guyler, 32 Ill. 323.

3. Royal *v.* Smith, 40 Iowa, 615.

4. Walnesly *v.* Robinson, 63 Ill. 41; Wells *v.* Podgett, 8 Barb. (N.Y.) 324; Wilcox *v.* Green, 23 Barb. (N.Y.) 639; Lecky *v.* Bloser, 24 Pa. St. 401.

For example, her going to another place at the request of the promisor to marry him there. Harvey *v.* Johnston, 17 L. J. C. P. 298. Getting ready for the wedding. Reed *v.* Clark, 47 Cal. 194; Wilcox *v.* Green, 123 Barb. (N. Y.) 639. Telling her friends of the engagement. King *v.* Hersey, 2 Ind. 402. Receiving his visits as her suitor. Daniels *v.* Bowles, 2 Car. & P. 553. Allowing familiarities and intercourse. People *v.* Kenyon, 5 Parker Cr. C. 254. Her declarations before suit brought. Leppinger *v.* Lowe. 6 N. J. L. 384; King *v.* Hersey, 2 Ind. 402; Cates *v.* McKinney, 48 Ind. 562.

In fact, express words need be proved on neither side; it is sufficient if there is shown a definite understanding between the parties, their friends and relations, that their marriage is to take place. Cole *v.* Holliday, 4 Mo. App. 94; Homan *v.* Earle, 53 N. Y. 267, 279; Burnham *v.* Cornwell, 16 B. Mon. (Ky.) 284; Wightman *v.* Coates, 15 Mass. 1.

Parties are presumed to intend what their conduct fairly indicates, and engagements to marry may with perfect propriety be inferred by the jury from their conduct, their treatment of each other, their epithets, their letters, their habits. Waters *v.* Bristol, 26 Conn. 398; Thurston *v.* Cavenor, 8 Iowa, 155; Rockafellow *v.* Newcomb, 57 Ill. 186; Blackburn *v.* Mann, 85 Ill. 222; Richmond *v.* Roberts, 98 Ill. 472; Conaway *v.* Shelton, 3 Ind. 334; Wightman *v.* Coates, 15 Mass. 1; Hoitt *v.* Moulton, 21 N. H. 586; Coil *v.* Wallace, 24 N. J. L. 291; Hubbard *v.* Bonesteel, 16 Barb. (N.Y.) 360; Wagenseller *v.* Simmers, 97 Pa. St. 465; Perkins *v.* Hersey, 1 R. I. 493; Memson *v.* Hastings, 12 Vt. 346; Whitcomb *v.* Walcott, 21 Vt. 368; Tefft *v.* Marsh, 1 W. Va. 38; Wilcox *v.* Gotfree, 26 L. T. N. S. 328; Hickey *v.* Campion, 20 Week. R. 752.

But the conduct must be something more than demanded by mere friendship. Burnham *v.* Cornwell, 16 B. Mon. (Ky.) 284; Walnesly *v.* Robinson, 63 Ill. 41; Whitcomb *v.* Walcott, 21 Vt. 368. And must be different from that which shows a mere meretricious connection. Com. *v.* Walton, 2 Brewst. (Pa.) 487; Weaver *v.* Zachert, 2 Pa. St. 80. It must be such as is unusual except between engaged persons. Perkins *v.* Hersey, 1 R. I. 493. Now that the parties may testify, the indirect mode of proof is less important than it was formerly. Homan *v.* Earle, 53 N. Y. 267, 269.

5. Graham *v.* Martin, 64 Ind. 567; Cates *v.* McKinney, 48 Ind. 562; Russell *v.* Cowles, 15 Gray (Mass.), 582; Green *v.* Spencer, 3 Mo. 318; Moritz *v.* Melhow, 18 Pa. St. 331; Wetmore *v.* Mell, 1 Ohio St. 26.

6. Lecky *v.* Bloser, 24 Pa. St. 401.

7. Vineall *v.* Viness, 4 Fost. & F. 344.

8. Clark *v.* Pendleton, 20 Conn. 495; Prescott *v.* Guyler, 32 Ill. 312.

In determining what is a reasonable time, their age, pecuniary ability, and circumstances in general are to be considered. Wagenseller *v.* Simmers, 97 Pa. St. 465; Stevenson *v.* Pettis, 12 Phila. 468. A year has been held a reasonable time. Nichols *v.* Weaver, 7 Kan. 373.

9. Conrad *v.* Williams, 6 Hill (N. Y.), 444.

woman if he married any one is void both because it is too indefinite and because it acts virtually as a restraint on marriage and is against public policy.[1] A promise to marry after the death of a parent, the parent having died, has been held good,[2] and a promise to marry a woman after she has had an operation performed, the operation not having been performed, has been held not binding.[3] Conditions which are insignificant are sometimes disregarded, as where a man promised to marry plaintiff when certain carriages should be finished and they were not finished, the court held such a limitation not of the essence of the contract and the man bound nevertheless.[4] But a man's promise conditional on his getting a divorce from his wife,[5] or upon her dying,[6] is void, and so is a promise conditional on the promisee's having intercourse with him[7] or continuing to live for a time as his mistress,[8] as such promises are contrary to public policy. If the parties do not themselves make the contract definite as to time and place, the law presumes that a promise to marry is a promise to marry within a reasonable time,[9] and at the residence of the woman,[10] and after a reasonable time has elapsed the Statute of Limitations begins to run.[11] In determining what is a reasonable time the age and circumstances of the parties will be considered.[12]

(*b*) *The Form.*—The contract need not be in writing,[13] or in any particular form.[14] It is not a contract in consideration of marriage within the Statute of Frauds;[15] but where statutes require contracts which are not to be performed within a limited time (as one year) to be in writing, these contracts are included,[16] though, under the familiar construction of such statutes, if the contract may or may not be performed within the limited time the statute does not apply.[17]

(*c*) *The Consideration.*—The consideration in contracts of this kind is the mutual promise.[18] There may be some other consider-

1. Lowe *v.* Peers, 4 Burr. 2225; Philips *v.* Medbury, 7 Conn. 568; Conrad *v.* Williams, 6 Hill (N. Y.), 444; Hall *v.* Wright, El. B. & E. 788.
2. Frost *v.* Knight, 41 L. J. Exch. 78.
3. Gring *v.* Lerch, 112 Pa. St. 244; 3 Cent. Rep. 161. 164.
4. Bennett *v.* Beam, 42 Mich. 346.
5. Noice *v.* Brown, 39 N. J. L. 133; s. c., 38 N. J. L. 228.
6. Paddock *v.* Robinson, 63 Ill. 99; Haviland *v.* Halstead, 34 N. Y. 643; Millwood *v.* Littlewood, 20 L. J. Exch. 2.
7. Hanks *v.* Naglee, 54 Cal. 51; Stinefield *v.* Levy, 16 Abb. Pr. N. S. (N. Y.) 26; Goodall *v.* Thurman, 1 Head (Tenn.), 209; Baldy *v.* Shatton, 11 Pa. St. 316; Beaumont *v.* Reeve, 8 Ad. & El. N. S. 483.
8. Boigneres *v.* Boulon, 54 Cal. 146. *Contra*, Morton *v.* Fenn, 26 Eng. C. L. Rep. 80. *Compare* Hotchkiss *v.* Hodge, 38 Barb. (N. Y.) 117.
9. Atchinson *v.* Baker, Peake Ad. Cas. 103; Cole *v.* Holliday, 4 Mo. App. 94; Coil *v.* Wallace, 24 N J. L. 291; Wagenseller *v.* Simmers, 97 Pa. St. 465.
10. Graham *v.* Martin, 64 Ind. 567.
11. Nichols *v.* Weaver, 7 Kan. 378.
12. Wagenseller *v.* Simmers, 97 Pa. St. 465.
13. Kelley *v.* Riley, 106 Mass. 339.
14. Homan *v* Earle, 53 N. Y. 267, 279; Hickey *v.* Campion, 20 Week. R. 752; Cole *v.* Holliday, 4 Mo. App. 94.
15. Cook *v.* Baker, 1 Strange, 34; Short *v.* Stotts, 58 Ind. 29; Clark *v.* Pendleton, 20 Conn. 495; Ogden, 1 Bland (Md.), 284; Deaby *v.* Phelps, 2 N. H. 515.
16. Nichols *v.* Weaver, 7 Kan. 373; Paris *v.* Strong, 51 Ired. 339.
17. Lawrence *v.* Cooke, 56 Me. 187; Wiggins *v.* Keizer, 6 Ind. 252.
18. Steinfield *v.* Levy, 16 Abb. Pr. N. S. (N. Y.) 26, 27. See *ante*, § 2, (*a*).

ation added, which will neither add to nor detract from the contract unless it be immoral. Thus a promise to marry made after seduction in consequence thereof is binding,[1] but a promise to marry in consideration of future intercourse is void.[2]

(*d*) *The Capacity of the Parties.*—The contract must be made between *competent parties*. In order to bind himself by a promise of marriage a person must be capable both of making a binding contract[3] and of entering into a valid,[4] and perhaps even a legal,[5] marriage. Thus, an infant not capable of making ordinary contracts, though he is old enough to marry[6] (and though he accomplished seduction by his promise[7]) is not bound by a promise of marriage,[8] though, as in the case of other contracts with infants, he may sue on the promise to him.[9] So where impotence rendered a marriage void, the promise of an impotent man to marry was held void.[10] So a promise of a nephew to marry his aunt where such marriages were illegal.[11] So with the promise of a married person to marry,[12] even though it be conditional on divorce[13] or on his wife's death.[14] But in all cases where the party is competent to contract and knew of his incompetence to marry he may be liable in an action for deceit though his promise to marry be void.[15] The fact that the party has already promised to marry some one (is engaged to be married) does not affect his capacity to promise to marry some one else.[16]

(*e*) *Fraud and Duress.—Force, fraudulent concealment*, and *false representations* may invalidate contracts to marry, just as they in-

1. Hotchkiss *v.* Hodge, 38 Barb. (N. Y.) 117.

2. Adding the immoral consideration of future intercourse to the legal consideration of a mutual promise makes the whole bad; but if the mutual promise is entirely distinct from the promise of intercourse, it will be good. Steinfield *v.* Levy, 16 Abb. Pr. N. S. (N.Y.) 26, 27. As where the defendant had said he would marry her anyhow in October, and at once if she became pregnant. Kurtz *v.* Frank, 76 Ind. 594; 40 Am. Rep. 275.

3. Frost *v.* Vought. 37 Mich. 65.

4. Paddock *v.* Robinson, 63 Ill. 99; Haviland *v.* Halstead, 34 N. Y. 643; Gulick *v.* Gulick, 41 N. J. L. 13; Harrison *v.* Cage, 1 Ld. Raym. 387.

5. Campbell *v.* Crompton, 8 Abb. N. Cas. (N.Y.) 363; s. c., 18 Blatch. C.C. 150. As to distinction between *valid* and *legal* marriages, see article MARRIAGE.

6. Frost *v.* Vought. 37 Mich. 65; Reish *v.* Thompson, 55 Ind. 34.

7. Lichtweiss *v.* Treskow, 21 Hun, 487.

8. Hale *v.* Ruthven, 20 L. T. N. S. 404; Pool *v.* Batt, 1 D. Chip. 252; Hunt *v.* Peake, 5 Cow. (N. Y.) 475; Cannon *v.* Alsbury, 1 A. K. Marsh. (Ky.) 76; Rush *v.* Wick, 31 Ohio St. 521; Reish *v.* Thompson, 55 Ind. 34.

Full age of defendant need not be alleged in declaration. Simmons *v.* Simmons, 8 Mich. 318.

9. Willard *v.* Stone, 7 Cow. (Ky.) 22.

The contract is voidable. Frost *v.* Vought. 37 Mich. 66; Warwick *v.* Cooper, 6 Sneed (Tenn.), 659.

Consent of parent not necessary. Beelman *v.* Rousch, 26 Pa. St. 509.

10. Gulick *v.* Gulick, 41 N. J. L. 13. See Allen *v.* Baker, 86 N. Car. 91, 96; Hall *v.* Wright, El. B. & E. 746; Boast *v.* Firth, L. R. 4 C. P. 8.

11. Campbell *v.* Crompton, 8 Abb. N. Cas. (N. Y.) 363.

12. Paddock *v.* Robinson, 63 Ill. 99; Haviland *v.* Halstead, 34 N. Y. 643.

13. Millward *v.* Littlewood, 20 Law. J. Ex. 2.

14. Noice *v.* Brown, 39 N. J. L. 133; s. c., 38 N. J. L. 228.

15. Wild *v.* Harris, 18 Law J. C. P. 297; Millward *v.* Littlewood, 20 L. J. Exch. 2; Kelley *v.* Riley, 106 Mass. 339; Blattmacher *v.* Saal, 29 Barb. (N. Y.) 22; Stevenson *v.* Pettis, 12 Phila. (Pa.) 468; Allen *v.* Baker, 86 N. Car. 91, 98; Coover *v.* Davenport, 1 Heisk. (Tenn.) 368; Pollock *v.* Sullivan, 53 Vt. 507, 38 Am. Rep. 702.

16. Roper *v.* Clay, 18 Mo. 383.

validate other contracts.[1] A promise made at the point of a pistol or to get free from actual confinement would not be enforceable.[2] While a person is supposed to have inquired and learnt all about the fortune, condition, circumstances, etc., of another before promising to marry her,[3] and while a woman is not bound to disclose anything[4] except her previous unchastity[5] or her unfitness for sexual intercourse,[6] any false representations made by her or on her behalf with her knowledge,[7] for the purpose of deceiving the promisor, constitute a fraud, and his promise is not binding whether such false representations relate to her social position and fortune[8] or to her character.[9]

3. The Breach.—There is a breach of the contract to marry entitling the party not in default to sue for damages, if a party (1) refuses to be married on the day fixed;[10] (2) or when the promise was general, upon request, after a reasonable time refuses to fix a day;[11] (3) marries some other person;[12] or (4) repudiates his promise and declares that he will not be bound by it.[13] In either of

1. See titles FRAUD. DURESS.

2. McCrum *v.* Hildebrand, 85 Ind. 204. An actual marriage entered into under such pressure would not be valid. Willard *v.* Willard, 6 Baxt. (Tenn.) 297, 298; Harford *v.* Morris, 2 Hagg. Const. 423; Bassett, 9 Bush (Ky.), 696; Pyle, 10 Phila. (Pa.) 58; Stevenson, 7 Phila. (Pa.) 336, 387; Collins *v.* Collins, 2 Brews. (Pa.) 515, 519; Stales *v.* Stales, 37 N. J. Eq. 195, 196, notes.

3. "When a man enters into an engagement of marriage with a woman, he is presumed to have made himself acquainted with her appearance, her temper, her manner, her character, and other matters which are obvious to the understanding, and which can be ascertained in the social intercourse which usually accompanies courtship. If he changes his mind and refuses to marry her for a defect which is open to observation, and which he might have ascertained before by reasonable care, it is no defence to an action for breach of promise of marriage." Paxson, J., in Gring *v.* Lerch, 112 Pa. St. 244; 3 Cent. Rep. 161, 163.

4. Not a contract *uberrimæ fidei*. Pollock Cont. 307. Calls for richest good faith. Gring *v.* Lerch, 3 Cent. Rep. 161, 164; 112 Pa. St. 244. Not bound to disclose a previous engagement. Beachy *v.* Brown. El. B. & E. 796; 29 L. J. Q. B. 105; Roper *v.* Clay, 18 Mo. 383. Or previous insanity. Baker *v.* Cartwright, 10 C. B. N. S. 124.

5. Irving *v.* Greenwood, 1 Car. & P. 360; Foulkes *v.* Sellway, 3 Esp. 236; Baddeley *v.* Mortlock, Holt, 151; Young *v.* Murphy, 3 Bing. N. C. 54; Beach *v.* Merrick, 1 Car. & K. 463; Espy *v.* Jones, 37 Ala. 379; Cal. Civ. Code, § 62; Woodard *v.* Bellamy, 2 Root (Conn.), 354; Denslow *v.* Van Horn, 16 Iowa, 476; Showman *v.* Wardwell, 32 Me. 275, Berry *v.* Bakeman, 44 Me. 164; Van Storch *v.* Griffin, 77 Pa. St. 504; Capehart *v.* Carradine, 4 Strobh. (S. Car.) 42; Goodall *v.* Thurman, 1 Head (Tenn.), 209.

6. "To conceal such a thing from him until after marriage would be a fraud. It would be a fraud to sell a cow with such a defect without making it known to the purchaser." Gring *v.* Lerch, 112 Pa. St. 244; 3 Cent. Rep. 161, 164.

7. Foote *v.* Hayne, 1 Car. & P. 546.

8. Wharton *v.* Lewis, 1 Car. & P. 529.

9. Foote *v.* Hayne, 1 Car. & P. 546; Leeds *v.* Lock, 4 Esp. 166; Bell *v.* Eaton, 28 Ind. 468; *supra*, n. 5.

If a man promises to marry one he knows to be a prostitute, he is bound. Sprague *v.* Craig, 51 Ill. 288; Burch *v.* Merrick, 1 Car. & K. 463; Berry *v.* Bakeman, 49 Ill. 164. Though the bad character of promisee is evidence in mitigation of damages. Burnett *v.* Simpkins, 24 Ill. 264; discussed *post*.

10. Reed *v.* Clark, 47 Cal. 194.

11. Cole *v.* Holliday, 4 Mo. App. 94; Prescott *v.* Guyler, 32 Ill. 323; Coil *v.* Wallace, 34 N. J. L. 291.

Where there was no day agreed upon, there can be no breach until an offer is made to fix the time and place for the marriage. Fible *v.* Coplinger, 13 B. Mon. (Ky.) 464.

12. Short *v.* Stone, 8 Q. B. 358; Shellenbarger *v.* Blake, 67 Ind. 76; King *v.* Hersey, 2 Ind. 402.

13. Frost *v.* Knight, 41 Law J. Ex. 78; Coil *v.* Wallace, 34 N. J. L. 291.

the two last-mentioned cases the party not in default need not wait for the time of performance to arrive,[1] or request the fulfilment of the promise,[2] but may sue at once.[3] When a request is required, in the case of a woman, the modest expression of her readiness to be married, in the presence of the man, is sufficient request.[4]

4. The Action.—Suit cannot be brought for the specific performance of a promise of marriage,[5] but an action for damages lies for a breach of such promise.[6] This action exists independently of statute by the common law,[7] although at an early day in this country it was questioned whether such an action could be brought,[8] and efforts have been made at various times to have it abolished.[9] The action may be brought by either a man or a woman.[10] It does not survive against a party's representatives unless there has been special damage.[11] The action is one for debt within a constitutional inhibition against imprisonment for debt.[12] There is no remedy by attachment, as the damages are not liquidated.[13] Breach of promise of marriage is not of itself a fraud, and punishable as such;[14] but if there has been also seduction and an attempt to abscond, it has been held to amount to a fraud.[15] The action is of course an action *ex contractu*.[16]

5. The Defences.—When sued for damages for breach of promise the defendant may show either that, owing to the absence of some requisite, there never was any contract,[17] or that, though such a contract did exist, he did not break it because he was discharged from his obligation. He may show that he was discharged by the plaintiff's express consent,[18] or by the plaintiff's consent to be implied by the jury from her conduct;[19] or by the plaintiff's failure

1. Lahey *v.* Knott, 8 Oregon, 198; Hunter *v.* Hatfield, 68 Ind. 416.

As where a man promised to marry a woman when his father died, and renounces his promise before that time. Frost *v.* Knight, L. R. 7 Exch. 111. Or has fixed the day for his marriage and marries another before it arrives. Sheehan *v.* Barry, 27 Mich. 223; Short *v.* Stone, 8 Q. B. 358.

2. Lahey *v.* Knott, 8 Oreg. 198; Hunter *v.* Hatfield, 68 Ind. 416; Pettengill *v.* McGregor, 12 N. H. 180.

3. Frost *v.* Knight, 41 L. J. Exch. 78; Donoghue *v.* Marshall, 32 L. T. N. S. 310; Kurtz *v.* Frank, 76 Ind. 594; Holloway *v.* Griffith, 32 Iowa, 409.

4. Cole *v.* Holliday, 4 Mo. App. 94.

5. Cheney *v.* Arnold, 15 N. Y. 345.

6. Wightman *v.* Coates, 15 Mass. 1; cases *post*, § 6.

7. Short *v.* Stotts, 58 Ind. 29.

8. 18 Central Law Journal, 441.

9. 18 Central Law Journal, 261.

10. Kelly *v.* Renfro, 9 Ala. 328.

11. Smith *v.* Sherman, 4 Cush. (Mass.) 408; Kelley *v.* Riley, 106 Mass. 330; Wade *v.* Kalbfleisch, 50 N. Y. 282; Grubb *v.* Sult, 32 Gratt. (Va.) 203; Shuler *v.* Milisape, 71 N. Car. 297.

But the mere fact that the woman has borne a child which she has had to support is not such special damage. This matter depends largely on the statutes of the particular State.

12. Perry *v.* Orr, 35 N. J. L. 295.

13. Price *v.* Cox, 83 N. Car. 261.

14. Tyson, 32 Mich. 262.

15. Sheahan *v.* Sheahan, 25 Mich. 145.

16. Malone *v.* Ryan, 14 R. I. 614; Shreckengast *v.* Ealy, 16 Neb. 510.

17. The essentials of the contract have already been discussed under section 1. The defendant may show that there was no offer, or no exception; or that the consideration was illegal; or that one of the parties was not competent; or that the promise was obtained by force or fraud. See *ante*, cases cited.

18. Shellenbarger *v.* Blake, 67 Ind. 75; Grant *v.* Willey, 101 Mass. 356.

19. As where the plaintiff went away and stayed two years without correspond-

to carry out some condition of the contract [1] or prior breach of the contract herself;[2] or by the plaintiff's (or even the defendant's [3]) having become physically or mentally unfit to marry after the promise was made;[4] or by the plaintiff's having been dissolute,[5] or guilty of such brutal or immoral conduct as shows her unfit to expect the defendant to marry her,[6] though excessive drinking has been held not enough.[7] But it is not a defence that after the promise the defendant discovered that he could not live happily with the plaintiff,[8] or that she had promised to marry some one else before she agreed to marry him,[9] or that he made his promise in bad faith,[10] or that after he refused to marry her he offered to carry out his contract,[11] certainly not if his second offer came after she had threatened or brought the suit.[12] If the defendant pleads the plaintiff's bad conduct as a discharge, he must show that his refusal to consummate his promise was due to such bad conduct,[13] and that he renounced his promise as soon as the conduct happened or was discovered by him.[14] And dissolute conduct is no defence if he was a party to it or connived at it.[15]

6. The Damages.—In actions for breach of promise of marriage damages have never been limited to the rules governing actions upon simple contracts for the payment of money,[16] but rest with the sound discretion of the jury under the circumstances of each particular case,[17] subject, of course, to the general restriction that a verdict influenced by prejudice, passion, or corruption will not be allowed to stand.[18] To keep cases of this kind out of the courts, *exemplary* damages may properly be awarded.[19] The

ence with the defendant. King *v.* Gillett, 7 Mees. & W. 55; Davis *v.* Bomford, 6 Hurl. & N. 245.

1. As where she had failed to have a promised operation performed on her hymen. Gring *v.* Lerch, 3 Cent. Rep. 1; s. c., 102 Pa. St. 244.

2. See *ante*, § 3; Bennett *v.* Beam, 42 Mich. 346; Fible *v.* Coplinger, 13 B. Mon. (Ky.) 464; McCoormick *v.* Robb, 24 Pa. St. 44.

3. See Hall *v.* Wright, El. B. & E. 746; Boast *v.* Firth, L. R. 4 C. P. 8; Allen *v.* Baker, 89 N. Car. 91; Barnes *v.* Brown, 69 N. Car. 439; Kantzler *v.* Grant, 2 Brad. (Ill.) 231.

4. Atchison *v.* Baker, Peake Ad. Cas. 103; cases last cited.

5 Espy *v.* Jones, 37 Ala. 379; Denslow *v.* Van Horn, 16 Iowa, 476.

6. Leeds *v.* Lock, 4 Esp. 166; 38 Barb. (N. Y.) 413.

7. Button *v.* McCauley, 1 Abb. Dec. (N. Y.) 282.

8. Coolidge *v.* Neat, 129 Mass. 146; Sheahan *v.* Barry, 27 Mich. 217.

9 Roper *v.* Clay, 18 Mo. 318.

10. Prescott *v.* Guyler, 32 Ill. 312.

11. Holloway *v.* Griffith, 32 Iowa, 409; Southard *v.* Wexford, 6 Cow. (N. Y.) 284 See Kelly *v.* Renfro, 9 Ala. 328.

12. Bennett *v.* Beam, 42 Mich. 354; cases last cited.

13. Woodard *v.* Bellamy, 2 Root (Conn.), 354; Butler *v.* Eschleman, 18 Ill. 44; Bell *v.* Eaton, 28 Ind. 468; Denslow *v.* Van Horn, 16 Iowa, 476; Showman *v.* Wardwell, 32 Me. 275; Berry *v.* Bakeman, 44 Me. 164; Van Storch *v.* Griffin, 77 Pa. St. 504; Capehart *v.* Carradine, 4 Strobh. (S. Car.), 42; Goodall *v.* Thurman, 1 Head (Tenn.), 209.

14. Boynton *v.* Kellogg, 3 Mass. 189; Palmer *v.* Andrews, 7 Wend. (N. Y.) 143; Young *v.* Murphy, 3 Bing. N. C. 54.

15. Johnson *v.* Smith, 3 Pittsb. (Pa.) 184.

16. Thorn *v.* Knapp, 42 N. Y. 474.

17. Southard *v.* Rexford, 6 Cow. (N. Y.) 254; Grant *v.* Willey, 101 Mass. 356; Coolidge *v.* Neat, 129 Mass. 146; Shreckengast *v.* Ealy, 16 Neb. 510; Barry *v.* Da Costa, 1 Har. & R. 291; Smith *v.* Woodfire, 1 Com. B. N. S. 660.

18. Collins *v.* Mack, 31 Ark. 684; Douglass *v.* Gausman, 68 Ill. 170; Denstow *v.* Van Horn, 16 Iowa, 477; Wilken *v.* Johnson, 58 Mo. 600.

19. Coryell *v.* Colbaugh, 1 N. J. L. 77;

plaintiff is entitled to recover not only an indemnity for her pecuniary loss, and the disappointment of her reasonable expectations of material and worldly advantage resulting from the intended marriage, but also compensation for wounded feelings, and the mortification and pain which she has been wrongfully made to undergo, and for the harm that has been done to her prospects in life.[1] Thus there may be given in evidence, and the jury may take into consideration in estimating the damages, the defendant's general reputation[2] for wealth[3] (and in rebuttal poverty[4]), and his social position;[5] the length of the engagement;[6] the depth of the plaintiff's devotion;[7] her lack of independent means:[8] her mortification and injured feelings and affections;[9] her loss of virtue and reputation, but not her loss of time and the expenses of medical attendance;[10] her altered social condition in relation to her home and family due to his conduct,[11] and her expenses in preparation for the marriage.[12] But no facts arising after suit brought may be proved.[13]

In *aggravation of damages*, it may be proved in some States, if this is alleged in the complaint,[14] that by means of his promise[15] the defendant seduced her;[16] and the results of the seduction, as the expenses attending the birth of a child,[17] or the pain and mortification of bearing a bastard.[18] In other States, on the ground that the plaintiff must have been a *particeps criminis* to the seduction, and therefore could not complain of it, the jury cannot consider it.[19] In aggravation also may be shown the

Davis *v.* Single, 27 Mo. 600; Fiddler *v.* McKinley, 21 Ill. 308; White *v.* Thomas, 12 Ohio St. 313.

1. Collins *v.* Mack, 31 Ark. 684; Sherman *v.* Rawson, 102 Mass. 399.

2. Kniffen *v.* McConnell 30 N. Y. 285, 289; Kerfoot *v.* Marsden, 2 Fost.& F. 160.

3. Douglass *v.* Gausman, 68 Ill. 170; Hunter *v.* Hatfield, 68 Ind. 422; Reed *v.* Clark, 47 Cal. 194; Bennett *v.* Beam, 42 Mich. 346; Wells *v.* Podgett, 8 Barb. (N. Y.) 323; Allen *v.* Baker, 89 N. Car. 91; Wilken *v.* Johnson, 58 Mo. 600.

The damages are not to be measured by the wealth or poverty of the defendant, though his wealth and rank may be pertinent to the issue as showing the injury sustained by the loss of marriage. Collins *v.* Mack, 31 Ark. 685.

4. Sprague *v.* Craig, 51 Ill. 288.

5. Bennett *v.* Beam, 42 Mich. 349; Lawrence *v.* Cooke, 56 Me. 187.

6. Coolidge *v.* Neat, 129 Mass. 146; Grant *v.* Willey, 101 Mass. 356.

7. Sprague *v.* Craig, 51 Ill. 288.

8. Vanderpool *v.* Richardson, 52 Mich. 336.

9. Barry *v.* Da Costa, 1 Har. R. 291; Reed *v.* Clark, 47 Cal. 194; Sauer *v.* Schulenberg, 33 Md. 288; Sherman *v.* Lawson, 102 Mass. 395.

10. Giese *v.* Schultz, 53 Wis. 462.

11. Barry *v.* Da Costa, 1 Har. & R. 291; s. c., 1 L. R. C. P. 331.

12. Smith *v.* Sherman, 4 Cush. (Mass.) 408.

13. Bennett *v.* Beam, 42 Mich. 346; Greenleaf *v.* McColly, 14 N. H. 304; Greenup *v.* Stoker, 7 Ill. 688.

14. Cates *v.* McKinney, 48 Ind. 562; Selger *v.* Etzell, 75 Ind. 417; Leavitt *v.* Cutler, 37 Wis. 46.

15. See Espy *v.* Jones, 37 Ala. 379; Sauer *v.* Schulenberg, 33 Md. 288.

16. Collins *v.* Mack, 31 Ark. 684; Whalen *v.* Layman, 2 Blackf. (Ind.) 194; Hatten *v.* Chapman, 46 Conn. 607; Burnett *v.* Simpkins, 24 Ill. 264; Tubbs *v.* Vankleek, 12 Ill. 446; King *v.* Kersey, 2 Ind. 339; Sheahan *v.* Barry, 27 Mich. 217; Green *v.* Spencer, 3 Mo. 318; Hill *v.* Waupin, 3 Mo. 324; Roper *v.* Clay, 18 Mo. 383; Wells *v.* Podgett, 8 Barb. (N. Y.) 323; Kniffen *v.* McConnell, 30 N. Y. 285; Coil *v.* Wallace, 21 N. J. L. 291; Williams *v.* Hollingsworth, 6 Baxt. (Tenn.) 12, White *v.* Campbell, 13 Gratt. (Va.) 573, Giese *v.* Shultz, 53 Wis. 462.

17. Collins *v.* Mack, 31 Ark. 684; and cases last cited.

18. Wilds *v.* Bogan, 57 Ind. 453.

19. Burks *v.* Shain, 2 Bibb (Ky.), 341;

mode in which the engagement was broken;[1] the cruel, indecent, and insulting conduct of the defendant;[2] and the fact that to justify his refusal he has pleaded the plaintiff's unchastity in bar,[3] whether such plea was in bad faith or not;[4] though in some States to enhance damages the plea of justification must have been made in bad faith,[5] and in some it cannot be taken into consideration at all.[6]

And in *mitigation of damages* may be shown the fact of the plaintiff's unchastity, though known at the time of the promise or condoned,[7] and her general bad character[8] (good character in rebuttal[9]); and the defendant's bad character,[10] or his being afflicted with a contagious[11] or incurable[12] disease; and any misconduct showing that the plaintiff would be an unfit companion in married life.[13] But not that since the commencement of the action the plaintiff has made declarations to the effect that she had no affection for the defendant, and would not marry him but for his property;[14] but such declarations made before the action were admitted,[15] and not the fact that the plaintiff had been trying to marry some one else,[16] or the probabilities of unhappiness resulting from the marriage;[17] and not that the defendant had seduced the plaintiff or corrupted her morals, rendering her a less desirable person to marry.[18]

BREACH OF TRUST. See TRUSTS AND TRUSTEES.

BREAK.—The lifting the latch of a door; the picking of a lock or opening with a key; the removal of a pane of glass, and indeed the displacement or unloosing of any fastening which the owner has provided as a security to the house, is a breaking—an actual

Weaver *v.* Bachert, 2 Pa. St. 80; Perkins *v.* Hersey, 1 R. I. 493.

1. Grant *v.* Willey, 101 Mass. 356; Chesley *v.* Chesley, 10 N. H. 327; Baldy *v.* Stratton, 11 Pa. St. 316.

2. Baldy *v.* Stratton, 11 Pa. St. 356; Chesley *v.* Chesley, 10 N. H. 327.

3. Davis *v.* Slagle, 27 Mo. 603; Thorn *v.* Knapp, 42 N. Y. 474; Southard *v.* Rexford, 6 Cow. (N. Y.) 260.

4. Kniffen *v.* McConnell, 30 N. Y. 285.

5. Powers *v.* Wheatly, 45 Cal. 113; Reed *v.* Clark, 47 Cal. 194; Blackburn *v.* Mann, 85 Ill. 222; Fiddler *v.* McKinley, 21 Ill. 308; Denslow *v.* Van Horn, 16 Iowa, 477; Tompkins *v.* Wadley, 3 Thomp. & C. (N. Y.) 424; White *v.* Thomas, 12 Ohio St. 312; Leavitt *v.* Cutler, 37 Wis. 46; Simpson *v.* Black, 27 Wis. 206.

6. Hunter *v.* Hatfield, 68 Ind. 416. *Compare* Kurtz *v.* Frank, 76 Ind. 594.

7. Burnett *v.* Simpkins, 24 Ill. 264; Butler *v.* Eschlemann, 18 Ill. 44; Denslow *v.* Van Horn, 16 Iowa, 474; Cole *v.* Holliday, 4 Mo. App. 94; Williams *v.* Hollingsworth, 6 Baxt. (Tenn.) 12; Sheahan *v.* Barry, 27 Mich. 217.

8. Berry *v.* Bakeman, 44 Me. 164; Morgan *v.* Yarborough, 5 La. Ann. 416.

9. Sprague *v.* Craig, 51 Ill. 288.

10. Button *v.* McCauley, 1 Abb. Dec. (N. Y.) 382.

11. Sprague *v.* Craig, 51 Ill. 288; Hall *v.* Wright, El. B. & El. 746.

12. Sprague *v.* Craig, 51 Ill. 288; Allen *v.* Baker, 86 N. Car. 91.

13. Button *v.* McCauley, 1 Abb. Dec. (N. Y.) 382.

14. Miller *v.* Hayes, 34 Iowa, 496; Stiles *v.* Tilford, 10 Wend. (N. Y.) 339.

15. Miller *v.* Rosier, 31 Mich. 475.

16. Simpson *v.* Black, 27 Wis. 256.

17. Piper *v.* Kingsbury, 48 Vt. 480

18. Boynton *v.* Kellogg, 3 Mass. 189. In this case, Sedgwick, J., said: "It is not to be endured that a man should seduce a female and ruin her character and standing in society, and, when she comes to ask compensation for the injury under which she is suffering, avail himself of her humiliation and disgrace to diminish her claim for damages."

breaking—within the meaning of the term as employed in the definition of burglary at common law, and it is employed in the statute.[1] What would be a "breaking" of the outer door in burglary is equally a "breaking" by the sheriff when he comes to levy.[2] As the word "break" has obtained a fixed and definite meaning at common law when applied to a dwelling-house proper or other buildings within the curtilage, the legislature must be presumed to have used it in the same sense when applied to other statutory breakings.[3] (See BURGLARY.)

BREAKING DOORS. See ARREST, vol. 1, pp. 722, 746.

BREEDING—BRED. See note 4.

BRETHREN—in the limitation over a child's share in a will—has been construed to include the *daughters* of the testator.[5]

BREVET.—"It may be that in the strict sense of the military term the rank of brigadier and brevet brigadier is the same, but it is well known that practically they are by no means identical, and that the position of the former is, in many respects, better than that of the latter. Brevet rank is conferred, in theory at least, for meritorious services by commission from the President, under authority of an act of Congress. It does not entitle the holder to corresponding pay or command, except under special circumstances defined by law."[6]

1. Walker *v.* State, 63 Ala. 59.

2 Curtis *v.* Hubbard, 1 Hill (N.Y.), 338.

3. Nichols *v.* State, 32 N. W. Repr. (Wis.) 546.

4. **For Breeding Purposes.**—The statute of the United States providing that "animals specially imported for breeding purposes shall be admitted free, etc.," limits free importation of animals to such as are imported for the particular purpose of breeding; and it is a sufficient compliance with the statute that the importer, in good faith, intends them for that purpose, and it does not prevent his otherwise disposing of them if he afterwards finds it necessary or desirable to do so. U. S. *v.* 196 Mares, 29 Fed. Repr. 139. See also U. S. *v.* 11 Horses, 33 Intern. Rev. Rec. 190.

Bred, Kept, or Preserved.—On an indictment for taking fish "bred, kept, and preserved" in a river running through a park, where it was shown that the park was walled round except where the river entered and passed out, and that there were fences to keep in the deer but nothing to keep in the fish, and that they were not known to breed there, and nothing was done to stock the river, but persons were never suffered to angle in the park without leave, *held*, that the place was not one where fish were "bred, kept, or preserved" within the meaning of the act, and that the conviction was wrong. Rex. *v.* Caradice, Russ. & Ry. 205.

Breeding Back Again.—The agreement with regard to a stallion to give to customers the "privilege of breeding back again next season, should the mare not prove with foal" means only that they could have such privilege if the horse and mares lived to another season and the owner did not covenant that his horse would live to another season, nor make the amount due him for the service of his horse depend upon whether the animal so lived. Price *v.* Pepper, 13 Bush (Ky.), 42.

5. Terry *v.* Brunson, 1 Rich. Eq. (S. Car.) 78. "That it is unusual and rather unnatural to employ the word 'brethren,' as it is employed in this will, to designate a class of persons such as the legatees named is admitted. . . . Nor is the philological criticism upon the word 'brethren' so strong as to forbid its application in the sense contended for by the plaintiff. This application of it is legitimate, although unusual. We hear from the highest authority of the words 'men,' and 'brethren,' both masculine, having been employed in addressing mixed multitudes, and we learn from the same sacred source that a whole nation was invoked as *brethren* of the stock of Abraham. The word is a noun of multitude, and may undoubtedly be so employed."

6. U. S. *v.* Hunt, 14 Wall. (U. S.) 552. "When an officer holding rank by brevet receives a regular commission of the

BREWER.—Every person, firm, or corporation who manufactures fermented liquors of any name or description for sale, from malt, wholly or in part, or from any substitute therefor, is a brewer, within the meaning of the Internal Revenue Acts.[1]

BRIBERY. See also CONSPIRACY.

Definition.—The crime of offering any undue reward or remuneration to any public officer, or other person intrusted with a public duty, with a view to influence his behavior in the discharge of his duty. The taking such reward is as much bribery as the offering it. It also sometimes signifies the taking or giving a reward for public office.[2]

same grade, he is said to be promoted and to become a full officer of that rank. These circumstances make it evident that there is a difference of military position between an officer by brevet and an officer by regular commission, and that the one is less eligible than the other. . . . We think that Congress had in view the distinction between brevet rank and regular rank, to which we have referred, and regarded the latter as above the former."

1. 14 U. S. Stat. at Large, 117.

2. Brown's Law Dict. See Dishon *v.* Smith, 10 Iowa, 212; 4 Black. Com. 139; State *v.* Ellis, 33 N. J. L. 102.

The voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done. 2 Bish. Cr. L. (7th Ed.) § 25.

Nature of the Offence.—Bribery is a misdemeanor punishable at common law. Bribery in strict sense, says Hawkins, is taken for a great misprision of one in a judicial place, taking any valuable thing except meat and drink of small value of any man who has to do before him in any way, for doing his office, or by color of his office. In a large sense, it is taken for the receiving or offering of any undue reward by or to any person whomsoever, whose ordinary profession or business relates to the administration of justice, in order to incline him to do a thing against the known rules of honesty and integrity. Also bribery sometimes signifies the taking or giving a reward for offices of a public nature. Hawk. P. C. b, 1, c. 67, §§ 1, 2, 3.

It seems that this offence will be committed by any person in an official situation who shall corruptly use the power or interest of his place for rewards or promises; as in the case of one who was clerk to the agent for French prisoners of war, and indicted for taking bribes in order to procure the exchange of some of them out of their turn. (R. *v.* Beale, E. T. 38 Geo. III., cited in R. *v.* Gibbs, 1 East R. 183; and see R. *v.* Vaughan, 4 Burr. 2494.) And bribery sometimes signifies the taking or giving of a reward for offices of a public nature. (1 Hawk. P. C. c. 67, s. 3.) Corrupt and illegal practices in giving rewards or making promises, in order to procure votes in the elections of members to serve in Parliament, are also denominated bribery, and punishable by common law and by statute. (R. *v.* Pitt, 3 Burr. 1338; 2 Geo. II. c. 24; 49 Geo. III. c. 118.) So, giving refreshments to voters before they vote, in order to induce them to vote for a particular candidate, is bribery at common law. (Hughes *v.* Marshall, 2 Tyrw. 134; s. c., 2 C. & J. 118; 5 C. & P. 151.) And the attempt to influence persons serving as jurymen corruptly to one side, by gifts or promises (which, with other practices tending to influence a jury, will be considered in treating of the crime called *embracery*), may be mentioned as a species of bribery. The law abhors the least tendency to corruption; and upon the principle which has been already mentioned of an attempt to commit even a misdemeanor being itself a misdemeanor, attempts to bribe, though unsuccessful, have in several cases been held to be criminal. Thus, it is laid down generally, that if a party offers a bribe to a judge, meaning to corrupt him in a case depending before him, and the judge takes it not, yet this is an offence punishable by law in the party that offers it. (3 Inst. 147; Rex *v.* Vaughan, 4 Burr. 2500.) And it has been held to be a misdemeanor to attempt to bribe a cabinet minister, and a member of the Privy Council, to give the defendant an office in the colonies. (Vaughan's Case, 4 Burr.

The mere offer to bribe, though it may be rejected, constitutes the offence;[1] and it is not necessary that the money should be

2494; and see R. *v.* Pollman, 2 Campb. 229.) And an information was granted against a man for promising money to a member of a corporation to induce him to vote for the election of a mayor. (Plympton's Case, 2 Ld. Raym. 1377.) An information also appears to have been exhibited against a person for attempting by bribery to influence a juryman in giving his verdict. (Young's Case, cited in Rex *v.* Higgins, 2 East R. 14 and 16.) Where a police officer was offered £1000 to assist a party in obtaining possession of a ward of the court of chancery who had a fortune of £5000, and who afterwards married such party, Lord Eldon, C., said: "The endeavor to bribe a man to commit an offence is itself a very serious offence, and the person who made that offer may not be aware of his danger." (Wade *v.* Broughton, 3 Ves. & B. 172.) 1 Russ on Cr. (9th Am. Ed.) 223.

Writing a letter in one State, proposing to bribe, and sending it by mail to a person in another State, is an offence completed in the State in which the letter is written. U. S. *v.* Warrall, 2 Dall. (U. S.) 384.

The offer of services is bribery, as where one offered to come and "chop cotton for a week." Caruthers *v.* State, 74 Ala. 406.

A note given as a bribe is void, as contrary to public policy. An indictment charging the receiving a promissory note is bad, as it does not charge the receiving a thing of value. State *v.* Walls, 54 Ind. 561. See Com. *v.* Callaghan, 2 Va. Cas. 460.

An indictment for offering to bribe need not allege the particular acts required to be done for the bribe. Reed *v.* State, 43 Tex. 319.

The offer must precede the act. Hutchinson *v.* State, 36 Tex. 293; Huntingtower *v.* Ireland, 2 D. & R. 450.

In a prosecution against a township trustee for accepting a bribe to influence him in his official action, and for entering into a contract for supplies in pursuance of such bribe, it is no defence that such contract was void and not enforceable against the township. Glover *v.* State, 109 Ind. 391.

On the trial of a defendant charged with having accepted a bribe, as trustee of a school township, and with having been influenced thereby to make purchases of school supplies, etc., in payment of which township warrants were by him issued, where an admission of the defendant is proved that a certain letter received by him as such trustee, from a third party, contained a correct list of township warrants issued by him, and that they were so issued and delivered in consideration of money received by him, such letter is admissible in evidence. Glover *v.* State, 109 Ind. 391.

De Facto Officer.—Appellant was indicted for offering to bribe one L., "a deputy sheriff of said county." The State having proved that L. at the date alleged was and for some time had been acting as deputy sheriff and jailer of the county, the defence proposed but was not permitted to prove that L. had not been appointed in writing, nor sworn, nor otherwise qualified as directed by article 4520 of the Revised Statutes. *Held*, that it was sufficient for the State to prove that L. was a deputy sheriff *de facto* at the date alleged. The regularity of his appointment and qualification was not an issue in the case, and therefore the proof proposed by the defence was properly excluded. The alleged object of the corrupt offer was to obtain the release of a prisoner who was in the custody of L. as jailer, and it is contended by the appellant that, inasmuch as no *mittimus* to L. was in proof, the prisoner was not legally in his custody. But *held* that the manner in which the jailer became charged with the custody of the prisoner was a matter into which the appellant was not entitled to inquire. Florez *v.* State, 11 Tex. App. 102.

Evidence.—Under the allegations of the indictment and the circumstances of the case as shown by the testimony, it was held competent for the State to prove other acts of bribery than those alleged in the indictment for the purpose of corroborating the principal witness upon material facts involved in the original contract of bribery, and also for the purpose of showing the system, plan, and design of the parties involved in the transaction alleged in the indictment. Guthrie *v.* State, 16 Neb. 667.

1. Walsh *v.* People, 65 Ill. 58; s. c., 16 Am. Rep. 569; Com. *v.* Harris, 1 Leg. Gaz. (Pa.) 455; State *v.* Ellis, 33 N. J. 102; U. S. *v.* Worrall, 2 Dall. (U. S.) 380.

If the offer be of a present, then its nature and value must not be left to conjecture; and therefore an affidavit for an information, charging that the offer was of "a present, or a present of $100, the

tendered or produced.[1] A proposal by a public officer to receive a bribe is an indictable offence at common law.[2] The payment or offer of a valuable consideration to a public officer constitutes the offence.[3]

affiant is not certain which," is insufficient, and a further charge therein of the payment of $100 after the official action desired was consummated is mere surplusage. State *v.* Stephenson, 83 Ind. 246. *Compare* Com. *v.* Chapman, 1 Va. Cas. 138.

If a person makes a full and complete delivery of money to a magistrate, with the corrupt intention of influencing his decision in a matter pending before him, such person is guilty of corruptly giving a gift to the magistrate, within the Pub. Sts. c. 205, § 9, although the latter receives the money in ignorance of what it is, and retains it solely for the purposes of public justice. Com. *v.* Murray, 135 Mass. 530.

In Sulston *v.* Norton, 3 Burr. 1235, which was an action under the st. of 2 Geo. II. c. 24, § 7, which provided that "if any person by himself, or any person employed by him, doth or shall, by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt or procure any person or persons to give his or their vote," he shall be subjected to a penalty of £500, Lord Mansfield remarks: "The offence was completely committed by the corrupter, whether the other party shall afterwards perform his promise or break it."

In Henslow *v.* Fawcett, 3 A. & E. 51, which was an action on the same statute, Lord Denman, in commenting upon it, remarks: "Procuring is one thing; it is essential that the vote should be given. Corrupting (which word is connected by the disjunctive particle) is another; it seems to me to lie altogether in the act of the party giving the bribe." Mr. Justice Coleridge says: "I am prepared to go the length of saying that if it were clearly shown that Garner [the person who received the money] never intended to give the vote, concealing the intention from the defendant, and being so far moved by the defendant's act as to receive his money and conceal such intention, the defendant would be liable."

It is not material whether the money was paid over to the defendant before or at the time he entered into the contract. It is sufficient if he received the money afterwards in pursuance of a prior arrangement and agreement. Glover *v.* State 109 Ind. 391.

1. People *v.* Ah. Fook, 62 Cal. 493; Jackson *v.* State, 43 Tex. 421. *Compare* Barefield *v.* State, 14 Ala. 603.

2. Walsh *v.* People, 65 Ill. 58; s. c., 16 Am. Rep. 569. *Compare* Hutchinson *v.* State, 36 Tex. 293; O'Brien *v.* State, 6 Tex. App. 665.

3. Watson *v.* State, 39 Ohio St. 123; State *v.* Ellis, 33 N. J. L. 102; State *v.* Pomeroy, 1 Cent. Law Jour. 414; Walsh *v.* People, 65 Ill. 58; s. c., 16 Am. Rep. 569; State *v.* Pearce, 14 Fla. 153; State *v.* Smalls, 11 S. Car. 262.

A bond given to influence an alderman to a particular course in the discharge of his duties is illegal and void. It is immaterial to whom it is executed. Cook *v.* Shipman, 24 Ill. 614.

An indictment which charges that defendant corruptly offered and promised to B., a member of the House of Representatives, with the intent to corruptly and feloniously influence his vote upon a certain bill then pending in such house, "a valuable thing, to wit, stock of the Cincinnati Union R. Co. of the amount and value of $20,000, and a large amount of money, of great value," is not bad for uncertainty. It is not necessary, in addition to such allegation, to recite the facts which give the thing offered a value, nor to charge that a definite sum of money was offered. A single count in such indictment, which charged that B. was a member of the House, and also a member of a standing committee of such House to which the bill was referred, and that the offer or promise was made to influence his vote therefor in the House, and his vote for a favorable report thereon in the committee, is not bad for duplicity. The charge thus made constitutes but one offence under the statute. To charge the jury in a trial upon such indictment that the thing offered or promised must have a value at the very time it is offered or promised, and while the bill is pending, is error, but not to the prejudice of the defendant. It is a crime to offer or promise a thing valuable at that time, or which will be valuable when, according to the promise, it is to be given or delivered. Watson *v.* State, 39 Ohio St. 123.

An indictment charging that on, etc., the defendant unlawfully, feloniously, and corruptly offered and promised one F., a township trustee, that if he, as such

2. Instances.—The promise or the payment of money to a public officer for the appointment as teacher in a public school, even if there is no vacancy,[1] or to summon such jurors as the person offering the bribe should name,[2] or for failure to execute a process on account of receiving a bribe from the person against whom it is issued;[3] an offer to a witness of a valuable consideration to disobey a subpœna,[4] or to offer one who has power of appointment a bribe for an appointment to office;[5] an offer to an officer, or a demand or acceptance by him, of a valuable consideration to permit a person in custody to escape,[6] or not to make an arrest,[7] nor to molest gamblers or other offenders;[8] an offer of a valuable consideration to a person in a judicial position to influence his decision.[9]

3. Of Voters.—Bribery of a voter is the offering of a valuable consideration either for his vote or for his forbearance to vote.[10]

trustee, would purchase of defendant twelve sets of reading charts for the township, and pay him therefor the sum of $175, he would sign and deliver to the trustee a voucher and receipt in his favor as such trustee, "on said township," for $194, thereby unlawfully, corruptly, and feloniously offering the sum of $19, of the value of $19, the difference between the amount of the receipt and the amount to be paid, and that the offer and promise were unlawfully, feloniously, and corruptly made for the purpose of bribing, inducing, and influencing the trustee to act in buying the charts of defendant, charges an offer and promise to do an act beneficial to the trustee, and is good on motion to quash. State *v.* McDonald, 106 Ind. 233.

1. Shircliff *v.* State, 96 Ind. 369.

2. Com. *v.* Chapman, 1 Va. Cas. 138.

3. Old *v.* Commonwealth, 18 Gratt. (Va.) 915.

4. Scroggins *v.* State, 18 Tex. App. 298. See Jackson *v.* State, 43 Tex. 421; State *v.* Hughes, 43 Tex. 518. *Compare* Brown *v.* State, 13 Tex. App. 358.

5. R. *v.* Vaughan, 4 Burr. 2494.

6. People *v.* Ah Fook, 62 Cal. 493; Florez *v.* State, 11 Tex. App. 102; O'Brien *v.* State, 7 Tex. App. 181.

7. A police officer who receives money in consideration of his promise not to arrest any one of a class of offenders against the criminal laws is guilty of receiving a bribe, and it is not necessary to allege in the information, or prove at the trial, that the crime was subsequently committed, and that the officer failed to make an arrest. People *v.* Markham, 64 Cal. 157; s. c., 49 Am. Rep. 700.

8. Guthrie *v.* State, 16 Neb. 667.

9. 4 Black. Com. 139; State *v.* Lusk, 16 W. Va. 767 (an arbitrator); People *v.* Purley, 2 Cal. 564; Newell *v.* Commonwealth, 2 Wash. (Va.) 88; Barefield *v.* State, 14 Ala. 603. See R. *v.* Vaughan, 4 Burr. 2500.

The offence may be committed by an attempt to influence an arbitrator. State *v.* Lusk, 16 W. Va. 767.

If a person makes a full and complete delivery of money to a magistrate with the corrupt intention of influencing his decision in a matter pending before him, such person is guilty of bribery, although the magistrate receives the money in ignorance of what it is, and retains it solely for the purpose of public justice. Com. *v.* Murray, 135 Mass. 530.

In Barefield *v.* State, 14 Ala. 603, it was held that under the Alabama statutes case must be pending and the bribe accepted to constitute the crime. See People *v.* Purley, 2 Cal. 565.

10. State *v.* Jackson, 73 Me. 91; s. c., 40 Am. Dec. 342; Com. *v.* Hoxey, 16 Mass. 385; Com. *v.* Silsbee, 9 Mass. 417; Nicholas *v.* Mudgett, 32 Vt. 546; People *v.* Thornton, 25 Hun (N. Y.), 555; Com. *v.* Shaver, 3 W. & S. (Pa.) 338; Com. *v.* Walter, 86 Pa. St. 105; State *v.* Ellis, 33 N. J. L. 102; Walsh *v.* People, 65 Ill. 58; s. c., 16 Am. Rep. 569; State *v.* Purdy, 36 Wis. 13; s. c., 17 Am. Rep. 485; State *v.* Franks, 38 Tex. 640; Russell *v.* Commonwealth, 3 Bush (Ky.), 469; Com. *v.* Stephenson, 3 Metc. (Ky.) 226; State *v.* Collier, 72 Mo. 13; Com. *v.* Callaghan, 2 Va. Cas. 460; Russell on Crimes (9th Ed.), 232; Henslow *v.* Fawcett, 3 Ad. & E. 51; Baker *v.* Rusk, 15 Q. B. 870; Bayntun *v.* Cattle, 1 M. & R. 265.

Promising is equivalent to offering a reward to a voter. State *v.* Harker, 4 Harr. (Del.) 559.

An attempt to bribe or corruptly influence the elector, although not accomplished, will subject the offender to an indictment. State *v.* Jackson, 73 Me. 91; s. c., 40 Am. Rep. 342.

Any one is a candidate for whom a vote is asked, and it is not competent to the defendant to dispute a man's right of voting when he had asked him for his vote; it being immaterial whether the voter bribed had a right to vote or not, if he claimed to have such a right. Russell on Crimes (9th Am. Ed.) 233; Lilley *v.* Corne, 1 Selw. N. P. 650, n.

A promise to pay for loss of time is bribery. Simpson *v.* Yeend, 4 L. R. Q. B. 626. So also to pay the travelling expenses of a voter. Bayntun *v.* Cattle, 1 M. & R. 265; Cooper *v.* Slade, 6 El. & Bl. 447. Even if all the candidates agree in the payment of the same amount. Bernbridge *v.* Roberts, 5 C. & P. 186.

If refreshments are supplied to voters with a view to influence elections, it is bribery. Hughes *v.* Marshall, 2 C. & J. 118. See Ribbans *v.* Crickett, 1 B. & P. 264; Lofthouse *v.* Wharton, 1 Camp. 550, n.; Ward *v.* Nanney, 3 C. & P. 399.

Thus an order given by a candidate to a tavern-keeper to furnish his friends with liquor and other articles during canvass has been pronounced bribery. Duke *v.* Asbee, 11 Ired. (N. Car.) 112. *Compare* Heilman *v.* Shanklin, 60 Ind. 424.

An agreement by the owner of a building that it should he kept open for the benefit of a certain party has been held to have in it the essence of bribery. Jackson *v.* Walker, 5 Hill (N. Y.), 27.

The acts must have been done by the candidate, or some person acting for him and on his behalf in order to be elected. Where supporters of a candidate gave orders to the landlord of a public house opened by the committee of the candidate to supply others with refreshments, which were supplied on the credit of those who gave the orders, *held*, not bribery. Ward *v.* Nanny, 3 C. & P. 399.

A promise made to the voters of a railroad-aid tax that they would be paid fifty cents on the dollar on their certificate when they paid such tax is bribery. Chicago, etc.. R. Co. *v.* Shea, 25 N. W. Repr. (Iowa) 901.

The town of Gloucester (Mass.) was entitled to six representatives in the legislature. Each town was required by law to pay its own members, and for economical reasons the town of Gloucester usually returned but two instead of six. For political reasons it was thought desirable that the town should elect a full delegation, and thereupon certain individuals, with a view to induce the town to do so, gave a bond for the use of the inhabitants, conditioned that the whole expense of a full representation should not exceed the pay of two members, and six members were accordingly elected. Although the members elected had no agency in procuring such bond to be given, the legislature declared the election void. Gloucester Case, Cushing's Mass. Contested Elect. Cas. 97.

A candidate announced in a circular to the voters and tax-payers that he was willing to discharge the duties of the office for a less salary than that established by law. *Held*, that such offer was illegal, as it was an attempt to bribe the voters. State *v.* Purdy, 36 Wis. 213; s. c., 17 Am. Rep. 485; Carrothers *v.* Russell, 53 Iowa, 346; s. c., 36 Am. Rep. 222; State *v.* Collier, 74 Mo. 13; State *v.* Church, 5 Oregon, 375; s. c., 20 Am. Rep. 746. *Compare* People *v.* Thornton, 25 Hun (N. Y.), 555; State *v.* Church, 5 Oregon, 375; s. c., 20 Am. Rep. 746.

Where a certain town offered to erect a public building if the voters of the county would locate the county seat at that town, *held*, that it was not bribery of the electors. Wells *v.* Taylor, 5 Montana. 202; Dishon *v.* Smith, 10 Iowa, 212; Hall *v.* Marshall, 80 Ky. 552.

A gave money to B to induce B to vote for a candidate, and B agreed to do so in consideration of the gift. A was liable for bribing B, although B never gave the vote. Henslow *v.* Fawcett, 3 Ad. & El. 51.

A gave B five guineas to vote, and took from him a note for that sum, but at the same time gave a counter-note to deliver up the first note when the elector had voted. *Held*, it was an absolute gift, and bribery, although B voted for the opposite party. Sulston *v.* Norton, 3 Burr. 1235.

Three persons were candidates. It was apparent that if only one ran, he would be elected. To secure this result, it was agreed between the three candidates and their supporters that there should be a test ballot to determine who should stand at the election. One of the three, who was at the head of the test ballot, stood at the election, and was returned; but his agents gave money to voters to vote for him at the test ballot, without, however, making any stipulation as to their votes at the election. *Held*, that this was bribery. Bristol Election Petition. Brett *v.* Robinson, 5 L. R. C. P. 503.

It must appear that an election was held and that a vote was given at the election. Newell *v.* Commonwealth, 2 Wash. (Va.) 88. See Reed *v.* Lamb, 6 H. & N. 75.

Where a person has been guilty of several acts of bribery at an election, he is liable to a penalty in respect of each such act of bribery. Milnes *v.* Bale, 10 L. R. C. P. 591.

An agreement in writing, by which B., a candidate for the sheriff's office, agrees to withdraw his pretensions and give his influence in favor of E., in consideration of which E., if elected, agreed to appoint B. his deputy at a yearly salary of $500, is bribery. Lewis Cr. L. 126, citing Benedict *v.* Ehler, Lancaster Com. Pleas. See Com. *v.* Callaghan, 2 Va. Cas. 460.

A sheriff, after his election, may be convicted of bribery committed during the canvass, in bribing an elector to vote for him and use his influence in his favor. But such conviction does not authorize the sheriff's removal from office. It is not a misbehavior in office, nor is it deemed an "infamous crime," and therefore it is no ground for removal, and the *supersedeas* of the governor, reciting the conviction and purporting to remove the person convicted from office, is a nullity. Com. *v.* Shaver, 3 W. & S. (Pa.) 338.

An officer may be removed by *quo warranto* for obtaining his election by bribery, without being first convicted of the offence on an indictment. Com. *v.* Walter, 83 Pa. St. 105.

English Statutes.—It was held that, notwithstanding the 2 Geo. II. c. 24, which made the offender liable to forfeit £500, bribery in elections of members to serve in Parliament remained a crime at common law; that the legislature never meant to take away the common-law crime, but to add a penal action; and that this appears by the words in the statute—"or being otherwise lawfully convicted thereof." (R. *v.* Pitt, 3 Burr. 1335.) And a conviction upon an information granted by the court of King's Bench was just the same as if the party had been convicted upon an indictment. (R. *v.* Pitt, 3 Burr. 1339.) But as the offender was equally liable to the penalties of the statute (Combe *v.* Pitt, 1 Blac. R. 524), that court would not interpose by information until the two years were expired in ordinary cases; though there might possibly be particular cases, founded on particular reasons, where it might be right to grant information before the expiration of the time limited for commencing the prosecution on the statute. (R. *v.* Pitt, 3 Burr. 1340.) And in one case, where the defendant had been convicted of bribery, and the time for bringing the penal action was not expired, the court permitted him to enter into a recognizance to appear at the expiration of that time. (R. *v.* Haydon, 3 Burr 1359.) There was a great difference between the two parts of sec. 7 of the 2 Geo. II. c. 24. The first part, which was applicable to the voter, contained the word "ask," which was not repeated in the second. From this it might be taken that, in an action against the party tendering the bribe, proof should be required of more than a mere solicitation. Then, in the first part, the words went on thus, "or agree or contract for any money;" the agreement, therefore, would subject the party to the penalty. (Henslow *v.* Faucett, 3 A. & E. 51.) In the second part the words were "corrupt or procure." As to procuring, it was necessary that the vote should be actually given, but the corruption was complete by effecting an agreement amounting to corruption, although the vote was not given. If, therefore, A gave money to B to induce B to vote for a candidate, and B agreed to do so in consideration of the gift, A was liable to the penalty for corrupting, although B never gave the vote (Henslow *v.* Faucett, 3 A. & E. 51), and two very learned judges thought that A was equally liable if B never intended to vote according to the agreement at all, as A had done all that lay with him (Henslow *v.* Faucett, 3 A. & E. 51); and this opinion was held to be correct by the court of exchequer. (Harding *v.* Stokes, 2 M. & W. 238.) Where a friend of the candidate gave an elector five guineas to vote, and took from him a note for that sum, but at the same time gave a counter-note to deliver up the first note when the elector had voted, it was held to be an absolute gift and bribery within the act, although the elector voted for the opposite party. (Sulston *v.* Norton, 3 Burr. 1235.) And laying a wager with the voter that he did not vote for a particular candidate was also bribery within the act. (1 Hawk. P. C. c. 67, § 10, and note.) In an action upon this statute it was held that before the time of election any one was a candidate for whom a vote was asked; and that it was not competent for the defendant to dispute a man's right of voting when he had asked him for his vote; it being immaterial whether the voter bribed had a right to vote or not, if he claimed to have such a right. (Combe *v.* Pitt, 1 Blac. R. 523.) A declaration upon this statute must

have stated what the bribe was, and specified that the defendant took money or some other particular species of reward; and where it stated generally "that the defendant did receive a gift or reward," in the disjunctive, it was held bad in arrest of judgment, the charge being of a criminal nature. (Davy *v.* Baker, 5 Burr. 2471.) And where the person corrupting was sued the same rule applied. And as the means of corrupting must be stated, so they must be stated accurately according to the facts. Where those means rest in agreement only, the actual agreement must be stated in order that the party may know what he has to answer, and may be able to plead the verdict, whatever it may be in another action, though it may not be necessary to state the matter with the same precision as in an action on the agreement supposing it were legal. (Baker *v.* Rusk, 15 B. Q. 870.) Where, therefore, a count stated that the defendant corrupted a voter by promising him to pay a debt of £41, and the evidence was a promise to pay the debt of £41 and the expenses in respect of the pledge of a boat for such debt, it was held that there was a fatal variance between the promise alleged and that proved by reason of the omission in the declaration of all mention of the expenses. (Baker *v.* Rusk, 15 Q. B. 870.) But where a count alleged that the defendant corrupted a voter by giving £10 and promising to pay £31 in addition, and the evidence proved the payment of the £10 and the promise to pay £31 and also the expenses of the pledge of the boat, it was held that the offence consisted in corrupting, which depends entirely on the means used in soliciting; the payment of £10 was undoubtedly corruption, and was sufficient to support this count; and that the promise to pay £31 more might be treated as surplusage, and, that being so, the omission to add "and the expenses" was immaterial. (Baker *v.* Rusk, 15 Q. B. 870.) The words of sec. 7 were all prospective, and they were construed as if they had been "in order to give" and "in order to forbear to give," and consequently they did not include a case where money was given to a voter after an election for having voted for a candidate, there having been no agreement made before the election for giving such money. (Lord Huntingtower *v.* Gardiner, 1 B. & C. 297.) Where voters for a member of Parliament had only been paid their actual travelling expenses, a difference of opinion has existed as to the legality of such payments; some committees of the House of Commons having held that such payments are legal, others (and probably theirs is the more correct opinion) that such payments are not legal, for it is obvious that such a mode of proceeding, if allowed, would lead to great abuses. (Bayntun *v.* Cattle, 1 M. & Rob. 265.) And it seems, at all events, that where the same sum is given to every voter coming from the same place to an election for his travelling expenses, it is bribery; and it is not the less so though all the candidates agree in the payment of the same amount. (Bremridge *v.* Campbell, 5 C. & P. 186.) But where an action was brought by an agent of a candidate to recover from him the amount so paid, Tindal, C. J., left it to the jury to say "whether the sums were paid really and *bona fide* for travelling expenses, and travelling expenses only, or to induce the voters to give their votes." (Bremridge *v.* Campbell, 5 C. & P. 186.) It has since, however, been decided by the House of Lords that such payments, though *bona fide* made for travelling expenses only, are illegal; and though they are now rendered legal to some extent by the 21 & 22 Vict. c. 87, § 1, the case contains so much that is valuable in other respects that it is here inserted. Every promise to pay and every payment of travelling expenses, though fair and reasonable, to a voter in order to induce him to vote—that is, every promise upon any condition, express or implied, that he should be paid his travelling expenses if he voted for a particular candidate—is bribery within the meaning of the 17 & 18 Vict. c. 102, § 2, No. 1. But where there is both a promise and a payment in pursuance of it, only one penalty is incurred within that clause. It is a clear proposition of law, that if a man employs an agent for a perfectly legal purpose, and that agent does an illegal act, that act does not affect the principal unless it is shown that the principal directed the agent so to act, or really meant he should so act, or afterwards ratified the illegal act, or he appointed one to be his agent to do both legal and illegal acts—to do everything, in short, which he might think proper to support the interests of the candidate;—if the candidate gives his agent such a general authority, and the agent is guilty of bribery, the candidate is no doubt responsible for it. (Cooper *v.* Slade, 6 H. L. C. 746.) One count alleged that the defendant promised money to R. C., a voter, in order to induce him to vote at an election; another count alleged that the defendant corruptly gave

money to the voter, on account of his having voted at the said election. The defendant was a candidate at an election for Cambridge, and a printed circular had been prepared whereby out-voters were requested to return and vote for the defendant, and in his committee-room the question was discussed whether the expense of bringing up voters was legal, and the opinion of Tindal, C. J., in Bremridge *v.* Campbell (5 C. & P. 186) was read, on which the defendant said, "I think the expenses are legal," but limited it to the payment of expenses out of pocket; and thereupon a clerk of the defendant's agent, in his presence, but without any express direction from him or his agent, wrote at the bottom of each circular the words, "Your railway expenses will be paid." In consequence of receiving one of the circulars, a voter went from Huntingdon to Cambridge in order to vote, and voted at the election for the defendant, and he was paid eight shillings for his expenses from Huntingdon by the defendant's agent. Parke, B., told the jury that, if they were satisfied upon the evidence that the defendant did, by himself or any other person on his behalf authorized so to do, promise money to the voter in order to induce him to vote for the defendant, they must find for the plaintiff on the first count, although the money so promised was no more than the fair and reasonable expenses of the voter's travelling from Huntingdon to Cambridge and back again; and that if they were satisfied upon the evidence that the defendant did, by himself or any other person on his behalf authorized by him so to do, give money to the voter on account of, that is to say, that the moving cause of his giving such money was the voter's having voted for the defendant, they must find for the plaintiff on the second count, although the money so given was no more than the fair and reasonable expenses of the voter's travelling from Huntingdon to Cambridge and back again, and although the defendant honestly believed that he was committing no offence thereby. The jury found a verdict for the plaintiff on both counts; and, upon a bill of exceptions, it was held that it was necessary to show that the circular was written by the authority, expressed or implied, of the defendant, and that there was not only evidence to go to the jury, but that they were well warranted in finding that both the promise and the payment were made by the authority, express or implied, of the defendant; and that although the defendant was perfectly innocent of any intention to violate the law, yet if he did authorize the memorandum to be added to the note, and that note was sent to the voter by his authority, he was acting in violation of the statute; but that the plaintiff ought not to recover two penalties, one for the promise to pay and the other for performing the promise by payment; for where there was a promise to pay, and a payment in pursuance of that promise, the legislature meant that to be only one act of bribery. (Cooper *v.* Slade, 6 H. L. C. 746.) But payment of the expense of taking up the freedom of voters is clearly illegal. (Bayntun *v.* Cattle, 1 M. & Rob. 265.) A declaration under the 2 Geo. II. c. 24, s. 7, for corrupting a voter by corruptly *giving* the voter the sum of £10, as a reward to him to give his vote, was supported by evidence that the defendant gave the voter a card in one room, which the voter presented to a person in another room, who thereupon gave him the money. (Webb *v.* Smith, 4 Bing. N. C. 373.) And it was held in the same case that the plaintiff might prove that the defendant on the same day, and at the same place, gave cards to other persons who also obtained money by presenting them to the person in the other room. (Webb *v.* Smith, 4 Bing. N. C. 373.) It seems that an indictment against a voter for giving a false answer at an election is insufficient if it merely state that the voter gave the answer at an election, and does not aver that the writ for holding the election, or that the election was duly held (R. *v.* Bowler, C. & M. 559; R. *v.* Ellis, C. & M. 564), and the same point would have applied to an indictment for bribery; but the 26 & 27 Vict. c. 29, s. 6, makes it sufficient to allege that the defendant was guilty of bribery at the election. Where the first count charged the defendant with having paid money to one Gilbert with intent that it should be applied in bribery at an election, and several other counts charged the defendant with the actual bribery of several persons named in these counts, and the only act of the defendant was giving £2000 to Gilbert for the purposes of the election, and Gilbert was the person who had bribed the persons named in the second and other counts, and the jury found the defendant guilty on all the counts, it was objected that, as the defendant was found guilty on the first count, he ought not to have been found guilty upon the other counts, it appearing that there was but one act, namely, that of paying money by him to an agent; but it was held that this objection, if available at all, would

only be by application at the trial that the prosecutor should be compelled to elect upon which count he would proceed. There was no doubt that a man by one and the same act might commit several distinct offences. By the 17 & 18 Vict. c. 102, s. 2, No. 5, paying money to any person with intent that such person should use it to bribe electors is declared to be equivalent to bribery, and, as such, a misdemeanor, though no person was actually bribed; and by No. 1, giving money to an elector to induce him to vote is declared to be bribery, and as such a misdemeanor; but the offences are not the same, though it may be said that they arise from one and the same act. It was further objected that as the defendant had employed subordinate agents, by whom the bribes were given, he could not be convicted of having bribed the voters himself; but it was held that if a man employs an agent to corrupt voters, and that agent in carrying such general instructions into effect employs subordinate agents within the scope of the authority received from the principal, such principal, with reference to the express terms of this statute, as well as upon general principles of law, will be guilty of a misdemeanor as a principal. (R. *v.* Leatham, 3 L. T. 504.) In an action for bribery at an election it was held that the register of voters at an election made in pursuance of the 6 & 7 Vict. c. 18, ss. 48, 49, is a document of such a public nature as to be admissible upon its mere production by the returning officer, and therefore an examined or certified copy of it is admissible; and where the plaintiff having given in evidence a copy of the writ and return from the office of the clerk of the crown, certified by a clerk in the office to be a true copy of the original writ and examined therewith, and the defendant's counsel, having suffered it to be given in evidence as a certified copy, at the close of the case objected that the copies of the writ and return were not duly certified copies, it was held that, assuming that they were not, there was no ground for granting a new trial, for the objection came too late, and might have been cured by proving that they were examined copies if it had been taken at the proper time. It seems that in such an action proof of the writ, return, and register of voters is requisite, and that parol evidence of an election having taken place is not sufficient. (Reed *v.* Lamb, 6 H. & N. 75.) And on an indictment for personating a voter at an election for a borough, it has been held that the writ to the sheriff must be produced in order to prove that the election was duly held. (R. *v.* Vaile, 6 Cox C. C. 470.) But where an offence is complete before the return is made, as where the offence is preventing a voter from voting, the return need not be given in evidence. (R. *v.* Clarke, 1 F. & F. 654.) The 26 & 27 Vict. c. 29, s. 6, makes the certificate of the returning officer evidence of the election. Where a book, which was in writing and duly signed, contained the register of voters, Byles, J., held that though there ought to be a copy of the list printed in a book and duly signed, in order to constitute a proper register, yet this register, though irregular, was valid, and admissible in evidence. (R. *v.* Clarke, 1 F. & F. 654.) Where an action for bribery was brought in Essex, and the sum of £10 had been paid by the defendant to the London correspondents of the Harwich Bank to the credit of a person who had a boat in his possession for a debt, and a few days afterwards the boat was released, it was held that the £10 must be taken upon the facts to have been paid at Harwich, and therefore the venue was properly laid in Essex. (Baker *v.* Rusk, 15 Q. B. 870.) The 5 & 6 Will. IV., c. 76, s. 54, enacts "that if any person who shall have or claim to have any right to vote in any election of mayor, or of a councillor, auditor, or assessor of any borough, shall, after the passing of this act, ask or take any money or other reward, by way of gift, loan, or other device, or agree or contract for any money, gift, office, employment, or other reward whatsoever, to give or forbear to give his vote in any such election, or if any person, by himself or any person employed by him, shall, by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt or procure, or offer to corrupt or procure, any person to give or forbear to give his vote in any such election, such person so offending in any of the cases aforesaid shall for every such offence forfeit the sum of fifty pounds of lawful money of Great Britain, to be recovered, with full costs of suit, by any one who shall sue for the same, by action of debt, bill, plaint, or information in any of his majesty's courts of record at Westminster; and any person offending in any of the cases aforesaid, being lawfully convicted thereof, shall forever be disabled to vote in any election in such borough, or in any municipal or Parliamentary election whatever in any part of the United Kingdom, and also shall for ever be disabled to hold, exercise, or enjoy any office or franchise

4. Embracery.—Embracery includes an actual bribery of, or any attempt to bribe, a jury. (See EMBRACERY.)

to which he then shall or at any time afterwards may be entitled as a burgess of such borough, as if such person was naturally dead." The 54th section, 17 & 18 Vict. c. 102, contemplates three descriptions of offences: first, that of procuring the party to give his vote for a particular candidate, that is, when he acts in pursuance of the corrupt agreement; secondly, that of procuring the voter, where the bribe is offered and accepted, an actual agreement is made, and the party promises to act upon it; the third offence is a new one, not found in the old Bribery Act, where the whole that appears is the mere offer of a bribe, refused on the other side, or not assented to at the time. An *employment* is a *reward* within the meaning of this section. The offence of corrupting a voter is complete where the two parties have agreed, the one to offer, the other to accept, a bribe as the condition of voting for a particular person, whether the person who has agreed to vote votes or not for such person, or whether he intended so to vote or not. But where a bribe is offered but not accepted, the offence is that of offering to corrupt. A declaration in debt for the penalty of £50, under the 5 & 6 Will. IV. c. 76, s. 54, alleged that the defendant did corrupt one J. W., who had a right to vote at an election of councillors for a borough, by corruptly promising to give the said J. W., if he should vote at the said election for certain candidates, employment in hauling stones at and for certain hire and reward to be paid for the same; and it was held upon demurrer that the declaration was sufficient. The question was whether any difference was made between the asker and the offerer of a gift or reward, as to the nature of the thing asked or offered. To ascertain what is the "gift or reward" contemplated in the latter branch of the clause, the court must look at the former part of the section, and there are found in conjunction the words "any money, gift, office, *employment*, or *other* reward whatsoever." An employment, therefore, is there considered as a reward; and by the common-sense of mankind it is so, where the party to whom it is offered wants employment. It falls, therefore, equally within the more general words of the latter part of the clause. But whether this employment was in the particular case given as a reward within the object of the act was a question for the jury; if only the ordinary wages were given they might probably find that the employment was not given for a corrupt reward. (Harding *v.* Stokes, 1 M. & W. 354.) The demurrer having been withdrawn by leave of the court, the defendant pleaded not guilty, and on the trial it appeared that J. W. having promised his vote in favor of certain candidates, the defendant told him that if he would vote for certain other candidates he would give him employment in hauling stones at certain weekly wages; J. W. answered that it was a good offer, but that the difficulty was how he should get off his promise; that he would consider it, and would see the defendant again the next Friday. No further communication, however, took place, and J. W. eventually voted for the candidates to whom he had originally promised his vote. It was objected for the defendant that the evidence did not prove a corrupting of the voter, as charged in the declaration, but a mere offering to corrupt; and the plaintiff was nonsuited. But the court, upon a rule to show cause why there should not be a new trial, held that if it were proved that there was an agreement to vote in pursuance of the offer, no matter whether the party intended to perform it or not, the offence of corrupting was complete. The evidence given in this case *might* be construed to prove that the offer was accepted; if the jury should be of that opinion the offence of corrupting was complete; but on the other hand they might well come to the conclusion that the voter had not made up his mind, but took time to consider further whether he would accept the offer; in that case the offence of corrupting was not complete, but it was a mere offer to corrupt within the third clause of the statute. (Harding *v.* Stokes, 1 M. & W. 354.) Some cases decided upon the 2 Geo. II. c. 24, s. 8, may throw light upon the construction of the 5 & 6 Will. IV. c. 76, s. 55. On that act it was decided that the circumstance of a party having been, within the limited time, a plaintiff in an action on the statute, and having prosecuted it to judgment, did not prove him to have been the first discoverer. Lord Mansfield, C. J., observed that the court had not said, nor would say, that a plaintiff cannot be the discoverer; but that the act does not *make* him so, or *consider* him as the discoverer; and that as the plaintiff could not be the witness himself in the action, some other person must have been the

BRICK. See note 1.

BRIDGES. (See also CONSTITUTIONAL LAW; DAMAGES; HIGHWAYS; MUNICIPAL CORPORATIONS; NAVIGATION; NEGLIGENCE; NUISANCES; RAILROADS; WATER-COURSES; WAYS.)

1. **Definition.**—A bridge is a structure which affords to travellers and others a safe and complete passageway over a river or stream,[2] or over a ditch or other place or obstruction.[3]

witness; it was not therefore to be presumed, without any evidence of it, that the plaintiff was the first discoverer. (Curgenven *v.* Cumming, 4 Burr. 2540.) And where one person procured another to make an affidavit of facts amounting to bribery, and then prosecuted a third person upon these facts to conviction, it was held that the person making the affidavit was the discoverer. (Sibly *v.* Cuming. 4 Burr. 2464.) Not only a verdict, but judgment must be obtained to satisfy the clause; but when judgment is obtained it will relate, for the purpose of the indemnity, to the time when the discovery was first made. (Sutton *v.* Bishop, 1 Blac. R. 665.) 1 Russ. on Cr. (9th Am. Ed.) 230 *et seq.*

1. Brick Dwellings.—Where buildings described in a policy of insurance as "brick dwellings" are shown to form a part of a block of houses having brick walls in the front and rear, with side walls in the basement and first story of brick, eight inches thick, and above them walls made with joists filled in with brick four inches thick and plastered, it is competent to ask a builder whether they would or would not be called brick houses. Mead *v.* N. W. Ins. Co., 7 N. Y. 530.

Brick Store.—Where a place in which liquors were kept was described in a warrant as a "brick store," and it was shown that the front and principal part of the store was of brick, but the liquors were kept and seized in a wooden addition in the rear, which communicated with the main room by a door, and that the store was also known in the neighborhood by the name of "the brick store," it was held that the place sufficiently answered the description in the warrant. "We think the objection is rather hypercritical. It was substantially a brick store. There is some wood in the construction of every brick building. Neither the plaintiff nor any one else would be liable to be misled by this description." Lowrey *v.* Gridley, 30 Conn. 450.

2. By the common law—*flumen vel cursus aquæ.* Rex *v.* Whitney, 3 N. & M. 60, 417, 421; Rex *v.* Oxfordshire, 1 Barn. & Ad. 300.

But water need not flow at all times. Regina *v.* Derbyshire, 2 G. & D. 97.

3. Whitall *v.* Freeholders of Gloucester, 40 N. J. L. 302; Board of Madison Co. *v.* Brown, 89 Ind. 48, 52; Tomlins' Law Dict.; Jacob's Law Dict.; Bouvier's Law Dict.; Proprietors of Bridges *v.* Hoboken Land Co., 13 N. J. Eq. 524, 525.

Bridges declared to be of the same nature as *ferries*, and within the same principles applicable to them. Gilman *v.* Philadelphia, 3 Wall. (U. S.) 713, 725; People *v.* Rensselaer & S. R. Co., 15 Wend. (N. Y.) 113, 133; **Ward** *v.* **Gray**, 6 B. & S. 345.

The term "bridges" is not confined to such structures as afford a complete passageway over a water-course.[1]

Exactly what constitutes a bridge is not a question of law, but rather of fact.[2]

2. Are Highways.—Public bridges are a part of the highway.[3]

But the terms "bridge" and "highway" are not convertible, so that an indictment for neglect to repair a bridge must be by the term bridge, and not highway.[4]

Railway viaducts are not bridges. Although it has been a subject of much discussion by the courts, it may be considered as settled, by a majority of the decisions, that a railway viaduct with no roadway or path over which man or beast could travel, intended only for railway trains and the transportation of passengers, baggage, etc., is not a bridge within the meaning of an act giving to a bridge company the exclusive right to erect and maintain a bridge and take tolls, especially where the act was passed when railroads were practically unknown.[5]

1. Whitall *v.* Freeholders of Gloucester, 40 N. J. L. 302, 305.

The common-law definition—*flumen vel cursus aquæ*, etc.—has a more enlarged signification by modern usage; so the term "bridge" in statutes signifies also crossings of public ways on land. State *v.* Gorham, 37 Me. 451.

Special Instances.—A structure over a canal or surface water is a bridge within the meaning of the law authorizing chosen freeholders to construct bridges. McKinley *v.* Chosen Freeholders of Union Co., 29 N. J. Eq. (2 Stew.) 164.

An aqueduct for the passage of a canal or water-pipes over the river is a bridge, but not such a bridge as to be the violation of a grant to a bridge company of an exclusive right to take tolls. Bridge Co. *v.* Hoboken Land and Improvement Co., 13 N. J. Eq. (2 Beas.) 81, 91.

Structures with their abutments erected over a railroad for highways to cross are bridges. State *v.* Gorham, 37 Me. 451.

Bridges are a "public use." Sedgwick on Statutory and Constitutional Law (2d Ed. Pomeroy's Notes), 446. Note *a et seq.*, citing Baldwin, J.. in Gilmer *v.* Lime Point, 18 Cal. 251, 251.

Case of a foot-bridge formed by three planks and a hand-rail used for a foot-path over a small stream. Regina *v.* Southampton, 14 Eng. L. & E. 116.

Structure over a channel dry part of the time is not a "county bridge." Taylor *v.* Davis, 40 Iowa, 295.

2. Tolland *v.* Willington, 26 Conn. 578; Regina *v.* Gloucestershire, 1 Carr. & M. 506; Moreland *v.* Mitchell Co., 40 Iowa, 394; Rex *v.* Whitney, 3 N. & M. 60, 417, 421.

3. Union Pacific R. Co. *v.* Commissioners, 4 Neb. 450; McCormick *v.* Township of Washington (Pa. 1886), 2 Cent. Repr. 584; Zimmerman *v.* Conemaugh (Pa. 1886), 2 Cent. Repr. 361; Rapho *v.* Moore, 68 Pa. St. 404; Rex *v.* Inhabitants of Bucks, 12 East, 192; (under sec. 416 of the Municipal Act) McHardy *v.* Corporation of Township of Ellice *et al* (Prov. Ont.), 1 App. R. 628; s. c., 39 Q. B. 546; Commonwealth *v.* Central Bridge Corporation, 12 Cush. (Mass.) 243; Washer *v.* Bullett Co., 110 U. S. 558, 564; City of Chicago *v.* McGinn, 51 Ill. 266; Rex *v.* Sainthill, 2 Ld. Ray. 1174. But see Osmond *v.* Widdecomb, 2 Barn. & Ald. 49; State *v.* Canterbury, 8 Fost. (N. H.) 195.

Bridge not a highway when. Rex *v.* Chart & Longbridge, 39 L. J. M. C. 107.

A bridge over a stream crossing a city street is a part of the street. City of Chicago *v.* Powers' Adm'x, 42 Ill. 169.

Is a street within intent of statute. Beaver *v.* Manchester L. J., 26 Q.B. 311; City of Eudora *v.* Miller, 30 Kan. 494; Erie City *v.* Schwingle, 22 Pa. St. 384.

The question whether actually a part of highway was not in issue in the last case, but action was for injury from defective highway, the injury having occurred on bridge upon it.

4. State *v.* Canterbury, 28 N. H. 195, 230; Rex *v.* Oxfordshire, 1 Barn. & Ad. 300, where it was held that an indictment must be of non-repair of *pons . . . super flumen*, etc.

5. Proprietors of Bridges *v.* Hoboken Land Co., 13 N. J. Eq. (2 Beas.) 503;

A Connecticut case, however, holds that a railroad bridge, although not convenient for or admitting common vehicles and not intended for or admitting foot-passengers, is what would ordinarily be called a bridge, since it had the form, name, and character of a bridge and did its work; its purposes being that of transportation in its cars of personal baggage and freight, etc.[1]

Bridges are classified as public or private.

3. Public Bridge.—The general use of a bridge by the public as a part of the highway common, and its public utility, are necessary to constitute it a public bridge.[2]

And whether a bridge is so connected with a public highway as to be of public necessity and utility is a question of fact for the jury.[3]

But such general use may be limited to occasions when special emergencies arise, as in times of freshets, and the bridge will still be a public bridge.[4]

4. Dedication and Prescription.—Bridges in respect to repairs may become public by dedication or prescription; as, where a private bridge built in a highway was used by the public for forty years, it was held to have become a public bridge.[5]

5. A Private Bridge is one erected for the use and benefit of a

Bridge Proprietors *v.* Hoboken Co., 1 Wall. (U. S.) 116; Mohawk Bridge Co. *v.* Utica & Schenectady R. Co., 6 Paige (N. Y.), 564; Bridge Co. *v.* Hoboken Land, etc., Co., 13 N. J. Eq. (2 Beas.) 81, 91; Attorney-General *v.* Delaware & Bound Brook R. Co., 27 N. J. Eq. (12 C. E. Green) 1; Thompson *v.* N. Y. & Harlem R. Co., 3 Sand. Ch. (N. Y.) 625; Lake *v.* Virginia Co., 7 Nev. 294.

A charter granted in 1766, with exclusive right to maintain a bridge and collect tolls, is not violated by a grant to a railroad to construct a bridge intended only for the transportation of its passengers, baggage, and freight in cars. McRee *v.* Wilmington & Raleigh R. Co., 2 Jones Law (N. Car.), 186.

1. Enfield Toll-bridge Co. *v.* Hartford R. Co., 17 Conn. 40. This case is criticised in Lake *v.* Virginia & Truckee R. Co., 7 Nev. 294; explained in Proprietors of Bridges *v.* Hoboken Land Co., 13 N. J. Eq. 524; and distinguished in Bridge Proprietors *v.* Hoboken Co., 1 Wall. (U. S.) 116, as being based upon a fact found and before the court, viz., that the road and bridge would to a certain extent diminish the tolls of the plaintiff.

2. Reg. *v.* Inhabitants of Yorkshire, 2 East, 342; Woolrych on Ways and Bridges, 202, 204; 1 Russell on Crimes (5th Am. Ed.), 342.

"The interpretation clause (s. 5) of the Highway Act, 1835, (5 & 6 Wm. IV. c. 50,) includes in the words 'county bridges' all public bridges." Boville, C. J., in The Queen *v.* Upper Half Hundred of Chart & Longbridge, Law Rep. 1 C. C. Res. 237. See further, on this point, notes to REPARATION under this subject.

3. State *v.* Northumberland, 44 N. H. 628.

4. Rex *v.* Devon, Ryan & Moody, 144; Rex *v.* Buckingham *et al.*, 4 Campb. 189. But see Rex *v.* Northampton, 2 M. & S. 262.

5. Town of Dayton *v.* Rutland, 84 Ill. 279; State *ex rel.* Lawrence, etc., 22 Kan. 438; Rex *v.* Glamorgan, 2 East, 356; Rex *v.* Ely, 4 New Sess. Cas. 222; Comyns Dig. *Chimin*, B. 1; Rex *v.* Stratford-upon-Avon, 14 East, 348; Glusburne Bridge Case, 5 Burr. 2594; 2 Inst. 201, 700; Rex *v.* Hendon, 4 B. & Ad. 628; Rex *v.* Kent, 2 M. & S. 513; Rex *v.* Inhabitants of Northampton, 2 M. & S. 262; State *v.* Town of Compton, 2 N. H. 573; Williams *v.* Cumington, 18 Pick. (Mass.) 312.

Whether a private bridge has been made a town bridge by public use is a question for the jury. Dygert *v.* Schenck, 23 Wend. (N. Y.) 445.

Stated impliedly that a bridge may become a public bridge by dedication. Regina *v.* Corporation of the County of Haldimand (Prov. Ont.), 38 Q. B. 396. See further, on this point, REPARATION under this title; see also title HIGHWAYS, sub-title DEDICATION.

private person and not built for common good and public convenience.[1]

6. By What Authority Erected.—*Who May Not Build.*—At the common law the rule prevailed that no one could erect a public bridge without license.[2]

Nor could the inhabitants of a county of their own authority change a bridge from one place to another, but must needs have an act of Parliament therefor.[3]

The fact that a public highway is laid out to a river on both sides does not authorize a private person to build a bridge over it and thereby make it a part of the highway.[4]

So a municipal corporation has no power without authority from the State to erect a toll-bridge and collect tolls.[5]

General Law as to Erection of Bridges.—Under the statute laws of most of the States it is made the duty of towns, counties, or other corresponding corporate divisions to maintain the public highways within their respective limits reasonably safe and convenient for public travel. This duty includes the duty of erecting and maintaining necessary bridges upon those highways.[6]

1. King *v.* Inhabitants of Bucks, 12 East, 203; 2 Inst. 701; 1 Salk. 359.

2. 1 Salk. 12.

3. Regina *v.* Inhab. *de Com.* Wilts, 6 Mod. 307; 2 Inst. 29, 700, 701.

4. Smith *v.* Harkins, 3 Ired. Eq. (N. Car.) 613; s. c., 44 Am. Dec. 83.

5. Clark *v.* City of Des Moines, 19 Iowa, 199, 223; Colton *et al. v.* Hanchett *et al.*, 13 Ill. 615.

6. Beatty *v.* Titus, 47 N. J. Law, 89; Freeholders *v.* State, 42 N. J. Law, 263, 273; Ripley *v.* Chosen Freeholders, etc., 40 N. J. Law, 45, 49; Penn. Township *v.* Perry County, 78 Pa. St. 457; McCormick *v.* Township of Washington (Pa. 1886), 2 Central Reporter, 584; Humphrey *v.* Armstrong County, 56 Pa. St. 204; City of Eudora *v.* Miller, 30 Kan. 494.

Where necessary to improve the usefulness of its streets, a municipal corporation may erect bridges over them or may bridge its gutters. Allentown *v.* Kramer, 73 Pa. St. 406.

As to the power of the board of county commissioners to purchase bridges, etc., see Fountain County *v.* Thompson, 106 Ind. 534; s. c., 4 Week. Repr. 520, citing Driftwood Valley Turnpike Co. *v.* Board, 72 Ind. 226; Board *v.* Duprez, 87 Ind. 309; Board *v.* Rushville, etc., Co., 37 Ind. 504.

Obligation to construct bridges in Iowa extends only to bridges of the larger class requiring an extraordinary expenditure of money. Taylor *v.* Davis County, 40 Iowa, 295; Moreland *v.* Mitchell County, 40 Iowa, 394.

Counties have the power in Iowa to provide for the erection of bridges necessary for public convenience within the county. Taylor *v.* Davis County, 40 Iowa, 295, citing Bell *v.* Foutch, 21 Iowa, 119; Long *v.* Boone County, 33 Iowa, 181.

County court under statute may grant franchise for toll-bridge subject to the police power of the State. Chandler *v.* Montgomery County, 31 Ark. 25.

Free bridge may be erected in place of private one. Red River Bridge Co. *v.* Mayor of Clarksville, 1 Sneed (Tenn.), 176

Municipal act of 1866, 29–30 Vict. c. 51, sec. 341, sub. sec. 12. requires county councils to "erect and maintain bridges over rivers forming township or county boundary lines;" case of river between two townships in same county and not county boundary. Kinnear *v.* Corporation of the County of Haldimand (Prov. Ont.), 30 Q. B. 398.

Sec. 413 of the municipal act makes it obligatory upon county councils to maintain bridges over rivers constituting boundary lines between municipalities in same county. McHardy *v.* Corporation of Township of Ellice *et al.* (Prov. Ont.), 1 App. R. 628; s. c. (Prov. Ont.), 39 Q. B. 546.

One county cannot compel another to erect a bridge over stream between adjoining counties. Garrard County Court *v.* Boyle County Court, 10 Bush (Ky.), 208.

In Indiana there is a statutory provision (R. S. 1881, secs. 2880–2884, Acts

And extends to rebuilding such bridges when destroyed.[1]

So a town may appropriate money to build a necessary public bridge (N. H. G. L. c. 37, § 4), and may accept a private donation to aid in making the same.[2]

Special Authority.—The legislature may authorize the erection of a bridge over small creeks, etc.[3] It may expressly delegate the power to determine whether a bridge is necessary over a creek or cove;[4] and may grant an exclusive right to erect a bridge.[5]

The State has a right to determine that a railroad bridge shall be constructed for railroad use and public travel, and that a certain proportionate amount of the cost of constructing the same shall be paid to the railroad by the county in which the bridge is located.[6]

So it may provide that a part or the whole of the expense of

1885, p. 58), concerning the erection, etc., of bridges over streams forming the boundary line between two counties. Fountain County *v.* Thompson (Ind. 1886), 4 Western Reporter, 520, citing Browning *v.* Board, 44 Ind. 11.

Recovery by one town from another of expense of building bridge. Pittsburg *v.* Clarksville, 58 N. H. 291.

Case of bridge over stream between two counties; one county not liable to the other in the absence of a contract for expense of building. Courts will not interfere with the discretion of the proper officials, in the matter of building, when there is no abuse of power. Brown *v.* Commissioners of Merrick County, 18 Neb. 355.

Liability of county to reimburse town for one half cost of bridge under bridge law of 1879. McHenry County Supervisors *v.* People, 12 Ill. App. 204.

Towns extending to centre of river are bound to erect necessary bridges within the town to make the highway passable. State *v.* Canterbury, 28 N. H. 195, 230.

Town must raise half the funds for building bridge before any obligation arises on part of county to do anything. Kendall County Supervisors *v.* People, 12 Ill. App. 210.

Town must Erect.—Where a bridge becomes necessary for the convenient use of a public highway, town may be compelled to erect a bridge. (G. L. c. 76, § 1, c. 1, § 25, N. H. Stat.) Kelly *v.* Kennard, 60 N. H. 1, citing State *v.* Canterbury, 28 N. H. 195, 228, 232.

Internal Improvement.—Bridges erected by county are not works of ——, when erected on highways and wholly within its limits. De Clerg *v.* Hogan *et al.*, 12 Neb. 185.

Petition for Bridge, under statute may be signed by attorney in behalf of town. Town *v.* Town of Royalton, 58 Vt. 212.

May not Remove.—A temporary railroad bridge, although it obstructs highway, cannot be forcibly removed by the selectmen of the town. Flanders *v.* Norwood, 141 Mass. 17.

Private person cutting a canal across a public highway for his own benefit *held* bound to erect and maintain a bridge over the same. Phœnixville *v.* Phœnix Iron Co., 45 Pa. St. 135.

But *aliter* where a new and wider public road was laid, necessitating a new and wider bridge. Phœnixville *v.* Phœnix Iron Co., 45 Pa. St. 135. See REPARATION under this title, *post.*

1. Whitall *v.* Freeholders of Gloucester, 40 N. J. Law, 302, 306.

A bridge owned by a private person was sold to a county, and was accepted, repaired, and maintained by it for a long period of time. A bridge was necessary at the point where built. Upon its destruction, *held* that the county was bound to rebuild it under the general law. (Acts of 1876, Purd. Dig. 2074, pl. 6.) Lancaster County *v.* Commonwealth (Pa. 1885), 1 Central Reporter, 130; State *ex rel.* Roundtree *v.* Board of Gibson County, 80 Ind. 478.

2. Kelly *v.* Kennard, 60 N. H. 1.

3. Commonwealth *v.* Commissioners of Monroe County, 2 Watts & Serg. (Pa.) 495.

4. State *v.* Anthonie, 40 Me. 435.

5. Piscataqua Bridge *v.* N. H. Bridge *et al.*, 7 N. H. 35.

Doubted if the State can erect bridges over a canal crossing public highway without the consent of the trustees after it has already transferred its interest. People *ex rel.*, etc., *v.* Canal Trustees, 14 Ill. 402.

6. Brayton *v.* Fall River, 124 Mass. 95.

constructing a bridge shall be borne by the county, notwithstanding the fact that under the general law the expense must have been sustained wholly by the town in which the bridge is located.[1]

The legislature may impose the burden of maintenance and repair upon one county when bridge is in another,[2] and may apportion among counties and towns the amount to be borne by each.[3] The legislature may impose duty of maintaining bridge on municipal corporation.[4]

Where a statute provided for the erection of a bridge by a railroad company, at the direction of the town, when the railroad should intersect any highway in any town, *held*, no express distinction being made between highways established and constructed and those established but not constructed, that none would be implied, and the company was bound to erect a bridge over the latter when required by the town.[5]

7. Ownership.—Towns have a qualified interest in bridges erected by them; and where the same are destroyed, or obstructed, or the materials converted, they may maintain an action therefor.[6]

In 1842 and 1843 a bridge was built across the Wabash river on the line of a public highway extending over the same. The superstructure was of wood; the abutments and piers were of stone, the latter resting on submerged timbers. A narrow structure was attached as a wing to the bridge. The bridge was used in connection with the highway for public travel, and the wing was used as a towpath by those navigating the canal to transfer horses used in towing boats across the river. The highway on

1. Norwich *v.* County Commissioners of Hampshire, 13 Pick. 60; Commonwealth *v.* Newburyport, 103 Mass. 13.

May require one county to build at its own expense a bridge across a boundary line into another county. Washer *v.* Bullett County, 110 U. S. 558, 565, citing Agawam *v.* Hampden, 130 Mass. 528, and other cases.

2. Carter *v.* Cambridge, etc., Bridge Proprietors, 104 Mass. 237, and cases cited in opinion; Commonwealth *v.* Newburyport, 103 Mass. 135. But see Boston *v.* County Commissioners, 111 Mass. 313.

3. Carter *v.* Cambridge, etc., Bridge Proprietors, 104 Mass. 237; Scituate *v.* Weymouth, 108 Mass. 130; Commonwealth *v.* Newburyport, 103 Mass. 135.

4. Pumphrey *v.* Mayor and C. C. of Baltimore, 47 Md. 145.

5. Worcester, N. & R. R. *v.* Nashua (N. H., 1886), 2 New Eng. Reporter, 292.

Question whether a canal company is bound to erect bridges over its canal to connect a highway laid out after the canal was constructed, the charter requiring the company to make good and sufficient bridges over the canal when the same should cross any public road. State *v.* Morris Canal & Banking Co., 22 N. J. Law (2 Zab.), 537. *Held*, however, in Morris Canal & Banking Co. *v.* State, 24 N. J. Law (4 Zab.), 62, that neither under the common law nor the charter of the company did any obligation to erect such bridges rest upon the company.

Bridge company not authorized to close fords, although it has exclusive rights under its charter over several miles of the river above and below a given point. Crupton *v.* Waco Bridge Co., 62 Tex. 715.

Where railroad company has a grant to lay its road over a bridge within a city, the fact that it afterwards lays another track over the bridge to accommodate increased business does not impair the grant. Des Moines *v.* Chicago, Rock Island & Pacific R. Co., 41 Iowa, 569.

6. Town of Troy *v.* Cheshire R. Co., 23 N. H. 83, citing Harrison *v.* Parker, 6 East 154. See Inhabitants of Freedom *v.* Weed, 40 Me. 383; s. c., 63 Am. Dec. 670.

County may maintain action for injury to or destruction of. Corporation of the County of Wellington *v.* Wilson *et al.*, 16 C. P. (Prov. Ont.) 124.

the line of which the bridge was erected was laid out in 1841, and had been continuously used as a public highway since that time. A dam had been built across the river just below the line of the highway. The river just above the dam constituted a part of a canal. In 1873 the wooden part of the bridge was blown down, and was rebuilt by the defendant. A short time thereafter the canal was abandoned. The public continued its use of the bridge as a highway until 1881, when the superstructure was again destroyed. A year prior to this the dam was so injured that the water above was let out and fell below the submerged timbers upon which the stone piers and abutments rested, exposing them to the air and decay, so that it was necessary, in order to make the bridge reasonably safe for public travel, to take down and rebuild the piers upon other and safer foundations. The appellants derived their title to the canal under a decree of court made in 1874, and a purchase under the same in 1876. It was claimed by the appellants that the piers and abutments were the property of the canal company, and that the commissioners of the defendant county had no right to use them in rebuilding its bridge. *Held*, that the purchasers of the canal took the fee burdened with the easement which the public had had, for over forty years, to use the bridge as a public highway; that the fee was thus burdened was a fact open and visible before them, and one of which they were bound to take notice, it not being necessary that they should have actual knowledge thereof; that they had no rights which would "prevent the State through its local instrumentality, the board of commissioners, from rebuilding the bridge and restoring the highway to its former condition," and that the piers and abutments and the material in them might be used in rebuilding.[1]

8. Over Navigable Waters.—Bridges connecting parts of turnpikes, streets, and railroads have been declared to be as much a means of commercial transportation as navigable waters.[2]

Congress has power to authorize the erection of a bridge over a navigable river, although it may obstruct the free navigation of the same to a certain extent.[3]

That a State has the power to authorize the building of bridges

1. Shirk, *et al. v.* Carroll County (Ind. 1886). 3 Western Reporter, 902, citing St. Louis Bridge Co. *v.* Curtis, 103 Ill. 410; Logansport *v.* Shirk, 88 Ind. 563. A petition for rehearing principal case was subsequently brought; this was overruled, and reasons therefor given at length.

Where the town erected a bridge jointly with the county, it is not exclusively a county bridge, and neither town nor county could remove it at pleasure. Greely Township *v.* Commissioners of Saline County, 26 Kan. 510.

Party permitting bridge to be erected upon his land without objection, insisting only on compensation, cannot afterwards claim the bridge as realty of his own, on ground that no condemnation proceedings were first had. Sullivan *v.* Board of Lafayette Co., 58 Miss. 790.

Town cannot recover for injury to a bridge upon a road in its limits where no attempt has been made to repair the injury, and no expense having been incurred on account of the same, although a town highway. Inhabitants of Freedom *v.* Weed, 40 Me. 383; s. c., 63 Am. Dec. 670.

2. Gilman *v.* Philadelphia, 3 Wall. (U. S.) 713, 729.

3. People *ex rel.* Kelly, 76 N. Y. 475; Pierce on Railroads, 207.

over navigable waters, although they may to a certain extent obstruct navigation, is a well-established doctrine. This power, however, is held to be subject to the exercise of the power of Congress to regulate navigation.[1] So it is declared to be a "proposition not disputed that but for the power granted by the constitution to Congress the State legislatures would have as full and entire control of the waters of their several States as they have over the land. . . . The States reserve all power not granted to Congress. The entire sovereignty over the waters of the States then vests in Congress and the several State legislatures. . . ."[2]

In the Wheeling Bridge Case,[3] decided in 1855, it was determined that "the regulation of commerce includes intercourse and navigation, and of course the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation; "that the purely internal streams of a State were, so far as the public right of navigation is concerned, entirely in the control of and subject to regulation by the State itself; and that a structure or impediment to the navigation of such internal waters, although a material obstruction, might be lawfully authorized by its legislature.

In a later case,[4] decided in 1865, where a bridge had been erected over the river Schuylkill, a navigable river entirely within

1. South Carolina *v.* Georgia, 93 U. S. 4; U. S. *v.* New Bedford Bridge, 1 Woodb. & M. (U. S.) 401, 508; Silliman *v.* Hudson River Bridge Co., etc., 4 Blatchf. (U. S.) 395; Parkersburg Transportation Co. *v.* Parkersburg, 107 U. S. 691; Wilson *v.* Blackbird Creek Marsh Co., 2 Pet. 245; City of Chicago *v.* McGuire, 51 Ill. 266; Bridge Co. *v.* U. S., 105 U. S. 470; Clinton Bridge *in re*, 10 Wall. (U. S.) 454; Hughes *v.* Northern Pacific R. Co., 18 Fed. Repr. 106, 113; U. S. *v.* Mil. & St. P. R. Co., 5 Biss. (U. S.) 410; Jolly *v.* Terre Haute Bridge Co., 6 McLean (U. S.), 237; U. S. *v.* Railroad Bridge Co., 6 McLean (U. S.), 517; Weldon *v.* State of Mo., 91 U. S. 275; Pound *v.* Turck, 95 U. S 459; Clarke *v.* Birmingham & Pittsburg Bridge Co., 5 Wright (Pa.), 147; Wright *v.* Nagle, 101 U. S. 791; Welton *v.* State of Mo., 91 U. S. 275, affd. in Monongahela Bridge Co. *v.* Kirk, 46 Pa. St 112; Board of Wardens, etc., of Philadelphia *v.* City of Philadelphia, 6 Wright (Pa.), 209; Atty.-Gen. *v.* Stevens, 1 Sax. Ch. (N. J.) 369; s. c., 22 Am. Dec. 526; Commonwealth *v.* Charlestown, 1 Pick. (Mass.) 180; Arundel *v.* Inhabitants of McCullough, 10 Mass. 70; Wisconsin River Improvement Co. *v.* Manson, 43 Wis. 255; Miss. River B. Co. *v.* Lonergan, 91 Ill. 508; Bainbridge *v.* Sherlock *et al.*, 29 Ind. 365; Talbot County *v.* Queen Anne County, 50 Md. 245–262; Philadelphia *v.* Field, 58 Pa. St. 320; Carter *v.* Bridge Proprietors, 104 Mass. 236; Pumphrey *v.* Baltimore, 47 Md. 145; Bailey *v.* Philadelphia W. & B. R. Co., 4 Harr. (Del.) 389; s. c., 44 Am. Dec. 593; Commonwealth *v.* Breed, 4 Pick. (Mass.) 460; Hamilton *v.* Vicksburg, etc., R. Co., 34 La. Ann. 970; Hatch *v.* Wallamet Iron Bridge Co., 7 Sawy. (C. C.) 127; s. c., 6 Fed. Repr. 326, 780; Commonwealth *v.* Inhabitants of Taunton, 7 Allen (Mass.), 311; Erie *v.* Canal, 59 Pa. St. 174; Piscataqua Bridge *v.* N. H. Bridge *et al.*, 7 N. H. 35; Commissioners *v.* Board, 39 Ohio St. 628; Rogers *v.* Kennebec & Portland R. Co., 35 Me. 319; Atty.-Gen. *v.* Stevens, 1 Sax. Ch. (N. J.) 369; s. c., 22 Am. Dec. 526; Flanagan *v.* City of Philadelphia, 42 Pa. St. 213, 232; Commissioners *v.* Board of Public Works, 39 Ohio St. 628; People *ex rel.* Kelly, 76 N. Y. 475. See Cox *v.* State, 3 Blackf. (Ind.) 193; Palmer *v.* Cuyahoga Co., 3 McLean (U. S.), 226; Columbus Ins. Co. *v.* Peoria Bridge Assoc., 6 McLean (U. S.), 70.

2. The court in People *v.* Rensselaer & Saratoga R. Co., 15 Wend. (N. Y.) 114.

3. State of Penn. *v.* Wheeling, etc., Bridge Co., 18 How. (U. S.) 421, 431; 13 How. (U. S.) 518.

4. Gilman *v.* Philadelphia, 3 Wall. (U. S.) 713, 725.

the limits of the State of Pennsylvania, the court argued, "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. . . . This necessarily includes the power to keep them open and free from any obstruction to their navigation interposed by the States or otherwise;" that Congress might interfere by general or special laws, regulating all bridges over navigable waters, "remove offending bridges, and punish those who should hereafter erect them." [1]

Later on, in 1882, a bill was brought to enjoin the closing at special hours of the draws to certain bridges over the Chicago river erected by the city to connect its avenues and streets and necessary to the condition of business in the city, and also to compel the removal of the bridges. The river and its branches were entirely within the limits of the State, and its free navigation necessary to those engaged in commerce on its waters, and were erected under authority from the State. The court held that the power of the States to regulate within their limits matters of internal police embraced the construction of bridges; but if a navigable river was unnecessarily obstructed by the State, or it should exercise its powers in an arbitrary manner or to the injury of commerce, Congress could interfere, although the river was wholly within the limits of the State. Until, however, "Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary," and such a drawbridge over a stream is not an obstruction.[2] Then followed in 1883 the case of the Brooklyn Bridge,[3] where it was held that so far as it was an obstruction it was authorized by both the State and Federal governments, and was a lawful structure which could not be abated. The principles enunciated in the last four cases were expressly affirmed by Mr. Justice Field in Cardwell *v.* Bridge Co.,[4] who says: "In these cases the control of Congress over navigable waters within the States so as to preserve their free navigation under the commercial clause of the constitution, the power of the States within which they lie to authorize the construction of bridges over them until Congress intervenes and supersedes their authority, and the right of private parties to interfere with their construction or continuance have been fully considered, and we are entirely satisfied with the soundness of the doctrines reached." [5]

1. Gilman *v.* Philadelphia, 3 Wall. (U. S.) 731. Three judges dissented in this case, and one judge did not sit or take part in the decision.

2. Escanaba *v.* Chicago, 107 U. S. 678, 690; s. c., 2 Am. & Eng. Corp. Cas. 220.

3. Miller *v.* Mayor of New York *et al.*, 109 U. S. 385; 18 Blatchf. C. C. (U. S.) 212.

4. 113 U. S. 205, 208.

5. **Proviso in Grant.**—The franchise of a corporation conferred upon it the right to erect and maintain a certain toll-bridge, with an express proviso that the bridge should not be erected in such a "manner as to injure, stop or interrupt the navigation of said river." *Held*, that the corporation by accepting the franchise with such a condition took it *cum onere*, and was limited in its enjoyment by that condition; and *held* that an authority to build a bridge causing as

Bridge in Two States.—The State of Kansas may authorize the building of a bridge over the Missouri river, although a part of the bridge will be in Kansas and the other in Missouri, and "a corporation of either State may build, own, and operate the whole of the bridge." [1]

Drawbridges.—The duty of maintaining a drawbridge over navigable waters includes the obligation to properly provide for the safe passage of vessels through the draw.[2]

little injury and obstruction to navigation as possible had reference not only to navigation as it existed at the time the charter was granted, but also to the future and possible increase and growth in navigation. Dugan *v.* Bridge Co., 27 Pa 82, 303; s. c., 67 Am. Dec. 464.

Proviso in the charter that the bridge should not be constructed so as to "injure, stop, or interrupt the navigation of said river." *Held*, that a strict literal meaning was not intended, but that a reasonable construction should be adopted. Monongahela Bridge Co. *v.* Kirk, 46 Pa. St. 112.

A general authority to build a bridge across a river does not warrant the erection of a bridge when there is no apparent necessity at a point or in a manner to obstruct navigation when it could reasonably be constructed at a point and in a manner not to have that effect. Hickok *et al. v.* Hine, 23 Ohio St. 523.

Municipal corporations may appoint agents to carry into effect powers granted, and authorize them to obtain loan to pay for expense of building bridge. Carter *v.* Bridge Proprietors, 104 Mass. 236; Philadelphia *v.* Field, 58 Pa. St. 320.

A bridge lawfully erected partially obstructed navigation by vessels with standing masts. *Held*, not to diminish the right of navigation so that the river ceased to be a navigable river, so as to authorize county commissioners to lay out a highway over it. Inhabitants of Charlestown *v.* County Commissioners, 3 Metc. (Mass.) 205.

Where by general law the Court of Sessions was authorized to lay out public highways, *held*, that it had no power to extend the highway over a navigable river so as to obstruct it by a bridge. Commonwealth *v.* Charlestown, 1 Pick. (Mass.) 180; s. c., 11 Am. Dec. 164.

Legislature may determine in its grant upon what conditions a bridge may be erected. Monongahela Bridge Co. *v.* Kirk, 46 Pa. St. 112; Flanagan *v.* City of Philadelphia, 42 Pa. St. 232.

Trespass.—A bridge lawfully erected over a navigable stream not the property of owner of land lying along the stream, and party tying his boat to such bridge below low-water mark, is not guilty of trespass against such owner. Parsons *v.* Clark, 76 Me. 476.

Secretary of War.—Acts of Congress of April 1st and June 4th, 1872, construed. Secretary of War may determine under these acts whether erection of bridge obstructs navigation and determine *de* its erection. Town of Dayton *v.* Rutland, 84 Ill. 279; State *ex rel.* Lawrence, etc., 22 Kan. 438.

Oregon, Act of Congress.—The State of Oregon may authorize the erection of a bridge over navigable waters within its limits, and such an act is not void and inoperative as being in conflict with a prior act of Congress admitting Oregon into the Union, which act provided that "all the navigable waters of the State shall be common highways and forever free, as well to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll therefor," the provision being similar to that admitting California into the Union, and being "only intended to prevent the use of navigable streams by private parties to the exclusion of the public and the exaction of tolls for their navigation," and does not prevent those States from exercising the powers possessed by other States in regard to obstructions of navigable waters. Scheurer *v.* Columbia St. Bridge Co., 27 Fed. Repr. (1886) 172.

1. Shook *v.* Waugh, 11 Mo. 412.

2. Weisenburg *v.* Winnecome; Winnecome *v.* Weisenburg, 56 Wis. 667; Edgerton *v.* Mayor, etc., 27 Fed Repr. 230 (1886).

Those having custody of the bridge are bound to use ordinary diligence, and are liable for want of ordinary care on the part of their servants. Weisenburg *v.* Winnecome; Winnecome *v.* Weisenburg, 56 Wis. 667; Edgerton *v.* Mayor, etc., 27 Fed. Repr. 230 (1886).

Railway company having swing bridge over canal *held* not bound to open it to vessel when railway train was about to

9. Nuisance, When.—It is held in Hughes *v.* Northern Pacific R. Co.,[1] that a bridge unlawfully erected over navigable waters is a nuisance.[2] So the power granted must be exercised as provided by the grant. If not, or if exceeded, bridge is a nuisance.[3]

Incorporated road company may not erect a bridge over navigable waters so as to impede navigation, although it only attempted to erect a fixed bridge at a point where insolvent canal had erected a bridge under a charter, said bridge having become out of repair.[4]

10. Railway Bridges over Navigable Waters.—The authority to bridge navigable waters may result by implication from the powers expressly granted as in the case of railroad companies, where a grant to construct its road carries with it the right to erect and maintain necessary bridges with suitable draws on the line of its lay-out.[5]

pass. Turner *v.* Great Western R. Co. (Prov. Ont.), 6 C. P. 536.

Railway bridge with opening span, over navigable stream, company not bound under Railway Clauses Act, 1863, to open bridge for vessel with mast constructed so that it could be lowered. West Lancashire R. Co. *v.* Iddon, 49 L. T. N. S. 600.

Dock company having swing bridge is bound to exercise all reasonable care to prevent unnecessary delay to passing vessels. Wiggins *v.* Boddington, 3 C. P. 544.

Cities.—All that can be required of a city is to use every reasonable effort, and as soon as possible to remove all obstacles to permit vessels to pass bridges within its limits over a navigable river. Scott *v.* City of Chicago, 1 Biss. (U. S.) 510.

City may regulate the time and manner of vessels passing bridges over navigable waters within their limits. City of Chicago *v.* McGinn, 51 Ill. 266.

Canal company intersecting highway and erecting a swing bridge must keep it safe and convenient for public travel, and use all reasonable means to prevent accidents, and must light bridge if necessary. Manley *v.* St. Helen's Canal & R. Co., 2 H. & N. 840; 27 L. J. Exch. 159.

1. Hughes *v.* Northern Pacific R. 18 Fed. Repr. 106, 113. citing Angell on Watercourses, sec. 555; The Wheeling Bridge Case, 13 How. (U. S.) 564; Hatch *v.* Wallamet Iron Bridge Co., 7 Sawy. C. C. 127; s. c., 6 Fed. Repr. 326, 780.

2. Dugan *v.* Bridge Co., 27 Pa. St. 303; s. c., 67 Am. Dec. 464; Arundel *v.* McCullough, 10 Mass. 70; Barnes *v.* City of Racine *et al.*, 4 Wis. 454; South Carolina R. Co. *v.* Moore & Philpot, 28 Ga. 398; s. c., 73 Am. Dec. 778; Georgetown *v.* Alexandria Canal Co., 12 Pet. (U. S.) 91; Silliman *v.* Troy, etc., 11 Blatchf. (U. S.) 271.

Public bridge is a nuisance if built in a public way without public utility. The King *v.* Inhabitants of W. R. of Yorkshire, 2 East, 342.

3. Ill. R. Packet Co. *v.* Peoria Bridge Association, 38 Ill. 467, 475

Discretion must be used in exercising the power granted. If discretion be abused or wilfully or wantonly exercised, court of equity will interfere, but not for mere mistake of judgment in exercising such discretion. Haight *et al. v.* Day *et al.*, 1 Johns. Ch. (N. Y.) 18.

4. Town of Dundas *v.* Hamilton & Milton Road Co. (Prov. Ont.), 18 Chy. 311.

Case of a broken railway bridge in navigable river and construction of North British Railway Act of 1881 (special act) authorizing the railway company to erect a new bridge near the old one, and providing that they should "remove the ruins and *débris* of the old bridge and all obstructions interfering with navigation caused by the old bridge, to the satisfaction of the Board of Trade." *Held*, that the company was bound to remove the whole ruins and *débris* of the old bridge, that they might remove them before applying to the Board of Trade, and that there was an effective remedy against an improper exercise by the company of its obligations under the statute. North British R. Co. *v.* Lord Provost of Perth *et al.*, Law Rep. 10 Appeal Cas. (1885) 579.

5. Hamilton *v.* Vicksburg, etc., R. Co., 34 La. Ann. 970; U. P. R. Co. *v.* Hall,

11. Remedy for Obstructing Navigation.—The remedy for impeding navigation of a river by a railway bridge is by indictment, and not by civil action.[1]

So held where the owner of a wharf was unable to obtain access thereto by vessels on account of a bridge.[2]

In the case of piers for the support of a bridge which are impliedly or expressly authorized, the fact that the discretion of the corporation was improperly exercised, or that there was a mere mistake of judgment in locating them, is not ground for a private action, and this although a pier may have been so located as to obstruct navigation to some extent. The remedy is in the public;[3] but in case of the unlawful, wanton, or malicious abuse by the company of its discretion in this respect whereby an immediate and particular injury resulted to an individual, a private action would lie.[4]

A bridge-owner has the right to remove a boat forced by ice up against his bridge and likely to cause damage to the same, but is bound to use ordinary care; and if in extricating the boat he unnecessarily and recklessly pulls down a span of the bridge upon it and causes the boat to sink, he is liable.[5]

91 U. S. 343; People *v.* R. & S. R. Co., 15 Wend. (N. Y.) 129.

A corporation organized under Wisconsin Railroad Laws (Gen. Laws 1872, ch. 119), is authorized to build a bridge over navigable waters crossing the line of its road. Miller *v.* Prairie du Chien & McGregor R. Co., 34 Wis. 533.

Contra, there must be a special or general act of the sovereign power to authorize such railroad bridge. Works *v.* Junction R., 5 McLean (U. S.), 425, 435.

A railroad has no authority to bridge navigable streams on the line of its road to impede navigation unless by virtue of an express provision in its charter. Little Rock, Mississippi, etc., R. Co. *v.* Brooks, 39 Ark. 403.

1. Small *v.* Grand Trunk R. Co. (Prov. Ont.), 15 Q. B. 283. See Regina *ex rel.* Trustees of St. Andrew's Church *v.* Great Western R. Co. (Prov. Ont.). 14 C. P. 462; Cull *v.* Grand Trunk R. Co. (Prov. Ont.) 10 Chy. 491; South Carolina R. Co. *v.* Moore & Philpot, 28 Ga. 398; s. c., 73 Am. Dec. 778.

2. Blackwell *v.* Old Colony R. Co., 122 Mass. 1.

3. Monongahela Bridge Co. *v.* Kirk, 46 Pa. St. 112.

4. Clarke *v.* Birmingham & Pittsburg Bridge Co., 41 Pa. St. 147.

Where a bridge erected by defendants caused the actual detention of plaintiff's boat when in the course of navigation, *held*, that an action would lie for particular damages resulting therefrom, and that, as a general rule, a public nuisance was the subject of indictment. South Carolina R. Co. *v.* Moore & Philpot, 28 Ga. 398; s. c., 73 Am. Dec. 778; Rogers *v.* Kennebec & P. R. Co., 35 Me. 319.

5. Mark *v.* Hudson River Bridge Co. (N. Y., 1886). 4 Central Repr. 203.

It was held in Arundel *v.* McCullough, 10 Mass. 70, that a private person is not liable in trespass for cutting down an unauthorized bridge over a navigable river when the same is an obstruction to the free navigation of his vessel, and this although the bridge had been maintained for fifty years. The United States has a right to maintain a suit against a company *de* unlawful bridge over the Ohio river which impedes the navigation of the stream. United States *ex rel.* Atty.-Gen'l *v.* Pittsburg & L. E. R. Co., 26 Fed. Repr. (1886) 113, citing Dugan *v.* United States, 3 Wheat. (U. S.) 173; United States *v.* Tingey, 5 Pet. (U. S.) 115. And the court said: "As an indictment against the bridge as a nuisance is not maintainable, no such proceeding having been authorized by Congress, the appropriate remedy is by an information at the suit of the attorney-general in equity;" citing State *v.* Wheeling Bridge Co., 13 How. (U. S.) 518; Story's Eq. Jur. sec. 921 *et seq.*; Wood's Nuisance, 813.

Under an act of Congress authorizing the construction of certain bridges, the owners must conform to the requirements of that law, and for a departure there-

12. Construction of Bridges.—The rule is that those constructing bridges must exercise care and caution to see that they are built of the requisite strength and in the best manner as to condition and safety, and must so build them as to cause the least injury possible to others; such as to owners of abutting land where a bridge is built over water-courses,[1] or so as to cause as little obstruction to navigation as possible when erected over navigable waters.[2]

A railroad company constructing a bridge under a legislative enactment is bound to construct the same with care and caution.[3]

from they are liable in damages to a party injured thereby. Mo. R. Pkt. Co. *v.* H. & St. J. R. Co., 79 Mo. 478.

Upon inquiry as to whether a bridge is a public nuisance and the charter is found to have been violated, the remedy would be, not to destroy the bridge, but to remove excess so that the bridge should conform to the charter requirements. Dugan *v.* Bridge Co., 27 Pa. St. 303; s. c., 67 Am. Dec. 464.

1. A town is bound to construct a bridge over a water-course so as not to unnecessarily obstruct the free course of the waters to the injury of owners of abutting land; nor may towns permit a third person to alter such bridge so as to cause such injury. Lawrence *v.* Inhabitants of Fairhaven, 5 Gray (Mass.), 110.

Bridges ought to be broad enough for passage of vehicles and the necessary uses of the travelling public. Irvinton *v.* Burton Road Supervisors, 61 Iowa. 471.

City is not required to construct its bridge for unusual and extraordinary use, such as crossing at great speed or with large or unusual weight, as a steam thresher consisting of three vehicles, engine, boiler, and water-tank. McCormick *v.* Washington Turnpike, 112 Pa. St. 185.

A city may not construct a bridge with water-ways so narrowed as to injure the plaintiff's mills by causing water in times of a freshet to set back upon them. Perry *v.* City of Worcester, 6 Gray (Mass.), 544; s. c., 66 Am. Dec. 431.

2. In the absence of express restrictions upon the power to erect a bridge over a navigable river, it is not unlawful to build and maintain piers in the bed of the river, the supporting of bridges in such manner being common and usual when the charter was granted, and the right to erect and maintain piers included the right to determine their number and location. Clarke *v.* Birmingham & Pittsburg Bridge Co., 41 Pa. St. 147.

Where the charter authorized the erection of a bridge "upon such piers and abutments as to afford at all times a clear and uninterrupted passage for the water of the river equal at least in area equal to that now existing" at a certain other bridge over the same river. *held*, under peculiar circumstances, to have reference, not to navigation, but to the outflow of the river; that the superficial area was not meant, but that the perpendicular depth taken with the width was the area intended. Clarke *v.* Birmingham & Pittsburg Bridge Co., 41 Pa. St. 147.

The defendant company having lawful authority to erect its bridge over the Allegheny river undoubtedly had the right to drive piles in the bed of the river as was done here, but in the exercise of that right the company was bound to observe all reasonable precautions to secure the safety of boats navigating the stream; and if at ordinary flood stage of the river such piles were likely to become a hidden and dangerous obstruction to navigation, it was the duty of the company to mark the spot by a buoy or otherwise so as to put approaching boats on their guard. The Modoc, 26 Fed. Repr. 718; Evans, etc., *v.* North Side Bridge Co., 26 Fed. Repr. 718.

3. Frankfort Bridge *v.* Williams, 9 Dana (Ky.), 403; s. c., 35 Am. Dec. 155.

Railway company constructing bridge over a dry channel bound to prepare against possible floods, which a careful examination of the country and channel-bed would have anticipated. Kansas Pacific R. Co. *v.* Miller, 2 Col. 442.

Railroad company must not construct its bridge over a river in a direction and manner to cause injury to the plaintiff in times of freshets by overflowing his grass land, and leaving deposits thereon of sand and earth, when with a little additional expense the bridge could have been constructed so as to have been equally safe, and not have caused the injury. Spencer *v.* Hartford, P. & F. R. Co., 10 R. I. 14.

And a contract for the construction of a drawbridge for a railroad implies a bridge reasonably safe, serviceable, and suitable for the use intended.[1]

In a recent case, where a bridge erected by a railroad corporation over a highway did not, when built, impede or obstruct the safe and convenient use of the highway, held that, if by an increased use of the highway an alteration of the bridge was necessitated, it was the duty of the railroad corporation to make such alteration to meet the public needs.[2]

And a city or town undertaking to erect a bridge is bound to construct it so that it shall be reasonably safe for travel.[3]

Generally the owner of a bridge franchise is obliged to exercise ordinary care in constructing its bridge.[4]

13. Reparation.—Under the common law the duty of repairing public bridges rested generally upon the counties at large in which they were situate, unless it appeared that some one else was obligated to repair them.[5]

The exact rule, however, seems to be as stated in a recent case, that "at common law highways are repairable by the parish or hundred, including bridges over small streams, while those over large streams are repairable by the county. Cases may arise where, under acts of Parliament authorizing the making of

Railroad company must conform to the requirements of its charter in constructing its bridge. Atty.-Gen'l *v.* Niagara Falls Bridge Co., 20 Grant U. C. 341; Atty.-Gen'l *v.* Mid-Kent, etc., Law Rep. 3 Ch. 100. See Atty.-Gen'l *v.* International Bridge Co., 22 Grant U. C. 298.

Railroad bridge crossing a city street 66 ft. wide, bridge 42 ft. 2 in., *held* compliance with company's charter requiring that bridge company should restore highway in such manner as not to impair its usefulness. Regina *v.* Great West. R. Co. (Prov. Ont.), 12 Q. B. 250; Ward *v.* Same (Prov. Ont.), 13 Q. B. 315.

1. Railroad Co. *v.* Smith, 21 Wall. (U. S.) 255.

Bridges weakened by sudden and unprecedented flood, duty of railway carrier to inspect, and liability consequent upon not exercising the highest degree of care proportioned to the known danger considered. So where a railroad bridge was so constructed as not to resist ordinary floods, and was occasionally in times of freshet covered with water, *held* unsafe. Louisville, N. A. & C. R. Co. *v.* Thompson's Adm (Ind. 1886), 5 West. Repr. 833, 838, 839; citing Hardy *v.* North Carolina Cent. R. Co., 74 N. Car. 734; Great West. R. Co. *v.* Braid, 1 Moore P. C. (N. S.) 101; Railroad Co. *v.* Halloran, 53 Tex. 46; s. c., 37 Am. Rep. 744.

2. Cooke *v.* Boston & Lowell R., 133 Mass. 185, citing Commonwealth *v.* New Bedford Bridge, 2 Gray (Mass.), 339.

3. Jordan *et al. v.* City of Hannibal, 3 Westn. Repr. 795 (Mo. 1886); Board of Shelby Co. *v.* Deprez Admr., 87 Ind. 509.

Whether the planks of a bridge on a township road should be spiked down or not depends upon whether an unspiked floor was reasonably safe and convenient for the public to travel over it. The court declared that "a bridge such as this on a township road, over a stream, would not necessarily be built at the same expense, nor would it require the same skill in building, as the famous Brooklyn bridge." There should be taken in consideration "all the surroundings and the use for which the bridge was intended by the community in determining what sort of a bridge it should be." Zimmerman *v.* Conemaugh (Pa. 1886), 2 Cent. Repr. 361.

4. Tift *v.* Touns, 53 Ga. 47; Townsend *v.* Susquehanna Turnpike Co., 2 Johns. (N. Y.) 90; City of Juliet *v.* Verley, 35 Ill. 58.

5. Rex *v.* West Riding of Yorkshire, 5 Burr. 2594; Tomlins' Law Dict.; Rex *v.* Middlesex, 3 B. & Ad. 201; Rex *v.* Sainthill, 2 Ld. Ray'd, 1174; Regina *v.* Inhabitants *de com.* Wilts, 6 Mod. Rep. 307; Rex *v.* Oxfordshire, 6 D. & R. 231; Rex *v.* Inhabitants of Bucks, 12 East, 192; Rex *v.* Surrey, 2 Camp. 455; Com-

bridges, the makers may be liable for their repair, . . . but the hundred is not thereby relieved."[1]

In the several States the obligation to repair bridges rests upon the counties, towns, cities, or other corporate bodies created with special reference to the constructing, maintaining, and repairing of highways, bridges, and public works.[2]

sioners *v.* Martin, 4 Mich. 557; s. c., 69 Am. Dec. 333.

So it is said that "bridges in highways, 'if within any city or town corporate,' were to be repaired by the inhabitants of such city or town; if 'without the city or town corporate,' by the county; and no other corporation or private person was bound to repair, unless by tenure or prescription." Hill *v.* Boston, 122 Mass. 344, 347; Washer *v.* Bullett Co., 110 U. S. 558, 564. These last three cases exhaustively consider this subject. State *v.* Gorham, 37 Me. 451.

The statute of 22 Hen. VIII. c. 5, is declaratory of the common law in this respect. 2 Inst. 701.

Obligation extended only to bridges over *flumen vel cursus aquæ.* Rex *v.* Oxfordshire, 1 B. & Ad. 289.

1. Blackburn, J., in Queen *v.* Kitchener, 2 C. C. Cas. Res'd, 88; citing Rex *v.* Ely, 15 Q. B. 827; 19 L. J. M. C. 223; Rex *v.* Southampton, 18 Q. B. 841; Reg. *v.* Inhabitants of Dorset, 45 L. T. N. S. 308.

2. No liability to repair exists outside of express statutory requirements. Mower *v.* Inhab. of Leicester, 9 Mass. 247; s. c., 6 Am. Dec. 63; Sawyer *v.* Northfield, 7 Mass. 494; Noyes *v.* Town of Morristown, 1 Vt. 353; Ried *v.* Belfast, 20 Me. 246; Chidsey *v.* Canton, 17 Conn. 475; Hill *v.* Livingstone County, 12 N. Y. 52; Whitall *v.* Freeholders of Gloucester, 40 N. J. Law, 302, 306, citing State *v.* Hudson, 30 N. J. Law, 137.

The history of the law of New Jersey as to erecting, maintaining, and repairing bridges fully considered. Beatty *v.* Titus, 47 N. J. Law, 89; Ripley *v.* Chosen Freeholders, etc., 40 N. J. Law, 45, 49; Freeholders of Bergen *v.* State, 42 N. J. Law, 263, 273; Freeholders of Sussex *v.* Strader, 3 Harr. (Del.) 108; s. c., 35 Am. Dec. 530.

Counties in *Indiana* must repair. Fulton County *v.* Richards (Ind.), 4 Westn. Repr. (1886) 492, citing Vaught *v.* Board, 101 Ind. 123; Patton *v.* Board, 96 Ind. 131; Board *v.* Bacon, 96 Ind. 31; Board *v.* Emerson, 95 Ind. 579; and others

County must repair primitive log and slab bridge over pond in highway. Board of Madison County *v.* Brown, 89 Ind. 48.

So in *Alabama.* Smoot *v.* Mayor, etc., of Wetumpka, 24 Ala. 112. In *New York.* Hill *v.* Livingston, 12 N. Y. 52. In *California.* Hoffman *v.* San Joaquin County, 21 Cal. 427.

"County to a great extent exercises a discretion in building and repairing bridges." Browning *v.* City of Springfield, 17 Ill. 144.

When county having over 2000 inhabitants is bound to repair a bridge within the limits of a city of the second class. County Commissioners *v.* Wyandotte, 29 Kan. 431.

"The liability to repair a public bridge may . . . be imposed upon a hundred or a division or a borough, or on one or more individuals," or upon the county. The Queen *v.* Chart & Longbridge, Law Rep. 1 C. C. Res. 237.

General rule is that towns and cities are liable, but certain facts held to change rule and county owning is liable. The State *ex rel.* Neeves *v.* Supervisors of Wood County, 41 Wis. 28, citing Hill *v.* Board of Supervisors of Wood County, 12 N. Y. 52.

In *Massachusetts* must be repaired by the town, city, or place where situated, in the absence of other provision therefor. Lyman *v.* Hampshire, 140 Mass. 311; Stat. of Mass. 1882, p. 347, c. 52 *et seq.*; City of Lowell *v.* Proprietors of Locks and Canals, 7 Metc. (Mass.) 4.

County only liable for bridges erected by it under legislative authority; duty to repair is on county or township, city or borough. Township of Newlin *v.* Davis, 77 Pa. St. 317; Erie City *v.* Schwingle, 22 Pa. St. 384; Pittsburg City *v.* Grier, 22 Pa. St. 64; Meadville *v.* Erie Canal Co., 18 Pa. St. 66; Rapho *v.* Moore, 68 Pa. St. 404; Zimmerman *v.* Conemaugh (Pa. 1886), 2 Cent. Repr. 361; McCormick *v.* Township of Washington (Pa. 1886), 2 Cent. Repr. 584.

City held liable. Holmes *v.* City of Hamburg, 47 Iowa, 348.

County held liable to repair (case under Code, sec. 527). Roby *v.* Appanoose Co., 63 Iowa, 113.

Liability to repair extends only to bridges of the larger class requiring a large expenditure of money. Bridge over a ravine not such a bridge. Taylor *v.*

Bridges in Two Counties.—Where county commissioners acting under a statute made a valid award that the defendant town should keep a certain portion of a bridge over the Merrimac river in repair, *held*, that the town was bound to keep such portion in repair although not wholly within the limits of the town.[1]

Davis County, 40 Iowa, 295; Moreland *v.* Mitchell County, 40 Iowa, 394; Long *v.* Boone County, 33 Iowa, 181.

A short foot-bridge formed by three planks and a hand-rail, used for a foot-path over a small stream, not such a bridge as county is bound to repair. Regina *v.* Inhabitants of Southampton, 14 Eng. L. & E. 116.

Towns and cities held liable. City of Eudora *v.* Miller, 30 Kan. 494, distinguishing Wyandotte County *v.* City of Wyandotte, 29 Kan. 431; State *v.* Boscawen, 32 N. H. 331, 342; Griffin *v.* Williamstown, 6 W. Va. 312; City of Denver *v.* Dinsmore, 7 Col. 328; McDonald *v.* Corporation of Township of South Dorchester (Prov. Ont.). 29 C. P. 249; Jordan *v.* City of Hannibal, 3 Westn. Repr. (Mo. 1886) 795; Medina *v.* Perkins, 48 Mich. 67; Town of Mechanicsburg *v.* Meredith, 54 Ill. 84.

Cases where towns were not held liable for non-repair. Conners *v.* Martin, 4 Mich. 557; s. c., 69 Am. Dec. 333; Hickok *v.* Trustees, etc., of Plattsburg, 15 Barb. (N. Y.) 427.

Town not obliged to keep in repair a bridge recently and unlawfully established. Commonwealth *v.* Charlestown, 1 Pick. (Mass.) 180; s. c., 11 Am. Dec. 164.

Turnpike road not a highway so as to make mill-owners liable in an action on behalf of the town to recover for an outlay for repair of a bridge over a turnpike and repaired by the mill-owners, said turnpike having subsequently become a public highway, such duty to repair not devolving upon the mill-owners under the statute (Gen. Stat. R. I. cap. 60, sec. 22), which provides that "whenever any artificial water-course has been or shall be made under, through, or by the side of any highway previously existing, the proprietors or occupants of such water-course shall make and maintain all necessary bridges. North Providence *v.* Dyerville Mfg. Co., 13 R. I. 45.

Canal company is not bound to keep in repair public bridges connecting highways intersected by its canal. City of Erie *v.* Erie Canal Co., 59 Pa. St. 174.

As to bridges over highways laid out across canal after it was constructed, canal company not bound to repair. Morris Canal & Banking Co. *v.* State, 24 N. J. Law (4 Zab.), 62; 22 N. J. Law (2 Zab.), 537.

Canal company is not bound to repair bridges where State has permitted it to abandon its rights thereto. Pennsylvania & Ohio Canal Co. *v.* Comm'rs of Portage Co., 27 Ohio St. 14.

Peculiar circumstances under which a toll-bridge corporation was held bound to keep its bridge in repair six days after the expiration of the term for which its charter was granted. Atty.-Gen'l *v.* Proprietors of Deerfield River Bridge, 105 Mass. 1.

1. Whitman *v.* Groveland, 131 Mass. 553.

In *Vermont* an act was passed in 1884 to entirely relieve towns from liability to support bridges or roads outside their own limits. Towns of Tunbridge and Chelsea *v.* Town of Royalton (Vt. 1885), 1 New Eng. Repr. 347.

County councils must maintain bridges over rivers constituting boundary lines between municipalities in same county (sec. 413 of the Municipal Act). McHardy *v.* Corporation of Township of Ellice *et al.* (Prov. Ont.), 1 App. R. 628; s. c., 29 Q. B. 546.

Both counties bound to repair a bridge over stream which was a boundary line between two counties—statute. Rapho *v.* Moore, 68 Pa. St. 404; Reg. *v.* New Sarum, 2 New Sess. Cas. 133; Washer *v.* Bullett Co., 110 U. S. 558, 564, citing Agawam *v.* Hampshire, 130 Mass. 528; Norwich *v.* County Comm'rs., 13 Pick. (Mass.) 60; and other cases.

Part in one shire and part in another, each bound to repair. Woolrych on Ways, 200; 2 Inst. 701; 1 Hawk. P. C. C. 77, § 2.

Under a statute a bridge was erected over an arm of the sea between two towns, the erection and repair of the same to be at the joint expense of both. It was afterwards discontinued and taken down, and that part of the channel was filled in and a roadway constructed in its place. *Held*, that one town could not maintain an action against the other for one half the expense incurred in repairing the roadway, the old statute relating to the bridge having become inoperative by discontinuing the bridge. Provincetown *v.* Truro, 135 Mass. 263.

Private corporations, generally canal companies, railway and other private corporations, are bound to repair all bridges erected by them under their charters over public highways, especially where a revenue is derived from them.[1]

Other Obligations.—Those bound to repair public bridges were by the common law compelled to make them of the height and strength necessary for the course of the water.[2]

14. Private Bridges—Public Use.—If an individual build a bridge and the public use it, and it becomes of public utility, the public must repair it.[3] But if a private bridge is erected by one for his own benefit and so continued, although the public use it, if it is not of public utility the county need not repair.[4]

1. Pittsburg City *v.* Grier, 22 Pa. St. 64; Nicholl *v.* Allen, 31 L. J. Q. B. 283; Rex *v.* Kent, 13 East, 220; Longmore *v.* Great Western R. Co., 19 C. B. N. S. 183; Rex *v.* Somerset, 16 East, 305; Hayes *v.* N. Y. C. & H. R. R. Co., 9 Hunt (N. Y.), 63; State *v.* Gorham, 37 Me. 451; Van Allen *v.* Grand Trunk R. Co., 29 U. C. Q. B. 436; Sawyer *v.* Inhabitants of Northfield, 7 Cush. (Mass.) 490; State *v.* Norridgewock Bridge, 65 Me. 514; People *ex rel. v.* Chicago & Alton R. Co., 67 Ill. 118; Burrett *v.* City of New Haven, 42 Conn. 174; Orcutt *v.* Kitterry Point Bridge Co., 53 Me. 500. Whicher *v.* Somerville, 138 Mass. 454; White *v.* Quincy, 97 Mass. 430.

An incorporated company was by act of the Assembly authorized to occupy a county bridge over a creek with a railway, conditioned that it should build and attach to the bridge a safe and convenient footway over the creek. *Held*, that the company was bound to repair it. Phœnixville *v.* Phœnix Iron Co., 45 Pa. St. 135.

Railroad company changed an old public highway at its intersection with the railroad, laid out another which was used by the public, and constructed a bridge over a stream on the line of the new road. *Held*, not liable for repair of the bridge, although it had repaired the same at different times. Brookins *v.* Central R. & Banking Co., 48 Ga. 523.

Company erecting bridges over navigable rivers is bound to keep them in such repair as public safety demands. Hamilton *v.* Vicksburg, etc., R. Co., 34 La. Ann. 970.

Highway carried over railway by a bridge; company must repair (C. S. C. c. 66, s. 9, sub-s. 5, sec. 12, sub. 4). Van Allen *v.* Grand Trunk R. Co. (Prov. Ont.), 29 Q. B. 436.

2. Tomlins' Law Dict., citing Dalt. cap. 16.

Of the obligation to repair, *ratione tenuræ* or by prescription. Reg. *v.* Sutton, 3 N. & P. 569; Rex *v.* Hendon, 4 B. & Ad. 628; Rex *v.* Stratford-upon-Avon, 14 East, 348; Hale's P. C. 143; Baker *v.* Greenhill, 3 Q. B. 148.

Some English statutes *de* repair, etc.: 9 Hen. III. c. 15; 22 Hen. VIII. c. 5; 5 Will. & M. c. 11, s. 6; 12 Geo. II. c. 29, s. 14; 52 Geo. III. c. 110; 55 Geo. III. c. 143; 13 & 14 Vict. c. 64; 24 & 25 Vict. c. 97, s. 33; 33 & 34 Vict. c. 73, s. 12; 41 & 42 Vict. c. 77, s. 21, 22; 5 & 6 Wm. IV. c. 50; 8 & 9 Vict. c. 20.

3. Regina *v.* Inhabitants *de com.* Wilts, 6 Mod. Rep. 307; Rex *v.* Inhabitants of the W. R. of Yorkshire, 2 East, 342, and cases reported; 2 East, 353, 354, and 356; 2 Inst. 701.

So the public must repair where private bridge was built before 43 Geo. III. c. 59, where used by public. Reg. *v.* Ely, 4 New Sess. Cas. 222; State *ex rel.* Roundtree *v.* Board of Gibson Co., 80 Ind. 478; 2 Inst. 701; State *v.* Crompton, 2 N. H. 513; Batty *v.* Duxburry, 24 Vt. 155.

Canal trustees cannot impose upon a city the burden of keeping a bridge in repair because built over its canal in the city limits, unless the city assumes control over it. City of Joliet *v.* Verley, 35 Ill. 58.

4. Regina *v.* Inhab. *de com.* Wilts, 6 Mod. Rep. 307; Rex *v.* Kerrison, 3 M. & S. 526; State *v.* Madison, 59 Me. 538; Township of Newlin *v.* Davis, 77 Pa. St. 317.

Canal company is bound to repair a bridge erected for its benefit over its canal where it crosses a highway. Reg. *v.* Desjardins Canal Co. (Prov. Ont.), 27 Q. B. 374.

A canal company having for its own benefit made a navigable cut so as to cause a ford crossing the highway, and of public utility, to be impassable, and having erected a bridge over the same, is bound to repair it. The King *v.* Inhabitants, etc., of Lindsay, 14 East, 317.

15. Approaches.—Approaches and embankments are as a rule a part of a bridge, and duty to repair bridge includes them.[1] And an act of Congress declaring an existing "bridge" to be a "lawful structure" was held to mean "the bridge as built with its abutments, piers, superstructures, draw, and height."[2]

It has been decided, however, that it is erroneous to hold that an approach is part of a bridge as a matter of law.[3]

Where a highway is located over private land and the owner should open a water-course across it, he is bound to erect and keep in repair a bridge over the same. Lowell *v.* Proprietors of Locks, etc., 104 Mass. 18.

Where private persons cut a canal across a public highway for their benefit, *held*, bound to erect and maintain a bridge over the same. Phœnixville *v.* Phœnix Ins. Co., 45 Pa. St. 135.

But *aliter* where a new and wider public road was laid out, necessitating a new and wider bridge, which was erected by the town in place of the old one. Phœnixville *v.* Phœnix Ins. Co., 45 Pa. St. 135.

Bridge erected near a public bridge by a private person, and travel equally divided between both, county not bound to repair (37 Vict. c. 16, §§ 17, 18, O.). Regina *v.* Corporation of the County of Wellington (Prov. Ont.), 39 Q. B. 194.

Where the owner of land cut a mill-race across a public highway for his own benefit, and erected a bridge over it, *held*, that he must keep the same in repair so as to maintain the road in as good a condition as it was before the mill-race was cut through. But "had the town agents actually taken the bridge under their care and repaired it for a long time, there might have been a question for a jury whether they had not made it a town bridge." Dyget *v.* Schenck, 23 Wend. (N. Y.) 445.

1. Watson *v.* Proprietors, 14 Me. 201; State *v.* Gorham, 37 Me. 451; Board of Rush County *v.* R. & V. Gravel Road Co., 87 Ind. 504; Board of Shelby County *v.* Duprez Adm'r, 87 Ind. 509; Freeholders of Sussex *v.* Strader, 3 Harr. 108; s. c., 35 Am. Dec. 530; Commonwealth *v.* Deerfield, 6 Allen (Mass.), 449.

If the charter does not expressly define the limits of a bridge in this respect, its extent must be determined by what is reasonable under the particular circumstances of each case. Commonwealth *v.* Deerfield, 6 Allen (Mass.), 449.

So of lateral embankments extending from railroad bridge to raise highway over its track Parker *v.* Boston & Maine R., 3 Cush. (Mass.), 107; s. c., 50 Am. Dec. 709; Burritt *v.* City of New Haven, 42 Conn. 174.

Approaches are part as well as every necessary appliance for its proper use. Penn. Township *v.* Perry County, 78 Pa. St. 457.

2. The Clinton Bridge, 10 Wall. (U. S.) 454, 462.

Under a statute requiring a railroad to keep a bridge in repair the obligation is not extended to the approaches as they existed when the bridge was erected, but attaches to the approaches when they are extended by a widening of the highway. Carter *v.* Boston & Providence R. Corp., 139 Mass. 525.

Duty to repair *held* to extend beyond abutments in a case where railway crossed highway. Titcomb *v.* Fitchburg R. Co., 12 Allen (Mass.), 254; White *v.* Quincy, 97 Mass. 430.

At the common law the duty to repair extended to the highway for a space of three hundred feet at each end. Rex *v.* West Riding of York, 7 East, 588; Rex *v.* Inhabitants of Devon, 14 East, 47.

So highways at either end are approaches. Whicher *v.* Somerville, 138 Mass. 454, and cases cited.

But where street had been lowered so that bridge might be erected over it for the passage of railroad as required by statute, *held*, that "approaches" did not include any portion of the highway. Whicher *v.* Somerville, 138 Mass. 454, and cases cited.

Bridge over a tidal river *held* to mean the structure over the river and its approaches, but did not include "causeways" built from each end of the structure. Swanzey *v.* Somerset, 132 Mass. 312.

That railroad company must keep in repair its bridges with their approaches and abutments. Whicher *v.* Somerville, 138 Mass. 454.

Fast driving on bridge prohibited. Evidence of fast driving on approach excluded. Weeks *v.* Town of Lyndon, 54 Vt. 638.

3. Nims *v.* Boone County, 66 Iowa, 272.

When question whether approach is a part of a bridge is for the jury. Moreland *v.* Mitchell County, 40 Iowa, 394.

16. Action—Damages.—The common law gives no action to a private person for damages consequent upon injury arising from a defective public bridge, and no such action lies against towns or counties unless given by statute.[1]

The case of Eastman *v.* Meredith[2] sustains the principle applicable to bridges that a civil action cannot be maintained against a *quasi* corporation for neglect of a public duty as repairing bridges unless so provided by statute.[3]

For want of repairs to a public bridge the remedy at the common law was by indictment or information at the suit of the king.[4]

But private persons may have an action under the statutes in most if not all of the States against such corporate bodies as are bound to repair.[5]

1. Mower *v.* Leicester 9 Mass. 247; Hedges *v.* County of Madison, 1 Gilm. (Ill.) 567; Cooley *v.* Chosen Freeholders of Essex, 27 N. J. Law (3 Dutch.), 415; Hoffman *v.* San Joaquin County, 21 Cal. 427. See Medina *v.* Perkins, 48 Mich. 67.

Statutory provision exists; counties and towns and cities distinguished in this respect. White *v.* Commr's of Chowan, 90 N. Car. 437; s. c. 47 Am. Rep. 534; Russell *et al. v.* The Men of Devon, 2 D. & E. 667; Crowell *v.* Sonoma County, 25 Cal. 313; Freeholders of Sussex *v.* Strader, 3 Harr. (Del.) 708; s. c., 35 Am. Dec. 530; Cooley *v.* Chosen Freeholders of Essex, 27 N. J. Law, 415.

A municipal corporation is not liable in a private action for lack of judgment in selecting a plan to construct a public improvement. Cooley *v.* Chosen Freeholders of Essex, 27 N. J. Law, 415; Jordan *et al. v.* City of Hannibal, 3 Western Reporter (Mo. 1886), 795.

Private action lies where special damage is suffered. City of Denver *v.* Duvemore, 7 Col. 328; Daniels *v.* Denver, 2 Col. 669, distinguished.

2. 36 N. H. 284.

3. Hill *v.* Boston, 122 Mass. 344, 347; Mower *v.* Inhabitants of Leicester, 9 Mass. 247; Bartlett *v.* Crozier, 17 Johns. (N. Y.) 250; Cooley *v.* Freeholders of Essex, 27 N. J. Law, 412; Livermore *v.* Freeholders of Camden, 29 N. J. Law, 245; aff'd, 31 N. J. Law, 394; Comm'rs of Highways *v.* Martin, 4 Mich. 557; White *et al. v.* County of Bond, 58 Ill. 297.

City liable for improperly constructing a bridge so as to injure plaintiff's land by overflow of water caused thereby. Perry *v.* City of Worcester, 6 Gray (Mass.), 544.

4. Hill *v.* Boston, 122 Mass. 344, 347; Mower *v.* Inhabitants of Leicester, 9 Mass. 247.

Indictments at the common law must be of non-repair of common bridges on highways, or possibly of common footways. Mod. Cas. 256.

Indictable at the common law not as a corporation. State *v.* Hudson, 30 N. J. Law, 137, 145; Rex *v.* Inhab. of Stratford upon-Avon, 14 East, 349.

In *Pennsylvania, held* that the supervisors of the township were indictable for neglect to repair. Zimmerman *v.* Conemaugh (Pa. 1886), 2 Central Reporter, 361.

Bridge corporation is liable to indictment for not building bridge as charter requires, Commonwealth *v.* Newburyport Bridge, 9 Pick. (Mass.) 141.

5. See cases under this subject, subtitles NAVIGABLE RIVERS, REMEDY, *supra*. See Clarke *v.* Birmingham & Pittsburg Bridge Co., 41 Pa. St. 147; Dugan *v.* Bridge Co., 27 Pa. St. 303; s. c., 67 Am. Dec. 464; Monongahela Bridge Co. *v.* Kirk, 46 Pa. St. 112.

Where inhabitants of a village were duly incorporated with power to build bridges, *held* liable for damages at suit of a private person injured by reason of negligent and defective construction of the bridge. Conrad *v.* Trustees of Ithaca, 16 N. Y. 161.

By statute the expense of erecting, maintaining, and repairing a certain bridge was to be borne equally by a certain town and county. Necessary repairs had always been made by the town, which had been reimbursed by the county for its half. *Held*, that county was liable for injury resulting from bridge being out of repair. Lyman *v.* Hampshire, 140 Mass. 311.

The clause in a statute "sufficient for the safe and easy travelling" defined. McCormick *v.* Township of Washington (Pa. 1886), 2 Central Reporter, 584.

Town's liability stops with constructing and maintaining its bridges, so as to protect against injury by a reasonable, proper and probable use thereof in view

Notice that a bridge is out of repair "should be brought home to the defendant, or the defect must be shown to have existed

of the surrounding circumstances, such as the extent, kind, and nature of the travel and business on the road of which it forms a part. McCormick *v.* Township of Washington (Pa. 1886), 2 Central Reporter, 584.

No action lies where horses take fright before entering bridge. Board of Fulton Co. *v.* Rickel, 106 Ind. 501.

A city bound by law to maintain a certain bridge as a highway is not liable for delay to a vessel caused by the draw being narrower than the statute prescribed unless the statute gives such action. French *v.* City of Boston, 129 Mass. 592; s. c., 37 Am. Rep. 393.

Where by statute a certain portion of a bridge was to be kept in repair by county commissioners, *held*, liable for damages occasioned by neglect to repair although that portion on which the injury occurred was not within the limits of the town. Whitman *v.* Groveland, 131 Mass. 553.

County commissioners may recover from canal company money paid to satisfy judgment against the county for injury on company's bridge over its canal crossing public county road. Chesapeake & Ohio Canal Co. *v.* Commissioners of Alleghany Co., 57 Md. 201.

For defect in approaches when highway is widened a railroad company held liable. Carter *v.* Boston & Providence R. Corp., 139 Mass. 525.

Person injured by embankments extending laterally from railroad bridge have an action under the statute therefor. Parker *v.* Boston & Maine R., 3 Cush. (Mass.) 107; s. c., 50 Am. Dec. 709.

Where by reason of a defect in a passageway leading from the public way to defendants' bridge the plaintiff's horse was injured and died therefrom, *held*, that defendants were liable by statute, although the approach was constructed by an individual, since the defendants had adopted and repaired the same. Watson *v.* Proprietors, 14 Me. 201.

That one end or approach was private property does not alter liability for neglect to repair. House *v.* Town of Fulton, 34 Wis. 608.

Bridge in four towns. Question as to the liability to repair a certain road or space between wing walls extending from abutments of bridge along the banks of the river. *Held*, that the space was not bridge, but highway. Powers *v.* Woodstock, 38 Vt. 44.

Railroad bridge; agreement by city to keep approaches in repair; estoppel by statute: city not liable. Rouse *v.* Somerville, 130 Mass. 361.

Bridge erected by a railroad company, but not one which the company was bound to repair, and not over a highway or private way established by law, the bridge not being so wide as necessitated by law, an action in behalf of a private person cannot be sustained, the lack of proper width being the only defect. Cox *v.* East Tennessee, etc., R. Co., 68 Ga. 446.

Action for compensation for injury to plaintiff's land by railroad bridge over company's road, where it crossed highway. No right of action. McDonnell *v.* Ontario, Simcoe & Huron R. Union Co. (Prov. Ont.), 11 Q. B. 271.

Railroad company and town jointly liable to repair under statute injury to company's car by gate being left open, defendant being required to take care and superintendence of the bridge by statute. *Held*, no liability for injury. Malden & Melrose R. Co. *v.* City of Charlestown, 8 Allen (Mass.), 245.

Case of private bridge and duty of company to repair. Whether town is liable to one injured. People *v.* Troy, 37 How. 430; Fairbanks *v.* Great Western, etc., 35 U. C. Q. B. 523; Whitmarsh *v.* Grand Trunk R. Co., 7 U. C. Com. Pl. 373.

Act 24 & 25 Vict c. 70, s. 7. *de* damage to county bridge by locomotive construed. Queen *v.* Kitchner, 2 C. C. Cas. Res. 88.

County liable for damage sustained on primitive log or slat bridge over a pond on public highway. Board of Madison Co. *v.* Brown, 89 Ind. 48.

Where by law a railroad company is obliged to erect a bridge so as to carry a highway over its road, *held* that the town is not liable for an injury caused by a defect in the bridge. Sawyer *v.* Inhabitants of Northfield, 7 Cush. (Mass.) 496; Wilson *v.* Boston, 117 Mass. 509; Campbell *v.* Boyd, 88 N. Car. 12; s. c., 43 Am. Rep. 740. See Gautret *v.* Egerton L. R. 2 C. P. 371.

Where a railroad bridge was constructed over a city street and it was shown that the surface of the street under the bridge could be lowered, *held*, that the court "could have ruled as a matter of law that the height of the bridge over the surface of the way did not make the way defective;" that the city was not liable for a defect in the railroad bridge itself. If the city had raised the grade

for such a length of time that the defendant by the use of ordinary care would have discovered the same in time to have made the needed repairs." [1]

Where from gradual decay of the timbers of a toll-bridge it was defective and dangerous, although not open and visible to all, *held* that the owners by keeping the bridge open and taking toll were liable in damages for an injury sustained by reason of such defect.[2]

So where bridges are built over a railroad track at a height reasonably safe above it for the free passage of cars, and the railroad builds higher cars, this fact, when it appears that the bridge owners had no notice of the change, will not render them liable in damages for the death of a brakeman on the railroad, who, while on the top of a car, was struck by the bridge and killed.[3]

Reasonable Care.—A town or other corporation must exercise reasonable care in ascertaining defect in bridge, which it is under obligations to repair.[4]

of the street the defect was in the way and not in the bridge, and city was liable therefor, Talbot *v.* City of Taunton, 140 Mass. 552.

1. Black, J., in Jordan *et al. v.* City of Hannibal, 3 Western Reporter, 795 (Mo. 1886).

2. Randall *v.* Proprietors of Cheshire Turnpike, 6 N. H. 147.

And so although they gave plaintiff notice that the bridge was unsafe for passage. It was incumbent upon them in addition to refuse toll. Randall *v.* Proprietors of Cheshire Turnpike, 6 N. H. 147.

Township held liable for damages sustained by reason of patent defects. For latent defects, however, the township is not liable "unless the supervisor exercising ordinary care had knowledge or notice of the defect," and reasonable time in which to make repairs. Zimmerman *v.* Conemaugh (Pa. 1886), 2 Central Reporter, 361.

County chargeable with knowledge of tendency of timbers to decay, but only bound to ordinary care. Board of Howard County *v.* Legg Adm'r, 93 Ind. 523.

Constructive notice and degree of care. Board of Porter County *v.* Dombke, 94 Ind. 72.

Action for damages; report of unsafe condition of bridge made to city council admissible to show notice to city. Bond *v.* City of Biddeford, 75 Me. 538.

3. Stoneback *v.* Thomas Iron Co. (Pa. 1886), 2 Central Reporter, 604.

4. Medina *v.* Perkins, 48 Mich 67.

Counties in Indiana are liable if negligent in not keeping county bridges in repair. The injury caused must, however, be the proximate result of the county's negligence. So where a horse before entering the bridge took fright at something upon the bridge, overturned the carriage and injured the plaintiff, *held* that the county was not liable. Fulton County *v.* Ricketts (Ind. 1886), 4 Western Reporter, 492.

Where a bridge is undergoing repair, it is the duty of the town to provide proper safeguards against accident. Mullen *v.* Rutland, 55 Vt. 77.

Owner of toll-bridge bound only to ordinary vigilance. Stokes *v.* Tift, 64 Ga. 312.

Duty of city under authority to light streets to light bridge crossing a city stream. City of Chicago *v.* Powers' Adm'x, 46 Ill. 169.

Negligence in constructing approach—whether county liable is question for the jury. Moreland *v.* Mitchell Co., 40 Iowa, 394.

Proprietors are bound to light toll-bridge at night if light be necessary to make it safe and convenient for public travel. Commonwealth *v.* Central Bridge Corporation, 12 Cush. (Mass.) 243.

Railroad company liable in damages for defective bridge caused by its neglect to exercise ordinary vigilance as to its condition and safety. Frankfort Bridge *v.* Williams, 35 Am. Dec. 155, citing Townsend *v.* Turnpike Road Co., 6 Johns. (N. Y.) 90.

Bridge company must exercise reasonable care to prevent driftwood accumulating about their piers, which might endanger navigation. Railroad Co. *v.* Meese, 44 Ark. 414.

Canal company is bound to light its

But the mere neglect to repair a bridge does not ordinarily constitute wilful negligence.[1]

So defendant county may show that the plaintiff might have gone another way over a good road and bridge, nearer than the road where the injury occurred.[2]

Where the sway-girt, the most essential timber in a certain bridge, was made of poor timber, whereby the plaintiff sustained an injury, the bridge giving way and killing a horse while he was driving over the same; *held*, that the owners of the bridge were liable.[3]

Public Officers.—A municipal corporation bound by statute to keep a certain bridge in repair is not liable in damages for the detention of a vessel on account of the draw not being of proper width, or because the bridge superintendent through his carelessness delays a vessel, unless there is an express statutory liability.[4]

drawbridge at night, or by suitable barriers make it safe for travellers passing upon and over it, or is liable. Manley *v.* St. Helen's Canal Co., 2 Hurl. & N. 840. See Witherly *v.* Regent's Canal Co., 12 C. B. N. S. 2.

Action of tort for injury to land from overflow of waters caused by railroad bridge over a river, held liable unless proven by defendants that they had used due and reasonable precautions without negligence or carelessness in constructing their bridge. Mellen *v.* Western R. Corp., 4 Gray (Mass.), 301.

Approaches to a bridge must be constructed so as to be reasonably safe for passengers by night or day, or action lies. Baltimore & Ohio R. Co. *v.* Boteler, 38 Md. 568.

1. Peoria Association *v.* Loomis, 20 Ill. 235; s. c., 71 Am. Dec. 263.

Where a bridge was used by a railroad company, *held* that such use made it obligatory upon the bridge association to furnish additional guards against new dangers. And whether the bridge was condemned for use by the railroad company, or whether such use was by permission of the bridge association, made no difference. Peoria Association *v.* Loomis, 20 Ill. 235; s. c., 71 Am. Dec. 263.

2. Walker *v.* Decatur County, 67 Iowa, 307, following Porkhill *v.* Brighton, 61 Iowa, 103.

When general allegation of negligence and no averment of notice is sufficient. Board of Allen Co. *v.* Bacon, 96 Ind. 31.

3. Townsend *v.* Susquehanna Turnpike Co., 2 Johns. (N. Y.) 90, action under statute.

If a bridge was sufficient to resist an ordinary storm, but gave way to a rainstorm unusually violent, defendant was not liable. Jordan *et al. v.* City of Hannibal, 3 Western Reporter (Mo. 1886).

Gorging of ice against bridge of railroad company, when company exercise reasonable care in constructing, is no ground of action. Omaha & Republican Valley R. Co. *v.* Brown, 14 Neb. 170.

If a city undertakes to construct approaches to a bridge erected over a company's canal within its limits, an obligation rested upon it to build them so as not to endanger the lives or limbs of its citizens. If an abutment of the bridge had stone steps leading from it, situated so that a passageway for travellers could not be safely constructed, the city in undertaking to make one was grossly derelict in its duty. The City of Juliet *v.* Verley, 35 Ill. 58.

4. French *v.* Boston, 129 Mass. 592.

Construction of statutes as to power of superintendent of a bridge to determine which of two vessels shall first pass the draw. Commonwealth *v.* Chase, 127 Mass. 7.

Tender of drawbridge held liable for negligence in not exercising proper care as to the safety of travellers passing upon and over the bridge when draw was open, although appointed and salary fixed by the State. Nowell *v.* Wright, 3 Allen (Mass.), 166; s. c., 80 Am. Dec. 62.

Tender of a drawbridge acting under an appointment by the governor and paid a salary was held bound to use reasonable care in the discharge of his duties, and was liable for neglect to exercise proper and due caution for the safety of travellers passing over the bridge. Nowell *et ux. v.* Wright, 3 Allen (Mass.), 166.

Contra, negligence of agents in taking care of bridge, county is liable. Patton

Railings.—The omission of suitable railings is a negligent act.[1]

17. **Eminent Domain.**—Under a general law the State may authorize the taking and laying out as a public highway a bridge erected and maintained by a private corporation and having a right to take tolls under its franchise, provided compensation be made for the property taken. The power of appropriation and the exertion thereof in such manner by the State by taking away the franchise from a corporation is not an instance of impairing the obligation of a contract in the sense of the constitution.[2]

"Although a State grants a privilege in exclusive terms, it does

v. Board of Montgomery County, 96 Ind. 131.

Municipality liable for neglect of public officer to keep bridge in repair. Township of Newlin *v.* Davis, 77 Pa. St. 317.

1. Whittaker's Smith on Negligence, 115.

A toll-bridge corporation is not bound by law to construct railings to a bridge for persons to sit upon, lean against, or lounge on. Orcutt *v.* Kittery Bridge Co., 53 Me. 500.

In the case of railroads intersecting a highway at a grade below the level of the highway, it was held in the Great Eastern R. Co. *v.* Hackney District Board of Works, Law Rep. 8 App. Cas. (1883), 687, by Lord Watson, that sec. 46 of the Railway Clauses Act of 1845 "provides that the 'road' shall be carried over the railway 'by means of a bridge.' Again, sec. 50 enacts, with regard to 'every bridge erected for carrying any road over a railway,' that there shall be a good and sufficient fence 'on each side of the bridge,' and also that 'the road over the bridge' shall have a clear space of a certain width between the fences thereof. The real import of these enactments is that the substitute road shall be supported by means of a bridge provided by the railway company, the land upon which the old highway rested having been taken and used for railway purposes." P. 691.

The public are "entitled in the terms of the statute to have the road maintained and to have the bridge kept properly fenced by the railway company." These remarks, although expounding the law in this respect, may perhaps have no special force, inasmuch as the question in the case cited was whether the railway company were "owners of land bounding and abutting on the highway" within the terms of the Metropolis Management Act, 1862, and so liable to contribute to the expense of paving the highway. See also Brighton R. Co. *v.* St. Giles Camberwell, Law Rep. 4 Ex. Div. 239. See generally, as to liability of municipal corporation for neglect to repair highways and bridges, 35 Am. Dec. 542, note; 27 Am. Dec. 99, note.

2. West River Bridge Co. *v.* Dix, 6 How. (U. S.) 535.

In 1825 the petitioners were incorporated with authority to construct a certain bridge, with the power to take toll for seventy years, to remunerate them for the cost of erecting and maintaining the structure. There was also a proviso that the bridge might be made free for public use upon the proprietors being reimbursed for the outlay originally made with annual interest at nine per cent less what had been received for tolls, although the bridge originally lay in two towns. By annexations it came entirely within the limits of the city of Lowell. In 1853 an act was passed authorizing the city of Lowell to take and lay out the bridge as a highway upon the payment of damages, to be assessed and paid as provided by law in laying out streets and highways in that city. *Held*, that upon the expiration of the seventy years the right of the proprietors in the bridge would determine, and the bridge would revert to the public, or upon the payment of the sum stipulated in the charter it would pass by redemption to the public, or it might be lawfully taken and appropriated to the use of the public, by right of eminent domain, and this without compensating the proprietors for the actual value of the bridge as a structure independently of their franchise, but only for the loss of their franchise. Central Bridge Corporation *v.* City of Lowell, 15 Gray (Mass.), 106.

A corporation to build a bridge is in one sense a franchise, and carries with it the right to erect a bridge and take tolls. West River Bridge Co. *v.* Dix, 6 How. (U. S.) 535.

Such franchise is a species of property vested in the corporation. West River Bridge Co. *v.* Dix, 6 How. (U. S.) 535.

not thereby bind its hands against such an exercise of the right of eminent domain as may annihilate the franchise for the benefit of another which the terms of the first would exclude." [1]

18. Toll-bridges—Exclusive Rights.—A new bridge erected so near another as to impair directly and materially the value of the exclusive right of the other under its franchise to collect tolls is a nuisance, for which action would lie; or if the law did not furnish adequate relief, equity will interfere by injunction:[2] and this was the rule under the common law.[3]

So where there was a grant of a privilege to erect a bridge and take tolls, and prohibiting the erection of another bridge "within two miles either above or below the bridges to be erected and maintained in pursuance of this act," *held*, to be a contract within the protection of the constitution within the principle laid down in Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 625.[4]

That an exclusive right to erect a bridge and take tolls will not be implied, is fully settled by the Charles River Bridge case.[5]

Where a petition for an injunction was brought to the supreme court of Massachusetts, and a bill was also filed in the same court for relief upon the ground that an exclusive right to erect a bridge and collect tolls was granted by the legislature to the plaintiff, that the grant to the defendant was invalid, impaired the obligation of contracts, and took away the property of the plaintiff without compensation, the petitioners were dismissed by the court. Under the provisions of the 25th section of the Judiciary Act of 1789 the case was taken by writ of error to the supreme court of the United States. The latter court found that the grant to the plaintiffs was silent as to the contested power, and was a grant only of such privileges as are usually given to corporations of that kind, and, in the absence of an express grant to the plaintiffs of an exclusive privilege to erect and maintain a bridge, that the court would not imply an engagement on the part of the State that another should not be erected, or that there should be no competition or improvements that might diminish the plain-

1. Cooley, C. J., in East Saginaw Mfg. Co. *v.* City of East Saginaw *et al.*, 19 Mich. 259, 282, citing West River Bridge Co. *v.* Dix, 16 Vt. 446; s. c., 6 How. (U. S.) 507; Enfield Toll Bridge Co. *v.* Hartford & N. H. R. Co., 17 Conn. 40, 454; Matter of Kerr, 42 Barb. (N. Y.) 119. The question in the main case was *de* power of State to exempt perpetually from taxation.

2. Newburg Turnpike *v.* Miller, 5 Johns. Ch. (N. Y.) 101; s. c., 9 Am. Dec. 274, citing Croton Turnpike *v.* Ryder, 1 Johns. Ch. (N. Y.) 611; Ogden *v.* Gibbons, 4 Johns. Ch. (N. Y.) 150, 160.

3. Morris *v.* Farmers & Teamsters' Co., 6 Cal. 590; s. c., 65 Am. Dec. 535, citing 3 Bla. Com. 319; Anonymous, 1 Hayw. L. & Eq. 457; Smith *v.* Harkins, 3 Ired. Eq. (N. Car.) 613; Harrell *v.* Ellsworth, 17 Ala. 584.

Limitations upon right in *California* to establish a bridge when likely to interfere with old one considered. Morris *v.* Farmers & Teamsters' Co., 6 Cal. 590; 65 Am. Dec. 535.

4. Binghamton Bridge, 3 Wall. (U. S.) 51, Chief Justice and Justices Field and Grier dissenting.

5. Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420; s. c., 6 Pick. (Mass.) 376; 7 Pick. (Mass.) 344; Thompson *v.* N. Y. & Harlem R. Co., 3 Sand. Ch. (N. Y.) 625; White River Turnpike Co. *v.* Vermont Central R. Co., 21 Vt. 595.

tiff's income. The decision of the Massachusetts supreme court in dismissing the bill was affirmed.[1]

19. Injunction.—An injunction will lie where bridge obstructs navigation.[2]

20. Mandamus.—*Mandamus* will lie to compel board of commissioners to approve or disapprove bridge plans submitted in accordance with statutory provision.[3]

21. Miscellaneous Cases.—A turnpike company may accept a subscription of stock from the county to aid in building a bridge.[4]

Bridges are not subjects of maritime lien.[5]

1. Turnpike Co. *v.* State, 3 Wall. (U. S.) 210.

2. Wisconsin River Improvement Co. *v.* Lyons, 30 Wis. 61.

Temporary injunction was issued to restrain a railroad corporation from building a bridge over Connecticut river. Baird *v.* Shore Line R. Co., 6 Blatch. (U. S.) 276.

Injunction to prevent building a bridge across a navigable river not allowed. Northern Pacific R. Co. *v.* Barnesville & Moorehead R. Co., 2 McCrary (U. S. C. C.), 224.

Case of railroad diverting a highway and erecting bridge over same, and right under Railway Clauses Land Clauses Act to restrain the erection of a bridge with less heading than fifteen feet, or any bridge which would carry the road to such a level as to cause it to be flooded. Atty.-Gen. *v.* Furness R. Co., 47 L. J. Ch. Div. 776; 38 L. T. N. S. 555.

In a proper case injunction lies in favor of landowner to prevent the entry of the public upon his land to build a bridge. Kyle *v.* Board of Kosciusko Co., 94 Ind. 115.

Location of bridge may be a proper subject of equitable control in injunction proceeding. Irwinton *v.* Burton Road Supervisor, 61 Iowa, 471.

3. Commissioners *v.* Board of Public Works, 39 Ohio St. 628.

Mandamus to compel railway company to construct bridge instead of a level crossing. British & North Somerset R. Co., *In re*, 3 L. R. Q. B. Div. 10; 47 L. J. Q. B. Div. 48.

Mandamus to compel adjoining county under statute to assist in making bridge over swamp and run denied. Construction of statute which provided for bridge or causeway. County Court of Gloucester Co. *v.* County Court of Middlesex Co., 79 Va. 15.

4. Mercer County Court *v.* Springfield, Maxville, etc., Turnpike Co., 10 Bush (K.), 254.

Bridge over a canal navigable by statute, *held*, upon facts presented, to be a bridge between city and county (under sec. 39 of 12th Vict. c. 81). Woods *v.* Municipality of Wentworth and Corporation of Hamilton (Prov. Ont.), 6 C. P. 101.

Other cases of construction of statutes upon this point. *In re* Corporation of the County of Waterloo and the Corporation of the County of Brant (Prov. Ont.), 23 Q. B. 537; Harold *v.* Corporation of the County of Simcoe *et al.* (Prov. Ont.), 16 C. P. 43

Held upon a question as to the construction of a statute (Rev. Stat. 1879, sec. 6901, Mo.): "That it matters not whether a bridge owned by a joint-stock company is a toll-bridge or not. it is taxable as a bridge." The statutory clause being "all bridges over streams in this State, or over streams dividing this State from other States owned by joint-stock companies, and all such bridges where a toll is charged, shall be subject," etc.; "but it does not embrace bridges owned by railroad corporations. Such corporations are not joint-stock companies." State *ex rel.* Collector *v.* Hannibal & St. J. R. Co. (Mo. 1886), 4 West. Repr. 697.

Neglect of defendant corporation to comply with terms of their charter requiring a return to be made of amount of tolls collected, whether decree of forfeiture should be made—a question. State *v.* Barron. 57 N. H. 498.

Board of county commissioners of one county no power to purchase toll-bridge over stream forming boundary line between two counties. Boards of both counties must concur. Board of Fountain Co. *v.* Thompson, 106 Ind. 534; Board of Fountain Co. *v.* Wright, 106 Ind. 600.

Building erected on bridge. Boston & Maine R. Co. *v.* Durgin, 67 Me. 263.

Corporation authorized to build a bridge may buy one at same place. Thompson *v.* N. Y. & Harlem R. Co., 3 Sand. Ch. (N. Y.) 625.

5. Galena Packet Co. *v.* Rock Island Bridge Co., 35 How. Pr. (N. Y.) 190.

The Niagara suspension bridge at Clifton is land.[1]

BRIEF. (See also CONVEYANCING.)—Short, condensed; used as a noun to mean a writ,[2] and an abstract, an abridgment, a memorandum; for example, a lawyer's brief, a brief of title.[3]

1. (Within act 29 & 30 Vict. 52, s. 3.) Niagara Falls Suspension Bridge Co. *v.* Gardner (Prov. Ont.), 29 Q. B. 194.

Relative rights and duties of Canadian and American powers *de* this bridge. Atty.-Gen. *v.* Niagara Falls International Bridge Co. (Prov. Ont.) 29 Chy. 34, 491.

Authorities for Bridges.—Pierce on Railroads; Wood's Law of Nuisances; Gould on Waters; High on Injunctions; Sedgwick on Statutory and Constitutional Law (2d Ed., Pomeroy's Notes); Shearman & Redfield on Negligence, with Addenda. 1874, 1880; Dillon on Municipal Corporations; Story's Eq. Jur.; Whittaker's Smith on Negligence; Thompson on Negligence; Russell on Crimes; Houck on Navigable Rivers; Abbott's National Digest; Lacey's Digest of Railway Decisions, 2 vols.; Field's Lawyers' Briefs.

2. *Brief*, in Norman-French, meant a writ (2 Co. Lit. 73, b: "*quia breviter et paucis verbis intentionem proferentis exponit*") because it set forth briefly and in a few words the plaintiff's claim. 5 Bracton, 413.

3. In *Indiana*, rule 14 of the Supreme Court provides that "where a cause is submitted on call the appellant shall have sixty days in which to file a *brief*. and if not filed within the time limited the clerk shall enter an order dismissing the appeal," etc. In affirming the judgment of the lower court, on the ground that the paper filed by the appellant was not a *brief*, the court, Perkins, J., said: "But is the paper filed in this case a *brief?* What is a brief? In the *English* practice it is 'an abbreviated statement of the pleadings, proofs, and affidavits at law; or of the bill, answer, and other proceedings in equity, with a concise narrative of the facts of the plaintiff's case, or the defendant's defence, for the instruction of counsel at the trial or hearing' Whart. Law Dict. In *America*, at least in *Indiana*, a brief, in addition to the statement of the case above mentioned, should contain a summary of the points or questions involved, with a citation of authorities, if authorities are relied on, and an argument based upon both, which should be characterized by perspicuity and conciseness; though says Bouvier: 'When the argument is pertinent and weighty, it cannot be too extended.' It is manifest from these definitions that the paper filed by counsel is not a *brief*. A mere copy of a part of the assignment of errors can scarcely be dignified with the name. Such being the fact, the cause is before us without a brief by the appellant. But, by rule 28 of the Supreme Court, points not made in the brief of counsel are considered as waived; and where no brief is filed no points are made, and all are waived. Such being the case, this court has nothing to do but to affirm the judgment below or dismiss the appeal, either of which courses it is in its power to take." Parker *v.* Hastings, 12 Ind. 654. See Deford *v.* Urbain, 42 Ind. 476.

In following this ruling, and holding that a paper which did not purport to contain any statement of the case or to furnish the court any information was not a *brief*, the court, Osborn, J., said: "Tidd says a brief should contain an abstract of the pleadings; a statement of the facts of the case, with such observations as occur thereon. The great rule to be observed in drawing briefs consists in conciseness with perspicuity. Tidd. Pr. 799. 'A detailed statement of a party's case.' Bouv. Law. Dict. 'An abridgment of a plaintiff's or defendant's case, prepared by his attorney, for the instruction of counsel on a trial at law.' Burrill Law Dict. A *brief* within the meaning of rule 14 is some kind of a statement of the case for the information of the court. We will not say that it should be as full as required by an attorney to counsel. Still it should at least purport to furnish the court some information; some aid in deciding the case. An attempt should be made to show why the judgment of the court below should be reversed or affirmed. To say that counsel cannot discuss the reasons upon which the court below decided the case, or to notify the court that the question is upon the sufficiency of the complaint, without making any suggestion or citing any authority, as in this case, does not purport to be a statement for the information of the court. It is no better than a blank sheet." Gardner *v.* Stover, 43 Ind. 356.

Brief Statements.—Where *brief statements* had been filed by both plaintiff and defendant, under the Maine practice, the court, Shepley, C. J., held that it did not prevent the offering of testimony pertinent to the general issue, saying:

BRING.—To transfer from one place or point to another. This word in its various forms is used in several metaphorical senses, examples of which will be found in the notes.[1]

"The rules applicable to special pleading can rarely be applied to *brief statements* and *counter brief statements*. One of the important purposes designed to be accomplished by allowing them to be used instead of pleas and replications was to relieve the parties from that exactness of allegation and denial by which parties were sometimes so entangled as to prevent a trial upon the merits. The term 'brief statement' conveys the idea of a short notice without formal or full statements of the matters relied upon. Such *brief statements* cannot prevent either party from offering testimony appropriate under the general issue. Nor can the omission of a denial in a *counter brief statement* of some matter alleged in the *brief statement* control or destroy the effect of testimony properly received under it. Such *brief statements* appear to have been considered as amounting to little more than notices of special matter to be given in evidence under it." Trask *v.* Patterson, 29 Me. 499. See Potter *v.* Titcomb, 13 Me. 26; s. c., 16 Me. 423; Bricket *v.* Davis, 21 Pick. (Mass.) 404.

1. Advancements Brought into Hotchpot.—In deciding, under a statute as follows, "Such advancements, both of real and personal estate, shall be *brought* into hotchpot, with the whole real and personal estate descended," etc., that the value of the property at the time of the advancement must govern in the distribution, the court, Handy J., said: "It is contended that by the terms of this statute the party *bringing in* or returning his advancement into the whole estate surrenders his title to the property so returned, and merges it in the general estate, agreeing to take from the value of the whole of it his portion, which of course must be ascertained by the valuation to be put upon the property at that time. We do not consider this a correct view of the subject. By the terms '*bringing* or returning the advancement into' the whole estate, it was not intended that the party should relinquish his interest in that particular property, but it is intended to be *brought in* for the purpose of being taken into consideration in making a distribution of the entire estate, in order to ascertain whether it amounts to his full share of the estate. His title to the property is derived from the gift, and cannot be affected by the distribution, and consequently its value must be estimated as at the time when the gift was made." Jackson *v.* Jackson, 28 Miss. 674, 680.

Bring Up.—To rear or educate children. In a group of cases it has been decided that under a devise to a wife on condition that she bring up the testator's children until they come of age creates an interest in a term in the wife, and is not a mere confidence, so that if she die before the term expires it passes to her personal representative. Smith *v.* Havens, 1 Cro. Eliz. 252. See also Merrill *v.* Emery, 10 Pick. (Mass.) 507; s. c., 4 Wheeler Am. C. L. 435. But *contra* in a Connecticut case, where a testator devised the use and improvement of all his real estate to his wife until his son should arrive at the age of twenty-one years, she "bringing him up," and then devised to his son the whole of his real estate, except the use and improvement as before disposed of, to be and remain to him an estate for ever. The wife intermarried again, and died before the son came of age, when, in ejectment by him against his mother's second husband, it was held that a fee, immediately on the testator's death, vested in the son, subject to a personal trust or confidence in his mother. Everts *v.* Chittendon, 2 Day (Conn.), 338.

Bringing an Action or Suit.—"The entering or *bringing* the action," said Tilghman, C. J., "is one thing, the appearance in court another. The first proviso in this same section shows that the legislature distinguish between the *bringing* of the action and the first term *after it is brought.*" And by Yeates, J.: "The words of the law are, 'it shall and may be lawful for either party in all civil suits or actions *pending* or that may hereafter be *brought* in any court, etc., to enter at the prothonotary's office a rule of reference, etc.' Whether the rule has been obtained prematurely or not must depend on the meaning of the words 'pending or that may hereafter be brought.' It may be said that, according to the common acceptation of the term, an action may be considered as *brought* immediately after mesne process has issued; but the legal idea seems to be different as we find it in our books. An action does not commence till the defendant makes his appearance, which is not till bail filed." Hertzog *v.* Ellis, 3 Binn. (Pa.) 208.

Under the *New Hampshire* statute February 9th, 1791, which provides that "no action of review shall be *brought* after the expiration of three years from the time of rendering the judgment to be reviewed," it was held that the true time when a writ is sued out, or an action commenced, is the time when the writ is in fact filled up with the declaration in order to have it served upon the opposite party, and the date, and not the service of the writ, is *prima-facie* evidence of the true time when it was sued out; but this *prima-facie* evidence may be rebutted, and the true time shown by parol testimony, the court, Woodbury, J., saying: "In this case the plea in abatement must be founded on the supposition that the time of the service of the writ is the time when the 'action of review' is *brought*, while the demurrer must rest on the opinion that it is *brought* at the time the writ bears date or, at the latest, when the writ was in fact sued out. In this State our writs of mesne process contain the declaration; and not being sued till that is inserted, they disclose the whole cause of action. But when obtained from the clerks of the respective courts, though attested and sealed, they are mere blank forms, and are afterwards filled up by the parties or their counsel with the appropriate term, dates, names and declaration, whenever an occasion arises to use them. They are then handed to an officer for service; and except the entry of the action on the docket of the court, the plaintiff does no more till the defendant appears and pleads. This course of practice differs so essentially from many of the English forms that sometimes the same expressions convey meanings altogether unlike, and the same principles are inapplicable to the same nominal stage in the proceedings. Thus, in the King's Bench the writ issues merely to bring the defendant into court, and not at the same time to apprise him of the cause of action. The cause of action may not even exist till the filing of the bill, and then for the first time it is technically set forth to the defendant. Hence it follows that for some purposes an action there may not be commenced till after both the date of the writ and the service, and also the appearance of the defendant in court; because the cause of action may neither exist nor be set forth till then. Thus in the Common Pleas, likewise, the filing of bail is in some cases for some purposes regarded as the commencement of the action. But it will be seen that in those cases no declaration had previously been filed, and the affidavit to hold to bail disclosed to the defendant the true cause of action. So it would seem that writs of error are not considered as commenced for some purposes till the errors are assigned, which in England is not till after the service and return of the writ. Then the defendant first receives notice of the special cause for which the writ issues. While, on the contrary, it has often been ruled that for most purposes an action is commenced at the date of the writ. Johnson *v.* Smith, 2 Burr. 950, and authorities there cited. The questions in this case, then, must be settled upon general principles, modified as we may find them by the peculiarities of our practice. . . . We entertain an opinion that the word 'action' here means writ; and that the word 'brought' means the procurement of it with a view to service upon the opposite party. Thus the word 'action,' though in general it signifies merely motion or an act, yet, when applied to legal subjects, means a proceeding by one party against another to try their mutual rights, or, as it is more technically expressed in some books, a process, to which there may be pleadings. As a writ here embraces the declaration, it is manifestly such a process; and the words 'writ of review' are frequently used as synonymous with 'action of review.' So the word 'brought' means obtained or gotten, and signifies the same as sued out, because the plaintiffs made suit, or *secta* to the king, to the chancellor, or to the clerk, as in different ages the practice altered; and obtained not a mere blank form as with us, but a writ filled up with the dates, term, etc., ready for service. In like manner we now obtain from the clerks writs of execution filled up; and hence, when thus obtained, they are properly said to be 'sued out.' But by the procurement of a blank form from the clerk or an attorney an action is not *brought*, because such form is not a writ, though by the procurement of such a form, suitably filled up and intended to be served, the 'writ' or 'action' may well be called 'commenced,' 'sued out,' or, in the language of the statute under consideration, 'brought.' . . . It must be obvious, therefore, that a plea which, like the present one, is founded on an idea that the service of the writ is necessarily, or even *prima facie*, the true time when the action is *brought* must be bad. The plea ought to follow the words of the statute, and allege that the action of review was not *brought* within the time limited; and then if the issue thus tendered be

BRITISH.—Of or belonging to; pertaining to or connected with Great Britain or its inhabitants.[1]

joined, the defendant may prove, by parol or otherwise, that the writ was not filled up with a view to service till the day of the service, or till some intervening time between its date and the service." Society Prop. Gospel *v.* Whitcomb, 2 N. H. 227.

Under a *New York* statute which makes "any person beneficially interested in the recovery of an action" (2 R. S. 515, § 47, 2d Ed.) liable for costs, it was held that one may be said to have *brought* the action within the meaning of the statute who has retained the attorney for that purpose, either individually or in conjunction with others, or sanctioned the act of an assumed agent in retaining him, or agreed to indemnify the nominal plaintiff for the expenses consequent upon the retainer. Whitney *v.* Cooper, 1 Hill (N. Y.), 629.

In construing the act of July 4th, 1857, (Acts of 1857, page 44), as follows, "All proceedings and prosecutions brought to obtain the forfeiture of any liquor, etc., shall be held, etc., proceedings *in rem* and not criminal proceedings, etc.," the court held that it applied to proceedings pending when the act was passed; Waldo, J., saying: "The language of the statute justifies the views we have taken of its meaning. The words are, 'all proceedings and prosecutions *brought* to obtain the forfeiture,' etc. The word 'brought' implies past time, and includes prosecutions then pending as well as those thereafter to be brought." Hine *v.* Belden, 27 Conn. 384. 390.

To Bring to Port.—Where a policy of insurance on a certain ship on a commercial voyage, with or without letters of marque, gave leave to the assured to chase, capture, and man prizes, and the letters of marque issued to the ship authorized the captain to seize and take the ships, etc., of the French Republic, etc., "and *to bring* the same *to such port* as shall be most convenient," it was held that the assured was not justified in shortening sail and laying to in order to let a prize keep up with him, for the purpose of protecting her as a convoy into port, though such port were within the voyage insured; the court, Lord Ellenborough, C. J., saying: "I would, however, observe that the words in the letter of marque which have been most relied on, directing the captor to *bring* the prize into port to be condemned, does not mean an actual *bringing* of it in by the master himself, but causing it to *be brought* into port would fully satisfy those words; that is, by putting a competent number of men on board the prize for that purpose." Lawrence *v.* Sydebotham, 6 East, 45, 52.

Brought Before the Justices or Magistrate.—Where a statute requires the justice to cause the offender to *be brought* before him, it has been considered that this implies an authority to use compulsory process. 2 Chitty Gen. Pr. 179.

It does not necessarily mean a being brought personally; as in construing the statute 35 Geo. III. c. 101, § 2, which confines the jurisdiction of the justices to suspend an order of removal made by them to cases where the pauper is "brought before the justices" for the purpose of being removed, Lord Ellenborough, C. J., said: "All, therefore, that the act meant was, not that where any pauper was *brought personally*, but where his case was *brought judicially* before the magistrates." The King *v.* Inhabitants of Everdon, 9 East, 101, 106.

1. Good British Brig.—Where a vessel, stated in the body of a policy to be the "good British brig called the John," was insured at the usual sea-risk premium, and the brig and her cargo were totally lost upon a reef of rocks, it was held that the words "British brig," even if a warranty, did not imply that she was a British registered vessel, but merely that she was owned by a British subject; and it being proved that the owner was a Scotchman by birth, and that he navigated the vessel under a clearance and license from the British custom-house, this was sufficient *prima facie* to show that he continued to be a British subject, without showing his domicile or place of habitual residence. In this case the court, Tilghman, C. J., said: "The first exception involves matter of greater difficulty. The insurance was on the 'good British brig,' etc. . . . It was urged on the part of the defendant that the expression 'the good British brig' amounted to a warranty; that the brig was a British registered vessel properly documented to entitle her to all the privileges attached to such vessels. On the contrary, it was contended for the plaintiff that this was not a warranty, but a description of the vessel, which was sufficiently complied with by proving to the referees that the brig belonged to a British subject. . . . I do not think it very material whether the expression 'British brig' is to be called a description or a warranty, since it is allowed on all hands to contain an assertion which the assured is bound to

maintain. . . . The material question is, what is the meaning of it? The words 'British brig' may have several meanings. Strictly speaking, a vessel owned by a British subject is a *British brig.* Or, they may have a more extensive signification—a brig not only owned by a 'British subject,' but having a 'British register,' etc. In ascertaining the meaning, I think it fair to resort to circumstances disclosed in other parts of the instrument. In that point of view it is material that the insurance was against perils of the sea only, so that it is not to be supposed that the privileges attached to a registered vessel entered into the contemplation of the parties, because those privileges could avail nothing against storms and tempests. And here it may be proper to take notice of the custom of the insurance officers to insert at the foot of the policy such matters as they think of sufficient importance to make the subject of a special warranty. These memorandums are generally expressed in plain terms, without regard to form; and I cannot help conjecturing that if the insurers had contemplated a '*British* registered vessel,' they would have had a note of it at the bottom, without trusting to the general expression 'British brig' in the descriptive part of the policy Considering the whole of the instrument, I am of opinion that the expression 'British brig,' is to be understood, a brig owned by a 'British subject.' The next question is whether the warranty thus understood has been complied with. The referees say it was proved to their satisfaction that the owner was a 'British subject.' They have been examined, and given their reasons, with which I cannot say that I am dissatisfied. Upon the whole, therefore, my opinion is that the defendant has not shown sufficient cause for setting aside the award." Mackie *v.* Pleasants, 2 Binney (Pa.), 363, 370.

British-built Ship —In an action of *assumpsit* by the master against the freighter of a ship for not loading and dispatching on a voyage from London to Gottenburg, where the ship was denominated in the memorandum for charter "the Swedish ship or vessel called the Maria." the defence was that the ship, instead of being Swedish, was *British built,* whereby the defendant had been prevented from sending her to Gottenburg, a Swedish port. To prove this, the defendant first offered in evidence a British register of this ship, stating J. Evans, of Yarmouth, to be sole owner. But Lord Ellenborough held that this was no evidence she was *British built,* without first proving that Evans was privy to the register, and then through some other medium that he was the owner of the ship. In the manner in which the register was actually presented, it was merely *res inter alios acta,* and proved nothing. Evans himself, being in court, was then called, and stated that he was sole owner, and had obtained the register for her as a *British-built ship* according to her real character, but that at the time this contract was entered into she had a complete set of Swedish papers, and a treasury license to sail as a Swedish ship, all which particulars were known to the defendant; whereupon Lord Ellenborough held: "I should hold that the ship must correspond with the description in the written contract; but she is Swedish in one sense, being furnished with Swedish papers, and in a condition to navigate as a Swedish ship. Although the expression in the memorandum for charter be ambiguous, I think it was enough that she had a Swedish national character imposed upon her, and that she was Swedish within the meaning of the parties to the contract." And the plaintiff had a verdict. Reasse *v.* Meyers, 3 Camp. 475.

Recognized British Ship.—In an action of limitation of liability under the Merchant Shipping Acts, on the part of a vessel which, though registered as a *British ship* at the time of the institution of the action, was not so registered at the time of the collision, Sir Robert Phillimore filed the following opinion: "On the 14th of July, 1877, the Andalusian, a vessel in the imperfect and unfinished state of equipment which is termed a launch, having been built in a building yard on the Cheshire side of the river Mersey, was launched into that river, and brought into collision with a ship called the Angerona, which ship brought an action against the Andalusian in this court, and I pronounced that the Andalusian was to blame for the collision. The Andalusian now brings an action for limitation of her liability under the Merchant Shipping Acts, and this action is opposed on behalf of the Angerona, upon the grounds, first, that the Andalusian was not a ship; secondly, that she was not used in navigation at the time of the collision; and thirdly, that she was not a '*British* registered ship.' The court is much indebted to the able and ingenious arguments of the attorney-general and Mr. Benjamin upon all these points. By the 2d section of the Merchant Shipping Act, 1854, it is enacted that '"ship" shall include every description of vessel used in navigation not propelled by oars.' I am disposed to consider that a ship of this character,

in the imperfect state of a launch, might be included under this provision. The 18th section of the same act provides that 'no ship shall be deemed to be a *British ship* unless she belongs wholly to owners of the following description.' It is only necessary to mention one category, namely, 'natural-born *British* subjects.' The Andalusian is proved to have been the property of a natural-born *British* subject, and therefore is, in one sense, a *British* ship. The last and most important question remains to be considered. At the time of the collision this launch-ship had not her engines and boilers and other portions of her machinery on board, and was not in a condition to be registered, and as a matter of fact was not registered. By the 19th section of the same statute it is enacted that 'every *British* ship must be registered in manner hereinafter mentioned,' with certain exceptions which it is not necessary to mention; and it is further enacted that 'no ship required to be registered shall, unless registered, be *recognized as a British ship*.' The 54th section of the Merchant Shipping Act, 1862, limits the liability of shipowners with reference to the registered tonnage of sailing ships and the gross tonnage of steamships, without deduction on account of engine room; and the 516th section of the Merchant Shipping Act, 1854, provides that nothing in that part of that act which relates to limitation of liability shall be construed to extend to any *British* ship not being a 'recognized British ship' within the meaning of that act. It has been contended by the attorney-general that these sections should not be construed to deprive a vessel such as this launch —not yet ripe for registration, but intended to be registered when the proper time has arrived—of the benefits of this limitation of liability; that it would be very harsh to put this construction upon the sections; that this launch is not a ship 'required to be registered,' because at the time of her being launched she was not ready for registration, inasmuch as a launch cannot, and in this instance did not, take place with all the machinery on board, which it is necessary she should have at the time of registration; that she is not an offender against the law by reason of not having been fully registered, and that being owned by a *British* subject, and intended to be registered, she might be *recognized as a British ship*. After much consideration, I am unable to arrive at this conclusion. It is, in the first place, to be remembered that the limitation of liability is a creature of statute law; that upon general principles of jurisprudence and natural equity, as I think Dr. Lushington more than once said, the sufferer is entitled to a *restitutio in integrum* at the hands of the wrong-doer; that it is not a question of the launch being liable to a penalty for necessary non-registration, but a question whether she is entitled to a privilege which operates severely upon the sufferer, unless she brings herself strictly within the plain meaning of the provisions of the statute. Now, it appears to me that, however unfortunate it may be that the collision should have happened before the privilege of limitation of liability accrued, I think that it has so happened, and that with respect to this privilege, at least, the Merchant Shipping Acts, from beginning to end, treat a registered *British* ship as the only 'recognized British ship' entitled to this privilege. I must, therefore, reject the claim of the plaintiff in this suit, and there must be judgment for the defendant with costs." The Andalusian, L. R. 3 Prob. Div. 182, 188.

British Custom.—Where a bill of lading read, "Average, if any, is to be adjusted according to British custom," in an action for general average contribution in respect of the destruction of plaintiff's bark shipped under said bill of lading, and destroyed by water pouring into the ship through a hole cut in the side to extinguish a fire in the forehold, whereby the general cargo on board was saved, the court, Brett, J., said: "But the bill of lading, which in express terms provides that 'average, if any, is to be adjusted according to British custom,' appears to us to admit of no other construction than that which has been put upon it by the court of Queen's Bench. The custom or usage prevailing among average staters in England is uniform and invariable that goods thus damaged or destroyed are not brought into account in an average adjustment. We agree with the court below that the phrase, 'British *custom*,' in this bill of lading, was intended to refer, and upon a true construction does refer, to this custom or usage, even if it be different from the British *law*, a point which in this case we do not determine." Stewart *v.* West India & Pacific Steamship Co., L. R. 8 Q. B. 362; s. c. in Q. B., L. R. 8 Q. B. 88.

British Statute.—An indictment concluding "against the form of the statute in such case made and provided, and made of force in the state aforesaid," cannot be sustained under an Act of Assembly, although it be entitled "an act for putting in force" certain British

BROKEN.—Out of repair. Used in the Statute of Bridges, 22 Hen. VIII. ch. 5.[1]

BROKERS. (See also AGENCY.)

1. **Definition.**—The term "broker" in its largest sense is applied to a specialist who acts as the medium of negotiating and con-

statutes, and the British statute relating to the offence be copied nearly *verbatim* in the Act of Assembly; for said Waters, J.: "I am of opinion that the judgment ought to be arrested, because it does not appear that the British statute against forgery is made of force here as such, but only that certain clauses thereof are incorporated in an act of our legislature. The indictment, therefore, should have concluded against the act, and for want of this must be quashed." State *v.* Holley, 1 Brev. (S. Car.) 35, 41; s. c., 2 Bay (S. Car.), 262. See State *v.* Sandford, 1 N & McC. (S. Car.), 512.

British Subjects.—The rule as to the point of time at which the American *ante nati* ceased to be *British subjects* is different in the United States and in England, as established by the courts of justice in the respective countries. The English rule is to take the date of the treaty of peace in 1783. Our rule is to take the date of the declaration of independence. Inglis *v.* Trustees of the Sailors' Snug Harbor, 3 Pet. (U. S.) 99.

The language of the ninth article of the treaty with Great Britain of 1794, as follows, "That 'British subjects' who now hold lands in the territories of the United States, etc., shall continue to hold them," etc., covers the case of one who, being born in South Carolina before the declaration of independence, married a British officer in 1781, and in 1782 accompanied her husband to England, where she remained until her death in 1801; and her children are entitled to inherit the real estate which vested in her on the death of her father in 1782 intestate. Shanks *v.* Dupont, 3 Pet. (U. S.) 242.

British Weight.—Where the words "British weight," in a charter-party, may have two meanings, it is such a latent ambiguity as to warrant the introduction of parol testimony to show whether, in commercial usage, it is understood to mean gross or net weight. Goddard *v.* Bulow, 1 N. & McC. (S. Car.) 45; s. c., 9 Am. Dec. 663.

1. By Wills, J.: "Now I come to the

tracting any kind of bargain. Thus there are ship-brokers, insurance brokers, real-estate and insurance brokers, etc. The term is, however, emphatically applied to persons whose business it is to negotiate and effect contracts of sales between merchants.[1]

Statute of Bridges, which, although it is in archaic language, is none the less expressive. The preamble describes the annoyance caused by bridges 'broken in highways,' and then describes the remedy. *Broken* means out of repair, and applies to bridges in highways." Queen *v.* Inhabitants, 16 Cox C. C. 117.

1. Coddington *v.* Goddard, 16 Gray (Mass.) 436; Hinckley *v.* Arey, 27 Me. 362; Saladin *v.* Mitchell, 45 Ill. 79; Beal *v.* McKiernan, 6 La. (O. S.) 407; Graham *v.* Duckwall, 8 Bush (Ky.), 12; White *v.* Brownell, 3 Abb. Pr. N. S. (N. Y.) 318; Barnard *v.* Monnot, 16 How. Pr. (N. Y.) 440; Keys *v.* Johnson, 68 Pa. St. 42.

A broker is one who makes a bargain for another and receives a commission for so doing. Pott *v.* Turner, 6 Bing. 702.

A broker, within the meaning of our revenue laws, is an agent who negotiates sales between parties for a commission, and therefore a person who sells only stocks and bonds bought by him is not a broker. State *v.* Duncan, 16 Lea (Tenn.), 75.

A salaried agent who does not act for a fee or rate per cent is not a broker. Portland *v.* O'Neill, 1 Oreg. 218.

A partnership whose sole employment relates to the property and business of third persons may act as brokers. Bromley *v.* Elliot, 38 N. H. 287; s. c., 75 Am. Dec. 182.

