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WILLIAM MACK AND HOWARD P. NASH

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TABLE OF TITLES, EDITORS, AND CONTRIBUTORS

CITE THIS VOLUME

5 Cyc.

FOLLOWED BY PAGE.

BAIL

By Joseph A. Joyce* and Howard C. Joyce†

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* Author of "A Treatise on Marine, Fire, Life, Accident, and Other Insurances"; and joint author of "A Treatise on Electric Law."

† Joint author of "A Treatise on Electric Law."

CROSS-REFERENCES

For Bonds, Undertakings, or Recognizances of Bail or in the Nature of Bail:
For Appearance, see APPEARANCES.
For Jail Liberties, see EXECUTIONS.

For Bonds, Undertakings, etc.—(*continued*)
For Prison Limits, see EXECUTIONS.
For Stay of Execution, see EXECUTIONS.
In Admiralty, see ADMIRALTY.
In Bastardy Proceedings, see BASTARDS.
In Contempt Proceedings, see CONTEMPT.
In Court-Martial Proceedings, see ARMY AND NAVY.
In Ne Exeat Proceedings, see NE EXEAT.
In Proceedings Against Poor Debtors, see ARREST; EXECUTIONS.
On Appeal or Error, see APPEAL AND ERROR.
On Arrest on Execution, see EXECUTIONS.
To Keep the Peace, see BREACH OF THE PEACE.
Liability for Requiring Excessive Bail, see JUDGES; JUSTICES OF THE PEACE.
Proceedings to Hold to Bail, see ARREST; CRIMINAL LAW.
Rights, Duties, and Liabilities of Sureties Generally, see PRINCIPAL AND SURETY.
See also ARREST; CRIMINAL LAW; ESCAPE.

I. DEFINITION.[1]

The word bail is used both as a verb and as a noun. As a verb it means to deliver an arrested person to his sureties[2] upon their giving security[3] for his appearance, at the time and place designated, to submit to the jurisdiction and judgment of the court.[4] In its substantive sense it may be defined as the sureties into whose custody the arrested person is delivered, and who are considered as having control of his person.[5] And these definitions apply to bail given and taken

1. In Canadian law "bail" signifies a lease; thus bail *emphyteotique*, a lease for years, with a right of indefinite renewal. Rapalje & L. L. Dict.

In French law the word "bail" is used in several contracts of hiring. Rapalje & L. L. Dict.

2. Bail saves a man from imprisonment, his friends undertaking for him that he shall appear at a day certain and answer whatever shall be objected to him in a legal way. Ramsey *v.* Coolbaugh, 13 Iowa 164 [*citing* 1 Bacon Abr. 321]. Blackstone defines bail as "a delivery or bailment, 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 gaol." *In re* Siebert, 61 Kan. 112, 116, 58 Pac. 971.

3. Bail-bond.— The obligation entered into by the surety or sureties. Anderson L. Dict.; Rapalje & L. L. Dict. [*citing* Graecen *v.* Allen, 14 N. J. L. 74]. See also *infra*, II, G; III, F.

Bail-piece.—A certificate from the record in a case that one or more persons named become bail in a certain sum of money. Anderson L. Dict.; Rapalje & L. L. Dict. A piece of parchment containing the names of special bail, with other particulars, which, being signed by a judge, was filed in the court in which the action was pending, and notice of the bail having justified was then given to the opposite party. Wharton L. Lex. [*citing* Bayley Pr. 361].

For forms of bail-piece see Mich. Comp. Laws (1897), § 10,001; N. J. Gen. Stat. (1895), p. 2546, § 75; Vt. Stat. (1894), pp. 979, 980; Va. Code (1887), § 3962; W. Va. Code (1899), c. 156, § 8.

Recognizance entered into before the county court, by a person in custody on a criminal charge, that the respondent shall make his personal appearance before the court then sitting, and remain from time to time, and from day to day, and shall answer, and shall abide the orders and decrees of the court, and not depart without leave, is a legal and valid recognizance. Treasurer *v.* Rolfe, 15 Vt. 9.

Special bail distinguished from delivery bond.—A delivery bond is not special bail. There is a wide distinction between the two obligations upon general principles. Ramsey *v.* Coolbaugh, 13 Iowa 164.

4. Bail as a verb.—Anderson L. Dict.; Rapalje & L. L. Dict. See also *infra*, note 5.

5. Bail as a noun.—Anderson L. Dict.; Rapalje & L. L. Dict.; 3 Bl. Comm. 290; Nicolls *v.* Ingersoll, 7 Johns. (N. Y.) 145; Devine *v.* State, 5 Sneed (Tenn.) 622; Taylor *v.* Taintor, 16 Wall. (U. S.) 366, 21 L. ed. 287.

Bail absolute is usually an obligation to the state to pay a specified sum of money for failure of the principal to account for moneys held in the capacity of administrator, trustee, or in other fiduciary capacity. Anderson L. Dict.

Bail above, bail below, and special bail explained.— In Blackstone's time the d fendant might put in special bail to the sheriff by entering into an obligation called a bail-bond with sureties who were real, responsible bondsmen, as distinguished from common bail or fictitious persons. This bail-bond, or bail to the sheriff below, was given to insure the defendant's appearance at the return of the writ. What was commonly called putting in

to release persons whether under arrest in civil actions[6] or on charges of crime.[7]

II. IN CIVIL ACTIONS.

A. Effect of Admission to Bail. While the giving of bail, as a general rule, restores a person to his freedom, yet technically he is considered as being delivered into the custody of his sureties, they being jailers of his own choosing, who have a control and dominion over him.[8]

B. Right to Release on Bail — 1. IN GENERAL. The right to release on bail in a civil proceeding is conceded, but it is subject almost entirely to statutory control.[9] If, however, an officer has a debtor in his keeping under the mittimus and

bail above was an appearance, according to the exigency of the writ, upon the return-day thereof, or within a certain time thereafter, effected by putting in and justifying bail to the action. In this bail above, or bail to the action, there was a joint and several undertaking by the sureties that, if the defendant were condemned in the action, he should pay the costs and condemnation or render himself a prisoner, which recognizance was denominated a bail-piece. It was a requirement that such bail above must be put in either in open court or before a judge thereof, or else in the country before a commissioner appointed therefor. Special bail was required only upon actions of debt, on the case in trover, or for money due, and even the right was subject to certain limitations. It was also required of heirs, executors, and administrators, in actions where the wrong was of their own committing, as in cases of *devastavit*, or the wasting of the goods of deceased. 3 Bl. Comm. 290–293; Anderson L. Dict.; Rapalje & L. L. Dict.

Bail in admiralty actions see ADMIRALTY V, L [1 Cyc. 871]; Rapalje & L. L. Dict.

Bail in error.— Bail given by defendant in an action when he is going to bring error on the judgment and wishes execution stayed in the meantime. Rapalje & L. L. Dict. See also *infra*, III, G.

Common bail or straw bail.—Where there was merely a personal service of the copy of the writ or process, or a notice in writing to appear and defend, the defendant could appear and put in sureties, called common bail, for his future attendance and obedience; these sureties being the same two imaginary persons who were pledges for the plaintiff's prosecution, or, if the defendant failed to put in such bail, the plaintiff might thereafter enter such appearance and file such bail for him, and proceed thereupon. 3 Bl. Comm. 287, 295; Anderson L. Dict.; Rapalje & L. L. Dict.

6. **In civil actions.**— "Upon those contracts of indemnity which are taken in legal proceedings as security for the performance of an obligation imposed or declared by the tribunals, and known as undertakings or recognizances, the sureties are called bail." Cal. Civ. Code (1899), § 2780; N. D. Rev. Codes (1899), § 4623. See also, generally, *infra*, II.

7. **In criminal prosecutions** admission to bail is defined as the order of a competent court or magistrate that the defendant be discharged from actual custody on bail; and taking of bail consists in the acceptance by a competent court or magistrate of the undertaking of sufficient bail for the appearance of defendant according to the terms of his undertaking, or that the bail will pay the state a specified sum. Ala. Crim. Code (1896), §§ 4348, 4349; Ariz. Pen. Code (1901), §§ 1069, 1070; Cal. Pen. Code (1899), § 72; Bullitt's Crim. Code (Ky. 1899), §§ 72, 73; Mont. Pen. Code (1895), §§ 2340, 2341; Nev. Comp. Laws (1900), §§ 4460, 4461; Utah Rev. Stat. (1898), §§ 4983, 4984. See also, generally, *infra*, III.

8. **Technically in custody.**— Hammons *v.* State, 59 Ala. 164, 31 Am. Rep. 13; Cain *v.* State, 55 Ala. 170; Taylor *v.* Taintor, 16 Wall. (U. S.) 366, 21 L. ed. 287; Reese *v.* U. S., 9 Wall. (U. S.) 13, 19 L. ed. 541. See also Wright *v.* Grant, 5 N. Y. St. 324. In an early case, where a bail-bond was taken by a sheriff under an agreement that it should be inoperative unless other or additional bail should be procured by the defendant, it was held that the defendant might be retaken by the sheriff before the writ was returned, if the additional bail provided for was not furnished. Bronson *v.* Noyes, 7 Wend. (N. Y.) 188.

9. **Under this right a person arrested** is, upon giving a sufficient bail-bond, legally entitled to be released, and if the sheriff thereupon, and upon compliance with the law governing the matter, refuses to discharge him, such sheriff is liable therefor. Richards *v.* Porter, 7 Johns. (N. Y.) 137. See also Wass *v.* Bartlett, 10 Gray (Mass.) 490; Brady *v.* Brundage, 2 Thomps. & C. (N. Y.) 621; Lake *v.* Haseltine, 12 N. Y. Civ. Proc. 309, 18 Abb. N. Cas. (N. Y.) 320.

Right to bail in criminal prosecutions see *infra*, III, A.

State statute controls.— Stone *v.* Murphy, 86 Fed. 158, construing U. S. Rev. Stat. (1878), §§ 990, 991. See in this connection Gardner *v.* Isaacson, Abb. Adm. 141, 9 Fed. Cas. No. 5,230, 3 Am. L. J. N. S. 193, 8 N. Y. Leg. Obs. 77, decided under the supreme court rules of 1845.

As to the practice in admiralty see ADMIRALTY, V, I, 2, b [1 Cyc. 867], and Martin *v.* Walker, Abb. Adm. 579, 16 Fed. Cas. No. 9,170.

The habeas corpus act, though it contains no express provision for relief in civil actions,

the statute does not prescribe who shall receive the bond for the debtor's release, the latter is entitled to be released upon a tender to the officer of an adequate and sufficient bond.[10]

2. As Affected by Assignment of Prisoner. Where an arrested person is entitled to bail, his right thereto will not be affected by the fact that the sheriff by whom he was arrested has delivered him over to his successor in office subsequent to the arrest and before the prisoner has given bail.[11]

3. As Affected by Erroneous Order. Where the court has power to issue writs of habeas corpus and admit to bail pending the hearing upon the writ, and the petitioner is before the court in such proceeding, so that it has jurisdiction of the subject-matter and of the person, an order authorizing the taking of bail, though erroneous, must be obeyed by the officer in whose custody the arrested person is, and the latter, upon tendering the desired bond, is entitled to be admitted to bail.[12]

4. As Affected by Surrender by Bail. Though a person surrendered by his bail is returned to all the disadvantages of the original arrest, he is, however, by the same act, restored to such privileges as existed thereunder, one of which was the right to release on bail, and he is therefore entitled to obtain his liberty by entering new bail.[13]

5. In Actions Against Joint Debtors. Where an action is commenced against joint debtors, and the plaintiff proceeds on the arrest of one of them, the latter may, by habeas corpus, remove the cause and put in bail for himself only.[14]

6. Time of Giving Bail. It is decided that bail may be given at any time before execution against the person,[15] but a rule to discharge a defendant on bail before he has been arrested is premature.[16]

C. Necessity of Special Bail[17] — 1. When Not Required. In certain juris-

is declared to embrace civil causes as well as criminal offenses, and the writ will lie to compel admission to bail in civil actions. *In re* Cazin, 56 Vt. 297.

In proceedings requiring bail in actions for the recovery of personal property the object of the statute is either to secure the property or the payment of the price therefor, and not to punish the debtor for illegal acts in obtaining it, and therefore, where it satisfactorily appears that a defendant imprisoned in such an action is unable either to produce the property or give security for the eventual condemnation money, it is proper for the court to discharge him on his own recognizance. Garrett *v.* Underwood, 102 Ga. 558, 27 S. E. 665; Ragan *v.* Chicago Packing, etc., Co., 93 Ga. 712, 21 S. E. 143. *Compare* Tracy *v.* Griffin, 50 Barb. (N. Y.) 70 [*disapproving* Elston *v.* Potter, 9 Bosw. (N. Y.) 636], construing N. Y. Code Proc. § 179.

10. Tender of bond to officer.—Wilson *v.* Gillis, 15 Me. 55.

Officer's duty to procure.— In the absence of a statutory provision a sheriff or other officer having a prisoner in his custody is under no obligation to travel about with such prisoner to enable him to obtain bail. Page *v.* Staples, 13 R. I. 306.

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

12. Matson *v.* Swanson, 131 Ill. 255, 23 N. E. 595 [*reversing* 31 Ill. App. 594]. In this case the prisoner was held, by virtue of a writ capias ad satisfaciendum, and the custody of the prisoner under this writ was held to be terminated by the writ of habeas corpus, since to the authority of this writ all other writs must yield.

13. New bail.— McCallum *v.* Barnard, 58 How. Pr. (N. Y.) 169; *Ex p.* Mason, 2 Ashm. (Pa.) 239. But see Chiswell *v.* Ellzey, Rice (S. C.) 29.

14. Corlies *v.* Wyckoff, 7 Cow. (N. Y.) 145.

15. Bostwick *v.* Goetzel, 57 N. Y. 582.

16. Robbins *v.* Redheffer, 33 Wkly. Notes Cas. (Pa.) 220.

New bail after surrender by bail may be entered even after verdict and judgment, but before a capias ad satisfaciendum has been taken out. *Ex p.* Mason, 2 Ashm. (Pa.) 239.

17. Entry of common bail by plaintiff to perfect appearance.— Under the early decisions there were certain prerequisites necessary to perfect appearance by the plaintiff, and it may be generally stated that entry of common bail has, by several adjudications, been included therein, and although this was a matter of form, nevertheless the filing of such bail has been decided to be necessary even though defendant acknowledges service of process, or has agreed to appear. The plaintiff's right, however, in this respect depends, at least under the early practice, upon compliance with certain required legal formalities. Anonymous, 20 N. J. L. 494; Corse *v.* Colfax, 5 N. J. L. 801; Anonymous, 2 Wend. (N. Y.) 630; Phelps *v.* Bronson, 4 Cow. (N. Y.) 61; Byrne *v.* Morris, 2 Cow. (N. Y.) 472; Lane *v.* Cook, 8 Johns. (N. Y.) 359; Smith *v.* Bohn, 4 Wash. (U. S.) 127, 22 Fed. Cas. No. 13,015.

dictions and in certain proceedings defendant had the right to appear and plead without first filing special bail to the action.[18] This rule has been held to include actions for libel or slander,[19] actions of debt upon foreign judgments,[20] actions on bonds containing collateral conditions,[21] proceedings in original attachment,[22] and proceedings by petition and summons.[23]

2. When Required. In some jurisdictions, however, a contrary rule has prevailed, to the extent at least that appearance has been refused without bail.[24] Thus special bail has been required in an action of covenant for rent.[25] So in an action

See also Appearances, III, A, 2 [3 Cyc. 503], as to appearance made by giving bail.

18. One acting in a representative capacity, such as an administrator, is included within the rule. Patterson *v.* McLaughlin, 1 Cranch C. C. (U. S.) 352, 18 Fed. Cas. No. 10,828.

That defendant is not a citizen of the state does not have the effect of limiting the right. Reid *v.* Moore, 12 Ga. 368.

Upon setting aside office judgment, where no appearance bail has been required, the court will not require special bail. Shean *v.* Towers, 1 Cranch C. C. (U. S.) 5, 21 Fed. Cas. No. 12,731; Gordon *v.* Riddle, 1 Cranch C. C. (U. S.) 329, 10 Fed. Cas. No. 5,619.

Defendant's appearance without special bail will not be struck out, so as to charge the marshal. Wood *v.* Dixon, 1 Cranch C. C. (U. S.) 401, 30 Fed. Cas. No. 17,943.

Plaintiff's attorney will not be given time to procure an affidavit to hold defendant to special bail, if, upon calling the appearance docket, the latter offers to appear. Meade *v.* Roberts, 1 Cranch C. C. (U. S.) 72, 16 Fed. Cas. No. 9,374.

19. Action for libel or slander.— Renninger *v.* Dillon, 2 Pa. Dist. 819, where plaintiff swears to special damages or defendant is about to leave the state.

20. In debt upon foreign judgment.—Wray *v.* Riley, 1 Cranch C. C. (U. S.) 361, 30 Fed. Cas. No. 18,060.

21. Action on bond containing collateral condition.—Barbour *v.* Russell, 3 Cranch C. C. (U. S.) 47, 2 Fed. Cas. No. 971. But see Craik *v.* Hilton, 2 Cranch C. C. (U. S.) 116, 6 Fed. Cas. No. 3,342. *Contra*, as to money bond see *infra*, note 27.

22. Proceedings in original attachment.— *Georgia.*— Reid *v.* Moore, 12 Ga. 368.

Indiana.— Unless an affidavit be made. State Bank *v.* Seaman, 8 Blackf. (Ind.) 181, since the statute abolishing imprisonment for debt.

Mississippi.— Rowley *v.* Cummings, 1 Sm. & M. (Miss.) 340, after statute abolishing imprisonment for debt.

North Carolina.— Stephenson *v.* Todd, 63 N. C. 368; Holmes *v.* Sackett, 63 N. C. 58.

Virginia.—Locke *v.* Cannon, 2 Cranch C. C. (U. S.) 186, 15 Fed. Cas. No. 8,440, subject to certain qualifications under the early Virginia statute.

United States.— Gibson *v.* Scull, Hempst. (U. S.) 36, 10 Fed. Cas. No. 5,400*a*, construing Arkansas statute.

See 5 Cent. Dig. tit. "Bail," § 6.

Extends to a common-law attachment.— So held in Locke *v.* Cannon, 2 Cranch C. C. (U. S.) 186, 15 Fed. Cas. No. 8,440 — under old Virginia statute — wherein it was said that the federal court could, in its discretion, allow the principal to appear without bail and plead to the jurisdiction.

23. Proceedings by petition and summons. — Thomas *v.* Mann, 4 Dana (Ky.) 452.

24. Campbell *v.* Morris, 3 Harr. & M. (Md.) 535, under Md. Acts (1795), c. 56; Acock *v.* Linn, Harp. (S. C.) 368. See also Fife *v.* Clarke, 3 McCord (S. C.) 347; Mayor *v.* Cooke, 1 Cranch C. C. (U. S.) 160, 16 Fed. Cas. No. 9,358, a motion for defendants to appear on a chancery attachment without giving security under Va. Acts (1792), c. 78.

When appearance without bail not allowed — Practice.— If appearance bail is required, special bail must be given to enable defendant to appear at the rules. Bradley *v.* Welch, 1 Munf. (Va.) 284. *Compare* State Bank *v.* Seaman, 8 Blackf. (Ind.) 181. It will also be ordered before appearance is permitted, where there is an affidavit of injury to a carrying away of personal property, and of plaintiff's belief that the defendant intends to depart without the jurisdiction. Voss *v.* Tuel, 1 Cranch C. C. (U. S.) 72, 28 Fed. Cas. No. 17,015. *Compare* Renninger *v.* Dillon, 2 Pa. Dist. 819. Plaintiff is entitled thereto on removal of a cause on habeas corpus to the supreme court, where defendant was held to bail in the court below, even though none was there required. Kirkham *v.* Fox, 19 Johns. (N. Y.) 126. Nor will the fact of a judgment in defendant's favor upon the same cause of action enable an appearance without bail, where the action was not decided upon merits. Gardner *v.* Lindo, 1 Cranch C. C. (U. S.) 592, 9 Fed. Cas. No. 5,232. Nor, unless the defendant be in actual custody, will the court hear a motion to so appear when made before appearance day. Olive *v.* Mandeville, 1 Cranch C. C. (U. S.) 38, 18 Fed. Cas. No. 10,488. Nor can the defendant, by a rule of arbitration entered by him before special bail, deprive plaintiff of his right thereto. Maus *v.* Sitesinger, 2 Serg. & R. (Pa.) 421.

Appearance without bail — Merits of the case.— Upon a motion to appear without special bail, the court will not examine the merits of the case. Lee *v.* Gamble, 3 Cranch C. C. (U. S.) 374, 15 Fed. Cas. No. 8,189; Day *v.* Hackley, 2 Cranch C. C. (U. S.) 251, 7 Fed. Cas. No. 3,679.

25. In covenant for rent.—Wager *v.* Lear, 2 Cranch C. C. (U. S.) 92, 28 Fed. Cas. No. 17,034.

upon a bond of long standing,[26] or in an action upon a money bond special bail has been required.[27]

3. Merger of Special and Appearance Bail. The effect of a condition in a bail-bond to the sheriff may be such that it answers the purposes of bail below and bail above at common law,[28] and bail below may become bail above.[29]

4. Waiver — a. Of Right to Special Bail. A plaintiff may always waive his right to special bail and proceed to trial.[30] Again it may be generally stated that where there are certain prerequisite legal steps which govern the plaintiff's rights in respect to special bail he must comply therewith, and if he does not, but subsequently legally proceeds to advance his cause of action to issue or trial, he thereby raises the legal presumption of waiver of prior irregularities or rights.[31]

b. Of Right to Object to Affidavit. Although the court can take nothing by intendment in an affidavit to hold to bail,[32] yet if bail is accepted without opposition, no objection lies to the affidavit.[33]

D. Entry of Special Bail[34] — **1. Prerequisites.** An order of court or consent

26. In action of bond of long standing.— Craik *v.* Hilton, 2 Cranch C. C. (U. S.) 116, 6 Fed. Cas. No. 3,342.

27. In action on money bond.— Aldridge *v.* Drummond, 1 Cranch C. C. (U. S.) 400, 1 Fed. Cas. No. 156. But see Craik *v.* Hilton, 2 Cranch C. C. (U. S.) 116, 6 Fed. Cas. No. 3,342.

28. Hale *v.* Russ, 1 Me. 334; Harrington *v.* Dennie, 13 Mass. 93; Champion *v.* Noyes, 2 Mass. 481; Pierce *v.* Read, 2 N. H. 359; Hamilton *v.* Dunklee, 1 N. H. 172. See also Toles *v.* Adee, 84 N. Y. 222. As to distinction between bail in Massachusetts and bail in England see Bean *v.* Parker, 17 Mass. 591, per Parker, C. J. And that undertaking to be released from arrest stands in place of bail to the sheriff and bail to the action, or special bail, see Toles *v.* Adee, 84 N. Y. 222, per Andrews, J.

29. *Ex p.* Metzler, 5 Cow. (N. Y.) 287. So plaintiff may elect to file appearance bail, proceed to final judgment, and then recover to such bail. De Myer *v.* McGonegal, 32 Mich. 120.

In South Carolina at a very early date bail to the sheriff were bail to the action (so after the statutes of 1785 and 1809). Harwood *v.* Robertson, 2 Hill (S. C.) 336. Bail was in every instance, except that of bail for a woman, upon the footing of bail above, and therefore possessed all the privileges, and was subject to all the liabilities of the latter. Broaders *v.* Welsh, 2 Nott & M. (S. C.) 569; Fletcher *v.* Weatherby, 3 Strobh. (S. C.) 56.

30. Paul *v.* Purcell, 1 Browne (Pa.) 348. And if such bail is not put in and perfected in due time, the plaintiff may elect to proceed against the appearance bail, or rule the sheriff to bring in the defendant, but he cannot do both. Valentine *v.* Smith, 8 Ohio 26.

31. Waiver is instanced by plaintiff accepting a plea before such bill is given (Hubbard *v.* Shaler, 2 Day (Conn.) 195); by his omitting to move for special bail and accepting a plea (Halsey *v.* Fanning, 2 Root (Conn.) 101); by his filing a statement, appearing and pleading before referee (Maus *v.* Sitesinger, 2 Serg. & R. (Pa.) 421); by joining issue with an objection (Culpeper Agricultural, etc., Soc. *v.* Digges, 6 Rand. (Va.) 165, 18 Am. Dec. 708); by taking out a rule for arbitration (Nones *v.* Gelbaud, 11 Serg. & R. (Pa.) 9; Phillips *v.* Oliver, 5 Serg. & R. (Pa.) 419; Moulson *v.* Rees, 6 Binn. (Pa.) 32); or by taking out a judgment, in a suit instituted by capias for want of affidavit of defense (Barbe *v.* Davis, 1 Miles (Pa.) 118). In these and other cases based upon like principle there is a waiver, and, unless the plaintiff appears at the return of the writ, special bail will not be required where no declaration is filed. Thompson *v.* Carenough, 1 Cranch C. C. (U. S.) 267, 23 Fed. Cas. No. 13,947. And an entry of the rule that the sheriff bring in the defendant, although not served, is an election to proceed against the defendant, instead of proceeding against the appearance bail, where special bail is not put in and perfected. Valentine *v.* Smith, 8 Ohio 26.

Special bail is not waived by filing a declaration. Bobyshall *v.* Oppenheimer, 4 Wash. (U. S.) 317, 3 Fed. Cas. No. 1,589; Caton *v.* McCarty, 2 Dall. (Pa.) 141, 1 L. ed. 323. See De Myer *v.* McGonegal, 32 Mich. 120, and also *supra*, II, C, 3; and *infra*, II, D, 2.

32. Macpherson *v.* Lovie, 1 B. & C. 108, 2 D. & R. 69, 8 E. C. L. 47.

33. Mammatt *v.* Mathew, 10 Bing. 506, 25 E. C. L. 242.

Where defendant gives bail and enters appearance, neither he nor his bail can afterward avail himself of any objection to the affidavit, on the ground of defect, deficiency, or irregularity therein, for this must be taken advantage of in the first instance. Sedgewick *v.* Houston, 8 Houst. (Del.) 132, 9 Houst. (Del.) 113, 32 Atl. 12, 43 Am. St. Rep. 165. See also Shawman *v.* Whalley, 6 Taunt. 185, 1 E. C. L. 568.

34. Withdrawal to plead limitations.— Where defendant is not precluded from pleading to the merits, and his attorney has examined the papers in season to plead limitations, he cannot accomplish this object by a motion to strike out bail and appearance for him, on the ground that they were unauthorized. Schleigh *v.* Hagerstown Bank, 4 Gill (Md.) 306.

Demanding bail in petition see Arrest, 3 Cyc. 951, note 69.

of plaintiff's counsel may be a prerequisite to entry of special bail,[35] and liberty will be granted the plaintiff's attorney to file such bail to enable him to surrender defendant where the circumstances justify such permission.[36]

2. TIME.[37] Where the statute which limits the time within which special bail may be entered is directory merely, it is always competent for the court in its discretion, upon good cause being shown, to suffer such bail to be put in at any time during the return-term,[38] and for a mere irregularity which is not error bail may on notice be filed *nunc pro tunc*,[39] and further time has been granted for filing special bail for informalities in a writ or capias or order for bail.[40] If the time expires on Sunday bail may be filed on the following Monday.[41]

3. NOTICE. The rule requiring notice of entry of special bail necessitated liberal compliance,[42] but a notice of intention to perfect will not enable a party to add new bail,[43] and plaintiff might enter default in the absence of the required notice.[44] He could also act upon such notice received from an attorney.[45]

E. Authority to Take Bail. The authority to take bail is vested in the person or persons designated in the statute. Generally the person so authorized is the sheriff.[46]

Necessity of affidavit to hold to bail see ARREST, 3 Cyc. 926, note 51.

35. Gilliam *v.* Allen, 4 Rand (Va.) 498.

36. Gilchrist *v.* Van Wagenen, 1 Cai. (N. Y.) 499, Col. & C. Cas. (N. Y.) 312.

37. **Common bail might be filed** at any stage of the case. Anonymous, 20 N. J. L. 494.

38. **At any time during return-term.**—Enos *v.* Aylesworth, 8 Ohio St. 322, under section 9 of the act of June 1, 1831. And this is declared to be the rule in the king's bench. Rolle Abr. 333, Cro. Jac. 384, Bacon Abr. 530; Tidd Pr. (9th ed.) 279. And special bail may be given at any time during the return-term, although plaintiff may have taken an assignment of the bail-bond. Rhodes *v.* Brooke, 1 Cranch C. C. (U. S.) 206, 20 Fed. Cas. No. 11,747. As to assignment from sheriff see 3 Bl. Comm. 291.

39. **Filing nunc pro tunc.**— Phelps *v.* Bronson, 4 Cow. (N. Y.) 61; Colden *v.* Knickerbacker, 2 Cow. (N. Y.) 31.

40. **Further time allowed.** — Logan *v.* Lawshe, 62 N. J. L. 567, 41 Atl. 751.

Erroneous order as affecting right to bail see *supra*, II, B, 3.

41. **Time expiring on Sunday.**— Clink *v.* Russell, 58 Mich. 242, 25 N. W. 175; Lane *v.* Cook, 8 Johns. (N. Y.) 359; Broome *v.* Wellington, 1 Sandf. (N. Y.) 664.

Intervening Sundays are excluded in computation of time, in order to fix bail. Sandon *v.* Proctor, 7 B. & C. 800, 14 E. C. L. 358. See also Combe *v.* Cuttill, 3 Bing. 162, 11 E. C. L. 87. The case does not fall within the rule for computing statutory time. Broome *v.* Wellington, 1 Sandf. (N. Y.) 664.

42. Stevenson *v.* Kimber, 3 Rawle (Pa.) 272.

This rule, however, was subject to certain exceptions and qualifications, such bail being valid until vacated (Worral *v.* Harper, 1 Jour. Law (Pa.) 33), and defendant must have been called upon to put in bail (Douglass *v.* Wight, 2 Brev. (S. C.) 218), and the bail-piece must have been actually filed prior to notice (Britt *v.* Van Norden, 1 Johns. Cas. (N. Y.) 390). See further Masterton *v.* Benjamin, 2 Cai. (N. Y.) 98.

43. **Adding new bail.**— Brown *v.* Williamson, 8 N. J. L. 363.

44. **Default in absence of notice.**— Pardee *v.* Reid, 4 Cow. (N. Y.) 51.

45. **Notice received from attorney.**— Even though attorney may not have been retained, and though bail be not put in as stated in the notice. Nichols *v.* Sutfin, 7 Cow. (N. Y.) 422; Cobb *v.* Darrow, 6 Cow. (N. Y.) 390. But plaintiff's attorney is not bound to take notice of the putting in of special bail; such notice must be given to him. Harris *v.* Underwood, 10 Wend. (N. Y.) 668; Butterfield *v.* Cooper, 6 Cow. (N. Y.) 608; Pardee *v.* Reid, 4 Cow. (N. Y.) 51.

46. **Sheriff.**—Although a sheriff or his deputy may have authority to accept bail (Bunch *v.* Deliesseline, Harp. (S. C.) 226); yet a sheriff has no authority to take a recognizance of special bail outside of the county of which he is sheriff, and one so taken is void (Harris *v.* Simpson, 4 Litt. (Ky.) 165, 14 Am. Dec. 101).

Authority to take bail in criminal prosecutions see *infra*, III, C.

In Pennsylvania, 23 Hen. VI, c. 9, which authorizes a sheriff to take bail where a person is arrested on civil process, is held to be superseded by the act abolishing imprisonment for debt. Keller *v.* Com., 2 Mona. (Pa.) 757.

Constable has no authority to release on bail one whom he has arrested in a civil action. Churchill *v.* Perkins, 5 Mass. 541; Ludlum *v.* Wood, 2 N. J. L. 52; Millard *v.* Canfield, 5 Wend. (N. Y.) 61.

Judge who has issued a writ of habeas corpus may admit the prisoner to bail before the return of the writ. Matson *v.* Swanson, 131 Ill. 255, 23 N. E. 595 [*reversing* 31 Ill. App. 594].

Justice of the peace authorized to take a recognizance before a certain court in term-time, or before the clerk of the court in vacation, has no authority to take a recognizance on a day when the court stands adjourned to

F. Amount of Bail — 1. In General. It may be generally stated that the probable amount of defendant's liability should be a determining factor as to the amount of bail, subject to such exception as may exist where the demand is very large, and a refusal to relax such a rule would operate as a hardship.[47] Ordinarily the bail is taken in double the amount claimed by the plaintiff in his writ or complaint;[48] but the amount may be fixed by express statutory provisions,[49] or by order of court.[50]

2. Reduction or Increase of Bail — a. In General. If the amount of bail required is excessive or unreasonable it will be reduced according to the circumstances and rights of the parties.[51] So the court may in its discretion enhance bail according to the rights of the parties.[52]

b. Application. The application for relief in case of excessive or unreasonable bail may be by way of a motion, based on affidavit to reduce or mitigate the bail[53] or to vacate the order of arrest[54] or by motion to discharge the bail.[55] The motion for an order to show cause why the bail should not be mitigated should not be made to a court without original jurisdiction thereof, although it may be carried to such court on appeal after application first made to a judge or commissioner having authority in the premises.[56] But in determining whether bail

another day of the same term. Brayman *v.* Whitcomb, 134 Mass. 525.

47. Amount of defendant's liability.—People *v.* Tweed, 13 Abb. Pr. N. S. (N. Y.) 25. See *infra*, II, F, 2.

Amount of bail in criminal prosecutions see *infra*, III, E.

A bail-bond or recognizance, though for a larger amount than the case legally demands, may be neither void nor irregular for that reason. Allen *v.* Hunt, 23 N. J. L. 376; Alexander *v.* Winn, 1 Brev. (S. C.) 14. And a recognizance may be for a larger amount than the judgment, for the payment of which it is conditioned. Worthen *v.* Prescott, 60 Vt. 68, 11 Atl. 690.

48. Double amount claimed.— Oxley *v.* Turner, 2 Va. Cas. 334. Or double the amount sworn to in the affidavit and indorsed on the writ. Ellis *v.* Robinson, 3 N. J. L. 280. Need not be double the amount, but a sum sufficient to cover costs on error from proceedings by scire facias. Hosie *v.* Gray, 73 Pa. St. 502.

Reasonable bail such as the jailer should require, or sufficient to satisfy the requirements demanded by the nature of the case, may be sufficient. Wilbur's Petition, 64 N. H. 387, 10 Atl. 817. Should be large enough to cover debt. Ratti *v.* Their Creditors, 9 La. 22; Day *v.* Hall, 12 N. J. L. 203.

The ad damnum in the writ, and the sum demanded, are guides to the sheriff, but the amount is subject to reduction. Parkhurst *v.* Kinsman, 3 Woodb. & M. (U. S.) 168, 18 Fed. Cas. No. 10,761.

49. Fixed by statute.— Beveridge *v.* Chetlain, 1 Ill. App. 231, holding that the provisions of the statute requiring the sheriff to take a bail-bond in double the sum in which bail is required are directory merely, and that a bond taken for a less sum is valid and may be enforced at least as a common-law bond.

50. The last order as to the amount of bail extinguishes prior contrary orders and alone binds defendant and his sureties. Potts *v.* Fitch, 2 Pa. St. 173.

When bail is directed by a judge on affidavit he is to ascertain the penalty of the bond. Oxley *v.* Turner, 2 Va. Cas. 334.

51. Right to reduce. — *Massachusetts.* — Jones *v.* Kelly, 17 Mass. 116.

New Hampshire.—Evans *v.* Foster, 1 N. H. 374.

New York.— Reigner *v.* Spang, 5 N. Y. App. Div. 237, 39 N. Y. Suppl. 127; Kahn *v.* Freytag, 2 Rob. (N. Y.) 678; Ballingall *v.* Burnie, 1 Hall (N. Y.) 237.

Pennsylvania.— Keppele *v.* Zantzinger, 3 Yeates (Pa.) 83.

United States.— Sanderson *v.* Serat, 5 Cranch C. C. (U. S.) 485, 21 Fed. Cas. No. 12,300; Parkhurst *v.* Kinsman, 3 Woodb. & M. (U. S.) 168, 18 Fed. Cas. No. 10,761; Martin *v.* Walker, Abb. Adm. 579, 16 Fed. Cas. No. 9,170.

See 5 Cent. Dig. tit. "Bail," § 5.

52. Right to increase.— Martin *v.* Walker, Abb. Adm. 579, 16 Fed. Cas. No. 9,170.

Bail given pursuant to the order of arrest cannot be increased on the ground that it does not cover plaintiff's claim. Agar *v.* Haines, 1 N. Y. Suppl. 212, 15 N. Y. Civ. Proc. 6.

53. Motion to reduce.— Parkhurst *v.* Kinsman, 3 Woodb. & M. (U. S.) 168, 18 Fed. Cas. No. 10,761. See also Britton *v.* Richards, 13 Abb. Pr. N. S. (N. Y.) 258; Union Bank *v.* Mott, 6 Abb. Pr. (N. Y.) 315.

Motion to quash a capias writ for excessive bail will be overruled, the remedy being an application for reduction of bail before giving bond. Moore *v.* Moore, 61 Me. 417.

54. Motion to vacate order of arrest.—See Union Bank *v.* Mott, 6 Abb. Pr. (N. Y.) 315.

55. Motion to discharge bail.— Jennings *v.* Sledge, 3 Ga. 128.

56. To whom application should be made. — Doremus *v.* Kinney, 3 Den. (N. Y.) 178. Defendants may apply to a judge. Bunting *v.*

should be reduced, the question rests upon the whole case as made by affidavits of matters which can be legally considered, and the subject is generally as if it were *res nova* with relation to the court.[57]

G. Bond, Undertaking, or Recognizance — 1. Form, Contents, and Validity — a. Compliance With Statute. The bond, recognizance, or undertaking should as a general rule conform to the statutory requirements, and officers armed with bailable process should in taking bonds or other securities be held to a strict compliance therewith, neither accepting less nor demanding more than the law prescribes.[58] Though a bond or undertaking may not be executed in conformity with the statutory requirements or otherwise be insufficient as a statutory bond,

Brown, 13 Johns. (N. Y.) 425. Such a motion is chamber business. Smith *v.* Newell, 7 Wend. (N. Y.) 484. Where a motion was denied by one justice another justice should not reduce the bail, unless upon new facts presented. Union Bank *v.* Mott, 6 Abb. Pr. (N. Y.) 315. A court will mitigate the bail. Sanderson *v.* Serat, 5 Cranch C. C. (U. S.) 485, 21 Fed. Cas. No. 12,300. But a federal court will not decide the question of jurisdiction on a motion to reduce special bail. Parkhurst *v.* Kinsman, 3 Woodb. & M. (U. S.) 168, 18 Fed. Cas. No. 10,761.

57. Union Bank *v.* Mott, 6 Abb. Pr. (N. Y.) 315.

Proof and questions considered.—A justice, previous to determining the amount of bail, is not required to hear testimony *pro* or *con*, but may merely make such inquiry into the proceedings in the suit as will furnish means for fairly fixing the amount. Newton *v.* Bailey, 36 Ga. 180. Defendant must show the facts relied on in defense. Britton *v.* Richards, 13 Abb. Pr. N. S. (N. Y.) 258. While in a proper case a reduction will be made according to the circumstances and counter-affidavits may be entertained, yet in certain causes the court will not consider affidavits to reduce the demand. Irregularities are, however, a subject of inquiry as well as matters showing that the bail as fixed will operate as an injustice or is otherwise unreasonable; thus bail will not be reduced upon affidavits that the whole sum is not due. Lee *v.* Welch, 1 Cranch C. C. (U. S.) 477, 15 Fed. Cas. No. 8,204. Nor can a set-off be shown. Robbins *v.* Upton, 5 Cranch C. C. (U. S.) 498, 20 Fed. Cas. No. 11,886. Nor has defendant a right to a reduction to a sum sufficient to secure his presence. People *v.* Tweed, 13 Abb. Pr. N. S. (N. Y.) 25. But affidavits bearing upon the true amount are admissible where the sum recoverable is contested. Parkhurst *v.* Kinsman, 3 Woodb. & M. (U. S.) 168, 18 Fed. Cas. No. 10,761. And counter-affidavits will be considered. Gall *v.* Molessa, 3 Pa. Dist. 537. So another suit pending for the same cause of action operates to reduce the bail, and a nominal sum or only common bail will be allowed. Parkhurst *v.* Kinsman, 3 Woodb. & M. (U. S.) 168, 18 Fed. Cas. No. 10,761. And mitigating circumstances of a seduction will be considered. Kahn *v.* Freytag, 2 Rob. (N. Y.) 678. So irregularity in the proceedings where the amount is large will be considered without affidavit on a judge's order. Ballingall *v.* Burnie, 1 Hall (N. Y.) 237. And where damages are uncertain bail will be reduced according to circumstances (Sanderson *v.* Serat, 5 Cranch C. C. (U. S.) 485, 21 Fed. Cas. No. 12,300), or according to the circumstances on a capias ad computandum (Keppele *v.* Zantzinger, 3 Yeates (Pa.) 83). So in an action for the conversion of shares of stock, bail in the amount of the par value thereof will be reduced on affidavit of a less value. Reigner *v.* Spang, 5 N. Y. App. Div. 237, 39 N. Y. Suppl. 127.

For form of order for reduction of bail see Collins *v.* Collins, 80 N. Y. 24.

58. **Should conform to statutory requirements.**— Toles *v.* Adee, 84 N. Y. 222; Cook *v.* Freudenthal, 80 N. Y. 202.

Bond, undertaking, or recognizance, in criminal prosecutions see *infra*, III, F.

For forms of bonds, undertaking, or recognizances for bail in civil actions see Chandler *v.* Byrd, 1 Ark. 152, 155; Deboard *v.* Brooks, 28 Ga. 362; Ill. Rev. Stat. (1899), c. 79, § 28; Neil *v.* Morgan, 28 Ill. 524; Bullitt's Civ. Code Ky. (1899), p. 696; Danker *v.* Atwood, 119 Mass. 146; Mich. Comp. Laws (1897), § 10,029; N. J. Gen. Stat. (1895), p. 2546, § 75; Tannenbaum *v.* Cristalar, 5 Daly (N. Y.) 141; 1 N. C. Code (1883), p. 355; Roulhac *v.* Miller, 90 N. C. 174.

Recognizance partly legal and partly unauthorized will be considered as wholly void. Billings *v.* Avery, 7 Conn. 236. In Cook *v.* Freudenthal, 80 N. Y. 202, an undertaking containing a provision beyond what was required by a statute was held to be void. See also *infra*, II, G, 1, e, (I), (B).

Variance from prescribed form.— If there is a material variance both in form and substance between the bond, as prescribed by law, and that executed it will render the latter void. Lexington, etc., R. Co. *v.* Barbee, 1 Metc. (Ky.) 384 [*citing* Basket *v.* Scott, 5 Litt. (Ky.) 208; Handley *v.* Ewings, 4 Bibb (Ky.) 505; Sullivan *v.* Alexander, 19 Johns. (N. Y.) 233; Strong *v.* Tompkins, 8 Johns. (N. Y.) 98; Richmond *v.* Roberts, 7 Johns. (N. Y.) 319; Love *v.* Palmer, 7 Johns. (N. Y.) 159].

Prescribed in order of arrest.—In New York an order of arrest in an action of replevin should show the grounds on which it was granted and prescribe the character of bail to be taken. But where such grounds are not shown in the order, the undertaking may be in ordinary form. Josuez *v.* Murphy, 6 Daly (N. Y.) 324.

yet it may in some cases be considered operative as an agreement between the parties.[59]

b. Parol Recognizance. A parol recognizance is not valid as a general rule, unless authorized by statute.[60]

c. To Whom Bond Should Run — (I) *In General.* The statutes as a general rule designate the person to whom a bail-bond should be taken.[61]

(II) *Running to Sheriff.* In most cases it is provided that such bonds should be taken to the sheriff of the county.[62] And if the obligors in a bail-bond acknowledge themselves bound to the sheriff by his proper name the bond will not be rendered invalid, if, by a clerical error, it is made payable to another person;[63] and under a statute requiring the bond to be given to the "sheriff as sheriff" an omission of the name of the county of which he is sheriff will not invalidate the bond.[64] If, however, the statute provides that the bonds shall be to the sheriff, a bond given to his deputy is invalid;[65] but where the statute requires

59. To what extent operative as an agreement between parties.— "It is competent for the parties, independently of the statute, to agree upon the terms and conditions upon which the discharge shall be had." Toles *v.* Adee, 84 N. Y. 222, 237. May be valid contract between the parties at common law. Emanuel *v.* Laughlin, 3 Sm. & M. (Miss.) 342. Though not conforming to statute, yet if good as a common-law bond may be enforced as such, a consideration to support it being implied from its seal. Paddock *v.* Hume, 6 Oreg. 82; Koons *v.* Seward, 8 Watts (Pa.) 388. See also Bell *v.* Pierce, 146 Mass. 58, 15 N. E. 119; Pratt *v.* Gibbs, 9 Cush. (Mass.) 82.

Note of third party.— But where a defendant indorses and delivers a note of a third party as security to the sheriff instead of giving bail as prescribed by law, such note cannot be collected by the latter, especially where the transfer is prohibited by statute. Strong *v.* Tompkins, 8 Johns. (N. Y.) 98.

60. Rule applied in case of a verbal promise by one arrested that he will appear for trial at a certain time. Bloomington *v.* Heiland, 67 Ill. 278. So execution issued against a person who signified his willingness to become bail for another should be quashed, as such signification is not binding. Amonett *v.* Nicholas, 5 Mo. 557. Following recognizance entered by justice of the peace on his docket was held to be informal and void: "Jacob Kearns *v.* John Stewart, Recognizance bail, 25. Simon Elliot appears, and acknowledges himself bail in the above case." Kerns *v.* Schoonmaker, 4 Ohio 331, 334, 22 Am. Dec. 757.

61. 23 Hen. VI, c. 9; and cases cited *infra*, this note and in note 62 *et seq.*

Running to arresting creditor.—Where a statute provides for the giving of a bond to an arresting creditor to secure his debt, no other creditor has any concern with such bond, and if taken for the benefit and use of other creditors, it is void. Beacon *v.* Holmes, 13 Serg. & R. (Pa.) 190.

Where, however, the statute is silent as to whom the bond shall be taken, a bond to the judge (McClelland *v.* Smith, 12 Pa. St. 303), or a bond to the person for whose benefit it is intended (Bishop *v.* Drake, Kirby (Conn.) 378; Nott *v.* Welles, Kirby (Conn.) 12), has been declared to be valid. But where, instead of being taken in name of creditor, it is taken by the sheriff in his own name, it will be valid, if sheriff stand ready to assign the bond to the creditor. Tucker *v.* Davidson, 28 Ga. 535.

62. Running to sheriff.— Hunter *v.* Gilham, 1 Ill. 82; Handley *v.* Ewings, 4 Bibb (Ky.) 505; Ralston *v.* Love, Hard. (Ky.) 501; Conant *v.* Sheldon, 4 Gray (Mass.) 300; Smith *v.* Adams, 12 Metc. (Mass.) 564; Loker *v.* Antonio, 4 McCord (S. C.) 175.

In England the general duties of a sheriff as to taking bail were early prescribed by statute 23 Hen. VI, c. 9.

Running to plaintiff instead of sheriff.— Though a bond, by reason of its running directly to the plaintiff in an action and not to the sheriff or other officer as provided by the statute, may not be valid as a bail-bond, yet if approved and accepted by the obligee it may be valid at common law. Bell *v.* Pierce, 146 Mass. 58, 15 N. E. 119. See Pratt *v.* Gibbs, 9 Cush. (Mass.) 82; and *supra*, II, G, 1, a.

63. Clerical error.—Glezen *v.* Rood, 2 Metc. (Mass.) 490.

64. Omitting name of county.— Payne *v.* Britton, 6 Rand. (Va.) 101. See also Kirkebridge *v.* Wilson, 2 Lev. 123, where a bond by N and T, of the county of C to J, sheriff, without saying of what county, was good. But see Neel *v.* Cooper, 2 Rolle 365, where name of county being in margin and bond given to A, sheriff of aforesaid county, was held void, not being given to sheriff in his name of office, which required not only the naming of him as sheriff, but of what county.

65. Running to deputy sheriff.— Conant *v.* Sheldon, 4 Gray (Mass.) 300, wherein such a bond was declared to be invalid, either under Mass. Rev. Stat. c. 91, § 1, which provided that "when bail is taken in any civil action, it shall be taken, as heretofore practised in this commonwealth, by a bond to the sheriff, if the writ is served by him or his deputy," or under 23 Hen. VI, c. 9.

Must run to deputy's own superior.—Where a statute providing that where bail is taken it must be by a bond to the sheriff, if bail is taken by a deputy sheriff, it must be by bond

the bond to be executed to the officer making the arrest a bond may be taken to the under-sheriff when the arrest has been made by such officer.[66]

d. Amount of Bond. A bond is not invalid because of the omission to state either the sum in which the obligors are held[67] or the amount demanded in the writ.[68] Nor will the fact that the bond is taken for an amount greater than the sum sworn to in the writ render the bond invalid.[69]

e. Conditions — (I) *In General* — (A) *Complying Substantially With Statute.* If the statute requires that certain conditions should be inserted in a bail-bond there should be a substantial compliance therewith, and as a general rule if the conditions of a bond do not differ materially from those prescribed by statute the bond will be valid and enforceable.[70]

(B) *Inserting Unauthorized Conditions.* In many cases unauthorized stipulations or conditions are inserted in a bond which neither add to nor impair its legal effect, and in such cases the added words may be treated as mere surplusage.[71] But the bond should not contain conditions which contravene public policy, or violate any statute.[72] Nor should a bond or recognizance impose condi-

to his own superior. Smith *v.* Adams, 12 Metc. (Mass.) 564, holding that the deputy's own superior is the sheriff of the same county, and that a bond taken to the sheriff of another county is void.

66. **Running to officer making arrest.** — Wilcox *v.* Ismon, 34 Mich. 268.

67. **Failure to state amount of bond.** — Haberstro *v.* Bedford, 43 Hun (N. Y.) 201; Harrison *v.* Tiernans, 4 Rand. (Va.) 177, assigning as a reason for this rule the fact that such sum may be ascertained from the order of arrest.

68. **Failure to state amount demanded in writ.** — Bull *v.* Clarke, 2 Metc. (Mass.) 587; Clyburn *v.* Ingram, 13 Rich. (S. C.) 248. But see People *v.* Felton, 36 Barb. (N. Y.) 429.

69. **Greater sum than demanded in writ.** — Allen *v.* Hunt, 23 N. J. L. 376.

70. **Illustrations of substantial compliance.** — Bond conditioned that surety will "render himself amenable to the court thereupon" does not differ materially from requirement that he shall "render himself amenable to the process of the court thereupon." Abbott *v.* Daniel, 3 Metc. (Ky.) 339, 340. The following condition was held to be sufficient: "Now, if the said Russell, in case he is cast in the said suit, shall well and truly pay and satisfy the condemnation of the Court, or render his body to prison in execution of the same, in terms of the law, in such case made and provided, and upon failure thereof the said H. W. Allen will do it for him, then the above obligation to be void." Scott *v.* Russell, 36 Ga. 494, 496. But see Sackett *v.* Tucker, 18 Ga. 401. In Louisiana, where defendant had been arrested for fraud under the act of March 15, 1855, relating to voluntary surrender of property by an insolvent, a condition in the bond that the sureties should be liable "in case the said insolvent shall have departed the State without the leave of our said court" was held sufficient as the condition required by La. Code Civ. Proc. art. 223 was held to relate only to arrests for debt. Figuiere *v.* His Creditors, 11 La. Ann. 557. See also Farmers' Bank *v.* Boyer, 16 Serg. & R. (Pa.) 48.

So conditions as to payment of the judgment must also substantially conform to statutory requirements. Phillips *v.* Parnell, 32 Ga. 522; Tucker *v.* Davis, 15 Ga. 573; Hysinger *v.* Colman, 5 Blackf. (Ind.) 596; Basket *v.* Scott, 5 Litt. (Ky.) 208; Cloud *v.* Catlett, 4 Leigh (Va.) 462. See also Clyburn *v.* Ingram, 13 Rich. (S. C.) 248.

Slight variance from prescribed form. — If the bond contain all the obligations imposed by statute and allow every defense given thereunder, the mere fact that it varies slightly from the form prescribed by statute will not affect its validity. Rhodes *v.* Vaughan, 9 N. C. 167. See Phillips *v.* Parnell, 32 Ga. 522.

But the exact words of a statute should be used where a covenant is to be implied from statutory words. Vipond *v.* Hurlburt, 22 Ill. 226.

71. **Surplusage.** — Block *v.* Maxwell, 10 La. Ann. 5 (where the bond was executed in strict conformity to statute with added stipulation "that otherwise the surety shall pay defendant"); Rosenberg *v.* McKain, 3 Rich. (S. C.) 145 (where the bond contained a statement of the damages such statement not being required by statute). Where the statute required a bond ordering defendant arrested on mesne process amenable to final process, a bond conditioned amenable to both mesne and final process was held valid, as no further mesne process could issue and the added words were mere surplusage. Haberstro *v.* Bedford, 118 N. Y. 187, 23 N. E. 459, 28 N. Y. St. 857 [*affirming* 43 Hun (N. Y.) 201; *distinguishing* Goodwin *v.* Bunzl, 102 N. Y. 224, 6 N. E. 399; Carr *v.* Sterling, 114 N. Y. 558, 22 N. E. 37, 24 N. Y. St. 521]. Where bond for appearance was conditioned "defendant to appear, &c., and to abide the event of the Court and jury," the words "abide the event of the Court and jury" were treated as surplusage. Saunders *v.* Hughes, 2 Bailey (S. C.) 504, 505. But see Blanding *v.* Rogers, 2 Brev. (S. C.) 394, 4 Am. Dec. 595; Stewart *v.* McClure, 1 Brev. (S. C.) 407.

72. Paddock *v.* Hume, 6 Oreg. 82.

Against a rule of court. — In Pennsylvania it has been held that, though a condition in a

tions beyond those which the law requires to fulfil the purposes thereof, and where conditions are inserted which are not warranted by law and which are onerous to the security, the instrument is thereby invalidated;[73] and such a condition will have this latter effect where the statute especially directs the form thereof and declares that a bond taken "in any other manner or form shall be void."[74] The general rule in such cases is that a bond which is void in part and legal in part, the void part being against the positive provisions of a statute, is void *in toto*;[75] and it is declared that the better opinion is that such an instrument is utterly void at common law.[76]

(c) *Omitting Necessary Conditions.* If the statute prescribes certain conditions to be inserted in the bond and they are omitted their omission will render the bond void.[77]

(II) *As to Appearance.* Under the early English statute,[78] and now where such or a similar statute is in force, the bond to the sheriff must be that the party appear according to the writ and not according to the condition of the bond,[79] and it is not necessary in such a case for the condition to specially designate the time and place of appearance.[80] But a bail-bond will be void if a condition therein pro-

bond may be against a rule of law, it will not avoid the bond. Holdship *v.* Jaudon, 16 Serg. & R. (Pa.) 307. But see Lexington, etc., R. Co. *v.* Barbee, 1 Metc. (Ky.) 384.

73. **Unwarranted and onerous conditions.** — Tucker *v.* Davis, 15 Ga. 573; Lexington, etc., R. Co. *v.* Barbee, 1 Metc. (Ky.) 384; Clark *v.* Walker, 25 N. C. 181. So a bond whose object is to secure the appearance of the principal has been held to be void where it contains a condition that the defendant shall "perform the final judgment of the Court in said case." Loyd *v.* McTeer, 33 Ga. 37, 38. A condition that the defendant "will perform the judgment of the court in the action" will invalidate a bond which the statute requires shall be given that the defendant will render himself amenable to the process of the court. Shuttleworth *v.* Levi, 13 Bush (Ky.) 195.

74. **Statute prohibiting any other than form therein prescribed.**— Shuttleworth *v.* Levi, 13 Busn (Ky.) 195. See Billings *v.* Avery, 7 Conn. 236. "The object of the statute prohibiting sheriffs and other officers from taking securities not authorized by law, and of the statutes prescribing the form of undertakings in particular cases, was to make the duty of the officer, and the rights of parties, certain and plain, and to prevent oppression, or abuse of authority, by disabling public officers from imposing terms, or making contracts as a condition of official action, except such as were sanctioned either by the statute or the common law." Cook *v.* Freudenthal, 80 N. Y. 202, 208; Barnard *v.* Viele, 21 Wend. (N. Y.) 88. See also Lexington, etc., R. Co. *v.* Barbee, 1 Metc. (Ky.) 384.

75. **Void in part void in toto.**— "It is no unreasonable principle, but one often recognized, that if persons will mix in a contract good and evil together, or right and wrong, courts will not make a separation, but will consider the whole as incurably tainted." Billings *v.* Avery, 7 Conn. 236, 239, per Hosmer, C. J. [*citing*, on general proposition in text, Hyslop *v.* Clarke, 14 Johns. (N. Y.) 458; Austin *v.* Bell, 20 Johns. (N. Y.) 442, 11 Am. Dec. 297; Norton *v.* Simmes, Hob. 18; Maleverer *v.* Redshaw, 1 Mod. 35; Collins *v.* Blantern, 2 Wils. C. P. 347].

76. Billings *v.* Avery, 7 Conn. 236 [*citing* Fermor's Case, 3 Comb. 77; Wimbish *v.* Tailbois, 1 Plowd. 38].

77. **A bond with a blank condition** is void under 23 Hen. VI, c. 9. Perry *v.* Dobbins, 2 Bailey (S. C.) 343.

Statutory conditions omitted.—Alexander *v.* Bates, 33 Ga. 125; Hutton *v.* Helme, 5 Watts (Pa.) 346; McKee *v.* Stannard, 14 Serg. & R. (Pa.) 380. Where a bond which is unauthorized, owing to the adding to or the omission of the statutory conditions, is designedly taken by a public officer from a person under arrest as a ground of his discharge it will be void as having been taken *colore officii*, though it may not have been the intention of the officer to violate the law. Cook *v.* Freudenthal, 80 N. Y. 202. But an omission of a condition which if it had been inserted would have increased the responsibilities of the obligors cannot be complained of by them. Farmers' Bank *v.* Boyer, 16 Serg. & R. (Pa.) 48.

78. **23 Hen. VI, c. 9,** which required the sheriff to release persons upon their giving sufficient sureties to appear at the day and place mentioned in the writ, bill, or warrant.

79. Payne *v.* Britton, 6 Rand. (Va.) 101; Gardiner *v.* Dudgate, 2 Show. 51.

80. Payne *v.* Britton, 6 Rand. (Va.) 101.

At court or for prison limits.— So also in an early decision where a debtor had been arrested on mesne process it was held that the condition might be either for appearance at court or for the prison limits. Holmes *v.* Chadbourne, 4 Mc. 10.

At return-term and from term to term.— Condition for appearance at return-term and for attendance from term to term until discharged is declared to be sufficient in an early case. Embree *v.* Norris, 2 Ala. 271.

Substantially designating court and place. — If the law requires that the bond shall substantially set forth the court and place of defendant's appearance, it is sufficient if the

vides for the appearance of the principal at a day different from that prescribed by law for holding the court.[81]

f. Misrecitals Which Do Not Vitiate. Where bonds are substantially correct there is a strong disposition in the court to disregard misrecitals therein, which are mere clerical errors, and to sustain the validity of the bonds.[82]

g. Validity as Affected by Antecedent Proceedings.[83] The validity of the bond may in some cases be affected by irregularities in the antecedent proceedings, such as an invalid order of arrest[84] or an unauthorized arrest.[85] But it

bond provides that the defendant shall appear before the judges and assistant justices of a certain court to be held at the court-house in a certain place. Stevens *v.* Clancey, 1 Johns. (N. Y.) 521.

Conflicting statutes.—Where the process is, under the statute, returnable to the court from which the writ issued and which is in another county than that in which the defendant resides, and by one statute it is provided that the defendant must appear at the court to which the process is returnable, while another statute requires that the bond for the defendant's release should be conditioned for appearance at the county of his residence, the condition of the bond should be for appearance in the county from which the writ issued. Mallory *v.* Powell, 1 Yerg. (Tenn.) 411.

81. At term not appointed by law.—Allen *v.* White, Minor (Ala.) 289.

Non-appearance at adjournment.— If a bond should be and is conditioned for an appearance only and the defendant appears as required thereby his sureties will not be liable for his failure to appear at an adjournment of the hearing. McClelland *v.* Smith, 12 Pa. St. 303.

82. Trivial defects.— Glezen *v.* Rood, 2 Metc. (Mass.) 490. See Sergeant Williams' notes to Posterne *v.* Hanson, 2 Saund. 59.

Illustrations.— So though there may be a misnomer in the body of the bail-bond of one of the parties thereto, or one of the names of the parties may be omitted, yet if such party is otherwise sufficiently described as to be identified, it will not vitiate the bond. Thus it has been held that neither the omission of names of sureties in the body of the instrument signed by them (Davidson *v.* Carter, 9 Ga. 501; Bruce *v.* Colgan, 2 Litt. (Ky.) 284; Valentine *v.* Christie, 1 Rob. (La.) 298; Raynolds *v.* Gore, 4 Leigh (Va.) 276 [but see Adams *v.* Hedgepeth, 50 N. C. 327]), nor the misnomer of the plaintiff (Colburn *v.* Downes, 10 Mass. 20), nor an inconsistent recital as to who is party plaintiff (Turner *v.* White, 49 N. C. 116), nor omission to state character of parties as plaintiff and defendant (Halsall *v.* Meier, 21 Mo. 136), nor omission of defendant's christian name (Danker *v.* Atwood, 119 Mass. 146; Donnelly *v.* Foote, 19 Wend. (N. Y.) 148), nor an omission of the name of one of several defendants (Ralston *v.* Love, Hard. (Ky.) 501; Kelly *v.* Com., 9 Watts (Pa.) 43; Smith *v.* Wallace, 1 Wash. (Va.) 254), nor a recital that plaintiff sues as "administrator" instead of as executor (Payne *v.* Britton, 6 Rand. (Va.) 101), nor the insertion in the condition of the bail-bond of the name of the bail with that of the principal (Fletcher *v.* Weatherby, 3 Strobh. (S. C.) 56) will render the instrument invalid. So also it has been declared that the bond is valid though it may contain no recital that the party was arrested (Walker *v.* Massey, 10 Ala. 30), or that the demand arose in the course of a legal proceeding (Churchill *v.* Perkins, 5 Mass. 541), or that the bond recited an arrest in an action of trespass on the case when it was taken in an action of trespass (Devereux *v.* Esling, 7 Pa. St. 383 [see also Palmer *v.* McGinnis, Hard. (Ky.) 505; Rowland *v.* Seymour, 2 Metc. (Mass.) 590; *In re* Friedrich, 113 Mich. 468, 71 N. W. 835]); or that it omitted the name of the county where the action was pending (Deboard *v.* Brooks, 28 Ga. 362), or the amount of the debt (Palmer *v.* McGinnis, Hard. (Ky.) 505 [see also McClean *v.* Lillard, 1 Bibb (Ky.) 146]). But where the code provides that those qualifying as bail must be residents and freeholders within the state a bond should show these facts on its face, and where they are not so recited the bond may be refused by the plaintiff Howell *v.* Jones, 113 N. C. 429, 18 S. E. 672.

83. Consent of the principal is necessary before another can become bail for him. People *v.* Davidson, 67 How. Pr. (N. Y.) 416, the reason assigned being that the giving of bail constitutes a contract between the principal and his sureties.

Plaintiff who has always repudiated the bail-bond during a time when the sureties could have surrendered the principal cannot subsequently, on payment of the judgment by the sheriff, surrender the bond to the latter so as to render the sureties liable. Bell *v.* Pierce, 146 Mass. 58, 15 N. E. 119.

84. Invalid order of arrest.— Brown *v.* Way, 33 Ga. 190; Pauer *v.* Simon, 6 Bush (Ky.) 514.

Waiver of defects in process.—And it has been declared that the voluntary appearance and entering into a recognizance by one arrested under a void process will operate as a waiver of defects in the process and that the recognizance will be valid. State *v.* Wenzel, 77 Ind. 428.

85. Illegal arrest.— Dumont *v.* Wright, 6 Blackf. (Ind.) 540; Gillespie *v.* Hewlings, 2 Pa. St. 492.

Illustrations.— So an arrest by virtue of a defective certificate (Sargent *v.* Roberts, 52 Me. 590), or without the required affidavit (Aiken *v.* Richardson, 15 Vt. 500), or where not authorized by statute (Usher *v.* Pease,

seems that, although the order admitting to bail may be erroneous, the bail may nevertheless be valid.[86]

h. Curing Defects in Bond. A bail-bond may, by permission of the court, be changed or amended in some cases if no rights are thereby prejudiced,[87] and it has been declared that under certain circumstances a new bond may be taken in the proper form where the former one was defective.[88]

2. Execution[89] — a. In General. In the absence of statutory provisions relating thereto, the formal requisites of contracts generally must control the execution of bonds or undertakings for bail,[90] but where the statute prescribes the form of the instrument or describes the manner of its execution, the bond or undertaking should, at least, substantially comply with the statute.[91] This rule has been applied in determining the necessity and sufficiency of signing,[92] sealing,[93] and acknowledging the instrument.[94] So in ascertaining the proper person in whose

116 Mass. 440, 17 Am. Rep. 169), or without proper authority (Thomas *v.* Mann, 4 Dana (Ky.) 452; Covey *v.* Noggle, 13 Barb. (N. Y.) 330), has been held to be such an irregularity as will invalidate the bond.

But though the capias was tested out of term the bond was held not to be affected thereby. Parke *v.* Heath, 15 Wend. (N. Y.) 301.

86. Erroneous order admitting to bail.— Matson *v.* Swanson, 131 Ill. 255, 23 N. E. 595. In this case, after the issuance of the writ of habeas corpus, the court issued an order admitting to bail before the return of the writ. See also *supra*, II, B, 3.

87. Amendment.—Walker *v.* Kennison, 34 N. H. 257. See Bennett *v.* Brickey, 4 Ark. 460. So an amendment may properly be made for the purpose of setting out the contract more accurately (Wright *v.* Blunt, 74 Me. 92), or for the purpose of curing a mistake or omission as to the names of the parties (Welch *v.* Vanbebber, 4 Yeates (Pa.) 559; Fletcher *v.* Weatherby, 3 Strobh. (S. C.) 56). But it has been held that a bail-piece cannot be amended for the purpose of curing a defect which was not discovered until after suit was brought against the bail (Morrell *v.* Pixley, 12 Johns. (N. Y.) 256, wherein an amendment striking out the words "trespass on the case" and inserting the word "debt" was not allowed under such circumstances).

On motion a mistake in the copy of the bond may be corrected by amending the copy so as to correspond with the original bond. So held in State *v.* Dowd, 43 N. H. 454, where the copy sent to the supreme court by the magistrate before whom taken contained the words "court of common pleas" wherever in the original bond the words "supreme judicial court" appeared. And where by mistake the obligation of the surety is not properly entered the remedy should be by motion to correct the entry, and not by motion to quash a scire facias which conforms to the record. Boyle *v.* Robinson, 7 Harr. & J. (Md.) 200.

88. New bond.— So in Pennsylvania the clerk of the supreme court has been permitted to take a new bond for the purpose of curing a defective bond in error taken in the court below. Hosie *v.* Gray, 73 Pa. St. 502.

89. Delivery either by the party himself, or by an attorney, is, by an early decision, declared to be necessary to have the bond take effect. Harrison *v.* Tiernans, 4 Rand. (Va.) 177.

90. See, generally, Bonds; Contracts; Undertakings.

91. See *supra*, II, G, 1, a, and cases cited *infra*, note 92 *et seq.*

92. Signing and subscribing.— If the statute requires that the bond should be executed by both principal and sureties, it must be actually executed by them and a recital in the bond of the defendant as principal and the others as sureties is not sufficient. Thus, although a person's name may be inserted in the body of the bond, it is error to take judgment against him, if he has not signed such bond. Goode *v.* Galt, Gilmer (Va.) 152. See also Bean *v.* Parker, 17 Mass. 591. In Indiana the statute did not formerly require parties entering into a recognizance to subscribe their names thereto. Doe *v.* Harter, 2 Ind. 252. In New York it was early decided that a statute providing that all recognizances, to be valid, should be signed by the party intended to be bound by them did not require that the principal and surety should unite in the same recognizance. People *v.* Huggins, 10 Wend. (N. Y.) 464.

A bond for an infant arrested in an action for tort should be executed by the aid of a next friend. Vincent *v.* Warner, 16 Phila. (Pa.) 87, 40 Leg. Int. (Pa.) 46. See also, generally, Infants.

93. Sealing.— If the statute requires that a seal be affixed to a bond the want thereof is fatal. Peyton *v.* Moseley, 3 T. B. Mon. (Ky.) 77; Smalley *v.* Vanorden, 5 N. J. L. 951. But in some states a seal is not required by law and in such a case its omission will not render the bond void. Labarre *v.* Durnford, 10 Mart. (La.) 180; Kelly *v.* McCormick, 28 N. Y. 318; Willet *v.* Lassalle, 1 Rob. (N. Y.) 618. And it was decided in an early case that, if a sheriff takes a bond which has no seals annexed to the names of the sureties, he will not be justified in detaining the defendant thereafter. Bunch *v.* Deliesseline, Harp. (S. C.) 226. See also, generally, Seals.

94. A recognizance acknowledged before a notary who has no power to take an acknowledgment of special bail is void. Clink *v.* Russell, 58 Mich. 242, 25 N. W. 175. See also, generally, Acknowledgments, 1 Cyc. 506.

presence the bond must be executed the statutory provisions relating to the execution of the instrument, if any, must be complied with.[95]

b. Indorsements on Writ. In an early case it is declared that sureties may assume the legal obligations of bail by entering their names on the back of the writ,[96] and in some states it has been held necessary that the name of the one becoming bail be indorsed on the writ.[97]

c. Qualification and Justification of Sureties — (i) *In General.* A person becomes a surety and is entitled to the rights and remedies and is subject to the liabilities of sureties in other cases where he signs a bail-bond to secure the discharge of a defendant from civil arrest and the payment of final judgment against him.[98]

(ii) *Competency* — (a) *Who May Be Sureties.* The rule as to competency has been held to include a housekeeper or householder,[99] or freeholder,[1] or one who has received transfers of property without consideration from defendant's friends to enable him to qualify,[2] or one who has received pecuniary consideration under agreement to go bail,[3] or a surety company,[4] or a stranger where defendant consents,[5] or under certain circumstances one who is not a housekeeper or freeholder,[6] or, in some jurisdictions, non-residents,[7] or a deputy sheriff,[8] or one who has been convicted of crime many years before;[9] also parties who, although

95. **Execution in presence of officer.**— The bond to be valid should be executed in the presence of the officer authorized to take it. Jones *v.* Bunn, 2 Metc. (Ky.) 490.

96. Pierce *v.* Read, 2 N. H. 359. But the indorsement "I, Ashbil Hurlburt, acknowledge myself special bail for the appearance of the within named Henry B. Roberts," signed A H was held not to have the force and effect of a recognizance. Vipoud *v.* Hurlburt, 22 Ill. 226.

97. Henderson *v.* Morrison, Ky. Dec. 181 (holding that judgment cannot be taken against appearance bail unless the sheriff shall indorse the name of the bail upon the writ); Dresser *v.* Fifield, 12 R. I. 24 (wherein it is held that where the statute requires one who becomes bail to indorse "his Christian and surname on the back of the writ," an indorsement by the bail of his surname and initials only is not a compliance therewith, and will not bind him as bail, though this may be his usual form of signature.

98. Culliford *v.* Walser, 158 N. Y. 65, 52 N. E. 648, 70 Am. St. Rep. 437 [*reversing* 3 N. Y. App. Div. 266, 38 N. Y. Suppl. 199, 73 N. Y. St. 692 (*affirming* 13 Misc. (N. Y.) 493, 35 N. Y. Suppl. 475, 69 N. Y. St. 173), *rehearing* denied in (N. Y. 1899) 53 N. E. 1124].

Bail are sureties and their rights and remedies are similar to those of sureties. Toles *v.* Adee, 84 N. Y. 222; Rathbone *v.* Warren, 10 Johns. (N. Y.) 587.

Bail-bond may be directed to stand as security where trial has been lost. Rex *v.* London Sheriffs, 1 Chit. 358, 18 E. C. L. 200.

99. **Description of residence** should not be too general when it can be specifically designated. Jackson's Bail, 1 Chit. 492, 18 E. C. L. 269; Rickman *v.* Hawes, 5 Taunt. 173, 1 E. C. L. 96. See Taylor's Bail, 1 Chit. 503, 18 E. C. L. 276.

One taking lodging-house and who has received rent from lodger may justify as housekeeper. Coehn *v.* Waterhouse, 8 Moore C. P. 365.

Unmarried man who owns machinery of a mill which he rents is a householder, within N. Y. Code Civ. Proc. § 812, although he is a boarder. Delamater *v.* Byrne, 59 How. Pr. (N. Y.) 71.

Who is householder.— Somerset, etc., Sav. Bank *v.* Huyck, 33 How. Pr. (N. Y.) 323; Savage *v.* Hall, 1 Bing. 430, 8 Moore C. P. 525, 8 E. C. L. 580.

1. **Title to real estate** constitutes one a freeholder. People *v.* Hynds, 30 N. Y. 470; People *v.* Scott, 8 Hun (N. Y.) 566.

2. People *v.* Ingersoll, 14 Abb. Pr. N. S. (N. Y.) 23.

3. Fitch *v.* Vanderveer, 6 N. Y. Wkly. Dig. 243.

Surety and fidelity companies receive consideration for this purpose to become bail. Bick *v.* Reese, 52 Hun (N. Y.) 125, 5 N. Y. Suppl. 121, 23 N. Y. St. 404.

4. **Surety companies.**— See Nichols *v.* MacLean, 98 N. Y. 458, 7 N. Y. Civ. Proc. 132, 1 How. Pr. N. S. (N. Y.) 370, construing N. Y. Laws (1881), c. 486; Travis *v.* Travis, 48 Hun (N. Y.) 343, 1 N. Y. Suppl. 357, 15 N. Y. St. 874, 14 N. Y. Civ. Proc. 307 [*reversed* in 122 N. Y. 449, 25 N. E. 920, 34 N. Y. St. 42, construing N. Y. Laws (1886), c. 416]; Rosenwald *v.* Phenix Ins. Co., 9 N. Y. Civ. Proc. 444.

5. **Stranger where defendant consents.**— People *v.* Davidson, 67 How. Pr. (N. Y.) 416.

6. **One not householder.**— Saggers *v.* Gordon, 5 Taunt. 174, 1 E. C. L. 96, a case of waiver.

7. **Non-residents.**— See Glezen *v.* Rood, 2 Metc. (Mass.) 490; Dickison *v.* Coward, 3 Rich. (S. C.) 49. But see *contra, infra,* II, G, 2, c, (II), (B).

8. **Deputy sheriff.**— Plumer *v.* Brewster, 2 N. H. 473. See *infra,* II, G, 2, c, (II), (B).

9. **One convicted many years before.**— It is not an objection to bail that he had been

originally incompetent, are estopped to deny their competency.[10] So a cosurety with a wife who is not liable may be bound where he has knowledge of the facts.[11] Again, after appearance bail have pleaded, the defendant may, at a subsequent term, appear and give the same persons as special bail.[12]

(B) *Who May Not Be Sureties.*[13] The rule of incompetency has been held to exclude as bail one who is not a housekeeper or householder;[14] non-residents;[15] persons seeking to justify in respect to property abroad;[16] the wife of the principal where her separate estate is not charged and she has received no consideration;[17] sheriffs;[18] a material witness;[19] a stranger;[20] attorneys and their clerks;[21] and a person who receives a commission from defendant's attorney on the amount on which he is to justify.[22]

(III) *Number.* Statutes prescribing the number of sureties on a bail-bond are in some jurisdictions directory and not exclusive, in so far at least as the validity of the bond is concerned,[23] although in respect to plaintiff's right he may be entitled to two sureties,[24] yet he must except if one surety be a fictitious per-

transported thirty years before. Hatfield's Bail, 2 Chit. 98, 18 E. C. L. 528.

10. Estoppel to deny competency.—And this may include a sheriff. Meriam *v.* Armstrong, 22 Vt. 26. And if the incompetency is not objected to the bail is not a nullity. Miles *v.* Clarke, 4 Bosw. (N. Y.) 632 [*affirming* 2 Bosw. (N. Y.) 709]. See Hubbard *v.* Gicquel, 14 N. Y. Civ. Proc. 15.

Non-residence of the surety may, under the circumstances, be no excuse for failure to comply with the conditions of the bond. Trimble *v.* Shaffer, 3 W. Va. 614.

Where the incompetency in respect to the person has ceased to exist, such person may be competent, as in case of an attorney who has not practised but has engaged in other avocations. Phillips *v.* Wortendyke, 5 N. Y. L. Bul. 90. See Evans *v.* Harris, 47 N. Y. Super. Ct. 366 [*cited* in Stringham *v.* Stewart, 3 How. Pr. N. S. (N. Y.) 215]; Stringham *v.* Stewart, 8 N. Y. Civ. Proc. 420, 3 How. Pr. N. S. (N. Y.) 214.

11. Yale *v.* Wheelock, 109 Mass. 502.

12. Dunlops *v.* Laporte, 1 Hen. & M. (Va.) 22.

13. The earlier New York code did not abrogate the common-law disqualifications of persons proposed for bail. Wheeler *v.* Wilcox, 7 Abb. Pr. (N. Y.) 73.

14. One cannot justify as housekeeper where he has taken a house, but is prevented by accident from obtaining possession, although time may be allowed in such case to justify. Bold's Bail, 1 Chit. 288, 18 E. C. L. 159.

In England one could justify as tenant by the curtesy of lands in places where such tenancy prevails. Tomsey *v.* Napier, 8 Taunt. 148, 4 E. C. L. 84.

15. Non-residents.— People *v.* New York C. Pl., 19 Wend. (N. Y.) 132; Lee *v.* Welch, 1 Cranch C. C. (U. S.) 477, 15 Fed. Cas. No. 8,204; Conningham *v.* Lacey, 1 Cranch C. C. (U. S.) 101, 6 Fed. Cas. No. 3,116. But see *supra*, II, G, 2, c, (II), (A).

16. Property abroad.— Levy's Bail, 1 Chit. 285, 18 E. C. L. 157.

17. Wife of principal.— Yale *v.* Wheelock, 109 Mass. 502.

18. Sheriffs.— Bailey *v.* Warden, 20 Johns. (N. Y.) 129. But see *supra*, II, G, 2, c, (II), (A).

19. Material witness.—Anonymous, 2 Chit. 103, 18 E. C. L. 532.

20. Strangers.— People *v.* Davidson, 67 How. Pr. (N. Y.) 416, except defendant consent.

21. Attorneys and their clerks.—Ryckman *v.* Coleman, 13 Abb. Pr. (N. Y.) 398; Scott *v.* Craig, 1 Wend. (N. Y.) 35.

Special circumstances excusing incompetency of attorney see Gilchrist *v.* Van Wagenen, 1 Cai. (N. Y.) 499, Col. & C. Cas. (N. Y.) 312.

22. Foxall's Bail, 7 D. & R. 783, 16 E. C. L. 322.

23. A less number may suffice. Holbrook *v.* Klenert, 113 Mass. 268; Rice *v.* Hosmer, 12 Mass. 126; Long *v.* Billings, 9 Mass. 479; Arrenton *v.* Jordan, 11 N. C. 98; Johnson *v.* Williams, 2 Overt. (Tenn.) 177.

One surety is sufficient on a capias ad respondendum bond. Glezen *v.* Rood, 2 Metc. (Mass.) 490; Morton *v.* Campbell, 37 Barb. (N. Y.) 179; Nulton *v.* Com., 19 Pittsb. Leg. J. (Pa.) 69.

Three persons may justify as bail. Jell *v.* Douglass, 1 Chit. 601, 18 E. C. L. 327.

24. Rice *v.* Hosmer, 12 Mass. 126; Long *v.* Billings, 9 Mass. 479; Cromelines *v.* Beldens, 1 Wend. (N. Y.) 107; Wendover *v.* Ball, 1 Col. Cas. (N. Y.) 49.

Two sureties are required if special bail be taken out of court by two justices of the peace by recognizance. Thomas *v.* Elliot, 2 Cranch C. C. (U. S.) 432, 23 Fed. Cas. No. 13,896.

In New York it has been decided that two sureties must justify as bail; one is not sufficient. O'Neil *v.* Durkee, 12 How. Pr. (N. Y.) 94. See Cromelines *v.* Beldens, 1 Wend. (N. Y.) 107. See also Grimwood *v.* Wilson, 31 Hun (N. Y.) 215, 66 How. Pr. (N. Y.) 283; Morss *v.* Hasbrouck, 10 Abb. N. Cas. (N. Y.) 407, 63 How. Pr. (N. Y.) 84. And that upon failure of one surety to justify and the undertaking is not approved the other surety is not obligated. Gross *v.* Bouton, 9 Daly (N. Y.) 25. It is also held, however,

son.[25] This rule, however, is subject to whatever exception exists by virtue of statutes relating to surety companies and which provide that any undertaking whatsoever shall be sufficient when executed or guaranteed solely by such company, and shall be accepted and taken and approved.[26]

(IV) *Exceptions to Sureties* — (A) *Right to Make.* Plaintiff may except to the bail[27] and to their sufficiency,[28] but he cannot proceed on the bail-bond;[29] nor is a party entitled to change his bail except for sufficient reason.[30]

(B) *Waiver.* An exception to special bail may thereafter be waived before the expiration of the time for justification and without requiring the latter.[31] Plaintiff may also waive his rights in respect to sureties by failing to except thereto in a proper case,[32] or by proceeding in the case without any justification or new bail,[33] or by filing a declaration or going to trial,[34] after notice received of special bail.[35]

(V) *Justification of Sureties* — (A) *Necessity* — (1) In General. Special bail must be given to entitle appearance bail to an *exoneretur*, and the former

that the sufficiency of the sureties is a matter resting in the discretion of the court, although two sureties are as a rule required. Delamater *v.* Byrne, 57 How. Pr. (N. Y.) 170.

25. Caines *v.* Hunt, 8 Johns. (N. Y.) 358.

26. Qualification of rule.— Nichols *v.* MacLean, 98 N. Y. 458, 7 N. Y. Civ. Proc. 132, 1 How. Pr. N. S. (N. Y.) 370; Travis *v.* Travis, 48 Hun (N. Y.) 343, 1 N. Y. Suppl. 357, 15 N. Y. St. 874, 14 N. Y. Civ. Proc. 307 [*reversed* in 122 N. Y. 449, 25 N. E. 920, 34 N. Y. St. 42]; Hurd *v.* Hannibal, etc., R. Co., 33 Hun (N. Y.) 109; Grimwood *v.* Wilson, 31 Hun (N. Y.) 215, 66 How. Pr. (N. Y.) 283; Matter of Filer, 11 Abb. N. Cas. (N. Y.) 107.

27. Cummings *v.* Meeker, 2 Miles (Pa.) 83.

For form of notice of exceptions to bail see 1 N. C. Code (1883), p. 355.

28. Caines *v.* Hunt, 8 Johns. (N. Y.) 358; Ferris *v.* Phelps, 1 Johns. Cas. (N. Y.) 249; Bennett *v.* Pendleton, 1 Cranch C. C. (U. S.) 146, 3 Fed. Cas. No. 1,322; Poe *v.* Mounger, 1 Cranch C. C. (U. S.) 145, 19 Fed. Cas. No. 11,240.

A plea served before justification of bail, after an exception thereto, becomes a nullity, even though received without objection, and the plaintiff must plead *de novo* after justifying. Briggs *v.* Rowe, 7 Cow. (N. Y.) 508. See Adams *v.* Minton, 6 Cow. (N. Y.) 56.

29. Cannot proceed on bond.— Caines *v.* Hunt, 8 Johns. (N. Y.) 358; Ferris *v.* Phelps, 1 Johns. Cas. (N. Y.) 249.

30. Change of bail by party.— Orchard *v.* Glover, 9 Bing. 318, 23 E. C. L. 597.

Sheriff cannot refuse to receive timely notice of exception to the sufficiency of sureties on the ground that the undertaking has been approved *ex parte* where the judge is of the proper court. Hetsch *v.* Bishop, 61 N. Y. Super. Ct. 441, 20 N. Y. Suppl. 837, 49 N. Y. St. 322.

The court may extend the time for serving notice of non-acceptance of bail. Zimm *v.* Ritterman, 5 Rob. (N. Y.) 618.

Justice should allow time for an exception. Smith *v.* Steel, 1 Ashm. (Pa.) 80.

31. Boyd *v.* Weeks, 6 Hill (N. Y.) 71; People *v.* New York Super. Ct., 20 Wend. (N. Y.) 607.

Defendant's giving notice of justification will not have the effect of waiving an irregularity in giving notice of exception to bail without entering it. Hodson *v.* Garrett, 1 Chit. 174, 18 E. C. L. 105.

32. Failure to except.—He may thus waive his right to more than one surety (Cummings *v.* Meeker, 2 Miles (Pa.) 83) or to have incompetent persons as attorneys, etc., rejected (Miles *v.* Clarke, 4 Bosw. (N. Y.) 632 [*affirming* 2 Bosw. (N. Y.) 709]). He may also waive justification that bail shall be a householder or freeholder (Saggers *v.* Gordon, 5 Taunt. 174, 1 E. C. L. 96); and exception must be taken to the sufficiency of appearance bail or he cannot be objected to as special bail (Dunlops *v.* Laporte, 1 Hen. & M. (Va.) 22).

After justification opposition to bail is too late. Butler's Bail, 1 Chit. 83, 18 E. C. L. 58.

33. Proceeding without justification.— Flack *v.* Eager, 4 Johns. (N. Y.) 185.

34. Filing declaration and going to trial.— People *v.* Stevens, 9 Johns. (N. Y.) 72; White *v.* Fitler, 7 Pa. St. 533; Com. *v.* Heilman, 4 Pa. St. 455; Com. *v.* Watmough, 1 Pa. L. J. Rep. 412, 3 Pa. L. J. 63, holding also that the rule was the same after the act of 1836 as before. See also Rex *v.* London Sheriffs, 1 D. & R. 163, 16 E. C. L. 26. But see Com. *v.* Heilman, 4 Pa. St. 455.

35. After notice of special bail.— So although the bail-piece was not filed when notice was given, and in such case the plaintiff cannot proceed against the sheriff, even if the bail are insufficient. People *v.* Stevens, 9 Johns. (N. Y.) 72. Nor where there is a waiver can he proceed against the bail excepted to. Flack *v.* Eager, 4 Johns. (N. Y.) 185. Nor can he by a waiver hold special bail who have not justified in time and are discharged. Thorp *v.* Faulkner, 2 Cow. (N. Y.) 514; People *v.* Judges Onondaga County C. Pl., 1 Cow. (N. Y.) 54.

must justify if excepted to.[36] But if bail is entered for the purpose of making a surrender justification is unnecessary.[37]

(2) Effect of Failure to Justify. After bail is accepted by the sheriff defendant is at large until actual failure of the sureties to justify in case of an exception taken to them,[38] and failure to justify makes the sheriff liable as bail, although he may exonerate himself by taking defendant into actual custody,[39] and when he becomes so liable he has all the rights and privileges and is subject to all the duties and liabilities of bail.[40] And bail who fail to justify unless other bail are given and justify are liable to the sheriff for all damages sustained by such failure, but the sureties are not liable as bail in such case,[41] nor are they liable to one to whom the bond has been assigned.[42] It has, however, been decided in an early case that the bond is still obligatory upon non-justification after exception taken, unless bail have duly surrendered their principal, and that plaintiff may proceed upon the bail-bond after judgment had against defendant and issuing a capias ad satisfaciendum which is returned *non est*.[43]

(3) No Renewal of Sheriff's Liability. Bail once regularly allowed cannot be set aside on the ground of excusable neglect of the plaintiff's attorney to

36. Bobyshall *v.* Oppenheimer, 4 Wash. (U. S.) 317, 3 Fed. Cas. No. 1,589.

37. Stockton *v.* Throgmorton, 1 Baldw. (U. S.) 148, 23 Fed. Cas. No. 13,463.

If, after exception taken, bail do not justify, the proper course is to rule the sheriff to bring in the body and compel him by attachment to procure sufficient bail or pay the money into court. Fitler *v.* Bryson, 6 Watts & S. (Pa.) 566. See also White *v.* Fitler, 7 Pa. St. 533; Freeman *v.* Hays, 2 Pa. L. J. Rep. 253, 4 Pa. L. J. 8; Com. *v.* Watmough, 1 Pa. L. J. Rep. 412, 3 Pa. L. J. 63.

38. Arteaga *v.* Conner, 88 N. Y. 403, 2 N. Y. Civ. Proc. 152, 14 N. Y. Wkly. Dig. 278 [*affirming* 47 N. Y. Super. Ct. 494].

39. **Liability of sheriff.**— Douglass *v.* Warren, 19 Hun (N. Y.) 1, 58 How. Pr. (N. Y.) 264. See also Neresheimer *v.* Bowe, 11 Daly (N. Y.) 301.

Sheriff's right to rearrest.—Arteaga *v.* Conner, 88 N. Y. 403, 2 N. Y. Civ. Proc. 152, 14 N. Y. Wkly. Dig. 278 [*affirming* 47 N. Y. Super. Ct. 494]; Watt *v.* Reilly, 62 How. Pr. (N. Y.) 350.

Failure of bail to justify as ground for second arrest see Arrest, II, K, 1, b [3 Cyc. 975, and note 12].

But no lapse of time will give him the right to rearrest defendant after indefinite postponement of justification by the plaintiff's attorney, unless the sureties have made actual default. Arteaga *v.* Conner, 88 N. Y. 403, 2 N. Y. Civ. Proc. 152, 14 N. Y. Wkly. Dig. (N. Y.) 278 [*affirming* 47 N. Y. Super. Ct. 494].

40. **Sheriff has rights of and is liable as bail.**— Brady *v.* Brundage, 59 N. Y. 310; Sartos *v.* Mèrceques, 9 How. Pr. (N. Y.) 188.

41. **Liability of bail to sheriff.**— Clapp *v.* Schutt, 44 N. Y. 104 [*affirming* 44 Barb. (N. Y.) 9, 29 How. Pr. (N. Y.) 255]; Douglass *v.* Warren, 19 Hun (N. Y.) 1, 58 How. Pr. (N. Y.) 264; *In re* Taylor, 7 How. Pr. (N. Y.) 212. See Haberstro *v.* Bedford, 43 Hun (N. Y.) 201.

Upon non-justification within time allowed bails' liability ceases and they cannot be held by plaintiff's notice of waiver of exception. Cooper *v.* Spicer, 2 Cow. (N. Y.) 619; Thorp *v.* Faulkner, 2 Cow. (N. Y.) 514; Trotter *v.* Hawley, 1 Cow. (N. Y.) 226; Waterman *v.* Allen, 1 Cow. (N. Y.) 60; People *v.* Judges Onondaga County C. Pl., 1 Cow. (N. Y.) 54.

42. **Liability to assignee of bond.**— Clapp *v.* Schutt, 44 N. Y. 104. Where the plaintiff in an execution gave notice of non-acceptance, and bail did not justify and defendant did nothing as to the undertaking, the plaintiff has no right of action as original obligee against the bail. Clapp *v.* Schutt, 44 Barb. (N. Y.) 9, 29 How. (N. Y.) 255 [*affirmed* in 44 N. Y. 104].

What bail-bonds are assignable under statute 4 Anne, c. 16, see Meller *v.* Palfreyman, 4 B. & Ad. 146, 24 E. C. L. 73.

43. Com. *v.* Watmough, 1 Pa. L. J. Rep. 412, 3 Pa. L. J. 63.

Failure of special bail to justify before expiration of time allowed therefor does not release them if exceptions are withdrawn before time expires. People *v.* New York Super. Ct., 20 Wend. (N. Y.) 607.

If bail has been treated as valid to gain a benefit *exoneretur* will not be entered on ground of bail being null. Sard *v.* Forrest, 1 B. & B. 139, 2 D. & R. 250, 1 L. J. K. B. O. S. 31.

That principal is a lunatic and that marshal refused to receive him into custody is no ground of *exoneretur* of bail-piece. Anderson's Bail, 2 Chit. 104, 18 E. C. L. 532.

Rule to bring in body.— Under the Pennsylvania act of June 13, 1836, as well as prior thereto, the effect of a non-justification might be a rule to the sheriff to bring in defendant's body. Fitler *v.* Bryson, 6 Watts & S. (Pa.) 566; Littleboy *v.* Blankman, 1 Miles (Pa.) 279. When rule not enforceable see Freeman *v.* Hays, 2 Pa. L. J. Rep. 253, 4 Pa. L. J. 8, under Pennsylvania act June 13, 1836, §§ 9, 12, 13, 14. And no action lies on bail-bond after such rule. Blackford *v.* Hawkins, 1 Bing. 181, 7 Moore C. P. 600, 8 E. C. L. 461.

attend the justification, and if the sheriff has once been legally exonerated from liability he cannot be reinstated.[44]

(B) *Notice.* Notice of justification must be given.[45]

(C) *Time and Place.* The general rule is that bail must justify at the time and place specified in the notice, and such justification is good.[46] Further time may be allowed for justification upon good cause appearing, but a new notice must be given.[47]

(D) *Sufficiency* — (1) In General. In New York the justification is not complete unless the judge, where he finds the bail sufficient, indorse his allowance on the undertaking and file it with the clerk;[48] and it was ruled early in Pennsylvania that an affidavit before a commissioner, with notice to the plaintiff that the bail would answer on oath any questions that might be put to them, was a sufficient justification.[49]

44. Lewis *v.* Stevens, 93 N. Y. 57, 4 N. Y. Civ. Proc. 224, 65 How. Pr. (N. Y.) 525 [*reversing* 48 N. Y. Super. Ct. 559].

45. Jaques *v.* Hemphill, 3 Harr. (Del.) 503.

For form of notice of justification of bail see 1 N. C. Code (1883), p. 355.

Sufficiency of notice — New bail.—A notice of intention to "perfect" bail is insufficient where, in addition to justification, it is purposed to add new bail. Brown *v.* Williamson, 8 N. J. L. 363.

46. Southerland *v.* Sheffield, 2 Wend. (N. Y.) 293. As to estoppel as to time against sureties on undertaking required for arrest see Vanderberg *v.* Connoly, 18 Utah 112, 54 Pac. 1097.

At a second term, after exception taken at the rules, it was decided in an early case that the marshal might justify appearance bail. Brent *v.* Brashears, 2 Cranch C. C. (U. S.) 59, 4 Fed. Cas. No. 1,836.

If justification is after plea served, the plea is not made good unless served *de bene esse* and with notice. Adams *v.* Minton, 6 Cow. (N. Y.) 56.

In open court.— Under a former rule a judge of the supreme court might, before justification, order it to be made in open court. N. Y. General Rule, 13 Johns. (N. Y.) 422.

In vacation.— So it has been held that bail excepted to might justify in vacation when defendant was arrested in vacation. Fenn *v.* Smith, 6 Johns. (N. Y.) 124.

Under the early English practice bail might justify at the rising of court before the last day of the term (Hopper *v.* Jacobs, 8 Taunt. 56, 4 E. C. L. 38); or at any time before execution issued (Tood *v.* Etherington, 2 Marsh. 374, 4 E. C. L. 489; Stanton's Bail, 2 Chit. 73, 18 E. C. L. 510).

Before whom made.— The present New York statute provides for notice of justification before a judge of the court or a county judge. N. Y. Code Civ. Proc. §§ 578, 580, 581. The early rule, however, permitted justification before a judge at chambers (Fenn *v.* Smith, 6 Johns. (N. Y.) 124); or on due notice before officers authorized to take recognizances (N. Y. General Rule, 13 Johns. (N. Y.) 422); or an officer other than the one named in the notice (Southerland *v.* Sheffield, 2 Wend. (N. Y.) 293). But if not made in open court an appeal lay to the court. N. Y. General Rule, 13 Johns. (N. Y.) 422.

47. **Further time allowed.**— Burns *v.* Robbins, 1 Code Rep. (N. Y.) 62; Smith *v.* Steel, 1 Ashm. (Pa.) 80, holding also that time may be allowed if necessary for entering good bail. So if time has been granted to inquire into the sufficiency of former bail fresh bail may be put in. Freeman *v.* Oldham, 2 Chit. 84, 18 E. C. L. 518. But if bail is approved the court cannot renew the sheriff's liability by opening the default by reason of neglect of plaintiff's attorneys. Lewis *v.* Stevens, 93 N. Y. 57, 4 N. Y. Civ. Proc. 224, 65 How. Pr. (N. Y.) 525, 2 McCar. (N. Y.) 450 [*reversing* 48 N. Y. Super. Ct. 559].

Bail becoming incompetent.— Time will be allowed to add and justify another bail where bail who has consented becomes incompetent. Dixon *v.* Clarke, 1 Chit. 3, 18 E. C. L. 16; Anonymous, 1 Chit. 6, 11, 18 E. C. L. 19, 22. See also Ayton's Bail, 1 Chit. 4, 18 E. C. L. 17.

Errors in jurat or notice.—And time to justify will be allowed for certain errors in jurat (Arrington's Bail, 1 Chit. 495, 18 E. C. L. 271; Drabble *v.* Denham, 2 Chit. 92, 18 E. C. L. 524) or in notice of justification (Atkinson's Bail, 2 Chit. 86, 18 E. C. L. 520).

Affidavit to add and justify on ground of bail not attending must show promise to attend and that deponent believed bail competent. West's Bail, 1 Chit. 292, 18 E. C. L. 162; Hamilton *v.* Dainsford, 2 Chit. 82, 18 E. C. L. 516; Gwillim *v.* Howes, 2 Chit. 107, 18 E. C. L. 534; Gillbank's Bail, 9 D. & R. 6, 22 E. C. L. 583. But when *contra*, see Joyce *v.* Pratt, 6 Bing. 377, 4 M. & P. 55, 19 E. C. L. 175; Lascar *v.* Morioseph, 1 Bing. 357, 8 E. C. L. 546.

48. O'Neil *v.* Durkee, 12 How. Pr. (N. Y.) 94.

For form of justification of bail see 1 N. C. Code (1883), p. 356.

For form of notice of other bail-bond see 1 N. C. Code (1883), p. 356.

49. Jones *v.* Badger, 5 Binn. (Pa.) 461.

Bail prevaricating may on coming up again be committed for contempt. Wilson *v.* Bodkin, 8 D. & R. 41, 16 E. C. L. 333; Curtis *v.* Smith, 1 Chit. 116, 18 E. C. L. 75. Bail will not be set aside on affidavit of perjury by bail in justifying. Stockham *v.* French, 1 Bing.

(2) As to Amount in Which Sureties Justify.[50] Where the statute provides that each surety must be worth the sum specified in the order of arrest, bail need not justify in double the amount, even though another enactment requires that, except when otherwise expressly prescribed by law, the justification must be in twice the sum specified in the undertaking.[51]

3. Return and Filing. As a general rule it is necessary, in order to render a recognizance a perfect instrument, which is valid and enforceable, that it, or a copy thereof, be returned to the court and filed,[52] but where omission to file the bail-piece has been by mistake the court may order it to be filed *nunc pro tunc*.[53]

H. Money Deposited in Lieu of Bail — 1. In General. A general power to take bail does not authorize receiving a deposit of money in lieu of bail.[54]

2. Disposition of — a. Refunding. Where, under the statute, money deposited in lieu of bail has been released, as by a termination of the proceedings,[55] or by the giving and justification of sufficient bail,[56] such money should be returned to the defendant; but, in the absence of a statute to the contrary,[57] such cash deposit

365, 8 E. C. L. 550. Nor will allowance of bail be set aside because one of them received money for trouble and loss of time. Wyllie *v.* Jones, 2 D. & R. 253, 16 E. C. L. 84.

Defendant's knowledge.— Defendant has been held bound to know circumstances of bail. Hunt *v.* Haynes, 1 Chit. 7, 18 E. C. L. 19; George *v.* Barnsley, 1 Chit. 8, 18 E. C. L. 20.

Fraud.— Justification will be set aside for gross fraud or imposition. Gould *v.* Berry, 1 Chit. 143, 18 E. C. L. 89.

50. As to the number of sureties required see *supra*, II, G, 2, c, (III).

51. Cafiero *v.* Demartino, 6 N. Y. Wkly. Dig. 55.

Double the amount was formerly required. Chapin *v.* White, 2 How. Pr. (N. Y.) 105; Louis *v.* Mitchell, 2 Hill (N. Y.) 379. But should the rule require that bail must justify in double the amount, nevertheless, if its enforcement will operate oppressively, as where the demand is very large, the court will mitigate the sum by making it reasonably sufficient to secure the plaintiff. Cromelines *v.* Beldens, 1 Wend. (N. Y.) 107. But a set-off will not be considered in mitigation, nor for such purpose will an affidavit be required which in effect substantially operates to reduce the demand. Robbins *v.* Upton, 5 Cranch C. C. (U. S.) 498, 20 Fed. Cas. No. 11,880. Where, in an action for libel, damages were laid at twenty thousand dollars and plaintiff averred damages to the same extent, justification was required for five hundred dollars only. Mayo *v.* Smith, 5 Cranch C. C. (U. S.) 569, 16 Fed. Cas. No. 9,355.

Recognizance should not be taken for a larger sum than directed. Waugh *v.* People, 17 Ill. 561.

52. **Necessity.**—Darling *v.* Hubbell, 9 Conn. 350; Trigg *v.* Shields, Hard. (Ky.) 168; Ruggles *v.* Berry, 76 Me. 262; Quarles *v.* Buford, 3 Munf. (Va.) 487. But see Jones *v.* Bunn, 2 Metc. (Ky.) 490, where it is held that a requirement that the bond when accepted shall be returned to the clerk's office is merely directory.

Effect of filing the bail-piece is to render it a record of court on which an action will lie. Green *v.* Ovington, 16 Johns. (N. Y.) 55.

53. **Nunc pro tunc filing.**— Nichols *v.* Sutfin, 7 Cow. (N. Y.) 422, where such an order was made after judgment.

Remedy where bond lost.—Where the original bond is lost and an application is made, in an action upon the recognizance, to substitute a copy in lieu of the original, notice should be given to the sureties as well as to the principal. Montgomery *v.* Henry, 10 Mich. 19. In an early case in New York it is decided that, if a bond is lost, permission may be given after a verdict to file common bail *nunc pro tunc*. Napier *v.* Whipple, 3 Cai. (N. Y.) 88. See also, generally, Lost Instruments.

54. Eagan *v.* Stevens, 39 Hun (N. Y.) 311 [*distinguished* in McShane *v.* Pinkham, 19 N. Y. Suppl. 969, 46 N. Y. St. 66, 22 N. Y. Civ. Proc. 173].

Money deposited in lieu of bail in criminal prosecutions see *infra*, III, H.

55. **That proceedings have terminated,** so as to release the money, must be shown in order to recover it from the sheriff. Alexander *v.* Creamer, 46 N. Y. App. Div. 211, 61 N. Y. Suppl. 539.

Where, upon appeal from a judgment against him, execution is stayed and he furnishes a sufficient undertaking for bail defendant is entitled to a return of his cash deposit. Lake *v.* Haseltine, 12 N. Y. Civ. Proc. 309, 18 Abb. N. Cas. (N. Y.) 320.

56. **Until after the giving and justification of bail,** a motion to refund money deposited in lieu of bail cannot be made. Hermann *v.* Aaronson, 3 Abb. Pr. N. S. (N. Y.) 389, 34 How. Pr. (N. Y.) 272 [*affirmed* in 8 Abb. Pr. N. S. (N. Y.) 155].

57. N. Y. Code Civ. Proc. § 586.

Acknowledgment and record of written direction to pay.—Where a statute provides that a written direction to pay money deposited in lieu of bail, in case defendant becomes entitled to a return thereof, shall be acknowledged and recorded in like manner as a deed, such acknowledgment is required merely to note the substance of the direction in the clerk's books. The statutory acknowledgment last above mentioned may, if insufficient, be amended *nunc pro tunc* on the certificate of payment into court. Kennerly *v.* Tompkins,

could be returned to no other person than the defendant, even though deposited by a third person.[58]

b. Satisfaction of Plaintiff's Judgment. Money on deposit in lieu of bail at the time of final judgment for the plaintiff should be applied in satisfaction of said judgment, irrespective of any third person's prior ownership of the money, or of any special stipulation for return on defendant's surrender,[59] although the plaintiff's right in this respect may not be absolute, but limited by circumstances.[60]

I. Discharge of Sureties — 1. Grounds — a. In General. The liability of bail rests upon the terms and conditions of their obligation. Therefore, as a general rule, special bail are discharged by anything which in any manner affects the nature and extent of their contract in such a way as to probably result in an increase of risk or liability.[61] For the same reason any alterations in the writ, changes in the pleadings by amendment or otherwise, or variances from the affidavit of arrest,[62] whereby a different or new cause of action is created and the bail thereby subjected to a different or additional responsibility, or whereby they are made liable for an increased sum or are otherwise placed in a situation which

7 N. Y. Suppl. 921, 17 N. Y. Civ. Proc. 428, 23 Abb. N. Cas. (N. Y.) 296.

58. Returning to third person.— Hermann *v.* Aaronson, 3 Abb. Pr. N. S. (N. Y.) 389, 34 How. Pr. (N. Y.) 272 [*affirmed* in 8 Abb. Pr. N. S. (N. Y.) 155]; Zimmerman *v.* Peirpont, 17 Phila. (Pa.) 53, 42 Leg. Int. (Pa.) 170, 2 Lanc. L. Rev. 177.

59. Hermann *v.* Aaronson, 3 Abb. Pr. N. S. (N. Y.) 389, 34 How. Pr. (N. Y.) 272.

60. Plaintiff's right in this respect does not extend to a case where, after bail has been accepted, at the officer's request a third person deposits money in his hands as security to the officer that bail will justify or the defendant surrender himself. New York Commercial Warehouse Co. *v.* Graber, 45 N. Y. 393.

61. Increasing risk or liability.—*Michigan.* — Campau *v.* Seeley, 30 Mich. 57.

New York.— Lathrop *v.* Briggs, 8 Cow. (N. Y.) 171.

Ohio.— Candee *v.* Kelsey, 7 Ohio, pt. II, 210.

Pennsylvania.— Hayden *v.* Adams, 2 Binn. (Pa.) 232; Lopeman *v.* Henderson, 4 Pa. St. 231; Myers *v.* Young, 2 Dall. (Pa.) 79, 1 L. ed. 297.

Virginia.— Grays *v.* Hines, 4 Munf. (Va.) 437.

See 5 Cent. Dig. tit. "Bail," § 64.

Discharge of bail in criminal prosecutions see *infra*, III, J.

Performance of obligation see *infra*, II, J.

Surrender of principal see *infra*, II, L.

Alteration of bond operating as discharge of obligors see Alterations of Instruments, 2 Cyc. 219, note 13.

In Canada it seems that bail are not bound by what the attorney for their principal may choose to do as such. Mitchell *v.* Noble, 1 C. L. Chamb. 284.

"Just cause" may be shown why judgment should not be rendered against the bail; but "just cause" does not mean a cause why the amount recovered should be reduced to nominal damages. Walker *v.* Waterman, 50 Vt. 107.

That officer was prevented by the principal's resistance from taking him in execution is no defense. Fitch *v.* Loveland, Kirby (Conn.) 380.

62. Alteration of writ, change in declaration; amendments.— *When bail discharged.* —*Delaware.*— Waples *v.* Derrickson, 1 Harr. (Del.) 134.

Massachusetts.— Wood *v.* Denny, 7 Gray (Mass.) 540 (holding that they are discharged by amending a declaration on money counts by adding a count on a guaranty of a debt due from a third person to the plaintiff); Willis *v.* Crooker, 1 Pick. (Mass.) 204 (counts added were not for same cause of action as the counts in the writ).

New York.— Pell *v.* Grigg, 4 Cow. (N. Y.) 426.

North Carolina.— Bradhurst *v.* Pearson, 32 N. C. 55 (holding that an amendment of the writ after bail is given, whereby the nature of the action is changed, discharges bail); Smith *v.* Shaw, 30 N. C. 233; West *v.* Ratledge, 15 N. C. 31; Bryan *v.* Bradley, 1 N. C. 54.

South Carolina.— Murrel *v.* Halbert, 1 Bailey (S. C.) 238; Woodfolk *v.* Leslie, 2 Nott & M. (S. C.) 585.

Vermont.— Wright *v.* Brownell, 3 Vt. 435.

United States.— Hyer *v.* Smith, 3 Cranch C. C. (U. S.) 437, 12 Fed. Cas. No. 6,979.

When bail not discharged.— *Massachusetts.*— Brown *v.* Howe, 3 Allen (Mass.) 528; Wood *v.* Denny, 7 Gray (Mass.) 540 (holding that bail were not discharged where counts added were in fact the same cause of action, though not so appearing on the record); Lord *v.* Clark, 14 Pick. (Mass.) 223; Seeley *v.* Brown, 14 Pick. (Mass.) 177 (judgment was taken on the original declaration and not on the new demand under the amendment).

New York.— Blue *v.* Stout, 3 Cow. (N. Y.) 354.

North Carolina.— Bradhurst *v.* Pearson, 32 N. C. 55, where bail was not discharged, but it was declared when an amendment would discharge.

Ohio.— Enos *v.* Aylesworth, 8 Ohio St. 322.

Pennsylvania.— Hackett *v.* Carnell, 106 Pa. St. 291.

South Carolina.— Woodfolk *v.* Leslie, 2 Nott & M. (S. C.) 585, holding that a creditor might hold the debtor to bail in one cause of action and declare on another.

materially changes the legal nature of their obligation, may operate to discharge the bail.[63] It is also decided that a verdict given on a different cause of action than that on which the creditor is held to bail may be taken advantage of in a suit on the bond.[64]

b. Arrest and Custody of Principal — (i) *In Other Proceedings.* Where the power of surrendering the principal is made impossible by an act of law, such as the imprisonment and custody of the principal in other proceedings, the obligation to surrender him is thereupon discharged,[65] but the liability must rest wholly

Vermont.— Wright *v.* Brownell, 3 Vt. 435, holding that bail are not discharged by filing a new count, unless they are thereby subjected to a new or additional responsibility or made liable for an increased sum.

United States.— Carrington *v.* Ford, 4 Cranch C. C. (U. S.) 231, 5 Fed. Cas. No. 2,449.

England.— Manesty *v.* Stevens, 9 Bing. 400, 2 M. & S. 563, 23 E. C. L. 633; Coppin *v.* Potter, 1 Bing. N. Cas. 443, 27 E. C. L. 714.

See 5 Cent. Dig. tit. "Bail," § 81.

63. Increase of ad damnum discharges bail. Langley *v.* Adams, 40 Me. 125. And they are discharged when the sum in the declaration is larger than in the writ. Matthews *v.* Armstrong, 4 Yerg. (Tenn.) 180. *Contra,* New Haven Bank *v.* Miles, 5 Conn. 587. See Carr *v.* Sterling, 114 N. Y. 558, 22 N. E. 37, 24 N. Y. St. 521 [*reversing* 53 N. Y. Super. Ct. 255].

Variance — Affidavit and declaration. — When bail are discharged. Robeson *v.* Thompson, 9 N. J. L. 97; Hyer *v.* Smith, 3 Cranch C. C. (U. S.) 437, 12 Fed. Cas. No. 6,979. When bail are not discharged. Cummer *v.* Moyer, 57 Mich. 375, 24 N. W. 110; Wilkinson *v.* Nichols, 48 Mich. 354, 12 N. W. 486; Robeson *v.* Thompson, 9 N. J. L. 97.

Demand contained in suit in which principal has been arrested is the only one on which the sureties are responsible. Bean *v.* Parker, 17 Mass. 591.

Discontinuance of the suit at the rules, if it be reinstated, does not discharge the bail. Gadsby *v.* Miller, 1 Cranch C. C. (U. S.) 39, 9 Fed. Cas. No. 5,167.

64. Verdict on different cause of action.— Woodfolk *v.* Leslie, 2 Nott & M. (S. C.) 585. But it has been determined that judgment against bail on scire facias is sufficiently regular, even though the action against the principal was changed from detinue to trover. Porter *v.* Brisbane, 2 Brev. (S. C.) 496. See Karck *v.* Avinger, Riley (S. C.) 201; Saunders *v.* Hughes, 2 Bailey (S. C.) 504.

65. *Delaware.*— Bail are discharged by act of the law as by the conviction or imprisonment of the principal for felony. Canby *v.* Griffin, 3 Harr. (Del.) 333.

Massachusetts.—The rule applies to a case where a lunatic is confined and a writ of habeas corpus is denied to bring in the principal from the hospital for surrender. Fuller *v.* Davis, 1 Gray (Mass.) 612. See also Way *v.* Wright, 5 Metc. (Mass.) 380. *Contra,* Parker *v.* Chandler, 8 Mass. 264, which holds that confinement in a state prison for felony did not excuse bail, since nothing but the act of God could so operate; this case is declared in Way *v.* Wright, 5 Metc. (Mass.) 380, to be shaken, if not overruled, by Bigelow *v.* Johnson, 16 Mass. 218, and also that it is opposed to the English decisions.

New Jersey.—"The cases almost uniformly recognized the rule, that where the condition of a bond or recognizance becomes impossible of performance by the act of God, or of the law, or of the obligee, the obligation is saved." Steelman *v.* Mattix, 38 N. J. L. 247, 249, 20 Am. Rep. 389.

New York.— Rule applied to a case of imprisonment for life; bail made a *bona fide* effort to surrender the principal, and if it had been done it would not have benefited the plaintiff. Cathcart *v.* Cannon, 1 Johns. Cas. (N. Y.) 28, Col. & C. Cas. (N. Y.) 64, Col. Cas. (N. Y.) 65. See also Loflin *v.* Fowler, 18 Johns. (N. Y.) 335, where principal was imprisoned in another state for felony.

Virginia.— Ross *v.* Randolph, 5 Call (Va.) 296.

United States.— Wormsley *v.* Beedle, 2 Cranch C. C. (U. S.) 331, 30 Fed. Cas. No. 18,049.

England.—"Wherever the principal, by act of God, or of the law, is taken, as it were, out of the bail's keeping, before the day of surrender allowed, and without fault in his bail, they are discharged." 5 Dane Abr. 290 [*quoted* in Fuller *v.* Davis, 1 Gray (Mass.) 612, 613]. Substantially the same rule is stated in Canby *v.* Griffin, 3 Harr. (Del.) 333 [*citing* Petersdorf Bail, 395]. In Fowler *v.* Dunn, 4 Burr. 2034, habeas corpus was moved on behalf of bail to bring up defendant, who was on ship about to be transported for felony, and motion was denied, in that it might delay the ship's sailing, and it was impliedly declared that habeas corpus would not lie after actual transportation. In Vergen's Bail, 2 Str. 1217, the convict was brought up on habeas corpus and surrendered in discharge of bail. The same was done in Sharp *v.* Sheriff, 7 T. R. 226; Biggnell *v.* Forrest, 2 Johns. (N. Y.) 482. In Trinder *v.* Shirley, 1 Dougl. 45, the principal became a peer by succession and could not be surrendered and *exoneretur* was entered. In Wood *v.* Mitchell, 6 T. R. 247, principal was convicted of felony and sentenced to transportation and *exoneretur* was entered on motion of bail. See also Merrick *v.* Vaucher, 6 T. R. 50; Bacon Abr. Bail in Civil Causes, D; 1 Tidd Pr. (1st Am. ed.) 243.

See 5 Cent. Dig. tit. "Bail," § 68.

upon such act of the law, without aid or contribution from the fault, neglect, or omission of the sureties themselves.[66]

(II) *In Same Action.* Bail are discharged by the legal arrest or commitment of the principal in that action; but charging one of two bail in execution does not discharge the other.[67]

c. Discharge of One of Several Co-Defendants. The discharge of one of several co-defendants does not release the bail as to the other or others, unless such bail's liability is thereby changed or varied, or they are subjected to a new or different cause of action, or to a greater risk, or the sureties are prejudicially affected in their rights or means of indemnity as shown by and dependent upon the bond.[68] The release of the husband after execution against him and his wife

66. See cases cited *supra*, note 65.

Rule qualified and distinguished.—*Massachusetts.*— A distinction has been made between these cases where the convict is confined under a charge only of felony, of which he may be acquitted and his creditor derive benefit by taking him in execution, and these cases where he is in prison under sentence and the creditor can derive no advantage from his execution, and the prisoner will be remanded. In such a case habeas corpus is an unnecessary expense, and, although habeas corpus is proper, it is not the only course. Way *v.* Wright, 5 Metc. (Mass.) 380. It is one thing to excuse bail and another to discharge them upon surrender of the principal. So, where the bail pleaded in bar the commitment of the principal to jail and the plaintiff in an action against the bail replied that they were afterward imprisoned in state prison on a charge of felony, the replication was adjudged bad, since the bail might have habeas corpus and surrender the principal. Bigelow *v.* Johnson, 16 Mass. 218.

New Jersey.— In Steelman *v.* Mattix, 38 N. J. L. 247, 20 Am. Rep. 389, the rule was declared as in force, but in that case the surrender was not rendered impossible by act of the law, or by operation thereof, and the sureties were not held.

New York.— In Haberstro *v.* Bedford, 118 N. Y. 187, 23 N. E. 459, 28 N. Y. St. 857 [*affirming* 43 Hun (N. Y.) 201, 5 N. Y. St. 399, 26 N. Y. Wkly. Dig. 56], the sureties were held not relieved from liability to the sheriff by his removal of the principal to an inebriate asylum in another county, nor by the fact that said sheriff released defendant from custody and caused his rearrest by the coroner. But in this case the bail refused to justify and the order of commitment to the asylum was void. In Phœnix F. Ins. Co. *v.* Mowatt, 6 Cow. (N. Y.) 599, the term of imprisonment was only two years, and the court declared that relief had only been granted in those cases where imprisonment was for life or for a long term of years in another state, and therefore temporary imprisonment was no ground for discharge, although that might be granted for surrender if bail were pressed with suit. The refusal was, it is apparent, to grant summary relief. In Nehresheimer *v.* Bowe, 3 N. Y. Civ. Proc. 363, the sheriff was refused relief where defendant escaped into another state and was there imprisoned for crime. But the bail did not justify, and the case really turned upon the construction of N. Y. Code Civ. Proc. §§ 589, 600.

North Carolina.— In Adrian *v.* Scanlin, 77 N. C. 317, bail was not exonerated where the term of imprisonment expired before judgment against bail. See also Sedberry *v.* Carver, 77 N. C. 319.

United States.— In Gadsby *v.* Miller, 1 Cranch C. C. (U. S.) 39, 9 Fed. Cas. No. 5,167, the plea was made, but abandoned, that the principal was in jail in another state at the time of the judgment and ever since. But in Bowerbank *v.* Payne, 2 Wash. (U. S.) 464, 3 Fed. Cas. No. 1,727, the court rules that even if the lunacy of the principal were permanent there was nothing to prevent his surrender, and in the absence of proof that it was not temporary, nothing could justify the release of bail.

Where other proceedings are civil.—In Ross *v.* Randolph, 5 Call (Va.) 296, the distinction is expressly made between arrest in civil and in criminal proceedings.

Where principal is imprisoned for crime before return of civil process surety may escape liability by filing special bail and surrendering the principal by habeas corpus, or by motion after sentence. Atkinson *v.* Prine, 46 N. J. L. 28. See Nehresheimer *v.* Bowe, 3 N. Y. Civ. Proc. 363.

67. Johnson *v.* Smith, 1 Root (Conn.) 373; Crouse *v.* Paddock, 8 Hun (N. Y.) 630; Penn *v.* Remsen, 24 How. Pr. (N. Y.) 503; Stewart *v.* McGuin, 1 Cow. (N. Y.) 99. Commitment "for the relief of bail" discharges (Ruggles *v.* Corey, 3 Conn. 419) or a commitment on alias execution (Warren v. Gilmore, 11 Cush. (Mass.) 15) or an arrest on capias ad satisfaciendum (Milner *v.* Green, 2 Johns. Cas. (N. Y.) 283; McKnight *v.* Sessions, 8 Rich. (S. C.) 210), and a subsequent discharge of the principal with his consent under the act of 1815 does not revive liability of bail (McKnight *v.* Sessions, 8 Rich. (S. C.) 210). Judgment against bail does not discharge principal taken on alias execution. *In re* Potoshinsky, (R. I. 1897) 36 Atl. 878.

68. Sanderson *v.* Stevens, 116 Mass. 133 [*citing* Leonard *v.* Speidel, 104 Mass. 356]. See also Happenny *v.* Trayner, 111 Mass. 279; Hamlin *v.* McNiel, 32 N. C. 306; Karck

upon a judgment in an action in which a body execution can issue does not release sureties, who were bail for both.[69]

d. Irregularity of Proceedings. Bail may be discharged by reason of the irregularity of the proceedings against the principal, whether the error be that of the court or judge, or exists in some material step in the process, or where it is otherwise such as to bring it within the rule that bail shall not be prejudiced materially contrary to the condition and terms of his obligation where he is not in fault.[70]

e. Judgment — (i) *For More Than Original Claim.* If the plaintiff takes judgment for more than the *ad damnum* named in the writ and attempts to hold bail by giving them notice on the execution they are discharged.[71]

(ii) *For Principal.* If judgment is rendered upon the merits for the principal bail are exonerated.[72]

f. Plaintiff's Acts. The plaintiff or his attorney may by acts or declarations done or made surrender their rights in respect to the obligation of bail,[73] but acts

v. Avinger, 3 Hill (S. C.) 215. So in Higginbotham *v.* Browns, 4 Munf. (Va.) 516, it was declared that the surrender of one only was not a full performance and no bar to scire facias, and also that the case was not analogous to the discharge of one of two defendants on execution since the execution was joint.

When bail released.— In Trice *v.* Turrentine, 27 N. C. 236, there was a joint judgment, a capias ad satisfaciendum issued against all, and the sheriff was directed by the plaintiff not to execute the capias ad satisfaciendum as to two, and it was declared that the law was for the benefit of bail, and good faith was required of the plaintiff in the effort to recover the debt of the principal. In Bryan *v.* Simonton, 8 N. C. 51, there was a joint capias ad satisfaciendum and it was held that a consent to a discharge of one of two prevented a retaking, as the execution was supposed to be satisfied. In Com. *v.* Clay, 9 Phila. (Pa.) 121, 30 Leg. Int. (Pa.) 148, it was declared that the event on which the bond was conditioned had not occurred; that a judgment against one was not in accordance with the bond and therefore the principal was discharged and the sureties exonerated, since they might have had an action over against him; that the confession of the judgment varied the nature of the obligation, for a demand sounding in money damages was converted into a contract to deliver stock, thereby altering the liability of bail in a material particular without their consent.

69. **Where the judgment is against husband and wife** the execution must follow the judgment and the wife is liable to be imprisoned on a capias ad satisfaciendum with or without her husband, although otherwise on mesne process; the wife, when taken in execution, can be relieved only in the same manner as other execution debtors are relieved. Hall *v.* White, 27 Conn. 488.

70. Baker Mfg. Co. *v.* Fisher, 35 Kan. 659, 12 Pac. 20 (an erroneous order of arrest and discharge); McCaleb *v.* Maxwell, 6 Mart. N. S. (La.) 527 (where service of process was irregular); Fish *v.* Barbour, 43 Mich. 19, 4 N. W. 502 (where declaration was not filed as required by statute); Myers *v.* Young, 2 Dall. (Pa.) 79, 1 L. ed. 297.

Great caution should, however, be used in the application of this rule. Gorgorian *v.* Prood, 167 Mass. 31, 44 N. E. 1069; *In re* Friedrich, 113 Mich. 468, 71 N. W. 835; Mason, etc., Vocalion Co. *v.* Killough Music Co., 45 S. C. 11, 22 S. E. 755.

Prosecution of different actions.— That action on bond to dissolve attachment and an action on a poor debtor's recognizance may be prosecuted at the same time, see Watts *v.* Stevenson, 169 Mass. 61, 47 N. E. 447.

71. Ruggles *v.* Berry, 76 Me. 262. See also *supra*, II, I, 1, a.

But if judgment for such larger amount rests upon a mere irregularity in an amendment increasing the claim for damages it is valid until corrected by motion. Carr *v.* Sterling, 114 N. Y. 558, 22 N. E. 37, 24 N. Y. St. 521 [*reversing* 53 N. Y. Super. Ct. 255].

72. **So held even though there is a reversal** thereof for error or a new trial granted. Lockwood *v.* Jones, 7 Conn. 431; Ainsworth *v.* Peabody, 1 Root (Conn.) 469; Fleming *v.* Lord, 1 Root (Conn.) 214; Butler *v.* Bissel, 1 Root (Conn.) 102; Duncan *v.* Tindall, 20 Ohio St. 567.

But it is also held that if the judgment is set aside and the plaintiff allowed to proceed in the action, the bail's liability revives. Watt *v.* Reilly, 62 How. Pr. (N. Y.) 350. So a fair trial and acquittal of the principal after a recognizance will release the sureties. Lafleur *v.* Mouton, 8 La. Ann. 489.

73. Kellogg *v.* Manro, 9 Johns. (N. Y.) 300; Hughes *v.* Hollingsworth, 5 N. C. 146; Howell *v.* Hunt, 1 Mill (S. C.) 321. See also Melvill *v.* Glendining, 7 Taunt. 126, 2 E. C. L. 290.

Acts or declarations of plaintiff or attorney may be such as to release the latter from liability, even though there was no mention to discharge bail, but the contrary; especially so where there is an attempt to entrap the bail against the honesty and justice of the case. Newell *v.* Hoadley, 8 Conn. 381; Howell *v.* Hunt, 1 Mill (S. C.) 321.

Laches is a good defense to the extent that the plaintiff should not neglect or delay per-

beneficial to the surety, or which cannot possibly operate to his prejudice, do not release him.[74]

g. Principal's Death. The principal's death does not necessarily exonerate bail, where the statute expressly specifies a time with relation to the pleadings or process within which the death must occur to be of avail to the sureties. Such enactment governs, subject, however, to the exception that the existence of another enactment may necessitate a construction extending the time; or some legal technicality or excuse, or the attendant circumstances may justify the departure from, or qualifications of, any statutory or other rule.[75] Death after return *non est inventus* does not discharge bail.[76]

h. Principal's Discharge in Bankruptcy or Insolvency. If the principal receives his discharge in insolvency or bankruptcy before the bail are fixed, they

formance of any material act nor compliance with any statutory requirements essential to fix or preserve the rights in regard to the obligation of bail, especially so where the surety is prejudiced to his loss or his risk is increased thereby. Toles *v.* Adee, 84 N. Y. 222; Remsen *v.* Beekman, 25 N. Y. 552; Gelston *v.* Swartwout, 1 Johns. Cas. (N. Y.) 136. The plaintiff's neglect or failure to comply with a statutory requirement necessary to prevent the defendant's release at the termination of a certain period of time discharges bail, where obligation rests upon such statute. Fonda *v.* Beach, 7 La. Ann. 213.

When neglect does not release.— It is no defense on a bond to appear and answer that the bond was not called so as to enforce an appearance, where defendants voluntarily appeared and pleaded. Billings *v.* Avery, 7 Conn. 236. Plaintiff's neglect to proceed against the sheriff does not discharge the appearance bail, the plaintiff having the option to so proceed or take an assignment of the bond. Wilcox *v.* Ismon, 34 Mich. 268.

74. Wilson *v.* Eads, Hempst. (U. S.) 284, 30 Fed. Cas. No. 17,801*a*.

Bail are not discharged by a mere parol declaration of attorney that they are released. Parker *v.* Bidwell, 3 Conn. 84. And the creditor may refuse to deliver his execution to an officer so that bail may surrender their principal. Stevens *v.* Bigelow, 12 Mass. 433. Nor are sureties released by the principal's affirmation to them that the debt was paid. Van Ness *v.* Fairchild, 1 D. Chipm. (Vt.) 153.

Failure to levy on property before principal's arrest.—Where a poor debtor's recognizance is given after defendant's arrest it constitutes no defense to an action against bail that the execution plaintiff failed to attempt, before arresting defendant, to find property on which execution could be levied. Watts *v.* Stevenson, 169 Mass. 61, 47 N. E. 447.

75. **Death of defendant discharges.**— The liability of sureties on a bond taken on a capias in detinue ceases when defendant's liability ceases by death. Chandler *v.* Byrd, 1 Ark. 152. In Granberry *v.* Pool, 14 N. C. 155, it was held that nothing can be pleaded in discharge except death or surrender of the principal.

Death before expiration of time to answer in action against bail is the limitation under N. Y. Code Civ. Proc. § 601. Walsh *v.* Schulz, 13 Daly (N. Y.) 132, 5 N. Y. Civ. Proc. 357, 67 How. Pr. (N. Y.) 173 [*affirmed* in 7 N. Y. Civ. Proc. 209, 1 How. Pr. N. S. (N. Y.) 506]. But see Bulkley *v.* Colton, 1 Johns. (N. Y.) 515.

Statutory time may be enlarged by construction.— Gauntley *v.* Wheeler, 4 Lans. (N. Y.) 491; Hayes *v.* Carrington, 12 Abb. Pr. (N. Y.) 179, 21 How. Pr. (N. Y.) 143.

Death before or after judgment.— Death of the principal at any time before final judgment on scire facias against bail, but not afterward, discharges them. Griffin *v.* Moore, 2 Ga. 331; Wakefield *v.* McKinnell, 9 La. 449. See also Saunders *v.* Gaines, 3 Munf. (Va.) 225.

Death after judgment and before execution issued does not affect the liability of bail. Parker *v.* Bidwell, 3 Conn. 84. And it is no defense if the death were after return-day of execution and after return was indorsed thereon, if it occurred before the execution was returned into the clerk's office. Bradford *v.* Earle, 4 Pick. (Mass.) 120.

Death before or after capias ad satisfaciendum.— If the principal die after capias ad satisfaciendum returned *non est*, and before return of the first scire facias executed, or the second *nihil*, bail are discharged. Mt. Pleasant Bank *v.* Pollock, 1 Ohio 35. And they are released where the death is before capias ad satisfaciendum issued. Antonio *v.* Arthur, 1 Nott & M. (S. C.) 251. The same is true where the death is after return of the capias ad satisfaciendum and before final judgment. White *v.* Cummins, 1 Overt. (Tenn.) 224. See II, I, 1, j, (II).

76. **Death after return non est inventus.**— *Kentucky.*— McClelland *v.* Chambers, 1 Bibb (Ky.) 366.

Massachusetts.— Champion *v.* Noyes, 2 Mass. 481.

New Hampshire.— Hamilton *v.* Dunklee, 1 N. H. 172.

New York.—Olcott *v.* Lilly, 4 Johns. (N. Y.) 407.

Pennsylvania.— Boggs *v.* Teackle, 5 Binn. (Pa.) 332.

South Carolina.— Gordon *v.* Liepman, 3 McCord (S. C.) 49.

Vermont.— Humphrey *v.* Kasson, 26 Vt. 760; Boardman *v.* Stone, Brayt. (Vt.) 35.

See 5 Cent. Dig. tit. "Bail," § 78.

are entitled to be released without a surrender;[77] and this rule applies where such discharge was in another state,[78] or under a state law, although the bail's release rests within the jurisdiction of other than the state court.[79] A rule contrary to that first above stated has been asserted upon principle, and there are also decisions denying relief to bail, where the insolvent or bankrupt has been discharged. These latter rulings cannot be considered as other than qualifications of, or exceptions to, said rule based rather upon particular facts or other elements

77. Operates to release bail.— *Delaware.*— Bailey *v.* Seal, 1 Harr. (Del.) 367.

Maryland.— McCausland *v.* Waller, 1 Harr. & J. (Md.) 156; Harrison *v.* Young, 1 Harr. & J. (Md.) 102 note; McKim *v.* Marshall, 1 Harr. & J. (Md.) 101.

Massachusetts.— Champion *v.* Noyes, 2 Mass. 481; Payson *v.* Payson, 1 Mass. 283.

Michigan.—Bryant *v.* Kinyon, (Mich. 1901) 86 N. W. 531, 53 L. R. A. 801, 8 Detroit Leg. N. 263, 6 Am. Bankr. Rep. 237.

New York.— Trumbull *v.* Healy, 21 Wend. (N. Y.) 670; Seaman *v.* Drake, 1 Cai. (N. Y.) 9; Kane *v.* Ingraham, 2 Johns. Cas. (N. Y.) 403.

South Carolina.— Saunders *v.* Bobo, 2 Bailey (S. C.) 492.

England.— Bacon Abr. tit. Bail in Civil Causes, D; 1 Tidd Pr. 243 [*cited* in Way *v.* Wright, 5 Metc. (Mass.) 380].

See 5 Cent. Dig. tit. "Bail," § 77.

Particular decisions.— An allegation of fraud does not prevent an *exoneretur* in such case. Trumbull *v.* Healy, 21 Wend. (N. Y.) 670; Burns *v.* Sim, 2 Cranch C. C. (U. S.) 75, 4 Fed. Cas. No. 2,184. So where the plaintiffs were parties to such discharge, proceedings on the capias ad satisfaciendum bond are stopped (Johnson *v.* Thurmond, 28 Ga. 127), and only nominal damages can be recovered for breach of an appearance bond after an insolvent's final discharge (State *v.* Reaney, 13 Md. 230). So the bail can ask to have an *exoneretur* entered on production of the certificates of discharge (Com. *v.* Huber, 3 Pa. L. J. Rep. 383, 5 Pa. L. J. 331), and special bail before surrender may plead discharge by the act to abolish imprisonment for debt (Kelly *v.* Henderson, 1 Pa. St. 495). Again such discharge of the insolvent entitles bail to an *exoneretur* any time before surrender (Thomae *v.* Brown, 9 Watts (Pa.) 288; Shaeffer *v.* Child, 7 Watts (Pa.) 84), and surety are released even though the debtor had personal property when arrested, and the discharge was under a petition pending at the time of the arrest (Lincoln *v.* Williams, 12 Serg. & R. (Pa.) 105). So *exoneretur* was granted on payment of costs of scire facias against special bail prior to return-day thereof (Boggs *v.* Bancker, 5 Binn. (Pa.) 507), and a certificate of discharge in bankruptcy may be pleaded in defense in scire facias (Belknap *v.* Davis, 21 Vt. 409). So a note given by bail will be canceled by insolvent's discharge (Bussard *v.* Warner, 2 Cranch C. C. (U. S.) 111, 4 Fed. Cas. No. 2,229), and such discharge before capias ad satisfaciendum returned is a good plea (Byrne *v.* Carpenter, 1 Cranch C. C. (U. S.) 481, 4 Fed. Cas. No. 2,271).

Discharge of insolvent should be pleaded.— Post *v.* Riley, 18 Johns. (N. Y.) 54; Hayton *v.* Wilkinson, Brunn. Col. Cas. (U. S.) 247, 11 Fed. Cas. No. 6,272, 1 Am. L. J. 260.

Right of bail may be waived.— Mechanics' Bank *v.* Hazard, 9 Johns. (N. Y.) 392. *Contra*, to extent that no delay forfeits the right. Thomae *v.* Brown, 9 Watts (Pa.) 288; Shaeffer *v.* Child, 7 Watts (Pa.) 84. See also Campbell *v.* Palmer, 6 Cow. (N. Y.) 596.

Suit not barred against surety by proof of claim in insolvency on judgment where recognizance is entered into by judgment debtor where execution issued. Harris *v.* Hayes, 171 Mass. 275, 50 N. E. 532.

78. Rule applies to discharge in another state.— Kennedy *v.* Adams, 5 Harr. (Del.) 160; McGlensey *v.* McLear, 1 Harr. (Del.) 466; Bailey *v.* Seal, 1 Harr. (Del.) 367; Richmond *v.* De Young, 3 Gill & J. (Md.) 64; McKim *v.* Marshall, 1 Harr. & J. (Md.) 101; Rowland *v.* Stevenson, 6 N. J. L. 149; Mount *v.* Bradford, 2 Miles (Pa.) 17.

The qualification exists that the same courtesy must not be refused in the foreign state. Walsh *v.* Nourse, 5 Binn. (Pa.) 381; Hilliard *v.* Greenleaf, 5 Binn. (Pa.) 336 note; Boggs *v.* Teackle, 5 Binn. (Pa.) 332; Smith *v.* Brown, 3 Binn. (Pa.) 201.

79. Claggett *v.* Ward, 5 Cranch C. C. (U. S.) 669, 5 Fed. Cas. No. 2,780; Beers *v.* Haughton, 1 McLean (U. S.) 226, 3 Fed. Cas. No. 1,230 [*affirmed* in 9 Pet. (U. S.) 329, 9 L. ed. 145, and qualified to the extent that defendants are not liable to be imprisoned on the judgment and that special bail may plead the insolvent's discharge]; Harrison *v.* Gales, 3 Cranch C. C. (U. S.) 376, 11 Fed. Cas. No. 6,136; King *v.* Simm, 2 Cranch C. C. (U. S.) 234, 14 Fed. Cas. No. 7,805; Burns *v.* Sim, 2 Cranch C C. (U. S.) 75, 4 Fed. Cas. No. 2,184; Bough *v.* Noland, 2 Cranch C. C. (U. S.) 2, 2 Fed. Cas. No. 1,114 (holding that *exoneretur* will be entered on producing copy of record of insolvent's discharge); Davis *v.* Marshall, 1 Cranch C. C. (U. S.) 173, 7 Fed. Cas. No. 3,641 (holding that defendant may appear and discharge attachment without giving special bail); Hayton *v.* Wilkinson, Brunn. Col. Cas. (U. S.) 247, 11 Fed. Cas. No. 6,272, 1 Am. L. J. 260 (holding that insolvent's discharge must be availed of by plea). *Contra*, Glenn *v.* Humphreys, 4 Wash. (U. S.) 424, 10 Fed. Cas. No. 5,480, holding that state insolvency laws do not affect the United States.

Bond not released where discharge under state law is after bail-bond has been assigned to the plaintiff. Bobyshall *v.* Oppenheimer, 4 Wash. (U. S.) 317, 3 Fed. Cas. No. 1,589.

than upon conflicting principles of law.[80] Again the liability of sureties in such cases may be preserved by statute.[81]

i. Principal's Enlistment in Army. Under certain decisions the enlistment of the principal in the army, being a voluntary act, does not discharge sureties on a bail-bond;[82] but it is also decided upon sound reasons that even though the act of enlistment is voluntary, nevertheless bail are discharged.[83]

j. Principal's Exemption From Arrest — (I) *In General.* Where the law protects the principal from arrest bail are entitled to a discharge,[84] even though the privileged party puts in special bail.[85] And the failure to surrender the debtor may be based on the consideration that the creditor release the bail, and they will then be discharged.[86] But an exoneration has been denied where the ground of exemption from arrest has not been availed of until after expiration of the time to surrender.[87]

(II) *Under Statutes Abolishing Imprisonment For Debt.* A recognizance of bail entered into before a statute abolishing imprisonment for debt is discharged by the passage of such statute.[88]

80. Contrary rule; that discharge does not constitute a ground for release.— *Kentucky.* — Sowle Mfg. Co. *v.* Bernard, 100 Ky. 658, 18 Ky. L. Rep. 1106, 39 S. W. 239.

Louisiana.— Henderson *v.* Lynd, 2 Mart. (La.) 51, 5 Am. Dec. 726.

Massachusetts.— Demelman *v.* Hunt, 168 Mass. 102, 46 N. E. 436. See Gorgorian *v.* Prood, 167 Mass. 31, 44 N. E. 1069. See also Smith *v.* Randall, 1 Allen (Mass.) 456.

New York.— Greenwood *v.* Cleveland, 2 How. Pr. (N. Y.) 168; Campbell *v.* Palmer, 6 Cow. (N. Y.) 596.

North Carolina.— Norment *v.* Alexander, 32 N. C. 71.

Pennsylvania.— Pepper *v.* Doores, 1 Miles (Pa.) 60.

United States.— Munroe *v.* Towers, 2 Cranch C. C. (U. S.) 187, 17 Fed. Cas. No. 9,930; Bennet *v.* Alexander, 1 Cranch C. C. (U. S.) 90, 3 Fed. Cas. No. 1,310.

See 5 Cent. Dig. tit. "Bail," § 77.

81. Liability preserved by statute.— Demelman *v.* Hunt, 168 Mass. 102, 46 N. E. 436, wherein it is held that, upon a breach of a poor debtor's recognizance before the discharge in insolvency of the principal, such discharge operated as a bar to an action against the principal for such breach, but that the surety was not thereby released, as the statute preserved his liability.

82. State *v.* Reaney, 13 Md. 230; Harrington *v.* Dennie, 13 Mass. 93; Sayward *v.* Conant, 11 Mass. 146.

83. Whatever would render the arrest unlawful or insufficient discharges bail. Such surrender would be useless and of no benefit to the creditor, since the plaintiff could not have legally held the body if surrendered. Besides the involuntary act of enlistment is no different from that of bankruptcy, etc. McFarland *v.* Wilbur, 35 Vt. 342. See also Herrick *v.* Richardson, 11 Mass. 234, holding without discussion that the surety cannot be charged in such case.

Bail are discharged by act of government, as where a seaman is impressed into the government service. Bacon Abr. tit. Bail in Civil Causes, D; 1 Tidd Pr. 243 [*cited* in Way *v.* Wright, 5 Metc. (Mass.) 380].

84. *California.*— Matoon *v.* Eder, 6 Cal. 57, where no body execution could lawfully issue against defendants.

Kentucky.— Holland *v.* Bouldin, 4 T. B. Mon. (Ky.) 147.

Massachusetts.— Harrington *v.* Dennie, 13 Mass. 93.

New Hampshire.— Gilman *v.* Perkins, 11 N. H. 343.

New York.—Dunham *v.* Macomber, 5 Wend. (N. Y.) 113. Bail will be canceled on the filing of common bail on application to relieve non-resident suitor from arrest. Taft *v.* Hoppin, Anth. N. P. (N. Y.) 255.

North Carolina.— McKay *v.* Ray, 63 N. C. 46.

Pennsylvania.—Thomas *v.* Stewart, 2 Penr. & W. (Pa.) 475.

United States.— Exemption from imprisonment on a judgment excuses special bail from surrendering defendant. Beers *v.* Haughton, 1 McLean (U. S.) 226, 3 Fed. Cas. No. 1,230 [*affirmed* in 9 Pet. (U. S.) 329, 9 L. ed. 145].

Contra, Jarvis *v.* Giberson, Dudley (S. C.) 223, in case of a female.

Exemption from arrest see Arrest, 3 Cyc. 922, note 33.

85. Notwithstanding special bail.— Washburn *v.* Phelps, 24 Vt. 506. And in such case an *exoneretur* may be entered on the bail-bond or bail may be discharged of his own motion, although it is also held that the principal alone will be heard where he was not originally liable to arrest. White *v.* Blake, 22 Wend. (N. Y.) 612.

86. Shields *v.* Smith, 78 Ind. 425.

87. Stever *v.* Somberger, 19 Wend. (N. Y.) 121. See Stever *v.* Sornberger, 24 Wend. (N. Y.) 275. So upon scire facias against bail, relief was denied where defendant in the original action was, at the time of his arrest, *chargé d'affaires* of this government to a foreign country and was then on his way thither. Springfield Card Mfg. Co. *v.* West, 1 Cush. (Mass.) 388.

88. *Indiana.*— Scott *v.* Brokaw, 6 Blackf. (Ind.) 241; White *v.* Guest, 6 Blackf. (Ind.) 228.

Kentucky.— Holland *v.* Bouldin, 4 T. B. Mon. (Ky.) 147.

k. Pursuing Remedy Against Principal's Property. A fieri facias issued before a capias ad satisfaciendum does not discharge the bail.[89] Proceedings in attachment are not of themselves necessarily exclusive of those in arrest and bail.[90]

l. Stipulations and Agreements — (i) *In General.* An agreement with bail which discharges his responsibility and which, if not enforced, would injure his rights, or an agreement with defendant which, if made without the bail's consent, would operate as a fraud upon the bail, will discharge his liability as bail.[91]

Michigan.— Bronson *v.* Newberry, 2 Dougl. (Mich.) 38.

New York.— White *v.* Blake, 22 Wend. (N. Y.) 612.

Ohio.— Towsey *v.* Avery, 11 Ohio 90; Parker *v.* Sterling, 10 Ohio 357.

Pennsylvania.— Gillespie *v.* Hewlings, 2 Pa. St. 492, Kelly *v.* Henderson, 1 Pa. St. 495.

South Carolina.— Ware *v.* Miller, 9 S. C. 13.

United States.— Gray *v.* Munroe, 1 McLean (U. S.) 528, 10 Fed. Cas. No. 5,724.

See 5 Cent. Dig. tit. "Bail," § 80.

Substantially the same rule has been sanctioned in the following decisions:

Arkansas.—Newton *v.* Tibbatts, 7 Ark. 150, abolished by statute before return-day of capias ad satisfaciendum.

Kentucky.— Palmer *v.* Merriwether, 7 J. J. Marsh. (Ky.) 506; Peteet *v.* Owsley, 7 T. B. Mon. (Ky.) 130; Holland *v.* Bouldin, 4 T. B. Mon. (Ky.) 147.

Louisiana.— Thomas *v.* McNeil, 2 La. Ann. 795; Frey *v.* Hebenstreit, 1 Rob. (La.) 561; Atchafalaya Bank *v.* Hozey, 17 La. 509; Cooper *v.* Hodge, 17 La. 476. See also Borgsted *v.* Nolan, 17 La. 593.

Mississippi.— Brown *v.* Dillahunty, 4 Sm. & M. (Miss.) 713, 43 Am. Dec. 499.

Pennsylvania.— Merritt *v.* Smith, 2 Pa. St. 161, and statute may be pleaded in bar.

Vermont.— McFarland *v.* Wilbur, 35 Vt. 342.

When no release.— See Bronson *v.* Newberry, 2 Dougl. (Mich.) 38 (a case of nonresident); Lopeman *v.* Henderson, 4 Pa. St. 231 (holding that rule only applied to actions *ex contractu*); Boardley *v.* Waltman, 1 Pa. L. J. Rep. 77, 1 Pa. L. J. 256; Patterson *v.* Matlack, 1 Pa. L. J. Rep. 76, 1 Pa. L. J. 255.

89. **Execution.**—Aycock *v.* Leitner, 29 Ga. 197; Ogier *v.* Higgins, 2 McCord (S. C.) 8. See also Johnson *v.* Myer, 17 Hun (N. Y.) 232, for the rule under the New York Code of Civil Procedure.

Compare also *infra*, II, K, 2.

If a capias ad satisfaciendum and a fieri facias are issued simultaneously, and the latter is levied and the capias ad satisfaciendum returned not found, this is of no avail in a plea to a scire facias to subject-bail. Wheeler *v.* Bouchelle, 27 N. C. 584.

If only part of the debt is levied on the bail are liable for the residue. Olcott *v.* Lilly, 4 Johns. (N. Y.) 407.

Proceeding in the original suit has been held to be a waiver of proceedings on the bail-bond. Huguet *v.* Hallet, 1 Cai. (N. Y.) 55, Col. & C. Cas. (N. Y.) 162, Col. Cas. (N. Y.) 162.

90. **In order that the levy of attachment** shall effect the satisfaction of the debt the property must be sufficient for and applied to the demand sued on. Chapman *v.* H. D. Lee Mercantile Co., 7 Kan. App. 254, 53 Pac. 778 [*affirmed* in 60 Kan. 858, 56 Pac. 749]. See also Yourt *v.* Hopkins, 24 Ill. 326.

See also ATTACHMENT, II, C [4 Cyc. 404].

An attachment of a judgment in defendant's hands is a defense to an action on recognizance of bail in error. Bobyshall *v.* Evans, 1 Pa. L. J. Rep. 315, 2 Pa. L. J. 297.

91. Clark *v.* Niblo, 6 Wend. (N. Y.) 236, where it was agreed that defendant might depart the state and that proceedings would be stayed until his return. *Compare* Shimer *v.* Isaac, 1 Ind. 568.

A stipulation which materially changes the situation of bail, or varies the exact terms of his contract, or increases his risk, or enlarges the time and manner of performance, discharges the surety. Edwards *v.* Coleman, 6 T. B. Mon. (Ky.) 567; Rathbone *v.* Warren, 10 Johns. (N. Y.) 587; Crutcher *v.* Com., 6 Whart. (Pa.) 340; Wilkins *v.* Burr, 6 Binn. (Pa.) 389.

Instances of no release.—A covenant before judgment not to arrest defendant on execution within four months is no defense to a scire facias. Fullam *v.* Valentine, 11 Pick. (Mass.) 156. So when judgment against defendant is entered by a stipulation which in effect is an admission of the fraud necessary to recover, the surety's liability is not thereby removed, even though there is a disclaimer in the agreement of any admission of the allegations of fraud. Steinback *v.* Evans, 122 N. Y. 551, 25 N. E. 929, 34 N. Y. St. 138 [*affirming* 55 N. Y. Super. Ct. 278, 18 N. Y. St. 325]. And an agreement not under seal made by a creditor to discharge the claim for less than the full amount due does not release bail. Von Gerhard *v.* Lighte, 13 Abb. Pr. (N. Y.) 101. Again a sheriff was bail for two defendants; after judgment a capias ad satisfaciendum was executed on one who gave security for his appearance at court, but the other defendant could not be found; before the appearance day for the arrested defendant, he stipulated with plaintiff to secure him for other debts he owed; the latter in consideration of a release under the capias ad satisfaciendum and non-opposition to the debtor's discharge in insolvency, and it was held that this did not operate as a

(II) *To Arbitrate.* If the reference to arbitration dissolves an attachment the bail are discharged; otherwise, if the action and only the demands against the plaintiff are referred;[92] and the bail are also released by a submission of the original action of all demands against the parties, for this is the substitution of another demand contrary to the contract.[93]

m. Satisfaction or Release of Debt or Judgment. As a rule the satisfaction, release, payment, or discharge of the debt or judgment, and in certain cases the reversal of the judgment, will either constitute a good defense in an action against bail or operate to discharge them.[94] The attendant circumstances may, however, be such that the rule does not apply.[95]

n. Substitution of New Bond. If the bond given is insufficient the sureties therein are discharged by the substitution of a new undertaking.[96]

2. Proceedings to Obtain — a. Mode of Application.[97] It has been determined that a motion by the bail is the proper course, if they desire to be exonerated;[98]

release of the debt. Ferrall *v.* Brikell, 27 N. C. 67. So a temporary stay of execution by agreement with plaintiff, based upon a confession of judgment by defendant, does not exonerate special bail. Johnson *v.* Boyer, 3 Watts (Pa.) 376, 27 Am. Dec. 363.

Waiver.— The bail may, in certain cases, lose his rights by a waiver. Bay *v.* Tallmadge, 5 Johns. Ch. (N. Y.) 305. *Examine* Crutcher *v.* Com., 6 Whart. (Pa.) 340.

92. Hill *v.* Hunnewell, 1 Pick. (Mass.) 192.

Reference to arbitration operating to discharge bail see Arbitration and Award, 3 Cyc. 606, note 6.

93. Bean *v.* Parker, 17 Mass. 591, wherein it is said: "A reference in such case has always been of the particular action only, with an agreement that the defendant may file in set-off any claims he may have against the creditor. This puts the bail upon a safe footing, and he cannot complain of the result."

In England a reference to arbitration of the cause of action discharged the sureties unless a verdict was taken for the plaintiff to stand as security for the award. For a discussion of this rule and the particular reasons therefor see Cunningham *v.* Howell, 23 N. C. 9, which, however, holds to the contrary.

94. Operates as discharge.— Creager *v.* Brengle, 5 Harr. & J. (Md.) 234, 9 Am. Dec. 516; National Security Bank *v.* Hunnewell, 124 Mass. 260; Champion *v.* Noyes, 2 Mass. 481; Short *v.* Hooker, 40 How. Pr. (N. Y.) 420; Mechanics' Bank *v.* Hazard, 9 Johns. (N. Y.) 392; Van Ness *v.* Fairchild, 1 D. Chipm. (Vt.) 153.

95. No discharge.— Seymour *v.* Hine, 1 Root (Conn.) 254 (where a judgment was recovered on the bail-bond and the debtor had paid the creditors and it was held that the administrator of the officer should recover what the latter had paid and his fees); Culliford *v.* Walser, 3 N. Y. App. Div. 266, 38 N. Y. Suppl. 199, 73 N. Y. St. 692 [*affirming* 13 Misc. (N. Y.) 493, 35 N. Y. Suppl. 475, 70 N. Y. St. 173, holding that bail were not discharged because the surety on a subsequent appeal-bond paid the judgment to relieve himself and with no intention of releasing bail];

Appleby *v.* Robinson, 44 Barb. (N. Y.) 316 (payment was made while appeal was pending, but it did not save costs); Ketland *v.* Medford, 1 Binn. (Pa.) 497 (holding that the payment of the whole debt is no ground for *exoneretur* at the instance of the principal against the wishes of bail, before the principal has been taken).

96. Cook *v.* Horwitz, 14 Hun (N. Y.) 542; Colgate *v.* Hill, 20 Vt. 56.

97. Mandamus will be granted by the supreme court commanding the court below to order an exoneration on a bail-piece, where the bail are released by a failure to justify. People *v.* Judges Onondaga County C. Pl., 1 Cow. (N. Y.) 54.

Effect of failure to justify see *supra*, II, G, 2, c, (v), (A), (2).

Rule to show cause.— It has been decided that sureties may proceed by rule on the adverse party to show cause why the bond should not be canceled and they discharged. Wallace *v.* Glover, 3 Rob. (La.) 411; Weyman *v.* Cater, 17 La. 529. The application to discharge bail should be made by rule to show cause and not the motion, since it involves matters *aliunde* and not on the face of the record. Hawkins *v.* Gibson, 1 Leigh (Va.) 476. See *infra*, note 98 *et seq.*

Notice of application by a surety to be exonerated as bail, if served without anything to show that the application is from the sheriff, calls on the attorney to do nothing more than apprise the sheriff that he has received such notice. Buckman *v.* Carnley, 9 How. Pr. (N. Y.) 180.

98. Motion.—Obregon *v.* De Mier, 54 How. Pr. (N. Y.) 390. See also McArthur *v.* Martin, 1 Gill (Md.) 259. *Contra*, Hawkins *v.* Gibson, 1 Leigh (Va.) 476.

Motion, according to rules of court, must be made. Karck *v.* Avinger, 3 Hill (S. C.) 215.

Where principal has been surrendered bail will be relieved by motion and not by plea. Brownelow *v.* Forbes, 2 Johns. (N. Y.) 101. See also McArthur *v.* Martin, 1 Gill (Md.) 259.

Waiver of right to move for exoneration arises by reason of justification. So held in Knight *v.* Dorsy, 1 Ball & B. 48.

but a motion will not prevail, if the principal himself could not thus be relieved.[99] Nor should an application to discharge appearance bail be on motion.[1]

b. Time of Application. Application to be exonerated should, if a time is fixed by statute within which the act relied on must occur to operate as a discharge of bail, be made within the period so specified.[2]

c. Entry of Exoneretur. Under the early decisions where the principal had been arrested on capias ad satisfaciendum an *exoneretur* need not be entered to complete the discharge.[3]

J. Breach or Performance of Bond, Undertaking, or Recognizance — 1. In General. Whether or not there is a breach of the bond, undertaking, or recognizance depends upon the terms, conditions, and construction thereof in connection with the statute. As a general rule, security taken by order of the court or of law is treated with more freedom by way of construction with relation to its binding force, than are obligations which result from the voluntary act of the parties.[4] So a bond will not be held binding where the material fact upon which the condition rests ceases to exist.[5]

2. Appearance — a. In General.[6] Where there is an appearance or surrender in conformity with the requirements of the bond, the obligation with relation to the sureties is satisfied.[7] Bail may become liable for the appearance or surrender

99. Plea not motion.—So held in Campbell *v.* Palmer, 6 Cow. (N. Y.) 596; Franklin *v.* Thurber, 1 Cow. (N. Y.) 427, where the plaintiff was discharged after judgment, which was revived by scire facias. Nor will equity relieve bail on motion until the condition of the bond has been broken, for defendants must rely on their plea. So held in Bird *v.* Mabbett, 1 Johns. Cas. (N. Y.) 31.

So payment of the debt cannot be availed of by motion, but must be pleaded. Mechanics' Bank *v.* Hazard, 9 Johns. (N. Y.) 392.

1. To discharge appearance bail.—Hawkins *v.* Gibson, 1 Leigh (Va.) 476.

2. Walsh *v.* Schulz, 13 Daly (N. Y.) 132, 5 N. Y. Civ. Proc. 357, 67 How. Pr. (N. Y.) 173.

But it is suggested that this rule ought not to be exclusive where such time is enlarged by construction with another statute as was done in Gauntley *v.* Wheeler, 4 Lans. (N. Y.) 491; Hayes *v.* Carrington, 12 Abb. Pr. (N. Y.) 179, 21 How. Pr. (N. Y.) 143.

A motion to discharge appearance bail cannot be entertained after judgment against the defendant by default has been entered, a writ of inquiry awarded, and defendant has left the state. Hawkins *v.* Gibson, 1 Leigh (Va.) 476.

A motion to quash the writ against bail is not available after an issue is raised in the action against them. Rodney *v.* Hoskins, 2 Miles (Pa.) 465.

Second motion rests upon leave granted therefor. Bode *v.* Maiberger, 12 N. Y. Civ. Proc. 53.

3. Johnson *v.* Smith, 1 Root (Conn.) 373; Stewart *v.* McGuin, 1 Cow. (N. Y.) 99; Smith *v.* Rosecrantz, 6 Johns. (N. Y.) 97; Milner *v.* Green, 2 Johns. Cas. (N. Y.) 283. *Contra,* Darling *v.* Cutting, 57 Vt. 218. *Compare* also Dalton *v.* Gib, 1 Arn. 463, 5 Bing. N. Cas. 113, 3 Jur. 43, 8 L. J. C. P. 151, 7 Scott 117, 35 E. C. L. 70.

A commissioner or a judge at chambers may order an *exoneretur* on the discharge of the principal, under the body act, in the same manner as on an actual surrender; and, as against the bail, the discharge is conclusive, and cannot be questioned for irregularity or fraud. Cunningham *v.* Brown, 5 Cow. (N. Y.) 289.

4. Lane *v.* Townsend, 1 Ware (U. S.) 289, 14 Fed. Cas. No. 8,054, 17 Am. Jur. 51.

Breach or performance of bond, undertaking, or recognizance, in criminal prosecutions see *infra,* III, J.

Statute is remedial and should be liberally construed in favor of bail. Lichten *v.* Mott, 10 Ga. 138. Or to state the rule in another form the risk of liability of special bail will not be increased by construction, for their obligations are in the nature of those of sureties and *strictissimi juris,* and cannot be enlarged. Campau *v.* Seeley, 30 Mich. 57. Bail are entitled to a strict construction of their obligation and their responsibility cannot be altered or enlarged. McAuliffe *v.* Lynch, 17 R. I. 410, 22 Atl. 940.

5. Gray *v.* Gidiere, 7 Rich. (S. C.) 168.

Exception — Strict performance.— Where the condition is in a contract to secure defendant's release, and is calculated to avoid said contract, it must be strictly performed. Bruce *v.* Snow, 20 N. H. 484.

6. Breach by departure from state must be proven. Weingerter *v.* White, 5 La. Ann. 487; Dussin *v.* Allain, 9 Rob. (La.) 394; Phillips *v.* Hawkins, 4 Rob. (La.) 218. And it is not sufficient to show that the principal cannot be found in the parish where the bond was taken. Sompeyrac *v.* Cable, 10 Mart. (La.) 361.

7. *California.*— Offer to surrender is good. Babb *v.* Oakley, 5 Cal. 93.

Georgia.— Where principal is called and presents himself at return-term to the court sureties are entitled to discharge. Swinney *v.* Watkins, 22 Ga. 570.

Massachusetts.— Debtor must appear at

of two or more co-defendants,[8] and where, the action being in tort, one may be convicted without the others, a failure to surrender him will be a breach of the condition.[9] Both the condition to appear and the condition to abide the judgment must be fulfilled, and there must not only be an appearance, but such a legal continuance thereof as to satisfy the second condition.[10] The last rule does not embrace a continuance or adjournment of the cause, without consent of the sureties, to the next term, for if this is done they will be discharged.[11]

b. Time of. An appearance or surrender should, or may, be made (1) at the time conditioned in the bond,[12] (2) before the return-day,[13] (3) or at any time within the term.[14] But when an appearance bond has been duly forfeited, the appear-

time fixed within life of recognizance given on his arrest on execution in poor debtor's proceedings and institution of insolvency proceedings does not excuse him. Demelman *v.* Hunt, 168 Mass. 102, 46 N. E. 436.

New Jersey.— Must appear and answer upon bail-bond to constable, but need not wait and deliver himself after judgment. Smalley *v.* Vanorden, 5 N. J. L. 951.

New Mexico.— May appear by attorney. Magruder *v.* Weisl, 2 N. M. 21.

New York.—A party bound to appear before a court or officer must, to save a default, make a technical appearance, and it is not enough to be corporally present if he refuse to answer when formally called. People *v.* Wilgus, 5 Den. (N. Y.) 58. Must appear in person on adjournment before justice, or bail are liable. Dunham *v.* Heyden, 7 Johns. (N. Y.) 381. Voluntary surrender by principal within time allowed to bail exonerates them, although sureties have been indemnified. Brownelow *v.* Forbes, 2 Johns. (N. Y.) 101.

North Carolina.— If debtor appears and answers when called, no judgment can be taken, although surety does not surrender him. Mears *v.* Speight, 49 N. C. 420.

South Carolina.—Where bail runs to the action and not to the sheriff, plea of appearance in original action is not good to declaration on the bond. Harwood *v.* Robertson, 2 Hill (S. C.) 336.

Virginia.—Appearance by attorney and setting aside a conditional judgment discharges bail, and subsequent judgments against them will be reversed. Fisher *v.* Riddell, 1 Hen. & M. (Va.) 330 note.

See 5 Cent. Dig. tit. "Bail," § 57.

See also *infra*, II, L, as to surrender of principal.

Consent to surrender.— Principal cannot surrender in discharge of bail without their consent and that of his creditor. Cushing *v.* Breck, 10 N. H. 111. *Contra*, Dick *v.* Stoker, 12 N. C. 91, and placing himself in sheriff's power is a surrender by the principal.

8. In case of two or more defendants.— Crouse *v.* Paddock, 8 Hun (N. Y.) 630; Penn *v.* Remsen, 24 How. Pr. (N. Y.) 503.

9. Briggs *v.* Wolf, 34 Leg. Int. (Pa.) 222.

10. Appearance and abiding judgment.— Billings *v.* Avery, 7 Conn. 236.

Condition is satisfied by an appearance at court at the term designated and remaining during that term to abide the order of the court. Dunbarton *v.* Palfrey, 27 N. H. 171.

"Abide, do and perform," as used in certain bail-bonds, is merely an emphatic expression of the idea "to abide" and not a covenant to pay. Hewins *v.* Currier, 62 Me. 236.

To "appear" is to remain within reach of the process of the court to satisfy the judgment. Harwood *v.* Robertson, 2 Hill (S. C.) 336; Saunders *v.* Hughes, 2 Bailey (S. C.) 504.

Undertaking of bail of a female defendant is within the rule. Jarvis *v.* Alexander, Cheves (S. C.) 143.

11. Continuance of cause.— Dunbarton *v.* Palfrey, 27 N. H. 171. It is not a forfeiture of the bond where the first day of the term was appointed for the hearing, and petitioner was not discharged until the fourth day without any record made of his appearance on the first day, or of any continuance from day to day. But evidence was admitted to show the practice to postpone the hearing, and continue it from day to day. Sheets *v.* Hawk, 14 Serg. & R. (Pa.) 173, 16 Am. Dec. 486. See also Bauerle *v.* Fox, 8 Pa. Dist. 45, 22 Pa. Co. Ct. 3, where hearing was adjourned and another appearance bond was given therefor, and defendant did not appear, but the bond was not forfeited. *Examine* Scully *v.* Kirkpatrick, 79 Pa. St. 324, 21 Am. Rep. 62.

Upon continuance and a subsequent default the condition was held to be broken and the plaintiff entitled to judgment. Arrington *v.* Bass, 14 N. C. 90.

12. Time conditioned in bond.— Osbourne *v.* State, 10 Gill & J. (Md.) 1. And the words "last day of the term" mean the last day of final adjournment. Parsons *v.* Hathaway, 40 Me. 132. Nor will the words "next court" control the time specified. Winslow *v.* Anderson, 20 N. C. 1, 32 Am. Dec. 651. For construction of terms of bond relating to time of appearance see Winslow *v.* Anderson, 20 N. C. 1, 32 Am. Dec. 651.

Where condition is without the requirements of the law making the bond not binding, the rule does not apply. Magruder *v.* Weisl, 2 N. M. 21.

13. Before return-day.— Florence *v.* Shumar, 34 N. J. L. 455. And if the sheriff accepts the surrender made at such time, the bail is discharged. Dalbey *v.* Lowenstein, 34 N. J. L. 465. Or within a certain or prescribed time thereafter. Begole *v.* Stimson, 39 Mich. 288; Lynn *v.* McMillen, 3 Penr. & W. (Pa.) 170.

14. During term.— May appear before the juries have been discharged. Jones *v.* Garrett, 20 Ga. 269. Or on the next day of term.

ance of the accused at a subsequent term of the court to stand his trial will not liberate the security from his liability.[15]

3. Entry of Special Bail. Where the obligation exists to put in special bail, it must be done, and bail must justify if not accepted.[16]

4. Forfeiture. The bond is not forfeited where there is no record in evidence showing a breach of condition;[17] or where the judge is not acting as a court of record and has no power to adjudge a forfeiture;[18] but both parties should go to trial according to the terms of the recognizance, or it is forfeited.[19]

K. Fixing Liability of Sureties — 1. Judgment. It is a general rule that, in order to fix the liability of sureties, there must be a judgment against them[20] and also a judgment against the principal.[21]

2. Execution and Return — a. In General. A distinction exists between bail to the action and bail in error, in that the return of a capias ad satisfaciendum against the principal is unnecessary before proceeding against the latter,[22] while such capias ad satisfaciendum must be issued and returned *non est* to hold the former.[23] Bail then become liable unless there is a surrender of the principal

Magruder *v.* Weisl, 2 N. M. 21. Has the whole of the return-term, and if action withdrawn before the end thereof, suit does not lie on the bail-bond. Ringgold *v.* Renner, 2 Cranch C. C. (U. S.) 263, 20 Fed. Cas. No. 11,849. But appearance during the same term will not save a bond of an insolvent debtor otherwise conditioned. Osbourne *v.* State, 10 Gill & J. (Md.) 1.

15. At subsequent term after forfeiture.— Guice *v.* Stubbs, 13 La. Ann. 442. Nor is the condition complied with by debtors presenting themselves after failure to obtain a discharge in insolvency and asking for an order of commitment. Stout *v.* Quinn, 9 Pa. Super. Ct. 179, 43 Wkly. Notes Cas. (Pa.) 418.

16. Bobyshall *v.* Oppenheimer, 4 Wash. (U. S.) 317, 3 Fed. Cas. No. 1,589.

If special bail be entered in time in the original suit in which the writ was returned *non est*, there is a compliance with the condition of a bail-bond given upon an alias or pluries capias. Lynn *v.* McMillen, 3 Penr. & W. (Pa.) 170. And no action lies on a bail-bond conditioned generally for defendant's appearance, where special bail has been entered. Worral *v.* Harper, 1 Pa. Journ. L. 333.

In so far as notice is a prerequisite to a valid compliance with said obligation, it must be given. Harris *v.* Underwood, 10 Wend. (N. Y.) 668. But suit on a bond may be precluded by notice given, before the commencement thereof, that special bail has been put in and filed, although it has not exactly been done and even though the filing was after the expiration of the time conditioned therein. Wiles *v.* Hill, 1 How. Pr. (N. Y.) 154.

17. No forfeiture.— Bauerle *v.* Fox, 9 Pa. Dist. 45, 22 Pa. Co. Ct. 3. See Sheets *v.* Hawk, 14 Serg. & R. (Pa.) 173, 16 Am. Dec. 486.

Compare also *infra*, III, M, N.

18. Where judge has no authority to forfeit.— Scully *v.* Kirkpatrick, 79 Pa. St. 324, 21 Am. Rep. 62.

19. People *v.* Winchell, 7 Cow. (N. Y.) 160.

An order estreating a recognizance, omitting the christian name of one of the cognizors, is sufficiently certain, especially when connected with the scire facias in which the names are fully set out, and to which no answer was filed. Barton *v.* Keith, 2 Hill (S. C.) 537.

Taking office judgment against the appearance bail, after special bail is entered, is not error if final judgment be not taken against the appearance bail. Bradley *v.* Steele, Hard. (Ky.) 559.

20. Against sureties.—Champion *v.* Noyes, 2 Mass. 481. Although it is held that the alleged fraud which is the basis of the original arrest need not be fixed by judgment as a prerequisite to a judgment against the bail. Patton *v.* Gash, 99 N. C. 280, 6 S. E. 193.

Fixing liability of bail in criminal prosecutions see *infra* III, K, 3.

Default.— Where special bail is not put in in compliance with condition of the bond, but no default is entered and thereafter an action is brought on the bond and defendant in the original suit goes through the form of perfecting special bail and of being surrendered by his sureties and default is entered, such giving of bail and entering default is of no effect. Pease *v.* Pendell, 57 Mich. 315, 23 N. W. 827.

Final judgment is necessary, default of appearance is insufficient. Cook *v.* Evans, 16 N. J. L. 177.

21. Against principal.— Walls *v.* Smith, 3 La. 498.

22. Bail in error.— Dowlin *v.* Standifer, Hempst. (U. S.) 290, 7 Fed. Cas. No. 4,041*a*.

On appeal from a justice, bail is absolutely fixed by a failure of the defendant to surrender or prosecute his appeal, a capias ad satisfaciendum need not be issued. Gray *v.* Dawson, 7 Watts (Pa.) 471.

23. Bail to the action.—*Alabama.*—Brown *v.* Simpson, 3 Stew. (Ala.) 331.

Delaware.— Layton *v.* Houston, 5 Houst. (Del.) 574.

Kentucky.—Abbott *v.* Daniel, 3 Metc. (Ky.) 339; Holland *v.* Bouldin, 4 T. B. Mon. (Ky.) 147.

within the time allowed *ex gratia* by the court's practice,[24] or unless it can be shown that such return was unfairly made.[25] The execution must be upon final judgment;[26] and while it is ordinarily necessary that the execution must be regularly sued out[27] and comply with the statutory requirements,[28] it has been held that mere irregularities in the writ or in its issuance cannot be taken advantage of by bail.[29] But bail have no concern with an additional execution against the principal after judgment by default against them and part payment

Louisiana.— See Block *v.* Maxwell, 10 La. Ann. 5; Lindley *v.* Hagens, 11 Rob. (La.) 203.

Massachusetts.— Herrick *v.* Richardson, 11 Mass. 234.

New Jersey.— Armstrong *v.* Davis, 1 N. J. L. 110.

New York.— Bradley *v.* Bishop, 7 Wend. (N. Y.) 352; Pearsall *v.* Lawrence, 3 Johns. (N. Y.) 514.

North Carolina.—Arrenton *v.* Jordan, 11 N. C. 98; Langdon *v.* Troy, 3 N. C. 165.

South Carolina.— Ware *v.* Miller, 9 S. C. 13; Saunders *v.* Bobo, 2 Bailey (S. C.) 492.

Tennessee.— Embree *v.* Lamb, 2 Yerg. (Tenn.) 290; Gillaspie *v.* Clark, 1 Overt. (Tenn.) 2.

Virginia.— Green *v.* Thompson, 1 Patt. & H. (Va.) 427.

United States.— Dowlin *v.* Standifer, Hempst. (U. S.) 290, 7 Fed. Cas. No. 4,041*a*.

See 5 Cent. Dig. tit. "Bail," § 85.

Statutory provisions.— If the statute requires the issue of a fieri facias and its return unsatisfied in whole or in part, and also a subsequent return of a capias ad satisfaciendum *non est*, these are prerequisites to fixing bail's liability. Bradley *v.* Bishop, 7 Wend. (N. Y.) 352. A capias ad satisfaciendum only and not a fieri facias may be required to be issued. Broaders *v.* Welsh, 2 Nott & M. (S. C.) 569. It is no objection that fieri facias is issued before capias ad satisfaciendum. Aycock *v.* Leitner, 29 Ga. 197. And although a return not found upon an execution against the principal may fix the sureties, yet if the statute also so provides a return on a notice of "not found" may enable the plaintiff to sue on the bail-bond before return-day of the execution. Wehrle *v.* Gurney, 146 Mass. 331, 15 N. E. 777. Where there is a misprint of the statute the enrolled law being "scire facias" (not a "fieri facias") the former must issue on a judgment before bail can be held. Hopkins *v.* Moon, 24 Ill. 115.

Where capias ad satisfaciendum is abolished by statute the bail are not liable thereafter, for this precludes return of such writ. Waring *v.* Crawford, 9 Rob. (La.) 291; Jartroux *v.* Debergue, 5 Rob. (La.) 126; Frey *v.* Hebenstreit, 1 Rob. (La.) 561; Borgsted *v.* Nolan, 17 La. 593. See further Blue *v.* McDuffie, 44 N. C. 131; Trice *v.* Turrentine, 32 N. C. 543. *Contra*, Peteet *v.* Owsley, 7 T. B. Mon. (Ky.) 130.

Supersedeas — No execution.— Where the statute requires a specified legal act as a prerequisite to a surrender or discharge of the principal or the discharge of the bail the non-performance of such legal act precludes the release of bail even though the principal is not actually charged in execution. Bostwick *v.* Wildey, 42 How. Pr. (N. Y.) 245, 34 N. Y. Super. Ct. 23, applying rule to a case where supersedeas is necessary to discharge defendant from custody under N. Y. Code Civ. Proc. § 572. But see Longuemere *v.* Nichols, 7 N. Y. Suppl. 157, 17 N. Y. Civ. Proc. 107, 23 Abb. N. Cas. (N. Y.) 221; Mechanics' Nat. Bank *v.* Mosher, 54 How. Pr. (N. Y.) 414.

24. Armstrong *v.* Davis, 1 N. J. L. 110; Olcott *v.* Lilly, 4 Johns. (N. Y.) 407; Rathbone *v.* Blackford, 1 Cai. (N. Y.) 588; Boggs *v.* Teackle, 5 Binn. (Pa.) 332; Gordon *v.* Liepman, 3 McCord (S. C.) 49.

25. Showing return unfairly made.— Collins *v.* Cook, 4 Day (Conn.) 1; Fitch *v.* Loveland, Kirby (Conn.) 380; Saunders *v.* Bobo, 2 Bailey (S. C.) 492; Howe *v.* Ransom, 1 Vt. 276.

26. Upon final judgment.— Cook *v.* Evans, 16 N. J. L. 177.

Capias ad satisfaciendum against female defendant will not be compelled in order to fix her bail. Jarvis *v.* Giberson, Dudley (S. C.) 223.

Execution against the body must conform to judgment to hold the surety liable. Abbott *v.* Daniel, 3 Metc. (Ky.) 339.

Pursuit of principal may not be required by nature of the bond to render surety liable. Seeley *v.* Evans, 19 Wend. (N. Y.) 459.

27. Must be regularly issued.— Brown *v.* Simpson, 3 Stew. (Ala.) 331. But a return of *non est* on an execution made by mistake of the clerk, returnable at an earlier day than by law it should have been, is *prima facie* evidence of the principal's avoidance and sufficient ground for a scire facias against bail when not rebutted. Runlet *v.* Warren, 7 Mass. 477.

28. Bail may plead non-compliance with statutory requirements as to executions, as that they were not issued or were not issued in time, or that service thereof was prevented by the plaintiff or his attorney by fraud or otherwise. Bradley *v.* Bishop, 7 Wend. (N. Y.) 352.

In a justice court plaintiff must prove at least the delivery of a writ to the proper officer with a *bona fide* intention of having it served. Brown *v.* Van Duzen, 11 Johns. (N. Y.) 472.

29. Mere irregularities.—Kenan *v.* Carr, 10 Ala. 867; Parker *v.* Bidwell, 3 Conn. 84; Gillespie *v.* White, 16 Johns. (N. Y.) 117. See also dissenting opinion in Gallarati *v.* Orser, 27 N. Y. 324.

thereof, so that the court will not therefore compel the plaintiff, by order at their instance, to issue a new execution against the defendant's body.[30]

b. County of Issuance. The decisions vary in some respects in regard to the county of issuance of execution or capias ad satisfaciendum in order to charge bail. Thus it has been decided that a fieri facias need not issue in the county where the principal defendant resides.[31] Under other rulings it has been held that the capias ad satisfaciendum should issue to the county where the original writ was served;[32] to the county of the principal's arrest, unless it is shown to be no longer his proper county;[33] to the county where the venue is laid, even though defendant was arrested in a different county;[34] and also that it need not be shown that capias ad satisfaciendum issue to the county of the defendant's removal after his arrest, nor if execution does issue to the latter county is a return of *non est* necessary to fix bail.[35]

c. Time of Issuance — (i) *In General.* Circumstances may justify refusing a motion for an exoneration when the capias ad satisfaciendum was issued less than the prescribed number of days before return-day.[36] Sunday is excluded in the computation of time of issue of a capias ad satisfaciendum or delivery of it to the officer.[37]

(ii) *Delay in Issuance.* Although it has been decided that delay to sue out execution within the prescribed time discharges bail,[38] the better doctrine seems to be that the rule should be applied only in cases where the delay has been unreasonable,[39] and not in cases where the delay is one of which only the princi-

30. Alias or new execution.— Stransky *v.* Harris, 22 Misc. (N. Y.) 691, 49 N. Y. Suppl. 1123 [*reversing* 22 Misc. (N. Y.) 15, 48 N. Y. Suppl. 623]. *Compare* Lyman *v.* Giddey, 96 Mich. 401, 56 N. W. 6.

By the common law the arrest of a debtor on an execution and his voluntary release by the creditor are a satisfaction of the judgment so that no alias execution can be taken out or other proceedings had under it. Kellogg *v.* Underwood, 163 Mass. 214, 40 N. E. 104, per Knowling, J. [*citing* Nowell *v.* Waitt, 121 Mass. 554; Kennedy *v.* Duncklee, 1 Gray (Mass.) 65; Coburn *v.* Palmer, 10 Cush. (Mass.) 273].

Where principal is taken on alias execution judgment against bail does not release former. *In re* Potoshinsky, (R. I. 1897) 36 Atl. 878.

31. County of principal's residence.—Fake *v.* Edgerton, 5 Duer (N. Y.) 681, 3 Abb. Pr. (N. Y.) 229. But see Fuller *v.* Howard, 6 Vt. 561.

Town annexed to another county.—Where a town in which defendant resided at the time of his original arrest is taken from one county and annexed to another, capias ad satisfaciendum need not thereafter issue to the sheriff of the former county, that not then being defendant's place of residence. Johnson *v.* Myer, 17 Hun (N. Y.) 232.

32. County where original writ was served. — Finley *v.* Smith, 14 N. C. 220; Embree *v.* Lamb, 2 Yerg. (Tenn.) 290.

To officer of county where original writ was served and the bail reside, although the principal's residence is elsewhere, is sometimes the requirement. Crane *v.* Shaw, 13 Mass. 213; Brown *v.* Wallace, 7 Mass. 208; Branch *v.* Webb, 7 Leigh (Va.) 371.

33. County of principal's arrest.— Benton *v.* Duffy, 1 N. C. 229.

34. County where venue laid.— Drake *v.* Cockran, 18 N. J. L. 9.

35. County of defendant's removal after arrest.— Kennedy *v.* Spencer, 4 Port. (Ala.) 428.

Domicile of bail.— The officer having the execution against the principal may, it is decided, leave a notice at the last and usual place of abode of bail in the state of his actual residence, although he may have had a legal domicile elsewhere when he became bail and have been actually resident there at all times after execution issued. Atherton *v.* Thornton, 8 N. H. 178.

36. Welsh *v.* Mead, 9 Phila. (Pa.) 261, 29 Leg. Int. (Pa.) 140.

37. Sunday is excluded.— Johnson *v.* Rea, 1 Miles (Pa.) 159.

Time is computed from the actual entry of judgment under a statute requiring the plaintiff, within a certain time after judgment is obtained, to charge in execution a defendant already in custody and allowing a supersedeas where he fails so to do. Lippman *v.* Petersberger, 9 Abb. Pr. (N. Y.) 209.

38. Maxwell *v.* Williams, Hempst. (U. S.) 172, 16 Fed. Cas. No. 9,324*a*.

39. Delay for long period of time.— Havemeyer Sugar Refining Co. *v.* Taussig, 44 Hun (N. Y.) 475, 9 N. Y. St. 380, 12 N. Y. Civ. Proc. 247, 19 Abb. N. Cas. (N. Y.) 57. Although even in such cases the laches of the plaintiff may be excused. Carr *v.* Sterling, 114 N. Y. 558, 22 N. E. 37, 24 N. Y. St. 521 [*reversing* 53 N. Y. Super. Ct. 255; *distinguishing* Toles *v.* Adee, 91 N. Y. 562, 84 N. Y. 222]. It is also decided that it is not a sufficient plea to a scire facias that the plaintiff failed for two years to sue out a capias ad satisfaciendum. Bell *v.* Bullitt, 3 T. B. Mon. (Ky.) 200.

"**The test is,** has the judgment creditor

pal could take advantage, or where it constitutes an immaterial error or a mere irregularity, or where the act of issuance or return would evince only a breach of contract without adding to or otherwise changing the existing liability of bail.[40]

d. Lodging Writ With Sheriff. The requirement that the execution be delivered to the sheriff within a certain time after judgment or issuance of the writ[41] and remain lodged with him for a certain time before return-day[42] may be either for the purpose of notice or to impose diligence on the execution of the writ.[43]

e. Diligence Required in Execution of Writ. Although various expressions are used to designate the degree of diligence to be exercised by the officer in searching for and causing the principal to be apprehended, nevertheless it would seem that only such due and reasonable diligence as is consistent with an honest endeavor is required,[44] and no fraudulent or collusive means should be used to prevent service,[45] but the officer is not required to subject himself to manifest danger of bodily harm to effect the arrest,[46] and although defendant was in the

been vigilant?" Longuemare *v.* Nichols, 7 N. Y. Suppl. 157, 158, 17 N. Y. Civ. Proc. 107, 23 Abb. N. Cas. (N. Y.) 221.

Where there is no unreasonable delay bail will not be discharged. Deboard *v.* Brooks, 28 Ga. 362.

40. Parker *v.* Bidwell, 3 Conn. 84; Stevens *v.* Bigelow, 12 Mass. 433; Gillespie *v.* White, 16 Johns. (N. Y.) 117; Handy *v.* Richardson, 3 N. C. 311.

Where the delay has occasioned special bail no particular injury, especially so where it is not necessary to give such bail notice of judgment against the principal nor of issuance or return of execution upon the same and no demand is required to charge them, such bail are not released. Vandergazelle *v.* Rodgers, 57 Mich. 132, 23 N. W. 713.

41. The execution must be lodged in the sheriff's hands within the time prescribed after judgment. Allcorn *v.* Tuggle, 3 Metc. (Ky.) 537 (holding that the object of the statute was to impose diligence not to shorten return-day); Johnson *v.* Rea, 1 Miles (Pa.) 159 (holding that capias ad satisfaciendum must be delivered to the sheriff four days before the return-day).

Where no rule is established for ascertaining the shortest time in which execution should be delivered to the officer before return-day it is necessary that he should have it a sufficient time before it is returnable to make diligent inquiry for the principal and a reasonable time and opportunity to arrest him, and the plaintiff must honestly endeavor to obtain satisfaction before recourse to bail. Stevens *v.* Bigelow, 12 Mass. 433. See also Rosenberg *v.* McKain, 3 Rich. (S. C.) 145.

42. That execution must lie in the sheriff's office four days, or that it is sufficient that it has so lain, is decided in several early cases. Armstrong *v.* Davis, 1 N. J. L. 110 (holding that the rule of Westminster requiring capias ad satisfaciendum to lie four days in the sheriff's office before the return is in force in that state); Gillespie *v.* White, 16 Johns. (N. Y.) 117; Carmer *v.* Weeks, 3 Johns. (N. Y.) 246; Cook *v.* Campbell, 3 Cai. (N. Y.) 322. But see Rosenberg *v.* McKain, 3 Rich. (S. C.) 145, holding that three days is sufficient to enable the sheriff to search for the defendant. It is also decided that if the four days did not elapse before *non est* returned, bail would not be entitled to an exoneration, but they might set aside the writ and avoid the effect of its return for the time being, but that circumstances might justify refusing an exoneration in such case of premature return. Welsh *v.* Mead, 9 Phila. (Pa.) 261, 29 Leg. Int. (Pa.) 140. The requirement that a capias ad satisfaciendum shall lie a specified number of days, exclusively before the return-day in the sheriff's office, excludes the return-day only. Gillespie *v.* White, 16 Johns. (N. Y.) 117. Also substantially so held in Carleton *v.* Bartlett, 16 N. H. 538.

Return not dated.— If the statute requires the officer to keep the execution in his hands until the return-day thereof, in order that the bail may produce the principal to the officer and that he may arrest him on said execution, an allegation in an action against bail that he has so kept the return is not proven by the fact that the sheriff returned his execution *non est* without any date thereon. Butterick *v.* Atkinson, 3 N. H. 307.

43. Object of the requirement.— See Allcorn *v.* Tuggle, 3 Metc. (Ky.) 537; Farrar *v.* Barnes, 12 Rich. (S. C.) 224; Stevens *v.* Adams, Brayt. (Vt.) 29; and cases cited *supra*, notes 41, 42.

44. Degree of diligence.— Sufficient diligence. Beach *v.* Elliott, 44 Conn. 237. No want of fairness or ordinary diligence. Hall *v.* White, 27 Conn. 488. Due diligence. Edwards *v.* Gunn, 3 Conn. 316. A reasonable endeavor. Fitch *v.* Loveland, Kirby (Conn.) 380. Diligent search. Kidder *v.* Parlin, 7 Me. 80. Reasonable care and diligence but not bound to make inquiries of the bail. Koch *v.* Coots, 43 Mich. 30, 4 N. W. 534. A certain degree of diligence. Stevens *v.* Adams, Brayt. (Vt.) 29.

45. Absence of fraud or collusion.—Lyman *v.* Giddey, 96 Mich. 401, 56 N. W. 6. See also Bull *v.* Clarke, 2 Metc. (Mass.) 587; Stevens *v.* Bigelow, 12 Mass. 433; Bradley *v.* Bishop, 7 Wend. (N. Y.) 352.

46. Danger to officer.— Fitch *v.* Loveland, Kirby (Conn.) 380.

city, county, or state, all the time, this is not of itself a sufficient defense to bail,[47] and the fact that defendant might have been found may be waived.[48] The sheriff cannot, however, return *non est* where defendant is in his custody on process.[49]

f. Time of Return — (i) *In General.* The only general rule governing the time of the return of an execution in order to fix bail is that they shall not be prejudiced contrary to the terms and intent of their obligation and their rights thereunder; that the plaintiff shall do no unfair, unlawful, or fraudulent act to prematurely or otherwise fix said bail, and that the return shall be made in a manner and at a time consistent with the officer's safety in the premises;[50] provided always that the return must not be void, illegal, or fraudulent, and that, if the statute is mandatory with relation to the bail rather than to the principal, it should be observed, especially where non-compliance would prejudice the rights of bail.[51]

(ii) *Premature Return.* Outside of the general rule just stated,[52] the cases establish no definite proposition other than of limited application. It is certain, however, that there ought to be a reasonable effort to arrest the principal and that no act should be done calculated to injuriously or unnecessarily fix bail; but it is a question whether only a reasonable time should be given bail to surrender the principal or they should have all the time therefor consistent with the officer's safety, the latter not being permitted to return the execution *non est* until his duty or safety requires it.[53]

47. Presence of defendant in city, county, or state.— Hall *v.* White, 27 Conn. 488; Winchell *v.* Stiles, 15 Mass. 230; Stevens *v.* Bigelow, 12 Mass. 433; Lyman *v.* Giddey, 96 Mich. 401, 56 N. W. 6; Carr *v.* Sterling, 114 N. Y. 558, 22 N. E. 37, 24 N. Y. St. 521. And even though plaintiff's attorney had been informed that defendant would remain in the state a month, the question of laches should be submitted to the jury. Toles *v.* Adee, 84 N. Y. 222.

48. Waiver.— Douglas *v.* Haberstro, 88 N. Y. 611 [*reversing* 25 Hun (N. Y.) 262]. It is also decided that, although service might have been made upon defendant, nevertheless, bail may be fixed by an instruction to return the capias ad satisfaciendum *non est*. Van Winkle *v.* Alling, 17 N. J. L. 446.

49. Defendant in sheriff's custody.— Van Winkle *v.* Alling, 17 N. J. L. 446.

50. Computation of time. — By three months, three calendar months are intended, and the day of the date is excluded in computing time on a return. Bull *v.* Clarke, 2 Metc. (Mass.) 587. Sunday is excluded in computing time of return on execution. Welsh *v.* Mead, 9 Phila. (Pa.) 261, 29 Leg. Int. (Pa.) 140.

Return to an adjourned term.— Bails' liability may be fixed by return of a capias ad satisfaciendum to a legally adjourned term of the court, especially so where they are benefited thereby. Aycock *v.* Leitner, 29 Ga. 197.

51. Statutory requirements.— McAuliffe *v.* Lynch, 17 R. I. 410, 22 Atl. 940. And where the statute requires a fieri facias to be returned not less than, nor more than, a certain number of days, return may be made at any time between the periods so fixed. Block *v.* Maxwell, 10 La. Ann. 5. But if the statute limiting the time for the return of an execution is solely for the plaintiff's benefit and special bail cannot possibly be prejudiced by the officer's failing to comply with such statutory requirement, the bail are not discharged. Wilson *v.* Eads, Hempst. (U. S.) 284, 30 Fed. Cas. No. 17,801*a*. So where the object of the statute is not to give notice to bail, but to require a certain degree of diligence in the creditor in causing principal to be apprehended or in obtaining satisfaction of the judgment, and also that the evidence of the search is to be certified by a return *non est*, it is sufficient that such return is written on the execution within the prescribed statutory period and that it be returned into office in a reasonable time thereafter. Stevens *v.* Adams, Brayt. (Vt.) 29. Statute construed, fixing return-day and to prevent bail being fixed sooner than if proviso had not been enacted, as not relating to special bail but only to bail to the sheriff. McMackin *v.* McFarland, 1 Miles (Pa.) 319.

The rules of court will govern the time of return where the object of the statute is not to shorten such time but only to impose diligence upon the plaintiff in placing the execution in the officer's hands. Allcorn *v.* Tuggle, 3 Metc. (Ky.) 537.

52. See *supra*, II, K, 2, f, (i).

53. Bail should be given all the time for the surrender consistent with the officer's safety. Lichten *v.* Mott, 10 Ga. 136. If reasonable time is given to surrender the principal, a premature return *non est* does not discharge bail, although it may be shown that the return was unfairly made or that bail were injured thereby or that there has not been a reasonable endeavor to find the principal and the return is merely made with the intention of charging bail. Edwards *v.* Gunn, 3 Conn. 316 (holding also that if the principal is in fact rendered to the officer within a reasonable time, though after return made, bail will be exonerated, although the officer must exercise due diligence to take the principal, and that what is a reasonable time

g. Sufficiency of Return. The return ought to show the exact truth concerning the required lawfully material acts necessary to be done, but it need not state the doing of acts which the officer is not obligated to do.[54]

h. Notice of Judgment or Execution. It is not a prerequisite to bringing suit against bail that special notice should be given them of a judgment in an action begun by capias, or that demand for the payment thereof should be made, or that notice of the issuance or return of execution should be given.[55]

i. Lien of Recognizance. Recognizances of bail create no lien on land or other property of the recognizor.[56]

L. Surrender of Principal — 1. Right to Surrender — a. In General. Sureties are technically considered as custodians of their principal over whom they are regarded as having control and dominion, and they may as a general rule discharge themselves by surrendering him,[57] and in case of the death of the sure-

for return of execution is a question of fact); Collins *v.* Cook, 4 Day (Conn.) 1; Fitch *v.* Loveland, Kirby (Conn.) 380; Jones *v.* Bunn, 2 Metc. (Ky.) 490; Opothlarholer *v.* Gardiner, 15 La. 512; Howe *v.* Ransom, 1 Vt. 276. *Contra*, Rowland *v.* Seymour, 2 Metc. (Mass.) 590; Niles *v.* Field, 2 Metc. (Mass.) 327 (upon the ground that such premature return would enlarge and alter bail's responsibility); Ancrum *v.* Sloan, 1 Rich. (S. C.) 421.

Officer need not wait until the last hour of the last day on which the writ is returnable. This rule is subject to the qualification that there is an absence of trick or deception to entrap bail or to prevent them surrendering the defendant. Bull *v.* Clarke, 2 Metc. (Mass.) 587.

Officer not bound to defer return until expiration of the term and bail can take no advantage thereof unless actually prejudiced. Hall *v.* White, 27 Conn. 488.

Return during vacation is premature and insufficient and is not a legal return. Lichten *v.* Mott, 10 Ga. 138. *Contra*, Farrar *v.* Barnes, 12 Rich. (S. C.) 224.

Where statute specifies the time, execution cannot be returned before return-day. McAuliffe *v.* Lynch, 17 R. I. 410, 22 Atl. 940.

54. It is elementary that whatever the officer does should be shown by the return and this return is based upon what he is legally obligated to do in the premises. It should be specific where it is expressly so required. If it is a legal prerequisite to further or other proceedings it should be sufficiently specific to constitute a basis therefor.

Georgia.— Ford *v.* Lane, 8 Ga. 322.

Louisiana.— Conway *v.* Jones, 17 La. 413.

Michigan.—Barnum *v.* Waterbury, 38 Mich. 280.

New Hampshire.— Rowell *v.* Hoit, 8 N. H. 38. See Banfill's Petition, 70 N. H. 132, 46 Atl. 1088.

North Carolina.— Jackson *v.* Hampton, 32 N. C. 579 [*overruling* Waugh *v.* Hampton, 27 N. C. 241].

Pennsylvania.— Brotherline *v.* Mallory, 8 Watts (Pa.) 132.

South Carolina.— Jarvis *v.* Alexander, Cheves (S. C.) 143; Mathewson *v.* Moore, 2 McCord (S. C.) 315.

Virginia.— Lee *v.* Chilton, 5 Munf. (Va.) 407.

See 5 Cent. Dig. tit. "Bail," § 89.

Amendment of return.—An insufficient return will not be permitted to be amended where a mortal sickness of the principal prevented his being surrendered. Goodwin *v.* Smith, 4 N. H. 29.

55. Stevens *v.* Bigelow, 12 Mass. 433; Vandergazelle *v.* Rodgers, 57 Mich. 132, 23 N. W. 713. But see *supra*, II, K, 2, d.

If, however, the statute requires notice of the execution, it must be given in the form and manner therein prescribed. Holmes *v.* Chadbourne, 4 Me. 10; Emerson *v.* Brown, 2 N. H. 347. But see Mahurin *v.* Brackett, 5 N. H. 9.

Notice to charge bail must be seasonable.— Carleton *v.* Bartlett, 16 N. H. 538.

56. So held in Dewitt *v.* Osburn, 5 Ohio 480; Patterson *v.* Sample, 4 Yeates (Pa.) 308; Campbell *v.* Richardson, 1 Dall. (Pa.) 131, 1 L. ed. 68.

57. *Alabama.*— Kennedy *v.* Rice 1 Ala. 11.

Arkansas.— Chandler *v.* Byrd, 1 Ark. 152.

Louisiana.— Slocomb *v.* Robert, 16 La. 173.

Michigan.— De Myer *v.* McGonegal, 32 Mich. 120.

New Jersey.— Anonymous, 9 N. J. L. 25.

New York.— Steinbock *v.* Evans, 55 N. Y. Super. Ct. 278, 18 N. Y. St. 325; Milk *v.* Waite, 18 Abb. N. Cas. (N. Y.) 236; *In re* Taylor, 7 How. Pr. (N. Y.) 212; Kibbe *v.* Ballard, Col. & C. Cas. (N. Y.) 55, Col. Cas. (N. Y.) 56. The method provided for the exoneration of sureties is by surrender of defendant. Stransky *v.* Harris, 22 Misc. (N. Y.) 691, 49 N. Y. Suppl. 1123 [*reversing* 22 Misc. (N. Y.) 15, 48 N. Y. Suppl. 623]; Campbell *v.* Palmer, 6 Cow. (N. Y.) 596; Franklin *v.* Thurber, 1 Cow. (N. Y.) 427. See Stark *v.* Hemstead, 6 Hun (N. Y.) 301.

North Carolina.— Underwood *v.* McLaurin, 49 N. C. 17; Hightour *v.* Murray, 2 N. C. 28. But *compare* Hinton *v.* Odenheimer, 57 N. C. 406.

South Carolina.— Jarvis *v.* Alexander, Cheves (S. C.) 143.

Vermont.— Worthen *v.* Prescott, 60 Vt. 68, 11 Atl. 690; Humphrey *v.* Kasson, 26 Vt. 760; Graves *v.* Dyer, 22 Vt. 614.

Virginia.— Levy *v.* Arnsthall, 10 Gratt. (Va.) 641.

Compare, however, Bobyshall *v.* Oppenheimer, 4 Wash. (U. S.) 333, 3 Fed. Cas.

ties their representatives may in some cases surrender the principal.[58] But an agreement as surety not complying with the statute, though it may be good as a common-law agreement, does not give the right to surrender.[59] Nor does such right exist where sureties have been relieved of their obligations by statute.[60]

b. Where Bail Indemnified. Where indemnity has been given to the bail in the nature of a bond, permission to surrender the principal will not be granted unless it be shown with reasonable certainty that the one giving the bond of indemnity is pecuniarily unable to meet the obligations therein assumed.[61]

2. Time When Surrender May Be Made — a. In General. A condition in the bond as to time of surrender may control,[62] but as a general rule this matter is regulated by the statute, and in such cases a surrender to be effectual must be in compliance with statutory provision in reference thereto.[63] In some cases the time of surrender is dependent upon the execution against the principal.[64] As a general rule, however, the time when surrender may be made depends upon some period in the course of the action against the bail on the recognizance. So in many states it has been declared that the surrender should be made upon the return of the process against the bail.[65] In others the surrender may take place

No. 1,590, distinguishing between special bail and appearance bail.

See 5 Cent. Dig. tit. "Bail," § 95; and *supra*, II, J, 2.

Surrender of principal by bail in criminal prosecutions see *infra*, III, L.

After capias ad satisfaciendum has been returned "Defendant discharged on entering bail," the sheriff is under no obligation to accept the surrender of the principal, the writ being dead and he having no process in his hands by which he can detain him. Keim *v.* Saunders, 120 Pa. St. 121, 13 Atl. 710.

An unauthorized surrender will not discharge the sureties. McKenzie *v.* Smith, 48 N. Y. 143.

Surety must obtain a certified copy of the bail-bond before he can surrender his principal. So held in Marking *v.* Needy, 8 Bush (Ky.) 22.

Unless an action be pending against the principal or bail, a surrender in court by bail of their principal is not effectual. Sloan *v.* Bryant, 28 N. H. 67.

Where the force of a special bail-piece has already been spent by the arrest of the principal on a capias ad satisfaciendum, bail cannot surrender their principal, though he may escape. *Ex p.* Badgley, 7 Cow. (N. Y.) 472.

58. Surrender by personal representatives. — Wheeler *v.* Wheeler, 7 M ss. 169.

59. Agreement not complying with statute. — Toles *v.* Adee, 84 N. Y. 222.

On undertaking to deliver chattels bail have no power to surrender. Hedges *v.* Payne, 85 Hun (N. Y.) 377, 32 N. Y. Suppl. 969, 66 N. Y. St. 405 [*affirmed* in 146 N. Y. 397, 42 N. E. 543, 70 N. Y. St. 869].

60. Sureties relieved by statute. — *Ex p.* Lafonta, 2 Rob. (La.) 495.

61. Mills *v.* Rodewald, 17 Hun (N. Y.) 297; Mills *v.* Hildreth, 7 Hun (N. Y.) 298. In an early case in New York it was decided that an *exoneretur* would be allowed on surrender within the eight days, though the bail may have been indemnified by the principal. Brownelow *v.* Forbes, 2 Johns. (N. Y.) 101.

62. If the condition of the bond is special for a surrender on a particular day, as for instance the first day of the next term after judgment is rendered against the principal, a surrender on a subsequent day is of no avail. Siter *v.* Welford, 1 Ashm. (Pa.) 61.

63. Under statutory requirements. — See Steward *v.* Patten, 1 Hall (N. Y.) 38; Geneva Bank *v.* Reynolds, 12 Abb. Pr. (N. Y.) 81, 20 How. Pr. (N. Y.) 18; Cornell *v.* Reynolds, 1 Cow. (N. Y.) 241; Kibbe *v.* Ballard, Col. & C. Cas. (N. Y.) 55, Col. Cas. (N. Y.) 56; Kelly *v.* Stepney, 4 Watts (Pa.) 69; Speakman *v.* Pearce, 1 Yeates (Pa.) 347; Walker *v.* Graham, 10 Yerg. (Tenn.) 230.

In New York it is held in an early case that, where an action on a recognizance of bail is taken in the court of common pleas, and prosecuted in the supreme court, the time of surrender is governed, not by the practice of the court in which the recognizance was taken, but by the practice of the supreme court. Ward *v.* Mozer, 19 Wend. (N. Y.) 153.

64. Dependent upon execution. — Allen *v.* Breslauer, 8 Cal. 552. In Thorne *v.* Hutchinson, 3 B. & C. 112, 10 E. C. L. 59, it is held that if defendant is surrendered after judgment in discharge of bail, but no notice thereof is given until execution is issued and executed, exoneration will be entered and the execution set aside.

In Michigan it has been decided that the sureties' right to surrender their principal does not terminate until, in regular course, an execution against defendant's body has failed. De Myer *v.* McGonegal, 32 Mich. 120. He may be legally surrendered into the sheriff's custody before or after the return-day of the fieri facias. Umphrey *v.* Emery, 121 Mich. 184, 80 N. W. 14.

65. Upon return of process against bail. — *Illinois.* — Gear *v.* Clark, 8 Ill. 64.

Missouri. — Parmer *v.* Moore, 1 Mo. 706; Hood *v.* Creath, 1 Mo. 582.

South Carolina. — Ancrum *v.* Sloan, 1 Rich. (S. C.) 421; Stevens *v.* Meeds, 1 Mill (S. C.) 318. See Watson *v.* Bancroft, 4 Strobh. (S. C.) 218.

Vermont. — Worthen *v.* Prescott, 60 Vt. 68, 11 Atl. 690.

within a certain number of days after the return of the writ on the recognizance or the commencement of the action against the bail,[66] and in others while the court is in session[67] or at any time during the term,[68] or before final judgment,[69] and in some states the right to surrender may continue to exist after judgment.[70]

Virginia.— Branch *v.* Webb, 7 Leigh (Va.) 371.

United States.— Stockton *v.* Throgmorton, 1 Baldw. (U. S.) 148, 23 Fed. Cas. No. 13,463; Boyer *v.* Herty, 1 Cranch C. C. (U. S.) 251, 3 Fed. Cas. No. 1,753.

See 5 Cent. Dig. tit. "Bail," § 97.

66. In Michigan.— Within eight days of the return-day of the writ. Lyman *v.* Giddey, 96 Mich. 401, 56 N. W. 6; Koch *v.* Coots, 43 Mich. 30, 4 N. W. 534; Begole *v.* Stimson, 39 Mich. 288.

In New York.— In the earlier cases eight days after the return of process was allowed. Mayell *v.* Follett, 7 Wend. (N. Y.) 507; Brownelow *v.* Forbes, 2 Johns. (N. Y.) 101; Kane *v.* Ingraham, 2 Johns. Cas. (N. Y.) 403; Ellis *v.* Hay, 1 Johns. Cas. (N. Y.) 334; Strang *v.* Barber, 1 Johns. Cas. (N. Y.) 329. Subsequently the time was changed to twenty days after commencement of suit against the bail, after the expiration of which surrender could not properly be made without leave of court. Mills *v.* Hildreth, 81 N. Y. 91; Hayes *v.* Carrington, 12 Abb. Pr. (N. Y.) 179, 21 How. Pr. (N. Y.) 143; Baker *v.* Curtis, 10 Abb. Pr. (N. Y.) 279.

In Pennsylvania.— Fourteen days after service of scire facias or summons, or until the *quarto die post.* Cowles *v.* Brawley, 4 Watts (Pa.) 358; McClurg *v.* Bowers, 9 Serg. & R. (Pa.) 24; Still *v.* Howard, 2 Miles (Pa.) 274; Carey *v.* Henry, 3 Pa. L. J. Rep. 32, 4 Pa. L. J. 360. See Com. *v.* Kite, 5 Serg. & R. (Pa.) 399, as to earlier rule in this state.

Computing the days.—The days within the teste and return-days of process are included in computing the days after return of process or *ex gratia* (Wiggins *v.* Wilson, 5 Cow. (N. Y.) 420); as is also Sunday (Brown *v.* Smith, 9 Johns. (N. Y.) 84). But where there are seven days only in the term after declaration is served on bail, the latter has one day in the next term in which to surrender his principal. Mayell *v.* Follett, 7 Wend. (N. Y.) 507.

67. While court in session.— In Vermont a surrender can only be made in a case before a justice of the peace while the court is in session, and it is not in session where it adjourns, though such adjournment may take place before the expiration of the time allowed for the parties to appear. Converse *v.* Washburn, 43 Vt. 129.

68. At any time during term.—Shannon *v.* Hyde, 17 Ga. 88; Dunbar *v.* Conway, 11 Gill & J. (Md.) 92; Breeze *v.* Elmore, 4 Rich. (S. C.) 436; Glover *v.* Gomillion, 2 Rich. (S. C.) 554; Davitt *v.* Counsel, 2 Nott & M. (S. C.) 136; Humphrey *v.* Kasson, 26 Vt. 760.

69. Before final judgment.— *Georgia.*— Griffin *v.* Moore, 2 Ga. 331.

Indiana.— Lewis *v.* Brackenridge, 1 Blackf. (Ind.) 220, 12 Am. Dec. 228.

Louisiana.—Slocomb *v.* Robert, 16 La. 173; Wakefield *v.* McKinnell, 9 La. 449; Jayne *v.* Cox, 8 Mart. N. S. (La.) 168.

Massachusetts.— Rice *v.* Carnes, 8 Mass. 490.

New York.— But not after appeal from judgment against sureties, no excuse for delay being made. Denny *v.* Blumenthal, 8 Misc. (N. Y.) 544, 28 N. Y. Suppl. 744, 59 N. Y. St. 263.

South Carolina.— Atkinson *v.* Martin, 1 Brev. (S. C.) 481.

See 5 Cent. Dig. tit. "Bail," § 97.

Where a surrender should be made before judgment the bail cannot release themselves by a surrender after judgment, though the record does not show when it was signed. Opothlarholer *v.* Gardiner, 15 La. 512.

70. After judgment.— Granberry *v.* Pool, 14 N. C. 141.

Surrender pending appeal.—Surrender may in some cases be made pending an appeal from a judgment on the scire facias. Davison *v.* Mull, 2 N. C. 364. So where the defendant in a writ of scire facias defaulted, but no judgment was entered, and pending an appeal from an order disallowing the motion to take off the default, the bail surrendered the principal, the surrender was declared to be in time under a statute providing that bail might surrender their principal at any time before final judgment on scire facias. Norcross *v.* Crabtree, 161 Mass. 55, 36 N. E. 678.

After reversal of a judgment surrender may be made. Safford *v.* Knight, 117 Mass. 281; Thayer *v.* Goddard, 19 Pick. (Mass.) 60.

After return of fieri facias.— It is declared in Michigan in a late case that under the laws of that state a surrender may be made at any time before or after the return-day of the fieri facias. Umphrey *v.* Emery, 121 Mich. 184, 80 N. W. 14.

Until return of non est inventus.— Where bail may, by statute, surrender their principal after judgment until a return of *non est inventus*, when they become liable, it has been decided in an action where the return was not made until after forty days, that the time was reasonably sufficient for the bail to surrender their principal. Collins *v.* Cook, 4 Day (Conn.) 1. See in this connection, generally, Edwards *v.* Gunn, 3 Conn. 316; Fitch *v.* Loveland, Kirby (Conn.) 380.

Certiorari after judgment.— It is declared in an early case that where judgment has been rendered on a scire facias, the bail cannot by certiorari carry the case into the circuit court by merely showing that he has the body of his principal ready to surrender. Sharp *v.* Clouston, 4 Yerg. (Tenn.) 193.

b. Extension of Time. The court may, in its discretion, after the expiration of the strict time allowed by law, grant to the sureties in certain cases an extension of time in which to surrender their principal.[71] Permission to surrender after the time allowed by law should not, however, be granted where the bail have the means of indemnifying themselves in case of recovery against them,[72] or where they have been guilty of inexcusable laches.[73] But bail may in a proper case, within the legal time therefor, make application to stay proceedings and for time to surrender where the principal has been concluded by judgment on default after failure to plead his discharge.[74]

2. Manner of Surrender. In the absence of any statutory formalities or rules of practice prescribed for the surrender of the principal by his sureties, the surrender should be by some distinct unequivocal act accompanied by such declarations or acknowledgments as show the case to which it applies and an actual honest delivery of the principal into the custody of the proper authority;[75] but if the statute or rules of court provide that a surrender by bail of their principal

71. Discretion of court.— Barker *v.* Russell, 11 Barb. (N. Y.) 303, Code Rep. N. S. (N. Y.) 57; Gilbert *v.* Bulkley, 1 Duer (N. Y.) 668; Geneva Bank *v.* Reynolds, 12 Abb. Pr. (N. Y.) 81, 20 How. Pr. (N. Y.) 18; Hall *v.* Emmons, 9 Abb. Pr. N. S. (N. Y.) 370 [*reversing* 2 Sweeny (N. Y.) 396]; Reynolds *v.* Boyd, 23 N. C. 106; Wright *v.* Coller, 35 Ohio St. 131; Davidson *v.* Taylor, 12 Wheat. (U. S.) 604, 6 L. ed. 743. See also Stransky *v.* Harris, 22 Misc. (N. Y.) 691, 49 N. Y. Suppl. 1123 [*reversing* 22 Misc. (N. Y.) 15, 48 N. Y. Suppl. 623].

But where the bail has become finally charged under a code provision which fixes the liability of bail by the return of a capias ad satisfaciendum against defendant "not found" it is held that the court has no power to extend the time of surrender. Whetstone *v.* Riley, 7 Ohio St. 514.

When extension may be granted.— Such an extension may be properly granted where the sureties have been lulled into security by the plaintiff (Livingston *v.* Bartles, 4 Johns. (N. Y.) 478), or where a judgment has been entered against them by mistake without their fault (Safford *v.* Knight, 117 Mass. 281. See Bogle *v.* Fitzhugh, 2 Wash. (Va.) 213), or where by an omission to file the bail-piece they are prevented from surrendering (Nichols *v.* Sutfin, 7 Cow. (N. Y.) 422), which may be granted in such case after judgment against them; or where inability to surrender is owing to the continued absence of the principal from the country, whether due to imprisonment, sickness, or wilful conduct of the latter (People *v.* New York C. Pl., 2 Wend. (N. Y.) 263; Geneva Bank *v.* Reynolds, 12 Abb. Pr. (N. Y.) 81, 20 How. Pr. (N. Y.) 18. But see Rathbone *v.* Warren, 4 Johns. (N. Y.) 310), or where it is impossible to make the surrender, owing to the distance to be traveled (Van Rensselaer *v.* Hopkins, 3 Cai. (N. Y.) 136, Col. & C. Cas. (N. Y.) 479, Col. Cas. (N. Y.) 481), or the sickness of the bail (Thomas *v.* Bulkley, 5 Cow. (N. Y.) 25; Boardman *v.* Fowler, 1 Johns. Cas. (N. Y.) 413), or where they have done all in their power to surrender the principal in the time prescribed (Warner *v.* Hayden, 2 Wend. (N. Y.) 251).

Renewal of motion.— The rule that a renewal of a motion made before one judge and denied cannot be renewed before another judge on the same facts without leave does not apply where an application is made to the discretion of the court to allow an extension of time for surrender of principal after an application for exoneration as a matter of right has been denied on the ground that the strict time had passed. Hall *v.* Emmons, 9 Abb. Pr. N. S. (N. Y.) 370 [*reversing* 2 Sweeny (N. Y.) 396].

72. Existence of means of indemnification. — Geneva Bank *v.* Reynolds, 12 Abb. Pr. (N. Y.) 81, 20 How. Pr. (N. Y.) 18.

73. Laches.— Bode *v.* Maiberger, 12 N. Y. Civ. Proc. 53; Baker *v.* Curtis, 10 Abb. Pr. (N. Y.) 279. See Denny *v.* Blumenthal, 8 Misc. (N. Y.) 544, 28 N. Y. Suppl. 744, 59 N. Y. St. 263.

74. So held in Franklin *v.* Thurber, 1 Cow. (N. Y.) 427, after return of writ against bail.

75. In the absence of statutory requirements.— Menude *v.* Butler, 5 Rich. (S. C.) 440; Bomar *v.* Poole, 2 Speers (S. C.) 119. See Moyers *v.* Center, 2 Strobh. (S. C.) 439. An announcement in open court that the sureties surrender the principal, who, though known to the judge, is unknown to all the others present, except the bail, does not constitute a valid surrender, where he is never delivered into the actual custody of the sheriff. Rountree *v.* Waddill, 52 N. C. 309. A surrender, however, of the principal in court may be valid (Coolidge *v.* Cary, 14 Mass. 115), though not before a judge at his chambers in the absence of some law or rule of court permitting it (Baxter *v.* Biays, Brunn. Col. Cas. (U. C.) 254, 2 Fed. Cas. No. 1,123, 4 Am. L. J. 276). Again, it has been held that the surrender should be at the jail. Glover *v.* Gomillion, 2 Rich. (S. C.) 554. And it has been decided that it is not necessary to make application to the court for permission to surrender the principal in order to make such surrender valid. Ellis *v.* Hay, 1 Johns. Cas. (N. Y.) 334.

For certificate of surrender of principal by bail see Sullivan *v.* Richardson, 25 Ga. 154. 155.

should be made in a certain manner, the surrender, to be effectual, should be in the manner prescribed.[76] The ordinary requirements as to the manner of surrender are that notice be given either to the plaintiff or his attorney,[77] that the bail-piece be exhibited to the judge before whom proceedings are brought for the commitment of the defendant in exoneration of bail or to the sheriff to whom the surrender is made;[78] that entry as a matter of record be made of the surrender or *exoneretur*;[79] that the surrender be indorsed upon a certified copy of the undertaking by the officer into whose custody the principal is delivered;[80] and in certain cases that payment of costs be made by the bail.[81]

76. Under statute or rule of court.— Cozine *v.* Walter, 55 N. Y. 304; Stark *v.* Hemstead, 6 Hun (N. Y.) 301.

Statutory provisions may in some cases be merely directory and not conditions precedent to the validity of a surrender, and a non-compliance with a provision of that character will not prevent the discharge of the sureties. Jones *v.* Varney, 8 Cush. (Mass.) 137; Cooke *v.* Beale, 1 Wash. (Va.) 313.

The question as to where or to whom the surrender should be made must depend upon either the statute or the conditions of the bond. If it be designated by statute such designation must control, but otherwise it may be subject to the provisions of the undertaking. So where the bond designated "the jail of said county" as the place of surrender, a surrender to a deputy sheriff in court is of no effect. Keim *v.* Saunders, 120 Pa. St. 121, 13 Atl. 710. A surrender, however, to the jailer of the county has been held sufficient, though the statute requires the surrender to be to the sheriff. Bruce *v.* Colgan, 2 Litt. (Ky.) 284.

Rule in New York.— The sureties must take the defendant to the sheriff and require him in writing to take the defendant into his custody. They must, at the same time, deliver to the sheriff a certified copy of the undertaking, whereupon it is made the duty of the latter to "detain the defendant in his custody thereupon, as upon the original mandate" and to acknowledge the surrender by a certificate in writing; and where the original mandate is the order of arrest the effect of any surrender which might be allowed would be that the sheriff must resume the custody of the defendant because of the original order for arrest, and his authority for so doing would rest upon the demand of the sureties and the papers required to be delivered to him at the time of the surrender. Stransky *v.* Harris, 22 Misc. (N. Y.) 691, 694, 49 N. Y. Suppl. 1123 [*reversed* in 22 Misc. (N. Y.) 15, 48 N. Y. Suppl. 623].

77. Notice to plaintiff or his attorney.— Sloan *v.* Bryant, 28 N. H. 67; Maynadier *v.* Wroe, 1 Cranch C. C. (U. S.) 442, 16 Fed. Cas. No. 9,351.

Notice required is of the surrender and not of the intention. Cleveland *v.* Skinner, 56 Ill. 500.

Omission of date of surrender in notice may not affect its validity. Reed *v.* Maynard, 11 Allen (Mass.) 394.

Signature to the notice is not an indispensable requisite. Tucker *v.* Bruce, 121 Mass. 400.

78. Exhibition of bail-piece.— Not sufficient in such case that copies of the recognizance be presented to the judge instead of the bail-piece. Elliott *v.* Dudley, 8 Mich. 62.

Copies of the bail-piece required to be produced in proceedings to surrender defendant by special bail need not be certified, and the sheriff's certificate shows that defendant is in custody by virtue of the commitment, where the commissioner indorses an order of commitment on one copy of the bail-piece and the sheriff certifies on the other copy that he had defendant in his custody. Morgan *v.* Jones, 117 Mich. 59, 75 N. W. 280. Surrender to sheriff is in an early case declared to be void, though bail-piece be not exhibited, if surrender be made in county where sureties were entered as special bail in open court and sheriff had knowledge of the bail's undertaking. Evans *v.* Freeland, 3 Munf. (Va.) 119.

79. Entry of surrender and exoneretur.— Whitton *v.* Harding, 15 Mass. 535; Colgan *v.* Supplee, 20 Wkly. Notes Cas. (Pa.) 87. That entry of *exoneretur* may be made after time limited therefor see Strang *v.* Barber, 1 Johns. Cas. (N. Y.) 329.

See also *supra*, II, I, 2, c, as to entry of *exoneretur*.

Entry of a surrender which has been made in discharge of bail cannot be rescinded on a subsequent day in the same term. Underwood *v.* McLaurin, 49 N. C. 17.

80. Indorsement of surrender.— Hume *v.* Norris, 5 Oreg. 478.

81. Payment of costs.— Cleveland *v.* Skinner, 56 Ill. 500; Bartlet *v.* Falley, 5 Mass. 373; Brownelow *v.* Forbes, 2 Johns. (N. Y.) 101; Parker *v.* Tomlinson, 2 Johns. Cas. (N. Y.) 220. But *compare* Morgan *v.* Jones, 117 Mich. 59, 75 N. W. 280 [*distinguishing* Cozine *v.* Walter, 55 N. Y. 304; Geneva Bank *v.* Reynolds, 12 Abb. Pr. (N. Y.) 81, 20 How. Pr. (N. Y.) 18; Mayell *v.* Follett, 7 Wend. (N. Y.) 507], that non-payment of accrued costs does not make void the proceedings for the surrender of the principal, where no objection to the commissioner's order of discharge is made and there is nothing to indicate that defendant, in the action on the bail-bond, had any knowledge of the amount thereof until it was stated in court, whereupon they were directed to pay the amount forthwith and a verdict was ordered in their favor.

Bail should seek plaintiff and pay the costs without waiting for demand. Cathcart *v.* Cannon, 1 Johns. Cas. (N. Y.) 220.

If separate writs of scire facias are issued

4. Effect of Surrender — a. On Principal. It has been held that, to authorize an order that the principal who has been surrendered in discharge of bail be committed in execution, a motion therefor should be made.[82] Commitment of the principal into custody may also be ordered on his surrender by his bail on affidavit by the plaintiff that the defendant is about to leave the state.[83]

b. On Sureties — (i) *In General.* Bail by a valid and proper surrender of their principal are thereby discharged from liability of their bond.[84] A surrender, however, which is made after the liability of the bail has become fixed,[85] as by a judgment against them, will not operate as a discharge or in any way relieve them of their liability.[86]

(ii) *By One of Two or More Sureties.* Where two or more persons become sureties on a bail-bond a surrender of the principal by one of them may be good as to all.[87]

(iii) *Principal Arrested or Convicted on Criminal Charge.* The general rule is that if a principal has been committed to prison on a criminal charge

against two sureties who have become jointly and severally liable, and a surrender is made by one of them, the costs of both writs should, it has been decided, be paid by such surety. Pennington *v.* Thornton, 1 Cranch C. C. (U. S.) 101, 19 Fed. Cas. No. 10,939*a*.

82. **Motion to commit on execution.**— Peter *v.* Suter, 1 Cranch C. C. (U. S.) 311, 19 Fed. Cas. No. 11,021. But see Howzer *v.* Dellinger, 23 N. C. 475, to the effect that though plaintiff may not pray for the committal of the principal in execution, it will not in all cases operate as a discharge of the latter from execution. *Compare* also Lawrence *v.* Graham, 9 Wend. (N. Y.) 477, holding that, though the bail may avail themselves of the fact that the plaintiff had given notice of the exception to bail, where no exception was in fact entered on the bail-piece, yet, if waived by them, defendant cannot avail himself thereof for the purpose of obtaining his discharge when surrendered.

See also *supra*, II, B, 4; *infra*, III, L, 3.

83. **Principal about to leave state.**— Farmers' Bank *v.* Freeland, 50 N. C. 326.

Where the statute provides for a capias against an absconding debtor the justice to whom the bail surrenders such principal may, under the statute, commit him to jail, unless he procures bail for his appearance on the continuance day, so that he may be had if needed on execution. Worthen *v.* Prescott, 60 Vt. 68, 11 Atl. 690; Abells *v.* Chipman, 1 Tyler (Vt.) 377.

If principal who has been discharged under an insolvent law is surrendered by the special bail he will be discharged from custody by the court. Richardson *v.* McIntyre, 4 Wash. (U. S.) 412, 20 Fed. Cas. No. 11,789.

84. **Releases from liability.**— Colgan *v.* Supplee, 20 Wkly. Notes Cas. (Pa.) 87; Fleming *v.* Rushton, 1 Brev. (S. C.) 383. So a surrender before the execution is returnable to the officer holding the same will have this effect. Collins *v.* Cook, 4 Day (Conn.) 1; Ryan *v.* Watson, 2 Me. 382; Rice *v.* Carnes, 8 Mass. 490; Champion *v.* Noyes, 2 Mass. 481. As will also a surrender before any attempt is made to enforce liability on the bond. De Myer *v.* McGonegal, 32 Mich. 120. And in some cases where made within a certain number of days of the service of the summons on the bail. Com. *v.* Malony, 3 Wkly. Notes Cas. (Pa.) 407. Again in an early case it is decided that a surrender before a judgment has been rendered on the scire facias will discharge the bail from the costs of such action. Peace *v.* Person, 5 N. C. 188.

The order of exoneration must be entered in New York in order to stay proceedings in an action to charge the sureties as bail. Surrender merely will not exonerate them so as to have the effect. Bode *v.* Maiberger, 12 N. Y. Civ. Proc. 53.

85. **A surrender will not exonerate** the bail where the bond is conditioned for the payment of any judgment which may be recovered, though such a bond is not authorized by statute. Paddock *v.* Hume, 6 Oreg. 82. And where by statute bail is liable in certain cases if the principal have property and removes it from the state but otherwise not, a surrender of the principal will not affect such liability. Kirley *v.* Sproul, 6 J. J. Marsh. (Ky.) 92.

86. **After judgment against sureties.**— Bode *v.* Maiberger, 12 N. Y. Civ. Proc. 53; Dowlin *v.* Standifer, Hempst. (U. S.) 290, 7 Fed. Cas. No. 4,041*a*.

87. Compton *v.* Williams, 27 Ga. 29; Kibbe *v.* Ballard, Col. & C. Cas. (N. Y.) 55, Col. Cas. (N. Y.) 56. So where the bail have been sued jointly a surrender of the principal by one of them will discharge all, although it is declared in this case to be otherwise if sued severally. Kibbe *v.* Ballard, Col. & C. Cas. (N. Y.) 55, Col. Cas. (N. Y.) 56. But in an early case in Kentucky it is held that, where the bond is a joint one and suit is commenced against one of the sureties, a surrender of the principal by him will discharge all except as to costs. Myers *v.* Irons, 1 A. K. Marsh. (Ky.) 156.

This rule does not apply, however, where the liability of one or more of the others has already become fixed, in which case such liability will not be affected thereby though the sureties will discharge the one making it. Cleveland *v.* Skinner, 56 Ill. 500.

habeas corpus will be granted on motion of the bail to enable them to surrender him,[88] and such a course may also be followed where the principal has been convicted of a crime,[89] although in the latter case the more proper and expedient course is probably to discharge the sureties on motion.[90]

5. Right of Bail to Arrest Principal. As a general rule the bail has the right at any time to arrest his principal, such right resulting from the relation of the parties.[91] The arrest may be made in open court,[92] or the bail may follow their principal beyond the jurisdiction of the court and even into another state and arrest him,[93] or he may be arrested on a Sunday,[94] and it has been decided that the arrest may be made though the principal is in the custody of another person who has subsequently become bail for him.[95] Bail may in certain cases obtain the assistance of some officer to aid in the arrest,[96] or may depute their power to take and surrender.[97]

M. Relief in Case of Forfeiture — 1. In General. It has been declared that, upon proper application made for that purpose,[98] the court will grant relief

88. **Committed on criminal charge.**— Way *v.* Wright, 5 Metc. (Mass.) 380; Atkinson *v.* Prine, 46 N. J. L. 28; Biggnell *v.* Forrest, 2 Johns. (N. Y.) 482; Sharp *v.* Sheriff, 7 T. R. 226. In a case in New Jersey it is declared that whether relief will be granted by habeas corpus or by extending the time for surrender or by discharge on motion will depend upon the fact as to which mode will be more beneficial to the plaintiff. Steelman *v.* Mattix, 38 N. J. L. 247, 20 Am. Rep. 389.

89. **Conviction for crime.**—Way *v.* Wright, 5 Metc. (Mass.) 380; Bigelow *v.* Johnson, 16 Mass. 218.

90. **Discharge on motion.**— Way *v.* Wright, 5 Metc. (Mass.) 380; Atkinson *v.* Prine, 46 N. J. L. 28; Loflin *v.* Fowler, 18 Johns. (N. Y.) 335; Cathcart *v.* Cannon, 1 Johns. Cas. (N. Y.) 28, Col. & C. Cas. (N. Y.) 64, Col. Cas. (N. Y.) 65.

The reason for the distinction is that when a party is merely confined on a charge he may be acquitted and the plaintiff derive some benefit from taking him on his execution, but when in prison under sentence no advantage can be derived from his execution, as the prisoner will be immediately remanded, and a habeas corpus is an unnecessary expense. Way *v.* Wright, 5 Metc. (Mass.) 380.

91. *Ex p.* Lafonta, 2 Rob. (La.) 495; Fisk *v.* Comstock, 2 Rob. (La.) 25; Henderson *v.* Lynd, 2 Mart. (La.) 57, 5 Am. Dec. 726.

Females are not exempt from arrest under a bail writ, though a statute may exempt them from arrest under a capias ad satisfaciendum. Jarvis *v.* Alexander, Cheves (S. C.) 143; Desprang *v.* Davis, 3 McCord (S. C.) 16.

Arrest of principal by bail made in good faith but erroneously on the authority of a transcript from the docket of the justice court, the arrest being for the purpose of exonerating the bail from liability, is not made under such color of authority as will aggravate damages for the principal in an action by him against the bail for false imprisonment. Campbell *v.* Rishaberger, 2 Watts (Pa.) 447.

Breaking into principal's dwelling-house.— After demand of entry, bail, or one lawfully deputed by him, may be justified in forcibly entering the dwelling-house of the principal for the purpose of arresting him. Read *v.* Case, 4 Conn. 166, 10 Am. Dec. 110; Nicolls *v.* Ingersoll, 7 Johns. (N. Y.) 145. See also Sheers *v.* Brooks, 2 H. Bl. 120.

92. **Made in open court.**— Marshall *v.* Carhart, 20 Ga. 419; Broome *v.* Hurst, 4 Yeates (Pa.) 123; Smith *v.* Catlett, 1 Cranch C. C. (U. S.) 56, 22 Fed. Cas. No. 13,021.

93. **Beyond jurisdiction of court.**— Ruggles *v.* Corey, 3 Conn. 419; Parker *v.* Bidwell, 3 Conn. 84; Pease *v.* Burt, 3 Day (Conn.) 485; *Ex p.* Lafonta, 2 Rob. (La.) 495; Fisk *v.* Comstock, 2 Rob. (La.) 25; Henderson *v.* Lynd, 2 Mart. (La.) 57, 5 Am. Dec. 726; Nicolls *v.* Ingersoll, 7 Johns. (N. Y.) 145; Sharpless *v.* Knowles, 2 Cranch C. C. (U. S.) 129, 21 Fed. Cas. No. 12,712.

94. **On Sunday.**— Broome *v.* Hurst, 4 Yeates (Pa.) 123.

95. **In custody of another.**— Sharpless *v.* Knowles, 2 Cranch C. C. (U. S.) 129, 21 Fed. Cas. No. 12,712. In this case bail followed his principal into another jurisdiction in which another had subsequently become bail for him. But see Holsey *v.* Trevillo, 6 Watts (Pa.) 402.

96. **Obtaining assistance of officer.**— *Ex p.* Lafonta, 2 Rob. (La.) 495.

97. **Deputizing another.**— State *v.* Mahon, 3 Harr. (Del.) 568; Com. *v.* Brickett, 8 Pick. (Mass.) 138; Nicolls *v.* Ingersoll, 7 Johns. (N. Y.) 145; Boardman *v.* Fowler, 1 Johns. Cas. (N. Y.) 413; Holsey *v.* Trevillo, 6 Watts (Pa.) 402.

What necessary to depute power.—In Kentucky it has been decided that the arrest of the principal by a third person can only be authorized by the written indorsement of the surety on the certified copy of the bail-bond. Marking *v.* Needy, 8 Bush (Ky.) 22. In a case in New York where ten persons were on the bail-bond an authority by eight of them to arrest the principal was held sufficient. *In re* Taylor, 7 How. Pr. (N. Y.) 212.

98. **Motion to exonerate bail** once made and denied cannot be renewed without leave. Bode *v.* Maiberger, 12 N. Y. Civ. Proc. 53.

On motion to set aside proceedings in a

to bail to the sheriff in all cases, on the usual terms, upon the return of the writ against them,[99] but not after judgment has been recovered against the sureties upon their undertaking.[1] In some cases, however, it may be proper to open the judgment and enter an *exoneretur* as to the bail.[2]

2. EQUITABLE RELIEF. If a judgment has been rendered against the bail at law, equity will not grant relief therefrom unless it appear that the bail had good cause for not defending the action at law.[3]

3. STAY OF PROCEEDINGS. Proceedings against bail upon their undertaking may, upon a proper showing therefor,[4] be stayed.[5] Where proceedings are stayed

suit on a bail-bond for irregularity, an affidavit used on such motion is properly entitled in such suit, and not in the original cause. Phelp *v.* Hall, 5 Johns. (N. Y.) 367; Pell *v.* Jadwin, 3 Johns. (N. Y.) 448. See *Ex p.* Metzler, 5 Cow. (N. Y.) 287.

Relief in case of forfeiture by bail in criminal prosecutions see *infra*, III, N.

99. Upon return of writ.— Haswell *v.* Bates, 9 Johns. (N. Y.) 80; Ellis *v.* Berry, Col. & C. Cas. (N. Y.) 61, Col. Cas. (N. Y.) 62. Bail may be so relieved after the death of the principal. Bulkley *v.* Colton, 1 Johns. (N. Y.) 515. Loss of trial merely will not be sufficient to prevent such relief, unless such loss was caused by defendant's delay after bail is called for and without neglect on plaintiff's part. Elles *v.* Berry, Col. & C. Cas. (N. Y.) 61, Col. Cas. (N. Y.) 62.

Where plaintiff has been delayed in the trial of his cause, owing to delay in putting in special bail, the bond must stand as security for the debt to be recovered (McFarland *v.* Holmes, 5 Serg. & R. (Pa.) 50; Fitler *v.* Probasco, 1 Browne (Pa.) 238), except where plaintiff may be put in as good a condition as if there had been no delay (State Bank *v.* Lassel, 2 Yeates (Pa.) 387).

1. It is then too late for them to apply for exoneration, as the judgment is a contract debt of record against them. Bode *v.* Maiberger, 12 N. Y. Civ. Proc. 53. And *compare* Claxton's Case, 1 Ashm. (Pa.) 102, wherein it is held that if, owing to the failure of the defendant to file his petition in time, the bail-bond becomes forfeited, the court has no power to relieve the surety by allowing the defendant to file his petition and be heard subsequently.

2. Opening judgment.— Com. *v.* Howard, 11 Wkly. Notes Cas. (Pa.) 81, wherein it appears that plaintiff had arrested principal in pursuance of information furnished on behalf of the bail, and had lodged him in jail, from which he was subsequently discharged, under the insolvent law. See also Keerle *v.* Norris, 2 Va. Cas. 217, where it was declared that an office judgment against the defendant, and his appearance bail, the latter afterward becoming special bail, might be set aside.

Though bail may have been guilty of laches relief may in some cases be granted. Bonsal *v.* Camp, 2 Harr. (Del.) 327.

Proceedings in outlawry, in a bailable action, will not, it has been held, be reversed on motion and affidavit, on the ground that the defendant was not a citizen of the state, unless special bail is put in by defendant on a writ issued by the plaintiff in a new action. Roosevelt *v.* Crommelin, 18 Johns. (N. Y.) 253.

Where bail have been personated a vacation of bail may be ordered. Such order, however, will be stayed where the personation was felonious until the felon has been prosecuted to effect. Renoard *v.* Noble, 2 Johns. Cas. (N. Y.) 293.

Where principal offered to surrender himself in due time, but was prevented owing to a mistake in entering the scire facias as of a former term, bail may be relieved. Hamilton *v.* Taylor, 3 Yeates (Pa.) 389.

3. Not granted as a rule.— Brown *v.* Toell, 5 Rand. (Va.) 543, 16 Am. Dec. 759. See also Allen *v.* Hamilton, 9 Gratt. (Va.) 255; Dickinson *v.* Sizer, 4 Rand. (Va.) 113; Carter *v.* Cockrill, 2 Munf. (Va.) 448. In Gilliam *v.* Allen, 4 Rand. (Va.) 498, it is declared that, as a general rule, where a legal advantage has been acquired by the plaintiff against bail, without any participation or agency on the part of the former, such advantage will not be taken from him by any tribunal.

But where a person who has not executed the bond is returned as appearance bail, his failure to appear and plead will not preclude him from equitable relief, and if such relief be sought in the nature of a bill of injunction, it is declared that both the plaintiff in the original suit, and the sheriff who returned the writ should be parties thereto. Spotswood *v.* Higgenbotham, 6 Munf. (Va.) 313.

In New York, in an action against bail in the supreme court, equitable relief may be granted to the bail by that court, although the original action was in another court, and a temporary stay of proceedings may be allowed to enable the bail to surrender their principal. Barker *v.* Russell, 11 Barb. (N. Y.) 303, Code Rep. N. S. (N. Y.) 57.

4. An affidavit that defendant has absconded from the state and that it is reported and believed that he is dead is not sufficient to stay such proceedings where it is not shown with sufficient certainty that he is dead or whether, even if dead, the bail had not become fixed at the time of death. State *v.* Crane, 17 N. J. L. 191.

Mere delay in moving for a stay will not deprive bail of their right thereto where no substantial damage has resulted therefrom. Masterton *v.* Benjamin, Col. & C. Cas. (N. Y.) 362, Col. Cas. (N. Y.) 363.

5. Barker *v.* Russell, 11 Barb. (N. Y.) 303, Code Rep. N. S. (N. Y.) 57.

by an agreement in the nature of a rule, and the filing of special bail, defendant should plead and tender costs, but after such special bail is entered and notice thereof given, plaintiff is not entitled to costs subsequently incurred.[6]

N. Actions on Bond, Undertaking, or Recognizance — 1. In General — a. Necessity of Action. Judgment cannot be entered upon a forfeited recognizance and execution issued against the sureties until they have been required in some proceeding to show cause why judgment should not be entered against them.[7]

b. Nature and Form of Proceeding. Whether the proceeding is a new suit[8] or incidental to the original suit is a matter upon which the decisions are not in harmony.[9] But as to the form of the action, it has generally been determined that scire facias is a proper remedy,[10] though in some jurisdictions an action of debt may be maintained on the bond.[11]

c. When Action May Be Brought. A recognizance is not a perfect instrument until it is returned to the court to which it is to be transmitted, and a suit upon a recognizance before the sitting of such court is premature.[12] The time within which a suit upon a bail-bond must be brought is generally limited by statute, and, when it is subject to statutory limitation, the action should be commenced within the time prescribed.[13]

Collusion of the plaintiff with others, depriving bail of the power to surrender principal, may constitute a ground for a stay. Barrett *v.* Lewis, 1 Mart. (La.) 188.

Principal's discharge in bankruptcy may stay proceedings, upon motion and payment of costs by bail seeking the stay. Nettleton *v.* Billings, 17 N. H. 453; Riddles *v.* Mitchell, 1 Cai. (N. Y.) 11 note; Seaman *v.* Drake, 1 Cai. (N. Y.) 9. See Carrew *v.* Willing, 1 Dall. (U. S.) 130, 1 L. ed. 68.

Where there has been no loss of any advantage to plaintiff which he would have had if special bail had been entered at the regular time a stay may be had. Union Bank *v.* Kraft, 2 Serg. & R. (Pa.) 284; Priestman *v.* Keyser, 4 Binn. (Pa.) 344. See also McFarland *v.* Holmes, 5 Serg. & R. (Pa.) 50.

6. Costs.—Huguet *v.* Hallet, 1 Cai. (N. Y.) 55, Col. & C. Cas. (N. Y.) 162, Col. Cas. (N. Y.) 162.

7. Gilmer *v.* Blackwell, Dudley (Ga.) 6; Varner *v.* Crabb, 2 Ind. 168; State *v.* Mills, 19 N. C. 552.

Actions on bond, undertaking, or recognizance, in criminal prosecutions see *infra*, III, O.

8. That proceeding is a new suit see Gale *v.* Quick, 2 La. 348; Labarre *v.* Fry, 9 Mart. (La.) 381; Davis *v.* Packard, 7 Pet. (U. S.) 276, 8 L. ed. 684 [*reversing* 6 Wend. (N. Y.) 327].

9. That proceeding is incidental to the main action see Wallace *v.* Glover, 3 Rob. (La.) 411; Weyman *v.* Cater, 17 La. 529; Bobyshall *v.* Oppenheimer, 4 Wash. (U. S.) 482, 3 Fed. Cas. No. 1,592. In other cases in Louisiana it has been held that it is not necessary to formally set the cause down for trial but that judgment against the bail may be had on motion (Kirkman *v.* Wyer, 10 Mart. (La.) 126; Hall *v.* Farrow, 9 Mart. (La.) 391); or that the proceedings may be taken by rule (Block *v.* Maxwell, 10 La. Ann. 5).

10. Scire facias.—*Kentucky.*—Price *v.* Lee, 1 Bibb (Ky.) 434.

Maine.— Packard *v.* Brewster, 59 Me. 404; Hale *v.* Russ, 1 Me. 334.

Massachusetts.— Heustis *v.* Rivers, 102 Mass. 398; Champion *v.* Noyes, 2 Mass. 481; Gale *v.* Boyle, 6 Cush. (Mass.) 138; Crane *v.* Keating, 13 Pick. (Mass.) 339.

Missouri.— Benton *v.* Brown, 1 Mo. 393; Priest *v.* Whitelow, 1 Mo. 259; Howel *v.* March, 1 Mo. 182.

New Hampshire.— Pierce *v.* Read, 2 N. H. 359.

North Carolina.— Hunter *v.* Hill, 3 N. C. 398.

See 5 Cent. Dig. tit. "Bail," § 108.

11. Debt.— Green *v.* Dana, 13 Mass. 493; Parmer *v.* Moore, 1 Mo. 176; Hawkins *v.* Quartermas, 1 Nott & M. (S. C.) 323.

N. Y. Laws (1855), c. 202, which provided that, in the case of forfeited recognizances in any of the counties of the state, all the provisions of the code of procedure should apply thereto have been held not to change the method of enforcing such recognizances in the city and county of New York but to give an additional remedy by action of debt. People *v.* Hickey, 5 Daly (N. Y.) 365.

12. Premature action.— Darling *v.* Hubbell, 9 Conn. 350.

13. Limitation of action.— Howard *v.* Miller, 1 Root (Conn.) 428; Rice *v.* Carnes, 8 Mass. 490; Swett *v.* Sullivan, 7 Mass. 342; McRae *v.* Mattoon, 10 Pick. (Mass.) 49; Pearce *v.* Curran, 15 R. I. 298, 3 Atl. 419; Strong *v.* Edgerton, 22 Vt. 249. See Deviney *v.* Wells, 26 N. C. 30.

Absence from the state will not prevent the running of the statute unless an exception in such case be made by statute. Gass *v.* Bean, 5 Gray (Mass.) 397. See Albemarle Steam Nav. Co. *v.* Williams, 111 N. C. 35, 15 S. E. 877.

Final judgment is declared in Massachusetts to mean not the judgment on review but the first judgment on which plaintiff may sue out an execution. Swett *v.* Sullivan, 7 Mass. 342.

2. Jurisdiction — a. In General. Under an early English statute [14] it was declared by the English decisions that the action on the bond must be brought in the same court as that out of which the process issued, as this was necessary to give the parties the relief intended by statute unless some special circumstance existed to warrant a departure from this rule.[15] This act has been adopted in some of the United States, and where adopted the rule of the English decisions has been followed.[16] And the general rule affirmed by the early American decisions is that, in the absence of any rules of practice or statute providing otherwise, the action should be brought in the court in which the original suit was instituted, as such court is supposed to be more competent to relieve the bail, when entitled to relief, but if, owing to some special circumstances, such as the removal of the plaintiff from the jurisdiction of the court, suit cannot be brought therein, the plaintiff is not deprived of his remedy but may bring his action in a different court.[17]

b. In Case of Bond Given in Another State. An action on a bail-bond will not lie in another state than that in which it was given.[18]

3. Parties — a. Who May Sue — (i) *In General.* A distinction based upon the form of the action is made by some of the earlier cases as to the right of the plaintiff to maintain an action upon the recognizance, it being declared in some of them that he who is to have the benefit of the recognizance shall have a scire facias upon it, whether he be the conusee or not;[19] but if the action be in the

Ignorance of breach of condition of the bond will not prevent the statute from running from the time of such breach. Pearce *v.* Curran, 15 R. I. 298, 3 Atl. 419.

Taking out of a writ is not a compliance with the statute, where such writ cannot be served within the time designated by statute. Strong *v.* Edgerton, 22 Vt. 249.

The object of the statute is to limit the rights of the creditor to call upon the surety to ascertain and fix time, so that the latter will be under no embarrassment as to the extent or duration of his contingent liability or as to the time when he may with safety to himself cease to look after his principal. Strong *v.* Edgerton, 22 Vt. 249.

14. 4 Anne, c. 16, § 20, by which it was provided that the court where the action was brought might, by rule or rules of such court, give such relief to the plaintiff or defendant in the original action and to the bail upon the bail-bond as was agreeable to reason and justice, and such rule or rules were declared to have the nature and effect of a defeasance to the said bond.

15. English rule.— Walton *v.* Bent, 3 Burr. 1923; Chesteron *v.* Middlehurst, 1 Burr. 642; Donatty *v.* Barclay, 8 T. R. 152.

16. English rule followed.— Florence *v.* Shumar, 34 N. J. L. 455; Roop *v.* Meek, 6 Serg. & R. (Pa.) 542. But see Van Winkle *v.* Alling, 17 N. J. L. 446.

17. American rule.—McRae *v.* Mattoon, 10 Pick. (Mass.) 49; McDougall *v.* Richardson, 3 Hill (N. Y.) 558; Otis *v.* Wakeman, 1 Hill (N. Y.) 604; Matthews *v.* Cook, 13 Wend. (N. Y.) 33; Burtus *v.* McCarty, 13 Johns. (N. Y.) 424; Gardiner *v.* Burham, 12 Johns. (N. Y.) 459; Haswell *v.* Bates, 9 Johns. (N. Y.) 80; Davis *v.* Gillet, 7 Johns. (N. Y.) 318; Davis *v.* Packard, 7 Pet. (U. S.) 276, 8 L. ed 684. But see Easton *v.* Collier, 1 Mo. 603; Easton *v.* Collier, 1 Mo. 467.