C., a manufacturer of railroad and bar iron, wrote to W. & L.: "In reply to your application to be appointed selling agent for the Glendower Iron Works, I will agree to appoint you my selling agent for the sale of my railroad iron, merchant bar and muck bar, for New York and Eastern markets, provided you will agree to exert yourselves to keep the mill employed, and give me the preference and refusal of all orders that may come to you. In compensation for such service I will agree to allow you a commission, on all sales of railroad iron and muck bar in your district, of one and one half per cent. (1½), out of this percentage you to pay all extra commissions to other brokers." On the same day W. & L. wrote on the face of this letter, "Terms and conditions of this agreement accepted." W. & L. negotiated a sale of 4500 tons of rails to a railroad company, but only 646 tons were delivered, as the company through its embarrassments was unable to pay for more. W. & L. claimed to recover commissions on the whole 4500 tons, and in a suit therefor the court below instructed the jury that the right of the plaintiffs to compensation did not depend upon the quantity of railroad iron delivered, but upon the amount which was sold through the agency of the plaintiffs; that if the latter brought the defendant and the purchaser together, and "there was an act of sale or purchase passing from one to the other, the one agreeing to do and the other accepting, this constitutes a sale so far as the agent employed is concerned, who when he has gained the mutual assent of the minds of the person who desires to purchase and of him who desires to sell, has then performed what he agrees to perform, and has earned his percentage." *Held*, that this was error; that plaintiffs were not acting in the capacity of brokers of the defendant, but as agents to sell under a special agreement, and that the sales contemplated in said agreement were actual sales in a commercial sense, and not mere contracts to sell. Creveling *v.* Wood, 95 Pa. St. 152.

A broker differs from a factor in this, that he has no possession of the goods he sells for his principal, and consequently no lien on them, neither can he sell in his own name. Story on Agency, § 34; Rutenberg *v.* Main, 47 Cal. 213; Saladin *v.* Mitchell, 45 Ill. 79; Bernshouse *v.* Abbott, 16 Vroom (N. J.), 531; s. c., 46 Am. Repr. 789; James' Appeal, 89 Pa. St. 54; Barry *v.* Boninger, 46 Md. 59; Graham *v.* Duckwall, 8 Bush (Ky.), 12; Markham *v.* Jaudon, 41 N. Y. 235; Fisher *v.* Brown, 104 Mass. 259; Stollenwerck *v.* Thacher, 115 Mass. 224; Baring *v.* Corrie, 2 B. & Ald. 137.

Although a broker has generally no lien, he may have a lien on the proceeds in his hands of a sale, for his commissions, but not for a general balance. Barry *v.* Boninger, 46 Md. 59; Bostock *v.* Jardine, 34 L. J. Exch. 142.

A principal may either directly or impliedly confer upon a broker the authority of a factor, as by investing him with the *indicia* of title. But the intention to extend the power of the broker must be clearly shown. Rutenberg *v.* Main, 47 Cal. 213; Jeffrey *v.* Bigelow, 13 Wend. (N. Y.) 518; Andrews *v.* Kneeland, 6 Cow. (N. Y.) 354; McNeil *v.* Tenth Natl. Bank, 46 N. Y. 325; Talmage *v.* Nev-

2. Authority of Broker.—*Defined by Usage.*—Where a person sends an order to a broker engaged in a known and established market or trade for a deal in that trade, he gives authority to the broker to deal according to any well-established usage in the market or trade, whether in fact known to him or not, provided such usage is fair in itself and does not change the essential character of the broker's employment as such or of the contract purporting to be made by him on behalf of his principal.[1]

Implied Authority.—A broker has generally the power to use all the means necessary to effect the business for the transaction of which he was employed, unless restricted by the well-known usages of trade.[2]

ins, 2 Sweeney (N.Y.), 38; Morey *v.* Webb, 65 Barb. (N.Y.) 22; Morton *v.* Scull, 23 Ark. 289; Wood *v.* Hayes, 15 Gray (Mass.), 375; Henry *v.* Philadelphia Warehouse Co., 81 Pa. St. 76.

An insurance broker may insure in his own name. Story on Agency, § 109; Baring *v.* Corrie, 2 B. & Ald. 137. See INSURANCE BROKERS.

1. Robinson *v.* Mollett, L. R. 7 H. L. 836; Sutton *v.* Tatham, 10 Ad. & E. 27; Young *v.* Cole, 3 Bing. N. Cas. 724; Russell *v.* Hankey, 6 T. R. 12; Bowring *v.* Shepherd, L. R. 6 Q. B. 309; Cropper *v.* Cook, L. R. 3 C. P. 194; Scufance *v.* Hawley, 13 C. B. N. S. 458; Sumner *v.* Stewart, 69 Pa. St. 321; Rosenstock *v.* Tormey, 32 Md. 169; s. c., 3 Am. Repr. 125; Rich *v.* Boyce, 39 Md. 314; Fame Ins. Co. *v.* Mann, 4 Ill. App. 485; Bailey *v.* Bensley, 87 Ill., 566; Walker *v.* Walker, 5 Heisk. (Tenn.) 425; Higgins *v.* Moore, 34 N. Y. 417; White *v.* Fuller, 67 Barb. (N.Y.) 267; Baker *v.* Drake, 66 N.Y. 518; Gilchrist *v.* Brooklyn Mfg. Assoc., 66 Barb. (N. Y.) 390; Gallup *v.* Lederer, 1 Hun (N. Y.), 282; Wanless *v.* McCandless, 38 Iowa, 20; Day *v.* Holmes, 103 Mass. 306; Butler *v.* Dorman, 68 Mo. 298.

But usage will never be allowed to take the preference over express instructions. Scott *v.* Rogers. 31 N. Y. 676; Pierce *v.* Thomas, 4 E. D. Smith (N.Y.), 354.

The agency of a real-estate broker, and his duty to his principal, ceases upon the delivery of the title-papers and payment for the property. Walker *v.* Derby, 5 Biss. (U.S.) 134.

A broker may sell on credit when it is the usage of trade. Henderson *v.* Barnewell, 1 Y. & Jerv. 387; Boorman *v.* Brown, 3 Q. B. 511.

Usage will not authorize brokerage of an illegal or immoral character, as stock-jobbing, smuggling, the procuration of divorces by clandestine and corrupt means, etc. Brown *v.* Turner, 7 T. R. 631; Steers *v.* Lashley, 6 T. R. 61; Irwin *v.* Williar, 110 U. S. 499; Trist *v.* Child, 21 Wall. (U. S.) 441; Kirkpatrick *v.* Bonsall, 72 Pa. St. 155; Evans *v.* Waln, 71 Pa. St. 69; Fareira *v.* Gabell, 89 Pa. St. 89; Ruchizky *v.* DeHaven, 97 Pa. St. 202; Farnsworth *v.* Hemmer, 1 Allen (Mass.), 494; s. c., 79 Am. Dec. 756; Com. *v.* Cooper, 130 Mass. 285; Pointer *v* Smith, 7 Heisk. (Tenn.) 137; Foster *v.* State. 45 Ark. 361; Gregory *v.* Wilson, 36 N. J. L. 315; s. c., 13 Am. Repr. 448; Lyon *v.* Culbertson, 83 Ill. 33; Pearce *v.* Foote, 113 Ill. 228; Yerkes *v.* Salomon, 11 Hun (N.Y.), 473; Gregory *v.* Wendell, 39 Mich. 337, 40 Mich. 432; Rumsey *v.* Berry, 65 Me. 574. *Compare* Smith *v.* Bouvier, 70 Pa. St. 325.

In the buying and selling of stocks upon margins the brokers employed to conduct such transactions are in Pennsylvania regarded as being engaged in wagering contracts, which the law of that State does not recognize, and they cannot recover in assumpsit for services rendered, or excess over the margin, where the *bona fides* of the transaction show them to have been of a wagering nature. Stewart *v.* Garrett, 4 Atl. Repr. (Md.) 399. See Kirkpatrick *v.* Adams, 20 Fed. Repr. 287; Bennett *v.* Covington, 22 Fed. Repr. 816; Fortenbury *v.* State, 1 S. Western Repr. (Ark.) 58.

2. The authority of a broker to sign bought- and sold-notes is implied. Parton *v.* Crofts, 16 C. B. N. S. 11; Greaves *v.* Legg, 34 Eng. L. & Eq. 489; Saladin *v.* Mitchell, 45 Ill. 79. But not the power to submit his principal's case to arbitration. Ingraham *v.* Whitmore, 75 Ill. 24.

A broker's power to negotiate for the sale of a promissory note implies the power to give all necessary information, and any false representations made in regard to it will bind the principal. McBean *v.* Fox, 1 Ill. App. 177.

A broker employed to buy or sell has authority to bind his principal by any price he may fairly and honestly agree to,

Power to Receive Payment.—A broker has ordinarily no authority *virtute officii* to receive payment for property sold by him; and if payment is made to him by the purchaser, it is at his own risk unless from other circumstances the authority can be inferred.[1]

Cannot Make a Contract in his Own Name.—Ordinarily a broker cannot make a contract either to buy or to sell in his own name, but should contract in the name of his principal; and where he contracts in his own name his principal will have the same rights and remedies against a third party as if his name had been disclosed by the broker, and no set-off will be allowed for a debt due by the broker to the third party contracting.[2]

except when specially limited. Wilkinson *v.* Churchill, 114 Mass. 184; East India Co. *v.* Hensley. 1 Esp. 111.

When not restricted as to the mode of sale he may sell by sample or with warranty, and bind his principal by the sale. Andrews *v.* Kneeland, 6 Cow. (N. Y.) 534; Boorman *v.* Jenkins, 12 Wend. (N. Y.) 566; Waring *v.* Mason, 18 Wend. (N. Y.) 425; The Monte Allegre, 9 Wheat. (U. S.) 616. *Compare* Dodd *v.* Farlow, 11 Allen (Mass.) 426.

Where defendant, in Council Bluffs, Iowa, appointed a broker in Mobile, Alabama, to sell hams, and the agent took plaintiffs' order for "choice, sugar-cured, canvassed hams," and plaintiffs had no opportunity to inspect the hams, but they were to be shipped from Council Bluffs, and defendant shipped the same and demanded and received payment therefor while they were in transit, *held*, that the facts amounted to a warranty that the hams shipped were "choice, sugar-cured, canvassed hams." Forcheimer *v.* Stewart, 65 Iowa, 594.

Except when specially empowered by his instructions or by the usage of trade, a broker has no implied authority to sell on credit. White *v.* Fuller, 67 Barb. (N. Y.) 267; Wiltshire *v.* Sims, 1 Camp. 258. See Higgins *v.* Moore, 6 Bosw. (N. Y.) 344.

Nor, where he is employed to buy, to borrow the money in his principal's name to make the purchase. Bank of Indiana *v.* Bugbee, 1 Abb. App. Dec. (N. Y.) 86.

A broker employed to buy has no implied authority to sell, unless his principal invests him apparently with the legal ownership of the goods sold. McNeilly *v.* Cont. Ins. Co., 66 N. Y. 23; Roach *v.* Turk, 9 Heisk. (Tenn.) 708.

A broker employed to sell lands has no implied authority to sign a contract for the sale in the name of his principal. Morris *v.* Ruddy, 20 N. J. Eq. 236; Coleman *v.* Garrigues, 18 Barb. (N. Y.) 60; Glentworth *v.* Luther, 21 Barb. (N. Y.) 145; Roach *v.* Coe, 1 E. D. Smith (N. Y.), 175; Ryon *v.* McGee, 2 Mackey (D. C.), 17; Rutenberg *v.* Main, 47 Cal. 213.

Oral employment of a broker to sell goods implies power to execute such writings as are necessary to execute the agency, but no other writings. Lawrence *v.* Gallagher, 42 N. Y. Super. Ct. 309.

The power of a broker to sell does not imply power to rescind the sale when once made. Saladin *v.* Mitchell, 45 Ill. 79.

A broker who has obtained a loan for his principal, and holds certain chattels as security therefor, has no implied authority to appropriate the proceeds of said chattels to the payment of a debt due to him by his principal. James's Appeal, 89 Pa. St. 54.

1. Baring *v.* Corrie, 2 B. & Ald. 137; Campbell *v.* Hassell, 1 Stark. 233; Graham *v.* Duckwall, 8 Bush (Ky.), 12; Rutenberg *v.* Main, 47 Cal. 213; Gallup *v.* Lederer, 3 Th. & C. (N. Y.) 710; Bassett *v.* Lederer, 3 Th. & C. (N. Y.) 671; Higgins *v.* Moore. 34 N. Y. 417; Doubleday *v.* Kress, 50 N. Y. 410; Bliss *v.* Bliss, 7 Bosw. (N. Y.) 339; Saladin *v.* Mitchell, 45 Ill. 79; Peck *v.* Harriott, 6 S. & R. (Pa.) 149; Seiple *v.* Irwin, 30 Pa. St. 513; Morris *v.* Ruddy. 20 N. J. Eq. 236.

So he has no implied authority to make the freight under a charter-party entered into by him in the name of his principal payable to himself. Walshe *v.* Provan, 8 Exch. 843.

Payment to the broker does not discharge the buyer from liability to the broker's principal. Baring *v.* Corrie, 2 B. & A. 137; Kymer *v.* Suwerkropp, 1 Camp. 109.

2. Baring *v.* Corrie, 2 B. & Ald. 137; Fowler *v.* Hollins, L. R. 7 Q. B. 616; Henderson *v.* Barnwall, 1 Y. & J. 387; Bostock *v.* Jardine, 24 L. J. Ex. 142; Saladin *v.* Mitchell, 45 Ill. 79; Gallup *v.* Lederer, 3 Th. & C. (N. Y.) 710; Bassett *v.* Lederer, 3 Th. & C. (N. Y.) 671; Beebee *v.* Robert, 12 Wend. (N. Y.) 413;

3. **Liability of Broker to Principal.**—*Must Obey Instructions.*—Like other agents, a broker is bound to obey his instructions in order to bind his principal, and he will be liable in damages if he does not.[1]

Must Use Reasonable Skill and Ordinary Diligence.—A broker is bound to use in the transaction of his business such skill as is ordinarily possessed and employed by persons of common capacity engaged in the same trade or business, and such diligence as persons of common prudence are accustomed to use about their own business and affairs.[2]

s. c., 27 Am. Dec. 132; McKindley *v.* Dunham, 55 Wis. 515; Graham *v.* Duckwall. 8 Bush (Ky.), 12; Evans *v.* Waln, 71 Pa. St. 69; Locke's App., 72 Pa. St. 491; Brown *v.* Morris, 83 N. Car. 254; Clark *v.* Smith, 88 Ill. 298; Korneman *v.* Monaghan, 24 Mich. 36.

A broker who was not intrusted with the possession of the property contracted in his own name to sell the same to a vendee, who had no knowledge that the broker was not the real owner, but dealt with him as such. The broker notified his principals that he had sold for them, and directed where to ship the property to the purchaser. The owners, without any knowledge that the broker had contracted in his own name, and without any conduct on their part clothing the broker with authority to receive payment for them, or any possession, actual or constructive, of the property, delivered the same to the vendee. *Held*, payment by the purchaser to the broker under such circumstances is not a bar to the right of recovery by the owner. Crosby *v.* Hill, 39 Ohio St. 100. *Compare* Cropper *v.* Cook, L. R. 3 C. P. 194.

1. Nesbit *v.* Helser, 49 Mo. 383; Morris *v.* Ruddy, 20 N. J. Eq. 236; Dav *v.* Holmes, 103 Mass. 306; Parsons *v.* Martin, 11 Gray (Mass.), 111; Pickering *v.* Demerritt, 100 Mass. 416; Hoyt *v.* Shipherd, 70 Ill. 309; Ward *v.* Lawrence, 79 Ill. 295.

Where a cotton-broker was authorized to deliver a bill of lading only upon payment of a bill of exchange, it was held that a delivery without such payment could not bind the principal. Stollenwerck *v.* Thacher, 115 Mass. 224.

Where a broker was instructed to sell real estate and to take part of the purchase-money in cash and part in notes, payable in three, four, and five years, and he received in payment notes payable in three, four, and five years, or before, the principal was held not to be bound by the transaction. Siebold *v.* Davis, 67 Iowa, 560.

Where he is employed for a single transaction he cannot bind his principal in any other transaction. East India Co. *v.* Hensley, 1 Esp. Cas. 111; Coddington *v.* Goddard, 16 Gray (Mass.), 436; Scott *v.* Rogers, 31 N. Y. 676.

Evidence that some real estate had doubled in value within a year has no tendency to prove that a broker was not authorized to sell during the year at the original price. Wilkinson *v.* Churchill, 114 Mass. 184.

Where the instructions to a broker are ambiguous or obscure, and he uses his own judgment in the matter, he will not be liable for a misunderstanding of his instructions. Bessent *v.* Harris, 63 N. Car. 542.

2. Jenkins *v.* Bethan, 15 C. B. 168; Gheen *v.* Johnson, 90 Pa. St. 38; Esser *v.* Linderman, 71 Pa. St. 76; Deshler *v.* Beers, 32 Ill. 368; Gettins *v.* Scudder, 71 Ill. 86; Stewart *v.* Muse, 62 Ind. 385; Greenleaf *v.* Moody, 13 Allen (Mass.), 362; Marland *v.* Stanwood, 101 Mass. 470; Stewart *v* Drake, 46 N. Y. 449; White *v.* Smith, 6 Lans. (N. Y.) 5; Schepeler *v.* Eisner, 3 Daly (N.Y.), 11.

But he will not be liable for any mistake he may make where he acts in good faith and uses reasonable skill and diligence. Matthews *v.* Fuller, 123 Mass. 446; Buddecke *v.* Alexander, 20 La. Ann. 563; Gettins *v.* Scudder, 71 Ill. 86; Pappa *v.* Rose, L. R. 7 C. P. 32.

A money-lender to whom a sum of money is given to invest is bound to exercise reasonable skill and prudence. By his business he holds himself out as possessing competent skill to determine what reasonable care and prudence required. If he fails to exercise these, and through his negligence loss occurs, he is liable to make it good. McFarland *v.* McClees, 5 Atl. Repr. (Pa.) 50.

Any loss a principal may have sustained on account of the negligence of his broker may be set off against the latter's claim for commissions. McEwen *v.* Kerfoot, 37 Ill. 530.

Brokers Cannot Delegate their Authority.—Inasmuch as a principal employs a broker from the opinion he entertains of his personal skill and integrity, a broker has no right, without notice, to turn his principal over to another of whom he knows nothing.[1]

May not Buy from or Sell to Themselves.—A broker employed to sell cannot buy for his own account, neither can a broker employed to buy, buy his own goods even if he acts in good faith, and purchases or sells at a fair market price.[2]

A loan-broker was held liable to a lender on real estate for negligently loaning his principal's money on property which was already encumbered. Shipherd *v.* Field, 70 Ill. 438.

In an action against a firm of real-estate brokers for negligence in selling a parcel of land belonging to the plaintiff, there was evidence that the land was situated in a State in which neither the plaintiff nor the defendants resided or had a place of business; that the plaintiff employed the defendants to obtain offers for the land; that the defendants employed one O. to obtain an offer; that he reported an offer, which was in fact made in his own behalf, and which was less than the market value of the land, which offer was reported to the plaintiff and accepted by him, and the land conveyed; that one of the defendants at the time of sending the order to the plaintiff, who did not know the value of the land, advised him that the sale was a good one, and the plaintiff relied to some extent on this advice; that the defendants did not in fact know the value, except as they were informed by O., who represented the value to be what was offered; that they did not communicate their want of knowledge to the plaintiff; and that the plaintiff directed one of the defendants to telegraph to his partner to accept the offer "if a good sale." *Held*, that if the acceptance by the plaintiff was on the condition that the defendants thought it was a good sale, they were not liable if their opinion was honestly formed and no misrepresentation of fact was made; that if the acceptance was conditional on the sale being a good one, and the defendants were informed that the plaintiff relied upon them to decide upon that, they were bound to exercise reasonable care in determining that fact. Barnard *v.* Coffin, 138 Mass. 37.

Where a broker through negligence loaned his principal's money on a second mortgage while he should have loaned it on a first mortgage, but before the debt became due the lender, with other creditors of the mortgagor, signed a composition releasing him from all liabilities beyond the lien of the mortgage, it was held that this released the broker from his contingent liability to the lender. Nicolai *v.* Lyon, 8 Oreg. 56.

A broker was employed to effect an exchange of property, and found a customer willing to exchange within a certain time by warranty deed free from encumbrances. He prepared a deed conveying his principal's property, subject to certain taxes, which the customer refused to receive, and kept his principal in ignorance of this refusal until the stipulated time had expired. *Held*, that his negligence precluded him from recovering his commissions. Fisher *v.* Dynes, 62 Ind. 348.

An owner of certain unregistered bonds instructed his broker to sell them and to invest the proceeds "in the Central Iowa or any sure road;" adding, "I want registered bonds of which I will have no trouble in drawing the interest;" also, "I shall feel under many obligations if you will kindly make such sale and purchases of bonds as your good sense dictates." The broker bought unregistered Central Iowa bonds which declined in value, in consequence of which the owner lost heavily. *Held*, that if the broker acted in good faith, the purchase was within the scope of his authority. Matthews *v.* Fuller, 123 Mass, 446.

1. Cockram *v.* Irlam, 2 M. & S. 301; Henderson *v.* Barnewell, 1 Y. & Jerv. 387; Locke's Appeal, 72 Pa. St. 491.

This rule does not apply, however, to mere ministerial acts. Williams *v.* Woods, 16 Md. 220; Commercial Bank, etc., *v.* Norton, 1 Hill (N. Y.), 501; Elwell *v.* Chamberlain, 2 Bosw. (N. Y.) 230.

2. Taussig *v.* Hart, 58 N. Y. 425; Conkey *v.* Bond, 34 Barb. (N. Y.) 276; Tewksbury *v.* Spruance, 75 Ill. 187; Hughes *v.* Washington, 72 Ill. 84; Stewart *v.* Mather, 32 Wis. 344; Ruckman *v.* Bergholz, 38 N. J. L. 531; Sharman *v.* Brandt, L. R. 6 Q. B. 720; *Ex p.* Dyster, 1 Meriv. 155; Mollett *v.* Robinson, L. R. 5 C. P. 655.

If A, after refusing to sell goods to B, a broker, personally delivers the goods to B, upon his representation that they

4. When Agent of Both Parties.—The broker is primarily the agent of the party who employs him, and he becomes the agent of the other party only when the bargain or contract is definitely settled as to its terms between the principals, and is then only the agent of the third party in making the memorandum of sale.[1]

5. Liabilities of Principal.—*Principal Liable for Contracts of Broker.*—A principal is liable to a third party for all contracts entered into by his broker within the scope of his authority, as defined by direct instructions of which such third party has knowledge, or by the usage and custom of the particular trade in which he is engaged.[2]

are for an undisclosed principal in good credit, and it turns out that no such principal exists, there is no sale, although the transaction is entered on A's books as a sale to B, and a bill of parcels of the goods is made to him; and A may maintain replevin for the goods against a *bona-fide* pledgee of B. Rodliff *v.* Dallinger, 141 Mass. 1.

A broker cannot sell his principal's goods to a firm of which he is a member. Martin *v.* Moulton, 8 N. H. 504. And this principle extends even to the broker's clerk, who has access to the correspondence between the broker and his principal. Gardner *v.* Ogden, 22 N. Y. 327.

A local or temporary custom of a board of trade cannot be set up in defence of a sale to or from the broker. Butcher *v.* Krauth, 14 Bush (Ky.), 713.

A broker may sell to himself or be the purchaser in behalf of his principal of his own goods, where he communicates the fact to his principal and acts openly and in good faith, and the principal does not object. Stewart *v.* Mather, 32 Wis. 344; Reed *v.* Reed, 82 Pa. St. 420; Keys *v.* Johnson, 68 Pa. St. 42; Edwards *v.* Goldsmith, 16 Pa. St. 43. And he may recover his commissions in such a case. Grant *v.* Hardy, 33 Wis. 668. *Compare* Tower *v.* O'Neil, 66 Pa. St. 332.

An agreement by a party who wished to buy certain property to convey part of it to the broker employed by the seller, if the broker would put him in communication with the seller, cannot be enforced. Smith *v.* Townsend, 109 Mass. 500.

1. Henderson *v.* Barnwall, 1 Y. & J. 387; Wright *v.* Danah, 2 Camp. 203; Fairbrother *v.* Simmons, 5 B. & Ald. 333; Greaves *v.* Legg, 2 Hur. & N. 210; Hinckley *v.* Arey, 27 Me. 362; Raisin *v.* Clark, 41 Md. 158; s. c., 20 Am. Rep. 66; Coddington *v.* Goddard, 16 Gray (Mass.), 436; Evans *v.* Waln. 71 Pa. St. 69; Everhart *v.* Searle, 71 Pa. St. 256; Schlesinger *v.* Texas., etc., R. Co., 13 Mo. App. 471; Grant *v.* Hardy, 33 Wis. 668; Woods *v.* Rocchi, 32 La. Ann. 210; Cassard *v.* Hinman, 6 Bosw. (N. Y.) 8; Pugsley *v.* Murray, 4 E. D. Smith (N. Y.), 245.

A broker cannot act for both parties where their interests conflict; conflict of duty renders such employment incompatible. Watkins *v.* Cousall, 1 E. D. Smith (N. Y.), 65; Dunlop *v.* Richards, 2 E. D. Smith (N. Y.), 181; Pugsley *v.* Murray, 4 E. D. Smith (N. Y.), 245; Stainback *v.* Read, 11 Gratt. (Va.) 281; Meyer *v.* Hanchett, 39 Wis. 419.

2. Story on Agency (9th Ed.), §§ 126, 127; Wiltshire *v.* Sims, 1 Camp. 258; State *v.* Delafield, 8 Paige (N. Y.), 527; Bank of Indiana *v.* Bugbee, 1 App. Dec. (N. Y.) 86.

When a broker is authorized by his non-resident principal to buy cotton of a particular quality, and at a specified price, and to draw on his principal for the purchase-money, the bank to which he applies, and which advances to him in good faith the money to pay for the cotton, taking his draft on his principal, is not bound to inquire whether the price and the quality of the cotton conform to the terms of the order. These matters were submitted to the discretion of the broker, and persons dealing in good faith with him had a right to rely on his representations in reference to them. Whilden *v.* Merchants', etc., Bank, 64 Ala. 1.

The authority of a broker cannot be limited by private instructions not known to the parties who deal with them. Lobdell *v.* Baker, 1 Metc. (Mass.) 193; s. c., 35 Am. Dec. 358.

When the language of the instructions is ambiguous, they must be taken most strongly against the principal, especially when a construction of which they are fairly susceptible has been placed upon it, and third parties have been induced to act upon such construction. Measured by this rule, it is held that certain letters, authorized by defendant to be written to certain agents in regard to the sale of

6. Compensation.—A broker is entitled to compensation from his employer for services rendered. This compensation is generally in the form of commissions, and is contingent on success.[1]

Transactions must be Complete.—Before a broker can claim his commissions the transaction by which they are alleged to be earned must be completed. But where he has done his part of the transaction and from no fault of his own, but by causes outside of the agent, as by the refusal of the principal to complete the contract, the contract is not consummated, the broker will be entitled to his commissions.[2]

lands, were susceptible of a construction which gave the agents authority to make sale of lands, and that defendant was bound to consummate a sale so made to the plaintiff. Hopwood *v.* Corbin, 63 Iowa, 218.

1. Howland *v.* Coffin, 47 Barb. (N. Y.) 653; Everhardt *v.* Searle, 71 Pa. St. 256; Street *v.* Swain, 21 Ind. 203; McClelland *v.* Snider, 18 Ill. 58; Bingham *v.* Hawley, 17 Ill. 38.

Brokers, in the discharge of their agency, are bound only to the exercise of reasonable skill and diligence; and so long as they are guilty of no bad faith, and exercise the same care and diligence that a prudent man would exercise in the management of his own like business, they are entitled to reasonable commissions for their services. Guesnard *v.* Louisville, etc., R. Co., 76 Ala. 453.

In the absence of a definite understanding between the parties, the amount may be fixed by custom or by a jury. Paley's Agency, 101–2; Ruckman *v.* Bergholz, 38 N. J. L. 531; Erben *v.* Lorrillard, 2 Keyes (N. Y.), 567; Graham *v.* Graham, 34 Pa. St. 475; Glenn *v.* Salter, 50 Ga. 170; Frazer *v.* Gregg, 20 Ill. 299; Kock *v.* Emmerling, 22 How. (U. S) 69.

In an action to recover for services rendered in effecting the sale of land located near a large city, evidence as to the character of the land and its possible value as a future suburb of the city is admissible. Forsyth *v.* Doolittle, 7 Supr. Ct. Rep'r, 408.

One who employs stockbrokers to purchase, carry, and sell stocks on his account, cannot dispute as too high the rates of commissions charged against him for raising money to carry the stock in a stringent money market, where he is informed of their custom in that respect in their dealings, and is kept informed at short intervals of the state of his accounts with them, and he makes no objection at the time. Robinson *v.* Norris, 51 How. Pr. (N. Y.) 442.

Where a custom exists, it is to be presumed parties deal in view of it, and where no agreement is made as to commissions, that they agree to pay the customary rate. In the absence of such custom and of any agreement as to rate, the measure of compensation would be the value of the services rendered. Potts *v.* Aechternacht, 93 Pa. St. 138.

A salaried agent who does not act for a fee or rate per cent is not a broker. Portland *v.* O'Neill, 1 Ore. 218.

The one who employs the broker is liable for the commissions, whether he holds the subject-matter of the brokerage in his own name or as trustee. Jones *v.* Adler, 34 Md. 440.

A broker was employed to buy certain lots, and agreed with the owner on a certain price, the owner stating he was not willing to pay commissions at that price. The purchaser upon being informed said that he would see to it. Matters remained in this state for about one month, when the purchaser went to the owner and bought the property at the price agreed upon. *Held*, that the purchaser was liable for the commissions. Lynch *v.* McKenna, 58 How. Pr. (N. Y.) 42.

The broker's principal must, however, be legally competent to enter into the contract to make him liable for commissions. Cavender *v.* Waddingham, 5 Mo. App. 457.

2. Mooney *v.* Elder, 56 N. Y. 238; Moses *v* Bierling, 31 N.Y. 462; Redfield *v.* Tegg, 38 N. Y. 212; Hague *v.* O Connor, 41 How. Pr. (N. Y.) 287; Wylie *v.* Marine Nat. Bank, 61 N. Y. 416; Glentworth *v.* Luther, 21 Barb. (N. Y.) 147; Lyon *v.* Mitchell, 36 N. Y. 237; Harris *v.* Burtnett, 2 Daly (N.Y.), 189; Briggs *v.* Boyd, 56 N. Y. 289; Doty *v.* Miller, 43 Barb. (N.Y.) 529; Barnard *v.* Monnott, 42 N.Y. 203; Hart *v.* Hoffman, 44 How. Pr. (N. Y.) 168; Higgins *v.* Moore, 34 N. Y. 417; Barnes *v.* Roberts, 5 Bosw. (N. Y.) 73; Fraser *v.* Wyckoff, 63 N. Y. 445; Holly *v.* Gosling, 3 E. D Smith (N. Y.), 262; Jacobs *v.* Kolff, 2 Hilt. (N. Y.) 133; Cor-

ning *v.* Calvert, 2 Hilt. (N. Y.) 56; Van Lien *v.* Burns, 1 Hilt. (N. Y.) 134; Trundey *v.* N. Y., etc., Steamb. Co., 6 Robt. (N. Y.) 312; Richards *v.* Jackson, 31 Md. 250; s. c., 1 Am. Rep. 49; Kimberly *v.* Henderson, 29 Md. 512; Jones *v.* Adler, 34 Md. 440; Ryon *v.* McGee, 2 Mackey (D. C.), 17; Kock *v.* Emmerling, 22 How. (U. S.) 69; Colwell *v.* Springfield Iron Co., 24 Fed. Repr. 631; McGavock *v.* Woodlief, 20 How. (U. S.) 221; Carter *v.* Webster, 79 Ill. 435; Rockwell *v.* Newton, 44 Conn. 333; Royster *v.* Mageneney, 9 Lea (Tenn.), 148; Hewett *v.* Brown, 21 Minn. 163; Finnerty *v.* Fritz, 5 Colo. 174; Gottschalk *v.* Jennings, 1 La. Ann. 5; s. c., 45 Am. Dec. 70; Santos *v.* Taney, 13 La. Ann. 151; Blanc *v.* Improvement Co., 2 Rob. (La.) 63; Didion *v.* Duralde, 2 Rob. (La.) 163; Anderson *v.* Weiser, 24 Iowa, 428; Iselin *v.* Griffith, 62 Iowa, 668; Shepherd *v.* Hedden, 29 N. J. L. 334; Morris *v.* Ruddy, 5 C. E. Greene (N. J.), 236; Hinds *v.* Henry, 36 N. J. L. 328; Treat *v.* Celis, 41 Cal. 202; Phelan *v.* Gardner, 43 Cal. 306; Middleton *v.* Findla, 25 Cal. 76; Duffy *v.* Hobson, 40 Cal. 240; Neilson *v.* Lee, 60 Cal. 555; Stewart *v.* Murray, 92 Ind. 543; s. c., 47 Am. Rep. 167; Fisher *v.* Bell, 91 Ind. 243; Beineke *v.* Wurgler, 77 Ind. 468; Thomas *v.* Lincoln, 71 Ind. 41; Bell *v.* Kaiser, 50 Mo. 150; Timberman *v.* Craddock, 70 Mo. 638; Tyler *v.* Pars, 52 Mo. 249; Bailey *v.* Chapman, 41 Mo. 536; Budd *v.* Zoller, 52 Mo. 238; Woods *v.* Stephens, 46 Mo. 555; McArthur *v.* Slauson, 53 Wis. 41; Stewart *v.* Mather, 32 Wis. 344; Coleman *v.* Meade, 13 Bush (Ky.), 358; Edwards *v.* Goldsmith, 16 Pa. St. 43; Tower *v.* O'Neil, 66 Pa. St. 332; Keys *v.* Johnson, 68 Pa. St. 42. Seiple *v.* Irwin, 30 Pa St. 513; Vanhorn *v.* Frick, 6 S. & R. (Pa.) 90; Chapin *v.* Bridges, 116 Mass. 105; Drury *v.* Newman, 99 Mass. 256; Desmond *v.* Stebbins. 1 New Engl. R. (Mass.) 528; Loud *v.* Hall. 106 Mass. 404; Gillespie *v.* Wilder, 99 Mass. 170; Newhall *v.* Pierce, 115 Mass. 459; Cook *v.* Fiske, 12 Gray (Mass), 491; Fisk *v.* Henarie, 9 Pac. Repr. (Oreg.) 322; Gillett *v.* Corum, 7 Kans. 156.

The plaintiffs were authorized, as the agents of the defendant, to sell his land for the price net to him of $7000, payable one half down and the remainder within one year. The plaintiffs were to have whatever they could obtain in excess of that sum. They secured the execution of a written agreement for the purchase for $7200, to be "paid in cash and mortgage" when the deed should be delivered, but without other provision as to manner of payment. The purchaser tendered to the defendant $3500 in money, and a like amount in notes secured by a mortgage payable within one year, and demanded a deed, which was refused. *Held*, that the written agreement for the sale was incomplete, and could not be enforced to recover the price named, $7200; and the evidence being insufficient to show the making of a contract for the payment of that sum, or that a purchaser had been procured ready to pay that sum, a verdict for the plaintiff for $200 was not justified. Bradford *v.* Menard, 28 North Western Repr. (Minn.) 248.

In Walker *v.* Tirrell, 101 Mass. 257; s. c., 3 Am. Rep. 352, the defendant sent a proposal to a broker in these words: "If you send, or cause to be sent, to me, by advertisement or otherwise, any party with whom I may see fit and proper to effect a sale or exchange of my real estate, above described, I will pay you the sum of $200." The broker found a person who proposed to purchase the property, but the sale was not effected, and the court held that the broker was not entitled to his commission.

A person desirous of purchasing certain real estate employed a real-estate broker to negotiate the purchase, and agreed to pay him $3500 in consideration "for his services in connection with the purchase." The agent or broker procured a contract for the sale of the property to be executed by four persons, one of whom had only a life estate in a one-fourth part of the premises, the remainder being in her minor children, so that it became necessary to foreclose a mortgage on the property to pass the title to such fourth interest, which was afterward done. The broker, after having been paid the $3500, as agreed upon, sued his principal to recover for his services in consummating the title, rendered after the date of the contract of sale. *Held*, that the broker's service did not end, under the contract, with the procuring of the agreement to sell, as the purchase was not then completed, and that he could not recover for subsequent services rendered, whereby the title was in fact acquired. It being uncertain whether the sale could be closed, and the purchaser being desirous of renting the property, the broker secured a lease of it for him, which was cancelled as soon as he acquired the title through the foreclosure, *held*, that the lease was made in the carrying out of the purpose of acquiring the property by purchase, and that the services of the broker in procuring

its execution were to be considered as rendered in connection with the purchase, and as paid for in the $3500 allowed him. It becoming necessary for the purchaser to borrow one half of the purchase-money for the property bought, the broker assisted in negotiating the loan, to enable the purchaser to complete the purchase, without notice that an extra charge should be made therefor, *held*, that such voluntary service might be treated as connected with the purchase, and as falling under the contract of employment, and that no recovery in addition to the sum agreed upon could be had for such services. Kerfoot *v.* Steele, 113 Ill. 610.

Under an oral contract, a broker is entitled to compensation if he substantially effects a sale by procuring and introducing a purchaser, to whom the owner sells the land. Desmond *v.* Stebbins, 140 Mass. 339.

If an agent or broker is employed to sell property at a stated price, and he finds a customer who is able and willing to take the property at that price, and upon the stated terms, he is entitled to compensation whether a sale is effected or not; or, if the undertaking is simply to find a customer, the broker will be entitled to compensation if he furnishes a purchaser who is ready and willing to buy, and to whom the principal makes a sale. Casady *v.* Seely, 29 N. Western Repr. (Iowa), 932.

Where the price of property and the terms of payment are fixed by the seller, and the broker engages to procure a purchaser at that price and upon those terms, if, upon the procurement of the broker, a purchaser is produced, with whom the seller himself negotiates and effects a sale, although the terms may be changed, and even the sale itself finally abandoned, he is entitled to his commission. And he is also in such case entitled to his commission, even although the seller see fit to let the contract rest in parol, whereby he may be unable to enforce it. Potvin *v.* Curran, 13 Nebr. 302.

Plaintiff was employed by defendant to find some person with whom he could trade a certain lot for other property, defendant agreeing to make the trade himself if the proper person were produced by plaintiff. After such person was found and a sealed contract for the exchange was made, plaintiff told defendant that he would not charge any commission for his services unless the trade went through and was consummated. The trade never was consummated. *Held*, that plaintiff was nevertheless entitled to his commissions, his verbal promise not to charge commissions being without a consideration and after he had performed his part of the contract. Little *v.* Rees, 26 N. Western Repr. (Minn.) 7; Bach *v.* Emerick, 53 N. Y. Super. Ct. 548.

It is said in Vinton *v.* Baldwin, 88 Ind. 104; s. c., 45 Am. Rep. 447, that a broker employed to procure a loan for a commission is entitled to his commission on finding a person able and willing to make the loan, although the principal declined to take it. See Budd *v.* Zoller, 52 Mo. 238.

Where a property owner contracted with a real-estate agent that the latter should not only find a purchaser for his property, but also make actual sale of the same, on terms stated, before claiming commissions, it was necessary for the agent to complete the sale; he must find a purchaser in a situation, and ready and willing to complete the purchase on the terms agreed on; upon doing this, he would be entitled to commissions, although the vendor should refuse to perfect the sale. But where the agent carried a proposition to purchase from a proposed buyer to the owner, and the latter indorsed upon it "Accepted," this did not entitle the agent to commissions, where the trade was not consummated, without fault on the part of the principal. Hyams *v.* Miller, 71 Ga. 608.

One authorized as agent to sell land, but without power to convey, who has procured a purchaser, and bound him by contract to purchase the land upon the terms prescribed by the principal, or upon such modified terms as the principal has elected to accept and ratify, has performed his duty, and is entitled to the stipulated compensation. Having bound the parties by an authorized contract, any inability or refusal of the principal to consummate the contract which he had authorized should not affect the agent's rights to compensation. Gross *v.* Stevens, 32 Minn. 472; Love *v.* Miller, 53 Ind. 294; s. c., 21 Am. Rep. 192; Mooney *v.* Elder, 56 N.Y. 238; Knapp *v.* Wallace, 41 N.Y. 477; Stillman *v.* Mitchell, 2 Rob. (N. Y.) 523; Higgins *v.* Moore, 34 N. Y. 417; Heinrich *v.* Korn, 4 Daly (N.Y.), 74; Barnard *v.* Monnot, 3 Keyes (N.Y.), 203; Chapin *v.* Bridges, 116 Mass. 105; Drury *v.* Newman, 99 Mass. 256; Cook *v.* Fiske, 12 Gray (Mass.). 491; Rice *v.* Mayo, 107 Mass. 550; Middleton *v.* Findla, 25 Cal. 76; Delaplaine *v.* Turnley, 44 Wis. 31; Phelan *v.* Gardner, 43 Cal. 306; Nesbit *v.* Helser, 49 Mo. 383.

In O'Connor *v.* Semple, 57 Wis. 243, where S. agreed to pay O. a certain sum if he would sell certain lands, or find a purchaser for them, within a specified

Failure of Principal to Make a Good Title.—The broker will be entitled to his commissions where the purchaser refuses to complete the sale on account of the failure of the principal to make a good title, or on account of misrepresentations of the principal, no fault or knowledge of the agent being proved.[1]

time, it was held that if, within the time limited, O. made a sale to a responsible party, and within a reasonable time thereafter gave notice to S., and produced the purchaser, who was ready and willing to complete the purchase on S.'s terms, O. was entitled to recover the agreed compensation, although he did not produce the purchaser in time, so that all the papers necessary to complete the sale could be executed within the time specified.

But see Watson *v.* Brooks, 11 Oreg. 271, where it was held that a broker could not recover commissions who was employed to sell land within a certain specified time and who on the last day brought a purchaser willing to buy if he could have a reasonable time to investigate the title, which was refused. See also McCarthy *v.* Cavers, 66 Iowa, 342.

Where a broker, employed to effect a sale of property, has found a purchaser of sufficient responsibility willing to take upon the terms named, he has performed his contract and is entitled to his commissions. If a broker is required to furnish the vendor with the name of the purchaser as a condition precedent to his right to recover commissions, when the vendor interposes no objection on that ground but absolutely disaffirms the sale, he thereby waives the right to insist upon the condition. Duclos *v.* Cunningham, 102 N. Y. 678.

A principal employed a broker to buy, stipulating that the broker was to look to the vendor for his commissions. The broker found one willing to sell on these terms, but the principal refused to take the property. *Held*, that under these circumstances he was liable to the broker for his commissions. Cavender *v.* Waddingham, 2 Mo. App. 551.

Where a broker produced certain parties willing to buy his principal's land, and the principal entered into negotiations with them, and left them a fixed time in which to decide, and the principal sold the land to other parties before the expiration of this time, the broker was held to be entitled to his commissions. Reed *v.* Reed, 82 Pa. St. 420; Lane *v.* Albright, 49 Ind. 275.

But where an exchange is not consummated on account of a refusal by the broker's principal to complete the transaction, the other party having made a material misstatement as to the amount of encumbrance on his property, the broker was held not to be entitled to his commissions. Rockwell *v.* Newton, 44 Conn. 333.

Where property is left in the hands of a broker for sale, a successful negotiation for its exchange will entitle him to his commissions. Hewett *v.* Brown, 21 Minn. 163; Redfield *v.* Tegg, 38 N. Y. 212.

Where a broker sells goods to arrive, he is entitled to his commissions as soon as a contract for the sale of the goods has been made, although the sale is never perfected on account of the non-arrival of the goods. Paulsen *v.* Dallett, 2 Daly (N. Y.), 40.

A broker is not entitled to commissions when the customer through no fault of the seller refuses to complete the contract; but it is different where the customer had entered into a contract binding on both parties, or into an agreement to pay a stipulated sum as damages in case of refusal to complete the contract. Leete *v.* Norton, 43 Conn. 219; Coleman *v.* Meade, 13 Bush (Ky.), 358; Veazie *v.* Parker, 72 Me. 443; Pearson *v.* Mason, 120 Mass. 53; Rice *v.* Mayo, 107 Mass. 550; Knapp *v.* Wallace, 41 N. Y. 477; Simonson *v.* Kissick, 4 Daly (N. Y.), 143; Mooney *v.* Elder, 56 N. Y. 238; Haines *v.* Bequer, 9 Phila. (Pa.) 51; Love *v.* Miller, 53 Ind. 294; s. c., 21 Am. Rep. 192; Lane *v.* Albright, 49 Ind. 275.

Where a broker, employed to sell real estate within "a short time," found a purchaser to take at the price fixed by the vendor, the vendee paying down a small sum to bind the bargain, and no notice being given the broker of withdrawal or change of terms, *held*, that two weeks was reasonable time within which to find a purchaser, and that a rise in value was no defence against the broker seeking to recover commissions. Smith *v.* Fairchild, 7 Colo. 510.

1. Glentworth *v.* Luther, 21 Barb. (N Y.) 145; Doty *v.* Miller, 43 Barb. (N. Y.) 529; Knapp *v.* Wallace, 41 N. Y. 477; Allen *v.* James, 7 Daly (N. Y.), 13; Smith *v.* Monney, 14 Week. Dig. (N. Y.) 237; Schwartze *v.* Yearley, 31 Md. 270; De Santos *v.* Taney, 13 La. Ann. 151; Phelan *v.* Gardner, 43 Cal. 311; Gonzales *v.* Broad, 57 Cal. 224; Middleton *v.* Findla.

Broker must Act in Good Faith.—The rule that a real-estate broker's commission is earned whenever a party is procured who will comply with the terms of the principal is to be enforced only when the agent acts with the utmost good faith towards his principal.[1]

Broker must have been the Procuring Cause.—The broker to be entitled to commissions must have been the procuring cause of the transaction; and it does not matter how slight his services had been or how great his exertions he can only recover when the sale resulted from them.[2]

25 Cal. 76; Cook *v.* Welch, 9 Allen (Mass.), 350; Cook *v.* Fiske, 12 Gray (Mass), 491; Topping *v.* Healey, 3 F. & F. 325.

A real-estate agent employed to procure a purchaser of real estate, but not to execute a contract on behalf of the seller, is entitled to his compensation where it appears that he has procured such purchaser, able, ready, and willing to make and complete the purchase upon the terms stipulated between such agent and his principal, though in consequence of the default of the seller, or his inability to make a good title, no sale is finally consummated. And where it appeared as a part of the terms and conditions stipulated between the vendor and his agents, upon which a purchaser was to be procured, that it was understood that the vendor's wife should unite in the sale, and also in a warranty deed of the premises (it being necessary to a good title), and a purchaser was procured by such agents, ready and willing to take the property and complete the purchase on such terms, but the sale was not consummated through the vendor's failure to comply with such conditions, and because of the refusal of the wife to ratify and consent to such sale, *held*, that a *prima facie* case was made in behalf of such agents for a recovery against their principal for their compensation. Hamlin *v.* Schulte, 27 N.Westn. Repr. (Minn.) 301; Clapp *v.* Hughes, 1 Phila. (Pa.) 382.

But where the purchaser refuses to complete the sale without the fault or negligence on the part of the principal on account of a supposed defect in the title, the broker cannot recover. Blankenship *v.* Ryerson, 50 Ala. 426.

1. Segar *v.* Parrish, 20 Gratt. (Va.) 672; Vennum *v.* Gregory, 21 Iowa, 326; Coleman *v.* Meade, 13 Bush (Ky.), 358; Bach *v.* Emerick, 35 N. Y. Super Ct. 548.

Where an owner employed an agent to sell his property for $140,000, and a purchaser entered into an agreement with the agent to purchase at that price on condition that the agent should endeavor to induce the owner to sell at a lower figure, and conceal from him the agreement, the concealment of the agreement, and efforts by the agent to induce the owner to sell at a lower sum, showed such a lack of good faith that the agent was not entitled to recover commissions from the vendor. Pratt *v.* Patterson, 112 Pa. St. 475.

2. Shepherd *v.* Hedden, 29 N. J. L. 334; Gillespie *v.* Wilder, 99 Mass. 170; Pope *v.* Beals, 108 Mass. 561; Cook *v.* Fiske, 12 Gray (Mass.), 491; Woods *v.* Stephens, 46 Mo. 555; Doonan *v.* Ives, 73 Ga. 295; Earp *v.* Cummins, 54 Pa. St. 394; Pratt *v.* Bank, 12 Phila. (Pa.) 378; Stewart *v.* Mather, 32 Wis. 344; Wylie *v.* Marine Nat. Bank, 61 N. Y. 415; Lloyd *v.* Matthews, 51 N. Y. 124; Sussdorff *v.* Schmidt, 55 N. Y. 319; Barnard *v.* Monnot, 1 Abb. App. Dec. (N. Y.) 108; McClave *v.* Paine, 49 N.Y. 561; s. c., 10 Am. Rep. 431; Moses *v.* Bierling, 31 N. Y. 462; Redfield *v.* Tegg, 38 N. Y. 212; Chilton *v.* Butler, 1 E. D. Smith (N. Y.), 150; Stillman *v.* Mitchell, 2 Rob. (N. Y.) 523; Arnold *v.* Wood, 13 Week. Dig. (N. Y.) 302; Arrington *v.* Cary, 5 Baxt. (Tenn.) 609; Carter *v.* Webster, 79 Ill. 435; Kimberly *v.* Henderson, 29 Md. 513; Jones *v.* Adler, 34 Md. 440; Lincoln *v.* McClatchie, 36 Conn. 136; Durkee *v.* Vermont, etc., R. Co., 29 Vt. 127; Mansell *v.* Clements, L. R. 9 C. P. 139. *Compare* Charlton *v.* Wood, 11 Heisk. (Tenn.) 19.

Where a person desiring a loan makes an application in writing, upon which is an indorsement authorizing a single broker to procure the loan, and the broker leaves copies of such application with a number of persons, one of whom, induced by such application, without the broker's knowledge lends the money, the broker is entitled to his commissions. Derrickson *v.* Quinby, 43 N. J. L. 373.

Where a broker who has property for

sale for his principal advertises it and gives information about it to a third party, who communicates such information to a friend, and the friend afterwards buys directly from the principal, the broker is entitled to his commissions. Lincoln *v.* McClatchie, 36 Conn. 136; Anderson *v.* Cox, 16 Nebr. 10. See Newhall *v.* Pierce, 115 Mass. 457.

An auctioneer and estate agent was employed to sell an estate, under an agreement by which he was to receive a commission of two and a half per cent if the estate should be sold, and in case the estate should not be sold he was to be paid 25*l.* as a compensation for his trouble and expense. Having put up the estate to auction and failed to sell it, the agent, being asked by a person who had attended the sale who was the owner of the property, referred him to his principal; and ultimately that person, without any further intervention of the agent, became the purchaser. *Held*, that, the sale having been effected through the means of the agent, he was entitled to the stipulated commission. Green *v.* Bartlett, 14 C. B. N. S. 681; 32 L. J. C. P. 261.

It is not necessary that the principal should know that the purchaser is the broker's customer. It is the principal's duty to inquire whence the customer derived his information. Lloyd *v.* Matthews, 51 N. Y. 124; Durkee *v.* Vermont Centr. R. Co., 29 Vt. 127; Hanford *v.* Shapter, 4 Daly (N. Y.), 243.

Where the broker procures a party ready and willing to buy, but the principal takes the further proceedings out of his hands and completes the sale himself or through another, the broker has earned his compensation. Gottschalk *v.* Jennings, 1 La. Ann. 5; s. c., 45 Am. Dec. 70; Levistones *v.* Landreaux, 6 La. Ann. 26; Winans *v.* Jaques, 10 Daly (N.Y.), 487; Martin *v.* Silliman, 53 N. Y. 615; Ludlow *v.* Carman, 2 Hilt. (N. Y.) 107; McGavock *v.* Woodlief, 20 How. (U. S.) 221; Gillespie *v.* Wilder, 99 Mass. 170; Bornstein *v.* Lans, 104 Mass. 214; Loud *v.* Hall, 106 Mass. 404; Newhall *v.* Pierce, 115 Mass. 457; Chapin *v.* Bridges, 116 Mass. 105; Delaplaine *v.* Turnley, 44 Wis. 31; Dolan *v.* Scanlan, 57 Cal. 261; Bailey *v.* Chapman, 41 Mo. 536; Timberman *v.* Craddock, 70 Mo. 638; Shepherd *v* Hedden, 5 Dutch. (N. J.) 334; Arrington *v.* Cary, 5 Baxt. (Tenn.) 609; Gillett *v.* Corum, 7 Kans. 156.

The duty of a broker employed to sell property is to bring the buyer and seller to an agreement. While it is not essential that he should be present and an active participator in the agreement or sale when it is actually concluded, to entitle him to his commissions he must produce a purchaser ready and willing to enter into a contract on the employer's terms. He is not entitled to commissions for unsuccessful efforts to effect a sale, unless the failure is caused by the fault of the principal. Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378; s. c., 38 Am. Rep. 441.

Merely putting a purchaser on the track of property is not equivalent to presenting him to the seller so as to entitle the broker to commissions. Sievers *v.* Griffin, 14 Ill. App. 63.

The defendant employed the plaintiff as a real-estate broker to sell his estate. The plaintiff rendered some services in attempting to sell the estate to P., who at one time thought of buying it, but abandoned the idea. A subscription was raised for the purpose of preserving the building standing on the estate as an historical monument. A committee of the subscribers employed C. as their agent, and he entered into negotiations for the property which resulted in an agreement by the defendant to sell it. Neither the plaintiff nor P. had any connection with these negotiations. The subscriptions were not sufficient to pay the price agreed upon, and it was necessary to borrow a large sum of money upon a mortgage of the estate. The lender required that the mortgage note should be signed by some known responsible person, and thereupon the committee induced P. to take the conveyance to himself and to sign the mortgage and note. *Held*, that P. was not a purchaser of the estate, even if the information furnished him by the plaintiff induced him to take the position he did in regard to the property, within the meaning of a usage that a broker, whose services are accepted by the seller, and who introduces the seller to a purchaser, is entitled to a commission upon the amount for which the estate is sold, if ultimately purchased by the person so introduced, whether the sale is finally effected by the same broker or by another person. Viaux *v.* Old South Soc., 133 Mass. 1.

Where the efforts of the broker do not effect the sale, and after the proposed purchaser has decided not to buy other parties induce him to buy, the broker will not be entitled to commissions. Earp *v.* Cummins, 54 Pa. St. 394; Doonan *v.* Ives, 73 Ga. 295; Wylie *v.* Marine Nat. Bank, 61 N. Y. 416; Harris *v.* Burtnett, 2 Daly (N. Y.). 189. See Bennett *v.* Kidder, 5 Daly (N. Y.). 512.

Where the broker has been allowed a

Principal may Negotiate Himself.—A party having employed a broker to sell real estate, may, notwithstanding, negotiate himself, and if he does so without any agency of the broker, he is not liable to the latter for a commission. To entitle the broker to his commission, he must be an efficient agent in, or the procuring cause of, the contract of sale.[1]

reasonable time to procure a purchaser and effect a sale, and has failed so to do, and the principal in good faith has terminated the agency, and sought other assistance by means of which a sale is consummated, the fact that the purchaser is one whom the broker introduced, and that the sale was in some degree aided by his previous unsuccessful efforts, does not give him a right to commissions. Defendant employed plaintiff, a broker, to sell the steel rails of its manufacture to the G. T. R. Co. After various unsuccessful negotiations for a sale, carried on during a period of four months, between that company and plaintiff, during which defendant had fixed its prices several times, upon receipt of a telegram from said company, asking upon what terms one thousand tons of defendant's rails would be delivered, plaintiff telegraphed to defendant asking its lowest terms. Defendant declined to fix a price or to negotiate further through plaintiff; and the latter thereupon telegraphed to the G. T. R. Co. that defendant declined to name a price. Subsequently a sale was made by defendant to said company through another broker. Upon the trial of an action to recover commissions, the court was requested to charge that defendant had the right, under the circumstances, to refuse to use the services of plaintiff if the action was taken in good faith and without intent to deprive him of his commissions. The court so charged, with the qualification, however, that defendant had no right, acting either in good or bad faith, to avail itself of what plaintiff had done, to make a sale through other agencies. *Held*, that the qualification was error; that defendant had the right to terminate the agency as it did; and, if done in good faith, plaintiff had no right to compensation although his efforts were of benefit in the subsequent successful negotiation. Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378; s. c., 38 Am. Rep. 441.

A broker who was fully aware of a defect in the title of the land he had for sale introduced a customer to his principal. The customer finding the title defective refused to complete the sale, when it was decided between them to sell the land at auction as a means to cure the defective title, the customer agreeing to bid a certain sum. At auction the land sold at a higher price to another party. *Held*, that the broker was not entitled to commissions for procuring the first customer, as he did not complete the sale; and that he could not claim any commissions on the auction sale because his agency in bringing it about was too remote. Tombs *v.* Alexander, 101 Mass. 255; s. c., 3 Am. Rep. 349.

A broker who was employed to sell real estate called the attention of a customer to it, who jointly with a friend negotiated for the sale but did not succeed in coming to terms. Two or three months after the negotiations were broken off, the friend, without the interference of the broker, bought the property. *Held*, that the latter was not entitled to commissions. Armstrong *v.* Wann, 29 Minn. 126.

A broker received an offer of $5000 for a certain property, which he advised his principal not to accept. The principal afterwards sold it to the same party without the interference of the broker for $5300. *Held*, that the broker was not entitled to commissions, the principal being the procuring cause. White *v.* Twitchings, 26 Hun (N. Y.), 503.

1. McClave *v.* Paine, 49 N. Y. 561; s. c., 10 Am. Rep. 431; Chilton *v.* Butler, 1 E. D. Smith (N. Y.), 150; Wylie *v.* Marine Nat. Bank, 61 N. Y. 415; Lloyd *v.* Matthews, 51 N. Y. 125; Barnard *v.* Monnot, 1 Abb. App. Dec. (N. Y.) 108; Stewart *v.* Murray, 92 Ind. 543; s. c., 47 Am. Rep. 167; Hungerford *v.* Hicks, 39 Conn. 259; Dolan *v.* Scanlan, 57 Cal. 261; Keys *v.* Johnson, 68 Pa. St. 42.

But the principal may not take negotiations out of the hand of his broker and complete them and refuse to pay commissions, specially where the broker has a reasonable time in which to make the sale. Lane *v.* Albright, 49 Ind. 275; Keys *v.* Johnson, 68 Pa. St. 42; Reed *v.* Reed, 82 Pa. St. 420; Briggs *v.* Boyd, 56 N. Y. 289; Doonan *v.* Ives, 73 Ga. 295.

And where the principal pending such negotiations reduces the price and sells at a lower price than he had authorized

Employment of Several Brokers.—Where a principal employs more than one broker, the several brokers act independently from each other; the one who first completes the sale is entitled to the commission, and such sale instantaneously revokes the authority of all the others. A subsequent sale will be subject to the risk of such revocation, and no action for damages will lie in such case unless the nature of the contract between the broker and the principal is such as to estop the principal.[1]

the broker to sell for, the latter will be entitled to *pro-rata* commissions. Martin *v.* Silliman, 53 N. Y. 615; Lawrence *v.* Atwood, 1 Ill. App. 217; Stewart *v.* Mather, 32 Wis. 344; Jones *v.* Adler, 34 Md. 440; Richards *v.* Jackson, 31 Md. 250; Lincoln *v.* McClatchie, 36 Conn. 136; Nesbit *v.* Helser, 49 Mo. 383; Lane *v.* Albright, 49 Ind. 275; Arrington *v.* Cary, 5 Baxt. (Tenn.) 609. *Compare* McArthur *v.* Slauson, 53 Wis. 41.

A employed B to find purchasers for a certain number of shares of stock at a price named, and agreed to pay him a commission of a certain per cent on the sale. B negotiated with C for the purchase of the stock, and D was subsequently consulted with by C, and later by B, as to joining in the purchase. D suggested E as an associate, and afterwards called his attention to the matter. While these negotiations for a sale were pending, A informed B that he had sold the stock to other persons, and could not sell to C and his associates; but afterwards, at the request of B and C, A transferred the shares to C, D, and E, as a sale in one "block," and at a lower price than that originally fixed by him, though B had nothing to do with such reduction in price. *Held*, in an action by B against A, that B was entitled to recover a commission on the shares so sold. Dexter *v.* Campbell, 137 Mass. 198.

Where the principal sells only part of the subject-matter of the brokerage, the broker will be entitled to commissions on the part so sold. Wood *v.* Stephens, 46 Mo. 555; Bailey *v.* Chapman, 41 Mo. 536; Kimberley *v.* Henderson, 29 Md. 512.

Where a broker opens negotiations for a sale, but fails to complete and abandons them, and the owner afterwards sells the property to the same customer, the broker cannot claim commissions. Lipe *v.* Ludewick, 14 Ill. App. 372; Doonan *v.* Ives, 73 Ga. 295; Wylie *v.* Mar. Nat. Bank, 61 N. Y. 415; Chandler *v.* Sutton, 5 Daly (N. Y.), 112; Lane *v.* Albright, 49 Ind. 275.

1. Ahern *v.* Baker, 24 N. Western Repr. (Minn.) 341; Maracella *v.* Odell, 3 Daly (N. Y.), 123; Dreyer *v.* Ranch, 42 How. Pr. (N. Y.) 22; Vreeland *v.* Vetterlein, 33 N. J. L. 247; Glenn *v.* Davidson, 37 Md. 365. *Compare* Fox *v.* Rouse, 47 Mich. 558.

If the owner has several agents appointed to sell the same land, and one of them finds a purchaser, and negotiates with him to sell the land at a certain stipulated price and on terms differing from those specified in the authority to sell, and when the sale is about to be consummated, another agent of the owner meets the same person, who talks to him about the offer of the first agent, and with full knowledge of the negotiations of the first agent, the second agent sells the same property to such person for a less price, but on the same terms as to cash down and time in which to pay the deferred payments, and the owner is ignorant of the negotiations of the first agent with the purchaser, but ratifies the sale by the second agent, made on the terms proposed by the first, he is not liable to the second but to the first agent, and should pay him a reasonable compensation for procuring said sale. Reynolds *v.* Tompkins, 23 W. Va. 229, 235.

Notice of a change of purpose to one of the brokers does not affect the others. Lloyd *v.* Matthews, 51 N. Y. 124, 131.

In an action brought by a real-estate broker to recover compensation for selling a certain piece of land, it was shown that the defendant had previously owned the land; that he put it into the hands of this broker, and also in the hands of another broker, for sale; that the land was sold, and that the plaintiff in the action was the primary, efficient, and procuring cause of the sale; and that the defendant had full notice of this fact; but that the defendant, on the trial, claimed that the plaintiff had not made the sale, but that it was made by the other broker, and asked the court to instruct the jury as follows: "Where several brokers are openly employed to effect the sale of the same property, the entire duty of the seller is performed by remaining neutral

Customer must be Ready to Buy on Terms Stipulated.—Where a broker finds a customer, the latter must not only be ready and willing to buy to entitle the broker to his commissions, but he must be ready and willing to buy on the terms specified by the principal to the broker, unless the principal himself changes such terms or ratifies any other terms the broker may have made.[1]

between them; and he has the right to make the sale to a buyer produced by either or any of them, without being called upon to decide between these several agents as to which of them was the primary cause of the purchase;" and the court refused to give the instruction. *Held*, that although said instruction may be good law for some cases, yet that, under the circumstances of this case, it is not good law for this case, and that the court below did not err in refusing to give it. Eggleston *v.* Austin, 27 Kans. 246. See Vreeland *v.* Vetterlein, 33 N. J. L. 247.

Where one of the brokers negotiated for the sale of the property but without success, and the negotiations were broken off, and afterwards another broker succeeded in selling the property to the same customer, and the jury found that the sale was accomplished wholly through the efforts of the second broker, the first one was held not to be entitled to commissions. Livezey *v.* Miller, 61 Md. 336; Chandler *v.* Sutton, 5 Daly (N. Y.), 112; Smith *v.* McGovern, 65 N. Y. 574.

An agreement to sell real estate was made by a broker and the owner. After some time the broker stated that he could not sell, but subsequently informed another broker that the property was for sale, and through the latter a sale was effected. *Held*, that the first broker was not entitled to commissions. Holley *v.* Townsend, 2 Hilt. (N. Y.) 34. See Ward *v.* Fletcher, 124 Mass. 224.

Where a real-estate agent enters into a written contract with the owner of land that his farm shall be left with him for sale for the term of two months, and that in case of a sale within the time, whether made by the agent, the landowner, or others, the agent is to receive a commission of 5 per cent, and within the two months the agent does not produce to the owner a purchaser who is ready and willing to take the farm and pay the money upon the terms prescribed in the special contract, the agent cannot, under the contract, recover anything for his services, although he has made efforts to sell the farm, and the person subsequently buying the farm had his attention first called thereto by the agent, and was by him introduced to the land-owner as one who wanted to buy the farm, if the delay in making the sale to the purchaser has not been caused by any negligence, fault, or fraud of the land-owner. Fultz *v.* Wimer, 34 Kans. 576; Coleman *v.* Meade, 13 Bush (Ky.), 358; Charlton *v.* Wood, 11 Heisk. (Tenn.) 19.

1. Schmidt *v.* Baumann, 30 N. Western Repr. (Minn.) 765; Nesbit *v.* Helser, 49 Mo. 383; Coleman *v.* Meade, 13 Bush (Ky.), 358; Williams *v.* McGraw, 52 Mich. 480; Wylie *v.* Marine Nat. Bank, 61 N. Y. 415; Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378; s. c., 38 Am. Rep. 441; Satterthwaite *v.* Vreeland, 3 Hun (N. Y.), 152; Briggs *v.* Rowe, 1 Abb. App. Dec. (N. Y.) 189; Rees *v.* Spruance, 45 Ill. 308; Menifee *v.* Higgins, 57 Ill. 50; Bash *v.* Hill, 62 Ill. 216; Clendenon *v.* Pancoast, 75 Pa. St. 213; Stewart *v.* Mather, 32 Wis. 344; Schwartze *v.* Yearly, 31 Md. 270; Jones *v.* Adler, 34 Md. 440; McGavock *v.* Woodlief, 20 How. (U. S.) 221.

Where plaintiffs entered into a contract to sell for defendant certain lands at and upon certain designated prices and terms, and afterwards they showed the lands to a third party, stating the prices at which they could be bought, and pointing out the advantages and profits which would accrue to a purchaser, but the third party entered into no negotiations with the plaintiffs, but resorted to the defendant, and began negotiations with it, which resulted in the sale to him of the whole list of lands at prices lower than those at which plaintiffs were authorized to sell, and defendant had no knowledge that the purchaser's attention had been called to the lands by plaintiffs, but, upon the opening of negotiations with the third party, it informed plaintiffs that the lands were, for the time being, withdrawn from sale through them, to await the result of such negotiations, *held* that plaintiffs could not recover under their contract a commission on the sale to such third party, because they had not found a purchaser on the terms named in the contract, and defendant did not accept what they did as performance—not knowing, until long afterwards, that they had done anything which tended to bring

Customer must be Responsible.—Not only must the broker, in order to earn his commissions, find a customer who is willing to buy at the terms given by the principal, but he must also be financially responsible, and able to respond in damages in case of breach of contract.[1]

about the sale to the third party. Blodgett *v.* Sioux City, etc., R. Co., 63 Iowa, 606.

Defendant, owning a building in which he and his wife resided, and a lease of the ground upon which the same was situate, employed plaintiffs, by written *memoranda*, to procure for him a purchaser thereof for the price of $25,000, as follows: $5000 cash; $5000 on or before 5 years; and $15,000 on or before 10 years, with semi-annual interest at 7 per cent per annum on the deferred payments. No other terms, conditions, or particulars of sale were specified in the *memoranda*. Plaintiffs procured a purchaser on the terms above mentioned, but added the following stipulations: "Possession to be given April 1, 1883; and we hereby agree to convey said building, and all our rights named, by good and sufficient warranty deed, on or before March 20, 1883 and at the same time to assign, by sufficient instrument in writing, to him the lease of the ground, subject to all its terms and conditions." *Held* that the broker was not entitled to commissions. Hamlin *v.* Schulte, 31 Minn. 486.

If an agent with authority to sell, upon a certain commission, in the event of a sale, procures a purchaser at the price and on the terms authorized, who would have taken the property at the price, and the owner of the property steps in, ignores the agent, and sells to the purchaser so secured, at the same price and on the same terms, or for a less price, and on the terms proposed to the purchaser by the agent, even if they were different from the terms stipulated in the authority to sell, the owner is liable to pay to the agent the amount of commission stipulated to be paid. Reynolds *v.* Tompkins, 23 W. Va. 229, 235.

The plaintiff was employed by the defendant, without power of attorney to convey, "to sell" real estate, for the price of $8000; "$3000 cash," and the balance ($5000) at a future time specified. His compensation was agreed upon. *Held*, that the agent completely executed this authority, and earned the stipulated compensation, when he procured a purchaser, and bound him by contract to the performance of the specified conditions, although no money was paid. The terms, "$3000 cash," do not import in such case the payment of any money until the owner should transfer the property by his deed of conveyance. Goss *v.* Broom, 31 Minn. 484.

Where A promises to pay B a certain sum if he will produce a purchaser of A's property at a specified price, B cannot recover on such promise without producing a person able and willing to pay such price. The stipulation as to price is not *waived* by A's selling the property for a less price to a person produced by B, unless he does so with knowledge that such person is able and willing to pay the price stipulated in the contract between A and B. McArthur *v.* Slauson, 53 Wis. 41. *Compare* Stewart *v.* Mather, 32 Wis. 344.

Plaintiff and defendant, the owner of a patent, entered into an agreement whereby defendant agreed to pay plaintiff $1500 provided he should procure a customer who would pay $17,500 for said patent, or ten per cent on any less sum defendant might agree to take. In pursuance of said agreement plaintiff procured two parties who went into partnership with defendant for the purpose of selling rights under said patent and operating it. The firm were to pay defendant $15,000 as follows: Twenty-five per cent of the net profits to be realized from the sale of rights, and twenty per cent of the net profits to be realized from operating it, until the whole amount should be paid. *Held*, that this agreement was not such a sale as was contemplated under the agreement, and that plaintiff was not entitled to commissions. Fraser *v.* Wyckoff, 63 N. Y. 445.

1. Coleman *v.* Meade, 13 Bush (Ky.), 358; Pratt *v.* Hotchkiss, 10 Ill. App. 603.

Where, by the terms of a contract, a real estate agent, upon "finding a purchaser" for a tract of land, was to receive certain compensation for his services, and he found one who said that he would take the land, but the owner, having then sold the land to another, was unable to make a deed to the agent's alleged purchaser, *held*, that the agent could not recover the agreed compensation, without showing that the purchaser found by him was in a condition to comply with the contract, or to respond in damages for a

Broker Must Show Express Appointment.—A broker to be entitled to commissions must be actually employed by the principal. Mere voluntary services, which result in a sale, will not be sufficient.[1]

Expenses.—The broker is not only entitled to his commissions, but also to be reimbursed for expenses and losses incurred in behalf of and in the service of his principal.[2]

Cannot Recover Commissions from Both Parties.—A broker is bound to employ his skill and best efforts in the interest of his immediate employer, and therefore it is unlawful for him to act also as agent for the other party, and to receive commissions from him also.[3]

failure so to do. Iselin *v.* Griffith, 62 Iowa, 668.

The burden of proof that the customer is not pecuniarily responsible is, however, upon the principal. Goss *v.* Broom, 31 Minn. 484; Cook *v.* Krolmeke, 4 Daly (N. Y.), 268; Hart *v.* Hoffman, 44 How. Pr. (N. Y.) 168.

1. Atwater *v.* Lockwood, 39 Conn. 45; Pierce *v.* Thomas, 4 E. D. Smith (N. Y.), 354; Glenn *v.* Davidson, 37 Md. 365; Hinds *v.* Henry, 36 N. J. L. 328; Cook *v.* Welch, 9 Allen (Mass.), 350; Platt *v.* Patterson, 7 Phila. (Pa.) 135; Keys *v.* Johnson, 68 Pa. St. 42; Morrow *v.* Allison, 39 Ala. 70.

The appointment may, however, be inferred from a ratification of the broker's acts. Low *v.* Connecticut, etc., R. Co., 46 N. H. 284.

In *California* a real-estate broker cannot, in consequence of the statute, recover reasonable compensation for services performed by him in negotiating for defendant an exchange of real property, unless the agreement authorizing him to perform the services was in writing, subscribed by the defendant. Myres *v.* Surryhue, 8 Pac. Repr. (Cal.) 523; Schuller *v.* Farquarson, 6 Pac. Repr. (Cal.) 86; Pacific L. & T. Co. *v.* Blockman, 11 Pac. C. L. J. 24; McCarthy *v.* Loupe, 62 Cal. 299.

In a suit by a broker against a corporation to recover commissions, he must establish his employment by a competent party authorized to bind the corporation, or prove a subsequent knowledge of, adoption, and ratification of his services by the corporation. Twelfth Street Market Co. *v.* Jackson, 102 Pa. St. 269.

A contract with a real-estate broker to pay him a certain sum in case he finds a purchaser for designated real estate at a price fixed, need not be in writing, and the broker, upon producing a purchaser ready, able, and willing to purchase at the price and on the terms fixed, with notice thereof to his employer, is entitled to his commission, though the employer may refuse to sell. Fischer *v.* Bell, 91 Ind. 243.

To recover for commissions, a broker must prove direct authority or employment by the principal, not the mere ordinary agency of a wife for her husband. Harper *v.* Goodall, 62 How. Pr. (N. Y.) 288.

2. Lacey *v.* Hill, L. R. 18 Eq. 182.

A broker who knowingly acts for parties who make mere bets or wagers on the future state of the market cannot recover his losses in such transactions. McLean *v.* Stuve, 15 Mo. App. 317.

3. Lynch *v.* Fallon, 11 R. I. 311; s. c., 23 Am. Rep. 458; Raisin *v.* Clark, 41 Md. 158; s. c., 20 Am. Rep. 66; Schwartze *v.* Yearly, 31 Md. 270; Holcomb *v.* Weaver, 136 Mass. 265; Farnsworth *v.* Hemmer, 1 Allen (Mass.), 494; s. c., 79 Am. Dec. 756; Rice *v.* Wood, 113 Mass. 133; s. c., 18 Am. Rep. 459; Follansbee *v.* O'Reilly, 135 Mass. 80; Smith *v.* Townshend, 109 Mass. 500; Walker *v.* Osgood, 98 Mass. 348; Lloyd *v.* Colston, 5 Bush (Ky.), 587; Mullen *v.* Keetzlieb, 7 Bush (Ky.), 253; Everhart *v.* Searle, 71 Pa. St. 256; Simonds *v.* Hoover, 35 Ind. 412; Railroad Co. *v.* Pattison, 15 Ind. 70; Stewart *v.* Mather, 32 Wis. 344; Walworth Co. Bank *v.* Farmer's Trust, etc., Co., 16 Wis. 629; Scribner *v.* Collar, 40 Mich. 375; s. c., 29 Am. Rep. 541; Redfield *v.* Tegg, 38 N. Y. 212; Pugsley *v.* Murray, 4 E. D. Smith (N. Y.), 245; Seigel *v.* Gould, 7 Lans. (N. Y.) 177; Finnerty *v.* Fritz, 5 Colo. 174; Bates *v.* Copeland, 4 MacArthur (D. C.), 50; Robbins *v.* Sears, 23 Fed. Repr. 874; Atlee *v.* Fink, 75 Mo. 100; Byrd *v.* Hughes, 84 Ill. 174; Shepherd *v.* Hedden, 29 N. J. L. 334; Harrington *v.* Victoria Graving Dock Co., 3 Q. B. D. 549. *Compare* Gordon *v.* Clapp, 113 Mass. 335.

By acting for both parties he loses his claim to commissions from his immediate

Except by Consent of Both Parties.—Where a broker is employed by both parties, and each has knowledge of the fact that he is acting in a double capacity, and each agrees to pay him a commission, he can recover from both.[1]

Or when Acting as Middleman.—Where he acts simply as a middleman to bring the parties together, and takes no part whatever in the negotiations, there will be nothing illegal in his acting for both parties and claiming remuneration from each.[2]

No Commissions can be Recovered for Illegal Transactions.—Where the transaction for which the broker was employed is

employer. Everhart *v.* Searle, 71 Pa. St. 256; Scribner *v.* Collar, 40 Mich. 375; s. c., 29 Am. Rep. 541; Smith *v.* Townshend, 109 Mass. 500; Meyer *v.* Hanchett, 39 Wis. 419; Bollman *v.* Loomis, 41 Conn. 581.

And can enforce payment of commissions from neither. Rice *v.* Wood, 113 Mass. 133; s. c., 18 Am. Rep. 459; Farnsworth *v.* Hemmer, 1 Allen (Mass.), 494; s. c., 79 Am. Dec. 756; Walker *v.* Osgood, 98 Mass. 348; Bell *v.* McConnell, 37 Ohio St. 396; s. c., 41 Am. Rep. 528; Capener *v.* Hogan, 40 Ohio St. 203.

And a custom among brokers that they are entitled to commissions of both parties is invalid as against public policy, and cannot be sustained. Raisin *v.* Clark, 41 Md. 158; s. c., 20 Am. Rep. 66; Farnsworth *v.* Hemmer, 1 Allen (Mass.), 494; s. c., 79 Am. Dec. 756; Com. *v.* Cooper, 130 Mass. 285; Day *v.* Holmes, 103 Mass. 306; Robinson *v.* Mollett, L. R. 7 H. L. 802. 838. And see Irwin *v.* Williar, 110 U. S. 499.

If a broker, employed by A to sell his house, effects a transaction by which A's house is bought by B, who sells his house to C, the purchase and the price paid by B being dependent upon the purchase and the price paid by C, by whom the purchase-money, the amount of which is the same in each, is paid directly to A, who pays the broker a commission for his services in selling A's house, the broker cannot maintain an action to recover a commission of C, even if he was employed by C to buy a house for him. Follansbee *v.* O'Reilly, 135 Mass. 80.

Where a broker has received a commission from a third party, he must account to his principal for the amount, and no previous demand is necessary. Morison *v.* Thompson, L. R. 9 Q. B. 480; Dodd *v.* Wakeman, 26 N. J. Eq. 484; Morrison *v.* Ogdensburgh, etc., R. Co., 52 Barb. (N. Y.) 173; Minn. C. R. Co. *v.* Morgan, 52 Barb. (N. Y.) 217; Dutton *v.* Willner, 52 N. Y. 312; Price *v.* Keyes, 62 N. Y. 378; Armstrong *v.* Elliott, 29 Mich. 485; Cotton *v.* Holliday, 59 Ill. 179; Farnsworth *v.* Hemmer, 1 Allen (Mass.), 494; s. c., 79 Am. Dec. 756.

A broker is without demand liable to his principal for a concealed excess received on a sale of land above the sum fixed for the price. Love *v.* Hoss, 62 Ind. 255.

1. Rowe *v.* Stevens, 53 N. Y. 621; Joslin *v.* Cowee, 56 N. Y. 626; Puggsley *v.* Murray, 4 E. D. Smith (N. Y.), 245; Alexder *v.* Northwestern University, 57 Ind. 466; Adams Mining Co. *v.* Senter, 26 Mich. 73; Fitzsimons *v.* South. Ex. Co., 40 Ga. 330; Rolling Stock Co. *v.* Railr., 34 Ohio St. 450; Bell *v.* McConnell, 37 Ohio St. 396; s. c., 41 Am. Rep. 528.

An agent to sell lands having found a purchaser, and having with the vendor's knowledge signed the contract of purchase on behalf of the vendee, may still recover his commissions of the vendor. Barry *v.* Schmidt, 57 Wis. 172; s. c., 46 Am. Rep. 35.

2. Rupp *v.* Sampson, 16 Gray (Mass.), 398; s. c., 77 Am. Dec. 416; Farnsworth *v.* Hemmer, 1 Allen (Mass.), 496; s. c., 79 Am. Dec. 756; Walker *v.* Osgood, 98 Mass. 352; Rice *v.* Wood, 113 Mass. 133; s. c., 18 Am. Rep. 459; Seigel *v.* Gould, 7 Lans. (N. Y.) 177; Balheimer *v.* Reichardt, 55 How. Pr. (N. Y.) 414; Rowe *v.* Stevens, 53 N. Y. 621; Muller *v.* Keetzleb, 7 Bush (Ky.), 253; Collins *v.* Fowler, 8 Mo. App. 588; Herman *v.* Martineau, 1 Wis. 151; s. c., 60 Am. Dec. 368; Orton *v.* Scofield, 61 Wis. 382; Barry *v.* Schmidt, 57 Wis. 172; s. c., 46 Am. Rep. 35; Stewart *v.* Mather, 32 Wis. 344; Meyer *v.* Hanchett, 39 Wis. 419; Finnerty *v.* Fritz, 5 Colo. 174; Alexander *v.* Northwestern, etc., University, 57 Ind. 466; Merryman *v.* David, 31 Ill. 404; Anderson *v.* Weiser, 24 Iowa, 430; Shepherd *v.* Hedden, 29 N. J. L. 334; Green *v.* Robertson, 64 Cal. 75; Collins *v.* Fowler, 8 Mo. App. 588.

illegal in its character, contrary to good morals, or to the precepts and policy of the law, he can claim no commissions.[1]

7. Liability of Broker to Third Parties.—Although a broker can ordinarily not act in his own name, yet if he does not disclose his principal and interposes his own credit or acts without authority he will be personally liable to third parties on contracts so entered into.[2]

1. Brua's Appeal, 55 Pa. St. 294.

Even where some of the parties to stock-gambling operations are actual buyers and sellers, and do not intend to gamble. Fareira *v.* Gabell, 89 Pa. St. 89.

But mere knowledge of a broker that his principal in making sales through him intends to thereby wager on the future price of the article will not affect his right to commissions and advances. Kent *v.* Miltenberger, 13 Mo. App. 503; Crane *v.* Whittemore, 4 Mo. App. 510.

Neither is this right affected where he merely brings the parties together and takes no part in the transactions. Ormes *v.* Danchy, 45 N. Y. Super. Ct. 85.

So where a professional broker acts without a license as required by a statute he cannot recover for his services; but the burden of proof that he acted without a license is upon his employer. Johnson *v.* Hulings, 103 Pa. St. 498; s. c., 49 Am. Rep. 131; Shepler *v.* Scott, 85 Pa. St. 329; Holt *v.* Green, 73 Pa. St. 198; s. c., 13 Am. Rep. 737. *Compare* Ruckman *v.* Bergholz, 37 N. J. L. 437; Woodward *v.* Stearns, 10 Abb. Pr. N. S. (N. Y.) 395

This does not refer to an individual who is not a professional broker. Chadwick *v.* Collins, 26 Pa. St. 138; Pope *v.* Beals, 108 Mass. 561.

2. McGraw *v.* Godfrey, 14 Abb. Pr. N. S. (N. Y.) 397; Cabot Bank *v.* Morton, 4 Gray (Mass.), 156; Calder *v.* Dobell, L. R. 6 C. P. 486; Talbot *v.* Godbolt, Yelv. 137; Harvey *v.* French, Alleyn, 6.

Where a broker purchases property without disclosing the name of the principal for whom he acts, he becomes liable personally for the purchase-price, and is entitled to collect such price from the principal; the latter can relieve himself from such liability only by showing payment to the vendor, or a release for a good and valuable consideration from the broker. Knapp *v.* Simon, 96 N. Y. 284.

And where in his memorandum of sale or in the "bought and sold notes" he assumes to act personally, parol evidence will not be admitted on his part to show that he acted as agent only, although a third party may show by parol the liability of the unnamed principal. Williams *v.* Bacon, 2 Gray (Mass.), 387; Eastern R. Co. *v.* Benedict, 5 Gray (Mass.), 561; Dykers *v.* Townsend, 24 N. Y. 57; Thomson *v.* Davenport, 9 B. & C. 78. See 2 Smith's L. C. (8th Am. Ed.) 398–435.

Where a broker signs as such, he will incur no personal liability to third parties even though in the body of the memorandum the description of his position is ambiguous. Fairlee *v.* Fenton, L. R. 5 Exch. 169.

Upon the question whether certain iron bought of M. & Co., who were iron-brokers, was sold as their own or for some other party, the court charged the jury that if they should find that M. & Co. were brokers and as brokers selling such iron at the time, and that the purchaser knew this, it would of itself be evidence of notice to the purchaser that they were not the owners but were selling for some one else. *Held* to be erroneous. But the court added that if the word "only" had been inserted after the word "brokers" wherever it is used in the charge, it would have avoided the objection. Elwell *v.* Mersick, 50 Conn. 272, 274. See Baxter *v.* Duren, 29 Me. 434.

Where money was paid to an agent under an agreement with his principal for the sale of real estate upon the promise of the agent to return it in case it should turn out that the principal had not a good title, and the sale fell through because the principal had no title in fee to the property, *held*, that an action would lie against the agent for the money thus deposited. Read *v.* Riddle, 7 Atl. Repr. (N. J.) 487.

Although the principal is primarily liable for all the acts of his broker within the scope of his employment, the broker is personally liable to third parties for any torts he may commit where he has liberty of action. Kimball *v.* Billings, 55 Me. 147; Spraight *v.* Hawley, 39 N. Y. 441.

So although a mere broker whose office it is simply to bring the parties together is not responsible for any fraud practised by his principal on the other party, yet where he conducts the negotiations he

8. Statute of Frauds.—*Broker Agent for Both Parties.*—To satisfy the Statute of Frauds the broker is the agent of both buyer and seller to sign the memorandum of sale required by the statute, and his signature to the memorandum or note of the agreement is binding on both principals if the memorandum be otherwise sufficient.[1]

Bought and Sold Note.—Where a broker has succeeded in making a contract he reduces it to writing, and delivers to each party a copy of the terms as reduced to writing by him. He also ought to enter them in his book and sign the entry. What he delivers to the seller is called the sold note; to the buyer, the bought note. No particular form is required.[2]

may be held liable for any deceit or fraud practised upon such other party. Todd *v.* Bourke, 27 La. Ann. 385.

A broker is liable to third parties in trover if he wrongfully obtains and converts their property even under the express orders of his principal. Williams *v.* Merle, 11 Wend. (N. Y.) 80; s. c., 25 Am. Dec. 604.

A broker is guilty of fraud and deceit when he was acquainted with the defects in his principal's title and either directly affirmed what was false or threw the plaintiff off his guard by a wilful and artful suppression of the truth; as where he directs an investigation about an encumbrance to a place where he knew no satisfactory information could be obtained, when he should have directed to another point where the truth could have been ascertained. Chisolm *v.* Gadsden, 1 Strobh. L. (S. Car.) 220; s. c., 47 Am. Dec. 550.

1. Coddington *v.* Goddard, 16 Gray (Mass.), 436; Shaw *v.* Finney, 13 Metc. (Mass.) 453; Butler *v.* Thomson, 92 U. S. 412; Newberry *v.* Wall, 84 N. Y. 576; Lawrence *v.* Gallagher, 10 J. & S. (N. Y.) 309; Merritt *v.* Clason, 12 Johns. (N. Y.) 102; s. c., 7 Am. Dec. 286; Hinckley *v.* Arey, 27 Me. 362; Schlesinger *v.* Texas, etc., R. Co., 87 Mo. 146.

Where the vendee's agent, known by the vendor to be acting as such, signs such memorandum in his own name, both parties are bound by it as a written contract. Wiener *v.* Whipple, 53 Wis. 298. *Compare* Morgan *v.* Bergen, 3 Neb. 209.

2. Benjamin on Sales, § 276; Davis *v.* Shields, 26 Wend. (N. Y.) 341.

From a careful review of the often contradictory decisions on the question whether the original entry, where it exists, or the bought or sold notes form the contract, Mr. Benjamin states the following propositions. See Benjamin on Sales, §§ 294–302.

1st. The broker's signed entry in his book constitutes the contract between the parties, and is binding on both. Heyman *v.* Neale, 2 Camp. 337; Thornton *v.* Charles, 9 M. & W. 802; Sievewright *v.* Archibald, 20 L. J. Q. B. 529; Thompson *v.* Gardiner, 1 C. P. D. 777. *Contra*, Cumming *v.* Roebuck, Holt, 172; Thornton *v.* Meux, M. & M. 43; Townend *v.* Drakeford, 1 Car. & K. 20; Thornton *v.* Charles, 9 M. & W. 802 (Lord Abinger).

2d. The bought and sold notes do not constitute the contract. Thornton *v.* Charles, 9 M. & W. 802; Heyman *v.* Neale, 2 Camp. 337; Sievewright *v.* Archibald, 17 Q. B. 115.

3d. The bought and sold notes, when they correspond and state all the terms of the bargain, are complete and sufficient evidence to satisfy the statute, even though there be no entry in the broker's book, or, what is equivalent, only an unsigned entry. Goom *v.* Aflalo, 6 B. & C. 117; Sievewright *v.* Archibald, 17 Q. B. 115. See Suydam *v.* Clark, 2 Sandf. (N. Y.) 133; Peltier *v.* Collins, 3 Wend. (N. Y.) 459; Davis *v.* Shields, 26 Wend. (N. Y.) 341.

4th. Either the bought or sold note alone will satisfy the statute, provided no variance be shown between it and the other note, or between it and the signed entry in the book. Hawes *v.* Forster, 1 Mood. & Rob. 368; Parton *v.* Crofts, 16 C. B. N. S. 11; Thompson *v.* Gardiner, 1 C. P. D. 777. See Newberry *v.* Wall, 84 N. Y. 576; Butler *v.* Thomson, 92 U. S. 412.

5th. Where one note only is offered in evidence, the defendant has the right to offer the other note or the signed entry in the book to prove a variance. Hawes *v.* Forster, 1 Mood. & Rob. 368; Parton *v.* Crofts, 15 C. B. N. S. 11.

6th. As to *variance*. This may occur between the bought and sold notes where there is a signed entry or where there is

9. Revocation.—The authority of a broker, like that of any other agent, may be revoked by either party before he has signed in behalf of the party so revoking, but not after he has signed.[1]

10. Real-estate Brokers.—*Definition.*—Real-estate agents or brokers are those who negotiate the sale or purchase of real property. They are a numerous class, and in addition to the above duty sometimes procure loans on mortgage security, collect rents, and attend to the letting and leasing of houses and lands.[2]

none. It may also occur when the bought and sold notes correspond but the signed entry differs from them. If there be a signed entry, it follows, from the authorities under the first of these propositions, that this entry will in general control the case, because it constitutes the contract of which the bought and sold notes are merely secondary evidence, and any variance between them could not affect the validity of the original written bargain. If, however, the bought and sold notes correspond, but there be a variance between them taken collectively and the entry in the book, it becomes a question of fact for the jury whether the acceptance by the parties of the bought and sold notes constitutes evidence of a new contract, modifying that which was entered in the book. Sievewright *v.* Archibald, 16 Q. B. 115; Thornton *v.* Charles, 9 M. & W. 802; Hawes *v.* Forster, 1 Mood. & Rob. 368. See Toomer *v.* Dawson, Cheeves (S. Car.), 68.

7th. If the bargain is made by correspondence, and there is a variance between the agreement thus concluded and the bought and sold notes, the principles are the same as those just stated which govern variance between a signed entry and the bought and sold notes. Heyworth *v.* Knight, 17 C. B. N. S. 298.

8th. If the bought and sold notes vary, and there is no signed entry in the broker's book, nor other writing showing the terms of the bargain, there is no valid contract. Thornton *v.* Kempster, 5 Taunt. 786; Cumming *v.* Roebuck, Holt, 172; Thornton *v.* Meux, 1 M. & M. 43; Grant *v.* Fletcher, 5 B. & C. 436; Gregson *v.* Rucks, 4 Q. B. 747; Sievewright *v.* Archibald, 17 Q. B. 115.

9th. If a sale be made by a broker on credit and the name of the purchaser has not been previously communicated to the vendor, evidence of usage is admissible to show that the vendor is not finally bound to the bargain until he has had a reasonable time after receiving the sold note to inquire into the sufficiency of the purchaser, and to withdraw if he disapproves. This was decided in Hodgson *v.* Davies, 2 Camp. 531; and as the special jury spontaneously intervened in that case and the usage was held good without proof of it, it is not improbable that the custom might now be considered as judicially recognized by that decision, and as requiring no proof (see Brandao *v.* Barnett, 3 C. B. 519); but it would certainly be more prudent to offer evidence of usage.

A slight difference in the language of bought and sold notes will not constitute a variance if the meaning is the same, and mercantile usage is admissible to explain the language. Bold *v.* Rayner, 1 M. & W. 343; Sievewright *v.* Archibald, 17 Q. B. 115; Rogers *v.* Hadley, 2 H. & C. 227; Kempson *v.* Boyle, 3 H. & C. 763.

A fraudulent alteration of a bought or sold note destroys its effect; and so will any material alteration, even if not fraudulently made. Powell *v.* Divett, 15 East, 29; Mollett *v.* Wackerbarth, 5 C. B. 181. See also ALTERATION OF INSTRUMENTS.

1. Farmer *v.* Robinson, 2 Camp. 389; Warwick *v.* Slade, 3 Camp 127. *Compare* Hodgson *v.* Davies, 2 Camp. 531.

In Lamson *v.* Sims, 48 N. Y. Super. Ct. 281, it was held that where a real-estate owner employed a real-estate agent to sell his property, and the latter, within the scope of his authority, but without the owner's knowledge, employed a broker for the same purpose, and the broker found a purchaser after the agent's authority had been revoked, but without notice to the broker, that the broker was entitled to his commissions.

A principal is not liable to a broker for commissions on a sale effected after revocation of the agency by the acceptance of a proposition made during the agency, the revocation being made in good faith with no intention to renew the negotiations. Uphoff *v.* Ulrich, 2 Ill. App. 399.

The broker must, however, receive distinct notice of such revocation. Bash *v.* Hill, 62 Ill. 216.

2. Bouvier Law Dict., title "Brokers."

The power of a real-estate broker does

11. Insurance Brokers.—*Definition.*—Insurance brokers procure insurance and negotiate between the insurers and insured.[1]

Their Power.—The usage of trade has conferred upon insurance brokers powers and liabilities in excess of those conferred upon other brokers and peculiar only to this class.[2]

not generally extend to execute a sale, but merely to bring the parties together or to negotiate for the contract. In some cases he may execute the contract for a sale binding on both parties under the Statute of Frauds. Rutenberg *v.* Main, 47 Cal. 213; Pringle *v.* Spaulding, 53 Barb. (N. Y.) 17; Haydock *v.* Stow, 40 N.Y. 363; Glentworth *v.* Luther, 21 Barb. (N. Y.) 145; Roach *v.* Coe, 1 E. D. Smith (N. Y.) 175; Force *v.* Dutcher, 18 N. J. Eq. 401: Morris *v.* Ruddy, 20 N. J. Eq. 236.

The owner of real estate situated in Kansas City wrote from Chicago, where he resided, to his agent at Kansas City in terms as follows: "Your letter received last night; I will leave the sale of the lots pretty much with you; if the party, or any one, is willing to pay sixty dollars per foot, one third cash, and balance one and two years, interest seven per cent per annum, and pay commission of sale, I think I am willing to have you make out a deed and I will perfect it; I think you have the deeds to those lots, have you not? If you think better to try spring market, hold till then; the party buying may want the abstract in full, which I believe I have at Rockford, and will sell much less than cost. The above price is only for the present. It is understood if I pay the taxes now due, that hereafter I am relieved from any taxes." *Held*, that the letter authorized the agent to make a contract for the present sale of the lots. Smith *v.* Allen, 86 Mo. 178.

The authority of a real-estate broker need not be under seal unless he is authorized to execute a contract under seal. It may be by parol. Smith *v.* Armstrong, 24 Wis. 446; 25 Wis. 518; Turbeville *v.* Ryan, 1 Humph. (Tenn.) 113; Mumley *v.* Doherty, 1 Yerg. (Tenn.) 26; Fiero *v.* Fiero, 52 Barb. (N. Y.) 288; Blood *v.* Goodrich, 12 Wend. (N. Y.) 525; Worrall *v.* Munn, 5 N. Y. 229.

Real-estate agents employed to buy cannot buy from themselves nor buy on their own account. See AGENCY, vol. 1, p. 375.

Where a person desiring to purchase a piece of land employs by parol a firm of land agents to negotiate for the purchase of the land for him, and the member of the firm who does the business commences such negotiations, but finally, and in violation of his duties as agent, purchases the property for himself, with his own money, and takes the title thereto in his own name, and afterward the principal tenders to the agent an amount of money equal to the purchase-money, and an additional amount sufficient to compensate the agent for all his services, and also tenders a deed for the land for the agent to execute to the principal, and demands of the agent that he shall execute the same, but the agent refuses, and claims to own the land himself, *held*, under these facts, and by operation of law, that the agent holds the legal title to the land in trust for his principal; that the principal holds the paramount equitable title thereto, and by keeping his tender good may recover the property in an action in the nature of ejectment; and this notwithstanding the Statute of Frauds, and the fact that the employment of the agent was only in parol, and the further facts that the principal did not advance the purchase-money, and has never been in the possession of the property, nor made any improvements thereon; that the case is not one of the creation of an express trust either by parol or in writing, nor one of the express transfer of any interest in real estate either by parol or in writing, but is simply a case of resulting trust, brought into existence by the operation of law upon the facts of the case; and that the case does not come within the Statute of Frauds; and that the authority of the agent for the purpose for which he was employed need not be in writing. Rose *v.* Hayden, 35 Kans. 106.

The agency of a real-estate broker and his duty to his principal ceases upon the delivery of the title papers and payment for the property. Walker *v.* Derby, 5 Biss. (U. S.) 134.

As to compensation of real-estate brokers, see COMPENSATION OF BROKERS.

1. Bouvier Law Dict., title "Brokers."

They are in some States liable to penalties for soliciting insurance for companies who have not complied with the statutes governing their authority to transact business in the State. State of Wisconsin *v.* Farmer, 9 Ins. Law Jour. 515; State *v.* Beazley, 60 Mo. 220; Ehrman *v.* Teutonia Ins. Co., 1 Fed. Repr. 471.

2. So the usage of trade makes an insurance broker an exception to the

Lien of Insurance Brokers.—Insurance brokers have by general usage a lien for their general balance upon policies of insurance in their hands procured by them for their principals, and also upon the moneys received by them upon such policies.[1]

general rule that a broker cannot contract or sue in his own name. Policies not under seal are often effected by brokers in their own name for the benefit of a named principal or of whom it may concern. The action on the policies so effected may be brought either in the name of the principal for whose benefit it was made or of the broker who was immediately concerned in effecting it. Browning *v.* Provincial Ins. Co., L. R. 5 P. C. 263; Provincial Ins. Co. *v.* Ledue, L. R. 6 P. C. 224; Baring *v.* Corrie, 2 B. & Ald. 137; Sargent *v.* Morris, 3 B. & Ald. 277; Farrow *v.* Com. Ins. Co., 18 Pick. (Mass.) 53; s. c., 29 Am. Dec. 564; Finney *v.* Bedford Com. Ins. Co., 8 Metc. (Mass.) 348; Braden *v.* Louisiana State Ins. Co., 1 La. 220; s. c., 20 Am. Dec. 277; Newson *v.* Douglass, 7 H. & J. (Md.) 417; s. c., 16 Am. Dec. 317.

An insurance broker employed by a party to effect insurance for him may be regarded by the insurer as clothed with full authority to act for his principal in procuring, modifying, or cancelling policies; and his acts in these respects are binding upon his principal. Standard Oil Co. *v.* Triumph Ins. Co., 64 N. Y. 85. So have they authority to adjust losses and to receive payment on them. Richardson *v.* Anderson, 1 Camp. 43; Bonsfield *v.* Creswell, 2 Camp. 545; Todd *v.* Reid, 4 B. & Ald. 210; Scott *v.* Irving, 1 B. & Ad. 605. But the authority to receive payment is restricted to receive payment in money. Russell *v.* Bangley, 4 B. & Ald. 395. But not to pay losses where he is the agent of the insurer. Bell *v.* Auldjo, 4 Doug. 48. Nor to allow the company to set off a debt due by the broker, even where it is the usage of trade, when such usage is not known to the insured. Sweeting *v.* Pearce, 7 Com. B. N. S. 449; Scott *v.* Irving, 1 B. & Ad. 605.

Where an insurance broker acts under a *del credere* commission he is not under such commission made the principal debtor under the contract, and cannot pay the insured the amount of the loss and afterward recover the same from the insurer. Grove *v.* Dubois, 1 T. R. 113; Morris *v.* Cleasby, 4 M. & S. 566.

An insurance broker may not arbitrate a loss in dispute. Goodson *v.* Brooke, 4 Camp. 163. *Compare* Huber *v.* Zimmerman, 21 Ala. 488. Nor abandon in case of loss. Chesapeake Ins. Co. *v.* Stark, 6 Cranch (U. S.), 26; Lattomus *v.* Farmers' M. F. Ins. Co., 3 Houst. (Del.) 404.

A broker has no implied authority to return a policy to the company to have it cancelled or to have a new one substituted in its place. Bennett *v.* City Ins. Co , 115 Mass. 241; Van Valkenburg *v.* Lenox F. Ins. Co., 51 N. Y. 465; Latoix *v.* Germania Ins. Co., 27 La. Ann. 113; Rothschild *v.* Am. Cent. Ins. Co., 5 Mo. App. 596. *Compare* Standard Oil Co. *v.* Triumph Ins. Co., 3 Houst. (Del.) 404.

An insurance broker must see that insurance covers risks and that the insurers are responsible. Gettins *v.* Scudder, 71 Ill. 86; Moore *v.* Morgue, Cowp. 479; Park *v.* Hammond, 6 Taunt. 495; Mallough *v.* Barber, 4 Camp. 150; Mayhew *v.* Forrester, 5 Taunt. 615.

He will not be liable, however, when he insures in companies which are generally considered solvent even where his principal requested him to insure in other companies. Gettins *v.* Scudder, 71 Ill. 86.

1. McKenzie *v.* Nevins, 22 Me. 138; s. c., 38 Am. Dec. 291; Spring *v.* South Car. Ins. Co., 8 Wheat. (U. S.) 268; Cranston *v.* Phila. Ins. Co., 5 Binn. (Pa.) 538; Moody *v.* Webster, 3 Pick. (Mass.) 424.

Even though the lien has been lost by a surrender of the policy by the broker, it revives at once when the policy comes again in the broker's possession, unless the manner of parting with it manifests his intention to abandon the lien. And if other liens have attached while the policy was out of the hands of the broker, as by a *bona fide* assignment, his lien will not revive. Spring *v.* South Car. Ins. Co., 8 Wheat. (U. S.) 268; Sharp *v.* Whipple, 1 Bosw. (N. Y.) 557.

This lien extends only over matters relating to insurance brokerage, not to matters outside of this relation. Walker *v.* Birch, 6 T. R. 258; Houghton *v.* Matthews, 3 B. & P. 485; Olive *v.* Smith, 5 Taunt. 56; Jarvis *v.* Rogers, 15 Mass. 389.

Sub-agents of the broker also have a lien on the policy in their hands, but not for the general balance due them from the broker, but only a particular lien for premiums and commissions in relation to the policy. Snook *v.* Davidson, 2

Broker Agent of Insured and Insurer.—An insurance broker is agent for the insured and also for the underwriter. He is agent for the insured first in effecting the policy, and in everything that has to be done in consequence of it; then he is agent for the underwriter as to the premium, but for nothing else; and he is supposed to receive the premium from the insured for the benefit of the underwriter; but the whole account with respect to the premium, after the insurance is effected, remains a clear and distinct account between the underwriter and broker. Exclusive of fraud and other similar circumstances, there is an end to everything with respect to the premium as between the insurer and insured.[1]

Camp. 218; Maans *v.* Henderson, 1 East, 335; McKenzie *v.* Nevins, 22 Me. 138; s. c., 38 Am. Dec. 291.

The broker's lien attaches to all policies procured by him even if his principal acts for another, of which fact the broker has no notice at the time. And the lien is not destroyed when he afterward discovers the rights of such third party. Mann *v.* Forrester, 4 Camp. 60; Rabone *v.* Williams, 7 T. R. 361; Maans *v.* Henderson, 1 East, 335; Foster *v.* Hoyt, 2 Johns. Cas. (N. Y.) 327.

But where he affects the policy, knowing that his principal is acting simply as agent for a third party, his lien is limited to charges against such third party. Foster *v.* Hoyt, 2 Johns. Cas. (N. Y.) 327; Bank of Metropolis *v.* New Engl. Bank, 1 How. (U. S.) 234; Snook *v.* Davidson, 2 Camp. 218.

1. Minett *v.* Forrester, 4 Taunt. 541; Crousillat *v.* Ball, 3 Yeates (Pa.), 375; s. c., 2 Am. Dec. 375; Hartford Fire Ins. Co. *v.* Reynolds, 36 Mich. 502; How *v.* Union Mut. Life Ins. Co., 80 N. Y. 39; Wood *v.* Firemen's Ins. Co., 126 Mass. 316; Monitor Ins. Co. *v.* Young, 111 Mass. 537; Mayo *v.* Pew, 101 Mass. 555; Planter's Ins. Co. *v.* Myers, 55 Miss. 479; Cahill *v.* Ander Ins. Co., 5 Biss. (U. S.) 211; Kings County F. Ins. Co. *v.* Swigert, 11 Ill. App. 590. *Compare* Robertson *v.* Atl., etc., Ins. Co., 68 N. Y. 192; Pottsville Mut. Ins. Co. *v.* Minnequa Springs Imp. Co., 100 Pa. St. 137.

But the broker is not so far the agent of the company that he may give the insured credit and bind the company in the mean time, or make a binding contract of renewal, or waive condition as to prepayment of premium. Marland *v.* Royal Ins. Co., 71 Pa. St. 393; Hambleton *v.* Home Ins. Co., 6 Biss. (U. S.) 91.

But where the company was in the habit of charging the premium to the broker, and the broker gave credit to the insured, it was held that by this usage the premium was considered paid, and the company liable on the policy. Train *v.* Holland, etc., Ins. Co., 62 N. Y. 598; Bang *v.* Farmville Ins. Co., 1 Hughes (U. S.), 290; White *v.* Conn. Ins. Co., 120 Mass. 330; Stebbins *v.* Lancashire Ins. Co., 60 N. H. 65.

A, an insurance broker, secured an application for a policy of fire insurance from B, which he gave to C, who, while he did not have a certificate of appointment as agent under seal from D, an insurance company, received applications, forwarded them, received policies, which he delivered to the assured, and collected premiums therefor for D. C forwarded B's application to D, received a policy of insurance and delivered the same to A, who delivered it to B. C about the same time had secured for A two other policies of insurance for B. He charged the premiums on all the policies, amounting to $200.82, to A. B's property covered by D's policy was destroyed by fire. A had paid on account of said premiums to C $100 before the fire, and the remainder of the premiums after the fire. C forwarded the premium received to D after the fire, which D refused to receive. In an action by B against D to recover the amount of his loss on his policy of insurance, D defended on the ground that there was no liability under the provisions of the policy until the premium was actually paid; the court entered a compulsory nonsuit, and overruled a motion to take it off. *Held*, that D could waive the provisions of the policy requiring the actual payment of the premium in full before there should be any liability on part of D under it, and whether or not this provision of the policy was waived should have been, under the evidence, submitted to the jury. Elkins *v.* Susquehanna F. Ins. Co., 113 Pa. St. 386.

So where the insurer has accepted the broker's promissory note on account of the premium. Union Ins. Co. *v.* Grant, 68 Me. 229.

An insurance company giving an in-

surance broker printed instructions to secure payment of premium when application is made, is responsible for such premium paid the broker on a risk they refuse to take, though plaintiff did not know of such instructions. Gentry *v.* Conn. Mut. L. Ins. Co., 15 Mo. App. 215.

Where an insurance broker gave a local agent of an insurance company a check in payment of a premium with directions to retain it until his principal should have accepted the policy, and the principal did not approve of the policy, it was held that the broker could recover from the local agent the amount of the check which he had given up to the general agent. Dobson *v.* Jordan, 124 Mass. 542.

Knowledge of a broker who makes application for insurance in behalf of another is not the knowledge of the company. McFarland *v.* Peabody Ins. Co., 6 W. Va. 425; Mellen *v.* Hamilton Fire Ins. Co., 17 N. Y. 609; McLachlan *v.* Ætna Ins. Co., 4 Allen (N. B), 173; Ben. Franklin Ins. Co. *v.* Weary. 4 Ill. App. 74.

But a notice from the company to the broker of a cancellation of the policy and payment or tender of the return payment to him affects the insured. Hartford F. Ins. Co. *v.* Reynolds, 36 Mich. 502. *Compare* Grace *v.* Am. Centr. Ins. Co., 109 U. S. 278, where it was held that where his employment did not extend beyond the procurement of the insurance, his agency ceased upon the execution of the policy, and subsequent notice to him of its termination by the company was not notice to the insured. Kehler *v.* New Orleans Ins. Co, 23 Fed. Repr. 709; Franklin Ins. Co., *v.* Sears, 21 Fed. Repr. 290; Hodge *v.* Security Ins. Co., 33 Hun (N.Y.), 583; White *v.* Conn. F. Ins. Co., 120 Mass. 330; Body *v.* Hartford F. Ins. Co., 63 Wis. 157.

An agent with authority to obtain insurance is not necessarily an agent of the insured to whom notice of cancellation of the policy may be given, or payment of the unearned premium made, so as to bind the insured; nor is a recital in the policy that the broker obtaining the insurance was agent of the insured conclusive upon that subject. In such case a direction to the agent to charge the unearned premium to the insurance company, he being personally indebted to the latter in a larger sum, is not a compliance with a stipulation in the policy that it may be cancelled by refunding the unearned premium. Indiana Ins. Co. *v.* Hartwell, 100 Ind. 566.

Plaintiff authorized K. & B., insurance brokers, to procure insurance on certain property for a sum specified; they procured a policy from defendant, which was delivered to plaintiff; it contained a clause giving the company the right to terminate the insurance "on giving notice to that effect." Defendant directed its agents to cancel the policy; they notified K. & B. of this fact, and arranged with them to issue a policy in another company to take the place of defendant's policy. K. & B. agreed to procure said policy from defendant, and thereupon defendant's agent wrote a policy in another company. Plaintiff had no knowledge or information as to this arrangement until after a loss, and had the original policy in his possession. *Held*, that the notice to K. & B. was not notice to plaintiff, and the transaction did not operate as a cancellation of defendant's policy. A clause in the policy declared that any person other than the assured procuring the policy should be deemed an agent of the assured, not of the company, "in any transaction relating to this insurance." *Held*, that this did not constitute K. & B. continuing agents, or make the notice to them binding upon plaintiff. Plaintiff resided in New York; the property insured was in Troy. Defendant gave evidence tending to show a local custom in Troy that notice of cancellation may be given to the broker who procures the insurance. This custom was unknown to plaintiff. *Held*, that the custom was inadmissible to control or affect the contract. Herman *v.* Niagara Fire Ins. Co., 100 N. Y. 411.

A party desiring to insure certain property applied to an insurance agent of his place to procure the insurance, leaving him to select the company. He forwarded the application to certain insurance brokers in Chicago, who procured the policy in a company with which they had considerable dealing, and sent the same to the assured through the first-named agents, and he sent the premium to the agents in Chicago, who never forwarded the same to the insurance company. The policy contained the usual clause that it should not be binding until the actual payment of the premium. A loss occurred, and payment was refused, when suit was brought on the policy, and a recovery had. *Held*, that the liability of the insurance company depended upon the fact whether the Chicago agents were its agents or were authorized to receive payment in its behalf. Where insurance brokers procuring a policy of insurance received payment of the required premium, and failed to return the same to

the insurance company, it was held that the correspondence between the brokers and the company was proper evidence for the purpose of showing their previous relations and methods of business in respect to insurance effected through them, and as tending to show they were, in fact, agents of the company, and as such authorized to receive payment of the premium. Sun Mutual Ins. Co. *v.* Saginaw Barrel Co., 114 Ill. 99.

A broker may, however, also be the agent of the insurer, and a clause in the policy making him the agent of the insured cannot operate to change his character or status. Bassell *v.* Am. Fire Ins. Co., 2 Hughes (U. S.), 531; Commercial Ins. Co. *v.* Ives, 56 Ill. 402; Newark Fire Ins. Co. *v.* Sammons, 110 Ill. 166; Wood *v.* Firemen's Ins. Co., 126 Mass. 316.

Where the agent of a company employed a broker to furnish business for the company, the company is bound by the broker's contract upon the receipt of the policy and the payment of the premium by the insured. Riley's Ex'rs *v.* Com. Mut. Fire Ins. Co., 1 Atl. Repr. (Pa.) 528.

The plaintiff signed an application for insurance, which was written by B., "an insurance broker," in the office of the defendant's agent. The defendant returned the application to its agent for further information as to the occupancy and ownership of the property insured. The agent handed it to B., requesting him "to go and get the reply." B. took it, saw the assured, and, although he learned from him that he was only a conditional vendee in possession of the personal property, and the vendor the tenant of the store in which it was situated, wrote in it that the assured was both the owner and tenant. B. was neither appointed nor recognized as agent by the company, or by its agent. *Held*, that the writing of the false statements, in legal significance, was the act of the agent; that the knowledge of B. was the knowledge of the company, and that it was estopped from claiming a forfeiture; that the defendant could not avoid its responsibilities by repudiating the acts of its agent, though done in part by a person employed by him. Mullin *v.* Vt. M. Fire Ins. Co., 58 Vt. 113.

Where a broker represents himself as the agent of an insurance company, and the insured deals with him as such, the supposed agent delivering the policy in due form, and receiving the premiums which, in fact, he did not pay over to the company, the company is estopped by the delivery of the policy from denying the authority of the broker, and payment to him is payment to the company. Lycoming Fire Ins. Co. *v.* Ward, 90 Ill. 545. *Compare* Germania Fire Ins. Co. *v.* McKee, 94 Ill. 494.

In such a case any waiver of condition by such broker will bind the company. Packard *v.* Dorchester Mut. Fire Ins. Co., 77 Me. 144.

The insured applied to W., an insurance agent, to insure his property. W. placed the risk, not in any company represented by him, but in companies, including the defendant, represented by other agents; and there was no communication on the subject between the insured and such other agents. *Held*, that W. must be regarded as the company's agent in respect to this insurance, and his knowledge that the premises were unoccupied at the time of the insurance binds the defendant, and operates as a waiver of the condition as to occupancy. Alkan *v.* New Hampshire Ins. Co., 53 Wis. 136; Schomer *v.* Hekla Ins. Co., 50 Wis. 575. See Knox *v.* Lycoming Fire Ins. Co., 50 Wis. 671.

A broker who effects insurance under no employment by the insurers, but for a commission paid by them, upon the premiums received, for such risks as he procures to be offered and they choose to accept, is not an agent in such a sense that they will be bound by notice to him after policies are issued. Defendant issued a policy of insurance to plaintiff upon his canal boat, which policy contained a warranty that the boat would be "securely moored in a safe place satisfactory to defendant from December 10th to April 1st, with privilege to lighter in in New York harbor during the winter." The boat was laid up during the period specified at a place outside of said harbor. No notice of the laying up was given save to S., an insurance broker, not in defendant's employ, who solicited applications for insurance by it, forwarded them when obtained, and, if accepted, policies were issued, sent to S., who delivered them to the applicants and received commissions thereon. While so laid up the boat was destroyed by fire. In an action upon the policy, *held*, that notice to S. was not notice to defendant. Devens *v.* Mechanics', etc., Ins. Co., 83 N. Y. 168; Mellen *v.* Hamilton Fire Ins. Co., 17 N. Y. 609.

Where an assured intrusts a written application to a broker, he constitutes him his agent for every purpose. Notice to such broker does not affect the company, and the rule that he is the agent of the insurer for the sake of delivering

12. Bill and Note Brokers.—Bill and note brokers negotiate the purchase and sale of bills of exchange and promissory notes, and are generally paid a commission by the seller of the securities. When they negotiate bills of exchange on foreign countries or on other places in this country, they are called *Exchange Brokers.*[1]

13. Ship-brokers.—Ship-brokers negotiate the purchase and sale of ships and the business of freighting vessels. Like other brokers, they receive a commission from the seller only.[2]

14. Stock-brokers.—As the law in regard to stock-brokers, closely connected with the law on stock exchanges, is of a peculiar character, in many respects differing from the law on the ordinary broker, this subject will be fully treated under the title STOCK-BROKERS.

15. Custom-house Broker.—A custom-house broker is a person authorized to act for parties at their option, in the entry or clearance of ships and the transaction of general business.[3]

16. Marriage-broker.—Marriage-brokage is the act by which a person interferes for a consideration to be received by him between a man and a woman for the purpose of promoting a marriage be-

the policy and to receive the premiums does not apply. Fame Ins. Co. *v.* Mann, 4 Ill. App. 485; Ben. Franklin Ins. Co. *v.* Weary, 4 Ill. App. 74.

If an application for a policy of insurance is made in writing, the insurance company has no right to rely upon a verbal representation made to the agent of the company by a clerk of the broker who procured the insurance; and such representation, though false, will not vitiate the policy. Dolliver *v.* St. Joseph, etc., Ins. Co., 131 Mass 39.

The insured is responsible for all representations and statements made by the broker in his behalf; but the statements must be absolute; a mere matter of opinion will not affect the interests of the insured. Standard Oil Co. *v.* Amazon Ins. Co., 14 Hun (N. Y.), 619; Samo *v.* Gore Distr. Mut. Fire Ins. Co., 26 U. C. C. P. 405.

Where one without an appointment acts as broker for the insured, the latter may ratify the acts of such party in obtaining a policy even after the loss, and so make him his agent. Excelsior Fire Ins. Co. *v.* Royal Ins. Co., 55 N. Y. 343; Grace *v.* Am. Centr. Ins. Co., 109 U. S. 278.

Conversations with the broker may be received in evidence as part of the *res gestæ* upon the question of agency. Lycoming Fire Ins. Co. *v.* Ward, 90 Ill. 545; Union Ins. Co. *v.* Chipp, 93 Ill. 96.

1. Bouvier's Law Dict., title "Brokers."

A broker who sells negotiable paper without disclosing his principal, guarantees that the signatures are genuine, and will be personally liable if they prove to be forgeries, but not so when he discloses his principal and pays over the proceeds to him. Thompson *v.* McCullough, 31 Mo. 224; s. c., 77 Am. Dec. 644; Lyons *v.* Miller, 6 Gratt. (Va.) 427; s. c., 52 Am. Dec. 129; Bell *v.* Cafferty, 21 Ind. 411; Herrick *v.* Whitney, 15 Johns. (N. Y.) 240; Shaver *v.* Ehle, 16 Johns. (N. Y.) 201; Morrison *v.* Currie, 4 Duer (N. Y.), 79; Flyn *v.* Allen, 57 Pa. St. 482; Merriam *v.* Wolcott, 3 Allen (Mass.), 258; Aldrich *v.* Jackson, 5 R. I. 218; Gurney *v.* Womersley, 4 El. & Bl. 132; McCay *v.* Barber, 37 Ga. 423; Terry *v.* Bissell, 26 Conn. 23; Thrall *v.* Newell, 19 Vt. 202; Dumont *v.* Williamson, 18 Ohio St. 516. *Compare* Baxter *v.* Duren, 29 Me. 434; s. c., 50 Am. Dec. 602.

The seller of a note is bound by the representations of the broker to whom he gave it for sale. Ahern *v.* Goodspeed, 72 N. Y. 108; Frevall *v.* Fitch, 5 Whart. (Pa.) 325; s. c., 34 Am. Dec. 558.

It is sometimes part of the business of exchange brokers to buy and sell uncurrent bank-notes and gold and silver coins, as well as drafts and checks drawn or payable in other cities, although as they do this at their own risk and for their own profit, it is difficult to see the reason for calling them brokers. The term is often thus erroneously applied to all persons doing a money business. Bouvier's Law Dict., title BROKERS.

2. Bouvier's Law Dict., title "Brokers." See also SHIPPING.

3. Bouvier Law Dict.

tween them. The money paid for such services is also known by this name.[1]

BROTHER. (See also BLOOD; HALF-BLOOD.)—Offspring of the same parents; but it also includes half-brothers, or those having one common parent.[2]

1. Bouvier Law Dict., title MARRIAGE-BROKAGE.

Any promise in consideration of such services is void as against public policy. Hall *v.* Potter, 3 Lev. 411; Williamson *v.* Gihon, 2 Sch. & L. 357; Drury *v.* Hooke. 1 Vern. 412; Cole *v.* Gibson, 1 Ves. Sr. 503; Debenham *v.* Ox, 1 Ves. 276; Smith *v.* Bruning, 2 Vern. 392; Roberts *v.* Roberts, 3 P. Will. 74.

Marriage-brokage bonds which are not fraudulent on either party are yet void, because they are a fraud on third persons and a public mischief, as they have a tendency to cause matrimony to be contracted on mistaken principles and without the advice of friends, and they are relieved against as a general mischief for the sake of the public. Boynton *v.* Hubbard, 7 Mass. 112; Crawford *v.* Russell, 62 Barb. (N. Y.) 92.

2. On an application for life insurance, deceased, in answer to a question as to how many brothers he had had, answered, "Three; two living;" whereas it appeared that he had had also four half-brothers, of whom only one was living. It was left to the jury to say whether the applicant in this answer was guilty of an untruth, and whether the statement was material; and it was held that it was properly so left, and a verdict for the plaintiff was sustained; the court, Hagarty, C. J., saying: "I do not see how the learned judge could have taken the question and answer wholly into his own hands, and directed the jury to find one way or the other purely as a consequence. He expressed an opinion that as a matter of mere legal construction he inclined to think *brothers* meant brothers of the whole blood. It is not easy, in my opinion, to give a very clear *legal* definition of the word 'brother.' I have not found a strict legal definition of the word as such.

Mr. Jarman says, vol. ii. (Ed. 1861) 140: "A gift to brothers and sisters extends to half brothers and sisters.' He cites Leake *v.* Robinson, 2 Mer. 363, but there the point, though adverted to, is not necessarily decided. In Grieves *v.* Rawley, 10 Hare, 63, before Tarner, V. C., Sir W. P. Wood, in arguing, quotes Johnson's Dictionary, defining a *brother* as one born of the same mother and father. The vice-chancellor says: 'It is true the dictionaries so describe the relation of brother and sister.' He adds: 'I think that in general when a man speaks of his brothers and sisters he speaks of them, not with reference to the definition of the word in the dictionary, but as a class, standing in the same relationship to one or both of his parents as he himself stands in. Though not descended from the same parents, the parties are, as is said in the *termes de la ley*, after a sort brothers; "brothers by the father's side," "brothers by the one mother;" and however other parties may describe them, or they designate themselves, if required to give a precise description of the nature and degree of the relation subsisting between them, I think that, in ordinary parlance, they would be called, and would call themselves, brothers and sisters.' He puts a case of a family of sons and daughters of the father by different marriages, and A was asked the question as to the relation between him and B, another member of the same family. Would not the question be, 'Is B your whole brother or sister, or your half brother or sister?' and would not the answer be in similar terms? Both the party questioning and the party questioned would thus call B a brother or a sister, but each would distinguish the character and degree of their relation. Lexicographers certainly favor the idea that *brother* means the offspring of the same parents. Richardson says: '*Brothers*, or brethren, are children bred from the same parent,' quoting Skinner: 'I believe that brother, the Dutch Broeder, the German Brüder, are all derived from the verb "to breed"—*simul fotus*, i.e., *educatus*—of the same brood." Again, under 'Sister': 'Females by the same parents are sisters. Males and females so related are brothers and sisters.' See also Imperial and other dictionaries. "*Frater consanguineus*, a brother by the father's side; *frater uterinus*, by the mother's side; *frater metricius*, sometimes used for a bastard brother.' Tomlins' Law Dictionary; Bridgman *v.* London Life Ins. Co., 44 U. C. Q. B. 536.

It is not necessary for an indictment for incest against a brother and sister to show that their parents were lawfully married; for, said the court, Beck, C. J.:

BUBBLE.—A scheme for business or trade projected by dishonest individuals to cheat the public.[1]

BUDGET.—The name applied in England to the financial statement of the national revenue and expenditure for each year submitted to Parliament by the chancellor of the exchequer.

BUFFALO.—A wild bovine animal. In America the term is popularly applied to the bison.[2]

BUGGERY (see SODOMY).—The crime against nature; carnal copulation of human beings with each other against nature, or with a beast.[3]

BUILD.—To frame, construct, and raise; to erect; to construct.[4]

"The statute declares the act of a brother marrying a sister to be incest. Now, the terms 'brother' and 'sister' mean offspring of the same parents. They do not imply legitimacy of birth. It would be quite proper to use these words in reference to those born out of wedlock." State *v.* Schaunhurst, 34 Iowa, 547.

So also the word "brother," in a statute against incest, includes a brother of the half-blood. State *v.* Wyman, 10 Eastn. Repr. (Vt.) 847; s. c., 4 New Eng. Repr. 126.

And a legacy "to my brother, J. S.," is good, although J. S. was an illegitimate son of the testator's mother before her marriage with his father. Dane *v.* Walker, 109 Mass. 179.

On the construction of the word "brother," when used in statutes of descent and distribution as denoting whole or half blood, see Gardner *v.* Collins, 3 Mason (U. S.), 398; s. c., 2 Peters (U. S.), 58; Crooke *v.* Watt, 2 Vern. 124; Tracy *v.* Smith, 2 Lev. 173; Sheffield *v.* Lovering, 12 Mass. 490; Clark *v.* Sprague, 5 Blackf. (Ind.) 412; Doe *d.* Moore *v.* Abernathy, 7 Blackf. (Ind.) 442; Cliver *v.* Sanders, 8 Ohio St. 501; Wheeler *v.* Clutterbuck, 52 N. Y. 67.

1. The stat. 6 Geo. I. c. 18, passed in 1719, "for restraining several extravagant and unwarrantable practices herein mentioned," was known as the "Bubble Act," as it prescribed penalties for the formation of companies with little or no capital, with the intention, by means of advertisement, of obtaining money from the public by the sale of shares. It was repealed by the 6 Geo. IV. c. 91.

2. A buffalo, though tamed, is not cattle within the meaning of a statute providing for the punishment of a person wilfully and maliciously killing, maiming, or wounding the cattle of another. State *v.* Crenshaw, 22 Mo. 457.

3. 3 Inst 59; 12 Co. 37. This crime was denominated "buggery" in 25 Hen. VIII. c. 6, and the use of the word was deemed indispensable in an indictment for the offence. Foster C. C. 424; 3 Inst. 59; 2 Stark Cr. Pl. 436. It is still in use and considered requisite in indictments for sodomy. Bishop's Direcs. & Forms, § 963. The term is used as an exact equivalent of sodomy. Rex *v.* Cousins, 6 C. & P. 351; Rex *v.* Jacobs, Russ. & Ry. 331; Commonwealth *v.* Thomas, 1 Va. Ca. 307; Penna. Act, 11th June, 1879, P. L. 148, where the offencee is defined.

4. **What the Power to Build Includes** — "It is incident to a general power to build a market, to determine upon the form, dimensions, and fashion of the edifice," and to employ an architect to prepare plans, specifications, and working drawings for its erection. Peterson *v.* Mayor, etc., of N. Y., 17 N. Y. 449.

Where one is authorized to make a canal and take tolls thereon, on the condition among others that he will build suitable and convenient bridges where the canal crosses highways, he is bound to keep the bridges in repair. Commissioners of Franklin Co. *v.* White Valley Canal Co., 2 Ind. 162; The King *v.* Inhabitants of Lindsey, 14 East, 317.

A corporation created "to build and maintain a flouring mill" may build a dam by means of which to obtain power to run the mill. Ginrich *v.* Patrons' Mill Co., 21 Kan. 61.

The grant of a privilege to build a certain building on land of the lessor without defining the place where it is to be erected or the quantity of land to be occupied does not, without actual entry and location, confer such a right as to enable the lessee to bring ejectment. Jackson *v.* May, 16 Johns. (N. Y.) 184.

In Contract.—Where a contract to build a ship is declared on, it is a fatal variance to prove a contract to finish a ship that is already partly built. Smith *v* Barker, 3 Day (Conn.), 312.

BUILDER.—One who builds; one whose occupation is to build.[1]

BUILDING. (See also FIXTURES; MECHANIC'S LIEN.)—I. A fabric or edifice constructed for use or convenience; as a house, a church, a shop.[2] It must be permanent,[3] and designed for the habitation of men or animals, or the shelter of property.[4]

A contract to build a ship is not a maritime contract. Edwards *v.* Elliott, 21 Wall. (U. S.) 532; Scull *v.* Shakespear, 75 Pa. 297.

A covenant in the lease that if the lessor shall be minded to sell any part of the land to build upon he may resume that part, is not restricted to any buildings of any particular species; warehouses are within the meaning of the clause, and wharves as appurtenant thereto. Gough *v.* Canal Co., 6 Ves. 353.

Under a contract to build a ship, house, or other thing, no property vests in the person for whom it is being built until it is finished and delivered. And the rule is the same where certain portions of the price are paid at specific stages of the work, and the building is carried on under the superintendence of the one for whom it is done. Andrews *v.* Durant, 11 N Y. 35; Merritt *v.* Johnson, 7 Johns. (N. Y.) 473; Low *v.* Austin, 20 N. Y. 182; Tompkins *v.* Dudley, 25 N. Y. 272; Scull *v.* Shakespear, 75 Pa. 297; Haney *v.* Schooner Rosabelle, 20 Wis. 247; Edwards *v.* Elliott, 36 N. J. L. 449; Laidler *v.* Burlinson, 2 M. & W. 602; Adams *v.* Nichols, 19 Pick. (Mass.) 275; School District *v.* Dauchy, 25 Conn. 530; Revenue Cutter No. 2, 4 Sawy. (C. C.) 144.

Specific Performance of a Contract to build may be decreed if the agreement is sufficiently defined, but not the performance of a general covenant to lay out a certain sum in a building, it not being distinctly expressed what the building is. Mosely *v.* Virgin, 3 Ves. 184.

Erect or Build.—To materially enlarge and alter a wooden building by adding stories and extending the walls is a breach of an ordinance forbidding any one to erect or build wooden buildings within a city. Douglass *v.* Commonwealth, 2 Rawle (Pa.), 262. See State *v.* Tuttle, 4 Conn. 68.

New-build.—A covenant in a lease to new-build the houses on the premises is not complied with by rebuilding some and repairing others, although the repairing consisted in pulling down the front and back walls and rebuilding them. City of London *v.* Nash, 3 Atk. 515.

1. Webster. One engaged in repairing and replacing machinery in a steam canal-boat is a builder within the meaning of an act providing for the collection of demands against vessels and creating a lien in favor of the builder. King *v.* Greenway, 71 N. Y. 413. But the builder of a steam-engine for a vessel is not. Calkin *v.* U. S., 3 Ct. of Cl. 298.

A lumber merchant is not an artisan, a builder, or a mechanic within the meaning of a mechanic's lien law. Duncan *v.* Bateman, 23 Ark. 327.

2. This is Webster's definition, and is adopted in State *v.* Barr, 39 Conn. 41; Church *v.* Allison, 10 Pa. 413; Coddington *v.* Dry Dock Co., 2 Vr. (N. J.) 477. The word has a narrower meaning than "build;" it does not mean anything built.

3. Stevens *v.* Gourley, 7 C. B. N. S. 99. But it need not be let into the ground, but may be laid on timbers upon the surface. See FIXTURES.

4. Railroad Co. *v.* Vanderpool, 11 Wis. 119.

"Taken in its broadest sense, it can mean only an erection intended for use and occupation as a habitation or for some purpose of trade, manufacture, ornament or use, constituting fabric or edifice, such as a house, a store, a church, a shed." Truesdell *v.* Gay, 13 Gray (Mass.), 312; Powell *v.* Boraston, 18 C. B. N. S. 175.

In Statutes.—"The word 'building' in a statute will almost always depend for its meaning in some degree on the particular subject, and its connection with other words." Bishop on Stat. Crimes, § 292.

A saw-mill is not necessarily a building within the meaning of a statute of arson. State *v.* Livermore, 44 N. H. 386. An unfinished house is. The Queen *v.* Manning, L. R. 1 C. C. R. 338. But it is not a building "erected for manufacture," etc., within such a statute. McGary *v.* People, 45 N. Y. 153.

The untenantable remains of a house after a previous fire are not a building within a statute of arson. Reg. *v.* Labadie, 9 U. C. Q. B. 429.

An unfinished structure to be used as a cart-shed, with boarded sides and a door with a lock, but unthatched, is a building within a larceny act. Rex *v.* Worrall, 7 C. & P. 516.

Under a statute prescribing a penalty for breaking into a building, an indict-

ment for breaking into a store is not good. Com. *v.* McMonagle, 1 Mass. 517.

A stable is a building within the statute of burglary. Orrell *v.* People, 94 Ill. 456.

Under an indictment for keeping a certain building for the illegal sale of intoxicating liquor, or for omitting to take all reasonable means to eject a tenant so using the building, it is a fatal variance to prove that the defendant is only tenant of a part of the building. Commonwealth *v.* McCaughey, 9 Gray (Mass.), 296; Commonwealth *v.* Bossidy, 112 Mass. 277.

Neither a park nor a platform erected therein is a building within a statute forbidding the sale of liquor on Sunday. State *v.* Barr, 39 Conn. 41. See Bishop on Stat. Crimes, § 1069.

Under a statute giving the suffrage to certain tenants of houses, warehouses, counting-houses, shops, or other buildings, one who had exclusive occupancy of certain apartments in a house and a key to the outer door while his landlord occupied, but did not reside in a part of the premises, is a tenant of a building. Toms *v.* Luckett, 5 C. B. 36. So are cotton-spinners who rent rooms in the factory. Wright *v.* Town Clerk, 5 M. & G. 33. And a shed, though covered with tarpaulin, used for the storage of marketing, is not denied to be within the act, though a pigsty is. Powell *v.* Farmer, 18 C. B. N. S. 181; Watson *v.* Cotton, 5 C. B. 51. But where the shed was erected by an electioneering agent for the pupose of qualifying the tenant, the contrary was held. "It ought to be in some degree adapted both to be used by man either for residence or for the industry to which the statute relates, and also to have the degree of durability which is included in the idea of building." Powell *v.* Boraston, 18 C. B. N. S. 175. See also Harris *v.* Amery, L. R. 1 C. P. 150; Morris *v.* Harris, L. R. 1 C. P. 155; s. c., Harr. & Ruth. 328.

Hustings erected at polls are not buildings within an act providing a remedy for the destruction of buildings by riotous assemblies. Allen *v.* Ayre, 3 Dowl. & Ry. 96.

A summer house is a building within an act making it felony to steal lead, etc., from any dwelling-house, out-house, coach-house, stable, or other building. Rex *v.* Norris, Russ. & Ry. 69.

In Indictment.—Where a statute of larceny says "in any building," the word "building" must be used in the indictment; it is not sufficient to say "in the saloon," without stating that the saloon was a building. Commonwealth *v.* Mahar, 8 Gray (Mass.), 469.

Mechanic's Lien Laws.—The following have been decided to be buildings within statutes giving a lien for labor performed in erecting, altering, or repairing a building: A church. Church *v.* Allison, 10 Pa. 413. A railroad depot. Hill *v.* Railroad Co., 11 Wis. 214. See McIlvain *v.* Railroad Co., 5 Ph. 13. The following are not buildings: A bridge. Railroad Co. *v.* Vanderpool, 11 Wis. 119; Burt *v.* Washington, 3 Cal. 246. A ditch. Ellison *v.* Water Co., 12 Cal. 542. A floating dock. Coddington *v.* Dry Dock Co., 2 Vr. (N. J.) 477. Swings and seats in a park, though a dancing-hall may be. Lothian *v.* Wood, 55 Cal. 159. A wall erected near and around a furnace. Truesdell *v.* Gay, 13 Mass. 312.

Where the structure of a building is so completely changed that in common parlance it may be properly called a new building or a rebuilding, it comes within a law giving a lien to mechanics on "every building erected." Armstrong *v.* Ware, 20 Pa. 520. See NEW BUILDINGS, *post*, p. 603.

In Deed—A privilege to cut wood (for building on premises) includes privilege to cut wood for fences. Livingston *v.* Ten Broek, 16 Jns. R. (N. Y.) 14; s. c., 8 Am. Dec. 287.

A covenant not to erect a building within a certain distance of a boundary line is broken by the erection of a fence twenty feet high. Wright *v.* Evans, 2 Abb. Pr. N. S. 308. So is the erection of a building the bay window of which extends beyond a certain line a breach of a covenant not to erect a building beyond that line. Manners *v.* Johnson, 1 Ch. Div. 673. But a restriction that no building should be erected within ten feet of the street is not violated by the erection of a brick wall six feet high. Nowell *v.* Academy of Notre Dame, 130 Mass. 209.

In Lease.—A covenant to keep buildings in repair only applies to existing structures, not to new ones. Cornish *v.* Cleife, 3 H. & C. 446.

A lease of a building conveys the land under the eaves, if it belongs to the lessor, and the erection of a wall on that land with the lessor's authority is a breach of a covenant for quiet enjoyment. Sherman *v.* Williams, 113 Mass. 481.

In Application for Insurance.—A hog-pen and a hen-house are not buildings within the meaning of an application which represents that there are no buildings not disclosed within a certain dis-

tance. White *v.* Mutual Fire Ins. Co., 8 Gray (Mass.), 566. An answer to the question, "How bounded, and the distance from other buildings if less than ten rods?" giving the distance of the nearest building in each direction, is sufficient though it does not mention remoter building within ten rods. Gates *v.* Ins. Co., 5 N. Y. 469.

Addition to a Building.—What is an addition under a lien law is a question of law. It must be lateral, on ground outside of the building. An increase in height is not such an addition. Updike *v.* Skillman, 27 N. J. L. 131; City *v.* Parker, 5 Vr. (N. J.) 352. A piazza is, while folding doors are not. Whitenack *v.* Noe, 11 N. J. Eq. 321, 412.

Appurtenance to a Building.—A vault under the pavement is not under a mechanic's lien law. Parmelee *v.* Hambleton, 19 Ill. 615.

Construction or Repair of Building.—Making a pavement is not. Knaube *v.* Kerchner, 39 Ind. 217. Nor does it come within the terms of *erecting, constructing, and finishing* a building. McDermott *v.* Palmer, 2 E. D. Smith (N. Y.), 675.

Construction, Erection, or Repair of Building.—The equipping of fixed machinery in a building to be used as a paper-mill is not under a lien law. Rose *v.* Paper Works, 29 Conn. 256.

Building Erected.—An unfinished building is not within this term as used in a statute of arson. McGary *v.* People, 45 N. Y. 153. Nor is a building repaired under a lien law. Landis's App., 10 Pa. 379. But see Armstrong *v.* Ware, 20 Pa. 520.

A building removed and fitted up as a school-house is a "building erected for public use" under an arson statute. Commonwealth *v.* Horrigan, 2 Allen (Mass.). 159.

Erection, Enlargement, and Repair of a Building.—Putting on a new roof comes within this phrase. King *v.* Davenport, 98 Ill. 306.

If the Building Should Fall.—This phrase in an insurance policy is construed literally. To meet the condition, the building must have actually and entirely fallen. It is not sufficient that it is very much damaged, has *fallen* into decay. Firemen's F. I. Co. *v.* Cong. Rodeph Sholom, 80 Ill. 558. Or that a part only has fallen. Brenner *v.* Ins. Co., 51 Cal. 101.

Building Ground.—The description of a bounding lot as building ground does not operate as notice of an intention to build, so as to alter the rule as to ancient lights. Swansborough *v.* Coventry, 9 Bing. 305.

Building Material.—Earth excavated from a lot preparatory to building is not within an ordinance forbidding the deposit of building material in the street. Hundhausen *v.* Bond, 36 Wis. 29.

Nature and Material Structure of the Buildings Insured, in an application for insurance, does not cover machinery in a building. Baxendale *v.* Harvey, 4 H. & N. 448.

New Buildings.—What is a new building within a mechanic's lien law is a question of law and for the court. Armstrong *v.* Ware, 20 Pa. 519; Smith *v.* Nelson, 2 Phila. 113. The following have been held not to be new buildings: Back buildings. Harris *v.* Woolston, 3 Phila. 376; Rand *v.* Mann, 3 Phila. 429. An old structure moved to a different part of the lot and extensively repaired. Tuttle *v.* State, 4 Conn. 68. A new structure raised in the place of a torn-down portion of an old one, the upper stories of which are only to be reached through the old part. Shiel *v.* Mayor, etc., of Sunderland, 6 H. & N. 796. "A substantial addition of material parts, a rebuilding upon another and larger scale, constitutes a new building, even though some portions of the old are preserved, and incorporated in the new." Driesbach *v.* Keller, 2 Pa. 77.

A new building is defined by the 18 & 19 Vict. c. 122, prohibiting building beyond a certain line, to include a building in course of erection which has not been carried higher than the footings at the time when the act goes into operation. Tear *v* Freebody, 4 C. B. N. S. 288. Where a back building was raised, and two of the walls of a building changed from wood to brick, this was held a new building within an act requiring that a certain amount of open space should be left whenever a new building was erected in a certain city. Brice's App., 89 Pa. 85.

Buildings or Other Property, in a statute making railroad companies liable for injury to buildings or other property along their route, and giving them the right to have such insured, includes fences and growing trees. Pratt *v.* R. Co., 42 Me. 579; Grissell *v.* Railroad (Conn.), 4 N. E. Repr. 85. All kinds of combustible property. Ross *v.* Railroad Co., 6 Allen (Mass.). 87. It was confined, however, to permanent, insurable property, and held not to extend to movables, as a pile of cedar posts in Chapman *v* R. Co., 37 Me. 92; Pratt *v.* Railroad Co., 42 Me. 579.

Public Buildings of a county are such as are ordinarily used in, or are indis-

II. Framing; erecting: the present participle of *build.*[1]

BUILDING AND LOAN ASSOCIATIONS. (See also AMOTION; CORPORATIONS; DISSOLUTION; INTEREST; OFFICERS, PRIVATE CORPORATIONS.)

1. **Definition.**—A building and loan association is an organization created for the purpose of accumulating a fund from the monthly subscriptions or savings of its members to assist them in building

pensable to, the conduct of the business of the county; an academy is not a public building under an act setting apart certain land for the public buildings of the county. Kittaning Academy *v.* Brown, 41 Pa. 270.

A church was treated as within a statute providing that the walls of public buildings should be constructed in such manner as is approved by the district surveyor. The Queen *v.* Carruthers, 8 B. & S. 817.

An act concerning roads which forbids the pulling down of "any dwelling-house, market-house, or other public building" does not cover an engine-house. The term "public building" means "such as that the property in it, and also its possession and use, are in the public." State *v.* Troth, 34 N. J. L. 377.

Land used for *building purposes* means land sold as building land or let on building leases and actually laid out for building. Coventry *v.* Railway Co., L. R. 5 Eq. 104. See Carrington *v.* Railway Co., 3 Ch. App. 377; Railroad Co. *v.* Doddridge, 4 E. & I. App. 610.

Buildings for Religious Worship.—The residence of a priest or clergyman is not exempt from taxation as such because it contains a room set apart for religious worship. Church *v.* Assessors, 12 R. I. 19.

Wooden Buildings.—Acts forbidding their erection within cities are constitutional, as an exercise of police power. King *v.* Davenport, 98 Ill. 305. But an ordinance for this purpose is not necessarily within the power of a municipal corporation. Thorne *v.* Hudson, 7 Paige (N. Y.), 261. The following structures have been held to be within such acts: An addition to a building made by erecting a wooden frame and placing a brick wall around it. Tuttle *v.* State, 4 Conn. 68. A structure of wood laid on timbers on the surface of the ground. Stevens *v.* Gourley, 7 C. B. N. S. 99. But a building composed partly of wood and partly of brick was held not within the meaning of such an act in Stewart *v.* Commonwealth, 10 Watts (Pa.), 306.

The lease of a wooden building does not pass as appurtenant any title to an out-building, yard, or passageway in an adjoining curtilage equally belonging to a brick house. Oliver *v.* Dickinson, 100 Mass. 114.

1. A contract to win stone for the purpose of building certain houses does not include the completion of the houses by plastering and tile-pointing. Charlton *v.* Gibson, 1 C. & K. 541.

The building a cabin on a steamboat is within a statute giving a lien for work and labor done "in the building, repairing, fitting, furnishing, and equipping" of ships. Steamboat Dictator *v.* Heath, 56 Pa. 290.

or purchasing for themselves dwellings or real estate by loaning to them the requisite money from the funds of the society upon good security.[1]

2. Origin.—The first building society is said to have been established at Kirkcudbright in Scotland by the Earl of Selkirk in 1815,[2] though mention of "building clubs" in Birmingham occurs in 1795,[3] and one appears to have existed at Greenwich in 1807.[4] The first association of this kind in the United States was established at Brooklyn (N. Y.) in 1836.[5] After that date they began to crop out plentifully throughout the eastern seaboard, sometimes as unincorporated voluntary associations and sometimes incorporated under general acts of the several States. In some States they have proved a failure and their formation has been either prohibited or abandoned; in others they have continued to prosper and multiply until their number and the amount of capital they control is truly enormous.[6]

3. Varieties.—The building association as known in the United

1. *Compare* Parker *v.* Fulton Building and Loan Assoc. 46 Ga. 166; 1 Bouv. Dict. (15th Ed.) 268.

"The primary design of building associations is to encourage the acquisition of real estate, the building of dwellings, the ownership of homesteads,—to increase the proportion of property-holders among that class of the population whose slow and laborious earnings are, by reason of their pettiness, most fugitive, and generally spent before they reach a sum of sufficient magnitude to back a desire for these guarantees of good citizenship which the policy of our law has always found in landed property. That is the class for whose benefit building associations were originally devised; from among whose number their membership was, and for the most part still is, drawn; and all the incidents of membership were designed to accommodate their necessities, and intended to serve their purposes." Endlich on Bldg. Assoc. (1st Ed.) § 118. Hence an association for the "accumulation of a fund by the savings of its members to build or purchase for themselves dwelling-houses, or to enter into business," or merely for the purpose of loaning money to its members without expressing any intention to further the acquisition of homesteads, is not a building association within the meaning of the legislature. Jarrett *v.* Cope, 68 Pa. St. 67; Kupfert *v.* Guttenberg Bldg. & Sav. Assoc., 30 Pa. St. 465. See also North American Bldg. Assoc. *v.* Sutton, 35 Pa. St. 463 (opinion of Strong, J., 467); Am. Security L. Assoc. *v.* Lake, 64 Ala. 456; s.c, 1 Am. & Eng. Corp. Cas. 418.

The end, however, must be attained by the association assisting its members to procure land for themselves, and not by first purchasing the land in its corporate capacity and then distributing it to the members. If it follows the latter course it usurps the functions of a freehold land society, and its acts are *ultra vires*. Grimes *v.* Harrison, 26 Beav. (Eng.) 442.

"A freehold land society buys land with the funds contributed by the members of the society, and then divides it amongst them; but a benefit building society advances to its borrowing members money derived from subscriptions, and which the borrowing members themselves lay out in the purchase of lands and buildings, and then mortgage them to the society." Master of the Rolls in Grimes *v.* Harrison, 26 Beav. (Eng.) 442.

2. Bibb County L. Assoc. *v.* Richards, 21 Ga. 592.

3. 4 Encyclopædia Britannica, 513.

4. Pratt *v.* Hutchinson, 15 East, 511.

5. Bibb County L. Assoc. *v.* Richards, 21 Ga. 592.

In 1836 the 6 & 7 Will. IV. was passed, affording ample opportunities for the formation of such associations.

6. Endlich on Bldg. Assoc. § 6.

This power and importance grew rapidly during the feverish period in our national development immediately preceding the Civil War, and most of the older States made their first attempts to control their powers, formation, and management by statutory enactment during the decade of 1850 to 1860. Endlich on Bldg. Assoc. § 6, and see chap. 2 for good compendium of legislation in the different States.

States exists in three varieties: the terminating, the permanent, and the serial

A *Terminating Society* is one which must terminate by expiration of its charter when the stock arrives at par value.[1] Upon each share a fixed monthly subscription of uniform amount is payable throughout the whole duration of the society, the purpose being to continue the same until the members' subscriptions by aid of investments, made from time to time, shall amount to a fund large enough to give to every member upon every share held by him a sum fixed by the charter at the commencement. The possible duration of the association is limited by law or by charter, and the payments required from the shareholders so adjusted as to guarantee, on the score of long experience, its running out within that period. The members all start from the same date; and should any one be permitted to join the society subsequently to the time limited for taking subscriptions, he will be required to make a "back payment" of an amount equivalent to the then value of the stock. Whenever the society has on hand a sum equal to the full value of a share, or, when by law required, at stated intervals, loans will be made to members upon sufficient security. The member then, in addition to the regular subscription, pays, also monthly, the legal interest upon the full face value of his loan or upon the amount actually received by him, according as the one or the other is allowed under the governing statute, and both these duties are stipulated for in the mortgage, which becomes available for their enforcement in the hands of the association.[2]

The *Permanent Building Association* may be described as "a society which has not by its rules any fixed date or specified result at which it shall terminate."[3] It differs from a terminating society chiefly in the fact that a person may become a member at any time without paying any back subscriptions, and in that a borrowing member can obtain an advance repayable by small instalments extending over a fixed term of years, at his own choice, with the absolute certainty of clearing his property from the encumbrance, and freeing himself from all further liability at the end of the time.[4]

1. A terminating society is one which by its rules is to terminate at a fixed date or when a result specified in its rules is attained. 37 & 38 Vict. c. 42, § 5.

2. Endlich on Bldg. Assoc. (1st Ed.) § 42.

3. 37 & 38 Vict. c. 42, § 5.

4. Endlich on Bldg. Assoc. (1st Ed.) § 46.

The following account of the development of this form of the building society is given in the Encyclopædia Britannica: "About 1846 an important modification of the system of these societies was introduced by the introduction of the 'permanent' plan, which was adopted by a great number of the societies established after that date. It was seen that these societies really consist of two classes of members; that those who do not care to have, or have not received, an advance upon mortgage security are mere investors; and that it matters little when they commence investing or in what amount, while those to whom advances have been made are really debtors to the society, and arrangements for enabling them to pay off their debt in various terms of years according to their convenience, would be of advantage both to themselves

Serial Associations differ from terminating in that, their duration being limited, instead of issuing all the stock, to the full extent allowed by law or charter, at once, they divide it up into series and issue each series successively, each class or series being then treated to some extent as a separate association distinct from the others, but with them sharing in the profits of the concern.[1]

and the society. By permitting members to enter at any time without back payment, and by granting advances for any term of years agreed upon, a continuous inflow of funds and a continuous means of profitable investment of them would be secured. The interest of each member of the society would terminate when his share was realized or his advance paid off, but the society would continue with the accruing subscriptions of other members employed in making other advances." 4 Enc. Brit. (9th Ed.) 514.

1. Endlich on Bldg. Assoc. (1st Ed.) § 47.

The successive serial issues of stock constitute its permanent feature; for although the membership of any individual terminates with the series of stock on which that membership is claimed, yet the association continues on until the last series is wound up. Endlich on Bldg. Assoc. (1st Ed.) § 49.

The advantages of the serial association are (1) that it allows a person wishing to become a member to avoid back payments by purchasing stock in the last series; (2) that by loaning the surplus funds of the elder series to the members of the younger a profitable investment can always be insured. When we recall the fact that the chief trouble in the successful working of the terminating plan arises from the difficulty of obtaining new members, owing to the heavy back payments necessary to equalize them with the first members, after the association has reached its third or fourth year, the consequent falling off in the number of stockholders by reason of death or withdrawal, and the difficulty thereby occasioned of finding proper investments for the large sums of money which accumulate upon the hands of the society, the immense practical importance of this feature of the serial system cannot be overestimated. See Wrigley, Workingman's Way to Wealth, p. 38.

"The total issue of stock is confined or limited to 2500 shares as formerly (i.e., in terminating plan), but in place of disposing of the whole in one issue, all at once, as in the terminating plan, an association working on the permanent (i.e., serial) plan will sell or dispose of as many shares as is thought advisable (say 500) during the first year, and these will run their course to the final result, precisely as those issued by a terminating association; and at the end of the first year the sum total of dues and profits is divided by the total number of shares in this first 'series,' and their value is thus ascertained, whereupon a new or second series of stock is issued, of as many shares as is thought advisable to sell, and payments on this second 'series' commence only with their issue; and these in turn run the same as the first series, and at the end of the second year the sum total of dues and profits for that year are divided by the total number of shares in both series, and their value again ascertained. The stock in the first series will be found to have a value of two years' dues ($24 per share), to which is added the profit made during the two years on each share; while the stock in the second series will be worth but the amount of the one year's dues ($12 per share) and the one year's profits; and so on, each year producing a new series of stock, the sum total formed by dues and profits being divided at the end of each year by the total number of shares of all the series then issued (excepting, of course, such stock as may have been withdrawn and returned to the association)." Wrigley, Workingman's Way to Wealth, p. 32.

Bowkett and Starr-Bowkett Societies.—These are terminating varieties of limited popularity. The former are best described in the language of the originator, Dr. Bowkett, in his evidence before the royal commissioners in England: "They are based on a principle of arithmetic which scarcely any one connected with building societies or any one else seems to comprehend. The principle is this: That, by a certain arrangement, men uniting together can realize, in the first instance, the same amount of interest for their own savings that they are accustomed to pay for other people's money; next, that they can practically obtain one fourth more than that rate of interest;

4. Method of Business.—The par value of the stock is fixed by charter or by-law, and each member of the society binds himself on becoming a member to pay a subscription at stated intervals, until the amount in the treasury produced by the sum total of all the subscriptions, together with the profits, is such as will enable the society to pay to each member on every share of stock the par value of that share. Whenever the amount in the treasury at any time equals the par value of one or more shares, that sum is "put up at auction," and that member obtains the loan who offers the highest premium, or, in other words, agrees to accept the smallest sum at the time of making the loan in lieu of the par value of his stock at the final distribution.

The borrower continues a member,[1] and gives adequate security for the payment of interest on the loan, subscriptions, and charges. On the final distribution of the stock those members who have not become borrowers receive the par value of their shares in cash, while borrowing members get back their bonds and mortgages receipted in full. To secure prompt payment of interest and dues a system of fines and forfeitures is adopted which at once makes it the interest of the member to discharge his obligations to the society and compensates the latter for the loss of the interest upon the amount due.[2]

and next, that that rate of interest is compound-interest. The plan is this: One hundred persons, putting down 9½d. a week, will produce £2 1s. 2d. each year. Leaving the 1s. 2d. out of the question, to pay the current expenses (and that amount is nearly sufficient), they have at the end of the year £200; they draw lots for it, and the one to whom it falls has the £200 lent to him, without interest, provided he expends it upon freehold property, and repays it at the rate of £10 per cent. per annum, continued for ten years. After that he continues his subscription, until if he is one of the earlier persons he has paid £62, and if one of the later ones £50. Each member has all his subscriptions back again, the principle being that the subscriber lends the society a small sum annually for a long time, and the society lends him a large one for a long time." First Rep. of Commissioners, p. 64.

"The chief difference between the Starr-Bowkett societies and the preceding is that, In the Starr-Bowkett societies, after a man has repaid that which has been lent to him upon property, he has to pay an increased subscription, so as to make the society terminate at an earlier period than it would do if the member still continued to pay his ordinary subscription." Davis, Law of Building, etc., Societies, p. 59.

1. In *Virginia* it is held that the contract between the association and the borrower involves the total cessation of his interest and membership in the concern, and the total extinguishment of his stock, his mortgage binding him, however, to continue his payments during the existence of the association. White *v.* Mechanics' Bldg. Assoc., 22 Grattan, 233; Winchester Bldg. Assoc. *v.* Gilbert, 23 Grattan, 787.

A similar doctrine appears to be held in the District of Columbia. Pabst *v.* Bldg. Assoc., 1 McArthur (D. C.), 385; Mulloy *v.* Fifth Ward Bldg. Assoc., 2 McArthur (D.C.), 594.

For full discussion of the relation between the borrowing member and the association, see next section.

2. As to nature of fines, see *post*, § 8, (b).

The following lucid account of the practical working of a building association is given in Endlich on Building Associations, § 8. "Suppose that there are a hundred men able to save five dollars out of their monthly earnings. They agree for the purpose of united action and mutual encouragement to put their money together upon fixed days every month, until the whole aggregate shall be sufficient to pay to each of the hundred associates $1000 in cash. It is clear that if all are prompt in their payments the treasure will be readyfor division at the end of 200 months;

in other words, letting each monthly payment of one dollar represent a 'share' in the common fund, each share will, at the end of 200 months be worth a fixed par value of $200. This period, however, will be shortened if, after each monthly collection of $500 has been made, that sum is at once put out at interest, upon some safe investment, with the addition of the interest, etc., accruing to the fund. The distribution of $200 to each share may be feasible in, say, 180 months, when each associate has, in fact, paid only $180 on each of his five shares—that is, has paid in $900 up to the time when he is entitled to receive $1000. Thus far we have only a co-operative savings fund, the stated payments being periodical and compulsory. But the persons who started this association, had an object beyond the mere saving of money; they desired through it to acquire houses, homes. When, therefore, the question of investing the money arose, it was found that it might be made the means of securing to some of the members, particularly anxious to 'become their own landlords,' the property upon which they wished to build, and the money to defray the expenses of building, they paying the interest upon the amount loaned them. In this way the money which belonged to all would assist the individual, and he, whilst he continued to pay his monthly instalments, would, in paying interest on the money advanced to him, in fact be paying it in part to himself, and would himself help to hasten the day when he would be entitled to participate with the others in the distribution of the common fund, his share in which might then at once be devoted to the extinguishment of the loan he had received. Thus he could get his house perhaps a number of years before his monthly payments of five dollars could be expected to amount to a sum sufficient to pay for it; and yet those small payments, being kept up by him, would in time equal the sum he had borrowed, and he would have his house free, virtually paying for it in instalments of five dollars monthly, and the interest on the amount he had borrowed. Such a bargain he could get nowhere else, and it stands to reason that more than one member should endeavor to obtain the advantage of being able to pay so gradually for his house and yet have it all his very own. Hence, whenever there is a sum of money ready for investment, there will probably be a number of applicants, and it will be a matter of embarrassment to know to whom to give the loan. But this awkwardness is again turned into a source of profit. Among those who apply there will be some to whom, for various reasons, the accomodation may be of considerably more moment than to others. It will be worth more to some than to the rest, and this difference will probably be capable of expression in dollars and cents. The loan, therefore, is put up at a sort of auction. Various members desirous of obtaining it bid against each other for the preference, agreeing that they will receive the sum offered less the amount bid by them. This difference is called the premium or bonus, which he undertakes to pay, together with the amount actually received by him, the two constituting his whole debt, to be discharged in the same manner and at the same time. It is a rule with these societies that a member's indebtedness by loan shall not exceed the paid-up value of the number of shares he holds in the association.

"The sources of profit are interest on the loans to members, premiums, and fines. The fact that the money so obtained is at once reinvested, and in like manner the interest derived therefrom, and so on *ad infinitum* enables the non-borrowing member to realize compound interest on his subscriptions; while to one wishing to become a borrower the fact that the loan can be repaid in small monthly instalments, and that the sum advanced is greater than private individuals would be willing to lend on the same security, offers substantial advantages. This the association can do without risk, since as each instalment is paid the security is by that much increased; thus property which at first might well seem inadequate security will at the end of six months be ample. To the workingman, above all, do these societies, when honestly conducted, commend themselves, in that their management is perfectly democratic, and that they have no preferred class to share its profits, no heavy sinking-fund to create and hold in reserve against possible contingencies, and in that it is the only plan by which he can become his own capitalist and create a source of wealth from which he can supply all reasonable demands, without the aid or interference of the outside capitalist. "However it may be elsewhere," says Chief-Justice Sharswood, "Philadelphia has become a city of comfortable homes for the poor by means of these organizations." Becket *v.* Uniontown B. & L. Assoc., 88 Pa. St. 211. 216. See also, in this connection, Wrigley, Workingman's Way to Wealth, pp. 5 *et seq.*, 80.

5. Mutuality of the System.—If one man lent another $800 upon an agreement that the latter should repay him $1000 in monthly instalments of $20 in addition to legal interest upon the amount received, the contract would be clearly usurious; still less inviting would the arrangement appear if the obligation of the unhappy debtor was enforced by an elaborate system of fines and forfeitures. There must therefore be something peculiar to the building-association loan by which the debtor receives some *quid pro quo* in return for the onerous liabilities which he assumes, and by which the transaction, though apparently usurious and oppressive, is rendered really equitable and mutual. This mutuality lies in the fact that after the loan the borrower still retains his membership in the association and all the rights and privileges thereunto belonging; he stands to the association in the twofold relation of debtor and member. As debtor, he is bound to pay premium, interest, and dues; as member, he has a proportionate interest to the extent of his stock in his own payments; and whatever profit the association may derive from their future investment redounds to his own advantage by hastening the day of final settlement, and thereby shortens the time during which the payments must be continued. He is interested in his subscriptions both at the time of payment and at the final settlement, and, in the expressive language of Judge Sharswood, "the borrower at usury is himself also a lender at usury."[1]

1. Becket *v.* Uniontown Bldg. & L. Assoc., 88 Pa. St. 211, 216. "It would require $5 per annum to pay off $100 in twenty years, and the interest during the same period, crediting each payment on the principal, would be $77. Our building associations often wind up in six or eight years—that is, their common fund becomes $200 a share, to be distributed to the members or applied in discharge of their loans. Thus it will be seen that the borrower at usury is himself also a lender at usury, and, if he can by economy and self-denial manage to make his payments, is sure to come out in the end a large gainer." See also Wrigley, Workingman's Way to Wealth, pp. 67–70, in which he shows by actual calculation that in those societies in which the premiums range low and the profits are small the sum total actually paid by the borrower is greater than in those in which the premiums are high, the profits large, and the winding up thereby hastened.

In the leading case in *Alabama* the following explanation is given: "Their purpose (i.e., of building associations) is not banking, neither are they manufacturing or trading corporations. They have some elements of mutual aid, and if properly organized and prudently and faithfully conducted they furnish a safe and profitable depository for surplus earnings, notably for small surplus earnings. Under their workings many small sums contributed by the many shareholders are brought together monthly, and an aggregate sum is thus gathered in which, passing out immediately to one or more shareholders, furnishes a capital or stock in trade sufficient for permanent and profitable investment. Each month this process is repeated, furnishing capital or stock in trade for other shareholders. Thus the working is continued from month to month, until a sufficient sum is collected and disbursed to pay off and cancel all the shares of stock, at the value fixed in the articles of incorporation. The lettings of the moneys are frequently called loans, but they are not strictly loans. The principal is never to be repaid. It is an advance payment by the corporation of the agreed value the shares owned by the bidder are to represent and have at the final completion of the enterprise and the dissolution of the corporation. It is the policy of the association that the funds received on stock calls should not remain idle, and hence they are employed in advance liquidation of the demands the shareholders are severally to have at the dissolution. In anticipating payments of shares the payments are at

the rate of $200 per share. But all payments cannot be made at the same time. Hence the competition. Hence the sale to the highest bidder. Those who obtain the first advance first realize the increased value of their shares, and so on, until the enterprise runs its course and winds itself up. Shareholders pay for their shares in stock calls $100 per share in instalments of one per cent a month, running through one hundred months—equal to eight years and four months. Discounting interest from the deferred payments, we have an average of four years and two months' interest saved. This would reduce the cash cost of shares to less than $73. Now, if those who receive early advance payment upon their shares, like the shareholders who are not paid in advance, are required to pay only the stock calls, it will readily be seen how inequitably such method of payment will work. Hence it is that those receiving payment in advance of others are required to pay for this privilege whatever premium they bid and bind themselves to pay. All such payments go to augment the fund for the payment of other shareholders and accelerate final completion of the purposes of the corporation, its final liquidation and dissolution." Stone, J., in Security Loan Assoc. *v.* Lake, 69 Ala. 456; 1 Am. & Eng. Corp. Cas. 418. See also Hammerslough *v.* Kansas City Bldg. Loan, etc., Assoc., 79 Mo. 80.

Nature of the Contract of Loan—Summary of Authorities. — Nevertheless it must be admitted that a true understanding of the exact nature of the contract of loan is difficult, and the authorities differ. In *England* the transaction was viewed as a dealing in partnership funds. "The defendant was interested in the fund when it was advanced and when it was repaid. The rules of the society are in effect a mere agreement by partners that their joint contributions shall be advanced for the use of the one or the other, as occasion requires; and the transaction was not a borrowing by the maker of the note from the payee." Tindal, C. J., in Silver *v.* Barnes, 6 Bing. N. C. 180; s. c., 8 Scott, 300; 37 Eng. C. L. Rep. 335. In this case the society was unincorporated, but the principle was subsequently applied to corporations chartered under the 6 & 7 Will. IV. c. 32, and has been uniformly followed ever since. Burbridge *v.* Cotton, 5 De G. & Sm. 17; 8 Eng. L. & Eq. 57; 15 Jur. 1070; 21 L. J. ch. 201; Seagrave *v.* Pope, 1 De G. M. & G. 783; 15 Eng. L. & Eq. 477; 16 Jur. 109; 22 L. J. (N. S.) ch. 258; Cutbill *v.* Kingdom, 27 L. J. Ex. 177; 1 Exch. 494; *In re* Durham County Perm. Ben. Bldg. Soc.; Davis's Case; Wilson's Case, Law Rep. 12 Eq. 516; s. c., 25 L. T. Rep. (N. S.) 83; *Ex parte* Bath, 51 L. T. (N. S.) 520.

These cases are followed in *Maryland*, where the mortgage is given for dues only, and the association is organized under the Building Association Act. Robertson *v.* Homstead Assoc., 10 Md. 397; Balt. Perm. Bldg., etc., Soc. *v.* Taylor, 41 Md. 417; Williar *v.* Balt. Butchers' L., etc., Assoc. 45 Md. 562; Birmingham *et al.* *v.* Maryland & Perm. Homestead Assoc., 45 Md. 541 See also Citizens' Security & Land Co. *v.* Uhler, 48 Md. 455, in which it was held that the act of 1872, ch. 78, authorizing corporations not within the Building Association Act to take more than six per cent interest was unconstitutional, and that where the borrower, immediately on borrowing the money, executes a mortgage releasing or transferring to the company his shares of stock, thereby ceasing to have any interest in the profits earned by the corporation, the association is not within the act.

In *Massachusetts* and *New Hampshire* the decision in Silver *v.* Barnes, 6 Bing. N. C. 180, was applied in all its consequences to an unincorporated association. Delano *v.* Wild, 6 Allen (Mass.), 1; Bowker *v.* Mill River L. Fund. Assoc., 7 Allen (Mass.), 100; Shannon *v.* Dunn, 43 N. H. 194.

In *Georgia* a distinction between a formal sale of stock to the association and a mere loan is recognized on the ground of the borrower's continued interest in the society's affairs—his partnership relations. Parker *v.* Fulton L. & B. Assoc., 46 Ga. 166; Bibb County L. Assoc. *v.* Richards, 21 Ga. 592; Pattison *v.* Albany Bldg. & L. Assoc., 63 Ga. 373.

In both *New Hampshire* and *Georgia* it is left to the jury to determine whether the object of the organization is the "accumulating a fund by monthly subscriptions or savings of the members thereof to assist them in procuring for themselves such real estate as they may deem proper," or a mere device to evade the usury laws. Parker *v.* Fulton L. & B. Assoc., 46 Ga. 166; Shannon *et al.*, Trustees Manchester L. & F. Assoc., *v.* Dunn, 43 N. H. 194.

In *Virginia* "the price of the shares is not a loan," but a redemption; they become the property of the association, and are sunk and extinguished, and the borrower loses his membership in the association. Winchester Bldg. Assoc. *v.* Gil-

bert *et al.*, 23 Gratt. (Va.) 787; Cason *v.* Seldner *et al.*. 77 Va. 297.

In *West Virginia* the payment of interest upon the money lent was held to mark the transaction as one of loan, and the English decisions are said to be founded upon the wording of the statute of 6 & 7 Will. IV. c. 32. Pfeister *v.* Wheeling Bldg. Assoc., 19 W. Va. 676. For extended review of decisions see this case.

The decisions in *Kansas*, *New Jersey*, and *New York* are inconsistent and vacillating. Hassey *v.* Citizens' Bldg. & Sav. Assoc. of Paola, 22 Kan. 624; Kekelnkaemper *v.* German Bldg. Assoc., 22 Kan. 549; Glyn *et al. v.* Home Bldg. Assoc., 22 Kan. 746; Clarkville Bld. & L. Assoc. *v.* Stephens, 11 C. E. Greene (N.J.), 351, 355; Hoboken Bldg. Assoc. *v.* Martin, 2 Beas. (N. J.) 428; Franklin Bldg. Assoc. *v.* Marsh, 5 Dutch. (N. J.) 225; Washington Bldg. & L. Assoc. Pros. *v.* Hornbaeker, 13 Vr. (N. J.) 635; Dime Sav. Inst. *v.* Mulford, 4 Stew. (N. J.) 99; Citizens' Mutual Loan Assoc. *v.* Webster, 25 Barb. (N. Y.) 263; City Bldg. & L. Assoc. *v.* Fatty, 1 Abb. App. Dec. (N. Y.) 347; Melville *v.* American Ben. Bldg. Assoc. *et al.*, 33 Barb. (N. Y.) 103.

In all these States, statutes enabling the association to recover the premium exist, and it is not believed that in the absence of such provision it could be recovered. Kekelnkaemper *v.* German Bldg. Assoc., 22 Kan. 549; Dime Sav. Inst. *v.* Mulford, 4 Stew. (N. J.) 99; Hamilton Bldg. Assoc. *v.* Reynolds, 5 Duer (N. Y.), 671.

In *New York* such recovery was refused in the case of an unincorporated association. Melville *v.* American Ben. Bldg. Assoc. *et al.*, 33 Barb. (N. Y.) 103.

In *North Carolina*, *South Carolina*, *Nebraska*, *Tennessee*, and *Kentucky* the transaction is considered simply a loan, and the premium is held to be usurious, and cannot be recovered. Mills *et al. v.* Salisbury Bldg. & L. Assoc., 75 N. Car. 292; Overby and Wife *v.* Fayetteville Bldg. & L. Assoc., 81 N. Car. 56; Columbia Bldg. & L. Assoc. *v.* Bollinger, 12 Rich. Eq. (S. Car.) 124; Lincoln Bldg. & Sav. Assoc., Appellee, *v.* Graham, Appellant, 7 Neb. 173; Same *v.* Benjamin and Benjamin, Appellants, 7 Neb. 181; Martin *v.* Nashville Bldg. Assoc., 2 Cold. (Tenn.) 418; Herbert *v.* Kenton Bldg. & Sav. Assoc. of Covington, 11 Bush (Ky.), 296; Gordon, etc., *v.* Winchester Bldg. & Accumulating Fund Assoc., 12 Bush (Ky.), 110.

In *Pennsylvania* the doctrine of Silver *v.* Barnes was held inapplicable. Bechtold *v.* Behm, 26 Pa. St. 269. And while the nature of the relationship sustained by a building association is at the present time more correctly appreciated, the legal position then taken has not been abandoned. North American Bldg. Assoc. *v.* Sutton, 35 Pa. St. 463; Becket *v.* Uniontown Bldg. & L. Assoc., 88 Pa. St. 211.

In *Indiana* the premium was held not to be interest on money within the meaning of sec. 22, art. 4, of the constitution of Indiana, which prohibits, *inter alia*, the enactment of local or special laws on such subjects. McLaughlin *et al. v.* Citizens' Bldg. L. & S. Assoc., 62 Ind. 264; Shaffrey *v.* Workingmen's Sav. L. & B. Assoc., 64 Ind. 600.

In *Alabama*, *Pennsylvania*, *West Virginia*, *Connecticut*, *Iowa*, and *Ohio*, the statute under which the association was incorporated is the exact measure of the legitimacy and binding effect of the contract. Only under the statute can it be enforced, and only so far as it is in accordance with the statute. Montgomery Mutual Bldg. & L. Assoc. *v.* Robinson, 69 Ala. 413; 1 Am. & Eng. Corp. Cas. 403; Rhoads *v.* Hornerstown Bldg. Assoc., 82 Pa. St. 180; Link *v.* Germantown Bldg. Assoc., 89 Pa. St. 15; Pfeister *v.* Wheeling Bldg. Assoc., 19 W. Va. 676; Mechanics' & Workingmen's Mut. Sav. Bank & Bldg. Assoc. of New Haven *v.* Wilcox *et al.*, 24 Conn. 147; Hawkeye Ben. & L. Assoc. *v.* Blackburn, 48 Iowa, 385; Hagerman *et al. v.* Ohio Bldg. & Sav. Assoc., 25 Ohio St. 186.

In *Pennsylvania* unincorporated societies are not within the provisions of the act of 1859, and cannot recover upon their mortgages more than the sum actually advanced with legal interest. Jarrett *v.* Cope, 68 Pa. St. 67; Link *v.* Germantown Bldg. Assoc., 89 Pa. St. 15; Hansbury *v.* Pfeiffer, 12 Phila. 250. Nor do the provisions of this act apply to borrowers who are not members or who are not *sui juris*, and incapable of acquiring membership. Wolbach *v.* Lehigh Bldg. Assoc., 84 Pa. St. 211.

But this principle has not been extended to protect the husband of a married woman who joins with the wife in the deed and obtains the full benefit of the loan. Tanner's App., 95 Pa. St. 118.

In like manner it has been held in Connecticut that if a statute authorizes the receipt of a premium or bonus upon a loan to members, in addition to the legal rate of interest, such a loan is usurious, if made to a corporation incapable of becoming a stockholder or member. Mechanics' Bldg. Assoc. *v.* Meriden

6. General Powers.—Building associations possess all the attributes of corporations: (1) to maintain perpetual succession; (2) to have a common seal; (3) to sue and be sued in their corporate name;[1] (4) to contract, grant, and receive and hold real

Agency Company, 24 Conn. 159. Or if made to persons generally who are not members. St. Joseph, etc., Bldg. Assoc. *v.* Thompson, 19 Kan. 321.

A Maryland association incorporated under an act passed in 1868, ch. 427, directing the corporation "in all cases to deduct the interest and bonus or either of them in advance," added the premium to the face value of the loan and took a note and mortgage for the amount. It was held that the mortgages were liable only for the amount actually lent. "The privilege thus granted is a very unusual and extraordinary one, and no contract should be brought within its operation unless made and executed in strict conformity with the very terms of the law." Birmingham *v.* Md. Land & Perm. Homestead Assoc. of Balt. Co., 45 Md. 541.

What Charges are Deemed Usurious?—In general the clauses in acts of assembly authorizing the charging of certain rates of interest on the "loan" made by the association are to be construed as referring to the actual amount advanced after all deductions for premiums and otherwise have been made. Forest City, etc., Bldg. Assoc. *v.* Gallagher, 25 Ohio St. 208; Oak Cottage Bldg. Assoc. *v.* Eastman, 31 Md. 556; Balt. Perm. B. & L. Soc. *v.* Taylor, 41 Md. 409; Burlington Mut. L. Assoc. *v.* Heider, 55 Iowa, 424.

In many States, where premiums themselves may be taken, charging interest thereon is illegal. *Post*, § 10, PREMIUMS.

A stipulation that a new member shall pay a sum equal to all back dues up to time of joining society is just and reasonable, and in Maryland authorized by the act of 1868. Geiger *v.* Eighth German Bldg. Assoc., 58 Md. 569; Home Mut. Bldg. Assoc. *v.* Thursby, 58 Md. 284.

Stipulations for payment by borrower of incidental charges and expenses incurred about his loan are not usurious. Hoboken Bldg. Assoc. *v.* Martin, 2 Beas. (N. J.) 428.

Stipulations that the mortgagor shall pay conveyancing expenses, ground rent, taxes, and insurance will not render the loan usurious. Hanner *v.* Greenboro Bldg. & L. Assoc., 78 N. C. 188; Oberly *v.* Fayetteville Bldg. & L. Assoc., 81 N. C. 56; Robertson *v.* American Homestead Assoc., 10 Md. 397.

Rights of Borrower in Case of Usury.—In a case where the association is not entitled to the premium the borrower may set up usury as a defence. Citizens' Security & Land Co. *v.* Uhler, 48 Md. 516; Pattison *v.* Albany Bldg. & L. Assoc., 63 Ga. 373. Or may recover the amount paid beyond the sum actually advanced, with legal interest. Philanthropic Bld. Assoc. *v.* McKnight, 35 Pa. St. 470.

In *North Carolina* the borrower is held to be *in pari delicto* with the lender, and cannot recover back money paid. Latham *et ux. v.* Bldg. & L. Assoc., 77 N. C. 145.

The decision in North Carolina is contrary to the general principles applicable to the law of usury, founded upon a misapplication of the maxim *in pari delicto, potior est conditio defendentis*, and opposed to the course of authority. See Clarke *v.* Shee & Johnson, Cowp. (Eng.) 197, in which Lord Mansfield discusses the proper limitations to the application of the maxim, and also an able review of the course of decisions by Strong, J., in Philanthropic Bldg. Assoc. *v.* McKnight, 35 Pa. St. 470.

If the person entitled to set up the defence of usury allows the usurious claim to become merged in a judgment, it is then too late to set it up. Schnepf's App., 48 Pa. St. 37; Thatcher *v.* Gammon, 12 Mass. 268; Thompson *v.* Berry & Van Benthuysen, 3 Johns. Ch. (N. Y.) 395; Berry *v.* Thompson, 17 Johns. Rep. (N. Y.) 436.

The plea of usury apart from fraud must conform to the statute, where as a defence it has been made the subject of special legislation. Pattison *v.* Albany Bldg. & L. Assoc., 63 Ga. 373. See also, in this connection, Citizens' Security & Land Co. of Balt. City *v.* Uhler, 48 Md. 455; Md. Perm. Land & Bldg. Soc. of Baltimore *v.* Smith *et al.*, 41 Md. 516.

The personal character of the defence of usury applies to contracts by building associations. Thus it cannot be set up by one who purchases the mortgaged premises subject to the mortgage. Stein *v.* Indianapolis, etc., Assoc., 18 Ind. 237; People's, etc., Bldg. Assoc. *v.* Collins, 27 Conn. 142. Nor by one who for a full consideration assumes the payment of the mortgage. Burlington Mut. L. Assoc. *v.* Heider, 55 Iowa, 424.

1. **Suits by the Association against Bor.**

estate subject to the provisions of the governing statute on the subject; (5) to make by-laws. Whether any particular power is implied in the charter depends upon whether its exercise would be conducive to the accomplishment of the legislative intent in creating the corporation. Any act which tends to defeat the accomplishment of the object contemplated is necessarily unlawful; for "the person, whether natural or artificial, to whom a privilege is granted is bound, upon accepting it, to render to the public that service the performance of which was the inducement of the grant; and it is because of such obligation to render service to the public that the legislature has power to make the grant." [1]

rowing Members.—In a suit by a building association upon a bond given to it containing the usual special conditions and provisos that upon the failure to make certain payments for a certain length of time the whole principal, with interest, fines, etc., shall become at once recoverable, the ordinary averment that the sum stipulated with interest yet remains unpaid is inapplicable. The declaration (or, if the action be by *scire facias* upon the mortgage securing the bond, the writ which takes its place) must show upon its face an immediate cause of action. There must be a specific allegation that there was a failure to pay instalments beyond the stipulated period of grace, and that the principal sum, etc., has actually become recoverable. Swift *v.* Allegheny Bldg. & L. Assoc., 82 Pa. St. 142; Second American Bldg. Assoc. *v.* Platt *et al.*, 5 Duer (N. Y.), 675; Schaeffer *v.* Amicable Perm. Land & Loan Co. of Baltimore City, 47 Md. 126. But in the computation of the period fixed by charter or by-laws as the limit allowed before the whole debt becomes due, partial payments of dues, etc., are not to be counted. The period begins to run from the first day of the month next following the last month on which the dues, etc., were fully paid. Barndt *v.* Greul, 4 Leg. Gaz. (Pa.) 388; 1 Luz. L. Reg. 737; Endlich on Law of Bldg. Assoc., § 259.

The defendant, on his part, must distinctly aver that the payments have been made upon the claim in suit. The presumption is that they were made upon fines and dues. Selden *v.* Reliable Sav. & Bld. Assoc., 32 P. F. Smith (Pa.), 336.

It has been held, however, in *Indiana* that a complaint on a promissory note conditioned for the payment of assessments in a building association need not allege with particularity the method of making the assessments. Borchus *v.* Huntingdon Bldg., Loan, etc., Assoc., 97 Ind. 180.

Nor is it necessary for the association to exhibit copies of the by-laws and constitution in a complaint to foreclose a mortgage, nor if exhibited will they be considered part of the complaint. Newman *v.* Ligonier Bldg., Loan, etc., Assoc., 97 Ind. 295.

1. Gordon, etc., *v.* Winchester Bldg. & Accommodating Fund Assoc., 12 Bush (Ky.), 110.

In *West Virginia*, therefore, when the building-association law provides for incorporating homestead and building associations for the purpose of raising money to be used among the members in buying lots or houses or in building or repairing houses, and directs that the funds shall be used for no other purposes, it was held that if the corporation fails to see that money lent to a member is applied in buying lots or houses or in building or repairing houses, it forfeits its privilege of exemption from the usury law, but may enforce the payment of principal and legal interest but nothing more, although stipulated for, except reasonable fines for non-payment of dues. Pf. Feister *v.* Wheeling Bldg. Assoc., 19 W. Va. 676. In connection with the principle stated in the text see also Mills *et al.* *v.* Salisbury Bldg. & L. Assoc., 75 N. Car. 292; Latham and Wife *v.* Washington Bldg. & L. Assoc., 77 N. Car. 145; Martin *v.* Nashville Bldg. Assoc. *et al.*, 2 Cold. (Tenn.) 418; Mechanics & Workingmen's Mutual Savings Bank & Building Assoc. of New Haven *v.* Meriden Agency Co., 24 Conn. 159; Same *v.* Wilcox, 24 Conn. 147.

Implied Powers.—The general rule that a corporation may make any contract fairly within the purposes and objects of their incorporation except when prohibited by their charters or other statutes applies to building and loan associations, as also does the converse of the rule, that contracts of a corporation which are not within any of the powers expressly

or impliedly granted are *ultra vires*. Therefore an executory contract between a building association and one of its members in respect of shares claimed by him in his own right, and in excess of the maximum number which under the statute a member may hold in his own right, is *ultra vires*, and cannot be enforced. Simpson *v.* Bldg. Assoc., 38 Ohio St. 349.

But the fact that a member holds a greater number of shares than is allowed by the by-laws of the association, but not in excess of the number limited by statute, is no defence to a claim which the association may have against him on account of such shares. Hagerman *v.* Ohio Bldg. & Sav. Assoc., 25 Ohio St. 186.

Borrowing Money.—In *England* societies incorporated under the 6 & 7 Will. IV. c. 32 may have a limited power to borrow conferred upon them by constitution or by-law. Laing *v.* Reed, 21 L. T. N. S. 773; *Re* Victoria Perm. Bldg. Soc., 22 L. T. N. S. 777. In the absence of such special provision in the constitution or by-law no such power can be implied. *In re* National Perm. Bldg. Soc., 22 L. T. N. S. 284. If the power so conferred is unlimited, it is held to be inconsistent with the legislative intent in creating the corporation and void. *In re* Vict. Perm. Bldg. Soc., 22 L. T. N. S. 777. To render the association liable in any given case under such a rule its particular exercise must be clearly within its intendment. "Thus societies have powers of borrowing for the special purpose indicated by their constitution, if those purposes do not violate any principle of law; but those powers of borrowing can only be for those special purposes within those limits." Moye *v.* Sparrow, 22 L. T. N. S. 156.

In *America* the point does not seem to have arisen frequently. In *Maryland* notes signed and given by building associations to members instead of money, the members giving mortgages to the building associations for the proceeds of the notes, the same as if they had received money, have been enforced, and their capacity to borrow money with a view to accomplish the purposes of their incorporation expressly recognized. Davis *v.* West Saratoga Bldg. Union No. 3, 32 Md. 285. See also Canton National Bldg. Assoc. *v.* Weber, 34 Md. 669; Jackson *et al. v.* Myers *et al.*, 43 Md. 452; Muth *v.* Dolfield, 43 Md. 466.

In *Pennsylvania* and *Ohio* the power has been denied, but in the former State the point was not directly before the court, and in the latter the facts showed that the money was borrowed by the association partly with a view to trafficking in its own stock. Stiles's App., 9 W. N. C. (Pa.) 83; State *v.* Oberlin Bldg. & L. Assoc., 35 Ohio St. 258. See, in this connection, Faulkner's App., 11 W. N. C. (Pa.) 48; Endlich on Law of Bldg. Assoc., § 301 *et seq.* and Murray *v.* Scott, 9 App. Cas. (Eng.) 538.

Under no circumstances, either in the United States or in England, can the individual credit of members be pledged to lenders of money to the society, and a rule granting such power is *ultra vires*. *In re* Mut. Aid Perm. Ben. Bldg. Soc., 13 Am. & Eng. Cor. Cas. 638; L. R. 30 Ch. Div. 434.

In England it is held that even when the society is not authorized by its rules to borrow money, nevertheless if it has given the creditor deeds to its property as security for the loan, it cannot compel him to surrender the deeds without first tendering him the money lent. *Re* Durham Co. Bldg. Soc., 25 L. T. N. S. 83.

Investing in Real Estate.—In *England* a building society is not precluded from investing its surplus funds in the purchase of real estate. Mullock *v.* Jenkins, 14 Beav. 628; 21 L. J. Ch. 56. And where a rule of a building society directed that unemployed money should be invested "in such manner and upon such legal security" as the board of directors should deem necessary, it may be invested in freeholds. Grimes *v.* Harrison, 26 Beav. 435; 5 Jur. N. S. 528; 28 L. J. Ch. 823; 33 L. T. Rep. 115. *Compare In re* Kent Benefit Bldg. Soc., 30 L. J. Ch. 787; 4 L. T. N. S. 610; 7 Jur. N. S. 1045; 1 Dr. & Sm. 417; 9 W. R. 686; Lethbridge *v.* Kirkman, 25 L. J. Q. B. 89; 2 Jur. N. S. 372. See Caldwell *v.* Ernest, 28 L. J. Ch. 810; 27 Beav. 39. But this does not warrant the association in usurping the functions of a freehold land society. Grimes *v.* Harrison, 26 Beav. 435.

In *Pennsylvania* building and loan associations have no power to take or hold real estate beyond the limits fixed by statute. Miller's Estate, 2 Pearson (Pa.), 248; Rhoads *v.* Hornerstown Bldg. & Sav. Assoc., 82 Pa. St. 180. And debts contracted by them in the purchase of real estate cannot be enforced against them. Faulkner's App., 11 W. N. C. (Pa.) 48.

As to the general powers of building associations incorporated under the general law of *Alabama* to hold real estate and convey the same (not abridged by the act of 1870), see Cahall *v.* Citizens' Mut. Bldg. Assoc., 61 Ala. 232.

By the Code of *California*, §§ 640, 641,

7. Who are Members.—As in other corporations, membership in a building association is acquired by becoming the owner of stock, and any person who is capable of entering into a binding contract may become a member by subscribing to its stock.[1] In the absence of express statutory authority, neither infants nor married women can become members; and where the statute does permit such membership, the license without further authorization extends only to allowing the enabled individual or class of individuals to become investing or depositing members of the society, and, as such, subject to its rules and entitled to exercise the rights of membership.[2] It does not extend without express provision to that effect to an authority to borrow money, execute a valid security, or enter into any other contract with the association from which the subsisting inability, under the law, of the individual's condition would in the ordinary relations of life debar him.[3] Independent of express statutory authorization a corpora-

building societies may also exercise the functions of freehold land societies, and may hold real estate within $100,000 in value, at any one time, with a view to allotment to members.

Loans to Strangers and Persons not "sui juris."—It is said in *Pennsylvania* and *Ohio*, and seems to be the understanding in *Indiana*, *Kansas*, and *Massachusetts*, that a building association has power to lend its money to members only, and not to strangers. Wolbach *v.* Lehigh Bldg. Assoc., 84 Pa. St. 211, 217. See Stiles' App., 9 W. N. C. (Pa.) 83 (84); State *v.* Oberlin Bldg. & Loan Assoc., 35 Ohio St. 258; Poock *et al. v.* Lafayette Bldg. Assoc., 71 Ind. 357; St. Joseph & Kansas L. & Bldg. Assoc. *v.* Thompson *et al.*, 19 Kan. 321; Howard Mut. L. & Fund Assoc. *v.* McIntire, 3 Allen (Mass.), 571.

In *England* and *New Jersey* the right to lend to strangers is admitted. Cutbill *v.* Kingdom, 1 Exch. 494 (505); 17 L. J. Exch. 177; Union Bldg. L. Assoc., etc., *v.* Masonic Hall Assoc., 2 Stew. (N. J.) 389 (392).

In *Connecticut*, under the act of 1850, the power of loaning to strangers was expressly recognized. Mechanics & Workingmen's Mut. Sav. Bank & Bldg. Assoc. *v.* Wilcox *et al.*, 24 Conn. 159. This act allowed loaning to strangers when no members applied. But in all these cases the power has been expressly granted by statute, and where such is not the case the weight of authority is to hold the loan to outsiders unlawful. Endlich on Law of Bldg. Assoc., p. 312.

In *Indiana* the borrower was not permitted to defend against the building association, plaintiff, on the ground that it had exceeded its powers in loaning the money to one not a member. Poock *et al. v.* Lafayette Bldg. Assoc., 71 Ind. 357.

In *Pennsylvania* and *Kansas* the building association is allowed to recover from a borrower, not being a member, the amount loaned with interest. Wolbach *v.* Lehigh Bldg. Assoc., 84 Pa. St. 211; St. Joseph & Kansas L. & Bldg. Assoc. *v.* Thompson, 19 Kan. 321.

The principle appears to be that a building association can only lend to strangers when no member offering proper security applies for the loan, and that in making such loans the building association holds to the stranger the same relation as any other money-lender, and can recover only the principal and legal interest on the loan. Mechanics & Workingmen's Mut. Sav. Bank & Bldg. Assoc. of New Haven *v.* Wilcox, 24 Conn. 147; Same *v.* Meriden Agency Co., 24 Conn. 159; Wolbach *v.* Lehigh Bldg. Assoc., 84 Pa. St. 211, 217.

1. Endlich on Law of Bldg. Assoc. § 69; Davis on Law of Bldg., etc., Societies, p. 144.

2. A person *non sui juris* may withdraw the whole or any part of the investment if and when the rules of the society and the statutes governing them permit; he may give a valid discharge to the society for any sum so withdrawn. Endlich on Law of Bldg. Assoc. § 70.

3. Endlich on Law of Bldg. Assoc. § 70; Davis on Law of Bldg., etc., Societies, p. 144.

In *Maryland* the sale upon an infant's mortgage to a building association was set aside where there was no evidence that the infant had received any part of the money loaned, or that he was capable of perpetuating a gross fraud upon

tion cannot become a member.[1] An executor or administrator of a deceased member does not *ipso facto* become a member, nor will a suit brought by him to enforce a liability of the society to the decedent, or an attempt to avail himself of the privileges of membership, render him such. If, however, he takes advantage of a rule allowing him to become a member, and is recognized as a member by the association, the relationship is created.[2]

the association, and it being uncertain whether or not the mortgage was for his benefit. Monumental Bldg. Assoc., No. 2. of Baltimore City *v.* Herman *et al.*, 33 Md. 128.

In *Pennsylvania*, under the Building Association Act of 1859 and its supplements, where a married woman capable of mortgaging her separate estate, but incapable of contracting except where expressly empowered by statute, and only to the precise extent granted by such authorization, gave a mortgage to a building association to secure the repayment of a loan together with fines, premiums, and dues, the association could recover from her no more than the amount actually loaned, with legal interest, and that notwithstanding the money received by her was expended in the improvement of her separate estate. Wolbach *v.* Lehigh Bldg. Assoc., 84 Pa. St. 211; Bldg. Assoc. *v.* Rice and Wife, 8 W. N. C. (Pa.) 12.

Where, however, being capable of giving a mortgage upon her separate property to secure her husband's debts, she joins him in executing such a mortgage to secure a loan which her husband, as a stockholder, procured from a building association, it was held to be a valid mortgage upon her separate property, covering premiums, fines, and dues. Juniata Bldg. & L. Assoc. *v.* Mixell, 84 Pa. St. 313. See also Kingsessing Bldg. Assoc. *v.* Roan, 9 W. N. C. (Pa.) 15; Tanner's App., 95 Pa. St. 118; Hudson City Sav. Inst. *v.* McArthur *et al.*, 8 N. Y. Weekly Digest, 63.

As to the nature of a married woman's interest in a building association, see Davis on Law of Bldg., etc., Societies, p. 147, and note (u.)

1. This would seem to flow from the design of the creation of building associations. *Compare* § 1 *supra*; North American Bldg. Assoc. *v.* Sutton. And is in accord with the English decisions. Dobinson *v.* Hawkes, 16 Sim. (Eng.) 407.

2. This at least would appear to be the rule deducible from the only cases on the subject, and which both arose in England. The earliest case simply held that a claim by an administrator of an investing member on a policy of life insurance granted to the intestate by a society enrolled under the Friendly Societies Acts, 10 Geo. IV. c. 56 and 4 & 5 Will. IV. c. 40, is not a dispute "between the society and a member or a person claiming on account of a member" within the meaning of the 27th sec. of 10 Geo. IV., which requires such disputes to be determined by arbitration. "An administrator does not claim on account of a member but on his own account." Pollock, C. B., in Kelsall *v.* Tyler, 11 Exch. 513; 25 L. J. Exch. 153.

In the later case of Knox *v.* Shepherd, 2 L. T. N. S. 351, the 14th rule of the North London Ben. Bldg. Society provided that "in case of the death of any member his executors or administrators shall be entitled to his share or shares, and may vote and act in all cases whatever as fully as the deceased member whom they represent might have done if living." Another rule provided for the settlement of disputes between members and the society by arbitration. The administrator of a deceased member called at the office of the society and produced letters of administration granted to himself, and the deceased's club book showing his payments to the society in support of his title as administrator under the above rule, and from henceforth he acted and was treated by the society as the legal representative of the deceased. Subsequently he gave notice to withdraw the shares held in the society, and brought suit for fines and dues between the death of the deceased member and notice of withdrawal. It was held that, having taken advantage of the 14th rule, and having been treated by the society as a member, he could compel the society to arbitrate. "The society have adopted the defendant as a member, for they so treated him, for they fined him. The father paid everything up to his death, and this action is for sums accrued due since. The rule makes the administrator liable, but fines and subscriptions can be claimed from him only as a member. As an administrator he is not subject to the rules, but he has availed himself of them to come in and become a member.

One who gives a bond and mortgage to an association, reciting in the bond that he is a member thereof, and recognizing the obligation of the by-laws, is estopped to deny that he is a member in an action to foreclose the mortgage from the fact that he never signed the by-laws as required.[1] On the other hand, the receipt of payments on account of instalments due on the plaintiff's shares of stock after a full recovery on a mortgage given by him will estop the association from denying the existence of the stocks, and in consequence his membership.[2] In all dealings between the association and its members the stock book is *prima-facie* evidence of membership.[3]

8. Duties and Liabilities of Members.—Members of a building association are liable by virtue of their membership for (*a*) subscriptions, stock payments, or dues, for (*b*) fines and forfeitures, and for (*c*) contribution to the losses and necessary expenses of the organization.

(*a*) *Subscriptions, Stock Payments, or Dues.*—Subscriptions, stock payments, or dues may be defined as the fixed periodical contributions upon each share of stock held which by virtue of the original undertaking of membership in the society the holder thereof is liable to pay, whether he remain an investor or become a borrower.[4] The obligation to pay dues is contemporaneous with

and if he is a member the dispute must be settled by arbitration." Cockburn, C. J.

Mr. Endlich is of opinion that the cases are inconsistent, and no inference can be drawn from them save that an administrator or executor is not *ipso facto* a member. His statement of facts in the latter case is very meagre. Endlich on Bldg. Assoc., § 73, n.

Where the charter of an association provides that in the event of the death of a stockholder who has obtained an advance his heirs or legal representatives may continue the membership, the death of a member works a dissolution of his membership; and if the privilege is exercised, such persons become members not in a representative capacity, but in their own right. Montgomery Mutual B. & L. Assoc. *v.* Robinson, 69 Ala. 413; 1 American & Eng. Corp. Cas. 401.

1. Howard Mutual L., etc., Assoc. *v.* McIntire, 3 Allen (Mass.), 571. And the general principle is asserted that a person is estopped from denying membership for like reasons after he has acted for years as a member, claiming and enjoying all the privileges of such. Parker *v.* U. S. Bldg., etc., Assoc., 19 W. Va. 744 (766).

But when land is purchased subject to a deed of trust to the association, which the purchaser agreed to discharge by monthly payments equal in amount to those agreed to be paid by the stockholder, the association cannot treat the purchaser as a stockholder and credit the monthly payments accordingly. Capitol Hill Bldg. Assoc. *v.* Hilton, 1 Mackey (D. C.), 107.

2. North American Bld. Assoc. *v.* Sutton, 35 Pa. St. 463. But the acceptance must be clearly the act of the association. Card *v.* Carr, 1 C. B. N. S. 197; 26 L. J. C. P. 113. See *post*, § 12, n.

3. Dobinson *v.* Hawkes, 16 Sim. Eng.) 407; Bank of Commerce App., 73 Pa. St. 59; Assoc. *v.* Sendmeyer, 50 Pa. St. 67.

If an association should refuse to transfer shares on their books to a purchaser, he is not entitled to a *mandamus* to compel a transfer. State *ex rel.* Galbraith *v.* People's B. & L. Assoc., 43 N. J. L. 389. He has an adequate remedy in a suit for damages, and the measure of damages is the actual value of the stock at the time of the refusal. Germantown Union Bldg., etc., Assoc. *v.* Sendmeyer, 50 Pa. St. 67; North American Bldg. Assoc. *v.* Sutton, 35 Pa. St. 463. That is, the plaintiff is entitled to recover the amount paid on the stocks as dues, with interest thereon from the time of the several payments. North American Bldg. Assoc. *v.* Sutton, 35 Pa. St. 463.

4. Endlich on Bldg. Assoc. § 371.

membership in the society, arises from the inherent nature of the contract of membership, and ends only when membership ceases to exist. The undertaking is absolute;[1] the misbehavior of other members, their refusal to live up to their engagements, their persistent and deliberate default in the payment of dues, will not excuse similar conduct on the part of any particular one, nor relieve him of his liability to the association for his stipulated stock payments.[2] The association may maintain an action of *assumpsit* against a member for his dues,[3] and it is not necessary that it should give the member notice of his delinquency.[4] The statutes in the various States regulating building associations generally give them a lien upon the defaulting members' shares for the amount of the unpaid instalments and other charges and liabilities of membership.[5] The fact that a member has become a borrower in no wise affects his liability,[6] and it is customary to make his

1. This absolute liability, however, does not attach until, where the amount of capital stock is fixed and number of shares ascertained by the charter, the whole capital has been subscribed. Morrison *et al.*, Receivers Chesapeake Mut. L. & Bldg. Assoc., *v.* Dorsey, 48 Md. 461.

2. Endlich on Law of Bldg. Assoc. § 84; Hoboken Bldg. Assoc. *v.* Martin, 13 N. J. Eq. 427.

Defection may amount to dissolution. See Endlich on Law of Bldg. Assoc. §§ 496–503.

The obligation to pay dues cannot extend beyond the existence of the association. Kisterbock *v.* Bldg. Assoc., 7 Phila. (Pa.) 185; Endlich on Law of Bldg. Assoc. § 496 *et seq.*

If the affairs of an association are placed in the hands of a receiver upon its becoming incapable of performing its obligations to its stockholders, the obligation to pay dues ceases. Low Street Bldg. Assoc. *v.* Zueker, 48 Md. 448; Peter's Bldg. Assoc. *v.* Jaecksch, 51 Md. 198.

Where the association without the consent of the defendant resolved to close its affairs and practically suspended business, and the defendant thereupon refused to make further payments upon his loan, and an action was commenced by the association to foreclose the mortgage, it was held that, as the association had practically dissolved, further payments by the mortgagor could not be required. Waverly, etc., Bldg. Assoc. *v.* Buck, 14 Am. & Eng. Corp. Cas. 649.

The obligation to pay dues likewise ends on withdrawal, and the stock is cancelled. Miller *v.* Second Jefferson Bldg. Assoc., 50 Pa. St. 32. See also further, on this question when liability to pay dues and fines ceases, Cook *v.* Kent, 105 Mass. 246.

But the bringing of suit by the building association against a member does not relieve him from continuing his payments, or, upon neglect to do so, from exposing himself to the penalties resulting therefrom under the rules of the society. German Fair Hill Bldg. Assoc. *v.* Metzger, 3 W. N. C. (Pa.) 204; Union Bldg. L. Assoc. *v.* Masonic Hall Assoc., 2 Stew. (N. J.) 389.

3. Bldg. Assoc. *v.* Krebs, 7 Leg. & Ins. Repr. (Pa.) 21.

4. A statutory direction to corporations generally to give notice to members of calls upon unpaid subscriptions does not apply to a corporation under whose by-laws the subscribers to its stock are under a continuing requirement to pay a periodical instalment of a fixed amount on each share. Hence it has no application to a building association. Morris *et. al.*, Recrs. Chesapeake Mut. Land & Bldg. Assoc., *v.* Dorsey, 48 Md. 461.

5. Such right of lien, however, rests upon statute and not upon common law. Field Corp. § 310, cit. Union Bank *v.* Laird, 2 Wheat. (U. S.) 390; Rogers *v.* Huntington Bank, 13 S. & R. (Pa.) 77; Grant *v.* Mechanics' Bank, 15 S. & R. 140; Sewall *v.* Lancaster Bank, 17 S. & R. 285; Utica Bank *v.* Smalley, 2 Cow. (N. Y.) 770; Steamship Dock Co. *v.* Heron, 52 Pa. St. 280.

6. Having been subject to this liability in the former capacity of investor, he is not relieved from it by the fact of having incurred the additional obligation of a loan. Delano *v.* Wild, 6 Allen (Mass.), 1. A borrowing member still retains his membership. See *ante*, § 5 (n.). If there is any surplus of assets, it is even said he may come in for his share of it on

mortgage or deed of trust secure the payment of dues, fines, and other charges in addition to the interest on the amount actually advanced.[1]

(*b*) *Fines and Forfeitures.*—To secure the prompt payment of dues, fines are imposed upon delinquent members, and the members may even be made liable to forfeiture of stock. Fines may be defined as impositions in the nature of liquidated damages upon members neglecting to pay, at the proper time, to the society any moneys which are due to the latter from them;[2] they are essentially an incident to membership in the association, the direct outgrowth of the obligation, resting upon every shareholder, regularly and punctually to pay the dues accruing periodically upon his stock.[3]

The power to impose fines depends upon authority conferred by statute, and in the absence of such authority they cannot be enforced, and if paid by the borrower may be defalked from the amount due by him to the association.[4] Fines cannot be collected at all unless they are imposed by charter or by-law,[5] and when so

distribution. State *v.* Oberlin Bldg. & Loan Assoc., 35 Ohio St. 258.

1. Parker *v.* U. S. B., etc., Assoc., 19 W. Va. 744. Even after repayment of the loan, if the borrower still continues a member, the liability for subscriptions continues, and is secured by the mortgage. *Post*, § 11 (b).

During the continuance of the loan the subscriptions and interest upon the money advanced are usually consolidated, under the general term of *redemption money* or *dues*; what is said in this section simply applies to the member's liability for "dues" proper, or stock payments by virtue of his membership, and does not affect his liability for interest on the loan. The former is an incident of membership, the latter of the contract of loan. See, as to the relation of dues to interest, Endlich on Law of Bldg. Assoc., § 373 *et seq.*, and *post*, § 10.

2. Endlich on Bldg. Assoc. § 379.

Fines are not within the equitable doctrine concerning penalties, and are in the nature of liquidated damages. A member seeking to redeem a mortgage will be compelled to pay them, and they will be included in a decree of foreclosure. Parker *v.* Butcher, L. R. 3 Eq. 762, 36 L. J. Ch. 552; Provident Perm. B. Soc. *v.* Greenhill, L. R. 9 Ch. D. 122, 38 L. T. 140, 27 Week. Rep. 110; Shannon *v.* Howard Mut. Bldg. Assoc., 36 Md. 383.

The Supreme Court of California seems, however, to regard them as penalties. Occidental B. & L. Assoc. *v.* Sullivan, 62 Cal. 394.

And in Ocmulgee B. & L. Assoc. *v.* Thomson, 52 Ga. 427, it was said that the law will not enforce fines as such, but where they are slightly in excess of the actual injury caused by the default they are recoverable as stipulated damages.

In Mulloy *v.* Fifth Ward Bldg. Assoc., 2 McArthur (D. C.), 594, unreasonable fines were considered as penalties which would be relieved against.

The obligation to pay fines in case of default does not cease on filing a bill of foreclosure, but they are recoverable for the time which has elapsed since the filing of the bill. Union Bldg., etc., Assoc. *v.* Masonic Hall Assoc., 29 N. J. Eq. 389.

If a member obtains a loan from the association, not only may his mortgage or deed of trust be made to secure the payment of dues, but fines also. Hagerman *v.* Ohio Bldg. & Sav. Assoc., 25 Ohio St. 186; Parker *v.* U. S. Bldg. Assoc., 19 W. Va. 744; Pfeister *v.* Wheeling Assoc., 19 W. Va. 676; Juniata Bldg. & Sav. Assoc. *v.* Mixell, 84 Pa. St. 313.

3. Dues and fines are payable in cash, and the treasurer has no right, and cannot be authorized by the officers, to receive anything but cash in payment thereof. People's Bldg. & L. Assoc. *v.* Wroth *et al.*, 14 Vr. (N. J.) 70.

4. Lincoln Bldg. & Sav. Assoc., Appellee, *v.* Graham, Appellant, 7 Neb. 173; Same *v.* Benjamin & Benjamin, 7 Neb. 181; Jarrett *v.* Cope, 68 Pa. St. 167; Rhoads *v.* Hoernerstown Bldg. Assoc., 82 Pa. St. 180; Link *v.* Germantown Bldg. Assoc., 89 Pa. St. 15; Endlich on Law of Bldg. Assoc. § 405.

5. Building Assoc. *v.* Schuller, 3 W N. C. (Pa.) 431.

imposed they must be certain and notorious;[1] and if the by-law imposing them admit of several constructions, the court will adopt that most favorable to the member and least favorable to the association.[2] Fines must be reasonable;[3] a second fine cannot be imposed for non-payment of the same dues,[4] nor is interest chargeable upon fines;[5] and, lastly, fines must be imposed for derelictions in duties incident to membership.[6]

In addition to fines, the rules of every society establish a limit beyond which indulgence cannot be claimed by derelict members, by providing for the forfeiture of their shares, when that limit is exceeded; and such rules, not imposing too short a period of grace, have expressly, upon general principles of law, been held reasonable, and within the legal power of building associations.[7] As in the

1. Endlich on Law of Bldg. Assoc., § 407; Davis on Law of Building, etc., Societies, p. 32.

2. Where the rule was that "mortgagors neglecting to pay their monthly repayments will be subject to fines at the rate of three per cent per share for the first month, and for each and for every succeeding month threepence per share additional on such repayments," the association was allowed to collect only one fine of threepence on each share of the defaulting member. Tierney's Est., 9 Ir. Rep. Eq. 1; 8 Ir. L. T. Rep. 29. See also Shannon *v.* Howard Mut. Assoc. of the City of Baltimore, 36 Md. 383; Monumental Perm. Bldg. & Land Society of Baltimore *v.* Lewin, 38 Md. 445; Bldg. Assoc. *v.* Schuller, 3 W. N. C. (Pa.) 431.

3. Hagerman *v.* Ohio Bldg. & Sav. Assoc., 25 Ohio St. 186. A fine of ten cents a share where the par value is $150 and the dues twenty-five cents a week is reasonable. McGannon *v.* Central Bldg. Assoc., 19 W. Va. 726.

So fines at the rate of a shilling per pound per month are reasonable. Parker *v.* Butcher, L. R. 3 Eq. 762, 36 L. J. Ch. 552.

The proper measure of fines is the real damage the building association sustains from the failure of a member to pay his dues, which damage is really equal to interest upon the amount, together with the proportion coming to it from the then obtainable premiums upon the sale of money. The fine should be slightly in excess of this, so as to make it more profitable to the member to pay promptly than to lag behind. Endlich on Bldg. Assoc., § 413. *Compare* Ocmulgee Bldg. & L. Assoc. *v.* Thomson, 52 Ga. 427; Davis on Law of Building, etc., Societies, p. 165.

4. McGannon *v.* Central Bldg. Assoc., 19 W. Va. 726; Hagerman *v.* Ohio Bldg. & Sav. Assoc., 25 Ohio St. 186; Monumental, etc., Soc. *v.* Lewin, 38 Md. 445; Forest City, etc., Bldg. Assoc. *v.* Gallagher, 25 Ohio St. 208.

Without special mention fines cannot be imposed for default in payment of interest on loans. Hagerman *v.* Ohio Bldg. & Sav. Assoc., 25 Ohio St. 186; Forest City, etc., Bldg. Assoc. *v.* Gallagher, 25 Ohio St. 208; Shannon *v.* Mut. Bldg. Assoc., 36 Md. 383; Occidental Bldg. & L. Assoc. *v.* Sullivan, 62 Cal. 394.

Under the code of *West Virginia* an association has no right to impose such a fine. Parker *v.* U. S. Bldg., etc., Assoc., 19 W. Va. 744.

5. Ingolby *v.* Riley, 28 L. T. Rep. N. S. 55.

6. Endlich on Law of Bldg Assoc. § 414.

An authority given by statute to an association to impose fines upon its members does not authorize their imposition upon persons holding the relation of depositors merely. Hagerman *et al. v.* Ohio Bldg. & Sav. Assoc., 25 Ohio St. 186.

7. Card *v.* Carr, 1 C. B. N. S. 197; 26 L. J. C. P. 113; Endlich on Law of Bldg Assoc. § 99.

"Gross impropriety of conduct on the part of a member may also become the ground of forfeiture, when it is specifically and distinctly set forth as such in the charter or by-laws, or for which he is indictable by the laws of the land." Endlich on Law of Bldg. Assoc. § 100, citing Angell & Ames Corp. §§ 412–417.

But without an express power in the charter, a corporator cannot be disfranchised unless the offence affects the good government of the society or is indictable by the law of the land; therefore a by-law to expel a member for villifying any members of the association is void. Commonwealth *v.* St. Patrick Society, 2 Binn. (Pa.) 440.

case of fines, so in that of forfeitures it is necessary that the causes of their occurrence should be distinctly defined by by-law,[1] and the method of their enforcement, as there pointed out, must be exactly followed.[2] Nor does forfeiture ever take place until declared against a member by the society or its competent officers.[3] Hence it may be waived by implication by the society or its officers,[4] and its enforcement is at all times at the option of the directors.[5]

"Forfeiture of stock is necessarily forfeiture of membership, and *vice versa;* and when it takes place the obligation to continue the payment of dues, the consequence and necessary incident of membership, necessarily is at an end."[6]

(*c*) *Contribution to Losses and Expenses.*—Being equally entitled with all the others, in the direct ratio of his interest in the society, to share in the common gains of the enterprise, every member is liable to contribute in the same proportion in which he expects to profit, to the losses and expenses incident to its management.[7] He cannot evade such liability by a transfer of the stock without the consent of the association;[8] nor can he be allowed to with-

1. Butchers' Beneficial Assoc., No. 1, 38 Pa. St. 298.

The supreme court will not approve a charter of incorporation for a beneficial society which gives the majority of the association power to expel any member "guilty of any offence against the law." The expression is too general for the purpose of the association. Ben. Assoc. of Brotherly Unity, 38 Pa. St. 299.

2. Wachtel *v.* Noah Widows & Orphans' Ben. Soc., 11 N. Y. Week. Dig. 457; Com. *v.* Pennsylvania Ben. Inst., 2 Serg. & R. (Pa.) 141; Dlligent Fire Co. *v.* Comm., 75 Pa. St. 291.

3. Watkins *v.* Workingmen's Bldg. Assoc., 97 Pa. St. 514; Reg. *v.* D'Eyncourt, 116 Engl. C. L. Rep. (4 Best & Smith), 820.

4. North American Bldg. Assoc. *v.* Sutton, 35 Pa. St. 463.

5. Moore *v.* Rawlins, 6 C. B. N. S. 289.

6. Endlich on Bldg. Assoc., § 202; McCahan *v.* Columbia Bldg. Assoc. of East. Baltimore, No. 2, 40 Md. 226.

An association has no power to retire or cancel any part of the stock of a member against his will and without any default on his part, unless such power is reserved in the articles of incorporation. Bergman *v.* St. Paul Mut. Bldg. Assoc., 29 Minn. 275.

Accelerating Payments. — Intimately connected with the matter of forfeitures of stock on default of members is the question of accelerating payments for a like cause. A provision in a mortgage to secure an advance that in case of failure to pay the prescribed contributions, interest, dues, or fines, for a time specified, the whole sum advanced, together with all dues and fines owing by the mortgagor, shall be deemed due, and may be collected, is lawful, and a court of equity will not relieve against the consequences. Concordia Sav. & Aid. Assoc. *v.* Read, 93 N. Y. 474.

And where the mortgage contains a provision that in case of default the association might sell under the statute, and invest the overplus, if any, and draw for, and apply it from time to time as required to the payment of all accruing dues, fines, etc., until the determination of the association, the association is entitled, on judgment of foreclosure, to have a provision inserted directing the surplus to be invested accordingly. Franklin Bldg. Assoc. *v.* Mather, 4 Abb. Pr. (N. Y.) 274.

But a provision in a mortgage given to secure monthly instalments, that if default should be made "in the said monthly payment for the space of six months after they, or any of them, should become due," it should be lawful for the association to advertise and sell the mortgaged premises at public auction, according to statute, precludes the association from suing to foreclose the mortgage within the six months, as well as from proceeding under the statute. Second American Bldg. Assoc. *v.* Platt, 5 Duer (N. Y.), 675. See also Robertson *v.* American Homestead Assoc., 69 Am. Dec. 154.

7. McGrath *v.* Hamilton Sav. & L. Assoc., 44 Pa. St. 383.

8. Everhart *v.* West Chester R., 28 Pa. St. 339.

draw for the purpose of escaping his just proportion of the common burden.[1] Nor is his liability in any way affected by the fact that he has become a borrower, so long as he still continues a member. Having been subject to this liability in his former capacity of investor, he is not relieved from it by the fact that he has incurred the additional obligation of a loan.[2] If, however, on becoming a borrower his membership is relinquished,[3] he bears to the association the relation of debtor simply; and the same result obtains where a borrower withdraws in accordance with the rules of the association, pays off his loans, and has his stock marked "cancelled" and "withdrawn."[4] If the association be incorporated, as a general proposition the extent of a member's liability is his stock interest.[5] And if he is himself a creditor of the corporation he may set off his debt when sued by the association to enforce this statutory liability.[6]

9. Rights of Members.—The rights acquired by a member on joining the association, as incident to membership, are: (*a*) the right to continue a member of the organization until the latter has run its course, and to receive on winding up the par value of his stock; (*b*) the right to withdraw; (*c*) the right to receive a loan. Of these, the first has been sufficiently considered.[7]

1. McGrath *v.* Hamilton Sav. & L. Assoc., 44 Pa. St. 383; United States Bldg. & L. Assoc. *v.* Silverman, 85 Pa. St. 394; Wittman *v.* Bldg. Assoc., 7 W. N. C. (Pa.) 80.

An allegation in the association's affidavit of defence to a suit by a withdrawing member for a refusal to make the payment demanded by him upon statutory notice of withdrawal, that the association had, owing to the depreciation of real estate, sustained heavy losses, and incurred liabilities which should be paid before the stockholders were permitted to withdraw, is insufficient unless it set forth losses incurred before the plaintiff's withdrawal. United States Bldg. & Loan Assoc. *v.* Silverman, 85 Pa. St. 394.

Such an allegation is a defence to the extent of the withdrawing member's proportionate share of the expenses of the association incurred prior to acceptance of the notice of withdrawal, and that sum can be deducted from the amount otherwise coming to him. Whether or not he would be liable for losses incurred between the time of acceptance of notice of withdrawal and actual withdrawal by payment of "bonus" and cancellation of stock would depend upon the status of withdrawing members; as to which see *post*, THE RIGHT TO WITHDRAW.

A building association has the right to retain from the withdrawing stockholders their proportion of *probable loss* sustained by reason of the purchase of real estate sold under its mortgage, which had depreciated, even before the loss has been finally determined by the sale of the real estate, where it is evident there will be a loss. The society may have the property appraised by a committee, and fix the loss and assess the same on each share of stock *pro rata*. Knoblauch *v.* Robert Blum Bldg. & L. Assoc., No. 2, 8 Pitts. Leg. Jur. N. S. 39; Paffert *v.* Same, 8 Pitts. Leg. Jur. N. S. 40. See also Endlich on Law of Bldg. Assoc. § 105.

2. McGrath *v.* Hamilton Sav. & Loan Assoc., 44 Pa. St. 383; Pattison *v.* Albany Bldg. & Loan Assoc., 63 Ga. 373.

3. Bowker *v.* Mill River, etc., Assoc., 7 Allen (Mass.), 100.

4. Miller *v.* Jefferson Bldg. Assoc., 50 Pa. St. 32.

So, after a shareholder has redeemed his stock, he cannot participate in the profits of the business thereafter. Overby *v.* Fayetteville Bldg. & Loan Assoc., 81 N. Car. 56.

5. State Sav. Assoc. *v.* Kellogg, 63 Mo. 540.

6. Remington *v.* King, 11 Abb. Pr. (N. Y.) 278.

7. As to the right to continue a member of the organization, see the article on AMOTION, vol. 1, p. 557.

As to the right of a member to receive the par value of his stock on winding up, see *ante*, §§ 4, 5.

The Right to Withdraw.—Inasmuch as a member's relation to the association is essentially that of one of a partnership for a definite period of time, entitled upon its expiration to the profits upon his investments in the enterprise, his failure to continue in the concern is in the nature of a breach of contract, upon which the loss of his previous contributions might not unnaturally be held to follow. To avoid such contingency, therefore, a provision, as politic in the interest of the building association as just and reasonable to its members, is usually made an integral part of the scheme, that a member desiring to withdraw shall be allowed to do so, with the privilege of receiving from the society the amount paid in by way of subscription (after deducting all fines and charges against him), together with such share of the profits of the association as may appear just and warranted by its business.[1] The right thus obtained is founded upon statute, charter, or by-law; it is a privilege reserved, not a duty imposed; if the member elect to exercise it he must comply with the terms prescribed.[2] To obtain the advantage of withdrawal, notice, if required, must be given.[3] If, however, the right is secured by statute, all provisions as to the matter in a charter, granted by the courts, or in a by-law of the association itself, if inconsistent with the provisions of the statute, are invalid;[4] and where by the rules of the association the grounds of withdrawal are to be submitted for the approval of a board of trustees or directors, such officers cannot withhold their approval without resonable cause.[5] In construing a by-law relative to withdrawal, the court will lean towards that construction most favorable to the members;[6] and where a

1. Endlich on Law of Bldg. Assoc. § 127.

2. Security Loan Assoc. *v.* Lake, 1 Am. & Eng. Corp. Cas. 418; 69 Ala. 456.

3. Hartford Coöperative Mut. Homestead Co., 128 Mass. 494.

4. Rhoads *v.* Hornerstown Bldg. & Sav. Assoc., 82 Pa. St. 180; Miller *v.* Jefferson Bldg. Assoc., 50 Pa. St. 32.

5. Wetterwulgh *v.* Knickerbocker Bldg. Assoc., 2 Bos. (N. Y.) 381. In this case the rules of the association provided that if any member, by reason of sickness, removal from the city, or misfortune, were unable to continue his subscriptions, he should give notice of his intention to withdraw; and in case the board of trustees were satisfied as to the grounds of withdrawal, the whole amount of subscriptions paid in by the member should be returned to him A member gave notice in due form of his intention to withdraw on the ground that he was "no longer able to continue the payment of his subscriptions to the association, owing to various misfortunes, losses in business, sickness in his family, and the rigor of the times." The approval of the trustees being withheld, suit was brought by the member against the society. It was held that he must be permitted to prove the truth of his alleged grounds of withdrawal, which were set forth in his complaint and denied in the building association's answer, and that if he proved upon these grounds his total inability to continue his subscriptions, and that there was nothing in the pecuniary circumstances of the building association furnishing any reason why the money paid into it should not be returned, he might recover it back, although the board of trustees may not have declared themselves satisfied as to the grounds of his withdrawal. The trustees, it was said, could not withhold their consent arbitrarily when no ground existed or could be suggested for their so doing.

6. Thus, the by-laws of an association provided that "in case any member by reason of sickness, removal, or through misfortune is unable to continue the payment of his subscription, he may give notice to the secretary of an intention to withdraw from the association, and in case the directors are satisfied as to the

by-law is favorable to a member, and he has acted on the strength thereof, the association is estopped from abrogating the rule, and cannot set up that it is *ultra vires.*[1] One who has become a borrower and whose stock is in pledge cannot withdraw until he redeems his stock by repayment or tender of the amount due.[2]

The right to withdraw does not entitle the member to an account of profits,[3] but merely to a sum equal to subscriptions paid in, less all fines and legal charges, and to such proportionate amount of the profits as the by-laws may declare.[4] Acceptance of notice of withdrawal terminates membership in the association; the member at once assumes the position of a creditor, and may recover the amount due in *assumpsit*, but the judgment and execution will be controlled by the court as justice and right may require.[5]

grounds of withdrawal his whole amount of subscription shall be returned except the entrance fee," and that "any person wishing to withdraw for the above reason or otherwise," and who shall have been a member for a certain length of time "and be clear of the books," shall be entitled to a certain interest on that amount. It was held that any person having been a member for the time specified, and being "clear of the books," might withdraw without leave of the directors, and was entitled to the benefits set forth in the by-laws. The requirement of the director's approval applied only to those who wished to withdraw for the reasons given in the by-laws and had not been members for the specified time. Fuller *v.* Salem & Danvers Loan & Fund Assoc., 10 Gray (Mass.), 94; Endlich on Law of Bldg. Assoc., § 135.

1 Miller *v.* Jefferson Bldg. Assoc., 50 Pa. St. 32; Hoboken Bldg. Assoc. *v.* Martin, 2 Beas. (N. J.) 428.

2. Watkins *v.* Workingman's Bldg. & Loan Assoc., 97 Pa. St. 514; Laurel Run Bldg. Assoc. *v.* Sperring, 15 W. N. C. (Pa.) 340; Anderson Bldg. Loan Fund & Sav. Assoc. *v.* Thompson, 4 Am. & Eng. Corp. Cas. 196; 88 Ind. Rep. 445; Endlich on Law of Bldg. Assoc. § 151 *et seq.* See also Barry on Law of Bldg. Assoc. § 26; Pabst *v.* Trustees, etc., of Economical Bldg. Assoc., 1 McArthur, 385.

Under the act of 1859 a stockholder cannot withdraw after the stock has reached par, and the association exists only for purposes of liquidation. The only object of such withdrawal is to gain the right to sue immediately for the value of the stock. This would be gaining an unfair advantage, which the law does not favor. Laurel Run Bldg. Assoc. *v.* Sperring, 15 W. N. C. (Pa.) 340.

3. Such right would be inconsistent with the nature of the relationship subsisting between a building association and its members, and the difficulty of estimating the sum to which the member would be entitled amounts to a practical impossibility. Endlich Law of Bldg. Assoc., § 128 *et seq.*; Citizens' Mut. Loan & Accumulating Fund Assoc. *v.* Webster, 25 Barb. (N. Y.) 263; Watkins *v.* Workingman's Bldg. & Loan Assoc., 97 Pa. St 514.

4. This is the simplest way of making the estimate; and in Pennsylvania has been prescribed by the act of April 12, 1859, P. D. 183. United States Bldg. Assoc. *v.* Silverman, 85 Pa. St. 394; Endlich Law of Bldg. Assoc., § 130.

Where, as formerly in *Connecticut*, the shares of a building association are a regular feature in the stock market, and have an ascertainable value by reason of that fact, the difficulty is readily removed. Babcock *v.* Middlesex Sav. Bank & Bldg. Assoc., 28 Conn. 302.

If the charter provides that on the death of a stockholder his legal representatives might receive the net value of his stock, a statement in the bank-book of the decedent of the computed value of his stock, made by the treasurer of the association, is not conclusive upon it. Babcock *v.* Middlesex, etc., Bldg. Assoc., 28 Conn. 302.

5. United States Bldg. & Loan Assoc. *v.* Silverman, 85 Pa. St. 394; O'Rourke *v.* W. Penn. Loan & Bldg. Assoc., 93 Pa. St. 308; Wetterwulgh *v.* Knickerbocker Bldg. Assoc., 2 Bosw. (N. Y.) 381; Hennighausen *v.* Fischer, 50 Md. 583.

A member may recover the amount due him by *assumpsit*, using the common counts. Haigh *v.* United States Bldg. etc., Assoc., 19 W. Va. 792.

Status of Withdrawing Member.—A member who has perfected his right to

withdraw by complying in all respects with the requirements of the governing statute is not estopped by a proviso that at no time shall more than one half the funds in the treasury be applied to the demands of withdrawing stockholders, from bringing suit for the recovery of the amount due, until the treasury has funds sufficient to meet his claim. To hold otherwise, it was said, would enable the association to defraud the member of all benefit from his right of withdrawal by keeping itself in a state of *quasi* insolvency. The proviso merely intended that the operations of the society should not be embarrassed by having the whole amount of its cash assets taken in order at once to pay the withdrawing stockholders; and this object is amply served by enabling the court to restrain the plaintiffs' execution in order to give the building association a reasonable time to raise the money without undue derangement of its affairs. United States Bldg. Assoc. *v.* Silverman, 85 Pa. St. 394; Nat., etc., Bldg. Assoc. *v.* Hubley, 34 Leg. Int. (Pa.) 6.

As to liability of withdrawing stockholder for his proportion of losses sustained prior to notice of withdrawal, see Wiltman *v.* Concordia Bldg. Assoc., 7 W. N. C. (Pa.) 80, and *ante*, § 8 (*c*).

He is not liable for dues subsequently accruing. Miller *v.* Jefferson Bldg. Assoc., 50 Pa. St. 32.

Nor is a member bound by new rules after he has given notice of an intention to withdraw. Armitage *v.* Walker, 26 L. T. 182; 2 Jur. N. S. 13; 2 Kay & J. 211.

In *England* the theory that a withdrawing stockholder, who has complied with all the prescribed requirements, assumes the position of a creditor, is consistently carried out. Thus, when a society was ordered to be wound up, and it appeared that the assets were sufficient to pay the outside creditors, but not sufficient to pay the investing members in full, it was held that the investing members who had given notice of withdrawal before the commencement of the winding up, but had not been repaid, were entitled to be paid next to the outside creditors, and in priority to those who had given no notice of withdrawal. *In re* Blackburn & Dist. Ben. Bldg. Soc., 4 Am. & Eng. Corp. Cas. 182; Eng. L. Rep. 24 Ch. D. 421. Affirmed in Walton *v.* Edge by the House of Lords, Nov. 1, 1884, 52 L. T. N. S. 666.

In *Pennsylvania*, on the other hand, it has been held that a withdrawing stockholder who held a withdrawal order from the treasurer of the association for the withdrawal value of his stock was not a creditor within the meaning of the assignment laws governing assignments for the benefit of creditors, and was not entitled to any priority over other members. "While, in a qualified sense withdrawing stockholders may be considered creditors of the association, their rights as against those with whom they have been associated are very different from those of general creditors whose claims are based wholly on outside transactions. If the association has been prosperous, they have a right under certain limitations and restrictions to demand and receive their proportionate share of the accumulated fund. But if bad investments have been made, or losses have been sustained before actual withdrawal, they must bear their just proportion thereof. That right, it was held in United States Bldg & Loan Assoc. *v.* Silverman, 4 Nor. (Pa.) 394. may be enforced by appropriate proceedings at law; but the right of withdrawal and the extent to which it may be exercised presupposes that at least a relative proportion of the assets will remain for the benefit of those who continue to be active members of the association. After expenses, incident to the administration of its assets, are deducted, the general creditors, if any, should be first paid in full, and the residue of the fund should be distributed among those whose claims are based upon the stock of the association, whether they have withdrawn and hold orders for the withdrawal value of their stock, or not. Both classes are equally meritorious, and in marshalling the assets neither is entitled to priority over the other. The claims of each are alike based upon their relation to the association as members thereof. Orders issued to withdrawing stockholders are merely evidence of their interest in the assets remaining after paying general creditors." Sterrett, J., in Christian's App., 102 Pa. St. 188, 189. See also *In re* Estate of Natl. Sav., L. & Bldg. Assoc., 9 W. N. C. (Pa.) 79; Chriswell's App., 100 Pa. St. 488.

Suits by Stockholders against the Association.—A withdrawing stockholder in a building association can only recover the withdrawal value of his stock under the constitution and by-laws of the association, and not its par value, even though it has matured. After the maturity of the stock, a stockholder is entitled not to the matured value of the stock, but to an equal division of the assets, less expenses and losses. Laurel Run Bldg. Assoc. *v.* Sperring, 15 W. N. C. (Pa.) 340.

Right to Receive a Loan.—The right to receive a loan is an essential incident of membership, and arises from the nature and objects of the association.[1] An association having funds cannot refuse to lend them to its members in good standing offering proper security.[2] The power to lend money to members when not expressly conferred by statute or charter may be implied from the general objects of the association.[3] If a statute confer express power to lend money to shareholders upon such terms and conditions as may be prescribed by the by-laws, a loan made not as

Nor in *Pennsylvania* can a member obtain judgment against the association, for want of an affidavit of defence, for the value of his shares merely upon the strength of the report of auditors that the shares were at par, and before a meeting has been convened to wind up and make distribution. Britton *v.* American Bldg. & L. Assoc., 12 Phila. Rep. (Pa.) 430. Nor does the report of auditors fixing the value of the shares entitle a withdrawing member to a judgment to that amount for want of an affidavit of defence, the value of the shares being liable to a deduction. Love *v.* Bldg. & L. Assoc., 11 W. N. C. (Pa.) 303.

Building associations form no exception to the general principle that a stockholder *qua* stockholder cannot sue the corporation. If he is not content to await the winding up of the concern, his course is to withdraw and bring suit as a withdrawing stockholder. O'Rourke *v.* W. Penna. Loan & Bldg. Assoc., 93 Pa. St. 308. "It is, however, a right belonging to every member of a building association, by virtue of his membership, in a proper case, and under proper circumstances, to invoke the jurisdiction of a court of equity to wind up the society, and thus compel a settlement." Endlich Law of Bldg. Assoc., § 145. See also, *post*, § 13; Mutual Bldg. & L. Assoc. *v.* Archbold, 4 East, Rep. 338; Arling *v.* Kenton Bldg. & Sav. Assoc., 26 Am. Law Reg. 273; Seibel *v.* Bldg. Assoc., 2 N. East. Rep. 417; Mechanics & Workingmen's Bldg. Assoc. *v.* Monroe, 6 Cent. Repr. (S. C. Pa.) 580. (Decided Jan. 17, 1887.)

To such a bill it has been said that all the shareholders, or at least all the delinquent shareholders, should be made parties. Cason *v.* Seldner, 77 Va. 293; Arling *v.* Kenton Bldg. & Sav. Assoc., 26 Am. Law Reg. (S. C. Ky.) 273. *Compare post*, § 13.

1. As to the general nature of this right, see §§ 4. 5.

Under the *West Virginia* Homestead and Building Association Act it is held to be incumbent upon the association to see that the money loaned is expended in purchasing real estate or in building or repairing houses. Pfeister *v.* Wheeling Bridge Co., 19 W. Va. 676. In *England*, *Pennsylvania*, and *Ohio* no such necessity exists. Cutbill *v.* Kingdom, 1 Exch. 494, 17 L. J. Exch. 177; Juniata Bldg. & Loan Assoc. *v.* Mixell, 84 Pa. St. 313; Johnston *v.* Elizabeth Bldg. & Loan Assoc., 14 W. N. C. 247; Hagerman *v.* Ohio Bldg. & Sav. Assoc., 25 Ohio St. 186.

2. State *v.* Oberlin Bldg. & Loan Assoc., 35 Ohio St. 258.

Under a by-law providing that "each stockholder, not in arrears, for each $200 worth of stock he may hold in this corporation be entitled to receive a loan of $200 of stock from its funds at 6 per cent interest," a stockholder not in arrears is entitled to a loan as a matter of right. Bergman *v.* St. Paul Mut. Bldg. Assoc., 12 N.W. Repr. 122; 29 Minn. 282. Defective title to the property offered as security is, however, always good ground for refusal. Conway *v.* Log Cabin Perm. Bldg. Assoc., 52 Md. 136.

3. Thus the object of an association as stated in the act of incorporation was "the accumulation of a fund by small monthly instalments, to enable its members to purchase real estate, erect buildings, redeem mortgages, satisfy ground rents, loan money, pay taxes, and effect other similar purposes." It was claimed on behalf of the defendant that the charter did not confer power upon the corporation to loan money; that it had authority only to accumulate funds by small monthly instalments; that by the terms of the charter it was the members and not the corporation who were enabled to "build houses," etc. But the court held otherwise: "What was the fund accumulated for? To enable its members to do certain things specified in the charter. How could it enable them to do these things? By loaning them money from its accumulated fund. By fair implication, it was one of the purposes of the

prescribed in the by-laws is not *ultra vires*.[1] But a shareholder bidding off a loan put up at auction cannot compel the association to lend him the money if it subsequently refuses to do so.[2]

10. Loans and their Incidents.—The general nature of a building-association loan has already been sufficiently considered.[3] Incident to every such loan are (1) stock payments or dues; (2) interest; (3) fines; (4) premiums; and (5) security.

Stock Payments or Dues are properly an incident of membership, and can only be deemed incident to the loan in so far as the security is conditioned upon their continued payment.[4]

Interest is so much an ordinary incident to a loan, that the authority to loan implies the right to take it.[5] It must be of the legal rate, and in the absence of express statutory sanction cannot be charged upon more than the amount actually advanced.[6] The interest reserved by a building association upon an advance to one

charter, and one of the powers intended to be conferred upon the company by it, to loan its accumulated fund to its members." Massey *v.* Citizens' Bldg. & Sav. Assoc. of Paola, 22 Kan. 624.

1. On suit to foreclose a building-association mortgage, defendant's counsel proposed to show by the evidence that the loan was not in accord with the by-laws of the association. *Held*, immaterial and irrelevant. "The lending of money to shareholders on mortgages of real estate, on such terms and conditions as may be prescribed by the by-laws, is one of the express powers conferred upon building and loan associations. Code of, 1876, § 1943, subd. 5. The loan to appellant may have been in conformity to, or may have been in contravention of, the by-laws of the association, but it was not *ultra vires*. By-laws of a corporation are not enforced by avoiding contracts made in violation of them." Kelly *v.* Mobile Bldg. & Loan Assoc., 64 Ala. 503. See also Agg. & Ames Corp. § 262.

2. Conklin *v.* People's, etc., Assoc., 12 Am. & Eng. Corp. Cas. 240.

Equity will not enforce specifically a contract to loan or pay money, the reason being that there is always in such cases an adequate remedy at law by suit for damages for breach of contract. Rogers *v.* Challis, 27 Beav. 175; Larios *v.* Garety, L. R. 5 P. C. 346. Nor, on the other hand, can *assumpsit* be maintained against the associations for the money: "We have failed to see any principle upon which an action like this can be supported. The appellant is not entitled to the money claimed as his absolutely; his only claim, to say the most, is solely as a temporary loan. How and in what form could a judgment be entered so as properly to limit the time for which the money sought to be recovered is to be held by the plaintiff? The judgment could only be for a sum certain, and would finally settle and determine what amount belonged to the plaintiff. It would be conclusive upon the parties, and would as a necessary consequence estop the defendant from setting up afterwards that the money so received was loaned to the plaintiff. We are clear that this action cannot be maintained. The remedy of the appellant might be by an action on the case for breach of contract, but certainly cannot be on *assumpsit*." Conway *v.* Log Cabin Perm. Bldg. Assoc., 52 Md. 136.

3. See MUTUALITY, *ante*, § 5.

4. STOCK PAYMENTS, *ante*, § 8 (*a*).

5. Endlich on Law of Bldg. Assoc. § 374.

6. *Post*, § 10. PREMIUMS.

It follows from the doctrine that payments upon stock are not payments upon the loan (which is a necessary consequence of the fact that stock payments are incident to membership); that is, that payments of dues are not intended to be applied as soon as made *ipso facto*, as partial payments to the *pro tanto* extinguishment of the debt, but are paid as the capital of the company, and paid alike by those who do and those who do not take loans; that the figure upon which the interest is to be paid, and hence the amount of the interest itself, does not vary from the time of taking the loan until it is finally discharged, and that consequently the reservation of an unvarying amount of interest for the whole period of the loan, whilst at the same time the borrower's stock payments are going on, is not usurious. Endlich on Law of Bldg. Assoc. § 374; Citizens' Mutual L. & Accumulating

of its members ceases when it is reimbursed for the advance.[1] In many building associations interest upon the loan and stock payments are consolidated under the name of "redemption money" or "dues," and form but a single payment.[2] When the "dues" have been so united by the by-laws, their subdivision for the purpose of imposing separate fines for the non-payment of each is improper.[3]

Fines may be imposed for non-payment of either subscriptions or interest.[4]

Premiums. — "The premium is a bonus charged to a stockholder wishing to borrow, for the privilege of anticipating the ultimate value of his stock, by obtaining the immediate use of the money his stock will be worth at the winding up."[5] It is in effect the conventional difference between the par value of the share advanced and the amount actually received by the borrower. It is not a cash payment which he is obliged to make upon obtaining his preference; nor can it properly be said to be a deduction made at the time from any money belonging to him.[6] It is

Fund Assoc. *v.* Webster *et al.*, 25 Barb. (N. Y.) 263; City Bldg. & L. Co. *v.* Fatty, 1 Abb. App. Dec. (N.Y.) 347; Red Bank Assoc *v.* Patterson, 12 C. E. Greene (N. J.). 223

Payments on account of interest are usually made monthly or weekly according to the rules of the society. Endlich on Law of Bldg. Assoc. § 374.

1. Endlich on Law of Bldg. Assoc. § 375, and cases cited.

2. "The dues per share of an investing member being a certain fixed amount per week or per month, these dues, it is said, become increased by another fixed amount per week or per month after he has received his advancement, and usually this additional payment is the amount for a week or a month of the interest, at the legal rate, either upon the nominal par value of the share advanced, or upon the amount actually received by the borrower." Endlich on Law of Bldg. Assoc. § 373.

3. Shannon *v.* Howard Mutual Bldg. Assoc. of Baltimore, 36 Md. 383. See also Hanner *et al. v.* Greensboro Bldg. & L. Assoc., 78 N. Car. 188; *Ex parte* Osborne; *In re* Goldsmith, L. R. 10 Ch. App. 41; Clarkville Bldg. & L. Assoc. *v.* Stephens, 11 C. E. Gr. (N. J.) 351; Delano *v.* Wild, 6 Allen (Mass.), 1.

4. Parker *v.* Butcher, L. R. 3 Eq. 762; 36 L. J. Ch. 552.

In *Ohio* fines are not allowed upon default in payment of interest on the loan, because, it is said, the object of fines being to reach the member in his relation as member, the statute did not contemplate exposing him under the same clause to additional and separate penalties, in a character which is distinct from that of membership, viz., debtor. Hagerman *et al. v.* Ohio Bldg. & Sav. Assoc., 25 Ohio St. 186; Forest City United L. & Bldg. Assoc. *v.* Gallagher *et al.*, 25 Ohio St. 208.

Were the advancement by a building association a mere loan, and the payment of interest a mere consideration for the forbearance of that loan, this reasoning might be held to be decisive. But its force is materially diminished when it is remembered that the transaction is not one of loan merely, and that when the advancement is taken the payment of interest or its equivalent, is just as much a duty belonging to membership as the payment of dues. Endlich on Law of Bldg. Assoc. § 415. All that has been said as to the payment of premiums (*ante*, § 5) applies equally to the payment of interest.

5. Wrigley, The Workingman's Way to Wealth, p. 67

6. Endlich on Law of Bldg. Assoc. § 388.

The borrower sells the future dividend upon his shares at a discount; the society its funds at a premium; but there is neither a transfer of money to the society to cover the premium, nor a deduction from anything belonging to the borrower to liquidate the debt. The taking of a prepayment on the part of the society would undoubtedly be beyond what the legislature contemplated, and therefore usurious. Nor can it be regarded as an actual deduction of money, either belonging to him, in the hands of the society, or which he was entitled to receive

in substance the pecuniary standard by which the value, to the member who obtains the loan, of the preference over other members seeking the same, is determined.[1] Since, however, in offering its money to borrowers, the society adopts as the basis of its loan the par value of its stock for purposes of computation, the premium must be treated as a deduction,[2] and must ordinarily be

from it. At the time when he received the loan, he had as yet nothing in the society but a prospective interest in its final accumulations, in proportion to the number of his shares. These are, to be sure, estimated at a certain figure. They may, however, never reach it; they may, indeed, exceed it; but, for the present, there is no basis for a deduction—no certain figure describing an amount which belonged to him, or which he was entitled at the time to receive. Hence it was said by Paxon, J., in Watkins *v.* Workingmen's Bldg. & L. Assoc., 97 Pa. St. 514, in answer to a claim by the defendant in a judgment which had been given by him as borrower, to a building association, and which embraced the whole debt—principal, premium, and interest: "It is a mistake to suppose, as was claimed by the defendant, that he has paid the premium. He only promised to pay it. It was inserted in the judgment note, and is now being collected."

In Low Street Building Association No. 6 *v.* Zueker, 48 Md. 448, the transaction is thus described: "The association proposes to sell to the shareholder the right of presently receiving the fixed value of the shares upon being allowed a certain deduction from the amount, commonly called a bonus, it being in fact a deduction made at the time, and the shares thus discounted or redeemed are to be paid for by the continuance of the subscriptions, and the payment of weekly dues, and fines, if any incurred, until the required amount shall be raised to pay each unredeemed shareholder the fixed value of his shares in full." Mr. Endlich holds this description to be inaccurate. "It is not 'the right of presently receiving the fixed value of the shares' which the society sells, subject to any deduction upon that value, but the right of anticipating that fixed value by receiving what, in the borrower's opinion, may presently be equal to that future dividend. The difference between these two values, the premium, he promises to make up in raising his share, for the benefit of all the members of the society, to its par value. When that is accomplished, the society absorbs the whole, and then only is the premium paid." Endlich on Law of Bldg. Assoc. § 390, n. (1).

1. See §§ 5, 6.

2. But it is apparent that this is a rule of computation merely necessitated by the fact that a member is ordinarily entitled to incur liabilities to the association not exceeding, in the whole, the par value of the shares he holds in the stock. Now, if it were attempted to add the premium he bids to the par value of such shares, his debt to the association would be clearly in excess of what is lawfully allowable. In other words, if the member holding five shares in the society, of a prospective aggregate value of $1000, be, under the law and rules of the society, entitled to receive a "loan" of that amount and not beyond; and in competing for the advance, if he be accepted, upon the offer of a premium of $50 per share, then his whole debt or loan, not being permitted to exceed $1000, it is evident that to ascertain the amount he is entitled to receive, the sum of $250 must be deducted from $1000. If it were added to $1000, the borrower actually receiving that amount, instead of $750, his debt would be $1250, i.e., $250 in excess of what it lawfully may be. He would therefore be obliged to make up to the society such an amount as would eventually render his shares worth $250 more than their fixed value, according to the value fixed for all the shares; whereas the manifest intention of the legislature, and the very nature and operation of the building association scheme, is to balance, upon final settlement, the par value of the shares standing to the borrower's credit, and which have been advanced against his indebtedness, so that the one shall cancel the other. Wrigley, The Workingman's Way to Wealth, p. 67; Endlich on Law of Bldg. Assoc., § 391.

An association incorporated under the Maryland Act of 1868, c. 427, which authorizes premiums and interest, or either, to be "deducted in advance," has no right to add the premium to the face value of the loan, taking a mortgage for the whole amount repayable in monthly instalments for 120 consecutive months, of $10.41⅔ dues, and of $6.25 for interest and bonus; and that a contract so made not being in conformity with the statute was usurious, and could be enforced only for

a gross amount per share, not merely increased interest.[1] The amount of the premium must be determined by full, fair, and open competition. A premium enhanced by fraud, express or implied, can neither be charged nor retained,[2] and on the same principle it is improper for the association to fix arbitrarily a certain figure as the lowest premium at which it will entertain a bid.[3] But the mere existence of the rule in the association will not enable the borrower to evade his obligation, unless his particular obligation has been affected by it.[4] In the absence of express statutory sanction, interest cannot be charged upon the premium.[5]

the amount actually received and lawful interest thereon. Birmingham *et al. v.* Maryland L. & Perm. Homestead Assoc., 45 Md. 541.

1. The statute, unless it declares otherwise or permits other methods, means a definite sum for the whole period of the loan, and not anything whatever which the parties, in their contract, may choose to denominate a bonus or premium. Endlich on Law of Bldg. Assoc. § 393; Mechanics & Workingmen's Mut. Sav. Bank & Bldg. Assoc. of New Haven *v.* Wilcox *et al.*, 24 Conn. 147; Same *v.* Meriden Agency Co., 24 Conn. 159.

The ground of these decisions is that while the borrower may be able to foresee the consequences of a contract to pay a gross sum in addition to the legal interest on the debt, he may not be able to foresee the effect of a contract to pay fifteen or twenty per cent per annum for the loan so long as it continues, and from an accumulation of the debt at that rate he has no means of rescuing himself except by the repayment of the debt with the accumulated interest. Nevertheless the practice of requiring the borrower to pay the premium in monthly instalments, instead of deducting the amount from the face of the loan, is by no means uncommon in Pennsylvania. This practice would appear to be entirely illegal, although it has not as yet been the subject of judicial construction. Wrigley, The Workingman's Way to Wealth, p. 71; Endlich on Law of Bldg. Assoc. §§ 392, 393.

2. Orangeville Mutual Sav. Fund & L. Assoc. *v.* Young, 9 W. N. C. (Pa.) 251.

3. "They" (i.e., building associations), says Sharswood, C. J., in Stiles's App., 9 W. N. C. (Pa.) 83, "are bound to offer all that is in the treasury to open competition, so that the members may obtain the loan at a low premium if there should be no bid at a higher. The practical operation of such institutions is, that whenever the member procures a loan, at a premium below the average of the premiums for the whole time the association has to make, he is to that extent a gainer; when his loan is at a premium higher than the average, he is to that extent a loser. This is a most valuable feature in such associations, and hence the importance of maintaining the principle of free competition in the bids. When the member is told that there is a minimum below which loans will not be made, he must offer that amount for the loan, whether any other one offers or not. If no offer to that amount is made, the money remains in the treasury without investment. It is evident in this way the members who are not borrowers will obtain a very undue advantage over the members who are borrowers. These institutions are liable, like everything else human, to abuse, and are bound to guard them carefully from being perverted into mere contrivances by which capitalists can evade the laws of usury. So the legislature evidently intended they should be by the act.

"When there is little or no competition, and a member bids a merely nominal premium for the preference, and there is no higher bid by any other member or depositor, he is entitled to the loan at such nominal premium, and the board of directors cannot refuse it, if sufficient security is properly tendered." Gilmore, C. J., in State *v.* Greenville Bldg. & Sav. Assoc., 29 Ohio St. 92. See also State *v.* Oberlin Bldg. & L. Assoc., 35 Ohio St. 258.

If, as appear, upon analysis of the transaction, the only ground upon which the charge of the premium can be justified is that it is the price paid by the member obtaining the loan for the preference over other bidders, it would appear that charging a premium, in the absence of competition, or other than that determined by competition, is entirely unwarranted. *Compare* §§ 4, 5.

4. Orangeville Mutual Sav. Fund & Loan Assoc. *v.* Young, 9 W. N. C. (Pa.) 251.

5. Charging interest upon the premium

It is, of course, within the discretion of the building association to allow abatements, discounts, or remissions upon the premium bid by any applicant for a loan under the specified conditions.[1] To compromise with its borrowing members, and, at all events, when the compromise has taken effect, the society is not in a position to dispute the validity of the arrangement.[2]

Security.—The power to loan money implies the power to take adequate security for the repayment of the loan,[3] and in the absence of express requirement in the statute or charter that the security taken shall be such and no other, building and loan associations have power to loan money on the same security as individuals, notwithstanding their usual mode is to require the borrower to assign their own stock as collateral to his mortgage.[4]

has been expressly held unlawful and essentially usurious in Maryland, Ohio, Iowa, Kentucky, and Tennessee. Williar *v.* Butchers' L. & Annuity Assoc., 45 Md. 546; Geiger *v.* Eighth German Bldg. Assoc., 58 Md. 569; Forest City United Land & Bldg. Assoc. *v.* Gallagher *et al.*, 25 Ohio St. 208; Risk *v.* Delphos Bldg. & Sav. Assoc., 31 Ohio St. 517; Burlington Mutual Loan Assoc. *v.* Heider *et al.*, 55 Iowa, 424; Hawkeye Ben. & L. Assoc. *v.* Blackburn, 48 Iowa, 385; Gordon, etc., *v.* Winchester Bldg. & Accumulating Fund Assoc., 12 Bush (Ky.), 110; Martin *v.* Nashville Bldg. Assoc., 2 Cold. (Tenn.) 418.

In *Pennsylvania* it is authorized by statute and held valid. See acts 12th April, 1859; 29th April, 1874; 7th June, 1879; Assoc. *v.* Neurath, 2 W. N. C. (Pa.) 95; Bldg. Assoc. *v.* George, 3 W. N. C. 239; Selden *v.* Reliable Sav. & Bldg. Assoc., 32 P. F. Smith, 336.

1. Such is the custom in *Pennsylvania:* "Where a member has simply paid dues on a certain series of stock, without borrowing, for one or more years, and then borrows, an allowance of ten per cent is made upon the premium bid (the rate it is believed most usual) for each year that has expired since the series of stock on which he borrows was issued. For instance, were he to borrow on a series of stock at any time during the running of the second year of its existence, say at thirty per cent, he would be allowed a deduction at ten per cent off the premium, thus reducing the premium to twenty-seven per cent. If the stock is in its third year, twenty per cent will be deducted, reducing the premium to twenty-four per cent. If it is in its sixth year, five-tenths of fifty per cent will be deducted, reducing the premium to fifteen per cent. This is manifestly a just and reasonable provision, as it would be unfair to charge one as much premium for the use of money borrowed in the second, third, or fifth year of a series, as is charged one borrowing during the first year, and who would then have the use of the money during the entire running of the series." Wrigley, The Workingman's Way to Wealth, pp. 73, 74.

Upon repayment of the loan previous to its maturity, such remissions or discounts may become obligatory upon the association under the statutes or under the provisions of its own by-laws. Endlich on Law of Bldg. Assoc. § 400. See *post*, § 11 (*a*).

2. Miller *v.* Jefferson Bldg. Assoc., 50 Pa. St. 32.

Such measures, even if *ultra vires*, come strictly within the principle that even unauthorized measures affecting only the interests of stockholders may be sanctioned and made operative by unanimous consent. Kent *v.* Quicksilver Mining Co., 78 N. Y. 159.

3. Thus when an association is authorized to loan money, but its charter does not expressly authorize it to take a mortgage or other security, it will nevertheless have power by implication to take a mortgage. Massey *v.* Citizens' Bldg. Assoc., 22 Kan. 624.

4. Union Bldg. L. Assoc. *v.* Masonic Hall Assoc., 29 N. J. Eq. 389; 2 Stew. (N. J.) 389.

The borrower at any sale cannot evade his obligation by showing a deviation from the rule governing the society, nor will any equities arise therefrom as against the building association in favor of other encumbrancers. Mut. Life Ins. Co. *v.* Wilcox, 7 N. Y. Weekly Dig. 13; Union Bldg. L. Assoc. of New Brunswick *v.* Masonic Hall Assoc., 2 Stew. (N. J.) 389.

Where the by-laws of an association provide that borrowers from it "shall

The mortgage or deed of trust of a third person may be taken to secure a loan to a member:[1] and a wife having power to mortgage her separate property for the debt of her husband may give a mortgage to a building association to secure a loan made to him,[2] and in either case the mortgage will stand for the full extent of the undertaking, including interest, fines, dues, and charges.[3] In such case the association is under no obligation to notify the third person of the member's default.[4]

11. Mortgages.—A mortgage taken by a building association is security for the payment of money only within the statute,[5] and operative only so far as authorized by it, and by the by-laws of the association, and in conformity therewith. No reservation, therefore, not contemplated in statute or by law can be enforced.[6]

The bond and mortgage or trust deed given by the borrower evidence the terms of the contract, and cannot subsequently be varied without his consent.[7] There are three principal classes of building association mortgages: (1) That in which the condition calls for regular stock payments of fixed amounts and performance of membership duties and liabilities generally, together with the

secure the repayment of the said loan with legal interest by satisfactory bond or mortgage upon real estate," the officers of the association have power to take both securities. Juniata Bldg. & L. Assoc. *v.* Hetzel, 103 Pa. St. 507. For a case where the contract was held to be in legal effect a mortgage although in form a lease, see Mobile Bldg. & L. Assoc. *v.* Robertson, 65 Ala. 382.

A building association having authority to make loans and provide for the security of the same on real estate, has as an incident thereto the right to provide for insuring the property taken as security. Chicago Bldg. Soc. *v.* Crowell, 65 Ill. 453.

1. Massey *v.* Citizens' Bldg., etc., Assoc., 22 Kan. 624; Relief, etc., Assoc. *v.* Longshore, 8 Luz. Lg. Reg. (Pa.) 199; Pfeister *v.* Wheeling Bldg. Assoc. 19 W. Va. 676.

2. Juniata Bldg. & L. Assoc. *v.* Mixell, 84 Pa. St. 313.

3. Pfeister *v.* Wheeling Bldg. Assoc., 19 W. Va. 676; Juniata Bldg. & L. Assoc. *v.* Mixell, 84 Pa. St. 313.

4. Pfeister *v.* Wheeling Bldg. Assoc., 19 W. Va. 676.

5. Franklin Bldg. Assoc. *v.* Mather, 4 Abb. Pr. (N. Y.) 274.

6. Shannon *v.* Howard Mut Bldg. Assoc. of City of Baltimore, 36 Md. 383; Hagerman *et al. v.* Ohio Bldg. & Sav. Assoc., 25 Ohio, 186.

Hence where a building association was incorporated by special act, its charter authorizing it to grant loans at a premium, taking mortgages from the borrowers for the payment of instalments to the end of the society's running, together with fines and interest on the par value of the shares advanced; a mortgage so written as to include the sum actually advanced, and making it repayable with interest from date, in case any default should be made by the borrower in the payments undertaken by him, was held to be *prima facie* in violation of the constitution of the association. Smith and Wife *v.* Mechanics' Bldg. & L. Assoc., 73 N. Car. 372. See also Baltimore Perm. Bldg. & Land Soc. *v.* Taylor, 41 Md. 409; Birmingham *et al. v.* Maryland Land & Perm. Homestead Assoc., 45 Md. 541; Bldg. Assoc. *v.* Schuller, 3 W. N. C. (Pa.) 431.

"It may be laid down, therefore, as a rule, that where the statute or charter under which a building association is incorporated defines the formal conditions and covenants which may be embodied in the mortgage, with a view to attaining the results contemplated by the act, these details must be strictly and technically followed out. Where, however, the statute and charter make provision merely for the results to be worked out by the scheme, a greater latitude obtains, and every form of mortgage or security which secures that result may be adopted by the association." Endlich on Law of Bldg. Assoc. § 420.

7. If these terms are to pay monthly instalments and interest on the sum borrowed, and he is not in default, he cannot be required to pay a sum *in solido*. Cason *v.* Seldner, 77 Va. 293.

payment of redemption money or interest on the amount advanced (being frequently lumped together with stock payments under the name of dues) to the end of the society's existence; (2) that in which in addition the sum advanced is made repayable; (3) that in which the nominal amount of the loan, the par value of the shares advanced, thus including the premium, is made payable, with interest (upon that whole sum or only upon the actual advance, accordingly as the statute may sanction the one or the other), stock payments, etc., being stipulated as in the other cases. It is the stipulation for the payment of dues and the discharge of membership duties which constitutes the *differentia* of the building association mortgage, every legitimate form of which presents it as the essential peculiarity; but the class in which the stipulation is simply for dues, etc., without any superfluous adjuncts concerning repayments, is to be regarded as the proper type of building association mortgages. There is at bottom no difference between them, and the same principles with very slight and obvious modifications apply to all.[1] In case these stipulations for the payment of dues and interest are not complied with by the mortgagor, there is a provision inserted for the foreclosure of the mortgage and sale of the encumbered property.[2] In such case the ordinary course of procedure in equity is to take a preliminary account of the actual arrears and charges[3] standing against the borrower up to that time of the decree, deducting the credits to

1. In the first form the obligation is for the payment of dues, etc., solely; in the second, "the obligation . . . is nominally for the repayment of the loan, but particularly for the payment of *monthly dues* on the stock, and the *legal interest* on the loan until the association is able to divide, to each share of stock held by the members, the sum of two hundred dollars (or whatever the par value of the shares may be), and when this result is reached, as the association would owe a borrower on five shares of stock $1000, and the borrower would also owe the association $1000, one debt cancels the other." Wrigley, Workingman's Way to Wealth, p. 67.

The third differs from the second only in the fact that interest may be charged upon the premium bid, as well as on the sum actually advanced, which in no wise affects the nature of the transaction. Endlich on Law of Bldg. Assoc. §§ 421, 422.

On the face of it, such a mortgage secures the payment of a series of small sums during an indefinite period of time. Yet though the time during which the payments are to be made is not specified, there is a contingency stated in the mortgage, on the happening of which the payments are to cease; and its duration may be ascertained by proof, or approximated with as much certainty and exactness as the duration of a mortgage securing an annuity for the life of a person. The mortgage is, therefore, not void for uncertainty, but a valid mortgage in law. Nor, though being for the payment of such trifling sums, does it fall under the operation of the principle *de minimis non curat lex*, but it is properly within the jurisdiction of a court of chancery. Endlich on Law of Bldg. Assoc. § 424, citing Merrill *v.* McIntire, 13 Gray (Mass.), 157; Franklin Bldg. Assoc. *v.* Mather, 4 Abb. Pr. (N. Y.) 274; Robertson *v.* American Homestead Assoc., 10 Md. 397; Winchester Bldg. Assoc. *v.* Gilbert, 23 Gratt. (Va.) 787.

2. As to the disposition of the surplus upon such sale, see Franklin Bldg. Assoc. *v.* Mather, 4 Abb. Pr. (N. Y.) 274; Winchester Bldg. Assoc. *v.* Gilbert, 23 Gratt. (Va.) 787; Seagrave *v.* Pope, 15 Eng. L. & Eq. Rep. 477.

A building association is entitled to a foreclosure of mortgages to members, although the deeds and rules contain only powers of sale in case of default. Ingolby *v.* Riley, 28 L. T. Rep. N. S. 55.

3. These charges consist of the items enumerated in the mortgage, monthly interest, weekly instalments, fines,

which the borrower is entitled. If he pays the amount thus found, the sale will be prevented, and the decree will stand against him as security for future payments.[1] If he refuses or neglects to pay them, the sale must take place, and the premises mortgaged will be discharged of the encumbrance.[2]

(*a*) *Rule for Ascertaining the Amount Presently Due upon Mortgage in Case of Foreclosure or Voluntary Redemption.*—The rule, as laid down in England, requires the probable or possible duration of the society to be approximated by proof, and the aggregate of all the dues—or redemption money—stipulated for in the mortgage to be calculated as they would accrue during that period, and the whole amount, thus found, to be charged against the member as a present debt immediately due, in addition to all arrearages and fines.[3] In America the rule is substantially the same except that, when the interest is lumped with stock payments as in England, there is a rebatement of interest for the time between the repayment of the loan and the estimated termination of the society, so that the society will not recover interest after that which bears interest, the loan, has been returned to its hands.[4] The rule ap-

ground rents, taxes, insurance, costs, etc., if any such be in arrear. Endlich on Law of Bldg. Assoc. § 428.

1. Robertson *v.* American Homestead Assoc., 10 Md. 397; Hagerman *et al. v.* Ohio Bldg. & Sav. Assoc., 25 Ohio St. 186; Risk *v.* Delphos Bldg. & Sav. Assoc., 31 Ohio St. 517. See also Somerset County Bldg. L. & Sav. Assoc. *v.* Vandervere, 3 Stock. (N. J.) 383; Citizens' Mutual L. & Accumulating Fund Assoc. *v.* Webster, 25 Barb. (N. Y.) 263; Endlich on Law of Bldg. Assoc. §§ 176, 177, 428.

2. Endlich on Law of Bldg. Assoc. § 428.

3. Endlich on Law of Bldg. Assoc. §§ 154–157, 158–164, 427; Fleming *v.* Self, 3 DeG. M. & G. 997; 1 Jur. N. S. 25; 24 L. J. Ch. 29; 3 Week. Rep. 89; Smith *v.* Pilkington, 1 DeG. F. & J. 120; 4 Jur. N. S. 58; 29 L. J. Ch. 227; Mosley *v.* Baker, 6 Hare, 87; 12 Jur. 551; 17 L. J. Ch. 257; affirmed on app., 13 Jur. 8, 17; 18 L. J. Ch. 457; 3 DeG. M. & G. 1032; Seagrave *v.* Pope, 1 DeG. M. & G. 783; 15 Eng. L. & Eq. 477; Archer *v.* Harrison, 7 DeG. M. & G. 404; 3 Jur. N. S. 194; 29 L. J. 71; Matterson *v.* Elderfield, L. R. 4 Ch. App. 207; 20 L. T. Rep. N. S. 504; 17 Week. Rep. 422; Farmer *v.* Smith, 4 H. & N. 196; 5 Jur. N. S. 533; 28 L. J. Exch. 226; Sparrow *v.* Farmer, 26 Beav. 511; 5 Jur. N. S. 530; 28 L. J. Ch. 537; 33 L. T. 216; Handley *v.* Farmer, 29 Beav. 362.

The position that no rebatement in interest can be allowed for the premature redemption of the debt is a legitimate consequence of the assumption that the transaction between the society and the borrower has nothing in it of the nature of a loan; but even American courts, which adopt the English theory of the building-association loan, feel obliged to repudiate this logical result of the doctrine. Endlich on Law of Bldg. Assoc. § 375, n. (3).

For discussion of English theory, see *ante*, MUTUALITY.

4. Endlich on Law of Bldg. Assoc. §§ 154–157, 375, 376, 427. For a case in which the same rule was applied in England, under the construction placed upon the rules of a permanent society, see *Ex parte* Osborne, *in re* Goldsmith, Law Rep. 10 Ch. App. 41.

In Robertson *v.* American Homestead Assoc., 10 Md. 397, 69 Amer. Decisions, 150, the leading case in the United States, the rule is thus stated: Ascertain the probable duration of the association, then estimate the probable amount of the interest and dues for that time, rebating from that sum a just sum for interest, and adding thereto the arrearages due, after allowing for payments made to the association.

In *Ohio* the same principle seems to be expressed in the rule thus laid down: Ascertain by proof the probable duration of the corporation, and calculate the dues and interest yet to come; then find the principal, which, with the interest for the supposed time, will amount to the dues and interest already calculated; this will be the present value of the anticipated pay-

plies equally to the case of a foreclosure or a redemption, the only difference being that in the latter a withdrawing borrower is entitled to the "bonus," or proportionate share of the profits allowed by the governing statute or the by-laws of the association.[1]

ments; to this principal add the arrearages due, and the fines for the time between the date of default and the entry of the decree of sale, and the sum will be the present value of the mortgage. Cincinnati German Bldg. Assoc., No. 3, *v.* Flach *et al*, 1 Rep. (Cinc. Sup. Ct.) 468; approved in Hagerman *et al. v.* Ohio Bldg. & Sav. Assoc., 25 Ohio St. 186. See also Risk *v.* Delphos Bldg. & S. Assoc., 31 Ohio St. 517; Licking County Sav., etc., Assoc. *v.* Beheels, Admr., 29 Ohio St. 252.

The rule as stated in the leading *Maryland* case has been approved in Oak Cottage Bldg. Assoc. *v.* Eastman, 31 Md. 559; Shannon *v.* Howard Mutual Bldg. Assoc., 36 Md. 383; Lister *v.* Log Cabin Bldg. Assoc., 38 Md. 115; McCahan *v.* Columbian Bldg. Assoc., 40 Md. 226; Hennighausen & Wolf, Recrs., *v.* Tischer, 50 Md. 583; Border State Perpetual Bldg. Assoc. *v.* McCarthy, 57 Md. 555.

The rule has been approved, recognized, or referred to in the following: Knell *v.* Green St. Bldg. Assoc., 34 Md. 72; Low St. Bldg. Assoc. *v.* Zucker, 48 Md. 452; Home Mutual Bldg. Assoc. *v.* Thursby, 58 Md. 288. See also Hoboken Bldg. Assoc. *v.* Martin, 2 Beas. (N. J.) 428; Somerset County Bldg. L. & Sav. Assoc. *v.* Vandervere, 3 Stock. (N. J.) 382; Mechanics' Bldg. & L. Assoc. of New Brunswick *v.* Conover, 1 McCart. (N. J.) 219 (not reversed in this particular in 2 C. E. Gr. 497); City Bldg. & L. Co. *v.* Fatty, 1 Abb. App. Dec. (N.Y.) 347; Citizens' Mutual Loan & Accumulating Fund Assoc. *v.* Webster, 25 Barb. (N. Y.) 263; Winchester Bldg. Assoc. *v.* Gilbert *et al*, 23 Gratt. (Va.) 787; Richards *v.* Bibb County Loan Assoc., 24 Ga. 198.

In Ocmulgee Bldg. & L. Assoc. *v.* Thomson, 52 Ga. 427, the borrower was compelled to pay back the money received, with such an advance as would enable the company, at the lower or higher rates prevailing, to get the same monthly interest upon it as he ought to pay at the same rates he got it at. See also Pattison *v.* Albany Bldg. & L. Assoc., 63 Ga. 373.

In Hoskins *v.* Mechanics' Bldg. & L. Assoc., 84 N. Car. 838, the rule of settlement indicated a basis of a mere loan and subsequent partial payments. *Compare* Overby & Wife *v.* Fayetteville Bldg. & L. Assoc., 81 N. Car. 56.

In *Kansas* the transaction is regarded as a mere loan, and the rule in the text is held inapplicable. Hekelnkaemper *v.* German Bldg. & Sav. Assoc., 22 Kan. 549; Glynn *et al. v.* Home Bldg. Assoc., 22 Kan. 746.

In *Pennsylvania* the leading case of Watkins *v.* Workingmen's Bldg. & L. Assoc. of Hyde Park, 97 Pa. St. 514, so far as it relates to voluntary repayments proceeds upon the provisions of the statute, and as for the rest, treats the transaction as a loan which must be repaid, but to which the borrower may apply his stock payments already made.

In *Alabama* the transaction is viewed as a loan, and all payments made by or for the mortgagor, except his contributions as a member of the association, are applied first to the reimbursement of the expenses incurred by the association in the conservation of the property held as security, and when these expenses are satisfied and the interest extinguished, if a surplus remain, it is applied to the reduction of the principal. Mutual Loan Assoc. *v.* Robinson, 69 Ala. 413; s. c., 1 Am. & Eng. Corp. Cas. 403. *Compare* Security Loan Assoc. *v.* Lake, 69 Ala. 456; s. c., 1 Am. & Eng. Corp. Cas. 418.

Where an association is prematurely dissolved, and the mortgages of members foreclosed, in determining the amount due, the mortgagors should be allowed not only for the sums paid by them as dues, but also for what they paid as interest, while they are to be charged interest on the sums advanced by the association, and so from time to time on the balance of such sums, after deducting therefrom the money paid by them for dues and interest. Windsor *v.* Baudel, 40 Md. 172. See also Low Street Bldg. Assoc. *v.* Zucker, 48 Md. 448; Hampstead Bldg. Assoc. *v.* King, 58 Md. 279; Waverly, etc., Bldg. Assoc. *v.* Buck, 3 East. Rep. (S. C. Md.) 137; Goodrich *v.* City Loan & Bldg. Assoc. 54 Ga 98.

A shareholder can set off, as against the amount due by him to the association under the mortgage, claims held by him against it, consisting of balances due from the association to members who had withdrawn from the association and assigned by them to the mortgagee. Hennighausen *v.* Tischer, 50 Md. 583.

1. The repayment of the loan at any period intermediate between the time of

In ascertaining the amount due it has been held that the court is bound by the terms of the mortgage and cannot look beyond the articles of association, unless the latter are so referred to in the instrument as to make them a part of the mortgage or call the court's attention to them.[1] But the rule is not to be so extended as to preclude the court from examining the articles of association for the purpose of determining when the mortgage contract terminated.[2]

taking it and the time of the ultimate squaring of accounts upon the expiration of the society or series is not contemplated by the contract. Seagrave *v.* Pope, 22 L. J. Ch. 258.

It is a privilege granted, not a duty imposed; and if the borrower elect to exercise it, he must comply with the conditions prescribed. Security Loan Assoc. *v.* Lake, 1 Am. & Eng. Corp. Cas. 418; s. c., 69 Ala. 456; Shannon *v.* Howard Mutual Bldg. Assoc. of Baltimore, 36 Md. 383.

On the other hand, the rights in respect of repayment or redemption which at the time of obtaining the loan are secured to the borrower by the rule then in force become part of his contract and cannot be subsequently varied without his consent. *In re* Norwich & Norfolk Provident Bldg. Soc., Smith's Case, 1 L. R. Ch. Div. 481, 45 L. J. Ch. Div. 143, 24 W. R. 103.

In construing provisions regulating the right and terms of repayment, the courts favor the borrower. Oak Cottage Bldg. Assoc. *v.* Eastman, 31 Md. 556. See *ante*, BY-LAWS

Therefore, in striking the account between the association and a borrowing member wishing to redeem and withdraw, the latter is to be credited only with his actual payments on account of stock and interest, and not with any of the profits thereon (unless special statutory enactments or the by-laws of the society allow him some share of the profits). For the profits the society is accountable only on dissolution, and then only to those who have persevered in its membership. Endlich on Law of Bldg. Assoc. § 156 *et seq.* See also note to WITHDRAWAL, *ante*, § 9 (*b*); also Watkins *v.* Workingmen's Bldg. Assoc., 97 Pa. St. 514; Mechanics' Bldg. & L. Assoc. of New Brunswick *v.* Conover, 1 McCart. (N. J.), 219 (not disturbed in this respect in 2 C. E. Gr. 497).

Nevertheless, it is said that where such "bonus," benefit, or rebate is not provided by statute or by law, a member thus repaying to obtain his discharge from the society is entitled to the same proportion of bonus as is conceded to withdrawing members. Endlich on Law of Bldg. Assoc. § 430. See also Flemming *v.* Self, 18 J. P. 296, 23 L. T. 63; Kay, 518. On appeal, 24 L. T. 101.

And this extends to the reduction of redemption moneys paid in by the borrower. Smith *v.* Pilkington, 4 Jur. N. S. 58; 30 L. T. 196; s. c. on app., 29 L. J. Ch. 227; 1 DeG. F. & J. 120.

And where a mortgage given by a member of a building association to it becomes divested and repayable, in consequence of a judicial sale of the mortgaged premises upon the member's decease, it has been held upon the principle *actus legis neminem in juriat*, that the association is bound to make the same allowances upon the mortgage as if the member had elected to pay off the loan and withdraw. Sindel's Est., 34 Leg. Int. (Pa. 49.

The cases which define the rights of repaying borrowers most clearly, and which are the leading authorities upon this point, arose in England: Mosley *v.* Baker, 12 Jur. 551; s. c., 10 L. T. 461; 6 Hare, 87; on app., 13 L. T. 317; 13 Jur. 317; 27 Eng L. & Eq. 512; Seagrave *v.* Pope, 22 L. J. Ch. 258; 16 Jur. 1099; 19 L. T. 173; 1 De.G. M. & G. 784; 15 Eng. L. & Eq. 477; Flemming *v.* Self, 23 L. T. 63; Kay, 518; 1 Jur. N. S. 25; Archer *v.* Harrison, 3 Jur. N. S. 194; 7 DeG. M. & G. 404; 29 L. T. 71; Smith *v.* Pilkington, 29 L. J. Ch. 227; 1 DeG. F. & J. 120; Farmer *v.* Smith, 28 L. J. Ex. 226; 32 L. T. Rep. 37; 5 Jur. N. S. 533 *n*; 3 H. & N. 196; W. R. 362.

1. Robertson *v.* American Homestead Assoc., 10 Md. 397; 69 Am. Dec. 150.

2. McCahan *v.* Columbian Bldg. Assoc. of East. Baltimore, No. 2, 40 Md. 234–236.

Repayment in Serial and Permanent Associations. In serial societies the rules above laid down apply with this only difference, that the rights and liabilities of each memberare relerable, in the first instance, to the series to which he belongs. National Bldg. Assoc. *v.* Hottenstein, 10 Pittsb. Leg. Jour. N. S. (Pa.) 225.

(*b*) *Extinguishment of Membership of Mortgagor, Mortgage Remaining Subsisting Security in Hands of Association.*—A sale of the mortgaged premises and application of the previous stock payments made by the mortgagor to the extinguishment of the debt "terminates the membership of the mortgagor in the association, and the obligation to continue payment of dues in consequence of membership ceases." [1] If, however, neither the building association nor the borrower applies the previous stock payments to the extinguishment of the debt, and the association collects the whole sum due from the proceeds of the sale of the mortgaged premises or upon voluntary repayment, the whole debt undiminished by any stock payments is returned to the society. The stock remains intact, and the member continuing to hold it retains his membership,[2] and is entitled upon the final distribution to his share in the company's profits.[3] In such case his bond and mortgage remain in the hands of the association as a subsisting security to insure the payment of future instalments and liabilities.[4]

The rules settle the terms upon which an advanced member may redeem equally whether the society be permanent or terminating. Matterson *v.* Elderfield, 20 L. T. Rep. N. S. 503, L. R. 4 Ch. App. 207.

If the rules do not provide otherwise, an advanced member in a permanent society must pay the *full* amount of his future subscriptions, and not merely their present value if he wishes to redeem. Matterson *v.* Elderfield, 20 L. T. Rep. N. S. 503, L. R. 4 Ch. App. 207.

If any fines are due at the time of notice of withdrawal, they must be paid before he will be entitled to have his security discharged. Parker *v.* Butcher, 36 L J. Ch. 552; L. R. 3 Eq. 762.

And it has been held that, on the society being wound up, the advanced members ought to be placed on the list of contributories of the society, for the purpose of discharging the debts due to third parties. *In re* Doncaster Permanent Bldg. Soc. *ex parte* Burgess, L. R. 3. Eq. 158; 15 L. T. Rep. N. S. 270; 15 W. R. 102. *Compare* Davis on Law of Bldg., etc., Societies; pp. 252–254; Endlich on Law of Bldg. Assoc. § 180.

1. McCahan *v.* Columbian Bldg. Assoc. of East Baltimore No. 4, 40 Md. 239; Endlich on Law of Bldg. Assoc. § 431. See also Robertson *v.* American Homestead Assoc., 10 Md. 397; Shannon *v.* Howard Mutual Bldg. Assoc. of the City of Baltimore, 36 Md. 383; Watkins *v.* Workingmen's Bldg., etc., Assoc., 97 Pa. St. 514.

2. North American Bldg. Assoc. *v.* Sutton, 35 Pa. St. 463; Hennighausen & Wolf, Recrs., *v.* Tischer, 50 Md. 583.

As to estoppel to deny membership by acceptance of stock payments under such circumstances, see *post* (*n*).

3. North American Bldg. Assoc. *v.* Sutton, 35 Pa. St. 463; Ocmulgee Bldg. & L. Assoc. *v.* Thomson, 52 Ga. 427; Overly and Wife *v.* Fayetteville Bldg. & L. Assoc., 81 N. Car. 56. See also Hekelnkaemper *v.* German Bldg. & Sav. Assoc., 22 Kans. 549; Richards *v.* Bibb County Loan Assoc., 24 Ga. 198; Hennighausen & Wolf, Recrs., *v.* Tischer, 50 Md. 583.

4. Everham *v.* Oriental Sav. & L. Assoc., 47 Pa. St. 352. This case arose prior to the act of 1859, and its policy expands with the act of that year. Endlich on Law of Bldg. Assoc. § 88 *n* (5).

In *England* the same principle is enforced. The estimated duration of a building association was thirteen years. An advanced member was held entitled to redeem on payment of his subscriptions (the mortgage being given to secure such) to the end of the thirteen years, although he was still liable to continue to pay subscriptions until the fixed value of each share was realized for every member. Sparrow *v.* Farmer, 26 Beav. 511; 5 Jur. N. S. 530; 28 L. J. Ch. 537; 33 L. T. 216. See also Handley *v.* Farmer, 29 Beav. 362.

In a similar case a borrower who was allowed to redeem was, notwithstanding the redemption, held liable to continue his subscriptions beyond the thirteen years, which period proved insufficient to bring the shares up to the fixed value, upon reaching which the society was to terminate. Farmer *v.* Smith, 4 H. & N. 196; 5 Jur. N.S. 533 *n*; 28 L. J. Exch. 226.

12. Application of Stock Payments to the Extinguishment of the Debt.—It is a well-recognized doctrine that payments of dues upon the stock are not payments upon the mortgage debt, and do not *ipso facto* work an extinguishment *pro tanto* of the mortgage.[1] But the borrower, by virtue of his membership, has, notwithstanding, a right at any time so to apply them, and the association holding a lien upon his shares as security for his debt may, in case of default, make a like application.[2] But in the latter case the appropriation by the society

1. In *North Carolina*, when a member of an association becomes a borrower, the transaction has been considered so much in the nature of a loan that subsequent payments made by the member upon his stock are held to be partial payments upon his debt. Overby *v.* Fayetteville Bldg. & L. Assoc., 81 N. Car. 56; Hoskins *v.* Mechanics' Bldg. & L. Assoc., 84 N. Car. 838.

Prior to the North American Bldg. Assoc. *v.* Sutton, 35 Pa. St. 463, the same view was maintained in *Pennsylvania*, and therefore every such payment made by a borrowing member was held to be a *pro-tanto* reduction of his mortgage debt. Kupfert *v.* Guttenberg Bldg. Assoc., 30 Pa. St. 465; Hughes's App., 30 Pa. St. 471; Philanthropic Bldg. Assoc. *v.* McKnight, 35 Pa. St. 470; Bldg. Assoc. *v.* Timmins, 3 Phila. 209; Bldg. Assoc. *v.* Reid, 3 Phila. 345. See also the later cases of Kelly *v.* Perseverance Bldg. Assoc., 39 Pa. St. 148; Schnepf's App., 47 Pa. St. 37; McGrath *v.* Hamilton Bldg. Assoc., 44 Pa. St. 383.

As sustaining the position in the text, see North American Bldg. Assoc. *v.* Sutton, 35 Pa. St. 463; Spring Garden Assoc. *v.* Tradesmen's Loan Assoc., 46 Pa. St. 493; Link *v.* Germantown Bldg. Assoc., 89 Pa. St. 15 (unincorporated); Economy Bldg. Assoc. *v.* Hungerbuehler, 93 Pa. St. 258; Germania Bldg. Assoc. *v.* Neill, 93 Pa. St. 322; Early & Lane's App., 89 Pa. St. 411; Weiss's App., 5 W. N. C. (Pa.) 423; Watkins *v.* Workingmen's Bldg. Assoc., 98 Pa. St. 514; Barker *v.* Bigelow, 15 Gray (Mass.), 130 (137); Delano *v.* Wild, 6 Allen (Mass.), 1; Mechanics' Bldg. & L. Assoc. *v.* Conover *et al.*, 1 McCart. (N. J.) 219 (not overruled in this particular in 2 C. E. Gr. 497); Hoboken Bldg. Assoc. *v.* Martin, 2 Beas. (N. J.) 428; 13 N. J. Eq. 428; Somerset County Bldg. & Sav. Assoc. *v.* Vandervere, 3 Stock. (N. J.) 382; State, Washington Bldg. & L. Assoc. Pros. *v.* Hornbacker, 13 Vr. (N. J.) 635; Hekelnkaemper *v.* German, etc., Assoc., 22 Kan. 549.

The distinct and independent existence of the stock and debt at the same time is well explained in State, Washington Bldg. & Loan Assoc., pros. *v.* Hornbacker, 13 Vr. (N. J.) 635. It was contended in this case that the mortgages held by an association, in which loans were made to members upon mortgages with a collateral assignment of the stock, could not be taxed at their full face value, but only after making allowance thereon for stock payments made. "The unsoundness of the argument in support of this denial consists in not observing the distinct and separate existence of the stock on the one hand and the bond on the other—the distinct and separate relation borne to the company on the one hand by its stockholder and on the other by its borrower. A connection is sought to be established between the stock held by the stockholder and the bond held by the company, by virtue of which, as payments are made on the stock, they are to be treated as payments on the bond, so that one steadily merges in or becomes offset by the other. But while in a general way this view may seem fair, because an exchange of the one for the other is the result expected to happen, it is still not a view warranted by the terms of the company's constitution, nor by the terms of the bond. By the condition of the bond the borrower is to pay interest monthly on the principal borrowed, at the rate of six per cent per annum. No time is named for the payment of the principal, because if the borrower, in addition to interest, pays also the monthly instalments on the stock, he cannot be compelled to pay the principal in cash, but may, when his stock becomes paid up, exchange his stock for such principal debt. This is so provided in the condition of the bond. But until so exchanged, they are distinct in legal contemplation as well as in form. The stock is a collateral security for, and not a credit on, the bond." Dodd, J., p. 638.

2. Spring Garden Assoc. *v.* Tradesmen's Bldg. Assoc., 46 Pa. St. 493; Early & Lane's App., 89 Pa. St. 411; North American Bldg. Assoc. *v.* Sutton, 35 Pa.

must be prompt and unequivocal.[1] By such application on the part of the borrower the stock is relinquished to the association, forced upon it, and its value deducted from the amount of the debt owing to it, and his membership destroyed.[2] The borrower's representative, his assignee for the benefit of creditors, or executor may also make the application,[3] but not a sheriff's vendee of the mortgagor.[4] When a member borrows money from the association, and gives a joint note of himself and another person for the advance, and the borrower's stock being assigned to the association as additional security, the third party has the right to have the stock sold first for the debt.[5] On the other hand, the title to the stock has so far passed from its owner by the assignment, that a subsequent purchaser cannot prevent the association from applying the sums paid thereon in extinguishment of the debt.[6] Where stock is pledged and a mortgage given for the same debt, the mortgagor has the right to insist as against his assignee in bankruptcy and an assignee of the mortgage that the stock be first sold to reduce the amount of the mortgage lien and

St. 463; Watkins *v.* Workingmen's Bldg. Assoc., 97 Pa. St. 514; Economy Bldg. Assoc. *v.* Hungerbuehler, 93 Pa. St. 258.

1. When payments made by a borrowing member on stock have been credited to his general account with the building association, the testimony of its officers that they considered those payments in law payments on the mortgage is not evidence of an application to that purpose. Economy Bldg. Assoc. *v.* Hungerbuehler, 9 W. N. C. (Pa.) 218.

The receipt of stock payments after a full recovery on a member's mortgage estops the association from denying the existence of the stock. And the receipt-book of the association, proved by the secretary to be such, containing entries of payments made by the member, is evidence against the association without producing the officer by whom they were countersigned. The fact that the entries furnish evidence of other payments than those for which they were properly admissible will not lead to their rejection. North American Bldg. Assoc. *v.* Sutton, 35 Pa. St. 463. But to work such an estoppel the acceptance must be clearly the act of the association or of such portion of it as can bind the whole. Hence when stock payments were received by only two of the twelve directors, from one whose shares under the rules were forfeited, and their acceptance was promptly disavowed and the money returned, no claim of membership upon the ground of the acceptance of such payment was allowed to avoid the forfeiture. Card *v.* Carr, 1 C. B. N. S. (87 Eng. C. L. R. 197); 26 L. J. C. P. 113.

2. Spring Garden Assoc. *v.* Tradesmen's Bldg. Assoc., 46 Pa. St. 493; North American Bldg. Assoc. *v.* Sutton, 35 Pa. St. 463; Watkin's *v.* Workingmen's Bldg. Assoc., 97 Pa. St. 514.

But the borrower may, when sued on his bond, continue a member, by paying the debt and retaining his stock. Springfield Bldg. Assoc. *v.* Raber's Adm., 33 Leg. Int. (Pa.) 329. *Compare* § 11 (*b*), *ante*.

3. Spring Garden Assoc. *v.* Tradesmen's Loan Assoc., 46 Pa. St. 493; Endlich on Law of Bldg. Assoc. § 459.

4. Springville Loan Assoc. *v.* Raber's Admr., 11 Phila. 546; 33 Leg. Int.(Pa.) 329. See *post*, § 13 (*n*).

5. Massey *v.* Citizens' Bldg. etc., Assoc., 22 Kan. 624.

A claim on the part of the society that the share is forfeited to it and that no credit should be given for it is inequitable and cannot be allowed. The share must be sold either subject to all dues which have accrued against it since the trial of the case, or freed from all dues accrued prior to the sale; in the latter case the dues accrued since the trial and before the sale to be first paid out of the proceeds. Massey *v.* Citizens' Bldg., etc., Assoc., 22 Kan. 624.

6. S., the holder of shares in a building association, procured a loan from the association giving a judgment to secure it. Afterwards he assigned his stock to G. Real estate of S. having been sold under a lien subsequent to the judgment, and the money paid into court, the association directed the sums already paid on the stock to be applied in payment of the original loan to S. G. appeared before

of the mortgagor's personal liabilities.[1] A member who has assigned his stock to a third person as collateral security for a debt, cannot, when sued upon his mortgage to the association, claim a credit for the value of his shares.[2]

As between the association and a second mortgagor of the premises, stock held by the association as collateral security will be first applied to the payment of amount due on the mortgage to the association before recourse is had to the mortgaged premises.[3] Nor will this equity be defeated by a levy upon the stock under a judgment against the mortgagor.[4]

the auditor and claimed that the judgment should be paid in full out of the proceeds of the sale. It was held that he had no claim upon the fund in distribution, and therefore no standing in the proceeding. "If the building association have injured him by a wrong in forfeiting his stock, his remedy is in a different proceeding." Weiss's App., 5 W. N. C. (Pa.) 423.

1. Wittenbrock *v.* Bellmer, 62 Cal. 560.

2. By the assignment he has already made a definite appropriation of the value of the stock. He cannot afterwards assume to reappropriate it in violation of that already consummated arrangement. Schober *v.* Accommodation Sav. Fund & Loan Assoc., 35 Pa. St. 223. And where a member assigned all his shares as collateral security, upon obtaining a loan from an association, and upon obtaining a second loan on other shares, made a second assignment of all his stock, he cannot afterwards apply the instalments paid upon the stock to the first loan which had been secured by a judgment, if before obtaining the second he had made no such appropriation. The second assignment to the building association itself operated as a new appropriation. See p. 239. Hence as the first assignment, as collateral, was not a discharge of the loan to the extent of the instalments paid, and as the second was an election by the defendant not to treat the first as a partial payment of the first bond, but to pledge all the stock as a living security for the payment of the second it was held that his payments on the stock should be applied to his second bond and not to his first, against the consent of the association, except to the extent of what might remain after the second. Phila. Mercantile L. Assoc. *v.* Moore, 47 Pa. St. 233.

3. Herbert *v.* Mechanics' Bldg. & L. Assoc. *et al.*, 2 C. E. Gr. (N. J.) 497, overruling on this point the same case *nom.* Mechanics' Bldg. & L. Assoc. of New Brunswick *v.* Conover *et al.*, 1 McCart. (N. J.) 219; Red Bank Mutual Bldg. & L. Assoc. *v.* Patterson, 27 N. J. Eq. 223; Phillipsburg Mutual L. & Bldg. Assoc. *v.* Hawk, 27 N. J. Eq. 355.

4. Phillipsburg Mutual L. & Bldg. Assoc. *v.* Hawk, 27 N. J. Eq. 355.

The right of the creditor to marshal the assets of the debtor is absolute as against the debtor himself, and cannot be taken away by the subsequent action of the other creditors. Herbert *v.* Mechanics' Bldg. & L. Assoc. of New Brunswick *et al.*, 17 N. J. Eq. 497.

Where a person executed a mortgage upon two lots to a building association, and assigned to it as security five shares of stock, and afterwards gave the complainant a mortgage on one of the lots, and then assigned his interest in the stock to third persons, the complainant may require the association to sell first the lot which was exclusively embraced in its mortgage, but cannot compel the appropriation of the stock to the payment of the first mortgage. Reilly *v.* Mayer, 12 N. J. Eq. 55; 1 Beas. (N. J.) 55. See also Washington Bldg. & L. Assoc. *v.* Beaghen *et al.*, 12 C. E. Greene (N. J.), 99.

In *Virginia*, where one whose shares were redeemed, and who executed a trust deed upon his property to secure the payment of dues, etc., then gives another deed to secure a debt to another party upon the same property; upon his default in paying dues and interest, and sale of the property by the building association, the debtor and other creditors may elect to have the proceeds of sale invested, and the unpaid monthly dues and interest paid monthly out of the interest and as much of the principal as may be necessary, or to have the present value of these monthly dues and interest ascertained, on the principal of annuities, and paid out of the proceeds of the sale to the building association. Winchester Bldg. Assoc. *v.* Gilbert *et al.*, 23 Grattan (Va.) 787.

In *Pennsylvania*, however, there is a

The rule for ascertaining the absolute value of the stock at any given time applicable in reduction of the mortgage debt, is to find the total gross amount of all the stock payments made by the member up to the time of default or repayment, allowing no interest upon any of them, the interest he has paid on his loan standing as interest to his credit.[1]

In the absence of express provision in the governing statute or by-laws, membership in the association does not entitle the borrower upon voluntary repayment of his loan to a proportionate

class of cases in which the right of applying the stock payments upon the borrower's stock, held as collateral by the building association, to the extinguishment of the debt also secured by mortgage in favor of the same, seems to be confined to the original parties to the transaction, the borrower and the society; and in which the right of any third party, no matter what may be his equities, to compel the society to so apply them seems to be denied *in toto*. Spring Garden Assoc. *v.* Tradesmen's Loan Assoc., 46 Pa. St. 493; Link *v.* Germantown Bldg. Assoc., 89 Pa. St. 15; Economy Bldg. Assoc. *v.* Hungerbuehler, 93 Pa. St. 258.

These cases all profess to be founded upon North American Bldg. Assoc. *v.* Sutton, 35 Pa. St. 463. See also Springville Bldg. Assoc. *v.* Raber's Adm., 33 Leg. Int. 329; Bldg Assoc. *v.* Eshelbach, 7 Phila. 189; Selden *v.* Reliable Sav. & Bldg. Assoc., 32 P. F. Smith, 336; Kreamer *v.* Springfield Bldg. Assoc., 6 W. N. C. 267; Kingsessing Bldg. Assoc. *v.* Roan, 9 W. N. C. 15; App. of Harris, 6 East. Rep. 865. For full discussion of the subject and analysis of cases see Endlich on Law of Bldg. Assoc., §§ 462, 466.

As to the standing of judgment creditors, see Herbert *v.* Mechanics' Bldg. & L. Assoc., 2 C. E. Gr. (N. J.) 497; Weiss's App., 5 W. N. C. (Pa.) 423; Lodge *v.* Lyseley, 6 Eng. Ch. R. 37; Knell *v.* Green St. Bldg. Assoc., 34 Md. 67; Cover *v.* Black, 1 Pa. St. 493.

The doctrine of marshalling the assets will not be applied to the injury of third parties, over whom the person claiming the benefit of the principle has no superior equities. Reynolds *v.* Tooker, 18 Wend. (N. Y.) 591. See also Ayres *v.* Husted, 15 Conn. 504; John *v.* Reardon, 11 Md. 465; Miller *v.* Jacobs, 5 Watts (Pa.), 208; Reilly *v.* Mayer *et al.*, 1 Beas. (N. J.) 55.

If there are any equities to compel the prior-lien creditor to resort to any particular fund, the subsequent creditor must notify him thereof; for a prior creditor is not bound to know of the existence of any subsequent encumbrance. Uniontown Bldg. & L. Assoc. App., 92 Pa. St. 200; Bank of Penna. *v.* Winger, 1 Rawle. (Pa.), 295; Konigmaker *v.* Brown, 2 Har. (Pa.) 274; Adams *v.* Hefferman, 9 Watts 529.

Recording the subsequent encumbrance is not notice to him. Taylor's Ex'rs *v.* Maris, 5 Rawle (Pa.), 51; Reilly *v.* Mayer, 1 Beas. (N. J.) 55.

Where, however, the building association, holding besides a mortgage upon the borrower's land, an assignment of his stock as collateral to his mortgage, released the stock, with actual notice of the existence of a subsequent mortgage on the land, it was held that the prior mortgage was, so far as the right of the subsequent mortgage was concerned, satisfied to the extent of the value of the stock. Washington Bldg. & L. Assoc. *v.* Beaghen *et al.*, 12 C. E. Gr. (N. J.) 99.

On the general subject of marshalling, see 1 Story Eq. Jur. § 633, and *Ex parte* Kendall, 17 Ves. (Eng.) 514.

1. Endlich on Law of Bldg. Assoc. § 456.

"If his interest has been punctually paid, the remaining claim against him to be discharged is the principal sum loaned. Towards payment of that, the mortgagor may properly apply the gross amount of all sums paid as monthly dues, computing the same as the amount may be at the time of the adjustment. But upon such payment of monthly dues the mortgagor can claim no interest, nor require any application of them to be made as payments at the time when received. They are not payments originally required or stipulated to be paid as payments towards any loan. They are paid as the capital of the company, and paid alike by those who do and by those who do not take loans. These who take loans may apply them, on the final adjustment of the loans, to the discharge of the loans; but they are to be applied in a gross sum, without any allowance of interest thereon." Barker *v.* Bigelow, 15 Gray (Mass.), 130 (137).

share of the profits up to the time of repayment ;[1] and even where express provision exists in the constitution or by-laws, a defaulting member can claim no such benefit.[2]

13. Winding Up.—Hopeless insolvency, rendering the accomplishment of the purposes of incorporation impossible, is good ground for a petition by members to the court for the winding up of the association and the appointment of a receiver.[3] The insolvency of a building association is a thing peculiar to itself, and consists in its inability not to pay outside debts (for such a case can hardly ever occur, and in the nature of things is not to be thought of), but to satisfy the demands of its own members ;[4] hence it has been repeatedly asserted that the application must proceed from persons interested and suing as members.[5]

1. Mechanics' Bldg. & L. Assoc. *v.* Conover, 1 McCart. (N. J.) 219; Link *v.* Germantown Bldg. Assoc., 89 Pa. St. 15; McGrath *v.* Hamilton Bldg. Assoc., 44 Pa. St. 383.

"Its value" (i.e., the member's stock) "for the purpose of this case was just what the defendant had paid on account thereof This was all . . . . the law gave him the right to apply. The value of the stock beyond this consisted mainly of the profits in which a defaulting borrower has no right to participate. This arises from two causes: 1st. The peculiar nature of the contract between building associations and their members; 2d. The difficulty, if not absolute impossibility, of ascertaining the profits until the association is ready to wind up. . . . The ascertainment of the real value of the stock can only be arrived at by closing up the affairs of the corporation. This the defendant has no right to demand. If, as was contended, he was entitled to it in this proceeding, the most that could be done would be to approximate it. The jury and even the court might place a much higher value upon its securities than could be realized therefrom. In such case the defaulting member would receive more than the members who paid up to the end; besides, the profits are composed chiefly of premiums; they are made up in part of the premium which the defendant agreed to pay. I say agreed to pay, for it is a mistake to suppose, as was claimed by the defendant, that he has paid the premium—he only promised to pay it. It was inserted in the judgment note, and is now being collected. The building-association law expressly authorizes the plaintiff to recover the premium from a defaulting borrower, yet the defendant's proposition, if sustained, would defeat his right in part. We are of opinion that the right to apply the stock in such cases as this means only the right to apply the payments made thereon." Paxson, J., in Watkins *v.* Workingmen's Bldg. & Loan Assoc., 97 Pa. St. 514. See also Mechanics' Bldg. & L. Assoc. *v.* Conover, 1 McCart. (N. J.), 219; Link *v.* Germantown Bldg. Assoc., 89 Pa. St. 15; McGrath *v.* Hamilton Bldg. Assoc., 44 Pa. St. 383. It must not be forgotten that the member is also liable to contribution to expenses and debts. *Ante*, § 8 (*c*). *Compare* also §§ 4, 5, 9 (*b*).

2. *Ante*, § 9 (*b*); Endlich on Law of Bldg. Assoc. §§ 175, 156 (n).

3. Insolvency does not necessarily dissolve a corporation. Railroad Co. *v.* Fitler, 60 Pa. St. 132; Brinkerhoff *v.* Brown, 7 Johns. Ch. (N. Y.) 217. It "neither impairs its power to manage its own affairs, nor converts its property into a trust fund for the benefit of its creditors." Angell & Ames Corp. § 770.

The mere allegation that the building association is without any responsible officers is not a sufficient ground for asking the interposition of a court of equity, even if coupled with an averment of the society's insolvency. Gormerly *v.* Port Richmond Bldg. & L. Assoc., 3 W. N. C. (Pa.) 11. See also Hoboken Bldg. Assoc. *v.* Martin, 2 Bees. (N. J.) 428.

Where, however, upon the ground stated in the text, the winding up of a building association becomes desirable, it has been decided in *Pennsylvania* that the proper course is through a court of equity by means of a receiver, and not by an assignment of its property under the insolvency laws to an assignee for the benefit of creditors. *In re* Assigned Est. of National Sav. L. & Bldg. Assoc., 9 W. N. C. (Pa.) 79.

4. *In re* Assigned Est. of National Sav. L. & Bldg. Assoc., 9 W. N. C. (Pa.) 79; Endlich on Law of Bldg. Assoc. § 488.

5. It has been held in *England* that an

The right to invoke the aid of a court of equity for the appointment of a receiver for the purpose of winding up the affairs of the association or series arises where, in point of fact, the time has arrived when the shares, owing to the past accumulations of the business, are worth the stipulated par value fixed by the charter. But while the right to invoke such aid has been repeatedly recognized and never denied,[1] it is a right which is conceded to none

order to wind up a building association whose rules do not give it express power to borrow may be obtained upon the petition of a person who, under the rules of the society, has deposited money with a view to becoming a shareholder, but before becoming one has given proper notice to withdraw the money, and been unable to obtain it. Such petition must express that the petitioner is a creditor in respect of money advanced by him as a member of the society which he has given notice to withdraw. *In re* Queen's Benefit Bldg. Society, 19 W. R. 697, 762; L. R. 6 Ch. 815. See also *In re* Planet Benefit Bldg. & Investment Society, L. R. 14 Eq. 441; 41 L. J. Ch. 738; 20 West. Repr. 935; 27 L. T. N. S. 638.

In *Pennsylvania* the court refused to wind up a society upon a petition filed by a shareholder who was also a creditor in the latter capacity, although the association was insolvent and had no responsible officers. Gormerly *v.* Port Richmond Bldg. & L. Assoc., 3 W. N. C (Pa.) 11. See also *In re* Professional, Commercial & Industrial Benefit Bldg. Society, L. R. 6 Ch. 856; 25 L. T. N. S. 397; 19 West. Repr. 1153.

1. O'Rourke *v.* West Pennsylvania L. & Bldg. Assoc., 93 Pa. St. 308; Bowker *v.* Mill River Loan Fund Assoc., 7 Allen (Mass.), 100; Lister *v.* Log Cabin Bldg. Assoc., 38 Md. 115; Edelyn *et al. v.* Pascoe *et al.*, 22 Gratt. (Va.) 826. In the last case it was said that a court of equity has jurisdiction at the suit of unredeemed shareholders in a building association to call the redeemed shareholders to account, enforce payment of what they respectively owe, and distribute the fund among the unredeemed shareholders, thus embracing the whole series of steps necessary to bring about the winding up of the concern, by making the corporation and its debtors all parties to one bill. See also Est. of National Sav. L. & Bldg. Assoc., 9 W. N. C. (Pa.) 79; Goodrich *v.* City Loan & Bldg. Assoc., 54 Ga. 98; Mechanics' & Workingman's Bldg. Assoc. *v.* Monroe, 6 Cent. Rep. 580.

If the constitution of a building society provides that it shall close when the unsold stock is worth fifty per cent premium, it cannot after that time has come defer closing for a further advance in the value of its real estate, and meanwhile compel stockholders to continue the payment of dues. Burns *v.* Metropolitan Bldg. Assoc., 2 Mackey (D. C.), 7.

On the other hand, until the period of duration fixed by charter or general law has been attained, not even a majority of the members can force a dissolution upon the rest against what the latter conceive to be their interests. Thus in a recent case in Kentucky certain members of a building association who had borrowed from the association to the full amount of their respective shares, securing the same by mortgages on real estate, met together, and without authority of the charter or constitution, and without consent of the other members, agreed among themselves that they would each pay up at once an amount equal to the dues accruing on their respective shares up to a certain date and no more, and that their mortgages should be cancelled by the association. The directors then in office accepted said payments, and caused the several mortgages to be cancelled, and released them from any further obligation to pay their weekly contributions, thus practically dissolving the association. Certain of the members who had not borrowed from the association the amount of their respective shares, and who did not consent to this arrangement, suing for themselves and other members of the same class, and averring these facts and the further fact that there was yet due on their shares a large balance, prayed for the dissolution of the association, a settlement of its affairs, and a judgment against the defendants. *Held* that the action could be maintained. *Held* further, that all the delinquent stockholders should be before the court, and their liabilities ascertained and determined. It was error to render judgment against only part of the delinquent stockholders, thus compelling them to pay not only their *pro rata* of the sum necessary to equalize the various stockholders, but the *pro rata* of the remaining debtors. Arling *v.* Kenton Bldg. & Sav. Assoc., 26 American Law Reg. (S.

but members.[1] Such an application must show that the assets of the association are sufficient to pay, over and above all losses and expenses, and after cancellation of the advanced members' securities, to every unadvanced member the par value of his stock. In ascertaining the sufficiency of the corporate assets for this purpose, mortgages held against advanced members must not be counted as assets.[2] Whenever the assets of the association become equal to the par value of all its stock, it is ready to be wound up, and ceases *ipso facto* to be a corporation, except for the purpose of winding up its affairs.[3] Whatever liabilities the association has

C. Ky.) 273; Cason *v.* Seldner, 77 Va. 293.

Where the borrowers, who formed a majority of the whole membership of the association, passed a resolution to wind up the concern before the time limited by the charter, and attempted to compel the non-borrowers to accept a sum less than the amount fixed by charter, an injunction was granted at the instance of the investors. Plaff *v.* Bldg. Assoc., 6 W. N. C. (Pa.) 349. See also Reg. *v.* D'Eyncourt, 116 Eng. C. L. R. (4 Best & Smith C. B.) 820; 9 L. T. Rep. N. S. 712. See also Hughes *v.* D'Eyncourt, 12 W. R. 408.

But where the stockholders had agreed to wind up the association before the period limited in the charter, it was held that the agreement was valid, and bound a member who had consented, and his assignee. White Haven L. & Bldg. Assoc. *v.* Kelley *et al.*, 9 Luz. Leg. Reg. (Pa.) 9. See also Field Corp. §§ 486, 487, where the authorities are collected.

1. Where, therefore, a borrower from a building association, who up to the time of taking the loan had been a member, but by the terms of his contract had ceased to be such, and became merely a debtor for a fixed sum repayable by instalments, believing that the period had arrived when the shares could be paid out by the society at their par value, but that the officers were redeeming certain shares at such a rate as to delay the time of his discharge, presented his bill for an injunction upon the officers of the society, the appointment of a receiver, and winding up of the concern, it was held that the bill was properly dismissed. Being simply a debtor, bound to pay a certain amount of money, he could not be discharged until that was paid, and as he had ceased to be a member, the continuance of the society for a greater or lesser time was not a matter wherein he could have any interest. Bowker *v.* Mill River Loan Fund Assoc., 7 Allen (Mass.), 100.

2. Lister *v.* Log Cabin Bldg. Assoc., 38 Md. 115.

"The association has no authority to collect and apply the indebtedness under the mortgage to the liquidation of the claims of unpaid members. Whilst they exist, and are of binding efficacy, they are only a source of revenue, and as such constitute an efficient part of the available assets of the association." Stewart, J., p. 122.

In such a computation they must be set off against the shares upon which they were advanced, and both be excluded from the reckoning. Endlich on Law of Bldg. Assoc. § 440; Lister *v.* Log Cabin Bldg. Assoc., 38 Md. 115.

For purposes of taxation, however, mortgages held against members must be considered as assets, "as synonymous with property." State, Washington Bldg. & L. Assoc. pros., *v.* Hornbacker, 12 Vr. (N. J.) 519; on app., 13 Vr. (N. J.) 635.

Where the real estate held by the association consists of property bought in by it at public auction in competition with other bidders, the price bid by the association must be taken, as against it, as conclusive of the value of the property, for the purpose of ascertaining if the time has arrived when the association should close; but the value, if greater, may be shown by witnesses. for the association cannot, with an all-sufficient amount of property in its hands to close up, go on collecting dues. Burns *v.* Metropolitan Bldg. Assoc., 2 Mackey (D. C.), 7.

In an action by a building association upon a judgment note given by one of its members, where the defence is "payment," the burden of proof that the association has matured is on the defendant. Watkins *v.* Workingmen's Bldg. & L. Assoc., 97 Pa. St. 514.

3. Hagerman *v.* Ohio Bldg. & Sav. Assoc., 25 Ohio St. 186 (205). The statutes under which the associations are incorporated sometimes contain provisions empowering the building associa-

lawfully incurred are, of course protected upon dissolution;[1] creditors and depositors are entitled to be paid out of the assets in priority to any of the members;[2] and where a member is also a creditor or depositor, he is entitled to come in upon the distribution of the assets as such.[3]

BULL.—The male of the bovine genus of animals.[4]

tion about to be wound up to elect officers to be charged with the duty of winding up the concern, or casting the burden upon those last elected or their survivors, and granting them all powers necessary to a proper settlement of the affairs of the association. In the absence of such provision, the general powers of supervision and control with which courts of equity are invested in respect of corporations afford a safe and perfect means of doing justice to all parties by the appointment of a receiver, even independently of the expedient which building associations have it in their own hands to adopt, of conveying to trustees all their assets before dissolution for the benefit of members and creditors. Endlich on Law of Bldg. Assoc. § 494.

Under the act of April 26, 1869. P. D. 227. building and loan associations of Philadelphia may, for the purpose of winding up their affairs, issue a *scire facias sur* mortgage after the expiration of the charter, although the land mortgaged lies outside of the city limits. This legislation does not "renew" or "extend" the time of the existence of these associations within the constitutional prohibition. It simply provides for the collection and distribution of their assets. Cooper *v.* Oriental Sav. & L. Assoc., 100 Pa. St. 402.

In *Pennsylvania* it has been held that the order prescribed by the by-laws of a building association for the payment of money out of its treasury to the different classes of members in the regular course of the business of the association does not apply to the distribution of its assets when insolvent. Criswell's App., 100 Pa. 488; Christian's App., 102 Pa. St. 184. See Goodrich *v.* City L. & Bldg. Assoc., 54 Ga. 98.

In *England*, on the other hand, it has been held that the rules applied to the relations of the members *inter se*, notwithstanding the winding up; and hence where the assets of a society were sufficient to pay the outside creditors, but not sufficient to pay the investing members in full, investing members who had fulfilled the requirements of the rules by giving notice of withdrawal prior to the commencement of the winding up, but had not been repaid, were entitled to priority to those who had given no notice of withdrawal. "The winding up," said Lord Blackburn, "no doubt stops all things which are coming on from coming to maturity—it stops them in that sense—but it does not affect the rights of the parties; and when a right has been acquired *in presenti*, although it is *solvendum in futuro*, I see no reason why it should not be enforced in a winding up as much as in a bankruptcy or anything else." Walton *v.* Edge (H. of L.), 52 L. T. N. S. 666, affirming *Re* Blackburn and Dist. Ben. Bldg. Society, 49 L. T. N. S. 720. See also *In re* Norwich & Norfolk Bldg. Soc.; *Ex parte* Rockham, 45 L. J. Ch. Div. 785.

1. Field Corp. §§ 491, 492, and cases cited. See also Kisterbock *v.* Bldg. Assoc., 7 Phila. (Pa.) 185.

2. *In re* Mutual Aid, etc., Soc., 13 Am. & Eng. Corp. Cas. 638; Criswell's App., 100 Pa. St. 488; Christian's App. 102 Pa. St. 184.

3. Criswell's App., 100 Pa. St. 488.

As to members who are creditors, see Angell & Ames Corp. § 394; Hennighausen *v.* Tischer, 50 Md. 583; U. S. Bldg. & L. Assoc. *v.* Silverman, 85 Pa. St. 394; Endlich on Law of Bldg. Assoc. §§ 144, 264, 268, 486, 487.

The mere fact that the member is also an officer or director in no wise affects his right. Christian's App., 102 Pa. St. 184. Unless he has been guilty of fraud or culpability in bringing about the insolvency. Hence one who was a director in a building association, long insolvent by declaring dividends out of the capital, with his knowledge and participation, is not entitled to receive from the estate of the corporation in the hands of an assignee any part of a loan made by him to the corporation, to pay a dividend fraudulently declared until the stockholders are fully paid. Kisterbock's App., 51 Pa. St. 483.

4. The act of 1869 (Session Laws, p. 176) which provides that it shall not be lawful for the owners of any domestic animals of the species horse, bull, mule, ass, sheep, and hog to suffer them to run at large in the counties named, and authorizing that they be impounded when

found at large, etc., does not authorize the taking up of any cow, heifer, or steer. In this case the court, Walker, J., said: "Do, then, the words 'species bull' embrace cows, heifers, and steers? Linnæus, the great naturalist, divides the science of zoology into classes, classes into orders, orders into genera, genera into species, and species into individuals. These general divisions are believed to still obtain among naturalists. A species, then, embraces individuals of the same kind, and all of the individuals having the same characteristics. It embraces all individuals that are precisely alike in every character and not capable of change by any accidental circumstances, and capable of uniform, invariable, and permanent continuance by natural propagation; or it is founded on identity of form and structure, both external and internal, —the principal characteristic of species in animals being the power to produce beings like themselves, and who are themselves also naturally productive. These seem to be the generally accepted definitions of the word 'species' in zoology. Then these bovine animals all seem to belong to the same species. They are identical in form and structure externally and internally, and naturally capable of producing like beings with themselves. The mere circumstance which changed the bulls to steers can in nowise affect the definition. They are nevertheless members of the same species. But when we turn to the third section of this act we see that the term 'bull' is referred to as an individual of the species. It provides that fees shall be paid for taking up and feeding the animals enumerated in the first section, and uses this language: 'For taking any horse, mule, ass, or bull, fifty cents.' This would seem to place it beyond question that cows, heifers, and steers were intended to be excluded. If not, surely some other language would have been employed. We can only conclude that the term 'species bull' was intended to embrace *bulls* of all kinds and descriptions, without reference to size, age, or quality. But it is said that the other description of cattle came as fully within the reason of the statute as *bulls*. This may be true, and we should, no doubt, so hold if it were not for the language of the third section. But we cannot say that when a cow, heifer, or steer is taken up the fee could be paid for taking up a *bull*. The legislature had the power to make this distinction, and seem to have done so in this enactment. Hence the pleas are bad, and the demurrer was properly sustained. When we remember that the General Assembly use such language as is apt and proper to embrace the objects intended to be embraced in a law, it would be unreasonable to hold that words shall be construed contrary to their etymological and grammatical meaning. The word 'bull' can by no rule of construction be held to mean a cow or a steer. Bulls are, no doubt, individuals of the bovine genera, and also of the species ox or cow, but individuals are never taken as a representative of a genus or a species. They are, no doubt, embraced in both. We cannot, according to the definition of the term 'species,' say that mules form a species, because they are hybrids, being neither of the species horse nor ass, but are a cross between the two; nor can they reproduce beings like themselves. Again, the legislature by a former enactment, when referring to kine, have almost uniformly designated them as cattle or neat cattle, thus embracing the entire species." Oil *v.* Rowley, 69 Ill. 469.

Therefore, where there was an indictment for stealing a *bull*, and the defendant's plea was that he had been previously indicted in the same court for stealing a *cow* and two *heifers*, tried and acquitted, and that the offence charged in the indictment was embraced in the former indictment,—that the offences were the same,—the court held this plea of former acquittal bad; English, C. J., saying: "On the first indictment he could not have been convicted for stealing a *bull*. If, upon the first indictment, he could not have been convicted of the offence described in the second, then an acquittal upon the former is no bar to the latter" (3 Greenleaf Ev. § 36; 1 Whart. Cr. L. 6th Ed. §§ 551–557). 'The rule is,' says Mr. Wharton, 'that if the prisoner *could* have been legally convicted on the first indictment upon any evidence that might have been legally adduced, his acquittal on that indictment may be successfully pleaded to a second indictment, and it is immaterial whether the proper evidence was introduced at the trial of the first indictment or not.' But upon the indictment for stealing a *cow* and two *heifers* appellant could not, upon any evidence that might have been legally adduced, have been convicted for stealing a *bull*, the variance between the indictment and proof as to the subject of larceny being material and fatal; hence an acquittal upon the first indictment could be no bar of the second for stealing a *bull*. This rule of the common law has not been changed by statute." State *v.* McMinn, 34 Ark. 160.

BULLION. (See also MONEY.)—Gold or silver in the mass.[1]

1. With regard to *bullion*, which signifies properly either gold or silver in the mass, and is here intended to denote those metals in any state other than that of authenticated coin, the legislature for the prevention of frauds, both with respect to the coin and to plate, have made several provisions. 1 East P. C. 188.

It has been held in *New York* that a contract to pay the plaintiff for his service "at the rate of sixty dollars per month in gold *bullion*, valued at sixteen dollars per ounce in gold coin of the United States" is a contract for wages payable in money, and that the plaintiff could sue for them without making the demand, required when payment is to be made in anything besides money. In this case, Daly, C. J., after citing several cases in which a demand was held necessary, before suit brought, said: "It is somewhat difficult to say what these cases collectively determine; but I think substantially that it amounts to this, that where it appears, or is necessarily implied from the terms of the contract, and the nature of the articles that are to be received in payment, that it was the intention of the parties that the debtor is to deliver them at his residence or otherwise when requested by the creditor, that a special request to deliver them must be made to the debtor before he can be sued for the non-performance of the contract. It is argued that such is the case here, the agreement being to pay in *bullion*, which it is urged is a specific article, *bullion* being merchandise. But in the same sense coin may be regarded as merchandise, for it is not its coinage which makes it the standard by which other commodities are measured, but its intrinsic value in the markets of the world as a precious metal. The precious metals are adopted as the general medium of exchange, because they have in themselves an intrinsic value, being used for many purposes, are produced in nearly equal quantities, at nearly equal cost, are portable, and comparatively indestructible, and they have this value coined or uncoined; for the stamp which the government impresses upon the coin is simply a guaranty of its weight and fineness. *Bullion*, when the word is used in a financial sense, for it has other meanings (Nares' Glossary, Ed. of 1872; Wedgwood's Eng. Etymology), imports uncoined gold and silver, either smelted, refined, or in the condition in which it is used for coining, and has from the earliest period been associated with or employed as a term denoting money. It is derived from the French word *billon*, which Savary, in his Dictionnaire Universel de Commerce, defines as a term for money, *Terme de monnoye*, and one of the earliest English authorities upon those words that are derived from the French. Cotgrave, in his French and English Dictionary of 1632, defines *bullion*, 'Money, *Monnoye de billon*.' Bayley, more than a century afterwards, defines it in his English Dictionary of 1763, 'Money having *no stamp upon it*;' and our own contemporary authority, Webster, says, 'The word is often used to denote gold and silver, *coined* and *uncoined*, when reckoned by weight and in mass, including especially foreign or uncurrent coin.' Webster's Dict., Unabridged, of 1864, and Locke, in his paper on Raising the Value of Money, so employs the word in this passage: 'Foreign coin hath no value here for its stamp, and our coin is *bullion* in foreign countries.' In France, *billon* is used not only for coin, and for the material before it is coined, but also for the mint or place where the precious metals are sent to be coined (Bescherelle, Dictionnaire Universel de la Langue Française); and *bullion* was formerly used in this sense in England (Wedgwood's Dictionary of English Etymology, p. 112; 27 Edw. III. st. 27, c. 14; 4 Henry IV. c. 10). That the words *billon* and *bullion* should be associated with the idea of coin, and used as terms to express it, very naturally follows from their etymology, both being derived from the Latin *bulla*, the name of the leaden seal which is affixed to the pope's ordinances or decrees, imparting to them the term by which they are known of Papal bulls. *Bulla* in the Latin meant any small object rounded by art, such as a boss or stud in a girdle, and was originally the small thin circular plate of gold or other metal, with some insignia or device engraved or stamped upon it, which was worn suspended from the neck by the children of Roman patricians as their distinguishing mark, and afterwards by all Roman children who were of free birth. From this origin it came in time to be used in the Latin for the seal hanging by a band to a legal instrument, or to the executive decrees of sovereigns or other public functionaries, as well as the term for the matrix or die with which a seal was impressed or a coin was stamped." Wedgwood's Dictionary,

BUNDLE.—To sleep on the same bed without undressing; applied to the custom of a man and woman, especially lovers, thus sleeping.[1]

BURDEN. See note 2.

BURDEN OF PROOF. (See also CRIMES; EVIDENCE; NEGLIGENCE.)

1. **Definition.**—The obligation imposed upon a party who alleges the existence of a fact or thing, necessary in the prosecution or defence of an action, to establish it by proof.[3]

English Etymology, p. 112; Milman's Hist. of Latin Christianity, book xii., c. xi.; Smith's Greek and Roman Antiquities, *bulla;* Phillip's New World of Words, *bull;* Andrew's Latin Lex., *bulla*, 2; Johnson's Dictionary (Quarto, 2d Edit.), *bull;* Bailey's Dict., *bull, golden bull*, 2d and 20th Eds.; Brandes' Dict. vol. i. p. 331; Counsel *v.* Vulture Mining Co. of Arizona, 5 Daly (N.Y.), 74.

1. "Van Corlear stopped occasionally in the villages to eat pumpkin pies, dance at country frolics, and *bundle* with the Yankee lasses." Washington Irving.

In an action by one for the seduction of his daughter, a custom of *bundling*, i.e., for persons courting to sleep together, cannot be set up by him to excuse his connivance at the intercourse, for a custom must be moral. Seagar *v.* Sligerland, 2 Caines (N. Y.), 219; s. c., Lawson's Usages and Customs, 9.

In an action brought to recover damages for the seduction of the plaintiff's daughter, it appeared that the defendant and daughter slept together on the occasion of the seduction, according to a custom which prevails in the part of the country where they resided, known as *bundling*, and with the knowledge of the plaintiff. *Held*, that the knowledge of the plaintiff amounted to connivance, and he could not therefore recover damages; the court, Banks, P. J., saying: "Much has been said by the plaintiff's counsel about the custom in courtship, which he has denominated *bundling*. He has said that this custom prevails very generally in the part of the country where these parties reside. This may be so, but I am unwilling to believe it. If it is so, it is time the custom should be abolished. Even if this custom does prevail, it furnishes no excuse for the plaintiff's carelessness or his daughter's indiscretion. If it be any excuse, it would extend equally to all concerned, and the defendant might claim his portion of protection under it also. The plaintiff has by this time, I apprehend, found out that this custom is dangerous at least, if he does not feel that it is indecent. A man who takes no pains to abolish this custom in his own house has no right to complain of consequences which most naturally follow." Hollis *v.* Wells, 3 Clark (Pa. L. J. Rep.), 29.

2. **Conveyance of Goods or Burden in Course of Trade.**—Carriages belonging to a circus and used for carrying the band and other performers in a parade through the town are not carriages "used solely for the conveyance of any goods or burden in the course of trade," so as to be exempt from duty under 32 & 33 Vict. c. 14, s. 19, subs. 6. "These carts or wagons cannot be properly said to have been conveying any 'goods or burden' of the respondents in the course of their trade. I may give as an illustration of the meaning of the statute the case of a coal merchant sending his carts or wagons to fetch coal to his yard or to convey it to his customers, or a wine-merchant or other tradesman similarly supplying goods in the ordinary course of business. . . . I cannot think that in the case I put in the argument, of a person carrying on his trade by means of sending out a traveller in a gig to obtain orders, the gig would be exempted on the ground that the traveller was a 'burden' conveyed in the course of trade."

3. Quoted from People *v.* McCann, 16

N. Y. 66; *Ex parte* Walls, 64 Ind. 461; Wilder *v.* Cowles, 100 Mass. 487; Burnham *v.* Allen, 1 Gray (Mass.), 500.

"The strict meaning of the term *onus probandi* is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases this *onus* is imposed on the party propounding a will." Barry *v.* Butler, 6 Eng. Eccl. Rep. 418, quoted in Davis *v.* Rogers, 1 Houst. (Del.) 95; Prevost *v.* Gratz, 6 Wheat. (U. S.) 481; Com. *v.* Tuey. 8 Cush. (Mass.) 1; Costigan *v.* Mohawk, etc., R. Co., 2 Denio (N. Y.), 600; Powsey *v.* Shook, 3 Blackf. (Ind.) 267; s. c., 25 Am. Dec. 108.

Roman Law.—The rule of the Roman law is, *Ei incumbit probatio qui dicit, non qui negat.* Dig. lib. 22, tit. 1, 2; Best on Ev. (Morgan's Ed.), § 267.

A Rule of Convenience.—The rule requiring the party having the affirmative to prove it is one of convenience, not because a negative cannot be proven, but because the affirmative can usually be proven more easily. Dranguet *v.* Prudhomme, 3 Lea (Tenn.), 83; Costigan *v.* Mohawk, etc., R. Co., 2 Denio (N. Y.), 609.

Price of Liquor Sold.—In an action for liquor sold by a liquor merchant the only evidence was that several bottles of liquor were delivered at the defendant's house; but the kind and price were not shown. The court instructed the jury to presume that it was the cheapest liquor in which the plaintiff dealt. Clunneo *v.* Pezzy, 1 Camp. 8.

Money Loaned.—In an action for money lent it appeared that, the defendant having asked the plaintiff for more money, the latter delivered to him a bank note, the amount of which could not be proven; it was held that the jury were rightly directed to presume the note to have been the lowest in amount in circulation. Lawton *v.* Sweeney, 8 Jur. 964.

Failure of Consideration.—The plaintiff brought suit upon a note; and the defendant answered that the consideration had failed because it had been given for a patent right to a person who was neither patentee nor assignee of the patent. It was held that the burden was on the defendant to prove his affirmative allegation. Towsey *v.* Shook, 3 Blackf. (Ind.) 267; s. c., 25 Am. Dec. 108; Rogers *v.* Worth, 4 Blackf. (Ind.) 186.

Illegal Note.—If it be alleged that a note was given without consideration, and also that it was illegal or fraudulent in its inception, the burden is upon the plaintiff, when he is the assignee, to prove that he purchased it for a good consideration. Munroe *v.* Conper, 5 Pick. (Mass.) 512; Paton *v.* Coit, 5 Mich. 505; s. c., 72 Am. Dec. 58; Northern *v.* Letouche, 4 C. & P. (Eng.) 140; Vallett *v.* Parker, 6 Wend. (N. Y.) 615; Zook *v.* Simoson, 72 Ind. 83; Vather *v.* Zane, 6 Gratt. (Va.) 246.

The burden is on the holder to prove a lack of knowledge of the fraud. Thrower *v.* Cureton, 14 Strobh. Eq. (S. Car.) 155; s. c., 53 Am. Dec. 660; Bailey *v.* Bidwell, 13 M. & W. 73.

Fraud.—He who alleges that a transaction was fraudulent must prove it. White *v.* Trotter, 14 S. & M. (Miss.) 30; s. c., 53 Am. Dec. 112; Bartlett *v.* Blake, 37 Me. 124; s. c., 58 Am. Dec. 775; Louisville, etc., R. Co. *v.* Thompson, 107 Ind. 442; Northwestern M. L. Ins. Co. *v.* Hazelett, 105 Ind. 212; Bixby *v.* Carskaddor, 29 N. Westn. Repr. 626; Rochester *v.* Sullivan, 11 Pac. Repr. 58.

Especially is this true of a fraudulent conveyance. Johnson *v.* McGreer, 11 Iowa, 151; s. c., 77 Am. Dec. 137; Ikerd *v.* Beavers, 107 Ind. 483.

Sometimes, where the relation of trustee or the like exists between the parties, the burden, upon a charge of fraud, rests upon the opposite party. Thus in an action against an insolvent by his assignee to set aside a transfer made by the insolvent, the burden is on the insolvent to show his good faith, and that the transaction complained of was in the usual course of dealing. 1 Rev. de Leg. (Can.) 40; Rochester *v.* Levering, 104 Ind. 562 (agency).

Dealing with Agent as Principal.—If a person deals with an agent as principal, the burden is on such agent to show that the person so dealing had notice that he was only acting for his principal and not for himself. Vawter *v.* Baker, 23 Ind. 63.

A failed in business, and started up in the same business in the same place as agent of B, and bought goods of an old customer. It was held that A must show that such customer had notice of the capacity in which he was acting in order to avoid a personal liability. Kerchner *v.* Reilly, 72 N. Car. 171.

General Issue.—Under the general issue the burden of proof is upon the plaintiff throughout, as to every part of his case. Berringer *v.* Lake Superior Iron Co., 41 Mich. 305; City of Lafayette *v.* Wortmer, 107 Ind. 404; Ingalls *v.* Eaton, 25 Mich. 32; Lafayette, etc., R. Co. *v.* Ehman, 30 Ind. 83; Jarboe *v.* Schreb, 34 Ind. 350; Rothrock *v.* Perkinson, 61 Ind. 39 (argumentative denial).

2. Negative Allegations.—The party who grounds his right of action or defence upon a negative proposition which is an essential element in it must prove such allegation.[1]

3. When Parties have Equal Opportunity of Proving a Negative.—When the means of proving the facts are equally within the control of each party, then the burden is upon the party averring the negative.[2]

1. 1 Greenl. on Ev. § 78; Harvey *v.* Towers, 4 E. L. & Eq. 531; s. c., 15 Jur. 544; Lane *v.* Crombie, 12 Pick. (Mass.) 177; Holmes *v.* Love, 3 B. & C. (Eng.) 242; Rex *v.* Pratten, 6 T. R. 559; Spiers *v.* Parker, 1 T. R. 141; Ross *v.* Hunter, 4 T. R. 33; Nash *v.* Hall, 4 Ind. 444; Dougherty *v.* Deardorf, 107 Ind. 527; Vigus *v.* O'Brannon, 8 N. E. Repr. 778; Carter *v.* Goff, 5 N. E. Repr. 471; s. c., 141 Mass. 123.

If the agreement is not to do a particular thing, slight evidence that it was done suffices. Thus in an action on an agreement to pay £100 if the plaintiff would not send herrings for one twelvemonth to the London market, and in particular to the house of J. & A. M., and the plaintiff proved he had sent no herrings during the twelvemonth to the house J. & A. M., it was held sufficient to entitle him to recover, no proof having been given that he had sent herrings within that time to the London market. Colder *v.* Rutherford, 3 B. & B. (Eng.) 302.

So on a charge of obtaining money by false pretences, where it was alleged that the accused obtained the money upon the representation that he owned certain bonds which were deposited with a third person, but never exhibited, it was held that the State must prove that there were no such bonds. State *v.* Wilborne, 16 Rep. 151.

2. Quoted from Great Western R. Co. *v.* Bacon, 30 Ill. 347; s. c., 83 Am. Dec. 199.

Fencing Railroad-track.—"This was an action on the case for killing a mule. The plaintiff below relies only on the first count of his declaration to maintain his judgment. This count is on the statute which requires the railroad company to fence its road where it runs through inclosed lands, except where it is fenced by the proprietor, or where the company has a contract with the proprietor of the lands that he shall fence the road. The mule was killed by a train on the defendant's road, at a place where it passes through inclosed grounds, and where it is not fenced; and the only question is whether it was the duty of the plaintiff to prove that there was no contract between the company and the proprietor of the land that he should fence the road. The statute requires, in general terms, all railroad companies to fence their roads, and then makes several exceptions, one of which is when it runs through inclosed lands the proprietor of which has agreed to fence it. We have repeatedly held that it was necessary, in pleading, to negative all these exceptions; whether it is necessary for the plaintiff to prove these negative averments must depend upon their nature and character. Where it is as easy for the plaintiff to prove the negative as it is for the defendant to disprove it, then the burden must rest upon him, or that the place where the animal was killed was not in a town or village or was not more than five miles from a settlement; but where the means of proving the negative are not within the power of the plaintiff, but all the proof on the subject is within the control of the defendant, who, if the negative is not true, can disprove it at once, then the law presumes the truth of the negative averment from the fact that the defendant withholds or does not produce the proof which is in his hands, if it exists, that the negative is not true. In other words, the burden of proof is thrown upon the defendant to prove the affirmative against the negative averment. There are cases between these extremes where the party averring a negative is required to give some proof to establish it. Indeed, it is not easy to lay down a general rule by which it may readily be determined upon which party the burden of proof lies when a negative is averred in pleading. Each case must depend upon its peculiar characteristics, and the courts must apply practical common-sense in determining the question. Where the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but where the opposite party must, from the nature of the case, be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party thus in the possession of the proof

4. Burden to Disprove Negative Averment.—Where the means of proving the negative are not within the power of the party alleging it, but all the proof on the subject is within the control of the opposite party, who, if the negative is not true, can disprove it at once, then the law presumes the truth of the negative averment from the fact that such opposite party withholds or does not pro-

should be required to adduce it, or on his failure to do so, we must presume it does not exist, which of itself establishes a negative. Such is the case here. If the railroad company has a contract with the proprietor of this land that he shall fence it, it is no trouble to produce it and thus exonerate itself from the liability to build the fence. If the defendant does not produce such a contract, the presumption is that none exists." Great Western R. Co. *v.* Bacon, 30 Ill. 347; s. c., 83 Am. Dec. 199. The language, "we have repeatedly held that it was necessary in pleading to negative all these exceptions," was modified in Great Western R. Co. *v.* Hanks, 36 Ill. 284, because the court had thus held only in regard to the exceptions contained in the enacting clause of the statute commented upon. "Whoever asserts a right dependent for its existence upon a negative must establish the truth of the negative by a preponderance of the evidence. This must be the rule, or it must follow that rights of which a negative forms an essential element may be enforced without proof. This conclusion would be both illogical and unjust, and we are therefore authorized to infer the truth of its converse. Confusion has arisen from statements loosely made by text-writers, and sometimes by courts; but it will be found upon examination that, wherever the question has been directly presented and considered with care, it has been uniformly held that, wherever the petitioner's right depends upon the truth of a negative, upon him is cast the *onus probandi*, except in cases where the matter is peculiarly within the knowledge of the adverse party." Goodwin *v.* Smith, 72 Ind. 113; s. c., 37 Am. Rep. 144.

Where one relied upon a negative allegation that a negotiable promissory note was not taken in payment of a precedent debt, it was held that he must prove it. Smith *v.* Bettger, 68 Ind. 254. See, generally, Spiers *v.* Parker, 1 T. R. 141; Rex *v.* Pratten, 6 T. R. 559; Holmes *v.* Love, 3 B. & C. 242; Lane *v.* Crombie, 12 Pick. (Mass.) 177; Harvey *v.* Towers, 15 Jur. 544; s. c., 4 E. L. & Eq. 531; Purcell *v.* Macnara, 1 Camp. 199; s. c., 9 East, 361; Phillipskirk *v.* Pluckwell, 2 M. & S. 395; Rex *v.* Rogers, 2 Camp. 654; Rex *v.* Jarvis, 1 East, 643, note; Rex *v.* Burditt, 4 B. & Ald. 95; Rex *v.* Turner, 5 M. & S. 206; Colder *v.* Rutherford, 3 B. & B. 302; s. c., 7 Moore, 158; Doe *v.* Johnson, 7 Mon. & Gr. 1047; Woodbury *v.* Frink, 14 Ill. 279; Little *v.* Thompson, 2 Greenl. (Me.) 128; Gibson *v.* Waterhouse, 4 Greenl. 226; Ulmer *v.* Leland, 1 Greenl. (Me.) 134; Com. *v.* Samuel, 2 Pick. (Mass.) 103; Smith *v.* Moore, 6 Greenl. (Me.) 274; Williams *v.* Hingham, etc., Co., 4 Pick. (Mass.) 341.

Malicious Prosecution.—An action for a malicious prosecution is grounded upon the absence of a probable cause; and, although a negative, the burden of proving that fact is upon the plaintiff, for his action is based upon the negative allegation of want of it. Adams *v.* Leiher, 3 Blackf. (Ind.) 445; Purcell *v.* Macnara, 9 East, 361; s. c., 1 Camp. 199; Cummings *v.* Parkes, 2 Ind. 148; Trogden *v.* Deckard, 45 Ind. 572; Smith *v.* Zent, 59 Ind. 362; Carey *v.* Sheets, 67 Ind. 375; Gibson *v.* Waterhouse, 4 Me. 22; Griffin *v.* Chubb, 7 Tex. 603; s. c., 58 Am. Dec. 85; Abrath *v.* Northwestern R. Co., 25 Am. L. Reg. 757. See Munandee *v.* Allard, 14 L. C. R. (Can.) 154.

Illegal Voter.—So in a prosecution against a man for illegal voting, and the cause of action is based upon the allegation that he was not a legal voter, the prosecution, civil or criminal, must prove it. Beardstown *v.* Virginia, 76 Ill. 34.

Incapacity to Marry.—In an action by the plaintiff to set aside the marriage of her brother with the defendant, on the ground that at the time of the solemnization of the marriage he was suffering from *delirium tremens* and had not the reason or mental capacity which rendered him competent to enter into such a contract, it was held that the burden was on the plaintiff to show such was the case. Scott *v.* Paquet, 4 L. C. J. (Can.) 151; 3 L. C. J. (Can.) 136; 11 L. C. J. (Can.) 289; 17 L. C. R. (Can.) 283.

Notary's Fees.—In a suit by a notary for his fees, the defendant pleaded that the deed was not made in time, and he was held to have the burden to prove it. Bedard *v.* Blouin, 4 R. L. (Can.) 479.

duce the proof which is in his hands, if it exists, that the negative is not true.[1]

1. Quoted in part from Great Western R. Co. *v.* Bacon, 30 Ill. 347; s. c., 83 Am. Dec. 199; Sunderland Marine Ins. Co. *v.* Kearney, 16 Q. B. 925; R. *v.* Burdett, 4 B. & A. 95, 140; King *v.* Turner, 5 M. & S. 206; State *v.* Crowell, 25 Me. 171; State *v.* Lipscomb, 52 Mo. 32; Sheldon *v.* Clark, 1 Johns. (N. Y.) 513; State *v.* Richeson, 45 Mo. 575.

In an action by the assignee of a bankrupt for a debt due to the bankrupt's estate, the defendant offered to set off some cash notes issued by the bankrupt, payable to bearer, and bearing date before his bankruptcy. It was held that the defendant was bound to show that they came into his hands before the bankruptcy. Dickson *v.* Evans, 6 T. R. 57. See, generally, Apothecaries Co. *v.* Bentley, Ry. & Mood. 159; R. *v.* Turner, 5 M. & S. 211; Elkin *v.* Janson, 13 M. & W. 655; R. *v.* Burdett, 4 B. & A. 95; Rex *v.* Hawkins, 10 East, 211; Powell *v.* Milburn, 3 Wils. 355; Sissons *v.* Dixon, 5 B. & C. 758; Rodwell *v.* Redge, 1 C. & P. 220; United States *v.* Hayward, 2 Wall. 498; Hartwell *v.* Root, 19 Johns. (N. Y.) 345; Com. *v.* Stow, 1 Mass. 54.

Where a grantee, in an answer to a bill filed by his grantor's creditor, who charged that the conveyance was fraudulent, and the allegation was that the conveyance embraced all the debtor's estate, denied the latter allegation and avered that the debtor had other estate in a particular county sufficient to pay the complainant, it was held that the defendant had to prove the presence of property in the county named. Birely *v.* Staley, 5 Gill & J. (Md.) 432; s. c., 25 Am. Dec. 303.

Sale without License.—Upon a charge of a sale of liquors or merchandise without a license as required by law, the burden is on the defendant to show a license; for if he have a license, that is a fact peculiarly within his knowledge, as proof of it can be more easily made than the negative can be by the prosecution. Farrall *v.* State, 32 Ala. 557; Williams *v.* State, 35 Ark. 430; Sharp *v.* State, 17 Ga. 290; Conyers *v.* State, 50 Ga. 103; s. c., 15 Am. Rep. 686; Noecker *v.* People, 91 Ill. 468; Gunnerssohn *v.* Sterling, 92 Ill. 569; Flora *v.* Ess, 5 Bradw. (Ill.) 629; Shearer *v.* State, 7 Blackf. 99; Howard *v.* State, 5 Ind. 516; Taylor *v.* State, 49 Ind. 555; State *v.* Miller, 53 Iowa, 84; State *v.* Stopp, 29 Iowa, 551; State *v.* Curley, 33 Iowa, 359; Haskill *v.* Com., 3 B. Mon. (Ky.) 342; State *v.* Woodward, 34 Me. 293; State *v.* Crowell, 25 Me. 171; Smith *v.* Adrain, 1 Mich. 455; State *v.* Schmail, 25 Minn. 370; Schmidt *v.* State, 14 Mo. 137; Easterling *v.* State, 35 Miss. 210; State *v.* Foster, 3 Fost. (N. H.) 348; State *v.* McGlynn, 34 N. H. 422; Bliss *v.* Brainard, 41 N. H. 256; State *v.* Morrison, 3 Dev. (N. Car.) 290; State *v.* Cutting, 3 Oreg. 260; State *v.* Edwards, 60 Mo. 490; Geuing *v.* State, 1 McCord (S. Car.), 573; Information against Oliver, 21 S. Car. 318; s. c., 53 Am. Rep. 681. *Contra*, State must show a sale without a license. Com. *v.* Bolkom, 3 Pick. (Mass.) 281; Com. *v.* Tuttle, 12 Cush. (Mass.) 502; Com. *v.* Kimball, 7 Metc. (Mass.) 304; Com. *v.* Thurlow, 24 Pick. (Mass.) 374. Changed by statute. Com. *v.* Lakey, 8 Gray (Mass.), 459; Com. *v.* Lock, 114 Mass. 288; Lisbon *v.* Lyman, 49 N. H. 553; State *v.* Perkins, 53 N. H. 435; s. c., 2 Green L. Cr. Cas. 332; Mehan *v.* State, 7 Wis. 760.

Permission.—On a charge of a sale of liquor to a slave without the master's permission, it was held that the prosecution must prove the absence of permission. McGuire *v.* State, 13 S. & M. (Miss.) 257. On the ground that the master could be easily called to prove the lack of permission. State *v.* Evans, 5 Jones (N. Car.), 250; State *v.* Woodly, 2 Jones (N. Car.), 276. Coming there without permit. Rex *v.* Rogers, 2 Camp. 654; State *v.* Whittier, 21 Me. 341; s. c., 38 Am. Dec. 272.

Sale without Inspection.—On a charge of a sale of adulterated liquor the prosecutor must give some evidence that the liquor had not been inspected. Cheadle *v.* State, 4 Ohio St. 477.

Sale to Persons not Travellers.—A statute allowed a sale of liquor by victuallers to travellers only on Sunday. In a prosecution for a violation of it, it was held that the prosecution must prove that the liquor sold was not to travellers. Taylor *v.* Humphries, 17 C. B. N. S. 539.

Disorderly Shop.—Where a statute made it a finable offence for any licensed liquor dealer to keep his shop in a disorderly manner, it was held incumbent upon the prosecution to allege and prove that the shopkeeper had a license to sell liquor. Brubaker *v.* State, 89 Ind. 577. See Schlict *v.* State, 31 Ind. 246.

Carrying Concealed Weapons.—A statute allowed only travellers to carry concealed weapons, the privilege being granted on exception. It was held that the State

5. Negative Involving a Criminal Omission.—Where a person is required to do an act the omission to do which would be criminal, his performance of that act will be intended until the contrary be shown.[1]

6. Where the Presumption of Law is in Favor of the Affirmative.—Where the presumption of law is in favor of the affirmative the opposite party has the burden of proving the contrary.[2]

was not bound to show affirmatively that the accused was not a traveller. Wiley *v.* State, 52 Ind. 516.

1. A suit had been instituted in the spiritual court for tithes, when the defendant pleaded that the plaintiff had not read the Thirty-nine Articles. The ecclesiastical court put the defendant to prove the fact though a negative; upon which he moved the court of King's Bench for a prohibition; but it was refused, upon the ground that in such a case the law will presume that a person has read the Articles, for otherwise he is to lose his benefice; and when the law presumes the affirmative, the negative must be proven. Monk *v.* Butler, 1 Rol. Rep. 83, cited in 3 East, 199; Hicks *v.* Martin, 9 Mart. (La.) 47; s. c., 13 Am. Dec. 304.

In an action by a ship-owner against a defendant for putting on board a ship a quantity of combustible and dangerous articles "without giving due notice thereof," the court held that it lay upon the plaintiff to prove the negative averment, for the omission involved a criminal offence. Williams *v.* East India Co., 3 East, 192; s. p., King *v.* Hawkins, 10 East, 216.

Even in an indictment for coursing deer upon inclosed ground without consent of the owner of the close, absence of consent must be proven. Rex *v.* Rogers, 2 Camp. 654.

The person alleging that goods were not legally imported must prove it. Sissons *v.* Dixon, 5 B. & C. 758. Or that a theatre was not licensed. Rodwell *v.* Redge, 1 C. & P. 220.

Where goods are seized and taken out of the owner's possession for an alleged forfeiture under the revenue laws, the seizure is presumed unlawful until proved otherwise. Aitcheson *v.* Maddock, Peake's Cases, 162; Lilienthal *v.* U. S., 97 U. S 237.

Exceptions.—If the circumstances of the case raise a presumption that all has not been regularly performed, whether that presumption arise from positive or negative evidence, then it is incumbent to prove the due performance of the act required. Thus on the trial of an indictment against a parish for not repairing a highway which was reputed to lie within the parish and had been from time to time repaired by the inhabitants, an award made by commissioners of inclosure, awarding the highway to be situated in a different parish, was adjudged not to be admissible evidence for the defendants, because it was not proven that the commissioners had given the previous notice (required by the inclosure act) to the parish which would be affected by their award; the circumstance of the defendant having continued to repair after the award raised a presumption that there had not been such a notice as the act of Parliament required. Rex *v.* Inhabitants, 2 M. & S. (Eng.) 558.

Where instances of a fiduciary relationship exist between the plaintiff and defendant, the burden is frequently charged by these circumstances. Thus in chancery, in the case of an attorney and client, it has been ruled that if the attorney, retaining his connection, contract with his client, he is subject to the burden of proving that no advantage has been taken of the situation of the latter. Gibson *v.* Jeyes, 6 Ves. 278; Cane *v.* Ld. Allen, 2 Dow. 289.

2. Thus an infant between seven and fourteen is presumed to be incapable of committing a crime; but the prosecution may show a mischievous disposition. 1 Hale P. C. 26; 4 Black. Com. 23; Hawks. P.C. 2; 1 Bish. Cr. L. § 461 (4th Ed.); Willett *v.* Com., 13 Bush (Ky.), 230; McClure *v.* Com., 81 Ky. 448; s. c., 5 Crim. L. Mag. 210; State *v.* Guild, 5 Halst. (N. J.) 192; Stage's Case, 5 City Hall Rec. (N. Y.) 120; R. *v.* Smith, 1 Cox C. C. (Eng.) 260; R. *v.* Owen, 4 C. & P. (Eng.) 236; Com. *v.* Mead, 10 Allen (Mass.), 398; State *v.* Bostick, 4 Harr. (Del.) 563; Angelo *v.* People, 96 Ill. 209; s. c., 36 Am. Rep. 132; Com. *v.* French, Thacher (Mass.), 163; Com. *v.* Green, 2 Pick. (Mass.) 380.

So a sale of liquors without a license is not presumed, in a civil case at least. Smith *v.* Joyce, 12 Barb. (N. Y.) 21. Or the running of a theatre unlicensed. Fry *v.* Bennett, 28 N. Y. 324; s. c., 3 Bosw. (N. Y.) 200,

7. Burden of Proof and Weight of Evidence Distinguished.—The burden of proof remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause; the weight of evidence shifts from side to side in the progress of a trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established.[1]

8. Test.—The party having the burden is the party who, if no proof is offered, will be defeated in the suit.[2]

So officers are presumed to do their duty, and the burden is on him who asserts the contrary. Wood *v.* Terry, 4 Lans. (N. Y.) 80; Wood *v.* Morehouse, 45 N. Y. 368; s. c., 1 Lans. (N. Y.) 405.

All persons are presumed to be sane; and the burden of proving a particular person is not is on him who alleges it. U. S. *v.* Lawrence 4 Cranch C. C. 514; Lilly *v.* Waggoner, 27 Ill. 395; State *v.* Brown, 12 Minn. 538.

1. Quoted from Central Bridge Co. *v.* Butler, 2 Gray (Mass.), 132.

A. sued B. on a warranty of the genuineness of an indorsement on a note sold by the latter to the former, and B. contended that A. knew he was acting as an agent for L. The court instructed the jury that A. was "bound to show to your satisfaction that at the time of the transaction he was ignorant that the defendant was dealing for L. If he fails to do this, or if you are unable to say, on the whole, how this is, the plaintiff is not entitled to recover." In reviewing this the appellate court said: "In a certain sense, and to a certain degree, these statements of the burden upon the plaintiff may be said to be correct. The plaintiff must prove that his contract was made with the defendant, and with no one else. He must maintain this proposition against all the evidence which tends to show that Lane was the real party instead of the defendant; and if the jury are left in doubt upon the whole evidence, the plaintiff must fail. But the particular facts, for which it is claimed that a contract with Lane, as the principal, may be inferred, must be proved by the defendant. If the plaintiff's evidence shows a contract negotiated with the defendant, apparently in his own behalf or principle, and nothing to the contrary appears, that is sufficient. He is not bound to go further and exclude other possibilities. Evidence tending to prove that the defendant was the agent of Lane does not require the plaintiff to prove affirmatively and specifically that the agency was not disclosed. The absence of all evidence of such disclosure, or tending to show knowledge without any affirmative proof upon the point, would warrant a jury in finding that the negotiation with the defendant, apparently as principal, was in fact so. The burden upon the plaintiff is coextensive only with the legal proposition upon which his case rests. It applies to every fact which is essential or necessarily involved in that proposition. It does not apply to facts relied upon in defence to establish an independent proposition, however inconsistent it may be with that upon which the plaintiff's case depends. It is for the defendant to furnish the proof of such facts; and when he has done so the burden is upon the plaintiff, not to disprove those particular facts nor the proposition which they tend to establish, but to maintain the proposition upon which his own case rests, notwithstanding such controlling testimony, and upon the whole evidence in the case. The distinction may be narrow, and may often be decisive. To apply it to this case, the burden upon the plaintiff is to prove a contract with the defendant, not to disprove a contract with Lane, nor to disprove any of the facts from which a contract with Lane might be inferred. It appears to us that the instructions of the learned judge at the trial extended the rule of the burden of proof beyond its legitimate office, making it apply to facts not strictly embraced within the issue." Wilder *v.* Cowles, 100 Mass. 487; Nat'l Bank *v.* Huxford, 29 Iowa, 579.

2. Barry *v.* Butlin, 2 Moo. P. C. 484; Geach *v.* Ingalls, 14 M. & W. 100; Amos *v.* Hughes, 1 Moo. & Rob. 464; Doe *v.* Rowlands, 9 C. & P. 735; Osborn *v.* Thompson, 2 Moo. & Rob. 254; Mercer *v.* Whall, 5 A. & E. 447; Judah *v.* Trustees, 23 Ind. 272; Kent *v.* White, 27 Ind. 390. This rule determines who has the open and close, or the right to begin, usually. Leet *v.* Gresham Life Ins. Co., 7 E. L. & Eq. 578; s. c., 15 Jur. 1161; Hackman *v.* Fernie, 3 Mes. & Wels. 510. Another test is to examine whether if the particular allegations were struck out of the plea there would or would not be a defence to the action. In this last instance the burden rests upon the party whose case would

thereby be destroyed. Mills *v.* Barber, 1 Mes. & Wels. 427; s. c., Tyrwh. & Gr. 835; Blecker *v.* McIntosh, 8 C. & P. 720; Osborn *v.* Thompson, 2 Man. & R. 254; Doe *v.* Rowlands, 9 C. & P. 734; Geach *v.* Ingall, 14 Mes. & Wels. 95; Ridgeway *v.* Ewbank, 2 Man. & R. 218; Thompson *v.* Lee, 8 Cal. 275; Judah *v.* Trustees, etc., 23 Ind. 272; Goodwin *v.* Smith, 72 Ind. 113; s. c., 37 Am. Rep. 144; Ford *v.* Simmons, 13 La. Ann. 397; Oppenheim *v.* Leo Woolf, 3 Sandf. Ch. (N. Y.) 571; New Haven Copper Co. *v.* Brown, 46 Me. 418; Hudson *v.* Wetherington, 79 N. Car. 3; McRae *v.* Lawrence, 75 N. Car. 289; Frost *v.* Brown, 2 Bay (S. Car.), 133; Gregory *v.* Baugh, 4 Rand. (Va.) 611.

Best puts the test, "Which party would be successful if no evidence at all, or no more evidence, as the case may be, were given." Best on Ev. (Morgan's Ed.) § 268. See Baker *v.* Bett, 2 Moo. P. C. C. 317.

Mere Form of a Proposition does not Change the Rule.—But the mere form of a proposition does not change the rule as to the burden. Lord Abinger said upon a like question: "Looking at these things according to common-sense, we should consider what is the substantive fact to be made out, and on whom it lies to make it out. It is not so much the form of the issue which ought to be considered as the substance and effect of it." Soward *v.* Leggatt, 7 C. & P. 613; Goodwin *v.* Smith, 72 Ind. 113, 116; s. c., 37 Am. Rep. 144; McLees *v.* Felt, 11 Ind. 218.

Upon an issue to determine whether certain land assigned for payment of a legacy was deficient in value, where issue was joined upon the deficiency, the one party alleging that it was deficient and the other that it was not, it was held by the court that though the averring that it was deficient is such an affirmative as implies a negative, yet it is such an affirmative as turns the proof on those that plead it; if he had joined in the issue that the land was not of value, and the other had averred that it was, the proof then had lain on the other side. Berty *v.* Dormer, 12 Mod. 526.

The following rules have been given by a standard writer: "Rule I. The issue must be proved by the party who states an affirmative, not by the party who states a negative. Rule II. The issue must be proved by the party who states the affirmative in substance, and not necessarily the affirmative in form. Rule III. In every case the *onus probandi* lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant. Rule IV. The burden of proof is shifted by presumptions of law, presumptions of fact of the stronger kind, and evidence strong enough to establish a *prima facie* case." Bailey's Onus Probandi, 1, 5.

Witness Testifying to an Affirmative Fact.—The general rule is that a witness testifying to an affirmative fact is entitled to credit (all other things being equal) in preference to one who testifies to a negative; for the latter may have forgotten what actually occurred, while it may be impossible to remember what never existed. Stilt *v.* Huidekoper, 17 Wall. (U. S.) 384. See 8 Mod. 81; 2 Curt. Eccl. Rep. 434; Wills. Circ. Ev. (3d Ed.) 224; Stark. Ev. (4th Ed.) 863.

Several Issues.—If there are several issues and the plaintiff hold the affirmative in any one of them, he is entitled to begin and close. Rees *v.* Smith, 2 Stark. 31; Jackson *v.* Hesketh, 2 Stark. 518; Curtis *v.* Wheeler, 4 C. & P. 196; s. c., 1 M. & M. 493; James *v.* Salter, 1 M. & Rob. 501; Comstock *v.* Hadlyme, 8 Conn. 261; Williams *v.* Thomas, 4 C. & P. 234; York *v.* Reese, 2 Gray (Mass.), 282; Holbrook *v.* McBride, 4 Gray (Mass.), 218; Cushing *v.* Billings, 2 Cush. (Mass.) 158; Browne *v.* Murray, Ry. & Mood. 254.

Examples.—In an action of *assumpsit* on a contract to emboss calico in a workmanlike manner, the breach was that the defendant did not emboss the calico in a workmanlike manner, but, on the contrary, embossed it in a bad and unworkmanlike manner; to which the defendant pleaded that he did emboss the calico in a workmanlike manner. It was held, on issue being joined on the plea, that the burden was on the plaintiff. Amos *v.* Hughes, 1 Moo. & R. 464.

A statute prohibited the granting of a license to retail intoxicating liquor to a person in the habit of becoming intoxicated. Where, therefore, under this statute, an applicant for a license applied, it was held that the burden was on him to show he was not such a person. Goodwin *v.* Smith, 72 Ind. 113; s. c., 37 Am. Rep. 144.

On a covenant to repair, it was alleged that the defendant had not repaired, and the defendant plead he had repaired in accordance with his covenant. The burden was held to lie on the plaintiff. Seward *v.* Leggatt, 7 C. & P. 613.

9. Criminal Cases.—In criminal cases the burden of proof never shifts; before a conviction can be had the jury must be satisfied from the evidence, beyond a reasonable doubt, of the affirmative of the issue presented in the accusation, that the defendant is guilty in the manner and form as charged in the indictment.[1]

1. So noted in substance from Lilienthal *v.* U. S., 97 U. S. 237; Com. *v.* McKie, 1 Gray (Mass.), 61; Com. *v.* Eddy, 7 Gray (Mass.), 583; State *v.* Bartlett, 43 N. H. 224; State *v.* Jones, 50 N. H. 369; State *v.* Redemier, 71 Mo. 173; s. c., 36 Am. Rep. 462; 1 Crim. L. Mag. 456; Shafer *v.* State, 7 Tex. App. 239; Lewis *v.* State, 7 Tex. App. 567; Guffee *v.* State, 8 Tex. App. 187; State *v.* Fowler, 2 Crim. L. Mag. 45; 2 Ky. L. Rep. 150; Alexander *v.* People, 96 Ill. 96; People *v.* Core, 8 Pac. C. L. J. 133; Dubose *v.* State, 10 Tex. 230; Fairchild *v.* People, 48 Mich. 31; s. c., 11 N. W. Repr. 773; Com. *v.* Whittaker, 131 Mass. 224; Grise *v.* State, 37 Ark. 456; People *v.* Cheong Foon Ark, 61 Cal. 527; s. c., 10 Pac. C. L. J. 275; Jones *v.* State, 18 Tex. App. 485; s. c., 15 Rep. 27; Davis *v.* State, 12 Tex. App. 11; Com. *v.* Kimball, 24 Pick. (Mass.) 373; State *v.* Flye, 26 Me. 312; State *v.* Tibbets, 35 Me. 81; People *v.* Bodine, 1 Denio (N. Y.), 281; U. S. *v.* Wright, 16 Fed. Repr. 112; Regina *v.* Jones, 50 L. T. 726; State *v.* Middleham, 62 Iowa, 150; Wharton *v.* State, 73 Ala. 366; People *v.* King, 64 Cal. 338; People *v.* Willett, 36 Hun (N. Y.), 500; s. c., 22 Week. Dig. 42; People *v.* Millard, 53 Mich. 63; U. S. *v.* Searcey, 26 Fed. Repr. 435; Kent *v.* People, 8 Colo. 563; s. c., 9 West C. Rep. 584, 9 Pac. Rep. 852.

"In every criminal case the burden is, throughout, upon the prosecution. Whatever course the defence deem it prudent to take, in order to explain suspicious facts or remove doubts, yet it is incumbent on the prosecution to show, under all the circumstances, as a part of their own case, unless admitted or shown by the defence, that there is no innocent theory possible which will, without violation of reason, accord with the facts. And in case of alleged poisoning, where the symptoms and appearances during the last illness become controlling facts in determining whether the death was from poison or from disease, the charge is not made out unless the prosecution negative everything but poison as the cause of death. And this they can only do by showing, affirmatively, that the combined symptoms, and the absolutely certain facts with which they are associated, are inconsistent with any other disease or ailment." People *v.* Millard, 53 Mich. 63; s. c., 5 Crim. L. Mag. 588.

Independent Exculpatory Fact.—If, however, there is an independent exculpatory fact relied upon by the accused, he must produce evidence of it; *and to this extent* the burden lies upon him; but when the whole evidence is in, the burden still lies upon the prosecution to, *upon the whole case*, establish the defendant's guilt beyond a reasonable doubt; and if not so established, he is entitled to a verdict of not guilty. Dubose *v.* State, 10 Tex. App. 230; People *v.* Marshall, 59 Cal. 386; Hawthorne *v.* State, 58 Miss. 778; State *v.* Hopkins, 15 S. Car. 153; State *v.* Payne, 86 N. Car. 609; People *v.* Cadd, 60 Cal. 640; Jones *v.* State, 18 Tex. App. 485; State *v.* Cain, 20 W. Va. 679; People *v.* Abbott, 4 Pac. Repr. 769; s. c., 6 Crim. L. Mag. 71; Kent *v.* People, 8 Colo. 563; s. c., 9 West C. Rep. 584; 9 Pac. Repr. 852.

Self-defence.—Self-defence is an illustration of the last proposition. For if an assault with a deadly weapon is shown to have been made by the accused, a *prima facie* case is proven, and he must produce some evidence of excuse, or else abide by a verdict of guilty. Sawyer *v.* People, 91 N. Y. 667; State *v.* Skidmore, 87 N. Car. 509. See State *v.* Fowler, 52 Iowa, 509; s.c., 2 Crim. L. Mag. 45.

Some of the cases claim that he must prove his defence by a preponderance of the evidence. State *v.* Jones, 20 W. Va. 764.

Former Conviction.—The burden is on the accused to show the offence charged is the identical one for which he has been formerly convicted. Cooper *v.* State, 47 Ind. 61.

Erasures in Indictment.—The burden is on the defendant to show by irresistible proof that erasures and interlineations in an indictment were not the act of the grand jury. Dodd *v.* State, 10 Tex. App. 370.

Insanity.—The presumption is that every man is sane, and that when he commits an act he has sufficient mental capacity to understand the nature of his act. When, therefore, the prosecution has proven the commission of the act denounced by the law, the law raises the presumption that the accused had sufficient mental capacity to understand what

BURGAGE-TENURE is a tenure whereby houses and lands which were formerly the site of houses, in an ancient borough, are held of some lord by a certain rent. [1] One of the most remarkable customs affecting these tenures is that of Borough-English (which see).

BURGESS.—An inhabitant of a borough. Also used to denote a magistrate of a borough.[2]

he was doing, and a *prima facie* case is made. The duty then devolves upon the accused to adduce some evidence of his insanity, which the State may rebut. Yet when the whole evidence is before the jury, the burden is with the prosecution that the accused was sane at the time the act was committed. In no sense has the burden changed; but a greater burden has been cast upon the prosecution—to prove a sanity which the law, before any exculpatory evidence was produced, presumed. The presumption of innocence never deserts the accused until a verdict of guilty is returned. Hopps *v.* People, 31 Ill. 385 (overruling Fisher's Case, 23 Ill. 293); Alexander *v.* People, 96 Ill. 96; Chase *v.* People, 40 Ill. 352; Bradley *v.* State, 31 Ind. 492; McDougal *v.* State, 88 Ind. 24; s. c., 4 Crim. L. Mag. 509, and note; Guetig *v.* State, 66 Ind. 94; s. c., 32 Am. Rep. 99; State *v.* Jones, 64 Iowa, 349; s. c., 17 N. W. Repr. 911; 20 N. W. Repr. 470; 6 Crim. L. Mag. 91; State *v.* Crawford, 11 Kans. 32; s. c., 24 Am. Law Reg. 21; People *v.* Garbutt, 17 Mich. 9; Cunningham *v.* State, 56 Miss. 269; s. c., 31 Am. Rep. 360; Wright *v.* People, 4 Neb. 407; Ballard *v.* State, 28 N. W. Repr. 27; State *v.* Pike, 49 N. H. 399; State *v.* Bartlett, 43 N. H. 224; State *v.* Jones, 50 N. H. 369; State *v.* Waterman, 1 Nev. 543; Walter *v.* People, 32 N. Y. 147; People *v.* McCann, 16 N. Y. 58; O'Brien *v.* People, 48 Barb. (N. Y.) 274; O'Connell *v.* People, 87 N. Y. 377; Dove *v.* State, 3 Heisk. (Tenn.) 348; State *v.* Patterson, 45 Vt. 308.

But a contrary view has been taken by many of the courts, substantially upon the ground that the sanity of mankind being the rule, the burden of proof is on the defendant to show that an exception exists in his case. Braswell's Case, 63 Ala. 307; s. c., 2 Crim. L. Mag. 32; 35 Am. Rep. 20; Ford *v.* State, 5 Crim. L. Mag. 32; McKenzie *v.* State, 26 Ark 334; Cavaness *v.* State, 43 Ark. 331; People *v.* McDonnell, 47 Cal. 134; People *v.* Bell, 49 Cal. 489; People *v.* Knapp, 8 Crim. L. Mag. 640: (by a preponderance under a statute People *v.* Rodrigo, 11 Pac. Repr. 483;) Jones *v.* State, 13 Tex. App. 1 (by code).

In some States he must not only raise a reasonable doubt, but prove his insanity by a preponderance. Ford *v.* State (Ala.), 5 Crim. L. Mag. 32; Graves *v.* State, 5 Crim. L. Mag. 815; State *v.* Spencer, 1 Zab. (N. J.) 196; State *v.* Martin (N. J.), 3 Crim. L. Mag. 44; Dejarnette *v.* Com., 75 Va. 867; s. c., 2 Crim. L. Mag. 348; State *v.* Hoyt, 47 Conn. 518; State *v.* Kline, 54 Iowa, 183; s. c., 2 Crim. L. Mag. 641; State *v.* Frazier, 1 Del. Cr. 177; State *v.* Taylor, 1 Del. Cr. 436; State *v.* Lawrence, 57 Me. 574; Com. *v.* Eddy, 7 Gray (Mass.), 583; Loeffner *v.* State, 10 Ohio St. 598; Bond *v.* State, 23 Ohio St. 349; Bonfanti *v.* State, 2 Minn. 123; State *v.* Gut, 13 Minn. 341; Ostwein *v.* Com., 76 Pa. St. 414; Lynch *v.* Com., 77 Pa. St. 205; State *v.* McCoy, 34 Mo. 531; State *v.* Klinger, 43 Mo. 127; State *v.* Humdley, 46 Mo. 414; State *v.* Smith, 53 Mo. 267; State *v.* Holme, 54 Mo. 153; Corbit *v.* Smith, 7 Iowa, 60; s. c., 71 Am. Dec. 431 (on person asserting); Webb *v.* State, 9 Tex. App. 490; Coyle *v.* Com., 100 Pa. St. 573; s. c., 45 Am. Rep. 397; 4 Crim. L. Mag. 76; 15 Cent. L. J. 413; State *v.* Redemier, 71 Mo. 173; s. c., 36 Am. Rep. 462; 1 Crim. L. Mag. 456.

Must be proven beyond a reasonable doubt. State *v.* Del Rance, 34 La. Ann. 186; s. c., 44 Am. Rep. 426; Baccigalpo *v.* Com., 33 Gratt. (Va.) 807; s. c., 36 Am. Rep. 795.

For discussion on this subject see 14 Cent. L. J. 2 and 16 Cent. L. J. 282.

Authorities for Burden of Proof.—1 Greenl. Ev. (13th Ed.) 74–81, c.; 1 Starkie Ev. (10th Am. Ed.) 585; 1 Whart. Ev. (2d Ed.) §§ 353–371; 1 Phillips Ev. (5th Am. Ed.) 683; 1 Taylor's Ev. (1st Eng. Ed.) 372; Woods Prac. Ev. (1st Ed.) 642; Burrill Cir. Ev. (1st Ed.) 728; Best's Prin. Ev. (Morgan's Ed.) §§ 265–290; Lawson Presumptive Ev. 20; 2 Southern L. Rev. (N. S.) 126; 17 Am. L. Rev. 892; 5 Am. L. Rev. 205 (reviewing the case of Cass *v.* Boston & Lowell R. Co., 14 Allen (Mass.), 448); Wharton Cr. Ev. §§ 319–344; Roscoe's Crim. Ev.; Bish. Cr. Proc. (2d Ed.) §§ 1056–1058.

1. Whar. Law Lex.

2. See Bright. Purd. Dig. (Pa.) 206.

BURGLARY. (See also CRIMINAL LAW.)

1. **Definition.**—Burglary, at the common law, is where a person breaks and enters any dwelling-house by night, with intent to commit a felony therein, whether such felonious intent be executed or not. The "breaking" is either actual, as where the person makes a hole in a door or opens a window, or in law, as where he obtains an entrance by threats or fraud or by collusion with some one in the house.[1]

1. Sweet's Law Dict. See People *v.* Marks, 4 Park. C. C. (N. Y.) 153; Allen *v.* State, 40 Ala. 334.

Offence at Common Law.—Burglary is a felony at common law, and a burglar is defined by Lord Coke as "he that in the night-time breaketh and entereth into a mansion-house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not." 3 Inst. 63. And this definition is adopted by Lord Hale. 1 Hale P. C. 549; Hawk. P. C. b. 1, c. 38, s. 1; 2 Russ. on Cr. (9th Am. Ed.) 1.

By Statute.—In the United States the English definition of burglary has been so far modified as to include offences committed by day as well as by night, and in other buildings than dwelling-houses; and various degrees of the crime have been established. Arch. Cr. L. (Pomeroy's Ed.) 1069.

Burglary is a common-law offence and not a statutory crime; but *Michigan* statutes distinguish between the degrees of punishment for simple and for aggravated burglary, and if all the incidents warranting the severer penalties are not alleged in the information, but the offence

2. **Breaking** necessarily includes force. An entrance may be made by force and not by breaking, but not by breaking without force. To allege a "breaking" sufficiently shows use of force.[1]

is stated as at the common law, the smaller punishment only can be inflicted. Harris *v.* People, 44 Mich. 305.

A building may be within a statute of burglary, although such building was unknown when the statute was enacted. State *v.* Bishop, 51 Vt. 287; s. c., 31 Am. Rep. 690.

Breaking and entering with intent to steal and carry away goods is burglary. The goods need not be actually carried away. Olive *v.* Com , 5 Bush (Ky.), 376. See, generally, Rex *v.* Hanson, 1 Root (Conn.), 59; Lewis *v.* State, 16 Conn. 32; State *v.* Wilson, Coxe (N. J.), 441; s. c., 1 Am. Dec. 216; Com. *v.* Newell, 7 Mass. 247; Com. *v.* Williams, 2 Cush. (Mass.) 582; State *v.* Newbegin, 25 Me. 500; State *v.* Seymour, 36 Me. 225; Cooper *v.* State, 69 Ga. 761; Thomas *v.* State, 6 Miss. 20; Cole *v.* People, 37 Mich. 544; Butler *v.* People, 4 Denio (N. Y.), 68; Earhart *v.* Commonwealth, 9 Leigh (Va.), 671.

An indictment for burglary must charge that the offence was "burglariously" committed ; otherwise it is bad. State *v.* Meadows, 22 W. Va. 766. *Compare* Reed *v.* State, 14 Tex. App. 662.

1. Matthews *v.* State, 36 Tex. 675; Shotwell *v.* State, 43 Ark. 345.

What shall constitute a breaking is thus described by Hawkins: "It seems agreed that such a breaking as is implied by law in every unlawful entry on the possession of another, whether it be opened or be inclosed, and will maintain a common indictment, or action of trespass *quare clausum fregit*, will not satisfy the words *felonice et burglariter*, except in some special cases, in which it is accompanied with such circumstances as make it as heinous as an actual breaking. And from hence it follows that if one enter into a house by a door which he finds open, or through a hole which was made there before, and steals goods, etc., or draw anything out of a house through a door or window which was open before, or enter into the house through a door open in the daytime, and lie there till night, and then rob and go away without breaking any part of the house, he is not guilty of burglary." Hawk. P. C. b. 1, c. 38, ss. 4, 5; State *v.* Boon, 13 Ired. (N. Car.) 244; s. c., 57 Am. Dec. 555; Green *v.* State, 68 Ala. 539; Walker *v.* State, 63 Ala. 49; Stone *v.* State, 63 Ala. 115; Walker *v.* State, 52 Ala. 376; Pines *v.* State, 50 Ala. 153; Hamilton *v.* State, 11 Tex. App. 116; People *v.* Fralick, Lalor's Sup. (N. Y.) 63; People *v.* Arnold, 6 Park. Cr. (N. Y.) 638; Timmons *v.* State, 34 Ohio St. 426; s. c., 32 Am. Rep. 376; State *v.* Wilson, Coxe (N. J.), 439; s. c., 1 Am. Dec. 216; Com. *v.* Stephenson, 8 Pick. (Mass.) 354; Com. *v.* Strupney, 105 Mass. 588; s. c., 7 Am. Rep. 556; State *v.* Boon, 13 Ired. (N. Car. 244; s. c., 57 Am. Dec. 555.

Evidence is admissible to prove that the doors or windows are usually kept closed. People *v.* Bush, 3 Park. Cr. (N. Y.) 552.

It not being proved that certain blinds through which the entry was made were so closed as to require a breaking to effect the entry, *held*, a conviction could not be sustained. Williams *v.* State, 52 Ga. 580.

Where a door bears evidence of having been forced open the jury may infer that it had been properly closed. Com. *v.* Merrill, Thach. Cr. Cas. 1.

Where a cellar window, which was boarded up, had in it a round aperture of considerable size, to admit light into the cellar, and through this aperture one of the prisoners thrust his head, and, by the assistance of the other prisoner, he thus entered the house, but the prisoners did not enlarge the aperture at all, it was held that this was not a sufficient breaking. R. *v.* Lewis, 2 C. & P. 628.

So where a hole had been left in the roof of a brew-house, part of a dwelling-house, for the purpose of light, and it was contended that an entry through this hole was like an entry by a chimney, it was held that this was not a sufficient breaking. Bosanquet, J.: "The entry by the chimney stands upon a very different footing; it is a necessary opening in every house, which needs protection; but if a man choose to leave an opening in the wall or roof of his house, instead of a fastened window, he must take the consequences. The entry through such an opening is not a breaking." R. *v.* Spriggs, 1 M. & R. 357.

So where corn having been abstracted from the crib by the defendant, by thrusting his arm through an opening between the chinks, if he made or enlarged the opening for the purpose, this would constitute a sufficient breaking as an element of burglary; but if the opening was neither made nor enlarged by him,

The breaking is either actual or constructive. ACTUAL where the offender, for the purpose of getting admission for any part of his body, or for a weapon or other instrument, in order to effect his felonious intention breaks a hole in the wall of a house, breaks a door or window, picks the lock of a door or opens it with a key, or even by lifting the latch, or unlooses any other fastenings to doors or windows which the owner has provided.[1]

though he thrust in his arm and took out the corn, and might thereby be guilty of larceny, he would not be guilty of burglary. Miller *v.* State, 77 Ala. 41.

The two rooms of a gin-house, which had not been used as such for two years or more, being separated by a partition in which an opening was left, not for ingress or egress, but for the passage of the cotton from the gin (when running) into the lint-room; and being used and occupied by two different persons, each having the key to the door of his own room; if one of them enters the room of the other, through the said opening, with the intent to steal his seed-cotton stored therein, he is not guilty of burglary, though he opened and entered the door of his own room with the intent to pass through the opening and steal the cotton in the other room, and carried his intent into execution. Stone *v.* State, 63 Ala. 115.

A person entering is not guilty of burglary because he removed the bar of the door while within, and opened it to let in his accomplices, if none of them in fact entered. Ray *v.* State, 66 Ala. 281.

Where the only evidence for the prosecution is the testimony of the owner of the house to the effect that he one morning found a window open which was usually kept closed, but could not say that it was closed or fastened the previous night, and that he found on examination no signs of a breaking or entry, the court should charge the jury, on the written request of the defendant, that they must find him not guilty. Green *v.* State, 68 Ala. 539.

So where there was no evidence that the defendant had opened the door of the office at all, as there was none that it was shut before he entered, the court should have instructed the jury, on his request, that upon the evidence they must find him not guilty. Lowder *v.* State, 63 Ala. 143; s. c., 35 Am. Rep. 9.

Where the indictment charges force, it is error for the court to instruct concerning burglary by threats or fraud, thus confusing the jury. Lott *v.* State, 17 Tex. App. 598.

But breaking a window, taking a pane of glass out by breaking or bending the nails or other fastenings, the drawing of a latch when a door is not otherwise fastened, picking open a lock with a false key, putting back the lock of a door or the fastening of a window with an instrument, turning the key where the door is locked on the inside, or unloosing any other fastening which the owner has provided,—these are all proofs of a breaking. 2 East P. C. 487; 2 Russ. Cr. (5th Ed.) 3.

Any breaking that enables the prisoner to take the property out through the breach with his hands is a sufficient breaking, if the intent was felonious. Fisher *v.* State, 43 Ala. 17.

1. 2 Russell on Cr. (9th Am. Ed.) 2.

The lifting the latch of a door, the picking of a lock or opening with a key, the removal of a pane of glass, and indeed the displacement or unloosing any fastening the owner has provided as a security to the house, is a breaking, an actual breaking, within the meaning of the term as employed in the definition of burglary at common law, and as it is employed in the statutes. Walker *v.* State, 52 Ala. 376.

A burglarious entry may be effected either by force, threats, or fraud, and the effect of charging it to have been made by force merely confines the proof to that character of entry. Summers *v.* State, 9 Tex. App. 396.

Actual Breaking—Doors.—Entering the house through an open door is not, as already stated *supra*, such a breaking as to constitute a burglary. Yet if the offender enters a house in the night-time through an open door or window, and when within the house turns the key of, or unlatches, a chamber-door with intent to commit felony, it is a burglary. Hale P. C. 553; State *v.* Scripture, 42 N. H. 485; Rolland *v.* Commonwealth, 85 Pa. St. 66; s. c., 27 Am. Rep. 626; Lowder *v.* State, 63 Ala. 143; s. c., 35 Am. Rep. 9; State *v.* Reid, 20 Iowa, 413; Carter *v.* State, 68 Ala. 96; Frank *v.* State, 39 Miss. 705; State *v.* Wilson, Coxe (N. J.), 439.

So where the prisoner entered the house by a back door which had been

left open by the family, and afterwards broke open an inner door and stole goods out of the room, and then unbolted the street door on the inside and went out, this was held by the judges to be burglary. R. *v.* Johnson, 2 East P. C. 488.

So where the master lay in one part of the house and the servants in another, and the stair-foot door of the master's chamber was latched, and a servant in the night unlatched that door and went into his master's chamber with intent to murder him, it was held burglary. R. *v.* Haydon, Hutt. 20; Kel. 67; 1 Hale P. C. 554; 2 East P. C. 488; U. S. *v.* Bowen, 4 Cranch C. C. 604.

A servant employed by an attorney in and about his office, and intrusted with the key to the front door, may be convicted of burglary if he enters the office by night, by using the key, with the intention at the time of stealing the money of his employer while asleep in an inner room; but if he is in the habit of sleeping in the office with the consent of his employer, or without objection from him, and enters with the intention only of going to bed, but afterwards forms the design to steal the money, and attempts to do so, he is not guilty of burglary. Lowder *v.* State, 63 Ala. 143; s. c., 35 Am. Rep. 9.

The force necessary to push open a closed but unfastened transom that swings horizontally on hinges over an outer door of a dwelling-house is sufficient to constitute a breaking. Timmons *v.* State, 34 Ohio St. 426; 32 Am. Rep. 376; Dennis *v.* People, 27 Mich. 151.

So the lifting of a latch may, when that is the ordinary mode of fastening, constitute a breaking. State *v.* Groning, 33 Kan. 18; State *v.* Jansen, 22 Kan. 498; State *v.* Wilson, Coxe (N. J.), 439; s. c., 1 Am. Dec. 216; Bass *v.* State, 1 Lea (Tenn.), 444; McCourt *v.* People, 64 N. Y. 583; People *v.* Bush, 3 Park. Cr. (N. Y.) 552; Frank *v.* State, 39 Miss. 705.

To constitute a breaking into a railroad car it is not necessary that the doors of the car should be locked. Lyons *v.* People, 68 Ill. 271.

Where defendant was indicted for burglary, with intent to commit robbery, proof showing the breaking and entry by violence, accompanied by a loud noise in the room where prosecutor and wife lived, indicates an attempt to rob rather than to commit a simple larceny. Lowe *v.* State, 14 Lea (Tenn.), 204.

The lifting the latch of a door, the picking of a lock or opening with a key, the removal of a pane of glass, and indeed the displacement or unloosing any fastening the owner has provided as a security to the house, is a breaking, an actual breaking, within the meaning of the term, as employed in the definition of burglary at common law, and as it is employed in the statutes. Walker *v.* State, 52 Ala. 376.

The pushing open of a closed door will constitute an actual breaking. State *v.* Reid, 20 Iowa, 413; Timmons *v.* State, 34 Ohio St. 426; s. c., 32 Am. Rep. 376; Mason *v.* People, 26 N. Y. 200; Tickner *v.* People, 6 Hun (N. Y.), 657; State *v.* Boon, 13 Ired. L. (N. Car.) 244; s. c., 57 Am. Dec. 555; People *v.* Nolan, 22 Mich. 229; State *v.* Comstock, 20 Kan. 650; State *v.* Jansen, 22 Kan. 498; Frank *v.* State, 39 Miss. 705; Carter *v.* State, 68 Ala. 96; Anderson *v.* State, 17 Tex. App. 305; Finch *v.* Commonwealth, 14 Gratt. (Va.) 643; Lyons *v.* People, 68 Ill. 271.

The opening of a door which is closed and fastened with a chain hooked over a nail is a sufficient breaking to constitute burglary, if done with the intent to steal and carry away property, and is followed by an entry of the building to which the door belonged. State *v.* Hecox, 83 Mo. 531; s. c., 5 Am. Cr. Rep. 98.

Where a store is lighted, and the doors are merely closed but not locked, and the clerks are in the store, it is not burglary for one to enter the store after sunset with intent to rob. State *v.* Newbegin, 25 Me. 500.

Whether the pushing open the flap or flaps of a trap-door, or door in a floor, which closes by its own weight, is a sufficient breaking, was for some time a matter of doubt. In the following case it was held to be a breaking. Through a mill (within a curtilage) was an open entrance or gateway, capable of admitting wagons, intended for the purpose of loading them with flour through a large aperture communicating with the floor above. This aperture was closed by folding doors with hinges, which fell over it, and remained closed with their own weight, but without any interior fastenings, so that persons without, under the gateway, could push them open at pleasure. In this manner the prisoner entered with intent to steal; and Buller, J., held that this was a sufficient breaking to constitute the offence of burglary. R. *v.* Brown, 2 East P. C. 487.

In another case, upon nearly similar facts, the judges were equally divided in opinion. The prisoner broke out of a cellar by lifting up a heavy flap, whereby the cellar was closed on the outside next the street. The flap had bolts, but was

not bolted. The prisoner being convicted of burglary, upon a case reserved, six of the judges, including Lord Ellenborough, C. J., and Mansfield, C. J., thought that this was a sufficient breaking; because the weight was intended as a security, this not being a common entrance; but the other six judges thought the conviction wrong. R. *v.* Callan, Russ. & Ry. 157.

It has been observed that the only difference between this and R. *v.* Brown, 2 East P. C. 487, seems to be that in the latter there were no internal fastenings, which in Callan's case there were, but were not used. Russ. & Ry. 158 (*n*). The authority of R. *v.* Brown has been since followed, and that decision may now be considered to be law. Roscoe's Cr. Ev. (10th Ed.) 361. See McCourt *v.* People, 64 N. Y. 583.

Upon an indictment for burglary, the question was whether there had been a sufficient breaking. There was a cellar under the house, which communicated with the other parts of it by an inner staircase; the entrance to the cellar from the outside was by means of a flap which let down: the flap was made of two-inch stuff, but reduced in thickness by the wood being worked up. The prisoner got into the cellar by raising the flap-door. It had been from time to time fastened with nails, when the cellar was not wanted. The jury found that it was not nailed down on the night in question. The prisoner being convicted, on a case reserved, the judges were of opinion that the conviction was right. R. *v.* Russell, 1 Moody C. C. 377.

Unless a distinction can be drawn between breaking into a house and breaking out of it, this case seems to overrule. R. *v.* Lawrence, 4 C. & P. 231.

The removal of an iron grating covering an area opposite a cellar window is a breaking. People *v.* Nolan, 22 Mich. 229.

Actual Breaking—Windows.—Where a window is open, and the offender enters the house, this is no breaking, as already stated, *ante*, p. 660, n. 1. But removing a netting which covers a window and entering through the window, although it was open, is burglary. Com. *v.* Stephenson, 8 Pick. (Mass.) 354. See Hunter *v.* Commonwealth, 7 Gratt. (Va.) 641; s. c., 56 Am. Dec. 121.

And where the prisoner was indicted for breaking and entering a dwelling-house and stealing therein, and it appeared that he had effected an entrance by pushing up or raising the lower sash of the parlor window, which was proved to have been, about twelve o'clock on the same day, in an open state, or raised about a couple of inches, so as not to afford room for a person to enter the house through that opening, it was said by all the judges that there was no decision under which this could be held to be a breaking. R. *v.* Smith, 1 Moody C. C. 178. See Com. *v.* Strupney, 105 Mass. 588; s. c., 7 Am. Rep. 556.

A square of glass in the kitchen window (through which the prisoners entered) had been previously broken by accident, and half of it was out when the offence was committed: the aperture formed by the half-square was sufficient to admit a hand, but not to enable a person to put in his arm, so as to undo the fastening of the casement: One of the prisoners thrust his arm through the aperture, thereby breaking out the residue of the square, and having so done, he removed the fastening of the casement; the window being thus opened, the two prisoners entered the house. The doubt which the learned judges entertained arose from the difficulty they had to distinguish satisfactorily the case of enlarging a hole already existing (it not being like a chimney, an aperture necessarily left in the original construction of the house, see *post*, p. 664, "But an entry through a hole," etc.), from enlarging an aperture by lifting up further the sash of the window, as in R. *v.* Smith, 1 Moody, C. C. 178, but the learned judges thought it was worth considering whether in both cases the facts did not constitute, in point of law, a sufficient breaking. Upon a case reserved, all the judges who met were of opinion that there was a sufficient breaking, not by breaking the residue of the pane, but by unfastening and opening the window. R. *v.* Robinson, 1 Moody C. C. 327; Miller *v.* State, 77 Ala. 41.

Where a pane of glass had been cut for a month, but there was no opening whatever, as every portion of the glass remained exactly in its place and the prisoner was both seen and heard to put his hand through the glass, this was held a sufficient breaking. R. *v.* Bird, 9 C. & P. 44.

Where a house was entered through a window upon hinges, which was fastened by two nails which acted as wedges, but notwithstanding these nails the window would open by pushing, and the prisoner pushed it open, the judges held that the forcing the window in this manner was a sufficient breaking to constitute burglary. R. *v.* Hall, Russ. & R. 355. So pulling down the upper sash of a window which has no fastening, but which is kept in its place by the pulley-weight

only, is a breaking, although there is an outer shutter which is not fastened. R. *v.* Haines, Russ. & Ry. 451. So raising a window which is shut down close, but not fastened, though it has a hasp which might be fastened. R. *v.* Hyam, 7 C. & P. 441; Com. *v.* Stephenson, 8 Pick. (Mass.) 354; State *v.* Carpenter, 1 Houst. Cr. C. (Del.) 367; State *v.* Tutt, 63 Mo. 595; People *v.* Edwards, 1 Wh. Cr. Cas. (N. Y.) 371; State *v.* Boon, 13 Ired. L. (N. Car.) 244; s. c., 57 Am. Dec. 555; Frank *v.* State, 39 Miss. 705; State *v.* Reid, 20 Iowa, 413; Dennis *v.* People, 27 Mich. 151; Frank *v.* State, 39 Mich. 705; Cooper *v.* State, 69 Ga. 761; People *v.* Bush, 3 Park. Cr. (N. Y.) 552.

Where a cellar window, which was boarded up, had in it an aperture of considerable size to admit light into the cellar, and through this aperture one of the prisoners thrust his head, and by the assistance of the others thus entered the house, Vaughan, B., ruled that this resembled the case of a man having a hole in the wall of his house large enough for a man to enter, and that it was not burglary. R. *v.* Lewis, 2 C. & P. 628.

A shutter-box partly projected from a house, and adjoined the side of the shop window, which side was protected by wooden panelling lined with iron. *Held* that the breaking and entering of the shutter-box without getting into the house did not constitute burglary. R. *v.* Paine, 7 C. & P. 135.

Where the evidence given in a prosecution for burglary made it impossible for the jury not to conclude that the window through which defendant effected an entrance was an outside window; *held*, that it was not essential for the trial court specially to instruct the jury that they could not convict unless they found this fact. State *v.* Butterfield, 75 Mo. 297.

Actual Breaking—Quality of Fastenings.—The law cannot institute an inquiry into the sufficiency of the various fastenings employed. Carter *v.* State, 68 Ala. 96.

Cutting and tearing down a netting of twine which is nailed to the top, bottom, and sides of a glass window, so as to cover it, and entering the house through such window, though it was not shut, constitutes a sufficient breach and entry. Com. *v.* Stephenson, 8 Pick. (Mass.) 354.

Actual Breaking—Chimneys.—"It was at one time considered doubtful whether getting into the chimney of a house in the night time, with intent to commit a felony, was a sufficient breaking to constitute burglary. 1 Hale P. C. 552. But it is now settled that this is a breaking; for though actually open, it is as much enclosed as the nature of the place will allow. Hawk. P. C. b. 1, c. 38, s. 6; 2 East P. C. 485; Carter *v.* State, 68 Ala. 96; Vonaken *v.* State, 36 Ala. 281. And accordingly it was so held, in a late case, by ten of the judges. Their lordships were of opinion that the chimney was part of the dwelling-house, that the getting in at the top was a breaking of the dwelling-house, and that the prisoner, by lowering himself, in the chimney, made an entry into the dwelling-house. R. *v.* Brice, Russ. & Ry. 450." Roscoe's Cr. Ev. (10th Ed.) 363.

To enter through a chimney into a store, the upper rooms of which are inhabited as a dwelling, is burglary, though there be no communication between the chimney and the dwelling. Robertson's Case, 4 C. H. Rec. (N. Y.) 63; Walker *v.* State, 52 Ala. 376; Donohoo *v.* State, 36 Ala. 281; State *v.* Willis, 7 Jones L. (N. Car.) 190.

But an entry through a hole in the roof, left for the purpose of admitting light, is not a sufficient entry to constitute burglary; for a chimney is a necessary opening and requires protection, whereas if a man chooses to leave a hole in the wall or roof of his house, instead of a fastened window, he must take the consequences. R. *v.* Spriggs, 1 Moo. & R. 357.

Actual Breaking—Interior Doors, etc.—The breaking requisite to constitute a burglary is not confined to the external parts of the house, but may be of an inner door, after the offender has entered by means of a part of the house which he has found open. Thus, if A enters the house of B in the night-time, the outward door being open, or by an open window, and, when within the house, turns the key of a chamber door, or unlatch it, with intent to steal, this will be burglary. 2 Russell on Cr. (9th Am. Ed.) 7. See Martin *v.* State, 1 Tex. App. 525; People *v.* Van Gaasbeck, 9 Abb. Pr. N. S. (N. Y.) 328; Smith's Case, 4 C. H. Rec. (N. Y.) 63; People *v.* McCloskey, 5 Park. Cr. (N. Y.) 57; State *v.* Scripture, 42 N. H. 485; State *v.* Wilson, Coxe (N. J.), 439; s. c., 1 Am. Dec. 216. *Compare* People *v.* Marks, 4 Park. Cr. (N. Y.) 153; People *v.* Fralick Hill & D. Sup. (N. Y.) 63; Rolland *v.* Commonwealth, 85 Pa. St. 66; s. c., 3 Am. Cr. Rep. 35.

Where the prisoners went into the house of the cook at Sergeant's Inn, in Fleet Street, to eat, and taking their opportunity, slipped up stairs, picked open the lock of a chamber door, broke open

a chest, and stole plate, it was agreed that the picking open the lock of a chamber door ousted them of their clergy, though the breaking open the chest would not have done so. 1 Hale, 524. And it will also amount to burglary if a servant in the night-time open the chamber door of his master or mistress, whether latched or otherwise fastened, and enter for the purpose of committing murder or rape, or with any other felonious design; or if any other person, lodging in the same house, or in a public inn, open and enter another's door, with such evil intent. 1 Hale, 553, 554; 4 Blac. Com. 227; Binglose's Case, 2 W. & M.; MS., Denton, cited 2 East P. C. c. 15, s. 4. p. 488; Gray's Case, 1 Str. 481; Sum. 82, 84; Bac. Abr. tit. "Burglary" (A.); R *v.* Wenmouth, 8 Cox C. C. 348; State *v.* Scripture, 42 N. H. 485; State *v.* Wilson, Coxe (N. J.), 439; Martin *v.* State, 1 Tex. App. 525.

But it has been questioned whether, if a lodger in an inn should, in the night-time, open his chamber door, steal goods, and go away, the offence would be burglary; on the ground of his having a kind of special property and interest in his chamber, and the opening of his own door being therefore no breaking of the innkeeper's house. 1 Hale, 554.

It is immaterial whether the felony is committed in the particular room into which the inner door leads or another part of the house. Rolland *v.* Commonwealth, 85 Pa. St. 66; s. c., 27 Am. Rep. 626; s. c., 3 Am. Cr. Rep. 35.

A servant left in charge of a house, who enters a closed room and steals therefrom, when, by virtue of his employment, he had no right to go there, is guilty of burglary. Hild *v.* State, 67 Ala. 39.

Unlatching the door of a sleeping apartment, and entering with intent to kill. *Held*, burglary. U. S. *v.* Bowen, 4 Cranch C. C. 604.

Where a boarder breaks into the room of a fellow-boarder in the same boarding-house, and robs it, it is burglary. Ullman *v.* State, 1 Tex. App. 220; s. c., 28 Am. Rep. 405. See State *v.* Clark, 42 Vt. 629.

The windows of the lower floor of a mill were left open. There was nothing kept on the floor. An entry was made to the second floor by pushing aside a board which covers a hole in the floor of the second story. The board was held in place by a small quantity of seed cotton. *Held*, that there was a breaking and entering. Carter *v.* State, 68 Ala. 96.

Removing a loose plank (not fixed to the freehold) in a partition-wall of a building is not a breaking. Com. *v.* Trimmer, 1 Mass. 476.

One who enters with burglarious intent a room of a house, enters the house with such intent; and where such room is a "ticket-office," it may properly be described as "a building, to wit, the ticket-office." In such an action it is not error to charge the jury that, to constitute a room, the partition between it and the rest of the house need not extend to the ceiling or roof of the house, but that a partition eight or nine feet high from the floor would be a sufficient partition. People *v.* Young, 65 Cal. 225.

An employé left in charge of a house, who enters a closed room and steals therefrom, when, by virtue of his employment, he had no right to go there, is guilty of burglary. Hild *v.* State, 67 Ala. 39.

Actual Breaking—Fixtures, Cupboards, Safes, etc.—The breaking open of a movable chest or box in a dwelling-house, in the night-time, is not such a breaking as will make the offence burglary, for the chest or box is no part of the mansion-house. Foster, 108; 2 East P. C. 488.

Whether breaking open the door of a cupboard let into the wall of a house, be burglary or not, does not appear ever to have been solemnly decided. In 1690 a case in which the point arose was reserved for the opinion of the judges, and they were equally divided upon it. Foster, 108.

Lord Hale says that such a breaking will not make a burglary at common law. 1 Hale P. C. 527. Though on the authority of R. *v.* Simpson, Kel. 31; 2 Hale P. C. 358, he considers it a sufficient breaking within the repealed stat. 39 Eliz. c. 15. In the opinion of Mr. Justice Foster, however, R. *v.* Simpson does not warrant the latter position. Foster, 108; 2 East P. C. 489. And see 2 Hale P. C. 358 (*n*). Mr. Justice Foster concludes that such fixtures as merely supply the place of chests and other ordinary utensils of household, should for the purpose be considered in no other light than as mere movables. Foster, 109; 2 East P. C. 489.

If one finds all the doors open, and breaks open a chest or box, it is not burglary. State *v.* Wilson, Coxe (N. J.), 439; s. c., 1 Am. Dec. 216.

Upon the trial of an indictment for burglary, the evidence tended to show that the accused, in the night, broke and entered a warehouse with intent to steal money supposed to be in a safe therein, belonging

3. Breaking out of a Dwelling-house.—It was formerly doubted whether, where a man entered a dwelling-house in the night (without breaking) with the intent to commit felony, and afterwards broke out of the same, or being there in the night committed a felony, and broke out, this amounted to burglary or not. It was, however, declared to be such by the repealed statute 12 Anne, c. 7, and the provision has been repeated in the subsequent acts.[1]

to the owner of the building, which safe, however, was not used as a place for the deposit of money. The court charged the jury, that if the accused broke and entered the building with the intent to break into the safe and steal money supposed to be therein, and the safe was not used as a place for the deposit of money, and there was none therein at the time, he was not guilty. *Held*, that the instruction was erroneous. State *v.* Beal, 37 Ohio St. 108: s. c., 41 Am. Rep. 490.

Actual Breaking—Walls.—"Whether breaking a wall, part of the curtilage, is a sufficient breaking to constitute burglary, has not been decided. Lord Hale, after citing 22 Assiz. 95, which defines burglary to be, 'to break houses, churches, walls, courts, or gates, in time of peace,' says, 'by that book it should seem that if a man hath a wall about his house for its safeguard, and a thief in the night breaks the wall or the gate thereof, and finding the doors of the gate open enters into the house, this is burglary; but otherwise it had been, if he had come over the wall of the court and found the door of the house open, then it had been no burglary.' 1 Hale P. C. 559. Upon this passage an annotator of the Pleas of the Crown observes, 'This was anciently understood only of the walls or gates of the city (*vide* Spelman, *in verbo Burglaria*). If so, it will not support our author's conclusion, wherein he applies it to the wall of a private house.' *Id.* (*n.*) *ed.* 1778. It has been likewise observed upon this passage, that the distinction between breaking and coming over the wall or gate, for the purpose of burglary, is very refined, for if it be part of the mansion, and be inclosed as much as the nature of the thing will admit of, it seems to be immaterial whether it be broken or overleaped, and more properly to fall under the same consideration as the case of a chimney; and if it be not part of the mansion-house for this purpose, then whether it be broken or not is equally immaterial; in neither case will it amount to burglary. 2 East P. C. 488." Roscoe's Cr. Ev. (10th Ed.) 363.

Actual Breaking—Gates.—Where a gate forms part of the outer fence of a dwelling-house only, and does not open into the house, or into some building parcel of the house, the breaking of it will not constitute burglary. Thus, where large gates open into a yard in which was situated the dwelling-house and warehouse of the prosecutors, the warehouse extending over the gateway, so that when the gates were shut the premises were completely inclosed, the judges were unanimous that the outward fence of the curtilage, not opening into any of the buildings, was no part of the dwelling-house. R. *v.* Bennett, Russ. & Ry. 289. So where the prisoner opened the area gate of a house in London with a skeleton key and entered the house by a door in the area, which did not appear to have been shut, the judges were all of opinion that breaking the area gate was not a breaking of the dwelling-house, as there was no free passage in time of sleep from the area into the dwelling-house. R. *v.* Davis, Russ. & Ry. 322.

1. 1 Hale P. C. 554; R. *v.* Clarke, 2 East P. C. 490; Lord Bac. Elem. 65; 2 Russ. Cri. (5th Ed.) 7; Roscoe's Cr. Ev. (10th Ed.) 386; State *v.* Ward, 43 Conn. 489; s. c., 21 Am. Rep. 665; Sand's Case, 6 C. H. R. (N. Y.) 1.

An indictment which stated in one count that the prisoner "did break to get out," and in another that he "did break *and* get out," was held by Vaughan and Patteson, J. J., insufficient since the last-mentioned statute, which uses the words "break out." R. *v.* Crompton, 7 C. & P. 139.

Where a lodger, in the prosecutor's house, got up in the night and unbolted the back door, and went away with a jacket of the prosecutor's which he had stolen, he was convicted of burglary. In his case it was also held to be not the less a burglary because the defendant was lawfully in the house as a lodger or as a guest at an inn. R. *v.* Wheeldon, 8 C. & P. 747.

It has been held that getting out of a house by pushing up a new trap-door, which was merely kept down by its own weight, and on which fastenings had not at that time been put, but the old trap-

4. Constructive.—The breaking is constructive where admission is gained by some device, there being no actual force.[1]

door, for which this new one was substituted, had been secured by fastenings, was not a sufficient breaking out of the house. R. *v.* Lawrence, 4 C. & P. 231. Unless a breaking out of a house can be distinguished from breaking into a house, this case seems overruled by Rex *v.* Russell, R. & M. C. C. R. 377 (*ante*, p. 663).

Unbolting a door to escape is not a "breaking and entering." White *v.* State, 51 Ga. 285; Rolland *v.* Commonwealth, 82 Pa. St. 306; s. c., 22 Am. Rep. 758; Brown *v.* State, 55 Ala. 123; s. c., 28 Am. Rep. 693; Adkinson *v.* State, 5 Baxt. (Tenn.) 569; s. c., 30 Am. Rep. 69; Wine *v.* State, 25 Ohio St. 69. *Compare* State *v.* Ward, 43 Conn. 489; s. c., 21 Am. Rep. 665.

An indictment charging "breaking, etc., into a house" will not warrant a conviction for "breaking out." State *v.* McPherson, 70 N. Car. 239; s. c., 16 Am. Rep. 769.

1. State *v.* Carter, 1 Houst. Cr. C. (Del.) 402; Johnston *v.* Commonwealth, 85 Pa. St. 54; s. c., 27 Am. Rep. 622; Rolland *v.* Commonwealth, 82 Pa. St. 306; s. c., 22 Am. Rep. 758; Clarke *v.* Commonwealth, 25 Gratt. (Va.) 908; Ducher *v.* State, 18 Ohio, 308; Fisher *v.* State, 43 Ala. 17; State *v.* Johnson, Phil. (N. Car.) 186; State *v.* Mordecai, 68 N. Car. 207; State *v.* Henry, 9 Ired. (N. Car.) 463; Conoly *v.* State, 2 Tex. App. 412; Martin *v.* State, 1 Tex. App. 525; Fisher *v.* State, 43 Ala. 17.

The breaking may be done by fire, and the breaking is not lost by the destruction of the building. White *v.* State, 49 Ala. 344.

Constructive Breaking—Fraud.—"In order to constitute such a breaking as will render the party subject to the penalties of burglary, it is not essential that force should be employed. There may be a constructive breaking by fraud, conspiracy, or threats, which will render the person who is party to it equally guilty as if he had been guilty of breaking with force. Where, by means of fraud, an entrance is effected into a dwelling-house in the night-time, with a felonious intent, it is burglary. Thieves came with a pretended hue and cry, and, requiring the constable to go with them to search for felons, entered the house, bound the constable and occupier, and robbed the latter. So where thieves entered a house, pretending that the owner had committed treason; in both these cases, though the owner himself opened the door to the thieves, it was held burglary. 1 Hale P. C. 552, 553. The prisoner knowing the family to be in the country, and meeting the boy who kept the key of the house, desired him to go with her to the house, promising him a pot of ale. The boy accordingly let her in, when she sent him for the ale, robbed the house, and went off. This, being in the night-time, was held to be burglary. R. *v.* Hawkins, 2 East P. C. 485. By the same reasoning getting possession of a dwelling-house by a judgment against the casual ejector, obtained by false affidavits, without any color of title, and then rifling the house, was ruled to be within the statute against breaking the house and stealing goods therein. 2 East P. C. 485. So where persons designing to rob a house took lodgings in it, and then fell on the landlord and robbed him. Kel. 52, 53; Hawk. P. C. b. 1, c. 38, s. 9." Roscoe's Cr. Ev. (10th Ed.).

Where the prisoners induced the occupant of a house to admit them, and there assaulted him and robbed the house, *held*, a sufficient breaking and entering. State *v.* Mordecai, 68 N. Car. 207; Ducher *v.* State, 18 Ohio, 308.

The prisoner, pretending to have business with the occupant of a dwelling-house, gained admittance thereto at night, with intent to commit a robbery. *Held*, a constructive breaking sufficient to support an indictment for burglary by breaking and entering. Johnston *v.* Commonwealth, 85 Pa. St. 54; s. c., 27 Am. Rep. 622; Rolland *v.* Commonwealth, 82 Pa. St. 306; s. c., 22 Am. Rep. 758; State *v.* Johnson, Phil. (N. Car.) 140.

Appellant was convicted of burglary on an indictment which charged a nocturnal entry effected by fraud. The evidence relied on to prove the entry and fraud tended to show that he took off his shoes and entered through an open door, without the consent of any one. *Held*, not sufficient to prove that the entry was effected by fraud. Hamilton *v.* State, 11 Tex. App. 117.

Where a guest at an inn entered the barroom in the night, and stole some money, *held*, that as the guest had a legal right to enter the inn and the barroom, his subsequent larceny did not relate back and give a character to his entry, so as to make it illegal, and a conviction could not be sustained. State *v.* Moore, 12 N. H. 42.

Where a boarder entered the room of

a fellow-boarder, and robbed it, *held*, burglary. Ullman *v.* State, 1 Tex. App. 220; s. c., 28 Am. Rep. 405; State *v.* Clark, 42 Vt. 629.

Where the owner of a house was induced to open the door and proceed to a distance from the house, leaving the door unfastened, and the prisoner entered the house through the unfastened door about fifteen minutes after the owner left it, *held*, that it was not a constructive breaking; that in order to make it such the entry must be immediate or in so short a time that the owner or his family has not the opportunity of refastening the door. State *v.* Henry, 9 Ired. L. (N. Car.) 463. *Compare* Breese *v.* State, 12 Ohio St. 146.

Where it is shown that the accused went to the house of another in the nighttime, and called to the persons within, who were asleep, to open the door, falsely stating that he was the sheriff of the county, and desired to serve a subpœna: but when the door was opened he ordered the inmates of the house to throw up their hands, but before he could enter the house, the door was closed, and through which he shot twice, and then forced the door open, and entered the house,—this was held to be sufficient proof of breaking and entering. Seling *v.* State, 26 N. W. Repr. (Neb.) 254.

Where the indictment charges that the accused "feloniously, fraudulently, and burglariously did break and enter," *held*, not sufficiently to charge an entry "by fraud." Sullivan *v.* State, 13 Tex. App. 462.

Where the indictment alleges force, it is not competent to prove that it was committed by force or fraud. Buntain *v.* State, 15 Tex. App. 485.

Constructive Breaking—Conspiracy.—"A breaking may be effected by conspiring with persons within the house, by whose means those who are without effect an entrance. Thus if A the servant of B conspire with C to let him in to rob B, and accordingly A in the nighttime opens the door and lets him in, this, according to Dalton (c. 99), is burglary in C and larceny in A. But according to Lord Hale, it is burglary in both; for if it be burglary in C it must necessarily be so in A, since he is present and assisting C in the committing of the burglary. 1 Hale P. C. 553. See People *v.* Bowjet, 2 Park. C. C. (N. Y.) 11. C. was indicted with another person for burglary, and it appeared that he was a servant in the house, and in the nighttime opened the street door and let in the other prisoner, who robbed the house, after which C. opened the door and let the other out, but did not go out with him. It was doubted on the trial whether this was a burglary in the servant, he not going out with the other; but afterwards, at a meeting of all the judges, they were unanimously of opinion that it was a burglary in both, and C. was executed. R. *v.* Cornwall, 2 Str. 881; 4 Bl. Com. 277; 2 East P. C. 486." Roscoe's Cr. Ev. (10th Ed.) 364.

But if a servant, pretending to agree with a robber, open the door and let him in for the purpose of detecting and apprehending him, this is no burglary, for the door is lawfully open. R. *v.* Johnson, Carr & M. 218.

The facts that the three were there together, that they would not leave, that they were followed and the goods found on them, make such a case of conspiracy as to authorize a charge that if one breaks in and another stands by and helps and receives the goods, all are guilty. Wilkerson *v.* State, 73 Ga. 799.

Constructive Breaking — Menaces.—There may also be a breaking in law, where, in consequence of violence commenced or threatened, in order to obtain entrance, the owner, either from apprehension of force, or with a view more effectually to repel it, opens the door, through which the robbers enter. 2 East P. C. 480. But if the owner only throw the money out of the house to the thieves who assault it, this will not be burglary. 2 East P. C. 480; Hawk. P. C. b. 1, c. 38, s. 3. Though if the money were taken up in the owner's presence it would be robbery. 2 Russ. on Cr. (9th Am. Ed.) 9. But in all other cases, where no fraud or conspiracy is made use of, or violence commenced or threatened, in order to obtain an entrance, there must be an actual breach of some part or other of the house, though it need not be accompanied with any violence as to the manner of executing it. 2 East P. C. 486; Hale, Sum. 80.

Where the evidence was that the family within the house were forced by threats and intimidation to let in the offenders, Thomson, B., told the jury, that although the door was, literally, opened by one of the family, yet if such opening proceeded from the intimidations of those who were without, and from the force that had been used, knocking at and breaking the windows, calling out and insisting upon the door being opened, and firing of guns, if under these circumstances the persons within were induced to open the door, it was as much a breaking by those who made use of such intimidations to prevail.

4. Entry.—The least degree of entry with any part of the body, or with any instrument held in the hand, will suffice; for example, stepping over the threshold, putting a finger or hook in at the open window in order to abstract goods.[1]

upon them so to open it, as if they had actually burst the door open. R. *v.* Swallow, 2 Russ. on Cr. (9th Am. Ed.) 9.

Constructive Breaking—by one of Several.—"Where several come to commit a burglary, and some stand to watch in adjacent places, and others enter and rob, in such cases the act of one is, in judgment of law, the act of all, and all are equally guilty of the burglary. 1 Hale P. C. 439, 534; 3 Inst. 63; 2 East P. C. 486. So where a room-door was latched, and one person lifted the latch and entered the room, and concealed himself for the purpose of committing a robbery there, which he afterwards accomplished. Two other persons were present with him at the time he lifted the latch to assist him to enter, and they screened him from observation by opening an umbrella. It was held that the two were, in law, parties to the breaking and entering, and were answerable for the robbery which took place afterwards, though they were not near the spot at the time it was perpetrated. Where the breaking in is one night, and the entering the night after, a person present at the breaking, though not present at the entering, is, in law, guilty of the whole offence. R. *v.* Jordan, 7 C. & P. 432." Roscoe's Cr. Ev. (10th Ed.) 365.