In a case in Georgia it is declared that scire facias is not such an original suit as requires it to be brought in the county of the bail's residence, but that the original suit gives jurisdiction to proceed against the bail. Garvin *v.* Gallagher, 1 Ga. 315.

In South Carolina, while the English rule is spoken of as clear, yet the reason therefor is said to be because the rules of practice differ in the different courts, and it is declared that, where the rules of the court taking the bond can be enforced by the court where the suit is brought, the action in the latter court must be allowed. So an action was permitted in the district courts on a bond taken in the city court of Charleston (McMillan *v.* Whitaker, 11 Rich. (S. C.) 523), and in the city court of Charleston on a bond taken in the court of common pleas (Legare *v.* Brown, 4 McCord (S. C.) 370), all of such courts being governed by the same rules of practice.

Court of final judgment has been declared to be the one in North Carolina from which scire facias must issue. Turner *v.* White, 49 N. C. 116. But see Jones *v.* McLaurine, 52 N. C. 392.

The remedy where suit is brought in wrong court is by motion and not by plea. Otis *v.* Wakeman, 1 Hill (N. Y.) 604; Matthews *v.* Cook, 13 Wend. (N. Y.) 33. See Garvin *v.* Gallagher, 1 Ga. 315.

18. McRae *v.* Mattoon, 10 Pick. (Mass.) 49.

19. Bishop *v.* Drake, Kirby (Conn.) 378. See also Ansley *v.* Harris, 22 Ga. 616 (where it is decided that the sheriff in taking the bond is in effect acting as agent of the plaintiff, and though the bond is payable to the former, it is in law payable to plaintiff, and therefore an assignment to him is not necessary to enable him to sue thereon); Ford *v.* Lane, 8 Ga. 322; Pierce *v.* Read, 2 N. H. 359; Douglass *v.* Wight, 2 Brev. (S. C.) 218; Alexander *v.* Winn, 1 Brev. (S. C.) 14. But

nature of debt, the suit should be in the name of the obligee, though the beneficial interest be in a third person.[20]

(II) *Where Bond Has Been Assigned.* Under an early English statute[21] it was provided that the sheriff, at the request and cost of plaintiff, should assign to him the bail-bond by indorsing the same and attesting it under his hand and seal in the presence of two or more credible witnesses, and that upon such assignment plaintiff might bring an action thereon in his own name.[22] In the absence, however, of any statutory requirement,[23] an assignment may be valid and effective though not under seal, provided it clearly purports to transfer the bond.[24] Nor need the assignment be made by the officer in his official capacity.[25] And where the bond is given to the sheriff or his successors in office, his successor may exe-

see Priest *v.* Whitelow, 1 Mo. 259; Lowther *v.* Lawrence, Wright (Ohio) 180.

20. Obligee.— Where the bond is taken in the name of the sheriff, an action of debt thereon should be in his name to the use of the real person in interest. Parmer *v.* Moore, 1 Mo. 176. See Bishop *v.* Drake, Kirby (Conn.) 378.

The force and effect of such distinction is of practically no value in those states where forms of action have, to a great extent, been abolished, and in any event the question as to who may bring the action where the bond is to the sheriff, or whether assignment thereof by him will be necessary, or of any effect whatever, must largely depend upon the statutory provisions and practice in each state. If no power is conferred by statute to assign the bond the action thereon should be in the name of the sheriff, where the bail is taken by statute to "himself." Hunter *v.* Gilham, 1 Ill. 82. Where assignment is expressly required by statute, it must be made, but otherwise if the statute is silent thereto. Sompeyrac *v.* Cable, 10 Mart. (La.) 361. If plaintiff is expressly authorized, on taking an assignment of a bond, to bring an action in his own name he may, when such assignment has been made, sue in his name. Hunt *v.* Allen, 22 N. J. L. 533.

Where plaintiff may sue as trustee.— Sureties on appeal-bonds become equitably subrogated to the rights of the plaintiff where they are obliged to pay the amount of their undertaking, and in such case they have a right of action against defendant's bail, but the plaintiff, being the real party in interest, may sue on the bond for himself and as trustee for the sureties on the appeal-bond, instead of a separate action being brought by each. Cullifford *v.* Walzer, 13 Misc. (N. Y.) 493, 35 N. Y. Suppl. 475, 70 N. Y. St. 173 [*affirmed* in 3 N. Y. App. Div. 266, 38 N. Y. Suppl. 199, 73 N. Y. St. 692].

Where money has been deposited in lieu of bail.— Though the plaintiff in attachment may be, by law, authorized to bring any action in the name of himself and the sheriff, which the sheriff might bring to recover property attached, or its value, or on an undertaking, yet under such statute no power or right is conferred on the plaintiff to bring an action against the clerk to recover money which has been deposited by the defendant in lieu of bail. Anderson *v.* Tomkins, 10 N. Y. Suppl. 39, 23 Abb. N. Cas. (N. Y.) 433.

21. 4 Anne, c. 16.

22. This statute was, in substance, early incorporated into the law of South Carolina, and where this or a similar act is in force the assignment should be in compliance therewith. Soloman *v.* Evans, 3 McCord (S. C.) 274, wherein, however, it was held that, under a plea of *non est factum*, the objection could not be raised that the bond was illegally assigned to plaintiff.

Failure of one of two witnesses to subscribe his name will not invalidate an assignment made under a statute requiring it to be executed in the presence of two witnesses. Bleibdrey *v.* Keppler, 33 N. J. L. 140.

Failure of the plaintiff to except to the bail may in some cases prevent him from taking an assignment of the bond. Caines *v.* Hunt, 8 Johns. (N. Y.) 358; Ferris *v.* Phelps, 1 Johns. Cas. (N. Y.) 249, Col. & C. Cas. (N. Y.) 98, Col. Cas. (N. Y.) 99.

If the name of the sheriff does not precede the seal the assignment will not be good where the statute prescribes the form of assignment concluding with "In witness, whereof, I have hereunto set my hand and seal, this the ——— day of ———." Hardy *v.* Andrews, 49 N. C. 476, 478.

The omission of the name of the county over which the sheriff's authority extends will not be fatal under a requirement that the bond be executed by "I, A. B., sheriff of ——— county" where the sheriff is properly designated as to his county in the body of the bond. Miller *v.* White, 6 Yerg. (Tenn.) 269, 272.

23. Statutory provisions as to assignment may not in all cases be obligatory but in the nature of a privilege, and the sheriff may, by following such provisions, exonerate himself from liability, but, until he has done so, his liability will continue and he may sue on the undertaking. Willet *v.* Lassalle, 1 Rob. (N. Y.) 618, 19 Abb. Pr. (N. Y.) 272, where it is so held in case of a requirement that the sheriff, in order to exonerate himself, should deliver the order of arrest and other documents to plaintiff's attorney.

24. Seal not necessary.— Wilcox *v.* Ismon, 34 Mich. 268.

25. Official capacity.— Wilcox *v.* Ismon, 34 Mich. 268.

cute a valid assignment of the bond;[26] but an assignment by the administrator of the sheriff will confer no right upon the assignee to sue in his own name.[27] The transfer of the bond by the sheriff to the creditor may be sufficient when made at any time before trial and judgment against the bail, where a statute or rule of practice requires the plaintiff to exhibit the bond assigned to him and which he can only do at the trial.[28]

b. Who May Be Sued. If the undertaking executed by the bail be joint and not several they should all be joined as defendants in an action to recover thereon;[29] but where the undertaking of bail is a several one by several recognizances they cannot all be joined in one scire facias.[30] The cause of action against bail survives.[31]

4. Process. Where bail are proceeded against by scire facias they are apprised, by the nature of the writ, of the character of the action against them,[32] but in an action of debt upon the recognizance in order to protect bail from surprise the original process should cite the defendants to answer to a plea of debt "upon recognizance."[33] The manner of making service of process against bail is, as a general rule, subject either to statute or rules of the court, and to be valid should conform to the requirements prescribed.[34]

5. Defenses — a. In General. It is declared in an early decision that, in an action on the bail-bond, the only direct defense thereto is performance of the condition, which may, however, be enlarged.[35] It has been repeatedly held, however,

26. Assignment by successor in office.— Loker *v.* Antonio, 4 McCord (S. C.) 175.

27. Assignment by sheriff's administrator. — Mann *v.* Hunter, 47 N. C. 11.

28. Time of assignment.—Harris *v.* Brown, 11 La. 90.

29. On joint undertaking.— Tannenbaum *v.* Cristalar, 5 Daly (N. Y.) 141.

Where only one of the bail can be joined the action may be against both, as in case of joint debtors, and in such a case an *exoneretur* will not be entered on motion of the surety not taken for the purpose of availing both. Steward *v.* Patten, 1 Hall (N. Y.) 38.

30. On several undertaking.— Garland *v.* Ellis, 2 Leigh (Va.) 555.

31. Action survives.— Parker *v.* Willard, Smith (N. H.) 212. So the action may be maintained against the administrator or executor of the bail. Langley *v.* Knighton, 2 Mill (S. C.) 451. The heirs and personal representatives may in some cases be proceeded against. Com. *v.* Haines, 2 Va. Cas. 134.

Death of bail during pendency of scire facias will not abate the suit, but the administrator may defend. Wheeler *v.* Wheeler, 7 Mass. 169; Com. *v.* Haines, 2 Va. Cas. 134.

The survivor, where one of the bail has died, cannot, it has been held, be joined with the executor of the deceased in one writ of scire facias. Niles *v.* Drake, 17 Pick. (Mass.) 516.

32. See *infra*, II, N, 6, b.

33. Citation to appear.— Van Winkle *v.* Alling, 17 N. J. L. 446.

Summons and alias summons.— Though scire facias may be a proper remedy in some jurisdictions, it is not necessary to resort thereto in all cases, but where summons has been served on one of several coöbligors and judgment by default entered against him, the other may be brought in by an ordinary alias summons. Cleveland *v.* Skinner, 56 Ill. 500.

34. Service of process.— Dennison *v.* Willson, 16 N. H. 496. See Ehler *v.* Stœver, 2 Miles (Pa.) 14; Branch *v.* Webb, 7 Leigh (Va.) 371; Kyles *v.* Ford, 2 Rand. (Va.) 1; Green v. Thompson, 1 Patt. & H. (Va.) 427.

Where bail has moved from the state service may be made by leaving a copy at his last and usual place of residence. People *v.* Judges of Monroe C. Pl., 3 Wend. (N. Y.) 443. Service on his attorney is not sufficient and the return should be verified by the oath of the officer. Dennison *v.* Willson, 16 N. H. 496.

Return of officer may be amended in discretion of court, after issue joined, by his verifying it. Dennison *v.* Willson, 16 N. H. 496.

Return of two nihils has been held to be a good service of scire facias against bail. Woodfork *v.* Bromfield, 5 N. C. 187.

35. Performance of condition.— Wurtz *v.* Musselman, 5 Watts (Pa.) 95.

See also *supra*, II, I, J, L, M.

An offer to surrender cannot, it has been held, be pleaded in defense to an action on the bond, the only proper plea being *comperuit ad diem*. Osborn *v.* Jones, 4 Harr. & M. (Md.) 5 note.

Where there has been a breach of the condition of a bond given by the debtor upon his arrest on the oath of the creditor that he believes the former is about to leave the state, it cannot be shown in defense thereto that the debtor was not in fact about to leave the state. Marston *v.* Savage, 38 Me. 128.

Where the statute expressly specifies the circumstances under which bail are entitled to a verdict and the facts urged in defense in a suit against them are not within the statutory designation, the plaintiff is not obligated to waive his rights and accept a sur-

that facts which would operate to discharge bail may be pleaded and shown in defense.[36] So also it is a good ground for dismissing a suit against bail that upon their motion an *exoneretur* was entered after the commencement of the action.[37] The bail may also be permitted to show the insolvency of the principal as a defense to a scire facias.[38] And it is declared that one arrested upon a capias ad satisfaciendum, who has given bond for an appearance, may adduce any matter which amounts to a defense, where a motion has been made for a judgment for a breach of the bond.[39] Bail cannot, however, in scire facias against them, impeach the judgment in the original action.[40]

b. Fraud, Collusion, or Mistake. Fraudulent conduct on the part of the plaintiff for the purpose of charging the bail, or collusion between the parties to the suit with the same object in view, are matters which are not concluded by the judgment, but may properly be shown in defense to an action on the bond.[41] In the absence, however, of fraud or some disability rendering the person incapable of reading and comprehending the writing for himself, it is no defense to an action against him on the bond that he was misled or misinformed as to the contents and effect thereof.[42]

c. Irregularities or Defects in Proceedings. Irregularities or defects in the proceedings against the principal which operate to the injury of the bail or affect the validity of the proceedings may in some cases be a proper defense[43] though

render or to cause a new writ of capias ad satisfaciendum to be issued. Lyman *v.* Giddey, 96 Mich. 401, 56 N. W. 6.

36. Matters of discharge.— McFarland *v.* Wilbur, 35 Vt. 342, holding that facts which would entitle bail to be discharged in the original action may be pleaded as a bar to a scire facias. See also *supra*, II, I.

Promise of plaintiff to discharge bail may be shown in defense. McFarland *v.* Wilbur, 35 Vt. 342.

Unlawful arrest, or an arrest insufficient by operation of law which would operate to discharge bail, may be set up as a defense to a scire facias. McFarland *v.* Wilbur, 35 Vt. 342, defendant having enrolled as a soldier in the United States army. See also Harrington *v.* Dennie, 13 Mass. 93. But see Gregory *v.* Levy, 12 Barb. (N. Y.) 610, 7 How. Pr. (N. Y.) 37.

Want of consideration may be pleaded, though the bond be under seal. So held in Greathouse *v.* Dunlap, 3 McLean (U. S.) 303, 10 Fed. Cas. No. 5,742.

37. Exoneretur entered.— Under such circumstances suit may be dismissed at the costs of the bail, but the *exoneretur* should not be pleaded in bar of the action. White *v.* Guest, 6 Blackf. (Ind.) 228.

38. To support such a defense where allowed by statute utter insolvency must be shown, and the fact that the principal does not possess enough property to pay all his debts is not sufficient. Kelly *v.* Porter, 6 B. Mon. (Ky.) 454. If the liability of bail has become fixed, however, the insolvency of the principal is no bar to an action against them as bail. Levy *v.* Nicholas, 1 Rob. (N. Y.) 614, 19 Abb. Pr. (N. Y.) 282.

39. Robinson *v.* McDugald, 34 N. C. 136.

40. Cannot impeach judgment in original action.— Morsell *v.* Hall, 13 How. (U. S.) 212, 14 L. ed. 117.

Want of notice.—Where, under the laws of a state, the bail is a party to the record to the extent that he is bound to take notice of all proceedings both against the principal and himself, want of notice to him of scire facias is no objection to an action on a judgment upon such scire facias issued after he left the state. McRae *v.* Mattoon, 13 Pick. (Mass.) 53.

Where scire facias against bail incorrectly recites name of the person against whom judgment was rendered and a plea of *nul tiel record* is sustained, such adjudication will be no bar to a scire facias in which the name of the judgment debtor is correctly recited. Benton *v.* Duffy, 1 N. C. 229.

41. Winchel *v.* Stiles, 15 Mass. 230; Stevens *v.* Bigelow, 12 Mass. 433; Weld *v.* Bartlett, 10 Mass. 470; Bradley *v.* Bishop, 7 Wend. (N. Y.) 352; Mott *v.* Hazen, 27 Vt. 208; Parkhurst *v.* Sumner, 23 Vt. 538, 56 Am. Dec. 94; Van Ness *v.* Fairchild, 1 D. Chipm. (Vt.) 153; Taylor *v.* Fleckenstein, 30 Fed. 99; Greathouse *v.* Dunlap, 3 McLean (U. S.) 303, 10 Fed. Cas. No. 5,742.

That service of process on the defendant in the original suit was prevented by fraudulent or collusive means may be shown, but such a defense must, however, be distinctly charged in the plea or notice. Bishop *v.* Earl, 17 Wend. (N. Y.) 316.

42. In the absence of fraud.— Taylor *v.* Fleckenstein, 30 Fed. 99. And the fact that the plaintiff was induced to consent to a judgment for costs against him while intoxicated is declared to be a matter not available as a defense, since it is concluded by the judgment as to both the principal and the bail. Parkhurst *v.* Sumner, 23 Vt. 538, 56 Am. Dec. 94.

Nor can duress of the principal be taken advantage of by the bail as a ground of defense, where no unlawful restraint has been imposed upon him. Oak *v.* Dustin, 79 Me. 23, 7 Atl. 815, 1 Am. St. Rep. 281.

43. Bond void because security for costs has not been given by plaintiff as required may be shown (Wood *v.* Yonge, 9 Port. (Ala.)

the bail may not be permitted to avail themselves of such defense if they have been guilty of laches.[44] But mere technical defects or errors in the original process, which might have been pleaded in the original action, or matters which tend to dispute the cause of such action cannot be taken advantage of by bail in an action on the bond.[45] And again the validity of the recognizance cannot, it is held, be questioned by proof that it was illegally taken by the justice, it being declared that the only remedy in such case is an application to the justice to reform or set aside the recognizance.[46]

d. Sickness. Inability of the principal to appear at the time fixed owing to sickness may be shown by the surety as a defense to an action on the bond;[47] but default of the principal cannot, however, be excused because of sickness of the surety.[48]

6. Pleadings — a. Declaration. In an action upon a recognizance the declaration should allege those facts which tend to show that such obligation was entered into by the defendants and such other necessary facts as may show that, as a result of such obligation, the defendants have become liable on their undertaking to the plaintiffs.[49] And if the declaration contains a proper and suffi-

208); or because it is taken by the sheriff out of his county (Harris *v.* Simpson, 4 Litt. (Ky.) 165, 14 Am. Dec. 101).

Irregularity in issuing a capias ad satisfaciendum against the original defendants may be taken advantage of by bail. Boggs *v.* Chichester, 13 N. J. L. 209.

Omission to enter an exception to bail may preclude plaintiff from maintaining an action on the bond. Ferris *v.* Phelps, 1 Johns. Cas. (N. Y.) 249, Col. & C. Cas. (N. Y.) 98, Col Cas. (N. Y.) 99.

That execution was issued prematurely to the injury of bail may be shown. Mattocks *v.* Judson, 9 Vt. 343.

Want of jurisdiction may be set up as a defense to an action on the bond (Broadhead *v.* McConnell, 3 Barb. (N. Y.) 175), unless there has been a waiver of same, in which case it cannot be taken advantage of (Hall *v.* Young, 3 Pick. (Mass.) 80, 15 Am. Dec. 180).

Non-liability of principal to arrest is not a defense to an action on the bond. Hall *v.* Young, 3 Pick. (Mass.) 80, 15 Am. Dec. 180; Stever *v.* Sornberger, 24 Wend. (N. Y.) 275. But see Stafford *v.* Low, 20 Ill. 152; Aiken *v.* Richardson, 15 Vt. 500. As by entering into the recognizance bail waive their right to take advantage thereof. Stever *v.* Sornberger, 24 Wend. (N. Y.) 275.

One defendant will not be permitted to avail himself of irregularities in the proceedings against the others. Bruce *v.* Colgan, 2 Litt. (Ky.) 284.

44. Effect of laches.— Jones *v.* Dunning, 2 Johns. Cas. (N. Y.) 74; Barton *v.* Keith, 2 Hill (S. C.) 537.

Alleged incapacity due to drunkenness of the party entering into a recognizance is not a ground for impeaching such recognizance where such party has recognized it as being in force and taken no steps to avoid it on this ground. Doe *v.* Harter, 1 Ind. 427.

Where the sanction of a court of chancery is required to a suit on a bond, objection that the suit was begun without such sanction should be by motion, which should be made at the earliest opportunity after suit is brought. Harris *v.* Hardy, 3 Hill (N. Y.) 393.

45. Mere technical defects.— *Alabama.*— Kennedy *v.* Rice, 1 Ala. 11.

Connecticut.— Robbins *v.* Bacon, 1 Root (Conn.) 548.

Georgia.— Gilmore *v.* Lidden, 23 Ga. 14.

Indiana.— Cutshaw *v.* Birge, 4 Blackf. (Ind.) 511.

New Jersey.— Hunt *v.* Allen, 22 N. J. L. 533.

South Carolina. Rosenberg *v.* McKain, 3 Rich. (S. C.) 145.

Vermont.— Stedman *v.* Ingraham, 22 Vt. 346.

United States.— Hall *v.* Singer, 3 McLean (U. S.) 17, 11 Fed. Cas. No. 5,946.

See 5 Cent. Dig. tit. "Bail," § 114.

46. Clark *v.* McComman, 7 Watts & S. (Pa.) 469.

47. Sickness of principal.— People *v.* Tubbs, 37 N. Y. 586, 5 Transcr. App. (N. Y.) 342; Scully *v.* Kirkpatrick, 79 Pa. St. 324, 21 Am. Rep. 62. But see Goodwin *v.* Smith, 4 N. H. 29.

48. Sickness of surety.— Speight *v.* Wooten, 14 N. C. 289.

49. Authority to make arrest should be alleged. Gallup *v.* Dennison, Kirby (Conn.) 430; Reed *v.* Lane, 61 Vt. 481, 17 Atl. 796.

Condition of bond and the proceedings against principal should be set out. Loker *v.* Antonio, 4 McCord (S. C.) 175.

Execution in the presence of some officer authorized to take bail should be alleged. Jones *v.* Bunn, 2 Metc. (Ky.) 490.

Judgment against principal should be alleged. Murphy *v.* Summerville, 7 Ill. 360; Gauntley *v.* Wheeler, 31 How. Pr. (N. Y.) 137. *Contra*, Bolles *v.* Haines, 7 Blackf. (Ind.) 398; Holton *v.* Smith, 6 Blackf. (Ind.) 424.

Particular breaches of the conditions should be alleged. Loker *v.* Antonio, 4 McCord (S. C.) 175. See also Gallup *v.* Dennison, Kirby (Conn.) 430; State *v.* Rolfe, 15 Vt. 9. But see Allen *v.* Hunt, 23 N. J. L. 376.

cient averment of facts it will not be vitiated by the allegation of an immaterial fact.[50]

b. Scire Facias. Such facts as show the legal right of the plaintiff to recover should be stated in a scire facias against bail,[51] and if all the proceedings are prop-

Recognizance should be set out in terms or according to its legal effect. Bolles *v.* Haines, 7 Blackf. (Ind.) 398.

Return of execution unsatisfied should be alleged. Gallup *v.* Dennison, Kirby (Conn.) 430; Murphy *v.* Summerville, 7 Ill. 360; Jones *v.* Bunn, 2 Metc. (Ky.) 490; Fisher *v.* Drewa, 63 Mich. 655, 30 N. W. 315; Prior *v.* Bodrie, 49 Mich. 200, 13 N. W. 515; Gauntley *v.* Wheeler, 31 How. Pr. (N. Y.) 137. See Little Rock *v.* Johnson, 5 Ark. 691. But see Bolles *v.* Haines, 7 Blackf. (Ind.) 398; Holton *v.* Smith, 6 Blackf. (Ind.) 424; Kelly *v.* McCormick, 2 E. D. Smith (N. Y.) 503.

That recognizance was filed in court and became a matter of record should be alleged. Mendocino County *v.* Lamar, 30 Cal. 627.

In other decisions, however, it has been declared, that in an action of scire facias against bail the record of the original suit is not a part of the record in the latter action unless made such by the plea (Bell *v.* Bullitt, 3 T. B. Mon. (Ky.) 200; Young *v.* Simral, 3 A. K. Marsh. (Ky.) 176; Lampton *v.* Scott, 3 A. K. Marsh. (Ky.) 172; Mattocks *v.* Judson, 9 Vt. 343); that the declaration need not aver that an affidavit of debt was made before the issue of the writ on which the arrest was made (Hunt *v.* Allen, 22 N. J. L. 533); or that the attachment on which defendant was arrested was returned, or that the defendant was called on the return-day and that his default was entered (Thomas *v.* Cameron, 17 Wend. (N. Y.) 59); or delivery of the undertaking (Willet *v.* Lassalle, 1 Rob. (N. Y.) 618, 19 Abb. Pr. (N. Y.) 272); or the date of the bond, but if stated, however, it must be correctly stated (Clark *v.* Kidder, 12 Vt. 689). Again it has been held unnecessary to allege that the defendants are citizens of a different state from that of the plaintiffs. Bobyshall *v.* Oppenheimer, 4 Wash. (U. S.) 482, 3 Fed. Cas. No. 1,592.

In an action by the sheriff on a bail-bond or his assignee, the complaint should, it has been declared, aver damage sustained by the sheriff and what such damage was. Clapp *v.* Schutt, 44 Barb. (N. Y.) 9. But it is not necessary to allege that the sheriff has exonerated himself, under the provisions of a statute that he may so do, by delivering the order of arrest, etc., to the attorney of the plaintiff. Willet *v.* Lassalle, 1 Rob. (N. Y.) 618, 19 Abb. Pr. (N. Y.) 272.

50. Immaterial facts averred.— Willet *v.* Lassalle, 1 Rob. (N. Y.) 618, 19 Abb. Pr. (N. Y.) 272.

51. Facts to be alleged.— Frost *v.* Reynolds, 2 Dana (Ky.) 94. Thus it has been held that scire facias should set forth the cause of action (Smith *v.* Shaw, 30 N. C. 233); the fact as to sureties becoming bail (Smith *v.* Shaw, 30 N. C. 233; Usher *v.* Frink, 2 Brev. (S. C.) 84); the substance of the bond (Kennedy *v.* Spencer, 4 Port. (Ala.) 428; Toulmin *v.* Bennett, 3 Stew. & P. (Ala.) 220; Usher *v.* Frink, 2 Brev. (S. C.) 84); before whom bond was taken (McMahan *v.* Knox, 4 Bibb (Ky.) 450); judgment against the principal (Stewart *v.* McClure, 1 Brev. (S. C.) 407); court in which judgment was obtained (Smith *v.* Shaw, 30 N. C. 233); notice to the bail if required by statute (Emerson *v.* Brown, 2 N. H. 347); and what notice, so court may judge if according to statute (Goodwin *v.* Smith, 4 N. H. 29); failure to satisfy the condemnation of the court (Embree *v.* Norris, 2 Ala. 271; Nichols *v.* Woodruff, 6 Blackf. (Ind.) 180; Holland *v.* Bouldin, 4 T. B. Mon. (Ky.) 147; Baker *v.* Harrison, 5 Litt. (Ky.) 59).

An averment of commitment to jail of the principal under a capias ad satisfaciendum, without showing how or whether he was discharged, shows no cause of action. Dozier *v.* Gore, 1 Litt. (Ky.) 163.

Omission to aver prout patet per recordum has been held to be fatal on special demurrer. Wright *v.* Brownell, 2 Vt. 117.

On undertaking not to remove effects from state should aver where it is suggested that defendant did remove property that he had title to, or interest in the same. Perrott *v.* Story, 9 Dana (Ky.) 126.

Where a debtor has been arrested in an action on contract a declaration in scire facias against his bail which avers that the debtor was a resident of another state, but does not aver that he was not a citizen of such state, is not sufficient, where an act forbids such an arrest of citizens of the United States. Blood *v.* Crandall, 28 Vt. 396.

What facts need not be alleged.— It has been held unnecessary to aver that the original writ issued as a capias (Yatter *v.* Pitkin, 66 Vt. 300, 29 Atl. 370); or to set forth the affidavit or order for bail (Glidden *v.* Leonard, 4 Port. (Ala.) 194); or to allege that the bail-bond was executed by the principal (Bull *v.* Clarke, 2 Metc. (Mass.) 587); or that the principal appeared to the action against him (Kenan *v.* Carr, 10 Ala. 867); or to state the form of the action in which judgment was rendered (Turner *v.* White, 49 N. C. 116); or to aver the issuing and return of the capias ad satisfaciendum (Ross *v.* Ellis, 6 J. J. Marsh. (Ky.) 91; Crawford *v.* Beall, 3 Bibb (Ky.) 472; Cappeau *v.* Middleton, 1 Harr. & G. (Md.) 154; Gray *v.* Hoover, 15 N. C. 475; Arrenton *v.* Jordan, 11 N. C. 98; Langdon *v.* Troy, 3 N. C. 165). See Bowen *v.* Pyne, Wright (Ohio) 602. But see Davis *v.* Dorr, 30 Vt. 97.

Nature of the bail's liability need not be averred, it has also been held; but if the scire facias undertakes to aver it, it must do so correctly. Wright *v.* Brownell, 2 Vt. 117.

erly set out in a scire facias and the liability of the bail shown judgment by default may be had though no declaration is filed.[52] The prayer in scire facias should, it has been held, be for the damages sustained in the first suit.[53]

c. Plea or Answer.[54] Matters which constitute an affirmative defense and matters of substance should be pleaded if the bail wish to avail themselves of such defenses.[55] The bail may, it has been decided in an action on the bond, plead to the jurisdiction of the court,[56] or a performance of the conditions of the bond,[57] or a surrender of the principal.[58] Again, if the bond has not become a part of the record and the defendant desires to put it in issue, it should be done, it is declared in early decisions, by a plea of *non est factum*,[59] but no allegation inconsistent with or against the validity of the record can be pleaded in an action of debt on the recognizance,[60] and in such an action the plea of *nil debet* is not good.[61]

d. Replication. In the absence of any substantial defect,[62] a replication will

Loss of papers alleged in declaration.—The fact that the writ in scire facias vouches the record for the affidavit to warrant the capias ad satisfaciendum and for the capias ad satisfaciendum itself, but that the declaration avers the loss of these papers since the writ was issued is no ground for objection to the proceedings. Kenan *v.* Carr, 10 Ala. 867.

It is sufficient to raise the issue on a plea of *nul tiel record* that there is a note of the substance of a recognizance from which a formal recognizance could have been drawn. Seidenstriker *v.* Buffum, 14 Pa. St. 158.

52. Necessity of declaration.— Walker *v.* Massey, 10 Ala. 30.

In determining the meaning of a word or sentence in a writ of scire facias, or other process, resort is not to be had to the next antecedent or next subsequent word but rather to the subject-matter. In notice dated "3d day of October, 1842" that execution was returnable "on the third Tuesday of October next," "next" was held to refer not to the month but to the third Tuesday of the month. Nettleton *v.* Billings, 13 N. H. 446.

53. Prayer.— Howel *v.* March, 1 Mo. 182.

Though prayer may be wrong yet it is a matter of form and it will be good on demurrer, and judgment for the right party will be given. Barton *v.* Vanzant, 1 Mo. 192.

54. Affidavit of defense.— A bond with a collateral condition is not within a rule of court which requires that, in all actions of debt or contract for the payment of a specific sum of money, the defendant shall make an affidavit of defense. Boas *v.* Nagle, 3 Serg. & R. (Pa.) 250. Nor is a rule that in any action brought upon a written instrument the plaintiff shall not be put to proof of its execution on the handwriting of the defendant, unless its execution be denied by affidavit applicable thereto. Elliott *v.* Green, 10 Mich. 113. An affidavit of defense may be sufficient without an averment of satisfaction where it presents facts showing a *prima facie* case of satisfaction. Christy *v.* Bohlen, 5 Pa. St. 38.

55. Affirmative defense.— Willet *v.* Lassalle, 1 Rob. (N. Y.) 618, 19 Abb. Pr. (N. Y.) 272; Mitchell *v.* Noble, 1 C. L. Chamb. (Can.) 284.

Cannot take advantage by motion of want of capias ad satisfaciendum against principal. Drake *v.* Cockran, 18 N. J. L. 9.

If injured by premature return such matter must be pleaded. Howe *v.* Ransom, 1 Vt. 276.

56. Plea to the jurisdiction.— Bobyshall *v.* Oppenheimer, 4 Wash. (U. S.) 482, 3 Fed. Cas. No. 1,592.

If a plea of abatement is set up by the bail, the existence of such facts as authorize bail to defend the suit must, it has been held, be alleged. Deforest *v.* Elkins, 2 Ala. 50.

57. May plead comperuit ad diem in action on bond given for appearance. Bobyshall *v.* Oppenheimer, 4 Wash. (U. S.) 388, 3 Fed. Cas. No. 1,591.

58. Surrender.—Should also allege in such case surrender before the return of the process against the bail executed (Easton *v.* Collier, 1 Mo. 467); to whom the surrender was made (Davison *v.* Mull, 2 N. C. 364); and notice and payment of the costs required by statute (Cleveland *v.* Skinner, 56 Ill. 500); and should conclude *prout patet per recordum* and not with a verification (Fleming *v.* Howard, 1 Brev. (S. C.) 465).

59. Non est factum.— Hamlin *v.* McNeill, 30 N. C. 172; Spotswood *v.* Douglas, 6 Munf. (Va.) 312. See State *v.* Daily, 14 Ohio 91.

Conclusion should be to the jury where the defendants deny that they became bail and it is not required that the bond be returned or recorded. Parks *v.* Hall, 2 Pick. (Mass.) 206.

60. If, however, the recognizance is not correctly stated in the declaration, the defendant may plead *nul tiel record*. Green *v.* Ovington, 16 Johns. (N. Y.) 55.

61. Nil debet not good, when.— White *v.* Converse, 20 Wend. (N. Y.) 266; Niblo *v.* Clark, 3 Wend. (N. Y.) 24; Bullis *v.* Giddens, 8 Johns. (N. Y.) 82.

62. Though a replication may be faulty, yet if a defendant neglects to take advantage by demurrer of any imperfection therein, and by such replication an issue in law or in fact has been formed, the case is ripe for trial. Bobyshall *v.* Oppenheimer, 4 Wash. (U. S.) 388, 3 Fed. Cas. No. 1,591.

As to insufficiency of replication see Rogers *v.* Lee, 3 Harr. & M. (Md.) 407; Houghton *v.* Jewett, 2 Tyler (Vt.) 183.

be held good on demurrer, though it may not be as attentive to form as it might be.[63]

e. Amendments. Defects in a scire facias or proceedings against bail on the bond may be cured by amendment[64] in the discretion of the court at any time before judgment rendered.[65]

f. Variance. If essential and material facts are averred in a manner wholly inconsistent with the facts proved it will constitute a fatal variance,[66] but though averments as to recitals in the recognizance may not set forth such recitals according to the tenor thereof, yet if they correspond in substance and legal operation it will be sufficient,[67] and the omission to aver matters which are not a necessary part of the record is no variance.[68]

7. Evidence — a. In General. In actions upon the bond the officer's return of the proceedings on the writ[69] and the records of the proceedings and the judgment rendered may be admissible in evidence,[70] and upon a plea of *nul tiel record* in an action upon a recognizance which is recorded in the same court in which the suit is brought an inspection of the original recognizance is proper evidence.[71]

63. Immaterial defects.—Colegate *v.* Frederick-Town Sav. Inst., 11 Gill & J. (Md.) 114; Jackson *v.* Trammell, Cooke (Tenn.) 274.

As to sufficiency of rejoinder see Cutts *v.* King, 1 Me. 158.

64. Patterson *v.* State, 10 Ind. 296.

Leave to amend so as to describe the record correctly and cure an accidental variance between judgment and declaration may be allowed, though it may deprive defendant of an opportunity of nonsuiting the plaintiff and of driving him to a new action which would give further opportunity to surrender the principal. State Bank *v.* Simpson, 2 Speers (S. C.) 41. See also Tatem *v.* Potts, 5 Blackf. (Ind.) 534.

Similiter to a replication may be shown to have been added without consent of bail. Nadenbousch *v.* McRea, Gilmer (Va.) 228.

65. Discretion of court.— The only limitation to the judge's authority, if it may be called a limitation, being declared to be that amendments should not be allowed where they will operate to delay or surprise the other party. State Bank *v.* Simpson, 2 Speers (S. C.) 41.

Amendment which will only falsify the exemplification of the record of another court will not be allowed. Thus a writ of scire facias issued from the common-pleas court, founded on a judgment in the supreme court, will not be amended by striking out the words which make it a common-pleas writ and inserting others making it a supreme-court writ. Osgood *v.* Thurston, 23 Pick. (Mass.) 110.

66. Fatal variance.— Tobias *v.* Reed, 1 Speers (S. C.) 295; Harvey *v.* Goodman, 9 Yerg. (Tenn.) 273.

Proof should support the plea.—Under plea of payment advantage cannot be taken of a variance between the actual recognizance and that set out in the scire facias. Abbott *v.* Lyon, 4 Watts & S. (Pa.) 38. Nor can evidence be given of facts submitted on a previous application for relief on the bond (Wurtz *v.* Musselman, 5 Watts (Pa.) 95), or of a payment of a less sum than the amount of the judgment (Mechanics' Bank *v.* Hazard, 13 Johns. (N. Y.) 353). A paper purporting to be a bond but with no seal will not support a scire facias against the signers thereof, on a plea of *nul tiel record*, where the seal is a material essence of a bond. Walker *v.* Lewis, 3 N. C. 168.

67. Immaterial variance.— Waldo *v.* Spencer, 4 Conn. 71; Rodman *v.* Forman, 8 Johns. (N. Y.) 26; Handy *v.* Richardson, 3 N. C. 311; Devereux *v.* Esling, 7 Pa. St. 383. See Payne *v.* Britton, 6 Rand. (Va.) 101.

68. So held in case of omission to aver costs — the costs which accrued after judgment. Alston *v.* Bullock, 1 N. C. 209.

69. Return of proceedings under writ.— Heymes *v.* Champlin, 52 Mich. 25, 17 N. W. 226; Wilson *v.* Gillis, 15 Me. 55. If a sheriff's return show the surrender of the principal and the cancellation of the bond, it will be presumed, in an action on a bond subsequently taken, that the creditor assented thereto in the absence of evidence to the contrary. Harris *v.* Brown, 11 La. 90.

Return made under date of return-day raises the presumption that the execution was properly kept by the officer until such time. Wheelock *v.* Hall, 3 N. H. 310.

Return of non est without date does not prove an allegation in the scire facias that the execution was kept by the officer until the return-day. Butterick *v.* Atkinson, 3 N. H. 307.

70. Record of proceedings.— Heymes *v.* Champlin, 52 Mich. 25, 17 N. W. 226.

If proceedings are merely incidental and collateral the record thereof is inadmissible. Scully *v.* Kirkpatrick, 79 Pa. St. 324, 21 Am. Rep. 62.

Judgment is admissible as fixing the measure of damages. Wilcox *v.* Ismon, 34 Mich. 268. But see Respublica *v.* Davis, 3 Yeates (Pa.) 128, 2 Am. Dec. 366.

71. Inspection of recognizance.— Blood *v.* Morrill, 17 Vt. 598. But on such a plea it has been held plaintiff is not bound to produce the bail-bond. Mason *v.* Cooper, 4 N. C. 83.

Neglect or refusal to surrender a principal in execution may be taken as *prima facie* evidence of the departure of the principal from the state and that the bond has thereby become forfeited.[72]

b. Best and Secondary Evidence. Matters of record in the original action cannot be impeached in scire facias against bail,[73] and an officer's return that he cannot find his principal has been declared to be conclusive evidence of the avoidance of such principal.[74] So also a surrender of the principal, being generally required by law to be recorded, must be proved by the record.[75]

8. Questions of Law and Fact. In those jurisdictions where proceedings against bail are declared to be in the nature of a new suit the bail, upon filing his answer, is entitled to a trial of his cause by jury,[76] and where issues, some of which are for the court and others for the jury, are found for the plaintiff, it is for the jury to determine the amount due the latter.[77] The issue raised by a plea of *nul tiel record* is one for the court to determine,[78] but the validity of the execution of a recognizance is a question of fact for the jury.[79]

9. Judgment — a. In General. The judgment should, it is declared, be entered for the penalty of the bond, and if entered erroneously, or no specific sum is mentioned, time will be allowed for the making of an amendment to correct such error.[80]

b. By Default. If no plea is filed by bail in scire facias against them, judgment may be rendered on motion without the intervention of a jury, as the default admits that bail has nothing to show against judgment being entered against them.[81] Judgment by default may, however, be set aside under power

72. Refusal to surrender principal.— Hudson *v.* Perry, 8 La. 121.

73. Record cannot be impeached.— Arrest of principal cannot be denied. Bean *v.* Parker, 17 Mass. 591. Nor can the judgment be collaterally impeached. Ford *v.* De Villers, 2 McCord (S. C.) 144. Nor can bail defend successfully by denying that there is any record of their becoming bail. Bean *v.* Parker, 17 Mass. 591. Though they may show that it is a case of mistaken identity in suing them as bail. Renoard *v.* Noble, 2 Johns. Cas. (N. Y.) 293.

Where a plea of nul tiel record is made to a scire facias a minute of the recognizance taken by the clerk of a prothonotary has been held to be sufficient. Moore *v.* McBride, 1 Penr. & W. (Pa.) 148.

74. Return conclusive.— Winchel *v.* Stiles, 15 Mass. 230; Stevens *v.* Bigelow, 12 Mass. 433.

75. Proof of surrender.— Fitch *v.* Hall, Kirby (Conn.) 18; Griffin *v.* Moore, 2 Ga. 331; Whitton *v.* Harding, 15 Mass. 535; Stewart *v.* Massengale, 1 Overt. (Tenn.) 479. But see Chase *v.* Holton, 11 Vt. 347.

Parol evidence.— It has been held, however, that an arrest under capias ad satisfaciendum may be shown by parol. McKnight *v.* Sessions, 8 Rich. (S. C.) 210. As may also the insolvency of the principal. Willard *v.* Wickham, 7 Watts (Pa.) 292. And for the purpose of determining whether scire facias is barred by limitations, evidence of the day on which the judgment was given is admissible. Clark *v.* Ely, 2 Root (Conn.) 380.

76. Right to jury trial.— Gale *v.* Quick, 2 La. 348; Labarre *v.* Fry, 9 Mart. (La.) 381.

77. Amount due a question for jury.— Bolles *v.* Haines, 7 Blackf. (Ind.) 398.

Though amount as found by jury may be in excess of that stated in a scire facias, yet the court may give judgment, it has been held, for the proper sum. Bowyer *v.* Hewitt, 2 Gratt. (Va.) 193.

78. Issue raised by nul tiel record.— Bolles *v.* Haines, 7 Blackf. (Ind.) 398; Merkle *v.* Bolles, 6 Blackf. (Ind.) 288.

79. Validity of execution of recognizance. — Spencer *v.* Fish, 43 Mich. 226, 4 N. W. 168, 287, 5 N. W. 95.

80. Entry of judgment.— Hunt *v.* Allen, 22 N. J. L. 533.

In New York it has been held that, if the judgment is in excess of the bond, the judgment is not thereby void but the amount of such excess should be credited in such manner as to effectually prevent abuse of process or proceeding. Bode *v.* Maiberger, 12 N. Y. Civ. Proc. 53.

In Tennessee it is held that judgment on a scire facias should not be for debt and damages but that the plaintiff have execution. Payton *v.* Stuart, Peck (Tenn.) 156.

Judgment is erroneous in an action of replevin where it is for the value of the property in controversy and the costs of the action. Eddings *v.* Boner, 1 Indian Terr. 173, 38 S. W. 1110.

81. Garvin *v.* Gallagher, 1 Ga. 315; Reed *v.* Sullivan, 1 Ga. 292. May be so rendered against the administrator of the bail. Denny *v.* Hutcheson, 1 Bibb (Ky.) 576.

Should not be rendered by default before return of the writ of scire facias. Lyon *v.* Randall, 1 Ohio Dec. (Reprint) 57, 1 West. L. J. 397.

Damages are assessed on the basis of those occasioned by the breach of the condition, which will be the amount of the recovery in

given to courts to grant bail such relief upon such terms and in such manner as may be just and equitable.[82]

c. Joint or Several. Judgment cannot be entered jointly against both the principal and the surety, the latter being no party to the action and having a right to be heard.[83] But if a joint and several recognizance is given and a scire facias thereon is returned as executed upon one of the defendants and not found as to the other, scire facias upon the latter is not a prerequisite to rendering judgment against the former.[84]

d. Amount and Extent of Liability. The liability of bail is joint or several according to the nature of their undertaking.[85] In actions on the bond the measure of damages is *prima facie* the whole amount of the undertaking.[86] Or they may be assessed, as held in some cases, on the basis of the actual damage to the plaintiff from the breach of the condition.[87] As a general rule, however, the measure of damages in an action on the bond is the amount of the judgment recovered against the principal in the original action together with the costs of the suit,[88] not exceeding the penalty of the bond.[89] And it has been held that

the suit in which the bond was given. O'Conner *v.* Mullen, 11 Ill. 116.

82. So judgment may be set aside and bail let in to defend original action against the principal. Guthrie *v.* Morrison, 1 Harr. (Del.) 368. And a judgment against the bail in favor of the plaintiff in the original judgment, but who is not a party to the bond, may be set aside. Earle *v.* Dobson, 46 N. C. 515.

Where, in the absence of the plaintiff, a judgment has been entered against bail such judgment may, at the former's request, be struck out and a discontinuance entered. Com. *v.* Kite, 5 Serg. & R. (Pa.) 399.

Though a new trial may in some cases be granted, it is no ground therefor that the defendant was informed and believed "that he had fully and legally discharged himself as bail" if he has omitted to do all that was necessary by law for a discharge. Howard *v.* Capron. 3 R. I. 182, 183.

83. McWhorter *v.* De Kay, 3 N. J. L. 469.

But in an early case in Tennessee it is held that under the statute a judgment on a capias ad satisfaciendum must be against both principal and surety. Grisham *v.* Grisham, 8 Yerg. (Tenn.) 393. And see Lee *v.* Carter, 3 Munf. (Va.) 121, where it is held that, if defendant fails to appear and plead, and his appearance bail is allowed to do so but subsequently withdraws his plea, judgment should not be against bail alone but against defendant.

84. Chinn *v.* Com., 5 J. J. Marsh. (Ky.) 29.

85. Joint or several liability.— Davis *v.* Van Buren, 6 Daly (N. Y.) 391; Tannenbaum *v.* Christalar, 5 Daly (N. Y.) 141. And see Luckett *v.* Austin, 4 Bibb (Ky.) 181; Morange *v.* Mudge, 6 Abb. Pr. (N. Y.) 243.

Sureties on appearance bail who become liable on failure to put in special bail are subject to the same liability as those on special bail would have been if such bail had been put in. Wilcox *v.* Ismon, 34 Mich. 268.

The liability of special bail is limited by the amount of the *ac etiam*. Mumford *v.* Stocker, 1 Cow. (N. Y.) 601.

86. Whole amount of bond.—Willet *v.* Lassalle, 1 Rob. (N. Y.) 618, 19 Abb. Pr. (N. Y.) 272. See Fetterman *v.* Hopkins, 5 Watts (Pa.) 539.

Nominal damages may, however, be given under particular circumstances. Morton *v.* Bryce, 1 Nott & M. (S. C.) 64. See Burbank *v.* Berry, 22 Me. 483; Graecen *v.* Allen, 14 N. J. L. 74.

87. Actual damage to plaintiff.— Clifford *v.* Kimball, 39 Me. 413; Burbank *v.* Berry, 22 Me. 483.

88. Amount of judgment against principal.
—*Arkansas.*— Leech *v.* Pirani, 5 Ark. 118.

Connecticut.—Hall *v.* White, 27 Conn. 488; New Haven Bank *v.* Miles, 5 Conn. 587.

Kentucky.—Abbott *v.* Daniel, 3 Metc. (Ky.) 339.

Louisiana.— Keane *v.* Fisher, 10 La. Ann. 261.

Maine.— Richards *v.* Morse, 36 Me. 240; Sargent *v.* Pomroy, 33 Me. 388.

New Jersey.—Kelly *v.* Simmons, 39 N. J. L. 438. See Graecen *v.* Allen, 14 N. J. L. 74.

New York.—Levy *v.* Nicholas, 1 Rob. (N. Y.) 614, 19 Abb. Pr. (N. Y.) 282.

South Carolina.— Longstreet *v.* Lafitte, 2 Speers (S. C.) 664; Kinsler *v.* Kyzer, 4 McCord (S. C.) 315.

Vermont.—Worthen *v.* Prescott, 60 Vt. 68, 11 Atl. 690.

See 5 Cent. Dig. tit. "Bail," § 134.

And where a wife with no separate estate and no property whatever becomes surety, the rule is the same. Hall *v.* White, 27 Conn. 488.

Though the writ by mistake states a less amount than the action is for, yet if bail assume their obligation with full knowledge of the actual amount claimed, collection of the full amount of the judgment will not be enjoined in equity. Carter *v.* Cockrill, 2 Munf. (Va.) 448.

89. Not exceeding penalty of bond.—Kelly *v.* Simmons, 39 N. J. L. 438. See Heustis *v.* Rivers, 103 Mass. 398; Oxley *v.* Turner, 2 Va. Cas. 334.

Where judgment for the penalty of a bond has been given a writ of inquiry may be di-

interest on the judgment is recoverable.[90] Satisfaction of the judgment may be pleaded in mitigation of damages,[91] but the amount of recovery cannot be affected by the insolvency of the principal.[92]

10. Execution on Judgment. On a joint scire facias against bail a separate execution may be issued against either of the bail,[93] but where the plaintiff may have an execution against the body of the principal, or of the bail, he must elect against which one he wishes the execution.[94]

III. In Criminal Prosecutions.

A. Right to Bail — 1. At Common Law. By the ancient common law all offenses, including treason, murder, and other felonies, were bailable before indictment found.[1]

2. Constitutional Guaranty. It is a constitutional guaranty that all persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption of guilt great; and that excessive bail shall not be required.[2]

rected to determine the sum due. Bobyshall *v.* Oppenheimer, 4 Wash. (U. S.) 482, 3 Fed. Cas. No. 1,592. See Kelly *v.* Simmons, 39 N. J. L. 438. Though not necessary. Leech *v.* Pirani, 5 Ark. 118. Where such a judgment has been entered the damages should not be assessed in the bail-bond suit, but in the original action. Mabbett *v.* Kelly, 2 How. Pr. (N. Y.) 62.

90. Interest on judgment.— *Alabama.*— Kenan *v.* Carr, 10 Ala. 867.

Arkansas.— Leech *v.* Pirani, 5 Ark. 118.

Maine.— Richards *v.* Morse, 36 Me. 240.

New Jersey.— Allen *v.* Hunt, 23 N. J. L. 376.

New York.— Steinbock *v.* Evans, 122 N. Y. 551, 25 N. E. 929, 34 N. Y. St. 138 [*affirming* 55 N. Y. Super. Ct. 278, 18 N. Y. St. 325].

Contra, Gray *v.* Cook, 3 Houst. (Del.) 49; Kinsler *v.* Kyzer, 4 McCord (S. C.) 315; Murden *v.* Perman, 1 McCord (S. C.) 128; Bowyer *v.* Hewitt, 2 Gratt. (Va.) 193; Anonymous, 1 Brunn. Col. Cas. (U. S.) 29, 1 Fed. Cas. No. 433, 3 N. C. 575.

See 5 Cent. Dig. tit. "Bail," § 134.

In case of unreasonable delay in proceeding against bail, interest during such time is not recoverable. Constable *v.* Colden, 2 Johns. (N. Y.) 480.

Costs as between two sets of sureties.— Although the order-of-arrest bail may become liable for the amount due on the judgment for costs in the court of appeals, yet the circumstances may give them the right of reimbursement from the court of appeals sureties. Culliford *v.* Walser, 158 N. Y. 65, 52 N. E. 648, 70 Am. St. Rep. 437 [*reversing* 3 N. Y. App. Div. 266, 38 N. Y. Suppl. 199, 173 N. Y. St. 692 (*affirming* 13 Misc. (N. Y.) 493, 35 N. Y. Suppl. 475)].

91. Mitigation of damages.— So held in suit against bail for indorser of note where satisfaction had been obtained from the makers. Wattles *v.* Laird, 9 Johns. (N. Y.) 327.

92. Effect of principal's insolvency.— Abbott *v.* Daniel, 3 Metc. (Ky.) 339; Sargent *v.* Pomroy, 33 Me. 388; Metcalf *v.* Stryker, 31 Barb. (N. Y.) 62; Levy *v.* Nicholas, 1 Rob. (N. Y.) 614, 19 Abb. Pr. (N. Y.) 282. But see Burbank *v.* Berry, 22 Me. 483.

93. Bruce *v.* Colgan, 2 Litt. (Ky.) 284; Luckett *v.* Austin, 4 Bibb (Ky.) 181.

94. Election.— Smith *v.* Rosecrantz, 6 Johns. (N. Y.) 97.

1. *Ex p.* McAnally, 53 Ala. 495, 25 Am. Rep. 646; *Ex p.* Bryant, 34 Ala. 270 [*citing* Rex *v.* Remnant, 5 T. R. 169]; Rex *v.* Marks, 3 East 157; *Ex p.* Baronnet, 16 Eng. L. & Eq. 361, 2 Hale P. C. 129, 2 Hawkes P. C. c. 15, §§ 40, 80. See also *Ex p.* Croom, 19 Ala. 561; Ford *v.* State, 42 Nebr. 418, 60 N. W. 960; Hampton *v.* State, 42 Ohio St. 401.

Right to bail in civil actions see *supra,* II, B.

Extent and limits of common-law rule.— Certain restrictions were, however, imposed upon justices of the peace concerning their right to let to bail, but, in the court of king's bench, bail was not a matter of right in capital felonies, being limited by judicial discretion exercised according to the degree of proof of guilt. Rex *v.* Marks, 3 East 157; *Ex p.* Baronnet, 16 Eng. L. & Eq. 361, 2 Hale P. C. 129.

As to bail for officer placed in confinement in court-martial proceedings see Army and Navy, VIII, I, 5, c [3 Cyc. 855].

2. With the exception that some constitutions contain only the provision as to excessive bail and that others use the words "before conviction" or words of like import, or the words "murder" and "treason" instead of the words "capital offenses" and other slight changes, the language of the text is substantially that of all the constitutions. See also Ariz. Pen. Code (1901), §§ 726, 733, 1071, 1072, 1074, 1081–1083; Nev. Comp. Laws (1900), §§ 4462, 4463; Foley *v.* People, 1 Ill. 57. Some constitutions, though substantially to the same effect, are worded differently throughout. Ind. Const. art. 1, § 17; Me. Const. art. 1, § 10; Oreg. Const. art. 1, § 14; R. I. Const. art. 1, § 9, which uses the words "unless for offences punishable by death or by imprisonment for life."

3. EXERCISE OF DISCRETION — a. Capital Offenses — (I) *RULE STATED.* Primarily the prisoner cannot demand bail as a matter of right where the offense is a capital one, since, upon ascertaining the character of the charge against the accused, the next question would be as to the degree of proof and the nature of the presumption of guilt.[3] The power, therefore, to admit to bail becomes a matter of judicial discretion in this class of cases.[4] This discretionary power should, however, be exercised with great caution.[5]

(II) *NATURE AND DEGREE OF PROOF.* As a general rule, bail should be denied whenever the trial court would sustain a verdict of conviction for a capital offense, if rendered on the same evidence given on the application for bail.[6] But this rule is not strictly followed, for it is declared that, under the liberal principles of the constitution, and the laws relating to bail, an application therefor will be allowed even in a case where the jury might and

3. But, where the proof is not evident nor the presumption of guilt great, it has been decided that bail should be allowed even in capital cases.

Alabama.— *Ex p.* King, 86 Ala. 620, 5 So. 863; *Ex p.* Dykes, 83 Ala. 114, 3 So. 306; *Ex p.* McAnally, 53 Ala. 495, 25 Am. Rep. 646; *Ex p.* Acree, 63 Ala. 234; *Ex p.* Bryant, 34 Ala. 270; *Ex p.* Banks, 28 Ala. 89.

California.— People *v.* Tinder, 19 Cal. 539, 81 Am. Dec. 77.

Colorado.— *In re* Losasso, 15 Colo. 163, 24 Pac. 1080, 10 L. R. A. 847.

Indiana.— *Ex p.* Richards, 102 Ind. 260, 1 N. E. 639; *Ex p.* Walton, 79 Ind. 600.

Kansas.— Matter of Malison, 36 Kan. 725, 14 Pac. 144.

Kentucky.— Ullery *v.* Com., 8 B. Mon. (Ky.) 3.

Louisiana.— Governor *v.* Fay, 8 La. Ann. 490; State *v.* Roger, 7 La. Ann. 382; Langworth Praying for Writ of Habeas Corpus, 7 La. Ann. 247; Territory *v.* McFarlane, 1 Mart. (La.) 216, 5 Am. Dec. 706; Territory *v.* Benoit, 1 Mart. (La.) 141.

Ohio.— State *v.* Summons, 19 Ohio 139.

Pennsylvania.— Com. *v.* Keeper Prison, 2 Ashm. (Pa.) 227.

Texas.— *Ex p.* Cosby, (Tex. Crim. 1899) 54 S. W. 587; *Ex p.* Hayes, (Tex. Crim. 1897) 38 S. W. 1149; *Ex p.* Darter, (Tex. Crim. 1897) 38 S. W. 770; *Ex p.* Jasef, (Tex. Crim. 1893) 24 S. W. 421; *Ex p.* Thompson, (Tex. App. 1890) 15 S. W. 912. See also *Ex p.* Coldiron, 15 Tex. App. 464; Ruston *v.* State, 15 Tex. App. 324; *Ex p.* Albitz, 29 Tex. App. 128, 15 S. W. 173; *In re* Wilson, (Tex. App. 1890) 13 S. W. 609; *Ex p.* Beacom, 12 Tex. App. 318; *Ex p.* Randon, 12 Tex. App. 145; *Ex p.* Bomar, 9 Tex. App. 610; Thompson *v.* State, 25 Tex. Suppl. 395.

Wyoming.— State *v.* Crocker, 5 Wyo. 385, 40 Pac. 681.

See 5 Cent. Dig. tit. "Bail," § 139.

Upon habeas corpus the court determines the amount of testimony proper to be heard and whether the petitioner should be allowed to give bail. State *v.* Herndon, 107 N. C. 934, 12 S. E. 268.

4. Matter of judicial discretion.— *Ex p.* Nettles, 58 Ala. 268; *Ex p.* McAnally, 53 Ala. 495, 25 Am. Rep. 646; *Ex p.* McCrary, 22 Ala. 65; State *v.* Abbot, R. M. Charlt. (Ga.) 244; *Ex p.* Fortenberry, 53 Miss. 428; Street *v.* State, 43 Miss. 1; Beal *v.* State, 39 Miss. 715; Moore *v.* State, 36 Miss. 137; *Ex p.* Wray, 30 Miss. 673; People *v.* Hyler, 2 Park. Crim. (N. Y.) 570. In People *v.* Perry, 8 Abb. Pr. N. S. (N. Y.) 27, it is said that the power of the supreme court to admit to bail existed in all cases, but that whether it should be exercised was a matter of judicial discretion.

Property qualification.— In *Ex p.* Arthur, (Tex. Crim. 1898) 47 S. W. 365, it is held that one indicted for a capital felony, who proves that he has property of the value of five hundred dollars, is entitled to be admitted to such bail as will insure his presence at his trial.

5. Caution should be used.—State *v.* Rockafellow, 6 N. J. L. 332; State *v.* Hill, 3 Brev. (S. C.) 89, 1 Treadw. (S. C.) 242. Or there should be exceptional circumstances to justify allowance of bail. *Ex p.* Hamilton, 65 Miss. 147, 3 So. 241; *Ex p.* Bridewell, 57 Miss. 39. See also *Ex p.* Fortenberry, 53 Miss. 428.

As to the nature and degree of proof see *infra*, III, A, 3, a, (II).

In a new state where courts are not fully organized and there are no jails, the court will, in its discretion, admit persons to bail. People *v.* Smith, 1 Cal. 9.

6. Where verdict would be sustained upon same evidence.— *Alabama.*— *Ex p.* Richardson, 96 Ala. 110, 11 So. 316; *Ex p.* Sloane, 95 Ala. 22, 11 So. 14; *Ex p.* Bown, 65 Ala. 446; *Ex p.* Nettles, 58 Ala. 268; *Ex p.* McAnally, 53 Ala. 495, 25 Am. Rep. 646.

California.— Matter of Troia, 64 Cal. 152, 28 Pac. 231.

Florida.— Thrasher *v.* State, 26 Fla. 526, 7 So. 847.

Mississippi.— Street *v.* State, 43 Miss. 1; Moore *v.* State, 36 Miss. 137; *Ex p.* Wray, 30 Miss. 673.

New York.— People *v.* Shattuck, 6 Abb. N. Cas. (N. Y.) 33.

Pennsylvania.— Com. *v.* Keeper Prison, 2 Ashm. (Pa.) 227.

Texas.— *Ex p.* Foster, 5 Tex. App. 625, 32 Am. Rep. 577.

Wyoming.— State *v.* Crocker, 5 Wyo. 385, 40 Pac. 681.

See 5 Cent. Dig. tit. "Bail," § 148.

perhaps ought upon the same evidence to render a verdict of guilty of murder.[7] In addition, the tendency of the courts has been rather toward a fair and liberal construction than otherwise of the law, in determining what degree of proof or conclusiveness of presumption is sufficient to justify a denial of bail. This is evident, not only from various expressions used in the decisions, many of which do not go to the extent of the general rule above stated, but also from a consideration of the facts upon which the courts have refused to allow bail.[8] Again, it has been declared that the constitutional clause "where the proof is evident or presumption great" indicates the same degree of certainty whether the

7. Rule not strictly followed.— Beall *v.* State, 39 Miss. 715. See People *v.* Baker, 10 How. Pr. (N. Y.) 567. So upon evidence taken before the grand jury, and affidavits furnished by the prisoner, bail was allowed. People *v.* Porter, 8 Barb. (N. Y.) 168 note.

8. Degree of proof and facts justifying denial of bail.—*Alabama.*—Where the homicide was committed in execution of a conspiracy. *Ex p.* Bonner, 100 Ala. 114, 14 So. 648. And so where murder is co mitted with a deadly weapon, unless the testimony which proved the killing proved also the justification. *Ex p.* Warrick, 73 Ala. 57. But the evidence should be clear and strong. *Ex p.* McAnally, 53 Ala. 495, 25 Am. Rep. 646. And where the evidence is circumstantial it should exclude to a moral certainty every other hypothesis but that of guilt. *Ex p.* Acree, 63 Ala. 234. Again the court may deny bail if a capital conviction would be sustained on the evidence. *Ex p.* Nettles, 58 Ala. 268. So, by the common law bail was denied if there was no reasonable doubt of guilt, whether the felony was capital or not. *Ex p.* McAnally, 53 Ala. 495, 25 Am. Rep. 646. And bail may be refused if the offense may be capitally punished, and the proof is evident, or the presumption great; that the jury may determine punishment shall be death or life-imprisonment does not make the offense less capital. *Ex p.* McCrary, 22 Ala. 65.

California.— Where the evidence points to accused and induces a belief that he may be guilty of murder. *Ex p.* Winthrop, (Cal. 1895) 40 Pac. 751. Where one, while resisting arrest, shoots an officer and attempts to escape. *Ex p.* Curtis, 92 Cal. 188, 28 Pac. 223.

Georgia.— The fact that the verdict of the coroner's jury does not charge felonious intent is not a ground for allowing bail, where the affidavits and depositions taken by the coroner and the committing magistrate in connection with the verdict show commission of a felony. State *v.* Abbot, R. M. Charlt. (Ga.) 244.

Indiana.— Shooting one, in the mistaken belief that he is another whom it would not have been murder to shoot, does not make the offense bailable. Brown *v.* State, 147 Ind. 28, 46 N. E. 34. See also Schmidt *v.* Simmons, 137 Ind. 93, 36 N. E. 516; *Ex p.* Colter, 35 Ind. 109.

Mississippi.—*Ex p.* Hamilton, 65 Miss. 147, 3 So. 241; *Ex p.* Bridewell, 57 Miss. 39. The provision that the jury may fix the punishment by death or life-imprisonment does not make the offense bailable. *Ex p.* Fortenberry, 53 Miss. 428.

Missouri.—Where defendant had threatened to kill any one who interfered with him, and there was proof of the killing, and of defendant's being seen bending over the body and then running away, and the accused offered no evidence. *In re* Bell, 113 Mo. 568, 21 S. W. 221.

New York.— Where the probability of conviction is so strong as to warrant the belief of the prisoner's flight. People *v.* Dixon, 3 Abb. Pr. (N. Y.) 395, 4 Park. Crim. (N. Y.) 651. So where it appears that there is probable cause for charging accused with murder (Matter of Collins, 11 Abb. Pr. (N. Y.) 406); where guilt is past dispute (People *v.* Lohman, 2 Barb. (N. Y.) 450); where there is good reason to believe guilt (People *v.* Restell, 3 How. Pr. (N. Y.) 251); where guilt is past reasonable doubt (*Ex p.* Tayloe, 5 Cow. (N. Y.) 39); where accused is found in actual possession of stolen property (People *v.* Ferris, 1 Wheel. Crim. (N. Y.) 19). See also People *v.* Budge, 4 Park. Crim. (N. Y.) 519, as to non-application of 2 N. Y. Rev. Stat. 568, § 58.

Pennsylvania.— In case of murder done in a riot where accused was one of the rioters, having full knowledge of their purpose and encouraging them. Com. *v.* O'Donnell, 2 Pa. Dist. 131, 12 Pa. Co. Ct. 142, 23 Pittsb. Leg. J. N. S. (Pa.) 76. See also Com. *v.* Megary, 8 Phila. (Pa.) 607; Com. *v.* McNall, 1 Woodw. (Pa.) 423.

Texas.— Where the proof is sufficient to show murder in the first degree (*Ex p.* Wright, 39 Tex. Crim. 193, 45 S. W. 593); where there is proof of the commission of the offense and of defendant's guilt (*Ex p.* Epps, 35 Tex. Crim. 406, 34 S. W. 113). Threats against the life of accused made by deceased some time before the murder does not entitle him to bail. *Ex p.* Taylor, 33 Tex. Crim. 531, 28 S. W. 957. So bail will be refused where the testimony of a witness shows malice in the killing and accused could disprove the salient points of the testimony if untrue but does not (Price *v.* State, (Tex. Crim. 1894) 26 S. W. 624); or where there is evidence of a quarrel, and so notwithstanding there is evidence of defendant's good reputation for peace (Randle *v.* State, (Tex. Crim. 1893) 22 S. W. 49). And bail will be denied where accused with others entered deceased's house evidently with intent to injure or kill him, even though accused did not fire the fatal shot. *Ex p.* Johnson, 30 Tex. App. 279, 17 S. W. 410. Nor

evidence is direct or circumstantial: the design being to secure the right to bail in all cases except those in which the facts show with reasonable certainty that the prisoner is guilty of a capital offense.[9] Following out, therefore, these last-mentioned principles, and applying the evident intent of the law-makers, and of the fundamental law to the facts, the courts have in many cases allowed bail under what in their discretion seemed justifying circumstances.[10]

does evidence of intoxication raise any doubt of criminal intent so as to entitle to bail. *Ex p.* Evers, 29 Tex. App. 539, 16 S. W. 343. But it is also said that the evidence of guilt should be satisfactory and conclusive. *Ex p.* Coldiron, 15 Tex. App. 464; Ruston *v.* State, 15 Tex. App. 324. In the following cases bail was also refused: Herrin *v.* State, 33 Tex. 638; *Ex p.* Mosby, 31 Tex. 566, 98 Am. Dec. 547; Cash *v.* State, (Tex. Crim. 1893) 24 S. W. 408; *Ex p.* Pace, (Tex. Crim. 1892) 20 S. W. 922.

Virginia.— If two distinct offenses are charged, an acquittal on one does not raise a presumption of innocence on the other. Summerfield *v.* Com., 2 Rob. (Va.) 767. *Contra,* Green *v.* Com., 11 Leigh (Va.) 709.

Wyoming.— Where judge could, upon the evidence, sustain a verdict of murder in the first degree. State *v.* Crocker, 5 Wyo. 385, 40 Pac. 681.

See 5 Cent. Dig. tit. "Bail," § 161.

9. Same degree of certainty, whether evidence is direct or circumstantial.— McCoy *v.* State, 25 Tex. 33, 78 Am. Dec. 520; Drury *v.* State, 25 Tex. 45. And see further *Ex p.* Smith, 23 Tex. App. 100, 5 S. W. 99 [*overruling Ex p.* Foster, 5 Tex. App. 625, 32 Am. Rep. 577].

10. Degree of proof and facts justifying the allowance of bail.— *Alabama.*— Deceased being the aggressor. *Ex p.* King, 86 Ala. 620, 5 So. 863. Where there was doubt whether death was by suicide, accident, or violence of another, there being no evidence on the prisoner's behalf. *Ex p.* Hammock, 78 Ala. 414. So (at common law) accused is entitled to bail if the evidence of guilt is not strong (*Ex p.* McAnally, 53 Ala. 495, 496, 25 Am. Rep. 646), or if a well-founded doubt of guilt exists (*Ex p.* Bryant, 34 Ala. 270; *Ex p.* Banks, 28 Ala. 89; *Ex p.* Simonton, 9 Port. (Ala.) 39, 33 Am. Dec. 320).

California.— Where there was nothing to show an intent to kill, death having followed an attempt to procure abortion. *Ex p.* Wolff, 57 Cal. 94.

Florida.— Where only a "probability" of guilt is shown. Gainey *v.* State, (Fla. 1900) 29 So. 405.

Georgia.— State *v.* Wicks, R. M. Charlt. (Ga.) 139.

Indiana.— Where the killing was in sudden heat and without previous acquaintance with deceased (*Ex* p. Hock, 63 Ind. 206), or where it is not clear that there was sufficient time between the provocation and the killing for passion to cool and reason to resume control or that the killing was malicious (*Ex p.* Moore, 30 Ind. 197).

Kansas.— Evidence of a quarrel, and an offer of deceased to fight accused if he would take the rocks out of his pocket, does not raise a presumption of guilt precluding bail. State *v.* Bell, (Kan. App. 1898) 54 Pac. 504. Nor should bail be denied upon testimony that deceased, having heard some one call, came to where accused was holding a person and was shot by the defendant, no reason being shown therefor. State *v.* Start, (Kan. App. 1898) 54 Pac. 22.

Kentucky.— Ready *v.* Com., 9 Dana (Ky.) 38.

Mississippi.— Where the evidence tends to show that another, who had been jointly indicted with petitioner, and who had been tried and convicted, was alone guilty. *Ex p.* Jack, (Miss. 1897) 22 So. 188. Upon evidence of a quarrel and facts tending to show a killing in self-defense. *Ex p.* Patterson, (Miss. 1897) 22 So. 186. Where the evidence is circumstantial and an *alibi* is relied on (*Ex p.* Catron, (Miss. 1897) 21 So. 1029), or where it is improbable that the alleged rape was committed by accused (*Ex p.* Manley, (Miss. 1896) 20 So. 1023), or where the testimony of fourteen witnesses for the state failed to disclose any criminality (*Ex p.* Floyd, 60 Miss. 913), or where there was a reasonable doubt whether accused committed the crime (*Ex p.* Bridewell, 57 Miss. 39).

Missouri.— Where the killing was after deceased had drawn his pistol and threatened to kill accused. *Ex p.* Goans, 99 Mo. 193, 12 S. W. 635, 17 Am. St. Rep. 571. *Compare* Shore *v.* State, 6 Mo. 640.

New York.— If it is evident that accused is guilty of no higher offense than manslaughter, even though the warrant calls it murder. People *v.* Sheriff Westchester County, 2 Edm. Sel. Cas. (N. Y.) 324, 10 N. Y. Leg. Obs. 298. Although by a verdict of a third jury the offense is murder, two former juries having adjudged it manslaughter where the state raises no objection to allowance of bail. People *v.* Van Horne, 8 Barb. (N. Y.) 158. Bail is not, however, a matter of right in manslaughter, but of discretion (*Ex p.* Tayloe, 5 Cow. (N. Y.) 39; People *v.* Goodwin, 1 Wheel. Crim. (N. Y.) 443); but if the proof is indifferent as to guilt or innocence, bail will be granted (People *v.* Goodwin, 1 Wheel. Crim. (N. Y.) 443).

Pennsylvania.— If the court is satisfied that accused is not guilty. Com. *v.* Lemley, 2 Pittsb. (Pa.) 362.

Texas.— Merely showing that death resulted from an abortion. *Ex p.* Fatheree, 34 Tex. Crim. App. 594, 31 S. W. 403. Where accused was in fear of his life from continued threats of deceased, and other facts tended to justify the shooting. *Ex p.* Rankin, 30 Tex. App. 71, 20 S. W. 202. Where there is no positive identification of accused and evidence

(iii) *Conflict of Evidence.* In many of the decisions considered under the preceding notes there has been a conflict of evidence upon the question of guilt, but outside of these it has been expressly decided that, where there is a conflict of evidence as to the state of mind of the accused at the time of the act of alleged homicide, the proof cannot be said to be "evident" so as to preclude admission to bail.[11]

(iv) *Burden of Proof.* Upon a petition for release on bail the petitioner must bring himself within the law under which he claims the right to bail, and this rule obviously casts upon him the burden of proof in homicide or capital cases to either overcome the presumption of guilt arising from the indictment, or of showing that the proof is not evident and the presumption not great.[12]

only of a belief that they were the persons who did the shooting. *Ex p.* Moore, (Tex. App. 1891) 16 S. W. 764. Where there is sufficient proof of present danger to raise the belief of killing in self-defense. *Ex p.* Hope, 29 Tex. App. 189, 15 S. W. 602. Where accused was so drunk that he did not know what he did or said. *Ex p.* Bates, 29 Tex. App. 138, 15 S. W. 406. Where the testimony was mostly circumstantial and no sufficient motive appeared and many of the witnesses for the state were prejudiced. *In re* Foulk, (Tex. App. 1890) 13 S. W. 746. Where accused was not aware of the official character or purpose of a constable whom he killed while making his arrest. *In re* Johnson, (Tex. App. 1889) 12 S. W. 504. Where the evidence was of self-defense. *Ex p.* Hanson, 27 Tex. App. 591, 11 S. W. 641. Where there was a quarrel, and it does not appear who drew his weapon first. *Ex p.* Suddath, 25 Tex. App. 426, 8 S. W. 479. Where there was no direct evidence and the proof tended to show motive on the part of another. *Ex p.* Kunde, 22 Tex. App. 418, 3 S. W. 332. Where there is doubt whether deceased committed suicide or was murdered. *Ex p.* Schamberger, 19 Tex. App. 572. For further illustrations of the allowance of bail on charge of murder see Bean *v.* Mathieu, 33 Tex. 591; *In re* Puryear, (Tex. App. 1889) 11 S. W. 32; *Ex p.* Rice, 26 Tex. App. 343, 9 S. W. 615; *Ex p.* Jones, 26 Tex. App. 597, 10 S. W. 114; *Ex p.* Smith, 26 Tex. App. 134, 9 S. W. 359; *Ex p.* Gallaher, 25 Tex. App. 455, 8 S. W. 481; *Ex p.* Henson, 24 Tex. App. 305, 5 S. W. 684; *Ex p.* McDowell, 23 Tex. App. 679, 5 S. W. 187; *Ex p.* Hay, 23 Tex. App. 585, 5 S. W. 98; *Ex p.* O'Connor, 22 Tex. App. 660, 3 S. W. 340; *Ex p.* Allen, 22 Tex. App. 201, 2 S. W. 588; *Ex p.* Bryant, 21 Tex. App. 639, 2 S. W. 891; *Ex p.* Williams, 18 Tex. App. 653; *Ex p.* Matlock, 18 Tex. App. 227. Examine also for general statement of the rule *Ex p.* Wilson, 20 Tex. App. 498; *Ex p.* Terry, 20 Tex. App. 486; *Ex p.* Dickson, 20 Tex. App. 332; *Ex p.* Cochran, 20 Tex. App. 242; *Ex p.* Boyett, 19 Tex. App. 17.

Virginia.— An acquittal in one case where several indictments are based on one criminal offense affords a presumption of innocence entitling petitioner to bail. Green *v.* Com., 11 Leigh (Va.) 709. But see Summerfield *v.* Com., 2 Rob. (Va.) 767.

Wyoming.— Where the evidence is not sufficient to warrant the court to sustain a verdict of conviction. State *v.* Crocker, 5 Wyo. 385, 40 Pac. 681, holding also that an indictment is not conclusive evidence of guilt.

United States.— If it is clear to the judge that a conviction should not take place. U. S. *v.* Marshal District Columbia, 2 Hayw. & H. (U. S.) 205, 26 Fed. Cas. No. 15,726*a*.

See 5 Cent. Dig. tit. "Bail," § 160 *et seq.*

11. *Ex p.* Miller, 41 Tex. 213. See also *Ex p.* Heffren, 27 Ind. 87; *Ex p.* Suddath, 25 Tex. App. 426, 8 S. W. 479.

But such conflict of evidence on habeas corpus does not necessarily imply that the proof is not "evident," for the evidence is to be considered in its entirety, and if in such view a reasonable doubt of guilt is not engendered, it is decided that bail should be refused. *Ex p.* Smith, 23 Tex. App. 100, 5 S. W. 99.

12. *Alabama.*— *Ex p.* Hammock, 78 Ala. 414; *Ex p.* Rhear, 77 Ala. 92; *Ex p.* Vaughan, 44 Ala. 417.

California.— Matter of Troia, 64 Cal. 152, 28 Pac. 231. See also People *v.* Tinder, 19 Cal. 539, 81 Am. Dec. 77.

Florida.— Rigdon *v.* State, 41 Fla. 308, 26 So. 711.

Indiana.— Brown *v.* State, 147 Ind. 28, 46 N. E. 34; *Ex p.* Jones, 55 Ind. 176; *Ex p.* Heffren, 27 Ind. 87.

Nevada.— See *Ex p.* Finlen, 20 Nev. 141, 18 Pac. 827.

New Jersey.— State *v.* Mairs, 1 N. J. L. 335, where rule was applied to a case of mayhem.

New York.— People *v.* Goodwin, 1 Wheel. Crim. (N. Y.) 434.

Texas.— *Ex p.* Jones, 31 Tex. Crim. 422, 20 S. W. 983; *Ex p.* Johnson, 30 Tex. App. 279, 17 S. W. 410; *Ex p.* Smith, 23 Tex. App. 100, 5 S. W. 99; *Ex p.* Beacom, 12 Tex. App. 318; *Ex p.* Randon, 12 Tex. App. 145; *Ex p.* Scoggin, 6 Tex. App. 546.

Utah.— *Ex p.* Springer, 1 Utah 214.

Wyoming.— State *v.* Crocker, 5 Wyo. 385, 40 Pac. 681.

See 5 Cent. Dig. tit. "Bail," § 161 *et seq.*

Under other decisions, however, the burden of proof has been placed upon the state to show that the offense is a capital one, and that the proof is evident, even though the statute gives the relator in habeas corpus the right to open and close the argument.

b. Offenses Not Capital — (i) *General Rule.* Under most constitutions the right to bail exists in other than capital offenses, independently of the discretion of courts or officers, being placed by the fundamental law, in cases not within the exception, beyond the power of either legislative or judicial interposition to the contrary. But in the absence of a constitutional prohibition it is within the legislative power to at least substantially abridge or modify the common-law right to bail.[13] The first question therefore in legal contemplation on an application for bail is whether the offense is of a character within the constitutional exception,[14] and if the offense is made capital by statute such enactments must be constitutional.[15]

(ii) *Rule Not Absolute.* The rule just stated is not absolute and unqualified in its application to bailable and non-bailable offenses, since some constitutions provide only against excessive bail. Again there are various statutory provisions which are constitutional and which relate to such offenses or which fix the degree of the crime within the constitutional exception.[16]

Ex p. Newman, 38 Tex. Crim. 164, 41 S. W. 628, 70 Am. St. Rep. 740; *Ex p.* Bramer, 37 Tex. 1.

13. *Alabama.*— *Ex p.* Croom, 19 Ala. 561. See also Taylor *v.* Smith, 104 Ala. 537, 16 So. 629; Callahan *v.* State, 60 Ala. 65; *Ex p.* McAnally, 53 Ala. 495, 25 Am. Rep. 646; Jones *v.* State, 63 Ala. 161; Hammons *v.* State, 59 Ala. 164, 31 Am. Rep. 13; *Ex p.* Bryant, 34 Ala. 270.

California.— People *v.* Tinder, 19 Cal. 539, 81 Am. Dec. 77.

Illinois.— Lewis *v.* People, 18 Ill. App. 76; Foley *v.* People, 1 Ill. 57.

Louisiana.— Governor *v.* Fay, 8 La. Ann. 490; State *v.* Roger, 7 La. Ann. 382; Longworth Praying for Writ of Habeas Corpus, 7 La. Ann. 247.

Michigan.— Daniels *v.* People, 6 Mich. 381.

Mississippi.— Street *v.* State, 43 Miss. 1; *Ex p.* Wray, 30 Miss. 673. See also Hill *v.* State, 64 Miss. 431, 1 So. 494; *Ex p.* Dyson, 25 Miss. 356.

Nebraska.— Ford *v.* State, 42 Nebr. 418, 60 N. W. 960, holding that the statutory right to bail is merely declaratory of the common law, and that neither the rights of the parties nor the practice are thereby changed.

Ohio.— Hampton *v.* State, 42 Ohio St. 401. See 5 Cent. Dig. tit. "Bail," § 153.

14. *Ex p.* McAnally, 53 Ala. 495, 25 Am. Rep. 646; *Ex p.* McCrary, 22 Ala. 65.

15. People *v.* Tinder, 19 Cal. 539, 81 Am. Dec. 77; State *v.* Crocker, 5 Wyo. 385, 40 Pac. 681.

Constitutional right of trial by jury is not abridged by a statute authorizing a police judge to hold the prisoner to bail before the proper court in cases where the offense is one which he cannot adequately punish. Stevens *v.* Anderson, 145 Ind. 304, 44 N. E. 460. But see People *v.* Johnson, 2 Park. Crim. (N. Y.) 322; People *v.* Kennedy, 2 Park. Crim. (N. Y.) 312, as to right of trial by jury in cases of misdemeanor not being taken away by implication.

16. Bailable offenses.— Bail will ordinarily be granted in all cases not capital (State *v.* McNab, 20 N. H. 160), including misdemeanors (Taylor *v.* Smith, 104 Ala. 537, 16 So. 629; Callahan *v.* State, 60 Ala. 65; Jones *v.* State, 63 Ala. 161; Hammons *v.* State, 59 Ala. 164, 31 Am. Rep. 13; Com. *v.* Yancy, 2 Duv. (Ky.) 375). See People *v.* Johnson, 2 Park. Crim. (N. Y.) 322; People *v.* Kennedy, 2 Park. Crim. (N. Y.) 312; Golden *v.* State, 32 Tex. 737; Reg. *v.* Badger, 4 Q. B. 468, D. & M. 375, 7 Jur. 216, 12 L. J. M. C. 66, 45 E. C. L. 468.

Among offenses held to be bailable are the following:

Abortion, even though death resulted. *Ex p.* Fathieree, 34 Tex. Crim. 594, 31 S. W. 403.

Assault and battery, even though there is a danger of death therefrom. State *v.* Judge Twenty-First Judicial Dist. Ct., 48 La. Ann. 92, 18 So. 902; Dunlap *v.* Bartlett, 10 Gray (Mass.) 282, 69 Am. Dec. 320.

Horse stealing. Rex *v.* ———, 2 Chit. 110, 18 E. C. L. 537.

Larceny. Foley *v.* People, 1 Ill. 57; *Ex p.* Burkham, (Tex. Crim. 1896) 33 S. W. 974.

Passing counterfeit money. Barton *v.* Keith, 2 Hill (S. C.) 537, but bailed before commitment.

Rape. People *v.* Burwell, 106 Mich. 27, 63 N. W. 986 (even though the punishment is imprisonment for life which is within the exception of 2 Howell's Anno. Stat. Mich. § 9479, where the constitutional exceptions are only murder and treason. Mich. Const. art. 6, § 29); *Ex p.* Manley, (Miss. 1896) 20 So. 1023 (depending upon the proof of guilt).

Shooting with intent to kill. Com. *v.* Yancy, 2 Duv. (Ky.) 375.

Treason. U. S. *v.* Hamilton, 3 Dall. (U. S.) 17, 1 L. ed. 490; Davis' Case, Chase (U. S.) 1, 7 Fed. Cas. No. 3,621*a*, 3 Am. L. Rev. 368.

Offenses not bailable.— If the warrant contains a specific charge of an offense not bailable the prisoner cannot be discharged. State *v.* Everett, Dudley (S. C.) 295. Although mayhem may be bailable, yet if the indictment charge it to be enormous, and there are no circumstances raising a presumption of the innocence, bail will be refused. State *v.* Mairs, 1 N. J. L. 335. So robbery when made a capital offense by statute may not be bailable. *Ex p.* Epps, 35 Tex. Crim. 406, 34

4. Matters Affecting Right — a. In General. The right to bail is often affected by certain elements more or less important, depending upon the provisions of the law and the attendant circumstances. Thus it has been held that the abolition of capital punishment,[17] the age of the prisoner,[18] and his health and physical condition,[19] may be considered as elements bearing upon or controlling the right of admission to bail. But neither the prisoner's agreement to turn state's evidence,[20] nor alleged financial ruin by reason of his confinement and his wife's frail and delicate physical condition,[21] nor his poverty constitute sufficient ground for allowance of bail.[22]

b. Breach of Prior Bond. Breach of prior bond may preclude the prisoner being admitted to further bail or recognizance in the same case,[23] except upon

S. W. 113, as where the proof shows the defendant guilty within the statute. Carnal intercourse with a female who is under fifteen years of age, and who is not accused's wife, precludes bail. *Ex p.* Cotton, (Tex. Crim. 1899) 53 S. W. 632. Nor is assault with intent to kill bailable as a matter of right where the person wounded is in danger of dying within a year and a day unless the accused can show that he would be entitled to bail, even if death should ensue (*Ex p.* Andrews, 19 Ala. 582); and under such facts he will not be discharged until the danger is over (Com. *v.* Trask, 15 Mass. 277). An application to be permitted to give bail to await the action of the grand jury, where there is a violation of the excise law, may be refused. People *v.* Batten, 1 N. Y. Suppl. 721, 17 N. Y. St. 234. So one charged with an offense above petit larceny cannot demand bail as a matter of right. People *v.* Goodwin, 1 Wheel. Crim. (N. Y.) 434. Counterfeiting may be bailable or not in the court's discretion. State *v.* Howell, R. M. Charlt. (Ga.) 120. Where rape is punishable by statute, with death or life-imprisonment, bail will not be allowed. *Ex p.* Dusenberry, 97 Mo. 504, 11 S. W. 217. As to non-bailable offenses see also *Ex p.* Bonner, 100 Ala. 114, 14 So. 648; *Ex p.* Richardson, 96 Ala. 110, 11 So. 316; *Ex p.* Sloane, 95 Ala. 22, 11 So. 14; *Ex p.* Turner, 112 Cal. 627, 45 Pac. 571; Chan Gun *v.* U. S., 9 App. Cas. (D. C.) 290; Thrasher *v.* State, 26 Fla. 526, 7 So. 847; State *v.* Madison County Ct., 136 Mo. 323, 37 S. W. 1126; *In re* Bell, 113 Mo. 568, 21 S. W. 221; Ford *v.* State, 42 Nebr. 418, 60 N. W. 960; *In re* Boulter, 5 Wyo. 263, 39 Pac. 875.

Accomplice not entitled to bail where the crime is murder, and he has testified for the government, and there has been no trial or conviction. *Ex p.* Birch, 8 Ill. 134.

In cases of felony it has been held in some cases that the right to bail is not absolute but rests in court's discretion. People *v.* Van Horne, 8 Barb. (N. Y.) 158; People *v.* Goodwin, 1 Wheel. Crim. (N. Y.) 434.

17. Abolition of capital punishment.— Matter of Perry, 19 Wis. 676, holding that the abolition of capital punishment will entitle persons charged with murder to bail in all cases.

18. Age of prisoner.— *Ex p.* Walker, 28 Tex. App. 246, 13 S. W. 861, construing Tex. Pen. Code, arts. 35, 609, and holding that one under seventeen years of age who commits murder will be admitted to bail.

19. Health and physical condition of prisoner.— The court will, upon a proper showing, admit the prisoner to bail where his health and physical condition is such as to justify the belief that continued imprisonment would probably result fatally, or at least endanger his life, or be ultimately dangerous thereto; otherwise, relief has generally been refused, except perhaps where there are other matters which, in connection with such bad health or disease, might warrant letting to bail. For this reason bail was allowed in *In re* Ward, 127 Cal. 489, 59 Pac. 894, 47 L. R. A. 466; *Ex p.* Azhderian, 123 Cal. 512, 56 Pac. 1130; *Ex p.* Wheeler, (Miss. 1898) 24 So. 261; Archer's Case, 6 Gratt. (Va.) 705; Com. *v.* Semmes, 11 Leigh (Va.) 696; Thomas *v.* State, 40 Tex. 6; U. S. *v.* Jones, 3 Wash. (U. S.) 224, 26 Fed. Cas. No. 15,495. Bail was not allowed for this cause in Lester *v.* State, 33 Ga. 192; *Ex p.* Pattison, 56 Miss. 161; Cole's Case, 4 Abb. Pr. N. S. (N. Y.) 280; *Ex p.* Meador, (Tex. Crim. 1892) 20 S. W. 371.

Insanity.— Bail should be refused where plea of not guilty and present insanity is entered. People *v.* Watson, 14 Misc. (N. Y.) 430, 35 N. Y. Suppl. 852, 70 N. Y. St. 327. But it is also determined that, after indictment, the accused is entitled to bail if the testimony as to his insanity, that being the issue, is such as to induce the belief that the "proof is evident or presumption great." Zembrod *v.* State, 25 Tex. 519. See *Ex p.* Miller, 41 Tex. 213.

20. Agreement to turn state's evidence.— *Ex p.* Greenhaw, (Tex. Crim. 1899) 53 S. W. 1024, wherein it is held that an agreement of a state's attorney to grant an accomplice in a capital offense immunity from punishment, and to admit him to bail when he should have reasonably complied with his agreement to give evidence for the state is ultra as to the promise to let to bail, and he is merely relegated to his rights under the statute as to bail.

21. Prisoner's financial condition and his wife's frail health.— Hill *v.* State, 64 Miss. 431, 1 So. 494.

22. Prisoner's poverty.— Matter of Jahn, 55 Kan. 694, 41 Pac. 956. This fact of poverty also goes to the amount of bail under which heading it is considered herein. See also *Ex p.* Lewis, (Tex. Crim. 1896) 38 S. W. 1150; and *infra*, III, E.

23. Allen's Case, 126 Mass. 224, also holding the statute applicable where a recogni-

reasonable excuse being shown for such default, and a statute so providing is constitutional.[24]

c. Status and Progress of Case[25]— (i) *After Indictment Found.* As a rule, in cases not within the constitutional or statutory exceptions, bail will be refused after indictment found.[26] This rule is not, however, enforced in all jurisdictions exclusive of circumstances entitling to bail, and some decisions hold that bail is a matter of right upon a proper showing.[27]

(ii) *Continuance or Delay of Trial.* While it has been held that one charged with a capital offense is entitled to bail as a matter of right in case of

zance to answer any indictment for the same offense has been defaulted, and defendant asks to be permitted to recognize anew.

24. Extent and limits of rule.— Bail has been denied where the prisoner, convicted and imprisoned for an offense in one county, has escaped and been arraigned in another county for a similar offense committed after such escape. State *v.* Burrows, Kirby (Conn.) 259. But bail has been granted by the higher court where accused has been charged with a lesser offense than the one on which there was a breach of a prior bond, since the question relating to such breach was for the lower court. State *v.* Judge Twenty-First Judicial Dist. Ct., 48 La. Ann. 95, 18 So. 904. And in Lee's Case, 15 Fed. Cas. No. 8,180, 6 Phila. (Pa.) 96, 22 Leg. Int. (Pa.) 284, it is held that one does not forfeit his right to be liberated on bail by a breach of a prior bond; but that the court should always exercise caution as to the amount of the bond and number of sureties.

25. The right to bail sometimes depends upon the status or progress of the case. The words "before conviction" appear in some of the constitutional provisions relating to the time within which bail may be demanded. See *infra*, notes 26 *et seq.*

Delay in finding an indictment after commitment for assault with intent to kill does not entitle the accused to bail as a matter of right, where a year and a day has not elapsed and the wounded person still lives, unless it also appears that defendant would be so entitled if death should ensue within such period of time. *Ex p.* Andrews, 19 Ala. 582.

Examination postponed.—Bail has been allowed where there is adjournment of an examination of a person arrested in one state for the crime of murder in the second degree committed in another state. State *v.* Hufford, 23 Iowa 579.

26. General rule supported.— *Alabama.*— Always refused at common law in capital cases. *Ex p.* Bryant, 34 Ala. 270.

Iowa.— Hight *v.* U. S., Morr. (Iowa) 407, 43 Am. Dec. 111.

Missouri.— State *v.* Madison County Ct., 136 Mo. 323, 37 S. W. 1126.

New York.— People *v.* Van Horne, 8 Barb. (N. Y.) 158.

Ohio.— Kendle *v.* Tarbell, 24 Ohio St. 196; Martin *v.* State, 17 Ohio Cir. Ct. 406, 9 Ohio Cir. Dec. 621, where indictment was for murder, but it appeared that the trial had been fixed for an early day and that was evidently the main reason for refusing bail.

United States.— U. S. *v.* Jones, 3 Wash. (U. S.) 224, 26 Fed. Cas. No. 15,495; U. S. *v.* Burr, 25 Fed. Cas. No. 14,693.

England.— 1 Bacon Abr. 581; Petersdorf Bail, 270, 521; Reg. *v.* Guttridge, 9 C. & P. 228, 38 E. C. L. 143; Reg. *v.* Chapman, 8 C. & P. 558, 34 E. C. L. 890; Rex *v.* Marks, 3 East 157; Rex *v.* Mohun, 1 Salk. 104; Lester's Case, 1 Salk. 103.

See 5 Cent. Dig. tit. "Bail," § 142.

Not discharged without bail after indictment.— Parker *v.* State, 5 Tex. App. 579; Hernandez *v.* State, 4 Tex. App. 425.

27. Rule not strictly enforced.— *Alabama.* — *Ex p.* Williams, 114 Ala. 29, 22 So. 446 (holding that bail is a matter of right upon a proper petition and evidence, under Ala. Crim. Code (1886), §§ 142, 4415, 4417, the case being an indictment for murder in the first degree); *Ex p.* Howard, 30 Ala. 43 (holding it a matter of right, but the indictment was for homicide of a slave).

California.— People *v.* Tinder, 19 Cal. 539, 81 Am. Dec. 77.

Illinois.— Sloan *v.* People, 23 Ill. 77, bail allowed at any time after indictment without waiting for a warrant to arrest, the prisoner being in the sheriff's custody.

Indiana.— Brown *v.* State, 147 Ind. 28, 46 N. E. 34; *Ex p.* Jones, 55 Ind. 176.

New York.— People *v.* Van Horne, 8 Barb. (N. Y.) 158, holding that there are circumstances arising after indictment justifying allowance of bail. See also Gorsline's Case, 10 Abb. Pr. (N. Y.) 282, 21 How. Pr. (N. Y.) 85 (holding that it is only a prisoner who has been committed that can be bailed on habeas corpus); People *v.* Porter, 8 Barb. (N. Y.) 168 note (as to power under certain circumstances to admit to bail after indictment for murder).

Pennsylvania.— Com. *v.* Lemley, 2 Pittsb. (Pa.) 362; Com. *v.* Keeper Prison, 2 Ashm. (Pa.) 227.

Wyoming.— State *v.* Crocker, 5 Wyo. 385, 40 Pac. 681.

England.— Bail allowed on charge of manslaughter by coroner's jury. Rex *v.* Mills, 4 N. & M. 6, 30 E. C. L. 573.

See 5 Cent. Dig. tit. "Bail," § 142.

A statute has been decided to be unconstitutional where it provides that no person under indictment for a capital offense shall be admitted to bail after indictment. State *v.* Crocker, 5 Wyo. 385, 40 Pac. 681, the only exception in the constitution [Wyo. Const. art. 1, § 14] being "capital offenses when the proof is evident or the presumption great."

undue delay or continuance of the trial, when such delay was without the accused's fault or assent, and so even though there had been a prior continuance at his request,[28] and that the accused may insist upon his right to be discharged on bail on account of a premature unauthorized adjournment of the term[29] at which he was properly triable,[30] a majority of the decisions are to the effect that bail in such cases is not a matter of right, where there is a justifiable cause for such continuances or delay;[31] but the delay to prosecute should not operate oppressively,[32] nor should the trial be unreasonably delayed.[33] It has, however, been decided that the accused is not entitled to a release where the delay or continuance has been at his request and for his benefit;[34] and that bail will not be allowed where the inability of the state to proceed to trial is occasioned by the accused's acts.[35] So too it has been held in some cases that bail will not be allowed even though the continuance or delay is at the state's instance or through its fault,[36] or is occasioned by illegalities relating to the indictment,[37] or irregulari-

28. *Ex p.* Stiff, 18 Ala. 464, where the cause was continued at one term on account of the incompetency of the judge to try the accused, and at the succeeding term by the state.

Where there is a statutory right to bail in a capital case, if more than one continuance has been granted to the state, accused is entitled to bail at the same term, whereat the second continuance was granted and he is entitled to be so admitted without any formal demand for a trial. *Ex p.* Walker, 3 Tex. App. 668.

29. **"Term" means an actual session available for trial,** and all circumstances of physical, moral, or legal necessity which prevent trial are exceptions which take a case out of the statute. Com. *v.* Brown, 11 Phila. (Pa.) 370, 32 Leg. Int. (Pa.) 430.

30. *Ex p.* Croom, 19 Ala. 561, even though he was in a distant prison and it was unsafe to remove him on account of his wounds, and although he made no application for trial, and might have continued his trial on account of his condition.

31. **Good cause for delay or continuance.**— As where the continuances were four in number, twice on account of defects in the venire or the service, once for want of time, and once for sickness of the judge. *Ex p.* Carroll, 36 Ala. 300. So, where there has been a change of venue which set aside the first continuance, a second continuance in the court of the state where transferred does not entitle to bail as of right. *Ex p.* Johnson, 18 Ala. 414. And although bail is not a statutory matter of right where one accused of a capital offense is not tried at the term at which he was first triable, by reason of non-attendance of the state's witnesses, "where an affidavit is made, satisfactorily accounting for their absence," yet the court is not obligated to admit accused to bail where such affidavit is not made, but it may be permitted to be made on habeas corpus. *Ex p.* Chaney, 8 Ala. 424. Nor does long delay give an absolute right to bail, but the court may consider whether it will let to bail and may consider the prisoner's escape after indictment as a factor. State *ex rel.* Vickers, 47 La. Ann. 662, 17 So. 296. And although the statute provides that the cause may be continued from term to term, and the accused bailed on his own undertaking, or discharged, it is not obligatory as a matter of right to compel admission to bail. *Ex p.* Lowrie, 4 Utah 177, 7 Pac. 493.

Constitutionality of statute.— An enactment providing that bail is not a matter of right where defendant is not tried at the first term, but that if he is not tried at the second term he may claim to be discharged unless the failure to try is occasioned by his own fault or misfortune, or on his application, or with his assent, is not in conflict with the constitution. *Ex p.* Croom, 19 Ala. 561.

32. **Delay should not operate oppressively.** — State *v.* Abbot, R. M. Charlt. (Ga.) 244. One charged with felony is entitled to bail where trial is delayed unless the state's witnesses could not be produced, or the defendant assented to the delay. *Ex p.* Simonton, 9 Port. (Ala.) 390, 33 Am. Dec. 320.

33. **Delay should not be unreasonable.**— People *v.* Tinder, 19 Cal. 539, 81 Am. Dec. 77.

So a long delay at the instance of the prosecution authorizes the exercise of the court's discretion as to bail. Territory *v.* McFarlane, 1 Mart. (La.) 216, 5 Am. Dec. 706. And unless the count with which accused is charged is within the excepted cases his trial cannot be delayed from term to term without bail being allowed. *Ex p.* Croom, 19 Ala. 561; Com. *v.* Phillips, 16 Mass. 423; State *v.* Buyck, 2 Bay (S. C.) 563.

34. **For benefit of accused.**— U. S. *v.* Stewart, 2 Dall. (U. S.) 343, 1 L. ed. 408, 27 Fed. Cas. No. 16,401, Whart. St. Tr. 172, even though he announces his readiness to proceed to trial at the close of the trial term before adjournment.

35. **Fault of accused.**— Com. *v.* Philadelphia County Prison, 4 Brewst. (Pa.) 320, absence of material witnesses through the accused's procurement.

36. **At instance of state.**— State *v.* Butler, 40 La. Ann. 3, 3 So. 350, a case of capital offense. As a continuance for want of witnesses. State *v.* Holmes, 3 Strobh. (S. C.) 272; U. S. *v.* Jones, 3 Wash. (U. S.) 224, 26 Fed. Cas. No. 15,495.

37. **Illegalities as to indictment.**— State *v.* Villeré, 41 La. Ann. 572, 6 So. 827.

ties in procuring the continuance,[38] or where the delay is short,[39] and especially where the state interposes no obstacle to a speedy trial.[40]

(III) *During Trial.* Where the accused is free on bail he may be ordered into actual custody during the trial of the case.[41] Nor will bail be allowed during adjournments of the daily sessions of the court;[42] nor will accused be admitted to bail during the progress of a new trial after reversal of a conviction of murder.[43]

(IV) *Upon Conviction.* The right to admit to bail after conviction, before sentence, has been decided not to be taken away by the words "before conviction" in the constitution.[44] It has also been held that it is a matter of discretion with the supreme court on habeas corpus, notwithstanding an inflexible rule of the trial court, not to admit any person convicted of felony to bail;[45] and that a prisoner may be admitted to bail after conviction to appear and abide the sentence of the court, in cases not capital,[46] where the record of conviction is not made up and the court has nothing before it on which to proceed for sentence,[47] or where the execution of the sentence is suspended;[48] and it is held that this discretion may be exercised after conviction of an infamous offense,[49] or upon conviction of manslaughter and recommendation to mercy.[50] But bail will not be granted in any such case as a matter of right;[51] nor after conviction of murder where the statute so prohibits;[52] nor in capital cases.[53]

(V) *Upon Mistrial.* A mistrial does not give one accused of a capital offense an absolute right to bail, although it may, in connection with other circumstances, constitute proper matter for the exercise of the court's discretion as to allowing bail,[54] and this is true as to a disagreement of the jury which does not

38. **Irregularities in procuring continuance.** — *Ex p.* Campbell, 20 Ala. 89, where continuance was procured on the unsworn statement of the prosecutor.

39. **Short delay.**— State *v.* Butler, 40 La. Ann. 3, 3 So. 350.

40. State *v.* Villeré, 41 La. Ann. 572, 6 So. 827.

41. **Court may order into custody.**— People *v.* Williams, 59 Cal. 674.

Court should order into custody.— People *v.* Beauchamp, 49 Cal. 41.

Such power is not restricted by a previous allowance of bail by another court. Adkins *v.* Com., 98 Ky. 539, 17 Ky. L. Rep. 1091, 33 S. W. 948, 32 L. R. A. 108.

The accused remains in custody during a trial for felony, unless, as authorized by some statutes, his bail consent in court to his remaining on bail. White *v.* Com., 80 Ky. 480 (where accused was, upon compliance with the statute and under the claim that his freedom was necessary to the preparation of his defense, allowed continuance of his bail); Willis *v.* Com., 7 Ky L. Rep. 229 (holding also that trial does not begin until jury has been selected and explaining the meaning of the words "during trial").

42. **During adjournments.**— Com. *v.* Rusk, 7 Wkly. Notes Cas. (Pa.) 486.

43. **During progress of new trial.**— Hull *v.* Reilly, 87 Mich. 497, 49 N. W. 869.

44. State *v.* Levy, 24 Minn. 362. But see *Ex p.* Ezell, 40 Tex. 451, 19 Am. Rep. 32. *Compare* State *v.* Vion, 12 La. Ann. 688, construing Louisiana constitution and holding that a bond given for the appearance of the accused after he has been convicted of larceny is null, and the surety on such a bond will be discharged.

45. **Discretion of supreme court.**— *Ex p.* Smith, 89 Cal. 79, 26 Pac. 638, under Cal. Pen. Code, § 1272.

46. **In cases not capital.**— Davis *v.* State, 6 How. (Miss.) 399; Hampton *v.* State, 42 Ohio St. 401; State *v.* Connor, 2 Bay (S. C.) 34; U. S. *v.* Greenwood, 1 Cranch C. C. (U. S.) 186, 26 Fed. Cas. No. 15,260.

47. **Where record is not made up.**— McNeill's Case, 1 Cai. (N. Y.) 72; Col. & C. Cas. (N. Y.) 175, a case of conspiracy.

48. **Execution suspended.**—State *v.* Smith, 3 N. C. 50.

49. **After conviction of infamous offense.** — State *v.* Satterwhite, 20 S. C. 536, holding, however, that the court should, in such cases, exercise great caution. *Contra*, State *v.* Connor, 2 Bay (S. C.) 34.

50. **Upon recommendation to mercy** after conviction of manslaughter. State *v.* Frink, 1 Bay (S. C.) 168.

51. **Not as a matter of right.**— *Ex p.* Brown, 68 Cal. 176, 8 Pac. 829. Nor before judgment, and a verdict of "guilty" constitutes conviction. See People *v.* Dixon. 3 Abb. Pr. (N. Y.) 395, 4 Park. Crim. (N. Y.) 651.

No constitutional right.— It has also been held that there exists no constitutional right to bail after conviction. State *v.* Vion, 12 La. Ann. 688; Hill *v.* State, 64 Miss. 431, 1 So. 494; *Ex p.* Dyson, 25 Miss. 356. And see U. S. *v.* Devlin, 25 Fed. Cas. No. 14,955, 7 Int. Rev. Rec. 44. But see *Ex p.* Smith, 89 Cal. 79, 26 Pac. 638.

52. Baldwin *v.* Westenhaver, 75 Iowa 547, 39 N. W. 882.

53. Hampton *v.* State, 42 Ohio St. 401.

54. **Mistrials.**— State *ex rel.* Vickers, 47 La. Ann. 662, 17 So. 296. See also Territory *v.* McFarlane, 1 Mart. (La.) 216, 5 Am. Dec. 706; *Ex p.* Pattison, 56 Miss. 161.

entitle the prisoner to be bailed as of course,[55] although the failure of two successive juries to agree is a circumstance strongly showing the lack of sufficient evidence within the reasoning of the fundamental law as to bailable offenses. It does not, however, preclude the court on habeas corpus from inquiring into the sufficiency of the proof.[56]

(VI) *Where Appeal, Error, or Motion For New Trial Is Pending.* The decisions are not in harmony as to the admission to bail pending an appeal, or writ of error, etc., and it is difficult to deduce any general rule of value, for the reason that the nature of the offense and the constitutional and statutory provisions governing the particular case should be considered, involving, as they necessarily must do, the construction and validity of enactments relating to such proceedings.[57] It would seem, however, that, in a majority of jurisdictions, bail will be permitted where the offense is not of a character wherein the right to bail is precluded by the constitution or statute, or where there is no express provision of the law, especially including appeal, error, and similar proceedings, as those in which bail should not be allowed. Provided, however, that in those cases where bail has been granted the matter has generally rested upon the court's discretion under the evidence, in the absence of a mandatory statute making bail substantially a matter of right on appeal, etc., and even then it appears that ordinarily much must depend upon the circumstances.[58] There are, however, many

55. **Disagreements of juries.**— State *ex rel.* Vickers, 47 La. Ann. 662, 17 So. 296 (holding also that the disagreement merely affords in connection with other testimony matter for consideration); Cole's Case, 4 Abb. Pr. N. S. (N. Y.) 280; State *v.* Summons, 19 Ohio 139; Webb *v.* State, 4 Tex. App. 167 (for the reason that such disagreement is not of itself exclusively indicative that the proof of guilt is not "evident").

56. **Disagreement of two successive juries.** — Matter of Alexander, 59 Mo. 598, 21 Am. Rep. 393.

Whether or not public justice is more securely protected by refusing than accepting bail is a question which should be considered.

California.—*Ex p.* McLaughlin, 41 Cal. 211, 10 Am. Rep. 272, where the prisoner was charged with murder, and, after being confined seven months, was tried, jury disagreed, and was discharged over defendant's objection and bail was allowed.

Missouri.— *Ex p.* Goans, 99 Mo. 193, 12 S. W. 635, 17 Am. St. Rep. 571, where the disagreement was considered in connection with other evidence as a factor bearing on the allowance of bail.

New York.— People *v.* Perry, 8 Abb. Pr. N. S. (N. Y.) 27 (where bail was allowed after two disagreements); Cole's Case, 4 Abb. Pr. N. S. (N. Y.) 280 (the trial was for murder and the jury disagreed; the prosecution promptly moved a second trial; the proofs against the prisoner were of a grave character and there was no satisfactory evidence that he was unable to bear the confinement and bail was denied).

Ohio.— State *v.* Summons, 19 Ohio 139, where the question was considered but bail was held allowable in the court's discretion if the facts justified.

Texas.— *Ex p.* England, 23 Tex. App. 90, 3 S. W. 714, where bail was allowed.

57. **Construction and constitutionality of statutes.**— Where "corporal punishment" is among the statutory exceptions of the right to bail pending review, such words do not include imprisonment. Ritchey *v.* People, 22 Colo. 251, 43 Pac. 1026. And a statute which provides that upon appeal by defendant in cases of felony he shall be committed to jail until the decision of the supreme court does not violate a constitutional provision permitting bail only before conviction. *Ex p.* Ezell, 40 Tex. 451, 19 Am. Rep. 32. See also *In re* Boulter, 5 Wyo. 263, 39 Pac. 875; State *v.* Crocker, 5 Wyo. 385, 40 Pac. 681. Accused is not deprived of liberty without due process of law by N. Y. Code Civ. Proc. §§ 527, 555, providing for bail on appeal of defendant from conviction of a crime not punishable with death only when there is a stay of proceedings by filing a certificate of a judge that there is a reasonable doubt whether the judgment should stand; nor are such sections repugnant to U. S. Const. art. 4, § 2, guaranteeing to citizens of each state all the privileges and immunities of citizens of the several states. McKane *v.* Durston, 153 U. S. 684, 14 S. Ct. 913, 38 L. ed. 867. Oklahoma act of Feb. 2, 1895, providing for bail pending appeal in certain criminal cases, excludes from its operation convictions of offenses "punishable by death or incarceration for life." *In re* Shoemaker, 2 Okla. 606, 607, 39 Pac. 284.

58. **Pending petition in error after conviction of felony,** the right to bail is in the court's discretion.

California.— *Ex p.* Voll, 41 Cal. 29.

Mississippi.— *Ex p.* Dyson, 25 Miss. 356.

Nebraska.— Ford *v.* State, 42 Nebr. 418, 60 N. W. 960.

New York.— People *v.* Lohman, 2 Barb. (N. Y.) 450.

North Carolina.— State *v.* Ward, 9 N. C. 443.

cases in which bail has been refused in proceedings of the character under consideration. In some of the adjudications the right to bail has not been denied on principle, but only under the facts, and the ruling is not therefore in conflict with what has been hereinbefore stated, while in other cases there has been an unqualified denial of bail as a legal right.[59]

Pennsylvania.—Com. *v.* Myers, 137 Pa. St. 407, 27 Wkly. Notes Cas. (Pa.) 205, 21 Atl. 246. See also cases cited *infra*, this note.

See 5 Cent. Dig. tit. "Bail," § 145.

One convicted of felony will not be let to bail pending an appeal, unless circumstances of an extraordinary character have intervened. *Ex p.* Smith, 89 Cal. 79, 26 Pac. 638; People *v.* Marshall, 59 Cal. 386; *Ex p.* Smallman, 54 Cal. 35; *Ex p.* Marks, 49 Cal. 680; People *v.* Bowe, 58 How. Pr. (N. Y.) 393.

Particular instances of allowance.— *California.*— In embezzlement held a matter of discretion. *In re* Ward, 127 Cal. 489, 59 Pac. 894, 47 L. R. A. 466. If offense is one for which court may in its discretion sentence for a felony or misdemeanor and the appeal is not frivolous. People *v.* Perdue, 48 Cal. 552; *Ex p.* Hoge, 48 Cal. 3.

Florida.— On writ of error. Miller *v.* State, 15 Fla. 575.

Illinois.— For larceny on writ of error, where very clear that there can be no conviction on another trial. Bennett *v.* People, 94 Ill. 581.

Iowa.— Code, § 4511, provides that court must fix the bail and this suspends judgment. Murphy *v.* McMillan, 59 Iowa 515, 13 N. W. 654.

Kansas.— Misdemeanor on appeal. State *v.* Allison, 44 Kan. 423, 24 Pac. 964.

Louisiana.— In cases not within the constitutional exception the court has no discretion to refuse bail even pending appeal. Governor *v.* Fay, 8 La. Ann. 490; State *v.* Roger, 7 La. Ann. 382; Longworth Praying for Writ of Habeas Corpus, 7 La. Ann. 247.

Michigan.— Matter of Montague, 70 Mich. 157, 38 N. W. 15.

Missouri.— Entitled on appeal from perjury conviction. *In re* Bauer, 112 Mo. 231, 20 S. W. 488.

Nebraska.— Rests in court's discretion after conviction for felony and petition in error, and a showing of probable reversal. Ford *v.* State, 42 Nebr. 418, 60 N. W. 960.

New York.— On writ of error after conviction of a misdemeanor. People *v.* Folmsbee, 60 Barb. (N. Y.) 480. But the application to be let to bail will be granted with great caution after affirmance of a conviction by the supreme court and pending a writ of error to the court of appeals. People *v.* Lohman, 2 Barb. (N. Y.) 450. And so even though the statute authorizes bail pending an appeal. People *v.* Lohman, 2 Barb. (N. Y.) 450.

North Carolina.—Entitled upon giving bail to be released during certiorari sued out as a substitute for an appeal lost through failure to perfect. State *v.* Walters, 97 N. C. 489, 2 S. E. 539, 2 Am. St. Rep. 310.

Ohio.— Entitled after conviction for perjury pending motion for new trial. State *v.* Granville, 9 Ohio Dec. (Reprint) 626, 15 Cinc. L. Bul. 419.

Oklahoma.—Bail on appeal in federal criminal cases must be given as required in territorial criminal cases. U. S. *v.* Raidler, (Okla. 1896) 48 Pac. 270; *Ex p.* Murphy, 1 Okla. 288, 29 Pac. 652.

Pennsylvania.— Upon quashing indictment and pending removal of case to supreme court, the court has discretion pending certiorari or writ of error to hold defendant to bail or to release him on his own recognizance. Com. *v.* Bartilson, 85 Pa. St. 482. Under special circumstances after conviction of larceny until motion for new trial. Respublica *v.* Jacob, 1 Smith Laws (Pa.) 57.

South Carolina.— In discretion of court pending appeal from conviction of manslaughter. State *v.* McFail, 35 S. C. 595, 14 S. E. 289.

Texas.— In all cases of misdemeanor, on appeal defendant must give bail for appearance, or pay the fine or go to jail. Golden *v.* State, 32 Tex. 737.

United States.— After conviction and sentence for embezzlement, on appeal bail was refused until application made for advancing the case on the docket as the public interest required a speedy disposition of the cause. U. S. *v.* Simmons, 47 Fed. 723, 14 L. R. A. 78. When a matter of right, and when of discretion under the statute, see Clawson *v.* U. S., 113 U. S. 143, 5 S. Ct. 393, 28 L. ed. 957.

See 5 Cent. Dig. tit. "Bail," § 145.

59. Particular instances of refusal.— *Illinois.*— On writ of error from conviction of larceny. Bennett *v.* People, 94 Ill. 581, wherein the rule is well stated.

Iowa.— Failure of court to fix the bail will not entitle prisoner to be discharged on habeas corpus. Murphy *v.* McMillan, 59 Iowa 515, 13 N. W. 654.

Louisiana.— Where crime is necessarily punishable with imprisonment and hard labor within the constitutional exception, accused not entitled to bail pending a suspensive appeal by the state from an order in arrest of judgment for defects in indictment. State *v.* Anselm, 43 La. Ann. 195, 8 So. 583.

Mississippi.— Facts not sufficient to justify release in case of manslaughter. Hill *v.* State, 64 Miss. 431, 1 So. 494.

New York.— Not let to bail after sentence where imprisonment begins on the day thereof. People *v.* Restell, 3 How. Pr. (N. Y.) 251.

North Carolina.— Not entitled where appeal is merely for delay. State *v.* Daniel, 30 N. C. 21.

North Dakota.— Order invalid continuing bail after writ of error. *In re* Markuson, 5 N. D. 180, 64 N. W. 939.

(VII) *WHERE CONVICTION IS REVERSED.* Where a conviction has been reversed the prisoner is not entitled to release by virtue of his former bail-bond;[60] but it has been held that a new recognizance for appearance is valid when taken after judgment reversed for error, even though the order of reversal is subsequently set aside.[61]

(VIII) *WHERE SECOND APPLICATION IS MADE.* A valid judgment on habeas corpus denying bail is *res adjudicata* unless reversed,[62] and it continues as a bar throughout the same case and after indictment, so as to preclude allowing bail on a second application therefor on a state of facts existing when the judgment was rendered;[63] but such bar may be avoided by some new state of the case which would be a ground for granting bail exclusive of the testimony given on the first hearing.[64] If, however, after admission to bail of one indicted for murder the cause is dismissed he is entitled to bail where he is again indicted, for his right to bail is also *res adjudicata*.[65]

d. Surrender by Bail. After surrender by his bail of an alleged criminal who

Ohio.— Recognizance void on allowance of writ of error. State *v.* Clark, 15 Ohio 595.

South Carolina.— Not entitled, where offense infamous, on motion in arrest and for new trial. State *v.* Connor, 2 Bay (S. C.) 34.

Texas.— Cannot be released. Warnock *v.* State, 6 Tex. App. 450.

Washington.— Pending appeal by one in custody under an extradition warrant from an order in habeas corpus remanding to custody. Matter of Foye, 21 Wash. 250, 57 Pac. 825.

Wyoming.— Not entitled under Wyo. Rev. Stat. § 3326, pending proceedings in error where conviction is for felony. *In re* Boulter, 5 Wyo. 263, 39 Pac. 875.

United States.— On felony cannot be released. U. S. *v.* Hudson, 65 Fed. 68. Defendant who has been sentenced to pay a fine, and also to imprisonment, not entitled to bail after appeal as a matter of right though a certificate of probable cause filed. Clawson *v.* U. S., 113 U. S. 143, 5 S. Ct. 393, 28 L. ed. 957. Nor can bail be taken during time given to counsel to prepare a case and move in arrest of judgment. U. S. *v.* Devlin, 25 Fed. Cas. No. 14,955, 7 Int. Rev. Rec. 44.

See 5 Cent. Dig. tit. "Bail," § 145.

60. *Ex p.* Williams, 114 Ala. 29, 22 So. 446, also holding that the fact that defendant was admitted to bail before a trial for murder in the first degree will not be considered in determining his right to bail after conviction reversed. But see, on the point that new bail is not required in such case, *Ex p.* Guffee, 8 Tex. App. 409.

After reversal of conviction of less degree than that charged.— In State *v.* Helm, 92 Iowa 540, 61 N. W. 246, it is held that a conviction of murder in a less degree than that charged operates as an acquittal of the latter, and upon a reversal the prisoner stands as unconvicted and may be let to bail even though the statute precludes allowing bail for murder after conviction.

61. Brewer *v.* State, 6 Lea (Tenn.) 198. See also Hull *v.* Reilly, 87 Mich. 497, 49 N. W. 869, where the prisoner's conviction of murder was reversed with order for a new trial, and he was admitted to bail.

62. Reviewing refusal of bail.— The presumption exists unless rebutted, that the court's refusal of bail was proper upon the evidence, and that abuse of discretion must therefore be shown to justify disturbing such refusal upon proceeding in review thereof. State *v.* Madison County Ct., 136 Mo. 323, 37 S. W. 1126.

63. *Ex p.* Hamilton, 65 Miss. 98, 3 So. 68 (under Miss. Code (1880), § 2534, declaring the effect of judgments on habeas corpus); *Ex p.* Pattison, 56 Miss. 161. Nor can a party make a second application to a circuit judge, and take such exceptions as will bring the original judgment and evidence before the appellate court. *Ex p.* Carroll, 36 Ala. 300. So the court, although not bound to do so, may decline to hear another application based on the same facts. *Ex p.* Campbell, 20 Ala. 89. And on certiorari an order of a justice of the supreme court admitting to bail on application made after refusal of bail by the committing magistrate will be reversed, as the matter became *res adjudicata* before it was brought before said justice. People *v.* Cunningham, 3 Park. Crim. (N. Y.) 531 [*reversing* 3 Park. Crim. (N. Y.) 520].

64. The proof, however, should not be newly discovered evidence as to old facts, but of matters which have actually occurred since the hearing on the original writ and upon such newly developed exculpatory proof bail may be allowed where there are other justifiable causes (*Ex p.* Pattison, 56 Miss. 161, a mistrial having also intervened); and where the return on the second writ shows that the prisoner was remanded on the first writ for an offense not bailable, such remand is conclusive against the second application (*Ex p.* Turner, 36 Mo. App. 75, under Mo. Rev. Stat. (1879), § 2672).

65. *Ex p.* Augustine, 33 Tex. Crim. 1, 23 S. W. 689, 47 Am. St. Rep. 17. And so where bail has been fixed before indictment accused may have another writ of habeas corpus and again be bailed after indictment if proper upon the facts. *Ex p.* Wilson, 20 Tex. App. 498, construing Tex. Code Crim. Proc. art. 187.

has been at large the sheriff may again admit such offender to bail with new sureties.[66]

B. Waiver of Right to Bail. Accused may waive his right to bail.[67]

C. Jurisdiction and Authority to Admit to Bail — 1. Courts and Judicial Officers — a. In General. Courts have inherent power to take a recognizance,[68] the authority to bail being incident to the right to hear and determine the offense charged;[69] and ordinarily a recognizance may be taken either by a court as such or by a judge thereof;[70] or in chambers in term-time for appearance during a subsequent day of that term.[71] If, however, no authority is conferred upon a judge to take a recognizance out of court, except in vacation, the doing such an act in term-time is void.[72]

b. Judges of Appellate Courts. Judges of appellate courts have power to admit to bail in certain cases.[73] And the supreme court of appeals may, on

66. **May admit to new bail.**— Kellogg *v.* State, 43 Miss. 57. The fact that the accused at once gave himself up after the killing has been considered in connection with other facts. *Ex p.* Goans, 99 Mo. 193, 12 S. W. 635, 17 Am. St. Rep. 571. See also *infra*, III, L.

Reasonable time and opportunity after surrender by his sureties pending appeal should be given accused to make another bond. *In re* Bauer, 112 Mo. 231, 20 S. W. 488.

67. Matter of Malison, 36 Kan. 725, 14 Pac. 144 (holding that where a defendant, charged with murder in the first degree, waives a preliminary examination for such offense, he not only waives his right to be let to bail, but also to have the facts of the alleged offense examined into on habeas corpus; but where said waiver is made under fear of personal violence, he will not be estopped by reason of such waiver); Devine *v.* People, 20 Hun (N. Y.) 98 (holding that the accused by pleading to the charge, without objecting, and applying for and obtaining two adjournments, had waived his right to waive an examination and give bail).

68. U. S. *v.* Evans, 2 Flipp. (U. S.) 605, 2 Fed. 147, 1 Crim. L. Mag. 600.

Authority to take bail in civil actions see *supra*, II, E.

69. **Incident to right to hear cause.**— People *v.* Van Horne, 8 Barb. (N. Y.) 158; People *v.* Goodwin, 1 Wheel. Crim. (N. Y.) 434. But it cannot be implied as incidental to the power to adjourn hearings, if not so specified by statute. Hallett *v.* U. S., 63 Fed. 817. But see State *v.* Schaffer, 36 Mo. App. 589.

If the court has jurisdiction of the offense, and the defendant is personally present at court, no jurisdictional fact is lacking. *Ex p.* Chandler, 114 Ala. 8, 22 So. 285. An order of a magistrate admitting to bail a defendant not in the custody of the court is an absolute nullity. St. Clair *v.* Com., 11 Ky. L. Rep. 812. But the obligation to appear and answer a criminal charge does not depend upon jurisdiction as to the particular crime charged, but upon the duty and power of the magistrate to examine and admit such party to bail. State *v.* Edney, 20 N. C. 423.

When a judge is specially appointed to try a case, because of the disqualification of the judge of the court, the latter may, upon failure of the appointed judge to appear, continue the cause and take recognizance for appearance of the accused. State *v.* Schaffer, 36 Mo. App. 589.

70. **By either court or judge.**— State *v.* Zwifle, 22 Mo. 467, holding also that the record should show by whom taken. But it is decided that an examining court has no right, in cases of felony, to admit accused to bail, and that a bail-bond taken during examination is void, for there is no power in such court to release accused from custody. Com. *v.* Moore, 3 Metc. (Ky.) 477.

This rule is subject, however, to such exceptions as exist by reason of legislative enactments conferring exclusive jurisdiction upon certain courts and judges, or in certain criminal cases in the matter of hearing and determining applications for bail.

Arkansas.— See *Ex p.* Kittrel, 20 Ark. 499.

Kansas.— State *v.* Davis, 26 Kan. 205.

Louisiana.—State *v.* Hebert, 10 Rob. (La.) 41.

New York.— People *v.* Hurlbutt, 44 Barb. (N. Y.) 126.

Pennsylvania.— Com. *v.* Keeper Prison, 2 Ashm. (Pa.) 227.

See also *infra*, II, C, 1, b, *et seq.*; and 5 Cent. Dig. tit. "Bail," § 165 *et seq.*

A recognizance before a de facto judge is valid. Brown *v.* O'Connell, 36 Conn. 432, 4 Am. Rep. 89.

Either justice of the examining court may take and attest a bail-bond. Murphy *v.* Com., 11 Bush (Ky.) 217.

The president judge and associates may let to bail. Saxton *v.* State, 8 Blackf. (Ind.) 200.

71. **Taken in chambers.**—Crandall *v.* State, 6 Blackf. (Ind.) 284, circuit judge.

The power of a particular judge to let to bail at chambers may exist, independently of the habeas corpus act or of proceedings thereunder. State *v.* Wilson, 12 La. Ann. 189; State *v.* Everett, Dudley (S. C.) 295.

72. **Taken out of court during term.**— Com. *v.* Littell, 1 A. K. Marsh. (Ky.) 566.

The legislature may, where the constitution so permits, confer upon any local officer or special judge appointed to discharge the duties of county judge the authority to take bail, including taking recognizance out of court. People *v.* Main, 20 N. Y. 434.

73. **For example** in capital cases where the office of a circuit judge is vacant (*Ex p.* Kit-

habeas corpus, admit to bail, notwithstanding a statute limiting the power to take bail to other courts.[74] The supreme court has, however, refused to issue a writ of habeas corpus where the inferior court has authority to admit to bail a petitioner who has been committed to jail on default of bail;[75] and the authority of such court to take a recognizance has been denied, even where exceptions have been transmitted to it to be heard before sentence.[76]

c. Particular Superior and Inferior Courts and Judges Thereof. The power to admit to bail has been decided to rest upon the common law;[77] but inasmuch as such authority is based, in the cases hereinafter considered, upon the statute conferring jurisdiction, a discussion of this point becomes unnecessary. The degree of the crime charged may, however, affect the jurisdiction,[78] as may the county of commission of the offense;[79] and undoubtedly other jurisdictional requisites must exist. In addition the status or progress of the case is of importance.[80] Dependent therefore upon the foregoing general principles, and subject to such qualifications as have been mentioned, and which may be applicable to the particular case, it may be stated that inferior courts, or the judges thereof,[81]

trel, 20 Ark. 499); or where, on a charge of manslaughter, the judge of the court in which accused is held is absent from the state (State *v.* Duson, 36 La. Ann. 855); or where the court having cognizance of the offense is not sitting at the time the application for bail is made (People *v.* Clews, 14 Hun (N. Y.) 90, under Rev. Stat. § 56 [That N. Y. supreme court has original and appellate jurisdiction, and is also subject to appellate jurisdiction, see N. Y. Const. art. 6, §§ 1, 2]); or where the charge is of treason (Com. *v.* Holloway, 5 Binn. (Pa.) 512); or after arrest and commitment for trial (*In re* Durant, 60 Vt. 176, 12 Atl. 650).

74. *Ex p.* Eastham, 43 W. Va. 637, 27 S. E. 896.

So the queen's bench division of the high court may admit to bail, until the time for his return, a person who has been committed to prison under the fugitive offender's act to await his return to the place where the offense was committed. Reg. *v.* Spilsbury, [1898] 2 Q. B. 615. As to original and appellate jurisdiction of this court see 38 & 39 Vict. c. 77; 36 & 37 Vict. c. 66.

75. Belgard *v.* Morse, 2 Gray (Mass.) 406.

76. People *v.* McKinney, 9 Mich. 444. So in 1820 a judge of the supreme court of Missouri had no power to take recognizance of bail. Todd *v.* State, 1 Mo. 566.

Bail will not be reduced by the supreme court in the absence of a motion therefor in the lower court. State *v.* Aucoin, 47 La. Ann. 1677, 18 So. 709. And bail cannot be reduced by a magistrate or county judge after termination of their judicial power. Reed *v.* Com., 13 Ky. L. Rep. 637. But see *infra*, III, C, 1, f.

77. **At common law.**—State *v.* Hill, 3 Brev. (S. C.) 89, 1 Treadw. (S. C.) 242. See also *supra*, III, A, 1.

78. **Degree of crime.**—State *v.* Harper, 3 La. Ann. 598; State *v.* Hebert, 10 Rob. (La.) 41; Com. *v.* Keeper Prison, 2 Ashm. (Pa.) 227. But see People *v.* Hurlbutt, 44 Barb. (N. Y.) 126.

79. **County of commission.**—State *v.* Davis, 26 Kan. 205.

80. Thus it is determined that the trial court has no authority to release on bail, after conviction, until accused has appealed by service of the statutory notice. State *v.* Murphy, 23 Nev. 390, 48 Pac. 628. Defendant may be ordered into custody under Wyo. Rev. Stat. § 3326, after conviction of a felony, notwithstanding Wyo. Const. art. 1, § 14, c. 1, provides for bail. *In re* Boulter, 5 Wyo. 263, 39 Pac. 875. See also *supra*, III, A, 4, c, (VI).

81. **Circuit court or judges** have exclusive power after indictment in capital cases. *Ex p.* Kittrel, 20 Ark. 499. And such court may order accused into custody after trial commenced, notwithstanding bail has been allowed by a county judge. Adkins *v.* Com., 98 Ky. 539, 17 Ky. L. Rep. 1091, 33 S. W. 948, 32 L. R. A. 108. An application for bail under the habeas corpus act must be, in the first instance, to a judge of the circuit court for the county in which applicant is held in custody. State *v.* Woolery, 39 Mo. 525.

Circuit superior court or judges have power. Com. *v.* Semmes, 11 Leigh (Va.) 696.

City court of Mobile has jurisdiction coextensive with the circuit court of Mobile. Arnold *v.* State, 25 Ala. 69.

County judges have no power to bail in capital cases after indictment. *Ex p.* Kittrel, 20 Ark. 499. See also Bowman *v.* Com., 14 B. Mon. (Ky.) 313; Adkins *v.* Com., 98 Ky. 539, 17 Ky. L. Rep. 1091, 33 S. W. 948, 32 L. R. A. 108, as to effect of allowance. In People *v.* Rutan, 3 Mich. 42, the power of a county judge to take bail after indictment was asserted. Applications for bail under the habeas corpus act may be made in the second instance to a justice of the county court. State *v.* Woolery, 39 Mo. 525. So in New York such judges have power to bail all cases where supreme-court commissioners had power so to do prior to the constitution of 1846. People *v.* Hurlbutt, 44 Barb. (N. Y.) 126. And where there is an arrest and commitment for trial, bail can be taken before a judge of the county court. *In re* Durant, 60 Vt. 176, 12 Atl. 650. But the recognizance is decided to be invalid where accused has

have the power to admit to bail in all cases within the law which constitutes the basis and source of their jurisdictional authority in the premises, and not otherwise, and this includes superior and other courts which have both original and appellate jurisdiction, although they are not of dernier resort except perhaps in certain cases.

d. Justices of the Peace — (i) *In General.* The rule that every member of a court which has authority to try an offense can bail the offender has been applied to justices of the peace.[82] But the constitution[83] or the statute may limit the power of a justice or justices of the peace to take bail on a recognizance, where such power is not otherwise limited by general principles governing the jurisdiction of such courts;[84] and such limitation may be express or implied, so

not been committed to jail for trial. State *v.* Lamoine, 53 Vt. 568.

Court of criminal corrections of St. Louis. — See State *v.* Hoeffner, 44 Mo. App. 543.

Court of special sessions of the city of New York.— An application to be allowed to give bail to await the action of the grand jury in a case of violation of the excise law was refused. People *v.* Batten, 1 N. Y. Suppl. 721, 17 N. Y. St. 234. *Compare* People *v.* Justices Ct. Special Sessions, 74 N. Y. 406, 18 Alb. L. J. 254 [*affirming* 13 Hun (N. Y.) 533].

District court.— See State *v.* Branner, 15 La. Ann. 565.

General court or judges have power to bail. Hamlett *v.* Com., 3 Gratt. (Va.) 78; Com. *v.* Semmes, 11 Leigh (Va.) 696.

Judges of general sessions have power in all cases. State *v.* Hill, 3 Brev. (S. C.) 89, 1 Treadw. (S. C.) 242.

Oyer and terminer had power in all cases. People *v.* Van Horne, 8 Barb. (N. Y.) 158. See N. Y. Const. art. 6, § 6.

Parish judge cannot let to bail in certain cases. State *v.* Hebert, 10 Rob. (La.) 41; State *v.* Harper, 3 La. Ann. 598.

Police judge or justice in a city of the second class has no authority to take a recognizance for appearance before the district court of one charged with a felony beyond the city limits. State *v.* Davis, 26 Kan. 205. But *compare* Matter of Gessner, 53 How. Pr. (N. Y.) 515.

Presidents of courts of common pleas possessed some authority and jurisdiction to admit to bail as judges of the supreme court. Com. *v.* Keeper Prison, 2 Ashm. (Pa.) 227. Judge of common pleas has no power. Powell *v.* State, 15 Ohio 579.

Probate judges.—See *Ex p.* Keeling, 50 Ala. 474. And *compare Ex p.* Ray, 45 Ala. 15; Hale *v.* State, 24 Ala. 80.

Recorders and recorders' courts have power. State *v.* Moulin, 45 La. Ann. 309, 12 So. 142; State *v.* Judge Fifth Dist. Ct., 32 La. Ann. 315; Matter of Goodhue, 1 Wheel. Crim. (N. Y.) 427. But the power of the recorder of Philadelphia was limited. Com. *v.* Keeper Prison, 2 Ashm. (Pa.) 227. A city recorder appointed by military authority had power to take bail. Cline *v.* State, 34 Tex. 98.

Superior court has power in all cases (State *v.* McNab, 20 N. H. 160), until accused is in execution (Corbett *v.* State, 24 Ga. 391).

Supreme court or justices thereof in New York possess indisputable discretionary power in all cases. People *v.* Perry, 8 Abb. Pr. N. S. (N. Y.) 27; People *v.* Van Horne, 8 Barb. (N. Y.) 158; *Ex p.* Tayloe, 5 Cow. (N. Y.) 39. Even in vacation. People *v.* Goodwin, 1 Wheel. Crim. (N. Y.) 443. But authority denied in People *v.* Mead, 1 N. Y. Crim. 417, 28 Hun (N. Y.) 227 (under 2 Rev. Stat. p. 728, §§ 56, 57); and in People *v.* Dutcher, 83 N. Y. 240 [*reversing* 20 Hun (N. Y.) 241].

82. Incident to authority to try offender. — People *v.* Huggins, 10 Wend. (N. Y.) 464, holding that justices of the peace or any one justice may, independently of the statute, bail persons indicted before the sessions of a bailable offense.

Interest may disqualify.— Com. *v.* McLane, 4 Gray (Mass.) 427, as where he resides in a town to which any forfeiture incurred under the recognizance is given by statute. But the fact that one of the justices had previously been of counsel for accused does not invalidate a bond for appearance on an adjournment. People *v.* Clark, 21 Barb. (N. Y.) 214.

83. Constitutional limitations.— State *v.* Toups, 44 La. Ann. 905, 11 So. 528; People *v.* Burwell, 106 Mich. 27, 63 N. W. 986.

84. Bond or recognizance when void or unauthorized.— *Colorado.*— Huston *v.* People, 12 Colo. App. 271, 55 Pac. 262, when taken after commitment in default of bail or in lieu of a recognizance previously given under a statute providing that the parties or a judge may take such recognizance.

Illinois.— People *v.* Cook, 68 Ill. App. 202, taken by one justice is void under a statute providing for two justices.

Kansas.— Cox *v.* State, 5 Kan. App. 539, 47 Pac. 191, when taken eight days after termination of jurisdictional proceedings.

Massachusetts.—Com. *v.* Otis, 16 Mass. 198, when taken after conviction by higher court, escape to another state and extradition.

Minnesota.— State *v.* Bartlett, 70 Minn. 199, 72 N. W. 1067, taken pending adjournment of preliminary examination where offense is punishable with death, or imprisonment over seven years.

Missouri.— State *v.* McGunnegle, 3 Mo. 402, single justice is not authorized to take bail where arrest is under capias issued on an indictment found in the circuit court.

Virginia.—Hamlett *v.* Com., 3 Gratt. (Va.)

that such justice or justices can only lawfully act within that law which constitutes the only source of their power, otherwise the acts are void and of no effect. This would also be true, whether the governing law relates merely to jurisdictional power or expressly to the authority to bail, or whether it is based upon the general principle stated at the beginning of this section or upon modification or statutes. Thus if the statute imposes upon the justice the legal obligation of trying a misdemeanor, he cannot evade such duty by binding the accused over and taking bail;[85] and the power to take a recognizance to appear may be restricted as to the term;[86] or the authority may exist only to bail a person charged with a bailable offense, and who has been committed for not finding sureties, excluding the right to inquire into or decide upon the particulars as to the offense;[87] or there may be a limitation as to the amount of the recognizance.[88] Where the offense is one concerning which a justice of the peace may exercise the power to bail, and he has authority to adjourn the examination, he may take a recognizance thereupon for the prisoner's appearance.[89]

78, taken after examining court has sent prisoner to superior court for trial.

See 5 Cent. Dig. tit. "Bail," § 170.

Bond or recognizance when valid or authorized.— *Colorado.*— Haney *v.* People, 12 Colo. 345, 21 Pac. 39 (may accept a recognizance though the sheriff received it and discharged the prisoner, before delivering it to the justice); Chase *v.* People, 2 Colo. 528 (valid though taken by two justices where one may lawfully act).

Illinois.— People *v.* McKay, 40 Ill. 386 (authority is limited by degree of crime and two justices may take a recognizance where indictment is for passing counterfeit bills, the indictment having been found while the prisoner was in jail); Johnston *v.* People, 31 Ill. 469 (the prisoner, on charge of larceny, failing to comply with a requirement to give appearance bail was committed and the committing magistrate four days thereafter alone took the recognizance, and it was declared valid); McFarlan *v.* People, 13 Ill. 9 (justices may take a recognizance in all cases where the offense is bailable; two justices may validly take a bond in a case where one may lawfully act).

Kentucky.— Com. *v.* Yancy, 2 Duv. (Ky.) 375 (holding that a charge of shooting with intent to kill is merely a misdemeanor, and an examining justice may, on adjournment, take bail for appearance); Com. *v.* Leight, 1 B. Mon. (Ky.) 107 (holding that the statute does not imply that a committing justice would have no legal authority to take a recognizance when the circuit judge happens to be in the county).

Louisiana.— State *v.* Toups, 44 La. Ann. 905, 11 So. 528, holding that a justice may, without any order from a district judge, take a recognizance of one accused of petit larceny.

Michigan.— People *v.* Burwell, 106 Mich. 27, 63 N. W. 986, holding that a justice may admit to bail a person charged with rape punishable by imprisonment for life or any number of years.

Missouri.— State *v.* Railey, 35 Mo. 168, holding it unnecessary that the record should show an adjudication of commission of an offense and probable cause to authorize taking bail. See also, as to presumption of validity of bond, State *v.* Woolery, 39 Mo. 525.

New York.— People *v.* Mack, 1 Park. Crim. (N. Y.) 567, holding that presumption favors validity of recognizance.

North Carolina.— State *v.* Edney, 60 N. C. 463, holding that a recognizance ordered by an authorized judge to be taken by two justices is valid.

South Carolina.— Barton *v.* Keith, 2 Hill (S. C.) 537, holding that two justices, one being of the quorum, may bail a prisoner, before commitment, charged with passing counterfeit money.

Vermont.— State Treasurer *v.* Brooks, 23 Vt. 698, holding that a recognizance conditioned for appearance in the county court of one bound over by a justice of the peace upon the information of the state's attorney is valid.

Virginia.—Hamlett *v.* Com., 3 Gratt. (Va.) 78, holding that if the examining court refuses bail, or is silent, a justice cannot admit to bail; he can only take bail after such court has decided that the prisoner is bailable and fixed the amount of bail.

United States.— U. S. *v.* Milburn, 4 Cranch C. C. (U. S.) 478, 26 Fed. Cas. No. 15,765, holding that marshal of District of Columbia may take a prisoner before a justice of the peace to give bail for appearance to answer.

See 5 Cent. Dig. tit. "Bail," § 170.

Justice cannot cancel recognizance to appear. Benjamin *v.* Garee, Wright (Ohio) 450.

85. Must try, not admit to bail.— Thomm *v.* State, 35 Ark. 327, holding that such bail-bond would be void.

86. Restriction as to term.— Hostetter *v.* Com., 12 B. Mon. (Ky.) 1.

87. Restricted to bailable offenses.—State *v.* Corson, 10 Me. 473.

88. Restriction as to amount.— State *v.* Wormell, 33 Me. 200.

89. On adjournment.— Potter *v.* Kingsbury, 4 Day (Conn.) 98; Lewis *v.* People, 23 Ill. App. 28; State *v.* Gachenheimer, 30 Ind. 63; State *v.* Kruise, 32 N. J. L. 313. See also *supra*, III, A, 4, c, (II), (III).

But magistrate cannot admit one to bail

(II) *Where Felony Is Charged.* A justice of the peace cannot admit to bail persons charged with felony.[90] This rule, however, is not absolute and unqualified.[91] Upon the same principle it has been held that offenses beyond the trial jurisdiction of a judge of a police court as a committing magistrate are excluded from his power to bail.[92]

e. Commissioners[93] — (I) *In General.* Under the practice in some jurisdictions certain court commissioners are vested with the power of taking the recognizances or admitting prisoners to bail.[94]

during the postponement of his examination. State *v.* Jones, 100 N. C. 438, 6 S. E. 655. Where bail has been taken and the court has adjourned, the sheriff and not the magistrate has power to take an additional bail-bond. State *v.* Russell, 24 Tex. 505.

90. Persons charged with felony.— *Arkansas.*— Bass *v.* State, 29 Ark. 142, where persons were, by an inquiry, implicated in charge of murder and arrested.

Indiana.— State *v.* Winninger, 81 Ind. 51, not at time of issuing warrant.

Kentucky.— Com. *v.* Fisher, 2 Duv. (Ky.) 376, single justice no power.

Louisiana.— State *v.* Harper, 3 La. Ann. 598; State *v.* Hebert, 10 Rob. (La.) 41, not where crime "punishable with death, or with seven years or more imprisonment at hard labor."

Massachusetts.— Com. *v.* Loveridge, 11 Mass. 337, not in case of homicide. See Com. *v.* Otis, 16 Mass. 198.

Minnesota.— See State *v.* Bartlett, 70 Minn. 199, 72 N. W. 1067.

New Jersey.— See State *v.* Kruise, 32 N. J. L. 313.

North Carolina.— See State *v.* Jones, 100 N. C. 438, 6 S. E. 655.

Pennsylvania.—Steel *v.* Com., 7 Watts (Pa.) 454 (not one arrested as a horse-thief); Com. *v.* Keeper Prison, 2 Ashm. (Pa.) 227 (not in cases of felonious homicide, robbery, burglary, arson, or horse-stealing).

United States.— U. S. *v.* Faw, 1 Cranch C. C. (U. S.) 486, 25 Fed. Cas. No. 15,078, not one committed for trial on felony charge.

See 5 Cent. Dig. tit. "Bail," § 173.

91. Rule not absolute. — *Colorado.*— See Haney *v.* People, 12 Colo. 345, 21 Pac. 39.

Illinois.— See Lewis *v.* People, 23 Ill. App. 28.

Indiana.— State *v.* Winninger, 81 Ind. 51, holding that power exists where he has granted a continuance or recognized accused to appear and answer in the circuit court.

Kentucky.— Tharp *v.* Com., 3 Metc. (Ky.) 411, holding that a single justice may hold to bail for misdemeanors but two justices are required in charges of felony.

Louisiana.— State *v.* Toups, 44 La. Ann. 896, 11 So. 524, no authority in cases of larceny without order from district judge.

Michigan.— See People *v.* Burwell, 106 Mich. 27, 63 N. W. 986.

New York.— People *v.* Huggins, 10 Wend. (N. Y.) 464, two justices may, before indictment, where prisoner in jail on suspicion of felony.

Pennsylvania.— Moore *v.* Com., 6 Watts & S. (Pa.) 314, he may discharge from prison one committed by him for a bailable offense, whether felony or misdemeanor, on taking a recognizance.

South Carolina.— Barton *v.* Keith, 2 Hill (S. C.) 537, one accused of passing counterfeit money, even if included in the statutes, to be refused bail by two justices must not only be charged with felony but there must also be a violent presumption of guilt.

Virginia.— Tyler *v.* Greenlaw, 5 Rand. (Va.) 711, may bail where charge is felony and there is only a slight suspicion.

See 5 Cent. Dig. tit. "Bail," § 173.

92. *In re* Mantz, 19 D. C. 595. But it is also held that, to authorize a magistrate to take bail for appearance to answer before a court of superior jurisdiction for an offense the punishment of which is beyond his jurisdiction, it should appear that the offense has been committed and that there is probable cause of guilt. State *v.* Hartwell, 35 Me. 129.

93. Nature of power.—Where the plain intent of a constitutional provision is to permit the legislature to invest commissioners with any of the judicial power which a circuit judge might lawfully exercise when not in court, the power of such commissioners to take bail is not a judicial power. Daniels *v.* People, 6 Mich. 381.

94. Maine.—Bail commissioners appointed by the supreme judicial court of Maine have the same power as a justice thereof, or of the supreme court; but during a term of the supreme court in any county such commissioner cannot admit to bail any person confined in jail or under arrest on a precept returnable to that term nor change the amount of bail. *In re* Bail Com'rs, 85 Me. 544, 27 Atl. 455.

Massachusetts.— Such a commissioner appointed by the superior court may take a recognizance when the court is in session for proceedings before the grand jury. Com. *v.* Merriam, 9 Allen (Mass.) 371. And the intermediate time during a temporary adjournment of the court from Saturday to Monday morning is not part of the "session" of the court under Mass. Pub. Stat. c. 212, § 48. Com. *v.* Gove, 151 Mass. 392, 24 N. E. 211. Special commissioner may be appointed by the court of common pleas to take a recognizance, in vacation, of one convicted on indictment and committed under an order to recognize with sureties and prosecute exceptions in the supreme court. Com. *v.* Dunbar, 15 Gray (Mass.) 209.

New York.— Under an early decision, such a commissioner could take bail in all bailable offenses, and also where defendant

(II) *United States Commissioners.* United States commissioners have power conferred upon them by statute[95] to take bail of one charged with an offense or crime against the United States for his appearance before the proper court, and this authority may be exercised upon an arrest before or after indictment, notwithstanding a state statute to the contrary.[96] And it is within the discretion of such commissioner to take recognizances of defendants and witnesses recognized in previous cases for the same grand jury.[97] So where the commitment is by the commissioner he has jurisdiction to entertain an application for release on bail any time before the issuing of a warrant for his removal to the jurisdiction from which he has fled.[98]

f. Exclusive Jurisdiction of Court or Judge.[99] It has been held that where the presiding judge has not acted arbitrarily on an application for bail no other court or judge can take cognizance and discharge or bail the prisoner;[1] that the district court cannot interfere by habeas corpus with a recorder's court which has full power to determine whether a prisoner shall be admitted to bail;[2] that a county judge whose power is limited in this matter by statute cannot bail a prisoner after the first term of the court other than the county court to which he is committed for trial;[3] and that the power of a justice of the supreme court to admit to bail is not restricted by the exclusive jurisdiction to try certain offenses vested in an inferior court,[4] although it is also decided that the power of such higher court to interfere does not exist during the session of the court having jurisdiction to try the indictment where the accused is indicted before arrest.[5] So a com-

waives all preliminaries and gives bail at once. Champlain *v.* People, 2 N. Y. 82.

Utah.— A supreme court commissioner has power to take bail of one accused of violating an act of congress prohibiting unlawful cohabitation in the territory. U. S. *v.* Eldredge, 5 Utah 161, 13 Pac. 673.

95. U. S. Rev. Stat. (1878), §§ 1014, 1015.

96. Hoeffner *v.* U. S., 87 Fed. 185, 59 U. S. App. 313, 30 C. C. A. 610; U. S. *v.* Dunbar, 83 Fed. 151, 48 U. S. App. 531, 27 C. C. A. 488.

The last statement of the text is qualified, however, by a decision holding that the state laws are of force so far as applicable to the proceedings, and in determining the authority conferred. It is therefore determined that such commissioner may, in conformity with the interpretation of the state law, take bail of the accused to answer further before him. U. S. *v.* Sauer, 73 Fed. 671. So a commissioner to take affidavits, etc., has power to let to bail pending the proceedings in those states where justices of the peace have similar power. U. S. *v.* Rundlett, 2 Curt. (U. S.) 41, 27 Fed. Cas. No. 16,208. It is also held that such commissioner has the same power as to bail as a state magistrate and no greater. U. S. *v.* Horton, 2 Dill. (U. S.) 94, 26 Fed. Cas. No. 15,393, 5 Chic. Leg. N. 471, 18 Int. Rev. Rec. 31, 63, 5 Leg. Gaz. 255, 21 Pittsb. Leg. J. (Pa.) 17. But see U. S. *v.* Case, 8 Blatchf. (U. S.) 250, 25 Fed. Cas. No. 14,742, holding that he has no power to take recognizance for appearance before him at a future day.

97. Hallett *v.* U. S., 63 Fed. 817.

98. U. S. *v.* Volz, 14 Blatchf. (U. S.) 15, 28 Fed. Cas. No. 16,627.

99. No fixed general rule.— Whether the power of the court or judge in denying or allowing bail is exclusive depends upon various factors, no one of which ordinarily constitutes the basis of a governing rule applicable to other than the particular jurisdiction in which the decision was rendered and frequently not even then, for the reason that the controlling statute may have been repealed or amended, or the practice may have been changed, or the court which decided the cause may itself have been abolished, or its jurisdiction changed. See cases cited *infra*, notes 1 *et seq.*

1. *Ex p.* Isbell, 11 Nev. 295.

2. State *v.* Judge Fifth Dist. Ct., 32 La. Ann. 315.

3. Branham *v.* Com., 2 Bush (Ky.) 3.

When, however, the statute so provides such judge can accept the bond of one bailed by another officer or magistrate. State *v.* Klingman, 14 Iowa 404.

4. People *v.* Dutcher, 20 Hun (N. Y.) 241.

5. Babcock's Case, 2 Abb. Pr. N. S. (N. Y.) 204.

Application for bail on indictment pending. — If an application for bail is pending in the circuit court in a capital case, and the judge is prevented by business or indisposition from attending thereto, it would be irregular for another tribunal or officer having concurrent jurisdiction to issue a writ of habeas corpus to admit to bail even after expiration of the term. *Ex p.* Kittrel, 20 Ark. 499. If an indictment is pending in court it may fix the bail without regard to any action theretofore taken by the committing magistrate. *Ex p.* Ryan, 44 Cal. 555. But if bail is allowed without issuance of a writ of habeas corpus by a judge of court other than that in which the indictment is pending, it is void. State *v.* Watson, 54 Mo. App. 416. And see also State *v.* Ferguson, 50 Mo. 409; State *v.* Nelson, 28 Mo. 13; State *v.* Ramsey, 23 Mo. 327. So one who is not the officer before whom the

mitting magistrate's power as to bail is not exclusive.[6] Again, the authority to admit to bail has been held, in a number of cases, to rest exclusively in the proper court of the county wherein the warrant was issued or the offense committed.[7] But when the indictment and arrest, or the indictment, is in one county, bail has been allowed to be taken in another county.[8] And the judge of a civil court cannot hear an application to admit to bail a prisoner in the custody of the military power in a district under martial law until the legality of such custody has been inquired into under an application for a writ of habeas corpus.[9]

g. Upon Change of Venue. Change of venue of a cause from one county to another transfers the entire control and jurisdiction thereof to the court of the latter county, including authority to entertain an application for and admit to bail.[10]

application for bail is pending may authorize bail to be taken, especially where jurisdiction of the person is acquired by voluntary appearance, and the officer before whom the application is pending adopts such recognizance. People *v.* Leggett, 5 Barb. (N. Y.) 360. And although jurisdiction of an indictment pending in one court cannot be conferred on another court by agreement, yet, if the latter has general jurisdiction over the offense, the defendant will not be discharged unless he gives new bail for appearance in the court where the indictment is pending. People *v.* Hartwell, 2 Park. Crim. (N. Y.) 32.

6. **Committing magistrate's power not exclusive.**— *California.*— *Ex p.* Ryan, 44 Cal. 555.

Indiana.— State *v.* Best, 7 Blackf. (Ind.) 611.

Kentucky.— *Compare* Com. *v.* Brown, 14 Ky. L. Rep. 301.

Maine.— State *v.* Baker, 50 Me. 45.

Michigan.— People *v.* Robb, 98 Mich. 397, 57 N. W. 257.

New York.— People *v.* McKinnon, 1 Wheel. Crim. (N. Y.) 170; People *v.* McLane, 1 Wheel. Crim. (N. Y.) 45.

Ohio.— State *v.* Dawson, 6 Ohio 251.

United States.— U. S. *v.* Brawner, 7 Fed. 86.

Contra, State *v.* Randolph, 26 Mo. 213.

See 5 Cent. Dig. tit. "Bail," § 176.

Courts of sessions are not authorized upon indictment before arrest and a subsequent arrest thereon to send the case to a police justice for examination, and an order therefor does not affect the question of the power to bail. Babcock's Case, 2 Abb. Pr. N. S. (N. Y.) 204.

Justice of the peace cannot take bail where another justice has issued a mittimus against defendant for want of sureties. State *v.* Berry, 8 Me. 179; Com. *v.* Canada, 13 Pick. (Mass.) 86. Nor has such justice authority to bail one convicted in another court, and who has made his escape before sentence. Com. *v.* Otis, 16 Mass. 198.

Police justice has no power to bail persons after they have been bound over to the recorder's court, and the proceedings certified thereto. Mills *v.* Chambers, 91 Mich. 521, 52 N. W. 20.

7. **County of issuance of warrant.**— *California.*— Mansir *v.* San Diego County Super. Ct., 65 Cal. 582, 4 Pac. 627; *Ex p.* Hung Sin, 54 Cal. 102.

Iowa.— State *v.* Cannon, 34 Iowa 322.

Kentucky.— Com. *v.* Salyer, 8 Bush (Ky.) 461.

Louisiana.— State *v.* Collins, 19 La. Ann. 145.

Missouri.— See State *v.* Ferguson, 50 Mo. 409; State *v.* Nelson, 28 Mo. 13.

New Hampshire.— State *v.* Fowler, 28 N. H. 184.

New York.— People *v.* Chapman, 30 How. Pr. (N. Y.) 202; Gorsline's Case, 10 Abb. Pr. (N. Y.) 282, 21 How. Pr. (N. Y.) 85; Clark *v.* Cleveland, 6 Hill (N. Y.) 344.

Contra, State *v.* Eastman, 42 N. H. 265, where application is voluntary. See Doyle *v.* Russell, 30 Barb. (N. Y.) 300; Com. *v.* Jailer, 1 Grant (Pa.) 218.

See 5 Cent. Dig. tit. "Bail," § 176.

Rule qualified by facts.— Haney *v.* People, 12 Colo. 345, 21 Pac. 39, holding that the surety was not discharged, since he must be held to have known of the irregularity when he signed the recognizance which showed that the arrest was made in another county.

8. Hunter *v.* State, 21 Ind. 351, where the prisoner was confined in jail in another county because of the insufficiency of the jail in the county of indictment and arrest. So in People *v.* Hurlbutt, 44 Barb. (N. Y.) 126, the accused was confined in jail in one county and the county judge of another county took the acknowledgment of the execution of a recognizance by the sureties in order that it might be sent to accused and acknowledged. See also People *v.* Clews, 77 N. Y. 39.

9. Davis' Case, Chase (U. S.) 1, 7 Fed. Cas. No. 3,621*a*, 3 Am. L. Rev. 368.

10. *Ex p.* Walker, 3 Tex. App. 668.

This includes right to hold a prior bail-bond of the court from which the case was transferred invalid, and gives the right to order accused into custody, notwithstanding such admission to bail. Adkins *v.* Com., 98 Ky. 539, 17 Ky. L. Rep. 1091, 33 S. W. 948, 32 L. R. A. 108, which case was removed from county court to circuit court of another county.

Presumption of validity attaches as to necessary preliminary steps on recognizance taken before a county judge after change of venue. State *v.* Woolery, 39 Mo. 525.

h. Upon Appeal or Error. In certain jurisdictions the question of admission to bail upon an appeal or on writ of error after a judgment of conviction seems to depend rather upon what constitutes the proper court and the procedure than upon the power of the court, the right itself not being disputed, but only the effect of the statute being considered.[11] And it has been decided that a statute which precludes "any justice of the supreme court" pending an appeal in specified cases from granting bail does not prevent the supreme court from exercising such power, but only inferentially shows an intent of the legislature to continue said power in that court.[12] Again, under a comparatively recent decision in the United States supreme court, it is decided that in cases of crimes not capital, at least, bail might be taken on writ of error by order of the court, justice, or judge, and although two justices dissented, they agreed as to the existence of the power but deduced this solely from the grant of jurisdiction over the proceedings in error, and it was also determined that a justice of such court might order the judge before whom the conviction was had to admit the prisoner to bail and enforce the order by mandamus.[13] But, where the statute so prohibits, a justice of the supreme court cannot release on bail one convicted or sentenced to the penitentiary.[14] So where a case has gone on exceptions to the supreme court a recognizance for appearance at the next county court is void even though there is a new trial.[15]

2. Sheriffs and Clerks[16]— a. Sheriffs. In order to enable the sheriff to take a bond or recognizance the prisoner must be in his custody on legal process,[17] or he must have authority to make the arrest;[18] or the offense charged may affect his right to take bail as in case of felony or con-

11. On appeal the power will not be exercised by the supreme court in the first instance. People *v.* January, 70 Cal. 34, 11 Pac. 326. *Compare Ex p.* Marks, 49 Cal. 680, stating the former rule. In State *v.* Jones, 3 La. Ann. 9, it was determined that the bond could be taken before an officer of the lower court or other person designated. So after a bill of exceptions allowed after verdict of guilty, the superior court may recognize the prisoner to appear from term to term in that court. Com. *v.* Field, 11 Allen (Mass.) 488. And under Howell's Anno. Stat. Mich. § 9578, the circuit court, upon appeal, raising questions of a serious nature, has no further jurisdiction, except to take bail. Matter of Montague, 70 Mich. 157, 38 N. W. 15. Again the supreme court pending appeal or error can admit to bail only while sitting in the grand division of the state in which the case is to be heard, but the trial court can admit to bail at any time when the supreme court is not so in session. Holcomb *v.* State, 6 Lea (Tenn.) 668.

And *compare* also *supra*, III, A, 4, c, (VI).

12. State *v.* Farris, 51 S. C. 176, 28 S. E. 370.

13. Hudson *v.* Parker, 156 U. S. 277, 15 S. Ct. 450, 39 L. ed. 424, considering U. S. Rev. Stat. (1878), §§ 1014–1017. But, pending an appeal from an order of a district judge denying a writ of habeas corpus to release a foreign consul imprisoned under state authority, said judge may not admit him to bail. *In re* Iasigi, 79 Fed. 755, under U. S. Rev. Stat. (1878), § 765, and U. S. Supreme Ct. Rules No. 34. And see U. S. *v.* Hudson, 65 Fed. 68, holding that the supreme court had no power to make Rule 36, par. 2, providing for admission to bail after appeal or writ of error.

14. State *v.* Clark, 1 Ohio Dec. (Reprint) 155, 3 West. L. J. 7 [*affirmed* in 15 Ohio 595].

15. State Treasurer *v.* Seaver, 7 Vt. 480.

16. Ministerial officers generally.— An officer without judicial power cannot take a recognizance. Solomon *v.* People, 15 Ill. 291. But an officer authorized to execute an attachment for contempt may take a recognizance. Baldwin *v.* State, 126 Ind. 24, 25 N. E. 820, under Ind. Rev. Stat. (1881), § 1705. So that officer only can take a recognizance who is "charged with the duty of arresting a person indicted." State *v.* West, 3 Ohio St. 509. And peace-officers have no power to take bail on charges of felony. Short *v.* State, 16 Tex. App. 44.

Governor.— The power to bail is not incidental to the power of the governor to reprieve, so that a bond given in conformity with a condition on reprieve is not binding on sureties. So held in Governor *v.* Fay, 8 La. Ann. 490.

Mayor.— The power of a mayor to take a recognizance is denied even though conferred upon him by the city charter. Cunningham *v.* State, 14 Mo. 402; Holmes *v.* State, 44 Tex. 631. But *compare* Scio *v.* Hollis, 10 Ohio S. & C. Pl. Dec. 99, 7 Ohio N. P. 281, holding that the mayor has no power after conviction and sentence, except upon order of the court or judge on granting leave, to file a petition in error.

17. In custody on legal process.— Blackman *v.* State, 12 Ind. 556.

18. Authority to make arrest.— Blevins *v.* State, 31 Ark. 53.

tempt;[19] or the magistrate issuing the warrant must have final jurisdiction of the offense;[20] or the amount of bail required must be indorsed on the warrant of commitment;[21] or the process must be issued by one having lawful authority,[22] or be based on an order of court or an order fixing the amount of bail,[23] or upon a warrant or other process showing that the accused is to be admitted to bail;[24] or his right to take bail before or after commitment may rest solely upon the statute.[25] Again the sheriff has no power to bail one committed because the examining magistrate did not know whether or not the offense was bailable;[26] nor can the sheriff of the county from which the venue is changed take a bail-bond.[27] And, even though he has the custody of the prisoner, if the authority to take

19. Nature of offense.— Thus a recognizance by the sheriff of one arrested on capias on a felony charge is void. Antonez *v.* State, 26 Ala. 81; Governor *v.* Jackson, 15 Ala. 703. See also Short *v.* State, 16 Tex. App. 44. Or he may be precluded from taking bail where the offense is punishable with death, although he may bail one arrested for any other cause. Pace *v.* State, 25 Miss. 54. And he has no power to recognize one arrested for contempt of court. State *v.* Howell, 11 Mo. 613.

20. Jurisdiction of magistrate.— Jones *v.* State, 63 Ala. 161.

21. Amount indorsed on warrant.— Evans *v.* State, 63 Ala. 195.

22. Process illegally issued.—Shaw *v.* Com., 1 Duv. (Ky.) 1 (issued by clerk of court without order of court gives no authority to sheriff to take bail); State *v.* Edwards, 4 Humphr. (Tenn.) 226 (holding that the statute limits the sheriff's power to bail to cases where the party has been surrendered by his surety, or where he has been committed for want of sureties). See also State *v.* Wren, 21 Tex. 379.

23. Process based upon proper order.— *Alabama.*— Callahan *v.* State, 60 Ala. 65 (considering when order may be granted in vacation); Antonez *v.* State, 26 Ala. 81 (sheriff has no power to bail after indictment, and power cannot be delegated under insufficient order).

Arkansas.— Dunlap *v.* State, 66 Ark. 105, 49 S. W. 349 (sheriff may take bail when amount is fixed without any special authorization); Havis *v.* State, 62 Ark. 500, 37 S. W. 957 (where amount is fixed and bail is ordered in court to which change of venue is made, said bond to be approved by sheriff, he may take bail); Moore *v.* State, 28 Ark. 480; Pinson *v.* State, 28 Ark. 397 (if amount is fixed sheriff may bail one upon arrest or in custody); Cooper *v.* State, 23 Ark. 278 (if amount is indorsed on warrant of commitment for want of bail habeas corpus is necessary and sheriff cannot recognize). But see Gray *v.* State, 5 Ark. 265.

Connecticut.— Dickinson *v.* Kingsbury, 2 Day (Conn.) 1, sheriff may bail one committed for want of sureties.

Georgia.— Simpson *v.* Robert, 35 Ga. 180. If sheriff authorized to imprison until bail furnished bond is valid.

Indiana.— McCole *v.* State, 10 Ind. 50, sheriff may bail before indictment on order from judge or clerk.

Iowa.— State *v.* Benzoin, 79 Iowa 467, 44 S. W. 709.

Kentucky.— Shaw *v.* Com., 1 Duv. (Ky.) 1.

Louisiana.— State *v.* Balize, 38 La. Ann. 542; State *v.* Loeb, 21 La. Ann. 599; State *v.* Gordon, 18 La. Ann. 528; State *v.* Badon, 14 La. Ann. 783; State *v.* Ansley, 13 La. Ann. 298 (also a case of estoppel); State *v.* McKeown, 12 La. Ann. 596; State *v.* Smith, 12 La. Ann. 349; State *v.* Wyatt, 6 La. Ann. 701 (rule somewhat qualified); State *v.* Jones, 3 La. Ann. 9. See also State *v.* Hendricks, 40 La. Ann. 719, 5 So. 24 (as to verbal order being sufficient).

Mississippi.— Cornwell *v.* State, 53 Miss. 385 (sheriff's power where one committed must strictly conform in the exercise thereof to judgment and he may take bail though mittimus is lost); State *v.* Brown, 32 Miss. 275 (sheriff may take bail under order of court until accused is duly discharged from custody even after mistrial).

Missouri.— State *v.* Austin, 141 Mo. 481, 43 S. W. 165 [*affirming* 69 Mo. App. 377] (sufficient where sheriff takes and approves recognizance in amount ordered by court and filing same with clerk); State *v.* Jenkins, 24 Mo. App. 433 (where amount of bail is fixed by order of court, sheriff may take one in his custody on a warrant of commitment for want of sureties).

North Carolina.— State *v.* Houston, 74 N. C. 549.

Texas.— Hodges *v.* State, 20 Tex. 493, one committed until bail found may be bailed by sheriff where judge fixed amount.

See 5 Cent. Dig. tit. "Bail," § 185.

24. Schneider *v.* Com., 3 Metc. (Ky.) 409, holding also that, where the code provides as above, if the sheriff arrest any person by authority of his bail he cannot take new bail any more than can a private individual.

25. Statutory authority.—Welborn *v.* People, 76 Ill. 516 (holding that his right to take bail is not limited to the time of making the arrest but that he may take it after he had committed the prisoner to jail); State *v.* McCoy, 1 Baxt. (Tenn.) 111 (holding that Tenn. Code, §§ 5017, 5056, 5144, limits the sheriff's power, and that bail taken before examination or commitment is a nullity).

26. State *v.* Horn, Meigs (Tenn.) 473.

27. Harbolt *v.* State, (Tex. Crim. 1898) 44 S. W. 1110. See Wilson *v.* Com., 99 Ky. 167, 18 Ky. L. Rep. 51, 35 S. W. 274.

bail is exclusively vested in certain judicial officers this precludes the sheriff in the matter;[28] nor can he take a bond on capias returnable forthwith.[29] Under other decisions, however, the right of the sheriff to take bail is absolutely denied.[30] But, in accordance with the underlying principles of the preceding cases, where the legal prerequisites to the sheriff's right to take bail exist and are complied with, he may take a bond or recognizance even though there may be some irregularities, provided they are immaterial;[31] and he may take bail in vacation or in term where so authorized and the offense is not within the cases excluded from his authority.[32]

b. Clerks of Courts. As to clerks of courts it may be generally stated that they have power to take a recognizance only by virtue of the statute;[33] and so even though the amount thereof is fixed by the court or they are deputized by the court or a judge thereof.[34] Again such clerk may, by statute, take bail in vaca-

28. Rupert *v.* People, 20 Colo. 424, 38 Pac. 702.

29. On capias returnable forthwith.—Bourdeaux *v.* Warren County, 66 Miss. 231, 5 So. 227; Jackson *v.* State, 13 Tex. 218; Busby *v.* State, 13 Tex. 136.

30. Right absolutely denied.— State *v.* Walker, 1 Mo. 546; State *v.* Mills, 13 N. C. 555 (holding that he is not a judicial officer and that a recognizance taken by him is merely a simple obligation); Keller *v.* Com., 2 Mon. (Pa.) 757 (holding that 23 Hen. VI, c. 9, does not authorize him to take a bond of one arrested for crime). In State *v.* Miller, 31 Tex. 564, it is also determined that he may not exact a bail-bond, and only has authority to take one whom he has arrested or who voluntarily surrendered himself before some magistrate that the offense may be inquired into.

31. Extent of right.— *Alabama.*— Holcombe *v.* State, 99 Ala. 185, 12 So. 794, holding that even though the prosecution is pending in another county the sheriff may, under a proper order, take bail where he has the prisoner in his custody.

Georgia.— Colquitt *v.* Bond, 69 Ga. 351, holding that bond not void merely because the sheriff in charge of accused filled it up, accepted the sureties, and returned the bond to the clerk.

Indiana.— Blackman *v.* State, 12 Ind. 556, taken by sheriff *de facto* valid.

Louisiana.— State *v.* Gilbert, 10 La. Ann. 524.

Mississippi.—Moss *v.* State, 6 How. (Miss.) 298, under a statute the sheriff may take a recognizance returnable to a day of the term, under a bench warrant issued in term-time returnable at the same term; it is not like the case of a warrant returnable forthwith.

Missouri.— State *v.* Austin, 141 Mo. 481, 43 S. W. 165, holding that where the supreme court reverses a conviction with direction to commit the prisoner to await the action of the trial court the sheriff holding him under the judgment may take bail.

Texas.— Golden *v.* State, 32 Tex. 737, after notice of appeal and failure to recognize before the district court and to pay the fine, sheriff may take a bond to abide decision of the supreme court.

See 5 Cent. Dig. tit. "Bail," §§ 184, 185.

Deputy sheriff who arrests one on a capias for a misdemeanor may, under the statute, take a recognizance, nor need it be certified by the officer. Shreeve *v.* State, 11 Ala. 676. And, where the statute so provides, a special deputy or deputy has the same power as the sheriff. State *v.* Kizer, 4 Sneed (Tenn.) 563. But a deputy cannot bail one surrendered by his bail or one committed for want of sureties. State *v.* Edwards, 4 Humphr. (Tenn.) 226.

Jailer.— A recognizance taken by a jailer is not a good statutory or common-law bond. Com. *v.* Roberts, 1 Duv. (Ky.) 199; Com. *v.* Lee, 3 J. J. Marsh. (Ky.) 698. And the delivery from prison does not validate such a bail-bond. Com. *v.* Roberts, 1 Duv. (Ky.) 199.

Marshal.— That marshal of city court has no authority to take a recognizance see Frishe *v.* Com., 6 Dana (Ky.) 318.

32. In term-time or in vacation.— Ellis *v.* State, 10 Tex. App. 324; Peters *v.* State, 10 Tex. App. 302 (provided the district court has not obtained jurisdiction). But see Gray *v.* State, 43 Ala. 41.

Sheriff cannot cancel recognizance after having approved, signed, and filed it with the clerk of the court. State *v.* Lay, 128 Mo. 609, 29 S. W. 999.

33. Statutory authority only.— U. S. *v.* Evans, 2 Flipp. (U. S.) 605, 2 Fed. 147, 1 Crim. L. Mag. 600. Under Iowa Code, § 4380, the clerk of a court to which the venue is taken has the same power to take bail as a clerk of the court in which the indictment is found. State *v.* Merrihew, 47 Iowa 112, 29 Am. Rep. 464. So an order to the clerk of a higher court to take bail is void where, by statute, the order should be to the clerk of the lower court. State *v.* Clark, 1 Ohio Dec. (Reprint) 155, 3 West L. J. 7.

Recognizance before a deputy clerk is void where it should have been taken before the court. Chinn *v.* Com., 5 J. J. Marsh. (Ky.) 29. See Workman *v.* Com., 16 Ky. L. Rep. 447.

Subsequent approval by the court does not validate a bail-bond taken by the clerk without legal authority. State *v.* Caldwell, 124 Mo. 509, 28 S. W. 4.

34. That clerk has no power to take bail in such cases see State *v.* Carothers, 11 Iowa 273; Morrow *v.* State, 5 Kan. 563; Lock *v.* Com., 11 Ky. L. Rep. 399.

tion or his authority may continue to and during subsequent terms of the court,[35] or he may be empowered by law to fix the amount of bail under certain circumstances, and this restricts his authority to the cases specified,[36] although it is decided that a legislative enactment conferring such power is unconstitutional.[37]

3. Delegation of Authority. Determinations allowing and fixing the amount of bail are judicial acts and the authority cannot be delegated.[38]

4. Termination of Authority. An order relating to bail or fixing it is void when made by a magistrate or county judge after the termination of his judicial power in the premises; and this may arise by fixing a prisoner's bail and committing him in default thereof,[39] or by committing the accused and adjourning court.[40] The authority to bail from day to day pending a hearing on habeas corpus expires, however, with the disposal of the case.[41]

5. Want of Authority. It is a constantly recurring principle that the right to bail must be secured by law, and that bail taken without authority of law is void.[42] This rule especially applies to a case where the magistrate is prohibited from admitting accused to bail.[43]

D. Proceedings to Admit to Bail — 1. Application. Application for bail may be made either by motion or by writ of habeas corpus.[44] If new evidence is

That clerk has authority to take bail in such cases see Wilson *v.* Com., 99 Ky. 167, 18 Ky. L. Rep. 51, 35 S. W. 274; Workman *v.* Com., 16 Ky. L. Rep. 447; Wallenweber *v.* Com., 3 Bush (Ky.) 68; Hunt *v.* U. S., 63 Fed. 568, 27 U. S. App. 287, 11 C. C. A. 340.

35. In vacation.— Wilson *v.* Com., 99 Ky. 167, 18 Ky. L. Rep. 51, 35 S. W. 274. And a law permitting the clerk in vacation to take bail and fix the amount is unconstitutional as conferring judicial power on such clerk. State *v.* Krohne, 4 Wyo. 347, 34 Pac. 3.

36. Fixing amount of bail.—State *v.* Woodward, 159 Mo. 680, 60 S. W. 1042. As to act being mere irregularity not available to accused see Matter of Eddy, 40 Kan. 592, 20 Pac. 283. That clerk may fix the bail where there is no district judge in the county see State *v.* Schweiter, 27 Kan. 499.

37. Gregory *v.* State, 94 Ind. 384, 48 Am. Rep. 162, assigning as the reason for this the fact that fixing of bail is a judicial function which should be vested in the courts.

38. Cannot be delegated.— Antonez *v.* State, 26 Ala. 81; Butler *v.* Foster, 14 Ala. 323; Com. *v.* Brown, 14 Ky. L. Rep. 301; State *v.* Jones, 3 La. Ann. 9. But see State *v.* Sewall, 3 La. Ann. 575.

39. By fixing bail and ordering commitment.— Reed *v.* Com., 13 Ky. L. Rep. 637. But a magistrate who commits a prisoner only until he gives bail may thereafter take and approve the bond. State *v.* Wyatt, 6 La. Ann. 701.

40. Committing accused and adjourning court.— Moore *v.* State, 37 Tex. 133; State *v.* Russell, 24 Tex. 505.

41. Disposal of case.— *Ex p.* Erwin, 7 Tex. App. 288 (Tex. Rev. Crim Code, art. 162).

42. Bail void.—*Arkansas.*—Cooper *v.* State, 23 Ark. 278.

Illinois.— Solomon *v.* People, 15 Ill. 291.

Kentucky.— Dugan *v.* Com., 6 Bush (Ky.) 305 (taken by a clerk); Branham *v.* Com., 2 Bush (Ky.) 3.

Louisiana.— State *v.* Collins, 19 La. Ann. 145.

Massachusetts.— Com. *v.* Otis, 16 Mass. 198; Com. *v.* Loveridge, 11 Mass. 337; Vose *v.* Deane, 7 Mass. 280.

United States.—U. S. *v.* Hudson, 65 Fed. 68. See 5 Cent. Dig. tit. "Bail," § 183.

43. Where magistrate is expressly prohibited.— Branham *v.* Com., 2 Bush (Ky.) 3; State *v.* Whitaker, 19 La. Ann. 142; State *v.* Hays, 4 La. Ann. 59; State *v.* Harper, 3 La. Ann. 598; State *v.* Hebert, 10 Rob. (La.) 41.

Extent and limits of rule.— It is decided, however, that, if the accused voluntarily gives a bail-bond without questioning the jurisdiction and is released, he can thereafter take no advantage of the want of authority of the magistrate. Jones *v.* Gordon, 82 Ga. 570, 9 S. E. 782. And a mere error in exercising his judicial authority does not invalidate a bail-bond taken by a justice of the peace. Creekmore *v.* Com., 5 Bush (Ky.) 312. But where no authority exists the irregularity is not cured by Ky. Crim. Code, § 80. Schneider *v.* Com., 3 Metc. (Ky.) 409.

A recognizance taken by the sheriff, who has no authority to take it, may be considered as a mere bond, a forfeiture of which cannot be had. Pace *v.* State, 25 Miss. 54. See also Dennard *v.* State, 2 Ga. 137; State *v.* Houston, 74 N. C. 549; State *v.* Mills, 13 N. C. 555.

44. By motion or habeas corpus.— Lynch *v.* People, 38 Ill. 494; *Ex p.* Walker, 3 Tex. App. 668.

Habeas corpus is not a prerequisite (Ready *v.* Com., 9 Dana (Ky.) 38; State *v.* Field, 112 Mo. 554, 20 S. W. 672), unless made necessary by statute (State *v.* Field, 112 Mo. 554, 20 S. W. 672).

Notice of application should be given to the district attorney and not to the sheriff. State *ex rel.* Vickers, 47 La. Ann. 662, 17 So. 296.

Respondent, it seems, should be the district attorney rather than the sheriff. State *ex rel.* Vickers, 47 La. Ann. 662, 17 So. 296.

Upon the application the accused should produce the testimony relied on by the state

relied on, the discovery thereof should be set out in the petition.[45] But it has been held that the prisoner cannot withdraw his motion for bail after submitting all his evidence.[46]

2. Hearing and Proofs — a. Time of Hearing. Applications for bail may be heard during the term or thereafter if public interests so require,[47] or during vacation where other business or the indisposition of the judge prevents a hearing during the term.[48]

b. Proofs — (I) *In General.* The decisions concerning what proof will be considered on the application for bail where an indictment has been found or there is a judgment of the examining court differ principally as to the conclusiveness of these acts.[49] In certain jurisdictions the rule precludes evidence to rebut the inference of guilt arising from the indictment in the absence of malice, mistake, or extraordinary circumstances.[50] But it is also decided that such indictment and judgment are not conclusive, and that other evidence will be considered, the question being one for the sound discretion of the court.[51] And it has been determined that if the application is before indictment the inquiry will be confined to the depositions on which commitment is ordered.[52]

(II) *In Homicide Cases.* A person indicted for murder is entitled to habeas corpus for the purpose of showing facts satisfying the court that he is entitled to a discharge on bail;[53] and it is the duty of the judge or court to hear the evidence,[54] although it is decided that such facts should be stated in the petition as will rebut the presumption raised by the indictment and that a general allegation of innocence is insufficient.[55]

and a list of the witnesses who have been furnished by the prosecuting attorney in due time. So held in Rigdon *v.* State, 41 Fla. 308, 26 So. 711, under an indictment for a capital offense.

The mode prescribed by the legislature of bringing the prisoner before the court or judge in the matter of taking bail is not necessarily essential to the jurisdiction. It is sufficient if the object of the statute is accomplished through the voluntary act of the prisoner or of the sheriff (State *v.* West, 3 Ohio St. 509; and see also State *v.* Wenzel, 77 Ind. 428; Ready *v.* Com., 9 Dana (Ky.) 38), or by waiver of irregularities (State *v.* Perry, 28 Minn. 455, 10 N. W. 778); and the doctrine of waiver may extend to errors in the proceedings (State *v.* Edney, 60 N. C. 463).

45. New evidence relied on.— *Ex p.* Curtis, 92 Cal. 188, 28 Pac. 223, Pen. Code, § 1484.

46. Withdrawal of application.— *Ex p.* Campbell, 20 Ala. 89.

47. During term.— *Ex p.* Wreford, 40 Ala. 378.

48. During vacation.— *Ex p.* Kittrel, 20 Ark. 499.

Prisoner's presence at hearing cannot be dispensed with by state unless petitioners on habeas corpus waive their right. State *v.* Jones, 32 S. C. 583, 10 S. E. 577. But see State *ex rel.* Vickers, 47 La. Ann. 662, 17 So. 296.

49. Elsewhere has been fully considered under what circumstances and upon what evidence bail will be allowed or denied, including the questions of conflict of evidence and burden of proof, and this covers generally the present inquiry. See, generally, *supra*, III, A, 3, a.

50. People *v.* Tinder, 19 Cal. 539, 81 Am. Dec. 77. See also People *v.* Dixon, 3 Abb. Pr. (N. Y.) 395, 4 Park. Crim. (N. Y.) 651 (excluding depositions before the committing magistrates); U. S. *v.* Jones, 3 Wash. (U. S.) 224, 26 Fed. Cas. No. 15,495 (holding that the evidence would not be examined after indictment. See also *infra*, III, D, 2, b, (II).

51. *Ex p.* Tayloe, 5 Cow. (N. Y.) 39; Com. *v.* Rutherford, 5 Rand. (Va.) 646.

So the court will look into the depositions taken before the committing magistrate (People *v.* Smith, 1 Cal. 9); or on motion the court will examine the papers in the case where the charge is felony (People *v.* De Graff, 1 Wheel. Crim. (N. Y.) 141); or it will hear and consider affidavits, even though they tend to contradict the finding of the jury (State *v.* Hill, 3 Brev. (S. C.) 891, 1 Treadw. (S. C.) 242); and on habeas corpus evidence will be heard as to the nature of the offense and the circumstances as to its commitment (*Ex p.* Campbell, 28 Tex. App. 376, 13 S. W. 141. See also *infra*, III, D, 2, b, (II).

52. People *v.* McLeod, 1 Hill (N. Y.) 377, 37 Am. Dec. 328. *Contra*, see People *v.* De Graff, 1 Wheel. Crim. (N. Y.) 141.

53. Holley *v.* State, 15 Fla. 688; Finch *v.* State, 15 Fla. 633; Lumm *v.* State, 3 Ind. 293.

54. Duty to hear evidence.—*In re* Losasso, 15 Colo. 163, 24 Pac. 1080, 10 L. R. A. 847; State *v.* Crocker, 5 Wyo. 385, 40 Pac. 681.

55. *Ex p.* White, 9 Ark. 222.

Effect of indictment.— *California.*— Presumption raised by indictment may be rebutted under certain circumstances. People *v.* Tinder, 19 Cal. 539, 81 Am. Dec. 77.

Illinois.— Indictment does not preclude inquiry. Lynch *v.* People, 38 Ill. 494.

Indiana.— Indictment *prima facie* excludes right to bail. *Ex p.* Kendall, 100 Ind. 599.

3. Order. Orders for bail, it seems, are valid and operative if they are sufficiently certain,[56] not unjust,[57] and are in substantial compliance with the statutory requirements.[58] If in habeas corpus they should be directed to the sheriff having custody of the prisoner, even though the latter be in a county other than that of the trial.[59] And an order of commitment without bail made on a second hearing and followed by an indictment for murder precludes the right to bail under an order of commitment on the first preliminary hearing.[60]

4. Review of Proceedings — a. Right of Review — (I) *In General.* It has been determined that the refusal of bail may be the subject of review.[61]

(II) *Appeal, Error, or Exceptions.* In some states a refusal to allow bail may be reviewed on appeal or writ of error,[62] or the evidence may be set out in

See *Ex p.* Heffren, 27 Ind. 87, as to production of the state's evidence and the right to cross-examine or impeach the witnesses against accused.

Iowa.— Hight *v.* U. S., Morr. (Iowa) 407, 43 Am. Dec. 111, substantially same rule as in California.

Louisiana.— Indictment excludes right to bail. State *v.* Butler, 40 La. Ann. 3, 3 So. 350. But see State *v.* Brewster, 35 La. Ann. 605; State *v.* Merrick, 10 La. Ann. 424.

Nevada.— Proof of allegations in petition showing manslaughter only may be given by witnesses before the grand jury or by other evidence, but all the exculpatory facts must appear without material conflict. *Ex p.* Finlen, 20 Nev. 141, 18 Pac. 827. See also *Ex p.* Isbell, 11 Nev. 295.

New York.— Justice of supreme court on habeas corpus may examine into defendant's guilt and the degree of crime. People *v.* Beigler, 3 Park. Crim. (N. Y.) 316. See also People *v.* Goodwin, 1 Wheel. Crim. (N. Y.) 443. In People *v.* Baker, 10 How. Pr. (N. Y.) 567, it was held that further evidence after indictment would not be received. *Examine* also People *v.* Hyler, 2 Park. Crim. (N. Y.) 570.

North Carolina.— See State *v.* Dew, 1 N. C. 88.

Pennsylvania.— State's evidence is conclusive. Com. *v.* McNall, 1 Woodw. (Pa.) 423.

South Carolina.— Indictment is not conclusive. State *v.* Hill, 3 Brev. (S. C.) 89, 1 Treadw. (S. C.) 242.

See 5 Cent. Dig. tit. "Bail," § 201.

Prisoner is entitled to benefit of reasonable doubt on application for bail. So held in *Ex p.* Bird, 24 Ark. 275.

56. Votaw *v.* State, 12 Ind. 497, holding that, if an order for bail sufficiently embraces the indictments intended, it is good as to them. But where the court ordered that in certain state cases designating only the name of the offense a recognizance should be taken, the bail to be fixed at the amounts stated, a recognizance taken under such order for the appearance of one indicted for an offense is void. State *v.* Hopson, 10 La. Ann. 550.

57. Carmody *v.* State, 105 Ind. 546, 5 N. E. 679, wherein it is held that a general order fixing the amount for bail as to the particular class is valid if not unjust in the particular case.

58. San Francisco *v.* Randall, 54 Cal. 408, holding that the statutes requiring the magistrate to make and sign an order for discharge is satisfied by an oral order certified in writing by the clerk to the keeper of the prison followed by a release of the prisoner.

For forms of orders admitting to bail see Ariz. Pen. Code (1891), § 1077; Humphries *v.* State, 33 Ark. 713; State *v.* James, 37 Conn. 355, 357; Hendee *v.* Taylor, 29 Conn. 448, 449; *Ex p.* Nightingale, 12 Fla. 272; State *v.* Pender, 66 N. C. 313, 314; Wash *v.* State, 3 Coldw. (Tenn.) 91. 92.

For form of order of discharge on giving bail see Iowa Code (1897), § 551; Hill's Anno. Laws Oreg. (1892), §§ 1477, 1478.

Interpretation of order.—An order of court directing the admission of an accused person to bail is not to be construed strictly as to any inartificial or ungrammatical language therein, but if the terms thereof will admit of a construction which will make such order legal, such construction should be given. So where in the case of these prisoners the court ordered that A should give bail in the sum of six hundred dollars, and B and C in the sum of five hundred dollars "each conditioned that the said A, B and C shall appear before the superior court," etc., it was held that the order was to be interpreted as requiring each to give bail for his own appearance, and not for the others. Hendee *v.* Taylor, 29 Conn. 448.

59. Directed to sheriff of another county. — Holcombe *v.* State, 99 Ala. 185, 12 So. 794.

60. When order precludes bail.— *Ex p.* Robinson, 108 Ala. 161, 18 So. 729. But see *Ex p.* Skelton, 104 Ala. 98, 16 So. 74.

New recognizance on same order.— If the prisoner fails to appear in obedience to an order of the court, and his recognizance is paid, a new bond may be taken if he comes again into the sheriff's custody. Lewis *v.* People, 18 Ill. App. 76.

61. *Ex p.* Harris, 26 Fla. 77, 7 So. 1, 23 Am. St. Rep. 548, 6 L. R. A. 713 (where lower court refused to act on ground that he was disqualified and the offense was a bailable felony); State *v.* Herndon, 107 N. C. 934, 12 S. E. 268 (where judge below refused to hear any evidence, on ground that return to writ showed that petitioner was indicted for a capital offense).

62. On appeal or error.— *Ex p.* Richards, 102 Ind. 260, 1 N. E. 639; Lumm *v.* State, 3

exceptions and the application made to the supreme court.[63] In several states, however, the refusal of, or admission to, bail is not within that class of cases in which an appeal or writ of error lies, either because acts of discretion are not reviewable or are not final judgments, or for some other statutory reason.[64]

(III) *Certiorari, Habeas Corpus, or Mandamus.*[65] Upon a proper showing habeas corpus and certiorari will be awarded by the supreme court to review the action of the court below in refusing bail,[66] and a denial of the application may be ordered with leave to move again on additional evidence for another hearing.[67] Mandamus will not issue to compel admission to bail unless all the facts on which the decision is based are legally certified up.[68]

b. Record and Presumptions. Where a copy of the record and other papers are required they must be filed in the supreme court before an application for bail will be heard therein,[69] and matters necessary for the court's information, or essential to be established, or to rebut presumptions of fact or of law, or in favor of the judgment showing the refusal of bail below to have been erroneous, must appear;[70] although such a *prima facie* case may be made out upon the record

Ind. 293; *Ex p.* Walker, 3 Tex. App. 668. See, generally, Appeal and Error, 2 Cyc. 474.

Reasons for decision.— The appellate court in Texas need not discuss the facts nor give the reasons for its reversal of the judgment below denying bail on habeas corpus. *Ex p.* Winters, (Tex. Crim. 1895) 32 S. W. 897; *Ex p.* McKinney, 5 Tex. App. 500; *Ex p.* Moore, 5 Tex. App. 103; *Ex p.* Rothschild, 2 Tex. App. 560.

63. Exceptions and application to supreme court.—*Ex p.* Banks, 28 Ala. 89.

64. Appeal or writ of error will not lie.— *Arkansas.*— *Ex p.* Kittrel, 20 Ark. 499; *Ex p.* Good, 19 Ark. 410.

California.— People *v.* Schuster, 40 Cal. 627.

Illinois.— Lynch *v.* People, 38 Ill. 494.

Louisiana.— State *v.* Judge Second Dist. Ct. New Orleans, 10 La. Ann. 424.

Mississippi.— State *v.* Shrader, 72 Miss. 541, 18 So. 454.

Texas.— Yarbrough *v.* State, 2 Tex. 519.

See 5 Cent. Dig. tit. "Bail," § 202.

65. Instead of the writs of certiorari and habeas corpus issuing from the supreme court, an agreed statement of the facts and proceedings had before the circuit judge may be submitted by the counsel for and against the prisoner, and if the supreme court decides that the prisoner is entitled to bail, application may again be made to the circuit judge. So held in *Ex p.* Croom, 19 Ala. 561.

66. Certiorari or habeas corpus.—*Ex p.* Croom. 19 Ala. 561 (discussing proper practice and what the petition should set forth); *Ex p.* Kittrel, 20 Ark. 499; *Ex p.* Good, 19 Ark. 410 (considering also duty of judge to make record). The body of the prisoner and the proceedings before the lower court (*Ex p.* Croom, 19 Ala. 561), or a transcript of all the proceedings (*Ex p.* Good, 19 Ark. 410) will be brought before the supreme court. See also, generally, Certiorari; Habeas Corpus.

Federal courts.— That the prosecuting attorney was duly a *de facto* officer and that petitioner was denied bail pending writ of error in the state court are not sufficient grounds under U. S. Rev. Stat. (1878), § 753. *In re* Humason, 46 Fed. 388.

Reviewing proceedings of courts of concurrent jurisdiction.— But it is also decided that these writs will not be granted by the supreme court to review the actions of another court having concurrent and not inferior jurisdiction in the matter of bail. *In re* Strickland, 41 La. Ann. 324, 6 So. 577.

67. Leave to apply again.—State *v.* Jones, 36 S. C. 607, 15 S. E. 544.

68. Mandamus.— *Ex p.* Good, 19 Ark. 410. See also, generally, Mandamus.

Mandamus to sheriff will not issue to compel him to bring accused before a certain circuit court commissioner for admission to bail where he has good reason to believe such commissioner disqualified and no issue is made to try the questions and there are other authorities having cognizance of the application. Elder *v.* Garner, 97 Mich. 617, 55 N. W. 460.

Refusal of the lower court to hear a second application for bail will not be controlled by mandamus. *Ex p.* Campbell, 20 Ala. 89.

Supersedeas and mandamus.—Although an order from a justice of the supreme court to the court below allows a "writ of error to operate as a supersedeas" but directs the admission to bail, it is not a mere supersedeas but a command to admit to bail, and the supreme court may compel compliance with such order by mandamus, although the judge below is of opinion that said order is unauthorized by law and that the bond would be void. Hudson *v.* Parker, 156 U. S. 277, 15 S. Ct. 450, 39 L. ed. 424.

69. Requisite papers must be filed.—Com. *v.* Myers, 2 Mon. (Pa.) 764, including copy of bills of exceptions and assignments in error.

70. The record should contain evidence of the applicant's ability to give or procure bail for the court's information in fixing the amount of bail if granted. Miller *v.* State, 42 Tex. 309; *Ex p.* Walker, 3 Tex. App. 668. So, where from the record it appears that a voluntary surrender after escape of one indicted for murder is an essential assertion. it is not established in the supreme court by

that it will be aided by a presumption in favor of the petitioner.[71] The presumption, however, exists that the court properly exercised its discretion and that the judgment is correct,[72] but this does not preclude the supreme court from reviewing the evidence and determining the facts,[73] nor from giving the prisoner the benefit of every reasonable doubt upon the case as presented;[74] and even though it may decline to consider the credibility of witnesses in the court below or to reverse the refusal on those grounds,[75] or to discuss the evidence in the record, yet it will consider its sufficiency to make a case in which the "proof is evident" that accused is guilty as charged,[76] and it may also, without reversing, reject, as irrelevant, inculpatory evidence improperly admitted below and affirm the judgment upon the legal evidence.[77]

E. Amount of Bail — 1. Excessive Bail. It is a constitutional guaranty that excessive bail shall not be required.[78] Bail must not, however, be in a prohibitory amount, for, if so, it is substantially a denial of bail within the constitutional provision, and the circumstances and ability of the prisoner or his poverty may be considered in connection with the atrocity of the offense, or turpitude of the crime and the punishment involved.[79] In addition it has been declared that the

a proffer before the district court to prove such fact and a refusal of the judge thereof to hear testimony upon the subject brought before the supreme court only on a bill of exceptions. State *ex rel.* Vickers, 47 La. Ann. 662, 17 So. 296. See further cases cited *infra*, note 71 *et seq.*

71. Prima facie case.—When no cause is assigned in the order and none appears in the record for a premature adjournment at which one accused of a capital offense is properly triable the appellate court will not presume that a sufficient cause existed for such adjournment, nor will it require the prisoner who has made out a *prima facie* case to prove that a sufficient cause did not exist. *Ex p.* Croom, 19 Ala. 561.

72. Abuse of discretion or manifest error.— The jurisdiction of the appellate court being revisory and correctory, upon reviewing proceedings as to bail it will not interfere except where such discretion has been exercised in an arbitrary, unjust, or oppressive manner, or where the refusal below is manifestly erroneous.

Alabama.— *Ex p.* Richardson, 96 Ala. 110, 11 So. 316; *Ex p.* Nettles, 58 Ala. 268; *Ex p.* Allen, 55 Ala. 258; *Ex p.* Weaver, 55 Ala. 250; *Ex p.* McCrary, 22 Ala. 65.

Arkansas.— *Ex p.* Osborn, 24 Ark. 185.

California.— *Ex p.* Turner, 112 Cal. 627, 45 Pac. 571.

Georgia.— Lester *v.* State, 33 Ga. 192.

Indiana.— *Ex p.* Halpine, 30 Ind. 254.

Mississippi.— Street *v.* State, 43 Miss. 1.

Texas.— McKinney *v.* State, (Tex. Crim. 1892) 20 S. W. 363.

Utah.— *Ex p.* Clawson, (Utah 1884) 5 Pac. 74.

See 5 Cent. Dig. tit. "Bail," § 203.

73. Reviewing facts.—*Ex p.* Kendall, 100 Ind. 599; *Ex p.* Sutherlin, 56 Ind. 595; *Ex p.* Moore, 30 Ind. 197; *Ex p.* Heffren, 27 Ind. 87. But see Street *v.* State, 43 Misc. 1, holding that the only possible inquiry is as to the grade of the offense on the strength of the evidence.

74. Giving benefit of reasonable doubt.— *Ex p.* Jones, 20 Ark. 9, where the only evidence considered was the written testimony taken by the committing magistrate.

75. Credibility of witnesses.— Street *v.* State, 43 Miss. 1. See also *Ex p.* Weaver, 55 Ala. 250.

76. *Ex p.* Cook, 2 Tex. App. 388. Where it appeared that the killing was with express malice and the identity of the person was the only question involved, the judgment of refusal was not disturbed. McKinney *v.* State, (Tex. Crim. 1892) 20 S. W. 363.

77. *Ex p.* Smith, 23 Tex. App. 100, 5 S. W. 99.

78. That the prohibition of the United States constitution relating to excessive bail does not apply to state governments has been decided. Foote *v.* State, 59 Md. 264; Com. *v.* Hitchings, 5 Gray (Mass.) 482.

Amount of bail in civil actions see *supra*, II, F.

79. Must not be in prohibitory amount.— U. S. *v.* Brawner, 7 Fed. 86; U. S. *v.* Lawrence, 4 Cranch C. C. (U. S.) 518, 26 Fed. Cas. No. 15,577. See also *Ex p.* Choynski, (Tex. Crim. 1901) 61 S. W. 391; *Ex p.* Tittle, (Tex. Crim 1897) 40 S. W. 598; *Ex p.* Lewis, (Tex. Crim. 1896) 38 S. W. 1150.

Fixed at ten thousand dollars will not be considered excessive on an indictment for murder in the absence of any showing as to accused's circumstances. McConnell *v.* State, 13 Tex. App. 390. See further People *v.* Town, 4 Ill. 19; *Ex p.* Hutchings, 11 Tex. App. 28.

If offense is punishable both by fine and imprisonment, a larger bond than the maximum of the fine is not illegal. State *v.* Martinez, 11 La. Ann. 23.

Inability to procure bail is insufficient to show that it is excessive. *Ex p.* Duncan, 53 Cal. 410, 54 Cal. 75. Nor is it a ground for release without bail. Matter of Jahn, 55 Kan. 694, 41 Pac. 956.

That amount depends upon turpitude of crime, etc., see *In re* Williams, 82 Cal. 183, 23 Pac. 118; U. S. *v.* Lawrence, 4 Cranch C. C. (U. S.) 518, 26 Fed. Cas. No. 15,577.

court, in fixing the amount of bail, will consider the nature of the offense charged, and on the whole case the probabilities of conviction, the sex, rank, and relations of the accused, so far as they have a bearing on the probabilities of his appearing for trial.[80] Again bail should not be clearly disproportionate to the offense charged, nor the amount thereof unreasonably large.[81]

2. Reduction or Increase of Bail — a. In General. If the amount of bail is clearly disproportionate to the offense or unreasonably large,[82] or it appears upon a proper presentation and showing to be excessive,[83] or the public interests will be the better subserved,[84] or there are other legal and justifiable reasons therefor,[85]

80. People *v.* Cunningham, 3 Park. Crim. (N. Y.) 520.

Amount involved in certain offenses may be considered, although this is not alone the criterion. *In re* Williams, 82 Cal. 183, 23 Pac. 118; People *v.* Tweed, 5 Hun (N. Y.) 382, 13 Abb. Pr. N. S. (N. Y.) 148.

The nature of the offense may also affect the amount of bail, as it may be within a statute fixing the amount, or be of a character which would make the matter one of discretion with the judge of court. People *v.* Page, 3 Park. Crim. (N. Y.) 600.

81. See *Ex p.* Duncan, 54 Cal. 75; *In re* Scott, 38 Nebr. 502, 56 N. W. 1009. An officer in taking bail is not bound by the amount of a previous bond taken on his own authority. Patillo *v.* State, 9 Tex. App. 456.

Amount need not be specified in, nor indorsed upon, the warrant to commit; it is sufficient that it is fixed by the proper authority. Votawo *v.* State, 12 Ind. 497. Ala. Crim. Code, § 3408, requiring such indorsement, applies only to preliminary proceedings before indictment, and not to commitments after indictment. Antonez *v.* State, 26 Ala. 81.

Supreme court on habeas corpus will fix amount of bond and direct the sheriff to take it and submit it to the court before the prisoner's discharge. Longworth Praying for Writ of Habeas Corpus, 7 La. Ann. 247.

82. *Ex p.* Duncan, 54 Cal. 75; *In re* Scott, 38 Nebr. 502, 56 N. W. 1009.

83. Excessive bail.— The petitioner should set forth that the amount is excessive. Hernandez *v.* State, 4 Tex. App. 425. And the question will not be considered where no complaint of it is made in the petition, and no testimony is adduced. *Ex p.* Warris, 28 Fla. 37, 9 So. 718. So the record should show accused's pecuniary circumstances. *Ex p.* Hutchings, 11 Tex App. 28. But if it appears that defendant is unable to give sufficient bail it will not be reduced. People *v.* Town, 4 Ill. 19. And if the application is to reduce bail after indictment, it is decided that the prisoner's guilt will be presumed (*Ex p.* Duncan, 54 Cal. 75), but the presumption may be rebutted (*In re* Scott, 38 Nebr. 502, 56 N. W. 1009); and if the facts on which the order of arrest was made are not denied, a presumption of their truth arises (People *v.* Tweed, 5 Hun (N. Y.) 382, 13 Abb. Pr. N. S. (N. Y.) 148).

84. To better subserve public interests.— Where defendant, who is implicated with another, has pleaded guilty and a sentence would deprive the state of his testimony on trial of his accomplice, bail will be reduced. Com. *v.* Lowry, 14 Leg. Int. (Pa.) 332.

85. When the trial is for a wrongful conversion of moneys and credits, and there has been a disagreement of the jury, and accused is held on other charges growing out of the same matter and has assigned all his property for the benefit of his creditors, bail will be reduced. Smith *v.* Lee, 13 Fed. 28. And if excessive bail be required the accused will be discharged on habeas corpus on bail in a reasonable sum. Whiting *v.* Putnam, 17 Mass. 175; Jones *v.* Kelly, 17 Mass. 116.

Instances of excessive bail.— *Louisiana.*— State *ex rel.* Chandler, 45 La. Ann. 696, 12 So. 884, libel and bail in the sum of ten thousand dollars.

Nevada.— *Ex p.* Douglas, 25 Nev. 425, 62 Pac. 49, larceny and bail in sum of five thousand dollars.

Pennsylvania.— Com. *v.* Lowry, 14 Leg. Int. (Pa.) 332.

Texas.—*Ex p.* Choynski, (Tex. Crim. 1901) 61 S. W. 319, prize-fighting and bail in sum of two thousand five hundred dollars, which was reduced to one thousand dollars.

United States.— U. S. *v.* Brawner, 7 Fed. 86.

See 5 Cent. Dig. tit. "Bail," § 209 *et seq.*

Instances of bail not excessive.— *California.*—*In re* Williams, 82 Cal. 183, 23 Pac. 118 (forgery and bail in sum of eight thousand dollars); *Ex p.* Ryan, 44 Cal. 555 (assault with intent to murder and bail in sum of fifteen thousand dollars).

Nebraska.— *In re* Scott, 38 Nebr. 502, 56 N. W. 1009, embezzlement and bail in sum of seventy thousand dollars.

New Hampshire.— Evans *v.* Foster, 1 N. H. 374, holding that bail in sum of one hundred and fifty dollars is not excessive where the crime is punishable by fine of from fifty to five hundred dollars.

New York.— People *v.* Tweed, 63 N. Y. 202, fraudulently obtaining six thousand dollars and bail in sum of three thousand dollars.

Rhode Island.— *Ex p.* Snow, 1 R. I. 360, embezzlement and bail in sum of two thousand five hundred dollars.

Texas.— *Ex p.* Scott, (Tex. Crim. App. 1901) 62 S. W. 568 (assault with intent to rape and bail in sum of six hundred dollars); *Ex p.* Bishop, (Tex. Crim. 1901) 61 S. W. 308 (burglary and bail in sum of two hundred and fifty dollars); *Ex p.* Hutchings, 11 Tex. App. 28 (felony and bail in sum of five hundred dollars). See also *Ex p.* Ferrell, (Tex. Crim. 1896) 37 S. W. 328.

United States.— U. S. *v.* Petit, 11 Fed. 58,

bail will be reduced. But the court has refused, after one has been admitted to bail, to increase the amount on an affidavit of aggravating facts.[86]

b. On Review. Much the same general principles as those considered under the last section apply to the review by the supreme court of the discretion of the trial court in fixing the amount of bail.[87] But it is also determined that all remedies below for a reduction must have been exhausted to justify such review.[88]

F. Bond, Undertaking, or Recognizance[89] **— 1. Form, Contents, and Validity — a. Bond or Recognizance.** If the law be silent as to the form in which the obligation is to be taken it may be done by bond or recognizance,[90] but if a bond be prescribed by statute a recognizance cannot be required;[91] and where such an obligation is required it should be in correct legal form.[92] On the other hand, if the statute requires a recognizance,[93] the material parts of the obligation and the condition should be set forth in the body of it.[94]

b. Compliance With Statute. The form of the instrument is in many cases provided for by law, and where such provision has been made there should be a compliance in substantial particulars with such requirements as apply thereto, and where it possesses none of them scire facias cannot be maintained thereon.[95]

counterfeiting and bail in sum of one thousand dollars.

See 5 Cent. Dig. tit. "Bail," § 209 *et seq.*

Amount fixed by the magistrate may be reduced or increased.

Indiana.— State *v.* Best, 7 Blackf. (Ind.) 611.

Michigan.— People *v.* Robb, 98 Mich. 397, 57 N. W. 257.

New York.— People *v.* McKinnon, 1 Wheel. Crim. (N. Y.) 170; People *v.* McLane, 1 Wheel. Crim. (N. Y.) 45.

Texas.— Johnson *v.* State, 31 Tex. Crim. 456, 20 S. W. 985.

United States.— U. S. *v.* Brawner, 7 Fed. 86.

But see State *v.* Aucoin, 47 La. Ann. 1677, 18 So. 709.

See 5 Cent. Dig. tit. "Bail," § 209 *et seq.*

The district court may consider a motion to reduce bail, notwithstanding the action of the supreme court is final and conclusive on appeal under habeas corpus. Miller *v.* State, 43 Tex. 579. See State *v.* Minkler, 6 Wash. 623, 34 Pac. 151, where the power of the supreme court to reduce the amount of the appeal-bond on a prosecution for manslaughter was denied.

86. Rex *v.* Salter, 2 Chit. 109, 18 E. C. L. 536.

87. Thus the amount must be disproportionate *per se*. *In re* Williams, 82 Cal. 183, 23 Pac. 118. Or there must be an abuse of discretion. Fitzpatrick *v.* State, (Tex. Crim. 1896) 33 S. W. 1085.

But an increase of bail to an amount which accused was unable to raise is decided not to be a ground for reversal. Johnson *v.* State, 31 Tex. Crim. 456, 20 S. W. 985.

88. State *v.* Aucoin, 47 La. Ann. 1677, 18 So. 709.

Bond, undertaking, or recognizance, in civil actions see *supra*, II, G.

89. For definition, form, and general nature of bonds, recognizances, or undertakings see Bonds; Recognizances; Undertakings.

In case of the loss of a recognizance the court may permit the same to be supplied under its power to permit any part of the record or files to be supplied in case of loss or destruction, and a forfeiture may be taken of the same when so supplied. McElwee *v.* People, 77 Ill. 493. See also, generally, Lost Instruments.

90. **Bond or recognizance.**— Pugh *v.* State, 2 Head (Tenn.) 227.

91. **Bond not recognizance.**— So the security to be taken by a justice of the peace of one accused as the putative father of a bastard child, if required to be in the form of a bond, cannot be by recognizance, as the party, or his sureties, cannot be relieved against the condition of the latter, though they may be against the penalty of a bond. Johnson *v.* Randall, 7 Mass. 340; Merrill *v.* Prince, 7 Mass. 396.

92. U. S. *v.* Hudson, 65 Fed. 68.

If all the words necessary to make a valid bond are inserted, the fact that the words are not correctly arranged will not vitiate a bond, for in such a case the court will reform and rearrange the words so as to give the bond its proper force and effect. State *v.* Adams, 3 Head (Tenn.) 259.

93. **Recognizance not bond.**— Shattuck *v.* People, 5 Ill. 477, wherein it is said that at common law a recognizance was an obligation entered into before some court of record or magistrate duly authorized, with a condition to do some particular act therein specified — an instrument declared to be an obligation of more solemnity and of greater effect than another bond.

94. Dillingham *v.* U. S., 2 Wash. (U. S.) 422, 7 Fed. Cas. No. 3,913.

95. Lloyd *v.* State, Minor (Ala.) 34.

Bond taken by United States commissioner should conform to the statutory requirements of the state in which the commissioner is sitting, so far as such laws are applicable. U. S. *v.* Sauer, 73 Fed. 671.

Though a United States statute may provide for a recognizance in offenses against the United States, it is not exclusive of any other mode of bail not inconsistent therewith, and a bond provided for by state laws

And if the form is laid down by statute it is declared that such form becomes an essential ingredient of the manner of exercising the right, and, when there is but one form and there is no authority given to vary it, this is the only form applicable to the specific remedy, and the court cannot alter it, or substitute another in its stead.[96] But it has been held that an obligation in the form of a penal bond with the condition of a recognizance has the force and effect thereof.[97]

c. Conformity to Order. A bond or recognizance should conform to the requirements of the order authorizing the taking of the same, and a material variance therefrom will be fatal.[98]

may be valid. Swan *v.* U. S., 3 Wyo. 151, 9 Pac. 931.

Failure to designate who is principal and who are sureties, when such designation is required, will invalidate a bond. Smith *v.* State, 35 Tex. Crim. 9, 29 S. W. 158.

For forms of bonds, undertakings, or recognizances for bail see Ala. Crim. Code (1896), §§ 4361, 4362; Ariz. Pen. Code (1901), §§ 1084, 1106; Sandels & H. Dig. Ark. (1894), §§ 769, 2013; Cal. Pen. Code (1899), §§ 1278, 1287, 1316; People *v.* Love, 19 Cal. 676, 677; People *v.* Mellor, 2 Colo. 705, 706; Hendee *v.* Taylor, 29 Conn. 448, 450; D. C. Comp. Stat. (1894), p. 452, § 61; Fla. Rev. Stat. (1892), p. 896; Colquitt *v.* Bond, 69 Ga. 351, 352; Ida. Rev. Stat. (1887), § 8108; Matson *v.* Swanson, 131 Ill. 255, 256, 23 N. E. 595; Ogden *v.* People, 62 Ill. 63, 64; Thornton's Stat. Ind. (1897), §§ 1804, 1806; Hannum *v.* State, 38 Ind. 32, 34; Iowa Code (1897), §§ 5501, 5505; Nelson *v.* State, 44 Kan. 154, 24 Pac. 58; Norton *v.* State, 40 Kan. 670, 20 Pac. 462; Bullitt's Crim. Code Ky. (1895), pp. 141, 142; Me. Rev. Stat. (1883), c. 134, § 26; State *v.* Cobb, 71 Me. 198, 199; State *v.* Hatch, 59 Me. 410; Daniels *v.* People, 6 Mich. 381, 382; Miss. Anno. Code (1892), §§ 1400, 1400*a*; Dean *v.* State, 2 Sm. & M. (Miss.) 200; Mo. Rev. Stat. (1899), § 2762; Carpenter *v.* State, 8 Mo. 291, 292; Mont. Pen. Code (1895), § 2351; Irwin *v.* State, 10 Nebr. 325, 326, 6 N. W. 370; Nev. Comp. L. (1900), §§ 4469, 4476, 4498; N. Y. Code Crim. Proc. §§ 554, 568, 581, 605; People *v.* Hurlbutt, 44 Barb. (N. Y.) 126, 127; People *v.* McCoy, 39 Barb. (N. Y.) 73, 74; State *v.* Houston, 74 N. C. 174, 175; State *v.* Edney, 60 N. C. 463, 465; N. D. Rev. Codes (1895), § 8454; Bates' Anno. Stat. Ohio (1900), § 7187; Millikin *v.* State, 21 Ohio St. 635, 636; Hill's Anno. Laws Oreg. (1892), §§ 1470, 2154; Whitney *v.* Darrow, 5 Oreg. 442, 443; Fox *v.* Com., 81* Pa. St. 511, 513; Tenn. Code (1896), §§ 7117, 7118; State *v.* Quinby, 5 Sneed (Tenn.) 418, 420; Pierce *v.* State, 10 Tex. 556; Utah Rev. Stat. (1898), § 4995; U. S. *v.* Eldredge, 5 Utah 161, 163, 13 Pac. 673; Tyler *v.* Greenlaw, 5 Rand. (Va.) 711; Wis. Stat. (1899), §§ 4746, 4811; State *v.* Wettstein, 64 Wis. 234, 235.

For form of entry of bail in criminal prosecution see Wis. Stat. (1899), § 4812.

96. Dover *v.* State, 45 Ala. 244.

Sufficiency as a recognizance.—An acknowledgment signed and sealed by the accused and two others and on which the judge wrote "attested and approved" has been held not good as a recognizance. State *v.* West, 3 Ohio St. 509. As has also a mere memorandum containing neither the form nor substance of a recognizance. State *v.* Crippen, 1 Ohio St. 399. Though it has been decided that a formal recognizance may be molded out of the entries in the court's docket. Pierson *v.* Com., 3 Grant (Pa.) 314. A simple bond with a collateral condition has also been declared not a recognizance. Hicks *v.* State, 3 Ark. 313. See Blackwell *v.* State, 3 Ark. 320. In Tennessee it has been held that, in any proceeding where any bond or recognizance may be questioned, it will be regarded as a sufficient statutory bond if it would have been good at common law. U. S. *v.* Evans, 2 Flipp. (U. S.) 605, 2 Fed. 147, 1 Crim. L. Mag. 600. But an undertaking prescribed by statute which differs radically in form and substance from a recognizance will not be construed as such. State *v.* Hays, 2 Oreg. 314.

A bond not good as a recognizance may be good as a statutory bond. Park *v.* State, 4 Ga. 329. And might, it has been said, be good as a common-law bond. Hicks *v.* State, 3 Ark. 313. But see Dickenson *v.* State, 20 Nebr. 72, 29 N. W. 184. But a bond taken without authority will not even be good as a common-law bond. Scio *v.* Hollis, 10 Ohio S. & C. Pl. Dec. 99, 7 Ohio N. P. 281.

97. Penal bond conditioned as recognizance.—*Colorado.*— People *v.* Mellor, 2 Colo. 705.

Illinois.— McFarlan *v.* People, 13 Ill. 9; Shattuck *v.* People, 5 Ill. 477.

Indiana.— Kearns *v.* State, 3 Blackf. (Ind.) 334.

Kansas.— Ingram *v.* State, 10 Kan. 630.

North Carolina.— State *v.* Jones, 88 N. C. 683; State *v.* Edney, 60 N. C. 463.

98. Material variance fatal.— Dillingham *v.* U. S., 2 Wash. (U. S.) 422, 7 Fed. Cas. No. 3,913. So where a single bond for an aggregate amount for appearance of one charged with distinct offenses is not authorized by the order, the sureties on such a bond will not be liable. Cooper *v.* Com., 13 Bush (Ky.) 654; U. S. *v.* Goldstein, 1 Dill. (U. S.) 413, 25 Fed. Cas. No. 15,226. And where the order directs that the bond be given at a certain term of court, one bearing an earlier date is not the bond required, and is void. State *v.* Williams, 37 La. Ann. 200.

That the date of the order is the same as

d. To Whom Bond Should Run. The question as to whom the bond should run is, in many cases, made dependent upon the nature of the offense charged or the jurisdiction of the magistrate.[99] But if the statute specifies that it shall be taken to a certain official, or to the state, there should be a compliance in this particular with the statutory requirement.[1]

e. Amount of Bond. To be valid the bond should specify the amount in which the obligors are bound.[2] If the statute specifies the amount of bail which shall be given in the particular class of offenses of which the defendant is accused, a recognizance for a sum less than that specified will be void,[3] as it will also be if the penalty of the bond is for too much.[4] Again if the committing court in its order for bail designated the amount to be required, a bond not conforming to such order will be void.[5] A bond cannot, it has been declared, be taken in an aggregate amount to cover the penalties in different prosecutions.[6]

that of the bond is not proof of the fact that at the time the bond was taken the court was in session. Lindsay *v.* State, (Tex. Crim. App. 1898) 46 S. W. 1045.

99. **So where a justice of the peace has final jurisdiction** of a criminal offense brought before him, but no authority to bind the offender over to the county court, the bond should, it was held in early Connecticut cases, be to the treasurer of the town (Bentley *v.* Lyman, 21 Conn. 81), and not to the county treasurer (Darling *v.* Hubbell, 9 Conn. 350), and the requirement that the bond should be to the county treasurer on an appeal from a justice of the peace was not changed by the Connecticut act of 1855, which abolished the county court and transferred its jurisdiction to the superior court (Salef *v.* Phelps, 25 Conn. 114).

A private prosecutor, having no pecuniary interest in the trial and conviction of the offender, is not entitled to have a bail-bond taken to him. State Treasurer *v.* Rice, 11 Vt. 339.

1. **So where the statute specifies** that the bond should run to the state, one made to the governor is invalid. Warren *v.* State, 21 Tex. 510; Lawton *v.* State, 5 Tex. 270. See also Chittenden County Treasurer *v.* Mitchell, 23 Vt. 131.

A mere clerical error, however, in inserting the name of the former executive instead of the present one, where the bond should be taken to the executive, will not vitiate it. State *v.* McKeown, 12 La. Ann. 596.

2. Com. *v.* Campbell, 9 Ky. L. Rep. 494; Townsend *v.* State, 7 Tex. App. 74.

Omission of a stipulation to pay a certain sum to the state in case of a failure to perform the conditions of a bond or recognizance, though it be required by law, will not invalidate such instrument where it elsewhere acknowledges indebtedness in a specified amount to be void on certain conditions, and by statute or code it is provided that defects in form will render a bond or recognizance void. Ky. Crim. Code, § 80; Miller *v.* Com., 1 Duv. (Ky.) 14. See also Com. *v.* O'Daniel, 9 Bush (Ky.) 551. But the mere omission of the word "dollars," or the sign therefor, will not, it has been held, avoid the instrument, for the omitted word may be supplied. Whitney *v.* Darrow, 5 Oreg. 442. But see Irwin *v.* State, 10 Nebr. 325, 6 N. W. 370, where a recognizance in the sum of "three hundred" was held insufficient. A bail-bond that was conditioned for the payment of "$500, five hundred ———" has been held sufficient. Roberts *v.* State, 11 Tex. App. 26.

3. **Less than statutory amount.**— State *v.* McCown, 24 W. Va. 625.

4. **More than proper amount.**— State *v.* Austin, 4 Humphr. (Tenn.) 213. See Dow *v.* Prescott, 12 Mass. 418; Vose *v.* Deane, 7 Mass. 280.

5. **Conformity to order.**— Neblett *v.* State, 6 Tex. App. 316.

A bond taken in a larger sum than that fixed by court is void. Waugh *v.* People, 17 Ill. 561; Roberts *v.* State, 34 Kan. 151, 8 Pac. 246; Com. *v.* Riffe, 20 Ky. L. Rep. 1608, 49 S. W. 772; Connolly *v.* Com., 10 Ky. L. Rep. 873. Where, however, the order of the court fixed the bond at seven hundred dollars and the court subsequently directed the entry to be amended by inserting seven thousand dollars, a bond which had been previously executed for the latter sum was declared to be valid, and it was held that the sureties could be relieved only on the ground of error in signing it. State *v.* Frith, 14 La. 191.

A bond taken at a less sum than that fixed by court has been, however, held to be valid. Com. *v.* Nimmo, 7 Ky. L. Rep. 287. See also Chumasero *v.* People, 18 Ill. 405; Peters *v.* State, 10 Tex. App. 302.

Indorsement of amount by the clerk.— Where such an indorsement is required by a statute which directs the court to fix the amount of accused's bail, or authorizes the clerk to fix it when the judge is out of the county (see Mo. Rev. Stat. (1889), § 4124) the indorsement should be that the judge ordered bail or that he was absent. State *v.* Pratt, 148 Mo. 402, 50 S. W. 113.

Where the order for bail designated the amount as four hundred dollars with two sureties in the sum of two hundred dollars, and the bond was for the amount specified, but with ten sureties in the sum of forty dollars each, it was held that the sureties were not bound. State *v.* Buffum, 22 N. H. 267.

6. Cooper *v.* Com., 13 Bush (Ky.) 654. But see U. S. *v.* Reese, 4 Sawy. (U. S.) 629, 27 Fed. Cas. No. 16,138.

f. Conditions — (I) *In General.* A recognizance in general binds the principal to appear to answer a specified charge against him, to abide the order and judgment of the court thereon, and not to depart without leave of court, each of which particulars is said to be distinct and independent.[7]

(II) *As to Appearance* — (A) *In General.* The condition for appearance has generally been held sufficient where it binds the principal to appear to answer the complaint before some court of competent jurisdiction,[8] and abide the judgment of the court thereon.[9] And, generally, it may be stated that omissions or other defects which are not of a substantial nature will not invalidate a recognizance to appear.[10] The question, however, as to the validity of an obligation in a recognizance to appear and answer a criminal charge depends in many cases upon the jurisdiction and authority of the magistrate to examine and admit such party to bail, and not as to whether the particular court before which the parties are to appear has jurisdiction of the crime charged.[11] In some cases conditions in a

7. State *v.* Stout, 11 N. J. L. 124.

8. **Made returnable to a court not having jurisdiction of.** the case is void. Williams *v.* Shelby, 2 Oreg. 144; Com. *v.* Bolton, 1 Serg. & R. (Pa.) 328; State Treasurer *v.* Danforth, Brayt. (Vt.) 140.

9. *Connecticut.*—Waldo *v.* Spencer, 4 Conn. 71; County Treasurer *v.* Burr, 1 Root (Conn.) 392.

Illinois.— Gallagher *v.* People, 91 Ill. 590.

Kentucky.—Roberts *v.* Com., 7 Bush (Ky.) 430; Tenney *v.* Com., 3 Metc. (Ky.) 415.

Massachusetts. — Com. *v.* Nye, 7 Gray (Mass.) 316.

New Hampshire.— State *v.* Eastman, 42 N. H. 265.

New York.— People *v.* Koeber, 7 Hill (N. Y.) 39.

Vermont.— State Treasurer *v.* Rolfe, 15 Vt. 9.

See 5 Cent. Dig. tit. "Bail." § 257.

Sufficiency, generally.— It is no objection to a recognizance which requires the appearance of the principal that the condition thereof provides that the obligation shall be void, if default be made in the condition. McCarty *v.* State, 1 Blackf. (Ind.) 338. Nor is a recognizance void which does not bind the principal in express terms to answer some charge where the nature of the offense is stated elsewhere in the instrument. State *v.* Whitecotton, 63 Mo. App. 8; State *v.* Becknall, 41 Tex. 319. See also *infra*, note 10. But see *contra*, Com. *v.* Fulks, 94 Va. 585, 27 S. E. 498. But where it cannot be ascertained whether the appearance is to be before a magistrate for examination or before the court for trial (Henry *v.* Com., 4 Bush (Ky.) 427), or where attendance is not required at the court before which the defendant may be tried (People *v.* Mack, 1 Park. Crim. (N. Y.) 567), the recognizance is defective. And a bond to appear and "answer the charge of the state of Texas with gift enterprise" has been held insufficient to support a verdict. Foard *v.* State, 3 Tex. App. 556.

A condition to appear at the next court of general sessions, then and there to answer all such matters and things as should be objected against the defendant and abide the order of the court, has been construed as binding the defendant to appear at the next court, to be forthcoming before such court until discharged. Gildersleeve *v.* People, 10 Barb. (N. Y.) 35.

If bond should be for appearance only no authority exists to exact in addition a condition for the payment of any fine against him. State *v.* Cobb, 44 Mo. App. 375.

Omission of word "next" before "term" will not invalidate a recognizance for appearance, but the instrument will be construed in connection with the statute requiring appearance at next term. Jedlicka *v.* State, 4 Ohio Dec. (Reprint) 463, 2 Clev. L. Rep. 196.

The phrase to "abide the judgment and orders" of the court does not mean that the final judgment shall be satisfied by the defendant or his sureties, but that the former will surrender himself ready and willing to either secure such judgment or be committed until such security is given. Sowders *v.* State, 37 Kan. 209, 14 Pac. 865.

10. **So omission of phrase** "to answer the charge" will not invalidate a recognizance. State *v.* Davidson, 20 Mo. 406; Gary *v.* State, 11 Tex. App. 527. Or that the defendant will not depart without leave. State *v.* Whitecotton, 63 Mo. App. 8; People *v.* Stager, 10 Wend. (N. Y.) 431.

The adding of clauses not required by law will not, in all instances, avoid the bond, but such clauses will be treated as surplusage. So held where the recognizance bound the party to appear "from day to day" (Cundiff *v.* State, 38 Tex. 641; State *v.* Glaevecke, 33 Tex. 53), and not to depart from the court "without leave" (Thompson *v.* State, 34 Tex. Crim. 135, 29 S. W. 789). See also *infra*, III, F, 1, l, as to effect of trivial defects.

11. State *v.* Edney, 20 N. C. 423. See also in this connection the following cases:

Alabama.— Gooden *v.* State, 35 Ala. 430.

Connecticut.— Darling *v.* Hubbell, 9 Conn. 350.

Indiana.— State *v.* Montgomery, 7 Blackf. (Ind.) 221; Paine *v.* State, 7 Blackf. (Ind.) 206.

Massachusetts.— Com. *v.* McNeill, 19 Pick. (Mass.) 127.

New Hampshire.—State *v.* Fowler, 28 N. H. 184.

New York.—People *v.* Shaver, 4 Park. Crim. (N. Y.) 45.

recognizance are prescribed by statute, and where so prescribed the courts will not inquire into the reasons of the legislature in requiring them.[12]

(B) *Place of Appearance.* A recognizance should designate a place or court where the defendant is to appear, and where this is not stated the instrument is fatally defective,[13] and if it designates a court, and there is no such court as that designated, it will be void.[14] But a mere misnomer of the court will not necessarily avoid it.[15] It has, however, been held unnecessary in some cases to specifically name the court for appearance where the court intended is sufficiently described by the designation of the place for appearance.[16] And the recognizance may in some cases designate the court of another county for the appearance of the defendant, as where an order has been made changing the venue to such county.[17]

(C) *Time of Appearance.* While the time for appearance of the defendant should be designated in a recognizance, yet it has generally been decided that it is not essential to the validity of such instrument that the day of the month or the year be correctly stated therein, provided the proper time is sufficiently fixed by other terms; and it has been held that a recognizance to appear at the "next term" of court will be valid, though there be an incorrect recital as to the

Texas.— Garner *v.* Smith, 40 Tex. 505.

Wisconsin.— State *v.* Wettstein, 64 Wis. 234, 25 N. W. 34.

See 5 Cent. Dig. tit. "Bail," §§ 257, 260.

12. Van Blaricum *v.* People, 22 Ill. 86.

13. State *v.* Allen, 33 Ala. 422; Grigsby *v.* State, 6 Yerg. (Tenn.) 354; State *v.* Phelps, 38 Tex. 555; Ward *v.* State, 38 Tex. 302; State *v.* Angell, 37 Tex. 357; Crouch *v.* State, 36 Tex. 333; Barnes *v.* State, 36 Tex. 332; Vivian *v.* State, 16 Tex. App. 262; Littlefield *v.* State, 1 Tex. App. 722.

In New York it has been held that a recognizance should be made returnable before a court at some term thereof. Corlies *v.* Waddell, 1 Barb. (N. Y.) 355.

Conditions held sufficient.—A statutory requirement that a recognizance shall state the court before which, and the time and place when and where, the defendant is to appear is sufficiently complied with by a requirement that he personally "appear before the next term of the District Court" instead of "before said court at its next term." Brown *v.* State, 28 Tex. App. 65, 66, 11 S. W. 1022. Condition that the defendant "shall well and truly make his personal appearance before the honorable district court of A county, Texas, now in session at the court house thereof in the town of B, and here remain from day to day" is a sufficient compliance. Thrash *v.* State, 16 Tex. App. 271; Ray *v.* State, 16 Tex. App. 268.

Defective conditions.—A condition stating the place as "the county court in and for the county of county, state of Texas at the court house thereof in the city of W," has been held defective. Hammond *v.* State, (Tex. App. 1886) 9 S. W. 269. As has also the condition to appear "at the next term of this court, and there remain" (Williamson *v.* State, 12 Tex. App. 169) or "before the District Court at Brackett" (Teel *v.* State, 3 Tex. App. 326, 327) under a requirement that the name of the court or county be stated. And a condition to appear "before said examining court" but omitting to name the magistrate has been held insufficient. Crowder *v.* State, 7 Tex. App. 484. Again, under a statute requiring that a debtor be taken before one of certain "magistrates," a recognizance that conditioned that the debtor will surrender himself "for examination before said police court" is not a compliance therewith. Underwood *v.* Clements, 16 Gray (Mass.) 169.

Recognizance to appear at next term of a certain court will be construed as meaning the court of the same county in which the prisoner was held to bail. People *v.* McCoy, 39 Barb. (N. Y.) 73; Hodges *v.* State, 20 Tex. 493.

14. Designating court not in existence.— Sherman *v.* State, 4 Kan. 570; Coleman *v.* State, 10 Md. 168; State *v.* Manly, 1 Md. 135. But where the recognizance was conditioned for appearance "before the criminal court" of a certain county, there was a sufficient designation of the court for appearance, where a certain court of such county alone had jurisdiction of the offense. Petty *v.* People, 118 Ill. 148, 8 N. E. 304.

15. Misnomer of court.— People *v.* Hawkins, 5 How. Pr. (N. Y.) 1, 3 Code Rep. (N. Y.) 42; State *v.* Edney, 20 N. C. 423.

16. Place designated by statute.— Norton *v.* State, 40 Kan. 670, 20 Pac. 462; Com. *v.* Stegala, 3 Ky. L. Rep. 686; State *v.* Quinby, 5 Sneed (Tenn.) 418. See People *v.* Carpenter, 7 Cal. 402, where it is held to be unnecessary if fixed by law.

Failure to designate the place will not avoid the recognizance where the statute designates a certain place as the only place at which such court shall meet. Tyler *v.* Greenlaw, 5 Rand. (Va.) 711.

17. Designating court of another county.— Hall *v.* State, 15 Ala. 431; Stebbins *v.* People, 27 Ill. 240. Such a condition has also been held valid where the indictment is pending and bail filed in another county. State *v.* Wells, 36 Iowa 238. But see Hodges *v.* State, 20 Tex. 493.

year or the day of the month on which the court will meet or for the defendant to appear,[18] or an omission to designate any date therefor.[19] But if there is no term of court to be held at the time specified in the recognizance and there is nothing in the record from which it may be inferred by the court that the time designated was intended to describe the next session of the court, the instrument will be void.[20]

(III) *Unauthorized Conditions.* Conditions in a recognizance, in addition to those authorized by law, are generally considered as not affecting the validity of the instrument, but as mere surplusage,[21] especially where they do not impose obligations which are more onerous than the law requires.[22]

18. *Illinois.*—Mooney *v.* People, 81 Ill. 134.
Indiana.— Hunter *v.* State, 21 Ind. 351.
Mississippi.— Curry *v.* State, 39 Miss. 511.
Missouri.— State *v.* Lay, 128 Mo. 609, 29 S. W. 999; State *v.* McElhaney, 20 Mo. App. 584.
New York.— People *v.* Welch, 47 How. Pr. (N. Y.) 420.
Texas.— O'Neal *v.* State, 35 Tex. 130; Brite *v.* State, 24 Tex. 219. But see *contra*, Maxwell *v.* State, 38 Tex. 171; Wegner *v.* State, 28 Tex. App. 419, 13 S. W. 608; Douglass *v.* State, 26 Tex. App. 248, 9 S. W. 733; Thomas *v.* State, 13 Tex. App. 496; Sloan *v.* State, 39 Tex. Crim. 63, 44 S. W. 1095, 73 Am. St. Rep. 903. In Texas the cases hold that the principal should be bound to appear at a fixed time. Wright *v.* State, 22 Tex. App. 670, 3 S. W. 346; Williamson *v.* State, 12 Tex. App. 169.
See 5 Cent. Dig. tit. "Bail," § 259.
Sufficiency of designation generally.—Under a code provision that a recognizance shall be for the prisoner's appearance on the first day of the next term, if the day specified in the recognizance is in fact the first day of the term it is sufficient. Holmes *v.* State, 17 Nebr. 73, 22 N. W. 232. But see *contra*, Teel *v.* State, 3 Tex. App. 326. Again a requirement has been held sufficient providing for appearance "instanter" (Fentress *v.* State, 16 Tex. App. 79), or before a certain court "now in session" (Camp *v.* State, 39 Tex. Crim. 142, 45 S. W. 490); and a recognizance taken to the second day of the term is held valid in an early Kentucky case. Adams *v.* Com., 1 B. Mon. (Ky.) 70. But see Hostetter *v.* Com., 12 B. Mon. (Ky.) 1.
At current term.—Whether under special circumstances an appearance may be compelled at the current term in the district court, though a state statute provides that recognizance shall be for appearance at the next term, and proceedings in such cases are required to be in accordance with the state statute, *quære*. U. S. *v.* Brawner, 7 Fed. 86.
"Before the next term."—Where a bond provides for appearance "before the next term" of a certain court the word "before" is construed as having reference not to time but to place. Williford *v.* State, 17 Tex. 653.
Bond dated in August conditioned for appearance in August next was construed as meaning August of the following year. Wheeler *v.* State, 21 Ga. 153.
"Next regular term."—Where a statute provided that the defendant might, "at his option, give bail either for his appearance at the then pending or next regular term thereof, or for his appearance at such term, and from term to term thereafter," bond was declared to be void which was conditioned for appearance at a special term of the United States district court which was not then called and was subsequently called at a different time from that named in the bond and after the lapse of two regular terms. U. S. *v.* Keiver, 56 Fed. 422, 424.
"Next term" of court in a recognizance entered into in a criminal case is construed as meaning the next term for the transaction of criminal business. People *v.* O'Brien, 41 Ill. 303.

19. Failure to designate any date.— Gay *v.* State, 7 Kan. 394; State *v.* Ansley, 13 La. Ann. 298; Kellogg *v.* State, 43 Miss. 57; State *v.* Potts, 60 Mo. 368. But see Coleman *v.* State, 10 Md. 168.
Omission of the word "next" before the word "term" in a recognizance required by statute to bind the accused to appear at the "next term" will not invalidate a recognizance which strictly conforms to the statute in other respects. Proseck *v.* State, 38 Ohio St. 606.

20. State Treasurer *v.* Merrill, 14 Vt. 64. See Butler *v.* State, 12 Sm. & M. (Miss.) 470; State *v.* Sullivant, 3 Yerg. (Tenn.) 280; Burnett *v.* State, 18 Tex. App. 283; Hayden *v.* State, (Tex. Crim. 1897) 38 S. W. 801; Moseley *v.* State, 37 Tex. Crim. 18, 38 S. W. 800.

21. Surplusage.—*Alabama.*—Howie *v.* State, 1 Ala. 113.
Maine.— State *v.* Cobb, 71 Me. 198; State *v.* Crowley, 60 Me. 103; State *v.* Hatch, 59 Me. 410; State *v.* Baker, 50 Me. 45.
Missouri.— State *v.* Lewis, 61 Mo. App. 633.
Rhode Island.— State *v.* Edgerton, 12 R. I. 104.
Tennessee.— State *v.* Adams, 3 Head (Tenn.) 259.
Vermont.— State Treasurer *v.* Woodward, 7 Vt. 529.
See 5 Cent. Dig. tit. "Bail," § 261.

22. Conditions not more onerous than law requires.— *Georgia.*— Simpson *v.* Robert, 35 Ga. 180.
Kansas.— Glasgow *v.* State, 41 Kan. 333, 21 Pac. 253.
Louisiana.— State *v.* Cassidy, 7 La. Ann. 273.
Ohio.— State *v.* Wellman, 3 Ohio 14.
Texas.— Wilcox *v.* State, 24 Tex. 544;

g. Description of Offense — (i) *Necessity.* A recognizance should either set out the kind of offense or describe it substantially, so that it may appear what the nature of the charge is for which the accused is to answer.[23] But this rule is not followed in some jurisdictions.[24]

(ii) *Sufficiency* — (a) *Particularity Required.* It is not necessary in a recognizance to describe the offense with legal accuracy,[25] or in the terms of the statute;[26] nor is it essential that the instrument designate by number the section of the statute alleged to have been violated,[27] or that it state the degree of the crime charged.[28] The offense need only be substantially described, it not being necessary to set it forth with the technical precision required in an indictment;[29]

Pickett *v.* State, 16 Tex. App. 648; Fulton *v.* State, 14 Tex. App. 32.

See 5 Cent. Dig. tit. "Bail," §§ 261, 262.

Conditions more onerous than law requires. — In some cases, however, it has been held that, if material and important words are added which impose more onerous conditions than are required by law, the recognizance is void. Durein *v.* State, 38 Kan. 485, 17 Pac. 49; Barringer *v.* State, 27 Tex. 553; Hand *v.* State, 28 Tex. App. 28, 11 S. W. 679; Wright *v.* State, 22 Tex. App. 670, 3 S. W. 346; Turner *v.* State, 14 Tex. App. 168. *Contra,* Ainsworth *v.* Territory, 3 Wash. Terr. 270, 14 Pac. 590.

23. Rule requiring description.—*Alabama.* — Goodwin *v.* Governor, 1 Stew. & P. (Ala.) 465.

Colorado.— Waters *v.* People, 4 Colo. App. 97, 35 Pac. 56.

Idaho.— People *v.* Sloper, 1 Ida. 158.

Kentucky.—Simpson *v.* Com., 1 Dana (Ky.) 523.

Louisiana.— State *v.* Wooten, 4 La. Ann. 515.

Oregon.— Belt *v.* Spaulding, 17 Oreg. 130, 20 Pac. 827.

Texas.— State *v.* Gordon, 41 Tex. 510; Gonzales *v.* State, 31 Tex. 205; Tierney *v.* State, 31 Tex. 40; Bennett *v.* State, 30 Tex. 446; Payne *v.* State, 30 Tex. 397; Horton *v.* State, 30 Tex. 191; O'Bannon *v.* State, 9 Tex. App. 465; Littlefield *v.* State, 1 Tex. App. 722.

Virginia.— Cannon *v.* Com., 96 Va. 573, 32 S. E. 33.

24. In these jurisdictions it is declared that if the defendant was in legal custody charged with a criminal offense, and was discharged from such custody by reason of the execution of the recognizance, and it can be ascertained that the sureties undertook that the defendant should appear before the proper court for trial for such offense, the recognizance is not void in failing to state the particular offense charged. Kansas City *v.* Hescher, 4 Kan. App. 782, 46 Pac. 1005. See also State *v.* Randolph, 22 Mo. 474; State *v.* Rye, 9 Yerg. (Tenn.) 386; Dailey *v.* State, 4 Tex. 417. And in New York it has been decided that, under the code provision that no proceeding thereunder shall be invalid because of any error or mistake which does not prejudice defendant's substantial rights [N. Y. Code Crim. Proc. § 684] an omission to specify the offense will not invalidate the bond, since defendant's substantial rights are not thereby prejudiced. People *v.* Gillman, 125 N. Y. 372, 26 N. E. 469, 35 N. Y. St. 280 [*reversing* 58 Hun (N. Y.) 368, 12 N. Y. Suppl. 40, 34 N. Y. St. 629].

25. Legal accuracy not required.— Patterson *v.* State, 12 Ind. 86.

26. Hall *v.* State, 9 Ala. 827. A description in the recognizance of the offense as "resisting process" is sufficient, though the statute makes the offense consist in "knowingly and wilfully resisting or opposing any officer of this State in serving or attempting to serve, or execute, any legal writ or process whatsoever." Browder *v.* State, 9 Ala. 58. But see Belt *v.* Spaulding, 17 Oreg. 130, 20 Pac. 827.

But following the language of the statute describing the offense will be sufficient. People *v.* Baughman, 18 Ill. 152. And it has been held that the offense should be set out in substantial conformity to the statutory definition. Hardin *v.* State, 36 Tex. Crim. 460, 37 S. W. 735.

Where a statute prescribes the form of bond and designates the manner of describing the offense, the omission of words not necessarily essential to the description will not avoid the recognizance. So where, under the statute, the bond should read to answer "for the offense of burglary," a bond to answer "for burglary" will be sufficient. Holcombe *v* State, 99 Ala. 185, 12 So. 794.

27. U. S. *v.* Dunbar, 83 Fed. 151, 48 U. S. App. 531, 27 C. C. A. 488.

28. Degree of offense need not be stated.— *Georgia.*— Foote *v.* Gordon, 87 Ga. 277, 13 S. E. 512; Clark *v.* Gordon, 82 Ga. 613, 9 S. E. 333.

Illinois.— Besimer *v.* People, 15 Ill. 439.

Kentucky.— Fowler *v.* Com., 4 T. B. Mon. (Ky.) 128.

Michigan.— People *v.* Dennis, 4 Mich. 609, 69 Am. Dec. 338.

Texas.— Thompson *v.* State, 31 Tex. 166; Cotton *v.* State, 7 Tex. 547.

See 5 Cent. Dig. tit. "Bail," § 263 *et seq.*

29. Substantial description sufficient.— *Alabama.*— State *v.* Weaver, 18 Ala. 293.

Georgia.— Hampton *v.* Brown, 32 Ga. 251.

Illinois.— People *v.* Baughman, 18 Ill. 152.

Indiana.— State *v.* Hamer, 2 Ind. 371.

Louisiana.— State *v.* Tennant, 30 La. Ann. 852; State *v.* Cunningham, 10 La. Ann. 393.

Maine.— State *v.* Howley, 73 Me. 552.

Missouri.— State *v.* Weideman, 30 Mo. App. 647.

nor need the facts of the case be set forth, it being sufficient if the offense be specified in general terms.[30] And where there are several indictments the fact that the recognizance does not specify to which indictment it refers will not affect its validity.[31] Again it has been held to be sufficient to state the name of the offense without setting out the elements thereof, or the facts.[32] Nor will clerical errors in the description of the offense invalidate a recognizance, where it is provided by law that no recognizance shall be void for want of form or substance, or for omission of any recital or condition.[33] And added or unnecessary words in the description may be treated as surplusage.[34]

(B) *Must Describe a Punishable Offense.* The recognizance, when required to describe the offense, should describe such a one as will, under the laws, justify a criminal prosecution, and if no such offense be described, the recognizance will be void.[35]

New York.— People *v.* Blankman, 17 Wend. (N. Y.) 252.

Texas.— State *v.* Gordon, 41 Tex. 510; Barrera *v.* State, 32 Tex. 644.

See 5 Cent. Dig. tit. "Bail," § 266.

30. Supporting the text and giving illustrations of sufficient descriptions see the following cases:

Alabama.— Hall *v.* State, 15 Ala. 431.

California.— People *v.* Barnes, 65 Cal. 16, 2 Pac. 493.

Colorado.— Chase *v.* People, 2 Colo. 528.

Illinois.— Young *v.* People, 18 Ill. 566.

Iowa.— State *v.* Merrihew, 47 Iowa 112, 29 Am. Rep. 464; State *v.* Marshall, 21 Iowa 143.

Kentucky.— Main *v.* Com., 22 Ky. L. Rep. 228, 56 S. W. 970.

Maine.— State *v.* Howley, 73 Me. 552.

Michigan.— Daniels *v.* People, 6 Mich. 381.

Nevada.— State *v.* Birchim, 9 Nev. 95.

Ohio.— Kinney *v.* State, 14 Ohio Cir. Ct. 91, 7 Ohio Cir. Dec. 97.

Texas.— Lewis *v.* State, (Tex. Crim. 1898) 47 S. W. 988; Camp *v.* State, 39 Tex. Crim. 142, 45 S. W. 490; Lockhart *v.* State, 32 Tex. Crim. 149, 22 S. W. 413; Lowrie *v.* State, 43 Tex. 602; Turner *v.* State, 41 Tex. 549; State *v.* Franklin, 35 Tex. 497; State *v.* Brown, 34 Tex. 146; Webb *v.* State, 32 Tex. 652; Barrera *v.* State, 32 Tex. 644; Goldthwaite *v.* State, 32 Tex. 599; Wilson *v.* State, 25 Tex. 169; Vivian *v.* State, 16 Tex. App. 262; Wills *v.* State, 4 Tex. App. 613; Morris *v.* State, 4 Tex. App. 557.

United States.— U. S. *v.* Dunbar, 83 Fed. 151, 48 U. S. App. 531, 27 C. C. A. 488; U. S. *v.* Dennis, 1 Bond (U. S.) 103, 25 Fed. Cas. No. 14,949; U. S. *v.* George, 3 Dill. (U. S.) 431, 25 Fed. Cas. No. 15,199, 2 Centr. L. J. 77, 22 Pittsb. Leg. J. (Pa.) 103.

For insufficient descriptions see State *v.* Moore, 2 Pennew. (Del.) 299, 46 Atl. 669; Fikes *v.* State, (Tex. Crim. 1899) 51 S. W. 248; Loveless *v.* State, (Tex. Crim. 1899) 50 S. W. 361; Mara *v.* State, 39 Tex. Crim. 183, 45 S. W. 594; Patton *v.* State, 35 Tex. 92; Hill *v.* State, 27 Tex. 608.

31. Several indictments.— People *v.* Ct. Oyer & Terminer, 7 Hun (N. Y.) 114.

Though several offenses may be charged in different counts in the indictment, a recital of one has been held sufficient. Mooney *v.* People, 81 Ill. 134; People *v.* Dennis, 4 Mich. 609, 69 Am. Dec. 338; State *v.* Peyton, 32 Mo. App. 522; Foster *v.* State, 38 Tex. Crim. 374, 42 S. W. 998.

32. Merely naming offense.— State *v.* Hamer, 2 Ind. 371; Belt *v.* Spaulding, 17 Oreg. 130, 20 Pac. 827; Jones *v.* State, 38 Tex. Crim. 364, 43 S. W. 78, 70 Am. St. Rep. 751. So held under a statute requiring a recognizance "briefly stating the nature of the offense." State *v.* Birchim, 9 Nev. 95. But see Belt *v.* Spaulding, 17 Oreg. 130, 20 Pac. 827.

An indorsement of the name of the offense may be sufficient. Tillson *v.* State, 29 Kan. 452.

33. State *v.* Soudriette, 105 Ind. 306, 4 N. E. 860. So a description of the offense as carrying "brass knucks" instead of "brass-knuckles" is not fatal. Mills *v.* State, 36 Tex. Crim. 71, 35 S. W. 370. See also People *v.* Hanaw, 106 Mich. 421, 64 N. W. 328, where it is held that a bond is not void because of a misnomer of the offense.

Misdescription of the offense will not relieve the sureties. Shreeve *v.* State, 11 Ala. 676; State *v.* Loeb, 21 La. Ann. 599.

Reference to indictment or information may cure an insufficient description (Com. *v.* Merriam, 7 Allen (Mass.) 356), or a misrecital in the recognizance (Com. *v.* Field, 11 Allen (Mass.) 488).

Where recognizance contains a condition that the accused will not depart without leave of court, it may be valid, though the offense is not properly described in the body of the instrument. State *v.* Arledge, 48 La. Ann. 774, 19 So. 761; State *v.* Loeb, 21 La. Ann. 599; State *v.* Ansley, 13 La. Ann. 298; State *v.* Gilbert, 10 La. Ann. 524; Gildersleeve *v.* People, 10 Barb. (N. Y.) 35; U. S. *v.* Atwill, 24 Fed. Cas. No. 14,475. See also State *v.* Whitley, 40 Ala. 728.

34. Surplusage.— So held where the offense was described as "assault and battery with intent to kill," and the words "with intent to kill" were rejected as surplusage. Sweetser *v.* State, 4 Blackf. (Ind.) 528. See also Wilson *v.* State, 25 Tex. 169; Hodges *v.* State, 20 Tex. 493.

35. Com. *v.* West, 1 Dana (Ky.) 165; State *v.* Ridgley, 10 La. Ann. 302; Edwards *v.* State, 29 Tex. App. 452, 16 S. W. 98; State *v.* Cotton, 6 Tex. 425; Dailey *v.* State, 4 Tex. 417;

(c) *Disjunctive Wording and Duplicity.* If the recognizance describes the offense in a disjunctive form it has been declared that such description will render it invalid;[36] and it may also be bad for duplicity.[37]

(d) *Intent of Accused.* Where, under the statute, a recognizance should name and describe the offense of which the defendant is accused, a failure therein to state that the act of the person was committed knowingly or with felonious intent, such description being under the statute essential to the offense, is a defect and will render the bond invalid;[38] but in some cases the recital of the offense may be construed as meaning a felonious intent on the part of the accused.[39]

(e) *Venue of Offense.* The venue of the offense need not be stated in a bond or recognizance,[40] and it has been held to be no objection to the validity of a recognizance that the crime is stated therein to have been committed in another county than that of the court to which the recognizance is taken.[41]

(f) *Variance Between Indictment and Recognizance.* The fact that the description of the offense in the recognizance varies from that set forth in the warrant of arrest or indictment will not avoid such recognizance if it in substance describes the offense charged.[42] But if the variance is a substantial one, and the

U. S. *v.* Hand, 6 McLean (U. S.) 274, 26 Fed. Cas. No. 15,296.

For offenses not punishable as described in a recognizance see the following:

Com. *v.* West, 1 Dana (Ky.) 165; State *v.* Gibson, 23 La. Ann. 698; State *v.* Ridgley, 10 La. Ann. 302; Jackson *v.* State, (Tex. Crim. 1894) 24 S. W. 902; Bowman *v.* State, (Tex. App. 1890) 13 S. W. 1009; Sively *v.* State, 44 Tex. 274. See also Stewart *v.* State, 37 Tex. 576; Davis *v.* State, 30 Tex. 352; State *v.* Hotchkiss, 30 Tex 162; Moore *v.* State, 34 Tex. 138; Stroud *v.* State, 33 Tex. 650; Montgomery *v.* State, 33 Tex. 179; McDonough *v.* State, 19 Tex. 293. See Tousey *v.* State, 8 Tex. 173; Cotton *v.* State, 7 Tex. 547; State *v.* Cotton, 6 Tex. 425; Cresap *v.* State, 28 Tex. App. 529, 13 S. W. 992; Bowen *v.* State, 28 Tex. App. 103, 12 S. W. 413; Cravey *v.* State, 26 Tex. App. 84, 9 S. W. 62; Kramer *v.* State, 18 Tex. App. 13; Keppler *v.* State, 14 Tex. App. 173; O'Bannon *v.* State, 9 Tex. App. 465; Riviere *v.* State, 7 Tex. App. 55; Stancel *v.* State, 6 Tex. App. 460; Massey *v.* State, 4 Tex. App. 580; Hutchison *v.* State, 4 Tex. App. 435; McLaren *v.* State, 3 Tex. App. 680; Wraybourn *v.* State, 2 Tex. App. 7; Coney *v.* State, 1 Tex. App. 62. But see Elkins *v.* State, (Tex. Crim. 1893) 22 S. W. 44; McGee *v.* State, 11 Tex. App. 520.

36. Disjunctive wording.— So a recognizance was held invalid which described the offense as "carrying on or about" the person a weapon. Burrows *v.* State, (Tex. App. 1891) 17 S. W. 257; Walker *v.* State, 32 Tex. Crim. 517, 24 S. W. 909; Kennedy *v.* State, (Tex. Crim. 1894) 24 S. W. 901.

37. Duplicity.— Thus it was so held where the bond was to answer "for theft, receiving and concealing stolen property." Hutchison *v.* State, 4 Tex. App. 435.

But where there were two counts in an indictment, one for forgery and the other for uttering a forged instrument, it was held that a bond reciting both offenses was not bad for duplicity. Douglass *v.* State, 26 Tex. App. 248, 9 S. W. 733. See also Baird *v.* Com., 2 Duv. (Ky.) 78, where a recognizance to appear to answer two separate indictments for the same act was held valid.

38. So where a recognizance stated that the defendant was charged with concealing smuggled goods, but did not state that he did so knowing the same to be smuggled, it was held to be invalid. U. S. *v.* Sauer, 73 Fed. 671. See also Smith *v.* State, 36 Tex. 317; Stancel *v.* State, 6 Tex. App. 460; Allison *v.* State, 33 Tex. Crim. 501, 26 S. W. 1080.

39. So held where the bond recited that defendant was to appear and answer to the state "upon a charge of killing one T. W." State *v.* Williams, 17 Ark. 371.

40. Cundiff *v.* State, 38 Tex. 641.

The rule is otherwise where it is provided by law that it must appear in the recognizance that the defendant is accused of some crime against the laws of the state. Tex. Code Crim. Proc. art. 288, sub. 3; La Rose *v.* State, 29 Tex. App. 215, 15 S. W. 33, wherein it was held that, where the defendant was accused of bigamy, the recognizance should show that unlawful marriage was contracted in the state, this being essential to the crime of bigamy under the laws of Texas.

41. Dean *v.* State, 2 Sm. & M. (Miss.) 200. *Contra*, Com. *v.* Nickols, 17 Ky. L. Rep. 1173, 33 S. W. 946.

42. Immaterial variance.—*Alabama.*—Holcombe *v.* State, 99 Ala. 185, 12 So. 794; Welch *v.* State, 36 Ala. 277; Howie *v.* State, 1 Ala. 113.

California.— People *v.* Eaton, 41 Cal. 657.

Illinois.— Graves *v.* People, 11 Ill. 542.

Louisiana.— State *v.* Ansley, 13 La. Ann. 298.

Michigan.—People *v.* Tuthill, 39 Mich. 262; People *v.* Gordon, 39 Mich. 259.

South Carolina.— State *v.* Rowe, 8 Rich. (S. C.) 17.

Texas.— State *v.* Hotchkiss, 30 Tex. 162; Dyches *v.* State, 24 Tex. 266; Collins *v.* State, 16 Tex. App. 274; Hill *v.* State, 15 Tex. App. 530.

See 5 Cent. Dig. tit. "Bail," § 273.

Illustrations.— So it has been held that a recognizance is valid where it sets forth the

recognizance names or describes a different offense from that charged in the indictment, it has been declared that the sureties will not be bound.[43] In some cases, however, it has been held that the fact that the offense described in the recognizance is of a lower grade than that charged in the indictment will not invalidate the former instrument.[44]

h. Recital of Authority or Jurisdiction. While it should appear, from the nature and character of the recognizance as evidenced by its general terms,[45] recitals, and conditions, that the magistrate or officer taking the same had authority to so act in that class of cases to which the offense alleged to have been committed by the defendant belongs, it is not necessary that the particular facts showing the jurisdiction of the magistrate in the premises or the authority of the officer to act in the particular case be stated therein.[46] But if it appear from

offense as assault with intent to commit rape, though the indictment fails to sufficiently charge such offense and only charges aggravated assault. Langan *v.* State, 27 Tex. App. 498, 11 S. W. 521. Again, a description of the offense as the theft of a steer, while the indictment only alleges the unlawful use of an estray, is not fatal. O'Neal *v.* State, 35 Tex. 130. Nor will the sureties be relieved because the accused is conditioned to answer a charge of murder if one be found, while the affidavit on which the prisoner was brought before the magistrate charged an assault with intent to kill. Dyches *v.* State, 24 Tex. 266. And it will not avoid a recognizance that the offense is described therein as malicious mischief and the indictment is for intentionally injuring telegraph wires. Welch *v.* State, 36 Ala. 277. So also a recognizance conditioned to appear and answer a charge of forgery is not void because the indictment is for uttering and publishing as true a false and forged order for the payment of money. State *v.* Ansley, 13 La. Ann. 298. And a slight variance between the name in the indictment and that in the recognizance will not avoid the latter instrument. People *v.* Eaton, 41 Cal. 657; Graves *v.* People, 11 Ill. 542.

43. **Material variance.**— Duke *v.* State, 35 Tex. 424; Draughan *v.* State, 35 Tex. Crim. 51, 35 S. W. 667.

Illustrations.— So, where the indictment was for an aggravated assault but the bond described the offense as assault and battery, the bond was held to be insufficient. Foster *v.* State, 27 Tex. 236. As it was also where the indictment was for assault with intent to commit rape and the offense was described in the bond as rape. State *v.* Forno, 14 La. Ann. 450. And where the indictment was for resisting an officer a bond describing the offense as aggravated assault was held invalid. Smalley *v.* State, 3 Tex App. 202 [*overruling* State *v.* Angell, 37 Tex. 357; McCoy *v.* State, 37 Tex. 219]. Again the recognizance was held invalid where it describes the offense as selling liquor in quantities "larger" than one gallon, while the indictment was for selling in quantities "less" than one gallon. Reese *v.* People, 11 Ill. App. 346. Where the recognizance does not describe the property as being the property of the same persons as are named in the indictment as owners thereof, it has been held a fatal variance. McAdams *v.* State, 10 Tex. App. 317.

44. State *v.* Tennant, 30 La. Ann. 852; State *v.* Cunningham, 10 La. Ann. 393. See also Campbell *v.* State, 18 Ind. 375, 81 Am. Dec. 363.

45. State *v.* Grant, 10 Minn. 39; State *v.* Railey, 35 Mo. 168; State *v.* Randolph, 22 Mo. 474; Holmes *v.* State, 17 Nebr. 73, 22 N. W. 232; Gildersleeve *v.* People, 10 Barb. (N. Y.) 35; People *v.* Kane, 4 Den. (N. Y.) 530.

46. **Sufficiency of recitals generally.**— So it has been held that the recital of the offense and the official character of the magistrate are enough (Chase *v.* People, 2 Colo. 528); and that the recognizance will be sufficient if it shows at what court the accused is to appear, and from the description of the offense it appears that the magistrate could take the same. State *v.* Gilmore, 81 Me. 405, 16 Atl. 339, 17 Atl. 316 [but see the earlier cases in this state. State *v.* Wormell, 33 Me. 200; State *v.* Magrath, 31 Me. 469; State *v.* Smith, 2 Me. 62]. So a recital that the defendant stands charged by indictment in the district court with embezzlement or theft has been held to sufficiently describe the offense and to show the jurisdiction of such court, though it has no jurisdiction if the property stolen or embezzled is under a certain value, it being in such case a misdemeanor. Brown *v.* State, 28 Tex. App. 65, 11 S. W. 1022. But in an early case in New York it is declared that where the crime charged is burglary and there are different degrees thereof, the recognizance should show what degree it was, it being necessary to sufficiently state the crime so as to show the case to be one in which the magistrate had the right to take bail. People *v.* Koeber, 7 Hill (N. Y.) 39. Where an appearance bond taken by the sheriff did not show that there was any order authorizing him to take the same, the surety was held not liable. State *v.* Smith, 12 La. Ann. 349. A paper purporting to be a recognizance which contained nothing in any recital therein, or in the attestation clause showing that it had been taken by one authorized to take recognizances was held invalid. State *v.* Ahrens, 12 Rich. (S. C.) 493.

Recitals as to authority.— As to other recitals showing authority it has been decided

indorsements on the bond or recitals therein[47] that the officer or magistrate taking such bond did not have authority or jurisdiction to act in the matter the bond will be void.[48]

i. Recital of Prior Proceedings. It is not essential to the validity of a recognizance that it recite the special circumstances under which it was taken or detail the proceedings leading up to the admission of the party to bail. If there is sufficient stated therein from which the regularity of the proceedings may be presumed, as where the recognizance contains a condition to do some act, for the doing of which such an obligation may be properly taken, and the court or officer before whom it was acknowledged had authority by law to act in cases of that general description the recognizance is valid.[49]

j. Recital of Probable Cause. It has generally been held that it is not sufficient to state merely the nature of the offense in the recognizance without giving some reason why defendant should be held to appear. There should be in some way a showing, or statement of probable cause to charge the accused.[50]

that a recognizance which should have been taken before the sheriff is not avoided by the indorsement "Taken and acknowledged before me . . . Webb McNall, notary public." State *v.* Kurtz, 27 Kan. 223. And in an early case in Indiana it was held that a recognizance taken before an associate judge of the county court need not state that he is a judge of the circuit court. McCarty *v.* State, 1 Blackf. (Ind.) 338. Where the bond recites that defendant is charged with a certain offense, which is not necessarily a felony, such recital does not show that an investigation was necessary as is required in cases of felony. Brauner *v.* Com., 7 Ky. L. Rep. 228.

Recitals as to where taken.— The venue in the margin of the recognizance giving the name of the state and county will sufficiently indicate where taken. State Treasurer *v.* Bishop, 39 Vt. 353. A bond taken by the sheriff of one county will not be invalidated by marginal words referring to another county. Allen *v.* Com., 8 Ky. L. Rep. 353. An abbreviation of the name of the county in the caption of a recognizance, which can be interpreted as referring to only one county in the state, is also sufficiently certain. Gedney *v.* Com., 14 Gratt. (Va.) 318. It has been held, however, that a recognizance need not show on its face the court in which it was taken. State *v.* Rye, 9 Yerg. (Tenn.) 386. But see Grigsby *v.* State, 6 Yerg. (Tenn.) 354.

47. **That it need not appear on the face of the recognizance** that a magistrate in committing the defendant acted within the jurisdiction was held in Daniels *v.* People, 6 Mich. 381.

48. **Want of authority appearing.**— Covington *v.* Com., 3 Bush (Ky.) 478. See Com. *v.* Collins, 11 Gray (Mass.) 465.

49. *Arkansas.*— State *v.* Williams, 17 Ark. 371.

Illinois.— McFarlan *v.* People, 13 Ill. 9.

Kentucky.— Rogers *v.* Com., 11 Ky. L. Rep. 97; Com. *v.* Gilbert, 5 Ky. L. Rep. 183.

Michigan.— People *v.* Dennis, 4 Mich. 609, 69 Am. Dec. 338.

New York.—People *v.* Kane, 4 Den. (N. Y.) 530.

Tennessee.— But see State *v.* Edwards, 4 Humphr. (Tenn.) 226.

Vermont.— State Treasurer *v.* Bishop, 39 Vt. 353.

Virginia.—Archer *v.* Com., 10 Gratt. (Va.) 627; Hamlett *v.* Com., 3 Gratt. (Va.) 78.

So it has been held unnecessary to recite the arrest of the prisoner, conviction, and order for bail (Adams *v.* Governor, 22 Ga. 417), or a preliminary examination (Adams *v.* Governor, 22 Ga. 417; State *v.* Cobb, 71 Me. 198), or that the principal has been committed to jail (Hodges *v.* State, 20 Tex. 493), or that the accused was bound over because such punishment as could be inflicted in such court would be inadequate (Harris *v.* State, 54 Ind. 2).

Recitals as to indictment or complaint.— While a bond should, it is declared, show that the accusation was legally made (Murphy *v.* State, 17 Tex. App. 100), it has been held unnecessary to state that the complaint was made under oath (McCarty *v.* State, 1 Blackf. (Ind.) 338) or the time when the indictment was found (Mooney *v.* People, 81 Ill. 134; Gragg *v.* State, 18 Tex. App. 295). But see State Treasurer *v.* Cook, 6 Vt. 282. Where there is a recital of a presentment against A by the grand jury for the crime of perjury, in a recognizance which is conditioned for his appearance to "answer unto said presentment, according to law," it may, it is held, be understood as showing the finding of an indictment against him. Wood *v.* People, 16 Ill. 171.

Form of accusation, whether by indictment or otherwise, need not be indicated in the recognizance. State *v.* Weideman, 30 Mo. App. 647; McGee *v.* State, 11 Tex. App. 520; Coleman *v.* State, 32 Tex. Crim. 595, 25 S. W. 286. *Contra*, State *v.* Gordon, 41 Tex. 510.

50. Nicholson *v.* State, 2 Ga. 363; Com. *v.* Daggett, 16 Mass. 447; Com. *v.* Downey, 9 Mass. 520; People *v.* Koeber, 7 Hill (N. Y.) 39. But see People *v.* Freeman, 20 Mich. 413. A recital "that there was good reason and probable cause to believe the said A to be guilty thereof" has been held sufficient. State *v.* Baker, 50 Me. 45. But a recognizance con-

k. Recital of Surety's Liability. The sureties may be bound in a "penal sum."[51] But as the nature of the sureties' liability to the state is fixed by the law under which the bond is taken, the fact that the bond does not bind them *in solido* cannot be objected to by them.[52]

l. Trivial Defects. While it has been held that necessary words which have been omitted from the recognizance will not be supplied by intendment,[53] mere technical defects in form which are not material in any way, and from which no injury is shown to have resulted will not affect the validity of a recognizance.[54] Again, the statutes in some of the states expressly provide that a recognizance shall not be rendered void because of mere defects in form.[55]

m. Validity as Affected by Defects in Preliminary Proceedings — (i) *In General.* Though it has been held that it is essential to the validity of the recognizance that the record of the court show that certain proceedings have taken place,[56] yet it may be stated generally that defects in the proceedings preliminary to the taking of bail are considered as waived by the sureties when they assume their obligations as such at the time of the execution of the recognizance, and such instrument, when filed, becomes a matter of record, and the presumption then arises that the proceedings prior thereto have been proper and legal.[57] And it has been

ditioned that the accused shall personally appear before a certain court at a certain term thereof, then and there to answer to such matters as are objected against him on behalf of the commonwealth has been declared to be insufficient. Com. *v.* Daggett, 16 Mass. 447.

51. In penal sum.— People *v.* Love, 19 Cal. 676, holding that where so bound the word "penal" will not make the sum mentioned strictly a penalty but the bond may be enforced as a simple undertaking to pay the sum specified.

52. State *v.* Lewis, 7 La. Ann. 540.

Recitation in a recognizance, that the principal binds himself, etc., and the surety binds "his heirs and legal representatives," without binding himself, is not sufficient. The defect is fatal, although it has not been assigned for error. Grier *v.* State, 29 Tex. 95.

Sureties may be bound separately in separate amounts where the amount secured is equal to the penalty of the bond in the aggregate. Moore *v.* State, 28 Ark. 480. See also Humphries *v.* State, 33 Ark. 713. But see Brown *v.* State, 34 Tex. 525.

53. Omission of necessary words.— Carroll *v.* State, 6 Tex. App. 463, wherein recognizance was held fatally defective by the omission of the word "appear" in the condition.

54. Petty *v.* People, 19 Ill. App. 317; State *v.* Patterson, 23 Iowa 575; Shupe *v.* State, 40 Nebr. 524, 59 N. W. 100; Steen *v.* State, 27 Tex. 86.

The same particularity is not required as in an indictment. Young *v.* People, 18 Ill. 566.

That defects in form shall not invalidate a recognizance is expressly provided for by statute in some states. Hardesty *v.* State, 5 Kan. App. 780, 48 Pac. 998; Kansas City *v.* Hescher, 4 Kan. App. 782, 46 Pac. 1005; Reed *v.* Lowell Police Ct., 172 Mass. 427, 52 N. E. 633; Shupe *v.* State, 40 Nebr. 524, 59 N. W. 100; State *v.* Lambert, 44 W. Va. 308, 28 S. E. 936.

After appearance, trial, and conviction, errors in a recognizance are immaterial. Bookhout *v.* State, 66 Wis. 415, 28 N. W. 179.

55. Kan. Comp. Laws, c. 82, § 154; Nelson *v.* State, 44 Kan. 154, 24 Pac. 58; Allen *v.* Com., 90 Va. 356, 18 S. E. 437. See also Miller *v.* Com., 1 Duv. (Ky.) 14; Ky. Crim. Code, § 77.

56. What record should show.—Where bail is taken by, or in pursuance of, the decision of an examining court, there should be some memorandum in writing showing that an examining court was held, and accused admitted to bail. Morgan *v.* Com., 12 Bush (Ky.) 84. One not charged with an offense, and who has had no trial cannot, it has been decided, be held to bail by such a court. Com. *v.* Thompson, 98 Ky. 593, 17 Ky. L. Rep. 1132, 33 S. W. 1103. And it has also been held that the record of the recognizance should show that the accused was committed for trial before the recognizance was taken. State *v.* Lamoine, 53 Vt. 568.

An order of court admitting the accused to bail and fixing the amount of his bond is declared in early decisions in Louisiana to be essential to the validity of the recognizance. State *v.* Cravey, 12 La. Ann. 224; State *v.* Gilbert, 10 La. Ann. 532. But see later decisions in this state in following note, and also Vancil *v.* People, 16 Ill. 120.

57. Waiver of defects.—*Alabama.*—Gooden *v.* State, 35 Ala. 430.

Illinois.—Chumasero *v.* People, 18 Ill. 405; Shattuck *v.* People, 5 Ill. 477.

Indiana.— State *v.* Osborn, 155 Ind. 385, 58 N. E. 491; State *v.* Downs, 8 Ind. 42.

Kentucky.— Com. *v.* Lester, 1 Ky. L. Rep. 276.

Louisiana.— State *v.* Hendricks, 40 La. Ann. 719, 5 So. 24; State *v.* Canady, 16 La. Ann. 141; State *v.* Wilson, 12 La. Ann. 189. In earlier cases in this state it was declared that the maxim "*volenti non fit injuria*" could not be extended to bonds in criminal

declared that the question as to whether such proceedings were legal is not rele-

proceedings and that an unauthorized bond or one illegally taken was not binding. Governor *v.* Fay, 8 La. Ann. 490.

Massachusetts.— Com. *v.* Gove, 151 Mass. 392, 24 N. E. 211.

Michigan.— Daniels *v.* People, 6 Mich. 381.

New York.— People *v.* Brown, 13 N. Y. Suppl. 320, 37 N. Y. St. 178.

United States.—Hunt *v.* U. S., 61 Fed. 795, 19 U. S. App. 683, 10 C. C. A. 74.

See 5 Cent. Dig. tit. "Bail," § 241.

Illustrations.— So it has been held no defense to an action on the recognizance that the minutes did not specify the cause for which an accused was arrested or that an order was given to prefer another indictment or to give bail (Gooden *v.* State, 35 Ala. 430); or that the affidavit on which the recognizance was founded was irregularly taken (Adair *v.* State, 1 Blackf. (Ind.) 200); or that the order admitting to bail did not set out the offense nor any affidavit, information, or indictment against the accused (State *v.* Nicol, 30 La. Ann. 628); or that there is no order committing the defendant for trial or admitting him to bail (State *v.* Herpin, 26 La. Ann. 612); or that there was no service on the district attorney of application for bail (Com. *v.* Gove, 151 Mass. 392, 24 N. E. 211); or that the warrant for the removal of the accused from the district in which he was arrested was not signed by the proper judicial officer (Hunt *v.* U. S., 61 Fed. 795, 19 U. S. App. 683, 10 C. C. A. 74); or that it did not appear from the bond that the accused had been brought before the clerk for examination and bail (U. S. *v.* Evans, 2 Flipp. (U. S.) 605, 2 Fed. 147, 1 Crim. L. Mag. 600). And where it did not appear in the record whether defendant had been arrested for petty or grand larceny it was held that, though no bail could have been taken if the charge had been grand larceny, the surety was estopped as affecting his liability from showing that the latter charge was subsequently made or that the defendant had committed such crime. Com. *v.* Lester, 1 Ky. L. Rep. 276. Again, failure to indorse on the process the amount of bail required is not a ground for defeating recovery on the recognizance. Trimble *v.* State, 3 Ind. 151; George *v.* State, 3 Kan. App. 566, 43 Pac. 850.

The fact that the arrest or detention of the defendant was illegal is, as it has been declared in numerous cases, no defense to an action on the recognizance.

Alabama.— Peck *v.* State, 63 Ala. 301.

Arkansas.— Dunlap *v.* State, 66 Ark. 105, 49 S. W. 349; Littleton *v.* State, 46 Ark. 413; Humphries *v.* State, 33 Ark. 713.

Colorado.— Haney *v.* People, 12 Colo. 345, 21 Pac. 39.

Illinois.— Mix *v.* People. 26 Ill. 32.

Iowa.— State *v.* Benzion, 79 Iowa 467, 44 N. W. 709.

Kansas.— Junction City *v.* Keeffe, 40 Kan. 275, 19 Pac. 735.

Minnesota.— State *v.* Grant, 10 Minn. 39.

Pennsylvania.— Com. *v.* Blair County Jail Warden, 8 Pa. Dist. 159.

Virginia.—Archer *v.* Com., 10 Gratt. (Va.) 627.

Wyoming.— State *v.* Krohne, 4 Wyo. 347, 34 Pac. 3.

United States.— U. S. *v.* Wallace, 46 Fed. 569.

See 5 Cent. Dig. tit. "Bail," § 242.

In other decisions, however, it has been held that if the arrest or detention of the defendant was illegal the bond is void.

Alabama.— State *v.* Brantley, 27 Ala. 44.

Illinois.— Plummer *v.* People, 16 Ill. 358; People *v.* Slayton, 1 Ill. 329.

Indiana.— State *v.* Wenzel, 77 Ind. 428.

Kentucky.—Shaw *v.* Com., 1 Duv. (Ky.) 1.

Maine.— State *v.* Young, 56 Me. 219.

Missouri.— State *v.* Swope, 72 Mo. 399; State *v.* Holtdorf, 61 Mo. App. 515.

Montana.— Deer Lodge County *v.* At, 3 Mont. 168.

New York.— People *v.* Shaver, 4 Park. Crim. (N. Y.) 45.

Ohio.— See also Gage *v.* State, 29 Ohio St. 6.

Texas.— Cassaday *v.* State, 4 Tex. App. 96; Hodges *v.* State, 20 Tex. 493.

See 5 Cent. Dig. tit. "Bail," § 242.

Actual custody of the principal has been held not essential to the validity of the bond. State *v.* Terrell, 29 Kan. 563.

A voluntary appearance in court of one under indictment but for whom no formal order of arrest has been issued places him in legal custody, and a bond therefor executed is valid and gives the surety control over him. Baird *v.* Com., 2 Duv. (Ky.) 78; Vias *v.* Com., 7 Ky. L. Rep. 743.

Objections to jurisdiction.— The jurisdiction of the committing court or of the court before whom the recognizance is taken cannot be questioned by the sureties in an action on the recognizance. Harris *v.* State, 60 Ark. 212, 29 S. W. 751; Pack *v.* State, 23 Ark. 235; Dilley *v.* State, 2 Ida. 1012, 29 Pac. 48; People *v.* Meacham, 74 Ill. 292; People *v.* Watkins, 19 Ill. 117. But as to sufficiency of a transcript showing jurisdiction see Gachenheimer *v.* State, 28 Ind. 91. Nor can they question the jurisdiction of the grand jury which found the indictment. Dilley *v.* State, 2 Ida. 1012, 29 Pac. 48.

Application for bail.— The sureties cannot, in defense to an action on the recognizance, avail themselves of the facts that the application for bail was not verified, or that proper notice was not given to the solicitor, or that no writ to produce the body of the prisoner was issued (Merrill *v.* State, 46 Ala. 82), or that his application was not by "written petition" (Com. *v.* Dye, 7 Ky. L. Rep. 517). Failure of the minutes for the recognizance to acknowledge the indebtedness to the people of the state has been held, however, to invalidate the recognizance, though such acknowledgment was made in the instrument as executed. People *v.* Felton, 36 Barb. (N. Y.) 429.

vant or material where the arrest was under color of process.[58] Again it has been decided that if it appears from the record that the accused was in actual custody and to secure his release therefrom the bond was given, the regularity of the proceedings cannot be questioned by the sureties.[59]

(II) *In Complaint or Indictment.* The fact that the indictment or complaint was defective is not a ground of defense for the sureties in an action against them on the recognizance.[60] And the sureties can neither deny the existence of an indictment, nor avoid liability on the ground of irregularities in the organization of the grand jury.[61]

n. Validity as Affected by Execution Before Indictment. The fact that no indictment had been found at the time of the execution of a recognizance will not render it void.[62]

o. Waiver or Adjournment of Preliminary Examination. A bond or recognizance, otherwise valid, cannot be objected to on the ground that there was no preliminary examination, where such examination was waived by accused,[63]

58. Arrest under color of process.— People *v.* Brown, 13 N. Y. Suppl. 320, 37 N. Y. St. 178.

59. Accused in actual custody.— State *v.* Hendricks, 40 La. Ann. 719, 5 So. 24. See State *v.* Austin, 141 Mo. 481, 43 S. W. 165.

The fact that date on officer's return on bench warrant or bond itself is incorrect will not invalidate the bond, where it appears that the officer had such writ in his hands, with proper authority to execute it, which he in fact did according to law. Com. *v.* Nimmo, 7 Ky. L. Rep. 287.

60. *Alabama.*— Peck *v.* State, 63 Ala. 201.

Arkansas.— Harris *v.* State, 60 Ark. 209, 29 S. W. 640; Reeve *v.* State, 34 Ark. 610.

Indiana.— State *v.* Osborn, 155 Ind. 385, 58 N. E. 491; Friedline *v.* State, 93 Ind. 366; Adams *v.* State, 48 Ind. 212.

Kentucky.— Com. *v.* Skeggs, 3 Bush (Ky.) 19; Decker *v.* Com., 6 Ky. L. Rep. 653; Com. *v.* Pierce, 4 Ky. L. Rep. 247.

Louisiana.— State *v.* Ruthing, 49 La. Ann. 909, 22 So. 199; State *v.* Snow, 23 La. Ann. 596; Taliaferro *v.* Steele, 14 La. Ann. 656.

Maine.— State *v.* Boies, 41 Me. 344.

Missouri.— State *v.* Austin, 141 Mo. 481, 43 S. W. 165; State *v.* Morgan, 124 Mo. 467, 28 S. W. 17; State *v.* Poston, 63 Mo. 521; State *v.* Hoeffner, 68 Mo. App. 164; State *v.* Livingston, 58 Mo. App. 445.

Nebraska.— King *v.* State, 18 Nebr. 375, 25 N. W. 519.

New Hampshire.— State *v.* Fowler, 28 N. H. 184.

Texas.— State *v.* Ake, 41 Tex. 166; McCoy *v.* State, 37 Tex. 219; State *v.* Rhodius, 37 Tex. 165; State *v.* Cocke, 37 Tex. 155; State *v.* Franklin, 35 Tex. 497; Lee *v.* State, 25 Tex. App. 331, 8 S. W. 277; Hester *v.* State, 15 Tex. App. 418; Jones *v.* State, 15 Tex. App. 82; Smalley *v.* State, 3 Tex. App. 202.

Wyoming.— State *v.* Krohne, 4 Wyo. 347, 34 Pac. 3.

United States.— Hardy *v.* U. S., 71 Fed. 158, 36 U. S. App. 225, 18 C. C. A. 22; U. S. *v.* Evans, 2 Flipp. (U. S.) 605, 2 Fed. 147, 1 Crim. L. Mag. 600; U. S. *v.* Reese, 4 Sawy. (U. S.) 629, 27 Fed. Cas. No. 16,138 [*reversed* in 9 Wall. (U. S.) 13, 19 L. ed. 541].

See 5 Cent. Dig. tit. "Bail," § 245.

But see *contra*, where it is held that, if an indictment is fatally defective, there cannot be a breach of a condition in the recognizance to appear and answer. Candler *v.* Kirksey, 113 Ga. 309, 38 S. E. 825; State *v.* Lockhart, 24 Ga. 420; Harrell *v.* State, 22 Tex. App. 692, 3 S. W. 479. And see Kingsbury *v.* Clark, 1 Conn. 406; State *v.* Hufford, 28 Iowa 391.

Defects held to be no defense.— It has been held to be no defense to an action on the recognizance that there was a mistake in the indictment as to the name of the accused (Decker *v.* Com., 6 Ky. L. Rep. 653); or a mistake in the date thereof (Blain *v.* State, 34 Tex. Crim. 417, 31 S. W. 366); or that no offense is charged in the information (Hardy *v.* U. S., 71 Fed. 158, 36 U. S. App. 225, 18 C. C. A. 22); or that separate offenses are set out in the complaint (State *v.* Fowler, 28 N. H. 184); or that the date when the offense was committed is not set out in the indictment (U. S. *v.* Evans, 2 Flipp. (U. S.) 605, 2 Fed. 147, 1 Crim. L. Mag. 600); or the place where it was committed (Harris *v.* State, 60 Ark. 209, 29 S. W. 640); or that it does not sufficiently specify the nature of the offense (State *v.* Franklin, 35 Tex. 497); or that the information was not sufficiently verified (State *v.* Krohne, 4 Wyo. 347, 34 Pac. 3); or that the finding of the grand jury was not signed by the district attorney (State *v.* Snow, 23 La. Ann. 596).

61. Cannot deny existence of indictment. — Pack *v.* State, 23 Ark. 235; State *v.* Cooper, 2 Blackf. (Ind.) 226; State *v.* Stout, 11 N. J. L. 124. *Contra*, Brown *v.* State, 6 Tex. App. 188.

Irregularity in grand jury.— Peck *v.* State, 63 Ala. 201; Sharpe *v.* Smith, 59 Ga. 707; State *v.* Borroum, 25 Miss. 203. *Contra*, Wells *v.* State, 21 Tex. App. 594, 2 S. W. 806.

62. Colquitt *v.* Bond, 69 Ga. 351; Marion *v.* Johnson, 23 La. Ann. 597; Moore *v.* State, 37 Tex. 133.

But if invalid at time of execution, a subsequent finding of an indictment will not aid the recognizance. Griffin *v.* State, 48 Ind. 258.

63. State *v.* Cobb, 71 Me. 198; Champlain *v.* People, 2 N. Y. 82; Hedges *v.* State, 18 Ohio St. 420.

or, it seems, where such examination was properly adjourned before completed.[64]

p. Where Prosecution Is Illegal. If a law under which a prosecution is commenced has been repealed prior to such prosecution, a recognizance entered into in such case will be void.[65]

q. Defects Cured by Amendment. Defects in a bail-bond or recognizance may, upon notice to the parties, be cured by amendments in the discretion of the court.[66] But if a recognizance is invalid at the time it is executed, owing to material misrecitals therein, or other substantial defects, it cannot subsequently be validated.[67]

r. Validity of Second Bond. A valid second bond or recognizance may be made or taken where an illegal or defective one has been abandoned,[68] or where the first one is about to be forfeited for non-appearance of principal.[69] But if the power of the officer in the premises to accept a recognizance has been exhausted or no good reason is shown on the record for taking the second one, the latter will be void.[70]

s. Effect of Invalid Bond. A bail-bond which is invalid does not bind either principal or sureties thereon.[71]

2. Execution — a. Requirements Generally. The execution of a bond dates

64. In an early case in Connecticut it is declared that, where a justice of the peace holding a court of inquiry on a complaint has authority to adjourn, he may take a recognizance to a future day to the same person as if given at final trial. Goodwin *v.* Dodge, 14 Conn. 206.

But, if the examination is adjourned for a longer time than the law allows, it has been decided that the recognizance taken by the magistrate for his appearance is invalid, and want of jurisdiction may be set up by the prisoner or his sureties. U. S. *v.* Hosmer, 26 Fed. Cas. No. 15,394, 7 Chic. Leg. N. 116, 17 Int. Rev. Rec. 38. So under the N. Y. Code Crim. Proc. § 191, providing that in case of an adjournment of a preliminary examination it shall not be for more than two days, except by defendant's consent, the sureties are only obliged to produce their principal at the time and place first fixed, and such obligation being performed the sureties are discharged and are not liable for failure to produce the principal at a future adjourned date, the adjournment having taken place without notice to principal or sureties. People *v.* McKenna, 62 N. Y. App. Div. 327, 70 N. Y. Suppl. 1057.

65. Gaspar *v.* State, 11 Ind. 548.

66. Com. *v.* Cheney, 108 Mass. 33; Blalack *v.* State, 3 Tex. App. 376; Bias *v.* Floyd, 7 Leigh (Va.) 640. A court cannot, however, of its own motion amend a recognizance *nunc pro tunc* over the objection of the sureties and without notice to the principal. Hand *v.* State, 28 Tex. App. 28, 11 S. W. 679.

67. State *v.* Winninger, 81 Ind. 51; Wallen *v.* State, 18 Tex. App. 414. See Com. *v.* Brown, 14 Ky. L. Rep. 301.

68. Where first bond abandoned.— State *v.* McKeown, 12 La. Ann. 596; Com. *v.* Merriam, 9 Allen (Mass.) 371. And the filing of the first one will not invalidate the second. State *v.* West, 3 Ohio St. 509.

69. Upon non-appearance on first bond.— Combs *v.* People, 39 Ill. 183, holding that, where the principal has entered into a recognizance, failed to appear, and his surety enters into a new one to save the forfeiture of the first, it is good.

That a bond had been previously given by the accused and forfeited constitutes no defense to an action on a recognizance in an arrest on a complaint for the same offense. Wallingford *v.* Hall, 45 Conn. 350. See Com. *v.* Abbott, 168 Mass. 471, 47 N. E. 112, wherein it was held that a recognizance was not void because one similar in all respects had been entered into by the parties in the police court.

70. After power of officer exhausted.— Matthews *v.* State, 92 Ala. 89, 9 So. 740; Townsend *v.* People, 14 Mich. 388.

If a valid bond is accepted by the sheriff his power in the premises is exhausted, and an agreement at the time such bond was given that it was to have effect only until a second one was given is of no avail and the taking of a second bond is unauthorized. Matthews *v.* State, 92 Ala. 89, 9 So. 740. See Schneider *v.* Com., 3 Metc. (Ky.) 409.

71. Binds neither principal nor sureties.— U. S. *v.* Hudson, 65 Fed. 68.

May be vacated or quashed on motion after forfeiture. State *v.* Halloway, 5 Ark. 433. Though in another case it is declared the court may vacate a void recognizance at any time. Butler *v.* State, 12 Sm. & M. (Miss.) 470. Where for defects apparent on the face of the record a motion to quash is made, the entire record, with all official acts and entries, is brought before the court. Com. *v.* Long, 4 Ky. L. Rep. 366. And if, on appeal by the commonwealth in such a case, it fails to make the indictment a part of the record it will be presumed that there were defects in the indictment which invalidated the bond. Com. *v.* Long, 4 Ky. L. Rep. 366 In other cases it is held that the question as to the validity of a recognizance cannot be tried on motion to quash but only on scire facias.

from the signature.[72] And sureties who admit their signature cannot object that their principal did not appear in person in court at the time the bond was approved.[73] If the recognizance in substance complies with the law in other respects the fact that the names of one or more of the parties thereto are omitted in the body of the instrument will not affect its validity, where such parties have signed and executed the same.[74] Nor will the fact that the defendant in an action on a bond is described therein by a wrong christian name avoid the instrument.[75] And again, though there may be a variance between the name given in the body of the recognizance, either as principal or surety, and that signed to such instrument in like capacity, the obligation will not thereby be avoided, but it may be shown, under proper averments in the petition, that the one named in the bond is the same person as the one whose signature is affixed thereto.[76] In the absence, however, of some statute which requires the parties to a bond to sign the same, it is not essential to the validity of such an instrument that the signature of the parties be affixed thereto, if it be taken in court in the usual form.[77] Where, however, a signature is necessary the fact that it is not placed at the bottom of the bond will not avoid such bond,[78] and a signing with the initials or mark of the

State *v.* Hopkins, 30 Mo. 404; State *v.* Davidson, 20 Mo. 406.

Remedy by appeal.—And again, that, when judgment is rendered on the bond, the remedy is by appeal. Taliaferro *v.* Steele, 14 La. Ann. 656.

72. Dates from signature.— Holt *v.* State, 20 Tex. App. 271.

73. Estoppel from admission of signatures. — State *v.* Peyton, 32 Mo. App. 522.

74. Names omitted in body of instrument. — *Alabama.*— Hall *v.* State, 9 Ala. 827; Badger *v.* State, 5 Ala. 21.

Idaho.— People *v.* Bugbee, 1 Ida. 88.

Illinois.— Neil *v.* Morgan, 28 Ill. 524.

Indiana.— Burton *v.* State, 6 Blackf. (Ind.) 339.

Missouri.— Cunningham *v.* State, 14 Mo. 402.

Nebraska.— Holmes *v.* State, 17 Nebr. 73, 22 N. W. 232.

Texas.— Gorman *v.* State, 38 Tex. 112, 19 Am. Rep. 29.

United States.— *Compare* U. S. *v.* Pickett, 1 Bond (U. S.) 123, 27 Fed. Cas. No. 16,043.

See 5 Cent. Dig. tit. "Bail," § 214 *et seq.*

Though blanks may be left in the recognizance at the time it is signed which are afterward to be filled in, it is not a ground for defeating a recovery thereon. So held where the instrument was afterward completed and delivered in the presence of the surety who had so signed. Madden *v.* State, 35 Kan. 146, 10 Pac. 469. But it is held otherwise where bond was, according to agreement, to be filled in by the magistrate, but was in fact filled in by the county clerk. Com. *v.* Ball, 6 Bush (Ky.) 291.

75. Defendant's wrong christian name.— State *v.* Rhodius, 37 Tex. 165, holding that, if it appear that such defendant entered into the obligation, he will be held thereto without regard to his appellation.

76. Variance between signature and name in body of instrument.— Stokes *v.* People, 63 Ill. 489; Lytle *v.* People, 47 Ill. 422; O'Brien *v.* People, 41 Ill. 456; Gay *v.* State, 7 Kan. 394. See State *v.* Cherry, Meigs (Tenn.) 232; Dodd *v.* State, 2 Tex. App. 58.

There is no presumption that the same person is indicated in such a case. McIntyre *v.* State, 19 Tex. App. 443.

77. Necessity of signing.—*Indiana.*—Grinestaff *v.* State, 53 Ind. 238; State *v.* Elder, 35 Ind. 368; Campbell *v.* State, 18 Ind. 375, 81 Am. Dec. 363.

Kentucky.— Com. *v.* Mason, 3 A. K. Marsh. (Ky.) 456.

Nebraska.— King *v.* State, 18 Nebr. 375, 25 N. W. 519; Irwin *v.* State, 10 Nebr. 325, 6 N. W. 370.

Ohio.— Millikin *v.* State, 21 Ohio St. 635.

United States.— U. S. *v.* Pickett, 1 Bond (U. S.) 123, 27 Fed. Cas. No. 16,043.

See 5 Cent. Dig. tit. "Bail," § 217.

A statute requiring all recognizances to be signed and sealed by the parties and certified to by the officer taking the same has been held not to apply in the case of a recognizance taken by a justice on a preliminary examination of one charged with an offense. Gamble *v.* State, 21 Ohio St. 183. And a similar statutory requirement as to appearance bonds to the sheriff or other officer has been held not applicable to an appearance bond taken by a judge. State *v.* West, 3 Ohio St. 509.

Signature of principal has been held to be not necessary.

Indiana.— Minor *v.* State, 1 Blackf. (Ind.) 236.

Iowa.— State *v.* Patterson, 23 Iowa 575.

Kansas.— Tillson *v.* State, 29 Kan. 452; Ingram *v.* State, 10 Kan. 630.

Kentucky.— Com. *v.* Radford, 2 Duv. (Ky.) 9.

Michigan.— People *v.* Dennis, 4 Mich. 609, 69 Am. Dec. 338.

But see State *v.* Taylor, 19 La. Ann. 145; State *v.* Doax, 19 La. Ann. 77; Chaney *v.* State, 23 Tex. 23.

See 5 Cent. Dig. tit. "Bail," § 217.

78. Place of signature.— A signature in the body of the bond above the condition may be sufficient. State *v.* Wilcox, 59 Mo. 176.

parties will be sufficient.[79] Again, if it be essential to the validity of a recognizance that it be signed by the principal, a signature by his attorney is not sufficient.[80] And it should be signed in the presence of the officer taking the same, where the statute authorizes the officer "taking a recognizance" to administer all necessary oaths.[81] It has also been held that it is not necessary to the validity of a recognizance that it be under the seal of the parties;[82] but it is declared that the bond or recognizance must be acknowledged.[83]

b. By Principals Jointly Indicted. Defendants who have been jointly prosecuted may give separate bail.[84]

c. Disability of Principal or Sureties. A recognizance executed by a minor as principal may be binding on him personally;[85] and the obligation of the bail will not be affected by any disability of the principal which is known to them.[86] So the disability of one of the sureties will only avoid the recognizance as to the surety under disability.[87]

d. Justification and Qualification of Sureties. If required, bail for a prisoner's appearance must justify.[88] Although the statute may require two or more

79. By initials or by mark.— Hammons *v.* State, 59 Ala. 164, 31 Am. Rep. 13. See Ingram *v.* State, 10 Kan. 630.

80. Signing by attorney.— Matter of Fowler, 49 Mich. 234, 13 N. W. 530; State *v.* Ahrens, 12 Rich. (S. C.) 493; Ferrill *v.* State, 29 Tex. 489; Price *v.* State, 12 Tex. App. 235.

Authority to appear by attorney confers no right to authorize any other person to enter into a recognizance. Grier *v.* State, 29 Tex. 487.

Signing by attorney at principal's request is not sufficient to bind the sureties, under a statute which requires authority to sign for another in such case to be in writing. Billington *v.* Com., 79 Ky. 400, 3 Ky. L. Rep. 19.

The name of one surety signed without proper authority will not be binding as to the others. Com. *v.* Belt, 21 Ky. L. Rep. 339, 51 S. W. 431.

81. Signed in presence of officer.— State *v.* Pratt, 148 Mo. 402, 50 S. W. 113.

82. Necessity of seal.— Slaten *v.* People, 21 Ill. 28; Grinestaff *v.* State, 53 Ind. 238; Campbell *v.* State, 18 Ind. 375, 81 Am. Dec. 363; State *v.* Foot, 2 Mill (S. C.) 122.

See also, generally, SEALS.

Where necessary, however, a scroll which contains the word "seal" opposite the name of each signer is sufficient. Lindsay *v.* State, 15 Ala. 43.

83. Necessity of acknowledgment.— Com. *v.* Hickey, 172 Pa. St. 39, 37 Wkly. Notes Cas. (Pa.) 328, 33 Atl. 188; Barber *v.* U. S., 35 Fed. 886. But see State *v.* Wells, 36 Iowa 238; Kansas City *v.* Fagan, 4 Kan. App. 796, 46 Pac. 1009.

See also, generally, ACKNOWLEDGMENTS, 1 Cyc. 506.

Failure, however, of principal to acknowledge the bond will not affect the liability of sureties who duly acknowledge the same and justify as sureties. People *v.* Hammond, 4 Silv. Supreme (N. Y.) 270, 7 N. Y. Suppl. 219, 26 N. Y. St. 486.

Sufficiency of acknowledgment.—A form of acknowledgment, following the signature of the recognizors, filled in with the names of the recognizors, but not signed by the official before whom the recognizance is taken, followed by a justification of the sureties before such official as appeared by his jurat over his name and seal, and this in turn followed by his indorsement that "I hereby approve the within recognizance and the sureties thereon," the jurat and indorsement being of the same date, was held to show a sufficient acknowledgment. State *v.* Perry, 28 Minn. 455, 459, 10 N. W. 778.

84. Separate bail.— State *v.* Lighton, 4 Greene (Iowa) 278.

Recognizance binding two principals jointly for the personal appearance of both, and to save the condition of which it is necessary that both personally appear, is void both as to principal and surety. Ferry *v.* Burchard, 21 Conn. 597; Com. *v.* Field, 9 Allen (Mass.) 581. But see Holtzclaw *v.* State, 4 Ind. 597, where it is held that, if there is a joint indictment and trial, the recognizance may be joint.

A recognizance on appeal by persons jointly indicted, tried, and convicted, if in the form of a joint obligation, is fatally defective. Stanly *v.* State, (Tex. Crim. 1899) 53 S. W. 345; Hodges *v.* State, (Tex. Crim. 1897) 38 S. W. 1019; McMeans *v.* State, 37 Tex. Crim. 130, 38 S. W. 998. See *infra*, III, G.

85. Executed by infant.— State *v.* Weatherwax, 12 Kan. 463. And where a recognizance is binding on him, if the surety has paid the amount of a judgment recovered against him, he is bound to reimburse such surety for the amount so paid. Fagin *v.* Goggin, 12 R. I. 398.

If prisoner be an infant or other incompetent person his sureties may be required to enter into the recognizance without the principal joining therein. Schultze *v.* State, 43 Md. 295; Com. *v.* Semmes, 11 Leigh (Va.) 696.

86. Principal's disability known to bail.— Weldon *v.* Colquitt, 62 Ga. 449, 35 Am. Rep. 128.

87. Disability of surety.—Pickett *v.* State, 16 Tex. App. 648, one surety being a married woman.

88. Necessity of justification.— People *v.* Vermilyea, 7 Cow. (N. Y.) 108.

sureties, a recognizance with a single surety may be valid.[89] Or it may be valid where a non-resident is accepted as bail, though the law requires that bail should be residents of the state.[90] And the fact that the sureties on an appeal-bond to the court of appeals are also sureties on a bond given on appeal to a lower court does not render them incompetent where no judgment has been entered against them.[91]

3. DELIVERY AS ESCROW. There can be no delivery of the bail-bond as an escrow to the obligee.[92]

4. CERTIFICATION, APPROVAL, AND ACCEPTANCE. Although it should appear in a recognizance that the principal was under arrest or required to give bail; that the amount of bail was fixed; by whom it was taken, and authority to take the same;[93] yet in many cases there are requirements and provisions as to the manner of its execution and acceptance which are imposed by statute and which are merely directory or ministerial in their nature, a strict compliance therewith not being essential to the validity of the instrument. Of such a character are statutory provisions as to justifying, certifying, and approving a recognizance, want of compliance with which cannot be taken advantage of by the parties executing the same, as such subsequent acts are not treated as essential to the validity of the contract.[94] So it has been declared that the failure of the magistrate to affix his seal to a recognizance will not vitiate it.[95] The recognizance may be taken

Justification in an amount less than that fixed by law does not authorize the sureties to object to the validity of the bond (People *v.* Shirley, 18 Cal. 121; People *v.* Carpenter, 7 Cal. 402; State *v.* Emily, 24 Iowa 24 [but see U. S. *v.* Hudson, 65 Fed. 68]), as exactments made in the state's favor may be waived by the state (State *v.* Benton, 48 N. H. 551).

New sureties may be required, if a magistrate has been deceived or taken insufficient bail, though ordinarily bail is considered absolute in the first instance. Spicer *v.* State, 9 Ga. 49.

89. One surety may be sufficient.—State *v.* Baker, 50 Me. 45; State *v.* Benton, 48 N. H. 551. See U. S. *v.* Petit, 11 Fed. 58.

90. Non-resident surety.— Com. *v.* Ramsay, 2 Duv. (Ky.) 385.

91. Sureties on other bond.— State *v.* Snow, 23 La. Ann. 596; Short *v.* State, 16 Tex. App. 44.

92. Brown *v.* State, 18 Tex. App. 326.

93. State *v.* Carr, 4 Iowa 289. See also *supra*, III, F, 1, m.

94. *Alabama.*— Badger *v.* State, 5 Ala. 21.

Arkansas.—Adler *v.* State, 35 Ark. 517, 37 Am. Rep. 48.

California.— People *v.* Penniman, 37 Cal. 271.

Indiana.— McAllister *v.* State, 81 Ind. 256; Ross *v.* State, 6 Blackf. (Ind.) 315.

Iowa.— State *v.* Wright, 37 Iowa 522; State *v.* Wells, 36 Iowa 238; State *v.* Emily, 24 Iowa 24.

Kentucky.— Com. *v.* Perkins, 17 Ky. L. Rep. 542, 32 S. W. 134; Workman *v.* Com., 16 Ky. L. Rep. 447; Com. *v.* Dye, 7 Ky. L. Rep. 517.

Minnesota.— State *v.* Perry, 28 Minn. 455, 10 N. W. 778.

Oregon.— State *v.* Hays, 2 Oreg. 314.

Texas.— Pierce *v.* State, 39 Tex. Crim. 343, 45 S. W. 1019; Doughty *v.* State, 33 Tex. 1; Dyches *v.* State, 24 Tex. 266.

Contra, Lawrence *v.* People, 17 Ill. 172; Bacon *v.* People, 14 Ill. 312; State *v.* Pratt, 148 Mo. 402, 50 S. W. 113; State *v.* Austin, 4 Humphr. (Tenn.) 213.

See 5 Cent. Dig. tit. "Bail," § 239.

Decisions as to sufficiency.— A statement as to the manner of executing a recognizance and who are the recognizors, preceding the recognizance, has been held equivalent to a formal certificate of such facts at the foot of it. Badger *v.* State, 5 Ala. 21. Where officially approved it is sufficient, though not formally certified to as required by statute. State *v.* Perry, 28 Minn. 455, 10 N. W. 778. And a subsequent approval may be good. State *v.* Wyatt, 6 La. Ann. 701.

An amended memorandum may be filed of a recognizance under permission therefor to the special commissioner appointed to take the same. Com. *v.* Field, 11 Allen (Mass.) 488.

A certificate of receipt and acceptance of the bond by the sheriff, though without date, may be sufficient, for it may be presumed that the bond was received and accepted by him after he had been authorized to do so by the magistrate. State *v.* Lewis, 7 La. Ann. 540.

The date of the bond controls where it is subsequently approved. Moseley *v.* State, 37 Tex. Crim. 18, 38 S. W. 800; Hayden *v.* State, (Tex. Crim. 1897) 38 S. W. 801. See also Lindsay *v.* State, 39 Tex. Crim. 468, 46 S. W. 1045. But where the bond is not dated the date of approval is said to fix the date of the bond. Ake *v.* State, 4 Tex. App. 126.

95. Failure of magistrate to affix seal.— Slaten *v.* People, 21 Ill. 28; Holmes *v.* State, 17 Nebr. 73, 22 N. W. 232. See Hall *v.* State, 9 Ala. 827.

If, from want of authority in a magistrate to take a recognizance, it is void as to the principal it will be void as to surety. Ferry *v.* Burchard, 21 Conn. 597.

and accepted in open court,[96] or before a judge in vacation;[97] nor is it necessary for the sureties to appear in order to give the judge jurisdiction.[98] But a bond taken and approved by one without authority to so act is invalid.[99] Again a clerk of a court may have no statutory authority to take and approve a recognizance, yet he may so act under orders of a judge;[1] and a sheriff may take bail when requested by the magistrate though not empowered by statute so to act.[2]

5. FILING. It has generally been decided that a bond or recognizance should be filed, thus making it a part of the record, such procedure being necessary before a scire facias may be had upon it or a forfeiture declared;[3] and an indorsement on a recognizance that it has been filed has also been declared essential.[4] But, where the purpose of a statute directing the filing of the instrument is that it may be a lien on real estate, it has been held that it may be the foundation of an action though not filed.[5] So also it is not in all cases necessary that there be a strict compliance with provisions which are merely directory as to time of filing,[6] or to the entering of the memorandum of a recognizance by the clerk, where such memorandum is merely a temporary substitute for the full record which is subsequently made,[7] or declaratory of the magistrate's duty,[8] or of the sheriff's duty.[9] And where there has been a failure to file the recognizance within the

96. **In open court.**—State *v.* Elgin, 11 Iowa 216; Com. *v.* Watts, 84 Ky. 537, 8 Ky. L. Rep. 571, 2 S. W. 123; Parrish *v.* State, 14 Md. 238.

97. **In vacation.**— Ainsworth *v.* Territory, 3 Wash. Terr. 270, 14 Pac. 590.

98. **Appearance of sureties unnecessary.**— People *v.* Hurlbutt, 44 Barb. (N. Y.) 126.

99. So held where bond was taken and approved by a mayor. Scio *v.* Hollis, 10 Ohio S. & C. Pl. Dec. 99, 7 Ohio N. P. 281.

1. In such case it is, in effect, the taking of a recognizance by the judge himself acting through the proper officer of his court. State *v.* Satterwhite, 20 S. C. 536; U. S. *v.* Evans, 2 Flipp. (U. S.) 605, 2 Fed. 147, 1 Crim. L. Mag. 600. See also *supra*, III, C, 2.

2. State *v.* Wyatt, 6 La. Ann. 701. But see Luckett *v.* State, 51 Miss. 799, where it is held that the judge has no power to delegate the duty of approving the bond to the sheriff.

3. *Arkansas.*—State *v.* Richardson, 28 Ark. 346.

Illinois.— Raysor *v.* People, 27 Ill. 190; People *v.* Watkins, 19 Ill. 117.

Indiana.— State *v.* Lewis, 4 Blackf. (Ind.) 20.

Iowa.— State *v.* Klingman, 14 Iowa 404.

Louisiana.— State *v.* Smith, 8 La. Ann. 471.

Massachusetts.— Com. *v.* Baird, 9 Metc. (Mass.) 407.

New York.—People *v.* Shaver, 4 Park. Crim. (N. Y.) 45; People *v.* Graham, 1 Park. Crim. (N. Y.) 141.

Ohio.— Sargeant *v.* State, 16 Ohio 267.

Oregon.— Belt *v.* Spaulding, 17 Oreg. 130, 20 Pac. 827.

Contra, Haney *v.* People, 12 Colo. 345, 21 Pac. 39; Jennings *v.* State, 13 Kan. 80; State Treasurer *v.* Pierce, 2 D. Chipm. (Vt.) 106.

See 5 Cent. Dig. tit. "Bail," § 240.

Bond to appear for examination before a justice of the peace should be returned to such justice. Garner *v.* Smith, 40 Tex. 505.

When magistrate need not enter on docket.—A statutory provision that the magistrate shall, in certain cases, transmit a transcript of his proceedings "together with" the recognizance does not require that such recognizance shall be entered upon and become a part of such magistrate's docket, but it may be taken upon a separate paper and when filed in the proper court it becomes a part of the record. State *v.* Moran, 24 Nebr. 103, 38 N. W. 29, 18 Nebr. 536, 26 N. W. 357, 25 N. W. 519.

Where the magistrate binds the principal over to another court to answer the charge against him, the original recognizance should be filed by the magistrate in such other court. State *v.* Lewis, 4 Blackf. (Ind.) 20.

Presumption that recognizance has been properly filed is raised by an indorsement thereon of the fact of filing and date thereof. People *v.* Hurlbutt, 44 Barb. (N. Y.) 126.

4. **Indorsement on recognizance.**— State *v.* Smith, 8 La. Ann. 471.

5. Adams *v.* State, 48 Ind. 212 [*overruling* Urton *v.* State, 37 Ind. 339]. And see Patterson *v.* State, 12 Ind. 86.

6. State *v.* Perry, 28 Minn. 455, 10 N. W. 778, where it is held that a provision that it be filed on or before the first day of the court before which defendant is bound to appear is merely directory, it being sufficient if it is of record in such court at the time when defendant is called on to appear. See also McNamara *v.* People, 183 Ill. 164, 55 N. E. 625.

7. State *v.* Williams, 14 Ohio St. 140.

8. A statutory provision that, where the respondent is bound over in cases heard before a magistrate, the latter shall furnish copies of the proceedings to the clerk of the court on or before a certain day is merely declaratory of his duty, and his failure to comply therewith will only affect his personal liability. State *v.* Davis, 43 N. H. 600.

9. Havis *v.* State, 62 Ark. 500, 37 S. W. 957, wherein it is held that the failure of the sheriff to file the bond in the court where the

proper time, or to indorse the time of filing thereon as required, a *nunc pro tunc* order for such filing or indorsement may be made at a subsequent term of the court.[10]

G. Bond, Undertaking, or Recognizance on Appeal — 1. Form, Contents, and Validity — a. Compliance With Statute. As to form and conditions the bond or recognizance on appeal should comply with the statutory requirements.[11]

b. Conditions. A recognizance on appeal should designate the time when[12] and the court before which the prisoner is to appear, and if the latter be not so designated no jurisdiction is conferred upon the appellate court to try the cause,[13] nor will the recognizance be good in such case;[14] and where a certain court is specified by law as the only one having jurisdiction of criminal appeals, a recognizance conditioned to perform the judgment of any other court will be void,[15] as it will

prosecution was commenced so that it might be copied in the transcript does not affect the right of such court to render a judgment against the sureties on a forfeiture of the bond.

10. Nunc pro tunc order.— McFarlan *v.* People, 13 Ill. 9; Wellman *v.* State, 5 Blackf. (Ind.) 343; State *v.* Patterson, 23 Iowa 575; Haverty *v.* State, 32 Tex. 602; Slocumb *v.* State, 11 Tex. 15.

An erroneous copy filed by one appointed by court to take a recognizance may be corrected by the court allowing such person to file an amended and correct copy, even after suit brought for default of the recognizance. Com. *v.* Field, 11 Allen (Mass.) 488.

11. *Ex p.* Bell, 56 Miss. 282; Laturner *v.* State, 9 Tex. 451. See also *supra*, III, F.

Bail pending appeal see Aliens, 2 Cyc. 129, note 98.

See also, generally, Appeal and Error, 2 Cyc. 474.

Substantial compliance, however, may be sufficient. So where the statute required the defendant to enter into recognizance to prosecute his appeal, one requiring him "to enter his appeal" was held valid, the latter being included in the former. State *v.* Boies, 41 Me. 344.

Recognizance may be executed to the city on an appeal from a conviction for violation of a municipal regulation. Kansas City *v.* Garnier, 57 Kan. 412, 46 Pac. 707.

Failure to indorse approval by the magistrate on an appeal-bond will not invalidate it, for it may be sufficient without such indorsement. Triplett *v.* State, (Tex. Crim. 1896) 33 S. W. 1079.

12. Time of appearance.— State *v.* Casey, 27 Tex. 111. *Contra*, State *v.* Murphy, 23 Nev. 390, 48 Pac. 628.

Conditioned for appearance from term to term.— It has been decided that, if the recognizance fails to bind the appellant to appear from term to term before the trial court and to abide the judgment of the appeal court, it is invalid. Barela *v.* State, (Tex. Crim. 1894) 26 S. W. 397. See also Wilson *v.* State, 7 Tex. App. 38; Anderson *v.* State, (Tex. Crim. 1894) 25 S. W. 289; Crise *v.* State, (Tex. Crim. 1894) 25 S. W. 285; Pollard *v.* State, (Tex. Crim. 1893) 24 S. W. 285; Knight *v.* State, (Tex. Crim. 1893) 24 S. W. 103; Sides *v.* State, (Tex. Crim. 1893) 24 S. W. 95. So a recognizance conditioned for appearance "from time to time," instead of "from term to term," is bad. Forbes *v.* State, (Tex. Crim. 1894) 25 S. W. 1072.

Condition that appellant shall satisfy judgment if affirmed was held to be insufficient. State *v.* Porte, 10 La. Ann. 148.

Where day specified is one on which there is no court the instrument is void. Com. *v.* Bolton, 1 Serg. & R. (Pa.) 328.

13. Designation of court.— Kazda *v.* State, 52 Nebr. 499, 72 N. W. 853; Pill *v.* State, 43 Nebr. 23, 61 N. W. 96; Howard *v.* State, 30 Tex. App. 680, 18 S. W. 790; Bigelow *v.* State, (Tex. Crim. 1896) 37 S. W. 330; Thompson *v.* State, 35 Tex. Crim. 505, 34 S. W. 124, 612; Mader *v.* State, (Tex. Crim. 1896) 34 S. W. 114; Short *v.* State, (Tex. Crim. 1894) 25 S. W. 288; Harris *v.* State, (Tex. Crim. 1893) 24 S. W. 290; Pippin *v.* State, (Tex. Crim. 1893) 20 S. W. 979. But see *contra*, State *v.* Murphy, 23 Nev. 390, 400, 48 Pac. 628, wherein it is held to be unnecessary for the recognizance to designate the court in which defendant must surrender himself, where it is recited therein that he "will surrender himself in execution of the judgment so as aforesaid entered upon its being affirmed, modified, or upon appeal being dismissed," as provided by Nev. Gen. Stat. § 4382, and further recites as provided by § 4395 that he "will in all respects abide the order and judgment of the appellate court upon the appeal."

A condition for appearance before court where convicted has been held essential to the validity of the recognizance. Henry *v.* State, (Tex. Crim. 1897) 38 S. W. 609. See also State *v.* Jones, 3 La. Ann. 9. But see *contra*, Hutchinson *v.* State, 3 Coldw. (Tenn.) 95.

14. Must designate proper court.— Manes *v.* State, 20 Tex. 38; Palvadore *v.* State, 12 Tex. 230.

15. Where court is specified by law.—Lawrence *v.* State, 1 Tex. App. 392; Jones *v.* State, (Tex. Crim. 1896) 34 S. W. 627. So in Texas where, by the act of 1892, the court of criminal appeals succeeded to the criminal jurisdiction of the court of appeals, a recognizance conditioned to "abide the judgment of the court of appeals" is invalid, and on

also be where the designation is so defective that it does not bind the defendant to abide the judgment of any court.[16]

c. Description of Offense — (I) *Necessity.* The fact that a recognizance given upon appeal from a conviction fails to definitely designate the offense for which the conviction was had will not invalidate the instrument where the complaint which sufficiently describes such offense is referred to therein and transmitted with it.[17] So also it has been declared sufficient if the obligation was properly entered into and the record shows what offense was charged.[18]

(II) *Sufficiency* — (A) *Particularity Required.* If the offense charged in the indictment or described in the recognizance is not an offense *eo nomine* under the laws of the state, the essential elements thereof must be set out in the latter.[19]

motion the appeal will be dismissed. The condition should be to "abide the judgment of the court of criminal appeals." Starr *v.* State, (Tex. Crim. 1897) 40 S. W. 790; Dun *v.* State, (Tex. Crim. 1897) 40 S. W. 287; Sturdevant *v.* State, (Tex. Crim. 1896) 37 S. W. 732; Tucker *v.* State, (Tex. Crim. 1897) 38 S. W. 1001; Lively *v.* State, (Tex. Crim. 1897) 38 S. W. 997; Cryer *v.* State, (Tex. Crim. 1896) 37 S. W. 753; Volney *v.* State, (Tex. Crim. 1896) 35 S. W. 658; Ray *v.* State, (Tex. Crim. 1896) 35 S. W. 368; Magers *v.* State, (Tex. Crim. 1896) 34 S. W. 114; McAfee *v.* State, (Tex. Crim. 1896) 33 S. W. 970; Bohanon *v.* State, (Tex. Crim. 1896) 33 S. W. 866; Blackshear *v.* State, (Tex. Crim. 1895) 33 S. W. 222; Irvin *v.* State, (Tex. Crim. 1895) 32 S. W. 899; Hill *v.* State, (Tex. Crim. 1895) 30 S. W. 806; McClesky *v.* State, (Tex. Crim. 1895) 30 S. W. 800; Cook *v.* State, (Tex. Crim. 1894) 28 S. W. 476; Barnard *v.* State, (Tex. Crim. 1894) 25 S. W. 967; Crawford *v.* State, (Tex. Crim. 1894) 25 S. W. 629; Calhoun *v.* State, (Tex. Crim. 1894) 25 S. W. 126; Powers *v.* State, (Tex. Crim. 1893) 23 S. W. 795; Horton *v.* State, (Tex. Crim. 1893) 23 S. W. 691; Garza *v.* State, (Tex. Crim. 1893) 22 S. W. 139; Neubauer *v.* State, 31 Tex. Crim. 513, 21 S. W. 363; Cummings *v.* State, 31 Tex. Crim. 406, 20 S. W. 706; Curry *v.* Dallas, (Tex. Crim. 1893) 21 S. W. 930; Kaiser *v.* Dallas, (Tex. Crim. 1893) 21 S. W. 767. And where this condition is inserted the omission to insert the expression "of the state of Texas" will not affect the validity of the recognizance. Anderson *v.* State, (Tex. Crim. 1896) 36 S. W. 97. Such a condition is also the proper one in appeals of cases of misdemeanors. Satterwhite *v.* State, (Tex. Crim. 1899) 49 S. W. 396; Guill *v.* State, (Tex. Crim. 1897) 42 S. W. 303.

16. Douglass *v.* State, (Tex. Crim. 1893) 22 S. W. 43.

17. Kansas City *v.* Garnier, 57 Kan. 412, 46 Pac. 707.

In Texas, however, it is held that the recognizance must show both the offense charged and that for which defendant was convicted. Sheppard *v.* State, (Tex. Crim. 1895) 32 S. W. 530. See also Fondren *v.* State, (Tex. Crim. 1895) 29 S. W. 479; Short *v.* State, (Tex. Crim. 1894) 25 S. W. 288.

18. State *v.* Heed, 62 Mo. 559. See also Holman *v.* State, 10 Tex. 558; Pierce *v.* State, 10 Tex. 556.

19. **Setting out elements of offense.**—Vanwey *v.* State, 44 Tex. 112; Youngman *v.* State, (Tex. Crim. 1897) 42 S. W. 988; Salmon *v.* State, (Tex. Crim. 1897) 38 S. W. 995; Ramsey *v.* State, (Tex. Crim. 1896) 37 S. W. 330; Warden *v.* State, (Tex. Crim. 1896) 34 S. W. 125; Leach *v.* State, 35 Tex. Crim. 449, 34 S. W. 124; Sanders *v.* State, (Tex. Crim. 1892) 20 S. W. 360; Johnson *v.* State, (Tex. Crim. 1893) 21 S. W. 371. And where a statute makes it necessary to constitute the offense that it was done "knowingly" or "wilfully" a recognizance which does not state that it was so done is fatally defective. Allison *v.* State, 33 Tex. Crim. 501, 26 S. W. 1080, 1081; Magee *v.* State, 7 Tex. App. 99.

Punishable offense must be described. Breeding *v.* State, 31 Tex. 94; Adler *v.* State, 31 Tex. 61; Riviere *v.* State, 7 Tex. App. 55; Coggin *v.* State, (Tex. Crim. 1897) 40 S. W. 984; McClure *v.* State, 37 Tex. Crim. 129, 38 S. W. 1002; Draughan *v.* State, 35 Tex. Crim. 51, 35 S. W. 667; Calhoun *v.* State, (Tex. Crim. 1894) 25 S. W. 126; Wilson *v.* State, (Tex. Crim. 1893) 24 S. W. 33; Morgan *v.* State, 32 Tex. Crim. 413, 23 S. W. 1107; Henderson *v.* State, (Tex. Crim. 1893) 23 S. W. 692; Yokum *v.* State, (Tex. Crim. 1893) 21 S. W. 191; Harris *v.* State, (Tex. Crim. 1893) 20 S. W. 708. If the offense described in a bond on appeal is not a criminal one the sureties on such instrument will not be liable. State *v.* Jones, 3 La. Ann. 9.

The following descriptions have been held insufficient: "Did unlawfully sell intoxicating liquor in a county where local option has been adopted and was in force" (Duffer *v.* State, (Tex. Crim. 1897) 38 S. W. 997), "betting at a game played with cards in a public place" (Heath *v.* State, (Tex. Crim. 1895) 31 S. W. 659), "disturbing the peace" (Strain *v.* State, (Tex. Crim. 1897) 42 S. W. 383), "disturbing religious worship" (Hunt *v.* State, (Tex. Crim. 1896) 34 S. W. 750), "gaming" (Harkey *v.* State, (Tex. Crim. 1894) 25 S. W. 423), "malicious mischief" (Koritz *v.* State, 27 Tex. App. 53, 10 S. W. 757), "retailing liquor without license" (Munch *v.* State, 3 Tex. App. 552), "unlawfully carrying a pistol" (Ross *v.* State, (Tex. Crim. 1898) 44 S. W. 492; Blackshear *v.*

But under a statute requiring that such instrument state briefly the nature of the offense, a recognizance on appeal which states in substance the charge upon which defendant was convicted under the statute is sufficient.[20] But a recognizance may be bad for duplicity or uncertainty where the description joins two or more offenses or states the offense in the alternative so that it is uncertain to which of them the description refers.[21]

(B) *Should Show Conviction.* It has been declared that a recognizance given on appeal which fails to show that the principal has been convicted of any offense is void,[22] and on appeal from a judgment in the lower court dismissing an appeal the recognizance should show what disposition was made in the lower court of the appeal.[23]

(C) *Variance Between Indictment and Recognizance.* A recital in the recognizance of the offense charged in the indictment is sufficient,[24] and where it is expressly provided by statute that the former must state the very offense named in the latter, or with which the defendant stands charged, a variance in these respects invalidates such recognizance.[25]

State, (Tex. Crim. 1895) 33 S. W. 222; Clark *v.* State, (Tex. Crim. 1895) 32 S. W. 901; Baizey *v.* State, (Tex. Crim. 1895) 30 S. W. 358; Rhoads *v.* State, (Tex. Crim. 1894) 28 S. W. 467; Heath *v.* State, (Tex. Crim. 1894) 28 S. W. 203), "unlawfully selling intoxicating liquors in a prohibition district" (McMeans *v.* State, 37 Tex. Crim. 130, 38 S. W. 998), violating the "Sunday law" (Pace *v.* State, (Tex. Crim. 1895) 32 S. W. 700). So a recognizance describing the offense as crap playing has been held insufficient in not stating the elements of the offense, it being necessary to show that the game was not played at a private residence. Roe *v.* State, (Tex. Crim. 1893) 24 S. W. 28. See also Allphin *v.* State, (Tex. Crim. 1894) 26 S. W. 61.

The following descriptions have been held to be sufficient: "Keeping a disorderly house" (Reed *v.* State, (Tex. Crim. 1893) 22 S. W. 969 [*reversing* 21 S. W. 364]), receiving "stolen" property (Sands *v.* State, 30 Tex. App. 578, 18 S. W. 86), "unlawfully obstructing a public highway" (Robinson *v.* State, (Tex. Crim. 1897) 39 S. W. 678), "unlawfully pursuing the occupation of selling medicated bitters in quantities of a quart and less than five gallons, without first obtaining a license therefor" (Viser *v.* State, 10 Tex. App. 86).

20. Describing in substance.— So a recital of the conviction as being for selling whisky to an Indian was held sufficient, where the defendant was convicted under a statute making it an offense to sell "spirituous" liquor to an Indian. State *v.* Murphy, 23 Nev. 390, 48 Pac. 628.

21. Uncertainty or duplicity.— Killingsworth *v.* State, 7 Tex. App. 28; Hart *v.* State, 2 Tex. App. 39; Davidson *v.* State, (Tex. Crim. 1898) 45 S. W. 488; Young *v.* State, (Tex. Crim. 1897) 42 S. W. 564; Whitehead *v.* State, 35 Tex. Crim. 437, 34 S. W. 114; Bailey *v.* State, (Tex. Crim. 1896) 34 S. W. 116; Kennedy *v.* State, (Tex. Crim. 1894) 24 S. W. 901; Knight *v.* State, (Tex. Crim. 1893) 24 S. W. 103; Garza *v.* State, (Tex. Crim. 1893) 22 S. W. 139; Wells *v.* State, (Tex. Crim. 1893) 21 S. W. 370; Parker *v.* State, (Tex. Crim. 1892) 20 S. W. 707. So where the conviction was for carrying a pistol on "and" about the person, a recognizance is void which recites the offense as carrying a pistol on "or" about the person. Strey *v.* State, (Tex. Crim. 1897) 40 S. W. 279; Polly *v.* State, (Tex. Crim. 1897) 40 S. W. 283; Lowery *v.* State, (Tex. Crim. 1897) 38 S. W. 609.

22. Jones *v.* State, 8 Tex. App. 365; Nunn *v.* State, 40 Tex. Crim. 435, 50 S. W. 713; McGough *v.* State, (Tex. Crim. 1899) 50 S. W. 712; Fancher *v.* State, (Tex. Crim. 1894) 25 S. W. 285.

The punishment assessed must also be shown where the statute so requires. Cauthern *v.* State, (Tex. Crim. 1900) 59 S. W. 273; Allred *v.* State, (Tex. Crim. 1900) 59 S. W. 273; Callicoatte *v.* State, (Tex. Crim. 1900) 58 S. W. 1008; Cartwright *v.* State, (Tex. Crim. 1900) 58 S. W. 1008; McCormack *v.* State, (Tex. Crim. 1900) 58 S. W. 1006; Cooper *v.* State, (Tex. Crim. 1900) 55 S. W. 494; Chumley *v.* State, (Tex. Crim. 1900) 55 S. W. 492; Jordan *v.* State, (Tex. Crim. 1900) 55 S. W. 176; Westfall *v.* State, (Tex. Crim. 1899) 53 S. W. 629; Secrest *v.* State, (Tex. Crim. 1899) 53 S. W. 630; Sessum *v.* State, (Tex. Crim. 1899) 51 S. W. 373; Peck *v.* State, (Tex. Crim. 1899) 51 S. W. 229; Donnelly *v.* State, (Tex. Crim. 1899) 51 S. W. 228; Cyrus *v.* State, (Tex. Crim. 1899) 50 S. W. 716; Bird *v.* State, (Tex. Crim. 1899) 50 S. W. 715; McGough *v.* State, (Tex. Crim. 1899) 50 S. W. 712; May *v.* State, 40 Tex. Crim. 196, 49 S. W. 402; Davis *v.* State, (Tex. Crim. 1899) 49 S. W. 403; Kirk *v.* State, (Tex. Crim. 1893) 22 S. W. 21.

23. Bennett *v.* State, 37 Tex. Crim. 244, 39 S. W. 363; Biggins *v.* State, (Tex. Crim. 1896) 34 S. W. 109; Alexander *v.* State, (Tex. Crim. 1895) 32 S. W. 695; Armento *v.* State, 33 Tex. Crim. 539, 28 S. W. 200; Sides *v.* State, (Tex. Crim. 1893) 24 S. W. 95.

24. Alford *v.* State, 37 Tex. Crim. 386, 35 S. W. 657.

25. Robinson *v.* State, 30 Tex. 437; Johnson *v.* State, (Tex. Crim. 1897) 40 S. W. 982;

d. Amendment. But a bond or recognizance cannot be amended after the adjournment of the term at which it is entered,[26] or in vacation,[27] or after the defendant has been discharged from arrest,[28] nor can a surety be substituted without the knowledge of the cosureties.[29]

2. Execution. Where the recognizance is required to be signed,[30] it will be binding though the signatures be in the body of the bond instead of at the bottom.[31] But it cannot be executed by another in behalf of the accused, either as attorney or otherwise.[32] So where it is expressly required by statute that in certain cases bail shall be by bond it must be executed under seal to be in form the instrument required.[33] And if two or more defendants have been jointly convicted in case of an appeal by them each must execute a separate recognizance.[34]

H. Money Deposited in Lieu of Bail — 1. In General. A magistrate or officer has no authority to accept a deposit of money in lieu of bail in the absence of a statute conferring such right upon him;[35] but where it is provided by statute that money may be deposited in lieu of bail, and the amount required is deposited, the defendant cannot be required to enter into a recognizance in form.[36]

2. Disposition of. Money deposited in lieu of bail with an officer or judge is said to be held in trust by such person for the commonwealth,[37] and on default for

Morrison *v.* State, 37 Tex. Crim. 601, 40 S. W. 591; Jackson *v.* State, (Tex. Crim. 1897) 40 S. W. 287; Wilson *v.* State, (Tex. Crim. 1897) 40 S. W. 279; Canady *v.* State, (Tex. Crim. 1897) 38 S. W. 610; Swain *v.* State, (Tex. Crim. 1897) 38 S. W. 609; Schoonmaker *v.* State, 37 Tex. Crim. 424, 35 S. W. 969; Couch *v.* State, (Tex. Crim. 1896) 34 S. W. 942; Smith *v.* State, (Tex. Crim. 1896) 33 S. W. 1079; Pace *v.* State, (Tex. Crim. 1895) 32 S. W. 697; Loven *v.* State, (Tex. Crim. 1895) 30 S. W. 358; Johnson *v.* State, 34 Tex. Crim. 106, 29 S. W. 472; Nichols *v.* State, (Tex. Crim. 1895) 29 S. W. 383; Nash *v.* State, 32 Tex. Crim. 368, 24 S. W. 32, 26 S. W. 412; Turner *v.* State, (Tex. Crim. 1894) 26 S. W. 62; Heilman *v.* State, (Tex. Crim. 1894) 25 S. W. 1120; Blevins *v.* State, (Tex. Crim. 1893) 23 S. W. 688; Mullinix *v.* State, 32 Tex. Crim. 116, 22 S. W. 407; Shackelford *v.* State, (Tex. Crim. 1893) 22 S. W. 26; Flemming *v.* State, (Tex. Crim. 1893) 22 S. W. 1038; Daggett *v.* State, (Tex. Crim. 1893) 21 S. W. 360; Morgan *v.* State, (Tex. Crim. 1893) 21 S. W. 260; McDaniel *v.* State, (Tex. Crim. 1893) 20 S. W. 1108; Bowen *v.* State, 28 Tex. App. 103, 12 S. W. 413; Jones *v.* State, 8 Tex. App. 365.

26. **After adjournment.**— Miller *v.* State, (Tex. Crim. 1894) 26 S. W. 71. A defect cannot be cured by granting a certiorari when the term of the court has expired. Harris *v.* State, (Tex. Crim. 1893) 24 S. W. 103.

27. **In vacation.**— Simpson *v.* State, (Tex. Crim. 1894) 25 S. W. 425.

28. **After discharge from arrest.**— Cox *v.* State, 5 Kan. App. 539, 47 Pac. 191.

If it is provided by statute that no appeal shall be dismissed, because of any informality in its taking, a defective appeal-bond may be amended by the substitution of one containing the conditions prescribed by law. Territory *v.* Milroy, 7 Mont. 559, 19 Pac. 209. But see Holman *v.* State, 10 Tex. 558 (where it is held that the supreme court will dismiss the appeal); Koritz *v.* State, 27 Tex. App. 53, 10 S. W. 757 (wherein it is held that the trial court has no jurisdiction to amend a bond).

29. **Substitution of surety.**— Cox *v.* State, 5 Kan. App. 539, 47 Pac. 191.

30. **Though the signatures of the defendant or his sureties** may not be required to a recognizance on appeal, the fact that they sign such instrument will not render it invalid. Shupe *v.* State, 40 Nebr. 524, 59 N. W. 100.

31. **Place of signatures.**—McHowell *v.* State, (Tex. Crim. 1899) 53 S. W. 630; Triplett *v.* State, (Tex. Crim. 1896) 33 S. W. 1079.

32. **By agent or attorney.**—Ferrill *v.* State, 29 Tex. 489.

33. **Seal.**— Williams *v.* State, 25 Fla. 734, 6 So. 831, 6 L. R. A. 821.

34. **By defendants jointly convicted.**—Goldman *v.* State, (Tex. Crim. 1896) 34 S. W. 122; Bowers *v.* State, (Tex. Crim. 1896) 33 S. W. 974. See also Irvin *v.* State, (Tex. Crim. 1895) 32 S. W. 899.

35. **This rule has been applied** to justices of the peace (Appelgate *v.* Young, 62 Kan. 100, 61 Pac. 402 [*reversing* 9 Kan. App. 493, 58 Pac. 1000]; U. S. *v.* Faw, 1 Cranch C. C. (U. S.) 486, 22 Fed. Cas. No. 15,078), to magistrates (Reinhard *v.* Columbus, 49 Ohio St. 257, 31 N. E. 35), to mayors (Columbus *v.* Dunnick, 41 Ohio St. 602), to police officers (Reinhard *v.* Columbus, 49 Ohio St. 257, 31 N. E. 35), and to sheriffs (Butler *v.* Foster, 14 Ala. 323; Smart *v.* Cason, 50 Ill. 195; State *v.* Reiss, 12 La. Ann. 166).

36. **Where statute permits.**— Morrow *v.* State, 6 Kan. 222; Wash *v.* State, 3 Coldw. (Tenn.) 91.

Money deposited in lieu of bail in civil actions see *supra*, II, H.

For form of deposit in lieu of bail in criminal cases see Bullitt's Crim. Code Ky. (1899), p. 143; N. Y. Code Civ. Proc. § 554.

37. **In trust for commonwealth.**— Com. *v.* Leech, 103 Ky. 389, 20 Ky. L. Rep. 129, 45 S. W. 361.

non-compliance with the conditions to secure the fulfilment of which the deposit was made it becomes forfeited.[38] Such deposit may also by statute be a security for the fine and costs, where judgment is rendered.[39] And if made in lieu of bail, under a statute permitting such procedure, it is presumed to have been made by the defendant and to belong to him, and therefore, though made by a third person in his name, it will be equally liable to be applied to the satisfaction of any judgment recovered against the defendant.[40]

I. Discharge of Sureties — 1. In General. Although the conditions of the recognizance should be performed, nevertheless the act of God or of the obligee or of the law may excuse performance, or operate to render it impossible.[41] Thus it has been held that the sureties are released from liability by death of the accused,[42] by discharge in bankruptcy or insolvency,[43] or by a material alteration

38. Forfeiture.— Rock Island County *v.* Mercer County, 24 Ill. 35; Com. *v.* Leech, 103 Ky. 389, 20 Ky. L. Rep. 105, 45 S. W. 361; Arnsparger *v.* Norman, 101 Ky. 208, 19 Ky. L. Rep. 381, 40 S. W. 574; Dean *v.* Com., 1 Bush (Ky.) 20; Bullock *v.* Com., 16 Ky. L. Rep. 284.

A married woman cannot on the ground of coverture resist a forfeiture of money deposited by her in lieu of bail. Bullock *v.* Com., 16 Ky. L. Rep. 284.

Statutory proceedings for the forfeiture of money in such a case are constitutional. Bullock *v.* Com., 96 Ky. 537, 16 Ky. L. Rep. 621, 29 S. W. 341.

A provision as to recognizances that, in case of breach thereof, they shall, in certain cases, be certified and returned from the justice's court to the district court has been held in Montana to confer no authority upon the justice, on declaring a forfeiture of money deposited in lieu of bail to turn the same over to the county attorney. State *v.* Evans, 13 Mont. 239, 33 Pac. 1010.

39. When security for fine and costs.— State *v.* Ross, 100 Tenn. 303, 45 S. W. 673, wherein it is held that, under a statute, the costs should be taken from a deposit made in the supreme court in a case affirmed on appeal before any part of such deposit is withdrawn.

40. State *v.* Owens, 112 Iowa 403, 84 N. W. 529 (wherein it is also declared that, under the statute, the money can only be returned to the defendant); Appelgate *v.* Young, 62 Kan. 100, 61 Pac. 402 [*reversing* 9 Kan. App. 493, 58 Pac. 100]; People *v.* Laidlaw, 102 N. Y. 588, 7 N. E. 910; State *v.* Ross, 100 Tenn. 303, 45 S. W. 673.

Return to attorney of the defendant has been held proper. Jackson *v.* Rome, 78 Ga. 343.

Where deposited with the clerk of the court who pays the same to the trustee of the jury fund, such clerk is considered as holding the money as agent for the person making the deposit and the payment by him is considered as equivalent to payment by such person. Arnsparger *v.* Norman, 101 Ky. 208, 19 Ky. L. Rep. 381, 40 S. W. 574.

41. Belding *v.* State, 25 Ark. 315, 99 Am. Dec. 214, 4 Am. Rep. 26; State *v.* Crosby, 114 Ala. 11, 22 So. 110; State *v.* McAllister, 54 N. H. 156. So an act of the court may operate as a discharge of the sureties, as in case of a release of the prisoner on habeas corpus from an illegal imprisonment, intended as a surrender, and discharging him. Smith *v.* Com., 91 Ky. 588, 13 Ky. L. Rep. 186, 16 S. W. 532. And payment to the clerk of the amount of the recognizance, he being the proper officer to receive said amount, releases the sureties. Flanigan *v.* Minneapolis, 36 Minn. 406, 31 N. W. 359. See also *infra*, III, J, L, N.

Discharge of bail in civil actions see *supra*, II, J.

The alteration of a bail-bond, made by a separate stipulation between the principal and the government, without the consent of the other obligors, renders the bond void as to the latter. Reese *v.* U. S., 9 Wall. (U. S.) 13, 19 L. ed. 541. See, generally, Alterations of Instruments, 2 Cyc. 137.

Fact that the cognizor was an infant and was removed by his parent out of the state, thereby preventing his surrender, does not discharge surety. Starr *v.* Com., 7 Dana (Ky.) 243.

Fact that the prisoner was appointed a deputy marshal and acted as such until the time for his appearance at court does not release sureties. Bolanz *v.* Com., 24 Gratt. (Va.) 31.

Pardon of accused does not discharge his sureties from forfeiture incurred prior thereto. Dale *v.* Com., 101 Ky. 612, 19 Ky. L. Rep. 1119, 42 S. W. 93, 38 L. R. A. 808.

42. Death releases the sureties where it renders the performance of the condition impossible. Pynes *v.* State, 45 Ala. 52; McKee *v.* Com., 7 Ky. L. Rep. 286 (holding that death before the day of appearance releases bail, but that it must be pleaded as an existing fact and not on information and belief); People *v.* Meyer, 9 Misc. (N. Y.) 726, 29 N. Y. Suppl. 1148, 61 N. Y. St. 121 (rule applied to death before forfeiture); Merritt *v.* Thompson, 1 Hilt. (N. Y.) 550; People *v.* Manning, 8 Cow. (N. Y.) 297, 18 Am. Dec. 451; Conner *v.* State, 30 Tex. 94 (where accused died pending appeal and the death was proved before judgment of affirmance).

43. Discharge in bankruptcy or insolvency releases the sureties from all liability upon the bond. Jones *v.* State, 28 Ark. 119; Richardson *v.* McIntyre, 4 Wash. (U. S.) 412, 20 Fed. Cas. No. 11,789. Although such dis-

of the bond after its final execution.[44] But if the fault of the sureties contributes in any way, together with the above acts, to prevent the principal's surrender, they are not discharged, although they are not liable where they are unable to produce the accused by one of the causes which the statute recognizes as a sufficient excuse.[45]

2. Arrest and Custody — a. In Other Proceedings. Notwithstanding the rule in civil bail,[46] the arrest or imprisonment of the accused in other proceedings does not in criminal cases operate in all jurisdictions to discharge the sureties. Under a federal decision [47] it is determined that the removal of a prisoner by a court of competent jurisdiction beyond the control of his bondsmen, thus rendering them unable to produce him at the time and place set for trial in accordance with the obligation, constitutes an act of the law and discharges the sureties; and under several decisions this seems to be a rule based on sound reasons.[48] But the arrest of accused for another offense while he is out on bail does not release the sureties,[49] for although by taking bail the state parts with the exclusive control of the prisoner and consents that the bondsmen may exercise direct control over him, yet it is only for the purpose of enabling them to produce him in court in conformity with their undertaking, and the state retains the right in certain con-

charge after giving the bond does not, it is decided, apply to a debt due to the state, since the statute cannot be extended by implication so as to defeat the execution of the criminal laws. Com. *v.* Anderson, 1 Ky. L. Rep. 275; Com. *v.* McMillen, 1 Ky. L. Rep. 270.

44. A material alteration of the bond after its final execution either by erasures, striking out, or adding to the same without the sureties' knowledge or consent releases them. Vincent *v.* People, 25 Ill. 500; Grant *v.* State, 8 Tex. App. 432; Davis *v.* State, 5 Tex. App. 48. But a change of the amount thereof where the recognizance need not have been in writing does not discharge the bail. Com. *v.* McHenry, 13 Phila. (Pa.) 451, 36 Leg. Int. (Pa.) 285. Nor are they released where the bond was filled up according to the sureties' directions after they had signed the same. Brown *v.* Colquitt, 73 Ga. 59, 54 Am. Rep. 867. Nor has the sheriff any power after bail is taken, the bond approved, and the accused released, to alter the bond upon stipulation with the sureties, and for their protection, even though it has not been returned into the sheriff's office. McClure *v.* Smith, 56 Ga. 439.

45. State *v.* McAllister, 54 N. H. 156.

Enlistment in the army by the principal without the knowledge or consent of his sureties, whereby he becomes subject to military jurisdiction and is without the jurisdiction of the state, or the reach of his sureties at the time of the forfeiture, so that he cannot be taken by habeas corpus or otherwise has been decided not to release the sureties. Gingrich *v.* People, 34 Ill. 448; Winninger *v.* State, 23 Ind. 228; State *v.* Scott, 20 Iowa 63. *Contra*, Com. *v.* Terry, 2 Duv. (Ky.) 383 (where the principal was unable to obtain a furlough); People *v.* Cushney, 44 Barb. (N. Y.) 118; People *v.* Cook, 30 How. Pr. (N. Y.) 110.

46. See *supra*, II, I, 1, b.

47. *In re* James, 18 Fed. 853.

48. Sureties are released where accused is imprisoned by an order of the military officer under a provisional government (Belding *v.* State, 25 Ark. 315, 99 Am. Dec. 214, 4 Am. Rep. 26); or where he is adjudged a lunatic and confined as such (Wood *v.* Com., 17 Ky. L. Rep. 1076, 33 S. W. 729); or escapes on his way to the asylum (Com. *v.* Fleming, 15 Ky. L. Rep. 491); or where accused is illegally imprisoned even by the sureties' own act and is released therefrom on habeas corpus (Smith *v.* Com., 91 Ky. 588, 13 Ky. L. Rep. 186, 16 S. W. 532); or where he is confined in the penitentiary and is incapable of appearing (Buffington *v.* Smith, 58 Ga. 341; Cooper *v.* State, 5 Tex. App. 215, 32 Am. Rep. 571; Caldwell *v.* Com., 14 Gratt. (Va.) 698).

49. Sureties not released. — *Alabama.* — State *v.* Crosby, 114 Ala. 11, 22 So. 110 [*citing* Ingram *v.* State, 27 Ala. 17], arrest and commitment to prison for another offense.

Arkansas. — Havis *v.* State, 62 Ark. 500, 37 S. W. 957.

Georgia. — Hartley *v.* Colquitt, 72 Ga. 351; West *v.* Colquitt, 71 Ga. 559, 51 Am. Rep. 277.

Kentucky. — Alguire *v.* Com., 3 B. Mon. (Ky.) 349; McGuire *v.* Com., 7 Ky. L. Rep. 287, and this even though defendant escapes.

Louisiana. — State *v.* Frith, 14 La. 191, and this even though the second offense is not bailable.

See also *In re* James, 18 Fed. 853; and 5 Cent. Dig. tit. "Bail," § 291.

Qualifications and particular instances. — Where the accused was detained out of court to pay a fine on another charge and the time of detention did not exceed five minutes bail were held responsible upon their obligation. People *v.* Robb, 98 Mich. 397, 57 N. W. 257. And it is decided that the arrest for another offense does not *ipso facto* discharge the sureties. Tedford *v.* State, 67 Miss. 363, 7 So. 352. Nor are they released although the accused was arrested as an escaped con-

tingencies to resume the custody of the offender, and it cannot therefore be claimed that the being out on bail operates as an immunity from arrest for a new offense.[50] This rule has been extended to apply to a case of confinement in the penitentiary of another state,[51] to a transfer by federal authority[52] from the state court into military custody in another state,[53] to an arrest in another county,[54] and to a removal into another county.[55]

b. Rearrest on Same Charge. Where the prisoner is rearrested or ordered into custody on the same charge or for the same offense, his sureties are discharged,[56]

vict and was lawfully in the custody of the warden of the penitentiary provided he was at large and might have appeared in court. Bishop *v.* State, 16 Ohio St. 419. Nor where, after arrest, trial, and conviction for another felony, the principal had escaped. Wheeler *v.* State, 38 Tex. 173. Nor will the federal court discharge bail because the principal is confined in jail under process of the state court. U. S. *v.* Van Fossen, 1 Dill. (U. S.) 406, 28 Fed. Cas. No. 16,607; U. S. *v.* French, 1 Gall. (U. S.) 1, 25 Fed. Cas. No. 15,165.

50. *In re* James, 18 Fed. 853 [*citing* Taintor *v.* Taylor, 36 Conn. 242, 4 Am. Rep. 58; State *v.* Horn, 70 Mo. 466, 35 Am. Rep. 437; Taylor *v.* Taintor, 16 Wall. (U. S.) 366, 21 L. ed. 287; U. S. *v.* Van Fossen, 1 Dill. (U. S.) 406, 28 Fed. Cas. No. 16,607].

Custody during trial of another indictment does not release the sureties although they are bound under separate bonds for accused's appearance under both indictments at the same term. Combs *v.* Com., 103 Ky. 385, 20 Ky. L. Rep. 129, 45 S. W. 359.

51. Confinement in penitentiary of another state.— *Alabama.*—Cain *v.* State, 55 Ala. 170.

Kentucky.— Yarbrough *v.* Com., 89 Ky. 151, 11 Ky. L. Rep. 351, 12 S. W. 143, 25 Am. St. Rep. 524; Withrow *v.* Com., 1 Bush (Ky.) 17.

Missouri.— State *v.* Horn, 70 Mo. 466, 35 Am. Rep. 437.

Nebraska.— King *v.* State, 18 Nebr. 375, 25 N. W. 519.

Tennessee.— Devine *v.* State, 5 Sneed (Tenn.) 622.

See 5 Cent. Dig. tit. "Bail," § 291.

It has also been applied to confinement of a lunatic in another state. Adler *v.* State, 35 Ark. 517, 37 Am. Rep. 48. And confinement in another state on authority thereof does not excuse failure to appear in discharge of the bond. Hall *v.* Com., 20 Ky. L. Rep. 99, 45 S. W. 458.

So on a requisition, where one was delivered upon suit to another state, tried, convicted, and sentenced to imprisonment for a long term of years, it was declared that that was not an act of the law which rendered the performance impossible, and therefore excused failure, since such law must be one operative in the state where the obligation was assumed and obligatory in this respect upon the authorities. Taintor *v.* Taylor, 36 Conn. 242, 4 Am. Rep. 58 [*affirmed* in 16 Wall. (U. S.) 366, 21 L. ed. 287]. See also Ingram *v.* State, 27 Ala. 17 (where the bail were held although the delivery was after escape from his bail but the demand was not on the same charge); State *v.* Burnham, 44 Me. 278 (where the principal was arrested in a neighboring state on a requisition and bail were held). *Contra*, People *v.* Moore, 4 N. Y. Crim. 205; State *v.* Allen, 2 Humphr. (Tenn.) 258.

52. But bail are discharged by the arrest upon the same charge in the same state by federal authorities and incarceration in another state. Com. *v.* Overby, 80 Ky. 208, 3 Ky. L. Rep. 704, 44 Am. Rep. 471. See *infra*, III, J, 1.

53. Transfer into military custody.—State *v.* Davis, 12 S. C. 528. Bail are not released where they take the principal out of the county to offer him as a substitute and he is seized by the military authorities as a deserter (Shook *v.* People, 39 Ill. 443), nor where the principal has placed himself under military jurisdiction are the bail discharged (Huggins *v.* People, 39 Ill. 241). But bail are not entitled to have the body in another state until a sentence of court martial has been complied with. U. S. *v.* Bishop, 3 Yeates (Pa.) 37.

54. Arrest in another county.— Mix *v.* People, 26 Ill. 32; Brown *v.* People, 26 Ill. 28; State *v.* Merrihew, 47 Iowa 112, 29 Am. Rep. 464. *Contra*, People *v.* Bartlett, 3 Hill (N. Y.) 570.

55. Removal into another county.— Stafford *v.* State, 10 Tex. App. 46. *Contra*, Com. *v.* Webster, 1 Bush (Ky.) 616.

56. *Alabama.*— State *v.* Posey, 79 Ala. 45.

Arkansas.— State *v.* Jones, 29 Ark. 127, for the right of bail to the custody of the defendant is impaired, even by giving the sheriff the custody of the prisoner to be transmitted to the sheriff of the county to which a change of venue is ordered.

Iowa.— State *v.* Orsler, 48 Iowa 343 (prisoner arrested on indictment subsequently found); State *v.* Holmes, 23 Iowa 458 (the state's custody on rearrest is actual, not constructive, and the bail has no control or liability).

Kentucky.— Medlin *v.* Com., 11 Bush (Ky.) 605.

Missouri.— See State *v.* Taylor, 136 Mo. 462, 37 S. W. 1121.

Nebraska.— Smith *v.* State, 12 Nebr. 309, 11 N. W. 317.

Texas.— Foster *v.* State, 38 Tex. Crim. 372, 43 S. W. 80; Peacock *v.* State, 44 Tex. 11. And they are discharged by rearrest of principal and bail thereupon. Roberts *v.* State, 22 Tex. App. 64, 2 S. W. 622; Lindley *v.* State, 17 Tex. App. 120.

See 5 Cent. Dig. tit. "Bail," § 290.

Particular applications of rule.— The bond is not given new life by the subsequent re-

nor are they liable where the prisoner escapes after such arrest.[57] But it is decided that the rule does not apply where the rearrest is irregular;[58] nor where the state has only temporary custody;[59] nor where the surety binds himself for merely a portion of the total bail, and the prisoner is retaken to compel them to keep good the additional security;[60] nor where the rearrest is under a second indictment though based on the same transaction as the first.[61]

3. FAILURE TO INDICT. Recurring to the general principle that the condition of the recognizance should be performed, it follows that, if the principal fails to appear according to the obligation, the bond is forfeited whether or not there is an indictment or information, for ordinarily the discharge is a matter for the court and does not result as of course from failure to indict or to proceed by information;[62] and this rule governs where, upon failure to indict, the accused is ordered to appear before a second grand jury.[63]

4. INDICTMENT FOR ANOTHER OFFENSE. It is determined that sureties have a

lease of accused. Smith *v.* State, 12 Nebr. 309, 11 N. W. 317. See People *v.* McReynolds, 102 Cal. 308, 36 Pac. 590. Even though the prisoner is erroneously discharged by legal authority. Com. *v.* Bronson, 14 B. Mon. (Ky.) 361. And the sureties are released where there is an appearance and accused is ordered into custody after sentence and permitted by the court's leave to depart in order to pay his fine (State *v.* Zimmerman, 112 Iowa 5, 83 N. W. 720); or where he is in the state's custody at the time his appearance is required (McGuire *v.* Com., 7 Ky. L. Rep. 287).

57. **Escape after rearrest.**—Smith *v.* Kitchens, 51 Ga. 158, 21 Am. Rep. 232; State *v.* Holmes, 23 Iowa 458; Medlin *v.* Com., 11 Bush (Ky.) 605; People *v.* Stager, 10 Wend. (N. Y.) 431. But see McGuire *v.* Com., 7 Ky. L. Rep. 287. *Contra*, Com. *v.* Branch, 1 Bush (Ky.) 59; Chappell *v.* State, 30 Tex. 613. See also Dunlap *v.* State, 66 Ark. 105, 49 S. W. 349 [*citing* Havis *v.* State, 62 Ark. 500, 37 S. W. 957; Stafford *v.* State, 10 Tex. App. 46], holding that the fact that the accused was in custody for another and distinct offense at the time of his escape does not discharge bail where he was not in custody at the time his bail was bound for his appearance.

Escape after release by order of court made without the sureties' application or knowledge after delivery of the prisoner into custody by a prior order operates to discharge the sureties. People *v.* McReynolds, 102 Cal. 308, 36 Pac. 590 [*citing* State *v.* Orsler, 48 Iowa 343; Medlin *v.* Com., 11 Bush (Ky.) 605; People *v.* Stager, 10 Wend. (N. Y.) 431; Reese *v.* U. S., 9 Wall. (U. S.) 13, 19 L. ed. 541].

58. **Where rearrest is irregular.**— Ingram *v.* State, 27 Ala. 17.

59. **Where state has only temporary custody.**— Com. *v.* Thompson, 9 Ky. L. Rep. 439.

60. U. S. *v.* Atwill, 24 Fed. Cas. No. 14,475.

61. **Rearrest under second indictment.**— Foster *v.* State, 38 Tex. Crim. 372, 43 S. W. 80.

62. *Alabama.*— State *v.* Kyle, 99 Ala. 256, 13 So. 538.

Illinois.— Mooney *v.* People, 81 Ill. 134; O'Brien *v.* People, 41 Ill. 456; Wheeler *v.* People, 39 Ill. 430; Garrison *v.* People, 21 Ill. 535; Chumasero *v.* People, 18 Ill. 405.

Indiana.— Fleece *v.* State, 25 Ind. 384; State *v.* Cooper, 2 Blackf. (Ind.) 226; Adair *v.* State, 1 Blackf. (Ind.) 200.

Kentucky.— Hinkson *v.* Com., 14 Ky. L. Rep. 203, only on failure to indict at the second term or on dismissal by the grand jury that the sureties are released.

Louisiana.— State *v.* Plazencia, 6 Rob. (La.) 441, 41 Am. Dec. 271, not absolved by omission of the state to proceed; appearance is only protection.

Missouri.— State *v.* Millsaps, 69 Mo. 359.

New Jersey.— State *v.* Stout, 11 N. J. L. 124.

New York.— Champlain *v.* People, 2 N. Y. 82.

Pennsylvania.—Com. *v.* McAnany, 3 Brewst. (Pa.) 292.

South Carolina.— State *v.* Fitch, 2 Nott & M. (S. C.) 558, and a new bill may be preferred.

Texas.— McCoy *v.* State, 37 Tex. 219; State *v.* Cocke, 37 Tex. 155; Coleman *v.* State, 32 Tex. Crim. 595, 25 S. W. 286.

Contra, Com. *v.* Blincoe, 3 Bush (Ky.) 12; Rion *v.* Com., 1 Duv. (Ky.) 235; Com. *v.* Roberts, 4 Metc. (Ky.) 219. See also Jones *v.* State, 11 Tex. App. 412.

See 5 Cent. Dig. tit. "Bail," § 293.

To what extent rule qualified.— In Rogers *v.* State, 79 Ala. 59, the condition was to appear at the next term and from term to term thereafter until discharged by law; there was no indictment had and no forfeiture taken, nor was the case continued, and the sureties were discharged. In Bryant *v.* Com., 3 Bush (Ky.) 9, no indictment was found or order made for resubmission or for discharge of the accused, and it was held error to forfeit the bond. In State *v.* Doane, 30 La. Ann. 1194, it was held that the sureties were entitled to release after the discharge of the grand jury at the first term. In State *v.* Mackey, 55 Mo. 51, the prisoner attended during the term named without any measures being taken to commit him, or otherwise secure his appearance, and it was decided that bail were released.

63. *Ex p.* Isbell, 11 Nev. 295

That indictment was under unconstitu-

right to stand upon the terms of their obligation, and therefore, if the recognizance is to answer an indictment for one offense, the bail are not liable for the failure of their principal to appear and answer to an indictment for an offense of an entirely distinct character,[64] that is where the offenses are not different degrees of the same class,[65] but different classes of crime, and there is nothing tending to identify the two crimes as one or to show that the one charge had any relation to the other.[66] But it has also been decided that it is within the terms of the bond to hold the sureties liable even though the information is for a different offense than that under the bond, for the accused binds himself not only to appear and answer the specific charge but also not to depart thence without leave of court first obtained.[67] Nor are the sureties discharged where it does not appear that the attorney for the state, who had filed an information for a different offense, had abandoned the original complaint,[68] or where one of several offenses charged is abandoned.[69]

5. New Bond. Bail will be discharged where accused appears according to the recognizance and new bail is given for his future appearance.[70] And a supersedeas bond given with new bail transfers the custody of defendant from his former bail for appearance to the new bail.[71] But where the statute so provides the appeal-bond can be forfeited only where the judgment against defendant

tional law will not discharge sureties. State *v.* Ruthing, 49 La. Ann. 909, 22 So. 199.

64. *Alabama.*— Gray *v.* State, 43 Ala. 41.
Idaho.— People *v.* Sloper, 1 Ida. 158.
Iowa.— State *v.* Brown, 16 Iowa 314.
Ohio.— Aultfather *v.* State, 4 Ohio St. 467.
Texas.—Addison *v.* State, 14 Tex. App. 568.
See 5 Cent. Dig. tit. "Bail," § 294.

65. Where the indictment is for an offense of a lesser degree, the sureties are not discharged. Mudd *v.* Com., 14 Ky. L. Rep. 672.
Where the indictment is for a higher offense, the sureties are not discharged. Gresham *v.* State, 48 Ala. 625, where the sureties were bound for manslaughter and the indictment was for murder. Again, where the original indictment was quashed and the defendant was bound to answer in a new indictment, it was decided that the sureties were not discharged where the indictment was for a higher offense, including that charged. Hortsell *v.* State, 45 Ark. 59. And where the recognizance is to appear for assault and battery and there is an indictment for murder the sureties are liable. Pack *v.* State, 23 Ark. 235; Adams *v.* Governor, 22 Ga. 417.

66. Where the identity of the two offenses does not appear the sureties are not liable. People *v.* Hunter, 10 Cal. 502. So a material variance between the crime set out in the recognizance and that charged in the indictment will be fatal. State *v.* Woodley, 25 Ga. 235. See also State *v.* Brown, 16 Iowa 314. But a bond is not invalidated where the indictment is for assault with intent to murder and the recognizance describes the offense as "assault and attempt to murder." Where the undertaking charges manslaughter in the second degree it is sufficient even though the indictment charges that offense by description and not in express words. People *v.* Brown, 13 N. Y. Suppl. 320, 37 N. Y. St. 178.
Where the complaint is illegal the principal is not compelled to appear and answer an information duly filed in the court by a proper officer. Kingsbury *v.* Clark, 1 Conn. 406.

67. People *v.* Meacham, 74 Ill. 292; State *v.* Cole, 12 La. Ann. 471, where the charge was robbery and the information was for larceny alone. And under the same condition the failure to appear was declared to be a breach of the bond although the bail was for manslaughter and upon the same facts an indictment for murder was found. State *v.* Bryant, 55 Iowa 451, 8 N. W. 303. So the bond was declared forfeited where the principal was to answer for the charge of adultery and he departed without leave of court, although the indictment in the superior court was lewd and lascivious cohabitation. Com. *v.* Teevens, 143 Mass. 210, 9 N. E. 524, 58 Am. Rep. 131. See also Hendee *v.* Taylor, 29 Conn. 448; Com. *v.* Slocum, 14 Gray (Mass.) 395. See further State *v.* Crosby, 114 Ala. 11, 22 So. 110; McCoy *v.* State, 37 Tex. 219.

68. Hendee *v.* Taylor, 29 Conn. 448. And see Foster *v.* State, 38 Tex. Crim. 374, 43 S. W. 80, where the prosecution under the former indictment was still pending, but the second indictment charged the original offense under different counts and also another offense.

69. Com. *v.* Field, 11 Allen (Mass.) 488. See also Foote *v.* Gordon, 87 Ga. 277, 13 S. E. 512.

70. Schneider *v.* Com., 3 Metc. (Ky.) 409. But they are not released where accused is brought into court on a bench warrant and new bail is entered and defendant escapes. Com. *v.* Dougherty, 8 Phila. (Pa.) 367. And if the new recognizance is before the same magistrate and upon another charge which is part of the same transaction as that upon which the first bond is given the bail are not discharged. State *v.* Shaw, 4 Ind. 428.
But statutory requirements must be complied with to effect the sureties' release where new bail is given and if a surrender is necessary thereto it must be made. Matthews *v.* State, 92 Ala. 89, 9 So. 740.

71. Smith *v.* Craig, 59 Ga. 882.

below has been affirmed; and upon reversal the appeal recognizance becomes *functus officio* while the original recognizance or bail-bond retains its full force and effect.[72]

6. Principal's Discharge, Acquittal, or Sentence. Sureties are released from further liability by the discharge or acquittal of their principal either on appearance and plea,[73] or after trial and before final judgment,[74] or on habeas corpus,[75] or before trial is fixed.[76] Again, where a party is convicted and sentenced he is no longer in the custody of his bail but is under the custody of the proper officer of the law and the sureties are entirely discharged by operation of the law, for there has been a compliance with the conditions of the bond.[77]

7. Proceedings Nullifying Indictment or Affecting Its Validity. It has been determined that sureties are released from their liability by quashing the indictment,[78] or by the finding thereafter of an indictment or information for the same offense;[79] or by entering a *nolle prosequi*.[80] But the construction of the conditions on the bond may operate to preclude such release where the indictment is quashed,[81] or *nolle prosequi* is entered.[82] Again the case may be resubmitted to the grand jury and the bail still be held,[83] but they are not released by the loss or destruction of the indictment,[84] nor by a failure to enter it upon the docket at the same term it is found and prosecuted.[85]

72. Wells *v.* State, 21 Tex. App. 594, 2 S. W. 806.

73. On appearance and plea.— Lyons *v.* State, 1 Blackf. (Ind.) 309.

74. After trial and before judgment.— State *v.* Hay, 7 La. 78; Mills *v.* McCoy, 4 Cow. (N. Y.) 406. Or upon trial at a subsequent court after default. State *v.* Saunders, 8 N. J. L. 177.

75. On habeas corpus.— State *v.* Adler, 67 Ark. 469, 55 S. W. 851. Or on habeas corpus after surrender. Smith *v.* Com., 11 Ky. L. Rep. 811.

76. Before trial fixed.— Kelly *v.* Com., 9 Watts (Pa.) 43.

An order of abatement as to one of two jointly indicted terminates the proceedings as to him, so that upon the indictment being reinstated and the party arrested, his bail are not responsible for his non-appearance. Henry *v.* Com., 4 Bush (Ky.) 427.

77. Conviction and sentence.— *Ex p.* Williams, 114 Ala. 29, 30, 22 So. 446 [*citing* Hawk *v.* State, 84 Ala. 466, 4 So. 690; Cain *v.* State, 55 Ala. 170; *Ex p.* Robinson, 108 Ala. 161, 18 So. 729]. See also *Ex p.* Chandler, 114 Ala. 8, 10, 22 So. 285.

78. Quashing indictment.— People *v.* Lafarge, 3 Cal. 130; State *v.* Clerk, 16 Ind. App. 137, 44 N. E. 813; McKensie *v.* Missouri Pac. R. Co., 24 Mo. App. 392 (also holding that they are discharged even though no formal entry of record is made); People *v.* Felton, 36 Barb. (N. Y.) 429 (where done upon motion of the prosecution, the accused being present, and the latter may thereupon depart from court without special permission or order). But see Little *v.* Com., 3 Bush (Ky.) 22.

Qualifications.—An order striking from the docket one of two indictments for the same offense is not equivalent to a discontinuance of the other. Bradley *v.* People, 21 Ill. App. 78. And bail are liable for non-appearance of accused to answer a second indictment where the first was set aside on defendant's motion after a plea of not guilty but before the jury was impaneled, and by order of court he was permitted to stand upon his bail-bond. Brewer *v.* Com., 3 Bush. (Ky.) 550.

Upon reversal of such order erroneously made at the instance of defendant's attorney a reasonable time to appear and discharge the recognizance will be allowed. Com. *v.* Thompson, 3 Litt. (Ky.) 284.

79. Subsequent indictment for same offense.— People *v.* Lafarge, 3 Cal. 130; State *v.* Clerk, 16 Ind. App. 137, 44 N. E. 813.

80. Entering nolle prosequi.— Lamp *v.* Smith, 56 Ga. 589; State *v.* Bugg, 6 Rob. (La.) 63; State *v.* Prendergast, 11 La. 68; State *v.* Dunbar, 10 La. 99. *Contra*, State *v.* Brooks, 48 La. Ann. 855, 19 So. 739; Silvers *v.* State, 59 N. J. L. 428, 37 Atl. 133; State *v.* Haskett, 3 Hill (S. C.) 95.

81. As where it is conditioned to appear and not depart without leave of the court. State *v.* Hancock, 54 N. J. L. 393, 24 Atl. 726; U. S. *v.* White, 5 Cranch C. C. (U. S.) 368, 28 Fed. Cas. No. 16,678.

82. Silvers *v.* State, 59 N. J. L. 428, 37 Atl. 133.

83. Even though the indictment was for assault and the new indictment was for aggravated assault. Hortsell *v.* State, 45 Ark. 59. See Brewer *v.* Com., 3 Bush (Ky.) 550.

Especially where the statute so provides, but such resubmission must be in conformity with the statutory requirements, or the sureties will be discharged. Hyde *v.* Cross, 25 Oreg. 543, 37 Pac. 59. See Lady *v.* Com., 7 Ky. L. Rep. 228.

84. Loss or destruction of indictment.— Price *v.* State, 42 Ark. 178; People *v.* Dennis, 4 Mich. 609, 69 Am. Dec. 338; Crouch *v.* State, 25 Tex. 755.

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

Filing indictment without indexing it releases the sureties. Hall *v.* Com., 17 Ky. L. Rep. 231, 30 S. W. 877.

8. Prosecuting Attorney's Acts. In so far as bail have a legal right to rely upon the acts or declarations of the prosecuting attorney in the premises, and they are induced thereby to so act as that their rights would be otherwise materially prejudiced under their bond or recognizance, they are not liable to forfeiture of bail.[86] But bail are not released by a failure of the state attorney to perform his duty to call those bound by any recognizance, and to take judgment if the principal be not produced.[87]

9. Reversal of Judgment. If the effect of a judgment has been to legally discharge the sureties the reversal of such judgment does not revive the liability of bail.[88]

J. Breach or Performance of Bond, Undertaking, or Recognizance —

1. Appearance — a. In General. Appearance should be made in conformity with the condition of the obligation at the time and place designated therein or legally required by the terms thereof.[89] If, however, a particular hour is specified then the full legal hour is ordinarily contemplated,[90] and if the designation is general as of a term without further requirement as to the day, then particular days are excluded,[91] unless there is some other legal requirement for appearance on the first day of the term.[92]

b. In Person or by Attorney. It has been held that, in order to prevent a

86. People *v.* Hammond, 4 Silv. Supreme (N. Y.) 270, 7 N. Y. Suppl. 219, 26 N. Y. St. 486, where accused was present in court at the time specified for his appearance, but the district attorney stated to counsel for defendant that he would not move the indictment against accused for that term, whereupon, and induced thereby, said counsel advised accused that he might leave the court. But it is not a defense that the district attorney told counsel for accused that he might go away, and when he wanted him he would send for him. People *v.* Brown, 13 N. Y. Suppl. 320, 37 N. Y. St. 178. Nor can bail defend on the ground that the solicitor-general gave him erroneous advice which he followed. Clark *v.* Gordon, 82 Ga. 613, 9 S. E. 333.

87. State *v.* Plazencia, 6 Rob. (La.) 441, 41 Am. Dec. 271.

There is an implied obligation on the part of the state that bail shall not be hindered by any authority within the limits of the state from surrendering his principal at any time before forfeiture, and that the state's peace-officers will arrest the principal if within the state when bail desires it. Com. *v.* Overby, 80 Ky. 208, 3 Ky. L. Rep. 704, 44 Am. Rep. 471. But see State *v.* Kraner, 50 Iowa 575.

Non-arrest in other cases.— Bail are not released where an officer neglects to arrest after conviction. State *v.* Stewart, 74 Iowa 336, 37 N. W. 400. Nor is it a defense that, after bail was raised and a new order of arrest issued, the prisoner escaped owing to the negligence of the officers in the proceedings. People *v.* Eaton, 41 Cal. 657. But where the sheriff had the defendant in his custody, and, after trial, conviction, and new trial had, the sheriff permitted accused to go at large to obtain a new bond, and he escaped, it was held a sufficient defense. State *v.* Rosseau, 39 Tex. 614.

88. State *v.* Glenn, 40 Ark. 332; State *v.* Murphy, 10 Gill & J. (Md.) 365. But *compare* Wells *v.* State, 21 Tex. App. 594, 2 S. W. 806.

89. Appearance should be on the first day of the term if so specified and not on a later day. Adair *v.* State, 1 Blackf. (Ind.) 200; Shore *v.* State, 6 Mo. 640. And if appearance is alone required non-appearance is a forfeiture. Wallenweber *v.* Com., 3 Bush (Ky.) 68. But a mere appearance at the specified time is insufficient where there are other requirements under the bond or recognizance. Starr *v.* Com., 7 Dana (Ky.) 243. And an order of court taking charge and control of the prisoner is necessary upon appearance. Com. *v.* Coleman, 2 Metc. (Ky.) 382. But accused need not appear at any other time or place than that specified. State *v.* Houston, 74 N. C. 174. See also *infra*, III, J, 1, c.

Breach of performance of bond, undertaking, or recognizance, in civil actions see *supra*, II, J.

Where there has been a failure to appear in accordance with a valid condition for appearance, it will operate as a forfeiture of the recognizance. Chase *v.* People, 2 Colo. 528; Sturges *v.* Sherwood, 15 Conn. 149.

90. **Particular hour designated.**— People *v.* Morstadt, 101 Cal. 379, 35 Pac. 1007; U. S. *v.* Rundlett, 2 Curt. (U. S.) 41, 27 Fed. Cas. No. 16,208.

91. Griffin *v.* Com., Litt. Sel. Cas. (Ky.) 31.

If the term designated has no existence then the recognizance for appearance thereat is not binding; and forfeiture for non-appearance at the next term of another court cannot be declared in such case. Thruston *v.* Com., 3 Dana (Ky.) 224.

The ordinary bail-bond requires an appearance at the next term of the court. State *v.* Langton, 6 La. Ann. 282.

92. As in case of a misdemeanor. U. S. *v.* Hodgkin, 1 Cranch C. C. (U. S.) 510, 26 Fed. Cas. No. 15,375.

forfeiture of bail, a personal appearance is required upon a felony charge[93] upon a condition to appear and abide the judgment of the court,[94] or where the order of the court is to appear in person to be arraigned.[95] And the rule has been applied in certain jurisdictions in cases of misdemeanor.[96] But ordinarily in cases of this character either the statute controls and appearance by attorney is sufficient, or the principle applies that the condition for appearance is for defendant's benefit, or the condition operates to secure compliance with the judgment.[97]

c. Time and Place — (i) *In General.* It is a general rule that a recognizance cannot be forfeited for failure to appear at any other time or place than that specified therein.[98]

(ii) *After Conviction.* There is a legal requirement for appearance after conviction where the conditions of the bond or recognizance are either not to depart without leave of court,[99] or to abide the order and judgment of the court,[1]

93. In felony cases.— State *v.* Rowe, 8 Rich. (S. C.) 17.

94. On condition to appear and abide judgment.— People *v.* McCully, 1 Edm. Sel. Cas. (N. Y.) 270.

95. For arraignment.— State *v.* Lartigue, 6 La. Ann. 404.

96. In misdemeanor cases.— *Arkansas.*— Warren *v.* State, 19 Ark. 214, 68 Am. Dec. 214.

Iowa.— State *v.* Ruferty, 70 Iowa 160, 30 N. W. 391; State *v.* Howorth, 70 Iowa 157, 30 N. W. 389, holding that defendant, who is recognized to appear and submit to judgment, must appear in person for sentence, otherwise the court may forfeit the recognizance notwithstanding Code (1873), § 4497, providing that judgment may be pronounced for a misdemeanor in the absence of defendant.

Kentucky.—Walker *v.* Com., 79 Ky. 292, 2 Ky. L. Rep. 197; Bond *v.* Com., 7 Ky. L. Rep. 94.

Massachusetts.— Com. *v.* McNeill, 19 Pick. (Mass.) 127.

South Carolina.— State *v.* Minton, 19 S. C. 280.

See 5 Cent. Dig. tit. "Bail," § 320.

97. It follows therefore that there can be no forfeiture where such conditions exist even though defendant does not appear in person but by attorney.

California.— People *v.* Budd, 57 Cal. 349; People *v.* Ebner, 23 Cal. 158.

Iowa.— State *v.* Conneham, 57 Iowa 351, 10 N. W. 677.

Kansas.— Kenworthy *v.* El Dorado, 7 Kan. App. 643, 53 Pac. 486.

Kentucky.— Johnson *v.* Com., 1 Duv. (Ky.) 244.

Montana.— State *v.* Evans, 13 Mont. 239, 33 Pac. 1010.

Texas.— Neaves *v.* State, 4 Tex. App. 1.

See 5 Cent. Dig. tit. "Bail," § 309 *et seq.*

98. State *v.* Houston, 74 N. C. 174. See also Hannum *v.* State, 38 Ind. 32; U. S. *v.* Rundlett, 2 Curt. (U. S.) 41, 27 Fed. Cas. No. 16,208. But see State *v.* Stout, 11 N. J. L. 124.

Before indictment.— If the bail-bond is conditioned to appear and answer an indictment the finding thereof is a condition precedent. Hudson *v.* State, 91 Ga. 553, 18 S. E. 432. See also Liceth *v.* Cobb, 18 Ga. 314. But see *supra*, III, I, 3.

Change of time of holding or failure to hold court.— A bond is not forfeited by failure to appear on another day than that fixed in said bond when the law changing said day is *post facto*. State *v.* Melton, 44 N. C. 426. See also State *v.* Stephens, 2 Swan (Tenn.) 307; State *v.* Edwards, 4 Humphr. (Tenn.) 226. But a recognizance to appear at the first day of the circuit next succeeding, etc., is not released by a failure to hold said court at the regular time appointed therefor, for there must be an appearance at the first circuit court actually held. Com. *v.* Cayton, 2 Dana (Ky.) 138. Nor is a recognizance avoided by a statute changing the time of holding the court to an earlier date. Walker *v.* State, 6 Ala. 350. Nor is a condition to appear at the next jury term to be holden, etc., affected by the court ordering a special jury term, and the defendant's failure to appear at said earlier term is not a ground for forfeiture. State *v.* Aubrey, 43 La. Ann. 188, 8 So. 440.

99. The sureties are not released where there is a departure without leave after verdict but before judgment or sentence (Glasgow *v.* State, 41 Kan. 333, 21 Pac. 253); nor where accused after being found guilty disappears (State *v.* Norment, 12 La. 511); nor where defendant so departs after conviction, but before sentence (Boring *v.* Com., (Pa. 1886) 4 Atl. 738; Magie's Appeal, (Pa. 1886) 4 Atl. 737).

Qualifications.— Where the clause in the bond "not thence to depart without leave" is not authorized by the statute it cannot be so construed as to hold the prisoner after examination and finding of guilt. State *v.* Bobb, 39 Mo. App. 543. And where a like clause is not supplemented by a condition to abide the final judgment of the court the sureties are not bound for accused's appearance at a term subsequent to that at which he was sentenced. Roberts *v.* Gordon, 86 Ga. 386, 12 S. E. 648.

1. State *v.* Baldwin, 78 Iowa 737, 36 N. W. 908. So the recognizance may be forfeited under such a condition for failure to appear after verdict. Neininger *v.* State, 50 Ohio St. 394, 34 N. E. 633, 40 Am. St. Rep. 674.

or both,[2] or that accused shall render himself in execution.[3] Again it has also been stated generally that there is a forfeiture of the recognizance where accused fails to comply with the judgment against him,[4] but the obligation of sureties ceases upon a surrender of defendant in execution,[5] or where he submits to and is taken into custody under sentence,[6] or where he is seized by the sheriff after a verdict of guilty and taken to jail.[7]

(III) *During Trial or Term.* The condition of the obligation must primarily be considered, and ordinarily such condition or the statute requires an attendance during the trial or the term or until surrender of the principal into proper custody or until otherwise legally discharged, so that the sureties are liable for an escape of the defendant before such fulfilment of the obligation or legal release therefrom.[8]

(IV) *From Day to Day or From Term to Term.* The effect of an adjournment upon the liability of sureties depends largely, if not exclusively, upon the conditions of the obligation. If such condition is, in effect, a continuing one, as that accused will appear and answer and not depart without leave or that he will abide the order and judgment of the court, it requires an appearance also at legal adjournments from day to day or from term to term at the peril of forfeiture of

2. But in such case the condition is satisfied by an appearance and submitting to the jurisdiction although he departed without leave after the imposition of the fine (Wilson *v.* People, 10 Ill. App. 357), or by an appearance receiving sentence and submitting to being taken into custody (Jackson *v.* State, 52 Kan. 249, 34 Pac. 744).

3. And in such case, if after conviction the court allows the principal to go from custody to obtain the amount of fine imposed, the sureties are liable on his disappearance. Com. *v.* Turpin, 98 Ky. 9, 17 Ky. L. Rep. 546, 32 S. W. 133.

4. State *v.* Whitson, 8 Blackf. (Ind.) 178 (and there is also a breach of the bond where after sentence and adjournment the prisoner escapes); Com. *v.* Casper, 6 Pa. C. Ct. 382.

When no forfeiture.— Where the condition of the recognizance is to abide final sentence there can be no forfeiture after appearance, a finding of guilt, and an order of commitment even though accused fails to return. Spillman *v.* People, 16 Ill. App. 224. And, even though there is a condition not to depart without leave until final trial and conviction or acquittal, the sureties' responsibility ceases after a verdict of guilty is found. State *v.* Wilson, 14 La. Ann. 446. Nor can the bond be forfeited for failure to appear subsequent to the trial to answer sentence. State *v.* Cobb, 44 Mo. App. 375. Nor can the sureties be held where sentence has been twice postponed and accused has appeared at the last term appointed but the court was not in session. People *v.* Kennedy, 58 Mich. 372, 25 N. W. 318.

5. Mitchell *v.* Com., 12 Bush (Ky.) 247.

6. Jackson *v.* State, 52 Kan. 249, 34 Pac. 744.

7. State *v.* Murmann, 124 Mo. 502, 28 S. W. 2.

8. *Alabama.*— Cook *v.* State, 91 Ala. 53, 8 So. 686; Hawk *v.* State, 84 Ala. 466, 4 So. 690.

Colorado.— Chase *v.* People, 2 Colo. 528.

Georgia.— Dennard *v.* State, 2 Ga. 137. *Compare* Lamb *v.* State, 73 Ga. 587, holding that where the jury has been discharged for the term and thereafter the cases are ordered continued, the recognizance cannot be forfeited, and it is not material that the defendant was not in court when the cause is not ready for trial.

Indiana.— Wilson *v.* State, 6 Blackf. (Ind.) 212.

Kansas.— Glasgow *v.* State, 41 Kan. 333, 21 Pac. 253.

Kentucky.— Askins *v.* Com., 1 Duv. (Ky.) 275. See Willis *v.* Com., 85 Ky. 68, 8 Ky. L. Rep. 653, 2 S. W. 654, construing Ky. Crim. Code, § 229. If the principal appears in discharge of the recognizance and is put on trial but escapes during its progress the sureties are not liable. Askins *v.* Com., 1 Duv. (Ky.) 275. Nor are they liable where, by order of court, the accused is placed in the sheriff's custody during trial and escapes while the jury is out. Com. *v.* Coleman, 2 Metc. (Ky.) 382.

Louisiana.— State *v.* Ruthing, 49 La. Ann. 909, 22 So. 199; State *v.* Martel, 3 Rob. (La.) 22.

Michigan.— People *v.* Tuthill, 39 Mich. 262; People *v.* Gordon, 39 Mich. 259. It is decided that, after appearance and a continuance without renewal of the bond, there could be no default for non-attendance thereafter during the term. Townsend *v.* People, 14 Mich. 388.

Mississippi.— Lavins *v.* State, (Miss. 1887) 3 So. 78; Lee *v.* State, 51 Miss. 665.

New York.— People *v.* McCoy, 39 Barb. (N. Y.) 73; People *v.* Stager, 10 Wend. (N. Y.) 431.

Virginia.— Allen *v.* Com., 90 Va. 356, 18 S. E. 437.

See 5 Cent. Dig. tit. "Bail," § 312.

Recognizance may be called any day during the continuance of the court (People *v.* Blankman, 17 Wend. (N. Y.) 252); or at any stage of the trial if accused fails to appear (People *v.* Petry, 2 Hilt. (N. Y.) 523).

the bail-bond for non-compliance with said obligation.[9] But notwithstanding such continuing nature of the obligation it has also been determined that an adjournment to a subsequent term is not within the contract of the recognizance.[10] If, however, the obligation of the bond is not a continuing one the surety is entitled to a discharge at the term designated for appearance.[11]

(v) *On Change of Venue.* But in case of a change of venue, transfer, or removal of a cause the defendant must appear in the court to which such change of venue is made or the bond or recognizance will be forfeited.[12]

9. Continuing obligation.— *Alabama.*— Ellison *v.* State, 8 Ala. 273.

Arkansas.— Hortsell *v.* State, 45 Ark. 59; Price *v.* State, 42 Ark. 178; Moore *v.* State, 28 Ark. 480; Gentry *v.* State, 22 Ark. 544.

Delaware.— See State *v.* Roop, 1 Marv. (Del.) 535, 41 Atl. 196.

Illinois.— Gallagher *v.* People, 88 Ill. 335, 91 Ill. 590. See also Stokes *v.* People, 63 Ill. 489 [*distinguishing* Norfolk *v.* People, 43 Ill. 9].

Indiana.— Rubush *v.* State, 112 Ind. 107, 13 N. E. 877, a case of forfeiture for failure to appear at a subsequent day in the term to which the cause had been continued.

Iowa.— See State *v.* Ryan, 23 Iowa 406; State *v.* Brown, 16 Iowa 314.

Kentucky.— See Ramey *v.* Com., 83 Ky. 534, 7 Ky. L. Rep. 704; Com. *v.* Branch, 1 Bush (Ky.) 59.

Louisiana.—State *v.* Plazencia, 6 Rob. (La.) 417. See also State *v.* Ruthing, 49 La. Ann. 909, 22 So. 199; State *v.* Langton, 6 La. Ann. 282.

Michigan.— People *v.* Hanaw, 106 Mich. 421, 64 N. W. 328.

North Carolina.— See State *v.* Smith, 66 N. C. 620.

See 5 Cent. Dig. tit. "Bail," § 313.

Particular instances.— A recognizance to appear at the next term is not discharged because the judge was ill and did not appear to hold court where by the code all matters are continued. State *v.* Horton, 123 N. C. 695, 31 S. E. 218. See State *v.* Jenkins, 121 N. C. 637, 28 S. E. 413. And it is determined that a bond, though not so expressed, binds accused to appear from term to term until discharged (Pickett *v.* State, 16 Tex. App. 648); and so, where the recognizance is to appear at the "next term" (Brite *v.* State, 24 Tex. 219).

Consent or agreement to postpone entered into between the government and the accused and making further prosecution of the action dependent upon the decree in cases in another court releases the sureties. Reese *v.* U. S., 9 Wall. (U. S.) 13, 19 L. ed. 541 [*reversing* 4 Sawy. (U. S.) 629, 27 Fed. Cas. No. 16,138]. So continuance without consent of the surety constitutes no defense. State *v.* Benzion, 79 Iowa 467, 44 N. W. 709. But an agreement between defendant and the commissioner, without the sureties' consent, that the cause shall be postponed will not obligate the sureties where that obligation has been discharged by appearance. U. S. *v.* Backland, 33 Fed. 156. And a recognizance cannot be respited from one court to another contrary to the remonstrance and express dissent of bail— the principal being in court when a motion for a respite is made. People *v.* Clary, 17 Wend. (N. Y.) 374.

Continuance at instance of defendant and failure to appear forfeits bail-bond. Miller *v.* Com., 1 Duv. (Ky.) 14; Waldron *v.* Harrison, 2 Oreg. 87; State *v.* Breen, 6 S. D. 537, 62 N. W. 135. See also People *v.* Hanaw, 106 Mich. 421, 64 N. W. 328. *Contra,* Swank *v.* State, 3 Ohio St. 429.

10. State *v.* Murdock, 59 Nebr. 521, 81 N. W. 447. See also Colquitt *v.* Smith, 65 Ga. 341; State *v.* Moore, 57 Mo. App. 662; People *v.* Hainer, 1 Den. (N. Y.) 454; People *v.* Greene, 5 Hill (N. Y.) 647; State *v.* Gardner, 29 Oreg. 254, 45 Pac. 753; Com. *v.* Somers, 14 Pa. Co. Ct. 159; Keefhaver *v.* Com., 2 Penr. & W. (Pa.) 240.

11. Lane *v.* State, 6 Kan. App. 106, 50 Pac. 905, condition being to appear "on the first day of the next term," etc. And if no proceedings are had at the particular term accused is discharged. Goodwin *v.* Governor, 1 Stew. & P. (Ala.) 465; U. S. *v.* Backland, 33 Fed. 156.

12. In case of change of venue.— *Arkansas.* — Beasley *v.* State, 53 Ark. 67, 13 S. W. 733, where the condition was that defendant should render himself answerable to all orders and processes of the court.

Iowa.— State *v.* Brown, 16 Iowa 314, where accused was ordered to appear at the court in which venue was changed.

Kentucky.— Ramey *v.* Com., 83 Ky. 534, 7 Ky. L. Rep. 704, where the cause was transferred to a criminal court under an act creating said court.

Louisiana.— *Contra,* State *v.* Young, 20 La. Ann. 397.

Missouri.— State *v.* Curtis, 67 Mo. App. 431, where the recognizance did not specify either division of the court as the one in which defendant should appear and he took a change of venue from one division to the other.

Texas.— Baker *v.* State, (Tex. Crim. 1893) 22 S. W. 1039 (where the cause was transferred from the county to the district court); Pearson *v.* State, 7 Tex. App. 279 (where the transfer was from the district to the county court).

Appearance at court from which cause is transferred is not a performance of the obligation of the sureties. Williams *v.* McDaniel, 77 Ga. 4 (Code, §§ 300, 314). But the failure to appear in the state court after removal in the federal court does not forfeit the bond. Davis *v.* South Carolina, 107 U. S. 597, 2 S. Ct. 636, 27 L. ed. 574.

When bond not forfeited.— The transfer of

(vi) *When Directed or Notified.* If notice is under the condition of the bond or recognizance, a prerequisite to an appearance either in the first instance or at an adjournment of the court or cause, then the obligation cannot be forfeited in the absence of the required notice.[13]

2. Failure to Challenge Grand Jury. Failure to challenge the grand jury by one held to answer will not justify a forfeiture.[14]

3. Failure to Enter Into New Recognizance. A recognizance may be forfeited by failure to enter into a new recognizance on change of venue,[15] or on continuance.[16]

4. In Case of Bail Pending Appeal. An appeal-bond may be forfeited where the appellant neither appears nor is produced by his sureties when the case is called on appeal.[17] And if it is given to appear at the next term and abide the judgment rendered it obligates an appearance at the next succeeding term and at subsequent terms or until decision rendered in the appellate court.[18] Again upon recognizance or bond on appeal and a reversal of the cause and the return of the case below, there should be an appearance below of the principal to save a forfeiture.[19]

the cause and the order changing the custody of the accused ends the liability of the sureties. State *v.* Jones, 29 Ark. 127. So where the court has no power to change the venue the recognizance cannot be forfeited by the failure of accused to appear in the court to which the cause is transferred. Adams *v.* People, 12 Ill. App. 380.

13. State *v.* Sypher, 19 La. Ann. 71 (condition to appear "when called on"); People *v.* Scott, 67 N. Y. 585 (condition to appear on a specified day "and from time to time as directed by said justice"). Nor can the bail be forfeited unless notice be given where, upon appearance, the prisoner is told by the justice that he cannot then be heard but will be notified of the hearing. Flynn *v.* State, 42 Ark. 315. But the bond is forfeited on a return of the sheriff that he could not find accused and the surety is notified in time but failed to produce the principal. State *v.* Cole, 12 La. Ann. 471, condition being to appear "when notified."

What constitutes notice.— When sureties are required to produce defendant "whenever requested to do so" no notice or request is necessary other than that given in open court at the time regularly set for trial. U. S. *v.* Dunbar, 83 Fed. 151, 48 U. S. App. 531, 27 C. C. A. 488.

14. Ringgold County *v.* Ross, 40 Iowa 176; State *v.* Klingman, 14 Iowa 401.

15. **On change of venue.**— Fowler *v.* State, 91 Ind. 507.

Mansfield's Dig. Ark. § 2199 providing that on change of venue the defendant shall enter into a recognizance with security to appear in the court to which the cause is removed is merely directory, and the condition of the bond may preclude the release of bail upon such change. Beasley *v.* State, 53 Ark. 67, 13 S. W. 733. But see State *v.* Jones, 29 Ark. 127, which holds that a change of venue ends the liability of bail. See *supra*, III, J, 1, c, (v).

16. **On continuance.**— So held in Swank *v.* State, 3 Ohio St. 429. But see *supra*, III, J, 1, c, (iv).

Although it is also decided that such new bond operates to avoid the prior recognizance. Thompson *v.* People, 73 Ill. App. 258. See State *v.* Clerk, 16 Ind. App. 137, 44 N. E. 813; Swank *v.* State, 3 Ohio St. 429.

17. And so even though no judgment is entered against the appellant in the appellate court. State *v.* Nichols, 43 Vt. 91. But in State *v.* Miller, 58 Vt. 21, 4 Atl. 418, it is decided that, where the recognizance is conditioned only for appearance at court and not that defendant would prosecute his appeal to effect, no action lies on the recognizance if the case has never been entered in the appellate court.

18. Williams *v.* State, 55 Ala. 71. See State *v.* Morgan, 124 Mo. 467, 28 S. W. 17, holding that the sureties should not be relieved from forfeiture by the fact that the appeal was not considered at the term named or that forfeiture for non-appearance was not declared until a later term when the appeal was considered.

Appeal-bond conditioned for surrender in execution of the judgment of the supreme court and to abide its orders, etc., is not forfeited by failure to appear at the next term of the district court after conviction is affirmed, where defendant is, at the time, surrendered to the penitentiary in execution of his sentence. State *v.* Row, 89 Iowa 581, 57 N. W. 306.

Default at subsequent term does not forfeit recognizance where appeal has been duly entered and process continued. State *v.* Richardson, 2 Me. 115.

Execution of judgment is suspended until the next succeeding term or until reversal or an order of extension. State *v.* Lowry, 29 Ala. 44.

19. **After reversal or exceptions overruled.** — State *v.* Heed, 62 Mo. 559; Riviere *v.* State, 7 Tex. App. 55. And sureties on the recognizance and not those on the former bail-bond are responsible for appearance after reversal. Weaver *v.* State, 43 Tex. 386.

This rule applies where the exceptions are overruled and the case remitted to the lower

K. Liability on Bond, Undertaking, or Recognizance — 1. LIABILITY OF PRINCIPAL. The principal's liability arising from a forfeiture of his recognizance is not released by his surrender, and the sureties' discharge,[20] but the former is not liable upon the bond after a judgment against bail.[21]

2. LIABILITY OF SURETIES — a. Joint or Several Liability. Although the liability of sureties on a bail-bond has been decided to be several as well as joint, whether the bond so expressly stipulates or not,[22] nevertheless, under the terms of the obligation, the obligors may be jointly and severally liable,[23] or only severally bound.[24]

b. Survival. A surety's obligation survives and binds his estate after death,[25] and forfeiture may be had as though the surety were alive.[26]

3. FIXING LIABILITY. Defendant may be called and his recognizance defaulted pending his motion for a new trial.[27] Liability is also fixed when the bail is first forfeited.[28] So a return of not found upon successive writs of scire facias may be equivalent to a service of the writ, so that execution may be awarded on failure of the principal to appear and plead.[29]

4. LIEN OF BOND, UNDERTAKING, OR RECOGNIZANCE. A recognizance of bail constitutes a lien upon land owned by the cognizor at the time of the acknowledgment,[30] although this has been decided not to apply to bail-bonds.[31]

L. Surrender of Principal — 1. RIGHT TO SURRENDER. An accused person who is admitted to bail is considered as being transferred to the friendly custody

court. Com. *v.* Austin, 11 Gray (Mass.) 330, where the condition was to "abide the order and sentence of said court thereon."

20. Weese *v.* People, 19 Ill. 643. See also Lorance *v.* State, 1 Ind. 359.

21. Com. *v.* Radford, 2 Duv. (Ky.) 9.

22. Mathena *v.* State, 15 Tex. App. 460.

23. If the parties expressly bind themselves in a specified sum to be levied severally and individually of their goods respectively, this constitutes a joint and several recognizance and not a several recognizance of each. Ellison *v.* State, 8 Ala. 273. Nor are obligors other than jointly and severally liable merely because different sums are set against their names, where the evident intent thereof is to fix their liability to one another. People *v.* Bugbee, 1 Ida. 88.

24. As where two acknowledge themselves indebted to the state in a specified sum each. Hildreth *v.* State, 5 Blackf. (Ind.) 80. See also Adair *v.* State, 1 Blackf. (Ind.) 200. So in Parrish *v.* State, 14 Md. 238, 239, the following was declared a several recognizance, viz.: "which they and each of them acknowledge themselves, and each of them severally, to owe and stand justly indebted to the State of Maryland, in the sum of seven hundred dollars, which said sum, they, and each of them, acknowledged, shall be made and levied of their respective bodies," etc., in case E should not appear, etc., and that "the said E. and J, although severally solemnly called," etc. See Mussulman *v.* People, 15 Ill. 51; U. S. *v.* Hawkins, 4 Mart. N. S. (La.) 317.

Separate recognizances for appearance of a person may be conferred by judgment of forfeiture. Henry *v.* McDaniel, 80 Ga. 174, 4 S. E. 906.

25. U. S. *v.* Keiver, 56 Fed. 422. See also State *v.* Gallagher, 9 La. Ann. 589; Langley *v.* Knighton, 2 Mill (S. C.) 451.

26. Vias *v.* Com., 7 Ky. L. Rep. 743.

Court cannot know that bail is dead and cannot therefore comply with the code requiring an order of arrest of accused in the absence of a motion and evidence showing said death. Vias *v.* Com., 7 Ky. L. Rep. 743.

27. Pending motion for new trial.— Campbell *v.* State, 18 Ind. 375, 81 Am. Dec. 363.

Fixing liability of bail in civil actions see *supra*, II, K.

But a case cannot be called out of its order contrary to the statute and bail be thereby charged. Johnson *v.* State, 12 Tex. App. 414.

Entry of forfeiture fixes liability so that relief can only be obtained by petition to remit. Com. *v.* Fogelman, 3 Pa. Super. Ct. 566, 40 Wkly. Notes Cas. (Pa.) 17.

28. When bail is first forfeited.— Com. *v.* Oblender, 135 Pa. St. 536, 19 Atl. 1057, even though the recognizance is respited from term to term to allow bail an opportunity to produce his principal.

29. State *v.* Culp, 39 Mo. 530.

Decree of forfeiture cannot be made if accused is present and bail be compelled to pay costs where the jury acquits the prisoner and determines that he shall pay costs. Keefhaver *v.* Com., 2 Penr. & W. (Pa.) 240.

30. State *v.* Stout, 11 N. J. L. 362; Burton *v.* Murphey, 6 N. C. 339; State *v.* Magniss, 2 N. C. 115; Cole *v.* Warner, 93 Tenn. 155, 23 S. W. 110; Wilkins *v.* May, 3 Head (Tenn.) 173; Pugh *v.* State, 2 Head (Tenn.) 227; State *v.* Winn, 3 Sneed (Tenn.) 393. *Contra*, State *v.* Carswell, 24 Ga. 261; McKee *v.* Brown, 43 Ill. 130; Com. *v.* Adkins, 8 B. Mon. (Ky.) 380.

Not a lien beyond the county.— State *v.* Miller, 11 Lea (Tenn.) 620.

Recognizance must be certified and recorded to constitute a lien on land. Patterson *v.* State, 12 Ind. 86.

31. Cole *v.* Warner, 93 Tenn. 155, 23 S. W. 110.

of his sureties and the right of the latter to surrender their principal exists in criminal as well as in civil cases.[32]

2. Time and Manner of. The surrender of the principal, to be effectual as an exoneration of the sureties, should generally be made before their liability on the bond or recognizance has become fixed and is a matter of record.[33] There must be an actual delivery[34] of the principal into the custody of the proper magistrate or officer, thus clearly manifesting the intention of the sureties to be no longer bound.[35] So a mere request by the sureties to the sheriff that he take the principal into custody is not sufficient.[36] Again, if the form and manner of surrender is prescribed by statute a surrender in any other manner than that prescribed will not relieve the sureties from liability.[37] So if it be required by law that an indorsement of the exoneration of the bail shall be made by certain officers it is decided that sureties are chargeable with the duty of seeing that such indorsement is made and that it is essential to a valid discharge.[38] And non-compliance with an order of court as to further security will invalidate a surrender.[39]

3. Effect of. The effect of a valid surrender of the principal by his sureties on a bond or recognizance is to relieve them from further liability on such instru-

32. State *v.* Lazarre, 12 La. Ann. 166; Kellogg *v.* State, 43 Miss. 57; Harp *v.* Osgood, 2 Hill (N. Y.) 216. *Contra*, Griswold's Petition, 13 R. I. 125.

Surrender of principal by bail in civil actions see *supra*, II, L.

Extent and limits of rule.— The right is not confined to cases of bonds for appearance in courts of original jurisdiction, but extends also to those where bail is given for appearance in an appellate court. *In re* Bauer, 112 Mo. 231, 20 S. W. 488. But where it is provided by law that the undertaking of bail shall be to pay the fine or such part thereof as may be directed, a surrender cannot be made. State *v.* Meier, 96 Iowa 375, 65 N. W. 316; State *v.* Stommel, 89 Iowa 67, 56 N. W. 263. Nor can the circuit court, where the principal is confined in jail under process of a state court, issue a writ of habeas corpus to surrender such principal in discharge of his bail. U. S. *v.* French, 1 Gall. (U. S.) 1, 25 Fed. Cas. No. 15,165.

33. Time of surrender.— Com. *v.* Johnson, 3 Cush. (Mass.) 454; Com. *v.* Gaul, 2 Woodw. (Pa.) 70. See also Boswell *v.* Colquitt, 73 Ga. 63.

34. Actual delivery.— State *v.* Martel, 3 Rob. (La.) 22. See also Ramey *v.* Com., 83 Ky. 534, 7 Ky. L. Rep. 704, wherein it is held the defendant must be delivered into the actual custody of the court or jailer. So again in McKinney *v.* Com., 3 Ky. L. Rep. 465, it is declared that the delivery to the jailer must be such as to give him actual dominion over the accused. But though the surrender should be made at the jail, in such case it may be effectual if accepted elsewhere. Com. *v.* Clark, 7 Ky. L. Rep. 828.

35. To whom surrender may be made.— A surrender may be made to the court in session at which the accused is to be tried, or to the tribunal which sent him to such court if the term of the trial court has not arrived. Com. *v.* Bronson, 14 B. Mon. (Ky.) 361. But see Stegars *v.* State, 2 Blackf. (Ind.) 104. Or the surrender may be to the sheriff who it is declared in some cases is the only officer to whom it may be made. Stegars *v.* State, 2 Blackf. (Ind.) 104; Roberts *v.* State, 4 Tex. App. 129. And, though the sheriff may have resigned, yet where his functions still continue, a valid surrender to him may be made, as it may also to the coroner under such circumstances. State *v.* Frith, 14 La. 191. Again it has been declared that the deputy sheriff may receive a surrender as such act is purely ministerial (Ward *v.* Colquitt, 62 Ga. 267), or a deputy sheriff *de facto* (Carter *v.* State, 43 Ark. 132).

36. Mere request to take accused into custody.— People *v.* Robb, 98 Mich. 397, 57 N. W. 257. See also State *v.* McMichael, 50 La. Ann. 428, 23 So. 992. But see State *v.* Trahan, 31 La. Ann. 715.

37. Manner prescribed by statute.— State *v.* McMichael, 50 La. Ann. 428, 23 So. 992; Roberts *v.* State, 4 Tex. App. 129. So a mere surrender, without delivering to the sheriff a certified copy of the bond or obtaining an exoneration as required by statute, has been decided to be insufficient to relieve the sureties from liability. State *v.* Tieman, 39 Iowa 474. But see Walton *v.* People, 28 Ill. App. 645, holding that if the surrender is voluntary a certified copy of the recognizance need not accompany it.

The affidavit required to be taken before the court or magistrate, under Tex. Code Crim. Proc. (1895), art. 321, may be taken out of term-time before the clerk of such court, under articles 320 and 322. Whitener *v.* State, 38 Tex. Crim. 146, 41 S. W. 595.

38. Indorsement of exoneration.— U. S. *v.* Stevens, 16 Fed. 101.

Such indorsement subsequently made will be sufficient if the party is either in actual custody or has been released on giving other security. U. S. *v.* Stevens, 16 Fed. 101. See Com. *v.* Clark, 7 Ky. L. Rep. 828.

39. Berkstresser *v.* Com., 127 Pa. St. 15, 17 Atl. 680.

ment,[40] and it also relegates the principal to the custody of the sheriff under the original capias.[41]

4. Arrest of Principal.[42] The principal being, in legal contemplation, in the custody of his sureties the latter may arrest him without the jurisdiction of the court in which bail was taken.[43] The arrest may be made by the sureties in person or by an agent;[44] or at common law they may command the assistance of the sheriff and his officers.[45] And they may break into his dwelling-house.[46]

M. Forfeiture Proceedings — 1. In General. It has been determined that the proper practice, where there has been a default in the condition of a bond or recognizance, is to enter a forfeiture, and until such entry has been made a right of action on the instrument does not accrue.[47] A forfeiture against the principal alone is not sufficient, it being necessary also to include the surety.[48] It need not, however, be taken on the day when the accused is, by the terms thereof, bound to appear,[49] but may be taken at a subsequent date[50] and without previ-

40. Releases sureties.— Wiggins *v.* Tyson, 112 Ga. 744, 38 S. E. 86; Shields *v.* Smith, 78 Ind. 425.

A note given by way of bail is discharged by a valid surrender. Daggett *v.* Gage, 41 Ill. 465.

A surrender by one of the several sureties will, where it relieves him from liability, also relieve the others. State *v.* Doyal, 12 La. Ann. 653.

A surrender in one case, however, by the sureties on a bond will not operate as a surrender in another case. Com. *v.* Thompson, 9 Ky. L. Rep. 439.

41. Relegates to custody of sheriff.— Kellogg *v.* State, 43 Miss. 57; Patillo *v.* State, 9 Tex. App. 456.

Custody of prisoner upon surrender by bail see Arrest, 3 Cyc. 895.

Though the surrender be made under a mistake of fact and the defendant has been illegally confined he should not, in such cases, be remanded to the custody of his sureties. Wiggins *v.* Tyson, 122 Ga. 744, 38 S. E. 86.

42. Arrest after admission to bail see Arrest, I, C, 3 [3 Cyc. 898].

43. Sureties' right to arrest principal.— State *v.* Mahon, 3 Harr. (Del.) 568; State *v.* Cunningham, 10 La. Ann. 393; Com. *v.* Brickett, 8 Pick. (Mass.) 138; Respublica *v.* Gaoler, 2 Yeates (Pa.) 263. Though in another state the principal may be so arrested. State *v.* Lingerfelt, 109 N. C. 775, 14 S. E. 75, 14 L. R. A. 605.

Effect of an arrest of the principal at request of the sureties is that a delivery by them will release them from liability. Sternberg *v.* State, 42 Ark. 127.

Warrant of arrest for the principal may be issued to a county other than that of the prosecution where the law provides that such a warrant shall be executed as in other cases. Whitener *v.* State, 38 Tex. Crim. 146, 41 S. W. 595.

The right to arrest ceases after the recognizance has become *functus officio*. Spillman *v.* People, 16 Ill. App. 224, wherein the right was held not to exist after the release of the principal from the sheriff's custody, to which he had been committed after appearance at the time fixed by the recognizance. See also Com. *v.* Johnson, 3 Cush. (Mass.) 454.

44. Arrest in person or by agent.— State *v.* Lingerfelt, 109 N. C. 775, 14 S. E. 75, 14 L. R. A. 605. But see State *v.* Mahon, 3 Harr. (Del.) 568, to the effect that a deputy of special bail cannot delegate his authority.

45. Assistance of sheriff.— State *v.* Cunningham, 10 La. Ann. 393; Com. *v.* Brickett, 8 Pick. (Mass.) 138.

46. Breaking into principal's house.—Com. *v.* Brickett, 8 Pick. (Mass.) 138.

47. Entry of forfeiture.— Marr *v.* State, 26 Ark. 410; Combs *v.* People, 39 Ill. 183; People *v.* Witt, 19 Ill. 169; State *v.* Klingman, 14 Iowa 404. But see People *v.* Race, 2 Ill. App. 563, wherein it is held that, if a default is required to be entered by the justice of the peace, a circuit court need not, in terms, declare a forfeiture before scire facias can be issued, except the recognizance be for appearance before the circuit court.

Proceedings on forfeiture are summary, and may be tried without a jury, the court assessing the damage. State *v.* Gilbert, 10 La. Ann. 524; Com. *v.* McAnany, 3 Brewst. (Pa.) 292. *Contra*, Hammons *v.* State, 59 Ala. 164, 31 Am. Rep. 13. And a judgment entered by filing the recognizance and a copy of the order of the court forfeiting it with the county clerk is one entered on due process of law, and is not an infringement of the constitutional right of trial by jury. People *v.* Hickey, 5 Daly (N. Y.) 365 [*affirmed* in 59 N. Y. 83].

48. Against both principal and surety.— Combs *v.* People, 39 Ill. 183.

49. Time of forfeiture.— State *v.* Brown, 16 Iowa 314.

50. It may be taken on the last day of the term (Sartorius *v.* Dawson, 13 La. Ann. 111), or at a subsequent term (Gallagher *v.* People, 88 Ill. 335, 91 Ill. 590; Stokes *v.* People, 63 Ill. 489; Norfolk *v.* People, 43 Ill. 9; State *v.* Merrihew, 47 Iowa 112, 29 Am. Rep. 464 [but see *contra*, McGuire *v.* State, 124 Ind. 536, 23 N. E. 85, 25 N. E. 11; Kiser *v.* State, 13 Ind. 80]), or it may be declared at any subsequent time prior to being barred by the statute of limitations (Brown *v.* State, 18 Tex. App. 326). But where no jury was summoned at the term at which defendant was held to appear, and no proceedings were had on the indictment or

ous notice to the surety.[51] And though it has been announced by the court, on failure of defendant to appear, that the case will go over to the next term, yet an order of forfeiture taken on such default will render the sureties liable where, after citation given, they have had sufficient time to rearrest defendant.[52]

2. JURISDICTION. If the court before which the accused is bound to appear has no jurisdiction of the charge against him, it has also no jurisdiction to declare a forfeiture of the recognizance.[53] And it is decided that the court where a recognizance was taken has exclusive jurisdiction of the question of the forfeiture of such instrument.[54] The authority, however, to forfeit a bond is not in all cases implied from authority to take one,[55] and if the case is transferred from the court where the recognizance is taken to another court, and the papers are properly transmitted, such instrument may be declared forfeited by the court to which the case has been transferred.[56] But the authority conferred upon a judge to enter up such a judgment cannot be delegated to the clerk.[57]

3. CALLING, OR NOTICE TO, SURETIES OR PRINCIPAL. It has been determined that, if there has been a default on the part of the principal, a forfeiture of the recognizance may be declared or entered without calling the sureties,[58] or the accused.[59] So the fact that no notice was given to the surety to produce the principal on the day the recognizance was forfeited is immaterial,[60] as is also the fact that the principal was given no notice of the forfeiture.[61]

recognizance, it was held there had been no breach of the condition and the recognizance was improperly defaulted at a subsequent term. People *v.* Derby, 1 Park. Crim. (N. Y.) 392.

51. Without notice to surety.— Sartorius *v.* Dawson, 13 La. Ann. 111. *Contra,* Moss *v.* State, 6 How. (Miss.) 298. See also *infra,* III, M, 3.

52. Combs *v.* Com., 103 Ky. 385, 20 Ky. L. Rep. 129, 45 S. W. 359.

53. McGee *v.* State, 11 Tex. App. 520 [*overruling* Wilson *v.* State, 25 Tex. 169].

If jurisdiction of the charge exists the court has also jurisdiction to forfeit a bond, though the amount be below the civil jurisdiction of the court. State *v.* Williams, 37 La. Ann. 200.

54. Exclusive jurisdiction.— People *v.* Devlin, 7 Daly (N. Y.) 47.

A bond executed in one state may, it has been held, be forfeited in another. Smith *v.* Spencer, 63 Ga. 702.

Where a court is abolished prior to the execution of a recognizance for appearance therein the court established by the same act has no jurisdiction to forfeit such recognizance. Coleman *v.* State, 10 Md. 168.

Where a recognizance is taken before a special judge appointed to try the case because of the disqualification of the judge of the criminal court, in the absence of the former, the latter has no power to order a forfeiture. State *v.* Schaffer, 36 Mo. App. 589.

Particular instances of jurisdiction.— The criminal district court of the parish of Orleans in Louisiana (State *v.* Cornig, 42 La. Ann. 416, 7 So. 698), the court of general sessions in South Carolina (State *v.* Wilder, 13 S. C. 344), and justices of the peace in Texas (Garner *v.* Smith, 40 Tex. 505) have power to forfeit recognizances for appearance in their respective courts.

55. So where the law authorizes municipalities to provide by ordinance for the forfeiture of bonds given in cases before the municipal courts there is no authority in such a court to forfeit a bond; it is conferred as prescribed. Koger *v.* Madison, 108 Ga. 543, 34 S. E. 133.

56. After transfer of cause.— Williams *v.* McDaniel, 77 Ga. 4; Warren County *v.* Polk County, 89 Iowa 44, 56 N. W. 281; Baker *v.* State, (Tex. Crim. 1893) 22 S. W. 1039, 24 S. W. 31.

If, however, no papers have been filed, or no minute from the record, showing the execution of a recognizance, the court has no power to declare a forfeiture. Com. *v.* Brents, 3 Ky. L. Rep. 466.

Police judge directed by the county judge to try a case may declare a forfeiture. Wilson *v.* Com., 2 Ky. L. Rep. 61.

57. Delegation of authority.— State *v.* Thistlewaite, 83 Ind. 317.

58. Need not call sureties.— Ingram *v.* State, 10 Kan. 630; Mishler *v.* Com., 62 Pa. St. 55, 1 Am. Rep. 377; Taylor *v.* State, 21 Tex. 499. But see Potter *v.* Kingsbury, 4 Day (Conn.) 98; Langridge *v.* Judge Twenty-First Judicial Dist. Ct., 46 La. Ann. 29, 14 So. 427.

The words "instanter" and "in open court" as used in calling upon the sureties to produce the body of their principal are not sacramental terms. State *v.* Badon, 14 La. Ann. 783.

59. Need not call principal.— Leeper *v.* Com., Litt. Sel. Cas. (Ky.) 102; State *v.* Holtdorf, 61 Mo. App. 515; State *v.* Murphy, 23 Nev. 390, 48 Pac. 628. *Contra,* Brown *v.* People, 24 Ill. App. 72; Com. *v.* Zeidler, 2 Lack. Leg. N. (Pa.) 356; Dillingham *v.* U. S., 2 Wash. (U. S.) 422, 7 Fed. Cas. No. 3,913.

60. Notice to surety.— People *v.* Kurtz, 16 Daly (N. Y.) 188, 9 N. Y. Suppl. 745, 31 N. Y. St. 276. See also State *v.* Brown, 13 La. Ann. 266; and *supra,* note 51.

61. Notice to principal.— State *v.* Alexander, 46 La. Ann. 550, 15 So. 361.

4. Filing of Recognizance. If neither the recognizance[62] nor a memorandum thereof[63] has been filed in the court, such court has no power to render a judgment of forfeiture.

5. Judgment or Record of Forfeiture[64] — a. Entry. The entry upon the record of defendant's failure to appear renders the forfeiture of his bail complete, though the entry of formal judgment is not made until afterward;[65] and in some cases it is decided that an entry of judgment is not necessary before scire facias can issue,[66] though the entry of default, however, is essential.[67] But it has also been determined that the record is merely evidence of the forfeiture, and that the failure of the clerk to enter the order therefor at the time it is made does not render it nugatory, but the record may be amended by an entry *nunc pro tunc*,[68] as is also the case where there has been a failure to make an entry of default on the bond or recognizance as required by law.[69]

b. Requisites and Sufficiency — (i) *In General.* The judgment or record of forfeiture should assume every fact necessary to show the liability of the defendants though great particularity therein is not required;[70] but if it is expressly provided by statute what the judgment or record should contain, a

62. Recognizance should be filed.— Bacon *v.* People, 14 Ill. 312; Belt *v.* Spaulding, 17 Oreg. 130, 20 Pac. 827.

63. A memorandum is sufficient.— Hinkson *v.* Com., 12 Ky. L. Rep. 894; Com. *v.* Merriam, 9 Allen (Mass.) 371.

But where a provision as to the time of filing is for the convenience of the state and not for the benefit of the recognizor non-compliance therewith which operates in no way to the injury of the surety does not relieve the latter from liability. State Treasurer *v.* Bishop, 39 Vt. 353.

64. Operating as lien on real estate.— The filing and entry of a forfeited recognizance when legally sufficient may constitute a lien on the real estate of the sureties. Gachenheimer *v.* State, 28 Ind. 91; People *v.* Lott, 21 Barb. (N. Y.) 130.

65. People *v.* Bennett, 136 N. Y. 482, 32 N. E. 1044, 49 N. Y. St. 908.

For form of entry of forfeiture see People *v.* Hickey, 5 Daly (N. Y.) 365, 367.

66. Potter *v.* Kingsbury, 4 Day (Conn.) 98; Andress *v.* State, 3 Blackf. (Ind.) 108. *Contra*, Eubank *v.* People, 50 Ill. 496; Kennedy *v.* People, 15 Ill. 418; Brown *v.* People, 24 Ill. App. 72.

If a judgment nisi is required by statute upon the forfeiture of a bail-bond to be made absolute at the next term of court, a final judgment can only be valid when predicated on a valid judgment *nisi*. Watkins *v.* State, 16 Tex. App. 646; Collins *v.* State, 12 Tex. App. 356.

67. McGuire *v.* State, 124 Ind. 536, 23 N. E. 85, 25 N. E. 11; State *v.* Lambert, 44 W. Va. 308, 28 S. E. 930. But see Ingram *v.* State, 10 Kan. 630.

68. Nunc pro tunc entry.—People *v.* Bennett, 137 N. Y. 601, 33 N. E. 373, 50 N. Y. St. 926; Rhoads *v.* Com., 15 Pa. St. 272.

69. State *v.* Jenkins, 121 N. C. 637, 28 S. E. 413. See also Adams *v.* State, 48 Ind. 212, wherein it is held that an action may be maintained on a recognizance though no entry of default thereon has been made.

Effect of a memorandum of forfeiture on a recognizance is not destroyed because an entry not contradictory thereto is made on the record, though the latter entry is not required by law. Franks *v.* State, 12 Ohio St. 1.

If the judgment of forfeiture has been erroneously docketed by the clerk when it should not have been entered, or is invalid because of the disability of the surety, the docket of such judgment may be expunged. People *v.* Devlin, 7 Daly (N. Y.) 47; Com. *v.* Matyiewicz, 17 Pa. Co. Ct. 154, 1 Lack. Leg. N. (Pa.) 294.

70. Holcombe *v.* State, 99 Ala. 185, 12 So. 794; Pugh *v.* State, 2 Head (Tenn.) 227.

Instances as to sufficiency.— A judgment *nisi* or record of forfeiture will be sustained though it is not signed by the judge (State *v.* Johnson, 12 La. 547; Ainsworth *v.* Territory, 3 Wash. Terr. 270, 14 Pac. 590), or though in reciting the title of the case it omits the name of one of the defendants (State *v.* Emily, 24 Iowa 24), or though it does not specify the amount of the bond (Spicer *v.* State, 9 Ga. 49 [*contra*, Galindo *v.* State, 15 Tex. App. 319; Evans *v.* State, 25 Tex. 80]). But a judgment for a larger sum than the penalty of the recognizance may be set aside. Barringer *v.* State, 27 Tex. 553. And a variance as to the name of the principal will be fatal. Lowe *v.* State, 15 Tex. 141. As to particular instances of sufficiency see also Banta *v.* People, 53 Ill. 434; Cable *v.* People, 46 Ill. 467; Weese *v.* People, 19 Ill. 643; Baird *v.* Com., 2 Duv. (Ky.) 78; State *v.* Ozer, 5 La. Ann. 744; People *v.* Rich, 36 N. Y. App. Div. 60, 56 N. Y. Suppl. 277.

If two forfeitures are entered at the same term on the same recognizance the latter may be treated as surplusage. State *v.* Pepper, 8 Mo. 249.

For forms of judgments of forfeiture see Ala. Crim. Code (1896), § 4375; Cantaline *v.* State, 33 Ala. 439, 440; People *v.* Witt, 19 Ill. 169, 170; Iowa Code (1897), § 5433; State *v.* Moody, 69 N. C. 529.

For form of notice of judgments of forfeiture see Ala. Crim. Code (1896), § 4376.

compliance therewith is essential.[71] Generally, however, the judgment *nisi* should so refer to and describe the recognizance that it may be sufficiently identified,[72] and should substantially describe the offense;[73] and it should also show that the condition as to appearance has not been complied with.[74]

(II) *Where Undertaking Is Joint and Several.* A judgment *nisi* may be entered against one or more of the obligors in a recognizance where the undertaking is a joint and several one.[75]

N. Relief From Forfeiture — 1. Authority to Remit — a. In General. A forfeiture of a recognizance is not in all cases final against the sureties, but it may be remitted or moderated, where, in the judgment of the court or official vested with such power, good reason therefor exists and substantial justice will be dispensed.[76] This power may exist in the courts,[77] or in some cases it is vested in

71. Compliance with statutory requirements.— So a requirement that the judgment *nisi* should state "that the same will be made final unless good cause be shown at the next term of court why the defendant did not appear" must be complied with. Ware *v.* State, 21 Tex. App. 328, 17 S. W. 624; McWhorter *v.* State, 14 Tex. App. 239; Cheatham *v.* State, 13 Tex. App. 32; Smith *v.* State, 13 Tex. App. 31; Thomas *v.* State, 12 Tex. App. 416; Bailey *v.* State, (Tex. Crim. 1893) 22 S. W. 40.

72. Describing recognizance.— Cantaline *v.* State, 33 Ala. 439; Howie *v.* State, 1 Ala. 113; Miller *v.* Com., 1 Duv. (Ky.) 14; Tenney *v.* Com., 3 Metc. (Ky.) 415; Overaker *v.* State, 4 Sm. & M. (Miss.) 738.

Variance between the bond and the judgment nisi will be fatal where the condition as recited in the latter is not in the recognizance. Werbiski *v.* State, 20 Tex. App. 131.

When may be amended.— A judgment *nisi* which incorrectly recites or describes the recognizance on which it is rendered may be amended *nunc pro tunc* to conform thereto (Governor *v.* Knight, 8 Ala. 297; State *v.* Jenkins, 121 N. C. 637, 28 S. E. 413); and such amendment may be made after the term (Collins *v.* State, 16 Tex. App. 274), or even after the scire facias has issued (State *v.* Craig, 12 Ala. 363; Browder *v.* State, 9 Ala. 58), and without serving notice on the principal of intention to amend (Sims *v.* State, (Tex. Crim. 1900) 55 S. W. 179).

73. Describing offense.— Hall *v.* State, 15 Ala. 431; Faulk *v.* State, 9 Ala. 919; Badger *v.* State, 5 Ala. 21; Howie *v.* State, 1 Ala. 113. *Contra*, Com. *v.* Pierce, 4 Ky. L. Rep. 247.

74. Showing non-compliance with condition.— It has been generally decided that this is sufficiently shown by a recital that the principal was called and did not appear. Spicer *v.* State, 9 Ga. 49; Park *v.* State, 4 Ga. 329; Alley *v.* People, 6 Ill. 109; State *v.* Gorley, 2 Iowa 52; Clifford *v.* Marston, 14 Oreg. 426, 13 Pac. 62; State *v.* Grigsby, 3 Yerg. (Tenn.) 279. And it is declared in some cases that the record must show this. Park *v.* State, 4 Ga. 329; State *v.* Grigsby, 3 Yerg. (Tenn.) 279. *Contra*, State *v.* Hirronemus, 50 Iowa 545; State *v.* Wells, 36 Iowa 238. But the failure to recite in the record that the non-appearance was "without sufficient cause or excuse" as provided by statute is not a fatal defect. State *v.* Austin, 141 Mo. 481, 43 S. W. 165 [*affirming* 69 Mo. App. 377].

75. Kilgrow *v.* State, 76 Ala. 101; Brewer *v.* State, 6 Lea (Tenn.) 198 [*overruling* Scott *v.* State, 1 Head (Tenn.) 483]; Avant *v.* State, 33 Tex. Crim. 312, 26 S. W. 411. But see Douglass *v.* State, 26 Tex. App. 248, 9 S. W. 733.

76. The highest evidence of a remission is an entry on the minutes, and an indorsement or entry on the original scire facias by one unauthorized is of no force as a discharge. Williams *v.* Jenkins, 53 Ga. 166.

Relief in case of forfeiture by bail in civil actions see *supra*, II, M.

77. Authority may be vested in court to remit. Hammons *v.* State, 59 Ala. 164, 31 Am. Rep. 13; People *v.* Conn, 13 Ill. App. 329; Com. *v.* Cantrell, 4 Ky. L. Rep. 364; U. S. *v.* Feely, 1 Brock. (U. S.) 255, 25 Fed. Cas. No. 15,082; U. S. *v.* Duncan, 25 Fed. Cas. No. 15,004, 2 Pittsb. (Pa.) 328, 10 Pittsb. Leg. J. (Pa.) 41, 4 West. L. Month. 425. But see Plate *v.* People, 15 Ill. 221, wherein it is held that the penalty of a recognizance cannot be relieved against by the courts. And see Johnson *v.* Randall, 7 Mass. 340. Thus it has been held that superior courts have such authority (State *v.* Moody, 74 N. C. 73), and courts of quarter sessions (Com. *v.* Phillips, 8 Kulp (Pa.) 230), and of common pleas where recognizance is taken and forfeited in court of quarter sessions (Com. *v.* Phillips, 8 Kulp (Pa.) 230; Com. *v.* Brandt, 17 Pa. Co. Ct. 138, 1 Lack. Leg. N. (Pa.) 287 [but see Com. *v.* Gaul, 2 Woodw. (Pa.) 70]). But where a recognizance was declared forfeited by a justice of the peace a circuit court has been held to have no power to set aside such forfeiture in an action on the recognizance (Day *v.* State, 125 Ind. 582, 25 N. E. 817), or an appellate court to enter satisfaction of the bond where, after the forfeiture of such bond and appeal therefrom, the defendant was tried, convicted, and sentenced on the charge for which he gave the bond to appear (State *v.* Schmidt, 13 La. Ann. 267).

Authority to cancel a bond is not authority to remit a forfeiture or fine, and is not an infringement of the rights of the executive. Com. *v.* Thornton, 1 Metc. (Ky.) 380.

Power of the court to determine the sufficiency of excuse for default of principal in a

the governor of the state,[78] or in both the courts and the executive;[79] and in some instances the consent of the district attorney should be obtained.[80]

b. Partial Remission. Though the facts of the case may not justify a full remission of the forfeiture, yet they may be such as to warrant a partial remission thereof.[81] And the remission may also be express as to the principal, in which case it is said the judgment cannot be enforced against the surety.[82] In case of a partial remission of a forfeiture, however, the sureties are not released on the recognizance until there has been a satisfaction of the part which is not remitted.[83]

c. Time When Remission May Be Made. Where authority exists in a court to discharge a forfeiture of a recognizance, such relief may be granted upon such terms as may be just before the final adjournment of the court,[84] or after the term at which the recognizance was forfeited if the authority of the court as to time is not limited by law,[85] or even after final judgment.[86] But it is declared that an

bail-bond is intended, it has been declared, to be exercised only when the principal has appeared and submitted to the court's orders and can be held to answer the charge against him. Hammons *v.* State, 59 Ala. 164, 31 Am. Rep. 13.

The power is discretionary which is conferred upon courts to remit a forfeiture. Com. *v.* Davidson, 1 Bush (Ky.) 133; Com. *v.* Rowland, 4 Metc. (Ky.) 225; State *v.* Moody, 74 N. C. 73; Com. *v.* Taylor, 1 Chest. Co. Rep. (Pa.) 261.

78. Power of governor.— State *v.* Shideler, 51 Ind. 64; Harbin *v.* State, 78 Iowa 263, 43 N. W. 210; Stone *v.* Riddell, 5 Bush (Ky.) 349; Com. *v.* Spraggins, 18 B. Mon. (Ky.) 512; Com. *v.* Morgan, 14 B. Mon. (Ky.) 314; Com. *v.* Denniston, 9 Watts (Pa.) 142; State *v.* Dyches, 28 Tex. 535.

Exclusive power in the executive to remit forfeiture and fines is not unlawfully interfered with by authority conferred upon a court to discharge sureties from further liability on a forfeited recognizance by a surrender of their principal. State *v.* Rowe, 103 Ind. 118, 2 N. E. 294. Nor is it infringed upon or limited by a statutory provision giving county attorneys, in addition to a salary, certain fees in suits on written instruments where judgment is obtained. State *v.* Beebe, 87 Iowa 636, 54 N. W. 479; Williams *v.* Shelbourne, 102 Ky. 579, 19 Ky. L. Rep. 1924, 44 S. W. 110.

Pardon by the governor after rearrest and conviction of the accused will not prevent the enforcement of the forfeiture. Weatherwax *v.* State, 17 Kan. 427.

79. State *v.* Shideler, 51 Ind. 64.

80. Consent of district attorney.— Com. *v.* Flucker, 11 Phila. (Pa.) 405, 32 Leg. Int. (Pa.) 208. See Esmond *v.* People, 18 Ill. App. 114.

81. *Alabama.*— Cain *v.* State, 55 Ala. 170.

Kentucky.— Yarbrough *v.* Com., 89 Ky. 151, 11 Ky. L. Rep. 351, 12 S. W. 143, 25 Am. St. Rep. 524.

New York.— People *v.* Young, 92 Hun (N. Y.) 373, 36 N. Y. Suppl. 547, 71 N. Y. St. 846.

Pennsylvania.— Com. *v.* Bruener, 17 Pa. Co. Ct. 151, 1 Lack. Leg. N. (Pa.) 295; Com. *v.* Gaul, 2 Woodw. (Pa.) 70.

Texas.— Hedrick *v.* Sisk, 73 Tex. 616, 11 S. W. 862; Golden *v.* State, 32 Tex. 737; Lee *v.* State, 25 Tex. App. 331, 8 S. W. 277.

See 5 Cent. Dig. tit. "Bail," § 360.

So expenses incurred by bail in attempting to bring back the principal may be allowed. Com. *v.* Brandt, 17 Pa. Co. Ct. 138, 1 Lack. Leg. N. (Pa.) 287; Com. *v.* Bilski, 1 Lack. Leg. N. (Pa.) 286.

Where judgment had been rendered and an execution thereon issued and returned unsatisfied, it was held that the court of common pleas had no authority to entertain an application by the defendant to vacate the judgment on payment of a certain per cent of such judgment. People *v.* Rofrano, 16 Daly (N. Y.) 148, 9 N. Y. Suppl. 634, 30 N. Y. St. 427.

A prosecuting attorney, whose duty it is to prosecute a forfeited recognizance to final judgment and execution unless remitted by the court for cause shown, cannot release the sureties on such an instrument where forfeited, with the consent of the judge of the criminal court in vacation or at chambers on payment to him of the per cent of the amount of the recognizance to which he is entitled by law for collecting forfeited recognizances and the costs of the prosecution. State *v.* Hoeffner, 124 Mo. 488, 28 S. W. 1.

82. Express remission as to principal.— Hatch *v.* State, 40 Ala. 718. Though it is declared in another case that if the obligation is several the surety is not thereby released. State *v.* Davidson, 20 Mo. 212, 61 Am. Dec. 603. See also State *v.* Meier, 96 Iowa 375, 65 N. W. 316.

83. Satisfaction as to part not remitted.— Buckler *v.* Com., 8 Ky. L. Rep. 63.

84. Before final adjournment.— U. S. *v.* Eldredge, 5 Utah 161, 13 Pac. 673. See U. S. *v.* Cookendorfer, 5 Cranch C. C. (U. S.) 113, 25 Fed. Cas. No. 14,856, wherein it is declared that a forfeiture cannot be remitted at a subsequent term.

85. After term of forfeiture.— Com. *v.* Coleman, 2 Metc. (Ky.) 382; People *v.* Nooney, 64 Hun (N. Y.) 171, 19 N. Y. Suppl. 134, 45 N. Y. St. 619; Com. *v.* Craig, 6 Rand. (Va.) 731.

86. After final judgment.—State *v.* Moody, 74 N. C. 73. *Contra,* Com. *v.* Becker, 1 Woodw. (Pa.) 297.

application for discharge is premature if made before the prisoner is produced, tried, and either convicted or acquitted, or a *nolle prosequi* is entered.[87]

2. Grounds For Relief — a. In General. It may be stated generally that a forfeiture will be vacated where it appears that the default of the principal was owing to some good and sufficient cause due to no fault on his part;[88] and that no rights have been lost by the prosecution to its prejudice as a result thereof.[89] Again it should appear that diligent efforts have been made to apprehend and surrender the principal.[90]

b. Arrest and Imprisonment of Principal in Other Proceedings. It has been determined that the arrest and imprisonment of the defendant in proceedings in

Remission may be filed after judgment and before mandate and the mandate will be conformed to it. Chambless *v.* State, 20 Tex. 197.

87. Premature application.— People *v.* Fields, 6 Daly (N. Y.) 410; People *v.* Coman, 5 Daly (N. Y.) 527, 49 How. Pr. (N. Y.) 91. See also State *v.* Brown, 13 La. Ann. 266.

88. *Georgia.*— Smith *v.* State, 17 Ga. 462.

Nebraska.— Rawlings *v.* State, 38 Nebr. 590, 57 N. W. 286.

New York.—People *v.* Flynn, 7 N. Y. Suppl. 661, 28 N. Y. St. 18.

Texas.— Barton *v.* State, 24 Tex. 250; State *v.* Warren, 17 Tex. 283; Baker *v.* State, 21 Tex. App. 359, 17 S. W. 256; Markham *v.* State, 33 Tex. Crim. 91, 25 S. W. 127.

United States.— U. S. *v.* Barger, 20 Fed. 500; U. S. *v.* Feely, 1 Brock. (U. S.) 255, 25 Fed. Cas. No. 15,082.

See 5 Cent. Dig. tit. "Bail," § 350.

Statutes as to remission construed.— A statutory provision authorizing the remission of a forfeiture for cause shown confers authority to remit only for cause shown. State *v.* Speck, 20 Ind. 211; State *v.* Warwick, 3 Ind. App. 508, 29 N. E. 1142. And where the grounds for which a forfeiture may be remitted are enumerated some one of such grounds must be shown. Barton *v.* State, 24 Tex. 250. The sureties are also entitled to a remission of the forfeiture of a recognizance by an enactment approved prior to the execution of such instrument, but taking effect subsequent thereto, and which provides that all bonds or recognizances, either pending in the courts to which returnable, or already forfeited, are by such act declared void and of no effect. Doniphan *v.* State, 50 Miss. 54. But the repeal, subsequent to the forfeiture, of the law under which accused was indicted is not of itself a ground for remission thereof. Sproat *v.* Com., 4 Ky. L. Rep. 629.

Sufficiency of excuse generally.— It has been held a sufficient excuse that the principal was under bond to appear in a foreign court (Wray *v.* People, 70 Ill. 664), or that he had enlisted in the army (Com. *v.* Terry, 2 Duv. (Ky.) 383), or that he was present in court at the time but did not hear his name called (People *v.* Baer, 7 N. Y. Suppl. 660, 28 N. Y. St. 412), or that he did not attend the court in which the action was brought because of an agreement as to change of venue (Mason *v.* People, 17 Ill. App. 331), or that the surety was misled by the attorney for the prosecution stating that he would not enter up judgment until the following day and in consequence application was not made to the court for indulgence on the day of forfeiture, and on the following day the surety appeared in court with his principal (Woodall *v.* Smith, 51 Ga. 171). In other cases, however, it has been held to be no ground for relief that there was a verbal agreement with the district attorney to postpone the trial (People *v.* Haggerty, 5 Daly (N. Y.) 532), or to discharge the defendant if he became a state's witness (State *v.* Moody, 69 N. C. 529). And the sickness of the surety is no excuse (People *v.* Meehan, 14 Daly (N. Y.) 333, 13 N. Y. St. 152); nor that of the wife of the principal (Com. *v.* Hart, 5 Pa. Dist. 109, 17 Pa. Co. Ct. 148 [but see McArdle *v.* McDaniel, 75 Ga. 270]).

Where no sufficient excuse is shown relief will not be granted. People *v.* Flynn, 53 Ill. App. 493; Noll *v.* State, 38 Nebr. 587, 57 N. W. 285; Com. *v.* Luther, 1 Woodw. (Pa.) 309.

Where principal has absconded and is a fugitive from justice, a motion in his behalf to set aside a forfeiture of a recognizance given by him will be denied. U. S. *v.* Stien, 13 Blatchf. (U. S.) 127, 27 Fed. Cas. No. 16,403. But by an early statute in Massachusetts provisions were made for the relief of sureties in such a case. Com. *v.* Dana, 14 Mass. 65.

89. Relief will not be granted where the state has been deprived of proofs (Noll *v.* State, 38 Nebr. 587, 57 N. W. 285), or its witnesses have disappeared (Com. *v.* McAnany, 3 Brewst. (Pa.) 292).

And in New York it is declared that, on an application for relief, bail must show that the prosecution has not been so prejudiced. People *v.* Abrahams, 6 Daly (N. Y.) 120; People *v.* Carey, 5 Daly (N. Y.) 533; People *v.* O'Donnell, 27 N. Y. Suppl. 1123, 57 N. Y. St. 870, 58 N. Y. St. 872; People *v.* Hassan, 20 N. Y. Suppl. 859, 49 N. Y. St. 702; People *v.* Cohen, 13 N. Y. Suppl. 921; People *v.* Baer, 7 N. Y. Suppl. 660, 28 N. Y. St. 412; People *v.* Flynn, 7 N. Y. Suppl. 661, 28 N. Y. St. 18; People *v.* Smith, 7 N. Y. Suppl. 659, 28 N. Y. St. 181; People *v.* Tietjen, 7 N. Y. Suppl. 642, 28 N. Y. St. 13; People *v.* Mooney, 15 N. Y. St. 382; People *v.* Flegenheimer, 15 N. Y. St. 376.

90. Efforts to apprehend and surrender principal.— People *v.* Kurtz, 16 Daly (N. Y.)

another jurisdiction than that in which the recognizance was entered into and in which the defendant was conditioned to appear is not a sufficient ground for remitting the forfeiture of the recognizance.[91]

c. Sickness or Death of Principal. A forfeiture of a recognizance taken because of the failure of the principal to appear as conditioned will be vacated where it appears that, owing to sickness, he was prevented from appearing;[92] and generally the death of the principal after forfeiture, but before judgment thereon, will exonerate the sureties.[93]

d. Surrender or Appearance of Principal. The sureties are not, as a matter of right, released from their obligations under a forfeited recognizance by the mere surrender of their principal after forfeiture or by his voluntary appearance,[94] unless it be provided by statute that such acts shall so result.[95] And the compulsory appearance of the principal by operation of the law will not be sufficient to nullify a judgment of forfeiture.[96] The surrender of the principal, however, after forfeiture, followed by his trial, has generally been decided to operate as a discharge from liability.[97]

188, 9 N. Y. Suppl. 745, 31 N. Y. St. 276; People *v.* Petry, 2 Hilt. (N. Y.) 523; Com. *v.* Bilski, 1 Lack. Leg. N. (Pa.) 286.

91. Com. *v.* House, 3 Bush (Ky.) 679; Com. *v.* Rowland, 4 Metc. (Ky.) 225; People *v.* Nooney, 73 Hun (N. Y.) 566, 26 N. Y. Suppl. 313, 56 N. Y. St. 155; U. S. *v.* Stricker, 12 Blatchf. (U. S.) 389, 27 Fed. Cas. No. 16,410. See also Yarbrough *v.* Com., 89 Ky. 151, 11 Ky. L. Rep. 351, 12 S. W. 143, 25 Am. St. Rep. 524. *Contra*, Cain *v.* State, 55 Ala. 170; Granberry *v.* Pool, 14 N. C. 141.

92. Sickness.— Chase *v.* People, 2 Colo. 481; Russell *v.* State, 45 Ga. 9.

93. Death.— *Georgia.*— State *v.* Cone, 32 Ga. 663.

Illinois.— Mather *v.* People, 12 Ill. 9.

Indiana.— Woolfolk *v.* State, 10 Ind. 532.

New Jersey.— State *v.* Traphagen, 45 N. J. L. 134; State *v.* McNeal, 18 N. J. L. 333.

New York.— People *v.* Wissig, 7 Daly (N. Y.) 23; People *v.* Perlstein, 7 N. Y. Suppl. 662, 28 N. Y. St. 171.

United States.— But see U. S. *v.* Van Fossen, 1 Dill. (U. S.) 406, 28 Fed. Cas. No. 16,607.

See 5 Cent. Dig. tit. "Bail," § 354.

But if on the escape of the principal the amount of the bond has been paid by the surety, the latter will not, on death of the former while free, be entitled to a return thereof. People *v.* Rich, 36 N. Y. App. Div. 60, 56 N. Y. Suppl. 277.

94. *Illinois.*— Hangsleben *v.* People, 89 Ill. 164.

Iowa.— State *v.* Emily, 24 Iowa 24; State *v.* Scott, 20 Iowa 63.

Kentucky.— Walker *v.* Com., 79 Ky. 292, 2 Ky. L. Rep. 197; Sproat *v.* Com., 4 Ky. L. Rep. 629.

Louisiana.— State *v.* Martin, 49 La. Ann. 752, 22 So. 224; State *v.* Defesse, 18 La. Ann. 104; State *v.* Schmidt, 13 La. Ann. 267; State *v.* Grice, 11 La. Ann. 605. But see State *v.* Williams, 37 La. Ann. 200; State *v.* Cotton, 19 La. 550; State *v.* Dunbar, 10 La. 99.

Rhode Island.— State *v.* McGuire, 16 R. I. 519, 17 Atl. 918.

Texas.— Conner *v.* State, (Tex. App. 1888) 9 S. W. 63; Chambless *v.* State, 20 Tex. 197; Lee *v.* State, 25 Tex. App. 331, 8 S. W. 277.

See 5 Cent. Dig. tit. "Bail," § 350.

95. Huston *v.* People, 12 Colo. App. 271, 55 Pac. 262; Williams *v.* McDaniel, 77 Ga. 4; McGuire *v.* State, 5 Ind. 65. See also State *v.* Rollins, 52 Ind. 168; Miller *v.* State, 8 Blackf. (Ind.) 77; State *v.* Taylor, 136 Mo. 462, 37 S. W. 1121.

96. Compulsory appearance.— State *v.* Martin, 49 La. Ann. 752, 22 So. 224, 50 La. Ann. 1157, 24 So. 590; Reed *v.* Lowell Police Ct., 172 Mass. 427, 52 N. E. 633.

Where the principal is rearrested on the same charge after forfeiture, the court may, under power given it to remit for cause shown before final judgment, discharge the bail on a showing of good cause therefor. State *v.* Taylor, 136 Mo. 462, 37 S. W. 1121.

In case of an arrest on a different charge after defendant has escaped a surrender may be made in some instances before judgment on the scire facias which will discharge the bail. Huston *v.* People, 12 Colo. App. 271, 55 Pac. 262. *Contra*, State *v.* Warwick, 3 Ind. App. 508, 29 N. E. 1142.

97. *Alabama.*— Bearden *v.* State, 89 Ala. 21, 7 So. 755.

Colorado.—Ayres *v.* People, 3 Colo. App. 117, 32 Pac. 77.

Georgia.— Williams *v.* McDaniel, 77 Ga. 4; Boswell *v.* Colquitt, 73 Ga. 63; Johnson *v.* State, 64 Ga. 442.

Louisiana.— State *v.* Martin, 50 La. Ann. 1157, 24 So. 590; State *v.* Alexander, 46 La. Ann. 550, 15 So. 361; State *v.* Schexneider, 45 La. Ann. 1445, 14 So. 250; State *v.* Langton, 6 La. Ann. 282; State *v.* Hamill, 6 La. Ann. 257.

Maine.— State *v.* Burnham, 44 Me. 278.

New Jersey.— State *v.* Saunders, 8 N. J. L. 177.

New York.— People *v.* Madden, 16 Daly (N. Y.) 63, 8 N. Y. Suppl. 531, 29 N. Y. St. 503; People *v.* Grossman, 15 Daly (N. Y.) 311, 5 N. Y. Suppl. 446, 24 N. Y. St. 1009, 25 N. Y. St. 754; People *v.* Deery, 6 Daly (N. Y.) 493; People *v.* O'Donnell, 27 N. Y.

3. Payment of Costs Necessary. Though sufficient grounds may exist for remitting a forfeiture of a recognizance, yet it is generally essential to the granting of such relief that the costs accruing up to the time of the granting thereof be paid.[98]

4. Application and Proof. In proceedings to obtain a remission of a forfeiture of a recognizance a complaint is not necessary, a written motion or application therefor being sufficient.[99] And there should be furnished with such application certified copies of the recognizance and indictment, and the record of the forfeiture and copy of the judgment.[1] The application should also be accompanied by a showing that the costs have been paid as required by law,[2] and there should be proof showing that no rights have been lost to or injury sustained by the prosecution as a result of the default.[3]

Suppl. 1123, 57 N. Y. St. 870, 58 N. Y. St. 872; People *v.* Samuels, 25 N. Y. Suppl. 81, 54 N. Y. St. 836; People *v.* Ohlrogge, 13 N. Y. Suppl. 814, 37 N. Y. St. 969; People *v.* Weber, 11 N. Y. Suppl. 53, 31 N. Y. St. 552; People *v.* Tietjen, 9 N. Y. Suppl. 285, 29 N. Y. St. 1000; People *v.* Cooney, 9 N. Y. Suppl. 285, 29 N. Y. St. 1000; People *v.* Mahon, 9 N. Y. Suppl. 284, 29 N. Y. St. 1000; People *v.* Perlstein, 7 N. Y. Suppl. 662, 28 N. Y. St. 171; People *v.* Brady, 7 N. Y. Suppl. 661, 28 N. Y. St. 170; People *v.* Higgins, 7 N. Y. Suppl. 658, 27 N. Y. St. 974; People *v.* Johnson, 4 N. Y. Suppl. 705, 23 N. Y. St. 631; People *v.* Boesseemeker, 12 N. Y. St. 122.

Pennsylvania.— Com. *v.* Howard, 11 Wkly. Notes Cas. (Pa.) 81; Com. *v.* Dewees, 1 Woodw. (Pa.) 28.

Contra, Hangsleben *v.* People, 89 Ill. 164; U. S. *v.* Mercer, Deady (U. S.) 502, 26 Fed. Cas. No. 15,758.

Acquittal of defendant who departs from court during the trial of the case may be a ground for setting aside the estreat. U. S. *v.* Santos, 5 Blatchf. (U. S.) 104, 27 Fed. Cas. No. 16,222.

98. *Georgia.*— Ward *v.* Colquitt, 62 Ga. 267.

Illinois.— People *v.* Smith, 43 Ill. App. 217.

Indiana.— State *v.* Rollins, 52 Ind. 168.

Maine.— State *v.* Burnham, 44 Me. 278.

Nebraska.— Rawlings *v.* State, 38 Nebr. 590, 57 N. W. 286.

New York.— People *v.* Brady, 11 N. Y. Suppl. 711, 34 N. Y. St. 307, 19 N. Y. Civ. Proc. 372.

Pennsylvania.— Com. *v.* Saloton, 17 Pa. Co. Ct. 152, 1 Lack. Leg. N. (Pa.) 296.

See 5 Cent. Dig. tit. "Bail," § 362.

The costs which are to be paid include those taxable by court and the sheriff's fees (Ayres *v.* People, 3 Colo. App. 117, 32 Pac. 77; People *v.* Deery, 6 Daly (N. Y.) 493; Com. *v.* Dewees, 1 Woodw. (Pa.) 28), and in addition thereto the expenses, if any, legitimately incurred in the apprehension or recapture of the accused (Ayres *v.* People, 3 Colo. App. 117, 32 Pac. 77; People *v.* Kelly, 3 Misc. (N. Y.) 223, 22 N. Y. Suppl. 775, 51 N. Y. St. 945; People *v.* Cohen, 2 Misc. (N. Y.) 64, 20 N. Y. Suppl. 854, 49 N. Y. St. 921; People *v.* Kirwan, 16 N. Y. Suppl. 956, 41 N. Y. St. 954; People *v.* Brady, 11 N. Y. Suppl. 711, 34 N. Y. St. 307, 19 N. Y. Civ. Proc. 372); but not such expenses where the arrest is under a different charge (Huston *v.* People, 12 Colo. App. 271, 55 Pac. 262).

99. **Written application.**— State *v.* Shideler, 51 Ind. 64. See also Foulke *v.* Com., 90 Pa. St. 257.

Notice to district attorney of application must be given where required by the rules of court. People *v.* Silverman, 25 N. Y. Suppl. 1150, 56 N. Y. St. 897; People *v.* Carroll, 20 N. Y. Suppl. 990, 49 N. Y. St. 921. And proof of service of such notice must be given. People *v.* Ketterle, 7 N. Y. Suppl. 657, 28 N. Y. St. 180.

Renewal of a petition for the vacating of a judgment of forfeiture must fulfil the conditions on which leave to renew was granted. People *v.* Samuels, 8 N. Y. Suppl. 475, 29 N. Y. St. 1000.

Where two or more courts are of concurrent jurisdiction an application heard and determined by one of them will not again be entertained by another. People *v.* Street, 14 N. Y. Suppl. 778, 38 N. Y. St. 801.

1. **Accompanying papers.**— People *v.* Williams, 6 Daly (N. Y.) 409; People *v.* Betts, 27 N. Y. Suppl. 1123, 57 N. Y. St. 870, 58 N. Y. St. 872.

2. **Showing that costs have been paid.**— People *v.* Rofrano, 16 Daly (N. Y.) 148, 9 N. Y. Suppl. 634, 30 N. Y. St. 427; People *v.* Cohen, 20 N. Y. Suppl. 854, 49 N. Y. St. 920; People *v.* Kirwan, 16 N. Y. Suppl. 956, 41 N. Y. St. 954.

3. **Loss of rights or injury sustained.**— People *v.* Williams, 6 Daly (N. Y.) 409; People *v.* Cary, 6 Daly (N. Y.) 406; People *v.* Byrnes, 29 N. Y. Suppl. 1147, 61 N. Y. St. 120; People *v.* Cohen, 13 N. Y. Suppl. 921.

Proof that no rights have been lost must be by facts shown in detail and the certificate of the district attorney is said not to be sufficient. People *v.* Devine, 7 N. Y. Suppl. 660, 28 N. Y. St. 404; People *v.* Tietjen, 7 N. Y. Suppl. 642, 28 N. Y. St. 13. See also People *v.* Carey, 5 Daly (N. Y.) 533.

Continuance to show cause.— Where the accused has failed to appear according to the condition of a recognizance, application may be made by the sureties for a continuance for a reasonable time for the purpose of enabling the accused to appear and show cause why the default should be set aside. People *v.* Conn, 13 Ill. App. 329.

5. Vacating or Reviewing Remission. A remission may be vacated;[4] and the power vested in the courts to grant relief in cases of forfeited recognizances is not, it has been determined, an arbitrary discretion but a sound legal one, and the action of the court in the exercise of such discretion, where an abuse thereof is shown, may be reviewed.[5]

6. Effect of a Remission. The effect of a remission is to place the accused in the same position as if no proceedings of forfeiture had taken place, and he is under the same obligation as to compliance with the conditions of the recognizance.[6] And though money may have been paid on a forfeited recognizance, yet relief may in some cases be thereafter granted and an order may be obtained for its repayment;[7] and, in case of the refusal of the officer to whom the order is directed to pay over the same, resort may be had to an action to recover such money.[8]

O. Actions on Bond, Undertaking, or Recognizance — 1. In General — a. Necessity of Action. Though a forfeiture may be declared of a bond or recognizance, a final judgment cannot be entered against the recognizors without the intervention of some process or proceeding.[9]

b. Form of the Proceeding. Scire facias, which is a civil proceeding,[10] is a

4. As where it appears that the court or official making such order was not informed of the true state of facts, or that it was fraudulently procured. State *v.* Scanlon, 2 Ind. App. 320, 28 N. E. 430; State *v.* Leak, 5 Ind. 359; People *v.* Lasher, 18 N. Y. Suppl. 136, 45 N. Y. St. 46 [*following* People *v.* Street, 14 N. Y. Suppl. 778, 38 N. Y. St. 801].

5. Wray *v.* People, 70 Ill. 664; People *v.* Hobbs, 46 Ill. App. 206; State *v.* Kraner, 50 Iowa 575; Com. *v.* Davidson, 1 Bush (Ky.) 133; Sproat *v.* Com., 4 Ky. L. Rep. 629; People *v.* Young, 92 Hun (N. Y.) 373, 36 N. Y. Suppl. 547, 71 N. Y. St. 846. *Contra*, People *v.* Bennett, 136 N. Y. 482, 32 N. E. 1044, 49 N. Y. St. 908; State *v.* Moody, 74 N. C. 73; State *v.* Brown, 35 Tex. 357. See also State *v.* Cole, 39 La. Ann. 938, 3 So. 84; Brown *v.* State, 28 Tex. App. 65, 11 S. W. 1022.

6. State *v.* Cornig, 42 La. Ann. 416, 7 So. 698; Anderson *v.* State, 19 Tex. App. 299. See also Com. *v.* Runnion, 3 Metc. (Ky.) 2.

7. Where money has been paid on forfeiture.— People *v.* Goltze, 16 Daly (N. Y.) 62, 8 N. Y. Suppl. 530, 29 N. Y. St. 503. *Contra*, State *v.* Langton, 6 La. Ann. 282. And see People *v.* Fischer, 14 Daly (N. Y.) 278, 8 N. Y. St. 382, wherein a remission of forfeiture was refused to one who had returned after forfeiture and payment thereof and gave bail under an indictment which was subsequently *nolle prosequied*, it being declared that the fact of payment was probably taken into consideration in moving to the *nolle*.

8. O'Donnell *v.* New York, 13 N. Y. Suppl. 357, 36 N. Y. St. 988.

9. *Arkansas.*— Johnstons *v.* State, 3 Ark. 524.

Georgia.— Robinson *v.* Gordon, 85 Ga. 559, 11 S. E. 844; Wright *v.* State, 51 Ga. 524.

Illinois.— Pinckard *v.* People, 2 Ill. 187.

Indiana.— State *v.* Robb, 16 Ind. 413.

Louisiana.— State *v.* Dunbar, 10 La. 99.

Tennessee.—Wash *v.* State, 3 Coldw. (Tenn.) 91.

Texas.— Waughhop *v.* State, 6 Tex. 337.

See 5 Cent. Dig. tit. "Bail," § 370.

Actions on bond, undertaking, or recognizance in civil actions see *supra*, II, N.

A motion may be sufficient, it has been held, to permit a recovery without the formality of any plea. State *v.* Hay, 7 La. 78.

Judgment upon a forfeited recognizance is considered absolute in some jurisdictions and not a judgment *nisi*. Lee *v.* State, 51 Miss. 665; U. S. *v.* Winstead, 4 Hughes (U. S.) 464, 12 Fed. 50.

Summary judgments without service of process or notice are authorized by statute in some states. Lang *v.* People, 14 Mich. 439; People *v.* Quigg, 59 N. Y. 83.

10. Scire facias.—*Alabama.*—Peck *v.* State, 63 Ala. 201; Hunt *v.* State, 63 Ala. 196; Hatch *v.* State, 40 Ala. 718. See also Hall *v.* State, 15 Ala. 431.

Georgia.— Vaughan *v.* Candler, 113 Ga. 9, 38 S. E. 352.

Illinois.— People *v.* Phelps, 17 Ill. 200.

Kentucky.— Speckert *v.* Com., (Ky. 1901) 63 S. W. 752.

Louisiana.— State *v.* Ansley, 13 La. Ann. 298. *Contra*, State *v.* O'Rourke, 49 La. Ann. 1567, 22 So. 818.

Maine.— State *v.* Chandler, 79 Me. 172, 8 Atl. 553.

Massachusetts.— Com. *v.* Stebbins, 4 Gray (Mass.) 25.

Missouri.— State *v.* Heed, 62 Mo. 559.

Montana.— U. S. *v.* Ensign, 2 Mont. 396.

New Hampshire.— State *v.* Kinne, 39 N. H. 129.

Texas.— Morse *v.* State, 39 Tex. Crim. 566, 47 S. W. 645, 50 S. W. 342. *Contra*, Hart *v.* State, 13 Tex. App. 555; Cassaday *v.* State, 4 Tex. App. 96.

See 5 Cent. Dig. tit. "Bail," § 372.

Nature of action upon bail-bond or recognizance see Actions, 1 Cyc. 732, note 69.

So the civil-practice acts of a state apply thereto. U. S. *v.* Ensign, 2 Mont. 396. And a judgment therein which is for less than the amount required to permit an appeal cannot be appealed from. Speckert *v.* Com.,

proper remedy to recover on a forfeited recognizance.[11] Such remedy is not, however, exclusive of the common-law action on the bond,[12] and debt also will lie.[13] And separate actions may also in some cases be brought simultaneously against the principal and surety.[14]

c. Sufficiency of Record as Affecting. The undertaking being the basis of the action should, in connection with the order of forfeiture, present a perfect cause of action, and the record should show the recognizance and order and such other essential facts as may be necessary;[15] and should also show a compliance with statutory requirements which are necessary to the maintenance of the action, such as certification and delivery of the recognizance.[16] But though the record may be incomplete it may be perfected by amendment and scire facias may issue on the amended record.[17]

2. Jurisdiction. The question as to jurisdiction depends, independent of any statute or rule of practice in reference thereto, upon the view which controls in the particular jurisdiction as to the nature of the action, that is whether it be an original action, for if it be so considered the jurisdiction of the court may be determined by the amount demanded,[18] or whether it be a civil or criminal proceeding and accordingly to be prosecuted in a court having civil or criminal juris-

(Ky. 1901) 63 S. W. 752. And the scire facias is amendable. Vaughan *v.* Candler, 113 Ga. 9, 38 S. E. 352. But it is held that it is not so far a civil proceeding as to permit a judgment against the sureties after a discontinuance as to the principal. Gay *v.* State, 20 Tex. 504.

11. Lloyd *v.* State, Minor (Ala.) 34; Chase *v.* People, 2 Colo. 528.

When scire facias will not lie.— If the hypothesis fails as to the supposition that the liability which the remedy of scire facias, conferred by statute, seeks to redress is unauthorized the defendant cannot be charged. Whitted *v.* Governor, 6 Port. (Ala.) 335.

When scire facias not intended by statute. — Where a statute provides that, on a forfeiture of a bail-bond, no pleadings are required but a summons may be issued by the clerk against the bail, such summons is not intended to be a writ of scire facias. Zufall *v.* U. S., 1 Indian Terr. 638, 43 S. W. 760.

Where both principal and surety were insolvent, a motion for scire facias was refused. State *v.* Anonymous, 16 N. J. L. 437.

12. Does not exclude common-law action on bond.— Littleton *v.* State, 46 Ark. 413; State *v.* Glass, 9 Iowa 325; State *v.* Gorley, 2 Iowa 52; State *v.* Ozer, 5 La. Ann. 744.

Choice of remedies is in some states given to the district attorney. State *v.* Norment, 12 La. 511; People *v.* Van Eps, 4 Wend. (N. Y.) 387.

If a mode is prescribed by statute it should be followed. Conner *v.* State, 30 Tex. 94.

Federal courts, in enforcing bonds, are not restricted to the remedies provided by the laws of the state, but may proceed according to the common law. U. S. *v.* Insley, 54 Fed. 221, 12 U. S. App. 125, 4 C. C. A. 296 [*reversing* 49 Fed. 776].

13. Debt will lie.— *Illinois.*— People *v.* Witt, 19 Ill. 169; Pate *v.* People, 15 Ill. 221.

Indiana.— State *v.* Inman, 7 Blackf. (Ind.) 225.

Iowa.— McKnight *v.* U. S., Morr. (Iowa) 444.

Maine.— State *v.* Folsom, 26 Me. 209.

Massachusetts.—Com. *v.* Green, 12 Mass. 1.

New York.— People *v.* Van Eps, 4 Wend. (N. Y.) 387.

Contra, Hazen *v.* Smith, 1 Tyler (Vt.) 105.

See 5 Cent. Dig. tit. "Bail," § 372.

14. Separate actions against principal and surety.— State *v.* Sutcliffe, 16 R. I. 410, 16 Atl. 710, wherein it was so held under a statute directing that process shall issue against the persons bound or such of them as the attorney-general shall direct.

15. The record should show an order of forfeiture. Com. *v.* Gilbert, 5 Ky. L. Rep. 183. And contain a memorandum of the recognizance. Sargeant *v.* State, 16 Ohio 267. But it has been held unnecessary for the transcript to show that defendant waived an examination or that there was a judgment of committal against him. State *v.* Wilcox, 59 Mo. 176. And omission of the record of the recognizance may be supplied by a scire facias. People *v.* Baughman, 18 Ill. 152.

16. Showing compliance with statute.— Connor *v.* People, 4 Colo. 134; Raysor *v.* People, 27 Ill. 190. *Contra,* Com. *v.* Hart, 5 Pa. Dist. 109, 17 Pa. Co. Ct. 148. And see Gachenheimer *v.* State, 28 Ind. 91.

A statute as to entry of recognizance on record providing that it "shall be considered as of record in such court, and proceeded on by process, issuing out of said court, in the same manner as if such recognizance had been entered into before said court," does not require that an action of debt on such a recognizance shall be commenced by process issuing out of such court. State *v.* West, 3 Ohio St. 509, 511.

17. Amended record.— Com. *v.* McNeill, 19 Pick. (Mass.) 127. See also State *v.* Cherry, 13 N. C. 550.

18. Depending on amount.— Blackwell *v.* State, 3 Ark. 320. But see Crisman *v.* People, 8 Ill. 351.

diction.[19] Aside from these factors, however, it has been determined that the proceedings should be in the court where appearance was required by the condition of the recognizance.[20] And again it has been decided that a court with authority to take a recognizance has jurisdiction of scire facias to enforce the same.[21] In some cases the jurisdiction may also depend upon the residence of the parties.[22]

3. PARTIES. An action on a forfeited recognizance may be brought in the name of the people or of the state[23] or of the county,[24] and in some cases in the name of the district attorney.[25] Again, where the recovery is for the use and benefit of the city, the action may be by the city attorney.[26] But it has been determined that it need not be brought at the relation of anybody, and the name of the relator if inserted may be stricken out on motion.[27] And the scire facias may be either joint or several as to the defendants.[28] Though it has been held that if

19. **Being a civil action** must be prosecuted in a court having civil jurisdiction. State *v.* Kinne, 39 N. H. 129. *Contra*, Cassaday *v.* State, 4 Tex. App. 96. And see Hutchings *v.* State, 24 Tex. App. 242, 6 S. W. 34.

20. **Court in which appearance was required.**— *Arkansas.*— Cauthron *v.* State, 43 Ark. 128.

Georgia.— Cooper *v.* State, 17 Ga. 437.

Iowa.— State *v.* Emerson, 16 Iowa 206.

Ohio.— State *v.* Byrne, 3 Ohio Dec. (Reprint) 302, L. & Bank. Bul. 302.

Texas.— Garner *v.* Smith, 40 Tex. 505.

See 5 Cent. Dig. tit. "Bail," § 374.

But in other jurisdictions the rule prevails that scire facias must issue from the court which is in possession of the record or recognizance upon which it issues. State *v.* Brown, 41 Me. 535; State *v.* Smith, 2 Me. 62; State *v.* Kinne, 39 N. H. 129.

21. **Court having authority to take.**—State *v.* Caldwell, 124 Mo. 509, 28 S. W. 4. See People *v.* Backman, 1 How. Pr. (N. Y.) 221, wherein it was held that the action should be brought in the court in which it was taken and which had jurisdiction of the defendants.

Change of venue, however, would warrant the bringing of the action in the jurisdiction to which the trial was transferred. Lucas County *v.* Wilson, 59 Iowa 354, 13 N. W. 325; Decatur County *v.* Maxwell, 26 Iowa 398.

Particular instances of exceptions.— See also following cases where bonds have been enforced in other courts than where taken. Bonds taken in a justice's court may be enforced in the court of common pleas (Hawkins *v.* State, 24 Ind. 288); or in the district court (State *v.* Emerson, 16 Iowa 206); or in the circuit court (State *v.* Inman, 7 Blackf. (Ind.) 225; Ross *v.* State, 6 Blackf. (Ind.) 315). So also bonds taken before a magistrate may be enforced in the court of quarter sessions. Com. *v.* Duffy, 11 Phila. (Pa.) 378, 32 Leg. Int. (Pa.) 83. And the court of common pleas may enforce those taken before a municipal court. Com. *v.* McNeill, 19 Pick. (Mass.) 127. And a bond taken in the court of oyer and terminer has in New York been enforced in the supreme court. People *v.* Van Eps, 4 Wend. (N. Y.) 387. Again a court of common pleas was held to have jurisdiction of an action on a recognizance forfeited before a city recorder. Sturgeon *v.* Com., (Pa. 1888) 14 Atl. 41.

22. **Depending upon residence of parties.**— People *v.* Blackman, 1 Den. (N. Y.) 632. See Dyches *v.* State, 24 Tex. 266. But see Cooper *v.* State, 17 Ga. 437.

23. **In name of people or state.**— *California.*— People *v.* De Pelanconi, 63 Cal. 409.

Idaho.— People *v.* Sloper, 1 Ida. 158; People *v.* Bugbee, 1 Ida. 88.

Ohio.— Gamble *v.* State, 21 Ohio St. 183.

Oklahoma.—McColgan *v.* Territory, 5 Okla. 567, 49 Pac. 1018.

Washington.— Ainsworth *v.* Territory, 3 Wash. Terr. 270, 14 Pac. 590.

See 5 Cent. Dig. tit. "Bail," § 382.

The state may maintain the action in its own name though it is provided by statute that the action must be brought in the name of the real party in interest. Territory *v.* Hildebrand, 2 Mont. 426; Chandler *v.* Scioto County, 2 Ohio Dec. (Reprint) 112, 1 West. L. Month. 401.

Though the money when collected may go to the county the action on a forfeited recognizance executed to the state may nevertheless be brought in the name of the state where it is provided by statute that an action may be brought in the name of the trustee of an express trust. State *v.* Wettstein, 64 Wis. 234, 25 N. W. 34. See also State *v.* Newson, 8 S. D. 327, 66 N. W. 468.

24. **In name of county.**— People *v.* De Pelanconi, 63 Cal. 409; Mendocino County *v.* Lamar, 30 Cal. 627; Shelby County *v.* Simmonds, 33 Iowa 345.

25. **In name of district attorney.**— Hannah *v.* Wells, 4 Oreg. 249.

26. **In name of city attorney.**— New Orleans Second Municipality *v.* Labatut, 8 Rob. (La.) 33; State *v.* Desforges, 5 Rob. (La.) 253.

27. **Relator.**— Black *v.* State, 58 Ind. 589; Hawkins *v.* State, 24 Ind. 288.

28. **Joint or several as to defendants.**— Howie *v.* State, 1 Ala. 113. So it may issue to the sureties alone (Hutchings *v.* State, 24 Tex. App. 242, 6 S. W. 34 [*contra*, Banta *v.* People, 53 Ill. 434; Alley *v.* People, 6 Ill. 109]; or against several of the recognizors (State *v.* Stout, 11 N. J. L. 124; Caldwell *v.* Com., 14 Gratt. (Va.) 698); or against each of the obligors (Dyches *v.* State, 24 Tex. 266).

the recognizance is several as to the obligors a joint scire facias against them cannot be maintained.[29]

4. Process — a. Scire Facias — (i) *Time of Issuance and When Returnable.* To determine the time when scire facias should be brought and made returnable recourse must be had to the statutes or rules of practice in the particular jurisdictions applicable thereto. In most states the rule prevails that a scire facias on a forfeited recognizance should be brought after the adjournment of the term of the court at which the forfeiture occurs and should be made returnable to the next term.[30]

(ii) *Service and Return.* Personal service of a scire facias is generally required, but where it cannot be made, a return of *nihil* upon two writs has ordinarily been considered equivalent to actual service.[31] And though the principal may not be a party to a scire facias notice to him has been held necessary.[32] Again the return should show the manner of service, and if some of the defendants cannot be found the proper return of such fact should be made.[33]

(iii) *Quashing or Discontinuance.* If it appears from the record that the state is entitled to an award of execution a scire facias will not be quashed on motion.[34] And it is no ground for quashing a scire facias which conforms to the record that defendant was erroneously entered as bail for two instead of one.[35] Again there may be a discontinuance of the action as to the principal and not as to the other defendants.[36] But it is not a discontinuance of a scire facias that the court failed to take action for one or more terms,[37] or without waiting for two returns of "not found" made the judgment final against the sureties.[38]

b. Summons. A summons will be sufficient if it describes the recognizance with such accuracy as to show the instrument upon which there is a claim of liability, and immaterial errors therein will not be fatal.[39] But if it is fatally defective for any cause it may be quashed on motion.[40]

29. Where recognizance is several.—Chandler *v.* State, 5 Blackf. (Ind.) 471; Wellman *v.* State, 5 Blackf. (Ind.) 343; Hildreth *v.* State, 5 Blackf. (Ind.) 80; Parrish *v.* State, 14 Md. 238. *Contra*, Farris *v.* State, 58 Ill. 26; Madison *v.* Com., 2 A. K. Marsh. (Ky.) 131. And see Stebbins *v.* People, 27 Ill. 240.

30. Rich *v.* Colquitt, 61 Ga. 197; Glass *v.* State, 39 Ind. 205; Com. *v.* Dexter, 11 Gray (Mass.) 205; Com. *v.* Brown, 7 Gray (Mass.) 319. See Bullard *v.* State, 32 Tex. Crim. 518, 24 S. W. 898. *Contra*, State *v.* Jenkins, 21 N. C. 637, 28 S. E. 413, as to time when returnable. And see Crandall *v.* State, 6 Blackf. (Ind.) 284, wherein it is held that a scire facias is not vitiated by the recital of an order made at the term of forfeiture that scire facias issue commanding the recognizor then and there to appear, where such scire facias is returnable to the next term.

An omission to name the day of the month in a scire facias to appear at the next term will not render it void. State *v.* Ricketts, 67 Miss. 409, 7 So. 282.

For form of scire facias see Ala. Crim. Code (1896), § 4376; Mo. Rev. Stat. (1897), § 2795; Gingrich *v.* People, 34 Ill. 448, 450; Grisby *v.* State, 6 Yerg. (Tenn.) 354, 355; Trash *v.* State, 16 Tex. App. 271, 272.

31. Hunt *v.* State, 63 Ala. 196; Besimer *v.* People, 15 Ill. 439; Crisman *v.* People, 8 Ill. 351; Sans *v.* People, 8 Ill. 327 [*overruling* Alley *v.* People, 6 Ill. 109]; West *v.* Com., 3 J. J. Marsh. (Ky.) 641. See State Treasurer *v.* Moore, 1 Tyler (Vt.) 329, wherein it is held scire facias may be served as an attachment.

Personal service is held necessary in an early case in Alabama. Hayter *v.* State, 7 Port. (Ala.) 156.

If no sufficient service has been made on a defendant principal, plaintiff cannot proceed to judgment against the other defendants. Burton *v.* State, 6 Blackf. (Ind.) 339.

32. Notice to principal.— Collins *v.* State, 16 Tex. App. 274. But see Branch *v.* State, 25 Tex. 423. And as to sufficiency of notice see State *v.* Cassidy, 7 La. Ann. 273.

33. Manner of service should be shown.— Chase *v.* People, 2 Colo. 528; State *v.* Johnson, 12 La. 547; Winans *v.* State, 25 Tex. Suppl. 175. A return of "not found within the county" is sufficient, it not being necessary to send the scire facias outside the county. Petty *v.* People, 118 Ill. 148, 8 N. E. 304.

34. State *v.* Littlepage, 30 Mo. 322.

35. Boyle *v.* Robinson, 7 Harr. & J. (Md.) 200.

36. Discontinuance as to principal.—Cooper *v.* State, 23 Ark. 278.

37. Failure to take action for one or more terms.— Hunt *v.* State, 63 Ala. 196.

38. Not waiting for two returns of "not found."— Keipp *v.* State, 49 Ala. 337.

39. Baird *v.* Com., 2 Duv. (Ky.) 78; Tenney *v.* Com., 3 Metc. (Ky.) 415; Abbott *v.* Com., 10 Ky. L. Rep. 873.

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

5. Defenses. The defendant is not precluded by an order of forfeiture from making any defense which he was entitled at any time to make;[41] and such pleas as their principal could urge are also available to the sureties as a defense in an action to enforce their liability.[42] The defense which a surety should interpose in an action on a forfeited recognizance must, to be sufficient, show such facts and valid reasons as will excuse non-performance of the condition of the obligation or such other facts as will show that, by reason thereof, judgment of forfeiture should not be made absolute.[43] So the surety may prove that the bond was conditioned for appearance at no fixed day before a tribunal which had no existence,[44] or that a judgment has already been rendered against him on the same bond.[45] But he cannot in defense to such action impeach the record of forfeiture,[46] or the entry of recognizance,[47] or the verity of the recognizance.[48]

6. Pleadings — a. Necessity of Declaration or Complaint. A scire facias which issues upon the forfeiture of a bond or recognizance takes the place of both summons and declaration or petition.[49]

41. State *v.* Wooley, 25 Ga. 235.

42. State *v.* Bugg, 6 Rob. (La.) 63.

43. Adequacy of defense.— Thomas *v.* Com., 14 Ky. L. Rep. 334; State *v.* Peyton, 32 Mo. App. 522.

Duress.— That the recognizance was executed under any illegal compulsion may be a defense. Champlain *v.* People, 2 N. Y. 82. See People *v.* Robb, 98 Mich. 397, 57 N. W. 257. *Contra,* Plummer *v.* People, 16 Ill. 358. But fear on the part of the accused of injury or mob violence is no defense (Sugarman *v.* State, 28 Ark. 142; Fleenor *v.* State, 58 Ind. 166); unless it appear that the proper authorities were applied to for protection which they failed to extend (Weddington *v.* Com., 79 Ky. 582).

Sickness of principal is no defense. Piercy *v.* People, 10 Ill. App. 219; Thomas *v.* Com., 14 Ky. L. Rep. 334; State *v.* Edwards, 4 Humphr. (Tenn.) 226. *Contra,* Hopkins *v.* Com., 5 Ky. L. Rep. 419.

Particular instances of insufficient defenses. —Unconstitutionality of statute giving plaintiff right of action on the bond. Louisiana Prevention Cruelty to Children Soc. *v.* Moody, 52 La. Ann. 1815, 28 So. 224. Flight or concealment of principal to avoid arrest on same or another charge. State *v.* Osborn, 155 Ind. 385, 58 N. E. 491. A previous prosecution for same offense which has been terminated by a *nolle prosequi.* Archer *v.* Com., 10 Gratt. (Va.) 627. Pendency of another prosecution. U. S. *v.* Eldrege, 5 Utah 189, 14 Pac. 42. No offense alleged in the information. Hardy *v.* U. S., 71 Fed. 158, 36 U. S. App. 225, 18 C. C. A. 22. Crime was committed in another county. State *v.* Osborn, 155 Ind. 385, 58 N. E. 491. Statute of limitations as to forfeitures or penalties. State *v.* Robb, 16 Ind. 413. That statute of limitations had run against the offense. U. S. *v.* Dunbar, 83 Fed. 151, 48 U. S. App. 531, 27 C. C. A. 488. That there would be no liability on the bond until the expiration of a year, this being the limitation of time prescribed by a statute against a sheriff on liability incurred by him. Tinker *v.* City Trust, etc., Co., 27 Misc. (N. Y.) 23, 57 N. Y. Suppl. 910, 29 N. Y. Civ. Proc. 67. Appearance or discontinuance after forfeiture. U. S. *v.* McGlashen, 66 Fed. 537. Satisfaction by defendant of a judgment in favor of the commonwealth after forfeiture. Oakes *v.* Scott, 7 Ky. L. Rep. 287. An order dismissing a prior proceeding on the same bond "without prejudice." Com. *v.* Nimmo, 7 Ky. L. Rep. 287. A respite by the governor not relied on by pleading. Brown *v.* Com., 4 Metc. (Ky.) 221. Death of the principal. State *v.* McNeal, 18 N. J. L. 333. That recognizance is several and action joint. Gedney *v.* Com., 14 Gratt. (Va.) 318. That the magistrate who took the recognizance had no jurisdiction. Wallingford *v.* Hall, 45 Conn. 350. As to jurisdiction see also Simmons *v.* Kelly, 39 N. J. L. 438.

44. No day fixed for appearance.— Coleman *v.* State, 10 Md. 168.

Sickness of the justice before whom the accused was to appear which prevented his being at his office on the day specified may be a defense where accused was prepared to appear. Neal *v.* State, 61 Ark. 282, 32 S. W. 1069.

45. Former judgment.— State *v.* Harrison, 38 La. Ann. 299.

46. Cannot impeach record.— Calvin *v.* State, 12 Ohio St. 60. See People *v.* Wolf, 16 Cal. 385, wherein it is held that the decision of a court that a bond has been forfeited cannot be revised in an action on the bond in another court.

47. State *v.* Wenzel, 77 Ind. 428; Com. *v.* Kanenheimer, 25 Leg. Int. (Pa.) 124.

48. People *v.* Watkins, 19 Ill. 117.

49. *Illinois.*— McNamara *v.* People, 183 Ill. 164, 55 N. E. 625; Compton *v.* People, 86 Ill. 176; Rietzell *v.* People, 72 Ill. 416; Shadley *v.* People, 17 Ill. 252; Wood *v.* People, 16 Ill. 171.

Iowa.— State *v.* Foster, 2 Iowa 559.

Mississippi.— Tucker *v.* State, 55 Miss. 452.

Texas.— Branch *v.* State, 25 Tex. 423; State *v.* Cox, 25 Tex. 404.

Virginia.—Gedney *v.* Com., 14 Gratt. (Va.) 318.

See 5 Cent. Dig. tit. "Bail," § 384 *et seq.*

For forms of declarations, complaints, or petitions on bonds, undertakings, or recognizances see State *v.* Wells, 36 Iowa 238; Barkey *v.* State, 15 Kan. 99, 100; People *v.* Den-

b. Sufficiency of Scire Facias or Declaration — (I) *In General.* A scire facias should present a perfect cause of action and it must therefore state with reasonable certainty the facts of which the parties are required to take notice and which they are called upon to answer and upon which the judgment is demanded;[50] and a similar rule prevails with respect to declarations in actions of debt upon a recognizance.[51]

(II) *Particular Allegations* — (A) *In General.* A scire facias or declaration should sufficiently show the authority and jurisdiction of the court or officer to take the recognizance,[52] though it is not necessary to state the special facts or circumstances conferring jurisdiction in the particular case.[53] It should also describe the offense with such particularity as to show with what offense the accused was charged and to answer for which the recognizance was taken,[54] and should also

nis, 4 Mich. 609, 69 Am. Dec. 338; People *v.* Shaver, 4 Park. Crim. (N. Y.) 45.

In Arkansas a summons to the bail may issue and a complaint is unnecessary where it is provided by statute that, when the bond is indorsed by the justice as forfeited and filed with the clerk of the court, he may issue a summons to the bondsmen. Neal *v.* State, 61 Ark. 282, 32 S. W. 1069; Thomm *v.* State, 35 Ark. 327; Miller *v.* State, 35 Ark. 276.

50. Scire facias.— State *v.* Patterson, 7 Baxt. (Tenn.) 246; Brown *v.* State, 43 Tex. 349; Branch *v.* State, 25 Tex. 423; State *v.* Cox, 25 Tex. 404; Davidson *v.* State, 20 Tex. 649; Lindley *v.* State, 17 Tex. App. 120; Pearson *v.* State, 7 Tex. App. 279. See Roberts *v.* Com., 7 Bush (Ky.) 430.

The particularity and precision, however, required in a civil suit are not essential in a scire facias. Davidson *v.* State, 20 Tex. 649; Thrash *v.* State, 16 Tex. App. 271. Nor need there be an exact or literal conformity with statutory forms. Grund *v.* State, 40 Ala. 709. See Gooden *v.* State, 35 Ala. 430.

Illustrations of sufficiency.— An allegation of forfeiture in a scire facias, and a requirement that defendant appear and show cause why he should not render to the commonwealth the amount of the recognizance is a sufficient notice of the object of the appearance. Com. *v.* Miller, 4 B. Mon. (Ky.) 418. And in a writ of scire facias it is not necessary that the declaration be certified. Com. *v.* Stevens, 10 Cush. (Mass.) 483. Though the writ should conclude against the dignity and peace of the commonwealth. Ullery *v.* Com., 8 B. Mon. (Ky.) 3; Com. *v.* Kimberlain, 6 T. B. Mon. (Ky.) 43; Downing *v.* Com., 4 T. B. Mon. (Ky.) 511. A complaint also is good against demurrer which alleges jurisdiction of the court and entry of judgment of forfeiture. Friedline *v.* State, 93 Ind. 366.

Oyer of the recognizance is not demandable in scire facias. Slaten *v.* People, 21 Ill. 28.

51. In an action of debt upon a recognizance the utmost strictness which is required as to the declaration or complaint is that it should, pursuing the description in the recognizance, allege with certainty in what court, at whose suit, and for what sum the defendants acknowledged themselves obligated; that the recognizance was made a part of the record, and should aver the breach according to its terms. State *v.* McGuire, 42 Minn. 27, 43 N. W. 687; State *v.* Davis, 43 N. H. 600. But see State *v.* Folsom, 26 Me. 209, wherein it is held that a declaration alleging the facts in a manner proper for a scire facias will be bad on demurrer.

The declaration should conclude with a *prout patet per recordum.* State *v.* Davis, 43 N. H. 600.

52. Should show authority to take recognizance.— *Arkansas.*— Hogan *v.* State, 23 Ark. 636; State *v.* Sartain, 23 Ark. 541; Darby *v.* State, 21 Ark. 523.

Illinois.— Thomas *v.* People, 13 Ill. 696; Noble *v.* People, 9 Ill. 433; Reese *v.* People, 11 Ill. App. 346.

Indiana.— Hannum *v.* State, 38 Ind. 32; State *v.* Hiney, 24 Ind. 381; Hawkins *v.* State, 24 Ind. 288; Myers *v.* State, 19 Ind. 127; Blackman *v.* State, 12 Ind. 556; Wellman *v.* State, 5 Blackf. (Ind.) 343; Lang *v.* State, 3 Blackf. (Ind.) 344; Andress *v.* State, 3 Blackf. (Ind.) 108.

Kentucky.— Ullery *v.* Com., 8 B. Mon. (Ky.) 3.

Massachusetts.— Com. *v.* Merriam, 7 Allen (Mass.) 356; Com. *v.* Dunbar, 15 Gray (Mass.) 209. But see Com. *v.* Gordon, 15 Pick. (Mass.) 193.

New York.— People *v.* Young, 7 Hill (N. Y.) 44; People *v.* Koeber, 7 Hill (N. Y.) 39.

Texas.— Cushman *v.* State, 38 Tex. 181. *Contra,* since the enactment of Code Crim. Proc. § 443. Werbiski *v.* State, 20 Tex. App. 131 [*overruling* Lindley *v.* State, 17 Tex. App. 120].

See 5 Cent. Dig. tit. "Bail," § 387.

53. People *v.* Dennis, 4 Mich. 609, 69 Am. Dec. 338; Champlain *v.* People, 2 N. Y. 82; People *v.* Millis, 5 Barb. (N. Y.) 511; People *v.* Kane, 4 Den. (N. Y.) 530; People *v.* Young, 7 Hill (N. Y.) 44; People *v.* Koeber, 7 Hill (N. Y.) 39; Archer *v.* Com., 10 Gratt. (Va.) 627; U. S. *v.* George, 3 Dill. (U. S.) 431, 25 Fed. Cas. No. 15,199, 2 Centr. L. J. 77, 22 Pittsb. Leg. J. (Pa.) 103.

54. Should describe offense.— *Georgia.*— Rich *v.* Colquitt, 61 Ga. 197.

Illinois.— Thomas *v.* People, 13 Ill. 696.

Maine.— State *v.* Brown, 41 Me. 535; State *v.* Lane, 33 Me. 536.

Oregon.— Hannah *v.* Wells, 4 Oreg. 249.

Texas.— Thompson *v.* State, 17 Tex. App. 318. But see Evans *v.* State, 25 Tex. 80.

See 5 Cent. Dig. tit. "Bail," § 389.

correctly describe such instrument and set out so much thereof as that the nature and character of the undertaking and the liability incurred by the party or parties against whom judgment is sought may appear.[55] Again a scire facias or declaration should also allege that the recognizance was returned or transmitted to the proper court and filed, thus being made a matter of record,[56] and should aver that there has been a breach thereof,[57] and that forfeiture for the breach of the

Illustrations as to sufficiency.— A recital of the offense as a misdemeanor has been held sufficient. Rich *v.* Colquitt, 61 Ga. 197. As has also a description of it as grand larceny, though the information to which it referred also stated that it was committed "by unlawfully taking one cow." State *v.* Wrote, 19 Mont. 209, 213, 47 Pac. 898. And again a recital was held sufficient which described the offense as "selling liquor without license," though the offense under the statute was for selling intoxicating liquors in a less quantity than one gallon by one not licensed. Compton *v.* People, 86 Ill. 176, 179. But a recital that the defendant was charged with "shooting and killing" was held not sufficient. Hannah *v.* Wells, 4 Oreg. 249. As was also a description of the offense as "unlawfully using an estray." Thompson *v.* State, 17 Tex. App. 318.

55. What should be alleged.— A scire facias should, it has been held, show who took the recognizance, the signing of same by the recognizors, and the sum (Gray *v.* State, 5 Ark. 265); that it was acknowledged (State *v.* Cherry, Meigs (Tenn.) 232); and approved (Bacon *v.* People, 14 Ill. 312 [but see McFarlan *v.* People, 13 Ill. 9]). But it is not necessary to allege the date of the recognizance (State *v.* Glaevecke, 33 Tex. 53); or that it was required by an order of court (McClure *v.* State, 29 Ind. 359); or that it was entered into in open court (Pleasants *v.* State, 29 Tex. App. 214, 15 S. W. 43); or that it was taken in consequence of a continuance (State *v.* Inman, 7 Blackf. (Ind.) 225). And it has been held that it need not aver the facts set forth in the bond. Furgison *v.* State, 4 Greene (Iowa) 302, 61 Am. Dec. 120; State *v.* Johnson, 6 Baxt. (Tenn.) 198; Cushman *v.* State, 38 Tex. 181; Cowen *v.* State, 3 Tex. App. 380.

The recognizance or a copy thereof should be filed with the complaint in Indiana. Swinney *v.* State, 16 Ind. 309; Kiser *v.* State, 13 Ind. 80; Votaw *v.* State, 12 Ind. 497. Or it may be set out in *haec verba* in the complaint. Campbell *v.* State, 18 Ind. 375, 81 Am. Dec. 363. Though in the latter case also an exact copy must be set out. Burton *v.* State, 6 Blackf. (Ind.) 339.

A misrecital of the names of the recognizors in the scire facias will be fatal. Loving *v.* State, 9 Tex. App. 471. See also Garrison *v.* People, 21 Ill. 535; Graves *v.* People, 11 Ill. 542; State *v.* Hiney, 24 Ind. 381.

56. Should show disposition of recognizance.— *Illinois.*— Conner *v.* People, 20 Ill. 381; Bacon *v.* People, 14 Ill. 312; Noble *v.* People, 9 Ill. 433.

Indiana.— Urton *v.* State, 37 Ind. 339; Paine *v.* State, 7 Blackf. (Ind.) 206; Davis *v.* State, 5 Blackf. (Ind.) 374; Andress *v.* State, 3 Blackf. (Ind.) 108.

Kentucky.— Starr *v.* Com., 7 Dana (Ky.) 243; Simpson *v.* Com., 1 Dana (Ky.) 523.

Maine.— State *v.* Baker, 50 Me. 45; Palister *v.* Little, 6 Me. 350; State *v.* Smith, 2 Me. 62. But see State *v.* Howley, 73 Me. 552.

Massachusetts.— Com. *v.* Dunbar, 15 Gray (Mass.) 209.

Minnesota.— State *v.* Grant, 10 Minn. 39.

Nevada.— State *v.* Murphy, 23 Nev. 390, 48 Pac. 628.

New Hampshire.— State *v.* Davis, 43 N. H. 600.

New Jersey.— Slape *v.* State, 44 N. J. L. 264.

New York.— People *v.* Van Eps, 4 Wend. (N. Y.) 387; People *v.* Shaver, 4 Park. Crim. (N. Y.) 45. But see People *v.* Huggins, 10 Wend. (N. Y.) 464.

Tennessee.— State *v.* Arledge, 2 Sneed (Tenn.) 229.

Virginia.—Gedney *v.* Com., 14 Gratt. (Va.) 318.

United States.— U. S. *v.* Atwell, 24 Fed. Cas. No. 14,475.

See 5 Cent. Dig. tit. "Bail," §§ 392, 393.

But see People *v.* Love, 19 Cal. 676, wherein it is held that an allegation that the recognizance was certified to the court in which the suit is pending is only necessary in scire facias upon the record of the recognizance and when the accused is a party and not in a suit against the sureties on the bond. And see also State *v.* Howley, 73 Me. 552, wherein it is decided that in scire facias in the superior court, upon a recognizance taken in such court and which is a part of the records of such court and in its keeping, it is not necessary to allege that the recognizance is recorded in that court. *Contra*, State *v.* Wrote, 19 Mont. 209, 47 Pac. 898.

A general averment is sufficient. State *v.* Murphy, 23 Nev. 390, 48 Pac. 628.

57. Should show breach of recognizance.— *Indiana.*—Hannum *v.* State, 38 Ind. 32; State *v.* Inman, 7 Blackf. (Ind.) 225; State *v.* Humphries, 4 Blackf. (Ind.) 538.

Iowa.— State *v.* Foster, 2 Iowa 559.

North Carolina.— State *v.* Mills, 19 N. C. 552.

Ohio.— State *v.* Johnson, 13 Ohio 176.

Wisconsin.— State *v.* Wettstein, 64 Wis. 234, 25 N. W. 34.

See also People *v.* Smith, 18 Cal. 498; and 5 Cent. Dig. tit. "Bail," § 392.

Averments in the complaint of payment or non-payment of the penalty or failure to satisfy the judgment are declared to be unnecessary (People *v.* Love, 19 Cal. 676; State *v.* Grant, 10 Minn. 39; State *v.* Biesman, 12

condition or conditions of the recognizance was judicially declared and properly and duly entered of record.[58]

(B) *As to Proceedings Preliminary to Giving Bail.* It may be stated generally, subject to the exceptions hereinafter noted, that the scire facias, declaration, or complaint need not contain averments as to the proceedings prior to or in connection with the giving of bail. So it has been decided that allegations are unnecessary as to the arrest of the accused or warrant therefor,[59] as to an indictment,[60] preliminary examination or waiver thereof,[61] or order of court directing a prosecution.[62] Nor need the declaration show probable cause to believe the accused guilty.[63] But it should, however, allege that the accused was released from custody by reason of the giving of the recognizance.[64]

(C) *Curing Defect by Amendment.* A scire facias or declaration to recover on a forfeited recognizance may, in the discretion of the court, be amended for the purpose of curing formal defects therein.[65]

Mont. 11, 29 Pac. 534), it being held that such averment is only necessary in scire facias (People *v.* Love, 19 Cal. 676).

An objection after verdict that the recognizance was on condition and breach thereof was not averred in the declaration is made too late. Kirkner *v.* Com., 6 Watts & S. (Pa.) 557.

58. Should show that forfeiture was properly declared and entered.

Colorado.— Higgins *v.* People, 2 Colo. App. 567, 31 Pac. 951.

Illinois.— Conner *v.* People, 20 Ill. 381; Kennedy *v.* People, 15 Ill. 418; Thomas *v.* People, 13 Ill. 696.

Minnesota.— State *v.* Grant, 10 Minn. 39.

New Mexico.— Brooks *v.* U. S., 9 N. M. 72, 27 Pac. 311.

New York.— People *v.* Van Eps, 4 Wend. (N. Y.) 387.

See 5 Cent. Dig. tit. "Bail," § 393.

The allegation of forfeiture and entry on record implies that the proper steps authorizing such forfeiture have been taken, and it is not necessary to allege that the principal or sureties were called and defaulted. Rubush *v.* State, 112 Ind. 107, 13 N. E. 877; State *v.* Grant, 10 Minn. 39. *Contra,* Urton *v.* State, 37 Ind. 339; White *v.* State, 5 Yerg. (Tenn.) 183.

Entry of record may be presumed.— In some cases the rule is affirmed that the regularity of the proceedings of the court may be presumed and that an averment that the forfeiture was entered of record is not necessary where there is an averment that the cognizors were called but did not appear. People *v.* Huggins, 10 Wend. (N. Y.) 464; State *v.* Edgerton, 12 R. I. 104. An averment that the bond was duly forfeited is unnecessary in a petition which sets forth exactly what was done to constitute the forfeiture. Kinney *v.* State, 14 Ohio Cir. Ct. 91, 7 Ohio Cir. Dec. 97. See also Barkley *v.* State, 15 Kan. 99; Rheinhart *v.* State, 14 Kan. 318; State *v.* Wrote, 19 Mont. 209, 47 Pac. 898.

Date of the term at which recognizance was forfeited need not be alleged. State *v.* Davis, 43 N. H. 600; Pugh *v.* State, 2 Head (Tenn.) 227.

A copy of the justice's certificate of forfeiture is not necessary in a complaint. Fowler *v.* State, 91 Ind. 507.

59. Averment as to arrest or warrant.— Jennings *v.* State, 13 Kan. 80; Conner *v.* State, (Tex. App. 1888) 9 S. W. 63. *Contra,* State *v.* Arledge, 3 Sneed (Tenn.) 229.