If two conspire to open a window and enter a store with intent to commit a larceny and one opens it in part and leaves it thus, standing a short distance off, while the other hoists the sash high enough to enter, and does enter except his legs, and is then seized, both are guilty of burglary. Cooper *v.* State, 69 Ga. 761.

1. 1 Hale P. C. 551, 555; 2 East P. C. 490; 1 Hawk. P. C. c. 38, § 11; Allen *v.* State, 40 Ala. 334; Pines *v.* State, 50 Ala. 153; State *v.* McCall, 4 Ala. 643; Burke *v.* State, 5 Tex. App. 74; France *v.* State, 42 Tex. 276; Com. *v.* Glover, 111 Mass. 395; Harris *v.* People, 44 Mich. 305.

It is always necessary to prove an entry; otherwise it is no burglary. 1 Hale P. C. 555.

If any part of the body be within the house, hand or foot, this is sufficient. Foster, 108; 2 East P. C. 490.

Thus where the prisoner cut a hole through the window-shutters of the prosecutor's shop, and putting his hand through the hole, took out watches, etc., but no other entry was proved, this was held to be burglary. R. *v.* Gibbon, Foster, 108.

So where the prisoner broke a pane of glass in the upper sash of a window (which was fastened in the usual way by a latch), and introduced his hand within, for the purpose of unfastening the latch, but while he was cutting a hole in the shutter with a centre-bit, and before he could unfasten the latch, he was seized, the judges held this to be a sufficient entry to constitute a burglary. R. *v.* Bailey, Russ. & Ry. 341.

The prosecutor, standing near the window of his shop, observed the prisoner with his finger against part of the glass. The glass fell inside by the force of his finger. The prosecutor added that, standing as he did in the street, he saw the fore-part of the prisoner's finger on the shop-side of the glass. The judges ruled this a sufficient entry. R. *v.* Davis, Russ. & Ry. 499.

Simply breaking the blinds, and making no entry beyond the sash-windows, is not a breaking and entering. State *v.* McCall, 4 Ala. 643; s. c., 39 Am. Dec. 314.

The prisoner raised a window, and held it so that his fingers were within the house, his elbows resting on the sill of the window. *Held*, that such entry and the circumstances were sufficient from which the jury might find the felonious intent, and their verdict of guilty would be supported. France *v.* State, 42 Tex. 276.

Where the facts do not quite amount to an entry, the prisoner may be found guilty of the attempt to commit burglary. R. *v* Spanner, 12 Cox C. C. 155.

The getting in at the top of the chimney, as already stated, *ante*, p. 664, has been held to be a breaking, and the prisoner's lowering himself down the chimney, though he never enters the room, has been held to be an entry. R. *v.* Brice, Russ. & Ry. 450.

Entry—Introduction of Fire-arms or Instruments.—Where no part of the offender's body enters the house, but he introduces an instrument, whether that introduction will be such an entry as to constitute a burglary depends, as it seems, upon the object with which the instrument is employed. Thus if the instrument be employed not merely for the

purpose of making the entry, but for the purpose of committing the contemplated felony, it will amount to an entry, as where a man puts a hook or other instrument to steal, or a pistol to kill, through a window, though his hand be not in, this is an entry. 1 Hale P. C. 555; Hawk. P. C. b. 1, c. 38, s. 11; 2 East P. C. 490; Roscoe's Cr. Ev. (10th Ed.) 366.

But where the instrument is used, not for the purpose of committing the contemplated felony, but only for the purpose of effecting the entry, the introduction of the instrument will not be such an entry as to constitute burglary. Thus where thieves had bored a hole through the door with a centre-bit, and part of the chips were found inside the house, by which it was apparent that the end of the centre-bit had penetrated into the house, yet as the instrument had not been introduced for the purpose of taking the property, or committing any other felony, the entry was ruled to be incomplete. R. *v.* Hughes, 2 East P. C. 491; 1 Leach, 406; Hawk. P. C. b. 1, c. 38, s. 12; Walker *v.* State, 63 Ala. 49; s. c., 35 Am. Rep. 1; Roscoe's Cr. Ev. (10th Ed.) 366.

A glass sash-window was left closed down, but was thrown up by the prisoners; the inside shutters were fastened, and there was a space of about three inches between the sash and the shutters, and the latter were about an inch thick. It appeared that after the sash had been thrown up, a crowbar had been introduced to force the shutters, and had been not only within the sash, but had reached to the inside of the shutters, as the mark of it was found there. On a case reserved, the judges were of opinion that this was not burglary, there being no proof that any part of the prisoner's hand was within the window. R. *v.* Rust, 1 Moody C. C. 183.

Introducing a knife between the upper and under sash of an outside window of a dwelling-house with the felonious intent to break and enter is enough to sustain a conviction for an attempt at burglary. Harris *v.* People, 44 Mich. 305.

A person who, with the intent to steal shelled corn heaped up in a crib on the floor, bores a hole through the floor, through which the loose corn runs down into his sack below, is guilty of burglary (Code, § 4343); the use of the auger in such case, with the intent to steal the corn, and effecting that purpose, constitutes both the breaking and the entry which are necessary elements of the offence. Walker *v.* State, 63 Ala. 49; s. c., 35 Am. Rep. 1. See Miller *v.* State, 77 Ala. 41.

Entry—by Firing a Gun into the House.—"It has been already stated that if a man breaks a house and puts a pistol in at the window with intent to kill, this amounts to burglary. 1 Hale P. C. 555. 'But,' says Lord Hale, 'if he shoots without the window, and the bullet comes in, this seems to be no entry to make burglary—*quære.*' Hawkins, however, states that the discharging a loaded gun into a house is such an entry as will constitute burglary; Hawk. P. C. b. 1, c. 38, s. 11. And this opinion has been followed by Mr. East and Mr. Serjeant Russell. 'It seems difficult,' says the former, 'to make a distinction between this kind of implied entry and that by means of an instrument introduced between the window or threshold for the purpose of committing a felony, unless it be that the one instrument by which the entry is effected is held in the hand, and the other is discharged from it. No such distinction, however, is anywhere laid down in terms, nothing further appearing than that the entry must be for the purpose of committing a felony.' 2 East P. C. 490; 2 Russ. Cri. (5th Ed.) 11. It was ruled by Lord Ellenborough, that a man who from the outside of a field discharged a gun into it, so that the shot must have struck the soil, was guilty of breaking and entering it. Pickering *v.* Rudd, 4 Camp. 220; 1 Stark. 58." Roscoe's Cr. Ev. (10th Ed.) 367.

Constructive Entry—by One of Several. It is not necessary in all cases to show an actual entry by all the prisoners; there may be a constructive *entry* as well as a constructive *breaking*. A, B, and C come in the night by consent to break and enter the house of D to commit a felony; A only actually breaks and enters the house; B stands near the door, but does not actually enter; C stands at the lane's end, or orchard-gate, or field-gate, or the like, to watch that no help come to aid the owner, or to give notice to the others if help comes; this is burglary in all, and all are principals. 1 Hale P. C. 555; Roscoe's Cr. Ev. (10th Ed.) 367.

So where a man puts a child of tender years in at the window of the house, and the child takes goods and delivers them to A, who carries them away, this is burglary in A, though the child that made the entry be not guilty on account of its infancy. 1 Hale P. C. 555.

And so if the wife, in the presence of her husband, by his threats or coercion break and enter a house in the night, this is burglary in the husband, though the wife, the immediate actor, is excused by the coercion of the husband. 1 Hale P.

6. Consent.—If the entry is made by consent of the person occupying the house, it is not a breaking and entering.[1]

7. What Premises are the Subject of Burglary.—The breaking and entering must take place in a mansion or dwelling-house or in a building designated by statute. Every house for the dwelling and habitation of man is taken to be a mansion-house in which burglary may be committed. A portion only of a building may come under this description.[2]

C. 556; and see R. *v.* Jordan, 7 C. & P. 432.

1. A banker, suspecting defendant of an intention of robbing his bank, employed detectives to act as decoys and induce him to enter the bank, with intent to rob it. *Held*, that the defendant could not be convicted of burglary therefor, the consent of the detectives being consent of their employer. Speiden *v.* State, 3 Tex. App. 156; s. c., 30 Am. Rep. 126. See Allen *v.* State, 40 Ala. 334; R. *v.* Johnson, Car. & M. 218; R. *v.* Egginton, 2 Leach 913.

A employed a detective to discover who had robbed his store. At the suggestion of A the detective associated with B and C, who were the suspected parties. It was arranged between them to break in and rob the store again. A furnished the detective with a key, and made arrangements to arrest the parties when they entered. *Held*, that the conspiracy was complete when B and C agreed with the detective to perpetrate the crime, and therefore their guilt was not affected by the subsequent consent of A and co operation of the detective unless A or the detective suggested the offence or originated the criminal intent or agreement. Johnson *v.* State, 3 Tex. App. 590.

Where the owner, by direction of the police, leaves a door unfastened in order that an intended "breaking and entering" may be facilitated, it is not consent on the part of the owner to the entry. State *v.* Jansen, 22 Kan. 498.

A married woman is incapable in law to give consent to the breaking and entering the dwelling of her husband for an unlawful purpose. Forsythe *v.* State, 6 Ohio, 20.

Consent of some authorized person other than the occupant is purely matter of defence to an indictment which negatives the consent of the occupant. Mace *v.* State, 9 Tex. App. 110. See, generally, Saunders *v.* People, 38 Mich. 218; Thompson *v.* State, 18 Ind. 386; Allen *v.* State, 40 Ala. 334.

2. Roscoe's Cr. Ev. (10th Ed.) 367; 2 Russell on Cr. (9th Am. Ed.) 15; Hollester *v.* Commonwealth, 60 Pa. St. 103; Fisher *v.* State, 43 Ala. 17.

A mere tent or booth erected in a market or fair is not a dwelling-house for the purpose of burglary. 1 Hale P. C. 557; 4 Bl. Com. 225.

But where the building was a permanent one of mud and brick on the down at Weyhill, erected only as a booth for the purpose of a fair for a few days in the year, having wooden doors and windows bolted inside, it was held that, as the prosecutor and his wife slept there every night of the fair (during one of which it was broken and entered, this was a dwelling-house. R. *v.* Smith, 1 Moo. & Rob. 256.

Upon an indictment for burglary charging the breaking of and entry into the mansion-house, a conviction is proper, the evidence showing that the house broken and entered was a smoke-house. Mansion or dwelling-house includes all such houses as are appurtenant thereto, as kitchen, laundry, smoke-house, and dairy. Fletcher *v.* State, 10 Lea (Tenn.), 338.

Occupancy.—It is not essential to constitute the felony that a person should be actually in the house at the time the crime is committed. State *v.* Reid, 20 Iowa, 413; State *v.* Meerchouse, 34 Mo. 344. See State *v.* Dan, 18 Nev. 345; s. c., 5 Am. Cr. Rep. 93.

An information, under the *Michigan* statute, for an attempt to commit burglary by one who was armed must allege that there was some one lawfully in the dwelling-house which he attempted to enter or the allegation that respondent was armed is mere surplasage, and conviction can only be had for the common-law offence of burglary. Harris *v.* People, 44 Mich. 305.

A storehouse, in which a clerk or servant of the owner sleeps, although to protect the property, is a dwelling-house as to burglary. State *v.* Williams, 90 N. Car. 724; s. c., 47 Am. Rep. 541; State *v.* Pressley, 90 N. Car. 730; State *v.* Mordecai, 68 N. Car. 207; U. S. *v.* Johnson, 2 Cranch C. C. 21. *Compare* State *v.* Potts, 75 N. Car. 129.

A log-cabin belonging to the owners of a tobacco factory, in which the superintendent usually slept, is a dwelling-house in which burglary may be committed. State *v.* Jake, 1 Wins. (N. Car.) No. 2. L. 80.

Temporary Absence.—A house is no less a dwelling-house because at certain periods the occupier quits it, or quits it for a temporary purpose. "If A. has a dwelling-house, and he and all his family are absent a night or more, and, in their absence, in the night a thief breaks and enters the house to commit felony, this is burglary." 1 Hale P.C. 556; 3 Inst. 64; Wilde *v.* Commonwealth, 2 Metc. (Mass.) 408 So, if A. have two mansion houses, and is sometimes with his family in one and sometimes in the other, the breach of one of them, in the absence of his family, is burglary. 3 Inst. 4, Rep. 40, *a.* Again, if A. have a chamber in a college or inn of court, where he usually lodges in term time, and in his absence in vacation his chamber or study is broken open, this is burglary. R. *v.* Evans, Cro. Car. 473; 1 Hale P. C. 556. The prosecutor being possessed of a house in Westminster in which he dwelt, took a journey into Cornwall, with intent to return and move his wife and family out of town, leaving the key with a friend to look after the house. After he had been absent a month, no person being in the house, it was broken open and robbed. He returned a month after with his family, and inhabited there. This was adjudged burglary. R. *v.* Murry, 2 East P. C. 496; Foster, 77.

In these cases the owner must have quitted his house *animo revertendi*, in order to have it still considered as his mansion, if neither he nor any part of his family were in at the time of the breaking and entering. 2 East P. C. 496. The prosecutor had a house at Hackney, which he made use of in the summer, his chief residence being in London. About the latter end of the summer he removed to his town house, bringing away a considerable part of his goods. The following November his house at Hackney was broken open, upon which he removed the remainder of his furniture, except a few articles of little value. Being asked whether at this time he had any intention of returning to reside, he said he had not come to any settled resolution, whether to return or not, but was rather inclined totally to quit the house and let it. His house was broken open in the January following. The court (at the Old Bailey) were of opinion, that the prosecutor having left the house and disfurnished it, without any settled resolution to return, but rather inclining to the contrary, it could not be deemed his dwelling-house. R. *v.* Nutbrown, Foster, 77; 2 East P. C. 496. See R. *v.* Flannagan, Russ. & Ry. 187.

A house which the owner visits once or twice a year, and in which, during his visits, he sleeps and eats for about a week, but which at all other times is unoccupied by any person, is not a "dwelling-house," the breaking and entering of which when no one is therein, is burglary. Scott *v.* State, 62 Miss. 781. See State *v.* Jenkins, 5 Jones L. (N. Car.) 430.

Where a person had moved his furniture into a house, intending to reside in it upon his return from the country, neither he nor his family having slept in the house, *held*, that a breaking and entering of such house was burglary. Com. *v.* Brown, 3 Rawle (Pa.). 207. See Wilde *v.* Com., 2 Metc. (Mass.) 408.

Mr. Roscoe says (Roscoe's Cr. Ev. (10th Ed.) 370):

"It must appear that the premises in question were, at the time of the offence, occupied as a dwelling-house. Therefore, where a house was under repair, and the tenant had not entered into possession, but had deposited some of his goods there, but no one slept in it, it was held not to be a dwelling-house, so as to make the breaking and entering a burglary. R. *v.* Lyon, 1 Leach, 185; 2 East P. C. 497. Nor will the circumstance of the prosecutor having procured a person to sleep in the house (not being one of his own family) for its protection, make any difference. Thus where a house was newly built and finished in every respect, except the painting, glazing, and flooring of one garret, and a workman, who was constantly employed by the prosecutor, slept in it for the purpose of protecting it, but no part of the prosecutor's domestic family had taken possession, it was held at the Old Bailey, on the authority of R. *v.* Lyon (*supra*), that it was not the dwelling-house of the prosecutor. R. *v.* Fuller, 1 Leach, 186 (*n*). So where the prosecutor took a house, and deposited some of his goods in it, and not having slept there himself, procured two persons (not his own servants), to sleep there for the purpose of protecting the goods, it was held at the Old Bailey, that as the prosecutor had only in fact taken possession of the house so far as to deposit certain articles of his trade therein, but had neither slept in it himself, nor had any of his servants, it could not in contemplation of law be called his dwelling-house. R. *v.* Harris, 2 Leach, 701; 2 East P. C. 498. See

At common law the mansion or dwelling-house in which burglary might be committed was held to include the out-houses, such as warehouses, barns, stables, cow-houses, or dairy-houses, though not under the same roof, or joining contiguous to the dwelling-house, provided they were parcel thereof, or within the curtilage.[1]

also R. *v.* Hallard, *coram* Buller, J., 2 Leach, 701 (*n*); R. *v.* Thompson, 2 Leach, 771.

"The following case, decided upon the construction of the statute 12 Anne, c. 7 (repealed), is also an authority on the subject of burglary. The prosecutor, a publican, had shut up his house, which in the daytime was totally uninhabited, but at night a servant of his slept in it to protect the property left there, which was intended to be sold to the incoming tenant, the prosecutor having no intention of again residing in the house himself. On a case reserved, the judges were of opinion, that as it clearly appeared by the evidence of the prosecutor that he had no intention whatever to reside in the house, either by himself or his servants, it could not in contemplation of law be considered as his dwelling-house, and that it was not such a dwelling-house wherein burglary could be committed. R. *v.* Davies, *alias* Silk, 2 Leach, 876; 2 East P. C. 499.

"Where some corn had been missed out of a barn, the prosecutor's servant and another person put a bed in the barn, and slept there, and upon the fourth night the prisoner broke and entered the barn; upon a reference it was agreed by all the judges, that this sleeping in the barn made no difference. R. *v.* Brown, 2 East P. C. 497.

So a porter lying in a warehouse, to watch goods, which is solely for a particular purpose, does not make it a dwelling-house. R. *v.* Smith, 2 East P. C. 497.

"Where no person sleeps in the house it cannot be considered a dwelling-house. The premises where the offence was committed consisted of a shop and parlor, with a staircase to a room over. The prosecutor took it two years before the offence committed, intending to live in it, but remained with his mother, who lived next door. Every morning he went to his shop, transacted his business, dined, and stayed the whole day there, considering it as his home. When he first bought the house he had a tenant, who quitted it soon afterwards, and from that time no person had slept in it. On a case reserved, all the judges *held* that this was not a dwelling-house. R. *v.* Martin, Russ. & Ry. 108.

"It seems to be sufficient if any part of the owner's family, as his domestic servants, sleep in the house. A died in his in his house. B, his executor, put servants into it, who lodged in it, and were at board wages, but B never lodged there himself. Upon an indictment for burglary, the question was, whether this might be called the mansion-house of B. The court inclined to think that it might, because the servants lived there; but upon the evidence there appeared no breach of the house. R. *v.* Jones, 2 East P. C. 499."

A and B were partners, and in their business used and occupied as stores the lower stories of two adjacent buildings opening into each other. A, with other persons, lived in the upper rooms, and was there at the time of the burglary, but there was no internal communication between the stores and the upper rooms, the latter being accessible only through a fenced yard and a staircase leading thence. The breaking was into one of the stores. *Held*, that the entry was into a "dwelling-house," within the statute of burglary, which enacts that no building shall be deemed a dwelling-house unless joined to, immediately connected with, and part of a dwelling-house; that phraseology being intended only to exclude isolated, uninhabited out-houses. Quinn *v.* People, 71 N. Y. 561; s. c., 27 Am. Rep. 87.

Under the Nevada statute it is immaterial whether the house was inhabited or not. State *v.* Dan., 18 Nev. 345. See State *v.* Cody, 1 Wins. (N. Car.) No. 1, 197.

1. 2 Russell on Crimes (9th Am. Ed.), 15. See Gibson's Case, Leach Cr. Cas. 357; R. *v.* Gibbons, Russ. & Ry. 442; Robertson's Case, 4 City Hall Rec. 63; R. *v.* Stock, Russ. & Ry. 185; R. *v.* Witt; 1 M. C. C. 248. *Ex parte* Vincent, 26 Ala. 145; State *v.* Langford, 1 Dev. L. (N. Car.) 253; State *v.* Twitty, 1 Hayw. (N. Car.) 102; State *v.* Wilson, 1 Hayw. (N. Car.) 102; State *v.* Mordecai, 68 N. Car. 207; State *v.* Ginns, 1 N. & McC. (S. Car.) 585; State *v.* Williams, 90 N. Car. 724; s. c., 47 Am. Rep. 541; State *v.* Evans, 18 S. Car. 137; State *v.* Sampson, 12 S. Car. 567; s. c., 32 Am. Rep. 512; Fletcher *v.* State, 10 Lea (Tenn.), 338; Palmer *v.* State, 7 Coldw.

(Tenn.) 82; Bryant *v.* State, 60 Ga. 358; Pitcher *v.* People, 16 Mich. 142; People *v.* Parker, 4 Johns. (N. Y.) 424.

Breaking and entering a store-house in the night-time with intent to steal is not burglary. Conners *v.* State, 45 N. J. L. 340; State *v.* Dozier, 73 N. Car. 117.

Mansion or dwelling-house includes all such houses as are appurtenant thereto, as kitchen, laundry, smoke-house and dairy. Fletcher *v.* State, 10 Lea (Tenn.), 338.

The breaking and entering a store-house not part of a dwelling-house is not burglary by the common law. Hollister *v.* Com., 60 Pa St. 103.

Breaking and entering a building, the front and door of which are in the yard of a dwelling-house, but the rear is not within the yard, and the breaking was in the rear, is within a statute defining burglary as breaking and entering "into a dwelling-house or any building within the curtilage of a dwelling-house, etc." Fisher *v.* State, 43 Ala. 17.

It is not burglary to break and enter a smoke-house, thirty-five steps from the dwelling-house, the latter having no inclosure around it. State *v.* Jake, 1 Wins. (N. Car.) No. 2, L. 80.

A mill in which no one sleeps, 75 yards from the owner's dwelling-house, separated therefrom by a public road, and not proved to be appurtenant to the dwelling-house, was not the subject of burglary at common law, and is not under a statute covering houses, out-houses, buildings, sheds, and erections within 200 yards of and appurtenant to such dwelling-house. State *v.* Sampson, 12 S. Car. 567; s. c., 32 Am. Rep. 512.

At Common Law, Buildings adjoining the Dwelling-house.—Mr. Roscoe says (Roscoe's Cr. Ev. (10th Ed.) 368): "At common law, in cases where buildings were attached to a dwelling-house, and were more or less connected with it, it was frequently a matter of dispute whether they formed a part of the dwelling-house, so that entering them would be burglary. The different tests proposed were principally three: (1) whether the building in question was within the same curtilage; (2) whether it was under the same roof; (3) whether it had an internal communication with the principal building.

"By the provisions of 24 & 25 Vict. c. 96. s. 53, *supra* (replacing the 7 & 8 Geo. IV. c. 29. s. 13, to the same effect), it is absolutely necessary that the building entered should have a covered and inclosed internal communication with the principal building. The statute does not, however, say that every building having such a communication should be included; it only excludes those which have it not.

"The following cases were decided previous to the 7 & 8 Geo. IV. c. 29, s. 13, which has prescribed what shall be considered a dwelling-house for the purpose of burglary.

"The mere fact of a building in the neighborhood of a dwelling-house being occupied, together with the dwelling-house, by the same tenant (not taking into consideration the question of the building being within the same curtilage, as to which *vide post*), will not render the former building a dwelling-house in point of law. The prisoner broke and entered an out-house in the possession of G. S., and occupied by him with his dwelling-house, but not connected therewith by any fence inclosing both. The judges *held* that the prisoner was improperly convicted of burglary. The out-house being separated from the dwelling-house, and not within the same curtilage, was not protected by the bare fact of its being occupied with it at the same time. R. *v.* Garland, 2 East P. C. 493. So where a manufactory was carried on in the centre building of a great pile, in the wings of which several persons dwelt, but which had no internal communication with these wings, though the roofs of all the buildings were connected, and the entrance to all was out of the same common inclosure: upon the centre building being broken and entered, the judges held that it could not be considered as part of any dwelling-house, but a place for carrying on a variety of trades, and no parcel of the house adjoining, with none of which it had any internal communication, nor was it to be considered as under the same roof, though the roof had a connection with the roofs of the houses. R. *v.* Eggington, 2 East P. C. 494. The house of the prosecutor was in High Street, Epsom. There were two or three houses there, insulated like Middle Row, Holborn. At the back of the houses was a public passage nine feet wide. Across this passage, opposite to his house, were several rooms, used by the prosecutor for the purposes of his house, viz., a kitchen, a coach-house, a larder, and a brewhouse. Over the brewhouse a servant boy always slept, but no one else; and in this room the offence was committed. There was no communication between the dwelling-house and these buildings, except a canopy or awning over the common passage, to prevent the rain from falling on the victuals carried across. Upon a case reserved, the judges

were of opinion that the room in question was not parcel of the dwelling-house in which the prosecutor dwelt, because it did not adjoin to it, was not under the same roof, and had no common fence. Graham, B., dissented, being of opinion that it was parcel of the house. But all the judges present thought that it was a distinct dwelling of the prosecutor. R. *v.* Westwood. Russ. & Ry. 495.

"In the following case the building, though not within the curtilage, and having no internal communication, was held to constitute part of the dwelling-house. The prosecutor, a farmer, had a dwelling-house in which he lived, a stable, a cottage, a cow-house, and barn, all in one range of buildings, in the order mentioned, and under one roof, but they were not inclosed by any yard or wall, and had no internal communication. The offence was committed in the barn, and the judges held this to be a burglary, for the barn, which was under the same roof, was parcel of, and enjoyed with, the dwelllng-house. R. *v.* Brown, 2 East P. C. 493. So where the premises, broken and entered, were not within the same external fence as the dwelling-house, nor had they any internal communication with it, yet they were held to be part of it. The prosecutor's dwelling-house was situate at the corner of two streets. A range of workshops adjoining the house at one side, and standing in a line with the end of the house, faced one of the streets. The roof of this range was higher than the roof of the house. At the end of this range, and adjoining to it, was another workshop projecting further into the street, and adjoining to that a stable and coach-house used with the dwelling-house. There was no internal communication between the workshops and the dwelling-house, nor were they surrounded by any external fence. Upon a case reserved, the judges were unanimously of opinion that the workshops were parcel of the dwelling-house. R. *v.* Chalking, Russ. & Ry. 334. See also R. *v.* Lithgo, Russ & Ry. 357. In the case about to be mentioned, the premises broken and entered were within the curtilage, but without any internal communication with the dwelling-house. It does not appear whether the decision proceeded upon the same ground in the last case, or whether on the ground that the building in question was within the curtilage. The prosecutor had a factory adjoining to his dwelling-house. There was no internal communication, the only way from the one to the other (within the common inclosures) being through an open passage into the factory passage, which communicated with a lumber-room in the factory, from which there was a staircase which led into the yarn-room, where the felony was committed. On a case reserved, all the judges held, that the room in question was properly described as the dwelling-house of the prosecutor. R. *v.* Hancock, Russ. & Ry. 170. See also R. *v.* Clayburn, Russ. & Ry. 360.

"The following cases have been decided on the 7 & 8 Geo. IV. c. 29, s. 13, and will be applicable to the present statute: The prosecutor's house consisted of two long rooms, another room used as a cellar and wash-house on the ground floor, and three bedrooms upstairs. There was no internal communication between the washhouse and any of the other rooms of the house, the door of the washhouse opening into the back yard. All the buildings were under the same roof. The prisoner broke into the washhouse, and the question reserved for the opinion of the judges was, whether this was burglary. Seven of their lordships thought that the wash-house was part of the dwelling-house, the remaining five thought it was not. R. *v.* Burrowes, 1 Moody C. C. 274. The ground for holding the building not to be excluded by the statute appearing to be that the statute only applied to such buildings within the curtilage as were *not* part of the dwelling-house, and that this building was part of the dwelling-house. Such a construction of the statute would seem to leave the question much as it stood before.

"Behind the dwelling-house there was a pantry; to get to the pantry from the house it was necessary to pass through the kitchen into a passage; at the end of the passage there was a door, on the outside of which, on the left hand, was the door of the pantry. When the passage door was shut, the pantry door was excluded, and open to the yard; but the roof or covering of the passage projected beyond the door of the passage, and reached as far as the pantry-door. There was no door communicating directly between the pantry and the house, and the two were not under the same roof. The roof of the pantry was a 'to-fall,' and leaned against the wall of an inner pantry, in which there was a lachet window common to both, and which opened between them; but there was no door of communication. The inside pantry was under the same roof as the dwelling-house. The prisoner entered the outer pantry by a window which looked towards

By statute in most States, the buildings which are the subject of burglary have been made to include almost every kind of construction used by man, the only difference being the degree of the crime.[1]

the yard, having first cut away the hair-cloth nailed to the window-frame. Taunton, J., held that the outer pantry was not part of the dwelling-house within the above clause, and consequently that no burglary had been committed. R. *v.* Somerville, 2 Lew. C. C. 113. See also R. *v.* Turner, 6 C. & P. 407.

"In R. *v.* Higgs, 2 C. & K. 322, it appeared that adjoining to the prosecutor's dwelling-house was a kiln, one end of which was supported by the end wall of the dwelling-house, and that adjoining to the kiln was a dairy, one end of which was supported by the end wall of the kiln. There was no internal communication from the dwelling-house to the dairy, and the roof of the dwelling-house, kiln, and dairy were of different heights. Wilde, C. J., held that the dairy was not a part of the dwelling-house.

"It would seem from the latter case that the decision in R. *v.* Burrowes has not been very strictly followed."

1. See 1 Whar. Cr. L. (9th Ed.) §§ 792–797; New York Penal Code, § 504; State *v.* Bishop, 51 Vt. 287; s. c., 31 Am. Rep. 690; State *v.* Canney, 19 N. H. 135; State *v.* Wilson, 47 N. H. 101; Com. *v.* Whalen, 131 Mass. 419; Com. *v.* White, 6 Cush. (Mass.) 181; State *v.* Bailey, 10 Conn. 144; State *v.* Clark, 5 West'n Repr. (Mo.) 417; Ratekin *v.* State, 26 Ohio St. 420; Bauer *v.* State, 25 Ohio St. 70; Thalls *v.* State, 21 Ohio St. 233; Barnett *v.* State, 38 Ohio St. 7; Wilson *v.* State, 34 Ohio St. 189; Blackford *v.* State, 11 Ohio St. 327; Orrell *v.* People, 94 Ill. 456; s. c., 34 Am. Rep. 241; Pitcher *v.* People, 16 Mich. 142; Bryant *v.* State, 60 Ga. 358; McElreath *v.* State, 55 Ga. 562; Bethune *v.* State, 48 Ga. 505; Fisher *v.* State, 43 Ala. 17; *Exp.* Vincent, 26 Ala. 145; Conoly *v.* State, 2 Tex. App. 412; Stevenson *v.* State, 5 Baxt. (Tenn.) 681; Palmer *v.* State, 6 Coldw. (Tenn.) 82; State *v.* Sampson, 12 S. Car. 567; s. c., 32 Am. Rep. 512; State *v.* Evans, 18 S. Car. 137; State *v.* Branham, 13 S. Car. 389; State *v.* Ginns, 1 N. & McC. (S. Car.) 585; State *v.* Hughes, 86 N. Car. 662; Terry *v.* Stokes, 2 N. Mex. 161.

Curtilage as used in a statute in relation to burglary means an enclosed space immediately surrounding the dwelling-house and contained within the same inclosure. State *v.* Hecox, 83 Mo. 531; s. c., 5 Am. Cr. Rep. 98. See Pitcher *v.* People, 16 Mich. 142; Pond *v.* People, 8 Mich. 150; People *v.* Taylor, 2 Mich. 251; Armour *v.* State, 3 Humph. (Tenn.) 379; State *v.* Fletcher, 10 Lea (Tenn.), 338; State *v.* Shaw, 31 Me. 523; State *v.* Twitty, 1 Hawy. (N. Car.) 102; 2 Bish. St. Cr. (2d Ed.) § 286.

A stable, as the word is commonly used, is a building, and may be included in the class of structures denominated in the statute as "other buildings." Orrell *v.* People, 94 Ill. 457.

The proof showed that the building, which had been broken and entered, had been erected by its owner on his farm, for a dwelling-house, but had never been occupied or used as such; that its owner had for several years, and ever since its erection, used it to store wheat after it was threshed, and corn after it was husked, such grain being the products of the farm on which the building was erected. *Held*, that this building was a barn within the meaning of the statute. Barnett *v.* State, 38 Ohio St. 7. See Ratekin *v.* State, 26 Ohio St. 420.

Under an indictment for burglary of a granary in which there were goods and valuable things and larceny therein, it is immaterial whether or not the granary is within the curtilage of the dwelling-house. State *v.* Hecox, 83 Mo. 531; s. c., 5 Am. Cr. Rep. 98.

An out-house is not necessarily within the curtilage. A house contiguous to and used in connection with a hotel, both belonging to and controlled by the same person, is an out-house. Shotwell *v.* State, 43 Ark. 345.

Defendant was convicted under an indictment that alleged a burglary in "a gin-house, situate within the curtilage of the dwelling-house." *Held*, that judgment should be arrested, because the indictment failed to allege that the gin-house was within two hundred yards of the dwelling-house and appurtenant to it, two averments that were essential under the statute. State *v.* Evans, 18 S. Car. 137.

Where a cellar of a building, the upper part whereof is occupied by families, is used as an ice-house and beer-cellar, with no communication with the rest of the building, an access thereto being only obtainable from outside the building, it is not such a house, in contemplation of R.

8. As to Ownership of Building—How it may be Laid.—In an indictment for burglary, the ownership of the building entered may be laid in the occupant whose possession is rightful, as against the burglar. Rooms rented to a person constitute his dwelling-house, when they are occupied as such.[1]

S. 1879, § 1309, as makes it grand larceny to steal therefrom. State *v.* Clark, 5 West. Repr. (Mo.) 417.

A railroad depot is a warehouse within the meaning of the Vermont Gen. Stat., although such building was unknown when the statute was enacted. State *v.* Bishop, 51 Vt. 287; s. c., 31 Am. Rep. 690.

An office built in the corner of a warehouse is a "house," which may be broken and entered by lifting the latch. Anderson *v.* State, 17 Tex. App. 305.

A ticket-office partitioned off in a railroad depot. People *v.* Young, 65 Cal. 225.

A banking-house is a store, shop, or warehouse. Wilson *v.* State, 24 Conn. 57.

The word "house," as used in Cal. Stat. 206, 1858, includes every structure which has sides, walls, and a roof, regardless of the fact whether it is at the time, or ever had been, inhabited by members of the human family. People *v.* Stickman, 34 Cal. 242.

An indictment which charges that the accused broke and entered "a gin-house, the property of W. R., in which was kept, for use, sale, or deposit, seed-cotton, a thing of value," etc., is sufficient, without an additional averment that the gin-house was specially constructed for the use to which it was applied. Under the statute (Code, § 4343), only structures of a temporary character, erected for special purposes or occasions, require such additional descriptive averment. Stone *v.* State, 63 Ala. 115.

The prisoner was charged with the statutory burglary of breaking and entering a store not adjoining to or occupied with a dwelling-house, with felonious intent. Under such a charge, if it turns out that the store does adjoin or is occupied with a dwelling-house, there can be no conviction. The evidence showed that the store was the first story of a building; that the proprietors were a co-partnership, composed of two persons who leased the building; that one of the partners occupied the upper part of the building as a dwelling-house, and the other partner lodged with him. *Held*, that the evidence did not support the information. Moore *v.* People, 47 Mich. 639.

An indictment alleged that the defendant "feloniously did break and enter a certain building, to wit, the store of A., with intent then and there in said store to commit the crime of larceny." The evidence was that A. occupied a building, in which were a saloon, a kitchen, two dining-rooms and a bedroom, and in one of the dining rooms, which was a front room into which a door opened from the street, there was a bar; that he kept and sold lager beer, cigars and oysters, and cooked meals for customers; and that the defendant entered by a back door which opened directly into the kitchen, one of the dining-rooms and the bedroom being between the kitchen and the bar-room. *Held*, that there was evidence for the jury that the building was a "store," within the ordinary meaning of that word as used in this Commonwealth; and that the defendant had no ground of exception to a ruling that he was not entitled, as a matter of law, to an acquittal on the ground of a variance between the allegation and the proof. Com. *v.* Whalen, 131 Mass. 419. See Moore *v.* People, 47 Mich. 639; Barth *v.* State, 18 Conn. 432; State *v.* Canney, 19 N. H. 135.

A house used exclusively for storing goods is a warehouse within the *Ohio* statute, although the building had been constructed and formerly used for another purpose. Allen *v.* State, 10 Ohio St. 287. See Wilson *v.* State, 24 Conn. 57.

An indictment charging that the prisoner broke into a "store-room," is insufficient under a statute making it an offence to break into a "store-house," and the defect is available to him although the objection was not made until the verdict had been rendered. Hagar *v.* State, 35 Ohio St. 268.

1. 1 Whar Cr. L. (9th Ed.) § 798; Bish. Cr. Proc. (3d Ed.) § 137; Smith *v.* People, 115 Ill. 17; State *v.* Rivers, 21 N. W. Repr. (Iowa) 781; Quinn *v.* People, 71 N. Y. 561; s. c., 27 Am. Rep. 87; People *v.* Parker, 4 Johns. (N. Y.) 424; People *v.* Snyder, 2 Park. C. C. (N. Y.) 23; Com. *v.* Carroll, 8 Mass. 490; Com. *v.* Lindsey, 10 Mass. 153; State *v.* Rand, 33 N. H. 216; Sullivan *v.* State, 13 Tex. App. 462.

The question of lawful occupancy, as against the landlord, or other person claiming title, cannot be raised. Houston *v.* State, 38 Ga. 165.

The name of the owner of the dwelling-house or of the building which was broken and entered must be stated with accuracy. Heard's Cr. L. 436; 1 Whart. Cr. L. (9th Ed.) § 816; Beale *v.* State, 53 Ala. 460; State *v.* Fockler, 22 Kan. 542; State *v.* Morrissey, 22 Iowa, 158; Wallace *v.* People, 63 Ill. 451; Doan *v.* State, 26 Ind. 495; Wilson *v.* State, 34 Iowa St. 199; Jackson *v.* State, 55 Wis. 589; Com. *v.* Perris, 108 Mass. 1; Pells *v.* State, 20 Fla. 774; Sullivan *v.* State, 13 Tex. App. 462; People *v.* Edwards, 59 Cal. 359.

Evidence that a dwelling-house in which a burglary was committed is the "Drake House," is a "house kept by Mr. Drake," and that "Mr. Drake lives there," is insufficient to sustain a conviction under an information charging a burglarious entry of the dwelling-house of *William* Drake. In such case there is not a mere variance which can be remedied by amendment. If the Christian name of the owner of the dwelling-house were stricken out in order to make the pleading and proof correspond, the information would then be bad, because it did not state the name of such owner with certainty to a common intent. Jackson *v.* State, 55 Wis. 589.

An indictment charging that "the prisoner, on, etc., a certain mill-house not adjoining to or occupied with the dwelling-house of F.," etc., sufficiently alleges the ownership of the mill-house to be in F., and is sufficient in law. Webster *v.* Commonwealth, 80 Va. 598.

Where A erects a building on the ground of B for their mutual convenience and use, the ownership is properly laid in A and B jointly. Webb *v.* State, 52 Ala. 422.

A description of the premises as the "warehouse of W. M., of Scioto County," is sufficient. Spencer *v.* State, 13 Ohio, 401.

A building may be described as "the shop of J. S.," although J. S. occupies only one room in it. Com. *v.* Bowden, 14 Gray (Mass.), 104.

An indictment is sufficient which alleges that the house belonged to the estate of R., and that his surviving widow and children being his heirs-at-law, kept goods and valuable things therein, instead of alleging that the house was the dwelling of those who dwelt therein. State *v.* Franks, 64 Iowa, 40. *Compare* Beall *v.* State, 53 Ala. 460.

House Divided, without Internal Communication, and Occupied by Several.—Where there is an actual severance in act of the house, by a partition or the like, all internal communication being cut off, and each part being inhabited by several occupants, the part so separately occupied is the dwelling-house of the person living in it, provided he dwell there. If A lets a shop, parcel of his dwelling-house, to B for a year, and B holds it, and works or trades in it, but lodges in his own house at night, and the shop is broken open, it cannot be laid to be the dwelling-house of A, for it was severed by the lease during the term; but if B or his servants sometimes lodge in the shop, it is the mansion-house of B, and burglary may be committed in it. 1 Hale P. C. 557. See R. *v.* Sefton, Russ. & Ry. 203; 2 Russ. Cr. (5th Ed.) 16.

The prosecutors, S. and K., were in partnership, and lived next door to each other. The two houses had formerly been one, but had been divided, for the purpose of accommodating the families of both partners, and were now perfectly distinct, there being no communication from one to the other, without going into the street. The housekeeping, servants' wages, etc., were paid by each partner respectively, but the rent and taxes of both the houses were paid jointly out of the partnership fund. The offence was committed in the house of the prosecutor S. On the trial it was objected that the burglary ought to have been laid to be in the dwelling-house of the prosecutor S. only; and of this opinion was the court. R. *v.* Martha Jones, 1 Leach, 537; 2 East P. C. 504.

But it is otherwise where there is an internal communication. Thus where a man let part of his house, including his shop, to his son, and there was a distinct entrance into the part so let, but a passage from the son's part led to the father's cellars, and they were open to the father's part of the house, and the son never slept in the part so let to him, the prisoner being convicted of a burglary in the shop, laid as the dwelling-house of the father, the conviction was held by the judges to be right, it being under the same roof, part of the same house, and communicating internally. R. *v.* Sefton, 2 Russ. Cr. (5th Ed.) 16; Russ. & Ry. 203.

Chambers in the inns of court are to all purposes considered as distinct dwelling-houses, and therefore whether the owner happens to enter at the same outer door or not, will make no manner of difference. The sets are often held under distinct titles, and are, in their nature and manner of occupation, as unconnected with each other as if they were under separate roofs. 2 East P. C. 505; 1 Hale P. C. 556.

Where there is an Internal Communication, but the Parts are Occupied by Several, under Distinct Titles.—Although in the case of lodgers and inmates who hold under one general occupier, the whole of the house continues to be his dwelling-house, if there be an internal communication, and the parties have a common entrance, *vide infra*, yet it is otherwise where several parts of a building are let under distinct leases. The owner of a dwelling-house and warehouse under the same roof, and communicating internally, let the house to A (who lived there), and the warehouse to A and B, who were partners. The communication between the house and warehouse was constantly used by A. The offence was committed in the warehouse, which was laid to be the dwelling-house of A. On a case reserved, the judges were of opinion that this was wrong, A holding the house in which he lived under a demise to himself alone, and the warehouse under a distinct demise to himself and B. R. *v.* Jenkins, Russ. & Ry. 244.

In a tenement-house severed by lease into distinct habitations, each room or suite of rooms occupied by a tenant is his dwelling-house, and a door of such room is an outer door, so that a breach of it is burglary, though the common door, for passage into the street, be open. Mason *v.* People, 26 N. Y. 200; People *v.* Bush, 3 Park. Cr. (N. Y.) 552; People *v.* Bouget, 2 Park. Cr. (N. Y.) 11.

Where Different Portions of the Same Room are Occupied by Separate Tenants.—Where a shop is occupied by A and B, each of whom pay rent to C, and by arrangement occupy a distinct portion, an indictment which charges the breaking and entering the shop of A is good, although it is not shown that the prisoner broke and entered the part occupied by A. Com. *v.* Thompson, 9 Gray (Mass.), 108. *Compare* Saxton's Case, 2 Harr. (Del.) 533.

Lodgers.—Where separate apartments were let in a dwelling-house to lodgers, it seems formerly to have been doubted whether they might not in all cases be described as the mansion-house of the lodgers. 2 East P. C. 505; Hawk. P. C. b. 1, c. 38, ss. 13, 14. But the rule is now taken to be, according to the opinion of Kelynge, 84, that if the owner, who lets out apartments in his house to other persons, sleeps under the same roof, and has but one outer door common to himself and his lodgers, such lodgers are only inmates, and all their apartments are parcel of the dwelling-house of the owner. But if the owner do not lodge in the same house, or if he and his lodgers enter by different outer doors, the apartments so let are the mansion, for the time being, of each lodger respectively. And accordingly it was so ruled by Holt, C. J., at the Old Bailey, in 1701, although in that case the rooms were let for a year, under a rent, and Tanner, an ancient clerk in court, said that this was the constant course and practice. 2 East P. C. 505; 1 Leach, 90 (*n*).

Where one of two partners is the lessee of a shop and house, and the other partner occupies a room in the house, he is only regarded as a lodger. M. and G. were partners; M. was the lessee of the whole premises, and paid all the rent and taxes for the same. G. had an apartment in the house, and paid M. a certain sum for board and lodging, and also a certain proportion of the rent and taxes for the shop and warehouses. The burglary was committed in the shop, which was held to be the dwelling-house of M., and the judges held the description right. R. *v.* Parmenter, 1 Leach, 537 (*n*).

In the following cases, the apartments of the lodger were held to be his dwelling-house: The owner let the whole of a house to different lodgers. The prosecutor rented the first floor, a shop and a parlor on the ground floor, and a cellar underneath the shop, at £12, 10s. a year. The owner took back the cellar to keep lumber in, for which he allowed a rebate of 40s. a year. The entrance was into a passage, by a door from the street, and on the side of the passage one door opened into the shop, and another into the parlor, and beyond the parlor was the staircase which led to the upper apartments. The shop and parlor doors were broken open, and the judges determined that these rooms were properly laid to be the dwelling-house of the lodger, for it could not be called the mansion of the owner, as he did not inhabit any part of it, but only rented the cellar for the purpose before mentioned. R. *v.* Rogers, 1 Leach, 89, 428; 2 East P. C. 506, 507; Hawk. P. C. b. 1, c. 38, s. 29.

The house in which the offence was committed belonged to one N. who did not live in any part of it himself, but let the whole of it out in separate lodgings from week to week. J., the prosecutor, had two rooms, viz., a sleeping-room, and a workshop in the garret, which he rented by the week as tenant at will to N. The workshop was broken and entered by the prisoner. Ten judges, on a case reserved, were unanimously of opinion,

that as N., the owner of the house, did not inhabit any part of it, the indictment properly charged it to be the dwelling-house of J. R. *v.* Carrell, 1 Leach, 237, 429; 2 East P. C. 506.

The prisoner was indicted under the repealed statute 3 & 4 Will. & M. c. 9, s. 1, for breaking and entering a dwelling-house and stealing therein. The house was let out to three families, who occupied the whole. There was only one outer door, common to all the inmates. J. L. (whose dwelling-house it was laid to be) rented a parlor on the ground floor, and a single room up one pair of stairs, where he slept. The judges were of opinion, that the indictment rightly charged the room to be the dwelling-house of J. L. R. *v.* Trapshaw, 1 Leach, 427; 2 East P. C. 506, 780.

It follows from the principle of the above cases, that if a man lets out part of his house to lodgers, and continues to inhabit the rest himself, if he breaks open the apartment of a lodger, and steals his goods, it is felony only, and not a burglary; for it cannot be burglary to break open his own house. 2 East P. C. 506; Kel. 84.

Personal property of a boarder left in B.'s saloon or bar-room during the night, while the boarder slept in some other part of the house, was in the actual possession of B. during that time; and proof of the intent to steal such property would sustain an averment of an intent to steal the property of B. Neubrandt *v.* State, 53 Wis. 89. See Rodgers *v.* People, 86 N. Y. 360; s. c., 40 Am. Rep. 548.

An indictment is good which charges the ownership of a room to be his who rents and occupies it as a lodger, from one who has the general supervision and control of the house. People *v.* St. Clair, 38 Cal. 137.

The room of a guest at an inn must be laid as the dwelling-house of the innkeeper, and not of the guest. Rodgers *v.* People, 86 N. Y. 360; s. c., 40 Am. Rep. 548. But a landlord may commit burglary in his guest's chamber. State *v.* Fish, 3 Dutch. (N. J.) 323; R. *v.* Ball, 1 Moody C. C. 30.

By Wife or Family.—"The actual occupation of the premises by any part of the prosecutor's domestic family will be evidence of its being his dwelling-house. The wife of the prosecutor had for many years lived separate from her husband. When she was about to take the house in which the offence was afterwards committed, the lease was prepared in her husband's name; but he refused to execute it, saying he would have nothing to do with it; in consequence of which, she agreed with the landlord herself, and constantly paid the rent herself. Upon an indictment for breaking open the house, it was held to be well laid to be the dwelling-house of the husband. R. *v.* Farre, Kel. 43, 44, 45. In a similar case, where there was the additional fact that the wife had a separate property vested in trustees, the judges were clear that the house was properly laid to be the dwelling-house of the husband. It was the dwelling-house of some one. It was not the wife's; because, at law, she could have no property; it was not the trustee's, because they had nothing to do with it; it could then only be the husband's. R. *v.* French, Russ. & Ry. 491. So where the owner of a house who had never lived in it permitted his wife, on their separation, to reside there, and the wife lived there in adultery with another man, who paid the expenses of housekeeping, but neither rent nor taxes, this was held by the judges to be properly described as the dwelling-house of the husband. R. *v.* Wilford, Russ. & Ry. 517; and see R. *v.* Smith, 5 C. & P. 203; Ducher *v.* State, 18 Ohio, 308. Where a prisoner was indicted for breaking into the house of Elizabeth A., and it appeared that her husband had been convicted of felony, and was in prison under his sentence when the house was broken into, it was held, on a case reserved, that the house was improperly described, although the wife continued in possession of it. R. *v.* Whitehead, 9 C. & P. 429. But if a case should arise in which the law would adjudge the separate property of the mansion to be in the wife, she having also the exclusive possession, it should seem that in such case the burglary would properly be laid to be committed in her mansion-house, and not in that of her husband. 2 East P. C. c. 15, s. 16; 2 Russ. Cri. (5th Ed.) 25. If the house were the separate property of the wife under the 45 & 46 Vict. c. 75, it would be sufficient to describe it as her house." Roscoe's Cr. Ev. (10th Ed.) 375.

In a case of burglary, the dwelling-house was occupied by husband and wife, but leased by the wife, who had a separate estate, and the goods in the house belonged to the wife. *Held,* that the indictment properly laid the ownership of the house in the wife. The ownership might properly have been laid in either husband or wife. State *v.* Trapp, 17 S. Car. 467; s. c., 43 Am. Rep. 614.

It is sufficient to lay the ownership in a married woman who lives apart from her husband, and has the occupancy and

control of the dwelling. Ducher *v.* State, 18 Ohio, 308.

Where a quilt which was stolen was the separate property of A.'s wife, and was laid in the indictment as the property of A., *held*, not to be error; that while a husband and wife live together, the husband has a special property as bailee in the wife's separate personal estate. State *v.* Wincroft, 76 N. Car. 38. See State *v.* Matthews, 76 N. Car. 41.

By Agents.—A., the agent of W., hired and paid the rent of a shop in which the business of the agency was conducted. *Held*, that the ownership was properly laid in A. People *v.* Smith, 1 Park. Cr. (N. Y.) 329.

By Clerks and Agents in Public Offices, Companies, etc.—An agent or clerk employed in a public office, or by persons in trade, is in law the servant of those parties; and if he be suffered to reside upon the premises which belong to the government or to the individuals employing him, the premises cannot be described as his dwelling-house. Three persons were indicted for breaking into the lodgings of H., at Whitehall, and the judges were of opinion that it should have been laid to be the king's mansion-house at Whitehall. R. *v.* Williams, 1 Hale P. C. 522, 527.

The prisoner was indicted for breaking into a chamber in Somerset House, and the apartment was laid to be the mansion-house of the person who lodged there; but it was held bad, because the whole house belonged to the queen-mother. R. *v.* Burgess, Kel. 27.

The prisoner was indicted under the 12 Anne, c. 7 (repealed), for stealing a gold watch in the dwelling-house of B. The house was the invalid office at Chelsea, an office under government. The ground-floor was used by the paymaster-general, for the purpose of conducting the business relating to the office. B. occupied the whole of the upper part of it; but the rent and taxes of the whole were paid by the government. The court (at the Old Bailey) held that it was not the dwelling-house of B. R. *v.* Peyton, 1 Leach, 324; 2 East P. C. 501.

The prisoner was indicted for burglary in the mansion-house of S. It appeared that the house belonged to the African Company, and that S. was an officer of the company, and had separate apartments, and lodged and inhabited there; but Holt, C. J., Tracy, J., and Bury, B., held this to be the mansion-house of the company, for though an aggregate corporation cannot be said to inhabit anywhere, yet they may have a mansion-house for the habitation of their servants. R. *v.* Hawkins, 2 East P. C. 501; Foster, 38. So it was held with regard to the dwelling-house of the East India Company, inhabited by their servants. R. *v.* Picket, 2 East P. C. 501.

The prisoner was indicted for breaking and entering the house of the master, fellows, and scholars of Bennet College, Cambridge. The fact was he broke into the buttery of the college, and there stole some money, and it was agreed by all the judges to be burglary. R. *v.* Maynard, 2 East P. C. 501.

The governor of the Birmingham workhouses was appointed under contract for seven years, and had the chief part of the house for his own occupation; but the guardians and overseers who appointed him reserved to themselves the use of one room for an office, and of three others for storerooms. The governor was assessed for the house, with the exception of these rooms. The office being broken open, it was laid to be the dwelling-house of the governor; but, upon a case reserved, the judges held the description wrong. R. *v.* Wilton, Russ. & Ry. 115. So a club-house is wrongly described as the dwelling-house of the house-steward who sleeps in the club-house, and has the charge of, and is responsible for, the plate in it. R. *v.* Ashley, 1 C. & K. 198.

The following case appears to be at variance with previous authorities, and it may be doubted whether it is to be considered as law. The prosecutor, S., kept a blanket warehouse in Goswell street, and resided with his family in the house over the warehouse, which was on the ground-floor and consisted of four rooms, the second of which was the room broken open. There was an internal door between the warehouse and the dwelling-house. The blankets were the property of a company of blanket manufacturers at Witney, in Oxfordshire, none of whom ever slept in the house. The whole rent, both of the dwelling-house and warehouse, was paid by the company, to whom S. acted as servant or agent, and received a consideration for his services from them, part of which consideration, he said, was his being permitted to live in the house rent free. The lease of the premises was in the company. The court were clearly of opinion that it was rightly charged to be the dwelling-house of S.; for though the lease of the house was held, and the whole rent reserved paid by the company in the country, yet as they had never used it in any way as their habitation, it would be doing an

equal violence to language and to common sense to consider it as their dwelling-house, especially as it was evident that the only purpose in holding it was to furnish a dwelling to their agent, and warerooms for the commodities therein deposited. It was the means by which they in part remunerated S. for his agency, and was precisely the same thing as if they had paid him as much more as the rent would amount to, and he had paid the rent. The bargain, however, the court observed, took another shape. The company preferred paying the rent of the whole premises, and giving their agent and his family a dwelling therein toward the salary which he was to receive from them. It was, therefore, essentially and truly, the dwelling of the person who occupied it. The punishment of burglary was intended to protect the actual occupant from the terror of disturbance during the hours of darkness and repose; but it would be absurd to suppose that that terror which is of the essence of this crime could, from the breaking and entering in this case, have produced an effect at Witney. R. *v.* Margett, 2 Leach, 930. It has been observed, that the accuracy of the reason given in the above judgment, with regard to protecting the actual occupant, may, perhaps, be questionable. The punishment of burglary will attach equally, and the actual occupant will not be less protected, though the offence should be laid in the indictment as committed in the dwelling-house of the real owner. And with respect to the terror in this case not having affected the company at Witney, the same might have been said of the terror to the East India Company or the African Company, in the cases of burglary in their houses. In the course of this case, Mr. Justice Grose inquired if there had not been a prosecution at the Old Bailey for a burglary in some of the halls of the city of London, in which it was clear that no part of the corporation resided, but in which the clerks of the company generally lived; and Mr. Knapp informed the court that his father was clerk to the Haberdashers' Company, and resided in the hall, which was broken open, and in that case the court held it to be his father's house. 2 Leach, 931, n ; Roscoe's Cr. Ev. (10th Ed.) 377. The case of R. *v.* Margett, however, appears to be supported by a more recent decision. The prosecutor was secretary to the Norwich Union Insurance Company, and lived with his family in the house used as the office of the company, who paid the rent and taxes. The burglary was in breaking into a room used for the business of the company. The recorder, on the authority of R. *v.* Margett, and the case of the clerk of the Haberdashers' Company there mentioned, thought the indictment correct, but reserved the point for the judges, who were of opinion that the house was rightly described as the prosecutor's, since he, his family, and servants were the only persons who dwelt there; and they only were liable to be disturbed by a burglary. Though their lordships would not say that it might not have been described as the company's house, they thought it might, with equal propriety, be described as the prosecutor's. R. *v.* Witt, 1 Moody (C. C.), 248.

By Servants Occupying as Such.—Where a servant occupies a dwelling-house, or apartments therein, as a servant, his occupation is that of his master, and the house is the dwelling-house of the latter. But it is otherwise where the servant occupies *suo jure* as tenant. Thus, apartments in the king's palaces or in the houses of noblemen for their stewards and chief servants can only be described as the dwelling-house of the king or noblemen. Kel. 27; 1 Hale, P. C. 522, 527.

G., a farmer, had a dwelling-house and cottage under the same roof, but they were not inclosed by any wall or court-yard, and had no internal communication. T., a servant of G., and his family resided in the cottage by agreement with G. when he entered his service. He paid no rent, but an abatement was made in his wages on account of the cottage. The judges held that this was no more than a license to T. to lodge in the cottage, and did not make it his dwelling-house. R. *v.* Brown, 2 East P. C. 501.

The prosecutors were partners as bankers, and also as brewers, and were the owners of the house in question, used in both concerns. There were three rooms with only one entrance by a door from the street. No one slept in these rooms. The upper rooms of the house were inhabited by S., the cooper employed in the brewing concern. He was paid half a guinea a week, and permitted to have these rooms for the use of himself and family. There was a separate entrance from the street to these rooms. There was no communication between the upper and lower floor, except by a trap-door (the key of which was left with S.) and ladder not locked or fastened and not used. S. was assessed to the window-tax for his part of the premises, but the tax was paid by his masters. It

being objected that the place where the burglary was committed was not the dwelling-house of the prosecutors, the point was reserved, when eight of the judges thought that S. was not a tenant, but inhabited only in the course of his service. Four of the judges were of a contrary opinion. Lord Ellenborough, C. J., said: "S. certainly could not have maintained trespass against his employers if they had entered these rooms without his consent Does a gentleman who assigns to his coachman the rooms over his stables thereby make him a tenant? The act of the assessors, whether right or wrong in assessing S. for the windows of the upper rooms, can make no difference; nor is it material which of the two trades the prosecutor carried on; S. was servant, for the property in both partnerships belonged to the same persons. As to the severance, the key of the trap-door was left with S., and the door was never fastened, and it can make no difference whether the communication between the upper and lower rooms was through a trap-door or by a common staircase." R. *v.* Stockton & Edwards, 2 Leach, 1015; 2 Taunt. 339; s. c., under the name of R. *v.* Stock and another, Russ. & Ry. 185. See 2 Russ. Cri. (5th Ed.) 27; R. *v.* Flannagan, Russ. & Ry. 187, *infra*.

In order to render the occupation of a servant the occupation of the master it must appear that the servant is, properly speaking, such, and not merely a person put into the house for the purpose of protecting it. The prosecutor left the dwelling-house, keeping it only as a warehouse and workshop, without any intention of again residing in it. In consequence of his thinking it not prudent to leave the house without some one in it, two women, employed by him as workwomen in his business, and not as domestic servants, slept there to take care of the house, but did not take their meals there or use the house for any other purpose than that of sleeping there. Upon an indictment for stealing goods to the amount of more than 40s., in the dwelling-house of the prosecutor, the judges held that this could not be considered his dwelling-house. R. *v.* Flannagan, Russ. & Ry. 187. It is difficult to distinguish this case from that of R. *v.* Stockton, 2 Leach, 1015, *supra*, which received an opposite decision. Still, though the object of the owner of the house in putting in his servants be to protect his property only, yet if *they live there* their occupation will be deemed his occupation, and the house may be described as his dwelling-house. The shop broken open was part of a dwelling-house which the prosecutor had inhabited. He had left the dwelling-house and never meant to live in it again, but retained the shop and let the other rooms to lodgers; after some time he put a servant and his family into two of the rooms lest the place should be robbed, and they lived there. Upon a case reserved, the judges thought that putting in a servant and his family *to live* was very different from putting them in merely to sleep, and that this was still to be deemed the prosecutor's house. R. *v.* Gibbons, 2 Russ. Cri. (5th Ed.) 23.

J. B. worked for one W., who did carpenter's work for a public company, and had put J. B. into the house in question to take care of it and of some mills adjoining, J. B. receiving no more wages after than before he went to live in the house; it was held that the house was not rightly described as the house of J. B. R. *v.* Rawlins, 7 C. & P. 150. See R. *v.* Ashley, 1 C. & K. 198, *ante*, p. 681.

Where a dwelling-house was occupied by one in charge of a plantation, and he ordinarily slept in one room of it, the entire house was his dwelling-house, although another room may have been occasionally occupied as an office or bedroom by another, who while there was the master. Ashton *v.* State, 68 Ga. 25.

By Servants, as Tenants.—Where a servant occupies part of the premises belonging to his master, not as in the cases above mentioned, *ante*, in the capacity of servant, but in the character of tenant, the premises must be described as his dwelling-house. G. & Co. had a house and building where they carried on their trade. M., their warehouseman, lived with his family in the house and paid £11 per annum for rent and coals (the house alone being worth £20 per annum). G. & Co. paid the rent and taxes. The judges were of opinion that this could not be said to be the dwelling-house of G. & Co. They thought that as M. stood in the character of tenant (for G. & Co. might have distrained upon him for his rent, and could not arbitrarily have removed him), M.'s occupation could not be deemed their occupation. R. *v.* Jarvis, 1 Moody C. C. 7.

Nor is it necessary, in order to invest the servant with the character of tenant, that he should pay a rent, if from other circumstances of the case it appears that he holds as tenant. The prosecutor (G.), a collier, resided in a cottage built by the owner of the colliery for whom he worked. He received 15s. a week as wages, be-

sides the cottage, which was free of rent and taxes. The prisoner being indicted for burglary in the dwelling-house of the prosecutor, Holroyd, J., was of opinion that though the occupation and enjoyment of the cottage were obtained by reason of G. being the servant of the owner, and were coextensive only with the hiring, yet that his inhabiting the cottage was not, as in the cases referred to (2 East P. C. 500), correctly speaking, merely as the servant of the owner, nor was it either as to the whole or any part of the cottage, as his (the owner's) occupation or for his use or business or that of the colliery, but wholly for the use and benefit of G. himself and his family, in like manner as if he had been paid the rent and taxes; and though the servant's occupation might in law, at the master's election, be considered as the occupation of the master and not of the servant, yet with regard to third persons it might be considered either as the occupation of the master or servant. The point was, however, reserved for the opinion of the judges, who held that the cottage might be described as the dwelling-house of G. R. *v.* Jobling, Russ. & Ry. 525.

A toll-house was occupied by a person employed by the lessee of the tolls at weekly wages as collector, and as such he had the privilege of living in the toll-house. The judges were unanimously of opinion that the toll-house was rightly described as his dwelling-house; for he had the exclusive possession of it, and it was unconnected with any premises of the lessee, who did not appear to have any interest in it. R. *v.* Camfield, 1 Moody C. C. 42.

So where a person who has been servant remains, on the tenant's quitting, upon the premises, not in the capacity of servant, they may be described as his dwelling-house. S. let a house to T., who underlet it The sub-lessee failed and quitted, and no one remained in the house but P., who had been servant to the sub-lessee. T. paid her 15s. a week till he died, when she received no payment, but continued in the house. At Michaelmas it was given up to S., but P. was permitted by the steward to remain in it. Bayley, J., thought P. might be considered tenant at will, but reserved the point for the opinion of the judges, who held that the house was rightly laid in the indictment as the dwelling-house of P., as she was there, not as a servant, but as a tenant at will. R. *v.* Collet, Russ. & Ry. 498. Where a gardener lived in a house of his master, quite separate from the dwelling-house of the latter, and had the entire control of the house he lived in and kept the key, it was held that it might be laid either as his or as his master's house. R. *v.* Rees, 7 C. & P. 568.

By Tenants.—Where the building is in possession of a lessee or tenant it may properly be charged to be his property or that of the landlord. Kennedy *v.* State, 81 Ind. 379. See People *v.* Smith, 1 Park. Cr. (N. Y.) 329. *Compare* McCrillis *v.* State, 69 Ind. 159.

The indictment having named the owner of the house, the naming therein also of another person as tenant, when as a fact the tenant had surrendered the premises a few hours before the commission of the crime, is not a fatal defect. The latter allegation was immaterial. State *v.* Dan, 18 Nev. 345; s. c., 5 Am. Cr. Rep. 93. See Com. *v.* Reynolds, 122 Mass. 454; Anderson *v.* State, 48 Ala. 665.

By Guests, etc.—If several persons dwell in one house, as guests or otherwise, having no fixed or certain interest in any part of the house, and a burglary be committed in any of their apartments, it seem clear that the indictment ought to lay the offence in the mansion-house of the proprietor. Hawk. P. C. b. 1, c. 38, s. 26. Therefore, where the chamber of a guest at an inn is broken open, it shall be laid to be the mansion-house of the innkeeper, because the guest has only the use of it, and not any certain interest. 1 Hale P. C. 557.

Where an indictment charged the accused with an attempt to burglariously break into and enter the dwelling-house of S., and it appeared upon the trial that the attempt was to break into a chamber in a hotel assigned to and occupied by S. as a guest, *held*, that the indictment was fatally defective. Rodgers *v.* People, 86 N. Y. 360; s. c., 40 Am. Rep. 548. See Neubrandt *v.* State, 53 Wis. 89.

It has been said that if the host of an inn break the chamber of his guest in the night to rob, this is burglary. Dalton, c. 151, s. 4. But it has been observed that this may be justly questioned; for that there seems no distinction between this case and the case of an owner residing in the same house breaking the chamber of an inmate having the same outer door as himself, which Kelynge says cannot be burglary. Kel. 84; 2 East P. C. 582.

It is said by Lord Hale, that if A be a lodger in an inn, and in the night opens his chamber door, steals goods in the house, and goes away, it may be a question whether this be burglary; "and," he

continues, "it seems not, because he had a special interest in his chamber, and so the opening of his own door was no breaking of the innkeeper's house; but if he had opened the chamber of B, a lodger in the inn, to steal his goods, it had been burglary." 1 Hale P. C. 554.

It has been observed that the reasoning in the following case is opposed to the distinction taken by Lord Hale, and that the case of a guest at an inn breaking his own door to steal goods in the night, falls under the same consideration as a servant under like circumstances. 2 East P. C. 503. The prosecutor, a Jew pedler, came to the house of one L., a publican, to stay all night, and fastened the door of his chamber. The prisoner pretended to L. that the prosecutor had stolen his goods, and under this pretence, with the assistance of L. and others, forced the chamber-door open, and stole the prosecutor's goods; Adams, B., doubted whether the chamber could be properly called the dwelling-house of the prosecutor being really a part of the dwelling-house of the innkeeper. Upon a case reserved, the judges all thought that though the prosecutor had for that night a special interest in the bedchamber, yet it was merely for a particular purpose, viz., to sleep there that night as travelling guest, and not as a regular lodger; that he had no certain and permanent interest in the room itself, but both the property and possession of the room remained in the landlord, who would be answerable *civiliter* for any goods of his guest that were stolen in the room, even for the goods now in question, which he could not be, unless that room were deemed to be in his possession; and that the landlord might go into the room when he pleased, and would not be a trespasser to his guest. R. *v.* Prosser, 2 East P. C. 502.

A landlord may commit burglary in his guest's chamber. State *v.* Fish, 3 Dutch. (N. J.) 323.

Partners.—Where one of several partners is the lessee of the premises where the business is carried on, and another partner occupies an apartment there, and pays for his board and lodging, the latter, as already stated, will be considered as a lodger only. R. *v.* Parmenter, 1 Leach, 537 (*n*), *ante*, p. 679. But where the house is the joint property of the firm, and one of the partners and the persons employed in the trade live there, it is properly described as the dwelling-house of the firm. R. *v.* Athea, 1 Moody C. C. 329.

In an indictment for burglary, where the house broken into and entered belongs to several partners, joint owners, or tenants in common, the ownership may be laid in any one or more of them. White *v.* State, 72 Ala. 195.

The information charged that the burglary alleged was committed in breaking and entering the store of John C. Clark and Frank G. Sutton, partners doing business under the firm-name of Clark & Sutton. The court, in its charge to the jury in regard to the ownership of the building, directed upon this point that it was sufficient to find that the building broken and entered belonged to Clark & Sutton. There was no contest over the ownership of the store building, and the evidence clearly established that the building in which the burglary was committed belonged to John C. Clark and Frank G. Sutton, partners as Clark & Sutton. *Held*, the court committed no material error in not repeating the full names of each member of the firm in its charge upon the question of the ownership of the building. State *v.* McAnulty, 26 Kan. 533.

Where the building broken into was in possession of the three members of a firm, but was owned by only two of them, it is not material that the indictment averred the ownership and possession to be in all three. Burglary being an offence against the possession, and that being proved as stated, the matter of the ownership was not important. State *v.* Rivers, 27 N. W. Repr. (Iowa) 781.

An indictment charged the breaking, etc., "dwelling-house of A and B, being co-partners in business under the firm-name and style of A & B." It was shown on the trial that A and B were partners, and in their business used and occupied as stores the lower stories of two adjacent buildings, opening into each other. A, with other persons, lived in the upper rooms, and was there at the time of the burglary, but there was no internal communication between the stores. The breaking was into one of the stores. *Held*, that the ownership was properly charged as being a partnership. Quinn *v.* People, 71 N. Y. 561; s. c., 27 Am. Rep. 87. See R. *v.* Athea, R. & M. C. C. 329.

Corporations.—An indictment charging that the accused burglariously broke and entered into "a certain dwelling-house, to wit, the infirmary of Morgan county," is not insufficient as failing to aver the fact of ownership. Davis *v.* State, 38 Ohio St. 505.

An averment in the indictment that

9. Night-time.—At common law, both the breaking and the entering must take place at night. The breaking may take place on one night, and the entering on another, provided that the breaking

the burglary was committed in "the St. Bridget's Church and Meeting House" is merely descriptive of the church, and has no reference to ownership. Wilson *v.* State, 34 Ohio St. 199.

The corporate character of the company may be shown by proof that it was a corporation *de facto*. Burke *v.* State, 34 Ohio St. 79.

An indictment for breaking, etc., "the storehouse of the Oxford Iron Co.," with intent, etc., sufficiently avers ownership, and it need not aver that the corporation was duly incorporated. Fisher *v.* State, 40 N. J. L. 169. See, as to proof of incorporation, Burke *v.* State, 34 Ohio St. 79; Hamilton *v.* State, 34 Ohio St. 82; Johnson *v.* State, 73 Ala. 83.

"The city hall of the city of Charlestown" is a sufficient averment that the property of the building alleged to be broken and entered is in the city of Charlestown. Com. *v.* Williams, 2 Cush. (Mass.) 582 (see vol. i. p. 771, note).

An indictment charging that the accused broke and entered, with intent to commit a felony, "a certain building, to wit: the Main Exhibition Building of the Middle Florida Agricultural and Mechanical Fair Association," is fatally defective in not alleging that the building is the property of a corporation or persons. Pells *v.* State, 20 Fla. 774. See State *v.* Clifton, 30 La. Ann. Pt. 2, 951.

The indictment alleged that the principal broke and entered "a building, called a bank, being the bank of the New Hampshire Savings Bank in Concord." On trial it appeared that the Merrimack County Bank owned the building in which the Savings Bank had their banking-rooms; that the owners occupied a distinct part of the building, entered by a separate outer door; that the Savings Bank had the exclusive occupation of their rooms, as tenants to the owners, and entered by another outer door, which also led to the other rooms in the building occupied by tenants. No part of the building was occupied as a dwelling-house. *Held*, that the rooms occupied by the Savings Bank were properly described as their bank. State *v.* Rand, 33 N. H. 216.

Testimony was given that the car, which the defendant was charged with burglariously entering, was upon the track of the C. P. R. Co., attached to its train, and in its possession, occupancy, and control. *Held*, that the ownership of the car was properly laid in the C. P. R. Co., although the legal title was in another. State *v.* Parker, 16 Nev. 79.

Where a railroad depot is in the exclusive control and possession of two corporations, but the ownership is in a third corporation, an indictment is good which describes it as the depot of the corporations in possession. State *v.* Scripture, 42 N. H. 485.

Under a statute declaring that the breaking and entry into a railroad car, in which goods, merchandise, or other valuable thing is kept for use, deposit, or transportation as freight, with the intent to steal, or to commit a felony, is burglary, it is essential that the indictment should allege the ownership of the car. Where, at the time of the breaking and entry, the car was the property of one railroad company, the ownership is properly laid in that company, although another railroad company may have had the possession and use of it. Where, in such case, the ownership is laid in a railroad company, averred to be a corporation, the fact of incorporation must be shown; and when that is derived from a statute of which the courts do not take judicial knowledge, the statute must be produced. Johnson *v.* State, 73 Ala. 483.

The allegation that the goods were taken from the possession of the railroad company is sufficient, as showing special property in the company, to designate the person injured by the crime. State *v.* McIntire, 59 Iowa, 267.

Variance as to Ownership of Property.—In an information for burglary the property entered was described as a certain building in the town of Gilroy, Santa Clara County, known as "the store of one S. Loupe." The evidence showed that the store in question was known as "Loupe's store;" that there was no other store and no other premises in the county which answered to that description: and that the store belonged to S. Loupe, L. Loupe, and A. Haas, who were partners doing business therein. *Held*, the variance was immaterial. People *v.* Edwards, 59 Cal. 359.

Evidence that a dwelling-house is the "Drake house," is a "house kept by Mr. Drake," and that "Mr. Drake lives there," is insufficient to sustain a conviction under an information charging a burglarious entry of the dwelling-house of *William* Drake. Jackson *v.* State, 55 Wis. 589. See Doan *v.* State, 26 Ind. 495.

is with intent to enter, and the entering is with intent to commit a felony.[1]

1. Whar. Cr. L. (9th Ed.) § 806; 2 Bish. Cr. L. (7th Ed.) 101. See Davis *v.* State, 3 Coldw. (Tenn.) 77; Com. *v.* Mark, 4 Leigh (Va.), 658; Earhart *v.* Commonwealth, 9 Leigh (Va.), 671; State *v.* Seymour, 36 Me. 225; State *v.* Mather, N. Chip. (Vt.) 32; State *v.* Ruby, 61 Iowa, 86; Brown *v.* State, 59 Ga. 456; Houser *v.* State, 58 Ga. 78; Waters *v.* State, 53 Ga. 567; Williams *v.* State, 46 Ga. 212; Wood *v.* State, 46 Ga. 322; Com. *v.* Glover, 111 Mass. 395; Com. *v.* Williams, 2 Cush. (Mass.) 582; State *v.* Robinson, 35 N. J. L. 71; People *v.* Arnold, 6 Park Cr. (N. Y.) 638; Butler *v.* People, 4 Denio (N. Y.), 68; People *v.* Taggart, 43 Cal. 81; Com. *v.* Kaas, 3 Brews. (Pa.) 422; Holl'ster *v.* Commonwealth, 60 Pa. St. 103; State *v.* Leaden, 35 Conn. 515; Lewis *v.* State, 16 Conn. 32; Thomas *v.* State, 6 Miss. 20; State *v.* Whit. 4 Jones L. (N. Car.) 349.

With regard to what shall be esteemed night, it is said by Lord Hale to have been anciently held, that after sunset, though daylight be not quite gone, or before sun-rising, is *noctanter*, to make a burglary (Dalt. c. 99; Cromp. 22, *b*); but he adds, that the better opinion has been, that if the sun be set, yet if the countenance of a party can be reasonably discerned by the light of the sun, or *crepusculum*, it is not night. 1 Hale P. C. 550; 3 Inst. 63.

This rule, however, does not apply to moonlight, otherwise many burglaries might pass unpunished. 1 Hale, 551; 4 Bl. Com. 224. By the 24 & 25 Vict. c. 96, § 1, "for the purposes of this Act, the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the succeeding day."

The night-time consists of the period from the termination of daylight in the evening to the earliest dawn of the next morning. State *v.* Bancroft, 10 N. H. 105; Com. *v.* Kaas, 3 Brews. (Pa.) 422; Methard *v.* State, 19 Ohio St. 363.

The New York Penal Code defines "night-time" as the period between sunset and sunrise. N. Y. Penal Code, § 500.

In order to avail the defence it is not sufficient that there was light enough caused by the moon, street lights, or lights from buildings, aided by newly-fallen snow, to enable one to discern the features of another; there must be daylight enough left for that purpose. State *v.* Morris, 47 Conn. 197.

Where the burglary was committed between six and seven o'clock, the sun setting at half-past six o'clock, and there was light enough to discern a man's features across the street. *Held*, that it was not proved that the crime was committed in the night-time. People *v.* Griffin, 19 Cal. 578.

An indictment charging the crime to have been committed "on the 16th day of March, in the year, etc., in the night season of the same day, to wit, about the hour of two o'clock at night," the allegation as to time is sufficiently definite and certain. Methard *v.* State, 19 Ohio St. 363.

Where a burglary was charged to have been committed "on the second day of February, A.D. 1881, and in the night-time of said day," the words "and in the night-time of said day" limit the allegation of time to the night of the day mentioned, and all the language together charges burglary in the night-time, and not in the day-time, of February 2, 1881. State *v.* Ruby, 61 Iowa, 86.

The prosecutor must prove that both the breaking and entering took place in the night-time, but it is not necessary that both should have taken place on the same night. It is said by Lord Hale, that if thieves break a hole in the house one night, to the intent to enter another night, and commit a felony through the hole they so made the night before, this seems to be burglary; for the breaking and entering were both *noctanter*, though not the same night, and it shall be supposed they broke and entered the night they entered, for the breaking makes not the burglary till the entry. 1 Hale P. C. 551.

This point was decided in the following case: During the night of Friday, the side-door of the prosecutor's house, which opened into a public passage, had all the glass taken out by the prisoner, with intent to enter, and on the Sunday night the prisoner entered through the hole thus made. On a case reserved, the judges were of opinion that the offence amounted to a burglary, the breaking and entry being both by night. And although a day elapsed between the breaking and entering, yet the breaking was originally with intent to enter. R. *v.* Smith, Russ. & Rv. 417. See R. *v.* Jordan, *ante*, p. 669.

"If the breaking of the house," says Lord Hale, "were done in the day-time, and the entering in the night, or the breaking in the night and the entering in

10. Intent.—To constitute burglary, there must be an intent to commit some felony in the house, otherwise the breaking and entry will amount to a trespass. It must be either proved from evidence of the actual commission of the felony, or implied from some overt act if the felony is not actually carried out. It is none the less burglary because the felony which is intended is not perpetrated.[1]

the day, that will not be burglary; for both make the offence, and both must be *noctanter*. 1 Hale, P. C. 551, citing Cromp. 33, a. ex. 8 ed. 2.

Upon this the annotator of Lord Hale observes, that "the case cited does not fully prove the point it is brought for, the resolution being only, that if thieves enter in the night at a hole in the wall which was there before, it is no burglary; but it does not appear who made the hole." 1 Hale P. C. 551 (*n*).

It is observed by Mr. Serjeant Russell, that it is elsewhere given as a reason by Lord Hale why the breaking and entering, if both in the night, need not be both in the same night, that it shall be supposed that the thieves broke and entered in the night when they entered; for that the breaking makes not the burglary till the entry; and the learned writer adds, that "this reasoning, if applied to a breaking in the day-time, and an entering in the night, would seem to refer the whole transaction to the entry, and make such breaking and entry a burglary." 2 Russ. Cri. (5th Ed.) 37; and see 2 East P. C. 509.

It would seem, however, to be carrying the presumption much further than in the case put by Lord Hale; and it may well be doubted whether, in such a case, the offence would be held to amount to burglary. Roscoe's Cr. Ed. (10th Ed.) 382.

An interval between two successive entrances of the same house on the same night by the same burglar does not prevent proof of what took place at the second visit in a prosecution for the crime; the two breakings constitute one continuous burglary, even though it began to be light before the burglar left the house the second time. But even if the second entrance were a separate transaction the fact could be shown by way of accounting for the whereabouts of respondent during the night. People *v.* Gibson, 58 Mich. 368.

Where the evidence leaves the time in which the offence was committed exactly balanced between day and night; that is, that it was committed within a period of about 40 or 45 minutes, one half of which was day and one half of which was night, the defendant should have the benefit of the doubt necessarily arising, and ought not to be convicted of a breaking in the night-time. Waters *v.* State, 53 Ga. 567; s. c., 1 Am. Cr. Rep. 367.

Evidence that the prosecutor discovered between daylight and sunrise that his house had been broken into, that the house was on a public street in a town, and that a dry-goods box and chair had been placed beneath the window where the entry was effected, is sufficient evidence to be submitted to the jury that the breaking was in the night-time. State *v.* McDonald, 73 N. Car. 346; s. c., 1 Am. Cr. Rep. 368.

An information which simply charges the commission of the crime of burglary, without stating whether the act was committed in the night-time or the day-time, embraces both degrees of the crime; and under such an information it is competent for the jury to find the defendant guilty of the crime in either degree. People *v.* Barnhart, 59 Cal. 381.

Indictment charging burglary, but not specifying either the day-time or the night-time, is demurrable upon arraignment. The defect, however, is not cause for arresting the judgment after verdict finding burglary in the day-time. Jones *v.* State, 63 Ga. 141.

An indictment for burglary with intent to commit theft which charged the entry to have been effected by "breaking" is not bad for failing to charge that it was effected in the night-time, or that the defendant, having so entered in the day-time, remained concealed therein till night; but the indictment will be held to charge a day-light breaking, which would render it necessary to prove the breaking to have been actual. Summers *v.* State, 9 Tex. App. 396.

An information alleging a breaking and entry of a store not occupied as a dwelling, but not stating whether it was done either in the night-time or in the day-time, does not allege any offence under Michigan laws. Hall *v.* People, 43 Mich. 417.

1. Roscoe's Cr. Ev. (10th Ed.), 382;

Whar. Cr. L. (9th Ed.) § 810; Jones *v.* State, 11 N. H. 269; State *v.* Squires, 11 N. H. 37; State *v.* Ayer, 23 N. H. 301; State *v.* Scripture, 42 N. H. 485; State *v.* Cooper, 16 Vt. 551; State *v.* Brady, 14 Vt. 353; State *v.* Colter, 6 R. I. 195; Josslyn *v.* Commonwealth, 6 Metc. (Mass.) 236; Com. *v.* Tuck, 20 Pick. (Mass.) 356; Com. *v.* Williams, 2 Cush. (Mass.) 582; McCourt *v.* People, 64 N. Y. 583; People *v.* Larned, 7 N. Y. 445; Osborne *v.* People, 2 Park. C. C. (N.Y.) 583; People *v.* Marks, 4 Park. C. C. (N. Y.) 153; Stoops *v.* Commonwealth, 7 S. & R. (Pa.) 491; Hackett *v.* Commonwealth, 15 Pa. St. 95; State *v.* Eaton, 3 Harr. (Del.) 554; State *v.* Manluff, 1 Houst. C. C. (Del.) 208; State *v.* Carpenter, 1 Houst. C. C. (Del.) 367; State *v.* Cody, Winst. (N. Car.) 197; Lowder *v.* State, 63 Ala. 143; s. c., 35 Am. Rep. 9; Barber *v.* State, 78 Ala. 19; Burke *v.* State, 5 Tex. App. 74; France *v.* State, 42 Tex. 276; People *v.* Beaver, 49 Cal. 57; People *v.* Soto, 53 Cal. 415; People *v.* Young, 65 Cal. 225; People *v.* Jenkins, 16 Cal. 431; State *v.* Cowell, 12 Nev. 337; Olive *v.* Com., 5 Bush (Ky.), 376.

The intent with which a prisoner breaks and enters is a question of fact for the jury. Woodward *v.* State, 54 Ga. 106; s. c., 1 Am. Cr. Rep. 366. See Brown *v.* State, 59 Ga. 456; France *v.* State, 42 Tex. 276; State *v.* Woods, 31 La. Ann. 267; Johnson *v.* Commonwealth, 29 Gratt. (Va.) 796; State *v.* Manluff, 1 Houst. C. C. (Del.) 208; Hackett *v.* Commonwealth, 15 Pa. St. 95; Osborne *v.* People, 2 Park. C. C. (N. Y.) 583; People *v.* Larned, 7 N. Y. 445; Com. *v.* Williams, 2 Cush. (Mass.) 582; People *v.* Beaver, 49 Cal. 57.

The intent to commit a felony, and the actual commission of it, may both be alleged; and in general this is the better mode of statement. Such, indeed, are all the precedents, when a theft immediately following the entry is expected to be proved. Upon such an indictment the prisoner may be acquitted of burglary and convicted of the theft, whilst a general verdict of guilty will cover both offences. 2 Archbold's Cr. P. & P. (Pomeroy's Ed.) 1072.

A count which fails to charge the felonious intent, and fails to charge an asportation sufficient to constitute larceny, is fatally defective. Barber *v.* State, 78 Ala. 19

One who enters with burglarious intent a room of a house, enters the house with such intent. 2 Bish. Cr. L. § 97; Whar. Cr. L. (9th Ed.) § 1536; State *v.* Scripture, 42 N. H. 485; People *v.* Young, 65 Cal. 225.

Under an information for burglary, which charges that the breaking and entry were with intent to steal the goods of B., no conviction can be had without proof of such particular intent. Neubrandt *v.* State, 53 Wis. 89.

The prosecutor must prove that the dwelling-house was broken and entered with intent to commit a felony therein. Evidence that a felony was actually committed is evidence that the house was broken and entered with intent to commit that offence. 1 Hale P. C. 560; 2 East P. C. 514.

It was at one time doubted whether it was not essential that the felony intended to be committed should be a felony at common law. 1 Hale P. C. 562; Crompton, 32; Dalt. s. 151, c. 5.

But it appears to be now settled, according to the modern authorities, that it makes no difference whether the offence intended be felony at common law or by statute; and the reason given is, that whenever a statute makes an offence felony, it incidentally gives it all the properties of a felony at common law. Hawk. P. C. b, 1, c. 38, s. 38; R. *v.* Gray, Str. 481; 4 Bl. Com. 228; 2 East P. C. 511; 2 Russ. Cri. (5th Ed.) 40; Roscoe's Cr. Ev. (10th Ed.) 383.

It is an essential element of the crime of burglary that the breaking and entering should be accompanied with an intent to steal or to commit some felony, and this intent must usually be alleged and proved; but where there is an averment of a completed larceny, or of some felony actually committed, it is unnecessary to aver the felonious intent. Barber *v.* State, 78 Ala. 19.

An indictment for burglary which charges that the defendant entered, etc., with intent to commit a felony, without stating what particular felony, does not state any offence. People *v.* Nelson, 58 Cal. 104. See Price *v.* People, 109 Ill. 109.

An indictment for burglary charging that the defendant entered "with the felonious intent then and there to commit arson" sufficiently specifies the felony intended to be committed. Shotwell *v.* State, 43 Ark. 345. See State *v.* Ely, 35 La. Ann. 895.

Where an information charges a burglary, in that defendant "did feloniously . . . enter the building, to wit, the ticket-office of the Central Pacific Railroad Company, a corporation, . . . with intent then and there to commit larceny," the court may properly refuse to charge

the jury that defendant could not be convicted unless he entered the building known as the ticket-office with intent to commit "some felony," since such instruction would imply that he could be convicted if he entered with intent to commit *any* felony. People *v.* Young, 65 Cal. 225.

If it appear that the intent of the party in breaking and entering was merely to commit a trespass, it is no burglary, as where the prisoner enters with intent to beat some person in the house, even though killing or murder may be the consequence, yet, if the primary intention was not to kill, it is still not burglary. 1 Hale P. C. 561; 2 East P. C. 509; Com. *v.* Newell, 7 Mass. 247; State *v.* Cooper, 16 Vt. 551; Com. *v.* Taylor, 5 Binn. (Pa.) 281; Hackett *v.* Commonwealth, 15 Pa. St. 95.

Where a servant embezzled money intrusted to his care, ten guineas of which he deposited in his trunk, and quitted his master's service, but afterwards returned, broke and entered the house in the night, and took away the ten guineas, this was adjudged no burglary, for he did not enter to commit a felony, but a trespass only. Although it was the master's money in right, it was the servant's in possession, and the original act was no felony. R. *v.* Bingley, Hawk. P. C. b. 1, c. 38, s. 37, cited 2 Leach, 841, as R. *v.* Dingley; 2 East P. C. 510; s. c., as Anon.

Where goods had been seized as contraband by an excise officer, and his house was entered in the night, and the goods taken away, upon an indictment for entering his house, with intent to steal his goods, the jury found that the prisoners broke and entered the house with intent to take the goods on behalf of the person who had smuggled them; and, upon a case reserved, all the judges were of opinion that the indictment was not supported, there being no intent to steal, however outrageous the conduct of the prisoners was in thus endeavoring to get back the goods. R. *v.* Knight & Roffey, 2 East P. C. 510.

If the indictment had been for breaking and entering the house, with intent feloniously to rescue goods seized, that being made a felony by statute 19 Geo. II. c. 34 (repealed), the chief baron and some of the other judges held it would have been burglary. But even in that case some evidence must be given, on the part of the prosecutor, to show that the goods were uncustomed, in order to throw the proof upon the prisoners that the duty was paid; but their being found in oil-cases, or in great quantities in an unentered place, would have been sufficient for this purpose. 2 East P. C. 510.

The prisoner was indicted for breaking, etc., with intent to kill and destoy a gelding there being. It appeared that the prisoner, in order to prevent the horse from running a race, cut the sinews of his fore legs, from which he died. Pratt, C.J., directed an acquittal, the intent being not to commit felony by killing and destroying the horse, but a trespass only to prevent his running, and therefore it was no burglary. But the prisoner was afterwards indicted for killing the horse, and capitally convicted. R. *v.* Dobb, 2 East P. C. 513.

Two poachers went to the house of a gamekeeper who had taken a dog from them, and, believing him to be out of the way, broke the door and entered. Being indicted for this as a burglary, and it appearing that their intention was to rescue the dog and not to commit a felony, Vaughan, B., directed an acquittal. Anon. Matth. Dig. C. L. 48. See R. *v.* Holloway, 5 C. & P. 524.

Evidence that the respondent entered the prosecutor's house between twelve and one o'clock at night by raising a window of the room in which the prosecutor and his wife were sleeping, and when discovered went out through the window, there being money and clothing in the room, is sufficient to sustain a conviction for burglary, although it does not appear that respondent stole anything. Woodward *v.* State, 54 Ga. 106; s. c., 1 Am. Cr. Rep. 366.

If two persons break into a house, one with intent to commit a felony and another with an innocent purpose, the party having the intent to commit a felony is guilty without reference to the secret purpose which the other party may have had. Gale *v.* State, 13 Lea (Tenn.), 489.

Sufficiency of Evidence as to the Absence of a Felonious Intent.—Three persons were indicted for burglary, and convicted. It appeared in evidence that one of them, before the burglarious act was committed, gave information of the intended crime to a justice of the peace, and on the day the crime was in fact committed informed a constable and others of the same, giving the names of all the persons concerned, and of the time and place of the proposed crime, and requested the constable to take steps to have the other defendants arrested, and that he accompanied his co-defendants to the place assigned and seemingly

participated with them in their acts, and that on the following morning he gave such full information of their affair as led to the arrest of the parties. The jury found all the defendants guilty. *Held*, that under the facts of the case the conviction of the party giving such information, and who claimed to have acted as a detective, could not be sustained. Price *v.* People, 109 Ill. 109.

A burglariously entered the shop of B and stole a brace, which A used to break in the house of C. A left the brace on the ground outside of C's house. *Held*, that, in the absence of intent of permanent appropriation, A could not be convicted for larceny of the brace. Wilson *v.* State, 18 Tex. App. 270; s. c., 51 Am. Rep. 309.

R. was indicted for feloniously and burglariously breaking and entering in the night-time the dwelling-house of one M., with intent the goods and chattels of M., then and there being, feloniously to steal, take, and carry away. At the trial R. offered to prove that M. was a lewd woman, and that he had had improper intimacy with her; which evidence the court below refused to admit. On exception, it was *held* that it was material to show for what object R. broke and entered the house; and that, if he entered the house solely for the purpose of having illicit connection with M., he could not be found guilty of burglary. Robinson *v.* State, 53 Md. 151; s. c., 36 Am. Rep. 399. *Compare* People *v.* Soto, 53 Cal. 415.

The prisoner requested P. to burglarize a building with him. P. informed the sheriff, and it was arranged between them that the burglary should be carried out. P. entered the building, robbed it, and divided the money with the prisoner, who was thereupon arrested by the sheriff. *Held*, that P. having no felonious intent in entering the building and taking the money, there was no crime committed, and the prisoner could not be convicted of burglary. People *v.* Collins, 53 Cal. 185.

An indictment alleged that the defendant attempted to break and enter a certain dwelling house in the night-time, with the intent to steal therein, and in such attempt broke and opened three windows in said house, but was intercepted and prevented in the execution of said offence. At the trial a police officer, who arrested the defendant, testified that, on the night in question, he saw the defendant on the piazza in front of said house; that the defendant turned the corner of the house, and the witness followed; that the defendant then ran into the yard and hid; that the witness searched for him with a lantern, and found him lying on the ground, apparently asleep, and with his face covered with a handkerchief; that he made conflicting statements to the witness as to his name and residence; and that three windows in the lower part of the house, which had been shut, were open, and the fastenings, which were on the inside, were turned aside. *Held*, that the judge properly declined to instruct the jury, as requested by the defendant, that, on the evidence, they would not be warranted in finding a verdict of guilty. Com. *v.* Shedd, 140 Mass. 451.

Intent—Variance in the Statement of.—The intent must be proved as laid. If it is laid that the intent was to commit one sort of felony, and it is proved that the intent was to commit another, it is a fatal variance. 2 East P. C. 514; Neubrandt *v.* State, 53 Wis. 89.

Where the prisoner was indicted for burglary and stealing goods, and it appeared that there were no goods stolen, but only an intent to steal, it was held by Holt, C. J., that this ought to have been so laid, and he directed an acquittal. R. *v.* Vandercomb, 2 East P. C. 514.

The property in the goods which it is alleged were intended to be stolen must be correctly laid. 2 Russ. Cr. (5th Ed.) 41.

The fact that the indictment charged an intent in the burglary to steal the property of one man, and the proof showed an actual stealing of the property of another, was wholly immaterial. 2 Bish. Cr. Pro., §§ 95, 96; Whart. Cr. L. § 820; Harris *v.* State, 61 Miss. 304.

An indictment for burglary charged the prisoner with breaking, in the night-time, into the dwelling-house of E. B., with intent the goods and chattels in the same dwelling-house then and there being feloniously and burglariously to steal, and stealing the goods of E. B. It was proved that it was the house of E. B., but that the goods the prisoner stole were the joint property of E. B. and two others. It was held that if it was proved that the prisoner broke into the house of E. B. with intent to steal the goods there generally, that would be sufficient to sustain the charge of burglary contained in the indictment, without proof of an intent to steal the goods of the particular person whose goods the indictment charged that he did steal. R. *v.* Clarke, 1 C. & K. 431.

A. was charged with breaking into the house of K. and stealing the goods of M. It was proved by M. that K., his brother-in-law, had taken the house, and that M.

(who lived on his property) carried on the trade of a silversmith for the benefit of K. and his family, having himself neither a share in the profits nor a salary. M. stated that he had authority to sell any part of the stock, and might take money from the till, but that he should tell K. of it; and that he sometimes bought goods for the shop, and sometimes K. did it; it was held that M. was a bailee, and that the goods in the shop might properly be laid as his property. R. *v.* Bird, 9 C. & P. 44.

It seems sufficient in all cases where a felony has been actually committed, to allege the commission without any intent. 1 Hale P. C. 560; 2 East P. C. 514; State *v.* Squires, 11 N. H. 37; Com. *v.* Tuck, 20 Pick. (Mass.) 356; People *v.* Marks, 4 Park. C. C. (N. Y.) 153; Stoops *v.* Commonwealth, 7 S. & R. (Pa.) 491. And in such case no evidence, except that of the committing of the offence, will be required to show the intention. Barber *v.* State, 78 Ala. 19; Woodward *v.* State, 54 Ga. 106; Whar. C. L. § 818.

It is a general rule, that a man who commits one sort of felony in attempting to commit another, cannot excuse himself on the ground that he did not intend the commission of that particular offence. Yet this, it seems, must be confined to cases where the offence intended is in itself a felony. 2 East P. C. 514, 515; State *v.* Boon, 13 Ired. (N. Car.) 244; s. c., 57 Am. Dec. 555.

The defendant was accused of the crime of burglary. The information charged that he feloniously and burglariously entered a certain house with intent to commit a rape, but did not state under which set of circumstances, specified in the Penal Code, the crime was committed. *Held*, that the information was sufficient. People *v.* Burns, 63 Cal. 614.

Where the indictment charged burglary with intent to commit an assault and battery, and the body of the crime was established, it was competent, for the purpose of identifying defendant as the criminal, to show that he knew that there was a sum of money in the house at the time, even though it tended to prove the commission of a distinct crime from that charged in the indictment, or a different motive from that alleged. State *v.* Kepper, 65 Iowa, 745.

The intent of the parties will be gathered from all the circumstances of the case. Three persons attacked a house. They broke a window in front and at the back. They put a crowbar and knife through a window, but the owner resisting them, they went away. Being indicted for burglary with intent to commit a larceny, it was contended that there was no evidence of the intent; but Park, J., said that it was for the jury to say whether the prisoner went with the intent alleged or not; that persons do not in general go to houses to commit trespasses in the middle of the night; that if was matter of observation that they had the opportunity, but did not commit the larceny, and he left it to the jury to say whether, from all the circumstances, they could infer that or any other intent. Anon., 1 Lewin C. C. 37.

Where it is shown, on an indictment for burglary, that the defendant broke and entered the house set out in the indictment, the intention with which the breaking and entering were done will be presumed from the act itself. State *v.* Teeter, 27 N. W. Repr. (Iowa) 485.

It is immaterial if the intent be not executed if it can be inferred. Olive *v.* Commonwealth, 5 Bush (Ky.), 376; State *v.* McDaniel, Winst. (N. Car.), No. 1, 249.

A burglar entered the room of B., who was asleep. He took hold of her ankle, when she screamed, whereupon A. escaped. *Held*, that this was evidence of intent to commit rape. State *v.* Boon, 13 Ired. (N. Car.) 244; s. c., 57 Am. Dec. 555.

The intent alleged was to commit a rape by force, and the evidence relied on to prove it tended to show that one of the three females in the house was awakened by something touching her foot, and, screaming, saw a man running away through an open door. *Held*, not sufficient to prove the intent alleged. Hamilton *v.* State, 11 Tex. App. 116.

In an indictment for burglary in the night-time, with intent to commit larceny of money, goods, and chattels, it is not necessary to aver what specific money, goods, or chattels were intended to be stolen, or the name of the owner thereof. Jones *v.* State, 18 Fla. 890.

One who breaks and enters a building with intent to steal money from a safe is guilty of burglary, although there is no money in the safe. State *v.* Beal, 37 Ohio St. 108; s. c., 41 Am. Rep. 490. See Olive *v.* Com., 5 Bush (Ky.), 376.

Where a person was found drunk in the house of another, the question of intent is for the jury. State *v.* Bell, 29 Iowa, 316.

A agreed with B to commit a burglary at a particular time and place. A came as appointed, bringing a set of burglar's tools. He went to a blacksmith's shop to procure a crowbar to break in the door of the store intended to be robbed.

11. Evidence—Possession of the Stolen Property.—The mere possession of stolen goods, without other evidence of guilt, is not regarded as *prima facie* evidence of burglary. The rule in larceny does not apply to burglary.[1]

While gone, an alarm was raised and the burglary prevented. *Held*, that this was sufficient evidence of an attempt to support a conviction. People *v.* Lawton, 56 Barb. (N. Y.) 126. See Wilson *v.* State, 24 Conn. 57; State *v.* McDaniel, 1 Wins. (N. Car.) No. 1, L. 249.

Where defendants broke into a tool-house of a railroad company, took from it a hand-car, put it on the track and rode in it twelve miles, and then removed it to and left it at the side of the track; *held*, that this did not establish the larcenous intent essential to constitute burglary. State *v.* Ryan, 12 Nev. 401; s. c., 28 Am. Rep. 802.

Where the defendant was indicted for an attempt to commit burglary, it is competent to show that he broke and entered the gate adjoining the dwelling-house. State *v.* Smith, 6 Phila. (Pa.) 305.

An indictment which charges that defendant "feloniously and burglariously . . . did break into the storeroom, . . . with intent the goods . . . then and there being, then and there feloniously and burglariously to steal, . . . and did then and there burglariously steal, take and carry away," etc., sufficiently charges the felonious intent. State *v.* McGraw, 87 Mo. 161.

The indictment need not allege intent, where the felony is alleged to have been committed after the breaking and entering. Com. *v.* Brown, 3 Rawle (Pa.), 207; Com. *v.* Hope, 22 Pick. (Mass.) 1; Jones *v.* State, 11 N. H. 269; State *v.* Moore, 12 N. H. 42.

1. 1 Whar. Cr. Ev. (9th Ed.) § 763; 1 Whar. Cr. L. (9th Ed.) § 813; Com. *v.* McGarty, 114 Mass. 299; Davis *v.* People, 1 Park. C. C. (N. Y.) 447; Jones *v.* People, 6 Park. C. C. (N. Y.) 126; State *v.* Reid, 20 Iowa, 413; State *v.* Tilton, 63 Iowa, 117; State *v.* Hayden, 45 Iowa, 11; State *v.* Shaffer, 59 Iowa, 290; People *v.* Gordon, 40 Mich. 716; Stuart *v.* People, 42 Mich. 255; Ingalls *v.* State, 48 Wis. 647; Neubrandt *v.* State, 53 Wis. 89; People *v.* Noregea, 48 Cal. 123; People *v.* Beaver, 49 Cal. 57; People *v.* Mitchell, 55 Cal. 236; Walker *v.* Commonwealth, 28 Gratt. (Va.) 969; Taliaferro *v.* Commonwealth, 77 Va. 411; State *v.* Reece, 27 W. Va. 375; Fuller *v.* State, 48 Ala. 273; White *v.* State, 72 Ala. 195.

Under an indictment for burglary, the prosecution having proved that a valise, part of the property stolen from the house at the time the offence was committed, was found in the defendant's house a short time afterwards, while the defendant's evidence tended to show that he was in Georgia when the alleged burglary was committed; *held*, that it was permissible for him to prove, by a witness who was present, "that on his return home, and so soon as he first discovered the valise, he asked his wife, Whose valise is that? and how came it here?" Henderson *v.* State, 70 Ala. 23; s. c., 45 Am. Rep. 72.

K.'s dwelling is broken open and her goods stolen therefrom. Next day the goods are found on a bed in a room occupied by prisoner and another woman, P., whose friend often came and spent the night there. On the second day prisoner sold the goods, worth $9, for seventy-five cents, and said she got them of P., but made contradictory statements. Prisoner was indicted for burglary, and convicted of house-breaking. *Held*, even in cases of simple larceny, in order to raise the presumption of guilt from the possession of stolen goods, it is necessary that they be found in the exclusive possession and subject to the exclusive control of the accused. Such was not so here. Prisoner's conflicting statements as to how she came by the goods certainly excite a strong suspicion against her, yet the testimony is insufficient to establish her guilt of burglary or house-breaking. Taliaferro *v.* Commonwealth, 77 Va. 411.

On a trial for burglary, the fact that the goods were found in a room occupied by two or three or more persons, was not conclusive evidence that the goods were in the possession of any one of them. Shropshire *v.* State, 69 Ga. 273.

An instruction that the burglary "could not be inferred" from the fact that the stolen property was found in defendant's possession, was properly refused, where there was proof, not only that the property was so found shortly after the burglary, but also of other suspicious circumstances. Neubrandt *v.* State, 53 Wis. 89; Ingalls *v.* State, 48 Wis. 647.

Where defendant was indicted for the burglary of a store, committed in February, and the only evidence against him was that some of the goods taken from

the store were found in July following, in a trunk used jointly by defendant and another, and that defendant was at the store the evening before the crime was committed, *held*, that this was not sufficient to justify a verdict of guilty, and, under the instructions of the court, defendant should have been acquitted. State *v.* Tilton. 63 Iowa, 117.

The presumption of guilt which arises, in a case of larceny, from the possession of goods recently stolen, does not apply with equal force to the crime of burglary with intent to steal. Such possession is evidence tending to show that the defendant committed the burglary, but is not of itself sufficient, even if unexplained, to warrant a conviction. State *v.* Shaffer, 59 Iowa, 290.

Possession of Stolen Goods by Accused.—Possession of stolen goods by the accused, even though unexplained and exclusive, does not authorize the inference of his complicity in the larceny or burglary charged, unless it is also recent, or soon after the commission of the offence; and while the word "recent," in this connection, is not capable of any exact definition, but varies within a certain range with the conditions of each particular case, and though there may be cases in which the court may, as matter of law, pronounce the possession recent; yet the question is usually one of fact for the determination of the jury, and a charge which ignores it, or withdraws it from their consideration, is erroneous. (Overruling Maynard *v.* State, 46 Ala. 85.) White *v.* State, 72 Ala. 195.

Where it appears that B was the owner of the house at the time of the criminal act, and had personal property therein, which might be the subject of larceny, and which was in the same room with property of C, and was stolen and carried away at the same time with the latter, the State may show that the property of C was afterwards found in defendant's possession. Neubrandt *v.* State, 53 Wis. 89.

The possession of property which has been stolen from a building which has been broken into and entered, is *prima facie* evidence of larceny, though not of the burglary. But where it is shown that the burglary and larceny were committed at the same time, and by the same person, then such possession is equally *prima facie* evidence of both crimes. State *v.* Rivers, 27 N. W. Repr. (Iowa) 781.

The facts that a building was burglariously entered, goods stolen therefrom, and the possession by the accused soon thereafter of the goods stolen, are competent evidence to go to the jury, and with other circumstances indicative of guilt, such as giving a false account, or refusing to give any account, of the manner in which or the means by which he came into possession of the stolen goods, may afford a strong presumption of fact of the guilt of the accused, and warrant the jury in finding him guilty of both the burglary and larceny. Methard *v.* State, 19 Ohio St. 363; State *v.* Owens, 79 Mo. 619; State *v.* Kennedy, 88 Mo. 341; State *v.* Butterfield, 75 Mo. 297; Lundy *v.* State, 71 Ga. 360; Brown *v.* State, 59 Ga. 454; 61 Ga. 311; Bryan *v.* State, 62 Ga. 179; Smith *v.* State, 62 Ga. 663; Walker *v.* Commonwealth, 28 Gratt. (Va.) 969; Com. *v.* Hall, 3 Gratt. (Va.) 593; Com. *v.* McGorty. 114 Mass. 299; Com. *v.* Chilson, 2 Cush. (Mass.) 15; Davis *v.* People, 1 Park. C. C. (N. Y.) 447; Knickerbocker *v.* People, 43 N. Y. 177; Stuart *v.* People, 42 Mich. 255.

An instruction that one found in the possession of property recently stolen is presumed to be the thief, and if he fails to account for his possession in a manner consistent with his innocence, the presumption becomes conclusive against him, is properly given in a case where there is no evidence as to the good character of the defendant. State *v.* Kennedy, 88 Mo. 341.

Recent Possession of a part of the stolen property is presumptive evidence that the possessor stole the whole of it. State *v.* Owens, 79 Mo. 619.

Where a burglary has been committed, and money, goods, or other property which was in the house at the time of the burglary is soon thereafter found in the possession of a person who is unable to account for his possession, it raises a presumption of his guilt, and the jury would be authorized to find a verdict of guilty. Lundy *v.* State, 71 Ga. 360.

An instruction that the jury may find the prisoner guilty of burglary, if they believe from the evidence that a burglary was committed in the store of M., and that a pistol was stolen at the time of the commission of such burglary, and that said pistol was thereafter found in the possession of the prisoner, and that it does not appear from the evidence how the prisoner came into the possession of said pistol otherwise than by such burglary or stealing, and that he has not accounted for the recent possession thereof, is correct. Harris *v.* State, 61 Miss. 304; Stokes *v.* State, 58 Miss. 680.

On an indictment for burglary, it ap-

peared that the owner of a store left the defendant and two other persons lying on the piazza thereof when he went home; that he tried to get them to go to their dinner, but they declined; that, on his return an hour or two later, he found the store broken open and goods stolen; that he caused the three to be followed, and found them that night, seven or eight miles away, with the stolen goods in their possession, the defendant having some of the stolen snuff. *Held*, that this was sufficient to authorize a conviction of burglary. Wilkerson *v.* State, 73 Ga. 799.

Possession of Burglarious Tools.—To connect the defendant with the crime, burglars' tools, found on his person, in his dwelling, or otherwise in his possession may be produced, together with evidence of the attending circumstances. Even tools not adapted to the particular burglary may be exhibited when found with those which are. Bish. Cr. Proc. (3d Ed.) § 151. See Com. *v.* Williams, 2 Cush. (Mass.) 582; Com. *v.* Tivnon, 8 Gray (Mass.), 375; People *v.* Larned, 7 N. Y. 445; Knickerbocker *v.* People, 43 N. Y. 177; State *v.* Harrold, 33 Mo. 496; Frank *v.* State, 39 Miss. 705; People *v.* Winters, 29 Cal. 658.

Where defendants were arrested only a few hours after the commission of the burglary with which they were charged, it was competent to prove that burglars' tools were found upon one of them when arrested. State *v.* Franks, 64 Iowa. 39.

The defendant was charged with burglary for entering the house, room, shop, warehouse, store, and building of S., with intent then and there to commit larceny, and was convicted of attempting to commit the crime. It appeared that S. owned the building, and that he occupied the first floor as a banking office and rented the second and third floors to tenants; that in consequence of the discovery of supposed indications of a design on the part of some person or persons to force an opening into the vault of the bank located in said building, certain police officers had been stationed where they could readily detect any one entering the building on the night of the arrest of the defendant, and that the defendant entered the building and was arrested on the second floor in a closet; and from an inspection of the premises, it appeared that in a closet over the bank vault, a trap-door about two feet wide and two and a half feet long had been sawed out of the floor and then fastened down with screws, so that it might be opened without making much, if any noise; and under the trap-door and on top of the vault there was found a large quantity of burglars' tools and a hole in the vault of the depth of two feet; and other tools, of a similar character, were found in the defendant's trunk in a room occupied by him in San Francisco. *Held*, the tools found in the excavation over the vault, and also those found in the appellant's trunk, were admissible in evidence. People *v.* Hope, 62 Cal. 291. See Com. *v.* Williams, 2 Cush. (Mass.) 582.

Nature of Offence of Having Possession of Implements of Housebreaking.—This offence consists in the possession merely without lawful excuse of the implements mentioned. Roscoe's Cr. Ev. (10th Ed.) 387. It is not necessary to allege or to prove at the trial an intent to commit a felony. R. *v.* Bailey, 1 Dears. C. C. R. 244; 23 L. J., M. C. 13. Where only one is in possession of the implements, the possession by him is possession by all. R. *v.* Thompson, 11 Cox, C. C. 362 (C. C. R.).

If a man is found with an implement of housebreaking in his possession, a general burglarious intent is sufficient to constitute an offence against the second clause of the 58th section, 24 and 25 Vict. c. 96, but if he is armed with any other weapon, there must be proof of an intent to break into some particular house in order to constitute an offence against the first branch of the 58th section. R. *v.* Jarrald, *per* Crompton, J., 1 L. & C. 306.

What are Implements of Housebreaking.—Keys are implements of housebreaking; for though commonly used for lawful purposes, they are capable of being employed for purposes of housebreaking, and it is a question for the jury whether the person found in possession of them by night had them without lawful excuse, and with the intention of using them as implements of housebreaking. R. *v.* Oldham, 2 Den. C. C. R. 472; 21 L. J., M. C. 134.

Value of Property.—It is not necessary that an indictment for burglary with intent to commit theft should describe the property it was the intention of the accused to steal. Summers *v.* State, 9 Tex. App. 392; Kelly *v.* State, 72 Ala. 244.

That the use of corn as food for horses and mules constitutes value, is a fact which all men are presumed to know; and the court may charge the jury that they may conclude the corn was valuable, if the proof shows that it was used to feed horses or mules; and cir-

12. Minor Offence—Larceny.—If the prosecutor fail in his attempt to prove the breaking and entry of the dwelling-house, but the indictment charge the prisoner with a larceny committed there, he may be convicted of the larceny, simple or compound, according to the circumstances of the case.[1]

cumstantial proof being sufficient, if strong and convincing to the satisfaction of the jury, may refuse to instruct them that the fact that the corn had value must "be positively proved by the evidence." Miller *v.* State, 77 Ala. 41.

Where an information for larceny states only the collective value of sundry silver coins alleged to have been stolen, and then describes the coins as follows, to wit: "Current as money in the State of Kansas, consisting of five-cent pieces of nickel, commonly called 'nickels;' of quarter-dollar silver pieces, commonly called 'quarters;' of ten-cent silver pieces, commonly called 'dimes;' of half-dollar pieces, commonly called 'half-dollars;' of one-dollar silver pieces, commonly called 'dollars;' of certain foreign coins of various denominations;" and further alleges that "a more particular description of any and of all such money cannot be given, as informant has no means of obtaining knowledge." *Held*, the information contains a sufficiently definite description of the property alleged to have been stolen, and if the defendant is convicted of stealing only a part thereof, and the jury find and in their verdict return the value of the part so stolen, judgment may be legally rendered upon the verdict. State *v.* McAnulty, 26 Kan. 533.

1. Roscoe's Cr. Ev. (10th Ed.) 385; 1 Bish. Cr. Proc. (3d Ed.) § 449; Whar. C. L. (9th Ed.) § 819; Whar. Cr. Pl. & Pr. (8th Ed.) §§ 244, 289; Harris *v.* State, 61 Miss. 304; Barber *v.* State, 78 Ala. 19; Bell *v.* State, 48 Ala. 684; Wolf *v.* State, 49 Ala. 359; Bush *v.* State, 65 Ga. 658; Berry *v.* State, 10 Ga. 511; Davis *v.* State, 3 Coldw. (Tenn.) 77; State *v.* Owens, 79 Mo. 619; State *v.* Alexander, 56 Mo. 131; State *v.* Turner, 63 Mo. 436; State *v.* Barker, 64 Mo. 282; State *v.* Davis, 73 Mo. 129; State *v.* Bruffey, 75 Mo. 389; State *v.* Martin, 76 Mo. 337; State *v.* Kelsoe, 76 Mo. 505; State *v.* Brandon, 7 Kan. 106; State *v.* Hayden, 45 Iowa, 11; Tobin *v.* People, 104 Ill. 565; s. c., 4 Am. Cr. Rep. 555; State *v.* Colter, 6 R. I. 195; State *v.* Squires, 11 N. H. 37; Com. *v.* Hope, 22 Pick. (Mass.) 1; Crowley *v.* Commonwealth, 11 Metc. (Mass.) 575; Dunham *v.* State, 9 Tex. App. 330; Shepherd *v.* State, 42 Tex. 501; Wilcox *v.* State, 31 Tex. 586; Clarke *v.* Commonwealth, 25 Gratt (Va.) 908; Speers *v.* Commonwealth, 17 Gratt. (Va.) 570; Com. *v.* Brown, 3 Rawle (Pa.), 207; Stoops *v.* Commonwealth, 7 S. & R. (Pa.) 491; Breese *v.* State, 12 Ohio St. 146; State *v.* Ah Sam, 7 Nev. 127. *Compare* People *v.* Garnett, 29 Cal. 622.

Mr. Roscoe says: "Where the prisoner was charged with breaking and entering the house of the prosecutor, and stealing 60l. therein, and the jury found that he was not guilty of breaking and entering the house in the night, but that he was guilty of stealing the money in the dwelling-house; upon a case reserved, it was resolved by the judges, after some doubt, that by this finding the prisoner was ousted of his clergy, for the indictment contained every charge necessary upon the statute 12 Anne c. 7 (repealed), viz., a stealing in the dwelling-house to the amount of 40s., and the jury had found him guilty of that charge. R. *v.* Withal, 2 East P. C. 517; 1 Leach, 88. In a similar case the verdict given by the jury was, 'not guilty of burglary, but guilty of stealing above the value of 40s. in the dwelling-house,' and the entry made by the officer was in the same words. On a case reserved, the judges held the finding sufficient to warrant a capital judgment. They agreed that if the officer were to draw up the verdict in form, he must do so according to the plain sense and meaning of the jury, which admitted of no doubt; and that the minute was only for the future direction of the officer, and to show that the jury found the prisoner guilty of the larceny only. But many of the judges said that when it occurred to them they should direct the verdict to be entered, 'not guilty of the breaking and entering in the night, but guilty of the stealing,' etc., as that was more distinct and correct. It appeared, upon inquiry, to be the constant course on every circuit in England, upon an indictment for murder, where the party was only convicted of manslaughter, to enter the verdict, 'not guilty of murder, but guilty of manslaughter,' or, 'not guilty of murder, but guilty of feloniously killing and slaying,' and yet murder includes the killing. The judges added that the whole verdict must be taken together, and that the jury must not be

made to say that the prisoner is not guilty generally, where they find him expressly guilty of part of the charge, or to appear to speak contradictory by means of the officers using a technical term, when the verdict is sensible and intelligent in itself. R. *v.* Hungerford, 2 East P. C. 518.

"It was formerly thought that if several were jointly indicted for burglary and larceny, and no breaking and entering were proved against one, he could not be convicted of larceny and the others of burglary. R. *v.* Turner, 1 Sid. 171; 2 East P. C. 519. But in a later case, where one prisoner pleaded guilty and the other two were found guilty of the larceny only, the judges, on a case reserved, differed in opinion. Seven of them resolved that judgment should be entered against all the three prisoners, against him who had pleaded guilty for the burglary and capital larceny, and against the other two for the capital larceny. Burrough, J., and Hullock. B., were of a different opinion, but Hullock thought that if a *nolle prosequi* were entered as to the burglary, judgment might be given against all the three for the capital larceny. The seven judges thought that there might be cases in which, upon a joint larceny by several, the offence of one might be aggravated by burglary in him alone, because he might have broken the house in the night, in the absence and without the knowledge of the others, in order to come afterwards and effect the larceny, and the others might have joined in the larceny without knowing of the previous breaking. R. *v.* Butterworth, Russ. & Ry. 520.

"Although a prisoner may be convicted of the larceny only, yet if the larceny was committed on a previous day, and not on the day of the supposed burglary, he cannot be convicted of such larceny. This point having been reserved for the opinion of the judges, they said: 'The indictment charges the prisoner with burglariously breaking and entering the house *and* stealing the goods, and most unquestionably that charge may be modified by showing that they stole the goods without breaking open the door; but the charge now proposed to be introduced goes to connect the prisoners with an antecedent felony committed before three o'clock, at which time, it is clear, they had not entered the house. Having tried without effect to convict them of breaking and entering the house, and stealing the goods, you must admit that they neither broke the house nor stole the goods on the day mentioned in the indictment; but to introduce the proposed charge, it is said that they stole the goods on a former day, and that their being found in the house is evidence of it. But this is surely a distinct transaction; and it might as well be proposed to prove any felony which these prisoners committed in this house seven years ago, as the present.' R. *v.* Vandercomb, 2 Leach, 708."

An indictment for burglary with intent to steal is not bad for duplicity because it contains allegations of facts constituting larceny. The charge of stealing may be regarded as a mere pleading of evidence or surplusage which might properly have been introduced to support the charge of an intent to steal. State *v.* Shaffer, 59 Iowa, 290.

A party cannot be guilty of robbery and of having received the same goods obtained by the robbery, knowing them to have been so obtained, where there is but a single transaction involved; and a verdict finding him guilty of the robbery, and of the larceny of the goods so taken, and of receiving them, knowing them to have been stolen or acquired by robbery, is inconsistent. The latter offence imports a subsequent and distinct transaction from the robbery, and involves some other person who had previously obtained the property by robbery. Tobin *v.* People, 104 Ill. 565; s. c., 4 Am. Cr. Rep. 555. See Gilbert *v.* State, 65 Ga. 449.

It is no objection to an indictment that it charges both burglary and theft, but a conviction cannot be had for both offences when thus charged in the same indictment, nor can a separate punishment be assessed for each, nor a joint punishment be assessed for both. Miller *v.* State, 16 Tex. App. 417; s. c., 5 Am. Cr. Rep. 94.

An indictment for burglary and theft, though consisting of but one count, may be insufficient to charge the burglary, and yet be sufficient to charge the theft; and it was not error to allow the prosecution, after the evidence was closed, to dismiss as to the charge of burglary and proceed as to that of theft. Burglary and theft may be conjointly charged in a single count, and it is immaterial that the theft is alleged to have been committed from a house. Dunham *v.* State, 9 Tex. App. 330.

A verdict in a prosecution for burglary and larceny declared defendants "guilty in manner and form as charged in the indictment," and assessed the punishment, but failed to say of which offence the defendants were found guilty. *Held*,

13. Plea of Autrefois Acquit.—In considering the evidence upon the plea of *autrefois acquit* in burglary, some difficulty occurs from the complex nature of that offence, and from some contrariety in the decisions. The correct rule appears to be, that an acquittal upon an indictment for burglary in breaking and entering and stealing goods cannot be pleaded in bar to an indictment for burglary in the same dwelling-house, and on the same night, with intent to steal, on the ground that the several offences described in the two indictments cannot be said to be the same.[1] (See JEOPARDY.)

BURIAL. See SEPULTURE.[2]

BURIAL-GROUNDS. See CEMETERIES.

BURLAPS, as used in the revenue statutes, does not in commercial usage, by which descriptive terms applied to articles of commerce must be construed, mean "oil-cloth foundations" or "floor-cloth canvas."[3]

BURN. See ARSON.

BURNING-FLUID, in a policy of insurance, does not mean every fluid that will burn. It does not include kerosene.[4] It denotes a mixture of camphene and alcohol, and means a recognized article known as "burning-fluid," and a different article from naphtha or kerosene."[5]

that it was nevertheless good. State *v.* Butterfield, 75 Mo. 297. *Compare* Roberts *v.* State, 55 Miss. 421.

On a trial for burglary, the reasonable doubt which would acquit the prisoner is whether or not he is guilty of that offence, and not whether he is guilty of larceny from the house. Bush *v.* State, 65 Ga. 658.

In a prosecution for burglary with intent to commit theft, it is incumbent on the court to give in charge to the jury the law of theft, as well as that of burglary. Castenada *v.* State, 11 Tex. App. 390.

1. Roscoe's Cr. Ev. (10th Ed.) 386. A full discussion of *autrefois acquit* will be found under the title JEOPARDY.

Authorities for Burglary. — Roscoe's Cr. Ev.; Russell on Cr.; Bishop's Cr. L.; Bishop's Cr. Proc.; Desty's Cr. L.; Wharton's Cr. L.; Wharton's Cr. Ev.; Wharton's Cr. Pl. & Pr.; Chitty's Cr. L.; Harris Cr. L. (Force's Ed.) Malone's Cr. Briefs; Am. Cr. Rep.; Heard's Cr. L.; Archbold's Cr. Pr. & Pl. (Pomeroy's Ed.).

2. **Places of Burial**, in a statute empowering the queen in council to order certain acts under the directions of church-wardens or such other persons as may have the care of "any vaults or places of burial," means "those which may be called public burial-places, and which still retain the character of burial-places, and have that permanent impress upon them, by reason of their having been devoted, either by consecration, by trust deed, or otherwise, to the purpose of interment, and which are kept and taken care of as such. The terms which the legislature have used in giving power to make the order on 'the church-wardens or such other persons as may have the care of any vaults or places of burial,' point to places irrevocably devoted to that particular purpose." Foster *v.* Dodd, 7 B. & S. 169.

Used for Burials, in an act declaring that "no ground not already used as or appropriated for a cemetery shall be used for burials," etc., "are words commonly understood to refer, and which properly refer, to actual burials within the ground," and do not mean merely "used as a cemetery." Lord Cowley *v.* Byas, 5 Ch. Div. 951.

3. Arthur *v.* Cumming *et al.*, 1 Otto (U. S.), 362.

4. Mark *v.* Nat'l Fire Ins. Co., 24 Hun (N. Y.), 569.

5. Putnam *v.* Com. Ins. Co., 4 Fed. Repr. 764, 766.

Camphene, Spirit-Gas, or any Burning-Fluid.—In this construction the words

BURST. See note 1.

BUSHEL.—According to the standard of weights and measures prepared for the use of custom-houses, a bushel is a measure containing 77.6274 pounds avoirdupois of distilled water at the temperature of the maximum density of water and barometer 30 inches at 62 deg. Fahr. This is the same as the Winchester bushel, and contains 2150.42 cubic inches.[2]

BUSINESS.—The word "business" embraces everything about which a person can be employed.[3] It is a word of large signification and denotes the employment or occupation in which a person is engaged to procure a living.[4] It is frequently used as synonymous with "occupation," and signifies more than the mere doing of acts which are usually done by persons engaged in the pursuit of a particular calling.[5] In the Sunday laws the terms "business" and "employment" as used are synonymous, signifying that which occupies the time, attention, and labor of men for the

"burning-fluid" must be held to mean only such burning-fluids as are in their nature like camphene or spirit-gas, and the court will not take judicial notice that "benzine" is such a fluid. It is a question of fact for the jury. Mears *v.* Humboldt Ins. Co., 92 Pa. St. 19; Wheeler *v.* Am. Cent. Ins. Co., 6 Mo. App. 235.

1. Bursting of Boiler, in an insurance policy, is synonymous with "explosion." "Notwithstanding learned authors and scientific men may make a distinction, there is no difference in the ordinary understanding of the meaning of these words. When it is stated that there has been an explosion of the boiler of a steamboat or a locomotive, the fact is stated in either or both forms. It is a common, perhaps not a refined expression, that the boiler has burst. Others would say that there has been an explosion. The ordinary idea I take to be, that the explosion is the cause while the rupture is the effect. It would be quite unsafe, in construing a commercial instrument, where strict technical terms are not looked for, to hold these two words as having different meanings. I think the parties understood them as synonymous, and supposed, when they interpreted the peril from the bursting of a boiler, that they thereby included that of an explosion of a boiler. Webster gives the definition thus: 'To explode; to burst forth as sound; to burst and expand with force and a violent report, as an elastic fluid.' He defines *burst*, 'to break or rend by force or violence.' There is no difference in these definitions." Case quoted in Browne's "Judic. Interp. of Com. Wds. & Phr.," "Bursting."

2. Caldwell, Hunter & Co. *v.* Dawson, 4 Metc. (Ky.) 123.

3. Parker Mills *v.* Comm'rs of Taxes, 23 N. Y. 244. "It is true, the doing of a single act pertaining to a particular business will not be considered engaging in or carrying on the business; yet a series of such acts would be so considered." Harris *v.* State, 50 Ala. 130.

4. Goddard *v.* Chaffee, 2 Allen (Mass.), 395. "The plaintiff is a musician and has for some years been employed in playing upon musical instruments, as a member of military and quadrille bands. He has in that way obtained his whole support and livelihood, has been engaged in no other pursuit, and has had no other trade or employment. That therefore is his business."

5. Hoagland *v.* Segur, 38 N. J. L. 237. "The sum of $10,000 is made payable on the breach by the defendant of his covenant 'to abandon, abstain from, and not engage in the business of banking.' The term 'business' is not used here to denote the single act of receiving deposits, but the aggregation of acts which fairly constitute the occupation of a banker." Where a statute defines a broker as one "whose business it is" to make sales, purchases, etc., "it is only when making sales and purchases in his business, his trade, his profession, his means of getting his living, or of making his fortune, that he becomes a broker within the meaning of the statute." Warren *v.* Shook, 1 Otto (U. S.), 711.

purpose of a livelihood or profit. Business is here used in the sense of a calling for the purpose of a livelihood.[1]

1. Moore *v.* State, 16 Ala. 413.

Labor, Business, Work.—The loaning of money comes within the prohibition against "labor, business, or work" on Sunday. Troewert *v.* Decker, 51 Wis. 47; Meader *v.* White, 66 Me. 91. And the making of contracts generally: "Could there be clearer evidence that the words 'work' and 'labor,' one or both of which are found in each of these acts save that of Pennsylvania, were not, in the opinion of law-makers, synonymous with, or so comprehensive as, the word 'business,' and that, consequently, this last word was employed to embrace what the two former did not include? And when it is remembered that neither in their strict sense nor popular signification are the words 'work' and 'labor' appropriate to describe the mere making of a contract, can it reasonably be doubted that it is the word 'business,' in these several laws, by which it was intended to embrace contracts, and which has had the effect to prohibit them?" Bloom *v.* Richards, 2 Ohio St. 402. So of the execution of a bond. Pattee *v.* Greely, 13 Metc. (Mass.) 286.

There is nothing in the position of the word "business" between "work" and "labor" to show that its meaning should be confined to such business as is manual. Fennell *v.* Ridler, 5 B. & C. 407, 408.

Trade, Business.—Where a lessee covenanted not to exercise any "trade or business" on the demised premises, it was held that using them for a schoolhouse was a violation of his covenant. "I do not think that the meaning of the parties can be fairly confined to trade, because they have used in addition the word 'business,' which must be intended of something not falling within the description of 'trade'." Doe *v.* Keeling, 1 M. & S. 100.

A covenant in a lease not to exercise specified "trades or businesses" is not broken by the use of the house as a private lunatic asylum. "Now it commences with prohibiting trades as well as businesses, two words which may be synonymous or may have a different meaning. . . . Every trade is a business, but every business is not a trade; to answer that description it must be conducted by buying and selling, which the business of a lunatic asylum is not." Doe *dem.* Wetherill *v.* Bird, 2 Ad. & El. 161. But a hospital the patients of which make small payments according to their means was held a "business" in the construction of a similar lease. "The question whether it is a business carried on for the purposes of profit or not is not, in my opinion, material. Even if it is not strictly a 'business,' it is, at all events, 'in the nature' of a business. But I am distinctly of opinion that this is a 'business' within the terms and meaning of the covenant." Bramwell *v.* Lacy, 10 Ch. Div. 695.

Farming is a "business that has for its object the acquisition of gain" within the meaning of the Companies Act, 1862, 25 and 26 Vict. c. 89, s. 4. "With respect to the word 'business' it is needless to refer to authorities, though they might be easily produced to show that the word has a more extensive meaning than 'trade.' Farming is a 'business,' though it cannot properly be called a 'trade,' which word has a technical meaning connected with buying and selling for gain and is so limited." Harris *v.* Amery, Harr. & Ruth. 366; s. c., L. R. 1 C. P. 154.

The provisions in a statute with reference to a married woman engaging in "trade or business as a *feme sole*" contemplate trade or business other than that specifically regulated by the statute, and "contracts made in the course of such trade or business" are distinct from those enumerated in the statute as within her capacity as a *feme covert.* Duncan *v.* Robertson, 58 Miss. 396.

The opening of a public-house is not a breach of a covenant in a lease against carrying on certain specified "trades or businesses" or any other business that might be offensive, etc. Jones *v.* Thorne, 1 B. & C. 715.

Business, Occupation.—A debtor employed as a clerk in a bank is one "carrying on business." "If I had to decide whether this man's employment was more properly described as a 'business' or an 'occupation,' I might think that the latter would be the more appropriate term. But 'business' is the larger term, and I think it includes his employment." *Ex parte* Breeull, 16 Ch. Div. 488.

All Business.—In a submission "of all business of whatever kind in dispute between the parties," prosecutions for assaults and batteries are included. Noble *v.* Preble, 13 S. & R. (Pa.) 322; 1 Wheel. Am. C. L. 423.

A power of attorney made to B to act in "all my business as if I were person-

ally present, and to stand good in law, on all my lands and other business," does not authorize the sale of land and the making of binding covenants in relation thereto. "The power does not give the least hint as to what this business is. . . . There is such a thing as a power being void for uncertainty; and this one is nearly so." Ashley *v.* Bird, 1 Mo. 457.

Business of a Court.—A judicial sale is not the "business" of a court within the meaning of the Rev. Stat. declaring that no court shall be opened or transact any business in any city or town on the day of elections. King *v.* Platt, 37 N. Y. 155.

The regulation of fees is a matter relating to the "business of a court of civil judicature" within the meaning of a statute. "There is nothing to limit the words . . . to that which is strictly the judicial business of such court." Palmer *v.* Powell, 6 M. & W. 636.

Business Corporation.—A railroad corporation is a "business corporation" within the meaning of the thirty-seventh section of the Bankruptcy Act of 1867. "'The provisions of this act shall apply to all moneyed business or commercial corporations.' To attempt to limit the word 'business' in this clause of the statute so as merely to be synonymous with 'trading' would deprive it of any meaning beyond that included in the other words 'moneyed and commercial.' A trading corporation is a commercial corporation. The word 'business' has a broader meaning as applied to corporations." Adams *v.* Boston, etc., R. Co., 1 Holmes (U. S.), 35; Winter *v.* Iowa, etc., R. Co., 2 Dill. (U. S.) 487.

So is an insurance company. *In re* Independent Ins. Co., 1 Holmes (U. S.), 103; Sibline *v.* Hercules Assur. Soc., 5 Am. L. T. Rep. 400; s. c., 16 Int. Rev. Rec. 148. See also 5 Abb. Nat. Dig. 71, § 431.

Doing Business.—An insurance company that has ceased to issue new policies, but collects premiums and pays losses on old ones, is to be considered as "doing business" within the meaning of a statute. Smyth *v.* Intern. Life Assur. Co. of London, 35 How. Pr. (N.Y.) 126; s. c., 4 Abb. Pr. N. S. (N. Y.) 11.

A railroad 455 miles long, 42 miles of which are in a State other than that in which it was incorporated, is "doing business" in the former State. Erie R. Co. *v.* Pa., 21 Wall. (U. S.) 492.

In People *v.* Horn Silver Mining Co. (N. Y.), 7 Cent. Rep. 223, the court says: "We cannot construe the words 'doing business in this State' to mean the whole business of the corporation within this State; and while we are not prepared to hold that an occasional business transaction—that keeping an office where meetings of the directors are held, transfer books kept, dividends declared and paid, and other business merely incidental to the regular business of the corporation is done—would bring a corporation within this act; yet when, as in this case, all these things are done, and in addition thereto a substantial part of the regular business of the corporation is carried on here, then we are unable to say that the corporation is not brought within the act as 'one doing business in this State.'"

A married woman who owns a farm and carries it on for the support of her family or her husband's family is one doing "business on her separate account" within the meaning of a statute. Snow *v.* Sheldon, 126 Mass. 334.

In and about Business.—Things not peculiar to a business, but kept really and *bona fide* for the purpose of the trade and not for pleasure, pass under a settlement of "all things belonging to A in and about his or her business." Dean *v.* Brown, 5 B. & C. 338.

Mercantile Business.—"The phrase 'mercantile business' has a definite meaning. It refers to the buying and selling of articles of merchandise as an employment. It implies operations conducted with a view of realizing the profits which come from skilful purchase, barter, speculation, and sale." Graham *v.* Hendricks, 22 La. Ann. 524, where it was held not to apply to the purchase of a lot of cotton by a Mississippi railroad company from a Louisiana party.

More Hazardous Business.—A stipulation in a policy of insurance that if the building be devoted to a "more hazardous business" the policy should be void is not infringed upon by lighting the building with gasoline, named as increasing the risk. "If a means of lighting the building in which the business of the assured is carried on can be deemed the business itself, then the rule covers the case and the policy is avoided. But this cannot be held to be the meaning of the parties." Mut. Fire Ins. Co. *v.* Coatesville Shoe Factory, 80 Pa. 407.

Office of Business, within the 6 and 7 Vict. c. 73, s. 37, means "the place where the party sought to be charged with the bill actually carries on his business,

BUT.—The word "but" has two meanings. It may be synonymous with "in addition," "to boot," "moreover," or be used in the sense of "without this" or "except." [1]

BUTCHER.—See note 2.

BUY. (See also CHAMPERTY; MAINTENANCE; PURCHASE.)—To acquire the property, right, or title to, by paying a consideration or an equivalent, usually in money; to purchase; to negotiate or treat about a purchase.[3]

either by himself or by an agent." Blandy *v.* De Burgh, 6 C. B. 639.

Other Business.—The words "other business" refer to business *ejusdem generis* as that mentioned before. Allen's Appeal, 81* Pa. St. 304; Reichard *v.* Duryea, 10 W. N. C. (Pa.) 189.

The phrase "transact such other business as may be prescribed by law," in a statutory power given to judges, "certainly includes such duties pertaining to judicial business as the legislature may deem it necessary for the judges to perform with a view to the efficient administration of justice or for the protection of the rights of litigants and others who are to be affected by legal proceedings." State *v.* Tolle, 71 Mo. 650.

See also notes under CARRY; COURSE; OFFENSIVE; PLACE; UNDERTAKE; and the titles of the various professions.

1. Abbott *v.* Middleton, 7 H. L. Cas. 116. See also Union Pap. Bag Mac. Co. *v.* Newell, 11 Blatchf. (U. S.) 383.

2. The business of a butcher may include in it the cutting up and selling by retail the carcasses of animals slaughtered by him; but proof that a person buys the bodies of animals slaughtered for meat, and cuts them up and retails them at a market stall, is not of itself sufficient to constitute him a butcher, within the meaning of a revenue law requiring any person engaged in that business to take out a license. "We have to disregard the true meaning and origin of the word, as explained in dictionaries, if we hold that he who buys the bodies of animals that have been slaughtered for meat, and cuts them up and retails them, without more, becomes thereby a butcher or engaged in the business of a butcher." Henback *v.* State, 53 Ala. 523.

But a covenant in a lease that the lessee shall not exercise "the trade or business of a butcher" upon the premises is broken by there selling raw meat by retail, although no beasts were there slaughtered. "There are in many markets butchers' shops where no animal ever is or can be slaughtered, and yet without doubt the persons occupying them carry on the trade of butchers there." "These acts [the 24 Hen. VIII., c. 3 & 27 Hen. VIII., c. 9] appear to have used the term 'butchers' and 'person selling flesh by retail' as synonymous." Doe *v.* Spry, 1 B. & Ald. 617.

3. Web. Dict.

Buy Off.—(*a*) To influence to compliance; to cause to bend or yield by some consideration. (*b*) To detach by a consideration given; as, to buy off one from a party.

Buy Out.—(*a*) To buy off or detach from. (*b*) To purchase the share or shares of stock in a fund, or partnership, by which the seller is separated from the company, and the purchaser takes his place.

Buy In.—To purchase stock in any fund or partnership.

Buy on Credit.—To purchase on a promise, in fact or in law; to make payment at a future day.

Buy the Refusal.—To give money for the right of purchasing at a fixed price at a future time. Web. Dict.

Power to Buy.—Where an agent is employed to buy goods, his acknowledgment of having received them is evidence of delivery to the buyer. Biggs *et al. v.* Lawrence, 3 T. R. 454.

Proposals to Buy, sell, or procure lottery tickets, in statute. State *v.* Sykes, 28 Conn. 226.

Buyer.—The duties of one employed as a "lace buyer." Price *v.* Mouat, 11 C. B. N. S. 508.

Buyer's Option.—The order of a customer to a broker to buy stock "on a sixty days' buyer's option" does not authorize the broker to buy the stock himself and hold it on his customer's account for sixty days. Pickering *v.* Demerritt, 100 Mass. 416.

Buying.—The words of the statute, 1 Jac. 1, c. 15, s. 2, ". . . trade of living by buying and selling," include every species of buying and selling, whether legal or illegal. Cobb *v.* Symonds, 5 B. & Ald. 518.

BY.—Near ;[1] besides; passing; in presence ; along ;[2] through ; with. It is a term of exclusion.[3]

Attorneys forbidden to buy things in action. See ATTORNEY AND CLIENT ; CHAMPERTY ; MAINTENANCE.

Buying Counterfeits.—Under a statute against buying "a false or counterfeit coin, . . ." the offence is possible only when the counterfeits have been furnished ready for circulation. R. *v.* Bradford, 2 Craw. & Dix. C. C. 41.

Buying of Pleas.—See MAINTENANCE.

Buying Office.—See OFFICERS.

Buying Pretended Titles.—See ADVERSE POSSESSION; CHAMPERTY, sec. 8; DEED.

Buying Stolen Property.—See RECEIVING STOLEN GOODS.

Buying Wife.—The public selling and buying of a wife has been held in England to be a common-law crime. Rex *v.* Delaval, 3 Burr. 1434. 1438; 4 Blk. Com. 64. note; Comm. *v.* Sharpless, 2 S. & R. (Pa.) 91, 102.

1. Rankin *v.* Woodworth, 3 P. & W. (Pa.) 48. "The word 'by,' when used descriptively in a grant, does not mean 'in immediate contact with,' but 'near' to the object to which it relates. And 'near' is a relative term, meaning, when used in land patents, very unequal and different distances." Wilson *v.* Inloes, 6 Gill (Md.), 121.

2. Peaslee *v.* Gee, 19 N. H. 273; Bailey *v.* White, 41 N. H. 337.

3. Rankin *v.* Woodworth, 3 P. & W. (Pa.) 48; Boadley *v.* Rice, 13 Me. 201; Bonney *v.* Morrill, 53 Me. 253; Wells *v.* Iron Co., 48 N. H. 491.

Abide By.—A stipulation in an arbitration bond that the parties will abide by the award of the arbitrators means only that the parties will await the award, without revoking it, and not that they will acquiesce in it when made. Shaw *v.* Hatch, 6 N. H. 162. See Haubert *v.* Haworth, 78 Pa. St. 78.

By his Agent —In a suit on a promissory note, an averment in the declaration that A by his agent B made it is a sufficient averment that A is the maker. Childress *v.* Emory, 8 Wheat. (U. S.) 642.

Authorized by Law, in a statute, means by the law of the State where the statute is enacted. Com. *v.* Dean, 2 Metc. (Mass.) 329.

By Authority.—A volume of the laws of another State with "by authority" printed upon the title-page is admissible in evidence to prove the laws of that State. Merrifield *v.* Robbins, 8 Gray. 150.

In a dissenting opinion, Rogers, J., in Com. *v.* Binns, 17 S. & R. (Pa.) 237, held that the printing of "by authority" at the head of the laws of the United States in a newspaper was an assertion of the official character of the editor inconsistent with the holding of the office of alderman under the State.

Bound by Surety.—A statute requiring a party appealing to be "bound with surety" was construed "bound by surety," so that it was not necessary for him to join in the recognizance. Cavence *v.* Butler, 6 Binn. 52; Boyce *v.* Wilkins, 5 S. & R. 329.

By a Certain Time.—A contract to finish work by November must be completed before November. When a thing is ordered by a particular day, it is with a view of having the use of it on that day. The import of the word as explained by our great lexicographer is 'near; besides; passing; in presence'—all of which denote exclusion." Rankin *v.* Woodworth, 3 P. & W. 48.

Where the contract was to deliver goods by a certain day, and the declaration stated that they were to be delivered on or before that day, there was held to be no variance. Coonley *v.* Anderson, 1 Hill (N. Y.), 519.

An order of court to file certain papers by a certain day is complied with by filing them on that day. Higley *v.* Gilmer, 3 Montana, 433.

In a rule to plead by a particular day, that day was construed to continue until the office was open next morning. Oxley *v.* Bridge, 1 Doug. 67. See Jemmet *v.* Voyer, Barnes 296.

By the Consent of the Company.—Where an insurance policy can only be assigned by the consent of the company, an assignment with the consent of the secretary is good. Conover *v.* Ins. Co., 1 N. Y. 290.

By the Court.—This phrase appended to a chamber order does not make it an order of the court. Marty *v.* Ahl, 5 Minn. 27.

By the Drink.—Retailing spirituous liquors by the drink must be in quantities not exceeding a quart, and no jury would fail to understand that such was the meaning of a judge using the expression. Sappinton *v.* Carter, 67 Ill. 482.

By Estimation.—A phrase frequently used in conveyances in reference to the quantity of land intended to be conveyed where it is not accurately ascertained by measurement. Rapalje's Law Dict.; Bouv. Law Dict. See MORE OR LESS.

By the Final Judgment.—An agreement to stay suit, and that it shall be settled and determined by the final judgment in another pending suit, is not a bar to the first.

By Force.—Where this term is used in a statute defining rape, the substitution of "violently" for it in an indictment vitiates the latter. State *v.* Blake, 39 Me. 322. *Contra*, Com. *v.* Fogerty, 8 Gray (Mass.), 489.

In an information alleging the seizure of a certain foreign vessel for being found within a league of the coast with certain spirits on board, "whereby and by force of the statute, etc., said vessel became forfeited," the last clause is surplusage. Atty.-Gen. *v.* Le Revet, 6 M. & W. 405.

By, From, or Under.—The entry and seizure of the goods of a vessel by a tax-collector is not a breach of a covenant of quiet enjoyment without let, etc., by the lessor or any person lawfully claiming by, from, or under him. Stanley *v.* Hayes, 3 Q. B. 105.

By a Highway.—By the use of this term as a boundary in the description in a deed, the land to the middle of the highway, if the grantor owns so far, passes. Angell on Highways, 315; Railroad Co. *v.* Gould (Md.), 10 Eastern Rep. 780; s. c., 7 Cent. Rep. 379.

By Him.—The bond of a contractor, required by statute, that he will pay all laborers employed by him does not provide for the payment of laborers employed by a person to whom the work is sublet by him. McCluskey *v.* Cromwell, 11 N. Y. 593.

Known by.—An indictment is sufficiently precise and formal which avers that the accused is known by the complainant instead of known *to.* Com. *v.* Griffin, 105 Mass. 175.

By Land of.—To express a boundary in a deed is a term of exclusion, unless by necessary implication manifestly used in a different sense. Wells *v.* Iron Co., 48 N. H. 491. It does not mean over or across, but along the line of. Peaslee *v.* Gee, 19 N. H. 273; Bailey *v.* White, 41 N. H. 337. But see Wilson *v.* Inloes, 6 Gill (Md.), 121.

By Means.—Allegations in an indictment that goods were obtained "under color and pretence of a purchase" and "under the false and fraudulent pretence" are substantially equivalent to an averment that they were obtained "by means of false pretence." Com. *v.* Walker, 108 Mass. 309.

"By whose means," in an act making the person by whose means a pauper is brought into a State liable for his support, means "by whose procurement or instigation." A common carrier who transports the pauper is not within the act. Fitchburg *v.* R. Co., 110 Mass. 210.

By Night.—In an indictment for burglary under a statute a general description "by night" is sufficient; it is not necessary to allege any particular hour of the night. State *v.* Robinson, 6 Vr. (N. J.) 71.

Where night is defined in a statute "to commence at the expiration of the first hour after sunset, and conclude at the beginning of the first hour before sunrise," an indictment is good which says, "by night, after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise." Cureton *v.* The Queen, 1 B. & S. 218.

By the People.—The canvassing of the votes for a constitutional amendment, and the declaration of the result by the board of canvassers, is its adoption by the people within the meaning of an article providing when an amendment to the constitution shall go into effect. Real *v.* People, 42 N. Y. 270; People *v.* Gardiner, 45 N. Y. 812.

By a Sea.—Where a steamer encountered a storm and the waves caused it to roll tremendously, so that cattle on board were violently thrown down and killed, the loss was held to be "caused directly by a sea" within the meaning of a marine-insurance policy. The risk contemplated was some effect of a sea upon the vessel, and was not limited to mean a blow by one or more particular waves on the vessel. Snowden *v.* Guion, 101 N. Y. 458.

By a Stream.—A grant of land bounded by a fresh-water stream, whether navigable or not, conveys the land *ad medium filum aquæ.* Steamboat Magnolia *v.* Marshall, 39 Miss. 109. But see Thomas *v.* Hatch, 3 Sumner (C. C.), 170; Bowman *v.* Wathen, 2 McL. (C. C.), 376.

By Virtue of his Employment.—A clerk intrusted to receive money at home from out-door collectors, but who received it abroad from out-door customers, receives it "by virtue of his employment" within an embezzlement statute. Rex *v.* Beechey, Russ. & Ry. 319.

By the Year.—A lease by the year is a lease for a year, and is not binding on the parties for a longer time. Pleasants *v.* Claghorn, 2 Miles (Pa.), 302.

BY-LAWS. (See also BENEFICIAL ASSOCIATIONS; BUILDING AND LOAN ASSOCIATIONS; CORPORATIONS; DIRECTORS; MUNICIPAL CORPORATIONS; ORDINANCES; SOCIETIES.)

1. **Definition.**—A by-law is a law made by a corporation under authority of its charter or statute, or by an unincorporated association with the consent of its members, governing the members and all others over whom the corporation or association has a legal jurisdiction.[1]

The distinction between a by-law and a regulation of a private corporation is that a by-law binds the members only, while a regulation affects third persons dealing with the corporation.[2]

The by-laws of a municipal corporation are usually called ordinances, and they affect not only members, but all persons within the jurisdiction of the municipal authority.[3]

The by-laws or ordinances of a municipality are in effect local laws, enacted by the municipal authorities in the exercise of legislative powers.[4]

But the authority conferred upon a municipal corporation to make by-laws does not give it a general authority to make laws.[5]

2. **Authority to Make By-laws.**—The right to make by-laws is not always essential to a corporation; it is not even generally incident to a charitable corporation, for in that case they are supposed to emanate from its founder.[6]

But where there is a voluntary association for religious, chari-

1. "A by-law is a rule or law of a corporation for its government." Jones, P. J., in Drake *v.* Hudson R. R. Co., 7 Barb. (N. Y.) 539.

"This term has a peculiar and limited signification; being used to designate the orders and regulations which a corporation, as one of its legal incidents, has power to make, and which is usually exercised to regulate its own action and concerns, and the rights and duties of its members amongst themselves." Shaw, C. J. Comm. *v.* Turner, 1 Cush. (Mass.) 496.

"The office of a by-law is to regulate the conduct and define the duties of the members towards the corporation and between themselves." Flint *v.* Pierce, 99 Mass. 70.

"A by-law is a law made with due legal obligation by some authority less than the sovereign and Parliament, in respect of a matter specially or impliedly referred to that authority, and not provided for by the general law of the land." An Essay on By-laws, W. G. Lumley, Q C.

2. Morris & Essex R. Co. *v.* Ayers, 5 Dutch. (N. J.) 393; State *v.* Overton, 24 N. J. L. 440; Compton *v.* R. Co., 34 N. J. 134.

3. Robinson *v.* Mayor, 1 Humph. 56; s. c., 34 Am. Dec. 625; Blanchard *v.* Bissell, 11 Ohio St. 96; Dillon on Mun. Corp. § 244; Gas Co. *v.* San Francisco, 6 Cal. 190; St. Paul *v.* Coulter, 12 Minn. 41; Ashton *v.* Ellsworth, 48 Ill. 299; Mobile *v.* Yuille, 36 Am. Dec. 441; Tanner *v.* Trustees, 40 Am. Dec. 337; Floyd *v.* Comm'rs, 58 Am. Dec. 559.

4. Morawitz on Corp. 491; Village of St. Johnsbury *v.* Thompson, 9 Atl. Repr. 571.

5. Comm. *v.* Turner, 1 Cush. (Mass.) 493

6. Taylor on Private Corp. § 19; Angell & Ames on Corp. 330; Phillips *v.* Berry, 1 Lord Raymond. 8; Reg. *v.* Dulwich Coll., 8 E. L. & E. 385; Phillips Academy *v.* King, 12 Mass. 546.

table, or social purposes, or a chartered stock corporation, the majority of the members of the association or the stockholders have the right to pass any reasonable by-law within the corporate or associate purpose.[1]

Every stock corporation has implied authority to make by-laws.[2]

The power to make by-laws includes also the power to repeal them.[3]

The power to make by-laws resides in the members of the corporation, not in the directors, unless there be a law or usage to the contrary.[4]

But the stockholders or members may delegate this power to a select body,[5] consisting of an even less number than a majority of the members, and the by-laws may prescribe how many of these shall constitute a quorum.[6]

The directors are bound by the by-laws, and cannot alter or amend a by-law imposing limitations on their power.[7]

3. Validity.—In the case of a corporation, the by-laws must be adopted in the State where the charter is in force.[8] They must not conflict with the law of the land, whether constitutional,[9]

1. Came *v.* Brigham, 39 Me. 35; State *v.* Tudor, 5 Day (Conn.), 329; People *v.* Sailors' Snug Harbor, 54 Barb. (N. Y.) 532; Poultney *v.* Bachman, 31 Hun (N. Y.), 49; German, etc., Congregation *v.* Pressler, 17 La. Ann. 128; Harrington *v.* Workingmen's Benev. Assoc., 70 Ga. 340; Security Loan Assoc. *v.* Lake, 69 Ala. 456; Dickenson *v.* Chamber of Commerce, 29 Wis. 45; State *v.* Milwaukee Ch. of Commerce, 47 Wis. 670; White *v.* Brownell, 4 Abb. Pr. N. S. (N. Y.) 162; s. c., 2 Daly (N. Y.), 329; People *v.* Bd. of Trade, 80 Ill. 134; Fisher *v.* Bd. of Trade, 80 Ill. 85; Baxter *v.* Bd. of Trade, 83 Ill. 146; Sturges *v.* Bd. of Trade, 86 Ill. 441; People *v.* N. Y. Com. Assoc., 18 Abb. Pr. (N. Y.) 271; People *v.* Miller, 39 Hun (N. Y.), 557; St. Mary's, etc., Soc. *v.* Burford, 70 Pa. St. 321.

2. Martin *v.* Nash. Bldg. Assoc., 2 Coldw. (Tenn.) 418; Child *v.* Hudson's Bay Co., 2 P. Wms. 207; Cahill *v.* Kalamazoo, etc., Co., 43 Am. Dec. 457; Drake *v.* Hudson R. R. Co., 7 Barb. (N. Y.) 508; City of London *v.* Vanacre, 1 Lord Raymond, 496; Dunston *v.* Imp. Gas Co., 3 B. & Ald. 125; Kearney *v.* Andrews, 2 Stock. Ch. (N. J.) 70.

3. Rex *v.* Westwood, 7 Dowl. & R. 267; s. c., 4 B. & C. 781; Rex *v.* Ashwell, 12 East, 22; Smith *v.* Nelson, 18 Vt. 511.

4. Salem Bank *v.* Gloucester Bank, 17 Mass. 129; Martin *v.* Nashville Bldg. Assoc., 2 Coldw. (Tenn.) 418; Bank of Holly Springs *v.* Pinson, 58 Miss. 421; State *v.* Curtis, 9 Nev. 335; Morton Gravel Rd. Co. *v.* Wysong, 51 Ind. 4; Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249; Rex *v.* Westwood, 7 Bing. 1; Union Bank of Md. *v.* Ridgeley, 1 Harr. & G. (Md.) 324; People *v.* Throop, 12 Wend. (N. Y.) 183.

5. *Ex parte* Wilcocks, 7 Cow. (N. Y.) 402; Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Doug. 24; Rex *v.* Head, 4 Burr. 2521.

6. Hoyt *v.* Thompson, 19 N. Y. 207.

7. Stevens *v.* Davison, 18 Gratt. (Va.) 819.

8. Mitchell *v.* Copper Mining Co., 8 Jones & S. 406; s. c., 67 N. Y. 280.

9. U. S. *v.* Hart, 1 Peters C. C. 390; Stuyvesant *v.* New York, 7 Cow. (N. Y.) 588.

Ex post facto laws and laws retrospective in their operation are no more lawful for corporations than for individuals. People *v.* Crockett, 9 Cal. 112; Pulford *v.* Fire Dept., 31 Mich. 458; Howard *v.* Savannah, Charlt. 173.

Where under the charter of a mutual fire-insurance association the incorporators are authorized to make such by-laws as they may deem advisable for the management of their corporate affairs, such by-laws can have no effect to modify contracts entered into between the corporation and the assured. Stewart *v.* Lee Mut. Fire Ins. Assoc. (Miss.) 1 So. 743; Great Falls Mut. F. Ins. Co. *v.* Harvey, 45 N. H. 292.

A corporation cannot pass a by-law in conflict with the constitution of the State. Mayor *v.* Beasley, 1 Humph. (Tenn.) 232.

statutory,[1] or common law,[2] nor with the charter[3] of a corporation; and they must be reasonable.[4]

And by-laws imposing excessive penalties for a breach, as a forfeiture of all profits or shares, are void. Adley *v.* Reeves, 2 M. & S. 53; s. c. in equity, Adley *v.* Whitstable, 17 Ves. Jr. 315; In Matter of Long Island R. Co., 32 Am. Dec. 429; s. c., 19 Wend. (N. Y.) 37.

1. Where the statute of the State expressly forbids the taking of more than 6 per cent interest by a bank, the by-laws cannot provide for the taking of a larger amount. Seneca Co. Bank *v.* Lamb, 26 Barb. (N. Y.) 595.

The national banking act forbidding a lien upon the shares for the indebtedness of a stockholder, no by-law can create it. *Re* Bigelow, 1 Bank. R. 667; Sec. Natl. Bank *v.* State Bank, 10 Bush (Ky.), 367; Del. R. Co. *v.* Oxford Iron Co., 38 N. J. Eq. 340, and notes; Bank *v.* Lanier, 11 Wall. (C. C. U. S.) 369; Bullard *v.* Bank, 18 Wall. (C. C. U. S.) 589; Evansville Natl. Bank *v.* Metropolitan Natl. Bank, 2 Biss. (C. C. U. S.) 527; Hagar *v.* Union Natl. Bank, 63 Me. 509; Rosenback *v.* Salt Springs Natl. Bank, 53 Barb. (N. Y.) 495; Conklin *v.* Sec. Natl. Bank, 45 N.Y. 655; Lee *v.* Citizens' Natl. Bank, 2 Cin. 398, 306.

By-laws of a corporation in contravention of a statute under which it is organized are *ultra vires* and of no effect. A corporation organized for cooperative insurance under Stat. 1877, c. 204, for the purpose of assisting the widows, orphans, or other dependents of deceased members, has no authority to create a fund for other persons than the class named. Legion of Honor *v.* Perry, 1 New Eng. Repr. 715.

2. Gosling *v.* Veley, 12 Q. B. 473; Hayden *v.* Noyes, 5 Conn. 391.

By-laws which are in restraint of trade are void. Sayre *v.* Louisville M. Benev. Assoc., 85 Am. Dec. 613; Butchers' Benev. Assoc., 35 Pa. St. 151; Moore *v.* Bank of Commerce, 52 Mo. 377; Clark *v.* Lecren, 9 B. & C. 52; Hesketh *v.* Braddock, 3 Burr. 1858. See also Mayor *v.* Yuille, 3 Ala. 137; People *v.* N. Y. Board of Underwriters, 54 How. Pr. 240; Cal. St. Nav. Co. *v.* Wright, 65 Am. Dec. 511; Goddard *v.* Merch. Ex., 9 Mo. App. 290; s. c., 78 Mo. 609. And a by-law may be void simply as being against public policy. People *v.* Benev. Soc., 3 Hun (N. Y.), 361.

A by-law that would deprive a stockholder of vested rights is invalid. Kent *v.* Quicksilver Mining Co., 78 N. Y. 159; Pentz *v.* Citizens' Fire Ins. Co., 35 Md. 73; Moore *v.* Bank of Commerce, 52 Mo. 377; Spurlock *v.* Pac. R. Co., 61 Mo. 319; Taylor *v.* Griswold, 14 N. J. Law, 222; Brewster *v.* Hartley, 37 Cal. 24; People *v.* Phillips, 1 Denio (N. Y.), 388; Comm. *v.* Gill, 3 Whart. (La.) 228; Petty *v.* Tooker, 21 N. Y. 267; Rex *v.* Head, 4 Burr. 2515.

The majority cannot by a by-law impose upon shareholders individual liability for corporate indebtedness. Reid *v.* Eatonton Manufacturing Co., 40 Ga. 103; Trustees *v.* Flint, 15 Metc. (Mass.) 539; Kennebec R. Co. *v.* Kendall, 31 Me. 470.

3. A corporation can only pass such by-laws as can fairly be said to come within the authority conferred by the charter. Martin *v.* Nashville Bldg. Assoc., 2 Coldw. (Tenn.) 418; State *v.* Curtis, 9 Nev. 325; Andrews *v.* Un. Mut. Fire Ins. Co., 37 Me. 256; Bergman *v.* St. Paul Mut. Bldg. Assoc., 29 Minn. 275; Am. Leg. of Honor *v.* Perry, 140 Mass. 580; Pres. Mut. Assoc. Fd. *v.* Allen, 106 Mass. 593; Mayor *v.* Ordrenan, 12 Johns. (N. Y.) 122; McMullen *v.* City of Charleston, 1 Bay (S. Car.), 46; Karney *v.* Andrews, 2 Stock. Ch. (N. J.) 70; Herzo *v.* San Francisco, 33 Cal. 134; Carr *v.* St. Louis, 9 Mo. 191. Presbyterian Assoc. Fd. *v.* Allen, 4 W. Rept. 712.

A form prescribed by the charter must be followed in adopting a by-law. Dunston *v.* Imp. Gas Lt. Co., 3 B. & Ad. 135.

4. The members of a corporation or association may adopt any reasonable by-laws within the scope of the purpose, and regulating the manner of voting and of holding meetings, and directing the order of proceedings. Juker *v.* Com., 20 Pa. 484; Com. *v.* Woelper, 3 S. & R. (Pa.) 29; Newburg *v.* Francis, 3 T. R. 189. *Cf.* Rex *v.* Spencer, 3 Burr. 827; People *v.* Kip, 4 Cow. (N. Y.) 382.

But such by-laws must reasonably and equally operate on all. Comm'rs *v.* Gas Co., 12 Pa. St. 318; Cartan *v.* Fr. Matthew Soc., 3 Daly (N. Y.), 20; State *v.* Merch. Ex., 2 Mo. App. 96; Amesbury *v.* Ins. Co., 6 Gray (Mass.), 596; Ellwood *v.* Bullock, 6 Q. B. 383; Palmetto Lodge *v.* Fleming, 49 Am. Dec. 604; Goddard *v.* Merch. Ex., 9 Mo. App. 290; Stewart *v.* Fr. Matthew Soc., 41 Mich. 67; People *v.* Med. Soc., 24 Barb. (N.Y.) 570; Buecking *v.* Lodge of O. F., 1 City Ct. R. 31; Scriveners' Co. *v.* Brooking, 3 Q. B. 95; s. c., 2 Gall & D. 419; Wood *v.* Searle, 3 Leon. 8. But see Framework Knitters' Co. *v.* Green, 1 Ld. Ry. 113; Waln's Case, Cro. Jac. 555; Taverner's

The validity of a by-law is a question for the court.[1]

Public and private corporations are governed by the same law in these respects.[2]

But a by-law may be void as to part and good as to the rest.[3]

4. Unincorporated Societies.—But in the case of the by-laws of an unincorporated voluntary association the court has no visitorial power and cannot determine whether they are reasonable or unreasonable; the only question for it to determine is whether they have been adopted in the way which has been agreed upon by the members of the association.[4]

But they are nevertheless bound to observe their constitution and by-laws.[5]

Case, T. Raym. 446; Jeffrey's Case, 5 Co. Rep. 66a; Mayor *v.* Phelps, 27 Ala. 55. *Re* Frazee 6 Westn. Repr. 140.

By-laws authorizing voting by proxy are valid. State *v.* Tudor, 5 Day (Conn.), 329; People *v.* Crossley, 69 Ill. 195; Phillips *v.* Wickham, 1 Paige (N. Y.), 590; People *v.* Twaddell, 18 Hun (N. Y.), 427.

State *v.* Merchants' Ex., 2 Mo. App. 96, was a proceeding by *mandamus* to compel the defendants to reinstate the relator as a member of the Union Merchants' Exchange of St. Louis. The defendants' by-laws provided for the submission of all questions in dispute to arbitration, and the relator declined to comply with an award of arbitrators made in pursuance of the by-law. He was consequently suspended from membership. It was in evidence that the privilege of membership was a very valuable one. Bakewell, J., said: "In view of the character and objects of this corporation, and the manifest inconvenience to which every trader must necessarily be subject who is not permitted to join, or is expelled from, the chief mart of commerce in the place of which he is a citizen and a trader, we think a by-law compelling the members of the Union Merchants' Exchange to submit their controversies to arbitration on pain of suspension or expulsion is unreasonable in the legal and technical sense of that term, and that it cannot be sustained." See also Savannah Cotton Ex. *v.* State, 54 Ga. 668.

In the case of an unincorporated association a by-law agreeing to submission to arbitration is considered to be in the nature of a contract, and like any other agreement to arbitrate is revocable. Heath *v.* Pres. of Gold Ex., 7 Abb. Pr. N. S. 251; 38 How. Pr. 168.

Mutual-benefit societies may provide modes of asserting rights or redressing grievances, which if properly and fairly administered may oust the jurisdiction of the court altogether. Poultney *v.* Bachman, 31 Hun (N. Y.), 49; Harrington *v.* Workingmen's Benev. Assoc., 70 Ga. 340; White *v.* Brownell, 2 Daly (N. Y.), 329; Lafond *v.* Deems, 81 N. Y. 508; Anacosta Tribe *v.* Murbach, 13 Md. 91; Osceola Tribe *v.* Schmidt, 57 Md. 98; Foran *v.* Howard Benev. Assoc., 4 Pa. 510; Black- & White-smiths' Soc. *v.* Vandyke, 2 Whart. (Pa.) 309. But the intention to surrender a legal right to resort to the court in the first instance must very clearly appear. Bauer *v.* Samson Lodge K. of P., 102 Ind. 262; Supreme Court *v.* Garrigues, 104 Ind. 133.

1. Hibernia Fire Eng. Co. *v.* Harrison, 93 Pa. St. 264; Com. *v.* Worcester, 3 Pick. (Mass.) 462; Queen *v.* Sadlers Co., 10 H. of L. C. 404; Vedder *v.* Fellows, 20 N. Y. 126; State *v.* Overton, 61 Am. Dec. 671.

2. Mayor *v.* Winfield, 8 Humph. 767; Dunham *v.* Rochester, 5 Cow. 462; St. Louis *v.* Weber, 44 Mo. 547; Pedrick *v.* Bailey, 12 Gray (Mass.), 161.

3. Rand *v.* Mather, 59 Am. Dec. 131, and note 135; Rogers *v.* Jones, 1 Wend. (N. Y.) 237; Skelton *v.* Mayor, 30 Ala. 540; Amesbury *v.* Bowditch Mut. Ins. Co., 6 Gray (Mass.), 596; Cleve *v.* Financial Co., L. R. 16 Eq. 363.

4. Kehlenbeck *v.* Logeman, 10 Daly (N. Y.), 447; Elsas *v.* Alfred, 1 City Ct. R. 113.

For a valuable note on the subject of judicial interference in the affairs of incorporated societies, see note to Loubat *v.* LeRoy, 15 Abb. N. Cas. 45.

5. Labouchere *v.* Earl of Warncliffe, L. R. 13 Ch. Div. 346; Waechtel *v.* Noah Widows' Soc., 84 N. Y. 28; People *v.* Ben Soc., 24 How. Pr. 216; Downing *v.* St. Columba's Soc., 10 Daly (N. Y.), 262; Fritz *v.* Muck, 62 How. Pr. 69; Fisher *v.* Kane, L. R. 11 Ch. Div. 353; Loubat *v.* LeRoy, 40 Hun (N. Y.), 546;

5. Adoption.—By-laws may be adopted without the use of a corporate seal, and no entry in writing is necessary. Their existence may be established by custom or by the acquiescence in a course of conduct by those authorized to enact them.[1]

Where a by-law has been formally adopted by a corporation the reason for its adoption need not be stated in the preamble.[2]

6. Who are Bound.—The by-laws of every corporation bind its members.[3]

But persons not members of a private corporation are, as a general rule, not bound by the by-laws as such; they may, however, be bound by them as being written into a contract with the corporation.[4]

But by reason of prescription or statute by-laws may regulate persons who are not members.[5]

Lehman *v.* Dist. No. 1 B. B., 39 Hun (N. Y.), 658.

1. In the case of the Union Bank *v.* Ridgely, 1 H. & G. 324–413, it was shown by oral testimony alone that for many years the rules and regulations headed "by-laws," and contained in one of the books of the bank, had been uniformly acted upon as the by-laws of the bank, although no entry in writing anywhere appeared showing their adoption; it was, however, said by Buchanan, C. J.: "No reason has been shown in argument, nor can we perceive any, why their adoption may not be proved, as well by the acts and uniform course of proceeding of the corporation as by an entry or memorandum in writing."

In Bank of Holly Springs *v.* Pinson, 58 Miss. 421, a by-law provided that the bank should have a lien upon its stock for the debts of its shareholders, but nothing appeared on the face of the certificate which they uniformly issued to place a purchaser upon notice. George, J., said: "This uniform conduct, at least as to all who are not members of the corporation, will be held as making a by-law repealing the other. By-laws need not be in writing." But see Sills *v.* Brown, 9 C. & P. 601. To the same effect see State *v.* Curtis, 9 Nev. 335; Langsdale *v.* Bouton, 12 Conn. 467; Henry *v.* Jackson, 37 Vt. 431; Fairfield T. Co. *v.* Thorp, 13 Conn. 173; Haven *v.* N. H. Asylum, 38 Am. Dec. 512; Lumbard *v.* Aldrich, 8 N. H. 35; Sell *v.* Brown, 9 C. & P. 601; Dunston *v.* Imp. Gas Lt. Co., 3 B. & Ad. 125; Rex *v.* Ashwell, 12 East, 22; Rex *v.* Miller, 6 T. R. 280; Rex *v.* Westwood, 4 B. & C. 786; Taylor *v.* Griswold, 2 C. E. Greene (N. J.), 223; Herzo *v.* Ins. Co. *v.* Smith, 11 Pa. 120; Northrop *v.* Curtis, 5 Conn. 246.

2. Rex *v.* Harrison, 3 Burr. 1322; Stuyvesant *v.* Mayor, 7 Cow. (N. Y.) 588–606.

Every reason for a by-law need not appear. Colchester *v.* Goodwin, Cart. 119; Poulterers' Co. *v.* Phillips, 6 Bing. N. C. 314; Hibernia Fire Eng. Co. *v.* Harrison, 93 Pa. St. 264.

3. Cummings *v.* Webster, 43 Me. 192; Weatherly *v.* Med. & Surg. Soc., 76 Ala. 567; Kent *v.* Quicksilver Mining Co., 78 N. Y. 179; Came *v.* Brigham, 39 Me. 35; German, etc., Cong. *v.* Pressler, 17 La. Ann. 128; Harrington *v.* Workingmen's Ben. Assoc., 70 Ga. 341; Poultney *v.* Bachman, 31 Hun (N. Y.), 49; Security Loan Assoc. *v.* Lake, 69 Ala. 456; Anacosta Tribe *v.* Murbach, 13 Md. 91; McDermot *v.* Board of Police, 5 Abb. Pr. 422; Sassenscheidt *v.* Ben., etc., Union, 1 City Ct. R. 8; Flint *v.* Peirce, 99 Mass. 68.

4. "The by-laws of a private corporation bind the members only by virtue of their assent, and do not affect third persons." Green, C. J., in State *v.* Overton, 24 N. J. L. 440.

Regulations affecting persons not members are not by-laws, properly speaking. Green, C. J., in State *v.* Overton, 24 N. J. L. 440. See also Co. of Horners *v.* Barlow, 3 Mod. 159; Bank of Wilmington *v.* Wollaston, 3 Har. (Del.) 90, Samuels *v.* Cent. Ex. Co., McCahon, 214.

A depositor in a savings bank is bound by the contract contained in the bank-book which he received at the time he made his first deposit, and by the by-laws of the institution, to which he subscribed at the time, but he is not bound by a change in the by-laws subsequently adopted without his knowledge or consent and of which he has received no notice. Kimins *v.* Boston Five-cent Sav. Bank, 2 New Eng. Repr. 33.

5. Rex *v.* Col. of Phys., 3 Burr. 2740;

By-laws which regulate the mode of making transfers of shares are perfectly valid.[1] But a by-law making the right to transfer depend upon the approval of the board of directors, or other agent is invalid.[2]

7. Notice.—The members of a corporation are presumed to know its by-laws;[3] and it is no objection to a by-law that a member of a corporation had no notice or was not a member when it was passed.[4] The by-laws are evidence against the officers of a corporation even though they may not be members.[5] The members of a corporation are bound to observe the forms prescribed by the by-laws.[6] But mere informalities will not be allowed to

Kirk *v.* Nowell, 1 T. R. 118; Marietta *v.* Fearing, 5 Ohio, 427; Vaudine's Case, 6 Pick. (Mass.) 187.

The by-laws of a corporation regulating the admission into it bind those who seek to become members. The most pertinent example of this, perhaps, is in those cases where the by-laws, passed in pursuance of the charter or statutory authority, reserve to the corporation a lien upon the shares of a stockholder for his debt to the corporation. Such a by-law is binding upon a purchaser with notice, and he cannot obtain a transfer until the debt is paid. Prendergast *v.* Bank of Stockton, 2 Sawy. 108; Geyer *v.* West. Ins. Co., 3 Pitts. 41; Brent *v.* Bank of Washington, 10 Pet. 616; St. Louis, etc., Ins. Co. *v.* Goodfellow, 9 Mo. 149; Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513; Cunningham *v.* Ala. L. Ins. Co., 4 Ala. 652; Bank of Holly Springs *v.* Pinson, 58 Miss. 421–35. *In re* Bachman, 12 Nat. Bank, 223; Tuttle *v.* Walton, 1 Ga. 43; McDowell *v.* Bank of Wilmington, 1 Har. (Del.) 27; Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308; Morgan *v.* Bank of N. A., 8 S. & R. 73; Child *v.* Hudson's Bay Co., 2 P. Wms. 207; Quiner *v.* Marblehead Ins. Co., 10 Mass. 476; Spurlock *v.* Pacific R. Co., 61 Mo. 319.

But this right of lien can only be secured by the by-laws in pursuance of authority derived from the act of incorporation or the general statutory law; it does not exist at common law. "When such a lien exists it is by statutory authority, either expressed in the act of incorporation or by by-laws made by authority of the act." Thompson, J., in Steamship Dock Co. *v.* Heron's Admx., 52 Pa. St. 280. See also Driscoll *v.* West Bradley, etc., Mfg. Co., 59 N. Y. 102; Carroll *v.* Mullanphy, Sav. Bank, 8 Mo. App. 249; Nesmith *v.* Washington Bank, 6 Pick. (Mass.) 324. *Cf.* Bryon *v.* Carter, 22 La. Ann. 98; Moore *v.* Bank of Commerce, 52 Mo. 377; Merchants' Bank *v.* Shouse, 102 Pa. St. 488.

And it is not binding upon a purchaser without notice. Anglo-Cal. Bank *v.* Grangers' Bank, 63 Cal. 359.

1. Northrop *v.* Newton, etc., I. Co., 3 Conn. 544; Union Bk. *v.* Laird. 2 Wheat. 390; Hibblewhite *v.* McMorine, 6 M. & W. 200; Merrill *v.* Call, 15 Me. 428; Weyer *v.* Second Nat. Bk., 57 Ind. 198; Bishop *v.* Globe Co., 135 Mass. 132; Bates *v.* Boston, etc., R. Co., 10 Allen (Mass.), 251; Stockwell *v.* St. Louis Mercantile Co., 9 Mo. App. 133; Fisher *v.* Essex Bank, 5 Gray (Mass.). 373; Corden *v.* Universal Gas Lt. Co., 6 Dowl. & L. 379; State *v.* Petinelli, 10 Nev. 641; Marlb. Mfg. Co *v.* Smith. 2 Conn. 579; Oxford Turnpike Co. *v.* Bunnell, 6 Conn. 552; Farmers' Bank *v.* Wasson, 48 Iowa. 339; Chouteau Spring Co. *v.* Harris, 20 Mo. 383.

2. Farmers' Bk. *v.* Wasson, 48 Iowa, 339; Sargent *v.* Franklin Ins. Co., 8 Pick. (Mass.) 90.

3. Inhabitants *v.* Morton, 25 Mo. 593; Buffalo *v.* Webster, 10 Wend. (N. Y.) 99.

By-laws contained in a book issued to shareholders are evidence against a shareholder in an action by the receiver of a corporation to collect a subscription. Frank *v.* Morrison, 58 Md. 423.

4. Susquehanna Ins. Co. *v.* Perrine, 7 W. & S. 348; Treadway *v.* Hamilton Ins. Co., 29 Conn. 68; London *v.* Vanacre, 12 Mod. 273; Cudden *v.* Eastwick, 6 Mod. 124.

5. In the case of the Bank of Wilmington *v.* Wollaston, 3 Harr. (Del.) 90, there was a suit brought on the official bond of the cashier, and the by-laws of the bank were offered in evidence, but objected to as not binding on the defendant, who was not a member. of the corporation, but they were admitted in evidence by the court.

6. Dunston *v.* Imp. Gas Lt. Co., 3 B. & Ad. 125; State *v.* Petinelli, 10 Nev. 141; Johnston *v.* Jones, 23 N. J. Eq. 216;

render an act invalid if the sense of the by-law has been maintained.[1]

8. Construction of By-Laws.—The ordinary rules of construction are to be applied,[2] and the courts will construe by-laws reasonably.[3]

9. Enforcement.—Questions arising under attempts to enforce by-laws usually occur in the case of municipal corporations. Thus it is held that without express power a corporation cannot imprison an offender against its by-laws;[4] nor impose a forfeiture of goods;[5] nor disfranchise a member;[6] nor avoid a contract made in contradiction of the by-law.[7] The power to enforce by fine excludes the right to enforce in any other way.[8] As a general rule the penalty can only be given to the corporation,[9] and it is usually recoverable in the name of the corporation[10] in an action of debt or *assumpsit*.[11] A third party can only enforce a by-law when he has some privity.[12] The courts do not readily interfere to prevent the enforcement of the by-laws of moral, religious, or social corporations.[13] But their enforcement must be at the peril of the members.[14]

10. Waiver.—Corporations may waive their by-laws,[15] or by a continued course of business render them nugatory.[16]

People *v.* Albany R. Co., 55 Barb. (N.Y.) 344; Comm. *v.* Woelper, 3 S. & R. (Pa.) 29.

1. Philip *v.* Wickham, 1 Paige (N. Y.), 590; Downing *v.* Potts, 3 Zab. (N. J.) 66; People *v.* Albany R. Co., 55 Barb. (N.Y.) 344; Wheeler's Case, 2 Abb. Pr. N.S. 361; People *v.* Peck. 11 Wend. (N. Y.) 641; People *v.* Campbell, 2 Cal. 135; Hardenburgh *v.* Farmers', etc., Bk., 3 N. J. Eq. 68; Hughes *v.* Parker, 20 N. H. 58; Blanchard *v.* Dow, 32 Me. 557; Ashtabula R. Co. *v.* Smith, 15 Ohio St. 328.

2. *Re* Dunkerson, 4 Biss. 227.

3. Vintner's Co. *v.* Passy, 1 Burr. 235.

In Rex *v.* Bailiffs, 4 Barn. & Ald. 271 s. c., 2 Dowl. & R. 172, the court construed the words "shall be lawful," and in Breneman *v.* Franklin Benef. Assoc., 3 W. & S. (Pa.) 218, the words "on application."

4 London *v.* Wood, 12 Mod. 686; Hart *v.* Mayor of Albany, 9 Wend. (N.Y.) 571; Barter *v.* Comm., 6 P. & W. 253; *Ex parte* Burnett, 30 Ala. 461.

5. Cotter *v.* Doty, 5 Ohio, 395; Kirk *v.* Nowell, 1 T. R. 118; Phillips *v.* Allen, 41 Pa. St. 481.

6. Rex *v.* London, 2 Lev. 201. But see Bab *v.* Clerk. F. Moore, 412.

7. Doggerell *v.* Pokes, F. Moore, 411.

8. Kirk *v.* Nowell, 1 T. R. 125; Nightingale *v.* Bridges, 1 Show. 135; Heise *v.* Town Council, 6 Rich. (S.Car.) 404; Miles *v.* Chamberlain, 17 Wis. 446.

9. London *v.* Wood, 12 Mod. 686.

10. Totterdeep *v.* Glazby, 2 Wils. 266. *Cf.* Graves *v.* Colby, 9 Ad. & E. 356; Piper *v.* Chappell, 4 Mees. & W. 624.

11. Woolley *v.* Idle, 4 Burr. 1951; Feltmakers *v.* Davis, 1 Bos. & P. 98.

12 Anacosta Tribe *v.* Murbach, 13 Md. [illegible]; Flint *v.* Pierce, 99 Mass. 68; Trustees *v.* Flint, 13 Metc. (Mass.) 543.

13. People *v.* Board of Trade, 80 Ill. 134; Hussey *v.* Gallagher, 61 Ga. 86; Dawkins *v.* Antrobus, L. R. 17 Ch. Div. 615; Lafond *v.* Deems, 81 N. Y. 507; s.c., 52 How. Pr. (N. Y.) 41; s. c., 1 Abb. N. C. (N. Y.) 318; Savannah Cotton Ex. *v.* State, 54 N. Y. 668; People *v.* St. George's Soc., 28 Mich. 261; Olery *v.* Brown, 51 How. Pr. (N. Y.) 92.

14. Where the ceremony of expulsion from a voluntary association involved an assault and battery upon a member unwilling to submit to the ceremony, it was held not sufficient to exonerate the defendant from a conviction for assault and battery. State *v.* Williams, 75 N. Car. 134.

15. Union Mut. F. Ins. Co. *v.* Keyser, 32 N. H. 313; Campbell *v.* Merch. & Farm. Mut. F. Ins. Co., 37 N. H. 35.

16. Bank of Holly Springs *v.* Pinson, 58 Miss. 421.

BY-ROAD.—"An obscure or neighborhood road in its earlier existence, not used to any great extent by the public, yet so far a public road that the public have free access to it at all times."[1]

BY-STANDER.—Under a statute authorizing tales to be returned from the bystanders, bystander is one actually in court.[2]

CABIN.—A small room; an inclosed place; a cottage, hut, or small house; an apartment in a ship for officers or passengers.[3]

CABINET.—I. A private room in which consultations are held.[4]

II. An advisory council of a sovereign or chief executive officer of a nation.[5]

III. A piece of furniture, consisting of a chest or box, with

1. Wood *v.* Hard, 5 Vr. (N. J.) 89. "A road used by the inhabitants and recognized by our statute, but not laid out." They are roads of necessity in newly-settled countries. Whether a road is a by-road is a question for the jury. Van Blarcom *v.* Frike, 5 Dutch. (N. J.) 316.

2. Simon *v.* Gratz, 2 P. & W. (Pa.) 412; s. c., 23 Am. Dec. 1.

3. Web. Dict.

A suit for forcible entry and detainer is for the possession of real property; and where the record in such a proceeding showed that the suit was for the possession of "a certain cabin situate, standing, and being upon the southwest quarter section," etc., *held*, that the action included not merely the cabin, but the ground inclosed by it. Harvie *v.* Turner, 46 Mo. 444.

A charter-party of a ship with two cabins, separated by a partition, one used as a dining-room and the other as a sitting-room, placed the whole ship, "with the exception of the cabin," at the disposal of the charterers. *Held*, that the charterers must pay freight beyond the amount of the charter-money for goods carried in either cabin. Leckie *v.* Sears, 109 Mass. 424.

4. Web. Dict.

5. Abbott's Law Dict.

In the United States.—In the organization of the United States government there is a Cabinet, whose action and influence are of great practical importance. Yet it exists as a collective body by custom and the will of the President merely. The constitution provides that the President may require the opinion in writing of the principal officer of each of the executive departments upon any subject relating to the duties of their respective offices, but leaves it wholly to Congress to say what executive departments shall be created; and it places the responsibility of official action upon the President or upon the heads of departments as individual officers, nowhere presenting them as a body authorized to decide questions by a vote of a majority of a quorum. There are at present seven executive departments created by Congress—the state, war, treasury, justice, post-office, navy, and interior. U. S. Rev. St. § 158.

A practice has grown up, commencing from the time of Washington's administration, of the heads of these departments meeting in cabinet council at the executive mansion by direction of the President, who presides over its deliberations and directs its proceedings. No record of its doings is kept, and it has as a body no legal authority. Its action is advisory merely. Bouvier's Law Dict.

Individually they (the Cabinet officers) are empowered to appoint numerous "heads of bureaus" and inferior officers to assist in transacting the business of their respective departments. The head of the so-called "department of agriculture" is not a member of the Cabinet. Rev. Stats. §§ 158, 159.

In England there is a similar council of high officers of state advisory to the king or queen in theory, though practically these officers in their several functions administer the government and hold the responsible charge. Abbott's Law Dict.

Where the maxim "the king can do no wrong" prevails the sovereign is not responsible, and the Cabinet (which is a select body of the privy council, *q. v.*) is. The members, called the ministers, are chosen by the sovereign, or rather the premier or prime minister is, and he selects the others—forms a government, as it is termed—from members of either House of Parliament. If displeased, the sovereign may dismiss the ministers, but the practice is for them to resign when unable to obtain for their measures a majority in the House of Commons. Rapalje & Lawrence's Law Dict.

drawers and doors. The word is also used to denote a valuable collection, the contents of such chest or box.[1]

CABLE.—A large, strong rope or chain, used to retain a vessel at anchor, and for other purposes.[2]

CADET [Fr. *cadet*, the younger or youngest son or brother [3]].—A youth under tuition and drill with a view to his becoming an army or navy officer.[4]

CALCULATED.—Suited or adapted by design.[5]

CALCUTTA.—The capital of the presidency of Bengal and metropolis of British India.[6]

The British Cabinet usually consists of from ten to fifteen members, and it is said to have been the invariable practice that the following ministers should be members: the prime minister, as first lord of the treasury; the lord chancellor; lord president of the council; lord privy seal; and chancellor of the exchequer; the secretaries of state (of late five), for the home department, foreign affairs, war, colonies, and India. In addition to these, from five to eight of the other ministers are usually admitted. Abbott's Law Dict.

1. **Cabinet or Collection of Curiosities.**—"Diamonds and pearls made up for wear will not pass by a devise of a cabinet or collection of curiosities, consisting of coins, medals, *gems* and *oriental stones*, and other valuable things. 'Valuable things' must mean *ejusdem generis*." Cavendish *v.* Cavendish, 1 Cox Ch. 77; 1 Brown, Ch. 467; State Cabinet of Natural History, Rev. St. of N. Y. (7th Ed.) 607.

Cabinet Ware.—*Held*, that an insurance on *cabinet ware* simply had reference to keeping the articles in a finished state; that no process of manufacture or completion of the articles was contemplated or covered by the policy. Appleby *v.* Astor Fire Ins. Co., 54 N. Y. 254.

Cabinet Ware-rooms.—The words "to be used as cabinet ware-rooms," following the description of the premises in a lease for years, do not imply a covenant on the part of the lessee not to use the premises for any other purposes than as cabinet ware-rooms. Brugman *v.* Noyes, 6 Wis. 1.

Cabinet Council.—A private and confidential assembly of the most considerable ministers of state to concert measures for the administration of public affairs, first established by Charles I. Wharton's Law Lexicon.

2. The proof and sale of chain-cables and anchors is regulated by 27 & 28 Vict. c. 27, and 37 & 38 Vict. c. 51.

A specification in a patent for a particular construction of windlasses stated that the object was "to hold without slipping a chain-cable of any size." Hastings *v.* Brown, 1 El. & Bl. 454.

Where a wire cable was laid across a river as a guy on which to run a ferry-boat, it was deemed not unlawful unless actually hazardous to the navigation of the river. The Vancouver, 2 Sawy. C. C. 381.

3. Web. Dict.

4. Rapalje & Lawrence's Law Dict.

In the United States laws, students in the military academy at West Point are styled *cadets;* students in the naval academy at Annapolis, *cadet midshipmen.* U. S. Rev. St. §§ 1309, 1512.

5. Gerrish *v.* Norris, 9 Cush. (Mass.) 170. "If he used language intended and *calculated* to convey to the plaintiff the idea that he waived all other objections, he would be estopped from setting up other objections." . . . If the party uses language suited or adapted by design (both of which are definitions by lexicography of the word 'calculated') to express to the hearer his purpose of waiver, the jury might find such waiver it would seem."

Hughes *v.* State, 9 Eng. (Ark.) 131. It is no violation of sec. 7, art. 3, div. 5, chap. 44 of Rev. St. p. 269, prohibiting the conveying to any person lawfully imprisoned any instrument, arms, or other thing *calculated* to aid his escape, for a person to convey to such prisoner an instrument of writing informing him that he has a friend and can be released from confinement.

Wootton *v.* Dawkins, 2 C. B. N. S. 413. To entitle plaintiff to recover under the statute it was not enough that the instrument was one *calculated* to create alarm, but that it must be *calculated* to destroy human life or inflict grievous bodily harm. . ."

6 **Calcutta Linseed.**—A bought of B a cargo of "Calcutta linseed, *tale quale.*"

CALENDAR, which originates from the verb *calare*, means the division of time into years, months, weeks, and days, and a register of them.[1] Also a list of cases arranged for trial or argument in court.

CALL.—Under a statute empowering a railway company to make "calls," the word "call" is capable of three meanings. It may either mean the resolution itself, or the time of its notification, or the time when the money is made payable. It must mean one of these three.[2] A "call" within the meaning of the Companies Clauses Consolidation Act, 8 Vict. c. 16, s. 16, means the resolution formally come to by those who have the power to determine that those who are bound to contribute, i.e., the shareholders, shall pay a certain instalment.[3] A call, in the language of stockbroking, is an option to claim stock at a fixed price on a certain day.[4]

Held, that the contract was not satisfied by the delivery of linseed, though coming from Calcutta, which contained so large an admixture of other inferior seeds as to have lost its distinctive character of Calcutta linseed. Wieler *v.* Schilizzi, 17 C. B. *619.

1. Rives *v.* Guthrie, 1 Jones L. (N. Car.) 86.

One Calendar Month's Notice.—In the computation of such notice under 24 Geo. II. c. 44, s. 1, the day of giving the notice and the day of suing out the writ are both to be excluded. Young *v.* Higgon, 6 M. & W. 49.

2. Railroad Co. *v.* Mitchell, 4 Exch. 543; s. c., 6 Eng. R. & Can. Cas. 238.

3. *Ex parte* Tooke, 6 Eng. R. & Can. Cas. 3. See Shaw *v.* Rowley, 5 Eng. R. & Can. Cas. 49, where counsel admitting that the call had been resolved upon by the directors, and a circular announcing it sent to each shareholder, Parke, B., remarked, "that, in this instance, constitutes the call." See also Newry, etc., R. Co. *v.* Edmunds, 5 Eng. R. & Can. Cas. 277, in which Parke, B., said: "It is clear that the word "call" is used in the act in two different senses. In one part it means the applications to the shareholders to pay, and in another the amount to be paid."

4. Biddle on Stock Br. 70; Pixley *v.* Boynton, 79 Ill. 353.

Call Forth, with respect to militia, is not synonymous with "employ in service." "To suppose them used to signify the same thing in the Constitution, and acts of Congress, would be to defeat the obvious purposes of both. The Constitution, in providing for the calling forth of the militia, necessarily supposes some act to be done before the actual employment of the militia; a requisition to perform service, a call to engage in a public duty. From the very nature of things, the call must precede the service; and to confound them is to break down the established meaning of language, and to render nugatory a power without which the militia can never be compelled to serve in defence of the Union." Houston *v.* Moore, 5 Wheat. (U. S.) 64. See also Duffield *v.* Smith, 3 S. & R. (Pa.) 593.

Called Lurchers, in an information against one for keeping dogs "called *lurchers*" to kill game, must be taken to indicate that they "were rightly so called, and that they *were* lurchers." Rex *v.* Earnshaw, 15 East, 458.

Called to Testify.—Where the defendant was introduced as a witness in his own behalf, it is competent for the plaintiff to cross-examine him as to certain transactions, such a witness being one "called to testify by the opposite party," within the meaning of the code. "The court below seems to have construed the phraseology of the section of the code above quoted to mean that neither party can, under any circumstances, call upon his adversary to testify as to any transaction with or statement by the testator or intestate, unless he makes such adversary *his witness*. We cannot yield our assent to this interpretation. The defendant having been introduced and examined as a witness in his own behalf, it was competent for the plaintiffs to ask the defendant, on cross-examination, the question which was propounded to him, and he should have been required to answer it; for he was then *called* by the opposite party, within the meaning of the statute, to testify as to a transaction with the plaintiff's intestate." Thomas's Adm'x *v.* Thomas, 42 Ala. 120.

On Call.—There is no legal distinction between an obligation payable "on de-

CALUMNY.—An unjust prosecution or defence of a suit. See note 1.

CAMEO. (See also JEWELRY.)—Any carved work, in relief; usually applied to precious stones, but also used generally.[2]

CAMPHENE. (See also BURNING-FLUID; FIRE INSURANCE.)—A chemical compound consisting of eight parts of hydrogen and ten of carbon; used for burning in lamps, and also as the common solvent in varnishes.[3]

mand" or "when demanded," and one payable "on call" or "when called for." In each case, under the laws of *Virginia*, the debt is payable immediately, and the obligors are bound to pay interest from the date of the obligation. 22 Gratt. (Va.) 612.

Ordinary Calling.—See ORDINARY.

1. In Lanning *v.* Christy, 30 Ohio St. 117, Wright, J., says: "There was a word called "calumny" in the civil law, which signified an unjust prosecution or defence of a suit, and the phrase is still said to be used in the courts of Scotland and the ecclesiastical and admiralty courts of England, though we do not find cases of the kind in the reports."

2. In an action against the collector of the port of New York to recover back an alleged excess of duty paid, under protest, on "coral cameos," not set, the court, Nelson, J., said: "The cameos in question were charged with a duty of twenty-four per cent *ad valorem*, under the act of March 3d, 1857 (11 U. S. Stat. at Large, 192), which reduces the duties imposed by Schedule C of the act of July 30th, 1846 (9 U. S. Stat. 44). The plaintiffs claim that the proper duty was only eight per cent *ad valorem*, under Schedule G of the act of 1846, as amended by the act of 1857, on the ground that the article is 'cameos, not set.' It is invoiced as 'coral cameos.' Schedule C of the act of 1846 imposes a duty on 'coral, cut or manufactured.' The article in question is coral, cut into the form of a cameo, and not set; and the question is whether the commercial designa- of the article which prevailed at the time of the passage of the act of 1846, shall govern, or the construction of the words of the statute. I am inclined to think the latter. As the article is 'coral, cut or manufactured,' although it may have had a fixed designation previously, from its shape and fashion, yet it was quite competent for Congress to designate it by a specific material description, which necessarily takes it out of the one known to the trade. This has been a not unusual mode adopted by Congress for the very purpose of taking away the power of fixing any other designation in commercial language. Inasmuch as the article comes within the very words of the specific description, I do not see that the evidence of the commercial designation can be allowed to prevail." Bailey *v.* Schell, 5 Blatchf. (U. S.) 195.

3. Where a policy of insurance against loss by fire to goods in a store contained a provision that in case the premises containing the goods should be appropriated, applied, or used for the purpose of storing or keeping therein any of the articles included in the memorandum of special rates in the terms and conditions annexed, unless by special agreement, the policy should be void; and under the class of special rates, after an enumeration of articles, there was a statement that *camphene* when used in stores, subjected the goods therein to an additional charge of ten cents on the hundred dollars, and that the premium for such use must be indorsed in writing on the policy,—it was held that the use of camphene to light the store was prohibited, and that its use without a compliance with the special provision in reference to it avoided the policy. Westfall *v.* Hudson River Fire Ins. Co., 12 N. Y. 289; Mead *v.* Northwestern Ins. Co., 3 Selden (N. Y.), 530.

But the use of camphene for cleaning type, a purpose customary among printers, is not a violation of a fire policy upon the printing and book materials and stock in a building "privileged for a printing-office, bindery, and bookstore," the printed conditions of the policy describing booksellers' stocks as extra-hazardous, subjecting camphene on sale and printers of books to special rates, and prohibiting the use of camphene, spirit-gas, or burning-fluid without permission, and requiring such conditions to be indorsed on the policy. Harper *v.* Albany Mutual Ins. Co., 17 N. Y. 194; Harper *v.* New York City Ins. Co., 22 N. Y. 441.

A stipulation in an insurance policy against "keeping or using camphene,

CAMP-MEETING. (See also ASSEMBLE; ASSEMBLY; MEETINGS.) —A temporary gathering of a large number of persons intents or booths for the purpose of holding frequent religious services.[1]

CAN.—An auxiliary verb, used as part of the verb *to be able*, to denote power and possibility.[2]

spirit-gas, burning-fluid, or chemical oils" is not violated by the use of a fluid for illuminating purposes not in its nature like camphene or spirit-gas. Wheeler *v.* American Central Ins. Co., 6 Mo. App. 235.

A policy of insurance against fire upon a steamboat provided that "if gunpowder, camphene, spirit-gas, naphtha, benzine or benzole, chemical, crude, or refined coal or earth oils be kept or used on the premises without written consent," the policy should be void. In an action on the policy it appeared that kerosene oil was used to light the cabin and saloon of the boat after such policy was issued. *Held*, that this did not void the policy and prevent a recovery. Morse *v.* Buffalo Fire and Marine Ins. Co., 30 Wis. 534; s. c., 11 Am. Rep. 587.

1. In a criminal complaint for a violation of the Public Laws of Rhode Island by selling, etc., within one mile of the place of holding a camp-meeting, the court said: "We think a camp-meeting is *ex vi termini* a religious meeting, and therefore, inasmuch as the society named is alleged to be a religious society, that it was not necessary to allege that the meeting was held for 'a purpose connected with the object for which the society was organized,' that being implied." State *v.* Read, 12 R. I. 135

The right to pass such acts forms part of the police power of the State, and the acts are constitutional. Com. *v.* Bearse, 132 Mass. 542; State *v.* Read, 12 R. I. 137.

The various statutes prohibiting the disturbing of religious meetings protect camp-meetings. The construction of them, however, has not been uniform. Thus in *Missouri* it has been held that it must appear that the acts charged as constituting the offence took place when the congregation were assembled for worship. State *v.* Edwards, 32 Mo. 548. And that an indictment for disturbing a congregation met for religious worship, etc., is not sustained by evidence of a disturbance after the congregation had been dismissed. State *v.* Jones, 53 Mo. 486. See Richardson *v.* State, 5 Tex. App. 470. Nor where the proof shows that the congregation, though disturbed, was assembled exclusively for business purposes, even though the proceedings were opened with religious exercises. Wood *v.* State, 11 Tex. App. 318.

But if the business for which the congregation is assembled is connected with their interests as a church, as the trial of an offending member, they are within the act. Hollingsworth *v.* State, 5 Sneed (Tenn.), 518.

On the other hand, in *Alabama* it has been held that to constitute an interruption or disturbance of an assemblage of people met for religious worship it is not necessary that the disturbance should be made during the progress of the religious services; if made after the conclusion of the services and the dismissal of the congregation, but while a portion of the people still remain, and before reasonable time has elapsed for their dispersion, the offence is complete. Kinney *v.* State, 38 Ala. 224.

So in *North Carolina* it is sufficient if the congregation are actually assembled for the purpose of worship, and are prevented therefrom by the acts of the defendant, although no act of worship is being performed at the time of the disturbance. State *v.* Ramsay, 78 N. Car. 448. But the people must be actually assembled. It is not sufficient that they are gathering and coming together. State *v.* Bryson, 82 N. Car. 576. *Contra*, Lancaster *v.* State, 53 Ala. 398, where it was held that the protection of the act extended to the assemblage when in the act of gathering together at the place appointed for worship while the exercises were in progress, and until there is a dispersion of the persons who have come together and they cease to be an assemblage or congregation. See Kinney *v.* State, 38 Ala. 224; Dawson *v.* State, 7 Tex. App. 59; Williams *v.* State, 3 Sneed (Tenn.), 313; State *v.* Lusk, 68 Ind. 264.

In *Virginia* an indictment for disturbing a camp-meeting was sustained though the disturbance took place at night after the religious services were closed for the day and the congregation had retired to rest. Com. *v.* Jennings, 3 Gratt. (Va.) 624.

But the camp-meeting must be held on a piece of ground set apart for that purpose. Assemblages gathered within a house or place of worship are within the act, but not upon public squares and streets. Wilcox *v.* State, 64 Mo. 386.

2. It has been held that a note for

CANADA.—A British province directly north of the United States.[1]

money, "which I promise to pay as soon as I *can*," is due *in presenti*; the court, Boyle, J., saying: "A promise to pay as soon as the debtor possibly *can* is, in the contemplation of law, a promise to pay presently. The law supposes every man able to pay his debts; and if the ability to pay was a question to be tried, the only practicable mode of trial is *per* execution; and of this it is not yet too late for the defendant in the court below to have full benefit." Kincaid *v.* Higgins, 1 Bibb (Ky.), 396.

Where an act which read, "A party may be examined on behalf of his co-plaintiff or co-defendant as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment *shall* be rendered," was amended so as to read "as to which a separate and not joint verdict or judgment *can* be rendered," it was held that the meaning was not altered; that the prior act could not mean that the competency of the witness or the admissibility of the testimony is to be determined according to the verdict or judgment afterwards to be rendered. Beal *v.* Finch, 11 N. Y. 128.

Where a declaration set forth that the alleged promise was made "in consideration that the plaintiffs would delay the service of the execution," etc., and on the trial a writing was offered in evidence which read "if said execution *can* be delayed," etc., the defendants claimed that there was a variance, and that the writing contained no promise on the part of the plaintiffs to delay the service. But the court, Jackson, J., held otherwise, saying: "As to the other supposed variance, we are equally satisfied that the declaration comports with the legal effect of the writing. The expression 'if the execution *can* be delayed, as introduced in this paper, is equivalent to saying 'if you will delay it,' or in 'consideration that you will delay it.'" Lent *v.* Padelford, 10 Mass. 230.

Best You Can.—In an action to recover damages for a loss arising from the repudiation of a contract under a telegraphic order to "buy one hundred and fifty bales of cotton *best you can*," with a limit of forty-two cents per pound, the court, Ames, J., said: "The defendant's instructions were substantially to buy 'the *best you can*,' a form of expression which apparently left to the plaintiffs the largest possible discretion to buy as opportunities should offer, at prices not exceeding the prescribed limit." Marland *v.* Stanwood, 101 Mass. 470.

Cannot.—The provisions of the *Pennsylvania* statute of 18th March, 1775, § 6, "that where the grantors and witnesses of any deed are deceased, or *cannot be had*, it shall be lawful," etc., are sufficiently complied with when it has been proved that no such person as the subscribing witness could be heard of although diligent search had been made. Powers *v.* McFerran, 2 S. & R. (Pa.) 44.

Where a *mandamus* was applied for to appoint separate overseers for the several districts of a certain parish under the St. 13 & 14 Car. II., c. 12, § 21, which provides for cases in which the inhabitants of counties, by reason of the largeness of their parishes, "have not, *nor cannot*," reap the benefit of the statute of 43 Eliz. in regard to the provision for the poor, on the ground that if a parish had once begun to act as this parish had done for a long course of years, both before and at the time of passing the stat. 13 & 14 Car. II., under that act, it was not competent for the inhabitants by any agreement to revert back again to the provisions of the stat. 43 Eliz., the court refused the *mandamus*, Ellenborough, C. J., saying: "There is nothing in the language of the act which imports that parishes were, in this respect, then immediately to adopt that mode of maintenance for their poor from which they should not afterwards be at liberty to depart. No decided case has excluded this provision from receiving a prospective construction. The words 'have not' were of themselves sufficient to cover any then actually existing case in which parishes did not reap the benefit of the statute 43 Eliz. The word 'cannot,' though in its strictest grammatical sense it applies properly to present time, yet familiar instances occur in which the word is used prospectively; and as the varying circumstances of parishes may make the provisions of the statute of Car. II. as necessary in respect to future cases as those which existed at the passing of the act, we think sound construction requires that it should be deemed applicable to both descriptions of cases. . . . According to the construction of the statute now adopted by us, the word 'cannot' must be read as 'may not.'" King *v.* Palmer, 8 East, 416.