That scire facias recites arrest of principal and surety instead of principal alone is not a fatal defect. Sturgeon *v.* Com., (Pa. 1888) 14 Atl. 41.

Where defendant is arrested on a pluries writ it is not necessary to set forth the attachment and alias in the declaration. Thomas *v.* Cameron, 17 Wend. (N. Y.) 59.

60. Averment as to finding of indictment. — Mooney *v.* People, 81 Ill. 134; O'Brien *v.* People, 41 Ill. 456; Garrison *v.* People, 21 Ill. 535; Chumasero *v.* People, 18 Ill. 405; Bernhamer *v.* State, 123 Ind. 577, 24 N. E. 509; Snowden *v.* State, 8 Mo. 483. But see *contra,* as to declarations and complaints, People *v.* Smith, 3 Cal. 271. And see Griffin *v.* State, 48 Ind. 258, wherein it was held that the complaint must show that a charge had been made against the principal. Also see U. S. *v.* Keiver, 56 Fed. 422, wherein it is held that the complaint must allege that criminal proceeding had been commenced.

61. Averment of preliminary examination or waiver thereof.—Jennings *v.* State, 13 Kan. 80. *Contra,* U. S. *v.* Keiver, 56 Fed. 422.

62. Averment of order of court directing prosecution.— People *v.* Blankman, 17 Wend. (N. Y.) 252. See also Champlain *v.* People, 2 N. Y. 82; Pugh *v.* State, 2 Head (Tenn.) 227.

63. Averment of probable cause to believe guilt.— Champlain *v.* People, 2 N. Y. 82.

64. Should show release from custody.— Los Angeles County *v.* Babcock, 45 Cal. 252; Com. *v.* Bordus, 2 Ky. L. Rep. 219; People *v.* Solomon, 5 Utah 277, 15 Pac. 4. But see Dilley *v.* State, 2 Ida. 1012, 29 Pac. 48, wherein it is held that the complaint need not allege that an order was made discharging the accused from custody.

65. In discretion of court.— *Illinois.*— Peacock *v.* People, 83 Ill. 331.

Mississippi.—Tucker *v.* State, 55 Miss. 452.

Missouri.— State *v.* Culp, 39 Mo. 530; Snowden *v.* State, 8 Mo. 483.

c. **Defendant's Pleadings** — (I) *In General.* In considering the defendant's pleadings the following distinctions should be remembered, (1) where a scire facias is regarded as a declaration, it should contain all the averments necessary to authorize judgment,[66] and if it fails to allege facts sufficient to constitute a cause of action it will not sustain a judgment of default; but (2) in certain jurisdictions no pleadings are required on the part of the state, although in all other respects the cause proceeds as in civil actions;[67] so (3) matters shown by the record are conclusive and cannot be contradicted,[68] and (4) the code may require only that substantial facts necessary to constitute a cause of action or defense should be stated.[69]

(II) *Demurrer.* The defendant may demur to the declaration or scire facias averring that insufficient matters have been alleged to maintain the action;[70] and in case of a demurrer to a scire facias a question only is raised as to the sufficiency of matters appearing on the record or necessarily implied by law and not matters outside thereof.[71] And the defendant may both demur and answer to the same cause of action.[72]

Texas.— Hutchings *v.* State, 24 Tex. App. 242, 6 S. W. 34.

Virginia.— Gedney *v.* Com., 14 Gratt. (Va.) 318. See also Bias *v.* Floyd, 7 Leigh (Va.) 640.

United States.— U. S. *v.* George, 3 Dill. (U. S.) 431, 25 Fed. Cas. No. 15,199, 2 Centr. L. J. 77, 22 Pittsb. Leg. J. (Pa.) 103.

See 5 Cent. Dig. tit. "Bail," § 397.

Notice to the principal is declared to be unnecessary, in order to amend a scire facias. Hutchings *v.* State, 24 Tex. App. 242, 6 S. W. 34.

66. McNamara *v.* People, 183 Ill. 164, 55 N. E. 625. Scire facias performs the office of a declaration as well as process, and a default admits the facts alleged in the writ. Rietzell *v.* People, 72 Ill. 416. See also *supra*, III, O, 6, a, b.

67. Miller *v.* State, 35 Ark. 276; Brown *v.* Com., 4 Metc. (Ky.) 221. If the complaint or its equivalent is fatally defective under the liberal rules of amendment applicable to writs or other civil suits, matters of defense on the merits may be set up by answer, as the summons is not the subject of demurrer. Miller *v.* State, 35 Ark. 276.

Motion to quash.— Where there are no pleadings on the part of the state, the summons may be the subject of a motion to quash. Miller *v.* State, 35 Ark. 276. In McNamara *v.* People, 183 Ill. 164, 55 N. E. 625, a motion to quash the writ upon scire facias was overruled.

68. State *v.* Bryant, 55 Iowa 451, 8 N. W. 303 (holding that answer denying breach of bond is insufficient as that is *res adjudicata*); Peacock *v.* People, 83 Ill. 331 (holding that pleas that defendant did not make and execute the bond and *nil debet* were not proper pleas, since return of and filing recognizance made it a record). See Rubush *v.* State, 112 Ind. 107, 13 N. E. 877.

Again the record cannot be disputed by a plea denying joint or several liability. McNamara *v.* People, 183 Ill. 164, 55 N. E. 625.

Where the truth or falsity of the matter alleged is apparent of record an answer will be good and a sufficient defense. Odiorne *v.* State, 37 Tex. 122. But it is also held that in such case there should be a special demurrer. Ross *v.* State, 6 Blackf. (Ind.) 315. See Rubush *v.* State, 112 Ind. 107, 13 N. E. 877.

69. State *v.* Meyers, 61 Mo. 414.

Payment of costs need not be averred when not necessary to a surrender. State *v.* Meyers, 61 Mo. 414.

70. **A demurrer will lie** in case of a variance between the scire facias and the recognizance (Ellison *v.* State, 8 Ala. 273); or where the declaration on its face shows want of authority to take the recognizance (Ferry *v.* Burchard, 21 Conn. 597); or where the scire facias is joint on a several recognizance (Parrish *v.* State, 14 Md. 238).

But a demurrer will not lie because of an incorrect description in the recognizance of the offense (State *v.* Eldred, 31 Ala. 393); or of other defects therein (Candler *v.* Kirkland, 112 Ga. 459, 37 S. E. 715; State *v.* Rhonimus, 47 Miss. 314 [see also Ross *v.* State, 6 Blackf. (Ind.) 315; and see Hall *v.* State, 9 Ala. 827]). And it has been declared that, in scire facias proceedings, errors or omissions in the writ will be disregarded on demurrer if it sufficiently appears from the records and files of the court that the state is entitled to execution. State *v.* Heed, 62 Mo. 559.

A summons issued upon forfeiture where no pleading is required is not the subject of demurrer, but may be quashed on motion. Miller *v.* State, 35 Ark. 276.

71. **Questions raised.**— Norfolk *v.* People, 43 Ill. 9; Fields *v.* State, 39 Miss. 509. The demurrer in such a case is said to reach only to the recognizance on which the judgment *nisi* is founded and the legal sufficiency of the indictment cannot be questioned. Williams *v.* State, 20 Ala. 63; State *v.* Weaver, 18 Ala. 293. But see Com. *v.* Pierce, 4 Ky. L. Rep. 247. The recognizance is only before the court for comparison with the scire facias and not to be quashed. Com. *v.* Miller, 4 B. Mon. (Ky.) 418.

72. **Both answer and demurrer.**— People *v.* Meyer, 2 Code Rep. (N. Y.) 49. But an

(III) *Plea or Answer*[73]—(A) *Nature.*[74] There may be a plea in abatement,[75] or in bar.[76] So the plea interposed by defendant may be a special plea, setting up special matters of defense;[77] or it may be *nil debet*,[78] *non est factum*,[79] or *nul tiel record*,[80] depending upon the circumstances of the particular case.

answer cannot be made to perform the office of a demurrer. State *v.* Bryant, 55 Iowa 451, 8 N. W. 303. And it has been declared that there is a waiver of the demurrer if, after it has been overruled, there is an answer over by defendant. State *v.* Morgan, 124 Mo. 467, 28 S. W. 17.

73. For necessity and sufficiency of replication or reply to defendant's plea or answer see the following cases:

Arkansas.— Cannon *v.* State, 17 Ark. 365.

Indiana.— James *v.* State, 7 Blackf. (Ind.) 325.

Kentucky.— Slodgill *v.* Com., 11 Ky. L. Rep. 368.

Missouri.— State *v.* Morgan, 124 Mo. 467, 28 S. W. 17.

New York.— Foster *v.* Rainsford, 1 Hill (N. Y.) 323.

See also, generally, Pleading.

A reply to the plea (*comperuit ad diem*) that defendant was an infant and did not appear by guardian is bad. Foster *v.* Rainsford, 1 Hill (N. Y.) 323.

74. Affidavits of defense may be required in Pennsylvania on all instruments in writing under a rule of court, making such affidavit obligatory in actions of scire facias on recognizances. Com. *v.* Hart, 5 Pa. Dist. 109, 17 Pa. Co. Ct. 148. See also Magie *v.* Com., (Pa. 1886) 4 Atl. 738; Boring *v.* Com., (Pa. 1886) 4 Atl. 738; Harres *v.* Com., 35 Pa. St. 416; Com. *v.* Taylor, 1 Chest. Co. Rep. (Pa.) 261; Com. *v.* Becker, 1 Woodw. (Pa.) 297.

Written statement by the defendant of the facts constituting his defense may be as applicable to this as to any other kind of action. Brown *v.* Com., 4 Metc. (Ky.) 221.

75. In abatement.— Wilson *v.* State, 6 Blackf. (Ind.) 212 (non-joinder of a surety must be availed of by plea in abatement showing that the omitted party is not living); People *v.* Watkins, 19 Ill. 117 (and the time of the principal's death should be averred). See also People *v.* Dennis, 4 Mich. 609, 69 Am. Dec. 338.

So matters of objection to copy of scire facias served should be pleaded in abatement. Wilson *v.* State, 25 Tex. 169.

Withdrawal of answer of general demurrer and general denial to allow answer in nature of abatement is properly refused. Camp *v.* State, 39 Tex. Crim. 142, 45 S. W. 490, 39 Tex. Crim. 143, 45 S. W. 491.

76. A plea is good in bar which alleges the discharge of accused by the court in such form that the contention arises that the discharge was by operation of law, as where the dismissal of the jury operated as an acquittal and the principal's departure was with leave of court, although it is necessary to allege such discharge by the court. Lyons *v.* State, 1 Blackf. (Ind.) 309. But matters which would induce the court to stay proceedings on the bail-bond are not a proper bar. King *v.* Gettysburg Bank, 2 Rawle (Pa.) 197. And uncertainty in the statement of the offense charged, whether caused by errors or discrepancies in dates or otherwise, affords no ground for arresting judgment and is not properly special matter in bar. Rubush *v.* State, 112 Ind. 107, 13 N. E. 877.

For forms of answers or pleas in actions upon bonds, undertakings, or recognizances see Waugh *v.* People, 17 Ill. 561, 562; People *v.* Shaver, 4 Park. Crim. (N. Y.) 45, 48.

77. Special plea.— State *v.* Hendricks, 40 La. Ann. 719, 5 So. 24, holding, however, that one who files a special plea is to be judged on that plea and no other, all else being admitted. See also Reading *v.* State, 1 Harr. (Del.) 190, holding that discharge on legal payment could not be proven under a plea of payment, but must be specially pleaded. So evidence is inadmissible of default, unless pleaded. Madden *v.* State, 35 Kan. 146, 10 Pac. 469. And if there is a mistake in the date of the bond there should be proper allegations to admit parol proof to correct the same, and in the absence of such averments it is not permissible to introduce a bond bearing any other date than that in the scire facias. Moseley *v.* State, 37 Tex. Crim. 18, 38 S. W. 800; Hayden *v.* State, (Tex. Crim. 1897) 38 S. W. 801.

If the execution of the bond is admitted in the answer, such bond may be put in evidence, for it cannot prejudice the defendant's rights to prove what is admitted. Votaw *v.* State, 12 Ind. 497.

It is not necessary for the state to plead a fact in order to introduce it in rebuttal of evidence offered by defendant to sustain an allegation of default. Allee *v.* State, 28 Tex. App. 531, 13 S. W. 991.

78. See, generally, Bonds.

Nil debet is not a proper plea in an action on a record. McNamara *v.* People, 183 Ill. 164, 55 N. E. 625; State *v.* Sutcliffe, 16 R. I. 520, 16 Atl. 710, 17 Atl. 920. See Peacock *v.* People, 83 Ill. 331.

79. Non est factum should explicitly and directly deny execution of instrument, and a mere denial of execution of the bond is not such a plea. Lindsay *v.* State, 39 Tex. Crim. 468, 46 S. W. 1045. See State *v.* Wrote, 19 Mont. 209, 47 Pac. 898; State *v.* Murphy, 23 Nev. 390, 48 Pac. 628.

Non est factum is not a proper plea to a scire facias which has become a matter of record. McNamara *v.* People, 183 Ill. 164, 55 N. E. 625; Johnston *v.* People, 31 Ill. 469; Kuhle *v.* People, 65 Ill. App. 378. See also Peacock *v.* People, 83 Ill. 331.

80. Nul tiel record.— That to which *nul tiel record* is appropriate must purport at least to be a record, and such a plea is not bad as attacking in a single plea both the recognizance and the judgment, and if a scire facias misdescribes the record, the proper

(B) *Particularity and Sufficiency of Averments.*[81] The answer or plea should plainly, fully, and distinctly set forth the grounds of defense[82] and should not be general and indefinite,[83] and a plea that does not aver, except argumentatively, a fact relied on by the defense is bad.[84] It is also technically bad when it neither denies any material fact averred in scire facias nor yet confesses and avoids;[85] and it is manifestly insufficient where the representations relied on, and which are negatived, relate to legal questions of which defendants are required to judge themselves.[86] Again a plea is bad which is not an averment of facts, but only a deduction from facts afterward averred which do not justify the averment.[87] And the allegations of the answer may be taken as confessed, no reply thereto being filed after demurrer overruled.[88] But an answer may cure the want of service of the scire facias.[89]

d. Variance. To constitute a fatal variance there must be a material misdescription in the pleadings of the cause of action such as is calculated to surprise or mislead the adverse party.[90] So a material variance between the warrant and

plea is *nul tiel record.* Slaten *v.* People, 21 Ill. 28. See also that *nul tiel record* does not lie: State *v.* Dickenson, 7 N. C. 10. So a denial of forfeiture must be proven under a plea *nul tiel record,* where the forfeiture is alleged by the scire facias to be of record (Wilson *v.* State, 6 Blackf. (Ind.) 212), although it is not competent under a plea of *nul tiel record* to raise other issues, since the only question under such plea is whether there is such a record, and it cannot be proven that defendant was not the recognizor or that the court taking the bond had no jurisdiction, for these must be specially alleged (State *v.* Sutcliffe, 16 R. I. 520, 16 Atl. 710, 17 Atl. 920).

Plea that defendant did not stand in open court and consent to terms of recognizance is in effect an attempt to dispute the record by a plea *nul tiel recognizance* which cannot be done. McNamara *v.* People, 183 Ill. 164, 55 N. E. 625.

81. Verification.— In Texas the statute does not require an answer to a scire facias to be sworn to, especially when the matters pleaded in the answer are of record and those of which the court ought to take judicial notice. Odiorne *v.* State, 37 Tex. 122.

82. Matters which are only of evidence need not be alleged. State *v.* Meyers, 61 Mo. 414, as that the acceptance of the prisoner was acknowledged in writing.

83. It should not admit a fact by negative pregnant and then deny it as a conclusion of law, for pleadings should state facts and not conclusions of law, and unless this is done they are fatally defective. Sasser *v.* McDaniel, 73 Ga. 547, applying this rule to a statement that the warrant was illegal as not being founded upon a sufficient affidavit; that the warrant described no offense, and that the bond contained no condition for personal appearance, and hence that there was no breach.

A plea which is open to an intendment in favor of the state is insufficient. U. S. *v.* Atwill, 24 Fed. Cas. No. 14,475, wherein it is said: "A cardinal rule in respect to pleas in bar is that the defendant must state his case with its legal circumstances, and if the plea be susceptible of two intendments it shall be taken most strongly against him. . . . He must also set forth his case according to the truth."

If, however, the complaint is bad, it need not be determined whether or not an answer is sufficient. Tucker *v.* State, 13 Ind. 332.

84. Argumentative plea.— Spicer *v.* State, 9 Ga. 49, a plea setting up the taking of a former bond, not alleging positively that such first bond was sufficient.

85. Neither denying nor confessing and avoiding.— Landis *v.* People, 39 Ill. 79, where an answer alleged that defendant did appear at the term and did abide the order of court. So a plea that the surety surrendered his principal, and confessing as to the costs is bad. People *v.* McFarland, 9 Ill. App. 275. If defendant should have moved to set aside the forfeiture *nisi,* the answer should show satisfactory cause for the default or it is insufficient or no answer. Goode *v.* State, 15 Tex. 124..

Continuing recognizance.— In the absence of an averment of duress or constraint the presumption is that the obligors intended to comply with the statute, and that they desired to enter into the statutory "continuing recognizance" and that the court "desired" the same. Carmody *v.* State, 105 Ind. 546, 5 N. E. 679.

86. As that they were misled by the sheriff's representations that accused was in the sheriff's legal custody. Peacock *v.* People, 83 Ill. 331.

87. Kirby *v.* Com., 1 Bush (Ky.) 113, applying this rule to an answer that the principal was necessarily prevented from appearing because he was then in custody of the state, etc., because this does not allege that he would have appeared if he had not been prevented and that the imprisonment was before the day specified.

88. Com. *v.* Anderson, 1 Ky. L. Rep. 275.

Facts set up in a plea are admitted by a demurrer, but not other facts which may be inferred from those admitted. State *v.* Bell, 58 Miss. 823. See also Com. *v.* Miller, 4 B. Mon. (Ky.) 418; State *v.* Millsaps, 69 Mo. 359.

89. Curing want of service of process.— Steen *v.* State, 27 Tex. 86.

90. Werbiski *v.* State, 20 Tex. App. 131. And the rule applies to averments as to the

the recognizance set forth in the declaration and that given in evidence,[91] or between a recognizance or scire facias or judgment therein are fatal.[92] But it is too late to inquire after judgment whether the recognizance conforms to the judgment *nisi* or scire facias.[93]

7. Trial — a. In General. In scire facias upon a bail-bond the court should consider the whole record,[94] and if it varies from the description in the scire facias the defendant must object when it is offered in evidence.[95] If the defense in an

place of taking the recognizance. Paine *v.* State, 7 Blackf. (Ind.) 206; State *v.* Miner, 14 R. I. 303.

The variance must be material to the merits and prejudicial to defendants in their defense; or it must be such that the scire facias could not have been amended so as to agree with the record. And the facts being within this rule, the judgment cannot be reversed because variances were disregarded by the court. Saxton *v.* State, 8 Blackf. (Ind.) 200. And where the statute so provides, an error or mistake in the form or mode of a pleading or proceeding will not render it invalid, unless it has actually prejudiced defendant or tended to his prejudice in respect to a substantial right. People *v.* Myers, 1 Ida. 355 [*citing* Tevis *v.* Randall, 6 Cal. 632, 65 Am. Dec. 547].

91. Dillingham *v.* U. S., 2 Wash. (U. S.) 422, 7 Fed. Cas. No. 3,913.

92. Daingerfield *v.* State, 4 How. (Miss.) 658.

Where sureties fail to appear when properly served they cannot avail themselves of a variance between the bond and scire facias, the bond not being a part of the record of scire facias proceedings. Smith *v.* State, 76 Miss. 728, 25 So. 491.

93. Shreeve *v.* State, 11 Ala. 676 (also declaring that, if advantage had been claimed in the court below on this ground, it would have been competent to set aside or perhaps to have amended the entry); Saffold *v.* State, 60 Miss. 928.

When fatal variance.— Within the general principles stated in the text a variance has been held fatal in the following cases as to the offense charged (Simpson *v.* Com., 1 Dana (Ky.) 523; State *v.* Borroum, 25 Miss. 203; Bailes *v.* State, 20 Tex. 498); as to appearance (Bridges *v.* State, 24 Miss. 153; Grigsby *v.* State, 6 Yerg. (Tenn.) 354; Smith *v.* State, 7 Tex. App. 160); as to the court (Frost *v.* State, 33 Tex. Crim. 347, 26 S. W. 412; Avant *v.* State, 33 Tex. Crim. 312, 26 S. W. 411; Brown *v.* State, 28 Tex. App. 297, 12 S. W. 1101); as to name (Weaver *v.* State, 13 Tex. App. 191); as to joint or several judgment (Farris *v.* People, 58 Ill. 26; Ellis *v.* State, 10 Tex. App. 324); as to officer taking the bond (Arrington *v.* State, 13 Tex. App. 554); as to recital of date of bond (Avant *v.* State, 33 Tex. Crim. 312, 26 S. W. 411; Bailey *v.* State, (Tex. Crim. 1893) 22 S. W. 40; Highsaw *v.* State, (Tex. App. 1892) 19 S. W. 762; Brown *v.* State, 28 Tex. App. 65, 11 S. W. 1022; Faubion *v.* State, 21 Tex. App. 494, 2 S. W. 830; Holt *v.* State, 20 Tex. App. 271; Hedrick *v.* State, 3 Tex. App. 570). And where, in scire facias, the declaration is on a forfeited recognizance and a forfeited bond is relied on at the trial the variance is fatal. Garrison *v.* State, 21 Tex. App. 342, 17 S. W. 351.

When no variance.— Within the general principles stated in the text a variance has been held in the following cases not to be fatal as to the offense charged (Whitfield *v.* State, 4 Ark. 171; State *v.* Livingston, 117 Mo. 627, 23 S. W. 766; State *v.* Millsaps, 69 Mo. 359; State *v.* Rye, 9 Yerg. (Tenn.) 386; Ross *v.* State, 35 Tex. 433; Arrington *v.* State, 13 Tex. App. 551); as to appearance (Sheets *v.* People, 63 Ill. 78; Allen *v.* People, 29 Ill. App. 555); as to the court (State *v.* Furguson, 50 Mo. 470; State *v.* Rye, 9 Yerg. (Tenn.) 386 [see also State *v.* McElhaney, 20 Mo. App. 584]); as to the name of the principal (Allen *v.* People, 29 Ill. App. 555); as to joint or several judgment (Allee *v.* State, 28 Tex. App. 531, 13 S. W. 991; Kiser *v.* State, 13 Tex. App. 201); as to recital of date of bond (Mills *v.* State, 36 Tex. Crim. 71, 35 S. W. 370); as to amount (Ditto *v.* State, 30 Miss. 126). And the variance is not material where the bond described in the complaint has no file-mark and the bond offered in evidence has. U. S. *v.* Eldredge, 5 Utah 161, 13 Pac. 673.

Qualifications.— Where the name differs in the bond, indictment, and judgment *nisi*, the bond and indictment are not admissible to show forfeiture in the absence of an allegation showing the name to be that of the same person. Weaver *v.* State, 13 Tex. App. 191. Although it has been decided that the question whether the person indicted was the same as the one recognized is for the jury. Wilcox *v.* State, 24 Tex. 544. And the recognizance is declared to be admissible in connection with other evidence to prove that the person who executed the bond was the one described in the body of the instrument by another name. O'Brien *v.* People, 41 Ill. 456 [*distinguishing* Vincent *v.* People, 25 Ill. 500]. See further as to variance Kuhle *v.* People, 65 Ill. App. 378; Camp *v.* State, 39 Tex. Crim. 143, 45 S. W. 491.

94. **Should consider whole record.**— State *v.* Jones, 29 Ark. 127.

95. Welborn *v.* People, 76 Ill. 516.

An objection that the paper produced is, on its face, not a recognizance may be made *ore tenus*, an affidavit of defense being unnecessary. State *v.* Ahrens, 12 Rich. (S. C.) 493.

If the plea is non est factum the court may require defendant, before permitting him to impeach the judgment *nisi* to prove that he is the same person on whom process was served as a defendant, and on his refusal may pro-

action of scire facias is defectively pleaded, the court should not proceed to judgment where such action would, upon the record, be illegal or unjust,[96] nor while a plea of death of the cognizor remains unanswered.[97]

b. Questions of Law and Fact. A question of fact may be involved upon the trial of a forfeited bail-bond which entitles the sureties to a jury,[98] although, where the statute so provides, the issues in scire facias on such bond are to be decided by the court.[99]

8. Evidence — a. Presumptions and Burden of Proof. In a suit upon a recognizance it will be presumed that the proceedings were regular and the recognizance valid; that the decision was based upon sufficient evidence,[1] and that the bond or recognizance was taken by the proper authority, legally empowered in the premises.[2] And while upon a general denial the burden of proof is not upon the defendant,[3] he must nevertheless sustain a special plea in the nature of *non est factum*, and show cause why the recognizance should not be escheated.[4]

b. Admissibility — (1) *Matters of Record or in the Nature Thereof.* In actions upon forfeited recognizances or bonds the affidavit, indictment, or information is admissible in evidence.[5] It is also proper to admit in evidence, in actions upon such instruments, the bonds or recognizances themselves,[6]

ceed to judgment. Rutledge *v.* State, 36 Tex. 459.

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

97. Mix *v.* People, 26 Ill. 480.

But when the recognizance is a collateral issue independent of the original indictment the court is not precluded from entering a judgment by default on a scire facias issued to enforce a judgment *nisi* on a recognizance, even though a plea to said indictment remains unanswered. Ditto *v.* State, 30 Miss. 126.

98. Questions for jury.— As whether or not there was a delivery by them of the person bailed to the jailer's custody. McKinney *v.* Com., 3 Ky. L. Rep. 465. In Texas a trial by jury on such bonds is governed by the rules relating to trials in civil causes. Short *v.* State, 16 Tex. App. 44.

99. Questions for court.— State *v.* Posey, 79 Ala. 45. Nor is a jury necessary to compute the amount of the debt on recognizance of bail. Crump *v.* People, 2 Colo. 316. So a plea of *nul tiel record* to a scire facias presents no issue for the jury. Kuhle *v.* People, 65 Ill. App. 378.

1. Presumption of regularity of proceedings, etc.— Friedline *v.* State, 93 Ind. 366; State *v.* Patterson, 23 Iowa 575; Redmond *v.* State, 12 Kan. 172; State *v.* Rogers, 36 Mo. 138. So the execution of the bond will be taken as proved unless denied under oath. State *v.* Carr, 4 Iowa 289.

Presumption exists that first default was executed upon sufficient showing to the satisfaction of court taking second recognizance. Com. *v.* Sholes, 13 Allen (Mass.) 396.

2. Presumption is that recognizance was taken before the court, even though the record shows that it was taken before the clerk of said court. Bodine *v.* Com., 24 Pa. St. 69. And it will be presumed that the proper transcript was before the court. Fox *v.* Com., 81* Pa. St. 511. So the officer's authority and jurisdiction will be presumed. Dunkin *v.* Hodge, 46 Ala. 523; Carmody *v.* State, 105 Ind. 546, 5 N. E. 679; Furgison *v.* State, 4 Greene (Iowa) 302, 61 Am. Dec. 120. But see McGuire *v.* State, 124 Ind. 536, 23 N. E. 85, 25 N. E. 11, and Gachenheimer *v.* State, 28 Ind. 91, for the necessity and sufficiency of proof of such authority.

Defendant may, however, show that the officer who took the bond was not authorized or was not the proper officer. So held in State *v.* Russell, 24 Tex. 505.

3. Burden of proof upon general denial.— Goodin *v.* State, 14 Tex. App. 443.

To explain alteration of the bond the burden is upon the plaintiff. State *v.* Roberts, 37 Kan. 437, 15 Pac. 593.

The cause of action must be proved, as in a civil suit, both by the bond and by the judgment *nisi*, declaring the forfeiture. McWhorter *v.* State, 14 Tex. App. 239. See also *infra*, III, O, 8, c.

Burden of sustaining special plea.— Brown *v.* Colquitt, 73 Ga. 59, 54 Am. Rep. 867.

4. Why recognizance should not be escheated.— State *v.* Carr, 4 Iowa 289.

5. Affidavit, indictment, or information.— Affidavit charging the crime is admissible in the circuit court (Adams *v.* State, 48 Ind. 212), and the affidavit and information filed after *nolle prosequi* to the original indictment and charging the same offense may be admitted in evidence (Clifford *v.* Marston, 14 Oreg. 426, 13 Pac. 62). So it is no objection to the admissibility of the indictment that it does not show upon its face that the principal was indicted for the offense with which he was charged before the examining court. Sims *v.* State, (Tex. Crim. 1900) 55 S. W. 179. But if an indictment for theft is put in evidence, the state cannot show under it a conviction for swindling. Martin *v.* State, 16 Tex. App. 265.

6. Bonds and recognizances.— Adams *v.* State, 48 Ind. 212. And if the execution of the bond is not in issue in scire facias such execution need not be proven before introducing the bond in evidence. Lindsay *v.* State, 39 Tex. Crim. 468, 46 S. W. 1045. But it cannot be considered as in evidence or as pro-

the scire facias,[7] and the justice's transcript,[8] or the minutes of the court or magistrate.[9] But the record is an entirety and it is error to reject a part thereof.[10]

(II) *Matters Not of Record* — (A) *Contradicting Record.* The record of forfeiture of a recognizance is conclusive evidence of the breach, and cannot be impeached by extrinsic evidence.[11]

duced on the trial when it has not been filed. State *v.* Wilson, 12 La. Ann. 189. And unless the admission of the bond in evidence is objected to, an objection to a variance between it and the recitals in the scire facias is waived. Lewis *v.* State, (Tex. Crim. 1897) 39 S. W. 570. See also *infra*, III, O, 8, c.

7. **Scire facias.**— Lewis *v.* State, (Tex. Crim. 1897) 39 S. W. 570.

A recital in a scire facias on a bail-bond in a justice's court, and in the judgment thereon, that the principal is required to answer in the district court is fatal to proceedings under scire facias to enforce the bond. Avant *v.* State, 33 Tex. Crim. 312, 26 S. W. 411.

8. **Justice's transcript.**— Adams *v.* State, 48 Ind. 212.

9. **The magistrate's minutes** taken on a recognizance and returned into court are proper evidence in an action on said obligation, provided they show the amount and evidence and that the party was bound to the state. Com. *v.* Emery, 2 Binn. (Pa.) 431. Where the minutes of the court contain no record of forfeiture such record cannot be supplied by parol testimony. State *v.* Doyle, 42 La. Ann. 640, 7 So. 699. But the magistrate's docket entry as to the time of an adjournment does not control the recitals in the bond, and parol evidence is admissible to show the real time fixed in the bond. State *v.* Burdick, 84 Iowa 626, 51 N. W. 67. On a motion to set aside the judgment on the ground of failure to enter on the minutes of the court an order for the special term, the county attorney may introduce a certified copy of the entry *nunc pro tunc* of an order showing that the special term had been legally entered, and such certified copy will also cure any defects in the proceedings. Harbolt *v.* State, 39 Tex. Crim. 129, 44 S. W. 1110.

The entry of the forfeiture stands for proof of all the steps necessary to complete the forfeiture, including the fact that the bail and defendant were duly called and did not appear and answer. Com. *v.* Fogelman, 3 Pa. Super. Ct. 566, 40 Wkly. Notes Cas. (Pa.) 17; Fox *v.* Com., 81* Pa. St. 511. So an entry "Recognizance forfeited" is conclusive that defendant and the bail were called and did not appear. Com. *v.* Basendorf, 153 Pa. St. 459, 25 Atl. 779. In the absence of journal entries showing defendant to have been present during the whole trial, sentence may be proven by parol. Moorehead *v.* State, 38 Kan. 489, 16 Pac. 957. See *infra*, III, O, 8, b, (II).

The indorsement by the clerk of the court into which a recognizance is returnable, showing its return and entry of record, is competent evidence of such facts. Com. *v.* Slocum, 14 Gray (Mass.) 395. But the clerk's certificate is not the only competent evidence of the filing of the recognizance in that court. Com. *v.* Merriam, 7 Allen (Mass.) 356.

Indorsement "approved" on an undertaking is not the only evidence by which approval may be shown. Ozeley *v.* State, 59 Ala. 94.

10. State *v.* Lighton, 4 Greene (Iowa) 278. But see Com. *v.* Dye, 7 Ky. L. Rep. 517.

Record of proceedings subsequent to forfeiture should be excluded. Com. *v.* Oblender, 135 Pa. St. 530, 19 Atl. 1057.

11. *Illinois.*— McNamara *v.* People, 183 Ill. 164, 55 N. E. 625; Welborn *v.* People, 76 Ill. 516 (record of taking recognizance imports verity and cannot be contradicted by pleas or parol evidence); Bulson *v.* People, 31 Ill. 409 (after recognizance has become of record the action of the magistrate cannot be impeached nor the proceedings assailed).

Iowa.— State *v.* Bryant, 55 Iowa 451, 8 N. W. 303; State *v.* Clemons, 9 Iowa 534; State *v.* Gorley, 2 Iowa 52.

Maine.— State *v.* Gilmore, 81 Me. 405, 16 Atl. 339, 17 Atl. 316.

Massachusetts.— Com. *v.* Slocum, 14 Gray (Mass.) 395. But if an agreed statement of facts show that the recognizance was not properly taken, the record ceases to be conclusive. Com. *v.* Greene, 13 Allen (Mass.) 251.

Ohio.— Calvin *v.* State, 12 Ohio St. 60.

Pennsylvania.—Com. *v.* Basendorf, 153 Pa. St. 459, 25 Atl. 779; Com. *v.* Burkholder, 3 Pa. Dist. 563; Pierson *v.* Com., 3 Grant (Pa.) 314.

Tennessee.—Barkley *v.* State, Meigs (Tenn.) 93, verity of recognizance filed in court of record cannot be questioned under a plea of *non est factum.*

United States.— U. S. *v.* Ambrose, 7 Fed. 554, evidence that the defendant was not called, nor his surety required to produce his body is incompetent to impeach the record.

See 5 Cent. Dig. tit. "Bail," § 403.

Physician's certificate is inadmissible to show that defendant was disabled by sickness, on appearance day, but defendant being appellant he cannot complain of such error. Price *v.* State, 4 Tex. App. 73. But see Baker *v.* State, 23 Tex. App. 657, 5 S. W. 130.

Written instructions by the district attorney to the sheriff to suspend proceedings are inadmissible where there is nothing therein to prevent postponement of the defendant's fine or his surrender. State *v.* Stewart, 74 Iowa 336, 37 N. W. 400.

If there is a surrender it may be proved by other evidence than the justice's certificate, he having failed to give the same. State *v.* Lambert, 44 W. Va. 308, 28 S. E. 930.

Sheriff's return in a capias may be contro-

(B) *Explaining Record.* But in certain cases extraneous proof and evidence explaining the record is admissible,[12] but it has been decided that a recognizance is a matter of record and cannot be aided by any parol evidence.[13]

c. Weight and Sufficiency. The proof may be sufficient to render the recognizors liable[14] without offering the indictment or showing that it was ever found;[15] but the bond or recognizance must be produced under a general denial.[16] Again, the recognizance and judgment of forfeiture are declared to be competent and sufficient evidence to authorize a judgment for the state.[17] But it has also been determined that a breach of the bond must be proven by evidence of the accused being called and neglecting to appear.[18]

verted as to arrest of accused, where such arrest operates to release the sureties. Gary *v.* State, 11 Tex. App. 527.

That accused's capture was not at defendant's instance, but to the contrary by circumstance tending to show such fact. Ayres *v.* People, 3 Colo. App. 117, 32 Pac. 77.

12. **Thus parol evidence is admissible** where there is a variance between the indictment and the capias and bail-bond (Welch *v.* State, 36 Ala. 277), or between the bond and scire facias (Allen *v.* People, 29 Ill. App. 555), or to show identity of the offense described in the recognizance with that in the statute (People *v.* Baughman, 18 Ill. 152), or to prove that both indictments, one being quashed, were for the same offense (State *v.* Clemons, 9 Iowa 534). So essential facts other than the undertaking may be proven by means other than the bond. Com. *v.* Pierce, 4 Ky. L. Rep. 247. Ambiguous words in the recognizance may be explained by surrounding circumstances. Colquitt *v.* Bond, 69 Ga. 351. That accused was released from custody by the execution of the bond may be proven by parol. Com. *v.* Perkins, 17 Ky. L. Rep. 542, 32 S. W. 134. Nor is it error to prove accused's discharge by parol. State *v.* Hays, 2 Oreg. 314.

Time of forfeiture of lost bond may be fixed by parol. State *v.* Burdick, 84 Iowa 626, 51 N. W. 67. Nor is it necessary to advertise the loss of the bond before giving evidence of its description. State *v.* Doyle, 42 La. Ann. 640, 7 So. 699.

Judicial notice will not be taken of the location of the court-house at which the principal was to appear. Vivian *v.* State, 16 Tex. App. 262. But judicial notice will be taken of the location of the jail, as showing that the recognizance was taken in the same county, one of the cognizors being confined in said jail. State Treasurer *v.* Bishop, 39 Vt. 353.

13. **Aiding recognizance by parol evidence.** — State Treasurer *v.* Merrill, 14 Vt. 64. See also Murphy *v.* Merry, 8 Blackf. (Ind.) 295; State *v.* Coppock, 79 Iowa 482, 44 N. W. 714. Nor is such evidence admissible to supply material parts of a recognizance not shown in the writing itself. State *v.* Crippen, 1 Ohio St. 399.

But the bond is not properly a part of the record of the scire facias proceedings (Smith *v.* State, 76 Miss. 728, 25 So. 491), unless made so by plea or bill of exceptions (Hendon *v.* State, 49 Ala. 380).

As to estoppel to deny jurisdiction see Kuhle *v.* People, 65 Ill. App. 378; State *v.* Dwyer, 70 Vt. 96, 39 Atl. 629.

14. **It is sufficient to prove** the information before the justice of the peace, the warrant and the return thereon of arrest, the record requiring bail and appearance, the bail-bond, and the record of the district court adjudging the default. State *v.* Coppock, 79 Iowa 482, 44 N. W. 714. So the statements in the order of commitment that accused was held for trial, that bail was required, and in default thereof was committed to jail are sufficient evidence of the proceedings of the examining court, it also appearing that the prisoner was arrested on a warrant by a police judge, but that there was no record of his examination or of any judgment. Dean *v.* Com., 1 Bush (Ky.) 20.

15. **Without aid of indictment.**—Kepley *v.* People, 123 Ill. 367, 13 N. E. 512; Mooney *v.* People, 81 Ill. 134; O'Brien *v.* People, 41 Ill. 456; Garrison *v.* People, 21 Ill. 535; Chumasero *v.* People, 18 Ill. 405; State *v.* Coppock, 79 Iowa 482, 44 N. W. 714. If the undertaking stipulates for appearance to answer the indictment but does not otherwise describe it, the state may, under the statute, supply by proof such deficiency. Vasser *v.* State, 32 Ala. 586.

16. **Production of bond or recognizance.**— Baker *v.* State, 21 Tex. App. 359, 17 S. W. 256. That the bond was produced before the judgment *nisi* does not dispense with its production on proceedings for final judgment. Hester *v.* State, 15 Tex. App. 418.

The bond is said to prove itself, and that its production proves its execution so that judgment may be entered. State *v.* Lewis, 7 La. Ann. 540. See also Gresham *v.* State, 48 Ala. 625. But a valid judgment can only be rendered on production of the bond in a form which proves itself, or on proof of execution. State *v.* Cooper, 3 La. Ann. 225.

17. **Recognizance and judgment of forfeiture.**— Cannon *v.* State, 17 Ark. 365; Peacock *v.* People, 83 Ill. 331 (under a plea of *nul tiel record*); People *v.* Witt, 19 Ill. 169. But that such bond and judgment must be proved see McWhorter *v.* State, 14 Tex. App. 239.

18. **Proof of breach of bond.**— Dillingham *v.* U. S., 2 Wash. (U. S.) 422, 7 Fed. Cas. No. 3,913; U. S. *v.* Rundlett, 2 Curt. (U. S.) 41, 27 Fed. Cas. No. 16,208, holding also that it is insufficient to prove the default outside of the record. As to minutes upon files being sufficient evidence of default see People *v.*

9. Judgment — a. In General. Jurisdiction is essential, for a valid judgment cannot be rendered against the sureties unless the court has power in the premises,[19] based upon some proper and legal notice or proceeding whereby they have an opportunity to be heard.[20] Again, while the issues involved should be determined, yet if the recitals support the final judgment they are sufficient, although not all the facts are set out in the record.[21] But a judgment rendered on facts not within the issues will be reversed,[22] although a judgment may be informal, but not erroneous.[23]

b. Joint or Several. Final judgment must be joint or several according to the liability of the parties.[24]

c. Against Part of Recognizors. Judgment may be taken against the sureties

Tuthill, 39 Mich. 262; People *v.* Gordon, 39 Mich. 259. That minutes of the court and judgment are sufficient evidence of the breach see State *v.* Fuller, 14 La. Ann. 726.

It is error to direct a verdict against plaintiff where there is evidence of execution of the bond and default of condition and forfeiture thereupon. State *v.* Burdick, 84 Iowa 626, 51 N. W. 67.

19. So the court cannot render judgment against sureties on a trial of accused on the merits, even though he and the state agreed to such trial. Huffman *v.* State, 23 Tex. App. 491, 5 S. W. 134.

20. Sureties must have a chance to appear and show cause why a judgment *nisi* should not be made absolute (Hunt *v.* State, 63 Ala. 196), and on motion to make a judgment *nisi* absolute the proceedings are summary (State *v.* Johnson, 12 La. 547); so where, after judgment *nisi* for non-appearance, if upon notice by scire facias to the sureties they defend the judgment against them it is valid (State *v.* Jones, 88 N. C. 683). A scire facias must be duly issued and served (Braxton *v.* Candler, 112 Ga. 459, 37 S. E. 710).

Court's power to render judgment for less than the amount of the bond can be exercised only on an admitted liability; it cannot be done on a plea of the general issue. State *v.* Connolly, 72 Conn. 607, 45 Atl. 432.

Judgment absolute upon scire facias may be rendered against sureties where they have had until the state case is called at next term to produce the principal and have failed to do so. Freeman *v.* State, 112 Ga. 648, 37 S. E. 886.

Time of rendition.— But if judgment *nisi* is to be made final at the succeeding term, and the court fails, it may be done at the next term, the law being merely directory. State *v.* Johnson, 12 La. 547.

21. Recital of facts.— Cantaline *v.* State, 33 Ala. 439; Richardson *v.* State, 31 Ala. 347; Farr *v.* State, 6 Ala. 794. As to description of amount and nature of undertaking see Smith *v.* State, 7 Port. (Ala.) 492.

Reasons for judgment, as that the bond was called and accused failed to appear, are sufficient on motion to enter it up against principal and sureties. State *v.* Gossin, 13 La. 96.

Variance.— The right exists to have a judgment entered according to the tenor of the recognizance, and not of the recitals of the writ, even though there is an agreement to take no advantage of a variance between such recognizance and scire facias. Briggs *v.* People, 13 Ill. App. 172.

Record of redocketing — Waiver of notice. — Judgment cannot be collaterally attacked after the case has been remanded, on the ground that the record does not show that the circuit court had ordered the case redocketed, or that the prisoner had not been notified of the intention to redocket it, where such record shows that the case was in fact redocketed, since, by appearing in court and entering into recognizance, the principal and his sureties waived notice and order. Quinn *v.* People, 146 Ill. 275, 34 N. E. 148 [*affirming* 45 Ill. App. 547].

22. Outside the issues.— State *v.* Connolly, 72 Conn. 607, 45 Atl. 432.

23. As that plaintiff recover instead of have execution. Fowler *v.* Com., 4 T. B. Mon. (Ky.) 128.

Judgment should be that plaintiff have execution.— Fowler *v.* Com., 4 T. B. Mon. (Ky.) 128; Davis *v.* Com., 4 T. B. Mon. (Ky.) 113. But it should be rendered to have execution according to the effect of the recognizance. Madison *v.* Com., 2 A. K. Marsh. (Ky.) 131.

Curing errors and defects.— A verdict on the general issue may cure defects in the petition in an action on the bond, even though no exception was taken thereto. McClellan *v.* State, 22 Tex. 405. So final judgment may correct a judgment *nisi* erroneously entered as to the amount. Sass *v.* State, 8 Tex. App. 426. But it is also decided that the state's counsel should amend and correct a judgment *nisi* before trial thereon, and that it is too late after verdict and judgment for defendant. Robertson *v.* State, 14 Tex. App. 211.

24. Howie *v.* State, 1 Ala. 113; Caldwell *v.* Com., 14 Gratt. (Va.) 698. And one judgment and one execution may be rendered against a plurality of cognizors. State *v.* Stout, 11 N. J. L. 124.

Several judgments nisi may be entered and prosecuted to final judgment upon a joint and several recognizance. Brewer *v.* State, 6 Lea (Tenn.) 198.

A joint scire facias may be maintained on a several recognizance. Madison *v.* Com., 2 A. K. Marsh. (Ky.) 131. But see *supra*, III, O, 3.

alone on a forfeited bail-bond,[25] or be rendered against a part only of the sureties, continuing the case as to the others,[26] or silently discontinuing it as to them.[27]

d. Amount and Extent of Liability — (I) *In General.* Judgment against bail may be rendered to the full amount of the penalty, but not for a larger sum, although a recovery may be had for a part thereof, where the statute permits;[28] but this does not include the full amount of the bond against each, where the principal and sureties are jointly and severally bound.[29] The judgment may, however, charge each recognizor to the extent of his liability.[30]

(II) *Interest and Costs.* Interest is allowed on recognizances from the time of forfeiture.[31] But it is decided that costs of the criminal proceedings are not taxable upon scire facias against the sureties.[32] The defendant in scire facias may, however, be entitled to costs if he prevails.[33]

10. Proceedings After Judgment — a. Arrest or Vacation of Judgment. Sureties have the right, without limitation to statutory grounds, to move to set aside the judgment forfeiting an appearance bond and condemning them in the

25. And so although the principal has not been summoned. Madison *v.* Com., 2 A. K. Marsh. (Ky.) 131. Or where the principal cannot be found. Thompson *v.* State, (Miss. 1890) 7 So. 403; Marx *v.* State, 61 Miss. 478; Saffold *v.* State, 60 Miss. 928. *Contra*, Brown *v.* State, 40 Tex. 49; Blalock *v.* State, 35 Tex. 89.

26. Continuance as to some.— Fowler *v.* Com., 4 T. B. Mon. (Ky.) 128, a case of recognizance by several.

27. Silent discontinuance.— And so even though all the recognizors are served. Robinson *v.* State, 5 Ala. 706. And service upon one of several sureties is sufficient as to him, although others are not found. People *v.* Mellor, 2 Colo. 705; Chase *v.* People, 2 Colo. 528.

So the court may dismiss the other sureties and proceed against the surety served (Marx *v.* State, 61 Miss. 478), and judgment may be rendered against one surety and the principal and in favor of the other surety (Ray *v.* State, 16 Tex. App. 268).

Where the recognizance is joint and several, judgment may be rendered only against those sureties served. Stokes *v.* People, 63 Ill. 489; Wheeler *v.* People, 39 Ill. 430; Mussulman *v.* People, 15 Ill. 51; McFarlan *v.* People, 13 Ill. 9; Passfield *v.* People, 8 Ill. 406; Sans *v.* People, 8 Ill. 327.

But there must be a dismissal or discontinuance or disposal, or notice of the other's case. Smith *v.* State, 12 Nebr. 309, 11 N. W. 317; Brown *v.* State, 40 Tex. 49; Thompson *v.* State, 17 Tex. App. 318; Stephenson *v.* State, 9 Tex. App. 459; Walter *v.* State, 6 Tex. App. 254.

28. *Alabama.*— Cain *v.* State, 55 Ala. 170 (or for any part thereof); Badger *v.* State, 5 Ala. 21 (even though said penalty exceed the forfeiture which the law imposes); State *v.* Hinson, 4 Ala. 671 (but not for a greater sum).

Connecticut.—Colt *v.* Eaton, 1 Root (Conn.) 524, recognizance may be chancered on scire facias.

Iowa.— State *v.* Hirronemus, 50 Iowa 545, amount is the penalty and not the fine and costs.

Kentucky.— Com. *v.* Thornton, 1 Metc. (Ky.) 380, statute providing for judgment for part is constitutional.

Michigan.— People *v.* Hanaw, 106 Mich. 421, 64 N. W. 328.

Tennessee.— State *v.* Austin, 4 Humphr. (Tenn.) 213, the whole amount of penalty or nothing, and if penalty is for too much recovery is void.

Texas.— Hodges *v.* State, 20 Tex. 493, not liable beyond penalty though recital is that bond is greater.

See 5 Cent. Dig. tit. "Bail," § 411.

29. Ishmael *v.* State, 41 Tex. 244; Thomas *v.* State, 13 Tex. App. 496. Nor can there be a recovery for double the sum set against each, namely, the principal and surety. Dean *v.* State, 2 Sm. & M. (Miss.) 200.

30. Smith *v.* State, 7 Port. (Ala.) 492.

31. From time of forfeiture.— Swerdsfeger *v.* State, 21 Kan. 475; State *v.* Frazier, 52 La. Ann. 1305, 27 So. 799 (from the date of the judgment of forfeiture); Kinney *v.* State, 14 Ohio Cir. Ct. 91, 7 Ohio Cir. Dec. 97. *Contra*, People *v.* Hanaw, 106 Mich. 421, 64 N. W. 328.

32. Costs of criminal prosecution.— Cade *v.* Gordon, 88 Ga. 461, 14 S. E. 706 (and a motion to retax or exclude them should be granted); People *v.* Phelps, 17 Ill. 200 (cost on a capias to apprehend and surrender the principal excluded). And the judgment should not be for the fine and costs imposed. State *v.* Hirronemus, 50 Iowa 545.

Against surety for costs and against principal for penalty and costs cannot stand. People *v.* McFarland, 9 Ill. App. 275. But *compare* State *v.* Homey, 44 Wis. 615.

Particular instances.— It is irregular to tax an attorney's fee and the county tax upon a judgment *nisi* on a recognizance when the judgment is afterward, at the same term, set aside on condition that all costs be paid. Weissinger *v.* State, 11 Ala. 540. But the surety on an appearance bond against whom judgment is rendered for the amount thereof is liable for costs in the action thereon, since they follow the judgment by operation of law. State *v.* Beebee, 87 Iowa 636, 54 N. W. 479.

33. Defendant's costs.— Com. *v.* Stebbins, 4 Gray (Mass.) 25.

amount thereof. If the motion comes too late the objection should be made as a ground of defense thereto rather than in opposition to filing or hearing the same.[34] So a motion may be made in arrest of judgment for insufficiency of description of the defense in the recognizance.[35] But an omission to state therein that the principal was a party is not available on such a motion.[36]

b. Execution.[37] A recognizance is an obligation of record, and when forfeiture is declared and entered by the court it becomes a judgment enforceable by execution.[38] But execution must be had according to the form, force, and effect of the recognizance itself.[39]

c. Payment or Satisfaction. Property transferred to indemnify sureties cannot be applied in satisfaction of the penalty.[40]

d. Review — (i) *Nature and Form of Remedy.* Although a writ of error will lie from a judgment in scire facias on a forfeited bail-bond notwithstanding such cases are criminal in their nature,[41] and while it is decided that proceedings on appeal from such judgment are governed by the rules relating to civil actions,[42] and that an appeal from a judgment against the sheriff for money collected on a forfeited bail-bond lies to the court of civil appeals,[43] yet it is also determined that appeals must be taken in conformity with the criminal statute relating thereto.[44] The form of the final judgment

34. State *v.* Hayes, 104 La. 461, 29 So. 22.

Remission by governor of forfeiture and judgment except "fees and costs" is no ground for setting aside judgment. Brown *v.* Com., 4 Metc. (Ky.) 221.

Variance in christian name may not constitute sufficient grounds for granting motion by recognizors to set aside the judgment against them. Tolison *v.* State, 39 Ala. 103.

35. Sively *v.* State, 44 Tex. 274.

36. People *v.* Dennis, 4 Mich. 609, 69 Am. Dec. 338.

37. **Stay of execution** will not be granted defendant in a judgment on a forfeited recognizance where bail is a debt due the state. Com. *v.* Markert, 4 Pa. Dist. 520.

Motion for judgment against the sheriff who has failed to pay in to the proper county the moneys collected on an execution issued upon a judgment rendered upon a forfeited recognizance is the proper remedy; and the district attorney for the state may prosecute such motion, and the judgment is properly rendered for the use of the county where the motion shows upon its face that it is so made and the action thereon is civil and not criminal and this applies to the appeal. Russell *v.* State, (Tex. Civ. App. 1897) 40 S. W. 69.

38. Schultze *v.* State, 43 Md. 295, holding also that such execution may be issued to another county other than that of rendition of judgment.

Verdict on scire facias, upon a common recognizance for appearance, which finds the issue for plaintiff, authorizes an award of execution. Mix *v.* People, 29 Ill. 196.

39. Farris *v.* People, 58 Ill. 26.

Principle applies to a several recognizance in that the execution must be several (Farris *v.* People, 58 Ill. 26), and a separate execution may issue against each of two cognizors for the amount of the obligation (Minor *v.* State, 1 Blackf. (Ind.) 236).

Execution against part of the cognizors may be awarded where the nature of the recognizance is several and not joint. Adair *v.* State, 1 Blackf. (Ind.) 200. See also State *v.* Woerner, 33 Mo. 216.

Execution against cognizor not served cannot be awarded except upon two returns not found to writs of scire facias against him. Graham *v.* State, 7 Blackf. (Ind.) 313.

40. People *v.* Skidmore, 17 Cal. 260.

Compromise after final judgment on a forfeited bail-bond cannot be made in settlement by the prosecuting attorney. Dunkin *v.* Hodge, 46 Ala. 523; Whittington *v.* Ross, 8 Ill. App. 234.

Surety indemnified is not liable as garnishee. Holker *v.* Hennessy, 143 Mo. 80, 44 S. W. 794, 65 Am. St. Rep. 642.

41. State *v.* Arrington, 13 Tex. App. 611; Houston *v.* State, 13 Tex. App. 560; Hart *v.* State, 13 Tex. App. 555.

Writ of error and not appeal lies to a judgment of the common pleas. Com. *v.* Rhoads, 9 Pa. St. 488.

42. Com. *v.* Hughes, 13 Bush (Ky.) 349; Brauner *v.* Com., 7 Ky. L. Rep. 228; Mayer *v.* State, (Tex. Crim. 1893) 24 S. W. 408. See further as to civil nature of bond Louisinana Prevention Cruelty to Children Soc. *v.* Cage, 45 La. Ann. 1394, 14 So. 422; State *v.* Hendricks, 40 La. Ann. 719, 722, 5 So. 24.

Appeal from judgment on forfeiture of bail see Appeal and Error, III, C, 2, r, [2 Cyc. 548].

Review of proceedings in arrest and bail see Appeal and Error, 3 Cyc. 227, note 74.

Under Ind. Rev. Stat. (1881), § 1722, on forfeiture of bail in criminal cases, the prosecuting attorney must sue the sureties in a civil action. McGuire *v.* State, 119 Ind. 499, 21 N. E. 1100.

43. Russell *v.* State, (Tex. Civ. App. 1897) 40 S. W. 69.

44. State *v.* Alexander, 46 La. Ann. 550, 15 So. 361; State *v.* Toups, 44 La. Ann. 896, 11 So. 524. So an action to enforce a recog-

may, however, affect subsequent proceedings in respect to their joint or several character.[45]

(II) *Decisions Reviewable.* No appeal lies from an order of forfeiture which is not a final judgment,[46] nor from a judgment refusing to remit a forfeited recognizance,[47] nor from a rule issued against accused and his sureties to show cause why the bail-bond should not be escheated;[48] although a writ of error lies to the supreme court on a judgment final on a recognizance,[49] and sureties may obtain a review by appeal of a judgment summarily entered under the statute.[50]

(III) *Assignment of Errors, Record, Bill of Exceptions, etc.* The record should fully and fairly present the issues between the appellant and appellee, and should, excluding those matters which are immaterial and irrelevant, sufficiently and explicitly set forth such of them as are legally necessary to apprise the appellate court of the questions before it. Matters not properly made part of such record will ordinarily not be considered, although the court has not adhered strictly to this rule, for in its application the material grounds relied on upon review are entitled to consideration.[51]

nizance is a continuation of the criminal proceeding, and appeal lies from judgment. State *v.* Hoeffner, 137 Mo. 612, 38 S. W. 1109.

Appeal or certiorari and not injunction is proper remedy for review of irregularities on forfeiture of bond by justice of the peace. Garner *v.* Smith, 40 Tex. 505. So remedy is by appeal and not an action to annul a judgment in case of invalidity of bond. Taliaferro *v.* Steele, 14 La. Ann. 656.

New trial to state will not be granted where the judgment is in favor of the defendant in a suit on a forfeited bond, as the action is thereby finally terminated. Robertson *v.* State, 14 Tex. App. 211; Perry *v.* State, 14 Tex. App. 166; Gary *v.* State, 11 Tex. App. 527.

State cannot appeal in scire facias cases under a constitutional inhibition as to appeal by it in criminal cases. State *v.* Ward, 9 Tex. App. 462.

45. Howie *v.* State, 1 Ala. 113. See Com. *v.* Teevens, 141 Mass. 577, 6 N. E. 756, as to final judgment.

46. McGuire *v.* State, 119 Ind. 449, 21 N. E. 1100.

Final judgment in state court is not reviewable in United States court on writ of error, and where the state court holds that bail may be indemnified by bond and mortgage given by a cosurety and that such indemnity is not against public policy no federal question is involved and proceedings in removal afford no ground for a writ of error. Nelson *v.* Moloney, 174 U. S. 164, 19 S. Ct. 622, 43 L. ed. 934 [*dismissing* writ in Moloney *v.* Nelson, 158 N. Y. 351, 53 N. E. 31 (*affirming* 12 N. Y. App. Div. 545, 42 N. Y. Suppl. 418, *affirming* 16 Misc. (N. Y.) 474, 39 N. Y. Suppl. 930)]. See further upon indemnity and liability Conley *v.* Buck, 100 Ga. 187, 28 S. E. 97.

47. Com. *v.* Oblender, 135 Pa. St. 536, 19 Atl. 1057, judgment was of the court of quarter sessions.

48 State *v.* McNinch, 13 S. C. 452.

49. Hill *v.* State, 27 Tex. 608.

50. State *v.* Brady, 62 Wis. 129, 22 N. W. 154.

51. **Applications of rule.**— A recognizance copied into the transcript, but not made part of the record by exceptions or appropriate reference, is not properly before the court. Cantaline *v.* State, 33 Ala. 439. So the recognizance, indictment, and preliminary affidavit and warrant are not a part of the record, so as to dispense with their identification as evidence offered on the trial. Colquitt *v.* Solomon, 61 Ga. 492. And briefs on demurrer and motion to quash, coupled with affidavits of the parties incorporated in the record, but not in the bill of exceptions, are no part of the record, and will not be considered. McNamara *v.* People, 183 Ill. 164, 55 N. E. 625. Again, the record must show non-appearance of defendant warranting a forfeiture, otherwise it is fatally defective. State *v.* Murphy, 23 Nev. 390, 48 Pac. 628. But a judgment may be reversed on the ground that the record does not show that the bond was accepted pursuant to the order of a competent judge, although there is no bill of exceptions or assignments of errors, such reversal not being made upon a review of the sufficiency of the evidence. State *v.* Toups, 44 La. Ann. 896, 11 So. 524. And the appellate court will not assume that the trial court had no recognizance before it from the mere fact that such an instrument copied in full does not appear in the transcript when the record shows that such recognizance was executed and lodged in the office of the clerk of the court below. State *v.* Riley, 34 Mo. App. 426. Again, error on the ground of variance between the bond and scire facias cannot be predicated, as the bond is not properly a part of the record (Smith *v.* State, 76 Miss. 728, 25 So. 491), and proceedings of the examining court constituting the basis of the action and read as evidence by the state will not be considered when not incorporated in the bill of exceptions or identified by order of court (Brauner *v.* Com., 7 Ky. L. Rep. 228).

Co-cognizor — Error cannot be assigned for failure of court to dispose of case as to cocognizors. Mussulman *v.* People, 15 Ill. 51.

Affirmance and reversal — Record.— There

(iv) *Filing Transcript, Briefs, etc.* The transcript,[52] assignment of errors,[53] and briefs on appeal must be prepared for submission and filed in accordance with, and at the time specified by, the statute or rules of court.[54]

(v) *Objections, Defenses, and Questions Not Raised Below.* It is a general rule that the court will not, on appeal, consider for the first time objections, defenses, or questions which should have been raised below.[55]

(vi) *Decision.* The appellate court has power, on appeal, without remand, to reform an error of judgment as to the amount recoverable[56] or to correct an error of the final judgment which is repugnant to the judgment *nisi*.[57]

P. Disposition of Proceeds. The existence or non-existence of constitutional or statutory provisions is of primary importance in determining the right to moneys collected upon a forfeited bail-bond or recognizance. Therefore, such moneys have been variously determined to belong to the state;[58] the county;[59] the library fund of the county;[60] and the school fund of the county;[61] and the

can be no affirmance of a judgment of forfeiture of bail merely on a certificate taken out by the state in the absence of a transcript of the proceeding in the record. State *v.* Lowry, 29 Ala. 44. But judgment will be reversed where the forfeiture is upon a bond which mentions no offense for which the accused is answerable and the record fails to show any indictment. State *v.* Derosier, 14 La. Ann. 736.

52. Hollenbeck *v.* State, (Tex. Crim. 1899) 51 S. W. 373.

53. Com. *v.* Hughes, 13 Bush (Ky.) 349.

54. Mayer *v.* State, (Tex. Crim. 1893) 24 S. W. 408.

55. **Illustrations.**— That the obligors did not execute the bond should have been pleaded and proved below. Gresham *v.* State, 48 Ala. 625. So defects in the writ cannot be questioned on appeal. McNamara *v.* People, 183 Ill. 164, 55 N. E. 625. And the question cannot be first raised on appeal that the record did not show that the indictment was returned into open court by the grand jury (Huggins *v.* People, 39 Ill. 241), or that there was no order admitting defendant to bail, fixing the amount thereof, or committing him for trial is not available (State *v.* Herpin, 26 La. Ann. 612). So a variance between the scire facias and recognizance as to the term to answer cannot be reached by writ of error. Ditto *v.* State, 30 Miss. 126. And verdict "for the amount due on the bond" not excepted to nor made the basis for a motion for new trial is sufficient. Calvin *v.* State, 12 Ohio St. 60. Nor can the principal urge on appeal that he had no notice of the state's intention to amend judgment *nisi* and scire facias as to recital. Sims *v.* State, (Tex. Crim. 1900) 55 S. W. 179. And alleged error in introduction of bond, reciting filing of indictment on erroneous date, is not reviewable. Blain *v.* State, 34 Tex. Crim. 417, 31 S. W. 366. Nor will it be first considered on appeal that judgment *nisi* was invalid. Watkins *v.* State, 16 Tex. App. 646.

Exceptions to rule.— Defendant sued on appearance bond in name of state may urge for first time on appeal that state took nothing by the forfeiture. State *v.* Desforges, 5 Rob. (La.) 253.

56. Carr *v.* State, 9 Tex. App. 463.

57. Robinson *v.* State, 11 Tex. App. 309.

Reversal where defects are amendable.— Where the statute so provides the judgment will not be reversed for any defects or imperfections in matter of form which are amendable by law. Wingate *v.* Com., 5 Cush. (Mass.) 446.

58. **To the state.**— Com. *v.* Shick, 61 Pa. St. 495.

59. **To the county.**—State *v.* Miles, 52 Wis. 488, 9 N. W. 403. See also State *v.* Newson, 8 S. D. 327, 66 N. W. 468; State *v.* Wettstein, 64 Wis. 234, 25 N. W. 34. *Compare* Galveston County *v.* Noble, 56 Tex. 575, to the effect that the funds belong to the county which has borne the burden of keeping prisoner bailed.

The county to which venue is changed is entitled (Rock Island County *v.* Mercer County, 24 Ill. 35; Decatur County *v.* Maxwell, 26 Iowa 398) where the judgment is rendered in said county on a recognizance there given (Russell *v.* State, (Tex. Civ. App. 1897) 40 S. W. 69). And this last statement especially applies where there is no statute requiring payment to the county where the indictment is found (State *v.* Speice, 24 Nebr. 386, 38 N. W. 837). Again under the code of Iowa, Code (1873), § 3370, the county where the forfeiture occurred after change of venue is entitled to said proceeds. Lucas County *v.* Wilson, 61 Iowa 141, 16 N. W. 60.

60. **To the library fund of the county.**— People *v.* Wayne County, 8 Mich. 392. But the taxable costs should be kept separate, nor should there be any deduction for expenses of collection. People *v.* Wayne County, 8 Mich. 392.

61. **To the school fund of the county.**— State *v.* June, (Kan. 1901) 64 Pac. 983, holding that upon appeal and affirmance of judgment and forfeiture for failure to surrender as ordered to the sheriff of the county in which conviction was had, the forfeiture inures to the benefit of such county and not of another county in which the supreme court was sitting. See also Shelby County *v.* Simmonds, 33 Iowa 345.

Entry of default does not operate to transfer the money to the school fund, but where the default has been set aside, though at a subsequent term, the forfeiture may be discharged and the money returned (Code (1873),

commonwealth or county attorney may be entitled by statute to a specified percentage of judgments on forfeited recognizances,[62] although an informer is entitled to no part of the money received on such forfeiture, as it is not a fine,[63] nor are escheated recognizances within charter provisions of a town covering fines, amercements, forfeited issues, and the like.[64]

BAILABLE. Admitting of bail; allowing or providing for release upon bail.[1]

BAIL-BOND. See BAIL.

BAIL COURT. An auxiliary of the court of queen's bench, which heard and determined ordinary matters and disposed of common motions. It was sometimes called the practice court.[2]

BAILEE. See BAILMENTS.

BAILIFF. An officer concerned in the administration of justice of a certain province;[3] an under or deputy sheriff;[4] a tipstaff;[5] a keeper or protector;[6] a servant who has the administration and charge of lands, goods, and chattels, to make the best benefit for the owner;[7] a person appointed by private persons to collect their rents and manage their estates.[8] (Bailiff: In General, see SHERIFFS AND CONSTABLES. Of Property Levied on — Under Attachment, see ATTACHMENT; Under Execution, see EXECUTIONS. Remedy Against Defendant as Bailiff, see ACCOUNTS AND ACCOUNTING.)

BAILIWICK. The district or jurisdiction of a bailiff or sheriff;[9] a county of which the sheriff is bailiff.[10]

§§ 4596–8, 4600). Arquette *v.* Marshall County, 75 Iowa 191, 39 N. W. 264.

Repayment.— Under the constitution and statutes moneys collected upon a forfeited bail-bond after reversal of judgment are not part of the irreducible school fund of the state, and the county is responsible for repayment and the obligation to restore said money is enforceable in an action against said county. Metschan *v.* Hyde, 36 Oreg. 117, 58 Pac. 80.

62. Percentage to commonwealth's attorney.— Williams *v.* Shelbourne, 102 Ky. 579, 19 Ky. L. Rep. 1924, 44 S. W. 110; Arnsparger *v.* Norman, 101 Ky. 208, 19 Ky. L. Rep. 381, 40 S. W. 574; Stone *v.* Riddell, 5 Bush (Ky.) 349; Fultz *v.* Crofton, 19 Ky. L. Rep. 1921, 42 S. W. 841. See State *v.* Beebee, 87 Iowa 636, 54 N. W. 479.

63. U. S. *v.* Fanjul, 1 Lowell (U. S.) 117, 25 Fed. Cas. No. 15,069.

64. Matter of Nottingham, [1897] 2 Q. B. 502, 61 J. P. 725, 66 L. J. Q. B. 833, 77 L. T. Rep. N. S. 210.

1. Anderson L. Dict.

2. Wharton L. Lex.

3. Coke Litt. 168*b*.

4. Nicholson *v.* State, 38 Fla. 99, 102, 20 So. 818 [*citing* 1 Bacon Abr. tit. Bailiff].

5. Anderson L. Dict.

6. Nicholson *v.* State, 38 Fla. 99, 102, 20 So. 818 [*citing* 1 Bacon Abr. tit. Bailiff].

7. Coke Litt. 172*a* [*quoted* in Barnum *v.* Landon, 25 Conn. 137, 149; Huff *v.* McDonald, 22 Ga. 131, 161, 68 Am. Dec. 487; Bredin *v.* Kingland, 4 Watts (Pa.) 420, 422].

8. Elwell *v.* Burnside, 44 Barb. (N. Y.) 447, 453 [*citing* Bouvier L. Dict.].

9. Burrill L. Dict.

10. 1 Bl. Comm. 344.

BAILMENTS

By George H. Bates

CROSS-REFERENCES

For Matters Relating to:
Agistment, see ANIMALS,
Carriers of Goods, see CARRIERS; SHIPPING.
Commission Merchants, see FACTORS AND BROKERS.
Conditional Sales, see SALES.
Confusion of Goods, see CONFUSION OF GOODS.
Consignments to Factors For Sale, see FACTORS AND BROKERS.
Delivery of Logs For Manufacture, see LOGGING.
Depositaries, see DEPOSITARIES.
Deposits:
For Collateral Security, see PLEDGES.
In Bank, see BANKS AND BANKING.
Embezzlement by Bailee, see EMBEZZLEMENT.
Factors, see FACTORS AND BROKERS.
Finding Lost Goods, see FINDING LOST GOODS.
Hire and Use of Animals, see ANIMALS.
Increase of Hired Animals, see ANIMALS.
Innkeepers, see INNKEEPERS.
Larceny by Bailee, see LARCENY.
Livery-Stable Keepers, see LIVERY-STABLE KEEPERS.
Pawnbrokers, see PAWNBROKERS.
Pledges, see PLEDGES.
Receiptors or Bailees of Attached Property, see ATTACHMENT.
Safe-Deposit Companies, see DEPOSITARIES.
Stake-Holders, see GAMING.
Warehousemen, see WAREHOUSEMEN.
Wharfingers, see WHARVES.

I. TERMINOLOGY.[1]

A. Bailment. A bailment may be defined as a delivery of personalty[2] for

1. **Comprehensive character of terms.**—The words "bailment," "bailor," and "bailee" are of very large signification, and when employed in a private writing, a verbal contract, or a statute their real meaning can be ascertained only by reference to the subject-matter, and the circumstances attending their employment.

Alabama.— Watson *v.* State, 70 Ala. 13, 45 Am. Rep. 70.

California.— People *v.* Poggi, 19 Cal. 600; People *v.* Cohen, 8 Cal. 42.

Oregon.— State *v.* Chew Muck You, 20 Oreg. 215, 25 Pac. 355.

Pennsylvania.— Krause *v.* Com., 93 Pa. St. 418, 39 Am. Rep. 762; Com. *v.* Chathams, 50 Pa. St. 181, 88 Am. Dec. 539.

England.— Reg. *v.* Garrett, 8 Cox C. C. 368, 2 F. & F. 14; Reg. *v.* Hoare, 1 F. & F. 647; Reg. *v.* Hassall, 8 Cox C. C. 491, 7 Jur. N. S. 1064, L. & C. 58, 30 L. J. M. C. 175, 4 L. T. Rep. N. S. 561, 9 Wkly. Rep. 708; Reg. *v.* Loose, Bell C. C. 259, 8 Cox C. C. 302, 6 Jur. N. S. 513, 29 L. J. M. C. 132, 2 L. T. Rep. N. S. 254, 8 Wkly. Rep. 422.

The words are derived from the French *bailler*,— to deliver. 2 Bl. Comm. 451 [*cited* in Todd *v.* Figley, 7 Watts (Pa.) 542].

2. **It has been said that real property may be bailed** where the bailment is in the nature

some particular purpose, or on mere deposit, upon a contract,[3] express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.[4]

B. Bailor and Bailee. The person who delivers a personal chattel or chattels to another under circumstances coming within the definition of the term bailment is called the bailor, and the person to whom such chattel or chattels have been delivered is called the bailee.[5]

II. CLASSIFICATION.

A. In General. There are several kinds of bailments involving different rights and duties upon the part of the bailor and bailee:[6] (1) the *depositum*, which is where the thing bailed is delivered by the bailor to the bailee to keep for the use of the former without any recompense; (2) the *mandatum*, which occurs where the subject of the bailment is to have something done to it by the bailee without recompense; (3) the *commodatum*, which takes place when the bailee may use or borrow what is bailed without paying for such use or loan; (4) the *pignori acceptum* or pledge of what is bailed for the mutual benefit of bailor and bailee;

of a *pignus*. Glanville, lib. 10, c. 1, p. 19 [*cited* in Cortelyou *v.* Lansing, 2 Cai. Cas. (N. Y.) 200]. So in the civil law it seems that real property may be the subject of a bailment. Schouler Bailm. § 31.

3. Bailment not always accompanied by contract.— It has been said that a bailment may exist without any contract, and that in the absence of a contract the law imposes duties which the bailee cannot neglect without liability, and which do not depend upon the existence of any contract. State *v.* Chew Muck You, 20 Oreg. 215, 25 Pac. 355. See also Schouler Bailm. § 9.

4. Burrill L. Dict. See also Knapp, etc., Co. *v.* McCaffrey, 178 Ill. 107, 52 N. E. 898, 69 Am. St. Rep. 290 [*affirming* 74 Ill. App. 80]; Phelps *v.* People, 72 N. Y. 334; State *v.* Chew Muck You, 20 Oreg. 215, 25 Pac. 355; Krause *v.* Com., 93 Pa. St. 418, 39 Am. Rep. 762; Trunick *v.* Smith, 63 Pa. St. 18.

Other definitions are: "A delivery of goods in possession, and is either to keep or employ." Finch Law, bk. 2, c. 18 [*quoted* in Fletcher *v.* Ingram, 46 Wis. 191, 202, 50 N. W. 424].

"A delivery of goods, in trust, on a contract, express or implied, that the trust shall be duly executed, and the goods re-delivered as soon as the time or use for which they were bailed shall have elapsed, or be performed." Jones Bailm. 117 [*quoted* in Baren *v.* Cain, 15 Ill. App. 387, 388; Krause *v.* Com., 93 Pa. St. 418, 420, 39 Am. Rep. 762].

"A delivery of goods in trust, upon a contract, express or implied, that the trust shall be executed, and the goods returned by the bailee, as soon as the purposes of the bailment shall be answered." 2 Kent Comm. 559 [*quoted* in Watson *v.* State, 70 Ala. 13, 14, 45 Am. Rep. 70; Krause *v.* Com., 93 Pa. St. 418, 420, 39 Am. Rep. 762; Com. *v.* Maher, 11 Phila. (Pa.) 425, 33 Leg. Int. (Pa.) 22].

"A delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust." Story Bailm. § 2 [*quoted* in Watson *v.* State, 70 Ala. 13, 14, 45 Am. Rep. 70; Krause *v.* Com., 93 Pa. St. 418, 420, 39 Am. Rep. 762].

"A delivery of goods or property for the execution of a special object, beneficial either to the bailor or bailee, or both; and upon a contract, expressed or implied, to carry out this object, and dispose of the property in conformity with the purpose of the trust." Ga. Code, § 2058 [*quoted* in Cabaniss *v.* Ponder, 65 Ga. 134, 138].

See also Bishop Stat. Crimes, § 423 [*quoted* in State *v.* Chew Muck You, 20 Oreg. 215, 218, 25 Pac. 355], to the effect that "a bailment takes place where an article of personal property is put into the hands of one for a special purpose, and it is to be returned by the bailee to the bailor or delivered to some third person when the object of the trust is accomplished."

Distinction between definitions.—Although the definitions agree in nearly all essential particulars, they disagree in two or three respects. Some of them assume that no contract is a bailment unless the specific property delivered is to be returned, while others assume that a contract is a bailment, although it does not contemplate a return of such property. Edwards Bailm. § 2 [*cited* in Krause *v.* Com., 93 Pa. St. 418, 39 Am. Rep. 762].

History of the law of bailments.— The principles of the English law of bailments are founded upon the civil law, and were first tersely expounded by Holt, C. J., in the leading case of Coggs *v.* Bernard, 2 Ld. Raym. 909, 1 Smith Lead. Cas. 354.

5. Anderson L. Dict.; Finch Law, bk. 2, c. 18; Wharton L. Lex.; Phelps *v.* People, 72 N. Y. 334.

6. Watson *v.* State, 70 Ala. 13, 45 Am. Rep. 70.

Rights and duties of bailor and bailee see *infra*, V.

(5) the *locatum*, or hiring, which is always for a reward.[7] This classification, however, is generally supplanted by a division with reference to compensation, under which bailments are divided into three kinds only: (1) bailments for the benefit of both parties; (2) bailments for the sole benefit of the bailor; (3) bailments for the sole benefit of the bailee.[8]

B. Bailments For Mutual Benefit. Under the head of bailments for the benefit of bailor and bailee are found the pledge,[9] and the *locatum* or what is denominated generally as a bailment for hire.[10] The latter comprises four distinct classes,[11] viz., the hire of a thing, or *locatio rei*, by which the hirer gains the temporary use thereof;[12] the hire of services on or about a thing, or *locatio operis faciendi*, when work and labor or care and pains are to be performed or bestowed on the thing delivered;[13] the hiring of the carriage of things, or *locatio*

7. Jones Bailm. 36 [*cited* in Todd *v.* Figley, 7 Watts (Pa.) 542].

Bailments are divided by Holt, C. J., into six classes, viz., *depositum*, *commodatum*, *locatio et conductio*, pledge, the carriage of or service about goods for reward, and the carriage of or service about them *gratis*. Coggs *v.* Bernard, 2 Ld. Raym. 909, 1 Smith Lead. Cas. 354.

8. Neel *v.* State, 33 Tex. Crim. 408, 26 S. W. 726. See also Schouler Bailm. § 14; Story Bailm. § 140.

9. **As to pledges, generally,** see PLEDGES.

10. Schouler Bailm. § 14.

Statutory definition of contract for hire.— A contract for hire is one whereby "one person grants to another the enjoyment of a thing, or the use of the labor and industry, either of himself or servant, during a certain time for a stipulated compensation." Ga. Code, § 2085 [*quoted* in Cabaniss *v.* Ponder, 65 Ga. 134, 139].

11. **Another classification.**— Contracts of hiring are of two kinds: (1) where the hirer gains a temporary use of the thing; (2) where something is to be done to the thing delivered. Neel *v.* State, 33 Tex. Crim. 408, 26 S. W. 726.

12. *Iowa.*— Nye *v.* Iowa City Alcohol Works, 51 Iowa 129, 50 N. W. 988, 33 Am. Rep. 121.

Massachusetts.— Spafford *v.* Dodge, 14 Mass. 66.

New Hampshire.— Sanborn *v.* Colman, 6 N. H. 14, 23 Am. Dec. 703.

New York.— Young *v.* Leary, 135 N. Y. 569, 32 N. E. 607, 49 N. Y. St. 93; Chamberlain *v.* Pratt, 33 N. Y. 47; Hyland *v.* Paul, 33 Barb. (N. Y.) 241; Ames *v.* Belden, 17 Barb. (N. Y.) 513; Zule *v.* Zule, 24 Wend. (N. Y.) 76, 35 Am. Dec. 600; Seymour *v.* Brown, 19 Johns. (N. Y.) 44.

North Carolina.— Maxwell *v.* Houston, 67 N. C. 305.

United States.—Ward *v.* Thompson, Newb. Adm. 95, 29 Fed. Cas. No. 17,162.

England.— Coggs *v.* Bernard, 2 Ld. Raym. 909, 1 Smith Lead. Cas. 354.

Option to purchase property.—A hiring of personalty for a specific term is not the less a bailment because the hirer has an option to purchase the property before the expiration of the term. Hunt *v.* Wyman, 100 Mass. 198; Bailey *v.* Colby, 34 N. H. 29, 66 Am. Dec. 752; Collins *v.* Bellefonte Cent. R. Co., 171 Pa. St. 243, 33 Atl. 331.

A loan where the lender gains a benefit therefrom as well as the borrower is a bailment of this class. Francis *v.* Shrader, 67 Ill. 272; Chamberlin *v.* Cobb, 32 Iowa 161; Neel *v.* State, 33 Tex. Crim. 408, 26 S. W. 726; Carpenter *v.* Branch, 13 Vt. 161, 37 Am. Dec. 587.

A person holding property for the purpose of exhibition is a party to a bailment of this class. Prince *v.* Alabama State Fair, 106 Ala. 340, 17 So. 449, 28 L. R. A. 716; Vigo Agricultural Soc. *v.* Brumfiel, 102 Ind. 146, 1 N. E. 382, 52 Am. Rep. 657; Moeran *v.* New York Poultry, etc., Assoc., 28 Misc. (N. Y.) 537, 59 N. Y. Suppl. 584. See also Smith *v.* Minneapolis Library Board, 58 Minn. 108, 59 N. W. 979, 25 L. R. A. 280; Davison *v.* Association, etc., 9 How. Pr. (N. Y.) 226.

13. *Illinois.*— Russell *v.* Kœhler, 66 Ill. 459; Spangler *v.* Eicholtz, 25 Ill. 297; Keith *v.* Bliss, 10 Ill. App. 424.

Indiana.— Cox *v.* Reynolds, 7 Ind. 257.

Kentucky.— Smith *v.* Frost, 1 Bibb (Ky.) 375.

Louisiana.— Broussard *v.* Declouet, 6 Mart. N. S. (La.) 259.

Massachusetts.— Lincoln *v.* Gay, 164 Mass. 537, 42 N. E. 95, 49 Am. St. Rep. 480; Judson *v.* Adams, 8 Cush. (Mass.) 556.

Missouri.— Halyard *v.* Dechelman, 29 Mo. 459, 77 Am. Dec. 585.

New York.— Seymour *v.* Brown, 19 Johns. (N. Y.) 44.

Pennsylvania.— Zell *v.* Dunkle, 156 Pa. St. 353, 33 Wkly. Notes Cas. (Pa.) 33, 27 Atl. 38; Gamber *v.* Wolaver, 1 Watts & S. (Pa.) 60.

South Carolina.— McCaw *v.* Kimbrel, 4 McCord (S. C.) 220.

Tennessee.— Kelton *v.* Taylor, 11 Lea (Tenn.) 264, 47 Am. Rep. 284.

Vermont.— Gleason *v.* Beers, 59 Vt. 581, 10 Atl. 86, 59 Am. Rep. 757.

The business of telegraphing has been regarded as consisting merely of receiving orders for work and labor and executing them, and the contract between the receiver and the remitter as constituting a bailment of this class. Western Union Tel. Co. *v.* Fontaine,

operis mercium vehendarum, where goods are bailed, for the purpose of being carried from place to place, either to a private person,[14] or to a person exercising a public employment as a carrier;[15] and the hiring of the custody of things or *locatio custodiæ*.[16]

C. Bailments For Sole Benefit of Bailor. Bailments for the sole benefit of the bailor include the *depositum* and the *mandatum*.[17]

D. Bailments For Sole Benefit of Bailee. The gratuitous loan or use of the thing bailed, the *commodatum* of the older classification, forms the division of bailments for the sole benefit of the bailee.[18] This division, however, is

58 Ga. 433. But see Western Union Tel. Co. *v.* Blanchard, 68 Ga. 299, 45 Am. Rep. 480. See, generally, TELEGRAPHS AND TELEPHONES.

14. *Delaware.*— Pennewill *v.* Cullen, 5 Harr. (Del.) 238.

Georgia.— Self *v.* Dunn, 42 Ga. 528, 5 Am. Rep. 544; Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393.

Minnesota.— St. Paul, etc., R. Co. *v.* Minneapolis, etc., R. Co., 26 Minn. 243, 2 N. W. 700, 37 Am. Rep. 404.

Missouri.— Holtzclaw *v.* Duff, 27 Mo. 392.

New Hampshire.— Sheldon *v.* Robinson, 7 N. H. 157, 26 Am. Dec. 726.

New York.— Stannard *v.* Prince, 64 N. Y. 300; Baird *v.* Daly, 57 N. Y. 236, 15 Am. Rep. 488; Allen *v.* Sackrider, 37 N. Y. 341, 4 Transcr. App. (N. Y.) 396; Pike *v.* Nash, 3 Abb. Dec. (N. Y.) 610, 1 Keyes (N. Y.) 335; Fish *v.* Clark, 2 Lans. (N. Y.) 176; Bush *v.* Miller, 13 Barb. (N. Y.) 481; Brown *v.* Denison, 2 Wend. (N. Y.) 593; Roberts *v.* Turner, 12 Johns. (N. Y.) 232, 7 Am. Dec. 311.

Pennsylvania.— Forsythe *v.* Walker, 9 Pa. St. 148.

Texas.— Haynie *v.* Baylor, 18 Tex. 498.

Vermont.— White *v.* Bascom, 28 Vt. 268.

England.— Nugent *v.* Smith, 1 C. P. D. 19.

15. Seymour *v.* Brown, 19 Johns. (N. Y.) 44. See, generally, CARRIERS; SHIPPING.

16. Schouler Bailm. § 13.

There is a bailment of this class where property is intrusted for keeping to a safety deposit company (Mayer *v.* Brensinger, 74 Ill. App. 475. See, generally, DEPOSITARIES), or to an innkeeper by one who is neither guest nor traveler (Healey *v.* Gray, 68 Me. 489, 28 Am. Rep. 80. See, generally, INNKEEPERS); and of a similar kind where goods are left by a customer in a store (Bunnell *v.* Stern, 122 N. Y. 539, 25 N. E. 910, 34 N. Y. St. 218, 19 Am. St. Rep. 519, 10 L. R. A. 481 [*reversing* 14 Daly (N. Y.) 357, 13 N. Y. St. 71]; Osgoodby *v.* Liemberner, 22 Alb. L. J. 114; Woodruff *v.* Painter, 150 Pa. St. 91, 24 Atl. 621, 30 Am. St. Rep. 786, 16 L. R. A. 451; McCollin *v.* Reed, 16 Wkly. Notes Cas. (Pa.) 287. But see Powers *v.* O'Neill, 89 Hun (N. Y.) 129, 34 N. Y. Suppl. 1007, 68 N. Y. St. 842), a restaurant (Simpson *v.* Rourke, 13 Misc. (N. Y.) 230, 34 N. Y. Suppl. 11, 67 N. Y. St. 867; Buttman *v.* Dennett, 9 Misc. (N. Y.) 462, 30 N. Y. Suppl. 247, 61 N. Y. St. 89), a barber's shop (Dilberto *v.* Harris, 95 Ga. 571, 23 S. E. 112. See also Trowbridge *v.* Schriever, 5 Daly (N. Y.) 11), or a bathing establishment (Tombler *v.* Koelling, 60 Ark. 62, 28 S. W. 794, 46 Am. St. Rep. 146, 27 L. R. A. 502; Bird *v.* Everard, 4 Misc. (N. Y.) 104, 23 N. Y. Suppl. 1008, 53 N. Y. St. 210; Levy *v.* Appleby, 1 N. Y. City Ct. 252); but the class of bailment under which a restaurateur is liable must be distinguished from the class under which an innkeeper is liable (Carpenter *v.* Taylor, 1 Hilt. (N. Y.) 193).

17. Schouler Bailm. § 14.

As to deposits, generally, see DEPOSITARIES.

Distinction between deposit and mandate. —A difference between a deposit and a mandate is that the latter lies in feasance and the former in custody, that is to say, the depositary is charged with keeping property only, and the mandatory with doing something with or about it. Jones Bailm. 53. Another distinction is said to consist in the fact that in a deposit the principal object is the custody of the thing and the service and labor are merely accessory, but that in a mandate the service and labor are the principal object and the thing is merely accessory. Story Bailm. § 140 [*cited* in Montgomery *v.* Evans, 8 Ga. 178].

Several kinds of mandate.—A mandate may be for the interest of the person granting it alone; for the joint interest of both parties; for the interest of a third person; for the interest of a third person and that of the party granting it; and for the interest of the mandatory and the third person. La. Civ. Code, art. 2986. See also Inst. Just. Sand. lib. 3, tit. XXVI. *Compare* Bourg *v.* Lopez, 36 La. Ann. 439.

Illustrations of mandatum are the carriage of goods without compensation therefor (Goodenow *v.* Snyder, 3 Greene (Iowa) 599); the gratuitous management of another's business (Richardson *v.* Futrell, 42 Miss. 525); a gratuitous undertaking to cure a horse (Conner *v.* Winton, 8 Ind. 315, 65 Am. Dec. 761); and a gratuitous transmission, by draft, of money deposited with the sender by the owner (Eddy *v.* Livingston, 35 Mo. 487, 88 Am. Dec. 122).

18. Schouler Bailm. § 14.

An illustration of commodatum is the use of another's property on condition that the user takes care of it and keeps it in good order. Booth *v.* Terrell, 16 Ga. 20; Bennett *v.* O'Brien, 37 Ill. 250. *Contra*, Chamberlin *v.* Cobb, 32 Iowa 161.

Loan for use.— The use of bonds given to a broker, provided that he keeps an equal amount of the same bonds at par as a circulating medium, is not a loan for use, under

capable of further subdivision into loans that are for use and those that are for consumption.[19]

III. Nature and Elements of Bailment.

A. Delivery and Acceptance — 1. Delivery — a. Necessity of. In order to constitute a transaction a bailment there must be a delivery to the bailee, either actual[20] or constructive.[21]

b. Sufficiency of. Such a full delivery of the subject-matter must be made to the bailee as will entitle him to exclude for the time of the bailment the possession of the owner, as will make him liable as its sole custodian to the latter in the event of his neglect or fault in discharging his trust with respect to the subject-matter,[22] and as to require a redelivery of it by him to the owner or other person entitled to receive it after the trusts of the bailment have been discharged.[23] Where the delivery can be constructive only, there must be an intention to transfer the possession of the property.[24]

2. Acceptance — a. Necessity of. Since the duties and responsibilities of a bailee cannot be thrust upon a person without his knowledge and against his con-

a statute defining a loan for use as the gratuitous grant of an article to another for use to be returned in specie, and at the will of the grantor. Cabaniss *v.* Ponder, 65 Ga. 134.

19. Jones Bailm. [*cited* in Seymour *v.* Brown, 19 Johns. (N. Y.) 44].

Mutuum in the civilian classification of contracts seems the equivalent of a loan for consumption. At common law, however, this kind of loan is not regarded as a bailment but as a sale, for the reason that the specific property delivered is not to be returned, but property of a like nature and equal value. Schouler Bailm. § 6. See also Lonergan *v.* Stewart, 55 Ill. 44; Seymour *v.* Brown, 19 Johns. (N. Y.) 44.

20. *Minnesota.*— Houghton *v.* Lynch, 13 Minn. 85.

Missouri.— Sherman *v.* Commercial Printing Co., 29 Mo. App. 31.

New York.— Samuels *v.* McDonald, 33 N. Y. Super. Ct. 211.

North Carolina.—Owens *v.* Kinsey, 52 N. C. 245.

Pennsylvania.— Trunick *v.* Smith, 63 Pa. St. 18.

Wisconsin.— Crosby *v.* German, 4 Wis. 373.

There is an actual delivery where the acts of the parties show an intention on the one part to make delivery then and there, and on the other part to accept delivery then and there. Fletcher *v.* Ingram, 46 Wis. 191, 50 N. W. 424.

Delivery as affecting subsequent purchasers or creditors of bailor.—A bailment without delivery is void as against subsequent *bona fide* purchasers, and generally as against creditors. On the other hand, a bailment with delivery is valid against purchasers and creditors. Sanders *v.* Davis, 13 B. Mon. (Ky.) 432. See also Hamilton *v.* Wagner, 2 A. K. Marsh. (Ky.) 331.

21. Trunick *v.* Smith, 63 Pa. St. 18; Lloyd *v.* Barden, 3 Strobh. (S. C.) 343; *Ex p.* Fitz, 2 Lowell (U. S.) 519, 9 Fed. Cas. No. 4,837; Meyerstein *v.* Barber, L. R. 2 C. P. 38; Reeves *v.* Capper, 1 Arn. 427, 5 Bing. N. Cas. 136, 2 Jur. 1067, 6 Scott 877, 35 E. C. L. 82.

Delivery of possession is not necessary where the parties have agreed that the possession of the thing bailed should remain with the bailor. Collins' Appeal, 107 Pa. St. 590, 52 Am. Rep. 479. See also Reeves *v.* Capper, 1 Arn. 427, 5 Bing. N. Cas. 136, 2 Jur. 1067, 6 Scott 877, 35 E. C. L. 82.

Placing meter on premises of consumer.— The placing of a meter in the house of a consumer has been held to constitute neither an actual nor constructive delivery of the meter. Blondell *v.* Baltimore City Consol. Gas Co., 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187.

22. Fletcher *v.* Ingram, 46 Wis. 191, 50 N. W. 424.

23. Fletcher *v.* Ingram, 46 Wis. 191, 50 N. W. 424. See also Samuels *v.* McDonald, 33 N. Y. Super. Ct. 211.

As to whom redelivery should be made see *infra*, V, A, 5, b, (IV).

24. Trunick *v.* Smith, 63 Pa. St. 18, holding that a railroad car having a qualified possession of a railroad track and incapable of being taken elsewhere, unless to a private siding, is not delivered to a railroad company because left on a siding belonging to such company in charge of one of its servants.

A written transfer of the muniments of title of the property bailed is sufficient, because it is a delivery of the means of obtaining possession. Goodenow *v.* Dunn, 21 Me. 86; Wilson *v.* Little, 2 N. Y. 443, 51 Am. Dec. 307; Mason *v.* Lickbarrow, 1 H. Bl. 357.

Goods left in lodging-house.— The mere leaving of goods by a lodger in his room is held not a delivery to the lodging-house keeper. Swann *v.* Smith, 14 Daly (N. Y.) 114, 3 N. Y. St. 588.

The mere leaving of a cloak on the counter of a store, without bringing the fact to the notice of the storekeeper or his servants, has been held constructive delivery to such storekeeper. Bunnell *v.* Stern, 122 N. Y. 539, 25 N. E. 910, 34 N. Y. St. 218, 19 Am. St. Rep. 519, 10 L. R. A. 481 [*reversing* 14 Daly (N. Y.) 357, 13 N. Y. St. 71].

sent, it is essential to a bailment that there be an acceptance of the subject-matter.[25]

b. Sufficiency of. It is not requisite that the acceptance be actual — one that is constructive being sufficient,[26] as where a person comes into actual possession and control of a chattel fortuitously or by mistake,[27] or takes possession of goods left rightfully in a place by their owner and removes them to another place.[28]

B. Subject-Matter — 1. In General. Any kind of personal property may be the subject of bailment unless statutes provide otherwise;[29] and such property need not be corporeal, because a chose in action may be bailed.[30]

2. Existence of Property. Property which is not in existence, or which is to be acquired by a person in the future, is not bailable;[31] that is to say, no con-

25. *Alabama.*— Bohannon *v.* Springfield, 9 Ala. 789.

Illinois.— Michigan Cent. R. Co. *v.* Carrow, 73 Ill. 348, 24 Am. Rep. 248.

Minnesota.— Houghton *v.* Lynch, 13 Minn. 85.

New Hampshire.— Cory *v.* Little, 6 N. H. 213, 25 Am. Dec. 458.

New Jersey.— Delaware, etc., R. Co. *v.* Central Stock-Yard, etc., Co., 45 N. J. Eq. 50, 17 Atl. 146, 6 L. R. A. 855.

New York.— Bunnell *v.* Stern, 14 Daly (N. Y.) 357, 13 N. Y. St. 71.

Pennsylvania.— Lloyd *v.* West Branch Bank, 15 Pa. St. 172, 53 Am. Dec. 581.

26. Rodgers *v.* Stophel, 32 Pa. St. 11, 72 Am. Dec. 775.

Custom of trade.—A purchaser of goods, bought subject to a trade custom for the purchaser to take care of the property in which the goods bought are delivered to him until called for by the seller, constructively accepts the property. Gaff *v.* O'Neil, 2 Cinc. Super. Ct. 246. See also Westcott *v.* Thompson, 18 N. Y. 363; Wescott *v.* Tilton, 1 Duer (N. Y.) 53.

No constructive acceptance by servant acting under orders.— The mere taking by an overseer of cotton-seed left by the former occupant on the plantation of the employer of the overseer, and the use of it by his directions, is not a constructive acceptance by such overseer. Bohannon *v.* Springfield, 9 Ala. 789.

Refusal to accept tender may effect constructive acceptance.— Should there be a refusal to accept a valid tender of chattels, followed by a retention of possession on the part of the person who tendered, the latter thereby becomes a bailee of the property tendered. Fannin *v.* Thomason, 50 Ga. 614.

27. *Massachusetts.*— Newhall *v.* Paige, 10 Gray (Mass.) 366.

Missouri.— T. J. Moss Tie Co. *v.* Kreilich, 80 Mo. App. 304.

New Hampshire.— Smith *v.* Nashua, etc., R. Co., 27 N. H. 86, 59 Am. Dec. 364.

New York.— Phelps *v.* People, 72 N. Y. 334; Morris *v.* Third Ave. R. Co., 1 Daly (N. Y.) 202.

England.—Armory *v.* Delamirie, 1 Str. 505, 1 Smith Lead. Cas. 631.

Involuntary bailments.—A person is said to become an involuntary bailee when he comes into possession and control of the chattel fortuitously. Story Bailm. §§ 44*a*, 83*a*, 121*a* [*cited* in Preston *v.* Neale, 12 Gray (Mass.) 222].

28. Tanner *v.* Chapman, 75 Ga. 871.

29. **Personal property only bailable** see *supra*, I, A.

30. *Georgia.*— Cabaniss *v.* Ponder, 65 Ga. 134.

Illinois.— Loomis *v.* Stave, 72 Ill. 623.

Kentucky.— Pindell *v.* Grooms, 18 B. Mon. (Ky.) 501; Sanders *v.* Davis, 13 B. Mon. (Ky.) 432.

Maine.— Shaw *v.* Wilshire, 65 Me. 485.

Massachusetts.— Jarvis *v.* Rogers, 15 Mass. 389.

Minnesota.—White *v.* Phelps, 14 Minn. 27, 100 Am. Dec. 190.

New Jersey.— Morris Canal, etc., Co. *v.* Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423.

New York.— McNeil *v.* New York City Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Wilson *v.* Little, 2 N. Y. 443, 51 Am. Dec. 307; Smedes *v.* Utica Bank, 20 Johns. (N. Y.) 372; Garlick *v.* James, 12 Johns. (N. Y.) 146, 7 Am. Dec. 294; McLean *v.* Walker, 10 Johns. (N. Y.) 471.

Pennsylvania.— Appleton *v.* Donaldson, 3 Pa. St. 381.

Wisconsin.— Bowers *v.* Evans, 71 Wis. 133, 36 N. W. 629.

United States.— Cowdrey *v.* Vandenburgh, 101 U. S. 572, 25 L. ed. 923; Biebinger *v.* St. Louis Continental Bank, 99 U. S. 143, 25 L. ed. 271.

England.— Collins *v.* Martin, 1 B. & P. 648, 2 Esp. 250, 4 Rev. Rep. 752; Mason *v.* Lickbarrow, 1 H. Bl. 357.

Where chose in action not bailable.—A chose in action arising out of a personal wrong, and not being for the recovery of damages for property illegally taken out of a person's possession or unlawfully withheld from him, cannot be the subject of a bailment. Pindell *v.* Grooms, 18 B. Mon. (Ky.) 501.

Land warrants or certificates, located or representing specific land, are not personalty and are not bailable. Mowry *v.* Wood, 12 Wis. 413 [*overruling* Ainsworth *v.* Bowen, 9 Wis. 348]; Whitney *v.* State Bank, 7 Wis. 620. Unlocated land warrants are and may be bailed. Smith *v.* Frost, 1 Bibb (Ky.) 375; Stone *v.* Brown, 54 Tex. 330.

31. Gittings *v.* Nelson, 86 Ill. 591; Macomber *v.* Parker, 14 Pick. (Mass.) 497; Smith-

tract respecting such property can operate by way of bailment until the property has come into existence,[32] been taken into possession by the bailee,[33] or the title thereto acquired by the bailor.[34] Moreover the continued existence of the thing bailed is implied in a contract of bailment.[35]

C. Sufficiency and Validity of Contract — 1. In General. The principles governing the validity and sufficiency of contracts in general are applicable to bailments:[36] Thus an oral bailment is as valid as one that is written, and is entitled to the same consideration;[37] and the contract must not be made in contravention of a prohibitory statute.[38]

2. Parties to Contract — a. Who May Be Bailee. Any one having contractual capacity[39] may be a bailee, but no persons, with the exception perhaps of innkeepers, common carriers, wharfingers, or warehousemen,[40] can be compelled to be bailees, since a person has the same right to decline becoming a bailee as he has to decline becoming a purchaser.[41]

b. Who May Be Bailor. It is not essential that the bailor should have an absolute title to the subject-matter of the bailment, it being sufficient if he is invested with such possessory interest in the subject-matter as will entitle him to assert his interest against all the world except the rightful owner.[42]

urst *v.* Edmunds, 14 N. J. Eq. 408. See also Story Bailm. § 286.

32. Collins' Appeal, 107 Pa. St. 590, 52 Am. Rep. 479; Smith *v.* Atkins, 18 Vt. 461.

33. Gittings *v.* Nelson, 86 Ill. 591.

34. Macomber *v.* Parker, 14 Pick. (Mass.) 497, holding that property not in existence or to be acquired by a person in the future may be hypothecated but not technically bailed.

An interest in a partnership will be affected in equity by an instrument bailing such interest, notwithstanding that the interest had no existence at the date of the contract of bailment. Collins' Appeal, 107 Pa. St. 590, 52 Am. Rep. 479.

35. Taylor *v.* Caldwell, 3 B. & S. 826, 32 L. J. Q. B. 164, 8 L. T. Rep. N. S. 356, 11 Wkly. Rep. 726, 113 E. C. L. 826; Williams *v.* Lloyd, W. Jones 179. See also Menetone *v.* Athawes, 3 Burr. 1592.

36. Newhall *v.* Paige, 10 Gray (Mass.) 366.

Principles of contracts, generally, see Contracts.

37. Sanders *v.* Davis, 13 B. Mon. (Ky.) 432. See also Giles *v.* Bradley, 2 Johns. Cas. (N. Y.) 253.

Recording or registration.— For the prevention of fraud the statutes in many jurisdictions necessitate the recording of a bailment in the nature of a loan or lease.

Alabama.— Butler *v.* Jones, 80 Ala. 436, 2 So. 300; Pharis *v.* Leachman, 20 Ala. 662.

Kentucky.—Penny *v.* Davis, 3 B. Mon. (Ky.) 313; Green *v.* Botts, 3 B. Mon. (Ky.) 196.

Missouri.— McDermott *v.* Barnum, 16 Mo. 114; Blount *v.* Hamey, 43 Mo. App. 644.

South Carolina.— Ludden, etc., Southern Music House *v.* Dusenbury, 27 S. C. 464, 4 S. E. 60.

Tennessee.— Walker *v.* Wynne, 3 Yerg. (Tenn.) 61; Porter *v.* Armstrong, 2 Yerg. (Tenn.) 74.

Virginia.— Gay *v.* Moseley, 2 Munf. (Va.) 543.

38. Stewart *v.* Davis, 31 Ark. 518, 25 Am. Rep. 576; Gregg *v.* Wyman, 4 Cush. (Mass.) 322; Logan *v.* Mathews, 6 Pa. St. 417; Berrill *v.* Smith, 2 Miles (Pa.) 402; Whelden *v.* Chappel, 8 R. I. 230.

Contracts of hiring made on Sunday see Sunday.

39. As to capacity to contract see Husband and Wife; Infants; Insane Persons.

40. As to the duty of accepting a bailment thrown upon persons exercising a public employment see Carriers; Innkeepers; Post-Office; Telegraphs and Telephones; Warehousemen.

41. King *v.* Richards, 6 Whart. (Pa.) 418, 37 Am. Dec. 420.

Refusal of acceptance.—Where property is consigned to a person as a bailee with specific directions as to its disposal the consignee may refuse to accept the consignment. Kansas Elevator Co. *v.* Harris, 6 Kan. App. 89, 49 Pac. 674.

As to acceptance see *supra*, III, A, 2.

42. *Alabama.*— Lowremore *v.* Berry, 19 Ala. 130, 54 Am. Dec. 188.

Delaware.— Hargardine *v.* Ford, 5 Houst. (Del.) 380; Clark *v.* Malony, 3 Harr. (Del.) 68.

Maryland.—Harker *v.* Dement, 9 Gill (Md.) 7, 52 Am. Dec. 670.

Massachusetts.— Learned *v.* Bryant, 13 Mass. 224; Caldwell *v.* Eaton, 5 Mass. 399.

New Hampshire.— Holt *v.* Burbank, 47 N. H. 164; Hyde *v.* Noble, 13 N. H. 494, 38 Am. Dec. 508.

New York.— McLaughlin *v.* Waite, 9 Cow. (N. Y.) 670; Smith *v.* James, 7 Cow. (N. Y.) 328; Dillenback *v.* Jerome, 7 Cow. (N. Y.) 294.

Pennsylvania.— Tatum *v.* Sharpless, 6 Phila. (Pa.) 18, 22 Leg. Int. (Pa.) 244.

Vermont.— Brown *v.* Gleed, 33 Vt. 147; Pettes *v.* Marsh, 15 Vt. 454, 40 Am. Dec. 689.

Virginia.—Tancil *v.* Seaton, 28 Gratt. (Va.) 601, 26 Am. Rep. 380.

England.— Burton *v.* Hughes, 2 Bing. 173, 9 E. C. L. 533; Taylor *v.* Plumer, 3 M. & S. 562, 2 Rose 457, 16 Rev. Rep. 361; Armory *v.* Delamirie, 1 Str. 505, 1 Smith Lead. Cas.

3. Express Contract Not Necessary. An express contract is not necessary — many well-recognized cases of bailment being founded on implied contract.[43] No bailment, however, can be implied when the relation of the parties to one another does not justify the presumption that a bailment was intended.[44]

4. Consideration. All bailments, whether with or without compensation to the bailee, are contracts founded on a sufficient consideration.[45] To constitute a sufficient consideration, it is not necessary that the bailee should derive some benefit from the bailment,[46] it being sufficient if the bailor on the faith of the bailee's undertaking parts with some present right, delays the present use of some right, suffers some immediate prejudice or detriment, or does some act at the bailee's request.[47]

631; Bridges *v.* Hawkesworth, 15 Jur. 1079, 21 L. J. Q. B. 75, 7 Eng. L. & Eq. 424.

Applicability of rule to choses in action.— It has been held that a person not entitled to a chose in action cannot make it the subject of a bailment. McLaughlin *v.* Waite, 9 Cow. (N. Y.) 670. *Contra*, Tancil *v.* Seaton, 28 Gratt. (Va.) 601, 26 Am. Rep. 380.

When nothing is said about the title it does not matter whether the bailor owns, or only has possession of, the subject-matter of the bailment. Andrews *v.* Keith, 168 Mass. 558, 47 N. E. 423.

Necessity of evidence of title.— To constitute the relation of bailor and bailee there must be some evidence of title in the bailor. Tome *v.* Parkersburg Branch R. Co., 39 Md. 36, 17 Am. Rep. 540.

Bailee cannot be in better situation than bailor.— Where the bailor has no title the bailee can have none, for the bailor can give no better than he has. Western Transp. Co. *v.* Barber, 56 N. Y. 544; Robinson *v.* Hodgson, 73 Pa. St. 202; Hentz *v.* The Steamship Idaho, 93 U. S. 575, 23 L. ed. 978; Wilson *v.* Anderton, 1 B. & Ad. 450, 9 L. J. K. B. O. S. 48, 20 E. C. L. 555 [*cited* in King *v.* Richards, 6 Whart. (Pa.) 418, 37 Am. Dec. 420].

43. *Alabama.*— Bohannon *v.* Springfield, 9 Ala. 787.

Colorado.— Wilson *v.* People, 19 Colo. 199, 34 Pac. 944, 41 Am. St. Rep. 243, 22 L. R. A. 449.

Maryland.— Moore *v.* State, 47 Md. 467, 28 Am. Rep. 483.

Massachusetts.— Blake *v.* Kimball, 106 Mass. 115; Briggs *v.* Dearborn, 99 Mass. 50.

Missouri.—State *v.* Fitzpatrick, 64 Mo. 185.

New Hampshire.—Stone *v.* Sleeper, 59 N. H. 205; Cross *v.* Brown, 41 N. H. 283.

New Jersey.— Mott *v.* Pettit, 1 N. J. L. 344.

New York.— Phelps *v.* People, 72 N. Y. 334; Witowski *v.* Brennan, 41 N. Y. Super. Ct. 284; Browning *v.* Hanford, 5 Hill (N. Y.) 588, 40 Am. Dec. 369.

Ohio.— Peabody *v.* State, 4 Ohio St. 387; Bassett *v.* Baker, Wright (Ohio) 337.

Pennsylvania.— Aurentz *v.* Porter, 56 Pa. St. 115.

Vermont.— Briggs *v.* Taylor, 28 Vt. 180.

United States.— Burke *v.* Trevitt, 1 Mason (U. S.) 96, 4 Fed. Cas. No. 2,163.

Implied contracts of bailment exist where property is left temporarily in a store (Bunnell *v.* Stern, 122 N. Y. 539, 25 N. E. 910, 34 N. Y. St. 218, 19 Am. St. Rep. 519, 10 L. R. A. 481 [*reversing* 14 Daly (N. Y.) 357, 13 N. Y. St. 71]; Osgoodby *v.* Liemberner, 22 Alb. L. J. 114; Woodruff *v.* Painter, 150 Pa. St. 91, 24 Atl. 621, 30 Am. St. Rep. 786, 16 L. R. A. 451; McCollin *v.* Reed, 16 Wkly. Notes Cas. (Pa.) 287), barber's shop (Dilberto *v.* Harris, 95 Ga. 571, 23 S. E. 112), restaurant (Carpenter *v.* Taylor, 1 Hilt. (N. Y.) 193; Simpson *v.* Rourke, 13 Misc. (N. Y.) 230, 34 N. Y. Suppl. 11, 67 N. Y. St. 867; Buttman *v.* Dennett, 9 Misc. (N. Y.) 462, 30 N. Y. Suppl. 247, 61 N. Y. St. 89), bathhouse establishment (Tombler *v.* Koelling, 60 Ark. 62, 28 S. W. 794, 46 Am. St. Rep. 146, 27 L. R. A. 502; Bird *v.* Everard, 4 Misc. (N. Y.) 104, 23 N. Y. Suppl. 1008, 53 N. Y. St. 210; Levy *v.* Appleby, 1 N. Y. City Ct. 252), or skating-rink (Donlin *v.* McQuade, 61 Mich. 275, 28 N. W. 114).

44. Thus the relationship of master and servant will not warrant the presumption of a bailment with respect to work intrusted to the servant as such. Com. *v.* Doane, 1 Cush. (Mass.) 5; Fletcher *v.* Ingram, 46 Wis. 191, 50 N. W. 424. So where a sovereign power requires the inspection of merchandise in its warehouses, no bailment can be implied between such power and the individual to whom the merchandise belongs (Moore *v.* State, 47 Md. 467, 28 Am. Rep. 483), and no new bailment can be implied where a hirer refuses to redeliver the thing bailed at the expiration of his term (Chamberlain *v.* Pratt, 33 N. Y. 47; Zule *v.* Zule, 24 Wend. (N. Y.) 76, 35 Am. Dec. 600).

45. McCauley *v.* Davidson, 10 Minn. 418.

Contingent benefit.— The adequacy of the consideration must be determined by the parties themselves, they being the sole judges of the benefits or advantages to be derived from the contract. Hence a contingent benefit which may inure to the bailee is sufficient. Newhall *v.* Paige, 10 Gray (Mass.) 366.

46. Durnford *v.* Patterson, 7 Mart. (La.) 460; McCauley *v.* Davidson, 10 Minn. 418; Funkhouser *v.* Ingles, 17 Mo. App. 232.

47. *Connecticut.*— Clark *v.* Gaylord, 24 Conn. 484.

Iowa.— Chamberlin *v.* Cobb, 32 Iowa 161.

Minnesota.— McCauley *v.* Davidson, 10 Minn. 418.

Missouri.— Funkhouser *v.* Ingles, 17 Mo. App. 232.

New Hampshire.— Benden *v.* Manning, 2 N. H. 289.

5. Return of Property. It is essential that the parties to the contract should have intended a return of the specific thing bailed,[48] even if in an altered form,[49] or its delivery to some third person, with the express or implied consent of the bailor.[50] Where there is no intention that the specific articles should be returned or delivered to another the transaction becomes either a sale,[51] a mortgage,[52] a gift,[53] or an exchange.[54]

New York.— Lyons First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181.

Ohio.—Young *v.* Noble, 2 Disn. (Ohio) 485.

Wisconsin.— Magdeburg *v.* Uihlein, 53 Wis. 165, 10 N. W. 363.

48. Bohannon *v.* Springfield, 9 Ala. 789; Coleman *v.* Lipscomb, 18 Mo. App. 443; Foster *v.* Pettibone, 7 N. Y. 433, Seld. Notes (N. Y.) 36, 57 Am. Dec. 530; Mallory *v.* Willis, 4 N. Y. 76; Arent *v.* Squire, 1 Daly (N. Y.) 347; Collier *v.* Poe, 16 N. C. 55.

Intention of bailor not material.— An express promise to redeliver goods when called for creates a bailment, although the promisee may intend never to call for a redelivery. Smith *v.* Jones, 8 Ark. 109; Selleck *v.* Selleck, 107 Ill. 389. See also Gunn *v.* Mason, 2 Sneed (Tenn.) 637.

Bailment or partnership.—Where animals are delivered to be taken care of for a certain time, and at the expiration of such time the same number of animals is to be returned, and any increase is to be enjoyed by both parties, there is a bailment and not a partnership. Robinson *v.* Haas, 40 Cal. 474. See also Ward *v.* Thompson, Newb. Adm. 95, 29 Fed. Cas. No. 17,162, where a charterer who, after paying the expenses of running the boat out of the earnings, was to divide what was left with the boat's owner was regarded as a bailee prior to the payment of the expenses and the striking of a balance.

49. *Indiana.*— Ashby *v.* West, 3 Ind. 170.

Maine.— Barker *v.* Roberts, 8 Me. 101.

Massachusetts.— Mansfield *v.* Converse, 8 Allen (Mass.) 182; Judson *v.* Adams, 8 Cush. (Mass.) 556.

New York.— Sattler *v.* Hallock, 160 N. Y. 291, 54 N. E. 667, 73 Am. St. Rep. 686, 46 L. R. A. 679; Mack *v.* Snell, 140 N. Y. 193, 35 N. E. 493, 55 N. Y. St. 576, 37 Am. St. Rep. 534; Foster *v.* Pettibone, 7 N. Y. 433, Seld. Notes (N. Y.) 36, 57 Am. Dec. 530; Mallory *v.* Willis, 4 N. Y. 76.

Pennsylvania.— Bretz *v.* Diehl, 117 Pa. St. 589, 11 Atl. 893, 2 Am. St. Rep. 706.

Canada.— *In re* Williams, 31 U. C. Q. B. 143.

Change immaterial when thing capable of ascertainment.— It makes no difference in reason or law into what other form different from the original the change may have been made; for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such; and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money and mixed and confounded in a general mass of the same description. Taylor *v.* Plumer, 3 M. & S. 562, 2 Rose 457, 16 Rev. Rep. 361. See also Scott *v.* Surman, Willes 400; Whitecomb *v.* Jacob, 1 Salk. 160.

50. Harris *v.* Coe, 71 Conn. 157, 41 Atl. 552; Wier Plow Co. *v.* Porter, 82 Mo. 23.

Contract intending title not to pass.— Where it appears by the contract that it is the *bona fide* intention of the parties that the title to goods shall not pass, but that the receiver shall sell them for the person who delivers, the transaction is a bailment and not a sale. Harris *v.* Coe, 71 Conn. 157, 41 Atl. 552.

51. Lyon *v.* Lenon, 106 Ind. 567, 7 N. E. 311; Mallory *v.* Willis, 4 N. Y. 76; Norton *v.* Woodruff, 2 N. Y. 153; Chase *v.* Washburn, 1 Ohio St. 244, 59 Am. Dec. 623; Bretz *v.* Diehl, 117 Pa. St. 589, 11 Atl. 893, 2 Am. St. Rep. 706.

As to the distinction between bailment and sale see Sales.

Effect of sale upon illegal consideration.— Where property is delivered upon sale the fact that the sale is void, because made upon an illegal consideration, will not constitute the purchaser a bailee of the property delivered. Green *v.* Hollingsworth, 5 Dana (Ky.) 173, 30 Am. Dec. 680.

52. Distinction between bailment and mortgage.—A radical distinction between a bailment and a mortgage is that by a mortgage the general title is transferred to the mortgagee, subject to be revested by performance of the condition; but in case of a bailment the bailor retains the general title in himself, and parts with the possession for a special purpose. Walker *v.* Staples, 5 Allen (Mass.) 34. See also White *v.* Phelps, 14 Minn. 27, 100 Am. Dec. 190; Garlick *v.* James, 12 Johns. (N. Y.) 146, 7 Am. Dec. 294; Collins' Appeal, 107 Pa. St. 590, 52 Am. Rep. 479. See, generally, Mortgages.

53. Stump *v.* Roberts, 3 Cooke (Tenn.) 350. See, generally, Gifts.

Presumption arising from permissive possession of property.—A person acquiring possession of personal property by permission of the owner will be presumed to hold as a bailee and not as a donee. Matter of Rathgeb, 125 Cal. 302, 57 Pac. 1010.

54. King *v.* Fuller, 3 Cai. (N. Y.) 152, holding that an agreement by which one party is to let the other have a horse, in consideration that the other party will let him have another, creates an exchange, not a bailment. See also Austin *v.* Seligman, 21 Blatchf. (U. S.) 506, 18 Fed. 519, where jeweler's sweepings delivered under an option to return either the product or its equivalent in value was held either an exchange or sale. See, generally, Exchange of Property.

IV. TITLE AND RIGHT OF PROPERTY.

A. In General — 1. Of Bailor. After the creation of a bailment the bailor retains a general title to, or property in, the subject-matter of the bailment,[55] which is not affected in any way by unauthorized acts of the bailee[56] or, in general, by his mere possession as bailee of the subject-matter for any length of time;[57] but acts of ownership inconsistent with the rights of the bailee may, if

55. *Alabama.*— Montgomery Gas-Light Co. *v.* Montgomery, etc., R. Co., 86 Ala. 372, 5 So. 735.

Maine.— Morse *v.* Androscoggin R. Co., 39 Me. 285.

Massachusetts.— Adams *v.* O'Connor, 100 Mass. 515, 1 Am. Rep. 137; Eaton *v.* Lynde, 15 Mass. 242.

Minnesota.—Chamberlain *v.* West, 37 Minn. 54, 33 N. W. 114; White *v.* Phelps, 14 Minn. 27, 100 Am. Dec. 190.

North Carolina.— Hopper *v.* Miller, 76 N. C. 402.

Nature of general property.— The general property which a bailor is said usually to retain is no more than a legal right to the restoration of the thing bailed, on the termination of bailment. Wilson *v.* Little, 2 N. Y. 443, 51 Am. Dec. 307.

Declarations affecting bailor's title.—A bailor's declarations that the bailee was the owner of the bailed property may estop the bailor to assert his title. Hunt *v.* Moultrie, 1 Bosw. (N. Y.) 531; McMahon *v.* Sloan, 12 Pa. St. 229, 51 Am. Dec. 601.

56. *Alabama.*— Medlin *v.* Wilkerson, 81 Ala. 147, 1 So. 37; Sumner *v.* Woods, 67 Ala. 139, 42 Am. Rep. 104; Fairbanks *v.* Eureka Co., 67 Ala. 109; McCall *v.* Powell, 64 Ala. 254; Calhoun *v.* Thompson, 56 Ala. 166, 28 Am. Rep. 754.

Arkansas.— Smith *v.* Jones, 8 Ark. 109.

California.— Kohler *v.* Hayes, 41 Cal. 455.

Connecticut.— Hart *v.* Carpenter, 24 Conn. 427.

Georgia.— Richardson *v.* Smith, 33 Ga. Suppl. 95.

Indiana.— Schindler *v.* Westover, 99 Ind. 395; Wolf *v.* Esteb, 7 Ind. 448; Ingersoll *v.* Emmerson, 1 Ind. 76; Leffler *v.* Watson, 13 Ind. App. 176, 40 N. E. 1107, 41 N. E. 467.

Iowa.— Baehr *v.* Clark, 83 Iowa 313, 49 N. W. 840, 13 L. R. A. 717.

Kentucky.— Vaughn *v.* Hopson, 10 Bush (Ky.) 337; Chism *v.* Woods, 3 Hard. (Ky.) 531, 3 Am. Dec. 740.

Louisiana.— Russell *v.* Favier, 18 La. 585, 36 Am. Dec. 662; Barfield *v.* Hewlett, 4 La. 118.

Massachusetts.—Benner *v.* Puffer, 114 Mass. 376; Zuchtmann *v.* Roberts, 109 Mass. 53, 12 Am. Rep. 663; Sargent *v.* Metcalf, 5 Gray (Mass.) 306, 66 Am. Dec. 368; Coggill *v.* Hartford, etc., R. Co., 3 Gray (Mass.) 545.

Michigan.— Dunlap *v.* Gleason, 16 Mich. 158, 93 Am. Dec. 231.

Missouri.— Sowden *v.* Kessler, 76 Mo. App. 581; Moore *v.* Simms, 47 Mo. App. 182; Hendricks *v.* Evans, 46 Mo. App. 313.

New Hampshire.— Stone *v.* Sleeper, 62 N. H. 3; Luther *v.* Cote, 61 N. H. 129; Weeks *v.* Pike, 60 N. H. 447; King *v.* Bates, 57 N. H. 446; Fisk *v.* Ewen, 46 N. H. 173; Phelps *v.* Gilchrist, 30 N. H. 171; Sargent *v.* Gile, 8 N. H. 325.

New York.— Austin *v.* Dye, 46 N. Y. 500; Ballard *v.* Burgett, 40 N. Y. 314; Boyce *v.* Brockway, 31 N. Y. 490; Dows *v.* Perrin, 16 N. Y. 325; Brower *v.* Peabody, 13 N. Y. 121; Cobb *v.* Dows, 10 N. Y. 335; Spaulding *v.* Brewster, 50 Barb. (N. Y.) 142; Dudley *v.* Hawley, 40 Barb. (N. Y.) 397; Cook *v.* Beal, 1 Bosw. (N. Y.) 497; Covill *v.* Hill, 4 Den. (N. Y.) 323; Connah *v.* Hale, 23 Wend. (N. Y.) 462; Hoffman *v.* Carow, 22 Wend. (N. Y.) 285; Saltus *v.* Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; Everett *v.* Coffin, 6 Wend. (N. Y). 603, 22 Am. Dec. 551; Murray *v.* Burling, 10 Johns. (N. Y.) 172.

Pennsylvania.— Davis *v.* Bigler, 62 Pa. St. 242, 1 Am. Rep. 393; Agnew *v.* Johnson, 22 Pa. St. 471, 62 Am. Dec. 303.

South Carolina.— Carmichael *v.* Buck, 12 Rich. (S. C.) 451.

Vermont.— Dunham *v.* Lee, 24 Vt. 432.

United States.— Stump *v.* Roberts, Brunn. Col. Cas. (U. S.) 224, 23 Fed. Cas. No. 13,561, Cooke (Tenn.) 350.

England.— Peer *v.* Humphrey, 2 A. & E. 495, 1 Hurl. & W. 28, 4 L. J. K. B. 100, 4 N. & M. 430, 29 E. C. L. 236; Whistler *v.* Forster, 14 C. B. N. S. 248, 32 L. J. C. P. 161, 8 L. T. Rep. N. S. 317, 11 Wkly. Rep. 648, 108 E. C. L. 248; Loeschman *v.* Machin, 2 Stark. 311, 20 Rev. Rep. 687, 3 E. C. L. 423.

57. Callis *v.* Tolson, 6 Gill & J. (Md.) 80; Green *v.* Harris, 25 N. C. 210; Darden *v.* Allen, 12 N. C. 466; Walker *v.* Wynne, 3 Yerg. (Tenn.) 61.

Possession of bailee does not exclude that of bailor.—The bailor's title and right to the property is not excluded by the possession of the bailee. Sallee *v.* Arnold, 32 Mo. 532, 82 Am. Dec. 144; Faulkner *v.* Brown, 13 Wend. (N. Y.) 63.

Bailee cannot acquire title through fraud. — A tortious seizure and sale of the property by a third person and a purchase by the bailee from such person will not assist the bailee to a title adverse to that of the bailor. Enos *v.* Cole, 53 Wis. 235, 10 N. W. 377. See also Knight *v.* Bell, 22 Ala. 198.

Where there is more than one bailor.—A bailee's possession of property bailed to him by two opposing claimants of the property will not assist either bailor to oust the title of the other. Hamlin *v.* Alston, 19 N. C. 269.

brought to the knowledge of the bailor, both affect his title and bar any right of action with respect to the property.[58]

2. Of Bailee. The bailee has, by virtue of the bailment and until its termination, a special property or possessory interest in the subject-matter[59] which entitles him, whatever be the class of the bailment, to avail himself of any legal means to defend it against any person who may interfere with his accomplishing the purposes of the bailment.[60]

58. Lucas *v.* Daniels, 34 Ala. 188; Knight *v.* Bell, 22 Ala. 198; Callis *v.* Tolson, 6 Gill & J. (Md.) 80; McMahon *v.* Sloan, 12 Pa. St. 229, 51 Am. Dec. 601.

Necessity of open and adverse claim.— Proof of some open, notorious, or unequivocal act evincing an intention to hold adversely to the bailor which is brought to the knowledge of the latter is requisite to affect his title, or bar his right of action.

Alabama.— Lucas *v.* Daniels, 34 Ala. 188; Knight *v.* Bell, 22 Ala. 198.

California.— Matter of Rathgeb, 125 Cal. 302, 57 Pac. 1010.

Mississippi.— Hall *v.* Dickey, 32 Miss. 208.

North Carolina.—Darden *v.* Allen, 12 N. C. 466.

Pennsylvania.— McMahon *v.* Sloan, 12 Pa. St. 229, 51 Am. Dec. 601.

Unauthorized sale an assertion of adverse claim.— An unauthorized sale by the bailee is a sufficient assertion of title adverse to the bailor. Crump *v.* Mitchell, 34 Miss. 449; Hall *v.* Dickey, 32 Miss. 208. So the bailee's offer to sell the bailed property as his own, where brought to the notice of the bailor, is a sufficient claim of adverse title. Echols *v.* Barrett, 6 Ga. 443.

A naked declaration by the bailee that he claims the property without change of possession, or demand or desire on the part of the bailor to resume the property, is not sufficient as an adverse claim. Green *v.* Harris, 25 N. C. 210.

59. *Alabama.*— Montgomery Gas-Light Co. *v.* Montgomery, etc., R. Co., 86 Ala. 372, 5 So. 735.

Louisiana.— Hardy *v.* Lemons, 36 La. Ann. 146.

Maine.— Morse *v.* Androscoggin R. Co., 39 Me. 285.

Massachusetts.— Adams *v.* O'Connor, 100 Mass. 515, 1 Am. Rep. 137; Eaton *v.* Lyndè, 15 Mass. 242.

Minnesota.— Engel *v.* Scott, etc., Lumber Co., 60 Minn. 39, 61 N. W. 825; Chamberlain *v.* West, 37 Minn. 54, 33 N. W. 114; White *v.* Phelps, 14 Minn. 27, 100 Am. Dec. 190.

North Carolina.—Hopper *v.* Miller, 76 N. C. 402.

Interest of bailee where bailment is gratuitous.— Some authorities hold that where the bailment is not for mutual benefit the bailee has only a custody of, and not a property in, the subject-matter of the bailment. Com. *v.* Morse, 14 Mass. 217; Warren *v.* Leland, 9 Mass. 265; Ludden *v.* Leavitt, 9 Mass. 104, 6 Am. Dec. 45; Waterman *v.* Robinson, 5 Mass. 303; Norton *v.* People, 8 Cow. (N. Y.) 137; Dillenback *v.* Jerome, 7 Cow. (N. Y.) 294; Sibley *v.* Story, 8 Vt. 15; Hartop *v.* Hoare, 3 Atk. 44, 2 Str. 1187, 1 Wils. C. P. 8; Holliday *v.* Camsell, 1 T. R. 658.

As to the interest of receiptors for property taken under process who may be looked upon as subbailees see Attachments; Executions.

Special property transient and qualified.— A transient, qualified property in what is the subject of the bailment is all that passes to the bailee. Spencer *v.* Pilcher, 8 Leigh (Va.) 565.

Possessory interest is the expression used by Blackstone respecting a bailee's right in the subject-matter of a bailment. 2 Bl. Comm. 452 [*cited* in Thayer *v.* Hutchinson, 13 Vt. 504, 37 Am. Dec. 607].

Bailee a mere trustee.—A bailee's property in the subject of a bailment is limited to a mere trust. Sowden *v.* Kessler, 76 Mo. App. 581.

Termination of special property right.— Where work has to be performed upon a thing delivered, the special property right of the bailee terminates when he ceases to have possession, or any right to possession, of it. Morse *v.* Androscoggin R. Co., 39 Me. 285.

Where term of bailment is indefinite.—A bailee for an indefinite term has a right of possession until a redelivery is demanded. Smith *v.* Jones, 8 Ark. 109.

60. *Alabama.*— Montgomery Gas-Light Co. *v.* Montgomery, etc., R. Co., 86 Ala. 372, 5 So. 735; Cox *v.* Easley, 11 Ala. 362.

Connecticut.—Burrows *v.* Stoddard, 3 Conn. 160.

Delaware.—Clark *v.* Maloney, 3 Harr. (Del.) 68.

Maine.— Morse *v.* Androscoggin R. Co., 39 Me. 285; Moran *v.* Portland Steam Packet Co., 35 Me. 55.

Massachusetts.— Harrington *v.* King, 121 Mass. 269; Shaw *v.* Kaler, 106 Mass. 448; Eaton *v.* Lynde, 15 Mass. 242; Burke *v.* Savage, 13 Allen (Mass.) 408.

Minnesota.—Chamberlain *v.* West, 37 Minn. 54, 33 N. W. 114.

Missouri.— Sowden *v.* Kessler, 76 Mo. App. 581.

New Hampshire.— Odiorne *v.* Colley, 2 N. H. 66, 9 Am. Dec. 39; Poole *v.* Symonds, 1 N. H. 289, 8 Am. Dec. 71.

New York.— Bliss *v.* Schaub, 48 Barb. (N. Y.) 339; Hendricks *v.* Decker, 35 Barb. (N. Y.) 298; Rogers *v.* Arnold, 12 Wend. (N. Y.) 30.

North Carolina.— Hopper *v.* Miller, 76 N. C. 402.

Pennsylvania.— Harris *v.* Smith, 3 Serg. & R. (Pa.) 20; Tatum *v.* Sharpless, 6 Phila. (Pa.) 18, 22 Leg. Int. (Pa.) 244.

B. Estoppel of Bailee — 1. In General. It has been stated broadly and without any qualifications, that a bailee may not, in any case, dispute or deny the title of the bailor.[61] The reasons given for such a doctrine are, however, by no means satisfactory,[62] and the rule must be accepted with many qualifications.[63] The generally accepted rule is that the bailee may not, for his own benefit, deny the title of the bailor or avail himself of the title of a third person although that person be the true owner,[64] nor may he do so in any case where he has not yielded the reclamation of possession by the true owner. Hentz *v.* The Steamship Idaho, 93 U. S. 575, 23 L. ed. 978.

Tennessee.— Carson *v.* Prater, 6 Coldw. (Tenn.) 565.

Vermont.— White *v.* Bascom, 28 Vt. 268; Thayer *v.* Hutchinson, 13 Vt. 504, 37 Am. Dec. 607; Burdict *v.* Murray, 3 Vt. 302, 21 Am. Dec. 588.

Virginia.—Spencer *v.* Pilcher, 8 Leigh (Va.) 565.

United States.— Knight *v.* Davis Carriage Co., 71 Fed. 662, 30 U. S. App. 664, 18 C. C. A. 287; Gibbs *v.* U. S., 14 Ct. Cl. 544.

England.— Giles *v.* Grover, 9 Bing. 128, 23 E. C. L. 515, 6 Bligh N. S. 277, 5 Eng. Reprint 598, 1 Cl. & F. 72, 6 Eng. Reprint 843, 2 Moore & S. 197; Bridges *v.* Hawkesworth, 15 Jur. 1079, 21 L. J. Q. B. 75, 7 Eng. L. & Eq. 424; Sutton *v.* Buck, 2 Taunt. 302, 11 Rev. Rep. 585, 587; Roberts *v.* Wyatt, 2 Taunt. 268, 11 Rev. Rep. 566; Holliday *v.* Camsell, 1 T. R. 658.

Where bailor hinders accomplishment.— In cases where the bailment is for a time certain, or for a specific purpose, the bailor is answerable to the bailee for removing the property before the time has expired, or the purpose is accomplished. McConnell *v.* Maxwell, 3 Blackf. (Ind.) 419, 26 Am. Dec. 428; Sowden *v.* Kessler, 76 Mo. App. 581; Neafie *v.* Patterson, 42 Leg. Int. (Pa.) 395; Burdict *v.* Murray, 3 Vt. 302, 21 Am. Dec. 588.

Remedies available to bailee against third persons see *infra*, VI, B, 1, b.

61. Fitzherbert Nat. Brev. tit. Writ of Detinue, M; Rolle Abr. tit. Detinue. See also Miles *v.* Cattle, 6 Bing. 743, 8 L. J. C. P. O. S. 271, 4 M. & P. 630, 31 Rev. Rep. 532, 19 E. C. L. 333.

Legal representatives of a bailee stand in his position as to estoppel. Maxwell *v.* Houston, 67 N. C. 305.

62. King *v.* Richards, 6 Whart. (Pa.) 418, 37 Am. Dec. 420; Hentz *v.* The Steamship Idaho, 93 U. S. 575, 23 L. ed. 978.

Reason of doctrine.— In Bacon Abr. tit. Bailment, A, the reason assigned is that by accepting the bailment the bailee has estopped himself against questioning the right of his bailor. Undoubtedly the contract raises a strong presumption that the bailor is entitled, but it is not true that thereby the bailee conclusively admits the right. His contract is to do with the property committed to him, what his principal has directed — to restore it or to account for it. And he does account for it when he has yielded to the claim of one who has right paramount to that of the bailor. If there be any estoppel it ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount, that is by

63. Bates *v.* Stanton, 1 Duer (N. Y.) 79.

64. *Arkansas.*— Estes *v.* Boothe, 20 Ark. 583.

California.— Wetherly *v.* Straus, 93 Cal. 283, 28 Pac. 1045; Dodge *v.* Meyer, 61 Cal. 405.

District of Columbia.— Moses *v.* Taylor, 6 Mackey (D. C.) 255.

Illinois.— Simpson *v.* Wrenn, 50 Ill. 222, 99 Am. Dec. 511.

Iowa.— Reed *v.* Reed, 13 Iowa 5.

Kansas.— Thompson *v.* Williams, 30 Kan. 114, 1 Pac. 47.

Kentucky.— Stephens *v.* Vaughan, 4 J. J. Marsh. (Ky.) 206, 20 Am. Dec. 216.

Maine.— Roberts *v.* Noyes, 76 Me. 590.

Maryland.— Casey *v.* Suter, 36 Md. 1.

Massachusetts.— Osgood *v.* Nichols, 5 Gray (Mass.) 420.

Michigan.— Sinclair *v.* Murphy, 14 Mich. 392.

Missouri.— Pulliam *v.* Burlingame, 81 Mo. 111, 51 Am. Rep. 229; Sherwood *v.* Neal, 41 Mo. App. 416; Dougherty *v.* Chapman, 29 Mo. App. 233; Cole *v.* Wabash, etc., R. Co., 21 Mo. App. 443; Swallow *v.* Duncan, 18 Mo. App. 622.

New Jersey.— Mount *v.* Hendricks, 5 N. J. L. 864, 8 Am. Dec. 623; Hampton *v.* Swisher, 4 N. J. L. 74.

New York.— Mullins *v.* Chickering, 110 N. Y. 513, 18 N. E. 377, 18 N. Y. St. 606, 1 L. R. A. 463; Wheeler *v.* Lawson, 103 N. Y. 40, 8 N. E. 360; Schrauth *v.* Dry Dock Sav. Bank, 86 N. Y. 390; Western Transp. Co. *v.* Barber, 56 N. Y. 544; Hayes *v.* Kedzie, 11 Hun (N. Y.) 577; Gerber *v.* Monie, 56 Barb. (N. Y.) 652; Bliven *v.* Hudson River R. Co., 35 Barb. (N. Y.) 188 [*affirmed* in 36 N. Y. 403, 2 Transcr. App. (N. Y.) 179]; Bates *v.* Stanton, 1 Duer (N. Y.) 79; Barnard *v.* Kobbe, 3 Daly (N. Y.) 35, 373 [*affirmed* in 54 N. Y. 516]; Gruel *v.* Yetter, 27 Misc. (N. Y.) 494, 58 N. Y. Suppl. 373 [*affirming* 26 Misc. (N. Y.) 851, 55 N. Y. Suppl. 443]; Leoncini *v.* Post, 13 N. Y. Suppl. 825, 37 N. Y. St. 255; Vosburgh *v.* Huntington, 15 Abb. Pr. (N. Y.) 254; Holbrook *v.* Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; Marvin *v.* Ellwood, 11 Paige (N. Y.) 365.

North Carolina.— Lain *v.* Gaither, 72 N. C. 234; Maxwell *v.* Houston, 67 N. C. 305; Burnett *v.* Fulton, 48 N. C. 486; Craig *v.* Miller, 34 N. C. 375.

Pennsylvania.— McCafferty *v.* Brady, (Pa. 1887) 9 Atl. 37.

South Carolina.— Manning *v.* Norwood, 2 Mill Const. (S. C.) 374.

to a paramount title in another,[65] the position of the bailee being precisely the same, whether his bailor was honestly mistaken as to the rights of the third person whose title is set up, or fraudulently acting in derogation of them.[66]

2. **When Property Is Taken by Process of Law.** The bailee may deny the title of the bailor when the property has been taken from him by due process of law.[67]

3. **When Property Is Delivered to One Having Paramount Title.** A bailee

Texas.— Moore *v.* Aldrich, 25 Tex. Suppl. 276.

Vermont.— Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.

West Virginia.—Kelly *v.* Patchell, 5 W. Va. 585.

Wisconsin.— Nudd *v.* Montanye, 38 Wis. 511, 20 Am. Rep. 25.

United States.— Hentz *v.* The Steamship Idaho, 93 U. S. 575, 23 L. ed. 978; McCullough *v.* Roots, 19 How. (U. S.) 349, 15 L. ed. 681.

England.— Wilson *v.* Anderton, 1 B. & Ad. 450, 9 L. J. K. B. 48, 20 E. C. L. 555; Holl *v.* Griffin, 10 Bing. 246, 3 L. J. C. P. 17, 3 Moore & S. 732, 25 E. C. L. 121; Gosling *v.* Birnie, 7 Bing. 339, 9 L. J. C. P. 105, 5 M. & P. 160, 20 E. C. L. 155; Caunce *v.* Spanton, 7 M. & G. 903, 49 E. C. L. 903.

See 6 Cent. Dig. tit. "Bailment," § 32.

Position of bailee analogous to that of tenant.— The position of an ordinary bailee, where there has been no special contract or representation on his part, is very analogous to that of a tenant, who, having accepted the possession of land from another, is estopped to deny his landlord's title, but whose estoppel ceases when he is evicted by title paramount. Shelbury *v.* Scotsford, Yelv. 23 [*cited* in Biddle *v.* Bond, 6 B. & S. 225, 11 Jur. N. S. 425, 34 L. J. Q. B. 137, 12 L. T. Rep. N. S. 178, 13 Wkly. Rep. 561, 118 E. C. L. 225].

65. *District of Columbia.*— Moses *v.* Taylor, 6 Mackey (D. C.) 255.

Missouri.— Dougherty *v.* Chapman, 29 Mo. App. 233; Cole *v.* Wabash, etc., R. Co., 21 Mo. App. 443.

New York.— Schrauth *v.* Dry Dock Sav. Bank, 86 N. Y. 390; Western Transp. Co. *v.* Barber, 56 N. Y. 544; Cook *v.* Holt, 48 N. Y. 275; Sedgwick *v.* Macy, 24 N. Y. App. Div. 1, 49 N. Y. Suppl. 154; Bates *v.* Stanton, 1 Duer (N. Y.) 79.

North Carolina.— Pitt *v.* Albritton, 34 N. C. 74.

United States.— Hentz *v.* The Steamship Idaho, 93 U. S. 575, 23 L. ed. 978.

See 6 Cent. Dig. tit. "Bailment," § 32.

66. *Missouri.*— Dougherty *v.* Chapman, 29 Mo. App. 233.

New York.— Western Transp. Co. *v.* Barber, 56 N. Y. 544; Sedgwick *v.* Macy, 24 N. Y. App. Div. 1, 49 N. Y. Suppl. 154.

West Virginia.—Kelly *v.* Patchell, 5 W. Va. 585.

United States.— Hentz *v.* The Steamship Idaho, 93 U. S. 575, 23 L. ed. 978.

England.— Cheesman *v.* Exall, 6 Exch. 341. In Biddle *v.* Bond, 6 B. & S. 225, 11 Jur. N. S. 425, 34 L. J. Q. B. 137, 12 L. T. Rep. N. S. 178, 13 Wkly. Rep. 561, 118 E. C. L. 225, it was said that upon principle there is no difference between cases in which the bailor in the first instance obtained possession of the goods by fraud, force, or felony, and cases in which he was only mistaken as to the rights of others; for a bailor can confer upon his bailee no better title than he has himself. If the true owner demand the property of the bailee and he refuses to deliver it he is at once liable in an action for its conversion. It would be somewhat anomalous if the bailee might shield himself from an action for conversion by delivering the property to the owner, if he could not show a delivery to the owner as a defense to the groundless claim of the bailor.

Felonious or tortious acquisition by a bailor.— In some cases the ground on which the defense was allowed seems to have been that there was a felonious or tortious acquisition by the bailor. Bates *v.* Stanton, 1 Duer (N. Y.) 79; Decan *v.* Shipper, 35 Pa. St. 239, 78 Am. Dec. 334; Floyd *v.* Bovard, 6 Watts & S. (Pa.) 75; King *v.* Richards, 6 Whart. (Pa.) 418, 37 Am. Dec. 420; Hardman *v.* Willcock, 9 Bing. 382 note, 23 E. C. L. 626.

67. *Georgia.*— Savannah, etc., R. Co. *v.* Wilcox, 48 Ga. 432.

Indiana.— Ohio, etc., R. Co. *v.* Yohe, 51 Ind. 181, 19 Am. Rep. 727.

Kentucky.— Stephens *v.* Vaughan, 4 J. J. Marsh. (Ky.) 206, 20 Am. Dec. 216.

Louisiana.— Britton *v.* Aymar, 23 La. Ann. 63.

Massachusetts.— French *v.* Star Union Transp. Co., 134 Mass. 288.

Missouri.— McAlister *v.* Chicago, etc., R. Co., 74 Mo. 351.

New Mexico.— MacVeagh *v.* Atchison, etc., R. Co., 3 N. M. 205, 5 Pac. 457.

New York.—Bliven *v.* Hudson River R. Co., 36 N. Y. 403, 2 Transcr. App. (N. Y.) 179; Livingston *v.* Miller, 48 Hun (N. Y.) 232, 16 N. Y. St. 71; Van Winkle *v.* U. S. Mail Steamship Co., 37 Barb. (N. Y.) 122; Stamford Steam Boat Co. *v.* Gibbons, 9 Wend. (N. Y.) 327; Edson *v.* Weston, 7 Cow. (N. Y.) 278.

Vermont.— Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.

United States.— The M. M. Chase, 37 Fed. 708; Robinson *v.* Memphis, etc., R. Co., 16 Fed. 57.

England.— Verrall *v.* Robinson, 2 C. M. & R. 495, 4 Dowl. P. C. 242, 1 Gale 244, 5 Tyrw. 1069; Cheesman *v.* Exall, 6 Exch. 341;

who has actually delivered the subject-matter of the bailment to a person having the paramount title thereto is not estopped to deny the bailor's title.[68]

4. When Bailee Is Authorized by Third Person to Deny Bailor's Title. Where the bailee retains possession of the goods, he may set up and rely upon a *jus tertii* if he defends his possession upon the right and title of the third person,[69] or where the bailor was himself the mere agent and the return of the property to him has been forbidden by his principal.[70]

5. Where Bailor Has Parted With Title Since Bailment. The bailee may deny the title of the bailor when the latter has, subsequently to the bailment, parted with his interest in the property.[71]

V. Rights, Duties, and Liabilities of Parties.

A. As Between Bailor and Bailee — 1. In General — a. Controlled by Contract — (I) *In General.* The rights, duties, and liabilities of the bailor and bailee must be determined from the terms of the contract between the parties, whether express or implied.[72] Where there is an express contract, the terms thereof control, since both the bailor and bailee are entitled to impose on one

Ogle *v.* Atkinson, 1 Marsh. 323, 5 Taunt. 759, 15 Rev. Rep. 647, 1 E. C. L. 389.

Issue of process under unconstitutional statute.—Where the property was taken from the bailee by process issued under an unconstitutional statute it was held that the defense was sufficient because the bailee was not bound to know that the law under which the proceedings were had was unconstitutional. McAlister *v.* Chicago, etc., R. Co., 74 Mo. 351.

68. *Maine.*— Fisher *v.* Bartlett, 8 Me. 122, 22 Am. Dec. 225.

Missouri.— Dougherty *v.* Chapman, 29 Mo. App. 233; Cole *v.* Wabash, etc., R. Co., 21 Mo. App. 443.

New York.—Western Transp. Co. *v.* Barber, 56 N. Y. 544; Sedgwick *v.* Macy, 24 N. Y. App. Div. 1, 49 N. Y. Suppl. 154; Bates *v.* Stanton, 1 Duer (N. Y.) 79; Edson *v.* Weston, 7 Cow. (N. Y.) 278.

North Carolina.— Pitt *v.* Albritton, 34 N. C. 74.

United States.— Hentz *v.* The Steamship Idaho, 93 U. S. 575, 23 L. ed. 978; Rosenfield *v.* Express Co., 1 Woods (U. S.) 131, 20 Fed. Cas. No. 12,060.

England.— Biddle *v.* Bond, 6 B. & S. 225, 11 Jur. N. S. 425, 34 L. J. Q. B. 137, 12 L. T. Rep. N. S. 178, 13 Wkly. Rep. 561, 118 E. C. L. 225; Shelbury *v.* Scotsford, Yelv. 23; Wilson *v.* Anderton, 1 B. & Ad. 450, 9 L. J. K. B. O. S. 48, 20 E. C. L. 555.

Reception by the true owner in a proper manner is virtually the act of the law. Stephens *v.* Vaughan, 4 J. J. Marsh. (Ky.) 206, 20 Am. Dec. 216.

Effect of bailee's previous knowledge of adverse claim.— Default on the part of a bailee will estop him from availing himself of a defense that the property had been yielded to a title paramount. Thus if a bailee, knowing of an adverse claim to the thing bailed, said to the bailor, "I will sell the property for you if you will let me have a commission, and I will offer the proceeds to you," he could not afterward set up against his bailor the title of the adverse claimant, because he would have acted with his eyes open. *Ex p.* Davies, 19 Ch. D. 86.

69. *Alabama.*— Lowremore *v.* Berry, 19 Ala. 130, 54 Am. Dec. 188.

California.—Wetherly *v.* Straus, 93 Cal. 283, 28 Pac. 1045; Dodge *v.* Meyer, 61 Cal. 405; Palmtag *v.* Doutrick, 59 Cal. 154, 43 Am. Rep. 245.

New York.— Kissam *v.* Roberts, 6 Bosw. (N. Y.) 154.

South Carolina.— Tindall *v.* McCarthy, 44 S. C. 487, 22 S. E. 734.

England.— Biddle *v.* Bond, 6 B. & S. 225, 11 Jur. N. S. 425, 34 L. J. Q. B. 137, 12 L. T. Rep. N. S. 178, 13 Wkly. Rep. 561, 118 E. C. L. 225; Thorne *v.* Tilbury, 3 H. & N. 534, 27 L. J. Exch. 407; Rogers *v.* Lambert, [1891] 1 Q. B. 318, 55 J. P. 452, 60 L. J. Q. B. 187, 64 L. T. Rep. N. S. 406, 39 Wkly. Rep. 114; Kingsman *v.* Kingsman, 6 Q. B. D. 122, 45 J. P. 357, 50 L. J. Q. B. 81, 44 L. T. Rep. N. S. 124, 29 Wkly. Rep. 207.

Where third person makes no claim or abandons it.— The right of a third person who makes no claim to the property, or who has abandoned any claim, cannot be set up as a defense. Betteley *v.* Reed, 4 Q. B. 511, 3 G. & D. 561, 7 Jur. 507, 12 L. J. Q. B. 172, 45 E. C. L. 511.

70. Bates *v.* Stanton, 1 Duer (N. Y.) 79.

71. Roberts *v.* Noyes, 76 Me. 590; Cole *v.* Wabash, etc., R. Co., 21 Mo. App. 443; Gerber *v.* Monie, 56 Barb. (N. Y.) 652; Gruel *v.* Yetter, 27 Misc. (N. Y.) 494, 58 N. Y. Suppl. 373 [*affirming* 26 Misc. (N. Y.) 851, 55 N. Y. Suppl. 443]; Marvin *v.* Ellwood, 11 Paige (N. Y.) 365.

Acquisition of interest by bailee who is a cestui que trust subsequently to bailment.— Where property after bailment is conveyed in trust, for the benefit of the bailee, the title of the bailor may be disputed. Burnett *v.* Fulton, 48 N. C. 486.

72. White *v.* Phelps, 14 Minn. 27, 100 Am. Dec. 190.

another any terms they respectively may choose.[73] Where the bailment is implied the intention of the parties must be ascertained and explained by all the surrounding and attending circumstances;[74] but in determining whether a bailment is gratuitous or lucrative the inquiry must not be directed to the character or certainty of a benefit or profit to either party, but to whether it was accepted for the purpose of deriving the one or the other.[75] There is always a presumption that the bailment is one for mutual benefit,[76] although the question is always one of fact.[77]

(II) *Restriction of Liability.* As a general rule bailees may contract for any degree of exemption from liability that stops short of protection in case of fraud[78] or their own negligence;[79] the principle being that the bailee may impose

The character of a bailment may be changed subsequently to the original contract. Preston *v.* Prather, 137 U. S. 604, 34 L. ed. 788.

73. Butler *v.* Greene, 49 Nebr. 280, 68 N. W. 496; Harris *v.* Howard, 56 Vt. 695; Walker *v.* York, etc., R. Co., 2 C. L. R. 237, 2 E. & B. 750, 18 Jur. 143, 23 L. J. Q. B. 73, 2 Wkly. Rep. 11, 75 E. C. L. 750; Van Toll *v.* South Eastern R. Co., 12 C. B. N. S. 75, 8 Jur. N. S. 1213, 31 L. J. C. P. 241, 6 L. T. Rep. N. S. 244, 10 Wkly. Rep. 578, 104 E. C. L. 75.

A special contract prevails against general principles of law applicable in the absence of express agreements. Butler *v.* Greene, 49 Nebr. 280, 68 N. W. 496; Lance *v.* Griner, 53 Pa. St. 204.

74. Mariner *v.* Smith, 5 Heisk. (Tenn.) 203.

75. Prince *v.* Alabama State Fair, 106 Ala. 340, 17 So. 449, 28 L. R. A. 716.

76. Swartz *v.* Hauser, 10 Wkly. Notes Cas. (Pa.) 434; Erie Second Nat. Bank *v.* Ocean Nat. Bank, 11 Blatchf. (U. S.) 362, 21 Fed. Cas. No. 12,602, 30 Leg. Int. (Pa.) 433.

When no hire is paid, the safer rule is to hold a bailment to be for hire only in those cases where it is a necessary incident of a business in which the bailee makes profit. Woodruff *v.* Painter, 150 Pa. St. 91, 24 Atl. 621, 30 Am. St. Rep. 786, 16 L. R. A. 451.

Distinction between deposit and mandate. —Where a gratuitous bailment for the bailor's benefit is claimed, a court will generally avoid making an issue between a deposit and mandate, and decide the question presented upon principles common to both classes. Story Bailm. (9th ed.) 143 [*cited* in Coleman *v.* Lipscomb, 18 Mo. App. 443].

77. *Indiana.*— Dart *v.* Lowe, 5 Ind. 131.

Kansas.— Lobenstein *v.* Pritchett, 8 Kan. 213.

Missouri.— Kincheloe *v.* Priest, 89 Mo. 240, 1 S. W. 235, 58 Am. Rep. 117.

New York.— Pattison *v.* Syracuse Nat. Bank, 1 Hun (N. Y.) 606.

Tennessee.— Mariner *v.* Smith, 5 Heisk. (Tenn.) 203.

See 6 Cent. Dig. tit. "Bailments," § 17.

78. Gashweiler *v.* Wabash, etc., R. Co., 83 Mo. 112, 53 Am. Rep. 558; Wells *v.* Steam Nav. Co., 8 N. Y. 375; Alexander *v.* Greene, 3 Hill (N. Y.) 9; Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; Coffield *v.* Harris, 2 Tex. App. Civ. Cas. § 315.

Powers of carriers and innkeepers in this respect see CARRIERS; INNKEEPERS.

Restriction of liability by masters of ships see SHIPPING.

Relief from custody of goods for indefinite period.— Where the business of the bailee is such that it is important to him not to be burdened with the care of articles for a long time after work to be done upon them has been completed, he may contract to deliver the goods to the bailor if called for within a certain time only. Lance *v.* Griner, 53 Pa. St. 204.

Necessity of express agreement.—Where a person vested with temporary control of another's property desires to shield himself from responsibility he must show his immunity on the face of his agreement. No stipulation can be implied from a general expression. Wells *v.* Steam Nav. Co., 8 N. Y. 375.

Such stipulations must be construed strictly. Hence where the bailor agreed that the bailed property should be stored in a particular warehouse, at his risk and expense, the bailees were liable for damage to the property upon its removal without the consent of the bailor. St. Losky *v.* Davidson, 6 Cal. 643. An undertaking to assume the risk of a destruction of the bailed article by a natural force that cannot be resisted should be special and express, and so clear as not to admit of any other construction. Such a risk is not covered by the words "the usual wear and tear excepted." McEvers *v.* Steamboat Sangamon, 22 Mo. 187.

79. *Kentucky.*— Bridwell *v.* Moore, 8 Ky. L. Rep. 535.

Missouri.— Cashweiler *v.* Wabash, etc., R. Co., 83 Mo. 112, 53 Am. Rep. 558.

New York.— Wells *v.* Steam Nav. Co., 8 N. Y. 375; Alexander *v.* Greene, 7 Hill (N. Y.) 533.

Pennsylvania.— Lancaster County Nat. Bank *v.* Smith, 62 Pa. St. 47.

Tennessee.— Memphis, etc., R. Co. *v.* Jones, 2 Head (Tenn.) 516.

Receipt of subject of bailment "at owner's risk."—Where the subject of bailment is received "at owner's risk," and with an express promise to exercise all reasonable diligence with respect thereto, but not to be responsible for loss by fire or otherwise, the bailor assumes only the risk from ordinary dangers, not to be prevented by reasonable and ordinary care on the part of the bailee; but the bailee is left liable for occurrences which

whatever terms he chooses if he gives the bailor notice that there are special terms and the means of knowing what they are, and if the bailor chooses to make the bailment he is bound by them.[80]

b. Insurance. Either the bailor or bailee may insure the subject-matter of the bailment for the joint benefit of both parties.[81]

c. Repairs. By the civil law the bailor for hire was generally bound to keep the thing in order, or in a state of repair suitable for use. No such liability, however, is recognized by the common law, and, in the absence of an express contract, whether the bailor or bailee is bound to pay the ordinary expenses incident to keeping the article hired in a state of repair, while in the custody of the bailee, depends largely on custom and usage and the character of the article.[82]

2. Use and Care of Property and Performance of Services — a. Use and Care — (i) *In General.* A bailee has not the right to make use of the property in any way not evidently contemplated by the parties to the contract of bailment.[83] Should he do so either in a different manner, for a different purpose, or for a longer time than was agreed upon, he is guilty of a conversion of the property,[84]

might be avoided with ordinary care and prudence. Moeran *v.* New York Poultry, etc., Assoc., 28 Misc. (N. Y.) 537, 59 N. Y. Suppl. 584.

80. Walker *v.* York, etc., R. Co., 2 C. L. R. 237, 2 E. & B. 750, 18 Jur. 143, 23 L. J. Q. B. 73, 2 Wkly. Rep. 11, 75 E. C. L. 750; Van Toll *v.* South Eastern R. Co., 12 C. B. N. S. 75, 8 Jur. N. S. 1213, 31 L. J. C. P. 241, 6 L. T. Rep. N. S. 244, 10 Wkly. Rep. 578, 104 E. C. L. 75; Wyld *v.* Pickford, 8 M. & W. 443.

Notice of restriction of liability must be given to the bailor. Hunter *v.* Reed, 12 Pa. Super. Ct. 112.

81. Watkins *v.* Durand, 1 Port. (Ala.) 251; Durand *v.* Thouron, 1 Port. (Ala.) 238; Savage *v.* Corn Exch. F., etc., Nav. Ins. Co., 36 N. Y. 655, 3 Transcr. App. (N. Y.) 112; De Forest *v.* Fulton F. Ins. Co., 1 Hall (N. Y.) 84.

As to insurable interest of bailee see Insurance.

Where the bailee has procured insurance without instructions from the bailor, the latter may adopt it before a loss or within a reasonable time thereafter, or may disclaim the policy entirely. Watkins *v.* Durand, 1 Port. (Ala.) 251.

The bailor is not liable for insurance charges unless he has agreed to pay them. Abbott *v.* Curtis, etc., Mfg. Co., 25 Fed. 402.

Bailor should notify bailee of insurance.— Where the bailor has insured the property as located in a particular place, he should inform the bailee to that effect, or in the event of a change of location by the bailee the insurance may be affected. Bradley *v.* Cunningham, 61 Conn. 485, 23 Atl. 932, 15 L. R. A. 679.

82. New York Cent. Trust Co. *v.* Wabash, etc., R. Co., 50 Fed. 857.

Repairs of railroad cars hired by one railroad from another see Railroads.

A bailor who binds himself to keep a bailed article in perfect repair, without any further charges whatever, is liable for repairs made necessary by an accident not caused by the wilful default of the hirer. Reading *v.* Menham, 1 M. & Rob. 234.

When expenses of repair recoverable from bailee.—Where the bailee agrees to return an article in as good condition as it was when hired, ordinary and natural wear excepted, the expense of necessary repairs made by the bailor after its return may be recovered from the bailee. Woodward *v.* Cutter, 33 Vt. 49. And where the bailee has agreed to pay the cost of repairs, the fact that the bailed article had a defect in it at the time of the hiring does not release him from his contract. Riley *v.* Lowry, 18 N. Y. Suppl. 299, 44 N. Y. St. 233.

83. Sowden *v.* Kessler, 76 Mo. App. 581.

84. *Alabama.*—Cartlidge *v.* Sloan, 124 Ala. 596, 26 So. 918; Bolling *v.* Kirby, 90 Ala. 215, 7 So. 914, 24 Am. St. Rep. 789; Jones *v.* Fort, 36 Ala. 449; Fail *v.* McArthur, 31 Ala. 26; Wilkinson *v.* Moseley, 30 Ala. 562; Moseley *v.* Wilkinson, 24 Ala. 411; Hooks *v.* Smith, 18 Ala. 338.

Arkansas.— Stewart *v.* Davis, 31 Ark. 518, 25 Am. Rep. 576.

California.— Welch *v.* Mohr, 93 Cal. 371, 28 Pac. 1060.

Connecticut.—Frost *v.* Plumb, 40 Conn. 111, 16 Am. Rep. 18.

Delaware.— Maguyer *v.* Hawthorn, 2 Harr. (Del.) 71.

Georgia.— Farkas *v.* Powell, 86 Ga. 800, 13 S. E. 200, 12 L. R. A. 397; Lewis *v.* McAfee, 32 Ga. 465; Latimer *v.* Alexander, 14 Ga. 259; Gorman *v.* Campbell, 14 Ga. 137; Columbus *v.* Howard, 6 Ga. 213.

Illinois.— Johnson *v.* Weedman, 5 Ill. 495.

Kentucky.— Kennedy *v.* Ashcraft, 4 Bush (Ky.) 530; Kelly *v.* White, 17 B. Mon. (Ky.) 124; King *v.* Shanks, 12 B. Mon. (Ky.) 410.

Louisiana.— Guillot *v.* Armitage, 7 Mart. (La.) 710.

Maine.— Morton *v.* Gloster, 46 Me. 520; Crocker *v.* Gullifer, 44 Me. 491, 69 Am. Dec. 118.

Maryland.— Clagett *v.* Speake, 4 Harr. & M. (Md.) 162.

Massachusetts.— Perham *v.* Coney, 117

if his acts of themselves imply an assertion of title to or a right of dominion over the bailor's property, notwithstanding that the bailee has honestly mistaken his rights;[85] or of a breach of contract, where his acts do not of themselves imply an assertion of title or right of dominion in himself.[86] He must, however, always use

Mass. 102; Hall *v.* Corcoran, 107 Mass. 251, 9 Am. Rep. 30; Lucas *v.* Trumbull, 15 Gray (Mass.) 306; Gregg *v.* Wyman, 4 Cush. (Mass.) 322; Rotch *v.* Hawes, 12 Pick. (Mass.) 136, 22 Am. Dec. 414; Homer *v.* Thwing, 3 Pick. (Mass.) 492; Wheelock *v.* Wheelwright, 5 Mass. 104.

Michigan.— Hubbell *v.* Blandy, 87 Mich. 209, 49 N. W. 502, 24 Am. St. Rep. 154; Fisher *v.* Kyle, 27 Mich. 454.

Mississippi.—Wallace *v.* Seales, 36 Miss. 53; Young *v.* Thompson, 3 Sm. & M. (Miss.) 129.

Missouri.— Kellar *v.* Garth, 45 Mo. App. 332; Fox *v.* Young, 22 Mo. App. 386.

New Hampshire.—Gove *v.* Watson, 61 N. H. 136; King *v.* Bates, 57 N. H. 446; Woodman *v.* Hubbard, 25 N. H. 67, 57 Am. Dec. 310.

New Jersey.— Schenk *v.* Strong, 4 N. J. L. 99.

New York.— Buchanan *v.* Smith, 10 Hun (N. Y.) 474; Harrington *v.* Snyder, 3 Barb. (N. Y.) 380; Fish *v.* Ferris, 5 Duer (N. Y.) 49; Disbrow *v.* Tenbroeck, 4 E. D. Smith (N. Y.) 397; Campbell *v.* Stakes, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561; Sarjeant *v.* Blunt, 16 Johns. (N. Y.) 74.

North Carolina.— Martin *v.* Cuthbertson, 64 N. C. 328; Slocumb *v.* Washington, 51 N. C. 357; Bell *v.* Bowen, 46 N. C. 316.

Pennsylvania.— Brown *v.* Baker, 15 Wkly. Notes Cas. (Pa.) 60.

South Carolina.— Richardson *v.* Dingle, 11 Rich. (S. C.) 405; Duncan *v.* South Carolina R. Co., 2 Rich. (S. C.) 613; De Tollenere *v.* Fuller, 1 Mill Const. (S. C.) 116, 12 Am. Dec. 616.

Tennessee.— Scruggs *v.* Davis, 5 Sneed (Tenn.) 261 [*distinguishing* Fouldes *v.* Willoughby, 8 M. & W. 540]; Bedford *v.* Flowers, 11 Humphr. (Tenn.) 241; Mullen *v.* Ensley, 8 Humphr. (Tenn.) 427; Horsely *v.* Branch, 1 Humphr. (Tenn.) 198; Angus *v.* Dickerson, Meigs (Tenn.) 459; McNeill *v.* Brooks, 1 Yerg. (Tenn.) 73.

Texas.— Mills *v.* Ashe, 16 Tex. 295; Sims *v.* Chance, 7 Tex. 561; Cochran *v.* Walker, (Tex. Civ. App. 1899) 49 S. W. 403; Evertson *v.* Frier, (Tex. Civ. App. 1898) 45 S. W. 201.

Vermont.— Malaney *v.* Taft, 60 Vt. 571, 15 Atl. 326, 6 Am. St. Rep. 135; Ray *v.* Tubbs, 50 Vt. 688, 28 Am. Rep. 519; Towne *v.* Wiley, 23 Vt. 355, 56 Am. Dec. 85; Green *v.* Sperry, 16 Vt. 390, 42 Am. Dec. 519.

Virginia.— Harvey *v.* Skipwith, 16 Gratt. (Va.) 393; Spencer *v.* Pilcher, 8 Leigh (Va.) 565.

Wisconsin.— De Voin *v.* Michigan Lumber Co., 64 Wis. 616, 25 N. W. 552, 54 Am. Rep. 649; Lane *v.* Cameron, 38 Wis. 603.

United States.— Ross *v.* Southern Cotton Oil Co., 41 Fed. 152.

It is immaterial what degree of care was employed by a bailee when using a bailed article in an unauthorized manner. Jones *v.* Fort, 36 Ala. 449.

Remedies for unauthorized use see *infra*, VI, A, 2, a.

85. *Alabama.*— St. John *v.* O'Connel, 7 Port. (Ala.) 466.

Georgia.—Fannin *v.* Thomason, 50 Ga. 614.

Illinois.— Follett *v.* Edwards, 30 Ill. App. 386.

Kentucky.— Newcomb-Buchanan Co. *v.* Baskett, 14 Bush (Ky.) 658.

Massachusetts.— Goell *v.* Smith, 128 Mass. 238.

Missouri.— State *v.* Berning, 74 Mo. 87.

New Hampshire.—Evans *v.* Mason, 64 N. H. 98, 5 Atl. 766.

New Jersey.— New Jersey Electric R. Co. *v.* New York, etc., R. Co., 61 N. J. L. 287, 41 Atl. 1116, 43 L. R. A. 849 [*affirming* 60 N. J. L. 338, 38 Atl. 828].

New York.— Bowen *v.* Fenner, 40 Barb. (N. Y.) 383.

Virginia.—Spencer *v.* Pilcher, 8 Leigh (Va.) 565.

England.— Fouldes *v.* Willoughby, 1 Dowl. N. S. 86, 5 Jur. 534, 10 L. J. Exch. 364, 8 M. & W. 540.

Canada.— Coffey *v.* Quebec Bank, 20 U. C. C. P. 110; Moffatt *v.* Grand Trunk R. Co., 15 U. C. C. P. 392; Wallace *v.* Swift, 31 U. C. Q. B. 523.

A right of dominion is implied by the use of a hired article for a purpose other than that for which it was hired (Fail *v.* McArthur, 31 Ala. 26; Moseley *v.* Wilkinson, 24 Ala. 411; Hooks *v.* Smith, 18 Ala. 338; Rotch *v.* Hawes, 12 Pick. (Mass.) 136, 22 Am. Dec. 414; Wheelock *v.* Wheelwright, 5 Mass. 104), but unauthorized use has been held not a conversion unless injury was caused thereby (Johnson *v.* Weedman, 5 Ill. 495; Harvey *v.* Epes, 12 Gratt. (Va.) 153), or there was an intent to convert by such use (Evans *v.* Mason, 64 N. H. 98, 5 Atl. 766; Harvey *v.* Epes, 12 Gratt. (Va.) 153).

Use of one of many articles bailed does not render the bailee a tort-feasor as to other articles stolen from him. Schermer *v.* Neurath, 54 Md. 491, 39 Am. Rep. 397.

The mere user of money bailed causes the bailee to be at once liable as a wrong-doer, notwithstanding that the manner of user was intended for the benefit of the bailor. Mott *v.* Pettit, 1 N. J. L. 344.

The pledge of a decedent's property by an administrator for his own purposes is an act constituting a conversion of such property. State *v.* Berning, 74 Mo. 87.

Bailee's right to pledge see *infra*, V, A, 3, a.

Unauthorized delivery of a bailed note to the maker who destroys it is a conversion. Hicks *v.* Lyle, 46 Mich. 488, 9 N. W. 529.

86. *Massachusetts.*— Spooner *v.* Manchester, 133 Mass. 270, 43 Am. Rep. 514; Bowlin *v.* Nye, 10 Cush. (Mass.) 416.

the property intrusted to him well,[87] and may impliedly contract for and bind the bailor with respect to the preservation and care of such property.[88]

(II) *Rights and Duties of Bailee*—(A) *Bailment For Mutual Benefit.* The bailee's right to use the subject-matter of the bailment is restricted to such uses only as are authorized by the contract, express or implied, as the case may be.[89] Thus, where it is the intention of the bailor that the bailee should act merely as the custodian of the article, it is the latter's duty to keep the property without using it, unless its preservation requires such use.[90] Where, however, the bailment is one of hiring, the bailee, during the period of the hiring, is entitled to use, enjoy, and possess the subject-matter thereof in any manner contemplated by the contract,[91] and this right is exclusive not

New Hampshire.—Evans *v.* Mason, 64 N. H. 98, 5 Atl. 766; Eaton *v.* Hill, 50 N. H. 235, 9 Am. Rep. 189; Wentworth *v.* McDuffie, 48 N. H. 402; Woodman *v.* Hubbard, 25 N. H. 67, 57 Am. Dec. 310.

Vermont.— Swift *v.* Moseley, 10 Vt. 208, 33 Am. Dec. 197.

England.— Heald *v.* Carey, 11 C. B. 977, 16 Jur. 197, 21 L. J. C. P. 97, 73 E. C. L. 977.

Canada.— Gilpin *v.* Royal Canadian Bank, 27 U. C. Q. B. 310 [*reversing* 26 U. C. Q. B. 445]; Lovekin *v.* Podger, 26 U. C. Q. B. 156; Wells *v.* Crew, 5 U. C. Q. B. O. S. 209.

Any misuse or abuse of the thing bailed in the particular use for which the bailment was made is merely a breach of contract. Swift *v.* Moseley, 10 Vt. 208, 33 Am. Dec. 197.

Simple asportation of the thing bailed, independent of any claim over it, is merely a breach of contract. Eldridge *v.* Adams, 54 Barb. (N. Y.) 417; Fouldes *v.* Willoughby, 1 Dowl. N. S. 86, 5 Jur. 534, 10 L. J. Exch. 364, 8 M. & W. 540.

87. Zell *v.* Dunkle, 156 Pa. St. 353, 33 Wkly. Notes Cas. (Pa.) 33, 27 Atl. 38.

88. *Kentucky.*— Tudor *v.* Lewis, 3 Metc. (Ky.) 378.

Maine.— Leach *v.* French, 69 Me. 389, 31 Am. Rep. 296.

New York.— Harter *v.* Blanchard, 64 Barb. (N. Y.) 617.

Pennsylvania.— Zell *v.* Dunkle, 156 Pa. St. 353, 33 Wkly. Notes Cas. (Pa.) 33, 27 Atl. 38.

United States.— Gibbs *v.* U. S., 14 Ct. Cl. 544.

89. *Alabama.*—Cartlidge *v.* Sloan, 124 Ala. 596, 26 So. 918; Singer Mfg. Co. *v.* Belgart, 84 Ala. 519, 4 So. 400; Fail *v.* McArthur, 31 Ala. 26.

Georgia.— Malone *v.* Robinson, 77 Ga. 719.

Massachusetts.— Lucas *v.* Trumbull, 15 Gray (Mass.) 306; Wheelock *v.* Wheelwright, 5 Mass. 104.

Michigan.— Fisher *v.* Kyle, 27 Mich. 454.

Missouri.— Fox *v.* Young, 22 Mo. App. 386.

New York.— Harrington *v.* Snyder, 3 Barb. (N. Y.) 380.

In the absence of an express contract concerning the manner of user, the residence of the parties, the character of their business, the nature and qualities of the thing hired, and other facts relating to the hiring are proper subjects of investigation to ascertain the implied obligations of the parties. Pridgen *v.* Buchannon, 24 Tex. 655.

Where there is an unauthorized use liability for injury or loss is said not to be dependent upon want of care upon the part of the bailee, but is absolute. Cartlidge *v.* Sloan, 124 Ala. 596, 26 So. 918. *Compare* Cullen *v.* Lord, 39 Iowa 302, where the court held that a bailee for hire was not liable for disregarding instructions, unless the injury directly resulted from a failure to follow them.

The bailee must act up to the spirit of his covenant and must not only observe a covenant of hire, but is bound to perform what has been omitted to be inserted but ought reasonably to be done. Cooper's Justinian, lib. 3, tit. 25, § 5 [*cited* in Spencer *v.* Pilcher, 8 Leigh (Va.) 565].

90. Butler *v.* Greene, 49 Nebr. 280, 68 N. W. 496.

Bailment of corpse for purpose of interment.—A bailee to whom a dead body is intrusted until the bailor is ready to inter the same is not entitled to dispose of such body. Renihan *v.* Wright, 125 Ind. 536, 25 N. E. 822, 21 Am. St. Rep. 249, 9 L. R. A. 514. As to corpses, generally, see Dead Bodies.

91. *Alabama.*— Harris *v.* Maury, 30 Ala. 679; Farrow *v.* Bragg, 30 Ala. 261.

Colorado.— Schoyer *v.* Leif, 11 Colo. App. 40, 52 Pac. 416.

New York.— Harrington *v.* Snyder, 3 Barb. (N. Y.) 380, holding that in a contract for the hire of a vehicle usually employed to carry two persons, no agreement is implied that it shall be used to carry one only; but that when both the bailor and bailee are silent as to the number of persons who may ride in the carriage, such number may ride as the vehicle was made for, not exceeding the ordinary load adapted to the team drawing the carriage.

Pennsylvania.— Zell *v.* Dunkle, 156 Pa. St. 353, 33 Wkly. Notes Cas. (Pa.) 33, 27 Atl. 38.

Vermont.— Hickok *v.* Buck, 22 Vt. 149; Soper *v.* Sumner, 5 Vt. 274.

Right to rebail.—Where a contract of hiring is general in its terms, and without restriction as to the employment or use of the bailed property, the bailee may rebail such property. Harris *v.* Maury, 30 Ala. 679. But if a hired article be rehired the original hirer is responsible for ordinary negligence

only against third persons[92] but against the bailor who has no right to disturb him.[93]

(B) *Bailment For Sole Benefit of Bailor.* Where the bailment is for the sole benefit of the bailor, the bailee may not use the property for his own purposes, or needlessly expose it,[94] or derive any benefit therefrom.[95]

(C) *Bailment For Sole Benefit of Bailee.* The right of the bailee to use the thing bailed is strictly confined to such use, expressed or implied, as was anticipated by the bailor at the time of the bailment and the former is responsible for any loss arising from an unauthorized use, although the loss be caused by some inevitable casualty.[96] So the bailee has no right to delegate his power of user[97] unless there be some understanding or agreement to that effect.[98]

(III) *Duties of Bailor* — (A) *Bailment For Mutual Benefit.* Where a bailment for mutual benefit is one of hiring, there is imposed on the bailor, in the absence of special contract or representation, an obligation that the thing or property hired for use shall be reasonably fit for the purpose, or capable of the use known to be intended, that is, that it shall possess the qualities usually belonging to things of that kind when used for the same purpose;[99] and for a failure to deliver the thing hired in a proper condition, the bailor is responsible for damage caused the bailee or his servants by its lack of such proper condition.[1]

(B) *Bailment For Sole Benefit of Bailee.* Where the bailment is for the sole benefit of the bailee, the bailor, when aware of any defect in the property which would make its use to the bailee dangerous or not beneficial, must inform him thereof;[2] and should he conceal such defect will be responsible for any injury arising therefrom.[3] Where, however, the defect is not known to the bailor he is

on the part of his bailee. Alabama, etc., Rivers R. Co. *v.* Burke, 27 Ala. 535.

92. Hartford *v.* Jackson, 11 N. H. 145.

93. Camp *v.* Dill, 27 Ala. 553.

94. Carico *v.* Fidelity Invest. Co., 5 Colo. App. 56, 37 Pac. 29; Persch *v.* Quiggle, 57 Pa. St. 247; Ulmer *v.* Ulmer, 2 Nott & M. (S. C.) 489.

Use for preservation of property.— It may, however, be necessary to use the bailed property for its preservation and for the benefit of the rightful owner, as in the case of an animal taken up as an estray. See ANIMALS, 2 Cyc. 362, note 19.

95. Boston, etc., Smelting Co. *v.* Reed, 23 Colo. 523, 48 Pac. 515.

96. *Iowa.*— Cullen *v.* Lord, 39 Iowa 302.

Kentucky.— Kennedy *v.* Ashcraft, 4 Bush (Ky.) 530.

New York.— Buchanan *v.* Smith, 10 Hun (N. Y.) 474.

Wisconsin.— Lane *v.* Cameron, 38 Wis. 603.

United States.— Ross *v.* Southern Cotton Oil Co., 41 Fed. 152.

See 6 Cent. Dig. tit. "Bailment," § 43.

Duties of bailee with respect to animals loaned for use see ANIMALS, 2 Cyc. 311.

97. Wilcox *v.* Hogan, 5 Ind. 546; Hunt *v.* Douglass, 22 Vt. 128.

98. Camoys *v.* Scurr, 9 C. & P. 383, 38 E. C. L. 229, holding that where a prospective purchaser of a horse asks the lender to let him have the animal, with the object of trying it, and such request is granted, there is an implied understanding that the prospective purchaser has a right to put some proper person on the horse for such purpose, and his right of user is not restricted to himself.

99. *Indiana.*— Bass *v.* Cantor, 123 Ind. 444, 24 N. E. 147.

Kentucky.— Swigert *v.* Graham, 7 B. Mon. (Ky.) 661.

Maine.— Windle *v.* Jordan, 75 Me. 149.

Massachusetts.—Horne *v.* Meakin, 115 Mass. 326.

New York.— Kissam *v.* Jones, 56 Hun (N. Y.) 432, 10 N. Y. Suppl. 94, 31 N. Y. St. 198; Campbell *v.* Page, 67 Barb. (N. Y.) 113; Cook *v.* New York Floating Dry Dock Co., 1 Hilt. (N. Y.) 436; Moriarty *v.* Porter, 22 Misc. (N. Y.) 536, 49 N. Y. Suppl. 1107.

Further use of unfit property improper.— After having tried property hired for a particular kind of work, the bailee should, if it is clear that the property is unfitted therefor and that further use would be injurious to the property, abstain from further use, unless the bailor is informed of the facts in relation to the property and his consent obtained for a further use thereof. Bass *v.* Cantor, 123 Ind. 444, 24 N. E. 147.

The bailee should not continue to use property needing repair, but should inform the bailor that it needs repair. Higman *v.* Camody, 112 Ala. 267, 20 So. 480, 57 Am. St. Rep. 33.

1. Gagnon *v.* Dana, 69 N. H. 264, 39 Atl. 982, 76 Am. St. Rep. 170, 41 L. R. A. 389; Harrington *v.* Snyder, 3 Barb. (N. Y.) 380.

2. MacCarthy *v.* Young, 6 H. & N. 329, 30 L. J. Exch. 227, 3 L. T. Rep. N. S. 785, 9 Wkly. Rep. 439; Blakemore *v.* Bristol, etc., R. Co., 8 E. & B. 1035, 92 E. C. L. 1035.

3. Blakemore *v.* Bristol, etc., R. Co., 8 E. & B. 1035, 92 E. C. L. 1035.

not liable in case of injury,[4] even if he ought to have known of it.[5] Neither is he responsible for injury done to another by the bailee's negligence in his use of what is bailed.[6]

b. Performance of Services — (I) *In General.* Where the nature of the bailment is such that duties or services are to be performed by the bailee he must pursue any instructions given, expressly or impliedly, in relation to the subject-matter of the bailment, or he will be liable in the event of loss or injury resulting from a non-performance.[7]

(II) *Where Skill Is Required.* Where skill as well as care is required in performing the undertaking, if the bailee purports to have skill in the business he must be understood to have engaged to use a degree of skill adequate to the due performance of his undertaking.[8] This rule is equally applicable to a mandatory who has actually entered upon the execution of some work or service that he has undertaken to perform respecting the subject-matter of the bailment.[9]

4. Gagnon *v.* Dana, 69 N. H. 264, 39 Atl. 982, 76 Am. St. Rep. 170, 41 L. R. A. 389; MacCarthy *v.* Young, 6 H. & N. 329, 30 L. J. Exch. 227, 3 L. T. Rep. N. S. 785, 9 Wkly. Rep. 439; Blakemore *v.* Bristol, etc., R. Co., 8 E. & B. 1035, 92 E. C. L. 1035.

5. Gagnon *v.* Dana, 69 N. H. 264, 39 Atl. 982, 76 Am. St. Rep. 170, 41 L. R. A. 389, holding that there is a distinction between the liability in a bailment of this character and the liability in a hiring agreement; for while in the former the liability for defects in the thing loaned extends only to those which are known to the bailor, and not communicated to the bailee, in the latter the bailor's duty is to deliver the thing hired in a proper condition, to be used as contemplated by the parties, and for failure so to do he is liable for damage directly resulting to the bailee, or his servants, from its unsafe condition.

6. Herlihy *v.* Smith, 116 Mass. 265.

7. *Arkansas.*— Lyon *v.* Tams, 11 Ark. 189.

Florida.— Ferguson *v.* Porter, 3 Fla. 27.

Illinois.— Walden *v.* Karr, 88 Ill. 49.

Indiana.— McClelland *v.* Hubbard, 2 Blackf. (Ind.) 361.

Iowa.— Serry *v.* Knepper, 101 Iowa 372, 70 N. W. 601; Cullen *v.* Lord, 39 Iowa 302.

Kentucky.— Fellowes *v.* Gordon, 8 B. Mon. (Ky.) 415; McKibben *v.* Bakers, 1 B. Mon. (Ky.) 120.

Mississippi.— Moore *v.* Gholson, 34 Miss. 372.

Missouri.— Coleman *v.* Lipscomb, 18 Mo. App. 443.

New York.— McCollough's Lead Co. *v.* Strong, 35 N. Y. Super. Ct. 21; Lienan *v.* Dinsmore, 3 Daly (N. Y.) 365; Rutgers *v.* Lucet, 2 Johns. Cas. (N. Y.) 92.

Pennsylvania.—Chambers *v.* Crawford, Add. (Pa.) 150.

Where a bailee is specifically directed as to the disposition of the bailed property the bailee must comply in substance with the instructions given. Kansas Elevator Co. *v.* Harris, 6 Kan. App. 89, 49 Pac. 674.

When the bailor renders performance by the bailee impossible the latter is excused. Russell *v.* Da Bandeira, 13 C. B. N. S. 149, 106 E. C. L. 149; Holme *v.* Guppy, 1 Jur. 825, 3 M. & W. 387.

Liability for acts of subbailee.—An original bailee is responsible for the acts of his substitute. Seevers *v.* Gabel, 94 Iowa 75, 62 N. W. 669, 58 Am. St. Rep. 381, 27 L. R. A. 733.

8. *Illinois.*— Keith *v.* Bliss, 10 Ill. App. 424.

Kentucky.— McKibben *v.* Bakers, 1 B. Mon. (Ky.) 120.

Massachusetts.— Lincoln *v.* Gay, 164 Mass. 537, 42 N. E. 95, 49 Am. St. Rep. 480; Morton *v.* Fairbanks, 11 Pick. (Mass.) 368.

New York.— Mack *v.* Snell, 140 N. Y. 193, 35 N. E. 493, 55 N. Y. St. 576, 37 Am. St. Rep. 534.

Pennsylvania.— Zell *v.* Dunkle, 156 Pa. St. 353, 33 Wkly. Notes Cas. (Pa.) 33, 27 Atl. 38; Gamber *v.* Wolaver, 1 Watts & S. (Pa.) 60; Chambers *v.* Crawford, Add. (Pa.) 150.

Wisconsin.— Kuehn *v.* Wilson, 13 Wis. 104.

See 6 Cent. Dig. tit. "Bailment," § 58.

Reasonable skill constitutes the measure of responsibility, in regard to the work undertaken by the bailee, unless he has professed to the highest degree of skill in regard to it, and expressly engaged to do it in the best manner. McCombs *v.* Megratten, 3 Houst. (Del.) 35.

Where unsuitable materials are handed to the bailee he is not bound to work them up but may do so if requested; and if the article manufactured is as good as could be made out of such materials the bailor cannot complain. Morton *v.* Fairbanks, 11 Pick. (Mass.) 368.

Acceptance of work by a bailor will not relieve the bailee from consequences arising from insufficient work. McKibben *v.* Bakers, 1 B. Mon. (Ky.) 120; Dale *v.* See, 51 N. J. L. 378, 18 Atl. 306, 14 Am. St. Rep. 688, 5 L. R. A. 583; Chambers *v.* Crawford, Add. (Pa.) 150.

Work prohibited by statute.— Where the bailee is charged with want of professional skill the fact that the sort of work performed by him is prohibited by a statute which came into operation after the performance of the work does not render his liability less. McKillip *v.* Bonynge, 86 Ill. App. 618.

9. Skelley *v.* Kahn, 17 Ill. 170; Eddy *v.* Livingston, 35 Mo. 487, 88 Am. Dec. 122; Funkhouser *v.* Ingles, 17 Mo. App. 232; Jenkins *v.* Motlow, 1 Sneed (Tenn.) 248, 60 Am.

c. Care and Negligence — (I) *In General* — (A) *Classification.* The terms "ordinary," "slight," and "great," as applied to care, and "ordinary," "gross," and "slight," as applied to negligence, are valuable standards for measuring the care and limiting the liability imposed by the several classes of bailments, according as they are made for mutual benefit of the parties or wholly for the benefit of the bailor or bailee.[10] With regard to the degrees of care it is generally admitted that the line between them cannot be disregarded,[11] but the propriety of establishing the degrees of negligence has been questioned, on the ground that negligence and gross negligence are the same things, with the addition of a vituperative epithet.[12] In all cases, however, the degree of care and diligence which a bailee must exercise corresponds with the degree of negligence for which he is responsible, there being the same difficulty in defining the extent of the positive duty in each case as the degree of neglect of it which incurs responsibility;[13] the

Dec. 154; Kirtland *v.* Montgomery, 1 Swan (Tenn.) 452; Jones *v.* Parish, 1 Pinn. (Wis.) 494.

A person to whom promissory notes are handed for collection need only exercise ordinary care or diligence in collecting them. Kincheloe *v.* Priest, 89 Mo. 240, 1 S. W. 235, 58 Am. Rep. 117. See also Newell *v.* Newell, 34 Miss. 385. *Compare* Tempest *v.* Bertrand, 19 Quebec Super. Ct. 365, where a mandatory, to whom money was sent to pay a debt due from the sender to a third person in a foreign country, deposited the money in a bank duly established and enjoying public confidence instead of keeping it with him, and left it there pending his finding the creditor and obtaining from him a power sufficient to permit the payment, was not liable for subsequent failure of the bank before he was able to execute his commission.

10. Whitney *v.* Lee, 8 Metc. (Mass.) 91; Mason *v.* St. Louis Union Stock Yards Co., 60 Mo. App. 93.

The terms, while not definable, are with some approach to certainty distinguishable, although it is often difficult to mark the line where the one ends and the other begins. Whitney *v.* Lee, 8 Metc. (Mass.) 91; Carlisle First Nat. Bank *v.* Graham, 79 Pa. St. 106, 21 Am. Rep. 49; Giblin *v.* McMullen, L. R. 2 P. C. 317, 38 L. J. P. C. 25, 21 L. T. Rep. N. S. 214, 5 Moore P. C. N. S. 434, 17 Wkly. Rep. 445, 16 Eng. Reprint 578. See also Beal *v.* South Devon R. Co., 3 H. & C. 337, 11 L. T. Rep. N. S. 184, 12 Wkly. Rep. 1115, where it was said that although there might be difficulty in defining what gross negligence was there was a certain degree of negligence to which everyone attached great blame, and that it was a mistake to suppose that things were not different because a strict line of demarcation could not be drawn between them.

11. Grill *v.* General Iron Screw Collier Co., L. R. 1 C. P. 600, 12 Jur. N. S. 727, 35 L. J. C. P. 321, 14 L. T. Rep. N. S. 711, 14 Wkly. Rep. 893, holding that it is more correct and scientific to define the degrees of care than the degrees of negligence, since the use of the term "gross negligence" is only a way of stating that less care is required in some cases than in others. See also Dudley *v.* Camden, etc., Ferry Co., 42 N. J. L. 25, 36 Am. Rep. 501.

12. The Steamboat New World *v.* King, 16 How. (U. S.) 469, 14 L. ed. 1019; Grill *v.* General Iron Screw Collier Co., L. R. 1 C. P. 600, 12 Jur. N. S. 727, 35 L. J. C. P. 321, 14 L. T. Rep. N. S. 711, 14 Wkly. Rep. 893; Hinton *v.* Dibbin, 2 Q. B. 646, 2 G. & D. 36, 6 Jur. 601, 42 E. C. L. 847; Wilson *v.* Brett, 12 L. J. Exch. 264, 11 M. & W. 113. See also Lamb *v.* Camden, etc., R., etc., Co., 2 Daly (N. Y.) 454, to the effect that it is perhaps more strictly accurate to call gross negligence simply negligence, since in every case negligence consists in a failure to bestow the care and skill which the situation demands. But see Doorman *v.* Jenkins, 2 A. & E. 256, 4 L. J. K. B. 29, 4 N. & M. 170, 29 E. C. L. 132, where it is said that gross negligence is a great and aggravated degree of negligence, as distinguished from negligence of lower degree.

There is, however, a practical difference between the degrees of negligence for which different classes of bailees are responsible, and the term "gross negligence" may be usefully retained as descriptive of that difference, especially as it has been long in familiar use and been sanctioned by high authority. Giblin *v.* McMullen, L. R. 2 P. C. 317, 38 L. J. P. C. 25, 21 L. T. Rep. N. S. 214, 5 Moore P. C. N. S. 434, 17 Wkly. Rep. 445, 16 Eng. Reprint 578, where the court said that from the time of the judgment in Coggs *v.* Bernard, 2 Ld. Raym. 909, 1 Smith Lead. Cas. 354, the term "gross negligence" had been used without objection as a short and convenient mode of describing the degree of responsibility which attaches to a bailee for the sole benefit of the bailor.

Introduction of division from Roman law. — The theory that there are three degrees of negligence described by the terms, "slight," "ordinary," and "gross," was introduced into the common law by some of the commentators on Roman law. Some, however, of the ablest commentators on the Roman law and on the civil code of France have wholly repudiated the theory, as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties. The Steamboat New World *v.* King, 16 How. (U. S.) 469, 14 L. ed. 1019.

13. Giblin *v.* McMullen, L. R. 2 P. C. 317, 38 L. J. P. C. 25, 21 L. T. Rep. N. S. 214, 5

true measure of liability being that the bailee is bound to that degree of diligence which the manner and the nature of his employment make it reasonable to expect of him, anything less than this being culpable in him.[14]

(B) *Ordinary Care and Ordinary Negligence.* What constitutes ordinary care or diligence necessarily varies not only with the circumstances under which the subject of it is placed,[15] and with the country and the age in which the bailee lives,[16] but with the nature of the subject itself[17] and the business of the bailee.[18] Ordinary diligence then means that degree of care, attention, or exertion which, under the actual circumstances, a man of ordinary prudence and discretion would use in reference to the particular thing were it his own property, or in doing the particular thing were it his own concern;[19]

Moore P. C. N. S. 434, 17 Wkly. Rep. 445, 16 Eng. Reprint 578.

14. Briggs *v.* Taylor, 28 Vt. 180.

Where there is a special contract providing what degree of care the bailee shall exercise over the property, he is of course required to use such care as the contract prescribes, otherwise the degree of care required will depend upon the particular circumstance of each case. Line *v.* Mills, 12 Ind. App. 100, 39 N. E. 870.

15. Gray *v.* Merriam, 148 Ill. 179, 35 N. E. 810, 39 Am. St. Rep. 172, 32 L. R. A. 769; Swigert *v.* Graham, 7 B. Mon. (Ky.) 661; Preston *v.* Prather, 137 U. S. 604, 34 L. ed. 788.

Under peculiar circumstances of danger extraordinary exertions may be required of one who is bound only to ordinary diligence, or, in other words, the circumstances may be such that extraordinary exertions are nothing more than ordinary diligence. Swigert *v.* Graham, 7 B. Mon. (Ky.) 661.

The care must be graduated according to the value of the property, the convenience of its being made secure, the facility for its being stolen, and the temptations thereto.

Indiana.— Conner *v.* Winton, 8 Ind. 315, 65 Am. Dec. 761.

Maine.— Storer *v.* Gowen, 18 Me. 174.

Missouri.— State *v.* Meagher, 44 Mo. 356, 100 Am. Dec. 298.

New Hampshire.— Graves *v.* Ticknor, 6 N. H. 537.

Pennsylvania.— Erie Bank *v.* Smith, 3 Brewst. (Pa.) 9.

United States.— Tracy *v.* Wood, 3 Mason (U. S.) 132, 24 Fed. Cas. No. 14,130.

16. Erie Bank *v.* Smith, 3 Brewst. (Pa.) 9, holding that what might be ordinary diligence in one country and in one age might, at another time and in another country, be negligence, or even gross negligence.

17. *Delaware.*— Chase *v.* Maberry, 3 Harr. (Del.) 266.

Kentucky.— Swigert *v.* Graham, 7 B. Mon. (Ky.) 661.

New York.— Magnin *v.* Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608.

North Carolina.—Pegram *v.* Western Union Tel. Co., 97 N. C. 57, 2 S. E. 256.

England.— Batson *v.* Donovan, 4 B. & Ald. 21, 22 Rev. Rep. 599, 6 E. C. L. 373.

Knowledge that the subject-matter requires extra care — as where a registered letter is delivered to a letter-carrier — necessitates the taking of such care. Joslyn *v.* King, 27 Nebr. 38, 42 N. W. 756, 20 Am. St. Rep. 656, 4 L. R. A. 457. See also Boyd *v.* Estis, 11 La. Ann. 704.

Ignorance of the value will excuse the bailee for not taking extra precautions. Mechanics', etc., Bank *v.* Gordon, 5 La. Ann. 604.

18. Lamb *v.* Camden, etc., R., etc., Co., 2 Daly (N. Y.) 454; Preston *v.* Prather, 137 U. S. 604, 34 L. ed. 788.

Where skill is required for an undertaking, ordinary diligence implies the possession and use of competent skill. Swigert *v.* Graham, 7 B. Mon. (Ky.) 661.

19. *Alabama.*— Haynie *v.* Waring, 29 Ala. 263.

Arkansas.— Gulledge *v.* Howard, 23 Ark. 61; Lyon *v.* Tams, 11 Ark. 189.

Delaware.— Chase *v.* Maberry, 3 Harr. (Del.) 266.

Florida.— Tallahassee R. Co. *v.* Macon, 8 Fla. 299; Kelly *v.* Wallace, 6 Fla. 690; Forsyth *v.* Perry, 5 Fla. 337.

Georgia.— McNabb *v.* Lockhart, 18 Ga. 495; Latimer *v.* Alexander, 14 Ga. 259; Gorman *v.* Campbell, 14 Ga. 137; Columbus *v.* Howard, 6 Ga. 213.

Illinois.— Cloyd *v.* Steiger, 139 Ill. 41, 28 N. E. 987; Mansfield *v.* Cole, 61 Ill. 191; Howard *v.* Babcock, 21 Ill. 259; Skelley *v.* Kahn, 17 Ill. 170.

Indiana.— Duffy *v.* Howard, 77 Ind. 182; Conwell *v.* Smith, 8 Ind. 530; Conner *v.* Winton, 8 Ind. 315, 65 Am. Dec. 761; Kemp *v.* Farlow, 5 Ind. 462.

Iowa.— Jourdan *v.* Reed, 1 Iowa 135.

Kansas.— Moore *v.* Cass, 10 Kan. 288; Lobenstein *v.* Pritchett, 8 Kan. 213.

Kentucky.— Sodowsky *v.* McFarland, 3 Dana (Ky.) 204; Jackson *v.* Robinson, 18 B. Mon. (Ky.) 1; Louisville, etc., R. Co. *v.* Yandell, 17 B. Mon. (Ky.) 586; Hawkins *v.* Phythian, 8 B. Mon. (Ky.) 515; Swigert *v.* Graham, 7 B. Mon. (Ky.) 661.

Louisiana.— Boyd *v.* Estis, 11 La. Ann. 704.

Maine.— Storer *v.* Gowen, 18 Me. 174.

Maryland.— Casey *v.* Suter, 36 Md. 1; Hambleton *v.* McGee, 19 Md. 43.

Massachusetts.—Wood *v.* Remick, 143 Mass. 453, 9 N. E. 831; Perham *v.* Coney, 117 Mass. 102; Maynard *v.* Buck, 100 Mass. 40; Edwards *v.* Carr, 13 Gray (Mass.) 234; Whitney *v.* Lee, 8 Metc. (Mass.) 91; Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

Michigan.— Ruggles *v.* Fay, 31 Mich. 141.

and the want of such care and attention may be described as ordinary negligence.[20]

(c) *Slight Care and Gross Negligence.* Taking ordinary diligence or care and ordinary negligence as the mean of the so-called three degrees of care and negligence, slight care may be described as a less degree of care than ordinary,[21] and gross negligence as an omission of the care which even the most inattentive and thoughtless never fail to take of their own concerns,[22] or as such a degree of negligence as excludes the loosest degree of care.[23] In determining what amounts to gross negligence, however, the nature of the subject-matter must be carefully considered, for an act under certain circumstances might be

Mississippi.— Lampley *v.* Scott, 24 Miss. 528.

Missouri.— Gashweiler *v.* Wabash, etc., R. Co., 83 Mo. 112, 53 Am. Rep. 558; Eddy *v.* Livingston, 35 Mo. 487, 88 Am. Dec. 122; Johnson *v.* Ruth, 34 Mo. App. 659; Taussig *v.* Schields, 26 Mo. App. 318.

New Hampshire.—Chase *v.* Boody, 55 N. H. 574.

New Jersey.— Dudley *v.* Camden, etc., Ferry Co., 42 N. J. L. 25, 36 Am. Rep. 501.

New York.— Harrington *v.* Snyder, 3 Barb. (N. Y.) 380; Fox *v.* Pruden, 3 Daly (N. Y.) 187; Smith *v.* Simms, 51 How. Pr. (N. Y.) 305; Beardslee *v.* Richardson, 11 Wend. (N. Y.) 25, 25 Am. Dec. 596; Millon *v.* Salisbury, 13 Johns. (N. Y.) 211.

North Carolina.— Stanton *v.* Bell, 9 N. C. 145, 11 Am. Dec. 744.

Ohio.—Anderson *v.* Foresman, Wright (Ohio) 598; Monteith *v.* Bissell, Wright (Ohio) 411.

Pennsylvania.— Swentzel *v.* Penn. Bank, 147 Pa. St. 140, 23 Atl. 405, 415, 30 Am. St. Rep. 718, 15 L. R. A. 305; Tompkins *v.* Saltmarsh, 14 Serg. & R. (Pa.) 275; Erie Bank *v.* Smith, 3 Brewst. (Pa.) 9.

South Carolina.— Carrier *v.* Dorrance, 19 S. C. 30; Barber *v.* Anderson, 1 Bailey (S. C.) 358.

Tennessee.— Yeatman *v.* Hart, 6 Humphr. (Tenn.) 374; Angus *v.* Dickerson, Meigs (Tenn.) 459.

Texas.—Willis *v.* Harris, 26 Tex. 136; Fulton *v.* Alexander, 21 Tex. 148; Green *v.* Larkins, 1 Tex. App. Civ. Cas. § 785.

Vermont.— Eastman *v.* Patterson, 38 Vt. 146; Briggs *v.* Taylor, 28 Vt. 180.

Wisconsin.— Jones *v.* Parish, 1 Pinn. (Wis.) 494.

United States.— Laub *v.* Lansdale, Hayw. & H. (U. S.) 45, 14 Fed. Cas. No. 8,118; Reeves *v.* The Constitution, Gilp. (U. S.) 579, 20 Fed. Cas. No. 11,659.

See 6 Cent. Dig. tit. "Bailment," § 46.

Where bailed property is treated as carefully as bailee's.— The fact that the bailee observes the same care and diligence in respect to the subject-matter of the bailment as he does with respect to his own property of like nature and value is sometimes stated to be a test of whether he is observing ordinary diligence; but this test is not conclusive, as he may be grossly negligent of his own property. Ray *v.* State Bank, 10 Bush (Ky.) 344; Carlisle First Nat. Bank *v.* Graham, 79 Pa. St. 106, 21 Am. Rep. 49. See also Lamb *v.* Camden, etc., R., etc., Co., 2 Daly (N. Y.) 454.

20. Lamb *v.* Camden, etc., R., etc., Co., 2 Daly (N. Y.) 454; Tompkins *v.* Saltmarsh, 14 Serg. & R. (Pa.) 275; Briggs *v.* Taylor, 28 Vt. 180. See also Whiting *v.* Chicago, etc., R. Co., 5 Dak. 90, 37 N. W. 222.

Where the bailee intrusts the subject-matter to two agents to return to the bailor — one to take it a part of the way and the other the rest of the way — he is not guilty of a want of ordinary care. Colton *v.* Wise, 7 Ill. App. 395.

21. Mason *v.* St. Louis Union Stock Yards Co., 60 Mo. App. 93; Lamb *v.* Camden, etc., R., etc., Co., 2 Daly (N. Y.) 454; Grill *v.* General Iron Screw Collier Co., L. R. 1 C. P. 600, 12 Jur. N. S. 727, 35 L. J. C. P. 321, 14 L. T. Rep. N. S. 711, 14 Wkly. Rep. 893.

22. *Dakota.*— Whiting *v.* Chicago, etc., R. Co., 5 Dak. 90, 37 N. W. 222.

Missouri.— Wiser *v.* Chesley, 53 Mo. 547; Mason *v.* St. Louis Union Stock Yards Co., 60 Mo. App. 93.

New York.— Lamb *v.* Camden, etc., R., etc., Co., 2 Daly (N. Y.) 454.

United States.— Tracy *v.* Wood, 3 Mason (U. S.) 132, 24 Fed. Cas. No. 14,130.

England.— Duff *v.* Budd, 3 B. & B. 177, 6 Moore C. P. 469, 23 Rev. Rep. 609, 7 E. C. L. 671; Riley *v.* Horne, 5 Bing. 217, 2 M. & P. 331, 30 Rev. Rep. 576, 15 E. C. L. 549; Batson *v.* Donovan, 4 B. & Ald. 21, 22 Rev. Rep. 599, 6 E. C. L. 373.

23. McNabb *v.* Lockhart, 18 Ga. 495; Cashill *v.* Wright, 6 E. & B. 891, 2 Jur. N. S. 1072, 4 Wkly. Rep. 709, 88 E. C. L. 891.

This has been said to be equivalent to fraud (McNabb *v.* Lockhart, 18 Ga. 495; Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Tompkins *v.* Saltmarsh, 14 Serg. & R. (Pa.) 275; Cashill *v.* Wright, 6 E. & B. 891, 2 Jur. N. S. 1072, 4 Wkly. Rep. 709, 88 E. C. L. 891), but this is not always true for gross negligence may be, and often is, consistent with good faith and honesty of intention (Tudor *v.* Lewis, 3 Metc. (Ky.) 378; Wilson *v.* York, etc., R. Co., 11 Gill & J. (Md.) 58; Carlisle First Nat. Bank *v.* Graham, 100 U. S. 699, 25 L. ed. 750). Gross negligence may, however, furnish evidence of fraud and of a violation of that good faith which the law assumes to exist in every contract of bailment. Tudor *v.* Lewis, 3 Metc. (Ky.) 378.

simple negligence and the same act under other circumstances might be grossly negligent.[24]

(D) *Great Care and Slight Negligence.* Great care or extraordinary diligence, when viewed from the point of ordinary care or diligence, may be regarded as a higher degree of care than ordinary;[25] a failure to observe such great care or extraordinary diligence being slight negligence.[26]

(II) *Bailment For Mutual Benefit.* Where a bailment is for mutual benefit, the bailee is held to the exercise of ordinary care in relation to the subject-matter thereof, and is responsible only for ordinary negligence.[27] He is not liable

24. Pegram *v.* Western Union Tel. Co., 97 N. C. 57, 2 S. E. 256; Tracy *v.* Wood, 3 Mason (U. S.) 132, 24 Fed. Cas. No. 14,130.

When securities are deposited with a bank accustomed to receive such deposits, the bailee is liable for any loss occurring through the mere want of that degree of care which good business men should exercise in keeping property of such value. Gray *v.* Merriam, 148 Ill. 179, 35 N. E. 810, 39 Am. St. Rep. 172, 32 L. R. A. 769. But that one who permits a friend to deposit valuables in a safe temporarily should not be held to the same degree of responsibility which attaches to a safe-deposit company is a rule of such obvious justice that it must inhere in every system of law that equitably regulates human conduct. Dudley *v.* Camden, etc., Ferry Co., 42 N. J. L. 25, 36 Am. Rep. 501.

Where the profession of the bailee implies skill, a want of such skill as is imputable to his calling will render him liable as for gross neglect. Stanton *v.* Bell, 9 N. C. 145, 11 Am. Dec. 744; Shiells *v.* Blackburne, 1 H. Bl. 158, 2 Rev. Rep. 750. Even where his profession does not imply skill, a bailee who assumes to perform a delicate task is not screened from liability in case he performs such task in gross ignorance, or with gross negligence. Conner *v.* Winton, 8 Ind. 315, 65 Am. Dec. 761.

25. Mason *v.* St. Louis Union Stock Yards Co., 60 Mo. App. 93.

26. Whiting *v.* Chicago, etc., R. Co., 5 Dak. 90, 37 N. W. 222; Mason *v.* St. Louis Union Stock Yards Co., 60 Mo. App. 93.

27. *Alabama.*— Wilkinson *v.* Moseley, 30 Ala. 562; Alabama, etc., Rivers R. Co. *v.* Burke, 27 Ala. 535; Jones *v.* Hatchett, 14 Ala. 743.

Arkansas.— Union Compress Co. *v.* Nunnally, 67 Ark. 284, 54 S. W. 872; Stewart *v.* Davis, 31 Ark. 518, 25 Am. Rep. 576.

Delaware.— Chase *v.* Maberry, 3 Harr. (Del.) 266; Early *v.* Wilson, 2 Harr. (Del.) 47.

Florida.— Tallahassee R. Co. *v.* Macon, 8 Fla. 299; Kelly *v.* Wallace, 6 Fla. 690; Forsyth *v.* Perry, 5 Fla. 337.

Georgia.— Latimer *v.* Alexander, 14 Ga. 259; Gorman *v.* Campbell, 14 Ga. 137; Columbus *v.* Howard, 6 Ga. 213.

Illinois.— Standard Brewery *v.* Bemis, etc., Malting Co., 171 Ill. 602, 49 N. E. 507; Gray *v.* Merriam, 143 Ill. 179, 35 N. E. 810, 39 Am. St. Rep. 172, 32 L. R. A. 769; Cloyd *v.* Steiger, 139 Ill. 41, 28 N. E. 987; Francis *v.* Shrader, 67 Ill. 272; Russell *v.* Hœhler, 66 Ill. 459; Mansfield *v.* Cole, 61 Ill. 191; Spangler *v.* Eicholtz, 25 Ill. 297; Howard *v.* Babcock, 21 Ill. 259; Saunders *v.* Hartsook, 85 Ill. App. 55; Colton *v.* Wise, 7 Ill. App. 395.

Indiana.— Bass *v.* Cantor, 123 Ind. 444, 24 N. E. 147; Duffy *v.* Howard, 77 Ind. 182; Conwell *v.* Smith, 8 Ind. 530; Cox *v.* O'Riley, 4 Ind. 368, 58 Am. Dec. 633.

Iowa.— Chamberlin *v.* Cobb, 32 Iowa 161.

Kansas.— Moore *v.* Cass, 10 Kan. 288.

Kentucky.— Jackson *v.* Robinson, 18 B. Mon. (Ky.) 1; Louisville, etc., R. Co. *v.* Yandell, 17 B. Mon. (Ky.) 586; Hawkins *v.* Phythian, 8 B. Mon. (Ky.) 515; Swigert *v.* Graham, 7 B. Mon. (Ky.) 661; Kimball *v.* Dohoney, 18 Ky. L. Rep. 937, 38 S. W. 3.

Louisiana.— Nicholls *v.* Roland, 11 Mart. (La.) 190.

Maryland.— Hambleton *v.* McGee, 19 Md. 43.

Massachusetts.—Wood *v.* Remick, 143 Mass. 453, 9 N. E. 831; Perham *v.* Coney, 117 Mass. 102; Maynard *v.* Buck, 100 Mass. 40; Eastman *v.* Sanborn, 3 Allen (Mass.) 594, 81 Am. Dec. 677; Edwards *v.* Carr, 13 Gray (Mass.) 234; Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

Michigan.— Ruggles *v.* Fay, 31 Mich. 141.

Missouri.— Gashweiler *v.* Wabash, etc., R. Co., 83 Mo. 112, 53 Am. Rep. 558; Buis *v.* Cook, 60 Mo. 391; Johnson *v.* Ruth, 34 Mo. 659; Halyard *v.* Dechelman, 29 Mo. 459, 77 Am. Dec. 585; Smith *v.* Meegan, 22 Mo. 150, 64 Am. Dec. 259; Johnson *v.* Ruth, 34 Mo. App. 659; Taussig *v.* Schields, 26 Mo. App. 318.

Nebraska.—Purnell *v.* Minor, 49 Nebr. 555, 68 N. W. 942.

New Hampshire.—Chase *v.* Boody, 55 N. H. 574.

New York.— Jones *v.* Morgan, 90 N. Y. 4, 43 Am. Rep. 131; Baird *v.* Daly, 57 N. Y. 236, 15 Am. Rep. 488; Schwerin *v.* McKie, 51 N. Y. 180, 10 Am. Rep. 581; Moore *v.* Westervelt, 27 N. Y. 234; Titsworth *v.* Winnegar, 51 Barb. (N. Y.) 148; Harrington *v.* Snyder, 3 Barb. (N. Y.) 380; Fox *v.* Pruden, 3 Daly (N. Y.) 187; Hoffmann *v.* Coughlin, 26 Misc. (N. Y.) 24, 55 N. Y. Suppl. 600; Smith *v.* Simms, 51 How. Pr. (N. Y.) 305; Millon *v.* Salisbury, 13 Johns. (N. Y.) 211.

North Carolina.—Henderson *v.* Bessent, 68 N. C. 223.

Pennsylvania.— Pittsburgh Safe Deposit Co. *v.* Pollock, 85 Pa. St. 391, 27 Am. Rep. 660; Rodgers *v.* Stophel, 32 Pa. St. 111, 72

if the subject-matter of the bailment has been injured by some internal decay, by accident, or by some other means wholly without his default, and in the absence of some special stipulation an injury to or loss of the property falls on the bailor.[28] The bailee may, however, be liable in all events where he has undertaken to keep

Am. Dec. 775; Erie Bank *v.* Smith, 3 Brewst. (Pa.) 9.

Rhode Island.— Moulton *v.* Phillips, 10 R. I. 218, 14 Am. Rep. 663.

South Carolina.— Carrier *v.* Dorrance, 19 S. C. 30; Barber *v.* Anderson, 1 Bailey (S. C.) 358.

Tennessee.— Kelton *v.* Taylor, 11 Lea (Tenn.) 264, 41 Am. Rep. 284; Yeatman *v.* Hart, 6 Humphr. (Tenn.) 374; Angus *v.* Dickerson, Meigs (Tenn.) 459.

Texas.— Willis *v.* Harris, 26 Tex. 136; Phillips *v.* Hughes, (Tex. Civ. App. 1895) 33 S. W. 157; Green *v.* Larkins, 1 Tex. App. Civ. Cas. § 785.

Vermont.— Eastman *v.* Patterson, 38 Vt. 146; White *v.* Bascom, 28 Vt. 268; Briggs *v.* Taylor, 28 Vt. 180.

United States.— New York Cent. R. Co. *v.* Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627; U. S. *v.* Yukers, 60 Fed. 641; 23 U. S. App. 292, 9 C. C. A. 171; Laub *v.* Lansdale, Hayw. & H. (U. S.) 45, 14 Fed. Cas. No. 8,118; Reeves *v.* The Constitution, Gilp. (U. S.) 579, 20 Fed. Cas. No. 11,659.

England.— Batut *v.* Hartley, L. R. 7 Q. B. 594, 41 L. J. Q. B. 273, 26 L. T. Rep. N. S. 968, 20 Wkly. Rep. 899; McMahon *v.* Field, 7 Q. B. D. 591, 50 L. J. Q. B. 852, 45 L. T. Rep. N. S. 381.

See 6 Cent. Dig. tit. "Bailment," § 46.

Shopkeepers, restaurant-keepers, barbers, bath-house keepers, and the like.— Where property is temporarily in charge of an incidental bailee such as a shopkeeper, restaurant-keeper, barber, bath-house proprietor, or the like, as an incident to his general business, the liability of the bailee does not differ in any respect from that of other bailees for hire (Tombler *v.* Koelling, 60 Ark. 62, 28 S. W. 794, 46 Am. St. Rep. 146, 27 L. R. A. 502; Dilberto v. Harris, 95 Ga. 571, 23 S. E. 112; Donlin *v.* McQuade, 61 Mich. 275, 28 N. W. 114; Bunnell *v.* Stern, 122 N. Y. 539, 25 N. E. 910, 34 N. Y. St. 218, 19 Am. St. Rep. 519, 10 L. R. A. 481; Buttman *v.* Dennett, 9 Misc. (N. Y.) 462, 30 N. Y. Suppl. 247, 61 N. Y. St. 89; Bird *v.* Everard, 4 Misc. (N. Y.) 104, 23 N. Y. Suppl. 1008, 53 N. Y. St. 210; Levy *v.* Appleby, 1 N. Y. City Ct. 252; Woodruff *v.* Painter, 150 Pa. St. 91, 24 Atl. 621, 30 Am. St. Rep. 786, 16 L. R. A. 451; Hunter *v.* Reed, 12 Pa. Super. Ct. 112; McGollin *v.* Reed, 16 Wkly. Notes Cas. (Pa.) 287. *Contra*, Rea *v.* Simmons, 141 Mass. 561, 6 N. E. 699, 55 Am. Rep. 492; Bunnell *v.* Stern, 14 Daly (N. Y.) 357, 13 N. Y. St. 71; Goff *v.* Wanamaker, 25 Wkly. Notes Cas. (Pa.) 358. *Compare* Powers *v.* O'Neill, 89 Hun (N. Y.) 129, 34 N. Y. Suppl. 1007, 68 N. Y. St. 842); but contributory negligence on the part of such a bailor may relieve the bailee from liability (Powers *v.* O'Neill, 89 Hun (N. Y.) 129, 34 N. Y. Suppl. 1007, 68 N. Y. St. 842; Trowbridge *v.* Schriever, 5 Daly (N. Y.) 11; McAllister *v.* Simon, 27 Misc. (N. Y.) 214, 57 N. Y. Suppl. 733; Schnitz *v.* Sturn, 25 Misc. (N. Y.) 168, 54 N. Y. Suppl. 140; Pattison *v.* Hammerstein, 17 Misc. (N. Y.) 375, 39 N. Y. Suppl. 1039; Hunter *v.* Reed, 12 Pa. Super. Ct. 112). To avoid liability under a bailment of this description, the bailee should provide a reasonably safe place for keeping such property, and advise the bailor thereof. Trowbridge *v.* Schriever, 5 Daly (N. Y.) 11; Appleton *v.* Welch, 20 Misc. (N. Y.) 343, 45 N. Y. Suppl. 751.

Effect of breach of contract by bailee.— Failure to keep the property in that place which he has contracted for makes the bailee liable for a loss, by reason of his failure so to do, without regard to the general principle that a bailee of this class need only take ordinary care. Butler *v.* Greene, 49 Nebr. 280, 68 N. W. 496. See also Otis *v.* Wood, 3 Wend. (N. Y.) 498.

Effect of termination of bailment.— Where the duration of the bailment is not fixed, and the bailee has given reasonable notice of his intention to terminate the bailment to the bailor, the degree of negligence for which the bailee is liable changes from ordinary negligence to gross negligence, the bailee not being liable for the destruction of the property by fire without any fault or negligence on his part. Barrows *v.* Cushway, 37 Mich. 481. See also Carnes *v.* Nichols, 10 Gray (Mass.) 369.

28. *Indiana.*— Rice *v.* Nixon, 97 Ind. 97, 49 Am. Rep. 430; Conwell *v.* Smith, 8 Ind. 530.

Massachusetts.— Perham *v.* Coney, 117 Mass. 102.

New York.— Stewart *v.* Stone, 127 N. Y. 500, 28 N. E. 595, 40 N. Y. St. 314, 14 L. R. A. 215; Hyland *v.* Paul, 33 Barb. (N. Y.) 241; Buddin *v.* Fortunato, 16 Daly (N. Y.) 195, 10 N. Y. Suppl. 115, 31 N. Y. St. 278; Millon *v.* Salisbury, 13 Johns. (N. Y.) 211.

Pennsylvania.— Zell *v.* Dunkle, 156 Pa. St. 353, 33 Wkly. Notes Cas. (Pa.) 33, 27 Atl. 38.

United States.— Pelham *v.* Pace, Hempst. (U. S.) 223, 19 Fed. Cas. No. 10,911*a*.

Canada.— Dickie *v.* Campbell, (C. Ms. 44) Stevens' N. Brunsw. Dig. 82.

Bailees for hire are not insurers of the bailed property. Standard Brewery *v.* Bemis, etc., Malting Co., 171 Ill. 602, 49 N. E. 507 [*affirming* 70 Ill. App. 363]; Field *v.* Brackett, 56 Me. 121; Ames *v.* Belden, 17 Barb. (N. Y.) 513; Montgomery *v.* Ladjing, 30 Misc. (N. Y.) 92, 61 N. Y. Suppl. 840; Pattison *v.* Hammerstein, 17 Misc. (N. Y.) 375, 39 N. Y. Suppl. 1039; Simpson *v.* Rourke, 13 Misc. (N. Y.) 230, 34 N. Y. Suppl. 11, 67 N. Y. St. 867.

the property safely, either expressly[29] or impliedly,[30] and for any injury or loss arising through the acts of his employees unauthorized by the bailor.[31]

(III) *Bailment For Sole Benefit of Bailor.* Where the bailment is one which is for the sole benefit of the bailor, it is uniformly held that the bailee is obligated only to the exercise of slight care, and is only answerable for gross neglect[32]

29. Vaughan *v.* Webster, 5 Harr. (Del.) 256; Smith American Organ Co. *v.* Abbott, 11 Pa. Co. Ct. 319.

An agreement to return property as it was at the time of hiring, usual wear excepted, does not make the bailee an insurer of the property. Seevers *v.* Gabel, 94 Iowa 75, 62 N. W. 669, 58 Am. St. Rep. 381, 27 L. R. A. 733.

Liability for all risks limited to period of contract.— Where the bailee covenants to insure for a particular time, and to assume all risks not covered by the insurance that may happen to the property during that time, he is not liable in the event of the destruction of the property while being returned to the bailor after the policy has expired, unless he has contracted to renew the policy. Young *v.* Leary, 135 N. Y. 569, 32 N. E. 607, 49 N. Y. St. 93.

30. Reinstein *v.* Watts, 84 Me. 139, 24 Atl. 719; Harvey *v.* Murray, 136 Mass. 377.

Implied and express contract equivalent to one another.—An implied contract that the property shall be at the risk of the bailee is equivalent to an express contract. Thomas *v.* Cummiskey, 108 Pa. St. 354.

Removal of goods from place deposited may amount to negligence.—When goods are deposited with a bailee for hire, without any contract as to where they shall be kept, but the bailor, supposing they will be kept where first deposited, insures them as located there, without informing the bailee of such insurance, the bailee is not guilty of such negligence in removing them to another place of deposit without informing the bailor of his intention of so doing as will of itself make him liable for the value of goods if burned; but the bailor loses the benefit of the insurance in case it only covers the goods while in the place named in the policy. Bradley *v.* Cunningham, 61 Conn. 485, 23 Atl. 932, 15 L. R. A. 679. Where, however, the bailee contracts to keep the goods at a particular place, but places part of them at another place, where they are destroyed by fire, the bailee is liable to the bailor in the event of the bailor's having insured the goods at the place where the bailee contracted to deposit them, if in the event of their removal he loses the benefit of the insurance. Lilley *v.* Doubleday, 7 Q. B. D. 510, 46 J. P. 708, 51 L. J. Q. B. 310, 44 L. T. Rep. N. S. 814.

31. *Alabama.*— McGill *v.* Monette, 37 Ala. 49; Maxwell *v.* Eason, 1 Stew. (Ala.) 514.

Maryland.— American Dist. Tel. Co. *v.* Walker, 72 Md. 454, 20 Atl. 1, 20 Am. St. Rep. 479.

Michigan.— Hofer *v.* Hodge, 52 Mich. 372, 18 N. W. 112, 50 Am. Rep. 256.

Missouri.— Kellar *v.* Garth, 45 Mo. App. 332.

New York.— Hall *v.* Warner, 60 Barb. (N. Y.) 198.

South Carolina.—McCaw *v.* Kimbrel, 4 McCord (S. C.) 220.

United States.— Smith *v.* Bouker, 49 Fed. 954, 1 U. S. App. 80, 1 C. C. A. 481 [*affirming* 40 Fed. 839].

See 6 Cent. Dig. tit. "Bailment," § 55.

Criminal conduct of a servant or employee is not imputable to the bailee. Mitchell *v.* Mims, 8 Tex. 6.

32. *Alabama.*— Henry *v.* Porter, 46 Ala. 293.

Delaware.— Chase *v.* Maberry, 3 Harr. (Del.) 266.

Georgia.— McNabb *v.* Lockhart, 18 Ga. 495.

Illinois.— Gray *v.* Merriam, 148 Ill. 179, 35 N. E. 810, 39 Am. St. Rep. 172, 32 L. R. A. 769; Michigan Cent. R. Co. *v.* Carrow, 73 Ill. 348, 24 Am. Rep. 248; Skelley *v.* Kahn, 17 Ill. 170; Singer Mfg. Co. *v.* Tyler, 54 Ill. App. 97; Race *v.* Hansen, 12 Ill. App. 605.

Indiana.—Bronnenburg *v.* Charman, 80 Ind. 475; Conner *v.* Winton, 8 Ind. 315, 65 Am. Dec. 761; Dart *v.* Lowe, 5 Ind. 131.

Kentucky.— Dunn *v.* Kyle, 14 Bush (Ky.) 134; Ray *v.* State Bank, 10 Bush (Ky.) 344; United Soc. of Shakers *v.* Underwood, 9 Bush (Ky.) 609, 15 Am. Rep. 731.

Louisiana.— Wilcox *v.* Steamboat Philadelphia, 9 La. 80, 29 Am. Dec. 436.

Maine.— Knowles *v.* Atlantic, etc., R. Co., 38 Me. 55, 61 Am. Dec. 234.

Maryland.— Schermer *v.* Neurath, 54 Md. 491, 39 Am. Rep. 397; Maury *v.* Coyle, 34 Md. 235.

Massachusetts.— Smith *v.* Westfield First Nat. Bank, 99 Mass. 605, 97 Am. Dec. 59; Whitney *v.* Lee, 8 Metc. (Mass.) 91; Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

Missouri.— Wiser *v.* Chesley, 53 Mo. 547; Huxley *v.* Hartzell, 44 Mo. 370; Graves *v.* Poage, 17 Mo. 91; Mason *v.* St. Louis Union Stock Yards Co., 60 Mo. App. 93.

Nebraska.— Burk *v.* Dempster, 34 Nebr. 426, 51 N. W. 976.

New Hampshire.— Brown *v.* Grand Trunk R. Co., 54 N. H. 535.

New Jersey.—Dudley *v.* Camden, etc., Ferry Co., 42 N. J. L. 25, 36 Am. Rep. 501.

New York.— Harter *v.* Blanchard, 64 Barb. (N. Y.) 617; Lamb *v.* Camden, etc., R., etc., Co., 2 Daly (N. Y.) 454.

North Carolina.— Patterson *v.* McIver, 90 N. C. 493; Bland *v.* Womack, 6 N. C. 373.

Ohio.— Griffith *v.* Zipperwick, 28 Ohio St. 388.

Pennsylvania.— Hibernia Bldg. Assoc. *v.* McGrath, 154 Pa. St. 296, 32 Wkly. Notes Cas. (Pa.) 233, 26 Atl. 377, 35 Am. St. Rep. 828; Swentzel *v.* Penn Bank, 147 Pa. St. 140, 23 Atl. 405, 415, 30 Am. St. Rep. 718, 15 L. R. A. 305; Carlisle First Nat. Bank *v.*

or bad faith.[33] While this general principle is the same in all cases, its application is materially affected by the circumstances of each particular case;[34] and the bailee's liability must be determined by a performance *bona fide* of the terms of the contract, or of a failure to perform such terms,[35] and by comparison

Graham, 79 Pa. St. 106, 21 Am. Rep. 49; Tompkins *v.* Saltmarsh, 14 Serg. & R. (Pa.) 275.

Texas.— Texas Cent. R. Co. *v.* Flanary, (Tex. Civ. App. 1899) 50 S. W. 726.

Vermont.— Spooner *v.* Mattoon, 40 Vt. 300, 94 Am. Dec. 395.

Virginia.— Tancil *v.* Seaton, 28 Gratt. (Va.) 601, 26 Am. Rep. 380.

Wisconsin.— Minor *v.* Chicago, etc., R. Co., 19 Wis. 40, 88 Am. Dec. 670.

United States.— Tracy *v.* Wood, 3 Mason (U. S.) 132, 24 Fed. Cas. No. 14,130.

England.— Doorman *v.* Jenkins, 2 A. & E. 256, 4 L. J. K. B. 29, 4 N. & M. 170, 29 E. C. L. 132; Giblin *v.* McMullen, L. R. 2 P. C. 317, 38 L. J. P. C. 25, 21 L. T. Rep. N. S. 214, 5 Moore P. C. N. S. 434, 17 Wkly. Rep. 445, 16 Eng. Reprint 578; Coggs *v.* Bernard, 2 Ld. Raym. 909, 1 Smith Lead. Cas. 354.

See 6 Cent. Dig. tit. "Bailment," §§ 37, 38.

Where the property is stolen it has been held that the bailee is not liable unless the loss is the result of gross negligence on his part (Whitney *v.* Lee, 8 Metc. (Mass.) 91; Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Tancil *v.* Seaton, 28 Gratt. (Va.) 601, 26 Am. Rep. 380; Coggs *v.* Bernard, 2 Ld. Raym. 909, 1 Smith Lead. Cas. 354. But see Huxley *v.* Hartzell, 44 Mo. 370 [holding that the mere fact that an article was stolen without the knowledge of the bailee is not an excuse; but that it must appear that it was lost without his negligence or fault]; State *v.* Meagher, 44 Mo. 356, 100 Am. Dec. 298 [to the effect that the fact of theft was presumptive evidence of carelessness or fraud under the civil law]), but a bailee having reason to believe that there is danger of robbery who takes no precautions against it is negligent (Jenkins *v.* Motlow, 1 Sneed (Tenn.) 248, 60 Am. Dec. 154), and where a bailee used the property and substituted other property of a similar kind and value, which was stolen, he was held liable for the loss to the bailor (Anderson *v.* Foresman, Wright (Ohio) 598).

Necessity of employing watchmen.—It has been said that there is no instance in which a bailee who has possession of goods solely for the benefit of the bailor is required to exercise diligence to the extent of employing a watchman to guard against danger to the property. Texas Cent. R. Co. *v.* Flanary, (Tex. Civ. App. 1899) 50 S. W. 726.

33. *Alabama.*— Haynie *v.* Waring, 29 Ala. 263.

Arkansas.— Gulledge *v.* Howard, 23 Ark. 61; Lyon *v.* Tams, 11 Ark. 189.

Georgia.— McNabb *v.* Lockhart, 18 Ga. 495.

Illinois.— Skelley *v.* Kahn, 17 Ill. 170.

Indiana.— Conner *v.* Winton, 8 Ind. 315, 65 Am. Dec. 761; Kemp *v.* Farlow, 5 Ind. 462.

Iowa.— Jourdan *v.* Reed, 1 Iowa 135.

Kansas.— Lobenstein *v.* Pritchett, 8 Kan. 213.

Kentucky.—Sodowsky *v.* McFarland, 3 Dana (Ky.) 204.

Louisiana.—Boyd *v.* Estis, 11 La. Ann. 704.

Maine.— Storer *v.* Gowen, 18 Me. 174.

Massachusetts.— Whitney *v.* Lee, 8 Metc. (Mass.) 91.

Mississippi.— Lampley *v.* Scott, 24 Miss. 528.

Missouri.—Eddy *v.* Livingston, 35 Mo. 487, 88 Am. Dec. 122.

New Jersey.—Dudley *v.* Camden, etc., Ferry Co., 42 N. J. L. 25, 36 Am. Rep. 501.

New York.— Beardslee *v.* Richardson, 11 Wend. (N. Y.) 25, 25 Am. Dec. 596.

North Carolina.— Stanton *v.* Bell, 9 N. C. 145, 11 Am. Dec. 744.

Ohio.— Anderson *v.* Foresman, Wright (Ohio) 598; Monteith *v.* Bissell, Wright (Ohio) 411.

Pennsylvania.—Swentzel *v.* Penn Bank, 147 Pa. St. 140, 23 Atl. 405, 415, 30 Am. St. Rep. 718; 15 L. R. A. 305; Tompkins *v.* Saltmarsh, 14 Serg. & R. (Pa.) 275.

Texas.— Fulton *v.* Alexander, 21 Tex. 148.

Vermont.— Whitney *v.* Brattleboro First Nat. Bank, 55 Vt. 154, 45 Am. Rep. 598.

Wisconsin.—Jones *v.* Parish, 1 Pinn. (Wis.) 494.

See 6 Cent. Dig. tit. "Bailment," § 38.

Treating property as he treats his own.— In Louisiana, under the code, the bailee must take the same care of the subject-matter of the bailment as he uses with respect to his own property. Mechanics', etc., Bank *v.* Gordon, 5 La. Ann. 604. Proof that the bailee so dealt with the property raises a presumption of adequate diligence (Carlisle First Nat. Bank *v.* Graham, 79 Pa. St. 106, 21 Am. Rep. 49), but the presumption is overcome by proof that he is greatly negligent of both (Carico *v.* Fidelity Invest. Co., 5 Colo. App. 56, 37 Pac. 29; Carlisle First Nat. Bank *v.* Graham, 79 Pa. St. 106, 21 Am. Rep. 49; Erie Bank *v.* Smith, 3 Brewst. (Pa.) 9).

Mere knowledge by the bailor of the mode in which a bailee cares for property intrusted to him will not absolve the latter from liability for want of due care in keeping the property. Such knowledge, accompanied by evidence of long acquiescence without objection, might show an agreement as to the nature and degree of care which the bailee was to use, but beyond this it would not be safe to go. Conway Bank *v.* American Express Co., 8 Allen (Mass.) 512. *Compare* Knowles *v.* Atlantic, etc., R. Co., 38 Me. 55, 61 Am. Dec. 234; The William, 6 C. Rob. 316.

34. Colyar *v.* Taylor, 1 Coldw. (Tenn.) 372.

35. Mariner *v.* Smith, 5 Heisk. (Tenn.) 203.

of his conduct with the conduct, not of individuals, but of classes of men under similar conditions.[36]

(iv) *Bailment For Sole Benefit of Bailee.* Where the bailment is for the sole benefit of the bailee, he is bound to great care or extraordinary diligence and is responsible for slight neglect in relation to the subject-matter of the bailment.[37] He is not responsible, however, for reasonable wear and tear of what is loaned,[38] or for its utter loss or damage without blame or neglect attributable to himself.[39]

3. Sale and Transfer — a. By Bailee — (i) *In General.* As a rule[40] the

Duty of person riding horse for exhibition purposes.—A person who, for the sole benefit of the bailor, and at his request, rides a horse in order to show his paces must use such skill as he possesses, and if proved to be skilled with respect to horses is liable for any injury to the horse. Wilson *v.* Brett, 12 L. J. Exch. 264, 11 M. & W. 113.

Where instrument of mandate is ambiguous.— It is a settled rule of the law of mandate that if the instrument is not expressed in plain and unequivocal terms, free from ambiguity, but the language is fairly susceptible of different interpretations, and the bailee, in fact, is misled and adopts and follows one, when the bailor intended the other, the latter will be bound and the former exonerated. Dunbar *v.* Hughes, 6 La. Ann. 466.

36. Carlisle First Nat. Bank *v.* Graham, 79 Pa. St. 106, 21 Am. Rep. 49.

37. *Illinois.*—Hagebush *v.* Ragland, 78 Ill. 40; Bennett *v.* O'Brien, 37 Ill. 250; Howard *v.* Babcock, 21 Ill. 259; Phillips *v.* Coudon, 14 Ill. 84.

Indiana.—Watkins *v.* Roberts, 28 Ind. 167; Wood *v.* McClure, 7 Ind. 155.

Iowa.— Cullen *v.* Lord, 39 Iowa 302.

Kentucky.— Kennedy *v.* Ashcraft, 4 Bush (Ky.) 530; Green *v.* Hollingsworth, 5 Dana (Ky.) 173, 30 Am. Dec. 680.

Maryland.— Casey *v.* Suter, 36 Md. 1.

New York.— Scranton *v.* Baxter, 4 Sandf. (N. Y.) 5.

North Carolina.— Fortune *v.* Harris, 51 N. C. 532.

Pennsylvania.— Todd *v.* Figley, 7 Watts (Pa.) 542.

England.— Coggs *v.* Bernard, 2 Ld. Raym. 909, 1 Smith Lead. Cas. 354.

See 6 Cent. Dig. tit. "Bailment," §§ 42, 43.

Necessity of common prudence.—A bailee who is driving his own horse in the carriage of the bailor, at the request of the latter, merely as a means of recreation and amusement for both of them, is liable for damage to the carriage if he does not use common prudence and is careless and negligent. Carpenter *v.* Branch, 13 Vt. 161, 37 Am. Dec. 587.

Failure to use reasonable diligence to collect notes.—A person who has borrowed the note of a third person is liable to the lender, where the amount of the note is lost through the borrower's failure to use reasonable diligence to receive the money. Higbie *v.* Hopkins, 1 Wash. (U. S.) 230, 12 Fed. Cas. No. 6,466.

The servant or agent employed by the bailee is bound to the same extraordinary care as the master himself. Scranton *v.* Baxter, 4 Sandf. (N. Y.) 5.

38. Blakemore *v.* Bristol, etc., R. Co., 8 E. & B. 1035, 92 E. C. L. 1035.

39. *Arkansas.*— Parker *v.* Gaines, (Ark. 1889) 11 S. W. 693.

Delaware.— Wilson *v.* Rockland Mfg. Co., 2 Harr. (Del.) 67.

Indiana.—Watkins *v.* Roberts, 28 Ind. 167; Wood *v.* McClure, 7 Ind. 155.

Kentucky.— Green *v.* Hollingsworth, 5 Dana (Ky.) 173, 30 Am. Dec. 680.

Maryland.— Casey *v.* Suter, 36 Md. 1.

Michigan.— Beller *v.* Schultz, 44 Mich. 529, 7 N. W. 225, 38 Am. Rep. 280.

New York.— Whitehead *v.* Vanderbilt, 10 Daly (N. Y.) 214.

North Carolina.— Fortune *v.* Harris, 51 N. C. 532.

United States.— World's Columbian Exposition Co. *v.* Republic of France, 91 Fed. 64, 62 U. S. App. 704, 33 C. C. A. 333 [*reversing* 83 Fed. 109].

England.— Coggs *v.* Bernard, 2 Ld. Raym. 909, 1 Smith Lead. Cas. 354.

Effect of bailor's interference with property.— The interference by a bailor to remedy an injury to the subject of the bailment, occasioned by the negligence of the bailee, will not exonerate the latter from his liability for slight neglect. Todd *v.* Figley, 7 Watts (Pa.) 542.

Wrongful act of third person.— Where the proximate cause of a loss is the wrongful act of a third person, the bailee is not excused unless it clearly appears that the act could not have been foreseen or prevented, and that no fault or neglect of his contributed in any degree to create the loss. Scranton *v.* Baxter, 4 Sandf. (N. Y.) 5.

40. **Where statutes require some contracts of bailment to be in writing and recorded,** else after the lapse of a specified time the subject-matter of the bailment shall, in the absence of demand by the bailor, be treated in all respects as the property of the bailee, the right of a purchaser from or a creditor of the bailee is unaffected by any interest of the bailor after the lapse of the specified time (Butler *v.* Jones, 80 Ala. 436, 2 So. 300; Pharis *v.* Leachman, 20 Ala. 662; Penny *v.* Davis, 3 B. Mon. (Ky.) 313; Green *v.* Botts, 3 B. Mon. (Ky.) 196; McDermott *v.* Barnum, 16 Mo. 114; Blount *v.* Hamey, 43 Mo. App. 644; Ludden, etc., Southern Music House *v.* Dusenberry, 27 S. C. 464, 4 S. E. 60; Walker *v.* Wynne, 3 Yerg. (Tenn.) 61; Porter *v.*

bailee cannot, in contravention of the purpose of the bailment, sell,[41] pledge, mortgage,[42] exchange,[43] or give away the property,[44] or otherwise expressly or impliedly transfer it[45] so as to give title even to one acting *bona fide* and without notice of the bailee's status.

Armstrong, 2 Yerg. (Tenn.) 74; Gay *v.* Moseley, 2 Munf. (Va.) 543); but the bailed property is liable only to the bailee's debts contracted after the expiration of the statutory term (Durden *v.* McWilliams, 31 Ala. 206; Carew *v.* Love, 30 Ala. 577).

41. *Alabama.*— Medlin *v.* Wilkerson, 81 Ala. 147, 1 So. 37; Sumner *v.* Woods, 67 Ala. 139, 42 Am. Rep. 104; Fairbanks *v.* Eureka Co., 67 Ala. 109; McCall *v.* Powell, 64 Ala. 254; Calhoun *v.* Thompson, 56 Ala. 166, 28 Am. Rep. 754.

Arkansas.— Smith *v.* Jones, 8 Ark. 109.

California.— Kohler *v.* Hayes, 41 Cal. 455.

Connecticut.— Hart *v.* Carpenter, 24 Conn. 427.

Indiana.— Wolf *v.* Esteb, 7 Ind. 448; Ingersoll *v.* Emmerson, 1 Ind. 76; Leffler *v.* Watson, 13 Ind. App. 176, 40 N. E. 1107, 41 N. E. 467.

Iowa.— Baehr *v.* Clark, 83 Iowa 313, 49 N. W. 840, 13 L. R. A. 717.

Kentucky.— Vaughn *v.* Hopson, 10 Bush (Ky.) 337; Chism *v.* Woods, 3 Hard. (Ky.) 531, 3 Am. Dec. 740.

Louisiana.— Short *v.* Lapeyreuse, 24 La. Ann. 45; Russell *v.* Favier, 18 La. 585, 36 Am. Dec. 662; Barfield *v.* Hewlett, 4 La. 118.

Maine.— Emerson *v.* Fisk, 6 Me. 200, 19 Am. Dec. 206.

Massachusetts.—Benner *v.* Puffer, 114 Mass. 376; Zuchtmann *v.* Roberts, 109 Mass. 53, 12 Am. Rep. 663; Sargent *v.* Metcalf, 5 Gray (Mass.) 306, 66 Am. Dec. 368; Coggill *v.* Hartford, etc., R. Co., 3 Gray (Mass.) 545.

Michigan.— Dunlap *v.* Gleason, 16 Mich. 158, 93 Am. Dec. 231.

Mississippi.— Crump *v.* Mitchell, 34 Miss. 449.

Missouri.— Sowden *v.* Kessler, 76 Mo. App. 581; Moore *v.* Simms, 47 Mo. App. 182; Hendricks *v.* Evans, 46 Mo. App. 313.

New Hampshire.— Stone *v.* Sleeper, 62 N. H. 3; Luther *v.* Cote, 61 N. H. 129; Weeks *v.* Pike, 60 N. H. 447; King *v.* Bates, 57 N. H. 446; Fisk *v.* Ewen, 46 N. H. 173; Bailey *v.* Colby, 34 N. H. 29, 66 Am. Dec. 752; Sargent *v.* Gile, 8 N. H. 325; Sanborn *v.* Colman, 6 N. H. 14, 23 Am. Dec. 703.

New York.— Austin *v.* Dye, 46 N. Y. 500; Ballard *v.* Burgett, 40 N. Y. 314; Spaulding *v.* Brewster, 50 Barb. (N. Y.) 142; Cook *v.* Beal, 1 Bosw. (N. Y.) 497; Covill *v.* Hill, 4 Den. (N. Y.) 323; Hoffman *v.* Carow, 22 Wend. (N. Y.) 285; Saltus *v.* Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541. *Compare* Wait *v.* Green, 36 N. Y. 556, 2 Transcr. App. (N. Y.) 340.

Pennsylvania.— Davis *v.* Bigler, 62 Pa. St. 242, 1 Am. Rep. 393; Agnew *v.* Johnson, 22 Pa. St. 471, 62 Am. Dec. 303.

South Carolina.— Carmichael *v.* Buck, 12 Rich. (S. C.) 451.

Vermont.— Dunham *v.* Lee, 24 Vt. 432; Hunt *v.* Douglass, 22 Vt. 128; Buckmaster *v.* Mower, 21 Vt. 204.

United States.— Stump *v.* Roberts, Brunn. Col. Cas. (U. S.) 224, 23 Fed. Cas. No. 13,561, Cooke (Tenn.) 350.

England.— Loeschman *v.* Machin, 2 Stark. 311, 20 Rev. Rep. 687, 3 E. C. L. 423.

See 6 Cent. Dig. tit. "Bailment," § 28.

Implied power to sell a bailed article to pay the expense of keeping does not warrant the bailee in selling more than sufficient for that purpose. Whitlock *v.* Heard, 13 Ala. 776, 48 Am. Dec. 73.

Sale by administrator of bailee.— The sale of the bailed property by an administrator of the bailee is void as against the bailor. Maxwell *v.* Houston, 67 N. C. 305.

Where a bailee for hire has a right to purchase property if he pay the price within a certain time, the contract gives him no right to sell. Partridge *v.* Philbrick, 60 N. H. 556.

An unauthorized sale by a bailee may be ratified by the bailor, who may demand the proceeds of the sale. Atkins *v.* Gamble, 42 Cal. 86, 10 Am. Rep. 282.

42. *Indiana.*— Schindler *v.* Westover, 99 Ind. 395.

Kansas.— Branson *v.* Heckler, 22 Kan. 610.

Missouri.— Sowden *v.* Kessler, 76 Mo. App. 581.

New York.— Nauman *v.* Caldwell, 2 Sweeny (N. Y.) 212; Holbrook *v.* Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; Kennedy *v.* Strong, 14 Johns. (N. Y.) 128.

Pennsylvania.— Agnew *v.* Johnson, 22 Pa. St. 471, 62 Am. Dec. 303.

Vermont.— Thrall *v.* Lathrop, 30 Vt. 307, 73 Am. Dec. 306.

Virginia.— Skinner *v.* Dodge, 4 Hen. & M. (Va.) 432.

United States.— Van Amridge *v.* Peabody, 1 Mason (U. S.) 440, 28 Fed. Cas. No. 16,825.

England.—Daubigny *v.* Duval, 5 T. R. 604; Paterson *v.* Tash, 2 Str. 1178.

Hypothecation of receipt for bailed goods. — A bailment of the class *locatio operis mercium vehendarum* does not authorize the bailee who has deposited the subject-matter of the bailment in a warehouse, according to his instructions, and taken a receipt therefor, to hypothecate such receipt as security for his own debt. Richardson *v.* Smith, 33 Ga. Suppl. 95.

43. Atkinson *v.* Jones, 72 Ala. 248.

44. Johnston *v.* Whittemore, 27 Mich. 463.

45. Sowden *v.* Kessler, 76 Mo. App. 581; Everett *v.* Coffin, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; Murray *v.* Burling, 10 Johns. (N. Y.) 172.

Consignment by the bailee of the goods bailed, in payment of a balance due by the bailee, does not divest the title of the bailor, even though the bailee has authority to sell.

(II) *Where Bailee Has Interest in Property.* Where the bailment is accompanied with other contracts or stipulations which affect its character and give to the bailee other rights not incident to a simple bailment, and where there is no personal confidence and none of the characters of an estate at will, and where it would be entirely consistent with the analogies existing in the case of real estate to hold that the bailee has an assignable interest which may be transferred to a third person, an assignment by the bailee will be enforced and protected as between the parties and as against all parties whose interests are not injuriously affected by the transfer.[46]

b. By Bailor. The bailor may sell the subject-matter of the bailment, and thereby confer on the purchaser an immediate and valid title thereto, the possession of the bailee becoming that of the purchaser,[47] without any formal delivery of the subject of the bailment to him, a mere notice to the bailee of the sale being sufficient.[48]

Canadian Bank of Commerce *v.* Baum, 187 Pa. St. 48, 40 Atl. 975.

A delivery to a creditor in part payment of the bailee's private debt is illegal. Gould *v.* Blodgett, 61 N. H. 115.

A distress or sale for rent owing by the bailee does not divest the title of the bailor. Connah *v.* Hale, 23 Wend. (N. Y.) 462.

A sale for taxes owed by the bailee does not operate to divest the bailor's title. Crist *v.* Kleber, 79 Pa. St. 290.

Subjection of bailed property to execution. — The bailor is not ordinarily divested of his title to the bailed property by reason of its sale under an execution against the bailee (Holt *v.* Holt, 58 N. H. 276; Cole *v.* Mann, 62 N. Y. 1; Frank *v.* Batten, 49 Hun (N. Y.) 91, 1 N. Y. Suppl. 705, 17 N. Y. St. 476; Clark *v.* Jack, 7 Watts (Pa.) 375; Cobb *v.* Deiches, 7 Pa. Super. Ct. 252; Hatch *v.* Heim, 86 Fed. 436, 58 U. S. App. 544, 30 C. C. A. 171); but creditors of a bailee may levy upon and sell property bailed for consumption or sale, or to be dealt with in any way inconsistent with the continued ownership of the bailor, or in a manner which would necessarily destroy his right of property (Frank *v.* Batten, 49 Hun (N. Y.) 91, 1 N. Y. Suppl. 705, 17 N. Y. St. 476; Ludden *v.* Hazen, 31 Barb. (N. Y.) 650. See also Russell *v.* Favier, 18 La. 585, 36 Am. Dec. 662; Devlin *v.* O'Neill, 6 Daly (N. Y.) 305 [*affirmed* in 68 N. Y. 622]). But where chattels are leased with an option to buy, the purchasers of the bailed property at a sheriff's sale, under an execution against the bailee, do not acquire the option to purchase the property. Cobb *v.* Deiches, 7 Pa. Super. Ct. 252.

Right to bail property. — It has been held that a bailee has such a special property in the goods as authorizes him to bail the goods to another. Cox *v.* Easley, 11 Ala. 362; Whitsett *v.* Womack, 8 Ala. 466.

46. Day *v.* Bassett, 102 Mass. 445; Vincent *v.* Cornell, 13 Pick. (Mass.) 294, 23 Am. Dec. 683; Bailey *v.* Colby, 34 N. H. 29, 66 Am. Dec. 752.

Of this class are cases where the bailee has a right as against the bailor to insist upon the possession of the property until a lien thereon is fully discharged by payment or performance of other conditions (Jarvis *v.* Rogers, 15 Mass. 389; Bailey *v.* Colby, 34 N. H. 29, 66 Am. Dec. 752; Urquhart *v.* McIver, 4 Johns. (N. Y.) 103; Ratcliffe *v.* Davis, 1 Bulst. 29; Man *v.* Shiffner, 2 East 523) and where there is a hiring for a fixed time, and without restriction or limitation from which any personal confidence may be inferred (Bailey *v.* Colby, 34 N. H. 29, 66 Am. Dec. 752; Davis *v.* Emery, 11 N. H. 230; Putnam *v.* Wyley, 8 Johns. (N. Y.) 432, 5 Am. Dec. 346); but a stipulation that a thing bailed is to be employed in the service of the bailee and in his business does not authorize the bailee to lease the property to another (Crocker *v.* Gullifer, 44 Me. 491, 69 Am. Dec. 118. See also Jones *v.* Fort, 36 Ala. 449; Persch *v.* Quiggle, 57 Pa. St. 247).

47. Hodges *v.* Hurd, 47 Ill. 363; Chambersburg Nat. Bank *v.* Buckeye Iron, etc., Works, 46 Ill. App. 526; Hardy *v.* Lemons, 36 La. Ann. 146; State *v.* Fitzpatrick, 64 Mo. 185; Erwin *v.* Arthur, 61 Mo. 386; Williams *v.* Gray, 39 Mo. 201; Sigerson *v.* Harker, 15 Mo. 101; Heine *v.* Anderson, 2 Duer (N. Y.) 318.

The bailee's interest after such sale remains as theretofore, with the substitution of a new bailor. Hardy *v.* Lemons, 36 La. Ann. 146.

48. Hodges *v.* Hurd, 47 Ill. 363; Chambersburg Nat. Bank *v.* Buckeye Iron, etc., Works, 46 Ill. App. 526; Whitney *v.* Lynde, 16 Vt. 579; Pierce *v.* Chipman, 8 Vt. 334; Harman *v.* Anderson, 2 Campb. 243, 11 Rev. Rep. 706. *Compare* Burnell *v.* Robertson, 10 Ill. 282.

No restriction of doctrine that actual delivery is unessential. — The doctrine that an actual delivery is unnecessary, even as against attaching creditors of the bailor, is not restricted to bailees of a quasi-public character, as carriers, warehousemen, or public officers holding the goods against the will of the vendor. Chambersburg Nat. Bank *v.* Buckeye Iron, etc., Works, 46 Ill. App. 526. See also Hughes *v.* Stubblefield, 21 Ill. App. 216.

Sufficiency of order for delivery. — As between the bailor and the vendee, an order on the bailee is a delivery, even if the order for delivery has been delivered to the vendee. Sigerson *v.* Harker, 15 Mo. 101.

4. Compensation, Reimbursement, and Lien — a. Compensation — (i) *Bailment Gratuitous.* Where the bailment is for the sole benefit of the bailee, the bailor is entitled to no recompense whatever;[49] and where it is for the sole benefit of the bailor or the sole benefit of the bailee, the latter is not entitled to any recompense for a duty involved by the bailment.[50]

(ii) *Bailment For Mutual Benefit* — (a) *In General.* Where the bailment is for the benefit of both parties both the bailor and the bailee are entitled to compensation which need not necessarily be in money.[51]

(b) *Of Bailee* — (1) In General. The bailee is entitled to compensation for the work performed by him;[52] but as a general rule where the contract is an entire one only upon full performance.[53]

(2) Compensation Pro Tanto. Where materials furnished by the bailor to be worked on by the bailee are accidentally destroyed before completion of the work, without any fault on the part of the bailee, the latter is entitled to compensation for such work as he has already done,[54] unless the contract of bailment imports a different obligation.[55] So it has been held that notwithstanding an unreasonable delay in completion, the bailee has a right to compensation for work that he has actually done upon the thing bailed.[56]

(c) *Of Bailor* — (1) In General. Where the bailment is one of hiring the bailor is entitled to rent for the use of the subject-matter thereof,[57] unless he

What amounts to a delivery, when the facts are given, is a question of law. Williams *v.* Gray, 39 Mo. 201.

49. *Iowa.*— Chamberlin *v.* Cobb, 32 Iowa 161.

New York.— Putnam *v.* Wyley, 8 Johns. (N. Y.) 432, 5 Am. Dec. 346.

Tennessee.—Gunn *v.* Mason, 2 Sneed (Tenn.) 637.

Texas.— Neal *v.* State, 33 Tex. Crim. 408, 26 S. W. 726.

Vermont.—Carpenter *v.* Branch, 13 Vt. 161, 37 Am. Dec. 587.

50. Prince *v.* Alabama State Fair, 106 Ala. 340, 17 So. 449, 28 L. R. A. 716; Wilson *v.* Wilson, 16 La. Ann. 155; Lafourche, etc., Nav. Co. *v.* Collins, 12 La. Ann. 119; Carpenter *v.* Branch, 13 Vt. 161, 37 Am. Dec. 587.

In Louisiana where the services are onerous, responsible, and toilsome, remuneration has sometimes been allowed to the mandatory. Beugnot *v.* Tremoulet, 52 La. Ann. 454, 27 So. 107; Krekeler's Succession, 44 La. Ann. 726, 11 So. 35; New Orleans, etc., Packet Co. *v.* Brown, 36 La. Ann. 138, 51 Am. Rep. 5; Lafourche, etc., Nav. Co. *v.* Collins, 12 La. Ann. 119; Fowler's Succession, 7 La. Ann. 207; Waterman *v.* Gibson, 5 La. Ann. 672; Decoux *v.* Plantevignes, 10 La. 503.

A bailee not willing to act gratuitously any longer must, if he means to make a charge thereafter, notify the bailor to that effect before he can make a claim for charges and sell the property therefor. Dale *v.* Brinckerhoff, 7 Daly (N. Y.) 45.

51. *Alabama.*— Prince *v.* Alabama State Fair, 106 Ala. 340, 17 So. 449, 28 L. R. A. 716.

Illinois.— Francis *v.* Shrader, 67 Ill. 272.

Indiana.— Vigo Agricultural Soc. *v.* Brumfield, 102 Ind. 146, 1 N. E. 382, 52 Am. Rep. 657.

Iowa.— Chamberlin *v.* Cobb, 32 Iowa 161.

Massachusetts.—Newhall *v.* Paige, 10 Gray (Mass.) 366.

Missouri.— Parker *v.* Marquis, 64 Mo. 38.

Pennsylvania.— Woodruff *v.* Painter, 150 Pa. St. 91, 24 Atl. 621, 30 Am. St. Rep. 786, 16 L. R. A. 451.

England.— White *v.* Humphery, 11 Q. B. 43, 12 Jur. 417, 63 E. C. L. 43.

52. Garrard *v.* Moody, 48 Ga. 96.

53. Niblo *v.* Binsse, 3 Abb. Dec. (N. Y.) 375, 1 Keyes (N. Y.) 476; Archer *v.* McDonald, 36 Hun (N. Y.) 194; Cohen *v.* Moshkowitz, 17 Misc. (N. Y.) 389, 39 N. Y. Suppl. 1084; Pierce *v.* Schenck, 3 Hill (N. Y.) 28.

54. Cohen *v.* Moshkowitz, 17 Misc. (N. Y.) 389, 39 N. Y. Suppl. 1084; Labowitz *v.* Frankfort, 4 Misc. (N. Y.) 275, 23 N. Y. Suppl. 1038, 53 N. Y. St. 525; Menetone *v.* Athawes, 3 Burr. 1592.

55. Cohen *v.* Moshkowitz, 17 Misc. (N. Y.) 389, 39 N. Y. Suppl. 1084.

Custom or local usage may throw the loss on the bailee. Niblo *v.* Binsse, 3 Abb. Dec. (N. Y.) 375, 1 Keyes (N. Y.) 476; Cohen *v.* Moshkowitz, 17 Misc. (N. Y.) 389, 39 N. Y. Suppl. 1084; Labowitz *v.* Frankfort, 4 Misc. (N. Y.) 275, 23 N. Y. Suppl. 1038, 53 N. Y. St. 525; Gillett *v.* Mawman, 1 Taunt. 137.

56. Shailer *v.* Corbett, 15 N. Y. Suppl. 875, 40 N. Y. St. 786.

57. *Iowa.*— Cullen *v.* Lord, 39 Iowa 302.

Missouri.— Bigbe *v.* Coombs, 64 Mo. 529.

New Hampshire.— Hartford *v.* Jackson, 11 N. H. 145.

New Mexico.—Armijo *v.* Abeytia, 5 N. M. 533, 25 Pac. 777.

New York.— Gleason *v.* Smith, 39 Hun (N. Y.) 617; Johnson *v.* Meeker, 31 Hun (N. Y.) 92; Foster *v.* Magee, 2 Lans. (N. Y.) 182; Rider *v.* Union India Rubber Co., 5 Bosw. (N. Y.) 85 [*affirmed* in 28 N. Y. 379]; Wilcox, etc., Sewing Mach. Co. *v.* Hynes, 21 N. Y. Suppl. 760, 50 N. Y. St. 489.

retakes possession of the property before the expiration of the stipulated time of hiring and against the objection of the bailee.[58]

(2) Implied Right to Rent. Whether a person who permits another to make use of his property has an implied right to recover rent therefor is an unsettled question, some authorities holding that in the absence of express agreement a contract to pay a reasonable price for the use of an article is implied,[59] while others hold that the mere use of an article does not warrant an inference that the bailor has a right to rent by reason of such use.[60]

(3) Where Bailee Loses Possession or Use of Property. Where the hired chattel is destroyed without fault of the bailee before the expiration of the period during which he was to have the use of it, he is, in the absence of express stipulations to the contrary, liable only *pro tanto* for the payment of the hire;[61] but he may agree to terms that will compel him to continue to pay the hire under any circumstances whatsoever.[62]

b. Reimbursement. Reimbursement for actual disbursements and necessary and useful expenses incurred in preserving the property bailed, or in fulfilling the objects of the bailment, may be recovered either by a gratuitous bailee[63] or

North Carolina.— Rogers *v.* McKenzie, 73 N. C. 487.

Vermont.— Cushman *v.* Somers, 60 Vt. 613, 15 Atl. 315; Woodward *v.* Cutter, 33 Vt. 49.

Avoiding payment of hire by purchase of article.—A bailee who agrees to pay a specified sum a day for use of an article, with the privilege of paying another sum for it if lost or injured, may, although the article is not lost or injured, pay its price and avoid paying the hire. Pope *v.* Murray, 6 Ala. 489.

Credit on rent should be allowed the bailee where he has laid out money for the benefit of the bailor and to secure the benefit of his lease. Rogers *v.* McKenzie, 73 N. C. 487.

Liability for rent on breach of contract.—Where a contract specifies that the bailed property is to be considered as value received and a breach of contract by the bailee takes place, the bailor is not entitled to rent for any time thereafter the article is retained by the bailee, because the bailor might refuse to institute suit for a considerable time and then recover the value of the article bailed and the rent for such time; whereas if suit was instituted at once upon the breach the damages would only be the value of the article. Armijo *v.* Abeytia, 5 N. M. 533, 25 Pac. 777.

Rent for use of article hired by another than user.—A bailor is not entitled to rent from the user of a thing, bailed to a person who hires it in the name of the person who uses it, unless the user has previously authorized the bailee to hire the article or subsequently ratifies the act. Adams *v.* Bourne, 9 Gray (Mass.) 100.

Rent not dependent on third party's failure to act as required by contract.—A bailee, who agrees to deliver as rent a certain article, to be selected by a third person, to the lessor, at a place designated by the third person, is not discharged from payment by reason of the third person's failure to make the selection, etc., but on the failure of the third person to act within a reasonable time the bailee should select the article, designate the place, deliver the article, and notify his bailor. Cushman *v.* Somers, 60 Vt. 613, 15 Atl. 315.

Warranty of quality as affecting right to rent.—Where the bailor stipulates to furnish an article in good order, he has, notwithstanding a breach of warranty on his part, a right to recover rent, if the bailee does not rescind the contract and return the article. Woodward *v.* Stein, 5 Ohio Dec. (Reprint) 171, 3 Am. L. Rec. 352.

58. Harris *v.* Maury, 30 Ala. 679; Farrow *v.* Bragg, 30 Ala. 261.

59. Cullen *v.* Lord, 39 Iowa 302; Rider *v.* Union India Rubber Co., 5 Bosw. (N. Y.) 85 [*affirmed* in 28 N. Y. 379].

Use under expectation of purchase.— There is an implied agreement that a person with whom another's property is left with an expectation of purchase will pay for the use of such property. Rider *v.* Union India-rubber Co., 28 N. Y. 379 [*affirming* 5 Bosw. (N. Y.) 85]. See also Rider *v.* Union India Rubber Co., 4 Bosw. (N. Y.) 169.

60. Davis *v.* Breon, 1 Ariz. 240, 25 Pac. 537; Kincheloe *v.* Priest, 89 Mo. 240, 1 S. W. 235, 58 Am. Rep. 117; Dunham *v.* Kinnear, 1 Watts (Pa.) 130; Plimpton *v.* Gleason, 57 Vt. 604.

61. Warth *v.* Mack, 79 Fed. 915, 51 U. S. App. 133, 25 C. C. A. 235.

62. Bigbee *v.* Coombs, 64 Mo. 529; Hartford *v.* Jackson, 11 N. H. 145; Gleason *v.* Smith, 39 Hun (N. Y.) 617; Warth *v.* Mack, 79 Fed. 915, 51 U. S. App. 133, 25 C. C. A. 235.

63. *Kentucky.*—Reeder *v.* Anderson, 4 Dana (Ky.) 193.

Louisiana.— Devalcourt *v.* Dillon, 12 La. Ann. 672.

Massachusetts.— Chase *v.* Corcoran, 106 Mass. 286; Preston *v.* Neale, 12 Gray (Mass.) 222.

Nebraska.— Moline, etc., Co. *v.* Neville, 52 Nebr. 574, 72 N. W. 854.

New York.— Bacon *v.* New York City Fourth Nat. Bank, 9 N. Y. Suppl. 435; Dale

by a bailee where the bailment is for the benefit of both parties.[64] No bailee, however, is entitled to reimbursement for expenses incurred by reason of his own negligence, misconduct, or misuse of the property bailed.[65]

c. Lien — (I) *Right to* — (A) *Bailment Gratuitous.* Where the bailment is gratuitous the bailee has no lien upon the subject-matter thereof.[66]

(B) *Bailment For Hire* — (1) In General. The right to a specific lien on property in the hands of a tradesman or artisan for the price of work done upon it is of common-law origin,[67] but the right has long been extended to every bailee who has by his labor or skill conferred some value on the thing bailed,[68] in the

v. Brinckerhoff, 7 Daly (N. Y.) 45; Baker *v.* Hoag, 6 How. Pr. (N. Y.) 201; Amory *v.* Flyn, 10 Johns. (N. Y.) 102, 6 Am. Dec. 316.

England.— Nicholson *v.* Chapman, 2 H. Bl. 254, 3 Rev. Rep. 374.

See 6 Cent. Dig. tit. "Bailment," § 85.

Legal expenses incurred in defending property from seizure are properly a subject for reimbursement. Bacon *v.* New York City Fourth Nat. Bank, 9 N. Y. Suppl. 435.

64. Fick *v.* Runnels, 48 Mich. 302, 12 N. W. 204.

Expenses of preserving property detained for a lien cannot be claimed by the bailee. Somes *v.* British Empire Shipping Co., 8 H. L. Cas. 338, 6 Jur. N. S. 761, 30 L. J. Q. B. 229, 8 Wkly. Rep. 707, 11 Eng. Reprint 459; Bruce *v.* Everson, 1 Cab. & El. 18.

65. Fick *v.* Runnels, 48 Mich. 302, 12 N. W. 204; Crigler *v.* Gaff, 8 Ohio Dec. (Reprint) 278, 7 Cinc. L. Bul. 17 [*affirmed* in 11 Cinc. L. Bul. 327].

A bailee conniving at a tortious act liable to destroy the property of the bailor is not entitled to reimbursement for money expended by him in preserving the property from such tortious act. Enos *v.* Cole, 53 Wis. 235, 10 N. W. 377.

Unauthorized expenditure is not the subject of a reimbursement. Pelletier *v.* Roumage, 2 La. 528.

Reimbursement by sale.—A bailee to whom goods have been consigned for sale may not sell the consigned property, contrary to instructions, in order to reimburse himself. Hallowell *v.* Fawcett, 30 Iowa 491.

66. Preston *v.* Neale, 12 Gray (Mass.) 222; Wentworth *v.* Day, 3 Metc. (Mass.) 352, 37 Am. Dec. 145; Amory *v.* Flyn, 10 Johns. (N. Y.) 102, 6 Am. Dec. 316; Etter *v.* Edwards, 4 Watts (Pa.) 63, 6 Am. Dec. 316; Nicholson *v.* Chapman, 2 H. Bl. 254, 3 Rev. Rep. 374; Binstead *v.* Buck, 2 W. Bl. 1117.

Advance of money by gratuitous bailee.—A bailee to whom property has been loaned, who afterward advances money to the bailor without any special contract, may not retain the property until the money is repaid. Cole *v.* Cole, 4 Bibb (Ky.) 340.

Expenses of preserving article.—In Hoover *v.* Epler, 52 Pa. St. 522, it was held that a bailee hired to do a particular act for which he was to receive compensation, who voluntarily incurred expenses in and about the preservation of the article, had a lien thereon for expenses he had incurred toward its preservation.

67. Holderman *v.* Manier, 104 Ind. 118, 3 N. E. 811; Wilson *v.* Guyton, 8 Gill (Md.) 213; McDearmid *v.* Foster, 14 Oreg. 417, 12 Pac. 813; McIntyre *v.* Carter, 2 Watts & S. (Pa.) 392, 37 Am. Dec. 519.

The bailee has no lien for money advanced on the property in relation to which the work is performed. East *v.* Ferguson, 59 Ind. 169.

68. *Connecticut.*— Leavy *v.* Kinsella, 39 Conn. 50.

Georgia.— Garrard *v.* Moody, 48 Ga. 96.

Indiana.— Holderman *v.* Manier, 104 Ind. 118, 3 N. E. 811; Hanna *v.* Phelps, 7 Ind. 21, 63 Am. Dec. 410.

Maryland.—Wilson *v.* Guyton, 8 Gill (Md.) 213.

New Hampshire.— Wilson *v.* Martin, 40 N. H. 88.

New Jersey.— White *v.* Smith, 44 N. J. L. 105, 43 Am. Rep. 347.

New York.— Conrow *v.* Little, 115 N. Y. 387, 22 N. E. 346, 26 N. Y. St. 527, 5 L. R. A. 693.

Oregon.— McDearmid *v.* Foster, 14 Oreg. 417, 12 Pac. 813.

Pennsylvania.— McIntyre *v.* Carver, 2 Watts & S. (Pa.) 392, 37 Am. Dec. 519.

Vermont.—James Smith Woolen Mach. Co. *v.* Holden, 73 Vt. 396, 51 Atl. 2.

England.— Chapman *v.* Allen, Cro. Car. 271; Jackson *v.* Cummins, 3 Jur. 436, 8 L. J. Exch. 265, 5 M. & W. 342.

See 6 Cent. Dig. tit. "Bailment," § 78.

A civil engineer who makes field-notes, maps, etc., in and about the construction of a canal on material furnished by his employer has a lien on the notes, field-maps, etc. Amazon Irrigating Co. *v.* Briesen, 1 Kan. App. 758, 41 Pac. 1116.

A mechanic to whom an engine has been sent for alteration or repair has, under Ind. Rev. Stat. (1881), §§ 5304, 5305, a lien on the engine. Watts *v.* Sweeney, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615.

Manufactured articles.—A person who has material left with him to be manufactured has a lien upon the article manufactured. Holderman *v.* Manier, 104 Ind. 118, 3 N. E. 811; Hazard *v.* Manning, 8 Hun (N. Y.) 613; White *v.* Hoyt, 7 Daly (N. Y.) 232; Pierce *v.* Schenck, 3 Hill (N. Y.) 28; Ruggles *v.* Walker, 34 Vt. 468. Under Cal. Civ. Code, § 3052, providing that any person who makes, alters, or repairs any article of personal property, at the request of the owner, has a lien thereon for his reasonable charges, it is immaterial whether the work be done

absence of anything in the contract inconsistent therewith.[69] No express agreement for a lien is necessary,[70] and it does not seem material whether the agreement be to pay a stipulated price or only an implied contract to pay a reasonable price.[71] The bailee must, however, have an exclusive legal possession[72] of the subject-matter created by some express or implied contract existing between the bailor and the bailee.[73]

(2) Effect of Special Agreement. A special agreement as to the mode of payment does not destroy the right to a lien,[74] except where it contains some terms inconsistent with that right.[75]

on the bailee's or bailor's premises. Douglass *v.* McFarland, 92 Cal. 656, 28 Pac. 687.

69. Hanna *v.* Phelps, 7 Ind. 21, 63 Am. Dec. 410; Wilson *v.* Martin, 40 N. H. 88; White *v.* Smith, 44 N. J. L. 105, 43 Am. Rep. 347; Morgan *v.* Congdon, 4 N. Y. 552.

70. Busfield *v.* Wheeler, 14 Allen (Mass.) 139; Hazard *v.* Manning, 8 Hun (N. Y.) 613; Hoover *v.* Epler, 52 Pa. St. 522. See also Conrow *v.* Little, 115 N. Y. 387, 22 N. E. 346, 26 N. Y. St. 527, 5 L. R. A. 693.

71. Douglass *v.* McFarland, 92 Cal. 656, 28 Pac. 687; Hanna *v.* Phelps, 7 Ind. 21, 63 Am. Dec. 410; Morgan *v.* Congdon, 4 N. Y. 552. *Contra*, Ruggles *v.* Walker, 34 Vt. 468.

72. Constructive possession may be sufficient, as where the thing is incapable of possession, or where the actual possession is in another, as where goods are consigned to one who has made advances on them. Heard *v.* Brewer, 4 Daly (N. Y.) 136.

73. *Florida.*—Wright *v.* Terry, 23 Fla. 160, 2 So. 6.

Maine.— Small *v.* Robinson, 69 Me. 425, 31 Am. Rep. 299; Hotchkiss *v.* Hunt, 49 Me. 213.

Massachusetts.— Gilson *v.* Gwinn, 107 Mass. 126, 9 Am. Rep. 13; King *v.* Indian Orchard Canal Co., 11 Cush. (Mass.) 31; Hollingsworth *v.* Dow, 19 Pick. (Mass.) 228.

New York.— Hassett *v.* Sanborn, 62 N. Y. App. Div. 588, 71 N. Y. Suppl. 81.

Pennsylvania.— McIntyre *v.* Carver, 2 Watts & S. (Pa.) 392, 37 Am. Dec. 519.

Hence at common law the lien does not extend, as against the bailor, to persons employed by the bailee (Wright *v.* Terry, 23 Fla. 160, 2 So. 6; Hollingsworth *v.* Dow, 19 Pick. (Mass.) 228), and the bailor's knowledge that a servant of the bailee is performing the work does not give the servant a right to a lien (Hollingsworth *v.* Dow, 19 Pick. (Mass.) 228); nor will the provisions of a statute, creating liens in favor of a bailee not entitled thereto at common law, be impliedly extended to his employees (Wright *v.* Terry, 23 Fla. 160, 2 So. 6; Landry *v.* Blanchard, 16 La. Ann. 173).

Lien of tortious bailee.— Manufacturers cannot lawfully set up a lien for labor performed upon articles tortiously converted to their own use. Hotchkiss *v.* Hunt, 49 Me. 213.

74. Chase *v.* Westmore, 2 Marsh. 346, 5 M. & S. 180, 17 Rev. Rep. 301; Crawshay *v.* Homfray, 4 B. & Ald. 50, 22 Rev. Rep. 618, 6 E. C. L. 385.

75. *Indiana.*— Hanna *v.* Phelps, 7 Ind. 21, 63 Am. Dec. 410.

Massachusetts.— Stickney *v.* Allen, 10 Gray (Mass.) 352.

New Hampshire.—Wilson *v.* Martin, 40 N. H. 88; Stoddard Woolen Manufactory *v.* Huntley, 8 N. H. 441, 31 Am. Dec. 198.

New Jersey.— White *v.* Smith, 44 N. J. L. 105, 43 Am. Rep. 347.

New York.— Morgan *v.* Congdon, 4 N. Y. 552; Chandler *v.* Belden, 18 Johns. (N. Y.) 157.

England.— Cowell *v.* Simpson, 16 Ves. Jr. 275, 10 Rev. Rep. 181; Blake *v.* Nicholson, 3 M. & S. 167; Chase *v.* Westmore, 2 Marsh. 346, 5 M. & S. 180, 17 Rev. Rep. 301; Crawshay *v.* Homfray, 4 B. & Ald. 50, 22 Rev. Rep. 618, 6 E. C. L. 385.

An agreement to give credit to the bailor has such effect.

Indiana.— Tucker *v.* Taylor, 53 Ind. 93.

New Hampshire.— Stillings *v.* Gibson, 63 N. H. 1; Stoddard Woolen Manufactory *v.* Huntley, 8 N. H. 441, 31 Am. Dec. 198.

New York.— Morgan *v.* Congdon, 4 N. Y. 552; Pierce *v.* Schenck, 3 Hill (N. Y.) 28; Chandler *v.* Belden, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193.

Pennsylvania.— Lee *v.* Gould, 47 Pa. St. 398.

Vermont.— Hutchins *v.* Olcutt, 4 Vt. 549, 24 Am. Dec. 634.

England.— Cowell *v.* Simpson, 16 Ves. Jr. 275, 10 Rev. Rep. 181; Crawshay *v.* Homfray, 4 B. & Ald. 50, 22 Rev. Rep. 618, 6 E. C. L. 385.

Contra, Ruggles *v.* Walker, 34 Vt. 468, where the contract called for the payment of the price of manufacturing the article in advance, but it was held that the right of lien was not affected by the neglect or refusal of the bailor to make such payment.

Leaving property in care of landlord.— Where, at the expiration of a tenancy, a person asked leave of his landlord to permit property to remain until such time as it should be required to be removed, agreeing to pay therefor a certain sum monthly, but not agreeing that the property should remain that long, or for payment when the property should be removed, the transaction was held inconsistent with a lien for storage in favor of the landlord. Webster *v.* Keck, (Nebr. 1902) 89 N. W. 410.

Where a mechanic agrees to labor on property in consideration of being employed and paid by its owner to do other work for him,

(II) *ASSIGNABILITY OF.* It has been said that the right is a personal one which cannot be transferred to another,[76] nor is it attachable as personal property or a chose in action of the person entitled to it.[77]

(III) *EXTENT OF*— (A) *In General.* As a general rule, the right to retain property on account of work performed or expenses incurred applies only to the identical property on which the work has been so performed, or on account of which the expenses have been so incurred.[78] The right, however, extends to the whole of an entire work upon one single subject,[79] even if the property be delivered in different parcels and at different times, if the work to be done under the agreement be entire,[80] and covers any outgoing expenses incurred by a bailee in order to perform his own work in relation to the bailed property.[81]

(B) *Where There Is a General Balance.* Where there is a general balance due from the bailor to the bailee the courts seem inclined to sustain a lien therefor whenever it can be done by evidence of custom or agreement.[82] Such a general lien, however, can only be acquired by a well-established custom, the particular mode of dealing between the parties,[83] or by express

the agreement is inconsistent with a lien. Stickney *v.* Allen, 10 Gray (Mass.) 352.

76. Lovett *v.* Brown, 40 N. H. 511; Ruggles *v.* Walker, 34 Vt. 468; Daubigny *v.* Duval, 5 T. R. 604. *Contra*, Davis *v.* Bigler, 62 Pa. St. 242, 1 Am. Rep. 393, where it was said that a bailee might transfer his claim and with it his lien and the possession of the thing as security for his claim, since such an act on his part amounted to a mere appointment of the assignee to keep possession as his servant or attorney, and that the lien was not thereby extinguished, for the possession still continued properly to be the possession of the bailee, but that it was entirely different where there was an unlawful sale or pledge by the bailee of the thing itself. Such an act puts an end to bailee's possession and with it his lien.

77. Lovett *v.* Brown, 40 N. H. 511 [*cited* in Ruggles *v.* Walker, 34 Vt. 468].

78. *Indiana.*— Holderman *v.* Manier, 104 Ind. 118, 3 N. E. 811.

Iowa.— Nevan *v.* Roup, 8 Iowa 207.

Missouri.— Honig *v.* Knipe, 25 Mo. App. 574.

New York.— Gregory *v.* Stryker, 2 Den. (N. Y.) 628.

Rhode Island.— Moulton *v.* Greene, 10 R. I. 330.

See 6 Cent. Dig. tit. "Bailment," § 79.

Work done under special contract as to payment.—Where there is a contract to do work upon several articles of property, and any one article is to be returned as soon as completed, and the bailor contracts to pay on the first of any month for those articles that are completed and returned during the preceding month, the bailee has no lien upon articles in his possession for an unpaid balance. Wiles Laundering Co. *v.* Hahlo, 105 N. Y. 234, 11 N. E. 500, 59 Am. Rep. 496.

79. Morgan *v.* Congdon, 4 N. Y. 552.

Effect of bailor's default on special contract limiting lien.— A special contract confining the lien to all articles manufactured and delivered after a specified quantity is of no avail, where the bailor does not supply the bailee with sufficient material to enable him to manufacture such a sufficient number of articles as to enable him both to deliver the specified quantity and satisfy his lien; but the bailee has a lien on the last lot of articles manufactured. Mount *v.* Williams, 11 Wend. (N. Y.) 77. See also Moore *v.* Hitchcock, 4 Wend. (N. Y.) 292.

80. Ruggles *v.* Walker, 34 Vt. 468; Chase *v.* Westmore, 2 Marsh. 346, 5 M. & S. 180, 17 Rev. Rep. 301.

81. Briggs *v.* Boston, etc., R. Co., 6 Allen (Mass.) 246, 83 Am. Dec. 626; Coller *v.* Shepard, 19 Barb. (N. Y.) 305.

The lien given by Mass. Gen. Stat. c. 151, § 21, attaches for all expenditure including the cost of material and labor. Busfield *v.* Wheeler, 14 Allen (Mass.) 139.

82. Honig *v.* Knipe, 25 Mo. App. 574.

Lien for purchase-money.— An article bought, partly paid for, and left with the seller for repairs cannot be retained for the purchase-money. Owen *v.* Duhme, 3 Ohio Dec. (Reprint) 303.

83. Moulton *v.* Greene, 10 R. I. 330; Lickbarrow *v.* Mason, 1 H. Bl. 357, 2 T. R. 63, 6 East 21 note, 1 Rev. Rep. 425.

Calico printers have a lien for a general balance on goods delivered to them to print. Weldon *v.* Gould, 3 Esp. 268, 6 Rev. Rep. 832.

Dyers.— As to the general liens of dyers see Bennett *v.* Johnson, 2 Chit. 455, 3 Dougl. 387, 18 E. C. L. 734; Green *v.* Farmer, 4 Burr. 2214, 1 W. Bl. 651; Savill *v.* Barchard, 4 Esp. 53; Close *v.* Waterhouse, 6 East 523 note, 8 Rev. Rep. 524 note; Kirkman *v.* Shawcross, 6 T. R. 14, 3 Rev. Rep. 103.

Packers have a general lien upon all the goods of a customer in their possession or in their hands, and not merely for money owing in respect to particular goods. *In re* Witt, 2 Ch. D. 489, 45 L. J. Bankr. 118, 34 L. T. Rep. N. S. 785, 24 Wkly. Rep. 891; *Ex p.* Deeze, 1 Atk. 228.

Printers employed to print certain numbers, but not all consecutive numbers, of an entire work have a lien upon undelivered copies for a general balance due for printing all the numbers. Blake *v.* Nicholson, 3 M. & S. 167.

contract,[84] unless the property delivered is of such a character that it is impracticable to keep separate and distinct charges against its several parts,[85] or different articles are received and treated by the bailee as one lot.[86]

(iv) *Waiver or Loss of.* A bailee's lien is lost or waived where not asserted at the proper time,[87] or where the bailee treats the bailed property as his own,[88] parts with the possession thereof,[89] or takes security as payment of the charges

84. Nevan *v.* Roup, 8 Iowa 207; Moulton *v.* Greene, 10 R. I. 330.

Extension of lien by agreement.—The common-law right of lien may be extended by an express agreement, or impliedly from usage and mutual understanding, that the property shall be held not only for expenses and labor actually bestowed upon it, but also as a security for the balance of similar demands. McFarland *v.* Wheeler, 26 Wend. (N. Y.) 467.

85. Holderman *v.* Manier, 104 Ind. 118, 3 N. E. 811; Shaw *v.* Ferguson, 78 Ind. 547; East *v.* Ferguson, 59 Ind. 169; Lane *v.* Old Colony, etc., R. Co., 14 Gray (Mass.) 143; White *v.* Hoyt, 7 Daly (N. Y.) 232.

86. Lane *v.* Old Colony, etc., R. Co., 14 Gray (Mass.) 143; Young *v.* Kimball, 23 Pa. St. 193.

87. Leigh *v.* Mobile, etc., R. Co., 58 Ala. 165; Hanna *v.* Phelps, 7 Ind. 21, 63 Am. Dec. 410; Mexal *v.* Dearborn, 12 Gray (Mass.) 336; Holbrook *v.* Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607.

A lien on the property of an insolvent is not waived by filing a claim for the amount due in the insolvency proceedings, if the lien be asserted when the claim is filed. Knapp, etc., Co. *v.* McCaffery, 178 Ill. 107, 52 N. E. 898, 69 Am. St. Rep. 290.

Lien for sum exceeding value of property. —A lien, upon property much less in value than the amount due, is not lost because the bailee asserts *bona fide*, to an officer attaching on behalf of a creditor of the bailor, that the bailor has no beneficial interest in such property. Mutual Redemption Bank *v.* Sturgis, 9 Bosw. (N. Y.) 660.

Where a different ground of retention than the lien is asserted the bailee waives the lien. Long Island Brewery Co. *v.* Fitzpatrick, 18 Hun (N. Y.) 389; Boardman *v.* Sill, 1 Campb. 410 note; White *v.* Gainer, 2 Bing. 23, 9 E. C. L. 464, 1 C. & P. 324, 12 E. C. L. 194, 9 Moore C. P. 41. Thus a bailee, who, having a lien on property, buys it under contract valid between the parties but void as to the bailor's creditors, claims such property as a purchaser when it is attached under process against the bailor, and does not give the attaching officer any notice of the lien, or make any demand for its amount, loses his lien. Mexal *v.* Dearborn, 12 Gray (Mass.) 336.

Whether an absolute refusal to deliver waives the lien is a point upon which the authorities are not uniform, some cases holding that a person having a lien does not waive it by the mere fact of his omitting to state that he claims a lien when the property is demanded (White *v.* Gainer, 2 Bing. 23, 9 E. C. L. 464, 1 C. & P. 324, 12 E. C. L. 194, 9 Moore C. P. 41) while others hold that he does (Hanna *v.* Phelps, 7 Ind. 21, 63 Am. Dec. 410; Dows *v.* Morewood, 10 Barb. (N. Y.) 183).

Reinstatement of a lien once lost is not effected by reason of the bailee's again coming into possession, unless such is the intention of the parties. Hale *v.* Barrett, 26 Ill. 195, 79 Am. Dec. 367; Robinson *v.* Larrabee, 63 Me. 116; Hartley *v.* Hitchcock, 1 Stark. 408, 18 Rev. Rep. 790, 2 E. C. L. 158.

88. Munson *v.* Porter, 63 Iowa 453, 19 N. W. 290; Mexal *v.* Dearborn, 12 Gray (Mass.) 336; Davis *v.* Bigler, 62 Pa. St. 242, 1 Am. Rep. 393; Rodgers *v.* Grothe, 58 Pa. St. 414.

89. *Indiana.*— Tucker *v.* Taylor, 53 Ind. 93.

Iowa.— Nevan *v.* Roup, 8 Iowa 207.

Massachusetts.— Stickney *v.* Allen, 10 Gray (Mass.) 352; Doane *v.* Russell, 3 Gray (Mass.) 382; King *v.* Indian Orchard Canal Co., 11 Cush. (Mass.) 231.

New York.— McFarland *v.* Wheeler, 26 Wend. (N. Y.) 467; Moore *v.* Hitchcock, 4 Wend. (N. Y.) 292.

North Carolina.— McDougall *v.* Crapon, 95 N. C. 292.

Pennsylvania.— Rodgers *v.* Grothe, 58 Pa. St. 414; Megee *v.* Beirne, 39 Pa. St. 50.

Vermont.— Kitteridge *v.* Freeman, 48 Vt. 62; Bailey *v.* Quint, 22 Vt. 474.

England.— Jones *v.* Pearle, 1 Str. 556; Lickbarrow *v.* Mason, 1 H. Bl. 357, 2 T. R. 63, 6 East 21 note, 1 Rev. Rep. 425.

See 6 Cent. Dig. tit. "Bailment," § 84.

Delivery of possession to bailor under conditional contract.— Where it was agreed that the property should be the bailee's until he was paid, but that the bailor should possess the property, and the bailee parted with the possession, he was held to have lost his lien. Kittridge *v.* Freeman, 48 Vt. 62.

Delivery at a time unauthorized by the bailee does not effect a waiver of the lien. Partridge *v.* Dartmouth College, 5 N. H. 286.

Delivery of some portion of the goods does not defeat a lien upon the remainder for the whole amount. Morgan *v.* Congdon, 4 N. Y. 552; Schmidt *v.* Blood, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143.

Retention of possession in statutory liens. — Statutes giving a bailee a right to a lien do not, as a rule, abrogate the necessity of a retention of possession by the bailee. Busfield *v.* Wheeler, 14 Allen (Mass.) 139; McDougall *v.* Crapon, 95 N. C. 292; McDearmid *v.* Foster, 14 Oreg. 417, 12 Pac. 813. *Contra*, Rodgers *v.* Grothe, 58 Pa. St. 414, where it was held, under a Pennsylvania act giving the bailee the power to sell the property at auction in order to enforce his lien, that the

due for labor.[90] The lien is not waived, however, where the bailee refuses to part with possession and declares that he retains possession in order to enforce payment of what is due,[91] where he fails to give notice of the lien to a subsequent purchaser of the property from the bailor,[92] or by reason of a special contract respecting payment.[93]

(v) *Enforcement of*—(a) *At Common Law.* At common law the bailee can enforce his lien only by detention of the subject-matter[94] until payment is made or tendered,[95] unless a power of sale is superadded by special agreement[96] or a custom exists with respect to particular trades.[97] Where, however, the property is perishable and likely to become entirely lost, the bailee may, if the owner is unknown, sell for the purpose of protecting his lien.[98]

bailee was relieved from the necessity of retaining possession.

The possession retained need not be the direct and actual possession of the bailee. Possession by one under his authority is sufficient. McFarland *v.* Wheeler, 26 Wend. (N. Y.) 467.

No special stipulation can extend the lien after the bailee has lost possession so as to prejudice general creditors or *bona fide* purchasers for valuable consideration and without notice. McFarland *v.* Wheeler, 26 Wend. (N. Y.) 467.

A presumption of waiver may be explained. — Robinson *v.* Larrabee, 63 Me. 116.

90. East *v.* Ferguson, 59 Ind. 169.

Effect of protested draft as payment.— Where the bailee has received drafts as part payment of the sum owing, his lien attaches for the amount due less the amount of the drafts received, notwithstanding that the drafts are protested. Montreal Bank *v.* J. E. Potts Salt, etc., Co., 91 Mich. 342, 51 N. W. 890.

Where lien is expressly reserved by contract.—Acceptance of additional security, or giving credit to the bailor, does not impliedly waive a lien expressly reserved by the contract. Montieth *v.* Great Western Printing Co., 16 Mo. App. 450.

91. Thatcher *v.* Harlan, 2 Houst. (Del.) 178; Hanna *v.* Phelps, 7 Ind. 21, 3 Am. Dec. 410.

Refusal to deliver because of general indebtedness.— No lien for a labor account is waived when the bailee expressly refuses to deliver on the ground of his charge for labor, even if he also declines to deliver because of a general claim for which he has no lien. Thatcher *v.* Harlan, 2 Houst. (Del.) 178.

92. Graham *v.* Fitzgerald, 4 Daly (N. Y.) 178, holding that a bailee need not give actual notice of his lien to purchasers from the bailor, since the possession of the property is constructive notice of the bailee's rights in relation thereto.

93. Mathias *v.* Sellers, 86 Pa. St. 486, 27 Am. Rep. 723.

Unreasonable delay on the part of the bailee in making repairs on an article delivered to him for that purpose, where acquiesced in by the bailor, does not preclude the bailee from detaining the article until paid for work that has been done up to the time a demand is made therefor. Shailer *v.* Corbett, 15 N. Y. Suppl. 875, 40 N. Y. St. 786.

94. Busfield *v.* Wheeler, 14 Allen (Mass.) 139; Doane *v.* Russell, 3 Gray (Mass.) 382; Thames Iron Works Co. *v.* Patent Derrick Co., 1 Johns. & H. 93, 6 Jur. N. S. 1013, 29 L. J. Ch. 714, 2 L. T. Rep. N. S. 208, 8 Wkly. Rep. 408; Lickbarrow *v.* Mason, 1 H. Bl. 357, 2 T. R. 63, 6 East 21 note, 1 Rev. Rep. 425; Jones *v.* Pearle, 1 Str. 556; Jones *v.* Thurloe, 8 Mod. 172. *Compare* Scott *v.* Delahunt, 65 N. Y. 128 [*affirming* 5 Lans. (N. Y.) 372], where it is stated that at common law a bailee who has possession of the article upon which he has bestowed labor may foreclose his lien.

95. Dilworth *v.* McKelvy, 30 Mo. 149; Montieth *v.* Great Western Printing Co., 16 Mo. App. 450; Gregory *v.* Stryker, 2 Den. (N. Y.) 628; Moore *v.* Hitchcock, 4 Wend. (N. Y.) 292; Dunn *v.* Oneal, 1 Sneed (Tenn.) 105, 60 Am. Dec. 140.

Where only part of the work is done, the tender of a sum sufficient to pay therefor is sufficient, even if there was a contract price for the whole work, provided that the completion of the work was countermanded. Lilley *v.* Barnsley, 1 C. & K. 344, 47 E. C. L. 344.

Notwithstanding the work done does not comply with the specifications the bailee may retain possession until paid for any benefit actually accruing to the bailor. The Isaac Newton, Abb. Adm. 11, 13 Fed. Cas. No. 7,089.

96. Briggs *v.* Boston, etc., R. Co., 6 Allen (Mass.) 246, 83 Am. Dec. 626; Doane *v.* Russell, 3 Gray (Mass.) 382.

97. Doane *v.* Russell, 3 Gray (Mass.) 382; Parker *v.* Brancker, 22 Pick. (Mass.) 40; Cortelyou *v.* Lansing, 2 Cai. Cas. (N. Y.) 200; Hart *v.* Ten Eyck, 2 Johns. Ch. (N. Y.) 62; Jones *v.* Pearle, 1 Str. 556; Pothonier *v.* Dawson, Holt N. P. 383, 17 Rev. Rep. 647, 3 E. C. L. 154.

98. Millcreek Tp. *v.* Brighton Stock Yards Co., 27 Ohio St. 435.

Statutory recognition of doctrine.— The doctrine stated in the text has received statutory recognition where perishable freight is concerned. Briggs *v.* Boston, etc., R. Co., 6 Allen (Mass.) 246, 83 Am. Dec. 626; Millcreek Tp. *v.* Brighton Stock Yards Co., 27 Ohio St. 435. See, generally, Carriers.

(B) *Under Statute.* In many jurisdictions, by statute the bailee may sell the property covered by the lien.[99] In some jurisdictions the sale is by auction after giving the notice required by statute,[1] while in others the lien can be enforced only by some judicial proceeding.[2] In all cases, however, a statute enabling a bailee to enforce his lien by sale must be strictly complied with.[3]

(VI) *PRIORITY.* Where the bailee has only a common-law lien it seems that it is subordinate to a lien created by a properly filed or recorded mortgage,[4] but where the lien is statutory it is sometimes provided that it shall be superior to that of a mortgage.[5] It has been held, however, that a bailee's lien is superior to that of an attaching creditor.[6]

(VII) *PROTECTION OF AND RECOVERY OF AMOUNT.* Where there is a legally subsisting lien the bailee may, if so disturbed in his possession of the property as to threaten the loss of the lien, take proper steps to protect it.[7] In the event

99. *Indiana.*— Watts *v.* Sweeney, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615.

Louisiana.— Landry *v.* Blanchard, 16 La. Ann. 173.

Massachusetts.— Busfield *v.* Wheeler, 14 Allen (Mass.) 139; Briggs *v.* Boston, etc., R. Co., 6 Allen (Mass.) 246, 83 Am. Dec. 626.

Minnesota.—Jesurun *v.* Kent, 45 Minn. 222, 47 N. W. 784.

New Hampshire.— Stillings *v.* Gibson, 63 N. H. 1.

New York.— Scott *v.* Delahunt, 65 N. Y. 128 [*affirming* 5 Lans. (N. Y.) 372].

North Carolina.— McDougall *v.* Crapon, 95 N. C. 292.

Ohio.— Millcreek Tp. *v.* Brighton Stock Yards Co., 27 Ohio St. 435.

Oregon.— McDearmid *v.* Foster, 14 Oreg. 417, 12 Pac. 813.

Pennsylvania.— Rodgers *v.* Grothe, 58 Pa. St. 414.

A statutory power of sale is exhausted as soon as enough property has been sold to satisfy the lien. Jesurun *v.* Kent, 45 Minn. 222, 47 N. W. 784.

1. Watts *v.* Sweeney, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615; McDougall *v.* Crapon, 95 N. C. 292; Rodgers *v.* Grothe, 58 Pa. St. 414.

Jurisdiction of courts.— Under Mass. Gen. Stat. c. 151, § 21, exclusive jurisdiction in the first instance was given to a justice of the peace or police magistrate, such jurisdiction not being affected by the amount of the claim or the value of the property. Busfield *v.* Wheeler, 14 Allen (Mass.) 139.

Sufficiency of initial proceeding.— A summons duly served on the bailor, containing a notice to the bailor as owner of the property to appear and show cause why the prayer of the petition should not be granted and reciting the substance of the petition, is sufficient. Busfield *v.* Wheeler, 14 Allen (Mass.) 139.

Contents and sufficiency of petition.— Neither a just and true account nor a description of the property intended to be covered by the lien is necessary under Mass. Gen. Stat. c. 151, a demand only being required by the statute as a preliminary to the proceedings for a determination of claimant's right to have an order for sale. Busfield *v.* Wheeler, 14 Allen (Mass.) 139.

Where bailment was to a partnership.— All proceedings for enforcement of a claim under Mass. Gen. Stat. c. 151, § 21, must, where the bailment was to a partnership, be brought in the name of the partnership, notwithstanding its dissolution and the assignment of his interest by one copartner to the other. Busfield *v.* Wheeler, 14 Allen (Mass.) 139.

3. Watts *v.* Sweeney, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615; Briggs *v.* Boston, etc., R. Co., 6 Allen (Mass.) 246, 83 Am. Dec. 626; Jesurun *v.* Kent, 45 Minn. 222, 47 N. W. 784; McDougall *v.* Crapon, 95 N. C. 292.

Application of proceeds of sale.—As a general rule the proceeds of sale must be applied to discharge the lien and the costs and expenses of sale, the balance, if any, being for the benefit of the bailor. Jesurun *v.* Kent, 45 Minn. 222, 47 N. W. 784; McDougall *v.* Crapon, 95 N. C. 292; Rodgers *v.* Grothe, 58 Pa. St. 414.

Cumulative character of statutory remedy.—A common-law lien is not affected by N. Y. Laws (1862), c. 482, which is intended to give a remedy where the bailee of a special class is not in possession. Scott *v.* Delahunt, 65 N. Y. 128.

4. Bissell *v.* Pearce, 28 N. Y. 252.

5. Scott *v.* Delahunt, 65 N. Y. 128.

Where a bailor gave a mortgage upon all his property, including property upon which labor was being performed, and such property was afterward taken possession of by a receiver, the bailee had a lien thereon superior to that of the mortgage. Montreal Bank *v.* J. E. Potts Salt, etc., Co., 91 Mich. 342, 51 N. W. 890.

6. Anheuser-Busch Brewing Assoc. *v.* Daviess County Distilling Co., 20 Ky. L. Rep. 1522, 49 S. W. 541.

7. Douglass *v.* McFarland, 92 Cal. 656, 28 Pac. 687; Knapp, etc., Co. *v.* McCaffrey, 178 Ill. 107, 52 N. E. 898, 69 Am. St. Rep. 290; Watts *v.* Sweeney, 128 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615; McFarland *v.* Wheeler, 26 Wend. (N. Y.) 467.

Equity has jurisdiction to afford relief to a

of such disturbance he may either recover the property or the amount covered by the lien.[8]

5. Redelivery or Delivery Over — a. Necessity of — (I) *In General.* Upon the termination of a bailment the identical thing bailed[9] or the product of, or substitute for, that thing[10] must be redelivered, delivered over, or accounted for by the bailee in accordance with the contract,[11] unless he has a sufficient excuse for failure so to do.[12]

(II) *Excuses For Non-Delivery or Misdelivery.* It is a sufficient, excuse for non-delivery or misdelivery that the property has been destroyed without fault of the bailee, by some act over which he had no control,[13] that

bailee where equitable circumstances exist justifying the granting of relief on equitable principles, as against purchasers threatening to take away the property and assignees for creditors of the bailor. Knapp, etc., Co. *v.* McCaffrey, 178 Ill. 107, 52 N. E. 898, 69 Am. St. Rep. 290.

8. Douglass *v.* McFarland, 92 Cal. 656, 28 Pac. 687; White *v.* Hoyt, 7 Daly (N. Y.) 232; Moore *v.* Hitchcock, 4 Wend. (N. Y.) 292.

Recovery from transferee of property subject to lien.— Where the bailor takes away a portion of property on which the bailee has a general lien, paying a portion of the amount due, and transfers the remainder of the property to a third person who has notice that there is still a balance due to the bailee, and the property is delivered to the transferee upon his promise to pay that amount, the bailee may recover the amount of his lien from the transferee. White *v.* Hoyt, 7 Daly (N. Y.) 232.

9. Hurd *v.* West, 7 Cow. (N. Y.) 752; Abrahams *v.* South-western Railroad Bank, 1 S. C. 441, 7 Am. Rep. 33.

Certificates of stock or bank-bills.— It is not requisite to return the identical certificates of stock or bank-bills that are bailed, providing stock or bills of equal value are returned. Barclay *v.* Culver, 30 Hun (N. Y.) 1. See also Henry *v.* Porter, 46 Ala. 293, where the bills returned had depreciated on account of the failure of the bank of issue.

10. Taylor *v.* Plumer, 3 M. & S. 562, 2 Rose 457, 16 Rev. Rep. 361.

11. *Alabama.*— Prince *v.* Alabama State Fair, 106 Ala. 340, 17 So. 449, 28 L. R. A. 716; Lay *v.* Lawson, 23 Ala. 377.

Georgia.— Columbus *v.* Howard, 6 Ga. 213.

Kentucky.—Ewing *v.* Gist, 2 B. Mon. (Ky.) 465.

Louisiana.— Nott *v.* Papet, 15 La. 306.

New Jersey.— Burgin *v.* Riggins, 3 N. J. L. 233.

New York.— Ouderkirk *v.* Central Nat. Bank, 119 N. Y. 263, 23 N. E. 875, 29 N. Y. St. 573.

Pennsylvania.— Rodgers *v.* Grothe, 58 Pa. St. 414.

See 6 Cent. Dig. tit. "Bailment," § 107.

12. *Alabama.*— Prince *v.* Alabama State Fair, 106 Ala. 340, 17 So. 449, 28 L. R. A. 716; Seals *v.* Edmondson, 71 Ala. 509; Spence *v.* Mitchell, 9 Ala. 744.

Indiana.— Underwood *v.* Tatham, 1 Ind. 276.

Nebraska.— Walter A. Wood Harvester Co. *v.* Dobry, 59 Nebr. 590, 81 N. W. 611.

New Hampshire.— Graves *v.* Ticknor, 6 N. H. 537.

Tennessee.— Roach *v.* Turk, 9 Heisk. (Tenn.) 708, 24 Am. Rep. 360.

Non-delivery without excuse after demand is *prima facie* negligence. Fairfax *v.* New York Cent. R. Co., 67 N. Y. 11; Steers *v.* Liverpool, etc., Steamship Co., 57 N. Y. 1, 15 Am. Rep. 453; Burnell *v.* New York Cent. R. Co., 45 N. Y. 184, 6 Am. Rep. 61; Anonymous, 2 Salk. 655.

13. *Alabama.*— Abraham *v.* Nunn, 42 Ala. 51.

Georgia.—Smith *v.* Frost, 51 Ga. 336; Mein *v.* West, T. U. P. Charlt. (Ga.) 170.

Illinois.— Russell *v.* Kœhler, 66 Ill. 459; Steele *v.* Buck, 61 Ill. 343, 14 Am. Rep. 60; Saunders *v.* Hartsook, 85 Ill. App. 55.

Iowa.— Seevers *v.* Gabel, 94 Iowa 75, 62 N. W. 669, 58 Am. St. Rep. 381, 27 L. R. A. 733; Irons *v.* Kentner, 51 Iowa 88, 50 N. W. 73, 33 Am. Rep. 119; Francis *v.* Dubuque, etc., R. Co., 25 Iowa 60, 95 Am. Dec. 769.

Kentucky.— Young *v.* Bruces, 5 Litt. (Ky.) 324.

Louisiana.— Spencer *v.* Cullom, 36 La. Ann. 213; McCranie *v.* Wood, 24 La. Ann. 406; Britton *v.* Aymar, 23 La. Ann. 63; Yale *v.* Oliver, 21 La. Ann. 454; McCullom *v.* Porter, 17 La. Ann. 89.

Maryland.— Schermer *v.* Neurath, 54 Md. 491, 39 Am. Rep. 397.

Missouri.— McEvers *v.* Steamboat Sangamon, 22 Mo. 187.

New York.— Young *v.* Leary, 135 N. Y. 569, 32 N. E. 607, 49 N. Y. St. 93; Coldwell-Wilcox Co. *v.* Sullivan, 3 N. Y. App. Div. 359, 38 N. Y. Suppl. 290, 73 N. Y. St. 657; Hayes *v.* Kedzie, 11 Hun (N. Y.) 577.

Pennsylvania.— Zell *v.* Dunkle, 156 Pa. St. 353, 33 Wkly. Notes Cas. (Pa.) 33, 27 Atl. 38; Jones *v.* Gilmore, 91 Pa. St. 310.

Tennessee.— Waller *v.* Parker, 5 Coldw. (Tenn.) 476.

Texas.— Wilkinson *v.* Williams, 35 Tex. 181.

Vermont.— Spooner *v.* Mattoon, 40 Vt. 300, 94 Am. Dec. 395.

Virginia.— Slaughter *v.* Green, 1 Rand. (Va.) 3, 10 Am. Dec. 488; Harris *v.* Nicholas, 5 Munf. (Va.) 483.

Wisconsin.— Stacy *v.* Knickerbocker Ice Co., 84 Wis. 614, 54 N. W. 1091.

it has been taken from him without his collusion under due process of law or by a person having a paramount title, or that the title of the bailor has terminated.[14]

United States.— U. S. *v.* Thomas, 15 Wall. (U. S.) 337, 21 L. ed. 89.

England.— Cunningham *v.* Dunn, 3 Aspin. 359, 3 C. P. D. 443, 48 L. J. C. P. 62, 38 L. T. Rep. N. S. 631; Taylor *v.* Caldwell, 3 B. & S. 826, 32 L. J. Q. B. 164, 8 L. T. Rep. N. S. 356, 11 Wkly. Rep. 726, 113 E. C. L. 826; Williams *v.* Lloyd, W. Jones 179; Menetone *v.* Athawes, 3 Burr. 1592.

Canada.— McKenna *v.* McNamee, 14 Ont. App. 339.

A loss occasioned by robbery on the highway, or by the depredation of mobs, riots, insurgents, etc., is not occasioned by the act of God or *vis major.* Story Bailm. (9th ed.) § 526 [*cited* in State *v.* Moore, 74 Mo. 413, 41 Am. Rep. 322].

Effect of bailor's neglect to save property where possible.— A bailor who being able to save and protect his property from a *vis major* neglects so to do, must himself suffer a loss if one occur, for he has no right to see his property go to ruin and rely upon a remedy against the bailee. Smith *v.* Frost, 51 Ga. 336.

14. *Connecticut.*— Clark *v.* Gaylord, 24 Conn. 484.

Illinois.— Great Western R. Co. *v.* McComas, 33 Ill. 185.

Louisiana.— Satterfield *v.* Delavalade, 21 La. Ann. 650.

New York.— Ball *v.* Liney, 48 N. Y. 6, 8 Am. Rep. 511; Welles *v.* Thornton, 45 Barb. (N. Y.) 390; Bliven *v.* Hudson River R. Co., 35 Barb. (N. Y.) 188; Bates *v.* Stanton, 1 Duer (N. Y.) 79; Edson *v.* Weston, 7 Cow. (N. Y.) 278.

Pennsylvania.— King *v.* Richards, 6 Whart. (Pa.) 418, 37 Am. Dec. 420.

Texas.— Roberts *v.* Yarboro, 41 Tex. 449.

Vermont.— Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.

United States.— Stiles *v.* Davis, 1 Black (U. S.) 101, 17 L. ed. 33; Robinson *v.* Memphis, etc., R. Co., 16 Fed. 57.

Necessity of legal process.—When property in the custody of a bailee for hire is demanded by a third person under color of process, it is the duty of the bailee to ascertain whether the process is such as requires him to surrender property (Edwards *v.* White Line Transit Co., 104 Mass. 159, 6 Am. Rep. 213; Roberts *v.* Stuyvesant Safe Deposit Co., 123 N. Y. 57, 25 N. E. 294, 33 N. Y. St. 175, 20 Am. St. Rep. 718, 9 L. R. A. 438; Bliven *v.* Hudson River R. Co., 35 Barb. (N. Y.) 188); but a writ not void on its face will protect him (McAlister *v.* Chicago, etc., R. Co., 74 Mo. 351).

Process must be against bailor.— To be sufficient as an excuse, the process must have been directly against the bailor. Barnard *v.* Kobbe, 3 Daly (N. Y.) 35, 373 [*affirmed* in 54 N. Y. 516]. Process against a person not the owner of the property is no excuse. Edwards *v.* White Line Transit Co., 104 Mass. 159, 6 Am. Rep. 213 [*criticizing* Stiles *v.* Davis, 12 Black (U. S.) 101, 17 L. ed. 33, which decided that a failure to deliver goods with no denial of the bailor's right, but merely for the reason that it was detained under legal process, was not a conversion of the property]. See also Robinson *v.* Memphis, etc., R. Co., 16 Fed. 57, which was a suit upon a contract of carriage, and it was held that seizure under legal process at the suit of strangers was a legal excuse, provided the bailor was promptly notified of the taking.

Notification of seizure under process should be given to the bailor. Ohio, etc., R. Co. *v.* Yohe, 51 Ind. 181, 19 Am. Rep. 727; Furman *v.* Chicago, etc., R. Co., 81 Iowa 540, 46 N. W. 1049; Bliven *v.* Hudson River R. Co., 36 N. Y. 403, 2 Transcr. App. (N. Y.) 179. See also Savannah, etc., R. Co. *v.* Wilcox, 48 Ga. 432; Scranton *v.* Farmers', etc., Bank, 24 N. Y. 424. But where the bailor has a timely knowledge that his property has been seized under legal process, a formal notice thereof by the bailee is not necessary. Furman *v.* Chicago, etc., R. Co., 81 Iowa 540, 46 N. W. 1049; MacVeagh *v.* Atchison, etc., R. Co., 3 N. M. 205, 5 Pac. 457; Baltimore, etc., R. Co. *v.* Davis, 20 Wkly. Notes Cas. (Pa.) 514. See also Robinson *v.* Memphis, etc., R. Co., 16 Fed. 57, where the court said that nothing less than a full showing of actual knowledge quite as nearly as would have resulted from proper notice by the bailee would be sufficient.

Where the process is not such as requires a surrender of the property the bailee should offer such resistance to the taking, and adopt such measures for reclaiming it, if taken, as a prudent and intelligent man would if it had been demanded and taken under a claim of right without legal process. Roberts *v.* Stuyvesant Safe Deposit Co., 123 N. Y. 57, 25 N. E. 294, 33 N. Y. St. 175, 20 Am. St. Rep. 718, 9 L. R. A. 438; Bliven *v.* Hudson River R. Co., 35 Barb. (N. Y.) 188.

Surrender of possession under a judgment by default, in a suit where the bailee fails to give his bailor statutory notice to defend, will render him liable for the goods, unless he has delivered them to the real owner. Powell v. Robinson, 76 Ala. 423.

After the bailee has negligently allowed the property to pass into the hands of trespassers or persons who have no right to it, a seizure under legal process is not sufficient as an excuse. Roberts *v.* Stuyvesant Safe Deposit Co., 123 N. Y. 57, 25 N. E. 294, 33 N. Y. St. 175, 20 Am. St. Rep. 718, 9 L. R. A. 438.

Seizure under process of property exempt from attachment is not a sufficient excuse. Kiff *v.* Old Colony, etc., R. Co., 117 Mass. 591, 19 Am. Rep. 429.

b. Manner of Redelivery — (i) *Compliance With Contract.* Where the manner of redelivery or delivery over is specified, the bailee must comply strictly therewith, or be liable in the event of any loss;[15] but where the contract is silent on the question of redelivery,[16] the bailee's obligation is generally regulated by the custom and usage of business at the place where the bailment was made, such custom and usage being adopted into the contract.[17]

(ii) *Time of.* Where the time of redelivery is not fixed by agreement, or by the nature of the object to be accomplished, redelivery must be made within a reasonable time after demand, the question of what time is reasonable being determined by the circumstances of each particular case.[18] Where the time is fixed the bailee must return the article at the time stipulated.[19]

(iii) *Place of.* Redelivery should be made at the place expressly or impliedly appointed by the bailor.[20]

(iv) *To Whom Made* — (a) *In General.* The delivery or accounting in all

Merely showing that legal title is in the estate of a deceased person is not enough to relieve the bailee from his obligation to redeliver to the bailor. McCafferty *v.* Brady, 19 Wkly. Notes Cas. (Pa.) 553.

When a bailment is made by a tenant in common, and the bailee undertakes to hold for him and subject to his order alone, he cannot excuse himself for failing to deliver to him by showing a delivery to the other, for the latter could not have compelled him by action so to do, and there is consequently no necessity for such a delivery. Pitt *v.* Albritton, 34 N. C. 74.

15. McGinn *v.* Butler, 31 Iowa 160; Clagett *v.* Speake, 4 Harr. & M. (Md.) 162; Forsythe *v.* Walker, 9 Pa. St. 148; Graves *v.* Smith, 14 Wis. 5, 80 Am. Dec. 762.

Delivery only on written order.— Where the bailor instructed the bailee not to deliver to any person except upon the bailor's written order, a delivery made without such order to the bailor's wife is not sufficient. Kowing *v.* Manly, 49 N. Y. 192, 10 Am. Rep. 346.

Where the bailee follows express directions of his bailor and delivers the property bailed to the person whom, or the place where, he has ordered, he has done all that can be required of him, either in law or ethics. Stearns *v.* Farrand, 29 Misc. (N. Y.) 292, 60 N. Y. Suppl. 501.

Where the bailee was called upon by the bailor for the property bailed, but he was at that time unable to comply with the demand and volunteered to send it by express, he assumed the responsibility of delivery and was liable for misdelivery. Rhind *v.* Stake, 28 Misc. (N. Y.) 177, 59 N. Y. Suppl. 42.

16. **In the absence of a contract** there is an implied promise on the part of the bailee to return the property at the expiration of the term in as good condition as when received — ordinary wear and tear excepted. Harvey *v.* Murray, 136 Mass. 377; Hyland *v.* Paul, 33 Barb. (N. Y.) 241; Colyar *v.* Taylor, 1 Coldw. (Tenn.) 372.

17. Story Bailm. § 384 [*cited* in Gleason *v.* Morrison, 20 Misc. (N. Y.) 320, 45 N. Y. Suppl. 684 (*affirming* 20 Misc. (N. Y.) 4, 44 N. Y. Suppl. 609)].

18. *Alabama.*— Lay *v.* Lawson, 23 Ala. 377; Spence *v.* Mitchell, 9 Ala. 744.

California.— Skidmore *v.* Taylor, 29 Cal. 619.

Indiana.— Underwood *v.* Tatham, 1 Ind. 276.

Kentucky.— Green *v.* Hollingsworth, 5 Dana (Ky.) 173, 30 Am. Dec. 680.

New York.— Wilson *v.* Press Pub. Co., 14 Misc. (N. Y.) 514, 36 N. Y. Suppl. 12, 70 N. Y. St. 770; Rutgers *v.* Lucet, 2 Johns. Cas. (N. Y.) 92.

Tennessee.— Cobb *v.* Wallace, 5 Coldw. (Tenn.) 539, 98 Am. Dec. 435.

Return not necessary until after demand.— In the case of a loan for use the bailee need not return the property until after demand made. Phelps *v.* Bostwick, 22 Barb. (N. Y.) 314; Brown *v.* Cook, 9 Johns. (N. Y.) 361.

Demand may be inferred.—Stewart *v.* Frazier, 5 Ala. 114.

19. Green *v.* Hollingsworth, 5 Dana (Ky.) 173, 30 Am. Dec. 680; Barber *v.* Anderson, 1 Bailey (S. C.) 358.

Whenever called for.— Where one receives a chattel from another, under a stipulation in writing that he will return it "whenever called for, in good repair, free from expense," he must deliver it on demand. Spence *v.* Mitchell, 9 Ala. 744.

Where goods are bailed for a specific time the bailee should return them when that time has expired, unless there is some agreement to the contrary. Barber *v.* Anderson, 1 Bailey (S. C.) 358; Clapp *v.* Nelson, 12 Tex. 370, 62 Am. Dec. 530.

20. Esmay *v.* Fanning, 9 Barb. (N. Y.) 176, 5 How. Pr. (N. Y.) 228, holding that where an article was loaned to be redelivered on request it should be returned to the residence of the bailor. See also Brown *v.* Cook, 9 Johns. (N. Y.) 361.

The bailee should ascertain from the bailor the place where he will receive the article bailed. White *v.* Perley, 15 Me. 470.

Restoration to the place from which the bailee took the property was at civil law a good redelivery in case no place was agreed on. Story Bailm. § 117 [*cited* in Esmay *v.* Fanning, 9 Barb. (N. Y.) 176, 5 How. Pr. (N. Y.) 228].

cases must be made to the person entitled thereto, or the bailee will be guilty of a conversion [21] in cases where he has the possession of the property and refuses to deliver or account,[22] and of a breach of contract where he has merely acted negligently.[23]

(B) *To Bailor*—(1) IN GENERAL. As a general rule the person to whom the thing bailed must be redelivered is the bailor, or some one claiming under him;[24] and where the bailor is not the owner of the property the bailee may still

21. *Alabama.*— Benje *v.* Creagh, 21 Ala. 151.

Arkansas.— Estes *v.* Boothe, 20 Ark. 583.

California.—Briggs *v.* Haycock, 63 Cal. 343.

Delaware.— Vaughan *v.* Webster, 5 Harr. (Del.) 256.

Indiana.— Hill *v.* Haverstick, 17 Ind. 517; Coffin *v.* Anderson, 4 Blackf. (Ind.) 395.

Maryland.— Buel *v.* Pumphrey, 2 Md. 261, 56 Am. Dec. 714; Hopkins *v.* Stump, 2 Harr. & J. (Md.) 301.

Massachusetts.— Hall *v.* Boston, etc., R. Corp., 14 Allen (Mass.) 439, 92 Am. Dec. 783.

Michigan.— Hubbell *v.* Blandy, 87 Mich. 209, 49 N. W. 502, 24 Am. St. Rep. 154; Donlin *v.* McQuade, 61 Mich. 275, 28 N. W. 114.

Missouri.—Loeffel *v.* Pohlman, 47 Mo. App. 574; Allgear *v.* Walsh, 24 Mo. App. 134.

Nebraska.— Walter A. Wood Harvester Co. *v.* Dobry, 59 Nebr. 590, 81 N. W. 611.

New York.— Coykendall *v.* Eaton, 55 Barb. (N. Y.) 188, 37 How. Pr. (N. Y.) 438; Carroll *v.* Mix, 51 Barb. (N. Y.) 212; Esmay *v.* Fanning, 9 Barb. (N. Y.) 176, 5 How. Pr. (N. Y.) 228; Gregory *v.* Fichtner, 14 N. Y. Suppl. 891, 38 N. Y. St. 192 [*reversing* 13 N. Y. Suppl. 593, 38 N. Y. St. 460]; Lockwood *v.* Bull, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539.

North Carolina.—Setzar *v.* Butler, 27 N. C. 212.

South Carolina.— Barber *v.* Anderson, 1 Bailey (S. C.) 358.

Texas.— Nelson *v.* King, 25 Tex. 655; Young *v.* Lewis, 9 Tex. 73.

Vermont.— Doharty *v.* Madgett, 58 Vt. 323, 2 Atl. 115; Sibley *v.* Story, 8 Vt. 15.

Wisconsin.— Magdeburg *v.* Uihlein, 53 Wis. 165, 10 N. W. 363.

England.—*Ex p.* Drake, 5 Ch. D. 866; Wilson *v.* Anderton, 1 B. & Ad. 450, 9 L. J. K. B. O. S. 48, 20 E. C. L. 555; Baldwin *v.* Cole, 6 Mod. 212.

Misdelivery whether intentional or otherwise is equivalent to non-delivery to the proper person, and, therefore, a conversion.

Illinois.— Illinois Cent. R. Co. *v.* Parks, 54 Ill. 294.

Iowa.— Serry *v.* Knepper, 101 Iowa 372, 70 N. W. 601.

Michigan.— Hubbell *v.* Blandy, 87 Mich. 209, 49 N. W. 502, 24 Am. St. Rep. 154; Gibbons *v.* Farwell, 63 Mich. 344, 29 N. W. 855, 6 Am. St. Rep. 381; Barnum *v.* Stone, 27 Mich. 332.

Missouri.—Loeffel *v.* Pohlman, 47 Mo. App. 574.

New York.— Price *v.* Oswego, etc., R. Co., 50 N. Y. 213, 10 Am. Rep. 475; Guillaume *v.* Hamburgh, etc., Packet Co., 42 N. Y. 212, 1 Am. Rep. 512; Markoe *v.* Tiffany, 26 N. Y. App. Div. 95, 49 N. Y. Suppl. 751; Hayes *v.* Kedzie, 11 Hun (N. Y.) 577; Coykendall *v.* Eaton, 55 Barb. (N. Y.) 188, 37 How. Pr. (N. Y.) 438; Esmay *v.* Fanning, 9 Barb. (N. Y.) 176, 5 How. Pr. (N. Y.) 228; Willard *v.* Bridge, 4 Barb. (N. Y.) 361; Hawkins *v.* Hoffman, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; Powell *v.* Myers, 26 Wend. (N. Y.) 591; Packard *v.* Getman, 4 Wend. (N. Y.) 613, 21 Am. Dec. 166; Lockwood *v.* Bull, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539.

Texas.—Nelson *v.* King, 25 Tex. 655; Horseley *v.* Moss, 5 Tex. Civ. App. 341, 23 S. W. 1115.

England.— Stephenson *v.* Hart, 4 Bing. 476, 6 L. J. C. P. O. S. 97, 1 M. & P. 357, 29 Rev. Rep. 602, 13 E. C. L. 596; Syeds *v.* Hay, 4 T. R. 260.

Canada.— Leslie *v.* Canada Cent. R. Co., 44 U. C. Q. B. 21; Grant *v.* Northern Pacific Junction R. Co., 21 Ont. App. 322 [*affirming* 22 Ont. 645].

Remedies for non-delivery or misdelivery see *infra*, VI, A, 2, a.

22. Packard *v.* Getman, 4 Wend. (N. Y.) 613, 21 Am. Dec. 166.

23. Hyde *v.* Noble, 13 N. H. 494, 38 Am. Dec. 508; Scovill *v.* Griffith, 12 N. Y. 509; Hawkins *v.* Hoffman, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; Packard *v.* Getman, 4 Wend. (N. Y.) 613, 21 Am. Dec. 166; Buck *v.* Ashley, 37 Vt. 475; Hale *v.* Huntley, 21 Vt. 147.

Omission to deliver property not actually placed in bailee's custody.— When property is not put into the actual custody of the bailee, but is deposited upon his premises, unprotected by an inclosure, and consequently accessible to all persons desiring to enter thereon, an omission to deliver the property upon demand is not sufficient to make the bailee liable for non-delivery. Feltman *v.* Gulf Brewery, 42 How. Pr. (N. Y.) 488. See also Morris *v.* Third Ave. R. Co., 1 Daly (N. Y.) 202.

24. *Alabama.*—Powell *v.* Robinson, 76 Ala. 433; Alabama, etc., Rivers R. Co. *v.* Nidd, 35 Ala. 209.

Illinois.— Foltz *v.* Stevens, 54 Ill. 180; Great Western R. Co. *v.* McComas, 33 Ill. 185; Garvey *v.* Scott, 9 Ill. App. 19.

Iowa.— McGinn *v.* Butler, 31 Iowa 160.

Louisiana.— Satterfield *v.* Delavalade, 21 La. Ann. 650.

Missouri.— Pulliam *v.* Burlingame, 81 Mo. 111, 51 Am. Rep. 229; Dufour *v.* Mepham, 31 Mo. 577; Smith *v.* Bell, 9 Mo. 873.

New York.— Welles *v.* Thornton, 45 Barb. (N. Y.) 390; Esmay *v.* Fanning, 9 Barb. (N. Y.) 176, 5 How. Pr. (N. Y.) 228.

Texas.— Freeman *v.* Perry, 25 Tex. 611.

redeliver to him[25] in the absence of a claim thereto by the owner,[26] in which case a subsequent redelivery to the bailor amounts to an unqualified refusal to deliver and a conversion of the bailed property.[27]

(2) Where There Is an Adverse Claim. Where there is an adverse claim, and the bailee cannot or does not compel an interpleader,[28] he may refuse delivery to the bailor and, assuming the burden of establishing a title paramount to that of the bailor, surrender the property to its claimant, if the real owner.[29] So, if unwilling to undertake the onus of proving a paramount title in the claimant, the bailee may retain possession for the bailor and await an action by the claimant in which he must stand or fall by the bailor's title;[30] or he may refuse to deliver the property to either party until he can in good faith investigate the facts as to the real ownership, and may, for a brief period, retain possession for that purpose. He must not, however, absolutely refuse to deliver the property without any qualification attached to his refusal, such refusal being equivalent to an actual

Bailment by joint owners.—The bailee may refuse to deliver to one of several joint owners making a joint bailment. Harper *v.* Godsell, L. R. 5 Q. B. 422, 39 L. J. Q. B. 185, 18 Wkly. Rep. 954; Atwood *v.* Ernest, 13 C. B. 881, 1 C. L. R. 738, 17 Jur. 603, 22 L. J. C. P. 225, 1 Wkly. Rep. 436, 76 E. C. L. 881; Brandon *v.* Scott, 7 E. & B. 234, 3 Jur. N. S. 362, 26 L. J. Q. B. 163, 5 Wkly. Rep. 235, 90 E. C. L. 34; May *v.* Harvey, 13 East 197, 12 Rev. Rep. 322.

25. Nelson *v.* Iverson, 17 Ala. 216; Foltz *v.* Stevens, 54 Ill. 180; Great Western R. Co. *v.* McComas, 33 Ill. 185; Satterfield *v.* Delavalade, 21 La. Ann. 650; Smith *v.* Bell, 9 Mo. 873.

Redelivery to the bailor must be in good faith and not to avoid a possible claim by the owner. Nelson *v.* Iverson, 17 Ala. 216. But a bailee, although having good ground for belief that his bailor obtained the property wrongfully, is not guilty of conversion by redelivery to the bailor. Hill *v.* Hayes, 38 Conn. 532.

26. *Alabama.*— Powell *v.* Robinson, 76 Ala. 423; Nelson *v.* Iverson, 17 Ala. 216.

Louisiana.— Dickson *v.* Chaffe, 34 La. Ann. 1133.

New Hampshire.— Doty *v.* Hawkins, 6 N. H. 247, 25 Am. Dec. 459.

New York.— Coykendall *v.* Eaton, 55 Barb. (N. Y.) 188, 37 How. Pr. (N. Y.) 438.

Texas.— Roberts *v.* Yarboro, 41 Tex. 449.

Where the bailee is aware that the title of the bailor has been assigned to another he must account to the assignee. Roberts *v.* Noyes, 76 Me. 590.

Restoration of property to a criminal by a public officer aware that the goods belong to a person from whom they have been stolen is conversion by such officer. Loeffel *v.* Pohlman, 47 Mo. App. 574.

A notice prohibiting a delivery to the bailor must assert some title absolute or qualified to the property, or it is insufficient to prevent delivery, or to justify the bailee in demanding a bond of indemnity before delivery. Susquehanna Boom Co. *v.* Rogers, 3 Wkly. Notes Cas. (Pa.) 478.

Trial of right of property.—A bailee is not authorized to surrender property to a third person without the bailor's authority, merely because in a trial of right of property between the bailor and such person the property bailed is proved to belong to the latter. Foltz *v.* Stevens, 54 Ill. 180.

27. Robinson *v.* Hodgson, 73 Pa. St. 202; Weston *v.* National Transit Co., 19 Wkly. Notes Cas. (Pa.) 378; Roberts *v.* Yarboro, 41 Tex. 449.

28. Powell *v.* Robinson, 76 Ala. 423.

In Alabama the bailee has a statutory right to require the claimants to interplead at law, and he is not justified in surrendering the property to either claimant, the statute contemplating a retention of possession by the bailee until there is an interpleader and then a delivery to the claimant who gives the bond required by statute; but, if neither party gives a bond, it is the bailee's duty to retain the property to abide the result of the action. Where, however, the bailee does not avail himself of his statutory right his liability remains as at common law. Behr *v.* Gerson, 95 Ala. 438, 11 So. 115; Powell *v.* Robinson, 76 Ala. 423.

29. Jackson *v.* Jackson, 97 Ala. 372, 12 So. 437; Young *v.* East Alabama R. Co., 80 Ala. 100; Powell *v.* Robinson, 76 Ala. 423.

A refusal to deliver to the bailor is not justified unless the true owner authorizes the bailee to vindicate his title. Wetherly *v.* Straus, 93 Cal. 283, 28 Pac. 1045; Dodge *v.* Meyer, 61 Cal. 405; Lain *v.* Gaither, 72 N. C. 234; Biddle *v.* Bond, 6 B. & S. 225, 11 Jur. N. S. 425, 34 L. J. Q. B. 137, 12 L. T. Rep. N. S. 178, 13 Wkly. Rep. 561, 118 E. C. L. 225; Betteley *v.* Reed, 4 Q. B. 511, 3 G. & D. 561, 7 Jur. 507, 12 L. J. Q. B. 172, 45 E. C. L. 511; Thorne *v.* Tilbury, 3 H. & N. 534, 27 L. J. Exch. 407; Palmteg *v.* Doutrick, 8 L. J. P. C. 884.

30. Powell *v.* Robinson, 76 Ala. 423; Wilson *v.* Anderton, 1 B. & Ad. 450, 9 L. J. K. B. O. S. 48, 20 E. C. L. 555.

Bailor should be notified of suit.— When action is brought the bailee may give the bailor notice thereof, and require him to defend. Powell *v.* Robinson, 76 Ala. 423. See also Bliven *v.* Hudson River R. Co., 35 Barb. (N. Y.) 188, where it was held that the bailee was not himself bound to litigate.

A judgment against the bailee, whether the bailor appears or refuses to defend after

conversion of the property.[31] Where more than one person claims the property, and neither of them is the bailor, the bailee must not decide between them. Should he do so he acts at his peril.[32]

6. Termination of Bailment — a. In General. A bailment may be determined by the mere lapse of time, as where the chattel is bailed for a stated period;[33] by the accomplishment of the object for which the thing was bailed;[34] by mutual agreement;[35] by rescission of the contract of bailment on grounds recognized in contracts generally;[36] by the total or partial destruction of the subject-matter, as

notice of suit, will be a sufficient excuse if the property be subsequently demanded by the bailor. Powell *v.* Robinson, 76 Ala. 423.

31. Ball *v.* Liney, 48 N. Y. 6, 8 Am. Rep. 511; McEntee *v.* New Jersey Steamboat Co., 45 N. Y. 34, 6 Am. Rep. 28; Rogers *v.* Weir, 34 N. Y. 463; Carroll *v.* Mix, 51 Barb. (N. Y.) 212; Willner *v.* Morrell, 40 N. Y. Super. Ct. 222; Tuttle *v.* Gladding, 2 E. D. Smith (N. Y.) 157; Dunlap *v.* Hunting, 2 Den. (N. Y.) 643, 43 Am. Dec. 763; Mount *v.* Derick, 5 Hill (N. Y.) 455; Holbrook *v.* Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; Dowd *v.* Wadworth, 13 N. C. 130, 18 Am. Dec. 567; Beckley *v.* Howard, 2 Brev. (S. C.) 94; Alexander *v.* Southey, 5 B. & Ald. 247, 24 Rev. Rep. 348, 7 E. C. L. 141; Isaack *v.* Clark, 2 Bulst. 306; Green *v.* Dunn, 3 Campb. 215 note; Solomons *v.* Dawes, 1 Esp. 83; Vaughan *v.* Watt, 9 L. J. Exch. 272, 6 M. & W. 492; Hollins *v.* Fowler, L. R. 7 H. L. 757, 44 L. J. Q. B. 169, 33 L. T. Rep. N. S. 73.

There is a conversion where delivery is refused because the property has been sold to pay storage (Briggs *v.* Haycock, 63 Cal. 343); where possession is retained (Dusky *v.* Rudder, 80 Mo. 400; Western Transp. Co. *v.* Barber, 56 N. Y. 544; Ball *v.* Liney, 48 N. Y. 6, 8 Am. Rep. 511; Dohorty *v.* Madgett, 58 Vt. 323, 2 Atl. 115); where the bailee signs a receipt acknowledging that he holds the property for some person other than the real owner (Holbrook *v.* Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607); where the bailor is notified that the bailee, or someone holding under him, claims to hold under a right adverse to and denying the bailor's title (Collins *v.* Bellefonte Cent. R. Co., 171 Pa. St. 243, 33 Atl. 331); and where delivery is refused unless certain claims of the bailor or bailee inconsistent with the true owner's title are first paid (Roberts *v.* Yarboro, 41 Tex. 449. See also Smith *v.* Bell, 9 Mo. 873).

Difficulty in distinguishing bailed property from other property in the hands of a bailee is not a proper reason for non-delivery. Dusky *v.* Rudder, 80 Mo. 400.

Refusal to deliver until receipt of order from bailor.— A bailee declining to deliver to a person claiming to be the owner until he has received an order to deliver them from the bailor is not guilty of a conversion. Freeman *v.* Perry, 25 Tex. 611.

The refusal of a servant to deliver goods intrusted to him by his employer on a demand made by a stranger, because he has no authority so to do, is a qualified refusal. Mount *v.* Derick, 5 Hill (N. Y.) 455.

32. Freeman *v.* Perry, 25 Tex. 611, where the bailor, after the bailment, sold the property and two persons claimed it as purchasers, the bailee detaining the property from one of them upon the ground that the other was entitled thereto.

33. Benje *v.* Creagh, 21 Ala. 151; New York, etc., R. Co. *v.* New Jersey Electric R. Co., 60 N. J. L. 338, 38 Atl. 828; Cobb *v.* Wallace, 5 Coldw. (Tenn.) 539, 98 Am. Dec. 435.

34. *Alabama.*— Lay *v.* Lawson, 23 Ala. 377.

Georgia.— Chattahoochee Nat. Bank *v.* Schley, 58 Ga. 369.

Maine.— Morse *v.* Androscoggin R. Co., 39 Me. 285.

Massachusetts.— Sessions *v.* Western R. Corp., 16 Gray (Mass.) 132.

New Jersey.— New York, etc., R. Co. *v.* New Jersey Electric R. Co., 60 N. J. L. 338, 38 Atl. 828.

Tennessee.— Cobb *v.* Wallace, 5 Coldw. (Tenn.) 539, 98 Am. Dec. 435.

See 6 Cent. Dig. tit. "Bailment," § 103.

35. New York, etc., R. Co. *v.* New Jersey Electric R. Co., 60 N. J. L. 338, 38 Atl. 828.

Bailor's sale of subject-matter with consent of bailee.— The bailor may, when his contract reserves a right to take possession of the property at any time, sell the property and thus terminate the bailment. Minturn *v.* Stryker, 1 Edm. Sel. Cas. (N. Y.) 356.

Demise of land with personal property thereon.— Where land is demised with personal property thereon for a term, and the lessor reserves right to sell the land before the expiration of the term, it is doubtful whether, if he exercises such right, he can terminate the bailment of the personal property before the expiration of the specified term. Zule *v.* Zule, 24 Wend. (N. Y.) 76, 35 Am. Dec. 600.

The bailor may reserve the right to terminate the bailment by retaking possession of the subject-matter whenever he becomes dissatisfied with the bailor's manner of user. Barr *v.* Van Duyn, 45 Iowa 228.

36. Camp *v.* Dill, 27 Ala. 553; Stiff *v.* Keith, 143 Mass. 224, 9 N. E. 577.

Consolidation of separate and distinct contracts of hire.— Where two articles are hired separately, the giving of a note for the correct amount agreed to be paid does not of itself consolidate the two contracts so as to warrant the rescission of both upon the breach of the one. Camp *v.* Dill, 27 Ala. 553.

Where the bailor does not care to keep a hired article in repair he cannot be held to

where a chattel is lost or destroyed[37] or it becomes unfit and unsuitable for the use for which it was hired ;[38] or by any act of the bailee which is inconsistent with the bailment or which tends to defeat the bailor's right to the property,[39] as where the bailee, when not authorized so to do, sells,[40] misuses,[41] or in any way converts[42]

do so, but if it becomes disabled the bailee may put an end to the agreement and return the article to the bailor. Gleason *v.* Smith, 39 Hun (N. Y.) 617.

37. New York, etc., R. Co. *v.* New Jersey Electric R. Co., 60 N. J. L. 338, 38 Atl. 828; Masterson *v.* International, etc., R. Co., (Tex. Civ. App. 1900) 55 S. W. 577; Morse *v.* Crawford, 17 Vt. 499, 44 Am. Dec. 349.

Bailee's right to sue for loss not barred by destruction.— The destruction of the subject of a bailment, while it terminates the contract of bailment, does not bar the bailee from maintaining an action for the loss against the party responsible therefor. Masterson *v.* International, etc., R. Co., (Tex. Civ. App. 1900) 55 S. W. 577.

38. New York, etc., R. Co. *v.* New Jersey Electric R. Co., 60 N. J. L. 338, 38 Atl. 828 [*affirmed* in 61 N. J. L. 287, 41 Atl. 1116, 43 L. R. A. 849].

39. *Indiana.*— Smith *v.* Stewart, 5 Ind. 220.

Maine.— Ripley *v.* Dolbier, 18 Me. 382.

New Jersey.— New York, etc., R. Co. *v.* New Jersey Electric R. Co., 60 N. J. L. 338, 38 Atl. 828.

North Carolina.— Barringer *v.* Burns, 103 N. C. 606, 13 S. E. 142.

South Carolina.— Clarke *v.* Poozer, 2 McMull. (S. C.) 434.

A gift of the property bailed to another person terminates the bailment. Johnston *v.* Whittemore, 27 Mich. 463.

40. *Maine.*— Emerson *v.* Fisk, 6 Me. 200, 19 Am. Dec. 206.

Michigan.— Dunlap *v.* Gleason, 16 Mich. 158, 93 Am. Dec. 231.

Mississippi.— Crump *v.* Mitchell, 34 Miss. 449.

New Hampshire.— Partridge *v.* Philbrick, 60 N. H. 556; King *v.* Bates, 57 N. H. 446; Bailey *v.* Colby, 34 N. H. 29, 66 Am. Dec. 752; Lovejoy *v.* Jones, 30 N. H. 164; Sargent *v.* Gile, 8 N. H. 325; Sanborn *v.* Colman, 6 N. H. 14, 23 Am. Dec. 703.

Vermont.— Dunham *v.* Lee, 24 Vt. 432.

See 6 Cent. Dig. tit. "Bailment," § 104.

An unauthorized sale by the bailee has been held not to terminate a bailment where he may either return the bailed property or pay a sum of money within a specified date and is still able so to do. Vincent *v.* Cornell, 13 Pick. (Mass.) 294, 23 Am. Dec. 683.

41. New York, etc., R. Co. *v.* New Jersey Electric R. Co., 60 N. J. L. 338, 38 Atl. 828, holding that while a mere misuse might not terminate a bailment, yet, when by the negligence of the bailee, either alone or in conjunction with the negligence of the third party, the subject-matter is no longer fit and suitable for the uses for which it was hired the contract of bailment is at an end.

42. *Alabama.*—Cartlidge *v.* Sloan, 124 Ala. 596, 26 So. 918; Bolling *v.* Kirby, 90 Ala. 215, 7 So. 914, 24 Am. St. Rep. 789; Jones *v.* Fort, 36 Ala. 449; Fail *v.* McArthur, 31 Ala. 26; Wilkinson *v.* Moseley, 30 Ala. 562; Moseley *v.* Wilkinson, 24 Ala. 411; Hooks *v.* Smith, 18 Ala. 338.

Arkansas.— Stewart *v.* Davis, 31 Ark. 518, 25 Am. Rep. 576; Estes *v.* Boothe, 20 Ark. 583.

California.— Welch *v.* Mohr, 93 Cal. 371, 28 Pac. 1060.

Connecticut.— Frost *v.* Plumb, 40 Conn. 111, 16 Am. Rep. 18.

Delaware.— Maguyer *v.* Hawthorn, 2 Harr. (Del.) 71.

Georgia.— Farkas *v.* Powell, 86 Ga. 800, 13 S. E. 200, 12 L. R. A. 397; Lewis *v.* McAfee, 32 Ga. 465; Latimer *v.* Alexander, 14 Ga. 259; Gorman *v.* Campbell, 14 Ga. 137; Columbus *v.* Howard, 6 Ga. 213.

Illinois.— Johnson *v.* Weedman, 5 Ill. 495.

Indiana.— Coffin *v.* Anderson, 4 Blackf. (Ind.) 395.

Kentucky.— Kennedy *v.* Ashcraft, 4 Bush (Ky.) 530; Kelly *v.* White, 17 B. Mon. (Ky.) 124; King *v.* Shanks, 12 B. Mon. (Ky.) 410.

Louisiana.— Guillot *v.* Armitage, 7 Mart. (La.) 710.

Maine.— Morton *v.* Gloster, 46 Me. 520; Crocker *v.* Gullifer, 44 Me. 491, 69 Am. Dec. 118.

Maryland.—Clagett *v.* Speake, 4 Harr. & M. (Md.) 162.

Massachusetts.— Perham *v.* Coney, 117 Mass. 102; Hall *v.* Corcoran, 107 Mass. 251, 9 Am. Rep. 30; Lucas *v.* Trumbull, 15 Gray (Mass.) 306; Gregg *v.* Wyman, 4 Cush. (Mass.) 322; Rotch *v.* Hawes, 12 Pick. (Mass.) 136, 22 Am. Dec. 414; Homer *v.* Thwing, 3 Pick. (Mass.) 492; Wheelock *v.* Wheelwright, 5 Mass. 104.

Michigan.— Hubbell *v.* Blandy, 87 Mich. 209, 49 N. W. 502, 24 Am. St. Rep. 154; Fisher *v.* Kyle, 27 Mich. 454.

Mississippi.— Wallace *v.* Seales, 36 Miss. 53; Young *v.* Thompson, 3 Sm. & M. (Miss.) 129.

Missouri.— Kellar *v.* Garth, 45 Mo. App. 332; Allgear *v.* Walsh, 24 Mo. App. 134; Fox *v.* Young, 22 Mo. App. 386.

New Hampshire.— Gove *v.* Watson, 61 N. H. 136; King *v.* Bates, 57 N. H. 446; Woodman *v.* Hubbard, 25 N. H. 67, 57 Am. Dec. 310.

New Jersey.— Schenk *v.* Strong, 4 N. J. L. 99.

New York.— Buchanan *v.* Smith, 10 Hun (N. Y.) 474; Harrington *v.* Snyder, 3 Barb. (N. Y.) 380; Fish *v.* Ferris, 5 Duer (N. Y.) 49; Disbrow *v.* Tenbroeck, 4 E. D. Smith (N. Y.) 397; Campbell *v.* Stakes, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561; Sarjeant *v.* Blunt, 16 Johns. (N. Y.) 74.

North Carolina.—Martin *v.* Cuthbertson, 64 N. C. 328; Slocumb *v.* Washington, 51 N. C. 357; Setzar *v.* Butler, 27 N. C. 212.

the property, purchases it from the bailor,[43] or does not perform the conditions of the contract.[44]

b. Bailment For Mutual Benefit. Where a bailment of hiring is without specification as to time either the bailor or bailee may terminate it at any time,[45] upon the one giving reasonable notice to the other.[46]

c. Bailment For Sole Benefit of Bailor. A bailment for the sole benefit of the bailor terminates upon the death of either the bailor or bailee before performance is entered upon;[47] and the bailor may at any time terminate the bailment upon giving notice to the bailee,[48] whether the purpose of the bailment be legal

Pennsylvania.— Brown *v.* Baker, 15 Wkly. Notes Cas. (Pa.) 60.

South Carolina.—Abrahams *v.* South Western Railroad Bank, 1 S. C. 441, 7 Am. Rep. 33; Richardson *v.* Dingle, 11 Rich. (S. C.) 405; Duncan *v.* South Carolina R. Co., 2 Rich. (S. C.) 613; De Tollenere *v.* Fuller, 1 Mill Const. (S. C.) 116, 12 Am. Dec. 616.

Tennessee.— Scruggs *v.* Davis, 5 Sneed (Tenn.) 261; Bedford *v.* Flowers, 11 Humphr. (Tenn.) 241; Mullen *v.* Ensley, 8 Humphr. (Tenn.) 427; Horsely *v.* Branch, 1 Humphr. (Tenn.) 198; Angus *v.* Dickerson, Meigs (Tenn.) 459; McNeill *v.* Brooks, 1 Yerg. (Tenn.) 73.

Texas.— Mills *v.* Ashe, 16 Tex. 295; Young *v.* Lewis, 9 Tex. 73; Cochran *v.* Walker, (Tex. Civ. App. 1899) 49 S. W. 403; Evertson *v.* Frier, (Tex. Civ. App. 1898) 45 S. W. 201.

Vermont.— Malaney *v.* Taft, 60 Vt. 571, 15 Atl. 326, 6 Am. St. Rep. 135; Ray *v.* Tubbs, 50 Vt. 688, 28 Am. Rep. 519; Towne *v.* Wiley, 23 Vt. 355, 56 Am. Dec. 85; Green *v.* Sperry, 16 Vt. 390, 42 Am. Dec. 519; Sibley *v.* Story, 8 Vt. 15.

Virginia.— Harvey *v.* Skipwith, 16 Gratt. (Va.) 393; Spencer *v.* Pilcher, 8 Leigh (Va.) 565.

Wisconsin.— De Voin *v.* Michigan Lumber Co., 64 Wis. 616, 25 N. W. 552, 54 Am. Rep. 649; Lane *v.* Cameron, 38 Wis. 603.

United States.— Ross *v.* Southern Cotton Oil Co., 41 Fed. 152.

43. Dunlap *v.* Gleason, 16 Mich. 158, 93 Am. Dec. 231.

44. Otis *v.* Wood, 3 Wend. (N. Y.) 498, holding that, where it is a condition in a lease of personal property that the lessee shall keep it upon particular premises and not remove it therefrom, a removal of such property by the lessee operates as a termination of the bailment.

45. *Alabama.*— Learned-Letcher Lumber Co. *v.* Fowler, 109 Ala. 169, 19 So. 396.

New Hampshire.— Drake *v.* Redington, 9 N. H. 243.

New Jersey.— New York, etc., R. Co. *v.* New Jersey Electric R. Co., 60 N. J. L. 338, 38 Atl. 828.

New York.— Emerald, etc., Brewing Co. *v.* Leonard, 22 Misc. (N. Y.) 120, 48 N. Y. Suppl. 706; Gleason *v.* Morrison, 20 Misc. (N. Y.) 4, 44 N. Y. Suppl. 909.

North Carolina.— Puffer, etc., Mfg. Co. *v.* Baker, 104 N. C. 148, 10 S. E. 254; Hoell *v.* Paul, 49 N. C. 75.

Where a bailee may at any time terminate the bailment, he must comply strictly with the contract. Thus where he is entitled to terminate by a return of the property he must so do. Wilcox, etc., Sewing Mach. Co. *v.* Himes, 21 N. Y. Suppl. 760, 50 N. Y. St. 489.

46. Wyman *v.* Dorr, 3 Me. 183; Emerald, etc., Brewing Co. *v.* Leonard, 22 Misc. (N. Y.) 120, 48 N. Y. Suppl. 706; Puffer, etc., Mfg. Co. *v.* Baker, 104 N. C. 148, 10 S. E. 254; Smith *v.* Plomer, 15 East 607.

The bailee has not the arbitrary and exclusive right to determine at what time a bailment shall terminate. Cobb *v.* Wallace, 5 Coldw. (Tenn.) 539, 98 Am. Dec. 435.

A notice by the bailee that he will pay no more hire is sufficient. Puffer, etc., Mfg. Co. *v.* Baker, 104 N. C. 148, 10 S. E. 254.

A demand by the bailor for the thing bailed is sufficient. Hoell *v.* Paul, 49 N. C. 75.

A refusal to accept back from the bailee the subject of the bailment is not a sufficient act on the part of the bailor to terminate the bailment. Andrews *v.* Keith, 168 Mass. 558, 47 N. E. 423.

Restoration of possession.— Where the bailee wishes to terminate the bailment he must restore the possession to the person whom, by accepting the bailment, he admitted to be entitled to it. Andrews *v.* Keith, 168 Mass. 558, 47 N. E. 423.

47. Farrow *v.* Bragg, 30 Ala. 261.

48. *Arkansas.*— McLain *v.* Huffman, 30 Ark. 428.

Georgia.—Montgomery *v.* Evans, 8 Ga. 178.

Illinois.— Hodges *v.* Hurd, 47 Ill. 363; Amberg *v.* Philbrick, 33 Ill. App. 200.

New Hampshire.— Winkley *v.* Foye, 33 N. H. 171, 66 Am. Dec. 715.

New York.— Phelps *v.* Bostwick, 22 Barb. (N. Y.) 314; Beardslee *v.* Richardson, 11 Wend. (N. Y.) 25, 25 Am. Dec. 596.

South Carolina.— West *v.* Murph, 3 Hill (S. C.) 284.

Vermont.— Jackman *v.* Partridge, 21 Vt. 558.

England.— Taylor *v.* Lendey, 9 East 49; Lyte *v.* Peny, Dyer 49*a*.

A mandate may be revoked at any time before it is executed, or at least before any engagement is entered into by the mandatory with a third person to execute it for his benefit, and it will be revoked by any prior disposition of the property inconsistent with such execution. Story Bailm. § 104; Bacon Abr. tit. "Bailment," D. [*cited* in Winkley *v.* Foye, 33 N. H. 171, 66 Am. Dec. 715].

A notice to the bailee that the title to the

or illegal.[49] In like manner the bailee may terminate at any time upon giving reasonable notice to that effect to the bailor.[50]

d. Bailment For Sole Benefit of Bailee. Where the loan is for an indefinite time the bailor may terminate the bailment when he pleases,[51] and the bailment terminates *eo instanti* by the death of the bailee.[52]

e. Effect of Termination. Upon the termination of the bailment the bailor has a right to resume possession of the property[53] or to consider the bailment as continued or renewed.[54] Should the bailment terminate by reason of the bailee's refusing to perform his part of the contract the bailor may use the subject-matter thereof so as to relieve the bailee from all unnecessary damage.[55]

B. As Between Bailor or Bailee and Third Persons — 1. Rights as Against Third Persons — a. In General. Since the property in things bailed is for some purposes in the bailee and for some in the bailor, the right of action in relation thereto must partake of the same properties, and so continue until it is finally fixed and determined by one or the other party appropriating it to himself.[56] Accordingly, for any wrong done by a third party in connection with the subject-matter of the bailment, either the bailor or the bailee may sue;[57] but a recovery of dam-

subject-matter passed from the bailor is sufficient. Hodges *v.* Hurd, 47 Ill. 363; Whitney *v.* Lynde, 16 Vt. 579; Pierce *v.* Chipman, 8 Vt. 334; Harman *v.* Anderson, 2 Campb. 243, 11 Rev. Rep. 706.

The bailment is terminated upon a demand for return of the property in relation to which some duty was to be performed. Carle *v.* Bearce, 33 Me. 337.

49. Taylor *v.* Lendey, 9 East 49; Lyte *v.* Peny, Dyer 49*a*.

50. Dale *v.* Brinckerhoff, 7 Daly (N. Y.) 45; Roulston *v.* McClelland, 2 E. D. Smith (N. Y.) 60; De Lemos *v.* Cohen, 28 Misc. (N. Y.) 579, 59 N. Y. Suppl. 498.

51. Pulliam *v.* Burlingame, 81 Mo. 111, 51 Am. Rep. 229. *Compare* Story Bailm. § 258, where it is said that a lender may not terminate the bailment unreasonably, while the object of the bailment is not accomplished, and that if he does so the bailee may recover damage in case of a loss occasioned thereby.

The bailor's right to terminate is not necessarily restricted to the life of the bailee. McGehee *v.* Mahone, 37 Ala. 258.

52. Smiley *v.* Allen, 13 Allen (Mass.) 465; Blount *v.* Hamey, 43 Mo. App. 644; Morris *v.* Lowe, 97 Tenn. 243, 36 S. W. 1098.

This principle is not affected by Mo. Rev. Stat. (1889), § 5173, providing that when personal property shall be pretended to have been loaned to any person, with whom or those claiming under him possession shall have remained for the space of five years without demand made and pursued by due process of law on the part of the pretended lender, the same shall be taken as to all creditors and purchasers of the persons so remaining in possession, to be void, and that the absolute property is with the possession unless such loan be recorded as required by the statute. Blount *v.* Hamey, 43 Mo. App. 644.

Where a bailment is terminated by the death of the bailee in a manner that requires an inquiry by a coroner, the administrator of the person deceased has no right or title to the subject-matter of the bailment; and it is the duty of the coroner, where he has taken possession of the property in his capacity as coroner, to deliver it to the bailor. Smiley *v.* Allen, 13 Allen (Mass.) 465.

53. *Alabama.*— Benje *v.* Creagh, 21 Ala. 151.

Massachusetts.— Smiley *v.* Allen, 13 Allen (Mass.) 465.

Michigan.— Johnston *v.* Whittemore, 27 Mich. 463.

Vermont.— Dunham *v.* Lee, 24 Vt. 432.

England.—Farrant *v.* Thompson, 5 B. & Ald. 826, 2 D. & R. 1, 24 Rev. Rep. 571, 7 E. C. L. 449; Samuel *v.* Morris, 6 C. & P. 620, 25 E. C. L. 606.

54. Benje *v.* Creagh, 21 Ala. 151.

No presumption of continuance.— The continued possession of personal property after the expiration of a hiring agreement does not imply that the bailment was continued, and in this respect a bailment is not analogous to a lease of real property, where there is a presumption that a tenant holding over after the termination of a specified time has renewed his lease. Benje *v.* Creagh, 21 Ala. 151; Chamberlain *v.* Pratt, 33 N. Y. 47.

Bailor's remedies for failure to return upon termination of bailment see *infra*, VI, A, 2, a.

55. Johnson *v.* Meeker, 31 Hun (N. Y.) 92 [*affirmed* in 96 N. Y. 93, 48 Am. Rep. 609], holding that the bailor is not bound to have his property suffer from disuse and exposure and sue finally upon the contract as if performed.

56. Elkins *v.* Boston, etc., R. Co., 19 N. H. 337, 51 Am. Dec. 184; Green *v.* Clarke, 12 N. Y. 343.

57. *Connecticut.*—Gillette *v.* Goodspeed, 69 Conn. 363, 37 Atl. 973.

Kentucky.— City Transfer Co. *v.* Robinson, 12 Ky. L. Rep. 555.

Massachusetts.— Rindge *v.* Coleraine, 11 Gray (Mass.) 157.

Mississippi.— Baggett *v.* McCormack, 73 Miss. 552, 19 So. 89, 55 Am. St. Rep. 554.

New Hampshire.— Elkins *v.* Boston, etc., R. Co., 19 N. H. 337, 51 Am. Dec. 184.

ages by either of them will be a full satisfaction[58] and a bar of any subsequent suit by the other.[59]

b. Of Bailor — (I) *Against Creditors of Bailee.* Where a creditor of the bailee seizes the bailed property, the bailor may recover possession or the value thereof from him,[60] unless the bailor has by his acts estopped himself from asserting his title to the property.[61]

(II) *Against Persons Contracting With Bailee.* Where the bailee and a third person enter into a contract respecting the subject-matter of the bailment the bailor may sustain an action for a breach of contract against such third person.[62]

(III) *Against Persons Injuring Property.* A right of action against a third party injuring the property while in the possession of the bailee accrues to the bailor,[63] as it does also against any person who commits a trespass upon the

New York.— Baird *v.* Daly, 57 N. Y. 236, 15 Am. Rep. 488; Green *v.* Clarke, 12 N. Y. 343; Coykendall *v.* Eaton, 55 Barb. (N. Y.) 188, 37 How. Pr. (N. Y.) 438; Paddock *v.* Wing, 16 How. Pr. (N. Y.) 547; Faulkner *v.* Brown, 13 Wend. (N. Y.) 63; Smith *v.* James, 7 Cow. (N. Y.) 328; Thorp *v.* Burling, 11 Johns. (N. Y.) 285.

Texas.—Masterson *v.* International, etc., R. Co., (Tex. Civ. App. 1900) 55 S. W. 577.

Vermont.— Wilder *v.* Stafford, 30 Vt. 399.

United States.— Knight *v.* Davis Carriage Co., 71 Fed. 662, 30 U. S. App. 664, 18 C. C. A. 287.

England.— Nicolls *v.* Bastard, 2 C. M. & R. 659, 1 Gale 295, 5 L. J. Exch. 7, 1 Tyrw. & G. 156.

58. *Maine.*— Little *v.* Fossett, 34 Me. 544, 56 Am. Dec. 671.

Massachusetts.— Harrington *v.* King, 121 Mass. 269.

New Hampshire.— Elkins *v.* Boston, etc., R. Co., 19 N. H. 337, 51 Am. Dec. 184; Chesley *v.* St. Clair, 1 N. H. 189.

New York.— Faulkner *v.* Brown, 13 Wend. (N. Y.) 63.

United States.— Knight *v.* Davis Carriage Co., 71 Fed. 662, 30 U. S. App. 664, 18 C. C. A. 287.

Where the bailor settles with the bailee for injuries done to the bailed article, and agrees with the latter that he may sue in the bailor's name at his own risk and expense and for his own benefit, the settlement is not a bar to the bailee's right of action. Rindge *v.* Coleraine, 11 Gray (Mass.) 157.

59. *Massachusetts.*— Johnson *v.* Holyoke, 105 Mass. 80.

Mississippi.— Baggett *v.* McCormack, 73 Miss. 552, 19 So. 89, 55 Am. St. Rep. 554.

New Hampshire.—Woodman *v.* Nottingham, 49 N. H. 387, 6 Am. Rep. 526.

New York.— Green *v.* Clarke, 12 N. Y. 343; Leoncini *v.* Post, 13 N. Y. Suppl. 825, 37 N. Y. St. 255.

United States.— Knight *v.* Davis Carriage Co., 71 Fed. 662, 30 U. S. App. 664, 18 C. C. A. 287.

Payment to the bailee of full damages for an injury to the subject of the bailment bars an action by the bailor, although such payment was not compelled by judicial proceedings. Masterson *v.* International, etc., R. Co., (Tex. Civ. App. 1900) 55 S. W. 577.

60. *Alabama.*— Abbercrombie *v.* Bradford, 16 Ala. 560.

California.— Hardy *v.* Hunt, 11 Cal. 343, 70 Am. Dec. 787.

Maine.— Small *v.* Hutchins, 19 Me. 255; Sibley *v.* Brown, 15 Me. 185.

New Hampshire.— Bellows *v.* Denison, 9 N. H. 293.

Pennsylvania.— King *v.* Humphreys, 10 Pa. St. 217.

Tennessee.— Caldwell *v.* Cowan, 9 Yerg. (Tenn.) 262.

Vermont.— Hart *v.* Hyde, 5 Vt. 328.

Whether bailed property is subject to attachment against bailee a question of fact.— Where the bailor leaves property with the bailee with directions to sell it, and, after deducting a debt due to himself, to pay the balance to the bailor, and the bailee exchanges it for other property, such property is not necessarily subject to be attached upon his debts. This depends upon whether the bailor ratifies or repudiates the exchange. Strong *v.* Adams, 30 Vt. 221, 73 Am. Dec. 305.

Bailed property not liable to distress levied against bailee. Owen *v.* Boyle, 22 Me. 47.

Seizure of receptacle containing bailed property.—Where the place in which a bailee keeps bailed property is seized by a creditor and such property is destroyed accidentally, the bailor cannot recover from the creditor unless the seizure caused the destruction. Hobson *v.* Woolfolk, 23 La. Ann. 384.

Liabilities of officers seizing property belonging to a third person see SHERIFFS AND CONSTABLES.

61. Drew *v.* Kimball, 43 N. H. 282, 80 Am. Dec. 163.

62. Taintor *v.* Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; Beebee *v.* Robert, 12 Wend. (N. Y.) 413, 27 Am. Dec. 132; Sanderson *v.* Lamberton, 6 Binn. (Pa.) 129; New Jersey Steam Nav. Co. *v.* Boston Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465.

63. *Kentucky.*— Lexington, etc., R. Co. *v.* Kidd, 7 Dana (Ky.) 245.

New Hampshire.—Howard *v.* Farr, 18 N. H. 457.

New York.—Orser *v.* Storms, 9 Cow. (N. Y.) 687, 18 Am. Dec. 543.

property while in the bailee's possession, notwithstanding the fact that no actual injury is done to the property.[64]

(iv) *Against Persons Wrongfully Dispossessing Bailee.* The bailor may maintain an action against a third party who wrongfully dispossesses the bailee of the subject-matter of the bailment.[65]

(v) *Against Vendees and Other Transferees of Bailee.* The bailor may recover possession of the subject-matter of the bailment, or its value, from any person who has acquired possession by a wrongful act of the bailee, such as a sale,[66] mortgage,[67] pledge,[68] or otherwise,[69] unless the bailor has done some act which estops him to set up his claim to the property.[70] This right is not affected, even if the person so in possession is in the position of a *bona fide* purchaser without notice,[71] unless possession was acquired by him under a sale in market

North Carolina.— White *v.* Griffin, 49 N. C. 139.

United States.— New Jersey Steam Nav. Co. *v.* Boston Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465.

64. White *v.* Griffin, 49 N. C. 139.

65. Walker *v.* Wilkinson, 35 Ala. 725, 76 Am. Dec. 315; Drake *v.* Redington, 9 N. H. 243; Orser *v.* Storms, 9 Cow. (N. Y.) 687, 18 Am. Dec. 543; Soper *v.* Sumner, 5 Vt. 274.

66. *Indiana.*—Kitchell *v.* Vanadar, 1 Blackf. (Ind.) 356, 12 Am. Dec. 249.

New Hampshire.— Partridge *v.* Philbrick, 60 N. H. 556; Johnson *v.* Willey, 46 N. H. 75; Lovejoy *v.* Jones, 30 N. H. 164; Sargent *v.* Gile, 8 N. H. 325.

New Jersey.— Midland R. Co. *v.* Hitchcock, 37 N. J. Eq. 549.

Ohio.— Roland *v.* Gundy, 5 Ohio 202.

Pennsylvania.— Rodgers *v.* Grothe, 58 Pa. St. 414; Heizmann *v.* Rank, 2 Woodw. (Pa.) 469; Hardy *v.* Metzgar, 2 Yeates (Pa.) 347.

Vermont.— Child *v.* Allen, 33 Vt. 476; Heacock *v.* Walker, 1 Tyler (Vt.) 338.

United States.—Aborn *v.* Mason, 14 Blatchf. (U. S.) 405, 1 Fed. Cas. No. 19.

See 6 Cent. Dig. tit. "Bailment," § 93.

Right of bailee to transfer see *supra*, V, A, 3, a.

No breach of the peace must be committed by a bailor when retaking his property. Heacock *v.* Walker, 1 Tyler (Vt.) 338.

Bailed property wrongfully annexed to real estate of bailee.— The bailor cannot recover property from a purchaser where it was tortiously annexed to the real estate of the bailee, who then sold the real estate to the purchaser. Fryatt *v.* Sullivan Co., 7 Hill (N. Y.) 529 [*affirming* 5 Hill (N. Y.) 116].

67. Thirlby *v.* Rainbow, 93 Mich. 164, 53 N. W. 159.

Record of an unauthorized mortgage does not affect the bailor with notice. Robinson *v.* Bird, 158 Mass. 357, 33 N. E. 391, 35 Am. St. Rep. 495.

68. Gallaher *v.* Cohen, 1 Browne (Pa.) 43; North *v.* Barr, 17 Wkly. Notes Cas. (Pa.) 425; Thrall *v.* Lathrop, 30 Vt. 307, 73 Am. Dec. 306.

69. Schenck *v.* Saunders, 13 Gray (Mass.) 37; Brainard *v.* Knapp, 9 Misc. (N. Y.) 206, 29 N. Y. Suppl. 678, 60 N. Y. St. 833.

Property taken as indemnity for becoming surety of bailee.— A person taking bailed property to indemnify himself for going on a recognizance for the bailee is liable to the bailor for the use of the property, according to the terms of the lease entered into by the bailee. Rowe *v.* Sharp, 51 Pa. St. 26.

A person who makes advances to the bailee upon the subject-matter of the bailment cannot hold such property as against the bailor. Schenck *v.* Saunders, 13 Gray (Mass.) 37.

70. Midland R. Co. *v.* Hitchcock, 37 N. J. Eq. 549; Penfield *v.* Dunbar, 64 Barb. (N. Y.) 239.

Declarations of the bailor that the bailee owns the property sold do not bind the bailor, unless the purchaser was thereby induced to buy. McMahon *v.* Sloan, 12 Pa. St. 229, 51 Am. Dec. 601; Hildeburn *v.* Nathans, 1 Phila. (Pa.) 567, 12 Leg. Int. (Pa.) 254.

To affect the bailor's title as to strangers, acts of ownership inconsistent with the bailor's title must have been brought to the knowledge of the bailor. McMahon *v.* Sloan, 12 Pa. St. 229, 51 Am. Dec. 601; Hildeburn *v.* Nathans, 1 Phila. (Pa.) 567, 12 Leg. Int. (Pa.) 254.

Where bailee has apparent ownership.— Whether the bailor is estopped to assert his claim against a person who deals with the bailee on the apparent ownership of the latter is a question of fact. Brainard *v.* Knapp, 9 Misc. (N. Y.) 206, 29 N. Y. Suppl. 678, 60 N. Y. St. 833.

A bailor is not estopped to assert his title to the bailed property, because he permits the bailee to sell it to a stranger to apply upon a prior indebtedness due to him from the bailee, if such purchaser is at the time of purchase aware of the bailor's title. Penfield *v.* Dunbar, 64 Barb. (N. Y.) 239.

The presence of the bailor's agent at a foreclosure sale under a wrongful mortgage by the bailee is not misleading to a purchaser, if such agent says nothing concerning the property and the purchaser is not aware that the bailor's agent is present. Thirlby *v.* Rainbow, 93 Mich. 164, 53 N. W. 159.

71. *Indiana.*— Ingersoll *v.* Emmerson, 1 Ind. 76; Kitchell *v.* Vanadar, 1 Blackf. (Ind.) 356, 12 Am. Dec. 249.

New Hampshire.— Johnson *v.* Willey, 46 N. H. 75.

New York.— Edwards *v.* Dooley, 120 N. Y. 540, 24 N. E. 827, 31 N. Y. St. 510; Wooster

overt,[72] the principle being that the bailee cannot transfer a greater right or better title than he himself possessess,[73] and that a person purchasing property from a stranger must be careful.[74]

c. Of Bailee — (i) *In General.* During the existence of the bailment but not after it has terminated [75] the bailee may maintain any proper action to protect his possession of the subject-matter, or may interpose a claim to such property if attached as that of the bailor [76] or of a third person.[77] So he may recover for any tort committed in relation to the property bailed, by a third person,[78] unless such person is the rightful owner of the property ; [79] or where a third person commits some breach of contract in connection with the bailed property.[80]

(ii) *Against Persons Injuring Property.* It has been held uniformly that the bailee has a right of action against a third party who by his negligence causes the loss of or any injury to the bailed article,[81] and this right has been

v. Sherwood, 25 N. Y. 278; Saltus *v.* Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541.

Pennsylvania.— McMahon *v.* Sloan, 12 Pa. St. 229, 51 Am. Dec. 601; Hardy *v.* Metzgar, 2 Yeates (Pa.) 347; Hildeburn *v.* Nathan, 1 Phila. (Pa.) 567, 12 Leg. Int. (Pa.) 254; Mann *v.* English, 7 Pa. Co. Ct. 637.

England.—McCombie *v.* Davies, 6 East 538, 2 Smith K. B. 557, 8 Rev. Rep. 534.

See 6 Cent. Dig. tit. "Bailment," § 93.

A denial of the bailor's title is permitted bona fide purchaser of the property. McFerrin *v.* Perry, 1 Sneed (Tenn.) 314.

72. Robinson *v.* Haas, 40 Cal. 474; Roland *v.* Gundy, 5 Ohio 202; King *v.* Richards, 6 Whart. (Pa.) 418, 37 Am. Dec. 420; Hartop *v.* Hoare, 3 Atk. 44, 2 Str. 1187, 1 Wils. C. P. 8; Horwood *v.* Smith, 2 T. R. 750, 1 Rev. Rep. 613.

Purchase at market overt.— For the security of a purchaser in his contract, and for the encouragement of commercial intercourse, the doctrine in England seems to be that all sales of things vendible in market overt shall not only be good between the parties but also binding on others who have any right or property therein. Kitchell *v.* Vanadar, 1 Blackf. (Ind.) 356, 12 Am. Dec. 249; Hoffman *v.* Carow, 22 Wend. (N. Y.) 285. In the United States, however, markets overt do not appear to exist (Robinson *v.* Haas, 40 Cal. 474; Kitchell *v.* Vanadar, 1 Blackf. (Ind.) 356, 12 Am. Dec. 249; Roland *v.* Gundy, 5 Ohio 202; Lecky *v.* McDermott, 8 Serg. & R. (Pa.) 500; Easton *v.* Worthington, 5 Serg. & R. (Pa.) 130; Hardy *v.* Metzgar, 2 Yeates (Pa.) 347; Heacock *v.* Walker, 1 Tyler (Vt.) 338. See also Hoffman *v.* Carow, 22 Wend. (N. Y.) 285), the only cases of sale that can with propriety be said to be made in market overt being those which are regulated by statute, which ought to inure against the owner (Heacock *v.* Walker, 1 Tyler (Vt.) 338).

73. Roland *v.* Gundy, 5 Ohio 202.

The bailee is not clothed with such indicia of ownership as to affect the bailor's right. Cox *v.* McGuire, 26 Ill. App. 315.

74. Hardy *v.* Metzgar, 2 Yeates (Pa.) 347.

75. Morse *v.* Androscoggin R. Co., 39 Me. 285.

76. Hartford *v.* Jackson, 11 N. H. 145; Truslow *v.* Putnam, 4 Abb. Dec. (N. Y.) 425, 1 Keyes (N. Y.) 568; Stanley *v.* Robbins, 36 Vt. 422; Smith *v.* Niles, 20 Vt. 315, 49 Am. Dec. 782. *Contra,* Anheuser-Busch Brewing Assoc. *v.* Daviess County Distilling Co., 20 Ky. L. Rep. 1522, 49 S. W. 541, where the court said it was aware of no case that went to the extent of holding that the bailee could recover possession of property as against an attaching creditor of the bailor.

Interest of bailor liable to execution or attachment.— In New York the bailee has no right of action against an officer who attaches or levies upon the interest of the bailor in the subject-matter of the bailment. Stief *v.* Hart, 1 N. Y. 20; Patterson *v.* Perry, 10 Abb. Pr. (N. Y.) 82; Bakewell *v.* Ellsworth, 6 Hill (N. Y.) 484. In Vermont under statute the right of the bailor in property hired may be attached. Brigham *v.* Avery, 48 Vt. 602.

77. Knight *v.* Davis Carriage Co., 71 Fed. 662, 30 U. S. App. 664, 18 C. C. A. 287.

78. Hollenback *v.* Todd, 19 Ill. App. 452; Faulkner *v.* Brown, 13 Wend. (N. Y.) 63; White *v.* Bascom, 28 Vt. 268.

79. Faulkner *v.* Brown, 13 Wend. (N. Y.) 63.

80. Bruen *v.* Kansas City Agricultural, etc., Fair Assoc., 40 Mo. App. 425; White *v.* Bascom, 28 Vt. 268.

Recovery by original bailee from contractor with subbailee.—Where a subbailee contracts with a third person in relation to the subject-matter of the bailment, such third person is liable to the original bailee for a breach of contract. Bruen *v.* Kansas City Agricultural, etc., Fair Assoc., 40 Mo. App. 425.

81. *Alabama.*— Montgomery Gas-Light Co. *v.* Montgomery, etc., R. Co., 86 Ala. 372, 5 So. 735; McGill *v.* Monette, 37 Ala. 49.

Georgia.—Lockhart *v.* Western, etc., R. Co., 73 Ga. 472, 54 Am. Rep. 883.

Illinois.— Peoria, etc., R. Co. *v.* McIntire, 39 Ill. 298.

Kentucky.— Belt Electric Line Co. *v.* Creason, 14 Ky. L. Rep. 203; Owensboro Wharfboat Co. *v.* Hoover, 13 Ky. L. Rep. 399.

Maine.— Moran *v.* Portland Steam Packet Co., 35 Me. 55.

Maryland.— American Dist. Tel. Co. *v.* Walker, 72 Md. 454, 20 Atl. 1, 20 Am. St. Rep. 479.

Massachusetts.— Johnson *v.* Holyoke, 105 Mass. 80.

held to be the same even though the bailee is not responsible to the bailor for the loss.[82]

(III) *Against Persons Wrongfully Dispossessing.* A bailee unlawfully dispossessed of the subject-matter of the bailment has a right to recover possession of such property or its value from the wrong-doer;[83] and this right is not divested because the bailor has, after the tortious act, demanded the property unavailingly from the wrong-doer,[84] or because such third person was acting under directions from the bailor.[85]

2. Liability to Third Parties — a. For Detention of Property From True Owner — (I) *Liability of Bailor.* The true owner of the property bailed may enforce his right to it as against the bailor whenever he sees fit so to do before its delivery by the bailee as directed by the bailor.[86]

(II) *Liability of Bailee.* Where the property bailed was at the time of the bailment owned by a third person, such person may enforce his claim thereto against the bailee[87] until its redelivery to the bailor[88] or other delivery in accord-

Minnesota.—Chamberlain *v.* West, 37 Minn. 54, 33 N. W. 114.

Mississippi.— Baggett *v.* McCormick, 73 Miss. 552, 19 So. 89, 55 Am. St. Rep. 554.

New Hampshire.— Murray *v.* Warner, 55 N. H. 546, 20 Am. Rep. 227; Woodman *v.* Nottingham, 49 N. H. 387, 6 Am. Rep. 526; Elkins *v.* Boston, etc., R. Co., 19 N. H. 337, 51 Am. Dec. 184.

New York.— Kellogg *v.* Sweeney, 1 Lans. (N. Y.) 397 [*affirmed* in 46 N. Y. 291, 7 Am. Rep. 333]; Bliss *v.* Schaub, 48 Barb. (N. Y.) 339.

England.— Croft *v.* Alison, 4 B. & Ald. 590, 23 Rev. Rep. 407, 6 E. C. L. 614; Nicolls *v.* Bastard, 2 C. M. & R. 659, 1 Gale 295, 5 L. J. Exch. 7, 1 Tyrw. & G. 156.

See 6 Cent. Dig. tit. "Bailment," § 100.

82. Chamberlain *v.* West, 37 Minn. 54, 33 N. W. 114; Kellogg *v.* Sweeney, 1 Lans. (N. Y.) 397 [*affirmed* in 46 N. Y. 291, 7 Am. Rep. 333]. But see Buddin *v.* Fortunato, 16 Daly (N. Y.) 195, 10 N. Y. Suppl. 115, 31 N. Y. St. 278, holding that a bailee, bound to use ordinary care only, is not entitled to recover for an injury occasioned by the wrongful act of another, because he is not liable to the owner.

The fact that the bailee has previously paid the bailor for damages caused by negligence of a third party does not affect his right of action against the tort-feasor. The Jersey City, 51 Fed. 527, 1 U. S. App. 244, 2 C. C. A. 365.

83. *Alabama.*— Cox *v.* Easley, 11 Ala. 362.

California.— Bode *v.* Lee, 102 Cal. 583, 36 Pac. 936.

Illinois.—McGraw *v.* Patterson, 47 Ill. App. 87.

Massachusetts.— Harrington *v.* King, 121 Mass. 269; Shaw *v.* Kaler, 106 Mass. 448; Eaton *v.* Lynde, 15 Mass. 242.

New Hampshire.— Poole *v.* Symonds, 1 N. H. 289, 8 Am. Dec. 71.

New York.— Bowen *v.* Tenner, 40 Barb. (N. Y.) 383; Leoncini *v.* Post, 13 N. Y. Suppl. 825, 37 N. Y. St. 255; Butts *v.* Collins, 13 Wend. (N. Y.) 139; Faulkner *v.* Brown, 13 Wend. (N. Y.) 63.

North Carolina.—Hopper *v.* Miller, 76 N. C. 402.

Vermont.— Burdict *v.* Murray, 3 Vt. 302, 21 Am. Dec. 588.

See 6 Cent. Dig. tit. "Bailment," § 99.

A bailee having a lien may recover the property or the amount of the lien from an officer who, without his consent, has taken it on execution against the bailor. Douglass *v.* McFarland, 92 Cal. 656, 28 Pac. 687; Moore *v.* Hitchcock, 4 Wend. (N. Y.) 292.

Where property belongs to different bailors.—A bailee has an entire cause of action against purchasers of bailed property taken out of his possession, even though such property belongs to more than one bailor. Bode *v.* Lee, 102 Cal. 583, 36 Pac. 936.

84. Harrington *v.* King, 121 Mass. 269.

Gratuitous bailee.— Where the bailor has intervened and asserted and proven his right, a gratuitous bailee cannot recover against a third person who has dispossessed him of the property. Engel *v.* Scott, etc., Lumber Co., 60 Minn. 39, 61 N. W. 825.

85. Burdict *v.* Murray, 3 Vt. 302, 21 Am. Dec. 588.

86. Wells *v.* American Express Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695.

87. *Indiana.*— Kitchell *v.* Vanadar, 1 Blackf. (Ind.) 356, 12 Am. Dec. 249.

New Hampshire.— Doty *v.* Hawkins, 6 N. H. 247, 25 Am. Dec. 459.

New York.— Florence Sewing Mach. Co. *v.* Warford, 1 Sweeny (N. Y.) 433; Hoffman *v.* Carow, 22 Wend. (N. Y.) 285.

Pennsylvania.—Gallaher *v.* Cohen, 1 Browne (Pa.) 43.

Wisconsin.—Wells *v.* American Express Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695.

Persons entitled to receive the subject-matter of the bailment from the bailee have a right of action against him, notwithstanding that they are not parties to the contract. Walden *v.* Karr, 88 Ill. 49; Thompson *v.* Fargo, 49 N. Y. 188, 10 Am. Rep. 342; Sturtevant *v.* Orser, 24 N. Y. 538, 82 Am. Dec. 321; Lawrence *v.* Fox, 20 N. Y. 268; Delaware, etc., Canal Co. *v.* Westchester County Bank, 4 Den. (N. Y.) 97; Berly *v.* Taylor, 5 Hill (N. Y.) 577.

88. Nelson *v.* Iverson, 17 Ala. 216.

ance with the bailor's instructions.[89] Moreover, the bailee is answerable to the true owner of the property in the event of its return to the bailor after being notified of the claim of the true owner,[90] and to a person who has purchased the property subsequently to the bailment,[91] provided he has knowledge of the transfer of the property.[92]

b. For Negligence — (I) *In General.* The liabilities of the bailor and bailee to third parties are so essentially independent of each other that the negligence of the one cannot be imputed to the other.[93]

(II) *Liability of Bailor.* In a contract of bailment for hire the bailor is not responsible to a third party for injuries occurring to such third party, by reason of the negligent use of the things hired by the bailee, or for the negligence of the servants of the bailee in respect thereto.[94] He is liable, however, where the subject-matter of the bailment is under the control of his own servant or employee.[95]

(III) *Liability of Bailee.* The bailee is responsible to third parties for injuries to them caused by the acts of his servants,[96] and may become liable for the acts of servants employed by the bailor, as where he orders the servant to act in a particular manner or to absent himself at any particular moment, and the like.[97]

VI. ACTIONS.

A. Between Bailor and Bailee — **1. Accrual of Right** — **a. To Bailor.** A right of action accrues to the bailor where the subject-matter of the bailment has been used differently from what was intended or the bailee fails to deliver over or redeliver in accordance with his contract;[98] where the bailee has been guilty

89. Wells *v.* American Express Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695.

90. Nelson *v.* Iverson, 17 Ala. 216; Dickson *v.* Chaffe, 34 La. Ann. 1133; Doty *v.* Hawkins, 6 N. H. 247, 25 Am. Dec. 459; McAnelly *v.* Chapman, 18 Tex. 198.

91. Mitchell *v.* McLean, 7 Fla. 329; Erwin *v.* Arthur, 61 Mo. 386; Smith *v.* Bell, 9 Mo. 873; Hall *v.* Robinson, 2 N. Y. 293; Willard *v.* Bridge, 4 Barb. (N. Y.) 361. *Compare* Gardner *v.* Adams, 12 Wend. (N. Y.) 297.

92. Mitchell *v.* McLean, 7 Fla. 329.

Effect of bailee's want of knowledge.— Where, without the knowledge of the bailee, a lien has been created by the bailor on the subject-matter of the bailment, the person owning the lien cannot recover the property from the bailee in the event of his subsequently delivering the property to a *bona fide* purchaser for value by the direction of the bailor. Peoples' Bank *v.* Gayley, 92 Pa. St. 518.

93. New York, etc., R. Co. *v.* New Jersey Electric R. Co., 60 N. J. L. 338, 38 Atl. 828 [*affirmed* in 61 N. J. L. 287, 41 Atl. 1116, 43 L. R. A. 849].

94. Herlihy *v.* Smith, 116 Mass. 265; New York, etc., R. Co. *v.* New Jersey Electric R. Co., 60 N. J. L. 338, 38 Atl. 828 [*affirmed* in 61 N. J. L. 287, 41 Atl. 1116, 43 L. R. A. 849].

95. *Indiana.*— Crockett *v.* Calvert, 8 Ind. 127.

New Jersey.— Bennett *v.* New Jersey R., etc., Co., 36 N. J. L. 225, 13 Am. Rep. 435.

New York.— Dyer *v.* Erie R. Co., 71 N. Y. 228.

Pennsylvania.— Simpson *v.* Hand, 6 Whart. (Pa.) 311, 36 Am. Dec. 231.

England.— Jones *v.* Liverpool, 14 Q. B. D. 890, 49 J. P. 311, 54 L. J. Q. B. 345, 33 Wkly. Rep. 551; Quarman *v.* Burnett, 4 Jur. 969, 9 L. J. Exch. 308, 6 M. & W. 499; Viner Abr. tit. Trespass, B, pl. 1.

96. Herlihy *v.* Smith, 116 Mass. 265; Quarman *v.* Burnett, 4 Jur. 969, 9 L. J. Exch. 308, 6 M. & W. 499.

97. Dyer *v.* Erie R. Co., 71 N. Y. 228; Little *v.* Hackett, 116 U. S. 366, 29 L. ed. 652; Quarman *v.* Burnett, 4 Jur. 969, 9 L. J. Exch. 308, 6 M. & W. 499.

98. *Alabama.*— Atkinson *v.* Jones, 72 Ala. 248; Cothran *v.* Moore, 1 Ala. 423.

Arkansas.— McLain *v.* Huffman, 30 Ark. 428.

California.— Atkins *v.* Gamble, 42 Cal. 86, 10 Am. Rep. 282.

Indiana.— Spencer *v.* Morgan, 5 Ind. 146.

Iowa.— Jones *v.* Foreman, 93 Iowa 198, 61 N. W. 846.

Kentucky.— Easley *v.* Easley, 18 B. Mon. (Ky.) 86.

Maryland.—Hopkins *v.* Stump, 2 Harr. & J. (Md.) 301.

Massachusetts.— Pratt *v.* Boston Heel, etc., Co., 134 Mass. 300.

Missouri.— Pritchett *v.* Reynolds, 21 Mo. App. 674.

New York.— Hayes *v.* Kedzie, 11 Hun (N. Y.) 577; Disbrow *v.* Tenbroeck, 4 E. D. Smith (N. Y.) 397; Fryatt *v.* Sullivan Co., 7 Hill (N. Y.) 529 [*affirming* 5 Hill (N. Y.)

of such a want of care with respect to the subject-matter of the bailment that the bailor is damaged thereby;[99] where the bailee has departed from the terms of the bailment or the instructions of the bailor;[1] or where services to be performed by the bailee have not been sufficiently performed.[2]

b. To Bailee. A right of action accrues to the bailee where the bailor has retaken from him the subject of the bailment during such time as the former was entitled to retain possession,[3] or where the bailee is entitled to compensation.[4] Again, where the contract is one of hiring, and the article hired is not fit for the purposes for which it was hired, the bailee may sue for a breach of the hiring contract.[5]

2. Form of Action — a. By Bailor[6] — (i) *In General* — (a) *Assumpsit.* Where the property bailed has been sold or converted into money or money's worth the bailor may sue the bailee in assumpsit.[7]

(b) *Case.* The bailor may sue in case where the subject-matter of the bailment has been misused by the bailee,[8] or where a loss or injury to the property has occurred from the latter's neglect.[9]

(c) *Detinue and Replevin.* The bailor may maintain detinue[10] where he

116]; Lockwood *v.* Bull, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539.

North Carolina.— Simmons *v.* Sikes, 24 N. C. 98.

Tennessee.— Moore *v.* Fitzpatrick, 7 Baxt. (Tenn.) 350.

Texas.— Nelson *v.* King, 25 Tex. 655.

99. *Georgia.*— McNabb *v.* Lockhart, 18 Ga. 495.

Missouri.— Coleman *v.* Lipscomb, 18 Mo App. 443.

New York.— Russell *v.* Roberts, 3 E. D. Smith (N. Y.) 318; Delaware Bank *v.* Smith, 1 Edm. Sel. Cas. (N. Y.) 351.

North Carolina.— Bland *v.* Womack, 6 N. C. 373.

Ohio.— Anderson *v.* Foresman, Wright (Ohio) 598.

Pennsylvania.— Persch *v.* Quiggle, 57 Pa. St. 247.

United States.— Tracy *v.* Wood, 3 Mason (U. S.) 132, 24 Fed. Cas. No. 14,130.

1. *Florida.*— Ferguson *v.* Porter, 3 Fla. 27.

Iowa.— Cullen *v.* Lord, 39 Iowa 302.

Maryland.— Casey *v.* Suter, 36 Md. 1.

Nebraska.— Burk *v.* Dempster, 34 Nebr. 426, 51 N. W. 976.

New York.— Buchanan *v.* Smith, 10 Hun (N. Y.) 474.

Tennessee.— Colyar *v.* Taylor, 1 Coldw. (Tenn.) 372.

Wisconsin.— Lane *v.* Cameron, 38 Wis. 603.

United States.— Higbie *v.* Hopkins, 1 Wash. (U. S.) 230, 12 Fed. Cas. No. 6,466.

2. *Illinois.*— Keith *v.* Bliss, 10 Ill. App. 424.

Kentucky.— McKibben *v.* Bakers, 1 B. Mon. (Ky.) 120.

New York.— Lienan *v.* Dinsmore, 3 Daly (N. Y.) 365.

Pennsylvania.— Rodgers *v.* Grothe, 58 Pa. St. 414; Chambers *v.* Crawford, Add. (Pa.) 150.

South Carolina.— McCaw *v.* Kimbrel, 4 McCord (S. C.) 220.

Wisconsin.— Kuehn *v.* Wilson, 13 Wis. 104.

United States.— The Una, 56 Fed. 157.

3. *Illinois.*— Simpson *v.* Wrenn, 50 Ill. 222, 99 Am. Dec. 511.

Indiana.— McConnell *v.* Maxwell, 3 Blackf. (Ind.) 419, 26 Am. Dec. 428.

Missouri.— Sowden *v.* Kessler, 76 Mo. App. 581.

Pennsylvania.—Neafie *v.* Patterson, 42 Leg. Int. (Pa.) 395.

South Carolina.— Bowen *v.* Coker, 2 Rich. (S. C.) 13.

Vermont.— Hickok *v.* Buck, 22 Vt. 149; Fisher *v.* Cobb, 6 Vt. 622.

4. Gerrard *v.* Moody, 48 Ga. 96.

5. Woodward *v.* Stein, 5 Ohio Dec. (Reprint) 171, 3 Am. L. Rec. 352.

6. Book-account will not lie for any breach of duty as a bailee. See Accounts and Accounting, 1 Cyc. 500, note 7.

7. *Illinois.*— Parker *v.* Tiffany, 52 Ill. 286.

Massachusetts.— Mason *v.* Briggs, 16 Mass. 453.

New Hampshire.— Frothingham *v.* Morse, 45 N. H. 545.

New York.— Scovill *v.* Griffith, 12 N. Y. 509; Berly *v.* Taylor, 5 Hill (N. Y.) 577.

Ohio.— Barker *v.* Cory, 15 Ohio 9.

Pennsylvania.— Hamaker *v.* Blanchard, 90 Pa. St. 377, 35 Am. Rep. 664.

Rhode Island.— Durfee *v.* Jones, 11 R. I. 588, 23 Am. Rep. 528.

8. Johnson *v.* Strader, 3 Mo. 359; Scovill *v.* Griffith, 12 N. Y. 509; Setzar *v.* Butler, 27 N. C. 212; Parker *v.* Thompson, 5 Sneed (Tenn.) 348; McNeill *v.* Brooks, 1 Yerg. (Tenn.) 73.

9. *Alabama.*— Lay *v.* Lawson, 23 Ala. 377.

Missouri.— Johnson *v.* Strader, 3 Mo. 359.

New York.— Hallenbake *v.* Fish, 8 Wend. (N. Y.) 547, 24 Am. Dec. 88; Packard *v.* Getman, 4 Wend. (N. Y.) 613, 21 Am. Dec. 166; Cairnes *v.* Bleecker, 12 Johns. (N. Y.) 300; Jenner *v.* Joliffe, 6 Johns. (N. Y.) 9.

Tennessee.— Hunter *v.* Sevier, 7 Yerg. (Tenn.) 126.

England.— Bromley *v.* Coxwell, 2 B. & P. 438, 5 Rev. Rep. 648.

10. Stoker *v.* Yerby, 11 Ala. 322; Rucker *v.* Hamilton, 3 Dana (Ky.) 36; Lewis *v.*

has a right to immediate possession of the bailed article or, under similar circumstances, he may maintain replevin.[11]

(D) *Trespass.* Trespass will lie where the bailee has destroyed the bailed property[12] or lost it.[13]

(E) *Trover.* Where the bailee has been guilty of a conversion of the bailed property, either by a user of it in a different manner or for a different purpose than was agreed upon, or by failure to redeliver or deliver over the property in accordance with the terms of the contract, the bailor may sue him in trover or in some action in the nature of trover.[14]

(II) *Election of Remedies.* The bailor may, where a tort has been committed with respect to the subject-matter of the bailment, either sue for the tort or waive the tort and sue for a breach of the contract of bailment.[15]

b. By Bailee. Where the bailor has taken the property bailed from the bailee during the term of the bailment the bailee may sue him in trover[16] or replevin.[17]

3. Conditions Precedent — a. Performance in General. No action will lie against the bailee until the performance of any conditions precedent by the bailor.[18]

b. Demand Before Suit — (I) *Necessity of.* As a general rule there must be a demand made upon the bailee and a refusal by him before suit can be brought;[19] but this is unnecessary where the bailee has determined the bailment by some act of his own;[20] where he fails to return the property at the expiration of the bailment;[21] where the gist of the action is the negligent loss of the bailor's property;[22] where the bailee has put it out of his power to comply with the demand;[23] or where the bailee has asserted, in another action respecting the

Hoover, 1 J. J. Marsh. (Ky.) 500, 19 Am. Dec. 120.

11. Wood *v.* Orser, 25 N. Y. 348, holding that the bailor cannot maintain replevin where the bailee has a present right to possession.

12. Hall *v.* Goodson, 32 Ala. 277; Nelson *v.* Bondurant, 26 Ala. 341; Setzar *v.* Butler, 27 N. C. 212; James *v.* Carper, 4 Sneed (Tenn.) 397.

13. James *v.* Carper, 4 Sneed (Tenn.) 397.

14. *Kentucky.*— Lewis *v.* Hoover, 1 J. J. Marsh. (Ky.) 500, 19 Am. Dec. 120.

Missouri.—Coffey *v.* National Bank, 46 Mo. 140, 2 Am. Rep. 488.

New York.— Rogers *v.* Weir, 34 N. Y. 463; Esmay *v.* Fanning, 9 Barb. (N. Y.) 176, 5 How. Pr. (N. Y.) 228; Dunlap *v.* Hunting, 2 Den. (N. Y.) 643, 43 Am. Dec. 763; Berly *v.* Taylor, 5 Hill (N. Y.) 577; Packard *v.* Getman, 4 Wend. (N. Y.) 613, 21 Am. Dec. 166; Lockwood *v.* Bull, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539; Thorp *v.* Burling, 11 Johns. (N. Y.) 285.

North Carolina.— Setzar *v.* Butler, 27 N. C. 212.

Ohio.— Bassett *v.* Baker, Wright (Ohio) 337.

Vermont.— Swift *v.* Moseley, 10 Vt. 208, 33 Am. Dec. 197.

Virginia.—Tancil *v.* Seaton, 28 Gratt. (Va.) 601, 26 Am. Rep. 380.

15. Suydam *v.* Smith, 7 Hill (N. Y.) 182. **Election between tort and contract** see Assumpsit, Action of, 4 Cyc. 317.

16. Bowen *v.* Coker, 2 Rich. (S. C.) 13; Hickok *v.* Buck, 22 Vt. 149.

17. Sowden *v.* Kessler, 76 Mo. App. 581; Neafie *v.* Patterson, 42 Leg. Int. (Pa.) 595.

18. Ferrier *v.* Wood, 9 Ark. 85; Ulmer *v.* Paine, 1 Me. 84.

Determination of title.—Where money was deposited with the bailee to be kept until it should be legally determined to which of several bailors it belonged, the title must be first determined by a judgment at law before an action will lie against the bailee. Ulmer *v.* Paine, 1 Me. 84.

19. *Arkansas.*— McLain *v.* Huffman, 30 Ark. 428; Spencer *v.* McDonald, 22 Ark. 466.

Georgia.—Montgomery *v.* Evans, 8 Ga. 178.

Indiana.— Underwood *v.* Tatham, 1 Ind. 276.

Missouri.— Ross *v.* Clark, 27 Mo. 549; Irwin *v.* Wells, 1 Mo. 9.

New York.— Phelps *v.* Bostwick, 22 Barb. (N. Y.) 314; Brown *v.* Cook, 9 Johns. (N. Y.) 361.

North Carolina.— Benners *v.* Howard, 1 N. C. 93, 1 Am. Dec. 583.

South Carolina.— West *v.* Murph, 3 Hill (S. C.) 284.

Texas.— Clapp *v.* Nelson, 12 Tex. 370, 62 Am. Dec. 530.

See 6 Cent. Dig. tit. "Bailment," § 120.

20. Cothran *v.* Moore, 1 Ala. 423; McLain *v.* Huffman, 30 Ark. 428; Spencer *v.* McDonald, 22 Ark. 466; Cox *v.* Reynolds, 7 Ind. 257; Smith *v.* Stewart, 5 Ind. 220; Spencer *v.* Morgan, 5 Ind. 146; Felton *v.* Hales, 67 N. C. 107.

21. Lay *v.* Lawson, 23 Ala. 377; Clapp *v.* Nelson, 12 Tex. 370, 62 Am. Dec. 530.

22. Warner *v.* Dunnavan, 23 Ill. 380; Line *v.* Mills, 12 Ind. App. 100, 39 N. E. 870; Ross *v.* Clark, 27 Mo. 549.

23. Dinsmore *v.* Abbott, 89 Me. 373, 36 Atl. 621; Lovejoy *v.* Jones, 30 N. H. 164; Esmay

subject-matter of the bailment, that he has fully performed the duty intrusted to him.[24]

(II) *Sufficiency of*—(A) *In General.* Where a demand is requisite, a letter demanding the property bailed is sufficient if the bailee understands that a demand is made upon him and denies that he ever received the property;[25] and where a note is taken for collection and mislaid, a promise by the bailee to pay the amount of the note to its owner, if not found upon a search therefor, is sufficient.[26]

(B) *By Whom Made.* Where one of two owners of property bails such property without the privity of the other, a demand by the bailor is sufficient; but where both owners bail, a demand by one without the authority of the other will not suffice.[27]

(C) *Upon Whom Made.* Where the action sounds in tort and the bailment was made to two persons, a demand upon one alone is not sufficient.[28] So where the property was bailed to a partnership another member of the firm is not chargeable if, after its dissolution, demand was made upon one partner only.[29]

c. Tender. Where money is due the bailee, a tender of the amount due must be made before suit,[30] unless the bailee refuses to deliver the subject-matter of the bailment and denies the bailor's right[31] or has failed to do as agreed.[32]

4. Parties. The bailor of property not owned by him, but under his control and in his possession, may sue for the loss of or an injury to the property in his own name and without making the real owner a party.[33]

5. Defenses—a. Due Care of Property. The fact that defendant has used the requisite degree of care in the keeping of the bailed property is a sufficient defense where the cause of action is negligence.[34]

b. Lien. The lien of the bailee is a good defense in an action to recover the bailed property.[35]

c. Property Taken by Process of Law. The fact that the property is taken from the bailee by authority of law is a good defense where the cause of action is non-delivery of the bailed article.[36]

d. Redelivery of Property. Redelivery of property and its acceptance by the bailor is not a defense to an action for an injury to such property;[37] but where redelivery is a defense, it is sufficient if it appears that delivery was made to one of several bailors if the action be brought by all of them.[38]

v. Fanning, 9 Barb. (N. Y.) 176, 5 How. Pr. (N. Y.) 228; Bates *v.* Conkling, 10 Wend. (N. Y.) 389; Delamater *v.* Miller, 1 Cow. (N. Y.) 75, 13 Am. Dec. 512.

24. Woods *v.* Hamilton, 39 Kan. 69, 17 Pac. 335.

25. Pattee *v.* Gilmore, 18 N. H. 460, 45 Am. Dec. 385.

26. Sandefur *v.* Mattingley, 16 Ark. 237, holding that even if not sufficient a demand made upon the executors of the bailee for an allowance of the claim would be sufficient.

27. May *v.* Harvey, 13 East 197, 12 Rev. Rep. 322.

28. White *v.* Demary, 2 N. H. 546.

29. Pattee *v.* Gilmore, 18 N. H. 460, 45 Am. Dec. 385.

30. Vance *v.* Dingley, 14 Cal. 53; Brown *v.* Holmes, 21 Kan. 687; Montieth *v.* Great Western Printing Co., 16 Mo. App. 450; Brown *v.* Dempsey, 95 Pa. St. 243.

Necessity of tender is not dispensed with because it appears that the bailee declared to a third party that he would not give up property, which he claimed under a lien, even if the lien was fully discharged. Brown *v.* Holmes, 21 Kan. 687.

31. Long Island Brewery Co. *v.* Fitzpatrick, 18 Hun (N. Y.) 389.

32. Barringer *v.* Burns, 108 N. C. 606, 13 S. E. 142, holding that no tender was necessary where a horse-trainer agreed to keep a mare delivered to him and, when requested, to show her speed to persons selected by the bailor, and declined upon request so to exhibit her speed.

33. Casey *v.* Suter, 36 Md. 1; White *v.* Nicholls, 1 Hayw. & H. (U. S.) 123, 29 Fed. Cas. No. 17,554.

34. Green *v.* Hollingsworth, 5 Dana (Ky.) 173, 30 Am. Dec. 680; Storer *v.* Gowen, 18 Me. 174; Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Hayes *v.* Kedzie, 11 Hun (N. Y.) 577.

Degrees of care and negligence see *supra*, V, A, 2, c.

35. Leavy *v.* Kinsella, 39 Conn. 50.

Lien of bailee see *supra*, V, A, 4, c.

36. Bliven *v.* Hudson River R. Co., 36 N. Y. 403, 2 Transcr. App. (N. Y.) 179 [*affirming* 35 Barb. (N. Y.) 188]; Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145. See also *supra*, V, A, 5, a, (II).

37. Cartlidge *v.* Sloan, 124 Ala. 596, 26 So. 918; Fox *v.* Pruden, 3 Daly (N. Y.) 187.

38. Brandon *v.* Scott, 7 E. & B. 234, 3 Jur. N. S. 362, 26 L. J. Q. B. 163, 5 Wkly. Rep. 235, 90 E. C. L. 234.

e. Unavoidable Loss. It is a good defense to an action for failure to return property that it was taken from the bailee by *vis major*.[39]

f. Want of Title in Bailor. Want of title in the bailor is under some circumstances a sufficient defense.[40]

6. Pleading — a. Complaint, Declaration, or Petition — (I) *In General.* The contract of bailment must be substantially and accurately stated[41] and a breach thereof alleged[42] in accordance with the principles applicable to actions for breach of contract generally.[43]

(II) *Particular Averments* — (A) *Demand.* Where a demand was requisite,[44] the declaration must specifically allege that demand was made and the manner of its making.[45]

(B) *Description of Subject-Matter.* A general description of the subject-matter of the bailment is sufficient.[46]

(C) *Negligence.* The negligence of the bailee need not be alleged where the ground of action is a breach of contract by the bailee's failure to return the subject-matter.[47]

(D) *Ownership of Bailor.* A specific allegation that plaintiff is the owner of the property bailed is not necessary, where the cause of action is an injury to the property, at least in an action before a justice.[48]

(E) *Possession of Bailee.* Where the ground of action is failure to return in good order, it should be alleged that the bailee had returned the subject-matter of the bailment, or given the bailors notice to remove it, and that the injury was done while in possession of the bailee.[49]

(F) *Termination of Bailment.* Where the ground of action is a failure to return in good order, according to contract, the complaint should allege that the term of the bailment had ceased.[50]

(III) *Joinder of Counts and Election.* Plaintiff may join counts in case[51]

39. Watkins *v.* Roberts, 28 Ind. 167; Meridian Fair, etc., Assoc. *v.* North Birmingham St. R. Co., 70 Miss. 808, 12 So. 555. See also *supra*, V, A, 5, a, (II).

40. *California.*— Palmtag *v.* Doutrick, 59 Cal. 154, 43 Am. Rep. 245.

Kentucky.— Stephens *v.* Vaughan, 4 J. J. Marsh. (Ky.) 206, 20 Am. Dec. 216.

New York.— Cook *v.* Holt, 48 N. Y. 275; Bates *v.* Stanton, 1 Duer (N. Y.) 79.

North Carolina.—Pitt *v.* Albritton, 34 N. C. 74; Dunwoodie *v.* Carrington, 4 N. C. 355.

Pennsylvania.— Floyd *v.* Bovard, 6 Watts & S. (Pa.) 75.

Virginia.— Kelly *v.* Patchell, 5 W. Va. 585. See also *supra*, IV, B.

A delivery of the property to the true owner upon his demand before the commencement of a suit by the bailor is a good defense in an action to recover bailed property. Bates *v.* Stanton, 1 Duer (N. Y.) 79.

Title in the estate of a decedent is not a defense to an action to recover the bailed property. McCafferty *v.* Brady, (Pa. 1887) 9 Atl. 37.

41. *Illinois.*— Standard Brewery *v.* Bemis, etc., Malting Co., 171 Ill. 602, 49 N. E. 507.

Iowa.— Jourdan *v.* Reed, 1 Iowa 135.

Tennessee.— Angus *v.* Dickerson, Meigs (Tenn.) 459.

Texas.— Grooms *v.* Rust, 27 Tex. 231; Duncan *v.* Mayette, 25 Tex. 245.

Vermont.— Graves *v.* Severans, 40 Vt. 636.

Delivery and acceptance.— An averment that the property was delivered to defendant and that he promised to take care of it and return it to the bailors sufficiently shows an acceptance of the property as a bailment. Belmont Coal Co. *v.* Richter, 31 W. Va. 858, 8 S. E. 609.

A promise must be alleged where the ground of action is not the gross or wilful negligence of a bailee liable only for ordinary negligence. Kingsley *v.* Bill, 9 Mass. 198.

42. Levis *v.* Burke, 51 Hun (N. Y.) 71, 3 N. Y. Suppl. 386, 20 N. Y. St. 789; Graves *v.* Severans, 40 Vt. 636.

43. See, generally, Contracts.

44. See *supra*, VI, A, 3, b.

45. Montgomery *v.* Evans, 8 Ga. 178.

For form of complaint alleging demand and refusal in general terms which was sustained upon general demurrer setting forth as a special cause the absence of an allegation of a demand for the property at any time before suit see Clapp *v.* Nelson, 12 Tex. 370, 62 Am. Dec. 530.

46. Moody *v.* Keener, 7 Port. (Ala.) 218, holding that where the subject of the bailment is bank-notes it is unnecessary to state the bank of issue.

47. Tindall *v.* McCarthy, 44 S. C. 487, 22 S. E. 734.

48. Johnson *v.* Moffett, 19 Mo. App. 159.

49. Levis *v.* Burke, 51 Hun (N. Y.) 71, 3 N. Y. Suppl. 386, 20 N. Y. St. 789.

50. Levis *v.* Burke, 51 Hun (N. Y.) 71, 3 N. Y. Suppl. 386, 20 N. Y. St. 789.

51. For forms of counts in case for a breach of contract of hiring see Wheelock *v.*

and trover;[52] but a count in trover cannot be joined with one in assumpsit,[53] since such counts require different pleas and judgments.[54] Where the declaration contains counts in trover and in assumpsit the court may strike out either count.[55]

b. Answer or Plea. Where there is a plea of property in the bailee on the ground of lien against the real owner the plea or answer should state the name of the owner.[56] A defense of fraud on the part of the bailor must be pleaded where the statutes provide that the question of fraudulent intent is one of fact and not of law.[57]

7. Evidence — a. Presumptions and Burden of Proof — (i) *Presumptions* — (a) *Diligence.* Where the bailee has taken the same care of the bailed property as he did of his own a presumption of adequate diligence arises.[58]

(b) *Negligence.* Where property was received by the bailee in good, and returned in bad, condition, or not returned at all, the bailee is presumed to have acted negligently;[59] and this is true where the bailor shows a degree of loss or damage to the bailed article that ordinarily does not happen where the requisite degree of care is exercised.[60]

(c) *State of Article on Delivery.* There is a presumption that an article was in proper condition when delivered to the bailee.[61]

(ii) *Burden of Proof.* Where negligence is the foundation of the action between the bailor and the bailee, the burden of proving negligence is ordinarily on the former.[62] The burden is on the bailee, however, to show that he has exercised such degree of care as the bailment called for, where the subject-matter was in good condition when placed in the hands of the bailee and was in a damaged

Wheelwright, 5 Mass. 104; Horsely *v.* Branch, 1 Humphr. (Tenn.) 198; Angus *v.* Dickerson, Meigs (Tenn.) 459; Spencer *v.* Pilcher, 8 Leigh (Va.) 565.

52. Horsely *v.* Branch, 1 Humphr. (Tenn.) 198; Angus *v.* Dickerson, Meigs (Tenn.) 459; Harvey *v.* Skipwith, 16 Gratt. (Va.) 393; Spencer *v.* Pilcher, 8 Leigh (Va.) 565.

53. **For form** of count in assumpsit on a contract of hiring see Baxter *v.* Pope, Meigs (Tenn.) 467 note.

54. Baxter *v.* Pope, Meigs (Tenn.) 467 note; Angus *v.* Dickerson, Meigs (Tenn.) 459.

55. Moses *v.* Taylor, 6 Mackey (D. C.) 255, holding that, where the declaration apparently set out an action of a double aspect, the court might strike out a feature that seemed to make it an action of tort and allow it to remain an action of assumpsit.

56. Stetler *v.* Philadelphia, etc., R. Co., 1 Wkly. Notes Cas. (Pa.) 401.

Denial of bailment and bailor's title.— Where plaintiff avers a hiring of property by defendant and that defendant had made use of what was hired, but does not show that plaintiff had possessed the property prior to defendant's possession, or that defendant had acquired possession through plaintiff, it is sufficient to deny the hiring and the right, title, or interest of plaintiff. Grooms *v.* Rust, 27 Tex. 231.

57. Wetherly *v.* Straus, 93 Cal. 283, 28 Pac. 1045, holding that under Cal. Civ. Code, § 3442, the bailee cannot, without pleading fraud, where the ground of action is failure to surrender property attached by creditors of the bailor's husband, show that the property was given to the bailor by the husband with the intention of defrauding creditors.

58. Carlisle First Nat. Bank *v.* Graham, 79 Pa. St. 106, 21 Am. Rep. 49; Erie Bank *v.* Smith, 3 Brewst. (Pa.) 9.

59. Funkhouser *v.* Wagner, 62 Ill. 59; Cumins *v.* Wood, 44 Ill. 416, 92 Am. Dec. 189; Bennett *v.* O'Brien, 37 Ill. 250; Baren *v.* Cain, 15 Ill. App. 387; Simmons *v.* Sikes, 24 N. C. 98; Logan *v.* Mathews, 6 Pa. St. 417. *Contra,* Wintringham *v.* Hayes, 144 N. Y. 1, 38 N. E. 999, 63 N. Y. St. 16, 43 Am. St. Rep. 725 [*reversing* 3 Misc. (N. Y.) 604, 23 N. Y. Suppl. 338, 52 N. Y. St. 858].

Even though the burden of proof is on the bailor to show negligence, a failure to produce the property or account for its nonproduction is *prima facie* negligence. Koch *v.* National Express Co., 1 Lack. Leg. N. (Pa.) 289.

A presumption arising from a return in a damaged condition may be rebutted by showing that the damage was not caused by the negligence either of the bailee or his servants. McLoughlin *v.* New York Lighterage, etc., Co., 7 Misc. (N. Y.) 119, 27 N. Y. Suppl. 248, 57 N. Y. St. 543.

60. Arnot *v.* Branconier, 14 Mo. App. 431; Canfield *v.* Baltimore, etc., R. Co., 93 N. Y. 532, 45 Am. Rep. 268.

61. Higman *v.* Camody, 112 Ala. 267, 20 So. 480, 57 Am. St. Rep. 33.

62. *Arkansas.*— James *v.* Orrell, 68 Ark. 284, 57 S. W. 931, 82 Am. St. Rep. 293; Sandefur *v.* Mattingley, 16 Ark. 237.

Maryland.— Hambleton *v.* McGee, 19 Md. 43.

New York.— Stewart *v.* Stone, 127 N. Y. 500, 28 N. E. 595, 40 N. Y. St. 314, 14 L. R. A. 215; Claflin *v.* Meyer, 75 N. Y. 260, 31 Am. Rep. 467 [*reversing* 43 N. Y. Super. Ct. 1]; Harrington *v.* Snyder, 3 Barb. (N. Y.) 380.

Pennsylvania.— Erie Bank *v.* Smith, 3 Brewst. (Pa.) 9.

South Carolina.— Carrier *v.* Dorrance, 19 S. C. 30.

condition when returned,[63] where it was lost or not returned at all,[64] or where he refuses to give any account of how the injury occurred.[65] Again, in an action to recover property on account of a breach of the contract, the bailee must prove a waiver of the breach, if the breach has been shown;[66] and where a lien is set up by the bailee the burden of proving its amount is upon him.[67] So where the bailee defends upon a *jus tertii* he takes upon himself the burden of proof.[68]

b. Admissibility — (i) *In General.* Where the question is whether the bailment was gratuitous or not, evidence showing that the bailee was a bailee for compensation in a different matter, and with a person other than plaintiff, is not admissible.[69] Where the ground of action is an injury to bailed property the bailor may show by expert evidence that the injuries were not the result of ordinary wear and tear;[70] and the testimony of a bailee for the sole benefit of the bailor has been held not admissible to disprove his negligence.[71] Parol evidence is not admissible to vary or modify the terms of a written contract of bailment,[72] except in a case of fraud, accident, or mistake;[73] but where a written contract of bailment does not specify the time of its continuance, what length of time is reasonable under the circumstances may be shown by parol.[74] Where an action is brought

Tennessee.—Runyan *v.* Caldwell, 7 Humphr. (Tenn.) 133.

Vermont.— Malaney *v.* Taft, 60 Vt. 571, 15 Atl. 326, 6 Am. St. Rep. 135.

See 6 Cent. Dig. tit. "Bailment," § 125.

In suits against common carriers and innkeepers a different rule may perhaps apply. Malaney *v.* Taft, 60 Vt. 571, 15 Atl. 326, 6 Am. Rep. 135. See, generally, CARRIERS; INNKEEPERS.

Property lost by vis major.— Notwithstanding that negligence is presumed where a demand and refusal to deliver have been proved, yet in the absence of any showing of bad faith if the property seem to have been lost by an unavoidable accident, the bailor must show that the loss arose from the bailee's negligence. Claflin *v.* Meyer, 75 N. Y. 260, 31 Am. Rep. 467 [*reversing* 43 N. Y. Super. Ct. 1].

63. Funkhouser *v.* Wagner, 62 Ill. 59; Cumins *v.* Wood, 44 Ill. 416, 92 Am. Dec. 189; Bennett *v.* O'Brien, 37 Ill. 250; Burlingame *v.* Horne, 30 Ill. App. 330; Baren *v.* Cain, 15 Ill. App. 387; Wintringham *v.* Hayes, 144 N. Y. 1, 38 N. E. 999, 63 N. Y. St. 16, 43 Am. St. Rep. 725; Collins *v.* Bennett, 46 N. Y. 490; Cox *v.* Pruden, 3 Daly (N. Y.) 187; Nichols *v.* Balch, 8 Misc. (N. Y.) 452, 28 N. Y. Suppl. 667, 59 N. Y. St. 573; Logan *v.* Mathews, 6 Pa. St. 417. But see Willett *v.* Rich, 142 Mass. 356, 7 N. E. 776, 56 Am. St. Rep. 684, 2 N. Eng. 672; Malaney *v.* Taft, 60 Vt. 571, 15 Atl. 326, 6 Am. St. Rep. 135; Cooper *v.* Barton, 3 Campb. 5 note, 13 Rev. Rep. 736, to the effect that the burden of proof is not shifted by a mere showing that the subject-matter was in good condition when delivered and returned injured in such a way that does not ordinarily occur without negligence.

64. *Alabama.*— Haas *v.* Taylor, 80 Ala. 459, 2 So. 633.

Georgia.— Hawkins *v.* Haynes, 71 Ga. 40.

Illinois.— Funkhouser *v.* Wagner, 62 Ill. 59; Cumins *v.* Wood, 44 Ill. 416, 92 Am. Dec. 189; Bennett *v.* O'Brien, 37 Ill. 250; Baren *v.* Cain, 15 Ill. App. 387.

Louisiana.— Nicholls *v.* Roland, 11 Mart. (La.) 190.

Maine.— Mills *v.* Gilbreth, 47 Me. 320, 74 Am. Dec. 487.

Missouri.—Taussig *v.* Schields, 26 Mo. App. 318.

New Hampshire.— Shelden *v.* Robinson, 7 N. H. 157, 26 Am. Dec. 726.

New York.— Scranton *v.* Baxter, 4 Sandf. (N. Y.) 5.

See 6 Cent. Dig. tit. "Bailment," § 125.

65. Logan *v.* Mathews, 6 Pa. St. 417.

66. Treacy *v.* Barclay, 9 Ky. L. Rep. 707, 6 S. W. 433.

67. Shearer *v.* Gunderson, 60 Minn. 525, 63 N. W. 103.

68. Wetherly *v.* Straus, 93 Cal. 283, 28 Pac. 1045; Western Transp. Co. *v.* Barber, 56 N. Y. 544; Sedgwick *v.* Macy, 24 N. Y. App. Div. 1, 49 N. Y. Suppl. 154; Nudd *v.* Montanye, 38 Wis. 511, 20 Am. Rep. 25; Rogers *v.* Lambert, [1891] 1 Q. B. 318, 55 J. P. 452, 60 L. J. Q. B. 187, 64 L. T. Rep. N. S. 406, 39 Wkly. Rep. 114; *Ex p.* Davies, 19 Ch. D. 86; Dixon *v.* Yates, 5 B. & Ad. 313, 2 L. J. K. B. 198, 2 N. & M. 177, 27 E. C. L. 137; White *v.* Bartlett, 9 Bing. 378, 2 L. J. C. P. 43, 23 E. C. L. 624; Biddle *v.* Bond, 6 B. & S. 225, 11 Jur. N. S. 425, 34 L. J. Q. B. 137, 12 L. T. Rep. N. S. 178, 13 Wkly. Rep. 561, 118 E. C. L. 225; Cheesman *v.* Exall, 6 Exch. 341; Shelbury *v.* Scotsford, Yelv. 23.

69. Lobenstein *v.* Pritchett, 8 Kan. 213.

70. Wintringham *v.* Hayes, 144 N. Y. 1, 38 N. E. 999, 63 N. Y. St. 16, 43 Am. St. Rep. 725 [*affirming* 3 Misc. (N. Y.) 604, 23 N. Y. Suppl. 338, 52 N. Y. St. 858].

71. Tompkins *v.* Saltmarsh, 14 Serg. & R. (Pa.) 275.

72. Selleck *v.* Selleck, 107 Ill. 389; Restein *v.* Graf, 17 Phila. (Pa.) 266, 41 Leg. Int. (Pa.) 134; Brown *v.* Hitchcock, 28 Vt. 452.

73. Restein *v.* Graf, 17 Phila. (Pa.) 266, 41 Leg. Int. (Pa.) 134.

74. Cobb *v.* Wallace, 5 Coldw. (Tenn.) 539, 98 Am. Dec. 435.

for a breach of contract against more than one, any defendant may, for the purpose of showing that he was not a party to the contract, show that he merely accompanied the real bailee.[75]

(II) *Admissions, Statements, or Acts of Parties.* Statements made by a bailee at the time of demand, excusing a failure of delivery or qualifying his refusal, are admissible as part of the *res gestæ* attending the demand;[76] as are the acts and declarations of a bailee made immediately before and after the loss of the bailed property.[77] So, too, letters of the bailee written to the bailor, or other admissions of his, while in possession, that go to show the manner in which he held the property, are admissible against the bailee or his transferee.[78]

(III) *Custom and Usage.* Where there is a question of diligence and ordinary care, a custom of the place where the contract was made with respect to the manner of storing and keeping a particular article may be proved;[79] and where there is a failure to manufacture a particular quality of article out of the material delivered to the bailee, the quality of the article manufactured by other persons transacting the same kind of business in the same neighborhood may be shown.[80] Where, however, the question turns upon whether the bailment is gratuitous or otherwise, proof that the article bailed had been used by others without a price being charged for such use is not admissible.[81]

(IV) *Measure of Damages or Compensation.* In an action to recover for the use of a hired article evidence of the value of such article when received and when returned is admissible on the question of the value of the use,[82] and it is admissible to show what would be a proper charge for the use of a hired article.[83] In a suit to recover for the loss of the article bailed evidence of the price of the article when bought is admissible to show its value at the time of the loss.[84]

c. Sufficiency. The evidence must conform substantially to the allegations of the pleading, or the party will fail by reason of a material variance,[85] or by reason of a total failure of proof.[86] A defense that the bailment was gratuitous and that the subject-matter had been stolen from the bailee while he held it in the performance of his duties is not supported where defendant fails to prove the necessity of keeping the subject-matter as alleged and to show that the loss

75. Adams *v.* Graves, 18 Pick. (Mass.) 355; Graves *v.* Moses, 13 Minn. 335.

76. Gracie *v.* Robinson, 14 Ark. 438; Lampley *v.* Scott, 24 Miss. 528.

77. Lampley *v.* Scott, 24 Miss. 528; Tompkins *v.* Saltmarsh, 14 Serg. & R. (Pa.) 275.

78. Robinson *v.* Haas, 40 Cal. 474.

79. Morehead *v.* Brown, 51 N. C. 367; Kelton *v.* Taylor, 11 Lea (Tenn.) 264, 47 Am. Rep. 284.

80. McKibben *v.* Bakers, 1 B. Mon. (Ky.) 120.

81. Harris *v.* Howard, 56 Vt. 695.

82. Wilcox *v.* Palmeter, 2 Hun (N. Y.) 517.

83. Curren *v.* Ampersee, 96 Mich. 553, 56 N. W. 87.

84. Bird *v.* Everard, 4 Misc. (N. Y.) 104, 23 N. Y. Suppl. 1008, 53 N. Y. St. 210.

85. Where a contract of hiring is alleged proof of a different kind of bailment will not support the action. Standard Brewery *v.* Bemis, etc., Malting Co., 171 Ill. 602, 49 N. E. 507; Jourdan *v.* Reed, 1 Iowa 135; Dunham *v.* Kinnear, 1 Watts (Pa.) 130; Harvey *v.* Skipwith, 16 Gratt. (Va.) 393.

A claim for the use of an article for a specified time is supported by proof of defendant's possession for that time with the right to use it at his pleasure. Reilly *v.* Rand, 123 Mass. 215.

Loss of subject-matter.— Evidence of what bailor paid for an article lost by defendant is sufficient in the absence of other proof to establish its value at the time of the loss. Bird *v.* Everard, 4 Misc. (N. Y.) 104, 23 N. Y. Suppl. 1008, 53 N. Y. St. 210.

Where the defense is that the bailor represented the article hired to be in good condition at the time of hiring, and that if it was not in good condition at that time it would cost little to take the article and try it, and the evidence upon this point is conflicting, the court is not warranted in directing a verdict for plaintiff, even if defendant admits a hiring of the article. Shaffer *v.* Harmon, 3 N. Y. Suppl. 591, 20 N. Y. St. 792.

86. Where negligence is the ground of bailor's claim there must be evidence of such negligence. Mock *v.* Erdmann, 28 Wis. 113, holding that proof of a promise by defendant to pay for injuries caused to the subject-matter of the bailment is not sufficient.

Slight evidence of gross negligence on the part of a gratuitous bailee is sufficient to warrant a refusal to direct a verdict for defendants by reason of the insufficiency of evidence. Whiting *v.* Chicago, etc., R. Co., 5 Dak. 90, 37 N. W. 222.

did not occur through his own negligence.[87] The bailor must show that there was an injury to his interest.[88]

8. Trial — a. Questions of Law and Fact. It is for the court to determine the degree of diligence and care in the relation of bailor and bailee;[89] but it is for the jury to determine under proper instructions whether the bailee has exercised due care.[90]

b. Instructions. The court should properly define the criterion of diligence imposed upon the bailee and the neglect that would make him liable,[91] and should correctly inform the jury upon whom the burden of proof lies.[92]

9. Damages — a. In Action by Bailor. Where a contract of hiring expressly stipulates the rent to be paid the measure of damages is the amount stipulated for[93] with interest thereon.[94] Where the bailed property is wholly lost through the negligence of the bailee, the value of the property at the place where received by him is the measure of damages.[95] Where the bailed articles are stolen from a negligent bailee the measure of damages is the market value of the property at the time the robbery was committed,[96] and such is the measure where the bailee has used the subject-matter in an unauthorized way by which the specific article is lost to the bailor.[97]

b. In Action by Bailee. The damages which the bailee may recover are held to be limited to his special interest in the property which was the subject-matter of the bailment.[98]

B. Action Against Third Parties — 1. Form of Action — a. By Bailor —

87. Carico *v.* Fidelity Invest. Co., 5 Colo. App. 56, 37 Pac. 29.

88. Lacoste *v.* Pipkin, 13 Sm. & M. (Miss.) 589.

Where property was damaged before delivery to bailee the bailor must show the amount and extent of damage that occurred while the property was held by defendant. Farley *v.* Vanwickle, 19 La. Ann. 9.

89. Watkins *v.* Roberts, 28 Ind. 167; Morris *v.* Third Ave. R. Co., 1 Daly (N. Y.) 202; Brock *v.* King, 48 N. C. 45.

90. *Georgia.*— McNabb *v.* Lockhart, 18 Ga. 495; Morel *v.* Roe, R. M. Charlt. (Ga.) 19.

Illinois.— Skelley *v.* Kahn, 17 Ill. 170.

Kentucky.— Green *v.* Hollingsworth, 5 Dana (Ky.) 173, 30 Am. Dec. 680; Dehoney *v.* Kimball, 14 Ky. L. Rep. 858.

Maine.— Storer *v.* Gowen, 18 Me. 174.

Massachusetts.— Whitney *v.* Lee, 8 Metc. (Mass.) 91.

New York.— Lamb *v.* Camden, etc., R., etc., Co., 2 Daly (N. Y.) 454; Lyons First Nat. Bank *v.* Ocean Nat. Bank, 48 How. Pr. (N. Y.) 148.

North Carolina.— Rowland *v.* Jones, 73 N. C. 52.

Ohio.— Griffith *v.* Zipperwick, 28 Ohio St. 388.

Pennsylvania.— Carlisle First Nat. Bank *v.* Graham, 79 Pa. St. 106, 21 Am. Rep. 49; Erie Bank *v.* Smith, 3 Brewst. (Pa.) 9; Swartz *v.* Hauser, 10 Wkly. Notes Cas. (Pa.) 434.

Tennessee.— Kirtland *v.* Montgomery, 1 Swan (Tenn.) 452.

Texas.— Fulton *v.* Alexander, 21 Tex. 148.

Virginia.— Carrington *v.* Ficklin, 32 Gratt. (Va.) 670.

United States.— Stewart *v.* Western Union R. Co., 4 Biss. (U. S.) 362, 23 Fed. Cas. No. 13,438.

England.— Doorman *v.* Jenkins, 2 A. & E. 256, 4 L. J. K. B. 29, 4 N. & M. 170, 29 E. C. L. 132.

Where negligence per se is disclosed by the evidence as to the bailee's treatment of the property it has been held erroneous to leave the question of requisite care to the jury. Wiser *v.* Chesley, 53 Mo. 547; Mason *v.* St. Louis Union Stock Yards Co., 60 Mo. App. 93; Briggs *v.* Taylor, 28 Vt. 180.

91. Tudor *v.* Lewis, 3 Metc. (Ky.) 378; Casey *v.* Suter, 36 Md. 1.

92. Higman *v.* Camody, 112 Ala. 267, 20 So. 480, 57 Am. St. Rep. 33; James *v.* Orrell, 68 Ark. 284, 57 S. W. 931, 82 Am. St. Rep. 293; Bennett *v.* O'Brien, 37 Ill. 250.

93. Negus *v.* Simpson, 99 Mass. 388; Woodward *v.* Stein, 5 Ohio Dec. (Reprint) 171, 3 Am. L. Rec. 352.

94. Negus *v.* Simpson, 99 Mass. 388.

95. Oregon Imp. Co. *v.* Seattle Gas-Light Co., 4 Wash. 634, 30 Pac. 672.

96. Baltimore Third Nat. Bank *v.* Boyd, 44 Md. 47, 22 Am. Rep. 35.

97. Hubbell *v.* Blandy, 87 Mich. 209, 49 N. W. 502, 24 Am. St. Rep. 154, holding that where stock handed to a bailee is converted to his own use the value of the stock at the time of such conversion and the dividends thereon from the time of delivery to the bailee, together with interest on the value of the stock from the date of the conversion and on the dividends from the date of the respective payments, are recoverable by the bailor.

98. White *v.* Webb, 15 Conn. 302; Benjamin *v.* Stremple, 13 Ill. 466.

Where the bailmnt was joint.— The whole value of property delivered to the bailee by a joint owner who was rightfully in possession thereof may be recovered where such property was wrongfully taken away by the

(I) *Assumpsit.* Assumpsit will lie at the suit of the bailor against a third party to enforce a contract entered into by such third party with the bailee in relation to the subject-matter of the bailment.[99] An action for money had and received, however, cannot be maintained by the bailor against a third person who has received from the bailee, in payment of a debt of his own, the proceeds of bailed property sold by the bailee in violation of his trust.[1]

(II) *Case.* Where any permanent injury was done to the chattel, the bailor may maintain an action of case against a third party for an injury to the reversionary interest.[2]

(III) *Trespass, Trover, Replevin, Detinue.* During the existence of the bailment the bailor cannot maintain against a third person an action of trespass,[3] because he has neither the actual nor constructive possession of the bailed article ;[4] of trover,[5] because he has neither an actual possession nor the right of possession ;[6] of replevin,[7] because he has not an immediate right of possession ;[8] or of detinue.[9] But the bailor may treat the bailment as ended and maintain trover,[10] trespass,[11]

other joint owner. Russell *v.* Allen, 13 N. Y. 173.

99. Taintor *v.* Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; Beebee *v.* Robert, 12 Wend. (N. Y.) 413, 27 Am. Dec. 132; Sanderson *v.* Lamberton, 6 Binn. (Pa.) 129; New Jersey Steam Nav. Co. *v.* Boston Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465.

1. Thacher *v.* Pray, 113 Mass. 291, 18 Am. Rep. 480; Lime Rock Bank *v.* Plimpton, 17 Pick (Mass.) 159, 28 Am. Dec. 286; Thorne *v.* Wilmington First Nat. Bank, 37 Ohio St. 254; Culver *v.* Bigelow, 43 Vt. 249; Foster *v.* Green, 7 H. & N. 881, 31 L. J. Exch. 158, 6 L. T. Rep. N. S. 390.

2. *Kentucky.*— Lexington, etc., R. Co. *v.* Kidd, 7 Dana (Ky.) 245; Hawkins *v.* Phythian, 8 B. Mon. (Ky.) 515.

New Hampshire.—Howard *v.* Farr, 18 N. H. 457.

New Jersey.— New York, etc., R. Co. *v.* New Jersey Electric R. Co., 60 N. J. L. 338, 38 Atl. 828.

North Carolina.— White *v.* Griffin, 49 N. C. 139.

England.— Mears, etc. *v.* London, etc., R. Co., 11 C. B. N. S. 850, 31 L. J. C. P. 220, 6 L. T. Rep. N. S. 190, 103 E. C. L. 850.

3. *Alabama.*—Walker *v.* Wilkinson, 35 Ala. 725, 76 Am. Dec. 315.

California.— Triscony *v.* Orr, 49 Cal. 612.

New Hampshire.— Wilson *v.* Martin, 40 N. H. 88.

New Jersey.— New York, etc., R. Co. *v.* New Jersey Electric R. Co., 60 N. J. L. 338, 38 Atl. 828.

Vermont.— Swift *v.* Moseley, 10 Vt. 208, 33 Am. Dec. 197.

England.— Viner Abr. Trespass, N, p. 11.

A bailor who has a right to terminate the bailment but does not exercise such right cannot maintain trespass against a third party. Soper *v.* Sumner, 5 Vt. 274.

4. Marshall *v.* Davis, 1 Wend. (N. Y.) 109, 19 Am. Dec. 463; Soper *v.* Sumner, 5 Vt. 274. See, generally, Trespass.

5. *California.*— Triscony *v.* Orr, 49 Cal. 612.

New Jersey.— New York, etc., R. Co. *v.* New Jersey Electric R. Co., 60 N. J. L. 338, 38 Atl. 828.

North Carolina.— Andrews *v.* Shaw, 15 N. C. 70.

Tennessee.— Caldwell *v.* Cowan, 9 Yerg. (Tenn.) 262.

Vermont.— Swift *v.* Moseley, 10 Vt. 208, 33 Am. Dec. 197.

England.— Gordon *v.* Harper, 7 T. R. 9, 2 Esp. 465, 4 Rev. Rep. 369.

6. Gordon *v.* Harper, 7 T. R. 9, 2 Esp. 465, 4 Rev. Rep. 369. See, generally, Trover and Conversion.

7. Wyman *v.* Dorr, 3 Me. 183; New York, etc., R. Co. *v.* New Jersey Electric R. Co., 60 N. J. L. 338, 38 Atl. 828; Marshall *v.* Davis, 1 Wend. (N. Y.) 109, 19 Am. Dec. 463.

8. Wyman *v.* Dorr, 3 Me. 183. See, generally, Replevin.

9. Sims *v.* Boynton, 32 Ala. 353, 70 Am. Dec. 540.

10. *Alabama.*— Abbercrombie *v.* Bradford, 16 Ala. 560.

New Hampshire.— Sargent *v.* Gile, 8 N. H. 325.

Pennsylvania.—Gallaher *v.* Cohen, 1 Browne (Pa.) 43; North *v.* Barr, 17 Wkly. Notes Cas. (Pa.) 425; Lewis *v.* Shortledge, 1 Wkly. Notes Cas. (Pa.) 507.

South Carolina.— Clarke *v.* Poozer, 2 McMull. (S. C.) 434.

Vermont.— Thrall *v.* Lathrop, 30 Vt. 307, 73 Am. Dec. 306; Swift *v.* Moseley, 10 Vt. 208, 33 Am. Dec. 197.

England.— Loeschman *v.* Machin, 2 Stark. 311, 20 Rev. Rep. 687, 3 E. C. L. 423.

But see Caldwell *v.* Cowan, 9 Yerg. (Tenn.) 262, where trover is said not to be maintainable against a third party, either before or after the termination of the bailment, in a case where an officer levies on and sells the property on an execution against the bailee before the term of the hiring has expired.

11. *Maine.*— Sibley *v.* Brown, 15 Me. 185.

Missouri.— Moore *v.* Simms, 47 Mo. App. 182.

New York.— Ely *v.* Ehle, 3 N. Y. 506; Orser *v.* Storms, 9 Cow. (N. Y.) 687, 18 Am. Dec. 543.

Vermont.— Swift *v.* Moseley, 10 Vt. 208, 33 Am. Dec. 197.

Wisconsin.— Enos *v.* Cole, 53 Wis. 235, 10 N. W. 377.

detinue,[12] or replevin,[13] where the bailee has done some act inconsistent with the bailment and calculated to defeat the bailor's right of property.

b. By Bailee — (I) *Case.* In the event of an injury caused by a stranger to the bailed property case is a proper remedy to be pursued against such person by the bailee.[14]

(II) *Trespass, Trover, Replevin, Detinue.* Where the bailee has been dispossessed of the property by a stranger he may maintain trespass,[15] trover,[16] detinue,[17] or replevin.[18]

2. Conditions Precedent — a. In General. Payment of the purchase-price of bailed property bought by a third party from a bailee not authorized to sell such property need not be made to the purchaser before suit by the bailor against such party;[19] and where stolen goods are found in the possession of another the owner need neither pay nor tender anything due thereon for storage of such goods before suit against the person possessing such property.[20] So where an article bailed has been illegally pawned by the bailee, the sum for which it was pawned need not be tendered before suing the pawnee.[21]

b. Demand. Where rendered necessary by the form of action the bailor must before suing a third person make a demand upon such person before commencing suit.[22]

3. Parties. Since the bailor's property in an article bailed is entire, distinct, and separate from that of the bailee, and their interests perhaps adverse, it is

12. Sims *v.* Boynton, 32 Ala. 353, 70 Am. Dec. 540.

13. *Maine.*— Small *v.* Hutchins, 19 Me. 255.

Michigan.— Dunlap *v.* Gleason, 16 Mich. 158, 93 Am. Dec. 231.

New Hampshire.— Partridge *v.* Philbrick, 60 N. H. 556.

New York.— Ely *v.* Ehle, 3 N. Y. 506.

Pennsylvania.— Collins *v.* Bellefonte Cent. R. Co., 171 Pa. St. 243, 33 Atl. 331; Heizmann *v.* Rank, 2 Woodw. (Pa.) 469.

Statutory substitute for replevin.—A bailee may avail himself of any statutory remedy in substitution for replevin. Knight *v.* Davis Carriage Co., 71 Fed. 662, 30 U. S. App. 664, 18 C. C. A. 287.

Where the act of the third party was not tortious the bailor should count on the detention and not on the taking of the property. Smith *v.* Clark, 21 Wend. (N. Y.) 83, 34 Am. Dec. 213.

14. *Iowa.*— Allen *v.* Barrett, 100 Iowa 16, 69 N. W. 272.

Maine.— Moran *v.* Portland Steam Packet Co., 35 Me. 55.

Massachusetts.— Finn *v.* Western R. Corp., 112 Mass. 524, 17 Am. Rep. 128.

Minnesota.—Chamberlain *v.* West, 37 Minn. 54, 33 N. W. 114.

New York.— Green *v.* Clarke, 12 N. Y. 343.

15. *Alabama.*— Cox *v.* Easley, 11 Ala. 362; Hare *v.* Fuller, 7 Ala. 717.

Illinois.— Hollenback *v.* Todd, 19 Ill. App. 452.

Maine.— Little *v.* Fossett, 34 Me. 545, 56 Am. Dec. 671.

New York.— Hendricks *v.* Decker, 35 Barb. (N. Y.) 298; Bass *v.* Pierce, 16 Barb. (N. Y.) 595; Butts *v.* Collins, 13 Wend. (N. Y.) 139; Orser *v.* Storms, 9 Cow. (N. Y.) 687, 18 Am. Dec. 543; Barker *v.* Miller, 6 Johns. (N. Y.) 195.

South Carolina.—Jones *v.* McNeil, 2 Bailey (S. C.) 466.

Vermont.— Thayer *v.* Hutchinson, 13 Vt. 504, 37 Am. Dec. 607; Hart *v.* Hyde, 5 Vt. 328; Burdict *v.* Murray, 3 Vt. 302, 21 Am. Dec. 588.

16. *California.*—Bode *v.* Lee, 102 Cal. 583, 36 Pac. 936.

Illinois.—McGraw *v.* Patterson, 47 Ill. App. 87; Hollenback *v.* Todd, 19 Ill. App. 452.

Massachusetts.— Harrington *v.* King, 121 Mass. 269; Shaw *v.* Kaler, 106 Mass. 448; Adams *v.* O'Connor, 100 Mass. 515, 1 Am. Rep. 137; Eaton *v.* Lynde, 15 Mass. 242.

New Hampshire.— Bradley *v.* Spofford, 23 N. H. 444, 55 Am. Dec. 205; Poole *v.* Symonds, 1 N. H. 289, 8 Am. Dec. 71.

New York.— Bowen *v.* Fenner, 40 Barb. (N. Y.) 383; Hendricks *v.* Decker, 35 Barb. (N. Y.) 298; Neff *v.* Thompson, 8 Barb. (N. Y.) 213; Leoncini *v.* Post, 13 N. Y. Suppl. 825, 37 N. Y. St. 255; Faulkner *v.* Brown, 13 Wend. (N. Y.) 63; Duncan *v.* Spear, 11 Wend. (N. Y.) 54; Dillenback *v.* Jerome, 7 Cow. (N. Y.) 294; Barker *v.* Miller, 6 Johns. (N. Y.) 195.

England.— Burton *v.* Hughes, 2 Bing. 173, 9 E. C. L. 533; Armory *v.* Delamirie, 1 Str. 505, 1 Smith Lead. Cas. 631; Sutton *v.* Buck, 2 Taunt. 302, 11 Rev. Rep. 585, 587.

17. Noles *v.* Marable, 50 Ala. 366; Bryan *v.* Smith, 22 Ala. 534; Traylor *v.* Marshall, 11 Ala. 458; Boyle *v.* Townes, 9 Leigh (Va.) 158.

18. Sowden *v.* Kessler, 76 Mo. App. 581; Alt *v.* Weidenberg, 6 Bosw. (N. Y.) 176. *Contra*, Waterman *v.* Robinson, 5 Mass. 303.

19. Kitchell *v.* Vanadar, 1 Blackf. (Ind.) 356, 12 Am. Dec. 249.

20. Florence Sewing Mach. Co. *v.* Warford, 1 Sweeny (N. Y.) 433.

21. Gallaher *v.* Cohen, 1 Browne (Pa.) 43.

22. Hunter *v.* Sevier, 7 Yerg. (Tenn.) 126.

neither necessary nor proper to join them where statutes provide for the prosecution of an action in the name of the real party in interest.[23]

4. Defenses — a. In General. A third person who has received property from the custodians of an insane bailee, under an agreement to keep it for such person, may set up any defense that the bailee might make.[24]

b. Judgment Recovered by Bailee. In an action brought by a bailor against a third party such party may defend by showing that the bailee had previously recovered judgment against him in an action respecting the same property.[25]

c. Negligence of Bailee. In a suit against a third party by the bailor for a loss of the property bailed negligence of the bailee is no defense.[26]

5. Pleading. In an action by a bailee against a third party for injuries sustained to the bailed article, the complaint, declaration, or petition must sufficiently show the connection of the bailee with an article of which he is not the owner.[27]

6. Evidence. Where the bailor sues a third person to recover property handed to him by the bailee, proof that would authorize a recovery against the bailee is generally sufficient.[28] Where the bailee sues for damages caused by a third party's carelessness to the subject-matter of the bailment, evidence of the amount paid by plaintiff to repair the damages is admissible.[29]

7. Questions For Jury. In an action by a bailor against a third person to recover property pledged to defendant by the bailee, where the question of the bailee's power to sell is at issue, if the evidence will support either of two inferences, that a power of sale was authorized, or that it was not, it is for the jury to try the inference, notwithstanding that the fact of the sale is undisputed.[30]

8. Damages. Where a third party has deprived the bailee of the possession of the property, or injured it, the bailee may recover the whole value of the property,[31] unless the bailor interposes by a suit for his own protection,[32] and will hold the excess beyond his special interest in trust for the bailor.[33]

23. White *v.* Phelps, 14 Minn. 27, 100 Am. Dec. 190.

24. Peters *v.* Peters, 3 Misc. (N. Y.) 264, 22 N. Y. Suppl. 764, 52 N. Y. St. 169.

25. Woodman *v.* Nottingham, 49 N. H. 387, 6 Am. Rep. 526. See also Pettigrew *v.* U. S., 97 U. S. 385, 27 L. ed. 1029.

26. Kellar *v.* Shippee, 45 Ill. App. 377.

27. Mizner *v.* Frazier, 40 Mich. 592, 29 Am. Rep. 562, holding that an allegation that a carriage injured was then and there lawfully used and driven by plaintiff was sufficient in the absence of a demurrer.

28. Pugh *v.* Calloway, 10 Ohio St. 488.

29. Schoenholtz *v.* Third Ave. R. Co., 14 Misc. (N. Y.) 461, 36 N. Y. Suppl. 15, 70 N. Y. St. 773.

30. Citroen *v.* Adam, 2 Silv. Supreme (N. Y.) 187, 5 N. Y. Suppl. 669, 24 N. Y. St. 263.

31. *Connecticut.*—Gillette *v.* Goodspeed, 69 Conn. 363, 37 Atl. 973; White *v.* Webb, 15 Conn. 302.

Illinois.— Benjamin *v.* Stremple, 13 Ill. 466.

Maine.— Moran *v.* Portland Steam Packet Co., 35 Me. 55; Little *v.* Fossett, 34 Me. 545, 56 Am. Dec. 671.

Maryland.— American Dist. Tel. Co. *v.* Walker, 72 Md. 454, 20 Atl. 1, 20 Am. St. Rep. 479.

Massachusetts.—White *v.* Allen, 133 Mass. 423; Finn *v.* Western R. Corp., 112 Mass. 524, 17 Am. Rep. 128.

Michigan.— Mizner *v.* Frazier, 40 Mich. 592, 29 Am. Rep. 562.

Minnesota.—Chamberlain *v.* West, 37 Minn. 54, 33 N. W. 114.

New Hampshire.—Woodman *v.* Nottingham, 49 N. H. 387, 6 Am. Rep. 526.

United States.— Knight *v.* Davis Carriage Co., 71 Fed. 662, 30 U. S. App. 664, 18 C. C. A. 287.

Where a bailee is entitled to use an article for a special purpose, the damages recoverable in case of an injury to the article cannot be measured by any criterion outside the strict right to use the article, nor can they be measured by any uncertain benefit that might accrue to him by the use of the article. Mizner *v.* Frazier, 40 Mich. 592, 29 Am. Rep. 562.

Articles bailed for specified time.— The value of the use of a bailed article from the time it is taken away from the bailee by a third party to the end of the time for which it was bailed may be recovered from the tort-feasor. Moore *v.* Winter, 27 Mo. 380.

Where a third person has not actually converted the bailed property to his own use, and the property is returned before suit is instituted, the bailee can recover only the value of his special interest in the bailed article. Eldridge *v.* Adams, 54 Barb. (N. Y.) 417.

32. Gillette *v.* Goodspeed, 69 Conn. 363, 37 Atl. 973.

33. *Connecticut.*—White *v.* Webb, 15 Conn. 302.

BAIL-PIECE. See Bail.

BAIRNS. In Scotch law, a term used to denote one's whole issue.[1]

BAIRN'S PART. In Scotch law, a third part of a deceased's free moveables, debt deducted, if his wife survive, and a half if she do not, due to his children.[2]

BAIT. To attack with violence; to harass by the help of others.[3]

BAKER. One whose occupation is to bake bread and other articles of food.[4] (Baker: License of Employment, see Licenses. Prohibition of Employment on Sunday, see Sunday. See, generally, Food.)

BALANCE.[5] The conclusion or result of the debit and credit sides of an account;[6] the difference between the debits and credits of an account;[7] the remainder of anything;[8] residue.[9] (See, generally, Accounts and Accounting.)

BALANCED. An ambiguous word 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.[10]

BALANCE OF TRADE. The difference between the value of the exports from and imports into a country.[11]

BALANCE-SHEET. A statement which should exhibit all the balances of debits and credits, the value of merchandise, and the result of the whole made by merchants and others to show the true state of a particular business;[12] a paper which shows a summation or general balance of all accounts but not the particular items going to make up the several accounts.[13]

BALDIO. In Spanish law, land that is neither arable nor pasture.[14]

BALIVO AMOVENDO. A writ to remove a bailiff from his office for want of sufficient land in the bailiwick.[15]

BALLAST. See Shipping.

Georgia.— Schley *v.* Lyon, 6 Ga. 530.

Illinois.— Benjamin *v.* Stremple, 13 Ill. 466.

Maine.— Moran *v.* Portland Steam Packet Co., 35 Me. 55.

Massachusetts.— Rindge *v.* Coleraine, 11 Gray (Mass.) 157.

Michigan.— Mizner *v.* Frazier, 40 Mich. 592, 29 Am. Rep. 562.

Minnesota.— Chamberlain *v.* West, 37 Minn. 54, 33 N. W. 114.

Mississippi.— Baggett *v.* McCormack, 73 Miss. 552, 19 So. 89, 55 Am. St. Rep. 554.

New Hampshire.— Woodman *v.* Nottingham, 49 N. H. 387, 6 Am. Rep. 526.

New York.— Mechanics', etc., Bank *v.* Farmers', etc., Nat. Bank, 60 N. Y. 40; Alt *v.* Weidenberg, 6 Bosw. (N. Y.) 176; Russell *v.* Butterfield, 21 Wend. (N. Y.) 300.

A bailee having a lien upon goods taken from his possession under process against his bailor can only recover to the extent of his special interest. Heard *v.* Brewer, 4 Daly (N. Y.) 136.

1. Burrill L. Dict.

2. Wharton L. Lex.

3. Johnson Dict. [*quoted* in Pitts *v.* Millar, L. R. 9 Q. B. 380, 382, 43 L. J. M. C. 96, 30 L. T. Rep. N. S. 328].

4. Com. *v.* Crowley, 145 Mass. 430, 432, 14 N. E. 459.

5. **"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, 19.

6. McWilliams *v.* Allan, 45 Mo. 573, 574.

Net balance in commercial usage as applied to the proceeds of the sale of stock means the balance of the proceeds after deducting the expenses incident to the sale. Evans *v.* Waln, 71 Pa. St. 69, 74.

7. Loeb *v.* Keyes, 156 N. Y. 529, 531, 51 N. E. 285.

8. Worcester Dict. [*quoted* in Lopez *v.* Lopez, 23 S. C. 258, 269].

9. Brooks *v.* Brooks, 65 Ill. App. 326, 331; Davis *v.* Hutchings, 15 Ohio C. C. 174, 177, 8 Ohio Cir. Dec. 52.

10. Wilde, C. J., in Finney *v.* Tootell, 5 C. B. 504, 509, 12 Jur. 291, 17 L. J. C. P. 158, 57 E. C. L. 504.

11. Wharton L. Lex.

12. Bouvier L. Dict.

13. Eyre *v.* Harmon, 92 Cal. 580, 584, 28 Pac. 779.

14. Burrill L. Dict.

15. Jacob L. Dict.

BALLASTAGE. A toll paid for the privilege of taking up ballast from the bottom of a port or harbor.[16]

BALLIUM. In old English law, bail.[17]

BALLOT.[18] A little ball used in giving votes;[19] a little ball or ticket used in voting privately, and, for that purpose, put into a box (commonly called a ballot-box) or some other contrivance;[20] any printed or written ticket used in voting;[21] a piece of paper, or suitable material with the name written or printed upon it, of the person to be voted for;[22] a bit of paper having printed or written thereon the designation of an office, and the name of a person to fill it;[23] a paper ticket containing the names of the persons for whom the elector intends to vote, and designating the office to which each person so named is intended by him to be chosen;[24] the act itself of giving votes;[25] a secret method of voting at elections;[26] secret voting by means of ball or ticket;[27] the act of voting by balls or tickets by putting the same into a box or urn.[28] (See, generally, ELECTIONS.)

BALLOT-BOX. A box or other contrivance for the receipt of ballots.[29]

BAN. A proclamation or public notice;[30] in Canadian law, a space within which certain privileges might be exclusively exercised and certain dues exacted.[31]

BANAL. In Canadian law, having qualities derived from a ban or privileged space; privileged.[32]

BANALITY. In Canadian law, a seigniorial right to exact certain dues or services within certain limits.[33]

BANC. Bench; the place where the court regularly sits; the full court.[34] (Banc: Sittings of Court In, see COURTS.)

BANCUS. The original name of the English court of common pleas.[35]

BANCUS REGINÆ. The court of queen's bench.[36]

BANCUS REGIS. The court of king's bench.[37]

BAND. A company of persons.[38]

BANDIT. A man outlawed.[39]

BANISHMENT. Transportation or exile by way of punishment for crime; expulsion or deportation by the political authority on the ground of expedi-

16. Wharton L. Lex.

17. Burrill L. Dict.

Used in the expression *quod imposuit commune ballium per nomen Eliz.*,— that she put in common bail by the name of Elizabeth, in Stroud *v.* Lady Gerrard, 1 Salk. 8.

18. "The word is of French origin, and has been adopted into the English language without any change in its meaning, so far as the authorities give us light." State *v.* Shaw, 9 S. C. 94, 138.

19. Williams *v.* Stein, 38 Ind. 89, 92, 10 Am. Rep. 97 [*quoting* Bouvier L. Dict.]; *In re* Voting Mach., 19 R. I. 729, 731, 36 Atl. 716, 36 L. R. A. 547.

20. Williams *v.* Stein, 38 Ind. 89, 92, 10 Am. Rep. 97 [*quoting* Bouvier L. Dict.].

21. Webster Int. Dict. [*quoted* in State *v.* Timothy, 147 Mo. 532, 535, 49 S. W. 499].

22. Daniel *v.* Simms, 49 W. Va. 554, 560, 39 S. E. 690.

23. Taylor *v.* Bleakley, 55 Kan. 1, 14, 39 Pac. 1045, 49 Am. St. Rep. 233, 28 L. R. A. 683.

24. People *v.* Holden, 28 Cal. 123, 137. See also Bourland *v.* Hildreth, 26 Cal. 161, 194 (where it is said that a ballot "in itself considered is nothing but a written note or communication from an elector addressed to the Government, expressing the choice of the elector, but which has not as yet been delivered"); Temple *v.* Mead, 4 Vt. 535, 541.

25. Williams *v.* Stein, 38 Ind. 89, 92, 10 Am. Rep. 97 [*quoting* Bouvier L. Dict.].

26. State *v.* Shaw, 9 S. C. 94, 138 [*citing* Webster Dict.; Worcester Dict.].

27. State *v.* Shaw, 9 S. C. 94, 138.

28. State *v.* Shaw, 9 S. C. 94, 138.

29. Williams *v.* Stein, 38 Ind. 89, 92, 10 Am. Rep. 97 [*quoting* Bouvier L. Dict.].

30. Jacob L. Dict.

31. Burrill L. Dict.

32. Burrill L. Dict.

33. Burrill L. Dict.

34. Black L. Dict.

35. Burrill L. Dict.

Bancus apud Westmonasterium,— the bench at Westminster — was the name by which this court was afterward distinguished. Burrill L. Dict.

36. Bouvier L. Dict.

37. Burrill L. Dict.

During the protectorate this court was known as "*bancus superior.*" Wharton L. Lex.

38. Guttman *v.* U. S., 9 Ct. Cl. 60, 67 [*affirmed* in 18 Wall. (U. S.) 84, 21 L. ed. 816], where it was said that it may perhaps mean a company of armed persons.

39. Wharton L. Lex.

ency.[40] (Banishment: Of Aliens, see ALIENS; WAR. Of Persons Accused of Crime in Other Jurisdictions, see EXTRADITION.)

BANJO. A musical instrument of the guitar class, having a neck with or without frets, and a circular body covered in front with tightly stretched parchment. It has from five to nine strings, of which the melody string, the highest in pitch, but placed outside of the lowest of the others, is played by the thumb of the performer. As in the guitar, the pitch of the strings is fixed by stopping them with the left hand while the right hand produces the tone by plucking or striking.[41]

BANK. A steep acclivity on the side of a lake, river, or the sea;[42] the continuous margin of a stream where vegetation ceases;[43] the outermost part of the bed in which the river naturally flows;[44] that space of ground above low water mark, which is usually covered by ordinary high water;[45] what contains the river in its natural channel when there is the greatest flow of water.[46] (See also BANKS AND BANKING.)

BANKABLE. Receivable at a bank;[47] receivable as the equivalent of cash at the bank; receivable for discount by a bank;[48] bank notes, checks, and other securities for money received as cash by the banks in the place where the word is used.[49]

BANK-ACCOUNT. A fund which merchants, traders, and others have deposited into the common cash of some bank, to be drawn out by checks, from time to time, as the owner or depositor may require.[50]

BANK-BILL. See BANK-NOTE.

BANK-BOOK. A book kept by a customer of a bank, showing the state of his account therewith.[51]

BANKER. See BANKS AND BANKING.

BANKER'S NOTE. A promissory note given by a private banker or banking institution, not incorporated, but in all other respects resembling a BANK-NOTE,[52] *q. v.*

BANKING. See BANKS AND BANKING.

BANK-NOTE or **BANK-BILL.**[53] A written promise on the part of the bank to pay to the bearer a certain sum of money, on demand;[54] obligations for the payment of money on demand, passing from hand to hand as money.[55] (See, generally, BANKS AND BANKING.)

BANKRUPT. See BANKRUPTCY.

40. Fong Yue Ting *v.* U. S., 149 U. S. 698, 709, 13 S. Ct. 1016, 37 L. ed. 905.

41. Dobson *v.* Cubley, 149 U. S. 117, 118, 13 S. Ct. 796, 37 L. ed. 671 [*citing* Century Dict.].

42. Hooper *v.* Hobson, 57 Me. 273, 275, 99 Am. Dec. 769.

43. McCullough *v.* Wainright, 14 Pa. St. 171, 174. See also Alabama *v.* Georgia, 23 How. (U. S.) 505, 16 L. ed. 556 [*citing* Johnson Dict.; Webster Dict.].

44. Harlan, etc., Co. *v.* Paschall, 5 Del. Ch. 435, 463. See also Howard *v.* Ingersoll, 13 How. (U. S.) 381, 427, 14 L. ed. 189.

45. Howard *v.* Ingersoll, 17 Ala. 780, 789.

46. Stowe *v.* Augusta, 46 Me. 127, 137 [*citing* Bouvier L. Dict.]; Paine Lumber Co. *v.* U. S., 55 Fed. 854, 864.

47. Webster Dict. [*quoted* in Edward P. Allis Co. *v.* Madison Electric Light, etc., Co., 9 S. D. 459, 464, 70 N. W. 650].

48. Anderson L. Dict. [*quoted* in Edward P. Allis Co. *v.* Madison Electric Light, etc., Co., 9 S. D. 459, 464, 70 N. W. 650].

49. Bouvier L. Dict. [*quoted* in Edward P. Allis Co. *v.* Madison Electric Light, etc., Co., 9 S. D. 459, 464, 70 N. W. 650], where it is said: "The word is also sometimes applied to promissory notes and bills of exchange in high credit, thereby denoting that they will be discounted by the banks."

50. Gale *v.* Drake, 51 N. H. 78, 84 [*quoting* Bouvier L. Dict.]. See also ACCOUNTS AND ACCOUNTING, 1 Cyc. 362, note 2.

51. Wharton L. Lex.

52. Bouvier L. Dict.

53. **The terms are convertible,** and mean the same thing.

Florida.— *Ex p.* Prince, 27 Fla. 196, 203, 9 So. 659, 26 Am. St. Rep. 67.

Indiana.— State *v.* Hays, 21 Ind. 176, 177 [*quoting* Webster Dict.].

Iowa.— Munson *v.* State, 4 Greene (Iowa) 483, 484.

Massachusetts.— Com. *v.* Stebbins, 8 Gray (Mass.) 492, 495; Eastman *v.* Com., 4 Gray (Mass.) 416, 418.

New York.— Low *v.* People, 2 Park. Crim. (N. Y.) 37, 41.

Texas.— See Roth *v.* State, 10 Tex. App. 27, 30.

Vermont.— State *v.* Wilkins, 17 Vt. 151, 156.

54. Townsend *v.* People, 4 Ill. 326, 328.

55. Low *v.* People, 2 Park. Crim. (N. Y.) 37, 41.

BANKRUPTCY

By James W. Eaton* and Frank B. Gilbert†

*Author of "Eaton's Equity Jurisprudence"; editor of the third edition of Collier's "Law and Practice in Bankruptcy"; late editor of the "American Bankruptcy Reports"; and late lecturer on Bankruptcy in the Albany Law School.

†Compiler of the "Domestic Relations Law of New York," the "New York Town and County Officers' Manual," etc.; and joint compiler of the "Annotated Insurance Laws of New York," the "General Laws and Other General Statutes of the State of New York," etc.

CROSS-REFERENCES

For Matters Relating to:

Assignments For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Insolvency, see INSOLVENCY.

I. GENERAL NATURE AND EFFECT OF BANKRUPTCY LAWS.

A. Definitions. A "bankrupt law" in modern legal significance means a statutory system under which an insolvent debtor[1] may either on his own petition[2] or that of his creditors[3] be "adjudicated bankrupt" by a court of competent jurisdiction,[4] which thereupon takes possession of his property, distributes it equally among his creditors, and discharges the bankrupt and his after-acquired property from debts existing at the initiation of the bankruptcy proceedings.[5] "Bankruptcy" means the status of one who has been made the subject of such a law.[6] A "bankrupt" includes a person against whom an involuntary petition or an application to set a composition aside, or to revoke a discharge, has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt.[7]

1. As to what constitutes insolvency see Bankr. Act (1898), § 1 (15), *infra*, note 8. See also Marvin *v.* Anderson, 111 Wis. 387, 87 N. W. 226, 6 Am. Bankr. Rep. 520, to the effect that "insolvency" as used in bankruptcy and insolvency laws means the inability of a person to pay his debts as they mature in the ordinary course of business; but that, as used in a general sense, it means a substantial excess of a person's liabilities over the fair cash value of his property.

2. As to voluntary proceedings see *infra*, VI, A.

3. As to involuntary proceedings see *infra*, VI, B.

4. As to courts and their jurisdiction see *infra*, II.

5. Black L. Dict. See also Anderson L. Dict.; Bouvier L. Dict.; Burrill L. Dict.; Rapalje & L. L. Dict.

6. Black L. Dict.; Bouvier L. Dict.; Cyclopedic L. Dict.; Rapalje & L. L. Dict. See also Sackett *v.* Andross, 5 Hill (N. Y.) 327, 339, 348, 3 N. Y. Leg. Obs. 11.

In its secondary sense the term "bankruptcy" refers to the system of law under which such a status is established. Black L. Dict. See also Anderson L. Dict.

7. Bankr. Act (1898), § 1 (4), *infra*, note 8. See also Barr *v.* Bartram, etc., Mfg. Co., 41 Conn. 502, 505; Anderson L. Dict.; Black L. Dict.; Bouvier L. Dict.; Rapalje & L. L. Dict.

Several derivations of the word "bankrupt" have been given. One is that it comes from the Italian words *banca rotta*, meaning

The meaning of the words and phrases used in the Bankruptcy Act of 1898 is defined by the Act itself.[8]

a broken bank or bench, and is said to have originated from the custom in Italy of breaking the bench or counter of a money-changer upon his failure. Century Dict.; 2 Bl. Comm. 472. Another derivation is Lord Coke's *banque route*, the latter word meaning a trace or track, and the combination signifying "one who hath removed his *banque*, leaving but a trace behind." 2 Bl. Comm. 472*n*. Judge Story, in Everett *v.* Stone, 3 Story (U. S.) 446, 453, 8 Fed. Cas. No. 4,577, says: "A bankrupt means a contemplation of becoming a broken up or ruined trader, according to the original signification of the term; a person whose table or counter of business is broken up, *bancus ruptus*."

8. Meaning of words and phrases.—Bankr. Act (1898), § 1, provides that the words and phrases used in the Act and in proceedings pursuant thereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the territories, and the supreme court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; (7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory and of Alaska; (9) "creditor" shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act; (13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the fourth of July, the twenty-second of February, and any day appointed by the President of the United States or the congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies or corporations; (20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or any one acting in his stead; (22) "conceal" shall include secrete, falsify, and mutilate; (23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) "states" shall include the territories, the Indian Territory, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and

B. History. Writers agree in finding the germ of modern bankruptcy statutes in the Roman *cessio bonorum*, under which the debtor, by surrender of his goods to his creditors, obtained exemption from imprisonment, and the harsh corporal punishment imposed by the Roman law upon insolvent debtors.[9] In England,[10] in the United States,[11] and in fact in nearly all civilized countries bankruptcy laws similar in essential characteristics have from time to time been enacted.[12]

C. Power to Enact — 1. Congress. The power vested in congress to enact national bankruptcy legislation arises from the provision of the constitution to the effect that "Congress shall have power . . . to establish . . . uniform laws on the subject of bankruptcies throughout the United States."[13]

women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things.

9. 2 Bl. Comm. 473 [*citing* Justinian Code 7, 71; Justinian Inst. lib. 4, tit. 6, § 60; Novellæ, 135, c. 1]. See also Mackeldey Rom. Law, § 767, *et seq.*; Sohm Inst. 211.

10. **English statutes.**— The earliest English statute was that of 34 & 35 Hen. VIII, c. 4, which was a criminal statute directed against fraudulent traders. But the first real bankruptcy laws were those of 4 Anne, c. 17, and 10 Anne, c. 15, under which bankruptcy proceedings became civil in their nature, administered by courts of equity, and granting to the bankrupt, who conformed to the provisions of the law, a discharge from his debts upon consent of a majority of his creditors. A large number of subsequent statutes have been passed, the most noteworthy of which was 24 & 25 Vict. c. 134, codifying former statutes and making the law applicable to non-traders, and which, with subsequent acts, was finally codified into the general bankruptcy acts of 1869 [32 & 33 Vict. c. 71] and of 1883 [46 & 47 Vict. c. 52], which, as amended from year to year, contain the present elaborate and complete system of bankruptcy legislation in England.

11. **United States statutes.**—In the United States there have been four bankruptcy laws, including the one now in force.

The first act was passed April 4, 1800, and repealed December 19, 1803. 2 U. S. Stat. at L. pp. 19, 248. It made no provision for voluntary bankruptcy and was only applicable to merchants, traders, bankers, etc.

The second of these laws was enacted August 19, 1841, and repealed March 3, 1843. 5 U. S. Stat. at L. pp. 440, 614. This act provided for both voluntary and involuntary bankruptcy and was broader in its provisions than the Act of 1800.

The third act was passed March 2, 1867, was subsequently amended June 22, 1874, and finally repealed to take effect September 1, 1878. 14 U. S. Stat. at L. p. 517; 20 U. S. Stat. at L. p. 99; U. S. Rev. Stat. (1878), §§ 4972–5132.

The law now in force in the United States was enacted July 1, 1898. 30 U. S. Stat. at L. p. 544. This act is in many respects similar to the Act of 1867, so that decisions under the earlier act have been constantly used in construing the Act of 1898. The act is supplemented by rules established by the United States supreme court, as to matters of practice, called General Orders, and also by official forms for use in such practice. See 89 Fed. iv; Collier Bankr. (3d ed.) 481 *et seq.*

12. See report of judiciary committee of the house of representatives, Dec. 16, 1897 [55th congress], for an enumeration of the countries having bankruptcy laws.

13. U. S. Const. art. i, § 8, cl. 4.

This grant of power to the federal government is a plenary grant, subject only to the provision that the bankruptcy legislation shall be uniform as to all the states. Mitchell *v.* Great Works Milling, etc., Co., 2 Story (U. S.) 648, 17 Fed. Cas. No. 9,662. In Silverman's Case, 2 Abb. (U. S.) 243, 245, 1 Sawy. (U. S.) 410, 22 Fed. Cas. No. 12,855, 13 Int. Rev. Rec. 52, 4 Nat. Bankr. Reg. 522, the court, in considering U. S. Const. art. 1, § 8, says: "If the language of this section means anything, it is something more than the power to re-enact the particular bankrupt act then in force in Great Britain. It is a grant of plenary power over the 'subject of bankruptcies.' Now the subject of bankruptcies includes the distribution of the property of the fraudulent or insolvent debtor among his creditors, and the discharge of the debtor from his contracts and legal liabilities, as well as all the intermediate and incidental matters tending to the accomplishment or promotion of these two principal ends. Congress is given full power over this subject, with the one qualification, that its laws thereon shall be uniform throughout the United States."

The uniformity required is geographical and not personal; and no limitation is imposed on congress as to the classification of persons who are to be affected by such laws, provided only the laws shall have uniform operation throughout the United States. Leidigh Carriage Co. *v.* Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383.

Constitutionality of former bankruptcy acts.— See the following cases:

Arkansas.— State Bank *v.* Wilborn, 6 Ark. 35.

Illinois.— Lalor *v.* Wattles, 8 Ill. 225.

Kentucky.— Columbia Bank *v.* Overstreet, 10 Bush (Ky.) 148.

Massachusetts.— Thompson *v.* Alger, 12 Metc. (Mass.) 428.

2. States. Except so far as congress shall exercise the power vested by the constitution, and subject to the restriction that no state may pass a law impairing the obligation of contracts, each state may pass laws in the nature of bankruptcy acts, operative within its own territorial limits.[14] The state laws have generally been called insolvency laws, while the federal acts, passed in accordance with the constitutional provision, have been known as bankruptcy laws.[15]

D. Effect of Federal Bankruptcy Laws Upon State Insolvency Laws. When the paramount jurisdiction of congress has once been exercised in the enactment of a bankruptcy law all state insolvency laws are suspended in so far as they relate to the same subject-matter and affect the same persons as the bankruptcy law.[16] But the state law is merely suspended during the life of the bank-

New Hampshire.— Cutter *v.* Folsom, 17 N. H. 139.

New York.— McCormick *v.* Pickering, 4 N. Y. 276.

United States.— Matter of Klein, 1 How. (U. S.) 277 note, 11 L. ed. 130; *In re* Reiman, 7 Ben. (U. S.) 455, 20 Fed. Cas. No. 11,673, 11 Nat. Bankr. Reg. 21; *In re* California Pac. R. Co., 3 Sawy. (U. S.) 240, 4 Fed. Cas. No. 2,315, 2 Centr. L. J. 79, 11 Nat. Bankr. Reg. 193; U. S. *v.* Pusey, 27 Fed. Cas. No. 16,098, 6 Nat. Bankr. Reg. 284; *In re* Jordan, 13 Fed. Cas. No. 7,514, 30 Leg. Int. (Pa.) 296, 5 Leg. Op. (Pa.) 169, 8 Nat. Bankr. Reg. 180.

See 6 Cent. Dig. tit. "Bankruptcy," § 1.

14. Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529. See also Pettit *v.* Seaman, 2 Root (Conn.) 178; Pugh *v.* Bussel, 2 Blackf. (Ind.) 394; Fisk *v.* Montgomery, 21 La. Ann. 446; Adams *v.* Storey, 1 Paine (U. S.) 79, 1 Fed. Cas. No. 66, 6 Am. L. J. (Hall's) 474.

Extent of state's authority.— The power of separate states to pass bankruptcy laws is undoubted, but they cannot, in the exercise of that power, act upon the rights of citizens of other states or countries. Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; 2 Kent Comm. 391.

15. Distinction between bankruptcy and insolvency.— A distinction has been made by judges and authors between bankruptcy and insolvency, which, however, has little importance at the present time. Black L. Dict. [*citing* Martin *v.* Berry, 37 Cal. 208; Sackett *v.* Andross, 5 Hill (N. Y.) 327; *In re* Black, 2 Ben. (U. S.) 196, 3 Fed. Cas. No. 1,457, 1 Am. L. T. Bankr. Rep. 39, 1 Nat. Bankr. Reg. 353]. It has been said that laws which merely liberate the person are insolvent laws, and those which discharge the contract are bankrupt laws; and that insolvency laws operate at the instance of an imprisoned debtor, and bankruptcy laws at the instance of a creditor. Per Marshall, C. J., in Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529.

The modern insolvency laws — obtaining in states like Massachusetts and others — however, practically cover the same scope within their own territorial limits as the bankruptcy laws. See, generally, Insolvency.

Under the early English law insolvency was a term confined to non-traders who were unable to pay their debts. All, however, who were traders, such as bankers, merchants, etc., were said under the same circumstances to be not insolvent but bankrupt. The traders were forced into the bankruptcy court upon petition of their creditors, while the non-traders, a broad and rather undefined class, made use of the insolvency court upon their own voluntary petition. It seems, however, that this purely technical distinction is unknown in the United States, where these two words have been used interchangeably by the courts and in common speech. See, generally, Insolvency; Bacon Abr. tit. Bankrupt; Bl. Comm. 473 *et seq.*; Comyns Dig. tit. Bankrupt; and *infra*, IV.

16. Rule explained.— So far as the state law administers upon the estate of an insolvent as a proceeding in the courts, the proceeding deriving its potency and force from the law itself and not from the voluntary act of the debtor, and where the estate is wound up judicially and the debtor discharged, the state law is undoubtedly suspended by a national bankruptcy law *ex proprio vigore*, as to all persons affected by the terms of the latter. Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529. See also the following cases decided under former acts:

Louisiana.— Fisk *v.* Montgomery, 21 La. Ann. 446.

Maryland.—Van Nostrand *v.* Carr, 30 Md. 128.

New Hampshire.— Rowe *v.* Page, 54 N. H. 190.

New York.— Boese *v.* Locke, 53 How. Pr. (N. Y.) 148.

Pennsylvania.— Com. *v.* O'Hara, 6 Phila. (Pa.) 402, 24 Leg. Int. (Pa.) 284, 3 Pittsb. (Pa.) 70.

Rhode Island.— Matter of Reynolds, 8 R. I. 485, 5 Am. Rep. 615.

United States.— *Ex p.* Eames, 2 Story (U. S.) 322, 8 Fed. Cas. No. 4,237, 5 Law Rep. 117, 1 N. Y. Leg. Obs. 212; *In re* Reynolds, 20 Fed. Cas. No. 11,723, 9 Nat. Bankr. Reg. 50.

See 6 Cent. Dig. tit. "Bankruptcy," §§ 7, 8.

The leading authorities under the present Act which hold a similar view and which cite with approval the leading cases under the former statute are: Barber *v.* Mexico International Co., 73 Conn. 587, 48 Atl. 758; Parmenter Mfg. Co. *v.* Hamilton, 172 Mass. 178,

ruptcy law, not repealed.[17] And the Act of 1898 expressly provides that "proceedings commenced under state insolvent laws before the passage of this Act shall not be affected by it."[18] On the other hand, a general assignment for the benefit of creditors by the debtor's voluntary common-law deed of assignment, conveying all his property subject to the payment of his debts for the equal benefit of all his creditors, but not providing for the release of the debtor, is valid except as against proceedings seasonably taken under the Bankruptcy Act to set it aside as an act of bankruptcy, even though such an assignment may be regulated and supplemented by legislative safeguards of the state where it is made or operates.[19]

51 N. E. 529, 70 Am. St. Rep. 258, 1 Am. Bankr. Rep. 39; Armour Packing Co. *v.* Brown, 76 Minn. 465, 79 N. W. 522; Foley-Bean Lumber Co. *v.* Sawyer, 76 Minn. 118, 78 N. W. 1038; *In re* John A. Etheridge Furniture Co., 92 Fed. 329, 1 Am. Bankr. Rep. 112; Davis *v.* Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; *In re* Smith, 92 Fed. 135, 2 Am. Bankr. Rep. 9; *In re* Curtis, 91 Fed. 737, 1 Am. Bankr. Rep. 440; *In re* Bruss-Ritter Co., 90 Fed. 651, 1 Am. Bankr. Rep. 58; *In re* Gutwillig, 90 Fed. 475, 1 Am. Bankr. Rep. 78; *In re* McKee, 1 Am. Bankr. Rep. 311; *In re* Adams, 1 Am. Bankr. Rep. 94.

17. **The authorities were in some conflict** at one time as to the extent of the suspension of the operation of the state insolvency laws, but the great weight of the decisions now is that after the passage of the Bankruptcy Act the insolvency laws are in complete abeyance. Laws passed while the Bankruptcy Act is on the statute books are not invalid, but rather they have no operative effect during that time. On the repeal, however, of the national law, the state bankruptcy statutes are again brought into full force and effect.

California.— Martin *v.* Berry, 37 Cal. 208.

Connecticut.— Ketcham *v.* McNamara, 72 Conn. 709, 46 Atl. 146, 50 L. R. A. 641, 6 Am. Bankr. Rep. 160.

Georgia.— Dodd *v.* Middleton, 63 Ga. 635.

Illinois.— Harbaugh *v.* Costello, 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147 [*affirming* 83 Ill. App. 29]; Wilson *v.* Aaron, 132 Ill. 238, 23 N. E. 1037.

Louisiana.— Orr *v.* Lisso, 33 La. Ann. 476.

Maine.— Palmer *v.* Hixon, 74 Me. 447.

Maryland.—Van Nostrand *v.* Carr, 30 Md. 128; Larrabee *v.* Talbott, 5 Gill (Md.) 426, 46 Am. Dec. 637; Clarke *v.* Ray, 1 Harr. & J. (Md.) 318.

Massachusetts.— Parmenter Mfg. Co. *v.* Hamilton, 172 Mass. 178, 51 N. E. 529, 70 Am. St. Rep. 258, 1 Am. Bankr. Rep. 39; Lyman *v.* Bond, 130 Mass. 291; Griswold *v.* Pratt, 9 Metc. (Mass.) 16.

New Hampshire.— Simpson *v.* City Sav. Bank, 56 N. H. 466, 22 Am. Rep. 491; Hawkins *v.* Learned, 54 N. H. 333; Rowe *v.* Page, 54 N. H. 190. *Compare* E. C. Wescott Co. *v.* Berry, 69 N. H. 505, 45 Atl. 352, 4 Am. Bankr. Rep. 264.

New York.—Boese *v.* Locke, 17 Hun (N. Y.) 270; Shears *v.* Solhinger, 10 Abb. Pr. N. S. (N. Y.) 287.

Washington.—State *v.* Kings County Super. Ct., 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177, 2 Am. Bankr. Rep. 92.

Wisconsin.— Segnitz *v.* Garden City Banking, etc., Co., 107 Wis. 171, 83 N. W. 327, 81 Am. St. Rep. 830.

United States.—Butler *v.* Goreley, 146 U. S. 303, 13 S. Ct. 84, 36 L. ed. 981; Tua *v.* Carriere, 117 U. S. 201, 6 S. Ct. 565, 29 L. ed. 855; Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529; *In re* Storck Lumber Co., 114 Fed. 360, 8 Am. Bankr. Rep. 86; *In re* Macon Sash, etc., Co., 112 Fed. 323, 7 Am. Bankr. Rep. 66 [*reversed*, on other grounds, in 8 Am. Bankr. Rep. 29]; *In re* Lengert Wagon Co., 110 Fed. 927, 6 Am. Bankr. Rep. 535; *In re* Curtis, 91 Fed. 737, 1 Am. Bankr. Rep. 440; *In re* Sievers, 91 Fed. 366, 1 Am. Bankr. Rep. 117; *In re* Bruss-Ritter Co., 90 Fed. 651, 1 Am. Bankr. Rep. 58.

18. Bankr. Act (1898), last clause.

19. Patty-Joiner, etc., Co. *v.* Cummins, 93 Tex. 598, 57 S. W. 566, 4 Am. Bankr. Rep. 269; Boese *v.* King, 108 U. S. 379, 2 S. Ct. 765, 27 L. ed. 760; Mayer *v.* Hellman, 91 U. S. 496, 23 L. ed. 377; *In re* Scholtz, 106 Fed. 834, 5 Am. Bankr. Rep. 782; *In re* Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496; *In re* Romanow, 92 Fed. 510, 1 Am. Bankr. Rep. 461; *In re* Sievers, 91 Fed. 366, 1 Am. Bankr. Rep. 117; *In re* Gutwillig, 90 Fed. 475, 1 Am. Bankr. Rep. 78. See also Armour Packing Co. *v.* Brown, 76 Minn. 465, 79 N. W. 522; Binder *v.* McDonald, 106 Wis. 332, 82 N. W. 156.

A general assignment for benefit of creditors is an act of bankruptcy, whether tainted with fraud or not. Bankr. Act (1898), § 3; Matter of Gray, 47 N. Y. App. Div. 554, 62 N. Y. Suppl. 618, 3 Am. Bankr. Rep. 647. See also *infra*, V. But where such assignment has been made and proceedings are not instituted in bankruptcy within the statutory four months thereafter, the state court may proceed to administer the estate under local statutes, and a trustee appointed in bankruptcy subsequent to the four months cannot attack such proceedings. Matter of Gray, 47 N. Y. App. Div. 554, 62 N. Y. Suppl. 618, 3 Am. Bankr. Rep. 647; George M. West Co. *v.* Lea, 174 U. S. 590, 19 S. Ct. 836, 43 L. ed. 1098, 2 Am. Bankr. Rep. 463; and cases cited *supra*, this note. The United States district court in Illinois, *In re* Curtis, 91 Fed. 737, 1 Am. Bankr. Rep. 440, held that where a state court has declared an act concerning assignments to be an insolvency law the federal

E. Interpretation. The Act of 1898 is a remedial statute and should be interpreted reasonably and according to the fair import of its terms with a view to effect its object and promote justice.[20]

II. COURTS AND THEIR JURISDICTION.

A. Original Bankruptcy Jurisdiction — 1. COURTS CREATED. The United States district courts in the several states, the supreme court of the District of Columbia, the district courts of the several territories and the federal courts in the Indian Territory and the District of Alaska are made courts of bankruptcy and are vested, within their territorial districts, with such jurisdiction at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings.[21]

2. TERRITORIAL EXTENT OF JURISDICTION — a. To Adjudge Certain Persons Bankrupt. The power to adjudge persons bankrupt extends to all persons who have their principal place of business, residence, and domicile within the respective territorial jurisdictions of the district courts for the greater portion of the six months preceding.[22] Bankruptcy courts also have jurisdiction over those who

courts will adopt this distinction and so hold it superseded by the Bankruptcy Act.

In Illinois the supreme court has held that since the Illinois Voluntary Assignment Act and the Bankruptcy Act of 1898 both operate upon the same subject-matter, to wit, the assets of the bankrupt, and upon the same persons, to wit, the bankrupt and his creditors, and in the same way and upon the same rights, to wit, the *pro rata* distribution of the assets among said creditors, they cannot be enforced together without direct and positive collision. It necessarily follows that the federal law suspends and supersedes the state law. Harbaugh *v.* Costello, 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147.

In Massachusetts it has also been held that the Bankruptcy Act of 1898 supersedes all state laws in regard to insolvency from the date of the passage of the statute, and that therefore insolvency proceedings commenced in the state court after the passage of that law are unauthorized. Parmenter Mfg. Co. *v.* Hamilton, 172 Mass. 178, 51 N. E. 529, 70 Am. St. Rep. 258, 1 Am. Bankr. Rep. 39.

20. Norcross *v.* Nathan, 99 Fed. 414, 3 Am. Bankr. Rep. 613; *In re* New York, etc., Water Co., 98 Fed. 711, 3 Am. Bankr. Rep. 508; *In re* Rhoads, 98 Fed. 399, 3 Am. Bankr. Rep. 380; Southern L. & T. Co. *v.* Benbow, 96 Fed. 514, 3 Am. Bankr. Rep. 9 [*citing* Houston *v.* New Orleans City Bank, 6 How. (U. S.) 486, 12 L. ed. 526; *In re* Kirtland, 10 Blatchf. (U. S.) 515, 14 Fed. Cas. No. 7,851]; Blake *v.* Francis-Valentine Co., 89 Fed. 691, 1 Am. Bankr. Rep. 372. See also Costello *v.* Harbaugh, 83 Ill. App. 29 [*affirmed* in 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147]; Ripon Knitting Works *v.* Schreiber, 101 Fed. 810, 4 Am. Bankr. Rep. 299; *In re* Terrill, 100 Fed. 778, 4 Am. Bankr. Rep. 145.

For analogous decisions under former acts see 6 Cent. Dig. tit. "Bankruptcy," § 3.

Time of taking effect.— The Bankruptcy Act of 1898 operated at and from the time of its passage. Bankr. Act (1898), last clause; *In re* Adams, 1 Am. Bankr. Rep. 94. See also Parmenter Mfg. Co. *v.* Hamilton, 172 Mass. 178, 51 N. E. 529, 70 Am. St. Rep. 258, 1 Am. Bankr. Rep. 39. For analogous decisions under former acts see 6 Cent. Dig. tit. "Bankruptcy," § 2.

21. Bankr. Act (1898), § 2.

These courts are always open for that purpose. Bankr. Act (1898), § 2.

Bankruptcy courts are purely statutory in their origin and their powers and jurisdiction are conferred by statute alone. Clark *v.* Binninger, 1 Abb. N. Cas. (N. Y.) 421, 38 How. Pr. (N. Y.) 341, 3 Nat. Bankr. Reg. 518; Norris' Case, 1 Abb. (U. S.) 514, 18 Fed. Cas. No. 10,304, 3 Am. L. T. 216, 1 Am. L. T. Bankr. Rep. 227, 4 Nat. Bankr. Reg. 35. See also the following cases:

Alabama.— Steele *v.* Moody, 53 Ala. 418.

Indiana.— Sherwood *v.* Burns, 58 Ind. 502.

Iowa.—Wright *v.* Watkins, 2 Greene (Iowa) 547.

Maryland.— Newman *v.* Fisher, 37 Md. 259.

Pennsylvania.—Zeigler *v.* Shomo, 78 Pa. St. 357.

See 6 Cent. Dig. tit. "Bankruptcy," § 11.

They are not inferior courts, however, in the sense that it is necessary that their jurisdiction should appear upon the face of the papers. Bryant *v.* Kinyon, (Mich. 1901) 86 N. W. 531, 53 L. R. A. 801, 6 Am. Bankr. Rep. 237; Chemung Canal Nat. Bank *v.* Judson, 8 N. Y. 254, Seld. Notes (N. Y.) 49; *In re* Elmira Steel Co., 109 Fed. 456, 5 Am. Bankr. Rep. 484; *In re* Columbia Real-Estate Co., 101 Fed. 965, 4 Am. Bankr. Rep. 411.

22. Bankr. Act (1898), § 2 (1).

Residence and domicile.—The word "domicile" means in its general significance the place of permanent abode; the place to which one claiming it when absent intends to return, in contradistinction to a residence which may be merely a temporary abode. *In re* Dinglehoef, 109 Fed. 866, 6 Am. Bankr. Rep. 242; *In re* Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 160; *In re* Berner, 3 Am. Bankr. Rep. 325; *In re* Clisdell, 2 Am. Bankr. Rep. 424. Under the Act of 1867 it was provided that

have no principal place of business, residence, or domicile within the United States, but have property within the territorial jurisdiction of such courts, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within the territorial jurisdiction of such courts.[23]

b. To Transfer Cases. If petitions are filed against the same person or against different members of a partnership in different courts of bankruptcy, each of which has jurisdiction, the cases shall be transferred by order of the court relinquishing jurisdiction, to be consolidated by the court which can proceed for the greatest convenience of the parties in interest.[24]

3. Trials by Jury. The bankruptcy court is a court of equity, and a jury trial is not granted as a matter of right in civil matters arising under the Act except that a person against whom an involuntary petition has been filed is entitled to have a trial by a jury in respect to the question of his insolvency. He must, however, file a written application therefor at or before the expiration of the time within which an answer may be filed.[25] The right to submit matters in contro-

the courts might adjudge as bankrupts persons who had "resided or carried on business for the six months next immediately preceding the time of filing such petition, or for the longest period during such six months." Questions frequently arose under this provision as to what constituted a residence. The framers of the present Act evidently intended to settle these questions by inserting the word "domicile." In the recent case of *In re* Dinglehoef, 109 Fed. 866, 868, 6 Am. Bankr. Rep. 242, it is said that "residence indicates permanency of occupation, as distinct from lodging or boarding or temporary occupation, but does not include as much as domicile, which requires an intention continued with residence." A domicile once acquired is presumed to continue until it is shown to have been changed. Where a change of domicile is alleged, the burden of proving it rests upon the person making the allegation. To constitute new domicile, two things are indispensable: First, residence in the new locality; and second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mitchell *v.* U. S., 21 Wall. (U. S.) 350, 22 L. ed. 584. So a person who flees from his previous domicile to escape prosecution for a criminal offense does not thereby lose his domicile within the meaning of the Bankruptcy Act. *In re* Filer, 108 Fed. 209, 5 Am. Bankr. Rep. 332. See also De Meli *v.* De Meli, 120 N. Y. 485, 24 N. E. 996, 31 N. Y. St. 704, 17 Am. St. Rep. 652; Anderson *v.* Watt, 138 U. S. 694, 11 S. Ct. 449, 34 L. ed. 1078; Morris *v.* Gilmer, 129 U. S. 315, 9 S. Ct. 289, 32 L. ed. 690; Desmare *v.* U. S., 93 U. S. 605, 23 L. ed. 959; Chambers *v.* Prince, 75 Fed. 176; and, generally, Domicile.

The expression "greater portion of six months" means any residence of at least three months' duration during the six months prior to the beginning of a proceeding. *In re* Berner, 3 Am. Bankr. Rep. 325 [*disapproving In re* Stokes, 1 Am. Bankr. Rep. 35]; *In re* Ray, 2 Am. Bankr. Rep. 158.

23. Bankr. Act (1898), § 2 (1).

The power to declare aliens bankrupt who have property within the jurisdiction of the court is very clearly conferred by the Act. See *infra*, IV, A, 2. Under the Act of 1867 the benefits of a discharge in bankruptcy were extended to resident aliens only. As to the effect of a discharge in a foreign court of bankruptcy see *infra*, XIX, H.

24. Bankr. Act (1898), § 32. See also Bankr. Act (1898), § 22, giving a judge authority, where he has made a reference of a case to a referee, to transfer such case from one referee to another, at any time, for the convenience of parties or for cause. See also *infra*, VIII, B.

In case two or more petitions are filed against the same individual in different districts, the first hearing is to be had in the domicile of the debtor. And in case two or more petitions against the same partnership are filed in different courts the petition first filed shall be first heard. In either event the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date; and the court which makes the first adjudication in bankruptcy may retain jurisdiction to the end, unless it deems it for the better convenience of the parties that the cases be transferred to another court having jurisdiction. U. S. Supreme Ct. Bankr. G. O. No. 6; *In re* Waxelbaum, 98 Fed. 589, 3 Am. Bankr. Rep. 392.

25. Bankr. Act (1898), § 19*a*; *In re* Christensen, 101 Fed. 802, 4 Am. Bankr. Rep. 202; Simonson *v.* Sinsheimer, 100 Fed. 426, 40 C. C. A. 474, 3 Am. Bankr. Rep. 824; Bray *v.* Cobb, 91 Fed. 102, 1 Am. Bankr. Rep. 153. See also *infra*, VI, B, 6, a, (III).

Framing issues.— There is, however, no doubt that the bankruptcy court, as any other court of equity, may frame issues for submission to a jury to aid the court in arriving at a correct conclusion, although it is not bound by the finding of such jury. Barton *v.* Barbour, 104 U. S. 126, 26 L. ed. 672.

If a jury is not in attendance upon the court one may be specially summoned for the trial, or the case may be postponed, or if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States it may be certified for trial

versy, or an alleged offense under the Act, to a jury is to be determined and enjoyed, except as otherwise provided in that Act,[26] according to the laws of the United States.[27]

B. General Powers of Bankruptcy Courts — 1. To Adjudge Certain Persons Bankrupt. The territorial extent of the jurisdiction of bankruptcy courts to adjudge persons bankrupt has been considered.[28] Questions concerning acts of bankruptcy, who may become bankrupts, and proceedings prior to and after adjudication will be hereinafter discussed.[29]

2. To Allow or Disallow Claims. Courts of bankruptcy are authorized to allow or disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates.[30]

3. To Appoint and Remove Trustees. Pursuant to the recommendations of creditors, or when they neglect to recommend the appointment of trustees,[31] courts of bankruptcy may appoint trustees, and, upon complaints of creditors, remove such trustees for cause upon hearings and after notice to them.[32] It must be necessarily inferred from the above provisions of the Act that the creditors are in all cases to be given an opportunity to appoint trustees, and that the court is only authorized to appoint where they neglect or fail to do so.[33]

to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance. Bankr. Act (1898), § 19*b*.

Form of order for jury trial is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 7, 89 Fed. xxx.

26. **Where the matters in controversy are of legal, as distinguished from equitable, cognizance,** the right of parties to trial by jury is expressly preserved. *In re* Baudouine, 101 Fed. 574, 41 C. C. A. 318, 3 Am. Bankr. Rep. 651; *In re* Russell, 101 Fed. 248, 41 C. C. A. 323, 3 Am. Bankr. Rep. 658.

27. Bankr. Act (1898), § 19*c*.

28. See *supra*, II, A, 2, a.

29. See *infra*, IV, V, VI, *et seq.*; and Bankr. Act (1898), § 2 (1).

30. Bankr. Act. (1898), § 2 (2).

As to proof and allowance of claims see Bankr. Act (1898), § 57; and *infra*, XI.

As to provable claims see Bankr. Act (1898), § 63; and *infra*, XI, A.

31. **Creditors may appoint one or three** trustees. They are to appoint at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, after an estate has been reopened, after a composition has been set aside, or a discharge revoked. If the creditors do not appoint trustees the courts are required to do so. Bankr. Act (1898), § 44. See also *infra*, XII, A, 1.

Approval of appointment.— The appointment of a trustee by creditors is subject to the approval or disapproval of the referee or judge. U. S. Supreme Ct. Bankr. G. O. No. 13. See also *infra*, XII, A, 1, a, (II).

32. Bankr. Act (1898), § 2 (17).

As to the qualifications, powers, duties, and liabilities of trustees see *infra*, XII, B, *et seq.*

33. *In re* Lewensohn, 98 Fed. 576, 3 Am. Bankr. Rep. 299. See also *infra*, XII, A, 1, a, b.

Appointment by court.— Under the Act of 1867, Blatchford, J., in *In re* Smith, 2 Ben. (U. S.) 113, 22 Fed. Cas. No. 12,971, 1 Nat. Bankr. Rep. 243, said: "The policy of the bankrupt act, as clearly shown in its provisions, is, to give to the creditors of the bankrupt the free, deliberate, unbiased choice, in the first instance, of the person who is to take the assets and manage them. . . . The importance of this policy has been uniformly recognized by this court. . . . It is especially incumbent upon registers (referees under act of 1867) in no manner to interfere with, or influence, either directly or indirectly, the choice of an assignee by creditors." Judge Brown, in *In re* Lewensohn, 98 Fed. 576, 3 Am. Bankr. Rep. 299, *supra*, remarked that this general intent is still more strongly manifested by the Act of 1898, since the latter Act has largely curtailed the former power of the court to appoint, and correspondingly extended the right of creditors.

Where the creditors fail to use their power of appointment for any cause, the court may appoint a trustee; and **the word "court" is** construed to include the referee. *In re* Brooke, 100 Fed. 432, 4 Am. Bankr. Rep. 50.

Where it appeared that the creditors, after two meetings, one of six hours' duration, had failed to agree upon a trustee, and there was apparent need of a trustee at once, it was held that the referee might properly appoint a trustee. *In re* Kuffler, 97 Fed. 187, 3 Am. Bankr. Rep. 162.