1. **Canada Money.** — A note for the payment of money, made, negotiated,

CANALS. See HIGHWAYS; WATERS AND WATERCOURSES.

CANCEL—CANCELLING—CANCELLATION. (See also DEEDS; REVOCATION OF INSTRUMENTS; WILLS.)—To cross and deface[1]

and payable in the United States, in "Canada money" is not a negotiable note within the meaning of the statute relative to bills of exchange and promissory notes, inasmuch as Canada money is not current here. Thompson *v.* Sloan, 23 Wend. (N. Y.) 71.

Canada Currency.—But a note made and indorsed in Michigan, and payable in *Canada* "in Canada currency," is payable in money, and is therefore negotiable. Black *v.* Ward, 27 Mich. 191.

1. On the question as to whether a will had been revoked by *cancelling*, the court, Barrett, J., said: "But what amounts to *cancelling?* How, with reference to the text of the instrument, must the act be done,—not as to the shape or character of the marks, but *where* must they be located,—is the main point of debate in the present case. The proponent claims that the cancelling marks must be made upon some part of the written text of the will. The Latin verb from which the term 'cancel' is derived means to make lattice-work, and the corresponding noun in Latin, in the plural, *cancelli*, signifies lattice-work. How this term came to be applied to marks made upon written instruments, for the purpose of destroying their validity, is obvious both from general and judicial history not ony as taught by the books, but as derived from observation. To draw cross-lines over the face of a written instrument has been, and is, a common mode of showing the intent thereby to make an end of it as an instrument in force. In earlier times when the ability to write was possessed by very few, the great mass of persons of all grades, from the highest lord to the lowest peasant, could manifest their intent with pen and ink only by unlettered marks. While they would be dependent on the few skilled in the art to draw their instruments of contract in making disposition of their property, they could and did resort to various modes by which, without *clerkly* aid, to make an end of their validity. From the fact that cross-marks were so easily made, and when made upon the face of a written instrument were so significant that thereby the maker of them designed to put an end to the continuing validity of the instrument, this mode was recognized and adopted into the statute in common with tearing, burning, and obliterating, as one by which wills might be revoked. In some instances this mode might be preferable to either of the others, as when it should be desirable to preserve the legibility of the entire instrument, which might not happen as the result of burning, tearing, or obliterating. While, therefore, a common and customary mode of manifesting the intent to abrogate the instrument by drawing cross-lines over the face of it gave rise to the use of the term 'cancel,' still the entire judicial history of the subject shows that that manner of marking an instrument is by no means essential in order to answer to the full force and effect of the term in its legal sense. The net result of all the cases and all the text books, as well as the reason of the thing and the appropriate analogies, seems to be this: that, where the instrument is so marked by the maker of it as to show clearly, whenever it is produced, that the act was designed by him to be a *cancelling*, that act becomes effectual, by force of the statute, as a revocation of the will, by *cancelling*. Warner *v.* Warner's Estate, 37 Vt. 356, 361.

"Revocation by *cancellation*, then is not to be understood to mean exclusively drawing crossed lines upon the paper, but it means any act done to it which in common understanding is regarded as *cancellation* when done to any other instrument. Undoubtedly it must be an act done to the will itself, and it must be done *animo cancellandi*." Evans's Appeal, 58 Pa. St. 238.

Under the English Statute of Frauds, providing "that no devise in writing of lands shall be revocable otherwise than by some other will, or by burning, *cancelling*, tearing, or obliterating the same by the testator, etc.," the act of tearing, etc., must be complete; and where a testator after tearing his will puts the several pieces aside, and expresses his satisfaction that no material part of the writing has been injured, and that it is no worse, it was held to have been properly left to the jury to say whether he had completely finished all that he intended to do for the purpose of destroying the will. Doe *dem.* Perkes *v.* Perkes, 3 B. & Ald. 489.

Cancellation of a Will is not a revocation thereof, under the words "otherwise destroying" the same, in the Stat. 1 Vict. c. 26, § 20, that statute having omitted the word "cancelling" which appeared

a writing; to annul or destroy[1] by cross marks or other obliteration, or by burning or tearing the material on which the writing is.

in the Statute of Frauds. Here the court, Sir Herbert Jenner, said: "It is admitted that prior to the first of January, 1838, this would have been a good revocation, for, under the old law, *cancellation animo revocandi* was a mode of revoking a will. The Act 1 Vict. c. 26, however, has made a very considerable alteration in the testamentary law. . . . *Cancellation* and *revocation* are different terms, though sometimes confounded, *cancellation* being an equivocal act. It appears to me that the legislature, having advisedly omitted *cancelling* amongst the modes of revocation, and substituted words of more equivocal meaning, cannot have intended that striking through with a pen should have been a mode of revocation, and that if they did consider *cancellation* to be a mode of revocation, they would have taken care to render their meaning clear. Stephens *v.* Taprell, 2 Curt. 458.

Where a will has been revoked by *cancelling*, it cannot be thereafter revived by parol declarations of such a purpose or desire on the part of the testator. Warner *v.* Warner's Estate, 37 Vt. 356.

In *Pennsylvania*, under the Wills Act, a will may be revoked by cancellation. Evans's Appeal, 58 Pa. St. 238.

Cancelling Deeds.—The cancellation of a deed will not divest property which has once vested by transmutation of possession. Co. Litt. 225 b, note 136, citing 1 Rep. in Ch. 100; Gilbert Rep. 236; Lewis *v.* Payn, 8 Cow. (N. Y.) 71; Holbrook *v.* Tirrell, 9 Pick. (Mass.) 105; Hatch *v.* Hatch, 9 Mass. 311; Marshall *v.* Fisk, 6 Mass. 32; Jackson *v.* Chase, 2 Johns, (N. Y.) 84; Bolton *v.* Carlisle, 2 H. Bl. 259; Roe *v.* Archbishop of York, 6 East. 86. See 4 Wheel. Am. C. L. 273.

A conveyed a piece of land to B in fee simple. B went into possession and paid about half the purchase-money, but, finding himself unable to pay the residue, sent back the deed, which had not been recorded, to A to be cancelled. A went again into possession, and gave up the notes for the residue of the purchase-money; C, a creditor of B, then levied an execution on the land, as B's property, and brought ejectment against A for it. *Held*, that the title did not revest in A by the return and cancellation of the deed, and that C was therefore entitled to recover. Botsford *v.* Morehouse, 4 Conn. 550; Gilbert *v.* Bulkley, 5 Conn. 262.

But as between the original parties the case is different; thus an unrecorded deed of lands voluntarily given up and cancelled by the parties to it with intent to revest the estate in the grantor as between them and as to all subsequent claimants under them, operates as a conveyance and revests the estate in the grantor. Tomsnn *v.* Ward, 1 N. H. 9.

A mere agreement, however, to cancel a deed, without actually cancelling it cannot have this effect. Farrar *v.* Farrar 4 N. H. 191; Dana *v.* Newhall, 13 Mass. 498; Cross *v.* Powell, Cro. Eliz. 483.

Cancellation of Stamps.—A neglect to cancel the stamps on an instrument by initials and the date indorsed thereon will not invalidate the instrument. Ballard *v.* Burnside, 49 Barb. (N. Y.) 102.

Where a promissory note made by three or more has the requisite stamps upon it, and is cancelled only by the initials of the first in order of the signers, with the date of the instrument, this is a sufficient cancellation within the meaning of the United States Revenue Law. Spear *v.* Alexander, Exr., 42 Ala. 572.

1. An agreement by one person to cancel the indebtedness of another to a third person is an agreement to pay it. In this case the court, Johnson, J., said: "As a stranger having no interest in the indebtedness, the only way in which he could cancel it would be by payment, and the agreement to cancel must be held to include the promise to do whatever should be necessary to effect the cancellation. To cancel is to blot out or obliterate; to annul or destroy; and as this could only be accomplished lawfully by a third person, by payment, it is clearly an undertaking to pay." Auburn City Bank *v.* Leonard, 40 Barb. (N. Y.) 119, 134.

Where A and B gave a sealed note to C, and A afterwards gave a bond and mortgage to C for the amount due on the note, in consideration of which C covenanted to procure and cancel the note, it was held that though the bond and mortgage were not an extinguishment of the note, yet the covenant made with A enured to B, and was a covenant not to sue, which amounted to a release of the note. Phelps *v.* Johnson, 8 John. (N. Y.) 54; s. c., 7 Wheel. Am. C. L. 514.

So where one entered into a contract for the purchase of land and paid part of the purchase-money, and subsequently the parties indorsed on the contract this agreement, to wit: "For value received, we hereby cancel the annexed and within agreement, and mutually agree and dis-

CANDIDATE. (See also ELECTIONS; LIBEL; LIBERTY OF THE PRESS; SLANDER.)—One who offers himself, or is offered by others, to the suffrages of the electors.[1]

charge each other from all the covenants and agreements therein contained; and the said Winton, the purchaser, hereby surrenders possession of the within described premises to said Spring, in a suit to recover the purchase-money paid,"—the court, Baldwin, J., said: "The agreement of cancellation evidently was intended to effect a complete settlement in regard to the subject; it discharges the parties from all covenants and agreements in the original contract, and provides for a surrender of the premises. Nothing is said or done in reference to the refunding of the $4000. If the intention was to place the parties *in statu quo*, and this were supposed to be effected by the use of the word 'cancel,' as equivalent to the word 'rescind,' it is probable that language more unequivocal would have been employed. The latter clause of the agreement in respect to the possession would be tautological in this view; for the restoration of possession would follow from the use of the word 'cancel' in the first line. Besides, it is to be supposed that the party in possession, having paid his money, would not abandon the possession until he got a return of it, or some provision was made for securing it. He would scarcely have left so large an amount a matter of open account. Nor is it probable that the question as to the rents and profits of the land would be left unliquidated. It is much more probable that when parties come to an arrangement of a business matter they settle all the terms of the contract than that they leave them unadjusted. The word 'cancel' applied to the agreement, under the circumstances, means no more than 'doing away with' an existing agreement upon the terms and with the consequences mentioned in the writing. What is not said is excluded; and whatever was meant to be obligatory was expressed." Winton *v.* Spring, 18 Cal. 451.

1. Where in a *qui tam* action of debt under the statute for bribery at an election verdict was given for the plaintiff; on a motion that verdict be entered for the plaintiff because, *inter alia*, it did not appear by any evidence given "that Lord Egmont (who was charged to be a candidate, and for whom these persons, alleged to have been bribed were to give their votes) was there *declared a candidate*," Lord Mansfield, C. J., said: "*Candidate* is a vague term; no certain idea is fixed, by law, to it. But Mr. Lockyer was certainly a candidate; and this was a bribe to induce White to vote for him, at least. Surely asking a vote for a man is enough to make him a candidate. Lockyer was clearly a candidate himself; and the bribe was, 'to vote for *him and his friend.*'" Combe *v.* Pitt, 3 Burrow, 1586, 1590. And in the same case reported by Wm. Blackstone: "The second objection goes upon the vague idea of what is a *candidate* previous to the day of election. The poll is then the only evidence. The House of Commons in the case of Gore of Tring, candidate for Bucks, determined that nothing was evidence of being a candidate but the poll-books. Before the time of election any one is a candidate for whom a vote is asked. This very fact makes the person in whose behalf the bribe was given a *candidate*." Combe *v.* Pitt, 1 Wm. Blackstone, 523.

But in holding that a person who is nominated and elected to serve in Parliament for the city of Westminster without being present at, or in any way interfering himself, or by his agents, with the election, or holding himself out, or authorizing any one else to hold him out as a candidate, but afterwards takes his seat in the House of Commons, is not chargeable under the stat. 51 G. III, c. 126 with the expenses of the hustings, Lord Ellenborough, C. J., said: "I own, upon consideration of this act of Parliament, I cannot bring myself to doubt what is the natural sense and meaning of the word 'candidate' as it is used by the legislature. The legislature has directed that convenient booths shall be erected by the bailiff for holding the election; and there can be no doubt that they assumed that upon every occasion of an election there would be found a 'candidate or candidates' in the ordinary sense of that word; that is, persons offering themselves to the suffrages of the electors. That I take it is, strictly speaking, the correct sense of the word 'candidate.' Therefore a person cannot be in that sense of the word a 'candidate' by the mere act of others, who propose him without his assent. The legislature, indeed, assumed that it would always be the case of every person who should be proposed, that he would be so far assenting as to answer the description of a candidate, and therefore they thought

CANDLES.—A wick composed of linen or cotton threads, and dipped or drawn through tallow, wax, spermaceti, or similar substances, so as to form a cylindrical body when hardened; used to furnish light.[1]

CANNOT. See CAN.

CANON.—I. A rule, law, or ordinance in general;[2] particularly a rule or precept of ecclesiastical law.[3]

II. A dignitary of the English Church; a person possessing a prebend or revenue allotted for the performance of divine service in a cathedral or collegiate church.[4]

III. (*Spanish Law.*) "The annual charge or rent which is paid on recognition of the *dominium utile* by the person who holds the *dominium utile*."[5]

CANT, or **LICITATION.**—A mode of dividing property held in common by two or more persons.[6]

it sufficient to impose the burthen of recompensing the bailiff on persons answering that description. But a case has arisen not within their contemplation; for here there is not any evidence that the defendant tendered himself in any way as the object of choice; but he was merely passive; the electors of themselves having brought him forward without any consent on his part. The question then is whether the legislature intended to throw on such a description of person, whom we must take to be an unwilling candidate, the charge of making this reimbursement. The legislature have not so said; they said only that the expenses shall be defrayed by the candidate, that is, by the person who offers himself. And really there might be infinite hardship in imposing this burthen on any others. Suppose a person from motives of spleen or in jest should think fit to put forward another as a candidate, shall it be in his power to cast so heavy a burthen on the other because he may choose to indulge his malice or pleasantry? I do not see anything in the act of Parliament which makes it susceptible of a construction leading to so mischievous a result, or which affords a reason for extending the word 'candidate' beyond its ordinary import." Morris *v.* Burdett, 2 M. & S. 212.

On the other hand, it has been held in Canada that a candidate for office who is proposed and seconded at the nomination meeting can only withdraw from his candidature with the consent of his proposer and seconder and of the electors present; the court saying: "It seems to me very clear, whatever may be the derivation of the word, that a candidate in the sense of the statute is one put forward for election, no matter whether with or against his own will; from which it would seem to follow that he cannot, without the consent of others, resign. His assent is not necessary to his candidature, but he must have a proposer and seconder. He need not be present at the meeting, and his dissent from the proceeding is unavailing." Reg. *ex rel.* Coyne *v.* Chisholm, 5 U. C. Pr. Rep. 328.

1. **Candles** one-eighth made are within the meaning of the statute 11 Geo 1. ch. 30, § 30, prohibiting candle-makers to mix unweighed with weighed candles. Atyt.-Gen. *v.* Barrell, 1 Younge & Jerv. 495.

The business of a tallow-chandler is a nuisance for which an action will lie. See 1 Hawk. P. C. (Curw. Ed.) 694, § 10; Morley *v.* Pragnell, Cro. Cas. 510; Allen *v.* State, 34 Tex. 230. *Contra*, Aldred's Case, 9 Co. 57 b.

2. Webster; Abbott's Law Dict.

E.g., canons of descent or inheritance, the legal rules by which inheritances are determined, and according to which estates are transmitted by descent from the ancestor to the heir. 2 Bl. Com. 208; 4 Kent. Com. 374.

3. In this sense canon is defined by Rapalje & Lawrence (L. Dict.) to be (1) any rule of the *jus canonicum* contained in the *Decretum Gratiani*, or (2) a rule of ecclesiastical conduct promulgated by the Convocation of the Church of England, whether it has legal force or not.

4. 1 Bl. Com. 382; 2 Steph. Com. 67.

All members of chapters, except deans, in every cathedral or collegiate church in England are to be styled Canons according to 3 & 4 Vict. c. 113, s. 1.

5. Hart *v.* Bennett, 15 Cal. 556.

6. It is a judicial sale made at the

CANVAS.—A coarse cloth made of hemp or flax.[1]

CAPABLE.—Endued with power competent to the object; qualified for; susceptible of.[2]

CAPACITY.—Power; competency; qualification; ability, power or qualification to do certain acts.[3]

request of the parties, and it may be avoided by the consent of all those interested, in the same manner in which any other contract or agreement may be avoided, which is entered into by consent. Hayes *v.* Curry, 9 Mart. (La.) 87. See Webster.

1. Webster.

In a revenue statute "floor-cloth canvas" and "oil-cloth foundation" were held to mean the same thing, and not burlaps, but a thing entirely distinct and different from that article. Arthur *v.* Cumming, 1 Otto (U. S.), 362.

2. Webster.

An unripe growing crop is personal property *not capable of manual delivery*, and is subject to attachment as such. Raventas *v.* Green. 57 Cal. 254.

Capable of Raising a Weight of 2000 lbs. without Risk, in a contract, means having strength or power enough to lift and sustain that weight during the lifting, and it does not amount to a stipulation that that capacity will exist with the application of any specified power. Hamilton *v.* Myers, 24 U. C. C. P. 309.

3. "The *test of capacity* to make an agreement or conveyance is that a man shall have the ability to understand the nature and effect of the act in which he is engaged and the business he is transacting." Eaton *v.* Eaton, 8 Vr. (N. J.) 113.

In any Office or Capacity.—In a statute providing for fixing the salaries of deputy collectors, by which it was provided that no such deputy should receive more than a certain amount "for any services he may perform for the United States in any office or capacity," the true intent of the last clause is to limit the emoluments of the deputy collector in that office, and "to make no allowance to him on account of any incidental services he may perform, or emoluments he may receive beyond that sum." "In any office or capacity" is equivalent to "in any *such* office or capacity." United States *v.* Morse, 3 Story (C. C.), 87.

Misdemeanor in his Professional Capacity.—This expression in a statute in reference to attorneys-at-law is not used in the technical sense of offences punishable by fine and imprisonment in jail, but as equivalent to professional misbehavior. *In re* Bowman, 8 Cent. L. J. 250; s. c., 7 Mo. App. 569.

Fiduciary Capacity.—Under an act providing process of arrest in an action for money had and received by "a factor, agent, broker, or other person in a fiduciary capacity," only those are subject to arrest "who received moneys purely in a fiduciary capacity as simple agents, to apply it as directed or agreed." All those are excluded "who may have a personal interest in such money or its use, and a right to control it independently of any appropriation of it according to instructions of the owner, or where liability for repaying such moneys grows out of a transaction in which credit appears to have been given to the pecuniary responsibility of the recipient rather than confidence placed in his personal character." McBurney *v.* Martin, 6 Robt. (N. Y.) 502.

Accordingly the following have been held to be within the act: A commission merchant. Schudder *v.* Shiells. 17 How. Pr. (N. Y.) 420; Ostell *v.* Brough, 24 How. Pr. (N. Y.) 274. An agent employed to collect moneys for his principal. Stoll *v.* King, 8 How. Pr. (N. Y.) 298. An agent employed to sell goods, who was to account weekly. Turner *v.* Thompson, 2 Abb. Pr. (N. Y.) 444. A factor who receives money to be invested in goods, with the condition that he is not to use it for any other purpose. Noble *v.* Prescott, 4 E. D. Smith (N. Y.), 139. An auctioneer who receives goods for sale under an agreement that he is to receive as compensation all obtained over a certain price. Holbrook *v.* Homer, 6 How. Pr. (N. Y.) 86. One intrusted by the plaintiffs with their acceptances of his drafts, to be procured by him to be discounted and the proceeds to be returned, for which service he was to receive a commission. Wolfe *v.* Brouwer, 5 Robt. (N. Y.) 601. A broker employed to buy and sell gold and stocks, with whom a deposit had been made to secure him against loss by such transactions, who had rendered an account showing a balance due by him, but who on demand had refused to pay it. Clark *v.* Pinckney, 50 Barb. (N. Y.) 226. An assignee for the benefit of creditors who had received money, of which by the

CAPE.—The termination of a neck of land extending some distance into the sea beyond the common shore.[1]

CAPIAS (see ARREST; BAIL; EXECUTION; WRIT).—*Capias,* take. Writ for the arrest of a defendant in a civil action. (See Bouvier Law Dict.)

CAPIAS AD RESPONDENDUM (abbreviation, *Capias.*)—A writ by means of which under the common law the body of a defendant in a civil action was taken into custody for the purpose of compelling him to answer the complaint of his adversary.[2]

"Rex —— vicecomiti salutem!

"Præcipimus tibi *quod capias* —— Si fuerit in balliva tua, et eum salvo

terms of the assignment the plaintiff was entitled to a share, which the assignee, though requested, had refused to pay over. Roberts *v.* Prosser, 53 N. Y. 260. And where goods were consigned to one firm for sale and another firm guaranteed such notes as the first should take in payment for the goods, these notes to be placed in their hands for collection, the latter firm were held to be in a fiduciary capacity. Chaine *v.* Coffin, 17 Abb. Pr. (N. Y.) 441. See also Angus *v.* Dunscomb, 8 How. Pr. (N. Y.) 14.

The following are not within the act: One who was to take charge of a ship, pay the expenses of every kind connected with her, sell her, pay the expenses of sale, and account for the balance which he might owe the owner after deducting the payments of all kinds made by him and whatever the owner had previously owed him. Goodrich *v.* Dunbar. 17 Barb. (N. Y.) 644. A banker who is allowed to use moneys deposited and collected. Bussing *v.* Thompson, 15 How. Pr. (N. Y.) 97.

Under a similar act, a son who in the course of the management of his father's farm sold a portion of the stock and retained the proceeds was held to be acting in a fiduciary capacity, when suit was brought against him after his father's death, by those interested in the latter's estate. Morris *v.* Ingram, 13 Ch. Div. 338.

The U. S. Bankrupt Act of 1841 provided that all persons owing debts which had not been created in consequence of defalcation as a public officer, or as an executor, administrator, guardian, or trustee, or while acting in another fiduciary capacity, should, on complying with its requisites, be entitled to discharge under it. Under this act it was held that the cases enumerated were "not implied but special trusts, and the 'other fiduciary capacity' mentioned must mean the same class of trusts. The act speaks of technical trusts and not those which the law implies from the contract." A factor is consequently not within the meaning of the act. Chapman *v.* Forsyth, 2 How. (U. S.) 202; Hayman *v.* Pond, 7 Metc. (Mass.) 328. Nor one who receives notes for collection and retains amounts collected. Bank *v.* Buckner, 2 La Ann. 1023. A collector of city taxes is. Morse *v.* Lowell, 7 Metc. (Mass.) 152.

The corresponding section (33) in the Bankrupt Act of 1867 limited the exception to persons "while acting in a fiduciary capacity." In construing this act Chapman *v.* Forsyth was followed in Cronan *v.* Cotting, 104 Mass. 245. But one who received goods to be sold on commission and was to transmit the proceeds to his principal, less his commissions, was held to be acting in a fiduciary capacity in Treadwell *v.* Holloway, 46 Cal. 547.

1. Webster.

"The terms 'beyond the Cape of Good Hope' (in tariff acts) are employed as descriptive of the locality of certain countries, not their relative position with respect to ports of import. They are used to avoid the necessity of enumerating the countries which lie east of the Cape. 'Beyond the Cape' and 'east of the Cape' are often used in the acts of Congress as equivalent expressions." Hadden *v.* Collector, 5 Wall. (U. S.) 107; Campbell *v.* Barney, 5 Blatchf. C. C. 221.

Countries beyond the Cape of Good Hope are those with which the United States, at the time of the passage of the act, ordinarily carried on commerce by passing around the cape. The existence of the Suez Canal furnishes no indication of an intention by Congress to give a new significance to the expression. Powers *v.* Comly, 11 Otto (U. S.), 789.

2. Bouvier, Tomlins, Wharton, and Abbott Law Dict.; Sellon Pr., Introduction; Archb. New Pr. 216; Chitty Pr. pt. iii. chap. 8; 1 Tidd Pr. 128.

custodias, ita quod habias corpus ejus coram justiariis nostris apud Westmonasterium —— tali die —— *ad respondendum:* de placito quod," etc. [1]

The history of the writ is inseparably connected with the history of the law of arrest in civil cases. At common law a person could not be arrested except in cases of injury committed *vi et armis*,[2] but by successive enactments the right of arrest came to be allowed in all actions for the recovery of money, damages, or personal property.[3] It is now limited to cases involving fifty pounds or more, where the defendant is about to leave England to the serious prejudice of the plaintiff's right of recovery.[4]

Originally the right of *capias* issued only in the event that the defendant failed to appear in response to the original writ, and was part of the mesne process to compel his appearance. In the course of time, however, it became the original writ in all cases where the right of arrest was allowed.[5] At present suits cannot be commenced in this manner. The original writ of *capias* has been abolished, and the writ of *capias* on mesne process restored.[6]

As will appear from the form given, a *capias* was a command issued in the name of the king to a sheriff or coroner of the county in which the defendant resided, commanding him to take and hold the body of the defendant, and have the same before the court on a certain day, there to answer the demand of the plaintiff. It was executed by the arrest and imprisonment of the person named. The return in such a case was, *Cepi corpus et committitur* (*C. C. et C.*). If the defendant could not be found, a return of *Non est inventus* (*N. E. I.*) was made, and the plaintiff might thereupon have an *alias*, or *pluries capias*. If the defendant still could not be found, the plaintiff was allowed an *exegi capias*, and might proceed to outlawry, the effect of which was to deprive the defendant of his rights of liberty and property, and subject him to various other penalties.[7] In early days, a defendant arrested for debt was kept in confinement until the return day of the writ. The great hardship of the law led to the adoption of a statute which permitted all persons arrested under such circumstances to be discharged on reasonable bail.[8] Further protection against the oppression of creditors has been afforded by recent statutes.[9] A defendant may also procure his release by showing that the writ is irregular, or by defeating the plaintiff at the trial of the cause, or by satisfying the demand against him.

In America the right of arrest on mesne process in civil actions, and the process by which the right is enforced, are regulated by the statutes of the various States. In most of the States such

1. 2 Reeves Hist. Common Law, 439.
2. Tidd Pr. 126–993; Sellon Pr. 52.
3. Stat. of Mortbridge, 2 Hen. III. c. 23; of Acton & Burrell, 2 Edw. I.; of Merchants, 13 Edw. I. and 25 Edw. III. c. 17, 19 Hen. VII. c. 9, 23 Hen. VIII. c. 14, 21 Jac. I. c. 4; Sellon Pr. and Tidd Pr., tit. Capias.
4. 32 & 33 Vict., c. 62, s. 6.
5. Sellon Pr., Introduction; Wharton Dict.
6. 1 & 2 Vict. c. 110. s. 3.
7. Tidd Pr. 126–128; Bouvier Dict., Ca. sa.
8. Sellon Pr. 57–58; 23 Hen. VII. c. 9.
9. 12 Geo. I. c. 29; 22 Geo. II. c. 3; 1 & 2 Vict. c. 110, s. 4; 32 & 33 Vict. c. 83, s. 20.

right has been abolished. Where it is allowed, it is restricted to special cases of fraud or probable injury to the plaintiff by reason of the removal of the defendant for the purpose of avoiding process. The word *capias* is still used to denote the writ by which an arrest is procured.

CAPIAS AD SATISFACIENDUM (*Ca. sa.*)—Writ of execution, issued after judgment against the body of the defendant for the purpose of compelling him to make the satisfaction awarded.[1]

"Rex —— vicecomiti salutem!

"Præcipimus tibi *quod capias* —— Si inventus fuerit in balliva tua, et eum salvo custodias, ita quod habias corpus ejus coram justiariis apud Westmonasterium —— tali die —— *ad satisfaciendum* —— tam de —— quos idem —— in curia nostra adjudicata fuerunt pro damnis suis, quæ habuit occasione detentionis debiti prædicti."[2]

The writ issued in all cases where the plaintiff might have procured the arrest of the defendant under a *capias ad respondendum*,[3] and was executed by the arrest and imprisonment of the person therein named, until the judgment of the court was complied with. The return of the officer was *Cepi corpus* (*C. C.*) if the defendant was found, or *Non est inventus* (*N. E. I.*) if he was not found.[4] A defendant taken under a *ca. sa.* could not procure his release by giving bail. The annals of Fleet prison afford many pathetic illustrations of the hardships inflicted upon debtors under this process.[5]

So long as the defendant was kept in confinement, an execution might not issue against his real or personal property. If he escaped he might be retaken. If he died in prison, or was released at the instance of the plaintiff, the judgment was held to have been satisfied, and no further proceedings could be had against his person or estate.[6] In the reign of James I., however, it "appearing that divers persons of sufficiency in real and personal estate, minding to deceive others of their just debts, have obstinately chosen to live and die in prison rather than make satisfaction," a statute was passed allowing in such cases a writ of execution to issue against their estates.[7]

The only modes by which a debtor might release himself from imprisonment were by showing an irregularity in the writ, by satisfying the judgment against him, or by reversing it.[8]

A *ca. sa.* also issued at the instance of a defendant if the plaintiff failed to make good his complaint for the costs of the suit.[9]

At present, both in England and the United States, process against the person of a defendant in a civil action is regulated by statute. In England the right to arrest a defendant against whom

1. Bouvier, Abbott, Tidd Pr.; Chitty Pr., tit. Capias.
2. 2 Reeves Hist. Com. Law, 439.
3. Tidd Pr. 1025.
4. Bouvier Dict.
5. Bouvier Dict.; Tidd Pr. 1029.
6. Tidd Pr. 1029.
7. 21 Jac. I. c. 24.
8. For irregularities see Peacock *v.* Day, 3 D. P. C. 291: Bastard *v.* Gutch, 4 D. P. C. 6; Rose *v.* Tomlinson, 3 D. P. C. 49; *In re* Cobbitt, 10 W. R. 40.
9. Tidd Pr. 1025; Newton *v.* Conyngham, 17 L. J. C. P. 288.

a judgment has been obtained is confined to cases where the defendant can pay but will not.[1]

CAPITA (pl. of *caput*).—Heads; entire bodies of persons or animals; persons individually considered, as distinguished from stocks of descent.[2]

CAPITAL.—I. The actual estate, whether in money or property, which is owned by an individual or a corporation.[3]

II. The sum of money which a merchant, trader, or other person or association adventures in any business requiring the expenditure of money, with a view to profit.[4]

III. The property or means contributed by the stockholders of a corporation or association as the fund or basis for the business or enterprise for which the corporation or association was formed.[5]

1. Wharton Lexicon; 32 & 33 Vict. c. 62

2. Burrill's L. Dict.

Per Capita.—When descendants take as individuals share and share alike, and not by right of representation (*per stirpes*) they are said to take *per capita*. 2 Bl. Com. 218.

3. People *v.* Commissioners, 23 N. Y. 219

The words "the whole of my capital which shall remain with me after my death in ready money and in bank billets," used in a will, do not include consols. Enohin *v.* Wylie, 10 H. L. 1.

Moneyed Capital, in the act of Congress of Feb 10, 1868 (Rev. Stat. § 5219), permitting taxation of national bank stock by a State provided it be at no greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. "The terms of the act of Congress include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money." Merc. Nat'l Bank *v.* City of New York, 121 U. S. 138; s. c., 7 Sup. Ct. Rep. 826.

It includes money at interest, shares in a national or other bank or trust company. Hepburn *v.* School Directors, 23 Wall. (U. S.) 480; Merc. Nat'l Bank *v.* City of New York, 121 U. S. 138. But not shares in railroad, ferry, canal, manufacturing or other industrial corporations. McMahon *v.* Palmer, 102 N. Y. 176. Nor insurance companies. Merc. Nat'l Bank *v.* City of New York, 121 U. S. 138. See Bank *v.* Britton, 105 U. S. 322.

4. Capital is "the fund dedicated to a business to support its credit, to provide for contingencies, to suffer diminution from losses, and to derive accretion from gains and profits." Lyon *v.* Zimmer, 30 Fed. Repr. 410.

Capital employed by a banker in the business of banking does not include, under sec. 110 of the Revenue Act of 1866, moneys borrowed by him temporarily from time to time in the ordinary course of his business. It applies only to the property or moneys of the banker set apart from other uses and permanently invested in the business. Bailey *v.* Clark, 21 Wall. (U. S.) 284.

Where A and B each contributed $20.-000 to a partnership, by the articles of which none of the capital of the firm nor of the accrued but undivided profits were to be used except in the business, and at dissolution each was to draw out the amount of capital originally contributed by him, and A died, directing his executors by his will to leave in the business for two years his "present capital" therein, *held*, that the word "capital" had the same meaning in the will as in the articles; it was to be distinguished from profits and applied only to the original contribution. Dean *v.* Dean, 54 Wis. 23.

5. Bailey *v.* Clark, 21 Wall. (U. S.) 284.

In this sense the word "stock" is sometimes added. Rapalje & Lawrence L. Dict., *v. infra.*

Capital, in an Internal Revenue Act, means in reference to a bank the amount of capital fixed by its charter, and does dot include its surplus earnings. Bank *v.* Townsend, 5 Blatchf. C. C. 318.

Where a foreign corporation is required to deposit a certain amount of securities before it can do business in a State, those securities are capital for purposes of taxation. Assurance Co. *v.* Commissioners, 28 Barb. (N. Y.) 318.

Where a mutual insurance company is authorized to accumulate from its profits a fund to continue liable for its losses

during the term of its existence, and to issue certificates to its members setting forth their interest therein, the accumulation becomes capital and is taxable as such. Insurance Co. *v.* Mayor, etc., of New York, 8 N. Y. 241. See Bank *v.* Milwaukee, 18 Wis. 281.

In a statute providing for the taxing of "all real estate of railroads not used for the ordinary and usual purposes of operating the roads and all real estate so used for which no part of the capital was expended," *capital* means "money used in the construction and equipment of the road whether obtained from the issuing of stock or by loan." Sawyer *v.* Nashua, 59 N. H. 404.

Where the directors of a company were authorized to borrow on the security of the company's property any sum not exceeding two thirds of the *capital* of the company *not called up*, the term "capital" was held to mean nominal capital and to include shares not yet issued. Steamship Co. *v.* Rolt, 17 Ch. Div. 715.

Capital Stock, used *in a charter*, means "the amount of capital to be contributed by the stockholders for the purposes of the corporation," and is never used "to indicate the value of the property of the company." State *v.* Morristown Fire Assoc., 3 Zab. (N. J.) 195.

It is "the whole undivided fund paid in by the stockholdders, the legal right to which is vested in the corporation to be used and managed in trust for the benefit of the members." Union Bank *v.* State, 9 Yerg. (Tenn.) 490; Bank *v.* Milwaukee, 18 Wis. 281.

The original sum upon which a corporation "commences." Bank *v.* City Council, 3 Rich. (S. Car.) 346.

"The capital stock of a corporation is, like that of a copartnership or joint-stock company, the amount which the partners or associates put in as their stake in the concern." It includes neither debt nor profits. Barry *v.* Merchants' Exchange Co., 1 Sandf. (N. Y.) 280; Reid *v.* Eatonton Mfg. Co., 40 La. 98.

It "consists of the sums due by virtue of the subscriptions or collected from the subscribers and invested for the benefit of the corporation." State *v.* Railroad Co., 30 Conn. 290.

The phrase is used convertibly with "capital." People *v.* Commissioners, 23 N. Y. 222; State *v.* Railroad Co., 30 Conn. 290.

It must be distinguished from *stock* and *stock certificates*, which are the individual interest of the stockholder and the evidence of such interest in the dividends as they are declared and the effects of the corporation on hand at its dissolution. Union Bank *v.* State, 9 Yerg. (Tenn.) 490.

Hence, a statute forbidding a corporation to divide any portion of its capital stock among its stockholders does not prevent the issuing and division among the stockholders of stock certificates. Williams *v.* W. U. Tel. Co., 9 Abb. N. C. (N. Y.) 437.

In Statutes and Charters. — The term "capital stock," in an act exempting the capital stock of a railroad from taxation, does not include the property into which the capital has been converted. Railroad Co. *v.* Gaines, 97 U. S. 697. Nor are lands granted by Congress within such an act. Railroad Co. *v.* Loftin, 30 Ark. 693.

But in Railroad Co. *v.* Shacklett, 30 Mo. 550, the term was held to include the road-bed, machinery, depots, and other property used in operating the road, though this was recognized as an unusual extension of its meaning required by the particular act construed. So where the capital stock of a bank was exempted from taxation by its charter, all its property, real and personal, was held to be exempt. New Haven *v.* City Bank, 31 Conn. 106.

But accumulated profits which have not been divided among the stockholders are not a part of the capital stock so as to be exempt from taxation. Bank *v.* City of Milwaukee, 18 Wis. 281. See also Insurance Co. *v.* Mayor, etc., 8 N. Y. 241.

Increases of stock authorized by the legislature are within the meaning of the term "capital stock" as used in the act of incorporation, and as such are exempt from taxation. State *v.* Railroad Co., 30 Conn. 290.

Under a statute imposing a tax on the franchises and capital stock of corporations, in which it was provided that "the capital stock of all companies and associations . . shall be so valued . . as to ascertain and determine, respectively, the fair cash value of such capital stock, including the franchise, over and above the asssesed value of the tangible property," etc., the term "capital stock" was held to mean not the shares of stock, but the aggregate capital of the company. State Railroad Tax Cases, 92 U. S. 575; Railroad Co. *v.* Vance, 96 U. S. 450. All the property belonging to the corporation, of whatever kind, wherever located. Pacific Hotel Co. *v.* Lieb, 83 Ill. 602; Railroad Co. *v.* Weber. 96 Ill. 443. It was held to have reference to the actual value and not to the nominal

IV. Punishable with death; affecting life.[1]
V. Large; of great size.[2]

CAPITATION.—A tax laid upon persons as individuals irrespective of property; a poll-tax.[3]

CAPTAIN.—The military officer who commands a company or troop; the commander of a ship; the foreman of a body of workmen, and the like.[4]

amount of the capital, in People *v.* Commissioners, 69 N. Y. 91.

Capital stock was held to mean capital paid in and not amount of authorized capital, in an act of incorporation which provided that when the dividends exceeded six per cent per annum on the capital stock, six per cent on the dividends should be paid to the municipality. Philadelphia *v.* Railway Co., 52 Pa. 177.

On the other hand, the amount of the shares subscribed and not the sum actually paid in was held to constitute the capital stock of a corporation, in Hightower *v.* Thornton, 8 Ga. 486.

But the "whole capital stock" means the capital stock actually subscribed for and issued in an act enabling a stockholder of a railroad sold on foreclosure to acquire the same relative interest in the road as he had before the sale, by paying to the purchasers a sum equal to such proportion of the price paid on the sale and the costs and expenses as his stock bears to the whole capital stock. Pratt *v.* Munson, 17 Hun (N. Y.), 475.

In a statute prohibiting the trustees of a corporation from dividing, withdrawing, or in any way paying to the stockholders any part of the capital stock, the latter means the "capital of the corporation in which it transacts its business, whether such capital consist of money, property, or other valuable commodities." Martin *v.* Zellerbach, 38 Cal. 300. See Williams *v.* W. U. Tel. Co., 9 Abb. N. C. (N. Y.) 437.

Available Capital.—A prospectus of a railway company describing the contract for the construction of the line as having been entered into at a price "considerably within the available capital of the company" was held not an honest and fair representation, but deceptive where the price was £420 000 and the capital was £500,000 less £50,000, the price of the concession to make the road. Railway Co. of Venezuela *v.* Kisch, L. R. 2 H. L. C. 99.

1. **Capital Cases,** in a statute requiring all the judges of a court to sit in such cases, includes the whole proceeding from the impanelling of the grand jury to the execution of final sentence; and an indictment cannot be found in the absence of the president of the court. Cook *v.* State, 7 Blackf. (Ind.) 165.

Capital Offence.—Although under the Penal Code of Alabama the jury have the power of determining whether the punishment for murder in the first degree shall be death or not, this does not make the offence any the less capital. Murder is still within the act forbidding bail to one charged with a capital offence. *Ex parte* McCrary, 22 Ala. 65.

Charged with a Capital Offence means charged in legal form. State *v.* Duncan, 9 Port. (Ala.) 260.

2. **Capital Letters.**—Letters of large size, though of small Roman character, are sufficient to comply with a statute requiring toll-boards to be erected bearing the rates of toll in large or capital letters. The object is legibility. Nichols *v.* Bertram, 3 Pick. (Mass.) 342.

3. Abbott's L. Dict.

A tax on "deadheads" is not a capitation tax, for it is a tax upon the privilege of a free ride in a railroad car. "A capitation tax is one upon the person simply, without reference to his property, real or personal, or to any business in which he may be engaged, or to any employment which he may follow." Gardner *v.* Hall, Phill. L. (N. Car.) 21.

4. Web. Dict.

There is a great necessity to give effect to a custom of captains of steamboats at a large river-port to insure their boats and give premium notes therefor; the perils of navigation being so well known that a due regard for some indemnity against loss is justly recognized as a necessary precaution. "That a custom so general and notorious may exist as to authorize the captain of a steamboat to effect an insurance on it for the benefit of the owners without their express direction we think well settled by authority." Adams *v.* Pittsburg Ins. Co., 14 Nor. (Pa.) 348.

Where it was made felony for a soldier to depart from his captain, the majority of the judges held that it was felony for him to depart from a conductor who was

CAPTION (see also INDICTMENT) is that part of the record which comprehends the history of the cause to the time of finding the indictment.[1]

CAPTURE (see also PRIZE and SEIZURE) includes every species of taking by force and violence from without to which a vessel may be exposed during a voyage, whether by a lawful government in the exercise of belligerent rights or the enforcement of municipal laws, or by mere pirates, or by vessels sailing under a pretended but illegitimate authority, such as cruisers of the Confederate States during the Civil War.[2]

taking him to the sea-side—a conductor being a captain within the meaning of the statute. Wilberf. Stat. L. 258; The Soldier's Case, Cro. Car. 71.

1. 1 Bish. Cr. Pr. § 657.

"All that part of the record which precedes the recital of the indictment is called the *caption*, and may as well as the indictment itself furnish matter of plea or ground for motion to quash," etc. State *v.* Gibbons, 1 South. (N. J.) 46.

"The *caption* of the indictment is no part of the indictment itself, but is the style or preamble or return that is made from an inferior court to a superior, from whence a *certiorari* issues to remove, or when the whole record is made up in form." People *v.* Bennett, 37 N. Y. 123.

"The title or *caption* of the bill is no part of the bill and does not remove the objection to the defects in the pleadings." Jackson *v.* Ashton, 8 Peters (U. S.). 148.

An indictment is good when the day of the commission of the offence is laid by reference to the *caption*. Jacobs *v.* Comm., 5 S. & R. (Pa.) 314. See also Wharton's Am. Cr. Law, 63.

The history of the proceedings, as copied or extracted from the schedule, is called the *caption*, and is entered of record immediately before the indictment. Taylor *v.* Clemson, 2 A. & E. (N. S.) 1010.

Caption of indictment need not state that the jury were sworn at the time when and the place where they presented it. Rex *v.* Pheasant, 2 Raym. R. 548.

The title of a deposition taken before a magistrate is also called the *caption*. Rosc. Cr. Ev. 71. And a certificate of the taking of a commission subscribed by the commissioners. Blount.

A taking, a seizure, an arrest. 2 Salk. 498. The word in this sense is now obsolete in English law. Burrill's Law Dict.

In Scotch law *caption* is an order to incarcerate a debtor who has disobeyed an order given him by what are called "letters of horning" to pay a debt or to perform some act enjoined thereby. Duncan *v.* Houston, 7 Wilson & Shaw, 519.

2. Dole *v.* New Eng. Mut. Mar. Ins. Co., 6 Allen (Mass.), 373.

"A taking by the enemy of vessel or cargo as prize in time of war, or by way of reprisal, with intent to deprive the owner of it. Mawran *v.* Ins. Co., 6 Wall. (U. S.) 10; Rodocanachi *v.* Elliott, L. R. 8 C. P. 670; Richardson *v.* Ins. Co., 6 Mass. 109; Dole *v.* Merchants' Ins. Co., 51 Me. 476.

Capture, in technical language, is a taking by military power; *seizure* is a taking by civil authority. U. S. *v.* Athens Armory. 35 Ga. 344.

In order to constitute a capture some act must be done indicative of an intention to seize and to retain as prize; it is sufficient if such intention is fairly to be inferred from the conduct of the captor. The Grotius, 9 Cranch (U. S.), 368.

It is not strictly necessary to a complete capture that the prize should be carried into the territory of the captors and there condemned. Moxon *v.* The Fanny, 2 Pet. Adm. 309; Firfield *v.* Ins. Co., 47 Pa. 187; Whitfield *v.* U. S., 11 Ct. of Claims R. 456.

Boarding and destroying a frigate under peremptory orders to set her on fire, and after blowing out her bottom to abandon her, was held not a capture. The duty performed was that of destruction, not of capture. Decatur *v.* U. S., 33 Dev. (U. S. Ct. of Cl.) 200.

Capture, as used in a policy of marine insurance, means a seizure as prize, with the intent or expectation of obtaining a condemnation. Richardson *v.* Maine Ins. Co., 6 Mass. 102.

The taking of a vessel with intent to make prize of her, as is proved by her being libelled, is a capture within the principles laid down by eminent writers. Lee *v.* Boardman, 3 Mass. 238.

The words "capture," "detention," etc., in the memorandum in a policy mean illegal seizure, arrest, etc. Archibald

CAR.—A carriage for running on the rails of a railway.[1]

v. Mercantile Ins. Co., 3 Pick. (Mass.) 70.

In international law the strict rule is that when two nations are at war with one another the movable property of the individual subjects of each nation is liable to capture by the other. In modern times, however, this rule has been subject to two qualifications: (1) that the capture must be effected by persons holding a commission or authority from their government; and (2) that the property of those subjects of the enemy who are within the dominions of the other State at the time of the declaration of war is exempt from capture, except by way of reprisals. The latter qualification is considered by some not to be a matter of strict right; it is provided for by treaties between the principal states of the world. It follows from the first qualification that persons seizing an enemy's property on the high seas without a commission are guilty of piracy. Mann. L. of N. 166 *et seq.*

Capturing Merchant-vessel as Pirate.—Since the vessels of all nations may capture pirates on the high seas, if an innocent merchant-vessel conducts in a way to induce the commander of another vessel to believe her piratical, this one by capturing her does not become subject to forfeiture. The Marianna Flora, 11 Wheat. (U. S.) 1; 2 How. (U. S.) 210.

Captured Property.—Property which has been seized or taken from hostile possession by the military and naval forces of the United States. U. S. *v.* Padelford, 9 Wall. (U. S.) 540.

Booty.—Property captured by an army on land is called "booty of war" and belongs to the sovereign; but it has long been usual to grant it to the captors.

Prize.—Property captured at sea.

The Captors, whether of booty or prize, are of two classes, actual, and constructive or joint. When a prize is taken at sea there is usually no doubt as to who is the actual captor, namely, the ship to which the prize strikes its flag. But the phrase "actual captors" includes many others besides those who actually have taken part in the capture. The whole of the ship's crew may not be on board the ship at the time of the capture, or the prize may have been taken out of sight of the ship, and at a great distance from it, by the ship's tender, or by a boat's crew detached from the ship, that is held to take the prize. The whole ship's crew share.

In the case of booty a similar principle is applied by drawing the line between division and division, treating the division of an army as analogous (for this purpose) to a ship of war, so that when booty has been captured by any portion of a division, that division is in the first instance to be regarded as the actual captor.

Joint or constructive captors are those who have assisted, or are taken to have assisted, the actual captors. The leaning of the courts is against claim by joint captors, except in the two cases of *association* and *co-operation.* Association takes place when two or more ships or divisions of an army are associated under the same immediate commander. Co-operation is where the joint captors have assisted the actual captors by conveying encouragement to them or intimidation to the enemy. In the case of naval prize the joint captor must be in sight both of the prize and the actual captor to substantiate her claim; but in cases of booty a wider application is allowed to the term "co-operation," owing to the difference between the nature of naval and military operations, and between the surface of the sea and that of the land; hence the rule of sight is inapplicable to capture on land, and each case must be judged on its own grounds, subject to the rule that services, to base a claim of joint capture, must have a direct and immediate effect in influencing the capture.

Conjunct Capture.—Where a capture is effected by naval or military forces in conjunction with an ally, the capture is said to be conjunct, and is divided between the allied forces. Rapalje & Lawrence Law Dict.

Recapture.—By the doctrine of *post-liminium* (q.v), property which has been captured by an enemy and recaptured within twenty-four hours, or before being taken to a place of safety, reverts to its original owner; the rule, however, varies with different nations. Mann. Int. Law, 190.

1. The indictment charging the offence as having been committed in "the freight and express car of the American Express Company" sufficiently describes "a railroad freight or passenger car" within the meaning of section 4410, Rev. St. "One of the definitions of a car given by Webster is 'a carriage for running on the rails of a railway,' illustrating by the picture of a 'railway car,' with these two words beneath it. Every 'express car' must be a 'freight car,' and to make it certain the charge is 'the freight and

CARDINAL.—I. In ecclesiastical law, a dignity of the court of Rome, next in rank to the pope.[1]

II. Points in surveying.[2]

CARDING. See note 3.

CARDS.—Small pieces of pasteboard, generally rectangular in form, used in playing certain games.[4]

CARE. (See also NEGLIGENCE.)—This word is generally used in jurisprudence in the sense of attention, heed, vigilance, watchfulness; its opposite being carelessness, heedlessness, negligence, rashness. The decisions defining its meaning have arisen mainly in cases involving the duties and liabilities of carriers, bailees, professional persons, etc., and turn almost uniformly on the question of negligence (*q. v.*).[5]

express car;' but it does not follow that every 'railroad freight car' is an 'express car.' Both courts and juries may take judicial notice of what everybody knows respecting the common incidents of railway and express carriage." Nichols *v.* State, 32 N. W. Repr. 546; Downey *v.* Hendie, 46 Mich. 498; The Queen *v.* Ruscoe, 8 Ad. & El. 386.

"An express car is a railway car," etc. The Queen *v.* Stroulger, L. R. 17 Q. B. Div. 327.

1. Rapalje & Lawrence Law Dict.

2. A contract to lay off a tract of land to the *cardinal points* shall be executed according to the magnetic meridian. Where an expression in a contract has a technical and a popular meaning it shall be taken in the latter sense. Finnie *v.* Clay, 2 Bibb (Ky.). 351.

3. "They should have submitted to the jury upon the evidence the question whether the words 'carding and fulling mill,' as used in the contract, did not mean the building on the farm in which the business of carding wool and dressing cloth had been carried on; and if so, whether the phrase 'fixtures belonging to the fulling-mill and carding-machine' did not mean the carding-machine and other machinery that had been used in said building, though detached and stored elsewhere at the date of the contract." Martin *v.* Cope, 28 N. Y. 180.

4. Estes *v.* State, 2 Humph. (Tenn.) 496; Com. *v.* Arnold, 4 Pick. (Mass.) 251.

Indictment against an innholder for suffering persons "to play at cards and other unlawful games" sufficiently certain. Com. *v.* Bolkom, 3 Pick. (Mass.) 281.

Under statute to punish those who should "set up or keep" the forbidden device, or "induce or permit any person or persons to bet any money or other thing" thereon, it was held that one to be within the inhibition need not personally bet; and if he deals the cards he commits the offence, though he had no interest in the profits of the game. Com. *v.* Burns, 4 J. J. Marsh. (Ky.) 177; State *v.* Younger, 1 Dev. (N. Car.) 357.

"There is no doubt that cards are a gambling device within the meaning of sec. 15 of the act," etc. State *v.* Herryford, 19 Mo. 377; State *v.* Lewis, 12 Wis. 434.

"The game of cards commonly called 'poker' is the result produced by the use of the device." Slab *v.* Mann, 2 Oregon. 238.

Dominos used as a device and substitute for cards. Windham *v.* State, 26 Ala. 69; Bryan *v.* State, 26 Ala 65.

Where the charge was an unlawful playing with cards, to wit, at the game of "all fours," of "loo," and of "whist," it was held that the defendant must be shown to have played at some one of the games specified. Windsor *v.* Com., 4 Leigh (Va.), 680.

Business Card.—In an action on a written agreement to pay plaintiff for inserting business card on two hundred copies of his advertising chart, to be paid when the chart is published, parol evidence is admissible for the interpretation of the contract and its application to the subject-matter. Stoops *v.* Smith, 100 Mass. 63.

5. There are different degrees of care, the several meanings of which, as defined by various courts, seem to be as follows:

Slight Care, such as is usually exercised by persons of common-sense but careless habits, under circumstances similar to those of the particular case in which the question arises, and where their own interests are to be protected from a similar injury. Johnson *v.* Rail-

CARELESSLY. See note 1.

CARGO.—A cargo of a vessel is the lading of a ship or vessel; the merchandise or wares contained and conveyed in a ship or vessel.[2] In an enlarged sense it signifies "all the merchandises and effects which are laden on board a ship, exclusive of the soldiers, crew, rigging, ammunition, provisions, guns, etc., though all these things load it sometimes more than the merchandises."[3] A

road, 20 N. Y. 65; Grant *v.* Bank, 8 Ohio St. 1; Todd *v.* Cochell, 17 Cal. 97; Fallon *v.* City, 3 Allen (Mass.), 38.

Ordinary Care is such as is usually exercised in the like circumstances by the majority of the community, or by persons of careful and prudent habits. Ernst *v.* Hudson River R. Co., 35 N. Y. 9; State *v.* Railroad, 52 N. H. 528; Old Colony & N. R. Co., 10 R. I. 22.

Party not bound to guard against want of ordinary care on part of another; he has a right to presume that ordinary care will be used to protect the property from injury. Brown *v.* Lynn, 31 Pa. St. 512.

Due Care.—It is erroneous to leave the question of *due care* to the jury, since it is the province and duty of the court to advise them on that point, supposing them to be satisfied of certain facts. Heathcock *v.* Pennington, 11 Ired. L. (N. Car.) 640; Jones *v.* Inhabitants of Andover, 10 Allen (Mass.), 20; B. & W. R. Corp., 10 Allen (Mass.), 532.

Reasonable and Proper Care.—"Want of care," when used in instructions to a jury, means "want of reasonable and proper care." Warner *v.* Dunnavan, 23 Ill. 380. "Reasonable care." Neal *v.* Gillett, 23 Conn. 443; South, etc., R. Co. *v.* Henlein, 52 Ala. 606.

Great Care is such as is exercised by persons of unusually careful and prudent habits. Brand *v.* S. & T. R. Co., 8 Barb. (N. Y.) 368

Especial Care.—Chicago & N. W. R. Co. *v.* Clark, 2 Bradw. (Ill.) 116.

Extraordinary Care.—Toledo, etc., R. Co. *v.* Baddeley, 54 Ill. 19.

Utmost Care.—"The phrase 'utmost care and diligence' means all the care and diligence possible in the nature of the case. . . . The injury was the result of an accident or act against which human care and foresight could not guard." B. & O. R. Co. *v.* Worthington, 21 Md. 275; Brand *v.* Railroad Co., 8 Barb. (N. Y.) 368.

Care and Management.—Boodle *v.* Dames, 3 Ad. & El. 207; Taylor *v.* Clay, 9 Q. B. 713; Duke of Somerset *v.* Inhabitants, 4 Barn & C. 167; State *v.* Buffington, 20 Kan. 599.

Support and Take Care of (in contract).—Bull *v.* McCrea, 8 B. Mon. (Ky.) 422.

Care and Skill.—Cunningham *v.* Hall, 4 Allen (Mass.), 268.

A, Care of B.—Where a package is delivered to an express company directed to "A, care of B," a delivery to B at the proper place discharges the company's liability. Ely *v.* American, etc., Express Co., 29 Wis 611.

1. Locomotive, etc., so Carelessly Managed.—Railroad company only required to use reasonable and ordinary care, i e., such care as prudent men skilled in the business would ordinarily exercise in the circumstances. Old Colony & Newport R. Co., 10 R. I. 22.

2. The Gov. Cushman, 1 Abb. (U. S.) 17.

"The word 'cargo' *ex vi termini* means goods on board of the vessel." Seamans *v.* Loring, 1 Mas. (U. S.) 142.

3. Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 433; s. c., 6 Wheel. Am. C. L. 200, where it was held, however, that mules on deck and their provender were not protected by a policy of insurance as "cargo." "But this food for the cattle was not laden on board as merchandise; and the circumstance that some of it might remain to be sold at the end of the voyage does not make it cargo, any more than the remnants of fishing-lines, harpoons, etc., in the whale-fishery would make the outfits to become cargo within the common meaning and understanding of merchants and underwriters. Then it is to be considered whether mules can be considered as cargo. According to Postlethwaite, *cargo* signifies [quoting the definition in the text]. In that enlarged sense the mules might be considered as cargo, and there should seem to be no distinction whether they were on or under deck. But the word has a much more limited meaning in this contract. The mules *on deck* would not be protected as cargo, because they would be exposed to greater risk, if there were no other objection. . . . But there is another objection, applicable both to the mules on deck and to those under deck, which is, that they are the subjects of particular insurance,

policy of insurance on "cargo" will not ordinarily cover goods stowed upon deck, or live stock.[1] Generally speaking, the term

and are not included under the general word 'cargo' or goods. . . . There were, however, ten doubloons on board, which we think may be considered as within the word 'cargo.' . . There is no evidence that this money was intended particularly for the expenses of the captain, and not as cargo to be laid out at the port of discharge; as dollars carried to India are to be invested for the use of the owners. . . . In the enlarged sense, it [viz., the word 'freight'] would apply to live stock, as well as to merchandise, on deck as well as under deck, and is coextensive with the word 'cargo' in the enlarged sense of that word."

"Cargo," in a policy of insurance on the cargo, freight, and profits, means "not the property on board exclusively belonging to the ship-owner, but all the property constituting the ship's lading, all the property on which freight and profits were to accrue." Bayard *v.* Ins. Co., 4 Mas. (U. S.) 264.

Oil and other articles which are the ordinary products of a whaling voyage, and the procuring of which constitutes its direct object, are undoubtedly included under the term "cargo" and covered by a policy on cargo, though it is doubtful whether the outfits, such as provisions, whaling gear, etc., would be. Paddock *v.* Franklin Ins. Co., 11 Pick. (Mass.) 230.

In a policy of insurance on a ship, a warranty "not to load more than her registered tonnage" with either or all of certain articles, including coal, applies only to articles laden as cargo, and is not broken by taking on board a quantity of coal for dunnage, when no more than reasonably necessary. "It is argued by the learned counsel for the defendants that an insurance on cargo would have covered the coal in question. But we are by no means sure that such would be the construction of such a policy. . . But if the word 'cargo,' in the description of the subject-matter insured, could be held to include merchandise shipped as ballast or for dunnage, it would only be upon the rule of liberal construction by which the general terms of a policy are interpreted, but which is never applied to a clause of warranty." Thwing *v.* Gr. West. Ins. Co., 103 Mass. 406, 407.

"A question has also been started and may be necessary to be settled, whether the word 'cargo' includes within its meaning the outfits as well as the catchings. . . . The word 'cargo' is not of such common occurrence in English policies of insurance as with us. They use in lieu thereof the words 'goods and merchandise.' But 'cargo' is a word of large import, and means the lading of the ship of whatever it consists; and we see not, in principle, why it may not cover the outfits, which are goods of value, as well as the 'catchings,' which is the technical word that includes the blubber taken on board, the oil, and the casks. But whether it should be so applied is not free from doubt, because the word 'outfits' is so generally used to express the outward lading; from which it may be reasonably inferred that the word 'cargo' is limited by the parties to the catchings of the ship. But on this point we do not now feel called upon to express an opinion." Macy *v.* Whaling Ins. Co., 9 Metc. (Mass.) 366.

In construing a bill of sale of a cargo by owners of the vessel, the court said: "The bill of sale undoubtedly gave the latter [i.e., the purchasers] a right to take to their own use whatever articles did or should constitute the homeward cargo of the ship Henry, when she should return from the voyage in which she was then engaged; that is, such lading as she should have which, independently of the bill of sale, would have been the property of the owners of the vessel; a sense latterly and not incorrectly given to the term 'cargo,' as exclusive of any other lading, or goods taken on freight." Ilsley *v.* Stubbs, 9 Mass. 67, 68.

1. Allegre's Admrs. *v.* Md. Ins. Co., 2 Gill & J. (Md.) 162, 163; s. c., 6 Wheel. Am. C. L. 195. "On account of this great diversity in the rates of premium, a policy on 'cargo' or 'goods and merchandise' will not cover articles which are stowed upon deck. . . . An uniformity of decision among the several States of the Union on subjects of this nature is of vast importance to the mercantile community; and that consideration alone, in the absence of all motive or obligation to embrace a contrary doctrine, should induce us to sanction the principle established in one of the most enlightened and commercial States in the Union that a policy on cargo, goods, or merchandise will not cover live stock." It was held, however, that if live stock constitute the only article of exportation from the port from which the vessel carrying the insured property is to sail to her point of destination; or if, according to the mercantile usage of the place of effecting the

"cargo," unless there is something in the context to give it a different signification, means the entire load of the ship which carries it;[1] but it is a word susceptible of different meanings, and must be interpreted with reference to the context.[2] (See also MARINE INSURANCE.)

insurance, the word "cargo" was understood to cover live stock, then an insurance under that general denomination would cover live stock. See also Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 433, cited in note 2, *supra*.

Convicts are not to be considered as "cargo" in estimating average. *Quære*, as to slaves. Brown *v.* Stapyleton, 4 Bing. 122.

1. Borrowman *v.* Drayton, 2 Ex. Div. 19, where it was held that a defendant who contracted for "a cargo of from 2500 to 3000 barrels" of petroleum was not obliged to accept them when delivered as a portion of 3300 barrels shipped on the same vessel. "It may fairly be assumed that when one man undertakes to sell and another to buy a cargo, the subject-matter of the contract is to be the entire load of the ship."

In giving a similar decision in Kreuger *v.* Blanck, L. R. 5 Ex. 183, the court said: "What then does the word 'cargo' mean? It means the cargo of the ship, that is, what is put on board the ship, or what the ship carries. If I were myself of a different opinion, I would not be guided by the meaning given in the dictionaries; but I find in Webster's Dictionary cargo defined as 'the lading or freight of a ship; the goods, merchandise, or whatever is conveyed in a ship or other merchant-vessel;' and Richardson gives its meaning as 'the freight or lading of a ship.' The question as to the meaning of the word arose also in the case of Sargent *v.* Reed [2 Str. 1228], to which my lord has referred. . . . It was there argued that the word was uncertain and might mean only a small parcel of goods on board, but the court said that 'the word "cargo" as referred to ship was very intelligible, and must mean the whole loading.' Here, however, on my own reading of the word, and upon authority, I think it means the whole cargo." *Compare* Benj on Sales, §§ 589, 590.

The purchaser of a "cargo of about 9000 bushels" is not bound to accept less in part performance of the contract. "A cargo is the lading of a ship or other vessel, the bulk or dimensions of which is to be ascertained from the capacity of the ship or vessel; and where the name of the ship or vessel is in the contract, her capacity for carrying, or the bulk of her cargo, need not be stated, for the word 'cargo' embraces all that the vessel is capable of carrying. . . . Neither less nor more than a 'cargo of barley' could be tendered as performance by the vendors. Nor were the vendees bound to accept a 'cargo' of less than about 9000 bushels. A vessel with capacity to carry ten thousand bushels, freighted with only five thousand bushels, would not have been a 'cargo' within the meaning of the contract. . . . A contract to sell a 'cargo' or 'boat-load' does not admit of the delivery of less than a cargo or boat-load, irrespective of any quantity which constitutes its bulk." Flanagan *v.* Demarest, 3 Robertson (N. Y.), 182.

But it is admissible to show by extrinsic evidence that the term "cargo," as used in a policy of insurance, means not the whole cargo, but an undivided share or interest in it. Catlett *v.* Pac. Ins. Co., 1 Wend. (N. Y.) 576.

2. Col. Ins. Co. of New Zealand *v.* Ad. Mar. Ins. Co., 12 App. Cas. 134; s. c., 56 L. T. N. S. 175, 35 W. R. 638, where it was held that where a contract of insurance related to a wheat cargo "now on board or to be shipped in the D. of S.," the risk commenced as soon as any portion thereof was on board. Lord Bramwell said: "'Cargo' is a word with different meanings. It may mean one thing in a charter-party, another in a policy, another in a contract of sale." In the opinion of their lordships it was said: "Their lordships interpret the meaning of the words 'wheat cargo' or 'cargo of wheat to be shipped on board' to be such a quantity of wheat to be shipped at Timaru as the ship could properly carry, and as the defendant's contract was to insure a wheat cargo then 'on board or to be shipped in the Duke of Sutherland,' etc., the insurance must be construed in the same manner as if it had been on 13,000 bags of wheat to be shipped, etc., at and from Timaru. The risk, therefore, in their lordships' opinion, commenced as soon as any portion of the wheat was on board."

Full and Complete Cargo must be taken to mean such a cargo as the ship could safely carry. Hunter *v.* Fry, 2 B. & Ald. 425.

In a contract to load "a full and complete cargo of sugar and molasses" it

CARNAL KNOWLEDGE.—From very early times, in the law, as in common speech, the meaning of the words "carnal knowledge" of a woman by a man has been sexual bodily connection; and these words without more have been used in that sense by writers of the highest authority on criminal law when undertaking to give a full and precise definition of the crime of rape, the highest crime of this character.[1] They are equivalent to "sexual intercourse,"[2] and seem to include in their meaning all that is signified by the word "abuse."[3] (See ABUSE; RAPE.)

CARRIAGE.—That which carries, especially on wheels; a vehicle. This is a general term for a coach, chariot, chaise, gig, sulky, or other vehicle on wheels,—as, a cannon-carriage on trucks; a block-carriage for mortars; and a truck-carriage. Appropriately the word is applied to a coach, and carts or wagons are rarely or never called carriages.[4] It is understood to refer to vehicles for

may be shown that this means a full and complete cargo of sugar and molasses packed in the ordinary way in which sugar and molasses are packed to be carried, in this case according to a custom by loading the sugar in hogsheads and the molasses in puncheons. Cuthbert *v.* Cumming, 10 Ex. 809; s. c., 11 Ex. 405. "We think that the custom does nothing more than explain the meaning of the term 'full and complete cargo.'"

Where a practice prevailed of compressing bales of cotton-wool by machinery, to improve their stowage, the furnishing of a cargo of cotton-wool in uncompressed bales, as they came from the grower, was held not to be a compliance with a contract to load a "full and complete cargo." Benson *v.* Schneider, 7 Taunt. 272; s. c., 1 Moore, 21; 1 Holt N. P. 416.

For construction of contract to load a "full and complete cargo, say about 1100 tons," see vol. 1, p. 34, n. 1.

Profit on Cargo, in a policy of insurance, means the improved value of the cargo when it has been landed at its destined point. Halhead *v.* Young, 6 El. & Bl. 324.

1. Com. *v.* Squires, 97 Mass. 61.

2. Noble *v.* State, 22 Ohio St. 545.

3. Dawkins *v.* State, 58 Ala. 378; Reg. *v.* Holland, 16 L. T. N. S. 536; s. c., 15 W. R. 879; 10 Cox Cr. C. 478.

4. Cream City R. Co. *v.* Chic., M. & St. P. R. Co., 63 Wis. 98; s. c., 21 Am. & Eng. R. R. Cas. 70, where it was held that the term "carriage," in a bill of lading, does not include a street-railroad car. The court says: "To the ordinary mind, in this country at least, the word 'carriage' alone does not convey the idea of a railroad car, or of a street-railroad car, nor does it even convey the idea of a wheeled vehicle used for the transportation of merchandise or products used in ordinary business. The idea conveyed is a vehicle used for the transportation of persons either for pleasure or business, and drawn by horses or other draught animals over the ordinary streets and highways of the country, and not cars used exclusively upon railroads or street railroads expressly constructed for the use of such cars. As yet in this country the vehicles used for the transportation of passengers on railroads and street railroads are generally called cars, and occasionally coaches; seldom, if ever, 'carriages.' The definition given by the older lexicographers of the word 'carriage' was of the most general and indefinite kind; but that given by those writing in our own times is more in consonance with the restricted and more definite meaning of the word as understood by people in general. Johnson, in his dictionary, dating back 130 years, defines the word 'carriage' as 'a vehicle;' 'that in which anything is carried.' In later years Worcester defines it as 'any vehicle on wheels; especially a vehicle of pleasure, or for the conveyance of passengers;' Webster, as 'that which carries or conveys on wheels; a vehicle, especially for pleasure or for passengers; sometimes for burdens, as a close carriage, a gun-carriage.' In the Imperial Dictionary, which is the latest authority, 'carriage' is defined as [giving the definition in the text]. If the definition given by Johnson was the true definition of the word in his time, it will be seen by a reference to the definition in the Imperial Dictionary that its common and ordinary meaning has been restricted to those vehicles which are used for the carriage of persons, such as a coach, etc., and does not include those wheeled vehicles which are used for the carriage of burdens only, such as wagons

the conveyance of persons rather than for the transportation of property.[1]

or carts, and most clearly does not include railroad cars, which can be used only on roads properly constructed for their use. Neither Webster, Worcester, nor the Imperial Dictionary mention railroad cars as coming within the common and ordinary meaning of the word 'carriage.' It is undoubtedly true that the word 'carriage' might sometimes be construed to include railroad cars and other vehicles not coming under the denomination of coach, chaise, chariot, gig, or sulky. The meaning to be given a word which may be used to designate a variety of things must in all cases depend upon its associations, and the subject-matter in relation to which it is used. The association in which the word is found in the bill of lading in question in this case, to our minds, clearly points to a meaning which excludes the idea of a railroad car or street-railroad car. All its associates are things either fragile in their nature or such as are easily damaged by exposure or perishable. Railroad and street cars are not the natural associates of the other articles mentioned in the exemption clause. We must therefore hold that the street car which was injured in this case was not a carriage within the meaning of the bill of lading, and so the plaintiff was entitled to recover upon proof of the injury while in the possession of the defendant as common carriers." It may be added that the list of articles taken at the owner's risk as enumerated in the bill of lading in this case were as follows: "Carriages and sleighs, eggs, furniture, looking-glasses, glass and crockery ware, acids, machinery, stoves and castings, rough marble, musical instruments, liquors put in glass or earthen ware, and all other frail and brittle articles, fruit, and all other perishable goods."

1. Snyder *v.* North Lawrence, 8 Kans. 84. and see opinion quoted in preceding note. In the Kansas case it was held that a vehicle described as a "certain wagon drawn by four horses and used in the transportation of property and for transferring goods of grocers and merchants" could not be considered as a "hackney-coach, carriage, omnibus, or dray." "The most general term of the four is 'carriage.' . . . The term 'wagon' is itself far more of a generic term than either of these four. It may indeed, without any great impropriety, be held to include them all. But it also includes many other kinds of vehicles."

The conductor of a street railroad car is not the driver of a "carriage" within the meaning of a statute making the owners of carriages running upon the highway for the conveyance of passengers liable for all injuries and damages done by the driver. "By section 7 (1 R. S. 696), enacted at the time of the revision of the statutes, a 'carriage,' as used in the act, is declared to include stage-coaches, wagons, carts, sleighs, sleds, and every other carriage or vehicle used for the transportation of persons and goods, or either. . . Notwithstanding the comprehensiveness of the term 'carriage,' as defined by the statute, it is very doubtful whether it includes a car used for the carriage of passengers over a street railroad. Such a vehicle was not within the spirit of the act, and is not within the general classification and specification of vehicles mentioned." Isaacs *v.* 3d Ave. R. Co., 47 N. Y. 122; s. c., 7 Am. Rep. 418.

A *sled carrying a load of coal* was held a "carriage" within the meaning of a statute providing for the recovery of damages against a town for injury done to any one's "person, or to his team or carriage." "By the term 'carriage' they [i.e., the legislature] intended to include whatever carried the load, whether upon wheels or runners, and also that which was carried, whether on wheels or runners or on horseback. I have looked in vain for legal authorities upon the use and construction of these words [*team* and *carriage*]. But the dictionary, the only authority I have found, justifies, I think, the construction I have given them. See Webster's Dictionary, Unabridged (Ed. 1865), titles 'Team' and 'Carriage.'" Conway *v.* Jefferson, 46 N. H. 523.

A *bicycle* was held to be a "carriage" within the meaning of a statute inflicting a penalty on any person "driving any sort of carriage furiously." "The question is whether a bicycle is a carriage within the meaning of the act. I think the word 'carriage' is large enough to include a machine, such as a bicycle, which carries the person who gets upon it, and I think that such person may be said to 'drive' it." Taylor *v.* Goodwin, 4 Q. B. D. 229. But a bicycle was held *not* to be a "carriage" within the meaning of an act imposing tolls. "I am of opinion that the conviction was right, and that a bicycle is not a 'carriage' within the meaning of the Local Turnpike Act. Where the words employed by the legislature do not directly apply to the particular case, we must consider the object

of the act, and therefore in Taylor *v.* Goodwin, 4 Q. B. D. 229, it was held that the words 'furiously driving any sort of carriage' applied to a bicycle, for it was the object of the act to prevent injury from the furious driving of any kind of vehicle. The present act begins with imposing a toll upon particular carriages which are described 'or other such carriage;' and then imposes a further toll upon 'every carriage of whatever description, and for whatever purpose, impelled by steam or any other power not being that of horses.' The carriages here referred to must be carriages *ejusdem generis* with the carriages previously specified. If a bicycle were held liable to pay toll as a carriage, I do not know where we could draw the line." Williams *v.* Ellis, 5 Q. B. D. 176.

Carriages belonging to a circus and used for carrying the band and other performers in a parade through the town are not "carriages used solely for the conveyance of any goods or burden in the course of trade." Speak *v.* Powell, L. R. 9 Ex. 25.

A statute requiring *carriages* when meeting in the highway to turn to the right has no application to the meeting of *railroad cars* with *common vehicles* in the streets of a city. Hegan *v.* 8th Ave. R. Co., 15 N. Y. 380.

Other Such Carriage, in a statute requiring the owner of a "wagon, cart, or other such carriage" to have his name painted thereon, are words referring to vehicles *ejusdem generis* with what has gone before, viz., with a wagon, and were held not to apply to a light spring cart with two wheels used by the owner in his business as an agricultural-implement maker, in which he frequently carried agricultural implements to market, and drove his family about from place to place. Danby *v.* Hunter, 5 Q. B. D. 20.

Other Four-wheel Spring Carriage.—In a statute imposing the payment of a toll "for each coach, chariot, phaeton, or other four-wheel spring carriage," the latter words do not qualify the former, so that no coach is chargeable unless it is also a spring carriage, but any species of carriage known as "coach" is chargeable. Housat. Turnpike Co. *v.* Frink, 15 Pick. (Mass.) 443.

Pleasure Carriage.—"A *pleasure carriage* is one for the more easy, convenient, and comfortable transportation of persons." Middlesex Turnpike Co. *v.* Wentworth, 9 Conn. 374. In this case it was held that a four-wheeled carriage, drawn by two horses, constructed like a stage-coach, except that the sides were not swelled or panelled, and the body was connected with the axle-trees by curved bars and chains, and was not as much elevated from the ground as the body of a stage-coach ordinarily is—used for the transportation of the U. S. mail and of passengers with their luggage, and passing regularly twice a week a distance of twenty-six miles and back—was a "pleasure carriage" and "stage" within the meaning of a charter.

A vehicle on four wheels drawn by four horses, constructed and used like the common stage-coach, is a four-wheeled *pleasure carriage.* Talcott Mt. Turnpike Co. *v.* Marshall, 11 Conn. 185. "The private individual keeps his coach to be used by himself, his family, or his friends, as his business may require or his pleasure dictate. Its principal use consists in the conveyance of persons; for that purpose it is built, and to that object it is mainly devoted. It is not the less a 'pleasure carriage' because it carries the baggage of the owner when on a journey; nor does it lose its distinctive characteristic when the *business* pursuits of its owner require its use. It is equally a pleasure carriage whether he rides in it for health, amusement, recreation, or business, and with or without luggage. The object for which it was built, and the use to which it is ordinarily applied, give to it the character of a pleasure carriage or the reverse. If it is constructed for the more easy and convenient transportation of the person of the owner, and is employed with reference to this original design, it is obviously a pleasure carriage, although it may never be used solely for the purposes of pleasure and amusement. . . We cannot doubt, therefore, that a private coach, built and used for the conveyance of persons, is a pleasure carriage, although in its actual use pleasure may be neither designed nor realized. A stage-coach is a carriage built and designed to accommodate persons who wish to pass from place to place. It is offered to them as a cheap, easy, and convenient mode of travelling. . . It is also true, a stage or stage-coach is a carriage which runs regularly from one place to another, in which respect it differs from a private coach. This, however, can make it the less a *pleasure* carriage. The same may be said of the coach of an individual, which may be, and sometimes is, employed regularly in conveying its owner from his place of residence to his place of business, and back again in different towns. The uniformity of the employment in running from place to place cannot constitute it a pleasure carriage, nor deprive it of that character

CARRIERS OF PASSENGERS. (See also ACCIDENT; ACT OF GOD; BAGGAGE; COMPARATIVE NEGLIGENCE; CONTRIBUTORY NEGLIGENCE; CONTRACT; DAMAGES; MASTER AND SERVANT; NEGLIGENCE; RAILROAD COMPANIES; STREET RAILWAY COMPANIES; TICKETS OF PASSENGERS.)

1. Contractual Liability.—If there be a legally enforceable contract between the carrier and the passenger, the terms of that contract must, if they so far extend, determine the liability of the carrier for personal injuries suffered by the passenger. If the contract contain no stipulation as to such liability, or if its stipulation be of such a character that it is against the policy of the law to enforce it, the liability of the carrier will be dependent solely on the duty raised by the law.

if, without such use, it is entitled to that appellation. Without impropriety, therefore, it may be said that stage-coaches are pleasure carriages, used by the public. The coach of the private gentleman and the coach of the stage proprietor are alike built to accommodate persons only; and to that purpose are appropriated. . . . No inquiry can or ought to be made, in either case, whether, on the occasion when it is used, business or pleasure has led to its use, or whether the traveller has luggage or is without any, or whether he receives pleasure or suffers pain from the journey. The carriage in which he rides is still one designed to convey his person, and is appropriated to that object, is built for his more comfortable conveyance, and used with reference to that design."

A one-horse wagon with a spring seat and panelled sides, used only for the carriage of persons, is a "pleasure carriage." Moss *v.* Moore, 18 Johns. (N. Y.) 128. But a light one-horse wagon, with a frame-box, swelled sides, painted in imitation of panel-work, a crooked bolster, a chair-seat with wooden springs in which were two passengers, a trunk, a box, a bag of oats, and a bottle, was held not to be a *chair* or *pleasure carriage*, in Pardee *v.* Blanchard, 19 Johns. (N. Y.) 442.

A clause imposing tolls upon "coaches, chariots, and other four-wheeled pleasure carriages" includes stage-coaches used for the conveyance of the mail or of passengers. Cin., etc., Turnpike Co. *v* Neil, 9 Ohio, 11. Lane, C. J., in his dissenting opinion, said: "A stage-coach is a vehicle *sui generis*, but used for business, and in no sense a 'pleasure carriage,' notwithstanding its ambitious name."

2. The General Rule.—The general principle on which rests the liability of carriers to passengers is that wherever one party enters into relations with another party upon the basis of a contract made upon a valuable, though not necessarily a pecuniary, consideration, and those relations bring one of the parties into contact with a material agency which the contract requires the other party to supply, the law then exacts of him who supplies that material agency the duty of exercising care in its selection, maintenance in repair, and operation; and this duty must be so performed as to protect not only the contracting party, but also those agents, servants, and assistants whom the nature of the relation between the contracting parties justifies him in employing.[1]

3. Persons to whom Liable.—Under the general principle last stated, carriers are liable to attendants of passengers;[2] passengers of another carrier received for transportation in the defendant's cars;[3] passengers of another carrier transported in a means of transportation furnished by the defendant;[4] passengers of another carrier with whom a station is jointly occupied;[5] servants of another carrier while upon the line or premises of the defendant in the performance of their duty to that other carrier;[6] consignors, con-

1. Parnaby *v.* L. Canal Co., 11 Ad. & El. 223; 39 E. C. L.; Mersey Docks Co. *v.* Gibbs, 3 H. & N. 164; 11 H. L. C. 686, L. R. 1 H. L. 93; Marfell *v.* S. W. Ry., 8 C. B. N. S. 525, 98 E. C. L.; Winch *v.* Conservators of the Thames L. R., 9 C. P. 378; Hartnall *v.* Ryde Commrs., 4 B. & S. 361, 116 E. C. L.; Ohrby *v.* Ryde Commrs., 5 B. & S. 743, 117 E. C. L.; Corby *v.* Hill, 4 C. B. N. S. 556, 93 E. C. L.; Pickard *v.* Smith, 10 C. B. N. S. 470, 100 E. C. L.; Chapman *v.* Rothwell, E. Bl. & E. 168, 96 E. C. L.; Thompson *v.* N. E. R., 2 B. & S. 106, 110 E. C. L.; Indermaur *v.* Dames, L. R. 1 C. P. 274, 2 C. P. 311; Smith *v.* L. & St. K. Docks Co., L. R. 3 C. P. 326; White *v.* France, L. R. 2 C. P. D. 308; Francis *v.* Cockrell, L. R. 5 Q. B. 184, 501; Lax *v.* Corporation of Darlington, 5 Ex. Div. 28; Briggs *v.* Oliver, 4 H. & C. 408; Heaven *v.* Pender, 11 Q. B. D. 502; Godley *v.* Haggerty, 20 Penn. St. 387; Carson *v.* Godley, 26 Penn. St. 111; Waldon *v.* Finch, 70 Penn. St. 460; McKee *v.* Bidwell, 74 Penn. St. 218; N. O. M. & C. R. *v.* Hanning, 15 Wall. 649; Bennett *v.* L. & N. R., 102 U. S. 577; s. c., 1 Am. & Eng. R. R. Cas. 71; Carleton *v.* F. I. Co., 99 Mass. 216; L. & B. R. *v.* Chenewith, 52 Penn. St. 382; Fries *v.* Cameron, 4 Richardson, 228.

2. McKone *v.* M. C. R., 51 Mich. 601; s. c., 13 Am. & Eng. R. R. Cas. 29; Langan *v.* St. L. I. M. & S. R., 72 Mo. 392; s. c., 3 Am. Eng. R. R. Cas. 355; Stiles *v.* A. & W. P. R., 65 Ga. 370; s. c., 8 Am. & Eng. R. R. Cas. 195; Tobin *v.* P. G. & P. R., 59 Me. 183; Dogs *v.* M. K. & T. R., 59 Mo. 27; Hamilton *v.* T & P. R., 64 Tex. 251; s. c., 21 Am. & Eng. R. R. Cas. 336; Lucas *v.* N. B. & T. R., 6 Gray (Mass.), 65; Griswold *v.* C. & N. W. R., 23 Am. & Eng. R. R. Cas. 463; T. & P. R. *v.* Best, 6 Tex. Law Rev. 232.

3. Foulkes *v.* M. D. R., 4 C. P. D. 267; 5 C. P. D. 157.

4. Grote *v.* C. & H. R., 2 Ex. 251; Reynolds *v.* N. E. R., Roscoe's *Nisi Prius*, 591; Dalyell *v.* Tyrer, 28 L. J. Q. B. 52; El. Bl. & El. 899; 96 E. C. L.; Martin *v.* G. I. P. R., L. R. 3 Ex. 9; Gill *v.* M. S. & L. R., L. R. 8 Q. B. 186; Schopman *v.* B. & W. R., 9 Cush. (Mass.) 24; W. St. L. & P. R. *v.* Peyton, 106 Ill. 534; P. C. & St. L. R. *v.* Spencer, 98 Ind. 126; s. c., 21 Am. & Eng. R. R. Cas. 478; Patterson *v.* W., St. L. & P. R., 54 Mich. 91; s. c., 18 Am. & Eng. R. R. Cas. 130.

5. Tebbutt *v.* B. & E. R., L. R. 6 Q. B. 73.

6. Vose *v.* L. & Y. R., 2 H. & N. 728; Graham *v.* N. E. R., 18 C. B. (N. J.) 229; 114 E. C. L.; Snow *v.* H. R. R., 8 Allen (N. Y.), 441; C. R. *v.* Armstrong, 49 Penn. St. 186; 52 Penn. St. 282; Brown *v.* G. W. R., 40 Up. Can. Q. B. 333; 2 Ont. App. Cas. 64; 5 Can. S. C. 159; Swainson *v.* N. E. R., 3 Ex. D. 341; Abraham *v.* Reynolds, 5 H. & N. 193; Warburton *v.* S. W. R., L. R. 2 Ex. 30; P., W. & B. R. *v.* State, 58 Md. 372;

signees, and their agents personally assisting in the reception or delivery of their freight;[1] persons entering under special contract upon the defendant's line or premises;[2] post-office employees carried under contract between the carrier and the government or under a statutory duty imposed upon the carrier;[3] soldiers carried under contract with the government;[4] express agents;[5] vendors of newspapers, refreshments, etc., and passengers.[6]

4. Pennsylvania Act of 1868.—The application of the rule as stated in § 3 is, in Pennsylvania, limited by the act of April 4, 1868,[7] which provides "that when any person shall sustain personal injury or loss of life while lawfully engaged or employed about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee; provided that this section shall not apply to passengers." The constitutionality of this statute has been sustained in Kirby *v.* P. R.[8] And it has been held that the stat-

I. C. R. *v.* Frelka, 110 Ill. 498; s. c., 18 Am. & Eng. R. R. Cas. 7; Penn. Co. *v.* Gallagher, 40 Ohio St. 637; s. c., 15 Am. & Eng. R. R. Cas. 341; *In re* Merrill (C. V. R.), 54 Vt. 200; s. c., 11 Am. & Eng. R. R. Cas. 680; Zeigler *v.* D. & N. R., 52 Conn. 543; s. c., 23 Am. & Eng. R. R. Cas. 400.

1. Holmes *v.* N. E. R., L. R. 4 Ex. 254; 6 Ex. 123; Wright *v.* L. & N. W. R., L. R. 10 Q. B. 298; 1 Q. B. D. 252; A. V. R. *v.* Findlay, 4 Weekly Notes of Cases (Penn.), 438; Foss *v.* C. M. & St. P. R., 33 Minn. 392; s. c., 19 Am. & Eng. R. R. Cas. 113; Watson *v.* W., St. L. & P. R., 66 Iowa, 164; s. c., 19 Am. & Eng. R. R. Cas. 114; I. C. R. *v.* Hoffman, 67 Ill. 287; Newson *v.* N. Y. C. R., 29 N. Y. 383; N. O., J. & G. N. R. *v.* Bailey, 40 Miss. 395; S. L. B. R. *v.* Lewark, 4 Ind. 471; Same *v.* Lynch, 4 Ind. 494; Dufour *v.* C. P. R., 7 Pac. Repr. 769; s. c., 25 Am. & Eng. R. R. Cas. 141 n.; Mark *v.* St. P. R., 32 Minn. 208.

But the railway is not liable to a volunteer who, while assisting a consignee in removing his freight, is injured by the breaking of a crane erected by the railway on its premises, and permitted to be used by the consignee, for the railway owes no duty to the volunteer. Blakemore *v.* B. & E. R., 8 El. & Bl. 1035; 92 E. C. L. In Heaven *v.* Pender, 11 Q. B. D. 516, Cotton and Bowen, L. JJ., question the propriety of considering the plaintiff in Blakemore's case as a volunteer. Nor is the railway liable to a consignee who is contributorily negligent, as, for example, in driving a wagon into a passage-way on the side of a canal so narrow that in attempting to pass another wagon he is thrown into the canal. Goldstein *v.* C. M. & St. P. R., 46 Wis. 404. Or in going on the line between the cars of a freight train for the purpose of uncoupling the cars. Burns *v.* B. & L. R., 101 Mass. 50. Or in carelessly crossing the tracks in a railway yard. Rogstad *v.* St. P., M. & M. R., 31 Minn. 208; s. c., 14 Am. & Eng. R. R. Cas. 648. Or in walking on the line in a railway yard in front of a locomotive and train which is obviously ready to move. B. & O. R. *v.* Depew, 40 Ohio St. 121; s. c., 12 Am. & Eng. R. R. Cas. 64.

2. Marfell *v.* S. W. R., 8 C. B. (N. J.) 525; 98 E. C. L.; B. & O. R. *v.* Rose (Md.), 27 Am. & Eng. R. R. Cas. 125.

3. Collett *v.* L. & N. W. R., 16 Q. B. 984; 71 E. C. L.; P. R. *v.* Price, 96 Penn. St. 256; Nolton *v.* W. R., 15 N. Y. 444; Seybolt *v.* N. Y., L. E. & W. R., 95 N. Y. 562; Hammond *v.* N. E. R., 6 S. C. 130; H. & I. C. R. *v.* Hampton, 64 Tex. 427; s. c., 22 Am. & Eng. R. R. Cas. 291. *Cf.* Turrestine *v.* R. & D. R. 23 Am. & Eng. R. R. Cas. 460.

4. Truax *v.* E. R., 4 Lans. (N. Y.) 198.

5. Blair *v.* L. R., 66 N. Y. 313; Chamberlain *v.* M. & M. R., 11 Wis. 238; Penn. Co. *v.* Woodworth, 26 Ohio St. 585.

6. Commonwealth *v.* V. C. R., 108 Mass. 7; Yeomans *v.* C. C. S. N. Co., 44 Cal. 71.

7. Pamph. Laws, 1868, p. 58.

8. 76 Pa. St. 508.

ute bars recovery, in the case of a plaintiff who, while engaged in the service of another party in loading coal on a siding which was in the sole possession and under the exclusive control of the defendant, was injured by the disengagement from their engine of some cars which were not equipped with a sufficient number of train hands to control them, and which, running upon a down grade, came upon the siding, the switch connecting the siding with the main line having been left open by the negligence of the railway's servants;[1] where the defendant had running powers over the line of another company, and theplaintiff, a freight brakeman in the employment of that other company, having left his train to turn a switch, while walking on the line was run over by a train of the first-mentioned railway, of whose approach no notice was given;[2] where the plaintiff, having gone to a station to receive freight consigned to him, and having, by permission of the railway's agent, and for the purpose of unloading his freight, entered a car upon a siding, was injured by the negligence of the railway's servants in shunting cars to the siding;[3] where a person, while unloading freight from a ship lying at a wharf owned and controlled by the railway, was injured by the negligence of the railway's servants in permitting an unusual escape of steam from an engine and so frightening the plaintiff's horses;[4] where the plaintiff, being the employee of a coal dealer, and engaged in unloading cars upon a siding constructed by the dealer upon his own land, and used by the railway, not as part of its line, but only for the purpose of delivering coal to the dealer, was injured by a collision caused by the negligent shifting of cars from the defendant's main line;[5] and where the plaintiff, a mail agent of the Post-office Department travelling on defendant's line in the performance of his duties as such mail agent, was injured by the negligence of the railway's servants in disobeying orders and thus causing a collision.[6]

The statute has been held not to bar recovery in the case of a plaintiff who, while employed in and about a rolling-mill in hauling ashes in a barrow across a siding upon his employer's premises, found the way blocked by some empty cars unattached to any engine or train, and in uncoupling and attempting to move the cars was killed by a movement of the cars, caused by the negligence of an engine-driver of the defendant in moving the cars without notice;[7] nor in the case of a servant of the owner of a lumber-yard adjoining the railway line, in which yard there was a siding from the railway, who was killed by cars run on the siding and striking against a car with a defective brake and unblocked, which had by

1. Kirby *v.* P. R., 76 Pa. St. 508.
2. D., L. & W. R. *v.* Mulherrin, 81 Pa. St. 366.
3. Ricard *v.* N. P. R., 89 Pa. St. 193.
4. Gerard *v.* P. R., 12 Phila. 394; s. c., 5 Weekly Notes of Cases (Pa.), 251.
5. Cummings *v.* P., C. & St. L. R., 92 Pa. St. 82.
6. P. R. *v.* Price, 96 Pa. St. 256 (affirmed in 113 U. S. 219, on the ground that the record raised no question of which the Supreme Court of the United States could take cognizance on appeal from a State court).
7. Richter *v.* P. R., 104 Pa. St. 511.

the negligence of the railway been permitted to remain on the siding.[1]

5. Passenger Defined.—A passenger is a person whom a common carrier has contracted to carry from one place to another, and has, in the course of the performance of that contract, received under his care either upon the means of conveyance, or at the point of departure of that means of conveyance.[2]

6. Liability Dependent on Contract.—The relation of carrier and passenger is dependent on the existence of a contract of carriage between the carrier and the passenger, made by themselves, or by their respective agents. Carriers are not liable to one who has not been accepted as a passenger, and the intention of the person to pay his fare is immaterial when there has been no contract of the carrier with him.[3]

A fortiori, where the person injured is a trespasser the carrier owes him no duty, and is not bound to indemnify him for anything less than injuries wilfully inflicted.[4]

Nor can one recover who fraudulently induces the carrier's servants to carry him gratuitously.[5]

7. Passengers on Freight Cars, etc.—Where the person injured has been permitted by the carrier's servants to ride without paying fare, the carrier is liable if the servant was expressly or impliedly authorized to grant such permission.[6] But where the carrier's regulations, publicly made known, do not authorize the servant to accept passengers, the carrier is not liable.[7] Conductors in charge of passenger trains have an implied authority to accept passengers,[8] but as freight trains are run by railways for the transportation of freight, not passengers, the servants of the railway when in charge of such trains have no implied authority to invite strangers to become passengers thereon, and in the absence of proof of express authority vested in the conductor of a freight train the acceptance of his invitation to ride thereon does not make a stranger a passenger;[9] nor have railway servants an implied authority to accept persons as pas

1. N. P. R. *v.* Kirk, 90 Pa. St. 15; 1 Am. & Eng. R. R. Cas. 45.
2. Price *v.* P. R., 96 Pa. St. 267.
3. Gardner *v.* N. H. & N. Co., 51 Conn. 143; 18 Am. & Eng. R. R. Cas. 170.
4. Duff *v.* A. V. R., 91 Pa. St. 458; T., W. & W. R. *v.* Brooks, 81 Ill. 245, 292; C. & B. R. *v.* Michie, 83 Ill. 427; Brown *v.* M. K. & T. R., 64 Mo. 536; T., W. & W. R. *v.* Beggs, 85 Ill. 80; Duff *v.* A. V. R., 91 Pa. St. 458.
5. T., W. & W. R. *v.* Beggs, 85 Ill. 80; T., W. & W. R. *v.* Brooks, 81 Ill. 245, 292.
6. Sherman *v.* H. & St. J. R., 72 Mo. 62; s. c., 4 Am. & Eng. R. R. Cas. 589; Wilton *v.* M. R., 107 Mass. 108; Same *v.* Same, 125 Mass. 130; P., A. & M. P. R. *v.* Caldwell, 74 Pa. St. 421; Gradin *v.* St. P. & D. R., 30 Minn. 217; s. c., 11 Am. & Eng. R. R. Cas. 644; Secor *v.* St. P., M. & M. R., 18 Fed. Rep. 221; Lucas *v.* M. & St. P. R., 33 Wis. 41; Creed *v.* P. R., 86 Pa. St. 139; St. J. & W. R. *v.* Wheeler, (Kans.), 26 Am. & Eng. R. R. Cas. 173.
7. T., W. & W. R. *v.* Brooks, 81 Ill. 245; C. & B. R *v.* Michie, 83 Ill. 427; Duff *v.* A. V. R., 91 Pa. St. 458; Jenkins *v.* C., M. & St. P. R., 41 Wis. 112; H. & T. C. R. *v.* Moore, 49 Tex. 31; Gardner N. H. & N. Co., 51 Conn. 143; 18 & Eng. R. R. Cas. 170.
8. P. R. *v.* Books, 57 Pa. St. 345; Creed *v.* P. R., 86 Pa. St. 139.
9. Eaton *v.* D., L. & W. R., 57 N. Y. 382; Waterbury *v.* N. Y. C. & H. R. R., 17 Fed. Rep. 671. *Cf.* Dunn *v.* G. T. R., 58 Me. 187.

sengers on pay-cars,[1] or on hand-cars,[2] but if it be proven that the railway servant was authorized to accept the person as a passenger on a hand-car,[3] or on a freight train,[4] the railway will, by reason of such acceptance, be liable to him as a passenger.

8. Servants as Passengers.—Where an individual is carried by a railway in performance of the conditions of a contract of service he is to be regarded as a servant, not as a passenger.[5] A passenger will not, by the performance of a casual service on a train, cease to be a passenger and become an employee of the railway.[6]

To constitute one a paying passenger, the payment of fare in money is not essential,[7] for any valuable consideration moving from the person injured to the railway will render him a paying passenger, such as the fact that he was travelling as a drover in charge of his cattle, which the railway was transporting for hire;[8] or that he, as the owner of a patented coupler, was travelling on the defendant's line at its invitation in the course of negotiations for the adoption of his patent;[9] or that he was a detective carried over the line on a hand-car in the performance of a special duty, for which the railway had entered into a contract with him;[10] or that he was with the consent of the railway travelling on a freight train in charge of stock or goods carried by the railway for him;[11] or that he was with the consent of the railway travelling on a hand-car.[12]

1. S. W. R. *v.* Singleton, 66 Ga. 252.
2. Hoar *v.* M. C. R., 70 Me. 65.
3. Pool *v.* C., M. & St. P. R., 56 Wis. 227; 8 Am. & Eng. R. R. Cas. 360; Prince *v.* I. & G. N. R., 64 Tex. 144; 21 Am. & Eng. R. R. Cas. 152.
4. Dunn *v.* G. T. R., 58 Me. 187; Lucas *v.* M. & St. P. R., 33 Wis. 41; Secord *v.* St. P., M. & M. R., 18 Fed. Rep. 221; Sherman *v.* H. & St. J. R., 72 Mo. 621; 4 Am. & Eng. R. R. Cas. 580; O. & M. R. *v.* Mahling, 30 Ill. 9; T. & P. R. *v.* Garcia, 62 Tex. 285; 21 Am. & E. R. R. Cas. 384.
5. Tunney *v.* M. R., L. R. 1 C. P. 291; Ryan *v.* C. V. R., 23 Pa. St. 384; Il. & St. J. R. *v.* Higgins, 36 Mo 418; Gillshannon *v.* S. B. R., 10 Cush. 228; Seaver *v.* B. & M. R., 14 Gray, 466; Russell *v.* H. R. R., 17 N. Y. 134; Ross *v.* N. Y. C. & H. R. R., 74 N. Y. 617; N. Y. C. & H. R. R. *v.* Vick, 95 N. Y. 267; s. c., 17 Am. & Eng. R. R. Cas. 609; K. P. R. *v.* Salmon, 11 Kans. 83; McQueen *v.* C. B. U. P. R., 30 Kans. 689; s. c., 15 Am. & Eng. R. R. Cas. 226. *Sed cf.* O'Donnell *v.* A. V. R., 50 Pa. St. 490; 59 Pa. St. 239; Torpy *v.* G. T. R, 20 Up. Can. Q. B. 446; B. & O. R. *v.* Trainor, 33 Md. 542; Abell *v.* W. M. R., 63 Md. 433; s. c., 21 Am. & Eng. R. R. Cas. 503.
6. C. V. R. *v.* Myers, 55 Pa. St. 288; Mcl. R. *v.* Bolton, 21 Am. & Eng. R. R. Cas. 501; P. P. R. *v.* Green, 56 Md. 84; s. c., 6 Am. & Eng. R. R. Cas. 168. *Cf.* Degg *v.* M. R., 1 H. & N. 773; Potter *v.* Faulkner, 1 B. & S. 800; 101 E. C. L.; Everhart *v.* T. H. & I. R., 78 Ind. 292; s. c., 4 Am. & Eng. R. R. Cas. 599; Sherman *v.* H. & St. J. R., 72 Mo. 62; s. c., 4 Am. & Eng. R. R. Cas. 589.
7. Cleveland *v.* N. J. G. Co., 68 N. Y. 306; Hart *v.* G. R., 40 Miss. 391.
8. N. Y. C. R. *v.* Lockwood, 17 Wall. 357; I. & St. L. R. *v.* Horst, 95 U. S. 291; C. P. & A. R. *v.* Curran, 19 Ohio St. 1; O. & M. R. *v.* Selby, 47 Ind. 471; Mastin *v.* B. & O. R., 14 W. Va. 180; L. R. & F. S. R. *v.* Miles, 40 Ark. 298; P. R. *v.* Henderson, 51 Pa. St. 315; Goldey *v.* P. R., 30 Pa. St. 242; O. & M. R. *v.* Nickless, 71 Ind. 271; Flinn *v.* P., W. & B. R., 1 Houst. (Del.) 469; T. & P. R. *v.* Garcia, 62 Tex. 285; s. c., 21 Am. & Eng. R. R. Cas. 384; Carroll *v.* M. P. R. (Mo.), 26 Am. & Eng. R. R. Cas. 268.
9. G. T. R. *v.* Stevens, 95 U. S. 655.
10. Pool *v.* C., M. & St. P. R., 54 Wis. 657; s. c., 3 Am. & Eng. R. R. Cas. 332; s. c., 56 Wis. 227; s. c., 8 Am. & Eng. R. R. Cas. 360.
11. I. R. *v.* Beaver, 41 Ind. 493; Lawson *v.* C., St. P., M. & O. R., 64 Wis. 447; s. c., 21 Am. & Eng. R. R. Cas. 249.
12. I. G. N. & M. P. R. *v.* Gray (Tex.), 27 Am. & Eng. R. R. Cas. 318.

Where the carrier has contracted to carry an individual whose fare is paid, or is agreed to be paid, by the person with whom the contract is made, the carrier is liable to the individual, who is so received for carriage, to the same extent as if he had personally paid fare before coming upon the carrier's premises or entering its cars.[1]

9. Free Passengers.—Where a contract of carriage has been in fact made between the carrier and the passenger, and the carrier has agreed to transport the passenger gratuitously, it is liable to him to the same extent as if he had paid his fare before coming upon the carrier's premises or entering its cars. The existence of the contract of carriage, as a fact, fixes the liability, and the law finds an adequate consideration for such a contract in the doctrine that "the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it."[2] The carrier is, therefore, liable to persons whom it accepts for transportation over its line, and from whom it demands no fare, to the same extent that it is liable to passengers who pay fare.[3]

10. When Relation Begins and Ends.—The relation of carrier and passenger begins when, a contract of carriage having been made or the passenger having been accepted as such by the carrier, he has come upon the carrier's premises, or has entered upon any means of conveyance provided by the carrier.[4]

Of course, the mere purchase of a ticket does not make the purchaser a passenger; he must also come upon the carrier's premises or upon its means of conveyance before the relation can be said to have begun. Nor is it enough that he has come to the carrier's station with the intention of taking passage at some indefinite time in the future. He must come to the station a

1. Austin *v.* G. W. R., L. R. 2 Q. B. 442; G. N. R. *v.* Harrison, 10 Ex. 376; Marshall *v.* Y. N. & B. R., 11 C. B. 655; s. c., 73 E. C. L.; Skinner *v.* L. B. & G. C. R., 5 Ex. 787; O. & M. R. *v.* Muhling. 30 Ill. 9; N. & C. R. *v.* Messino, 1 Sneed (Tenn.), 220; Hurt *v.* S. R., 40 Miss. 391.

2. Coggs *v.* Bernard, 1 Sm. Lead. Cas. 293.

3. P. & R. R. *v.* Derby, 14 How. 468; Steamboat New World *v.* King, 16 How. 469; P. R. *v.* Butler, 57 Penna. St. 335; B., P. & W. R. *v.* O'Hara. 12 Weekly Notes of Cases (Penna.), 473; Todd *v.* O. C. R., 3 Allen, 18; 7 Allen, 207; Jacobus *v.* St. P. & C. R., 20 Minn. 125; Rose *v.* D. M.V. R., 39 Iowa, 246; F. & P. M. R. *v.* Weir, 37 Mich. 111; Lemon *v.* Chanslor, 68 Mo. 340; O. & M. R. *v.* Selby, 47 Ind. 471; Waterbury *v.* N. Y. C. & H. R. R., 17 Fed. Rep. 671; Abell *v.* W. M. R., 63 Md. 433; s. c., 21 Am. & Eng. R. R. Cas. 503; Gillenwater *v.* M. & I. R., 5 Ind. 339; O. & M. R. *v.* Nickless, 71 Ind. 271; Prince *v.* I. & G. N. R., 64 Tex. 144; s. c., 21 Am. & Eng. R. R. Cas. 152; G. C. & S. F. R. *v.* McGowan (Tex.), 26 Am. & Eng. R. R. Cas. 274; Arnes *v.* M. & N. R. (Wis.), 27 Am. & Eng. R. R. Cas. 102. *Sed cf.* Griswold *v.* N. Y. &c. R., 26 A. & E. R. R. Cas. 280. 37 Ill., 484; 34 N. J., 513; 24 N. Y., 181; 21 Ind., 48.

4. Brien *v.* Bennett, 8 C. & P. 724, 34 E. C. L.; Warren *v.* F. R., 8 Allen, 227; Davis *v.* C. L. R., 10 How. Pr. 300; Gordon *v.* G. St. & N. R., 40 Barb. 546; Smith *v.* St. P. C. R., 32 Minn. 1, 16 Am. & Eng. R. R. Cas. 310; Allender *v.* C. R., 37 Iowa, 264; W., St. L. & P. R. *v.* Rector, 104 Ill. 296; C. R. *v.* Perry, 58 Ga. 461; Cleveland *v.* N. J. Steamboat Co., 68 N. Y. 306; H. & St. J. R. *v.* Martin, 11 Bradwell, 386. *Sed cf.* I. C. R. *v.* Hudelson, 13 Ind. 325; Smith *v.* St. P. C. R., 32 Minn. 1; s. c., 16 Am. & Eng. R. R. Cas. 310. *Sed cf.* Merrill *v.* E. R., 139 Mass. 238.

reasonable time before the departure of the train by which he is to travel.[1]

But if a person has the *bona-fide* intention of taking passage by a train, and if he goes to a station at a reasonable time, he is entitled to protection as a passenger, not only from the moment he enters upon the carrier's premises, but also while *en route* to the station in an omnibus run by the railway to take passengers to their trains.[2]

The relation of carrier and passenger having been constituted continues until the journey, expressly or impliedly contracted for, has been concluded, and the passenger has left the carrier's premises; thus, one who has been accepted as passenger is entitled to protection as such while he is in the railway's station, journeying on its line, in transit from one means of conveyance to another provided by the railway, and while he is temporarily absent from the cars at a way station for a proper purpose.[3]

A person who has been rightfully ejected from the cars for misconduct or non-payment of fare, cannot become a passenger by subsequently entering the car and tendering his fare.[4] A passenger who has, by mistake, taken a wrong train, is, so far as regards protection from injury, a passenger on that train.[5]

The relation of carrier and passenger ends only when the journey contracted for has been concluded, and the passenger has left the carrier's premises;[6] or, if a reasonable time has elapsed after the arrival of the train at the passenger's destination, which was sufficient for the passenger to leave the railway premises.[7]

11. **Act of God.**—The duty of a common carrier to his passengers requires him to exercise the highest degree of care for their safety.[8]

1. Harris *v.* Stevens, 31 Vt. 79.
2. Buffett *v.* T. & B. R., 40 N. Y. 166.
3. Clossman *v.* L. I. R., 73 N. Y. 606; J., M. & I. R. *v.* Riley, 39 Ind. 568; K. N. L. Packet Co. *v.* True, 88 Ill. 608. *Sed cf.* State *v.* G. T. R., 58 Me. 176; Com. *v.* B. & M. R., 129 Mass. 500; s. c., 1 Am. & Eng. R. R. Cas. 457; Johnson *v.* B. & M. R., 125 Mass. 75.
4. O'Brien *v.* B. & W. R., 15 Gray, 20; Hibbard *v.* N. Y. & E. R., 15 N. Y. 455. *Cf.* Dietrich *v.* P. R., 71 Pa. St. 432; State *v.* Overton, 4 Zab. 438; Pease *v.* D. & L. R. (N. Y.), 26 Am. & Eng. R. R. Cas. 185.
5. C., C. & I. R. *v.* Powell, 40 Ind. 37
6. P., C. & St. L. R. *v.* Krouse, 30 Ohio St. 222.
7. Imhoff *v.* C. & M. R., 20 Wis. 344.
8. White *v.* Boulton, Peake, 113; Christie *v.* Griggs, 2 Camp. 79; Harris *v.* Costar, 1 C. & P. 636; 11 E. C. L.; Bremner *v.* Williams, 1 C. & P. 414; 11 E. C. L.; Sharp *v.* Gray, 9 Bing. 457; Fowler *v.* Locke, L. R. 7 C. P. 272; 9 C. P. 751 *n*; Searle *v.* Laverick, L. R. 9 Q. B. 122; Kopitoff *v.* Wilson, 1 Q. B. D. 377; Randall *v.* Newson, 2 Q. B. D. 102; Hyman *v.* Nye, 6 Q. B. D. 685; White *v.* F. R., 136 Mass. 321; Sales *v.* Western Stage Co., 4 Iowa, 547; Wilson *v.* N. P. R., 26 Minn. 280; Warren *v.* F. R., 8 Allen, 233; Taylor *v.* G. T. R., 48 N. H. 229; T., H. & W. R. *v.* Baddeley, 54 Ill. 19; Dunn *v.* G. T. R., 58 Me. 157; Tuller *v.* Talbot, 23 Ill. 357; P. & C. R. *v.* Thompson, 56 Ill. 138; I. & St. L. R. *v.* Horst, 93 U. S. 291; T. H. & I. R. *v.* Jackson, 81 Ind. 20; Sherlock *v.* Alling, 44 Ind. 184; Penna. Co. *v.* Roy, 102 U. S. 451; M. R. *v.* Blakely, 59 Ala. 477; Tanner *v.* L. & N. R., 60 Ala. 621; Wheaton *v.* N., B. & M. R., 36 Cal. 593; P. P. C. Co. *v.* Barker, 4 Colo. 344; Derwort *v.* Loomer, 21 Conn. 253; Flinn *v.* P., W. & B. R., 1 Houston (Del.), 499; U. P. R. *v.* Hand, 7 Kans. 392; Sherley *v.* Billings, 8 Bush (Ky.), 151; Black *v.* C. R., 10 La. Ann. 38; B. & O. R. *v.* Worthington, 21 Md. 275; McClary *v.* S. C. P. R., 3 Neb. 54; Laing *v.* Colder, 8 Pa. St. 482; Meier *v.* P. R., 64 Pa. St. 230; P. & R. R. *v.* Anderson, 94 Pa. St. 351; I. & G. N. R.

But carriers are not insurers of the safety of their passengers; nor are they to be held liable for injuries to their passengers resulting from such defects in their buildings or means of transportation as could not have been guarded against by the exercise of care on their part,[1] nor for injuries caused solely by an "act of God," without negligence on the carrier's part.[2] But where the carrier has been in any respect negligent the concurrence of an "act of God" in causing the injury will not relieve the carrier from responsibility.[3]

12. Act of Public Enemy.—Nor are carriers to be held liable for injuries caused without fault on their part by an act of the public enemy.[4]

13. Accident.—Nor are carriers to be held liable for injuries caused by inevitable accident, not due in any way to negligence on the part of the carrier, and such as no human foresight on his part could avert.[5]

v. Halloren, 53 Tex. 46; V. C. R. *v.* Sanger, 15 Gratt. 236; P. & R. R. *v.* Derby, 14 How. 468; Steamboat New World *v.* King, 16 How. 469; N. Y. C. R. *v.* Lockwood, 17 Wall. 357; Stockton *v.* Frey, 4 Gill, 406; State *v.* B. & O. R., 24 Md. 84; McElroy *v.* N. & L. R. 4 Cush. 400; Shopman *v.* B. & W. R., 9 Cush. 24; Knight *v.* P., S. & P. R., 57 Me. 202; Fairchild *v.* C. S. Co., 13 Cal. 604; Jamison *v.* St. J. & S. C. R., 55 Cal. 593; s. c., 3 Am. & Eng. R. R. Cas. 350; P. C. & St. L. R. *v.* Williams, 74 Ind. 462; s. c., 3 Am. & Eng. R. R. Cas., 457. *Cf.* L. C. R. *v.* Weams, 80 Ky. 420; s. c., 8 Am. & Eng. R. R. Cas. 399; Moore *v.* D. M. & F. D. R. (Iowa), 27 Am. & Eng. R. R. Cas. 315.

1. Ingalls *v.* Bills, 9 Metc. 1; Redhead *v.* M. R., L. R. 2 Q. B. 412; L. R. 4 Q. B. 379; Meier *v.* P. R., 64 Pa. St. 225; Gilson *v.* J. C. H. R., 76 Mo. 282; s. c., 12 Am. & Eng. R. R. Cas. 132; Smith *v.* C., M. & St. P. R., 42 Wis. 520; De Graff *v.* N. Y. C. & H. R. R., 76 Am. & Eng. R. R. Cas. 125; McPadden *v.* N. Y. C. R., 44 Am. & Eng. R. R. Cas. 478; Caldwell *v.* N. J. S. Co., 47 Am. & Eng. R. R. Cas. 290; Carroll *v.* S. J. R., 58 Am. & Eng. R. R. Cas. 126; G. R. & I. R. *v.* Boyd, 65 Ind. 526; Lemon *v.* Chanslor, 68 Mo. 340; Sawyer *v.* H. & St. J. R., 37 Mo. 240. *Sed cf.* Alden *v.* N. Y. C. R., 26 N. Y. 102.

2. Withers *v.* N. K. R., 3 H. & N. 969; P. & R. R. *v.* Anderson, 94 Pa. St. 351; B. & A. R. *v.* School District, 96 Pa. St. 65; P., F. W. & C. R. *v.* Brigham, 29 Ohio St. 374; G. W. R. *v.* Braid, 1 Moore P. C. N. S. 101; Nichols *v.* Marsland, 2 Ex. D. 1; P., F. W. & C. R. *v.* Brigham, 29 Ohio St. 374; Lehigh Bridge *v.* L. C. & N. Co., 4 Rawle, 9; P. & R. R. *v.* Anderson, 94 Pa. St. 351; B. & O. R. *v.* School District, 96 Pa. St. 65; s.c., 2 Am. & Eng. R. R. Cas. 166; Foster *v.* Juniata Bridge Co., 16 Pa. St. 393; P., F. W. & C. R. *v.* Gilleland, 56 Pa. St. 445; Livezey *v.* Philadelphia, 64 Pa. St. 106; Welker *v.* N. C. R., 1 Weekly Notes of Cases (Pa.), 210; Hayes *v.* Kennedy, 41 W. N. C. 378; Morrison *v.* Davis, 20 W. N. C. 171; Gould *v.* McKenna, 86 W. N. C. 297; Nugent *v.* Smith, 1 C. P. D. 423; I. & G. N. R. *v.* Halloren, 53 Tex. 46; s. c., 3 Am. & Eng. R. R. Cas. 343; M. & C. R. *v.* Reeves, 10 Wall. 176; Gates *v.* S. M. R., 28 Minn. 110; s. c., 2 Am. & Eng. R. R. Cas. 237; Denny *v.* N. Y. C. R., 13 Gray, 481; H. & T. C. R. *v.* Fowler, 56 Tex. 452; s. c., 8 Am. & Eng. R. R. Cas. 504; O. & R. V. R. *v.* Brown, 14 Neb. 170; s. c., 11 Am. & Eng. R. R. Cas. 501; Ely *v.* St. L., K. C. & N. R., 77 Mo. 34; s. c., 16 Am. & Eng. R. R. Cas. 342; McClary *v.* I. C. R., 3 Neb. 44; McPadden *v.* N. Y. C. R., 44 N. Y. 478; N. P. & O. W. *v.* Docks Co., 9 Ch. D. 515. *Sed cf.* K. P. R. *v.* Meller, 2 Colo. 442.

3. P. & R. R. *v.* Anderson, 94 Pa. St. 356; Davis *v.* C. V. R., 55 Vt. 84; s. c., 11 Am. & Eng. R. R. Cas. 173; Lambkin *v.* S. E. R., 5 App. Cas. 352; Ellet *v.* St. L., K. C. & N. R., 76 Mo. 518; s. c., 12 Am. & Eng. R. R. Cas. 183; Dixon *v.* M. Board of Works, 7 Q. B. D. 418; Truitt *v.* H. & St. J. R., 62 Mo. 527; B. & O. R. *v.* School District, 96 Pa. St. 65; s.c., 2 Am. & Eng. R. R. Cas. 166; Straoss *v.* W., St. L. & P. R., 17 Fed. Rep. 209; L., N. A. & C. R. *v.* Thompson (Ind.), 27 Am. & Eng. R. R. Cas. 88.

4. Sawyer *v.* H. & St. J. R., 37 Mo. 240.

5. Aston *v.* Heaven, 2 Esp. 533; Hammack *v.* White, 11 C. B. N. S. 588; s. c.,

14. Act of Injured Party.—Nor are carriers to be held liable for injuries caused solely by the act of the injured person, and without fault on the carrier's part.[1]

15. Third Parties.—Nor are carriers liable for injuries solely caused by the acts of third parties unconnected with the carrier by any relation of agency.[2] But where the passenger's injury can be traced to negligence on the part of the carrier as its primary and proximate cause, the concurrence of the negligence of a person unconnected with either the carrier or the person injured will not relieve the carrier from responsibility for the consequences of its negligence.[3]

16. Ultra Vires.—Where a corporation, acting as a carrier, has injured a passenger by negligence on its part, it is no defence to the carrier that the injury was done in the prosecution of a business which the corporation had, under its charter, no power to conduct.[4]

It is the duty of the carrier, whatever be the means of conveyance which it uses, to provide everything which is essential to the safety of the passenger and reasonably consistent with the transportation of the passenger by the particular means of conveyance so used; thus one who has been accepted as a passenger

103 E. C. L.; Beach *v.* Parmeter, 23 Pa. St. 197; A., T. & S. F. R. *v.* Flinn, 24 Kans. 627; s. c., 1 Am. & Eng. R. R. Cas. 240; Hallihan *v.* St. J. R., 71 Mo. 113; s. c., 2 Am. & Eng. R. R. Cas. 117; Maschek *v.* St. L. R., 71 Mo. 276; s. c., 2 Am. & Eng. R. R. Cas. 38; H. M. & F. P. R. *v.* Kelley, 102 Pa. St. 115; Woodbridge *v.* D., L. & W. R., 105 Pa. St. 460; s. c., 16 Weekly Notes of Cases (Pa.), 55; Meyer *v.* M. P. R., 2 Neb. 320; State *v.* B. & O. R., 24 Md. 84.

1. Caswell *v.* Worth, 5 El. & Bl. 849, 85 E. C. L.; Woolf *v.* Beard, 8 C. & P. 373. 34 E. C. L.; E. & C. R. *v.* Hiatt, 17 Ind. 102; Kleimenhagen *v.* C., M. & St. P. R. (Wisc.), 26 Am. & Eng. R. R. Cas. 179; G. C. & S. F. R. *v.* Wallen (Tex.), 26 Am. & Eng. R. R. Cas. 219. *Sed cf.* Eckert *v.* L. I. R., 43 N. Y. 502.

2. Reedie *v.* L. & N. W. R., 4 Ex. 243; Curtis *v.* R. & S. R., 18 N. Y. 534; Harris *v.* U. P. R., 13 Fed. Rep. 591, 4 McCrary, 454; Latch *v.* R. R., 27 L. J. Exch. 155, 3 H. & N. (Am. Ed.) 930; Keeley *v.* E. R., 47 How. Pr. 256; Jones *v.* G. T. R., 45 Up. Can. (Q. B.) 193; Daniel *v.* M. R., L. R. 3 C. P. 216, 591, 5 H. L. 45; Taylor *v.* G. N. R., L. R. 1 C. P. 385; Wright *v.* M. R., L. R. 8 Ex. 137; P., F. W. & C. R. *v.* Hinds, 53 Pa. St. 512.

3. Scott *v.* Shepherd, 3 Wils. 403, 2 W. Bl. 892, 2 Sm. Lead. Cas. 797; Dixon *v.* Bell, 5 M. & S. 198; Illidge *v.* Goodwin, 5 C. & P. 190, 24 E. C. L.; Lynch *v.* Nurdin, 1 Q. B. 29, 41 E. C. L.; Daniels *v.* Potter, 4 C. & P. 262, 19 E. C. L.; Hughes *v.* Macfie, Abbott *v.* Macfie, 2 H. & C. 744; Bird *v.* Holbrook, 4 Bing. 628, 15 E. C. L.; Hill *v.* N. R. Co., 9 B. & S. 303; Collins *v.* M. L. Commrs., L. R. 4 C. P. 279; Harrison *v.* G. N. R., 3 H. & C. 231; Sneesby *v.* L. & Y. R., 1 Q. B. D. 42; Clark *v.* Chambers, 3 Q. B. D. 327, disapproving Mangan *v.* Atterton, L. R. 1 Ex. 239; Smith *v.* L. & S. W. R., L. R. 5 C. P. 98; Pittsburgh *v.* Grier, 22 Pa. St. 54; Scott *v.* Hunter, 46 Pa. St. 192; P. R. *v.* Hope, 80 Pa. St. 373; O. C. Gas Co. *v.* Robinson, 99 Pa. St. 1; Hey *v.* Philadelphia, 2 Weekly Notes of Cases (Pa.), 466; Raydure *v.* Knight, 2 W. N. C. 713; Fawcett *v.* P., C. & St. L. R., 24 W. Va. 755; s. c., 19 Am. & Eng. R. R. Cas. 1; Smith *v.* N. Y. S. & W. R., 46 N. J. L. 7; s. c., 18 Am. & Eng. R. R. Cas. 399; L. & M. R. *v.* McKenna, 13 Lea (Tenn.), 280; s. c., 18 Am. & Eng. R. R. Cas. 276; Brown *v.* P. R., 8 Rob. (La.) 45. *Sed cf.* Nicholson *v.* E. R., 41 N. Y. 525.

4. N. Y., L. E. & W. R. *v.* Haring, 47 N. J. L. 137; s. c., 21 Am. & Eng. R. R. Cas. 436; Bissell *v.* M. S. & N. J. R., 22 N. Y. 258; Hutchinson *v.* W. & A. R., 53 Tenn. 634; Gruber *v.* W. & J. R., 92 N. Car. 1; s. c., 21 Am. & Eng. R. R. Cas. 438; C. R. & B. Co. *v.* Smith, 76 Ala. 572; s. c., 25 Am. & Eng. R. R. Cas. 25. *Sed cf.* Hood *v.* N. Y. & N. H. R., 22 Conn. 1; s.c., 23 Conn. 609.

to be carried in a freight train is entitled to the same character, though not to the same degree, of protection as if he were carried in a passenger train.[1]

The stringent obligations which the law imposes upon common carriers of passengers are not applicable to individuals occasionally carrying passengers gratuitously, or upon such special contracts as constitute them private carriers.[2]

17. **Contributory Negligence.**—Where the person injured, or the plaintiff, or any person whose negligence is attributable to the plaintiff, has so far contributed to the injury by his want of ordinary care, that, but for such want of ordinary care on his part, the injury would not have been done, the carrier is not liable to the plaintiff in damages for such injury.[3]

Although negligence upon the part of the plaintiff may have in fact contributed to his injury, the carrier will nevertheless be liable, if its servants could by the exercise of ordinary care have avoided the injury to the plaintiff.[4]

1. Murch *v.* C. R., 29 N. H. 9; C., B. & Q. R. *v.* Hazzard, 26 Ill. 373; I. R. *v.* Beaver, 1 Md. 493; I. & St. L. R. *v.* Horst, 93 U. S. 291; C. & G. R. *v.* Fay, 16 Ill. 568; Edgerton *v.* N. Y. & H. R. R., 39 N. Y. 227; Dunn *v.* G. T. R., 58 Me. 187; Tibby *v.* M. P. R., 82 Mo. 292. As to the restricted statutory liability of railways in Mississippi to passengers on freight trains, see Code, 1880. § 1054; Perkins *v.* C., St. L. & N. O. R., 60 Miss. 726; s. c., 21 Am. & Eng. R. R. Cas. 242.

2. Moffatt *v.* Bateman, L. R. 3 P. C. 115; Shoemaker *v.* Kingsbury, 12 Wall. 369; Griggs *v.* Houston, 104 U. S. 553.

3. Butterfield *v.* Forrester, 11 East, 60; Bridge *v.* G. J. R., 3 M. & W. 244; Tuff *v.* Warman, 5 C. B. N. S. 573, 94 E. C. L.; Holden *v.* L. N. G. & C. Co., 3 M. G. & S. 1, 54 E. C. L.; Illott *v.* Wilkes, 3 B. & Ald. 304, 5 E. C. L.; Ellis *v.* L. & S. W. R., 2 H. & N. 424; B. & P. R. *v.* Jones, 95 U. S. 439; P. R. *v.* Aspell, 23 Pa. St. 147; Hice *v.* Kugler, 6 Wh. 336; Simpson *v.* Hand, 6 Pa. St. 311; Wynn *v.* Allard, 5 W. & S. 524; Gould *v.* McKenna, 86 Pa. St. 303; 13th & 15th Sts. P. R. *v.* Boudrou, 92 Pa. St. 480; Heil *v.* Glanding, 42 Id. 493; Sills *v.* Brown, 9 C. & P. 601, 38 E. C. L.; Creed *v.* P. R., 86 Pa. St. 139; Cremer *v.* Portland, 36 Wis. 92; H. & T. C. R. *v.* Gorbett, 49 Tex. 573; Mackey *v.* M. P. R., 18 Fed. Rep. 236; K. C. R. *v.* Thomas, 79 Ky. 160; s. c, 1 Am. & Eng. R.R. Cas. 79; Harper *v.* E. R., 3 Vroom, 88; Deyo *v.* N. Y. C. R., 34 N. Y. 9; J. R. *v.* Hendricks, 26 Ind. 228; Higgins *v.* H. & St. J. R., 36 Mo. 418; Sullivan *v.* L. Bridge Co., 9 Bush, 81; O. & N. H. R. *v.* Ward, 47 N. J. L. 560; s. c., 25 Am. & Eng. R.R. Cas. 359.

4. Davies *v.* Manor, 10 M. & W. 546; Radley *v.* L. & N. W. R., L. R. 9 Ex. 91, 10 Ex. 100; s. c., 1 App. Cas. 754; Dowell *v.* G. S. Nav. Co., 5 E. & B. 195, 85 E. C. L.; Witherly *v.* Regent's Canal Co., 12 C. B. N. S. 2, 104 E. C. L.; Tuff *v.* Warman, 5 C. B. N. S. 573, 94 E. C. L.; Morrisey *v.* Wiggins Ferry Co., 43 Mo. 380; Hulsencamp *v.* C. R., 37 Mo. 537; Kennedy *v.* N. M. R., 36 Mo. 351; Boland *v.* Missouri R., 36 Mo. 484; Meyer *v.* Pacific R., 40 Mo. 153; Liddy *v.* St. Louis R., 40 Mo. 506; Scott *v.* D. & W. R., 11 Irish Com. Law, 377; C. & A. R. *v.* Gretzner, 46 Ill. 76; C. & A. R. *v.* Pondrum, 51 Ill. 333; K. C. R. *v.* Dills, 4 Bush, 593; L. & C. R. *v.* Siekings, 5 Bush, 1; M. & W. R. *v.* Davis, 18 Ga. 679; 19 Ga. 437; M. & W. R. *v.* Winn, 19 Ga. 440; Raisin *v.* Mitchell, 9 C. & P. 613, 38 E. C. L.; Mayor of Colchester *v.* Brooke, 7 Q. B. 339, 378, 53 E. C. L.; Clayards *v.* Dethick, 12 Q. B. 439, 64 E. C. L.; Thompson *v.* N. E. R., 2 B. & S. 106, 110 E. C. L.; Wyatt *v.* G. W. R., 6 B. & S. 709, 118 E. C. L.; Isbell *v.* N. Y. & N. H. R., 27 Conn. 393; Meeks *v.* S. P. R., 56 Cal. 513; s. c., 8 Am. & Eng. R. R. Cas. 314; Needham *v.* S. F. & S. J. R., 37 Cal. 409; C. C. R. *v.* Holmes, 5 Colo. 197; s. c., 8 Am. & Eng. R. R. Cas. 410; State *v.* B. & O. R., 24 Md. 84; Trow *v.* V. C. R., 24 Vt. 487; N. H. S. & T. Co. *v.* Vanderbilt, 16 Conn. 421; Kerwhacker *v.* C., C., C. & I. R., 3 Ohio St. 172; Burnett *v.* B. & M. R., 16 Neb. 332; s. c., 19 Am. & Eng. R. R. Cas. 25; M. C. R. *v.* Neubeur, 62 Md. 391; s. c., 19 Am. & Eng. R. R. Cas.

18. Comparative Negligence.—In Illinois, Georgia, and Tennessee a contributorily negligent plaintiff is, under certain conditions, held to be entitled to recover damages against a carrier.[1]

There are, however, many cases in other jurisdictions disapproving the theory of comparative negligence.[2]

A person is not chargeable with contributory negligence who is injured in the effort to escape from an imminent peril to which he has been exposed by the negligence of the carrier.[3]

Nor is a person chargeable with contributory negligence who is injured in the attempt to obviate by an act not essentially dangerous an inconvenience to him caused by negligence on the part of the carrier.[4]

But it is contributory negligence if, in the attempt to avoid that which is merely inconvenient and in no sense dangerous the per-

261; Kean *v.* B. & O. R., 61 Md. 154; s. c., 19 Am. & Eng. R. R. Cas. 321; Johnson *v.* H. R. R., 5 Duer, 27; Button *v.* H. R. R., 18 N. Y. 248; B. & O. R. *v.* State, 33 Md. 542; L. C. & L. R. *v.* Mahony, 7 Bush (Ky.), 235; L. & N. R. *v.* Filbern, 6 Bush (Ky.), 574; Thayer *v.* St. L., A. & T. H. R., 22 Ind. 26; C. St. R. *v.* Steen, 42 Ark. 321; s. c., 19 Am. & Eng. R. R. Cas. 30. *Sed cf.* Creed *v.* P. R., 86 Pa. St. 139; Heil *v.* Glanding, 42 Pa. St. 493; C. R. *v.* Armstrong, 49 Pa. St. 193; Railroad *v.* Boudrou, 92 Pa. St. 475; Nelson *v.* A. & P. R., 68 Mo. 593; Price *v.* St. L., K. C. & N. R., 72 Mo. 414; s. c., 3 Am. & Eng. R. R. Cas. 365; Isabel *v.* H. & St. J. R., 60 Mo. 482; Harlan *v.* St. L., K. C. & N. R., 65 Mo. 22; Scoville *v.* H. & St. J. R., 81 Mo. 434; s. c., 22 Am. & Eng. R. R. Cas. 534; Zimmerman *v.* H. & St. J. R., 71 Mo. 476; s. c., 2 Am. & Eng. R. R. Cas. 191.

1. W., St. L. & P. R. *v.* Wallace, 110 Ill. 114; s. c., 19 Am. & Eng. R. R. Cas. 359; L., N. A. & C. R. *v.* Shires, 108 Ill. 617; s. c., 19 Am. & Eng. R. R. Cas. 387; C., B. & Q. R. *v.* Van Patten, 74 Ill. 91; I. C. R. *v.* Patterson, 93 Ill. 290; G. & C. U. R. *v.* Jacobs, 20 Ill. 478; C. & N. W. R. *v.* Sweeny, 52 Ill. 330; R. R. I. & St. L. R. *v.* Delaney, 82 Ill. 198; A. & R. A. L. R. *v.* Ayers, 53 Ga. 12; C. R. *v.* Gleason, 69 Ga. 200; A. & S. R. *v.* McElmurry, 24 Ga. 75; A. & W. P. R. *v.* Wyly, 65 Ga. 120; Thompson *v.* C. R., 54 Ga. 509; Campbell *v.* A. R., 53 Ga. 488; Hendricks *v.* W & A. R., 52 Ga. 467; M. & W. R. *v.* Davis, 27 Ga. 113; Beach on Contributory Negligence, p. 97; N. & C. R. *v.* Carroll, 6 Heisk. 347; R. R. *v.* Walker, 11 Heisk. 383; L. & N. R. *v.* Flemming, 14 Lea (Tenn.), 128; s. c., 18 Am. & Eng. R. R. Cas. 347.

2. L. S. N. R. *v.* Norton, 24 Pa. St. 465; Heil *v.* Glanding, 42 Pa. St. 493; Reeves *v.* D. L. & W. R., 30 Pa. St. 464; Stiles *v.* Geesey, 71 Pa. St. 439; C. R. *v.* Armstrong, 49 Pa. St. 193; Wilds *v.* H. R., 24 N. Y. 432; Pa. Co. *v.* Roney, 89 Ind. 453; O'Keefe *v.* C. R. I. & P. R., 32 Iowa, 467; P. R. *v.* Righter, 42 N. J. Law, 180; Gothard *v.* A. G. S. R., 67 Ala. 114; Potter *v.* C. & W. N. R., 21 Wis. 372; Marble *v.* Ross, 124 Mass. 44; H. & T. C. R. *v.* Gorbett, 49 Texas, 573; K. P. R. *v.* Peavey, 29 Kans. 170; s. c., 11 Am. & Eng. R. R. Cas. 260.

3. Jones *v.* Boyce, 1 Starkie, 493; s. c., 2 E. C. L.; Stokes *v.* Saltonstall, 13 Pet. 181; N. & C. R. *v.* Erwin, 3 Am. & Eng. R. R. Cas. 465; Caswell *v.* B. & W. R., 98 Mass, 194; E. T., V. & G. R. *v.* Gurley, 12 Lea (Tenn.), 46; s. c., 17 Am. & Eng. R. R. Cas. 568; C. R. *v.* Rhodes, 56 Ga. 645; C. R. *v.* Roach, 64 Ga. 635; s. c., 8 Am. & Eng. R. R. Cas. 79; P. B. & W. R. *v.* Rohrman, 13 Weekly Notes of Cases, 258; s. c., 12 Am. & Eng. R. R. Cas. 176; Smith *v.* St. P., M. & M. R., 30 Minn. 169; s. c., 9 Am. & Eng. R. R. Cas. 262; Iron R. *v.* Mowery, 36 Ohio St. 418; s. c., 3 Am. & Eng. R. R. Cas. 361; Buel *v.* N. Y. C. R., 31 N. Y. 314; S. W. R. *v.* Paulk, 24 Ga. 356; Twomley *v.* C. P., N. & E. R. R., 69 N. Y. 158; Mark *v.* St. P., M. & M. R., 30 Minn. 493; s. c., 12 Am. & Eng. R. R. Cas. 86; Woolery *v.* L., N. A. & C. R. (Ind.), 27 Am. & Eng. R. R. Cas. 210. *Sed cf.* G. C. & S. F. R. *v.* Wallen (Tex.), 26 Am. & Eng. R. R. Cas. 219; S. C. & C. St. R. *v.* Ware (Ky.), 27 Am. & Eng. R. R. Cas. 206.

4. Gee *v.* Metropolitan R., L. R. 8 Q. B. 161; Clayards *v.* Dethick, 12 Q. B. 439, 64 E. C. L.; Wyatt *v.* G. W. R., 6 B. & S. 709, 118 E. C. L.; the judgment of Kelly, C. B., in Siner *v.* G. W. R., L.

son injured encounters a danger obviously apparent to the minds of reasonable men.[1]

19. Infants, etc.—Lunatics, idiots, and children are to be held only to the exercise of that degree of care and discretion which ought reasonably to be expected of persons of their age and capacity;[2] and in general it is for the jury to determine, under the circumstances of the particular case, what amount of reason and discretion ought to have been exercised by the injured infant.[3] But where the injured person is confessedly of average capacity and an infant only in legal theory, it ought not to be left to the jury to determine what amount of discretion ought, under the circumstances of the particular case, to have been exercised by the injured person.[4]

A carrier owes to an infant, or to an adult of known mental or physical incapacity, a higher measure of duty than that which it owes to an adult of average mental and physical capacity; but the fact of the infancy, or other incapacity, of the injured person will not supply the want of proof of negligence on the part of the carrier.[5]

R. 3 Ex. 150; Johnson *v.* W. C. & P. R., 70 Pa. St. 357; W. P. P. R. *v.* Whipple, 5 Weekly Notes of Cases, 68.

1. Adams *v.* L. & Y. R., L. R. 4 C. P. 739; Siner *v.* G. W. R., L. R. 3 Ex. 150, 4 Ex. 117; G. H. & S. A. R. *v.* Le Gierse, 51 Tex. 189; Damont *v.* N. O. & C. R., 9 La. An. 441; I. C. R. *v.* Able, 59 Ill. 131; Gavett *v.* M. & L. R., 16 Gray, 501; J. R. *v.* Hendricks, 26 Ind. 228; Judgment of Bramwell, L. J., in Lax *v.* Darlington, 5 Ex. D. 28; P. R. *v.* Aspell, 23 Pa. St. 147.

2. Lynch *v.* Nurdin, 1 Q. B. 29, 41 E. C. L.; Rauch *v.* Lloyd, 31 Pa. St. 358; P. R. *v.* Kelly, 31 Pa. St. 372; Oakland R. *v.* Fielding, 48 Pa. St. 320; Smith *v.* O'Connor, 48 Pa. St. 218; H. M. & F. R. *v.* Gray, 3 Weekly Notes of Cases, 421; P. & R. R. *v.* Spearen, 47 Pa. St. 300; Kay *v.* P. R., 65 Id. 269; P. C. P. R. *v.* Hassard, 75 Id. 367; Crissey *v.* H. M. & F. R., Id. 83; Gray *v.* Scott, 66 Pa. St. 345; W. & G. R. *v.* Gladmon, 15 Wall. 401; Mangan *v.* B. C. R., 30 N. Y. 445; W. P. R. *v.* Gallagher, 16 Weekly Notes of Cases (Pa.), 413; Barry *v.* N. Y. C. & H. R. R., 92 N. Y. 289, 13 Am. & Eng. R. R. Cas. 615; Dowling *v.* N. Y. C. & H. R. R., 90 N. Y. 670; s. c., 12 Am. & Eng. R. R. Cas. 73; Thurber *v.* H. B. M. & F. R., 60 N. Y. 326; Reynolds *v.* N. Y. C. & H. R. R., 58 N. Y. 248; Byrne *v.* N. Y. C. & H. R. R., 83 N. Y. 620; O'Connor *v.* B & L. R., 135 Mass. 352; s. c., 15 Am. & Eng. R. R. Cas. 362; McMahon *v.* N. C. R., 39 Md. 438; Schmidt *v.* M. & St. P. R., 23 Wis. 186; C. & A. R. *v.* Gregory, 58 Ill. 226; Boland *v.* M. R., 36 Mo. 484; S. C. & P. R. *v.* Stout, 17 Wallace, 657; Elkins *v.* B. & A. R., 115 Mass. 190; Walter *v.* C. D. & M. R., 39 Iowa, 33.

3. Johnson *v.* C. & N. W. R., 49 Wis. 529; s. c., 1 Am. & Eng. R. R. Cas. 155; Ewen *v.* C. & N. W. R., 38 Wis. 614; Townley *v.* C. M. & St. P. R., 53 Wis. 626; s. c., 4 Am. & Eng. R. R. Cas. 562; Evansich *v.* G. C. & S. F. R., 57 Tex. 123; s. c., 6 Am. & Eng. R. R. Cas. 182; Vickers *v.* A. & W. P. R., 64 Ga. 306; s. c., 8 Am. & Eng. R. R. Cas. 337; M. & M. R. *v.* Crenshaw, 65 Ala. 566; s. c., 8 Am. & Eng. R. R. Cas. 340; Johnson *v.* C. & N. W. R., 56 Wis. 274; s. c., 8 Am. & Eng. R. R. Cas. 471; Nagel *v.* M. P. R., 75 Mo. 653; s. c., 10 Am. & Eng. R. R. Cas. 702; P. & M. R. *v.* Hoehl, 12 Bush (Ky.), 41; Reynolds *v.* N. Y. C. & H. R. R., 58 N. Y. 248; Ihl *v.* F. S. St. R., 47 N. Y. 317; Mulligan *v.* Curtis, 100 Mass. 512; O'Connor *v.* B. & L. R., 135 Mass. 352; s. c., 13 Am. & Eng. R. R. Cas. 362.

4. Nagle *v.* A. V. R., 85 Pa. St. 35; Colgan *v.* W. P. P. R., 4 Weekly Notes of Cases (Pa.), 400; Dietrich *v.* B. & H. S. R., 58 Md. 347; s. c., 11 Am. & Eng. R. R. Cas. 115. *Sed cf.* Haycroft *v.* L. S. & M. S. R., 64 N. Y. 636.

5. A., T. & S. F. R. *v.* Flinn, 24 Kans. 627; s. c., 1 Am. & Eng. R. R. Cas. 240; Snyder *v.* H. & St. J. R., 60 Mo. 413; P. & R. R. *v.* Heil, 5 Weekly Notes of Cases, 91; H. M. & F. P. R. *v.* Kelley, 102 Pa. St. 115; Flanders *v.* Meath, 27 Ga. 358; Roller

20. Intoxication.—The fact of the intoxication of the injured person at the time of the injury will not only not relieve him from the legal consequences of his contributory negligence, but also, if his intoxicated state contributed to the happening of the injury, will be admissible in evidence as proof of contributory negligence.[1]

An incapacity on the part of the injured person will not render the carrier liable to him under circumstances in which it would not be liable to a person of average capacity, unless that incapacity be known to the carrier's servants.[2]

The plaintiff's own contributory negligence will bar his recovery when he sues for damage to himself resulting from the personal injuries of some one else.[3]

21. Attributed Negligence.—Where a passenger sues for injuries done by other than that passenger's carrier, negligence upon the part of that carrier is, in some jurisdictions, attributed to the passenger as contributory negligence upon his part, but in other jurisdictions this attribution of contributory negligence is not recognized. The reason of the rule is, not that the servant of the passenger's carrier, who, by his negligence, has contributed to the accident, is *pro hac vice* the servant of the passenger, but that the carrier is so far the agent of the passenger that his negligence is the passenger's negligence, or, in other words, that the passenger, having intrusted his person to the carrier, and having been injured by the negligence of that carrier, combined with the negligence of a third party who was not under any contractual duty to him, cannot be permitted to recover from that third party for an injury which would not have happened if it had not been for negligence on the part of that carrier co-operating in bringing the passenger into a position of danger. For the rule there can be cited some cases.[4]

v. S. S. R., 19 Am. & Eng. R. R. Cas. 333; Hogan *v.* C., M. & St. P. R., 59 Wis. 139; s. c., 15 Am. & Eng. R. R. Cas. 439; Maschek *v.* St. L. R., 71 Mo. 276; s. c., 2 Am. & Eng. R. R. Cas. 38; C. & A. R. *v.* Becker, 76 Ill. 25.

1. Kean *v.* B. & O. R., 61 Md. 154; s. c., 19 Am. & Eng. R. R. Cas. 321; T. P. & W. R. *v.* Riley, 47 Ill. 514; C., R. I. & P. R. *v.* Bell, 70 Ill. 102; I. C. R. *v.* Hutchinson, 47 Ill. 408; Weeks *v.* N. O. & C. R., 32 La. An. 615; Milliman *v.* N. Y. C. & H. R. R., 66 N. Y. 642; Herring *v.* W. & R. R., 10 Ired. 402; I. C. R. *v.* Hutchinson, 47 Ill. 408; Weeks *v.* N. O. & C. R., 32 La. An. 615; Davis *v.* O. & C. R., 8 Oreg. 172; S. W. R. *v.* Hankerson, 61 Ga. 114; H. & T. C. R. *v.* Waller, 56 Tex. 331; s. c., 8 Am. & Eng. R. R. Cas. 431; C. & P. R. *v.* Sutherland, 19 Ohio St. 151.

2. C., C. & C. R. *v.* Terry, 8 Ohio St. 570; Poole *v.* N. C. R., 8 Jones (N. Car.), 340; I. C. R. *v.* Buckner, 28 Ill. 299; Johnson *v.* L. & N. R., 13 Am. & Eng. R. R. Cas. 623; Zimmerman *v.* H. & St. J. R., 71 Mo. 476; s. c., 2 Am. & Eng. R. R. Cas. 191; Purl *v.* St. L., K. C. & N. R., 73 Mo. 168; 6 Am. & Eng. R. R. Cas. 27; C. & N. W. R. *v.* Miller, 46 Mich. 532; 6 Am. & Eng. R. R. Cas. 89; Laicher *v.* N. O., J. & S. R., 28 La. Ann. 320; Cogswell *v.* O. & C. R., 6 Oregon, 417.

3. Glassey *v.* F. & P. R., 57 Pa. St. 172; Smith *v.* H. M. & F. R., 92 Pa. St. 450; Cauley *v.* P. C. & St. L. R., 95 Pa. St. 398; P. R. *v.* Bock, 93 Pa. St. 427; Roller *v.* S. S. R., 19 Am. & Eng. R. R. Cas. 333; B. & I. R. *v.* Snyder, 24 Ohio St. 670; P., F. W. & C. R. *v.* Vining, 27 Ind. 513.

4. Thorogood *v.* Bryan, 8 C. B. 115; 65 E. C. L.; Bridge *v.* G. J. R., 3 M. & W. 244; Catlin *v.* Hills, 8 C. B. 123; 65 E. C. L.; Armstrong *v.* L. & Y. R., L.

Against the rule there can be cited more recent cases.[1]

Upon the same principle it has been held that where a wife is injured by collision with a train, while travelling in a vehicle driven by her husband, his contributory negligence bars her recovery.[2]

But the Supreme Court of Ohio has refused to attribute the contributory negligence of a father to a daughter.[3]

The contributory negligence of a person who has been killed will bar a recovery by those who sue for damages for his death.[4]

Where the action is brought to recover damages for a tort founded upon a contract, the contributory negligence of the contracting party will bar a recovery by the person upon whose behalf the contract was made.[5]

The contributory negligence of persons unconnected with the plaintiff will not be imputed to the plaintiff as contributory negligence.[6]

22. Liability of Carrier for Acts of Others.—Where the injury is done by the omission of a particular act of care which the duty of

R. 10 Ex. 47; Child *v.* Hearn, L. R. 9 Eq. 176; The Bernina, 11 P. D. 31; Simpson *v.* Hand, 6 Wh. 311; Lockhart *v.* Lichtenthaler, 46 Pa. St. 151; P. & R. R. *v.* Boyer, 97 Pa. St. 91; Smith *v.* Smith, 2 Pick. 621; C., C. & C. R. *v.* Terry, 8 Ohio St. 570; Puterbaugh *v.* Reasor, 9 Ohio St. 484; Bryan *v.* N. Y. C. R., 31 Barb. 335; Nicholls *v.* G. W. R., 27 Up. Can. (Q. B.) 382; Payne *v.* C., R. I. & P. R., 39 Iowa, 523; Mooney *v.* H. R. R., 5 Robertson (N. Y.), 548; L. S. & M. S. R. *v.* Miller, 25 Mich. 274.

1. Little *v.* Hackett, 116 U. S. 366; The Bernina, 12 P. D. 58; Colegrove *v.* N. Y. & N. H. R., 20 N. Y. 492; Bennett *v.* N. J. R., 32 N. J. Law, 225; Tompkins *v.* Clay St. H. R., 18 Am. & Eng. R. R. Cas. 144; Chapman *v.* N. H. R., 19 N. Y. 341; W., St. L. & P. R. *v.* Shacklet, 105 Ill. 364; s. c., 12 Am. & Eng. R. R. Cas. 166; Dyer *v.* Erie R., 71 N. Y. 228; Danville Turnpike Co. *v.* Stewart, 2 Metc. (Ky.) 119; L. R. *v.* Case, 9 Bush, 728; Eaton *v.* B. & L. R., 11 Allen, 500; Transfer Co. *v.* Kelly, 36 Ohio St. 86; s. c., 3 Am. & Eng. R. R. Cas. 335; Masterson *v.* N. Y. C. & H. R. R., 84 N. Y. 247; s. c., 3 Am. & Eng. R. R. Cas. 408; Robinson *v.* N. Y. C. & H. R. R., 66 N. Y. 11; Malmsten *v.* M. H. & O. R., 49 Mich. 94; s.c., 8 Am. & Eng. R. R. Cas. 291; N. Y., L. E. & W. R. *v.* Steinbrenner, 47 N. J. L. 161; Perry *v.* Lansing, 17 Hun, 34; Busch *v.* B. C. R., 29 Hun, 112; Gray *v.* P. & R. R. (U. S. C. C. N. D. N. Y.), 22 Am. & Eng. R. R. Cas. 351; Webster *v.* H. R., 38 N. Y. 260; P., C. & St. L. R. *v.* Spencer, 98 Ind. 186; s. c., 21 Am. & Eng. R. R. Cas. 478; St. C. St. R. *v.* Eadie, 23 Am. & Eng. R. R. Cas. 269.

2. Carlisle *v.* Sheldon, 38 Vt. 440; Peck *v.* N. Y., N. H. & H. R., 50 Conn. 379; 14 Am. & Eng. R. R. Cas. 633; G. C. & S. F. R. *v.* Greenlee, 62 Tex. 344; 23 Am. & Eng. R. R. Cas 322.

3. St. C. St. R. *v.* Eadie, 23 Am. & Eng. R. R. Cas. 269.

4. Witherley *v.* Regents' Canal Co., 12 C. B. N. S. 2; 104 E. C. L.; Lofton *v.* Vogles, 17 Ind. 105; Rowland *v.* Cannon, 35 Ga. 105; Gerety *v.* P., W. & B. R., 81 Pa. St. 274; Karle *v.* K. C., St. J. & C. B. R., 55 Mo. 476; Dewey *v.* C. & N. W. R., 31 Iowa, 373; Kelly *v.* Hendrie, 26 Mich. 355.

5. Waite *v.* N. E. R., El. Bl. & El. 719, 96 E. C. L.

6. Eaton *v.* B. & L. R., 11 Allen, 500; Scott *v.* Shepherd, 2 W. Bl. 892; Dixon *v.* Bell, 5 M. & S. 198, Stark. 287, 2 E. C. L.; Illidge *v.* Goodwin, 5 C. & P. 190, 24 E. C. L.; Hughes *v.* Macfie, 2 H. & C. 744; Hill *v.* New River Co., 9 B. & S. 303; Burrows *v.* March G. & C. Co., L. R. 5 Ex. 66, 7 Ex. 96; Collins *v.* Middle Level Commrs., L. R. 4 C. P. 279; Harrison *v.* G. N. R., 3 H. & C. 321; Watling *v.* Oastler, L. R. 6 Ex. 73; Daniels *v.* Potter, 4 C. & P. 262, 19 E. C. L.; Clark *v.* Chambers, L. R. 3 Q. B. D. 327, criticising Mangan *v.* Atterton, L. R. 1 Ex. 239; P. R. *v.* Mahoney, 57 Pa. St. 187; Railroad *v.* Caldwell, 74 Pa. St. 421.

the carrier to the person injured requires it to do for his protection, the fact of the omission fixes the liability of the carrier; and the relation between the carrier and the person who has omitted to perform the duty is immaterial; but where the injury is done by an act of commission, the liability of the carrier depends upon the fact of the relation of agency between the carrier and the actual wrongdoer.[1]

23. Respondeat Superior.—The general rule is that a carrier, like other masters, is legally responsible for an injury done by an act of its servant if the particular act be within the scope of, and be done in the exercise of, the servant's delegated authority.[2]

The rule does not apply to cases where the carrier does not stand in the character of employer to the person by whose act the injury has been occasioned. A carrier is, therefore, not liable for the acts of a volunteer assisting its servants, as, for instance, for the negligence of passengers in assisting other passengers to alight; nor for advice given by passengers to another passenger to leap from a moving train; or to leave a train at a place other than a station; nor is the carrier to be held liable for the negligent act of a person engaged as his assistant by a servant to whom the carrier has not delegated the power of employing an assistant. Whether or not the person causing the injury be a servant of the carrier is, of course, a question of fact for the jury. The test of the existence of the relation of master and servant is to be found not in the payment of the servant's wages by the carrier, but in the exercise by the carrier of authority in appointing the servant, in directing his acts, in receiving the benefit of those acts, and in reserving the power of dismissing the servant.[3]

Where the relation of master and servant exists, and where

1. The Mersey Docks Trustees *v.* Gibbs, L. R. 1 H. L. 115; Pickard *v.* Smith, 10 C. B. N. S. 470, 100 E. C. L.; Bower *v.* Peate, 1 Q. B. D. 326; Reedie *v.* L. & N. W. R., Hobbitt *v.* Same, 4 Ex. 243; Bartonshill Coal Co. *v.* Reid, 3 Macq. H. L. 282.

2. Bartonshill Coal Co. *v.* Reid, 3 Macq. H. L. 266, 4 Jur. N. S. 767; Randleson *v.* Murray, 8 A. & E. 109, 35 E. C. L.; Yarborough *v.* Bank of England, 16 East, 6; Whitfield *v.* S. E. R., 1 El. Bl. & El. 115, 96 E. C. L.; Limpus *v.* London Genl. Omnibus Co., 1 H. & C. 526; Green *v.* Same, 7 C. B. N. S. 290, 97 E. C. L.; Seymour *v.* Greenwood, 6 H. & N. 359; Lawson *v.* Bank of London, 18 C. B. 84, 86 E. C. L.; E. C. R. *v.* Broom, 6 Ex. 314; Chilton *v.* L. & C. R., 15 M. & W. 212; Smith *v.* B. & S. Gas Light Co., 1 Ad. & El. 526, 28 E. C. L.; Patten *v.* Rea, 2 C. B. N. S. 606, 89 E. C. L.; Goodman *v.* Kennell, 3 C. & P. 167; 14 E. C. L.; Page *v.* Defries, 7 B. & S. 137; Shaw *v.* Reed, 9 W. & S. 72; N. Y. & W. Tel. Co. *v.* Dryburgh, 35 Pa. St. 298; P. & R. R. *v.* Derby, 14 How. 469.

3. Burrows *v.* Erie R., 63 N. Y. 556; Morrison *v.* Erie R., 56 N. Y. 302; O. & N. R. *v.* Stratton, 78 Ill. 88; Filer *v.* N. Y. C. & H. R. R., 59 N. Y. 351; Frost *v.* G. T. R., 10 Allen, 387; C. & I. R. *v.* Farrell, 31 Ind. 408; Jewell *v.* G. T. R., 55 N. H. 84; P. R. *v.* Spicker, 105 Pa. St. 142; Laugher *v.* Pointer, 5 B. & C. 547, 12 E. C. L.; Quarman *v.* Bennett, 6 M. & W. 499; Purnell *v.* G. W. R., mentioned by Melish, L. J., in 2 C. P. D. 210; Holmes *v.* Onion, 2 C. B. N. S. 790, 89 E. C. L.; Fenton *v.* City of Dublin Steam Packet Co., 8 A. & E. 835, 35 E. C. L.; Dalyell *v.* Tyrer, El. Bl. & El. 890, 96 E. C. L., 28 L. J. Q. B. 25; Jones *v.* Mayor, etc., of Liverpool, 14 Q. B. D. 890; Fletcher *v.* Braddick, 5 Bos. & Pul. 182; Sproul *v.* Hemmingway, 14 Pick. 1: Rourke *v.* White Moss Colliery Co., 2 C. P. D. 205; Little *v.* Hacket, 116 U. S. 366.

the act causing the injury is within the scope of the servant's employment, it is not material that the master did not order or even know of the doing of the particular act, or that in doing the act, or in the manner of its performance, the servant disobeyed the express injunctions of the master.[1]

Nor will the carrier escape liability if in doing the act or in the manner of its performance the servant disobey the express injunctions of his superior officers, provided that the act be of that class with whose performance the servant is charged.[2]

Where the particular act is done in furtherance of the general purpose of the carrier, and is within the scope of the servant's authority, the carrier is liable, even though the act be a trespass.[3]

But carriers are not liable for a mistaken exercise of judgment upon the part of their servants in an emergency; nor, for a failure upon the part of their servants to act with the utmost possible promptitude when the circumstances are such as to afford no time for deliberation.[4]

A carrier is not liable for the wilful act of its servant beyond the scope of that servant's general authority, unless it be proven that there was an antecedent special authorization or subsequent ratification.[5]

1. Barwick *v.* English Joint Stock Bank, L. R. 2 Ex. 259; Huzzey *v.* Field, 2 C. M. & R. 432; The Thetis, L. R. 2 Ad. & Ec. 365; Johnson *v.* C. V. R., 56 Vt. 707.

2. Bayley *v.* M. G. & L. R., L. R. 7 C. P. 415, 8 C. P. 148; Peck *v.* N. Y. C. & H. R. R., 70 N. Y. 587; P. R. *v.* Vandiver, 42 Pa. St. 365.

3. Yarborough *v.* Bank of England, 16 East, 6; Whitfield *v.* S. E. R., 1 El. Bl. & El. 115, 96 E. C. L.; Green *v.* L. G. Omnibus Co., 7 C. B. N. S. 290, 97 E. C. L.; Limpus *v.* Same, 1 H. & C. 526; Roe *v.* B. L. & C. J. R., 7 Ex. 36; Seymour *v.* Greenwood, 7 H. & N. 354; Bayley *v.* M. S. & L. R., L. R. 7 C. P. 315, 8 C. P. 148; P. R. *v.* Vandiver, 42 Pa. St. 365; Railroad *v.* Finney, 10 Wis. 388; Weed *v.* P. R., 17 N. Y. 362; Moore *v.* F. R., 4 Gray, 465; Holmes *v.* Wakefield, 12 Allen, 580; L., N. A. & C. R. *v.* Dunkin, 92 Ind. 601; s. c., 15 Am. & Eng. R. R. Cas. 422; State *v.* Ross, 2 Dutcher, 224; Coleman *v.* N. Y. & N. H. R., 106 Mass. 160; Brokaw *v.* N. J. R., 3 Vroom. 328; C. & A. R. *v.* Flagg, 43 Ill. 364; E. & C. R. *v.* Banin, 26 Ind. 70; G. W. R. *v.* Miller, 19 Mich. 305; Jackson *v.* S. A. R., 47 N. Y. 274; Kline *v.* C. P. R., 39 Cal. 587; Higgins *v.* W. T. & R. R., 46 N. Y. 23; C., C. & I. R. *v.* Powell, 40 Ind. 37; Sanford *v.* E. A. R., 23 N. Y. 343; Marquette *v.* C. & N. W. R., 33 Iowa, 562; Carter *v.* L., N. A. & C. R., 98 Ind. 522; s. c., 22 Am. & Eng. R. R. Cas. 360; Kline *v.* C. P. R., 37 Cal. 400; Schultz *v.* T. A. R., 89 N. Y. 242; s. c., 19 Am. & Eng. R. R. Cas. 579; N. Y. C. & H. R. R. *v.* Hoffman, 87 N. Y. 25; s. c., 4 Am. & Eng. R. R. Cas. 537; Benton *v.* C., R. I. & P. R., 55 Iowa, 496.

4. Cotton *v.* Wood, 8 C. B. N. S. 568, 98 E. C. L.; Brown *v.* French, 14 Weekly Notes of Cases (Pa.), 412; Gumz *v.* C., M. & St. P. R., 52 Wis. 672; s. c., 5 Am. & Eng. R. R. Cas. 583; Maschek *v.* St. L. R., 71 Mo. 276; s. c., 2 Am. & Eng. R. R. Cas. 38; Dunleavy *v.* C., R. I. & P. R., 21 Am. & Eng. R. R. Cas. 542; Brown *v.* C. & B. St. R., 49 Mich. 153; s. c., 8 Am. & Eng. R. R. Cas. 385; C. & N. W. R. *v.* Smith, 46 Mich. 504; s. c., 4 Am. & Eng. R. R. Cas. 535; Jenkins *v.* C., M. & St. P. R., 41 Wis. 112.

5. McManus *v.* Crickett, 1 East, 106; Croft *v.* Alison, 4 B. & Ald. 590, 6 E. C. L.; Lawson *v.* Bank of London, 18 C. B. 84, 86 E. C. L.; Edwards *v.* L. & N. R., L. R. 5 C. P. 445; Walker *v.* S. E. R., L. R. 5 C. P. 640; E. C. R. *v.* Broom, 6 Ex. 314; Roe *v.* B. L. & C. J. R., 7 Ex. 36; Smith *v.* B. & S. Gas Light Co., 1 A. & E. 526, 28 E. C. L.; Hays *v.* H. G. N. R., 46 Tex. 280; G. H. & S. A. R. *v.* Donahoe, 56 Tex. 162; s. c., 9 Am. & Eng. R. R. Cas. 287; Isaacs *v.* T. A. R., 47 N. Y. 122; R. T. Co. *v.* Vanderbilt, 2 N. Y. 479; C. & N. W. R. *v.* Bayfield, 37 Mich. 205; I. C. R. *v.* Downey, 18 Ill. 259.

24. Independent Contractors.—A carrier is not liable for the negligence of an independent contractor or of his servants in the course of the prosecution of a lawful work. The modern doctrine is that if an independent contractor is employed to do a lawful act, the employer not reserving a control over the manner of its performance, and in the course of the work he or his servant commits some casual act of negligence, the employer is not answerable.[1] But where a passenger is injured while being transported over a line which is in process of construction by contractors, and which has not been formally received from the contractors, but the train is manned by servants of the railways, and the passenger's injuries are caused by the negligence of those servants, the railway must be held liable therefor.[2]

Where a carrier has contracted for the performance of a work, and has reserved to itself control both of the result and of the means by which that result is to be accomplished, the contractor and his servants are the servants of the carrier, and the carrier is held liable as master for their acts.[3] The fact that the contract requires the contractor to do the work in accordance with the plans, specifications, and instructions furnished by a railway will not render the railway liable,[4] nor that the contract reserves to the railway power to insist on the removal of careless or incompetent workmen employed by the contractor;[5] nor that the contract reserves to the railway power to direct changes in the time and manner of doing the work;[6] nor that the contract reserves to the railway the right to direct as to the quantity of work to be done, or as to the condition of the work when completed;[7] nor that the

1. Pickard *v.* Smith, 10 C. B. N. S. 480, 100 E. C. L.; Overton *v.* Freeman, 11 C. B. 867, 73 E. C. L.; Knight *v.* Fox, 5 Ex. 721; Allen *v.* Hayward, 7 Q. B. 960, 53 E. C. L.; Steel *v.* S. E. R., 16 C. B. 550, 81 E. C. L.; Peachey *v.* Rowland, 13 C. B. 181, 76 E. C. L.; Brown *v.* A. C. S. & M. Co., 3 H. & C. 511; Pearson *v.* Cox, 2 C. P. D. 369; Rapson *v.* Cubitt, 9 M. & W. 710; Hilliard *v.* Richardson, 3 Gray, 349; Scammon *v.* Chicago, 25 Ill. 424; School District of Erie *v.* Fuess, 98 Pa. St. 600; Smith *v.* Simmons, 13 Weekly Notes of Cases (Pa.), 242; Allen *v.* Willard, 57 Pa. St. 374; Wray *v.* Evans, 80 Pa. St. 102; Milligan *v.* Wedge, 12 A. & E. 737, 40 E. C. L.; Murray *v.* Currie, L. R. 6 C. P. 24; Rourke *v.* White Moss Colliery Co., L. R. 2 C. P. D. 205; Hall *v.* Smith, 2 Bing. 156; as explained by Alderson, B., in Scott *v.* Mayor of Manchester, 1 H. & N. 59; Wiggett *v.* Fox, 11 Ex. 832; as explained by Channell, B., in Abraham *v.* Reynolds, 5 H. & N. 143, and dissented from by Cockburn, C. J., in Rourke *v.* Colliery Co., 2 C. P. D. 205; Painter *v.* Pittsburgh, 46 Pa. St. 213; Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 146; Erie *v.* Caulkins, 85 Pa. St. 247; Borough of Susquehanna Depot *v.* Simmons, 17 Weekly Notes of Cases (Pa.), 362; Reed *v.* Allegheny, 79 Pa. St. 300; Barry *v.* St. Louis, 17 Mo. 121; Blake *v.* Ferris, 5 N. Y. 58; N. O. & N. E. R. *v.* Reese, 61 Miss. 581; Hughes *v.* C. & S. R., 15 Am. & Eng. R. R. Cas. 100, and note, Ohio St.; Linton *v.* Smith, 8 Gray, 147; DeForrest *v.* Wright, 2 Mich. 368; McCafferty *v.* S. D. & P. M. R., 61 N. Y. 178; Boswell *v.* Laird, 8 Cal. 469; Clark *v.* Fry, 8 Ohio St. 358; Hofnagle *v.* N. Y. C. & H. R. R., 55 N. Y. 608; King *v.* N. Y. C. & H. R. R., 66 N. Y. 181; Hexamer *v.* Webb, 101 N. Y. 377.

2. Burton *v.* G. H. & S. A. R., 61 Tex. 526; s. c., 21 Am. & Eng. R. R. Cas 218.

3. Randleson *v.* Murray, 8 A. & E. 109, 35 E. C. L.; Speed *v.* A. & P. R., 71 Mo. 303; s. c., 2 Am. & Eng. R. R. Cas. 77; M. & A. R. *v.* Mayes, 49 Ga. 355.

4. Hunt *v.* P. R., 51 Pa. St. 475; Smith *v.* Simmons, 103 Pa. St. 32.

5. Reedie *v.* L. & N. W. R., 4 Ex. 243.

6. Erie *v.* Caulkins, 85 Pa. St. 247.

7. Hughes *v.* C. & S. R., 39 Ohio St.

contractor is paid by the day;[1] nor that the contractor's servant whose negligence caused the injury is paid by the railway while directed and controlled in his action by the contractor.[2]

The doctrine of the independent contractor will not exempt an employer from liability where the act which occasions the injury is one which the contractor was engaged to do, and which he has done in pursuance of his contract, and where the act in itself is a wrong. In such cases the employer is, of course, liable, for the contractor in fulfilling his contract is the employer's agent.[3]

So also the employer is liable where the contractor, having been intrusted with the performance of a duty incumbent upon the employer, neglects its fulfilment, whereby an injury is occasioned.[4]

An employer is not bound to anticipate that a carefully-selected and experienced contractor will do his work negligently, and therefore is not liable if he fails to take precautions against possible negligence on the part of the contractor or of his servants.[5]

25. Lessors and Lessees.—A railway is liable for the negligent acts of a lessee of its line, when the lease has not been expressly authorized by statute,[6] and in such case both the lessor and lessee railways are liable for injuries done by the lessee's negligent operation of the line.[7]

On the other hand, where a railway, under due authority of law, has leased its line to another railway, the lessor railway is not liable for torts committed by the lessee railway in the operation of the line.[8]

A railway operated on joint account by receivers of part of its line, and also by lessees of the remaining part thereof, is liable

461; s. c., 15 Am. & Eng. R. R. Cas. 100.

1. Harrison *v.* Collins, 86 Pa. St. 153; Hexamer *v.* Webb, 101 N. Y. 377.

2. Rourke *v.* White Moss Colliery Co., L. R. 2 C. P. D. 205.

3. Hole *v.* S. & S. R., 6 H. & N. 488; Ellis *v.* Sheffield G. C. Co., 2 E. & B. 767, 75 E. C. L.; Blake *v.* Thirst, 2 H. & C. 20; Pickard *v.* Smith, 10 C. B. N. S. 470, 100 E. C. L.; Tarry *v.* Ashton, 1 Q. B. D. 314; Chicago *v.* Robbins, 2 Black, 418; Robbins *v.* Chicago, 4 Wall. 657; Clark *v.* Fry, 8 Ohio St. 359; Lowell *v.* B. & L. R., 23 Pick. (Mass.) 24; St. P. Water Co. *v.* Ware, 16 Wall. 566; R. R. I. & St. L. R. *v.* Wells, 66 Ill. 321; C. & St. L. R. *v.* Woolsey, 85 Ill. 370.

4. Pickard *v.* Smith, 10 C. B. N. S. 483, 100 E. C. L.; Bower *v.* Peate, 1 Q. B. D. 326; Dalton *v.* Angus, 6 App. Cas. 740; Trustees *v.* Gibbs, L. R. 1 H. L. 116; Homan *v.* Stanley, 66 Pa. St. 464.

5. Daniels *v.* M. R., L. R. 5 H. L. 61. *Sed cf.* V. C. R. *v.* Sanger, 15 Gratt. (Va.) 230.

6. Gardner *v.* L. C. & D. R., L. R. 2 Ch. 201; W. A. & G. R. *v.* Brown, 17 Wall. 445; Y. & M. L. R. *v.* Winans, 17 How. (U. S.) 30; Beman *v.* Rufford, 1 Sim. N. S. 550; Winch *v.* B. L. & C. J. R., 5 DeG. & S. 562, 16 Jur. 1035; G. N. R. *v.* E. C. R., 9 Hare, 306; Black *v.* D. & R. Canal Co., 22 N. J. Eq. 130; M. R. *v.* B. & C. R., 115 Mass. 347; Thomas *v.* W. J. R., 101 U. S. 71.

7. I. C. R. *v.* Barron, 5 Wall. 90; C. & St. L. R. *v.* McCarthy, 20 Ill. 385; C. & R. I. R. *v.* Whipple, 22 Ill. 105; Nelson *v.* V. C. R., 26 Vt. 717; McElroy *v.* N. R., 4 Cush. (Mass.) 400; Y. & M. L. R. *v.* Winans, 17 How. (U. S.) 30; Freemann *v.* M. & St. L. R., 28 Minn. 443; s. c., 7 Am. & Eng. R. R. Cas. 410; Speed *v.* A. & P. R., 71 Mo. 303; s. c., 2 Am. & Eng. R. R. Cas. 77.

8. Mahony *v.* A. & St. L. R. 63 Me. 68; Ditchett *v.* St. P., D. & P. M. R., 67 N. Y. 425. *Sed cf.* Singleton *v.* S. W. R., 70 Ga. 464; s. c., 21 Am. & Eng. R. R. Cas. 226; Langley *v.* B. & M. R., 10 Gray (Mass.), 103.

where the railway has permitted tickets to be issued in its name for transportation over the whole line.[1]

26. Mortgage Trustees.—A railway cannot, without express statutory authority, mortgage its franchise or line. But where a mortgage has been duly executed under such authority, and the mortgage trustees have entered into possession of the line in accordance with the terms of such a mortgage, the railway is not liable for injuries done by the mortgage trustees or their servants.[2]

Mortgage trustees in possession are liable for injuries caused by their neglect or that of their servants, and this liability is enforceable in any jurisdiction in which they may be properly served with process.[3]

27. Receivers.—A railway whose line is in the custody of and operated by a receiver is not liable in damages for injuries resulting from the negligence of the receiver or his servants.[4]

28. Connecting Lines.—A carrier is liable to its passengers for negligence in the construction, maintenance in repair, or operation of means of transport which are under the immediate control of third parties.[5]

A carrier is liable to one whom it has contracted to carry to a point beyond the terminus of its own line and over the line of a connecting carrier for injuries done on that connecting line.[6]

A carrier who, by contract, voluntarily permits another party to run trains over its line is liable to its passengers for the negligence of that railway or individual.[7] But a carrier railway, where there has been no negligence upon its part, or upon the part of its agents or servants, is not to be held liable for an injury caused to its passenger solely by negligence on the part of another railway which, under statutory authority, uses its line.[8]

1. W. A. & G. R. *v.* Brown, 17 Wall. 445.

2. State *v.* E. & N. A. R., 67 Me. 479.

3. Sprague *v.* Smith, 29 Vt. 421; Barter *v.* Wheeler, 49 N. H. 9; Lamphear *v.* Buckingham, 33 Conn. 237; Rogers *v.* Wheeler, 43 N. Y. 598; Smith *v.* E. R., 124 Mass. 154.

4. Ballou *v.* Farnum, 9 Allen (Mass.),47; O. & M. R. *v.* Davis, 23 Ind. 553; Bell *v.* I. C. & R. R., 53 Ind. 57; Metz *v.* B. C. & P. R., 58 N. Y. 61; Rogers *v.* M. & O. R., 12 Am. & Eng. R. R. Cas. 442; Davis *v.* Duncan (U. S. C. C., So. Dist. Miss.), 17 Am. & Eng. R. R. Cas. 295; M. & L. R. R. *v.* Stringfellow, 44 Ark. 322; s. c., 21 Am. & Eng. R. R. Cas. 374; Turner *v.* H. & St. J. R., 74 Mo. 603; s. c., 6 Am. & Eng. R. R. Cas. 38.

5. Bullett *v.* T. & B. R., 40 N. Y. 168; N. J. R. *v.* Palmer, 4 Vroom (N. J.), 90; John *v.* Bacon, L. R. 5 C. P. 437; Knight *v.* P. S. & P. R., 56 Me. 234; Gruber *v.* W. & J. R., 92 N. Car. 1; s. c., 21 Am. & Eng. R. R. Cas. 438; Pennsylvania Co. *v.* Roy, 102 U. S. 451; C., C. & I. R. *v.* Walrath, 38 Ohio St. 461; s. c., 8 Am. & Eng. R. R. Cas. 371; Kinsley *v.* R., 125 Mass. 54; Thorpe *v.* N. Y. C. & H. R. R., 76 N. Y. 402; Combe *v.* Railroad, 31 L. T. N. G. 613.

6. G. W. R. *v.* Blake, 7 H. & N. 987; Birkett *v.* W. H. J. R., 4 H. & N. 730; Buxton *v.* N. E. R., L. R. 3 Q. B. 549; Thomas *v.* Railroad, L. R. 6 Q. B. 266; Murch *v.* C. R., 9 Foster, 9; Stetler *v.* C. & N. W. R., 49 Wis. 609; W., St. L. & P. R. *v.* Peyton, 106 Ill. 534; Quimby *v.* Vanderbilt, 17 N. Y. 306; Bissell *v.* M. S. & N. I. R., 22 N. Y. 258. *Sed cf.* Sprague *v.* Smith, 29 Vt. 421.

7. I. C. R. *v.* Barron, 5 Wall. 90; C. & St. P. R. *v.* McCarthy, 20 Ill. 385; O. & M. R. *v.* Dunbar, 20 Ill. 623; C. & R. I. R. *v.* Whipple, 22 Ill. 105; Nelson *v.* V. & C. R., 26 Vt. 717; M. & A. R. *v.* Mayes, 49 Ga. 355; Aycock *v.* Railroad, 89 N. Car. 321.

8. Wright *v.* M. R., L. R. 8 Ex. 137.

Where, however, the carrier railway is in any respect negligent, it is liable, although the injury was, in part, caused by negligence on the part of a railway which exercises statutory running powers over its line.[1]

A railway corporation which, by means of a subscription to stock, or bonds, or to a contract of guaranty, promotes the organization of an auxiliary corporation for the purpose of constructing a line which shall serve as a feeder of the main line, is not, by reason of such subscription or guaranty, to be held liable for injuries done in the operation of the subsidiary line by the auxiliary corporation.[2]

Where injury to a passenger results from an imperfection in the line, or in the means of transportation, due to the negligence of the party who built the same and furnished it to the carrier, the carrier is liable therefor.[3]

29. Duty of the Carrier.—The duty of the carrier requires it not only to test its machinery and appliances before they are put into use, but also to test them from time to time subsequently, in order that it may be known if they are deteriorating by wear and tear. The criterion of negligence in such cases is, not whether the particular defect which was the cause of the injury could possibly have been detected by the use of scientific means of investigation, but whether the defect ought to have been observed practically and by the use of ordinary and reasonable care.[4]

1. McElroy *v.* N. & L. R., 4 Cush. (Mass.) 400.

2 A. I. & S. F. R. *v.* Davis. 8 Pac. Repr. 530; 25 Am. & Eng. R. R. Cas. 312.

3. Grote *v.* C. & H. R., 2 Ex. 251; Francis *v.* Cockrell, L. R. 5 Q. B. 501; Hegeman *v.* W. R. Corporation, 13 N. Y. 9; Readhead *v.* M. R., L. R. 4 Q. B. 379; Burns *v.* C. & Y. R., 13 C. L. (N. S.) 543.

4. Manser *v.* E. C. R., 3 L. T. N. S. 585; T. & St. L. R. *v* Suggs, 62 Tex. 323; s. c., 21 Am. & Eng. R. R. Cas. 475; Stokes *v.* E. C. R., 2 F. & F. 691; Robinson *v.* N. Y. C. & H. R. R., 9 Fed. Repr. 877; s. c., 20 Blatchf. 338.

As to negligence of railways in construction and inspection, consult the following cases:

Roadway.—G. W. R. *v.* Braid, 1 Moo. P. C. N. S. 101; P., C. & St. L. R. *v.* Williams, 74 Ind. 462; O'Donnell *v.* A. V. R., 59 Pa. St. 259; V. C. R. *v.* Sanger, 15 Gratt. (Va.) 230; Mattison *v.* N. Y. C. R., 35 N. Y. 487; P., P. & J. R. *v.* Reynolds, 88 Ill. 418; N. & T. R. *v.* Johnson, 15 Lea (Tenn.), 677.

Rails.—Brignoli *v.* C. & G. E. R., 4 Daly (N. Y.). 182; M. S. & N. J. R. *v.* Lantz. 29 Ind. 528; C., C., C. & I. R. *v.* Newell, 75 Ind. 542; s. c., 8 Am. & Eng. R. R. Cas. 377; George *v.* St. L., I. M. & S. R., 34 Ark. 613; s. c., 1 Am. & Eng. R. R. Cas. 294; McPadden *v.* N. Y. C. R., 44 N. Y. 478; Reed *v.* N. Y. C. R., 56 Barb. (N. Y.) 493; V. & M. R. *v.* Putnam, 118 U. S. 545; s. c., 27 Am. & Eng. R. R. Cas. 291.

Ties.—P., C. & St. L. R. *v.* Thompson, 56 Ill. 138; T. & P. R. *v.* Hardin, 62 Tex. 367; s. c., 21 Am. & Eng. R. R. Cas. 460.

Bridges.—Grote *v.* C. & H. R., 2 Ex. 251; T. W. & W. R. *v.* Conroy, 68 Ill. 560; Oliver *v.* N. Y. & E. R., 1 Edm. Sel. Cas. 589; Locke *v.* S. C. & P. R., 46 Iowa, 109; K. P. R. *v.* Miller, 2 Colo. 442; Jamison *v.* St. J. & S. C R., 55 Cal. 593; s. c., 3 Am. & Eng. R. R. Cas. 350; B. S. O. & B. R. *v.* Rainbolt, 99 Ind. 551; s. c., 21 Am. & Eng. R. R. Cas. 466; D. & W. R. *v.* Spicker, 61 Tex. 427; s. c., 21 Am. & Eng. R. R. Cas. 160.

Embankments.—Henley *v.* H. R., 1 Edm. Sel. Cas. 359; P. & R. R. *v.* Anderson, 94 Pa. St. 351; I. & G. N. R. *v.* Halloren, 53 Tex. 46; s. c., 3 Am. & Eng. R. R. Cas. 343.

Level Crossings.—Graham *v.* G. W. R., 41 Up. Can. (Q. B.) 324.

Switches.—N. Y., L. E. & W. R. *v.* Daugherty, 11 Weekly Notes of Cases (Pa.), 437; P. & R. I. R. *v.* Lane, 83 Ill.

30. New Appliances.—The duty of the carrier to its passengers requires it to adopt such improved appliances and methods of operation as, having been tested and found to materially contribute to the safety of its operations, are in practical use and can be in fact adopted.[1]

31. Railway Regulations.—It is both the right and the duty of the carrier to make regulations for the safe conduct of its business, but those regulations must be reasonable in themselves, and must be so published that all persons who are to be affected thereby may have an opportunity of learning the existence and effect of such regulations.[2]

It is for the jury to determine whether or not any particular regulation is reasonable.[3]

It is the duty of a carrier to enforce its regulations; and servants, by permitting the passengers to disobey regulations, will make the carrier liable for injuries caused to passengers by such

449; B. & O. R. *v.* Worthington, 21 Md. 275; McElroy *v.* N. & L. R., 4 Cush. (Mass.) 400; Smith *v.* N. Y. & H. R., 19 N. Y. 227; Caswell *v.* B. & W. R., 98 Mass 194.

Rolling Stock—Cars.—Penna. Co. *v.* Roy. 102 U. S. 451; s. c., 1 Am. & Eng. R. R. Cas. 225; C., C., C. & I. R. *v.* Walrath, 38 Ohio St. 461; Lyon *v.* Mells, 5 East, 428; P. P. R. *v.* Weiller, 4 Eastn. Repr. 832.

Axles.—Hegeman *v.* W. R., 13 N. Y. 9; Alden *v.* N. Y. C. R., 26 N. Y. 102; McPadden *v.* Same, 44 N. Y. 478; G. R. & I. R. *v.* Boyd, 65 Ind. 525; Richardson *v.* G. E. R., L. R. 10 C. P. 486, 1 C. P. D. 342.

Brakes.—N. Y., L. E. & W. R. *v.* Daugherty, 11 Weekly Notes of Cases (Pa.), 437; Costello *v.* S. & R. R., 65 Barb. (N. Y.) 92.

Wheels.—T. W. & W. R. *v.* Beggs, 85 Ill. 80; Readhead *v.* M. Ry., L. R. 2 Q. B. 412, 4 Q. B. 379; Meier *v.* P. R., 64 Pa. St. 225; T. & P. R. *v.* Hamilton (Tex.), 26 Am. & Eng. R. R. Cas. 182.

Locomotives.—Robinson *v.* N. Y. C. & H. R. R., 20 Blatchf. 338; Manser *v.* E. C. R., 3 L. T. N. J. 585.

1. Freemantle *v.* L. & N. W. R., 10 C. B. N. S. 95, 100 E. C. L.; Ford *v.* L. & S. W. R., 2 F. & F. 730; Hegeman *v.* Western R. Corporation, 13 N. Y. 9; Smith *v.* N. Y. & H. R., 19 N. Y. 127; Brown *v.* N. Y. C. R., 34 N. Y. 404; Taylor *v.* Railroad, 48 N. H. 304; B. & O. R. *v.* State, 29 Md. 252, 420; Warren *v.* Fitchburg R., 8 Allen, 227; LeBaron *v.* East Boston Ferry Co., 11 Allen, 312; Meier *v.* P. R., 64 Pa. St. 225; F. & B. Turnpike Co. *v.* P. & T. R., 54 Pa. St. 345; L. & B. R. *v.* Doak, 52 Id. 379; N. Y., L. E. & W. R. *v.* Daugherty, 11 W. N. C. 437; I. & G. N. R. *v.* Halloren, 53 Tex. 46; s. c., 3 Am. & Eng. R. R. Cas. 343; Bowen *v.* N. Y. C. R., 18 N. Y. 408; K. C. R. *v.* Thomas, 79 Ky. 160; s. c., 1 Am. & Eng. R. R. Cas. 79; Randall *v.* B. & O. R., 109 U. S. 478; Bartley *v.* G. R., 60 Ga. 182; N. & J. R. *v.* McNeil, 61 Miss. 434; s. c., 19 Am. & Eng. R. R. Cas. 518.

2 McDonald *v.* C. & N. W. R., 26 Iowa, 124; Sullivan *v.* P. & R. R., 30 Pa. St. 238; P. R. *v.* Zebe, 32 Pa. St. 326; P. R. *v.* McClurg, 56 Pa. St. 294; Powell *v.* P. R., 32 Pa. St. 414; C. R. *v.* Green, 86 Pa. St. 421; O'Donnell *v.* A. V. R., 59 Pa. St. 239; Creed *v.* P. R., 86 Pa. St. 139; B. & M. R. *v.* Rose, 11 Neb. 177; s. c., 1 Am. & Eng. R. R. Cas. 253.

3. Jencks *v.* Coleman, 2 Sumner, 221; State *v.* Overton, 4 Zab. (N. J.) 435; Bass *v.* C. & N. W. R., 36 Wis. 450; Day *v.* Owen, 5 Mich. 520; McDonald *v.* C. & N. W. R., 26 Iowa, 124; P. R. *v.* Zebe, 33 Pa. St. 326; P. R. *v.* Langdon, 92 Pa. St. 21; Creed *v.* P. R., 86 Id. 139; P. & C. R. *v.* McClurg, 56 Pa. St. 294; Wills *v.* L. & B. R., 129 Mass. 351; A. G. S. R. *v.* Hawk, 72 Ala. 112; s. c., 18 Am. & Eng. R. R. Cas. 194; Trollinger *v.* E. T., V. & G. R., 11 Tenn. 533; Beauchamp *v.* I. & G. N. R., 56 Tex. 239; Murch *v.* C. R., 29 N. H. 9; B. & M. R. *v.* Rose, 11 Neb. 177; s. c., 1 Am. & Eng. R. R. Cas. 253; I. & St. L. R. *v.* Kennedy, 77 Ind. 507; s. c., 3 Am. & Eng. R. R. Cas. 467; Arnold *v.* I. C. R., 83 Ill. 273; C. & A. R. *v.* Flagg, 43 Ill. 364; C., C. & C. R. *v.* Bartram, 11 Ohio St. 457; Law *v.* I. C. R., 32 Iowa, 534.

disobedience;[1] but the servant's dispensing power does not apply to regulations which forbid a passenger to occupy a position of danger.[2]

32. Stations.—A carrier is liable for negligence in its construction or maintenance in repair of its station approaches,[3] station buildings,[4] urinals,[5] and station platforms.[6]

A carrier is also liable for negligence in permitting snow and ice to remain on its station platforms,[7] or on the approaches to its cars,[8] or on the steps of its cars.[9]

A carrier is also liable for a failure to adequately light its stations and platforms,[10] and for negligent obstructions on station platforms;[11] for injuries caused by objectsn egligently thrown or falling from passing trains;[12] or for the careless handling of baggage by the carrier's servants.[13]

Railways are liable to passengers on station platforms if they are struck by a passing train any part of whose engine or cars projects over the platform.[14]

1. Britton *v.* A. & C. A. L. R., 88 N. Car. 536; s. c., 18 Am. & Eng. R. R. Cas. 391; Creed *v.* P. R., 86 N. Car. 139.

2. P. R. *v.* Langdon, 92 Pa. St. 21.

3. Burgess *v.* G. W. R., 6 C. B. N. S. 923, 95 E. C. L.; Hulbert *v.* N. Y. C. R., 40 N. Y. 145; C. & I. C. R. *v.* Farrell, 31 Ind. 408; Bennett *v.* L. & N. R., 102 U. S. 577; Hartwig *v.* C. & N. W. R., 49 Wis. 358; s. c., 1 Am. & Eng. R. R. Cas. 65; Tobin *v.* P. S. & P. R., 59 Me. 183; Forsyth *v.* B. & A. R., 103 Mass. 510; Dillaye *v.* N. Y. C. R., 56 Barb. 30; Hoffmann *v.* N. Y. C. & H. R. R., 75 N. Y. 605; C. & N. R. *v.* Fillmore, 57 Ill. 265; Quimby *v.* B. & M. R., 69 Me. 340; Longmore *v.* G. W. R., 19 C. B. N. S. 183, 115 E. C. L.; Mooreland *v.* B. & M. R., 1 New Engl. Repr. 909; Davis *v.* L. R., 2 F. & F. 588.

4. See the charge of Maule, J., to the jury, as reported in Martin *v.* G. N. R., 16 C. B. 179, 81 E. C. L., and also the judgment of Dillon, J., in McDonald *v.* C. & N. W. R., 26 Iowa, 124; and the note of Judge Redfield to the last cited case in 2 Redf. R. Cas. 532.

5. McKone *v.* M. C. R., 51 Mich. 601; s. c., 13 Am. & Eng. R. R. Cas. 29.

6. Brassell *v.* N. Y. C. & H. R. R., 84 N. Y. 241; Dobiecki *v.* Sharp, 88 Id. 203; s. c., 8 Am. & Eng. R. R. Cas. 485; C. & N. W. R. *v.* Scates, 90 Ill. 586; McDonald *v.* C. & N. W. R. 26 Iowa, 124, 29 Id. 170; St. L., I. M. & S. R. *v.* Cantrell, 37 Ark. 519; s. c., 8 Am. & Eng. R. R. Cas. 198; P. R. *v.* Henderson, 51 Pa. St. 315; L. & N. R. *v.* Wolfe, 80 Ky. 82; s. c., 5 Am. & Eng. R. R. Cas. 625; T. W. & W. R. *v.* Grush, 67 Ill. 262; Liscomb *v.* N. J. R., 6 Lans. 75; C. R. *v.* Martin, 112 Ill. 16; Keefe *v.* B. & A. R. (Mass.), 7 Am. & Eng. R. R. Cas. 137.

7. Seymour *v.* C. B. & Q. R., 3 Biss. 43; Sheppard *v.* M. R., 20 Weekly Reporter, 705; Weston *v.* N. Y. E. R., 73 N. Y. 595.

8. Dixon *v.* B. C. & N. R., 100 N. Y. 170; s. c., 26 Am. & Eng. R. R. Cas. 203, 207.

9. Neslie *v.* S. & T. Sts. P. R. (Pa.), 27 Am. & Eng. R. R. Cas. 180.

10. Renneker *v.* S. C. R., 20 Shand (S. Car.), 219; Stewart *v.* I. & G. N. R., 53 Tex. 289; s. c., 2 Am. & Eng. R. R. Cas. 497; Forsyth *v.* B. & A. R., 103 Mass. 510; Beard *v.* C. & P. R., 48 Vt. 101; Knight *v.* P. S. & P. R., 56 Me. 234; Patten *v.* C. & N. W. R., 32 Wis. 524; Patten *v.* C. & N. W. R., 36 Id. 413; Peniston *v.* C., St. L. & N. O. R., 34 La. Ann. 777; Buenemann *v.* St. P., M. & M. R., 32 Minn. 390; s. c., 18 Am. & Eng. R. R. Cas. 153; Quaife *v.* C. & N. W. R., 48 Wis. 513.

11. Martin *v.* G. N. R., 16 C.B. 179, 81 E. C. L.; Nicholson *v.* L. & Y. R., 3 H. & C. 534. *Sed cf.* Cornman *v.* E. C. R., 4 H. & N. 781.

12. J. M. & I. R. *v.* Riley, 34 Ind. 368; T. W. & W. R. *v.* Maine, 67 Ill. 298; Snow *v.* F. R., 136 Mass. 552; s. c., 18 Am. & Eng. R. R. Cas. 161; Carpenter *v.* B. & A. R., 24 Hun (N. Y.), 104; s. c., 97 N. Y. 494; s. c., 21 Am. & Eng. R. R. Cas. 331. *Sed cf.* Muster *v.* C. M. & St. P. R., 61 Wis. 325; s. c., 18 Am. & Eng. R. R. Cas. 113; Walton *v.* N. Y. C. S. C. Co., 139 Mass. 556; O. & M. R. *v.* Gullett, 15 Ind. 487.

13. Tebbutt *v.* B. & E. R., L. R. 6 Q. B. 73.

14. Dobiecki *v.* Sharp, 88 N. Y. 203;

Where the arrangement of a station is such that a passenger has to cross a track either before entering or after leaving the cars, he has a right to assume that that track may be crossed safely, and the railway is liable if he be struck by a train moving on that track when he is approaching or leaving the cars or station.[1] Of course a carrier is not to be held liable to the passenger at its stations or on its premises for injuries which do not result from its negligence;[2] nor for injuries which are, in part, caused by the contributory negligence of the passenger.[3]

33. Boarding and Leaving Trains.—It is the duty of a railway to give to passengers at its stations reasonable notice of the starting of its trains,[4] and to give to its passengers in its trains reasonable notice of the approach of the train to its stations, in order that the passengers who are to leave the cars may prepare to alight.[5]

In cases of injuries to passengers in leaving trains, it is, in general, for the jury to determine what effect, if any, is to be attributed to the calling of the name of a station before the train comes to a stop.[6]

It is the duty of the railway to stop its trains for a reason-

s. c., 8 Am. & Eng. R. R. Cas. 485; Langan *v.* St. L., I. M. & S. R., 72 Mo. 392; s. c., 3 Am. & Eng. R. R. Cas. 355; C. & A. R. *v.* Wilson, 63 Ill. 167.

1. Rogers *v.* R. R., 26 L. T. N. S. 879; Warren *v.* F.R., 8 Allen (Mass.), 227; Gaynor *v.* O. C. & N. R., 100 Mass. 208; Terry *v.* Jewett, 78 N. Y. 338; Brassell *v.* N. Y. C. & H. R. R., 84 N. Y. 241; s. c., 3 Am. & Eng. R. R. Cas. 380; Green *v.* E.R., 11 Hun (N.Y.), 333; P. R. *v.* White, 88 Pa. St. 327; Klein *v.* Jewett, 25 N. J. Eq. 474; Armstrong *v.* N. Y. C. & H. R. R., 64 N. Y. 635; B. & O. R. *v.* State, to use of Hauer, 60 Md. 449; s. c., 12 Am. & Eng. R. R. Cas. 149; Chaffee *v.* B. & L. R., 104 Mass. 108; Wheelock *v.* B. & A. R., 105 Mass. 203; Phillips *v.* R. & S. R., 57 Barb. (N. Y.) 644; *Sed. cf.* I. C. R. *v.* Hudelson, 13 Ind. 325; D. W. & W. R. *v.* Slattery, 3 App. Cas. 1155; Sonier *v.* B. & L. R., 1 New Eng. Repr. 493; Magone *v.* Little, 25 Fed. Repr. 627.

2. Cornman *v.* E. C. R., 4 H. & N. 781; Crafter *v.* M. R., L. R. 1 C. P. 300; Crocheron *v.* Ferry Co., 56 N. Y. 656; Toomey *v.* L. B. & S. C. R., 3 C. B. N. S. 146, 91 E. C. L.; Potter *v.* W. & W. R., 92 N. Car. 541; s. c., 21 Am. & Eng. R. R. Cas. 328; Welfare *v.* L. & B. R., L. R. 4 Q. B. 693; Smith *v.* G. E. R., L. R. 2 C. P. 54; C., St. L. & N. O. R. *v.* Trotter, 61 Miss. 417; s. c., 18 Am. & Eng. R. R. Cas. 159.

3. Renneker *v.* S. C. R., 20 Shand (S. Car.), 219; Forsyth *v.* B. & A. R., 103 Mass. 510; Rigg *v.* M. S. & L. R., 12 Jur. N. S. 525; Watkins *v.* G. W. R., 37 L. T. N. S. 193; P. R. *v.* Zebe, 33 Pa. St. 318; s. c., 37 Pa. St. 420; Bancroft *v.* B. & W. R., 97 Mass. 275; McQuilkin *v.* C. P. R., 64 Cal. 463; s. c., 16 Am. & Eng. R. R. Cas. 353; Forsyth *v.* B. & A. R., 103 Mass. 510. *Cf.* P. R. *v.* White, 88 Pa. St. 327; M. C. R. *v.* Coleman, 28 Mich. 440; Harvey *v.* E. R., 116 Mass. 269; s.c., 12 Weekly Notes of Cases (Pa.), 348. See also Wheelwright *v.* B. & A. R., 135 Mass. 225; s. c., 16 Am. & Eng. R. R. Cas. 315; C., B. & Q. R. *v.* Dewey, 26 Ill. 225.

4. Perry *v.* C. R., 58 Ga. 461; s. c., 66 Ga. 746.

5. Dawson *v.* L. & N. R., 11 Am. & Eng. R. R. Cas. 134.

6. Lewis *v.* I. C. & D. R., L. R. 9 Q. B. 71; Weller *v.* L. B. & S. C. R., L. R. 9 C. P. 132, 134; Whittaker *v.* M. & S. R., L. R. 5 C. P. 464, note; Bridges *v.* N. L. R., L. R. 7 H. L. 224; P. R. *v.* Aspell, 23 Pa. St. 147; P. R. *v.* White, 88 Pa. St. 327; C. R. *v.* Van Horn, 38 N. J. L. 133; Mitchell *v.* C. & G. T. R., 51 Mich. 236; s. c., 18 Am. & Eng. R. R. Cas. 176; Taber *v.* D., H. & L. R., 71 N. Y. 489; C. I. R. *v.* Farrell, 31 Ind. 408; Pabst *v.* B. & P. R., 2 McArthur (D. C.) 42; Nicholls *v.* G. S. & W. R., 7 Ir. C. L. 40; Thompson *v.* B., H. & H. R., 5 Ir. C. L. 517; Brooks *v.* B. & M. R., 135 Mass. 21; s. c., 16 Am. & Eng. R. R. Cas. 345; Edgar *v.* N. R., 4 Ont (Can.) 201; s. c., 16 Am. & Eng. R. R. Cas. 347; Penna. Co. *v.* Hoagland, 78 Ind.

able time at way stations in order that passengers may get on or off the cars with safety.[1]

Of course the railway is liable when its conductor, or other servant, gives a signal to start while a passenger is obviously in the act of getting on or off its train.[2]

But if the train has stopped a reasonable time, and the passenger has given no notice of an intention to alight, and the conductor does not see him in the act of alighting, the railway is not liable for the act of its conductor in starting the train.[3]

A passenger who is carried past the station, or who is not taken up at the station, to or from which the railway had contracted to carry him, is entitled to recover compensatory damages.[4]

When a passenger not having been set down or taken up at the station to or from which the railway has contracted to carry him is injured in the attempt to board or leave a moving train, the railway is liable if the person injured in getting on or off the train did not incur a danger obviously apparent to the mind of a reasonable man.[5]

203; s. c., 3 Am. & Eng. R. R. Cas. 436.

1. Bucher *v.* N. Y. C. & H. R. R., 98 N. Y. 128; Wood *v.* L. S. & M. S. R., 49 Mich. 370; Brooks *v.* B. & M. R., 135 Mass. 21; D. & M. R. *v.* Curtis, 23 Wis. 152; 27 Wis. 158; S. R. *v.* Kendrick, 40 Miss. 374; Imhoff *v.* C. & M. R., 20 Wis. 344; N. O. R. *v.* Statham, 42 Miss. 607; Millimann *v.* N. Y. C. & H. R. R., 66 N. Y. 642; P. R. *v.* Kilgore, 32 Pa. St. 292; J., M. & I. R. *v.* Parmalee, 51 Ind. 42; Keller *v.* S. C. & St. P. R., 27 Minn. 178; Swigert *v.* H. & St. J. R., 75 Mo. 475; s. c., 9 Am. & Eng. R. R. Cas. 322; W., St. L. & P. R. *v.* Rector, 104 Ill. 296; s. c., 9 Am. & Eng. R. R. Cas. 264; Penna. Co. *v.* Hoagland, 78 Ind. 203; s. c., 3 Am. & Eng. R. R. Cas. 436; T. W. & W. R. *v.* Baddeley, 54 Ill. 19; Fuller *v.* N. R., 21 Conn. 557; Davis *v.* C. & N. W. R., 18 Wis. 175; Paulitsch *v.* N. Y. C. & H. R. R., 26 Am. & Eng. R. R. Cas. 162.

2. Swigert *v.* H. & St. J. R. 75 Mo. 475; s. c., 9 Am. & Eng. R. R. Cas. 322; Bucher *v.* N. Y. C. & H. R. R., 98 N. Y. 128; Keating *v.* N. Y. C. & H. R. R., 49 N. Y. 673; Mitchell *v.* W. & A. R., 30 Ga. 22; C. W. D. R. *v.* Mills, 105 Ill. 63; s. c., 11 Am. & Eng. R. R. Cas. 128; Conner *v.* C. S. R. (Ind.), 26 Am. & Eng. R. R. Cas. 210; Eppencorll *v.* B. C. & N. R., 69 N. Y. 195; Vance *v.* Railroad, 26 Am. & Eng. R. R. Cas. 223; Straus *v.* K. C., St. J. & C. B. R., 86 Mo. 421; s. c., 27 Am. & Eng. R. R. Cas. 170.

3. Strauss *v.* K. C., St. J. & C. B. R., 75 Mo. 185; s. c., 6 Am. & Eng. R. R. Cas. 384; H. & St. J. R. *v.* Clotworthy, 80 Mo. 220; s. c., 21 Am. & Eng. R. R. Cas. 371.

4. Hobbs *v.* L. & S. W. R., L. R. 10 Q. B. 111; C., St. L. & N. O. R. *v.* Scurr, 59 Miss. 456; s. c., 6 Am. & Eng. R. R. Cas. 341; Trigg *v.* St. L., K. C. & N. R., 47 Mo. 147; s. c., 6 Am. & Eng. R. R. Cas. 345; I. & G. N. R. *v.* Terry, 62 Tex. 380; s. c., 21 Am. & Eng. R. R. Cas. 323.

5. Bucher *v.* N. Y. C. & H. R. R., 98 N. Y. 128; Swigert *v.* H. & St. J. R., 75 Mo. 475; s. c., 9 Am. & Eng. R. R. Cas. 322; C. R. *v.* Perry, 58 Ga. 461; s. c., 66 Ga. 746; Johnson *v.* W. C. & P. R., 70 Pa. St. 357; P. R. *v.* Kilgore, 32 Pa. St. 292; C. V. R. *v.* Maugans, 61 Md. 53; s. c., 18 Am. & Eng. R. R. Cas. 182; Edgar *v.* N. R., 4 Ont. (Can.) 201; Doss *v.* M., K. & T. R., 59 Mo. 37; Loyd *v.* H. & St. J. R., 53 Mo. 509; Curtis *v.* D. & M. R., 27 Wis. 158; D. & M. R. *v.* Curtis, 23 Wis. 152; Filer *v.* N. Y. C. R., 49 N. Y. 47; Delamatyr *v.* M. & P. M. C. R., 24 Wis. 578; Davis *v.* C. & N. W. R., 18 Wis. 175; Price *v.* St. L., K. C. & N. R., 72 Mo. 414; s. c., 3 Am. & Eng. R. R. Cas. 365; St. L., I. M. & S. R. *v.* Cantrell, 37 Ark. 519; s. c., 8 Am. & Eng. R. R. Cas. 198; C. & A. R. *v.* Bonifield, 104 Ill. 223; s. c., 8 Am. & Eng. R. R. Cas. 443; Lambeth *v.* N. C. R., 66 N. Car. 494; U. P. R. *v.* Diehl, 33 Kans. 422; s. c., 21 Am. & Eng. R. R. Cas. 350; Boss *v.* P. & W. R., 21 Am. & Eng. R. R. Cas. 364; H. & St. J. R. *v.* Clotworthy, 80 Mo. 220;

But when the train is moving at so high a rate of speed, or where the place of the passengers' ascent or descent is so obviously perilous that a person of ordinary prudence would not attempt to get on or off the train then and there, the act of the person injured in so doing is such contributory negligence as will bar his recovery.[1]

While it is the duty of a carrier to provide reasonably safe and convenient means of ingress and egress from its cars and carriages, the railway is only to be held liable for accidents happening to its passengers in descending from a car when at rest at a station if the circumstances are such as to induce the passenger to believe that he has reached his point of destination, and that it is safe for him to get out.[2]

On the other hand, where a passenger, in the exercise of rea-

s. c., 21 Am. & Eng. R. R. Cas. 371; M. & L. R. R. *v.* Stringfellow, 44 Ark. 32; s. c., 21 Am. & Eng. R. R. Cas. 374; Leslie *v.* W., St. L. & P. R., 26 Am. & Eng. R. R. Cas. 229; D. & H. C. Co. *v.* Webster (Pa.), 27 Am. & Eng. R. R. Cas. 160.