Where creditors are less than a majority.— Where, at a meeting of creditors for the purpose of electing a trustee, proxies were presented for such election, and enough of the proxies were disallowed, because of defective execution, to reduce the number of creditors to less than a majority in number and amount of the claims presented and allowed, the creditors cannot elect a trustee, but he must be appointed by the referee. *In re* Henschel, 109 Fed. 861, 6 Am. Bankr. Rep. 305. See also X, C, 3.

4. To Bring in and Substitute Additional Parties. Courts of bankruptcy may bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy.[34]

5. To Close and Reopen Estates. Courts of bankruptcy may close[35] estates whenever it appears that they have been fully administered, by proving the final accounts and discharging the trustees, and reopen[36] them whenever it appears that they were closed before being fully administered.[37]

6. To Collect Claims and Determine Controversies. The court may cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto,[38] except as herein otherwise provided.[39] It is also provided that such courts may make such orders and issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of the Act;[40] and may enforce

Where majority in number of the creditors vote for one person and majority in amount for another, it is proper for the referee to appoint as trustee the person who received the majority in number of the creditors' votes. *In re* Richards, 103 Fed. 849, 4 Am. Bankr. Rep. 631.

34. Bankr. Act (1898), § 2 (6).

For other provisions relating to parties in bankruptcy proceedings see *infra*, VI, A, 1, a, (I); VI, B, 1, c; VI, B, 5, c, (II).

As a bankruptcy proceeding is a proceeding in rem all persons interested in the *res* are regarded as parties to the proceeding. These parties may be not only the bankrupt and trustee, but also all the creditors of the bankrupt, both secured and unsecured. Southern L. & T. Co. *v.* Benbow, 96 Fed. 514, 3 Am. Bankr. Rep. 9; Carter *v.* Hobbs, 92 Fed. 594, 1 Am. Bankr. Rep. 215. As to the right of creditors to file answers to a voluntary petition in bankruptcy see *In re* Jehu, 94 Fed. 638, 2 Am. Bankr. Rep. 498; and VI, A, 1, d.

The power to bring in additional parties should not be construed to extend the jurisdiction of the court of bankruptcy to those controversies not brought within the court's jurisdiction. *In re* Ward, 104 Fed. 985, 5 Am. Bankr. Rep. 215; *In re* Hammond, 98 Fed. 845, 3 Am. Bankr. Rep. 466; *In re* Brodbine, 93 Fed. 643, 2 Am. Bankr. Rep. 53.

Trustees under a will, having no adverse interest, may properly be made parties to a bankruptcy proceeding so as to be bound by the decree. *In re* Baudouine, 96 Fed. 536, 3 Am. Bankr. Rep. 55 [*overruled* by the circuit court of appeals in 101 Fed. 574, 41 C. C. A. 318, 3 Am. Bankr. Rep. 651, upon the question as to the original jurisdiction of district courts to determine controversies in cases involving adverse claims of third parties to the bankrupt's property, where it was said, however, that the jurisdiction of the district courts as courts of bankruptcy to adjudge the rights and titles of persons not parties to the bankruptcy proceeding who claim property adversely to the bankrupt, or in hostility to the trustee, if given at all is conferred by Bankr. Act (1898), § 2 (6), (7)].

35. Trustees must close up the estates of bankrupts as expeditiously as is compatible with the best interests of parties in interest. Bankr. Act (1898), § 47*a* (2). See also *infra*, XII, D, 3.

36. It is the duty of the court to reopen the estate whenever it satisfactorily appears that there are assets of the bankrupt which have not been administered. When such facts are produced as will justify the court in making an order reopening the estate, such order should be made by the court as the first step toward the further administration of the bankrupt's estate. *In re* Newton, 107 Fed. 429, 46 C. C. A. 399, 6 Am. Bankr. Rep. 52, where it was held that the petition to reopen an estate need not be of a formal or technical character, but it must be, either in itself or in connection with supporting affidavits, of such persuasive character as to reasonably satisfy the court of the requisite jurisdictional fact, namely, that there are some assets belonging to the bankrupt which have not been administered.

37. Bankr. Act (1898), § 2 (8).

38. Bankr. Act (1898), § 2 (7). See also *infra*, XVIII, A.

39. The exercise of the power of bankruptcy courts to collect the estates of bankrupts and reduce them to money should be subjected to the requirement that suits by trustees must be brought in the courts where the bankrupt might have brought them if proceedings in bankruptcy had not been instituted, unless power is conferred by the consent of the proposed defendant. Bankr. Act (1898), § 23*b*. See also *infra*, XVIII, A. The exception contained in Bankr. Act (1898), § 2 (7), refers to provisions of section 23, by virtue of which the district court can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy against third persons to recover property fraudulently conveyed by the bankrupt to them before the institution of proceedings in bankruptcy. Bryan *v.* Bernheimer, 181 U. S. 188, 21 S. Ct. 557, 45 L. ed. 814, 5 Am. Bankr. Rep. 623; Hicks *v.* Knost, 178 U. S. 541, 20 S. Ct. 1006, 44 L. ed. 1183, 4 Am. Bankr. Rep. 178; Mitchell *v.* McClure, 178 U. S. 539, 20 S. Ct. 1000, 44 L. ed. 1182, 4 Am. Bankr. Rep. 177; Bardes *v.* Hawarden First Nat. Bank, 178 U. S. 524, 20 S. Ct. 1000, 44 L. ed. 1175, 4 Am. Bankr. Rep. 163.

40. Bankr. Act (1898), § 2 (15).

obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment, or fine and imprisonment.[41]

7. To Confirm or Reject Compositions. The bankruptcy court may confirm or reject compositions between bankrupts and their creditors, and set aside compositions and reinstate cases.[42]

8. To Confirm, Overrule, etc., Findings of Referees. Courts of bankruptcy may consider and confirm, modify and overrule, or return with instructions for further proceedings, records, and findings certified to them by referees.[43]

9. To Determine Claims of Bankrupts to Exemptions. Bankruptcy courts may determine all claims of bankrupts to their exemptions.[44] The Bankruptcy Act does not affect the allowances to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition.[45]

10. To Discharge or Refuse to Discharge. Courts of bankruptcy may discharge or refuse to discharge bankrupts, and set aside discharges and reinstate the cases.[46]

11. To Extradite Bankrupts. Courts of bankruptcy may extradite bankrupts as provided by section 2[47] and section 10 of the Act.[48]

12. To Preserve the Estate — a. Appointment of Receivers or Marshals. The Act of 1898 expressly authorizes bankruptcy courts to appoint receivers or the marshals, in certain cases, to take charge of and preserve the estate.[49] And independent of such express delegation of authority, courts of bankruptcy may, by virtue of their general equity powers, appoint receivers and preserve the estate of bankrupts by taking it into their legal custody.[50]

41. Bankr. Act (1898), § 2 (13). See also *infra*, III, D, 7.

42. Bankr. Act (1898), § 2 (9).

As to when compositions will be confirmed and when set aside see Bankr. Act (1898), §§ 12, 13; and *infra*, XIV.

The authority conferred upon the court by Bankr. Act (1898), § 2 (9), is limited by sections 12, 13, and the court has no power to confirm or reject a composition except as provided in section 12, nor has it power to set it aside except as provided in section 13.

43. Bankr. Act (1898), § 2 (10).

For appointment, qualifications, powers, and duties of referees see *infra*, III, D.

Referees being quasi-judicial officers and under bonds for the faithful performance of their duties, their decisions should not be lightly treated, but be given the consideration due to conclusions reached by conscientious officers seeking to discharge their duties to the best of their ability; and they should not be reversed except upon clear and convincing proof of error, and especially as to the findings of fact, and when they have seen the witnesses and have heard them testify. *In re* Covington, 110 Fed. 143, 6 Am. Bankr. Rep. 373.

44. Bankr. Act (1898), § 2 (11). See also *infra*, XV, B.

This power is to be exercised without enlargement or diminution of such exemptions as allowed by the laws of the state where the bankrupt has his domicile. *In re* Woodard, 95 Fed. 260, 2 Am. Bankr. Rep. 339.

It is the duty of the bankrupt to include in his schedules a claim for such exemptions as he may be entitled to. Bankr. Act (1898), § 7 (8). See also U. S. Supreme Ct. Bankr. Forms, No. 1, schedule B (5).

45. Bankr. Act (1898), § 6. See also *infra*, XV, A.

46. Bankr. Act (1898), § 2 (12). See *infra*, XIX.

For forms of petitions for discharges, specification of grounds in opposition thereto, and the discharge itself see U. S. Supreme Ct. Bankr. Forms, Nos. 57–59.

47. Bankr. Act (1898), § 2 (14); *In re* Ketchum, 5 Am. Bankr. Rep. 532 [*distinguishing In re* Lipke, 98 Fed. 970, 3 Am. Bankr. Rep. 569]. See also *infra*, XVII, D.

48. Bankr. Act (1898), § 10; U. S. Rev. Stat. (1878), § 1014.

49. Bankr. Act (1898), §§ 2 (3); 69. See also *infra*, III, C; VI, B, 9.

This power is for the purpose of enabling courts of bankruptcy to take possession of the property of a bankrupt before adjudication. The title of trustee in the bankrupt's estate only vests from the time of the adjudication. Bankr. Act (1898), § 70. See also *infra*, XII, F. But from the time of filing the petition, in a case of voluntary bankruptcy the estate is *in custodia legis*, and therefore under the protection and control of the court. *In re* Abrahamson, 1 Am. Bankr. Rep. 44. See also *infra*, XII, F, 2.

50. Independent of statutory provision.— Cox *v.* Wall, 99 Fed. 546, 3 Am. Bankr. Rep. 664; *In re* Fixen, 96 Fed. 748, 2 Am. Bankr. Rep. 822; *In re* John A. Etheridge Furniture Co., 92 Fed. 329, 1 Am. Bankr. Rep. 112; Davis *v.* Bohle, 92 Fed. 325, 34 C. C. A.

b. Continuance of Business. Such courts may authorize the business of bankrupts to be continued for limited periods by receivers, marshals, or trustees, if necessary for the best interests of the estates.[51]

13. To Punish For Contempt. Such courts may punish persons for contempts committed before referees.[52] This power of the court to punish for contempt and disobedience of its lawful orders is inherent in every court of general jurisdiction. Without such power the orders of the court would be non-enforceable, and would command neither respect nor obedience. It rests upon the fundamental principles of judicial establishments, and is inseparable from the existence as well as the usefulness of a court of general jurisdiction.[53]

14. To Punish For Violations of Act. Courts of bankruptcy may arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors, or trustees, or other similar controlling bodies of corporations, for violations of the Act, in accordance with the laws of procedure of the United States in force at the time of its enactment or thereafter enacted, regulating trials for the alleged violation of laws of the United States.[54]

372, 1 Am. Bankr. Rep. 412. See also *infra*, III, C.

Receivers of property transferred by general assignment.— A receiver may be appointed by a court of bankruptcy to take charge of property transferred by a general assignment to an assignee under a state law. The fact that such property is being administered by a state court is not sufficient reason why such court should not assume jurisdiction by the appointment of a receiver. To allow the bankrupt to select the trustee to administer upon his estate, instead of the creditors, as provided in the Bankruptcy Act, or to allow the state court to take jurisdiction of the estate of the bankrupt and administer and distribute it, would effectually destroy the efficiency of any bankruptcy act that might be enacted by congress, and thus destroy the power vested in congress to pass such an act. *In re* John A. Etheridge Furniture Co., 92 Fed. 329, 1 Am. Bankr. Rep. 112. A person holding property by virtue of a general assignment for the benefit of creditors does not hold such property under any claim of right in himself, but simply as an agent for the debtor for the distribution of the proceeds of such property. An order may be issued where property has been so assigned for the appointment of a marshal to take charge of such property after the adjudication and before the qualification of a trustee. Bryan *v.* Bernheimer, 181 U. S. 188, 12 S. Ct. 557, 45 L. ed. 814, 5 Am. Bankr. Rep. 623.

51. Bankr. Act (1898), § 2 (5). See also *infra*, III, B, C; VI, B, 9; XII, D.

52. Bankr. Act (1898), § 2 (16). See also *infra*, III, D, 7.

Bankr. Act (1898), § 41a, prescribes what constitutes a contempt, and subdivision *b* of the same section provides the practice for the punishment thereof. See also *infra*, III, D, 7.

53. Watson *v.* Williams, 36 Miss. 331; *In re* Knaup, 144 Mo. 653, 46 S. W. 151, 66 Am. St. Rep. 435; *Ex p.* Crenshaw, 80 Mo. 447; U. S. *v.* Hudson, 7 Cranch (U. S.) 32, 3 L. ed. 259; 4 Bl. Comm. 286.

See also, generally, Contempt.

Commitment of bankrupt for refusal to deliver over property to trustee.— If it appears to the satisfaction of the referee or the court that property of the bankrupt estate is in possession of the bankrupt, a lawful order for its delivery to the trustee may be made, and a refusal to obey this order may be punished as contempt of court, both under the general law relating to contempts and under the special provisions of the Bankruptcy Act. The contention that the commitment of a bankrupt for failure to comply with such an order constitutes imprisonment for debt and therefore is violative of a constitutional provision is untenable. *In re* Rosser, 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153. See also Ripon Knitting Works *v.* Schreiber, 101 Fed. 810, 4 Am. Bankr. Rep. 299; *In re* Purvine, 96 Fed. 192, 37 C. C. A. 446, 2 Am. Bankr. Rep. 787. An order for the delivery by the bankrupt of the assets of the estate to his trustee in bankruptcy is in no proper sense a judgment or decree for the payment of a debt. If the enforcement of an order for the delivery to the trustee in bankruptcy of the assets of an estate which had been converted into money could not be had except by an execution the power of the bankruptcy court would be minimized, and the assets of estates in bankruptcy would be subject to great reduction. *In re* Schlesinger, 102 Fed. 117, 42 C. C. A. 207, 4 Am. Bankr. Rep. 361.

Notice to bankrupt.— In *In re* Rosser, 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153, which upholds the power of bankruptcy courts to imprison bankrupts for failure to obey orders directing them to turn over to the trustee property belonging to the bankrupt estate, it was held that before such a bankrupt can be punished for such failure to obey the order of the court he must be given notice and an opportunity to contest the questions of fact presented, and a chance to be heard upon the questions of law involved.

54. Bankr. Act (1898), § 2 (4). *Compare* Bankr. Act (1898), § 29.

The United States circuit courts have concurrent jurisdiction with courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in the Act.[55] All the offenses arising under the Act which are punishable by imprisonment for more than one year are to be presented by indictment.[56] It is also provided that a person shall not be prosecuted for any offense arising under the Act unless the indictment is found or the information is filed in court within one year after the commission of the offense.[57]

15. To Tax Costs. Bankruptcy courts may tax costs whenever they are allowed by law, and render judgments therefor, against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against the estates in proceedings in bankruptcy.[58]

C. Jurisdiction of Other Courts in Matters of Bankruptcy — 1. United States Circuit Courts — a. In Civil Matters — (i) *Statutory Provision.* United States circuit courts have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees, as such,[59] and adverse claimants, concerning the property acquired or claimed by

As to offenses by bankrupts see *infra*, XXI, A.

As to offenses by referees see *infra*, XXI, B.

As to offenses by trustee see *infra*, XXI, B.

55. Bankr. Act (1898), § 23*c*; and see *infra*, II, C, 1, b.

56. Mackin *v.* U. S., 117 U. S. 348, 6 S. Ct. 777, 29 L. ed. 909; *Ex p.* Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. ed. 89.

It was held under Bankr. Act (1867), § 44, making the wilful and fraudulent omission of assets from the schedules a misdemeanor, that a proceeding against the offending bankrupt might be by information and not by indictment. U. S. *v.* Block, 4 Sawy. (U. S.) 211, 24 Fed. Cas. No. 14,609, 9 Chic. Leg. N. 234, 15 Nat. Bankr. Reg. 325.

Sufficiency of indictment.— An indictment under Bankr. Act (1867), § 44, was held insufficient where it omitted the name of the court, and failed to state the time or place where the proceedings in bankruptcy were instituted. U. S. *v.* Latorre, 8 Blatchf. (U. S.) 134, 26 Fed. Cas. No. 15,567. See also U. S. *v.* Prescott, 2 Abb. (U. S.) 169, 2 Biss. (U. S.) 325, 27 Fed. Cas. No. 16,084, 9 Am. L. Reg. N. S. 481, 4 Nat. Bankr. Reg. 112, 18 Pittsb. Leg. J. (Pa.) 21. It is not necessary that an indictment for perjury by a petitioner in bankruptcy should set out the petition at length. U. S. *v.* Deming, 4 McLean (U. S.) 3, 25 Fed. Cas. No. 14,945. But such an indictment must include direct and specific allegations negativing the truth of the alleged false testimony, together with affirmative averments setting up the truth by way of antithesis. An indictment which charges the accused of having committed perjury by falsely omitting from his schedules in bankruptcy certain of his property must not only allege that his deposition was false in that regard, but it must go further and allege that he had other property and describe the property so omitted; otherwise it does not inform him of the offense with which he is charged, and does not contain proper averments to falsify the matter wherein the perjury is assigned. Bartlett *v.* U. S., 106 Fed. 884, 46 C. C. A. 19, 5 Am. Bankr. Rep. 678 [*citing* U. S. *v.* Morgan, Morr. (Iowa) 341, 41 Am. Dec. 234].

57. Bankr. Act (1898), § 29*d*. See also *infra*, XXI, C.

58. Bankr. Act (1898), § 2 (18); U. S. Supreme Ct. Bankr. G. O. No. 37.

For fees: Of clerks and marshals see Bankr. Act (1898), § 52; U. S. Supreme Ct. Bankr. G. O. No. 35. Of referees see Bankr. Act (1898), § 40; U. S. Supreme Ct. Bankr. G. O. No. 35, par. 2. Of trustees see Bankr. Act (1898), § 48; U. S. Supreme Ct. Bankr. G. O. No. 35, par. 3.

For proof of claims for costs see *infra*, XI, A, 4.

Priority of costs and fees see Bankr. Act (1898), § 64*b*. See also *infra*, XVIII, H, 1, b.

Although the Bankruptcy Act itself is silent on the question of awarding costs against a creditor who has filed specifications of objection in opposition to a bankrupt's discharge, the district court may, however, award costs against him in case he fails to prevent the discharge. *In re* Wolpert, 1 Am. Bankr. Rep. 436. See also *infra*, XIX, C, 5.

Costs in contested adjudications.— In cases of involuntary bankruptcy, when the debtor resists adjudication, and the court, after a hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover and be paid out of the estate the same costs that are allowed to a party recovering in a suit in equity. And if the petition is dismissed the debtor shall recover like costs against the petitioner. U. S. Supreme Ct. Bankr. G. O. No. 34. See also *infra*, VI, B, 11.

Under the Bankruptcy Act of 1867 it was held that the power to award costs was inherent in the district court in bankruptcy as a court of equity, and that such court could, in its discretion, like other courts of equitable jurisdiction, give or withhold costs. *Ex p.* Tremont Nat. Bank, 2 Lowell (U. S.) 409, 24 Fed. Cas. No. 14,169, 16 Nat. Bankr. Reg. 397, 25 Pittsb. Leg. J. (Pa.) 84.

59. See *infra*, II, C, 1, a, (II).

the trustee,[60] in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.[61] It is also provided in the same section of the Act that suits by the trustee shall only be brought or prosecuted in the court where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.[62]

(II) *Controversies at Law and in Equity.* The jurisdiction conferred by this section [63] includes controversies at law and in equity as distinguished from bankruptcy proceedings. Such jurisdiction must be construed in connection with other provisions of the federal statutes conferring jurisdiction upon such courts. It was not intended to either limit or extend such jurisdiction.[64]

(III) *Adverse Claimants.* The controversies of which the United States circuit courts are given jurisdiction are those arising between trustees, as such, and adverse claimants concerning the property acquired or claimed by the trustees.[65] The term "adverse claimants" has been the subject of more or less discussion. It has been held that all holdings must be construed as adverse when the circumstances are such that the property cannot be recovered without resort to legal remedies.[66] The adverse claims are those arising generally by reason of

60. See *infra*, II, C, 1, a, (III).

61. Bankr. Act (1898), § 23*a*, relating exclusively to circuit courts of the United States.

The only original jurisdiction conferred upon circuit courts in bankruptcy matters is in a case where no jury is in attendance upon a district court situated within the jurisdiction of a circuit court of the United States. Bankr. Act (1898), § 19*b*. See also *supra*, II, A, 3. And under U. S. Rev. Stat. (1878), § 601, if a district judge is disqualified a bankruptcy proceeding may be certified to the next circuit court for the district. This section provides that if there be no circuit court in such district, then the case shall be certified to the next circuit court in the state, and if there be no circuit court in the state, to the next convenient circuit court in an adjoining state.

62. Bankr. Act (1898), § 23*b*. And this provision applies not only to circuit courts of the United States but also to state courts. Perkins *v.* McCauley, 98 Fed. 286, 3 Am. Bankr. Rep. 445.

Diverse citizenship is necessary to confer jurisdiction under Bankr. Act (1898), § 23. Goodier *v.* Barnes, 94 Fed. 798, 2 Am. Bankr. Rep. 328.

63. Bankr. Act (1898), § 23.

64. **The controversies which are subject to the jurisdiction** of such courts are those which might have been disposed of therein if they had arisen between the bankrupt and his adverse claimants prior to instituting bankruptcy proceedings. U. S. Rev. Stat. (1878), § 433. Bankr. Act (1898), § 23, has been construed to mean that so much of the act of March 3, 1887, as amended by the act of August 13, 1888 [U. S. Rev. Stat. (1878), § 433], as confers jurisdiction upon circuit courts of the United States of a suit in favor of an officer holding title under a law of the United States is inoperative with respect to the officer known as a trustee. Section 23*b* is in the nature of a prohibition, addressed to the circuit courts, from exercising jurisdiction in any case between the trustee in bankruptcy and an adverse claimant, unless the bankrupt himself could have resorted to the circuit court for the assertion of such claim against the adverse claimant. *In re* Sievers, 91 Fed. 366, 1 Am. Bankr. Rep. 117.

65. Bankr. Act (1898), § 23*a*.

66. **In the case of a general assignment for the benefit of creditors,** the assignment being void, the assignee's possession is without right, and the title as well as the right to possession is in the trustee, but if the latter cannot recover the property otherwise than by legal proceedings, he must resort to the ordinary legal remedies. We perceive no valid distinction between such a case and one where there is an adverse holding in fact by one not a party to the proceedings, no matter what the character of such possession may be in point of law. *In re* Nugent, 105 Fed. 581, 44 C. C. A. 620, 5 Am. Bankr. Rep. 176. But in Bryan *v.* Bernheimer, 181 U. S. 188, 21 S. Ct. 557, 45 L. ed. 814, 5 Am. Bankr. Rep. 623, it was in effect held that a general assignment for the benefit of creditors did not constitute the assignee an assignee for value, but simply made him an agent of the debtor for the distribution of the proceeds of the property among his creditors. In the note to this case [as reported in 5 Am. Bankr. Rep. 623], the editor concludes that the opinion therein decides that an assignee for the benefit of creditors is not an adverse claimant in any sense of the term. See also Sinsheimer *v.* Simonson, 107 Fed. 898, 47 C. C. A. 51, 5 Am. Bankr. Rep. 537; Smith *v.* Belford, 106 Fed. 658, 45 C. C. A. 526, 5 Am. Bankr. Rep. 291.

Fraudulent title in third person.— Where it is shown that a third person is in possession claiming title before the bankruptcy, even if it appears that such possession is

conveyances or assignments made before bankruptcy proceedings were instituted.[67] As a result of the requirement that controversies of which circuit courts assume jurisdiction must be between trustees, as such, and adverse claimants, it would seem to follow that if such claims are not adverse they are to be summarily adjudicated in the bankruptcy courts; but if such claims are adverse, that is, where there is a color of title asserted against the trustee, the claimants are entitled to be heard in a plenary suit.[68]

b. In Criminal Matters. United States circuit courts have concurrent jurisdiction with courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in the Act.[69]

2. State Courts — a. Statutory Provision. The Act provides that suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.[70]

b. Effect of Statute. It has been finally determined that this statutory provision controls and limits the jurisdiction of all courts, including the district courts, over suits brought by trustees in bankruptcy to recover and collect debts due from third parties or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors.[71] And it is further decided that the district courts of the

fraudulent, summary proceedings will not lie against him, and there is no jurisdiction in the district court except by consent of the proposed defendant. *In re* Sheinbaum, 107 Fed. 247, 5 Am. Bankr. Rep. 187.

67. *In re* Bender, 106 Fed. 873, 5 Am. Bankr. Rep. 632.

A testamentary trustee of a trust created pursuant to a state statute has an interest adverse to the trustee in bankruptcy and cannot be proceeded against summarily, but is entitled to be heard in a plenary suit. *In re* Baudouine, 101 Fed. 574, 41 C. C. A. 318, 3 Am. Bankr. Rep. 651. The trust in this case was one to receive the rents and profits of land and apply them to the use of the beneficiary during his lifetime, without any direction for an accumulation. The state statute provided that the surplus of such rents and profits beyond the sum that may be necessary for the support and education of the beneficiary shall be liable in equity to the claims of his creditors, in the same manner as other personal property which cannot be reached by an execution at law. The courts of New York have uniformly declared nugatory every attempt by the act of the beneficiary to alienate or encumber the income arising under such a trust, or to anticipate it in any manner, and have denied the power of the courts to sanction any disposition of it by the concurrence of the beneficiary and the trustee. Douglas *v.* Cruger, 80 N. Y. 15. See Cuthbert *v.* Chauvet, 136 N. Y. 326, 32 N. E. 1088, 49 N. Y. St. 671, 18 L. R. A. 745.

Business of bankrupt carried on in name of another.—Where bankrupt's daughter carried on a business which creditors claim to have been the business of the bankrupt, and the only bank-account used in the business was her own genuine bank-account, in which receipts of the business were deposited and upon which the checks in payment of its obligations were drawn, she is in the position of a third person, not only claiming title, but in possession of the business, and the alleged fraud between her and the bankrupt can only be inquired into and adjudged in a plenary suit brought against her by the trustee. Her rights cannot be adjudicated in a summary manner by the referee in the bankruptcy proceedings. *In re* Cohn, 98 Fed. 75, 3 Am. Bankr. Rep. 421.

68. Under the Bankruptcy Act of 1867 it was repeatedly held that the right of an assignee in bankruptcy to assert a title in property transferred by the bankrupt before the bankruptcy to a third person, who now claimed it adversely to the assignee, could only be enforced by a plenary suit, at law or in equity, under the second section of that act, and not by summary proceedings under the first section thereof, notwithstanding the declaration in that section that the jurisdiction in bankruptcy should extend "to the collection of all the assets of the bankrupt," and "to all acts, matters, and things to be done under and in virtue of the bankruptcy," until the close of proceedings in bankruptcy. Eyster *v.* Gaff, 91 U. S. 521, 23 L. ed. 403; Marshall *v.* Knox, 16 Wall. (U. S.) 551, 21 L. ed. 481; Smith *v.* Mason, 14 Wall. (U. S.) 419, 20 L. ed. 748.

69. Bankr. Act (1898), § 23*c*. See also *supra*, II, B, 14; *infra*, XXI.

For offenses against the Bankruptcy Act see Bankr. Act (1898), § 29. See also *infra*, XXI.

The words "offenses enumerated" as used in this section mean only the crimes described in Bankr. Act (1898), § 29. Goodier *v.* Barnes, 94 Fed. 798, 2 Am. Bankr. Rep. 328.

70. Bankr. Act (1898), § 23*b*.

71. Bardes *v.* Hawarden First Nat. Bank,

United States can only entertain jurisdiction of such suits when it appears that the proposed defendant has consented thereto.[72] It follows therefore that where the trustee and the proposed defendant are residents of the same state, all such collateral actions must be brought in the state courts unless there is consent to the jurisdiction of the United States circuit or district courts.[73]

178 U. S. 524, 20 S. Ct. 1000, 44 L. ed. 1175, 4 Am. Bankr. Rep. 163.

A majority of the cases decided in the district courts prior to Bardes case, *supra*, held that such courts could entertain jurisdiction of suits brought by trustees against third parties pursuant to Bankr. Act (1898), § 23*b*. Norcross *v.* Nathan, 99 Fed. 414, 3 Am. Bankr. Rep. 613; Pepperdine *v.* Headley, 98 Fed. 863, 3 Am. Bankr. Rep. 455; *In re* Hammond, 98 Fed. 845, 3 Am. Bankr. Rep. 466; Louisville Trust Co. *v.* Marx, 98 Fed. 456, 3 Am. Bankr. Rep. 450; Robinson *v.* White, 97 Fed. 33, 3 Am. Bankr. Rep. 88; *In re* Booth, 96 Fed. 943, 2 Am. Bankr. Rep. 770; *In re* Fixen, 96 Fed. 748, 2 Am. Bankr. Rep. 822; *In re* Baudouine, 96 Fed. 536, 3 Am. Bankr. Rep. 55; *In re* Pittelkow, 92 Fed. 901, 1 Am. Bankr. Rep. 472; Carter *v.* Hobbs, 92 Fed. 594, 1 Am. Bankr. Rep. 224; *In re* Smith, 92 Fed. 135, 2 Am. Bankr. Rep. 9; *In re* Brooks, 91 Fed. 508, 1 Am. Bankr. Rep. 531. Among the cases involving this question which were carried to the circuit court of appeals and which are now considered as overruled are *In re* Baudouine, 101 Fed. 574, 41 C. C. A. 318, 3 Am. Bankr. Rep. 651; *In re* Francis-Valentine Co., 94 Fed. 793, 36 C. C. A. 499, 2 Am. Bankr. Rep. 522; Davis *v.* Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412. But in a number of cases in the district courts and circuit courts of appeals handed down prior to Bardes *v.* Hawarden First Nat. Bank, 178 U. S. 524, 20 S. Ct. 1000, 44 L. ed. 1175, 4 Am. Bankr. Rep. 163, *supra*, the jurisdiction of the bankruptcy courts in suits brought by trustees against third persons to collect debts, set aside transfers of property made by the bankrupt, etc., was denied. In Perkins *v.* McCauley, 98 Fed. 286, 3 Am. Bankr. Rep. 445, suit was brought by a trustee in bankruptcy in a district court to set aside a transfer of property made by the bankrupt alleged to have been a preference and without consideration and in violation of the Bankruptcy Act. The complainant and the defendant were citizens of the same state. The court was of the opinion that it was the apparent purpose of congress to make the boundaries between federal and state judiciaries as to "all controversies at law and in equity, as distinguished from proceedings in bankruptcy," coincident with the lines of demarcation then existing, thus giving an adverse claimant, against whom a trustee in bankruptcy asserted a cause of action, the privilege of being sued in local courts, and thereby saving to such claimant the burdensome expense and costs necessarily incident to litigation in a distant tribunal. In Burnett *v.* Morris Mercantile Co., 91 Fed. 365, 1 Am. Bankr. Rep. 229, it was argued that, because the bankrupt cannot maintain a suit to set aside a conveyance made by himself as fraudulent, therefore the provision [Bankr. Act (1898), § 23*b*] did not apply. But the court held that the question of jurisdiction alone was involved, a question of the right to determine, not of the principles to obtain in reaching a determination. If the bankrupt himself brought the suit he could not be turned out of court on the question of jurisdiction. The authority of the court to decide as to his right would be unquestioned, although he might be precluded in his right to relief by his own act. See also to the same effect Hicks *v.* Knost, 94 Fed. 625, 2 Am. Bankr. Rep. 153 [*affirmed* in 178 U. S. 541, 20 S. Ct. 1006, 44 L. ed. 1183, 4 Am. Bankr. Rep. 178]; *In re* Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. Bankr. Rep. 266 [*affirmed* in 181 U. S. 188, 21 S. Ct. 557, 45 L. ed. 814, 5 Am. Bankr. Rep. 623]; Mitchell *v.* McClure, 91 Fed. 621, 1 Am. Bankr. Rep. 53 [*affirmed* in 178 U. S. 539, 20 S. Ct. 1000, 44 L. ed. 1182, 4 Am. Bankr. Rep. 177]. In *In re* Franks, 95 Fed. 635, 2 Am. Bankr. Rep. 634, property was sold by a sheriff under an execution rendered null and void by a subsequent adjudication in bankruptcy against the execution debtor. The district court held that it had no power to make an order in a summary proceeding directing the sheriff to pay over such money to the trustee; that the remedy of the trustee is to petition the state court out of which the execution issued for such an order directing the sheriff to pay over to him the money in his hands belonging to the trustee of the bankrupt's estate; and if such an order is refused the proper course would then be for the trustee to sue the sheriff for money had and received.

72. Bardes *v.* Hawarden First Nat. Bank, 178 U. S. 524, 20 S. Ct. 1000, 44 L. ed. 1175, 4 Am. Bankr. Rep. 163.

73. Reason for rule.— It was the intention of congress to permit such suits, when they could not be settled by compromise or arbitration, to be litigated in the courts which, under the general law, would have jurisdiction of them, just as assignees under state insolvency laws bring suits in courts of general jurisdiction to collect assets which are afterward distributed by the court of insolvency. The bankruptcy court controls the trustee, supervises the administration of his trust, settles his accounts, and orders the distribution of the moneys in his hands, but it is not required to assume the burden of the litigations necessary for the collection of assets, nor are adverse claimants of property acquired or claimed by the trustee to

c. Suits Affected by Statute. Subdivision *b* of section 23 of the Act has reference to suits which might have been brought by the bankrupt, "if proceedings in bankruptcy had not been instituted." Such suits include all actions by the trustee to collect debts due to the bankrupt, as well as actions brought by him to set aside illegal transfers, invalid assignments, and other transactions of the bankrupt, made for the purpose of hindering, delaying, and defrauding his creditors.[74] A careful analysis of the section above referred to will show that subdivision *b* relates to suits brought and prosecuted by trustees against third persons for transfers and conveyances made before the bankruptcy proceedings were instituted,[75]

be put to unnecessary inconvenience and expense in litigating their rights. Hicks *v.* Knost, 94 Fed. 625, 2 Am. Bankr. Rep. 153 [*affirmed* in 178 U. S. 541, 20 S. Ct. 1006, 44 L. ed. 1183, 4 Am. Bankr. Rep. 178]. The course which gives to the state courts the amplest, and to the bankruptcy courts the narrowest, control over proceedings for the collection of debts by trustees will be the one which the case of Bardes *v.* Hawarden First Nat. Bank, 178 U. S. 524, 20 S. Ct. 1000, 44 L. ed. 1175, 4 Am. Bankr. Rep. 163, and the course of judicature which will be founded upon it will sanction. *In re* Porter, 109 Fed. 111, 6 Am. Bankr. Rep. 259.

Jurisdiction of state courts under former acts.— Under Bankr. Act (1867), § 2 [U. S. Rev. Stat. (1878), § 4986] the United States district and circuit courts were given concurrent jurisdiction of all suits, at law or in equity, brought "by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property, of said bankrupt transferable to or vested in such assignee." The jurisdiction of the courts of the United States over all matters and proceedings in bankruptcy, as distinguished from independent suits at law or in equity, was of course exclusive. But it was well settled that jurisdiction of such suits, conferred by section 2 of the Act of 1867 upon the United States circuit and district courts for the benefit of an assignee in bankruptcy, was concurrent with that of the state courts. Bardes *v.* Hawarden First Nat. Bank, 178 U. S. 524, 20 S. Ct. 1000, 44 L. ed. 1175, 4 Am. Bankr. Rep. 163. See also Eyster *v.* Gaff, 91 U. S. 521, 23 L. ed. 403; Lathrop *v.* Drake, 91 U. S. 516, 23 L. ed. 414. From the cases above cited it would seem that the jurisdiction of state courts of suits between trustees and third parties claiming title to the bankrupt's property was under the Act of 1867 concurrent with that of the United States circuit and district courts. The general rule was stated to be that where jurisdiction may be conferred on United States courts it may be made exclusive, where not so by the constitution itself, but if exclusive jurisdiction be neither express or implied, the state courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it. Claflin *v.* Houseman, 93 U. S. 130, 23 L. ed. 833; *In re* Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. Bankr. Rep. 266.

Effect of omission of concurrent jurisdiction in Act of 1898.— In Bardes *v.* Hawarden First Nat. Bank, 178 U. S. 524, 20 S. Ct. 1000, 44 L. ed. 1175, 4 Am. Bankr. Rep. 163, in determining whether the jurisdiction of the circuit and district courts of the United States was concurrent with the state courts in certain suits at law and in equity between the trustee and the adverse claimant of property of the bankrupt, the statutes of 1841 and 1867 were compared with that of 1898, and from the omission from the latter of certain provisions of the former statutes it was decided that such jurisdiction did not exist. Mr. Justice Gray said: "We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provision, and substituted the restricted provisions of § 23, it intended that either of those courts should retain the jurisdiction which it had under the absolute provision of the earlier acts." See also Pirie *v.* Chicago Title, etc., Co., 182 U. S. 438, 21 S. Ct. 906, 45 L. ed. 1171, 5 Am. Bankr. Rep. 814.

74. Fraudulent conveyances by bankrupt. — In Bardes *v.* Hawarden First Nat. Bank, 178 U. S. 524, 20 S. Ct. 1000, 44 L. ed. 1175, 4 Am. Bankr. Rep. 163, it was contended that Bankr. Act (1898), § 23*b*, could not apply to a suit brought by a trustee to set aside a conveyance made by the bankrupt in fraud of creditors, because the bankrupt himself could not have brought such an action. The court said: "But the clause concerns the jurisdiction only, and not the merits, of the case; the forum in which a case may be tried, and not the way in which it must be decided; the right to decide the case, and not the principles which must govern the decision. The bankrupt himself could have brought a suit to recover property which he claimed as his own, against one asserting an adverse title in it; and the incapacity of the bankrupt to set aside his own fraudulent conveyance is a matter affecting the merits of such an action, and not the jurisdiction of the court to entertain and determine it." The fact that the bankrupt might be estopped and fail of a recovery in no manner changes the aspect of the question as to the court in which a suit for such recovery could be brought by him. *In re* Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. Bankr. Rep. 266 [*affirmed* in 181 U. S. 188, 21 S. Ct. 557, 45 L. ed. 814, 5 Am. Bankr. Rep. 623].

75. *In re* Bender, 106 Fed. 873, 5 Am. Bankr. Rep. 632.

and has no reference to suits brought respecting the property of a bankrupt which has come legally into the custody of a court of bankruptcy.[76]

d. Consent of Proposed Defendant. To deprive state courts of their jurisdiction and to authorize district courts to entertain suits to recover property in the possession of adverse claimants the consent of such claimants must be entirely voluntary.[77] The conduct of the adverse claimant may, however, be such as to necessarily imply consent.[78]

e. Priority of Jurisdiction. Where a state court acquires possession of the property of a bankrupt prior to the institution of bankruptcy proceedings such court would be authorized, it seems, to entertain all actions and proceedings involving the rights of parties to such property.[79]

76. Summary process by district courts.— At the date of the adjudication in bankruptcy goods were at the store of the bankrupts and in their actual possession, and were claimed by them as their property, and on such date the court referred the case to a referee in bankruptcy, and by his direction the entrance to the store was locked. The goods were then in the lawful possession of the referee in bankruptcy, and of the bankruptcy court, whose representative and substitute he was. Being thus in the custody of a court of the United States they could not be taken out of that custody upon any process from a state court. An action of replevin in a state court cannot therefore be maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of the adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin was begun. And where goods legally in the custody of a district court have been seized upon a writ of replevin from a state court, the district court sitting in bankruptcy has jurisdiction by summary process to compel the return of the property so seized. White *v.* Schloerb, 178 U. S. 542, 20 S. Ct. 1007, 44 L. ed. 1183, 4 Am. Bankr. Rep. 178. Where property, the ownership of which is in dispute, was in the possession of a trustee in bankruptcy as a part of the bankrupt's estate to be duly administered, the district court has jurisdiction to restrain proceedings under a sequestration issued from a state court; and if such property has been taken from the possession of such trustee, an order may be issued compelling its return. Since the property is in the custody of the district court sitting in bankruptcy that court may entertain a petition of intervention on the part of the adverse claimant and determine the issues presented thereby. *In re* Whitener, 105 Fed. 180, 44 C. C. A. 434, 5 Am. Bankr. Rep. 198.

77. J. B. McFarlan Carriage Co. *v.* Solanas, 106 Fed. 145, 45 C. C. A. 253, 5 Am. Bankr. Rep. 442.

78. *In re* Connolly, 100 Fed. 620, 3 Am. Bankr. Rep. 842.

Implied consent.—Where assignee for benefit of creditors sells property after the filing of a petition in bankruptcy, but before the appointment of a trustee, and the creditors petition the district court for an order directing that the property be taken into the custody of the marshal of such court for the benefit of the bankrupt's estate, and the vendee does not protest against the jurisdiction of the court but submits his claim to that court and asks for such orders as may be necessary for his protection, such vendee will be deemed to have consented to the jurisdiction of the district court. Bryan *v.* Bernheimer, 181 U. S. 188, 21 S. Ct. 557, 45 L. ed. 814, 5 Am. Bankr. Rep. 623. Where adverse parties permitted a cause to proceed upon the merits without raising the question of the referee's jurisdiction, and the referee rendered a decree against them, and where, upon a review of the decision of the referee, objection to his jurisdiction was first raised, it will be held that the respondents have consented to the jurisdiction of the district court. *In re* Steuer, 104 Fed. 976, 5 Am. Bankr. Rep. 209.

When jurisdiction not consented to.— The general appearance of defendants to a rule to show cause, and their failure to set up their right to be sued in the state court until after the filing of a second amended petition, when for the first time a case was made upon which relief could be had against them, did not constitute such consent of the defendants as is contemplated by the Bankruptcy Act. *In re* Hemby-Hutchinson Pub. Co., 105 Fed. 909, 5 Am. Bankr. Rep. 569.

79. It is a general rule that when property is in the possession of a court this draws to it the right to decide upon conflicting claims to its ultimate possession and control; and as between two courts exercising concurrent jurisdiction the court which first acquires possession will retain such possession intact. Rouse *v.* Letcher, 156 U. S. 47, 15 S. Ct. 266, 39 L. ed. 341; Byers *v.* McAuley, 149 U. S. 608, 13 S. Ct. 906, 37 L. ed. 867; *In re* Russell, 101 Fed. 248, 41 C. C. A. 323, 3 Am. Bankr. Rep. 658; Louisville Trust Co. *v.* Cincinnati, 76 Fed. 296, 47 U. S. App. 36, 22 C. C. A. 334; Summers *v.* White, 71 Fed. 106, 36 U. S. App. 395, 17 C. C. A. 631.

This is undoubtedly the rule without regard to the decision of the supreme court, holding that United States courts have no jurisdiction in controversies between trustees and adverse claimants as to the title to property conveyed or assigned prior to the filing

3. Stay of Suits in Other Courts — a. Statutory Provision. A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of the petition against him, must be stayed until after an adjudication or the dismissal of the petition; and if such person is adjudged a bankrupt such action may be further stayed until twelve months after the date of such adjudication, or if within that time such person applies for a discharge then until the question of such discharge is determined.[80]

b. Suits to Be Stayed[81] — (i) *In General.* A suit to be stayed must be founded upon a claim from which a discharge in bankruptcy would be a release.[82]

of the petition, unless by consent of the proposed defendant. See Bardes *v.* Hawarden First Nat. Bank, 178 U. S. 524, 20 S. Ct. 1000, 44 L. ed. 1175, 4 Am. Bankr. Rep. 163.

Powers of state courts over proceedings pending before bankruptcy.— There is no provision in the Act which authorizes or permits courts of bankruptcy by the use of either summary or plenary process to stop proceedings of a state court in a suit in which it had already, before the institution of the bankruptcy proceedings, obtained possession of the subject-matter and jurisdiction of the parties. This was held in a case where a suit was begun and proceeded to judgment in the state court, and there was a seizure thereunder of the property subject to the privilege and right of pledge, and the same was advertised for sale, all before the beginning of the bankruptcy proceedings. *In re* Seebold, 105 Fed. 910, 45 C. C. A. 117, 5 Am. Bankr. Rep. 358. But see *In re* Kenney, 105 Fed. 897, 45 C. C. A. 113, 5 Am. Bankr. Rep. 355, where it was held that the bankruptcy court is authorized to order the right of the judgment creditor under a levy to be transferred and conveyed to the trustee, which is properly accomplished by ordering the sheriff to pay over the proceeds.

80. Bankr. Act (1898), § 11*a*. Construing this section of the Act see *In re* Whitener, 105 Fed. 180, 44 C. C. A. 434, 2 Am. Bankr. Rep. 198; Wagner *v.* U. S., 104 Fed. 133, 43 C. C. A. 445, 4 Am. Bankr. Rep. 596; Heath *v.* Shaffer, 93 Fed. 647, 2 Am. Bankr. Rep. 98; *In re* Ogles, 93 Fed. 426, 1 Am. Bankr. Rep. 671; *In re* Gutwillig, 92 Fed. 337, 63 U. S. App. 191, 34 C. C. A. 377, 1 Am. Bankr. Rep. 388 [*affirming* 90 Fed. 475, 1 Am. Bankr. Rep. 78]; Davis *v.* Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412 [*affirming* 91 Fed. 366]; Blake *v.* Francis-Valentine Co., 89 Fed. 691, 1 Am. Bankr. Rep. 372; and *infra*, note 81 *et seq.*

Bankr. Act (1867), § 21, provides in effect that a creditor who proves his debt or claim in the bankruptcy proceeding shall not be allowed to maintain a suit at law or in equity therefor against the bankrupt; and further provides that no creditor whose "debt is provable under this Act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined. And any such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge." But it was provided that there should be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and that if the amount due the creditor was in dispute the suit, by leave of the court in bankruptcy, might proceed to judgment for the purpose of ascertaining the amount due.

Bankr. Act (1841), § 5, is a similar provision as to the waiver of the right of the creditor to maintain an action against the bankrupt, but contained no provision as to a stay of suit against the debtor.

A comparison of the Act of 1867 with the present Act will show that under the former Act provable debts could not be prosecuted to final judgment in any suit until the question of the discharge was determined. But the present Act would not seem to authorize a stay of a suit based upon such a debt unless it was pending against the bankrupt at the time of the filing of the petition against him.

81. The fact that a trustee in bankruptcy may be interested in the result of a litigation which is pending between third parties in a state court does not entitle him to have the proceedings in such action stayed, or to have the controversy transferred for adjudication to the bankruptcy court. *In re* Horton, 102 Fed. 986, 43 C. C. A. 87, 4 Am. Bankr. Rep. 486.

82. Bankr. Act (1898), § 11*a*. The debts of a bankrupt which may be proved and allowed against his estate are those specified and described in Bankr. Act (1898), § 63. See *infra*, XI, A. But see Bankr. Act (1898), § 17, which provides that a discharge in bankruptcy shall release a bankrupt from all his provable debts except such as are mentioned in that section.

Non-dischargeable claims.— The discretion to grant stays after adjudication conferred by Bankr. Act (1898), § 11, should not be exercised unless the claim on which the suit is pending is clearly dischargeable. For the purpose of determining whether a debt is dischargeable, under a motion for a stay, a claim grounded in tort on which a verdict assessing the damages has been rendered, but which is not yet in judgment, will be considered so far liquidated as to come within the meaning of Bankr. Act (1898), § 17 (2). *In re* Sullivan, 2 Am. Bankr. Rep. 30.

Actions for fraud.— If the action in the state court is founded on a claim arising

Under the Act of 1867 it was held that the word "suit" included all cases where the personal liability of the debtor was sought to be fixed or determined by a final judgment pending the determination of the question of the discharge.[83] Such suits include those pending in both state and federal courts. Federal courts, under the Act of 1898, have restrained proceedings in state courts founded on debts dischargeable in bankruptcy, which would result in the arrest of the bankrupt, as for contempt of court for failure to pay alimony, although under a recent decision alimony in arrears at the time of the adjudication in bankruptcy or alimony accruing since that adjudication is not a provable or dischargeable debt.[84] Proceedings in state courts have been restrained where the cause of action was a claim for labor which, under a local statute, might result in a body execution;[85] and where the cause of action was a claim for loss of services to a father by reason of seduction of his daughter.[86] They have also restrained pro-

from the fraud of the bankrupt, and the judgment therein, if obtained, would not be dischargeable, no stay should be granted by a bankruptcy court. *In re* Cole, 106 Fed. 837, 5 Am. Bankr. Rep. 780. See also *In re* Lewensohn, 99 Fed. 73, 3 Am. Bankr. Rep. 594; *In re* Rhutassel, 96 Fed. 597, 2 Am. Bankr. Rep. 697.

Actions for conversion.— The judgments for fraud which are excepted by Bankr. Act (1898), § 17, from the effect of discharge are such as are essentially fraudulent in fact, involving moral turpitude or intentional wrong, and as an action for conversion is not essentially an action for fraud, it is generally dischargeable. Burnham *v.* Pidcock, 58 N. Y. App. Div. 273, 68 N. Y. Suppl. 1007, 5 Am. Bankr. Rep. 590. Where an action is begun against a bankrupt in a state court to recover for a technical conversion of goods consigned to him for sale, a motion to stay such an action should be granted since the claim would be barred by the bankrupt's discharge. *In re* Basch, 97 Fed. 761, 3 Am. Bankr. Rep. 235.

83. *In re* Rossenberg, 3 Ben. (U. S.) 14, 20 Fed. Cas. No. 12,054, 1 Chic. Leg. N. 103, 2 Nat. Bankr. Reg. 236.

For meaning of term "suit" see ACTIONS, II, F, 2, b [1 Cyc. 714].

Stay of proceedings under Act of 1867.— It was frequently held that creditors could be restrained from entry of judgment on provable debts and that sheriffs could be enjoined from making sales under execution thereon. *In re* Schnepf, 2 Ben. (U. S.) 72, 21 Fed. Cas. No. 12,471, 7 Am. L. Reg. N. S. 204, 1 Am. L. T. Bankr. Rep. 46, Bankr. Reg. Suppl. 41, 6 Int. Rev. Rec. 214, 1 Nat. Bankr. Reg. 190; *In re* Mallory, 1 Sawy. (U. S.) 88, 16 Fed. Cas. No. 8,991, 6 Nat. Bankr. Reg. 22; Jones *v.* Leach, 13 Fed. Cas. No. 7,475, 1 Nat. Bankr. Reg. 595; Irving *v.* Hughes, 13 Fed. Cas. No. 7,076, 7 Am. L. Reg. N. S. 209, 6 Phila. (Pa.) 451, 24 Leg. Int. (Pa.) 380, 15 Pittsb. Leg. J. (Pa.) 121, 2 Nat. Bankr. Reg. 61; *In re* Hufnagel, 12 Fed. Cas. No. 6,837, 12 Nat. Bankr. Reg. 554; *In re* Bloss, 3 Fed. Cas. No. 1,562, 4 Nat. Bankr. Reg. 147. An order of arrest made by a state court in a suit against a bankrupt upon an affidavit showing that the suit was founded on a debt created by the fraud of the bankrupt could not be vacated by the bankruptcy court, but the suit was stayed until the final determination of the bankruptcy proceedings. *In re* Migel, 17 Fed. Cas. No. 9,538, 2 Nat. Bankr. Reg. 481. Among other cases arising under the former law in which actions in other courts were stayed until the discharge of the bankrupt see Scott *v.* Ellery, 142 U. S. 381, 12 S. Ct. 233, 35 L. ed. 1050; Hill *v.* Harding, 107 U. S. 631, 2 S. Ct. 404, 27 L. ed. 493; *In re* Belden, 5 Ben. (U. S.) 476, 3 Fed. Cas. No. 1,239, 6 Nat. Bankr. Reg. 443; *In re* Myers, 2 Ben. (U. S.) 424, 17 Fed. Cas. No. 9,518, 1 Nat. Bankr. Reg. 581; *In re* Schwartz, 14 Blatchf. (U. S.) 196, 21 Fed. Cas. No. 12,502, 15 Alb. L. J. 350, 52 How. Pr. (N. Y.) 513, 15 Nat. Bankr. Reg. 330; *In re* Rundle, 21 Fed. Cas. No. 12,138, 1 Chic. Leg. N. 30, 2 Nat. Bankr. Reg. 113.

84. Proceedings which would result in bankrupt's arrest.—Audubon *v.* Shufeldt, 181 U. S. 575, 21 S. Ct. 735, 45 L. ed. 1009, 5 Am. Bankr. Rep. 829 [*overruling In re* Houston, 94 Fed. 119, 2 Am. Bankr. Rep. 107]; *In re* Challoner, 98 Fed. 82, 3 Am. Bankr. Rep. 442; *In re* Van Orden, 96 Fed. 86, 2 Am. Bankr. Rep. 801.

As to whether alimony is a provable debt see *In re* Nowell, 99 Fed. 931, 3 Am. Bankr. Rep. 837. In *In re* Smith, 3 Am. Bankr. Rep. 67, the referee has carefully collected and ably discussed the cases bearing upon the question of whether alimony due under a New York decree of divorce is a provable debt, and vacated an order restraining further proceedings in the supreme court of New York to punish a husband who failed to pay alimony and counsel fees. Judge Brown of the southern district of New York in a memorandum accompanying decisions in Andrews *v.* Andrews, and Shepard *v.* Shepard [reported in New York Law Journal, June 28, 1899] said: "In my judgment, the liability to pay alimony would not be released by a discharge in bankruptcy, and no stay should therefore be granted on its enforcement, except where a preference is sought upon the assets." See also *infra*, XI, A, 7.

85. *In re* Grist, 1 Am. Bankr. Rep. 89.

86. *In re* Sullivan, 2 Am. Bankr. Rep. 30.

ceedings supplementary to an execution following a judgment in a suit for a debt[87] and execution sales by sheriffs.[88] And in a case of involuntary bankruptcy the distribution of the proceeds of an execution sale under a levy made within four months prior to the filing of a petition in bankruptcy was restrained.[89]

(II) *Attachment Proceedings.* Attachment proceedings pending at the time the petition was filed, and the distribution of funds secured thereunder should be restrained.[90]

(III) *Foreclosure Proceedings.* Actions to foreclose real-estate mortgages have been restrained where the mortgage exceeds the value of the realty, and there is likelihood of a deficiency judgment against the bankrupt.[91] It is a gen-

87. **Supplementary proceedings.**— Zimmer *v.* Schleehauf, 115 Mass. 52; *In re* Kletchka, 92 Fed. 901, 1 Am. Bankr. Rep. 479; *In re* Adams, 1 Am. Bankr. Rep. 94. Where it appears that the only effect of staying proceedings supplementary to execution would be to prevent the examination of the bankrupt and to secure information for the purpose of initiating a creditor's bill, the district court may nevertheless stay such proceedings. *In re* Lesser, 99 Fed. 913, 40 C. C. A. 177, 3 Am. Bankr. Rep. 758.

88. *In re* Kimball, 97 Fed. 29, 3 Am. Bankr. Rep. 161; Blake *v.* Francis-Valentine Co., 1 Am. Bankr. Rep. 372 [*affirmed* in 94 Fed. 793]; *In re* Northrop, 1 Am. Bankr. Rep. 427.

89. *In re* Kenney, 95 Fed. 427, 2 Am. Bankr. Rep. 494, upon the ground that the levy was void under Bankr. Act (1898), § 67*f*, and the execution creditor therefore had no special lien upon the proceeds.

But in cases of voluntary bankruptcy such an order has been refused, on the ground that Bankr. Act (1898), § 67*f*, does not apply. *In re* Easley, 93 Fed. 419, 1 Am. Bankr. Rep. 715; *In re* De Lue. 91 Fed. 510, 1 Am. Bankr. Rep. 387. This latter case was decided by Judge Lowell. This judge in *In re* Blair, 108 Fed. 529, 6 Am. Bankr. Rep. 206, states that the remark found in his opinion in the De Lue case to the effect that Bankr. Act (1898), § 67*f*, was limited to involuntary bankruptcy was hastily made, both counsel having agreed in argument upon that construction of the section. It is clearly erroneous, and has long been treated as overruled.

As to construction and application of Bankr. Act (1898), § 67*f*, see *infra*, XVI, B, 2.

90. In Bear *v.* Chase, 99 Fed. 920, 923, 40 C. C. A. 182, 3 Am. Bankr. Rep. 746, certain creditors levied by attachment upon the bankrupt's goods and sold them under an order of the state court, and the proceeds thereof were paid to the clerk of such court. Within a few days thereafter proceedings in involuntary bankruptcy were begun against the bankrupt. The court said: "Upon the adjudication of the bankrupt, all creditors became parties to the bankruptcy proceedings by operation of law, and particularly those creditors by whose acts the bankruptcy was caused. No good reason would seem to exist why a court, as to any creditor before it in a bankruptcy proceeding, should not, after the service of a rule, enjoin such creditor from taking any step or doing any act affecting the bankrupt's estate, or interrupting the court in the due administration thereof." But *compare In re* Ogles, 93 Fed. 426, 1 Am. Bankr. Rep. 671, where it was questioned whether a stay should be granted.

Under the Bankruptcy Act of 1867 it was held that a suit previously begun in a state court by attachment was only suspended by proceedings in bankruptcy, and that after the determination of the question of whether a discharge should be granted the creditor could continue his action. If the discharge is refused the plaintiff, upon establishing his claim, may obtain a general judgment. If the discharge is granted the court in which the suit is pending may then determine whether the plaintiff is entitled to a special judgment for the purpose of enforcing an attachment made more than four months before the commencement of the proceedings in bankruptcy, or for the purpose of charging sureties on a bond given to dissolve such an attachment. Hill *v.* Harding, 107 U. S. 631, 2 S. Ct. 404, 27 L. ed. 493.

91. *In re* Sabine, 1 Am. Bankr. Rep. 315. In *In re* Pittelkow, 92 Fed. 901, 1 Am. Bankr. Rep. 472, it was held that the district court had jurisdiction to restrain mortgagees for a reasonable time from foreclosure proceedings, and stated that it is the duty of the court to consider the interest of the mortgagees and other secured creditors as well as those of the general creditors; and unless it is apparent (1) that the mortgaged premises in the given case will probably realize upon a sale an amount substantially in excess of the mortgage, and (2) that there are no complications by dower rights, conveyances, or other conditions, which require foreclosure under the mortgage, the power to proceed summarily by sale, including the interest of the mortgagees, should not be exercised.

Under the Acts of 1841 and 1867 cases frequently arose where the district courts intervened by injunction to restrain the foreclosure of mortgages in state courts. Factors', etc., Ins. Co. *v.* Murphy, 111 U. S. 738, 4 S. Ct. 679, 28 L. ed. 582; Ray *v.* Norseworthy, 23 Wall. (U. S.) 128, 23 L. ed. 116; Houston *v.* New Orleans City Bank, 6 How. (U. S.) 486, 12 L. ed. 526; Nugent *v.* Boyd, 3 How. (U. S.) 426, 11 L. ed. 664; *Ex p.* New Orleans City Bank, 3 How. (U. S.) 292,

eral principle that the trustee takes the property of the bankrupt subject to all valid liens.[92] The Act recognizes the claims of secured creditors "for such sums only as to the courts seem to be owing over and above the value of their securities or priorities,"[93] unless such creditors surrender their securities or preferences.[94] The Act also provides for the payment of a dividend to secured creditors only upon the balance remaining unpaid after converting the securities into money and the payment thereof upon the secured debt.[95] The Act, carefully analyzed, recognizes the right of a creditor to have the property upon which he has a valid lien pay the debt for which it is bound to the exclusion of other creditors; and that the excess above the debt secured is all that a court of bankruptcy will administer where there is no surrender of the lien.[96] Lienholders, unless they surrender their securities and prove their claims, are strangers to the bankruptcy proceedings and are entitled to have their property rights adjudicated by the courts of the state in which the realty is situated.[97]

11 L. ed. 603; *In re* Sacchi, 10 Blatchf. (U. S.) 29, 21 Fed. Cas. No. 12,200, 4 Chic. Leg. N. 289, 43 How. Pr. (N. Y.) 252, 6 Nat. Bankr. Reg. 497; *In re* Iron Mountain Co., 9 Blatchf. (U. S.) 320, 13 Fed. Cas. No. 7,065, 4 Nat. Bankr. Reg. 645; Sutherland *v.* Lake Superior Ship Canal, etc., Co., 9 Blatchf. (U. S.) 29, 23 Fed. Cas. No. 13,643, 1 Centr. L. J. 127, 9 Nat. Bankr. Reg. 298.

Where, after an adjudication, a proceeding is instituted to foreclose a mortgage upon the bankrupt's property the court will not restrain the foreclosure proceeding upon the petition of the trustee, but will permit the whole matter of the mortgage debt and the controversies arising therefrom to be disposed of in the state court, for the reason that all matters pertaining to the mortgage may be more comprehensively and conveniently treated in proceedings in that court. *In re* Porter, 109 Fed. 111, 6 Am. Bankr. Rep. 259.

92. Taylor *v.* Taylor, 59 N. J. Eq. 86, 45 Atl. 440, 4 Am. Bankr. Rep. 211; Esterbrook Steel Pen Mfg. Co. *v.* Ahern, 30 N. J. Eq. 341; Amsterdam First Nat. Bank *v.* Shuler, 153 N. Y. 163, 47 N. E. 262, 60 Am. St. Rep. 601. See also *infra*, XVI, B.

93. Bankr. Act (1898), § 57*e*. See also *infra*, XI, B, 5.

94. Bankr. Act (1898), § 57*g*. See also *infra*, XI, B, 4, 5.

95. Bankr. Act (1898), § 57*h*; U. S. Supreme Ct. Bankr. G. O. No. 28. See also *infra*, XVIII, H, 2, b.

96. By U. S. Supreme Ct. Bankr. G. O. No. 28, the trustee is authorized, whenever it is deemed by the court to be for the best interest of the estate, to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal. U. S. Supreme Ct. Bankr. Forms Nos. 43, 44, provide for petitions and orders for the redemption of property from a lien, and for the sale thereof subject to a lien. The rule and forms cited would seem to substantiate in a sense the statement in the text. See also Carter *v.* Peoples Nat. Bank, 109 Ga. 573, 35 S. E. 61, 4 Am. Bankr. Rep. 211 note.

Where, then, the property exceeds in value the lien thereon, there would seem to be no reason for the exercise of the discretion of a court of bankruptcy in staying proceedings brought in a state court for the foreclosure of such a lien. Carter *v.* Peoples Nat. Bank, 109 Ga. 573, 35 S. E. 61, 4 Am. Bankr. Rep. 211 note.

97. *In re* Gerdes, 102 Fed. 318, 4 Am. Bankr. Rep. 346; Hicks *v.* Knost, 94 Fed. 625, 2 Am. Bankr. Rep. 153 [*affirmed* in 178 U. S. 541, 20 S. Ct. 1006, 44 L. ed. 1183, 4 Am. Bankr. Rep. 178]. See also *infra*, XI, B, 4; XVI, B.

And when the state court acquires jurisdiction of the property and the parties, it may proceed to sell under a foreclosure and to distribute the proceeds of the sale, notwithstanding the commencement, pending the sale, of proceedings in bankruptcy against the mortgagor. Moran *v.* Sturges, 154 U. S. 256, 14 S. Ct. 1019, 38 L. ed. 981; Rio Grande R. Co. *v.* Vinet, 132 U. S. 478, 10 S. Ct. 155, 33 L. ed. 400; *In re* Gerdes, 102 Fed. 318, 4 Am. Bankr. Rep. 346.

Where the holder of a chattel mortgage had taken possession of the mortgaged property before the institution of proceedings in bankruptcy against the mortgagor, and thereafter brought suit in a state court for foreclosure of the mortgage against the bankrupt and his trustee in bankruptcy, it was held that the court of bankruptcy would not, on a bill by such trustee alleging the mortgage to be voidable as an unlawful preference, enjoin the further prosecution of such suit, but the trustee must appear and assert his rights and title in the state court. Heath *v.* Shaffer, 93 Fed. 647, 2 Am. Bankr. Rep. 98.

The following cases arose under the former acts respecting the jurisdiction of state courts in proceedings in bankruptcy for the foreclosure of mortgages: Markson *v.* Haney, 47 Ind. 31, 12 Nat. Bankr. Reg. 484; McKay *v.* Funk, 37 Iowa 661, 13 Nat. Bankr. Reg. 334; Jerome *v.* McCarter, 94 U. S. 734, 24 L. ed. 136, 15 Nat. Bankr. Reg. 546; *In re* Irving, 8 Ben. (U. S.) 463, 13 Fed. Cas. No. 7,073, 14 Nat. Bankr. Reg. 289, 2 N. Y. Wkly. Dig. 500 (holding that the filing of a petition in involuntary bankruptcy did not divest the jurisdiction of the state court over an action to foreclose); *In re* Davis, 1 Sawy. (U. S.) 260, 7 Fed. Cas. No. 3,620, 4 Nat. Bankr. Reg. 715, 8 Nat. Bankr. Reg. 167. The general rule under former acts was to permit secured

c. Application For Stay. The Bankruptcy Act, like all laws of the United States made in pursuance to the constitution, binds state as well as federal courts.[98] Hence it is the duty of a state court to entertain a motion properly brought before it to stay proceedings pending at the time of the filing of the petition in bankruptcy.[99] The proper procedure to secure a stay may be stated as follows: The bankrupt who is the defendant in the state court should file therein a proper pleading setting forth the pendency of the proceedings in bankruptcy, and based thereon should ask a stay as provided;[1] and, being thus informed of the pendency of proceedings in bankruptcy, it will become the duty of the state court to grant the stay prayed for.[2] Although the application should be made to a state court in the first instance, if the state court does not grant the stay an application may be made to the court of bankruptcy.[3] The application of the bankrupt may be made in the form of an affidavit, and when presented to the court in which the action is pending should entitle him to an injunction staying such action until his application for a discharge is determined, unless there are good reasons for the continuance of the suit.[4]

creditors to enforce their liens in state courts unless it appeared that the bankrupt estate would be injured or inconvenienced thereby. If such proceedings were established at the time of the filing of the petition in bankruptcy a stay was never granted unless, by a continuance of the suit, the mortgagee would secure by a judgment or otherwise an amount greater than that to which he would be entitled by virtue of his security. *In re* McGilton, 3 Biss. (U. S.) 144, 16 Fed. Cas. No. 8,798, 5 Chic. Leg. N. 1, 29 Leg. Int. (Pa.) 332, 7 Nat. Bankr. Reg. 294, 20 Pittsb. Leg. J. (Pa.) 29; *In re* Iron Mountain Co., 9 Blatchf. (U. S.) 320, 13 Fed. Cas. No. 7,065, 4 Nat. Bankr. Reg. 645; Davis *v.* Anderson, 7 Fed. Cas. No. 3,623, 6 Nat. Bankr. Reg. 145; *In re* Davis, 7 Fed. Cas. No. 3,618, 2 Am. L. T. Bankr. Rep. 52, 1 Chic. Leg. N. 171, 2 Nat. Bankr. Reg. 391; *In re* Brinkman, 4 Fed. Cas. No. 1,883, 6 Nat. Bankr. Reg. 541.

98. Hill *v.* Harding, 107 U. S. 631, 2 S. Ct. 404, 27 L. ed. 493; *In re* Rosenberg, 3 Ben. (U. S.) 14, 20 Fed. Cas. No. 12,054, 1 Chic. Leg. N. 103, 2 Nat. Bankr. Reg. 236; *In re* Metcalf, 2 Ben. (U. S.) 78, 17 Fed. Cas. No. 9,494, 1 Am. L. T. Bankr. Rep. 46, Bankr. Reg. Suppl. 43, 6 Int. Rev. Rec. 223, 1 Nat. Bankr. Reg. 201.

99. Judicial notice of pendency of bankruptcy proceeding.— Boynton *v.* Ball, 121 U. S. 457, 7 S. Ct. 981, 30 L. ed. 985, where the court said: "The state court could not know or take judicial notice of proceedings in bankruptcy unless they were brought before it in some appropriate manner, and the provisions of this section [Bankr. Act (1867), § 21] show plainly that it does not thereupon lose jurisdiction of the case, but the proceedings may, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of his discharge" in the bankruptcy court. In Eyster *v.* Gaff, 91 U. S. 521, 23 L. ed. 403, in speaking of the effect of the adjudication in bankruptcy on the jurisdiction of the state court over a case commenced therein prior to the institution of bankruptcy proceedings, the court said: "The court in the case before us had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding, according to the law which governed such a suit, to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending. It was the duty of that court to proceed to a decree as between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of those parties to the subject-matter of the suit."

After an adjudication in bankruptcy the state court is not bound to stay further proceedings therein. Hence if after verdict and before judgment the defendants are adjudicated bankrupts, and they thereafter file a suggestion of the fact and move that the proceedings be stayed, the court may deny such motion and direct the entry of a special judgment to enable the plaintiff to proceed against the sureties upon the bond to dissolve an attachment given more than four months before the bankruptcy. Rosenthal *v.* Nove, 175 Mass. 559, 56 N. E. 884, 78 Am. St. Rep. 512.

1. Bankr. Act (1898), § 11.

2. *In re* Geister, 97 Fed. 322, 3 Am. Bankr. Rep. 228.

3. Collier Bankr. (3d ed.) 130; Loveland Bankr. 76.

4. Frostman *v.* Hicks, 3 Wkly. Notes Cas. (Pa.) 202, 15 Nat. Bankr. Reg. 41.

Under the Act of 1867 it was stated that the application for a stay should be by a petition containing the title of the action, the court in which it is pending, the cause of action, and facts sufficient to show that it was founded upon a provable debt, and that the action was one that might properly be stayed. *In re* Rosenberg, 3 Ben. (U. S.) 14, 20 Fed. Cas. No. 12,054, 1 Chic. Leg. N. 103, 2 Nat. Bankr. Reg. 236; *In re* Meyers, 2 Ben. (U. S.) 424, 17 Fed. Cas. No. 9,518, 1 Nat. Bankr. Reg. 581; *In re* Reed, 20 Fed. Cas. No. 11,637, Bankr. Reg. Suppl. 1, 6 Int. Rev. Rec. 21, 24 Leg. Int. (Pa.) 196, 1 Nat. Bankr. Reg. 1.

d. Power to Stay Discretionary. The power conferred by the Act[5] to stay a suit founded upon a provable debt is discretionary with the district court, and when exercised should not be interfered with unless it has been abused.[6]

e. Duration of Stay. It is provided that the pending suit may be stayed until after an adjudication[7] or the dismissal of the petition.[8] The stay is merely temporary for the purpose of enabling the bankrupt to plead his discharge in bankruptcy.[9]

f. Effect of Stay. The stay does not affect the state court nor does it operate as a bar to an action.[10]

D. Appellate Jurisdiction — 1. Of Circuit Courts of Appeals — a. To Review Both Law and Facts — (I) *In General.* The circuit courts of appeals of the United States, in conjunction with the supreme court of the United States and the supreme courts of the territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.[11]

(II) *In What Cases Appeal May Be Taken.* Appeals as in equity cases[12]

5. Bankr. Act (1898), § 11*a*.

6. *In re* Lesser, 99 Fed. 913, 40 C. C. A. 177, 3 Am. Bankr. Rep. 758, where it appeared that the only effect of the order staying proceedings in the state court would be to prevent the obtaining of information by an examination of an execution debtor in supplementary proceedings which was desired for the purpose of bringing a creditor's suit in equity. It was held that this was not sufficient reason for interference on the part of the circuit court of appeals with the exercise of the discretionary power by the district court. See also *In re* Holloway, 93 Fed. 638, 1 Am. Bankr. Rep. 659.

7. **The term "adjudication"** is defined in the Act. Bankr. Act (1898), § 1 (2).

8. Bankr. Act (1898), § 11*a*.

If the person is adjudicated a bankrupt the action may be further stayed for a period of twelve months after the adjudication, "or, if within that time such person applies for a discharge, then until the question of such discharge is determined." Bankr. Act (1898), § 11*a*.

If the bankrupt is discharged there can be no further continuance of the suit, but if the bankruptcy court refuses a discharge the stay is terminated and the action may be continued without a formal order vacating the injunction. *In re* Belden, 5 Ben. (U. S.) 476, 3 Fed. Cas. No. 1,239, 6 Nat. Bankr. Reg. 443; *In re* Thomas, 23 Fed. Cas. No. 13,890, 3 Nat. Bankr. Reg. 38; Dingee *v.* Becker, 7 Fed. Cas. No. 3,919, 9 Nat. Bankr. Reg. 508. See also Cox *v.* Dorwin, 29 Hun (N. Y.) 293, decided under the Act of 1867.

9. **When discharge has been granted** a stay should ordinarily be vacated as a matter of course upon the application of a creditor, in order that the validity of the discharge as against the creditor's debt may be duly tested in case the creditor should wish to litigate its application to his debt, and both parties should be remitted alike to their rights, remedies, and defenses under the law. *In re* Rosenthal, 108 Fed. 368, 5 Am. Bankr. Rep. 799.

10. **The stay operates merely as a suspension of proceedings** against a bankrupt until the question of bankruptcy or of the discharge is determined. If the petition in bankruptcy is dismissed, or if after an adjudication a discharge is refused, the court in which the suit is pending may proceed to such judgment as the circumstances of the case may require. Hill *v.* Harding, 107 U. S. 631, 2 S. Ct. 404, 27 L. ed. 493.

11. Bankr. Act (1898), § 24*a*.

This provision confers the same general appellate jurisdiction in respect to controversies arising in bankruptcy proceedings as is possessed by the circuit courts of appeals in respect to other proceedings arising in district and circuit courts. 26 U. S. Stat. at L. p. 826; Duncan *v.* Landis, 106 Fed. 839, 843, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649, where the court held that there was nothing in the provisions of Bankr. Act (1898), § 24, inconsistent with, or superseding the provisions of section 6 of the act of March 3, 1891, establishing the circuit courts of appeals, and said: "There can be no doubt now, in view of this provision [Bankr. Act (1898), § 24] that inasmuch as the circuit courts of appeal have appellate jurisdiction over district courts in other cases, so, also, they have the same jurisdiction over those courts when acting as courts of bankruptcy. That a jury trial has been ordered under the provisions of section 19 of the bankrupt act does not remove the controversy from this appellate jurisdiction." See also *In re* Seebold, 105 Fed. 910, 45 C. C. A. 117, 5 Am. Bankr. Rep. 358; Courier-Journal Job-Printing Co. *v.* Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614, 4 Am. Bankr. Rep. 183; *In re* Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145 [*dismissing petition* for review of judgment in 95 Fed. 258, 2 Am. Bankr. Rep. 518.

12. **Appeals as in equity.**—The appeal is an

may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the territories, in the following cases: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt;[13] (2) from a judgment granting or denying a discharge;[14] and (3) from a judgment allowing or rejecting a debt or claim[15] of five hundred dollars or over.[16] Such appeal must be taken within ten days

appeal in equity which brings up for consideration both questions of fact and of law. Courier-Journal Job-Printing Co. *v.* Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614, 4 Am. Bankr. Rep. 183; *In re* Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145. An appeal as in equity necessarily involves the idea of the reëxamination by the appellate court of both the facts and the law of the case. Egan *v.* Hart, 165 U. S. 188, 17 S. Ct. 300, 41 L. ed. 680; Dower *v.* Richards, 151 U. S. 658, 14 S. Ct. 452, 38 L. ed. 305; Cunningham *v.* Neagle, 135 U. S. 1, 10 S. Ct. 658, 34 L. ed. 55; Simonson *v.* Sinsheimer, 100 Fed. 426, 40 C. C. A. 474, 3 Am. Bankr. Rep. 824.

Appeals in jury cases.— The question of the insolvency of the bankrupt is the only question involved in bankruptcy proceedings which is triable by a jury (Bankr. Act (1898), § 19*a*; and *supra*, II, A, 3), and if the bankrupt invokes the right to trial by jury a review of the rulings of the trial court must be by a writ of error to the circuit court of appeals. Knickerbocker Ins. Co. *v.* Comstock, 16 Wall. (U. S.) 258, 21 L. ed. 493; Duncan *v.* Landis, 106 Fed. 839, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649. In such a case neither the appellate court nor the court below can review the facts. U. S. Const. art. 7, § 1; Parsons *v.* Bedford, 3 Pet. (U. S.) 433, 7 L. ed. 732. *Compare* Simonson *v.* Sinsheimer, 100 Fed. 426, 40 C. C. A. 474, 3 Am. Bankr. Rep. 824, where it was held that when there is an appeal under Bankr. Act (1898), § 25*a*, from an adjudication in involuntary bankruptcy by the district court, decided upon the issue as to whether an assignment for the benefit of creditors is an act of bankruptcy, that the method of procedure in the court of appeals is not in accordance with the rules which obtain in respect to the hearing of a writ of error to a judgment of law in cases where a jury is waived, but the appeal is in equity, involving a reëxamination of the facts as well as the law.

Decision or order must be a final one to warrant an appeal therefrom under Bankr. Act (1898), § 25. *In re* Russell, 101 Fed. 248, 41 C. C. A. 323, 3 Am. Bankr. Rep. 658. See also Goodman *v.* Brenner, 109 Fed. 481, 48 C. C. A. 516, 6 Am. Bankr. Rep. 470.

Where no prejudice has resulted to the appellant his appeal is without merit. *In re* McDuff, 101 Fed. 241, 41 C. C. A. 316, 4 Am. Bankr. Rep. 110; *In re* Lesser, 99 Fed. 913, 40 C. C. A. 177, 3 Am. Bankr. Rep. 758. See also Fisher *v.* Cushman, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292, 4 Am. Bankr. Rep. 646; *In re* T. L. Kelly Dry-Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528.

Reasonable exercise of judicial discretion will not be reviewed on appeal. *In re* Horgan, 98 Fed. 414, 39 C. C. A. 118, 3 Am. Bankr. Rep. 253 [*affirming* 97 Fed. 319].

Decisions not reviewable.— For illustrations of decisions held not to be reviewable under the appeal allowed by Bankr. Act (1898), § 25, see Goodman *v.* Brenner, 109 Fed. 481, 48 C. C. A. 516, 6 Am. Bankr. Rep. 470; Fisher *v.* Cushman, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292, 4 Am. Bankr. Rep. 646; *In re* T. L. Kelly Dry-Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528; *In re* Russell, 101 Fed. 248, 41 C. C. A. 323, 3 Am. Bankr. Rep. 658; *In re* McDuff, 101 Fed. 241, 41 C. C. A. 316, 4 Am. Bankr. Rep. 110; *In re* Lesser, 99 Fed. 913, 40 C. C. A. 177, 3 Am. Bankr. Rep. 758; *In re* Horgan, 98 Fed. 414, 39 C. C. A. 118, 3 Am. Bankr. Rep. 253.

13. *In re* Good, 99 Fed. 389, 39 C. C. A. 581, 3 Am. Bankr. Rep. 605.

14. **An order refusing confirmation of a composition** tendered by the bankrupt and accepted by the requisite number of creditors has been held to be a proper subject of an appeal. U. S. *v.* Hammond, 104 Fed. 862, 44 C. C. A. 229, 4 Am. Bankr. Rep. 736 [*distinguished* in Ross *v.* Saunders, 105 Fed. 915, 45 C. C. A. 123, 5 Am. Bankr. Rep. 350, where, upon an application to confirm a composition, no creditors appeared formally in opposition, but the trustee, as such, appeared and opposed such confirmation, and where such confirmation was refused and an appeal was taken by the bankrupt against the trustee and citation issued to such trustee and to no other person, it was held that there were no proper parties before the circuit court of appeals and that the appeal must therefore be dismissed]. See also *infra*, XIV, C, 4.

15. **The word "claim"** means a money demand, the same as "debt," and was used in this subdivision in connection with that word, not to enlarge, but to render certain. *In re* Whitener, 105 Fed. 180, 44 C. C. A. 434, 5 Am. Bankr. Rep. 198.

16. **Allowance of an attorney's fee exceeding the amount of five hundred dollars** may be reviewed. *In re* Roche, 101 Fed. 956, 42 C. C. A. 115, 4 Am. Bankr. Rep. 369; *In re* Curtis, 100 Fed. 784, 41 C. C. A. 59, 4 Am. Bankr. Rep. 17.

An appeal from a territorial district court in a matter in bankruptcy will not lie to the territorial supreme court from a judgment allowing or rejecting a debt or claim of less than five hundred dollars. *Ex p.* Stumpff, 9 Okla. 639, 60 Pac. 96, 4 Am. Bankr. Rep. 267.

Exercise of its summary jurisdiction by a bankruptcy court, adjudging the amount due on a secured claim, may be reviewed on ap-

after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.[17]

(III) *Manner of Taking Appeal.* Appeals from a court of bankruptcy to a circuit court of appeals must be allowed by a judge of the court appealed from[18] or of the court appealed to, and shall be regulated, except as otherwise provided by the Act, by the rules governing appeals in the courts of the United States.[19]

(IV) *Time For Taking Appeal.* It is prescribed that an appeal shall be taken within ten days after the judgment appealed from has been rendered.[20]

peal. *In re* Roche, 101 Fed. 956, 42 C. C. A. 115, 4 Am. Bankr. Rep. 369.

Question as to priority of claim.—Congress having specifically provided, in Bankr. Act (1898), § 25, for an appeal with reference to proofs of debts exceeding five hundred dollars, on which appeal all questions are open to the appellate tribunal, and having also provided [§ 24*b*] that, for all matters of administration which concern the relations to each other of the different interests in the estate, the action of the bankruptcy court shall be revised only in matters of law, the courts are not at liberty to disregard the distinction so created; and, where an order allowing the proving of a claim also determines its priority, the former part of the order is appealable, but the latter part can only be reviewed on a petition for revision. *In re* Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496.

Question as to rank of lien.—Under Bankr. Act (1898), § 25 (3), which gives a right of appeal "from a judgment allowing or rejecting a debt or claim of five hundred dollars or over," such an appeal includes as an incident any question as to the rank or lien of such debt or claim in the distribution of the bankrupt's estate; at least, where such question is one of controverted fact and law. Cunningham *v.* German Ins. Bank, 103 Fed. 932, 43 C. C. A. 377, 4 Am. Bankr. Rep. 192. Under the provision of the Bankruptcy Act that an appeal may be taken from a judgment of the court of bankruptcy allowing or rejecting a debt or claim of five hundred dollars or over, when a creditor proving his debt in bankruptcy claims a lien on property of the bankrupt the question of the lien asserted is an incident to the allowance or rejection of the debt, and may therefore be reviewed on an appeal from an order allowing or rejecting the debt; and such an appeal brings up both questions of law and fact. See also Courier-Journal Job-Printing Co. *v.* Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614, 4 Am. Bankr. Rep. 183.

17. Bankr. Act (1898), § 25*a*.

18. **Writ of mandamus** will be allowed compelling a judge of a court of bankruptcy to allow an appeal; the fact that an application for an appeal may also be made to a judge of the court of appeals is not a sufficient objection to the allowance of such a writ. U. S. *v.* Gomez, 3 Wall. (U. S.) 752, 18 L. ed. 212; U. S. *v.* Hammond, 104 Fed. 862, 44 C. C. A. 229, 4 Am. Bankr. Rep. 736. And see Sage *v.* Iowa Cent. R. Co., 93 U. S. 412, 23 L. ed. 933.

19. U. S. Supreme Ct. Bankr. G. O. No. 36, par. 1. See also, generally, Appeal and Error, 2 Cyc. 474.

Petition and bond.— An appeal is properly taken by presenting a petition therefor, either to the judge of the court of bankruptcy or one of the judges of the circuit court of appeals. Such petition must be accompanied with an assignment of errors and an appeal-bond. Cir. Ct. App. Rules, No. 11 [90 Fed. cxlvi]. An appeal-bond is an essential for the prosecution of an appeal, although an appeal may be taken without such bond. Dodge *v.* Knowles, 114 U. S. 436, 5 S. Ct. 1108, 1197, 29 L. ed. 296; The Dos Hermanos, 10 Wheat. (U. S.) 306, 6 L. ed. 328. But trustees need not give bonds. Bankr. Act (1898), § 25*c*.

Assignment of errors.— While an appellant may not demand as a matter of right that the circuit court of appeals should entertain a question which is not properly raised by a specific assignment of error, the court may, in its discretion, notice a plain error, although it is not assigned. Boonville Nat. Bank *v.* Blakey, 107 Fed. 891, 47 C. C. A. 431, 6 Am. Bankr. Rep. 13.

Record.— Where a referee in bankruptcy on petition of a party desiring a review by the judge of an order made by him, in accordance with the requirements of Bankr. Act (1898), § 39 (5) and U. S. Supreme Ct. Bankr. G. O. No. 27 [32 C. C. A. xxvii, 89 Fed. xi], has certified to the judge the question presented, "a summary of the evidence relating thereto, and the finding and order of the referee thereon," and the matter has been heard and determined by the judge on the record so made, the original evidence before the referee is no part of the record in the court, and cannot be required to be included in the transcript on an appeal from its decision. Cunningham *v.* German Ins. Bank, 103 Fed. 932, 43 C. C. A. 377, 4 Am. Bankr. Rep. 192.

20. Bankr. Act (1898), § 25*a*.

The limitation of time prescribed refers only to decrees or orders in bankruptcy proceedings, and to the appeals mentioned therein, and has no application to collateral suits for the recovery of the bankrupt's assets (Boonville Nat. Bank *v.* Blakey, 107 Fed. 891, 47 C. C. A. 43, 6 Am. Bankr. Rep. 13; Steele *v.* Buel, 104 Fed. 968, 44 C. C. A. 287, 5 Am. Bankr. Rep. 165), and has no

The general rule is that where the time for taking an appeal is prescribed by statute there can be no extension.[21] The number of days within which an appeal is to be taken is to be computed by excluding the first and including the last, unless the last fall on a Sunday or a holiday,[22] in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.[23] The time begins to run from the date of the entry or filing of the judgment, decree, or order appealed from.[24] While it has been determined that an appeal is not taken within the meaning of this section[25] until the petition and allowance of appeal (where there is such a petition and allowance) and the appeal-bond and citation are presented to and filed in the court which made the decree appealed from,[26] there are, however, cases holding that the failure to issue a citation,[27] or to give an appeal-bond[28] within ten days is not necessarily a fatal defect.

(v) *Who May Take an Appeal.* The general rule is that where an appeal lies from any judgment or decree, the same may be taken by any party or person injured or affected by the decree or judgment. It has accordingly been held that since the Bankruptcy Act is silent as to the party who may take an appeal on the allowance or disallowance of a claim against a bankrupt's estate, any creditor who is directly interested in the judgment complained of may appeal therefrom.[29] It has also been held that an appeal from the allowance of a claim by

reference to a petition for a review (*In re* New York Economical Printing Co., 106 Fed. 989, 45 C. C. A. 691, 5 Am. Bankr. Rep. 697). *Compare In re* Wright, 96 Fed. 820, 3 Am. Bankr. Rep. 184, where it is held that when the district court, in a controversy between a trustee in bankruptcy and a creditor of the estate, has rendered a decree on the merits adverse to the trustee, and the latter, without culpable neglect, has lost his right of appealing therefrom by the expiration of the time limited by Bankr. Act (1898), § 25*a*, the district court may grant a rehearing, on his petition filed thereafter, for the purpose of reviving his right of appeal.

21. Credit Co. *v.* Arkansas Cent. R. Co., 128 U. S. 258, 9 S. Ct. 107, 32 L. ed. 448; Wood *v.* Bailey, 21 Wall. (U. S.) 640, 22 L. ed. 689.

But where, because of a mistake in the choice of remedies, a party omitted to take an appeal within the statutory time, the United States supreme court held that the district court might grant a review of the decree so as to enable the party to take an appeal in time. Stickney *v.* Wilt, 23 Wall. (U. S.) 150, 23 L. ed. 50, 11 Nat. Bankr. Reg. 97.

22. **A holiday** is either Christmas, the fourth of July, the twenty-second of February, or any day appointed by the president of the United States or the congress of the United States as a holiday or as a day of public fasting or thanksgiving. Bankr. Act (1898), § 1 (14).

23. Bankr. Act (1898), § 31.

24. *In re* Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496. See also Aspen Min., etc., Co. *v.* Billings, 150 U. S. 31, 14 S. Ct. 4, 37 L. ed. 986; Radford *v.* Folsom, 123 U. S. 725, 8 S. Ct. 334, 31 L. ed. 292; Del Valle *v.* Harrison, 93 U. S. 233, 23 L. ed. 892; Providence Rubber Co. *v.* Goodyear, 6 Wall. (U. S.) 153, 18 L. ed. 762; Andrews *v.* Thum, 64 Fed. 149, 21 U. S. App. 459, 12 C. C. A. 77.

25. Bankr. Act (1898), § 25*a*.

26. Norcross *v.* Nave, etc., Mercantile Co., 101 Fed. 796, 42 C. C. A. 29, 4 Am. Bankr. Rep. 317, where it appeared that none of the papers mentioned in the text were filed within the ten days except the appeal-bond. The court held that the presumption that might arise from the filing and approval of the bond does not obtain when the record affirmatively discloses that there was a prayer for the appeal, and its allowance, and a citation, none of which were filed in the court until after the expiration of the ten days allowed to perfect the appeal. See also Fowler *v.* Hamill, 139 U. S. 549, 11 S. Ct. 663, 35 L. ed. 266; Farrar *v.* Churchill, 135 U. S. 609, 10 S. Ct. 771, 34 L. ed. 246; Credit Co. *v.* Arkansas Cent. R. Co., 128 U. S. 258, 9 S. Ct. 107, 32 L. ed. 448.

27. Green *v.* Elbert, 137 U. S. 615, 11 S. Ct. 188, 34 L. ed. 792; Richardson *v.* Green, 130 U. S. 104, 9 S. Ct. 443, 32 L. ed. 872; Hewitt *v.* Filbert, 116 U. S. 142, 6 S. Ct. 319, 29 L. ed. 581.

28. Dodge *v.* Knowles, 114 U. S. 436, 5 S. Ct. 1108, 1197, 29 L. ed. 296; The Dos Hermanos, 10 Wheat. (U. S.) 306, 6 L. ed. 328.

29. *In re* Roche, 101 Fed. 956, 42 C. C. A. 115, 4 Am. Bankr. Rep. 369. This case seems to have been followed in McDaniel *v.* Stroud, 106 Fed. 486, 45 C. C. A. 446, 5 Am. Bankr. Rep. 685, where it appeared that the trustee, for no other reason than that the matter did not concern him, so conducted himself as not only to deprive the dissatisfied creditors of the use of his name, but to prevent them from appealing to the court for an order compelling this use; an appeal was brought in this case in the name of the creditors, which was subsequently supplemented by an order providing that the case

the district court can only be taken by the trustee as the representative of all the creditors, and that where the trustee upon the request of a creditor refuses to take an appeal the district court may direct an appeal by the trustee or permit a creditor to appeal in the name of such trustee.[30]

(VI) *Disposition of Appeal.* As in ordinary appeals in equity cases the circuit court of appeals may review the facts as well as the law of the case,[31] and affirm or reverse the judgment,[32] or grant such other relief as may be proper in such cases.[33]

be conducted in the name of the trustee in connection with such creditors, and that the record be amended to that extent. It was held that the matter was thus properly brought within the consideration of the appellate court. See also *In re* Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559 [*affirming* 92 Fed. 896], discussing the right of creditors, who appear in opposition to a petition in involuntary bankruptcy against their debtor and contest the adjudication, to appeal from the decree making the adjudication; also the right of an assignee for the benefit of creditors to appeal from the decree of a district court adjudging his assignor a bankrupt, where the act of bankruptcy charged is a general assignment for the benefit of creditors.

But see under Bankr. Act (1867), § 6, the following cases: *In re* Troy Woolen Co., 9 Blatchf. (U. S.) 191, 24 Fed. Cas. No. 14,202; *In re* Place, 8 Blatchf. (U. S.) 302, 19 Fed. Cas. No. 11,200, 3 Chic. Leg. N. 218, 4 Nat. Bankr. Reg. 451; *In re* Joseph, 2 Woods (U. S.) 390, 13 Fed. Cas. No. 7,532.

30. Chatfield *v.* O'Dwyer, 101 Fed. 797, 799, 42 C. C. A. 30, 4 Am. Bankr. Rep. 313. The court in this case stated as one of the reasons for its decision: "If one creditor of a bankrupt may prosecute an appeal, under section 25 of the bankrupt law, from the allowance of a claim, then any other creditor may take a like appeal upon the same or different grounds, and this court may be required to entertain a number of appeals, all of which are brought to test the validity of the same demand. In a case which arose under the old bankrupt law [*In re* Randall, 1 Sawy. (U. S.) 56, 20 Fed. Cas. No. 11,552] Judge Deady pointed out very clearly the evil results which would follow if every factious creditor was allowed to litigate individually and in his own name the claims of other creditors, without the sanction or approval of the assignee or the bankrupt court." See also Foreman *v.* Burleigh, 109 Fed. 313, 48 C. C. A. 376, 6 Am. Bankr. Rep. 230, where the court states that in the case of *In re* Roche, 101 Fed. 956, 42 C. C. A. 115, 4 Am. Bankr. Rep. 369, the question here involved was given but slight consideration, because it was complicated with another proposition upon which the decision might clearly have turned, as it appears in the decision of that case that the creditor bringing the appeal had a special lien on the sum in the hands of the trustee, and further declares that the case turned on such fact, and what appears in that decision beyond that is dictum.

31. Simonson *v.* Sinsheimer, 100 Fed. 426, 40 C. C. A. 474, 3 Am. Bankr. Rep. 824. See also *supra*, note 12; and *compare* Duncan *v.* Landis, 106 Fed. 839, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649.

32. Thus where, on appeal from a final order of the district court granting a discharge to a bankrupt, no assignment of errors is filed in such court, as required by rule 11 of the circuit courts of appeal [31 C. C. A. cxlvi, 90 Fed. cxlvi], the judgment of the district court will be affirmed. *In re* Dunning, 94 Fed. 709, 36 C. C. A. 437; Lloyd *v.* Chapman, 93 Fed. 599, 35 C. C. A. 474.

Compare also *In re* Rome Planing-Mill Co., 99 Fed. 937, 3 Am. Bankr. Rep. 766, holding that where a petition in involuntary bankruptcy is referred to a referee in bankruptcy to find and report on the question whether the respondent was solvent or insolvent at the date of the alleged act of bankruptcy, his conclusion, based on the examination of witnesses as to the extent of the respondent's liabilities and the value of his property, will not be set aside by the court on review, unless plainly contrary to the evidence.

33. Dismissal.— An appeal from an order of a court of bankruptcy allowing a claim, although taken in the name of other creditors, will not be dismissed where the trustee refused to allow the use of his name when the time for taking the appeal had so nearly expired that it was impossible to obtain an order requiring him to consent in time, and where the district court subsequently made an order that the appeal taken should be continued in the name of the trustee in connection with the appealing creditors. McDaniel *v.* Stroud, 106 Fed. 486, 45 C. C. A. 446, 5 Am. Bankr. Rep. 685.

Petition for revision in lieu of appeal.— Where an appeal from an order of the district court in bankruptcy was allowed by the judge thereof, and all parties concerned had due and actual notice, and the record brought up presents all the facts in issue and the action of the court thereon, but the order in question was not appealable, the circuit court of appeals may permit the appellant, in lieu of his appeal, to file a petition for revision of the proceedings in the district court, and on due notice thereof to parties entitled proceed in the exercise of its revisory jurisdiction, or may under special circumstances consider the case on its merits in like manner as if a formal petition had been presented

b. To Superintend and Revise in Matter of Law — (i) *Statutory Provision.*[34] The several circuit courts of appeals[35] have jurisdiction in equity, either interlocutory or final, to superintend and revise[36] in matter of law[37] the proceed-

and due notice thereof given. *In re* Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. Bankr. Rep. 266.

34. Bankr. Act (1898), § 24*b*.

35. **Provision does not apply** to supreme courts of the territories. *Ex p.* Stumpff, 9 Okla. 639, 60 Pac. 96, 4 Am. Bankr. Rep. 267. But *compare In re* Blair, 106 Fed. 662, 45 C. C. A. 530, 5 Am. Bankr. Rep. 793. See also *infra*, note 38.

36. **This supervisory jurisdiction only extends** over bankruptcy proceedings strictly so-called, that is, those which are initiated by the petition and end in the distribution of assets among creditors, and the discharge or refusal of discharge of the bankrupt. Lowell Bankr. 419; *In re* Jacobs, 99 Fed. 539, 39 C. C. A. 647, 3 Am. Bankr. Rep. 671. The corresponding section in the Bankruptcy Act of 1867 [U. S. Rev. Stat. (1878), § 4986] is construed and explained in Lathrop *v.* Drake, 91 U. S. 516, 23 L. ed. 414; Sandusky *v.* Indianapolis First Nat. Bank, 23 Wall. (U. S.) 289, 23 L. ed. 155; Coit *v.* Robinson, 19 Wall. (U. S.) 274, 22 L. ed. 152; Marshall *v.* Knox, 16 Wall. (U. S.) 551, 21 L. ed. 481; Morgan *v.* Thornhill, 11 Wall. (U. S.) 65, 20 L. ed. 60. It does not extend to suits brought in the district court by the trustee in bankruptcy against third persons (*In re* Jacobs, 99 Fed. 539, 39 C. C. A. 647, 3 Am. Bankr. Rep. 671), or to a case where there is a trial of a question of insolvency by a jury (Duncan *v.* Landis, 106 Fed. 839, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649 [*citing* Parsons *v.* Bedford, 3 Pet. (U. S.) 433, 7 L. ed. 732], or to a judgment adjudicating a person bankrupt (*In re* Good, 99 Fed. 389, 39 C. C. A. 581, 3 Am. Bankr. Rep. 605). And see also Knickerbocker Ins. Co. *v.* Comstock, 16 Wall. (U. S.) 258, 21 L. ed. 493).

Review of orders of circuit court.— In *In re* Seebold, 105 Fed. 910, 45 C. C. A. 117, 5 Am. Bankr. Rep. 358, the circuit court of appeals entertained a petition to review an order of the circuit court denying an application on the part of the bankrupt's trustee to compel the sheriff of the state court to turn over to such trustee the proceeds obtained under an execution sale. The editor of the American Bankruptcy Reports in his note to this case calls attention to the fact that the statute contains no provision conferring authority or jurisdiction upon circuit courts in original proceedings in bankruptcy, and states that "apparently the only jurisdiction which the circuit court obtains in any proceeding relating to bankruptcy is in suits brought by the trustee, or by reason of diversity of citizenship, such court has general jurisdiction over such kind of litigation." In the case cited it would appear that, the parties not objecting, it was assumed by the court that the action sought to be reviewed was the action of a court of bankruptcy. It may be therefore that the case cited will not be controlling on this point.

37. **Matters of law.**— This section is intended to provide a summary way of reviewing the orders of bankruptcy courts upon questions of law but does not contemplate any review of the facts. Fisher *v.* Cushman, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292, 4 Am. Bankr. Rep. 646; *In re* Eggert, 102 Fed. 735, 43 C. C. A. 1, 4 Am. Bankr. Rep. 449; Courier-Journal Job-Printing Co. *v.* Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614, 4 Am. Bankr. Rep. 183; *In re* Rosser, 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153; *In re* Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145; *In re* Rouse, 91 Fed. 96, 63 U. S. App. 570, 33 C. C. A. 356, 1 Am. Bankr. Rep. 234. See also *In re* Seebold, 105 Fed. 910, 45 C. C. A. 117, 5 Am. Bankr. Rep. 358; *In re* Purvine, 96 Fed. 192, 37 C. C. A. 446, 2 Am. Bankr. Rep. 787; *In re* Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. Bankr. Rep. 266.

A distinction is thus made between the review prescribed by Bankr. Act (1898), § 24*b*, and that by the following section. Bankr. Act (1898), § 25, provides for the review of both questions of law and fact. *In re* Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496. If a party, doubtful whether his remedy is under section 24 or section 25, undertakes to avail himself of both, one does not necessarily neutralize the other, because in contemplation of law no substantial injury is thereby done to the party appealed against. *In re* Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496.

A decision, though not final, may be reviewed on a petition under Bankr. Act (1898), § 24*b*. *In re* Russell, 101 Fed. 248, 41 C. C. A. 323, 3 Am. Bankr. Rep. 658.

An order allowing or rejecting a lien claimed may be reviewed on a petition for review, but only as to matter of law. Courier-Journal Job-Printing Co. *v.* Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614, 4 Am. Bankr. Rep. 183.

Exercise of reasonable discretion by the district court is not reviewable on petition for review under Bankr. Act (1898), § 24*b*. *In re* Lesser, 99 Fed. 913, 40 C. C. A. 177, 3 Am. Bankr. Rep. 758.

The fact that an appeal is taken in bankruptcy proceedings, and a petition for revision also filed, both relating to the same subject-matter, does not defeat the right to have the matter determined on the merits in whichever proceeding is held to be appropriate. Fisher *v.* Cushman, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292, 4 Am. Bankr. Rep. 646.

ings of the several inferior courts of bankruptcy within their jurisdiction.[38] Such power shall be exercised upon due notice and petition[39] by any party aggrieved.[40]

(II) *PETITION*—(A) *Requisites.* The petition for revision should, with reasonable clearness, show the action of the court which it seeks to have revised in matter of law.[41] Such petition should be accompanied by a certified copy of so much of the record as will exhibit the manner in which the question of law arose and its determination.[42] It has been held that an appeal may, in proper cases, be treated as a petition for revision.[43]

(B) *Time of Presentation.* The Act does not fix the time for presenting a petition for a review, but it has been held that such time is limited by analogy to the six months allowed by statute for taking appeals generally in the circuit court of appeals.[44] In another case it has been held that since neither the stat-

38. **The words "within their jurisdiction"** relate to territorial limits and confine the circuit court of appeals in the exercise of its supervisory jurisdiction to the revision of proceedings of a court of bankruptcy within its circuit. *In re* Seebold, 105 Fed. 910, 45 C. C. A. 117, 5 Am. Bankr. Rep. 358. Such words refer to existing appellate jurisdiction and should be construed as if the phrase read "within their appellate jurisdiction." While the United States courts having original jurisdiction in the Indian Territory are inferior courts of bankruptcy within the meaning of such section, they are not within the jurisdiction, either territorial or appellate, of the United States circuit court of appeals for the eighth judicial circuit, and appeals from the territorial bankruptcy courts can only be had to a court of appeals for the territory, and the only appellate jurisdiction vested in the circuit court of appeals for the eighth circuit is on writ of error and appeal from such court of appeals. *In re* Stumpff, 9 Okla. 639, 4 Am. Bankr. Rep. 267; *In re* Blair, 106 Fed. 662, 45 C. C. A. 530, 5 Am. Bankr. Rep. 793.

39. See *infra*, II, D, 1, b, (II).

40. **Parties.**— Upon a petition for revision the persons whose names appear in the petition of the trustee as creditors of the bankrupt, and whose names do not otherwise appear upon the record, are not necessary parties. Since they are represented by the trustee in the proceedings in the court below, they must be deemed to be sufficiently represented by him in the proceeding for a revision in the court of appeals. *In re* Utt, 105 Fed. 754, 45 C. C. A. 32, 5 Am. Bankr. Rep. 383; Courier-Journal Job-Printing Co. *v.* Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614, 4 Am. Bankr. Rep. 183.

41. *In re* Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. Bankr. Rep. 266 [*reversed*, on other grounds, in Bryan *v.* Bernheimer, 181 U. S. 188, 21 S. Ct. 557, 45 L. ed. 814, 5 Am. Bankr. Rep. 623]. See also *In re* Steuer, 104 Fed. 976, 5 Am. Bankr. Rep. 209; Courier-Journal Job-Printing Co. *v.* Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614, 4 Am. Bankr. Rep. 183; *In re* Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145.

The value of the matter or thing concerning which an appeal is sought need not be alleged in the petition. *In re* Rouse, 91 Fed. 96, 63 U. S. App. 570, 33 C. C. A. 356, 1 Am. Bankr. Rep. 234. See also *In re* Clark, 9 Blatchf. (U. S.) 379, 5 Fed. Cas. No. 2,802, 6 Nat. Bankr. Reg. 410.

42. Courier-Journal Job-Printing Co. *v.* Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614, 4 Am. Bankr. Rep. 183; *In re* Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145, where it was held that the question of law so presented is the only question that can properly be ruled upon by the court upon an original petition; and that where a petition states no such question but simply charges that the decision of the court below was erroneous upon the facts as well as upon the law it is defective.

U. S. Supreme Ct. Bankr. G. O. No. 36 provides that "appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States." An application of this General Order requires petitions for review to be expressed as provided in U. S. Equity Rules, No. 26, which rule states that "every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recital of deeds, contracts, or other instruments *in hæc verba*, or any impertinent matter, or any scandalous matter not pertinent to the suit." The application of this Equity Rule, however, does not affect the requirement that a petition to review should present in some way enough of the tenor of the record in the district court to enable the circuit court of appeals to perceive the issue of law which is sought to be raised. *In re* Baker, 104 Fed. 287, 43 C. C. A. 536, 4 Am. Bankr. Rep. 778.

43. *In re* Whitener, 105 Fed. 180, 44 C. C. A. 434, 5 Am. Bankr. Rep. 198 (where it is held, however, that an appeal taken to the circuit court of appeals from a judgment of a court of bankruptcy, which was not appealable, cannot be treated as a petition in equity for revision in matter of law, under Bankr. Act (1898), § 24*b*, where the questions presented for review all involve matters of fact); *In re* Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. Bankr. Rep. 266. *Compare In re* Steuer, 104 Fed. 976, 5 Am. Bankr. Rep. 209.

44. *In re* Worcester County, 102 Fed. 808,

ute nor the rules limit the time within which such petition should be filed a motion to dismiss will not be entertained unless there has been unreasonable delay.[45]

(c) *To What Court Made.* In analogy to the rule prescribed for allowing appeals and the practice of allowing writs of error in cases at law, the petition for revision may be presented to and allowed by a judge of a court of bankruptcy, or any one of the judges of the circuit court of appeals.[46]

2. Of the United States Supreme Court — a. Appeals From Courts of Bankruptcy. The supreme court of the United States is invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.[47]

b. Appeals From Circuit Courts of Appeals. From any final decision of a court of appeals allowing or rejecting a claim under the Bankruptcy Act, an appeal may be had under such rules and within such time as may be prescribed by the supreme court of the United States, in the following cases and no other: (1) where the amount in controversy exceeds the sum of two thousand dollars,[48]

42 C. C. A. 637, 4 Am. Bankr. Rep. 496. But see *In re* Good, 99 Fed. 389, 39 C. C. A. 581, 3 Am. Bankr. Rep. 605, where the court seems to infer that the supervisory jurisdiction of the circuit court of appeals is limited and governed by Bankr. Act (1898), § 25*a*, to the effect that an appeal may be taken to such court within ten days after the judgment appealed from is rendered. In another case in the same circuit it was held that the limitation of ten days prescribed in section 25 within which an appeal must be taken applies only to appeals in the three classes of cases mentioned therein. Steele *v.* Buel, 104 Fed. 968, 44 C. C. A. 287, 5 Am. Bankr. Rep. 165. See also Boonville Nat. Bank *v.* Blakey, 107 Fed. 891, 47 C. C. A. 43, 6 Am. Bankr. Rep. 13.

45. *In re* New York Economical Printing Co., 106 Fed. 989, 45 C. C. A. 691, 5 Am. Bankr. Rep. 697.

In construing a similar provision of the Act of 1867, in Troy First Nat. Bank *v.* Cooper, 20 Wall. (U. S.) 171, 22 L. ed. 273, Mr. Justice Strong said: "It is true their bill was not filed in the circuit court until about four months and a half after the order complained of was made. But the Act of Congress prescribes no time within which the application for a review must be presented. An appeal is required to be taken within ten days. Not so with a petition or bill for a review. Undoubtedly the application should be made within a reasonable time, in order that the proceedings to settle the bankrupt's estate may not be delayed, but neither the Act of Congress nor any rule of this court determines what that time is. At present therefore, it must be left to depend upon the circumstances of each case. Perhaps, generally, it should be fixed in analogy to the period designated within which appeals must be taken." Littlefield *v.* Delaware, etc., Canal Co., 3 Cliff. (U. S.) 371, 15 Fed. Cas. No. 8,400, 4 Nat. Bankr. Reg. 257. See also Sweatt *v.* Boston, etc., R. Co., 3 Cliff. (U. S.) 339, 23 Fed. Cas. No. 13,684, 5 Nat. Bankr. Reg. 234; Baldwin *v.* Raplee, 2 Fed. Cas. No. 802, 5 Nat. Bankr. Reg. 19.

46. *In re* Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. Bankr. Rep. 266. But in Courier-Journal Job-Printing Co. *v.* Schaefer-Meyer Brewing Co., 101 Fed. 699, 702, 41 C. C. A. 614, 4 Am. Bankr. Rep. 183, the court says: "Under section 24 the jurisdiction is not exercised under an appeal, but upon an original petition filed in this court by any person aggrieved by the decision or order complained of." And in *In re* Williams, 105 Fed. 906, 907, 5 Am. Bankr. Rep. 198 note, Hammond, J., says: "Neither the Supreme Court nor the Court of Appeals has seen fit to regulate the practice by rules prescribed for the purpose, and it seems plain to me that it would be an impertinent usurpation for the district court or judge to assume any function or authority in that behalf; and this notwithstanding the analogy suggested in *Re* Abraham."

47. Bankr. Act (1898), § 24*a*.

The jurisdiction thus conferred permits the supreme court to entertain appeals from any of the courts of bankruptcy where, under the general law, an appeal would lie in cases other than controversies in bankruptcy proceedings. 26 U. S. Stat. at L. 826, which authorizes appeals or writs of error to be taken from the district courts or from the existing circuit courts directly to the supreme court in certain cases. The cases mentioned in such section which may be applicable to controversies in bankruptcy are those (1) in which the jurisdiction of the court is in issue; (2) in which the construction or application of the United States constitution is involved; (3) in which the constitutionality of any law of the United States is drawn into question; and (4) in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States. Such court is expressly authorized to exercise an appellate jurisdiction in respect to controversies arising in bankruptcy proceedings from courts of bankruptcy not within any organized circuit of the United States, and from the supreme court of the District of Columbia. Bankr. Act (1898), § 24*a*. See also, generally, Appeal and Error, 2 Cyc. 474.

48. Amount in controversy.— An appeal from the final decision of the circuit court of

and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the supreme court of the United States;[49] or (2) where some justice of the supreme court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of the Act throughout the United States.[50]

c. Review of Cases From Other Courts of the United States. Controversies may be certified[51] to the supreme court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari[52] in pursuance of the provisions of the United States laws now in force or which may hereafter be enacted.

d. Appeals From State Courts. By the Bankruptcy Act the supreme court of the United States has appellate jurisdiction of controversies in bankruptcy proceedings.[53] The jurisdiction here conferred is frequently exercised in the consideration of cases removed to such court by a writ of error to the highest courts of the states. The cases in which the supreme court may review judgments of such state courts are prescribed by statute.[54]

appeals under Bankr. Act (1898), § 25*b* (1), cannot be had unless the amount in controversy exceeds the sum of two thousand dollars. The supreme court in considering language somewhat similar to this has stated that the matter in controversy must be either money or some right, the value of which in money can be calculated and ascertained. Barry *v.* Mercein, 5 How. (U. S.) 103, 12 L. ed. 70. See also APPEAL AND ERROR, III, C [2 Cyc. 542].

49. Questions considered on appeal.— Not only must the amount involved in the controversy exceed two thousand dollars, but the question involved must be one which might have been taken on appeal or writ of error from the highest court of a state to the supreme court of the United States. Bankr. Act (1898), § 25*b* (1). The use of the words "on appeal" in this clause is probably an inadvertence, since it is only possible to remove cases from the highest court of a state to the supreme court upon a writ of error. Brandenburg Bankr. 383; Collier Bankr. (3d ed.) 251. See U. S. Rev. Stat. (1878), § 709.

50. Bankr. Act (1898), § 25*b* (2).

Certification of questions.— This provision of the present Act [Bankr. Act (1898), § 26*b* (2)] is supplementary to the certification of questions to the supreme court from the circuit court of appeals authorized by the Circuit Court of Appeals Act of 1891 [26 U. S. Stat. at L. 826]. See also, generally, APPEAL AND ERROR, V, B, 4, t [2 Cyc. 751]; McHenry *v.* Alford, 168 U. S. 651, 18 S. Ct. 242, 42 L. ed. 614; Warner *v.* New Orleans, 167 U. S. 467, 17 S. Ct. 892, 42 L. ed. 239.

51. Bankr. Act (1898), § 25*d*. This provision applies the rules and statutes regulating the certification of controversies involved in ordinary proceedings to controversies arising in bankruptcy cases. In addition to the certificate from the circuit court of appeals, which has already been referred to [see *supra*, II, D, 2, b], the Circuit Court of Appeals Act of 1891 authorizes a certificate from a circuit or district court with reference to the jurisdiction of either of them. 26 U. S. Stat. at L. 826. See also Bardes *v.* Hawarden First Nat. Bank, 178 U. S. 524, 20 S. Ct. 1000, 44 L. ed. 1175, 4 Am. Bankr. Rep. 163, for application of this principle.

52. Writs of certiorari.—Bankr. Act (1898), § 25*d*. The power thus conferred with respect to controversies in bankruptcy proceedings is similar to that possessed in respect to other cases. The general power of granting such writs for the purpose of removing cases from the circuit courts of appeals to be reviewed by the supreme court is conferred by the Circuit Court of Appeals Act of 1891. 26 U. S. Stat. at L. 826. By this statute it is made competent in all cases where judgments or decrees of the circuit court of appeals are final for the supreme court to require by certiorari or otherwise any such case to be certified to the supreme court for its review and determination, with the same power and authority in the case as if it had been carried by writ of error or appeal to such court. The granting of this writ is discretionary with the supreme court, and it will not be used unless the matter involved is one of great importance and of general interest. Forsyth *v.* Hammond, 166 U. S. 506, 17 S. Ct. 665, 41 L. ed. 1095; American Constr. Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 13 S. Ct. 758, 37 L. ed. 486; *Ex p.* Woods, 143 U. S. 202, 12 S. Ct. 417, 36 L. ed. 125.

53. Bankr. Act (1898), § 24*a*.

54. U. S. Rev. Stat. (1878), § 709.

Among the cases specified in which a judgment of a state court respecting bankruptcy may be reviewed are: (1) where it affects the validity of the Bankruptcy Act; (2) where it sustains a statute which is claimed to be repugnant to the United States constitution, or some provision of the Bankruptcy Act, or (3) where it is against the right, title, privilege, or immunity claimed by a person under some provision of the Bankruptcy Act. Collier Bankr. (3d ed.) 242. Among the cases in bankruptcy where judgments of state courts have been reviewed by the supreme court are: Forsyth *v.* Vehmeyer,

e. Time and Manner of Taking Appeal. Both the time[55] and manner of taking an appeal to the supreme court of the United States under the Bankruptcy Act have been regulated by rules of court.[56]

III. CLERKS, MARSHALS, RECEIVERS, AND REFEREES.

A. Clerks — 1. Definition. The term "clerk" as used in the Act means the clerk of the court of bankruptcy.[57]

2. Duties — a. As to Accounts. The clerk is required to account for, as for other fees received by him, the clerk's fee paid in each case, and such other fees as may be received for certified copies of records which may be prepared for persons other than officers.[58]

b. As to Attesting Process. All process, summons, and subpœnas must issue out of the court, under the seal thereof, and be tested by the clerk.[59]

c. As to Checks and Warrants. No moneys deposited as required by the Act can be drawn from the depositary unless by check or warrant signed by the clerk or by a trustee and countersigned by the judge of the court or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge stating the date, the sum, and the account for which it is drawn.[60]

d. As to Collection of Fees. The clerk must collect the fees of the clerk,[61] referee,[62] and trustee[63] in each case instituted, before the filing of the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit[64] stating that the petitioner is without and cannot obtain the money with which to pay such fees.[65]

e. As to Delivery of Papers to Referee. The clerks must deliver to the referees upon application all papers which may be referred to them, or if the offices of such referees are not in the same cities or towns as the offices of such

177 U. S. 177, 20 S. Ct. 623, 44 L. ed. 723, 3 Am. Bankr. Rep. 807; Williams *v.* Heard, 140 U. S. 529, 11 S. Ct. 885, 35 L. ed. 550; Palmer *v.* Hussey, 119 U. S. 96, 7 S. Ct. 158, 30 L. ed. 362; Strang *v.* Bradner, 114 U. S. 555, 5 S. Ct. 1038, 29 L. ed. 248; Hennequin *v.* Clews, 111 U. S. 676, 4 S. Ct. 576, 28 L. ed. 565; Hill *v.* Harding, 107 U. S. 631, 2 S. Ct. 404, 27 L. ed. 493; O'Brien *v.* Weld, 92 U. S. 81, 23 L. ed. 675.

55. Time of taking.— Appeals under the Act to the supreme court of the United States from a circuit court of appeals, or from the supreme court of a territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree and shall be allowed by a judge of the court appealed from, or by a justice of the supreme court. U. S. Supreme Ct. Bankr. G. O. No. 36, par. 2.

56. Manner of taking.— In every case in which either party is entitled by the Act to take an appeal to the supreme court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of facts, and its conclusions of law thereon, stated separately; and the record transmitted to the supreme court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law. U. S. Supreme Ct. Bankr. G. O. No. 36, par. 3.

57. Bankr. Act (1898), § 1 (5), *supra*, note 8, p. 238.

The term "officer," when so used, includes the clerk. Bankr. Act (1898), § 1 (18), *supra*, note 8, p. 238.

58. Bankr. Act (1898), § 51 (1).

Under the Act of 1867 it was made the duty of the clerk to account for moneys received. See rule 28 of General Orders in Bankruptcy, adopted under that Act.

59. U. S. Supreme Ct. Bankr. G. O. No. 3.

Blanks with the signature of the clerk and seal of the court may upon application be furnished to the referees. U. S. Supreme Ct. Bankr. G. O. No. 3.

60. U. S. Supreme Ct. Bankr. G. O. No. 29.

An entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. U. S. Supreme Ct. Bankr. G. O. No. 29.

61. Fee of clerk is fixed by Bankr. Act (1898), § 52*a*. See also *infra*, III, A, 3.

62. Fee of referee is fixed by Bankr. Act (1898), § 40*a*. See also *infra*, III, D, 6.

63. Fee of trustee is fixed by Bankr. Act (1898), § 48*a*. See also *infra*, XII, G.

64. As to affidavit stating that the petitioner is without and cannot obtain money with which to pay fees see *infra*, III, D, 6, a.

65. Bankr. Act (1898), § 51 (2).

clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used.[66]

f. As to Docket. The clerk must keep a docket in which the cases shall be entered and numbered in the order in which they are commenced. It should contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid.[67]

g. As to Filing Papers. The clerk or the referee must indorse on each paper filed[68] with him the day and the hour of filing and a brief statement of its character.[69]

h. As to Payment of Fees. Clerks must, within ten days after each case has been closed,[70] pay to the referee, if the case has been referred, the fee collected for him, and to the trustee the fee collected for him at the time of the filing of the petition.[71]

3. Compensation. Clerks respectively receive as full compensation for their services to each estate[72] a filing fee of ten dollars,[73] except when a fee is not required from a voluntary bankrupt.[74]

B. Marshals[75] **— 1. Duties.** Marshals are required to serve such writs and processes as are directed to them.[76] When necessary for the preservation of estates the court may require the marshal to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee has

66. Bankr. Act (1898), § 51 (3).

Clerk must deliver personally or send by mail to the referee a copy of the order of reference. U. S. Supreme Ct. Bankr. G. O. No. 12, par. 1.

For duties of referee as to papers see *infra*, III, D, 4, d.

67. U. S. Supreme Ct. Bankr. G. O. No. 1. See also *In re* Dupree, 97 Fed. 28; *In re* Van Borcke, 94 Fed. 352, 2 Am. Bankr. Rep. 322; *In re* Stevenson, 94 Fed. 110, 2 Am. Bankr. Rep. 66.

Arrangement and inspection of docket.— The docket must be arranged in a manner convenient for reference, and shall at all times be open to public inspection. U. S. Supreme Ct. Bankr. G. O. No. 1.

68. **All petitions in bankruptcy proceedings** should be filed with the clerk. *In re* Sykes, 106 Fed. 669, 6 Am. Bankr. Rep. 264.

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk. U. S. Supreme Ct. Bankr. G. O. No. 20.

69. U. S. Supreme Ct. Bankr. G. O. No. 2.

70. **The case is probably deemed closed** when the referee has transmitted to the clerk the records required to be kept by him. Bankr. Act (1898), § 39*a* (7).

71. Bankr. Act (1898), § 51 (4).

72. **"Full compensation" explained.**—The fees allowed by the Act to clerks are in full compensation for all services performed by them in regard to filing petitions or other papers required by the Act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies of records furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers. U. S. Supreme Ct. Bankr. G. O. No. 35, par. 1.

The clerk may require an indemnity before incurring any expense in publishing or mailing notices. U. S. Supreme Ct. Bankr. G. O. No. 10.

73. Bankr. Act (1898), § 52*a*.

A bankrupt's estate is liable for clerk's fees, as in the case of referee's fees. U. S. Supreme Ct. Bankr. G. O. No. 35, par. 4. See also *infra*, XVIII, H, 1, b.

74. **A voluntary bankrupt** is not required to pay such filing fee if he accompanies his petition with an affidavit stating that he is without, and cannot obtain, the money with which to pay such fee. Bankr. Act (1898), § 51 (2).

As to poverty affidavit and effect thereof see *infra*, III, D, 6, a.

75. **The term "officer"** when used in the Act includes a marshal. Bankr. Act (1898), § 1 (18), *supra*, note 8, p. 238.

76. **Service of all process, mesne and final,** shall be by the marshal of the district or his deputy, or by some other person specially appointed by the court for that purpose and not otherwise. In the latter case the person serving the process shall make affidavit thereof. U. S. Equity Rules, No. 15.

For the powers and duties of United States marshals, generally, see United States Marshals.

The petition and writ of subpœna in involuntary bankruptcy proceedings must be served by the marshal upon the bankrupt. Bankr. Act (1898), § 18*a*. See also *infra*, VI, B, 4.

qualified.[77] The marshal may also be authorized by a court of bankruptcy to conduct the business of bankrupts for a limited period.[78]

2. COMPENSATION. Marshals shall respectively receive from the estate where the adjudication in bankruptcy is made, except as otherwise provided in the Act, for the performance of their services in the proceedings in bankruptcy the same fees, and account for them in the same manner, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with the laws of the United States fixing the compensation of marshals.[79]

C. Receivers[80] — 1. APPOINTMENT. Courts of bankruptcy may appoint receivers upon the application of parties in interest[81] to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified, if they find it absolutely necessary for the preservation of estates.[82] The jurisdiction thus conferred is independent of the power conferred upon the judge to issue warrants of seizure against a bankrupt's property.[83] The appointment of a receiver by a referee is authorized by the power vested in him to perform the duties conferred on courts of bankruptcy.[84]

77. Bankr. Act (1898), §§ 2 (3), 69. See also *infra*, VI, B, 9, b.

As to bond of applicant see Bankr. Act (1898), § 3*e*; and *infra*, VI, B, 9, e.

78. Bankr. Act (1898), § 2 (5). See also *infra*, VI, B, 9.

79. Bankr. Act (1898), § 52*b*.

The fees and salaries of marshals are prescribed by the U. S. Rev. Stat. (1878), § 829; 29 U. S. Stat. at L. 140. The marshal receives personal compensation for all services rendered by him in the way of a salary, and fees which were allowed him as compensation before the act fixing his salary are still collected in suits of all kinds as a fund out of which all salaries shall be paid. So the fact that there is a salary is a matter of no weight; the marshal is entitled when he takes possession of the goods of a bankrupt by order of the court to a reasonable compensation for his services in addition to his disbursements. *In re* Adams Sartorial Art Co., 101 Fed. 215, 4 Am. Bankr. Rep. 107.

Where, by a rule of a federal court, service of the petition and affidavits upon which an order to show cause is based is required to be made together with such order, and the marshal makes such service in a bankruptcy proceeding, he is entitled to charge and receive a reasonable fee therefor in addition to his fee for the service of the order, under Bankr. Act (1898), § 52*b*, although the petition cannot be considered a writ within the meaning of U. S. Rev. Stat. (1878), § 829; and the same fee fixed by such section for the service of a writ, where it has customarily been charged and allowed by the court, must be regarded as reasonable. *In re* Damon, 104 Fed. 775, 5 Am. Bankr. Rep. 133.

Compensation of deputy marshal.— There is no fixed rule as to the allowance to be made to a deputy marshal for services performed in protecting the property of the bankrupt, but the sum must be fixed by the court in the exercise of its sound discretion. *In re* Scott, 99 Fed. 404, 3 Am. Bankr. Rep. 625. Three dollars a day, with actual and necessary expenses, is a reasonable and proper fee to be allowed to a deputy marshal for his services in taking an inventory, and otherwise assisting in the settlement of an estate in bankruptcy. *In re* Woodard, 95 Fed. 955, 2 Am. Bankr. Rep. 692.

Marshal may require indemnity for expenses; in like manner the clerk may do so. U. S. Supreme Ct. Bankr. G. O. No. 10. See also *supra*, III, A, 3.

Return of expenses.— The marshal must make return under oath of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services and other actual and necessary expenses paid by him, with vouchers therefor, whenever practicable, and also a statement that the amounts charged by him are just and reasonable. U. S. Supreme Ct. Bankr. G. O. No. 19. *Compare In re* Comstock, 6 Fed. Cas. No. 3,075, 9 Nat. Bankr. Reg. 88, construing similar rule under the Act of 1867.

80. **The term "officer"** shall include receiver. Bankr. Act (1898), § 1, *supra*, note 8, p. 238.

81. Bankr. Act (1898), § 2 (3). See also *supra*, II, B, 12; *In re* Fixen, 96 Fed. 748, 2 Am. Bankr. Rep. 822; Blake *v.* Francis-Valentine Co., 89 Fed. 691, 1 Am. Bankr. Rep. 372.

82. **A receiver should not be appointed** unless the exigencies of the case demand it, as where the subject-matter of the action is easily concealed or removed and the interference of the court is necessary to protect it pending the controversy. *In re* Florcken, 107 Fed. 241, 5 Am. Bankr. Rep. 802; Cox *v.* Wall, 99 Fed. 546, 3 Am. Bankr. Rep. 664 [*reversed* on a question of jurisdiction in 5 Am. Bankr. Rep. 727].

83. *In re* Florcken, 107 Fed. 241, 5 Am. Bankr. Rep. 802. See also *infra*, VI, B, 9, a, b.

84. Bankr. Act (1898), § 38 (4). But in no case can this authority be exercised before the order of reference has been delivered to him. U. S. Supreme Ct. Bankr. G. O. No. 12; *In re* Florcken, 107 Fed. 241, 5 Am. Bankr. Rep. 802.

2. Powers. The object of the appointment of a receiver is generally to preserve the property of the bankrupt so as to prevent its deterioration or waste.[85] His powers are statutory and can only be exercised as prescribed in the Act. He cannot bring suit to recover a preferential payment to a creditor, although he may be authorized, by suit or otherwise, to assert or defend his possession of the visible property which the law has placed in his custody.[86] Where a receiver has possession of property and it becomes necessary for preserving it, or its value, which is the essential matter, the court may order or confirm a sale thereof.[87]

3. Compensation. The Act does not limit or prescribe the compensation of receivers. It is within the discretion of the court to determine such compensation according to the services performed.[88] Such compensation should be reasonable and fair.[89]

D. Referees — 1. Appointment and Removal. The office of referee is created by the Bankruptcy Act.[90] Courts of bankruptcy are required, within the territorial limits[91] of which they respectively have jurisdiction, to appoint referees, each for a term of two years[92] and may, in their discretion, remove them because their services are not needed, or for other cause.[93] The power of removal is in the discretion of the court, although the general rule is that where a statute

85. Boonville Nat. Bank *v.* Blakey, 107 Fed. 891, 47 C. C. A. 43, 6 Am. Bankr. Rep. 13. See also *infra*, VI, B, 9, b.

Conduct of business of bankrupt.— Courts of bankruptcy may authorize receivers to conduct the business of bankrupts for a limited period, if necessary for the best interest of the estate. Bankr. Act (1898), § 2 (5).

86. **Suits to recover property.**— The trustee, as representative and in the interest of all the creditors, is to determine in the first instance whether a payment was made with a view to give a preference, and whether the creditor receiving payment had reasonable cause to believe that it was preferential. He is to ascertain the facts and determine the probability of successful litigation, and whether the creditor sought to be pursued is responsible, so that the estate should not be mulcted in unnecessary litigation and costs. The receiver or marshal is, in the contemplation of the Act, merely the temporary custodian selected to take possession of visible property liable to waste, and to conserve it until the trustee is appointed; but he is vested with no right to avoid a transaction which by the Act is specifically given to the trustee, and which but for the Act would not exist. Boonville Nat. Bank *v.* Blakey, 107 Fed. 891, 47 C. C. A. 43, 6 Am. Bankr. Rep. 13. But see *In re* Schrom, 97 Fed. 760, 3 Am. Bankr. Rep. 352; *In re* Fixen, 96 Fed. 748, 754, 2 Am. Bankr. Rep. 822, 830, where it is said: "To say that he [the receiver] cannot resort to legal proceedings when necessary to take charge of the property of the bankrupt, while conceding that he may employ all other suitable agencies and instrumentalities for the purpose, is wholly illogical. Legal proceedings are sometimes the only means whereby the property of bankrupts can be preserved. Suppose that an estate consists of personal property, which has come into the hands of wrong-doers, who are about to secrete it or carry it beyond the jurisdiction of the court. Can it be seriously claimed in such a case that the receiver must sit quietly by and suffer the property to be irretrievably lost, on the ground that his functions are limited to the receipt of such property as may be voluntarily surrendered to him? The statement of the claim is its refutation. I hold that it is clearly within the jurisdiction of the court appointing a receiver in bankruptcy to authorize him to institute necessary actions for the recovery of the bankrupt's property."

87. *In re* Becker, 98 Fed. 407, 3 Am. Bankr. Rep. 412.

Permission to sell perishable property may be obtained by the receiver upon petition made to the court. U. S. Supreme Ct. Bankr. G. O. No. 18, par. 3.

88. *In re* Scott, 99 Fed. 404, 3 Am. Bankr. Rep. 625 [*citing* The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. ed. 937].

89. Cake *v.* Mohun, 164 U. S. 311, 17 S. Ct. 100, 41 L. ed. 447; Stuart *v.* Boulware, 133 U. S. 78, 10 S. Ct. 242, 33 L. ed. 568.

90. Bankr. Act (1898), § 33.

91. **Districts.**— Courts of bankruptcy are authorized to designate and from time to time change the limits of the districts of referees so that each county where the services of a referee are needed may constitute at least one district. Bankr. Act (1898), § 34. This section would seem to require the appointment of at least one referee for each county in a district. To avoid confusion it would be necessary that the limits of a district be clearly defined. By Bankr. Act (1898), § 35 (4), referees are required to be residents of or have their offices in the territorial districts for which they are to be appointed.

92. It is probable that under the general rule a referee may hold his office and exercise the duties thereof until the appointment and qualification of his successor. See State *v.* Harrison, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663; and, generally, Officers.

93. Bankr. Act (1898), § 34.

authorizes a removal for cause, it must be after due notice to the officer and an opportunity for a hearing.[94]

2. Qualifications — a. In General. Individuals are not to be deemed eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office;[95] (2) not holding any office of profit or emolument under the laws of the United States or of any state other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public;[96] (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed;[97] and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.[98]

b. Bond. Referees are required, before assuming the duties of their offices, and within such time after their appointment as the district court having jurisdiction shall prescribe,[99] to enter into a bond to the United States.[1] Such bond is to

Such number of referees are to be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business in the various courts of bankruptcy. Bankr. Act (1898), § 37.

The term "courts" may include the referee. Bankr. Act (1898), § 1 (7), *supra*, note 8, p. 238.

The term "judge" shall not include the referee. Bankr. Act (1898), § 1 (16), *supra*, note 8, p. 238.

The term "officer" includes the referee. Bankr. Act (1898), § 1 (18), *supra*, note 8, p. 238.

The term "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred or any one acting in his stead. Bankr. Act (1898), § 1 (21), *supra*, note 8, p. 238.

The office of referee corresponds to that of the register under the Act of 1867. U. S. Rev. Stat. (1878), § 4993 *et seq.*

94. *Michigan.*— Hallgren *v.* Campbell, 82 Mich. 255, 46 N. W. 381, 21 Am. St. Rep. 557, 9 L. R. A. 408.

Missouri.— State *v.* Walbridge, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663.

New Jersey.— State *v.* Love, 39 N. J. L. 14.

Ohio.— State *v.* Sullivan, 58 Ohio St. 504, 51 N. E. 48, 65 Am. St. Rep. 781.

Pennsylvania.— Field *v.* Com., 32 Pa. St. 478.

See also, generally, Officers.

Absence or disability.— Whenever the office of a referee is vacant or its occupant is absent or disqualified to act, the judge may act or appoint another referee, or another referee holding an appointment under the same court may by order of the judge temporarily fill the vacancy. Bankr. Act (1898), § 43; Bray *v.* Cobb, 91 Fed. 102, 1 Am. Bankr. Rep. 153.

95. Not to be interested.— Referees shall not act in cases in which they are directly or indirectly interested. Bankr. Act (1898), § 39*b* (1). A referee who is indebted to the alleged bankrupt is not thereby disqualified to act as referee in bankruptcy proceedings against his creditor. If he were a creditor he would be interested; but he is a debtor and there is no denial of the debt. He can have no interest in either the estate or the proceedings; the proceedings do not change his status. Bray *v.* Cobb, 91 Fed. 102, 1 Am. Bankr. Rep. 153.

96. Attorneys as referees.— Under the Act of 1867 no person was eligible to the appointment as register unless he was a counselor of the district or one of the courts of record of the state in which he resided. Bankr. Act (1867), § 3 [U. S. Rev. Stat. (1878), § 4993]. The present Act contains no such restriction, but in many of the districts appointment has been refused to persons unless they were attorneys at law, for the reason that one having no legal training cannot be considered as competent. Black Bankr. 142; Loveland Bankr. 88.

97. Relationship by affinity is a connection by marriage. Relationship by consanguinity is the connection of persons to a common ancestor, that is, blood-relationship. In computing the degree of relationship the rule of the common law is to begin at the common ancestor and reckon downward: the degree of relationship between two persons is the degree of the most remote of them from a common ancestor. 2 Bl. Comm. 206. Chancellor Kent says [4 Kent Comm. 413]; "In the canon law, which is also the rule of the common law, in tracing title by descent, the common ancestor is the *terminus a quo*. The several degrees of kindred are deduced from him. By this method of computation the brother of A is related to him in the first degree instead of being in the second, according to the civil law; for he is but one degree removed from the common ancestor. The uncle is related to A in the second degree; for though the uncle be but one degree from the common ancestor, yet A is removed two degrees from the grandfather, who is the common ancestor."

98. Bankr. Act (1898), § 35.

99. If a referee fails to give a bond within the time limited he shall be deemed to have declined his appointment. Bankr. Act (1898), § 50*k*.

1. The requirement of a bond from a quasi-

be in the sum fixed by the district court making the appointment, not exceeding the sum of five thousand dollars,[2] conditioned for the faithful performance of official duties.[3]

c. Oath. Referees are required to take the same oath of office as that prescribed for judges of the courts of the United States.[4]

3. Jurisdiction and Powers — a. Adjudications. Referees in bankruptcy are invested with jurisdiction to consider all petitions referred to them by the clerks and to make the adjudications or dismiss the petitions.[5]

b. Reference After Adjudication. After an adjudication in bankruptcy the judge may either cause the trustee to proceed with the administration of the bankrupt's estate, or refer it generally to the referee or specially with only limited authority to act in the premises, or to consider and report upon specified issues, or to any referee within the territorial limits of the court if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside or have his domicile in the district.[6]

c. Performance of Duties Conferred upon Courts of Bankruptcy — (i) *In General.* Referees are authorized to perform such part of the duties, except as to questions arising out of the applications of bankrupts for composition or

judicial officer, such as a referee in bankruptcy, is unusual. Referees are not only judicial officers charged with the performance of the duties prescribed in the Act, for the faithful performance of which they take and subscribe an official oath, but are also required to give bond to insure the observance of the oath. This is an unusual requirement of a quasi-judicial officer. Being thus bound their decisions should not be lightly treated, but given the consideration due to conclusions reached by conscientious officers, seeking to discharge their duties to the best of their ability. *In re* Covington, 110 Fed. 143, 6 Am. Bankr. Rep. 373.

There must be at least two sureties on each bond, to be approved by the district court. Bankr. Act (1898), § 50*a*, *e*.

Surety companies may be accepted as sureties upon the bond of a referee, when authorized by law to act as such, and when the court is satisfied that the rights of all parties in interest will be thereby amply protected. Bankr. Act (1898), § 50*g*. The execution of a bond with a single surety company as surety is sufficient. *In re* Kalter, 2 Am. Bankr. Rep. 590; 28 U. S. Stat. at L. 279.

Such bonds must be filed of record in the office of the clerk of the court. Bankr. Act (1898), § 50*h*.

2. The actual value of the property of the sureties, over and above their liabilities and exemptions, must equal at least the amount of the bond. Bankr. Act (1898), § 50*f*.

3. Bankr. Act (1898), § 50*a*.

The form of bond is prescribed by U. S. Supreme Ct. Bankr. Forms, No. 17; 89 Fed. xxxvi.

Suits may be brought for alleged breach of conditions thereof within two years after such breach is alleged to have occurred (Bankr. Act (1898), § 50*l*) in the name of the United States for the use of any person injured by such breach (Bankr. Act (1898), § 50*h*).

4. Bankr. Act (1898), § 36.

The form of oath is given in U. S. Supreme Ct. Bankr. Forms, No. 16; U. S. Rev. Stat. (1878), § 712; 89 Fed. xxxv.

A person conscientiously opposed to taking an oath may affirm; the punishment for a false affirmation is the same as for a false oath. Bankr. Act (1898), § 20*b*.

The oath may be administered by an officer authorized to administer oaths in proceedings before the courts of the United States, or under the laws of a state where the oath is to be taken. Bankr. Act (1898), § 20*a*.

5. Bankr. Act (1898), § 38*a* (1). See also *infra*, VI, A, 2; VI, B, 10.

Such petitions may be either in involuntary or voluntary bankruptcy.— The adjudication in bankruptcy is within the exclusive jurisdiction of the court (Bankr. Act (1898), § 18*d*, *e*); but if the judge is absent from the district on the next day after the last day on which pleadings may be filed in involuntary bankruptcy and none had been filed by the bankrupt or any of his creditors, or at the time of the filing of a voluntary petition, the clerk must refer the case to a referee. The referee cannot adjudicate a person a bankrupt if the question of bankruptcy is contested. Bankr. Act (1898), § 18*g*, *h*.

The petitions here referred to are those defined as a "paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named." Bankr. Act (1898), § 1 (20).

For form of debtor's and creditor's petition see U. S. Supreme Ct. Bankr. Forms, Nos. 1, 3; 89 Fed. xv.

6. Bankr. Act (1898), § 22*a*. See *infra*, VIII.

It is required by the General Orders that all proceedings after the order of reference, except such as are required to be had before the judge, shall be had before the referee. U. S. Supreme Ct. Bankr. G. O. No. 12, pars. 1, 2.

discharge, as are by the Act conferred upon courts of bankruptcy, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided.[7] A case may be referred to a referee with only limited authority to act or to consider and report upon specified issues,[8] and the referee has no authority except that specified in the order of reference.[9]

(II) *Discharge and Confirmation of Composition.* Questions arising out of applications of bankrupts for compositions or discharges are expressly excepted from the jurisdiction of the referee.[10]

(III) *Power to Grant Injunctions.* It is provided by the General Orders that the application for an injunction to stay proceedings of a court or officer of the United States or of a state shall be heard and decided by the judge, but he may refer such application or any specified issue arising thereon to a referee to ascertain and report the facts.[11]

d. Stenographers. Upon the application of a trustee during the examination of a bankrupt, or in the courts of other proceedings, the referee may authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.[12] But a referee is not authorized to hire a clerk at a fixed sum.[13]

e. Taking Possession of Property. In case of the absence of the judge from the judicial district, or the division of the district, or his sickness or inability to act, a referee may take possession and release the property of the bankrupt.[14]

7. Bankr. Act (1898), § 38 (4). See also U. S. Supreme Ct. Bankr. G. O. No. 12.

This evidently confers upon referees the power possessed by courts of bankruptcy, unless by the terms of the Act jurisdiction is exclusively conferred upon such courts. The powers of referees are not to be exercised until a service, either personally or by mail, of the order of reference upon such referees. U. S. Supreme Ct. Bankr. G. O. No. 12; *In re* Florcken, 107 Fed. 241, 5 Am. Bankr. Rep. 802.

Proceedings to punish for contempt are within the exclusive jurisdiction of the district judge. Bankr. Act (1898), § 41*b*. See also *infra*, III, D, 7.

8. Bankr. Act (1898), § 22*a*.

9. Clark *v.* American Mfg., etc., Co., 101 Fed. 962, 42 C. C. A. 120, 4 Am. Bankr. Rep. 351.

10. Bankr. Act (1898), § 38 (4). See also *infra*, XIV, C, D.

Such applications must be heard and decided by the district judge, or he may refer them or any specific issue arising thereon to a referee to ascertain and report the facts. U. S. Supreme Ct. G. O. No. 12, par. 3; *In re* McDuff, 101 Fed. 241, 41 C. C. A. 316, 4 Am. Bankr. Rep. 110, where it was held that the judge is required to hear and determine the application for a discharge, and such briefs and pleas as may be made in opposition thereto; and that the decision of the question as to whether or not a discharge shall be granted cannot be turned over to a referee. All that a referee can do is to ascertain and report the facts.

Where contested applications for discharge are referred to referees they may not only take, rule upon, and report the evidence, but they may also make findings and recommendations thereon. *In re* Kaiser, 99 Fed. 689, 3 Am. Bankr. Rep. 767, where it was held that (1) the authority of the referee extends beyond taking, ruling upon, and reporting evidence, and includes making findings and recommendations thereon; (2) specifications of opposition to discharge intended to show that the bankrupt has been guilty of criminal concealment must aver *scienter* and all necessary facts necessary to establish the commission of the offense; (3) such specification is a prerequisite to the introduction of any evidence, and defines the issues to which the inquiry should be confined, and (4) cannot be amended by the referee but may be amended by the court.

11. U. S. Supreme Ct. Bankr. G. O. No. 12, par. 3.

Notwithstanding the apparently exclusive jurisdiction thus conferred upon the district judge, a number of referees have assumed that under Bankr. Act (1898), § 38 (4) they have the power to restrain by injunction proceedings in a state court. See *In re* Globe Cycle Works, 2 Am. Bankr. Rep. 447; *In re* Kerski, 2 Am. Bankr. Rep. 79; *In re* Rogers, 1 Am. Bankr. Rep. 541; *In re* Northrop, 1 Am. Bankr. Rep. 427; *In re* Sabine, 1 Am. Bankr. Rep. 315; *In re* Adams, 1 Am. Bankr. Rep. 94; U. S. Rev. Stat. (1878), § 720.

12. Bankr. Act (1898), § 38 (5).

13. *In re* Carolina Cooperage Co., 96 Fed. 950, 3 Am. Bankr. Rep. 154.

14. Bankr. Act (1898), § 38 (3). See also *infra*, VI, B, 9.

The power thus conferred is exercised in cases of involuntary bankruptcy where it appears that the bankrupt has so neglected his property as to lessen its value. Bankr. Act (1898), § 69.

A referee has no power under this provision until an order of reference has been mailed or delivered to him. U. S. Supreme

The referee is also authorized to appoint receivers or marshals upon the application of parties in interest when it is found absolutely necessary for the preservation of the bankrupt's estate.[15]

f. Witnesses. Referees may exercise the powers vested in courts of bankruptcy for the administering of oaths[16] to and the examination of persons as witnesses,[17] and for requiring the production of documents in proceedings before them, except the power of commitment.[18]

g. The Referee's Orders, Decisions, and Findings. In all orders made by a referee it must be recited, according as the fact may be, that notice was given, and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.[19] The decisions of referees are subject always to review by the district judge.[20] Findings of fact by a referee will not be reversed

Ct. Bankr. G. O. No. 12; *In re* Florcken, 107 Fed. 241, 5 Am. Bankr. Rep. 802.

15. Bankr. Act (1898), § 2 (3). See also *infra*, VI, B, 9.

While ordinarily an order of sale should not be made until after adjudication, if the property is perishable a sale may be ordered by the referee before adjudication. It has also been held that a sale made by a referee in the absence of the judge, even if the property is not perishable, will not be set aside where a fair sum is realized, and it does not appear that the interests of parties have been injuriously affected. *In re* T. L. Kelly Dry-Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528.

16. Bankr. Act (1898), § 38 (2).

Another provision of the Bankruptcy Act is to the effect that oaths required by the Act, except upon hearings in court, may be administered by referees. Bankr. Act (1898), § 20*a* (1).

A person who is conscientiously opposed to taking an oath may, in lieu thereof, affirm; but a false affirmation is punishable in the same manner as a false oath. Bankr. Act (1898), § 20*b*.

17. Bankr. Act (1898), § 38 (2).

A court of bankruptcy must order the attendance of any person who is a competent witness upon the application of the referee, or the bankrupt, or creditors, to appear before the referee and be examined concerning the acts, conduct, or property of the bankrupt whose estate is in process of administration. Bankr. Act (1898), § 21*a*. It has been held that this provision does not authorize any examination into the acts, conduct, or property of any person other than the bankrupt, unless the acts of such person are so connected and interwoven with those of the bankrupt as to make them virtually the same by reason of community of interest. *In re* Carley, 106 Fed. 862, 5 Am. Bankr. Rep. 554. See also *In re* Horgan, 98 Fed. 414, 39 C. C. A. 118, 3 Am. Bankr. Rep. 253; *In re* Cliffe, 97 Fed. 540, 3 Am. Bankr. Rep. 257; *In re* Fixen, 96 Fed. 748, 2 Am. Bankr. Rep. 822; *In re* Howard, 95 Fed. 415, 2 Am. Bankr. Rep. 582.

No person is required to attend as a witness before a referee at a place outside of the state of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and a fee for one day's attendance is first paid or tendered to him. Bankr. Act (1898), § 41*a* (4).

Subpœnas issue out of the court under the seal thereof, attested by the clerk. Blank forms of subpœnas with the signature of the clerk and the seal of the court are furnished to referees to be used by them. U. S. Supreme Ct. Bankr. G. O. No. 3. See also *supra*, III, A, 2, b; and *infra*, VI, B, 3.

The examination of witnesses before the referee may be conducted in person by the party, or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him or under his direction in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to and his decision thereon, and the court shall have power to deal with the costs of incompetent, immaterial, and irrelevant depositions, or parts of them, as may be just. U. S. Supreme Ct. Bankr. G. O. No. 22.

18. **A referee has no power to commit** a person for disobedience of a subpœna, refusal to take the oath, or to be examined as a witness; but such conduct is a contempt punishable by the district judge upon certification of the facts to him by the referee. Bankr. Act (1898), § 41. See also *infra*, III, D, 7.

Form of summons to witness is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 30; 89 Fed. xlii.

Form of return of summons to witness is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 30; 89 Fed. xlii.

Form of examination of witness is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 29; 89 Fed. xli.

19. U. S. Supreme Ct. Bankr. G. O. No. 23.

20. **Review of referee's decisions.**—Bankr. Act (1898), § 38*a*. Bankr. Act (1898), § 2 (10), provides that courts of bankruptcy may consider, confirm, modify, or overrule or return with instructions for further proceedings, records and findings certified to them by referees. When a bankrupt, creditor, trustee, or other person shall desire a review by the

unless it is clearly shown that there is error in such findings such as would, under the equity rules which govern in bankruptcy proceedings by express provision of the Act, justify the reversal of a master in an equity cause.[21]

4. Duties — a. As to Accounts. Referees are required to keep an accurate account of their traveling and incidental expenses, and of those of any officer or any clerk attending them in the performance of their duties in any case which may be referred to them; and must make return of the same under oath to the judge with proper vouchers, if vouchers can be procured, on the first Tuesday of every month.[22]

b. As to Declaration of Dividends. Referees are required to declare dividends[23] and to prepare and deliver to trustees dividend sheets[24] showing the dividends declared, and to whom payable.[25] The referee is also required to countersign all checks for dividends and all payments made by the trustee.[26]

c. As to Information and Notice. A referee is required to furnish such information concerning the estates in process of administration before him as may be requested by the parties in interest.[27] The referee is required to give such notices as are provided in the Act, unless otherwise ordered by the judge.[28] The referee is entitled, in sending notices to creditors, to use what is known as an official penalty envelope.[29]

d. As to Papers. Referees must transmit to the clerks such papers as are on file before them whenever they are needed in any proceeding in court, and in like manner secure the return of such papers after they have been used, or if it be impracticable to transmit the original papers, to transmit certified copies of them, by mail.[30]

judge of an order made by a referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, and a summary of the evidence relating thereto, and the finding and order of such referee thereon. U. S. Supreme Ct. Bankr. G. O. No. 27.

For form of certificate see U. S. Supreme Ct. Bankr. Forms, No. 56; 89 Fed. lvi.

21. *In re* Covington, 110 Fed. 143, 6 Am. Bankr. Rep. 373; *In re* Waxelbaum, 101 Fed. 228, 4 Am. Bankr. Rep. 120.

22. U. S. Supreme Ct. Bankr. G. O. No. 26.

The referee may require indemnity before incurring any expense in the publication or mailing of notices, or in traveling; in procuring the attendance of witnesses, or in perpetuating testimony from the bankrupt or other person in whose behalf the duty is to be performed. Money advanced for this purpose by the bankrupt or other person shall be repaid out of the estate as part of the cost of administering the same. U. S. Supreme Ct. Bankr. G. O. No. 10.

23. A dividend in bankruptcy is a parcel of the fund arising from the assets of the estate rightfully allotted to a creditor entitled to share in the fund, whether in the same proportion with other creditors or in a different proportion. *In re* Barber, 97 Fed. 547, 3 Am. Bankr. Rep. 306. See also *infra*, XVIII, H, 2, a.

24. The dividend sheets delivered to the trustee constitute his only warrant for paying money to any creditor. *In re* Barber, 97 Fed. 547, 3 Am. Bankr. Rep. 306.

25. Bankr. Act (1898), § 39*a* (1). The declaration and payment of dividends are regulated by another provision of the Bankruptcy Act and will be discussed hereafter. Bankr. Act (1898), § 65. See also *infra*, XVIII, H, 2.

The list of dividends is to be in the form prescribed by U. S. Supreme Ct. Bankr. Forms, No. 40; 89 Fed. xlviii.

The duties here imposed involve a computation of the per centum to which a creditor shall be entitled, and a further computation of the amount due to each creditor according to such per centum. *In re* Ft. Wayne Electric Corp., 94 Fed. 109, 1 Am. Bankr. Rep. 706.

26. U. S. Supreme Ct. Bankr. G. O. No. 29. *Compare supra*, III, A, 2, c.

27. Bankr. Act (1898), § 39*a* (3).

A refusal by the referee to permit the inspection of accounts pertaining to estates in his charge is an offense punishable by fine and forfeiture of office. Bankr. Act (1898), § 29*c* (3).

As to offenses of referee see *infra*, XXI, B.

28. Bankr. Act (1898), § 39*a* (4). Bankr. Act (1898), § 58, specifies the notices which are required to be given by the court to creditors and the manner of serving them. See also *infra*, X, A, 2; and U. S. Supreme Ct. Bankr. G. O. No. 21, pars. 2, 3; 22.

29. U. S. Stat. at L. c. 335, §§ 5, 6; 23 Stat. at L. c. 156, § 3.

30. Bankr. Act (1898), § 39*a* (8). See also Bankr. Act (1898), § 51 (3); and *supra*, III, A, 2, e.

Referees are also required to transmit to the clerk a list of claims proved against the estate of a bankrupt with the names and addresses of the proving creditors. U. S. Supreme Ct. Bankr. G. O. No. 24.

e. As to Preservation of Evidence. Referees are required upon the application of any party in interest to preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance.[31]

f. As to Records. Referees must make up records embodying the evidence or the substance thereof as agreed upon by the parties in all contested matters arising before them whenever requested to do so by either of the parties thereto, together with their findings thereon and transmit them to the judges.[32] Referees are required to safely keep, perfect, and transmit to the clerks the records required by the Bankruptcy Act to be kept by them, when the cases are concluded.[33] The referee must indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.[34]

g. As to Schedules of Property and Lists of Creditors. The referee must examine all schedules of property[35] and lists of creditors[36] filed by the bankrupt and cause such as are incomplete or defective to be amended.[37] A referee may prepare and file schedules of property or lists of creditors required to be filed by bankrupts, or cause the same to be done, when the bankrupt fails or neglects to do so.[38]

5. Restrictions. Referees cannot act in cases in which they are directly or indirectly interested,[39] practice as attorneys and counselors at law in any bank-

Whenever the offices of referees are in the same cities or towns where courts of bankruptcy convene, such referees must call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them. Bankr. Act (1898), § 39*a* (10).

31. Bankr. Act (1898), § 39*a* (9). See also *supra*, III, D, 3, f; and *infra*, III, D, 4, f.

32. Bankr. Act (1898), § 39*a* (5). See also *supra*, III, D, 3, f; III, D, 4, e.

A record of proceedings in each case shall be kept in a separate book or books and shall, together with the papers on file, constitute the records of the case. Bankr. Act (1898), § 42*b*.

The records of all proceedings in each case before the referee are to be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States. Bankr. Act (1898), § 42*a*.

The book or books containing the record of proceedings shall, when the case is concluded before the referee, be certified to by him and, together with such papers as are on file before him, be transmitted to the court of bankruptcy, and shall there remain as a part of the records of the court. Bankr. Act (1898), § 42*c*.

33. Bankr. Act (1898), § 39*a* (7).

34. U. S. Supreme Ct. Bankr. G. O. No. 2. *Compare supra*, III, A, 2, g.

35. **The schedules must be printed or plainly written** without abbreviation or interlineation except for reference. U. S. Supreme Ct. Bankr. G. O. No. 5.

36. **If the lists of creditors are defective** because not containing the addresses of creditors by street and number it is proper for the referee to order an amendment and to refuse to fix the date for the first meeting of creditors. *In re* Brumelkamp, 95 Fed. 814, 2 Am. Bankr. Rep. 318. The referee should require the addresses of creditors to be furnished or satisfactory proof to be made that they cannot be ascertained after due search has been made. In the absence of the exercise of such diligence the court does not gain jurisdiction of the proceedings to discharge upon the publication of a notice in a newspaper simply. *In re* Dvorak, 107 Fed. 76, 6 Am. Bankr. Rep. 66.

37. Bankr. Act (1898), § 39*a* (2). Bankr. Act (1898), § 7 (8), requires the bankrupt to prepare and file the schedule of his property and a list of his creditors, and specifies the contents thereof. See also *infra*, VI, A, 1; IX, A, B, C.

The provision as to the amendment of schedules to cure defects or omissions is mandatory, and it is the duty of the referee to make such amendment even though none of the parties in interest make a motion therefor. *In re* Orne, 1 Ben. (U. S.) 420, 18 Fed. Cas. No. 10,582, Bankr. Reg. Suppl. 18, 6 Int. Rev. Rec. 116, 1 Nat. Bankr. Reg. 79; *In re* Mackey, 1 Am. Bankr. Rep. 593.

Application for the amendment of schedules may be made by the bankrupt, which application shall state the cause of error in the schedules originally filed. If amendments are made to separate schedules the same must be made separately with proper reference. U. S. Supreme Ct. Bankr. G. O. No. 11.

38. Bankr. Act (1898), § 39*a* (6).

In cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it is the duty of the petitioning creditor to file within five days after the date of the adjudication a schedule giving the names and places of residence of all creditors of the bankrupt according to the best information of the petitioning creditor. U. S. Supreme Ct. Bankr. G. O. No. 9.

39. Bankr. Act (1898), § 39*b* (1); Bray *v.* Cobb, 91 Fed. 102, 1 Am. Bankr. Rep. 153.

ruptcy proceedings, or purchase directly or indirectly any property of an estate in bankruptcy.[40]

6. COMPENSATION — a. In General. Referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars, to be deposited with the clerk at the time of the filing of the petition in each case,[41] except when a fee is not required of a voluntary bankrupt.[42] The fee is to be paid in both voluntary and involuntary proceedings. Where there are no assets there is no authority for any other compensation to the referee than the original fee deposited with the clerk.[43] It is the duty of the clerk to collect the fee before filing the petition, unless the petition of a proposed voluntary bankrupt is accompanied by an affidavit stating that the petitioner is without and cannot obtain the money with which to pay such fee.[44] Referees shall receive from estates which have been administered before them one per centum commission on sums to be paid as dividends[45] and commissions, or one half of

As to interest of referees in bankruptcy cases see *supra*, III, D, 2.

40. Bankr. Act (1898), §§ 39*b* (2), 29*c*.

As to offenses by referees see *infra*, XXI, B.

41. **Where a firm and individual partners are petitioners** the proceeding is deemed single, and but one petition and one filing fee is necessary. *In re* Gay, 98 Fed. 870, 3 Am. Bankr. Rep. 529; *In re* Langslow, 98 Fed. 869, 3 Am. Bankr. Rep. 529 note. But see, as to involuntary bankruptcy proceedings as against a partnership, *In re* Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559. In Mahoney *v.* Ward, 100 Fed. 278, 3 Am. Bankr. Rep. 770, a petition in involuntary bankruptcy was filed against one partner individually and another member of the firm attempted to come into court and be adjudged a bankrupt in the same proceeding. It was held that this was not permissible even by a consent order. If the several partners desire to avail themselves of the benefits of the bankruptcy law they must file individual petitions, make the deposit required, and proceed *stricti juris*. This seems to be the prevailing rule, although it has been held that where a petition is filed by a partnership, and also separate petitions by the separate members of the firm, each petition is a separate case, and the referee is entitled to a separate fee in each case. *In re* Barden, 101 Fed. 553, 4 Am. Bankr. Rep. 31.

42. Bankr. Act (1898), § 40*a*.

Payment of fees out of the estate or by the bankrupt.— If the fees of the referee are not required by the Act to be paid by a debtor before the filing of his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has, or can obtain, the money with which to pay those fees, order him to pay them within a time specified, and if he fails to do so may order his petition to be dismissed. U. S. Supreme Ct. Bankr. G. O. No. 35, par. 4.

43. *In re* Langslow, 98 Fed. 869, 3 Am. Bankr. Rep. 529 note.

44. Bankr. Act (1898), § 51 (2). See also U. S. Supreme Ct. Bankr. G. O. No. 35, par. 4. See also *supra*, III, A, 2, d.

A voluntary bankrupt who has filed an affidavit with his petition that he has not and cannot obtain the money with which to pay the filing fees cannot be compelled to pay such fees out of his exempt property, nor out of the amount which he may earn for the support of himself and family. Nor is he required to borrow the money of his friends, even if it is shown that they would have loaned it to him, and he does not thereby make a false oath when he says that he cannot obtain the money. Sellers *v.* Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529. But in another case it was held that as the case progresses the petitioner must pay the necessary expenses before a final discharge will be granted, and he must also pay the amount of compensation allowed to the clerk, referee, and trustee, or else make a showing to the satisfaction of the court that by reason of ill health or circumstances of peculiar misfortune he is a worthy object of charity. Anonymous, 2 Am. Bankr. Rep. 527.

Poverty affidavit.— There is no law or rule authorizing the referee to require the bankrupt to pay the statutory fee before he is given his discharge where such bankrupt has filed an affidavit of inability. *In re* Plimpton, 103 Fed. 775, 4 Am. Bankr. Rep. 614. Where a bankrupt files his voluntary petition and the statutory affidavit therewith that he has not and cannot obtain the money with which to pay the advance fees, the affidavit establishes a *prima facie* right to such exemption. *In re* Levy, 101 Fed. 247, 4 Am. Bankr. Rep. 108. The filing of the affidavit does not preclude an inquiry by the court into the actual facts. It is not the intention of the statute that the bankrupt's affidavit should be considered as conclusive of the fact of his inability to obtain the money. The court has the right to demand some evidence which shows that it is reasonable to conclude that the petitioner cannot really obtain the money. *In re* Collier, 93 Fed. 191, 1 Am. Bankr. Rep. 182.

45. **Dividends.**— The sums to be paid upon secured claims or other claims entitled to priority of payment are not dividends upon which the referee may receive a commission. *In re* Utt, 105 Fed. 754, 45 C. C. A. 32, 5 Am. Bankr. Rep. 383; *In re* Fielding, 96 Fed. 800,

one per centum on the amount to be paid to creditors on the confirmation of a composition.[46]

b. Additional Compensation. Notwithstanding the fact that under the General Orders the compensation of referees prescribed by the Act is in full compensation for all services performed by them under the Act or under the general rules,[47] it has been held that when issues arising upon an application for a discharge are sent to a referee, a reasonable allowance may be made for the referee's services outside and apart from the compensation authorized by the Act,[48] upon the theory that the reference of such issues are made to him as a special master in chancery and not as a referee in bankruptcy.[49]

c. When to Be Paid. The fees and commissions are to be paid to the referees after their services have been rendered.[50]

7. Contempts Before Referees — a. In General. A person who, in proceedings before a referee, (1) disobeys or resists any lawful order, process, or writ;[51]

3 Am. Bankr. Rep. 135; *In re* Ft. Wayne Electric Corp., 1 Am. Bankr. Rep. 706. In *In re* Barber, 97 Fed. 547, 3 Am. Bankr. Rep. 306, a distinction was made against secured creditors who invoke the action of the bankrupt court, and through the action of that court alone have their security converted into a fund in the hands of the trustee, and it was held that there is nothing in the law which excludes a referee from commissions upon dividends to any class of creditors from a fund obtained through the action of the court alone, and the services of its officers, when such action and services have been invoked by such creditors. See also *In re* Gerson, 2 Am. Bankr. Rep. 352; *In re* Coffin, 2 Am. Bankr. Rep. 344; *In re* Sabine, 1 Am. Bankr. Rep. 322. In *In re* Utt, 105 Fed. 754, 45 C. C. A. 32, 5 Am. Bankr. Rep. 383, *supra*, this distinction was disapproved.

46. Bankr. Act (1898), § 40*a*.

The commissions are to be reckoned on the sums paid as dividends and commissions only, and not on costs or other payments. *In re* Smith, 108 Fed. 39, 5 Am. Bankr. Rep. 559.

In the event of the reference of a case being revoked before it is concluded, and when a case is specially referred the judge shall determine what part of the fee and commissions shall be paid to the referee. Bankr. Act (1898), § 40*c*.

Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor should be divided between the referees. Bankr. Act (1898), § 40*b*.

47. U. S. Supreme Ct. Bankr. G. O. No. 35, par. 2; Bankr. Act (1898), § 40*a*.

Expenses necessarily incurred by referees in publishing or mailing notices, in traveling or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the Act and allowed by special order of the judge are not included. U. S. Supreme Ct. Bankr. G. O. No. 35, par. 2.

48. Fellows *v.* Freudenthal, 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490. *Contra, In re* Troth, 104 Fed. 291, 4 Am. Bankr. Rep. 780, construing U. S. Supreme Ct. Bankr. G. O. Nos. 13, par. 3, 35, par. 2.

49. **The rules of some of the district courts** have recognized the theory of this decision and permit an allowance of additional compensation to referees when sitting as special masters in cases requiring services not devolving upon them by virtue of their offices. *In re* Gaylord, 5 Am. Bankr. Rep. 805; U. S. Dist. Ct. (N. D. N. Y.) Rules, No. 30.

Where application is made outside the ordinary scope of the referee's duties a reasonable compensation should be allowed him. *In re* Todd, 109 Fed. 265, 6 Am. Bankr. Rep. 88.

50. Bankr. Act (1898), § 40*a*.

The fee deposited with the clerk must be paid to the referee within ten days after each case has been closed. Bankr. Act (1898), § 51 (4).

51. **Disobedience of orders.**— The orders of referees are in effect the orders of the court, and a violation thereof will subject the offender to punishment in the same manner and to the same extent as for the violation of an order of a court of bankruptcy. *In re* Allen, 13 Blatchf. (U. S.) 271, 1 Fed. Cas. No. 208; *In re* Speyer, 22 Fed. Cas. No. 13,239, 42 How. Pr. (N. Y.) 397, 6 Nat. Bankr. Reg. 255. For disobedience of order constituting contempt under the Act of 1867 see *In re* Kempner, 14 Fed. Cas. No. 7,689, 6 Nat. Bankr. Reg. 521; *In re* Carpenter, 5 Fed. Cas. No. 2,427, 1 Nat. Bankr. Reg. 299. It was held that a register might order the bankrupt to hand over estate funds in his hands, and that a failure to obey was a contempt for which an attachment might issue. *In re* Speyer, 22 Fed. Cas. No. 13,239, 42 How. Pr. (N. Y.) 397, 6 Nat. Bankr. Reg. 255, where the court referred the matter back to the register to take such testimony as the bankrupt might offer in order to purge himself of the contempt.

Notice to show cause.— Before a bankrupt or other person can be punished for contempt for failure to obey an order to turn over property he must have notice and an opportunity to show cause why he should not comply with the order. *In re* Miller, 105 Fed. 57, 5 Am. Bankr. Rep. 184; *In re* Rosser, 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153.

(2) misbehaves during a hearing or so near the place thereof as to obstruct the same; (3) neglects to produce, after having been ordered to do so, any pertinent document; or (4) refuses to appear after having been subpœnaed, or upon appearing refuses to take the oath as a witness, or after having taken the oath refuses to be examined according to law,[52] may be punished for contempt.[53]

b. Certification of Facts to the Judge. If a person is in contempt the referee shall certify the facts to the judge, who shall thereupon, in a summary manner,[54] hear the evidence as to the acts complained of, and if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before a court of bankruptcy, or commit such person upon the same condition as if the doing of the forbidden act had occurred with reference to the process of or in the presence of the court.[55]

Power to obey must exist.— To warrant punishment for contempt it must appear not only that the party complained of refuses to obey, but also that it is within his power to obey (Texas *v.* White, 22 Wall. (U. S.) 157, 22 L. ed. 819); for the court will not order an impossibility (Sinsheimer *v.* Simonson, 107 Fed. 898, 47 C. C. A. 51, 5 Am. Bankr. Rep. 537). See also *In re* Rosser, 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153; Hendryx *v.* Fitzpatrick, 19 Fed. 810. Where property of the bankrupt, unlawfully concealed and withheld from the trustee, is beyond the control of the bankrupt and in the hands of third parties claiming title thereto, there can be no punishment for contempt, although the transaction is manifestly fraudulent. *In re* Greenberg, 106 Fed. 496, 5 Am. Bankr. Rep. 840; *In re* Mayer, 98 Fed. 839, 3 Am. Bankr. Rep. 533.

The fact that the bankrupt has squandered the money sought to be recovered in gambling and indulgence in other vices is not a satisfactory defense in a proceeding for contempt. Ripon Knitting Works *v.* Schreiber, 101 Fed. 810, 4 Am. Bankr. Rep. 299. But *compare In re* Rosser, 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153, 157, where it is held that if the money was a part of the estate of the bankrupt but "before the order for its delivery is made" he has squandered, disposed of, or lost it, so that it is not in his control or possession and he cannot obtain and deliver it at the time the order of delivery is made or within a reasonable time thereafter, the punishment of the bankrupt for such acts must be sought under Bankr. Act (1898), § 29, relating to the fraudulent concealment of the property of the estate, and the making of false oaths in relation thereto.

This power should be cautiously exercised and only in cases where the alleged acts of contempt have been proved beyond a reasonable doubt to have been committed in wilful disobedience of the orders of the court. *In re* Anderson, 103 Fed. 854, 4 Am. Bankr. Rep. 640; *In re* Schlesinger, 97 Fed. 930, 3 Am. Bankr. Rep. 342; *In re* McCormick, 97 Fed. 566, 3 Am. Bankr. Rep. 340.

52. Bankr. Act (1898), § 41*a*.

Under the Act of 1867 [U. S. Rev. Stat. (1878), § 5006] it was held that a register [referee] to whom a case was referred had all the powers of the court of bankruptcy which appointed him for the purpose of summoning and examining witnesses, except the power of commitment. *In re* Woodward, 8 Ben. (U. S.) 112, 30 Fed. Cas. No. 18,000, 7 Chic. Leg. N. 387, 12 Nat. Bankr. Reg. 297, 1 N. Y. Wkly. Dig. 33.

For failure to make answers on examination constituting contempt under the Act of 1867 see *In re* Glaser, 10 Fed. Cas. No. 5,476, 2 Nat. Bankr. Reg. 398; *In re* Dole, 7 Fed. Cas. No. 3,965, 7 Nat. Bankr. Reg. 538, 7 West. Jur. 629.

Proviso as to witnesses.— But it is provided that no person shall be required to attend as a witness before a referee at a place outside of the state of his residence and more than one hundred miles from such residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered him. Bankr. Act (1898), § 41*a*. And fees of witnesses are provided for in U. S. Rev. Stat. (1878), §§ 848, 849.

53. Bankr. Act (1898), § 41*a*.

Not imprisonment for debt.— An order for the payment of money or the delivery of property, which is a part of the estate in bankruptcy and which is in the control and possession of the party directed to pay or deliver it at the time of the making of the order, is not an order for the payment of a debt, and a commitment to jail for the disobedience of such an order is not an imprisonment for debt within the constitutional provision prohibiting such an imprisonment. *In re* Anderson, 103 Fed. 854, 4 Am. Bankr. Rep. 640; Ripon Knitting Works *v.* Schreiber, 101 Fed. 810, 4 Am. Bankr. Rep. 299; *In re* Rosser, 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153; *In re* Purvine, 96 Fed. 192, 37 C. C. A. 446, 2 Am. Bankr. Rep. 787.

54. **Right to jury trial.**— The person alleged to be in contempt is not entitled to a jury trial on the questions involved. Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 14 S. Ct. 1125, 38 L. ed. 1047; Eilenbecker *v.* Plymouth County Dist. Ct., 134 U. S. 31, 10 S. Ct. 424, 33 L. ed. 801; Ripon Knitting Works *v.* Schreiber, 101 Fed. 810, 4 Am. Bankr. Rep. 299. See also *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092.

55. Bankr. Act (1898), § 41*b*; *In re* Miller, 105 Fed. 57, 5 Am. Bankr. Rep. 184; *In re*

IV. WHO MAY BECOME BANKRUPTS.

A. Voluntary Bankrupts — 1. In General. Any person who owes debts, except a corporation,[56] is entitled to the benefits of the Bankruptcy Act as a voluntary bankrupt.[57]

2. Aliens. An alien may become a voluntary bankrupt or may be adjudged a bankrupt in involuntary proceedings, if he has had his principal place of business, resided, or had his domicile within the territorial jurisdiction of the court for the preceding six months, or the greater portion thereof, or has property within such jurisdiction.[58]

3. Corporations.[59] A corporation[60] is not entitled to the benefits of the Act as a voluntary bankrupt.[61] It has been questioned, when a corporation has signified its inability to pay its debts and its willingness to be adjudged bankrupt, and has induced its creditors to file an involuntary petition, whether such a petition is not in effect a voluntary one and an evasion of the Act.[62] It would seem, however, that the weight of authority is in favor of permitting the filing of a petition in bankruptcy in such cases.[63]

McCormick, 3 Am. Bankr. Rep. 340 [*approving In re* Salkey, 6 Biss. (U. S.) 280, 21 Fed. Cas. No. 12,254, 7 Chic. Leg. N. 195, 11 Nat. Bankr. Reg. 516].

As to contempt proceedings, generally, see Contempt.

If the record does not show that it is or was possible for the person against whom the contempt proceedings are instituted to perform the decree the court has no authority to punish for the failure to perform it. *In re* Purvine, 96 Fed. 192, 37 C. C. A. 446, 2 Am. Bankr. Rep. 787.

56. See *infra*, IV, A, 3.

57. Bankr. Act (1898), § 4*a*.

Under the Act of 1867, it was provided that a person residing within the jurisdiction of the United States, owing debts provable under that Act exceeding the amount of three hundred dollars might apply by petition addressed to the judge of the judicial district in which such person resided or had carried on his business for the six months next immediately preceding the time of filing such petition, setting forth his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, for the purpose of obtaining the benefits of that Act. U. S. Rev. Stat. (1878), § 5014.

For analogous decisions under former acts see 6 Cent. Dig. tit. "Bankruptcy," § 13 *et seq.*

The term "person" as used in the Act includes partnerships and women. Bankr. Act (1898), § 1 (19).

Indians.— Proceedings in bankruptcy cannot be instituted either in behalf of or against Indians unless they are citizens, or unless under the United States statutes or treaties with the tribes of which they are members the debts contracted by them are binding in the same manner as debts of other persons. *In re* Rennie, 2 Am. Bankr. Rep. 182. See also *In re* Russie, 96 Fed. 609, 3 Am. Bankr. Rep. 6; U. S. Rev. Stat. (1878), § 110.

The pendency of proceedings in insolvency under a state law, on the debtor's voluntary petition, begun before the passage of the Bankruptcy Act, will not be ground for dismissing the debtor's subsequent voluntary petition in bankruptcy, although he has contracted no new debts, when it appears that one or more of the creditors scheduled by the bankrupt are citizens of states other than that in which the insolvency proceedings were instituted. *In re* Mussey, 99 Fed. 71, 3 Am. Bankr. Rep. 592.

58. Bankr. Act (1898), § 2 (1). See also Aliens, IV, D, 1 [2 Cyc. 104].

For analogous decisions under former acts see 6 Cent. Dig. tit. "Bankruptcy," § 13.

59. Corporations as involuntary bankrupts see *infra*, IV, B, 2.

60. The term "corporations" is defined **in the Act.** Bankr. Act (1898), § 1 (6), *supra*, note 8, p. 238.

61. Bankr. Act (1898), § 4*a*.

Under Bankr. Act (1867), § 37, it was provided that all moneyed business or commercial corporations and joint-stock companies might become bankrupts either voluntarily or involuntarily.

For analogous decisions under former acts see 6 Cent. Dig. tit. "Bankruptcy," § 17.

62. *In re* Bates Mach. Co., 91 Fed. 625, 1 Am. Bankr. Rep. 129.

63. *In re* Marine Mach., etc., Co., 91 Fed. 630, 1 Am. Bankr. Rep. 421.

Admission of bankruptcy.— Where a petition has been filed against a corporation asking that it be adjudged a bankrupt and there has been filed in the name of the corporation a written admission of the act of bankruptcy charged in the petition, and a stipulation waiving service of subpœna and time for appearance, and entering such appearance, the proceeding is still involuntary, and the requirement of the Act relating to proceedings for involuntary bankruptcy must be complied with. *In re* L. Humbert Co., 100 Fed. 439, 4 Am. Bankr. Rep. 76. The directors of a corporation have the power to make the statutory admission of its inability

4. Infants, Lunatics, and Married Women.[64] While a minor is a person within the meaning of the above provision he is not entitled to the benefits of the Act, since the debts which he owes are for the most part voidable, and there would be no certainty as to what course an infant would adopt with reference to his debts provable in bankruptcy. If he chose to avoid them the proceeding in bankruptcy would be futile.[65] It has been held that a person of unsound mind and incapable of managing his own affairs, or who has been judicially declared insane, cannot commit an act of bankruptcy, nor will a bankruptcy court entertain a petition against him.[66] It is probable that a person who has been adjudged a lunatic may, through his guardian or committee, file a voluntary petition in bankruptcy.[67] The question as to whether a married woman may be adjudged a bankrupt in either voluntary or involuntary proceedings is dependent upon the statutes of the state wherein she resides pertaining to her liability for debts contracted by her.[68]

to pay its debts and its willingness to be adjudged bankrupt required by Bankr. Act (1898), § 3. *In re* Rollins Gold, etc., Min. Co., 102 Fed. 982, 4 Am. Bankr. Rep. 327.

64. Infants, lunatics, and married women as involuntary bankrupts see *infra*, IV, B, 4.

65. *In re* Duguid, 100 Fed. 274, 3 Am. Bankr. Rep. 794.

For analogous decisions under former acts see 6 Cent. Dig. tit. "Bankruptcy," § 14.

In discussing this question under the Act of 1867 in *In re* Derby, 6 Ben. (U. S.) 232, 8 Nat. Bankr. Reg. 106, 6 Alb. L. J. 422, Blatchford, J., said: "The general contracts of an infant having no force, if disaffirmed by him after attaining his majority, it is idle for him to set forth, in a voluntary case, commenced during his infancy, a schedule of his creditors, and idle for them to prove their debts during his infancy, for, the whole proceedings must be in vain, if the debts are disaffirmed by him after he attains his majority. . . . It is not intended to express any opinion as to whether an infant may or may not voluntarily petition in respect of contracts for which he is liable, such as debts for the value of necessaries."

It seems that under the Act of 1841 infants were held entitled to the benefits of the Act. *In re* Book, 3 McLean (U. S.) 317, 3 Fed. Cas. No. 1,637.

Minor engaging in business as adult.— Where a state statute provides that if a minor engages in business as an adult and a party giving him credit has reason to believe him of full age, the minor cannot upon becoming of full age disaffirm his contract made while an infant, it was held that a minor becomes liable for goods sold to him on credit while conducting a general store, and that notwithstanding his infancy he may be adjudged a bankrupt upon his own petition. *In re* Brice, 93 Fed. 942, 2 Am. Bankr. Rep. 197.

66. *In re* Funk, 101 Fed. 244, 4 Am. Bankr. Rep. 96; *In re* Marvin, 1 Dill. (U. S.) 178, 16 Fed. Cas. No. 9,178, 3 Chic. Leg. N. 394.

For analogous decisions under former acts see 6 Cent. Dig. tit. "Bankruptcy," § 19.

Becoming insane after having committed an act of bankruptcy does not prevent one from being adjudged a bankrupt in voluntary bankruptcy proceedings. So held under the former act. *In re* Weitzel, 7 Biss. (U. S.) 289, 29 Fed. Cas. No. 17,365, 3 Centr. L. J. 557, 14 Nat. Bankr. Reg. 466; *In re* Pratt, 2 Lowell (U. S.) 96, 19 Fed. Cas. No. 11,371, 6 Nat. Bankr. Reg. 276.

It is apparently an open question in England under the bankruptcy statute there as to whether a lunatic can be adjudged either a voluntary or involuntary bankrupt. *In re* Farnham, [1895] 2 Ch. 799, 64 L. J. Ch. 717.

The insanity of a bankrupt after proceedings begun does not abate such proceedings, but they must be conducted and concluded in the same manner, so far as possible, as though he had not become insane. Bankr. Act (1898), § 8.

67. *In re* Burka, 107 Fed. 674, 5 Am. Bankr. Rep. 843. A person who is so unsound of mind as to be incapable of managing his affairs cannot in that condition commit an act by which he can be forced into bankruptcy by his creditors against the objection of his guardian. *In re* Marvin, 1 Dill. (U. S.) 178, 16 Fed. Cas. No. 9,178, 3 Chic. Leg. N. 394.

68. *In re* Goodman, 5 Biss. (U. S.) 401, 10 Fed. Cas. No. 5,540, 8 Nat. Bankr. Reg. 380; *In re* Howland, 12 Fed. Cas. No. 6,791, 2 Am. L. T. Bankr. Rep. 53, 1 Chic. Leg. N. 163, 2 Nat. Bankr. Reg. 357.

If she may lawfully engage in business and incur liabilities, such a woman is entitled on her own petition to receive the benefits of the Bankruptcy Act. *In re* Collins, 3 Biss. (U. S.) 415, 6 Fed. Cas. No. 3,006, 10 Nat. Bankr. Reg. 335.

If she may interpose the defense of coverture and defeat the debt which is the basis of the bankruptcy proceedings she cannot avail herself of the Act. *In re* Slichter, 22 Fed. Cas. No. 12,943, 2 Nat. Bankr. Reg. 336.

Under the former act it was held that where the law had not removed her common-law disabilities a petition in bankruptcy would not lie against a married woman, unless it appeared that she had a separate estate (*In re* Goodman, 5 Biss. (U. S.) 401, 10 Fed. Cas. No. 5,540, 8 Nat. Bankr. Reg. 380), and that the debts had been contracted by her for the benefit of her separate estate

B. Involuntary Bankrupts — 1. In General. Any natural person, except a wage-earner[69] or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits,[70] owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and are subject to the provisions and entitled to the benefits of the Act.[71]

2. Corporations[72] — a. In General. A corporation cannot be adjudged a bankrupt by involuntary proceedings, unless it is engaged either in manufacturing, trading, printing, publishing, or mercantile pursuits.[73]

b. Manufacturing Corporations. Within the meaning of the terms "manufacturer" and "manufacturing,"[74] a corporation engaged principally in smelting ores is a manufacturing[75] corporation, and may be adjudged a bankrupt.[76]

c. Mining Corporations. A mining corporation is neither a manufacturing nor a trading corporation, and cannot be proceeded against as an involuntary bankrupt.[77] If the principal business of a mining corporation is to buy and sell

or with intent to bind such estate (*In re* Howland, 12 Fed. Cas. No. 6,791, 2 Am. L. T. Bankr. Rep. 53, 1 Chic. Leg. N. 163, 2 Nat. Bankr. Reg. 357). *Compare In re* Kinkead, 3 Biss. (U. S.) 405, 14 Fed. Cas. No. 7,824, 1 Am. L. Rec. 533, 6 Am. L. T. Rep. 45, 2 Bench & Bar N. S. 41, 5 Chic. Leg. N. 217, 7 Nat. Bankr. Reg. 439, 7 West. Jur. 110. See also *In re* Brice, 93 Fed. 942, 2 Am. Bankr. Rep. 197.

69. **The term "wage-earner"** means an individual who works for wages, salary, or hire at a rate of compensation not exceeding one thousand five hundred dollars per year. Bankr. Act (1898), § 1 (17).

70. **Private bankers, but not national banks or banks** incorporated under state or territorial laws, may be adjudged involuntary bankrupts. Bankr. Act (1898), § 4*b*. The liquidation and settlement of all state and national banks is provided for by federal or state statutes. See, generally, Banks and Banking.

71. Bankr. Act (1898), § 4*b*.

An involuntary bankruptcy proceeding is a proceeding by the creditors adverse to the bankrupt. *In re* Taylor, 102 Fed. 728, 42 C. C. A. 1, 4 Am. Bankr. Rep. 515.

72. Corporations as voluntary bankrupts see *supra*, IV, A, 4.

The fact that a corporation cannot become a voluntary bankrupt does not preclude its directors and stock-holders who are creditors from commencing involuntary proceedings against it. *In re* Rollins Gold, etc., Min. Co., 102 Fed. 982, 4 Am. Bankr. Rep. 327.

73. Bankr. Act (1898), § 4*b*.

Intent of the Act.— Presumably with the knowledge of the "broad grant of jurisdiction over corporations under the former law, congress passed the present law in which there is not alone no broad grant of jurisdiction over corporations, but in which . . . congress does enumerate, by name and description, the various kinds of such corporations subjected to the jurisdiction of the court. There being a manifest purpose to abridge the prior broad jurisdiction over corporations, we are not now warranted in enlarging by judicial construction where congress has evidenced its purpose to restrict." *In re* Keystone Coal Co., 109 Fed. 872, 873, 6 Am. Bankr. Rep. 377, 378.

The Act of 1867 applied to all moneyed, business, or commercial corporations, and joint-stock companies. It was held that the language used was for the purpose of including all corporations of a private nature organized for pecuniary profit. Walter *v.* Iowa, etc., R. Co., 2 Dill. (U. S.) 487, 30 Fed. Cas. No. 17,890, 6 Alb. L. J. 358, 5 Chic. Leg. N. 74, 7 Nat. Bankr. Reg. 289, 6 West. Jur. 562. See also New Orleans, etc., R. Co. *v.* Delamore, 114 U. S. 501, 5 S. Ct. 1009, 29 L. ed. 244.

74. **For definition** of these terms see People *v.* Roberts, 145 N. Y. 377, 40 N. E. 7, 64 N. Y. St. 827; and, generally, Corporations; Manufactures.

75. **The term "manufacturing"** has been held to include the cutting up trees into timber. *In re* Chandler, 1 Lowell (U. S.) 478, 5 Fed. Cas. No. 2,591, 4 Nat. Bankr. Reg. 213; *In re* Cowles, 6 Fed. Cas. No. 3,297, 1 Nat. Bankr. Reg. 280, 1 West. Jur. 367.

76. *In re* Tecopa Min., etc., Co., 110 Fed. 120, 121, 6 Am. Bankr. Rep. 250 [*criticizing In re* Rollins Gold, etc., Min. Co., 102 Fed. 982, 4 Am. Bankr. Rep. 327], where the referee in his opinion, which was approved by the court, said: "In a strict sense, man can create nothing. He can only alter the form of existing things. The ore, when taken from the mine by the process of mining, is changed neither in form nor in substance, unless breaking may be termed a change of form. It is ore still. But when smelted it is ore no longer in form, and the substance is altered by taking away some of its component parts. There has been alteration, and that by human hands and machinery. To my mind, it comes clearly within the popular definition of 'manufacturing.'"

77. *In re* Elk Park Min., etc., Co., 101 Fed. 422, 4 Am. Bankr. Rep. 131.

ores it may be deemed a trading corporation, notwithstanding the fact that incidentally it has been engaged in mining; but if the principal business is mining and selling the ores mined it is not a trading corporation.[78]

d. Trading and Mercantile Corporations. The term "mercantile pursuit" necessarily carries with it the idea of traffic, the buying of something from another, or the selling of something to another, and is allied to trade.[79] A "trader" has been defined as one who makes it his business to buy merchandise or goods and chattels, and to sell the same for the purpose of making a profit.[80] Under the present Act, the principal business which characterizes a corporation

Mining companies were not named in the Act and a fair import of the terms used cannot be stretched to include them. *In re* Keystone Coal Co., 109 Fed. 872, 6 Am. Bankr. Rep. 377 [*reversing* 5 Am. Bankr. Rep. 389]. See also Byers *v.* Franklin Coal Co., 106 Mass. 131 (where it was held that a mining company is not a manufacturing company within the meaning of a statute imposing a liability for debts upon officers and stock-holders for a manufacturing corporation); *In re* Rollins Gold, etc., Min. Co., 102 Fed. 982, 4 Am. Bankr. Rep. 327. In *In re* Woodside Coal Co., 105 Fed. 56, 57, 5 Am. Bankr. Rep. 186, McPherson, J., says: "It may, perhaps, be worth suggesting that, although mining companies are in some sense engaged in trade, nevertheless they belong so plainly to a distinct class of trading corporations that they are almost always specifically named in any statute that is intended to embrace them. Failure to name them, therefore, raises a presumption of some force that they were not in the legislative view."

78. *In re* Chicago-Joplin Lead, etc., Co., 104 Fed. 67, 4 Am. Bankr. Rep. 712. But *compare* McNamara *v.* Helena Coal Co., 5 Am. Bankr. Rep. 48, where it is held that if a mining corporation, as an incident to and in connection with its coal-mining business, conducts a small supply store for the convenience of its employees, in which only a small part of its assets are invested, it cannot be considered as principally engaged in trading and therefore subject to be adjudged an involuntary bankrupt.

79. *In re* Cameron Town Mut. F., etc., Ins. Co., 96 Fed. 756, 2 Am. Bankr. Rep. 372.

Broader signification than "trading."— "Mercantile pursuit" signifies for the most part the same thing as trading; and by mercantile pursuits we mean the buying or selling of goods and merchandise, or dealing in the purchase or sale of commodities, and that, too, not incidentally or occasionally, but habitually as a business. *In re* New York, etc., Water Co., 98 Fed. 711, 3 Am. Bankr. Rep. 508.

80. Bouvier L. Dict. Also defined as "one whose business is to buy and sell merchandise, or any class of goods, deriving a profit from his dealings." Black L. Dict. See also *In re* Smith, 2 Lowell (U. S.) 69, 22 Fed. Cas. No. 12,981; *In re* Chandler, 1 Lowell (U. S.) 478, 5 Fed. Cas. No. 2,591, 4 Nat. Bankr. Reg. 213; Wakeman *v.* Hoyt, 28 Fed. Cas. No. 17,051, 5 Law Rep. 309, 1 N. Y. Leg. Obs. 132; Love *v.* Love, 15 Fed. Cas. No. 8,549, 21 Pittsb. Leg. J. (Pa.) 101.

Under the Bankruptcy Act in England as it existed prior to 24 & 25 Vict. c. 134, a person could not be adjudged a bankrupt unless he was a trader. Lord Ellenborough, in Sutton *v.* Weeley, 7 East 442, 3 Smith K. B. 445, states that the proper description of the business of a trader includes both buying and selling either goods or merchandise, or other goods ordinarily the subject of traffic. 12 & 13 Vict. § 65 enumerated the persons to be deemed as traders. See *In re* Cleland, L. R. 2 Ch. 466, 36 L. J. Bankr. 33, 16 L. T. Rep. N. S. 403, 15 Wkly. Rep. 681; 3 Parsons Contr. (7th ed.) c. 12.

Among the persons held to be traders under former acts are: Bakers. *In re* Cocks, 3 Ben. (U. S.) 260, 5 Fed. Cas. No. 2,933. Butchers. Daniels *v.* Palmer, 35 Minn. 347, 29 N. W. 162; *In re* Bassett, 8 Fed. 266. Furniture dealers. *In re* Newman, 3 Ben. (U. S.) 20, 18 Fed. Cas. No. 10,175, 1 Chic. Leg. N. 123, 2 Nat. Bankr. Reg. 302. Innkeepers. *In re* Ryan, 2 Sawy. (U. S.) 411, 21 Fed. Cas. No. 12,183, 5 Leg. Gaz. (Pa.) 263. Livery-stable keepers. *In re* Odell, 9 Ben. (U. S.) 209, 18 Fed. Cas. No. 10,426, 17 Nat. Bankr. Reg. 73. Persons engaged in manufacturing lumber. *In re* Cowles, 6 Fed. Cas. No. 3,297, 1 Nat. Bankr. Reg. 280, 1 West. Jur. 367. Stair builders. *In re* Garrison, 5 Ben. (U. S.) 430, 10 Fed. Cas. No. 5,254, 17 Nat. Bankr. Reg. 287.

A railroad contractor or a speculator in stocks is not deemed a trader or a merchant. *In re* Woodward, 8 Ben. (U. S.) 563, 30 Fed. Cas. No. 18,001; *In re* Marston, 5 Ben. (U. S.) 313, 16 Fed. Cas. No. 9,142; *In re* Smith, 2 Lowell (U. S.) 69, 22 Fed. Cas. No. 12,981; *In re* Moss, 17 Fed. Cas. No. 9,877, 19 Nat. Bankr. Reg. 132.

Incidental purchases or sales by a person who is not otherwise a trader will not constitute him one. *In re* Kimball, 7 Fed. 461; *In re* Duff, 4 Fed. 519; *In re* Rogers, 1 Lowell (U. S.) 423, 20 Fed. Cas. No. 12,001, 3 Nat. Bankr. Reg. 564.

The selling of the natural products of one's own land does not constitute trading or a mercantile pursuit, even though some yearly purchases may be made by the seller in order to keep up his regular supply. *In re* Woods, 30 Fed. Cas. No. 17,990, 29 Leg. Int. (Pa.) 236, 7 Nat. Bankr. Reg. 128, 20 Pittsb. Leg. J. (Pa.) 21. And see *In re* Cleland,

as being engaged in trading or mercantile pursuits is not what it might have done within the provisions of its charter, but rather what it is actually engaged in doing.[81]

e. Effect of Dissolution. In spite of a corporation's application to a state court for a dissolution and the appointment of a temporary receiver, the local law necessarily yields to the general law, and an adjudication in bankruptcy will be granted if it is determined that the corporation has committed an act of bankruptcy.[82]

3. Farmers. Involuntary bankruptcy proceedings cannot be brought against a person engaged chiefly in farming or the tillage of the soil.[83] It is difficult, if

L. R. 2 Ch. 466, 36 L. J. Bankr. 33, 16 L. T. Rep. N. S. 403, 15 Wkly. Rep. 681; *Ex p.* Gallimore, 2 Rose 424.

81. *In re* Chicago-Joplin Lead, etc., Co., 104 Fed. 67, 4 Am. Bankr. Rep. 712. The question is not how extensive the company's powers may be, but in what pursuits the corporation is in fact principally engaged, and whether those pursuits are principally trading or mercantile. *In re* New York, etc., Water Co., 98 Fed. 711, 3 Am. Bankr. Rep. 508. See also *In re* Minnesota, etc., Constr. Co., (Ariz. 1900) 60 Pac. 881; *In re* Cameron Town Mut. F., etc., Ins. Co., 96 Fed. 756, 2 Am. Bankr. Rep. 372.

A company incorporated to buy and sell water for power, manufacturing, and hydraulic purposes, but which has confined itself to supplying water to the residents of municipalities and the municipal corporations themselves, is not engaged principally in either trading or mercantile pursuits. *In re* New York, etc., Water Co., 98 Fed. 711, 3 Am. Bankr. Rep. 508, where the court says: "But in each case as it arises the limitations imposed by the act must be carefully observed. No such corporation can be subjected to the operation of a bankrupt law nor can the court acquire jurisdiction over it, unless it is found to be 'engaged principally in trading or mercantile pursuits.' These words must be interpreted in the sense in which they are commonly used and received, and not in any strained or unnatural sense for the purpose of including or of excluding particular corporations."

A corporation engaged in giving theatrical performances is not a trading corporation and cannot be declared a bankrupt. *In re* Oriental Soc., 104 Fed. 915, 5 Am. Bankr. Rep. 219.

A corporation organized for the purpose of insuring the property of its members against loss by fire, lightning, or wind-storms is not engaged principally in mercantile pursuits. *In re* Cameron Town Mut F., etc., Ins. Co., 96 Fed. 756, 2 Am. Bankr. Rep. 372.

A corporation principally engaged in boarding horses for its customers, including the complete care of them, and also care of wagons, harness, coaches, etc., is engaged in trading or mercantile pursuits. *In re* Morton Boarding Stables, 108 Fed. 791, 5 Am. Bankr. Rep. 763 [*following In re* Odell, 9 Ben. (U. S.) 209, 18 Fed. Cas. No. 10,426, 17 Nat. Bankr. Reg. 73, where Blatchford, J., construed the words "merchant or tradesman" in the Act of 1867, as including livery-stable keepers, considering that the purchase and supply of hay, oats, feed, etc., which are the principal duties in this business, and receiving pay therefor in the compensation paid for the board of horses was equivalent to a sale of the feed, and constituted trading].

A private hospital for the cure of consumptives conducted for a financial profit has been held to be a trading or mercantile corporation. *In re* San Gabriel Sanatorium Co., 95 Fed. 271, 2 Am. Bankr. Rep. 408. But this doctrine has been disapproved. *In re* Elk Park Min., etc., Co., 101 Fed. 422, 4 Am. Bankr. Rep. 131.

82. *In re* Empire Metallic Bedstead Co., 1 Am. Bankr. Rep. 136.

Under the Act of 1867 it was held that notwithstanding the dissolution of a corporation by action of the state court, if there were undisputed assets and unpaid debts the corporation might be put into bankruptcy. *In re* Washington Mar. Ins. Co., 2 Ben. (U. S.) 292, 29 Fed. Cas. No. 17,246, 2 Nat. Bankr. Reg. 648; *In re* Merchants' Ins. Co., 3 Biss. (U. S.) 162, 17 Fed. Cas. No. 9,441, 4 Chic. Leg. N. 73, 6 Nat. Bankr. Reg. 43, 20 Pittsb. Leg. J. (Pa.) 32; *In re* Independent Ins. Co., 2 Lowell (U. S.) 97, 13 Fed. Cas. No. 7,018, 6 Nat. Bankr. Reg. 169.

83. Bankr. Act (1898), § 4*b*.

Two classes of persons are within this exception: those engaged in farming and those engaged in the tillage of the soil. A person engaged in raising live stock may be deemed a farmer, although not chiefly engaged in the tillage of the soil. It may be objected to this construction of the Act, that one who is engaged chiefly in farming will be engaged in the tillage of the soil, and therefore both descriptions are applicable to only one class of persons; but this is not true in all cases, and while it is true that both descriptions will, in the majority of instances, be applicable to those engaged in farming, yet this is not universally true, and the two descriptions are not strictly synonymous. Thus market-gardeners, nurserymen, and the like are engaged in tilling the soil, but they are not engaged in "farming," as that term is now used, and hence the need of including in the Act words descriptive of a class who are engaged in tilling the soil, but who are not farmers, as that word is now used and understood by the community at large. *In re* Thompson, 102 Fed. 287, 4 Am. Bankr. Rep. 340.

not impossible, to state facts which will, in all cases, determine whether a person is engaged chiefly in farming. It may be stated generally that if a person's principal business, in which he is permanently engaged, and upon which he mainly relies for his livelihood and financial welfare, is that of farming he is entitled to the exemption.[84] If, after an act of bankruptcy has been committed, a person changes his occupation to that of farming he is not thereby relieved from the operation of the Act.[85]

4. INFANTS, LUNATICS, AND MARRIED WOMEN.[86] An infant cannot be adjudged a bankrupt in involuntary proceedings where the debt is one that can be avoided by him.[87] The application of the present Act to lunatics and married women has already been considered.[88]

5. PARTNERS. A partnership during the continuation of the partnership business or after its dissolution or before the final settlement thereof may be adjudged bankrupt.[89]

V. ACTS OF BANKRUPTCY.

A. Who May Commit. Any person[90] who can be adjudged an involuntary bankrupt[91] may commit an act of bankruptcy.[92]

84. *In re* Mackey, 110 Fed. 355, 6 Am. Bankr. Rep. 577, where it is said: "A person engaged chiefly in farming is one whose chief occupation or business is farming. The chief occupation or business of one, so far as worldly pursuits are concerned, is that which is of principal concern to him, of some permanency in its nature, and on which he chiefly relies for his livelihood or as the means of acquiring wealth, great or small."

85. **Change of occupation.**— A petition in involuntary proceedings must be filed within four months of the commission of the act of bankruptcy relied on, and if an insolvent is engaged in an occupation which is within the purview of the law, has committed an act amenable to its provisions, and desires within such period to adopt one of the callings favored by the law and exempted from its operation in respect to involuntary proceedings, he should not be permitted to carry with him the property previously accumulated, to the defrauding of preëxisting creditors. *In re* Luckhardt, 101 Fed. 807, 4 Am. Bankr. Rep. 307. And see *In re* Mackey, 110 Fed. 355, 6 Am. Bankr. Rep. 577.

86. Infants, lunatics, and married women as voluntary bankrupts see *supra*, IV, A, 4.

87. *In re* Eidemiller, 105 Fed. 595, 5 Am. Bankr. Rep. 570.

Acts of bankruptcy by infants.— If a transfer is made by an infant which would be an act of bankruptcy if committed by an adult, and the transfer is affirmed upon his becoming of age, then a liability exists and proceedings in bankruptcy, voluntary or involuntary, may be instituted. But if the transfer is not affirmed, then it seems that it is no act of bankruptcy, and no proceedings can be instituted by or against the person who did it, even after he attains his majority. If the proceedings are instituted during the infancy of the alleged bankrupt, no affirmance of the act after he becomes of age will give the court jurisdiction of the proceedings; but the proceeding must be instituted *de novo*. Collier Bankr. (3d ed.) 47 [*citing In re* Derby, 6 Ben. (U. S.) 232, 7 Fed. Cas. No. 3,815, 6 Alb. L. J. 422, 8 Nat. Bankr. Reg. 106; Belton *v.* Hodges, 9 Bing. 365, 2 Moore & S. 496, 23 E. C. L. 618; Rex *v.* Cole, 1 Ld. Raym. 443; *Ex p.* Watson, 16 Ves. Jr. 265; *Ex p.* Moule, 14 Ves. Jr. 602; *Ex p.* Barwis, 6 Ves. Jr. 601; *Ex p.* Henderson, 4 Ves. Jr. 163; *Ex p.* Barrow, 3 Ves. Jr. 554; *Ex p.* Adam, 1 Ves. & B. 493, 12 Rev. Rep. 280].

88. See *supra*, IV, A, 4.

In England it has been held that a married woman, carrying on trade in the name of a firm separately from her husband, cannot be made bankrupt for non-compliance with a bankruptcy notice founded on a judgment obtained against her in the name of the firm. *In re* Handford, [1899] 1 Q. B. 566, 68 L. J. Q. B. 386, 80 L. T. Rep. N. S. 125, 6 Manson 131, 47 Wkly. Rep. 391.

89. Bankr. Act (1898), § 5*a*. See also Davis *v.* Stevens, 104 Fed. 235, 4 Am. Bankr. Rep. 763; *In re* Levy, 95 Fed. 812, 2 Am. Bankr. Rep. 21; *In re* Dunnigan, 95 Fed. 428, 2 Am. Bankr. Rep. 628.

As to bankruptcy proceedings in partnership cases see *infra*, XX.

For analogous decisions under former acts see 6 Cent. Dig. tit. "Bankruptcy," § 21.

The partnership here referred to is one between the parties where there may be joint and individual assets, and not a partnership as to creditors only, without any possible joint estate. *In re* Kenney, 97 Fed. 554, 3 Am. Bankr. Rep. 353. See also *In re* Downing, 1 Dill. (U. S.) 33, 7 Fed. Cas. No. 4,044, 3 Am. L. T. 165, 1 Am. L. T. Bankr. Rep. 207, 2 Chic. Leg. N. 265, 3 Nat. Bankr. Reg. 748, 17 Pittsb. Leg. J. (Pa.) 169.

90. **The term "person"** includes corporations, partnerships, and women. Bankr. Act (1898), 1 (19), *supra*, note 8, p. 238.

91. As to persons who may be adjudged bankrupts see *supra*, IV, B.

92. **An agent** acting without the scope of

B. What Constitutes — 1. Construction of Statute. While a bankruptcy act itself may be deemed remedial,[93] it would seem that the section thereof prescribing what constitutes an act of bankruptcy should be considered penal in its operation and effect,[94] and should therefore not be construed to include within its provisions any act not therein specified as an act of bankruptcy.[95]

2. Admission of Willingness to Be Declared Bankrupt — a. In General. A person commits an act of bankruptcy by admitting in writing[96] his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.[97]

b. Of Corporations. The question arose at the outset as to whether a corporation could make a written admission of inability to pay debts and declare its willingness to be adjudged bankrupt.[98] But there seems to be no question at the present time as to the power of a corporation, through its properly authorized officers,[99]

his agency and without the consent of his principal cannot render his principal liable for an act of bankruptcy. *Ex p.* Blain, 12 Ch. D. 522, 41 L. T. Rep. N. S. 46, 28 Wkly. Rep. 334. But if one member of a partnership commits an act of bankruptcy, within the scope of his authority and in respect to the partnership property, an involuntary bankruptcy proceeding may be instituted against the partnership itself. Strang *v.* Bradner, 114 U. S. 555, 5 S. Ct. 1038, 29 L. ed. 248; *In re* Dibblee, 3 Ben. (U. S.) 283, 7 Fed. Cas. No. 3,884, 1 Chic. Leg. N. 355, 2 Nat. Bankr. Reg. 617; *In re* Black, 2 Ben. (U. S.) 196, 3 Fed. Cas. No. 1,457, 1 Am. L. T. Bankr. Rep. 39, 1 Nat. Bankr. Reg. 353.

93. The Act is not to be construed strictly as if it were an obscure and penal enactment. It does not attempt to punish the bankrupt, but to distribute his property fairly and impartially between his creditors to whom, in justice, it belongs. 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. Silverman's Case, 2 Abb. (U. S.) 243, 1 Sawy. (U. S.) 410, 22 Fed. Cas. No. 12,855, 13 Int. Rev. Rec. 52, 4 Nat. Bankr. Reg. 522; *In re* Muller, Deady (U. S.) 513, 17 Fed. Cas. No. 9,912, 2 Am. L. T. Bankr. Rep. 33, 3 Nat. Bankr. Reg. 329; *In re* Locke, 1 Lowell (U. S.) 293, 15 Fed. Cas. No. 8,439, 2 Nat. Bankr. Reg. 382. See *supra*, I, E.

94. Jones *v.* Sleeper, 2 N. Y. Leg. Obs. 131, 13 Fed. Cas. No. 7,496.

To the same effect see Wilson *v.* St. Paul City Bank, 17 Wall. (U. S.) 473, 21 L. ed. 723, 5 Nat. Bankr. Reg. 270.

95. When acts of bankruptcy are classified as they are in the Act it is not the province of the court to enlarge the classification because the admitted class seems to partake of the sin of the named class. *In re* Empire Metallic Bedstead Co., 98 Fed. 981, 39 C. C. A. 372, 3 Am. Bankr. Rep. 575.

For analogous decisions under former acts see 6 Cent. Dig. tit. "Bankruptcy," § 61 *et seq.*

96. The admission must be written and signed by the alleged bankrupt. There must **also be expressed** therein a willingness to be declared a bankrupt. A written admission **of insolvency** alone is not an act of bankruptcy. *In re* Lange, 97 Fed. 197, 3 Am. Bankr. Rep. 231.

One member of a partnership may, by a written statement signed by him in behalf of himself and his partners, admit insolvency and express willingness that the firm **be** adjudged bankrupt within the requirements **of the Act.** *In re* Kersten, 110 Fed. 929, 6 Am. Bankr. Rep. 516.

97. Bankr. Act (1898), § 3*a* (5).

Specifying cause of inability to pay.— "The force of the admission of their [a firm's] inability to pay the debts of the firm is not impaired by the specification of the cause thereof, as the conditions thus stated are proven to exist in fact, and unquestionably prevent any payment of debts by the co-partners; and the test for the purposes of this admission as an act of bankruptcy is not that of ultimate sufficiency or insufficiency of the assets to meet the indebtedness, but of present inability to pay." *In re* Kersten, 110 Fed. 929, 6 Am. Bankr. Rep. 516.

98. *In re* Bates Mach. Co., 91 Fed. 625, 1 Am. Bankr. Rep. 129. In this case the directors signified in writing the company's inability to pay its debts and its willingness to be adjudged a bankrupt, and procured creditors to file an involuntary petition to have the corporation adjudged a bankrupt. One of the creditors was the president of the company, and the other two were his creatures. The court said: "It is very clear that, if an adjudication of bankruptcy were made in this case, the plain intent of section 4 of the bankrupt act would be evaded. Whether the law shall be construed so as to permit such evasion, and the provision denying the benefits of voluntary bankruptcy to a corporation shall be nullified by a petition involuntary only in form, is a serious question."

99. Sufficiency of admission.— Where a resolution was adopted at a meeting of the stock-holders authorizing one of its officers, in behalf of the company, to appear in the United States courts "in the event of an involuntary petition in bankruptcy being filed

to make such an admission.[1] The fact that the petitioning creditors are persons to whom claims of officers of the corporation have been assigned is not material.[2]

3. Disposal of Property in Fraud of Creditors — a. Statutory Provision. Having conveyed, transferred, concealed, or removed or permitted to be concealed or removed any part of his property with intent to hinder, delay, or defraud his creditors, or any of them,[3] constitutes an act of bankruptcy on the part of the person so doing.[4]

b. Concealment[5] and Removal. A concealment[6] may with correctness be stated to be a separation of some tangible thing, money, or chose in action from the body of the insolvent debtor's estate, and its secretion from those who have a right to seize upon it for payment of their debts.[7] The removal of property within the meaning of the Act is a removal from the jurisdiction of the court with intent to deprive creditors of their legal rights in respect thereto.[8]

c. Conveyances and Transfers — (1) *In General.* The conveyances and transfers[9] which are declared by the Act to be acts of bankruptcy are those which

against the company," and admit in writing the inability of the company to pay its debts, and its willingness to be adjudged a bankrupt on that ground, it was held that such resolution was not such an unqualified admission as is required. *In re* Baker-Ricketson Co., 97 Fed. 489, 4 Am. Bankr. Rep. 605.

Application under a state law for a receiver in dissolution proceedings, although a written admission of its inability to pay its debts, does not also express a willingness to be adjudged a bankrupt, and is not for that reason an act of bankruptcy. *In re* Empire Metallic Bedstead Co., 95 Fed. 957, 39 C. C. A. 372, 1 Am. Bankr. Rep. 136.

1. *In re* T. L. Kelly Dry-Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528; *In re* L. Humbert Co., 100 Fed. 439, 4 Am. Bankr. Rep. 76; *In re* Marine Mach., etc., Co., 91 Fed. 630, 1 Am. Bankr. Rep. 421.

2. *In re* Rollins Gold, etc., Min. Co., 102 Fed. 982, 4 Am. Bankr. Rep. 327.

3. **The term "creditor"** is defined in the Act. Bankr. Act, § 1 (9), *supra*, note 8, p. 238. In Beers *v.* Hanlin, 99 Fed. 695, 3 Am. Bankr. Rep. 745, it is said: "Unless the petitioner was a 'creditor' at the time of the transfer to Aylsworth, such transfer did not constitute an act of bankruptcy. A creditor, under the bankrupt act, is one who owns a demand or claim provable in bankruptcy, and this was not such a demand or claim. An unliquidated claim is not provable in bankruptcy. A claim like this, arising out of a tort, must be reduced to judgment, or, pursuant to application to the court, be liquidated in such manner as the court shall direct, in order to be proved against a bankrupt's estate."

4. Bankr. Act (1898), § 3*a* (1).

5. As to what concealment of the property of a bankrupt will prevent his discharge see *infra*, XIX, D, 3.

The concealment of property by a bankrupt after adjudication or after his discharge is an offense against the Bankruptcy Act and is punishable by imprisonment. Bankr. Act (1898), § 29*b* (1). See *infra*, XXI, A.

6. **The term "conceal"** includes to secrete, falsify, and mutilate. Bankr. Act (1898), § 1 (22) *supra*, note 8, p. 238.

7. Salem Citizens' Bank *v.* W. C. De Pauw Co., 105 Fed. 926, 45 C. C. A. 130, 5 Am. Bankr. Rep. 345, holding that where an officer of an insolvent corporation buys up at a discount, under the guise of another person, outstanding judgments against such corporation, under which its property, under the same guise, is purchased at judicial sale, and where the quantum of the property is not kept under cover or concealed but remains visible, and the only concealment is that of the actual consideration paid, such transaction is not a continuing concealment within the meaning of Bankr. Act (1898), § 3*a* (1), although it may be fraudulent. See also Fox *v.* Eckstein, 9 Fed. Cas. No. 5,009, 4 Nat. Bankr. Reg. 373.

An attachment secured upon a fictitious debt for the purpose of preventing an attachment by a *bona fide* creditor has been considered a concealment, because the words imply not only a physical removal or concealment of the property, but also a concealment of title and the position of the property. *In re* Williams, 1 Lowell (U. S.) 406, 29 Fed. Cas. No. 17,703, 3 Nat. Bankr. Reg. 286; *In re* Hussman, 12 Fed. Cas. No. 6,951, 2 Am. L. T. Bankr. Rep. 53, 1 Chic. Leg. N. 177, 2 Nat. Bankr. Reg. 437.

Presumption of concealment.— If money belonging to an insolvent debtor has been lost or not accounted for there is no presumption that it has been secreted or concealed. Davis *v.* Stevens, 104 Fed. 235, 4 Am. Bankr. Rep. 763.

8. *In re* Hammond, 1 Lowell (U. S.) 381, 11 Fed. Cas. No. 5,999, 3 Nat. Bankr. Reg. 273.

Where an insolvent debtor flees from his domicile to escape prosecution for crime and takes with him property which, had he remained, must have been transferred to his trustee in bankruptcy, it constitutes both concealment and removal of property with intent to defraud his creditors, and is an act of bankruptcy within the meaning of the Act. *In re* Filer, 108 Fed. 209, 5 Am. Bankr. Rep. 332.

9. **The term "transfer"** is defined in the Act. Bankr. Act (1898), § 1 (25), *supra*, note 8, p. 238.

by the common law and by statute are deemed fraudulent.[10] Thus a conveyance by a debtor of property to a trustee of his own selection, for the equal benefit of his creditors, although not a general assignment,[11] because containing certain conditions of defeasance, is nevertheless an act of bankruptcy, since it tends to defeat or delay the operation of the Act, by providing a different method of administration than that contemplated thereby.[12] But where a debtor borrows money prior to bankruptcy and at the same time makes a transfer of property as a security therefor, such transfer is not an act of bankruptcy.[13]

(II) *Voluntary Transfers.* A voluntary transfer of property founded upon the consideration of blood or marriage is presumptively valid;[14] such a transfer, where the only consideration is good will or friendship, is, however, *prima facie* fraudulent.[15] But in any event, if the grantor is indebted at the time the transfer is made the burden is upon the grantee to show that the grantor had abundant means, in addition to the property transferred, to pay all his debts.[16] If at the time the transfer is made the grantor is indebted to such an extent that the transfer will embarrass him in the payment of his debts, such transfer will be deemed fraudulent, although the debts due may be subsequently paid in the course of business.[17] A voluntary transfer made while the grantor was free from

10. See *In re* Shapiro, 106 Fed. 495, 5 Am. Bankr. Rep. 839; *In re* Baker-Ricketson Co., 97 Fed. 489, 4 Am. Bankr. Rep. 605; and, generally, FRAUDULENT CONVEYANCES. All such conveyances and transfers are null and void as to creditors, if made within four months prior to the filing of the petition in bankruptcy (Bankr. Act (1898), § 67*e*; and, generally, *infra*, XVI, C), and may be set aside in an action brought by the trustee, even if made earlier than four months prior to the filing of such petition (Bankr. Act (1898), § 70*e*; and, generally, *infra*, XVI, C, 2).

11. See, generally, *infra*, V, B, 4.

12. Davis *v.* Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; Globe Ins. Co. *v.* Cleveland Ins. Co., 10 Fed. Cas. No. 5,486, 4 Am. L. Rec. 652, 8 Chic. Leg. N. 258, 14 Nat. Bankr. Reg. 311. In Rumsey, etc., Co. *v.* Novelty, etc., Mfg. Co., 99 Fed. 699, 3 Am. Bankr. Rep. 704, the court says: "Among . . . the rights conferred upon creditors by the Bankruptcy Act are: (1) to choose their own trustees; (2) to examine the bankrupt; (3) to have notice of all the important steps in the administration of the estate; and (4) to have the assets converted into money and distributed under the supervision and control of a court of bankruptcy. Any course of procedure by an insolvent . . . whereby he conveys all his property to some trustee of his own selection, with power to dispose of it according to his own judgment, and with none of the safeguards provided by the bankruptcy act, clearly deprives the creditors of the valuable rights accorded to them by that act."

13. *In re* Wolf, 98 Fed. 84, 3 Am. Bankr. Rep. 555. See also *In re* Davidson, 109 Fed. 882, 5 Am. Bankr. Rep. 528, where it was held that a mortgage executed to secure a money loan made at the same time was valid; if such mortgage was given to secure an antecedent debt it would be deemed a preferential transfer, and therefore an act of bankruptcy. Under the former act it was held that "an insolvent person may properly make efforts to extricate himself from his embarrassments, and therefore he may borrow money, and give at the time security therefor, provided always that the transaction be free from fraud in fact and upon the bankrupt act. And hence it is a settled principle of bankrupt law, both in England and in this country, that advances made in good faith to a debtor to carry on business, upon security taken at the time, do not violate either the terms or policy of the bankrupt act." Darby *v.* Boatman's Sav. Inst., 1 Dill. (U. S.) 141, 6 Fed. Cas. No. 3,571, 1 Am. L. T. Bankr. Rep. 251, 4 Am. L. T. 117, 3 Chic. Leg. N. 249, 1 Leg. Op. (Pa.) 146, 4 Nat. Bankr. Reg. 600. See also Gatman *v.* Honea, 10 Fed. Cas. No. 5,271, 7 Chic. Leg. N. 395, 12 Nat. Bankr. Reg. 493; *In re* Sanford, 21 Fed. Cas. No. 12,310, 7 Nat. Bankr. Reg. 351; *In re* Rosenfeld, 20 Fed. Cas. No. 12,057, 1 Am. L. T. Bankr. Rep. 100, 8 Am. L. Reg. N. S. 44, 2 Nat. Bankr. Reg. 116; *In re* Cowles, 6 Fed. Cas. No. 3,297, 1 Nat. Bankr. Reg. 280, 1 West. Jur. 367.

14. Sedgwick *v.* Place, 5 Ben. (U. S.) 184, 21 Fed. Cas. No. 12,620, 5 Nat. Bankr. Reg. 168.

15. Babcock *v.* Eckler, 24 N. Y. 623; Van Wyck *v.* Seward, 18 Wend. (N. Y.) 375; and, generally, FRAUDULENT CONVEYANCES.

16. Pratt *v.* Curtis, 2 Lowell (U. S.) 87, 19 Fed. Cas. No. 11,375, 6 Nat. Bankr. Reg. 139.

17. Antrim *v.* Kelly, 1 Fed. Cas. No. 494, 4 Nat. Bankr. Reg. 587. See also Smith *v.* Kehr, 2 Dill. (U. S.) 50, 22 Fed. Cas. No. 13,071, 7 Nat. Bankr. Reg. 97, 6 West. Jur. 451; *In re* Antisdel, 1 Fed. Cas. No. 490, 18 Nat. Bankr. Reg. 289; Fisher *v.* Henderson, 9 Fed. Cas. No. 4,820, 8 Nat. Bankr. Reg. 175.

Conveyance by a father to his sons, in consideration of his support, is fraudulent as to his creditors, and would be an act of bankruptcy at the instance of his creditors. *In re* Johann, 2 Biss. (U. S.) 139.

debt cannot be impeached by subsequent creditors, unless it be shown to have been fraudulent, or made with a view to future debts.[18]

d. Intent. Intent to hinder, delay, or defraud creditors is an essential element of the act of bankruptcy; and the question of intent is one of fact which must be proved or inferred from other facts in evidence.[19]

4. General Assignment For Benefit of Creditors — a. In General. Having made a general assignment for the benefit of creditors constitutes an act of bankruptcy on the part of the person so doing.[20] There is a distinction to be made

One engaged in business made a settlement upon his wife to protect his family in case he became insolvent, and at the time, though not actually insolvent, he was weak and unsteady in his pecuniary matters. The conveyance was fraudulent. Sedgwick *v.* Place, 12 Blatchf. (U. S.) 163, 21 Fed. Cas. No. 12,621, 10 Nat. Bankr. Reg. 28.

18. *In re* Jones, 6 Biss. (U. S.) 68, 13 Fed. Cas. No. 7,444, 6 Chic. Leg. N. 271, 9 Nat. Bankr. Reg. 556; Barker *v.* Barker, 2 Woods (U. S.) 87, 2 Fed. Cas. No. 986, 2 Am. L. T. Rep. N. S. 386, 12 Nat. Bankr. Reg. 474. But where grantor is engaged, or is about to engage, in a business involving great risks, or which is in a failing condition, such transfers are then looked upon with suspicion. Beecher *v.* Clark, 12 Blatchf. (U. S.) 256, 3 Fed. Cas. No. 1,223, 10 Nat. Bankr. Reg. 385; Case *v.* Phelps, 39 N. Y. 164, 5 Nat. Bankr. Reg. 452.

Settlement of property of moderate value upon his wife, by a bankrupt when in prosperous circumstances, all his debts existing at the time being afterward paid, was held to be valid as against his creditors. Smith *v.* Vodges, 92 U. S. 183, 23 L. ed. 481, 13 Nat. Bankr. Reg. 433.

Where a voluntary transfer is made to a child, and at the time the grantor is in prosperous circumstances, although in debt to a small amount, the transfer is not fraudulent if it be shown that the gift is reasonable and sufficient property remain to pay debts. Sedgwick *v.* Place, 5 Ben. (U. S.) 184, 21 Fed. Cas. No. 12,620, 5 Nat. Bankr. Reg. 168.

19. *In re* Goldschmidt, 3 Ben. (U. S.) 379, 10 Fed. Cas. No. 5,520, 3 Nat. Bankr. Reg. 164; Langley *v.* Perry, 14 Fed. Cas. No. 8,067, 8 Am. L. Reg. N. S. 427, 2 Am. L. T. Bankr. Rep. 84, 2 Balt. L. Transcr. 521, 2 Nat. Bankr. Reg. 596, 16 Pittsb. Leg. J. (Pa.) 117; *In re* Cowles, 6 Fed. Cas. No. 3,297, 1 Nat. Bankr. Reg. 280, 1 West. Jur. 367. The intent need exist only on the part of the person making the transfer; if that exists the debtor clearly commits an act of bankruptcy, however innocent the intent of the preferred creditor or the person receiving it may be. *In re* Drummond, 7 Fed. Cas. No. 4,093, 1 Am. L. T. Bankr. Rep. 7, 1 Nat. Bankr. Reg. 231. If the natural consequence of a fraudulent transfer is to defraud creditors the intent will be presumed. Wager *v.* Hall, 16 Wall. (U. S.) 584, 21 L. ed. 504; Toof *v.* Martin, 13 Wall. (U. S.) 40, 20 L. ed. 481, 6 Nat. Bankr. Reg. 49; *In re* Bloch, 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300; Johnson *v.* Wald, 93 Fed. 640, 35 C. C. A. 522, 2 Am. Bankr. Rep. 84; *In re* Smith, 4 Ben. (U. S.) 1, 22 Fed. Cas. No. 12,974, 3 Am. L. T. 7, 1 Am. L. T. Bankr. Rep. 147, 3 Nat. Bankr. Reg. 377; Sawyer *v.* Turpin, 1 Holmes (U. S.) 251, 21 Fed. Cas. No. 12,409, 5 Nat. Bankr. Reg. 339 [*affirmed* in 91 U. S. 114, 23 L. ed. 235]; Miller *v.* Keys, 17 Fed. Cas. No. 9,578, 3 Nat. Bankr. Reg. 224.

Every one is presumed to intend the legal consequences of his acts, and where an insolvent debtor transfers a large portion of his property to one creditor to the exclusion of others, such transaction must be taken as conclusive of an intent to give a preference. *In re* McGee, 105 Fed. 895, 5 Am. Bankr. Rep. 262.

20. Bankr. Act (1898), § 3*a* (4).

The Bankruptcy Act of 1867 contained no express provision making a general assignment for the benefit of creditors an act of bankruptcy; but the prevailing authority was in favor of the position that such assignments were acts of bankruptcy, for the reason that they avoided the provisions of the bankruptcy laws and enabled the debtor to escape examination and to control and regulate, through an assignee appointed by him, the distribution of his estate. Boese *v.* King, 108 U. S. 379, 2 S. Ct. 765, 27 L. ed. 760; *In re* Lawrence, 10 Ben. (U. S.) 4, 15 Fed. Cas. No. 8,133, 18 Nat. Bankr. Reg. 516, 26 Pittsb. Leg. J. (Pa.) 143; Macdonald *v.* Moore, 8 Ben. (U. S.) 579, 16 Fed. Cas. No. 8,763, 1 Abb. N. Cas. (N. Y.) 53, 23 Int. Rev. Rec. 25, 15 Nat. Bankr. Reg. 26, 3 N. Y. Wkly. Dig. 461, 24 Pittsb. Leg. J. (Pa.) 83; *In re* Smith, 4 Ben. (U. S.) 1, 22 Fed. Cas. No. 12,974, 3 Am. L. T. 7, 1 Am. L. T. Bankr. Rep. 147, 3 Nat. Bankr. Reg. 377; *In re* Croft, 8 Biss. (U. S.) 188, 6 Fed. Cas. No. 3,404, 6 Am. L. Rec. 597, 10 Chic. Leg. N. 204, 17 Nat. Bankr. Reg. 324, 6 N. Y. Wkly. Dig. 218; *In re* Frisbee, 14 Blatchf. (U. S.) 185, 9 Fed. Cas. No. 5,129, 15 Nat. Bankr. Reg. 522; *In re* Beisenthal, 14 Blatchf. (U. S.) 146, 3 Fed. Cas. No. 1,236, 15 Nat. Bankr. Reg. 228; *In re* Randall, Deady (U. S.) 557, 20 Fed. Cas. No. 11,551, 2 Am. L. T. Bankr. Rep. 69, 1 Chic. Leg. N. 209, 3 Nat. Bankr. Reg. 18; *In re* Burt, 1 Dill. (U. S.) 439, 4 Fed. Cas. No. 2,210; McLean *v.* Johnson, 3 McLean (U. S.) 202, 16 Fed. Cas. No. 8,883, 1 West. Jur. 189; McLean *v.* Meline, 3 McLean (U. S.) 199, 16 Fed. Cas. No. 8,890, 1 West. L. J. 51; Jackson *v.* McCulloch, 1 Woods (U. S.) 433, 13 Fed. Cas. No. 7,140, 13 Nat. Bankr. Reg. 283, 1 N. Y. Wkly. Dig. 534; *In re* Mendelsohn, 3 Sawy. (U. S.) 342, 17 Fed. Cas. No. 9,420, 12 Nat. Bankr. Reg. 533; Spicer *v.* Ward, 22 Fed. Cas.

between general assignments for the benefit of creditors and proceedings under state insolvency laws providing for the discharge of an insolvent debtor.[21] A general assignment is valid unless invalidated by subsequent bankruptcy proceedings;[22] but all proceedings under state insolvency laws are void.[23]

b. What Is an Assignment Within the Meaning of the Act. Under the present Act any voluntary general[24] assignment for the benefit of creditors, whether with or without preferences,[25] if made within four months of the filing of the petition in bankruptcy against the assignor, is an act of bankruptcy by express enactment.[26] Thus, a general assignment for the benefit of creditors made by the vote of a majority of the board of directors and of the stock-holders of a corporation is an act of bankruptcy.[27] And it has been held that a confession of

No. 13,241, 3 Nat. Bankr. Reg. 512; Platt *v.* Preston, 19 Fed. Cas. No. 11,219, 19 Nat. Bankr. Reg. 241; *In re* Kasson, 14 Fed. Cas. No. 7,617, 18 Nat. Bankr. Reg. 379; Hardy *v.* Bininger, 11 Fed. Cas. No. 6,057, 4 Nat. Bankr. Reg. 262; Globe Ins. Co. *v.* Cleveland Ins. Co., 10 Fed. Cas. No. 5,486, 13 Alb. L. J. 305, 4 Am. L. Rec. 652, 8 Chic. Leg. N. 258, 14 Nat. Bankr. Reg. 311; *In re* Chamberlain, 5 Fed. Cas. No. 2,574, 3 Nat. Bankr. Reg. 710. *Contra*, see Sedgwick *v.* Place, 34 Conn. 552, 21 Fed. Cas. No. 12,622, 1 Am. L. Bankr. Rep. 97, 1 Nat. Bankr. Reg. 673; Hewitt *v.* Northrup, 75 N. Y. 506; Haas *v.* O'Brien, 66 N. Y. 597; *In re* Wells, 29 Fed. Cas. No. 17,387, 7 Am. L. Reg. N. S. 163, 1 Am. L. T. Bankr. Rep. 20, Bankr. Reg. Suppl. 37, 6 Int. Rev. Rec. 181, 1 Nat. Bankr. Reg. 171; Langley *v.* Perry, 14 Fed. Cas. No. 8,067, 8 Am. L. Reg. N. S. 427, 2 Am. L. T. Bankr. Rep. 84, 2 Balt. L. Transcr. 521, 2 Nat. Bankr. Reg. 596, 16 Pittsb. Leg. J. (Pa.) 117.

The present English statute has declared a general assignment to be an act of bankruptcy, in conformity with the decisions of the courts previously rendered. Bankr. Act (1883), § 4*a*. See also *In re* Wood, L. R. 7 Ch. 302; Tappenden *v.* Burgess, 4 East 230, 1 Smith K. B. 33; Thompson *v.* Jackson, 11 L. J. C. P. 44, 3 M. & G. 621, 4 Scott N. R. 234, 42 E. C. L. 325; Simpson *v.* Sikes, 6 M. & S. 295.

In the absence of statutory enactments.— Since the time of George II, and even prior, the current of English adjudications, followed by our own, has been that a voluntary assignment of all his property by an insolvent debtor to an assignee of his own choosing, though without preferences, is itself an act of bankruptcy, a fraud upon the Act and hence a fraud upon the creditors, as respects their rights in bankruptcy, and voidable at the trustee's option, even without an express provision to that effect in the statute. *In re* Gutwillig, 90 Fed. 475, 1 Am. Bankr. Rep. 78 [*affirmed* in 92 Fed. 337, 63 U. S. App. 191, 34 C. C. A. 377, 1 Am. Bankr. Rep. 388]. A voluntary assignment is in effect an act of bankruptcy, and is fraudulent, not at common law, or under 13 Eliz., but because it defeats the rights of creditors secured by the bankrupt law to the choice of a trustee, to the summary jurisdiction of the bankruptcy court, and to the ample control which the law intended to give them over the estate of their insolvent debtor, and is therefore a fraud upon the Act and upon the creditors' rights, which prevent the assignee from holding the assigned estate as against a trustee in bankruptcy. Barnes *v.* Rettew, 8 Phila. (Pa.) 133, 28 Leg. Int. (Pa.) 124, 2 Fed. Cas. No. 1,019; *In re* Beisenthal, 14 Blatchf. (U. S.) 146, 3 Fed. Cas. No. 1,236, 15 Nat. Bankr. Reg. 228; Globe Ins. Co. *v.* Cleveland Ins. Co., 10 Fed. Cas. No. 5,486, 13 Alb. L. J. 305, 4 Am. L. Rec. 652, 8 Chic. Leg. N. 258, 14 Nat. Bankr. Reg. 311.

21. *In re* Sievers, 91 Fed. 366, 1 Am. Bankr. Rep. 117. See also, generally, Assignments For Benefit of Creditors, 4 Cyc. 113.

22. Patty-Joiner, etc., Co. *v.* Cummins, 93 Tex. 598, 57 S. W. 566, 4 Am. Bankr. Rep. 269; *In re* Romanow, 92 Fed. 510, 1 Am. Bankr. Rep. 461. See also Assignments For Benefit of Creditors, 4 Cyc. 113; and *supra*, I, D.

23. *In re* John A. Etheridge Furniture Co., 92 Fed. 329, 1 Am. Bankr. Rep. 112. See also Patty-Joiner, etc., Co. *v.* Cummins, 93 Tex. 598, 57 S. W. 566, 4 Am. Bankr. Rep. 269. See also *supra*, I, D.

24. **Partial assignment.**— An assignment which purports to transfer all the property of a partnership is a general assignment by the partnership, and if it does not purport to assign the individual property of each member of the firm, it is but a partial assignment by such members. *In re* Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559.

25. **The validity or invalidity of the assignment is immaterial.**—Congress, in denominating the making of a general assignment for the benefit of creditors an act of bankruptcy, did not make any distinction between valid and invalid instruments, but used terms which would reach the execution of any instrument which is, or purports to be, a general assignment. *In re* Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559.

26. Bankr. Act (1898), § 3*a* (4). See also Costello *v.* Harbaugh, 83 Ill. App. 29 [*affirmed* in 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147]; *In re* Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559 [*affirming* 92 Fed. 896]; Leidigh Carriage Co. *v.* Stengel, 95 Fed. 637, 37 C. C. A. 210; Bray *v.* Cobb, 91 Fed. 102, 1 Am. Bankr. Rep. 153.

27. Bankr. Act (1898), § 3*a*, *b*; Clark *v.* American Mfg., etc., Co., 101 Fed. 962, 42

judgment to a trustee for the benefit of all creditors is a general assignment and therefore an act of bankruptcy.[28] But a petition for the appointment of a receiver by a corporation under a state statute regulating the voluntary dissolution of corporations is not an assignment for the benefit of creditors and consequently not an act of bankruptcy.[29] So the appointment of a receiver in a suit brought in equity by an administrator of a deceased partner for the purpose of liquidating the affairs of the partnership thus dissolved by the death of the partner is not the making of a general assignment.[30] Nor is a deed of trust in the nature of a mortgage, containing a power of sale and providing for the distribution of the proceeds thereof among creditors of the mortgagor, a general assignment for the benefit of creditors.[31]

5. Permitting Preferences Through Legal Proceedings — a. In General. Having suffered or permitted, while insolvent,[32] any creditor to obtain a preference[33] through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged, such preference constitutes an act of bankruptcy on the part of the person so doing.[34]

b. Intent Not Material. Under the present Act the intent of the insolvent debtor in permitting or suffering a preference by legal proceedings is not material. It is enough that a creditor has obtained a preference, and that the debtor has permitted it to remain undischarged.[35]

C. C. A. 120, 4 Am. Bankr. Rep. 351. See also George M. West Co. *v.* Lea, 174 U. S. 590, 19 S. Ct. 836, 43 L. ed. 1098, 2 Am. Bankr. Rep. 463; *In re* Gutwillig, 92 Fed. 337, 63 U. S. App. 191, 34 C. C. A. 377, 1 Am. Bankr. Rep. 388.

28. *In re* Green, 106 Fed. 313, 5 Am. Bankr. Rep. 848.

29. *In re* Empire Metallic Bedstead Co., 98 Fed. 981, 39 C. C. A. 372, 3 Am. Bankr. Rep. 575. See also *In re* Harper, 100 Fed. 266, 3 Am. Bankr. Rep. 804; *In re* Baker-Ricketson, 97 Fed. 489, 4 Am. Bankr. Rep. 605.

30. Vaccaro *v.* Memphis Security Bank, 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bankr. Rep. 474.

The mere fact that similar consequences attach to the appointment of a receiver for the purpose of winding up the affairs of a partnership or a corporation, as result to creditors from a general assignment, is not enough. Vaccaro *v.* Memphis Security Bank, 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bankr. Rep. 474; *In re* Empire Metallic Bedstead Co., 98 Fed. 981, 39 C. C. A. 372, 3 Am. Bankr. Rep. 575.

Under the Act of 1867 it was held to be an act of bankruptcy to permit the creation of a receivership. *In re* Bininger, 7 Blatchf. (U. S.) 262, 3 Fed. Cas. No. 1,420. But as Judge Lowell observed in *In re* Baker-Ricketson Co., 97 Fed. 489, 491, 4 Am. Bankr. Rep. 605, 606, this ruling was based upon Bankr. Act (1867), § 39, which made it an act of bankruptcy to "procure or suffer his property to be taken on legal process with intent to defeat or delay the operation of this act." Under that provision it was held that the appointment of a receiver was upon legal process. But this provision is not found in the present Act. Vaccaro *v.* Memphis Security Bank, 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bankr. Rep. 474.

31. Rumsey, etc., Co. *v.* Novelty, etc., Mfg. Co., 99 Fed. 699, 3 Am. Bankr. Rep. 704. See Collier Bankr. (3d ed.) 42.

32. That debtor was insolvent at the time the preference was obtained must be shown. *In re* Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123. See also *infra*, V, B, 7.

33. That preference was actually secured through such proceedings must be shown. *In re* Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123.

34. Bankr. Act (1898), § 3*a* (3); *In re* Elmira Steel Co., 109 Fed. 456, 5 Am. Bankr. Rep. 484; Duncan *v.* Landis, 106 Fed. 839, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649; *In re* Harper, 105 Fed. 900, 5 Am. Bankr. Rep. 567; *In re* Miller, 104 Fed. 764, 5 Am. Bankr. Rep. 140; Davis *v.* Stevens, 104 Fed. 235, 4 Am. Bankr. Rep. 763; *In re* Storm, 103 Fed. 618, 4 Am. Bankr. Rep. 601; Vaccaro *v.* Memphis Security Bank, 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bankr. Rep. 474; *In re* Thomas, 103 Fed. 272, 4 Am. Bankr. Rep. 571; *In re* Gormully, etc., Co., 95 Fed. 429, 2 Am. Bankr. Rep. 586; *In re* Chapman, 99 Fed. 395, 3 Am. Bankr. Rep. 607; *In re* Nelson, 98 Fed. 76, 1 Am. Bankr. Rep. 63; *In re* Baker-Ricketson Co., 97 Fed. 489, 4 Am. Bankr. Rep. 605; Parmenter Mfg. Co. *v.* Stoever, 97 Fed. 330, 38 C. C. A. 200, 3 Am. Bankr. Rep. 220; *In re* Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re* Ferguson, 95 Fed. 429, 2 Am. Bankr. Rep. 586; *In re* Cliffe, 94 Fed. 354, 2 Am. Bankr. Rep. 317; *In re* Moyer, 93 Fed. 188, 1 Am. Bankr. Rep. 577; *In re* Reichman, 91 Fed. 624, 1 Am. Bankr. Rep. 17.

35. *In re* Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123.

Under Bankr. Act (1867), § 39, specifying what are deemed acts of bankruptcy, provided, that one being bankrupt or insolvent, or in contemplation of bankruptcy or insol-

e. "Legal Proceedings." The words "legal proceedings" as used in the Act have reference to any proceedings in a court of justice, interlocutory or final, by which the property of the debtor is seized and diverted from his creditors.[36]

d. "Suffered or Permitted." The authorities are not harmonious as to the use of the words "suffered or permitted" in respect to preferences by legal proceedings. The prevailing doctrine in nearly all the circuits and districts is that if the insolvent debtor remains passive and supine and permits his property to be taken by judicial proceedings by one creditor at the expense of the others, he has

vency who shall give any warrant to confess judgment or procure or suffer his property to be taken on legal proceedings "with intent" to give a preference to one or more of his creditors or with intent to defeat or delay the operation of the Act was guilty of an act of bankruptcy. This provision was first construed upon the theory that where a debtor could prevent the taking of his property by legal proceedings, as by going into voluntary bankruptcy, that if he did not do so he suffered or permitted the taking of his property. *In re* Craft, 2 Ben. (U. S.) 214, 6 Fed. Cas. No. 3,316, 1 Nat. Bankr. Reg. 378; *In re* Black, 2 Ben. (U. S.) 196, 3 Fed. Cas. No. 1,457, 1 Am. L. T. Bankr. Rep. 39, 1 Nat. Bankr. Reg. 353; *In re* Schick, 2 Ben. (U. S.) 5, 21 Fed. Cas. No. 12,455, 1 Am. L. T. Bankr. Rep. 28, Bankr. Reg. Suppl. 38, 6 Int. Rev. Rec. 183, 1 Nat. Bankr. Reg. 177; *In re* Sutherland, Deady (U. S.) 344, 23 Fed. Cas. No. 13,638, 1 Nat. Bankr. Reg. 531; *In re* Gallingher, 1 Sawy. (U. S.) 224, 9 Fed. Cas. No. 5,202, 4 Nat. Bankr. Reg. 729. These cases considered an intent as necessarily implied by the suffering or permitting of the creation of a preference, or else overlooked the fact that an intent to prefer was an essential element to make the sufferance of a preference by legal proceedings an act of bankruptcy. But Wilson *v.* St. Paul City Bank, 17 Wall. (U. S.) 473, 21 L. ed. 723, 9 Nat. Bankr. Reg. 97, overruled in effect the cases above cited and held that no intent whatever could be inferred from the neglect of the debtor, properly sued upon a just claim, to interpose a defense when there was no valid defense; that while, when a person does a positive act, the consequences of which he knows beforehand, he must be deemed to intend those consequences, it cannot be inferred that a man intends the consequences of other persons' acts when he contributes nothing to their success. The effect of this decision was to hold that under the Act of 1867, a failure to interpose a defense in an action brought against an insolvent debtor, when no good defense existed, was not an act of bankruptcy.

Effect of omission of provision as to intent. — Intent was necessary under the Act of 1867 in order that a preference by permitting or suffering of legal proceedings might constitute an act of bankruptcy. Clark *v.* Iselin, 21 Wall. (U. S.) 360, 22 L. ed. 568; Wilson *v.* St. Paul City Bank, 17 Wall. (U. S.) 473, 21 L. ed. 723. In *In re* Thomas, 103 Fed. 272, 275, 4 Am. Bankr. Rep. 571 [*citing* Parmenter Mfg. Co. *v.* Stoever, 97 Fed. 330, 38 C. C. A. 200, 3 Am. Bankr. Rep. 220; *In re* Moyer, 93 Fed. 188, 1 Am. Bankr. Rep. 577; *In re* Reichman, 91 Fed. 624, 1 Am. Bankr. Rep. 17], Buffington, J., says: "Presumably with knowledge of these decisions, congress enacted the present law. Not only does the particular subdivision [Bankr. Act (1898), § 3*a* (3)] now under consideration omit the element of the intent of either creditor or debtor, but that such omission was purposeful and significant is evidenced by the fact that in the acts of bankruptcy defined by the two preceding subdivisions an intent to hinder, delay, or defraud creditors in the one, and to prefer a creditor in the other, is expressly required. It is clear that, by the purposeful omission of the element of intent in this class, congress has made facts, and not intent, the test of this particular act of bankruptcy. Such facts are insolvency of the debtor, preference through legal proceedings, nonvacation or discharge of such preference five days before a sale, etc."

36. *In re* Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123.

"Legal process" as used in the Act of 1867 was not confined to any particular form of writ, execution, or attachment. The writ, mandate, or order of a court taking hold of the property and withdrawing it from the possession and control of the debtor and from the ordinary reach of creditors for the payment of what is due to them, are, each and either of them, within the intent and true meaning of the term "legal process" as implied in that Act. *In re* Bininger, 7 Blatchf. (U. S.) 262, 3 Fed. Cas. No. 1,420, 4 Nat. Bankr. Reg. 262.

Proceedings for the foreclosure of liens. — The provision of the Act making the suffering or permitting of a preference by legal proceedings an act of bankruptcy does not apply to proceedings to enforce a lien of a mortgage acquired more than four months before the filing of the petition, notwithstanding the fact that in such proceedings a general judgment was obtained against the alleged bankrupt. *In re* Chapman, 99 Fed. 395, 3 Am. Bankr. Rep. 607. The act of bankruptcy referred to in Bankr. Act (1898), § 3*a* (3), must be limited to such acts as, by construction of law, and in view of the Bankruptcy Act, work an injury to creditors, by securing to them a preference which the bankruptcy law is designed to prevent. The language of this subdivision shows this intent. This cannot apply therefore to such levies and liens as are acquired long prior to the passage of the Act, and more than four months prior to the petition, which the Bankruptcy Act does not vacate or disallow. Such a lien the

"suffered or permitted" a preference to be obtained, and is therefore guilty of an act of bankruptcy.[37] It has been held that the suffering or permitting of a receiver to be appointed for the general benefit of creditors of a dissolved and insolvent partnership is not an act of bankruptcy.[38]

6. Preferential Transfers — a. In General. Having transferred[39] while insolvent[40] any portion of his property to one or more of his creditors with intent[41] to prefer[42] such creditors over his other creditors constitutes an act of bankruptcy on the part of the person so doing.[43]

b. What Constitutes a Preferential Transfer Within Meaning of the Act. The term "preference" includes not only a transfer of property[44] but also a

debtor cannot be required to satisfy or vacate. *In re* Ferguson, 95 Fed. 429, 2 Am. Bankr. Rep. 586.

37. *In re* Kersten, 110 Fed. 929, 6 Am. Bankr. Rep. 516; *In re* Miller, 105 Fed. 57, 5 Am. Bankr. Rep. 184; *In re* Thomas, 103 Fed. 272, 4 Am. Bankr. Rep. 571; *In re* Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re* Moyer, 93 Fed. 188, 1 Am. Bankr. 577; *In re* Reichman, 91 Fed. 624, 1 Am. Bankr. Rep. 17; *In re* Gallagher, 6 Am. Bankr. Rep. 255. *Contra*, Duncan *v.* Landis, 106 Fed. 839, 849, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649, where the judge said: "Suffering or permitting a creditor to obtain a preference within the meaning of clause 3 of section 3 may consist of connivance between the debtor and creditor, but in any event there must be some act of the will on the part of the debtor, whether by way of procurance or voluntary acquiescence." See also *In re* Nelson, 98 Fed. 76, 1 Am. Bankr. Rep. 63 [*following* New York City Tenth Nat. Bank *v.* Warren, 96 U. S. 539, 24 L. ed. 640; Wilson *v.* St. Paul City Bank, 17 Wall. (U. S.) 473, 21 L. ed. 723], holding that in order to constitute such a preference an act of bankruptcy there must be some act on the part of the debtor, either by way of active procurance or voluntary acquiescence arising from connivance, coöperation, or participation. This case was certified to the United States supreme court, in which the questions of law considered by that court were whether the bankrupt, by his failure to file his voluntary petition in bankruptcy before the sale under a levy, and to procure thereon an adjudication of bankruptcy, or by his failure to pay and discharge the judgment before the sale under such levy was an act of bankruptcy; and also whether the judgment entered and the levy on the execution thereon was a preference "suffered or permitted" by the bankrupt within the meaning of section 3*a* of the Act. The supreme court answered these questions in the affirmative, and held that the cases of Wilson *v.* St. Paul City Bank, and New York City Tenth Nat. Bank *v.* Warren, *supra*, relied upon in the district court, have no application under the present Act. Wilson *v.* Nelson, 7 Am. Bankr. Rep. 142.

38. Davis *v.* Stevens, 104 Fed. 235, 4 Am. Bankr. Rep. 763; Vaccaro *v.* Memphis Security Bank, 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bankr. Rep. 474. Where a bill in equity had been filed against a corporation asking for the appointment of a receiver, the fact that the corporation makes no opposition to the appointment of such receiver is not an act of bankruptcy. *In re* Empire Metallic Bedstead Co., 98 Fed. 981, 39 C. C. A. 372, 3 Am. Bankr. Rep. 575; *In re* Baker-Ricketson Co., 97 Fed. 489, 4 Am. Bankr. Rep. 605.