1. Phillips *v.* R. & S. R., 49 N. Y. 177; Harper *v.* E. R., 32 N. J. L. 88; D., S. P. & P. R. *v.* Pickard, 8 Colo. 163; M. C. R. *v.* Coleman, 28 Mich. 440; Harvey *v.* E. R., 116 Mass. 269; P. R. *v.* Aspell, 23 Pa. St. 147; G., H. & S. A. R. *v.* Le Gierse, 51 Tex. 189; Lindsey *v.* C., R I. & P. R., 64 Iowa, 407; s. c., 18 Am. & Eng. R. R. Cas. 179; L. S. & M. S. R. *v.* Bangs, 47 Mich. 470; C. R. *v.* Letcher, 69 Ala. 106; s. c., 12 Am. & Eng. R. R. Cas. 115; Burrows *v.* E. R., 63 N. Y. 556; J. R. *v.* Hendricks, 26 Ind. 228; Gavett *v.* M. & L. R., 16 Gray (Mass.), 501; Hickey *v.* B. & L. R., 14 Allen (Mass.), 429; Davis *v.* C. & N. P., 18 Wis. 175; Nelson *v.* A. & P. R., 68 Mo. 595; Kelly *v.* H. & St. J. R., 70 Mo. 604; Strauss *v.* K. C., St. J. & C. B. R., 75 Mo. 185; s. c., 6 Am. & Eng. R. R. Cas. 384; H. & T. C. R. *v.* Leslie, 57 Tex. 83; s. c., 9 Am. & Eng. R. R. Cas. 384; S. W. R. *v.* Singleton, 67 Ga. 306; Jewell *v.* C., St. P. & M. R., 54 Wis. 610; s. c., 6 Am. & Eng. R. R. Cas. 379; I. C. R. *v.* Chambers, 71 Ill. 519; I. C. R. *v.* Lutz, 84 Ill. 598; Dougherty *v.* C., B. & Q. R., 86 Ill. 467; R. & D. R. *v.* Morris, 31 Gratt. (Va.) 200; Gonzales *v.* N. Y. & H. R. R., 50 How. Pr. (N.Y.) 126; Secor *v.* T. P. & W. R., 10 Fed. Repr. 15; Blodgett *v.* Bartlett, 50 Ga. 353; Haldan *v.* G. W. R., 30 Up. Can. C. P. 89; Knight *v.* P. R., 23 La. Ann. 462; Hubener *v.* N. O. & C. R., 23 La. Ann. 492; Mitchell *v.* C. & G. T. R., 31 Mich. 266; s. c., 18 Am. & Eng. R. R. Cas. 176; McCorkle *v.* C., R. I. & P. R., 61 Iowa, 555; s. c., 18 Am. & Eng. R. R. Cas. 156; W., St. L. & P. R. *v.* Rector, 104 Ill. 296; s. c., 9 Am. & Eng. R. R. Cas. 264; R. & D. R. *v.* Morris, 31 Gratt. (Va.) 200; Damont *v.* N. O. & C. R., 9 La. Ann. 441; I. C. R. *v.* Able, 59 Ill. 131; J. R. *v.* Swift, 26 Ind. 459; E. & C. R. *v.* Duncan, 28 Ind. 441; I. C. R. *v.* Slatton, 54 Ill. 133; O. & M. R. *v.* Schiebe, 44 Ill. 460; H. & T. C. R. *v.* Schmidt, 61 Tex. 282; s. c., 21 Am. & Eng. R. R. Cas. 345; Adams *v.* L. & N. R., 21 Am. & Eng. R. R. Cas. 380; S. & N. A. R. *v.* Schaufler, 75 Ala. 136; s. c., 21 Am. & Eng. R. R. Cas. 405; E. T. V. & G. R. *v.* Messengill, 15 Lea (Tenn.), 328; Beattie *v.* C. P. R. (Pa.), 1 Cent. Repr. 633; Solomon *v.* M. R., 27 Am. & Eng. R. R. Cas. 155.

2. Foy *v.* L. B. & S. C. R., 18 C. B. N. S. 225, 114 E. C. L.; Praeger *v.* B. & E. R., 24 L. T. N. S. 105; Cockle *v.* L. & S. E. R., L. R. 5 C. P. 457, 7 C. P. 321; Weller *v.* L. B. & S. C. R., L. R. 9 C. P. 126; Bridges *v.* N. L. R., L. R. 7 H. L. 213; Robson *v.* N. E. R., L. R. 10 Q. B. D. 371; Rose *v.* N. E. R., 2 Ex. D. 248; Foulkes *v.* M. D. R., 4 C. P. D. 267, 5 C.P.D. 157; P.R. *v.* White, 88 Pa. St 327; T. H. & I. R. *v.* Buck, 96 Ind. 346; s. c., 18 Am. & Eng. R. R. Cas. 234; Cartwright *v.* C. & G. T. R., 52 Mich. 606; s. c., 16 Am. & Eng. R. R. Cas. 321; C. & I. C. R. *v.* Farrell, 31 Ind. 408; Gaynor *v.* O. C. & N. R., 100 Mass. 208; Brooks *v.* B. & M. R., 135 Mass. 21; s. c., 16 Am. & Eng. R. R. Cas. 345; Edgar *v.* N. R., 4 Ont. 201; s. c., 16 Am. & Eng. R. R. Cas. 347; C. R. *v.* Van Horn, 38 N. J. Law, 133; Edgar *v.* N. R., 11 Ont. App. 452; s. c., 22 Am. & Eng. R. R. Cas. 433; E. T. V. & G. R. *v.* Conner, 15 Lea (Tenn.), 254; Delamatyr *v.* M. R., 24 Wis. 578.

sonable care, can see that by getting out then and there, in his own way, he is encountering a peril, the carrier is not liable.[1]

A carrier is liable to passengers injured by its negligent operation of its line or conduct of its business, as, for instance, collisions, derailment, boiler explosions, etc.[2]

34. Disorderly Passengers.—It is both the right and the duty of a carrier to remove from its cars disorderly passengers whose misconduct endangers the safety of their fellow-passengers;[3] but the duty of the carrier to its passengers does not require it to maintain a police force, either at its stations or on its cars, for the suppression of riots or the prevention of any possible breach of the peace.[4] Nevertheless, the duty of the carrier requires it to protect its passengers from the disorderly acts of other passengers and of strangers, provided that the parties causing the disorder are not sufficiently numerous or strong to overthrow the authority of

1. Siner *v.* G. W. R., L. R. 3 Ex. 150, 4 Ex. 117; Lewis *v.* L. C. & D. R, L. R. 9 Q. B. 66; D., L. & W. R. *v.* Napheys, 90 Pa. St. 135; P. R. *v.* Zebe, 33 Pa. St., 318; s. c., 37 Pa. St. 420; E. & C. R. *v.* Duncan, 28 Ind. 441; Mitchell *v.* C. & G. T. R., 51 Mich. 236; Frost *v.* G. T. R., 10 Allen (Mass.), 387; Eckerd *v.* C. & N. W. R., 27 Am. & Eng. R. R. Cas. 114.

2. C. C. R. *v.* Mumford, 97 Ill. 560; Wardle *v.* N. O. C. R., 35 La. Ann. 202; s. c., 13 Am. & Eng. R. R. Cas. 60; Knowlton *v.* M. C. R., 59 Wis. 278; s. c., 16 Am. & Eng. R. R. Cas. 330; Ward *v.* C. C. R., 19 Shand (S. Car.), 521; s. c., 16 Am. & Eng. R. R. Cas. 356; Mulhado *v.* B. C. R., 30 N. Y. 370; Oram *v.* M. R., 112 Mass. 38; Nichols *v.* M. R., 106 Mass. 463; C. W. D. R. *v.* Mills, 105 Ill. 63; s. c., 11 Am. & Eng. R. R. Cas. 128; Rathbone *v.* U. R., 13 R. I. 709; s. c., 13 Am. & Eng. R. R. Cas. 58; Skinner *v.* L. B. & S. C. R., 5 Ex. 787; I. R. *v.* Mowery, 36 Ohio St. 418; s. c., 3 Am. & Eng. R. R. Cas. 361; N. O., J. & G. N. R. *v.* Albertson, 38 Miss. 242; N. Y., L. E. & W. R. *v.* Seybolt, 95 N. Y. 562; s. c., 18 Am. & Eng. R. R. Cas. 162; Farlow *v.* Kelly, 108 U. S. 288; Smith *v.* St. P. C. R., 32 Minn. 1; s. c., 16 Am. & Eng. R. R. Cas. 310; Carpue *v.* L. & B. R., 5 Q. B. 747, 48 E. C. L.; Dawson *v.* M. R., 7 H. & N. 1037; Sullivan *v.* P. & R. R., 30 Pa. St. 234; N. Y., L. E. & W. R. *v.* Daugherty, 11 Weekly Notes of Cases (Pa.), 437; Edgerton *v.* N. Y. C. & H. R. R., 39 N. Y. 227; Festal *v.* M. R., 109 Mass. 720; George *v.* St. L., I. M. & S. R., 34 Ark. 613; s. c., 1 Am. & Eng. R. R. Cas. 294; P., C. & St. L. R., *v.* Williams, 74 Ind. 462; C., C., C. & I. R. *v.* Newell, 75 Ind. 542; Curtis *v.* R. & S. R., 18 N. Y. 534; Tuttle *v.* C., R. I. & P. R., 48 Iowa, 236; Brignoli *v.* C. & G. E. R., 4 Daly (N. Y.), 182; C., B. & Q. R. *v.* George, 19 Ill. 510; L. R. & F. S. R. *v.* Mills, 40 Ark. 298; s. c., 13 Am. & Eng. R. R. Cas. 10; Yonge *v.* Kenney, 28 Ga. 111; T. & St. L. R. *v.* Suggs, 62 Tex. 323; s. c., 21 Am. & Eng. R. R. Cas. 475; K. C. R. *v.* Thomas, 79 Ky. 160; s. c., 1 Am. & Eng. R. R. Cas. 79; Brown *v.* N. Y. C. R., 34 N. Y. 404; C., R. I. & P. R. *v.* McAra, 52 Ill. 296; N. & C. R. *v.* Massino, 1 Sneed (Tenn.), 220; Robinson *v.* N. Y. C. & H. R. R., 20 Blatchf. 338; White *v.* F. R., 136 Mass. 321; Tyrrel *v.* E. R., 111 Mass. 546; B. & Y. T. Road *v.* Leonhardt, 27 Am. & Eng. R. R. Cas. 194; T. H. & I. R. *v.* Jackson, 81 Ind. 19; s. c., 6 Am. & Eng. R. R. Cas. 178; Gruber *v.* W. & J. R., 92 N. Car. 1; s. c., 21 Am. & Eng. R. R. Cas. 438; Dickinson *v.* P., H. & N. W. R., 53 Mich. 43; s. c., 21 Am. & Eng. R. R. Cas. 456; Lambkin *v.* S. E. R., 5 App. Cas. 352; Matteson *v.* N. Y. C. R., 35 N. Y. 487; Dixon *v.* B., C. & N. R., 100 N. Y. 171.

3. R. *v.* Valleley, 32 Ohio St. 345; P., C. & St. L. R. *v.* Vandyne, 57 Ind. 576; B., P. & C. R. *v.* McDonald, 68 Ind. 316; Lemont *v.* W. & G. R., 1 Mackey (D. C.), 180; s. c., 1 Am. & Eng. R. R. Cas. 263.

4. P. N. R. *v.* Hinds, 53 Pa. St. 512; Cannon *v.* M. G. W. R., 6 Ir. C. L. 199; Putnam *v.* B. & S. A. R., 55 N. Y. 108; C. & A. R. *v.* Pillsbury (Ill.), 26 Am. & Eng. R. R. Cas. 241; Simmons *v.* N. B., V. & N. S. S. Co., 97 Mass. 361; Spohn *v.* M. P. R. (Mo.), 26 Am. & Eng. R. R. Cas. 252; Felton *v.* C., R. I. & P. R. (Iowa), 27 Am. & Eng. R. R. Cas. 229.

its servants; for in such a case the servants are negligent in not removing or controlling the disorderly persons.[1]

35. Sudden Jolts.—A carrier is liable for injuries to passengers in its cars caused by a sudden jolting of the car in starting or coming to a stop, and in such cases it is for the jury to say whether or not the plaintiff was contributorily negligent in rising from his seat before the car stopped.[2]

The carrier's duty requires it to provide seats for its passengers,[3] but the mere failure to provide a seat for a passenger is not such negligence as will render a carrier responsible to the passenger if he, while standing, be thrown down without negligence upon the part of the carrier.[4] A carrier is liable for injuries caused to a passenger by the falling of a package upon him from a rack in a car, the carrier's servants having negligently permitted the package to remain in a dangerous position.[5]

36. Contributory Negligence of Passengers.—A passenger who voluntarily and unnecessarily places himself in a position of danger cannot hold the carrier responsible for injuries of which his position was the efficient cause; as, for instance, crossing the line in front of a train moving or likely to move,[6] or riding on an engine[7] or on the platform of a moving car,[8] or putting his head or arm out of the window of a car in motion,[9] or riding in a

1. P. & C. R. *v.* Pillow, 76 Pa. St. 510; Flint *v.* N. & N. Y. T. Co., 34 Conn. 554; Britton *v.* A. & C. R., 88 N. Car. 536; s. c., 18 Am. & Eng. R. R. Cas. 391; Hendricks *v.* S. A. R., 44 N. Y. Sup. Ct. 8; N. O., St. L. & C. R. *v.* Burke, 53 Miss. 200; King *v.* O. & M. R. (U. S. C. C. Ind.), 18 Am. & Eng. R. R. Cas. 386.

2. N. J. R. *v.* Pollard, 22 Wall. 341; C. & P. S. Ferry Co. *v.* Monaghan, 10 Weekly Notes of Cases (Pa.), 46; W. P. P. R. *v.* Whipple, 5 W. N. C. 68; Barden *v.* B., C. & F. R., 121 Mass. 436; Worthen *v.* G. T. R., 125 Mass. 99; Geddes *v.* M. R., 103 Mass. 391; Spearman *v.* C. St. R., 57 Cal. 432; s. c., 8 Am. & Eng. R. R. Cas. 193; M. P. R. *v.* Marten (Tex.), 22 Am. & Eng. R. R. Cas. 409; Dougherty *v.* M. R., 81 Mo. 325; s. c., 21 Am. & Eng. R. R. Cas. 497; N. H. R. *v.* May (N. J.), 27 Am. & Eng. R. R. Cas. 151; Bartholomew *v.* N. Y. C. & H. R. R. (N. Y.), 27 Am. & Eng. R. R. Cas. 154; Condy *v.* St. L., I. M. & S. R., 85 Mo. 79; s. c., 27 Am. & Eng. R. R. Cas. 282. *Sed cf.* Harris *v.* H. & St. J. R. (Mo.), 27 Am. & Eng. R. R. Cas. 216.

3. L. & N. R. *v.* Kelly, 92 Ind. 371; s. c., 13 Am. & Eng. R. R. Cas. 1.

4. Burton *v.* Ferry Co., 114 U. S. 474.

5. Morris *v.* N. Y. C. & H. R. R., 22 Am. & Eng. R. R. Cas. 411.

6. B. & O. R. *v.* State, 60 Md. 449; Henry *v.* St. L., K. C. & N. R., 76 Mo. 288; s. c., 12 Am. & Eng. R. R. Cas. 136; Hallihan *v.* H. & St. J. R., 71 Mo. 113; s. c., 2 Am. & Eng. R. R. Cas. 117; Johnson *v.* B. & M. R., 125 Mass. 75.

7. Robertson *v.* E. R., 22 Barb. (N.Y.) 91; B. & P. R. *v.* Jones, 95 U. S. 439; Rucker *v.* M. P. R., 61 Tex. 499; s. c., 21 Am. & Eng. R. R. Cas. 245; Daggett *v.* I. C. R., 34 Iowa, 284. *Cf.* W., St. L. & P. R. *v.* Shacklet, 105 Ill. 364; s. c., 12 Am. & Eng. R. R. Cas. 166.

8. Secor *v.* T., P. & W. R., 10 Fed. Repr. 15; I. C. R. *v.* Green, 81 Ill. 19; Blodgett *v.* Bartlett, 50 Ga. 353; A. G. S. R. *v.* Hawk, 72 Ala. 12; C. & A. R. *v.* Hoosey, 99 Pa. St. 492; Hickey *v.* B. & L. R., 14 Allen (Mass.), 429; Quinn *v.* I. C. R., 51 Ill. 495; M. & W. R. *v.* Johnson, 38 Ga. 409; P., R. I. & St. L. R. *v.* Coultas, 67 Ill. 398.

9. Todd *v.* O. C. R., 3 Allen (Mass.), 18, 7 Id. 207; P. R. *v.* McClurg, 56 Pa. St. 294; I. & C. R. *v.* Rutherford, 29 Ind. 83; P. & C. R. *v.* Andrews, 39 Md. 329; Holbrook *v.* U. & S. R., 12 N. Y. 236; Dun *v.* S. & R. R., 78 Va. 645; s. c., 16 Am. & Eng. R.R. Cas. 363; L. & N. R. *v.* Siekings, 5 Bush (Ky.), 1; Dale *v.* D., L. & W. R., 73 N. Y. 468. *Sed cf.* N. J. R. *v.* Kennard, 21 Pa. St. 203; C. & A. R. *v.* Pondrom, 51 Ill. 333; Spencer *v.* M. & P. I. C. R., 17 Wis. 487; Winters *v.* H. & St. J. R., 39 Mo. 368; Summers *v.* C. C. R., 34 La. Ann. 139.

baggage or other car not intended for the carriage of passengers,[1] or riding on a platform car with his legs hanging over the side of the car,[2] or standing or sitting while the train is in motion near to an open side door of a car,[3] or riding on an open platform car and thus exposing himself to risk of injury from cinders,[4] etc.

If the passenger assumes a position of danger at the invitation of a servant of the carrier, or under an express or implied representation that he may safely occupy the position, the carrier will, in general, be held liable for the injuries resulting therefrom.[5] The fact that a servant of the carrier invited, or even directed, the passenger to occupy a position of danger will not render the carrier liable for injuries resulting therefrom, if the danger was so obvious that a reasonable man would not have obeyed the servant, or accepted his invitation.[6] Nor will a carrier be held responsible if the servant was not expressly or impliedly authorized to give the invitation. In particular is this the case when the general regulations of the carrier for the protection of the passenger forbid him to occupy a position of danger, as, for instance, to ride in the baggage car.[7]

It is not contributory negligence in a passenger to ride in a passenger car other than that in which he has been assigned to a seat.[8]

The carrier is, of course, liable, if the passenger's arm resting within the window is jolted out by a collision and injured.[9]

The conditions of travel on a street car are, of course, different from those on lines of railway whose cars are propelled at the higher rate which the use of steam as a motor makes possi-

1. H. & T. C. R. *v.* Clemmons. 55 Tex. 88; s. c., 8 Am. & Eng. R. R. Cas. 396; K. C. R. *v.* Thomas, 79 Ky. 160; s. c., 1 Am. & Eng. R. R. Cas. 79; P. R. *v.* Langdon, 92 Pa. St. 21; s. c., 1 Am. & Eng. R. R. Cas. 87; P. & R. I. R. *v.* Lane, 83 Ill. 448; Higgins *v.* H. & St. J. R., 36 Mo. 418. *Cf.* Watson *v.* N. R., 24 Up. Can. (Q. B.) 98; Jacobus *v.* St. P. & C. R., 20 Minn. 125.

2. St. L. R. *v.* Marker, 41 Ark. 542; s. c., 22 Am. & Eng. R. R. Cas. 296.

3. N. & W. R. *v.* Ferguson, 79 Va. 241; Thompson *v.* Duncan, 76 Ala. 334.

4. Higgins *v.* C. R., 73 Ga. 149; s. c., 27 Am. & Eng. R. R. Cas. 218.

5. O'Donnell *v.* A. V. R., 59 Pa. St. 239; Dunn *v.* G. T. R., 58 Me. 187; Edgerton *v.* N. Y. C. R., 39 N. Y. 227; N. & C. R. *v.* Erwin (Tenn.), 3 Am. & Eng. R. R. Cas. 465; I. & St. L. R. *v.* Horst, 93 U. S. 291; L. & N. R. *v.* Kelley, 92 Ind. 371; s. c., 13 Am. & Eng. R. R. Cas. 1; Pool *v.* C. R., 56 Wis. 227; St. L., I. M. & S. R. *v.* Cantiell, 37 Ark. 519; s. c., 8 Am. & Eng. R. R. Cas. 198; G. R. & B. Co. *v.* McCurdy, 45 Ga. 288; Lambeth *v.* N. C. R., 66 N. Car. 494; Filer *v.* N. Y. C. & H. R. R., 59 N. Y. 351; Creed *v.* P. R., 86 Pa. St. 139; Colegrove *v.* N. Y. & H. & N. Y. & N. H. R., 20 N. Y. 492; C., C., C. & I. R. *v.* Manson, 30 Ohio St. 451; Waterbury *v.* N. Y. C. & H. R. R., 17 Fed. Repr. 671; C., B. & Q. R. *v.* Sykes, 96 Ill. 162; s. c., 2 Am. & Eng. R. R. Cas. 254; H. & St. J. R. *v.* Martin, 111 Ill. 210; B. & O. R. *v.* Leapley (Md.), 27 Am. & Eng. R. R. Cas. 167.

6. Hazzard *v.* C. B. & Q. R., 1 Biss. 503; C. & A. R. *v.* Randolph, 53 Ill. 510; B. & P. R. *v.* Jones, 95 U. S. 439; S. W. R. *v.* Singleton, 67 Ga. 306, 66 Id. 252; S. & N. A. R. *v.* Schaufler, 75 Ala. 136; s. c., 21 Am. & Eng. R. R. Cas. 405.

7. P. R. *v.* Langdon, 92 Pa. St. 21.

8. Penn. Co. *v.* Roy, 102 U. S. 451.

9 Farlow *v.* Kelly, 108 U. S. 288; G. P R. *v.* Brophy, 105 Pa. St. 38; s. c., 16 Am. & Eng. R. R. Cas. 361; Dahlberg *v.* M. St. R., 32 Minn. 404; s. c., 18 Am. & Eng. R. R. Cas. 202. See also Dickinson *v.* P., H. & N. W. R., 18 N. W. Repr. (Mich.) 553; P. P. R. *v.* Lauderbach (Pa.), 26 Am. & Eng. R. R. Cas.

ble, and it is not necessarily contributory negligence to ride on the platform of a street car.[1]

37. Infirm Passengers.—Where the railway voluntarily accepts as a passenger one whose physical disability is apparent or is made known to its servants, and renders special assistance necessary, the railway is negligent if such assistance be not afforded.[2]

The fact that the passenger was in a state of health predisposing him or her to suffer in case of injury more seriously than would otherwise have been the case will not relieve the carrier from liability for the injury and its consequences.[3]

A carrier owes to an infant passenger a higher measure of duty than it owes to an adult passenger.[4]

38. Burden of Proof.—The burden of proof is, in general, upon the plaintiff of showing, in a case of personal injury, negligence on the part of the carrier.[5]

But it is not necessary that the party on whom the burden of proof rests should establish a case free from any doubt, and it is sufficient to justify a verdict for him that the evidence preponder-

166; Hollahan *v.* N. Y., L. E. & W. R. (N. Y.), 26 Am. & Eng. R. R. Cas. 169.

1. Meesel *v.* L. & B. R., 8 Allen, 234; Spooner *v.* B. C. R., 54 N. Y. 230; G. P. R. *v.* Walling. 97 Pa. St. 55; Maguire *v.* M. R., 115 Mass. 237; Sheridan *v.* B. & N. R., 36 N. Y. 39; Clark *v.* 8th Ave. R., N. Y. 135; Burns *v.* B. R., 50 Mo. 139; Nolan *v.* B. C. & N. R., 87 N. Y. 63; s. c., 3 Am. & Eng. R. R. Cas. 463; 13th & 15th Sts. P. R. *v.* Boudrou, 92 Pa. St. 480; s. c., 8 Weekly Notes of Cases (Pa.), 244; Fleck *v.* U. R., 134 Mass. 480; s. c., 16 Am. & Eng. R. R. Cas. 372.

2. T., W. & W. R. *v.* Baddely, 54 Ill. 19; C. C. I. R. *v.* Powell, 40 Ind. 37; Millimann *v.* N. Y. C. & H. R. R., 66 N. Y. 642; Sheridan *v.* B. C. R., 36 N. Y. 39; N. O., J. & G. N. R. *v.* Statham, 42 Miss. 607.

3. Stewart *v.* Ripon, 38 Wis. 364; J. & M. R. *v.* Riley, 39 Ind. 568; Fitzpatrick *v.* G. W. R., 12 Upp. Can. Q. B. 645; B. C. R. *v.* Kemp, 61 Md. 74; s. c., 18 Am. & Eng. R. R. Cas. 220; L., Na. & C. R. *v.* Falvey, 23 Am. & Eng. R. R. Cas. 522; R. C. P. R. *v.* Eckert (Pa.), 4 Atl. Repr. 530.

4. As illustrations of liability to infant passengers, see I. P. & C. R. *v.* Pitzer, 25 Am. & Eng. R. R. Cas. 313; Love *v.* H. S. R., 9 Allen (Mass.), 557; Kline *v.* C. P. R., 37 Cal. 400; Biddle *v.* St. M. & F. P. R. (Pa.), 26 Am. & Eng. R. R. Cas. 208.

5. Stephen Dig. of Ev. arts. 93–95; Daniel *v.* M. R., L. R. 3 C. P. 216; Hayes *v.* M. C. R., 111 U. S. 228; P., W. & B. R. *v.* Stebbing, 62 Mo. 504; s. c., 19 Am. & Eng. R. R. Cas. 36; C. & N. W. R. *v.* Smith, 46 Mich. 504; Brown *v.* C. & B. St. R., 49 Mich. 153; Henry *v.* L. S. & M. S. R., Mich. 495; Mitchell *v.* C. & G. T. R., 51 Mich. 236; C., St. L. & N. O. R. *v.* Trotter, 61 Miss. 417; Parrott *v.* Wells, 15 Wall. 524; P. & R. R. *v.* Heil, 5 Weekly Notes of Cases (Pa.), 91; Clark *v.* P. & R. R., W. N. C. 119; P. & R. R. *v.* Hummel, 44 Pa. St. 375; P. & R. R. *v.* Spearen, 47 Pa. St. 300; Holbrook *v.* U. & S. R., 12 N. Y. 236; Curtis *v.* R. & S. R., 18 N. Y. 524; P., W. & B. R., *v.* Stebbing, 62 Md. 504; s. c., 19 Am. & Eng. R. R. Cas. 36; C., C. & I. C. R. *v.* Troesch, 68 Ill. 545; Robinson *v.* F. & W. R., 7 Gray (Mass.), 92; Cotton *v.* Wood, 8 C. B. N. S. 568, 98 E. C. L.; Hammack *v.* White, 11 C. B. N. S. 588, 103 E. C. L.; Toomey *v.* L., B. & S. C. R., 3 C. B. N. S. 146, 91 E. C. L.; Gallagher *v.* Piper, 16 C. B. N. S. 692, 111 E. C. L.; Welfare *v.* L. & B. R., L. R. 4 Q. B. 693; Manzoni *v.* Douglass, 6 Q. B. D. 145; Allyn *v.* B. & A. R., 105 Mass. 77; Lane *v.* Crombie, 12 Pick. 177; Corcoran *v.* B. & A. R., 133 Mass. 507; B., C., R. & N. R. *v.* Dowell, 62 Iowa, 629; Carter *v.* C. & G. R., 19 S. Car. 20; B. & O. R. *v.* State to use of Allison, 62 Md. 479; s. c., 19 Am. & Eng. R. R. Cas. 83; Ford *v.* C. I. R., 17 Am. & Eng. R. R. Cas. 599; C. & A. R. *v.* Mock, 88 Ill. 87; Cordell *v.* N. Y. C. & H. R. R., 75 N. Y. 330; Warner *v.* E. R., 44 N. Y. 465; T., W. & W. R. *v.* Branagan 75 Ind. 490; s. c., 5 Am. & Eng. R. R. Cas. 630; Willoughby *v.* C. & N. W. R., 37 Iowa, 432. *Cf.* Allen *v.* Willard, 57 Pa. St. 347; Simpson

ates in his favor, and that the jury would not act unreasonably in finding a verdict for him.[1]

While all of the authorities agree that the burden is upon the plaintiff of showing that the defendant was negligent, or, in other words, that the injury resulted *prima facie* from the negligence of the defendant, it is nevertheless held in some jurisdictions that the burden is on the plaintiff of showing affirmatively that the person injured was without fault, but that that may be shown, either by direct evidence or by proof of circumstances reasonably establishing that the injury may have been occasioned without contributory negligence upon the part of the person injured.[2]

Other authorities hold that if the plaintiff's case has shown that under the circumstances the defendant owed him a duty, and that that duty has not been performed, and that the injury has resulted therefrom, the obligation is then upon the defendant to prove plaintiff's contributory negligence, if he relies upon that contributory negligence as a defence to the action.[3]

39. Presumption of Negligence—Where circumstances are proven from which it may fairly be inferred that there is a reasonable probability that the injury resulted from the want of some precaution which the carrier might, and ought to, have resorted to, there is, in the absence of explanation by the carrier, a presumption of negligence upon its part.[4]

This presumption of negligence has been applied in stage-

v. L. G. Omnibus Co., L. R. 8 C. P. 390; Mitchell *v.* Alestree, 1 Ventr. 295.

1. Johnson *v.* Agricultural Ins Co., 25 Hun, 251; N. Y., L. E. & W. R. *v.* Seybolt, 95 N. Y. 562.

2. Per Brett, M. R., in Davey *v.* L. & S. W. R., 12 Q. B. D. 71; Murphy *v.* Deane, 101 Mass. 466; Mayo *v.* B. & M. R., 104 Mass. 137; Hinckley *v.* C. C. R., 120 Mass. 262; Tolman *v.* S. B. & N.Y. R., 98 N. Y. 198; Lee *v.* Troy Co., N. Y. 115; Warren *v.* F. R., 8 Allen, 227; Gleason *v.* Bremen, 50 Me. 222; State *v.* G. T. R., 58 Me. 176; State *v.* M. C. R., 76 Me. 357; s. c., 19 Am. & Eng. R. R. Cas. 313; Pzolla *v.* M. C. R., 54 Mich. 273; s. c., 19 Am. & Eng. R. R. Cas. 334; Murphy *v.* C., R. I. & P. R., 45 Iowa, 661; Starry *v.* D. & S. W. R., 51 Iowa. 419; Raymond *v.* B., C., R. & N. R., 65 Iowa, 152; s. c., 18 Am. & Eng. R. R. Cas. 217, reversing s.c., 13 Am. & Eng. R.R. Cas. 6; Behrens *v.* K. P. R., 5 Col. 400; s.c., 8 Am. & Eng. R.R. Cas. 184; Penna. Co. *v.* Galentine, 77 Ind. 320; s.c., 7 Am. & Eng. R. R. Cas. 517; P., C. & St. L. R. *v.* Noel, 77 Ind. 110; s. c., 7 Am. & Eng. R. R. Cas. 524; T., W. & W. R. *v.* Branagan, 75 Ind. 490; s. c., 5 Am. & Eng. R. R. Cas. 630; Hawes *v.* B., C., R. & N. R., 64 Iowa, 315; s. c., 19 Am. & Eng. R. R. Cas. 220; L., N., A. & C. R. *v.* Shanks, 94 Ind. 598; s. c., 19 Am. & Eng. R. R. Cas. 28.

3. D., W. & W. R. *v.* Slattery, 3 App. Cas. 1155; W. & G. R. *v.* Gladmon, 15 Wall. 401; L. & St. L. R. *v.* Horst, 93 U. S. 291; Oldfield *v.* N. Y. & H. R., 14 N. Y. 310; Johnson *v.* H. R. R., 20 N. Y. 65; Button *v.* H. R. R., 18 N.Y. 248; Wilds *v.* H. R. R., 24 N. Y. 230; Buesching *v.* Gaslight Co., 73 Mo. 229; Sweigert *v.* H. & St. J. R., 75 Mo. 475; Waters *v.* Wing, 50 Pa. St. 213; Canal Co. *v.* Bentley, 66 Pa. St. 32; P. R. *v.* Weber, 76 Pa. St. 157; K. C., St. J. & C. B. R. *v.* Flynn, 78 Mo. 195; s. c., 18 Am. & Eng. R. R. Cas. 23; D. & W. R. *v.* Spicker, 61 Tex. 427; s. c., 21 Am. & Eng. R. R. Cas. 160; P. R. *v.* McTighe, 46 Pa. St. 316; P. R. *v.* Warner, 89 Pa. St. 59; C. & P. R. *v.* Rowan, 66 Pa. St. 393; Abbett *v.* C., M. & St. P. R., 30 Minn. 482; Mares *v.* N. P. R., 17 Am. & Eng. R. R. Cas. 620; Wilson *v.* N. P. R., 26 Minn. 278; McQuilken *v.* C. P. R., 50 Cal. 7; McDougall *v.* C. R., 63 Cal. 431; s. c., 12 Am. & Eng. R. R. Cas. 143; P., C. & St. L. R. *v.* Wright, 80 Ind. 182; s. c., 5 Am. & Eng. R. R. Cas. 628.

4. Scott *v.* L. & St. K. Docks Co., 3 H. & C. 596; W. T. Co. *v.* Downer, 11 Wall. (U. S.) 129; Railroad *v.* Mitchell, 11 Heisk. (Tenn.) 400.

coach accidents resulting from the breaking of an axle,[1] reckless driving;[2] or coming off of a wheel,[3] and in railway accidents in cases of collision;[4] boiler explosion,[5] breaking down of bridges and embankments,[6] derailment of cars,[7] sudden jerks in starting or stopping car or ferry-boat,[8] falling of berth in sleeping-car,[9] falling of a bale of cotton down a hatchway,[10] and in a case of injuries received by a passenger in the course of a fight between other passengers.[11]

40. Presumption Regulated by Burden of Proof—Rebuttal.—In those jurisdictions where the burden is on the plaintiff of proving affirmatively that he was not contributorily negligent, the presumption necessarily is that the plaintiff was contributorily

1. Christie *v.* Griggs, 2 Camp. 79.
2. Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181.
3. Ware *v.* Gay, 11 Pick. (Mass.) 106.
4. Skinner *v.* L. B. & S. C. R., 5 Ex. 787; I. R. *v* Mowery, 36 Ohio St. 418; s. c., 3 Am. & Eng. R. R. Cas. 361; N. O., J. & G. N. R. *v.* Allbritton, 38 Miss. 242; Smith *v.* St. P. C. R., 32 Minn. 1; s. c., 16 Am. & Eng. R. R. Cas. 310; N. Y., L. E. & W. R. *v.* Seybolt, 95 N. Y. 562; s. c., 18 Am. & Eng. R. R. Cas. 162; B. & Y. T. Road *v.* Leonhardt (Mo.), 27 Am. & Eng. R. R. Cas. 194.
5. Robinson *v.* N. Y. C. & H. R. R., 20 Blatchf. (U. S.) 338.
6. G. W. R. *v.* Braid, 1 Moore P. C. N. S. 101, 9 Jur. N. S. 339; P. & R. R. *v.* Anderson, 94 Pa. St. 251; B. S. O. & B. R. *v.* Rainbolt, 99 Ind. 551; s. c., 21 Am & Eng. R. R. Cas. 466; K. P. R. *v.* Miller, 2 Colo. 442; L. N. A. & C. R. *v.* Thompson (Ind.), 27 Am. & Eng. R. R. Cas. 88; L. N. A. & C. R. *v.* Pedigo (Ind.), 27 Am. & Eng. R. R. Cas. 310.
7. Carpue *v.* L. & B. R., 5 Q. B. 747, 48 E. C. L.; Dawson *v.* M. R., 7 H. & N. 1037; Sullivan *v.* P. & R. R., 30 Pa. 234; N. Y., L. E. & W. R. *v.* Daugherty, 11 Weekly Notes of Cases (Pa.), 437; Edgerton *v.* N. Y. C. & H. R. R., 39 N. Y. 227; Festal *v.* M. R., 109 Mass. 720; George *v.* St. L., I. M. & S. R., 34 Ark. 613; s. c., 1 Am. & Eng. R. R. Cas. 294; P., C. & St. L. R. *v.* Williams, 74 Ind. 462; C., C., C. & I. R. *v.* Newell, 75 Ind. 542; Curtis *v.* R. & S. R., 18 N. Y. 534; Tuttle *v.* C., R. I. & P. R., 48 Iowa, 236; Brignoli *v.* C. & G. E. R., 4 Daly (N.Y.), 182; C., B. & Q. R. *v.* George, 19 Ill. 510. Pollock, C. B., in Bird *v.* G. W. R., 28 L. J. Exch. 3, doubts as to the applicability of the presumption of negligence on the part of the railway in case of simple derailment. See also Heazle *v.* I. B. & W. R., 76 Ill. 501; Curtis *v.* R. & S. R., 18 N. Y. 543; L. R. & F. S. R. *v.* Miles, 40 Ark. 298; s. c., 13 Am. & Eng. R. R. Cas. 10; Yonge *v.* Kinney, 28 Ga. 111; T. & St. L. R. *v.* Suggs, 62 Tex. 323; s. c., 21 Am. & Eng. R. R. Cas. 475; C., C., C. & I. R. *v.* Newell, 23 Am. & Eng. R. R. Cas. 492; R. C. P. R. *v.* Eckert, 4 Atl. Repr. 530; Hipsley *v.* K. C., St. J. & C. B. R. (Mo.), 27 Am. & Eng. R. R. Cas. 287; C. R. *v.* Sanders, 73 Ga. 513; s. c., 27 Am. & Eng. R. R. Cas. 300.
8. N. J. R. *v.* Pollard, 22 Wall. (U. S.) 341; C. P. R. *v.* Swayne, 13 Weekly Notes of Cases (Pa.), 41; Ferry Co. *v.* Monaghan, 10 W. N. C. 46; Dougherty *v.* M. R., 81 Mo. 425; s.c. 21 Am. & Eng. R. R. Cas. 325; Condy *v.* St. L., I. M. & S. R., 85 Mo., 282; s. c., 27 Am. & Eng. R. R. Cas. 282.
9. C., C., C. & I. R. *v.* Walrath, 38 Ohio St. 461; s. c., 8 Am. & Eng. R. R. Cas. 371.
10. O. & M. Packe & Co. *v.* McCool, 8 Am. & Eng. R. R. Cas. 390.
11. P. & C. R. *v.* Pollard, 76 Pa. St. 510.

For illustrations of cases in which the presumption has been held to be inapplicable, see Daniel *v.* M. R., L. R. 3 C. P. 216, 591, 5 H. L. 45; Welfare *v.* L. & B. R., L. R. 4 Q. B. 693; LeBaron *v.* E. B. Ferry Co., 11 Allen (Mass.), 312; F. S. & P. V. R. *v.* Gibson, 96 Pa. St. 83; Corcoran *v.* B. & A. R., 133 Mass. 507; State, to use of Barnard, *v.* P. W. & B. R., 60 Md. 555; s. c., 15 Am. & Eng. R. R. Cas. 481; Holbrook *v.* U. & S. R., 12 N. Y. 236; P. & R. *v.* Boyer, 97 Pa. St. 91; D., L. & W. R. *v.* Napheys, 90 Pa. St. 135; s. c., 1 Am. & Eng. R. R. Cas. 52; C., St. & L. N. O. R. *v.* Trotter, 60 Miss. 442; Mitchell *v.* C. & G. T. R., 31 Mich. 266; s. c., 18 Am. & Eng R. R. Cas. 176. *Cf.* Fuller *v.* N. R., 21 Conn. 557; Muster *v.* C. M. & St. P. R., 61 Wis. 325; s. c., 18 Am. & Eng. R. R. Cas. 113; Eldredge *v.* M. & St. L. R., 32 Minn. 253; s. c., 21 Am. & Eng. R. R. Cas. 494.

negligent; but in other jurisdictions where the burden is not on the plaintiff of proving affirmatively that he was not contributorily negligent, the presumption, of course, is that he was not contributorily negligent. This presumption is rebutted when testimony to the contrary is adduced, and the jury should be directed that if they believe the testimony they should find for the defendant.[1]

72. Conclusive Presumption—Laws of Nature.—There is a conclusive and unrebuttable presumption of the accuracy and certainty of the operation of the laws of nature.[2]

CARRIERS OF GOODS. (See also ACT OF GOD; BAILMENTS; BILL OF LADING; CARRIERS OF PASSENGERS; CARRIERS OF LIVE STOCK; CHARTER-PARTY; DAMAGES; EXPRESS COMPANIES; FREIGHT; INTERSTATE COMMERCE; NEGLIGENCE; RAILROAD COMPANIES; SHIPPING; STOPPAGE IN TRANSITU; WAREHOUSEMEN.)

1. P. R. *v.* Weber, 76 Pa. St. 157; Weiss *v.* P. R., 79 Pa. St. 387; s. c., 87 Pa. St. 447; L. V. R. *v.* Hall, 61 Pa. St. 361; C. & P. R. *v.* Rowan, 66 Pa. St. 393; Longenecker *v.* P. R., 105 Pa. St. 328; Schum *v.* P. R., 107 Pa. St. 8; Buesching *v.* St. L. G. L. Co., 73 Mo. 229; K. C., St. J. & C. B. R. *v.* Flynn, 78 Mo. 105; s. c., 18 Am. & Eng. R. R. Cas. 23. *Sed cf.* Corcoran *v.* B. & A. R., 133 Mass. 507; Riley *v.* C. R. R., 135 Mass. 292; s. c., 15 Am. & Eng. R. R. Cas. 181; Chase *v.* M. C. R., 77 Me. 62; s.c., 19 Am. & Eng. R. R. Cas. 356.

For illustrations of minor rebuttable presumptions, see Ayler *v.* S. E. R., L. R. 3 Ex. 146; Ferguson *v.* W. C. R., 63 Wis. 145; s. c., 19 Am. & Eng. R. R. Cas. 285; P. R. *v.* Books, 57 Pa. St. 345; Creed *v.* P. R., 86 Pa. St., 139; Eaton *v.* D., L. & W. R., 57 N. Y. 382; Waterbury *v.* N. Y. C. & H. R. R., 17 Fed. Repr. 671; Giles *v.* T. V. R., 2 El. & Bl. 822, 75 E. C. L.; Goff *v.* G. N. R., 3 E. & E. 672, 107 E. C. L; Hughes *v.* N. T. & N. H. R., 36 N. Y. Sup. Ct. 222; Hoffman *v.* N. Y. C. & H. R. R., 44 N. Y. Sup. Ct. 1; H. & B. T. R. *v.* Decker, 84 Pa. St. 424; C., B. & Q. R. *v.* Warner, 108 Ill. 538; s c., 18 Am. & Eng. R. R. Cas. 100; T. W. & W. R. *v.* Moore, 77 Ill. 217; I. C. R. *v.* Houck, 72 Ill. 286.

2. Briggs *v.* Taylor, 28 Vt. 180; Cauley *v.* P. C. & St. L. R., 98 Pa. St. 498.

1. **Definition.**—Three classes of carriers are recognized by law: *Carriers without hire; Carriers for hire but not Common Carriers;* and *Common Carriers.* While in great measure the names given explain the difference between them, and would suggest a difference in the extent of their liability, many complications have arisen in the application to them of the principles of the law of bailments. The legal responsibility of one who undertakes to carry the goods of another will depend primarily upon his classification among carriers, and this classification will result from such considerations as the kind of business in which he is engaged, the character in which he holds himself out to the world, the terms of his contract to carry and deliver, and generally his legal relations with the consignor, the consignee, and third persons. A further

measure of liability is based upon what he undertakes to carry and deliver—whether goods, animals, or passengers. While the principles applicable to carriers of goods are of ancient origin, those applied to carriers of animals and passengers, while not new, have risen to their present importance since the introduction of railroads. We are now concerned with the first class alone. Since the questions involved will all hinge upon the liability of carriers who have undertaken to carry goods shipped by the consignor for delivery to the consignee, the natural and logical order of treatment would seem to be as follows: first, a classification of the kinds of carriers; second, principles of liability arising out of consignment to the carrier; third, principles of liability arising out of the acts of the carrier while the goods are in his possession; fourth, principles of liability arising out of delivery to the consignee; fifth, actions against carriers. Whatever collateral questions arise at any of these stages should find a place for consideration in which the temporary possession of the goods is of the essence of liability.

2. Classes of Carriers.—1. CARRIERS WITHOUT HIRE.—*Carriers without hire* and *Carriers for hire but not Common Carriers* are defined by the authorities as those who have assumed simply the duties and liabilities of bailees. (See BAILMENTS.)

Since the duties and liabilities of carriers without hire are simply those of bailees, it will be seen that their responsibility does not necessarily arise from an undertaking to carry. A discussion of the law of bailments is therefore out of place here. The application of that law to the facts of cases involving carriers without hire is all that need be attempted. Its cardinal principles are thus tersely stated: When the bailment is for the sole benefit of the bailor the law requires only slight diligence on the part of the bailee, and he is consequently responsible for nothing less than gross neglect. When the bailment is for the sole benefit of the bailee an extraordinary degree of care is demanded, and the bailee is therefore responsible for slight neglect. When the bailment is reciprocally beneficial to both parties (as in the case of the carriage of goods for hire) such care is exacted of the bailee as every prudent man commonly takes of his own goods; or, in other words, the law requires ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect.[1]

The well-known and most important distinction between carriers without hire and common carriers is found in the measure of liability they respectively assume in their undertaking to carry and deliver; that of the former is determined by the degree of negligence of which he is guilty, while the latter is an insurer. The common-law doctrine on the subject is said to date from the celebrated case of Coggs *v.* Bernard,[2] where the defendant gratuitously

1. Angell on Carriers (5th Ed.), § 11.

2. Coggs *v.* Bernard, 2 Ld. Raym. 909; 1 Sm. Lead. Cas. (12th Am. Ed.) 96. The elaborate judgment of Lord Holt in this case is justly celebrated and contains, says Mr. Wallace (1 Sm. Lead. Cas. 293),

undertook to remove certain casks of brandy from one cellar to another, but did it so carelessly that one of the casks was burst and the brandy spilled, and the defendant was held liable. The doctrine, as commonly stated, is that if a man undertakes to carry goods safely he is responsible for damage sustained by them in the carriage through his neglect, though he was not a common carrier and was to have nothing for his carriage. It is further said that the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.[1] While perhaps few propositions of law can be considered as better settled, difficulties have arisen in its application through a division of the degree of negligence necessary to render a gratuitous bailee liable into "slight," "ordinary," and "gross." The fact that such distinctions were ever made has often been regretted,[2] but their existence is recognized by the authorities at

"the first well-ordered exposition of the English law of bailments." See also Southcote's Case, 4 Rep. 84; Cro. Eliz. 815; Story on Bailm. (9th Ed.) § 72.

1. Angell on Carriers (5th Ed.), § 20; Coggs *v.* Bernard, 2 Ld. Raym. 909; 1 Sm. Lead. Cas. (12th Am. Ed.) 96; Whitehead *v.* Greetham, 2 Bing. N. C. 464; Shilliber *v.* Glyn, 2 M. & W. 143; Robinson *v.* Threadgill, 13 Ired. (N. Car.) 89; Mobile & Ohio R. Co. *v.* Hopkins, 44 Ala. 486.

2. "The theory that there are three degrees of negligence described by the terms 'slight,' 'ordinary,' and 'gross' has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice." Curtis, J., in Steamboat New World *v.* King, 16 How. (U. S.) 474; Holladay *v.* Kennard, 12 Wall. (U. S.) 254; Railroad Co. *v.* Lockwood, 17 Wall. 357; Wells *v.* New York, etc., R., 24 N. Y. 181; Perkins *v.* New York, etc., R., 24 N. Y. 196; Carter *v.* Holbrook, 3 Cush. (Mass.) 331; M. & St. P. R. *v.* Arms, 91 U. S. 495; Briggs *v.* Taylor, 28 Vt. 180; Wyld *v.* Pickford, 8 M. & W. 443; Wilson *v.* Brett, 11 M. & W. 113; Hinton *v.* Dibbin, 2 Q. B. 646, where Lord Chief Justice Denman remarks: "Where we find 'gross negligence' made the criterion to determine the liability of a carrier who has given the usual notice, it might perhaps have been reasonably expected that something like a definite meaning should have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made; and it may well be doubted whether, between gross negligence and negligence merely, any intelligible distinction exists." Austin *v.* Manchester R. Co., 10 C. B. 454; 11 Eng. L. & Eq. 512; Armistead *v.* Wilde, 17 Q. B. 261; Beal *v.* South Devon R., 3 H. & C. 341; Grill *v.* Iron Screw Collier Co., L. R. 1 C. P. 612.

"Any negligence is gross in one who undertakes a duty and fails to perform it. The term 'gross negligence' is applied to the case of a gratuitous bailee who is not liable unless he fails to exercise the degree of skill he possesses." Willes, J., in Lord *v.* Midland R. Co., T. R. 2 C. P. 340; Cashill *v.* Wright, 6 E. & B. 891; Giblin *v.* McMullen, L. R. 2 P. C. 317.

On this point Hutchinson remarks: "It is true it has been said that it may be doubted whether the terms 'slight,' 'ordinary,' and 'gross' can be usefully applied in practice to distinguish the different degrees of negligence on account of their ambiguous and inexact meaning. But while this may be true, it does not follow that all distinction between the degrees of negligence should be ignored. All negligence is not the same, although it has been said, and perhaps rightly, that where human life is at stake, as in the carriage of passengers by the dangerous agency of steam, it will admit of no degrees. But the case is different when the subject of bailment is property, and its propriety in such case has never been practically denied. The objection is to the terms used to describe the difference in the degrees of the diligence or negligence, and not that the distinction does not exist in fact. Their uncertainty, however, arises from the nature of the subject, and until others are suggested not liable to the objection, we must continue to use them as familiar

least to the extent of qualifying the common-law doctrine. It is now considered, therefore, that the most accurate statement of the liability of a carrier without hire is that he becomes liable for gross negligence if not liable for other kinds of negligence.[1]

Cases determining the liability of carriers without hire have most frequently involved a real or an alleged theft of the bailor's property from the bailee. From the uncertain character of the rule already laid down, it is evident that each case must turn upon its particular facts, the question being whether under the circumstances the bailee's conduct could be construed as gross negligence, negligence of a lesser degree, or not negligence at all. The facts may create a presumption of fraud,[2] or such gross negligence may appear as to be inexcusable even in the absence of fraud.[3]

The factors which naturally enter into a determination of the question are the acts and declarations of the bailee immediately preceding and directly following the alleged theft, which are admissible in evidence;[4] the bailee himself is a competent witness;[5] whether or not the bailee lost articles of his own at the same time, which fact has sometimes been held sufficient evidence of good faith and therefore a valid defence,[6] and that where he has been

legal terms and as suggestive of the ideas intended to be conveyed by them with tolerable certainty." Hutchinson on Carriers, § 11.

1. Angell on Carriers (5th Ed.), § 20; Hutchinson on Carriers, §§ 19, 22.

2. Bland *v.* Womack, 2 Murph. (N. Car.) 373; Rooth *v.* Wilson, 1 B. & Ald. 59; Stanton *v.* Bell, 2 Hawks (N. Car.), 145; Doorman *v.* Jenkins, 2 Ad. & El. 256.

3. In Colyar *v.* Taylor, 1 Coldw. (Tenn.) 372, A intrusted a sum of money to B, an acquaintance, upon the latter's promise that upon his return home he would deliver it as requested. Upon finding that he could not return as soon as expected, B turned the money over to C, a neighbor, who was about to start for home, with similar directions as to its delivery, but did so in the presence of witnesses upon a race-track. C's pocket was picked during the journey home and the money was lost. In an action by A against B, the latter was held liable, first, because the unauthorized delivery was a conversion, and, second, because he had been guilty of gross negligence. His conduct evinced such a degree of heedless incaution and disregard of common prudence as might justly be considered to amount to the grossest negligence. See also Tompkins *v.* Saltmarsh, 14 S. & R. (Pa.) 275; Tracy *v.* Wood, 3 Mason (U. S.), 132; Bland *v.* Womack, 2 Murph. (N. Car.) 373.

Where a box belonging to one who intended going upon a vessel, but was casually left behind, was broken open by the captain on suspicion that it contained contraband goods, and its valuable contents were exposed to the view of the passengers, but were then placed in the captain's chest in the cabin with his own valuables, and upon the vessel's arrival in port the captain and one mate went ashore, leaving the other mate in charge of the vessel, but in the captain's absence the money was stolen and never recovered, and it appeared that the night preceding the loss an excise officer and two young men belonging to the ship slept in the captain's cabin, it was held that the captain had been guilty of negligence, and a verdict was found for plaintiff for the full value of the property. Nelson *v.* Mackintosh, 1 Stark. 237. See also Jenkins *v.* Motlow, 1 Sneed (Miss.). 248; Adams Exp. Co. *v.* Cressap, 6 Bush (Ky.), 572. *Compare* Pender *v.* Robbins, 6 Jones Law (N. Car.), 207.

4. Tompkins *v.* Saltmarsh, 14 S. & R. (Pa.) 275; Lampley *v.* Scott, 24 Miss. 528; Beardslee *v.* Richardson, 11 Wend. (N. Y.) 25; Andersen *v.* Foresman, Wright (Ohio), 598.

5. Lampley *v.* Scott, 24 Miss. 528; Sandowsky *v.* McFarland, 3 Dana (Ky.), 205; Foster *v.* Essex Bank, 17 Mass. 479; Fulton *v.* Alexander, 21 Tex. 148.

6. Coggs *v.* Bernard, 1 Ld. Raymond, 909; 1 Sm. Lead. Cas. 96; Doorman *v.* Jenkins, 2 A. & E. 256; Rooth *v.* Wilson, 1 B. & Ald. 59; McLean *v.* Rutherford,

guilty of an act of gross negligence in regard to his own goods as well as those bailed to him and they are both lost, he cannot be held liable;[1] but while this may repel a presumption of fraud, it need not always excuse;[2] the value of the goods and consequent temptation;[3] the character of the goods whether perishable, or for any reason requiring an especial sort of care.[4]

What is gross negligence, and how far the carrier is liable under the circumstances, is a question of fact for the jury,[5] though it may be a mixed question of facts and law.[6] The burden of proof is usually upon the party who alleges the negligence, because the law presumes that every person does his duty until the contrary is established.[7]

2. CARRIERS FOR HIRE BUT NOT COMMON CARRIERS.—*Definition.*—Carriers for hire but not common carriers, who form the second of the three classes of carriers, are defined as those who, without being engaged in carrying as a public employment, undertake to deliver goods, in a particular case, for hire or reward.[8] With the difference in the measure of the reward the law exacts a greater degree of diligence, and holds the carrier responsible for a less degree of negligence. Accordingly this class of carriers must act with ordinary diligence and good faith, and are responsible for ordinary

8 Mo. 109; Tracy *v.* Wood, 3 Mason (U.S.), 132. *Compare* Bland *v.* Womack, 2 Murph. (N. Car.) 373; Stanton *v.* Bell, 2 Hawks (N. Car.), 145; Andersen *v.* Foresman, Wright (Ohio), 598; Foster *v.* Essex Bank, 17 Mass. 479.

1. Knowles *v.* Railway, 38 Me. 55. *Compare* Giblin *v.* McMullen, L. R. 2 P. C. 317; Eddy *v.* Livingston, 35 Mo. 487; Smith *v.* First Natl. Bank, 99 Mass. 605.

2. McLean *v.* Rutherford, 8 Mo. 109.

3. Nelson *v.* Mackintosh, 1 Stark. 237; The Rendsberg, 6 Rob. Adm. 142; Baltimore & Ohio R. Co. *v.* Schumacker, 29 Md. 175; State *v.* Meagher, 44 Mo. 356.

4. Story on Bailm. (9th Ed.) 67; Mytton *v.* Cock, 2 Stra. 1099; Carpenter *v.* Branch, 13 Vt. 161.

5. In Storer *v.* Gowen, 18 Me. 174, the court observed that how much care will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending upon a great variety of circumstances which could not be exactly defined. Beardslee *v.* Richardson, 11 Wend. (N. Y.) 25; Beatty *v.* Gilmore, 16 Pa. St. 463; Beauchamp *v.* Powley, 1 M. & Rob. 38; Tracy *v.* Wood, 3 Mason (U. S.), 132.

6. Doorman *v.* Jenkins, 2 Ad. & El. 261.

7. Clark *v.* Spence, 10 Watts (Pa.), 335; Graves *v.* Ticknor, 6 N. H. 537; Beardslee *v.* Richardson, 11 Wend. (N. Y.) 25; Newstadt *v.* Adams, 5 Duer (N. Y.), 43; Stewart *v.* Frazier, 5 Ala. 114; Williams *v.* East India Co., 3 East, 192.

8. Samms *v.* Stewart, 20 Ohio, 69; Pennewill *v.* Cullen, 5 Harr. (Del.) 238; Sheldon *v.* Robinson, 7 N. H. 157; Pike *v.* Nash, 1 Keyes (N. Y.), 335; s. c., 3 Abb. Ct. App. 610; Moriarty *v.* Herndon's Exp. 1 Daly (N. Y.), 227.

In Brind *v.* Dale, 8 Car. & P. 207, where the goods which the carrier undertook to carry in his carts were lost, the court remarked: "I take it that if a man agrees to carry goods for hire, although not a common carrier, he thereby agrees to make good the losses arising from the negligence of his own servants, although he would be liable for losses by thieves, or by any taking by force, or if the owner accompanies the goods to take care of them and was himself guilty of negligence; for it is a rule of law that a party cannot recover if his own negligence was as much the cause of the loss as that of the defendant." See also Rogers *v.* Head, Cro. Jac. 262.

All persons who carry under a special contract, as the driver of a stage-coach occasionally taking packages to carry for compensation, are private carriers. Beekman *v.* Shouse, 5 Rawle (Pa.), 179.

One who is the owner of a vessel, and who is specially employed to transport a cargo of grain, is not a public carrier, but only a private carrier for hire. Allen *v.* Sackrider, 37 N. Y. 341.

negligence, and this diligence is such as every prudent man commonly takes of his own goods, and ordinary negligence is the want of such diligence.[1] Here, again, the undertaking to carry serves to produce a difference of facts rather than of legal principles,[2] and a determination of the degree of negligence presents the same difficulties whether the undertaking is gratuitous or for hire.[3]

Such carriers are not liable for loss or injury which could not have been prevented by the use of ordinary diligence;[4] nor where occasioned by unavoidable accident;[5] or by robbery,[6] though a distinction has been drawn between a robbery by force and one by stealth.[7]

Where the owner of the goods has by his misconduct conduced to the loss, the carrier is released;[8] if he accompanies the goods to care for them, and the negligence causing the loss may as well be attributed to him as to the carrier, the latter is excused.[9]

The responsibility of the carrier may be increased or diminished by special contract,[10] but he does not thereby change his character as a carrier.[11]

The burden of proof is considered by the weight of authority to rest upon the party alleging the negligence,[12] but some facts have been held to raise a *prima-facie* presumption of negligence

1. In Tompkins *v.* Saltmarsh, 14 S. & R.(Pa.) 280, Duncan, J., remarks: "There is a marked difference in cases where ordinary diligence is required, and where a party is only accountable for gross neglect. Ordinary neglect is the want of that diligence which the generality of mankind use in their own concerns; and that diligence is necessarily required where the contract is reciprocally beneficial." Penobscot Boom Corp. *v.* Baker, 16 Me. 233; White *v.* Winnisimmet Co., 7 Cush. (Mass.) 155; Verner *v.* Sweitzer, 32 Pa. St. 208; Dover *v.* Mills, 5 Car. & P. 175; Gilbart *v.* Dale, 1 Nev. & P. 22; 5 A. & E. 543; Raphael *v.* Pickford, 2 Dowl. N. S. 916; Freeman *v.* Birch, 3 Q. B. 483.

2. Angell on Carriers (5th Ed.), c. iii.; Hutchinson on Carriers, § 35 *et seq.*

3. *Supra*, this title, CARRIERS WITHOUT HIRE.

4. Ferguson *v.* Brent, 12 Md. 9; Hollister *v.* Nowlen, 19 Wend. (N. Y.) 239; Beekman *v.* Shouse, 5 Rawle (Pa.), 179.

5. Hollister *v.* Nowlen, 19 Wend. (N. Y.) 239; Hodgson *v.* Fullarton, 4 Taunt. 787; Hatchwell *v.* Cooke, 6 Taunt. 577.

6. Coggs *v.* Bernard. 2 Ld. Raym. 909; 1 Sm. Lead Cas. (12th Am. Ed.) 96; Brind *v.* Dale, 8 Carr. & P. 207; Story on Bailm. (9th Ed.) § 457. *Compare* Whitney *v.* Lee, 8 Metc. (Mass.) 91; Foster *v.* Essex Bk., 16 Mass. 479.

7. Hodgson *v.* Fullarton, 4 Taunt. 787; Montagu *v.* Jauverin, 3 Taunt. 442: Angell on Carriers (5th Ed.), §§ 47, 48; Hutchinson on Carriers, § 39.

8. Robinson *v.* Dinsmore, 2 Bos. & P. 417; Whalley *v.* Wray, 3 Esp. 74; Cailiff *v.* Danvers, 1 Peake N. P. 114.

9. Brind *v.* Dale, 8 Car. & P. 207; Robinson *v.* Dunmore, 2 Bos. & P. 417. *Compare* Bowman *v.* Teall, 23 Wend. (N. Y.) 306.

10. Calye's Case, 8 Co. 33; Paradine *v.* Jane, Alleyn, 27; Hadley *v.* Clark, 8 T. R. 259; Brecknock Canal Nav. *v.* Pritchard, 6 T. R. 750; Robinson *v* Dunmore, 2 Bos. & P. 417; Hand *v.* Baynes, 4 Whart. (Pa.) 214; Fish *v.* Chapman. 2 Ga. 349; Alexander *v.* Green, 3 Hill (N. Y.), 9; Wells *v.* Steam Nav. Co., 2 N. Y. 204.

In Ross *v.* Hill, 2 C. B. 877; 3 Dowl. & L. 788, was considered the question whether the undertaking to carry "safely and securely" did not import a more extended liability, and it was held that it did not. This is no more than an undertaking implied by law to carry free from ordinary negligence.

11. Kimball *v.* Railroad, 26 Vt. 247.

12. Brind *v.* Dale, 8 Car. & P. 207; Cooper *v.* Barton, 3 Camp. 5; Finacune *v.* Small, 1 Esp. 314; Harris *v.* Packwood, 3 Taunt. 264, Marsh *v.* Horne, 5 B. & C. 322; Clay *v.* Willan, 1 H. Bl. 298.

which the carrier must rebut.[1] The carrier's contemporaneous acts and statements are admissible in evidence.[2]

The questions involved are in great measure those of fact and for a jury.[3]

Whether the carrier has a lien upon the goods is not settled,[4] but text writers, arguing by analogy to the lien of other bailees, agree that such a lien should exist.[5]

3. COMMON CARRIERS.—A common or public carrier is one who undertakes as a business to carry from one place to another the goods of all persons who may apply for such carriage, provided the goods be of the kind which he professes to carry and the persons so applying will agree to have them carried upon the lawful terms prescribed by the carrier; and who, if he refuses to carry such goods for those who are willing to comply with his terms, becomes liable to an action by the aggrieved party for such refusal.[6]

1. Rogers *v.* Head, Cro. Jac. 262; Mackenzie *v.* Cox, 9 Car. & P. 632; Ross v. Hill, 2 C. B. 877; 3 Dowl. & L. 788; Hodgson *v.* Fullarton, 4 Taunt. 787; Hatchwell *v.* Cooke, 6 Taunt. 577; Angell on Carriers (5th Ed.), §§ 48, 49.

2. Stores *v.* Gowen, 18 Me. 174; Tompkins *v.* Saltmarsh. 14 S. & R. (Pa.) 275; Deorman *v.* Jenkins, 2 Ad. & El. 256.

3. Walker *v.* Johnson, 10 M. & W. 161; Green *v.* Hollingsworth, 5 Dana (Ky.), 173; Whitney *v.* Lee, 8 Metc. (Mass.) 91; *supra*, this title, CARRIERS WITHOUT HIRE.

4. Steimman *v.* Wilkins, 7 W. & S. (Pa.) 466; Miller *v.* Mansfield, 112 Mass. 260; Story on Bailments (9th Ed.) § 453, *a*; Dresser *v.* Bosanquet, 4 Best & S. 460. *Compare* Fuller *v.* Bradley, 25 Pa. St. 120.

5. Angell on Carriers (5th Ed.), § 66; Hutchinson on Carriers, § 46.

6. Hutchinson on Carriers (1882), § 47.

An examination of the various definitions which have been from time to time advanced will show no small conflict of opinion. This seems to arise not so much from the difficulty of determining in a given case whether or not a carrier is a common carrier, but because it is not easy to present in so concise a form all the principles applicable; and also because there is plainly a difference of ideas as to the relative importance of these principles.

English Definition.—A common carrier is one who plies between certain termini and openly professes to carry for hire the goods of all such persons as may choose to employ him. He may profess to carry all descriptions of goods or particular descriptions only. Redman's Law of Railway Carriers (2d Ed. 1880), 1.

A common carrier is one who undertakes for hire to transport the goods of such as choose to employ him from place to place, and such undertaking may be carried on at the same time with other business. Dwight *v.* Brewster, 1 Pick. (Mass.) 50; The Niagara *v.* Cordes, 21 How. (U. S.) 7.

Any man undertaking for hire to carry the goods of all person indifferently. Gisbourn *v.* Hurst, 1 Salk. 249. Approved, Jeremy on Carriers, 4; Gordon *v.* Hutchinson, 1 W. & S. (Pa.) 285 (C. J. Gibson); Orange County Bank *v.* Brown, 3 Wend. (N. Y.) 161.

Common carriers undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed for hire as a business, and with or without a special agreement as to price. 2 Kent's Com. 598.

The liability to an action for a refusal to carry is perhaps the safest criterion of the character of the carrier. Nesbit, J., in Fish *v.* Chapman, 2 Kelly (Ga.), 352; Fish *v.* Clark, 49 N. Y. 122. *Compare* Gordon *v.* Hutchinson, 1 W. & S. (Pa.) 285; Steinman *v.* Wilkins, 7 W. & S. (Pa.) 466.

"The real test whether a man is a common carrier, whether by land or water, therefore, really is whether he has held out that he will, so long as he has room, carry for hire the goods of every person who will bring goods to him to be carried. The test is not whether he is carrying as a public employment or whether he carries to a fixed place, but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons indifferently who

The distinction between common carriers and all others is of paramount importance because of the liability they assume in their undertaking, and it seems that distinction might well play a part in any definition of a common carrier. First, and most important, is the fact that he insures the goods he carries against loss or injury from whatever cause arising, excepting only acts of God and the public enemy.[1] Second, he is a public or common carrier

send him goods to be carried. If he does this, his first responsibility naturally is that he is bound by a promise, implied by law, to receive and carry for a reasonable price the goods sent to him upon such an invitation. This responsibility is not one adopted from the Roman law on grounds of policy; it arises according to the general principles which govern all implied promises. And his second responsibility, which arises upon reasons of policy, is that he carries the goods upon a contract of insurance. This policy has fixed the latter liability upon common carriers by land and water, not because they hold themselves out to carry for all persons indifferently; if that were all, there would be no ground for the policy; it would be without reason. Many other persons hold themselves out to act in their trade or business for all persons indifferently who will employ them, and the policy in question is not applied to such trades; the policy is applied to the trade of common carriers, because when the common law adopted that policy the business of common carriers in England was exercised in a particular manner and subject to particular conditions, which called for the adoption of that policy." Brett, J., in Nugent *v.* Smith, L. R. 1 C. P. 19, 423.

"It is exceedingly clear that no person is a common carrier, in the sense of the law, who is not a carrier for hire, that is, who does not receive, or is not entitled to receive, any recompense for his services. The known definition of a common carrier in all our books fully establishes this result. If no hire or recompense is payable *ex debito justitiæ*, but if something is bestowed as a mere gratuity or voluntary gift, then, although the party may transport either persons or property, he is not in the sense of the law a common carrier, but he is a mere mandatary or gratuitous bailee, and, of course, his rights, duties, and liabilities are of a very different nature and character from those of a common carrier. It is not necessary that the compensation should be a fixed sum or known as freight, for it will be sufficient if a hire or recompense is to be paid for the service in the nature of a *quantum meruit* to or for the benefit of the company." Story, J., in Citizens' Bank *v.* Nantucket Steamboat Co., 2 Story C. C. 35; Kirtland *v.* Montgomery, 1 Swan, 452.

"The true test of the character of a party as to the fact whether he is a common carrier or not is his legal duty and obligation with reference to transportation. Is it optional with him whether he will or will not carry? or must he carry for all? If it is his legal duty to carry for all alike who comply with the terms as to freight, etc., then he is a common carrier, and is subject to all those stringent rules which for wise ends have long since been adopted and uniformly enforced both in England and in all the States upon common carriers. If, on the contrary, he may carry or not as he deems best, he is but a private individual, and is invested, like all other private persons, with the right to make his own contracts, and when made to stand upon them. While the law has imposed duties and heavy responsibilities upon common carriers which they cannot avoid, limit, or shake off, yet it has never attempted to hamper and surround those who are not common carriers with the stringent rules applicable to carriers, or to prevent them from exercising their own judgment as to the responsibilities which they are willing to assume in a special case." Simpson, C. J., in Piedmont Mfg. Co. *v.* Columbia, etc., R., 19 S. Car. 353; s. c., 16 Am. & Eng. R. R. Cas. 194.

1. South & North Alabama R. *v.* Wood, 66 Ala. 167; s. c., 9 Am. & Eng. R. R. Cas. 419; Texas Exp. Co. *v.* Scott, 16 Am. & Eng. R. R. Cas. 111; Houston, etc., R. *v.* Burke, 55 Tex. 323; s. c., 9 Am. & Eng. R. R. Cas. 59; Davis *v.* Wabash, etc., R., 26 Am. & Eng. R. R. Cas. 315; Hart *v.* Chicago, etc., R., 27 Am. & Eng. R. R. Cas. 59.

In Gales *v.* Hailman, 11 Pa. St. 515, C. J. Gibson remarks: "But a carrier is not an insurer, though he is sometimes inadvertently called so. In respect to the extent of his responsibility, not the nature of it, he is said to be effectually such; for the law raises a conclusive pre-

for hire, who is obliged by law to carry for all persons indifferently. The only limitations upon this duty are that he need not profess to carry every possible description of goods, and he may prescribe certain lawful terms or conditions. The liablity thus imposed was not a part of the ancient common law, but grew up with the extension of commercial relations in England, and found a reason for its existence in an imperfect police, imperfect protection from the government, and frequent losses by robbery.[1] The early decisions relate, of course, to the methods of transportation in use at the time, while in modern litigation the carriers chiefly involved are railroad and express companies and the various kinds of carriers by water. In spite, however, of the necessary difference in the facts of cases, there has been, for the most part, a consistent application of principles by the courts.

In view of the serious additional liability assumed by common carriers as distinguished from other bailees, it becomes important to know the test to be applied to determine their character, and to point out what classes of persons are held, from the nature of their occupation, to assume this liability.

As is obvious from the various definitions, it is perhaps impossible to state in few words a conclusive test. In *England* what is perhaps the latest decision on the point establishes the following: Whether the carrier has held out that he will, so long as he has room, carry for hire the goods of every person who will bring him goods to be carried.[2] In Lord Holt's view he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation *pro hac vice*.[3]

In the *United States* the test is thus stated: Whether the carrier has held himself out or has advertised himself in his dealings or course of business with the public as being ready and willing, for hire, to carry particular classes of goods for all those who may desire the transportation of such goods between the places between which he professes, in this manner, his readiness and willingness to

sumption of misconduct against him in relation to every loss not caused by either of the perils excepted by implication from the terms of his contract. But his is not a contract of indemnity independent of the care and custody of the goods. It is a contract of transportation and safe delivery in consideration of a premium, not merely for a risk incurred, but for labor expended. Unlike an underwriter, a carrier is not entitled by the conditions of his contract to have notice given him of a loss, or to be furnished with preliminary proofs of it, or to receive a cession of the fragments of the property, or to have the loss adjusted on principles peculiar to the contract of insurance. These and other discrepancies show that he is not in any sense an insurer." It was accordingly held in this case that the carrier cannot, in case of his own liability, call upon the insurer for contribution upon the principle of double insurance; for the carrier is not an insurer, though he is sometimes inadvertently called so. See also Hall *v.* Railroad Co., 13 Wall. (U. S.) 367; Hart *v.* Western, etc., R., 13 Metc. (Mass.) 99.

1. Hutchinson on Carriers, § 47, note; Van Santvoord, *v.* St. John, 6 Hill (N. Y.), 157.

2. Brett, J., in Nugent *v.* Smith, L. R. 1 C. P. 19. See *supra*, DEFINITION, note.

3. Story on Bailments (9th Ed.), § 495; Citizens' Bank *v.* Nantucket Steamboat Co., 2 Story C. C. 32.

carry.[1] The liability to an action for a refusal to carry is perhaps the safest criterion of the character of the carrier.[2] The decisions are not uniform, however, as to whether a casual undertaking to carry by one not engaged in carrying as a business imposes the liability of a common carrier, though it is said by an accepted authority that it is considered well settled in this country that such liability is thereby assumed.[3] Such, at any rate, is the law in Pennsylvania,[4] Indiana,[5] NewHampshire,[6] Tennessee,[7] Alabama,[8] South Carolina,[9] Texas.[10]

The contrary is held in Georgia,[11] Mississippi.[12]

There is no substantial difference, in the principles of law applicable, between carriers by land and carriers by water.[13]

A feature in modern litigation involving common carriers, and, in one sense, a point of distinction between them and other carriers, arises from the fact, already adverted to, that they are for the most part corporations. As such, railroad companies are endowed with certain rights and privileges, the gift of the public, and intended to be used for its convenience and advantage. It is well settled that they, therefore, exercise a *quasi*-public employment, and are subject to legislative and judicial control to prevent an abuse of their powers and privileges. This distinction, it is evi-

1. Hutchinson on Carriers, § 48.

2. Nesbit, J., in Fish *v.* Chapman, 2 Ga. 352. See also Piedmont Mfg. Co. *v.* Columbia, etc., R., 19 S. Car. 353; s. c., 16 Am. & Eng. R. R. Cas. 194.

3. Angell on Carriers (5th Ed.), § 70; Coggs *v.* Bernard, 1 Sm. Lead. Cas. (12th Am. Ed.) 96, note. *Compare* Hutchinson on Carriers, § 52.

4. Gordon *v.* Hutchinson, 1 W. & S. (Pa.) 285.

But one who holds himself out to the public to carry for hire is a common carrier as much in his first trip as in any subsequent one. Fuller *v.* Bradley, 25 Pa. St. 120.

5. Powers *v.* Davenport, 7 Blackf. (Ind.) 497.

6. Moses *v.* Morris, 4 N. H. 304; Elkins *v.* Boston, etc., R., 3 Fost. (N. H.) 275.

7. Turney *v.* Wilson, 7 Yerg. (Tenn.) 340; Craig *v.* Childress, Peck (Tenn.). 270; Johnson *v.* Friar, 4 Yerg. (Tenn.) 48; Gordon *v.* Buchanan, 5 Yerg. (Tenn.) 71; Moss *v.* Bettis, 4 Heisk. (Tenn) 661.

8 State *v.* McTyler, 31 Ala. 667.

9. McClure *v.* Hammond, 1 Bay (S. Car.), 99. *Compare* Piedmont Mfg. Co. *v.* Columbia, etc., R., 19 S. Car. 353; s. c., 16 Am. & Eng. R. R. Cas. 194.

10. Chevallier *v.* Strahan, 2 Tex. 115. See also Haynie *v.* Baylor, 18 Tex. 408.

11. Fish *v.* Chapman, 2 Ga. 349.

12. In Harrison *v.* Roy, 39 Miss. 396, under the circumstances of the case the wagoner was held liable, but it was observed that there was force in the position that he could not have been so held if the transaction had been a mere isolated undertaking, such as the carrier had not been in the habit of engaging in, and which was foreign to his regular and usual business.

13. Jones on Bailments, 107; Nugent *v.* Smith, L. R. 1 C. P. 19; Jeremy on Carriers, 9; Story on Bailments (9th Ed.), §§ 489, 508; Dwight *v.* Brewster, 1 Pick. (Mass.) 50; Hastings *v.* Pepper, 11 Pick. (Mass.) 41; Moses *v.* Norris, 4 N. H. 304; Williams *v.* Grant, 1 Conn. 487; Clark *v.* Richards, 1 Conn. 54; Richards *v.* Gilbert, 5 Day (Conn.), 415; Colt *v.* McMechen, 6 Johns. (N. Y.) 160; Schiefflin *v.* Harvey, 6 Johns. (N. Y.) 170; Elliott *v.* Rossell, 10 Johns. (N. Y.) 1; Allen *v.* Sewall, 2 Wend. (N. Y.) 327; McArthur *v.* Sears, 21 Wend. (N. Y.) 190; Bell *v.* Reed, 4 Binn. (Pa.) 127; Harrington *v.* McShane, 2 Watts (Pa.), 443; Craig *v.* Childress, Peck (Tenn.), 270; Gordon *v.* Buchanan, 5 Yerg. (Tenn.) 71; Turney *v.* Wilson, 7 Yerg. (Tenn.) 340; Murphy *v.* Stanton, 3 Munf. (Va.) 239; McClure *v.* Hammond, 1 Bay (S. Car.), 99; Miles *v.* Johnson, 1 McCord (S. Car.), 157; Cohen *v.* Hume, 1 McCord (S. Car.), 439; Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135. *Compare* Aymar *v.* Astor, 6 Cow. (N. Y.) 266; Gordon *v.* Little, 8 S. & R. (Pa.) 533.

dent, owes its existence very little, if at all, to the principles applied to common carriers as such, but is based upon the duty which may fairly be demanded of them as corporations in return for their franchises. While the doctrine is still in course of development to suit the exigencies of modern times and methods, it is of great and growing importance.[1]

(*a*) *Who are Common Carriers.*—The following classes of carriers have been held to be common carriers: railroad companies;[2]

1. Public Character of Duties of Common Carriers.—Peik *v.* Chicago, etc., R., 94 U. S. 164; Chicago, etc., R. *v.* Ackley, 94 U. S. 179; Winona, etc., R. *v.* Blake, 94 U. S. 180.

While the law affords railroad corporations adequate and complete protection in the exercise of their chartered rights, it also holds them to a strict performance of the public duties enjoined upon them as a consideration for the rights and powers thus granted. In cases of apparent conflict between the rights and powers conferred, and the duties imposed, the solution may oftentimes be rendered easy by regarding the admitted right of public use as the touchstone of judicial interpretation. Railroad Comm'r *v.* Portland, etc., R. Co., 63 Me. 269. See State *v.* Railroad Co., 29 Conn. 538; Comm'r *v.* Eastern R. Co., 103 Mass. 258.

"Whenever a charter is granted for the purpose of constructing a railroad, and the corporation is clothed with the power to take private property in order to carry out the object, it is an inference of law, from the extent of the power conferred, and subject-matter of the grant, that the road is for the public accommodation. The right to take tolls is the compensation to be received for the benefits conferred. If the public are entitled to these advantages, it results from the nature of the right that the benefits should be extended to all alike, and that no special privileges should be granted to one man or set of men, and denied to others." Sandford *v.* Railroad Co., 24 Pa. St. 378.

"In my opinion a railroad company, constituted under statutory authority, is not only by force of its inherent nature a common carrier, . . . but it becomes an agent of the public in consequence of the powers conferred upon it. A company of this kind is invested with important prerogative franchises, among which are the rights to build and use a railroad, and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. Although in the hands of a private corporation they are still sovereign franchises, and must be used and treated as such, they must be held in trust for the general good. If they remained under the control of the State, it could not be pretended that in the exercise of them it would have been legitimate to favor one citizen at the expense of another. If a State should build and operate a railroad, the exclusion of everything like favoritism with respect to its use would seem to be an obligation that could not be disregarded without violating natural equity and fundamental principles. . . . In their very nature and constitution, as I view the question, these companies become, in certain aspects, public agents, and the consequence is must, in the exercise of their calling, observe to all men perfect impartiality." Messenger *v.* Pennsylvania R. Co., 36 N. J. Law, 407.

"A railroad corporation, in view of its origin, objects, uses, and the control of the government over it, is a public corporation, though its shares may be owned by private individuals. It is a governmental agency for public purposes." Tallcott *v.* Township of Pine Grove, 1 Flippin, 120. See also McDuffee *v.* Portland & R. R., 52 N. H. 430.

"The above authorities abundantly show that railroad companies are common carriers, receiving from the State a delegation of a portion of its sovereign powers for the public good; that being public agents, and, in the place and stead of the government, exercising public duties, they are therefore subject to the legislative and judicial authority to correct the abuse of their privileges and powers." Scofield *v.* Lake Shore, etc., R. (Ohio), 23 Am. & Eng. R. R. Cas. 612. See also People *v.* New York Central, etc., R. (New York General Term, 1882), 9 Am. & Eng. R. R. Cas. 1; McGowan *v.* Wilmington, etc., R., 27 Am. & Eng. R. R. Cas. 64.

2. Who are Common Carriers.—Railroad companies. Pegler *v.* Monmouthshire R. Co., 30 L. J. Ex. 249; 6 H. & N. 644; Palmer *v.* Grand Junction R. Co., 4 M. & W. 749; Crouch *v.* London & North-

street railway companies under certain circumstances;[1] receivers of a railway operating it under order of a court;[2] trustees of mortgage bonds of a railway who have possession and control and actually operate the road;[3] one railroad transporting the cars of another railroad for hire, though the cars are on their own trucks;[4] ferrymen;[5] draymen, cartmen, and porters who undertake to

western R. Co., 23 L. J. (C. P.) 73; 14 C. B. 255; Richards *v.* London & South Coast R. Co., 18 L. J. (C. P.) 251; 7 C. B. 839; Southwestern R. Co. *v.* Webb, 48 Ala. 585; Kimball *v.* Rutland & Burlington R. Co., 26 Vt. 247; Southern Exp. Co. *v.* Thornton, 41 Miss. 216; Southern Exp. Co. *v.* Moon, 39 Miss. 822; Mississippi Cent. R. Co. *v.* Kennedy, 41 Miss. 671; Thomas *v.* Boston, etc., Co., 10 Metc. (Mass.) 472; s. c., 43 Am. Dec. 444; Fuller *v.* Naugatuck R. Co., 21 Conn. 570; Eagle *v.* White, 6 Whart. (Pa.) 505; Weed *v.* Saratoga R., 19 Wend. (N. Y.) 534; Root *v.* Railroad, 45 N. Y. 524; Camden R. *v.* Burke, 13 Wend. (N. Y.) 611; s. c., 28 Am. Dec. 488; Dill *v.* South Carolina R., 7 Rich. (S. Car.) 158; Jones *v.* Railroad, 27 Vt. 399; Roger Locomotive Works *v.* Railroad, 5 C. E. Greene (N. J.), 379; Noyes *v.* Railroad. 27 Vt. 110; Contra Costa, etc., R. *v.* Moss, 23 Cal. 323; Scofield *v.* Lake Shore, etc., R., 23 Am. & Eng. R. R. Cas 612. *Compare* Piedmont Mfg. Co. *v.* Columbia, etc., R., 19 S. Car. 353; s. c., 16 Am. & Eng. R. R. Cas. 194.

"The introduction of railroads into the State has been followed by their construction over the great lines of travel of passengers and transportation of merchandise; and the proprietors of these novel and important modes of travel and transportation which have received so much public favor, have become the carriers of great amounts of merchandise. They advertise for freight; they make known the terms of carriage; they provide suitable vehicles, and select convenient places for receiving and delivering goods; and, as a legal consequence of such acts, they have become common carriers of merchandise, and are subject to the provisions of the common law which are applicable to carriers." Thomas *v.* Boston & Providence R., 10 Metc. (Mass.) 472.

A railroad company which occasionally carries goods or freight in passenger trains is not a common carrier of goods in such trains. Elkins *v.* Boston & Maine R. Co., 3 Fost. (N. H.) 275. And the same rule applies to a railroad which occasionally carries passengers in its freight trains. Murch *v.* Concord R. Co., 9 Fost. (N. H.) 9. See also Lawrenceburgh, etc., R. Co. *v.* Montgomery, 7 Ind. 474; Pennewill *v.* Cullen, 5 Harr. (Del.) 238. But see 1 Sm. Lead. Cas. (8th Ed.) vol. i., pt. 1, p. 418.

1. Street-railway companies. Levi *v.* Lynn & Boston, etc., R., 11 Allen (Mass.), 300.

2. Receivers running a railroad under an appointment of a court of chancery are liable as common carriers. Blumenthal *v.* Brainerd, 38 Vt. 402; Paige *v.* Smith, 99 Mass. 395; Nichols *v.* Smith, 115 Mass. 332.

3. Trustees of mortgage bonds of a railroad who have possession and control and actually operate the road are liable as common carriers. Sprague *v.* Smith, 29 Vt. 421; Rogers *v.* Wheeler, 2 Lans. (N. Y.) 486; affirmed, 43 N. Y. 598.

4. Mallory *v.* Tioga, etc., R., 39 Barb. (N. Y.) 488; s. c., affirmed, 32 How. (N. Y.) 616; New Jersey, etc., R. *v.* Pennsylvania R., 3 Dutch. (N. J.) 100; Vermont, etc., R. *v.* Fitchburg, etc., R., 14 Allen (Mass.), 462; Peoria, etc., R. *v.* Chicago, etc., R., 109 Ill. 135; s. c., 18 Am. & Eng. R. R. Cas. 506.

5. Ferrymen are common carriers. Albright *v.* Penn, 14 Tex. 298; Richards *v.* Fuqua, 28 Miss. 793; Powell *v.* Mills, 37 Miss. 691; Self *v.* Dunn, 42 Ga. 528; Clark *v.* Union Ferry Co., 35 N. Y. 485; Harvey *v.* Rose, 26 Ark. 3; Griffith *v.* Cave, 22 Cal. 535; White *v.* Winnissimmet Co., 7 Cush. (Mass.) 155; Joy *v.* Winnissimet Co., 114 Mass. 63; Miller *v.* Pendleton, 8 Gray (Mass.), 547; Wilson *v.* Hamilton, 4 Ohio St. 722; Ferris *v.* Union Ferry Co., 36 N. Y. 312; Wyckoff *v.* Ferry Co., 52 N. Y. 32; Fisher *v.* Clisbee, 12 Ill. 344; Claypool *v.* McAlister, 20 Ill. 504; Pomeroy *v.* Donaldson, 5 Mo. 36; Hall *v.* Renfro, 3 Metc. (Ky.) 51; Sanders *v.* Young, 1 Head (Tenn.), 219; Babcock *v.* Herbert, 3 Ala. 392; Cohen *v.* Hume, 1 McCord (S. Car.), 439; Littlejohn *v.* Jones, 2 McMullan (S. Car.), 365; Smith *v.* Seward, 3 Pa. St. 342; Cook *v.* Gourdin, 2 Nott & McC. 19; Whitmore *v.* Bowman, 4 Greene (Iowa), 148; Slimmer *v.* Merry, 23 Iowa, 90; Pate *v.* Henry, 5 Stew. & P. (Ala.) 101. *Compare* Wyckoff *v.* Queens Co. Ferry Co., 82 N. Y. 32; Wilson *v.* Hamilton, 4 Ohio St. 722; Fisher *v.* Clisbee, 12 Ill. 344.

carry goods for hire as a common employment, from one part of a town to another,[1] or from one town to another;[2] express companies;[3] transportation companies;[4] express freight lines;[5] wagoners;[6] omnibus proprietors who carry passengers and bag-

1. Draymen, cartmen, and porters who undertake to carry goods for hire as a common employment from one part of a town to another are common carriers. Robertson *v.* Kennedy, 2 Dana (Ky.), 431; Powers *v.* Davenport, 7 Blackf. (Ind.) 497; s. c., 43 Am. Dec. 100; McHenry *v.* R. Co., 4 Harr. (Del.) 448; Campbell *v.* Morse, Harper (S. Car.). 468. So a city expressman. Richards *v.* Westcott, 2 Bosw. (N. Y.) 589.

2. Gordon *v.* Hutchinson, 1 W. & S. (Pa.) 285; Lecky *v.* McDermott, 8 S. & R. (Pa.) 500.

3. Express companies. Stadhecker *v.* Combes, 9 Rich. Law (S. Car.), 193; Southern Express Co. *v.* Crook, 44 Ala. 468; U. S. Exp. Co *v.* Bockman, 28 Ohio St. 144; Southern Exp. Co. *v.* Womack, 1 Heisk. (Tenn.) 256; Southern Exp. Co. *v.* Newby, 36 Ga. 635; Bank of Kentucky *v.* Adams Exp. Co., 93 U. S. 174; Southern Exp. Co. *v.* McVeigh, 20 Gratt. (Va.) 264; Sherman *v.* Wells, 28 Barb. (N. Y.) 403; Lowell Wire Fence Co. *v.* Sargent, 8 Allen (Mass.), 189; Buckland *v.* Adams Exp. Co., 97 Mass. 124; Read *v.* Spaulding, 5 Bosw. (N. Y.) 395; Haslam *v.* Adams Exp. Co., 6 Bosw. (N. Y.) 235; Baldwin *v.* American Exp. Co., 23 Ill. 197; 26 Ill. 504; American Ins. Co. *v.* Pinckney, 29 Ill. 392; Gulliver *v.* Adams Exp. Co., 38 Ill. 503; Christenson *v.* Am. Exp. Co., 15 Minn. 270; Verner *v.* Switzer, 32 Pa. St. 208; Sweet *v.* Barney, 23 N. Y. 335.

Express companies cannot limit their liability by alleging that they are not common carriers but simply forwarders, and therefore not liable for the negligence of those whom they employed to actually carry. Bank of Kentucky *v.* Adams Exp. Co., 93 U. S. 174; Buckland *v.* Adams Exp. Co., 97 Mass. 124; Russell *v.* Livingston, 19 Barb. (N. Y.) 346; Place *v.* Union Exp. Co., 2 Hilt. (N. Y.) 27; U. S. Exp. Co. *v.* Backman, 28 Ohio St. 144. *Compare* Hersfield *v.* Adams, 19 Barb. (N. Y.) 577.

Nor by contracting in that capacity. Christenson *v.* Am. Exp. Co., 15 Minn. 270; Read *v.* Spaulding, 5 Bosw. (N. Y.) 404; South. Exp. Co. *v.* McVeigh, 20 Gratt. (Va.) 264; Bank of Kentucky *v.* Adams Exp. Co., 93 U. S. 174.

4. **Transportation Companies.**—Mercantile Mut. Ins. Co. *v.* Chase, 1 E. D. Smith (N. Y.), 115.

5. **Express Freight Lines.**—Read *v.* Spaulding, 5 Bosw. (N. Y.) 395.

6. **Wagoners.**—In Gordon *v.* Hutchinson, 1 W. & S. (Pa.) 285, it was held that a wagoner who, upon his own request, carries goods for hire, is a common carrier, whether the transportation be his principal and direct business or an occasional and incidental employment even where the principal business of the wagoner is that of a farmer. Powers *v.* Davenport, 7 Blackf. (Ind.) 497; Chevalier *v.* Straham, 2 Texas, 115. In Moss *v.* Bettis, 4 Heisk. (Tenn.) 661, a farmer "after his crops were laid by" would run boats for himself or any one else who would employ him. He had built a flatboat to transport to market a cargo of his own staves, but at the instance of plaintiff abandoned that project and loaded his own and another boat furnished by plaintiff with the latter's lumber, and undertook to carry it by river to market. The boats struck an obstruction causing a partial loss of the lumber, and it was held that defendant was liable as a common carrier. Craig *v.* Childress, Peck (Tenn.), 270; Johnson *v.* Friar, 4 Yerg. (Tenn.) 48; Gordon *v.* Buchanan, 5 Yerg. (Tenn.) 71; Turney *v.* Wilson, 7 Yerg. (Tenn.) 340; Moses *v.* Norris, 4 N. H. 304; Elkins *v.* Boston, etc., R., 3 Fost. (N. H.) 275; McClure *v.* Hammond, 1 Bay (S. Car.), 99.

Fish *v.* Chapman, 2 Ga. 353, is the leading authority to the contrary. Here the farmer had never held himself out as a carrier generally, but was employed by the plaintiff to carry goods which, in crossing a stream upon the way, were injured by the upsetting of the wagon. The court observes, speaking of Gordon *v.* Hutchinson, 1 W. & S. (Pa.) 285: "This decision no doubt contemplates an undertaking to carry generally without a special contract, and does not deny to the undertaker the right to define his liability. There are cases in Tennessee and New Hampshire which favor the Pennsylvania rule, but there can be little doubt that that case is opposed to the principles of the common law, and its rule wholly inexpedient." *Compare* Harrison *v.* Roy, 39 Miss. 396. See also Fish *v.* Clark, 2 Lans. (N. Y.) 176; s. c., 49 N. Y. 122; Allen *v.* Sackrider, 37 N. Y. 341.

Where the undertaking is an unauthor-

gage for hire;[1] owners of canal-boats;[2] towboats used in towing barges or other water craft loaded with freight, from one point to another on the Mississippi river;[3] owners and masters of ships or steamboats employed as general ships or vessels;[4] owners of vessels usually engaged in transporting goods from one port of the United States to another.[5] An established practice of carrying parcels for hire on a stage-coach which do not belong to passengers imposes the liability of common carriers.[6]

(*b*) *Who are not Common Carriers.*—The following classes of carriers have been held not to be common carriers: the owner of a toll-bridge;[7] a company owning a canal which they allow boatmen to use upon payment of tolls;[8] "forwarding merchants,"—persons who act as agents and warehousemen in assuming the expense of transportation and forwarding goods to their destina-

ized act of the agent of the owner of the wagon no liability attaches. Jenkins *v.* Pickett, 9 Yerg. (Tenn.) 480; Satterlee *v.* Groat, 1 Wend. (N. Y.) 272; Haynie *v.* Baylor, 18 Tex. 498.

1. Dibble *v.* Brown, 12 Ga. 217; Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234; Cole *v.* Goodwin, 19 Wend. (N. Y.) 251; Clark *v.* Faxton, 26 Wend. (N. Y.) 153; Powell *v.* Myers, 26 Wend. (N. Y.) 591; Jones *v.* Voorhees, 10 Ohio, 145; Camden, etc., Transpr. Co. *v.* Belknap, 21 Wend. (N. Y.) 354.

2. Owners of canal-boats are common carriers when they hold themselves out as willing to carry for all persons indifferently. Fuller *v.* Bradley, 25 Pa. St. 120; Humphrey *v.* Read, 6 Whart. (Pa.) 435; Spencer *v.* Daggett, 2 Vt. 92; Arnold *v.* Hallenbake, 5 Wend. (N. Y.) 33; Bowman *v.* Teal, 23 Wend. (N. Y.) 306; s. c., 35 Am. Dec. 562; Parsons *v.* Hardy, 14 Wend. (N. Y.) 215; s. c., 28 Am. Dec. 521; De Mott *v.* Laraway, 14 Wend. (N. Y.) 225; s. c., 28 Am. Dec. 523; Fish *v.* Clark, 49 N. Y. 122.

In Fish *v.* Clark, 49 N. Y. 122, it was held that the owner of a canal-boat used generally in transportation of freight for himself, who is not in business as a common carrier, applying to a common carrier, possessed with full knowledge of these facts, to carry a load of freight, does not thereby assume the liability of a common carrier. Nor will such owner's knowledge of the fact that the carrier contracted with others for the carriage of freight affect the question. His liability is to be determined by the business in which he is engaged and the character of his own employment, and not by that of his employer.

In Flautt *v.* Lashley, 36 La. Ann. 106, it was held that a boat used by its owners for their own purposes and those of others who agree to pay certain rates for the transportation of their goods from one point to another, and which is not shown to have been held out as a common carrier, cannot be declared to be such at the instance of one of the agreeing parties.

3. Bussey *v.* Mississippi Valley Transportation Co., 24 La. Ann. 165; Clapp *v.* Stanton, 20 La. Ann. 495; White *v.* Tug Mary Ann, 6 Cal. 462.

4. Hall *v.* Connecticut River Steamboat Co., 13 Conn. 324; Peters *v.* Rylands, 20 Pa. St. 497; Tuckerman *v.* Brown, 17 Barb. (N. Y.) 191; Saltus *v.* Everett, 20 Wend. (N. Y.) 267; Jencks *v.* Coleman, 2 Sumner (C. C.), 221; Dibble *v.* Brown, 12 Ga. 217; Wilsons *v.* Hamilton, 4 Ohio St. 722; Dunseth *v.* Wade, 2 Scam. (Ohio) 285. *Compare* Smith *v.* Pierce, 1 La. 349; Adams *v.* New Orleans Towboat Co., 11 La. 46; Walston *v.* Myers, 5 Jones (N. Car.), 174; White *v.* The Mary Ann, 6 Cal. 462; Ashmore *v.* Penn. Steam Tow Co., 28 N. J. Law 180; and cases cited under WHO ARE NOT COMMON CARRIERS, *infra*.

5. Clark *v.* Richards, 1 Conn. 54; Allen *v.* Sewall, 2 Wend. (N. Y.) 327; 6 Wend. (N. Y.) 335; Elliott *v.* Rossell, 10 Johns. (N. Y.) 1; Garrison *v.* Memphis Ins. Co., 19 How. (N. Y.) 312; Gage *v.* Tirrell, 9 Allen (Mass.), 299. *Compare* authorities cited in preceding note and under WHO ARE NOT COMMON CARRIERS, *infra*. *Compare* Aymar *v.* Astor, 6 Cow. (N. Y.) 266; Crosby *v.* Fitch, 12 Conn. 410.

6. Powell *v.* Mills, 30 Miss. 231; Beckman *v.* Shouse, 5 Rawle (Pa.), 179; Merwin *v.* Butler, 17 Conn. 138; McHenry *v.* R. Co., 4 Harr. (Del.) 448; Jones *v.* Voorhees, 10 Ohio, 145.

7. **Owner of a Toll-Bridge.**—Grigsby *v.* Chappell, 5 Rich. (S. Car.) 443.

8. Exchange Ins. Co. *v.* Delaware Canal Co., 10 Bosw. (N. Y.) 180.

tion,—provided they have no concern in the vehicle by which the goods are sent and have no interest in the freight, though they are liable as warehousemen;[1] postmasters and mail contractors;[2] owners of steamboats employed in the business of towing, but the decisions hereon are not uniform;[3] owner of a mill operating a ferry for his own use and his customers' convenience, and who charges no ferriage;[4] a contractor undertaking to cut timber and carry it to the place of delivery to be there used;[5] sleeping-car companies;[6] telegraph companies;[7] telephone com-

1. Platt *v.* Hibbard, 7 Cow. (N. Y.) 497; Ackley *v.* Kellogg. 8 Cow. (N. Y.) 223; Sage *v.* Gittner, 11 Barb. (N. Y.) 120; Cowles *v.* Pointer, 26 Miss. 253; Maybin *v.* So. Car., etc., R., 8 Rich. (S. Car.) 240; Denny *v.* New York, etc., R., 13 Gray (Mass.), 487. See also Nichols *v.* Smith, 115 Mass. 332.

2. **Postmasters and Mail Contractors.**— By the common law and in the days of private posts a liability as common carriers naturally attached to postmasters. Jones on Bailments, 109, 110.

When the Government assumed control of the Post-Office (Stat. 12 Car. II.) it was held that the postmaster was not liable for the loss of a letter with exchequer bills in it, and that postmasters enter into no contract with individuals, and receive no hire, like common carriers, in proportion to the value of the letters under their charge, but only a general compensation from government, and are, therefore, not liable as common carriers. Lane *v.* Cotton, 1 Ld. Raym. 546.

The same rule obtains in the United States. Schroyer *v.* Lynch, 8 Watts (Pa.), 453; Dunlop *v.* Munroe, 7 Cranch (U. S.), 242; Bolan *v.* Williamson, 2 Bay (S. Car.), 551; Conwell *v.* Voorhees, 13 Ohio, 523; Wiggins *v.* Hathaway, 6 Barb. (N. Y.) 632; Foster *v.* Metts, 55 Miss. 77; Hutchins *v.* Brackett, 22 N. H. 252; Central R., etc., Co *v.* Lampley, 76 Ala. 357; s. c., 23 Am. & Eng. R. R. Cas. 720; 2 Kent's Com. 610; Story on Bailm. § 462. But see Sawyer *v* Corse, 17 Gratt. (Va.) 230. *Compare* Fitzgerald *v.* Burrill. 106 Mass. 446; Ford *v.* Parker, 4 Ohio St. 576; Bishop *v.* Williamson, 11 Me. 495; Christy *v.* Smith, 23 Vt. 663.

3. Owners of steamboats who undertake to tow freight-boats for hire, or to tow vessels in and out of port for hire, are not common carriers. Leonard *v.* Hendrickson, 18 Pa. St. 40; Brown *v.* Clegg, 64 Pa. St. 51; s. c., 3 Am. Rep. 522; Hays *v.* Millar, 77 Pa. St. 238; s. c., 18 Am. Rep. 445; Wells *v.* Steam Nav. Co., 2 Comst. (N. Y.) 204; Caton *v.* Rumney, 13 Wend. (N. Y.) 387; Alexander *v.* Greene, 3 Hill (N. Y.), 9; s. c., 7 Hill (N. Y.), 533; Wooden *v.* Austin, 51 Barb. (N. Y.) 9; Arctic Fire Ins. Co. *v.* Austin, 54 Barb. (N. Y.) 559; Varble *v.* Bigley (Ky.), 9 Cent. L. J. 153; Penn Nav. Co. *v.* Dandridge, 8 Gill & J. (Md.) 248; Hinter *v.* Steamer Napoleon, 3 Wall. (U.S.) 5. *Compare* cases cited *supra* under heading WHO ARE COMMON CARRIERS.

4. Self *v.* Dunn, 42 Ga. 528; s. c., 5 Am. Rep. 544; Littlejohn *v.* Jones, 2 McMullan (S. Car.), 366.

A ferryman is not chargeable with the liability of a common carrier as to the property of passengers retained within their own control. Wyckoff *v.* Queens County Ferry Co., 52 N. Y. 32; Wilson *v.* Hamilton, 4 Oh.o St. 722; Fisher *v.* Clisbee, 12 Ill. 344.

5. Pike *v.* Nash, 3 Abb. Ct. App. (N. Y.) 610.

6. Pullman Palace Car Co. *v.* Smith, 73 Ill. 360; Blum *v.* Southern Pullman Palace Car Co., 3 Cent. L. J. 591. *Compare* Nevin *v.* Pullman Palace Car Co., 11 Am. & Eng. R. R. Cas. 92; Pullman, etc., Co. *v.* Gardner, 16 Am. & Eng. R. R. Cas. 324; Heenrich *v.* Pullman, etc., Co., 18 Am. & Eng. R. R. Cas. 379.

7. **Telegraph Companies.** — Although there has been some conflict upon the question of whether or not telegraph companies could be considered as common carriers, it is now well settled and almost undisputed that the common-law principles governing common carriers are wholly inapplicable to telegraph companies. Leonard *v.* Tel. Co., 41 N. Y. 544; Baldwin *v.* Allen, 45 N. Y. 744; s. c., 54 Barb. (N. Y.) 505; Ellis *v.* Am. Tel. Co., 13 Allen (Mass.), 226; N. Y. Tel. Co. *v.* Dryburg, 35 Pa. St. 298; Passmore *v.* W. U. Tel. Co., 78 Pa. St. 238; Tel. Co. *v.* Carew, 15 Mich. 525; Tyler *v.* W. U. Tel. Co., 60 Ill. 421; Breese *v.* U. S. Tel. Co., 45 Barb. (N. Y.) 274; s. c., 48 N. Y. 132; Wann *v.* W. U. Tel. Co., 37 Mo. 472; Birney *v.* N. Y., etc., Tel. Co., 18 Md. 341; Washington Tel. Co. *v.* Hobson, 15 Gratt. (Va.) 122; Bartlett *v.* W. U. Tel. Co., 62 Me. 209; W. U. Tel. Co. *v.* Fontaine,

panies;[1] boom companies;[2] railroad company contracting with circus to furnish men and motive-power to transport cars owned and managed by a circus;[3] in South Carolina a railroad company is a common carrier over its own line, but not beyond its termini and over connecting lines, unless it has become so by usage, character of business, or contract;[4] a railroad company carrying a dog in its baggage car for the accommodation of a passenger, although the baggageman accepted compensation for his trouble;[5] a contractor undertaking to carry goods subject to a contract exempting him from liability for "river risks" where the goods were destroyed by fire.[6]

58 Ga. 433; Camp *v.* W. U. Tel. Co., 1 Metc. (Ky.) 164, De Rutte *v.* N. Y., etc., Tel. Co., 30 How. Pr. 403; s. c., 1 Daly (N. Y.), 547; Aiken *v.* Tel. Co., 5 S. Car. 358; Tel. Co. *v.* Gildersleeve, 29 Md. 246; Sweatland *v.* Tel. Co., 27 Iowa, 458; W. U. Tel. Co. *v.* Neill, 57 Texas, 283; Hibbard *v.* Tel. Co., 33 Wis. 565; Berry *v.* N. Y., etc., Tel. Co., 18 Md. 341; Grinnell *v.* W. U. Tel. Co., 113 Mass. 299; s. c., 18 Am. Rep. 485; Schwartz *v.* Atlantic, etc., Tel. Co., 18 Hun (N. Y.). 157; Pinckney *v.* Tel. Co., 19 S. Car. 71; Tyler *v.* W. U. etc., Tel. Co., 60 Ill. 421; s. c., 14 Am. Rep. 38; Baxter *v.* Dominion Tel. Co., 37 Upper Can. Q. B. 470; Bell *v.* Dominion Tel. Co., 3 Leg. News, 405; Lawson's Contracts of Carriers, 3; Gulf, Colorado & S. F. R. *v.* Levy, 12 Am. & Eng. R. R. Cas., 96, note; Abraham *v.* W. U. Tel. Co. (U. S. C. C. Dist. Oregon), 8 Am. & Eng. Corp. Cas. 130; Smith *v.* W. U. Tel. Co., 8 Am. & Eng. Corp. Cas. 15. But see Parks *v.* Alta California Tel. Co., 13 Cal. 422; Bowen *v.* Lake Erie Tel. Co., 1 Am. Law Reg. 685; Bryant *v.* Amer. Tel. Co., 1 Daly (N. Y.), 575; McAndrew *v.* Electric Tel. Co., 17 C. B. 3; Shearm. & Redf. on Negligence, sec. 554 *et seq.*

1. See American Rapid Telegraph Co. *v.* Connecticut Telephone Co., 49 Conn. 352; s. c., 1 Am. & Eng. Corp Cas. 378 and note; State *ex rel. v.* Nebraska Telephone Co., 8 Am. & Eng. Corp. Cas. 1.

2. Mann *v.* White River Log & Booming Co., 46 Mich. 38.

3. Coup *v.* Wabash, etc., R., 18 Am. & Eng. R. R. Cas. 542.

4. Piedmont Mfg. Co. *v.* Columbia, etc., R., 19 S. Car. 353; s. c., 16 Am. & Eng. R. R. Cas. 194.

5. In Honeyman *v.* Oregon, etc., R., 25 Am. & Eng. R. R. Cas. 380, it was held that a common carrier who does not assume to act as such in the carriage of dogs, but, upon the request of a party, consents to carry a dog on a particular occasion, cannot be sued as a common carrier for the subsequent death of the dog while under his charge, even though money may have passed to defendant's agent for the carriage. The action must be upon a private contract, if recovery is sought. Lord, J., observed: "The facts disclose that the defendant did not hold itself out as a common carrier of dogs, or assume their transportation in that character, but that the defendant expressly refused to accept hire and furnish tickets for their transportation. The evidence shows that when the party having in charge the dogs applied to the ticket agent of the defendant for transportation for himself and dogs that the agent refused tickets for the dogs, and referred him to the baggage-master, who told him, 'You know the rules about dogs;' but, as an accommodation, consented to take the dogs in his car, and promised to look after them, for which he received two dollars. These circumstances do not show that it was the business of the defendant to carry dogs, or to receive pay for their transportation, but that, as a matter of accommodation to a passenger, it permitted the baggage master, after the party was notified of the rules, to carry them in his car, and to accept pay for them." A contrary conclusion was, however, reached in Cantling *v.* Hannibal, etc., R., 54 Mo. 585. The owner having a dog on a railroad train, being informed by a brakeman and a baggage-master that the animal would not be allowed in the passenger car, placed him in charge of the baggage-master, and paid the latter for his transportation. By the regulations which were posted and printed at the various stations, "live animals" were "allowed as baggageman's perquisites." No special notice of this rule was brought home to the owner. *Held*, that the company was liable for the loss of the dog by the baggageman.

6. A person entered into a contract with the United States to transport cer-

3. Consignment to Carrier.—1. CARRIER'S DUTY TO RECEIVE GOODS.—The carrier's first duty is to accept and carry the goods consigned. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal.[1]

(*a*) *Exceptions to Duty to Receive.*—Certain exceptions to this general principle have been admitted. These find an explanation in modifications—already explained—of the general duty and liability of common carriers to carry for all persons indifferently all the goods consigned. Thus the carrier may choose by public profession the kind of conveyance, the time for transit, and the articles to be received. And the duty to receive is always limited by the convenience to carry.[2] The carrier may have a reasonable time to make up trains, and may refuse to receive goods not offered in reasonable time before the departure of trains: or at a place other than that which he has appointed for delivery to him.[3] Where goods are defectively packed, and from their character and the nature of the journey extra care and extra risk would be imposed, the carrier may refuse to receive.[4] Or where the consignor refuses to pay reasonable charges for carriage.[5] He may refuse to receive

tain goods to points in Montana. The contract provided that no liability for loss by river risks was assumed by the contractor. *Held*, that the person so contracting was but a private carrier, whose liabilities were limited, and that loss by fire on board the steamer transporting the goods fell within the exemption from liability for loss by river risks incorporated in the contract. As a private carrier he was only bound to the exercise of ordinary care. United States *v.* Power (Montana), 12 Pacific Rep. 639

1. Duty to Receive Goods—New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344; Merriam *v.* Hartford, etc., R. Co., 20 Conn. 354; Jordan *v.* Fall River, etc., R., 5 Cush. (Mass.) 69; Messenger *v.* Pennsylvania R., 8 Vroom (N. J.), 531; s. c., 18 Am. Rep. 754; East Tennessee R. *v.* Nelson, 1 Coldw. (Tenn.) 271; Fish *v.* Clark, 2 Lans. (N. Y.) 176; Hollister *v.* Nowlen, 19 Wend. (N. Y.) 334; Cole *v.* Goodwin, 19 Wend. (N. Y.) 261; Hamel *v.* Owens, 1 Dev. & Bat. (N. Car.) 273; Anon. *v.* Jackson, 1 Hayw. (N. Car.) 14.

English Authorities.—Crouch *v.* Great Northern R., 11 Exch. 742; 34 Eng. L. & Eq. 573; Morton *v.* Tibbett, 15 A. & E. 428; Crouch *v.* London & N. W. R. Co., 23 L. J. C. P. 73; 14 C. B. 255; Garton *v.* Bristol & Exeter R. Co., 30 L. J. Q. B. 273; 1 B. & S. 112; Lane *v.* Cotton, 12 Mod. 472.

There is no distinction in this respect between the liability of a common carrier whose business is entirely within the country, and that of a carrier who transports goods to a place without the country. Crouch *v.* London, etc., R., 14 C. B. 255; 25 Eng. L. & Eq. 287.

2. Exceptions to Duty to Receive.—McManus *v.* Lancashire, etc., R., 28 L. J. Exch. 343; 4 H. & N. 327; Johnson *v.* Midland R., 18 L. J. Exch. 366; 4 Exch. 371; Illinois Cent., etc., R. *v.* Cobb, 64 Ill. 128; Lake Shore, etc., R. *v.* Perkins, 25 Mich. 329.

Need not carry goods from every station (such as coal) unless they have conveniences therefor, unless they have made public profession of so doing. This even though they may carry same goods past such stations from through points. Johnson *v.* Midland R. Co., 18 L. J. Exch. 366; 4 Exch. 371. *Compare* Oxlade *v.* Northeastern R., 9 W. R. 272. But see Thomas *v.* North Staffordshire R., 21 Sol. Jour. 183.

3. Palmer *v.* London & S. W. R., 35 L. J. C. P. 289; L. R. 1 C. P. 588; Garten *v.* Bristol, etc., R., 28 L. J. C. P. 306; Lane *v.* Cotton, 1 Ld. Raym. 652; Pickford *v.* Railway, 12 M. & W. 766; Cronkite *v.* Wells, 32 N. Y. 247.

4. Munster *v.* Southeastern R., 27 L. J. C. P. 308; 4 C. B. N. S. 676; Hart *v.* Baxendale, 16 L. T. N. S. 396; Union Exp. Co. *v.* Graham, 26 Ohio St. 595.

5. Wyld *v.* Pickford, 8 M. & W. 443; Bastard *v.* Bastard, 2 Show. 81; Galena, etc., R. *v.* Rae, 18 Ill. 488.

But company cannot sue for price of

dangerous articles; where there is reasonable ground to suspect their character he may demand to examine them. But without such reasonable ground for suspicion he cannot force the consignor to disclose their nature.[1] He may refuse because his coach is full.[2] Where he does not carry to the place of consignment.[3] Where at the time goods are offered the way is exposed to particular danger, such as the fury of a mob, etc.[4] Where goods are perishable, and the carrier has not the means to forward them, he should peremptorily decline to receive them.[5]

(*b*) *Waiver.*—The acceptance of goods without asserting his right to refuse is a complete waiver by the carrier.[6]

(*c*) *Preferences and Facilities.*—In *England* the whole matter of preference given consignors by a carrier has been carefully regulated by statute. These statutes have been frequently and carefully construed. The Railway and Canal Traffic Act provides that railway and canal companies shall, according to their respective powers, "afford all reasonable facilities" for receiving, forwarding, and delivering traffic; and, further, that "no company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company or any particular description of traffic in any respect whatsoever." It may be that the commissioners appointed under this act have authority to interfere even with the construction of the railway and to direct the providing of any new and improved structural accommodations. Their power certainly extends to the compelling a railway company to so use and manage its institutions and works and to so conduct its business as to afford accommodation reasonably to be expected of it with the means at its disposal for receiving, forwarding, and delivering traffic; and possibly even to the extent of determining the number of trains to be run or the times of departure or the like.[7] But to induce the interference of the court

carriage until goods are delivered. Barnes *v.* Marshall, 18 Q. B. 785; 21 L. J. Q. B. 388.

1. The Nitro-glycerine Case, 15 Wall. (U. S.) 524; Boston & Albany R. *v.* Shanley, 107 Mass. 568; s. c., 12 Am. L. Reg. N. S. 500.

Persons shipping dangerous articles without informing carriers of their nature must in England forfeit 20*l.* for every such offence. (8 & 9 Vict. c. 20, s. 105.) See also Hearne *v.* Garton, 28 L. J. M. C. 216, 2 Ell. & Ell. 66. See Brass *v.* Maitland, 6 Ellis & B. 470; Farrant *v.* Barnes, 11 C. B. N. S. 553; Williams *v.* East India Co., 3 East, 192; Alston *v.* Herring, 11 Ex. 822; George *v.* Skivington, 5 L. R. Ex. 1.

2. Lovett *v.* Hobbs, 2 Show. 127. See also Riley *v.* Home, 5 Bing. 217; Peet *v.* Railway, 20 Wis. 594.

3. Pitlock *v.* Wells, Fargo & Co., 109 Mass. 452.

4. Edwards *v.* Sherratt, 1 East, 604; Pearson *v.* Duane, 4 Wall. (U. S.) 605.

5. Tierney *v.* New York Central, etc., R., 76 N. Y. 305.

6. Pickford *v.* Railway, 12 M. & W. 766; Great Northern, etc., R. *v.* Shepherd, 8 Exch. 30; 14 Eng. L. & Eq. 367; Hannibal, etc., R. *v.* Swift, 12 Wall. (U. S.) 262; The David, 5 Blatchf. C. C. 266; Porcher *v.* Railroad, 14 Rich. Law (S. Car.), 181.

7. **Preferences and Facilities.**—In *England.* Stat. 17 & 18 Vict. c. 31, s. 2 (Railway and Canal Traffic Act), provides that railway and canal companies shall, according to their respective powers, *afford all reasonable facilities* for receiving, forwarding, and delivering traffic; and further that, "no company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic in

on a question of "reasonable facilities" under this act it is necessary to show a public inconvenience and not merely an individual grievance.[1] Examples of the English decisions upon the question of undue preference are the following: Failing to require certain consignors to sign conditions demanded of others;[2] receiving goods of certain consignors after the carrier's offices were closed and refusing to receive those of others;[3] admitting into the carrier's stations their own vans at a later hour than they admitted those of other persons.[4]

In the *United States*, until the passage of the Interstate Commerce Act, cases involving questions of preference have been decided for the most part upon common-law principles. It has been said that common carriers could not legally give undue and unjust preferences nor make unequal or extravagant charges. Having the means of transportation, they are liable to an action if they

any respect whatsoever." It further provides for the appointment of certain railway commissioners. This act underwent a full and elaborate examination in South Eastern R. *v.* Railway Commissioners, 41 L. T. N. S. 760; 28 W. R. 464. "The clause as to 'affording reasonable facilities' is in itself wide enough to give authority to interfere even with the construction of the railway, and to direct the providing of new or improved structural accommodations. This view of its scope seems to have been adopted by the judges in the case of Caterham R. Co. *v.* London & Brighton R. Co. (26 L. J. C. P. 161; 1 C. B. N. S. 410), in granting a rule *nisi*, which, however, was never drawn up." Redman's Law of Railway Carriers (2d Ed.), p. 20. It was, however, held by Lord Cockburn, that the commissioners referred to could not make an order directing a company to execute certain structural works in respect of this railway, amongst others, to extend the limits of stations, to widen a bridge so as to admit two instead of one double set of lines, to increase existing platforms and yards, to cover with roofs certain platforms and yards, etc.; such statute merely gave power to compel a railway company to so use and manage its stations and works, and so conduct its business as to afford accommodation reasonably to be expected of it with the means at its disposal for receiving, forwarding, and delivering traffic, and possibly even to the extent of determining the number of trains to be run, or the times of departure or the like. South Eastern R. *v.* Railway Commissioners, L. R. 5 Q. B. D. 217; 28 W. R. 464.

1. It has been held that in order to introduce the interference of the court on a question of 'reasonable facilities' in the English Railway and Canal Traffic Act, it is necessary to show a public inconvenience, and not merely an individual grievance. Barret *v.* Great Northern, etc., R., 26 L. J. C. P. 83; 1 C. B. N. S. 423; Beadell *v.* Eastern Counties R., 26 L. J. C. P. 250; 2 C. B. N. S. 509.

2. In Baxendale *v.* Bristol, etc., R., 11 C. B. N. S. 787, it was *held*, where a railway company permitted a carrier (who acted as superintendent of their goods traffic) to hold himself out as their agent for the receipt of goods to be carried on their line, and his office as the receiving office of the company, and goods were received by him at that place without requiring the senders to sign conditions which the company required all other carriers who brought goods to their station to sign, that this amounted to undue preference.

3. In Garton *v.* Bristol, etc., R., 30 L. J. Q. B. 273; 1 B. & S. 112; Garton *v.* Bristol, etc., R., 28 L. J. C. P. 306; 6 C. B. N. S. 639, it was held, where a company closed their offices at a certain hour, and refused to receive goods tendered to them after, with the proper amount of carriage, while at the same time they continued to receive goods of the same class, prepared in the same manner, from a particular individual, that this amounted to undue preference.

4. In Palmer *v.* London, etc., R., 40 L. J. C. P. 133; L. R. 6 C. P. 194, it was held, where a company admitted into their stations their own vans, with goods to be forwarded that night at a later hour than they admitted those of other persons, that this amounted to undue preference. See Palmer *v.* London, etc., R., 35 L. J. C. P. 289; L. R. 1 C. P. 588.

refuse to carry freight or passengers without just ground for such refusal. The very definition of a common carrier excludes the right to grant monopolies or to give special or unequal preferences. It implies indifference as to whom they may serve, and an equal readiness to serve all who may apply in the order of their application.[1]

A carrier is bound to provide sufficient facilities and means of transportation for all freight which it should reasonably expect will be offered. But it is not bound to provide in advance for extraordinary occasions, nor for any unusual influx of business which is not reasonably to be expected. Should, however, a carrier accept the property for transportation without any agreement to the contrary, he thereby undertakes to carry and deliver it within a reasonable time regardless of any extraordinary or unexpected pressure of business upon it.[2] When delay occurs in consequence of

1. "Common carriers are bound to carry indifferently, within the usual range of their business, for a reasonable consideration, all freight offered and all passengers who apply. For similar equal services, they are entitled to the same compensation. All applying have an equal right to be transported or to have their freight transported, in the order of their application. They cannot legally give undue and unjust preferences, nor make unequal and extravagant charges. Having the means of transportation, they are liable to an action if they refuse to carry freight or passengers without just ground for such refusal. The very definition of a common carrier excludes the right to grant monopolies, or to give special or unequal preferences. It implies indifference as to whom they may serve, and an equal readiness to serve all who may apply in the order of their application." Appleton, C. J., in New England Exp. Co. *v.* Maine Central R., 57 Me. 188.

In Houston, etc., R. *v.* Smith, 63 Tex. 322; s. c., 22 Am. & Eng. R. R. Cas. 421, it was held that railway companies must take and transport property in the order in which it is offered, and they cannot exercise partiality in accepting the property tendered by some, and rejecting that offered by other persons. If this rule is violated the company is liable for all damages resulting therefrom.

Chicago, etc., R. *v.* People, 67 Ill. 11; s. c., 16 Am. Rep. 599; Wheeler *v.* San Francisco, etc., R., 31 Cal. 46; Messenger *v.* Pennsylvania R., 8 Vroom (N. J.), 531; s. c., 19 Am. Rep. 754; 13 Am. Rep. 457; McDuffee *v.* Railroad, 52 N. H. 730; Kenney *v.* Grand Trunk, etc., R., 59 Barb. (N. Y.) 104; s. c., affirmed, 47 N. Y. 525. *Compare* Fitchburg, etc., R. *v.* Gage, 12 Gray (Mass.), 393; Branley *v.* Southeastern, etc., R., 12 C. B. N. S. 74; Baxendale *v.* Eastern Counties, etc., R., 4 C. B. N. S. 78.

2. "A common carrier is not bound to supply more carts than he is in the habit of employing, because more goods are tendered than usual. Johnson *v.* Midland R. Co., 18 L. J. C. P. 368, per Parke, B. But, as regards railway companies, this must, it is suggested, be received with some qualification. If the pressure of traffic is such as the company might reasonably have anticipated and provided for, it is assumed they would not be released from the liability to receive goods on the ground of want of convenience. See Wallace *v.* Great Southern & Western R. Co., 17 W. R. 464." Redman's Law of Railway Carriers (2d Ed.), p. 14.

In Chicago, etc., R. *v.* Dawson, 70 Mo. 296; s. c., 18 Am. & Eng. R. R. Cas. 521, it was held that a contract by which a railroad company undertakes to relieve itself of all liability for damages occasioned by any delay in transportation, and to impose them upon the shipper, will be effectual to protect the company only against the consequences of delays not caused by its own negligence. It is the duty of a railroad company to provide sufficient facilities and means of transportation for all freight which it should reasonably expect will be offered, but it is not bound to provide in advance for extraordinary occasions, nor for an unusual influx of business which is not reasonably to be expected. If a railroad company receives property for transportation without any agreement to

a lack of cars, the company is liable where occasioned through its fault,[1] but not otherwise.[2] When the delay is shown to be partly not the fault of the carrier, the plaintiff must, in order to recover, specifically show the damage to him following from delay which was the carrier's fault.[3] It has been held that where there is a lack of cars or a blockade or stoppage of any kind rendering it impossible to forward goods, it is the carrier's duty to inform the consignor so that he may elect to sell his goods at the intended point of shipment or forward them by some other route.[4] It appears, however, that such notice is not the duty of the carrier where the obstruction is beyond his own line and on a connecting road.[5] Perhaps the weight of authority, however, holds that no rule of law requires such notice. It is said that in such a case if the consignor has not all the information he desires as to the circumstances or causes which will expedite or delay the delivery of goods it would be more reasonable that he should make inquiry than to impose on the company or its agents the duty of giving unasked a statement of such circumstances.[6]

the contrary, it thereby undertakes to carry and deliver it within a reasonable time, regardless of any extraordinary or unexpected pressure of business upon it. Hough, C. J., observed: "It is the duty of a common carrier to provide sufficient facilities and means of transportation for all freight which it should reasonably expect will be offered, but it is not bound to provide in advance for extraordinary occasions, nor for an unusual influx of business which is not reasonably to be expected. When an emergency arises, and more business is suddenly and unexpectedly cast upon a carrier than he is able to accommodate, unless the carrier decline to receive the excess offered, some shippers must necessarily be delayed; yet if the carrier do receive the goods without notice to the shipper of the circumstances likely to occasion delay, or fail to obtain his assent, express or implied, to the delay, he will be bound to transport the goods within a reasonable time, notwithstanding such emergency. When the facilities of the carrier are adequate to the business reasonably to be expected, the delay caused by the emergency cannot of course be regarded as a delay caused by the negligence of the carrier."

1. When delay occurs in the transportation of goods in consequence of a lack of cars of the road, the company is liable for the delay where it is occasioned through its fault. Illinois Central R. Co. *v.* Cobb, 64 Ill. 128; Chicago & Alton R. Co. *v.* Thrapp, 5 Bradw. (Ill.) App. 502.

2. But not when the delay is not the carrier's fault. Taylor *v.* Great Northern R. Co., L. R. 1 C. P. 385.

3. And when the delay is shown to be partly not the fault of the carrier, the plaintiff must, in order to recover, specifically show the damage to him following from delay which was the carrier's fault. Detroit, etc., R. Co. *v.* McKenzie, 9 Am. & Eng. R. R. Cas. 15.

4. Great Western R. Co. *v.* Burns, 60 Ill. 284; Halliwell *v.* Grand Trunk R. Co., 10 Biss. C. C. 170.

5. McCarthy *v.* Terre Haute & Ind. R. Co., 9 Mo. App. 159.

6. It is conceded that a railroad company is not liable for delay in transportation of goods caused by a sudden and unexpected press of freight not known to the railroad company at the time it received the goods for carriage. But where there is a blockade of freight well known to the railroad at the time it receives the goods for transportation, there is some doubt whether the railroad company is liable for a delay in case it receives the goods without notifying the shipper of the blockade. Some cases hold that the railroad company must give notice to shippers of facts within its knowledge likely to cause delay, and, in case of failure so to do, assumes the responsibility of transporting the goods within the usual time. This was held in Halliwell *v.* Grand Trunk R. Co., 10 Biss. (U. S. C. Ct.) 170. In Faulkner *v.* South Pacific R. Co., it was held that unusual pressure of business will justify a railroad company in refusing to accept freight, but not in delaying promptly to forward freight received for carriage. Faulkner *v.* South

Two of the States, North Carolina and Texas, have regulated the duty of the carrier to receive and immediately forward freight or goods by statute. In the former State a penalty is imposed upon the carrier for allowing any freight they may receive for shipment to remain unshipped for more than five days unless otherwise agreed between the company and the shipper. This statute has been declared constitutional.[1] It was at first held in construing the act that the carrier was not relieved from liability for the penalty imposed by reason of his alleged inability to procure the necessary transportation on account of the accumulation of freight.[2] But this decision was subsequently modified, and it was held that where, by the terms of the bill of lading, the goods are to be forwarded at "carrier's convenience," and, owing to the fault of a connecting line, the company is unable to furnish cars to

Pacific R. Co., 51 Mo. 311. See Illinois Central R. Co. *v.* Cobh, 64 Ill. 128, 140. But the weight of authority seems to favor the view that the railroad company is under no duty to the shipper to inform him at the time of shipment of a blockade that may cause delay in transportation. According to this view the only duty the company is under is to transport the goods with such despatch as is reasonable; all the facts of the case, including the fact of the freight blockade, being considered. Thus it was held that where, during the month of January, there was a great press of freight, which the defendant did his best to accommodate by running freight trains as frequently as possible, and plaintiff's goods, shipped January 18th, were delayed in consequence of the press of freight, defendant was not liable, notwithstanding a statute requiring railroad companies to furnish sufficient accommodation for the transportation of all property offered for transportation. Wilbert *v.* New York & Erie R. Co., 12 N. Y. 245; s. c., below, 19 Barb. 36. In Peet *v.* Chicago & Northwestern R. Co., 20 Wis. 594, the court below instructed the jury that "press of freight will not excuse failure to carry in ordinary time in cases where such press was known to the company when they received the freight, and had existed a long time when the goods were received, unless they notified the shipper of the necessity of delay." This charge was held, on appeal, to be erroneous. The court say: "We are also of opinion that there is no rule of law requiring the notice mentioned in the third instruction. We have seen that the general rule is that the common carrier is to transport and deliver the goods within a reasonable time; and what is a reasonable time is to be determined by all the circumstances of each particular case. If the shipper has not all the information he desires as to the circumstances or causes which will expedite or delay the delivery of the goods, it would be more reasonable that he should make inquiry than to impose on the company or its agents the duty of giving unasked a statement of such circumstances." Peet *v.* Chicago & Northwestern R. Co., 20 Wis. 594; Galena, etc., R. *v.* Rae, 18 Ill. 488; Thayer *v.* Burchard, 99 Mass. 508.

1. *Texas.*—See Houston, etc., R. *v.* Smith, 63 Tex. 322; s. c., 22 Am. & Eng. R. R. Cas. 421.

In *North Carolina*, a statute imposes upon a railroad company a penalty for allowing any freight they may receive for shipment to remain unshipped for more than five days, unless otherwise agreed between the company and the shipper. This statute has been declared constitutional. Branch *v.* Wilmington, etc., R., 77 N. Car. 347; Katzenstein *v.* Raleigh, etc., R., 86 N. Car. 688; s. c., 6 Am. & Eng. R. R. Cas. 464; Whitehead *v.* Wilmington, etc., R., 87 N. Car. 255; s. c., 9 Am. & Eng. R. R. Cas. 168; McGowan *v.* Wilmington, etc., R., 27 Am. & Eng. R. R. Cas. 64.

2. In Keeter *v.* Wilmington, etc., R., 86 N. Car. 346; s. c., 9 Am. & Eng. R. R. Cas. 165, it was held that a railroad company is not relieved of liability to the penalty of $25 per day, under the North Carolina act of 1875, ch. 240, for delay of shipment of goods beyond five days after receipt of same, by reason of its alleged inability to procure the neces sary transportation on account of the large accumulation of freight. It is the duty of the company to provide a sufficient number of cars.

meet an unusually heavy demand, it is not liable to the statutory penalty.[1]

(*d*) *Order of Transmission.*—Where there is a blockade of freight, goods should be sent forward in the order of time in which they are received by the carrier for transportation.[2] Nor can the carrier exercise partiality in such cases in accepting goods tendered by some and rejecting those offered by others.[3]

In exceptional instances—as, for example, when it is important to forward relief for sufferers from a flood or fire—the rule may be dispensed with.[4]

2. DECLARATION OF VALUE.—The liability imposed upon common carriers by the common law for all losses except those caused by the act of God or the public enemy was early found to work in-

1 In an action to recover the penalty provided by the said act, the provisions thereof are to be construed strictly in favor of those charged with violating its provisions. The rigid rules of the common law with reference to the liability of common carriers should not be applied where in such case it appears that the delay in shipping the goods has been caused by circumstances which the railroad company could not have been expected to provide for, and which have occurred entirely without fault on the company's part, *semble* that it will be held excused from liability. A railroad company accustomed to transport cotton owned 120 flat cars, which were usually ample to carry on all its business in that line. In the autumn of 1881 the cotton crop was very heavy, and there were many delays in consequence. At the same time a connecting line over which much of the cotton was forwarded gave notice that it would thereafter transport cotton only in box cars, and not in flat cars. The company first above named had not sufficient box cars to carry on its business, and was wholly unable at once to obtain more. At this juncture, A. & Co. delivered certain cotton to the railroad for transportation, receiving a through bill of lading over the connecting line, which bill contained a clause providing that the cotton was received for transportation "at the company's convenience." A. & Co., although well able to read, did not notice said clause until after the bringing of the suit hereinafter mentioned. The cotton was not shipped for more than five days, owing to the circumstances above mentioned. In a suit by A. & Co. against the railroad company to recover the statutory penalty, *held*, that under the circumstances of the case, the clause above cited in the bill of lading was a valid one, and might be taken advantage of by the company, and that therefore plaintiffs could not recover. Whitehead *v* Wilmington, etc., R., 87 N. Car. 255: s.c., 9 Am. & Eng. R. R. Cas. 168.

2. Order of Transmission of Freight.—Where there is a blockade of freight, goods should be sent forward in the order of time that they were received by the carrier for transportation. Acheson *v.* New York Central & H. R. Co., 61 N. Y. 652; Page *v.* Great Northern R. Co., 2 Ir. Rep. (C. L.) 288.

3. Houston, etc., R. *v.* Smith, 63 Tex. 322; s. c., 22 Am. & Eng. R. R. Cas. 421, where it was held that in such case where the carrier, from an unexpected and unprecedented press of business, is unable to furnish sufficient transportation to carry all property offered, this will in general furnish a legal excuse for refusal to receive. This in spite of a statute regulating the forwarding thereof. But that the carrier is bound to transport in the order in which the freight is offered, and cannot exercise partiality in accepting the property tendered by some and rejecting that offered by other persons.

4. Michigan Central, etc., R. *v.* Burrows, 33 Mich. 6. See, generally, Richardson *v.* Chicago, etc., R., 18 Am. & Eng. R. R. Cas. 530

Contracts to Furnish Care to Forward Live Stock.—As to the construction of contracts on the part of a railroad company to furnish rolling-stock to forward cattle by a certain time, and as to the liability of the company under such contracts, see the following authorities: Philadelphia, etc., R. *v.* Lehman, 6 Am. & Eng. R. R. Cas. 194; Harrison *v.* Missouri, etc., R., 7 Am. & Eng. R. R. Cas. 382; Ayres *v.* Chicago, etc., R., 16 Am. & Eng. R. R. Cas. 171; Richardson *v.* Chicago, etc., R., 16 Am. & Eng. R. R. Cas. 172; Richardson *v.* Chicago, etc., R., 18 Am. & Eng. R. R. Cas. 530.

justice if unrestricted. Where the carrier assumed the liability of an insurer as to all goods of whatever description consigned to his care, it was thought reasonable that the difference in the value of the articles should produce a difference in the degree of liability. The care which a bailee would naturally take of any article of value, and the disproportion in the responsibility he assumed for precisely the same services, were naturally taken into consideration. It was thought that in the case of packages of value he might reasonably charge a higher rate than for others. Having such a privilege, however, he was constantly exposed to the risk of the fraudulent concealment of the value of the consignment by the consignor. The admission of any limitation upon his liability resulted in an uncertainty as to the law on the subject, and led to the passage of the English Carriers Act. Under this statute common carriers are not liable for the loss, etc., of specified articles above 10*l.* in value, unless their nature and value are declared at the time of consignment.[1] The valuation fixed by the consignor is not, however, conclusive. But the carrier may require proof of the actual value, and is only liable for such damages, so

1. **Declaration of Value under English Carriers Act.**—Under the Carriers Act (1 Will. IV., c. 68), common carriers are not liable for the loss, etc., of specified articles above 10*l.* in value, unless the nature and value are declared at the time of consignment. These articles are specified as follows: Gold or silver coin; gold or silver, manufactured or unmanufactured; precious stones, jewelry, watches, clocks or timepieces of any description (*held* to include a ship's chronometer). Le Conteur *v.* London, etc., R., 35 L. J. Q. B. 40; L. R. 1 Q. B. 54). Trinkets (*held* to include ornamented portemonnaies and ladies' smelling-bottles, ivory bracelets, ornamental shirt-pins, bracelets, rings, brooches. Bernstein *v.* Baxendale, 28 L. J. C. P. 265; 6 C. B. N. S. 251. And ivory fans. Attorney-Gen. *v.* Harley, 7 L. J. Ch. 31; 5 Russ. 173. But not an eye-glass and gold chain. Davey *v.* Mason, Car. & M. 45. Nor a plain, unornamented German-silver fusee-box, or other articles, the principal object of which is utility, and whatever ornament they may possess is only accessory to their use. Bernstein *v.* Baxendale, 28 L. J. C. P. 265; 6 C. B. N. S. 251). Bills (an accepted bill not assigned by the drawer is not within the act as a "bill," though it might be as a writing. Stoessiger *v.* South-Eastern R., 23 L. J. Q. B. 293; 3 E. & B. 549). Notes of the Governor and Company of the Banks of England, Scotland, and Ireland, respectively, or of any other bank in Great Britain or Ireland; orders, notes, or securities for payment of money; English or foreign stamps; maps. Wyld *v.* Pickford, 8 M. & W. 443. Writings. Piancini *v.* London, etc., R., 18 C. B. 226. Title-deeds; paintings (and artist's pencil sketches). Mytton *v.* Midland R., 28 L. J. Ex. 285; 4 H. & N. 615. But they must be articles of artistic value, as paintings, and not mere designs or patterns. Woodward *v.* London, etc., R., 47 L. J. Exch. 263; L. R. 3 Ex. Div. 121. Engravings. Boys *v.* Pink, 8 C. & P. 361. Pictures (and their frames). Anderson *v.* London, etc., R., 39 L. J. Exch. 55; s. c., *sub nom.* Henderson *v.* London, etc., R., L. R. 5 Exch. 90. Gold or silver-plated articles; glass (including looking-glasses). Owen *v.* Burnett, 2 Cr & M. 357; 3 L. J. Exch. 76. China; silks, in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials (including silk hose). Hart *v.* Baxendale, 6 Exch. 769; 20 L. J. Exch. 338. Elastic silk web. Brunt *v.* Midland R., 33 L. J. Exch. 187; 2 H. & C. 889. A truss of silk. Butt *v.* Great Western R., 20 L. J. C. P. 241; 11 C. B. 140. And a silk dress made up for wearing. Flowers *v.* South Eastern R., 16 L. T. N. S. 329. Furs (does not include hat-bodies made partly of fur and partly of wool). Mayhew *v.* Nelson, 6 C. & P. 58. Lace. Treadwin *v.* Great Eastern R., 37 L. J. C. P. 83; L. R. 3 C. P. 308. But not machine-made lace. 28 & 29 Vict. c. 94; Redman's Law of Railway Carriers (2d Ed.), p. 45.

proved, not exceeding the declared value, together with the increased charges.[1] "Value," under this act, means intrinsic value at the time the parcel is delivered.[2] In England the consignor is bound by his declaration of value, and will not be permitted to show subsequently that the value of the goods exceeded that declared.[3] In both countries it is well settled that where the value of articles shipped is deliberately and intentionally concealed by the consignor, the carrier is not liable except for the value of what he supposed he undertook to carry.[4] In a leading case it was pointed out that if any means are used to conceal the nature of the article, and thereby the owner avoids paying a reasonable compensation for the risk, this unfairness and its consequence to the carrier, upon the principles of common justice, will exempt him from responsibility. For such a result is alike due to the carrier who has received no reward for the risk, and to the party who has been the cause of it by means of disingenuousness and unfair dealing.[5]

The following are instances of such concealment of the nature or value of the articles as have been held to release the carrier from liability. Where bank-notes were packed in a chest with clothes, and the fact of their existence was not disclosed to the

1. It is also provided in section nine of this act that the carrier shall not be concluded as to the value of any parcel or package so declared, but may require proof of the actual value of the contents by the ordinary legal evidence, and that the carrier shall be liable to such damages only as shall be so proved, not exceeding the declared value, together with the increased charges. See, generally, Millen *v.* Brasch, L. R. 9 Q. B. Div. 143; s. c., 9 Am. & Eng. R. R. Cas. 326. See also Anderson *v.* London, etc., R., 39 L. J. Exch. 55; L. R. 5 Exch. 90; Wyld *v.* Pickford, 8 M. & W. 443; Bernstein *v.* Baxendale, 28 L. J. C. P. 265; Treadwin *v.* Great Eastern, etc., R., 37 L. J. C. P. 83; L. R. 3 C. P. 308.

2. Thus a bill of exchange, if it is in an imperfect state, is only a writing of which the value is that of the paper on which it is written. Stoessiger *v.* South-Eastern R., 23 L. J. Q. B. 293; 3 E. & B. 549.

3. McCance *v.* London, etc., R., 34 L. J. Exch. 39; 3 H. & C. 343; Redman's Law of Railway Carriers (2d Ed.). p. 51. See also, Edwards *v* Sherratt, 1 East, 604; Batson *v.* Donovan, 4 Barn. & Ald. 2; Tichburne *v.* White, 1 Strange, 145; Kenny *v.* Eggleston, Aleyn, 93; Tyly *v.* Morrice, Carth. 485; Harris *v.* Packwood, 3 Taunt. 264.

4. Tyly *v.* Morrice, 3 Carth. 485; Tichburne *v.* White, 1 Strange, 145; Miles *v.* Cattle, 6 Bing. 943; Edwards *v.* Sherratt, 1 East, 604; Batson *v.* Donovan, 4 B. & Ald, 21; Kenny *v.* Eggleston, Aleyn, 93; Belfast, etc., R. *v.* Keys, 9 H. L. Cas. 556; Gibbon *v.* Paynton, 4 Burr. 2298; Walker *v.* Jackson, 10 M. & W. 161; Sleat *v.* Tagg, 5 B. & Ald. 342; Bradley *v.* Waterhouse, M. & M. 154; Great Northern R. *v.* Shepherd, 14 Eng. L. & Eq. 367; McCance *v.* London, etc., R., 7 H. & N. 477; Earnest *v.* Express Co., 1 Woods, 579; St. John *v.* Express Co., 1 Woods, 612; Orange Co. Bank *v.* Brown, 9 Wend. (N. Y.) 85; Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234; Hawkins *v.* Hoffman, 6 Hill (N. Y.), 586; Pardee *v.* Drew, 25 Wend. (N. Y.) 85; Richards *v.* Westcott, 7 Bosw. (N. Y.) 6; Cole *v.* Goodwin, 19 Wend. (N. Y.) 251; Warner *v.* W. T. Co., 5 Robt. (N. Y.) 490; Belger *v.* Dinsmore, 51 N. Y. 266; Magnin *v.* Dinsmore, 62 N. Y. 35; Cincinnati, etc., R. *v.* Marcus, 38 Ill. 219; Chicago, etc., R. *v.* Thompson, 19 Ill. 578; Oppenheimer *v.* U. S. Exp. Co., 69 Ill. 62; Chicago, etc., R. *v.* Shea, 66 Ill. 471; Southern Exp. Co., *v.* Everett, 37 Ga. 688; Everett *v.* Southern Exp. Co., 46 Ga. 303; Cooper *v.* Berry, 21 Ga. 526; Coxe *v.* Heisley, 19 Pa. St. 243; Relf *v.* Rapp, 3 W. & S. (Pa.) 21; The Ionic, 5 Blatchf. C. C. 538; Hayes *v.* Wells, 23 Cal. 185; Houston, etc., R. *v.* Burke, 9 Am. & Eng. R. R. Cas. 59; Texas Exp. Co. *v.* Scott, 16 Am. & Eng. R. R. Cas. 111; Missouri Pacific R. *v.* York, 18 Am. & Eng. R. R., Cas. 623; Rosenfeld *v.* Peoria, etc., R., 21 Am. & Eng. R. R. Cas. 87.

5. Nelson, J., in Orange County Bank *v.* Brown, 9 Wend. (N. Y.) 116.

carrier;[1] where two hundred sovereigns were packed in six lbs. of tea;[2] where a sum of money was concealed in a bag of hay;[3] or placed in a box with articles of small value;[4] where a diamond ring was sent in a small paper bag, tied up with a string;[5] where valuable jewelry was sent under circumstances which naturally led the carrier to conclude that it was of trifling value;[6] where a check indorsed in blank was sent in a letter;[7] where money was sent in a package, not indorsed and sealed in the particular manner required by the carrier;[8] where articles of a brittle nature were sent without any intimation of the peculiarly delicate care necessary for their transportation, and they were broken in consequence;[9] where a trunk containing jewelry was shipped marked "glass," and represented to be so, in consequence of which a low rate of freight was paid;[10] where the value of horses shipped was wilfully understated in order to procure a cheaper rate of freight.[11] In another case, however, a distinction was drawn with regard to money carried as part of freight and when carried as a part of baggage. In the latter case the passenger may place money in a trunk without communicating the fact to the carrier, but is guilty of fraud in so doing, if such trunk is shipped as freight.[12]

The weight of authority holds that the consignor is not bound to state the value of the goods unless asked.[13]

1. Chicago, etc., R. *v.* Thompson, 19 Ill. 578.

2. Bradley *v.* Waterhouse, 1 Moo. & M. 154.

3. Gibbon *v.* Paynton, 4 Burr. 2298.

4. Belger *v.* Dinsmore, 51 N. Y. 266; Earnest *v.* Exp. Co., 1 Woods, 573; Magnin *v.* Dinsmore, 62 N. Y. 35; Chicago, etc., R. *v.* Thompson, 19 Ill. 578.

5. Everett *v.* Southern Exp. Co., 46 Ga. 303.

6. Oppenheimer *v.* United States Exp. Co., 69 Ill. 62.

7. Hayes *v.* Wells, 23 Cal. 185.

8. St. John *v.* Express Co., 1 Woods, 612.

9. Chicago, etc., R. *v.* Thompson, 19 Ill. 578.

10. Relf *v.* Rapp, 3 W. & S. (Pa.) 21.

11. McCance *v.* London, etc., R., 7 H. & N. 477.

12. In Missouri Pacific R. *v.* York, 18 Am. & Eng. R. R. Cas. 623, it was held that where goods are shipped as freight, the shipper shall use no fraud or artifice to deceive the carrier, whereby his risk is increased or his care and vigilance lessened. If there be such fraud or concealment the carrier is relieved from liability. There is a distinction with regard to money carried as part of freight and when carried as part of baggage. In the latter case the passenger may place money in a trunk without communicating the fact to the carrier. But he is guilty of fraud in so doing if such trunk be shipped as freight.

13. Brooke *v.* Pickwick, 4 Bing. 218; Lebeau *v.* General Steam Nav. Co., L. R. 8 C. P. 88; Batson *v.* Donovan, 4 B. & Ald. 21; Sleat *v.* Tagg, 5 B. & Ald. 342; Walker *v.* Jackson, 10 M. & W. 168; Relf *v.* Rapp, 3 W. & S. (Pa.) 21; Camden, etc., R. *v.* Baldauf, 16 Pa. St. 67; Southern Exp. Co. *v.* Crook, 44 Ala. 468; Adams Exp. Co. *v.* Boskowitz, 16 Am. & Eng. R. R. Cas. 102; Texas Exp. Co. *v.* Scott, 16 Am. & Eng. R. R. Cas. 111; Gulf, etc., R. *v.* Clark, 18 Am. & Eng. R. R. Cas. 628; Gorham Manuf. Co. *v.* Fargo, 45 How. Pr. (N. Y.) 90; Sewall *v.* Allen, 6 Wend. (N. Y.) 349; Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234; Baldwin *v.* L. & G. W. S. S. Co., 74 N. Y. 125; Warner *v.* Western Transp. Co., 5 Robt. (N. Y.) 490; Phillips *v.* Earle, 8 Pick. (Mass.) 182; Parmelee *v.* Lowitz, 74 Ill. 116; Merchants' Disp., etc., Co. *v.* Bowles, 80 Ill. 473; Lewis *v.* Gale, 17 La. Ann. 302. *Compare* Fassett *v.* Ruark, 3 La. Ann. 694; Lewis *v.* Gale, 17 La. Ann. 302; Baldwin *v.* Collins, 9 Rob. (La.) 468; Merchants' Dispatch, etc., Co. *v.* Bolles, 80 Ill. 473; Phillips *v.* Earle, 8 Pick. (Mass.) 182; Little *v.* Boston, etc., R., 66 Me. 239; Brown *v.* Camden, etc., R., 83 Pa. St. 316; Magnin *v.* Dinsmore,

There is no ground to impute fraud to a consignor who informs the carrier that a certain package dispatched by him is very valuable, but fails to tell him that it contains money;[1] the consignor must state the specific nature of the articles consigned,[2] but is not bound to make any express and formal declaration of their value;[3] where the consignor gave a warning as follows: "Take care: these are pictures of the value of 100*l.*;"[4] where the consignor inserted the word "silks" as a description of the goods, and remarked: "There are about 100*l.* worth of goods in the parcel."[5] These were held sufficient declarations of value under the Carrier's Act.[6]

Where the consignor is asked the value of goods he must give correct and truthful answers.[7]

62 N. Y. 35; Macklin *v.* Waterhouse, 5 Bing. 212; 2 M. & P. 319.

1. In Allen *v.* Sewall, 2 Wend. (N. Y.) 327, it was held that where a shipper informs a carrier that a certain package dispatched by him is very valuable, but fails to tell him that it contains money, there is no ground to impute fraud to the consignor.

In Lebeau *v.* General Steam Nav. Co., L. R. 8 C. P. 88, it was held that where a consignor, knowing that the freight for linen was less than that for silk, dispatched certain bales of the latter material, receiving for them a bill of lading in which they were termed "linen," but bearing on its face a stamp "weight, value, and contents unknown," there was not, under the circumstances, any ground to exempt the carrier from liability in case of loss for the full value of the silk.

2. Owen *v.* Burnett, 2 Cr. & M. 353; 3 L. J. Exch. 76.

3. Bradbury *v.* Sutton, 19 W. R. 800; 21 W. R. 128.

4. Behrens *v.* Great Northern R., 30 L. J. Exch. 158.

5. Bradbury *v.* Sutton, 19 W. R. 800; W. R. 128.

6. Redman's Law of Railway Carriers (2d Ed.), p. 52.

In Walker *v.* Jackson, 10 M. & W. 168, the plaintiff went on board the defendant's steamboat with his horse and carriage, paying the defendant's usual ferry charge for his vehicle. Underneath the seat he had stored watches and jewelry of great value, which much increased the weight, and of which he said nothing to defendant. In running the wagon off the boat upon the slip two of defendant's servants were overpowered by its weight, let it fall, and in consequence it ran into the river. The carrier was held liable. Baron Parke used the following language: "I take it to be now perfectly well understood, according to the majority of opinions upon the subject, that if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary. If he asks no questions and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is. It is the duty of the person who receives it to ask the questions; if they are answered improperly so as to deceive him, then there is no contract between the parties; it is a ground which vitiates the contract altogether."

In Riley *v.* Horne, 5 Bing. 217, the court remarked: "A carrier has a right to know the value and quality of what he is required to carry. If the owner of the goods will not tell him what his goods are and what they are worth, the carrier may refuse to take charge of them; but if he does take charge of them, he waives his right to know their contents and value." It was, however, pointed out in a later case that this was the only authority which could be found or relied upon for the contention that the carrier had the right to require the consignor to inform him of the nature of the contents of packages offered for carriage; and that the law as thus stated would not bear the test of reason. Crouch *v.* Railway, 7 Exch. 705. See also The Nitro-Glycerine Case, 15 Wall. (U. S.) 524.

7. Walker *v.* Jackson, 10 M. & W. 168; Graves *v.* Lake Shore, etc., R., 16 Am. & Eng. R. R. Cas. 108; Texas Express Co. *v.* Scott, 16 Am. & Eng. R. R. Cas. 111; Boskowitz *v.* Adams Exp. Co., 5 Cent. L. J. 58; Phillips *v.* Earle, 8 Pick. (Mass.) 182; Camden, etc., R. *v.* Baldauf, 16 Pa. St. 67; Little *v.* Boston, etc., R., 66 Me. 239.

As will subsequently appear, it is the almost universal rule in the United States that the carrier cannot limit by contract his liability for the negligence of himself or his servants.[1] This rule has given rise to a conflict of decision upon the question as to whether, if a contract is made fixing a value upon the goods consigned and a rate of freight is established based upon the agreed valuation, the carrier shall be liable, where a loss occurs through his negligence, for any greater sum than such valuation. In a late and leading case[2] in the United States Supreme Court it

1. See *infra* this title, CONTRACTS LIMITING LIABILITY.

2. In Hart *v.* Pennsylvania R., 112 U. S. 331; s. c., 18 Am. & Eng. R. R. Cas. 604, it was held that where a contract of carriage, signed by the shipper, is fairly made with a railroad company, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. H. shipped five horses, and other property, by a railroad, in one car, under a bill of lading, signed by him, which stated that the horses were to be transported "upon the following terms and conditions, which are admitted and accepted by me as just and reasonable: *First*, to pay freight thereon" at a rate specified, "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding $200 each. . . . If a chartered car, on the stock and contents in same, $1200 for the car-load. But no carrier shall be liable for the acts of the animals themselves, . . . nor for loss or damage arising from condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier released therefrom." By the negligence of the railroad company or its servants, one of the horses was killed and the others were injured, and the other property was lost. In a suit to recover the damages, it appeared that the horses were race-horses, and the plaintiff offered to show damages, based on their value, amounting to over $25,000. The testimony was excluded, and he had a verdict for $1200. On a writ of error, brought by him, *held*, (1) the evidence was not admissible, and the valuation and limitation of liability in the bill of lading was just and reasonable, and binding on the plaintiff; (2) the terms of the limitation covered a loss through negligence. In this case, Blatchford, J., delivering the opinion of the court, observes:

"To the views announced in these cases we adhere; but there is not in them any adjudication on the particular question now before us. It may, however, be disposed of on principles which are well established, and which do not conflict with any of the rulings of this court. As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods, though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed. 2 Kent Comm. 603, and cases cited; Relf *v.* Rapp, 3 Watts & S. 21; Dunlap *v.* Steamboat Co., 98 Mass. 371; Railroad Co. *v.* Fraloff, 100 U. S. 24. This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement

was held that where a contract of carriage signed by the shipper is fairly made with a railroad company, agreeing on the valuation

is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract.

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss. This principle is not a new one. In Gibbon *v.* Paynton, 4 Burr. 2298, the sum of £100 was hidden in some hay in an old nail-bag and sent by a coach and lost. The plaintiff knew of a notice by the proprietor that he would not be answerable for money unless he knew what it was, but did not apprise the proprietor that there was money in the bag. The defence was upheld, Lord Mansfield saying: 'A common carrier, in respect of the premium he is to receive, runs the risk of the goods and must make good the loss, though it happen without any fault in him, the reward making him answerable for their safe delivery. His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionable to the risk. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other methods of security, and therefore he ought, in reason and justice, to have a greater reward.' To the same effect is Batson *v.* Donovan, 4 Barn. & Ald. 21.

"The subject-matter of a contract may be valued, or the damages in case of a breach may be liquidated, in advance. In the present case, the plaintiff accepted the valuation as 'just and reasonable.' The bill of lading did not contain a valuation of all animals at a fixed sum for each, but a graduated valuation according to the nature of the animal. It does not appear that an unreasonable price would have been charged for a higher valuation. . . . Applying to the case in hand the proper test to be applied to every limitation of the common-law liability of a carrier—its just and reasonable character—we have reached the result indicated. In Great Britain, a statute directs this test to be applied by the courts. The same rule is the proper one to be applied in this country, in the absence of any statute."

"The distinct ground of our decision in the case at bar is that, where a contract of the kind, signed by the shipper, is fairly made, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. Squire *v.* New York Central, etc., R. R., 98 Mass. 239, 245, and cases there cited."

In Oppenheimer *v.* U. S. Express Co., 69 Ill. 62, it was pointed out that a distinction exists between the effects of those notices by a carrier by which it is sought to discharge him from duties which the law has annexed to his employment and those designed simply to insure good faith and fair dealing on the part of his employer. In the former, notice without assent to the attempted restriction is ineffectual, while, in the latter, actual notice alone will be sufficient. See also Orange Co. Bank *v.* Brown, 9 Wend. (N. Y.) 86; 2 Greenlf. Ev., sec. 215; Ang. on Carriers (5th Ed.), sec. 245; Farmers & M. Bank *v.* Champlain Trans. Co., 23 Vt. 186; Moses *v.* Boston & M. R., 4 Foster (N. H.), 85; Western Trans. Co. *v.* Newhall *et al.*, 24 Ill. 466.

of the property carried, with the rate of freight based on the condition that the carrier assumes liability, only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible, and the freight he receives, and of protecting himself against extravagant and fanciful valuations. Another line of cases maintains that where the clause in a bill of lading limits the amount of the common carrier's liability, it shall not be construed to release the carrier from liability for loss or damage occurring through his negligence, but that in such case there may be a recovery for the entire loss.[1]

M. delivered to an express company for transportation a trunk with contents of the value of $4172, taking a receipt exempting the company from loss by fire and from liability beyond $50, "at which sum said property is hereby valued, unless the just and true value thereof is stated herein." The value of the trunk and contents was not stated in the receipt. Through the negligence of the employees of a railroad company employed by the express company to transport the property, it was destroyed by fire. In a suit by M. against the express company for the value of the property, *held*, that the limitation of the liability to $50 is binding on M., as a reasonable condition. Muser *et al. v.* Holland, Treas. Am. Ex. Co., 17 Blatchf. C. C. 412.

In Elkins *v.* Empire Transportation Co., 81* Pa. St. 315, by a bill of lading of a transportation company, loss occurring during the transportation was to be "computed at the value of the cost of the goods at the time and place of shipment." A tariff of rates of freight put "high-wines" in the first class, and in the fourth class "high-wines" . . . "at an agreed valuation, not exceeding $20 per barrel;" the freight for first class was $1.60. for fourth class 50 cents, per 100 pounds, the rate of freight written in the bill was "50 cents per 100 pounds;" and "valuation $20 per barrel." *Held*, that this valuation and rate were controlling parts of the bill, and loss occurring to the goods was to be estimated at $20 per barrel.

In Harvey *v.* Terre Haute, etc., R., 74 Mo. 538; s. c., 6 Am & Eng. R. R. Cas. 293, it was held that where the consignor fixes a stated value upon the article shipped he cannot recover a larger amount.

In Graves *v.* Lake Shore, etc., R., 137 Mass. 33; s. c., 16 Am. & Eng. R. R. Cas. 108, it was held that if a consignor voluntarily represents and agrees that the goods delivered to the carrier are of a certain value, and the carrier is thereby induced to grant him a reduced rate of compensation for the carriage, such shipper is bound by his representation and agreement. See also Dunlap *v.* Inter. Steamboat Co., 98 Mass. 371; Judson *v.* Western, etc., R., 6 Allen (Mass.), 486; Squire *v.* New York Central, etc., R., 98 Mass. 239; Railroad Co. *v.* Fraloff, 100 U. S. 26; Muser *v.* American Exp. Co., 1 Fed. Rep. 382; Magnin *v.* Dinsmore, 56 N. Y. 168, and 62 N. Y. 35, and 70 N. Y. 410; Belger *v.* Dinsmore, 51 N. Y. 166; Hopkins *v.* Westcott, 6 Blatchf. C. C. 64; Earnest *v.* Express Co., 1 Woods, 573; South, etc., R. *v.* Henlein, 52 Ala. 606; s.c., 56 Ala. 368.

1. American Exp. Co. *v.* Sands, 55 Pa. St. 140; Westcott *v.* Fargo, 61 N. Y. 542; Lamb *v.* Camden, etc., R., 46 N. Y. 271; United States Exp. Co. *v.* Backman, 28 Ohio St. 144; Orndorff *v.* Adams Exp. Co., 3 Bush (Ky.), 194; Mobile, etc., R. *v.* Hopkins, 41 Ala. 486; Chicago, etc., R. *v.* Abels, 60 Miss. 117; Southern Exp. Co. *v.* Moon, 39 Miss. 822; Kirby *v.* Adams Exp. Co., 2 Mo. App. 369; Adams Exp. Co. *v.* Stettaners, 61 Ill. 184; Judson *v.* Western R. Corp., 6 Allen (Mass.), 486; Steamboat City of Norwich, 4 Ben. C. C. 271; Morrison *v.* Construction Co., 44 Wis. 405; Black *v.* Goodrich Transp. Co., 55 Wis. 319; Moulton *v.* St. Paul, etc., R., 31 Minn. 85; s. c., 12 Am. & Eng. R. R. Cas. 13; Kansas City, etc., R. *v.* Simpson, 30 Kans. 645; s. c., 16 Am. & Eng. R. R. Cas. 158.

In McCune *v.* B., C. R. & N. R. Co., 52 Iowa, 600, a regulation of a railway company to the effect that no valuable live-stock shall be received for shipment until a contract is signed by the owner releasing the company from all liability for injury to such stock in shipment, above the value of ordinary stock, is

In another case, where the bill of lading stipulated that in case of loss the value or cost at the point of shipment should measure

void under section 1308 of the Iowa Code.

In *Minnesota*, by the terms of a contract for the transportation of a car-load of horses, the railway company was discharged from any liability for any cause, excepting the wilful negligence of its agents. By other terms of the contract it was agreed that in case of total loss the damage should in no case exceed the sum of $100 per head. The contract was construed as, in effect, an agreement for absolute exemption from liability except for wilful negligence; and in case such contract of exemption should not be sustained, then that the liability should be limited to the sum named. *Held*, not valid as exempting the railway company in whole or in part from liability for its own negligence, to the extent of the value of the property. Moulton *v.* St. Paul, M. & M. R. Co., 31 Minn. 86; s. c., 12 Am. & Eng. R. R. Cas. 13.

In *Kansas*, where a horse was shipped by rail, and the bill of lading was signed by the carrier and by the agent of the shipper, and provided that "value not to exceed $100," which was arbitrarily inserted in the bill of lading by the carrier, and the horse was injured by the carrier's negligence, it was held that the recovery was not limited to $100. Kansas City, St. J. & C. B. R. Co. *v.* Simpson, 30 Kans. 645; s. c., 16 Am. & Eng. R. R. Cas. 158. Horton, C. J., observed: "James, J., used the following language in an unreported case of the Supreme Court of the District of Columbia: 'The principle of law which, for considerations of public welfare, forbids a common carrier to bargain in particular cases for complete exemption from responsibility for a violation of his duties, forbids him to impair his obligations to the community by bargaining in particular cases for an exemption from a considerable part of that responsibility. The ground on which the rule is based, that even the shipper's perfect consent cannot relieve the carrier, is that the object which he undertakes to regulate by contract is not his own, but a public right. . . . The principle of the rule is, that any agreement which operates to interfere with a public right, touching the character and good faith of common carriers, is an agreement against public policy and welfare, and is therefore void; and as an agreement that his negligence shall be cheap, must operate in this way, it necessarily falls within that principle.' Galt *v.* Express Co. (S. C. D. C.), MS.; Lawson on Carriers, 434, 435. See also Goggin *v.* Railroad Co., 12 Kans. 416; Railroad Co. *v.* Caldwell, 8 Kans. 244; Railroad Co. *v.* Reynolds, 8 Kans. 623; Kallman *v.* Express Co., 12 Kans. 21; Railroad Co. *v.* Nichols, 9 Kans. 225; Railroad Co. *v.* Piper, 13 Kans. 505; Railroad Co. *v.* Maris, 16 Kans. 333; The Emily *v.* Carney, 5 Kans. 685; Railroad Co. *v.* Peavey, 29 Kans. 169. While the provision in a bill of lading or contract between the shipper and carrier, that the latter will not be liable beyond a certain sum expressed in the contract, may be valid to limit the liability of the carrier as an insurer, a condition of this character which seeks to cover the negligence of the carrier is void; therefore, the direction of the trial court was not erroneous. The present case furnishes a strong illustration of the oppression and injustice of a contrary doctrine. Simpson, the owner of the horse, sent his rider, Towne, a young boy, to ship the horse to St. Joseph, Mo., and enter him in the races there. He did not authorize him to fix any limitation on the value, in transporting him, and the horse was worth more than $300. The agent of the company shipping the animal supposed the horse was fancy stock, or a race-horse, and without any inquiry as to its actual value, arbitrarily inserted in the bill of lading 'value not to exceed $100.' Towne told the agent that he did not want the contract limited, but afterward signed it with the clause inserted According to the testimony of the agent, the rules of the company required him to insert this clause in transporting fine stock, whether the shipper wanted it or not. At St. Joseph the car containing the horse was run up into the yard of the company, a flying switch made, and the car run about 200 yards without any brakeman or other person on the car to stop or control it, at such a speed that the horse was knocked down upon his knees and injured."

In *Wisconsin* it was held that the words "liquor carried at val. $20 per bbl." stamped upon the face of a receipt, if they can be construed into a contract to limit the liability of the carrier to the sum of $20 in case of loss, must be so construed as to limit such liability only in case of loss without the fault of the carrier. Even the transportation of goods at an agreed valuation, if it can be construed into a simple agreement limit-

the amount of recovery, and certain letters and figures were illegibly written thereon, without the shipper's knowledge, and he was ignorant of the meaning thereof, he was entitled to recover the value of the goods at the point of shipment.[1]

It has been held in *England*, that the carrier would not be liable for his knowledge of the nature and value of the parcel not derived from the declaration of the consignor or his agent.[2] That it is not sufficient for the carrier to have a conviction as to the contents of the parcel,[3] nor that its appearance, or something written on it, indicates that it is of value. It was so held where a looking-glass was marked "Plate-glass, looking-glass; keep this edge upwards," but no actual declaration was made, or increased value paid.[4] So where pictures were so exposed that their nature could be easily seen by the carrier's servants.[5] On the

ing the liability of the carrier, will have no application when goods are lost through the carrier's negligence.

1. In Rosenfeld *v.* Peoria, etc., R., 21 Am. & Eng. R. R Cas. 87, it was *held*, that common carriers may limit their liability as insurers, but cannot relieve themselves from liability for negligence or fraud to a specified sum. But if a shipper, for the purpose of getting a reduced rate on his goods, misrepresents their value to the carrier, this is a fraud which will preclude his recovery for their loss at a greater valuation. If a carrier claims that by contract or the misconduct of a shipper his common-law liability has been limited, the burden is upon him clearly to show it, and all such contracts will be interpreted most strictly against the carrier.

A bill of lading stipulated that in case of loss the value or cost at the point of shipment should measure the amount of recovery. In the bill were also the letters and figures "L. & O. Ex. $20 R. R. Val." These letters and figures were placed there without the shipper's knowledge, were illegibly written, and their meaning. "Leaks and outs excepted, $20 railroad valuation," was unknown to him. *Held*, that he was entitled to recover the value of the goods at the point of their shipment. The court, in an able opinion by Zollars, J., thus comments upon the facts: "Tested by these rules of the law, how stands the case before us? As we have seen, there is an express and definite stipulation in the bill of lading that in case of loss the value or cost at the point of shipment shall measure the amount of recovery. To overthrow this specific stipulation, appellee relies upon the figures and letters in the blank, which, as we have seen, are so written that no one could read or interpret them, unless he had previous knowledge of their import. We think that it would not be reasonable to hold that these shall overthrow the express and plainly printed stipulations above referred to, and that the only proper and reasonable construction of the contract is that it fixes the amount of recovery, in case of loss, at the value of the barrel of whiskey at the point of shipment. The evidence shows that the agents of appellee put the letters and figures upon the bill of lading without the knowledge or consent of appellant. He had no understanding, or knowledge of their import, except what they of themselves import, and that was practically nothing. He made no representations as to the value of the barrel of whiskey, nor was he asked to make any. The testimony by the agents of appellee tends to show that less freight was charged than would have been charged had the value been stated at a greater amount; but there is no evidence that appellant was a party to such an arrangement, nor that he had any knowledge of it. There is evidence that he had accepted several like bills of lading for barrels of whiskey shipped, but they of themselves would not furnish any information that the carrier, by such letters and figures, was limiting its liability—first, because the letters and figures could not be intelligently deciphered by the shipper; and, second, if they could, they would not be sufficient to overthrow and destroy the plainly printed stipulation that the damages should be measured by the value at the point of shipment."

2 Robinson *v.* South-Western R., 34 L. J. C. P. 234.

3. Boys *v.* Pink, 8 C. & P. 363.

4. Owen *v.* Burnett, 2 Cr. & M. 353.

5. Morritt *v.* North-Eastern R., 45 L.

other hand, it has been held in the *United States* that the character and value of the goods may be inferred from their appearance. And in such case an acceptance by the carrier imposes a liability for their value, even though the contract of carriage may stipulate against a liability beyond a specified amount. In one case,[1] the court pointed out that when a small package contains an article of great value, there is great propriety that the carrier should have information thereof. But in large bulky articles, such as barrels of flour, bales of cotton, and the like, there appears to be no necessity for giving information of the value, as the carrier can determine that for himself. The design is to insure good faith. If an inquiry were made of the shipper of the value of the goods about to be shipped, he would be bound to state truly the value. But when the value appears in the package itself, such an inquiry would be useless, and a voluntary statement unnecessary.

3. WHAT CONSTITUTES CONSIGNMENT.—The carrier's liability begins from the moment of complete delivery.[2]

A delivery at the usual place of consignment is constructive notice to the carrier of the consignment of the goods, and such delivery binds him.[3] A carriage is delivered into the charge of

J. Q. B. 289; L. R. 1 Q. B. Div. 302; Redman's Law of Railway Carriers, (2d Ed.) p. 53. See also Angell on Carriers (5th Ed.), § 279; Marsh *v.* Horne, 5 B. & C. 322; Story on Bailm. (9th Ed.) § 572. *Compare*, however, Beck *v.* Evans, 3 Camp. 267; Down *v.* Fromont, 4 Camp. 40; Levi *v.* Waterhouse, 1 Price Ex. 280; Thorogood *v.* Marsh, Gow. 105; Alfred *v.* Horne, 3 Stark. 136; Lawson's Contracts of Carriers, § 93.

1. In Boskowitz *v.* Adams Exp. Co., 5 Cent. L. J. 58 (Illinois), the court observes: "When a small package contains an article of great value, there is great propriety the carrier should have information thereof; but in large bulky articles, such as barrels of flour, bales of cotton, and the like, there appears to be no necessity for giving information of the value, as the carrier can determine that for himself. The design is to insure good faith. Was an inquiry made of a shipper of the value of the goods about to be shipped, he would be bound to state truly the value; but when the value appears in the package itself, such an inquiry would be useless, and a voluntary statement unnecessary." Boskowitz *v.* Adams Exp. Co., 9 Cent. L. J. 389; Van Winkle *v.* Adams Exp. Co., 3 Robt. (La.) 59; Southern Exp. Co. *v.* Crook, 44 Ala. 468; Moses *v.* Boston, etc., R., 24 N. H. 71; Orndorff *v.* Adams Exp. Co., 3 Bush (Ky.), 194; Dwight *v.* Brewster, 1 Pick. (Mass.) 50. *Compare* Story on Bailments (9th Ed.), § 572; Angell on Carriers (5th Ed.), § 279; Lawson's Contracts of Carriers, § 93.

Family Portrait.—A clause in a bill of lading, "specie, bank-bills, and other articles of great intrinsic or representative value, will only be taken upon a representation of their value, and by a special agreement," was held not to apply to a family portrait inclosed in a wooden case. Green *v.* Boston & Lowell R. Co., 128 Mass, 221. See Michigan Central R. Co. *v.* Boyd. 91 Ill. 268.

2. English Laws.—Randleson *v.* Murray, 8 A. & E. 109; Evershed *v.* London, etc., R., 47 L. J. Q. B. 284; L. R. 3 Q. B. Div. 134; Bergheim *v.* Great Eastern, etc., R., 47 L. J. C. P. 318; L. R. 3 C. P. Div. 22; Hart *v.* Baxendale. 6 Exch. 769.

3. American Cases.—Blanchard *v.* Isaacs, 3 Barb. (N. Y.) 389; Grosvenor *v.* New York Central, etc., R., 39 N. Y. 34; Rogers *v.* Wheeler, 52 N. Y. 262; McHenry *v.* Philadelphia, etc., R., 4 Harring. (Del.) 448; Williams *v.* Peytavin, 4 Mart. (La.) 304; Illinois Central, etc., R. *v.* Smyser, 38 Ill. 354; Merritt *v.* Old Colony R., 11 Allen (Mass.), 80; Hickox *v.* Naugatuck, etc., R., 31 Conn. 281; Pittsburgh, etc., R. *v.* Barrett, 3 Am. & Eng. R. R. Cas. 256; Marquette, etc., R. *v.* Kirkwood, 9 Am. & Eng. R. R. Cas. 85.

Delivery at usual place is constructive notice. Salinger *v.* Simmons, 57 Barb. (N. Y.) 513. *Compare* Packard *v.* Get-

the ferryman as soon as it is fairly on the slip or drop of the flat, though driven by consignor's servant.[1] If the landing-place at a ferry is not safe through the culpable negligence of the carrier, he becomes liable.[2]

The deposit of goods in a warehouse as accessory to the carriage and for the purpose of being carried, imposes upon the carrier the liability of a carrier, and not that of a warehouseman.[3] In such case, if they are lost by fire while awaiting shipment, the carrier is liable to the same extent as if the goods were in transit, unless his liability has been modified, limited, or restricted with the consent of the shipper or owner of the goods.[4] A wharfinger conveying goods to a vessel in his own lighter is liable as a common carrier.[5] The taking of goods upon a barge or lighter by direction of the ship's agent to be conveyed to the ship, is a good delivery to the ship.[6] The sending of goods to a particular place such as a booking office, by direction of the carrier or his agent, renders the carrier liable as a common carrier.[7] Receipt of the goods at a place or time,[8] different from the usual manner, or an agreement[9] to so receive them, imposes the liability of a common

man, 6 Cow. (N. Y.) 757; Fitchburg, etc., R. *v.* Hanna, 6 Gray (Mass.), 539; Moses *v.* Boston, etc., R., 4 Fost. (N. H.) 71; Merriam *v.* Hartford, etc., R., 20 Conn. 354; Trowbridge *v.* Chapin, 23 Conn. 598; Houston, etc., R. *v.* Hodde, 42 Tex. 467; Woods *v.* Devin, 13 Ill. 746. Wells *v.* Wilmington, etc., R., 6 Jones Law (N. Car.), 47; Southern Exp. Co. *v.* Newby, 36 Ga. 635; Clarke *v.* Needles, 25 Pa. St. 338.

1. Miles *v.* James, 1 McCord (S. Car.), 157; Cohen *v.* Hume, 1 McCord (S. Car.), 439; Wilsons *v.* Hamilton, 4 Ohio St. 722; Cook *v.* Gourdin, 2 Nott & McCord (S. Car.), 19; Blakeley *v.* Le Duc, 19 Minn. 187. *Compare* White *v.* Winnisimmet Co., 7 Cush. (Mass.) 155; Wyckof *v.* Ferry Co., 52 N. Y. 32.

2. Hayman *v.* Hoboken Land, etc., Co., 50 N. Y. 53; Willoughby *v.* Horrige, 16 Eng. Law & Eq. 437; 12 C. B. 742.

3. Moffat *v.* Great West. R., 15 L. T. N. S. 630; Blossom *v.* Griffin, 3 Kern. (N. Y.) 569; Ladue *v.* Griffith, 25 N. Y. 264; Wade *v.* Wheeler, 47 N. Y. 658; Rogers *v.* Wheeler, 52 N. Y. 262; Whitbeck *v.* Holland, 45 N. Y. 13; Shelton *v.* Merch. Desp. Trans. Co., 36 N. Y. Sup. Ct. 527; s. c., 59 N. Y. 258; Clarke *v.* Needles, 25 Pa. St. 338; Fitchburg, etc., R. *v.* Hanna, 6 Gray (Mass.), 539; Hickox *v.* Naugatuck, etc., R., 31 Conn. 281; Michigan, etc., R. *v.* Shurtz, 7 Mich. 515.

4. Merriam *v.* Hartford & New Haven R. Co., 20 Conn. 354; Trowbridge *v.* Chapin, 23 Conn. 595; 2 Redfield on Railways, 63, § 174; Ford *v.* Mitchell, 21 Ind. 54; Gleason *v.* Transportation Co., 32 Wis. 85; O'Bannon *v.* Southern Express Co., 51 Ala. 481; Grosvenor *v.* New York Central R. Co., 39 N. Y. 34; Illinois Central R. Co. *v.* Smyser, 38 Ill. 354; Burrell *v.* North, 2 Car. & Kir. 680; Schouler on Bailments, 381, ch. 4.

Where goods are delivered to a common carrier for shipment, and received by him to be forwarded in the usual course of business, the liability of a common carrier immediately attaches; and if they are lost by an accidental fire while in the carrier's warehouse awaiting transportation, he is liable, unless his common-law liability has been limited by an agreement with the shipper. Pittsburgh, etc., R. *v.* Barrett, 36 Ohio St. 448; s. c., 3 Am. & Eng. R. R. Cas. 256; Little Rock, etc., R. *v.* Hunter, 42 Ark. 200; s. c., 18 Am. & Eng. R. R. Cas. 527.

5. Maving *v.* Todd, 1 Stark. 72. See also Cobban *v.* Downe, 5 Esp. 41; British Columbia, etc., Co. *v.* Nettleship, L. R. 3 C. P. 499.

6. The Bark Edwin, 1 Sprague's Dec. 477; Bulkley *v.* The Naumkeag, etc., Co., 24 How. (U. S.) 386; The Oregon, Deady, 179; Greenwood *v.* Cooper, 10 La. Ann. 796.

7. Culpepper *v.* Good, 5 Car. & P. 380; Camden, etc., R. *v.* Belknap, 21 Wend. (N. Y.) 354; Merriam *v.* Railroad, 20 Conn. 354; Converse *v.* Transp. Co., 33 Conn. 166; Green *v.* Railroad, 38 Iowa, 100; s. c., 41 Iowa, 410.

8. Phillips *v.* Earle, 8 Pick. (Mass.) 182.

9. Dale *v.* Hall, 1 Wils. 281.

carrier. A delivery to the clerk of an agent of an express company outside the office of such agent is not a good delivery to the company.[1] A consignment to the authorized agent[2] of the carrier, or where such agent is sent to receive the goods at the consignor's request,[3] imposes such liability.

(*a*) *Who are Agents Authorized to Receive.*—The following have been held to be agents of the carrier authorized to accept a consignment of goods: The mate of a ship accustomed to receive goods;[4] the baggage-master of a railroad receiving on behalf of a connecting road at his own station;[5] the captain of a steamboat, though there was a freight agent of the boat in the same place, but the consignor was ignorant of the fact;[6] officials at a railway station;[7] drayman of a railroad company collecting goods at the houses of the consignors;[8] servants of another carrier engaged by a company under a special contract to deliver and collect goods.[9] A person acccustomed to book for the company, although a servant of and deriving his authority from a connecting carrier.[10]

(*b*) *Powers of Agents to Accept.*—Since most of the carrier's business, both as to the receipt of goods, and the making of contracts for their transportation, must be conducted by agents, there is necessarily a large delegation of authority to them, and it is reasonable that the consignor should have the right to presume that they have the necessary authority to act for the carrier. It has been held that such agents exercising the police power of the company appointing them may make reasonable regulations for the conduct of passengers and others having business at their stations.[11] Where a railroad places an agent in charge of its business at a station, and empowers him to contract for the shipment of produce and freight, it holds him out as possessing the authority to contract with reference to all the necessary and ordinary details of the business, and, within the range of such business, he is a general agent.[12] It has been pointed out that such agents are of the carrier's own selection; are employed to represent and act

1. Cronkite *v.* Wells, 32 N.Y. 247. See Southern Exp. Co. *v.* Newby, 36 Ga. 635.

2. Cobban *v.* Downe, 5 Esp. 41; Taff Vale R. *v.* Giles, 23 L. J. Q. B. 43; 2 E. & B. 823; Riley *v.* Horne, 1 C. & P. 610; Winkfield *v.* Packington, 2 C. & P. 599; Pickford *v.* Grand Junction R., 12 M. & W. 766; Wilson *v.* York, etc., R., 17 L. T. 223; Davey *v.* Mason, Car. & M. 45; Baxendale *v.* Hart, 21 L. J. Exch. 123; 6 Exch. 769; Machin *v.* London, etc., R., 17 L. J. Exch. 271; 2 Exch. 415; McCourt *v.* London, etc., R., 3 Ir. C. L. 107.

3. Boys *v.* Pink, 8 Car. & P. 361; Lloyd *v.* Barden, 3 Strob. 343; Davey *v.* Mason, 1 Car. & M. 45.

4. Cobban *v.* Downe, 5 Esp. 41.

5. Jordan *v.* Fall River, etc., R., 5 Cush. (Mass.) 69.

6. Whitbeck *v.* Schuyler, 44 Barb. (N. Y.) 469.

7. Pickford *v.* Grand Junction R., 12 M. & W. 766; Wilson *v.* York & Newcastle R., 17 L. T. 223; Quarrier *v.* Baltimore, etc., R., 24 W. Va. 424; s. c., 18 Am. & Eng. R. R. Cas. 535.

8. Davey *v.* Mason, Car. & M. 45; Baxendale *v.* Hart, 21 L. J. Exch. 123; 6 Exch. 769.

9 Machin *v.* London & S. W. R., 17 L. J. Exch. 271; 2 Exch. 415.

10. McCourt *v.* London & N. W. R., 3 Ir. C. L. 107, 402.

11. **Powers of Agents to Contract.**—Commonwealth *v.* Burr, 7 Metc. (Mass.) 596.

12. Pruitt *v.* Hannibal & St. J. R. Co., 62 Mo. 527; Deming *v.* Grand Trunk R. Co., 48 N. H. 455.

for him; and to hold that contracts entered into by them within the apparent scope of their authority may be defeated by secret limitations upon their authority, would impose, in many cases, very grievous hardships upon those who are compelled to deal with them. The soundest considerations of public policy demand that the rule should be otherwise.[1]

Station agents will not be presumed to have authority to bind the company by a contract beyond its line. But may bind the company by a contract to deliver goods at an unusual place upon its own line.[2] A general agent, however, has authority to contract for the delivering of goods beyond the company's line. But the mere fact that the goods were billed through, or that freight was paid in advance, will not amount to such a contract.[3] A carrier's agents cannot bind the company beyond the authority presumed

1. In Wood *v.* Chicago, etc., R., 59 Iowa, 196; s. c., 21 Am. & Eng. R. R. Cas. 36, it was held where a freight agent having power to contract for the carriage of freight, agreed with a party to furnish cars at a given point on a certain day, and then telegraphed to headquarters for the cars which were not furnished, that there was nothing in the above evidence to show that the agent had power to contract to furnish special cars, or that he was held out to the public by the railroad company as having such power.

But this decision was subsequently overruled in Wood *v.* Chicago, etc., R., 24 Am. & Eng. R. R. Cas. 91, and it was held that where a station agent has power from his principal to contract for the shipment of freight or produce he has also power to contract for the performance of whatever is reasonably necessary to be done to protect the merchandise or produce from injury, unless restricted by special instructions. Where a railroad places an agent in charge of its business at a station, and empowers him to contract for the shipment of produce and freight, it holds him out as possessing the authority to contract with reference to all the necessary and ordinary details of the business; and within the range of such business he is a general agent. Where a railroad company, by its local agent, contracts to ship potatoes from a given point, at a given date, and fails to do so for a reasonable time thereafter, and by reason of such delay the potatoes are frozen, the company will be liable in damages. The court, in an opinion by Reed, J., remarks: "We are aware that what is here said is not in harmony with our holding in Wood *v.* Chicago, M. & St. P. R. Co., 59 Iowa, 196; s. c., 21 Am. & Eng. R. R. Cas. 36. We entertained such grave doubts, however, as to the correctness of our holding in that case, that we announced to counsel, when this rehearing was granted, that we would review the question upon the final hearing. Our conclusion is that that case, in so far as it holds that the defendant, for the purpose of defeating its liability upon a contract made by a station agent within the apparent scope of his authority, may show that in making it the agent acted in violation of instructions of which the shipper had no notice, ought not to be followed. Shippers, as a rule, are required to deal with these agents in making contracts for the shipment of property. They are agents of the company's own selection, and are employed to represent and act for it; and to hold that contracts entered into by them, within the apparent scope of their authority, may be defeated by secret limitations upon their authority, would impose, in many cases, very grievous hardships upon those who are compelled to deal with them. The soundest considerations of public policy demand that the rule should be otherwise; and this view is well sustained by the authorities. See 2 Redf. Rys. 139–141; Hutch. Carr. § 269; Deming *v.* Grand Trunk R. Co., 48 N. H. 455; Pruitt *v.* Hannibal & St. J. R. Co., 62 Mo. 527; Harrison *v.* Missouri Pac. R. Co., 74 Mo. 364."

2. **What Station Agents Cannot Do.**—Southern Express Co. *v.* McVeigh, 20 Gratt. (Va.) 264; Grover & Baker S. M. Co. *v.* Mo. Pac. R. Co., 70 Mo. 672; Mann *v.* Birchard, 40 Vt. 326; Phillips *v.* North Carolina R. Co., 78 N. Car. 294; Cummings *v.* Dayton, etc., R. Co., 9 Am. & Eng. R. R. Cas. 36; Webber *v.* Great Western R. Co., 3 H. & C. 771.

3. Armstrong *v.* Grand Trunk R. Co., 2 P. & B. (N. B.) 445; Mullarky *v.* Phila-

from their employment.[1] Nor even then, if the consignor have notice of a more limited authority.[2] Nor do they bind the company when acting in contravention of their duty and in fraud of the company by acknowledging the receipt of goods never received.[3] Nor when acting in defiance of the known course of business of the company.[4] It has been held that if such agents do any act beyond their ordinary power, special authority from the carrier must be shown in order to bind him.[5] But customary authority cannot be restricted by special instructions of which the consignor is ignorant.[6]

(*c*) *Agents Not Authorized to Receive Consignments.*—The following have been held not to be agents authorized to accept consignments of goods: drivers of wagons and stage-coaches acting on their own account;[7] the master of a steamboat known to receive goods on his own account;[8] deck hands of a steamboat.[9]

It is a well-settled general principle that goods must be delivered into the actual custody of the carrier or his servants in order to impose liability. It was early held that the deposit of goods in the yard of an inn from which the carrier starts was not a consignment.[10] The mere delivery of articles at or near the point from which a railroad company runs its trains does not amount to a delivery to the company which will bind it in the absence of a custom to that effect.[11] In Texas, it has been held that the mere

delphia, etc., R. Co., 9 Phila. (Penn.) 114.

In an action for damages against a railroad company, where it appeared that the plaintiff had employed one C., who was a depot agent of the defendant, to purchase cotton for him, and to hold and ship it under his directions, it was *held*, that C., in so dealing in cotton for the plaintiff, acted solely as the plaintiff's agent, and there was no liability on the defendant from any loss from the failure of C. to perform his duty as such agent. The law does not favor double agencies. Sumner *v.* Charlotte, Columbia & Augusta R. Co. 78 N. Car. 289. See also Mulligan *v.* Northern Pacific R., 27 Am. & Eng. R. R. Cas. 33.

1. Great Western R. *v.* Willis, 34 L. J. C. P. 195; 18 C. B. N. S. 748; Horn *v.* Midland R., 42 L. J. C. P. 59; L. R. 8 C. P. 131.

2. Walker *v.* York, etc., R., 23 L. J. Q. B. 73; 2 E. & B. 750.

3. Coleman *v.* Riches, 24 L. J. C. P. 125; 16 C. B. 104.

4. Slim *v.* Great Northern, etc., R., 23 L. J. C. P. 166; 14 C. B. 647; Belfast & Ballymena R. *v.* Keys, 9 H. L. C. 556. See also Little Rock, etc., R., *v.* Hunter, 42 Ark. 200; s. c., 18 Am. & Eng. R. R. Cas. 527.

5. Taff Vale R. *v.* Giles, 23 L. J. Q. B. 43.

6. Page *v.* London, etc., R., 16 W. R. 566.

7. **Who are not Agents Authorized to Receive Goods.**—Butler *v.* Basing, 2 Car. & P. 613; Bignold *v.* Waterhouse, 1 Maule & S. 259; Williams *v.* Cranston, 2 Stark, 48; Citizens' Bank *v.* Nantucket Steamboat Co., 2 Story C. C., 32; Bean *v.* Sturtevant, 8 N. H. 146; Shelden *v.* Robinson, 7 N. H. 157; Blanchard *v.* Isaacs, 3 Barb. (N. Y.) 388.

8. Allen *v.* Sewall, 2 Wend. (N. Y.) 327; 6 Wend. (N. Y.) 335; King *v.* Lenox, 19 Johns. (N. Y.) 235; Walter *v.* Brewer, 11 Mass. 99. *Compare* Whitbeck *v.* Schuyler, 44 Barb. (N. Y.) 469; Missouri Coal Co. *v.* Hannibal, etc., R., 35 Mo. 84.

9. Trowbridge *v.* Chapin, 23 Conn. 595; Ford *v.* Mitchell, 21 Ind. 54. See Leigh *v.* Smith, 1 Carr. & P. 638. See, generally, Wright *v.* Caldwell, 3 Mich. 51; Freeman *v.* Newton, 3 E. D Smith (N. Y.), 246; Butler *v.* Hudson River, etc., R., 3 E. D. Smith (N. Y.), 571; Merriam *v.* Hartford, etc., R., 20 Conn. 354; Wells *v.* Wilmington, etc., R., 6 Jones (N. Car.). 47; Gleason *v.* Goodrich Trans. Co., 32 Wis. 85.

10. **Goods Must be Delivered into the Actual Custody of the Carrier or his Servants.**—Selway *v.* Holloway, 1 Ld. Raym. 46; Buckman *v.* Levi, 3 Camp. 414.

11. Houston & T. C. R. Co. *v.* Hodde,

permission by the agent of a railroad company to an owner of cattle to place the cattle in the company's yards where no bill of lading is given does not render the company liable for any damages caused by the escape of the cattle.[1] Where the consignor, after paying freight charges and notifying the carrier of an intention to send the goods, dispatched them by a servant, who placed them upon the depot platform, and called the baggage-master's attention to them, but failed to notify the freight agent, and they were injured by a passing train, it was held that this did not constitute a consignment.[2]

A carrier was held liable, however, for goods deposited alongside of the platform in his yard, although no receipt was given for such goods, where it was the common custom of the carrier's servants to construe this a delivery.[3] "Wayside deposits" made to save the trouble of delivery at a regular station are at the risk of the consignor until the goods are put upon the train.[4]

(*d*) *Incomplete Consignment and Retention of Control.*—Where something remains undone by the consignor to complete the consignment, or where the circumstances show his retention of the control over the goods, the carrier's liability is not that of a common carrier.[5] Where goods are consigned with instructions

42 Tex. 467; O'Bannon *v.* Southern Express Co., 51 Ala. 481; Brown *v.* Atlanta & C. Air-Line Co., 13 Am. & Eng. R. R. Cas. 479. And see Pickford *v.* Grand Junction R. Co., 12 M. & W. 766; Lovette *v.* Hobbs, 2 Show. 127; Leigh *v.* Smith, 1 Carr. & Payne, 640; Marquette, etc.. R. Co. *v.* Kirkwood, 9 Am. & Eng. R. R. Cas. 85.

1. In Fort Worth, etc., R. *v.* Riley, 27 Am. & Eng. R. R. Cas. 49. But in *Texas* a statute provides that the carrier's liability begins from the signing of the bill of lading. See *infra*, INCOMPLETE CONSIGNMENT, etc.

2. Grosvenor *v.* R. Co., 39 N. Y. 34. But see Rogers *v.* Railroad Co., 2 Lans. (N. Y.) 269; s. c., 56 N. Y. 620; s. c., 49 N. Y. 655; Ouimit *v.* Henshaw, 35 Vt. 605.

3. In Montgomery, etc.. R. *v.* Kolb, 73 Ala. 396; s. c., 18 Am. & Eng. R. R. Cas. 512, the carrier was held liable as a common carrier for goods deposited alongside of a platform in its yard, although no receipt was given for such goods, when common custom of company's servants was to consider this a delivery. The fact that the rules of company required a receipt to be given, and that knowledge of the custom was not traced to superintendent of company, made no difference.

4. Wells *v.* Railroad, 6 Jones (N.Car.), Law, 47.

A deposit of goods upon a platform or in the warehouse of a company, with its agent's permission, to await a permit from military authorities then in control, and also until cars could be had to transport them, imposes upon a carrier only the liability of a warehouseman. Though it was observed that additional liability might have been imposed by the agent undertaking to transport them unconditionally or by his giving a shipping receipt. Illinois Central, etc., R. *v.* Ashmead, 58 Ill. 487; Illinois Central, etc., R. *v.* McClellan, 54 Ill. 58; Illinois Central, etc., R. *v.* Hornberger, 77 Ill. 457.

5. **Incomplete Consignment and Retention of Control.**—Where the circumstances show a retention of control of the goods by the consignor, or that something remained undone by him to complete the delivery, the carrier's liability is not that of a common carrier. Barron *v.* Eldredge. 100 Mass. 455; Watts *v.* Boston, etc., R., 106 Mass. 467; Nichols *v.* Smith, 115 Mass. 332; White *v.* Winnissimmet Co.,7 Cush. (Mass.) 155; Clark *v.* Burns, 118 Mass. 275; Judson *v.* Western R., 4 Allen (Mass.), 520; Moses *v.* Boston, etc., R., 32 N. H. 71; Reed *v.* Philadelphia, etc., R., 3 Houst. (Del.) 176; Orange Co. Bank *v.* Brown, 9 Wend. (N.Y.) 85; Tower *v.* Utica, etc ,R., 7 Hill (N. Y.), 47: Blanchard *v.* Isaacs, 3 Barb. (N. Y.) 388; Cohen *v.* Frost, 2

to await further orders from the consignor before carriage, the carrier incurs, at the utmost, the liability of a warehouseman.[1]

Duer (N. Y.), 335; Rogers *v.* Wheeler, 52 N. Y. 262; O'Neil *v.* New York Central, etc., R., 60 N. Y. 138; Gilbert *v.* New York Central, etc., R., 4 Hun (N. Y.). 378; McDonald *v.* Western, etc., R., 34 N. Y. 497; Cohen *v.* Hume, 1 McCord (S. Car.), 439; Michigan, etc., R. *v.* Schurtz, 7 Mich. 515; Gleason *v.* Goodrich Transp. Co., 32 Wis. 85; Lawrence *v.* W. & St. P. R., 15 Minn. 390; St. Louis, etc., R. *v.* Montgomery, 39 Ill. 335; Pittsburg, etc., R. *v.* Barrett, 36 Ohio St. 448; s. c., 3 Am. & Eng. R. R. Cas. 256. *Compare* Tower *v.* Utica, etc., R., 7 Hill (N. Y.), 47; Ford *v.* Mitchell, 21 Ind. 54; Trowbridge *v* Chapin, 23 Conn. 595; Michaels *v.* New York, etc., R., 30 N. Y. 564; Gatterne *v.* Adams, 12 C. B. N. S. 560; Boys *v.* Pink, 8 Car. & P. 361; Syms *v.* Chaplin, 5 A. & E. 634; Miles *v.* Cattle, 6 Bing. 743; East India Co. *v.* Pullen, 1 Stra. 690; Brind *v.* Dale, 8 Car. & P. 207.

In Hart *v.* Chicago, etc., R., 27 Am. & Eng. R. R. Cas. 59, the owner of certain property, by agreement with the carrier, undertook to care for it in the course of transportation. The property was destroyed through the act of the owner. Sec. 1308 of the Code of Iowa provides that "no contract, receipt, rule, or regulation shall exempt any corporation engaged in transportation of persons or property by railway from liability of common carrier." *Held*, first, that the carrier was not liable for the loss, although the agreement between the owner and carrier may have been in violation of the above section. Second, that a railroad company is not liable for the injury or destruction of property in the course of transportation when the injury is occasioned by the owner's own act, and whether the act of the owner which caused the injury amounted to negligence or not, is immaterial. Reed, J., observes: "The carrier is held to be an insurer of the safety of the property while he has it in possession as a carrier. His undertaking for the care and safety of the property arises by implication of law out of the contract for its carriage. The rule which holds him to be an insurer of the property is founded upon considerations of public policy. The reason of the rule is that as the carrier ordinarily has the absolute possession and control of the property while it is in course of shipment, he has the most tempting opportunities for embezzlement or for fraudulent collusion with others. If it is lost or destroyed while in his custody, the policy of the law therefore imposes the loss upon him. Coggs *v.* Bernard, 2 Ld. Raym. 909; Forward *v.* Pittard, 1 Durn. & E. 27; Riley *v.* Horne, 5 Bing. 217; Thomas *v.* R. Co., 10 Metc. (Mass.) 472; Roberts *v.* Turner, 12 Johns. (N.Y.) 232; Moses *v.* R. Co., 24 N. H. 71; Rixford *v.* Smith, 52 N. H. 355. His undertaking for the safety of the property, however, is not absolute. He has never been held to be an insurer against injuries occasioned by the act of God or the public enemy, and there is no reason why he should be; and it is equally clear, we think, that there is no consideration of policy which demands that he should be held to account to the owner for an injury which is occasioned by the owner's own act, and whether the act of the owner by which the injury was caused amounted to negligence is immaterial also. If the immediate cause of the loss was the act of the owner, as between the parties, absolute justice demands that the loss should fall upon him rather than upon the one who has been guilty of no wrong, and it can make no difference that the act cannot be said to be either wrongful or negligent. If, then, the fire which occasioned the loss in question was ignited by the lantern which plaintiff's servant, by his direction, took into the car, and which at the time was in the exclusive control and care of the servant, defendant is not liable, and the question whether the servant handled it carefully or otherwise is not material. This view is abundantly sustained by the authorities. See Hutch. Carr., § 216, and cases cited in the note; also Lawson Carr. §§ 19, 23."

1. In Little Rock, etc., R. *v.* Hunter, 42 Ark. 200; s. c., 18 Am. & Eng. R. R. Cas. 527, it was held that a railroad company is liable as a common carrier when goods are delivered to and accepted by it for immediate transportation in the usual course of business. If they are to await further orders from the shipper before carriage, it incurs, at the utmost, the liability of a warehouseman. When goods are left with a railroad company's agent at their depot to be kept until the owner should be prepared to proceed on his journey, and to be returned on request if he should not go, then the company becomes a mere gratuitous bailee, provided the agent can bind it at all by

The giving of a bill of lading, entry of goods upon the freight-list, etc., are not essential to a consignment unless by statute.[1]

In *Texas* a statute provides "that the trip or voyage shall be considered as having commenced from the time of signing of the bill of lading, and the liability of common carrier shall attach as at common law from and after such signing." In that State it is accordingly held that the liability of the common carrier for freight does not attach until a receipt or a bill of lading for the same has been given by the carrier; and that a custom of the carrier to receive freight on its platform without giving a bill of lading cannot be pleaded to change or modify the plain provisions of the statute.[2]

The undertaking by the carrier to transport the property received by him to its destination may be implied from the circumstances under which it comes into his possession. In that case he is charged with the same responsibility for its safety as though his obligation to transport it was created by express agreement.[3]

(*e*) *Marking Goods.*—The consignor is charged with the duty of seeing to it that the goods consigned are properly marked, and cannot hold the carrier responsible in such case for errors.[4]

(*f*) *Presumption from Consignment.*—Where goods are consigned to a consignee he must be regarded by the carrier as the *prima-facie* owner unless the carrier has notice that the right of the consignee to receive the goods is disputed.[5] Where goods

the reception of goods under such circumstances. See also cases cited in preceding note.

1. Parker *v.* Great Western R., 7 Man. & G. 253; Citizens' Bank *v.* Nantucket Steamboat Co., 2 Story C. C. 16; Shelton *v.* Merchants' Desp. Transp. Co., 4 Jones & Sp. (N. Y.) 527; Landes *v.* Pacific R., 50 Mo. 346.

2. Missouri Pacific, etc., R. *v.* Douglass & Sons, 16 Am. & Eng. R. R. Cas. 98.

In Merritt *v.* Earle, 31 Barb. (N. Y.) 38; s. c., affirmed, 29 N. Y. 115, it was held that a contract for the transportation of property on a steamboat, followed by delivery to carrier on the same dav. is not void because made on Sunday, and the carrier could not claim exemption from liability because of these facts.

3. In Aiken *v.* Chicago, etc., R., 25 Am & Eng. R. R. Cas. 377, it was held that the undertaking by the carrier to transport the property received by him to its destination may be implied from the circumstances under which it comes into his possession, and in that case he is charged with the same responsibility for its safety as though his obligation to transport it was created by express agreement.

4. Angell on Carriers (5th Ed.), § 136; The Huntress, Davies, 83; Bradley *v.* Dunipace, 1 H. & C. 521; 7 H. & N. 200. *Compare* Finn *v.* Western, etc., R., 100 Mass. 283; Kreuder *v.* Woolcott, 1 Hilt. (N. Y.) 223; Rome, etc., R. *v.* Sullivan, 25 Ga. 228.

In McGowan *v.* Wilmington, etc., R., 27 Am. & Eng. R. R. Cas. 64, where a bill of lading provides against any liability of the carrier for "wrong carriage or wrong delivery of goods that are marked with the initials, unnumbered or imperfectly marked," and it is not a part of the plaintiff's complaint that the rice was wrongly carried or wrongly delivered, and no defence is set up that the goods were not marked with the proper directions, nor any imperfection in that respect brought to the attention of the plaintiff, but the sole ground of action is that the goods were not shipped at all, the only question at issue is whether the goods were shipped or not.

5. **Presumption from Consignment.**—Brower *v.* Peabody, 13 N. Y. 121; Angle *v.* Mississippi, etc., R. Co., 9 Iowa, 487;

are delivered to a common carrier by the vendor in pursuance of an order for delivery to the buyer, the consignment to the carrier passes the property.[1] The legal presumption is that, upon the delivery of the goods by the consignor to a common carrier, the title thereto vests in the consignee.[2]

4. NOTICES LIMITING LIABILITY.—Closely allied to the subject of the declaration of the value of goods consigned, is that of notices limiting liability. Whether a carrier by a public notice stipulating that he will not assume responsibility for articles of a value beyond a specified sum unless their value be declared at the time of shipment, and an increased charge be paid, is a proper and reasonable limitation of his common-law liability as an insurer, is the first question; whether the carrier by the publication of a notice which contains a limitation upon his common-law liability, where such notice is not confined to the question of the value of the articles, but is, in effect, an exoneration of the carrier from liability for negligence, can thereby screen himself, is the second question.

Notices to limit the carrier's liability for goods beyond a certain value were considered in many early English cases. A review of these, with the comments of the judges will be found in the notes.[3] A learned commentator, whose remarks have frequently

Webb *v.* Winter, 1 Cal. 417; Glidden *v.* Lucas, 7 Cal. 26; Decan *v.* Shipper, 35 Pa. St. 329; Green *v.* Clark, 12 N.Y. 343; Dows *v.* Greene, 24 N. Y. 638; Dows *v.* Perrin, 16 N. Y. 325; Fitzhugh *v.* Wiman, 9 N. Y. 559; Rowley *v.* Bigelow, 12 Pick. (Mass.) 308; Merchants' Nat. Bank *v.* Bangs, 102 Mass. 291; Foster *v.* Roper, 111 Mass. 10; Upton *v.* Sturbridge Mills, 111 Mass. 446; Harrison *v.* Hixson, 4 Blackf. (Ind.) 226; Gurney *v.* Behrend, 3 Ellis & B. 622; Miner *v.* Norwich, etc., R. Co., 32 Conn. 91; Mosely *v.* Lord, 2 Conn. 389; Cox *v.* Harden, 4 East, 211.

1. Wait *v.* Baker, 2 Ex. 1; Dawes *v.* Peck, 8 T. R. 330; Dutton *v.* Solomonson, 3 B. & P. 582; London, etc., R. Co. *v.* Bartlett, 7 H. & N. 400; Dunlop *v.* Lambert, 6 Cl. & Fin. 600; Johnson *v.* Stoddard, 100 Mass. 306; Stanton *v.* Eager, 16 Pick. 367; Magruder *v.* Gage, 33 Md. 344; Waldron *v.* Romaine, 22 N. Y. 368; Rodgers *v.* Phillips, 40 N.Y. 519; Garland *v.* Lane, 46 N. H. 245; Arnold *v.* Prout, 51 N. H. 587; Griffith *v.* Ingledew, 6 Serg. & Rawle (Pa), 429; Cross *v.* O'Donnell, 44 N. Y. 661; Watkins *v.* Paine, 57 Ga. 50; Ranny *v.* Higby, 5 Wis. 62; Putnam *v.* Tillotson, 13 Metc. (Mass.) 517; Whitcomb *v.* Whitney, 24 Mich. 486; Terry *v.* Wheeler, 25 N. Y. 520; Hyde *v.* Lathrop, 2 Abb. (N.Y.) App. Dec. 436; South-Western Freight Co. *v.* Stanard, 44 Mo. 71; Dexter *v.* Norton, 55 Barb. (N.Y.) 272; Bradley *v.* Wheeler, 44 N. Y. 495; Dyer *v.* Libby, 61 Me. 45.

2 Pennsylvania Co. *v.* Holderman, 69 Ind. 18; s. c., 1 Am. & Eng. R. R. Cas. 285.

3. The cases usually cited as originating the doctrine are: Southcote's Case, 4 Coke, 84; Morse *v.* Slue, 1 Ventris, 238; Gibbon *v.* Paynton, 4 Burr. 2298; Forward *v.* Pittard, 1 T. R. 27; Smith *v.* Horne, 8 Taunt. 144.

In Nicholson *v.* Willan, 5 East. 507, the carrier had posted a notice upon a board in his office that he would not be liable for goods beyond the value of £5, unless insured and paid for at the time of consignment, and unless its value should be demanded within one month after damage had occurred. The plaintiff knew of such notice, and consigned a package containing £58 without giving information of its value. Upon proof of loss the jury awarded him £5, but Lord Ellenborough refused him even this amount, and said: "Considering the length of time during which and the extent and universality in which the practice of making such special acceptances of goods for carriage by land and water has now prevailed in this kingdom, under the observation and with the allow-

ance of courts of justice, and with the sanction and countenance of the legislature itself, which is known to have rejected a bill brought in for the purpose of narrowing the carrier's responsibility in certain cases, on the ground that such a measure being unnecessary, inasmuch as carriers were deemed fully competent to limit their own responsibility in all cases by special contract; considering also that there is no case to be met with in the books in which the right of the carrier thus to limit his own responsibility by special contract has ever been by express decision denied, we cannot do otherwise than sustain such right, however liable to abuse and productive of inconvenience it may be, leaving to the legislature, if it shall think fit, to apply such remedy hereafter as the evil may require."

In Riley *v.* Horne, 5 Bing. 217, Ch. J. Best observes: "As the law makes the carrier an insurer, and as the goods he carries may be injured or destroyed by many accidents, against which no care on the part of the carrier can protect them, he is as much entitled to be paid a premium for his insurance of their delivery at the place of destination, as for the labor and expense of carrying them there. Indeed, besides the risk that he runs, his attention becomes more anxious, and his journey more expensive, in proportion to the value of his load. If he has things of great value contained in such small packages as to be the objects of theft or embezzlement, a strong and more vigilant guard is required than when he carries articles not easily removed, and which offer less temptations to dishonesty. He must take what is offered to him to carry to the place to which he undertakes to convey goods, if he has room for it in his carriage. The loss of one single package might ruin him. By means of negotiable bills, immense value is now compressed into a very small compass. Parcels containing these bills are continually sent by common carriers. As the law compels carriers to undertake for the security of what they carry, it would be most unjust if it did not afford them the means of knowing the extent of their risk. Other insurers, whether they divide the risk, which they generally do, amongst several different persons, or one undertakes for the insurance of the whole, always have the amount of what they are to answer for specified in the policy of insurance."

In Gibbon *v.* Paynton, 4 Burr. 2298, the carrier had given notice by advertisement and handbills that he would not be answerable for money, jewels, or other valuables, unless he had notice of them. The consignor, who was proved to have been cognizant of this limitation of liability, concealed £100 in some hay in an old nail-bag. The bag and hay were carried safely, but the money was lost. The plaintiff was not permitted to recover. Yates, J., considered the notice equivalent to a special acceptance, and Aston, J., hinted at the same ground. Lord Mansfield made no distinct reference to the question of notice, but said: "The party undertaking ought to be apprised what it is that he undertakes, and then he will or at least may take proper care. But he ought not to be answerable where he is deceived. Here he was deceived."

In Batson *v.* Donovan, 4 Barn. & Ald. 21, the carrier had given notice that he would not be liable for parcels of value unless entered and paid for accordingly. The consignor delivered for shipment a box containing bills and bank notes of the value of £4072, but he was not asked and did not disclose the value of the articles. The box was stolen, and in an action by the consignor against the carrier, the jury found for the defendant upon the question as to whether the facts constituted fair dealing with the carrier. The judges, with the exception of Best, C. J., decided the effect of the notice by the carrier to be to prevent the necessity for a particular inquiry by him as to value, the inference being, in such a case, that the consignor who fails to pay for the extraordinary value impliedly holds out the goods as articles of ordinary value. Under such circumstances the contract itself becomes a nullity. Bayley, J., observed: "The risk upon a parcel of great value is greater than that upon a small one. The value is a temptation to thieves to make attempts which, but for that value, they would not make. The omission, therefore, to apprise the coach proprietor of the value operates in two ways. It deprives the proprietors of the extra compensation they ought to have, and it prevents them from taking that extraordinary caution which, upon a parcel of extraordinary value, they naturally would take. The value is an ingredient to be taken into consideration, because that may be gross negligence in the case of a parcel of large value which would be ordinary care in the case of a parcel of small value. The plaintiffs having pre-

been quoted with approval, has shown that there seems to be only one point to which legitimately notices of carriers could be admitted, which is the regulation of the consideration for risk. In other words, that the carrier may lawfully stipulate by public notice that his insurance must be properly compensated, and the value of what he undertakes to carry must be declared, but that in other respects a notice cannot serve to release him from liability for negligence.[1] In England what was practically this result

vented this extra care being taken by the carrier, should bear the loss." Best, C. J., considered that when the carrier had given notice of the limited liability which he would assume in such cases, he was bound to inquire the value of the consignment, but that the owner was not bound to disclose the value unless asked. He distinguished the case from Gibbon *v.* Paynton, 4 Burr. 2298, and declared that a carrier who has given no notice is an insurer. If the carrier had given no notice and did not inquire the value, the consignor was not bound to say a syllable as to the value of the goods. The effect of such a notice as that in this case was to prevent the necessity of a particular inquiry in each case; its effect was not to limit the carrier's responsibility in case of misfeasance or negligence. The carrier having given the notice, was no longer an insurer of parcels of value, but was still liable for negligence or misfeasance even if their value be not declared. Silence did not amount to fraud, "and to this opinion," says Angell, "he has steadily adhered, and so strenuously, that in one case (Brooke *v.* Pickwick, 4 Bing. 218) he said he must continue to retain his opinion till the twelve judges decided he was wrong." Angell on Carriers (5th Ed.), § 266 citing Sleat *v.* Fagg, 5 B. & Ald. 342; Butt *v.* Great Western R., 11 C. B. 140; 7 Eng. L. & Eq. 443; Garnett *v.* Willan, 5 B. & Ald. 53; Riley *v.* Horne, 5 Bing. 217; Bignold *v.* Waterhouse, 1 Maule & S. 255.

Further reviews of the English cases may be found in Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234; Cole *v.* Goodwin, 19 Wend. 251; New York Cent., etc., R. *v.* Lockwood, 17 Wall. (U. S.) 357; Sager *v.* Railroad, 31 Me. 228.

1. One carrier frees himself from responsibility for fire. Maving *v.* Todd, 1 Stark. 79. Another from the common responsibility of the contract for negligence. Leeson *v.* Holt, 1 Stark. 186. One man is bound by a notice which has appeared in a newspaper that he is accustomed to read. Leeson *v.* Holt, 1 Stark. 186. Another person because a large board was stuck up in his office. Clark *v* Gray, 4 Esp. 177. Another is freed from the effect of the notice in the office because handbills were circulated of a different import Cobden *v.* Bolton, 2 Camp. 108. "Then, it is said, what if he cannot read? or if he does not go himself, but sends a porter, and he cannot read? or, what if he be blind and cannot see the placard? and thus difficulties multiply; the courts are filled with questions, and the public left in uncertainty." 1 Bell's Com. 382.

The same writer has pointed out the true foundation and limit of the carrier's limitation of liability by notice, and his remarks are frequently quoted with approval. "The unhappy consequences of this doctrine are to be ascribed, as it would seem, to a wrong bias unfortunately admitted in the progress of its establishment from not keeping a steady eye upon the principles which ought to have regulated the practice of giving notices. There seems to be only one point to which, legitimately, notices of carriers could be admitted, viz., the regulation of the consideration for risk. Saving always the power of making an express contract, the effect of mere notice ought justly to be restricted to this point; as to which alone it is competent for a carrier to refuse employment. Had this been attended to, the law on this subject would have been conformable to the general system of jurisprudence, and a sort of legislative power never would have been assumed by common carriers. Any exorbitancy of charge would at once have been brought to a true standard by judicial determination; while the responsibilities of the carrier, under the common law of his contract, and on the principles of public policy, would have remained untouched but by positive agreement in each individual." 1 Bell's Com. 382; approved in Southern Exp. Co. *v.* Newby, 36 Ga. 635.

It is probable that the effect of these and other decisions involving the carrier's right to limit his common-law liability by contract was to permit him to

was accomplished by statute. The Carrier's Act[1] and the Railway and Canal Traffic Act[2] brought about what was substantially a return to the rules of the common law. The provisions of the former regarding the declaration of the value of specific articles have been already set forth.[3] The latter[4] contains, *inter alia*, the following provisions: It renders the carrier liable for the loss of or injury to animals and goods by the neglect or default of the company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in any wise limiting such liability; and declares such notices, conditions, or declarations to be null and void. The carrier, however, is permitted to make such conditions with respect to the receiving, forwarding, and delivering what is consigned, as may be construed by the courts to be just and reasonable.

(*a*) *In England.*—It is accordingly accepted as the settled law of *England*, that no general notice given by the carrier, however published, will limit his liability.[5]

(*b*) *In Canada.*—In *Canada*, under statutes modelled upon the English, and containing substantially the same provisions, it is settled that notices, conditions, or declarations where the damages arises from any negligence or omission of the carrier or his servants are ineffectual to limit his liability.[6]

provide by special contract against liability even for gross negligence. Carr *v.* Lancashire R., 7 Exch. 704; Austin *v.* Manchester R., 10 C. B. 454; Great Northern R. *v.* Morville, 21 Law Jour. N. S. Q. B. 319; York R. *v.* Crisp, 14 C. B 527; Hughes *v.* Great Western, etc., R., 14 C. B. 637; Slim *v.* Great Northern, etc., R., 14 C. B. 647; Chippendale *v.* Lancashire, etc., R., 21 Law Jour. N. S. Q. B. 22; Austin *v.* Manchester R., 16 Q. B. 600; Shaw *v.* York R., 13 Q. B. 547.

1. The Carriers Act (11 Geo. IV. and 1 Wm. IV. c. 68), to which attention has been called above (*supra*, DECLARATION OF VALUE), restored to some extent the operation of the common law. Hollister *v.* Nowlen, 19 Wend. (N.Y.) 234; Story on Bailm. (9th Ed.) § 554; Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357.

2. 17 & 18 Vict. c. 31.

3. See *supra*, this title, DECLARATION OF VALUE.

4. The Railway and Canal Traffic Act (1854), 17 and 18 Vict. cap. 31, contains, *inter alia*, the following provisions: Every such company as aforesaid shall be liable for the loss of or for any injury done to animals and goods by the neglect or default of the company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void. Provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods or things as shall be adjudged by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable. The act goes on to provide that the carrier shall not be liable beyond a limited amount in certain cases unless the value is declared and extra payment made by the consignor. Proof of the value is placed upon the person claiming compensation. No special contract is binding unless signed by the consignor or his representative. A final proviso declares that nothing contained in the act shall alter or affect the rights, privileges, or liabilities of any such company under the Carriers Act, with respect to articles of the descriptions mentioned in the said act.

5. Peik *v.* North Staffordshire R., 52 L. J. Q. B. 241; 10 H. L. C. 473; Cohen *v.* South-Eastern R., 46 L. J. Ex. 417; L. R. 2 Exch. Div. 253; Doolan *v.* Midland R., L. R. 2 H. L. 792; 25 W. R. 882. *Compare* Angell on Carriers (5th Ed.), § 54; Bodenham *v.* Bennett, 4 Price, 31; Wyld *v.* Pickford, 8 M. & W. 461; Hinton *v.* Dibbin, 2 Q. B. 646.

6. Grand Trunk R. *v.* Vogel, 11 Supreme Court of Canada, 612; s. c., 27

(c) *In the United States.*—In the United States it is the generally accepted doctrine that the carrier may limit his liability by public notice of a reasonable requisition as to manner of consignment and entry of goods, their character, their value, and his own charges.[1] It has also been held that a notice by the carrier stipulating that he shall not be liable for any loss unless the claim therefor shall be made in writing at his office within a limited time after the date of the contract is reasonable and valid.[2] The

Am. & Eng. R. R. Cas. 18. See also, Fitzgerald *v.* Grand Trunk R., 4 Ontario App. 601; s. c., 5 Supreme Court of Canada, 209.

1. 2 Greenleaf on Evidence, sec. 215; Belger *v.* Dinsmore, 51 N. Y. 166; Fibel *v.* Livingston, 64 Barb. (N. Y.) 179; Magnin *v.* Dinsmore, 62 N. Y. 35; Oppenheimer *v.* U. S. Exp. Co., 69 Ill. 62; Boorman *v.* Express Co., 21 Wis. 152; Kallman *v.* Express Co., 3 Kans. 205; Brehone *v.* Adams Exp. Co., 25 Md. 328; Snider *v.* Adams Exp. Co., 63 Mo. 376; Ketchum *v.* Am. Exp. Co., 52 Mo. 390; Fish *v.* Chapman, 2 Ga. 349; McMillan *v.* Michigan, etc., R., 16 Mich. 79; Moses *v.* Boston, etc., R., 24 N. H. 71; Farmers' Bank *v.* Champlain Transp. Co., 23 Vt. 186; Lawrence *v.* New York, etc., R., 36 Conn. 63; Judson *v.* Western R., 6 Allen (Mass.), 485; Hopkins *v.* Westcott, 6 Blatchf. C. C. 64; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344.

In Belger *v.* Dinsmore, 51 N. Y. 166, the receipt for a trunk read as follows: "In no event shall the holder hereof demand beyond the sum of fifty dollars, at which the article forwarded is hereby valued, unless herein otherwise expressed or unless specially insured by him and so specified in this receipt, which insurance shall constitute the limit of the liability of the Adams Express Company." The court observes: "The plaintiff in this case must be assumed to have paid freight on the trunk in question and its contents, worth $467, at the rate prescribed for an article not exceeding fifty dollars in value. He was then willing and agreed to assume all risks for the excess in value, and to relieve the company from all liability on account thereof beyond that sum. He can with no more propriety or justice claim remuneration therefor than the company could demand additional freight therefor."

2. Provision for Thirty Days' Notice Construed.—The Southern Express Co. received for carriage a package of money, for which it gave a receipt in which was the following stipulation: "This company is not liable in any manner, or to any extent, for any loss, damage, or detention of such package or of its contents, or of any portion thereof, occasioned by the acts of God, the public enemy, mobs, riots, and other casualties mentioned, unless specially insured by this company, and so specified in this receipt. In no event is this company to be liable for a greater sum than that above mentioned, nor shall it be liable for any such loss unless the claim therefor shall be made in writing at this office within thirty days from this date." A loss of $200 occurred, and suit was brought to collect this deficit. No notice of the loss was given to the company until six or seven months after the date of the receipt. The court charged the jury that the stipulation in the receipt for thirty days' notice of the loss need not be considered by them, because that stipulation applied only to the case of a loss by the act of God, or of a mob, or the other specified causes of exception for which defendant was not to be liable unless it was so specified in the contract. This was held erroneous; that the words "such loss" have reference to the loss of the package of money, and not to the means by which the loss was occasioned. The court say: "We think the obvious construction of the contract is that the company is not to be liable for loss, damage, etc., by the act of God, by mobs, riots, etc., unless it expressly undertakes to be so liable in the receipt, and no such undertaking was entered into in this case; and, further, that for loss, damage, or detention by means other than those specially mentioned as exonerating the company from liability, the company is entitled to thirty days' notice from the date of contract, of such loss, by the express terms of said contract." Southern Exp. Co. *v.* Glenn, 1 S. W. Repr. 102. See also Nicholson *v.* Willan, 5 East, 507; Lewis *v.* Railway, 5 H. & N. 867; Express Co. *v.* Caldwell, 21 Wall. (U. S.) 264; Rice *v.* Railroad, 63 Mo. 314; U. S. Exp. Co. *v.* Harris, 51 Ind. 127; Westcott *v.* Fargo, 61 N. Y. 551; Black *v.* Wabash, etc., R., 111 Ill. 351; s. c., 25 Am. & Eng. R. R. Cas. 388. *Compare* Adams Exp. Co. *v.* Reagan, 29 Ind. 21.

weight of authority in the various States is clearly to the effect, however, that the carrier cannot limit his liability for negligence by notice. The law upon the subject in the various States is as follows: In *Alabama*[1] carriers cannot limit their liability by notice in a receipt unless assented to by the consignor. To the same effect is the law of *Connecticut*.[2] In *Illinois*[3] notices by advertisement, conditions printed on the back of a bill of lading, receipt ticket, or other voucher of the carrier, are ineffectual to limit his liability. In *Indiana*,[4] *Kentucky*,[5] and *Louisiana*[6] it is settled that the carrier cannot limit his liability by notice. In *Maine*[7] the common-law liability of the carrier may be restricted by notice, but not unless the consignor has knowledge of the notice, and either expressly or impliedly assents thereto. This is also the law of *New Hampshire*.[8] In *Michigan*[9] and *Mississippi*[10] the carrier cannot limit his liability by notice. In *New York*[11] the carrier cannot screen himself by notice whether brought home to the consignor or not. It is said that notice is no evidence of assent on the part of the consignor, and he has a right to repose on the common-law liability of the carrier who cannot relieve himself from such liability by any act of his own. In *North Carolina*,[12] although a general notice of "baggage at owner's risk" will not avail the carrier, he may by special notice, brought to the knowledge of

1. **Alabama.**—Southern Exp. Co. *v.* Caperton, 44 Ala. 101; Southern Exp. Co. *v.* Crook, 44 Ala. 468; Southern Exp. Co. *v.* Armstead, 50 Ala. 350; Steele *v.* Townsend, 37 Ala. 247.

"At owner's risk" only affects carrier's liability as an insurer. Mobile, etc., R. *v.* Jarboe, 41 Ala. 644.

2. **Connecticut.**—Peck *v.* Weeks, 34 Conn. 145; Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539; Derwoort *v.* Loomer, 21 Conn. 245.

3. **Illinois.**—Western Transp. Co. *v.* Newhall, 24 Ill. 466; Illinois Central, etc., R. *v.* Frankenberg, 54 Ill. 88.

In Western Transp. Co. *v.* Newhall, 24 Ill. 466, the court observes: "He may qualify his liability by a general notice to all who employ him of any reasonable requisition to be observed on their part in regard to the manner of delivery and entry of parcels, and the information to be given him of their contents, the rates of freight, and the like; as, for example, that he will not be responsible for goods above the value of a certain sum unless they are entered as such and paid for accordingly." *Compare* Adams Exp. Co. *v.* Stettaners, 61 Ill. 184; Oppenheimer *v.* United States Exp. Co., 69 Ill. 62; Boskowitz *v.* Adams Exp. Co., 9 Cent. L. J. 389 (1879), dissenting opinion of Sheldon, J.

4. **Indiana.**—Evansville, etc., R. *v.* Young, 28 Ind. 516; Indianapolis, etc., R. *v.* Cox, 29 Ind. 360.

5. **Kentucky.**—Adams Exp. Co. *v.* Nock, 2 Duv. (Ky.) 562; Louisville, etc., R. *v.* Hedger, 9 Bush (Ky.), 645.

6. **Louisiana**—Baldwin *v.* Collins, 9 Rob. (La.) 468; Roberts *v.* Riley, 15 La. Ann. 103; New Orleans Mut. Ins. Co. *v.* New Orleans, etc., R., 20 La. Ann. 302; Simon *v.* The Fung Shuey, 21 La. Ann. 363.

7. **Maine.**—Bean *v.* Green, 12 Me. 422; Sager *v.* Portsmouth, etc., R., 31 Me. 228; Fillebrown *v.* Grand Trunk R., 55 Me. 462; Willis *v.* Grand Trunk R., 62 Me. 488; Little *v.* Boston, etc., R., 66 Me. 239.

8. **New Hampshire.**—Moses *v.* Boston, etc., R., 24 N. H. 71. See also Bennett *v.* Dutton, 10 N. H. 481.

9. **Michigan.**—American Transp. Co. *v.* Moore, 5 Mich. 368; McMillan *v.* Michigan, etc., R., 16 Mich. 79.

10. **Mississippi.**—Mobile, etc., R. *v.* Weiner, 49 Miss. 725.

11. **New York.**—Hollister *v.* Nowlen, 19 Wend. 234; Cole *v.* Goodwin, 19 Wend. 251; Camden, etc., Transp. Co. *v.* Belknap, 21 Wend. 354; Rawson *v.* Pennsylvania R., 48 N. Y. 212; Blossom *v.* Dodd, 43 N. Y. 264.

12. **North Carolina.**—Williams *v.* Branson, 1 Murphey, 417; Smith *v.* North Carolina, etc., R. 64 N. C. 235. *Compare* Capehart *v.* Seaboard, etc., R., 77 N. Car. 355.

the owner, reasonably qualify his liability for the loss of particularly perishable or unusually valuable articles. In *Ohio* [1] the carrier cannot restrict his liability by notice, verbal, written, or printed, even when brought to the knowledge of the consignor. In *Tennessee* [2] the carrier cannot limit his liability at common law by a general notice. In *Texas* [3] a statute prevents the carrier from limiting or restricting his liability as it exists at common law by any general or special notice, or by inserting explanations in the bill of lading or memorandum given upon the receipt of the goods for transportation, or in any other manner whatever. And no special agreement made in contravention of the foregoing is held valid. In *Vermont* [4] the carrier cannot restrict his liability by general notice, unless clearly proved to have been assented to by the employer. In the *United States* courts [5] it is the settled doctrine that the carrier cannot limit his liability by notice. And the acceptance by a consignor without objection of a receipt containing notice of exemptions printed on its back does not amount to such a contract as under the rule here established is required. In *Massachusetts* [6] the rule is that the carrier may limit his responsibility for property entrusted to him by notice containing reasonable and suitable restrictions, if brought home to the owner of the goods delivered for transportation, and assented to clearly and

1. **Ohio.**—Davidson *v.* Graham, 2 Ohio St. 131. See Union Mut. Ins. Co. *v.* Indianapolis, etc., R., 1 Disney, 480; Jones *v.* Voorhees, 10 Ohio, 145.

In Gaines *v.* Union Transp. Co., 28 Ohio St. 418, Johnson, J., declares the following to be the settled law in that State: "That a special exception of the liability of a common carrier for any loss which may arise from damage by fire happening without his neglect or fault, may be lawfully created by special contract between the parties, though it cannot be made by general notice known or unknown to the party engaging the services of the common carrier. Davidson *v.* Graham, 2 Ohio St. 131; Graham & Co. *v.* Davis & Co., 4 Ohio St. 362; Welsh *v.* Pittsburgh, etc., R., 10 Ohio St. 65; Cincinnati, etc., R. *v.* Pontius, 19 Ohio St. 221."

2. **Tennessee.**—Walker *v.* Skipwith, Meigs, 502.

3. **Texas.**—A statute provides "that railroad companies and other common carriers of goods, wares, and merchandise for hire, within this State, on land, or in boats or vessels on the waters entirely within the body of this State, shall not limit or restrict their liability, as it exists at common law, by any general or special notice, nor by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation, nor in any other manner whatever; and no special agreement made in contravention of the foregoing provisions of this section shall be valid." Paschal's Digest, art. 4253.

4. **Vermont.**—Farmers', etc., Bank *v.* Champlain Transp. Co., 18 Vt. 131; s. c., 23 Vt. 186; Kimball *v.* Rutland, etc., R., 26 Vt. 247; Blumenthal *v.* Brainerd, 38 Vt. 402; Mann *v.* Birchard, 40 Vt. 326.

5. **United States Court.**—Railroad Co. *v.* Manufacturing Co., 16 Wall. (U. S.) 318; Ayres *v.* Western Co., 14 Blatchf. C. C. 9; The Pacific, 1 Deady C. C. 17; The May Queen, 1 Newb. C. C. 465.

In New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344, the court observes: "We lay out of the case the notices published by the respondents seeking to limit their responsibility, because the carrier cannot in this way exonerate himself from duties which the law has annexed to his employment."

6. **Massachusetts.**—In Buckland *v.* Adams Exp. Co., 97 Mass. 124, the court remarks: "It is no longer open to controversy in this State that a common carrier may limit his responsibility for property intrusted to him by a notice containing reasonable and suitable restrictions, if brought home to the owner of the goods delivered for transportation, and assented to clearly and unequivocally by

unequivocally by him. In *Pennsylvania*[1] the carrier may limit his liability by a clear and explicit general notice brought home to the consignor. In *Maryland*[2] and *New Jersey*[3] the question has arisen, but decision upon it was avoided. In *South Carolina*[4] it is unsettled.

5. CONTRACTS LIMITING LIABILITY.—Whether the common carrier's contract is "just and reasonable" in the eyes of the law may be said to be the hinge upon which it turns. This result has been reached in England after a long and determined contest between the carrier who has strenuously resisted the burden of his common-law responsibility and his employer, who has with equal earnestness urged that this burden should not be lightened. It must be conceded that the exceptional measure of responsibility imposed upon common carriers, as contrasted with other bailees, cannot find a satisfactory reason for existence in the principle which gave it birth, viz.: imperfect police, imperfect protection from the government, and frequent losses by robbery. Founded alone upon this basis the rule must have died. The latest cases, writers and statutes make it evident, however, that whatever part the principle *stare decisis* may have played, the present development of the law finds its explanation in the public nature of the carrier's employment, and in his public character as a corporation. This is clearly illustrated by the long line of cases in which his contracts have been construed, and in the statutes by which they have been regulated. In one of the leading American cases, Railroad Co. *v.* Lockwood,[5] the able and elaborate opinion of Mr. Justice Bradley points out that it was for the reason that the limitations of liability first introduced by common carriers into their notices and contracts were just and reasonable that the courts sustained them. Limitations against liability for acts of God and the public enemy, for valuable packages contained in small compass, for perishable articles, for live animals liable to become frightened and unruly and thus to injure themselves, were just and reasonable, and were therefore sustained. For what is, in effect, precisely the same

him." See Thomas *v.* Boston R., 10 Met. 499; Judson *v.* Western R., 6 Allen, 486; Perry *v* Thompson, 98 Mass. 249; Gott *v.* Dinsmore, 111 Mass. 45.

1. **Pennsylvania.**—Beckman *v.* Shouse, 5 Rawle, 179; Bingham *v.* Rogers, 6 W. & S. 495; Camden, etc., R. *v.* Baldauf, 16 Pa. St. 67; Laing *v.* Colder, 8 Pa. St. 479; Verner *v.* Sweitzer, 32 Pa. St. 208; Pennsylvania R. *v.* Schwarzenberger, 45 Pa. St. 208; Farnham *v.* Camden, etc., R., 55 Pa. St. 53.

In Laing *v.* Colder, 8 Pa. St. 479, Bell, J., observes: "The expediency of recognizing in him (the carrier) a right to do so by general notice, such as was given here, has been strongly and justly questioned, and in some of our sister States altogether denied. Were the question an open one in Pennsylvania, I should, for one, unhesitatingly follow them in repudiating a principle which places the bailor absolutely at the mercy of the carrier, whom, in the vast majority of cases, he cannot but choose to employ."

2. **Maryland.**—Barney *v.* Prentiss, 4 H. & J. 317; Brehme *v.* Adams Exp. Co., 28 Md. 328. But see Baltimore, etc., R. *v.* Brady, 32 Md. 333.

3. **New Jersey.**—Gibbons *v.* Wade, 8 N. J. Law, 255.

4. **South Carolina.**—Levy *v.* Southern Exp. Co., 4 S. Car. 234; Patton *v.* Magrath, Dudl. 159.

5. Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357.

reason the limitations upon the common carrier's right to contract are imposed. A mere inequality in the position of a shipper who wishes his goods transported and the carrier who monopolizes the best and perhaps the only outlet, is a matter which, it has been said, in no way affects the public morals or conflicts with the public interests, and does not justify a court or legislature in saying that the parties may not themselves limit the precise extent of their respective risks and liabilities.[1] But that there are well settled restrictions both in England and the United States upon the carrier's freedom to contract can be satisfactorily explained upon the ground that his duties are public, that the nature of those duties places him in a position where he can take an undue advantage of the shipper, and that his character as a corporation—usually powerful and wealthy—serves to add new strength to his position, but, at the same time, makes him subject to legislative and judicial control to prevent an abuse of his powers and privileges.[2]

The cases which will show the historical development of the English law have already been cited, and many of them abstracted, under prior subdivisions of this title. The particular terms of the carrier's contracts and their effect will be found treated under another title.[3] The exact present status of the English law seems to have been occasionally misunderstood and misstated. The effect of the Carriers Act[4] has been already noted. The Railway and Canal Traffic Act,[5] and subsequent statutes extending its operations, under certain circumstances, to sea transit, declared that special contracts limiting the carrier's liability must be "just and reasonable" in order to be valid. These words have been frequently construed, and the deductions to be made from the cases seem to be as follows:

Any stipulation or condition, framed without limitation or exception, to exempt a company from liability for its own negligence or misconduct, or that of its servants or agents, is unjust and unreasonable.

A condition is reasonable which reduces a company's liability to a minimum if it is coupled with compensating advantages to the customer (such as cheapness of carriage), and the latter has the alternative of getting rid of the condition by paying a reasonably higher rate.

A condition is reasonable which exempts a company from any liability for extraordinary loss to the customer (such as that of market or profit, or deterioration from innate infirmity) caused by those ordinary detentions to which goods traffic is subject; especially if the goods are such as the company only profess to carry on special trains, and are peculiarly liable to deterioration.[6]

1. Smith *v.* New York Central R., 24 N.Y. 222; Parsons *v.* Monteath, 13 Barb. (N. Y.) 353; Dorr *v.* New Jersey Steam Nav Co., 11 N. Y. 485.

2. Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357; and cases cited *infra.*

3. See BILLS OF LADING.

4. (1 Will. IV. cap. 68.) See *supra*, this title, DECLARATION OF VALUE.

5. (17 & 18 Vict. cap. 31.)

6. In his admirable little epitome of the Law of Carriers Mr. Redman has de-

duced the following principles from the decisions upon this act and subsequent statutes extending its operation to sea transit (31 & 32 Vict. c. 119, s. 14 & 16, and 34 & 35 Vict. c. 78, s. 12):

1. That all general notices to limit the liability of a company are ineffectual.

2. That the company can only limit its common-law liability by contracts which are signed by the sender or his agent delivering the goods or live stock to the company.

3. Even if the contract is so signed, it is not binding upon the customer unless it is just and reasonable in its terms.

4. These rules apply whether the transit is by sea or land, in vessels belonging to the company or in those not belonging to them, but by which they procure the traffic to be carried. Redman's Law of Railway Carriers, pp. 8, 69, 75.

Reasonable Conditions Exempting Carriers from Liability.—In the following cases the conditions of the carrier's contract were held to be reasonable: Goods carried at special rates. Simons *v.* Great Western, etc., R., 26 L. J. C. P. 25, 18 C. B. 805. Loss of market. White *v.* Great Western R., 26 L. J. C. P. 158, 2 C. B. N. S. 7; see also Lord *v.* Midland R., L. R. 2 C. P. 339, 36 L. J. C. P. 170. Injury to live stock. Pardington *v.* South Wales R., 26 L. J. Exch. 105, 1 H. & N. 392; but see Rooth *v.* North Eastern R., 36 L. J. Exch. 83. Claim to be made within limited time. Simons *v.* Great Western R., 26 L. J. C. P. 25, 18 C. B. 805; and see Lewis *v.* Great Western R., 29 L. J. Exch. 425, 5 H. & N. 867. Incorrect description. Lewis *v.* Great Western, etc., R.; 29 L. J. Exch. 425, 5 H. & N. 867. Detention of fish. Bell *v.* South Devon R., 29 L. J. Exch. 441; affirmed, 3 H. & C. 337. Liability for damage to horses and dogs. Harrison *v.* London, etc., R., 31 L. J. Q. B. 113, 2 B. & S. 152; but see Ashenden *v.* London, etc., R., 28 W. R. 511. Goods to be carried beyond company's line. Aldridge *v.* Great Western R., 33 L. J. C. P. 161, 15 C. B. N. S. 582. Low rates of carriage. Robinson *v.* Great Western R., 35 L. J. C. P. 123; approved and followed, D'Arc *v.* London, etc., R., L. R. 9 C. P. 325, 22 W. R. 919. Reasonable alternative. Great Western R. *v.* Glenister, 22 W. R. 72. Wilful misconduct of company's servants. Lewis *v.* Great Western R., 47 L. J. Q. B. 131, L. R. 3 Q. B. D. 45; Harris *v.* Midland R., 25 W. R. 63; Haynes *v.* Great Western R., 41 L. T. N. S. 436. Fair option of alternative must be allowed. Lloyd *v.* Waterford, etc., R., 15 Ir. C. L. 37; Foreman *v.* Great Western R., 38 L. T. N. S. 851.

A contract which is on its face apparently unjust and unreasonable may be considered valid if the party forwarding the goods had an option which he has declined to forward them on just and reasonable terms. Gallagher *v.* Great Western R. Co., 18 Ir. C. L. N. S. 326.

In Manchester, etc., R. *v.* Brown, L. R. 8 H. L. Cases, 703; s. c., 16 Am. & Eng. R. R. Cas. 174, where a fish merchant delivered fish to a railway company to carry upon a signed contract relieving the company as to all fish delivered by him "from all liability for loss or damage by delay in transit or from whatever other cause arising," in consideration of the rates being one fifth lower than where no such undertaking was granted; the contract to endure for five years. The servants of the company accepted the fish, although from pressure of business they could not carry it in time for the intended market, and the fish lost the market. *Held*, reversing the decision of the Court of Appeal, that upon the facts the merchant had a *bona fide* option to send fish at a reasonable rate with liability on the company as common carriers, or at the lower rate upon the terms of the contract; that the contract was in point of fact just and reasonable within the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31,) s. 7, and covered the delay; and that the company were not liable for the loss.

Unreasonable Conditions Exempting Carrier from Liability.—In the following cases the conditions of the carrier's contract were held to be unreasonable: Conditions framed to exempt the company from loss or injury, however caused, including therefore gross negligence and even fraud or dishonesty on the part of the company's servants, are bad. Ashenden *v.* London, etc., R., 28 W. R. 511. Company not to be liable for their own defaults or defects of station. Rooth *v.* North Eastern R., 36 L. J. Exch. 83, L. R. 2 Eq. 173. Company not to be liable for negligence of their servants. Doolan *v.* Midland R., L. R. 2 App. Cas. 792, 32 L. T. N. S. 317. Company not to be liable for hazardous goods unless insured. Peek *v.* North Staffordshire R., 32 L. J. Q. B. 241, 10 H. L. Cas. 473. Not liable for loss, etc., of goods imperfectly packed. Simons *v.* Great Western R., 26 L. J. C. P. 25, 18 C. B. 805; and see Garton *v.* Bristol, etc., R., 30 L. J. Q.

It is sometimes said that in the United States the English cases have no application, because they involve constructions of statutes which are of no force here. But in almost every State it is the

B. 273, 1 B. & S. 112. Conveyance to be entirely at the owner's risk. McManus *v.* Lancashire, etc., R., 28 L. J. Exch. 353, 4 H. & N. 327; Gregory *v.* West Midland R., 33 L. J. Exch. 155, 2 H. & C. 944; McCance *v.* London, etc., R., 31 L. J. Exch. 65, 7 H. & N. 477. Company not liable for "empties." Aldridge *v.* Great Western, etc., R., 33 L. J. C. P. 161, 15 C. B. N. S. 582. Overcarriage, detention or delay in conveying or delivering animals, however caused. Allday *v.* Great Western R., 34 L. J. Q. B. 5, 5 B. & S. 903; Kirby *v.* Great Western R., 18 L.T.N. S. 658. "Packed parcels"—that is, packages of common carriers containing several parcels of different persons packed together—to be charged 50 per cent above ordinary rates. Garton *v.* Bristol, etc., R., 30 L. J. Q. B. 293, 1 B. & S. 112.

"There is no such thing as reasonableness in the abstract, and in dealing with conditions by which a company limit their liability it is necessary to take into consideration the facts with reference to which they would be reasonable or unreasonable. (Lewis *v.* Great Western R., 47 L. J. Q. B. 131, L. R. 3 Q. B. Div. 45, per Cotton, L. J.) For a condition reasonable as to one state of facts may be applied to another state of facts which makes it unreasonable. (Gregory *v.* West Midland R., 33 L. J. Exch. 155, 2 H. & C. 944.) And a condition applying to live animals and dead stock may be good as to the one and void as to the other. (Rooth *v.* North Eastern R., 36 L. J. Exch. 83, L. R. 2 Exch. 173, per Channell, B.) The reasonableness or unreasonableness of a condition will materially depend upon the nature of the articles to be conveyed, the degree of risk attendant upon their conveyance, the rate of charge made, and whether the railway company were bound by the common law or by statute to carry the articles on being paid the customary hire, or whether it was in their power to reject them altogether, and refuse to carry them on any terms, and whether or not the customer had a reasonable alternative offered of having the goods carried free from such restrictive conditions."

The burden of proving the reasonableness of a condition lies upon the company. The most cogent evidence in favor of reasonableness is to show that the condition was not forced upon the customer, but that he had a fair alternative of getting rid of the condition, and yet agreed to it. Lewis *v.* Great Western R., 47 L. J. Q. B. 131, L. R. 3 Q. B. Div. 45.

In Rooth *v.* North Eastern R.—36 L. J. Exch. 83, L. R. 2 Exch. 173—it was doubted whether a condition can be severed so as to allow it to be good in part and bad in part; and in a case at *nisi prius*—Kirby *v.* Great Western R., 18 L. T. N. S. 658—Martin, B., held that a whole set of conditions in a consignment note is bad if any part of it is unreasonable. A contrary rule has, however, been acted upon in other cases, and in Simons *v.* Great Western R., 26 L. J. C. P. 25, 18 C. B. 805, Jervis, C. J., said: "I think we are bound to look at the particular matters relied on to see if they are just and reasonable; and we are not entitled to look through the whole of the regulations, some of which are not relied upon, to see if any of them may be considered unjust or unreasonable." Redman's Law of Railway Carriers, p.65.

Certain cattle were forwarded upon a railway, the freight being prepaid. The bill of lading provided that they were to be "at the owner's own risk." Through the negligence of the carrier's servants the fact that the freight had been prepaid was not known at the point of destination. The cattle were accordingly detained there some time and injured in consequence. *Held*, that the clauses of the bill of lading had no application, and that the carrier was liable. Gordon *v.* Great Western R. Co., 45 L. T. R. N. S. 509; s. c., 3 Am. & Eng. R. R. Cas. 619.

Where a carrier, in consideration of a reduced rate of freight, entered into a special contract stipulating for a limitation of liability, and a "risk note" to that effect was signed by the shipper, it was held that the contract was reasonable and binding; it appearing that the carrier was also accustomed to carry goods without any limitation, and that the shipper knew that fact when he signed the "risk note." Brown *v.* Manchester S. & L. R. Co., 46 L. T. Rep. N. S. 389. See also Doolan *v.* Midland R. Co., L. R. 18, 10 C. L. 47; Moore *v.* Midland R. Co., I. R. 8 C. L. 234, 9 C. L. 20.

well-settled rule that the carrier cannot by contract relieve himself from liability for negligence. In determining whether or not a given contract has that effect, its character for justice and reasonableness, in view of the principles already adverted to, public policy, and the like, is the practical test applied. Several of the States have enacted laws adopting some of the essential features of the English statutes, and the recent passage of the Inter-State Commerce Act will still further tend to establish the law in the two countries upon substantially the same basis.[1]

By the clear weight of authority in England,[2] Canada,[3] and the United States, and almost without exception in the States of the Union, the rule has been adopted that the common carrier can make no contract the effect of which will be to exempt him from liability for negligence. In the United States courts the rule is thus stated: no contract by a common carrier for an exemption from responsibility can be sustained as being lawful unless it is just and reasonable in the eye of the law, and a contract by

1. See the "Annotated Interstate Commerce Act," with full text of the English and American statutes and complete annotation, by Adelbert Hamilton, Esq., Editor of American and English Railroad Cases, 27 Am. & Eng. R. R. Cas., Appendix (Edward Thompson, publisher, 1887).

2. See cases cited *supra*.

3. In Grand Trunk R. *v.* Vogel, 11 Supreme Court of Canada, 612; s. c., 27 Am. & Eng. R. R. Cas. 18.

A dealer in horses hired a car from the Grand Trunk R. Co. for the purpose of transporting his stock over their road, and signed a shipping note by which he agreed to be bound by the following, among other, conditions:

"1. The owner of animals undertakes all risks of loss, injury, damage, and other contingencies, in loading, etc.

"3. When free passes are given to persons in charge of animals, it is only on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind on the part of the company or their servants, or of any other person or persons whomsoever, causing or tending to cause the death, injury, or detention of any person or persons travelling upon any such free passes—the person using such pass takes all risks of every kind, no matter how caused."

The horses were carried over the Grand Trunk Railway in charge of a person employed by the owner, such person having a free pass for the trip; through the negligence of the company's servants a collision occurred by which the said horses were injured.

Held, per Ritchie, C. J., and Fournier and Henry, JJ., that under the General Railway Act, 1868 (31 Vict. ch. 68), sec. 20, subsec. 4, as amended by 34 Vict. ch. 43, sec. 5, re-enacted by Consolidated Railway Act, 1879 (42 Vict. ch. 9), sec 25, subsecs. 2, 3, 4, which prohibited railway companies from protecting themselves against liability for negligence by notice, condition, or declaration, and which applies to the Grand Trunk Railway Co., the company could not avail themselves of the above stipulation that they should not be responsible for the negligence of themselves or their servants.

Per Strong and Taschereau, JJ., that the words "notice, condition, or declaration," in the said statute, contemplate a public or general notice, and do not prevent a company from entering into a special contract to protect itself from liability.

Sir W. J. Ritchie, C. J., observes, after commenting upon the various statutes: "I think the object of the legislation was to prevent railway companies from escaping liability by entering into contracts whereby they could free themselves from liability for the neglect of themselves or their servants, whether by way of notice or condition or declaration, be the same by way of contract or otherwise; in other words, to prevent them from contracting themselves out of liability for negligence. To limit the clause as contended for would, in my opinion, entirely frustrate the intention of the

which a carrier would stipulate for exemption from responsibility for the negligence of himself or his servants is not just and reasonable in the eye of the law.[1] The general rule already stated

legislature, or enable the companies to do so with impunity."

1. "It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. Thus in Dorr *v.* New Jersey Steam Navigation Co., 11 N. Y. 485, the court sums up its judgment thus: 'To say the parties have not a right to make their own contract and to limit the precise extent of their own respective risks and liabilities in a matter no way affecting the public morals or conflicting with the public interests would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right.' Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect by introducing new rules of obligation. The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business. . . . If the customer had any real freedom of choice; if he had a reasonable and practicable alternative, and if the employment of the carrier was not a public one charging him with the duty of accommodating the public in the line of his employment—then if the customer chose to assume the risk of negligence it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse, to say the least, to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule that he must be responsible at all events. Hence the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public

has been adopted in the following States: *Alabama*,[1] *Arkansas*,[2]

carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law. Hence, as we before remarked, we regard the English statute, called the Railway and Canal Traffic Act, passed in 1854, which declared void all notices and conditions made by common carriers, except such as the judge at the trial or the courts should hold just and reasonable, as substantially a return to the rules of the common law. It would have been more strictly so, perhaps, had the reasonableness of the contract been referred to the law instead of the individual judges. The decisions made for more than half a century before the courts commenced the abnormal course which led to the necessity of that statute giving effect to certain classes of exemptions stipulated for by the carrier may be regarded as authorities on the question as to what exemptions are just and reasonable. So the decisions of our own courts are entitled to like effect when not made under the fallacious notion that every special contract imposed by the common carrier on his customers must be carried into effect for the simple reason that it was entered into without regard to the character of the contract and the relative situation of the parties. Conceding, therefore, that special contracts made by common carriers with their customers limiting their liability are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident without any negligence or fraud on their part; when they ask to go still further and to be excused for negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public operate with full force to divest the transaction of validity." Mr. Justice Bradley in Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357; Bank of Kentucky *v.* Adams Exp. Co., 93 U. S. 174; Railway Co. *v.* Stevens, 95 U. S. 655; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344; Railroad Co. *v.* Pratt, 22 Wall. (U. S.) 123; Nelson *v.* National Steamship Co., 7 Ben. C. C. 340; Rintoul *v.* New York Central, etc., R., 16 Am. & Eng. R. R. Cas. 144.

United States Courts.—A carrier cannot by stipulating against liability for a loss by fire exempt himself from liability for a loss occasioned by a fire caused by the negligence of himself or his servants. Muser *v.* Holland, 17 Blatchf. C. C. 412.

A carrier may lawfully limit its liability to a reasonable sum (*e.g.* $50) for the loss of a trunk or box, the contents of which is not revealed to it. Muser *v.* Holland, 17 Blatchf. C. C. 412.

Where a bill of lading stipulated that a carrier should not be responsible for loss or damage by fire, and the goods were stopped in transit by a mob, set fire to and consumed, *held*, that the burden of proof was on the consignor in an action against the carrier to prove that the loss was occasioned by the negligence of carrier or his servants. Wertheimer *v.* Penna. R. Co., 17 Blatchf. C. C. 421.

Where the shipper signs a bill of lading limiting the amount in which the carrier shall be liable, the provisions of such bill of lading are binding. Hart *v.* Pennsylvania R. Co., 7 Fed. Repr. 630.

1. Alabama.—Steele *v.* Townsend, 37 Ala. 247; South & North Alabama R. *v.* Henlein, 52 Ala. 606; s. c., 56 Ala. 368; Grey *v.* Mobile, etc., Trade Co., 55 Ala. 387; Mobile, etc., R. *v.* Hopkins, 41 Ala. 486; Montgomery, etc., R. *v.* Edmonds, 41 Ala. 667; Southern Exp. Co. *v.* Crook, 44 Ala. 468; M. & O. R. *v.* Jarboe, 41 Ala. 644.

In Alabama, etc., R. *v.* Little, 12 Am. & Eng. R. R. Cas. 37, Brickett, C. J., observes: "Public policy and every consideration of right and justice forbids that he should be allowed to stipulate for exemption from liability for losses or injuries occurring through the want of his own skill or diligence, or that of the servants or agents he may employ, or through his own or their wilful default or tort."

2. Arkansas.—In Taylor *v.* Little Rock, etc., R., 39 Ark. 148; s. c., 18 Am. & Eng. R. R. Cas. 590, it was held in an opinion by English, C. J., citing Taylor *v.* Little Rock, etc., R., 32 Ark. 398, that a common carrier may, by special contract and for a consideration, contract for exemption from liability as insurer upon its own or connecting line, but cannot contract for exemption from liability for losses occasioned by the negligence of

Colorado,[1] *Connecticut,*[2] *Georgia,*[3] *Illinois,*[4]

itself or its servants. To same effect see Little Rock, etc., R. *v.* Talbot, 39 Ark. 523; s. c., 18 Am. & Eng. R. R. Cas. 598.

1. **Colorado.**—Western Union Tel. Co. *v.* Graham, 1 Col. 230; Merchants' Desp., etc., Co. *v.* Cornforth, 3 Col. 280.

2. **Connecticut.**—Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539; Welch *v.* Boston, etc., R., 41 Conn. 333; Camp *v.* Hartford, etc., Steamboat Co., 43 Conn. 333.

3 **Georgia.**—The leading case of Fish *v.* Chapman, 2 Ga. 349, held contracts limiting liability void as against public policy. This case was overruled in Cooper *v.* Berry, 21 Ga. 526. See also Berry *v.* Cooper, 28 Ga. 543. Subsequently a statute was passed which provides that no contract limiting the carrier's liability shall be valid unless it has the express assent of the consignor. It has been held in construing this statute that the contract might be by parol. Purcell *v.* Southern Exp. Co., 34 Ga. 315; Southern Exp. Co. *v.* Barnes, 36 Ga. 532.

Acceptance of a receipt for goods does not raise a presumption of assent except to the familiar provision that the carrier shall not be liable beyond a fixed sum unless a larger one is named in the receipt. Southern Exp. Co. *v.* Newby, 36 Ga. 635; Mosher *v.* Southern Exp. Co., 38 Ga. 37.

The question of assent is for the jury. Wallace *v.* Sanders, 42 Ga. 486.

4. **Illinois.**—Chicago, etc., R. *v.* Montfort, 60 Ill. 175; Merchant's Disp. Trans. Co. *v.* Theilbar, 86 Ill. 71; Erie, etc., Trans. Co. *v.* Dater, 8 Cent. L. J. 293; Boskowitz *v.* Adams Exp. Co., 5 Cent. L. J. 58; Adams Exp. Co. *v.* Stettaners, 61 Ill. 184; Illinois Central, etc., R. *v.* Sauper, 38 Ill. 354; Erie R. *v.* Wilcox, 84 Ill. 239.

In Black *v.* Wabash, etc., R., 111 Ill. 351; s. c., 25 Am. & Eng. R. R. Cas. 388, it was held that a stipulation in a shipping contract, voluntarily and understandingly entered into by a shipper of live-stock for transportation, that in consideration of a reduced rate no claim for damages accruing to the shipper shall be allowed or paid by the carrier, or sued for in any court, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the shipper or his agent, and delivered to the general freight agent of the carrier, at his office, within five days from the time such stock is removed from the cars, will be binding upon the shipper, and is not void as being contrary to any law or to public policy.

Where a party of mature years and sound mind, being able to read and write, without any imposition or artifice to throw him off his guard, deliberately signs a written agreement without informing himself of the nature of its contents, he will nevertheless be bound by it, for the reason the law will not permit him to allege, as a matter of defence, his ignorance of that which it was his duty to know, particularly when the means of information are within his immediate reach, and he neglects to avail himself of them.

In Wabash, etc., R. *v.* Peyton, 106 Ill. 534; s. c., 18 Am. & Eng. R. R. Cas. 1, it was held that a common carrier cannot by contract with another road exempt itself from liability as a common carrier.

The mere fact that a shipper receives a bill of lading containing a clause limiting the carrier's responsibility does not of itself operate to exempt the carrier. In order to have that effect, it must appear that the shipper knew the contents of the bill of lading and assented thereto. Whether he has done so or not is a question for the jury. Merchant's Despatch Trans. Co. *v.* Leysor, 89 Ill. 43. Where in such case the shipper reads the receipt and makes no objection, his assent thereto will be presumed. The fact that the merchant of whom goods are purchased knew of such limitation of liability in the receipt given when they shipped the goods is not sufficient to lessen the common-law liability of the carrier, unless there be proof that such merchant had power to enter into such special contract with the carrier. In the absence of evidence it will be presumed that he had no such power. Merchant's Despatch Trans. Co. *v.* Jocsting, 89 Ill. 152.

Where no receipt is given by the carrier at the time of receiving the goods, he cannot subsequently limit his liability by a receipt afterwards given, when it appears that the shipper had no knowledge of the terms of such receipt or of any claim of right on the carrier's part to limit his liability. American Express Co. *v.* Spellman, 90 Ill. 195.

The assent of a shipper to the conditions of a bill of lading limiting the carrier's liability will not be inferred from

Indiana,[1] *Iowa,*[2] *Kansas,*[3] *Kentucky,*[4] *Louisiana,*[5] *Maine,*[6] *Massachusetts,*[7]

the mere acceptance of the bill by him without objection, nor from the fact of his having formerly received similar bills. Both these facts are evidence of such assent, however, and may go to the jury. Erie & West Trans. Co. *v.* Dater, 91 Ill. 195.

Where a carrier seeks to limit his liability by special contract he is bound by the law of the State where the contract was made. Michigan Central R. Co. *v.* Boyd, 91 Ill. 268.

In Massachusetts, in order to render a clause in the bill of lading limiting the liability of the carrier effectual for that purpose, the bill must be taken by the consignor without dissent at the time of the delivery of the property for transportation. If such bill be given a few days after, and be dissented from by the consignee or owner, the carrier is not protected. Michigan Central R. Co. *v.* Boyd, 91 Ill. 268.

The fact that the owner of goods by himself or his clerk filled up a railway receipt for goods shipped, which receipt contains a clause limiting the carrier's liability, is evidence to go to a jury of an assent by such owner to the stipulations of the receipt. It is not, however, conclusive in that respect. Boscowitz *v.* Adams Express Co., 93 Ill. 523.

Where such receipt was the receipt of another company, *held*, that it was inoperative even for the purpose above designated. Boscowitz *v.* Adams Express Co., 93 Ill. 523.

A carrier gave a receipt for three bales of furs containing a clause exempting him from liability for any loss or damage "of any box, package, or thing" for over $50. The furs being lost, *held*, that the consignor could recover $50 for each bale. Boscowitz *v.* Adams Express Co., 93 Ill. 523.

Where an express company enters into a contract for carriage whereby it exempts itself from liability for loss, it will nevertheless be responsible for the negligence of a railroad company to whom it commits the goods. Boscowitz *v.* Adams Express Co., 93 Ill. 253.

1. Indiana.—Might *v.* Gaff, 6 Ind. 416; Adams Exp. Co. *v.* Fendrick, 38 Ind. 150; Ohio, etc., R. *v.* Selby, 47 Ind. 471; St. Louis, etc., R. *v.* Smuck, 49 Ind. 302; Adams Exp. Co. *v.* Reagan, 29 Ind. 21; Bartlett *v.* Pittsburgh, etc., R., 94 Ind. 281; s. c., 18 Am. & Eng. R. R. Cas. 549; Rosenfeld *v.* Peoria, etc., R., 21 Am. & Eng. R. R. Cas. 87.

2. Iowa.—Laws 1866, c. 13, p. 121, provide as follows: "In the transportation of persons or property by any railroad or other company or by any person or firm engaged in the business of transportation of persons or property, no contract, receipt, rule or regulation shall exempt such railroad or other company, person or firm from the full liability of a common carrier, which in the absence of any contract, receipt, rule or regulation would exist with respect to such persons or property." The Iowa Code, § 1307, provides: "Every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineers or other employees of the corporation to any person sustaining such damage, all contracts to the contrary notwithstanding." Brush *v.* S. A. & D. R., 43 Iowa, 554; McCoy *v.* Keokuk, etc., R., 44 Iowa, 424; Stewart *v.* Merchant's Desp. Co., 47 Iowa, 227; Bancroft *v.* Merchant's Disp. Co., 47 Iowa, 262.

3. Kansas. — Missouri, etc., R. *v.* Caldwell, 8 Kans. 244; Goggin *v.* Kansas, etc., R., 12 Kans. 416; St. Louis, etc., R. *v.* Piper, 13 Kans. 505; Kansas Pacific R. *v.* Reynolds, 17 Kans. 251; Railroad Co. *v.* Maris, 16 Kans. 333; Railroad Co. *v.* Peavey, 29 Kans. 169; Kansas, etc., R. *v.* Simpson, 16 Am. & Eng. R. R. Cas. 158; Sprague *v.* Missouri Pacific R., 23 Am. & Eng. R. R. Cas. 684.

4. Kentucky.—Adams Exp. Co. *v.* Nock, 2 Duv. 562; Adams Exp. Co. *v.* Guthrie, 9 Bush, 78; Louisville, etc., R. *v.* Hedger, 9 Bush 645; Rhodes *v.* Louisville, etc., R., 9 Bush, 688.

5. Louisiana.—Lawson's Contracts of Carriers, § 43; Baldwin *v.* Collins, 9 Rob. 468; New Orleans, etc., Ins. Co. *v.* New Orleans, etc., R., 20 La. Ann. 302; Simon *v.* The Fung Shuey, 21 La. Ann. 363. *Compare* Higgins *v.* New Orleans, etc., R., 28 La. Ann. 133.

6. Maine.—Tillebrown *v.* Railroad, 55 Me. 462; Sager *v.* Railroad, 31 Me. 228; Willis *v.* Railroad, 62 Me. 488.

7. Massachusetts.—Buckland *v.* Adams Exp. Co., 97 Mass. 124; Perry *v.* Thompson, 98 Mass. 249; Gott *v.* Dinsmore, 111 Mass. 45; Grace *v.* Adams,

Minnesota,[1] *Mississippi*,[2] *Missouri*,[3]

100 Mass. 505; School District *v.* Boston, etc., R., 102 Mass. 552; Hoadley *v.* Northern Transp. Co., 115 Mass. 304.

1. **Minnesota.**—Christenson *v.* Am. Exp. Co., 15 Minn. 270; Jacobus *v.* St. Paul, etc., R., 20 Minn. 125; s. c., 1 Cent. L. J. 125.

Moulton *v.* St. Paul, etc., R., 12 Am. & Eng. R. R. Cas. 13, where Dickinson, J., observes: "The recovery in this case rests alone upon the neglect of the defendant to transport the horses to their destination within a reasonable time, whereby from exhaustion and exposure to cold they died. The law has been determined in this State, and in most of the United States, as well as in the federal supreme court, to be that a common carrier of goods cannot by contract relieve himself from liability for his own negligence. Christenson *v.* Am. Exp. Co., 15 Minn. 270 (Gil. 208); Shriver *v.* Sioux City & St. P. R. Co., 24 Minn. 506; Railroad Co. *v.* Lockwood, 17 Wall. 357; Bank of Kentucky *v.* Adams Exp. Co., 93 U. S. 174. Nor is there any reason why a different rule should prevail in respect to the transportation of live-stock, or of property under the care of the owner. The rule itself rests upon considerations of public policy, and upon the fact that to allow the carrier to absolve himself from the duty of exercising care and fidelity is inconsistent with the very nature of his undertaking. These reasons apply with undiminished force where the property is live-stock, or is under the care of the owner, who has not the direction or control of the agencies and the operation of the transportation. To whatever extent such facts might modify or affect the liability of the carrier for accidents, or for injuries not the result of his own negligence, they would not qualify his responsibility for his own neglect of duty. The agreement discharging the defendant from the liability of a common carrier cannot avail to divest the carrier of his real character, nor indirectly relieve him from responsibilities from which he cannot directly by contract free himself. Christenson *v.* Am. Exp. Co., 15 Minn. 270; Bank of Kentucky *v.* Adams Exp. Co., 93 U. S. 174. Our conclusion, therefore, is that the defendant was responsible in damages for its negligence, notwithstanding the contract."

A common carrier cannot by special contract limit his liability to cases of injuries caused by gross negligence. He will in any event be liable for his own negligence and that of his servants. Shriver *v.* Sioux City & St. Paul R. Co., 24 Minn. 506.

Where there is a contract limiting the liability of a common carrier of goods and a loss occurs, the burden is on the carrier to show from what cause the loss occurred. Shriver *v.* Sioux City & St. Paul R. Co., 24 Minn. 506.

2. **Mississippi.**—Southern Exp. Co. *v.* Moon, 39 Miss. 822; Mobile, etc., R. *v.* Franks, 41 Miss. 494; Mobile, etc., R. *v.* Weiner, 49 Miss. 725.

In New Orleans, etc., R. *v.* Faler, 58 Miss. 911; s. c., 9 Am. & Eng. R. R. Cas 96, it was held that wherever a loss of goods being transported by a railroad company results from a cause against which the company has by a special contract stipulated for immunity, the company is still liable, notwithstanding the special contract, unless it can be acquitted of all blame for the loss. If the loss be attributable to the omission of the carrier to provide the safest vehicle in use for the transportation of the particular goods lost, or to a failure to do anything that diligence and care would suggest was feasible to have been done, the company is liable, even though it may have made a special contract for immunity against the cause of the loss. Chicago, etc., R. *v.* Abels, 60 Miss. 1017; s. c., 21 Am. & Eng. R. R. Cas. 105.

3. **Missouri.** — Levering *v.* Union Transp. Co., 42 Mo. 88; Rice *v.* Kansas, etc., R., 63 Mo. 314; Sturgeon *v.* St. Louis, etc., R., 65 Mo. 569; Oxley *v.* St. Louis, etc., R., 65 Mo. 629; Kirby *v.* Adams Exp. Co., 2 Mo. App. 369; s. c., 3 Cent. L. J. 435. Drew *v.* Red Line Transit Co., 3 Mo. App. 495; Read *v.* St. Louis, etc., R., 60 Mo. 199; Wolf *v.* American Exp. Co., 43 Mo 421; Ketchum *v.* American Merchants' Union Exp. Co., 52 Mo. 390; Snider *v.* Adams Exp. Co., 63 Mo. 376; Rice *v.* Railroad, 63 Mo. 314; Sturgeon *v.* Railroad, 65 Mo. 569; St. Louis, etc., R. *v.* Cleary, 77 Mo. 634; s. c., 16 Am. & Eng. R. R. Cas. 122; Chicago, etc., R. *v.* Dawson, 79 Mo. 296; s. c., 18 Am. & Eng. R. R. Cas. 521.

In Harvey *v.* Terre Haute, etc., R., 74 Mo. 541; s. c., 6 Am. & Eng. R. R. Cas. 293, Hough, J., observes: "This court has repeatedly held that public policy will not permit a common carrier to contract for exemption from liability

Nebraska,[1] *New Hampshire,*[2] *New Jersey,*[3] *North Carolina,*[4] *Ohio,*[5] *Pennsylvania,*[6] *South Carolina,*[7] *Tennessee,*[8]

on account of the negligence of itself or its servants. The plaintiff contends that it is as much against the policy of the law to permit the carrier to limit its liability to a part of the loss, as it would be to permit it to stipulate against the entire loss. We do not regard a contract limiting a right of recovery to a sum expressly agreed upon by the parties as representing the true value of the property shipped as a contract in any degree exempting the carrier from the consequences of its own negligence. Such a contract fairly entered into leaves the carrier responsible for its negligence, and simply fixes the rate of freight and liquidates the damages. This we think it is competent for the carrier to do." Ball *v.* Wabash, etc., R., 83 Mo. 574; s. c., 23 Am. & Eng. R. R. Cas. 384.

1. **Nebraska.**—Atchison, etc., R. *v.* Washburn, 5 Neb. 117.

2. **New Hampshire.**—Moses *v.* Boston, etc., R., 24 N. H. 71; Barter *v.* Wheeler, 49 N. H. 9; Hall *v.* Cheney, 36 N. H. 26.

3. **New Jersey.**—Ashmore *v.* Pennsylvania, etc., Towing Co., 28 N. J. Law, 180. See also Gibbons *v.* Wade, 8 N. J. Law, 255. *Compare* Kinney *v.* Central R., 34 N. J. Law, 513; 32 N. J. Law, 407.

4. **North Carolina.**—Lee *v.* Raleigh, etc., R., 72 N. Car. 236; Smith *v.* Railroad, 64 N. Car. 235.

5. **Ohio.**—Davidson *v.* Graham, 2 Ohio St. 131; Graham *v.* Davis, 4 Ohio St. 362; Union Exp. Co. *v.* Graham, 26 Ohio St. 595; Gaines *v.* Union Transp. Co., 28 Ohio St. 418; Erie R. *v.* Lockwood, 28 Ohio St. 358; Jones *v.* Voorhies, 10 Ohio St. 145; Cleveland, etc., R. *v.* Curran, 19 Ohio St. 1; Knowlton *v.* Railroad, 19 Ohio St. 260.

In Pittsburgh, etc., R. *v.* Barrett, 36 Ohio St. 448; s. c., 3 Am. & Eng. R. R. Cas. 256, it was held that the assent of the shipper to conditions in a bill of lading, or other contract for the carriage of goods, limiting the carrier's liability, is binding upon him, when the loss happens without fault or negligence of the carrier; but such assent will not be implied or presumed from facts and circumstances which do not clearly show an assent to such conditions in the contract on which the action is founded. In the absence of satisfactory proof, showing that the shipper has, by assent and acquiescence, or otherwise, agreed to limit the liability of the carrier, the presumption is that he intended to insist on his common-law rights. Neither usage nor custom, though known to the shipper, which he has not clearly assented to as a condition of the contract of shipment, can be set up to absolve a carrier from his common-law liability.

6. **Pennsylvania.**—Camden, etc., R. *v.* Baldauf, 16 Pa. St. 67; Farnham *v.* Camden, etc., R., 55 Pa. St. 53; American Exp. Co. *v.* Sands, 55 Pa. St. 140; Empire Transp. Co. *v.* Wamsutta, etc., Oil Co., 63 Pa. St. 14; Adams Exp. Co. *v.* Sharpless, 77 Pa. St. 516.

A common carrier cannot by contract limit his liability for damages resulting from the loss of articles carried, when the loss is the result of his negligence, and an instruction by the court that he can is erroneous. Grogan *v.* Adams Exp. Co. (Pa.). 7 Atlantic Repr. 134.

7. **South Carolina.**—Patton *v.* Magrath, Dudl. 189; Porter *v.* Southern Exp. Co., 4 S. Car. 135; Levy *v.* Southern Exp. Co., 4 S. Car. 234. See also Gen. Stats. of South Carolina, 1872, p. 336, where it is provided that common carriers cannot limit their common-law responsibility by any notice or declaration or special contract for or in respect of any goods to be carried by them. Piedmont Manuf. Co. *v.* Columbia, etc., R., 19 S. Car. 353; s. c., 16 Am. & Eng. R. R. Cas. 194.

8. **Tennessee.**—East Tennessee, etc., R. *v.* Nelson, 1 Cold. 272; Olwell *v.* Adams Exp. Co., 1 Cent. L. J. 186; Southern Exp. Co. *v.* Womack, 1 Heisk. 256; Nashville, etc., R. *v.* Jackson, 6 Heisk. 271.

In Dillard *v.* Louisville, etc., R., 2 Lea 288, it was held that a carrier may by special contract limit his liability, but cannot exempt himself from responsibility for the negligence of himself and his servants. The acceptance by the consignor on the day of shipment of a bill of lading containing valid stipulations against liability for loss, and the retention of the same by him without objection, raises a presumption, in the absence of evidence to the contrary, that the shipper knew the contents of the receipt and assented to its terms.

In E. N. Va. & Ga. R. *v.* Bramley, 5 Lea 401, it was held that a railroad company receiving goods for shipment beyond the terminus of its line may by special contract protect itself from liability for loss occurring on its line. And

Texas,[1] *Virginia*,[2] *West Virginia*,[3] and *Wisconsin*.[4] The question remains an open one in the following States:

such contract will be presumed from the fact that a clause thus limiting the liability is to be found printed in the bill of lading, even though the shipper's attention was not called to it, if it appears that he had previously shipped like articles and taken like bills of lading.

1. **Texas.**—Paschal's Dig., art. 4253, provides: "That railroad companies and other common carriers of goods, wares, and merchandise for hire, within this State, on land, or in boats or vessels on the waters entirely within the body of this State, shall not limit or restrict their liability, as it exists at common law, by any general or special notice, nor by inserting exceptions in the bill of lading or memorandum given upon the receipt of goods for transportation, nor in any other manner whatever, and no special agreement, made in contravention of the foregoing provisions of this section, shall be valid."

A former statute upon the subject, which prohibited notices limiting liability, but authorized a special agreement in writing, signed by the parties or their agents, was repealed by the later act.

In Houston, etc., R. *v.* Burke, 55 Tex. 323; s. c., 9 Am. & Eng. R. R. Cas. 59, Gould. J., remarks: "The defence that the company was exempt from liability because of the exceptions or stipulations in the bill of lading, seems to us plainly invalid under the statute. The claim is not only to limit and restrict the liability of the company by provisions inserted in the bill of lading, but to make these provisions relieve them from all liability. For reasons of public policy, and having regard, doubtless, to the 'inequality of the parties; the compulsion under which the customer is placed, and the obligations of the carrier to the public,' the legislation of this State, and the previous decisions of our courts, hold common carriers liable as at common law for all losses 'not occasioned by the act of God or public enemies,' and declare invalid any exceptions or special contract seeking to vary that liability. Chevallier *v.* Strahan, 2 Tex. 115; Arnold *v.* Jones, 26 Tex. 337. See also Heaton & Bro. *v.* Morgan's La. & Tex. R. & S. Co., Court of Appeals, 4 Tex. L. J., 375; Railroad Co. *v.* Lockwood, 17 Wall. 357."

In Galveston, etc., R. *v.* Allison, 12 Am. & Eng. R. R. Cas. 28, it was held that where there is no express statute forbidding it, a carrier may contract not to be liable for damages which do not occur from the negligence of himself or his servants or agents. See, generally, Gulf, etc., R. *v.* Maetze, 18 Am. & Eng. R. R. Cas. 613.

2. **Virginia.**—Nelson *v.* Chesapeake, etc., R., 21 Gratt. 654; Virginia, etc., R. *v.* Sayers, 26 Gratt. 328.

3. **West Virginia.**—Carriers may contract for exemption from all liability resulting from any and every degree of negligence short of fraud, provided the contract is clear that such was the intention of the parties to it. Baltimore, etc., R. *v.* Rathbone, 1 W. Va. 87; Baltimore, etc., R. *v.* Skeels, 3 W. Va. 556.

In Brown *v.* Adams Exp. Co., 15 W. Va. 812, it was *held* that a common carrier cannot exempt himself from liability for loss or damage in any degree caused by the negligence or misfeasance of himself or his servants. It was further *held*, that where goods are committed to a carrier without an express contract limiting liability, the mere fact that the consignor had previously seen bills of lading issued by said carrier containing clauses limiting liability does not afford the carrier any ground for setting up that the particular contract in question was made on such terms. It was also doubted whether the acceptance of a bill of lading containing such clauses would of itself be enough to exempt the carrier.

4. **Wisconsin.**—See The Sultana *v.* Chapman, 5 Wis. 454; Falvey *v.* Northern Transp. Co., 15 Wis. 129; Detroit, etc., R. *v.* Farmers' Bank, 20 Wis. 122; Boorman *v.* American Exp. Co., 21 Wis. 152; Betts *v.* Farmers' Loan, etc., Co., 21 Wis. 80.

In Cream City, etc., R. *v.* Chicago, etc., R., 21 Am. & Eng. R. R. Cas. 70, it was held that a common carrier may, by express contract, limit his liability as a carrier, and when he does so he can only be held liable for a loss of goods intrusted to his charge, or for injury to the same while in his possession, upon proof that the loss or injury was the result of the negligence of himself, his agents, or employees. In construing a contract limiting the liability of a common carrier the provisions of the contract are not construed liberally in his favor.

California,[1] *Delaware*,[2] *Florida*,[3] *Nevada*,[4] *Oregon*,[5] *Rhode Island*.[6]

In *Maryland*[7] the question has several times arisen, and it has been said that the right of carriers to restrict their common-law liability by express contract was too well established to be any longer questioned, and that common carriers may, by special contract, limit their common-law liability by express contract where there seems to be reason and justice to sustain the exemption. But the contract ought to be in clear and distinct terms.

In *Vermont*[8] the liability of the carrier may be restricted by contract; but not by general notice unless clearly proved to have been assented to by the employer.

In *Michigan* an early case[9] to the effect that the common-law liability of a carrier could not be limited by contract was overruled.[10] It is now provided by statute that no railroad company shall be permitted to change or limit its common-law liability as a common carrier by any contract or in any other manner except by a written contract, none of which shall be printed, which shall be signed by the owner or shipper of the goods to be carried.[11] In this State a common carrier may limit his liability by contract, but not by notice.[12]

In *New York*,[13] while the decisions have shown some individual

1. **California.** — Hooper *v.* Wells, 27 Cal. 11.

2. **Delaware.** — Flinn *v.* Philadelphia, etc., R., 1 Houst. 469.

3. **Florida.** — Bennett *v.* Filyaw, 1 Fla. 403; Brock *v.* Gale, 14 Fla. 523.

4. **Nevada.** — Lawson's Contracts of Carriers, § 52.

5. **Oregon.** — Lawson's Contracts of Carriers, § 58.

6. **Rhode Island.** — Hubbard *v.* Harnden Express Co., 10 R. I. 244.

7. **Maryland.** — Brehme *v.* Adams Exp. Co., 25 Md. 328; Baltimore, etc., R. *v.* Brady, 32 Md. 333; Bankard *v.* Baltimore, etc., R., 34 Md. 197; McCoy *v.* Erie, etc., Transp. Co., 42 Md. 498; Lawson's Contracts of Carriers, § 45.

8. **Vermont.** — Lawson's Contracts of Carriers, § 64; Blumenthal *v.* Brainerd, 38 Vt. 402; Kimball *v.* Rutland, etc., R., 26 Vt. 247; Farmers', etc., Bank *v.* Champlain Transp. Co., 18 Vt. 131; s. c., 23 Vt. 186; Mann *v.* Birchard, 40 Vt. 326; Cutts *v.* Brainerd, 42 Vt. 566.

In Hadd *v.* United States Exp. Co., 52 Vt. 335, a railway receipt for goods contained a clause limiting the liability of the company to its own line. The consignor could not read. The carriers' clerk read him the receipt, omitting said clause. *Held*, that as the clause was merely expressive of the common law no fraud had been practised on the consignor.

9. **Michigan.** — Michigan Central R. *v.* Ward, 2 Mich. 538.

10. Michigan Cent. R. *v.* Hale, 6 Mich. 243; McMillan *v.* Michigan, etc., R., 16 Mich. 79; Hawkins *v.* Great Western R., 17 Mich. 57; Great Western R. *v.* Hawkins, 18 Mich. 427. *Compare* Coup *v.* Wabash, etc., R., 18 Am. & Eng. R. R. Cas. 542.

11. Mich. Comp. L. (1871) sec. 2386, p. 783.

12. Lawson's Contracts of Carriers, § 47.

13. **New York.** — The decisions in New York have shown quite a difference of opinion, but the law in that State may be regarded as settled in favor of allowing the carrier to contract for exemption from liability, by means of a plain and unmistakable special contract, for losses arising from any degree of negligence on the part of his servants.

In Gould *v.* Hill, 2 Hill 623, it was held that carriers could not limit their liability, or evade the consequences of a breach of their legal duties as such, by an express agreement, and that where the memorandum or receipt given by the carrier promised to forward the goods to their place of destination "danger of fire, etc., excepted," he was liable for a

differences of opinion among the judges, the law is clearly settled that the carrier may, by means of a plain and unmistakable special contract, exempt himself from liability for losses arising from any loss by fire though not resulting from negligence.

In Parsons *v.* Monteath, 13 Barb. 358; Moore *v.* Evans, 14 Barb. 624; Dorr *v.* New Jersey Steam Nav. Co., 4 Sandf. 136, 1 Kern. 485; and Stoddard *v.* Railroad, 5 Sandf. 180, the case of Gould *v.* Hill, 2 Hill, 623, was expressly overruled. These cases followed the decisions of the United States Supreme Court in New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, where the court expressed themselves as unable to perceive any well-founded objection to a restriction of the carrier's liability, by a special contract, or any stronger reasons for forbidding it to exist than in the case of any other insurer of goods, to which his obligation is analogous, and which depends altogether upon the contract between the parties.

In Parsons *v.* Monteath, 13 Barb. 353, Welles J., observes: "If I have goods to transport, and the common carrier tells me he will carry them for a particular price, without incurring the risk of loss or damage by inevitable accident, but that if he takes such risks he must add a percentage to the price of transportation, I really cannot see what the public have to do with our negotiations, nor why we should not be permitted to make a valid contract, with such conditions and stipulations as we choose."

In Smith *v.* New York Central, etc., R., 24 N. Y. 222, Allen, J., observes: "No principle is better settled than that a party to whom any benefit is secured by contract, statute, or even by the constitution may waive such benefit, and the public are not interested in protecting him or benefiting him against his wishes. The public have no interest in the question which of the two, A or B, shall take the risk of the seaworthiness of a ship, or the fitness of a railway carriage, or the care and faithfulness of a third person employed in the performance of a duty, in which either or both have an interest, although by certain general rules the law has declared that, in the absence of any contract, the risk shall be upon A and not upon B. But if B elects to relieve A, and to assume his risks and liabilities, the public are not at all concerned, and have no occasion to forbid such contracts. If the contract is induced by fraud or duress, it is of course void, and the common-law liabilities of the parties will remain unchanged. The character of the liability which one contracting party assumes in relief of the other cannot affect the validity of the contract, it being wholly personal to the parties. If one is unwise enough deliberately to excuse another from liability for gross and very gross neglect, there is no good reason why he should not be permitted to do so, even for personal neglect of that character; that is, there is no reason why the contracting party should not be estopped from setting up a claim against his express contract not to do so. If the public have any claim against the negligent party, either criminally or otherwise, it will not be affected by the contract, and if the contract be in violation of the law, or for the commission of a criminal offence, neither party can maintain an action against the other upon it or in respect to the transaction to which it relates. Such a contract will not be construed—except its terms compel such construction—as authorizing or contemplating a crime, and hence would not ordinarily be held to embrace acts of culpable negligence resulting in death under circumstances that would constitute manslaughter, that is, culpable negligence of that degree in the principal and the contracting party. But the reason does not extend to or prohibit a contract shifting the pecuniary liability of A for the acts of C to B, although such acts of C might be such as would subject him to punishment for manslaughter, for causing death by his culpable negligence, or for any other offence. A man should not be permitted to contract for impunity for his own criminal acts, but there is no reason why he may not contract for such impunity from the acts of his agents, for whom and for whose acts he is only pecuniarily responsible in the nature of a guarantor." To the same effect see Dorr *v.* New Jersey Steam Nav. Co., 11 N. Y. 485; French *v.* Buffalo, etc., R., 4 Keyes, 108; Wells *v.* New York Central, etc., R., 24 N. Y. 181; Perkins *v.* New York Central, etc., R., 24 N. Y. 196. See also Guillaunne *v.* Hamburg, etc., Packet Co., 42 N. Y. 212; Nelson *v.* Hudson River, etc., R., 48 N. Y. 498; Westcott *v.* Fargo, 63 Barb. 349; Westcott *v.* Fargo, 61 N. Y. 542; Condict *v.* Grand Trunk, etc., R., 54 N. Y. 500; Nicholas *v* New York Central, etc., R., 89 N. Y. 370; s. c., 9 Am. & Eng. R. R. Cas. 103. *Compare* Smith *v.*

degree of negligence on the part of his servants. Yet such contracts in order to have such effect must be plainly and distinctly expressed so that their purport cannot be misunderstood by the

New York Central, etc., R., 24 N. Y. 222; Stinson *v.* New York Central, etc., R., 32 N. Y. 333; Wells *v.* N. Y. Cent., etc., R., 24 N. Y. 181, dissenting opinion of Sutherland, J.

In Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357, the decisions in New York to the effect that a carrier may contract for exemption from liability for negligence were commented upon and disapproved. But the State courts have expressly refused to follow the weight of authority and have reaffirmed the doctrine above stated. Mynard *v.* Railroad, 7 Hun, 399; Magnin *v.* Dinsmore, 56 N. Y. 168; Westcott *v.* Fargo, 61 N. Y. 542.

By the terms of a contract for the transportation of sheep over the line of the defendant company, it was released from liability originating in the viciousness or weakness of the animals, or from delays, or in consequence of heat, suffocation, or of being crowded, "or on account of being injured, whether such injury shall be caused by burning of hay, straw, or any other material used for feeding said animals or otherwise, and for any damage occasioned thereby," in consideration of a reduction in the charges for freight. There were no words expressly and definitely exempting the company from liability for its own negligence. *Held*, under the doctrine of Mynard *v.* S. B. & N. Y. R. Co., 71 N. Y. 180, that when general words limiting the liability of a carrier may operate without including his negligence or that of his servants, such negligence will not lie within the exemption of the agreement. The carrier was liable for injury done to the sheep by fire, which started in the bedding of their cars, which injury resulted from the negligence of the railroad company in omitting to supply the train in which the sheep were with such appliances as would have enabled those in charge of it to have put out the fire before the injury was done. Holsapple *v.* Rome, etc., R., 3 Am. & Eng. R. R. Cas. 487. In this case Finch J., observes: "The agreement contains no words expressly and definitely exempting the carrier from liability for his own negligence, and the question presented is whether, upon any just interpretation, it can be said to create such an exemption. The doctrine of Mynard *v.* S. B. & N. Y. R. Co., 71 N. Y. 180, is decisive upon this question. It was there held that where general words limiting the liability of a carrier may operate without including his negligence or that of his servants, such negligence will not be within the exemption of the agreement. To this extent, at least, we all concur. However broad or general may be the language of the contract which does not specifically and in express terms release the carrier from the consequences of his own negligence, it will not effect such release if the general words may operate without including such negligence. That is the case here. The precise injury might have occurred which actually happened, without fault or negligence on the part of the carrier. The sheep were burned by a fire which started in the bedding of their cars. That might have happened without the fault or negligence of the defendant or its servants. For such injury the carrier would have been liable at common law, and irrespective of the question of negligence, since it did not originate in the vitality of the freight or its inherent nature and condition. That liability was plainly asserted in the Mynard case and sustained by the authorities there cited."

In Nicholas *v.* N.Y.Cent.,etc., R.,89 N. Y. 370; s.c., 9 Am. & Eng. R. R. Cas. 103, it was held that although in the State of New York common carriers may by express contract exempt themselves from liability for their own negligence, yet such contracts in order to have such effect must be plainly and distinctly expressed so that their purport cannot be misunderstood by the shipper. A delivered certain trees to a railroad company for carriage and received a long printed shipping contract which he signed. This contract contained numerous provisions exempting the company from the extraordinary liabilities of carriers, and also from liability "for damage occasioned by delays from any cause or change of weather." *Held*, that the terms of the shipping contract were not effectual to exempt the company from liability for a loss occurring through an unreasonable detention occasioned by the company's negligence. *Affirmed*. McKinney *v.* Jewett, 9 Am. & Eng. R. R. Cas. 209; Canfield *v.* Baltimore, etc., R , 93 N. Y. 532; s. c., 16 Am. & Eng. R. R. Cas. 152.

New York Law as to Clauses in Bills of Lading Exempting Carriers from Liability for Loss occurring through Negligence.—

shipper. And however broad or general may be the language of the contract which does not specifically and in express terms release the carrier from the consequences of his own negligence, it will not effect such release if the general words may operate without including such negligence.

In spite of the well-established principle that a common car-

It is settled that a clause in a bill of lading by which a common carrier is exempted from liability for loss or injury caused by negligence of said carrier or its servants is valid. Nelson *v.* Hudson River R. Co., 48 N. Y. 498.

But a clause in a bill of lading exempting a carrier from losses resulting from certain specified causes will not exempt it from liability for damage or injury resulting from one of the causes specified, where the damage or injury was caused by negligence on the part of the carrier or its agents, unless the bill of lading expressly provides that the exemption shall extend to losses caused by the negligence of the carrier or its agents. Thus, where the bill of lading provided that the carrier should be released from liability "from damage or loss to any article from or by fire or explosion of any kind," it was held that the exemption did not extend to loss from a fire resulting from the negligence of the carrier. Steinweg *v.* Erie R., 43 N. Y. 123. The following cases illustrate the same principle: Condict *v.* Grand Trunk R. Co,, 54 N. Y. 500; Lamb *v.* Camden & Amboy R. Co., 46 N. Y. 271; Rawson *v.* Holland, 59 N. Y. 611; Nicholas *v.* New York Central, etc., R. Co., 89 N. Y. 370; s. c., 9 Am. & Eng. R. R. Cas. 103; Holsapple *v.* Rome, W. & O. R. Co., 86 N. Y. 275; s. c., 3 Am. & Eng. R. R. Cas. 487.

Similarly, it was held that a clause in a bill of lading made by an express company which limited the recovery in case of loss to $50, where the value of the goods was not disclosed, did not apply to the case of a loss occurring through the negligence of the carrier. Magnin *v.* Dinsmore, 56 N. Y. 168. See Westcott *v.* Fargo, 61 N. Y. 542.

General Words not Enough to Exempt for Negligence —But the New York courts have gone further beyond this principle, and have held that general words are insufficient, though clearly covering the loss through the negligence of the carrier or its servants. This was squarely held in Mynard *v.* Syracuse, Binghamton & N. Y. R. Co., 71 N. Y. 180. In that case the bill of lading provided that the carrier was to be released "from all claims, demands, and liabilities of every kind and character whatsoever, for or on account of or connected with any damage or injury to or the loss of said stock, or any portion thereof, from any cause arising," and it was held that this clause would not exempt the carrier from liability for a loss caused by negligence. The decision in this case is explained by Andrews, Ch. J., in Nicholas *v.* New York Cent., etc., R., 89 N. Y. 370; s. c., 9 Am. & Eng. R. R. Cas. 103, who said: "The words 'from whatsoever cause arising' were as broad and comprehensive as possible. The court, however, refused to construe them as covering a loss arising from negligence of the carrier, not, as I understand the decision, because the words in their ordinary signification and interpretation, did not include a loss of this character, but because it is a part of the rule, which in this State allows a common carrier to contract against his liability for negligence, that the contract must in terms and expressly exempt the carrier from liability on this account."

In Wilson *v.* N. Y. Cent., etc., R., 97 N. Y. 87; s. c., 21 Am. & Eng. R. R. Cas. 148, plaintiff shipped two horses by defendant's road under a contract by which he released the company from liability for damages resulting from the negligence of its servants or which should be occasioned by the insecurity of its cars. The horses were transported in a grain car, which was out of repair, and, while sufficient for the use for which it was intended, unsafe for the transportation of live stock. In consequence of such defect one of the horses was injured. In an action to recover damages it did not appear but that other safe and secure cars were provided by defendant, and were on hand ready for use, so that the injury might have been caused by carelessness on the part of the defendants in selecting an insecure car. *Held*, that the only negligence shown was that of defendant's servants, from the consequences of which it was released by the contract; and that plaintiff was not entitled to recover.

rier cannot limit by contract his liability for negligence, it is said that the extent to which he can limit his liability by an express or special agreement fairly and understandingly made with the consignor is almost unlimited. This upon the theory that the latter, for the consideration which it is supposed he always receives, may surrender if he will the obligation of the carrier as an insurer to any extent he may choose.[1]

In *England*, where there is a limitation of liability by contract, the suit must be upon the contract, and not against the carrier as a common carrier.[2] Nor can the carrier there force upon a consignor a contract limiting the carrier's liability if the goods are such as he professes to carry.[3] The consignor may refuse to sign such contract, and insist upon the company taking subject to the liability of a common carrier, tendering the proper hire to him.

It is also settled that the consignor of goods has implied authority from the consignee to stipulate as to terms of transportation. The carrier is authorized to act upon this presumption in contracting with the agent, and need not inquire into his authority to make the particular shipment.[4]

6. CONFLICT OF LAWS.—The contracts of carriers are governed by the law of the place where made.[5] Where in the case

1. Hutchinson on Carriers, § 248; Belger *v.* Dinsmore, 51 N. Y. 166; Kallman *v.* Express Co., 3 Kans. 205; Hopkins *v.* Westcott, 6 Blatchf. C. C. 64; Brehme *v.* Adams Exp. Co., 25 Md. 328; Boorman *v.* Express Co., 21 Wis. 152; Oppenheimer *v.* U. S. Exp. Co., 69 Ill. 62; Levy *v.* Southern Exp. Co., 4 Rich. (S. Car.) N. S. 234, Snider *v.* Adams Exp. Co., 63 Mo. 376; Ketchum *v.* American Exp. Co., 52 Mo. 390; Roberts *v.* Riley, 15 La. Ann. 103; Wallace *v.* Matthews, 39 Ga. 617; Mobile, etc., R. *v.* Weiner, 49 Miss. 725; Reno *v.* Hogan, 12 B. Mon. (Ky.) 63; Grace *v.* Adams, 100 Mass. 505; Kimball *v.* Rutland, etc., R., 26 Vt. 256; Derwent *v.* Loomer, 21 Conn. 246; Express Co. *v.* Caldwell, 21 Wall. (U. S.) 264; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344; Bank of Kentucky *v.* Adams Exp. Co., 93 U. S. 174; Railway Co. *v.* Stevens, 95 U. S. 655. See *infra*, this title, INSURANCE.

2. Where there is a limitation of liability by contract, the suit must be upon the contract, and not against the carrier as a common carrier. White *v.* Great Western R., 26 L. J. C. P. 158; 2 C. B. N. S. 7; Harris *v.* Midland R., 25 W. R. 63.

The contract must be proved and put in or plaintiff will be non-suited. Robinson *v.* Great Western R., 35 L. J. C. P. 123.

Parol evidence is admissible to show a contemporaneous parol contract not inconsistent therewith, but not to contradict the written agreement. Malpas *v.* London, etc., R., 35 L. J. C. P. 166; L. R. 1 C. P. 366. See also BILLS OF LADING.

3. The carrier cannot force upon a consignor a contract limiting the carrier's liability if the goods are such as he professes to carry. The consignor may refuse to sign such contract, and insist upon the company taking subject to the liability of common carriers tendering the proper hire to them. Carr *v.* Lancashire, etc., R., 21 L. J. Exch. 261; 7 Exch. 707.

4. The consignor of goods has implied authority from the consignee to stipulate as to terms of transportation. The carrier is authorized to act upon this presumption in contracting with the agent, and need not inquire into his authority to make the particular shipment. Ryan *v.* Missouri, etc., R., 23 Am. & Eng. R. R. Cas. 703; Nelson *v.* Railroad, 48 N. Y. 498; Squire *v.* Railroad, 98 Mass. 239; York Co. *v.* Central R., 3 Wall. (U. S.) 107; Morrity *v.* Harnden's Exp., 1 Daly (N. Y.), 227; Megu *v.* Harnden's Exp., 24 How. Pr. (N. Y.) 290.

5. First National Bank *v.* Shaw, 61 N. Y. 283. See also Dike *v.* Erie R., 45 N. Y. 113; Maghee *v.* Camden, etc., R., 45 N. Y. 514; Canter *v.* Bennett, 39 Tex. 303; Robinson *v.* Merchants' Dispatch Transp. Co., 45 Iowa, 470; McDaniel *v.*

of a contract by a carrier made in one State, and to be performed in another, there is a conflict in the law of the two States upon the question of his liability, the presumption will be that the parties have made the agreement with reference to the law favorable to its validity and performance. And in a choice among several laws applicable to a case, that must be preferred which is the most favorable for upholding it.[1]

In a case where a contract was made in a State under a law which was held to be a regulation of interstate commerce, and therefore unconstitutional, it was pointed out that the general rule already referred to, while correct when applied to a valid enactment of the legislature of the State where a contract is entered into, yet such unconstitutional law cannot enter into and become part of any contract.[2]

Chicago, etc., R., 24 Iowa, 412; Carton *v.* Illinois Central, etc., R., 6 Am. & Eng. R. R. Cas. 305; Pennsylvania Co. *v.* Fairchild, 99 Ill. 260; Michigan Central R. *v.* Boyd, 91 Ill. 268; Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539; Peninsular, etc., Steam Nav. Co. *v.* Shand, 11 Jur. N. S. 771; 13 W. R. 1049; 12 L. T. N. S. 808, 3 C. *Compare* Knowlton *v.* Erie R., 19 Ohio St. 260; Hoadley *v.* Northern Transp. Co., 115 Mass. 304.

1. In Talbot *v.* The Merchants' Transp. Co., 41 Iowa, 247, a contract was made in Connecticut for the delivery of goods in Iowa. By statute in the latter State the carrier was prevented from limiting his liability by contract; and in an action for a loss brought in Iowa, although such loss arose from a cause excepted by the contract, and although by the law of Iowa such contract was valid, it was held that the contract must be governed by the law of Connecticut. The principle of the decision was the fact that the parties must be presumed to have made the agreement with reference to the law favorable to its validity and performance, and in a choice among several laws applicable to a case that must be preferred which is the most favorable for upholding it.

In First National Bank *v.* Shaw, 61 N. Y. 283, the court observes: "In the more general case, where a contract is made in one country and to be performed in another, it is not always easy to determine according to the authorities whether the interpretation of the words is to be governed by the law of the place where the contract is made or by that where it is to be performed. The general principle is, that the law of the place where the contract is made is to govern, unless it is positively to be performed elsewhere. The fact that acts are to be done abroad under a contract does not necessarily make it a contract to be performed there in a legal sense. . . . The true inquiry is, what was the intent of the parties? It would seem that in a case like the present, where the contract was made in Ohio, by Toledo parties, the money being advanced there and the security there, that they had in view, in employing words, their own usages, even though the goods were to be sent to another State and ultimately sold there if the advances were not repaid."

In Ryan *v.* Missouri, etc., R., 23 Am. & Eng. R. R. Cas. 703, it was held that where a contract of carriage is to be performed in several States, the *lex loci contractus* determines the validity of clauses for exemption from liability for loss of or damage to the goods.

2. In Carton *v.* Illinois Central R., 6 Am. & Eng. R. R. Cas. 305, it was held that a contract is subject to the laws of the State wherein it is made, and which are applicable thereto. But it was further held, that an interstate contract of shipment, entered into by a common carrier, is an entire contract, and the laws of the State wherein it is made, so far as they attempt to regulate interstate commerce, do not enter into it as a part of the contract, being repugnant to the federal constitution. The court observes: "It is urged with great earnestness that these contracts of shipment are entire contracts, and having been entered into in Iowa, the laws of this State entered into and become a part of the contracts, and the statute fixing the rate governed the price for the entire distance. This rule is, no doubt, correct when applied to a valid enactment of the legislature of the State where a contract is entered into, and no one doubts the power of a

The principle has also been applied, however, in other cases, that it is the law of the place of the performance of a contract by which the mode of its fulfilment and the measure of liability for its breach must be determined.[1]

In a *Texas* case, where a statute provides that carriers for hire within that State cannot limit their liability as it exists at common law, it was held that the provision in a contract of shipment as to notice of a claim for damages being given within a specified time, or the consignor to be precluded from a recovery, while valid and binding in contracts to be partly performed without that State, the statute is not valid or binding where the contract is to be wholly performed within the State.[2]

4. Carrier's Liability during Transit—1. LIABILITY AS INSURER.[3]—Throughout the United States the rule is that the carrier may by special contract limit his responsibility as insurer.[4]

common carrier to bind itself to ship freight beyond State lines, or even to foreign countries and beyond the terminus of its line of transportation. Under such a contract it is everywhere held that the carrier is bound to perform his contract and is liable for loss by negligence. But this position of counsel, it seems to us, begs the question, because if the law of Iowa under consideration is an unauthorized regulation of interstate commerce, it cannot enter into and become part of any contract. This position of counsel forcibly illustrates the correctness of our conclusions, that the law in question, if held to have been intended to operate upon interstate traffic, is directly and palpably contrary to the constitution of the United States. If the law entered into and became part of the contract of shipment, we would have a law of Iowa which would control and regulate the transportation of freight not only to the remotest parts of the States and Territories of this country, but extending to all the nations of the earth to which lines of common carriers extend, and to which local carriers may undertake to transport goods. That such legislation is national in its character it seems to us must be conceded."

1. In Brown *v.* Camden, etc., R., 83 Pa. St. 316, where a passenger upon a railroad purchased in Philadelphia from a New Jersey corporation a ticket to Atlantic City and checked his trunk to that point, and the trunk was lost, it was held that as the contract was to be performed in New Jersey by a corporation of that State, a statute of Pennsylvania limiting the liability of railroad companies for loss of baggage did not apply; the principle applied being that it is the law of the place of the performance of a contract by which the mode of its fulfilment and the measure of liability for its breach must be determined. See also Barter *v.* Wheeler, 49 N. H. 9; Gray *v.* Jackson, 51 N. H. 9; Rixford *v.* Smith, 52 N. H. 355; Dyke *v.* Erie R., 45 N. Y. 113.

2. In Gulf, etc., R. *v* Maetze, 18 Am. & Eng. R. Cas. 613, it was held that the provision in a contract of shipment as to notice of a claim for damages being given within a specified time, or the consignor is precluded from a recovery, while valid and binding in contracts to be partly performed without the State, is not valid nor binding where the contract is to be wholly performed within the State. See generally (as to discrimination in freight tariff by corporation of several States) Scofield *v.* Lake Shore, etc., R., 23 Am. & Eng. R. R. Cas. 612.

3. See WHO ARE COMMON CARRIERS, *ante*, as to the principles of the liability of carriers as insurers.

4. The following are the leading authorities: Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357; Railroad Co. *v.* Pratt, 22 Wall. (U. S.) 123; Grey *v.* Mobile Trade Co., 55 Ala. 387; Merchant's Dispatch Co. *v.* Comforth, 3 Col. 280; Welch *v.* Boston. etc., R. Co., 41 Conn. 333; Flinn *v.* Phila., etc., R. Co., 1 Houst. (Del.) 469; Southern Express Co. *v.* Newby, 36 Ga. 635; Ill. Cent. R. Co. *v.* Frankenberg, 54 Ill. 88; St. Louis, etc., R. Co. *v.* Smuck, 49 Ind. 302; St. Louis, etc., R. Co. *v.* Piper, 13 Kansas, 505; Adams Exp. Co. *v.* Guthrie, 9 Bush (Ky.), 78; Roberts *v.* Riley, 15 La. Ann. 113; Willis *v.* Grand Trunk R. Co., 62 Me. 488; McCoy *v.* Erie Trans. Co., 42 Ind. 498;

A carrier, like other bailees, has such an insurable interest in the goods consigned that he may insure them not only to the extent of his own liability, but to their full value.[1]

Subrogation.—Where the consignor has insured the goods and they are lost, the insurance company having paid the insurance is entitled to be subrogated to the rights of the consignor against the carrier.[2] This doctrine of subrogation depends, not upon the effect of contract, but is worked out through the right of the creditor or owner. The primary liability is upon the carrier, the secondary upon the insurer. Though the contract of the carrier may not be the first in order of time, it is first and principal in ultimate liability. An analogous doctrine is applied in the case of the payment of a

School Dist. *v.* Boston, etc., R. Co., 100 Mass. 505; Gordon *v.* Ward, 16 Mich. 360; Christenson *v.* Am. Express Co., 15 Minn. 270; Mobile, etc., R. Co. *v.* Werner, 49 Miss. 725; Ketchum *v.* Am. Exp. Co., 52 Mo. 390; Moses *v.* Boston, etc., R. Co., 24 N. H. 71; Kenney *v.* Cent. R. Co., 32 N. J. Law, 407; Westcott *v.* Fargo, 61 N. Y. 542; Smith *v.* N. C. R. Co., 64 N. C. 235; Union Express Co. *v.* Graham, 26 Ohio St. 295; Farnham *v.* Camden, etc., R. Co., 55 Pa. St. 53; Levy *v.* S. Express Co., 4 S. C., 234; Olwell *v.* Adams Exp. Co., 1 Cent. L. J. 186; Mann *v.* Burchard, 40 Vt. 326; Virginia, etc., R. Co. *v.* Sayers, 26 Gratt. (Va.) 328; Balt. & Ohio R. Co. *v.* Skeels, 3 W. Va. 556; Cream City, etc., R. *v.* Chicago, etc., R., 21 Am. & Eng. R. R. Cas. 70.

1. Waters *v.* Monarch Insurance Co., 5 El. & B. 870; Crowley *v.* Cohen, 3 B. & Ad. 478; London, etc., R. *v.* Glyn, 1 Ellis & E. 652; Marks *v.* Hamilton, 7 Exch. 323; Wolff *v.* Horncastle, 1 B. & P. 316; Caruthers *v.* Sheddon, 6 Taunt. 14; Savage *v.* Corn Exchange Ins. Co., 4 Bosw. (N. Y.) 1; s. c., 36 N. Y. 635; Chase *v.* Washington Ins. Co., 12 Barb. (N. Y.) 595; Van Natta *v.* Insurance Co., 2 Sandf. (N. Y.) 490; Waring *v.* Insurance Co., 45 N. Y. 606; Phœnix Ins. Co. *v.* Erie, etc., Transp. Co. (U. S. Dist. Ct. E. Dist. of Wisconsin, 1879); Lawson's Contracts of Carriers, 383; Vermont, etc., R. *v.* Fitchburg, etc., R., 14 Allen (Mass.), 462; Eastern, etc., R. *v.* Insurance Co., 98 Mass. 420; Commonwealth *v.* Insurance Co., 112 Mass. 136; Miltenberg *v.* Beacom, 9 Pa. St. 198; Rintoul *v.* New York Central, etc., R., 16 Am. & Eng. R. R. Cas. 144; Jackson Co. *v.* Boylston Ins. Co. 21 Am. & Eng. R. R. Cas. 117.

2. **Subrogation between Carrier and Insurer.**—In the case of Hall & Long *v.* Railroad Cos., 13 Wall. (U. S.) 370, Strong, J., says: "It is too well settled by the authorities to admit of question, that as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be the first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract or for non-performance of his legal duty. Standing thus, as the insurer does, practically in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner." See also Hart *v.* Western R. Corp., 13 Metc. (Mass.) 105; Gailes *v.* Hailman, 11 Pa. St. 515; Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., 10 Biss. C. C. 18; s. c., Lawson's Contracts of Carriers. 383; Mobile, etc., R. *v.* Jurey, 16 Am. & Eng. R. R. Cas. 132; Rintoul *v.* New York Central etc., R., 16 Am. & Eng R. R. Cas. 144; British, etc., Ins. Co. *v.* Gulf, etc., R., 21 Am. & Eng. R. R. Cas. 112; Jackson Co. *v.* Boylston Ins. Co., 21 Am. & Eng. R. R. Cas. 117; Carstairs *v.* Mechanics', etc., Ins. Co., 16 Am. & Eng. R. R. Cas. 142. See also Simpson *v.* Thompson, L. R. 3 App. Cas. 279.

loss by an insurance company occasioned by a fire negligently communicated by the sparks of a railroad locomotive to adjacent property.[1] But where a railroad company has negligently caused the death of a person an insurance company paying the amount of the policy upon the life of the deceased is held to have no claim against the railroad.[2]

The question has arisen whether, where the consignor, as a prudent business man, insures against the accidental injuries for which the carrier is not liable, and the carrier inserts a clause in the bill of lading claiming for himself the benefit of any insurance that may have been effected upon the damaged goods, the effect of such a contract is not to virtually protect the carrier from liability arising from his negligence; whether in such a case the carrier has not indirectly and covertly, but securely, protected himself against the injurious consequences of his want of care by an insurance for which he did not pay, and on account of which there is no evidence of reduction of the rates for freight. In a well-considered case it was held that such a contract was not an unreasonable and unjust exemption from liability for negligence, and would be enforced.[3]

1. Hart *v.* Western R. Corp., 13 Metc. 99; Peoria Marine & Fire Ins. Co. *v.* Frost, 37 Ill. 333; Bean *v.* Atlantic & St. L. R. Co., 58 Me. 82; Connecticut Fire Ins. Co. *v.* Erie R. Co., 73 N. Y. 399; Swarthout *v.* Chicago & N. W. R. Co., 49 Wisc. 625; Brighthope R. Co. *v.* Rogers, 8 Am. & Eng. R. R. Cas. 710.

2. Conn. Mutual L. I. Co. *v.* N. Y. & N. H. R. Co., 25 Conn. 265; Insurance Co. *v.* Brehme, 95 U. S. 754.

3. In Rintoul *v.* New York Central, etc., R., 16 Am. & Eng. R. R. Cas. 144, it was held that a clause in a bill of lading which provides that the carrier who is legally liable for any damage shall have the benefit of any insurance that may have been effected upon the damaged goods, is not an unreasonable and unjust exemption from liability for negligence, and may be enforced. Shipman, J., observes: "It does not seem to me that such a contract is unreasonable, because:

"(1) It is not one of exemption from liability. The owner is under no obligation to insure; he is not compelled to furnish indemnity to the carrier; and, if he insures, can make a limited contract of insurance which does not cover losses through the carrier's negligence. There is, therefore, no contract of exemption against liability for loss by negligence, no agreement that the carrier shall be protected or be indemnified, but the contract simply is that, in the contingency of insurance, a consequent benefit will, in case of loss, result to the carrier.

"(2) It is not unfair to the owner. The carrier is at liberty to insure his interest in the property intrusted to his care, and the fact that he may obtain an indemnity from a third person by means of the owner's policy is not unfair to the owner, unless the obtaining such indemnity is, in reality, made compulsory upon him, because the owner 'can equitably receive but one satisfaction' for the loss of his goods. Hart *v.* Railroad Corp., 13 Metc. (Mass.) 99. If it was a part of the bill of lading that the owner must insure for the benefit of the carrier, such condition would be unfair.

"(3) The contract is not necessarily unfair to the insurers. At common law the owner who has been paid in full or in part for his loss by the insurance company, may sue the carrier upon the contract of bailment, and as to so much of the amount recovered from the carrier as is in excess of a full satisfaction of the loss, the owner will be a trustee for the insurance company. It seems that the effect of the clause in the bill of lading which is now under consideration is to provide that the owner in such circumstances is not a trustee for the insurance company, but a trustee for the carrier. If such a contract is entered into, without fraudulent concealment of the facts from the insurers, of which there is no evidence in this case, it cannot

In a case where the insurance company stipulated in the policy that in case of loss it should be subrogated to all claims against

properly be considered unjust or unreasonable, because the insurance company obtains its remedy, not by virtue of a contract of its own with the carrier, but through the owner's contract, and its right depends upon, or is subject to, the agreement made by the owner with the carrier, which he is at liberty to make to suit his own interest, provided there is no fraudulent concealment from the insurers. They can, in view of this provision in a bill of lading, modify the contract which they have heretofore customarily made with the insured, and the result will probably be that the insurers will also make provisions in their policies, by virtue of which insurance on property in transit will have a limited character. British, etc., Insurance Co. *v.* Gulf, etc., R., 21 Am. & Eng. R. R. Cas. 112."

In Jackson Co. *v.* Boylston Ins. Co., 21 Am. & Eng. R. R. Cas. 117, it was held that the right of an insurance company insuring a property *in transitu*, to be substituted to the rights of the insured as against the common carrier upon paying a loss, is subject to the owner's contract of carriage with the railroad company provided there be no fraudulent concealment from the insurer. An insurance company insuring property *in transitu*, and making no provisions in regard to the nature of the contract of carriage, must be held to have insured subject to the actual contract of carriage so far it was a lawful contract. Devens, J., observes: "Subrogation is the substitution of one person in place of another, whether as a creditor or the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies, or securities. It does not necessarily depend upon contract, but grows out of the relation which two parties sustain to each other, and the party subrogated acquires no greater rights than those of the party for whom he is substituted. The contract of insurance being one of indemnity, the insurer, when he has indemnified the insured, is equitably entitled to succeed to the right which he had against the carrier. But, as the insurance company obtains its remedy against the carrier, not by virtue of any contract of its own with him, but through the contract of the owner of the goods, such owner may make the contract of carriage so as to suit his own interest, provided there be no fraudulent concealment from the insurer, and the right which the insurer obtains is subject to the agreement made with the carrier. Carriers have an insurable interest in the goods they transport, and may, therefore, effect insurance upon them for their own benefit. There is no reason why they may not insure them jointly with the owner, and, if so, why they may not contract for the benefit of insurance effected by the owner, in the absence of fraud or of any contract to the contrary, with the insurer.

In Mobile, etc., R. Co. *v.* Jurey, 111 U. S. 584; s. c., 16 Am. & Eng. R. R. Cas. 132, it was held by the United States Supreme Court that the payment of a total loss by an insurer works an equitable assignment to him of all the remedies which the insured has against a common carrier for the destruction of property intrusted to its care. The suit may be brought in the name of the nominal plaintiff, and the party beneficially interested is only bound to establish the cause of action, without proof of his equitable right of recovery. Woods, J., in delivering the opinion of the court, remarked: "But we are of opinion that the ground upon which this assignment of error is based is not tenable, which is that the recovery must be limited to the amount paid by the insurance company to the defendants in error, and that the burden is on the insurance company to show how much it paid. Although the suit is brought for the use of the insurer, and it is the sole party beneficially interested, yet its rights are to be worked out through the cause of action which the insured has against the common carrier. The legal title is in the insured, and the carrier is bound to respond for all the damages sustained by the breach of his contract. If only part of the loss has been paid by the insurer, the insured is entitled to the residue. How the money recovered is to be divided between the insured and the insurer is a question which interests them alone, and in which the common carrier is not concerned. The payment of a total loss by the insurer works an equitable assignment to him of the property, and all the remedies which the insured had against the carrier for the recovery of its value. Mason *v.* Sainsbury, 3 Doug. 61; Yates *v.* Whyte, 4 Bing. N. C. 272; Clark *v.* Hundred of Blything, 2 Barn. & C. 254; Ætna Ins. Co. *v.* Tyler, 16 Wend. (N. Y.) 385; Atlantic Ins. Co. *v.* Storrow, 5 Paige (N. Y.), 285."

the carrier, and goods were subsequently shipped under a bill of lading which provided that in case of loss by which the railroad company incurred any liability the railroad company should have the benefit of any insurance which might have been effected on the goods, it was held in an action by the insured against the insurance company that he could not recover, having by the bill of lading defeated the right of subrogation against the carrier to which the insurance company was entitled.[1]

In the absence of any contract on the subject, if the insured owner accepts payment from the insurers they may use the name of the insured in an action to obtain redress from the carrier whose failure of duty caused the loss. The right rests upon the doctrine of subrogation, depending not at all upon privy of contract, but worked out through the right of the creditor or owner. And suit cannot be in the name of the insurers.[2]

1. In Carstairs *v.* Mechanics, etc., Ins. Co., 16 Am. & Eng. R. R. Cas. 142, it was held that under an open policy of insurance on goods while in transit by railroad, it was stipulated that the insurance company should, in case of loss, be subrogated to all claims against the carrier. Certain goods covered by the policy were destroyed in a railroad collision, having been shipped under a bill of lading which provided that in case of loss, by which the railroad company incurred any liability, the railroad company should have the benefit of any insurance which might have been effected on the goods. *Held*, in an action by the insured against the insurance company, that he could not recover, having, by the bill of lading, defeated the right of subrogation against the carrier, to which the insurance company was entitled. Morris, J., observes: "In Mercantile Mut. Ins. Co. *v.* Calebs, 20 N. Y. 173 (1859), the insurer who had paid the loss, and who would have been subrogated to all the rights of the shipper of the goods against the carrier, was defeated in an action against the carrier solely and distinctly upon the ground that such an agreement in the bill of lading was valid and binding. It is contended that this decision is not an authority in courts which do not (as the New York courts do) uphold contracts made by carriers exempting them from liability for negligence. This case is, however, cited with approval in several text-books on the law of carriers, and it does not appear that it has ever been questioned. The case of the Phœnix Ins. Co. *v.* Erie & Western Transp. Co., decided by Judge Dyer, in the United States circuit court for the eastern district of Wisconsin (1879), reported in Lawson Carr. 382, is a very carefully considered decision of a federal court, in which the question was distinctly made under circumstances most favorable for the insurance company. It was there conceded to be law that the carrier could not stipulate for exemption from liability for negligence, and it was a fact found by the court that the loss had occurred through the negligence of the carrier, against whom the owner might have recovered. But the court held that, as the carrier could have insured himself against the peril by which the loss happened, although the negligence of his servants was the cause of it, there was no rule of law which forbade his contracting for the benefit of the insurance effected by the shipper. These two cases would have to be disregarded by any court which should permit this defendant to be subrogated to the rights of the plaintiff, and to recover against the carrier after having paid the loss claimed in this suit; and I should therefore have not only to doubt the correctness of these two decisions,—which I am not prepared to say I do,—but to be clearly convinced that they were wrongly decided, before I could rule that the defendant, on paying the insurance claimed, could have the benefit of that subrogation which the plaintiffs expressly agreed it should have." *Compare* Jackson Co. *v.* Boylston Ins. Co., 21 Am. & Eng. R. R. Cas. 117.

2. Rintoul *v.* New York Central, etc., R., 16 Am. & Eng. R. R. Cas. 144; Hall *v.* Railroad Cos., 13 Wall. (U. S.) 367; Hart *v.* Railroad Corp., 13 Metc. (Mass.) 99; Mercantile Mut. Ins. Co. *v.* Calebs, 20 N. Y. 173; Connecticut Mut. Life Ins. Co. *v.* Railroad Co., 25 Conn. 265. See also Rockingham Mutual Fire Ins. Co.

2. CARRIER'S LIABILITY ARISING FROM DELAY.—Where the carrier makes an express contract for delivery within a specified time, he is bound to the fulfilment of that contract and is liable for delay from whatever cause the delay may have arisen.[1]

There is no rule of law which specifies the time within which the delivery must be made unless the contract was express. A promise to carry and deliver within a reasonable time will, however, always be implied.[2] It has been said that what is a reasonable time is not susceptible of definition. The circumstances of the particular case must be adverted to. The mode of conveyance, the distance, the nature of the goods, the season of the year, the character of the weather, and the ordinary facilities of transportation are to be considered in determining whether in the particular case there has been any unreasonable delay. The character of the freight, whether ordinary merchandise, such as iron, wool, cotton, grain, etc., or whether perishable goods such as live-stock, fish, oysters, fruit, vegetables, etc., must be considered, because in the first case their character would not suggest probable damage from delay, whereas in the second it would. The season of the year is also to be considered, because the same delay at one time might be harmless, whereas at another it would do serious injury.[3] The question as to the carrier's diligence and a reason-

v. Bosher, 39 Me. 253; Bean *v.* Atlantic, etc.. R. Co., 58 Me 82; Peoria Marine & Fire Ins. Co. *v.* Frost, 37 Ill. 333; Connecticut Fire Ins. Co. *v.* Erie R., 73 N. Y. 399; Ætna Ins. Co. *v.* Hannibal, etc., R., 3 Dill. C. C. 1. But see Swarthout *v.* Chicago, etc., R., 49 Wis. 265.

1. Robinson *v.* Dunmore, 2 B. & P. 416; Great Northern R. *v.* Hawcroft, 21 L. J. Q. B. 178; Tirrell *v.* Gage, 4 Allen (Mass.). 251; Wareham Bank *v.* Burt, 5 Allen (Mass.), 113; Gage *v.* Tirrell, 9 Allen (Mass.), 299; Higginson *v.* Weld, 14 Gray (Mass.), 465; Knowles *v.* Dabney, 105 Mass. 437; Collier *v.* Swinney, 16 Mo. 484; Harmony *v.* Bingham, 1 Duer (N. Y.) 209; Place *v.* Union Exp. Co., 2 Hilt. (N. Y.) 19; Hand *v.* Baynes, 4 Whart. (Pa.) 214; The Harriman, 9 Wall. (U. S.) 161; Texas Pacific R. *v.* Nicholson, 61 Tex. 491; s. c., 21 Am. & Eng. R. R. Cas. 133; Wood *v.* Chicago, etc., R., 24 Am. & Eng. R. R. Cas. 91, overruling Wood *v.* Chicago, etc., R., 21 Am. & Eng. R. R. Cas. 36; Ball *v.* Wabash, etc., R., 83 Mo. 574; s. c., 28 Am. & Eng. R. R. Cas. 384.

2. Donohoe *v.* London, etc., R., 15 W. R. 792; Raphael *v.* Pickford, 5 M. & G. 558; Hales *v.* London, etc., R., 4 B. & S. 66; Robinson *v.* Great Western, etc., R., 35 L. J. N. S. C. P. 123; D'Arc *v.* London, etc., R., L. R. 9 C. P. 325; Hughes *v.* Great Western, etc., R., 14 C. B. 637; 25 Eng. L. & Eq. 283; Nettles *v.* South Carolina, etc., R., 7 Rich. (S. Car.) 190; Boner *v.* Merchants' Steamboat Co., 1 Jones (N. Car.), 211; East Tennessee, etc., R. *v.* Nelson, 1 Coldw. (Tenn.) 272; Nudd *v.* Wells, 11 Wis. 407; McLaren *v.* Detroit, etc., R., 23 Wis. 138; Illinois Central, etc., R., 41 Ill. 73; Michigan, etc., R. *v.* Day, 20 Ill. 375; Mann *v.* Birchard, 40 Vt. 326; Parsons *v.* Hardy, 14 Wend. (N. Y.) 215; Wilbert *v.* New York, etc., R., 19 Barb. (N. Y.) 36; Rome, etc., R. *v.* Sullivan, 14 Ga. 277; Hill *v.* Humphreys, 5 W. & S. (Pa.) 123; Ludwig *v.* Meyre, 5 W. & S. (Pa.) 438; Eagle *v.* White, 6 Whart. (Pa.) 505; Chicago, etc., R. *v.* Dawson. 79 Mo. 296; s. c., 18 Am. & Eng. R. R. Cas. 521.

3 In McGraw *v.* Baltimore, etc., R., 18 W. Va. 361; s. c., 9 Am. & Eng. R. R. Cas. 188, Patton, J., observes: "The obligation of the common carrier is to transport the goods safely and within a reasonable time. What is a reasonable time is not susceptible of being defined by any general rule; but the circumstances of each particular case must be adverted to in order to determine what is a reasonable time in that case. But it may be said that the mode of conveyance, the distance, the nature of the goods, the season of the year, the character of the weather, and the ordinary facilities of transportation are to be considered in determining whether in the particular case

able time is for the jury.[1] In *North Carolina*, where a statute imposes a penalty upon the carrier for the failure to ship goods within five days after their consignment, there is an implied agreement on the carrier's part to ship within a reasonable time, the limits of which are defined by the statute.[2]

In *England* the carrier may contract, but only by express stipulation, in modification of his common-law obligation to carry and deliver within a reasonable time, that he shall not be responsible for delivery within any certain or definite time.[3]

Where the carrier only professes to run trains for a certain class of traffic at stated intervals, it will be within a reasonable time if he carries in due course according to his profession. But in a case in which a company received cattle for carriage and it did not appear that there were any ordinary cattle trains on the line, it was held to be properly left to the jury to say what was a reasonable time within which to convey the cattle, and therefore whether the company were bound to send them by a special train.[4] The route which the carrier ordinarily uses may be considered in determining what is a reasonable time, and he is not bound to carry by the shortest route if that is not his custom.[5]

there has been an unreasonable delay. Vicksburg & Meridian R. Co. *v.* Ragsdale, 46 Miss. 458. It is obvious that ordinarily the delay in shipping articles not liable to decay or damage, such as iron, wool, cotton, grains and things of like character are liable to be injured by a few days' delay, would be no test in a case where the delay of a day in transportation would result in loss or damage by reason of their nature and inherent character, such as live-stock, fish, oysters, fruits, vegetables, and things of like character. In the one case there is nothing in the thing itself, which would induce a prudent business man to anticipate injury from a temporary delay in transportation, whereas in the other case any prudent business man from the nature of the thing itself might reasonably anticipate loss or damage from delay. So the season of the year is an element to be considered, some articles, as some kinds of vegetables, being of that nature that at certain seasons of the year a brief delay would be harmless, whereas at another season of the year the delay would result in loss or damage."

In St. Louis, etc., R. *v.* Heath, 42 Ark. 477; s. c., 18 Am. & Eng. R. R. Cas. 557, it was held that a railroad company is bound to deliver freight at its destination with reasonable expedition, and a delay of seventy days, unexplained, is an unreasonable delay. *Compare*, however, Greisмer *v.* Lake Shore, etc., R., 26 Am. & Eng. R. R. Cas. 287, where it was held that in respect to the liability of a railroad company for delay in transportation and delivery of goods all that can be required of it is the exercise of due care to forward and deliver promptly. There is no absolute duty resting upon a carrier by railroad to deliver goods within what is, under ordinary circumstances, a reasonable time, and delay caused by a strike of employees and the forcible stopping by them of the running of trains was excused.

What is a "reasonable time" may depend upon a variety of circumstances, such as the nature of the goods and the ordinary course of business of the company. Wren *v.* Eastern Counties R., 1 L. T. N. S. 5.

1. Hales *v.* London, etc., R., 32 L. J. Q. B. 292; 4 B. & S. 66.

2. In McGowan *v.* Wilmington, etc., R., 27 Am. & Eng. R. R. Cas. 64, it was held that in the absence of a contract between the consignor and the shipper to the contrary, there is an implied agreement on the part of the carrier to ship goods within a reasonable time, which the statute of North Carolina has fixed to be within five days next after the receipt of the goods.

3. Hughes *v.* Great Western R., 23 L. J. C. P. 153; 14 C. B. 637; Robinson *v.* Great Western R., 35 L. J. C. P. 123.

4. Donohoe *v.* London, etc., R., 15 W. R. 792; Redman's Law of Railway Carriers (2d Ed. 1880), p. 117.

5. Hales *v.* London, etc., R., 32 L. J. Q. B. 292, 4 B. & S. 66.

Where the carrier's ordinary course of business is inconsistent with reasonably early transit, it is no answer to an action for damages arising from delay that he carried at the ordinary rate at which he conducted his business.[1]

Where a carrier accepted perishable goods, but was detained at the port of consignment for two days by fog, and failed to take any care of the goods or to ship them by railroad as he had done in similar cases, he was held liable.[2] An instruction to the jury that the railroad company was bound to forward apples the same day they are received, and permitting no excuse whatever for delay, is erroneous.[3] In *Wisconsin* it was held that the railroad company, as a common carrier, and independent of any contract between it and a shipper, is not liable for loss and expense occasioned by its failure to have cars in readiness to ship live stock on the day that the consignor notified the agent of the company that he would tender them for shipment, when it is not shown that the notice given was a "reasonable notice" within the meaning of a statute, or what was the general custom of the company as to receiving and shipping live stock.[4]

Where by reason of a failure to deliver goods in a reasonable time the consignor is compelled to and does purchase other goods, he is not forced to receive the goods consigned when offered at another time.[5]

(*a*) *Loss of Market.*—In *England* it is held that a condition in the carrier's contract exempting itself from liability for loss of market, or other claim arising from delay or detention of any train, whether at starting or at any of the stations or in the course of the journey, is just and reasonable.[6]

1. Blakemore *v.* Lancashire, etc., R., 1 F. & F. 76; Redman's Law of Railway Carriers, p. 114.

2. Peck *v.* Weeks, 34 Conn. 145.

3. Dixon *v.* Chicago, R. I. & P. R. Co., 18 Am. & Eng. R. R. Cas. 525.

4. Richardson *v.* Chicago, etc., R., 18 Am. & Eng. R. R. Cas. 530.

5. Gulf, etc., R. *v.* Maetze, 18 Am. & Eng. R. R. Cas. 613.

6. **Loss of Market.**—In White *v.* Great Western R., 26 L. J. C. P. 158, 2 C. B. N. S. 7, it was held that a condition in the contract of a carrier was just and reasonable which provided as follows. "That the company will not, under any circumstances, be liable for loss of market, or other claim arising from delay or detention of any train, whether at starting or at any of the stations or in the course of the journey." See also Lord *v.* Midland R., L. R. 2 C. P. 339, 36 L. J. C. P. 170.

In Black *v.* Baxendale, 1 Exch. 410, the consignor sent certain goods for delivery at a certain place in time for market, but failed to notify the carrier of this purpose. The carrier did not deliver in time for market, and was held liable for his unreasonable delay, and the jury were permitted to award damages sufficient to cover the consignor's expenses in effecting a sale at another place. *Compare* Woodger *v.* Great Western R., L. R. 2 C. P. 318, where such expenses were held not to be properly allowed.

A fish-merchant delivered fish to a railway company to carry upon a signed contract relieving the company as to all fish delivered by him "from all liability for loss or damage by delay in transit or from whatever other cause arising," in consideration of the rates being one fifth lower than where no such undertaking was granted; the contract to endure for five years. The servants of the company accepted the fish, although from a pressure of business they could not carry in time for the intended market, and the fish lost the market. *Held*, reversing the decision of the court of appeal, that upon the facts the merchant had a *bona-fide* option to send fish at a reasonable rate, with

In a *Michigan* case, where unreasonable delay was complained of, and loss of market claimed, it was held not to be sufficient for the plaintiff to prove delay, and also a damage, when it appears from his proofs that there was other delay not chargeable to the carrier; but some damage must be traced to the delay for which the carrier was in fault. And where unexpected difficulties occur in the transportation of property by a carrier, and the consignor agrees in view of them to pay a sum for the carriage in addition to what had been previously fixed upon, and pays the same, he cannot recover it back as paid without consideration.[1]

In a *Texas* case, where the carrier failed to transport produce destined for market in the condition in which it was consigned, and without unnecessary delay, the owner could recover among other elements of damage, by way of indemnity, interest on the value of the consignment, running from the time it should have been delivered at its market destination by the carrier.[2]

(*b*) *Excuses for Delay.*—The following have been held to be such excuses for delay as will release the carrier from liability: Where the delay occurred through the negligence of another company, with running power over the carrier's line.[3] Where the carrier can show that the delay was necessary to insure the safety of the goods, upon the ground that the first duty of the carrier is to carry safely.[4]

(*c*) *Act of God.*—In general, a carrier is not liable for the delay caused by an act of God, where no negligence in the performance of his duties is shown. It has been held that he is not bound to use extra efforts or incur extra expense in order to surmount obstructions caused by a fall of snow.[5] It has also been held, however, that the carrier cannot excuse his delay by setting up an increased expense not unforeseen nor entirely unreasonable. He was excused where the loss or delay arose by action of the weather.[7]

liability on the company as common carriers, or at the lower rate upon the terms of the contract; that the contract was in point of fact just and reasonable within the Railway and Canal Traffic Act, and covered the delay; and that the company were not liable for the loss. Manchester, etc., R. *v.* Brown, L. R. 8 H. L. Cas. 703; s. c., 16 Am. & Eng. R. R. Cas. 174.

1. Detroit, etc., R. *v.* McKenzie, 43 Mich. 609; s. c., 9 Am. & Eng. R. R. Cas. 15.

2. Houston, etc., R. *v.* Jackson, 62 Tex. 209; s. c., 21 Am. & Eng. R. R. Cas. 126. See, generally, Texas Pacific R. *v.* Nicholson, 61 Tex. 491; s. c., 21 Am. & Eng. R. R. Cas. 133.

3. Great Northern R. *v.* Taylor, 35 L. J. C. P. 210; s. c., *sub nom.* Taylor *v.* Great Northern R., L. R. 1 C. P. 385; Hadley *v.* Clarke, 8 T. R. 259.

4. Great Northern R. *v.* Taylor, 35 L. J. C. P. 210; s. c., *sub nom.* Taylor *v.* Great Northern R., L. R. 1 C. P. 385.

With reference to the time to be occupied in transporting the property the carrier is not held to the extraordinary liability to which he is held for its safety while it is in his custody, and he may excuse delay in its delivery by proof of misfortune or accident, although not inevitable or produced by act of God. Kinnick *v.* Chicago, etc., R., 27 Am. & Eng. R. R. Cas. 55; Hutchinson on Carriers, § 330.

5. Briddon *v.* Great Northern R. Co., 28 L. J. Exch. 51; 32 L. T. 94.

6. Condict *v.* Railroad, 54 N. Y. 500; Deming *v.* Grand Trunk, etc., R., 48 N. H. 455.

7. Nor by action of the weather. Swetland *v.* Boston, etc., R. Co., 102 Mass. 276; Curtis *v.* Chicago, etc., R. Co. 18 Wis. 312; Ballentine *v.* North Missouri

Where a freshet swept away a railroad bridge [1]—where the carrier was delayed by the freezing of a canal.[2]

(*d*) *Proximate and Remote Cause.*—The question has arisen whether, where the loss or injury occurs by act of God following upon the carrier's delay, the carrier should be held liable upon the ground that but for the delay the loss would not have occurred. In some States it is held that under such circumstances the carrier is not liable. This is the law in *New York*,[3] *Illinois*,[4] *Missouri*,[5] and *Tennessee*.[6]

In other States it is held that the carrier's negligence or misconduct must be immediately or proximately connected with the accident or loss. If it is remotely the occasion of the loss or damage the carrier is not liable. He is answerable for the ordinary and proximate consequence of his negligence, and not for those that are remote or extraordinary. And this liability includes all those consequences which may have arisen from the neglect to make provision for those dangers which ordinary skill and foresight is bound to anticipate. This is the rule which has been expressly or in effect adopted in *Pennsylvania*,[7] *Massachusetts*,[8]

R. Co., 40 Mo. 491. But where perishable articles were frozen by reason of an unusual intensity of cold, the fact that the carrier had done what is usual is not sufficient to exempt him from a charge of negligence. Wing *v.* N. Y., etc., R. Co., 1 Hilton (N. Y.), 235.

1. It may be stated in general terms that a carrier is not liable for loss of freight, when such loss is occasioned by an unexpected flood, and no negligence is shown in the performance of his duties. Nashville, etc., R. Co. *v.* David. 6 Heisk. (Tenn.) 261; Nashville, etc., R. Co. *v.* King, 6 Heisk. (Tenn.) 269; Nashville, etc., R. Co. *v.* Jackson, 6 Heisk. (Tenn.) 271; Railroad Co. *v.* Reeves, 10 Wall. (U. S.) 176; Read *v.* Spaulding, 30 N. Y. 630; Wallace *v.* Clayton, 42 Ga. 443; Denny *v.* N. Y., etc., R. Co., 13 Gray (Mass.), 481; Lipford *v.* Charlotte, etc., R. Co., 7 Rich. (S. Car.) 409.

2. In Beckwith *v.* Frisbie, 32 Vt. 559, the carrier was delayed by the freezing of a canal, and, upon his storing the goods, it was held that their owner was liable for the storage. See also Parsons *v.* Hardy, 14 Wend. (N. Y.) 215. But see O'Connor *v.* Foster, 10 Watts. (Pa.) 118.

3. **New York.**—In Read *v.* Spaulding, 30 N. Y. 630, the carrier delayed the transportation of the goods, and they were damaged by an extraordinary flood, which would not have overtaken them had not the delay occurred. The carrier was held liable because the delay was similar in effect to a deviation. A similar conclusion was reached in Michaels *v.* Railroad, 30 N. Y. 564. This doctrine has since been followed in New York Bostwick *v.* Railroad, 45 N. Y. 712; Condict *v.* Railroad, 54 N. Y. 500; Duncan *v.* Railroad, 3 Lans. (N. Y.) 265.

4. **Illinois.**—Michigan, etc., R. *v.* Curtis. 80 Ill. 324.

5. **Missouri.**—Wolf *v.* American Express Co., 43 Mo. 421; Read *v.* Railroad, 60 Mo. 199; Pruitt *v.* Railroad, 62 Mo. 52. See also Davis *v.* Wabash, etc., R., 26 Am. & Eng. R. R. Cas. 315.

6. **Tennessee.**—Southern Express Co. *v.* Womack, 1 Heisk. (Tenn.) 256.

7. **Pennsylvania.**—In the case of Morrison *v.* Davis & Co., 20 Pa. St. 171, the goods were injured by a flood. The evidence showed that the canal-boat, by which the goods were transported, was drawn by a lame horse. The result was that the boat did not make its usual speed. If it had, it would have passed the point, where the goods were injured, before the flood. It was held that the carrier was not liable, because the lameness of the horse was the remote and not the proximate cause of the injury. See also Clarke *v.* Needles, 25 Pa. St. 338.

8. **Massachusetts.**—Denny *v.* New York Cent. etc., R., 13 Gray (Mass.), 481; Hoadley *v.* Northern Transp. Co., 115 Mass. 304.

In Denny *v.* New York Central R. Co., 13 Gray (Mass.), 481, the goods were unnecessarily delayed on the way for six days at an intermediate point, and were then carried to their destination and placed in the depot of the company. It was held that the company was liable for

Ohio,[1] *Michigan*,[2] *Nebraska*,[3] *West Virginia*,[4] *Iowa*,[5] *New*

any injury resulting from the delay in transportation, but that it was not liable for the injury done by a flood after the goods were placed in the depot; that the delay was merely the remote cause of the injury by the flood.

1. **Ohio.**—Daniels *v.* Ballantine, 23 Ohio St. 532.

2. **Michigan.**—Railroad *v.* Burrows, 33 Mich. 6.

3. **Nebraska.**—McClary *v.* Sioux City, etc., R., 3 Neb. 44.

4. **West Virginia.**—In McGraw *v.* Baltimore, etc., R., 18 W. Va. 361; s. c., 9 Am. & Eng. R. R. Cas. 188, B. in Parkersburg delivered potatoes at the B. & O. R. Co.'s depot to be conveyed to McG. in Grafton on the 13th day of February, 1866, to be shipped on the 14th; there was a daily train between those points; the weather was mild and so continued on the 14th; the potatoes did not reach Grafton until the 16th, and arrived so frozen as to be worthless, the weather on the 15th and 16th having become cold. *Held*, under the circumstances of this case the company is liable in damages. Patton, J., observes: "If the question in this case depended solely on the question whether the plaintiff in error was liable for the loss of the property from freezing, because that was an act of God, I should have no hesitation in saying that the liability existed. But on the other hand, if the question of liability rested simply upon the question, whether they were liable for the freezing of the property, having been guilty of no negligence or misconduct, by which that injury resulted, I would have as little hesitation in saying that they were not liable; not because the freezing was an act of God or an inevitable accident, but because of the exception to that principle on account of the nature and inherent character of the property and its liability to freeze. Maslin *v.* B. & O. R. Co., 14 W. Va. 189. But whenever the common carrier is exempt from liability, either because of the act of God or because of the nature and inherent character of the property and its liability to loss and damage, he must be free from any previous negligence and misconduct, by which that loss or damage may have been occasioned. For though the immediate or proximate cause of a loss in any given instance may have been what is termed the act of God, or from the nature and inherent character of the property, yet if the carrier unnecessarily exposed the property to such accident by any culpable act or omission of his own, he is not excused. Williams *et al. v.* Grant *et al.*, 16 Conn. 487. That previous negligence or misconduct, which makes the carrier liable for loss to property, must be immediately or proximately connected with the accident or loss. If it is remotely the occasion of the loss or damage, the carrier is not liable. He is answerable for the ordinary and proximate consequences of his negligence, and not for those that are remote and extraordinary, and this liability includes all those consequences which may have arisen from the neglect to make provision for those dangers, which ordinary skill and foresight is bound to anticipate. Morrison *v.* Davis & Co., 20 Pa. St. 171; Denny *v.* New York Central R. Co., 13 Gray, 481; R. Co. *v.* Reeves, 10 Wall. 176."

5 **Iowa.**—In Hewitt *v.* Chicago, etc., R., 18 Am. & Eng. R. R. Cas. 568, a car of potatoes was delivered to the defendant on November 10th, to be shipped to Omaha. The car arrived at Council Bluffs, the defendant's terminus, November 11th, and was put in the yard of the connecting line to be forwarded. That line refused to receive the car, as it was out of repair. Defendant retook the car, repaired it, and redelivered it on the afternoon of the 13th, and it arrived in Omaha on the 15th. The weather was warm on the 10th, but before the 15th it turned cold, and the potatoes were frozen. *Held*, that the danger from cold was one which ordinary foresight could have apprehended and guarded against; that great diligence and dispatch were required of the company in the duty of forwarding these perishable articles, and that if they were exposed to the danger which injured them through the company's negligence, it is responsible for the damage. Where the evidence shows that the car was delivered on the 13th, but the receipt therefor was delivered on the 14th, it war error to exclude evidence that between the companies it was the custom that receipts for cars received by one from the other in the afternoon or evening are not delivered till the following day. Reed, J., observed: "In Morrison *v.* Davis, 20 Pa. St. 171, and Denny *v.* Railroad Co., 13 Gray, 481, it is held that the carrier is not responsible for injuries to the property while in his possession caused by sudden and extraordinary floods, notwithstanding the fact that it would not have been exposed to the danger if he had used proper diligence in forwarding it to its destination. But the

Mexico,[1] and has met with approval in the *United States Courts*.[2]

(*e*) *Strikes, Riots, and Mobs*—In the earliest cases in which the question arose as to how far a carrier was responsible, where the delay occurred through the acts of mobs, rioters, etc., the carrier was held liable. A mob, no matter how overwhelming in numbers, was never considered as coming within the terms "public enemy." Lord Mansfield objected to the reason at first given for this view, namely, that the carrier should have a sufficient force to repel a mob, and observed that there are cases in which that would be impossible. He suggested the true reason, namely, the fear that it may give room for collusion, that the carrier may contrive to do wrong on purpose to share the spoil.[3] In Blackstock *v.* New York, etc., Railroad,[4] the question arose as to whether,

injury in these cases was occasioned by a cause which human foresight or sagacity could not have apprehended. The holding, therefore, is not in conflict with the rule as we have stated it."

1. **New Mexico.**—In MacVeagh *v.* Atchison, etc., R., 18 Am. & Eng. R. R. Cas. 651, the carrier failed to forward the goods promptly in consequence of which delay they were attached. *Held*, that he was not liable, as his negligence was the remote and not the proximate cause of the injury. Seizure under legal process, like the act of God, will excuse the common carrier from delivering goods intrusted to his care for shipment.

2. Railroad *v.* Reeves, 10 Wall. (U. S.) 176.

3. "If," said Lord Holt in Coggs *v.* Bernard, 2 Salk. 919, "the force used be never so great, as if an irresistible multitude of persons should rob him (the carrier), he is, nevertheless, responsible." To the same effect are the remarks of Lord Mansfield in Forward *v.* Pittard, 1 T. R. 27: "If an armed force come to rob the carrier of his goods he is liable, and a reason is given in the books which is a bad reason, viz., 'that he ought to have a sufficient force to repel it.' But that would be impossible in some cases, as, for instance, in the riots of 1780 (the Lord George Gordon riots). The true reason is for fear it may give room for collusion, that the carrier may contrive to be robbed on purpose and share the spoil." It was, accordingly, held in Barclay *et al. v.* Cevailla y Gana, 3 Doug. 389, where a vessel lying in the Thames, with goods on board, was seized at night by a band of eleven armed men and plundered of her cargo, that the captain was liable to the shippers for the loss, and could not defend on the ground of *vis major*. In the United States a number of decisions have been rendered in which this interesting question has been touched upon. As to Indians, Holladay *v.* Kennards, 12 Wall. (U. S.) 254. Confederate forces in War of the Rebellion. Hubbard *v.* Hernden Exp. Co., 10 R. I. 244; Lewis *v.* Ludwick, 6 Cold. (Tenn.) 368; Philadelphia, etc. R. *v.* Harper, 29 Md. 330; Gage *v.* Tirrell, 9 Allen (Mass.), 299; Bland *v.* Adams Exp. Co., 1 Duv. (Ky.) 232; Porcher *v.* Northeastern, etc., R., 14 Rich. (S. Car.) 181; Nashville, etc., R. *v.* Estes, 3 Am. & Eng. R. R. Cas. 492. *Compare* McCrane *v.* Wood, 24 La. Ann. 406. United States troops in same war. Southern Exp. Co. *v.* Womack, 1 Heisk. (Tenn.) 256; Smith *v.* Brazelton, 1 Heisk. (Tenn.) 44.

5. In Blackstock *v.* N. Y. & Erie R. Co., 20 N. Y. 48, the facts were these: On May 15, 1874, the company defendant adopted a regulation whereby their engineers were made respectively accountable for running any train upon a switch at a station where it ought to stop. This regulation the referee found to be a reasonable one. In consequence thereof, however, one hundred and forty out of one hundred and sixty-eight engineers employed struck for a period of two weeks, during which time the transportation of certain potatoes belonging to the plaintiff was delayed. The court held the company liable for the damage thus occasioned, reasoning as follows: "Assuming, then, that abandoning their work was a breach of duty on the part of the engineers, they by this act became responsible to the defendants for all its direct consequences. The case, therefore, is one in which the actual delinquents were responsible to the defendants, but were not responsible to the plaintiff. This shows the equity of the rule which holds the master or employer answerable in such cases. Its policy is not less

where the delay occurred through a strike of railroad employees, the carrier was liable. It was held that he was, and the court considered the railroad liable for the acts of its employees upon the ground that those who intrust their goods to carriers have no means of ascertaining the character or disposition of their agents or servants, have no voice in their selection, and no control over their actions. The latest cases upon the subject, however, have established a contrary doctrine, and the ruling in the case referred to has been overthrown in New York. In an Indiana case,[1] the

apparent. Those who intrust their goods to carriers have no means of ascertaining the character or disposition of their subordinate agents or servants; they have no agency in their selection and no control over their actions. . . . The rule which the law has adopted, by which a master is held responible for the acts of his servants, is the best calculated to secure the observance of good faith on the part of persons intrusted with the property of others."

1. In Pittsburgh, etc., R. *v.* Hollowell, 65 Ind. 188, it appeared that the railroad company was prevented from receiving and transporting cattle belonging to the plaintiff, as it had agreed to do, by reason of the forcible resistance of an armed mob, who prevented the company from moving its trains. Plaintiff urged that on principle a mob was not a "public enemy," and that therefore the company defendant was clearly liable. The court, however, said: "The strict rule contended for by the appellee is applicable to common carriers only after they have received the goods for transportation and fail to deliver them at their destination, or when they are lost. In cases like the present, for delay in receiving and carrying the goods, the carrier is not an insurer, and is bound only by the general rule of liability for the breach of his contract or of his public duty as a carrier, and may be excused for delay in receiving the goods or in transporting them after they have been received, whenever the delay is necessarily caused by unforeseen disaster, which human prudence cannot provide against, or by accident not caused by the negligence of the carrier, or by thieves and robbers, or an uncontrollable mob."

In Pittsburgh, Fort Wayne & Chicago R. *v.* Hazen, 84 Ill. 36, plaintiff shipped certain cheese over the line of the defendant's road from Chicago to New York. While in transit a strike of the company's employees occurred, who refused to work. They were accordingly discharged and new hands were employed. The strikers, however, forcibly prevented the new hands from running the trains, in consequence of which the transportation of plaintiff's cheese was delayed and the cheese spoiled. Under the circumstances the court held the company absolved from liability. See also Lake Shore, etc., R. *v.* Bennett, 6 Am. & Eng. R. R. Cas. 391.

In Sherman, Hall & Co. *v.* Penn. R., 3 Am. & Eng. R. R. Cas. 274, the question was not fairly raised. Plaintiffs here shipped goods under a bill of lading which contained a clause relieving the carrier from liability in case of fire. While in transit a strike occurred. An armed mob prevented all cars from moving east of Pittsburgh, and when the car containing plaintiff's goods arrived there said mob forced the company to permit it to stand on the track. Within a few hours afterward some contiguous cars containing petroleum were fired by the mob. The flames communicated to plaintiff's goods and they were consequently destroyed. The court held that it was clear that the cause of the loss was within the exempting clause of the bill of lading, and entered judgment for the defendant accordingly.

A similar conclusion was reached in Wertheimer *v.* Penn. R., 17 Blatchf. C. C. 421, where goods were lost at the same time, shipped under a similar bill of lading. In this case, however, the court added the following: "Where it appears, as it did here, that the fire by which the plaintiff's goods were destroyed was the act of a mob, engaged in a struggle with the military authorities of the State without anything to show that the defendants were bound from the circumstances to anticipate such a result, the defence was affirmatively established."

In Seligman *v.* Armigo, 1 New Mex. 459, defendant undertook to carry certain liquor for the plaintiff across the plains. On the way he was stopped by a detachment of United States soldiers, and the liquor was taken from him and destroyed, it being alleged

court pointed out that under such circumstances the carrier was not an insurer, and liable for delay in receiving and carrying the goods. He is bound only by the general rule of liability for the breach of his contract or of his public duty as a carrier, and may be excused for delay in receiving the goods or in transferring them after they have been received, whenever the delay is necessarily caused by unforeseen disaster which human prudence cannot provide against; or by an accident not caused by the negligence of the carrier; or by thieves and robbers, or an uncontrollable mob. In the latest case[1] on the subject, it was said that in respect to the liability of the railroad company for delay in the transportation and delivery of goods all that can be required of the carrier is the exercise of due care to forward and deliver promptly; that there is no absolute duty resting upon the carrier by railroad to deliver goods within what is, under ordinary circumstances, a reasonable time. The court rejected the reasoning that because the strikers were employees of the company and the carrier might have put an end to the strike and delay by yielding to their demands, upon the ground that it was shown the carrier held employees at hand who were able and willing to move the trains required for carriage of the goods, but were forbidden and prevented by the violent and lawless acts of the strikers; and that the lawless acts of employees adverse to the interests and contrary to the orders of the carrier could not be imputed to him as having been done by his agents and servants.

that he had been selling it to the troops and the Indians, though this was actually not the case. Suit being brought to recover the value of the liquor, defendant set up the doctrine of *vis major*. The strict rule of the common law was, however, applied, and he was held liable accordingly. See also I. & St. Louis R. *v.* Juntgen, 10 Brad. (Ill.) 295.

1. In Greisemer *v.* Lake Shore, etc., R. (New York), 26 Am. & Eng. R. R. Cas. 287, it was held that in respect to the liability of a railroad company for delay in transportation and delivery of goods, all that can be required of it is the exercise of due care to forward and deliver promptly. There is no absolute duty resting upon a carrier by railroad to deliver goods within what is, under ordinary circumstances, a reasonable time. When the misconduct of men acting unlawfully, such as incendiaries, mobs, etc., delays the running of trains, the only duty resting upon the carrier, if not otherwise in fault, is to use reasonable diligence to overcome the obstacles interposed, and forward the goods. The facts that persons who formed themselves into a mob and organized arrangements to hinder the running of railroad trains were employees of the company engaged by it to render the various services needful in operating the road, that they united in a "strike," and engaged in lawless acts of violence, injurious to the property and discipline of the company, and which for a time prevented the running of trains, as a means of coercing the company in yielding to their demands upon it, relative to hours of labor, rate of wages, and like matters, and that the company might have put an end to the strike and the detention by yielding to such demands, but did not do so, do not prevent the company from interposing the detention as a defence to a demand of shippers of goods over the road for damages for delay in transportation, especially if it had, throughout the detention, employees at hand who were able and willing to move the trains required for carriage of the plaintiff's goods, but who were forbidden and prevented by the violent, lawless acts of the strikers. Lawless acts of employees, adverse to the interests and contrary to the orders of the employer, cannot be imputed to it as having been done by its agents and servants.

(*f*) *Delay Generally.*—In a *New York* case[1] it was held that the carrier is liable for the negligent delay, notwithstanding an exemption from liability for delay in the bill of lading. Where a railroad company contracts to carry goods over its own and connecting routes, and deliver the same within a certain time at a distance beyond the terminus of its own line, it is liable to the consignor for damages caused by delay in transportation over such connecting road.[2] A clause in a bill of lading that the goods will be shipped "at the convenience of the company" will not protect it from liability for an unreasonable delay.[3]

(*g*) *Measure of Damages for Delay.*—In case of delay in the transportation of goods, the proper measure of damages is the difference between the market value of the goods when delivered and that at the time they should have been delivered.[4]

The damages recoverable from a carrier for an unreasonable delay are only such as are actual and legitimate. The carrier is not liable for hypothetical damages, nor for any supposed loss occurring in an illegal traffic.[5]

3. CARRIER'S LIABILITY ARISING FROM DEVIATION.—The carrier is liable for a deviation from his usual route where a loss occurs in consequence, whether or not such loss be attributable to an act of God.[6] In a leading case[7] it was urged that

1. Nicholas *v.* New York Central, etc., R., 9 Am. & Eng. R. R. Cas. 103.

2. Pereira *v.* New York Central, etc., R., 9 Am. & Eng. R. R. Cas. 103. *Compare* Hewitt *v.* Chicago, etc., R., 18 Am. & Eng. R. R. Cas. 568.

3. In Branch *v.* Wilmington, etc., R., 88 N. Car. 573; s. c., 18 Am. & Eng. R. R. Cas. 621, it was held that the clause in a bill of lading that the goods will be shipped "at the convenience of the company," will not protect it from liability for an unreasonable delay. Smith, C. J., remarked in this case: "The clause in the receipt assenting to the conveyance of the goods at the convenience of the company cannot be permitted to protect the company from liability for an unreasonable detention of the goods in their warehouse, nor from the forfeiture incurred thereby. It would be against public policy to allow common carriers to free themselves from this common-law obligation by a stipulation that they should consult their own convenience about the time of carriage of goods intrusted to their custody for that purpose."

4. **Measure of Damages for Delay in Transporting Goods.**—Newell *v.* Smith, 49 Vt. 255; Illinois Central R. Co. *v.* Cobb, 72 Ill. 148; Devereux, Receiver, *v.* Buckley, 34 Ohio St. 16; Rankin *v.* Pacific R. Co., 55 Mo. 167; Detroit & Bay City R. Co. *v.* McKenzie, 43 Mich. 209, Lindley *v.* Richmond, etc., R. Co., 9 Am. & Eng. R. R. Cas. 31; Evansville, etc., R. Co. *v.* Montgomery, 9 Am. & Eng. R. R. Cas. 195; Louisville & N. R. Co. *v.* Mason, 11 Lea (Tenn.), 116; s. c., 16 Am. & Eng. R. R. Cas. 241.

In St. Louis, etc., R. *v.* Mudford, 44 Ark. 439; s. c., 21 Am. & Eng. R. R. Cas. 139, it was held that a common carrier is liable in damages for negligent delay in the transportation of property; but the owner cannot, on account of unreasonable delay in the transportation and delivery, refuse to receive the goods and sue as for a conversion. He can claim only the damages sustained by the delay. See also Hutchinson on Carriers, § 775; 3 Sutherland on Damages, 215, Scovill *v.* Griffith, 12 N. Y. 509.

5. Gerhard *v.* Neese, 36 Tex. 635.

6. See cases cited in succeeding note.

7. In Davis *v.* Garrett, 6 Bing. 716, where a quantity of lime was lost, as plaintiff claimed, in consequence of a deviation from the usual and customary route of the carrier, without any justifiable cause, it was held that the carrier could not set up as a defence the possibility of a similar loss occurring in his regular route from similar causes; that no wrong doer could apportion or qualify his own wrong. Ch. J. Tindal remarks: "But the objection taken is, that there is

there was no natural or necessary connection between the deviation and the loss, for the latter might have as well occurred on the direct route. But the court pointed out that the real answer to such a claim was, that no wrongdoer could be allowed to apportion or qualify his own wrong. As the loss had actually happened whilst his wrongful act was in operation, and was attributable to his wrongful act, he could not set up as an answer a bare possibility of a loss had the deviation not occurred. That it might admit of a different construction could the carrier show not only that the same loss might have happened, but that it must have happened, if the act complained of had not been done. The difficulty of such proof has been noticed by the various authorities, but it was said in one case that if the carrier could show that the loss must have certainly occurred had there been no deviation, he would not be liable.[1]

Consent of the owner to a deviation will excuse the carrier.[2] Such consent may be inferred where the carrier has a choice of two rontes which are equally safe, and the contract does not confine him to a stipulated route. But the carrier's choice of an unsafe route will not excuse him.[3]

no natural or necessary connection between the wrong of the master in taking the barge out of its proper course and the loss itself; for that the same loss might have been occasioned by the very same tempest if the barge had proceeded in her direct course. But if this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. And yet in Parker *v.* James, 4 Camp. 112, where the ship was captured while in the course of deviation, no such ground of defence was even suggested. Or, again, if the ship strikes against a rock or perishes by storm in the one course, no one can predicate that she might not equally have struck upon another rock or met with the same or another storm if pursuing her right and ordinary voyage. . . . But we think the real answer to the objection is, that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done; but there is no evidence to that effect in the present case." Powers *v.* Davenport, 7 Blackf. (Ind.) 497; Crosby *v.* Fitch, 12 Conn. 410; Express Co. *v.* Kountze, 8 Wall. (U. S.) 342; Williams *v.* Grant, 1 Conn. 487; Lawrence *v.* McGregor, Wright (Ohio), 193; Phillips *v.* Brigham, 26 Ga. 617; Hand *v.* Baynes, 4 Whart. (Pa.) 204; Robinson *v.* Merchant's Disp. Transp. Co., 45 Iowa 470; Stewart *v.* Merchant's Disp. Trans. Co., 47 Iowa, 229; Johnson *v.* New York Central, etc., R., 33 N. Y. 610; Galveston, etc., R. *v.* Allison, 12 Am. & Eng. R. R. Cas. 28.

1. In Maghee *v.* Camden, etc., R., 45 N. Y. 514, it was said that if a carrier can show that the loss must have certainly occurred had there been no deviation, he will not be liable. "It is difficult to see how such proof would be possible." Lawson's Contracts of Carriers, § 11; Hutchinson on Carriers, § 210; Story on Bailments (9th ed.) § 413 d.

2. Hendricks *v.* The Morning Star, 18 La. Ann. 353; Harris *v.* Rand, 4 N. H. 289 (criticised in Lawson's Contracts of Carriers, § 143).

3. In Bird *v.* Georgia R., 72 Ga. 655; S. C. 27 Am. & Eng. R. Cas. 39, it was held that a carrier who receives goods to be carried over its own lines and over successive lines of transportation connected therewith, to be delivered at some distant point, acts as the forwarding

The carrier may set up in excuse of a deviation a sudden emergency which justified it.[1]

In emergencies which justify a deviation, and when the owner's consent might fairly be presumed, the carrier may act in contradiction or modification of the letter of his instructions, but should give notice of such action as promptly as possible.[2]

The burden of proof lies upon the carrier to explain the necessity for a deviation.[3] The question of a necessity justifying a deviation is one of law for the court.[4]

4. CARE DURING TRANSIT.—The carrier must give all reasonable care and attention to the goods during the transit, where through accident they are, from their nature, peculiarly exposed to danger.[5] This principle has been held, however, not to be extended to the compelling a carrier to suspend his voyage to care for the damaged goods to the probable injury or delay of whatever else he may be transporting.

agent of the owner in giving instructions as to the transportation of the goods; and in case of a mistake by the first carrier in directing the goods, the last carrier will have a lien upon them for the freight earned by it, unless the owner gave notice of the route and the lines of road over which his goods were to be transported. If goods were shipped over a connecting line of roads, and there were two routes by which the terminal point could be reached, one of which was designated by direction of the consignee, who was also the owner, but they were, in fact, sent to the terminal point by the other route, if the road so wrongly receiving them knew of the direction as to their shipment when it received them, its transportation of the goods would be voluntary; it would have no right to charge freight for transportation, would have no lien on the goods for such charges, and could not retain possession for the purpose of collecting them. A demand by the consignee and refusal by the defendant to deliver the goods would be a conversion for which trover would lie; and the county where such demand and refusal occurred would be the proper venue of the action. Whether the carrier receiving and transporting the goods had knowledge of the direction that they should be transported by a different line, was a question of fact for the jury; and the marks on the goods, with other circumstances, could be considered in determining that question. See also Hand *v.* Baynes, 4 Whart. (Pa.) 204; Johnson *v.* New York, etc., R., 33 N. Y. 610; Sager *v.* Portsmouth, etc., R., 31 Me. 228; Ingalls *v.* Brooks, Ed. Sel. Cas. 104.

1. Maryland Ins. Co. *v.* Le Roy, 7 Cranch (U. S.), 26; Johnson *v.* New York, etc., R., 33 N. Y. 610; Sager *v.* Portsmouth, etc., R., 31 Me. 228.

2. Johnson *v.* New York Central, etc., R., 33 N. Y. 610; Fisk *v.* Newton, 1 Denio (N. Y.), 45; Goodrich *v.* Thompson, 44 N. Y. 324; Sager *v.* Portsmouth, etc., R., 31 Me. 228.

3. Hand *v.* Baynes, 4 Whart. (Pa.) 204; Ackley *v.* Kellogg, 8 Cow. (N. Y.) 223; Le Sage *v.* Great Western, etc., R., 1 Daly (N. Y.), 306.

4. Crosby *v.* Fitch, 12 Conn. 410; Read *v.* Spaulding, 30 N. Y. 630.

5. **Poultry.**—Peck *v.* Weeks, 34 Conn. 145.

Furs.—Chouteaux *v.* Leech, 18 Pa. St. 224.

Brandy Leaking.—Beck *v.* Evans, 16 East, 244; Cox *v.* London, etc., R., 3 F. & F. 77. See also Hudson *v.* Bavendale, 6 W. R. 83.

Wet Coffee.—Bird *v.* Cromwell, 1 Mo. 58.

Wet Beans.—Notara *v.* Henderson, L. R. 52 B. 346; s. c., Exch. Ch. L. R. 7 Q. B. 225.

Failure to Wet Casks Containing Oil to Prevent Leakage.—Hunnewell *v.* Taber, 2 Sprague (R. I.), 1.

Neglect to Supply Ice for Meat.—Sherman *v.* Inman Steamship Co., 26 Hun (N. Y.), 107.

6. The Lynx *v.* King, 12 Mo. 272; Notara *v.* Henderson, L. R. 5 Q. B. 346. See also The Niagara *v.* Cordes, 21 How. (U. S.) 7; Blocker *v.* Whittenburg, 12 La. Ann. 410; Rogers *v.* Murray, 3 Bosw. (N. Y.) 357; s. c., 1 Blatchf. C. C. 196; The Brig Gentleman, Olcott's Adm. 110; The America, 8 Ben. C. C. 491;

5. MEASURE OF CARE AFTER DISASTER.—Even though the loss of or damage to the goods may impose no liability upon the carrier, because occurring in the first instance through an act of God, he is still held to an account for his care of what remains uninjured.[1]

6. FELONY OF SERVANTS.—In England, under the Carriers Act,[2] which provides that it shall not be construed to protect the carrier from liability for the felonious acts of any of his servants, a defence by the carrier which shows that he has been guilty of no negligence is ineffectual.[3]

A carrier is no less liable for the fraud or felony of his servants than for their negligence.[4]

7. PERISHABLE GOODS.—The carrier is in general not liable for injury to goods occurring without his negligence, where from their intrinsic qualities or perishable nature they are peculiarly exposed to danger.[5] The carrier in a pressure of business may discriminate in favor of perishable goods.[6]

8. DEFECTIVE PACKING.—The carrier is not liable for loss or injury occurring through defective packing, where such defects are not apparent.[7] Patent defects to packing will justify the carrier

Davidson *v.* Guynne, 12 East, 381; Sherman *v.* Inman Steamship Co., 26 Hun (N. Y.), 107; The Brig Collenberg, 1 Black (U. S.), 170; Ship Howard *v.* Wissman, 18 How. (U. S.) 231; Warden *v.* Greer, 6 Watts (Pa.), 424; Leech *v.* Baldwin, 5 Watts (Pa.), 446; Gowdy *v.* Lyon, 9 B. Mon. (Ky.) 112; Burwell *v.* Railroad Co., 25 Am. & Eng. R. R. Cas. 410; Kinnick *v.* Chicago, etc., R., 27 Am. & Eng. R. R. Cas. 55.

In Kinnick *v.* Chicago, etc., R., 27 Am. & Eng. R. R. Cas. 55, it was held that a common carrier is an insurer of the safety of property in its charge for transportation, and is not released from that extraordinary liability for its care by an accident which causes delay, even though it offers an excuse for the delay.

1. See *supra*, LIABILITY FOR DELAY; Chouteaux *v.* Leech, 18 Pa. St. 224; Day *v.* Ridley, 16 Vt. 48; Craig *v.* Childress, Peck (Tenn.), 270; The Maggie Hammond, 9 Wall. (U. S.) 435.

2. 1 Will. V. cap. 68.

3. The Carriers' Act (§ 8) provides that it shall not be construed to protect the carrier from liability for the felonious acts of any of his servants. A defence by the carrier which shows that he has been guilty of no negligence is ineffectual. Redman's Law of Railway Carriers (2d Ed.), p. 55; Great Western R. *v.* Rimmel, 27 L. J. C. P. 201; 18 C. B. 575; explaining Butt *v.* Great Western R., 11 C. B. 149; 20 L. J. C. P. 241. See, generally, Vaughton *v.* London, etc., R., 43 L. J. Exch. 75; L. R. 9 Exch. 93; Kirkstall Brewery Co. *v.* Furness R., 43 L. J. Q. B. 142; L. R. 9 Q. B. 468; McQueen *v.* Great Western R., 44 L. J. Q. B. 130; L. R. 10 Q. B. 569; Turner *v.* Great Western R., 34 L. T. 22.

4. Hutchinson on Carriers, § 248, and see cases *supra*, CONTRACTS LIMITING LIABILITY.

Canada.—Grand Trunk, etc., R. *v.* Vogel, 11 Sup. Ct. Canada, 612; s. c., 27 Am. & Eng. R. R. Cas. 18. *Compare* Dodson *v.* Grand Trunk R., 7 Can. L. J. N. S. 263; Sutherland *v.* Great Western R., 7. U. C. C. P. 409; Alexander *v.* Toronto, etc., R., 36 U. C. Q. B. 453; Lawson's Contracts of Carriers, § 27.

5. See, generally, Story on Bailments (9th Ed.), § 492*a*; Boyd *v.* Dubois, 3 Camp. 133; Hunter *v.* Potts, 4 Camp. 203; Kendall *v.* L. & S. W. R., L. R. 7 Exch. 573; 41 L. J. (Exch.) 184; Nugent *v.* Smith, 45 L. J. C. P. 697; L. R. 1 C. P. Div. 423. See also *supra*, this title, LIABILITY FOR DELAY. Wabash, etc., R. *v.* Jaggerman, 23 Am. & Eng. R. R. Cas. 680.

6. Michigan Central, etc., R. *v.* Burrows, 33 Mich. 6; Great Western etc., R., *v.* Burns, 60 Ill. 284; Peet *v.* Railroad, 20 Wis. 594; Marshall *v.* Railroad, 45 Barb. (N. Y.) 502; Tierney *v.* Railroad, 10 Hun (N. Y.), 569.

7. Northeastern R. *v.* Richardson, 41 L. J. C. P. 60; L. R. 7 C. P. 75; Barbour *v.* Southeastern R., 34 L. T. N. S.

in refusing to receive.[1] Carrying in a manifestly unsafe condition is carrying without due care; and where the carrier has failed to exercise his right to refuse goods defectively packed where the defect is visible, he becomes liable if the goods are damaged, although partly through the packing; and the defective packing only goes in reduction of damages.[2]

9. SEIZURE OF GOODS BY LEGAL PROCESS.—Seizure of goods intrusted to a carrier under a valid and legal process of law constitutes a good and sufficient excuse for non-delivery.[3] If, however, the goods have been improperly attached and detained by legal process, the carrier cannot set this up as a defence.[4] In such case the carrier must notify the owner of such process.[5]

(*a*) *Color of Title Adverse to Consignor.*—The carrier is not excused for non-delivery where he has delivered the goods to persons setting up an adverse title to that of the consignor, no matter how good that title may be.[6]

(*b*) *When Goods in the Carrier's Custody are Attachable.*—Goods in the custody of a railroad company within the State and county where the writ is issued at the time of the issuing of the writ

67; Nelson *v.* Stephenson, 5 Duer (N. Y.). 538.

1. See *supra*, CARRIER'S DUTY TO RECEIVE.

2. Higginbotham *v.* Great Northern R., 10 W. R. 358.

3. **Valid Attachment Good Excuse for Non-delivery.**—Rogers *v.* Weir, 34 N. Y. 463. *Compare* Mierson *v.* Hope, 2 Sweeney, 561; Burton *v.* Wilkinson, 18 Vt. 186; Savannah, etc., R. Co. *v.* Wilcox, 48 Ga. 432; Ohio, etc., R. Co. *v.* Yohe, 51 Ind. 181; Bliven *v.* Railroad, 36 N. Y. 403; Stiles *v.* Davis, 1 Black (U. S.), 101; The Idaho, 93 U. S. 575; Edson *v.* Weston, 7 Cow. (N.Y.) 278; Van Winkle *v.* Steamship Co., 37 Barb. (N. Y.) 122; Furman *v.* Chicago, etc., R. Co., 6 Am. & Eng. R. R. Cas. 280; MacVeagh *v.* Atchison, etc., R., 18 Am. & Eng. R. R. Cas. 651.

4. **Invalid Attachment No Excuse for Non-delivery.**—Kibb *v.* Old Colony, etc., R. Co., 117 Mass. 591; Edwards *v.* White Line Transit Co., 104 Mass. 159; Faust *v.* South Carolina R. Co., 8 S. Car., 118.

In McAllister *v.* Chicago, etc., R., 4 Am. & Eng. R. R. Cas. 210, where certain cattle while in transportation were unloaded from the cars of the company, and were then illegally seized under a writ for an alleged violation of the statute of the State prohibiting the introduction of Texas, Mexican, or Indian cattle into the State, and subsequently were sold to satisfy the fine, the costs of the proceedings, and the forage and care of the cattle, *held*, that the company was not liable for the loss of the cattle, upon the allegation of a wrongful unloading, the damages being too remote.

In Furman *v.* Chicago, etc., R. Co., 6 Am. & Eng. R. R. Cas. 280, goods belonging to the wife and consigned to her at Atchison, Kansas, were delivered to a carrier at Chicago by the husband, who had authority to so deliver the same and contract for their transportation. After their delivery to the carrier they were attached in an action against the husband and taken possession of by an officer, and upon the husband going to the office of the carrier to direct a change of place of shipment he was informed of the attachment, and after such notice had ample time to assert plaintiff's right to the goods. *Held*, that upon such showing a verdict against the carrier for failure to deliver the goods, pursuant to the contract for their carriage, should be set aside as against the evidence.

5. The liability of a common carrier ceases if the goods are taken from his possession by legal process, but he must notify the owner of such process. Savannah, etc., R. Co. *v.* Wilcox *et al.*, 48 Ga. 432; s. c., 11 Am. R. Rep. 375; Styles *v.* Davis, 1 Black (U. S.), 101; Bliven *v.* Hudson, etc., R. Co., 36 N. Y. 403; Burton *v.* Wilkinson, 18 Vt. 186; Edson *v.* Weston, 7 Cow. (N. Y.) 278; Ohio, etc., R. Co. *v.* Yohe, 51 Ind. 181; Mierson *v.* Hope, 2 Sweeney (N. Y.), 561.

6. **Color of Title Adverse to Consignor.**—Western Transp. Co. *v.* Barber, 56 N. Y.

would seem clearly to be subject to attachment.[1] But where the property is not at the time in the State or county, it cannot be attached. This is the case because where the goods are not in the county they are not capable of manual seizure.[2]

10. STOPPAGE IN TRANSITU.—Stoppage *in transitu* is the right of a vendor of goods upon credit, to reclaim and take possession of them while they are being carried to the vendee, whose bankruptcy or insolvency has occurred or become known after the sale.[3] It exists only where goods are sold on credit, where the consignee is insolvent, and where the goods are still in transit and have not been delivered to the consignee.[4]

Numerous remedies exist for the enforcement of this right in case of a demand for the goods and a refusal to deliver them. Thus trover,[5] trespass on the case[6] and replevin[7] may be employed. A bill in equity is an available remedy.[8]

(*a*) *Who Possesses the Right to Stop in Transitu.*—The right to stop belongs only to the vendor of goods on credit or to one who occupies a similar position.[9] But when the vendor has received

544; Rosenfeld *v.* Express Co., 1 Woods, 131; The Idaho, 93 U. S. 575.

1. **When Goods in Custody of Carrier are Attachable.**—Wheat *v.* Platte City & Ft. Des Moines R. Co., 4 Kans. 370; Sutherland *v.* Second Nat. Bank of Peoria, 78 Ky. 250; s. c., 6 Am. & Eng. R. R. Cas. 368; Western R. *v.* Thornton, 60 Ga. 300; Illinois Central R. Co. *v.* Cole, 48 Ill. 402; Lawrence *v.* Smith, 45 N. H. 533.

2. Pennsylvania R. Co. *v.* Pollock, 51 Pa. St. 244.

3. Lickbarrow *v.* Mason, 1 Sm. Lead. Cas. 699; Whitehead *v.* Anderson, Tudor's Lead. Cas. 632 and notes; Chicago, etc., R. *v.* Painter, 15 Neb. 594; Bloomingdale *v.* Memphis, etc., R., 6 Lea (Tenn.). 618; s. c., 6 Am. & Eng. R. R. Cas. 371.

The essential feature of a stoppage *in transitu* is that the goods should be at the time in the possession of a middleman, or of some person intervening between the vendor who has parted with and the purchaser who has not yet received them. Schotsman *v.* Lancashire, etc., R. Co., L. R. 2 Ch. App. 332.

The goods are liable to stoppage so long as they remain in possession of the carrier. Mills *v.* Ball, 2 B. & P. 457; James *v.* Griffin, 2 M. & W. 633; Lickbarrow *v.* Mason, 1 Smith's L. C. 699; Reynold's *v.* Boston, etc., R. Co., 43 N. H. 591; Atkins *v.* Colby, 20 N. H. 154; White *v.* Mitchell, 38 Mich. 390; Chicago, etc., R. *v.* Painter, 15 Nev. 594. See Wigton *v.* Bowley, 3 Am. & Eng. R. R. Cas. 328.

4. Story on Bailments (9th Ed.), § 581.

5. Morrison *v.* Gray, 2 Bing. 260; Clough *v.* London, etc., R., L. R. 7 Exch. 26; Bohtlingtk *v.* Inglis, 3 East, 381; Inslee *v.* Lane, 57 N. H. 454.

6. Calahan *v.* Babcock, 21 Ohio St. 281; Pottinger *v.* Hecksher, 2 Grant's Cas. (Pa.) 309.

7. Hay *v.* Mouille, 14 Pa. St. 48; Newhall *v.* Railroad, 51 Cal. 345; Benedict *v.* Schaettle, 12 Ohio St. 515; Chicago, etc., R. *v.* Painter, 15 Neb. 396. See also Howe *v.* Stuart, 40 Vt. 145; Reynolds *v.* Railroad, 43 N. H. 580; Rucker *v.* Donovan, 13 Kans. 251; McFetridge *v.* Piper, 40 Iowa, 627.

8. Hause *v.* Judson, 4 Dana (Ky.), 7; Ford *v.* Sproule, 2 A. K. Marsh. (Ky.) 528; Schotsmans *v.* Railway, L. R. 1 Eq. 349; L. R. 2 Ch. App. 332. *Compare* Straker *v.* Erving, 34 Beav. 147.

9. Kinloch *v.* Craig, 3 T. R. 783; Feise *v.* May, 3 East, 93; Van Castell *v.* Booker, 18 L. J. Exch. 17; The Tigress, 32 L. J. Adm. 97; Newsom *v.* Thornton, 6 East, 17; Redman's Law of Railway Carriers (2d Ed.), p. 93. *Compare* Siffken *v.* May, 6 East, 371; Sweet *v.* Pyne, 1 East, 4. See also Bachellor *v.* Lawrence, 6 C. B. N. S. 543; De Wolff *v.* Lindsell, L. R. 5 Eq. 209; Phillips *v.* Dickson, 8 C. B. N. S. 391; Bird *v.* Brown, 4 Exch. 786; Davis *v.* McWhirter, 40 Up. Can. Q. B. 598; Newhall *v.* Vargas, 13 Me. 93; Chandler *v.* Fulton, 10 Tex. 2; Reynolds *v.* Boston, etc., R., 43 N. H. 580; Gassler *v.* Schepler, 5 Daly (N. Y.), 476; Durgy Cement Co. *v.* O'Brien, 123 Mass. 12; Jenkins *v.* Jarrett, 70 N. Car. 255; Ober *v.* Smith, 78 N.

part payment for the goods he will still have the right of stoppage *in transitu* for the balance of purchase-money due.[1] The right will not be lost by his receipt of notes or bills of exchange as conditional payment, even though he may have negotiated the bills so that they are outstanding in third hands.[2] Persons not vendors of the consignee, and having no priority of contract with him, cannot stop goods *in transitu*.[3]

(*b*) *Waiver of the Vendor's Rights.*—The right of stoppage *in transitu* may be waived by the vendor, as, for example, where he knows of the vendee's insolvency at the time of the sale.[4]

An attachment of the goods by the vendor while they are in transit is a waiver of his right to stop.[5] A railroad receiving goods from a vendor consigned to the vendee is the agent of the latter, and liable to him only for its safe delivery. The vendor having no further authority over them, except the right of stoppage *in transitu*, they cannot be attached for his debt.[6]

But attachment of the goods in transit by a creditor of the vendee will not defeat the right.[7]

Car. 313; Gwyn *v.* Richmond, etc., R., 85 N. Car. 427; s. c., 6 Am. & Eng. R. R. Cas. 452.

1. Newhall *v.* Vargas, 13 Me. 93; Hodgson *v.* Loy, 7 T. R. 440; Feise *v.* Wray, 3 East, 75; Edwards *v.* Brewer, 2 M. & W. 375; Van Casteel *v.* Booker, 2 Ex. 702.

2. White *v.* Welsh, 396; Arnold *v.* Delano, 4 Cush. (Mass.) 53; Donath *v.* Bromhead, 7 Pa. St. 301; Hays *v.* Mouille, 14 Pa. St. 148; Bell *v.* Moss, 5 Whart. (Ga.) 189; Newhall *v.* Vargas, 13 Me. 93; Dixon *v.* Yates, 5 B. & Ad. 345; Kinloch *v.* Craig, 4 Brg. P. C. 47; Feise *v.* Wray, 3 East, 93; Edwards *v.* Brewer, 2 M. & W. 375; Patten *v.* Thompson, 5 M. & S. 350; Hodgson *v.* Loy, 7 T. R. 440; Miles *v.* Gorton, 2 C. & M. 504; Lewis *v.* Mason, 36 U. C. Q. B. 590.

But where the vendor has taken the vendee's acceptance in full payment, the goods cannot be stopped *in transitu*, unless the acceptances have been dishonored. Davis *v.* Reynolds; Rucker *v.* Donovan, 13 Kans. 257; Eaton *v.* Cook, 32 Vt. 48.

A being indebted to B on balance of accounts, including bills still running, accepted by B for A, consigned goods to B on account of this balance. *Held*, that A had a right to stop the goods *in transitu* upon B becoming insolvent before the bills were paid. Vertue *v.* Jewell, 4 Camp. 31. *Compare* Patten *v.* Thompson, 5 M. & S. 350; Kinloch *v.* Craig, 3 T. R. 786; Wood *v.* Roach, 1 Yeates (Ga.), 177; Clark *v.* Mauran, 3 Paige (N. Y.), 373; Wood *v.* Jones, 7 D. & R. 126.

3. Memphis, etc., R. *v.* Freed, 38 Ark. 614; s. c., 9 Am. & Eng. R. R. Cas. 212.

4. Buckley *v.* Furniss, 15 Wend. (N. Y.) 137, Conyers *v.* Ennis, 2 Mason, 236; O'Brien *v.* Norris, 16 Md. 122.

In Mason *v.* Elliott, 30 La. Ann. 147, it was held that where cotton is nominally sold for cash but the price is not paid on delivery, and the vendor receives on the following day a part of the price and accepts security for the balance, the right to stop is waived. See also Valpy *v.* Gibson, 16 L. J. C. P. 241; 4 C. B. 837.

And generally where goods are purchased and paid for by the order, note, or accepted bill of a third party, without the indorsement or guaranty of the purchaser, the vendor has no right to stop. Eaton *v.* Cook 32 Vt. 58. But the commencement of an action against the vendee by the attorney of the vendor for the price of the goods sold on credit without the vendor's knowledge, and before either was apprised that the transit was not ended, is not a waiver of the right to stop, if it is asserted within a reasonable time and the improvident action be discontinued. Calahan *v.* Babcock, 21 Ohio St. 281.

5. An attachment of the goods by the vendor while they are in transit waives his right to stop them. Woodruff *v.* Noyes, 15 Conn. 235.

6. Louisville, etc., R. *v.* Spalding, 22 Am. & Eng. R. R. Cas. 418.

7. But an attachment of the goods in transit by a creditor of the vendee will not defeat the right. Clark *v.* Sheriff, 4 Daly (N. Y.), 83; Buckley *v.* Furniss, 15

Nor will a sale of goods attached by order of court defeat the right.[1]

Nor will the wrongful delivery of the goods to one not entitled to receive them preclude the right to stop.[2]

(*c*) *Notice to the Carrier.*—The carrier is entitled to express notice from the consignor before he will be liable for not stopping goods in transit. To make such a notice effective it must be given at such a time and under such circumstances that the carrier may, by the exercise of reasonable diligence, communicate it to his servants in time to prevent the delivery of the goods to the consignee.[3] Where there is no general freight agent of a railroad, notice to station agent is sufficient.[4]

(*d*) *When the Transit Ends.*—The *English* rule to be collected from the cases is said to be that the goods are in transit so long as they are in the hands of the carrier as such, no matter whether he was or was not appointed by the consignee. To end the transit there must be an actual delivery of the goods to the vendee or his agent; not a mere constructive delivery, such as that of a shipmaster on the order of and engaged by the vendee.[5]

The transit was not considered to be ended under the following circumstances: Goods taken from carrier by agent of the purchaser, who was not held to be sufficiently a representative of his principal.[6] Mere arrival of a vessel at the wharf without delivery out of hold.[7] Where freight remained to be paid.[8] A promise

Wend. (N. Y.) 137; Benedict *v.* Schaettle, 12 Ohio St. 515; Wood *v.* Yeatman, 15 B. Mon. (Ky.) 270; Woodruff *v.* Noyes, 15 Conn. 335; O'Brien *v.* Norris, 16 Md. 122; Hays *v.* Mouille, 14 Pa. St. 48; Blackman *v.* Pierce, 23 Cal. 508; Aguirre *v.* Parmalee, 22 Conn. 473; Blum *v.* Marks, 21 La. Ann. 268; Calahan *v.* Babcock, 21 Ohio St. 281; Rucker *v.* Donavin, 13 Kan. 251; Morris *v.* Shryock, 50 Miss. 590; Seymour *v.* Newton, 105 Mass. 272; Smith *v.* Goss, 1 Camp. 282; Chicago, etc., R. *v.* Painter, 15 Neb. 394.

1. Neither will a sale of goods attached by order of court defeat the right. The effect of such sale is merely to convert the goods into money, which remains in the hands of the sheriff pending the determination of the attachment, and subject to any claims that might have been asserted against the goods themselves. O'Brien *v.* Norris, 16 Md. 122.

2 Kitchen *v.* Spear, 30 Vt. 545. See also Lentz *v.* Flint, etc , R., 53 Mich. 444; s. c., 21 Am. & Eng. R. R. Cas. 82.

3. Whitehead *v.* Anderson, 9 M. & W. 518; Litt *v.* Cowley, 7 Taunt. 169; *Ex parte* Falk, L. R. 14 Ch. Div. 446; Ascher *v.* Grand Trunk R., 36 U. C. Q. B. 609; Bell *v.* Moss, 5 Whart. (Pa.) 189; Mottram *v.* Heyer, 5 Denio (N. Y.), 629; Bloomingdale *v.* Memphis, etc., R., 6 Lea (Tenn.), 618; s. c., 6 Am. & Eng. R. R. Cas. 371.

4. Poole *v.* Houston, etc., R., 9 Am. & Eng. R. R. Cas. 197.

5. Redman's Law of Railway Carriers (2d Ed.), p. 94; *Ex parte* Rosevear Clay Co., *Re* Cock, L. R. 11 Ch. Div. 560; 40 L. T. N. S. 730; *Ex parte* Cooper, *Re* McLaren, 48 L. J. Bkcy. 49; L. R. 11 Ch. Div. 68; *Ex parte* Golding, Davis & Co., *Re* Knight, 28 W. R. 481; 42 L. T. N. S. 270; Schotsmans *v.* Lancashire, etc., R., 36 L. J. Ch. 361, L. R. 2 Ch. 332; Gibson *v.* Carruthers, 8 M. & W. 328; Berndtson *v.* Strang, 37 L. J. Ch. 665, L. R. 3 Ch. 588; Coventry *v.* Gladstone, 37 L. J. Ch. 492, L. R. 6 Eq. 44; Chicago, etc., R. *v.* Painter, 15 Neb. 394. See also Bartram *v.* Farebrother, 4 Bing. 579; Coates *v.* Railton, 6 B. & C. 422; Benjamin on Sales (4th Am. Ed.), §§ 839, 844.

6. Bolin *v.* Huffnagle, 7 Rawle (Pa.), 9; Buckley *v.* Furniss, 15 Wend. (N. Y.) 137; Cabeen *v.* Campbell, 6 Casey (Pa.), 254; Harris *v.* Hart, 6 Duer (N. Y.), 606; Harris *v.* Pratt, 17 N. Y. 249. *Compare* James *v.* Griffin, 2 M. & W. 633; Whitehead *v.* Anderson, 9 M. & W. 534; Newhall *v.* Vargas, 13 Me. 93; Stubbs *v.* Lund, 7 Mass. 453.

7. Tucker *v.* Humphrey, 4 Bing. 516;

8. Hutchinson on Carriers, § 416. Whitehead *v.* Anderson, 9 M. & W. 518.

by the carrier to deliver as soon as goods can be got at, but no actual delivery.[1] An authorized demand upon the carrier with which he fails to comply.[2] Where consignee, having no warehouse of his own, is accustomed so to employ that of the carrier, the transit ends when goods arrive, even though they immediately receive a fresh destination.[3]

But delivery, actual or constructive, of the goods to the vendee or his servant will defeat the right of stoppage *in transitu*.[4]

1. Coventry *v.* Gladstone, 37 L. J. Ch. 492; L. R. 6 Eq. 44.

2. Reynolds *v.* Railroad, 43 N. H. 480, Allen *v.* Mercier, 1 Ash, 103.

3. Scott *v.* Pettit, 3 B. & P. 469; Rowe *v.* Pickford, 8 Taunt. 83; Allan *v.* Gripper, 2 Cr. & J. 218; Foster *v.* Frampton, 6 B. & C. 107; Hurry *v.* Mangles, 1 Camp. 512. See also Wentworth *v.* Outhwaite, 10 M. & W. 436.

4. A delivery, actual or constructive, of the goods to vendee or his servant or agent will defeat the right of stoppage *in transitu*. Ogle *v.* Atkinson, 5 Taunt. 759; Bolton *v.* Lancashire, etc., R. Co., 1 L. R. C. P. 431; Turner *v.* Liverpool Docks Co , 6 Ex. 543; Van Casteel *v.* Booker, 2 Ex. 691; Ellis *v.* Hunt, 3 J. R. 464; Dixon *v.* Baldwin, 5 East, 175; Benedict *v.* Schaettle, 12 Ohio St. 521; Covel *v.* Hitchcox, 23 Wend. (N. Y.) 611; Buckley *v.* Furniss, 15 Wend. (N. Y.) 137; Mottram *v.* Heyer, 5 Denio (N. Y.), 629; Harris *v.* Pratt, 17 N. Y. 249; Aguiree *v.* Parmelee, 22 Conn. 473; Moses *v.* Boston, etc.. R. Co., 24 N. H. 71; Smith *v.* Nashua R. Co., 27 N. H. 86; Clark *v.* Needles, 25 Pa. St. 338; McCarthy *v.* N.Y., etc., R. Co., 30 Pa. St. 247; Wood *v.* Crocker, 18 Wis. 345; Alabama, etc.. R. Co. *v.* Kidd, 35 Ala. 209; Michigan, etc., R. Co. *v.* Ward, 2 Mich. 539; Moses *v.* Boston, etc., R. Co., 32 N. H. 523.

Where the goods come into the hands of a shipping-agent of the vendee, who has no authority to dispose of them at his discretion, but only holds them to await further directions from the vendee as to the time and conveyance by which to ship them to such vendee at a place previously determined, the vendee's control over the goods is not terminated. Harris *v.* Pratt, 17 N. Y. 249; Caheen *v.* Campbell, 30 Pa. St. 254. *Compare* Parker *v.* McIvers, 1 Desau. (S. Car.) 274.

The actual delivery to the vendee or his agent, which puts an end to the *transitu* or state of passage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods. Scott *v.* Pettit, 3 B. & B. 469; Rowe *v.* Pickford, 8 Taunt. 83; Frazer *v.* Hilliard, 2 Strob. 309. At a place where he means the goods to remain until a new destination is communicated to them by orders from himself. . Dixon *v.* Baldwin, 5 East, 175; Rowe *v.* Pickford, 1 Moore, 526; Morley *v.* Hay, 3 M. & R. 696; Harris *v.* Pratt, 17 N. Y. 249; Biggs *v.* Barry, 2 Curtis (U. S.), 259; Guilford *v.* Smith, 30 Vt. 49; Caheen *v.* Campbell, 30 Pa. St. 254; Rowley *v.* Bigelow, 12 Pick. (Mass.) 307. By the vendee's taking possession at some point short of the original intended place of destination. James *v.* Griffin, 1 M. & W. 20, 2 M. & W. 633; Foster *v.* Frampton, 6 B. & C. 107; Mohr *v.* Boston, etc., R. Co., 106 Mass. 67; Durgy Cement Co. *v.* O'Brien, 123 Mass. 12; Jordan *v.* James, 5 Ohio, 89; Wood *v.* Yeatman, 15 B. Mon. (Ky.) 270.

In Leeds *v.* Wright, 3 B. & P. 320, the London agent of a Paris firm had in the packer's hands in London goods sent there by the vendor from Manchester under the agent's orders; but it appeared that the goods were at the agent's discretion, to be sent where he pleased, and not for forwarding to Paris; and it was held that the *transitu* was ended.

In Scott *v.* Pettit, 3 B. & P. 469, the goods were sent to the house of the defendant, a packer, who received all of the buyer's goods, the buyer having no warehouse of his own, and there was no ulterior destination. *Held*, that the packer's warehouse was the buyer's warehouse, the packer having no agency except to hold the goods subject to the buyer's orders.

In Valpy *v.* Gibson, 4 C. B. 837, the goods were sent to a forwarding house in Liverpool by order of the buyer, to be forwarded to Valparaiso; but the Liverpool house had no authority to forward till receiving orders from the buyer. The buyer ordered the goods to be relanded after they had been put on board, and sent them back to the vendor, with orders to repack them into eight packages instead of four; and the vendors accepted the instructions, writing, "we are now repacking them in conformity with

(*e*) *Stoppage in Transitu Defeated by Transfer of Bill of Lading.*—The right of stoppage *in transitu* may be defeated by a transfer of the bill of lading to a *bona-fide* indorsee for value.[1]

11. CONNECTING CARRIERS.—(*a*) *Rule in Muschamp's Case.*—The leading English case of Muschamp *v.* Lancaster, etc., R. established the rule in *England*, which is there universally accepted, that the liability of one of several connecting carriers who receives goods for transportation consigned to a point beyond his own line extends throughout the journey and until there has been a complete delivery to the consignee, unless he has made a special contract limiting his liability to his own line.[2] The reasons urged in favor of this rule are various and forcible. It is said that the consignor cannot be supposed to know in the case of a continuous line who are the owners of its different portions. He may fairly assume either that the first carrier owns the continuous line, or that he intends to so represent and contracts upon that basis.[3] Further, that the consignor should only be obliged to make one

your wishes." *Held*, that the right of stoppage was lost; that the *transitu* was at an end; and that the redelivery to the vendor for a new purpose could give him no lien. See also Dodson *v.* Wentworth, 4 M. & G. 1080; Cooper *v.* Bill, 3 H. & C. 722; Smith *v.* Hudson, 6 B. & S. 431; Rowe *v.* Pickford., 8 Taunt. 83; Sawyer *v.* Nash, 20 Vt. 172; Covell *v.* Hitchcock, 25 Wend. (N. Y.) 611; Biggs *v.* Barry, 2 Curtis (U. S.). 259. See, generally, Macon, etc., R. *v.* Meador, 65 Ga. 705; s. c., 6 Am. & Eng. R. R. Cas. 450; MacVeagh *v.* Atchison, etc., R., 18 Am. & Eng. R. R. Cas. 651.

If only a part of the goods are delivered, the right of stoppage *in transitu* will exist as to the balance. Dixon *v.* Yates, 5 B. & Ad. 313; Tanner *v.* Scovell, 14 M. & W. 28; Buckley *v.* Furniss, 15 Wend. (N. Y.) 137; Caheen *v.* Campbell, 30 Pa. St. 264; White *v.* Welsh, 38 Pa. St. 396. But stoppage of a portion of the goods will not affect the claim of the vendee to a portion of the consignment which comes into his possession. Wentworth *v.* Outhwaite, 10 M. & W. 436. But the delivery of a part will not operate as a delivery of the whole, or preclude the right of the vendor to stop any portion not actually reduced to possession by the purchaser. Mohr *v.* Boston, etc., R. Co., 106 Mass. 76; White *v.* Welsh, 38 Pa. St. 396; Buckley *v.* Furniss, 17 Wend. (N.Y.) 504; Mills *v.* Gordon, 2 C. & M. 509; Tanner *v.* Scovell. 14 M. & W. 28.

1. See title BILL OF LADING. *supra*, this volume. p. 244.

Stoppage in Transitu and Attachment.—In Louisville, etc., R. *v.* Spalding, 22 Am. & Eng. R. R. Cas. 418, it was held that a railroad receiving freight from a vendor consigned to the vendee is the agent of the latter and liable to him only for its safe delivery. The vendor having no further authority over it except the right of stoppage *in transitu*, it cannot be attached for his debt.

2. In the absence of a special contract the receiving carrier's liability extends through the carriage and delivery by a connecting carrier. Muschamp *v.* Lancaster, etc., R., 8 M. & W. 421; Mytton *v.* Midland R., 28 L. J. Exch. 385, 4 H. & N. 615; Bristol, etc., R. *v.* Collins, 29 L. J. Exch. 41, 7 H. L. C. 194; Crouch *v.* London, etc., R., 23 L. J. C. P. 73, 14 C. B. 255; Wilby *v.* West Cornwall. etc., R., 27 L. J. Exch. 181, 2 H. & N. 703; Coxon *v.* Great Western R., 5 H. & N. 615; Bristol, etc , R. *v.* Cummings, 5 H. & N. 969; Collins *v.* Bristol, etc., R., 11 Exch. 790, 39 Eng. L. & Eq. 482, reversed in Exch. Ch., 1 H. & N. 57.

The rule established in Muschamp *v.* Lancaster, etc., R., 8 M. & W. 421, was that a carrier accepting goods consigned to a place beyond his own line, without a special contract limiting his liability to his own line, binds him for their safe delivery at the destination named. The decisions upon the point in *England* are uniform, and further hold the receiving carrier to be alone liable to an action, though the loss or injury may have occurred on the line of a connecting carrier, upon the ground of a want of privity of contract between the injured party and any connecting carrier. See cases cited in the preceding note.

3. Bristol, etc., R. *v.* Collins, 29 L. J. Exch. 41, 7 H. L. C. 194.

contract, and that with the carrier accepting the goods.[1] It is neither reasonable nor just to construe the agreement as a contract with several separate companies, and to force the consignor to seek his remedy against the carrier on whose line the loss occurred. Whether the connecting carriers are in reality partners, the effect of their private arrangement is to give them the advantages of that relation. Any rule which should have the effect to defeat or embarrass the consignor's remedy would be in direct conflict with the principles and whole policy of the common law. A consignor compelled to seek out the negligent carrier would find his task often difficult and sometimes impossible. He could hope for little aid from the associated carriers, and might be obliged to assert his claim for compensation against a distant party, among strangers, in circumstances such as would discourage a prudent man and induce him to bear the loss rather than incur the expense and risk of pursuing his legal remedy under another rule.[2] The construction should be that the first carrier is the responsible party, and the intermediate roads his agents.[3] Carriers possess facilities for tracing lost packages which the consignor does not have and cannot obtain. Their books are their own. They may properly, fairly, and without inconvenience charge the loss to the agent responsible for the negligence.[4]

This rule has not the sanction of the weight of authority in the United States.[5] It has been adopted, however, in the following

1. Wilby *v.* West Cornwall, etc., R., 2 H. & N. 707.

2. Perley, C. J., in Lock Co. *v.* Railroad, 48 N. H. 338.

3. Breese, J., in Illinois Central R. *v.* Frankenburg, 54 Ill. 88.

4. Freeman, J., in Western, etc., R. *v.* McElwee, 6 Smed. (Miss.) 208.

Carrier not Liable Beyond His Own Line.—There are many cases to the effect that where goods are received for transportation to a point beyond the carrier's line, he is not responsible for any loss occurring beyond said line in the absence of some special contract to that effect. Nutting *v.* Connecticut, etc., R. Co., 1 Gray (Mass.), 502; Darling *v.* Boston, etc., R. Co., 11 Allen (Mass.), 295; Burroughs *v.* Norwich, etc., R. Co., 100 Mass. 26; Farmers', etc., Bank *v.* Champlain Trans. Co., 16 Vt. 52; Brintnall *v.* Saratoga, etc., R. Co., 32 Vt. 665; Cutts *v.* Brainerd, 42 Vt. 566; Perkins *v.* Portland, etc., R. Co., 47 Me. 573; Skinner *v.* Hall, 60 Me. 477; Inhabitants *v.* Hall, 61 Me. 517; Hood *v.* N. Y., etc., R. Co., 22 Conn. 502; Elmore *v.* Naugatuck R. Co., 23 Conn. 457; Converse *v.* Norwich, etc., R. Co., 33 Conn. 166; Baltimore, etc., R. Co. *v.* Schumacher, 29 Md. 168; McMillan *v.* Michigan, etc., R. Co., 16 Mich. 79; Phillips *v.* North Carolina R. Co., 78 N. Car. 294; Railroad *v.* Pratt, 22 Wall. (U. S.) 123; Railroad *v.* Manufacturing Co., 16 Wall. (U. S.) 318; Crawford *v.* Southern R. Assoc., 521 Miss. 222; Irish *v.* Milwaukee, etc., R. Co., 19 Minn. 376; St. John *v.* Van Santvoord, 25 Wend. (N. Y.) 660, 6 Hill (N. Y.), 157; Root *v.* Great West. R. Co., 45 N. Y. 524; Lamb *v.* Camden, etc., R. Co., 46 N. Y. 271; Reed *v.* U. S. Ex. Co., 48 N. Y. 462; Babcock *v.* Lake Shore, etc., R. Co., 49 N. Y. 491; Condict *v.* Grand Trunk R. Co., 59 N. Y. 500; Camden, etc., R. Co. *v.* Forsyth, 61 Pa. St. 81; St. Louis Ins. Co. *v.* St. L., etc., R. Co., 3 Am. & Eng. R. R. Cas. 260; St. Louis, etc., R. Co. *v.* Larned, 6 Am. & Eng. R. R. Cas. 436; Hadd *v.* U. S. & C. Ex. Co., 6 Am. & Eng. R. R. Cas. 443; Detroit, etc., R. Co. *v.* McKenzie, 9 Am. & Eng. R. R. Cas. 15; Michigan Central R. Co. *v.* Myrick, 9 Am. & Eng. R. R. Cas. 25; Lindley *v.* Richmond, etc., R. Co., 9 Am. & Eng. R. R. Cas. 31; Cummins *v.* Dayton, etc., R. Co., 9 Am. & Eng. R. R. Cas. 36; Knight *v.* Providence, etc., R. Co., 9 Am. & Eng. R. R. Cas. 90

5. **Carrier Liable for Goods Carried Beyond His Own Line.**—It is held in some cases that where a carrier receives goods for transportation to a point beyond his own line, he is, in the absence of special contract, responsible for any loss or injury

States: *Alabama*,[1] *Florida*,[2] *Georgia*,[3] *Illinois*,[4]

occurring to the point of destination. Illinois, etc., R. Co. *v.* Copeland, 24 Ill. 332; Illinois, etc., R. Co. *v.* Cowles, 32 Ill. 316; Illinois, etc., R. Co. *v.* Johnson, 34 Ill. 289; Illinois, etc., R. Co. *v.* Frankenburg, 54 Ill. 88; Chicago, etc., R. Co. *v.* People, 56 Ill. 365; Chicago, etc., R. Co. *v.* Montforth, 60 Ill. 175; U. S. Express Co. *v.* Haines, 67 Ill. 137; Field *v.* Chicago, etc., R. Co., 71 Ill. 458; Adams Express Co. *v.* Wilson, 81 Ill. 339; Milwaukee, etc., R. Co. *v.* Smith, 84 Ill. 239; Western, etc., R. Co. *v.* McElwell, 6 Heisk. (Tenn.) 208; East Tenn., etc., R. Co. *v.* Rogers, 6 Heisk. (Tenn.) 143; Louisville, etc., R. Co. *v.* Campbell, 7 Heisk. (Tenn.) 253; Carter *v.* Hough, 4 Sneed (Tenn.), 203; East Tenn., etc., R. Co. *v.* Nelson, 1 Coldw. (Tenn.) 272; Kyle *v.* Railroad, 10 Rich. (S.Car.) 382; Bradford *v.* Railroad Co., 7 Rich. (S. Car.) 201; Lock Co. *v.* Railroad Co., 48 N. H. 339; Gray *v.* Jackson, 51 N. H. 9; Bennett *v.* Filyau, 1 Fla. 403; Mosher *v.* Southern Ex. Co., 38 Ga. 37; Southern Ex. Co. *v.* Shea, 38 Ga. 519; Cohen *v.* Southern Ex. Co., 45 Ga. 158; Angle *v.* Mississippi, etc., R. Co., 9 Iowa, 487; Mulligan *v.* Illinois, etc., R. Co., 36 Iowa, 181; Balt. & Ohio R. Co. *v.* Campbell, 3 Am. & Eng. R.R. Cas. 246; Harding *v.* International Nav. Co., 6 Am. & Eng. R. R. Cas. 588; Cummins *v.* Dayton, etc., R. Co., 9 Am. & Eng. R. R. Cas. 36; Texas & Pacific R. Co. *v.* Fort, 9 Am. & Eng. R. R. Cas. 392; Same *v.* Ferguson, 9 Am. & Eng. R. R. Cas. 395.

Contract to Transport Beyond Company's Line.—In the United States the weight of authority is to the effect that the mere receipt of goods addressed to a point beyond the line of a railroad company does not throw upon the company any extra-terminal liability. Railroad Co. *v.* Pratt, 22 Wall. (U. S.) 123; Inhabitants *v.* Hall, 61 Me. 517; Skinner *v.* Hall, 60 Me. 477; Perkins *v.* Portland, etc., R. Co., 47 Me. 373; Brintnall *v.* Saratoga, etc., R. Co., 32 Vt. 665; Farmers & Merch. Bank *v.* Champlain Trans. Co., 16 Vt. 52; Cutts *v.* Brainerd, 42 Vt. 566; Burroughs *v.* Norwich, etc., R. Co., 100 Mass. 26; Darling *v.* Boston, etc., R. Co., 11 Allen (Mass.), 295; Nutting *v.* Connecticut, etc., R. Co., 1 Gray (Mass.), 502; Elmore *v.* Naugatuck R. Co., 23 Conn. 457; Hood *v.* New York, etc., R. Co., 22 Conn. 502; Converse *v.* Norwich, etc., R. Co., 33 Conn. 166; Babcock *v.* Lake Shore, etc., R. Co., 49 N. Y. 491; Root *v.* Great Western R. Co., 45 N. Y. 524; Reed *v.* U. S. Ex. Co., 48 N. Y. 462; Condict *v.* Grand Trunk R. Co., 59 N. Y. 500; Lamb *v.* Camden & Amboy R. Co., 46 N. Y. 271; Jenneson *v.* Camden & Amboy R. Co., 4 Am. L. Reg. 235; Camden, etc., R. Co. *v.* Forsyth, 61 Pa. St 81; Baltimore, etc., R. Co. *v.* Schumacher, 26 Md. 168; Phillips *v.* North Carolina R. Co., 78 N. Car. 294; McMillan *v.* Michigan, etc., R. Co., 16 Mich. 79; Irish *v.* Milwaukee, etc., R. Co., 19 Minn. 376; Railroad Co. *v.* Mfg. Co., 16 Wall. (U.S.) 318; St. Louis Ins. Co. *v.* St. Louis, etc., R. Co., 3 Am. & Eng. R. R. Cas. 260; Hadd *v.* U. S. & C. Ex. Co., 6 Am. & Eng. R. R. Cas. 443; Detroit, etc., R. Co. *v.* McKenzie, 9 Am. & Eng. R. R. Cas. 15; Michigan Central R. Co. *v.* Myrick, 9 Am. & Eng. R. R. Cas. 25; Lindley *v.* Richmond, etc., R. Co., 9 Am. & Eng. R. R. Cas. 36; Knight *v.* Providence, etc., R. Co., 9 Am. & Eng. R. R. Cas. 90.

But by some authorities it is held that such is the law. Mulligan *v.* Illinois Central R. Co., 36 Iowa, 181; Angle *v.* Mississippi, etc., R. Co., 9 Iowa, 487; Illinois Central R. Co. *v.* Cowles, 32 Ill. 116; Illinois Central R. Co. *v.* Johnson, 34 Ill. 389; Illinois Central R. Co. *v.* Frankenberg, 54 Ill. 88; Adams Ex. Co. *v.* Wilson, 81 Ill. 339; Milwaukee, etc., R. Co. *v.* Smith, 84 Ill. 239; East Tenn., etc., R. Co. *v.* Rogers, 6 Heisk. (Tenn.) 143; Louisville, etc., R. Co. *v.* Campbell, 7 Heisk. (Tenn.) 253; Bennett *v.* Filyau, 1 Fla. 403; Lock Co. *v.* Railroad, 48 N.H. 339; Gray *v.* New Hampshire, 51 N. H. 9; Cohen *v.* Southern Ex. Co., 45 Ga. 148; East Tenn., etc., R. Co. *v.* Brumley, 6 Am. & Eng. R. R. Cas. 356; Cummins *v.* Dayton, etc., R. Co., 9 Am. & Eng. R. R. Cas. 36.

1. **Alabama.**—Mobile, etc., R. *v.* Copeland, 63 Ala. 219; Montgomery, etc., R. *v.* Culver, 75 Ala. 587; s. c., 22 Am. & Eng. R. R. Cas. 411; Louisville, etc., R. *v.* Meyer, 78 Ala. 597; s. c., 27 Am. & Eng. R. R. Cas. 44.

2. **Florida.**—Bennett *v.* Filyau, 1 Fla. 403.

3. **Georgia.**—Mosher *v.* Southern Ex. Co., 38 Ga. 37; Southern Ex. Co. *v.* Shea, 38 Ga. 519; Rome, etc., R. *v.* Sullivan, 25 Ga. 228; Cohen *v.* Southern Ex. Co., 45 Ga. 148.

4. **Illinois.**—Illinois Central, etc., R. *v.* Copeland, 24 Ill. 332; Illinois Central, etc., R. *v.* Johnson, 34 Ill. 389; Illinois Central, etc., R. *v.* Frankenberg, 54 Ill. 88; Chicago, etc., R. *v.* People, 56 Ill. 365; U. S. Ex. Co. *v.* Haines, 67 Ill. 137; Adams Ex. Co. *v.* Wilson, 81 Ill. 339; Illinois Central, etc., R. *v.* Cowles, 32 Ill. 116; Chicago, etc., R. *v.* Montfort, 60

Iowa,[1] *Kentucky*,[2] *New Hampshire*,[3] and *Tennessee*.[4] In *Kansas*[5] the question has arisen in a case in which the court intimates an opinion in favor of the adoption of the English rule, but did not pass definitely upon the question. In *South Carolina*,[6] while two cases were supposed to have adopted the rule, it is not easy to reconcile a later authority with them.

In support of the contrary doctrine, it is said that the implied

Ill. 175; Field *v.* Chicago, etc., R., 71 Ill. 458; Erie, etc., R. *v.* Wilcox, 84 Ill. 239.

In Illinois Central R. *v.* Frankenberg, 54 Ill. 88, and Illinois Central R. *v.* Johnson, 34 Ill. 389, the court seems to hold that a railroad company which receives goods to carry, marked for a particular destination, though beyond its own line, is *prima facie* bound to carry them to that place and deliver them there; and that an agreement to that effect is implied from the reception of the goods thus marked. Michigan Central R. *v.* Myrick, 9 Am. & Eng. R. R. Cas. 25; Wabash, etc., R. *v.* Jaggerman, 23 Am. & Eng. R. R. Cas. 680. See also St. Louis, etc., R. *v.* Larned, 6 Am. & Eng. R. R. Cas. 436. *Compare* Hewitt *v.* Chicago, etc., R., 18 Am. & Eng. R. R. Cas. 568.

1. **Iowa.**—Angle *v.* Mississippi, etc., R., 9 Iowa, 487; Mulligan *v.* Illinois, etc., R., 36 Iowa, 181.

2. **Kentucky.**—Cincinnati, etc., R. *v.* Spratt. 2 Duval, 4.