39. **A transfer of the debtor's property** to his creditor is essential. *In re* Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123.

40. **Debtor must have been insolvent** at the time of making the transfer. *In re* Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123. See also *infra*, V, B, 7.

41. **Intent to prefer** the creditor to whom the transfer is made is an essential element. *In re* Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123. See also *infra*, V, B, 6, c.

42. **What constitutes a preference** is stated in Bankr. Act (1898), § 60*a*. See also *infra*, V, B, 6, b.

As to setting aside preferential transfers and to the rights of transferees thereunder see, generally, *infra*, XVI, C.

43. Bankr. Act (1898), § 3*a* (2). See also Rumsey, etc., Co. *v.* Novelty, etc., Mfg. Co., 99 Fed. 699, 3 Am. Bankr. Rep. 704; Beers *v.* Hanlin, 99 Fed. 695, 3 Am. Bankr. Rep. 745; *In re* Pearson, 95 Fed. 425, 2 Am. Bankr. Rep. 482.

Under the Bankr. Act (1867), § 39, it was provided that a person should be adjudged a bankrupt upon the petition of his creditors "who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency shall make any payment, gift, grant, sale, conveyance, (or transfer of money, or other property, estate, rights, or credits, or give any warrant to confess judgment, or procure or suffer his property to be taken on legal process), with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise." See *In re* Dibblee, 3 Ben. (U. S.) 283, 7 Fed. Cas. No. 3,884, 1 Chic. Leg. N. 355, 2 Nat. Bankr. Reg. 617, construing that statute.

Under the common law a debtor, although insolvent, may pay one creditor in full to the exclusion of all others. Gassett *v.* Morse, 21 Vt. 627, 10 Fed. Cas. No. 5,264, 3 N. Y. Leg. Obs. 350. See also, generally, Assignments For Benefit of Creditors, 4 Cyc. 113.

44. **The term "property"** includes money. Landry *v.* Andrews, 22 R. I. 597, 48 Atl. 1036, 6 Am. Bankr. Rep. 281; *In re* Fixen,

payment of money.[45] Hence a payment of money on account within the four months' limitation and with intent to prefer must be deemed an act of bankruptcy.[46] To constitute a preferential transfer it is immaterial to whom the transfer is made if it be made for the purpose of paying the claims of one creditor in preference to those of others.[47] An unlawful preference can only arise where the transfer is made for an antecedent debt.[48] And a conveyance of personal property greater in value than the amount of the debt by an insolvent debtor to his creditor, the difference being paid in cash to the debtor, is an act of bankruptcy.[49]

c. Intent. The intent which it is necessary to establish in order to show an act of bankruptcy is that of the debtor.[50] As in the case of fraudulent transfers the intent to prefer must be proved, although an intent may be presumed from proven facts;[51] and where the necessary consequence of a transfer or payment made by an insolvent debtor is to liquidate the debt of one creditor to the entire or partial exclusion of the others an intent to prefer will be presumed.[52] A pref-

102 Fed. 295, 42 C. C. A. 354, 50 L. R. A. 605, 4 Am. Bankr. Rep. 10.

45. **Includes payment of money.**— *In re* Sloan, 102 Fed. 116, 4 Am. Bankr. Rep. 356; *In re* Ft. Wayne Electric Corp., 99 Fed. 400, 39 C. C. A. 582, 3 Am. Bankr. Rep. 634; *In re* Piper, 5 Am. Bankr. Rep. 144 note.

46. Pirie *v.* Chicago Title, etc., Co., 182 U. S. 438, 443, 21 S. Ct. 906, 45 L. ed. 1171, 5 Am. Bankr. Rep. 814, where the court said: "We are not unaware that a distinction between money and other property is sometimes made, but it would be anomalous in the extreme that in a statute which is concerned with the obligation of debtors and the prevention of preferences to creditors, the readiest and most potent instrumentality to give a preference should have been omitted. Money is certainly property, whether we regard any of its forms or any of its theories."

47. Goldman *v.* Smith, 93 Fed. 182, 1 Am. Bankr. Rep. 266.

48. **Must be for antecedent debt.**—Tiffany *v.* Boatman's Sav. Inst., 18 Wall. (U. S.) 375, 21 L. ed. 868; *In re* Flick, 105 Fed. 503, 5 Am. Bankr. Rep. 465.

Security for advances not preferential.— Where a person, knowing a debtor to be financially embarrassed, loans him money with which to pay his debts, and at the same time as security therefor takes a mortgage on the debtor's property, such mortgage is not a preferential transfer. *In re* Davidson, 109 Fed. 882, 5 Am. Bankr. Rep. 528; *In re* Wolf, 98 Fed. 84, 3 Am. Bankr. Rep. 555.

Where, in pursuance of a contract, valid and equitable, the creditor exercised his rights in possessing himself of the bankrupt's property and making a sale thereof under such contract he is not thereby given a preference. Sabin *v.* Camp, 98 Fed. 974, 3 Am. Bankr. Rep. 578.

49. **Exchange of property.**— Johnson *v.* Wald, 93 Fed. 640, 35 C. C. A. 522, 2 Am. Bankr. Rep. 84. This decision seems to be based upon the definition of the word "transfer" contained in Bankr. Act (1898), § 1 (25), *supra*, note 8, p. 238.

50. **It is not important that the intent of the creditor** to whom the preference was given should be shown; whether or not he had reasonable cause to believe that a preference was intended is immaterial. *In re* Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123.

51. See, generally, *supra*, V, B, 3, d.

52. Silverman's Case, 2 Abb. (U. S.) 243, 1 Sawy. (U. S.) 410, 22 Fed. Cas. No. 12,855, 13 Int. Rev. Rec. 52, 4 Nat. Bankr. Reg. 522; Driggs *v.* Moore, 1 Abb. (U. S.) 440, 7 Fed. Cas. No. 4,083, 3 Nat. Bankr. Reg. 602; *In re* Batchelder, 1 Lowell (U. S.) 373, 2 Fed. Cas. No. 1,098, 3 Nat. Bankr. Reg. 150; *In re* Oregon Bulletin Printing, etc., Co., 18 Fed. Cas. No. 10,559, 1 Cinc. L. Bul. 87, 13 Nat. Bankr. Reg. 503; Farrin *v.* Crawford, 8 Fed. Cas. No. 4,686, 1 Chic. Leg. N. 342, 2 Nat. Bankr. Reg. 602; Collier Bankr. (3d ed.) 30. See also *In re* McGee, 105 Fed. 895, 5 Am. Bankr. Rep. 262; Johnson *v.* Wald, 93 Fed. 640, 35 C. C. A. 522, 2 Am. Bankr. Rep. 84. The debtor's intent to give a preference may be presumed from a transfer while insolvent of a large portion of his property to a single creditor. *In re* Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123.

Proof of intent.— Since a preference may be inferred from the conduct of a debtor and from circumstances connected with the transaction, all facts may be proven which tend to justify the inference. Beattie *v.* Gardner, 4 Ben. (U. S.) 479, 3 Fed. Cas. No. 1,195, 4 Nat. Bankr. Reg. 323; Linkman *v.* Wilcox, 1 Dill. (U. S.) 161, 15 Fed. Cas. No. 8,374; Giddings *v.* Dodd, 1 Dill. (U. S.) 116, 10 Fed. Cas. No. 5,405, 4 Nat. Bankr. Reg. 657. The testimony of the debtor himself to the effect that no preference was intended is of little weight as against the inferences arising from the nature of the transaction. Chicago Traders' Nat. Bank *v.* Campbell, 14 Wall. (U. S.) 87, 20 L. ed. 832, 6 Nat. Bankr. Reg. 353; Oxford Iron Co. *v.* Slafter, 13 Blatchf. (U. S.) 455, 18 Fed. Cas. No. 10,637, 14 Nat. Bankr. Reg. 380. The fact that the debtor had no knowledge of the provisions of the Bankruptcy Act in respect to preferential transfers has no bearing upon the question of intent. *In re* Craft, 2 Ben. (U. S.) 214, 6 Fed. Cas. No. 3,316, 1 Nat. Bankr. Reg. 378.

erential transfer is none the less an act of bankruptcy because the motive of the debtor was honest if the intent to prefer existed.[53] And the fact that a preference is secured through means of coercion or threats of the preferred creditor does not affect its character as an act of bankruptcy.[54]

7. When Insolvency Material. Preferential transfers and suffering or permitting creditors to obtain preferences through legal proceedings are not acts of bankruptcy unless the person is insolvent.[55] So if the alleged act of bankruptcy is the fraudulent conveyance, transfer, concealment, or removal of property, it is a complete defense to bankruptcy proceedings brought therefor to allege and prove that the party proceeded against was not insolvent at the time of the filing of the petition against him.[56] But the question of insolvency is immaterial where the act of bankruptcy consists of a general assignment for the benefit of creditors or an admission of inability to pay debts and willingness to be adjudged a bankrupt.[57]

53. Honest motive immaterial.— Silverman's Case, 2 Abb. (U. S.) 243, 1 Sawy. (U. S.) 410, 22 Fed. Cas. No. 12,855, 13 Int. Rev. Rec. 52, 4 Nat. Bankr. Reg. 522; Warren *v.* Tenth Nat. Bank, 10 Blatchf. (U. S.) 493, 29 Fed. Cas. No. 17,202, 7 Nat. Bankr. Reg. 481; *In re* Bininger, 7 Blatchf. (U. S.) 262, 3 Fed. Cas. No. 1,420, 4 Nat. Bankr. Reg. 262; Webb *v.* Sachs, 4 Sawy. (U. S.) 158, 29 Fed. Cas. No. 17,325, 9 Chic. Leg. N. 156, 15 Nat. Bankr. Reg. 168.

54. Secured by coercion or threats.— Sawyer *v.* Turpin, 91 U. S. 114, 23 L. ed. 235, 14 Nat. Bankr. Reg. 271; Clarion First Nat. Bank *v.* Jones, 21 Wall. (U. S.) 325, 22 L. ed. 542, 11 Nat. Bankr. Reg. 381; Atkinson *v.* Farmers' Bank, Crabbe (U. S.) 529, 2 Fed. Cas. No. 609; Arnold *v.* Maynard, 2 Story (U. S.) 349, 1 Fed. Cas. No. 561, 5 Law Rep. 296.

Transfer to avoid criminal prosecution under advice that the debtor would be liable for such prosecution if he did not make the transfer is none the less an act of bankruptcy if preferential in its nature. Strain *v.* Gourdin, 2 Woods (U. S.) 380, 23 Fed. Cas. No. 13,521, 11 Nat. Bankr. Reg. 156.

55. Bankr. Act (1898), § 3*c; In re* Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123.

Presumption and burden of proof.— When it is proved that a debtor while insolvent has transferred a large portion of his property to a single creditor, intent to prefer being presumed, the burden is upon the debtor to show that he was ignorant of his insolvency and had reason to believe that he could pay his debts in full. *In re* Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123. In Toof *v.* Martin, 13 Wall. (U. S.) 40, 20 L. ed. 481, it was held that such preferential transfer must be taken as conclusive of intentional preference, unless the debtor can show his ignorance of the insolvency, and that the burden of proof is thrown upon the defendant. But if the debtor denies the allegation of insolvency and appears in court on the hearing with his books, papers, and accounts and submits to an examination and gives testimony as to all matters tending to establish solvency or insolvency, it would seem that the burden of proving insolvency is transferred from the alleged bankrupt to the petitioning creditor. Bankr. Act (1898), § 3*d; In re* Bloch, 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300; *In re* West, 108 Fed. 940, 48 C. C. A. 155, 5 Am. Bankr. Rep. 734.

Value of the property at the time of the alleged fraudulent transfer may be shown by evidence of what it sold for at private sale by the receiver of the alleged bankrupt appointed in the state court, and the exclusion of such evidence is reversible error. *In re* Bloch, 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300.

56. Bankr. Act (1898), § 3*c.*

As to insolvency as a defense to involuntary proceedings in bankruptcy see *infra*, VI, B, 5, c, (III), (B).

When insolvency must be alleged.—"The acts of bankruptcy embraced in subdivisions numbered 2 and 3 [of section 3*a*] clearly contemplate, not only the commission of the acts provided against, but also cause the insolvency of the debtor to be an essential concomitant. On the contrary as to the acts embraced in the enumerations 1, 4, and 5 [of section 3*a*] there is no express requirement that the acts should have been committed while insolvent. Considering alone the text of paragraph *a* [of section 3] it results that the non-existence of insolvency at the time of the filing of a petition for adjudication in involuntary bankruptcy, because of the acts enumerated in 1, 4, and 5 (which embrace the making of a deed of general assignment) does not constitute a defense to the petition, unless provision to that effect be found elsewhere in the statute." Paragraph *c* of section 3 does not refer to all the provisions of paragraph *a*. The context of paragraph *c* makes it plain that that paragraph only refers to the first subdivision of paragraph *a*. George M. West Co. *v.* Lea, 174 U. S. 590, 19 S. Ct. 836, 43 L. ed. 1098, 2 Am. Bankr. Rep. 463, 465 [*affirming* Lea *v.* West, 91 Fed. 237, 1 Am. Bankr. Rep. 261].

57. George M. West *v.* Lea, 174 U. S. 590, 19 S. Ct. 836, 43 L. ed. 1098, 2 Am. Bankr. Rep. 463 [*affirming* Lea *v.* West, 91 Fed. 237, 1 Am. Bankr. Rep. 261]; Bankr. Act (1898), § 3*a* (4). See also Bryan *v.*

VI. ADJUDICATION AND PROCEEDINGS PRIOR THERETO.

A. Voluntary Bankruptcy Proceedings — 1. Petition and Schedules — a. Petition — (I) *Who May File.* Any qualified person[58] may file a petition to be adjudged a voluntary bankrupt.[59] A person cannot be enjoined by a state court from applying to a court of bankruptcy to be adjudged a bankrupt.[60] Under the present Act the pendency of an involuntary petition before adjudication will not necessarily invalidate a subsequent voluntary petition filed in the same or another district.[61]

(II) *Where Filed.* Voluntary petitions should be filed in the court of bankruptcy for the district in which the bankrupt has had his principal place of business, resided, or had his domicile for the preceding six months or the greater portion thereof.[62] A delivery of a petition to the clerk of the court and its acceptance by him amounts to a filing, although at the time he was not at his office.[63]

Bernheimer, 181 U. S. 188, 21 S. Ct. 557, 45 L. ed. 814, 5 Am. Bankr. Rep. 623; Green River Deposit Bank *v.* Craig, 110 Fed. 137, 6 Am. Bankr. Rep. 381; Bray *v.* Cobb, 91 Fed. 102, 1 Am. Bankr. Rep. 153.

58. A "qualified person" is one, who under the Bankr. Act (1898), § 4, may become a bankrupt. See *supra*, IV, A.

59. Bankr. Act (1898), § 59*a*. Where the law of the state [Iowa Code (1897), § 3190] provides that a minor may not disaffirm his contracts on reaching full age when, "from his having engaged in business as an adult, the other party had good reason to believe him capable of contracting," if a minor engages in business as a merchant, and parties consequently assume that he is of full age, and deal with him in that belief, no inquiry or representation being made as to his minority, he becomes absolutely liable for the debts contracted in such business, and may be adjudged bankrupt on his own petition, though still an infant. *In re* Brice, 93 Fed. 942, 947, 2 Am. Bankr. Rep. 197. Where the allegation of a voluntary petition in bankruptcy as to the residence of the proposed bankrupt within the district is contested, and it is shown that, until a few years before, he resided and did business in another state, that he is still in the employ of a business firm in that state, and that he spends part of his time in the one state and part in the other, the burden is on the petitioner to prove his alleged change of residence by satisfactory evidence. *In re* Waxelbaum, 97 Fed. 562, 3 Am. Bankr. Rep. 267.

For analogous decisions under former acts see 6 Cent. Dig. tit. "Bankruptcy," § 38 *et seq.*

A corporation cannot become a voluntary bankrupt, and where a corporation through its board of directors makes a written admission of inability to pay its debts and its willingness to be adjudged a bankrupt, and procures some of its creditors to file an involuntary petition against it, it must be adjudged a bankrupt in involuntary proceedings. *In re* T. L. Kelly Dry-Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528; *In re* Maine Mach., etc., Co., 91 Fed. 630, 1 Am. Bankr. Rep. 421. And where a petition has been filed against a corporation asking that it be adjudged a bankrupt, and there has been filed in the name of the corporation a written admission of the act of bankruptcy charged in the petition, and a stipulation waiving the service of subpœna and time for appearance and entering such appearance, the proceeding is still an involuntary one. *In re* L. Humbert Co., 100 Fed. 439, 4 Am. Bankr. Rep. 76. See also *supra*, IV, A, 3; IV, B, 2.

60. Fillingin *v.* Thornton, 49 Ga. 384, 12 Nat. Bankr. Reg. 92.

61. The first petition may be invalid for lack of jurisdiction when the facts appear; and other considerations also may sometimes justify, or even make desirable, a subsequent voluntary petition. The question of jurisdiction will arise on each petition, and neither is necessarily exclusive of the other. *In re* Waxelbaum, 97 Fed. 562, 3 Am. Bankr. Rep. 267.

Under former bankruptcy acts there was some conflict of authority as to whether a person could file a voluntary petition after an involuntary petition had been filed against him. In *In re* Stewart, 25 Fed. Cas. No. 13,419, 3 Nat. Bankr. Reg. 108, it was held that he could not. But in other cases it was held that the pendency of involuntary proceedings did not bar the right of a debtor to file a voluntary petition, if no decree of bankruptcy had been granted. *In re* Davidson, 4 Ben. (U. S.) 10, 7 Fed. Cas. No. 3,599, 3 Nat. Bankr. Reg. 418; *In re* Flanagan, 5 Sawy. (U. S.) 312, 9 Fed. Cas. No. 4,850, 18 Nat. Bankr. Reg. 439; *In re* Canfield, 5 Fed. Cas. No. 2,380, 5 Law Rep. 415, 1 N. Y. Leg. Obs. 234.

62. Bankr. Act (1898), § 2 (1).

Residence and place of business in different districts.— If a debtor has his principal place of business in one district and resides in another he may file his petition in either district. The petition should be filed with the clerk of the court and not sent directly to the judge. *In re* Sykes, 106 Fed. 669, 6 Am. Bankr. Rep. 264.

63. *In re* Wolf, 98 Fed. 84, 3 Am. Bankr. Rep. 555.

Fees to be deposited.— Upon the filing of

(III) *Form and Contents.* The form of the debtor's petition in voluntary bankruptcy is prescribed,[64] and is to be observed and used with such alterations as may be necessary to suit the circumstances of any particular case.[65] A petition must allege that the residence, domicile, or place of business of the petitioner was within the territorial jurisdiction of the court for a period of at least six months preceding the filing of the petition, and that such petitioner has not absented himself from such jurisdiction during such period, except for a period of less than three months.[66]

(IV) *Verification.* All voluntary petitions should be verified.[67] The verification of the petition is, however, a formal matter and does not affect the jurisdiction and a defect therein may be waived.[68]

the petition with the clerk a voluntary bankrupt must deposit as a filing fee the sum of ten dollars, and also the sum of ten dollars as compensation for the referee, together with the sum of five dollars as compensation for the trustee, unless the petition is accompanied by an affidavit stating that the petitioner is without and cannot obtain the money with which to pay such fees. For filing fee of clerk see Bankr. Act (1898), § 52*a*; and *supra*, III, A, 3. For compensation of referee see Bankr. Act (1898), § 40*a*; and *supra*, III, D, 6. For compensation of trustee see Bankr. Act (1898), § 48*a*; and *infra*, XII, G. A deposit of the statutory filing fee by a proposed voluntary bankrupt, not within the exception in favor of paupers, is a condition precedent to the filing of the petition; but if the petition is placed on file, and an adjudication made without payment of such fee, the objection may be raised on the bankrupt's application for discharge, and action on such application will be stayed until the filing fee is paid. *In re* Barden, 101 Fed. 553, 4 Am. Bankr. Rep. 31. A person employed by a railroad company at a salary of thirty dollars per month, such salary being exempt from execution by the law of the state, is not entitled to take the benefit of the bankruptcy law without depositing the fees required by the Act, on an affidavit that he cannot obtain the money with which to pay such fees; and his petition will be dismissed unless the fees are deposited within a reasonable time. *In re* Collier, 93 Fed. 191, 1 Am. Bankr. Rep. 182.

Such fees are in full compensation for all services rendered by such officers except as therein specified. U. S. Supreme Ct. Bankr. G. O. No. 35.

The clerk is required to indorse upon each petition filed with him the day and hour of the filing. U. S. Supreme Ct. Bankr. G. O. No. 2.

64. U. S. Supreme Ct. Bankr. Forms, No. 1; 89 Fed. xv.

65. U. S. Supreme Ct. Bankr. G. O. No. 38.

Petition must be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation or interlineation may be for the purpose of reference. U. S. Supreme Ct. Bankr. G. O. No. 5. Under the rules in force in the eastern district of North Carolina petitions in bankruptcy are not filed or considered unless they are on the prescribed printed forms. Written or typewritten petitions or schedules are returned to parties without action. Mahoney *v.* Ward, 100 Fed. 278, 3 Am. Bankr. Rep. 770.

66. *In re* Plotke, 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171; *In re* Stokes, 1 Am. Bankr. Rep. 35. But see *In re* Ray, 2 Am. Bankr. Rep. 158, where referee Worden states that a petition in bankruptcy may be filed in the district in which the bankrupt has resided for the longest period during the six months prior to the filing of his petition.

67. Bankr. Act (1898), § 18*c*.

Oaths may be administered by the referee, by officers authorized to administer oaths in proceedings before courts of the United States, or under the laws of the state where the same are to be taken, and by diplomats or consular officers of the United States in any foreign country. Any person conscientiously opposed to taking an oath may in lieu thereof affirm. See Bankr. Act (1898), § 20.

Sufficiency.— A petition, the verification of which is made before a notary public, which does not show in the statement of the venue that the verification was taken within the jurisdiction of the notary is defective and should be amended. If the notary public is one of the attorneys for the party making the verification such verification is defective. *In re* Brumelkamp, 95 Fed. 814, 2 Am. Bankr. Rep. 318. But it has been held that an attorney for a creditor may take the oath of his client to the proof of the claim of such client. *In re* Kimball, 100 Fed. 777, 4 Am. Bankr. Rep. 144. Where the verification of the petition was taken before a notary who afterward became an attorney for the bankrupt, it was held that the verification was not defective. *In re* Kindt, 98 Fed. 403, 101 Fed. 107, 3 Am. Bankr. Rep. 443.

68. Leidigh Carriage Co. *v.* Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383. See also *In re* McNaughton, 16 Fed. Cas. No. 8,912, 8 Nat. Bankr. Reg. 44; *Ex p.* Jewett, 2 Lowell (U. S.) 393, 13 Fed. Cas. No. 7,303, 11 Nat. Bankr. Reg. 443, 12 Nat. Bankr. Reg. 170; *In re* Simmons, 22 Fed. Cas. No. 12,864, 1 Centr. L. J. 440, 10 Nat. Bankr. Reg. 253; *In re* Sargent, 21 Fed. Cas. No. 12,361, 13 Nat. Bankr. Reg. 144, 1 N. Y. Wkly. Dig. 435.

(v) *Withdrawal.* Where there is no estate, no claim proved, and no trustee appointed, a bankrupt may withdraw his voluntary petition,[69] provided the costs and expenses be paid.[70] But a voluntary petition cannot be dismissed upon the application of the petitioner, or for want of prosecution or by consent of parties, until after notice to creditors.[71]

b. Schedules. A petition in voluntary bankruptcy must be accompanied by a schedule of the proposed bankrupt's property, showing its amount and kind, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known;[72] if unknown, that fact should be stated;[73] the amounts due to each of them, the consideration thereof, the security held by them, if any;[74] and a claim for such exemptions as he may be entitled to,[75] all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee.[76] The form of the schedules is prescribed.[77]

69. *In re* Hebbart, 104 Fed. 322, 5 Am. Bankr. Rep. 8.

Where a petition was withdrawn and subsequently amended and refiled, the date of the last filing controls as a basis for adjudication. *In re* Washburn, 99 Fed. 84, 3 Am. Bankr. Rep. 585.

70. *In re* Salaberry, 107 Fed. 95, 5 Am. Bankr. Rep. 847.

71. Bankr. Act (1898), § 59*g*. See also Neustadter *v.* Chicago Dry-Goods Co., 96 Fed. 830, 3 Am. Bankr. Rep. 96.

72. **Schedules are defective if they do not contain the addresses** of the creditors, stating street and number in case the creditors reside in large cities, or unless the schedules show that after diligent effort no better addresses can be obtained. Unless such facts are shown the proper practice is for the referee to order an amendment and to refuse to fix a date for the first meeting of creditors. *In re* Brumelkamp, 95 Fed. 814, 2 Am. Bankr. Rep. 318; *In re* Mackey, 1 Am. Bankr. Rep. 593.

73. **If the list of creditors states that their addresses are unknown,** the referee should require such addresses to be furnished, or sufficient proof to be made that they cannot be ascertained after due search. *In re* Dvorak, 107 Fed. 76, 6 Am. Bankr. Rep. 66.

74. **What debts to be scheduled.**— Where a judgment appears as being in the name of a certain creditor, it is proper to schedule such judgment in the name of such creditor even if such judgment has been assigned and the debtor has knowledge of such assignment; and where a debtor has no assets and is compelled to borrow money in order to pay the costs and fees of proceedings in bankruptcy, he is not required to schedule the amount so borrowed. Sellers *v.* Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529. It has been held that debts which are barred by the statute of limitations should be inserted in the schedule. *In re* Kingsley, 1 Lowell (U. S.) 216, 14 Fed. Cas. No. 7,819, 7 Am. L. Reg. N. S. 423, 1 Nat. Bankr. Reg. 52, 329.

75. **Exempt property.**— Where, by the laws of the state where the debtor resides, he is entitled to an exemption to the amount of one thousand dollars and all necessary wearing apparel, it is not necessary for the bankrupt to specifically mention in his schedule of assets property which is thus exempt. Sellers *v.* Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

Pension money, although exempt, should be inserted in the debtor's schedule as money on hand, with a statement of the exemption. If it has been omitted from the schedule with fraud the referee may allow an amendment inserting it. *In re* Bean, 100 Fed. 262, 4 Am. Bankr. Rep. 53.

The duty of setting apart the bankrupt's exemptions rests upon the trustee. *In re* Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730. While a voluntary bankrupt must file with his petition a claim for his exemptions, the severance in fact of exempted property from the general estate is to be made by the trustee, not by the debtor, and the value of the property so severed is to be determined in the first instance by the trustee. *In re* Friedrich, 100 Fed. 284, 40 C. C. A. 378, 3 Am. Bankr. Rep. 801. See also *infra*, XV, C.

76. Bankr. Act (1898), § 7 (8).

A petition in voluntary bankruptcy which schedules no property except such as is exempt under the laws of the state, and but a single debt, which is a judgment from which the petitioner would not be released by a discharge, fails to disclose any subject-matter upon which the court can act, and an adjudication of bankruptcy made thereon will be set aside on motion, and the proceedings dismissed for want of jurisdiction. *In re* Maples, 105 Fed. 919, 5 Am. Bankr. Rep. 426. Under a devise to S during life, with remainder to her husband, provided that upon the death of either of such devisees the shares so devised to him shall be equally divided between his children if living, the husband has an interest in the property devised, during the life of S and while having children living, that should be included in his schedule of assets in proceedings in bankruptcy. *In re* Shenberger, 102 Fed. 978, 4 Am. Bankr. Rep. 487.

77. U. S. Supreme Ct. Bankr. Forms, No. 1, Schedules A, B; 89 Fed. xvi *et seq.*

Form of partnership petition is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 2; 89 Fed. xxvii.

Forms of statements of: Accommodation paper (U. S. Supreme Ct. Bankr. Forms, No. 1, Schedule A (5); 89 Fed. xx); all creditors

c. Amendments. The court may allow amendments to a petition and schedules on application of the petitioner.[78] It is peculiarly within the province of the referee to order the amendment of a defective petition and schedule, and the district court will not interfere in such matters.[79] Amendments may be made before the bankrupt's discharge, even after objections to his discharge have been filed by creditors.[80]

d. Answers by Creditors. The Act contains no provision authorizing creditors to file answers to voluntary petitions in bankruptcy.[81]

2. The Adjudication. Upon the filing of a voluntary petition the judge[82] shall hear the petition and make the adjudication or dismiss the petition.[83] The

who are to be paid in full or to whom priority is secured by law (U. S. Supreme Ct. Bankr. Forms, No. 1, Schedule A (1); 89 Fed. xvi); choses in action of bankrupt (U. S. Supreme Ct. Bankr. Forms, No. 1, Schedule B (3); 89 Fed. xxiii); creditors holding securities (U. S. Supreme Ct. Bankr. Forms, No. 1 Schedule A (2); 89 Fed. xvii); creditors whose claims are unsecured (U. S. Supreme Ct. Bankr. Forms, No. 1, Schedule A (3); 89 Fed. xviii); liabilities on notes or bills discounted which ought to be paid by the drawers, makers, accepters, or indorsers (U. S. Supreme Ct. Bankr. Forms, No. 1, Schedule A (4); 89 Fed. xix); personal property of bankrupt (U. S. Supreme Ct. Bankr. Forms, No. 1, Schedule B (2); 89 Fed. xxii); property claimed as exempt (U. S. Supreme Ct. Bankr. Forms, No. 1, Schedule B (5); 89 Fed. xxv); property in reversion, remainder, or expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge (U. S. Supreme Ct. Bankr. Forms, No. 1, Schedule B (4); 89 Fed. xxiv); real estate of bankrupt (U. S. Supreme Ct. Bankr. Forms, No. 1, Schedule B (1); 89 Fed. xxi); books, papers, deeds, and writings relating to bankrupt's estate and business (U. S. Supreme Ct. Bankr. Forms, No. 1, Schedule B (6); 89 Fed. xxvi) are prescribed.

They must be printed or written out plainly without abbreviation or interlineation, except for the purpose of reference. U. S. Supreme Ct. Bankr. G. O. No. 5.

Abbreviations.— In stating the addresses of creditors, petitioners may use the ordinary and common abbreviations of the names of the states, but abbreviations of the names of cities and villages, not being in common use, will be deemed as forming a defective address and must be amended. *In re* Mackey, 1 Am. Bankr. Rep. 593. Under the former Act in construing a rule similar to the one now in force it was held that dots or ditto marks could not consistently be used for the purpose of indicating anything necessary to be stated. *In re* Orne, 1 Ben. (U. S.) 420, 18 Fed. Cas. No. 10,582, 1 Nat. Bankr. Reg. 79.

78. **The amendments are to be printed or written, signed, and verified,** in the same manner as the original petition and schedules. If amendments are made to separate schedules the same must be made separately with proper reference. In the application for leave to amend the petition must state the cause of the error in the paper originally filed. U. S. Supreme Ct. Bankr. G. O. No. 11.

79. *In re* Brumelkamp, 95 Fed. 814, 2 Am. Bankr. Rep. 318.

By Bankr. Act (1898), § 39a (2), it is made the duty of all referees to examine all schedules of property and lists of creditors filed by the bankrupt, and cause such as are incomplete and defective to be amended. See also *supra*, III, D, 4, g.

When amendments permitted.— While the courts are liberal in permitting amendments in cases of mistake or accident, such forbearance should not be extended in favor of the bankrupt whose business career is tainted and whose conduct toward his creditors has not been on the lines of fair and honest dealing. *In re* Gross, 5 Am. Bankr. Rep. 271. The provision of the Virginia constitution giving to a householder or the head of a family an exemption in the nature of a homestead right is intended for the benefit of the debtor's family, and the court will not exercise its power to allow an amendment to the schedules in order to include such homestead exemption, where it clearly appears that the intent of the bankrupt is to benefit creditors who hold under the code of Virginia waivers of such exemption. *In re* Moran, 105 Fed. 901, 5 Am. Bankr. Rep. 472.

80. *In re* Preston, 19 Fed. Cas. No. 11,392, 3 Nat. Bankr. Reg. 103; *In re* Heller, 11 Fed. Cas. No. 6,339, 41 How. Pr. (N. Y.) 213, 5 Nat. Bankr. Reg. 46; *In re* Connell, 6 Fed. Cas. No. 3,110, 3 Nat. Bankr. Reg. 443.

81. *In re* Taylor, 102 Fed. 728, 42 C. C. A. 1, 4 Am. Bankr. Rep. 515; *In re* Jehu, 94 Fed. 638, 2 Am. Bankr. Rep. 498.

82. **If the judge is absent** from the district, or the division of the district in which the petition is filed, at the time of the filing, the clerk shall forthwith refer the case to the referee. Bankr. Act (1898), § 18*g*. Form of order of reference in judge's absence is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 15; 89 Fed. xxxv.

83. Bankr. Act (1898), § 18*g*. An adjudication of bankruptcy duly entered upon the voluntary petition of a debtor personally within the jurisdiction of the court, the petition and schedules being signed and verified by the bankrupt himself in proper form, will not be set aside, on motion of a creditor, because the attorney who appeared on the petition as the bankrupt's attorney, and who represented him before the referee, had not been admitted to practice in the federal courts of

order[84] adjudicating a person a voluntary bankrupt is made *ex parte* without notice to creditors.[85]

B. Involuntary Bankruptcy Proceedings[86]— **1. Petition — a. Time and Place of Filing.** A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act.[87] Such time does not expire until four months after the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors, or for the purpose of giving a preference as hereinbefore discussed,[88] or a general assignment for the benefit of creditors, if by law such recording or registering is required or permitted, or if it is not, from

the district; such an objection not affecting the jurisdiction of the court. *In re* Kindt, 98 Fed. 867, 3 Am. Bankr. Rep. 546.

The alternative of adjudication or dismissal given by the Act implies that the court should make such inquiry into the facts as may be necessary to determine whether to adjudicate or to dismiss. *In re* Waxelbaum, 98 Fed. 589, 591, 3 Am. Bankr. Rep. 392, where the court says: "No express provision is made in the act or in the rules as to when or how an inquiry into the truth of the jurisdictional facts alleged in a voluntary petition is to be made; but considering the complication which would often arise, it seems evident that the jurisdiction when challenged, should be inquired into as early as possible, so that the proceedings, if invalid, may be arrested *in limine*."

After the adjudication, the proceedings are the same as in cases of involuntary bankruptcy, which will be hereafter discussed. See *infra*, VI, B.

84. **Form of the order of adjudication is** prescribed. U. S. Supreme Ct. Bankr. Forms, No. 12; 89 Fed. xxiii.

85. **If creditors object to the jurisdiction** of the court they must seasonably move to vacate the adjudication. Allen *v.* Thompson, 10 Fed. 116; *In re* Thomas, 23 Fed. Cas. No. 13,891, 7 Chic. Leg. N. 187, 11 Nat. Bankr. Reg. 330; *In re* Polakoff, 1 Am. Bankr. Rep. 358. Unless the person petitioning to set aside the adjudication in bankruptcy is a creditor owning a provable claim against the bankrupt he is a stranger to the proceedings, and cannot sustain a petition to set it aside. *In re* Columbia Real-Estate Co., 101 Fed. 965, 4 Am. Bankr. Rep. 411.

86. **Nature of proceeding.**— The default of defendant to a petition in involuntary bankruptcy, through failure to appear, does not convert the proceeding into one of voluntary bankruptcy. *In re* Taylor, 102 Fed. 728, 42 C. C. A. 1, 4 Am. Bankr. Rep. 515.

87. Bankr. Act (1898), § 3*b*. See also Salem Citizens' Bank *v.* W. C. De Pauw Co., 105 Fed. 926, 45 C. C. A. 130, 5 Am. Bankr. Rep. 345; *In re* Stein, 105 Fed. 749, 45 C. C. A. 29, 5 Am. Bankr. Rep. 288; *In re* Mingo Valley Creamery Assoc., 100 Fed. 282, 4 Am. Bankr. Rep. 67; *In re* Romanow, 92 Fed. 510, 1 Am. Bankr. Rep. 461.

For analogous decisions under former acts see 6 Cent. Dig. tit. "Bankruptcy," § 50 *et seq.*

Computation of time.— Whenever time is enumerated by days, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday. Bankr. Act (1898), § 31*a*.

Fractions of days are not to be counted. If an act of bankruptcy is committed upon a certain day the filing of a petition in involuntary bankruptcy during the last day of the four months after the date of the commission of such act of bankruptcy is sufficient. Jones *v.* Stevens, 94 Me. 582, 48 Atl. 170, 5 Am. Bankr. Rep. 571; *In re* Tonawanda St. Planing Mill Co., 6 Am. Bankr. Rep. 38.

The four months after the commission of an act of bankruptcy within which an involuntary petition must be filed are to be so computed as to exclude the day on which such act of bankruptcy was committed. *In re* Stevenson, 94 Fed. 110, 2 Am. Bankr. Rep. 66; *In re* Dupree, 97 Fed. 28. In Leidigh Carriage Co. *v.* Stengel, 95 Fed. 637, 640, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383, in construing Bankr. Act (1898), § [71*a*], to the effect that "no petition for involuntary bankruptcy shall be filed within four months of the passage thereof," it was held that a petition filed on Nov. 1, 1898, the Act taking effect July 1 of that year, was not premature. The court in reaching its conclusion concluded the four months as beginning on July 1 and ending October 31. *Compare* Dutcher *v.* Wright, 94 U. S. 553, 24 L. ed. 130, construing Bankr. Act (1867), § 48.

88. Bankr. Act (1898), § 3*b*.

Where the act of bankruptcy consists of suffering or permitting a creditor to obtain a preference through proceedings by attachment, time begins to run from the date of the sale under the attachment, or from the five days anterior thereto, and not from the date of the attachment. Parmenter Mfg. Co. *v.* Stoever, 97 Fed. 330, 38 C. C. A. 200, 3 Am. Bankr. Rep. 220. In such cases the act of bankruptcy is consummated by the failure of the debtor to vacate or discharge the lien secured by virtue of the legal proceedings five days before the day upon which the property is to be disposed of. *In re* Rome Planing-Mill Co., 99 Fed. 937, 3 Am. Bankr. Rep. 766. See also *In re* Fellerath, 95 Fed. 121, 2 Am. Bankr. Rep. 40.

the date when the beneficiary takes notorious, exclusive, or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment.[89] A proceeding in bankruptcy is deemed commenced at the date of the filing of the original petition.[90] The petition must be filed in the office of the clerk of the court and not with the referee or judge.[91]

b. Against Whom Filed. A petition in involuntary bankruptcy may be filed against any person who may be adjudged a bankrupt, who is insolvent[92] and who has committed an act of bankruptcy;[93] but no person can be adjudged an involuntary bankrupt unless he owes debts to the amount of one thousand dollars or over.[94]

c. Who May File — (1) *Statutory Provision.* Three or more creditors who have provable claims[95] against any person which amount in the aggregate in excess of the value of the securities held by them, if any, to five hundred dollars or over;[96] or if all of the creditors of such person are less than twelve in number,

89. Bankr. Act (1898), § 3*b*.

The notorious, exclusive, or continuous possession here mentioned depends upon the character of the property transferred and the usual and customary mode of dealing therewith. *In re* Woodward, 2 Am. Bankr. Rep. 233.

90. *In re* Appel, 103 Fed. 931, 4 Am. Bankr. Rep. 722; *In re* Lewis, 91 Fed. 632, 1 Am. Bankr. Rep. 458. See also Neustadter *v.* Chicago Dry-Goods Co., 96 Fed. 830, 3 Am. Bankr. Rep. 96, where, after an original petition in bankruptcy had been dismissed, it was held that other creditors might file a new petition, but could not reopen the original petition, although four months had elapsed since the act of bankruptcy was committed upon which the new petition was founded.

91. *In re* Sykes, 106 Fed. 669, 6 Am. Bankr. Rep. 264.

What has been said in regard to the place of filing voluntary petitions and the fees therefor applies also to involuntary petitions. See *supra*, VI, A, 1.

92. The Bankruptcy Act of 1898 does not make insolvency an essential prerequisite in every case to an adjudication in involuntary bankruptcy. George M. West Co. *v.* Lea, 174 U. S. 590, 19 S. Ct. 836, 43 L. ed. 1098, 2 Am. Bankr. Rep. 463.

As to who is considered insolvent within the meaning of the Act see National Bank, etc., Co. *v.* Spencer, 53 N. Y. App. Div. 547, 65 N. Y. Suppl. 1001; George M. West Co. *v.* Lea, 174 U. S. 590, 19 S. Ct. 836, 43 L. ed. 1098, 2 Am. Bankr. Rep. 463; Duncan *v.* Landis, 106 Fed. 839, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649; *In re* Miller, 104 Fed. 764, 5 Am. Bankr. Rep. 140; Davis *v.* Stevens, 104 Fed. 235, 4 Am. Bankr. Rep. 763; *In re* Rome Planing Mill Co., 99 Fed. 937, 3 Am. Bankr. Rep. 766; *In re* Baumann, 96 Fed. 946, 3 Am. Bankr. Rep. 196.

For analogous decisions under former acts see 6 Cent. Dig. tit. "Bankruptcy," § 84.

93. Bankr. Act (1898), § 4*b*.

As to what constitutes acts of bankruptcy see *supra*, V.

As to who may become bankrupts see *supra*, IV.

Joining third persons.— The Act contains no specific provision authorizing any third person to be joined as a party to a petition in involuntary bankruptcy, and, conceding that a general assignee of the alleged bankrupt is a proper party, it can only be for the purpose of enabling him to contest the adjudication, the result of which might be to prejudice his rights as assignee. He cannot, by being so joined, be thus brought into the case for the purposes of all future inquiries and determinations made during the administration of the estate. Sinsheimer *v.* Simonson, 107 Fed. 898, 47 C. C. A. 51.

94. Bankr. Act (1898), § 4*b*.

In determining the amount of the debts owed by the insolvent debtor to see if they aggregate the sum of one thousand dollars, and thus give jurisdiction to the court of bankruptcy to make an involuntary adjudication, not only those debts which exist unpaid at the time of the filing of the petition, but also those which the debtor may have preferentially paid within four months, in violation of the provisions of the Act, are to be counted. *In re* Scrafford, 4 Dill. (U. S.) 376, 21 Fed. Cas. No. 12,556, 3 Month. Jur. 614, 10 Nat. Bankr. Reg. 104; *In re* Cain, 2 Am. Bankr. Rep. 378.

95. Under Bankr. Act (1898), § 59, providing that, where the whole number of creditors of any person is less than twelve, one of such creditors, whose claims equal the sum of five hundred dollars, may file a petition to have him adjudged a bankrupt, but limiting such right of petition to creditors only having "provable claims," a creditor is not entitled to maintain such petition who within four months next preceding the filing of the petition has received payment of a claim which is separate and distinct from that upon which the petition is based. *In re* Rogers' Milling Co., 102 Fed. 687, 4 Am. Bankr. Rep. 540.

96. Claims to be computed.— Bankr. Act (1898), § 63, specifies the debts which may be proved in bankruptcy. In determining the amount of provable claims for the purpose of petitioning in involuntary cases only those claims which have been reduced to judgment at the time of the commission of the alleged

then one of such creditors whose claims equal such amount may file a petition to have a person adjudged a bankrupt.[97]

(II) *Creditors Holding Secured Claims.* Creditors holding claims which are secured or which have priority must not be counted, nor can their claims be computed in determining the number of creditors and the amount of claims necessary for instituting involuntary proceedings, except for the amount of the excess of such claims over the value of the securities.[98]

(III) *Creditors Participating in General Assignment.* The prevailing rule seems to be that a creditor is not estopped from instituting a bankruptcy proceeding against a person who has made a general assignment for the benefit of creditors, unless it appears that such creditor has induced and abetted the making of the assignment, or that after he learned of such assignment he acquiesced in it and did not at once file a petition in bankruptcy.[99]

(IV) *Preferred and Attaching Creditors.* Under the present Act a creditor cannot prove any claim against a bankrupt's estate until he has sur-

act of bankruptcy will be considered. *In re* Brinckmann, 103 Fed. 65, 4 Am. Bankr. Rep. 551; Beers *v.* Hanlin, 99 Fed. 695, 3 Am. Bankr. Rep. 745. See also *In re* Morales, 105 Fed. 761, 5 Am. Bankr. Rep. 425.

Claims may be purchased by a person to enable him to join in a petition and to make up the necessary amount of claims. *In re* Woodford, 30 Fed. Cas. No. 17,972, 1 Cinc. L. Bul. 37, 13 Nat. Bankr. Reg. 575.

If a petition is filed against a member of a partnership, both the claims of a creditor against the individual members and those against the partnership may be computed. *In re* Lloyd, 15 Fed. Cas. No. 8,429, 15 Alb. L. J. 293, 5 Am. L. Rec. 679, 15 Nat. Bankr. Reg. 257, 24 Pittsb. Leg. J. (Pa.) 113.

Creditor of a partnership is also a creditor of each member of the firm, and is entitled as such to join in a petition in involuntary bankruptcy brought against one of the partners individually. *In re* Mercur, 95 Fed. 634, 2 Am. Bankr. Rep. 626.

Creditors of a corporation who happen also to be stock-holders and directors in the company are not precluded by reason of such relation from commencing proceedings in involuntary bankruptcy against the corporation. *In re* Rollins Gold, etc., Min. Co., 102 Fed. 982, 4 Am. Bankr. Rep. 327.

Creditors of an infant, in Illinois, whose debts the infant is entitled to repudiate at majority, cannot have him adjudged an involuntary bankrupt, since they are not creditors in the sense of the Bankruptcy Act of 1898. *In re* Eidemiller, 105 Fed. 595, 5 Am. Bankr. Rep. 570.

Married woman.— Where the law of the state permits the creation of enforceable debts as between husband and wife, a married woman who is an actual creditor of her husband in good faith, having a claim against him which would be provable in bankruptcy, may join in a petition in involuntary bankruptcy against him, or, if such claim amounts to five hundred dollars or over, and all his creditors are less than twelve in number, she may maintain such petition alone; but her alleged debt will be carefully scrutinized, to prevent fraud upon other creditors. *In re* Novak, 101 Fed. 800, 4 Am. Bankr. Rep. 311.

Persons who have sold and assigned their claims against a debtor have no standing to petition that such debtor be adjudged a bankrupt. *In re* Burlington Malting Co., 109 Fed. 777, 6 Am. Bankr. Rep. 369.

97. Bankr. Act (1898), § 59*b*. See also *In re* Miller, 104 Fed. 764, 5 Am. Bankr. Rep. 140; Simonson *v.* Sinsheimer, 100 Fed. 426, 40 C. C. A. 474, 3 Am. Bankr. Rep. 824 [*affirming* 95 Fed. 948, 37 C. C. A. 337 (*reversing* 92 Fed. 904)].

The term "creditor" is defined in the Act. Bankr. Act (1898), § 1 (9), *supra*, note 8, p. 238.

98. Bankr. Act (1898), § 56*b*.

Creditors secured by a mortgage have the right to institute proceedings in the United States courts in bankruptcy to enforce their rights and reach other assets. Owen *v.* Potter, 115 Mich. 556, 73 N. W. 977.

99. *In re* Miner, 104 Fed. 520, 4 Am. Bankr. Rep. 710; Leidigh Carriage Co. *v.* Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383. See also Simonson *v.* Sinsheimer, 100 Fed. 426, 40 C. C. A. 474, 3 Am. Bankr. Rep. 824 [*affirming* 95 Fed. 948, 37 C. C. A. 337 (*reversing* 92 Fed. 904)]. But *compare In re* Romanow, 92 Fed. 510, 1 Am. Bankr. Rep. 461 [*following* Perry *v.* Langley, 19 Fed. Cas. No. 11,006, 7 Am. L. Reg. N. S. 429, 1 Am. L. T. Bankr. Rep. 34, 1 Nat. Bankr. Reg. 559], where it was held that where creditors voluntarily become parties to proceedings under a general assignment for the benefit of creditors, and assert their claims against the assignor in such proceedings they are estopped from instituting involuntary bankruptcy proceedings against such assignor based upon the assignment as an act of bankruptcy.

Where the assignment is under a state insolvency law which is nullified by the Bankruptcy Act, and is therefore absolutely void, the creditors who proved their claims under such assignment are not estopped from instituting bankruptcy proceedings. *In re* Curtis, 91 Fed. 737, 1 Am. Bankr. Rep. 440 [*affirmed* in 94 Fed. 630, 2 Am. Bankr. Rep. 226], where it appeared that the creditors had taken no other action in the proceedings than to file their claims.

rendered all preferences obtained by him.[1] So a claim which is secured by a preferential transfer is not provable and the creditor cannot file a petition to have the debtor adjudged bankrupt.[2] Under the present Act it has been asserted that an attaching creditor is in the position of a preferred creditor and that he cannot follow up his attachment with a petition for an adjudication of bankruptcy unless formally surrendering his levy.[3]

d. Computing Number of Creditors. In computing the number of creditors of the bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition, or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, should not be counted.[4]

e. Form and Contents — (i) *In General.* The form of the petition in involuntary bankruptcy proceedings is prescribed[5] and should be observed and used with such alterations as may be necessary to suit the circumstances of any particular case.[6]

1. Bankr. Act (1898), § 57*g*; *In re* Ft. Wayne Electric Corp., 99 Fed. 400, 39 C. C. A. 582, 3 Am. Bankr. Rep. 634; *In re* Conhaim, 97 Fed. 923, 3 Am. Bankr. Rep. 249; *In re* Knost, 2 Am. Bankr. Rep. 471 [*affirmed* in 99 Fed. 409, 3 Am. Bankr. Rep. 631]. Where a creditor has voluntarily and expressly surrendered his preference he may file a petition on the original debt. *In re* Marcer, 16 Fed. Cas. No. 9,060, 29 Leg. Int. (Pa.) 76, 6 Nat. Bankr. Reg. 351; *In re* Hunt, 12 Fed. Cas. No. 6,882, 5 Nat. Bankr. Reg. 433.

2. *In re* Gillette, 104 Fed. 769, 5 Am. Bankr. Rep. 119; *In re* Rogers' Milling Co., 102 Fed. 687, 4 Am. Bankr. Rep. 540.

Under the Act of 1867 creditors who had been fraudulently preferred were not counted in determining whether a sufficient number had joined in the petition. *In re* Rado, 6 Ben. (U. S.) 230, 20 Fed. Cas. No. 11,522; *In re* Israel, 3 Dill. (U. S.) 511, 13 Fed. Cas. No. 7,111, 2 Centr. L. J. 219, 12 Nat. Bankr. Reg. 204; *In re* Currier, 2 Lowell (U. S.) 436, 6 Fed. Cas. No. 3,492, 13 Nat. Bankr. Reg. 68; *In re* Rosenfields, 20 Fed. Cas. No. 12,061, 3 Am. L. Rec. 724, 11 Nat. Bankr. Reg. 86; *In re* Hunt, 12 Fed. Cas. No. 6,883, 4 Chic. Leg. N. 5, 5 Nat. Bankr. Reg. 493, 2 Pac. L. Rep. 146; Clinton *v.* Mayo, 5 Fed. Cas. No. 2,899, 12 Nat. Bankr. Reg. 39.

3. *In re* Burlington Malting Co., 109 Fed. 777, 6 Am. Bankr. Rep. 369, holding also that the filing of the petition cannot be considered as an unconditional release of the attachment. But see *In re* Cain, 2 Am. Bankr. Rep. 378, where it was held that an attaching creditor might be counted in ascertaining the number of creditors which the bankrupt was owing at the time of the filing of the petition.

Under the Act of 1867 the general proposition was maintained that an attaching creditor could not institute bankruptcy proceedings upon his claim while retaining his levy. *In re* Jewett, 7 Biss. (U. S.) 242, 13 Fed. Cas. No. 7,305; *In re* Hazens, 4 Dill. (U. S.) 549, 11 Fed. Cas. No. 6,285; *In re* Scrafford, 4 Dill. (U. S.) 376, 21 Fed. Cas. No. 12,556, 3 Month. Jur. 614, 15 Nat. Bankr. Reg. 104, 3 N. Y. Wkly. Dig. 552.

4. Bankr. Act (1898), § 59*e*.

As to consanguinity or affinity within the third degree see *supra*, III, D, 2.

Creditors who have expressly assented to a general assignment for the benefit of creditors are not to be computed. *In re* Miner, 104 Fed. 520, 4 Am. Bankr. Rep. 710. See also *supra*, VI, B, 1, c, (III).

Intervening petitioning creditors whose claims are in fact owned by the original petitioner are not existing creditors who have "provable claims" and cannot be considered. *In re* Burlington Malting Co., 109 Fed. 777, 6 Am. Bankr. Rep. 369.

5. U. S. Supreme Ct. Bankr. Forms, No. 3; 89 Fed. xxviii.

6. U. S. Supreme Ct. Bankr. G. O. No. 38. But see *In re* Ogles, 93 Fed. 426, 1 Am. Bankr. Rep. 671, where it was said that a petition filed before the promulgation of the official forms by the supreme court should not be dismissed for want of conformity thereto; but the court will order a new petition in the form prescribed, to be filed *nunc pro tunc*, the original petition, however, not to be withdrawn from the files. And *compare* Mather *v.* Coe, 92 Fed. 333, 1 Am. Bankr. Rep. 504, where it was held that no official form having been prescribed for a petition in involuntary bankruptcy against a partnership, the general form of a creditors' petition [U. S. Supreme Ct. Bankr. Forms, No. 3; 89 Fed. xxviii] is to be used for that purpose, with such adaptations as will meet the exigencies of the particular case.

The official form thus prescribed was not intended to add to or modify the provisions of the Bankruptcy Act in regard to what constitute sufficient facts for adjudications of bankruptcy. George M. West Co. *v.* Lea, 174 U. S. 590, 19 S. Ct. 836, 43 L. ed. 1098, 2 Am. Bankr. Rep. 463, where it was held that the fact that the official form for involuntary petitions contains an allegation of insolvency does not make such an allegation material where the statute provides that other facts alone constitute a sufficient cause for adjudication.

Petitions must be plainly written or printed, without abbreviation or interlinea-

(II) *Allegations of Jurisdictional Facts.* The petition should state the names and residences of the petitioning creditors and the bankrupt. It should show that the bankrupt has had his principal place of business, or resided or had his domicile within the jurisdiction of the court for the greater portion of the six months next preceding the date of the filing of the petition.[7] It should also allege the insolvency of the proposed bankrupt,[8] although it has been held that where such bankrupt is guilty of an act of bankruptcy, although solvent, as in the case of a general assignment, the insolvency of the bankrupt need not be alleged.[9] It is probable that the petition should show what the business of the proposed bankrupt was,[10] or that he did not come within one of the excepted classes, although a failure to so plead would probably not be deemed a jurisdictional defect.[11] The act of bankruptcy must be alleged to have been committed [12]

tion, except as may be necessary for the purpose of reference. U. S. Supreme Ct. Bankr. G. O. No. 5. As to abbreviations see *supra*, note 77. By rule of court in the district court of North Carolina, petitions in bankruptcy will not be placed on file nor considered unless made out on the prescribed printed forms. Written or typewritten petitions and schedules will be returned to the parties without action. Mahoney *v.* Ward, 100 Fed. 278, 3 Am. Bankr. Rep. 770.

Petitions must be filed in duplicate, one copy for the clerk and one to be served on the bankrupt. Bankr. Act (1898), § 59*c*.

7. See Bankr. Act (1898), § 2 (1); and *supra*, II, A, 2.

Limitation as to residence or place of business is made with reference alone to the duration of business in the district, and regardless of the fact that its location may be changed short of the period, and thus be carried on in different districts without exceeding the three months in either, or that it may be discontinued entirely without reaching the time limited in any one; and the provisions in reference to domicile and residence are equally restricted, except for the distinction as to residence, that it may be retained in one district after domicile is changed to another. *In re* Plotke, 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171. See also *In re* Ray, 2 Am. Bankr. Rep. 158; *In re* Laskaris, 1 Am. Bankr. Rep. 480; *In re* Stokes, 1 Am. Bankr. Rep. 35.

Place of business of corporation.— Where the petition alleges that a corporation was organized and is existing under the laws of a state, it is equivalent to an allegation of domicile and residence within such state; and where it is alleged that its principal place of business has been within the district since its organization, and the proof shows such organization to have been more than six months prior to the filing of the petition, the petition will be deemed amended accordingly, although it fails to allege the length of domicile, residence, or principal place of business. *In re* Elmira Steel Co., 109 Fed. 456, 5 Am. Bankr. Rep. 484.

8. Bankr. Act (1898), § 3*b*. See also *supra*, V, B, 7.

9. George M. West Co. *v.* Lea, 174 U. S. 590, 19 S. Ct. 836, 43 L. ed. 1098, 2 Am. Bankr. Rep. 463.

10. Bankr. Act (1898), § 4*b*; *In re* Taylor, 102 Fed. 728, 42 C. C. A. 1, 4 Am. Bankr. Rep. 515.

An involuntary petition against a corporation which does not allege the corporation to be principally engaged in manufacture, trading, printing, publishing, or mercantile pursuits is insufficient to confer jurisdiction, and an adjudication made upon it is void. *In re* Elmira Steel Co., 109 Fed. 456, 5 Am. Bankr. Rep. 484.

11. Green River Deposit Bank *v.* Craig, 110 Fed. 137, 138, 6 Am. Bankr. Rep. 381, where the court says: "With this section [4*b*] before it, the supreme court in making the general orders in bankruptcy, prescribed form No. 3 for petitions by creditors against a debtor, which, no doubt, has been generally followed in involuntary bankruptcy cases from that time until now. It might, I suppose, be quite fairly inferred that the judges of that court, in framing the rules and forms, considered the question whether the allegation that the debtor was not a wage earner and was not chiefly engaged in farming or the tillage of the soil, was essential, and concluded that it was not. Otherwise, doubtless, the form prescribed would have included it. They probably thought that the exceptions named in section 4 could more properly be specially and affirmatively pleaded if the facts justified it, and that they need not be anticipated or negatived in the petition."

Under the Act of 1867 it was held that a petition was demurrable which did not allege that the bankrupt was not within the excepted classes. *In re* California Pac. R. Co., 3 Sawy. (U. S.) 240, 4 Fed. Cas. No. 2,315, 2 Centr. L. J. 79, 11 Nat. Bankr. Reg. 193.

12. **Several acts of bankruptcy** may be pleaded in the same petition, but they should be stated conjunctively. *In re* Drummond, 7 Fed. Cas. No. 4,093, 1 Am. L. T. Bankr. Rep. 7, 1 Nat. Bankr. Reg. 231.

The circumstances and facts upon which the act of bankruptcy is based should be specifically alleged; it is insufficient to allege the act in the terms of the statute without detail. *In re* Cliffe, 94 Fed. 354, 2 Am. Bankr. Rep. 317: *In re* Raynor, 11 Blatchf. (U. S.) 43, 20 Fed. Cas. No. 11,597, 1 Am. L. Rec. 736, 7 Nat. Bankr. Reg. 527; *In re*

within four months of the filing of the petition.[13] The petition must affirmatively show that the aggregate of the claims of the petitioning creditors equals or exceeds the sum of five hundred dollars,[14] and that the debtor owes debts to the amount of one thousand dollars.[15] If only one creditor petitions, it must be alleged that the whole number of creditors is less than twelve.[16]

(III) *Prayer.* The prayer of the petition should be to the effect that service of the petition and a subpœna be made upon the alleged bankrupt, and that he be adjudged a bankrupt.[17]

f. Signature and Verification. The petition should be signed by the petitioners, although the statute does not seem to prevent a signature by an agent or attorney in behalf of a petitioner.[18] Such petition must be verified under the oath of three petitioners if there be more than one.[19] The form of the verification is given in the form of the creditors' petition,[20] and contemplates that the verification is to be made by the petitioners and not by their attorney.[21]

g. Amendments. The court may allow amendments to the petition on appli-

Randall, 1 Deady (U. S.) 557, 20 Fed. Cas. No. 11,551, 3 Nat. Bankr. Reg. 18; Hallack *v.* Tritch, 11 Fed. Cas. No. 5,956, 10 Chic. Leg. N. 219, 17 Nat. Bankr. Reg. 293.

Allegations as to preferences.— Allegations that one has within the four months last past transferred large amounts and values of his property to one or more persons, with intent to prefer them, are wholly insufficient. The specific facts must be alleged, with the time, place, persons, and circumstances. Issuable facts and not conclusions should be alleged. *In re* Nelson, 98 Fed. 76, 1 Am. Bankr. Rep. 63.

13. Bankr. Act (1898), § 3*b*.

14. Bankr. Act (1898), § 59*b*. If it appear after the filing of the petition that the petitioning creditors had not provable claims amounting to five hundred dollars, the dismissal of the petition is necessary, unless the fault can be corrected. There is nothing in the Act which prevents the correction of such fault. *In re* Mackey, 110 Fed. 355, 6 Am. Bankr. Rep. 577.

15. Bankr. Act (1898), § 4*b*.

16. Bankr. Act (1898), § 59*d*.

17. U. S. Supreme Ct. Bankr. Forms, No. 3; 89 Fed. xxviii.

It is improper to include in the petition a prayer for the seizure of the assets of the alleged bankrupt, or for an injunction against further proceedings by a receiver appointed by a state court. Mather *v.* Coe, 92 Fed. 333, 1 Am. Bankr. Rep. 504.

Multifariousness.— A petition in involuntary bankruptcy which unites with a prayer for an adjudication in bankruptcy a prayer for the seizure of assets of the debtor, and for an injunction restraining attaching creditors, should be dismissed for multifariousness. *In re* Ogles, 93 Fed. 426, 1 Am. Bankr. Rep. 671. See also *In re* Kelly, 91 Fed. 504, 1 Am. Bankr. Rep. 306.

18. Wald *v.* Wehl, 6 Fed. 163. See *In re* Raynor, 11 Blatchf. (U. S.) 43, 20 Fed. Cas. No. 11,597, 1 Am. L. Rec. 736, 7 Nat. Bankr. Reg. 527.

19. Bankr. Act (1898), §§ 18*c*, 59*b*. See Green River Deposit Bank *v.* Craig, 110 Fed. 137, 6 Am. Bankr. Rep. 381.

As to defective verification see *supra*, note 67.

As to who may administer oath see Bankr. Act (1898), § 20; and *supra*, note 67.

A lack of verification or a defect therein is not jurisdictional and may be cured by amendment. Green River Deposit Bank *v.* Craig, 110 Fed. 137, 6 Am. Bankr. Rep. 381; *In re* Simonson, 92 Fed. 904, 1 Am. Bankr. Rep. 197; *In re* Soper, 1 Am. Bankr. Rep. 193.

20. U. S. Supreme Ct. Bankr. Forms, No. 3; 89 Fed. xxix.

21. **Verification by agent or attorney.**— The court says in *In re* Nelson, 98 Fed. 76, 77, 1 Am. Bankr. Rep. 63: "I am not prepared to hold that there could not be a case where the verification might be made by the attorney where the facts are within his knowledge, and not within the knowledge of the petitioners, and the attorney is authorized by the petitioners to make it. But it is not necessary to decide that question here." The petitioners, speaking generally, should certainly swear to the petition in person, though it may be that a duly authorized agent might, under some circumstances, properly verify it, at the same time showing by his affidavit his authority. A non-compliance with the form prescribed by the supreme court does not render the verification void and unavailing. *In re* Simonson, 92 Fed. 904, 1 Am. Bankr. Rep. 197 [*reversed* in 95 Fed. 948].

The fact that the term "creditor" as defined in the Bankruptcy Act includes his duly authorized agent, attorney, or proxy, does not authorize a verification by an attorney. *In re* Simonson, 92 Fed. 904, 1 Am. Bankr. Rep. 197 [*reversed* in 95 Fed. 948].

Under the former Act there were some cases to the effect that unless the statute expressly authorized an agent to verify, as where the principal did not live in the district, a verification could not be by an agent. Hunt *v.* Pooke, 12 Fed. Cas. No. 6,896, 5 Nat. Bankr. Reg. 161; *In re* Butterfield, 6 Nat. Bankr. Reg. 257. *Contra*, *In re* Raynor, 11 Blatchf. (U. S.) 43, 20 Fed. Cas. No. 11,597, 1 Am. L. Rec. 736, 7 Nat. Bankr. Reg. 527.

cation of the petitioners. In the application for leave to amend the petitioner should state the cause of the error in the petition originally filed.[22] The courts are disinclined to allow amendments where the object is to introduce new facts or to change essentially the grounds of the petition, unless they are clearly required in the furtherance of justice.[23]

h. Two or More Petitions—(I) *In Same District*—(A) *Where Acts of Bankruptcy Were Committed on Different Days.* Where two or more petitions are filed in the same district against a debtor by different creditors, and different acts of bankruptcy committed on different days are alleged in each petition, and the debtor appears and shows cause against an adjudication of bankruptcy against him on the petitions, the petition which alleges the commission of the first act of bankruptcy should be first heard and tried.[24]

(B) *Where Acts of Bankruptcy Were Committed on Same Day.* If the acts of bankruptcy are alleged in the petitions to have been committed on the same day the court before whom they are pending may order them to be consolidated

22. U. S. Supreme Ct. Bankr. G. O. No. 11. See also *supra*, VI, A, 1, c. See *In re* Nelson, 98 Fed. 76, 1 Am. Bankr. Rep. 63 (where it is said that where a petition in involuntary bankruptcy attempts to set forth acts of bankruptcy by the respondent which would justify an adjudication if properly alleged and proved, but its averments are so vague and general as not to be sufficient in law, and the petition is verified by the attorney of the petitioning creditors, instead of by the creditors themselves, the court of bankruptcy, instead of dismissing the petition, may allow it to be amended and verified anew by the petitioners); *In re* Mercur, 95 Fed. 634, 2 Am. Bankr. Rep. 626 (holding that where, at the hearing on a petition in involuntary bankruptcy, it is proved that the debtor within the statutory time has made an assignment for the benefit of creditors, this act of bankruptcy, although not originally alleged in the petition as ground for an adjudication, may be added to the petition by amendment).

Amended petition not convertible into original petition.—An amended petition in bankruptcy, executed as such by a creditor to be filed in proceedings previously instituted, cannot, after such execution, and after the proceedings have been dismissed by the court, be converted into an original petition by striking out the word "amended," and be made the basis of a new and independent proceeding; and where it has been so filed it will be dismissed on the facts being made to appear to the court. *In re* Hyde, etc., Mfg. Co., 103 Fed. 617, 4 Am. Bankr. Rep. 602.

When amendment deemed to have been made.—Where, on a hearing before a referee on the issues joined on a petition in involuntary bankruptcy, the testimony of the alleged bankrupts discloses an additional act of bankruptcy not specified in the petition an amendment will be deemed to have been made to include such act. *In re* Miller, 104 Fed. 764, 5 Am. Bankr. Rep. 140. See also *In re* Lange, 97 Fed. 197, 3 Am. Bankr. Rep. 231, holding that where a petition in bankruptcy alleges the payment of a certain debt by the respondent as a preference and an act of bankruptcy, it may be amended, on application duly made, by inserting allegations of other preferential payments made by the respondent before the filing of the petition, and in discharge of debts of like general character with that first mentioned; or such an amendment may be deemed to have been made, and to warrant an adjudication against the respondent, when his own testimony upon the trial of the petition discloses the essential facts as to such other payments of debts.

23. *In re* Craft, 2 Ben. (U. S.) 214, 6 Fed. Cas. No. 3,316, 1 Nat. Bankr. Reg. 378 [*affirmed* in 6 Blatchf. (U. S.) 177, 6 Fed. Cas. No. 3,317, 2 Nat. Bankr. Reg. 111]; *In re* Waite *v.* Crocker, 1 Lowell (U. S.) 207, 28 Fed. Cas. No. 17,044, 1 Nat. Bankr. Reg. 373; *In re* Gallinger, 1 Sawy. (U. S.) 224, 9 Fed. Cas. No. 5,202, 4 Nat. Bankr. Reg. 729; *In re* Leonard, 15 Fed. Cas. No. 8,255, 4 Nat. Bankr. Reg. 562.

An amendment to add a new party will not be allowed after all the testimony is taken. *In re* Pitt, 8 Ben. (U. S.) 389, 19 Fed. Cas. No. 11,188, 14 Nat. Bankr. Reg. 59, 23 Pittsb. Leg. J. (Pa.) 196.

When permitted under the present Act.—An amendment may be made to a petition for the purpose of joining additional creditors where it appears that the provable claims of the original petitioning creditors did not equal the sum of five hundred dollars. The power of amendment is substantial and conferred for effecting the broad purposes of the Act, and is not confined to niceties of diction or other immaterial or merely formal matters. To hold that it does not embrace the insertion of material and essential averments at any stage of the proceedings before judgment would reduce it to a shadow. *In re* Mackey, 110 Fed. 355, 6 Am. Bankr. Rep. 577. Any petition in bankruptcy which is not specific in its allegations, as where no details of the alleged act of bankruptcy are stated, may be amended. *In re* Cliffe, 94 Fed. 354, 2 Am. Bankr. Rep. 317. Acts of bankruptcy not included in the original petition may be inserted by amendment where it appears that they were omitted for some sufficient reason, even if they were committed more than four months prior to the filing of the original petition. *In re* Strait, 2 Am. Bankr. Rep. 308.

24. U. S. Supreme Ct. Bankr. G. O. No. 7.

and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it is not necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.[25]

(c) *Where Several Partners File Separate Petitions Against Firm.* If two or more petitions are filed by different members of a partnership for the adjudication of the bankruptcy of such partnership, action should be had upon the one first filed.[26]

(II) *In Different Districts*—(A) *Against Individuals.* If two or more petitions are filed against the same individual in different districts, the first hearing should be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such act is charged in either of the other petitions.[27]

(B) *Against Partnerships*—(1) In General. In case two or more petitions are filed against the same partnership in different courts, each having jurisdiction over the case, the petition first filed must be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions.[28]

(2) By Different Members of the Partnership. In case two or more petitions are filed in different districts by different members of the same partnership for the adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, must take and retain jurisdiction over all proceedings in such bankruptcy until the same are closed.[29]

(c) *Transfer of Cases.* The court retaining jurisdiction must, if satisfied that it is for the best interest and convenience of parties in interest that another court should proceed with the cases, order them to be transferred to that court.[30]

2. Order to Show Cause. Upon the filing of a petition an order is granted under the seal of the court, and tested by the clerk, requiring a copy of the petition with the writ of subpœna to be served upon the bankrupt and directing that he appear and show cause upon the return-day why the prayer of the petition should not be granted.[31]

25. U. S. Supreme Ct. Bankr. G. O. No. 7. The order is practically the same as the rule adopted under the Act of 1867.

26. U. S. Supreme Ct. Bankr. G. O. No. 6. **Proceeding becomes involuntary, when.**—If some of the members of a partnership file a petition in bankruptcy against the partnership, and the non-joining members make defense to the petition the proceeding as to them becomes an involuntary one. *In re* Murray, 96 Fed. 600, 3 Am. Bankr. Rep. 601.

27. U. S. Supreme Ct. Bankr. G. O. No. 6. **The proceedings upon the other petitions may be stayed** until an adjudication is made upon the petition first heard, and the court which makes the first adjudication retains jurisdiction over all proceedings therein until the same are closed. U. S. Supreme Ct. Bankr. G. O. No. 6. The "first adjudication" referred to, which gives the court making it prior jurisdiction, must have been made in accordance with the other provision of the rule as to the place of first hearing, and that creditors, by filing a second petition against an individual in another district, and obtaining a first hearing and adjudication thereon, cannot thereby oust the jurisdiction of the court in the district of the bankrupt's domicile, in which a petition had been first filed by other creditors. *In re* Elmira Steel Co., 109 Fed. 456, 5 Am. Bankr. Rep. 484.

28. U. S. Supreme Ct. Bankr. G. O. No. 6. **The other proceedings are stayed** and the court making the first adjudication retains jurisdiction until the close of the proceeding. U. S. Supreme Ct. Bankr. G. O. No. 6.

29. U. S. Supreme Ct. Bankr. G. O. No. 6.

30. U. S. Supreme Ct. Bankr. G. O. No. 6. **Bankr. Act (1898), § 32,** provides that in the event petitions are filed against the same person, or against different members of a partnership in different courts of bankruptcy, each of which has jurisdiction, the cases shall be transferred by order of the court relinquishing jurisdiction to, and be consolidated by, the one of such courts which can proceed with the same for the greatest convenience of the parties.

31. See U. S. Supreme Ct. Bankr. G. O. No. 3; Bankr. Act (1898), § 18*a*. **Form of order to show cause** is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 4; 89 Fed. xxix.

3. WRIT OF SUBPŒNA. Upon the filing of a petition a writ of subpœna is issued under the seal of the court, addressed to the alleged bankrupt, commanding him to appear before the court at the place and on the day mentioned therein to answer to the petition.[32]

4. SERVICE OF PETITION AND PROCESS — a. In General. The Act provides that upon the filing of a petition for involuntary bankruptcy, service thereof, with the writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States,[33] except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time.[34] If personal service of process cannot be made, then notice must be given by publication in the same manner and for the same time as provided by law for notice by publication in suits in equity in the courts of the United States.[35]

b. Waiver. There is nothing in the present Act which precludes a waiver of process upon the voluntary appearance of the bankrupt and the filing of an answer admitting the bankruptcy on the day the petition is filed.[36] Under the present Act formal service of the subpœna may be waived by the proper and authorized acceptance of service being entered thereon by the alleged bankrupt.[37]

5. APPEARANCES, PLEADINGS, AND DEFENSES — a. Appearance in Person or by Attorney. Appearance in bankruptcy proceedings by a bankrupt or his creditors may be made in person or by attorney; but a creditor will only be allowed to manage before the court his own individual interests.[38]

32. See U. S. Supreme Ct. Bankr. G. O. No. 3; Bankr. Act (1898), § 18*a*.

Form of subpœna is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 5; 89 Fed. xxx.

33. Bankr. Act (1898), § 18*a*; U. S. Supreme Ct. Bankr. G. O. No. 37.

For manner of service see U. S. Equity Rules, No. 13 *et seq.*

Personal service of the writ of subpœna must be made at least five days before the return-day. U. S. Supreme Ct. Bankr. Forms, No. 4; U. S. Supreme Ct. Bankr. G. O. No. 37.

Service upon a lunatic confined in an asylum may be made by reading a copy to such lunatic in the presence of the superintendent or other official of the asylum. *In re* Burka, 107 Fed. 674, 5 Am. Bankr. Rep. 843.

34. Bankr. Act (1898), § 18*a*.

A judge is authorized by a special order in any case to vary the time allowed for the return of process, for appearance and pleading in order to facilitate a speedy hearing. U. S. Supreme Ct. Bankr. G. O. No. 37.

35. Bankr. Act (1898), § 18*a*.

Manner of service by publication is prescribed. U. S. Rev. Stat. (1878), § 738, *amended* by 18 U. S. Stat. at L. 472. See Foster Fed. Pr. (3d ed.) § 97.

Designation of newspapers.— Courts of bankruptcy must by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by the Act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published. Bankr. Act (1898), § 28.

Service upon non-joining member of partnership.— If a petition is filed on behalf of some of the members of a partnership it must be deemed an involuntary petition as to the members who do not join, and service must be made upon such non-joining members personally or by publication as in other cases. *In re* Murray, 96 Fed. 600, 3 Am. Bankr. Rep. 601.

36. *In re* Mason, 99 Fed. 256, 3 Am. Bankr. Rep. 599.

For analogous decisions under former acts see *In re* Leighton, 4 Ben. (U. S.) 457, 15 Fed. Cas. No. 8,221, 5 Nat. Bankr. Reg. 95; *In re* Little, 3 Ben. (U. S.) 25, 15 Fed. Cas. No. 8,391, 1 Chic. Leg. N. 123, 2 Nat. Bankr. Reg. 294.

Under the former Bankruptcy Act it was generally held that a voluntary appearance upon the part of the alleged bankrupt was a waiver of service and vested the court with jurisdiction. *In re* Ulrich, 3 Ben. (U. S.) 355, 24 Fed. Cas. No. 14,327, 3 Nat. Bankr. Reg. 133; *In re* Kirtland, 10 Blatchf. (U. S.) 515, 14 Fed. Cas. No. 7,851; *In re* McNaughton, 16 Fed. Cas. No. 8,912, 8 Nat. Bankr. Reg. 44.

37. *In re* L. Humbert Co., 100 Fed. 439, 4 Am. Bankr. Rep. 76.

Waiver of defects in verification.— If the respondent in a case of involuntary bankruptcy pleads to the merits, without objecting to the form of the petition, he thereby waives any defect in the verification of the petition; such verification being a matter of form and not affecting the jurisdiction of the court. Leidigh Carriage Co. *v.* Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383.

38. U. S. Supreme Ct. Bankr. G. O. No. 4. See also Leiter *v.* Payson, 6 Chic. Leg. N. 157, 9 Nat. Bankr. Reg. 205, 15 Fed. Cas. No. 8,226 *mem.*

b. Time of Appearance. The bankrupt or any creditor may appear and plead to the petition within ten days from the return-day, or within such further time as the court may allow.[39]

c. Answer — (I) *Right of Bankrupt to File.* The bankrupt may file an answer to a petition for involuntary insolvency.[40]

(II) *Right of Creditor to File.* Creditors other than the original petitioners may, at any time, enter their appearance and join in the petition,[41] or file an answer and be heard in opposition to the prayer of the petitioner.[42] When a creditor intervenes for the purpose of opposing the adjudication in bankruptcy he may file his answer in the same manner, and he is entitled to the same rights as parties respondent in other proceedings.[43] And the court cannot deny him an opportunity to answer an involuntary petition.[44]

(III) *Form, Contents, and Sufficiency* — (A) *In General.* While the form of a denial of bankruptcy on the part of a bankrupt is prescribed,[45] the rules of

Attorney entering appearance must be an attorney and counselor authorized to practice in the circuit or district court. U. S. Supreme Ct. Bankr. G. O. No. 4. But the jurisdiction of the court, acquired by the due filing of a petition, and all the necessary jurisdictional facts stated in such petition, is not affected by the fact that the attorney who appeared for the bankrupt was not at that time admitted to practice in the court. The proper remedy in such cases is for the objecting creditor to make a motion to expunge the unauthorized appearance, or for a stay of such proceedings until the bankrupt has procured an attorney admitted to practice in the court. It is not proper to dismiss such petition for want of jurisdiction. *In re* Kindt, 98 Fed. 867, 3 Am. Bankr. Rep. 546.

39. Bankr. Act (1898), § 18*b*.

Consent to extension of time. — The petitioning creditors and the bankrupt cannot stipulate for an extension of time for the bankrupt to plead, unless all the creditors of the defendant consent, or due notice is given to them and they fail to object. *In re* Simonson, 92 Fed. 904, 1 Am. Bankr. Rep. 197.

40. See *infra*, VI, B, 5, c, (II) *et seq.* as to what a bankrupt may set up in his answer.

41. Bankr. Act (1898), § 59*f*. Construing this section, Judge Lowell, in *In re* Romanow, 92 Fed. 510, 511, 1 Am. Bankr. Rep. 461, said: "Those who are permitted to 'join in' a petition, by so doing commonly become parties to it; and the words 'join in the petition' as used in paragraph *e* and paragraph *b* of the same section, plainly carry that implication. It is urged by the respondents that, if this construction be given to paragraph *f*, an insufficient number of creditors, or creditors having an insufficient amount of claims, may file a petition against a debtor, and obtain an adjudication by subsequently procuring other creditors to join with them, such joinder being possible at any time before the petition is dismissed. This practice, it is said, would permit a petition, at the time of its filing insufficient in substance as well as in form, to be made good by subsequent acts. It must be admitted that there is weight in this argument, but the language of the act is clear; and the inconvenience, if inconvenience there be, was not deemed by congress a controlling consideration in the act of 1867, nor in some cases, at least, under the act of 1898. I think, therefore, that creditors, otherwise competent to appear and join in a petition subsequent to its filing, may be reckoned in making up the number of creditors and amount of claims required by section 59." See also *In re* Mammouth Pine Lumber Co., 109 Fed. 308, 6 Am. Bankr. Rep. 84; *In re* John A. Etheridge Furniture Co., 92 Fed. 329, 1 Am. Bankr. Rep. 112.

The subsequent joinder of creditors as petitioners will not be allowed where the original petition manifestly upon its face showed that an insufficient number of creditors or an insufficient amount of claims had united in the petition. *In re* Bedingfield, 96 Fed. 190, 2 Am. Bankr. Rep. 355.

Unless a creditor avails himself of the opportunity on intervention afforded by the Act he will be deemed, in contemplation of law, as represented by his debtor, and will be concluded as to all matters directly in issue and determined by the decree. *In re* Henry Ulfelder Clothing Co., 98 Fed. 409, 3 Am. Bankr. Rep. 425 [*citing* Candee *v.* Lord, 2 N. Y. 269, 51 Am. Dec. 294]. But see Brooks *v.* Wilson, 125 N. Y. 256, 26 N. E. 258, 34 N. Y. St. 739.

42. Bankr. Act (1898), § 59*f*.

43. Knickerbocker Ins. Co. *v.* Comstock, 14 Fed. Cas. No. 7,879, 6 Chic. Leg. N. 142, 9 Nat. Bankr. Reg. 484.

44. *In re* Elmira Steel Co., 109 Fed. 456, 5 Am. Bankr. Rep. 484.

45. U. S. Supreme Ct. Bankr. Forms, No. 6; 89 Fed. xxx. But see *In re* Paige, 99 Fed. 538, 3 Am. Bankr. Rep. 679; *infra*, VI, B, 5, (III), (B); and U. S. Supreme Ct. Bankr. G. O. No. 38.

Amended answer. — Where the answer of the bankrupt is not in the simple form of denial of bankruptcy as prescribed in U. S. Supreme Ct. Bankr. Forms, No. 6, 89 Fed. xxx, it may be sufficient in substance as a compliance with this form to present the issue of a contested adjudication, although it is misleading and unnecessarily defensive in

equity practice established by the supreme court of the United States apply in involuntary bankruptcy proceedings,[46] and therefore regulate the form and contents of answers by bankrupts and intervening creditors.[47] The sufficiency of an answer to an involuntary petition in bankruptcy cannot be raised by a demurrer.[48] It can only be raised by setting the case for hearing upon the bill and answer.[49]

(B) *What Defenses May Be Pleaded.* All facts may be pleaded which constitute defenses to the alleged act of bankruptcy upon which the petition is based.[50] Not only the bankrupt, but also any creditor may avail himself of any such defenses.[51] Any material fact of the petition may be controverted, as for example, the allegations in respect to the provable claims of the petitioning creditors;[52] that the court had no jurisdiction because of the non-residence of the bankrupt;[53] and that the act of bankruptcy was not committed.[54]

its statements. It must, however, be refiled as of the original date amended to conform to the simple form prescribed, though it must remain on file as it is in the original answer. Mather *v.* Coe, 92 Fed. 333, 1 Am. Bankr. Rep. 504.

46. U. S. Supreme Ct. Bankr. G. O. No. 37; Goldman *v.* Smith, 93 Fed. 182, 1 Am. Bankr. Rep. 266.

47. U. S. Equity Rules, Nos. 39–46.

48. **Demurrer to an answer is unknown** to the federal equity practice as it was unknown to the high court of chancery in England. Banks *v.* Manchester, 128 U. S. 244, 9 S. Ct. 36, 32 L. ed. 425; Crouch *v.* Kerr, 38 Fed. 549.

49. Goldman *v.* Smith, 93 Fed. 182, 1 Am. Bankr. Rep. 266.

50. **The bankrupt may answer** denying his bankruptcy. U. S. Supreme Ct. Bankr. Forms, No. 6; 89 Fed. xxx. And it has been held that the bankrupt in answering a petition for involuntary bankruptcy may not only deny insolvency but may also set up a defense or counterclaim which may show him to have been solvent at the time when it is adjudged that the act of bankruptcy was committed. *In re* Paige, 99 Fed. 538, 3 Am. Bankr. Rep. 679, where it is said that the law does not contemplate that the bankrupt shall be confined to the form prescribed by the supreme court and that he can answer only such facts as are suggested therein.

Sufficiency of denial.— A deed of general assignment for the benefit of creditors is made by the Act alone sufficient to justify an adjudication in involuntary bankruptcy against the debtor making such deed, without reference to his solvency at the time of the filing of the petition; hence the denial of insolvency by way of defense to a petition based upon the making of a deed of general assignment is not a good plea. George M. West Co. *v.* Lea, 174 U. S. 590, 19 S. Ct. 836, 43 L. ed. 1098, 2 Am. Bankr. Rep. 463.

Superfluous allegation of insolvency in the petition need not be traversed. George M. West Co. *v.* Lea, 174 U. S. 590, 19 S. Ct. 836, 43 L. ed. 1098, 2 Am. Bankr. Rep. 463 [*affirming* 91 Fed. 237].

Effect of denial.— Where, to a petition in proceedings in involuntary bankruptcy, a creditor answers, alleging that the alleged bankrupt is not insolvent, and the case is submitted on the pleadings, the allegations of the answer must be taken as true, and an adjudication of bankruptcy upon the pleadings is error. *In re* Taylor, 102 Fed. 728, 42 C. C. A. 1, 4 Am. Bankr. Rep. 515.

51. *In re* Cornwall, 9 Blatchf. (U. S.) 114, 6 Fed. Cas. No. 3,250, 6 Am. L. Rev. 365, 6 Nat. Bankr. Reg. 305; *In re* Quimette, 1 Sawy. (U. S.) 47, 18 Fed. Cas. No. 10,622, 3 Nat. Bankr. Reg. 566; *In re* Scrafford, 21 Fed. Cas. No. 12,557, 3 Centr. L. J. 252, 14 Nat. Bankr. Reg. 184.

That bankrupt is within the exceptions of Bankr. Act (1898), § 4, may be raised by any creditor; the defense is not personal to the bankrupt, as it goes to the jurisdiction of the court. *In re* Taylor, 102 Fed. 728, 42 C. C. A. 1, 4 Am. Bankr. Rep. 515.

52. *In re* Williams, 29 Fed. Cas. No. 17,706, 14 Nat. Bankr. Reg. 132; *In re* Osage Valley, etc., R. Co., 18 Fed. Cas. No. 10,592, 1 Centr. L. J. 33, 9 Nat. Bankr. Reg. 281.

It is not a defense to a petition in involuntary bankruptcy that the petitioning creditors had previously agreed to compromise with the debtor on receiving half the amount of their claims, when it appears that the composition has not been paid, and that half of the debts alleged to be due the petitioning creditors would be a sufficient sum to enable them to maintain the petition. Simonson *v.* Sinsheimer, 95 Fed. 948 [*reversing* 92 Fed. 904]. In proceedings in involuntary bankruptcy, the allegation of the petition that the petitioning creditors have provable claims which amount in the aggregate, in excess of the value of securities held by them, to five hundred dollars is not met by an answer that they had not provable claims to the required amount at the time of the commission of the act of bankruptcy charged. *In re* John A. Etheridge Furniture Co., 92 Fed. 329, 1 Am. Bankr. Rep. 112.

53. *In re* Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730; *In re* Berner, 3 Am. Bankr. Rep. 325.

54. *In re* Skelley, 3 Biss. (U. S.) 260, 22 Fed. Cas. No. 12,921, 5 Nat. Bankr. Reg. 214.

If the act of bankruptcy consists of a transfer or conveyance by the debtor with intent to hinder, delay, or defraud his creditors, the solvency of such debtor at the time of the filing of the petition is a complete defense. Bankr. Act (1898), § 3*c*; George M.

(IV) *List of Creditors to Be Filed With Answer.* If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a large number of creditors, there must be filed with the answer a list under oath of all the creditors with their addresses.[55]

(V) *Prior Defects Waived by Answer.* Where the answers of all the parties in interest contain no objection to the form and substance of the petition, the parties will be deemed to have waived all formal defects in the petition which are not jurisdictional.[56]

d. Replication. If the petitioning creditors wish to contest the questions raised by the answer a replication should be put in denying the allegations and a trial should be had thereon before an adjudication.[57]

6. Conduct of Proceedings — a. Determination of Issues — (I) *By Judge.* If the bankrupt or any of his creditors shall appear within the time limited,[58] and controvert the facts alleged in the petition,[59] the judge must determine as soon as may be the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by the Act,[60] and make the adjudication or dismiss the petition.[61]

(II) *By Referee.* If the judge is absent from the district or the division of the district in which the petition is pending on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors the clerk shall forthwith refer the case to the referee.[62]

West Co. *v.* Lea, 174 U. S. 590, 19 S. Ct. 836, 43 L. ed. 1098, 2 Am. Bankr. Rep. 463.

As to effect of Bankr. Act (1898), § 3*c* see *supra*, V.

As to what constitutes insolvency see *supra*, I, A.

55. Bankr. Act (1898), § 59*d*.

Notice to creditors upon filing list.—Upon the filing of such list the court shall cause all the creditors named therein to be notified of the pendency of the petition, and shall delay the hearing thereon for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed. Bankr. Act (1898), §§ 59*d*, 59*f*.

As to manner of service of notice see Bankr. Act (1898), § 39*a* (4); and *supra*, VI, B, 4, a.

Where but one creditor has filed a petition against his debtor, alleging that the creditors are less than twelve in number, but there are in fact more than twelve, other creditors may be permitted to join in the petition, and the original petition may be amended. *In re* Mercur, 95 Fed. 634, 2 Am. Bankr. Rep. 626.

56. Leidigh Carriage Co. *v.* Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383.

57. *In re* Taylor, 102 Fed. 728, 42 C. C. A. 1, 4 Am. Bankr. Rep. 515.

58. As to time within which to appear and file pleadings see Bankr. Act (1898), § 18*b*; and *supra*, VI, B, 5, b.

As to effect of appearance see *supra*, VI, B, 5.

59. Default by bankrupt or creditors.— If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors the judge shall, on the next day, if present, or as soon as practicable thereafter, make the adjudication or dismiss the petition. Bankr. Act (1898), § 18*e*.

If bankrupt answers after the time required, the case should be adjudicated as if he had failed to plead. Bray *v.* Cobb, 91 Fed. 102, 1 Am. Bankr. Rep. 153.

60. Bankr. Act (1898), § 19; and *infra*, VI, B, 6, a, (III).

For form of order directing jury trial see U. S. Supreme Ct. Bankr. Forms, No. 7; 89 Fed. xxx.

61. Bankr. Act (1898), § 18*d*. *Compare* Bankr. Act (1867), § 41.

62. Bankr. Act (1898), § 18*f*. Under this section the clerk cannot refer a petition in involuntary bankruptcy to the referee for adjudication, except in cases where no issue is made by the bankrupt or any creditor upon the facts averred in the petition, and where the judge is absent from the district, or from the division of the district where the petition is filed, on the next day after the last day on which pleadings may be filed. *In re* L. Humbert Co., 100 Fed. 439, 4 Am. Bankr. Rep. 76. But *compare* Clark *v.* American Mfg., etc., Co., 101 Fed. 962, 42 C. C. A. 120, 4 Am. Bankr. Rep. 351, holding that where answers are filed to a petition in involuntary bankruptcy, it is proper for the court to refer the case to a referee in bankruptcy to take and return the evidence and report upon the questions presented; and it is no ground of objection to such a course that the only questions arising in the case are questions of law, the action of the referee being always subject to the control of the court. See also, generally, *supra*, III, D, 3; *infra*, VIII.

The order referring a case to a referee

(III) *By Jury.* A person against whom an involuntary petition has been filed is entitled to a jury trial in respect to the question of his insolvency and as to any act of bankruptcy alleged in such petition.[63]

b. Evidence — (I) *In General.* Evidence may be introduced in proceedings to determine the question of bankruptcy in the same manner as in other civil proceedings.[64]

(II) *Burden of Proof* — (A) *In General.* As a general rule the burden of proof is upon the petitioning creditor to show that an act of bankruptcy has been committed;[65] and the same is true as to any other fact requisite to confer jurisdiction upon the court.[66]

(B) *As to Insolvency.* When the act of bankruptcy consists of a transfer or conveyance of his property to hinder, delay, or defraud his creditors;[67] or when the allegation of insolvency is denied by the bankrupt, and he fails to appear in court on the hearing with his books, papers, and accounts and submit to an examination as to matters tending to establish his solvency, the burden of proving his solvency rests upon the bankrupt.[68] In all other cases the burden of

shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection from arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall be forthwith sent to the referee by mail, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings except such as are required by the Act or by these General Orders to be had before the judge shall be had before the referee. U. S. Supreme Ct. Bankr. G. O. No. 12.

63. Bankr. Act. (1898), § 19*a*; also *supra*, II, A, 3.

It would seem, since a bankruptcy proceeding is a proceeding in equity, that the only issues to be submitted as of right to a jury are those mentioned in this section. *In re* Christensen, 101 Fed. 802, 4 Am. Bankr. Rep. 99; Simonson *v.* Sinsheimer, 100 Fed. 426, 40 C. C. A. 474, 3 Am. Bankr. Rep. 824; Collier Bankr. (3d ed.) 225.

Application for such trial must be filed at or before the time within which an answer may be filed. If such application is not filed within such time a trial by jury shall be deemed to have been waived. Bankr. Act (1898), § 19*a*; Bray *v.* Cobb, 91 Fed. 102, 1 Am. Bankr. Rep. 153.

64. Bankr. Act (1898), § 21*a*; *In re* Bloch, 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300; *In re* Elmira Steel Co., 109 Fed. 456, 5 Am. Bankr. Rep. 484.

As to the sufficiency of such evidence see Lott *v.* Young, 109 Fed. 798, 48 C. C. A. 654, 6 Am. Bankr. Rep. 436; *In re* Rogers' Milling Co., 102 Fed. 687, 4 Am. Bankr. Rep. 540; *In re* Lange, 97 Fed. 197, 3 Am. Bankr. Rep. 231.

Court may compel the attendance of witnesses in person, who are competent witnesses under the laws of the state in which the proceedings are pending, to appear in court or before the referee to be examined concerning the matters in issue. Bankr. Act (1898), § 21*a*. See also *supra*, III, D, 3, f.

Examination of wife of bankrupt.— Where a state statute provides that a wife is not a competent witness as to confidential communications between her and her husband, she cannot be compelled in a bankruptcy proceeding to reveal such confidential matters. *In re* Cohn, 104 Fed. 328, 5 Am. Bankr. Rep. 16; *In re* Mayer, 97 Fed. 328, 3 Am. Bankr. Rep. 222; *In re* Jefferson, 96 Fed. 826, 3 Am. Bankr. Rep. 174; *In re* Fowler, 93 Fed. 417, 1 Am. Bankr. Rep. 555.

65. *In re* Parker, 11 Fed. 397, 18 Fed. Cas. No. 10,721 *mem.*, 19 Nat. Bankr. Reg. 340; *In re* Price, 19 Fed. Cas. No. 11,411, 8 Nat. Bankr. Reg. 514; *In re* Oregon Bulletin Printing, etc., Co., 18 Fed. Cas. No. 10,559, 1 Cinc. L. Bul. 87, 13 Nat. Bankr. Reg. 503; *In re* King, 14 Fed. Cas. No. 7,783, 10 Nat. Bankr. Reg. 104. See also *In re* Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123.

66. *In re* Hymes, 7 Ben. (U. S.) 427, 12 Fed. Cas. No. 6,986, 10 Nat. Bankr. Reg. 433. *Compare* Hill *v.* Levy, 98 Fed. 94, 3 Am. Bankr. Rep. 374, holding that where the respondent in a petition in involuntary bankruptcy resists an adjudication on the ground that the debt of the petitioning creditor (evidenced by a promissory note of which he is the indorsee) is invalid under the state statute against gaming, because the note was given to respondent's brokers to cover his losses arising out of certain purchases and sales of wheat negotiated for him by said brokers on the board of trade, he must assume the burden of proving, by clear and conclusive evidence, that the dealings in question were mere speculations in the rise and fall of prices, and that neither party contemplated any actual sale and delivery of the wheat; failing this the debt will be provable in bankruptcy, and if sufficient in amount will warrant an adjudication.

67. Bankr. Act (1898), § 3*c*; *In re* West, 108 Fed. 940, 48 C. C. A. 155, 5 Am. Bankr. Rep. 734.

68. Bankr. Act (1898), § 3*d*; *In re* Rome

proving the insolvency of the bankrupt, when material, is upon the petitioning creditors.[69]

(III) *Depositions.* The right to take depositions in proceedings in bankruptcy is determined and enjoyed according to the laws of the United States relating to the taking of depositions.[70]

7. Abatement of Proceedings. The Act provides that the death or insanity of the bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane.[71]

8. Dismissal or Withdrawal of Petition. An involuntary petition may be dismissed if the issues presented by the pleadings are decided adversely to the petitioning creditors, or in case no pleadings have been filed by the alleged bankrupt or any of his creditors, if the facts alleged in the petition are not sufficient to warrant the adjudication of bankruptcy.[72] Where a creditor joins in a proceeding in involuntary bankruptcy and allows a petition to be filed and afterwards obtains a settlement of his claim, he cannot withdraw from the proceeding if any of the creditors object.[73] Where an original petition has been dismissed other creditors may file a new petition against the debtor, but cannot intervene and reopen the original petition.[74]

9. Preservation of Property Prior to Adjudication — a. Seizure of Property. Upon specific proof by affidavit that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy or has neglected, or is neglecting, or is about to neglect, his property, that it has thereby deteriorated, or is deteriorating, or is about to deteriorate, in value, the judge may issue a warrant to the marshal to seize and hold such property subject to further orders.[75]

Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123. Under this section a simple denial of the fact of insolvency in the answer by an alleged bankrupt (who had previously assigned all his property for the benefit of creditors), unaccompanied by any affidavits, schedules, or other evidence, does not raise such an issue of solvency as is contemplated by the Act, nor sustain the burden of proof. Bray *v.* Cobb, 91 Fed. 102, 1 Am. Bankr. Rep. 153.

69. See *In re* Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123.

70. Bankr. Act (1898), § 21*b*; U. S. Rev. Stat. (1878), §§ 861–870.

See also, generally, Depositions.

Notice of the taking of depositions must be filed with the referee if the hearing is before him. Bankr. Act (1898), § 21*c*.

71. Bankr. Act (1898), § 8. And in *In re* Hicks, 107 Fed. 910, 6 Am. Bankr. Rep. 182, it was held that after an involuntary petition has been filed the proceedings in bankruptcy are commenced and that such proceedings are not abated, though the bankrupt die prior to an adjudication.

See also, generally, Abatement and Revival, 1 Cyc. 10.

72. Bankr. Act (1898), § 18*d*, *e*.

Form of dismissal is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 11; 89 Fed. xxxiii.

Until after notice to all the creditors neither a voluntary nor an involuntary petition may be dismissed by the petitioner or petitioners, or for want of prosecution or by consent of parties. Bankr. Act (1898), § 59*g*. *Compare In re* Gillette, 104 Fed. 769, 5 Am. Bankr. Rep. 119, holding that no power is vested in a court of bankruptcy by the Act of 1898 to compel a creditor to become a petitioner in an involuntary proceeding, nor is it the province of the court to serve notice on creditors who have not appeared of the proposed dismissal of a petition because of the insufficient number of eligible creditors joining therein.

73. *In re* Bedingfield, 96 Fed. 190, 2 Am. Bankr. Rep. 355. *Compare*, under the former Act, *In re* Heffron, 6 Biss. (U. S.) 156, 11 Fed. Cas. No. 6,321, 6 Chic. Leg. N. 358, 10 Nat. Bankr. Reg. 213; *In re* Indianapolis, etc., R. Co., 5 Biss. (U. S.) 287, 13 Fed. Cas. No. 7,023, 18 Int. Rev. Rec. 79, 5 Leg. Gaz. (Pa.) 275, 8 Nat. Bankr. Reg. 302, 21 Pittsb. Leg. J. (Pa.) 4; *In re* Sargent, 21 Fed. Cas. No. 12,361, 13 Nat. Bankr. Reg. 144, 1 N. Y. Wkly. Dig. 435.

Where a majority of the petitioning creditors have consented to a dismissal of the petition the minority, however small, can insist upon an adjudication if an act of bankruptcy has been committed. *In re* Cronin, 98 Fed. 584, 3 Am. Bankr. Rep. 552.

74. Neustadter *v.* Chicago Dry-Goods Co., 96 Fed. 830, 3 Am. Bankr. Rep. 96, holding that the fact that more than four months have elapsed since the act of bankruptcy on which the petition is founded is no reason for the allowance of a petition by creditors to reopen and join in the original petition.

75. Bankr. Act (1898), § 69. *Compare* proceedings under Bankr. Act (1898), § 2 (3). See also *supra*, II, B, 12; III, B, 1; III, C, 2.

b. Appointment of Marshal or Receiver. It is also provided that courts of bankruptcy may appoint receivers or marshals upon application of parties in interest in case the court shall find it absolutely necessary for the preservation of estates to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified.[76] The bankruptcy courts may also authorize the receivers and marshals so appointed to conduct the business of bankrupts for limited periods, if necessary for the best interests of estates.[77]

c. Marshal's Liability. The responsibility of determining the ownership of property seized by the marshal rests upon him.[78]

Construing Bankr. Act (1867), § 40, the court of appeals of the state of New York held that it related only to property belonging to and in the possession of the debtor and over which he had control. Doyle *v.* Sharpe, 74 N. Y. 154 [*citing In re* Harthill, 4 Ben. (U. S.) 448, 11 Fed. Cas. No. 6,161, 4 Nat. Bankr. Reg. 392; *In re* Holland, 12 Fed. Cas. No. 6,605, 12 Nat. Bankr. Reg. 403, 1 N. Y. Wkly. Dig. 126]; but this case was overruled by the United States supreme court. Sharpe *v.* Doyle, 102 U. S. 686, 26 L. ed. 277. See also Feibelman *v.* Packard, 109 U. S. 421, 3 S. Ct. 289, 27 L. ed. 984.

Form of warrant of seizure is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 8; 89 Fed. xxxi.

Nature of remedy.— In *In re* Kelly, 91 Fed. 504, 506, 1 Am. Bankr. Rep. 306, Hammond, J., said: "It is desired to . . . call attention to the fact that this section 69 was not designed as a general grab-all attachment proceeding, nor a statutory remedy for the seizure of property fraudulently conveyed by an alleged insolvent debtor, nor is it in any sense to be made a summary proceeding against anybody but the alleged bankrupt, nor against any property except that which is in his own hands, or those of his acknowledged agents, and certainly not against any one claiming adversely to him."

Property in hands of adverse claimant.— In Bardes *v.* Hawarden First Nat. Bank, 178 U. S. 524, 20 S. Ct. 1000, 44 L. ed. 1175, 4 Am. Bankr. Rep. 163, it was said: "The powers conferred on the courts of bankruptcy by clause 3 of § 2, and by § 69, after the filing of a petition in bankruptcy, and in case it is necessary for the preservation of property of the bankrupt, to authorize receivers or the marshals to take charge of it until a trustee is appointed, can hardly be considered as authorizing a forcible seizure of such property in the possession of an adverse claimant." But see Bryan *v.* Bernheimer, 181 U. S. 438, 45 L. ed. 814, 5 Am. Bankr. Rep. 623, where the court said in effect that this statement was upon a question not arising in the case then before the court, which related exclusively to jurisdiction of a suit by the trustee after his appointment, and might therefore be deemed a dictum and not controlling. Section 69 is intended to authorize the court to prevent the wasting, deterioration, or loss of the bankrupt's property in his possession pending the hearing on the petition for adjudication, but it is not intended to authorize a taking away from third parties property to which they were entitled. It does not authorize the seizure of property which has passed from the possession of the bankrupt before the institution of proceedings under the Act. *In re* Rockwood, 91 Fed. 363, 1 Am. Bankr. Rep. 272.

Property subsequently claimed by third person.— Where the marshal, acting under his warrant, seizes the estate of the bankrupt peaceably and quietly and without protest, and thereby becomes possessed of property which is subsequently claimed by a third person, the court will not direct the marshal to turn over the property so seized to the claimant, and thereby compel the trustee to institute suit in a court of proper jurisdiction for the recovery thereof. *In re* Bender, 106 Fed. 873, 5 Am. Bankr. Rep. 632.

76. Bankr. Act (1898), § 2 (3). See also *supra*, II, B, 12.

Jurisdiction over bankrupt's property sold by assignee.— Where an assignee for the benefit of creditors sells property assigned after and with notice of the petition in bankruptcy, but before the appointment of a trustee and the creditors petition in the district court for an order requiring that the property be taken into the custody of the marshal of such court for the benefit of the bankrupt's estate, and the vendee does not protest against the jurisdiction of the court of bankruptcy, but submits his claim to that court and asks for such orders as may be necessary for his protection, the district court may try the title to the goods involved in the controversy by summary proceedings, and may decree that the vendee has no title superior to the title of the bankrupt's estate. Bryan *v.* Bernheimer, 181 U. S. 188, 45 L. ed. 814, 5 Am. Bankr. Rep. 623.

Bankr. Act (1898), § 2 (3), distinguished from Bankr. Act (1898), § 69.— It will be noticed that the authority here conferred by Bankr. Act (1898), § 2 (3), may be exercised at any time prior to the qualification of the trustee, without reference to the adjudication of bankruptcy; it differs in this respect from a warrant of seizure issued under Bankr. Act (1898), § 69, which can only be granted while the petition is pending. Bryan *v.* Bernheimer, 181 U. S. 188, 45 L. ed. 814, 5 Am. Bankr. Rep. 623.

77. Bankr. Act (1898), § 2 (5). See also II, B, 12; III, B, 1; III, C, 2.

78. If he should seize the property of another, although in good faith, he may be held for any damages which the party injured may sustain; the warrant is no protection to him

d. Marshal's Return. The marshal is required to return under oath a statement of his actual and necessary expenses in the service of the warrant, and for the custody of the property, and other services, and the actual and necessary expenses paid by him, with vouchers therefor, whenever procurable, together with a statement that the amounts charged by him are just and reasonable.[79]

e. Petitioners' Bond. Before a warrant of seizure may issue the petitioners or applicants therefor are required to file the bond required by the provisions of the Act.[80]

f. Release of Property Seized. Property seized must be released if the bankrupt gives a bond in the sum which shall be fixed by the judge with such sureties as he shall approve, conditioned to turn over such property or to pay the value thereof in money to the trustee in the event he is adjudged a bankrupt pursuant to the petition.[81]

10. The Adjudication. If upon the pleadings and the proof it appears that the debtor has been guilty of an act of bankruptcy the court must adjudge him to be a bankrupt.[82]

11. Costs. In cases of involuntary bankruptcy when the debtor resists the adjudication, and the court, after a hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover and be paid out of the estate the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed the debtor shall recover like costs against the petitioner.[83]

in such cases. Marsh *v.* Armstrong, 20 Minn. 81, 18 Am. Rep. 355; *In re* Vogel, 7 Blatchf. (U. S.) 18, 28 Fed. Cas. No. 16,982, 2 Am. L. T. 154, 1 Am. L. T. Bankr. Rep. 170, 3 Nat. Bankr. Reg. 198; *In re* Muller, Deady (U. S.) 513, 17 Fed. Cas. No. 9,912, 3 Nat. Bankr. Reg. 329.

79. U. S. Supreme Ct. Bankr. G. O. No. 19.

Form of the return by the marshal is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 8; 89 Fed. xxxi.

80. **Bankr. Act (1898), § 3e,** provides that before the warrant is issued the petitioners or applicants are required to file, where an involuntary petition has been filed, a bond, with at least two good and sufficient sureties, who shall reside within the jurisdiction of the court, to be approved by the judge thereof, in such sum as the court shall direct, conditioned for the payment to the bankrupt, or his or her personal representatives, of all costs and expenses and damages occasioned by the seizure and detention of the property in case such petition is dismissed.

Bankr. Act (1898), § 69, provides that before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained.

Forms of bonds for release are prescribed. U. S. Supreme Ct. Bankr. Forms, Nos. 9, 10; 89 Fed. xxxii.

81. Bankr. Act (1898), § 69*a*.

82. Bankr. Act (1898), § 18. See also *In re* Columbia Real-Estate Co., 101 Fed. 965, 4 Am. Bankr. Rep. 411; *In re* L. Humbert Co., 100 Fed. 439, 4 Am. Bankr. Rep. 76; Mahoney *v.* Ward, 100 Fed. 278, 3 Am. Bankr. Rep. 770; *In re* Harper, 100 Fed. 266, 3 Am. Bankr. Rep. 804.

Form of order of adjudication is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 12; 89 Fed. xxxiii. This form should be substantially complied with, with such alterations as may be necessary to suit the circumstances of any particular case. U. S. Supreme Ct. Bankr. G. O. No. 38; *In re* Hill, 7 Ben. (U. S.) 378, 12 Fed. Cas. No. 6,484, 1 Am. L. T. Rep. N. S. 421, 20 Int. Rev. Rec. 81, 10 Nat. Bankr. Reg. 133. See also *In re* Boston, etc., R. Co., 9 Blatchf. (U. S.) 409, 3 Fed. Cas. No. 1,678, 6 Am. L. Rev. 582, 6 Nat. Bankr. Reg. 222.

The term "adjudication" is defined in the Act. Bankr. Act (1898), § 1 (2), *supra*, note 8, p. 238.

Necessity of notice to creditors.— On a petition in involuntary bankruptcy against a corporation, there can be no adjudication or reference of the case by the clerk to the referee, on a written admission by the respondent of the acts of bankruptcy charged, and a waiver of service and of the time for appearance. Since creditors, as well as the alleged bankrupt, have the right to appear and plead to the petition within ten days after the return-day, that day must be fixed by the issuance of a subpœna, and the case must remain in the clerk's office until the ten days have expired. *In re* L. Humbert Co., 100 Fed. 439, 4 Am. Bankr. Rep. 76.

83. U. S. Supreme Ct. Bankr. G. O. No. 34. See also, generally, *supra*, II, B, 15.

For priority of payment out of estate see *infra*, XVIII, H, 1, b.

The provision applies only to cases where an application to seize and hold the property of the alleged bankrupt pending the hearing was granted, and bond given. *In re* Ghiglione, 93 Fed. 186, 1 Am. Bankr. Rep. 580.

Attorney's fees.— The attorneys for the petitioning creditors in involuntary proceedings, for the bankrupt in involuntary pro-

VII. SETTING ASIDE ADJUDICATION.

An adjudication of bankruptcy is conclusive as to the matters decreed by the order, if made by a court of competent jurisdiction,[84] and such adjudication cannot be attacked collaterally.[85] It can only be set aside upon an application made therefor by motion,[86] notice of which should be served on the bankrupt.[87] Such

ceedings while performing the duties prescribed by the Bankruptcy Act, and for the bankrupt in voluntary cases are entitled to a reasonable fee. Bankr. Act (1898), 64*b* (3); *In re* Smith, 108 Fed. 39, 5 Am. Bankr. Rep. 559; *In re* Anderson, 103 Fed. 854, 4 Am. Bankr. Rep. 640; *In re* Lewin, 103 Fed. 850, 4 Am. Bankr. Rep. 632; *In re* Terrill, 103 Fed. 781, 4 Am. Bankr. Rep. 625; *In re* Rude, 101 Fed. 805, 4 Am. Bankr. Rep. 319; *In re* Little River Lumber Co., 101 Fed. 558, 3 Am. Bankr. Rep. 682; *In re* Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235; *In re* Dreeben, 101 Fed. 110, 4 Am. Bankr. Rep. 146; *In re* Curtis, 100 Fed. 784, 41 C. C. A. 59, 4 Am. Bankr. Rep. 17; *In re* O'Connell, 98 Fed. 83, 3 Am. Bankr. Rep. 422; *In re* Burrus, 97 Fed. 926, 3 Am. Bankr. Rep. 296; *In re* Matthews, 97 Fed. 772, 3 Am. Bankr. Rep. 265; *In re* Silverman, 97 Fed. 325, 3 Am. Bankr. Rep. 227; *In re* Carolina Cooperage Co., 96 Fed. 950, 3 Am. Bankr. Rep. 154; *In re* Kross, 96 Fed. 816, 3 Am. Bankr. Rep. 187; *In re* Woodard, 95 Fed. 955, 2 Am. Bankr. Rep. 692; *In re* Michel, 95 Fed. 803; *In re* J. W. Harrison Mercantile Co., 95 Fed. 123, 2 Am. Bankr. Rep. 419; *In re* Stotts, 93 Fed. 438, 1 Am. Bankr. Rep. 641; *In re* Beck, 92 Fed. 889, 1 Am. Bankr. Rep. 535. The contempt of the bankrupt for disobedience of the orders of the court does not affect the right of his attorney to an allowance, where the misconduct of the bankrupt was without fault on the part of such attorney. *In re* Mayer, 101 Fed. 695, 4 Am. Bankr. Rep. 238.

Extra compensation to expert witnesses above the statutory witness fee of one dollar and fifty cents per day and mileage cannot be taxed as costs, or allowed against a losing party, in a court of bankruptcy; and the court will not be bound to make such an allowance because counsel have so agreed, especially where the agreement is not in writing. *In re* Carolina Cooperage Co., 96 Fed. 604.

84. In the case of a voluntary proceeding it is conclusive as to the insolvency of the petitioner, his willingness to be adjudged a bankrupt, and his desire to avail himself of the benefits of the Act. *In re* Fowler, 1 Lowell (U. S.) 161, 9 Fed. Cas. No. 4,998, 1 Nat. Bankr. Reg. 680. But it is not conclusive as to any fact which tends to defeat the jurisdiction of the court. *In re* Goodfellow, 1 Lowell (U. S.) 510, 10 Fed. Cas. No. 5,536, 1 Am. L. T. Bankr. Rep. 179, 3 Am. L. T. Bankr. Rep. 69, 3 Nat. Bankr. Reg. 452.

85. Chapman *v.* Brewer, 114 U. S. 158, 5 S. Ct. 799, 29 L. ed. 83; *In re* Getchell, 8 Ben. (U. S.) 256, 10 Fed. Cas. No. 5,371.

Impeachment of adjudication.— An adjudication in bankruptcy against a corporation, made on the day of the filing of an involuntary petition against it, although the corporation appears and makes no objection, but admits the alleged acts of bankruptcy, is not conclusive upon creditors who do not appear. Bankr. Act (1898), § 18, which requires the issuance and service of a subpœna on the filing of an involuntary petition, and provides that "the bankrupt or any creditor may appear and plead to the petition within ten days after the return day," gives to creditors a substantial right to the limitation of a time within which they may be heard, which is not derived through the bankrupt, and of which they cannot be deprived by any act of such bankrupt, nor by the court; and they may attack the validity of such adjudication collaterally in proceedings previously instituted by them in another district. *In re* Elmira Steel Co., 109 Fed. 456, 5 Am. Bankr. Rep. 484. But a decree of the district court, sitting in bankruptcy, reciting that "upon due consideration had" the respondent corporation "is adjudged a bankrupt, within the true intent and meaning of the acts of congress relating to bankruptcy," cannot be impeached collaterally, as for a want of jurisdiction, merely because the petition omitted to allege that the corporation belonged to one of the classes made subject to be adjudicated bankrupt in involuntary proceedings. *In re* Columbia Real-Estate Co., 101 Fed. 965, 4 Am. Bankr. Rep. 411. So where the respondent in a petition in involuntary bankruptcy denies his alleged indebtedness to the petitioning creditor, and takes issue on the validity and the consideration of the note set forth in the petition and on which such creditor claims, and upon evidence offered on both sides the court finds the allegations of the petition to be true and makes an adjudication of bankruptcy, such adjudication is conclusive evidence of the validity of the petitioner's claim when the note is presented for allowance as a claim against the bankrupt's estate, and it cannot be disputed either by the bankrupt or by any creditor who joined in the proceedings and opposed the adjudication. *In re* Henry Ulfelder Clothing Co., 93 Fed. 409, 3 Am. Bankr. Rep. 425.

86. *In re* Great Western Tel. Co., 5 Biss. (U. S.) 359, 10 Fed. Cas. No. 5,739, 5 Chic. Leg. N. 493; *In re* Dunn, 12 Blatchf. (U. S.) 42, 8 Fed. Cas. No. 4,173, 9 Nat. Bankr. Reg. 487.

87. *In re* Bush, 4 Fed. Cas. No. 2,222, 6 Nat. Bankr. Reg. 179, 6 West. Jur. 274, holding that the bankrupt has an interest.

motion should be made within a reasonable time after the entry of the order.[88] It may be granted for sufficient cause in the discretion of the court, when made by a person who has an interest in the proceedings.[89]

VIII. ORDER OF REFERENCE.

A. In General. After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee, or specially with only limited authority to act in the premises, or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of the parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.[90] A copy of the order of reference must be sent by mail or delivered personally to the referee or other officer of the court; and thereafter all the proceedings, except such as are required by the Act or the General Orders to be had before the judge,[91] shall be had before the referee.[92]

B. Transfer of Case From One Referee to Another. The judge may at any time for the convenience of parties or for cause transfer a case from one referee to another.[93]

IX. SCHEDULES IN INVOLUNTARY CASES.[94]

A. Furnished by Bankrupt. It is made the duty of the bankrupt within

88. *In re* Neilson, 17 Fed. Cas. No. 10,090, 7 Nat. Bankr. Reg. 505; Leiter *v.* Payson, 6 Chic. Leg. N. 157, 9 Nat. Bankr. Reg. 205, 15 Fed. Cas. No. 8,226 *mem.*

89. *In re* Great Western Tel. Co., 5 Biss. (U. S.) 359, 10 Fed. Cas. No. 5,739, 5 Chic. Leg. N. 493; *In re* Dunn, 12 Blatchf. (U. S.) 42, 8 Fed. Cas. No. 4,173, 9 Nat. Bankr. Reg. 487; *In re* De Forest, 7 Fed. Cas. No. 3,745, 9 Nat. Bankr. Reg. 278.

An adjudication will not be set aside on the ground that a due proportion of creditors did not join in the petition, unless fraud is shown. *In re* Duncan, 8 Ben. (U. S.) 365, 8 Fed. Cas. No. 4,131, 14 Nat. Bankr. Reg. 18; *In re* McKinley, 7 Ben. (U. S.) 562, 15 Fed. Cas. No. 8,864; *In re* Funkenstein, 3 Sawy. (U. S.) 605, 9 Fed. Cas. No. 5,158, 14 Nat. Bankr. Reg. 213. Nor is the pendency of a prior petition in another district sufficient ground for setting aside an adjudication. *In re* Harris, 6 Ben. (U. S.) 375, 11 Fed. Cas. No. 6,111. And where an admission of bankruptcy is falsely made by a debtor the adjudication will not be set aside. *In re* Thomas, 23 Fed. Cas. No. 13,891, 7 Chic. Leg. N. 187, 11 Nat. Bankr. Reg. 330.

Who may make application.— Application cannot be made by a mere creditor. Karr *v.* Whittaker, 14 Fed. Cas. No. 7,613, 5 Nat. Bankr. Reg. 123; *In re* Bush, 4 Fed. Cas. No. 2,222, 6 Nat. Bankr. Reg. 179, 6 West. Jur. 274. But may be made by an attaching creditor. Fogarty *v.* Gerrity, 1 Sawy. (U. S.) 233, 9 Fed. Cas. No. 4,895, 5 Am. L. Rev. 163, 4 Nat. Bankr. Reg. 450. And by a creditor who is alleged to have secured a preference. *In re* Derby, 6 Ben. (U. S.) 232, 7 Fed. Cas. No. 3,815, 6 Alb. L. J. 422, 8 Nat. Bankr. Reg. 106.

90. Bankr. Act (1898), § 22*a*. See also *supra*, III, D.

The form of the order of reference after an adjudication is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 14; 89 Fed. xxxv.

The order of reference must state a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt is subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection from arrest to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. U. S. Supreme Ct. Bankr. G. O. No. 12. The protection from arrest here referred to is that accorded bankrupts in the cases mentioned in Bankr. Act (1898), § 9*a*. See *infra*, XVII, C.

91. **Applications for compositions or discharge** are not within the jurisdiction of referees. See Bankr. Act (1898), § 38 (4); and *supra*, III, D, 3, c, (II); *infra*, XIV, C. But by U. S. Supreme Ct. Bankr. G. O. No. 12, par. 3, it is provided that "applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States, or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts."

Applications for discharge are heard by the judge. Bankr. Act (1898), § 14*b*. See *infra*, XIX, B.

Confirmations of compositions are made by the judge. Bankr. Act (1898), § 12*d*. See *infra*, XIV, C.

92. U. S. Supreme Ct. Bankr. G. O. No. 12, par. 1.

93. Bankr. Act (1898), § 22*b*. See also *supra*, II, A, 2, b.

94. As to schedules in voluntary cases see *supra*, VI, A, 1.

ten days after the adjudication in involuntary bankruptcy to prepare, make oath to, and file in court a schedule of his property, showing the amount and kind of such property, the location thereof, and its money value in detail; and also in connection therewith a list of his creditors, showing their residences, if known, if unknown that fact to be stated, the amount due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to.[95]

B. Furnished by Petitioning Creditor. In all cases in involuntary bankruptcy in which the bankrupt is absent or cannot be found, the petitioning creditor must file within five days after the date of the adjudication a schedule giving the names and places of residence of all the creditors of the bankrupt according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish the schedule as aforesaid.[96]

C. Prepared by Referee. It is made the duty of the referee to prepare and file schedules of property and lists of creditors required to be filed by the bankrupt, or cause the same to be done, whenever bankrupts fail, refuse, or neglect to do so.[97]

X. MEETINGS OF CREDITORS.

A. First Meeting — 1. When and Where Held. The referee is required to cause the first meeting of the creditors of the bankrupt to be held not less than ten nor more than thirty days after the adjudication of bankruptcy,[98] at the county seat of the county at which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient for a place of meeting of the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court or referee shall fix a place for the meeting which is the most convenient for the parties in interest.[99]

2. Notice of. Creditors are entitled to at least ten days' notice, by mail, to their respective addresses, as they appear in the list of creditors of the bankrupt,[1] of the first meeting.[2] Such notices must be published at least once, and may be published such additional number of times as the court or referee may direct;

95. Bankr. Act (1898), § 7 (8).

Such schedules and lists are to be in triplicate, one copy for the clerk, one for the referee, and one for the trustee. Bankr. Act (1898), § 7 (8).

Such schedules are to be in the same form as in the case of schedules accompanying voluntary petitions. U. S. Supreme Ct. Bankr. Forms, No. 1; 89 Fed. xv *et seq.*; and *supra*, VI, A, 1.

96. U. S. Supreme Ct. Bankr. G. O. No. 9.

97. Bankr. Act (1898), § 39 (6). See also *supra*, III, D, 4, g.

This duty is to be performed only after an order has been issued compelling the bankrupt to file such schedules, and he has neglected or refused to do so. Bankr. Act (1898), § 7 (8).

98. If such meeting should by any mischance not be held within such time the court shall fix the date, as soon as may be thereafter, when it shall be held. Bankr. Act (1898), § 55*a*.

99. Bankr. Act (1898), § 55*a*.

1. A creditor may file with the referee a request that notices be addressed to him at any place designated by him. U. S. Supreme Ct. Bankr. G. O. No. 21.

2. Bankr. Act (1898), § 58*a* (3).

An objection by an involuntary bankrupt to the regularity of a first meeting of his creditors, and to the validity of proceedings had thereat, on the ground that the notices of such meeting were prepared by the referee before the bankrupt's own list of creditors was filed, whereby it resulted that some of the creditors were not notified, will not be sustained when it appears that the bankrupt's list of creditors was not filed within the time limited by the law, and was incomplete and imperfect. *In re* Schiller, 96 Fed. 400, 2 Am. Bankr. Rep. 704.

It is within the jurisdiction and the discretion of a referee in bankruptcy to order amendments to be made in the petition and schedule of a voluntary bankrupt referred to him, in particulars as to which he finds them defective or insufficient, and to refuse to call a first meeting of creditors until such amendments be made. *In re* Brumelkamp, 95 Fed. 814, 2 Am. Bankr. Rep. 814.

The form of the notice here required is

such publication must be at least one week prior to the date fixed for the first meeting.[3]

3. ADJOURNMENTS. Adjournments of the first meeting may be had if the business requires it, but all adjourned meetings must in contemplation of law be deemed the same meeting.[4]

4. PROCEEDINGS. The judge or referee is required to be present and to preside at the first meeting.[5] The bankrupt is also required to attend such meeting if directed by the court,[6] unless it is held at a place more than one hundred and fifty miles distant from his home or principal place of business.[7] The referee should keep a record of the proceedings.[8] At the outset it would not be inappropriate for referees to follow the familiar practice of explaining the object of the meeting to creditors and attorneys not familiar with the practice in courts of bankruptcy.[9] Before proceeding with the other business the referee may allow or disallow the claims of creditors presented at the creditors' meeting, and may publicly examine the bankrupt, or cause him to be examined at the instance of any creditor.[10] At the first meeting the creditors are authorized to elect a trustee.[11]

B. Subsequent Meetings — 1. By Consent of Creditors. A meeting of creditors, subsequent to the first one, may be held at any time and place when all the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.[12]

2. By Call of Court — a. At Request of Creditors. The court must call a meeting of creditors whenever one fourth or more in number of those who have proven their claims file a written request to that effect.[13]

b. For Special Purposes. Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the Act, the court may call such a meeting, specifying in the notice the purpose for which it is called.[14]

prescribed. U. S. Supreme Ct. Bankr. Forms, No. 18; 89 Fed. xxxvi.

3. Bankr. Act (1898), § 58*b*.

The newspaper in which notices are to be published is to be designated by the court. Bankr. Act (1898), § 28.

4. *In re* Eagles, 99 Fed. 695, 3 Am. Bankr. Rep. 733.

5. Bankr. Act (1898), § 55*b*.

6. Bankr. Act (1898), § 7*a* (1). The order of reference requires the attendance of the bankrupt at the time and place designated therein. See U. S. Supreme Ct. Bankr. Forms, No. 14.

7. Bankr. Act (1898), § 7.

8. Bankr. Act (1898), § 42. See also *supra*, III, D, 4, f.

He should make a list of the debts proved at the first meeting, containing the names and residences of creditors and the amount of the debts (U. S. Supreme Ct. Bankr. Forms, No. 19; 89 Fed. xxxvii), which should be transmitted to the clerk (U. S. Supreme Ct. Bankr. G. O. No. 24).

9. Conduct of meeting.—The meeting must be held in strict accordance with the notice, at the time and place specified, not at some other time sooner or later, or another place, though near by. If no creditors appear the meeting is as effectual as if they were present and represented. The referee should be punctually present at the time and place specified in the notice. He or the judge presides, and his duties are judicial. He does not otherwise participate. The bankrupt is required and should be actually present at the first meeting. It is a creditors' meeting and they (the referee and the bankrupt) are there to assist the creditors, the first as an officer of the law and the other to aid him in so doing. Thus aided, the referee should in most cases be able to pass upon all claims which have been or may be presented at the meeting. *In re* Eagles, 99 Fed. 695, 3 Am. Bankr. Rep. 733.

10. Bankr. Act (1891), § 55*b*.

As to the allowance or disallowance of claims, generally, see *infra*, XI.

As to the examination of the bankrupt, generally, see *infra*, XVII, A, 2.

11. Bankr. Act (1898), § 44. See also *infra*, XII, A, 1, a.

12. Bankr. Act (1898), § 55*d*.

13. Bankr. Act (1898), § 55*e*.

If such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request. Bankr. Act (1898), § 55*e*.

14. U. S. Supreme Ct. Bankr. G. O. No. 25.

Notice, by whom sent.— Notice of a special meeting should be sent out by the referee and not by the petitioner. Bankr. Act (1898), § 58*c*. *In re* Stoever, 105 Fed. 355, 5 Am. Bankr. Rep. 250.

3. Final Meeting. Whenever the affairs of an estate are ready to be closed a final meeting of creditors must be ordered.[15]

C. Vote of Creditors — 1. Who Entitled to Vote — a. In General. Only a creditor as defined in the Act, that is any one who owns a demand or claim provable in bankruptcy, is entitled to vote at creditors' meetings.[16] Other creditors, through the mere filing of objections to a claim, cannot prevent a *bona fide* claimant from voting.[17] When a partnership is in bankruptcy, a creditor of one of the members cannot vote,[18] and where a member of a partnership is a bankrupt the creditors of the partnership are to be excluded.[19]

b. Secured Creditors. But creditors holding claims which are secured or that have priority, are not in respect to such claims entitled to vote, nor are such claims to be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.[20] To entitle secured and preferred creditors to vote at the first meeting upon the whole of their claims they must surrender their securities or priorities.[21] If a portion of a creditor's debt is secured and a portion unsecured he may vote on the unsecured portion.[22] Where the security is upon the exempt property of the bankrupt the creditor is entitled to vote.[23]

2. Vote by Proxy or Attorney. An attorney, agent, or proxy [24] may represent and vote for creditors at creditors' meetings, but before doing so he must produce and file written authority from the creditor,[25] which should be filed by the

15. Bankr. Act (1898), § 55*f*.

The reference to the referee in bankruptcy to hold the final meeting of creditors under U. S. Dist. Ct. (N. C.) Dist Ct. Rules, No. 8, and the allowance of a fee therefor, constitute him a special master for this purpose, and such procedure is authorized. *In re* Steed, 107 Fed. 682, 6 Am. Bankr. Rep. 73.

16. Bankr. Act (1898), § 1 (9), *supra*, note 8, p. 233.

17. *In re* T. L. Kelly Dry-Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528.

18. *In re* Phelps, 9 Fed. Cas. No. 11,071, 2 Am. L. T. Bankr. Rep. 25, 1 Nat. Bankr. Rep. 525.

19. *In re* Purvis, 20 Fed. Cas. No. 11,476, 1 Am. L. T. Bankr. Rep. 19, Bankr. Reg. Suppl. 35, 6 Int. Rev. Rec. 173, 1 Nat. Bankr. Reg. 163.

20. Bankr. Act (1898), § 56*b*.

For definition of secured creditor see Bankr. Act (1898), § 1, (23), *supra*, note 8, p. 238.

A judgment secured by adverse proceedings commenced many years before the Act was passed, upon which execution was levied after the bankrupt became insolvent and nothing collected thereon, does not bar the right of the judgment creditor to vote at creditors' meetings, since by Bankr. Act (1898), § 67, the levy is made null and void and the security is therefore destroyed. *In re* Scully, 108 Fed. 372, 5 Am. Bankr. Rep. 716.

Claims of secured creditors and of those having priorities may be allowed by the court or referee to enable such creditors to participate in the proceedings of meetings held prior to the determination of the value of their securities or priorities; but such claims shall only be allowed for such sums as may seem to be owing over and above the value of the securities or priorities. Bankr. Act (1898), § 57*e*.

In partnership cases, creditors of the partnership are entitled to vote at the first meeting to the full amount of their claims, if otherwise proper, except as for such securities as are held upon partnership assets. The value of any securities upon property of individual members of the partnership are not securities which need to be deducted in order to ascertain the value of claims against the partnership. *In re* Coe, 1 Am. Bankr. Rep. 275. In a proceeding in bankruptcy, a creditor of the firm, holding security upon the separate property of one of the members of such firm, may prove his entire claim against the joint estate without releasing his security, though the member whose individual estate constitutes the security owes no individual debts. *In re* Thomas, 8 Biss. (U. S.) 139, 23 Fed. Cas. No. 13,886, 6 Centr. L. J. 151, 17 Nat. Bankr. Reg. 54.

21. Bankr. Act (1898), § 57*g*. See *In re* Eagles, 99 Fed. 695, 3 Am. Bankr. Rep. 733; *In re* Saunders, 2 Lowell (U. S.) 444, 21 Fed. Cas. No. 12,371, 13 Nat. Bankr. Reg. 164.

22. *In re* Hanna, 5 Ben. (U. S.) 5, 11 Fed. Cas. No. 6,027, 7 Nat. Bankr. Reg. 502; *In re* Parkes, 18 Fed. Cas. No. 10,754, 10 Nat. Bankr. Reg. 82.

23. *In re* Tertelling, 2 Dill. (U. S.) 339, 23 Fed. Cas. No. 13,842; *In re* Stillwell, 23 Fed. Cas. No. 13,448, 11 Am. L. Reg. N. S. 706, 7 Nat. Bankr. Reg. 226.

24. **The term "creditor"** as defined in the Act includes not only the owner of the claim but his "duly authorized agent, attorney, or proxy." Bankr. Act (1898), § 1 (9), *supra*, note 8, p. 238.

25. **A letter of attorney** to represent a creditor at a creditors' meeting may be proved or acknowledged before a referee, a United States commissioner, or a notary public. U. S. Supreme Ct. Bankr. G. O. No. 21, par. 5.

referee as a part of his record.[26] The referee presiding at the first meeting must determine who is to make up its constituent members, and he may refuse to allow a person to qualify who acts under a power of attorney nominally executed by the creditors, but in fact procured by the bankrupt.[27] An attorney at law voting for the creditor at a creditors' meeting acts purely as his attorney in fact and must present the same papers duly qualifying him to represent the creditor in that capacity as if he were his agent.[28]

3. MAJORITY VOTE REQUIRED. Creditors must pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of

When executed in behalf of a partnership or of a corporation the person executing the instrument shall make oath that he is a member of the partnership or a duly authorized officer of the corporation on whose behalf he acts. U. S. Supreme Ct. Bankr. G. O. No. 21, par. 5. A letter of attorney executed on behalf of a partnership must contain the oath of the partner executing it that he is a member of the partnership, even though on the same day he has made such oath in a deposition to prove the partnership claim against the bankrupt estate. *In re* Finlay, 3 Am. Bankr. Rep. 738.

When the person executing the letter is not personally known to the officer taking the proof or acknowledgment his identity shall be established by satisfactory proof. U. S. Supreme Ct. Bankr. G. O. No. 21, par. 5.

The forms of letters of attorney are prescribed (U. S. Supreme Ct. Bankr. Forms, Nos. 20, 21; 89 Fed. xxxvii), and should be observed and used with such alterations as may be necessary to suit the circumstances of any particular case (U. S. Supreme Ct. Bankr. G. O. No. 38).

26. *In re* Eagles, 99 Fed. 695, 3 Am. Bankr. Rep. 733; *In re* Sugenheimer, 91 Fed. 744, 1 Am. Bankr. Rep. 425.

27. *In re* Scully, 108 Fed. 372, 5 Am. Bankr. Rep. 716.

Interference by the bankrupt, or the voting of claims in his interest or at his direction has always been discountenanced by the courts and held to invalidate a choice of trustee thus secured. *In re* Scully, 108 Fed. 372, 5 Am. Bankr. Rep. 716; *In re* McGill, 106 Fed. 57, 45 C. C. A. 218, 5 Am. Bankr. Rep. 155; Falter *v.* Reinhard, 104 Fed. 292, 4 Am. Bankr. Rep. 782; *In re* Lewensohn, 98 Fed. 576, 3 Am. Bankr. Rep. 299; *In re* Bliss, 1 Ben. (U. S.) 407, 3 Fed. Cas. No. 1,543, Bankr. Reg. Suppl. 17, 6 Int. Rev. Rec. 116, 1 Nat. Bankr. Reg. 78; *In re* Wetmore, 29 Fed. Cas. No. 17,466, 16 Nat. Bankr. Reg. 514. Proxies presented under circumstances of evident collusion with the bankrupt should be disallowed. It would be intolerable if the bankrupt by such means should be enabled to prevent or embarrass necessary investigation into his conduct or estate. *In re* Rekersdres, 108 Fed. 206, 5 Am. Bankr. Rep. 811. Where a proxy who had been an attorney for the bankrupt refuses to answer questions put to him by the referee to determine the charges made against him of complicity with the bankrupt he is in contempt of court and should be excluded from participating in the proceedings of the creditors' meetings, even though he procures a new letter of attorney to represent creditors. *In re* Henschel, 109 Fed. 861, 6 Am. Bankr. Rep. 305.

Power of referee to pass on letters of attorney.— Under the provision of the General Order which requires the register to hold and preside at meetings and to report to the court the proceedings thereof, with his opinion thereon, he must be held to possess the power to regulate the form and order of proceedings at the meeting, and to decide questions that may arise, subject to review by the judge. He must necessarily decide who are entitled to vote, and in respect to what amount of debts, and to pass upon the regularity and propriety of form of proof of debts and of letters of attorney. *In re* Holmes, 8 Ben. (U. S.) 74, 12 Fed. Cas. No. 6,632, 12 Nat. Bankr. Reg. 86.

28. *In re* Blankfein, 97 Fed. 191, 3 Am. Bankr. Rep. 165.

Vote by attorney.— Voting at a creditors' meeting in a bankruptcy proceeding is an act so essentially different in its nature and character from an attorney's ordinary duties in the conduct of litigation, and the business considerations that enter into the choice of a trustee are so foreign to a lawyer's ordinary functions, that the right to vote cannot be deemed to be a part of his implied authority, nor be presumed to be conferred upon a lawyer from his mere retainer in a bankruptcy proceeding. To authorize an attorney to vote he must prove his authority by letter of attorney, or by the oath of some one showing him to be a duly constituted attorney, i. e., an attorney in fact for that purpose. *In re* Blankfein, 97 Fed. 191, 3 Am. Bankr. Rep. 165, following the settled practice under the Act of 1867 that an attorney could not vote for an assignee merely by virtue of his general authority as an attorney-at-law. *In re* Knoepfel, 1 Ben. (U. S.) 398, 14 Fed. Cas. No. 7,892, Bankr. Reg. Suppl. 16, 1 Nat. Bankr. Reg. 70; *In re* Knoepfel, 1 Ben. (U. S.) 330, 14 Fed. Cas. No. 7,891, 1 Nat. Bankr. Reg. 23; *In re* Purvis, 20 Fed. Cas. No. 11,476, 1 Am. L. T. Bankr. Rep. 19, Bankr. Reg. Suppl. 35, 6 Int. Rev. Rec. 173, 1 Nat. Bankr. Reg. 163. See also, under the Act of 1898, *In re* Richards, 103 Fed. 849, 4 Am. Bankr. Rep. 631.

The letter of attorney should conform to the requirements of the Act and the General Orders; if materially defective the referee should refuse to permit its use. U. S. Supreme Ct. Bankr. Forms, No. 20; 89 Fed. xxxvii; *In re* Blankfein, 97 Fed. 191, 3

all creditors whose claims have been allowed and are present, except as otherwise provided in the Act.[29]

XI. PROOF AND ALLOWANCE OF CLAIMS.

A. Debts Which May Be Proved — 1. In General. There is no general provision in the Act as to the time when debts founded upon a contract must have come into existence to be provable.[30] But it has been held that only such debts are provable as were in existence at the time of the filing of the petition.[31] The debts which may be proved and allowed against the estate of a bankrupt are specified.[32] Every debt which may be recovered either at law or in equity may, generally speaking, be proved in bankruptcy.[33]

2. Claims Barred by Statute of Limitations. A claim barred by the statute of limitations of the state where action thereon could have been brought is not provable.[34]

Am. Bankr. Rep. 165. When the notary's certificate of acknowledgment attached to the proxy and forming no part of the preceding affidavit is without venue it is defective and the proxy should not be allowed. *In re* Henschel, 109 Fed. 861, 6 Am. Bankr. Rep. 305.

29. Bankr. Act (1898), § 56*a*. Under this provision the matter submitted at a creditors' meeting can only be determined by the vote of the creditors whose claims have been allowed; and although the proxies presented by attorneys representing certain creditors have been disallowed, it has been held that such creditors are nevertheless present and their claims are to be counted in ascertaining what constitutes a majority vote. *In re* Henschel, 109 Fed. 861, 862, 6 Am. Bankr. Rep. 305. In this case the court says: "That section [Section 56*a*] is very explicit in requiring matters submitted to the creditors to be passed upon 'by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present.' According to the language of this section, therefore, the vote should turn, not upon the number and amount of creditors, but on the number and amount of allowed claims 'present' before the referee, at the time the vote is taken; and unless there is a majority vote in number and amount of such claims for some one candidate, the referee is required by section 44 to appoint the trustee, as he did in this case. As Section 56*a* stands, the word 'present' cannot, by any possible grammatical construction, be made to refer to the word 'creditors.' Nor can that legal construction be put upon it, except by an alteration and reconstruction of the sentence." This section limits the voters at the meeting to those whose claims are proved and who are actually in attendance. *In re* Richards, 103 Fed. 849, 4 Am. Bankr. Rep. 631.

30. Bankr. Act (1898), § 63*a*.

Under the Act of 1867, however, it was provided that all debts due and payable by the bankrupt, at the time of the commencement of the proceedings in bankruptcy, and all debts which then exist but are not payable until a future day, were provable. Bankr. Act (1898), § 19; U. S. Rev. Stat. (1878), § 5067.

The term "debt" as used in the Bankruptcy Act includes any debt, demand, or claim provable in bankruptcy. Bankr. Act (1898), § 1 (11), *supra*, note 8, p. 238.

31. *In re* Burka, 104 Fed. 326, 5 Am. Bankr. Rep. 12. See also *In re* Bingham, 94 Fed. 796, 2 Am. Bankr. Rep. 223.

32. Bankr. Act (1898), § 63*a*.

33. *In re* Kelly, 18 Fed. 528; *In re* Secor, 18 Fed. 319; *In re* Jordan, 2 Fed. 319; *In re* Fortune, 1 Lowell (U. S.) 306, 9 Fed. Cas. No. 4,955, 2 Nat. Bankr. Reg. 662. See also, generally, DEBT, ACTION OF.

34. *In re* Resler, 95 Fed. 804, 2 Am. Bankr. Rep. 602; *In re* Lipman, 94 Fed. 353, 2 Am. Bankr. Rep. 46. But see *In re* Levy, 95 Fed. 812, 2 Am. Bankr. Rep. 21.

Under the Act of 1867 there was confusion among the cases. Some held that a debt, to be barred by limitation so as not to be provable under the Bankruptcy Act, as not being due and payable, must be shown to be so barred throughout the United States. *In re* Ray, 2 Ben. (U. S.) 53, 20 Fed. Cas. No. 11,589, 1 Am. L. T. Bankr. Rep. 46, 7 Am. L. Reg. N. S. 283, 6 Int. Rev. Rec. 223, 1 Nat. Bankr. Reg. 203; *In re* Shepard, 21 Fed. Cas. No. 12,753, 7 Am. L. Reg. N. S. 484, 1 Nat. Bankr. Reg. 439. The weight of authority, however, was against this doctrine, and in favor of the rule that where a debt is barred by the statute of limitations of the state where the bankrupt resides it cannot be proved against his estate in bankruptcy. *In re* Reed, 6 Biss. (U. S.) 250, 20 Fed. Cas. No. 11,635, 7 Chic. Leg. N. 76, 11 Nat. Bankr. Reg. 94; *In re* Cornwall, 9 Blatchf. (U. S.) 114, 6 Fed. Cas. No. 3,250, 6 Am. L. Rev. 365, 6 Nat. Bankr. Reg. 305; *In re* Harden, 1 Hask. (U. S.) 163, 11 Fed. Cas. No. 6,048, 1 Am. L. T. Bankr. Rep. 48, 119, 1 Nat. Bankr. Reg. 395; *In re* Kingsley, 1 Lowell (U. S.) 216, 14 Fed. Cas. No. 7,819, 1 Nat. Bankr. Reg. 329.

Where the debt is not barred at the time of the commencement of bankruptcy proceedings it may be proved, although the limitation has expired prior to the time when the claim is finally acted upon. *In re* Wright, 6 Biss. (U. S.) 317, 30 Fed. Cas. No. 18,068; *In re* Eldridge, 2 Hughes (U. S.) 256, 8 Fed. Cas. No. 4,331, 12 Nat. Bankr. Reg. 540, 1

3. CONTINGENT LIABILITIES. There is no provision in the present Act making a contingent liability provable in bankruptcy.[35]

4. COSTS. An amount due as costs taxed against an involuntary bankrupt who was, at the time of the filing of the petition against him, plaintiff in a cause of action which would pass to the trustee, and which the trustee declines to prosecute after notice, may be proved and allowed against the bankrupt estate.[36] And a debt founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition, in an action to recover a provable debt, is provable.[37]

5. DEBTS DUE UNITED STATES, STATE, OR MUNICIPALITY. Debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture

N. Y. Wkly. Dig. 243. But see *contra*, Nicholas *v.* Murray, 5 Sawy. (U. S.) 320, 18 Fed. Cas. No. 10,223, 18 Nat. Bankr. Reg. 469.

Where the bankrupt has included in his schedules of claims against his estate claims which are barred by the statute of limitations, such scheduling of the claims does not revive them and make them payable against the bankrupt's estate. *In re* Lipman, 94 Fed. 353, 2 Am. Bankr. Rep. 46; *In re* Resler, 2 Am. Bankr. Rep. 166 [*affirmed* in 95 Fed. 804, 2 Am. Bankr. Rep. 602].

35. **Under the Act of 1867** it was provided that when the "bankrupt shall be bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared." Bankr. Act (1867), § 19; U. S. Rev. Stat. (1878), § 5069.

Where a person is contingently liable to pay the debt of a bankrupt his claim may be proved in the name of the creditor to whom he is liable, or if unknown, in his own name. U. S. Supreme Ct. Bankr. G. O. No. 21, par. 4.

Where the claim is founded upon a contingency contained in a contract which may never arise, and there is no means of ascertaining the amount of the claim at the time of the filing of the petition, the claim is not provable. Riggin *v.* Magwire, 15 Wall. (U. S.) 549, 21 L. ed. 232. See also Ellis *v.* Ham, 28 Me. 385; Woodard *v.* Herbert, 24 Me. 358; Deane *v.* Caldwell, 127 Mass. 242.

36. Bankr. Act (1898), § 63*a* (2).

Costs which are part of a judgment entered prior to the filing of the petition in bankruptcy are provable, although the judgment was not founded upon a provable debt, since the debt in such a case is a fixed liability evidenced by a judgment. Bankr. Act (1898), § 63*a* (1); Graham *v.* Pierson, 6 Hill (N. Y.) 247; *Ex p.* O'Neil, 1 Lowell (U. S.) 163, 18 Fed. Cas. No. 10,527, 1 Nat. Bankr. Reg. 677. But a judgment for costs incurred after the filing of a petition in bankruptcy was not provable under the former Act, and cannot be proved under any provision of the present Act. Sanford *v.* Sanford, 58 N. Y. 67, 17 Am. Rep. 565, 12 Nat. Bankr. Reg. 565. See also *In re* Marcus, 104 Fed. 331, 5 Am. Bankr. Rep. 19 [*affirmed* in 105 Fed. 907, 45 C. C. A. 115, 5 Am. Bankr. Rep. 365]. Costs incurred prior to the filing of the petition are to be treated as debts, and costs following a judgment after the filing of the petition are allowed only to such an extent as they are earned prior to such filing. Aiken, etc., Co. *v.* Haskins, 34 Misc. (N. Y.) 505, 70 N. Y. Suppl. 293, 6 Am. Bankr. Rep. 46.

37. Bankr. Act (1898), § 63*a* (3). See also Coe *v.* Waters, (Colo. App. 1901) 64 Pac. 1054.

The costs and disbursements in an attachment suit pending against a bankrupt at the time of the filing of the petition are a mere incident of the lien of attachment, and since the adjudication in bankruptcy dissolves the lien, such costs and disbursements fall with it and are not provable as a claim against the estate. *In re* Young, 96 Fed. 606, 2 Am. Bankr. Rep. 673. But see *In re* Allen, 96 Fed. 512, 3 Am. Bankr. Rep. 38, holding that the costs of attachment incurred in good faith prior to the filing of the petition in bankruptcy are a provable claim against the estate, although the claim for such costs is not entitled to priority and is not a lien upon the proceeds of the trustee's sale of the attached property. Under the Act of 1867 it was generally held that costs and disbursements in an attachment suit could not be proven as a debt against the bankrupt. *In re* Hatje, 6 Biss. (U. S.) 436, 11 Fed. Cas. No. 6,215, 12 Nat. Bankr. Reg. 548; *In re* Fortune, 1 Lowell (U. S.) 306, 9 Fed. Cas. No. 4,955, 2 Nat. Bankr. Reg. 662; *In re* Ward, 29 Fed. Cas. No. 17,145, 9 Nat. Bankr. Reg. 349; *In re* Preston, 19 Fed. Cas. No. 11,394, 6 Nat. Bankr. Reg. 545; Gardner *v.* Cook, 9 Fed. Cas. No. 5,226, 7 Nat. Bankr. Reg. 346. But see *In re* Housberger, 2 Ben. (U. S.) 504, 12 Fed. Cas. No. 6,734, 2 Nat. Bankr. Reg. 92; Zeiber *v.* Hill, 1 Sawy. (U. S.) 268, 30 Fed. Cas. No. 18,206, 8 Nat. Bankr. Reg. 239; *In re* Foster, 2 Story (U. S.) 131, 9 Fed. Cas. No. 4,960, 5 Law Rep. 55; *In re* Jenks, 13 Fed. Cas. No. 7,276, 15 Nat. Bankr. Reg. 301; *Ex p.* Holmes, 12 Fed. Cas. No. 6,631, 14 Nat. Bankr. Reg. 493.

arose, with reasonable and actual costs occasioned thereby, and such interest as may have accrued thereon according to law.[38]

6. Debts Founded Upon Contract. A debt founded upon a contract express or implied[39] may be proved in bankruptcy.[40] Thus damages arising from a breach of a contract prior to an adjudication in bankruptcy constitute a provable claim.[41] But contracts which are void because of an illegal consideration or because against public policy cannot be the basis of a provable debt.[42] If there

38. Bankr. Act (1898), § 57*j*. See also U. S. *v.* Herron, 20 Wall. (U. S.) 251, 22 L. ed. 275; *In re* Baker, 96 Fed. 954, 3 Am. Bankr. Rep. 101.

As to provability of judgments for fines and penalties see *infra*, note 46.

39. **The implied contract intended** includes the fictitious contract implied in law — which is only treated as a contract for the sake of the remedy — and the true contract implied in fact. *In re* Hirschman, 104 Fed. 69, 4 Am. Bankr. Rep. 715.

A debt founded upon a so-called quasi-contract — a contract not created by the consent of the parties but by the law itself, which imposes upon one of the parties an obligation to perform a certain act in the same manner as if the contract was express — is provable, and when liquidated should be allowed. People *v.* Speir, 77 N. Y. 144.

A stock-holder's liability for the debts of a corporation under a state statute is not only a liability created by statute but is also founded upon an implied contract and provable as such in bankruptcy proceedings against the bankrupt. *In re* Rouse, 1 Am. Bankr. Rep. 393. See also Hager *v.* Cleveland, 36 Md. 476; Norris *v.* Wrenschall, 34 Md. 492; Brown *v.* Hitchcock, 36 Ohio St. 667.

As to release of stock-holder's liability by discharge see *infra*, note 36, p. 397.

Where a claim arises ex delicto it is not provable unless a recovery could be had at the option of the claimant in a suit brought *ex contractu*. *In re* Hirschman, 104 Fed. 69, 4 Am. Bankr. Rep. 715. See also *In re* Filer, 5 Am. Bankr. Rep. 582, holding that where the bankrupt while in the employment of the claimants was guilty of various fraudulent acts, consisting of obtaining money by false indorsements and also in taking money from the cash drawer of the claimants and concealing the same by means of false entries, the claimants may waive the tort and treat the claim as one for money had and received by the bankrupt to the use of the claimants.

40. Bankr. Act (1898), § 63*a* (4); *In re* Wright, 95 Fed. 807, 2 Am. Bankr. Rep. 592.

"There is no method of proving a mere contract liability unless there is something owing, either because of a breach of the contract before the petition was filed, or because of performance." Collier Bankr. (3d ed.) 396.

A claim for breach of warranty, though based on a contract, is not one founded on a contract so as to permit it to be the basis of an adjudication in bankruptcy, but is such an unliquidated claim as, after such an adjudication, may be liquidated. *In re* Morales, 105 Fed. 761, 5 Am. Bankr. Rep. 425. See also Schuchardt *v.* Allen, 1 Wall. (U. S.) 359, 17 L. ed. 642.

41. *In re* Silverman, 101 Fed. 219, 4 Am. Bankr. Rep. 83.

A claim for damages because of a breach of contract to marry is based upon a contract, and is provable if the breach occurred and the cause of action accrued before the petition was filed. *In re* Fife, 109 Fed. 880, 6 Am. Bankr. Rep. 258; *In re* McCauley, 101 Fed. 223, 4 Am. Bankr. Rep. 122; *In re* Sidle, 22 Fed. Cas. No. 12,844, 2 Nat. Bankr. Reg. 220; *In re* Sheehan, 21 Fed. Cas. No. 12,737, 8 Nat. Bankr. Reg. 345.

Contract by bankrupt with wife.— Under the statutes of New York it has been held that a debt founded upon a contract made by the bankrupt with his wife for services performed by her is not a provable debt. *In re* Kaufman, 104 Fed. 768, 5 Am. Bankr. Rep. 104.

Contract to pay annuity.—A bond executed by a person who is thereafter adjudged a bankrupt to secure the payment to the obligee of an annuity during life is an instrument creating a fixed liability absolutely owing at the time of the filing of the petition, payable in the future, and is provable as a debt against the bankrupt's estate for the amount of the penalty stated therein. Cobb *v.* Overman, 109 Fed. 65, 48 C. C. A. 223, 54 L. R. A. 369, 6 Am. Bankr. Rep. 324 [*reversing* 100 Fed. 270, 3 Am. Bankr. Rep. 788].

Where a broker has contracted to purchase stock for a customer and he advances money therefor, and it is agreed that the stock shall be delivered to the customer when he tenders the price current at the time the contract was made and demands delivery of the stock, the customer may treat the contract as breached by the bankruptcy of the broker, and may prove his claim for damages, the measure of which is to be fixed as of the date of the adjudication in bankruptcy. *In re* Swift, 105 Fed. 493, 5 Am. Bankr. Rep. 335.

42. *In re* Hatje, 6 Biss. (U. S.) 436, 11 Fed. Cas. No. 6,215, 12 Nat. Bankr. Reg. 548; *In re* Young, 6 Biss. (U. S.) 53, 30 Fed. Cas. No. 18,145; *In re* Chandler, 5 Fed. Cas. No. 2,590, 13 Am. L. Reg. N. S. 310, 6 Chic. Leg. N. 229, 9 Nat. Bankr. Reg. 514.

Futures.— Under the laws of some states a contract for the future delivery of grain at a certain price, if the parties do not intend to deliver the grain, is void as a gambling contract, and a claim for the amount due thereunder is not provable. *In re* Green, 7 Biss. (U. S.) 338, 10 Fed. Cas. No. 5,751. 15 Nat. Bankr. Reg. 198; *In re* Chandler, 5 Fed. Cas. No. 2,590, 13 Am. L. Reg. N. S. 310, 6

are covenants in a contract which are of a continuing character the bankrupt remains liable to fulfil those covenants, notwithstanding his discharge in bankruptcy.[43] There is no provable debt on account of a covenant contained in a continuing contract, however, until such covenant has been broken.[44] If the amount of a claim is unliquidated the Act provides for a method of liquidation.[45]

7. Debts Founded Upon Fixed Liability. Debts of the bankrupt which are a fixed liability, as evidenced by a judgment[46] or an instrument in writing, abso-

Chic. Leg. N. 229, 9 Nat. Bankr. Reg. 514. If there is an apparent intent of the parties that the goods shall be delivered by the seller and the price is to be paid by the buyer the contract is valid. The contract is presumed to be legal until clear and conclusive proof has been given to show its invalidity, and the burden of proof rests upon the party who contests the claim. Hill *v.* Levy, 98 Fed. 94, 3 Am. Bankr. Rep. 374.

If the statute of frauds is a defense to an action to recover for a debt it may be set up against the allowance of the claim. Capell *v.* Trinity M. E. Church, 5 Fed. Cas. No. 2,392, 11 Nat. Bankr. Reg. 536.

Ultra vires acts of corporation.— If a corporation enters into a contract with the bankrupt, which is *ultra vires* and upon which it could not maintain an action, a debt founded thereon is not provable. *In re* Jaycox, 12 Blatchf. (U. S.) 209, 13 Fed. Cas. No. 7,237, 7,244 *mem.*, 13 Nat. Bankr. Reg. 122. So a contract made by a foreign corporation before it was legally authorized to transact business within a state is void and a claim based thereon cannot be proved. *In re* Comstock, 3 Sawy. (U. S.) 320, 6 Fed. Cas. No. 3,079, 12 Nat. Bankr. Reg. 110.

43. Robinson *v.* Pesant, 53 N. Y. 419, 8 Nat. Bankr. Reg. 426. See also *infra*, XIX, E, 3, b.

44. Parker *v.* Bradford, 45 Iowa 311; Fowler *v.* Kendall, 44 Me. 448; Murray *v.* De Rottenham, 6 Johns. Ch. (N. Y.) 52.

45. Bankr. Act (1898), § 63*b*. See also *infra*, XI, A, 11.

46. **If a judgment is secured within four months** prior to the filing of the petition in bankruptcy it is still an evidence of debt, although it may be void as a preference (Bankr. Act (1898), § 67*f*), and a judgment creditor may prove his claim as an unsecured claim in the same manner as a general creditor (*In re* Richard, 94 Fed. 633, 2 Am. Bankr. Rep. 506).

Judgment for alimony.— Alimony payable under a decree of a court of appropriate jurisdiction is not a fixed liability absolutely owing and is not a provable debt, either as to the amount in arrears at the time of the adjudication in bankruptcy, or as to the amount accruing after that time. Barclay *v.* Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; Maisner *v.* Maisner, 62 N. Y. App. Div. 286, 70 N. Y. Suppl. 1107, 6 Am. Bankr. Rep. 295; Young *v.* Young, 35 Misc. (N. Y.) 335, 71 N. Y. Suppl. 944, 7 Am. Bankr. Rep. 171; Audubon *v.* Shufeldt, 181 U. S. 575, 21 S. Ct. 735, 45 L. ed. 1009, 5 Am. Bankr. Rep. 829; Turner *v.* Turner, 108 Fed. 785, 6 Am. Bankr. Rep. 289; *In re* Nowell, 99 Fed. 931, 3 Am. Bankr. Rep. 837; *In re* Anderson, 97 Fed. 321, 5 Am. Bankr. Rep. 858; *In re* Shepard, 97 Fed. 187, 5 Am. Bankr. Rep. 857; *In re* Smith, 3 Am. Bankr. Rep. 67. See also *In re* Lachemeyer, 14 Fed. Cas. No. 7,966, 18 Alb. L. J. 242, 18 Nat. Bankr. Reg. 270; Kerr *v.* Kerr, [1897] 2 Q. B. 439, 66 L. J. Q. B. 838, 77 L. T. Rep. N. S. 29, 46 Wkly. Rep. 46; Linton *v.* Linton, 15 Q. B. D. 239, 54 L. J. Q. B. 529, 52 L. T. Rep. N. S. 782, 2 Morrell 179. But see *contra*, Fite *v.* Fite, 22 Ky. L. Rep. 1638, 61 S. W. 26, 5 Am. Bankr. Rep. 461; *In re* Challoner, 98 Fed. 82, 3 Am. Bankr. Rep. 442; *In re* Van Orden, 96 Fed. 86, 2 Am. Bankr. Rep. 801; *In re* Houston, 94 Fed. 119, 2 Am. Bankr. Rep. 107.

As to release of alimony by discharge see *infra*, XIX, E, 2.

Judgments for fines or penalties.— Judgments rendered by state or federal courts imposing fines in the enforcement of criminal laws, as such, are not provable debts. *In re* Moore, 6 Am. Bankr. Rep. 590 [*disapproving In re* Alderson, 98 Fed. 588, 3 Am. Bankr. Rep. 544]. See also Spalding *v.* People, 7 Hill (N. Y.) 301 [*affirmed* in 4 How. (U. S.) 21, 11 L. ed. 858]; *In re* Sutherland, Deady (U. S.) 416, 23 Fed. Cas. No. 13,639, 8 Am. L. Reg. N. S. 39, 3 Nat. Bankr. Reg. 314. And a judgment secured in bastardy proceedings against a putative father is not a civil debt within the meaning of the Act. *In re* Baker, 96 Fed. 954, 3 Am. Bankr. Rep. 101. But a penalty imposed for a failure to comply with the internal revenue laws of the United States has been held to be a provable debt. *In re* Rosey, 6 Ben. (U. S.) 507, 20 Fed. Cas. No. 12,066, 8 Nat. Bankr. Reg. 509. A claim of the United States for the value of goods unlawfully imported without the payment of custom duties has also been held to be provable. *In re* Vetterlein, 13 Blatchf. (U. S.) 44, 28 Fed. Cas. No. 16,929, 21 Int. Rev. Rec. 212, 12 Nat. Bankr. Reg. 526, 1 N. Y. Wkly. Dig. 177, 2 Fed. Cas. No. 1,023 *mem.* [*cited* in *In re* Van Buren, 28 Fed. Cas. No. 16,833, 19 Nat. Bankr. Reg. 149].

As to release of fines by discharge see *infra*, XIX, E, 5.

Judgment for seduction.— A judgment recovered by a woman against her seducer is a debt provable against his estate in bankruptcy. *In re* McCauley, 101 Fed. 223, 4 Am. Bankr. Rep. 122.

Where an appeal has been taken from a judgment the judgment debt may, nevertheless, be proven, but no dividends will be paid thereon until the appeal is heard and determined by the appellate court. *In re* Sheehan, 21 Fed. Cas. No. 12,737, 8 Nat. Bankr. Reg. 345.

lutely owing at the time of the filing of the petition against him,[47] whether then payable or not, with any interest thereon which would have been recoverable at that date,[48] or with a rebate of interest upon such as were not then payable and did not bear interest,[49] may be proved and allowed against the bankrupt's estate.[50]

8. DEBTS FOUNDED UPON OPEN ACCOUNT. A debt founded upon an open account is provable in bankruptcy.[51]

9. JUDGMENTS OBTAINED AFTER FILING PETITION. A claim which is founded upon

Debts reduced to judgment pending proceedings in bankruptcy see *infra*, XI, A, 9.

47. **Liability as surety or indorser.**— The liability imposed by the indorsement of commercial paper which is not yet due is not a fixed liability as evidenced by a written instrument, but is a debt founded upon an express contract. Moch *v.* Market St. Nat. Bank, 107 Fed. 897, 47 C. C. A. 49, 6 Am. Bankr. Rep. 11 [*affirming* 105 Fed. 891, 5 Am. Bankr. Rep. 89]; *In re* Schaefer, 104 Fed. 973, 5 Am. Bankr. Rep. 92 note; Matter of Marks, 6 Am. Bankr. Rep. 641. If the liability of a bankrupt as an indorser has become absolute and fixed prior to the filing of the petition the debt is provable as a fixed liability evidenced by a written instrument. *In re* Bruce, 6 Ben. (U. S.) 515, 4 Fed. Cas. No. 2,044; *In re* Loder, 4 Ben. (U. S.) 305, 15 Fed. Cas. No. 8,457, 4 Nat. Bankr. Reg. 190; *In re* Nickodemus, 18 Fed. Cas. No. 10,254, 2 Am. L. T. 168, 1 Am. L. T. Bankr. Rep. 140, 2 Chic. Leg. N. 49, 3 Nat. Bankr. Reg. 230, 16 Pittsb. Leg. J. (Pa.) 233. Where the bankrupt is the principal debtor and there is a fixed liability imposed upon him by a written instrument his surety thereon may prove the debt, although the liability of such surety to the creditor is not yet fixed. Bankr. Act (1898), § 57*i*. The claim may be proved by the surety although he has not paid the debt for which he is liable. Morse *v.* Hovey, 1 Sandf. Ch. (N. Y.) 187; Fulwood *v.* Bushfield, 14 Pa. St. 90; Mace *v.* Wells, 7 How. (U. S.) 272, 12 L. ed. 698. If the surety pays the debt he is subrogated to the rights of the creditor and may prove his claim if the creditor has not already done so. *In re* Ellerhorst, 8 Fed. Cas. No. 4,381, 6 Am. L. Rev. 162, 5 Nat. Bankr. Reg. 144. The surety may prove his debt although the debt does not fall due until after the proceedings in bankruptcy have been commenced. Crafts *v.* Mott, 4 N. Y. 604; Hardy *v.* Carter, 8 Humphr. (Tenn.) 152.

As to release of surety or indorser by discharge see *infra*, XIX, E, 6.

48. **If the contract is silent as to interest** after maturity the creditor is entitled to interest after that time by operation of law. *In re* Bartenbach, 2 Fed. Cas. No. 1,068, 2 Am. L. T. Rep. N. S. 33, 11 Nat. Bankr. Reg. 61. And where property is held by a creditor as security for his debt which, under the contract, he is authorized to appropriate in case of the default of the debtor, and the value of such property exceeds the debt secured thereby, the creditor is entitled to receive from the proceeds of the sale of the property the principal of his debt with interest thereon to the time of payment. *In re* Newland, 7 Ben. (U. S.) 63, 18 Fed. Cas. No. 10,171, 9 Nat. Bankr. Reg. 62; *In re* Haake, 2 Sawy. (U. S.) 231, 11 Fed. Cas. No. 5,883, 7 Nat. Bankr. Reg. 61. So where creditors are legally preferred they may prove interest on their claims to the date of payment. *In re* Strachan, 3 Biss. (U. S.) 181, 23 Fed. Cas. No. 13,519, 4 Chic. Leg. N. 145. But interest on a provable debt cannot be computed as against the bankrupt estate after the filing of the petition. *In re* Orne, 1 Ben. (U. S.) 361, 18 Fed. Cas. No. 10,581, Bankr. Reg. Suppl. 13, 6 Int. Rev. Rec. 84, 1 Nat. Bankr. Reg. 57, 14 Pittsb. Leg. J. (Pa.) 613; *In re* Haake, 2 Sawy. (U. S.) 231, 11 Fed. Cas. No. 5,883, 7 Nat. Bankr. Reg. 61; *In re* Bugbee, 4 Fed. Cas. No. 2,115, 9 Nat. Bankr. Reg. 258.

No interest can be allowed on the bills of a bankrupt until payment has been demanded thereon and refused. *In re* North Carolina Bank, 2 Hughes (U. S.) 369, 2 Fed. Cas. No. 894, 10 Nat. Bankr. Reg. 289.

Under the Act of 1867, § 19, it was generally held that all interest-bearing debts due at the time of the commencement of bankruptcy proceedings were to be allowed with accrued interest to that time. Sloan *v.* Lewis, 22 Wall. (U. S.) 150, 22 L. ed. 832, 12 Nat. Bankr. Reg. 173; *In re* Orne, 1 Ben. (U. S.) 361, 18 Fed. Cas. No. 10,581, Bankr. Reg. Suppl. 13, 6 Int. Rev. Rec. 84, 1 Nat. Bankr. Reg. 57, 14 Pittsb. Leg. J. (Pa.) 613; *In re* Broich, 7 Biss. (U. S.) 303, 4 Fed. Cas. No. 1,921, 15 Nat. Bankr. Reg. 11; *In re* Port Huron Dry Dock Co., 19 Fed. Cas. No. 11,293, 14 Nat. Bankr. Reg. 253; *In re* Crawford, 6 Fed. Cas. No. 3,363, 3 Am. L. T. 169, 1 Am. L. T. Bankr. Reg. 210, 3 Nat. Bankr. Reg. 698.

49. **The time of the filing of the petition** is taken by the statute as the decisive time. The debt must exist at that time or it cannot be proved. If it exists then but is not payable until afterward, and is not a debt running with interest, there must be a rebate from its amount of the interest on that amount from the time of the adjudication of bankruptcy to the time when it would be payable. *In re* Orne, 1 Ben. (U. S.) 361, 18 Fed. Cas. No. 10,581, Bankr. Reg. Suppl. 13, 6 Int. Rev. Rec. 84, 1 Nat. Bankr. Reg. 57, 14 Pittsb. Leg. J. (Pa.) 613. See also Sloan *v.* Lewis, 22 Wall. (U. S.) 150, 22 L. ed. 832, 12 Nat. Bankr. Reg. 173.

50. Bankr. Act (1898), § 63*a* (1).

51. Bankr. Act (1898), § 63*a* (4).

Set-off.— In all cases of mutual debts or mutual credits between the estate of the bankrupt and the creditor the account shall be stated, and one debt shall be set off against

a provable debt, reduced to judgment after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less the costs incurred and interest accrued after the filing of such petition, and up to the time of the entry of such judgment may be proved and allowed against the bankrupt's estate.[52]

10. RENT. Claims for rent due at the time of the filing of the petition in bankruptcy are provable.[53] But where, at the time of the adjudication, the bankrupt is the lessee of certain property for a term of years, the rent being payable in monthly instalments, the landlord cannot prove a claim against the bankrupt for rent which would accrue subsequent to the date of the adjudication.[54]

11. UNLIQUIDATED CLAIMS. Unliquidated claims against the bankrupt may, pursuant to an application to the court, be liquidated in such a manner as it shall direct, and may thereafter be proved and allowed against his estate.[55]

the other and the balance only shall be allowed and paid. Bankr. Act (1898), § 68*a*. See also *infra*, XVIII, F.

52. Bankr. Act (1898), § 63*a* (5).

The entry of the judgment in a suit brought against the bankrupt on a provable debt which is pending at the time of the filing of the petition does not affect the character of the debt; it is not merged in the judgment, but is merely liquidated. *In re* McBryde, 99 Fed. 686, 3 Am. Bankr. Rep. 729; *In re* Pinkel, 1 Am. Bankr. Rep. 333. See also Boynton *v.* Ball, 121 U. S. 457, 7 S. Ct. 981, 30 L. ed. 985; *In re* Brown, 5 Ben. (U. S.) 1, 4 Fed. Cas. No. 1,975, 3 Nat. Bankr. Reg. 584; *In re* Vetterlein, 13 Blatchf. (U. S.) 44, 28 Fed. Cas. No. 16,929, 21 Int. Rev. Rec. 212, 12 Nat. Bankr. Reg. 526, 1 N. Y. Wkly. Dig. 177, 2 Fed. Cas. No. 1,023 *mem.*; *In re* Vickery, 28 Fed. Cas. No. 16,930, 3 Nat. Bankr. Reg. 696; *In re* Crawford, 6 Fed. Cas. No. 3,363, 3 Am. L. T. 169, 1 Am. L. T. Bankr. Rep. 210, 3 Nat. Bankr. Reg. 698.

53. *In re* Arnstein, 101 Fed. 706, 4 Am. Bankr. Rep. 246; *In re* Gerson, 2 Am. Bankr. Rep. 170.

54. Atkins *v.* Wilcox, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118, 5 Am. Bankr. Rep. 313; *In re* Mahler, 105 Fed. 428, 5 Am. Bankr. Rep. 453; *In re* Arnstein, 101 Fed. 706, 4 Am. Bankr. Rep. 246; *In re* Jefferson, 93 Fed. 948, 2 Am. Bankr. Rep. 206; *In re* Collignon, 4 Am. Bankr. Rep. 250; *In re* Goldstein, 2 Am. Bankr. Rep. 603. See also Bowditch *v.* Raymond, 146 Mass. 109, 15 N. E. 285; Deane *v.* Caldwell, 127 Mass. 242; Savory *v.* Stocking, 4 Cush. (Mass.) 607; Bordman *v.* Osborn, 23 Pick. (Mass.) 295.

The Act of 1867 contained the following provision: "Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods." U. S. Rev. Stat. (1878), § 5071. Under this provision it was held that rent for the time after the commencement of bankruptcy proceedings was not a provable debt. *In re* Breck, 8 Ben. (U. S.) 93, 4 Fed. Cas. No. 1,822, 12 Nat. Bankr. Reg. 215; *In re* May, 7 Ben. (U. S.) 238, 16 Fed. Cas. No. 9,325, 9 Nat. Bankr. Reg. 419; Bailey *v.* Loeb, 2 Woods (U. S.) 578, 2 Fed. Cas. No. 739, 2 Centr. L. J. 42, 11 Nat. Bankr. Reg. 271; *In re* Webb, 29 Fed. Cas. No. 17,315, 6 Nat. Bankr. Reg. 302.

The relation of landlord and tenant must, of necessity, cease when the tenant is adjudged a bankrupt. Bray *v.* Cobb, 100 Fed. 270, 3 Am. Bankr. Rep. 788; *In re* Jefferson, 93 Fed. 948, 2 Am. Bankr. Rep. 206. But see *In re* Ells, 98 Fed. 967, 3 Am. Bankr. Rep. 564; *Ex p.* Houghton, 1 Lowell (U. S.) 554, 12 Fed. Cas. No. 6,725, which cases hold that the trustees of a bankrupt have a reasonable time to elect whether they will assume a lease which they find in his possession; and if they do not take it the bankrupt retains the term on precisely the same footing as before with the right to occupy and the obligation to pay rent.

Occupancy by trustee.— The trustee of the bankrupt estate may, after adjudication, occupy or use the rented or leased premises for the estate, but under such circumstances the rent would be chargeable to the estate, not as rent under the bankrupt's contract but as costs and expenses of administering the estate. Bray *v.* Cobb, 100 Fed. 270, 3 Am. Bankr. Rep. 788; *In re* Ells, 98 Fed. 967, 3 Am. Bankr. Rep. 564; *In re* Jefferson, 93 Fed. 948, 2 Am. Bankr. Rep. 206; *In re* Gerson, 2 Am. Bankr. Rep. 170.

55. Bankr. Act (1898), § 63*b*; *In re* Silverman, 101 Fed. 219, 4 Am. Bankr. Rep. 83; *In re* Heinsfurter, 97 Fed. 198, 3 Am. Bankr. Rep. 113.

The intent of this provision is to provide for the liquidation of all debts which are provable under Bankr. Act (1898), § 63*a*, which are yet unliquidated. *In re* Hirschman, 104 Fed. 69, 4 Am. Bankr. Rep. 715. If a claim does not fall within any of the classes specified in such section it cannot be proved as an unliquidated claim. It follows that claims for damages arising from tort are not provable unless a judgment has been obtained therefor prior to the filing of the petition or unless the tort is of such a character that it may be waived and an action be brought as upon an implied contract. *In re* Hirschman, 104 Fed. 69, 4 Am. Bankr. Rep. 715. See also Beers *v.* Hanlin, 99 Fed. 695, 3 Am.

B. Manner of Proving Claims — 1. In General. Proof of a claim must consist of a statement under oath[56] in writing signed by a creditor setting forth the claim, the consideration therefor,[57] and whether any, and if so, what securities are held therefor, and whether any, and if so, what payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.[58]

2. Assigned Claims. Claims which have been assigned before proof must be supported by the deposition of the owner at the time of the commencement of bankruptcy proceedings, setting forth the true consideration of the debt, and that

Bankr. Rep. 745; *In re* Filer, 5 Am. Bankr. Rep. 582 [*affirmed* in 5 Am. Bankr. Rep. 835].

Stock-holder's statutory liability for the debts of an insolvent corporation is an unliquidated claim founded upon an implied contract, and the court will direct the manner of its liquidation upon application. *In re* Rouse, 1 Am. Bankr. Rep. 393.

As to release of stock-holder's liability by discharge see *infra*, note 36, p. 397.

The Act of 1867 provided that when the bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate. U. S. Rev. Stat. (1878), § 5067. Under such provision a claim for damages for a purely personal injury was held not to be provable unless liquidated and transmitted into a legal debt by a judgment obtained before the adjudication in bankruptcy. *In re* Schuchardt, 8 Ben. (U. S.) 585, 21 Fed. Cas. No. 12,483, 15 Nat. Bankr. Reg. 161; *In re* Hennocksburgh, 6 Ben. (U. S.) 150, 11 Fed. Cas. No. 6,367, 7 Nat. Bankr. Reg. 37. And a judgment entered after the commencement of the proceedings in bankruptcy upon a verdict rendered before that time in an action for a personal tort is not a provable debt. Black *v.* McClelland, 3 Fed. Cas. No. 1,462, 12 Nat. Bankr. Reg. 481.

56. The statement under oath, if it contain the matter required by the provision of the Act, is at once the claimant's pleading and his evidence, and makes for him a *prima facie* case. *In re* Sumner, 101 Fed. 224, 4 Am. Bankr. Rep. 123.

57. The statement of consideration should be sufficiently specific and full to enable creditors to pursue proper and legitimate inquiry as to the fairness and legality of the claim, and if it is so meager and general in character as not to do this it is insufficient. *In re* Stevens, 107 Fed. 243, 5 Am. Bankr. Rep. 806; *In re* Scott, 93 Fed. 418, 1 Am. Bankr. Rep. 553.

The account, where possible, should be itemized and should contain a statement of the date of sale, quantity of merchandise, and the price thereof. *In re* Scott, 93 Fed. 418, 1 Am. Bankr. Rep. 553; *In re* Elder, 1 Sawy. (U. S.) 73, 8 Fed. Cas. No. 4,326, 3 Nat. Bankr. Reg. 670. Where the claims are for balances due on various collateral notes upon which the bankrupt is either the maker or indorser, and which were in part to become due after discount, the proof of claim must state the date of discount, amount advanced, and to whom. When the liability of the bankrupt is that of indorser notice of dishonor and any other facts necessary to fix such liability must be stated. *In re* Stevens, 104 Fed. 325, 5 Am. Bankr. Rep. 11.

Effect of misstatements.—Where the claim had been originally for a number of notes given by the bankrupt, for which had been substituted a new note, payable on demand, which was not intended to be in extinguishment of the old notes, a misstatement as to the date of the new note and to the effect that the old notes were all overdue is not sufficient to vitiate the claim. *In re* Stevens, 107 Fed. 243, 5 Am. Bankr. Rep. 806.

58. Bankr. Act (1898), § 57*a*.

Depositions to prove claims against a bankrupt's estate "shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership it must appear on oath that the deponent is a member of the partnership; when made by an agent the reason that it is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation the deposition shall be made by the treasurer or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred." U. S. Supreme Ct. Bankr. G. O. No. 21, par. 1.

Forms have been prescribed for the proof of unsecured debts (U. S. Supreme Ct. Bankr. Forms, No. 31; 89 Fed. xlii), of secured debts (U. S. Supreme Ct. Bankr. Forms, No. 32; 89 Fed. xliii), of a debt due a corporation (U. S. Supreme Ct. Bankr. Forms, No. 33; 89 Fed. xliii), of a debt by a partnership (U. S. Supreme Ct. Bankr. Forms, No. 34; 89 Fed. xliv), of a debt by an agent or attorney (U. S. Supreme Ct. Bankr. Forms, No. 35; 89 Fed. xlv), and of a secured debt by an agent (U. S. Supreme Ct. Bankr. Forms, No. 36; 89 Fed. xlv). Such forms should be observed and used with such alterations as may be necessary to suit the circumstances of any particular case. U. S. Supreme Ct. Bankr. G. O. No. 38.

it is entirely unsecured, or if it is secured, the security, as is required in proving secured claims.[59] Where a claim has been proved and entered on the referee's docket and is afterwards assigned, satisfactory proof of such assignment must be filed, and the referee must give immediate notice by mail to the original claimant of the filing of such proof of assignment. If no objection is entered within ten days, or within any further time allowed by the referee, he must make an order subrogating the rights of the assignee to the original claimant. If objection is made he must proceed to hear and determine the matter.[60]

3. CLAIMS FOUNDED UPON WRITTEN INSTRUMENTS. Whenever a claim is founded upon a written instrument such instrument, unless lost or destroyed, must be filed with the proof of claim. If such instrument is lost or destroyed a statement of such fact and the circumstances of such loss shall be filed under oath with the claim. After the claim is allowed or disallowed such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.[61]

4. CLAIMS OF PREFERRED CREDITORS — a. Necessity of Surrender of Preference. The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences.[62] In determining the right of a preferred creditor to share in the estate of the bankrupt, the intent of the parties or the time of giving the preference is immaterial. If a preference has in fact been given there must be a surrender of the property received.[63] Thus money paid on account by an insolvent debtor must be surrendered before a claim for the

59. U. S. Supreme Ct. Bankr. G. O. No. 21, par. 3.

As to proof of secured claims see *infra*, XI, B, 5.

60. U. S. Supreme Ct. Bankr. G. O. No. 21, par. 3.

The execution of an assignment of claim after proof may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. U. S. Supreme Ct. Bankr. G. O. No. 21, par. 5.

61. Bankr. Act (1898), § 57*b*.

The court will not permit the withdrawal of such instrument except upon the application of some person having an interest therein. *In re* McNair, 16 Fed. Cas. No. 8,907, 2 Nat. Bankr. Reg. 219.

Form of affidavit of lost bill or note is prescribed in U. S. Supreme Ct. Bankr. Forms, No. 37; 89 Fed. xlvi.

62. Bankr. Act (1898), § 57*g*. See also *In re* Owings, 109 Fed. 623, 6 Am. Bankr. Rep. 454.

The Act of 1867 provided that: "Any person who, . . . has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provisions of the [Bankruptcy Act] . . . shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit, or advantage received by him under such preference." U. S. Rev. Stat. (1878), § 5084.

A person is deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Bankr. Act (1898), § 60*a*. See also *infra*, XVI, C, 1.

If a bankrupt has given a preference within four months of the filing of the petition in bankruptcy, and the person preferred has reasonable cause to believe that a preference was intended, it shall be avoided by the trustee and the property or its value may be recovered from such person. Bankr. Act (1898), § 60*b*. See also *infra*, XVI, C. 2.

63. Pirie *v.* Chicago Title, etc., Co., 182 U. S. 438, 21 S. Ct. 906, 45 L. ed. 1171, 5 Am. Bankr. Rep. 814; *In re* Abraham Steers Lumber Co., 110 Fed. 738, 6 Am. Bankr. Rep. 315; *In re* Jones, 110 Fed. 736, 4 Am. Bankr. Rep. 563; *In re* Flick, 105 Fed. 503, 5 Am. Bankr. Rep. 465; *In re* Arndt, 104 Fed. 234, 4 Am. Bankr. Rep. 773; *In re* Teslow, 104 Fed. 229, 4 Am. Bankr. Rep. 757; *In re* Rogers' Milling Co., 102 Fed. 687, 4 Am. Bankr. Rep. 540; *In re* Fixen, 102 Fed. 295, 42 C. C. A. 354, 50 L. R. A. 605, 4 Am. Bankr. Rep. 10; *In re* Sloan, 102 Fed. 116, 4 Am. Bankr. Rep. 356; *In re* Klingaman, 101 Fed. 691, 4 Am. Bankr. Rep. 254; Strobel, etc., Co. *v.* Knost, 99 Fed. 409, 3 Am. Bankr. Rep. 631; *In re* Conhaim, 97 Fed. 923, 3 Am. Bankr. Rep. 249; *In re* Gallagher, 6 Am. Bankr. Rep. 255. But see *In re* Ratliff, 107 Fed. 80, 5 Am. Bankr. Rep. 713; *In re* Smoke, 104 Fed. 289, 4 Am. Bankr. Rep. 434; *In re* Eggert, 98 Fed. 843, 3 Am. Bankr. Rep. 541; *In re* Hall, 4 Am. Bankr. Rep. 671, which cases are to the effect that where the bankrupt makes payments to creditors prior to his bankruptcy with no intention to prefer such creditors such payments cannot be deemed preferential.

If a creditor has innocently received a

balance due on such account can be proved in bankruptcy proceedings.[64] So where an attachment has been secured by a creditor with the sufferance of his debtor it may be treated as a preference, and the claim upon which such attachment was based cannot be proved unless the preference is surrendered.[65] An unlawful preference can arise, however, only in the case of an antecedent debt.[66] If a preferential transfer is made at the time the debt is incurred as a security therefor, a creditor will not be required to surrender the preference so received, and will be entitled to prove his claim as a secured creditor.[67]

b. Time of Surrender of Preference. If proceedings are commenced by the trustee to set aside a preferential transfer and a preferred creditor puts in a defense it will be too late thereafter for him to exercise his option of surrendering his preference and proving his claim.[68] It has been held, however, in a number of cases arising under the former act that a preferred creditor may surrender his preference at any time before the actual entry of judgment in a suit brought against him by the trustee for the recovery of such preference.[69]

preference and the transaction is otherwise valid, he cannot be compelled to return that which he has received, but before sharing with the other creditors in the proceeds of the bankrupt's estate he must surrender such preference. Strobel, etc., Co. *v.* Knost, 99 Fed. 409, 3 Am. Bankr. Rep. 631; *In re* Ft. Wayne Electric Corp., 99 Fed. 400, 39 C. C. A. 582, 3 Am. Bankr. Rep. 634. See also *In re* Wertheimer, 6 Am. Bankr. Rep. 187.

64. Pirie *v.* Chicago Title, etc., Co., 182 U. S. 438, 21 S. Ct. 906, 45 L. ed. 1171, 5 Am. Bankr. Rep. 814; *In re* Bashline, 109 Fed. 965, 6 Am. Bankr. Rep. 194; *In re* Keller, 109 Fed. 306, 6 Am. Bankr. Rep. 487; *In re* Seckler, 106 Fed. 484, 5 Am. Bankr. Rep. 579; *In re* Conhaim, 97 Fed. 923, 3 Am. Bankr. Rep. 249; *In re* Schafer, 5 Am. Bankr. Rep. 146. But see *In re* Ratliff, 107 Fed. 80, 5 Am. Bankr. Rep. 713; *In re* Smoke, 104 Fed. 289, 4 Am. Bankr. Rep. 434; *In re* Alexander, 102 Fed. 464, 4 Am. Bankr. Rep. 376; Blakey *v.* Boonville Nat. Bank, 95 Fed. 267, 2 Am. Bankr. Rep. 459; *In re* Piper, 5 Am. Bankr. Rep. 144 note; *In re* Hall, 4 Am. Bankr. Rep. 671, which cases hold that payments on account by a bankrupt debtor prior to bankruptcy, in the ordinary course of his business transactions, are not preferential and need not be surrendered.

The transfer of any of the property of a debtor to constitute a preference includes the sale, and every other and different mode of disposing of or parting with property, as a payment, pledge, mortgage, gift, or security. Bankr. Act (1898), § 1*a* (25). A payment of money is a transfer. Landry *v.* Andrews, 22 R. I. 597, 48 Atl. 1036, 6 Am. Bankr. Rep. 281; *In re* Sloan, 102 Fed. 116, 4 Am. Bankr. Rep. 356; *In re* Ft. Wayne Electric Corp., 99 Fed. 400, 39 C. C. A. 582, 3 Am. Bankr. Rep. 634.

Surrender of payment by firm creditor.— Where, while a firm is insolvent, one partner purchases his copartner's interest in the partnership property, assuming the firm debts, and shortly thereafter goes into bankruptcy, a firm creditor, upon filing against the estate of the bankrupt a claim in part for goods sold to the firm, must, as a condition of being allowed to prove such claim, surrender such payments on account as were made by the firm in the usual course of business within four months preceding the filing of the petition in bankruptcy, even though when he received such payments he did not know or have reason to believe that the firm was insolvent. *In re* Keller, 109 Fed. 118, 6 Am. Bankr. Rep. 334.

65. *In re* Burlington Malting Co., 109 Fed. 777, 6 Am. Bankr. Rep. 369.

66. Tiffany *v.* Boatman's Sav. Inst., 18 Wall. (U. S.) 375, 21 L. ed. 868. See also *infra*, XVI, C, 1.

67. *In re* Davidson, 109 Fed. 882, 5 Am. Bankr. Rep. 528; *In re* Wolf, 98 Fed. 84, 3 Am. Bankr. Rep. 555.

68. *In re* Lee, 15 Fed. Cas. No. 8,179, 14 Nat. Bankr. Reg. 89. See also *In re* Riorden, 20 Fed. Cas. No. 11,852, 14 Nat. Bankr. Reg. 332.

69. *In re* Leland, 7 Ben. (U. S.) 156, 15 Fed. Cas. No. 8,230, 9 Nat. Bankr. Reg. 209; *In re* Davidson, 4 Ben. (U. S.) 10, 7 Fed. Cas. No. 3,599, 3 Nat. Bankr. Reg. 418; *In re* Montgomery, 3 Ben. (U. S.) 567, 17 Fed. Cas. No. 9,727, 3 Nat. Bankr. Reg. 429; Burr *v.* Hopkins, 6 Biss. (U. S.) 345, 4 Fed. Cas. No. 2,192, 7 Chic. Leg. N. 266, 12 Nat. Bankr. Reg. 211; *In re* Richter, 1 Dill. (U. S.) 544, 20 Fed. Cas. No. 11,803, 4 Nat. Bankr. Reg. 221; *In re* Tonkin, 24 Fed. Cas. No. 14,094, 3 Am. L. T. 221, 1 Am. L. T. Bankr. Rep. 232, 4 Nat. Bankr. Reg. 52; *In re* Scott, 21 Fed. Cas. No. 12,518, 4 Nat. Bankr. Reg. 414; *In re* Cramer, 6 Fed. Cas. No. 3,345, 8 Chic. Leg. N. 106, 13 Nat. Bankr. Reg. 225.

If the transaction is not tainted with actual fraud the creditor, in equity, should have a reasonable opportunity of considering whether he will surrender his preference and pay all the costs and charges, but his decision must precede the final decree. Zahm *v.* Fry, 30 Fed. Cas. No. 18,198, 9 Nat. Bankr. Reg. 546; Hood *v.* Karper, 12 Fed. Cas. No. 6,664, 5 Nat. Bankr. Reg. 358, 8 Phila. (Pa.) 160, 8 Leg. Int. (Pa.) 340. But see *In re* Stephens, 3 Biss. (U. S.) 187, 22 Fed. Cas. No. 13,365, 6 Nat. Bankr. Reg. 533, holding that it was a matter of discretion with the court

5. CLAIMS OF SECURED CREDITORS.[70] Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value[71] of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of such securities or priorities.[72] If the creditor in proving his debt fails to mention his security, as a general rule he will be deemed to have elected to prove his claim as unsecured.[73]

6. CLAIMS OF TRUSTEE OF OTHER ESTATE. The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon the same terms as the claims of other creditors.[74]

7. AMENDMENT OF PROOF. The district court possesses the power in its discretion and in a proper case to allow proofs of debts to be amended.[75] If the omission or defect was fraudulently effected and has operated to the advantage of the

whether a party should be allowed to surrender his preference after a suit is brought against him, and particularly after the testimony is taken and the party becomes satisfied that it is enough to defeat him.

70. For definition of "secured creditor" see *supra*, note 8, p. 238.

71. **The value of securities** held by secured creditors shall be determined by converting the same into money according to the terms of the agreement, pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee, or by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. Bankr. Act (1898), § 57*h*.

As to meetings of creditors see *supra*, X.

72. Bankr. Act (1898), § 57*e*.

The evident purpose of this provision is to secure to secured creditors the right of participating in the election of a trustee and in other business transacted at creditors' meetings to the extent only of the sum which is due to such creditors over and above the value of the property held by them as security. If the security consists of property belonging to a person other than the bankrupt, the creditor may prove his entire claim against the bankrupt's estate and receive dividends thereon, and thereafter institute proceedings to enforce his claim upon the security for the balance. Collier Bankr. (3d ed.) 314 [*cited* in *In re* Headley, 97 Fed. 765, 3 Am. Bankr. Rep. 272]. This principle is also applied in the case of a security on the individual property of a member of a partnership for a debt of a bankrupt partnership, and the firm creditors holding such security are not deemed secured creditors within the meaning of this provision. *In re* Coe, 1 Am. Bankr. Rep. 275. In bankruptcy the joint and several estates of a partnership and the members thereof are considered as distinct estates. A joint creditor having security on a separate estate may prove against the joint estate without relinquishing his security, or he may prove his claim against both estates and receive a dividend from each, but so as not to receive more than the amount of his debt. *In re* Howard, 12 Fed. Cas. No. 6,750, 4 Nat. Bankr. Reg. 571. See also *In re* Thomas, 8 Biss. (U. S.) 139, 22 Fed. Cas. No. 13,886, 6 Centr. L. J. 151, 17 Nat. Bankr. Reg. 54.

Form for the proof of a secured debt is prescribed in U. S. Supreme Ct. Bankr. Forms, No. 32; 89 Fed. xliii.

73. Stewart *v.* Isidor, 5 Abb. Pr. N. S. (N. Y.) 68, 1 Nat. Bankr. Reg. 435; *In re* Brand, 2 Hughes (U. S.) 334, 4 Fed. Cas. No. 1,809, 2 Am. L. T. Bankr. Rep. 66, 3 Nat. Bankr. Reg. 324; *In re* Granger, 10 Fed. Cas. No. 5,684, 8 Nat. Bankr. Reg. 30; *In re* Bloss, 3 Fed. Cas. No. 1,562, 4 Nat. Bankr. Reg. 147.

As to amendment of proof of debt see *infra*, XI, B, 7.

74. Bankr. Act (1898), § 57*m*.

75. *In re* Stevens, 107 Fed. 243, 5 Am. Bankr. Rep. 806; *In re* Myers, 99 Fed. 691, 3 Am. Bankr. Rep. 760; *In re* Falls City Shirt Mfg. Co., 98 Fed. 592, 3 Am. Bankr. Rep. 437; *In re* Montgomery, 3 Ben. (U. S.) 566, 17 Fed. Cas. No. 9,729, 3 Nat. Bankr. Reg. 423; *In re* Hubbard, 1 Lowell (U. S.) 190, 12 Fed. Cas. No. 6,813, 1 Nat. Bankr. Reg. 697; *In re* Elder, 1 Sawy. (U. S.) 73, 8 Fed. Cas. No. 4,326, 3 Am. L. T. 140, 1 Am. L. T. Bankr. Rep. 198, 2 Chic. Leg. N. 241, 3 Nat. Bankr. Reg. 670, 17 Pittsb. Leg. J. (Pa.) 178; *In re* Wiener, 29 Fed. Cas. No. 17,620, 14 Nat. Bankr. Reg. 218, 3 N. Y. Wkly. Dig. 95.

A secured creditor who inadvertently proves his debt as an unsecured claim will not be required to surrender his lien and participate in the general distribution of assets, but will be allowed, if he elects to do so, to withdraw or amend the proof and rely upon his security. *In re* Wilder, 101 Fed. 104, 3 Am. Bankr. Rep. 761; *In re* Falls City Shirt Mfg. Co., 98 Fed. 592, 3 Am. Bankr. Rep. 437; *In re* Harwood, Crabbe (U. S.) 496, 11 Fed. Cas. No. 6,185; *In re* Brand, 2 Hughes (U. S.) 334, 4 Fed. Cas. No. 1,809, 2 Am. L. T. Bankr. Rep. 66, 3 Nat. Bankr. Reg. 324; *In re* Hope Min. Co., 1 Sawy. (U. S.) 710, 12 Fed. Cas. No. 6,681; *In re* Clark, 5 Fed. Cas. No. 2,806, 5 Nat. Bankr. Reg. 255.

creditor so that the estate of the bankrupt would be injured by an amendment it should not be allowed.[76]

C. Time of Proof. Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment.[77]

D. Filing Claims. Claims after being proved may for the purpose of allowance be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.[78]

E. Objections to Allowance of Claims — 1. In General. Claims which have been duly proved must be allowed upon receipt by, or upon presentment to, the court, unless objection to their allowance is made by parties in interest,[79] or their consideration is continued for cause by the court upon its own motion.[80]

2. Hearing and Determination of Objections. Objections to claims must be heard and determined as soon as the convenience of the court and the best interests of the estate and the claimants will permit.[81]

F. Reconsideration of Claims. Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case before but not after the estate has been closed.[82] The

76. Stewart *v.* Isidor, 5 Abb. Pr. N. S. (N. Y.) 68; *In re* Elder, 1 Sawy. (U. S.) 73, 8 Fed. Cas. No. 4,326, 3 Am. L. T. 140, 1 Am. L. T. Bankr. Rep. 198, 2 Chic. Leg. N. 241, 3 Nat. Bankr. Reg. 670, 17 Pittsb. Leg. J. (Pa.) 178; *In re* Parkes, 18 Fed. Cas. No. 10,754, 10 Nat. Bankr. Reg. 82; *In re* Jaycox, 13 Fed. Cas. No. 7,242, 8 Nat. Bankr. Reg. 241.

An amendment was denied where it was sought to add to a proof of a claim a statement of the security in the nature of a claim to an equitable lien upon certain real estate under a notice of *lis pendens* in a suit pending against the bankrupt and his wife prior to the adjudication in bankruptcy, no mention of which was made in the proof of claim filed. *In re* Wilder, 101 Fed. 104, 3 Am. Bankr. Rep. 761.

An amendment will not be permitted to include new claims after the time for filing has expired. *In re* Stevens, 107 Fed. 243, 5 Am. Bankr. Rep. 806.

77. Bankr. Act (1898), § 57*n*.

The limitation of time prescribed is imperative and prohibits the proof and allowance of a claim presented after the expiration of one year from the date of adjudication. *In re* Leibowitz, 108 Fed. 617, 6 Am. Bankr. Rep. 268; *In re* Rhodes, 105 Fed. 231, 5 Am. Bankr. Rep. 197; *In re* Shaffer, 104 Fed. 982, 4 Am. Bankr. Rep. 728; Bray *v.* Cobb, 100 Fed. 270, 3 Am. Bankr. Rep. 788.

The right of infants and insane persons without guardians and without notice of bankruptcy proceedings to prove their claims continues six months longer than in other cases. Bankr. Act (1898), § 57*n*.

78. Bankr. Act (1898), § 57*c*.

The clerk or referee with whom a paper is filed must indorse thereon the day and hour of filing and a brief statement of its character. U. S. Supreme Ct. Bankr. G. O. No. 2.

79. **The bankrupt is required to examine the correctness** of all proofs of claims filed against the estate. Bankr. Act (1898), § 7*a* (3); *In re* Ankeny, 100 Fed. 614, 4 Am. Bankr. Rep. 72. See also *infra*, XVII. The trustee or any other person interested in the bankrupt's estate may interpose objections to the allowance of claims. Atkins *v.* Wilcox, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118, 5 Am. Bankr. Rep. 313; *In re* Sumner, 101 Fed. 224, 4 Am. Bankr. Rep. 123.

80. Bankr. Act (1898), § 57*d*.

The meaning is that if objection be interposed or if the court be not satisfied with the *prima facie* case thus made, the claim shall not be accepted as proven until disposition shall have been made of such objection, or, if the court continue the consideration, until the court shall be convinced of its validity. *In re* Sumner, 101 Fed. 224, 4 Am. Bankr. Rep. 123.

81. Bankr. Act (1898), § 57*f*; *In re* Eagles, 99 Fed. 695, 3 Am. Bankr. Rep. 733.

Burden of proof.— If the statement of proof presented by the creditor presents a *prima facie* case the creditor may rest and await the introduction of evidence opposed to the sufficient evidence presented by him. The bankrupt or any creditor may oppose the allowance of the claim, and if evidence is introduced by him sufficient to overcome the presumptive case made by the claimant it is incumbent upon the claimant to produce further evidence to establish the provability of his claim. *In re* Sumner, 101 Fed. 224, 4 Am. Bankr. Rep. 123. See also *In re* Shaw, 109 Fed. 780, 6 Am. Bankr. Rep. 499.

Form of order expunging claim is prescribed in U. S. Supreme Ct. Bankr. Forms, No. 39; 89 Fed. xlvii.

Form of order reducing claim is prescribed in U. S. Supreme Ct. Bankr. Forms, No. 38; 89 Fed. xlvii.

82. Bankr. Act (1898), § 57*k*.

Recovery of dividend upon rejection.—

reëxamination of a claim may be had upon the application of the trustee[83] or any creditor by petition[84] to the referee to whom the case is referred for an order for such reëxamination, and thereupon the referee must make an order fixing the time for hearing the petition, of which due notice[85] shall be given by mail addressed to the creditor.[86] At the time appointed the referee must take the examination of the creditor and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished the referee may order accordingly.[87]

G. Transmission of Proved Claims to Clerk. The referee must forthwith transmit to the clerk a list of the claims which have been proved against the bankrupt estate, with the names and addresses of the proving creditors.[88]

XII. TRUSTEES.[89]

A. Appointment — 1. How Made — a. By Creditors — (1) *In General.* The creditors of the bankrupt estate[90] must, at their first meeting after the adju-

Whenever a claim shall have been reconsidered and rejected in whole or in part upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part. Bankr. Act (1898), § 57*l*. See also XVIII, H, 2, b, (VIII).

83. Where no trustee has been appointed for the estate of a bankrupt, a motion for the reëxamination of a claim proved and allowed against the estate may be made by the bankrupt himself. *In re* Ankeny, 100 Fed. 614, 4 Am. Bankr. Rep. 72.

84. Sufficiency of petition.— Where a petition for the reconsideration of a claim does not aver the essential facts with sufficient particularity, the proper method of objecting to it is by a motion for a more specific statement, and not by motion to strike out parts of the petition. *In re* Ankeny, 100 Fed. 614, 4 Am. Bankr. Rep. 72.

85. Notice of a special meeting called upon the petition of a creditor to have a reëxamination of claims should be sent out by the referee and not by the petitioner. Bankr. Act (1898), § 58*c*; *In re* Stoever, 105 Fed. 355, 5 Am. Bankr. Rep. 250.

86. U. S. Supreme Ct. Bankr. G. O. No. 21, par. 6.

This provision refers to claims against the bankrupt that were in existence when the petition in bankruptcy was filed and not to claims against the estate for expenses of administration. *In re* Reliance Storage, etc., Co., 100 Fed. 619, 4 Am. Bankr. Rep. 49.

87. U. S. Supreme Ct. Bankr. G. O. No. 21, par. 6.

Burden of proof.— In a proceeding to reconsider claims which have been allowed the burden of proof is upon the petitioner. *In re* Howard, 100 Fed. 630, 4 Am. Bankr. Rep. 69; *In re* Doty, 5 Am. Bankr. Rep. 58.

A wide discretion is vested in the referee, and the judge upon review will not interfere with his decision upon questions of fact, unless convinced that the decision is manifestly against the weight of evidence. *In re* Rider, 96 Fed. 811, 3 Am. Bankr. Rep. 178.

In an application to increase or diminish the sum at which a claim has previously been allowed the better practice is to vacate the former order of allowance and allow the claim at the new amount as if then moved for the first time. *In re* Smith, 2 Am. Bankr. Rep. 648.

Form of order expunging claim is prescribed in U. S. Supreme Ct. Bankr. Forms, No. 39; 89 Fed. xlvii.

Form of order reducing claim is prescribed in U. S. Supreme Ct. Bankr. Forms, No. 38; 89 Fed. xlvii.

88. U. S. Supreme Ct. Bankr. G. O. No. 24. See also *supra*, III, D, 4.

89. The office of trustee in bankruptcy is created by the Act. Bankr. Act (1898), § 33. The officer performing the duties of a trustee was known, under the Act of 1867, as an assignee. Bankr. Act (1867), § 3.

90. Right of creditors absolute.—The creditors of the bankrupt are entitled in the first instance to a free, deliberate, and unbiased choice of the trustee. *In re* Lewensohn, 98 Fed. 576, 578, 3 Am. Bankr. Rep. 299, where the court says: "From what the act provides, as well as from what it omits, therefore, the necessary inference is that it designs to give creditors in all cases an opportunity to choose the trustee, and to authorize the court to appoint only where they neglect or fail to do so." Under the Act of 1867 it was held, in *In re* Smith, 2 Ben. (U. S.) 113, 22 Fed. Cas. No. 12,971, 1 Nat. Bankr. Reg. 243, that the policy of the Bankrupt Act, as clearly shown in its provisions, is to give to the creditors of the bankrupt the free, deliberate, and unbiased choice in the first instance of the person who is to take the assets and manage them. The importance of this policy has been uniformly recognized by this court. It is especially incumbent upon registers in no manner to interfere with or influence, either directly or indirectly, the choice of the assignee by the creditors.

Bankrupt not to interfere.— The trustee must be free from all entangling alliances and associations which might in any way control his actions, and therefore he cannot be named by the bankrupt or the bankrupt's attorney.

dication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one or three trustees of such estate.[91]

(II) *Approval or Disapproval.* The appointment of the trustee by the creditors is subject to the approval or disapproval of the referee or the judge.[92]

b. By Court. If the creditors do not appoint a trustee or trustees as provided in the Act the court[93] must do so.[94] Thus the court or referee may appoint the trustee where it appears that the creditors at the first meeting have failed to elect.[95]

In re Rekersdres, 108 Fed. 206, 5 Am. Bankr. Rep. 811; Falter *v.* Reinhard, 104 Fed. 292, 4 Am. Bankr Rep. 782 [*affirmed* in 106 Fed. 57, 62, 45 C. C. A. 218, 5 Am. Bankr. Rep. 155, where it is said: "It may be taken, then, as an established proposition, upon reason and authority, that interference by the bankrupt, certainly when such as to control the election, will avoid the choice thereby attained, as it is the policy of the law to secure a trustee who is the selection of the creditors, and not the bankrupt"]. Under the Act of 1867 interference by the bankrupt, the voting of claims in his interest or at his direction was discountenanced by the court and held to invalidate a choice of trustee thus secured. *In re* Bliss, 1 Ben. (U. S.) 407, 3 Fed. Cas. No. 5,143, Bankr. Reg. Suppl. 17, 6 Int. Rev. Rec. 116, 1 Nat. Bankr. Reg. 78; *In re* Wetmore, 29 Fed. Cas. No. 17,466, 16 Nat. Bankr. Reg. 514.

91. Bankr. Act (1898), § 44.

As to conduct of proceedings at the first meeting of creditors and the qualifications of voters thereat see *supra*, X, A.

Manner of voting.— No particular mode or manner of voting is prescribed by the Act. It may be assumed therefore that any mode or manner of voting by which the choice of each creditor entitled to vote is clearly expressed is sufficient. It may no doubt be taken by ballot, or *viva voce*; it may be taken by calling the name of each creditor, or by calling upon the person or persons representing creditors by power of attorney to name the choice of the creditor or creditors represented by him. *In re* Lake Superior Ship Canal, etc., Co., 14 Fed. Cas. No. 7,997, 7 Nat. Bankr. Reg. 376.

No official trustee may be appointed by the court. U. S. Supreme Ct. Bankr. G. O. No. 14.

The form of appointment of trustee by creditors is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 22; 89 Fed. xxxviii.

92. U. S. Supreme Ct. Bankr. G. O. No. 13.

When appointment should be approved.— The General Order as to the approval of the appointment of a trustee means that a supervisory power is vested in the court to meet contingencies which could not be definitely provided for in the Act, and which must fall to the good judgment and conscience of the court, and whereby the court would be armed with the power to prevent the selection of a person who, in his judgment, and notwithstanding the express desire of the majority in number and amount of the creditors, or even of all the creditors, would not be a proper selection, and whose appointment might result in a defeat of a proper, just, and equitable administration of the bankrupt law in that particular case; but the emergency should not be a trivial one; it should be one of grave character and due weight, and unless such an emergency appears it would become the duty of the referee to approve the selection, always subject of course to a review by the district judge. *In re* Henschel, 6 Am. Bankr. Rep. 25. See also *In re* Henschel, 109 Fed. 861, 6 Am. Bankr. Rep. 305.

93. The word "court" as here used includes the referee as well as the district judge. Bankr. Act (1898), § 1 (7), *supra*, note 8, p. 238; *In re* Brooke, 100 Fed. 432, 4 Am. Bankr. Rep. 50.

The form of order of appointment of trustee by the referee is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 23; 89 Fed. xxxix.

94. Bankr. Act (1898), § 44.

95. When creditors fail to elect at first meeting.— Where a majority in number of the creditors present at the first meeting voted for one person, and a majority in amount for another, the referee may appoint the person voted for by the majority in number. The creditors, by disagreeing, cannot block the administration of the estate. *In re* Richards, 103 Fed. 849, 4 Am. Bankr. Rep. 631. The first session of the first meeting of the creditors was held at the referee's office from ten-thirty A. M. until four-thirty P. M., without an adjudication. On the adjourned day, when called upon to proceed with the election, the creditors were still unable to agree. There was an apparent need of a trustee at once. The judge had directed several days before that the referee should appoint a trustee unless a suitable person were elected by the creditors. It was held that ample opportunity had been given the creditors to proceed with the election and that it was proper for the referee to appoint. The court said: "The creditors have no right to use the office of the referee or his time in protracted maneuvers in behalf of their special favorites. Such work should be done elsewhere. Nor can the court regard with any complacency the efforts of creditors to secure a particular trustee for merely personal objects." *In re* Kuffler, 97 Fed. 187, 188, 3 Am.

2. Notice of Appointment. The referee must, immediately upon the appointment and approval of the trustee, notify him in person or by mail of his appointment.[96]

3. Vacancy Caused by Failure to Qualify. If a trustee fails to give a bond he must be deemed to have declined his appointment, and such failure creates a vacancy in his office.[97] The Act requires that where there is a vacancy in the office of trustee an opportunity should be offered the creditors to fill the same, and the court cannot make an appointment in such cases until such opportunity has been given.[98] Whenever, by reason of a vacancy in the office of trustee, it becomes necessary to call a special meeting of the creditors in order to fill such vacancy, the court may call such meeting, specifying in the notice thereof its purpose.[99]

4. When Appointment Unnecessary. If the schedules of a voluntary bankrupt disclose no assets,[1] and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed by the court if it shall deem it desirable. If no trustee is appointed as aforesaid the court may order that no meeting of the creditors other than the first meeting shall be called.[2]

B. Qualification — 1. In General. Trustees may be (1) individuals who are

Bankr. Rep. 162. See also *In re* Newton, 107 Fed. 429, 46 C. C. A. 399, 6 Am. Bankr. Rep. 52; *In re* Brooke, 100 Fed. 432, 4 Am. Bankr. Rep. 50.

Effect of excluding proxies.— Where, at an adjourned meeting for the election of a trustee, twenty-four claims presented by attorneys and proxies of the creditors are allowed and filed, and upon presentment of proxies for the purpose of voting at the meeting for trustee the votes offered by ten of the proxies were properly excluded because of defective execution — ten of the remaining creditors being less than a majority in number and amount of claims allowed cannot elect — and the referee must appoint a trustee. *In re* Henschel, 109 Fed. 861, 6 Am. Bankr. Rep. 305.

96. U. S. Supreme Ct. Bankr. G. O. No. 16.

The form of the notice to the trustee of his appointment is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 24; 89 Fed. xxxix.

The notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond. U. S. Supreme Ct. Bankr. G. O. No. 16.

97. Bankr. Act (1898), § 50*k*.

Whenever the trustee chosen refuses to accept or fails to qualify or is disapproved by the court there is a vacancy in the office of such trustee. *In re* Lewensohn, 98 Fed. 576, 3 Am. Bankr. Rep. 299. See also *infra*, XII, C.

98. Bankr. Act (1898), § 44. Commenting upon this section the court, in *In re* Lewensohn, 98 Fed. 576, 579, 3 Am. Bankr. Rep. 299, says: "The first clause 'after a vacancy has occurred' imports that the office was previously filled; but the revisers apparently not being satisfied with this limitation, the second clause was added in order to secure an opportunity of choice to creditors in every case 'where there is a vacancy,' i. e. where the office, from whatever cause, is unfilled. . . . So long as the office is unfilled, therefore, 'there is a vacancy,' whether previously filled or not, and this second clause as respects vacancies, therefore, applies. If this clause were not broader than the first, it would be mere surplusage."

99. U. S. Supreme Ct. Bankr. G. O. No. 25.

Such notices are to be sent to the creditors by mail to their respective addresses, as they appear in the list of creditors furnished by the bankrupt, or as afterward filed with the papers in the case by the creditors, ten days prior to such meeting. Notices are to be given by the referee unless otherwise ordered by the judge. Bankr. Act (1898), § 58*a* (3), *c*.

When a trustee elect dies before he qualifies it is proper, at a continuation of the meeting at which he was chosen, to allow the creditor who named him to name his successor. In such a case no new notice to creditors is necessary. *In re* Wright, 2 Am. Bankr. Rep. 497.

1. **In the absence of substantial assets,** either appearing from the schedules or discoverable, the appointment of a trustee is not indispensable, and clearly no power exists to require acceptance and qualification by one who may be chosen but refuses to accept without compensation. If creditors insist upon an appointment under such circumstances they must furnish the advance fee or otherwise arrange with the proposed trustee. *In re* Levy, 101 Fed. 247, 4 Am. Bankr. Rep. 108.

2. U. S. Supreme Ct. Bankr. G. O. No. 15. But if the referee afterward learns that property of the bankrupt has been found, which creditors claim as assets of the estate, a trustee should then be appointed, according to U. S. Supreme Ct. Bankr. G. O. No. 15. *In re* Smith, 93 Fed. 791, 2 Am. Bankr. Rep. 190.

Form of order that no trustee be appointed is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 27; 89 Fed. xli.

respectively competent to perform the duties of that office and reside or have an office in the judicial district within which they are appointed,[3] or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.[4]

2. BOND — a. In General. Trustees,[5] before entering upon their official duties and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, must respectively qualify by entering into a bond with the United States, with such sureties as may be approved by the court, conditioned for the faithful performance of their official duties.[6]

b. Amount of Bond. The creditors of the bankrupt estate, at their first meeting, after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there be a vacancy in the office of trustee, must fix the amount of the bond of the trustee.[7]

c. Sureties — (I) *NUMBER OF.* There must be at least two sureties upon each bond.[8] But the execution of a bond with a single surety company[9] as surety is sufficient.[10]

(II) *JUSTIFICATION.* The sufficiency of the sureties on the bond given by the trustee is to be approved by the court or by the referee,[11] and evidence must

3. Bankr. Act (1898), § 45.

Under the Act of 1867 the only provision relative to the eligibility of an assignee was to the effect that "no person who has received any preference contrary to the provisions of this Title shall vote for or be eligible as assignee." U. S. Rev. Stat. (1878), § 5035. There was no other provision in that Act rendering a person ineligible for the position of assignee. *In re* Barrett, 2 Hughes (U. S.) 444, 2 Fed. Cas. No. 1,043, 1 Am. L. T. Bankr. Rep. 144, 2 Am. L. T. Rep. 182, 1 Chic. Leg. N. 202, 11 Int. Rev. Rec. 21, 2 Nat. Bankr. Reg. 533.

Any bias, either for or against the bankrupt and his dealings, will not disqualify a person as trustee. *In re* Clairmont, 1 Lowell (U. S.) 230, 5 Fed. Cas. No. 2,781, 1 Am. L. T. Bankr. Rep. 6, 1 Nat. Bankr. Reg. 276; *In re* Grant, 10 Fed. Cas. No. 5,692, 2 Nat. Bankr. Reg. 106. The trustee's duties are administrative, not judicial. It is not his special duty "to hold an even hand or an unbiased mind" toward the bankrupt, but to make the most possible out of the assets, and in the performance of this duty mere bias or unfriendliness toward the bankrupt must be rarely, if ever, material. Considering the number and frequency of fraudulent bankruptcies in the past a zealous watch and scrutiny of an insolvent's transactions cannot be looked upon as demerit, or as indicative of a lack of "competency" in a trustee. And unfounded suspicions and prejudices even may be met by the honest merchant without fear. *In re* Lewensohn, 98 Fed. 576, 3 Am. Bankr. Rep. 299, 305.

An attorney for the bankrupt may be a trustee but he must withdraw from his relation as attorney. *In re* Barrett, 2 Hughes (U. S.) 444, 2 Fed. Cas. No. 1,043, 2 Am. L. T. Rep. 182, 1 Am. L. T. Bankr. Rep. 144, 1 Chic. Leg. N. 202, 11 Int. Rev. Rec. 21, 2 Nat. Bankr. Reg. 533; *In re* Clairmont, 1 Lowell (U. S.) 230, 5 Fed. Cas. No. 2,781, 1 Nat. Bankr. Reg. 276.

Person who was himself a bankrupt, not yet discharged, was deemed disqualified. Matter of Smith, 1 Am. Bankr. Rep. 37.

Relative of bankrupt.— The Act does not specifically prescribe the personal qualifications of trustees, except as to the matter of residence, but under the former Act, which contained even less reference as to a trustee's qualifications, it was held that the election of a near relative of the bankrupt as trustee was improper. *In re* Zinn, 30 Fed. Cas. No. 18,216, 40 How. Pr. (N. Y.) 461, 4 Nat. Bankr. Reg. 370; *In re* Powell, 19 Fed. Cas. No. 11,354, 2 Nat. Bankr. Reg. 45.

4. Bankr. Act (1898), § 45 (2).

5. **Joint trustees** may give joint and several bonds. Bankr. Act (1898), § 50*j*.

6. Bankr. Act (1898), § 50*b*.

The form of the bond of trustees is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 25; 89 Fed. xl.

Form of order approving trustee's bond is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 26; 89 Fed. xl.

7. Bankr. Act (1898), § 50*c*.

Amount of bond may be increased at any time by the creditors. Bankr. Act (1898), § 50*c*.

If the creditors do not fix the amount of the bond of the trustee as thus provided the court shall do so. Bankr. Act (1898), § 50*c*.

8. Bankr. Act (1898), § 50*e*.

9. **Corporations organized for the purpose of becoming sureties** upon bonds, authorized by law to do so, may be accepted as sureties whenever the courts are satisfied that the rights and interests of all parties will be thereby amply protected. Bankr. Act (1898), § 50*g*.

10. *In re* Kalter, 2 Am. Bankr. Rep. 590; 28 U. S. Stat. at L. 279.

11. Bankr. Act (1898), § 50*b*.

be required as to the actual value[12] of the property of the sureties executing such bond.[13]

d. Where Filed. Bonds of trustees are required to be filed of record in the office of the clerk of the court.[14]

e. Actions on Bond. A bond of a trustee may be sued upon in the name of the United States for the use of any person injured by a breach of its conditions,[15] but such suits cannot be brought subsequent to two years after the estate has been closed.[16]

C. Death, Removal, or Resignation — 1. Power to Remove. The court may, upon the application of creditors, remove a trustee for cause,[17] upon a hearing, after notice to him;[18] but such removal can be made by the judge only.[19]

2. Right to Resign. The Act of 1898 contains no provision authorizing the resignation of a trustee. It is probable, however, that he may be permitted to resign by the court.[20]

3. Effect of Death or Removal. The death or removal of a trustee will not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal.[21]

The form of the order approving bond of trustee is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 26; 89 Fed. xl.

12. The actual value of the property of sureties over and above their liabilities and exemptions on each bond shall equal the amount of such bond. Bankr. Act (1898), § 50*f*.

13. Bankr. Act (1898), § 50*d*.

14. Bankr. Act (1898), § 50*h*.

15. Bankr. Act (1898), § 50*h*.

See, generally, Bonds.

Liability of trustees for acts of bankrupt. — Trustees shall not be liable personally or on their bonds to the United States for any penalties or forfeitures incurred by the bankrupts, under the present Act, of whose estates they are respectively trustees. Bankr. Act (1898), § 50*i*.

16. Bankr. Act (1898), § 50*m*.

17. In case the trustee shall neglect to make and file any report or statement which it is made his duty to file or make by the Act, or by any General Order, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge at a time specified in the order why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. U. S. Supreme Ct. Bankr. G. O. No. 17.

Removal for gross neglect.—An assignee is not appointed simply for his own profit, but as trustee for the creditors, and he is bound to use due diligence in collecting and disposing of property of the bankrupt, and in distributing its proceeds among the creditors. If he is guilty of gross and culpable neglect of duty in this respect he may be removed. *In re* Morse, 17 Fed. Cas. No. 9,852, 7 Nat. Bankr. Reg. 56.

18. Bankr. Act (1898), § 2 (17).

For form of petition for removal of trustee, of the notice thereof, and of the order of removal see U. S. Supreme Ct. Bankr. Forms, No. 52; 89 Fed. lv.

Form of notice of petition for removal of trustee is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 53; 89 Fed. lv.

Form of order for removal of trustee is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 54; 89 Fed. lv.

Form of order for choice of new trustee is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 55; 89 Fed. lvi.

19. U. S. Supreme Ct. Bankr. G. O. No. 13.

The power of removal as thus conferred is discretionary and should not be reviewed or reversed on appeal. *In re* Perkins, 5 Biss. (U. S.) 254, 19 Fed. Cas. No. 10,982, 8 Nat. Bankr. Reg. 56; *In re* Adler, 2 Woods (U. S.) 571, 1 Fed. Cas. No. 82. But such discretion should only be exercised when cause is shown rendering such removal expedient or necessary. *In re* Mallory, 16 Fed. Cas. No. 8,990, 4 Nat. Bankr. Reg. 153; *In re* Blodget, 3 Fed. Cas. No. 1,552, 5 Nat. Bankr. Reg. 472.

20. Collier Bankr. (3d ed.) 286.

21. The litigation may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone, or by such successor. Bankr. Act (1898), § 46. Where a cause of action has been brought by a creditor against a trustee in bankruptcy for a wrongful payment of assets of the estate to other creditors in disregard of the plaintiff's rights in the property it does not abate by the death of such trustee. U. S. *v.* Dewey, 39 Fed. 251. See also, generally, *supra*, VI, B, 7; and Abatement and Revival, 1 Cyc. 10 *et seq.*

The settlement of a bankrupt estate by the trustee does not divest the jurisdiction of the federal district court which adjudicated the bankruptcy, and where the trustee dies such court has power to take such steps as the circumstances require, so that a mistake as to the proper step to be taken cannot

D. Duties — 1. In General. The trustee represents the bankrupt debtor as the custodian of all of his property not exempt; and he represents the creditors of such bankrupt, in that he is to gather from every source the property of the debtor, protect and dispose of the same to the effect that their interests may be preserved and their claims paid.[22] He succeeds to all the interests of the bankrupt, becomes in effect the owner of his property, and subject to his accountability to the court holds absolutely the title to such property.[23] The trustee is an officer of the court and is subject to its orders and directions. The referee may compel him to perform his duties.[24]

2. To Account For Interest. Trustees are required to account for and pay over to the estates under their control all interest received by them upon the property of such estates.[25]

3. To Collect and Close up Estates. Trustees are required to collect and reduce to money the property of the estates under their control, under the direction of the court, and close up such estates as expeditiously as compatible with the best interests of the parties in interest.[26]

4. To Deposit and Disburse Money. Trustees must deposit all moneys received by them in one of the designated depositories.[27] Trustees can dis-

be collaterally attacked. Lloyd *v.* Davis, 123 Cal. 348, 55 Pac. 1003.

22. *In re* Wynn, Chase (U. S.) 227, 30 Fed. Cas. No. 18,117, 9 Am. L. Reg. N. S. 627, 2 Am. L. T. Bankr. Rep. 116, 4 Nat. Bankr. Reg. 23; Lowell Bankr. § 296.

As representative of creditors.— The trustee, while in some respects the representative of the bankrupt is, as to the property of such bankrupt and its administration, primarily a representative of the creditors. *In re* Campbell, 3 Hughes (U. S.) 276, 4 Fed. Cas. No. 2,348, 17 Nat. Bankr. Reg. 4; Edmondson *v.* Hyde, 2 Sawy. (U. S.) 205, 8 Fed. Cas. No. 4,285, 7 Nat. Bankr. Reg. 1. The adjudication of bankruptcy is in the nature of a statutory execution for all creditors, and the assignee, as their representative, may enforce against the debtor every right a judgment creditor could enforce. Bamewall *v.* Jones, 2 Fed. Cas. No. 1,027, 14 Nat. Bankr. Reg. 278. *Contra,* Cook *v.* Whipple, 55 N. Y. 150, 14 Am. Rep. 202, 9 Nat. Bankr. Reg. 155.

As representative of unsecured creditors. — Where, at the time of the adjudication in bankruptcy of an insolvent debtor upon an involuntary petition, there are claims against the bankrupt that are unperfected liens, the trustee in bankruptcy only represents unsecured creditors, and therefore he can do nothing toward perfecting the imperfect lien. Goldman *v.* Smith, 2 Am. Bankr. Rep. 104. See also Morgan *v.* Campbell, 22 Wall. (U. S.) 381, 22 L. ed. 796.

23. Leighton *v.* Harwood, 111 Mass. 67, 15 Am. Rep. 4. He is remitted to all the rights and duties of the bankrupt. Randolph *v.* Canby, 20 Fed. Cas. No. 11,559, 11 Nat. Bankr. Reg. 296. He must be considered in the light of a purchaser of the bankrupt's property. Bromley *v.* Smith, 2 Ben. (U. S.) 511, 4 Fed. Cas. No. 1,922, 3 Chic. Leg. N. 297, 5 Nat. Bankr. Reg. 152. See also Dudley *v.* Easton, 104 U. S. 99, 26 L. ed. 668; Starkweather *v.* Cleveland Ins. Co., 2 Abb. (U. S.) 67, 22 Fed. Cas. No. 13,308, 1 Am. L. Reg. N. S. 333, 5 Am. L. Rev. 568, 3 Chic. Leg. N. 77, 28 Leg. Int. (Pa.) 36, 4 Nat. Bankr. Reg. 341; Smith *v.* Buchanan, 8 Blatchf. (U. S.) 153, 22 Fed. Cas. No. 13,016, 3 Alb. L. J. 97, 4 Nat. Bankr. Reg. 397; Purviance *v.* Union Nat. Bank, 20 Fed. Cas. No. 11,475, 30 Leg. Int. (Pa.) 352, 8 Nat. Bankr. Reg. 447, 21 Pittsb. Leg. J. (Pa.) 33.

24. *In re* Blaisdell, 5 Ben. (U. S.) 420, 3 Fed. Cas. No. 1,488, 42 How. Pr. (N. Y.) 274, 6 Nat. Bankr. Reg. 78; *In re* Bushey, 4 Fed. Cas. No. 2,227, 27 Leg. Int. (Pa.) 111, 3 Nat. Bankr. Reg. 685.

A trustee is an officer of the court and is strictly limited to the powers conferred by the Act and the orders of the court. Any agreement made by him in violation thereof is void. *In re* Ryan, 21 Fed. Cas. No. 12,182, 6 Nat. Bankr. Reg. 235.

25. Bankr. Act (1898), § 47*a* (1).

The present Act does not expressly authorize temporary investment of the funds of the estate, but the trustee would be held liable for interest on any considerable amount of money collected by him and not deposited within a reasonable time without sufficient cause. *In re* Newcomb, 32 Fed. 826; *In re* Burt, 27 Fed. 549; *In re* Thorp, 2 Ware (U. S.) 294, 23 Fed. Cas. No. 14,002, 4 N. Y. Leg. Obs. 377.

26. Bankr. Act (1898), § 47*a* (2).

As to dividends see *infra,* XVIII, H, 2.

As to sales see *infra,* XVIII, G.

As to suits by and against trustees see *infra,* XVIII, B.

Trustees must use diligence in collecting and disposing of the property of the bankrupt, and in distributing the proceeds thereof among the creditors; they are personally liable for any loss to the estate occasioned by their negligence. *In re* Morse, 17 Fed. Cas. No. 9,852, 7 Nat. Bankr. Reg. 56.

27. Bankr. Act (1898), § 47*a* (3).

Designation of depositories.— Courts of bankruptcy shall designate by order banking institutions as depositories for the money of

burse money only by check or draft on the depositories in which it has been deposited.[28]

5. To Furnish Information. Trustees are required to furnish such information concerning the estates of which they are trustees, and of their administration, as may be requested by parties in interest.[29]

6. To Keep Accounts. Trustees must keep regular accounts showing all amounts received and from what sources, and all amounts expended and on what accounts.[30]

7. To Make Inventory. The trustee must, immediately upon entering upon the duties of his office, prepare a complete inventory of all the property of the bankrupt that comes into his possession.[31]

8. To Make Statements and Reports[32] — a. Detailed Statements. Trustees must lay before the final meeting of the creditors detailed statements of the administration of the estates.[33]

b. Bi-Monthly Reports. Trustees must report to the court in writing the condition of the estates, the amounts of money on hand, and such other details as may be required by the courts within the first month after their appointment and every two months thereafter, unless otherwise ordered by the court.[34]

bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may, from time to time, as occasion may require, by like order, increase the number of depositories or the amount of any bond and change such depositories. Bankr. Act (1898), § 61.

28. Bankr. Act (1898), § 47*a* (4).

Checks to be signed and countersigned.— No money deposited as required by the Act can be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn. U. S. Supreme Ct. Bankr. G. O. No. 29. A copy of this General Order and the name of any referee or clerk authorized to countersign checks is to be furnished to the depository. See also *supra*, III, A, 2, c.

An entry of the substance of each check and warrant, with the date thereof, the sum for which it is drawn, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. U. S. Supreme Ct. Bankr. G. O. No. 29.

29. **Duty to disclose.**— It is the duty of a trustee to disclose to the creditors, upon inquiry, and where it appears that they are ignorant thereof, the main facts known to him relating to the condition and assets of the bankrupt estate. Where he knows there is a large sum of money belonging to the estate deposited in a bank against which the bank claimed and were purchasing set-offs, it is his imperative duty to state these facts to creditors inquiring concerning the value of their claims. The trustee should also make in due season the reports prescribed by the rules in bankruptcy. Where an assignee has failed in properly informing creditors in regard to their rights and the value of the assets and the information has been suppressed in the interest of one class of creditors it is the duty of the court to remove him. *In re* Perkins, 5 Biss. (U. S.) 254, 19 Fed. Cas. No. 10,982, 8 Nat. Bankr. Reg. 56.

30. Bankr. Act (1898), § 47*a* (6).

Audit of accounts.— All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court. U. S. Supreme Ct. Bankr. G. O. No. 17.

Inspection.— The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest. Bankr. Act (1898), § 49.

Punishment for refusal to permit inspection.— A trustee who refuses to permit a reasonable opportunity for the inspection of the accounts relating to the affairs, and the papers and records of estates in his charge by parties in interest, when directed by the court so to do, shall be punished by a fine not to exceed five hundred dollars and forfeit his office, and upon conviction the same shall thereupon become vacant. Bankr. Act (1898), § 29*c* (3).

31. U. S. Supreme Ct. Bankr. G. O. No. 17.

32. As to removal for failure to make statement or report see *supra*, XII, C, 1.

33. Bankr. Act (1898), § 47*a* (7).

34. Bankr. Act (1898), § 47*a* (10).

Form of trustee's report of exempted property is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 47; 89 Fed. lii.

Form of trustee's return of no assets is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 48; 89 Fed. lii.

c. Final Report. Trustees must make final reports and file final accounts with the court fifteen days before the final meeting of the creditors.[35]

9. To Pay Dividends. Trustees must pay dividends within ten days after they are declared by the referee.[36]

10. To Set Apart Exemptions. Trustees must set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.[37]

E. Concurrence of Two Trustees. Whenever three trustees have been appointed for the estate the concurrence of at least two of them is necessary to the validity of their every act concerning the administration of the estate.[38]

F. Title of Trustee to Bankrupt's Property — 1. General Nature and Character of Trustee's Title. The trustee becomes possessed of the title to the bankrupt's property for the purpose of equally distributing the proceeds thereof among the creditors of such bankrupt. He stands in the place of the bankrupt, with power to do what the bankrupt ought to have done, that is, pay the debts out of the assets.[39] He becomes vested with the same kind of a title as though he were a purchaser, but such title is subject to all the rights and equities existing in favor of third persons against the bankrupt,[40] except as to fraudulent conveyances and transfers, preferences, and other transactions in fraud of the Bankruptcy Act.[41]

35. Bankr. Act (1898), § 47*a* (8).

36. Bankr. Act (1898), § 47*a* (9).

As to declaration and payment of dividends see *infra*, XVIII, H.

Where a claim has been reconsidered and rejected after proof and payment of dividends thereon the trustee may recover the amount of the dividends received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part. Bankr. Act (1898), § 57*l*; and *supra*, XI, F.

37. Bankr. Act (1898), § 47*a* (11).

As to exemptions see *infra*, XV.

Report of exemptions to court.— The trustee must make report to the court within twenty days after receiving notice of his appointment of the article set off to the bankrupt by him according to the provisions of the forty-seventh section of the Act, with the estimated value of each article, and any creditor may take exception to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. U. S. Supreme Ct. Bankr. G. O. No. 17; U. S. Supreme Ct. Bankr. Forms, No. 47; 89 Fed. lii.

38. Bankr. Act (1898), § 47*b*.

39. Starkweather *v.* Cleveland Ins. Co., 2 Abb. (U. S.) 67, 22 Fed. Cas. No. 13,308, 10 Am. L. Reg. N. S. 333, 5 Am. L. Rev. 568, 3 Chic. Leg. N. 77, 28 Leg. Int. (Pa.) 36, 4 Nat. Bankr. Reg. 341. See also *In re* Lesser, 100 Fed. 433, 3 Am. Bankr. Rep. 815.

40. **Subject to equities of third persons.**— *In re* Swift, 108 Fed. 212; *In re* Hanna, 105 Fed. 587, 5 Am. Bankr. Rep. 127; *In re* Shaeffer, 105 Fed. 352; *In re* Mullen, 101 Fed. 413, 4 Am. Bankr. Rep. 224.

As to fraudulent transfers, liens, and preferences see *infra*, XVI.

Property in custodia legis.—Where a judgment creditor brought suit in a state court, before the passage of the Bankruptcy Act, to set aside a fraudulent conveyance by his debtor and to have a mortgage given by the latter declared to operate as a general assignment for creditors, and obtained a decree to that effect, and the state court appointed a receiver, who took possession of the property of the debtor, and thereafter the debtor was adjudged bankrupt on his voluntary petition, the adjudication not being based upon the transfers impeached in the creditors' suit, it was held that, as to all property covered by the decree, the court of bankruptcy would not require its surrender by the receiver, or otherwise interfere with its administration by the state court. *In re* Kavanaugh, 99 Fed. 928, 3 Am. Bankr. Rep. 832. But see Southern L. & T. Co. *v.* Benbow, 96 Fed. 514, 3 Am. Bankr. Rep. 9, where it is held that a receiver appointed by a state court in proceedings supplementary to execution, and empowered to sue for and collect the property of the debtor previously passed to a third person by a fraudulent assignment, but who has not reduced the same to his possession nor taken any steps to do so, is not vested with such a title or right of possession of the property as will prevent a court of bankruptcy, on the adjudication of the debtor, from taking possession of it through the trustee.

41. Dudley *v.* Easton, 104 U. S. 99, 26 L. ed. 668; Bromley *v.* Smith, 2 Biss. (U. S.) 511, 4 Fed. Cas. No. 1,922, 3 Chic. Leg. N. 297, 5 Nat. Bankr. Reg. 152; Purviance *v.* Union Nat. Bank, 20 Fed. Cas. No. 11,475, 30 Leg. Int. (Pa.) 352, 8 Nat. Bankr. Reg. 447, 21 Pittsb. Leg. J. (Pa.) 33.

Title of conditional vendee who becomes bankrupt.— Where the possession of property is in a bankrupt, but by the terms of a contract of conditional sale he is not to have title until such goods are paid for, and during that time the title is to remain in the vendor, it was held that such property is not

2. When Title Passes — a. After Appointment of Trustee — (i) *In General.* The trustee of the estate of the bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, is in turn vested by operation of law with the title of the bankrupt to his property as of the date he was adjudged a bankrupt, unless such property is exempt.[42]

an asset of the bankrupt, and title to it does not pass to his trustee upon his appointment. The trustee in bankruptcy acquires no greater title than the conditional vendee had, even though there is a state statute in effect which provides that as to creditors without notice the conditional sale shall be deemed absolute, unless the contract of sale is filed in the recorder's office. *In re* McKay, 1 Am. Bankr. Rep. 292. See also Stewart *v.* Platt, 101 U. S. 731, 25 L. ed. 816; *In re* Bozeman, 2 Am. Bankr. Rep. 809; *In re* Ohio Co-Operative Shear Co., 2 Am. Bankr. Rep. 775; *In re* Klingaman, 2 Am. Bankr. Rep. 44. *In re* McKay, 1 Am. Bankr. Rep. 292, *supra*, however, was disapproved in *In re* Yukon Woolen Co., 2 Am. Bankr. Rep. 805, where the court held that under the laws of Connecticut a conditional bill of sale is not valid as against execution creditors unless recorded, and that the trustee of the bankrupt conditional vendee acquires an absolute title to the property sold for the benefit of the bankrupt's creditors. In New York, under a conditional sale of merchandise to be retailed by the vendee in the ordinary course of business, the title to remain in the vendor until paid for, the title, so far as the creditors of, and purchasers from, the vendee are concerned is deemed absolute in the vendee. *In re* Howland, 109 Fed. 869, 6 Am. Bankr. Rep. 495. And in North Carolina where each of several promissory notes given for the purchase-price of personal property provide that the ownership and title to the property shall remain in the vendor "until this note is paid" and neither the notes nor the contract of sale have been duly registered as required by the statutes of that state, and the purchaser is thereafter adjudged a bankrupt, the lien of the vendor for unpaid purchase-money is not effective against other creditors of the bankrupt, and the vendor cannot prove such claim as a secured claim. *In re* Tatem, 110 Fed. 519, 6 Am. Bankr. Rep. 426.

Trustee takes subject to all equities, etc. — The trustee takes the property of the estate subject to all equities, liens, and encumbrances existing against it in the hands of the bankrupt, and takes no greater interest than the bankrupt himself had, except in the instance specified in the Act, that is, where liens are void for want of record or otherwise, liens *ipso facto* dissolved by the adjudication and fraudulent and voidable transfers. *In re* Bozeman, 2 Am. Bankr. Rep. 809. See also Kelley *v.* Scott, 49 N. Y. 595; Cook *v.* Tullis, 18 Wall. (U. S.) 332, 21 L. ed. 933; *Ex p.* Dalby, 1 Lowell (U. S.) 431, 6 Fed. Cas. No. 3,540, 3 Nat. Bankr. Reg. 731. In *In re* Booth, 96 Fed. 943, 3 Am. Bankr. Rep. 574, the court says that trustees of bankrupts stand in the position of purchasers for value without notice. The United States circuit court for the northern district of Georgia, in considering the title of a trustee to property remaining in the hands of the bankrupt pledged as security for a debt, says that if the principle stated in the case of *In re* Booth, 96 Fed. 943, 3 Am. Bankr. Rep. 574, was to be applied, that the trustee having no notice of the pledge would obtain a good title to the property as against the secured creditor. The court differs from the statement made in the Booth case and holds that a trustee does not take as an innocent purchaser, but that the property comes to him subject to all valid claims, liens, and encumbrances. Chattanooga Nat. Bank *v.* Rome Iron Co., 102 Fed. 755, 4 Am. Bankr. Rep. 441. An assignment in bankruptcy, like any other assignment, by operation of law passes the rights of the bankrupt precisely in the same plight and condition as he possessed them, subject to all equities. Casey *v.* La Societe De Credit Mobilier, 2 Woods (U. S.) 77, 5 Fed. Cas. No. 2,496, 7 Chic. Leg. N. 313, 21 Int. Rev. Rec. 219, 1 Thomps. Nat. Bank Cas. 285. See also Donaldson *v.* Farwell, 93 U. S. 631, 23 L. ed. 993; Winsor *v.* McLellan, 2 Story (U. S.) 492, 30 Fed. Cas. No. 17,887, 6 Law Rep. 440; Potter *v.* Coggeshall, 19 Fed. Cas. No. 11,322, 4 Nat. Bankr. Reg. 73.

42. Bankr. Act (1898), § 70*a*. *Compare* Potter *v.* Martin, 122 Mich. 542, 81 N. W. 424; King *v.* Hutton, [1899] 2 Q. B. 555, 68 L. J. Q. B. 975, 48 Wkly. Rep. 95. See also *infra*, XII, F, 2, (II) *et seq.*

Exception as to exempt property. — *In re* Mayer, 108 Fed. 599, 47 C. C. A. 512, 6 Am. Bankr. Rep. 117; *In re* Moran, 105 Fed. 901, 5 Am. Bankr. Rep. 472; *In re* Wells, 105 Fed. 762, 5 Am. Bankr. Rep. 308; *In re* Black, 104 Fed. 289, 4 Am. Bankr. Rep. 776; *In re* Daubner, 96 Fed. 805, 3 Am. Bankr. Rep. 368; *In re* Russie, 96 Fed. 609, 3 Am. Bankr. Rep. 6; *In re* Woodard, 95 Fed. 260, 2 Am. Bankr. Rep. 339. See also *In re* Roberts, [1900] 1 Q. B. 122, 69 L. J. Q. B. 19, 81 L. T. Rep. N. S. 467, 48 Wkly. Rep. 132 [*explaining and distinguishing* Chippendale *v.* Tomlinson, 4 Dougl. 318, 7 East 57 note].

As to exemptions, generally, see *infra*, XV.

As to specific property passing see *infra*, XII, F, 4.

Under Bankr. Act (1867), § 14, it was provided "As soon as said assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real

(II) *Upon Confirmation of Composition.* Upon the confirmation of a composition offered by a bankrupt the title to his property will thereupon revest in him.[43]

(III) *Upon Setting Aside of Composition or Discharge.* Whenever a composition is set aside or a discharge revoked the trustee is, upon his appointment and qualification, vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside such composition or revoking such discharge.[44]

b. Before Appointment of Trustee — (I) *After Adjudication.* After an adjudication in bankruptcy has been made the title to all of the property of the bankrupt as of that date passes to the person who is subsequently chosen trustee.[45] The title to the estate in the interval between the date of the adjudication and the appointment of the trustee remains in the bankrupt, but is defeasible, and is divested as of the date of the adjudication when the trustee is appointed.[46] All titles claimed under or through him subsequent to adjudication are by force of law, and without regard to the knowledge or motives of the one so claiming, overreached, and defeated.[47]

and personal, of the bankrupt, with all his deeds, books, and papers relating thereto; and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings."

Where once the trustee is appointed his title to the bankrupt's estate relates back to the date of the adjudication. Bankr. Act (1898). § 70*a*.

43. Bankr. Act (1898), § 70*f*. See also *infra*, XIV, C.

44. Bankr. Act (1898), § 70*d*. See also *infra*, XIV, D; XIX, J.

45. Keegan *v.* King, 96 Fed. 758, 3 Am. Bankr. Rep. 79. See also *In re* Burka, 107 Fed. 674, 5 Am. Bankr. Rep. 843; *In re* Engle, 105 Fed. 893, 5 Am. Bankr. Rep. 372; *In re* Yukon Woolen Co., 2 Am. Bankr. Rep. 805.

46. Connor *v.* Long, 104 U. S. 228, 26 L. ed. 723; International Bank *v.* Sherman, 101 U. S. 403, 25 L. ed. 866. In Hampton *v.* Rouse, 22 Wall. (U. S.) 263, 22 L. ed. 755, it was held that after the adjudication, but before assignment of property to the assignee, the bankrupt retained such a title that he had authority to redeem real estate belonging to him from a sale for taxes.

The adjudication is notice to all the world of the bankruptcy of the debtor, and after such time persons dealing with him do so at their peril. Mays *v.* Manufacturers' Nat. Bank, 64 Pa. St. 74, 3 Am. Rep. 573, 4 Nat. Bankr. Reg. 660; *In re* Lake, 3 Biss. (U. S.) 204, 14 Fed. Cas. No. 7,992, 4 Chic. Leg. N. 281, 6 Nat. Bankr. Reg. 542, 6 West. Jur. 360; *In re* Gregg, 1 Hask. (U. S.) 173, 10 Fed. Cas. No. 5,796, 1 Am. L. T. Bankr. Rep. 298, 3 Nat. Bankr. Reg. 529.

47. **Payments made to bankrupt.**— Since the title to the bankrupt's property relates back to the date of the adjudication, payments made to the bankrupt by his debtors after such adjudication and prior to the appointment of the trustee have been held to be mere nullities, and the trustee may sue and compel the bankrupt's debtors to make payments again to him. Stevens *v.* Mechanics Sav. Bank, 101 Mass. 109, 3 Am. Rep. 325; Mays *v.* Manufacturers' Nat. Bank, 64 Pa. St. 74, 3 Am. Rep. 573, 4 Nat. Bankr. Reg. 660; *Ex p.* Foster, 2 Story (U. S.) 131, 9 Fed. Cas. No. 4,960, 5 Law Rep. 55. In Babbitt *v.* Burgess, 2 Dill. (U. S.) 169, 173, 2 Fed. Cas. No. 693, 5 Chic. Leg. N. 326, 7 Nat. Bankr. Reg. 561, the court said: "It is not necessary for this court to take the extreme position held by the supreme court of Pennsylvania [Mays *v.* Manufacturers' Nat. Bank], and rule that all payments made to a debtor, after a petition filed against him in bankruptcy, are to be adjudged void, if the debtor is subsequently declared bankrupt. This court, however, holds that payments thus made *mala fide*, or with a view of defeating the bankrupt act in any of its essential requirements, are void, and the person by whom such payment was made can be held to answer for the original demand to the assignee, whose title relates to the day of commencing proceedings in bankruptcy."

Where property is acquired by the bankrupt subsequent to his adjudication in bankruptcy it is not an asset of the estate which passes to his trustee to be administered by him, but belongs absolutely to the bankrupt. *In re* Rennie, 2 Am. Bankr. Rep. 182. See also *In re* Pease, 4 Am. Bankr. Rep. 578, where the referee held that creditors who become such before the filing of the petition cannot compel a bankrupt to account for profits in business after the petition and before the adjudication, or for goods sold in the interval, which were purchased of other dealers and not taken from the bankrupt stock, but can, for moneys collected in that interval, or even after, for goods sold either be-

(II) *Before Adjudication.* After the filing of the petition and prior to the adjudication the bankrupt has full control over his property, and during such interval he may transfer the title thereof, provided he does not contravene the provisions of the Bankrupt Act relative to fraudulent and illegal preferences.[48]

fore or after the petition, out of the stock with which the trustee becomes vested on the adjudication.