3. **New Hampshire.**—Lock Co. *v.* Railroad, 48 N. H. 339. The court remarks: "The large business between the different parts of the country is done by parties who are associated in long continuous lines, receiving all fare through and dividing it among themselves by mutual agreement. They act together for all practical purposes so far as their own interests are concerned, as one united and joint association. In managing and controlling the business on their lines, they have all the advantages that could be derived from a legal partnership. They make such arrangements among themselves as they see fit for sharing the losses, as they do the profits, that happen on any part of their route. If by their agreement each party to their connected line is to make good the losses that happen on his part of the route, the associated carriers, and not the owner of the goods, have the means of ascertaining where the losses have happened; and if this cannot be known, there is nothing unreasonable or inconsistent in their sharing the losses, as in the case of a legal partnership, in proportion to their respective interests in the whole route. What, then, is the situation of the owner whose goods have been damaged or lost on a continuous line of three or any larger number of associated carriers, if he can look only to the carrier on whose part of the route the damages have happened? In the first place, he must set about learning where his loss happened. This would be difficult and often impossible. . . . He would have no means of learning himself, and he would not, unless of a very confiding disposition, rely on any very zealous aid in his search from the different carriers associated in the connected line. And if he should have the luck to make the discovery, he might be obliged to assert his claim for compensation against a distant party, among strangers, in circumstances such as would discourage a prudent man and induce him to sit down patiently under his loss rather than incur the expense and risk of pursuing his legal remedy under the rule set up by these defendants." Gray *v.* Jackson, 51 N. H. 9.

4. **Tennessee.**—Western, etc., R. *v.* McElwee, 6 Heisk. 208; East Tenn., etc., R. *v.* Rogers, 6 Heisk. 143; Louisville, etc., R. *v.* Campbell, 7 Heisk. 253; Carter *v.* Hough, 4 Sneed, 203; East Tenn., etc., R. *v.* Nelson, 1 Coldw. 272.

A railroad company receiving goods for shipment, marked to an extra-terminal point, is liable for all losses occurring beyond its own line. In the absence of a special contract limiting its liability such contract will be presumed from the fact that a clause thus limiting liability is to be found printed in the bill of lading, even though the shipper's attention was not called to it, if it appears that he had previously shipped like articles and taken like bills of lading. East Tenn., V. & G. R. Co. *v.* Brumley, 5 Lea, 401; s. c., 6 Am. & Eng. R. R. Cas. 356. See Sumner *v.* Southern R. Assoc., 9 Am. & Eng. R. R. Cas. 18.

5. **Kansas.**—In Berg *v.* Atchison, etc., R., 16 Am. & Eng. R. R. Cas. 229, the court refuses to pass definitely upon the question, but intimates an opinion in favor of the adoption of the English rule.

6. **South Carolina.**—Bradford *v.* Railroad, 7 Rich. 201; Kyle *v.* Laurens, etc., R., 10 Rich. 382.

In Piedmont Mfg. Co. *v.* Columbia, etc., R., 19 S. Car. 353; s. c., 16 Am. & Eng. R. R. Cas. 194, Simpson, C. J., draws the following distinction between

contract which the law makes for the parties must be reasonable and such as is consistent with the receiving carrier's occupation and the usages of trade. Such implied contract would limit the first carrier's responsibility to his own line, and make him simply a forwarder beyond it. Carriers are frequently called upon to carry goods for every dealer and retailer, and for many of the consumers, throughout the wide extent of the country. To hold him responsible for the goods of others with whom he has no connection and over whom he has no control, and make him liable as a common carrier for the safety of each of these parcels until it reaches its ultimate destination, would be the short way to ruin him. His business could not be carried on under the operation of such a rule. The same principle which would make a carrier liable a short distance beyond his line, consistently applied, would continue his liability across the world. The just construction would be to limit the carrier's liability to his own route, which he controls, on which he selects his own servants and provides the facilities for caring for and guarding the goods.[1] This rule, sometimes called the American doctrine, has been adopted in *Connecticut*,[2] *Indiana*,[3] *Maine*,[4] *Maryland*,[5] *Massachusetts*,[6]

the English and American cases: "The argument of respondent, it appears to us, has assumed the real point at issue, to wit: that the defendant, as to the goods in question, was a common carrier. We do not think that the defendant was a common carrier beyond its termini under its charter. We hold that there was no legal duty on it to deliver goods beyond its line; that it might contract to do so, however, according to such terms as might be agreed upon between it and the shipper. This agreement might be either absolute or conditional. It might make the company substantially a common carrier, and therefore subject it to all the rules and principles contended for by the respondent, or it might contain limitation and restriction far short of this. But, whatever may be the contract in a given case is a question of fact for the jury, which, when found and properly construed, must become the law of the case. There is really no great difference between the English and American doctrine on this subject. The one holds that, to exempt a carrier from liability beyond its terminus there must be a special contract to that end. The other, that to make the first carrier responsible there must be a special contract to that end. Both admit that the carrier is not bound to go beyond the terminus, but that he may do so; and if he undertakes to do so he is bound by his undertaking. In the one case, if the contract contains no exemption it is absolute; in the other, if the conditions are specified they must govern. This is nothing more than saying that the whole thing is per contract, and that whatever the contract is that must be enforced—the legal construction being, that in the one case, in the absence of exemptions, the carrier has contracted, unconditionally, to deliver; the other, with conditions inserted, they must control." It was accordingly held in this case, while expressly affirming the decision in Kyle *v.* Laurens, etc., R., 10 Rich. 382, that while the first of several connecting carriers may assume a liability for the safe carriage of goods to the place of delivery, he does not assume the liability of a common carrier beyond his own line, unless by express contract, and that whether or not such contract was made, where it is uncertain whether a parol or written contract was the real one, is for the jury. McGowan, J., dissented.

1. Bockee and Rhoades, Senators, in Van Santvoord *v.* St. John, 6 Hill (N. Y.), 157.

2. **Connecticut.**—Elmore *v.* Railroad, 23 Conn. 457; Hood *v.* New York, etc., R., 22 Conn. 502; Naugatuck, etc., R. *v.* Waterbury, etc., Button Co., 24 Conn. 468; Converse *v.* Norwich, etc., Transp. Co., 33 Conn. 166.

3. **Indiana.**—Pittsburgh, etc., R. *v.* Morton, 61 Ind. 539; Cummins *v.* Dayton, etc., R., 9 Am. & Eng. R. R. Cas. 36.

4. **Maine.**—Perkins *v.* Portland, etc., R., 47 Me. 573; Skinner *v.* Hall, 60 Me. 477; Plantation *v.* Hall, 61 Me. 517.

5. **Maryland.**—Baltimore, etc., R. *v.* Schmaker, 29 Md. 176.

6. **Massachusetts.**—Nutting *v.* Connec-

Michigan,[1] *Minnesota*,[2] *Mississippi*,[3] *New York*,[4] *North Carolina*,[5] *Pennsylvania*,[6] *Rhode Island*,[7] *Vermont*,[8] and in the *United States courts*.[9] In the latter the approved rule is thus stated: That each road confining itself to its common-law liability is only bound in

ticut, etc., R., 1 Gray, 502; Darling *v.* Boston, etc., R., 11 Allen, 295; Burroughs *v.* Norwich, etc., R., 100 Mass. 26; Lowell Wire Fence Co. *v.* Sargent, 8 Allen, 189; Pendergast *v.* Adams Exp. Co., 101 Mass. 120; Pratt *v.* Ogdensburg, etc., R., 102 Mass. 557; Crawford *v.* Southern R. Assoc., 51 Mass. 222. See Washburn, etc., Mfg Co. *v.* Providence, etc., R., 113 Mass. 490; Hill Mfg. Co. *v.* Boston, etc., R., 104 Mass. 122.

In Argen *v.* Boston, etc., R., 6 Am. & Eng. R. R. Cas. 426, it was held that where freight is carried over connecting railroads, each road is liable for loss or injury occurring through its own negligence, even although the first carrier may also by express contract have assumed a responsibility for losses occurring on the lines of succeeding carriers.

1. **Michigan.**—McMillan *v.* Michigan Southern, etc., R., 16 Mich. 79.

In Detroit, etc., R. *v.* McKenzie, 43 Mich. 609; s. c., 9 Am. & Eng. R. R. Cas. 15, it was held that a railroad company receiving and receipting goods for transportation to a point beyond the terminus of its road is not to be understood as undertaking to carry the goods beyond such terminus, unless there is an express promise to that effect. But if the company receipts the goods to be transported to a point beyond its line for a definite sum named, and the consignor is charged a larger sum therefor, the receipting company is responsible to the consignor for the excess.

2. **Minnesota.**—Irish *v.* Milwaukee, etc., R., 19 Minn. 376; Lawrence *v.* Winona, etc., R., 15 Minn. 390; s. c., 2 Am. Rep. 130.

3. **Mississippi.**—Crawford *v.* Railroad Assoc., 51 Miss. 222.

4. **New York.**—Root *v.* Great Western, etc., R., 45 N. Y. 524; Condict *v.* Grand Trunk, etc., R., 54 N. Y. 500; Van Santvoord *v.* St. John, 6 Hill, 158; Lamb *v.* Camden, etc., R., 46 N. Y. 271; Rawson *v.* Holland, 59 N. Y. 611; Reed *v.* United States Exp. Co., 48 N. Y. 462; s. c., 8 Am. Rep. 561. But see Weed *v.* Railroad, 19 Wend. 534.

5. **North Carolina.**—Phillips *v.* North Carolina, etc., R., 78 N. Car. 294.

In Lindley *v.* Richmond, etc., R., 88 N. Car. 547; s. c., 9 Am. & Eng. R. R. Cas. 29, it was held that, in the absence of explanation as to how or where the loss or damage occurred, or which of the roads on the route is culpable, the receiving carrier must be held responsible for the injury, and that the non-delivery, or delivery in bad condition, by the last of the connecting lines is *prima-facie* evidence of default in the receiving carrier.

6. **Pennsylvania.**—Camden, etc., R. *v.* Forsyth, 61 Pa. St. 81; American Express Co. *v.* Second Nat. Bank, 69 Pa. St. 394; Pennsylvania *v.* Schwarzenberger, 45 Pa. St. 408.

In the absence of stipulation by a carrier to transport freight beyond its own line, it is not responsible for the default of those whom it employs to convey it the remainder of the distance. But if it make itself responsible by contract, or if an agreement to be so can be fairly inferred from the bill of lading, it will be liable for a loss or misdelivery beyond its own line. Where a company holds itself out as a "through freight line," and contracts to carry as such, it will be held liable for all losses occurring up to the point of destination. Clyde *v.* Hubbard, 88 Pa. St. 358. See also Baltimore Steamboat Co. *v.* Brown, 54 Pa. St. 77.

7. **Rhode Island.**—Knight *v.* Providence, etc., R., 9 Am. & Eng. R. R. Cas. 90; Harris *v.* Grand Trunk R., 26 Am. & Eng. R. R. Cas. 323.

8. **Vermont.**—Brintnall *v.* Saratoga, etc., R., 32 Vt. 665; Farmers & Merchants' Bank *v.* Transportation Co., 23 Vt. 186; Noyes *v.* Rutland, etc., R., 27 Vt. 110; Cutts *v.* Brainerd, 42 Vt. 566; Sprague *v.* Smith, 29 Vt. 426.

In the absence of a special contract, a carrier receiving goods marked beyond his own line, and who has no special business connection with the next succeeding carrier, is not responsible for the safety of the goods after they leave his hands. It is no fraud to suppress a clause in the bill of lading limiting his liability to his own line from an ignorant and unlettered consignor, for such clause is only expressive of the common law. Hadd *v.* United States & Canada Ex. Co., 52 Vt. 335; s. c., 6 Am. & Eng. R. R. Cas. 443.

9. **United States Courts.**—Railroad Co. *v.* Mfg. Co., 16 Wall. 318; Railroad Co. *v.* Pratt, 22 Wall. 123; St. Louis Ins. Co. *v.* St. Louis, etc., 3 Am. & Eng. R. R. Cas. 260.

the absence of a special contract to safely carry over its own road and safely to deliver to the next connecting carrier; but that any one of the companies may agree that over the whole road its liability shall extend. In the absence of a special agreement to that effect such a liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence.[1] In *Missouri*[2] it was at first held that, in the absence of any special contract, a carrier receiving goods marked to a distant point is not liable for an injury occurring beyond his own line. A late statute provided in effect that whenever a common carrier received property to be transferred from one place to another within or without that State, or when a railroad or other transportation company issued receipts or bills of lading, such company should be liable for any loss, damage, or injury to such property caused by its negligence or the negligence of another common carrier to which the goods were delivered or over whose line they passed. And the carrier receipting for the goods should be entitled to recover, in a proper action, the amount of any loss, damage, or injury it may be required to pay to the owner of such property from the company causing the loss.[3] It has since been held, in a case where a bill of lading was given which guaranteed the transportation and delivery of the goods to the terminus of the line or (if they were to be forwarded beyond this point) to any company receiv-

1. In Michigan Cent. R. *v.* Myrick, 9 Am. & Eng. R. R. Cas. 25, Field, J., in delivering the opinion of the U. S. Supreme Court, said: "Although a railroad company is not a common carrier of live animals in the same sense that it is a carrier of goods, its responsibilities being in many respects different, yet when it undertakes generally to carry such freight it assumes, under similar conditions, the same obligations, so far as the route is concerned over which the freight is to be carried."

In Railway Co. *v.* McCartney, 96 U. S. 258, it was held that corporations, unless forbidden by their charter, have the power to contract for shipment the entire distance over any connecting line. The company is liable upon the other lines as upon its own.

2. **Missouri.**—The general freight agent of a railroad company has power to bind the company by a contract for transportation to points beyond its own line. A station agent has no such power, and such a contract entered into by him is void unless he has express authority from his proper superior officer, or there have been previous dealings from which such authority on his part may be reasonably inferred. Grover & B. Sewing M. Co. *v.* Mo. Pac. R. Co., 70 Mo. 672.

A railroad company has power to contract with another corporation to complete the transportation of goods whose destination is beyond the terminus of its own line. Wiggins Ferry Co. *v.* Chicago & Alton R. Co., 73 Mo. 389; s. c., 5 Am. & Eng. R. R. Cas. 1.

In the absence of any special contract a carrier receiving goods marked to a distant point is not liable for an injury occurring beyond its own line. The mere giving of a through rate to the shipper does not constitute an assumption on its part of such responsibility. McCarthy *v.* Terre Haute & Ind. R. Co., 9 Mo. App. 159.

Railroads doing business together, sharing profits and sending freight over one or the other of the combined lines, at their pleasure, or the shipper's request, make themselves jointly liable to the shipper. Testimony to show that such railroads form a line, have a common office, and employ a general freight agent may go to the jury to prove the existence of such a relation between them as will render them jointly liable. Barrett *v.* Indianapolis & St. L. R. Co., 9 Mo. App. 226.

3. Rev. Stat. (Missouri) 1879, cap. 14, § 598, p. 95. Quoted in Lawson's Contracts of Carriers, § 238, note.

ing or which may receive freight from said company, that the railroad company receiving goods for transportation beyond the terminus of its line cannot by contract avoid its statutory liability for the loss of the goods through negligence of the connecting carrier.[1]

(*b*) *Contract for Through Transportation.*—It is well settled that the receiving carrier may contract for the entire transportation.[2] The company so contracting to deliver goods within a certain time at a destination beyond the terminus of its own line is liable to the consignor for damages caused by delay in transportation over such connecting roads. The terms of the contract in such case are for the jury.[3]

(*c*) *Limitation of Liability to Carrier's Own Route.*—It is well settled, even in those States where the acceptance of goods by a carrier marked to a destination beyond his own line is held to render him responsible for their safe through transportation, that it is competent for him by special contract to limit his liability to his own line. In such case, his full duty is discharged when he delivers the goods in safety to a connecting carrier.[4]

1. **Liability for Loss of Goods through Negligence of Connecting Carrier.**—A railroad company received goods for transportation beyond the terminus of its line. A bill of lading was given for the goods which guaranteed the transportation and delivery of the goods to the terminus of the line or (if they were to be forwarded beyond this point) to any company receiving or which may receive freight from said company. This was all the testimony bearing upon the question whether defendant had received the goods under contract to transport them to the terminus of its own line or to a point beyond that terminus. *Held*, that a railroad company that receives goods for transportation beyond the terminus of its line cannot, by contract, avoid its statutory liability for the loss of the goods through negligence of the connecting carrier. A shipper cannot recover of the receiving carrier for a loss occurring beyond the terminus of its line, without proving both a loss and a contract by the defendant to transport the goods beyond such terminus, where it proves that it delivered the goods in good order to the connecting carrier. Orr *v.* Chicago & Alton R. Co. (Mo. St. Louis Ct. Appeals, March, 1886).

In two *North Carolina* cases it has been held that a stipulation in a bill of lading, given by one of an associated through line, limiting liability for loss or damage to the common carrier in whose custody the goods were at the time of the loss is reasonable and binding. Phifer *v.* Railroad, 89 N. Car. 311; Weinburg *v.* Railroad, 18 Am. & Eng. R. R. Cas. 597.

2. Gray *v.* Jackson, 5 N. H. 9; Root *v.* Railroad, 45 N. Y. 532; Condict *v.* Grand Trunk R., 54 N. Y. 500; Hill Manuf. Co. *v.* Railroad, 104 Mass. 122; Pratt *v.* Railroad, 22 Wall. (U.S.) 132; Evansville, etc., R. *v.* Androscoggin Mills, 22 Wall. (U. S.) 894; Candee *v.* Pennsylvania R., 21 Wis. 582; Robinson *v.* Merchants' Desp. Transp. Co., 45 Iowa, 470.

3. A railroad company that contracts to carry goods over its own and connecting roads, and deliver the same within a certain time at a destination beyond the terminus of its own line, is liable to the shipper for damages caused by delay in transportation over such connecting roads. Whether the contract of shipment provided for a carriage beyond such terminus is a question for the jury. Upon the determination of this question the provisions of the receipt delivered by the carrier to the shipper are not conclusive upon the latter. Pereira *v.* Central Pacific R., 18 Am. & Eng. R. R. Cas. 565.

In Hewitt *v.* Chicago, etc., R., 18 Am. & Eng. R. R. Cas. 568, it was held, that where a railroad company takes property for shipment to a point beyond its own line, it is bound to deliver it in a reasonable time at its own terminus to another carrier to be forwarded, but is not liable for injuries which might be caused by the negligence of such other carrier after the property was delivered to it.

4 **Limitation of Liability of Carrier's Own Route.**—Aldridge *v.* Great Western

A railroad company cannot be compelled to give a bill of lading for delivery beyond its line. Such bills when given bind the company for safe delivery at the agreed point of destination. But this is a question of contract, and, in the absence of a special contract to deliver, the receiving railroad is not liable for loss or injury occurring after the goods have passed from its line.[1]

In *England*, where a special contract in limitation of the carrier's liability to his own line is made, the first carrier, in order to claim exemption under such a contract, must show that the goods passed uninjured into the custody of some other carrier who would be responsible, before, they were lost or injured.[2] The consequence of the English rule is, that the receiving carrier is the only one against whom an action lies. Where a special contract is made, an action will not lie against the connecting carrier on such a contract for loss or damage occurring on its line unless the carriers can be considered partners, or the receiving can be considered the agent of the connecting carrier.[3]

R. Co., 15 C. B. N. S. 582; Fowler *v.* Great Western R. Co., 7 Exch. 609; Kent *v.* Midland R.Co.,L.R. 10 Q.B.1; Garside *v.* Trust Nav. Co., 4 T. R. 581: Railroad Co. *v.* Androscoggin Mills, 22 Wall.(U.S.) 594; Railroad Co. *v.* Pratt. 22 Wall. (U.S.) 123; St. John *v.* Express Co., 1 Woods, 615; Sullivan *v.* Thompson, 99 Mass. 259; Pendergast *v.* Adams Express Co., 101 Mass. 120; Pemberton Co. *v.* New York, etc., R. Co , 104 Mass. 144; Burroughs *v.* Norwich R. Co., 100 Mass. 26; Gibson *v.* American Express Co., 1 Hun (N.Y.) 387; Ricketts *v.* Baltimore,etc., R.Co.,61 Barb. (N. Y.) 18; Witlock *v.* Holland, 55 Barb. (N. Y.) 443; Hinkley *v.* New York Central R. Co., 3 T. & C. 281; Babcock *v.* Lake Shore, etc., R. Co., 49 N. Y. 491; Ætna Ins. Co. *v.* Wheeler, 49 N. Y. 616; Reed *v.* United States Express Co., 48 N. Y. 462; Lamb *v.* Camden & Amboy R. Co., 46 N. Y. 271; American Express Co. *v.* Second National Bank, 69 Pa. St. 394; Penna. R. Co. *v* Schwarzenberger, 45 Pa. St. 208; Mulligan *v.* Illinois R. Co., 36 Iowa, 180; Illinois Central R. Co. *v.* Frankenberg, 54 Ill. 88; Chicago. etc., R. Co. *v.* Montfort, 60 Ill. 175; United States Express Co. *v.* Haines, 67 Ill. 137; Erie R. Co. *v.* Willcox, 84 Ill. 239; Taylor *v.* Little Rock. etc., R. Co.. 32 Ark. 393; Farmers', etc., Bank *v.* Champlain Trans. Co., 23 Vt. 186; Camden, etc., R. Co. *v.* Forsyth, 61 Pa. St. 81: Maghee *v.* Camden & Amboy R. Co., 45 N. Y. 514; United States Express Co. *v.* Rush. 24 Ind. 403; Oakly *v.* Gordon, 7 La. Ann. 235; Martin *v.* American Express Co., 19 Wis. 336; Cincinnati, etc., R. Co. *v.* Pontius, 19 Ohio St. 221; St. Louis, etc., R. Co. *v.* Piper. 13 Kans. 505; East Tennessee, etc., R. Co. *v.* Brumley, 6 Am. & Eng. R. R. Cas. 356. But see Galveston H. & H. R. Co. *v.* Allison, 12 Am. & Eng. R. R. Cas. 28.

When by terms of bill of lading company was exempt from liability for loss by fire or beyond its own line, and delivered gonds at steamboat wharf, and while in storage awaiting transportation same were burned, *held*, company was not liable. Deming *v.* Norfolk & W. R. Co., 16 Am. &. Eng. R. R. Cas. 232.

In Louisville, etc., R. *v.* Meyer, 78 Ala. 597, s. c., 27 Am. & Eng. R. R. Cas. 44, it was held that the carrier may, by express contract, limit his liability to losses or damage occurring on his own route; but such limitation must be shown to have been brought to the notice of the consignor, and to have been accepted by or acquiesced in by him. If the consignor, contemporaneously with the delivery of the gonds to the carrier, receives a bill of lading limiting the liability of the carrier to losses occurring on his own route, "possibly he would be conclusively presumed to have read it, and to have acquiesced in it;" but this principle does not apply where it is shown that the carrier, receiving the freight for the entire route, made out a bill of lading, which, being incomplete as to the amount of the charges, was not delivered to the consignor at the time, but was afterwards forwarded to him by mail at the place of destination.

1. Lotspeich *v.* Central R. & Banking Co., 73 Ala. 306; s. c., 18 Am. & Eng. R. R. Cas. 490.

2. Kent *v.* Midland R., 44 L. J. Q. B. 18; L. R. 10 Q. B. 1. But see Midland R. *v.* Bromley. 25 L. J. C. P. 94; 17 C. B. 372.

3. An action will not lie against the

(*d*) *Inference of Through Contract.*—A contract to carry throughout to the place of delivery may be inferred from certain circumstances: from the naming of the destination in the bill of lading,[1] though this, of course, is liable to be rebutted by other circumstances or stipulations in the bill; from the receipt of the entire freight, unless there be stipulation limiting the liability;[2] from various expressions or phrases more or less definite contained in the bill of lading, or verbally agreed upon between the parties.

connecting carrier on such a contract for loss or damage occurring on its line, unless the carriers can be considered partners, or the receiving can be considered the agent of the connecting carrier. Coxen *v.* Great Western R., 29 L. J. Exch. 165; 5 H. & N. 274; Foulkes *v.* Metropolitan District R., 28 W. R. 526.

This rule is followed in all its strictness in the State of Georgia. Southern Exp. Co. *v.* Shea, 38 Ga. 319: Mosher *v.* Southern Exp. Co., 38 Ga. 37; Cohen *v.* Southern Exp. Co., 45 Ga. 148.

1. Cutts *v.* Brainerd, 42 Vt. 566; Toledo, etc., R. Co. *v.* Merriman, 52 Ill. 123; Schroeder *v.* Hudson River R. Co., 5 Duer (N.Y.), 55. Though this, of course, is liable to be rebutted by other circumstances or stipulations in the bill. East Tenn. R. Co. *v.* Montgomery, 44 Ga. 278; St. John *v.* Express Co., 1 Woods, 612; American Exp. Co. *v.* Second Nat. Bank, 69 Pa. St. 394; Pendergast *v.* Adams Express Co., 101 Mass. 120; Witbeck *v.* Holland, 55 Barb. (N.Y.) 443; Coates *v.* U. S. Exp. Co., 45 Mo. 238; Reed *v.* U. S. Exp. Co., 48 N. Y. 462; Oakey *v.* Gordon, 7 La. Ann. 235; Penna. R. Co. *v.* Schwarzenberger, 45 Pa. St. 208; Collender *v.* Dinsmore, 55 N. Y. 200; Converse *v.* Norwich, etc., R. Co., 33 Conn. 166.

2. Reed *v.* Saratoga, etc., R. Co., 19 Wend. (N. Y.) 534; St. John *v.* Express Co., 1 Woods, 612; Berg *v.* Narragansett Steamship Co., 5 Daly (N. Y.), 394; Candee *v.* Penna. R. Co., 21 Wis. 582; R. Co. *v.* Androscoggin Mills, 22 Wall. (U. S.) 594.

3. Robinson *v.* Merchants' Despatch Co., 45 Iowa, 470; Root *v.* Great West. R. Co., 45 N.Y. 524; R. Co. *v.* Pratt, 22 Wall.(U.S.) 123; Hill Mfg.Co. *v.* B., etc., R. Co., 104 Mass. 122; Quimby *v.* Vanderbilt, 17 N. Y. 306. And see, as to the effect of contracts made with express companies or with other railroad companies, Schulter *v.* Adams Express Co., 6 Cent. L. J. 175; Wilson *v.* Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654; Carter *v.* Peck, 4 Sneed (Tenn.), 203; Ellsworth *v.* Yartt, 26 Ala. 733; Briggs *v.* Vanderbilt, 19 Barb. (N. Y.) 222; Gass *v.* N. Y., etc., Co., 99 Mass. 220; Cobb *v.* Allot, 14 Pick. (Mass.) 289.

It was said in Railroad Co. *v.* Pratt, 22 Wall.(U.S.)123, that ordinarily it is the duty of the carrier in the absence of any special contract to carry safely to the end of its line, and to deliver to the next carrier on the route beyond. . . . In reference to contracts to transport over other lines, such may be shown by an express undertaking, or by showing that the company held itself out as a carrier for the entire distance, or received freight for the entire distance, or other circumstances indicating an understanding that it was to carry through the entire route. On the same points see Baltimore & Pa. Steamboat Co. *v.* Brown, 54 Pa. St. 77; Wheeler *v.* San Francisco & Alameda Railroad, 31 Cal. 46; Cincinnati, Hamilton, Dayton & Richmond R. *v.* Pontius, 19 Ohio St. 221; also Pierce on Railroads, 510, where the authorities are fully collected.

In Cummins *v.* Dayton, etc., R., 9 Am. & Eng. R. R. Cas. 36, it was held that railroad companies have the power to contract to carry goods beyond their their own line, and where they enter into such contract they will be liable as a common carrier throughout the whole transit. Three railroad companies, whose lines formed a continuous road between X and Y, held themselves out to the public as having formed a combination for the transportation of goods on the entire route. A at X shipped goods with one of the companies addressed to B at Y, and took a receipt whereby the company undertook to forward as per directions. Said receipt contained numerous provisions limiting liability, and provided that all the carriers transporting the property as a part of the through line should be entitled to all the exceptions and conditions therein mentioned. *Held*, that said carrier had contracted to carry the goods through to Y, and was liable

(*e*) *Liability for Through Transportation in Spite of Contract.*—It is held that where the first of several connecting lines contracts to transport goods over the whole line, but inserts a clause in the bill of lading providing that only the company in whose charge the goods might be at the time an injury occurred should be liable, was of no effect ,but that the companies were all jointly liable.[1]

(*f*) *Delivery to Connecting Carrier.*—The liability of a connecting carrier does not begin, and the duty of the first carrier is not completed, until there has been an actual delivery to the connecting carrier, or at least such a notification to him as, according to the course of business, is equivalent to a tender of delivery.[2]

for a loss occurring in consequence of delay in said transit, although the same occurred beyond its own line.

In St. Louis Ins. Co. *v.* St. Louis, etc., R., 3 Am. & Eng. R R. Cas. 260, it was held that a common carrier is not in the absence of a special contract liable for injuries occurring on a connecting road beyond its own line. A special undertaking to assume such liability cannot be inferred from: 1. The entry of the carrier into an arrangement with the connecting line to carry freight at tariff rates, or at any special rates furnished by the other lines. 2. The giving of a way-bill which expressed the goods to be consigned to an extra-terminal point, but which purports to be a manifest of freight from one terminus of the road to another. See also Stewart *v.* Terre Haute, etc., R., 1 McCrary C. C. 312.

1. In Milne *v.* Douglass, 13 Fed. Rep. 37, where three railroad companies having connected lines of road and a steamship company connecting with the terminal line contracted to transport goods over the whole line, and said goods were damaged while in transit in the custody of one of the companies, it was held that the companies were all jointly liable, and that notwithstanding a clause in the bill of lading providing that that company alone should be liable in whose charge the goods might be at the time an injury occurred.

In Gulf, etc., R. *v.* Golding, 23 Am. & Eng. R. R. Cas. 732, Wilson, J., in delivering the opinion of the Texas Court of Appeals observed: "It is said by Mr. Lawson, in his work on Carriers, that 'when a carrier has contracted for the carrying of goods over another line beyond his route, a stipulation that his responsibility is to terminate at the end of his own line will be of no available effect.' This text has been quoted approvingly by the Supreme Court of this State in the case of G. H. & H. R. *v.* Allison, 59 Tex. 193, and in that case it is further said that the carrier will be held responsible for the negligence not only of himself and his servants, but of the connecting lines, they being considered his agents for carrying out the particular contract. This doctrine is well supported by authority, and is, we think, the just and true doctrine. Bank of Ky. *v.* Adams Exp. Co., 93 U. S. 174; Railroad *v.* Pontius, 19 Ohio St. 221; Condict *v.* Railroad, 54 N. Y. 500."

2. In Condon *v.* Marquette, etc., R., 18 Am. & Eng. R. R. Cas. 574, it was held that where a carrier receives goods to be transported over a connecting line to their final destination, its liability as a common carrier continues until the goods are delivered to the other carrier; and if they are destroyed by fire while in the warehouse of the first carrier, it will be liable for their loss, notwithstanding a custom that the connecting carrier shall inspect the books in which goods are entered as received, and take possession of and transport over its line goods intended to be so transported.

Cooley, C. J., in delivering the opinion of the court observes: "We think these cases lay down a rule which is just to the shippers of goods, and not unreasonably burdensome to carriers. The shipper delivers his goods to a carrier, who becomes insurer for their safe transportation; and if the operations of one carrier cover a part only of the line of transit, and another is to receive the goods from him, the shipper has a right to understand that the liability of an insurer is upon some one during the whole period. The duty of the one is not discharged until it has been imposed upon the succeeding carrier, and this is not done until there is delivery of the goods, or at least such a notification to the succeeding carrier as, according to the course of the business,

There may be by express agreement, by usage and custom in a particular trade, or from a course of dealing between particular carriers, a constructive delivery from one carrier to a connecting carrier. But this cannot affect the owner of the goods, and he can be required to look for reparation of his loss only to the connecting carrier in actual possession when it occurred, and the carrier whose duty it was to make the delivery to the succeeding one will be presumed to have still had the possession until it be shown that it had actually been transferred to another.[1]

is equivalent to a tender of delivery. There is nothing in this which is burdensome to the carrier, for this is the customary method in which the business is done; and the rule only requires that the customary method shall be pursued without unreasonable delay or negligence. The connecting carriers in this case appear to have established a custom of their own, under which actual delivery of the goods or notice to take them was dispensed with, and the one was to ascertained from the books of the other what goods were ready for reception and further carriage. This, as between themselves, was well enough while it worked well; but it was an arrangement to which the plaintiff was not a party, and the defendant could not, by means of it, relieve itself of any liability which duty to the plaintiff imposed. And it was clearly its duty to the plaintiff, as we think, to relieve itself of the responsibility of the goods remaining for an unreasonable time in its warehouse, and to do this it was necessary that the responsibility be transferred to the carrier next in line. But the mere permission to inspect its books and take whatever was ready for carriage would not do this; there should have been distinct notice which would apprise the other carrier that defendant expected the removal of the goods."

In Peterson *v.* Case, 18 Am. & Eng. R. R. Cas. 578, it was held that when goods are to be delivered by a railroad company to a second line of conveyance for transportation further on, the common-law liability of common carriers remains on the first carrier until he has delivered the gonds for transportation to the next one. Its obligation while the goods are in its depot does not become that of a warehouseman. Where, while goods received by the first carrier are in transit, the connecting line notifies it that it cannot receive the goods and transport them to their destination because of a block in freight, this will not relieve the first carrier from liability for damages caused by the delay, where it fails to notify the shipper and give him an opportunity to dispose of the property or take measures for its preservation. See also Lesinsky *v.* Great Western Disp. Co., 10 Mo. App. 134, where it was held that where a railroad company in such case is unable to forward the goods by the lines of the next connecting carrier owing to an obstruction thereof, it is bound to retain the goods and give notice to the owner so that he may reclaim them. If it fails to give such notice, the company is liable for the delay. *Compare*, however. Armstrong *v.* Grand Trunk, etc., R., 2 Pugs. & B. (N. B.) 445; Michigan Central, etc., R. *v.* Hall, 6 Mich. 243; Michigan Central, etc., R. *v.* Lantz, 32 Mich. 502; Deming *v.* Norfolk, etc., R., 16 Am. & Eng. R. R. Cas. 232.

The liability of a connecting carrier does not begin until he has received possession of the goods. The receiving carrier cannot shirk his responsibility by simply unloading and storing them, but must actually deliver them to the connecting carrier, or at least attempt to do so. Railroad Co. *v.* Manufacturing Co., 16 Wall. (U. S.) 318; Brintnall *v.* Railroad, 32 Vt. 665; Gass *v.* Railroad, 99 Mass. 220; Blossom *v.* Griffin, 3 Kern. (N. Y.) 569; Michaels *v.* Railroad, 30 N. Y. 564; Root *v.* Railroad, 45 N. Y. 24; Mills *v.* Michigan, etc., R., 45 N. Y. 622; McDonald *v.* Western Railroad Corporation, 34 N. Y. 497; Rawson *v.* Holland, 59 N. Y. 611. See also Ladue *v.* Griffith, 25 N. Y. 364; Louisville, etc., R. *v.* Campbell, 7 Heisk. (Tenn.) 253; Western Transp. Co. *v.* Newhall, 24 Ill. 422; Merchant's Disp. Transp. Co. *v.* Kahn, 76 Ill. 520; Indianapolis, etc., R. *v.* Strain, 81 Ill. 504; Conkey *v.* Milwaukee, etc., R. 31 Wis. 619; Irish *v.* Milwaukee, etc., R., 19 Minn. 376; s. c., 18 Am. Rep. 340.

1. Hutchinson on Carriers, § 104. Conkey *v.* Milwaukee, etc., R., 31 Wis. 619; McDonald *v.* Western Railroad Corporation, 34 N. Y. 497; Irish *v.* Mil-

(*g*) *Contract Limiting Liability Inures to the Benefit of Intermediate Carriers.*—Where goods are to be transferred over a number of connecting lines, a contract entered into by the carrier receiving the goods, stipulating for exemption from liability in general terms, will inure to the benefit of all the various carriers over whose routes the goods may be carried.[1] A contract may, however, expressly stipulate that the immunity shall extend only to the single company entering into it.[2]

(*h*) *Obligation of the Carrier to Notify the Consignor of Obstructions.*—Where a railroad company is unable to forward freight by the next connecting lines owing to an obstruction thereof, it is bound to retain the goods and notify the owner so that he may reclaim them.[3]

(*i*) *Transportation of Cars of other Companies.*—In some States railroad companies are required by statute to receive and transport

waukee, etc., R., 19 Minn. 376; s. c., 18 Am. Rep. 340; Erie, etc., R. *v.* Lockwood, 28 Ohio St. 358; Brintnall *v.* Saratoga, etc., R., 32 Vt. 665; Louisville, etc., R. *v.* Campbell, 7 Heisk. (Tenn.) 253; Packard *v.* Taylor, 35 Ark. 402; Michigan Central, etc., R. *v.* Manuf. Co , 16 Wall. (U. S.) 318; Reynolds *v.* Boston, etc., R., 121 Mass. 291. But see Converse *v.* Transportation Co., 33 Conn. 166; Pratt *v.* Railroad, 95 U. S. 43. *Compare* Van Santvoord *v.* St. John, 6 Hill (N. Y.), 157; Mills *v.* Railroad, 45 N. Y. 622.

1. **Contracts Limiting Liability Inure to Benefit of Intermediate Carrier.**—Babcock *v.* Lake Shore. etc., R., 49 N. Y. 494; Camden, etc., R. *v.* Forsyth, 61 Pa. St. 81; Jurson *v.* Camden, etc., R., 4 Am. Law Reg. 234; U. S. Express Co. *v.* Harris, 51 Md. 127; Levy *v.* Southern Express Co., 4 S. Car. 234; Maghee *v.* Camden, etc., R. Co., 45 N. Y. 514; Manhattan Oil Co. *v.* Camden, etc., R. Co., 54 N. Y. 197; Lamb *v.* Camden, etc., R. Co., 2 Daly (N.Y.). 454; s. c., 46 N.Y. 271; Hall *v.* N. E. R. Co., L. R. 10 Q. B. 437; Whitworth *v.* Erie R. Co., 6 Am. & Eng. R. R. Cas. 349; Halliday *v.* St. Louis, etc., R. Co., 6 Am. & Eng. R. R. Cas. 443; Whitehead *v.* Wilmington, etc., R. Co., 9 Am. & Eng. R. R. Cas. 168; Taylor *v.* Little Rock, etc., R., 39 Ark. 148; s. c., 18 Am. & Eng. R. R. Cas. 590.

2. Bancroft *v.* Merchants' Despatch Trans. Co., 47 Iowa, 262; Babcock *v.* Lake Shore, etc., R. Co., 49 N. Y. 491; Martin *v.* Am. Express Co., 19 Wisc. 336; Camden, etc., R. Co. *v.* Forsyth, 61 Pa. St. 81; Merchants' Despatch Trans. Co. *v.* Bolles, 80 Ill. 473; Railroad Co. *v.* Pratt, 22 Wall. (U. S.) 123; Ætna Ins. Co. *v.* Wheeler, 49 N. Y. 616.

When merchandise is shipped "at owner's own risk," the limitation of liability inures to protection of connecting lines. Kiff *v.* Atchison, T. & S. F. R. Co., 18 Am. & Eng. R. R. Cas. 618.

In Burwell *v.* Railroad Co., 25 Am. & Eng. R. R. Cas. 410, it was held that a railroad company is not bound to transport goods delivered to it for carriage in a box car. It is only required to keep them dry, and free from exposure and injury while the same are in its care and custody. Where goods are injured while in transit the receipt and manifest given by the railroad company are evidence going to prove a *prima-facie* case of liability against it. But they are not conclusive, and the defendant has the right to offer any competent evidence going to show that the property in question was not damaged while on its line of road. A box containing a theatre drop-curtain was injured by water while being carried from one place to another. The carriage was performed by several connecting lines of road. *Held*, that evidence that it did not rain while the box was in transit over defendant's road tended to prove that it did not get wet while in its custody; and an instruction that the jury might consider this fact in connection with other evidence was proper.

3. **Company Bound to Notify Owner in Case of Obstruction of Connecting Lines.**—If it fails to give such notice the company is liable for the delay. Louisville & N. R. Co. *v.* Campbell, 7 Heisk. (Tenn.) 253; Lesinsky *v.* Great Western Dispatch Co., 10 Mo. App. 134; Petersen *v.* Case, 18 Am. & Eng. R. R. Cas. 578. See Dunn *v.* Hannibal, etc., R., 68 Mo. 268; Rice *v.* Kansas Pacific R., 63 Mo.

the cars of other companies.[1] When so requested, while so transporting them, and in complete and undisputed control of them, they are liable as common carriers in case any injury to them is occasioned.[2]

(*j*) *Burden of Proof Where the Place of Loss is Unknown.*—The weight of opinion is to the effect that if there be evidence of delivery to the first carrier, and evidence of non-delivery at the terminus, the burden of proof is on the first carrier to show that the loss did not take place while the goods were in his possession. In default of such evidence on his part he will be held liable.[3] In

314. But see Frank *v.* Memphis, etc., R., 52 Miss. 570.

1. **Transportation of Cars of other Carriers.**—Michigan Central R. Co. *v.* Smithson, 1 Am. & Eng. R. R. Cas. 101; Rae *v.* Grand Trunk R. Co., 9 Am. & Eng. R. R. Cas. 470; Texas & Pac. R. Co. *v.* Carlton, 15 Am. & Eng. R. R. Cas. 350.

In Peoria, etc., R. *v.* Chicago, etc., R., 109 Ill. 135; s. c., 18 Am. & Eng. R. R. Cas. 506, it was held that a railway company engaged in the transportation of freights for hire as a common carrier is bound to transport or haul upon its road the cars of any other railroad company when requested so to do, and will hold the same relation as a common carrier to such cars as it does to ordinary freight received by it for transportation, and in case of loss will be held to the same measure and character of liability to the owner of the cars so received for transportation as would attach in respect to any other property.

In this case the defendant railroad company's principal business was switching cars for other railroad companies. Its tracks were connected with those of the other railroads by a transfer switch, and with mills, elevators, and manufactories in and around the city where its business was transacted. The plaintiff corporation brought a car loaded with freight to the city, and placed the same on the transfer track, with orders to the defendant to ship the same to a certain distillery, to which place it was taken and unloaded. When unloaded it was taken by the defendant, without orders from the plaintiff, to a sugar refinery, to be loaded, and then switched to the transfer track for shipment. On the same day the sugar refinery was burned, and also the car. *Held*, that the defendant was liable, as a common carrier, to the plaintiff for the value of the car so destroyed.

2. New Jersey, R. & T. Co. *v.* Pennsylvania R. Co., 3 Dutch. (N. J.) 100; Mallory *v.* Tioga R. Co., 39 Barb. (N. Y.) 488: Vermont & Mass. R. Co. *v.* Fitchburg R. Co., 14 Allen (Mass.), 462. See also, as having some bearing on the question, Hannibal R. *v.* Swift, 12 Wall. (U. S.) 262; Atchison, T. & S. F. R. Co. *v.* Denver & New Orleans R. Co., 16 Am. & Eng. R. R. Cas. 57.

In Missouri Pacific R. *v.* Chicago, etc., R., 23 Am. & Eng. R. R. Cas. 718, it was held that where a railroad company receives loaded cars from another road for transportation, it is liable as a common carrier in case they are destroyed *en route* by fire. But if destroyed by fire after delivery to the consignee, or after they have been tendered to him, the company is not liable if not in fault. In the latter case its duties are only those of warehousemen. See generally Bird *v.* Georgia R., 72 Ga. 655; s. c., 27 Am. & Eng. R. R. Cas. 39.

3. Brintnall *v.* Saratoga & W. R. Co., 32 Vt. 665. The doctrine of this case is amply supported in the opinion, thus: "The duty of the defendants was to safely transport the box to Castleton, the end of their road, and there deliver it to the next carrier. The negligence alleged in the declaration, the breach of duty complained of, is that they did not do this, and, of course, in order to establish a right of recovery against the defendants, there must be some proof offered to prove such negligence. It is an affirmative allegation by the plaintiff, and the burden is upon him, though it involves the proof of a negative. It is not enough for the plaintiff to show the box in the hands of the defendants and throw upon them the burden to prove that they delivered it to the plaintiff, or at its proper destination, under their contract of carriage. But in such cases a plaintiff is only bound to give such proof of the loss as the nature of the case admits of, and is fairly in his power to bring. The fact that he is thus really called upon to prove a negative is not to be lost sight of, nor

Georgia it is provided by statute that the last of a connecting line of railroads over which goods are shipped which receives them in good order shall be liable to the consignee for any damage occurring during the whole transit.[1]

Where goods have been transported by several successive carriers, and it appears that they were in good condition when delivered to the first carrier, the jury may presume, in absence of evidence to the contrary, that the goods reached the hands of the last carrier in the same condition as when delivered to the first.[2]

Where an arrangement is made between several connecting railroad companies, by which goods to be carried over the whole route are to be delivered by each to the next succeeding company, and such company is to pay to the preceding company the amount already due for the carriage, and the last one is to collect the whole from the consignee, the receipt of goods by the last company and the payment of all the charges of its predecessors will not render

that ordinarily after the delivery of goods to a carrier, and especially to a railway company, the means of proving what has been done with them, or what has become of them, are wholly within their own power and knowledge, and out of that of the plaintiff. The plaintiff can, and ought always to be required to, show that he has not received his property; that it has been lost. The county court required this to be done by the plaintiff, and held that if this was shown, and that the goods never reached Boston, their ultimate destination, then the burden was on the defendants to show the box out of their hands. . . . We are satisfied, under the circumstances, that the instruction was correct." There have also been several cases where suits have been brought and recoveries permitted against the last carrier in the connecting line, the argument being that if the goods were delivered to the first carrier in good condition they must be presumed to have continued in that state."

In Dixon *v.* Richmond & Danville R. Co., 74 N. Car. 538, the facts were these: A piano was shipped in good order from Boston to Greensboro, N.C., over several connecting lines. It was in good order when it arrived at New York, but was greatly damaged when it was delivered by defendants, the last carrier in the line, at Greensboro. Under these circumstances it was held that the burden of proving that the piano was injured on some other of the connecting lines than their own was on defendants, and having failed to do this, they were held liable for the damage.

To precisely similar effect is the case of Laughlin *v.* Chicago & N. W. R. Co., 28 Wis. 204: Here goods in a box were shipped over connecting lines, consisting of three successive carriers, and finally, on delivery to the consignee, the box was found to have been opened, and various articles abstracted therefrom. It was held, in the absence of evidence to the contrary, that the jury might presume that the box remained unopened until it came into the custody of the last carrier, and that while in his custody the loss occurred. The last carrier was held liable accordingly. Laughlin *v.* Chicago & N. W. R. Co., 28 Wis. 204.

In *New York* the authorities are the same way. It has been expressly held that where goods are delivered to a railroad company to be transported by it and other connecting lines to the point of destination, it is enough for the owner in an action against the last carrier for an injury occasioned to the goods in transit to show a delivery of them in good order to the first carrier. The defendant can then only escape liability by proving affirmatively that the loss did not occur on his line. Smith *v.* New York Central R., 43 Barb. (N. Y.) 228.

1. Wolf *v.* Central, etc., R., 6 Am. & Eng. R. R Cas. 441.

As to burden of proof see Elmore *v.* Naugatuck R., 23 Conn. 482.

2. Leo *v.* St. Paul, etc., R., 12 Am. & Eng. R. R. Cas. See also Shriver *v.* Sioux City & St. Paul R. Co., 24 Minn. 506; Laughlin *v.* Chicago & N. W. R. Co., 28 Wis. 204; Smith *v.* N. Y. C. R. Co., 43 Barb. (N. Y.) 225; Brintnall *v.* S. & W. R. Co., 32 Vt. 665; Dixon *v.* Richmond & Danville R. Co., 74 N. Car. 538.

it liable for any injury done to the goods before it received them, provided there has been no contract rendering one carrier liable for the negligence or default of the others.[1]

(*k*) *Connecting Lines in Partnership.*—Payment of freight in advance is generally inconvenient; and as the goods may be presumed to be of sufficient value to pay the freight, an arrangement is sometimes made by which each carrier subsequent to the first pays what is due when the goods are delivered to him, and the last carrier collects the whole bill from the consignee. Such an arrangement creates no partnership or joint liability. If a further arrangement is made between the carriers, that the freight bills shall not be paid on the receipt of each parcel of goods, but an account shall be kept on each line on a particular route, and periodically settled, this will not create a co-partnership or joint liability, for each line charges separately for its own freight. If it is further arranged that each line shall charge only a stipulated rate of freight, so that any customer can be informed beforehand what the amount of freight will be to a given place of destination, this does not create a partnership or joint liability.[2] Where

1. Darling *v.* Boston & Worcester R. Co., 11 Allen (Mass.). 295; Gass *v.* New York R. Co., 99 Mass. 220. *Cf.* Brintnall *v.* Saratoga R. Co., 32 Vt. 665; Angle *v.* Mississippi R. Co., 9 Iowa, 487; Dillon *v.* New York R. Co., 1 Hilt. (N. Y.) 231; Bradford *v.* South Carolina R. Co., 10 Rich. (S. Car.) 221; s. c., 10 Rich. (S. Car.) 307; Kyle *v.* Laurens R. Co., 10 Rich. (S. Car.) 382; Wilson *v.* Owners, etc., of Tuscarora, 32 Pa. St. 270; Carson *v.* Harris, 4 Greene (Iowa), 516. See also Montieth *v.* Kirkpatrick, 3 Blatchf. C. C. 279. And the last carrier has a lien in such case for his own freight, and for the back charges paid, the consignee being prohibited from setting off against this claim the damage done to the goods. Bowman *v.* Hilton, 11 Ohio, 303.

In the absence of such a contract no one of several carriers forming a connected and continuous line is liable for the loss or injury of goods occurring while such goods are in the hands of other carriers. Ricketts *v.* Baltimore & Ohio R. Co., 59 N. Y. 637; Schiff *v.* N. Y. Central & Hudson R. R. Co., 16 Hun (N. Y.), 278. Each carrier in the line is bound to unload the goods and deliver them safely to the next succeeding carrier. But having done this, he has discharged his full duty. McDonald *v.* Western R. Corp., 34 N. Y. 501.

2. Connecting Railroad Lines as Partners.—An agreement among several railroad companies constituting a through freight line to divide receipts among them according to some fixed plan does not constitute them partners in any sense. Watkins *v.* Terre Haute, etc., R. Co., 8 Mo. App. 570; Hill *v.* Burlington, etc., R. Co., 9 Am. & Eng. R. R. Cas. 21; Insurance Co. *v.* Railroad Co., 104 U. S. 146; s. c., 3 Am. & Eng. R. R. Cas. 260; Deming *v.* Norfolk & Western R. Co., 16 Am. & Eng. R. R. Cas. 332; Converse *v.* N. & N. Y. Trans. Co., 33 Conn. 166. See also Merrick *v.* Gordon, 20 N. Y. 96.

In Hot Springs, etc., R. *v.* Trippe, 42 Ark. 465, s. c., 18 Am. & Eng. R. R. Cas. 562, it was held that an association among railroad companies for the transportation of through freights, and a division of the receipts in prescribed proportion, does not constitute a partnership, nor render the carriers jointly liable for loss or injury occurring to goods transported.

Smith, J., in delivering the opinion of the court, observed: "In Darling *v.* B. & W. R. Co., 93 Mass. 295, a similar question came before the Supreme Judicial Court of Massachusetts. . . Arrangements of this character are convenient to the public, because they enable carriers to transport goods at low rates. They are inconvenient in some respects. They render it difficult to obtain compensation for injuries to goods, because it is difficult for the owner to prove where the injury was done, and, if he can prove it, he may be obliged to carry on a litigation in a distant State. But if the law is adhered to and contracts are enforced according to their legal interpretation,

several carriers constitute a through line, and each sells "through tickets," deducting its own share of the price paid for each for the same, and accounting to the other companies for their share, the price being fixed according to the tariff fixed by each company as to its own road, this does not constitute carriers partners.[1] Where a contract between a despatch company and a railroad company, whose route in connection with those of other companies

business will regulate itself, and methods will be discovered to avoid inconveniences.' See also Converse *v.* N. & N. Y. Transp. Co., 33 Conn. 166, upon the point that an association among carriers for the transportation of freights and a division of the receipts in prescribed proportions, does not constitute a partnership, nor render the carriers jointly liable." See also Gass *v.* New York, etc., R., 99 Mass. 220; Burroughs *v.* Norwich, etc., R., 100 Mass. 26; Aigen *v.* Boston, etc., R., 132 Mass. 423; s. c., 6 Am. & Eng. R. R. Cas. 426.

In Deming *v.* Norfolk, etc., R., 16 Am. & Eng. R. R. Cas. 232, it was held that an agreement between connecting carriers on a through route, each having exclusive control and ownership of its line, with arrangements for continuous transportation on through bills of lading at settled rates of compensation, each being by special provision in the bills of lading responsible only for his own acts or omissions, does not make such carriers partners and responsible for the acts and omissions of each other.

Butler, J., remarks: "The agreement between the several railroad companies did not make them partners, nor responsible in any respect for each other's acts or contracts. They were connecting carriers on a through route, each having the exclusive ownership and control of its line, with arrangements for continuous transportation on through bills of lading, at settled rates of compensation, each being alone responsible for its own acts or omissions, as specified in the bill before us. That such agreements do not render intermediate carriers responsible for the undertakings, representations, or misconduct of the carrier who receives merchandise from a shipper seems to be so fully settled by the authorities as to leave nothing for discussion. It was the point directly involved and decided in Insurance Co. *v.* Railroad Co., 104 U. S. 146; s. c., 3 Am. & Eng. R. R. Cas. 260."

There was an arrangement between different railroads connecting with each other whereby each road agreed to carry the cars of the others having the name "Green Line" painted thereon over its own road without breakage of bulk, at such rates as might be agreed on, each company fixing its own rates of freight passing over its own road, and collecting the same as the freight passed over its road, and having no interest in freights not reaching its road. Each road being desirous of making a through rate over other roads via these "Green Line" cars, would ascertain the rates the intermediate road or roads charged, and, adding the same to its own rates, fix its own schedule of through rates, which it termed "Green Line rates." There was no joint expense, loss, or profits except that where a loss could not be located on any particular road a *pro rata* share of the loss was borne by all that carried the freight. It was decided that there was no partnership by the fact that the words "Green Line" were painted on the roof of a wharf-boat, and printed also upon the bills of lading. Irvin *v.* Nash., Chat. & St. L. R. Co., 92 Ill. 103. That an agreement to share *pro rata* losses that cannot be located does not make the connecting carrier partners, see Aigen *v.* Boston & M. R. Co., 132 Mass. 423; s. c., 6 Am. & Eng. R. R. Cas. 426. See Schiff *v.* N. Y. Cent. & Hudson Riv. R. Co., 16 Hun (N. Y.), 278.

Another arrangement very common among railway companies is this: several connecting railway companies form a "through line," agreeing that when goods are received to be carried over the whole route they shall be delivered by each to the next succeeding company, which shall "advance charges" thereupon; that is, pay to its predecessor the amount already due for the carriage, the last company collecting the whole from the consignee. This does not constitute the companies' partners, nor make the last company liable for goods lost or injured before it received them. Darling *v.* Bost. & Wor. R. Co., 11 Allen, 295; Hot Springs R. *v.* Trippe, 42 Ark. 465; s. c., 18 Am. & Eng. R. R. Cas. 562.

1. Croft *v.* Balt. & O. R. Co., 1 MacArth. (D. C.) 492; S. P. Straiton *v.* N. Y. & N. H. R. Co., 2 E. D. Smith (N. Y.), 184. See also Converse *v.* Nor. & N. Y. Transp

formed a continuous line, stipulated that the railroad should receive, load, unload, deliver, and way-bill all freight sent to it by the despatch company at such rates for the transportation as might be established by the railroad companies; and should, while assuming all the risks of a common carrier, pay for all damage to or loss of property while on its road or in its possession; and where the despatch company entered into a similar arrangement with each of the other companies, between which there was an agreement that the amount charged for the through freight should be divided between them according to the length of their respective roads; and that on such freight the last carrier should collect the charges from the consignee, deduct its share thereof, account in the same way to the next company, and so on to the first; and that settlement were to be made by the railroad company periodically upon accountings between them, and each settled separately with the despatch company,—it was held that by the agreement the despatch company imposed upon the railroad company neither an obligation to carry freight beyond its own road nor a liability for the negligence of either of the other companies; and that such arrangement did not constitute them partners, either as between themselves or as to third persons.[1] In an action against a common carrier seeking to hold it liable as partner of another road by which the goods were shipped, the mere facts that such roads were continuous, and that an association engaged in shipping goods between points connected by these roads, and using its own cars, and employing agents distinct from those of these roads, was in the habit of giving a through bill of lading between these points, and distributing the freight received among the roads actually engaged in the carriage in proportion to the freight earned by each road, it was held that there was no evidence of a partnership between the roads, or that the shipping association in question made the contract of affreightment in question as agent of the defendant.[2]

In these cases it is held that although in some of them the companies were doing business through a common agent,[3] or were regulating parts of their business by a joint committee,[4] there was in fact no joint expense, no joint property, no joint fund, no joint profits, and no arrangement to share loss and profit. A communion of profit is of the very essence of the contract of partnership. And without this communion of profit a partnership cannot in law exist.[5]

Co., 33 Conn. 167; Harton *v.* Eastern R. Co., 114 Mass. 44; Ellsworth *v.* Tartt, 16 Ala. 733.

1. Insurance Co. *v.* Railroad Co., 104 U. S. 146; s. c., 3 Am. & Eng. R. R. Cas. 260.

2. Watkins *v.* Terre Haute, etc., R., 8 Mo. App. 569; s. c., 1 Am. & Eng. R. R. Cas. 614. See also Schiff *v.* N. Y. Cent., etc., R., 16 Hun (N. Y.), 278.

3. Ellsworth *v.* Tartt, 26 Ala. 733; Straiton *v.* New York, etc., R., 2 E. D. Smith (N. Y.), 184; Watkins *v.* Terre Haute, etc., R., 8 Mo. App. 569; s. c., 1 Am. & Eng. R. R. Cas. 614.

4. Straiton *v.* New York, etc., R., 2 E. D. Smith (N. Y.), 184.

5. Irvin *v.* Nashville, etc., R. 92 Ill. 103.

(*l*) *Charter Power.*—Railroad companies cannot enter into partnership unless authorized by their charter to do so.[1] It seems well settled that connecting railroad companies have no authority under their charters to form a partnership arrangement for the joint management of the two roads, and the division of profit and losses. The charter authorizes the company to manage and control its own road, and that alone, and that it must govern and control without the intervention or co-operation of another railroad.[2]

(*m*) *When connecting Carriers are Partners.*—If several carriers, each having its own line, associate and form what to the shipper is a continuous line, and contract to carry goods through for an agreed price which the consignor or consignee pays in one sum, and which the carriers divide among them, then as to third parties, with whom they contract, they are liable jointly for a loss taking place on any part of the whole line.[3]

1. Railroad companies cannot enter into partnership unless authorized by their charters so to do. Burke *v.* Concord R. Corp., 8 Am. & Eng. R. R. Cas. 94; State *ex rel. v.* Concord R Corp. *et al.*, 13 Am. & Eng. R. R. Cas. 94. See Silver *v.* St. Louis, etc., R. Co., 72 Mo. 193, in which a contract between connecting lines as to certain freight, which contract was alleged to amount to a partnership, was discussed and commented upon.

2. Burke *v.* Concord R. Co., 8 Am. & Eng. R. R. Cas. 552; Pearce *v.* Mad. & Ind. R. C. & Peru & Ind. R. Co., 21 How. (U. S.) 441. See also Bissell *v.* Mich. South. & North. Ind. R. Co., 22 N. Y. 259. But through freight line partnerships involve considerations somewhat different from those involved in the cases just cited. Such a partnership does not involve a joint management of the road. The management of each road is kept entirely distinct and is not affected by the partnership arrangement. The partnership relates only to through business, and each road contributes to the partnership its services as a carrier over its line. It is objected that a railroad has no authority under its charter to assume a liability for the defaults or torts of another road, but it seems well settled that a road may contract for the carriage of goods or passengers beyond its own *termini*. Nashua Lock Co. *v.* Worc. & Nashua R. Co., 48 N. H. 339; Stewart *v.* Erie & West. Transp. Co., 17 Minn. 372.

3. Barton *v.* Wheeler. 49 N. H. 25; Bradford *v.* Railroad Co., 7 Rich. (S. Car.) 201; Cincinnati, etc., R. Co. *v.* Spratt, 2 Duval (Ky.), 4; Nashua Lock Co. *v.* Railroad Co., 48 N. H. 339; Quimby *v.* Vanderbilt, 17 N. Y. 306; Chouteaux *v.* Leach, 18 Pa. St. 224; Boston, etc., Steamboat Co. *v.* Brown, 54 Pa. St. 77; Hart *v.* Railroad Co., 4 Seld. (N. Y.) 37; Railroad Co. *v.* Androscoggin Mills, 22 Wall. (U. S.) 594; Railroad Co. *v.* Pratt, 22 Wall. (U. S) 123; Wyman *v.* Chicago, etc., R., 4 Mo. App. 39; Erie, etc., Despatch *v.* Cecil, 112 Ill. 180; Rice *v.* I. & St. L. R., 3 Mo. App. 31; Coates *v.* United States Exp. Co., 45 Mo. 238; Barton *v.* Wheeler, 40 N. H. 11; Bostwick *v.* Champion, 11 Wend. (N.Y.) 571; Champion *v.* Bostwick, 18 Wend. (N.Y.) 175; Briggs *v.* Vanderbilt, 19 Barb. (N.Y.) 222; Hart *v.* Rensselaer, etc., R., 8 N.Y. 37; Gass *v.* New York, etc., R., 99 Mass. 220; Converse *v.* Norwich, etc., Transp. Co., 33 Conn. 166; Ellsworth *v.* Tartt, 26 Ala. 733; Montgomery, etc., R. *v.* Moore, 51 Ala. 394; Wilson *v.* Chesapeake, etc., R., 21 Gratt. (Va.) 654; Schulter *v.* Adams Exp. Co., 6 Cent. L. J. 175; Gill *v.* Manchester, etc., Ry., L. R. 8 Q. B. 136.

In Block *v.* Erie & North Shore Despatch Fast Freight Line, 21 Am. & Eng. R. R. Cas. 1, it was held that several railway companies forming a fast freight line are partners liable jointly and severally for goods lost or damaged in transportation by such line. By a bill of lading "The Erie & North Shore Despatch" contracted to carry plaintiff's goods from Boston by the Fitchburg R. and thence by the Erie & North Shore Despatch to Chicago, and there to deliver them to connecting railroad lines to be forwarded to Denver, their destination—not naming the several railroad companies forming the association, but providing that in case of loss or damage of the goods "that company shall alone be held answerable therefor in whose actual custody the same may be at the time of the

Where several carriers unite to complete a line of transportation and receive goods for freight, and give a through bill of lading, each carrier is agent of the others, and is liable for any damage to the goods on whatever part of the line the damage is received.[1]

5. Carrier's Liability as Warehouseman.—1. RECEIPT OF GOODS IN WAREHOUSE FOR TRANSPORTATION.—Where goods are received to be forwarded in the usual course of business, the liability of the common carrier immediately attaches. Where they are lost by an accidental fire while in the carrier's warehouse, awaiting transportation, he is liable as a common carrier unless his common-law liability has been limited by an agreement with the shipper.[2] Where goods are left by the consignor with the carrier awaiting orders to forward the same, the liability of the company is that of a warehouseman and not that of a common carrier.[3]

2. MEASURE OF WAREHOUSEMAN'S DUTY.—The measure

happening thereof." *Held*, that the words "that company" referred only to the companies named in the contract, and that plaintiff need not sue the member of the Despatch Line on whose road the goods were lost, the Despatch Co. being liable as a partnership. Morton, C. J., observes: "So far as the question in this case is concerned, it is unlike those cases where a railroad forming one link in a line of connecting roads between two points receives goods to be transported over its line and delivered to the connecting road, in which it has been held in this commonwealth that each railroad in the continuous line is liable only for loss or damage happening on its own road. Darling *v.* Boston & W. R. Co., 11 Allen, 295; Gass *v.* New York, P. & B. R. Co., 99 Mass. 220; Burroughs *v.* Norwich & W. R. Co., 100 Mass. 26; Aigen *v.* Boston & M. R., 132 Mass. 423; s. c., 6 Am. & Eng. R. R. Cas. 426."

1. Texas & Pac. R. Co. *v.* Fort, 14 Rep. 319.

2. Pittsburgh, etc., R. *v.* Barrett, 3 Am. & Eng. R. R. Cas. 256. See also Story on Bailments (9th Ed.), § 536.

Where goods are such as company only carry by particular trains and at certain intervals, the acceptance in a warehouse before time for starting imposes the liability of common carrier, not of warehouseman. Moffat *v.* Great Western R., 15 L. T. N. S. 630.

3. Cairns *v.* Robins, 8 M. & W. 258.

If the delivery of goods at a carrier's warehouse is accompanied with instructions not to forward until further orders, or if anything remains to be done to the goods by the shipper before they are to be forwarded, liability as a common carrier does not attach. Pittsburgh, etc., R. *v.* Barrett, 3 Am. & Eng. R. R. Cas. 256.

Where goods are left by the owner, with the railway company, pending orders to transport the same, the liability of the company is that of a warehouseman, and not that of a common carrier. Michigan Southern & Northern Ind. R. Co. *v.* Schurtz, 7 Mich. 515; O'Neill *v.* N. Y. Cent., etc., R. Co., 60 N. Y. 138.

In Missouri Pacific, etc., R. *v.* Douglass, 16 Am. & Eng. R. R. Cas. 98, it was held that in *Texas*, where a statute provides that the liability of a common carrier shall not attach to a carrier until he has given a receipt or a bill of lading, if the company has a depot or warehouse for storing goods it is responsible for all goods in its care as a warehouseman until the commencement of the trip or voyage; and the trip or voyage is not to be considered as having commenced until the signing of the bill of lading.

In Barron *v.* Eldredge, 100 Mass. 455, it was held that after goods are consigned for transportation, where it appears that something remained undone by the consignor prior to their shipment, the carrier has not assumed the liability of a common carrier, but that of a warehouseman only. To the same effect are various cases holding that the same rule applies where the consignor directs that the goods be held for future orders. Platt *v.* Hibbard, 7 Cow. (N. Y.) 499; Ackley *v.* Kellogg, 8 Cow. (N. Y.) 223; Dickinson *v.* Winchester, 4 Cush. (Mass.) 114. See also Nichols *v.* Smith, 115 Mass. 332; Michigan, etc., R. *v.* Shurtz, 7 Mich. 515; St. Louis, etc., R. *v.* Montgomery, 39 Ill. 335.

of the warehouseman's duty is that degree of care which a reasonably prudent man takes of his own property of a like description.[1] He is not an insurer.[2] Where he has exercised ordinary care he is not liable for loss or injury of goods by rats ;[3] nor, in such case, for goods stolen ;[4] nor, in such case, for goods destroyed by accidental fire ;[5] nor for casualties ;[6] nor for the loss of goods by the explosion of dangerous goods; when their character was unknown ;[7] nor for loss by the leakage of a defective cask ;[8] nor for the depreciation of goods in market value.[9]

Where the warehouseman's storage is gratuitous he is only liable for gross negligence ;[10] he may charge reasonable rates for storage ;[11] he may first give notice of such fact and the owner will be liable to pay storage, whether actually informed of the contents of the notice or not.[12]

Although the carrier makes no charge for warehouse storage of goods held to await future orders whether at the beginning or end of the transit, he is not to be considered a gratuitous bailee but a bailee for hire.[13]

1. Giblin *v.* McMullen, 38 L. J. P. C. 25; L. R. 2 P. C. 517; Heugh *v.* London, etc., R., 39 L. J. Exch. 48; L. R. 5 Exch. 51; Alabama, etc., R. *v.* Kidd, 35 Ala. 209; Mobile, etc , R. *v.* Prewitt, 46 Ala. 63; Leland *v.* Chicago, etc., R., 21 Am. & Eng. R. R. Cas. 108; Kennedy *v.* Mobile, etc., R., 74 Ala. 430; s. c., 21 Am. & Eng. R. R. Cas. 145; Gashweiler *v.* Wabash, etc., R., 83 Mo. 112; s. c., 25 Am. & Eng. R. R. Cas. 403.

2. Searle *v.* Laverick, 43 L. J. Q. B. 43; L. R., 9 Q. B. 122.

3. Cailiff *v.* Danvers, Peake, 114.

4. Finucane *v.* Small, 1 Esp. 315; Neal *v.* Railroad, 8 Jones L. (N. Car.) 482.

Where the plaintiff, in an action against a railroad company to recover damages for goods lost while in store, alleges that they have been stolen, the burden of proof is upon him to show a lack of ordinary care on the part of the defendant in guarding the goods. Lamb *v.* Western, etc., R., 7 Allen (Mass.), 98.

5. Chapman *v.* Great Western R., 28 W. R. 566; Garside *v.* Trent Nav. Co., 4 T. R. 581; Fenner *v.* Railroad, 44 N. Y. 505.

6. Mackenzie *v.* Cox, 9 C. & P. 632.

7. Weed *v.* Barney, 45 N. Y. 344.

Where the carrier had stored powder in the same warehouse with goods, and the latter were destroyed in consequence, this was held to constitute negligence on the part of the carrier for which he was held liable. White *v.* Colorado Central R., 5 Dill. C. C. 428.

8. Hudson *v.* Baxendale, 2 Hurl. & N. 575.

9. Kremer *v.* Southern Exp. Co., 6 Cold. (Tenn.) 356; Fisk *v.* Newton, 1 Denio (N. Y.), 45.

A railroad company which has assumed the duties of a warehouseman is liable for negligence only, in the care of the goods stored by it. McCarty *v.* N. Y. & Erie R. Co., 30 Pa. St. 247.

10. If the storage be gratuitous on his part, he is liable only for gross negligence. McCombs *v.* North Carolina R. Co., 67 N. Car. 163; Michigan G. & N. R. Co. *v.* Schurtz, 7 Mich. 515.

11. Railroad companies are, however, generally held entitled to charge reasonable rates for storage,—Illinois Central R. Co. *v.* Alexander, 20 Ill. 23,—and are therefore generally held as warehousemen to the liabilities of other bailees for hire.

12. Where a railroad company had posted a notice that storage would be charged upon all goods left with it for more than two days after arrival, it was held that a consignee leaving goods for a greater length of time became liable to pay storage whether he was actually informed of the contents of the notice or not, and hence that the company was liable as a bailee for hire. Dimmick *v.* Milwaukee *v.* St. Paul R. Co., 18 Wis. 471.

Where goods at end of transit are tendered at consignee's residence and refused, liability of carrier is that of warehouseman or involuntary bailee. Heugh *v.* London, etc., R., 39 L. J. Exch. 48; L. R. 5 Exch. 51; Store *v.* Crowley, McClel. & Y. 129.

13. Cairns *v.* Robins, 8 M. & W. 258; White *v.* Humphrey, 11 Q. B. 43; Mit-

3. SPECIAL CONTRACTS OF WAREHOUSEMEN.—A carrier fulfilling the duties of a warehouseman is not obliged to accept the goods subject to his ordinary liability. He may impose such terms as he pleases, and the consignor, with notice thereof, will be bound. Whether such terms are or are not reasonable is an irrelevant inquiry.[1]

4. CONNECTING CARRIERS AS WAREHOUSEMEN.—Where, by the terms of a special contract, or by the law of a State, a railroad company receiving goods for transportation to a point beyond its own line assumes no extra terminal liability, it is, nevertheless, not exempted from liability until it has actually delivered the goods to the next carrier in the line, and, while stored in its warehouse or station awaiting transportation by such connecting carrier, the liability is that of a common carrier, and not that of a warehouseman.[2] Where, at the end of the transit, the carrier retains the

chell *v.* Railway Co., L. R. 10 Q. B. Div. 256; Brown *v.* Railroad, 54 N. H. 535.

1. Van Toll *v.* South Eastern R., 31 L. J. C. P. 241; 12 C. B. N. S. 75; Harris *v.* Great Western R., 45 L. J. Q. B. 729; L. R. 1 Q. B. Div. 515.

A railroad company is not required by law to keep a warehouse or depot at every station along the line of its road, and may lawfully stipulate, either expressly or by implication, that it will assume no liability as a warehouseman at a "flag station," where it has no depot or agent; and when the consignee is fully advised, at the time of the shipment, that the company has no depot nor agent at such station, and it is not shown that the exigencies of its business required that it should have an agent or depot at the place, the liability of the company as a common carrier terminates with the safe delivery of the goods on the side track at that point, and it assumes no liability as a warehouseman. Southern, etc., R. *v.* Wood, 66 Ala. 167; s. c., 9 Am. & Eng. R. R. Cas. 419. In this case Somerville, J., observed: "We can see no reason why a railway company, acting as a common carrier, cannot stipulate, by a contract express or implied, that their liability as a carrier shall terminate with a delivery at a particular point, and that they will assume no liability at all, in such case, as warehousemen. If the consignee is fully advised, at the time of shipment, that the company has no agent at the particular station or place to which the consignment is made, and the failure to employ such agent is not shown to be unreasonable in view of the condition of the company's business, there is, in the absence of rebutting circumstances, an implied consent that the carrier's responsibility shall be dissolved, when he has done all that the nature of the case permits him to do, according to the reasonable and proper usages of his business." See also Gashweiler *v.* Wabash, etc., R., 83 Mo. 112; s. c., 25 Am. & Eng. R. R. Cas. 403, where it was held that a warehouseman may restrict his liability by contract, except as to loss occurring through his fraud or want of good faith.

In Mitchell *v.* Lancashire, etc., R., 44 L. J. Q. B. 107, L. R. 10 Q. B. 2566, a railway company, on the arrival of goods at a station, gave notice to the consignee that they held the goods "not as common carriers, but as warehousemen at owner's sole risk, and subject to the usual warehouse charges," in which notice the consignee acquiesced. It was held upon the construction of the terms of this notice, that it did not qualify the duty of the company as warehousemen and free them from the ordinary liability to take reasonable care, and that they were therefore liable for damage happening through their negligence. Redman's Law of Railway Carriers (2d Ed.), p. 133. See also Kimball *v.* Western, etc., R., 6 Gray (Mass.), 542.

2. Railroad Company is Liable as Common Carrier for Goods in Storage at Terminus Awaiting Transportation Over Connecting Lines.—Railroad Co. *v.* Manufacturing Co., 16 Wall. (U.S.) 318; Conkey *v.* Railroad Co., 31 Wis. 619; Railroad Co. *v.* Mitchell, 68 Ill. 471; Irish *v.* Milwaukee & St. P. R. Co., 19 Minn. 376; Reynolds *v.* Boston & Albany R. Co., 121 Mass. 291; McDonald *v.* Western R. Corp., 34 N. Y. 497; Ladue *v.* Griffith, 25 N. Y. 364; Mills *v.* Michigan Central R. Co., 45 N. Y. 622; Brintnall *v.* Saratoga, etc., R. Co., 32 Vt. 665; Erie R. Co. *v.* Lock-

goods in his own possession according to custom or previous usage, and for the consignee's convenience, to hold them until called for, his liability is that of a warehouseman only.[1] This limited liability may arise from various circumstances, among which are the following: Where the consignee has been duly notified of the arrival of the goods and is not ready to receive them.[2] Where the consignee resided a long distance from the railway station and failed to have an agent awaiting their arrival.[3] Where the car-

wood, 28 Ohio St. 358. But see Armstrong *v.* Grand Trunk R. Co., 2 Pugs. & B. (N. B.) 445; Michigan Central R. Co. *v.* Hall, 6 Mich. 243; Michigan Central R. Co. *v.* Lantz, 32 Mich. 502; Deming *v.* Norfolk & W. R. Co., 16 Am. & Eng. R. R. Cas. 232.

Carrier cannot assume to be a warehouseman at some point during the transit, and thus escape the liability of a common carrier. In McDonald *v.* Western, etc., R., 34 N. Y. 497, a carrier deposited goods in his warehouse at the end of the journey, awaiting, according to custom, a connecting carrier assuming charge of them, but neglecting to notify such carrier and making no effort to divest himself of liability, and in holding him liable as a common carrier the court observed: "The owner loses sight of his goods when he delivers them to the first carrier, and has no means of learning their whereabouts till he or the consignee is informed of their arrival at destination. At each successive point of transfer, from one carrier to another, they are liable to be placed in warehouses, there perhaps to be delayed by the accumulation of freight or other causes, and exposed to loss by fire or theft, without fault on the part of the carrier or his agents. Superadded to these risks are the dangers of loss by collusion, quite as imminent while the goods are thus stored at some point unknown to the owner as while they are in actual transit. As a general rule the storing of the goods under such circumstances should be held to be a mere accessory to the transportation, and they should be under the protection of the rule which makes the carrier liable as an insurer from the time the owner transfers their possession to the first carrier until they are delivered to him at the end of the route." See also Railroad Co. *v.* Mfg. Co., 16 Wall. (U. S.) 327.

Where goods are shipped over various lines, and lie in warehouse at the connecting point of one line with another, they are nevertheless considered *qua* the owners as continuing in transit. Hence the liability of the railroad company who has contracted to transport them remains that of a common carrier. Conkey *v.* Milwaukee & St. Paul R. Co., 32 Wis. 319; Wood *v.* Milwaukee & St. Paul R. Co., 398.

But where a number of mules were forwarded over various connecting lines, and were stored at a point of intersection, and, while so stored, escaped, it was held proper to submit to the jury the question whether under the contract of transportation the carrier was liable as warehouseman or as a common carrier. North Missouri R. Co. *v.* Akers, 4 Kans. 453.

1. *In re* Webb, 8 Taunt. 443; Garside *v.* Trent Nav. Co., 4 T. R. 581; Chapman *v.* Great Western R., 42 L. T. N. S. 252, 28 W. R. 566; Rowe *v.* Pickford, 8 Taunt. 83; Hathorn *v.* Ely, 28 N. Y. 78; McCarty *v.* New York, etc., R., 30 Pa. St. 247; New Albany, etc., R. *v.* Campbell, 12 Ind. 55; Hilliard *v.* Wilmington, etc., R., 6 Jones (N. Car.), 343. See, further, Michigan Central, etc., R. *v.* Hale, 6 Mich. 243; Mills *v.* Michigan Central, etc., R., 45 N. Y. 626; Railroad Co. *v.* Mfg. Co., 16 How. (U. S.) 318.

2. Rothschild *v.* Michigan, etc., R. Co., 69 Ill. 164; Stowe *v.* N. Y., Bost., etc., R. Co., 113 Mass. 521; Mohr *v.* Chicago, etc., R. Co., 40 Iowa, 579.

Where goods are stored on a platform, and notice given to the consignee to remove them, and he fails to do so for two days, and they are then burned by fire originating in a steam compress on the carrier's grounds, *held*, the carrier is not liable. Nicholas *v.* New York Central, etc., R., 9 Am. & Eng. R. R. Cas. 103. See also Leland *v.* Chicago, etc., R., 21 Am. & Eng. R. R. Cas. 108.

3. Where the distance over which the goods had been transported was very short, and the consignee resided a long distance from the railway station, and fail to have an agent awaiting their arrival, it was held that the railroad company having stored the goods was thenceforth liable as warehouseman only. Hilliard *v.* Wilmington & Weldon R. Co., 6 Jones L. (N. Car.) 343.

Where the consignee of goods refuses to accept them, and thereupon the rail-

rier's agent was considered to have no authority to make a contract to retain the goods.[1] No other liability is imposed by an act in force in *Tennessee*, requiring the company to give a prescribed notice to the consignee.[2] Where the consignee or any agent to receive for him was absent.[3] Where the carrier had orders to hold the goods until paid for, and received the promise of the consignee to pay for and take them in a few days.[4]

5. LIABILITY AS COMMON CARRIER CONTINUING AFTER TRANSIT.—Where a railroad company receives loaded cars from another road for transportation it is liable as a common carrier in case they are destroyed *en route* by fire.[5] Where goods were at

road company states to him that it has no accommodation for the storage of said goods, notwithstanding which said consignee leaves them in the hands of the company by which they are stored, said company is liable as a warehouseman. Smith *v.* Nashua & Lowell R. Co., 27 N. H. 86.

1. In Mulligan *v.* Northern Pacific R., 27 Am. & Eng. R. Cas. 33, a railway company delivered to the owner certain goods which were in its warehouse, taking his receipt therefor. By an arrangement between the owner and the warehouseman and baggageman a part of the goods were left in the warehouse, and subsequently lost. The baggageman had no authority to make any contract for the company. *Held*, that the company was not liable for the goods lost; that the baggageman permitting part of the goods to remain in the warehouse was his private arrangement, to which the company was not a party.

2. The duty of a railroad company is to carry freight to the place directed, and to deliver it to the party entitled if there ready to receive it, and, if not, to store it for him. The liability of the company as a common carrier ceases when the freight is deposited in a warehouse, and is not extended by the Tennessee act of 1870, c. 17 (Code, § 1993j), requiring the company to give a prescribed notice to the consignee. Butler *v.* East Tennessee, etc., R. Co., 8 Lea (Tenn.), 32; s. c., 9 Am. & Eng. R. R. Cas. 249. See also Rankin *v.* Memphis Packet Co., 9 Heisk. (Tenn.) 564; Express Co. *v.* Kaufman, 12 Heisk. (Tenn.) 161.

3. Clendaniel *v.* Tuckerman, 17 Barb. (N. Y.) 184; Roth *v.* Railroad, 34 N. Y. 548; Adams Exp. Co. *v.* Darnell, 31 Ind. 20; Marshall *v.* Am. Exp. Co., 7 Wis. 1; Alabama, etc., R. *v.* Kidd, 35 Ala. 209.

It is the duty of a railroad company, after transporting goods to the point of destination, to put them in store, when the consignee is not on hand to receive them. McHenry *v.* Phila., W. & Balt. R. Co., 4 Harr. (Del.) 448.

Some authorities hold that the liability of a railroad company for goods thus stored remains that of a common carrier. Buckley *v.* Great Western R. Co., 18 Mich. 121. But the great weight of authority is to the contrary. In almost every State it is held that when once the transportation has been completed the company may terminate its liability as common carrier by storing the goods, and thereafter is bound only to the duties of a warehouseman. Rice *v.* Boston & Worcester R. Co., 98 Mass. 212; Cincinnati & Chicago R. Co. *v.* McCool, 26 Ind. 141; Northrop *v.* Syracuse & C. R. Co., 5 Abb. Pr. N. S. (N. Y.) 425; Jackson *v.* Sacramento Valley R. Co., 23 Cal. 269; Judson *v.* Western R. Co., 4 Allen (Mass.), 520; McCarty *v.* N. Y. & E. R. Co., 30 Pa. St. 247; Davis *v.* Michigan Southern & North Ind. R. Co., 20 Ill. 412; Mobile & Girard R. Co. *v.* Prewitt, 46 Ala. N. S. 63; Bansemer *v.* Toledo & Wabash R. Co., 25 Ind. 434; Ayres *v.* Morris & Essex R. Co. 5 Dutch. (N. J.) 393. Francis *v.* Dubuque, etc., R., 25 Iowa, 60; Mohr *v.* Chicago, etc., R., 40 Iowa, 579; Leland *v.* Chicago, etc., R., 21 Am. & Eng. R. R. Cas. 108.

4. A carrier under orders to hold goods until paid for, receiving the promise of the consignee to pay for and take them in a few days, is only liable as a warehouseman while the goods are so held, although he fails to notify the consignor. In this case the custom of carriers to so extend the time for delivery, and the distance to the place of first consignment, were regarded as important factors in the conclusion. Weed *v.* Barney, 45 N. Y. 344. See also Great Western R. *v.* Crouch, 3 H. & N. 183; Storr *v.* Crowley, McClel. & Y. 129; Marshall *v.* American Exp. Co., 7 Wis. 1.

5. In Missouri Pacific, etc., R. *v.* Chicago, ect., R., 23 Am. & Eng. R. R. Cas.

once called for by the consignee, but delivery thereof was refused until the next day ;[1] where a special contract was made to deliver goods at a particular place[2]—in such cases liability continued.

6. NEGLIGENCE OF WAREHOUSEMAN.—A carrier as warehouseman may be guilty of such negligence as will render him liable.[3]

7. ADMIXTURE OF GOODS BY WAREHOUSEMAN.—Where grain delivered to a warehouseman by various parties without any contract of sale is, without the knowledge or consent of the owners, mixed with other grain of the same quality in one common mass, the owners become tenants in common of the entire amount in store of like quality. And where such grain is destroyed by negligence of a railroad company in setting fire to the elevator, an owner may recover in an action against the railroad the value of the grain delivered by him for storage.[4]

718, it was held that where a railroad company receives loaded cars from another road for transportation it is liable as a common carrier in case they are destroyed *en route* by fire. If destroyed by fire after delivery to the consignee, or after they have been tendered to him, the company is not liable if not in fault. In the latter case its duties are only those of a warehouseman.

1. Faulkner *v.* Hart, 82 N. Y. 413. Where a railroad company has knowingly received and transported goods which could legally be deposited only in a bonded warehouse, and, upon their arrival at the point of destination, stores the same, neglecting to notify either the revenue officers or the consignee, the duty of the company as a common carrier will be held to continue. Chicago, etc., R. Co. *v.* Sawyer, 69 Ill. 285.

In *Illinois*, railroad companies are expressly forbidden by statute to store grain transported by them in any other warehouse than that to which it is specially consigned. Vincent *v.* Chicago & Alton R. Co., 49 Ill. 33; People *ex rel. v.* Chicago & Alton R. Co., 55 Ill. 95.

2. Moore *v.* Michigan, etc., R., 3 Mich. 23.

3. Aland *v.* Boston, etc., R., 100 Mass. 31; Parker *v.* Lombard, 100 Mass. 405; Barron *v.* Eldredge, 100 Mass. 455; Lamb *v.* Western, etc., R., 7 Allen (Mass.), 98; Lane *v.* Boston, etc., R., 112 Mass. 455; American Express Co. *v.* Baldwin, 26 Ill. 504. A carrier may have his liability as a common carrier continued by unloading coal in an unsuitable place. The court observed: " A railroad corporation does not discharge itself of its duty as a carrier by merely bringing goods to the terminus of its road; it is bound also to unload them with due care, and put them in a place where they will be reasonably safe and free from injury. Until this is done, the duty and responsibility which attach to a corporation as carriers do not close." Rice *v.* Boston, etc., R., 98 Mass. 212; Chicago, etc., R. *v.* Scott, 42 Ill. 132; Milwaukee, etc., etc,, R. *v.* Fairchild, 6 Wis. 403. For cases in which is considered the effect of knowledge on the part of the owner of goods of the mode in which a warehouseman keeps them, see Mitchell *v.* Lancashire, etc., R., 10 Q. B. 256; Conway Bank *v.* American Exp. Co., 8 Allen (Mass.), 512. A railroad company which has assumed the functions of a warehouseman is liable if it negligently deliver the goods to the wrong person, but only in case it does so negligently. Lichtenhein *v.* Boston, etc., R., 11 Cush. (Mass.) 70; Alabama, etc., R. *v.* Kidd, 35 Ala. 209.

4. Arthur *v.* Chicago, etc., R., 16 Am. & Eng. R. R. Cas. 283. In such action, as the amount of damages is capable of exact computation, plaintiff will be entitled to recover interest thereon. The mixture of grain of like quality, as delivered by different owners, in one common mass, by a party operating an elevator, will not constitute a wrongful conversion, and will not divest the owners of their property, whether the admixture be made with or without their knowledge.

Admixture of Goods.—Where the goods of one person are mixed indiscriminately with those of another so that separation is impossible, the respective owners are to be considered as tenants in common of the whole mass. Sexton *v.* Graham, 53 Iowa. 181; Cushing *v.* Breed, 14 Allen (Mass.), 376; Bryant *v.* Clifford, 13 Metc. (Mass.) 138; Keller *v.* Godwin, 111 Mass. 490: Wingate *v.* Smith, 20 Me. 287; Pratt *v.* Bryant, 20 Vt. 333; Forbes *v.* Fitch-

8. EVIDENCE.—Evidence is admissible in an action to charge a carrier with negligence as warehouseman, to prove the degree of care usually exercised by warehousemen in the vicinity in the care of such property.[1]

9. BURDEN OF PROOF.—In case of loss or injury to goods in the possession of the warehouseman it has been said that it lies upon him to show that he was not in fault.[2]

10. MEASURE OF DAMAGES.—The measure of damages, in case of loss through the negligence of the warehouseman, is the value of the article itself, not the consequential damages resulting from such loss.[3]

11. LIEN OF WAREHOUSEMAN.—A railroad company acting as warehouseman has a lien upon goods stored by it until all the back charges thereon are paid.[4]

6. Carrier's Liability Arising out of Delivery.—1. DELIVERY GENERALLY.—The carrier's duty to deliver according to the terms of his expressed or implied contract is as essential and binding as is his duty to carry safely.[5] The question of negligence in the per-

burg R. Co., 9 Am. & Eng. R. R. Cas. 80. But see Ryder *v.* Hathaway, 21 Pick. 298; Stephenson *v.* Little, 10 Mich. 433.

1. Cass *v.* Boston, etc., R., 14 Allen (Mass.), 448.

2. Mackenzie *v.* Cox, 9 C. & P. 632; Wardlaw *v.* South Carolina, etc., R., 11 Rich. (S. Car.) 337. *Compare* Lamb *v.* Western, etc., R., 7 Allen (Mass.), 98.

Where a railroad company is sued to recover the value of goods lost by it while discharging the duty of a warehouseman, it may exempt itself from liability by simply showing that the loss occurred without the want of any ordinary diligence on its part. It need not prove exactly how the loss did occur. Lichtenheim *v.* Bost. & Prov. R. Co., 11 Cush. (Mass.) 70.

It was proved on the trial that the respondent had stored in appellant's warehouse sixty-four bales of wool of a certain value per pound, which, on demand and tender of the storage due upon it, the appellant refused to deliver to the respondent, assigning as a reason that the warehouse and all it contained, including the wool of the respondent, except about three bales, which were returned to him, had been consumed in the fire. *Held*, a *prima-facie* case of negligence is made out against a warehouseman who refuses to deliver property stored with him, upon proof of demand and refusal. Upon such proof alone the burden is on him to account for the property, otherwise he shall be deemed to have converted it to his own use. But if it appears that the property when demanded was consumed by fire, the burden of proof is then on the bailor to show that the fire was the result of the negligence of the warehouseman. Wilson *v.* S. P. R., 7 Am. & Eng. R. R. Cas. 400; s. c., 9 Am. & Eng. R. R. Cas. 161. See also Harris *v.* Packwood. 3 Taunt. 264; Beardslee *v.* Richardson, 11 Wend. (N. Y.) 26; Brown *v.* Johnson, 29 Tex. 43; Lamb *v.* Camden, etc., R., 46 N. Y. 271; Jackson *v.* Sacramento Valley R., 23 Cal. 269.

Where a carrier has received and stored all the goods and subsequently delivers to the consignee only a part of them, having in the meantime lost the rest, the burden of proof is upon the carrier to show that the loss has not been occasioned by his negligence. Boies *v.* Hartford, etc., R., 37 Conn. 273.

3. Redman's Law of Railway Carriers (2d Ed.), p. 134; Henderson *v.* Northeastern R., 9 W. R. 519. See also Hiort *v.* London, etc., R., 27 W. R. 778, 48 L. J. Exch. 545; L. R. 4 Exch. Div. 188.

4. Alden & Co. *v.* Carver, 13 Iowa, 253.

5. Carrier's liability continues until actual or constructive delivery is made to consignee or his agent at the stipulated or authorized place of delivery. Moffat *v.* Great Western, etc., R., 15 L. T. N. S. 630; Fowles *v.* Great Western, etc., R., 22 L. J. Exch. 76, 7 Exch. 699; Erskine *v.* Thames, 6 Miss. 371; Smith *v.* Nashua, etc., R., 7 Fost. (N. H.) 86; Parker *v.* Flagg, 26 Me. 181; Groff *v.* Bloomer, 9 Pa. St. 114; American, etc., Co. *v.* Baldwin, 26 Ill. 504.

A subsequent acquiescence by the consignee in a wrong delivery exempts the carrier from liability therefor. O'Dougherty *v.* Boston, etc., R., 1 N. Y. S. Ct. 477.

The defence to an action by a consignor against the carrier for the conversion of

formance of this duty is immaterial, for his warranty as insurer is broken by non-delivery.[1] In England, and in those of the United States where the rule in Muschamp's Case is enforced, the obligation of the carrier receiving the goods to deliver safely extends through a delivery by a connecting carrier.[2]

Where a delivery is made impossible by the absence or death of the consignee, or because he cannot be found, or because he neglects or refuses to receive the goods, the carrier is only liable as a warehouseman if he has done all that could reasonably be required of him.[3]

certain sewing machines which had been consigned to K. at M., was, in substance, that K. did not live at M., and did not expect to be there to receive the machines; that it was understood between plaintiff and defendant that on arrival at M. they were to be delivered to B. & S., who were plaintiff's agents and dealt in sewing machines of plaintiff's manufacture at M., and that they were so delivered. Among the evidence offered by defendant was testimony tending to show that B. & S. had obtained the machines by representing to defendant's agents that they were intended for them. For the plaintiff the court instructed the jury, in substance, that defendant was bound to deliver the machines to K., and that the mere fact that B. & S. had made such representations and had thus obtained the machines was no defence, if the representations were untrue in fact; and further instructed that the fact that K. was not and did not intend to be at M. did not of itself justify defendant in delivering the machines to B. & S. For defendant the court instructed, in substance, that if they found that the understanding alleged in the answer existed, their verdict should be for defendant. *Held*, that these instructions, taken together, put the case fairly before the jury. Wilson Sewing M. Co. *v.* Louisville, etc., R. Co., 71 Mo. 203.

Carrier's engagement is to deliver safely as well as to carry safely. Bodenham *v.* Bennett, 4 Price, 31; Duff *v.* Budd, 3 B. & D. 177. See also Richards *v.* London, etc., R., 18 L. J. C. P. 251, 7 C. B. 839; South & North Alabama R. *v.* Wood, 66 Ala. 167; s. c., 9 Am. & Eng. R. R. Cas. 419.

1. Richards *v.* London, etc., R., 18 L. J. C. P. 251, 7 C. B. 839; Hall *v.* Boston, etc., R., 12 Allen (Mass.), 439; Forbes *v.* Boston, etc., R., 9 Am. & Eng. R. R. Cas. 76.

2. See *supra*, this title, CONNECTING CARRIERS. *Rule in Muschamp's Case.*

3. Stephenson *v.* Hart, 4 Bing. 476, Cairns *v.* Robins, 8 M. & W. 258; Heugh *v.* London, etc., R., 39 L. J. Exch. 48, L. R. 5 Exch. 51; Garside *v.* Trent Nav. Co., 4 T. R. 581; White *v.* Humphrey, 11 Q. B. 43; Hurd *v.* Hartford, etc., R., 40 Conn. 49; Fenner *v.* Buffalo, etc., R., 44 N. Y. 505; Mayell *v.* Pather. 2 Johns. Cas. (N. Y.) 371; Clendaniel *v.* Tuckerman, 17 Barb. (N. Y.) 184; Roth *v.* Railroad, 34 N. Y. 548; Hirsch *v.* Quaker City, 2 Disney (Ohio), 144; Marshall *v.* American Exp. Co., 7 Wis. 1; Bartholomew *v.* St. Louis, etc., R., 52 Ill. 106, Ill. Central, etc., R. *v.* Friend, 64 Ill. 303; Adams Exp. Co. *v.* Darnell, 31 Ind. 20; Alabama, etc., R. *v.* Kidd, 35 Ala. 209; Dean *v.* Vacaro, 2 Head (Tenn.), 490; Rankin *v.* Memphis Packet Co., 9 Heisk. (Tenn.) 564; Express Co. *v.* Kaufman, 12 Heisk. (Tenn.) 161; Cope *v.* Cordova, 1 Rawle (Penn.), 203; Kennedy *v.* Mobile, etc., R., 74 Ala. 430; s. c., 21 Am. & Eng. R. R. Cas. 145. See *supra*, this title, LIABILITY AS WAREHOUSEMEN.

"The precise degree of care which it is the duty of a carrier to use in delivering the goods entrusted to him must depend upon and vary with the nature and condition of the thing carried, and the ever varying circumstances under which the delivery takes place. Some goods require much more tender handling than others; some animals much more care and management than others, according to their nature, habits, and conditions; and the line of conduct which the carrier should propose to himself is that which a prudent owner would adopt if he were in the carrier's place, and had to deal with the goods or animals under circumstances and subject to the condition in which the carrier is placed, and under which he is called on to act." Gill *v.* Manchester, etc., R., 42 L. J. Q. B. 89, L. R. 8 Q. B. 186; Redman's Law of Railway Carriers (2d Ed.), p. 103.

In Newcomb *v.* Boston, etc., R., 115 Mass. 233, B sent certain goods by railroad taking therefor a railroad receipt in

2. DELIVERY TO AGENT OF CONSIGNEE.—A delivery to a drayman, cartman, or any other person unauthorized by the consignee to receive goods is made at the risk of the carrier.[1]

which he was named as consignor and consignee. He indorsed on this receipt an order to deliver to C, drew a draft on C for the price, attached the receipt to the draft, and sent both to a bank for collection. C accepted the draft, and afterwards sold the goods to D. A, at the request of C, afterwards took up the draft, and C thereupon indorsed on the receipt an order to deliver the goods to A. The railroad company, however, delivered the goods to D upon their arrival. This was held a misdelivery, and the company was held liable to A for the conversion accordingly. See also Alderman *v.* Eastern R. Co., 115 Mass. 233; The Thames, 14 Wall. (U. S.) 98; Forbes *v.* Boston, etc., R., 9 Am. & Eng. R. R. Cas. 70. See also Peoria, etc., R. *v.* Buckley, 21 Am. & Eng. R. R. Cas. 94.

In the case of the Jeffersonville, Madison & Ind. R. Co. *v.* Irvin *et al.*, 46 Ind. 180, the facts were these: J. & Co., of Indianapolis, shipped to C. & Co., of Columbus, certain flour, receiving a bill of lading containing a stipulation that the company undertook to deliver the flour on presentation of the said bill. J. & Co. then drew a draft on C. & Co. attached the bill of lading to it, and had the same discounted. C. & Co. accepted the draft, but failed to meet it on maturity. J. & Co then took up the draft, and presented the accompanying bill of lading to the railroad, demanding the goods. It appeared, however, that the goods had been already delivered to the consignee without demanding the bill of lading. This was adjudged to be a conversion by the railroad company. See McEwen *et al. v.* Jeffersonville, Madison & Ind. R. Co., 33 Ind. 368.

Where there has been an erroneous delivery of goods, and subsequently the person to whom they have been delivered accounts for their full value to the consignee, said consignee can recover only nominal damages from the carrier. Rosenfeld *v.* Express Co., 1 Woods, 131.

Where through a mistake in the way-bill of a carrier goods are delivered to the wrong factor, and by him sold, the proceeds being accounted for to the consignor, the receipt of such proceeds does not estop the consignor from bringing his action against the carrier. His damages in such case will be the highest price attained by the goods between the time of sale and the time of suit brought. Arrington *v.* Wilmington & Weldon R. Co., 6 Jones Law (N. Car.), 68.

Where the carrier is guilty of no negligence, but the consignee refuses to receive goods partly on account of alleged delay and partly because they were not as ordered, the carrier is not liable to the consignor. Adams Exp. Co. *v.* McConnell, 27 Kans. 32; s. c., 9 Am. & Eng. R. R. Cas. 240.

In Houston, etc., R. *v.* Harry, 18 Am. & Eng. R. R. Cas. 502, a Texas statute was held constitutional which subjected a railroad company to a penalty equal in amount to the freight charges for every day the goods were withheld after payment or the offer of payment of the charges due as shown by the bill of lading. Independently of such statute a consignee would have a right of action under such circumstances.

But he cannot abandon the goods upon the wharf, and if he does so he is responsible to the owner for their loss or injury. Rowland *v.* Miln, 2 Hilt. (N. Y.) 150; McAndrew *v.* Whitlock, 52 N. Y. 40; Mobile, etc., R., 46 Ala. 63; Gulliver *v.* Adams Exp. Co., 38 Ill. 502; Bartholomew *v.* St. Louis, etc., R., 53 Ill. 227; Chicago, etc., R. *v.* Fairclough, 51 Ill. 106. See also Mote *v.* Chicago, etc., R., 27 Iowa, 22; Mattison *v.* New York, etc., R., 57 N. Y. 552.

It has been held that the responsibility of a common carrier on the Ohio River does not cease by the delivery of the goods on the wharf and notice given to the consignee, but that the duty of the carrier is to attend to the actual delivery. Hemphill *v.* Chenie, 6 W. & S. (Pa.) 62. And see Blin *v.* Mayo, 10 Vt. 56; Galloway *v.* Hughes, 1 Bailey (S. Car.), 553.

1. Alabama, etc., R. *v.* Kidd, 35 Ala. 209; Bartlett *v.* Steamboat Philadelphia, 32 Mo. 316; Sultana *v.* Chapman, 5 Wis. 454; Herman *v.* Goodrich, 21 Wis. 356; Dean *v.* Vacaro, 2 Head (Tenn.), 488. Williams *v.* Holland, 22 How. (N. Y.) 137.

Where goods are directed to the consignee the carrier cannot discharge himself from liability by delivering them to the consignor's general agent at the point of destination. Ela *v.* American Merchant's Union Ex. Co., 29 Wis. 611; and this even though no such person as the consignee lives at the point of destination. Wilson Sewing Machine Co. *v.* Louisville & Nashville R. Co., 71 Mo. 203.

3. DELIVERY TO REAL CONSIGNEE.—An essential part of the carrier's undertaking is that of making delivery only to the real consignee or his authorized agent.[1] The measure of his duty in this regard is said to be the reasonable diligence which a prudent business man would be expected to exercise in any important business affair of his own, in searching for and delivering to the consignee at his house or place of business.[2]

It has been held that the presentation of an order from the consignee, or the bill of lading with his indorsement, was sufficient evidence of ownership to authorize the carrier to make the delivery.[3] Or if the goods are delivered to one to whom it has been customary to make delivery. although the bill of lading is to the order of another party.[4] Where goods have been shipped to a consignee and he indorses and sells the bill of lading, but, before the carrier has notice of such transfer of title. the consignee sells the goods to another party who is a *bona fide* purchaser and the goods are delivered to such *bona fide* purchaser on an order of the consignee, the carrier cannot be held liable for the value of the goods.[5]

Where certain dutiable goods were sent in bond from a point in Canada to a point in Massachusetts. directed to a special agent who was to discharge the duties thereon, it was held that the agent's authority did not extend so far as to authorize him to change the destination of the goods. Where accordingly the carrier, knowing such agent's limited authority, delivered the goods on his order to a third person, it was held liable for a conversion. Claflin *v.* Boston & Lowell R. Co., 7 Allen, 341.

An express company, being informed and knowing that certain goods received by it for transportation were the property of the shipper, delivered them without his knowledge to a third person at the place of shipment on the order of the consignee. This was held a misdelivery, and the company was liable accordingly. Southern Express Co. *v.* Dickson, 94 U. S. 549.

1. Carrier is liable for a delivery to any other person than the real consignee. Hoare *v.* Great Western R., 25 W. R. 631; Youl *v.* Harbottle, Peake N. P. 49; Duff *v.* Budd, 3 B. & B. 177; see cases cited *infra*.

2. Quinn *v.* Steamboat Co., 49 N. Y. 442; Schroeder *v.* Railroad, 5 Duer (N. Y.), 55; Witbeck *v.* Holland, 40 N. Y. 13.

In Alabama, etc., R. *v.* Kidd, 35 Ala. 209, it was held that if a railroad company contracts to deliver goods to its own agent it becomes liable as carrier for their transportation and as warehouseman for their subsequent safe keeping and delivery. And if the agent deposits the goods in the warehouse of a third person who by mistake delivers them to a person not authorized to receive them, the railroad company is liable. See also Hathorne *v.* Ely, 28 N. Y. 78.

When the usual course of business was for a carrier, on the arrival of goods at the place to which they were consigned, to send a notice to the address of the consignee requesting the goods to be removed, and stating that that notice must be produced by the person who was sent for the goods, indorsed as a delivery order; and, this notice having been sent, it was afterwards produced so indorsed by a person who was not the intended consignee, whereupon the goods were delivered to him, it was held that the carrier was not liable as for a misdelivery, since, following his usual course of business, he had obeyed the directions given to him. McKean *v.* McIver, 40 L. J. Exch. 30. L. R. 6 Exch. 36; and see Heugh *v.* London, etc., R. 39 L. J. Exch. 48, L. R. 5 Exch. 51; Redman's Law of Railway Carriers (2d Ed.), p. 112.

3. Newhall *v.* Railroad, 51 Cal. 345; The Argentina, 1 L. R. Adm. 370; The Emilien Marie, 32 L. T. N. S. 435; Lickbarrow *v.* Mason, 2 T. R. 63; Coombs *v.* Bristol, etc., R. Co., 3 H. & N. 1.

4. Ontario Bank *v.* Steamboat Co., 59 N. Y. 510.

5. Newcomb *v.* Railroad, 115 Mass. 230; Alderman *v.* Railroad, 115 Mass. 233; The Argentina, 1 L. R. Adm. 370.

Carriers are bound in all cases to be diligent in their efforts to secure a delivery to the parties entitled. Where

4. FRAUD, IMPOSITION, OR MISTAKE.—Fraud, imposition, or mistake to which the carrier is subjected will not excuse a misdelivery.[1] The carrier is responsible for a mistake in the marking marks on the goods differed from those on way-bill, the carrier may delay to make sure of propriety of delivery to the consignee. Whether the delay was reasonable or not is for the jury. Baltimore, etc., R. *v.* Humphrey, 9 Am. & Eng. R. R. Cas. 331.

As to delivery of goods without requiring the presentation of the bill of lading. Finn *v.* Western R. Co., 102 Mass. 283; Libby *v.* Ingalls, 124 Mass. 503; McEwen *v.* Jeffersonville, etc., R. Co., 33 Ind. 368; Houston, etc., R. Co. *v.* Adams, 49 Tex. 748.

1. Devereux *v.* Barclay, 2 B. & Ald. 702; Duff *v.* Budd, 3 Bod. & B. 177; Winslow *v.* Vermont, etc., R., 42 Vt. 700; Viner *v.* Steamship Co., 50 N. Y. 23; Price *v.* Oswego, etc., R., 50 N. Y. 213; Hawkins *v.* Hoffman, 6 Hill (N. Y.), 586; Powell *v.* Myers, 26 Wend. (N. Y.) 591; McEntee *v.* New Jersey Steamboat Co., 45 N. Y. 34; Guillaume *v.* Packet Co., 42 N. Y. 212; Collins *v.* Burner, 63 N. Y. 212; American Merchants' Exp. Co. *v.* Miller, 73 Ill. 224; Meyer *v.* Chicago, etc., R., 24 Wis. 566; American Exp. Co. *v.* Fletcher, 25 Ind. 492; Jeffersonville, etc., R. *v.* Cotton, 29 Ind. 498; American Exp. Co. *v.* Stock, 29 Ind. 27; Southern Exp. Co. *v.* Cook, 44 Ala. 468; Houston, etc., R. *v.* Adams, 49 Tex. 748; Little Rock, etc., R. *v.* Glidewell, 39 Ark. 487; s. c., 18 Am. & Eng. R. R. Cas. 539. *Compare* Bush *v.* St. Louis, etc., R., 3 Mo. App. 62; Ten Eyck *v.* Harris, 47 Ill. 268; Edmunds *v.* Merchants' Desp. Transp. Co., 135 Mass. 233; s. c., 16 Am. & Eng. R. R. Cas. 250.

In Duff *v.* Budd, 3 Brod. & B. 177, a swindler ordered goods shipped to J. Parker, High Street, Oxford. The consignor found upon investigation that Mr. Parker of High Street was a tradesman of respectability. It subsequently proved, however, that W. Parker was the only tradesman of that name on that street. The latter was known to the servants of the carrier, who had been accustomed to deliver parcels to him, and upon the arrival of the goods informed him of that fact. But the reply was that he had expected no goods. Subsequently a man to whom the carrier's agents had before delivered parcels under the name of Parker called at the carrier's office and claimed the package, which was delivered to him. The carrier was held liable upon the finding of the jury that he had been guilty of negligence.

In Stephenson *v.* Hart, 4 Bing. 476, a swindler ordered goods which by his direction were consigned to one J. West, Great Winchester Street, London. The carrier attempted delivery at this address, but finding no such person, retained the goods. He subsequently received a letter from the swindler informing him that the former address was an error, and directing that the goods be reshipped to him at another address. At the latter place the swindler called for and received the goods. The court, in an opinion by Burrough, J., observes: "At the outset, no doubt, the contract was between the carrier and the consignee; but when it was discovered that no such person as the consignee was to be found in Great Winchester Street, that contract was at an end, and the goods remaining in the hands of the carrier are the goods of the consignor, and an implied contract arose between the carrier and the consignor to take care of the goods for the use of the consignor. It is clear that the property in them never passed out of the plaintiff, the consignor. The whole transaction was a gross fraud. The goods were procured by a bill with a false drawer, a false acceptor, and no such person as the consignee ever heard of at the place to which he had addressed the goods. That circumstance ought to have awakened the suspicions of the defendants, and they are guilty of gross negligence in parting with them without further inquiry. They had the goods of the plaintiff in their possession, and they are liable to him if they delivered them wrongfully."

In Heugh *v.* London, etc., R., L. R. 5 Exch. 50, the facts were as follows: A swindler ordered goods which were consigned to the carrier directed to a particular number and street. An offer of delivery at that address was declined; and the carrier, in accordance with its method of business, sent an advice note to the place of delivery. Subsequently the swindler appeared at the company's office with an order purporting to come from the consignee, and obtained the goods. The court held that the carrier, having tendered the goods at the place of delivery and sent the advice note, according to the usual course of its business, ceased to hold the goods as carrier. The question was whether under the circumstances the delivery amounted in law to a conversion or whether the carrier was only bound to act and did act

with reasonable caution. Kelly, C. B., observed: "The plaintiffs contend that this was a misdelivery on the part of the defendants, amounting to a conversion. But no sufficient authority has been cited in support of this position. It is true that a misdelivery by a carrier has been held to amount to a conversion, but the defendant's character of carriers had ceased, and whatever character they were, it was not that. Their position has been not inaptly described as that of involuntary bailees without their own default. They find these goods in their hands under circumstances in which the character of carriers under which they received them had ceased. Did they then as involuntary bailees become subjected to an absolute duty to deliver to the proper person, so as to be liable for misdelivery, for that negligence? The only authorities in the courts of this country cited in support of that proposition are Stephenson *v.* Hart, 4 Bing. 476 and Duff *v.* Budd, 3 Brod & B. 177. But in neither case was it held or even contended that the misdelivery amounts as a matter of law to conversion. But in both cases it was deemed to be a question for the jury, and the question was in fact left to them whether under all the circumstances the defendant had acted with reasonable care. It is plain, then, on the authority of these cases that misdelivery under such circumstances is not as a matter of law and conversion, but that it is a question of fact for the jury whether the defendants have exercised reasonable and proper care and caution. The jury have answered this question in favor of the defendants, and they are therefore entitled to keep their verdict." Hutchinson on Carriers, § 353.

In Price *v.* R. Co., 50 N. Y. 213, a swindler ordered goods to be shipped to the address of a fictitious firm. This firm was unknown to the carrier's agents at the place of delivery, but the carrier nevertheless delivered them to a stranger who called at the office and paid the freight charges. It subsequently proved that the person who represented himself to be the consignee was the same person who had ordered the goods. The court held that the carrier must at his peril deliver property to the true owner. Delivery to the wrong person either by innocent mistake or through fraud constitutes a conversion. The carrier's duty involved an investigation or inquiry as to the existence of the consignee. And had this been made, the fraud would have been discovered, in which case the carrier should have warehoused the goods. Had a delivery been made to any other person than the real swindler under the same circumstances, the defendants would have been clearly liable. The question was therefore, whether the swindler who wrote the order acquired a right so far as the carrier was concerned to a delivery of the goods; in other words, whether as to the carrier he was the consignee. If he was, then the delivery to him discharged the carrier upon the principle that any delivery valid as to the consignee is a defence for the carrier as to all persons. But the plaintiff did not intend that the goods should be delivered to the writer of the order, but to the firm to which they were directed, and the writer of the order was not the consignee. The delivery was therefore made to one who was neither the consignee nor the owner of the goods; and the defendants were liable for their value."

In Dunbar *v.* Boston, etc., R., 110 Mass. 26, A sold goods to B; he gave his name as C. The goods were sent by the carrier addressed to B, and a bill of lading sent by mail to the same address. B obtained the goods of the carrier without producing the bill of lading, by signing a receipt in his own name. There was no person by the name of C in the place to which the goods were sent. *Held*, that an action would not lie by A against the carrier.

In Edmunds *v.* Merchants' Despatch Transp. Co., 135 Mass. 233; s. c., 16 Am. & Eng. R. R. Cas. 250, it was held that if A, fraudulently assuming the name of a reputable merchant in a certain town, buys, in person, goods of another, the property in the goods passes to A, and the seller cannot maintain an action against a common carrier to whom the carriage of the goods is intrusted, for delivering them to A. If A, representing himself to be a brother of a reputable merchant in a certain town, buying for him, buys, in person, goods of another, the property in the goods does not pass to A; and in an action by the seller against a common carrier to whom the carriage of the goods is intrusted, for delivering them to A, the carrier cannot justify on the ground that he has delivered them to the owner.

The carrier is bound to exercise great care in searching out the proper person indicated as the consignee, and cannot excuse himself by setting up the fact that he has been imposed upon. Where, for example, certain goods were shipped without any bill of lading marked to the consignee or order the carrier is not justified in delivering the goods to a third

of goods made by himself,[1] but not for one made by the owner.[2] A misdelivery by the carrier is held to amount to a conversion of the property.[3]

party on the presentation by him of a letter from the consignor alluding to the shipment of goods to him similar to those in question upon the same day. Viner *v.* New York, Alex., Georgetown & W. S. Co., 50 N. Y. 23. The same principle applies where the carrier is deceived by fraud and false personation as to the identity of the consignee. Winslow, Ward & Co. *v.* Vt. & Mass. R. Co., 42 Vt. 700. And that no matter how plausible the fraud and false personation may be. Houston & Tex. Cent. R. Co. *v.* Adams, 49 Tex. 748. The carrier is likewise liable if it delivers the goods on a forged order purporting to be given by the consignee. American Merchants' Union Express Co. *v.* Miller, 73 Ill. 224. Even though the person presenting the order has formerly been the clerk of the consignee. This doctrine was carried to an extraordinary length in Price *v.* Oswego & Syracuse R. Co., 50 N. Y. 213 (reversing 58 Barb. 599). Here a person wrote ordering goods in the name of a fictitious firm. The goods were accordingly forwarded on the line of the defendant company directed to the fictitious firm. They were claimed by the person who had ordered them and were delivered to him by the company, he signing the pretended firm name. This person afterwards proving entirely irresponsible, the consignor sued the company for a misdelivery. The court held that they were entitled to recover. Where there are two persons of the same name in one place the carrier is not liable for a misdelivery in giving the goods to one of the two when the other was intended by the consignor, and this even though the person to whom the goods are delivered is a comparative stranger in the town. The blame falls upon the shoulders of the consignor for not more specifically marking the goods. Bush *v.* St. Louis R. C. & N. R. Co., 3 Mo. App. 62. Where the goods are delivered by the carrier to a person professing to be the consignee, and who is identified as such by a trustworthy party, and who calls for the goods at about the proper season, this state of facts raises a reasonable *prima-facie* presumption that a proper delivery has been made, and the burden of proof is on the party alleging a misdelivery. Ten Eyck *v.* Harris, 47 Ill. 268.

1. Meyer *v.* Chicago, etc., R., 24 Wis. 566; s. c., 1 Am. Rep. 207. Or where he accepts goods defectively addressed he waives any right to plead such defect when he fails to deliver as contracted. Gulf, etc., R. *v.* Maetze, 18 Am. & Eng. R. R. Cas. 613.

2. Conger *v.* Chicago, etc., R., 24 Wis. 157; s. c., 1 Am. Rep. 164; Bush *v.* St. Louis, etc., R., 3 Mo. App. 62. See also Baltimore, etc., R. *v.* Humphrey, 9 Am. & Eng. R. R. Cas. 331. *Compare* Gulf, etc., R. *v.* Maetze, 18 Am. & Eng. R. R. Cas. 613. See, generally, Chicago, etc., R. *v.* Bovine, 61 Miss. 288; s. c., 18 Am. & Eng. R. R. Cas. 644. Where goods addressed to the cashier of a bank are accepted by the clerk or receiving teller acting behind the counter of the bank in the discharge of his duties as teller, this is a delivery to the real consignee sufficient to discharge the carrier. Hotchkiss *v.* Artisans' Bank, 2 Abb. Ct. App. (N. Y.) 403; Ela *v.* American M. U. Exp. Co., 29 Wis. 611; Winslow *v.* Vermont, etc., R., 42 Vt. 700. Where through mistake the carrier refuses to deliver to the real consignee, and while deposited in his warehouse they are destroyed by fire, he is liable. Meyer *v.* Chicago, etc., R., 24 Wis. 566; s. c., 1 Am. Rep. 207.

3. Bowlin *v.* Nye, 10 Cush. (Mass.) 416; Devereux *v.* Barclay, 2 B. & A. 702; Hawkins *v.* Hoffman, 6 Hill (N. Y.), 586; Rosenfield *v.* Express, 1 Woods, 131; Winslow Ward & Co. *v.* Vermont & Mass. R. Co., 42 Vt. 700; Newhall *v.* Central Pac. R. Co., 51 Cal. 345; Price *v.* Oswego, etc., R., 50 N. Y. 213.

Where, therefore, a railroad company stored certain barrels of flour at the point of destination, and upon presentation of an order from the consignee gave in exchange flour checks, it was held that it was guilty of a conversion in having subsequently delivered a portion of the flour to other persons than those holding the checks. Hall *v.* Boston & Worcester R., 14 Allen (Mass.), 439.

Where goods were destroyed through bad packing, and the carrier by mistake misdelivered them, he was held liable in nominal damages only. Baldwin *v.* London, etc., R., 9 Am. & Eng. R. R. Cas. 175. See also Forbes *v.* Boston, etc., R., 9 Am. & Eng. R. R. Cas. 76; Jelletts *v.* St. Paul, etc., R., 16 Am. & Eng. R. R. Cas. 246; Cunningham *v.* Great Northern R., 49 Law Times N. S.,

5. USAGE.—An established custom or usage with regard to delivery, general orders previously given and until countermanded, will release the carrier.[1] The place of delivery may be determined by usage in the absence of contract or special orders.[2] But custom or usage will not relieve the carrier from liability for negligence.[3]

6. NOTICE TO CONSIGNOR.—It has been held that where the carrier finds that the consignee is not known at the address given, or the address is only a general one and the consignee cannot be found, it is the carrier's duty to notify the consignor and await orders before delivering to anybody.[4] Other authorities are to the effect that no rule of law requires such notice.[5] It is said that the obligation of the carrier to give notice to the consignor of the non-acceptance of the goods can only arise where the carrier is required to make a personal delivery. Where his orders are to deposit the goods to await the call of the consignee such obligation does not exist.[6]

7. NOTICE TO CONSIGNEE.—The question has arisen as to whether the liability of the carrier as a common carrier should end when the transit was completed, and nothing further remained to be done by him, or whether such liability should continue until the consignee had been given a reasonable opportunity, by the use of due diligence, and, perhaps, after notice from the carrier of the arrival of the goods, to remove them. The authorities are conflicting upon the point. The leading cases upon the first proposition were decided in *Massachusetts.*[7] They established the doctrine that as regards carriers by railroad, liability should end upon the completion of the transit, the unloading of the goods from the cars, and their safe deposit upon the platform or in the warehouse of the company. They refused to impose upon the

394; s. c., 16 Am. & Eng. R. R. Cas. 254.

1. London, etc., R. *v.* Bartlett, 31 L. J. Exch. 92; 7 H. & N. 400; Quiggin *v.* Duff, 1 M. & W. 174; Richardson *v.* Goss, 3 B. & P. 119; F. & M. Bank *v.* Champlain Transp. Co., 23 Vt. 186; Loveland *v.* Burk, 120 Mass. 139; Van Santvoord *v.* St. John, 6 Hill (N. Y.), 157; Huston *v* Peters, 1 Metc. (Ky.) 558; Broadwell *v.* Butler, 6 McLean, 296.

2. Merriam *v.* Hartford, etc., R., 20 Conn. 354; Farmers', etc., Bank *v.* Champlain Transp. Co., 23 Vt. 186; Noyes *v.* Rutland, etc., R., 27 Vt. 110; Barstow *v.* Murison, 14 La. Ann. 335; Hosea *v.* McCrory, 12 Ala. 349; Garey *v.* Meagher, 33 Ala. 630; Vincent *v.* Chicago, etc., R., 49 Ill. 33; South & North Alabama R. *v.* Wood, 71 Ala. 215; s. c., 16 Am. & Eng. R. R. Cas. 267.

As to the effect of custom or usage generally see the following cases: Haynie *v.* Waring, 29 Ala. 263; Garey *v.* Meagher, 33 Ala. 630; Chicago, etc., R. *v.* People, 56 Ill. 365; Strong *v.* Grand Trunk R., 15 Mich. 206; Forbes *v.* Boston, etc., R., 9 Am. & Eng. R. R. Cas. 76.

3. Higler *v.* McCartney, 31 Ala. 501.

4. Stephenson *v.* Hart, 4 Bing. 476; Birkett *v.* Willan, 2 B. & Ald. 356; Green, etc., Nav. Co. *v.* Marshall, 48 Ind. 596; The Eddy, 5 Wall. (U. S.) 481; American, etc., Exp. Co. *v.* Wolf, 99 Ill. 430. *Compare* Sweet *v.* Barney, 45 N. Y. 344.

5. Mayel *v.* Potter, 2 Johns. (N. Y.) 371; Fisk *v.* Newton, 1 Denio (N. Y.), 45; Fenner *v.* Railroad, 44 N. Y. 515; Zinn *v.* Steamboat Co., 49 N. Y. 442; Neal *v.* Railroad, 8 Jones Law (N. Car.), 482.

6. Merchants', etc., Co. *v.* Hallock, 64 Ill. 284; Sweet *v.* Barney, 45 N. Y. 344.

7. **Massachusetts.**—Norway Plains Co *v.* Boston, etc., R., 1 Gray (Mass.), 263; Rice *v.* Boston, etc., R., 98 Mass. 212; Thomas *v.* Boston, etc., R., 10 Metc. (Mass.) 472; Barron *v.* Eldredge, 100 Mass. 455; Stowe *v.* New York, etc., R., 113 Mass. 521.

carrier the onerous duty of sending express notice of arrival of all the various consignments of goods to the numerous consignees, but placed upon the latter the duty of ascertaining whether or not his goods had arrived, and only permitted him to charge the carrier after such arrival with the liability of a warehouseman. This rule has been adopted in the following States: *Alabama*,[1] *California*,[2] *Georgia*,[3] *Illinois*,[4] *Indiana*,[5] *Iowa*,[6] *Missouri*,[7] *North Carolina*,[8] *Pennsylvania*.[9]

The contrary doctrine was established in *New Hampshire*, and is founded substantially upon the reasoning that the time of arrival was at best uncertain, and it was not just to require of the consignee attendance at the depot; that the mere unloading was not equivalent to delivery, because as yet the consignee has nothing to do with the goods; and that the application, during such a time, of precisely the same principle of liability as that applied during the transit, and for the same reasons, was just to both parties.[10] In a *Michigan* case[11] it was pointed out that the doctrine requiring notice to the consignee of the arrival of goods owed its origin to certain English decisions as to carriers by water. Originally the carrier was required to make the delivery from his vehicle at the consignee's residence or place of business. In the case of a vessel or a railroad this was impracticable, unless the carrier also assumed the duties of a drayman. In modern times a notice to the consignee of the arrival of the goods was a just and reasonable substitute for such delivery. In the absence of any special agreement imposing upon the carrier what were practically the duties of a warehouseman, or unless the consignee by his own negligence delayed to remove the goods, or implied assent in permitting them to remain, it was just to both parties, and burdensome to neither, to require that the carrier should notify the consignee of the arrival of the goods and should hold them subject to a common carrier's liability until the consignee was given a reasonable opportunity to remove them.

1. **Alabama.**—Alabama, etc., R. *v.* Kidd, 35 Ala. 209; Mobile, etc., R. *v.* Prewitt, 46 Ala. 63; South & North Alabama R. *v.* Wood, 66 Ala. 167; s. c., 9 Am. & Eng. R. R. Cas. 419. *Compare* Southern Exp. Co. *v.* Armistead, 50 Ala. 350; Kennedy *v.* Mobile, etc., R., 74 Ala. 430; s. c., 21 Am. & Eng. R. R. Cas. 145.

2. **California.**—Jackson *v.* Sacramento Valley R., 23 Cal. 268.

3. **Georgia.**—South Western R. *v.* Felder, 46 Ga. 433. See also Rome, etc., R. *v.* Sullivan, 14 Ga. 277.

4. **Illinois.**—Porter *v.* Railroad, 20 Ill. 407; Richards *v.* Railroad, 1 Ill. 404 Chicago, etc., R. *v.* Scott, 47 Ill. 132; Merchants' Despatch Co. *v.* Hallock, 64 Ill. 284; Rotchild *v.* Railroad, 69 Ill. 164.

5. **Indiana.**—Bansenner *v.* Toledo, etc., R., 25 Ind. 434; Chicago, etc., R. *v.* McCool, 26 Ind. 140.

6. **Iowa.**—Mohr *v.* Chicago, etc., R., 40 Iowa, 579; Francis *v.* Railroad, 25 Iowa, 60.

7. **Missouri.**—Gashweiler *v.* Wabash, etc., R., 83 Mo. 112; s. c., 25 Am. & Eng. R. R. Cas. 403; Hotzclaw *v.* Duff, 27 Mo. 395; Cramer *v.* Express Co., 56 Mo. 528; Rankin *v.* Pacific, etc., R., 55 Mo. 168. *Compare* Wilson Sewing Machine Co. *v.* Louisville, etc., R., 71 Mo. 203, s. c., 6 Am. & Eng. R. R. Cas. 593.

8. **North Carolina.**—Neal *v.* Railroad, 8 Jones Law (N. Car.), 482.

9. **Pennsylvania.**—McCarthy *v.* Railroad, 30 Pa. St. 247; Shenk *v.* Propeller Co., 60 Pa. St. 109. But see Union Exp. Co. *v.* Ohleman, 92 Pa. St. 323.

10. **New Hampshire.**—Moses *v.* Boston, etc., R., 32 N. H. 523.

11. McMillan *v.* Michigan, etc., R., 16 Mich. 79.

The *New Hampshire* rule has been adopted in the following States: *Kansas*,[1] *Kentucky*,[2] *Lousiana*,[3] *Michigan*,[4] *Minnesota*,[5] *New Jersey*,[6] *New York*,[7]

1. **Kansas.**—Leavenworth, etc., R. *v.* Maris, 16 Kans. 333.

2. **Kentucky.**—Jeffersonville, etc., R. *v.* Cleaveland, 2 Bush (Ky.), 468.

3. **Louisiana.**—Maignan *v.* Railroad, 24 La. Ann. 333.

4. **Michigan.**—Buckley *v.* Railroad, 18 Mich. 121; McMillan *v.* Railroad, 16 Mich. 79.

In McMillan *v.* Railroad, 16 Mich. 79, Cooley, J., observes: "The rule that the liability of the carrier shall continue until the consignee has had reasonable time after notification to take away his goods, is traceable to certain English decisions having reference to carriers by water; whose mode of doing business resembles that of railroad companies in the inability to proceed with their vehicles to every man's door and there deliver his goods. It is a modification in favor of the carrier by land of the obligation formerly resting upon him, and which required in the absence of special contract an actual delivery to the consignee of the goods carried. The modern modes of transportation render this impracticable unless the carrier shall add to his business that of drayman also, which is generally a distinct employment. In lieu of delivery therefore the carrier is allowed to discharge himself of his extraordinary liability by notifying the consignee of the receipt of the goods, who is then expected, in accordance with what is the almost universal custom, to remove them himself. It is insisted, however, that this rule, so far as it can be considered as established by authority, is applicable only to carriers who have no warehouses of their own but make the wharf or platform their place of delivery, and who therefore never become warehousemen and are held to a continued liability as carriers as the only mode of insuring watch and protection over the goods until the owner can have opportunity to receive them. This distinction would not be entirely without force, but would seem to be acted upon in one State at least. *Compare* Scholes *v.* Ackland, 14 Ill. 474, and Crawford *v.* Clark, 15 Ill. 561, with Richards *v.* M. F. & N. J. R., 20 Ill. 404, and Porter *v.* Same, 20 Ill. 407. See also Chicago, etc., R. *v.* Warren, 16 Ill. 502, where the railroad company was held to the same measure of responsibility as a carrier by water, where the property carried, instead of being placed in their warehouse, was left outside. . . . A critical examination of the cases on this subject would scarcely be useful, as they cannot be reconciled. The court must follow its own reasons. I am unable to discover any ground which to me is satisfactory on which a common carrier of goods can excuse himself from personal delivery to the consignee except by that which usage has made a substitute. To require him to give notice when the goods are received so that the consignee may know when to call for them, imposes upon him no unreasonable burden. If by understanding with the consignee the goods were to remain in store for a definite period or until he should give directions concerning them, the rule would be different, because the relation of warehouseman would then be established by consent. In the absence of such an understanding sound policy, I think, requires the carrier to be held liable as such until he has notified the consignee that the goods are received. If the nature of the bailment then becomes changed through the neglect of the consignee to remove the goods, it will be by his implied assent. Such a rule is just to both parties and burdensome to neither, and it will tend to promptness on the part of carriers in giving the notices which, whether compulsory or not, are generally expected from them."

5. **Minnesota.**—Pinney *v.* St. Paul, etc., R., 19 Minn. 251; Derosia *v.* Railroad, 18 Minn. 133.

6. **New Jersey.**—Morris, etc., R. *v.* Ayres. 5 Dutch. (N. J.) 393.

7. **New York.**—Mills *v.* Michigan, etc., R., 45 N. Y. 622; s. c., 6 Am. Rep. 152; Hedges *v.* Hudson River, etc., R., 49 N. Y. 223; Rawson *v.* Holland, 59 N. Y. 611; McKenney *v.* Jewett, 9 Am. & Eng. R. R. Cas. 209. *Compare* Nicholas *v.* New York Central, etc., R., 9 Am. & Eng. R. R. Cas. 113.

Carrier must give notice of the arrival of goods and allow reasonable time for the consignee to call and take them away. At the expiration of a reasonable time the carrier's liability ceases. But if the consignee is absent, unknown, or cannot be found the carrier may store them. McDonald *v.* Railroad, 34 N. Y. 497; Fenner *v.* Railroad, 44 N.Y. 504; Hedges *v.* Railroad, 49 N. Y. 223; Sprague *v.* Railroad, 52 N. Y. 637; Pelton *v.* Railroad, 54 N. Y. 214.

In Sherman *v.* Hudson River, etc., R.,

Ohio,[1] *South Carolina*,[2] *Tennessee*,[3] *Vermont*,[4] *Wisconsin*.[5]

In *England*[6] there is at least one decision in which the majority of the court adopted the rule as laid down in *Massachusetts*.

What is a reasonable time for the carrier to hold the goods subject to this responsibility where there is no dispute as to the facts is a question of law for the court.[7] Where the consignee is unknown to the carrier, or refuses to receive the goods, or is absent and has no agent to whom notice can be given, want of notice will be excused.[8]

Even where no notice of arrival is required, the carrier is bound to unload the goods with due care and deposit them in a safe and suitable place, and perhaps to put them in store.[9]

8. WAIVER BY CONSIGNEE.—A waiver by the consignee of the

64 N. Y. 254, the court observed: "A carrier has not performed his duty until he has delivered or offered to deliver the goods to the consignee, or done what the law esteems equivalent to delivery. When the consignee is unknown to the carrier, a due effort to find him and notify him of the arrival of the goods is a condition precedent to the right to warehouse them." See also Spears *v.* Spartanburg, etc.. R., 11 S. Car. 158; Union Exp. Co. *v.* Ohleman, 92 Pa. St. 323.

1. **Ohio.**—Hirsch *v.* Quaker City, 2 Disney (Ohio), 144; Tanner *v.* Railroad, 53 Pa. St. 411; Chicago, etc., R. *v.* Scott, 42 Ill. 133.

2. **South Carolina.**—Spears *v.* Spartanburg, etc., R., 11 S. Car. 158.

3. **Tennesses.**—Dean *v.* Vacaro, 2 Head, 490; Rankin *v.* Memphis Packet Co., 9 Heisk. 564; Express Company *v.* Kaufman, 12 Heisk. 570; Butler *v.* East Tennessee, etc., R., 8 Lea, 32; s. c., 9 Am. & Eng. R. R. Cas. 249.

In *Tennessee* common carriers are required by statute (Act 1870, ch. 17, Rev. Stat. sec. 1993j), to give the consignee notice of the arrival of goods. In Dean *v.* Vacaro, 2 Head, 490, it was held that such was the duty of the carrier irrespective of the statute. In Butler *v.* East Tennessee, etc., R., 8 Lea, 32; s. c., 9 Am. & Eng. R. R. Cas. 249, the consignee had no fixed residence and the carrier had no knowledge of his temporary stopping-place. It was held that the statute cited did not, by prescribing a particular form and manner of notice, change the character of the carrier's liability, and that he was not liable for the loss of a trunk stored in his warehouse and burned under such circumstances.

4. **Vermont.**—Oumit *v.* Henshaw, 35 Vt. 604; Blumenthal *v.* Brainard, 38 Vt. 402; Winslow *v.* Vermont, etc., R., 42 Vt. 700.

5. **Wisconsin.**—Wood *v.* Crocker, 18 Wis. 345; Lemke *v.* Chicago, etc., R., 39 Wis. 449.

6. **England.**—Shepherd *v.* Bristol, etc., R., 37 L. J. Exch. 113, L. R. 3 Exch. 189. See also Rowth *v.* North Eastern R. Co, 36 L J. Exch. 83, L. R. Exch. 173; Chapman *v.* Great Western R. Co., 42 L. T. N S. 252. See, further, comments in Redman's Law of Railway Carriers (2d Ed.), p. 104.

7. Roth *v.* Buffalo, etc., R., 34 N. Y. 548.

Where goods arrived at carrier's station, but consignee was repeatedly informed that they had not arrived, and they were then destroyed by fire, the company was held liable as a common carrier. Burlington, etc., R. *v.* Arms, 16 Am. & Eng. R. R. Cas. 272.

8. Kremer *v.* Southern Exp. Co., 6 Coldw. (Tenn.) 356; Northup *v.* Syracuse, etc., R., 3 Abb. Ct. App. 386; s. c., 5 Abb. N. S. 425; Pelton *v.* Rensselaer, etc., R., 54 N. Y. 214.

Where, after goods reached the station to which they were consigned, the carrier sent a notice to the consignee to come and remove his goods, or they would be unloaded at his risk and expense, and the consignee sent a servant, who removed a small portion of the goods and gave directions to have the trucks placed on a siding near his premises, which was done, it was held that the notice to remove the goods amounted to a delivery, and that, the consignee having had a reasonable time for removal, the duty of the company as common carrier was at an end. Bradshaw *v.* Irish Northwestern R., 21 W. R. 581; Redman's Law of Railway Carriers (2d Ed.), p. 108.

9. Hutchinson on Carriers, paragraph 371; Porter *v.* Railroad, 20 Ill. 407; Chicago, etc., R. *v.* Beasley, 69 Ill. 630; Alabama, etc., R. *v.* Kidd, 35 Ala. 209.

rights or privileges he enjoys as to delivery may occur, and will release the carrier. A waiver may be brought about by a direct request for delivery at some other than the stipulated or authorized place;[1] by the conduct of the consignee, in spite of the universal custom to deliver at his residence or place of business;[2] by an order of the consignee as to delivery which conflicts with the general instructions given by the consignor;[3] by acceptance by the consignee of goods delivered at an unreasonable time or an improper place.[4] But the acceptance by the consignee of a portion of the goods at a place other than that specified for their delivery does not release the carrier from his obligation as to the remainder.[5]

1. London, etc., R. *v.* Bartlett, 31 L. J. Exch. 92; 7 H. & N. 400; Cork Distillery Co. *v.* Great Southern, etc., R., L. R. 7 H. L. 269; Dixon *v.* Baldwin, 5 East, 181; Sparrow *v.* Caruthers, 2 Str. 1236; Strong *v.* Natally, 1 Bos. & P. N. R. 16.

In Gulf, etc., R. *v.* Clark, 18 Am. & Eng. R. R. Cas. 628, it was held that a consignee is not bound to receive his freight at any other point than that of its destination. He may do so, however, and relieve the carrier from liability. See also Houston, etc., R. *v.* Harn, 44 Tex. 628; Houston, etc., R. *v.* Adams, 49 Tex. 748.

2. Strong *v.* Natally, 1 B. & P., N. R. 16; *In re* Webb, 8 Taunt. 443; Richardson *v.* Goss, 3 B. & P. 119.

3. An order by the consignee as to delivery which conflicts with the general direction given by the consignor may be followed by the carrier, and the latter's liability be thereby ended. This even though the consignor could not recover the price of the goods from the consignee in consequence of there being no acceptance by the latter within the Statute of Frauds. London, etc., R. *v.* Bartlett, 31 L. J. Exch. 92; 7 H. & N. 400. See also Dobbin *v.* Michigan Central R., 21 Am. & Eng. R. R. Cas. 85.

4. Sweet *v.* Barney, 23 N. Y. 335; Richardson *v.* Goddard, 23 How. (N. Y.) 28; Haslaine *v.* Express Co., 6 Bosw. (N. Y.) 235; Goodwin *v.* Railroad, 58 Barb. (N. Y.) 195; Parsons *v.* Hardy, 14 Wend. (N. Y.) 306; Hill *v.* Humphries, 5 W. & S. (Pa.) 123; Bartlett *v.* Steamboat Philadelphia, 32 Mo. 256; Cleveland, etc., R. *v.* Sargent, 19 Ohio St. 438; Lewis *v.* Railroad, 55 N. H. 84.

5. Cox *v.* Peterson, 30 Ala. 608; Home Ins. Co. *v.* Western Transp. Co., 51 N. Y. 93; Bissell *v.* Campbell, 54 N. Y. 353. See also Jelletts *v.* St. Paul, etc., R., 16 Am. & Eng. R. R. Cas. 246.

In Abbe *v.* Eaton, 51 N. Y. 410, it was held that unless the bill of lading expressly provides otherwise, a carrier is discharged by a delivery of the quantity of goods received by him, though less than that specified in the bill.

Orders for Delivery.—The defendants, who were common carriers, had a written order from the plaintiff "to deliver to F. or Dane County Bank any packages that might come for him." They received at their express office, which was in the same building with the bank, a package of $1000 for the plaintiff, and the bank clerk being in while defendants were distributing their goods, they said to him: "Here is a package for D. J. B." (the plaintiff); "will you take it?" He answered, "I will ask the bank;" and, returning immediately, said, "Let F. have it." The defendants' agent left word at the store of F. that the package was at the office; F.'s clerk said that F. was absent, but that he would come over and see about it. He afterwards went over and said that "F. was away and had the key of the safe, and that the defendants would have to keep it." The package was not offered to him, nor was it entered on the delivery book, according to the custom of the company. *Held*, that the package was not delivered, and that the company was liable. Baldwin *v.* American, etc., Co., 23 Ill. 197.

"Delivered at the depot at Whitewater free" was held to mean that the consignees were not to be at any expense for packing and hauling the goods to the depot. Congar *v.* Galena C. U. R. Co., 17 Wis. 477.

A statement by a teamster that certain flour owned by his employer was for a third person does not authorize delivery of the flour to such person. Sawyer *v.* Chicago & N. W. R. Co. 22 Wis. 403.

Where a railway company issued two delivery orders for the same grain, both orders being in the same form, and con-

A waiver also occurs by the owner's resumption of the charge of the goods.[1]

9. DELIVERY AT RESIDENCE.—The ordinary obligation of the carrier is to deliver directly to the consignee at his residence or place of business, even though such place of business is the upper story of a building.[2] But this rule is apparently modified in its application to railroad companies.[3]

taining nothing to show that they related to the same consignment, it was held liable to third persons making advances upon both orders. Coventry *v.* Great East. R. Co., L. R. 11 Q. B. Div. 776.

Where goods are sent "order A. B. & Co., notify C.," if the company delivers to C. without an order from A. B. & Co. it is liable for a misdelivery. Wright *v.* North Cent. R. Co., 8 Phila. 19.

Where an order was given to a firm of warehousemen authorizing them to receive from a railway company all goods shipped to the drawer, after which the firm was dissolved, and a new firm composed of a part of the members of the old firm was formed, *held*, that the new firm derived no authority from the order to receive the goods of the drawer. Angell & Co. *v.* Mississippi & Missouri R. Co., 9 Iowa, 487.

The owners of a lot of flour which had been brought to B. by a railroad company, and which remained at the railroad depot, sold fifty barrels thereof, and gave to the purchasers an order upon the company for the delivery thereof, and the purchasers upon presenting the same received another order, or "flour check," for the same, which, according to the usual course of business, was delivered to a clerk who had charge of the actual delivery of flour from the depot, and who was accustomed to keep such "flour checks," and take receipts upon the back thereof for flour actually delivered. This clerk delivered twenty-two barrels of flour to the purchasers, and twenty-eight barrels to other persons not authorized to receive them. *Held*, that the company was liable to the purchasers for the value of the twenty-eight barrels without regard to the question of its due care or negligence. Hall *v.* Boston & Worcester R. Co., 14 Allen (Mass.), 439. See also Dobbin *v.* Michigan Central R., 21 Am. & Eng. R. R. Cas. 85; Furman *v.* Chicago, etc., R., 23 Am. & Eng. R. R. Cas. 730.

1. Delivery Waiver.—Stone *v.* Waitt, 31 Me. 409. See also Dobbin *v.* Michigan Central R., 21 Am. & Eng. R. R. Cas. 85; Furman *v.* Chicago, etc., R., 23 Am. & Eng. R. R. Cas. 730. *Compare* Atkinson *v.* Steamboat Castle Garden, 28 Mo. 124; Cleveland, etc., R. *v.* Sargent, 19 Ohio St. 438.

2. Duff *v.* Budd, 3 Brod. & B. 137; Birket *v.* Illan, 2 Barn. & Ad. 356; Storr *v.* Crowley, 1 McClel. & Y. 129; Hyde *v.* Trent, etc., Nav. Co., 5 T. R. 389; Gibson *v.* Culver, 17 Wend. (N. Y.) 305; Schroeder *v.* Railroad, 5 Duer (N.Y.). 55; Fisk *v.* Newton, 1 Den. (N. Y.) 45; Witteck *v.* Holland, 55 Barb. (N. Y.) 443; s. c., 45 N. Y. 13; Merwin *v.* Butler, 17 Conn. 138; Eagle *v.* White, 6 Whart (Pa.) 505; Hemphill *v.* Chenie, 6 W. & S. (Pa.) 62; Graff *v.* Bloomer, 9 Pa. St. 114; Bartlett *v.* Steamboat Philadelphia, 32 Mo. 256.

Delivery to the consignee whose place of business is in the upper story of a building cannot be made by leaving the goods, with notice to the consignee, on the ground floor. Haslam *v.* Adams Exp. Co., 6 Bosw. (N. Y.) 235; Mierson *v.* Hope, 2 Sweeney (N. Y.). 561.

3. When it is the usual custom of a carrier to deliver goods, or particular classes of goods, at the consignee's residence or place of business, the liability as a common carrier continues until such delivery takes place. Where he is not bound to so deliver them, it is his duty, within a reasonable time, to give notice of their arrival to the consignee, and his liability as a common carrier continues during such a period as the consignee might, by the exercise of reasonable diligence, remove them. Redman's Law of Railway Carriers (2d Ed.), p. 105; Golden *v.* Manning, 2 W. Bl. 916; Duff *v.* Budd, 3 B. & B. 177; Bourne *v.* Gatliffe, 11 Cl. & F. 45; 4 Bing. N. C. 314; Storr *v.* Crowley, McCle. & Y. 129; Mitchell *v.* Lancashire, etc., R., 44 L. J. Q. B. 107; L. R. 10 Q. B. 256. See also Birket *v.* Illan, 2 Barn. & Ad. 356; Hyde *v.* Trent Nav. Co., 5 T. R. 389. See cases cited *supra*, this title and subdivision, NOTICE TO CONSIGNEE.

A tender of the goods to be delivered upon payment of freight is sufficient to discharge the carrier. Storr *v.* Crowley, McCle. & Y. 129.

A carrier may or may not deliver at the edge of their rails. Evershed *v.* London, etc., R., 47 L. J. Q. B. 284.

Goods must be dealt with in delivery ac-

10. CHANGE IN DESTINATION OF FREIGHT BY THE CONSIGNOR OR CONSIGNEE.—The right to demand a re-delivery by the carrier, or to change the original destination of freight, depends upon the ownership of the goods, and the notice to the carrier of such ownership. The rule is said to be that where the consignor is known to the carrier to be the owner, the carrrier must be understood to contract with him only for his interest, upon such terms as he dictates in regard to the delivery, and that the consignee is to be regarded simply as an agent selected by the consignor to receive the goods at a place indicated. Where the carrier has no notice of the ownership of the property other than that implied from the relation of the parties to each other as consignor and consignee, the latter is the implied owner, and the carrier is justified in taking his directions as to the manner of delivery.[1]

cording to their nature and the usual and known course of business of the carrier. Taff Vale R. *v.* Giles, 23 L. J. Q. B. 43; 2 E. & B. 823; Wise *v.* Great Western, etc., R., 25 L. J. Exch. 258; 1 H. & N. 63.

1. Change in Destination of Freight by Consignee.—As the consignee is the presumptive owner of goods shipped, he may change their destination, unless the carrier is informed that the title to them has not passed from the consignor. London, etc., R. *v.* Bartlett, 7 H. & N. 400; Hutch. Carr. § 394.

But where the carrier has notice that the title has not passed to the consignee, the carrier has no right to deliver to him at any other destination than that fixed by the consignor. This was held in Southern Express Co. *v.* Dickson, 94 U. S. 549, where the court say: "In the case before us the proof was given, and the jury found that the goods did not belong to the consignees, but were the property of the shipper, and that this was known to the carrier. . . . We think the rule is, that where the consignor is known to the carrier to be the owner, the carrier must be understood to contract with him only, for his interest, upon such terms as he dictates in regard to the delivery, and that the consignees are to be regarded simply as agents selected by him to receive the goods at the place indicated; where he is an agent merely, the rule is different. . . . The numerous cases cited by the plaintiff in error, to the effect that any delivery to the consignee which is good as between him and the carrier is good against the consignor, are cases where the carrier has no notice of the ownership of the property other than that implied from the relation of the parties to each other as consignor and consignee. This gives the consignee the implied ownership of the property, and hence justifies the carrier in taking his direction as to the manner of delivery." The court then proceed to discuss some of the cases where it was held that the consignee might change the destination of goods. Among other cases discussed was Sweet *v.* Barney, 23 N. Y. 335, where a package of money was sent by express directed to "The People's Bank, 173 Canal Street, New York City." The package was delivered to an agent of the People's Bank at the express office, and was stolen from him. It was held that the delivery exonerated the express company from responsibility, since it had no notice that the money was not the property of the bank, the consignee.

Another case was London & Northwestern R. Co. *v.* Bartlett, 7 H. & N. 400, where wheat was held at the station, by order of the consignee, instead of being delivered at consignee's mill according to the contract contained in the bill of lading. It was held that the carrier was exonerated for injury to wheat caused by delay in station in the absence of knowledge by it that the wheat belonged to the consignor. The court observes: "It is, I think, quite clear that the consignee of goods may receive the goods at any stage of the journey, and I think that if the consignor directs the goods to be delivered at a particular place, it is no contract to deliver the goods at that place and not elsewhere. The contract is to deliver the goods there, unless the consignee shall require them to be delivered at some other place." Other cases were those of Mitchel *v.* Ede *et al.*, 11 A. & E., 888; Foster *v.* Frampton, 6 B. & C. 107, which are decided on similar principles.

In Southern Express Co. *v.* Dickson, 94 U. S. 549, it was held that where the

11. TIME OF DELIVERY.—The essential requirements as to delivery are that it shall be made at a proper time, in a proper manner, and at a proper place.[1] An offer to deliver after business hours, and after the consignee has dismissed his servants, is not made at a proper time.[2]

12. DELIVERY OF GOODS ON HOLIDAYS, FAST-DAYS, ETC.—The carrier is excused from giving the consignee notice of arrival where the latter's place of business is closed, because the day of arrival is

carrier, who is informed that the consignee is merely the agent of the real owner of the goods, permits such agent to take back the goods, or deliver, them to another upon his order at the place of shipment, or at any other place than the one to which they were consigned, the carrier is liable,

Change in Destination of Freight by Consignor.—"So long as the goods remain the property of the bailor he may countermand any directions he may have given as to their consignment, and may at any time during the transit require of the carrier their re-delivery to himself; and if such re-delivery can be made without too much inconvenience or expense to the carrier, he will be bound to make it. 'A carrier is employed as bailee of a person's goods for the purpose of obeying his directions respecting them, and the owner is entitled to receive them back at any period of the journey when they can be got at. To say that a carrier is bound to deliver goods according to the owner's first directions, is a proposition wholly unsupported, either by law or common sense. I can well understand the case of goods being placed in such a position that they cannot easily be got at, though it is usually otherwise.' (Per Martin B. in Scothorn *v.* Railway Co., 8 Exch. 341. See also Michigan, etc., R. Co. *v.* Day, 20 Ill. 375.) But if the goods are demanded by the owner during the transit, when the carrier is willing and able to fulfil the contract on his part, the latter will be entitled to his full freight for the whole distance to the destination to which they were originally directed, and any expense he may be put to in unloading. (Violett *v.* Stettinius, 5 Cranch C. C. 559; Shipton *v.* Thornton, 9 Ad. & El. 314; Thompson *v.* Small, 1 C. B. 328.) If this be tendered and he refuse to restore the goods, it will amount to a conversion." Hutchinson on Carriers, § 337.

Unless the carrier has notice that the goods belong to the consignor, he will not be warranted in delivering to his order. Wilson Sewing Machine Co. *v.* Louisville, etc., R. Co., 71 Mo. 203. See generally Wabash, etc., R. *v.* Saggerman, 23 Am. & Eng. R. R. Cas. 680.

1. In Eagle *v.* White, 6 Whart. (Pa.) 505, the carrier's cars reached the place of delivery about sundown on Saturday evening, and were placed on a side track. The consignee declined receiving the goods, on the ground that it was too late. When the carrier's agents opened the cars on Monday morning, it was found that some of the goods had been stolen, and the carrier was held liable to the consignee for the value of the goods. The court considered that the offer of delivery was wanting in any one of the essential requirements of a proper time, a proper manner, and a proper place, and the responsibility as carrier still continued.

2. Hill *v.* Humphreys, 5 W. & S. (Pa.) 123.

The following cases decide that a delivery of specie to a bank after banking hours, and after the bank has been closed, is not a good delivery. Merwin *v.* Butler, 17 Conn. 138; Young *v.* Smith, 3 Dana (Ky.), 92; Marshall *v.* American Exp. Co., 7 Wis. 1; Pate *v.* Henry, 5 Stew. & P. (Ala.) 101.

In Marshall *v.* American Exp. Co., 7 Wis. 1, the carrier delivered a package of money to the teller of a bank at half-past five in the afternoon. He refused it, on the ground that the cashier had gone home, and the vault was locked up. The carrier put it in his own safe, and in the night the money was stolen. Banking hours closed at 4 P.M. Held that the carrier was not liable. It appeared in evidence that the bank had been accustomed to receive money from the carrier after banking hours.

The extraordinary liability of a railroad company as carrier of goods extends until the consignee has a reasonable time to inspect the goods and remove them in the usual hours of business, and in the ordinary course of business. Leavenworth, L. & G. R. Co. *v.* Morris, 16 Kan. 333; Pinney *v.* First Div. St. Paul & Pacific R. Co., 19 Minn. 251; The Mary Washington, 1 Abb. C. C. 1; Solomon *v.* Philadelphia Steamboat, etc., Co.,

the Fourth of July.[1] Where there is no evidence that the unloading of goods on Sunday is unlawful,[2] and since there is no general usage in commercial law forbidding the unloading of goods on such a day as a church festival, fast-day, or holiday, the carrier is not liable for unloading at such times.[3] A consignee is not bound to risk injury to the goods by their receipt on a stormy day.[4]

13. C. O. D. GOODS.—Where the carrier accepts a consignment of goods with the undertaking to collect on delivery, he is the agent of the consignor for such a purpose, and is bound to an exact compliance with his undertaking.[5]

14. GOODS TO BE HELD TILL CALLED FOR.—A carrier's acceptance of goods with an undertaking that they are to be left till called for is bound to hold them a reasonable time for the consignee to demand and receive delivery, and thereupon his liability as common carrier ceases.[6]

Where he agrees with the owner of goods after their arrival to keep them a certain time for him, he may after the expiration of that time deliver them to a warehouseman, and if he does so the latter is not his agent, and he is not liable for the negligence of the warehouseman.[7]

15. EXCUSES FOR NON-DELIVERY.—The following have been held valid excuses for non-delivery by the carrier: Where occa-

2 Daly (N. Y.), 104; Lamb *v.* Camden, etc., R. Co., Id. 454; Shenk *v.* Philadelphia Steam Propeller Co., 60 Pa. St. 109; Winslow *v.* Vermont, etc., R. Co., 42 Vt. 700; Chicago, etc., R. Co. *v.* Beasley, 69 Ill. 630. See also McKinney *v.* Jewett, 9 Am. & Eng. R. R. Cas. 209.

1. Ely *v.* New Haven Steamboat Co., 53 Barb. (N. Y.) 207.

2. Shelton *v.* Merchants' Desp. Transp. Co., 59 N. Y. 258.

3. Richardson *v.* Goddard, 23 How. (U. S.) 27; Sleade *v.* Pyne, 14 La. Ann. 453. In Goddard *v.* Bark Tangier, 23 How. (U. S.) 28, goods were placed upon the wharf, and notice given to the consignee on a fast day, and while on the wharf were destroyed by fire. It was held that as the evidence did not show that there was a general usage at that port for vessels to unload on a fast day, and there was no law of the State making the transaction of business on that day illegal, the master had a right to deliver his cargo.

4. The Grafton, 1 Blatchf. C. C. 173.

5. Meyer *v.* Lemcke, 31 Ind. 208; American Exp. Co. *v.* Leseur, 39 Ill. 312; Murray *v.* Warner, 55 N. H. 546; Jelletts *v.* St. Paul, etc., R., 16 Am. & Eng. R. R. Cas. 246. See, generally, Old Colony, etc., R. *v.* Wilder, 137 Mass. 546; s. c., 21 Am. & Eng. R. R. Cas. 41.

This duty of the carrier is not an obligation arising from the nature of his duty, but is founded upon a special contract. American Exp. Co. *v.* Leseur, 39 Ill. 312; Union, etc., R. *v.* Reigel, 73 Pa. St. 72.

In the absence of such a contract none will be implied. Chicago, etc., R. *v.* Merrill, 48 Ill. 425.

After such tender of goods to the consignee the carrier becomes a mere warehouseman. Storr *v.* Crowley, McClell. & Y. 129; Marshall *v.* American Exp. Co., 7 Wis. 1.

Where the carrier takes C. O. D. goods under a contract to collect he must allow the consignee a reasonable time in which to make payment, and would be liable for an immediate return of the goods to the consignor without giving reasonable time for payment. Gr. Western R. *v.* Crouch, 3 H. & N. 183.

A peremptory refusal of the goods by the consignee imposes a duty upon the carrier to notify the consignor and await his instructions, and would justify his immediate return of the goods. Hutchinson on Carriers. § 392.

Inspection by Consignee.—The consignee has the right to inspect the goods, and the carrier is bound to furnish him the opportunity. Lyons *v.* Hill, 46 N. H. 49; Herrick *v.* Gallagher, 60 Barb. (N. Y.) 566.

6. Chapman *v.* Great Western, etc., R., 12 L. T. N. S. 252.

7. Bickford *v.* Metropolitan Steamship Co., 109 Mass. 181.

sioned by the illegal acts of the consignor.[1] By an act of the consignor discharging the carrier from further responsibility.[2] Where the carrier surrenders possession of the goods to the person whom he ascertains in the course of the transit, or before final delivery, to be their real owner.[3] Where the consignor exercises his right of *stoppage in transitu*.[4] Where goods are attached in the carrier's hands by due process of law.[5] Where a carrier by water is obliged to throw goods overboard to lighten the vessel and preserve life.[6]

16. DELIVERY ON WHARF.—An accepted authority has said that the doctrine appears to be established in this country that in the absence of a special contract or a well-established usage, the mere landing of goods from the vessel on the wharf is not such a delivery to the consignee as will discharge the carrier.[7]

1. Hastings *v.* Pepper, 11 Pick. (Mass.) 41; Gosling *v.* Higgins, 1 Camp. 451; Southern Exp. Co. *v.* Kauffman, 12 Heisk. (Tenn.) 161; Bush *v.* St. Louis, etc., R., 3 Mo. App. 62.

2. Todd *v.* Figley, 7 Watts (Pa.), 542; Sanderson *v.* Lambert, 6 Binn. (Pa.) 129; Bowman *v.* Teall, 23 Wend. (N. Y.) 306; St. Louis, etc., R. *v.* Montgomery, 39 Ill. 335; Boyce *v.* Anderson, 2 Pet. (U. S.) 150.

3. Story on Bailm. (9th Ed.) § 582; Hutchinson on Carriers, § 404; King *v.* Richards, 6 Whart. (Pa.) 418; Floyd *v.* Bovard, 6 W. &. S. (Pa.) 75; Blivin *v.* Hudson River, etc., R., 36 N. Y. 403; Bates *v.* Stanton, 1 Duer (N. Y.), 79; Western Transp. Co. *v.* Barber, 56 N. Y. 544; Barker *v.* Dement, 9 Gill (Md.), 7; Rosenfield *v.* Express Co., 1 Woods C. C. 131; The Idaho, 93 U. S. 575, 11 Blatchf. C. C. 218; Hardman *v.* Willark, 9 Bing. 382; Biddle *v.* Bond, 6 Best & S. 225; Cheesman *v.* Ex All, 6 Exch. 341; Dixon *v.* Yates, 5 B. & Ad. 340.

It is well settled, however, that the carrier, like other bailees, cannot set up a *jus tertii*, nor in any way dispute the bailor's title. Story on Bailm. (9th Ed.) §§ 450, 582; Great Western R. *v.* Crouch, 3 H. & N. 183; Vurroughes *v.* Vayney, 5 H. & N. 296; Gesling *v.* Birnie, 7 Bing. 339; Kiernan *v.* Sanders, 6 Ad. & El. 515; Launch *v.* Towle, 3 Esp. 114; Western Transp. Co. *v.* Barber, 56 N. Y. 544; The Idaho, 93 U. S. 575, 11 Blatchf. C.C. 218.

Where the goods are claimed from the carrier by another person than the consignor or consignee, such person asserting ownership, the carrier is justified in holding the goods a sufficient time to satisfy a reasonable doubt. Green *v.* Dunn, 3 Camp. 215; Solomons *v.* Dawes, 1 Esp. 83; Dunlap *v.* Hunting, 2 Denio (N.Y.), 643; Holbrook *v.* Wight, 24 Wend. (N. Y.) 169; Rogers *v.* Weir, 34 N. Y. 463.

4. Oppenheim *v.* Russel, 3 Bos. & Pul. 42; Morley *v.* Hay, 3 Man. & Ryl. 396; Stiles *v.* Holland, 31 N. Y. 309. See *supra*, this title, STOPPAGE IN TRANSITU.

5. Barnard *v.* Kobbe, 54 N. Y. 516; Bates *v.* Stanton, 1 Duer (N. Y.), 79; Ohio, etc., R. *v.* Yohe, 51 Ind. 181; Savannah, etc., Co. *v.* Wilcox, 48 Ga. 432; Wallace *v.* Matthews, 39 Ga. 617; Hayden *v.* Davis, 9 Cal. 573; Sheridan *v.* New Quay Co., 4 C. B. N. S. 618; Wilson *v.* Anderton, 1 B. & Ald. 450; Walker *v.* Detroit, etc., R., 9 Am. & Eng. R. R. Cas. 251. See *supra*, this title, SEIZURE OF GOODS. *Compare* Great Western, etc., R. *v.* McComas, 33 Ill. 185.

In Keiff *v.* Old Colony, etc., R., 117 Mass. 591, it was held that if goods exempt from attachment are taken from the carrier by an officer who attaches them as the property of the owner, it is no defence to an action against the carrier by the owner for failure to deliver the goods that they were taken from him against his will, and without fraud or collusion on his part, and that he was ignorant of the nature of the goods and supposed the attachment to be valid. Angell on Carriers, paragraph 335, note.

In Edwards *v.* White Line Transit Co., 104 Mass. 159, it was held to be no defence against a common carrier for breach of his contract to deliver goods that they were taken from him by an officer under an attachment against a person who was not their owner. See also The Mary Ann Guest *v.* Olcott 498, 1 Blatchf. C. C. 358.

6. Smith *v.* Wright, 1 Caines, 43; Monzes Case, 12 Co. 63.

7. Angell on Carriers, paragraph 300; Ostrander *v.* Brown, 15 Johns. (N. Y.) 39; Hemphill *v.* Chenie, 6 W. & S. (Pa.) 62; Galloway *v.* Hughes, 1 Bailey (S. Car.), 553; Blin *v.* Mayo, 10 Vt. 56; Row-

17. FACILITIES FOR DELIVERY AT TERMINUS—DISCRIMINATION.—Questions as to discrimination by carriers in facilities for delivery have chiefly arisen in England, and some examples of the decisions will be found cited in the notes.[1]

land *v.* Miln, 2 Hilt. (N. Y.) 150; Stead *v.* Payne, 14 La. Ann. 453. See also Morgan *v.* Dibble, 29 Tex. 107.

1. Terminal Facilities. Discrimination. —Where a common carrier that acted as superintendent of goods traffic for a railway company at a particular station was allowed by the railroad company to hold himself out as its agent for the receipt of goods to be carried by its line, and goods thus received by him were received without conditions which the company required of other shippers at that station, *held*, that these facts showed undue discrimination in favor of company's agent. Baxendale *v.* Bristol, etc., R. Co., 11 C. B. N. S. 787. So where the railway company received goods from a particular individual later than it did from the general public. Garton *v.* Bristol, etc., R. Co., 1 B. & S. 112. So where the railway company admitted its own vans with goods to be forwarded at a later hour than it admitted the vans of others. *In re* Palmer, London, Brighton & South Coast R. Co., L. R. 6 C. P. 194; Ragan *v.* Aiken, 9 Lea (Tenn.). 609; Johnson *v.* Pensacola, etc., R. Co., 16 Fla. 623. It was doubted if the railway company had any right to make such an arrangement even if it was for the convenience of the public, by giving an opportunity for sending parcels later than would otherwise be possible. *In re* Palmer, London, Brighton & South Coast R. Co., L. R. 1 C. P. 588.

Again, where a railway company employed an agent to receive goods at a particular station and to deliver them to consignees, and refused to deliver goods at that station to any other carriers without a written order specifying the particular goods, this was held to be an undue discrimination. Parkinson *v.* Great Western R. Co., L. R. 6 C. P. 554; Fishbourne *v.* Great Southern, etc., R. Co., 19 Sol. Jour. 859.

It is important to bear in mind that in determining whether an undue discrimination exists, the convenience of the railroad company is to be considered. Thus where by reason of increase of business the railway company was obliged to separate its mineral from its goods traffic at its station at O., and to handle its mineral traffic at another station, but still continued to deliver coal at O. to a large gas works near the station which had sidetracks, so that coal consigned to it could be removed at once, *held*, that this did not constitute an undue preference. Lees *v.* Lancashire, etc., R. Co., 18 Sol. Jour. 629.

In McCoy *v.* Cincinnati, etc., R. Co., 13 Fed. Rep. 3, it was held that a railroad company cannot bind itself to deliver to a particular stock-yard all live-stock coming over its line to a certain point, but it is bound to transport over its road and deliver to all stock-yards at such point, reached by its tracks or connections, all live-stock consigned, or which the shippers desire to consign, to them upon the same terms and in the same manner as under like conditions it transports and delivers to their competitors. McCoy *v.* Cincinnati, etc., R. Co., 13 Fed. Rep. 3.

The case of Audenried *v.* Phil. & Reading R. Co., 68 Pa. St. 370, involves an interesting question of the obligation of a railroad in regard to terminal facilities. In that case it was alleged that the plaintiff was a shipper of coal over defendant's road, that it had for many years allotted to shippers of coal certain spaces or parts of a wharf owned by the road at its terminus on the Delaware River; that such wharfage facility was necessary to the plaintiff for the reason that the coal was to be shipped in boats and had to lie on the wharf until it could be loaded on the boats; that defendant regularly furnished such wharfage facilities to all shippers of coal over its road, and its wharf was large enough to furnish such facilities to all shippers; that plaintiff had formerly enjoyed such facilities, but that the company had cut them off in order to coerce him as to another matter in dispute between them. Plaintiff sought to enjoin defendant from refusing him such facilities. Sharswood, J., on p. 379, says: "It is very doubtful whether the defendants, under their charter, are bound to provide any wharf accommodations for the coal dealers at Port Richmond (the terminal point on the Delaware River) and equally doubtful whether, having done so to a limited extent, not sufficient to supply the entire business, they are subject to any trust to use or dispose of that property in any particular way. . . . Transportation by a common carrier is necessarily open to the public upon equal and reasonable terms. An exclusive right

18. BURDEN OF PROOF.—The burden is ordinarily upon the carrier to show a valid excuse for the non-delivery of goods.[1]

7. Actions against Carriers.—1. PARTIES TO THE SUIT.—It is not always easy to determine the proper parties to sue in actions against carriers for damage to or loss of goods. The general rules are thus stated: That the proper person to sue the carrier is the person who employs him; that in the absence of any express contract, it is presumed that the carrier is employed by the person at whose risk the goods are carried; that is, the person whose goods they are, and who would suffer if they were lost.[2] Many authorities maintain that the person making the contract of transportation with the carrier is the person entitled to bring an action in case of a failure to deliver the goods or any injury thereto, and this irrespective of the question whether or not he has any title thereto.[3]

2. SUIT BY CONSIGNEE.—Where the consignor has parted with his interest in the goods, and the actual owner is the consignee, the latter alone is entitled to bring suit.[4] When, however, the consignor retains any contingent interest whatever in the goods other than the mere right of *stoppage in transitu*, he is entitled, in case of loss or non-delivery, to recover damages from the carrier.[5] Where both the consignor and the consignee have an interest in the goods, one having a general and the other a special property, either may

granted to any one is inconsistent with the rights of all others. This was not transportation but wharfage, the nature of which requires exclusive possession temporarily. The railroad company as trustees of the public have a necessary discretion in the management of such interests, and the motives of their proceeding cannot be reviewed by the court." Audenried *v.* Philadelphia, etc., R., 68 Pa. St. 370. See, generally, Rhodes *v.* Northern Pacific R., 21 Am. & Eng. R. R. Cas. 31.

1. Chapman *v.* New Orleans, etc., R., 21 La. Ann. 224; Wallace *v.* Sanders, 50 Ga. 134; Green, etc., Nav. Co. *v.* Marshall, 48 Ind. 506. See *infra*, this title, ACTIONS AGAINST CARRIERS.

2. Dicey, Parties to Actions, 87.

3. Party Contracting with Carrier may Bring Suit for Loss of Goods.—It is in many cases held that the person making the contract of transportation with the carrier is the party entitled to bring an action in case of a failure to deliver the goods, or an injury thereto, and this irrespective of the question whether or not he has any title thereto. Blanchard *v.* Page, 8 Gray, 281; Finn *v.* Railroad Co., 112 Mass. 524; Southern Express Co. *v.* Craft, 49 Miss. 480; Hooper *v.* Railway, 27 Wis. 81; Dunlop *v.* Lambert, 6 Cl. & Fin. 600; Davis *v.* James, 5 Burr. 2680; Moore *v.* Wilson, 1 T. R. 659; Mead *v.* Southeastern R. 18 W. R. 735. See, generally, Snider *v.* Adams Exp. Co., 77 Mo. 523; s. c., 16 Am. & Eng. R. R. Cas. 261.

4. Consignee Must Bring Suit.—But where the shipper has parted with his interest in the goods, and the actual owner is the consignee, the latter alone is entitled to bring suit. Blum *et al. v.* The Caddo, 1 Woods, 64; Griffith *v.* Ingleden, 6 S. & R. 429; Potter *v.* Lansing, 1 Johns. 215; Green *v.* Clark, 12 N. Y. 343; Krulder *v.* Ellison, 47 N. Y. 36; Canfield *v.* Northern R. Co., 18 Barb. 586; Gwyn *v.* Richmond, etc., R. Co., 6 Am. & Eng. R. R. Cas. 452; Everett *v.* Saltus, 15 Wend. 474; South & North Ala. R. Co. *v.* Wood, 72 Ala. 451; s. c., 18 Am. & Eng. R. R. Cas. 634; Denver, etc., R. *v.* Frame, 6 Colorado, 382; s. c., 18 Am. & Eng. R. R. Cas. 637; Dunlop *v.* Lambert, 6 Cl. & Fin. 600; Dutton *v.* Solomson, 3 Bos. & P. 582; Dawes *v.* Peck, 8 T. R. 330; Cork Distillery Co. *v.* Great Western, Southern, etc., R., L. R. 7 H. L. 269.

The mere fact of payment of freight by the consignor will not prevent the property and risk from passing to the consignee. King *v.* Meredith, 2 Camp. 639.

5. Consignor Retaining Interest Must Bring Suit.—When, however, the consignor retains any contingent interest whatever in the goods, other than the mere right of stoppage *in transitu*, he is entitled in case of loss or non-delivery to recover damages from the carrier. Sweet *v.* Barney, 33 N. Y. 335; Conger *v.* Rail-

sue; but a recovery by one constitutes a bar to an action by the other.[1]

3. ACTIONS IN TORT AND ON CONTRACT.—It was at first the almost universal practice to make the action one of tort for a breach of the carrier's public duty.[2] This is explained as an application to carriers of the strict principles of the common law which regarded them as the agents or servants of the public, and bound them to a measure of duty to the public distinct from that which would arise out of contract. In modern times the distinction is not regarded as of importance, particularly in view of the changes wrought in the forms of action and manner of pleading.[3]

road Co., 17 Wis. 447; W. & A. R. Co. *v.* Kelly, 1 Head, 158; Sanford *v.* Railroad Co., 11 Cush. 155; Price *v.* Powell, 3 N. Y. 322; O'Neill *v.* Railroad Co., 60 N. Y. 138; Wilson *v.* Wilson, 26 Pa. St. 393; Snider *v.* Adams Exp. Co., 77 Mo. 523; s. c., 16 Am. & Eng. R. R. Cas. 261; Denver, etc., R. *v.* Frame, 6 Colorado, 382; s. c., 18 Am. & Eng. R. R. Cas. 637; Sargent *v.* Morris. 3 B. & Ald. 277; Swain *v.* Shepherd, 1 M. & Rob. 223; Goodwin *v.* Douglas, 1 Cheves, 174; Coates *v.* Chaplin, 3 Q. B. 483; 11 L. J. Q. B. 315; Coombs *v.* Bristol, etc., R., 27 L. J. Exch. 401; 3 H. & N. 510; Hoare *v.* Great Western R., 37 L. T. (N. S.) 186; 25 W. R. 631. Heugh *v.* London, etc., R., 39 L. J. Exch. 48; L. R. 5 Exch. 51.

1. **Recovery Either by Consignor or Consignee Bars Recovery by the Other.**—Where both the consignor and the consignee have an interest in the goods, one having a general and the other a special property, either may sue, but a recovery by one constitutes a bar to an action by the other. Green *v.* Clark, 12 N. Y. 343; Steamboat Farmer *v.* McCraw, 26 Ala. 189; Denver, etc., R. *v.* Frame, 6 Colorado, 382; s. c., 18 Am. & Eng. R. R. Cas. 637. See also Metcalfe *v.* London, etc., R., 26 L. J. C. P. 333; 4 C. B. N. S. 317.

2. Ansell *v.* Waterhouse, 6 M. & S. 385.

3. The party injured by the breach of the carrier's duty may therefore elect at the present day either to sue in tort on the custom of the realm, or to waive the tort and bring assumpsit. Tattan *v.* Great Western R. Co., 2 Ell. & Ell. 344; Salstonstall *v.* Stockton, Taney's Decisions, 11.

The mere fact of there being a contract of carriage does not preclude the bringing of an action of tort for breach of the public duty of the carrier. "If the relation in which the carrier and passenger stand to one another—to wit, that of bailor and bailee—can be said to be created by contract, yet, as soon as that relation subsists, the law interposes and prescribes the rights and duties and liabilities of both parties. It regulates the degree of skill and care with which the passenger is to be carried, and any negligence on the part of the carrier is an unlawful act, is a breach of legal duty." Salstonstall *v.* Stockton, Taney's Dec. 11.

Where the action sounds in tort, such facts must be alleged as show that the defendant is bound to a public duty and has been guilty of a breach thereof. Baltimore & Ohio R. Co. *v.* Wilson, 31 Ohio St. 555. But a declaration which avers such facts distinctly, and bases its ground of action on a breach of the custom of the realm, is good. Pozzi *v.* Shipton, 8 Ad. & Ell. 963.

Where a declaration in tort averred that the carrier had received goods to be safely conveyed, but was careless and negligent, in consequence of which the goods were injured, it was held that such a declaration was good, and set forth a valid cause of action. Brotherton *et al. v.* Wood, 6 J. B. Moo. 141.

An action sounding in tort lies on the part of a master against a carrier for injuries done to the servant of the plaintiff, while being transported as a passenger by the defendant. Havens *v.* Hartford & New Haven R. Co., 28 Conn. 69; St. Louis, etc., R. Co. *v.* Dabby, 19 Ill. 353; Ames *v.* Union R. Co., 117 Mass. 541.

So an action in tort will lie by a passenger for a personal injury received through the negligence of the carrier while riding in a stage coach. Salstonstall *v.* Stockton, Taney's Dec. 11; Frink *et al. v.* Potter, 17 Ill. 406.

A mail agent transported by a railroad company in pursuance of a contract with the government may maintain an action against the company in tort for breach of its public duty. Hammond *v.* North Eastern R. Co., 6 S. Car. 130.

In those States where all forms of

4. EVIDENCE.—Whatever the form of action, the party bringing suit must show a delivery of the goods to the carrier, the latter's express or implied contract to carry and deliver, and his failure to perform it.[1]

The defence of the carrier, as is evident from principles and authorities already set forth, must be based upon evidence that the loss or injury occurred through causes which impose no liability upon him, because they are within the exceptions allowed to him generally by law, or by the terms of his special contract.

pleading are abolished, the court will look to the nature of the cause of action in order to determine whether the suit sounds in tort or contract. Heim *v.* McCaughan, 32 Miss. 17; New Orleans, etc., R. Co. *v.* Hurst, 36 Miss. 660.

An action by a husband against a carrier for injuries done to the plaintiff's wife while travelling as a passenger on the line of defendant, will be considered as sounding in tort. Cregin *v.* Brooklyn & Crosstown R. Co., 75 N. Y. 192.

An action against the owner of a steamboat for failing to stop as specified in its time-table to take the plaintiff aboard, will be deemed to sound in tort. Heim *v.* McCaughan, 32 Miss. 17.

So an action for forcibly ejecting plaintiff from a railroad train will be deemed to sound in tort. New Orleans, etc., R. Co. *v.* Hurst, 36 Miss. 660.

The true test to apply in all cases to determine the nature of the action is thus laid down in the case of Frink *v.* Potter, 17 Ill. 406.

"There is a class of cases arising out of contract where, by reason of the contract, the law raises a duty, for the breach of which duty an action on the case may be maintained; and in such cases the contract, being the basis and gravamen of the suit, must be alleged and proved. . . . But when the gist of the action is a breach of duty and not of contract, and the contract is not alleged as the cause of action, and when from the facts alleged the law raises the duty by reason of the calling of the defendant —as in case of innkeepers and common carriers—and the breach of duty is solely counted upon, the rules applying to actions *ex delicto* determine the rights of the parties." The question under consideration as to the form of action is frequently a matter of very great practical importance, as will be seen from a consideration of the following circumstances: Where the action is in tort a non-joinder of all the defendants cannot be taken advantage of. A recovery may be had against such as are sued. Ansell *v.* Waterhouse, 6 M. & S. 385; s. c., 2 Chitt. 1; McCall *v.* Forsyth, 4 W. & S. 179. Moreover, if the action be tort, proof need not be adduced that the defendants are all liable. A recovery may be had against such as the evidence discloses to be liable. Frink *et al. v.* Potter, 17 Ill. 406.

The form of action also makes a great difference as to the damages recoverable. Where the action is in contract, compensatory damages only can be recovered; where it sounds in tort, punitive or vindictive damages will be allowed. New Orleans, etc., R. Co. *v.* Hurst, 36 Miss. 660; Walsh *v.* Chicago, etc., R. Co., 42 Wis. 23; Hamlin *v.* Great Northern R. Co., 1 H. & N. 408.

Further, formal variances between the allegata and the probata are much less noted in actions sounding in tort than in those sounding in contract. Hence it was formerly deemed safest to declare always in tort on the special custom. In modern practice, however, this matter is of little importance, as mere formal variances are generally disregarded, or at least readily cured by amendment. Weed *v.* Saratoga & Schenectady R. Co., 19 Wend. (N. Y) 534.

It seems that no recovery can be had from a carrier in an action sounding in tort for failure to perform a contract of carriage on Sunday. The general public duty of carriers does not extend to that day. Walsh *v.* Chicago, etc., R. Co., 42 Wis. 23.

Where a party sues in contract, he can have none of the advantages of the action of tort above enumerated. Bayliss *v.* Lintott, L. R. 8 C. P. 345.

As to what will be deemed an action sounding in contract and not in tort, see School District *v.* Boston, Hartford & Erie R. Co., 102 Mass. 552. See, generally, St. Louis, etc., R. *v.* Heath, 42 Ark. 477; s. c., 18 Am. & Eng. R. R. Cas. 557.

1. Angell on Carriers (5th Ed.), § 461

5. BURDEN OF PROOF.—Where there is a clause in the contract limiting liability on the part of the carrier, and it appears that the loss has been occasioned by fire, or some other cause, then the question and burden is upon the plaintiff to prove negligence on the part of the carrier in causing the loss.[1] Where a carrier fails to deliver to the consignee goods intrusted to his charge, a presumption of negligence arises which it is for him to rebut.[2]

The burden of proof however is upon the carrier in the first instance to show that the cause of the loss was within the terms of the limitation.[3]

Where the loss is unexplained, or the apparent cause of it is not of such a character as fails to give rise to any *prima facie* presumption of negligence, the burden of proof is on the carrier to disprove negligence.[4]

When the facts establish that the cause of the loss is such as might or might not have been occasioned by the carrier's negligence, the question is for the jury.[5]

6. MEASURE OF DAMAGES.—When a common carrier fails to transport goods to the point of destination, the damages usually recovered are the value of the goods at that point with interest

et seq.; Hutchinson on Carriers, § 759 *et seq.* See, generally, Hot Springs, etc., R. *v.* Hudgins, 42 Ark. 485; s. c., 18 Am. & Eng. R. R. Cas. 643.

1. **Burden of Proof where Carrier's Liability is Limited by Contract.**—Where there is a clause limiting the liability on the part of the carrier, and it appears that the loss has been occasioned by fire, or some other cause within the exception, the burden is upon the plaintiff to prove negligence on the part of the carrier in causing the loss. Transportation Co. *v.* Downer, 11 Wall. 133; Boskowitz *v.* Adams Ex. Co., 9 Cent. L. J. 389; Cochran *v.* Dinsmore, 49 N. Y. 249; French *v.* Buffalo, etc., R. Co., 4 Kerzes (N. Y.), 108; Whitworth *v.* Erie R. Co., 6 Am. & Eng. R. R. Cas. 349; Little Rock, etc., R. *v.* Talbot, 39 Ark. 523; s. c., 18 Am. & Eng. R. R. Cas. 598; Little Rock, etc., R. *v.* Corcoran, 40 Ark. 375; s. c., 18 Am. & Eng. R. R. Cas. 602. See also South & North Alabama R. *v.* Wood, 71 Ala. 215; s. c., 16 Am. & Eng. R. R. Cas. 269.

2. American Express Co. *v.* Sands, 55 Pa. St. 140; Murphy *v.* Staton, 3 Munf. 239; Riley *v.* Horn, 5 Bing. 217; Clark *v.* Spence, 10 Watts, 335; Colt *v.* McMechen, 6 Johns. 160. See Farnham *v.* Camden & Amboy R. Co., 55 Pa. St. 53. Alabama, etc., R. *v.* Little, 12 Am. & Eng. R. R. Cas. 37; Rintoul *v.* New York Central, etc., R., 16 Am. & Eng. R. R. Cas. 144. *Compare* South & North Alabama R. *v.* Wood, 71 Ala. 215; s. c., 16 Am. & Eng. R. R. Cas. 267; Little Rock, etc., R. *v.* Talbot, 39 Ark. 523; s. c., 18 Am. & Eng. R. R. Cas. 598.

3. Alabama, etc., R. Co. *v.* Little, 12 Am. & Eng. R. R. Cas. 37.

4. Alabama, etc., R. Co. *v.* Little, 12 Am. & Eng. R. R. Cas. 37; Rintoul *v.* New York C. & H. R. Co., 16 Am. & Eng. R. R. Cas. 144.

5. Canfield *et al.*, *v.* Baltimore & Ohio R. Co., 16 Am. & Eng. R. R. Cas. 152.

In Canfield *v.* Baltimore, etc., R., 93 N. Y. 532; s. c., 16 Am. & Eng. R. R. Cas. 152, the court observe: "Had it not been for the rulings of the court below in this case, we should have considered the law to have been settled, beyond controversy, that proof of the non-delivery of property by a bailee upon demand, unexplained, makes out a *prima facie* case of negligence against such bailee in the care and custody of the thing bailed, and, in the absence of any evidence on his part, excusing such non-delivery, presents a question of fact as to the negligence of the bailee for the consideration of the jury. Burnell *v.* N. Y. C. R. Co., 45 N. Y. 185; 6 Am. Rep. 61; Magnin *v.* Dinsmore, 56 N. Y. 168; Steers *v.* Liverpool, N. Y. & P. Steamship Co., 57 N. Y. 6; 15 Am. Rep. 453; Fairfax *v.* N. Y. C. & Hudson R. R. Co., 67 N. Y. 11; Claflin *v.* Meyer, 75 N. Y. 260; 31 Am. Rep. 467; Schmidt *v.* Blood, 9 Wend. 268; Moore *v.* Evans, 14 Barb. 524. The principle upon which this rule is founded embraces as well the case of a partial a-

from the time they should have been delivered less the amount of freight.[1]

(*a*) *Measure of Damages in Case of Delay.*—Where the goods are unreasonably delayed the measure of damages is the difference between the market value of the goods at the time they should have arrived and their actual value when they did arrive, with interest from the former date less the freight.[2]

(*b*) *Measure of Damages in Case of Refusal to Transport.*—The measure of damages for breach of the contract to transport goods where they have never been taken into the carrier's possession is the difference between the value of the goods at the time they were to have been delivered at the point of destination and the value of goods of the same quality at the same time in the same place of shipment, together with interest on said amount from the time the goods should have arrived less the cost of transportation.[3]

of a total failure to deliver the subject of a bailment.

1. Damages for Failure to Deliver Goods.—Whitney *v.* Railroad Co., 27 Wis. 327; Chapman *v.* Railroad Co., 26 Wis. 295; Northern Transportation Co. *v.* McClary, 66 Ill. 233; Sturgess *v.* Bissell, 46 N. Y. 462; Gray *v.* Packet Co., 64 Mo. 47; Perkins *v.* Railroad Co., 47 Me. 573; Chicago & N. W. R. Co. *v.* Dickman, 74 Ill. 249; Hackett *v.* Railroad Co., 35 N. H. 390; O'Hanlon *v.* Railroad Co., 6 Best & S. 484; Erie R. Co. *v.* Lockwood 28 Ohio St. 358; Colt *v.* Illinois R. Co., 38 Iowa, 601; Robinson *v.* Merchants' Despatch Co., 45 Iowa, 470; Forbes *v.* Boston, etc., R. Co., 9 Am. & Eng. R. R. Cas. 76; Baltimore & Ohio R. Co. *v.* Humphrey, 9 Am. & Eng. R. R. Cas. 331; Louisville & N. R. Co. *v.* Mason, 11 Lea (Tenn.), 116; s. c., 16 Am. & Eng. R. R. Cas. 241. See also Jelletts *v.* St. Paul, etc., R., 16 Am. & Eng. R. R. Cas. 246; Leader *v.* Northern R., 3 Ontario C. P. Div., 92; s. c., 16 Am. & Eng. R. R. Cas. 287; Quarries *v.* Baltimore, etc., R., 20 W. Va. 424; s. c., 18 Am. & Eng. R. R. Cas. 535; Gulf, etc., R. *v.* Clark, 18 Am. & Eng. R. R. Cas. 628; South & North Alabama R. *v.* Wood, 72 Ala. 451; s. c., 18 Am. & Eng. R. R. Cas. 634.

2. Measure of Damages in Case of Delay.—Peet *v.* Chicago & N. W. R. Co., 20 Wis. 594; Cutting *v.* Grand Trunk R. Co., 13 Allen, 381; Ward *v.* New York Central R. Co., 47 N. Y. 29; Sisson *v.* Cleveland & Toledo R. Co., 14 Mich. 489; Spring *v.* Haskell, 4 Allen, 112; Dean *v.* Vaccaro & Co., 2 Head, 488; Ingledew *v.* Northern R., 7 Gray, 86; The Vaughan & Telegraph, 14 Wall. 258; Wilbert *v.* New York & Erie R. Co., 19 Barb. 36; Lakeman *v.* Gunnell, 5 Bosw. 625; McHenry *v.* Phila., W. & B. R. Co., 4 Harring. 448; Scott *v.* Boston & New Orleans S. Co., 106 Mass. 468; Rice *v.* Baxendale, 7 H. & N. 96; British Columbia, etc., Co. *v.* Nettleship, L. R. 3 C. P. 499; Kansas Pac. R. Co. *v.* Reynolds, 8 Kans. 623; Michigan S. & N. Ind. R. Co. *v.* Carter, 13 Ind. 164; Holden *v.* New York Central R. Co., 54 N. Y. 662; Illinois Central R. Co. *v.* McClellan, 54 Ill. 58; Blumenthal *v.* Brainerd, 38 Vt. 402; Faulkner *v.* South Pac. R. Co., 51 Mo. 311; Chicago & N. W. R. Co. *v.* Dickinson, 74 Ill. 249; Weston *v.* Grand Trunk R. Co., 54 Me. 376; Bailly *v.* Shaw, 24 N. H. 297; Ringgold *v.* Haven, 1 Cal. 108; Hart *v.* Spalding, 1 Cal. 213; Galena & Chicago R. Co. *v.* Rae, 18 Ill. 488; Chicago & N. W. R. Co. *v.* Stambro, 87 Ill. 195.

And the rule as to delay applies even when there has been no contract by the carrier to transport and deliver the goods within a specified time, for the law in such case always implies an undertaking to perform the transportation within a reasonable time. Chicago & Alton R. Co. *v.* Thrapp, 5 Ill. App. 502.

The carrier defendant cannot complain that evidence as to the value of the goods is confined to the place of shipment, as the presumption is, in the absence of other evidence, that their value there is less than at the point of destination. Rome R. Co. *v.* Sloan, 39 Ga. 636; Lindley *v.* Richmond, etc., R., 9 Am. & Eng. R. R. Cas. 31; Evansville, etc., R. *v.* Montgomery, 9 Am. & Eng. R. R. Cas. 195; Louisville, etc., R. *v.* Mason, 11 Lea (Tenn.), 116; s. c., 16 Am. & Eng. R. R. Cas. 241; Peterson *v.* Case, 18 Am. & Eng. R. R. Cas. 578.

3. Refusal to Transport.—Galena, etc., R. *v.* Rae, 18 Ill. 488; Cowley *v.* David-

(*c*) *Measure of Damages in Case of Refusal to Deliver.*—Where the carrier refuses to deliver the goods, except upon an unreasonable condition, this is equivalent to conversion, and the measure of damages will be the value of the goods at the time of the conversion.[1]

(*d*) *Measure of Damages for Delivery at Wrong Destination.*—Where the carrier delivers at the wrong destination, the measure of damages is the difference between the value of the goods where they are delivered and the value at the point where they should have been delivered.[2]

(*e*) *Contract of Sale as a Criterion of Damages.*—Where goods are forwarded by the carrier in pursuance of a contract of sale between the consignor and consignee, the contract price furnishes the measure of damages in case of loss or delay.[3] Where in consequence of such delay the consignee refuses to accept the goods and they are therefore sold, the measure of damages is the difference between the contract price and the value on the day when they are actually delivered.[4] This rule applies even where the consignee has under the contract the condition to refuse or accept the goods.[5]

(*f*) *Damages for Delay where Goods remain Salable.*—The mere fact that the goods are injured by delay does not render the carrier liable for their full value if they are still applicable to the intended use.[6] Where goods are delayed and further expense is necessarily incurred to put them in salable condition, the carrier must also bear this expense.[7]

son, 13 Minn. 92; Harvey *v.* Connecticut, etc., R., 124 Mass. 421.

Where the article which the carrier refuses to carry is perishable, the shipper must not remain supine, but must adopt whatever means are at hand to forward the goods at once. He cannot at his leisure send them forward in parcels, and hold the carrier liable for the difference in freight. Ward's Central & Pacific Lake Co. *v.* Elkins. 34 Mich. 439.

1. **Refusal to Deliver.**—Loeffler *v.* Keokuk, etc., Co., 7 Mo. App. 185; Rice *v.* Indianapolis, etc.. R., 3 Mo. App. 27.

2. **Wrong Destination.**—Galena, etc., R. *v.* Rae, 18 Ill. 488.

3. **Sale as Criterion.**—Illinois, etc., R. *v.* McClellan, 54 Ill. 58; Medbury *v.* New York, etc., R., 26 Barb. (N. Y.) 564.

4. Deming *v.* Grand Trunk, etc., R., 48 N. H. 455.

5. Magnin *v.* Dinsmore, 62 N. Y. 35.

6. **Delay.**—Hackett *v.* B., C. & M. R., 35 N. H. 390.

7. Winne *v.* Illinois Central R., 31 Iowa, 583. .See, generally, Jones *v.* Grand Trunk R., 74 Me. 356; s. c., 16 Am. & Eng. R. R. Cas. 265.

Effect of Notices of Special Circumstances.—Where a carrier is notified, either expressly by the nature of the articles, or by custom, of any special circumstances which make delay or loss of particular moment to the consignee, he is liable to respond in damages for all injury which he might reasonably have foreseen would occur; but, unless such notice is given, he is not liable further than is indicated above. Illinois Central R. Co. *v.* Cobb *et al.*, 64 Ill. 128; Vicksburg & M. R. Co. *v.* Ragsdale, 46 Miss. 458; Gee *v.* Lancashire & Yorkshire R. Co., 6 H. & N. 211; Toledo, W. & W. R. Co. *v.* Lockhart, 71 Ill. 627; King *v.* Woodbridge, 34 Vt. 565; Chicago, B. & Q. R. Co. *v.* Hale, 83 Ill. 360; Great Western R. Co. *v.* Redmayne, L. R. 1 C. P. 329.

Where a saw-mill is delayed in transportation, the expense of idle hands and the loss of profits from contracts actually on hand is recoverable. The carrier might, from the nature of the article, have foreseen the loss. Vicksburg & M. R. Co. *v.* Ragsdale, 46 Miss. 458. And so where the delay was occasioned in carrying live-stock to market, where the carrier had contracted to deliver them on a certain day, which was market-day, it was held that the said carrier was liable for the expenses of keeping the cattle till

the next market-day. Toledo, W. & W. R. Co. *v.* Lockhart, 71 Ill. 627; King *v.* Woodbridge, 34 Vt. 565.

In Priestly *v.* Northern I. & C. R. Co., 26 Ill. 205, certain machinery was unduly delayed, and suit was brought against the carrier. The court, in its opinion, says: "Had the plaintiffs notified the defendants for what purpose they designed the machinery and the circumstances of their necessities, they might have brought forward other topics and elements of damage, such as they attempted to show on the trial—that a large number of hands were of necessity under pay and idle, loss of promised custom out of which profits would have been made. In the absence of notice proof of this kind was properly rejected."

And where the carrier knew that certain corn intrusted to its care was to be sold to the government at a certain price, it was held liable, having lost the corn, for the amount which the government would have paid. Illinois Central R. Co. *v.* Cobb *et al.*, 64 Ill. 128.

But the notice will not be construed to extend the carrier's liability any further than it may be inferred from its terms to have informed the carrier of the probable results of failure on his part punctually to fulfil his contract. Home *v.* Midland R. Co., L. R. 8 C. P. 131. See, generally, Missouri Pacific, etc., R. *v.* Nevin, 16 Am. & Eng. R. R. Cas. 252; Cunningham *v.* Great Western R., 49 L. T. N. S. 394; s. c., 16 Am. & Eng. R. R. Cas. 254; Gulf, etc., R. *v.* Maetze, 18 Am. & Eng. R. R. Cas. 613.

Business Profits—Existing Contracts.—The loss of mere speculative profits in consequence of the delay of the carrier, or his failure to deliver the goods, is not an element of damage. The recovery is limited to compensation for loss of profits on existing contracts. Chicago, B. & Q. R. Co. *v.* Hale, 83 Ill. 360; Frazer *v.* Smith, 64 Ill. 128; Priestly *v.* Northern Ind. & C. R. Co., 26 Ill. 205; Vicksburg & M. R. Co. *v.* Ragsdale, 46 Miss. 458. Where, therefore, in an action for an injury to a jack, plaintiff endeavored to include in his damages the amount of profits he might have recovered from letting the animal out to serve mares, it was held that, there being no evidence that plaintiff had made contracts to that effect, or notified the defendant thereof, his damages must be confined to the value of the jack. On the other hand, where there was unreasonable delay in transporting a saw-mill, the plaintiff was held entitled to recover for loss on contracts actually entered into and on hand pending the delay. Vicksburg & M. R. Co. *v.* Ragsdale, 46 Miss. 458.

Consequential and Remote Damages.—In some cases the damages sought to be recovered are so evidently consequential that there is no room for question. A consignee cannot recover for his loss of time in waiting for delayed goods. Ingledew *v.* Northern R. Co , 7 Gray, 86. Nor for his hotel expenses during the same period. Woodger *v.* Great Western R. Co., L. R. 2 C. P. 318.

In Pennsylvania R. Co. *v.* Titusville Plank Road Co., 71 Pa. St. 350, the railroad company undertook to carry certain planks from one station to another, which were to be used in making a plank road. They were not carried according to agreement, and the consignee was allowed to recover the difference between the prices of plank at the two stations. The court held, however, that it was error to instruct the jury that plaintiff was entitled, in addition, to recover the increased expense of putting down the plank road consequent upon the non-delivery. As to this point Sharswood, J., remarked: "To say that the increased expense of labor in putting down the planks in consequence of such delay would be such an immediate and proximate effect as ought to be charged to the common carriers seems to be entirely too indefinite. It would include a rise of wages, stormy weather, bad roads in consequence, which would have been entirely beyond what would naturally have been within the view of the parties, and might well have happened even had the railroad company punctually performed its duty. The natural consequences of delay and stoppage of work and payment of wages and expenses arising therefrom, and the loss from not having the work finished at the time it otherwise would have been, but for the rule."

Executory Contracts.—In an action against a carrier for breach of an executory contract to carry goods, the measure of damages is the difference between the market value of the goods at the intended points of shipment and delivery, less the freight. The fact that the owner of the goods informed the carrier at the time of making the contract that he did so because he wished to make contracts with third persons for the sale of the goods to them, does not entitle him to recover of the carrier the profits which he would have made out of such contracts but for the breach of the contract of carriage. Harvey *v.* Connecticut & P. R. Co., 124 Mass. 421.

How Value is Estimated.—In order to

Measure of Damages where Special Damage is Occasioned by Loss or Delay.—It is said that compensation for the actual loss sustained is the fundamental principle upon which our law bases the allowance of damages. It will not indeed make this allowance upon a calculation of speculative profits, for this would be proceeding upon contingencies, and would involve the subject in too much uncertainty. It would be too difficult for practical application. Nor will the law indemnify for remote or indirect losses. The loss must be the natural and proximate consequence of the act. And when this can be ascertained without uncertainty the principle of comparison will be adopted.[1] It is said to be impossible

determine the value of the goods at the point of destination, the current newspapers, giving the general state of the markets, are admissible in evidence, and are deemed far more reliable than private memoranda. Sisson *v.* Cleveland, etc., R., 14 Mich. 489.

Where the only evidence of value is the price stated in the bill when the goods were purchased the jury is confined to this. Blumenthal *v.* Brainerd, 38 Vt. 402.

Where the liability of the first carrier has terminated short of the point of destination by handing the goods over to a connecting line, the condition of the goods at the point of destination is nevertheless admissible in an action against the first carrier for an unreasonable delay occurring on his line. Marshall *v.* New York Central, etc., R., 45 Barb. (N. Y.) 502.

Interest.—Interest is allowed on the amount recovered from the time when the goods should have been delivered. Kyle *v.* Laurens, etc., R., 10 Rich. (S. Car.) 382; Robinson *v.* Merchants' Desp. Co., 45 Iowa, 420. Interest runs from date of judgment, not from date of verdict. Quarrier *v.* Baltimore, etc., R., 20 W. Va. 424; s. c., 18 Am. & Eng. R. R. Cas. 535. See, generally, Arthur *v.* Chicago, etc., R., 16 Am. & Eng. R. R. Cas. 283.

But the allowance of interest is to some degree within the discretion of the court, and where there has been no negligence on the carrier's part, the recovery of interest is not permitted. Gray *v.* Missouri River Packet Co., 64 Mo. 49.

Factor's Commissions.—The amount of the factor's commission on the value of the goods is not allowed as an abatement. Kyle *v.* Laurens, etc., R., 10 Rich. (S. Car.) 382.

Freight.—Although the amount of the freight is generally deducted from the damages, yet there can be no such deduction when the amount of the freight does not appear. Gray *v.* Missouri River Packet Co., 64 Mo. 47.

Notice of Intention to Claim Damages for Loss of Goods.—A clause in a bill of lading exempting a company from liability for loss of goods, unless a claim for damages is presented within a specified time after the loss, is ordinarily held to be reasonable and valid, provided the specified time is not unreasonably short. Express Co. *v.* Caldwell, 21 Wall. 264; Southern Express Co. *v.* Hunnicutt, 54 Miss. 566; Weir *v.* Express Co., 5 Phila. 355; United States Express Co. *v.* Harris, 51 Ind. 127; Capenart *v.* Seaboard, etc., R. Co., 77 N. Car. 355; Lewis *v.* Great Western R. Co., 5 H. & N. 867; Texas Central R. *v.* Morris, 16 Am. & Eng. R. R. Cas. 259; Gulf, etc., R. *v.* Maetze, 18 Am. & Eng. R. R. Cas. 613. But see, *contra*, Adams Express Co. *v.* Reagan, 29 Ind. 21; Southern Express Co. *v.* Caperton, 44 Ala. 101.

Where an unreasonably short time is given within which to present the claim, the clause is held to be invalid. Memphis R. Co. *v.* Holloway, 4 L. & Eq. R. 425; Browning *v.* L. I. R. Co., 2 Daly, 117.

Presentation of Claim Before Withdrawal of Goods.—In certain cases where the injury, if any, is in its nature patent, it has been held that a stipulation is not unreasonable requiring the presentation of a claim for damages before the goods are taken away. Goggin *v.* Kansas, etc., R. Co., 12 Kans. 416; Bill *v.* Kansas, etc., R. Co., 63 Mo. 314; Capenart *v.* Seaboard, etc., R. Co., 77 N. Car. 355.

Notice of Claim not Condition Precedent.—A clause requiring a claim for loss or damage to be presented within a specified time after the goods are delivered has no application in a case where there has been no delivery of the goods. Porter *v.* Southern Express Co., 4 S. Car. 135.

Such a clause has in some cases been held not a condition precedent to plaintiff's right of action. If relied on as a defence, it must therefore be specially set up. Westcott *v.* Fargo, 61 N. Y. 452.

1. **Special Damages from Loss or De-**

to lay down any fixed rule for estimating the damages in such cases. In a well-considered case the following principles were established: 1st. The proximate and natural consequences of the breach must be always considered. 2d. Such consequences as from the nature and subject-matter of the contract may be reasonably admitted to have been in the contemplation of the parties at the time the contract was entered into may be considered. 3d. Damages which may fairly be supposed not to have been the necesnecessary and natural consequences of the breach cannot be recovered unless by the terms of the agreement or by express notice they were brought within the expectation of the parties. 4th. Loss of property in business cannot be allowed unless the data of estimation are so definite and certain that they can be ascertained reasonably by calculation, and then the carrier must have notice either from the nature of the contract itself, or by explanation of the circumstances at the time the contract was made that such damages would inure from non-performance. 5th. If the contract is made with reference to embarking in a new business, the speculative profits therein which may be supposed to have been defeated by the breach, cannot be recovered. 6th. Where the articles in question are to be applied to a particular use, and this is known to the carrier, he is liable for damages fairly attributable to the delay. 7th. The party injured must not remain supine, but must take such steps to reduce his loss as lie in his power.[1]

Liability when Goods are Shipped at a Fixed Valuation.—When the goods are transported at a fixed valuation, this will control in any event.[2]

Carrier's Lien.—As to the lien of carrier for charges of freight, see FREIGHT.

Carriers of Animals.—As to carriers of animals, see CARRIERS OF LIVE STOCK.

lay.—Medway *v.* New York, etc., R., 26 Barb. (N. Y.) 564.

1. Vicksburg, etc., R. *v.* Ragsdale, 46 Miss. 458.

Loss of Household Goods, Furniture, etc.—In cases where the articles lost are household goods or the like, the same strict rule cannot be applied, as such articles cannot be said to have a fixed market value. Marsh *v.* Union Pacific R. Co., 6 Am. & Eng. R. R. Cas. 359; Denver & South Park R. Co. *v.* Frame, 6 Col. 382.

See particularly Houston & T. C. R. Co. *v.* Burke, 9 Am. & Eng. R. R. Cas. 59, where the question arose as to the measure of damages for the loss of a family picture.

Evidence of Value of Goods at Destination.—In an action against a carrier for causing the loss of goods, the shipper may testify as to their value, though he is ignorant of their value at their destination. Marsh *v.* Union Pacific R. Co., 6 Am. & Eng. R. R. Cas. 359.

2. Carrier Bound by his Valuation.—Atchison, etc., R. *v.* Miller, 16 Neb. 661; s. c., 18 Am. &. Eng. R. R. Cas. 545; Hart *v.* Pennsylvania R., 112 U. S. 331; s. c., 18 Am. & Eng. R. R. Cas. 604.

Authorities for Carriers of Goods.—Angell on Carriers (5th Ed.); Hutchinson on Carriers; Lawson's Contracts of Carriers; Redman's Law of Railway Carriers (2d Ed., Lond. 1882), which is a valuable and admirably condensed epitome of the English law upon the subject; American and English Railroad Cases, vols. 1 to 27 inclusive, with annotations.

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