Under the Act of 1867 the earnings and acquisitions of a bankrupt subsequent to the commencement of a proceeding were held to belong to him subject to his eventual discharge. If he does not succeed in procuring a discharge, they remain liable to execution or attachment by his former creditors. Mays *v.* Manufacturers' Nat. Bank, 64 Pa. St. 74, 3 Am. Rep. 573, 4 Nat. Bankr. Reg. 660. See also Rugely *v.* Robinson, 19 Ala. 404; Bond *v.* Baldwin, 9 Ga. 9; Bennett *v.* Bailey, 150 Mass. 257, 22 N. E. 916; *In re* Patterson, 1 Ben. (U. S.) 508, 18 Fed. Cas. No. 10,815, Bankr. Reg. Suppl. 27, 33, 1 Nat. Bankr. Reg. 125, 150; *In re* Levy, 1 Ben. (U. S.) 496, 15 Fed. Cas. No. 8,296, Bankr. Reg. Suppl. 30, 6 Int. Rev. Rec. 163, 1 Nat. Bankr. Reg. 136; *In re* Grant, 2 Story (U. S.) 312, 10 Fed. Cas. No. 5,693, 5 Law Rep. 11.

48. *In re* Pease, 4 Am. Bankr. Rep. 578, 582, where it is said: "I am satisfied, therefore, that, though the words are confusing, Congress has accomplished what it intended, namely, that for the protection of those who deal with the bankrupt in the interval between the filing of the petition and the adjudication, he shall have a title capable of transfer, but that the day of cleavage, both as to provable and dischargable debts and as to property with which to pay those debts, is the day when the petition is filed."

Custody of the court.— From the time of filing the petition in a case of voluntary bankruptcy, the bankrupt's estate is *in custodia legis*; and upon the general powers and jurisdiction conferred upon a court of bankruptcy, which powers are to be exercised by the referee to whom the matter in bankruptcy is referred, it is the duty of the court upon its own motion in a proper case to take actual possession and custody of the bankrupt's estate through a receiver or by a direction to a marshal. *In re* Abrahamson, 1 Am. Bankr. Rep. 44.

By Bankr. Act (1898), § 70a (5), the trustee is vested with the title to all the property which, prior to the filing of the petition in bankruptcy, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him. There is an apparent conflict between this provision and the one already quoted to the effect that the title of the trustee vests as of the date of the bankrupt's adjudication. It has been held that the words "prior to the filing of the petition," as contained in subdivision 5, refer to what passes; and the words "as of the date he was adjudged a bankrupt" in paragraph *a* refer to the time when it passes. *In re* Barrow, 98 Fed. 582, 3 Am. Bankr. Rep. 414; *In re* Pease, 4 Am. Bankr. Rep. 578, in which the referee says that the words "prior to the filing of the edition" refer to what passes, and the seemingly antagonistic words earlier in the section refer only to when such title passes. Adams, J., in *In re* Burka, 104 Fed. 326, 327, 5 Am. Bankr. Rep. 12, says: "After a careful consideration of the provisions of this section, I am persuaded that there are two separate subjects treated of: First, the time at which the title to something vests in the trustee; second, the 'something' or property the title of which is to vest in the trustee. Inasmuch as the trustee, by the provisions of the act, cannot be chosen or qualified until some time after the date of the filing of the petition, and in fact until some time after the date of adjudication, it is appropriate and fit that some time should be fixed, to which his title to whatever he gets should relate; and such, in my opinion, is the subject-matter of the first part of the section in question. Properly interpreted, the trustee is by operation of law vested with the title as of the date the bankrupt was adjudged to be a bankrupt. The further provisions of the section, already quoted [Sec. 70*a* (5)] undertake to point out the property of which by operation of law he is to become the owner, namely, all property which prior to the filing of the petition the bankrupt could have transferred."

The Act of 1867, as will be observed by the above extract from section 14, vested the title in the assignee as of the date the proceedings were commenced. As a result a merchant against whom a petition in bankruptcy was pending could not do business, the title to his estate being in the air until the adjudication or the dismissal of the petition. There seems little doubt that the insertion of the words "as of the date of the adjudication" in section 70 of the present Act was intended to meet this difficulty.

The judiciary committee of the 54th congress, in its report on House Bill No. 8110 [House Report No. 1228] said in reference to section 70: "Under Section 70 an important change has been made from the former laws, as well as from proposed legislation. Under the Act of 1867, as interpreted by the courts, it was held that the title to the bankrupt's property vested by operation of law as of the date of the filing of the petition. By the proposed bill it is provided that the trustee shall be vested with the title of the bankrupt as of the date he was adjudged a bankrupt. By this change the alleged bankrupt can sell and convey and protect title up to the date of the adjudication and the purchaser does not buy at his own risk and in danger of having secured an imperfect title by reason of an adjudication which may be made subsequent to the purchase. It does not follow that because

3. Execution of Necessary Transfers by Bankrupt. The bankrupt is required to execute and deliver such papers relating to his estate as shall be ordered by the court.[49] It is the duty of the bankrupt to deliver to his trustee all his assets which are subject to his debts. Upon his failure to make such delivery he may be ordered by the court to do so, and obedience thereto may be enforced by commitment as for contempt.[50] But no valid order directing the delivery of the property can be made before the issue is squarely raised between the trustee and the bankrupt as to whether or not he has such property in his possession.[51] And no such order should be made unless it appears beyond a reasonable doubt that the property is in the possession or under the control of the bankrupt.[52]

4. Specific Kinds of Property Passing — a. Assets of Corporation. The unpaid stock subscriptions of a corporation are a primary fund for the payment of the corporate debts, but such subscriptions are only payable upon a call therefor;

a petition is filed against a person in the bankruptcy court that he will be adjudged a bankrupt, and it seems but proper that the public in dealing with him, until he is adjudged a bankrupt, should deal without fear of loss or danger as to title. It may be suggested that this is too liberal a provision, and that the bankrupt may neglect his business or estate as soon as bankruptcy proceedings are commenced against him, and that he may allow it to deteriorate in value. But this is provided against by section 69, which permits the issuing of a warrant to the marshal for the seizure of the property of the bankrupt, in case of a person against whom bankruptcy proceedings have been commenced, for neglecting his property."

49. Bankr. Act (1898), § 7*a* (4).

Bankrupt must execute to his trustee transfers of all of his property in foreign countries. Bankr. Act (1898), § 7*a* (5).

Bankrupt must furnish trustee with information as to any attempt coming to his knowledge by his creditors or other persons to evade the provisions of the Bankruptcy Act. Bankr. Act (1898), § 7*a* (6). See also *infra*, XVII, A, 1.

50. **Delivery of assets.**— *In re* Purvine, 96 Fed. 192, 37 C. C. A. 446, 2 Am. Bankr. Rep. 787.

Power to make order.—Under general rules of law and under the specific provisions of the Act, a court of bankruptcy has power and jurisdiction to make an order requiring the bankrupt to pay or deliver to his trustee in bankruptcy money or other property in his possession or control constituting a part of his estate in bankruptcy, and which he has not surrendered or accounted for, and to enforce his obedience to such order by commitment as for contempt. *In re* Rosser, 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153. The order directing delivery of the bankrupt's property may be made by the referee. *In re* Miller, 105 Fed. 57, 5 Am. Bankr. Rep. 184; *In re* Oliver, 96 Fed. 85, 2 Am. Bankr. Rep. 783.

Contempt for disobedience.— While it is clear that the court has power to punish for contempt a disobedience by a bankrupt of an order to deliver property over to a trustee (see Bankr. Act (1898), § 41, and the following cases under the Act of 1867: *In re* Salkey, 6 Biss. (U. S.) 269, 21 Fed. Cas. No. 12,253, 7 Chic. Leg. N. 178, 11 Nat. Bankr. Reg. 423; *In re* Peltasohn, 4 Dill. (U. S.) 107, 19 Fed. Cas. No. 10,912, 6 Centr. L. J. 311, 10 Chic. Leg. N. 10, 4 L. & Eq. Rep. 441, 16 Nat. Bankr. Reg. 265; *In re* Speyer, 22 Fed. Cas. No. 13,239, 42 How. Pr. (N. Y.) 397, 6 Nat. Bankr. Reg. 255; *In re* Kempner, 14 Fed. Cas. No. 7,689, 6 Nat. Bankr. Reg. 521; *In re* Dresser, 7 Fed. Cas. No. 4,077, 3 Nat. Bankr. Reg. 557) the power to punish for contempt should be carefully exercised (*In re* McCormick, 97 Fed. 566, 3 Am. Bankr. Rep. 340; *In re* Purvine, 96 Fed. 192, 37 C. C. A. 446, 2 Am. Bankr. Rep. 787, *supra*, where it was held that where the disobedience charged is disobedience to the orders of a referee directing the bankrupt to pay money to the trustee, the better practice is to direct the bankrupt to be brought before the judge for a further examination upon petition as to whether or not he has made a full disclosure of the facts). See also *In re* Miller, 105 Fed. 57, 5 Am. Bankr. Rep. 184. The district court as a court of bankruptcy has power to punish a bankrupt for contempt of court, as manifested by his refusal to obey an order of the court, made after due hearing of the parties, directing him to deliver his assets to his trustee, and the exercise of such power is in no sense a violation of the prohibition against imprisonment for debt. *In re* Schlesinger, 102 Fed. 117, 42 C. C. A. 207, 4 Am. Bankr. Rep. 361; Ripon Knitting Works *v.* Schreiber, 101 Fed. 810, 4 Am. Bankr. Rep. 299.

51. *In re* Pearson, 2 Am. Bankr. Rep. 819.

52. Ripon Knitting Works *v.* Schreiber, 101 Fed. 810, 4 Am. Bankr. Rep. 299; *In re* Schlesinger, 97 Fed. 930, 3 Am. Bankr. Rep. 342; *In re* McCormick, 97 Fed. 566, 3 Am. Bankr. Rep. 340. In *In re* Mayer, 98 Fed. 839, 3 Am. Bankr. Rep. 533, it was held that where the evidence showed that the property had passed from the control of the bankrupt and into the possession of third persons claiming title derived prior to the proceedings in bankruptcy, although the transaction is manifestly fraudulent, there is no power to punish for contempt the disobedience of an order directing the bankrupt to deliver such property to his trustee.

where a corporation has gone into bankruptcy the right to collect such unpaid subscriptions vests in the trustee.[53]

b. Beneficial Powers. Powers which the bankrupt might have exercised for his own benefit, but not those which he might have exercised for some other person, are vested in his trustee.[54]

c. Documents. The title to all documents relating to the property of the bankrupt vests in the trustee.[55]

d. Patents, Copyrights, and Trade-Marks. The interest which the bankrupt may have in patents, patent rights, copyrights, and trade-marks passes to his trustee in bankruptcy.[56]

e. Property Transferred in Fraud of Creditors — (i) *In General.* All the property of a bankrupt debtor transferred by him in fraud of his creditors passes to his trustee in bankruptcy.[57] The fraudulent transfers here specified are not only those made within the four months' period prior to the filing of the petition but those made at any other time.[58] This provision was intended to provide sim-

53. *In re* Crystal Springs Bottling Co., 96 Fed. 945, 3 Am. Bankr. Rep. 194. See also Scovill *v.* Thayer, 105 U. S. 143, 26 L. ed. 968.

54. Bankr. Act (1898), § 70*a* (3).

The Act of 1867 contained no provision similar to the one in the present Act, and under that Act it was held that the power of appointment vested in the bankrupt debtor did not pass to his assignee. Brandies *v.* Cochrane, 112 U. S. 344, 5 S. Ct. 194, 28 L. ed. 760; Jones *v.* Clifton, 101 U. S. 225, 25 L. ed. 908.

The intent of this provision is to require the passing of a power which is vested in the bankrupt to the trustee, if such power could have been exercised for the benefit of such bankrupt himself. The interest of a husband in the real estate of his wife during her life and after issue is born is not a power in the sense in which the word is used in section 70*a* (3) of the Act. Hesseltine *v.* Prince, 95 Fed. 802, 2 Am. Bankr. Rep. 600.

55. Bankr. Act (1898), § 70*a* (1).

56. Bankr. Act (1898), § 70*a* (2).

But the trustee does not succeed to the rights of a bankrupt under an application for letters patent, where the patent is issued to such bankrupt after the adjudication. Section 70 does not declare that the bankrupt's interest in patentable inventions or in pending applications for patents shall be vested in the trustee, but only his interest in patents and patent rights; the words "patent rights" being intended to include rights secured under a patent to a third party, such as a license or manufacturing ight, and the word "patents" to include cases where any title to letters patent, in whole or in part, is vested in the bankrupt, either by the issuance of letters in his name or by a proper assignment in writing from the patentee. *In re* McDonnell, 101 Fed. 239, 4 Am. Bankr. Rep. 92.

57. Bankr. Act (1898), § 70*a* (4). See also *In re* Tollett, 105 Fed. 425, 5 Am. Bankr. Rep. 305; Marden *v.* Phillips, 103 Fed. 196, 4 Am. Bankr. Rep. 566; *In re* Brown, 91 Fed. 358, 1 Am. Bankr. Rep. 107.

As to fraudulent transfers see *infra*, XVI, A.

It is also provided that the trustee may avoid any transfer of the bankrupt of his property which any of the creditors of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from any person who may have received it, except a *bona fide* holder for value. Bankr. Act (1898), § 70*e*.

Fraudulent transfers within four months. — Under Bankr. Act (1898), § 67*e*, conveyances, transfers, assignments, or encumbrances of the bankrupt's property made by the bankrupt within four months prior to the filing of the petition with the intent of defrauding his creditors are null and void, and all the property so conveyed, transferred, assigned, or encumbered passes to his trustee, whose duty it is to recover and claim the same by legal proceedings or otherwise for the benefit of the creditors. See *infra*, XVI, A.

58. **Title vests regardless of the time of fraudulent transfer.**— In construing the provisions of sections 67*e* and 70*e*, the court in Matter of Gray, 47 N. Y. App. Div. 554, 556, 62 N. Y. Suppl. 618, 3 Am. Bankr. Rep. 647, said: "It will be observed that there is here no four months' limitation, and it is plain that the limitation which runs through the act in connection with frauds upon the system was at this point advisedly omitted. The purpose of the two sections is quite apparent. One covers frauds upon the act, whether actual or constructive, committed within four months; the other actual or common-law frauds exclusively, committed at any time. . . . When, however, the trustee seeks to avoid a fraudulent or any avoidable transfer by the bankrupt antedating the four months, he does so, not in the right conferred as a concomitant to the due operation of the system, but exclusively in the creditors' common-law right. He is, with relation to these anterior transfers, so to speak, subrogated to that right. Such of these anterior transfers as any creditor might have avoided, he may avoid. Such as no creditor could have

ply that the trustee in bankruptcy should have the same right to avoid conveyances as was possessed by creditors, with special reference to the statutes of frauds of the several states.[59]

(II) *Unfiled Transfers of Personalty.* The trustee, representing the creditors and succeeding to the title and interest of the bankrupt, can set aside unfiled chattel mortgages or other transfers of personalty for the benefit of those creditors who have valid liens against the mortgaged property acquired more than four months prior to the commencement of the bankruptcy proceedings.[60]

avoided, he cannot avoid." As to the setting aside of unlawful liens and preferences, and the recovery of property fraudulently transferred see, generally, *infra*, XVI. The trustee is vested with the title of all property which at any time has been fraudulently conveyed by the bankrupt. This relates to any past fraud whereby property which should rightfully be applied to the payment of the debts owing by the bankrupt has been conveyed, if the property can be followed and seized for that purpose. Such property or its value may be recovered from whoever may have received it except a *bona fide* holder. *In re* McNamara, 2 Am. Bankr. Rep. 566.

59. *In re* Mullen, 101 Fed. 413, 416, 4 Am. Bankr. Rep. 224, where it is said: "13 Eliz. makes void, as against creditors, conveyances in fraud of creditors, but provides that the operation of the statute shall not extend to any estate conveyed upon good consideration and bona fide. In inserting a like exception in section 70*e*, I think congress meant substantially to re-enact the exception placed in the statute of Elizabeth, and not to give to bona fide purchasers for value greater or less rights than those which that statute gives them. The reference to bona fide purchasers in section 70*e* should therefore receive the same construction that a like reference has received in the statute of 13 Eliz. and its American substitutes." In this case it was attempted to defeat a prior attachment made by the creditor of the fraudulent grantee, who had no notice of the fraud or of the bankruptcy proceedings. The court held that where property conveyed in fraud of creditors is first attached by creditors of the transferee who have no knowledge of the fraud, such attachment will prevail as against the rights of defrauded creditors of the transferrer, and that therefore the attachment could not be defeated, unless notice of the bankruptcy proceedings had been given to the attaching creditor.

Where property conveyed is in possession of bankrupt.— Where the court finds that a transfer of property by a bankrupt is in fraud of creditors and the property still remains in the hands of the bankrupt, such court will direct the trustee of the bankrupt's estate to take charge of it and proceed with its administration until the fraudulent transferee shall conclusively demonstrate his title to the property. *In re* Smith, 100 Fed. 795, 3 Am. Bankr. Rep. 95.

Action to be brought before trustee takes possession.— Where property is in the hands of one to whom, it is alleged, it was transferred by the bankrupt in fraud of his creditors more than four months prior to the filing of the petition in bankruptcy, the trustee has no right to take possession of the same before he has brought suit to have the transfer set aside, in which action all parties in interest should be made defendants. *In re* Grahs, 1 Am. Bankr. Rep. 465. See also *In re* Buntrock Clothing Co., 92 Fed. 886, 1 Am. Bankr. Rep. 454. In Yeatman *v.* New Orleans Sav. Inst., 95 U. S. 764, 24 L. ed. 589, in which was involved the right to the possession of certain certificates of indebtedness issued by the state of Louisiana, which formed part of a bankrupt estate, and which were pledged as security for a debt, it was held that suit could not be maintained by the trustee for the wrongful conversion of such certificates, and that if the pledge was in fraud of the Bankruptcy Act and consequently void, the assignee might disregard the contract of pledge and recover the property for the benefit of the creditors; but if the contract of pledge was valid, then the assignee would not be entitled to take possession of the property until he had redeemed the same by payment of the debt due to the pledgee.

60. **Effect of failure to file chattel mortgage.**— Under the Bankruptcy Act of 1867 a failure to file a mortgage of goods and chattels in the manner prescribed by the law of the state, while rendering the mortgage void as against creditors of the mortgagor, if it was not accompanied by an immediate delivery and followed by an actual change of possession of the chattels, did not affect its validity as against the assignee of the mortgagor in bankruptcy. The assignee succeeded merely to the title of the mortgagor, and as between the mortgagor and the mortgagee the validity of the mortgage was unaffected by the failure to file. Stewart *v.* Platt, 101 U. S. 731, 25 L. ed. 816. But Bankr. Act (1898), § 67*f*, provides that claims which for want of record or for other reasons would not have been valid liens as against creditors of the bankrupt are not liens against his estate [subd. *a*], and that whenever a creditor is prevented from enforcing his rights against a lien created by his debtor, who afterward becomes a bankrupt [subd. *b*] the trustee is subrogated to and may enforce the rights of such creditor for the benefit of the estate. See *infra*, XVI, B. And furthermore Bankr. Act (1898), § 70*e*, provides that the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bank-

f. Property Transferable or Leviable — (i) *In General.* Property which prior to the filing of the petition the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him, vests in the trustee as of the date he was adjudged a bankrupt.[61]

(ii) *Growing Crops.* The interest of a bankrupt in growing crops on lands kept by him as lessee passes to the trustee in bankruptcy as personal property.[62]

(iii) *Income of Life and Trust Estates.* The income given to a legatee for life under a will providing that it shall be inalienable and not subject to the claims of creditors does not pass to the trustee in bankruptcy.[63] A vested equi-

rupt might have avoided. In view of these distinct and unequivocal provisions of the Bankruptcy Act it may well be doubted whether the case of Stewart *v.* Platt, 101 U. S. 731, 25 L. ed. 816, is now applicable. These provisions, however, do not confer upon trustees any greater rights than those possessed by the bankrupt and his creditors at the time their title accrues. If none but judgment creditors can avail themselves, under state statutes requiring the filing of chattel mortgages, of the effect of failure to file them, it follows that trustees cannot avoid the lien of an unfiled chattel mortgage in favor of general creditors; as to them the lien of the mortgagor is paramount. *In re* New York Economical Printing Co., 110 Fed. 514, 49 C. C. A. 133, 6 Am. Bankr. Rep. 615. See also as to conditional sales *In re* Howland, 109 Fed. 869, 6 Am. Bankr. Rep. 495.

See also, generally, Chattel Mortgages.

Rule in New York.— According to the settled construction of the chattel mortgage statute the provisions in respect to filing must be strictly followed. Compliance stands as a substitute for immediate delivery and an actual and continued change of possession of the mortgaged property, and repels the conclusive presumption of fraud which would otherwise infect the transfer. *In re* New York Economical Printing Co., 110 Fed. 514, 49 C. C. A. 133, 6 Am. Bankr. Rep. 615.

61. Bankr. Act (1898), § 70*a* (5).

The words "prior to the filing of the petition" do not apply to the time when the title vests in the trustee. *In re* Yukon Woolen Co., 2 Am. Bankr. Rep. 805. See also *In re* Pease, 4 Am. Bankr. Rep. 578; Collier Bankr. (3d ed.) 456.

This subdivision is intended to cover in general terms all the property of the bankrupt which is to pass to the trustee; it prescribes the test to determine what property vests in the trustee. The value or character of the property is immaterial if it is transferable or subject to levy under a judicial process. Bankr. Act (1867), § 14, required that the register "by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto." It was held that the words "all the estate, real and personal" were 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, 7 L. ed. 108. And see French *v.* Carr, 7 Ill. 664. Every definition of property ignores the idea of value in the thing owned. If there is an exclusive right to a thing, the law immediately presumes it to have at least a nominal value to the owner. Kinzie *v.* Winston, 56 Ill. 56, 4 Nat. Bankr. Reg. 21.

62. *In re* Schumpert, 21 Fed. Cas. No. 12,491, 8 Nat. Bankr. Reg. 415.

Products of wife's land.— In Vermont the products of the wife's lands conveyed to her by deed without limitation, to her separate use, and occupied by her husband according to his marital right, are assets belonging to his estate in bankruptcy. *In re* Rooney, 109 Fed. 601, 6 Am. Bankr. Rep. 478.

Undivided interest in growing crops.— Where a tenant farmer has by his contract with his landlord a three-fourths interest in a crop of any kind, whether growing or matured, severed or unsevered, his interest therein being such as could have been transferred before filing his petition vests in his trustee as of the date of the adjudication. The trustee is entitled to immediate possession of the property, and the bankrupt must account for such part as he has disposed of. *In re* Barrow, 98 Fed. 582, 3 Am. Bankr. Rep. 414.

Where the crop is planted by the bankrupt after the petition in bankruptcy has been filed it does not pass to the trustee. *In re* Barnett, 2 Fed. Cas. No. 1,024, 3 Pittsb. (Pa.) 559, 15 Pittsb. Leg. J. (Pa.) 73.

63. Billings *v.* Marsh, 153 Mass. 311, 26 N. E. 1000, 25 Am. St. Rep. 635, 10 L. R. A. 764; Munroe *v.* Dewey, 4 Am. Bankr. Rep. 264.

It is provided by statute in some states that the surplus income of a trust created to receive the rents and profits of real property, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property. N. Y. Laws (1896), § 78, cl. 547.

It was the rule at common law that a trust could not be created with a proviso that the equitable estate or interest of the *cestui que trust* shall not be alienable or charged with his debts. Cushing *v.* Spalding, 164 Mass. 287, 41 N. E. 297; Winsor *v.* Mills, 157 Mass. 362, 32 N. E. 352; Todd *v.* Sawyer, 147 Mass. 570, 17 N. E. 527.

Contrary to this doctrine many federal and state courts have maintained that the power of alienation is not a necessary incident to an equitable estate for life, and that the owner

table interest in a trust estate is alienable and will pass to the trustee in bankruptcy of the *cestui que trust*.[64] It must be observed, however, that a trust may be so created that no absolute interest vests in the *cestui que trust*, as where property is given to a trustee for the support and education of the *cestui que trust* and his family; in which case neither the trustee, the *cestui que trust*, nor his creditors, nor trustees in bankruptcy, can divest the property from the appointed purposes.[65] In a trust of such a character it is obviously the right and duty of a trustee to protect the income for the use and enjoyment of the beneficiary and to resist any attempt to divert it from the object of the testator's solicitude. The surplus income of such a trust may be reached by means of a plenary suit in equity.[66] The alienability of an interest in a trust estate, and therefore the question whether such interest passes to the trustee in bankruptcy of the *cestui que trust* is to be determined by the laws of the state in which the property is situated.[67]

(IV) *Life Insurance Policies*—(A) *In General.* It is provided that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets.[68]

(B) *Considered as Property.* A life insurance policy which entitles the bankrupt or his assignee to have an agreed sum paid to him in the event of his surviving until a certain date is property which passes to his trustee.[69]

(C) *Having No Surrender Value.* It has been contended that the proviso as to insurance policies contained in section 70*a* (5) is an exclusive definition of what class of policies vest in the trustee, regardless of their assignability, and that it means that no policies of insurance pass to the trustee except those which have a surrender value, and which the bankrupt has failed to redeem by paying or securing to the trustee such ascertained surrender value.[70] But this contention

of the property may, in the exercise of his bounty, so dispose of it as to secure its enjoyment to the objects of his bounty without making it alienable by them or liable for their debts, and this intention, clearly expressed by the founder of the trust, must be carried out by the courts. Campbell *v.* Foster, 35 N. Y. 361; Shankland's Appeal, 47 Pa. St. 113; Still *v.* Spear, 45 Pa. St. 168; Brown *v.* Williamson, 36 Pa. St. 338; White *v.* White, 30 Vt. 338; Hyde *v.* Woods, 94 U. S. 523, 24 L. ed. 264; Nichols *v.* Eaton, 91 U. S. 716, 23 L. ed. 254. See also Perry Trusts (5th ed.), § 386*a*; and, generally, TRUSTS.

64. Perry Trusts (5th ed.) § 386.

65. Young *v.* Snow, 167 Mass. 287, 45 N. E. 686; Loring *v.* Loring, 100 Mass. 340; Chase *v.* Chase, 2 Allen (Mass.) 101; Cuthbert *v.* Chauvet, 136 N. Y. 326, 32 N. E. 1088, 49 N. Y. St. 671, 18 L. R. A. 745; Douglas *v.* Cruger, 80 N. Y. 15; Graff *v.* Bonnett, 31 N. Y. 9, 88 Am. Dec. 236.

66. *In re* Baudouine, 101 Fed. 574, 41 C. C. A. 318, 3 Am. Bankr. Rep. 651.

Discretion of testamentary trustee.— If a will confers an absolute discretion on a trustee which he is under no obligation to exercise in favor of the beneficiary, it does not grant such an interest as will pass to the trustee in bankruptcy of such beneficiary. Nichols *v.* Eaton, 91 U. S. 716, 23 L. ed. 254, 13 Nat. Bankr. Reg. 421.

67. Spindle *v.* Shreve, 111 U. S. 542, 4 S. Ct. 522, 28 L. ed. 512.

68. Bankr. Act (1898), § 70*a* (5).

69. New York L. Ins. Co. *v.* Flack, 3 Md. 341, 56 Am. Dec. 742; Bassett *v.* Parsons, 140 Mass. 169, 3 N. E. 547; Brigham *v.* Home L. Ins. Co., 131 Mass. 319; New York Mut. L. Ins. Co. *v.* Armstrong, 117 U. S. 591, 6 S. Ct. 877, 29 L. ed. 997.

If a bankrupt's interest in an insurance policy is property which prior to the filing of the petition he could have transferred, it vests by operation of law in the trustee, unless prevented by the proviso of Bankr. Act (1898), § 70, or by its peculiar nature as a contract of life insurance. *In re* Slingluff, 106 Fed. 154, 5 Am. Bankr. Rep. 76.

70. *In re* McDonnell, 101 Fed. 239, 4 Am. Bankr. Rep. 92; *In re* Buelow, 98 Fed. 86, 3 Am. Bankr. Rep. 389.

Intent of proviso.— The latter part of clause 5 of section 70 clearly declares that all insurance policies having a cash surrender value payable to the bankrupt, his estate, or his personal representatives, form part of the assets falling to the trustee, subject to the right of the bankrupt to secure to himself the future benefits thereof by paying to the trus-

does not seem to be based upon a proper construction of the provision If a policy has by its express terms no surrender value prior to the expiration of the period named therein, but has a large actual value, it passes to the trustee, subject to his determination whether he shall continue such policy in force for the benefit of the bankrupt estate.[71]

(D) *Payable to Wife or Children.* A policy of insurance payable to the wife, children, or other kin of the bankrupt is not a part of the assets of the bankrupt's estate.[72]

(E) *Exemption Under State Statute.* Where a state statute exempts a policy of life insurance from the payment of the debts of the person insured,[73] such policy does not pass to the trustee in bankruptcy of such person.[74]

tee a sum equal to the surrender value of the policy, which represents the amount which the trustee would ordinarily realize, if the policy should pass to him. It was not the intent of congress in the enactment of this clause to deprive the family of a debtor of the protection which he may have secured to them in taking out the policies for their benefit payable at his death; but it was intended to prevent debtors from availing themselves of the opportunity of making investments for their own benefit in the form of endowment policies, or policies payable to themselves, and holding the same while seeking a discharge in bankruptcy. *In re* Lange, 91 Fed. 361, 1 Am. Bankr. Rep. 189. See also Morris *v.* Dodd, 110 Ga. 606, 36 S. E. 83, 78 Am. St. Rep. 129, 50 L. R. A. 33, 5 Am. Bankr. Rep. 76 note.

71. Policy having an actual value.—Where the bankrupt had at the time of his adjudication a twenty-year tontine insurance policy which had been running for eighteen years, the premiums having been paid up to such date, the policy being payable upon the expiration of the tontine period to the bankrupt or his legal representatives, or in case of his death within that period to his wife or her legal representatives, the policy also providing that previous to the completion of its tontine period it should have no surrender value in cash or in a paid-up policy, it was held that the policy in question passed to the trustee, subject to a possible future consideration as to whether or not it will be a benefit to the estate to keep the policy alive. *In re* Slingluff, 106 Fed. 154, 5 Am. Bankr. Rep. 76.

"Cash surrender value."— The term "cash surrender value" means the sum the company will pay upon the surrender and discharge of the policy; and it makes no difference whether the amount is an arbitrary one fixed by the statute, or one settled by the terms of the policy, or merely a voluntary matter on the company's part. So held in a case of a "free tontine" policy of insurance held by the bankrupt payable to himself, his executors, administrators, or assigns on the date named, or, if he should die before that time, to his mother, or otherwise to his heirs, personal representatives, or assigns, on which policy the company admitted a cash surrender value. *In re* Boardman, 103 Fed. 783, 4 Am. Bankr. Rep. 620.

72. *In re* Steele, 98 Fed. 78, 3 Am. Bankr. Rep. 549 [*overruled* on another point in 104 Fed. 968, 44 C. C. A. 287, 5 Am. Bankr. Rep. 165].

Effect of assignment.— In *In re* Steele, 98 Fed. 78, 3 Am. Bankr. Rep. 549, a bankrupt, before the adoption of the Bankruptcy Act, assigned a policy of insurance payable to his executors, administrators, or assigns, to the woman to whom he was engaged and who afterward became his wife. The effect of this assignment was to make the policy payable to the wife of the assured and to take it out of the assets of the estate of such bankrupt.

Effect of payment of premiums by wife.— Where an endowment policy was issued upon the application of the bankrupt and his wife, payable fifteen years after such issue to the bankrupt, should he then be living, and in case of his death to his wife if surviving, and if not, to the bankrupt's personal representatives or assigns; and where the premiums were at first paid by the bankrupt, and afterward by his wife because of his inability, it was held that upon an adjudication of bankruptcy the wife became entitled to a contingent interest in the surrender value of the policy, and that the payments of premiums made by her created in her favor an equitable lien upon the surrender value of the policy in an amount equal to the proportion which the payments made by her bore to all the payments made upon the policy. *In re* Diack, 100 Fed. 770, 3 Am. Bankr. Rep. 723.

73. **The Bankruptcy Act** does not affect the allowance to bankrupts of the exemptions which are prescribed by the statutes of the state within which they reside. Bankr. Act (1898), § 6. As to Exemptions see *infra*, XV.

74. Steele *v.* Buel, 104 Fed. 968, 44 C. C. A. 287, 5 Am. Bankr. Rep. 165 [*reversing* 98 Fed. 78, 3 Am. Bankr. Rep. 549].

Reason for rule.— The case of Steele *v.* Buel, 104 Fed. 968, 972, 44 C. C. A. 287, 5 Am. Bankr. Rep. 165, arose under an Iowa statute which expressly exempts policies of life insurance from payment of the debts of the insured. The court said: "It has always been the policy of congress to exempt to debtors and bankrupts the property exempt to them by the state law. From the organization of the federal courts under the judiciary act of 1789 the law has been that creditors suing in those courts could not subject to execution property of their debtor exempt to

(v) *Personal Privileges*—(a) *In General.* There are many property rights which are, by the terms of their creation, expressly or impliedly restricted to the person originally acquiring them, or which are by an express provision made non-assignable without the consent of the other party to their creation.[75] The question of whether such rights are assignable must depend upon their nature and upon the terms of the contract upon which they are founded. If the contract calls for the exercise of personal skill or discretion it is inalienable, and would therefore not pass to the trustee in bankruptcy.[76]

(b) *Liquor License.* A liquor license that has a marketable value, and upon the surrender of which a sum of money can be secured, is an asset which passes to the trustee in bankruptcy, although such license is transferable only by the consent of the officer or board by whom it was issued.[77]

(c) *Market License.* A license to keep a city market stall is property passing

him by the law of the state. . . . Confessedly the creditors, who through the trustee are now seeking to subject these policies to the payment of their debts, could not have subjected them to the payment of their debts by execution or other legal process issuing either from the state or the federal courts. The same rule has obtained under the bankrupt acts, which have sometimes increased the exemptions, notably so under the act of 1867 (U. S. Rev. Stat. § 5045) but have never lessened or diminished them. An intention on the part of congress to violate or abolish this wise and uniform rule observed from the creation of our federal system should be made to appear by clear and unmistakable language. It will not be presumed from a doubtful or ambiguous provision fairly susceptible of any other construction. If congress was going to attack the state exemptions and lessen or diminish them in any degree, the exemption of life insurance policies would be the very last exemption to be attacked. They are very generally esteemed the best and safest means by which a man of limited means, or one dependent on his daily earnings for his support, can make provision to preserve his family from suffering and want after his death. . . . The proviso [Bankr. Act (1898) § 70*a* (5)] is operative in those states only whose laws do not exempt policies of insurance, and has no application in states whose laws do exempt them. This construction removes all seeming conflict or inconsistency between section 6 and the proviso of section 70, and gives that effect to each which congress plainly intended they should have." See *contra*, *In re* Lange, 91 Fed. 361, 1 Am. Bankr. Rep. 189; *In re* Grahs, 1 Am. Bankr. Rep. 405. The case of *In re* Scheld, 104 Fed. 870, 44 C. C. A. 233, 52 L. R. A. 188, 5 Am. Bankr. Rep. 102, approves the opinion of Shiras, J., in *In re* Lange, 91 Fed. 361, 1 Am. Bankr. Rep. 189, and holds that a policy of life insurance payable to the bankrupt, his estate, or personal representatives, and having a cash surrender value passes to the trustee although exempt under the state law.

75. Collier Bankr. (3d ed.) 467.

76. Parsons Contr. pt. II, c. 12, § 9.

A franchise consisting of the right to take tolls for crossing at a bridge is property which passes to the assignee. Stewart *v.* Hargrove, 23 Ala. 429. *Contra*, People *v.* Duncan, 41 Cal. 507.

Property partaking of the qualities of personal privilege.— Without undertaking to make nice discriminations between what might properly be classified as property and what clearly appears to be a mere personal privilege, it is held that whatever has a money value in the hands of a trustee, so that some person may be willing to buy from him at a price, even though it partake of the qualities of a personal privilege, in the sense of not being legally assignable, passes to the trustee, except such property as is expressly exempted by law. *In re* May, 5 Am. Bankr. Rep. 1.

77. *In re* Fisher, 98 Fed. 89, 3 Am. Bankr. Rep. 406, 1 Am. Bankr. Rep. 557 [*affirmed* in 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292, 4 Am. Bankr. Rep. 646].

The right to apply for renewal of a license held by a bankrupt passes to his trustee in bankruptcy, and such trustee may dispose of the same for the benefit of the bankrupt's estate. *In re* Brodbine, 93 Fed. 643, 2 Am. Bankr. Rep. 53.

The laws of Minnesota make no provision for an assignment of a liquor license, but it is the practice in that state to sell and transfer such licenses without assignment. It was held that a liquor license in the possession of a bankrupt is in some sense property; it represents the investment of a large amount of money and will be deemed to have a money value; the trustee in bankruptcy is entitled to such license and is bound to realize upon it whatever he may be able to sell it for. The question as to what title he may be able to give is for the consideration of an intending purchaser. *In re* May, 5 Am. Bankr. Rep. 1.

Under the statutes of Pennsylvania a liquor license may be transferred subject to the approval of the court of quarter sessions. It was held that a license, notwithstanding such provision, is property which passes to the trustee in bankruptcy, and the bankrupt may be compelled to execute instruments necessary to confer upon the trustee the right to sell. *In re* Becker, 98 Fed. 407, 3 Am. Bankr. Rep. 412.

from the bankrupt lessee to his trustee in bankruptcy, and the court will order an assignment of such license to the trustee.[78]

(D) *Membership in Stock Exchange.* A seat or membership in a stock exchange is property which, prior to the filing of the petition, the bankrupt might have transferred, and which therefore passes to his trustee as assets of the bankrupt estate.[79]

(VI) *Property Held in Trust by Bankrupt.* Under the Act of 1867 it was provided that no property held by the bankrupt in trust should pass to his assignee.[80] No such provision is contained in the present Act, but the principle stated is still applicable under the general rule that only such property passes to the trustee of the bankrupt as can be transferred by him or which might have been levied upon and sold under judicial process against him.[81]

(VII) *Vested and Contingent Remainders.* For the purpose of determining what constitutes a vested or a contingent remainder reference must be had to the statutes of the several states. A remainder which is transferable would, under the provisions of clause 5 of section 70 of the Bankruptcy Act, pass to the trustee. At common law a contingent remainder is inalienable, but in many of the states it is provided by statute that contingent remainders are assignable, devisable, and descendible, in the same manner as estates in possession. Under the statutes of New York where a remainder is contingent as to the person who will take, and not as to the event merely, such remainder not

78. *In re* Emrich, 101 Fed. 231, 4 Am. Bankr. Rep. 89; *In re* Gallagher, 16 Blatchf. (U. S.) 410, 9 Fed. Cas. No. 5,192, 19 Nat. Bankr. Reg. 224.

79. *In re* Page, 107 Fed. 89, 46 C. C. A. 160, 5 Am. Bankr. Rep. 707 [*affirming* 102 Fed. 746, 4 Am. Bankr. Rep. 467], where it appeared that a member of a stock exchange might sell his membership, provided he had no unsettled contract or claim against him by any other member of the exchange, for transactions arising in or relating to the business of banker, or stock-exchange broker. On appeal the court said: "It appears that the bankrupt had at the time of the adjudication no such unsettled contracts or claims against him, and that the value of his seat or membership amounted to a substantial sum of money. It is true that the approval of the proper authorities in the exchange was necessary to a valid transfer of the membership, and that, as such approval might or might not be withheld, this requirement might prevent a transfer to a given person. This contingency possibly affected the value of the seat for the purposes of sale, but, while restricting, did not destroy its transferability. The membership was more than a mere privilege. It was property vested in Page [the bankrupt] and transferable to any person meeting the approval of the exchange. On principle we perceive no reason why the seat of the bankrupt was not embraced in 'property which prior to the filing of the petition he could by any means have transferred.'"

Membership in a stock-exchange board is property.— In Hyde *v.* Woods, 94 U. S. 523, 24 L. ed. 264, it was ruled that the ownership of a seat in a stock-exchange board is property, not absolute and unqualified, but limited and restricted by the rules of the association; that such rules, in imposing the condition upon the disposition of memberships that the proceeds should be first applied to the benefit of creditor members, are not open to objection on the ground of public policy or because in violation of the Bankrupt Act; and that in the case of the bankruptcy of a member his right to a seat would pass to his assignee, and the balance of the proceeds upon sale could be recovered for the benefit of the estate. While the property is peculiar, and in its nature a personal privilege, yet such value as it may possess, notwithstanding the restrictions to which it is subject, is susceptible of being realized by creditors. Sparhawk *v.* Yerkes, 142 U. S. 11, 12 S. Ct. 104, 35 L. ed. 915. See also *In re* Werder, 15 Fed. 789; *In re* Warder, 10 Fed. 275; *In re* Ketchum, 1 Fed. 840. And *contra*, Weaver *v.* Fisher, 110 Ill. 146; Barclay *v.* Smith, 107 Ill. 349, 47 Am. Rep. 437; Pancoast *v.* Gowen, 93 Pa. St. 66; Thompson *v.* Adams, 93 Pa. St. 55; *In re* Sutherland, 6 Biss. (U. S.) 526, 23 Fed. Cas. No. 13,637.

80. Bankr. Act (1867), § 14.

81. Bankr. Act (1898), § 70*a* (5).

Money paid to bankrupt by mistake.— Where a bankrupt has in his possession money paid to him by mutual mistake, and demand for repayment was made promptly after the discovery of such mistake, the trustee will be ordered to pay such money to the person making such demand if it can be traced to the bank deposit standing in the bankrupt's name *In re* Collisi, 1 Am. Bankr. Rep. 625.

Where the bankrupt mingles trust funds with his own so that their identity is lost they pass to the trustee in bankruptcy, and the *cestui que trust* must share *pari passu* with the other creditors. *In re* Richard, 104 Fed. 792, 4 Am. Bankr. Rep. 700.

being vested in right or interest in the person, is inalienable while the precedent life-estate is outstanding, and will not therefore pass to the trustee as a property right.[82]

g. Rights of Action. Rights of action belonging to the bankrupt at the date of the adjudication, arising upon contracts or from the unlawful taking or deten-

82. *In re* Hoadley, 101 Fed. 233, 3 Am. Bankr. Rep. 780, where it appeared that the bankrupts were not personally named as devisees in either of the wills creating the estates which were the subjects of the claim and they could only take as members of a special and limited class of children living at the death of the life-tenants; and as the life-tenants were still living at the time of the filing of the petition it was wholly uncertain whether the bankrupts would ever be in the class of persons among whom the estates were to be divided upon the death of the beneficiaries for life.

It is a well-recognized doctrine in New York that where the testator directs a division of his estate into shares upon the termination of a life-tenancy, as a gift to his children then living, or in the case of the death of either of them then to the lawful issue of any deceased child, the intent of the testator, if nothing else indicates the contrary, will be construed to be to convey to the future beneficiaries no estate or interest of any kind until the termination of the life-estate. Clark *v.* Cammann, 160 N. Y. 315, 54 N. E. 709; Paget *v.* Melcher, 156 N. Y. 399, 51 N. E. 24; Matter of Brown, 154 N. Y. 313, 48 N. E. 537; Townshend *v.* Frommer, 125 N. Y. 446, 26 N. E. 805, 36 N. Y. St. 153; Delafield *v.* Shipman, 103 N. Y. 463, 9 N. E. 184. In such cases there is no alienable or descendible interest while the precedent life-estate is outstanding. See cases cited *supra*, this note, and also *In re* Gardner, 106 Fed. 670, 5 Am. Bankr. Rep. 432.

Contingent executory limitation.— Where the bankrupt's father had died bequeathing a fund in trust for the benefit of the bankrupt's mother during her lifetime, and giving to her a power of appointment by will of the corpus of the fund, and provided that upon the non-exercise of such power of appointment the corpus of said fund should go to the testator's next of kin then surviving, but not named, and where subsequent to the adjudication in bankruptcy of the bankrupt the donee of the power died, having exercised her power of appointment by bequeathing the corpus to the bankrupt, it was held that since at the time of his adjudication he had no interest in his father's estate, the property descending to him because of the subsequent death of the donee did not pass to his trustee. *In re* Wetmore, 102 Fed. 290, 4 Am. Bankr. Rep. 335 [*affirmed* in 108 Fed. 520, 47 C. C. A. 477, 6 Am. Bankr. Rep. 210]. See also *In re* Ehle, 109 Fed. 625, 6 Am. Bankr. Rep. 476.

Vested remainders.—It was held under the statutes of New York that a bequest of a specific sum to the use of one person during her lifetime and upon her death to her children, and in the event of such person dying childless to the bankrupt, constitutes during the lifetime of the life-tenant, at that time childless, an estate which is transferable and may be levied upon under judicial process, and which therefore passes to the trustee. *In re* St. John, 105 Fed. 234, 5 Am. Bankr. Rep. 190. Where the father of the bankrupt left a will giving to his wife all his real and personal estate for life, and providing that on her death the property in controversy should pass to the bankrupt, subject to the condition contained in the will, "that should any of my said children die, then, and in that case, the share so devised to such child shall be equally divided between their children then living," it was held that the bankrupt had a vested remainder which passed to his trustee. *In re* Shenberger, 102 Fed. 978, 4 Am. Bankr. Rep. 487. And where the bankrupt's father devised his estate to the bankrupt's mother for life only, vesting in her a power of sale, not for her own benefit, but for reinvestment of the principal fund, and devised the remainder to the bankrupt, such bankrupt has an absolute vested remainder in his father's estate which passes to his trustee. *In re* Wood, 98 Fed. 972, 3 Am. Bankr. Rep. 572.

Devise to surviving children.— A testator devised certain real estate situated in Pennsylvania to the mother of the bankrupt "for and during the term of her natural life and at the time of her decease to her surviving children equally share and share alike, . . . to hold to them, their heirs and assigns forever." After the death of the testator and during the lifetime of the life beneficiary, one of her children was adjudged a bankrupt. It was held that he had a vested interest in the subject of the devise, which passed to his trustee in bankruptcy. *In re* Twaddell, 110 Fed. 145, 6 Am. Bankr. Rep. 539. The determination of the question of whether the interest of the bankrupt was vested, in this case, depended upon the interpretation of the words "to her surviving children." The court said: "That the word 'surviving' in the testamentary provision in question has relation to the death of the testator; that on the happening of that event the then living children of Mrs. Twaddell acquired a vested remainder in fee as tenants in common, though liable to open and let in afterborn children; and that consequently the bankrupt had, by virtue of that provision, at and prior to the date of the adjudication, an interest and estate in the houses constituting property which prior to the filing of the petition he could have transferred and which might have been levied upon and sold under judicial process against him." The

tion of or injury to his property vest in the trustee.[83] A cause of action for damages arising out of a personal wrong suffered by the bankrupt is not embraced in those rights of action which, by operation of the above provision, vest in the trustee of the bankrupt. The right to sue for a personal tort, such as slander, malicious prosecution, assault, etc., is strictly personal; it cannot be assigned, is not subject to levy and sale by judicial process, and the Act does not contemplate that the bankrupt's right to maintain an action to recover damages for such wrongs shall constitute any part of his estate in bankruptcy.[84]

G. Compensation — 1. Fees and Commissions. Trustees shall receive as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time of the filing of the petition in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars.[85] A fee upon the filing of a petition is not required of

property in question being located in the state of Pennsylvania the court based its decision upon the following Pennsylvania authorities: Ross *v.* Drake, 37 Pa. St. 373; Chew's Appeal, 37 Pa. St. 23; Letchworth's Appeal, 30 Pa. St. 175.

83. Bankr. Act (1898), § 70*a* (6).

84. Actions for personal injuries.— *In re* Haensell, 91 Fed. 355, 1 Am. Bankr. Rep. 286, where the question arose whether a cause of action for malicious prosecution and imprisonment of the bankrupt constitutes a part of his estate in bankruptcy. It was held that the court had no jurisdiction over such a cause of action, and that it was not necessary for the bankrupt to obtain the consent of the court to continue the prosecution thereof, although the action was pending at the time he was adjudged a bankrupt.

Actions for deceit and fraud.— A right of action for damages arising from a fraudulent and deceitful recommendation of a person as worthy of trust and confidence does not pass to an assignee. Crockett *v.* Jewett, 2 Ben. (U. S.) 514, 6 Fed. Cas. No. 3,402, 2 Am. L. T. Bankr. Rep. 21, 2 Nat. Bankr. Reg. 208. But in Hyde *v.* Tufts, 45 Nat. Bankr. Reg. 56, where one who afterward became a bankrupt was induced by false representations to engage in a business venture in which, by reason of the false representations, he incurred great loss, it was held that the cause of action for the fraud vested in his assignee in bankruptcy.

Actions to recover usurious interest.— Under the former Act the right of a trustee to sue for the recovery of usurious interest was controverted. The weight of authority was in favor of considering the exacting of usury as an injury to a property right, and that therefore a right of action based thereon would pass as an asset of the bankrupt's estate to the trustee. Tiffany *v.* Boatman's Sav. Inst., 18 Wall. (U. S.) 375, 21 L. ed. 868; Wright *v.* Greensburg First Nat. Bank, 8 Biss. (U. S.) 243, 30 Fed. Cas. No. 18,078, 18 Alb. L. J. 115, 10 Chic. Leg. N. 348, 2 Nat. Bank Cas. 138, 18 Nat. Bankr. Reg. 87, 6 N. Y. Wkly. Dig. 543, 26 Pittsb. Leg. J. (Pa.) 11, 6 Reporter 229; Crocker *v.* Chetopa First Nat. Bank, 4 Dill. (U. S.) 358, 6 Fed. Cas. No. 3,397, 11 Am. L. Rev. 169, 3 Am. L. T. Rep. N. S. 350, 3 Centr. L. J. 527, 1 Cinc. L. Bul. 350, 3 N. Y. Wkly. Dig. 105, 24 Pittsb. Leg. J. (Pa.) 73, 1 Thomps. Nat. Bank Cas. 317. See also Wheelock *v.* Lee, 64 N. Y. 242, where the court held that a trustee in bankruptcy could recover usurious interest, basing its decision upon the fact that money sought to be recovered belonged to the borrower as well after as before payment and that the right to maintain the action is allowed by law, not as a penalty against the usurer, but because the usurer never acquired any title to the money. But see *contra*, Bromley *v.* Smith, 2 Biss. (U. S.) 511, 4 Fed. Cas. No. 1,922, 3 Chic. Leg. N. 297, 5 Nat. Bankr. Reg. 152, where the right of a trustee in bankruptcy to recover usurious interest was denied upon the ground that a right given by the statute was in the nature of a right to redress a personal injury done to the borrower himself, and that like rights of action for personal torts it did not pass to the trustee.

The Act of 1867 provided that all the bankrupt's rights of action for property or estate, real or personal, and for any cause which he had against any person arising from contract, or from the unlawful taking or detention of, or injury to, property of the bankrupt, shall, in view of the adjudication in bankruptcy and the appointment of his assignee but subject to the exception stated in the preceding clause, be at once vested in such assignee. The rights of action which pass to the assignee are those that are founded upon beneficial contracts made with the bankrupt where the pecuniary loss is the substantial and primary cause of action for injuries affecting his property, so far as they do not involve a claim for personal damages. Dillard *v.* Collins, 25 Gratt. (Va.) 343.

85. Bankr. Act (1898), § 48*a*. See also Bankr. Act (1898), § 40; *In re* Carolina Cooperage Co., 96 Fed. 950, 3 Am. Bankr.

a voluntary bankrupt who makes an affidavit stating that he is without and cannot obtain the money with which to pay such fee.[86]

2. EXTRA COMPENSATION. Notwithstanding the fact that the Act fixes the fees and commissions of trustees as full compensation for their services, it has been held that where a trustee performs other services than those required by law for the benefit of the estate he may be allowed a reasonable additional fee as compensation therefor.[87]

Rep. 154, holding that Bankr. Act (1898), § 48*a*, providing that trustees in bankruptcy shall be compensated for their services by commissions not exceeding a certain percentage on the sums paid as dividends and commissions by the estates administered, is mandatory, and must be followed; and a court of bankruptcy has no authority to allow to a trustee a lumping sum in lieu of commissions calculated as the Act directs.

Payments on secured claims are not dividends upon which a trustee of a referee is entitled to a commission. *In re* Ft. Wayne Electric Corp., 94 Fed. 109, 1 Am. Bankr. Rep. 706. But see *contra*, *In re* Gerson, 2 Am. Bankr. Rep. 352; *In re* Sabine, 1 Am. Bankr. Rep. 322, where the referee says: "Now, as secured creditors and creditors entitled to priority of payment are nevertheless creditors, the amounts awarded to them out 'of the net proceeds of the estate' must be dividends" upon which the trustee is entitled to a commission. And in the case of *In re* Coffin, 2 Am. Bankr. Rep. 344, the referee held that trustees are entitled to commissions not only upon the general dividends but also upon the proceeds of the property affected by lien if such property is administered in the bankruptcy court and comes into the hands of the trustee. Where a secured creditor does not invoke the aid of the court to enable him to turn his security into cash, but the court, in the exercise of its equitable power for the benefit of unsecured creditors, orders the sale of such property free of encumbrance, and assumes the protection of the equitable rights of the secured creditor in the disposition of the proceeds of the sale, it seems that the moneys coming to the secured creditor under such circumstances come into the case incidentally and are not to be regarded as any dividend and should not be charged with commissions. But where the secured creditors, in their own interest, invoke the aid of the court for the purpose of realizing upon their securities, without the expenses and delay of a foreclosure suit, the amount paid to them by virtue of such sale must be properly considered as a dividend and is therefore chargeable with commissions. *In re* Barber, 97 Fed. 547, 3 Am. Bankr. Rep. 306. *Compare In re* Fielding, 96 Fed. 800, 3 Am. Bankr. Rep. 800, holding that under Bankr. Act (1898), §§ 40, 48, providing that referees and trustees in bankruptcy shall be entitled to receive commissions on "sums to be paid as dividends" by the estates administered by them, these officers are not entitled to commissions on disbursements made in payment of those creditors who are entitled, under the Act, to priority of payment, and to full satisfaction, before distribution to general creditors begins, the sums paid to these preferred creditors not being "dividends," within the meaning of the law. See also *In re* Utt, 105 Fed. 754, 45 C. C. A. 32, 5 Am. Bankr. Rep. 383, holding that trustees are not entitled to commissions on sums paid to mortgagees from the proceeds of the mortgaged property on its sale by order of the court of bankruptcy, such sums not being dividends, within the meaning of the statute.

In the event of an estate being administered by three trustees instead of one trustee, or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administration of any estate a greater amount than one trustee would be entitled to. Bankr. Act (1898), § 48*b*.

Where marshal was appointed an agent to make a sale of property in the hands of a sheriff under an execution levied at the time of the bankrupt's adjudication and was afterward elected trustee of the bankrupt's estate, it was held that he was not entitled to compensation for services rendered as agent of the court in addition to commissions to be allowed him as trustee. *In re* Carolina Cooperage Co., 96 Fed. 950, 3 Am. Bankr. Rep. 154.

86. Bankr. Act (1898), § 51 (2). See also as to poverty affidavit of a voluntary bankrupt *supra*, III, A, 2, d.

Payment of fee by a voluntary bankrupt. — Where the fee of a trustee is not required to be paid by the debtor before the filing of the petition to be adjudged a bankrupt, the judge at any time during the pendency of the proceedings in bankruptcy may order those fees to be paid out of the estate; or may, after notice to the bankrupt and satisfactory proof that he then has or can obtain the money with which to pay the fees, order him to pay them within a time specified, and if he fails to do so may order his petition to be dismissed. U. S. Supreme Ct. Bankr. G. O. No. 35, par. 4.

Compensation to be in full. — It is provided in the General Orders that the compensation allowed to trustees by the Bankruptcy Act shall be in full compensation for the services performed by them, but shall not include expenses necessarily incurred in the performance of their duties, and allowed upon the settlement of their accounts. U. S. Supreme Ct. Bankr. G. O. No. 35, par. 3.

87. *In re* Plummer, 3 Am. Bankr. Rep. 320, where the trustee continued, at the request of the creditors, to run a manufactur-

3. In Case of Removal. The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.[88]

XIII. Appraisal of Bankrupt's Estate.

All real and personal property belonging to the bankrupt's estate must be appraised by three disinterested appraisers; they must be appointed by and report to the court.[89]

XIV. Compositions.

A. Definition. A composition in bankruptcy is a contract by which creditors agree to accept a part of their demand, and to discharge the debtor from liability for the rest.[90]

B. Offer of Terms. A bankrupt may offer[91] terms of composition to his creditors[92] after, but not before,[93] he has been examined in open court or at a meeting of his creditors,[94] and filed in court the schedule of his property[95] and

ing plant, to buy new material, to make necessary repairs to machinery, and to give his personal attention to the business with a profit to the creditors, he thus performs extra services for the beneficiaries of the trust for which he should be allowed a reasonable compensation.

Compensation of trustee who acts as counsel.— If professional services necessary to the proper administration of the estate have been rendered by a trustee in person he is entitled to such reasonable fees as he would have been obliged to pay had he employed other competent counsel. Perkins' Appeal, 108 Pa. St. 314, 56 Am. Rep. 208; *In re* Mitchell, 1 Am. Bankr. Rep. 687.

88. Bankr. Act (1898), § 48*c*.

89. Bankr. Act (1898), § 70*b*.

Form of appointment of appraisers is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 13; 89 Fed. xxxiv.

Form of oath of appraisers is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 13; 89 Fed. xxxiv.

Form of report of appraisers is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 13; 89 Fed. xxxiv.

90. Anderson L. Dict.

Another definition is "an arrangement between a bankrupt and his creditors whereby the amount he can be expected to pay is liquidated, and he is allowed to retain his assets, upon condition of his making the payments agreed upon." Black L. Dict.

Such agreements are enforceable independent of any statutory provision. The beneficial consideration to each creditor in such an agreement is the engagement on the part of all the other creditors to forbear in the enforcement of the full amount of their several claims. Blair *v.* Wait, 69 N. Y. 113; Williams *v.* Carrington, 1 Hilt. (N. Y.) 515; Way *v.* Langley, 15 Ohio St. 392; Good *v.* Cheesman, 2 B. & Ad. 328, 22 E. C. L. 142. See, generally, Compositions With Creditors.

91. **In England** the statute of 6 Geo. IV, c. 16, first introduced the principle of deeds of arrangement, whereby the property of an insolvent trader was made applicable for the common benefit of his creditors, without his going through proceedings in bankruptcy. *In re* Reiman, 7 Ben. (U. S.) 455, 20 Fed. Cas. No. 11,673, 11 Nat. Bankr. Reg. 21.

In the United States the Bankruptcy Acts of 1800 and 1841 contained no such provisions. The Act of June 22, 1874, c. 390, § 17; U. S. Rev. Stat. (1878), § 5103, amended the Act of 1867 and permitted a composition by a debtor with his creditors after the commencement of bankruptcy proceedings against him. *In re* Adler, 103 Fed. 444, 4 Am. Bankr. Rep. 583; *In re* Reiman, 7 Ben. (U. S.) 455, 20 Fed. Cas. No. 11,673, 11 Nat. Bankr. Reg. 21; *In re* Scott, 21 Fed. Cas. No. 12,519, 15 Nat. Bankr. Reg. 73, 4 Centr. L. J. 29.

The constitutionality of the provision as to compositions in the Act of 1874 was questioned upon the theory that the subject of bankruptcy does not properly include a composition agreement; but the validity of the provision was sustained. *In re* Chamberlin, 9 Ben. (U. S.) 149, 5 Fed. Cas. No. 2,580, 17 Nat. Bankr. Reg. 49; *In re* Reiman, 7 Ben. (U. S.) 455, 20 Fed. Cas. No. 11,673, 11 Nat. Bankr. Reg. 21 [*affirmed* in 12 Blatchf. (U. S.) 562, 20 Fed. Cas. No. 11,675, 13 Nat. Bankr. Reg. 128].

92. **The composition must be offered to all the creditors** of the bankrupt whether they have proved their claims or not; but in order to qualify themselves to vote upon the question as to the acceptance of the composition they are required to prove their claims. *In re* Rider, 96 Fed. 808, 3 Am. Bankr. Rep. 178.

Form of petition for a meeting to consider an offer of composition is prescribed in U. S. Supreme Ct. Bankr. Forms, No. 60; 89 Fed. lviii.

93. **Under the Act of 1874** (U. S. Rev. Stat. (1878), § 5103), a composition could be offered by a bankrupt after proceedings had been commenced and either before or after adjudication.

94. **A submission of the bankrupt's offer of composition to the creditors at their first meeting,** after an examination of the bankrupt, is competent and sufficient. *In re* Hilborn, 104 Fed. 866, 4 Am. Bankr. Rep. 741.

95. See *supra*, VI, A, 1, b.

list of his creditors,[96] required by the Bankruptcy Act of 1898 to be filed by bankrupts.[97]

C. Confirmation — **1. In General.** Courts of bankruptcy have power to confirm or reject compositions between debtors and their creditors.[98]

2. Consent of Creditors. An application for the confirmation of a composition may be filed in a court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed,[99] which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings[1] have been deposited in such place as shall be designated by and subject to the order of the judge.[2]

3. When Ordered. The judge must confirm a composition, if satisfied that it is for the best interests of the creditors;[3] that the bankrupt has not been guilty

96. See *supra*, VI, A, 1, b.

97. Bankr. Act (1898), § 12*a*.

Construction.— The provision enabling a debtor to compromise his claims with the creditors by a composition agreement is in derogation of a common right and should therefore be strictly construed. *In re* Rider, 96 Fed. 808, 3 Am. Bankr. Rep. 178. See also *In re* Shields, 4 Dill. (U. S.) 588, 21 Fed. Cas. No. 12,784, 4 Centr. L. J. 557, 15 Nat. Bankr. Reg. 532, 24 Pittsb. Leg. J. (Pa.) 190.

98. Bankr. Act (1898), § 2 (9). See also *supra*, II, B, 7; III, D, 3, c, (II).

After the consent of the creditors has been obtained and a deposit has been made by the bankrupt, the bankrupt makes a petition to a court of bankruptcy, praying for the confirmation of the composition. U. S. Supreme Ct. Bankr. Forms, No. 61; 89 Fed. lix. Such petition is filed with the clerk, and the creditors are entitled to at least ten days' notice by mail of the hearing upon such application. Bankr. Act (1898), § 58*a* (2). The court may in its discretion direct that such notice be published. Bankr. Act (1898), § 58*b*.

Applications for the approval of a composition must be heard and decided by the district judge, although such judge may refer the application or any issue arising thereon to a referee to ascertain and report the facts. U. S. Supreme Ct. Bankr. G. O. No. 12, par. 3.

Form of application for confirmation of composition is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 61; 89 Fed. lix.

Form of order confirming composition is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 62; 89 Fed. lix.

99. **A composition is only permitted when sanctioned by a majority** in number and amount of the creditors whose claims have been allowed, after due notice to them of the bankrupt's proposition. *In re* Rider, 96 Fed. 808, 3 Am. Bankr. Rep. 178.

Opposition to confirmation of a composition shall be made by the creditors on the day required in the order to show cause, and such opposing creditors shall file specifications in writing of the grounds of their opposition within ten days thereafter, unless the same shall be enlarged by special order of the judge. U. S. Supreme Ct. Bankr. G. O. No. 32. Specifications in opposition must be similar to specifications in opposition to a discharge (see *infra*, XIX, C, 3) which should show fraud on his part. Dallas City Nat. Bank *v.* Doolittle, 107 Fed. 236, 46 C. C. A. 258, 5 Am. Bankr. Rep. 736.

Withdrawal of consent.— When creditors have once accepted a composition they will not be allowed to withdraw their consent thereto in the absence of fraud or misrepresentation. *In re* Levy, 110 Fed. 744, 6 Am. Bankr. Rep. 299.

1. **The deposits required of bankrupts** in composition cases must be sufficient to cover, in addition to costs, prior claims and expenses, the named percentage not only on all claims filed before composition, but also on all other claims listed by the bankrupts in their original schedules. Matter of Fox, 6 Am. Bankr. Rep. 525. See also *In re* Rider, 96 Fed. 808, 3 Am. Bankr. Rep. 178.

2. Bankr. Act (1898), § 12*b*.

Manner of obtaining consent.— The Act makes no special provision in regard to the method in which the consent of creditors may be obtained. Under the Act of 1874 (U. S. Rev. Stat. (1878), § 5103), a meeting of the creditors was first required to be held. The consent need not have been obtained at a meeting. The debtor might procure it within any reasonable time thereafter. *In re* Spillman, 22 Fed. Cas. No. 13,242, 8 Chic. Leg. N. 140, 13 Nat. Bankr. Reg. 214, 23 Pittsb. Leg. J. (Pa.) 87; *In re* Scott, 21 Fed. Cas. No. 12,519, 4 Centr. L. J. 29, 15 Nat. Bankr. Reg. 73. It has been held under the present Act that the calling of a special meeting of creditors to receive an offer of composition is not required. *In re* Hilborn, 104 Fed. 866, 4 Am. Bankr. Rep. 741.

3. Bankr. Act (1898), § 12*d* (1).

It should be made to appear that the amount offered will at least equal the amount that the creditors would receive, if the proceedings were allowed to continue. Adler *v.* Jones, 109 Fed. 967, 48 C. C. A. 761, 6 Am. Bankr. Rep. 245. A gross discrepancy between the amount offered and the probable value of the assets would make it the duty of the court to refuse to confirm the composition. *In re* Reiman, 7 Ben. (U. S.) 455,

of any of the acts or failed to perform any of the duties which would be a bar to his discharge;[4] and the offer and its acceptance are in good faith and have not been made or procured except as provided in the Act, or by any means, promises, or acts forbidden therein.[5]

4. Appeal. An appeal lies to the circuit court of appeals from an order of the district court refusing a confirmation of a composition.[6]

D. Setting Aside. The judge may upon the application of parties in interest filed at any time within six months after a composition has been confirmed set the same aside and reinstate the case, if it shall be made to appear upon a trial that fraud[7] was practised in the procuring of such composition, and that the

20 Fed. Cas. No. 11,673, 11 Nat. Bankr. Reg. 21; *In re* Whipple, 2 Lowell (U. S.) 404, 29 Fed. Cas. No. 17,513, 11 Nat. Bankr. 524. But the mere fact that there is a discrepancy between the estimated value of the assets as appearing in the schedules and the terms of composition offered, even if the discrepancy is so great as to make the composition appear unreasonable, does not justify the court in refusing absolutely to confirm. *In re* Weber Furniture Co., 29 Fed. Cas. No. 17,331, 13 Nat. Bankr. Reg. 559 [*reversing* 29 Fed. Cas. No. 17,330, 13 Nat. Bankr. Reg. 529].

Whether it be to the interests of creditors to confirm a composition is a question of fact to be determined by the court after ascertaining, from all material circumstances, the reasonableness and good faith of the offer. *In re* Adler, 103 Fed. 444, 4 Am. Bankr. Rep. 583. See also Ross *v.* Saunders, 105 Fed. 915, 45 C. C. A. 123, 5 Am. Bankr. Rep. 350. If the offer is adequate in view of the aggregate value of the assets it should be confirmed. *In re* Whipple, 2 Lowell (U. S.) 404, 29 Fed. Cas. No. 17,513, 11 Nat. Bankr. Reg. 524. See also *Ex p.* Jewett, 2 Lowell (U. S.) 393, 13 Fed. Cas. No. 7,303, 11 Nat. Bankr. Reg. 443, 12 Nat. Bankr. Reg. 170; *In re* Haskell, 11 Fed. Cas. No. 6,192, 1 Am. L. T. N. S. 182, 1 Centr. L. J. 531, 11 Nat. Bankr. Reg. 164.

Burden of proof.— When the only opposition to the confirmation of a composition is that it was not for the best interests of the creditors, the burden of proof rests upon those attacking such composition in showing it to be erroneous. Adler *v.* Jones, 109 Fed. 967, 48 C. C. A. 761, 6 Am. Bankr. Rep. 245; Dallas City Nat. Bank *v.* Doolittle, 107 Fed. 236, 46 C. C. A. 258, 5 Am. Bankr. Rep. 736.

4. Bankr. Act (1898), § 12*d* (2).

As to acts barring discharge see *infra*, XIX, D.

Where the bankrupts' failure to keep proper books of account was not shown to have been with a fraudulent intent to conceal their true financial condition, or in contemplation of bankruptcy, such failure and proof that their business methods had been loose were insufficient to prevent the confirmation of a composition between the bankrupts and their creditors which was for their best interests. *In re* Wilson, 107 Fed. 83, 5 Am. Bankr. Rep. 849.

5. Bankr. Act (1898), § 12*d* (3).

Any act on the part of the debtor or any of his creditors amounting to fraud will vitiate the composition. Fairbanks *v.* Amoskeag Nat. Bank, 38 Fed. 630; *In re* Sawyer, 2 Lowell (U. S.) 475, 21 Fed. Cas. No. 12,395, 14 Nat. Bankr. Reg. 241; *In re* Whitney, 2 Lowell (U. S.) 455, 29 Fed. Cas. No. 17,580, 8 Chic. Leg. N. 195, 14 Nat. Bankr. Reg. 1. Any secret advantage given to one creditor for the purpose of inducing him to consent will also be sufficient. *In re* Bennett, 8 Ben. (U. S.) 561, 3 Fed. Cas. No. 1,312; Bullene *v.* Blain, 6 Biss. (U. S.) 22, 4 Fed. Cas. No. 2,124; Bean *v.* Brookmire, 2 Dill. (U. S.) 108, 2 Fed. Cas. No. 1,170, 2 Am. L. Rec. 222, 6 Am. L. T. Rep. 418, 5 Chic. Leg. N. 314, 7 Nat. Bankr. Reg. 568, 7 West. Jur. 324. See also Dexter *v.* Snow, 12 Cush. (Mass.) 594, 59 Am. Dec. 206; Bean *v.* Amsinck, 10 Blatchf. (U. S.) 361, 2 Fed. Cas. No. 1,167, 12 Am. L. Reg. N. S. 379, 8 Nat. Bankr. Reg. 228; *In re* Shine, 21 Fed. Cas. No. 12,788; *In re* Jacobs, 13 Fed. Cas. No. 7,159, 18 Nat. Bankr. Reg. 48; Hall *v.* Dyson, 17 Q. B. 785, 21 L. J. Q. B. 224, 79 E. C. L. 785; Knight *v.* Hunt, 5 Bing. 432, 7 L. J. C. P. O. S. 165, 3 M. & P. 18, 30 Rev. Rep. 692, 15 E. C. L. 656; Atkinson *v.* Denby, 6 H. & N. 778.

See 6 Cent. Dig. tit. "Bankruptcy," § 587.

The mere omission of assets without fraudulent intention does not imply bad faith and will not affect its validity. *In re* Reiman, 7 Ben. (U. S.) 455, 20 Fed. Cas. No. 11,673, 11 Nat. Bankr. Reg. 21 [*affirmed* in 12 Blatchf. (U. S.) 562, 20 Fed. Cas. No. 11,675, 13 Nat. Bankr. Reg. 128]; *In re* Scott, 21 Fed. Cas. No. 12,519, 4 Centr. L. J. 29, 15 Nat. Bankr. Reg. 73.

Form of order confirming composition is prescribed in U. S. Supreme Ct. Bankr. Forms, No. 62; 89 Fed. lix.

6. U. S. *v.* Hammond, 104 Fed. 862, 44 C. C. A. 229, 4 Am. Bankr. Rep. 736 [*reversing In re* Adler, 103 Fed. 444, 4 Am. Bankr. Rep. 583]. See also Adler *v.* Jones, 109 Fed. 967, 48 C. C. A. 761, 6 Am. Bankr. Rep. 245; and *supra*, II, D, 1.

Where no objecting creditors have appeared opposing the confirmation, but the trustee appeared in opposition and confirmation was refused, the appeal of the bankrupt will be dismissed. Ross *v.* Saunders, 105 Fed. 915, 45 C. C. A. 123, 5 Am. Bankr. Rep. 350.

7. **Fraud is the only ground** upon which a composition can be set aside. *In re* Rud-

knowledge thereof has come to the petitioners since the confirmation of such composition.[8]

E. Operation and Effect. The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.[9]

XV. EXEMPTIONS.

A. Right to Exemptions[10] **— 1. In General.** The Bankruptcy Act does not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws[11] in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition.[12]

wick, 93 Fed. 787, 2 Am. Bankr. Rep. 114, holding that where there has been a composition in a bankruptcy proceeding it will not be set aside on the ground that a creditor has failed to get notice of the proceedings because his address was by mistake incorrectly given in the bankrupt's schedules.

8. Bankr. Act (1898), § 13*a*.

9. Bankr. Act (1898), § 14*c*.

As to debts not affected by discharge see *infra*, XIX, E.

Distribution.— Upon the confirmation of a composition the consideration shall be distributed as the judge shall direct and the case dismissed. Whenever a composition is not confirmed the estate shall be administered in bankruptcy as provided in the Act. Bankr. Act (1898), § 12*e*.

Form of order of distribution is prescribed in U. S. Supreme Ct. Bankr. Forms, No. 63; 89 Fed. lx.

Revestment of title.— Upon the confirmation of a composition offered by a bankrupt the title to his property shall thereupon revest in him. Bankr. Act (1898), § 70*f*.

10. As to what is exempt see EXEMPTIONS.

11. **In determining the application of state laws,** courts of bankruptcy are to be guided by the decisions of the courts of the states as to the meaning and construction of their exemption laws. *In re* White, 109 Fed. 635, 6 Am. Bankr. Rep. 451; Richardson *v.* Woodward, 104 Fed. 873, 44 C. C. A. 235, 5 Am. Bankr. Rep. 94; *In re* Woodard, 95 Fed. 955, 2 Am. Bankr. Rep. 692; Goodall *v.* Tuttle, 3 Biss. (U. S.) 219, 10 Fed. Cas. No. 5,533, 5 Am. L. T. Rep. U. S. Cts. 240, 7 Nat. Bankr. Reg. 193, 7 West. Jur. 32. Where there is no construction of a state law, or there is a conflict of authority in respect thereto, courts of bankruptcy will give such law a construction to carry out the purport and intention of the act of congress. Richardson *v.* Woodward, 104 Fed. 873, 44 C. C. A. 235, 5 Am. Bankr. Rep. 94; *In re* Beauchamp, 101 Fed. 106, 4 Am. Bankr. Rep. 151; *In re* Camp, 91 Fed. 745, 1 Am. Bankr. Rep. 165; *In re* Ogilvie, 5 Am. Bankr. Rep. 374. Reference should also be had to the decisions of the courts of the state in which the bankrupt resides to determine the question as to whether a bankrupt who has fraudulently conveyed his property prior to filing his petition can claim his exemption from the property after the transfer has been set aside in an action brought by the trustee. *In re* White, 109 Fed. 635, 6 Am. Bankr. Rep. 451; *In re* Tollett, 106 Fed. 866, 46 C. C. A. 11, 54 L. R. A. 222, 5 Am. Bankr. Rep. 404 [*reversing* 105 Fed. 425, 5 Am. Bankr. Rep. 305]. Under the former Bankruptcy Acts it was held that a bankrupt could not claim any exemption in property conveyed by him prior to the commencement of proceedings in bankruptcy in fraud of his creditors and afterward recovered to the estate. *In re* Graham, 2 Biss. (U. S.) 449, 10 Fed. Cas. No. 5,660, 4 Alb. L. J. 49; *In re* Dillard, 2 Hughes (U. S.) 190, 7 Fed. Cas. No. 3,912, 6 Am. L. T. Rep. 490, 9 Nat. Bankr. Reg. 8, 21 Pittsb. Leg. J. (Pa.) 82; Keating *v.* Keefer, 14 Fed. Cas. No. 7,635, 4 Am. L. T. 162, 1 Am. L. T. Bankr. Rep. 266, 5 Nat. Bankr. Reg. 133; *In re* Everitt, 8 Fed. Cas. No. 4,579, 9 Nat. Bankr. Reg. 90. But see *contra*, McFarland *v.* Goodman, 6 Biss. (U. S.) 111, 16 Fed. Cas. No. 8,789, 3 Am. L. Reg. N. S. 697, 11 Nat. Bankr. Reg. 134; Bartholomew *v.* West, 2 Dill. (U. S.) 290, 2 Fed. Cas. No. 1,071, 8 Nat. Bankr. Reg. 12, 7 West. Jur. 441; Cox *v.* Wilder, 2 Dill. (U. S.) 45, 6 Fed. Cas. No. 3,308, 5 Am. L. T. Rep. U. S. Cts. 500, 7 Nat. Bankr. Reg. 241; Penny *v.* Taylor, 19 Fed. Cas. No. 10,957, 10 Nat. Bankr. Reg. 200; *In re* Detert, 7 Fed. Cas. No. 3,829, 14 Am. L. Reg. N. S. 166, 7 Chic. Leg. N. 130, 11 Nat. Bankr. Reg. 293.

Exemption laws are to be liberally construed to accomplish the purpose of the exemption. *In re* Tilden, 91 Fed. 500, 1 Am. Bankr. Rep. 300. See also Steele *v.* Buel, 104 Fed. 968, 44 C. C. A. 287, 5 Am. Bankr. Rep. 165.

12. Bankr. Act (1898), § 6*a*.

Bankr. Act (1867), § 14, specified in detail certain articles to be exempt, and provided that such other property "as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the consti-

2. NATURE OF RIGHT. The right of exemption is a personal privilege granted to the bankrupt which he can exercise or waive,[13] and unless otherwise provided by statute[14] it cannot be exercised by any other person.[15] The bankrupt must include in the schedule of his property a claim for such exemptions as he may be entitled to.[16] He must also be able to show a clear title to it under the requirements of the state statutes.[17] The fact that he has failed to account for all his assets and is in possession of portions thereof which were not turned over to the trustee is no reason, however, why he should be deprived of his exemptions.[18]

3. PARTNERSHIP CASES. The authorities are in conflict as to the right of a partner to be allowed exemptions out of the partnership assets. According to some decisions an individual member of a firm is not entitled to a separate exemption out of the undivided partnership estate.[19] Other decisions are to the effect that

tution and laws of each State" should be excepted from the operation of the conveyance to the assignee.

Constitutionality.— It was contended under the Act of 1867 that the clause allowing exemptions to be regulated by the laws of the several states occasioned a lack of uniformity in the bankruptcy law, and that therefore it did not comply with the constitutional provision requiring uniformity of bankruptcy legislation (U. S. Const. art. I, § 8). It was settled, however, that the Act was not unconstitutional for lack of uniformity because of such provision. Darling *v.* Berry, 13 Fed. 659; *In re* Beckerford, 1 Dill. (U. S.) 45, 3 Fed. Cas. No. 1,209, 10 Am. L. Reg. N. S. 57, 4 Am. L. T. 14, 1 Am. L. T. Bankr. Rep. 241, 4 Nat. Bankr. Reg. 203; *In re* Kean, 2 Hughes (U. S.) 322, 14 Fed. Cas. No. 7,630, 2 Am. L. Rec. 230, 8 Nat. Bankr. Reg. 367, 2 South. L. Rev. 725; *In re* Jordan, 13 Fed. Cas. No. 7,514, 30 Leg. Int. (Pa.) 296, 5 Leg. Op. (Pa.) 169, 8 Nat. Bankr. Reg. 180. But see *contra*, Bush *v.* Lester, 55 Ga. 579, 15 Nat. Bankr. Reg. 36; *In re* Deckert, 2 Hughes (U. S.) 183, 7 Fed. Cas. No. 3,728, 3 Am. L. Rec. 96, 13 Am. L. Reg. N. S. 624, 8 Am. L. Rev. 786, 1 Am. L. T. Rep. N. S. 336, 1 Centr. L. J. 316, 320, 6 Chic. Leg. N. 310, 10 Nat. Bankr. Reg. 1; *In re* Duerson, 7 Fed. Cas. No. 4,117, 13 Nat. Bankr. Reg. 183.

13. As to waiver of exemption see *infra*, XV, D.

14. **Under the laws of some states the** wife or children may claim the benefit of the exemption in the absence or disability of the bankrupt. Smith *v.* Kehr, 2 Dill. (U. S.) 56, 22 Fed. Cas. No. 13,071, 7 Nat. Bankr. Reg. 97, 6 West. Jur. 451 [*affirmed* in 20 Wall. (U. S.) 31, 22 L. ed. 313]; *In re* Pratt, 1 Flipp. (U. S.) 353, 19 Fed. Cas. No. 11,370, 1 Centr. L. J. 290.

15. *In re* Schuller, 108 Fed. 591, 6 Am. Bankr. Rep. 278; *In re* Bolinger, 108 Fed. 374, 6 Am. Bankr. Rep. 171; *In re* Black, 104 Fed. 289, 4 Am. Bankr. Rep. 776.

A mortgagee of exempt property cannot assert it unless the exemption is waived in the mortgage. Edmondson *v.* Hyde, 2 Sawy. (U. S.) 205, 8 Fed. Cas. No. 4,285, 5 Am. L. T. Rep. U. S. Cts. 380, 7 Nat. Bankr. Reg. 1.

16. Bankr. Act (1898), § 7*a* (8).

An intentional failure to include such claim may be deemed a waiver. *In re* Munn, 2 Am. Bankr. Rep. 664, in which the referee refused to permit a bankrupt to amend his schedules by inserting therein a claim for exemptions, which it appeared he had omitted for the purpose of deceiving his creditors.

The right of a bankrupt to amend his schedules, where he shows an honest intention to claim the benefit of the homestead exemption for himself or his family, cannot be questioned. But there must be a real, a substantial, claim to property that can be set apart under the provisions of the homestead law, and which the bankrupt as a householder or head of a family is entitled to hold exempt from levy, seizure, or sale under any execution, order, or other process. *In re* Moran, 105 Fed. 901, 5 Am. Bankr. Rep. 472. See also *In re* Kean, 2 Hughes (U. S.) 322, 14 Fed. Cas. No. 7,630, 2 Am. L. Rec. 230, 8 Nat. Bankr. Reg. 367, 2 South. L. Rev. 725.

Pension money in the hands of the bankrupt at the time of filing his petition should be included in the schedules as money on hand, with a statement of the exemption. *In re* Bean, 100 Fed. 262, 4 Am. Bankr. Rep. 53.

17. *In re* Tobias, 103 Fed. 68, 4 Am. Bankr. Rep. 555.

The burden of showing that an article alleged to be exempt is within the provisions of the statute rests upon the bankrupt. Gay *v.* Southworth, 113 Mass. 333; *In re* Wilson, 108 Fed. 197, 6 Am. Bankr. Rep. 287; *In re* Turnbull, 106 Fed. 667, 5 Am. Bankr. Rep. 549.

18. *In re* Park, 102 Fed. 602, 4 Am. Bankr. Rep. 432; *In re* Rothschild, 6 Am. Bankr. Rep. 43. But see *In re* Waxelbaum, 101 Fed. 228, 4 Am. Bankr. Rep. 120, holding under a statute of Georgia that a bankrupt claiming exemptions must make a full and fair disclosure of all his property, and he forfeits his claim where he has been guilty of fraud in withholding assets.

19. *In re* Beauchamp, 101 Fed. 106, 4 Am. Bankr. Rep. 151; *In re* Lentz, 97 Fed. 486; *In re* Hughes, 8 Biss. (U. S.) 107, 12 Fed. Cas. No. 6,842, 16 Nat. Bankr. Reg. 464; *In re* Handlin, 3 Dill. (U. S.) 290, 11 Fed. Cas. No. 6,018, 2 Centr. L. J. 264, 12 Nat. Bankr. Reg. 49; *In re* Tonne, 24 Fed. Cas. No. 14,095, 13 Nat. Bankr. Reg. 170, 1 N. Y.

the exemption rights of the individual members are superior to the rights of general creditors of the partnership and should be recognized before the payment of partnership debts.[20]

B. Jurisdiction to Determine. Bankruptcy courts may determine the rights of the bankrupt to the exemptions claimed, the kinds of property and the value and amount to be exempted, and whether the trustee properly set apart such exemption.[21] They cannot direct a sale of the exempted property or enforce a mortgage or other lien against it.[22]

C. Duty of Trustee to Set Apart. It is the duty of the trustee[23] to set

Wkly. Dig. 437; *In re* Stewart, 23 Fed. Cas. No. 13,420, 13 Nat. Bankr. Reg. 295, 2 N. Y. Wkly. Dig. 3; *In re* Hafer, 11 Fed. Cas. No. 5,896, 25 Leg. Int. (Pa.) 148, 1 Nat. Bankr. Reg. 547, 15 Pittsb. Leg. J. (Pa.) 389; *In re* Boothroyd, 3 Fed. Cas. No. 1,652, 14 Nat. Bankr. Reg. 223. But a bankrupt is entitled to exemptions out of merchandise in a store conducted in the name of a partnership, but which is shown to have been in fact owned by him exclusively for some years prior to his bankruptcy. *In re* Meriwether, 107 Fed. 102, 5 Am. Bankr. Rep. 434.

Partnership assets are a trust fund for the payment of the creditors of the firm, and an exemption cannot be set apart from them to the individual partners until the partnership debts are paid. *In re* Demarest, 110 Fed. 638, 6 Am. Bankr. Rep. 232; *In re* Croft, 8 Biss. (U. S.) 188, 6 Fed. Cas. No. 3,404, 6 Am. L. Rec. 597, 10 Chic. Leg. N. 204, 17 Nat. Bankr. Reg. 324, 6 N. Y. Wkly. Dig. 218; *In re* Price, 19 Fed. Cas. No. 11,410, 1 Md. L. Rec. 236, 6 Nat. Bankr. Reg. 400.

20. *In re* Camp, 91 Fed. 745, 1 Am. Bankr. Rep. 165 [*citing* Hahn *v.* Allen, 93 Ga. 612, 20 S. E. 74; Blanchard *v.* Paschal, 68 Ga. 32, 45 Am. Rep. 474; Harris *v.* Visscher, 57 Ga. 229]; *In re* Young, 30 Fed. Cas. No. 18,148, 3 Nat. Bankr. Reg. 440; *In re* Richardson, 20 Fed. Cas. No. 11,776, 7 Chic. Leg. N. 62, 11 Nat. Bankr. Reg. 114.

The North Carolina rule is in favor of permitting exemptions from partnership assets. *In re* Wilson, 101 Fed. 571, 4 Am. Bankr. Rep. 260; *In re* Duguid, 100 Fed. 274, 3 Am. Bankr. Rep. 794; *In re* Grimes, 94 Fed. 800, 2 Am. Bankr. Rep. 160; *In re* Stevenson, 93 Fed. 789, 2 Am. Bankr. Rep. 230. It must appear, however, that the members of the firm have no individual personal property exemption exclusive of firm assets; if they have such exemption it cannot be allowed from the firm assets. *In re* Steed, 107 Fed. 682, 6 Am. Bankr. Rep. 73.

The Wisconsin rule is to permit individual members of a partnership, with the consent of each other, to claim and receive from the partnership property the exemptions allowed them by law if they have no individual property from which the exemptions may be secured. *In re* Nelson, 98 Fed. 76, 2 Am. Bankr. Rep. 556 [*citing* O'Gorman *v.* Fink, 57 Wis. 649, 15 N. W. 771, 46 Am. Rep. 58]. Copartners in trade may sever their joint interest in the partnership property by common consent so as to permit each of them to claim therefrom the amount allowed by law as an exemption to a trader. *In re* Friedrich, 100 Fed. 284, 40 C. C. A. 378, 3 Am. Bankr. Rep. 801.

21. *In re* Black, 104 Fed. 289, 4 Am. Bankr. Rep. 776; *In re* White, 103 Fed. 774, 4 Am. Bankr. Rep. 613; *In re* Ogilvie, 5 Am. Bankr. Rep. 374. See also *In re* Mayer, 108 Fed. 599, 47 C. C. A. 512, 6 Am. Bankr. Rep. 117. See also *supra*, II, B, 9.

Review of determination as to exemptions. — Upon the question of whether or not a certain chattel is exempt property, before the court can review a determination on the question it is necessary that a trustee be appointed and that he set aside the bankrupt's exemptions. Then if creditors except to the determination the referee must certify the controversy to the judge for determination upon a hearing before him upon the exceptions to the trustee's action. The court will not review a finding or order of the referee that property is not exempt unless a trustee has been appointed and has set apart the bankrupt's exemptions. *In re* Smith, 93 Fed. 791, 2 Am. Bankr. Rep. 190.

22. *In re* Hatch, 102 Fed. 280, 4 Am. Bankr. Rep. 349.

Enforcement of vendor's lien. — Prior to bankruptcy creditors sold to the bankrupt goods which at the time of bankruptcy were not paid for and which, still in unbroken packages, were set aside by the trustee at the request of the bankrupt as exempt. It was held upon exception by vendors that the title to such property had vested in the bankrupt; that the trustee had no discretion save to set aside such goods as exempt; and that the vendor's lien, if it existed, must be asserted in the state court. *In re* Wells, 105 Fed. 762, 5 Am. Bankr. Rep. 308.

Waiver of exemptions. — A court of bankruptcy has no jurisdiction to determine the rights of creditors in whose favor a waiver of the right of exemption has been made by the bankrupt. Woodruff *v.* Cheeves, 105 Fed. 601, 44 C. C. A. 631, 5 Am. Bankr. Rep. 296 [*reversing* 96 Fed. 317, 2 Am. Bankr. Rep. 678]; *In re* Black, 104 Fed. 289, 4 Am. Bankr. Rep. 776; *In re* Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730; *In re* Hill, 96 Fed. 185, 2 Am. Bankr. Rep. 798; *In re* Camp, 91 Fed. 745, 1 Am. Bankr. Rep. 165; *In re* Ogilvie, 5 Am. Bankr. Rep. 374. *Contra*, *In re* Sisler, 96 Fed. 402, 2 Am. Bankr. Rep. 760. *Compare In re* Garden, 93 Fed. 423, 1 Am. Bankr. Rep. 582.

23. The duty cannot be performed by any other person. — It is wholly and entirely the

apart the bankrupt's exemptions and report the items and estimated value[24] thereof to the court as soon as practicable[25] after his appointment.[26]

D. Waiver — 1. In General. It is a generally recognized doctrine that an exemption may be waived by the debtor, by contract,[27] surrender, or neglect to claim it.[28] A debtor may also waive his exemption in favor of one creditor and insist upon it as against another.[29]

2. Effect of Waiver. If there be a waiver the property which might have been covered by the exemption becomes a part of the bankrupt estate.[30]

duty of the trustee. Any agreement on the part of the bankrupt or his creditors that the exemptions shall be allotted in any other manner than that prescribed by the bankruptcy law, or through any other channel than as prescribed by the Act, is a nullity. *In re* Friedrich, 100 Fed. 284, 40 C. C. A. 378, 3 Am. Bankr. Rep. 801; *In re* Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730.

24. **The trustee is required upon entering upon his duties** to prepare a complete inventory of all the property of the bankrupt that comes into his possession. He must make report to the court within twenty days after receiving notice of his appointment of the articles set off to the bankrupt by him, with the estimated value of each article, and any creditor may take exceptions to the determinations of the trustee within twenty days after the filing of the report. U. S. Supreme Ct. Bankr. G. O. No. 17. The trustee's action in setting apart exemptions is not final, and the twenty days allowed for exceptions to such action applies to creditors and not to the bankrupt. *In re* White, 103 Fed. 774, 4 Am. Bankr. Rep. 613. See also *supra*, XII, D, 10.

Appraisers need not be appointed to value exemptions to be set apart to the bankrupt, where the exemptions exceed the amount of assets; but where the assets are in excess of exemptions all the property of the bankrupt should be appraised. *In re* Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730. See also *supra*, XIII.

In valuing and setting apart a homestead exemption a trustee in bankruptcy should conform as nearly as may be to the method provided by the state law for that purpose. *In re* McCutchen, 100 Fed. 779, 4 Am. Bankr. Rep. 81.

25. **Exemptions must be set aside by the trustee as soon as possible after his appointment,** without awaiting a determination by the state courts as to such exemptions. *In re* Camp, 91 Fed. 745, 1 Am. Bankr. Rep. 165.

26. Bankr. Act (1898), § 47*a* (11); *In re* Hopkins, 103 Fed. 781, 4 Am. Bankr. Rep. 619.

The trustee has no title to exempt property.— The title remains in the bankrupt, and the trustee can exercise no right and owes no duty concerning exempt property other than to set it apart to the bankrupt. *In re* Black, 104 Fed. 289, 4 Am. Bankr. Rep. 776; *In re* Hatch, 102 Fed. 280, 4 Am. Bankr. Rep. 349; *In re* Hill, 96 Fed. 185, 2 Am. Bankr. Rep. 798; *In re* Camp, 91 Fed. 745, 1 Am. Bankr. Rep. 165; *In re* Bass, 3 Woods (U. S.) 382, 2 Fed. Cas. No. 1,091, 9 Chic. Leg. N. 303, 15 Nat. Bankr. Reg. 453; *In re* Hester, 12 Fed. Cas. No. 6,437, 5 Nat. Bankr. Reg. 285. But as to property which might be exempt but of which the exemption has been waived the trustee has a modified title as great as that of creditors in favor of whom the exemptions have been waived. *In re* Sisler, 96 Fed. 402, 2 Am. Bankr. Rep. 760. But see Woodruff *v.* Cheeves, 105 Fed. 601, 44 C. C. A. 631, 5 Am. Bankr. Rep. 296.

27. **The statutes of some states** provide for the waiver of exemptions by bonds, notes, or other instruments. Ala. Code (1896), § 2104; Va. Code (1887), § 3647; *In re* Sisler, 96 Fed. 402, 2 Am. Bankr. Rep. 760; *In re* Garden, 93 Fed. 423, 1 Am. Bankr. Rep. 582. A mere waiver does not in itself create any lien on the exempt property. *In re* Hopkins, 1 Am. Bankr. Rep. 209. It does not constitute a waiver of the right to have the exempted property set apart in bankruptcy proceedings. *In re* Hill, 96 Fed. 185, 2 Am. Bankr. Rep. 798. And a waiver contained in a note is ineffectual unless reduced to judgment. *In re* Brown, 1 Am. Bankr. Rep. 256.

If the contract right of exemption waiver has never been enforced the bankrupt's right to the statutory exemption is not affected. *In re* Black, 104 Fed. 289, 4 Am. Bankr. Rep. 776.

28. *In re* Black, 104 Fed. 289, 4 Am. Bankr. Rep. 776; *In re* Solomon, 2 Hughes (U. S.) 164, 22 Fed. Cas. No. 13,166, 3 Am. L. Rec. 226, 1 Am. L. T. Rep. N. S. 351, 10 Nat. Bankr. Reg. 9. See also Exemptions.

Agreement for sale by trustee.—The bankrupt does not surrender his right to an exemption by agreeing to a sale of the exempt property by the trustee. *In re* Browne, 104 Fed. 762, 4 Am. Bankr. Rep. 46; *In re* Park, 102 Fed. 602, 4 Am. Bankr. Rep. 432; *In re* Lynch, 101 Fed. 579, 4 Am. Bankr. Rep. 262; *In re* Richard, 94 Fed. 633, 2 Am. Bankr. Rep. 506. And the fact that the bankrupt prior to bankruptcy made no protest or claim of exemption against the sale on execution of exempt property does not prevent him, when the judgment, sale, and execution are set aside and the property surrendered to the trustee, from claiming such exemption. *In re* Osborn, 104 Fed. 780, 5 Am. Bankr. Rep. 111.

29. *In re* Osborn, 104 Fed. 780, 5 Am. Bankr. Rep. 111; *In re* Camp, 91 Fed. 745, 1 Am. Bankr. Rep. 165.

30. *In re* Bolinger, 108 Fed. 374, 6 Am. Bankr. Rep. 171.

E. Liability of Exempt Property For Fees. Money in the hands of the bankrupt which is exempt may be subjected to an order for the payment of the statutory fees which are primarily for services for the benefit of the bankrupt, and do not depend upon property not exempt, but upon absolute inability.[31]

F. Sale of Exempt Property. The bankrupt may consent to the sale of exempt property, in which case the proceeds thereof shall be paid to him.[32]

XVI. FRAUDULENT TRANSFERS, LIENS, AND PREFERENCES.

A. Fraudulent Transfers. All conveyances, transfers, assignments, or encumbrances of the property of a bankrupt, or any part thereof, made or given by such person adjudged a bankrupt under the provisions of the Act subsequent to the passage thereof and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, are null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile are, and must remain, a part of the assets of the bankrupt estate, and pass to his trustee, whose duty it is to recover and reclaim the same by legal proceedings or otherwise for the benefit of creditors. And all conveyances, transfers, or encumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate, are to be deemed null and void against such creditors of the debtor if he be adjudged a bankrupt, and such property will pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.[33]

31. *In re* Bean, 100 Fed. 262, 4 Am. Bankr. Rep. 53. See also *In re* Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730, holding that if the trustee has no cash in hand with which to pay storage charges to a landlord whose property he has occupied for the storage of the bankrupt's goods, he may be ordered to sell sufficient personal property for that purpose; and this will take precedence of the bankrupt's claim to have his exemptions set apart out of such personalty.

A claim for unpaid taxes is a debt which is to be paid in full out of the assets of the bankrupt estate, and although such taxes are upon exempt property they may be paid out of the proceeds of other property in the hands of the trustee. *In re* Tilden, 91 Fed. 500, 1 Am. Bankr. Rep. 300; *In re* Baker, 1 Am. Bankr. Rep. 526.

32. *In re* Richard, 94 Fed. 633, 2 Am. Bankr. Rep. 506.

Sale of homestead.— Where there is a dispute between the trustee and the bankrupt as to the value of the property claimed by the bankrupt as a homestead exemption, the practical method for the determination of the dispute is to order the property sold and the trustee to set apart to the bankrupt the amount of the statutory exemption. *In re* Lynch, 101 Fed. 579, 4 Am. Bankr. Rep. 262. See also *In re* Hopkins, 103 Fed. 781, 4 Am. Bankr. Rep. 619; *In re* Oderkirk, 103 Fed. 779, 4 Am. Bankr. Rep. 617.

Where exempt property is sold by the bankrupt between the time of filing his petition in bankruptcy and the appointment of the trustee the bankrupt is entitled to his exemption in the proceeds of the sale. *In re* Wilson, 108 Fed. 197, 6 Am. Bankr. Rep. 287.

When property is incapable of division without injury, and it appears that all parties, including the bankrupt, would be benefited by a sale of the property as a whole, the referee may direct the trustee to sell the whole property and pay to the bankrupt the cash value of his exemption. *In re* Woodard, 95 Fed. 955, 2 Am. Bankr. Rep. 692. But see *In re* Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730.

33. Bankr. Act (1898), § 67*e*.

As to fraudulent transfer as act of bankruptcy see *supra*, V, B, 3.

History of provision.— "Neither the Torrey Bill nor the Henderson Bill, commonly known as the House Bill in the Fifty-fifth Congress, contained any clause like section 67*e* of the present act. Each of these bills, however, contained a clause which is now found in section 70*e* of the law. It seems, therefore, to have been the opinion of the framers of those bills that the latter clause was sufficient, especially as in every state in the Union there is a statute making transfers and conveyances which are made in fraud of creditors absolutely void. The Senate Bill, commonly known as the Nelson Bill, in the Fifty-fifth Congress, section 7, contains a clause which is similar to the present section 67*e*. It is well known that the two bills were fused in

B. Liens — 1. Liens Enforceable — a. In General. Liens given or accepted in good faith — and not in contemplation of or in fraud upon the Bankruptcy Act and for a present consideration — which have been recorded according to law, if record thereof was necessary in order to impart notice, are not affected by the Act.[34] Claims which, for want of record or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt, are not liens against his estate.[35]

the Conference Committee, and it would seem, from an examination of section 7, *supra*, and section 67*e* of the present law, that, in the fusing process, the former was inserted as a harmless addition. It probably gives no rights not already given by State statutes." Per Hotchkiss, Referee, in *In re* Phelps, 3 Am. Bankr. Rep. 396, 401.

The provision refers to fraudulent transfers made with the intent on the part of the bankrupt to hinder, delay, or defraud his creditors. Under it the trustee can only set aside such fraudulent transfers as were made within the four months' period. *In re* Gray, 47 N. Y. App. Div. 554, 62 N. Y. Suppl. 618, 3 Am. Bankr. Rep. 647; *In re* Steininger Mercantile Co., 107 Fed. 669, 46 C. C. A. 548, 6 Am. Bankr. Rep. 68; *In re* Teague, 2 Am. Bankr. Rep. 168; *In re* Adams, 1 Am. Bankr. Rep. 94. The facts and circumstances must be such as to show an intent on the part of the insolvent debtor to hinder or defraud his creditors. *In re* McLam, 97 Fed. 922, 3 Am. Bankr. Rep. 245; *In re* Jacobs, 1 Am. Bankr. Rep. 518. If such intent does not exist the transfer is valid. It is not intended by the Act to prevent legitimate sales and transfers of property. Tiffany *v.* Lucas, 15 Wall. (U. S.) 410, 21 L. ed. 198. For analogous decisions under former acts see 6 Cent. Dig. tit. "Bankruptcy," § 247.

A voluntary assignment, though untainted with any fraudulent purpose, is nevertheless, when made within four months of the filing of the petition in bankruptcy, as a matter of law a constructive fraud upon the Act and is voidable by the trustee. Matter of Gray, 47 N. Y. App. Div. 554, 62 N. Y. Suppl. 618, 3 Am. Bankr. Rep. 647. See also George M. West Co. *v.* Lea, 174 U. S. 590, 19 S. Ct. 836, 43 L. ed. 1098, 2 Am. Bankr. Rep. 463; *In re* Romanow, 92 Fed. 510, 1 Am. Bankr. Rep. 461; Davis *v.* Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; *In re* Curtis, 91 Fed. 737, 1 Am. Bankr. Rep. 440; *In re* Gutwillig, 90 Fed. 475, 1 Am. Bankr. Rep. 78 [*affirmed* in 92 Fed. 337, 63 U. S. App. 191, 34 C. C. A. 377, 1 Am. Bankr. Rep. 388]. For analogous decisions under former acts see 6 Cent. Dig. tit. "Bankruptcy," § 283.

As to voluntary assignment as act of bankruptcy see *supra*, V, B, 4.

The words "conveyance, transfer, assignment or encumbrance" apply to a transfer of property real or personal rather than to a payment of money upon a preëxisting debt. Blakey *v.* Boonville Nat. Bank, 95 Fed. 267, 2 Am. Bankr. Rep. 459.

34. Bankr. Act (1898), § 67*d*; *In re* Georgia Handle Co., 109 Fed. 632, 48 C. C. A. 571, 6 Am. Bankr. Rep. 472; *In re* Gormully, etc., Co., 102 Fed. 1002, 43 C. C. A. 89.

As to liens dissolved or annulled by adjudication see *infra*, XVI, B, 2.

As to effect on lien of discharge see *infra*, XIX, E, 8.

The trustee takes title to the property of the bankrupt subject to all subsisting and valid liens, encumbrances, or equities, whether created by operation of law or by the act of the bankrupt. Yeatman *v.* New Orleans Sav. Inst., 95 U. S. 764, 24 L. ed. 589; Jerome *v.* McCarter, 94 U. S. 734, 24 L. ed. 136; Donaldson *v.* Farwell, 93 U. S. 631, 23 L. ed. 993; Cook *v.* Tullis, 18 Wall. (U. S.) 332, 21 L. ed. 933; Gibson *v.* Warder, 14 Wall. (U. S.) 244, 20 L. ed. 797; Chattanooga Nat. Bank *v.* Rome Iron Co., 102 Fed. 755, 4 Am. Bankr. Rep. 441; Courier-Journal Job-Printing Co. *v.* Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614, 4 Am. Bankr. Rep. 183; *In re* Dunavant, 96 Fed. 542, 3 Am. Bankr. Rep. 41; *In re* Kerby-Dennis Co., 95 Fed. 116, 36 C. C. A. 677, 2 Am. Bankr. Rep. 402; *In re* Blumberg, 94 Fed. 476, 1 Am. Bankr. Rep. 627; *Ex p.* Dalby, 1 Lowell (U. S.) 431, 6 Fed. Cas. No. 3,540, 3 Nat. Bankr. Reg. 731; *In re* Rockford, etc., R. Co., 1 Lowell (U. S.) 345, 20 Fed. Cas. No. 11,978, 2 Am. L. T. 105, 1 Am. L. T. Bankr. Rep. 133, 1 Chic. Leg. N. 337, 3 Nat. Bankr. Reg. 50; Mitchell *v.* Winslow, 2 Story (U. S.) 630, 17 Fed. Cas. No. 9,673, 6 Law Rep. 347; Winsor *v.* McLellan, 2 Story (U. S.) 492, 30 Fed. Cas. No. 17,887, 6 Law Rep. 440; Goddard *v.* Weaver, 1 Woods (U. S.) 257, 10 Fed. Cas. No. 5,495, 6 Nat. Bankr. Reg. 440; Potter *v.* Coggeshall, 19 Fed. Cas. No. 11,322, 4 Nat. Bankr. Reg. 73. See also *supra*, XII, F.

35. Bankr. Act (1898), § 67*a*.

In determining the validity of unrecorded liens it is necessary to consult the statutes of the state wherein the lien was created. See *In re* Tatem, 110 Fed. 519, 6 Am. Bankr. Rep. 426; *In re* Wright, 96 Fed. 187, 2 Am. Bankr. Rep. 364.

If under the laws of a state an unrecorded chattel mortgage is enforceable against the general creditors of the mortgagor it will be recognized and enforced as a valid lien in a court of bankruptcy. *In re* Schmitt, 109 Fed. 267, 6 Am. Bankr. Rep. 150. See also *In re* Wright, 96 Fed. 187, 2 Am. Bankr. Rep. 364; *In re* Bozeman, 2 Am. Bankr. Rep. 809; *In re* Ohio Co-Operative Shear Co., 2 Am. Bankr. Rep. 775; *In re* McKay, 1 Am. Bankr. Rep. 292. *Compare In re* Booth, 98 Fed. 975, 3 Am. Bankr. Rep. 574; *In re* Yukon Woolen Co., 2 Am. Bankr. Rep. 805.

b. Attachments. Under the statutes of some states the lien of an attachment is only provisional, and will not avail the attaching creditor unless a judgment is finally obtained.[36] It has accordingly been held that where judgment is recovered within four months prior to the bankruptcy the conditional or provisional lien created by the attachment is destroyed.[37]

c. Equitable Liens. An equitable lien will be recognized and preserved in bankruptcy unless there is some prohibition in the state laws which renders it invalid.[38]

d. Judgments and Executions. Liens obtained by judgment or execution prior to four months before filing a petition in bankruptcy by or against the judgment debtor are valid and in full force.[39] It is only when such liens are

36. An attachment of property upon mesne process is a specific charge upon the property for the security of the debt sued for, and the property is set apart and placed in the custody of the court for that purpose, subject only to the condition that the attaching creditor shall obtain judgment in the suit and take out execution and levy upon the property within a limited time. See ATTACHMENT, XII, A [4 Cyc. 622].

37. *In re* Beaver Coal Co., 110 Fed. 630, 6 Am. Bankr. Rep. 404; *In re* Johnson, 108 Fed. 373, 6 Am. Bankr. Rep. 202; *In re* Lesser, 108 Fed. 201, 5 Am. Bankr. Rep. 326. But see *contra*, *In re* Blair, 108 Fed. 529, 6 Am. Bankr. Rep. 206. See also Stickney, etc., Coal Co. *v.* Goodwin, 95 Me. 246, 49 Atl. 1039.

As to attachments dissolved or annulled by adjudication see *infra*, XVI, B, 2.

Under the Act of 1867 an attachment levy was not displaced by proceedings in bankruptcy, unless such proceedings were commenced within four months after the levy of the attachment.

Alabama.— Crowe *v.* Reid, 57 Ala. 281; May *v.* Courtnay, 47 Ala. 185.

California.— Howe *v.* Union Ins. Co., 42 Cal. 528.

Connecticut.— Daggett *v.* Cook, 37 Conn. 341.

Florida.— Carr *v.* Thomas, 18 Fla. 736.

Georgia.— Louden *v.* King, 50 Ga. 302; Randell *v.* McLain, 40 Ga. 162.

Kansas.— Gillett *v.* McCarthy, 23 Kan. 668.

Kentucky.— Columbia Bank *v.* Overstreet, 10 Bush (Ky.) 148.

Maine.— Bowman *v.* Harding, 56 Me. 559.

Maryland.— Lewis *v.* Higgins, 52 Md. 614.

Massachusetts.— Blaine *v.* Gilbert, 124 Mass. 215.

Nebraska.— Tootle *v.* Sheldon, 10 Nebr. 44, 4 N. W. 358.

Nevada.— Barker *v.* McLeod, 14 Nev. 148.

New Hampshire.— Taylor *v.* Whitefield Lumber Co., 58 N. H. 369.

New York.— Miller *v.* Bowles, 58 N. Y. 253.

Tennessee.— Epperson *v.* Robertson, 91 Tenn. 407, 19 S. W. 230.

West Virginia.— Weisenfeld *v.* Mispelhorn, 5 W. Va. 46.

United States.— Doe *v.* Childress, 21 Wall. (U. S.) 642, 22 L. ed. 549; Hatfield *v.* Moller, 4 Fed. 717; *In re* Peck, 9 Ben. (U. S.) 169, 19 Fed. Cas. No. 10,886, 16 Nat. Bankr Reg. 43; *In re* Housberger, 2 Ben. (U. S.) 504, 12 Fed. Cas. No. 6,734, 2 Nat. Bankr. Reg. 92; Bracken *v.* Johnston, 4 Dill. (U. S.) 518, 3 Fed. Cas. No. 1,761, 5 Am. L. Rec. 461, 11 Am. L. Rev. 609, 3 Am. L. T. Rep. N. S. 537, 4 Centr. L. J. 9, 1 Cinc. L. Bul. 358, 3 Month. Jur. 629, 15 Nat. Bankr. Reg. 106, 3 N. Y. Wkly. Dig. 573; McCord *v.* McNeil, 4 Dill. (U. S.) 173, 15 Fed. Cas. No. 8,714, 17 Am. L. Reg. N. S. 52; Robinson *v.* Tuttle, 2 Hask. (U. S.) 76, 20 Fed. Cas. No. 11,968; *In re* Davis, 1 Hask. (U. S.) 232, 7 Fed. Cas. No. 3,616; Zeiber *v.* Hill, 1 Sawy. (U. S.) 268, 30 Fed. Cas. No. 18,206, 8 Nat. Bankr. Reg. 239.

See 6 Cent. Dig. tit. "Bankruptcy," § 297.

38. Fletcher *v.* Morey, 2 Story (U. S.) 555, 9 Fed. Cas. No. 4,864; Parker *v.* Muggridge, 2 Story (U. S.) 334, 18 Fed. Cas. No. 10,743, 5 Law Rep. 351.

An equitable lien is acquired upon the assets of the judgment debtor by the filing of a creditors' bill in a state court. Where such a bill is filed more than four months prior to the bankruptcy of the debtor the trustee takes the property subject to the lien, and the proceedings of the state court are not abated. Taylor *v.* Taylor, 59 N. J. Eq. 86, 45 Atl. 440, 4 Am. Bankr. Rep. 211. See also Doyle *v.* Heath, 22 R. I. 213, 47 Atl. 213, 4 Am. Bankr. Rep. 705; Miller *v.* Sherry, 2 Wall. (U. S.) 237, 17 L. ed. 827.

39. Clark *v.* Iselin, 21 Wall. (U. S.) 360, 22 L. ed. 568; Wilson *v.* St. Paul City Bank, 17 Wall. (U. S.) 473, 21 L. ed. 723; Marshall *v.* Knox, 16 Wall. (U. S.) 551, 21 L. ed. 481; *In re* Dunavant, 96 Fed. 542, 3 Am. Bankr. Rep. 41. See also Doyle *v.* Hall, 86 Ill. App. 163; and 6 Cent. Dig. tit. "Bankruptcy," § 306.

As to effect of discharge on lien of judgment see *infra*, XIX, E, 7.

Where the judgment is not a lien by state laws it will not be treated as a lien by a court of bankruptcy. *In re* McIntosh, 16 Fed. Cas. No. 8,826, 2 Nat. Bankr. Reg. 506; *In re* Cozart, 6 Fed. Cas. No. 3,313, 3 Nat. Bankr. Reg. 508.

Actual levy is not necessary in order to create a lien, unless made so by the laws of the state. *In re* Smith, 2 Ben. (U. S.) 432, 22 Fed. Cas. No. 12,973, 1 Am. L. T. Bankr. Rep. 112, 1 Nat. Bankr. Reg. 599; *In re* Weeks, 2 Biss. (U. S.) 259, 29 Fed. Cas. No. 17,350, 14 Nat. Bankr. Reg. 364.

procured within such period of four months that they are void and may be dissolved.[40]

e. Mechanics' Liens. If mechanics' liens are valid under the state laws creating them and are perfected at the time of the filing of the petition in bankruptcy they are to be recognized as valid and binding in a court of bankruptcy.[41]

f. Mortgages. Mortgages which are valid under the laws of the state wherein they are created and are not within the prohibitions and limitations of the Bankruptcy Act are valid and must be recognized in a court of bankruptcy.[42] It is only the mortgage executed within four months prior to the bankruptcy to secure an antecedent debt, with intent to prefer,[43] or such a mortgage executed with intent to hinder, delay, or defraud creditors, which can be affected by the bankruptcy of the mortgagor.[44]

2. Liens Dissolved or Annulled by Adjudication. One section of the Act pro-

40. See *infra*, XVI, B, 2.

Levy of execution within four months.— Filing a petition in bankruptcy does not affect the lien of an execution issued and levied within the four months but founded on a judgment recovered two years before. *In re* Easley, 93 Fed. 419, 1 Am. Bankr. Rep. 715.

41. *In re* Laird, 109 Fed. 550, 48 C. C. A. 538, 6 Am. Bankr. Rep. 1; *In re* Lowensohn, 100 Fed. 776, 4 Am. Bankr. Rep. 79; *In re* Kerby-Dennis Co., 95 Fed. 116, 36 C. C. A. 677, 2 Am. Bankr. Rep. 402; *In re* Dey, 3 Ben. (U. S.) 450, 7 Fed. Cas. No. 3,870, 3 Nat. Bankr. Reg. 305; *In re* Brunquest, 7 Biss. (U. S.) 208, 4 Fed. Cas. No. 2,055, 14 Nat. Bankr. Reg. 529; *In re* Cook, 3 Biss. (U. S.) 122, 6 Fed. Cas. No. 3,150, 4 Chic. Leg. N. 1, 20 Pittsb. Leg. J. (Pa.) 32; *In re* Coulter, 2 Sawy. (U. S.) 42, 6 Fed. Cas. No. 3,276, 4 Am. L. T. 131, 1 Am. L. T. Bankr. Rep. 257, 3 Chic. Leg. N. 377, 5 Nat. Bankr. Reg. 64. See 6 Cent. Dig. tit. "Bankruptcy," § 294; and, generally, Mechanics' Liens.

A mechanic's lien is not a lien obtained through legal proceedings against an insolvent debtor, nor is it an encumbrance created by the act of the debtor. Such a lien is created by statute, or by the act of the lienor in filing the statutory notice. *In re* Emslie, 102 Fed. 291, 42 C. C. A. 350, 4 Am. Bankr. Rep. 126 [*reversing* 3 Am. Bankr. Rep. 282].

42. *In re* Dunavant, 96 Fed. 542, 3 Am. Bankr. Rep. 41; *In re* Wright, 96 Fed. 187, 2 Am. Bankr. Rep. 364; *In re* Buntrock Clothing Co., 92 Fed. 886, 1 Am. Bankr. Rep. 454.

A mortgage made in good faith to secure future advances is valid to the extent of the advances actually made. Marvin *v.* Chambers, 12 Blatchf. (U. S.) 495, 16 Fed. Cas. No. 9,179, 13 Nat. Bankr. Reg. 77, 1 N. Y. Wkly. Dig. 365; *Ex p.* Ames, 1 Lowell (U. S.) 561, 1 Fed. Cas. No. 323, 7 Nat. Bankr. Rep. 230; *In re* York, 30 Fed. Cas. No. 18,138, 3 Nat. Bankr. Reg. 661; and 6 Cent. Dig. tit. "Bankruptcy," § 27.

A mortgage of personal property to be subsequently acquired is valid and enforceable against a trustee in bankruptcy if it is free from fraud and otherwise valid. Barnard *v.* Norwich, etc., R. Co., 4 Cliff. (U. S.) 351, 2 Fed. Cas. No. 1,007, 3 Centr. L. J. 608, 14 Nat. Bankr. Reg. 469; Mitchell *v.* Winslow, 2 Story (U. S.) 630, 17 Fed. Cas. No. 9,673, 6 Law Rep. 347. Such a mortgage constitutes an equitable lien which attaches as soon as the mortgagor acquires title to the property which is the subject of the mortgage. Mitchell *v.* Winslow, 2 Story (U. S.) 630, 17 Fed. Cas. No. 9,673, 6 Law Rep. 347; Brett *v.* Carter, 2 Lowell (U. S.) 458, 4 Fed. Cas. No. 1,844, 13 Alb. L. J. 361, 10 Am. L. Rev. 600, 3 Centr. L. J. 286, 22 Int. Rev. Rec. 152, 14 Nat. Bankr. Reg. 301, 2 N. Y. Wkly. Dig. 331.

Mortgages to secure loans given at the time they are executed are valid. Tiffany *v.* Boatman's Sav. Inst., 18 Wall. (U. S.) 375, 21 L. ed. 868; *In re* Davidson, 109 Fed. 882, 5 Am. Bankr. Rep. 528; Greenville City Nat. Bank *v.* Bruce, 109 Fed. 69, 48 C. C. A. 236, 6 Am. Bankr. Rep. 311; *In re* Wolf, 98 Fed. 84, 3 Am. Bankr. Rep. 555; *In re* Cobb, 96 Fed. 821, 3 Am. Bankr. Rep. 129; *In re* Little River Lumber Co., 92 Fed. 585, 1 Am. Bankr. Rep. 483; *In re* Woodward, 2 Am. Bankr. Rep. 233.

43. Bankr. Act (1898), § 60*b*.

Mortgage filled in after execution.— A mortgage which is executed in blank, and in which subsequently the blanks are filled in, does not take effect until the latter date, and if such date falls within the four months prior to the bankruptcy the mortgage is invalid. *In re* Barrett, 6 Am. Bankr. Rep. 48.

44. Bankr. Act (1898), § 67*e*.

Usurious mortgages.— Where an insolvent debtor, within four months prior to the filing of a petition in bankruptcy, makes a transfer of mortgaged property for the purpose of hindering and delaying creditors, and upon an action brought by the trustee of the bankrupt to set such transfer aside as fraudulent and void the grantee conveys the property to the trustee, the trustee stands in the same relation to the mortgage as the bankrupt, and may in bankruptcy proceedings attack it for usury, regardless of the fact that after the mortgagor's adjudication as a bankrupt the assignee of the mortgage brought suit to foreclose it. *In re* Kellogg, 6 Am. Bankr. Rep. 389.

vides[45] that "A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved[46] by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted[47] while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of the Act;[48] or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened."[49] A subsequent section provides[50] that "All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void[51] in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or

45. Bankr. Act (1898), § 67*c*.

46. **The effect of dissolution by the adjudication** of bankruptcy is to destroy the lien of the judgment, but not the judgment itself. The judgment continues as conclusive upon all parties as to the validity of the creditor's claim, and the amount of the indebtedness. *In re* Beaver Coal Co., 110 Fed. 630, 6 Am. Bankr. Rep. 404; *In re* Lesser, 5 Am. Bankr. Rep. 320.

47. **A lien is permitted** by the bankrupt by not paying the debt upon which it is founded, or when, by failing to take other necessary action, he suffers the conditions to exist by virtue of which the lien is created. *In re* Arnold, 94 Fed. 1001, 2 Am. Bankr. Rep. 180. See also *In re* Burlington Malting Co., 109 Fed. 777, 6 Am. Bankr. Rep. 369; *In re* Nelson, 98 Fed. 76, 1 Am. Bankr. Rep. 63; *In re* Reichman, 91 Fed. 624, 1 Am. Bankr. Rep. 17; and *supra*, V, B, 5.

Knowledge of the lienor that at the time the lien was obtained the debtor was insolvent, or of the debtor's intent to permit a lien to be obtained, is not material. *In re* Burrus, 97 Fed. 926, 3 Am. Bankr. Rep. 296.

48. **Any act on the part of the lienor** or the debtor which will defeat an equitable and *pro rata* distribution of the debtor's property among the creditors will constitute such fraud as is contemplated by the Act. Collier Bankr. (3d ed.) 455.

The question as to whether there is fraud or not will be determined by the facts and circumstances existing in each case. Wager *v.* Hall, 16 Wall. (U. S.) 584, 21 L. ed. 504; Buchanan *v.* Smith, 16 Wall. (U. S.) 277, 21 L. ed. 280; Toof *v.* Martin, 13 Wall. (U. S.) 40, 20 L. ed. 481.

49. **The spirit of the Act** does not lead to the destruction of lawful liens, and its provisions should not be used to displace one lien by another, for the purpose of defeating the former without good cause, and where a trustee seeks to preserve a voidable attachment for the purpose of defeating a prior chattel mortgage the petition will be dismissed, and the liens left to stand upon their own merits. *In re* Moore, 111 Fed. 145, 6 Am. Bankr. Rep. 590.

50. Bankr. Act (1898), § 67*f*.

51. **The lien of the judgment is annulled** but the judgment is not avoided. Such a judgment when offered for proof can be attacked only on the grounds of fraud, collusion, or want of jurisdiction. *In re* Pease, 4 Am. Bankr. Rep. 547. See also Doyle *v.* Heath, 22 R. I. 213, 47 Atl. 213, 4 Am. Bankr. Rep. 705.

The provision is intended to apply only to such judgments as of themselves create liens. *In re* Kavanaugh, 99 Fed. 928, 3 Am. Bankr. Rep. 832. It does not apply to judgments obtained subsequent to an adjudication in bankruptcy. *In re* Engle, 105 Fed. 893, 5 Am. Bankr. Rep. 372 [*disapproving* St. Cyr *v.* Daignault, 103 Fed. 854, 4 Am. Bankr. Rep. 638]. See also Kinmouth *v.* Braeutigam, 65 N. J. L. 165, 46 Atl. 769, 4 Am. Bankr. Rep. 344.

Courts of bankruptcy have no jurisdiction to summarily annul the lien. An action must be brought therefor in a state court, unless the parties consent to such jurisdiction on the part of a court of bankruptcy or there is a diversity of citizenship. Bardes *v.* Hawarden Nat. Bank, 178 U. S. 524, 20 S. Ct. 1000, 44 L. ed. 1175, 4 Am. Bankr. Rep. 163.

other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry." [52] These sections are antagonistic and irreconcilable.[53] In conformity with the rule that where two provisions in the same statute are clearly repugnant it has been held that, where the liens are such as may be included within the terms of either, the latter will control.[54] In any event the insolvency of the

52. *In re* D. H. Dougherty Co., 109 Fed. 480, 6 Am. Bankr. Rep. 457; *In re* Kaupisch Creamery Co., 107 Fed. 93, 5 Am. Bankr. Rep. 790; *In re* Kemp, 101 Fed. 689, 4 Am. Bankr. Rep. 242; Bear *v.* Chase, 99 Fed. 920, 40 C. C. A. 182, 3 Am. Bankr. Rep. 746; *In re* Fellerath, 95 Fed. 121, 2 Am. Bankr. Rep. 40. See also Jones *v.* Stevens, 94 Me. 582, 48 Atl. 170; National Bank, etc., Co. *v.* Spencer, 53 N. Y. App. Div. 547, 65 N. Y. Suppl. 1001; Schmilovitz *v.* Bernstein, 22 R. I. 330, 47 Atl. 884, 5 Am. Bankr. Rep. 265; Kosches *v.* Libowitz, (Tex. Civ. App. 1900) 56 S. W. 613.

53. Inconsistency of sections.—The former section saves a lien obtained through legal proceedings begun within four months, unless it was obtained and permitted while the debtor was insolvent or the creditor had reasonable cause to believe such insolvency, or the lien was sought and permitted in fraud of the provisions of the Act. The question of the pecuniary condition of the debtor and knowledge upon the part of the creditor are influential in determining the validity of the lien so obtained. But the latter is broader in its scope and avoids all liens obtained through legal proceedings within the time stated against a person who is insolvent, within the meaning of the section, irrespective of knowledge on the part of the creditor of the fact of insolvency, and irrespective of the question whether the obtaining of the lien was in any way suffered and permitted by the debtor. It avoids all liens obtained through legal proceedings against a person who is insolvent within four months before the filing of the petition. *In re* Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145.

History.—"Two bills in bankruptcy were presented to congress; one to the senate and one to the house of representatives. They were broadly divergent in spirit. One was supposed to be largely in the interest of the creditor; the other largely in the interest of the debtor. Subdivision *c* of section 67 was contained in the house bill; subdivision *f* was contained in the senate bill. The two houses were at disagreement respecting these bills, and the matter was referred to a conference committee of the two houses near the end of the session, resulting in the incorporation into the house bill of subdivision *f* which was in the senate bill. Mr. Henderson, in presenting the conference report to the house, stated that subdivision *f* was incorporated into the bill to strengthen the bill. 31 Congressional Record, pt. 7, p. 6428, June 28, 1898. The confusion results from the omission of the conference committee to modify the language of subdivision *c*, or to strike it out altogether." Per Jenkins, J., in *In re* Richards, 96 Fed. 935, 939, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145.

54. *In re* Kemp, 101 Fed. 689, 4 Am. Bankr. Rep. 242; *In re* Rhoads, 98 Fed. 399, 3 Am. Bankr. Rep. 380; *In re* Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145.

Some courts have endeavored to distinguish by holding that the former section refers to voluntary cases and that the latter refers to involuntary cases alone. *In re* O'Connor, 95 Fed. 943; *In re* Easley, 93 Fed. 419, 1 Am. Bankr. Rep. 715; *In re* De Lue, 91 Fed. 510, 1 Am. Bankr. Rep. 387. The weight of authority, however, is against this contention. *In re* McCartney, 109 Fed. 621, 6 Am. Bankr. Rep. 367; *In re* Blair, 108 Fed. 529, 6 Am. Bankr. Rep. 206; *In re* Lesser, 100 Fed. 433, 3 Am. Bankr. Rep. 815; *In re* Dobson, 98 Fed. 86, 3 Am. Bankr. Rep. 420; *In re* Higgins, 97 Fed. 775, 3 Am. Bankr. Rep. 364; *In re* Vaughan, 97 Fed. 560, 3 Am. Bankr. Rep. 362; *In re* Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145; *In re* Fellerath, 95 Fed. 121, 2 Am. Bankr. Rep. 40; *In re* Brown, 91 Fed. 358, 1 Am. Bankr. Rep. 107; Peck Lumber Co. *v.* Mitchell, 1 Am. Bankr. Rep. 701; *In re* Friedman, 1 Am. Bankr. Rep. 510.

If the judgment was consummated within four months prior to the filing of the petition in bankruptcy it is annulled by the adjudication without regard to the circumstances or conditions under which it was obtained. *In re* Burrus, 97 Fed. 926, 3 Am. Bankr. Rep. 296; *In re* Higgins, 97 Fed. 775, 3 Am. Bankr. Rep. 364; *In re* Vaughan, 97 Fed. 560, 3 Am. Bankr. Rep. 362; *In re* Booth, 96 Fed. 943, 2 Am. Bankr. Rep. 770; *In re* Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145; *In re* Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re* Fellerath, 95 Fed. 121, 2 Am. Bankr. Rep. 40; *In re* Moyer, 93 Fed. 188, 1 Am. Bankr. Rep. 577; *In re* Reichman, 91 Fed. 624, 1 Am. Bankr. Rep. 17; *In re*

debtor is a material element in determining whether a lien created by legal proceedings is to be dissolved or annulled.[55]

3. SUBROGATION OF TRUSTEE TO RIGHTS OF CREDITORS. Whenever a creditor is prevented from enforcing his rights as against a lien created or attempted to be created by his debtor, who afterward becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.[56]

C. Preferences — 1. WHEN DEEMED TO HAVE BEEN GIVEN. A person shall be deemed to have given a preference if, being insolvent,[57] he has procured or suffered a judgment to be entered against himself in favor of any person, or made any transfer of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.[58] A preference is created regardless of the debtor's intent, or the time when the judgment was suffered or the transfer made, provided that at that time the debtor was insolvent.[59]

2. RECOVERY BY TRUSTEE. It is provided by the Bankruptcy Act of 1898 that if a bankrupt shall have given a preference within four months [60] before the filing

Huffman, 1 Am. Bankr. Rep. 587. But *compare In re* Nelson, 98 Fed. 76, 1 Am. Bankr. Rep. 63.

55. Simpson *v.* Van Etten, 108 Fed. 199, 6 Am. Bankr. Rep. 204; *In re* Friedman, 1 Am. Bankr. Rep. 510. See also Levor *v.* Seiter, 34 Misc. (N. Y.) 382, 69 N. Y. Suppl. 987, 5 Am. Bankr. Rep. 576; *In re* Alexander, 102 Fed. 464, 4 Am. Bankr. Rep. 376.

As to what constitutes "insolvency" see *supra*, I, A.

56. Bankr. Act (1898), § 67*b*. See also *In re* Howland, 109 Fed. 869, 6 Am. Bankr. Rep. 495; Bear *v.* Chase, 99 Fed. 920, 40 C. C. A. 182, 3 Am. Bankr. Rep. 746; *In re* Hammond, 98 Fed. 845, 3 Am. Bankr. Rep. 466.

57. As to when person is deemed insolvent see *supra*, I, A. For analogous decisions under former acts see 6 Cent. Dig. tit. "Bankruptcy," § 249.

58. Bankr. Act (1898), § 60*a*. See also Chicago Title, etc., Co. *v.* John A. Roebling's Sons Co., 107 Fed. 71, 5 Am. Bankr. Rep. 368; *In re* Grant, 106 Fed. 496, 5 Am. Bankr. Rep. 837; Shutts *v.* Aurora First Nat. Bank, 98 Fed. 705, 3 Am. Bankr. Rep. 492; *In re* Wolf, 98 Fed. 84, 3 Am. Bankr. Rep. 555; *In re* Lange, 97 Fed. 197, 3 Am. Bankr. Rep. 231; *In re* Cobb, 96 Fed. 821, 3 Am. Bankr. Rep. 129. For analogous decisions under former acts see 6 Cent. Dig. tit. "Bankruptcy," § 247.

As to giving preference as act of bankruptcy see *supra*, V, B, 5, 6.

As to permitting judgment to be entered as act of bankruptcy see *supra*, V, B, 5.

As to surrender of preference as condition to proving claim see *supra*, XI, B, 4, a.

Assignment of insurance policy while solvent.— Where the holder of a policy of fire insurance, while not insolvent within the meaning of the Bankruptcy Act, assigns such policy as collateral security for an antecedent debt, and thereafter and within four months preceding the filing of the petition in bankruptcy of the debtor he becomes insolvent by reason of the destruction of the insured property by fire, the assignment of the policy is not a preference within the meaning of the Bankruptcy Act. *In re* Wittenberg Veneer, etc., Co., 108 Fed. 593, 6 Am. Bankr. Rep. 271.

Collateral to renewal notes.— Where certain promissory notes made by a bankrupt had a contract of pledge indorsed thereon as collateral security for the payment thereof, and such notes were dated within four months prior to the petition in bankruptcy, it is a sufficient answer to a claim of an illegal preference that the notes were in renewal of notes made prior to the four months' period and renewed from time to time until the notes in question were given. Chattanooga Nat. Bank *v.* Rome Iron Co., 102 Fed. 755, 4 Am. Bankr. Rep. 441.

Return of goods sold.— Where goods were sold to the bankrupt and afterward, in view of his insolvency, the vendors induced him to return an unsold portion of such goods within four months prior to his bankruptcy, they releasing him from all claim for any balance due them, such an act constitutes a preference even though the amount received was less than that due. Silberstein *v.* Stahl, 32 Misc. (N. Y.) 353, 66 N. Y. Suppl. 646, 4 Am. Bankr. Rep. 626.

59. See cases cited note 63, p. 330.

To determine what constitutes a preference it is only necessary to ascertain the effect of permitting a judgment to be entered, or of making a transfer. If by such judgment or transfer one creditor has been enabled to obtain a greater percentage of his debt than other creditors of the same class a preference has been given. *In re* Kellar, 110 Fed. 348, 6 Am. Bankr. Rep. 621.

60. **The four months** within which a preferential transfer is voidable dates from the recording or registering of the transfer, when that is done, or if not, from the time the transferee takes notorious, exclusive, and continuing possession of the property. *In re*

of a petition, or after the filing of the petition and before the adjudication, and the person receiving it or to be benefited thereby, or his agent[61] acting therein, shall have reasonable cause to believe that it was intended thereby to give a preference,[62] it shall be voidable by the trustee, and he may recover[63] the property or its

Klingaman, 101 Fed. 691, 4 Am. Bankr. Rep. 254. See also *supra*, V, B, 5, 6.

In computing the time the date of the transfer should be excluded and the date of the filing of the petition should be included. Bankr. Act (1898), § 31*a*. The four months is to be determined by computing four calendar months from the date the petition in bankruptcy is filed, and not by computing the time by days. Kelly *v.* Skaggs, 90 Ill. App. 543.

Agreements to pledge.— Where an agreement to pledge was made more than four months prior to the filing of the petition, but there was no consummation of this agreement by the making of the pledge until a few days before the petition was filed, the pledgee's title did not attach until the goods were actually in his possession and therefore the transfer was preferential and voidable. *In re* Sheridan, 98 Fed. 406, 3 Am. Bankr. Rep. 554.

Taking possession of personal property under contract.— Where a person loaned money to the bankrupt under an agreement that in case such bankrupt failed to pay the sums of money loaned upon demand after six months from the date of the first loan, the lender might take possession of the property purchased with the money borrowed, and the lender, when the first payment became due, made demand therefor, and upon default took possession of the property, and less than four months thereafter the debtor was adjudged a bankrupt, it was held that the lender in taking possession of the property under the agreement did not thereby secure a voidable preference. Sabin *v.* Camp, 98 Fed. 974, 3 Am. Bankr. Rep. 578.

61. **Attorneys for collection agencies.**— Under the Act of 1867 it was held that, where a claim was given to a collection agency for collection, and the latter employed attorneys to collect the claim, and the attorneys, with full knowledge of the debtor's insolvency, induced him to make a preferential transfer by confessing judgment in favor of the creditors, the creditors were not chargeable with the knowledge of the debtor's insolvency which the attorneys had, when it appeared that such creditors never received the proceeds of the confessed judgment. Hoover *v.* Wise, 91 U. S. 308, 23 L. ed. 392.

Knowledge acquired by attorney while acting as attorney of debtor.— A preferred transferee is not chargeable with the knowledge of his attorney, if such knowledge was acquired by him while acting as the attorney for the transferrer, since for the attorney to divulge such knowledge would be a gross breach of professional duty. *In re* Ebert, 1 Am. Bankr. Rep. 340.

A bank is chargeable with notice of the insolvency of a debtor from whom it receives a payment, and that such payment constitutes an unlawful preference, where **its president** had knowledge of such insolvency, gained while acting for the bank in the matter of such indebtedness. *In re* Gillette, 104 Fed. 769, 5 Am. Bankr. Rep. 119.

62. **Reasonable cause to believe that it was intended by the debtor to prefer** does not imply an actual belief or knowledge on the part of the creditor that the transfer was intended as a preference, provided there are facts and circumstances to put the creditor upon inquiry. Crittenden *v.* Barton, 59 N. Y. App. Div. 555, 69 N. Y. Suppl. 559, 5 Am. Bankr. Rep. 775; *In re* Eggert, 102 Fed. 735, 43 C. C. A. 1, 4 Am. Bankr. Rep. 449 [*affirming* 98 Fed. 843, 3 Am. Bankr. Rep. 541]; *In re* Jacobs, 1 Am. Bankr. Rep. 518. See also Sebring *v.* Wellington, 63 N. Y. App. Div. 498, 6 Am. Bankr. Rep. 671; Cincinnati Merchants' Nat. Bank *v.* Cook, 95 U. S. 342, 24 L. ed. 412; Dutcher *v.* Wright, 94 U. S. 553, 24 L. ed. 130; Wager *v.* Hall, 16 Wall. (U. S.) 584, 21 L. ed. 504. It is not, however, enough that the creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency in order to invalidate a security taken for his debt. Grant *v.* Monmouth First Nat. Bank, 97 U. S. 80, 24 L. ed. 971. See also Stucky *v.* Masonic Sav. Bank, 108 U. S. 74, 2 S. Ct. 219, 27 L. ed. 640; Barbour *v.* Priest, 103 U. S. 293, 26 L. ed. 478; Buchanan *v.* Smith, 16 Wall. (U. S.) 277, 21 L. ed. 280; and 6 Cent. Dig. tit. "Bankruptcy," § 256.

63. **The right to set aside a preferential transfer** is incident to the trustee's title and duties, and it is not necessary for him to obtain an order to sue from the bankruptcy court. Chism *v.* Citizens' Bank, 77 Miss. 599, 27 So. 637, 5 Am. Bankr. Rep. 56.

Demand.— Since a preferential transfer is not absolutely void, but voidable only, the trustee can only recover where he has demanded the return of the property transferred or its value and has been refused, unless there has been an actual conversion of the property by the transferee. Shuman *v.* Fleckenstein, 4 Sawy. (U. S.) 174, 22 Fed. Cas. No. 12,826, 9 Chic. Leg. N. 174, 15 Nat. Bankr. Reg. 224; *In re* Phelps, 3 Am. Bankr. Rep. 396.

In a motion by the trustee to compel a creditor to repay the amount of a preference, it must be alleged that the creditor had reasonable cause to believe that the preference was intended. *In re* Blair, 102 Fed. 987, 4 Am. Bankr. Rep. 220. See also Crooks *v.* People's Nat. Bank, 46 N. Y. App. Div. 335, 61 N. Y. Suppl. 604, 3 Am. Bankr. Rep. 238, holding that a complaint in an action brought by a trustee to set aside a preferential transfer is sufficient which alleges that defendant

value[64] from such person.[65] The payment of money by an insolvent debtor is a transfer within the meaning of this provision.[66] A preference is not voidable, however, unless it is given in satisfaction of an antecedent debt — that is a debt which existed prior to the time the judgment was suffered or the transfer made.[67]

3. Payments or Transfers to Attorneys. If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney or counselor at law, solicitor in equity, or proc-

had knowledge of the transfers of the property to the creditors and of the purpose of such transfers, and that such defendant had reasonable cause to believe that it was intended thereby to give a preference. It is not necessary to allege why defendant had reasonable cause to so believe, or the evidence thereof.

Measure of damages.— Where the property transferred has been disposed of by the transferee, the measure of damages is the value of the property and not the amount received by its sale. Clarion First Nat. Bank *v.* Jones, 21 Wall. (U. S.) 325, 22 L. ed. 542; Marshall *v.* Knox, 16 Wall. (U. S.) 551, 21 L. ed. 481. But the evidence of value derived from an actual sale is admissible. *In re* Bloch, 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300. But see Sebring *v.* Wellington, 63 N. Y. App. Div. 498, 71 N. Y. Suppl. 788, 6 Am. Bankr. Rep. 671.

64. **The trustee may accept the sale and** treat the proceeds as money had and received for his use. Chicago Traders' Nat. Bank *v.* Campbell, 14 Wall. (U. S.) 87, 20 L. ed. 832; Cookingham *v.* Morgan, 7 Blatchf. (U. S.) 480, 6 Fed. Cas. No. 3,183, 5 Nat. Bankr. Reg. 16; Shuman *v.* Fleckenstein, 4 Sawy. (U. S.) 174, 22 Fed. Cas. No. 12,826, 9 Chic. Leg. N. 174, 15 Nat. Bankr. Reg. 224.

65. Bankr. Act (1898), § 60*b*.

Under the Act of 1867 a preferential transfer was void if the transferee or the person to be benefited by the transfer had reasonable cause to believe that his debtor was insolvent. U. S. Rev. Stat. (1878), § 5128.

The question of fraud does not enter in determining whether a preferential transfer is voidable and recoverable by the trustee. It is the resulting effect of the act done which is declared against, not the manner or method by which it is done. If the effect of a transfer of property within the four months prior to the filing of the petition is to enable any of the creditors to obtain a greater percentage of his debt than others of the same class, such transfer is voidable if the person receiving it or to be benefited thereby had reasonable cause to believe that it was intended thereby to give a preference. Crooks *v.* People's Nat. Bank, 46 N. Y. App. Div. 335, 61 N. Y. Suppl. 604, 3 Am. Bankr. Rep. 238.

66. Chism *v.* Citizens' Bank, 77 Miss. 599, 27 So. 637, 5 Am. Bankr. Rep. 56; Landry *v.* Andrews, 22 R. I. 597, 48 Atl. 1036, 6 Am. Bankr. Rep. 281; Pirie *v.* Chicago Title, etc., Co., 182 U. S. 438, 21 S. Ct. 906, 45 L. ed. 1171; *In re* Fixen, 102 Fed. 295, 42 C. C. A. 354, 50 L. R. A. 605, 4 Am. Bankr. Rep. 10; *In re* Sloan, 102 Fed. 116, 4 Am. Bankr. Rep. 356; *In re* Christensen, 101 Fed. 802, 4 Am. Bankr. Rep. 202; Blakey *v.* Boonville Bank, 95 Fed. 267, 2 Am. Bankr. Rep. 459; *In re* Knost, 2 Am. Bankr. Rep. 471. For analogous decisions under former acts see 6 Cent. Dig. tit. "Bankruptcy," § 267.

A payment of accrued rent by a tenant within four months prior to his bankruptcy is not a preference. *In re* Barrett, 6 Am. Bankr. Rep. 199. See also *In re* Pearson, 95 Fed. 425, 2 Am. Bankr. Rep. 482, holding that where a portion of the proceeds of a leasehold which could not be sold without the consent of the landlord was applied to paying off back rent upon the ground that unless this was paid no sale of the leasehold whatever could have been made, and the value of it could not otherwise be secured for creditors, such payment of rent did not constitute a preference.

67. *In re* Davidson, 109 Fed. 882, 5 Am. Bankr. Rep. 528; Greenville City Nat. Bank *v.* Bruce, 109 Fed. 69, 48 C. C. A. 236, 6 Am. Bankr. Rep. 311; *In re* Wolf, 98 Fed. 84, 3 Am. Bankr. Rep. 555; *In re* Cobb, 96 Fed. 821, 3 Am. Bankr. Rep. 129; *In re* Little River Lumber Co., 92 Fed. 585, 1 Am. Bankr. Rep. 483; *In re* Woodward, 2 Am. Bankr. Rep. 233. See also Tiffany *v.* Boatman's Sav. Inst., 18 Wall. (U. S.) 375, 21 L. ed. 868; Wadsworth *v.* Tyler, 28 Fed. Cas. No. 17,032, 2 Am. L. T. Bankr. Rep. 28, 1 Chic. Leg. N. 139, 2 Nat. Bankr. Reg. 316.

The performance of labor by a debtor for his creditor is not a transfer of property. *In re* Abraham Steers Lumber Co., 110 Fed. 738, 6 Am. Bankr. Rep. 315.

Sums collected on collateral security.— Where notes were given, and as collateral security therefor the book accounts of the bankrupt were assigned to the payee, and subsequently such notes were transferred for value, and the transferee upon default in payment of the notes collected the accounts and applied the amount received in payment of the notes, within four months prior to the adjudication of bankruptcy, it was held that the preference was created when the collaterals were assigned by the bankrupt, and not when the collections were made thereon. And since the collaterals were assigned as security for a debt created at the time of the assignment, and not as security for a preëxisting indebtedness, there was no ground

tor in admiralty for services to be rendered, the transaction shall be reëxamined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.[68]

4. Set Off Where New Credit Is Given. If a creditor has been preferred and afterwards in good faith gives the debtor further credit, without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.[69]

XVII. Statutory Duties, Liabilities, and Privileges of Bankrupt.

A. Duties — 1. In General. The bankrupt must attend the first meeting of his creditors, if directed by the court or any judge thereof to do so, and the hearing upon his application for a discharge, if filed;[70] comply with all lawful orders of the court;[71] examine the correctness of all proofs of claims filed against his estate;[72] execute and deliver such papers as shall be ordered by the court;[73] execute to his trustee transfers of all his property in foreign countries;[74] immediately inform his trustee of any attempt, by his creditors or other persons, to avoid the provisions of the Bankruptcy Act coming to his knowledge;[75] in case of any person having to his knowledge proved a false claim against his estate, disclose that fact at once to his trustee;[76] and prepare, make oath to, and file in

for holding that the collections made could be recovered by the trustee. *In re* Little, 110 Fed. 621, 6 Am. Bankr. Rep. 681.

68. Bankr. Act (1898), § 60*d*.

69. Bankr. Act (1898), § 60*c*. See also *In re* Oliver, 109 Fed. 784, 6 Am. Bankr. Rep. 626; *In re* Ryan, 105 Fed. 760, 5 Am. Bankr. Rep. 396.

As to set-offs, generally, see *infra*, XVIII, F.

This provision applies exclusively to cases where the trustee has brought an action against a creditor who has been preferred and recovered therein the property transferred, or its value. *In re* Abraham Steers Lumber Co., 110 Fed. 738, 6 Am. Bankr. Rep. 315; *In re* Kellar, 110 Fed. 348, 6 Am. Bankr. Rep. 621; *In re* Christensen, 101 Fed. 802, 4 Am. Bankr. Rep. 202. But see *contra*, McKey *v.* Lee, 105 Fed. 923, 45 C. C. A. 127, 5 Am. Bankr. Rep. 267.

In proceedings by a creditor of a bankrupt to obtain a set-off of a credit given after receipt of a preferential payment, he must plead the essential facts entitling him thereto in the same manner as if he sought to maintain a separate action on such claim. *In re* Oliver, 109 Fed. 784, 6 Am. Bankr. Rep. 626.

70. Bankr. Act (1898), § 7*a* (1).

As to application for discharge see *infra*, XIX, B.

As to meetings of creditors see *supra*, X.

The bankrupt is not required to attend a meeting of his creditors at a place more than one hundred and fifty miles distant from his home or principal place of business, unless ordered by the court or a judge thereof for cause shown, and the bankrupt shall be paid his actual expenses from the estate when required to attend at any place other than the city, town, or village of his residence. Bankr. Act (1898), § 7*a*.

71. Bankr. Act (1898), § 7*a* (2).

As to contempts before referees see *supra*, III, D, 7.

Any disobedience of an order issued by the court is deemed a contempt and is punishable as such. Bankr. Act (1898), § 41*a*.

72. Bankr. Act (1898), § 7*a* (3).

As to proof and allowance of claims against estate see *supra*, XI.

The bankrupt is not required to examine claims except when presented to him. Bankr. Act (1898), § 7*a*.

73. Bankr. Act (1898), § 7*a* (4).

The bankrupt may be compelled by the court to execute the papers necessary to enable the trustee to prosecute or defend suit brought by or against the bankrupt in state courts. Samson *v.* Burton, 5 Ben. (U. S.) 325, 21 Fed. Cas. No. 12,285, 4 Nat. Bankr. Reg. 1; *In re* Clark, 4 Ben. (U. S.) 88, 5 Fed. Cas. No. 2,798, 1 Am. L. T. Bankr. Rep. 189, 3 Nat. Bankr. Reg. 491, 524.

The holder of a license to sell liquor may be compelled by an order of the court to indorse the license in the manner required by law so that the trustee may realize its value for the benefit of the creditors. *In re* Fisher, 98 Fed. 89, 3 Am. Bankr. Rep. 406.

74. Bankr. Act (1898), § 7*a* (5).

As to transfer of title of bankrupt's estate to trustee and the execution of the necessary papers therefor see *supra*, XII, F, 1, 2, 3.

75. Bankr. Act (1898), § 7*a* (6).

76. Bankr. Act (1898), § 7*a* (7).

The fact that no trustee has been appointed will not relieve the bankrupt from the duty or deprive him of the right of objecting to the allowance of any false or unjust claim against his estate. *In re* Ankeny, 100 Fed. 614, 4 Am. Bankr. Rep. 72.

court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee.[77]

2. EXAMINATION. The bankrupt when present at the first meeting of his creditors,[78] and at such other times as the court shall order,[79] may submit to an examination[80] concerning the conducting of his business, the cause of his bankruptcy,

77. Bankr. Act (1898), § 7*a* (8).

As to exemptions of bankrupt see *supra*, XV.

As to schedules: In voluntary cases see *supra*, VI, A, 1, b. In involuntary cases see *supra*, IX.

78. **An examination may be allowed prior to the first meeting** for the purpose of preparing schedules. *In re* Franklin Syndicate, 101 Fed. 402, 4 Am. Bankr. Rep. 244. An examination may also be ordered prior to such meeting for the purpose of enabling creditors to establish their objections to the bankrupt's discharge. *In re* Mellen, 97 Fed. 326, 3 Am. Bankr. Rep. 226; *In re* Price, 91 Fed. 635, 1 Am. Bankr. Rep. 419. See also *In re* Seckendorf, 2 Ben. (U. S.) 462, 21 Fed. Cas. No. 12,600, 1 Am. L. T. Bankr. Rep. 122, 1 Nat. Bankr. Reg. 626, 15 Pittsb. Leg. J. (Pa.) 450; *In re* Baum, 1 Ben. (U. S.) 274, 2 Fed. Cas. No. 1,116, Bankr. Reg. Suppl. 2, 6 Int. Rev. Rec. 28, 1 Nat. Bankr. Reg. 5; *In re* Vogel, 28 Fed. Cas. No. 16,984, 5 Nat. Bankr. Reg. 393; *In re* Mawson, 16 Fed. Cas. No. 9,320, 1 Am. L. T. Bankr. Rep. 46, 1 Nat. Bankr. Reg. 271; *In re* Brandt, 4 Fed. Cas. No. 1,813, 2 Nat. Bankr. Reg. 345; and 6 Cent. Dig. tit. "Bankruptcy," § 393.

The bankrupt is not required to attend at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, unless ordered by the court or a judge thereof for cause shown, and he shall be paid his actual expenses from the estate when examined at any place other than the city, town, or village of his residence. Bankr. Act (1898), § 7*a*.

79. **A court of bankruptcy may, upon the application** of any officer, bankrupt, or creditor, by order, require any designated person, including the bankrupt, who is a competent witness under the laws of the state in which the proceedings are pending, to appear in court or before a referee or the judge of any state court to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under the Act. Bankr. Act (1898), § 21*a*.

Under the Act of 1867, § 26, it was provided "that the court may, on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination, on oath, upon all matters relating to the disposal or condition of his property; to his trade and dealings with others, his accounts concerning the same; to all debts due to or claimed from him; and to all other matters concerning his property and estate, and the due settlement thereof according to law; which examination shall be in writing, and shall be signed by the bankrupt, and be filed with the other proceedings." See also *In re* Salkey, 5 Ben. (U. S.) 486, 21 Fed. Cas. No. 12,252, 2 Am. L. Rec. 502, 6 Chic. Leg. N. 69, 9 Nat. Bankr. Reg. 107, 21 Pittsb. Leg. J. (Pa.) 56; *In re* Mendenhall, 17 Fed. Cas. No. 9,423, 9 Nat. Bankr. Reg. 285; *In re* Bromley, 3 Nat. Bankr. Reg. 686.

80. **Every creditor has a right to examine the bankrupt.** Such examination inures to the benefit of all the creditors, but the fact that one creditor has examined the bankrupt is no reason for withholding the privilege from another creditor. Yet the time, manner, and course of the examination should be so regulated as to protect the bankrupt from annoyance, oppression, and mere delay. *In re* Walker, 96 Fed. 550, 3 Am. Bankr. Rep. 35; *In re* Jehu, 94 Fed. 638, 2 Am. Bankr. Rep. 498; *In re* Adams, 3 Ben. (U. S.) 7, 1 Fed. Cas. No. 40, 1 Chic. Leg. N. 107, 36 How. Pr. (N. Y.) 270, 2 Nat. Bankr. Reg. 272; *In re* Gilbert, 1 Lowell (U. S.) 340, 10 Fed. Cas. No. 5,410, 3 Nat. Bankr. Reg. 152; and 6 Cent. Dig. tit. "Bankruptcy," § 390.

If a full examination has already been had a subsequent application may be denied, unless it is made to appear that the first examination was either collusive or deficient in some material and specific particulars. *In re* Isidor, 2 Ben. (U. S.) 123, 13 Fed. Cas. No. 7,105, 1 Nat. Bankr. Reg. 264; *In re* Van Tuyl, 28 Fed. Cas. No. 16,881, 2 Nat. Bankr. Reg. 70; *In re* Frizelle, 9 Fed. Cas. No. 5,133, 5 Nat. Bankr. Reg. 122; *In re* Frisbee, 9 Fed. Cas. No. 5,131, 13 Nat. Bankr. Reg. 349. And only one examination as respects a discharge should ordinarily be had, since the Act, in requiring that all creditors shall have notice of it, presumably intends that all should be equally allowed to participate in it and not further harass the bankrupt. *In re* Price, 91 Fed. 635, 1 Am. Bankr. Rep. 419. See also *In re* Vogel, 28 Fed. Cas. No. 16,984, 5 Nat. Bankr. Reg. 393.

A refusal to take the oath and be examined according to law is a contempt and is punish-

his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property,[81] and in addition all matters which may affect the administration and settlement of his estate; but no testimony given by him[82] shall be offered in evidence against him in any criminal proceeding.[83] The application

able as such. Bankr. Act (1898), § 41. Where a bankrupt refuses upon his examination to take an oath unless there is added the following proviso, "reserving, however, the right to claim any lawful privilege as against or in relation to any question which may arise upon any examination," it was held that he must take the oath as given by the referee and prescribed by the Bankruptcy Act, since his taking an oath does not deprive him of any constitutional or legal privilege he may have. *In re* Scott, 95 Fed. 815, 816, 1 Am. Bankr. Rep. 49. If the bankrupt interposes unsatisfactory answers to the questions put to him, and it is apparent he is evading such questions for the purpose of concealing property in his possession, he may be punished for contempt or compelled to deliver such property to his trustee. *In re* Schlesinger, 97 Fed. 930, 3 Am. Bankr. Rep. 342; *In re* McCormick, 97 Fed. 566, 3 Am. Bankr. Rep. 340. See also *In re* Salkey, 6 Biss. (U. S.) 269, 21 Fed. Cas. No. 12,253, 7 Chic. Leg. N. 178, 11 Nat. Bankr. Reg. 423.

Form of examination of bankrupt is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 29; 89 Fed. xli.

81. **It is competent to inquire** as to the disposal of the bankrupt's property in order to ascertain whether there exists any property right in which the bankrupt has an interest, and the inquiry is not necessarily as to transactions which have occurred within the four months prior to the filing of the petition. *In re* Brundage, 100 Fed. 613, 4 Am. Bankr. Rep. 47. But see *In re* Hayden, 96 Fed. 199, 1 Am. Bankr. Rep. 670. The bankrupt should discover to the court what property he has, what disposal of any property he has made which the court is entitled to administer, to what persons he has paid money or delivered property, where such persons are, and questions of like nature. *In re* Franklin Syndicate, 101 Fed. 402, 4 Am. Bankr. Rep. 244, 511. See also *In re* Horgan, 98 Fed. 414, 39 C. C. A. 118, 3 Am. Bankr. Rep. 253. Interrogatories in regard to money in the possession of the bankrupt soon after the commencement of proceedings in bankruptcy are relevant and must be answered. *In re* McBrien, 3 Ben. (U. S.) 481, 15 Fed. Cas. No. 8,666, 3 Nat. Bankr. Reg. 344. But questions as to property acquired or business transacted by the bankrupt subsequent to the filing of the petition in bankruptcy are improper, unless it can be shown that they relate to his property rights and business transactions prior to that time. *In re* Patterson, 1 Ben. (U. S.) 508, 18 Fed. Cas. No. 10,815, Bankr. Reg. Suppl. 27, 33, 6 Int. Rev. Rec. 157, 1 Nat. Bankr. Reg. 125, 150; *In re* Levy, 1 Ben. (U. S.) 496, 15 Fed. Cas. No. 8,296, Bankr. Reg. Suppl. 30, 6 Int. Rev. Rec. 163, 1 Nat. Bankr. Reg. 136; *In re* Rosenfield, 20 Fed. Cas. No. 12,059, 1 Am. L. T. Bankr. Rep. 47, 1 Nat. Bankr. Reg. 319, 15 Pittsb. Leg. J. (Pa.) 245; and 6 Cent. Dig. tit. "Bankruptcy," §§ 399–401.

Examination of wife of bankrupt.—Where, by the law of the state in which the proceedings are had, a wife cannot be a witness for or against her husband, she cannot be required, in proceedings in bankruptcy against the husband, to testify concerning sums of money alleged to have been placed in her hands by the husband shortly before the institution of the bankruptcy proceedings, with a view to their recovery by the trustee. *In re* Mayer, 97 Fed. 328, 3 Am. Bankr. Rep. 222; *In re* Fowler, 93 Fed. 417, 1 Am. Bankr. Rep. 555. But see *In re* Foerst, 93 Fed. 190, 1 Am. Bankr. Rep. 259, holding that the wife of a bankrupt, under examination as a witness at the instance of the trustee or creditors, may be questioned as to money or other property in her possession, and as to how and when the same was received or acquired, provided only that the testimony shows such questions to be reasonably pertinent to the subject of inquiry, the nature and location of the assets of the bankrupt. See also *supra*, note 64, p. 313.

82. **The immunity afforded** is not sufficient to authorize a referee to compel a bankrupt to disclose facts which will tend to criminate him. *In re* Feldstein, 103 Fed. 269, 4 Am. Bankr. Rep. 321; *In re* Rosser, 96 Fed. 305, 2 Am. Bankr. Rep. 755; *In re* Scott, 95 Fed. 815, 1 Am. Bankr. Rep. 49; *In re* Hathorn, 2 Am. Bankr. Rep. 298. But see *contra*, Mackel *v.* Rochester, 102 Fed. 314, 42 C. C. A. 427, 4 Am. Bankr. Rep. 1.

Books of voluntary bankrupt containing criminating evidence.—Where a bankrupt has in his possession or under his control books of account that were kept by him in conducting the business in which he was engaged at the time of filing his voluntary petition in bankruptcy, and refuses to produce them before the referee for examination by his creditors, upon the ground that they would tend to criminate him, it was held that a voluntary petition in bankruptcy operates as a waiver of the constitutional privilege to refuse to give criminating evidence, and also as a transfer of the right of custody of the books to his trustee; and that the books cannot be withheld upon the assertion that they might or do contain criminating evidence or matter. *In re* Sapiro, 92 Fed. 340, 1 Am. Bankr. Rep. 296.

83. Bankr. Act (1898), § 7*a* (9).

Examination by attorney.— The examination of witnesses before a referee may be conducted by a party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with

should be made by petition.[84] Service of the order for examination[85] should be made upon the bankrupt, and it is his duty to comply therewith.[86]

B. Detention. The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail, conditioned for his appearance and for examination, from time to time, not exceeding ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.[87]

C. Exemption From Arrest. A bankrupt is exempt from arrest[88] upon

the mode now adopted in courts of law. U. S. Supreme Ct. Bankr. G. O. No. 22.

Referees have the same power with respect to examination of persons as witnesses as courts of bankruptcy. Bankr. Act (1898), § 38*a* (2). See also *supra*, III, D, 3, f.

84. *In re* Adams, 2 Ben. (U. S.) 503, 1 Fed. Cas. No. 39, 36 How. Pr. (N. Y.) 51, 2 Nat. Bankr. Reg. 95; *In re* Brandt, 4 Fed. Cas. No. 1,813, 2 Nat. Bankr. Reg. 34.

Requisites of petition.— The petition on the part of the creditor should show good cause for the examination. *In re* Adams, 2 Ben. (U. S.) 503, 1 Fed. Cas. No. 39, 36 How. Pr. (N. Y.) 51, 2 Nat. Bankr. Reg. 95. When made on the part of the trustee the grounds need not be specified, since the trustee being an officer of the court, it is only necessary that the court should be satisfied of his good faith in making the application. *In re* McBrien, 2 Ben. (U. S.) 513, 15 Fed. Cas. No. 8,635, 2 Nat. Bankr. Reg. 197; *In re* Lanier, 14 Fed. Cas. No. 8,070, 2 Nat. Bankr. Reg. 154.

Notice of examination.— All creditors are entitled to at least ten days' notice by mail to their respective addresses as they appear in the list of creditors furnished by the bankrupt, or as afterward filed with the papers in the case by the creditors, unless they waive notice in writing of all examinations of the bankrupt. Bankr. Act (1898), § 58*a* (1); *In re* Price, 91 Fed. 635, 1 Am. Bankr. Rep. 419. The bankrupt if present at the first meeting of creditors may be required to submit to an examination without having had previous notice thereof. Bankr. Act (1898), § 7*a* (9). See also *In re* Brandt, 4 Fed. Cas. No. 1,812, 2 Nat. Bankr. Reg. 215; *In re* Bromley, 3 Nat. Bankr. Reg. 686. But if the order directs an examination at any other time the bankrupt should be given reasonable notice so that he may prepare himself for such examination. *In re* Bromley, 3 Nat. Bankr. Reg. 686.

85. **Form of order for examination** is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 28: 89 Fed. xli.

86. Bankr. Act (1898), § 7*a* (2).

Costs of examination.— Where the assets of an estate are no more than sufficient to pay certain labor claims, proved and allowed as preferred debts, and an examination of the bankrupt is undertaken in the hope of discovering concealed assets, at the suggestion of the attorney for the trustee (who previously represented the creditors by whom the trustee was chosen), but against the objection of the labor claimants, and without resulting benefit to the estate, the expenses of such examination should not be paid out of the funds of the estate, but must be borne by the creditors who procured it. *In re* Rozinsky, 101 Fed. 229, 3 Am. Bankr. Rep. 830. See also *In re* Silverman, 97 Fed. 325, 3 Am. Bankr. Rep. 227.

87. Bankr. Act (1898), § 9*b*.

In presenting its report on the bankruptcy bill the judiciary committee of the house of representatives said: "In the section where provisions are made for taking into custody the bankrupt when he is about to leave the district and where his departure would tend to delay the proceedings in bankruptcy an amendment has been made limiting the departure to cases in which the bankrupt was leaving for the sole purpose of avoiding the examination. If he left for other purposes, such as to better his condition, the provisions of the law will not apply to him." Report of Judiciary Committee of the House of Representatives, Dec. 16, 1897 [55th Congress].

A warrant of arrest cannot be issued as a basis for extradition proceedings to bring a bankrupt before the court for examination after he has departed from the district and settled in another district. *In re* Ketchum, 5 Am. Bankr. Rep. 532. See also *In re* Hassenbusch, 108 Fed. 35, 47 C. C. A. 177.

Writ of ne exeat.— The provision made for the detention of a bankrupt does not limit the power of the court to grant a writ of ne exeat. *In re* Lipke, 98 Fed. 970, 3 Am. Bankr. Rep. 569.

88. See, generally, ARREST, 3 Cyc. 923, note 35; 927, note 52; 928, note 58.

Release of imprisoned debtor on habeas corpus.— If at the time of preferring his

civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a state court[89] having jurisdiction, and served within such state, upon a debt or claim from which his discharge in bankruptcy would not be a release,[90]

petition the debtor shall be imprisoned the court upon application may order him to be produced upon habeas corpus by the jailer or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and if committed after the filing of his petition, upon process in any civil action founded upon a claim provable in bankruptcy, the court may upon like application discharge him from such imprisonment. If the petitioner during the pendency of the proceedings in bankruptcy be arrested or imprisoned upon process in any civil action the district court, upon his application, may issue a writ of habeas corpus to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order. U. S. Supreme Ct. Bankr. G. O. No. 30. See also *In re* Claiborne, 109 Fed. 74.

Conflict between statute and general order. — The language of the order is more comprehensive than the terms of the statute. The order provides for the bankrupt's release upon habeas corpus if the arrest or imprisonment complained of is upon a claim provable in bankruptcy, while the statute permits his arrest if it is based upon a debt or claim from which his discharge in bankruptcy would not be a release. The order must, however, yield to the terms of the statute. *In re* Baker, 96 Fed. 954, 3 Am. Bankr. Rep. 101 [*citing In re* Patterson, 2 Ben. (U. S.) 155, 18 Fed. Cas. No. 10,817, 1 Nat. Bankr. Reg. 307, 15 Pittsb. Leg. J. (Pa.) 241; *In re* Robinson, 6 Blatchf. (U. S.) 253, 20 Fed. Cas. No. 11,939, 2 Am. L. T. Bankr. Rep. 18, 36 How. Pr. (N. Y.) 176, 2 Nat. Bankr. Reg. 341; *In re* Whitehouse, 1 Lowell (U. S.) 429, 29 Fed. Cas. No. 17,564, 4 Nat. Bankr. Reg. 63].

89. **Arrest upon debt not dischargeable.**— If the debt upon which the process of arrest is issued from a state court is upon a non-dischargeable debt or claim, the bankrupt will not be released therefrom, except while in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by the Act. *In re* Lewensohn, 99 Fed. 73, 3 Am. Bankr. Rep. 594 [*affirmed* in 104 Fed. 1006, 44 C. C. A. 309].

Arrest on a judgment for costs obtained after adjudication.— Where the bankrupt was adjudicated such on his own petition filed before a judgment for costs was rendered, the costs are not provable against his estate, are not dischargeable, and are within the letter of the express exception so far as they relate to arrests on civil process when issued upon a debt or claim from which a discharge in bankruptcy is not a release. Consequently an arrest under these circumstances cannot be regarded as illegal and the bankrupt is not entitled to a discharge therefrom in a court of bankruptcy. *In re* Marcus, 105 Fed. 907, 45 C. C. A. 115, 5 Am. Bankr. Rep. 365.

A bankrupt arrested under a judgment entered upon an action for a breach of promise is entitled to a discharge from such arrest. *In re* Fife, 109 Fed. 880, 6 Am. Bankr. Rep. 258.

A debt for the proceeds of cotton purchased and resold by a bankrupt as a broker on orders from a customer is one from which he is released by a discharge, and his right to exemption from arrest and imprisonment upon an execution issued from a state court upon such debt will be protected by injunction pending a determination of his application for discharge. Knott *v.* Putnam, 107 Fed. 907, 6 Am. Bankr. Rep. 80.

90. As to debts not released by discharge see *infra*, XIX, E.

The question of what constitutes a dischargeable debt should be determined by the court of bankruptcy upon the face of the papers used in the proceedings in the state court. *In re* Robinson, 6 Blatchf. (U. S.) 253, 20 Fed. Cas. No. 11,939, 2 Am. L. T. Bankr. Rep. 18, 36 How. Pr. (N. Y.) 176, 2 Nat. Bankr. Reg. 341. See also *In re* Valk, 3 Ben. (U. S.) 431, 28 Fed. Cas. No. 16,814, 3 Nat. Bankr. Reg. 278. When it appears from the face of the proceedings that the debt is one from which a discharge will not release the debtor, he cannot be relieved. It is not necessary that this should appear from the declaration or complaint. It is sufficient if it appears from the affidavits and the order of arrest. *In re* Kimball, 6 Blatchf. (U. S.) 292, 14 Fed. Cas. No. 7,769, 2 Am. L. T. Bankr. Rep. 52, 1 Chic. Leg. N. 163, 2 Nat. Bankr. Reg. 354. See also *In re* Devoe, 1 Lowell (U. S.) 251, 7 Fed. Cas. No. 3,843, 7 Am. L. Reg. N. S. 690, 1 Am. L. T. Bankr. Rep. 90, 2 Nat. Bankr. Reg. 27; *In re* Migel, 17 Fed. Cas. No. 9,538, 2 Nat. Bankr. Reg. 481. But see *contra*, *In re* Williams, 6 Biss. (U. S.) 233, 29 Fed. Cas. No. 17,700, 7 Chic. Leg. N. 49, 11 Nat. Bankr. Reg. 145; *In re* Alsberg, 1 Fed. Cas. No. 261, 16 Nat. Bankr. Reg. 116.

Arrest in actions based on fraud.— A judgment rendered upon a complaint setting forth all the facts that make up the fraud is conclusive evidence of the fraud, and a bankrupt arrested under such judgment should not be released. *In re* Patterson, 2 Ben. (U. S.) 155, 18 Fed. Cas. No. 10,817, 1

and in such case he shall be exempt from arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by the Act.[91]

D. Extradition. Whenever a warrant for the apprehension of a bankrupt shall have been issued and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are extradited from one district within which a district court has jurisdiction to another.[92]

XVIII. MANAGEMENT AND ADMINISTRATION OF ESTATE.

A. Collection of Assets and Reduction Thereof to Money. Courts of bankruptcy are authorized to cause the estates of bankrupts to be collected, reduced to money, and distributed, and to determine controversies in relation thereto, except as otherwise provided in the Act.[93]

B. Duty of Trustee as to Pending Suits — 1. To Continue. A trustee may with the approval of the court be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication with like force and effect as though it had been commenced by him.[94]

Nat. Bankr. Reg. 307, 15 Pittsb. Leg. J. (Pa.) 241; *In re* Pettis, 19 Fed. Cas. No. 11,046, 7 Am. L. Reg. N. S. 695, 2 Nat. Bankr. Reg. 44. And a judgment rendered in an action for deceit does not so merge the original cause of action as to make the demand dischargeable. The record of the action in which the execution issues may be looked at, and if it shows a material and traversable allegation of fraud as its sole foundation, the debt or demand may fairly be said to be one founded in fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge would not release him. *In re* Whitehouse, 1 Lowell (U. S.) 429, 29 Fed. Cas. No. 17,564, 4 Nat. Bankr. Reg. 63.

91. Bankr. Act (1898), § 9*a*.

The Act of 1867 provided that "no bankrupt shall be liable during the pendency of the proceedings in bankruptcy to arrest in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." U. S. Rev. Stat. (1878), § 5107.

The referee shall protect the bankrupt from arrest from the day he is required to attend before him, until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. U. S. Supreme Ct. Bankr. G. O. No. 12, par. 1.

Security required from bankrupt.— Upon granting to the bankrupt protection from arrest a court of bankruptcy may require security that during the continuance of such protection he will not depart from the jurisdiction of the court and will obey its lawful orders. *In re* Lewensohn, 99 Fed. 73, 3 Am. Bankr. Rep. 594 [*affirmed* in 104 Fed. 1006, 44 C. C. A. 309].

When exemption begins.— The authority of a court of bankruptcy to release a bankrupt from imprisonment applies only to cases where the arrest is made after the commencement of proceedings in bankruptcy. *In re* Rank, Crabbe (U. S.) 493, 20 Fed. Cas. No. 11,566; *In re* Hoskins, Crabbe (U. S.) 466, 12 Fed. Cas. No. 6,712, 1 Pa. L. J. 287; Minon *v.* Van Nostrand, 1 Lowell (U. S.) 458, 17 Fed. Cas. No. 9,642, 4 Nat. Bankr. Reg. 108 [*affirmed* in Holmes (U. S.) 251, 17 Fed. Cas. No. 9,641]; Hazleton *v.* Valentine, 1 Lowell (U. S.) 270, 11 Fed. Cas. No. 6,287, 1 Am. L. T. Bankr. Rep. 105, 2 Nat. Bankr. Reg. 31; *In re* Walker, 1 Lowell (U. S.) 222, 29 Fed. Cas. No. 17,060, 1 Nat. Bankr. Reg. 318; *In re* Cheney, 5 Fed. Cas. No. 2,636, 5 Law Rep. 19.

92. Bankr. Act (1898), § 10*a*.

This section states more specifically the power conferred upon courts of bankruptcy "to extradite bankrupts from their respective districts to other districts." Bankr. Act (1898), § 2 (14); *In re* Ketchum, 5 Am. Bankr. Rep. 532. See also *supra*, II, B, 11.

93. Bankr. Act (1898), § 2 (7). See also *supra*, II, B; XII, D, 3.

As to the authority of trustee, receiver, or marshal to conduct the business of the bankrupt see Bankr. Act (1898), § 2 (5); and *supra*, III, B, 1; III, C, 2; VI, B, 9; XII, D, 3.

As to duty of trustee to collect and reduce to money the property of a bankrupt's estate see Bankr. Act (1898), § 47*a* (2); and *supra*, XII, D, 3.

94. Bankr. Act (1898), § 11*c*.

Abatement of actions by or against trustees in bankruptcy see ABATEMENT AND REVIVAL, 1 Cyc. 69, note 47; 99, note 82; 124, note 93.

Actions for personal injury.— As has already been stated a right of action for damages in tort on account of personal injuries does not pass to the trustee. Bankr. Act (1898), § 70*a* (6). See also *supra*, XII, F, 4, g. If such action has been commenced by the bankrupt prior to his adjudication, the trustee cannot continue such action even with the consent of a court of bankruptcy. *In re* Haensell, 91 Fed. 355, 1 Am. Bankr. Rep. 286.

As to the bankrupt estate.— If the pending suit affects property constituting any part of the bankrupt estate, the trustee may inter-

2. To Defend. The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.[95] In determining an application made by a trustee to intervene in a suit pending in a state court such court will be governed by the laws and judicial policy of the state.[96] The trustee is not absolutely bound to enter an appearance and defend a pending suit against the bankrupt; unless ordered by the court he may exercise his discretion.[97]

C. Limitations of Actions. Suits cannot be brought by or against a trustee of the bankrupt estate subsequent to two years after the estate has been closed.[98]

D. Arbitration[99] **— 1. Submission.** The trustee may, pursuant to the direc-

vene therein. If the fund is in the hands of a receiver appointed by a state court he may, as the representative of the bankrupt and his creditors, make himself a party to the proceedings and contest any claim against such fund. Loudon *v.* Blandford, 56 Ga. 150.

Substitution of trustee as plaintiff.— Where a receiver of partnership property has been appointed by a state court in a suit brought by one partner to procure a dissolution of the partnership, and such receiver has taken possession of the property of the firm and collected its debts, a court of bankruptcy will not compel a delivery of the assets in the hands of the receiver to the trustee. In such a case the proper proceeding is for the trustee to procure authority from the court of bankruptcy to move in the state court for an order substituting him as plaintiff in the case, and then to move for an entry of a decree settling the partnership accounts, and for an order directing a transfer of the assets to him by the receiver. *In re* Price, 92 Fed. 987, 1 Am. Bankr. Rep. 606. See also Appeal and Error, 2 Cyc. 630, 782, note 97; Attachment, 4 Cyc. 848.

95. Bankr. Act (1898), § 11*b*.

96. Bank of Commerce *v.* Elliott, 109 Wis. 648, 655, 85 N. W. 417, 6 Am. Bankr. Rep. 409, where it was contended that when the federal court issues an order directing the trustee to defend a pending suit in a state court, it was the duty of the state court to give effect to such order by granting the motion to make him a party to such action. The court said: "If an order be made under it [section 11*b* of the Bankruptcy Act] commanding a trustee to intervene in the state court in an action to which the bankrupt is a party, the former performs his full duty when he makes the proper application to such court to be let in to such action. In disposing of such application the statutes of the state, and the rules and practice of its court, must necessarily govern, the same as when any other party invokes the court's jurisdiction." The federal statute, however mandatory its terms, does not control the practice in state courts, and was not intended to do so. National Distilling Co. *v.* Seidel, 103 Wis. 489, 79 N. W. 744.

An action to foreclose a mortgage upon the bankrupt's property, brought in a state court after the adjudication, will not be enjoined by the bankruptcy court upon petition of the trustee, but the court, in the exercise of its discretion, will leave the matter to the jurisdiction of the state court which is perfectly competent to settle all the matters involved, and will direct the trustee to intervene in the action for the purpose of protecting the creditors of the bankrupt. *In re* Porter, 109 Fed 111, 6 Am. Bankr. Rep. 259. *Compare* Neiman *v.* Shoolbraid, 30 Pittsb. Leg. J. N. S. (Pa.) 301; *In re* Riker, 107 Fed. 96, 5 Am. Bankr. Rep. 720.

Objection to a petition of intervention by a trustee in bankruptcy that it failed to allege that the bankrupt had been adjudged a bankrupt is obviated by an answer containing such allegation, though a demurrer to the paragraph of answer containing the allegation is sustained. Jones *v.* Meyer Bros. Drug Co., (Tex. Civ. App. 1901) 61 S. W. 553.

97. Chicago Traders' Bank *v.* Campbell, 14 Wall. (U. S.) 87, 20 L. ed. 832, 6 Nat. Bankr. Reg. 353, decided under the Act of 1867, which differed in language from the provisions of the present law. But it would seem that the words are still permissive rather than mandatory, and that the trustee is not required to defend a pending suit unless ordered by the court. See also Reade *v.* Waterhouse, 52 N. Y. 587, 10 Nat. Bankr. Reg. 277.

Objection that a trustee could not intervene in an action without leave of court cannot be first made after verdict. Jones *v.* Meyer Bros. Drug Co., (Tex. Civ. App. 1901) 61 S. W. 553.

98. Bankr. Act (189°), § 11*d*.

The limitation here prescribed is independent of any state statute of limitation and expressly bars the commencing of a suit against a trustee, even if the limitation prescribed by the state law has not yet expired. Freelander *v.* Holloman, 9 Fed. Cas. No. 5,081, 9 Nat. Bankr. Reg. 331. See, generally, Limitations of Actions.

There is no express provision in the Act stating when an estate is deemed closed; impliedly an estate would be closed whenever the final accounts of the trustee or trustees have been approved and the bankrupt has been discharged. Bankr. Act (1898), § 2 (8).

99. See, generally, Arbitration and Award, 3 Cyc. 568.

The validity of an award is not necessarily affected by the bankruptcy of a party after the submission and before the execution of the award. Russell Arb. & Award (8th ed.) [*citing Ex p.* Edwards, 3 Mor. Bankr. Cas. 179]. *Compare* Russell Arb. & Award (8th ed.) [*citing* Rex *v.* Bingham, 1 L. J. Exch. 62, 2 Tyrw. 46]. Bankruptcy of a party does

tion of the court, submit to arbitration any controversies arising in the settlement of the estate.[1]

2. FINDING OF ARBITRATORS. The written finding of the arbitrators, or a majority of them, as to the issues presented may be filed in court, and shall have like force and effect as the verdict of a jury.[2]

E. Compromise.[3] The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.[4]

F. Set-Off and Counter-Claim[5] — 1. WHEN ALLOWED — a. In General. In all cases of mutual debts and mutual credits between the estate of the bankrupt and the creditor, the account shall be stated, and one debt shall be set off against the other and the balance shall be allowed or paid.[6]

not, of itself, operate as a revocation, nor give the trustee power to revoke the submission. Andrews *v.* Palmer, 4 B. & Ald. 250, 23 Rev. Rep. 267, 6 E. C. L. 471; Hemsworth *v.* Brian, 1 C. B. 131, 2 Dowl. & L. 844, 14 L. J. C. P. 134, 50 E. C. L. 131; Snook *v.* Hellyer, 2 Chit. 43, 23 Rev. Rep. 741, 18 E. C. L. 493. And where the arbitrator is also the stakeholder, or money is placed in his hands to abide the award, the authority is coupled with an interest, and is not revoked by bankruptcy. Taylor *v.* Marling, 2 M. & G. 55, 2 Scott N. R. 374, 40 E. C. L. 488; Taylor *v.* Shuttleworth, 6 Bing. N. Cas. 277, 8 Dowl. P. C. 280, 9 L. J. C. P. 138, 8 Scott 565, 37 E. C. L. 621. But it has been held that the bankruptcy of one party will justify the other in revoking the submission. Marsh *v.* Wood, 9 B. & C. 659, 8 L. J. K. B. O. S. 327, 4 M. & R. 504, 17 E. C. L. 296. Proof of amount awarded to plaintiff was allowed as a provable debt, where after the award and before judgment the defendant committed an act of bankruptcy. *Ex p.* Harding, 5 De G. M. & G. 367, 54 Eng. Ch. 293.

1. Bankr. Act (1898), § 26*a*.

Application.— Whenever the trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against the bankrupt's estate, or for a debt due to it, to the determination of arbitrators, the application shall clearly and distinctly set forth the subject-matter of the controversy and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise. U. S. Supreme Ct. Bankr. G. O. No. 33.

Appointment of arbitrators.— Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the third arbitrator shall be appointed by the court. Bankr. Act (1898), § 26*b*. The arbitrators must be chosen in strict conformity with this provision. *In re* McLam, 97 Fed. 922, 3 Am. Bankr. Rep. 245.

2. Bankr. Act (1898), § 26*c*.

Such finding is subject to be set aside or adjudged upon by the court in the same manner as a jury verdict. *In re* McLam, 97 Fed. 922, 3 Am. Bankr. Rep. 245.

3. See also, generally, COMPROMISE AND SETTLEMENT.

4. Bankr. Act (1898), § 27.

Effect of compromise.— Bankr. Act (1898), § 27, provides that the trustee "may, with the approval of the court," compromise any controversy arising in the proceedings. Section 56*a* provides that creditors shall pass on all matters submitted to them at their meetings by a majority vote. Section 58*a* (7) provides for notice to creditors of proposed compromise of any controversy. It was held that the action of the creditors on any compromise offered on claims due the estate of the bankrupt is not conclusive, but may, for good cause, be disallowed by the court under section 27, as the compromise when determined must be carried out and executed by the trustee under the "approval of the court." *In re* Heyman, 108 Fed. 207, 5 Am. Bankr. Rep. 808.

For analogous decisions under former acts see 6 Cent. Dig. tit. "Bankruptcy," § 348.

The application made by the trustee therefor must clearly and distinctly set forth the subject-matter of the controversy, and the reasons why he thinks it most for the interest of the estate that the controversy should be compromised. U. S. Supreme Ct. Bankr. G. O. No. 33.

Under the Act of 1867, which contained an analogous provision, it was held that the court was not authorized to make an order permitting the assignee, with the approval of a committee of the creditors, to compromise any and all debts that to him seemed best. Each case should be brought before the court by the assignee and the special facts which make it proper to compromise should be set forth. *In re* Dibblee, 3 Ben. (U. S.) 354, 7 Fed. Cas. No. 3,885, 3 Nat. Bankr. Reg. 72.

5. See, generally, RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

6. Bankr. Act (1898), § 68*a*.

Bankr. Act (1867), § 20, provided "that in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid." In considering this section

b. Meaning of "Debt." The word "debt" as here used includes any debt, demand, or claim provable in bankruptcy.[7] A set-off or counter-claim which is not provable against the estate shall not be allowed in favor of any debtor or of the bankrupt.[8]

c. Meaning of "Mutual Credits" — (i) *Definition.* The term "mutual credit" as used in equity means a credit agreed upon by the parties, or arising out of connected transactions.[9] But in bankruptcy statutes "mutual credits" are extended to mean that the parties are, or in the natural course of events will be, creditors of each other.[10]

the court, in Sawyer *v.* Hoag, 17 Wall. (U. S.) 610, 21 L. ed. 731, 9 Nat. Bankr. Reg. 145, said: "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; must be in the same right."

Setting off preference against new credit.— Though payment made to creditors by a bankrupt in good faith and without knowledge of his insolvency induced a new credit, it did not amount to a preference, within section 60*c*, providing for a set-off of a preference against a new credit. *In re* Ratliff, 107 Fed. 80, 5 Am. Bankr. Rep. 713. See also *supra*, XVI, C.

7. Bankr. Act (1898), § 1 (11), *supra*, note 8, p. 238.

A debt payable in futuro may be set off against a debt *in præsenti*. Drake *v.* Rollo, 3 Biss. (U. S.) 273, 7 Fed. Cas. No. 4,066, 4 Chic. Leg. N. 284, 18 Int. Rev. Rec. 159, 2 Ins. L. J. 935, 4 Nat. Bankr. Reg. 689; *In re* City Sav., etc., Bank, 5 Fed. Cas. No. 2,742, 4 Chic. Leg. N. 81, 6 Nat. Bankr. Reg. 71, 6 West. Jur. 65.

8. Bankr. Act (1898), § 68*b*.

The intent of this provision is to permit a set-off or counter-claim of only such debts as are provable under the Act. Bankr. Act (1898), § 63*a*. A debt, the liability upon which had not accrued to the bankrupt but subsequently accrued to a trustee, may be set off when the claim and liability are mutual. *In re* Crystal Spring Bottling Co., 100 Fed. 265, 4 Am. Bankr. Rep. 55.

A creditor of a bankrupt, who is also his debtor in a larger amount, will not be permitted to prove his claim against the estate so long as his own debt remains unpaid. *In re* Gerson, 105 Fed. 893, 5 Am. Bankr. Rep. 850.

A surety it seems, who pays the debt of his bankrupt principal, after the adjudication in bankruptcy, may set off the amount so paid against his own debt to the bankrupt. *In re* Dillon, 100 Fed. 627, 4 Am. Bankr. Rep. 63.

Under the Act of 1867 it was provided that no set-off should be allowed in favor of any debtor of the bankrupt of a claim in its nature not provable in bankruptcy. Bankr. Act (1867), § 20. Under this provision it was held that a creditor might retain money due to the bankrupt and apply it to his claim, although he had attempted to obtain a preference thereon, since the debt is a valid debt against the bankrupt, although it could not be provable. Clark *v.* Iselin, 21 Wall. (U. S.) 360, 22 L. ed. 568, 9 Nat. Bankr. Reg. 19.

9. Story Eq. Jur. § 1435.

10. Lowell Bankr. § 255. The term "mutual credits" in the Bankruptcy Act is more comprehensive than the term "mutual debts" in the statutes relating to set-off. The term "credit" is synonymous with the term "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 bankruptcy by a valid contract, by the terms of which the deposit will result in a debt, as if they were 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 p.* Caylus, 1 Lowell (U. S.) 550, 5 Fed. Cas. No. 2,534; Catlin *v.* Foster, 1 Sawy. (U. S.) 37, 5 Fed. Cas. No. 2,519, 3 Am. L. T. 134, 1 Am. L. T. Bankr. Rep. 192, 3 Nat. Bankr. Reg. 540.

Mutual debts and mutual credits.— Rose *v.* Hart, 2 Moore C. P. 547, 8 Taunt. 499, 506, 20 Rev. Rep. 533, 4 E. C. L. 248, 2 Smith Lead. Cas. 172, is a leading case on this question. The court there said: "Something more is certainly meant here by mutual credits than the words mutual debts import; and yet, upon the final settlement, it is enacted merely that one debt shall be set against another. We think this shews that the legislature meant such credits only as must in their nature terminate in debts, as where a debt is due from one party, and credit given by him on the other for a sum of money payable at a future day, and which will then become a debt, or where there is a debt on one side, and a delivery of property with directions to turn it into money on the other; in such case the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on the two debts, and the words of the statute will in all respects be complied with; but where there is a mere deposit of property, without any authority to turn it into money, no debt can ever arise out of it, and, therefore, it is not a credit within the meaning of the statute."

The terms "credits" and "debts" are used as correlative.— What is a debt on one side is a credit on the other, so that the term "credits" can have no broader meaning than the term "debts." There is no warrant in the language of this section or its contents for extending the term so as to include trusts. Libby *v.* Hopkins, 104 U. S. 303, 26 L. ed. 769.

(II) *Mutuality.* The debts and credits must be mutual.[11] The debts to be mutual must be owing and be due between the parties in the same rights and capacities.[12] The credit is not mutual unless there is a knowledge on both sides of an existing debt due the one party and the credit by the other party founded on and trusting to that debt as a means of payment.[13] The term "mutual credit" includes only such debts as might have been within the contemplation of the parties.[14] Payments in money intended to be applied upon an existing open account constituting a preference do not create a case of mutual debits and credits between the bankrupt and the creditor.[15] Since the relation between a bank and a depositor is that of debtor and creditor, a debt due to the bank on a loan may be set off against deposits.[16]

11. A separate debt cannot be set off against a joint debt in equity or in bankruptcy, unless they have grown out of a transaction under circumstances establishing that a joint credit had been given on account of the separate debt. Gray *v.* Rollo, 18 Wall. (U. S.) 629, 21 L. ed. 927; Forsyth *v.* Woods, 11 Wall. (U. S.) 484, 20 L. ed. 207; *In re* Crystal Spring Bottling Co., 100 Fed. 265, 4 Am. Bankr. Rep. 55.

12. Thus, a debt due to a person as a guardian or trustee cannot be set off against a debt owing by him individually. Bishop *v.* Church, 3 Atk. 691.

Debts due a corporation.— Upon the principle that the capital of a corporation is a trust for the payment of the debts due to creditors, it has been held that one could not set off an indebtedness due to him personally against a claim for an unpaid subscription to the corporate stock. And where, to evade this liability, he had made a nominal payment of his subscription, but had at the same time withdrawn an equivalent amount from the treasury of the corporation as a loan and given his note therefor, the purpose being to turn the firm liability into a contract liability, the whole transaction was held to be fraudulent. Sawyer *v.* Hoag, 17 Wall. (U. S.) 610, 21 L. ed. 731, 9 Nat. Bankr. Reg. 145. See also Jenkins *v.* Armour, 6 Biss. (U. S.) 312, 13 Fed. Cas. No. 7,260, 8 Chic. Leg. N. 267, 22 Int. Rev. Rec. 169, 14 Nat. Bankr. Reg. 276; Scammon *v.* Kimball, 5 Biss. (U. S.) 431, 21 Fed. Cas. No. 12,435, 6 Am. L. T. Rep. 424, 4 Chic. Leg. N. 284, 2 Ins. L. J. 775, 18 Int. Rev. Rec. 118, 5 Leg. Gaz. (Pa.) 321, 8 Nat. Bankr. Reg. 337; Drake *v.* Rollo, 3 Biss. (U. S.) 273, 7 Fed. Cas. No. 4,066, 4 Chic. Leg. N. 284, 2 Ins. L. J. 935, 18 Int. Rev. Rec. 159, 4 Nat. Bankr. Reg. 689.

Where one owes an unpaid subscription to the capital stock of a corporation and has a claim against the same corporation, he cannot prove his claim in bankruptcy until he has fully paid his subscription to the capital stock. After the insolvency of the corporation he cannot set off his claim against his indebtedness. *In re* Wiener, etc., Shoe Co., 96 Fed. 949, 3 Am. Bankr. Rep. 200.

13. Munger *v.* Albany City Nat. Bank, 85 N. Y. 580.

Transactions with same persons constituting separate firms.— It has been held that where the same persons constitute separate firms doing business under different names, if a party has credit with one firm and an indebtedness with the other, the indebtedness due to the latter cannot be set off against the credit with the former, unless the party knew that both firms were composed of the same persons and the course of business between them showed that his transactions with each firm were considered as having a connection. Sparhawk *v.* Drexel, 22 Fed. Cas. No. 13,204, 12 Nat. Bankr. Reg. 450, 1 Wkly. Notes Cas. (Pa.) 560.

14. If property is intrusted with another to be applied for a specific purpose, with no intention of creating a debt, no credit is thereby given which can be set off. Libby *v.* Hopkins, 104 U. S. 303, 26 L. ed. 769.

Where securities have been deposited with one as collateral to a debt owing to him with the power of sale existing at the time of the bankruptcy, notwithstanding that there was a promise implied by law, if not express, to return the surplus, he is not prevented from holding the surplus and using it as a set-off, unless the property was intrusted to him for a particular purpose, inconsistent with such application of the surplus, so that to retain it would be a fraud or breach of trust. *Ex p.* Whiting, 2 Lowell (U. S.) 472, 29 Fed. Cas. No. 17,573, 14 Nat. Bankr. Reg. 307.

15. Payments in money on account.—*In re* Christensen, 101 Fed. 802, 4 Am. Bankr. Rep. 202.

Cash payments on account within four months prior to the filing of the petition against a bankrupt are not mutual debits and credits as contemplated by section 68*a* of the Bankruptcy Act, and the creditors cannot be permitted to have an accounting of all transactions between them and the bankrupt, both prior to and during such four months, and to have their claims allowed for the balance shown by such accounting. *In re* Ryan, 105 Fed. 760, 5 Am. Bankr. Rep. 396. See also McKey *v.* Lee, 105 Fed. 923, 45 C. C. A. 127, 5 Am. Bankr. Rep. 267.

16. Set-off of loans against deposits in bank.— *In re* Little, 110 Fed. 621, 6 Am. Bankr. Rep. 681 (where it was held that the amount of the bankrupt's credit in the bank at the time of filing his petition in bankruptcy may be set off against a debt due from him to the bank); *In re* Myers, 99 Fed. 691, 3 Am. Bankr. Rep. 760; *In re* Petrie, 5 Ben. (U. S.) 110, 19 Fed. Cas. No. 11,040, 7 Nat. Bankr. Reg. 332; *In re* Madison Bank, 5 Biss.

2. Purchase or Transfer of Claims Within Four Months Prior to Filing of Petition. A set-off or counter-claim cannot be allowed in favor of a debtor of the bankrupt which was purchased by, or transferred to, him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy.[17]

G. Sale of Property[18] **— 1. Duty of Trustee.** It is made the duty of the trustee to reduce to money the property of the estate under the direction of the court.[19]

2. Approval of Court. Real and personal property must, when practicable, be sold, subject to the approval of the court; it must not be sold otherwise than subject to such approval for less than seventy-five per centum of its appraised value.[20]

3. How Conducted. All sales shall be by public auction, unless otherwise ordered by the court.[21]

(U. S.) 515, 2 Fed. Cas. No. 890, 9 Nat. Bankr. Reg. 184.

17. Bankr. Act (1898), § 68*b* (2). Under the former Act it was provided that no set-off should be allowed in favor of a debtor of the bankrupt of a claim purchased by, or transferred to, him after the filing of the petition. Bankr. Act (1867), § 20.

This provision was evidently inserted for the purpose of preventing the purchase of outstanding claims against the bankrupt at a discount and offsetting them against the amount due by the purchaser to the bankrupt. There must be an intent to so use the claims purchased in order to prevent their use as offsets. Collier Bankr. (3d ed.) 448.

18. See, generally, Judicial Sales.

Order in nature of writ of assistance.— Where the homestead of the bankrupt has been sold, pursuant to an order of the bankruptcy court, to satisfy a debt secured upon it by a deed of trust or mortgage, such court has jurisdiction to order the bankrupt to deliver up possession of the property to the purchaser. *In re* Betts, 4 Dill. (U. S.) 93, 3 Fed. Cas. No. 1,371, 15 Nat. Bankr. Reg. 536, 7 Reporter 522, 4 Cent. L. J. 558, 24 Pittsb. L. J. (Pa.) 195. See, generally, Assistance, Writ of, 4 Cyc. 289.

19. Bankr. Act (1898), § 47*a* (2). See also *supra*, XII, D, 3; XVIII, A.

20. Bankr. Act (1898), § 70*b*.

As to the appraisal of property see *supra*, XIII.

Discretion as to approval.— Where a creditor of the bankrupt was secured both by a mortgage of personalty and a mortgage of realty, and there was some doubt as to the property covered by the chattel mortgage, and the referee ordered the trustee to sell the personal property free of encumbrances, which was done, for a price found to be its fair cash value, though this was less than the amount of the mortgage debt, it was held that the referee's approval of the sale thus made was within the fair exercise of his discretion. *In re* Sanborn, 96 Fed. 551, 3 Am. Bankr. Rep. 54.

Effect of want of approval.— Where a court of bankruptcy ordered an assignee to sell real estate at public sale, without a direction that the sale be reported to the court, a purchaser at such sale acquired a good title though the sale was not reported for approval. James *v.* Koy, (Tex. Civ. App. 1900) 59 S. W. 295.

When court will not approve of sale.— Although a court of bankruptcy may sell a bankrupt's real estate discharged of all liens the sale should not be ordered unless the court is satisfied that the interests of general creditors would thus be advanced, and that the interests of the lien creditors would not be injuriously affected. *In re* Shaeffer, 105 Fed. 352, 5 Am. Bankr. Rep. 248; *In re* Styer, 98 Fed. 290, 3 Am. Bankr. Rep. 424.

When sale will not be set aside for inadequacy of price.— A sale which has been regularly and fairly made by the trustee in bankruptcy will not be set aside, nor will the court refuse to confirm it upon objections or exceptions that the price received was inadequate and when the objecting or excepting party is a creditor who was present and who was a bidder at the sale, even though at the time of objecting he offers to bid slightly more. *In re* Thompson, 2 Am. Bankr. Rep. 216.

21. U. S. Supreme Ct. Bankr. G. O. No. 18, par. 1.

Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specific portion of the bankrupt estate at private sale; in such case he shall keep an account of each article sold, the price sold for, and to whom sold; which account he shall file at once with the referee. U. S. Supreme Ct. Bankr. G. O. No. 18, par. 2.

For form of petition for sale by auction of real estate see U. S. Supreme Ct. Bankr. Forms, No. 42; 89 Fed. xlix.

Form of order for sale by auction of real estate is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 42; 89 Fed. xlix.

Form of petition for private sale is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 45; 89 Fed. li.

Form of order for private sale is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 45; 89 Fed. li.

Considered a judicial sale.— A sale and conveyance by a district court in bankruptcy

4. When Property Is Encumbered. The trustee is not required to take charge of or sell any portion of the estate that is so heavily encumbered with valid liens that nothing can be realized therefrom for the unsecured creditors.[22] The power to order the sale of encumbered property is discretionary and should not be exercised where it appears that the liens are valid and exceed in amount the value of the property encumbered by them.[23] The court, including the referee, may authorize, under proper circumstances, the sale of property free and clear from mortgages or other liens, and preserve such liens by transferring them to the funds which are the proceeds of the sale.[24]

proceedings is a judicial sale, and therefore valid, though the land is held adversely. Carlisle *v.* Cassady, 20 Ky. L. Rep. 562, 46 S. W. 490.

Place of sale.— A statute providing that lands taken in execution shall be sold in the county where the land is situated has no application to a proceeding in bankruptcy in a federal court, and an assignee in bankruptcy may conduct a sale of land in a county other than that in which the land is situated. James *v.* Koy, (Tex. Civ. App. 1900) 59 S. W. 295.

Time of sale.— Where an assignee in bankruptcy was authorized to sell the property acquired under such proceedings, the fact that he did not sell the same until six years from the filing of the petition in bankruptcy had expired did not invalidate the conveyance. Potter *v.* Martin, 122 Mich. 542, 81 N. W. 424.

Validity presumed, when.— After the lapse of many years, during which all the parties in interest have acquiesced in a sale of land made in a bankruptcy proceeding, the sale will not be treated as void in a collateral proceeding in the state court; the presumption being that the assignee did his duty, and paid out the proceeds of sale in the bankruptcy case. Buckler *v.* Rogers, 21 Ky. L. Rep. 1265, 54 S. W. 848, 53 S. W. 529.

22. Sessions *v.* Romadka, 145 U. S. 29, 12 S. Ct. 799, 36 L. ed. 609; Sparhawk *v.* Yerkes, 142 U. S. 1, 12 S. Ct. 104, 35 L. ed. 915; Glenny *v.* Langdon, 98 U. S. 20, 25 L. ed. 43. See also *supra*, XVI, B.

Redemption of property.—Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee. U. S. Supreme Ct. Bankr. G. O. No. xxviii.

For forms of petition and order for redemption of property from lien see U. S. Supreme Ct. Bankr. Forms, No. 43; 89 Fed. xlix.

23. Power to order sale discretionary.— *In re* Cogley, 107 Fed. 73, 5 Am. Bankr. Rep. 731. It is not a question of jurisdiction or of right, but of discretion. The fact which determines the exercise of this discretion is whether or not the general creditors of the bankrupt have any interest to be promoted by it. If it appears to the court that the liens are valid and that they exceed in value the real estate encumbered by them, there can be no reason for the exercise of the powers of the bankruptcy court. *In re* Dillard, 2 Hughes (U. S.) 190, 7 Fed. Cas. No. 3,912, 6 Am. L. T. Rep. 490, 9 Nat. Bankr. Reg. 8, 21 Pittsb. Leg. J. (Pa.) 82.

Form of petition for sale subject to lien is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 44; 89 Fed. li.

Form of order for sale subject to lien is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 44; 89 Fed. li.

24. Sale free from liens.—*In re* Matthews, 109 Fed. 603, 6 Am. Bankr. Rep. 96; *In re* Barber, 97 Fed. 547, 3 Am. Bankr. Rep. 306; Southern L. & T. Co. *v.* Benbow, 96 Fed. 514, 3 Am. Bankr. Rep. 9; *In re* Pittelkow, 92 Fed. 901, 1 Am. Bankr. Rep. 472; *In re* Worland, 92 Fed. 893, 1 Am. Bankr. Rep. 450. Under the Act of 1867 the cases were uniformly in favor of the proposition stated in the text. Factors', etc., Ins. Co. *v.* Murphy, 111 U. S. 738, 4 S. Ct. 679, 28 L. ed. 582; Ray *v.* Norseworthy, 23 Wall. (U. S.) 128, 23 L. ed. 116; *In re* Kahley, 2 Biss. (U. S.) 383, 14 Fed. Cas. No. 7,593, 4 Nat. Bankr. Reg. 378; *In re* Kirtland, 10 Blatchf. (U. S.) 515, 14 Fed. Cas. No. 7,851; Foster *v.* Ames, 1 Lowell (U. S.) 313, 9 Fed. Cas. No. 4,965, 2 Nat. Bankr. Reg. 455; Sutherland *v.* Lake Superior Ship Canal, etc., Co., 23 Fed. Cas. No. 13,643, 1 Centr. L. J. 127, 9 Nat. Bankr. Reg. 298.

But the court will not order a trustee to sell the bankrupt's real property free of liens, unless satisfied that the interests of the general creditors will be advanced thereby, and that the interests of creditors holding liens on such property will not be injuriously affected. *In re* Styer, 98 Fed. 290, 3 Am. Bankr. Rep. 424.

Interests of mortgagees and creditors to be considered.— Upon a hearing of an application for an order of sale of mortgaged property free from encumbrances, it is the duty of the court to consider the interests of

5. When Property Is Perishable. Upon petition by a bankrupt, creditor, receiver, or trustee setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated, and that the sale is required in the interests of the estate, may order the same to be sold with or without notice to the creditors, and the proceeds to be deposited in court.[25]

6. Wife's Dower, How Affected. A sale by the trustee of real property does not bar the wife's right of claim of dower.[26]

H. Distribution of Assets — 1. Priority of Payment of Debts — a. Taxes. The court must order the trustee to pay all taxes legally due and owing before the bankruptcy to the United States, state, county, district, or municipality, in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.[27]

mortgagees and other secured creditors as well as those of general creditors; and unless it is apparent (1) that the mortgaged premises in the given case will probably realize upon a sale an amount substantially in excess of the mortgage; and (2) that there are no complications by dower rights, conveyances, or other conditions which require foreclosure upon the mortgage, the power to proceed summarily by sale including the interest of the mortgagee, should not be exercised. *In re* Pittelkow, 92 Fed. 901, 1 Am. Bankr. Rep. 472. See also *In re* Barber, 97 Fed. 547, 3 Am. Bankr. Rep. 306.

Payment of expenses.— Where the mortgaged property has been sold by the trustee in bankruptcy under an order of the district court the expenses of the sale, including advertisement, appraisement, if appraisement was required by law, revenue stamps, and the compensation of the referee, not exceeding that of a master in chancery if the sale had been made by him under a decree of the state court, should be paid out of the proceeds of the sale; but the attorneys, the clerk, and the marshal should not be paid for services not directly connected with the sale. *In re* Utt, 105 Fed. 754, 45 C. C. A. 32, 5 Am. Bankr. Rep. 383.

That the referee, sitting as a court of bankruptcy, has power to order and approve a sale free of encumbrances of property in the possession of the trustee on notice to the encumbrancer seems to be clear. So held under similar provisions in this respect in the Act of 1841. Ray *v.* Norseworthy, 23 Wall. (U. S.) 128, 23 L. ed. 116; Houston *v.* New Orleans City Bank, 6 How. (U. S.) 486, 12 L. ed. 526; *Ex p.* New Orleans City Bank, 3 How. (U. S.) 292, 11 L. ed. 603. The same conclusion was reached on the corresponding provision of the Act of 1867. Ray *v.* Norseworthy, 23 Wall. (U. S.) 128, 23 L. ed. 116. Such a sale will not be set aside where it would be necessary to gather back numerous articles and animals of small and changeable value and to return the prices paid to purchasers, and would give to the mortgagee the right only to have them sold again in the same way. *In re* Sanborn, 96 Fed. 551, 3 Am. Bankr. Rep. 54.

25. U. S. Supreme Ct. Bankr. G. O. No. 18, par. 3.

Form of petition for sale of perishable property is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 46; 89 Fed. li.

Form of order for sale of perishable property is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 46; 89 Fed. lii.

When order of sale will be made.— In *In re* T. L. Kelly Dry-Goods Co., 102 Fed. 747, 749, 4 Am. Bankr. Rep. 528, the court said: "It has been the uniform practice of this court, under the act, to make no order of sale until after adjudication of bankruptcy; and, unless the property is of such nature that immediate sale is necessary to preserve its value, such rule will be maintained. Whether the facts stated justified a departure in this instance — consent appearing on the part of the bankrupt and other creditors — is not deemed material for present purposes, as a fair sum was realized, and no showing is presented of injurious effect upon any interests."

26. Porter *v.* Lazear, 109 U. S. 84, 3 S. Ct. 58, 27 L. ed. 865. In *In re* Shaeffer, 105 Fed. 352, 5 Am. Bankr. Rep. 248, the court said: "Even if the reasoning of the decision in Porter *v.* Lazear, which was made under the act of 1867, should be regarded as inapplicable now,— a position to which I do not assent,— section 8 of the act of 1898 expressly saves the wife's inchoate right of dower, and such a provision was not found in the preceding act."

27. Bankr. Act (1898), § 64*a*. Construing the section see *In re* Anson, 101 Fed. 698, 4 Am. Bankr. Rep. 231; *In re* Ott, 95 Fed. 274, 2 Am. Bankr. Rep. 637.

Discharge does not release bankrupt from the payment of taxes. Bankr. Act (1898), § 17*a* (1). See also *infra*, XIX, E, 5.

Payment of taxes on property sold.— The manifest intent of the Bankruptcy Act is that while the estate is in the hands of the trustee his custody shall not constitute a barrier to prevent the collection of taxes which would

b. Other Debts Which Have Priority. The debts to have priority, except as otherwise provided by the Act, and to be paid in full out of the bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to the filing of the petition;[28] (2) the filing fees paid by creditors in involuntary cases;[29] (3) the cost of administration,[30] including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States,[31] and one reasonable attorney's fee for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties prescribed by the Act, and to the bankrupt in voluntary cases, as the court may allow;[32] (4) wages due to workmen, clerks, or servants

be collectable under the law, if the property had remained in the possession and control of the bankrupt himself. But where the goods have been sold by the trustee and the vendees have resisted payment of the taxes because they accrued before the sale to them, it is the duty of the trustee to have the goods assessed at a fair valuation in his name and to pay the amount which can be legally assessed thereon. *In re* Conhaim, 100 Fed. 268, 4 Am. Bankr. Rep. 58.

Priority over secured creditors.—Taxes due and owing by the bankrupt at the time of the adjudication are a prior claim and must be paid before the secured creditors. Matter of Hilberg, 6 Am. Bankr. Rep. 714.

Taxes on exempt property.—The trustee in bankruptcy must pay taxes levied upon exempt property out of the general assets of the estate, although such taxes are a lien upon such exempt property. *In re* Tilden, 91 Fed. 500, 1 Am. Bankr. Rep. 300; *In re* Baker, 1 Am. Bankr. Rep. 526.

Taxes on mortgaged property.—Where real property is mortgaged for an amount which, including the taxes, would exceed the value of the property, and under a state statute the taxes are a prior secured lien upon such property, the trustee will not be ordered to pay such taxes, since the effect would be to give the mortgagee an additional advantage over the general creditors. *In re* Veitch, 101 Fed. 251, 4 Am. Bankr. Rep. 112. See also *In re* Hollenfeltz, 94 Fed. 629, 2 Am. Bankr. Rep. 499.

Taxes paid by remainderman.— Where taxes, chargeable upon the life-estate of the bankrupt and payable by his trustee, have been charged upon the remaindermen, and in effect paid by them, such remaindermen have an equitable claim upon the funds in the trustee's hands for reimbursement which should be recognized in bankruptcy. *In re* Force, 4 Am. Bankr. Rep. 114.

Priority of debts due the United States.— U. S. Rev. Stat. (1878), § 3466. See also *supra*, XI, A, 5.

28. Bankr. Act (1898), § 64*b*.

Cost of preserving estate.— The necessary costs of preserving the estate prior to the filing of the petition in bankruptcy are not entitled to priority (*In re* Allen, 96 Fed. 512, 3 Am. Bankr. Rep. 38); but after filing the petition the actual and necessary costs of preserving such estate are a prior claim (Bankr. Act (1898), § 64*b* (1)). So where an attaching creditor continues in possession of the property, after the dissolution of the attachment by an adjudication in bankruptcy, he may be given priority for the cost actually and necessarily incurred of preserving the estate after the adjudication and until the qualification of the trustee. *In re* Allen, 96 Fed. 512, 3 Am. Bankr. Rep. 38.

29. Bankr. Act (1898), § 64*b* (2).

These fees include the fee of ten dollars deposited with the clerk for the referee, the clerk's fee of ten dollars, and the fee of five dollars for the trustee. Bankr. Act (1898), §§ 40*a*, 48*a*, 52*a*. See *supra*, III, A, 2, d.

30. Bankr. Act (1898), § 64*b* (3). See also *In re* Neely, 108 Fed. 371, 5 Am. Bankr. Rep. 836; *In re* Beaver Coal Co., 107 Fed. 98, 5 Am. Bankr. Rep. 787; *In re* Utt, 105 Fed. 754, 45 C. C. A. 32, 5 Am. Bankr. Rep. 383; Stearns *v.* Flick, 103 Fed. 919, 4 Am. Bankr. Rep. 723; *In re* Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235; *In re* Lewis, 99 Fed. 935, 4 Am. Bankr. Rep. 51; *In re* Statts, 93 Fed. 438, 1 Am. Bankr. Rep. 641; *In re* Beck, 92 Fed. 889, 1 Am. Bankr. Rep. 535. *Compare In re* Sanderlin, 109 Fed. 857, 6 Am. Bankr. Rep. 384, holding that where a firm gives a mortgage on its property, and afterward is dissolved, one of the partners taking its assets and assuming its debts, and bankruptcy proceedings are then had against such partner, costs of sale should first be paid from the proceeds of the property, and the mortgage then be paid, instead of the mortgagee being charged a proportionate part thereof.

The costs of administration are a prior lien upon the assets of the bankrupt estate before there is any distribution thereof to creditors. *In re* Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235.

The expenses of a referee, including a reasonable allowance for clerk hire, are entitled to priority. *In re* Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235.

A stenographer may be employed at the expense of the estate which is being administered, but it has been held that a claim for his services should not be allowed for the benefit of general creditors at the expense of a claim for wages by laborers. *In re* Razinsky, 101 Fed. 229, 3 Am. Bankr. Rep. 830.

31. Bankr. Act (1898), § 64*b* (3). See also *supra*, III, D, 3, f.

32. Bankr. Act (1898), § 64*b* (3).

Attorney's fees.— *In re* Curtis, 100 Fed.

which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant;[33] and (5) debts owing to any person who, by the laws of the states or the United States, is entitled to priority.[34]

784, 41 C. C. A. 59, 4 Am. Bankr. Rep. 17. See also *In re* Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235; *In re* Dreeben, 101 Fed. 110, 4 Am. Bankr. Rep. 146; *In re* O'Connell, 98 Fed. 83, 3 Am. Bankr. Rep. 422; *In re* Burrus, 97 Fed. 926, 3 Am. Bankr. Rep. 296; *In re* Silverman, 97 Fed. 325, 3 Am. Bankr. Rep. 227; *In re* Carolina Cooperage Co., 96 Fed. 950, 3 Am. Bankr. Rep. 154; *In re* Woodard, 95 Fed. 955, 2 Am. Bankr. Rep. 692; *In re* Knight, 5 Am. Bankr. Rep. 560 note. The fact that a claim for an attorney's fee was not presented until after the first dividend had been declared does not destroy its priority of payment out of any funds on hand when the claim is properly proved and allowed. *In re* Scott, 96 Fed. 607, 2 Am. Bankr. Rep. 324.

33. Bankr. Act (1898), § 64*b* (4). Construing this section see *In re* Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235; *In re* Dreeben, 101 Fed. 110, 4 Am. Bankr. Rep. 146; *In re* Rouse, 91 Fed. 514, 1 Am. Bankr. Rep. 231.

Nature and extent of the priority.— It was not intended that the priority given to claims for wages should affect or impair the lien of a mortgage on real property. *In re* Frick, 1 Am. Bankr. Rep. 719. The priority given to such claims by subdivision 4 of section 64*b* of the Act is not enlarged by the subsequent subdivision of that section which recognizes the priority given to debts by state statutes. *In re* Rouse, 91 Fed. 96, 63 U. S. App. 570, 33 C. C. A. 356, 1 Am. Bankr. Rep. 234.

Priority of claims for wages provided for in the Act is independent of the provisions of state statutes making such claims specific liens upon property. *In re* Kerby-Dennis Co., 95 Fed. 116, 36 C. C. A. 677, 2 Am. Bankr. Rep. 402 [*affirming* 94 Fed. 818, 2 Am. Bankr. Rep. 218]. See also *In re* Shaw, 109 Fed. 782, 6 Am. Bankr. Rep. 501.

State liens of laborers on real property.— Under a state statute providing for a lien to laborers upon all the real property of the employer superior to certain other liens specified in such statute, it has been held that where a laborer's lien attached prior to the vesting of the bankrupt's estate in his trustee, its priority should be recognized in accordance with the state statute, notwithstanding the contrary provision contained in the Act. *In re* Laird, 109 Fed. 550, 48 C. C. A. 538, 6 Am. Bankr. Rep. 1. But see *In re* Rouse, 91 Fed. 96, 63 U. S. App. 570, 33 C. C. A. 356, 1 Am. Bankr. Rep. 234, which apparently holds that the priority of claims for laborers for wages is to be determined by Bankr. Act (1898), § 64*b* (4), regardless of the fact that under state statutes a general lien is created in favor of laborers for wages earned at any time prior to the cessation of business by the employer.

Who is a wage-earner or workman.— A wage-earner is defined as meaning an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand and five hundred dollars per year. Bankr. Act (1898), § 1 (27), *supra*, note 8, p. 238. But it would seem that the definition of wage-earner as contained in the Bankruptcy Act is not controlling in determining what claims are entitled to priority under the provisions of the statute giving priority to a certain extent to wages due to workmen, clerks, or servants. If it was intended that such definition should control congress would doubtless have used the word "wage-earner" in section 64 instead of the language actually employed. *In re* Scanlan, 97 Fed. 26, 3 Am. Bankr. Rep. 202. A person working for a commission on sales made by him is not a wage-earner. *In re* Mayer, 101 Fed. 227, 4 Am. Bankr. Rep. 119. A traveling salesman is not a workman, clerk, or servant and is not entitled to priority of payment (*In re* Greenewald, 99 Fed. 705, 3 Am. Bankr. Rep. 696; *In re* Scanlan, 97 Fed. 26, 3 Am. Bankr. Rep. 202 [but see *contra*, *In re* Lawler, 110 Fed. 135, 6 Am. Bankr. Rep. 184]); but a salesman or clerk who sells at retail at a store is entitled to such priority (*In re* Flick, 105 Fed. 503, 5 Am. Bankr. Rep. 465; *In re* Greenewald, 99 Fed. 705, 3 Am. Bankr. Rep. 696). The term "workman" does not include a person who performs labor and furnishes material under an express contract, where the claim is based upon the use of the machinery, factory, and employees of the alleged workman. *In re* Rose, 1 Am. Bankr. Rep. 68. The president and officers of a corporation are not servants who are entitled to priority. *In re* Carolina Cooperage Co., 96 Fed. 950, 3 Am. Bankr. Rep. 154; *In re* Grubbs-Wiley Grocery Co., 96 Fed. 183, 2 Am. Bankr. Rep. 442.

Wages to have priority must be due to the wage-earner at the time the proceedings in bankruptcy are instituted, and if an assignment of such wages is made prior to the filing of the petition the assignees are not entitled to such priority. *In re* Westlund, 99 Fed. 399, 3 Am. Bankr. Rep. 646.

When assignment made after filing of petition.— Where an assignment of a claim for wages due is made after the filing of the petition it is entitled to priority to the same extent as though no assignment had been made. *In re* Campbell, 102 Fed. 686, 4 Am. Bankr. Rep. 535. See also *In re* Brown, 4 Ben. (U. S.) 142, 4 Fed. Cas. No. 1,974, 3 Nat. Bankr. Reg. 720.

34. Bankr. Act (1898), § 64*b*. See also *In re* Oconee Milling Co., 109 Fed. 866, 48 C. C. A. 703, 6 Am. Bankr. Rep. 475; *In re* Wood, 95 Fed. 946, 2 Am. Bankr. Rep. 695; *In re* Wright, 95 Fed. 807, 2 Am. Bankr. Rep. 592.

c. Upon Confirmation of Composition or Revocation of Discharge. In the event of the confirmation of a composition being set aside or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.[35]

2. Dividends — a. Definition. The word "dividend" is a business term applied to the division among stock-holders of a fund arising from profits, or to the division among creditors of an insolvent of the fund arising from the assets of the insolvent's estate.[36]

b. Declaration and Payment — (I) *In General.* Referees must declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable.[37] It is the duty of the trustee, within ten days after they are declared by the referees, to pay dividends to the persons entitled thereto.[38]

(II) *On What Claims Declared.* Dividends of an equal per centum must be declared and paid on all allowed claims, except such as have priority and are secured.[39]

(III) *When and How Declared.* The first dividend must be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have

It was the intention of congress to recognize by this provision all liens created under the laws of the state, and to leave them precisely as it found them. *In re* Falls City Shirt Mfg. Co., 98 Fed. 592, 3 Am. Bankr. Rep. 437; *In re* Byrne, 97 Fed. 762, 3 Am. Bankr. Rep. 268.

Claims of counties which are provable against the bankrupt and are entitled to priority under a state statute are also entitled to priority in bankruptcy. *In re* Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496.

Priority for rents due.— Under the laws of many of the states a landlord is entitled to priority for rent due out of the funds arising from the sale of the tenant's property. The lien thus created is entitled to recognition. *In re* Byrne, 97 Fed. 762, 3 Am. Bankr. Rep. 268; *In re* Goldstein, 2 Am. Bankr. Rep. 603; *In re* Gerson, 2 Am. Bankr. Rep. 170. In *In re* Jefferson, 93 Fed. 948, 2 Am. Bankr. Rep. 206, it was held that a state statute which provides that in cases where the tenant's property on the premises is levied upon under an execution or attachment a year's rent to accrue shall be paid out of the proceeds as a prior claim is not applicable to cases in bankruptcy.

As to provability of claims for rent to accrue see *supra*, XI, A, 10.

Priority of sheriff's fees under a Massachusetts statute provided for in insolvency proceedings will be recognized and enforced in courts of bankruptcy by virtue of Bankr. Act (1898), § 64*b*. *In re* Lewis, 99 Fed. 935. 4 Am. Bankr. Rep. 51. But see as to sheriff's fees on attachment, where the lien of the judgment is subsequently destroyed by bankruptcy, *In re* Daniels, 110 Fed. 745, 6 Am. Bankr. Rep. 699; *In re* Beaver Coal Co., 110 Fed. 630, 6 Am. Bankr. Rep. 404.

35. Bankr. Act (1898), § 64*c*.

36. **Apportionment of dividends.**— Dividends upon profits may be apportioned at one rate to the holders of preferred stock, and at another rate to the holders of common stock. So, in insolvency, a creditor having priority may be paid in full, yet such payment is just as certainly his dividend or share of the fund as is the small percentage on his claim which the general creditor may receive from the same fund. A dividend in bankruptcy is a parcel of the fund arising from the assets of the estate rightfully allotted to a creditor entitled to share in the fund, whether in the same proportion with the other creditors or in different proportion. *In re* Barber, 97 Fed. 547, 3 Am. Bankr. Rep. 306. But see *In re* Fielding, 96 Fed. 800, 3 Am. Bankr. Rep. 135; *In re* Ft. Wayne Electric Corp., 94 Fed. 103, 1 Am. Bankr. Rep. 706; *In re* Sabine, 1 Am. Bankr. Rep. 322. *Compare*, generally, as to dividends, Corporations.

37. **Referee must declare.**— Bankr. Act (1898), § 39*a* (1). See also *supra*, III, D, 4, b.

For form of dividend sheets see U. S. Supreme Ct. Bankr. Forms, No. 40; 89 Fed. xlviii.

The referee is entitled to commissions on dividends paid. Bankr. Act (1898), § 40*a*; and *supra*, III, D, 6.

38. Bankr. Act (1898), § 47*a* (9). See also *supra*, XII, D, 9.

Trustees are entitled to commission on dividends paid. Bankr. Act (1898), § 48; and *supra*, XII, G.

39. Bankr. Act (1898), § 65*a*.

not been, but probably will be allowed, equals five per centum or more of such allowed claims. Dividends subsequent to the first must be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order.[40]

(IV) *Notice to Creditors.* Creditors must have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of the declaration and time of payment of dividends.[41]

(V) *Effect of Adjudication Without the United States.* Whenever a person has been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States are first paid a dividend equal to that received in the court without the United States by other creditors, before creditors who have received a dividend in such court can be paid any amounts.[42]

(VI) *Effect of Allowance of Claims Subsequent to Declaration.* The rights of creditors who have received dividends, or in whose favor final dividends have been declared, are not affected by the proof and allowance of claims subsequent to the date of such payment or declaration of dividends; but the creditors proving and securing the allowance of such claims must be paid dividends equal in amount to those already received by the other creditors, if the estate equals so much before such other creditors are paid any further dividends.[43]

(VII) *No Greater Amount to Be Collected.* A claimant is not entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of the Act.[44]

40. Bankr. Act (1898), § 65*b*.

41. Bankr. Act (1898), § 58*a* (5).

Form of notice of dividend is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 41; 89 Fed. xlviii.

Form of creditor's letter to trustee for delivery of dividend is prescribed. U. S. Supreme Ct. Bankr. Forms, No. 41; 89 Fed. xlix.

42. Bankr. Act (1898), § 65*d*.

43. Bankr. Act (1898), § 65*c*. Under this section it has been held that where the holder of a note made by a partnership, and indorsed by one of the partners, both maker and indorser having been adjudicated bankrupts, proves his claim against the partnership estate after a dividend has been declared and paid to other creditors, his right to a preference in future dividends cannot be considered equivalent to a dividend actually declared in his favor, or to an actual part payment of his note by the maker, and he is entitled to prove his claim against the estate of the indorser for the full amount of the note. *In re* Swift, 106 Fed. 65, 5 Am. Bankr. Rep. 415.

Holding back dividends.— Claims enjoying the first dividend are not allowed to share in the second distribution until those that were credited with no part of the first dividend shall be paid a sum equal in amount to that received by other creditors. The holding back of any amount by the referee from distribution gives claimants whose debts are not properly proven no lien of any kind upon such amount. In declaring the first dividend the referee should withhold from distribution sufficient funds to cover all expenses of administration and priorities. He is required to hold back only sufficient funds to cover claims that will probably be allowed. This includes only those claims as to which he has information such as justifies him in the conclusion that they will be allowed when presented. *In re* Scott, 96 Fed. 607, 2 Am. Bankr. Rep. 324. Creditors who have proved their claims promptly should not be delayed nor prejudiced by the negligence of other creditors. The final settlement or closing of an estate in bankruptcy cannot be delayed when it is ready for the final settlement or closing thereof, and other creditors cannot be kept out of the money which is due them upon their claims, in order to furnish a negligent creditor a further opportunity for the proof and allowance of his claim after all the debts of the estate have been converted into money and are ready for distribution. *In re* Stein, 94 Fed. 124, 1 Am. Bankr. Rep. 662.

44. Bankr. Act (1898), § 65*e*.

Distribution not in accordance with the Act.— An order entered by consent of all known creditors in proceedings against an insolvent corporation for the settlement of the estate and distribution of the proceeds as therein provided, but not in accordance with any express provision of the Bankrupt Act, must be held subject to the rights of any unknown creditors who may appear within the time given by law and present their claims. *In re* Lockwood, 104 Fed. 794, 4 Am. Bankr. Rep. 731. Again, where a trustee in bank-

(VIII) *Upon Reconsideration and Rejection of Claim.* Whenever a claim has been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportionate part thereof if rejected only in part.[45]

(IX) *Unclaimed Dividends.* Dividends which remain unclaimed for six months after the final dividend has been declared must be paid by the trustee into court.[46] Dividends remaining unclaimed for one year must, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance must be paid to the bankrupt: *Provided*, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.[47]

I. Expenses of Administration. The actual and necessary expenses incurred by officers in the administration of estates must, except where otherwise provided for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved they must be paid or allowed out of the estates in which they were incurred.[48]

ruptcy has paid to a lien creditor of the bankrupt his distributive share of the estate, but without any warrant or order of the referee or the court so to do, and the court afterward determines that such creditor's attorney is entitled to a lien on the fund for his services in securing its allowance, the money must be regarded as still in the hands of the trustee, and he will be required to satisfy the claim of the attorney. *In re* Rude, 101 Fed. 805, 4 Am. Bankr. Rep. 319.

45. Bankr. Act (1898), § 57*l*.

As to reconsideration of allowance of claims and the reallowance or rejection thereof see *supra*, XI, F.

46. Bankr. Act (1898), § 66*a*.

47. Bankr. Act (1898), § 66*b*.

48. Bankr. Act (1898), § 62. And see *In re* Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235; *In re* J. W. Harrison Mercantile Co., 95 Fed. 123, 2 Am. Bankr. Rep. 419.

As to priority of payment of costs, expenses, and fees see *supra*, XVIII, H, 1, b.

General rule as to charge for services impracticable.— In *In re* Noyes, 18 Fed. Cas. No. 10,371, 6 Nat. Bankr. Reg. 277, it was said: "It would be difficult, and I think impracticable, to prescribe any general rule defining the circumstances under which, and extent to which, an assignee is at liberty to charge the assets of the estate in his hands for professional and clerical services in the execution of his trust. This must be left to be decided in each individual case according to its peculiar exigencies."

Employment of counsel.— The trustee is entitled to counsel when necessary for the proper discharge of his duties as such trustee, and the reasonable expenses incurred by him for such a purpose may be allowed as a charge against the estate. He must exercise a reasonable judgment as to the necessity for securing such advice and assistance. *In re* Smith, 108 Fed. 39, 5 Am. Bankr. Rep. 559; *In re* Salaberry, 107 Fed. 95, 5 Am. Bankr. Rep. 847; *In re* Abram, 103 Fed. 272, 4 Am. Bankr. Rep. 575; *In re* Little River Lumber Co., 101 Fed. 558, 3 Am. Bankr. Rep. 682; *In re* Curtis, 100 Fed. 784, 41 C. C. A. 59, 4 Am. Bankr. Rep. 17; *In re* Carolina Cooperage Co., 96 Fed. 950, 3 Am. Bankr. Rep. 154; *In re* Stotts, 93 Fed. 438, 1 Am. Bankr. Rep. 641. See also *Ex p.* Whitecomb, 2 Lowell (U. S.) 523, 29 Fed. Cas. No. 17,529, 15 Nat. Bankr. Reg. 92; *In re* Davenport, 7 Fed. Cas. No. 3,587, 2 Am. L. T. 136, 3 Nat. Bankr. Reg. 77. For analogous decisions under former acts see 6 Cent. Dig. tit. "Bankruptcy," § 872 *et seq.*

Compare In re Roche, 101 Fed. 956, 42 C. C. A. 115, 4 Am. Bankr. Rep. 369, holding that where a mortgage contains an agreement for the payment of an attorney's fee of ten per cent of the amount of the debt, if the mortgagee should elect or it should become necessary to foreclose the mortgage by suit or proceedings in court, and the mortgagor becomes bankrupt, and the creditor proves his claim in the bankruptcy proceedings as a secured debt, and the property covered is sold by the trustee in bankruptcy at private sale under order of the court, such attorney's fee cannot be allowed and paid to the creditor out of the proceeds of sale, in addition to the principal and interest of the debt; the same not having become due and payable according to the contract made by the parties.

Expenditures for rent.— A trustee in bankruptcy may continue to occupy and use, for the benefit of the estate, premises which the bankrupt held under a lease at the time of his adjudication in bankruptcy, and the landlord will be entitled to compensation for such use of the premises by the trustee; the amount thereof being chargeable as part of the expenses of administering the estate. Bray *v.* Cobb, 100 Fed. 270, 3 Am. Bankr. Rep. 788; *In re* Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730. See also *supra*, XI, A, 10.

Preservation of estate.— The necessary expenses incurred by the trustee in the preservation of the property belonging to the bankrupt estate may be legally charged to such estate. *In re* Scott, 99 Fed. 404, 3 Am.

XIX. DISCHARGE.

A. Right to Discharge. A bankrupt is entitled to a discharge as a matter of right,[1] provided he has not committed any of the acts presently considered.[2]

B. Application For Discharge — 1. Time of Application. Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in a court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within, but not after, the expiration of the next six months.[3]

2. Requisites of Petition. The petition of a bankrupt for a discharge must state concisely, in accordance with the provisions of the Act and the orders of the court, the proceedings in the case and the acts of the bankrupt.[4]

3. Notice to Creditors. Creditors must have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by creditors, unless they waive notice in writing, of all hearings upon applications for discharge.[5]

4. Hearing and Determination of Application. The judge must hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give such parties a reasonable opportunity to be fully heard, and investigate the merits of the application.[6] In

Bankr. Rep. 625; *In re* Gregg, 1 Hask. (U. S.) 173, 10 Fed. Cas. No. 5,796, 1 Am. L. T. Bankr. Rep. 298, 3 Nat. Bankr. Reg. 529.

Under Bankr. Act (1898), § 64b, the actual and necessary cost of preserving the estate subsequent to the filing of the petition must be paid in full out of the bankrupt estate.

1. *In re* Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38, 4 Am. Bankr. Rep. 468. See also Woodruff *v.* Cheeves, 105 Fed. 601, 44 C. C. A. 631, 5 Am. Bankr. Rep. 296.

The fact that a bankrupt is a non-resident of the district does not affect his right to a discharge. *In re* Goodale, 109 Fed. 783, 6 Am. Bankr. Rep. 493; *In re* Clisdell, 101 Fed. 246, 4 Am. Bankr. Rep. 95; *In re* Mason, 99 Fed. 256, 3 Am. Bankr. Rep. 599.

Right of corporation to discharge.— A corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits may be adjudged an involuntary bankrupt (Bankr. Act (1898), § 4*b*; and *supra*, IV, B, 2) and is therefore entitled to a discharge (*In re* Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38, 4 Am. Bankr. Rep. 468).

As to release of stock-holder's liability by discharge see *infra*, note 36, p. 397.

2. See *infra*, XIX, D.

3. Bankr. Act (1898), § 14*a*.

The Act of 1867, § 29 (U. S. Rev. Stat. (1878), § 5108), provided that "At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and before the final disposition of the cause, the bankrupt may apply to the court for a discharge from his debts."

Where the petition is filed later than twelve months after the adjudication it is necessary that sufficient cause for the delay be shown; otherwise the petition will be dismissed. *In re* Wolff, 100 Fed. 430, 4 Am. Bankr. Rep. 74.

4. U. S. Supreme Ct. Bankr. G. O. No. 31.

Filing petition.— The petition for a discharge should be filed with the clerk and not sent to the judge of the district court. *In re* Sykes, 106 Fed. 669, 6 Am. Bankr. Rep. 264. See also U. S. Supreme Ct. Bankr. G. O. No. 20, providing that proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

Form of the bankrupt's petition for a discharge is prescribed by U. S. Supreme Ct. Bankr. Forms, No. 57; 89 Fed. lvii.

5. Bankr. Act (1898), § 58*a* (2); *In re* Sykes, 106 Fed. 669, 6 Am. Bankr. Rep. 264.

Notice by publication to judgment creditors is insufficient to entitle a bankrupt to discharge, unless he shows that the addresses of such creditors cannot be ascertained after diligent search and inquiry. *In re* Dvorak, 107 Fed. 76, 6 Am. Bankr. Rep. 66.

A form has been prescribed for an order of notice in the nature of an order to show cause, attested by the clerk, with the seal of the court, and to be served by the clerk by mail upon all the known creditors of the bankrupt, addressed to them at their places of residence as stated in the schedules. Such order states the time and place of the hearing of the application, and requires a publication of a notice in a newspaper designated in such order. U. S. Supreme Ct. Bankr. Forms, No. 57. Such form should be observed and used, with such alterations as may be necessary to suit the circumstances of the particular case. U. S. Supreme Ct. Bankr. G. O. No. 38.

6. Bankr. Act (1898), § 14*b*.

Form of discharge of bankrupt is pre-

determining the application the court will consider the right of the bankrupt to his discharge and not the effect thereof.[7] Unless some creditor objects and specifies his grounds of objection[8] the prayer of the petition will be granted as of course.[9]

C. Opposition to Discharge — 1. WHO MAY OPPOSE DISCHARGE. Any party or parties in interest may appear and oppose the bankrupt's discharge.[10]

2. APPEARANCE OF CREDITOR. A creditor opposing the application of a bankrupt for his discharge must enter his appearance in opposition thereto on the day when the creditors are required to show cause why the discharge should not be granted.[11]

3. SPECIFICATION OF OBJECTIONS. A creditor opposing the application of a bankrupt for his discharge must also file a specification in writing of the ground of his opposition within ten days after the day when creditors are required to show cause, unless the time is enlarged by special order of the judge.[12] Such specifications must be clear, positive, and direct, and must distinctly allege one or more of the statutory grounds[13] for refusing a discharge.[14] No plead-

scribed. U. S. Supreme Ct. Bankr. Forms, No. 59; 89 Fed. lviii.

Reference.— Though applications for a discharge are to be heard and determined by the judge, such judge may refer the application, or any specific issue arising thereon, to a referee to ascertain and report the facts. U. S. Supreme Ct. Bankr. G. O. No. 12, par. 3; *In re* Logan, 102 Fed. 876, 4 Am. Bankr. Rep. 525; Fellows *v.* Freudenthal, 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490; *In re* McDuff, 101 Fed. 241, 41 C. C. A. 316, 4 Am. Bankr. Rep. 110. The authority of the referee is not limited to the taking and reporting of the evidence and ruling as to its admissibility. In addition to that, it is competent and desirable that he shall report findings and recommendations. *In re* Kaiser, 99 Fed. 689, 3 Am. Bankr. Rep. 767. Where the objections to a discharge are on the ground of concealment of assets the report of the referee as to the facts will not be set aside unless clearly erroneous. *In re* Lafleche, 109 Fed. 307, 6 Am. Bankr. Rep. 483. After two hearings before a referee and a third before the judge upon all the testimony offered, the request of the objecting creditor that the matter be sent back to the referee for new testimony will not be granted. *In re* Eaton, 110 Fed. 731, 6 Am. Bankr. Rep. 531.

7. *In re* Steed, 107 Fed. 682, 6 Am. Bankr. Rep. 73; *In re* Tinker, 99 Fed. 79, 3 Am. Bankr. Rep. 580; *In re* Mussey, 99 Fed. 71, 3 Am. Bankr. Rep. 592; *In re* Rhutassel, 96 Fed. 597, 2 Am. Bankr. Rep. 697; *In re* Blumberg, 94 Fed. 476, 1 Am. Bankr. Rep. 627; *In re* Thomas, 92 Fed. 912, 1 Am. Bankr. Rep. 515; *In re* Lieber, 3 Am. Bankr. Rep. 217.

The right to a discharge and the effect of a discharge are wholly distinct propositions. The time and place for the determination of the effect of a discharge is when the same is pleaded or relied upon by the debtor as a defense to the enforcement of a particular claim. *In re* Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38, 4 Am. Bankr. Rep. 468; *In re* Tinker, 99 Fed. 79, 3 Am. Bankr. Rep. 580; *In re* Mussey, 99 Fed. 71, 3 Am. Bankr. Rep. 592; *In re* Black, 97 Fed. 493, 4 Am. Bankr. Rep. 471 note; *In re* Rhutassel, 96 Fed. 597, 2 Am. Bankr. Rep. 697; *In re* Thomas, 92 Fed. 912, 1 Am. Bankr. Rep. 515; *In re* McCarty, 7 Am. Bankr. Rep. 40.

8. See *infra*, XIX, C, 3.

9. *In re* Logan, 102 Fed. 876, 4 Am. Bankr. Rep. 525; *In re* Holman, 92 Fed. 512, 1 Am. Bankr. Rep. 600. See also *supra*, XIX, A.

10. Bankr. Act (1898), § 14*b*.

The right to object to a discharge is not limited to creditors who have proved their claims. *In re* Frice, 96 Fed. 611, 2 Am. Bankr. Rep. 674.

11. U. S. Supreme Ct. Bankr. G. O. No. 32.

12. U. S. Supreme Ct. Bankr. G. O. No. 32.

The time within which the specifications are to be filed must be strictly complied with, and a failure to do so will only be excused when excellent reasons therefor are shown to the court. *In re* Clothier, 108 Fed. 199, 6 Am. Bankr. Rep. 203; *In re* Albrecht, 104 Fed. 974, 5 Am. Bankr. Rep. 223.

Filing nunc pro tunc.— The judge may, in his discretion, allow specifications to be filed *nunc pro tunc*. *In re* Frice, 96 Fed. 611, 2 Am. Bankr. Rep. 674.

13. See *infra*, XIX, D.

14. *In re* Steed, 107 Fed. 682, 6 Am. Bankr. Rep. 73; *In re* Mudd, 105 Fed. 348, 5 Am. Bankr. Rep. 242; *In re* Adams, 104 Fed. 72, 4 Am. Bankr. Rep. 696; *In re* McGurn, 102 Fed. 743, 4 Am. Bankr. Rep. 459; *In re* Quackenbush, 102 Fed. 282, 4 Am. Bankr. Rep. 274; *In re* Peacock, 101 Fed. 560, 4 Am. Bankr. Rep. 136; *In re* Kaiser, 99 Fed. 689, 3 Am. Bankr. Rep. 767; *In re* Cornell, 97 Fed. 29, 3 Am. Bankr. Rep. 172; *In re* Frice, 96 Fed. 611, 2 Am. Bankr. Rep. 674; *In re* Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; *In re* Hixon, 93 Fed. 440, 1 Am. Bankr. Rep. 610; *In re* Thomas, 92 Fed. 912, 1 Am. Bankr. Rep. 515; *In re* Holman, 92 Fed. 512, 1 Am. Bankr. Rep. 600; *In re* Wolfensohn, 5 Am. Bankr. Rep. 60; *In re* McNamara, 2 Am. Bankr. Rep. 566.

Amendments of specifications.— The court has power, even after the time in which specifications may be filed has expired, to allow an amendment of the specification. *In re* Pierce, 103 Fed. 64, 4 Am. Bankr. Rep. 554;

ing upon the part of the bankrupt in response to the specifications is necessary.[15]

4. Evidence — a. Burden of Proof. The burden of proving the necessary facts to constitute a ground for the refusal of the bankrupt's application for a discharge rests upon the creditors alleging such facts.[16]

b. Admissibility. Evidence will not be admitted in opposition to a discharge which does not tend to support the allegations contained in the specifications.[17]

c. Sufficiency. Proof beyond a reasonable doubt is not required to sustain specifications of opposition to a bankrupt's discharge; but the proof should be clear and satisfying where the commission of an offense punishable by imprisonment is charged.[18]

5. Costs. The district court has an inherent power to award costs against a creditor who files specifications against the discharge of a bankrupt and fails to substantiate them.[19]

In re Morgan, 101 Fed. 982, 4 Am. Bankr. Rep. 402; *In re* Price, 96 Fed. 611, 2 Am. Bankr. Rep. 674; *In re* Holman, 92 Fed. 512, 1 Am. Bankr. Rep. 600. When the creditors have long delayed the hearing of the application for a discharge by reason of their insufficient objections, it rests largely in the sound discretion of the court as to whether or not amended specifications shall be permitted. *In re* Mudd, 105 Fed. 348, 5 Am. Bankr. Rep. 242. Applications to amend should be made to the judge and not to the referee. *In re* Kaiser, 99 Fed. 689, 3 Am. Bankr. Rep. 769.

Examination of bankrupt.— The creditors may be allowed to examine the bankrupt concerning the mode of conducting his business, for the purpose of ascertaining whether there has been any such offense committed, or failure to keep books as would furnish a just ground for refusing a discharge. An application for such an examination should be granted before specifications are filed, if applied for on the return-day of the notice of the debtor's application for a discharge and no prior examination of that kind has been held. *In re* Price, 91 Fed. 635, 1 Am. Bankr. Rep. 419. See also *In re* Mellen, 97 Fed. 326, 3 Am. Bankr. Rep. 226.

The form of a specification in opposition to discharge is prescribed in U. S. Supreme Ct. Bankr. Forms, No. 58; 89 Fed. lviii.

15. *In re* Logan, 102 Fed. 876, 4 Am. Bankr. Rep. 525 [*criticizing* Loveland Bankr. § 281].

The fact that the bankrupt makes no response to the specifications in opposition to his discharge is not an admission on his part that the averments contained in such specifications are true. *In re* Logan, 102 Fed. 876, 4 Am. Bankr. Rep. 525.

16. Bauman *v.* Feist, 107 Fed. 83, 46 C. C. A. 157, 5 Am. Bankr. Rep. 703; *In re* Gaylord, 106 Fed. 833, 5 Am. Bankr. Rep. 410; *In re* Corn, 106 Fed. 143, 5 Am. Bankr. Rep. 478; *In re* Ferris, 105 Fed. 356, 5 Am. Bankr. Rep. 246; *In re* Bryant, 104 Fed. 789, 5 Am. Bankr. Rep. 114; *In re* Fitchard, 103 Fed. 742, 4 Am. Bankr. Rep. 609; *In re* Logan, 102 Fed. 876, 4 Am. Bankr. Rep. 525; *In re* McGurn, 102 Fed. 743, 4 Am. Bankr. Rep. 459; *In re* Shertzer, 99 Fed. 706, 3 Am. Bankr. Rep. 699; *In re* Wetmore, 99 Fed. 703, 3 Am. Bankr. Rep. 700; *In re* Wood, 98 Fed. 972, 3 Am. Bankr. Rep. 572; *In re* Phillips, 98 Fed. 844, 3 Am. Bankr. Rep. 542; *In re* Hirsch, 97 Fed. 571, 3 Am. Bankr. Rep. 344; *In re* Idzall, 96 Fed. 314, 2 Am. Bankr. Rep. 741; *In re* Hixon, 93 Fed. 440, 1 Am. Bankr. Rep. 610; *In re* Thomas, 92 Fed. 912, 1 Am. Bankr. Rep. 515; *In re* Holman, 92 Fed. 512, 1 Am. Bankr. Rep. 600; *In re* Boasberg, 1 Am. Bankr. Rep. 353.

17. **A specification of objections is a necessary prerequisite** to the introduction of any evidence by the objecting party. The referee should not disregard the specifications but should confine the evidence to the material facts alleged therein. *In re* Kaiser, 99 Fed. 689, 3 Am. Bankr. Rep. 767. See also *In re* Wolfensohn, 5 Am. Bankr. Rep. 60.

Evidence taken at creditors' meeting.— The testimony of witnesses other than the bankrupt taken at the first meeting of the creditors is inadmissible in support of the specifications of objection to the bankrupt's discharge. *In re* Wilcox, 109 Fed. 628, 48 C. C. A. 567, 6 Am. Bankr. Rep. 362. But testimony of third persons, taken in the course of bankruptcy proceedings, when the bankrupt is present in person or by counsel, and taking part in the examination, is admissible in support of specifications in opposition to his discharge, so far as the same is relevant. *In re* Cooke, 109 Fed. 631.

18. *In re* Steed, 107 Fed. 682, 6 Am. Bankr. Rep. 73; *In re* Gaylord, 106 Fed. 833, 5 Am. Bankr. Rep. 410; *In re* Bryant, 104 Fed. 789, 5 Am. Bankr. Rep. 114; *In re* Hirsch, 97 Fed. 571, 3 Am. Bankr. Rep. 344; *In re* Berner, 4 Am. Bankr. Rep. 383.

Where the charge is that the bankrupt has sworn falsely the strict rules applicable to the trial of the bankrupt under an indictment for perjury should not be applied in case of discharge proceedings; if the conscience of the court is satisfied by proper and sufficient evidence that the bankrupt is not entitled to receive a discharge it is sufficient ground for a refusal. *In re* Gross, 5 Am. Bankr. Rep. 271.

19. *In re* Wolpert, 1 Am. Bankr. Rep. 436. See the following cases arising under the Act of 1867: *In re* Holgate, 8 Ben. (U. S.) 355,

D. Grounds of Opposition — 1. In General. The only grounds upon which the court can refuse to discharge a bankrupt upon his application therefor are those prescribed in the Bankruptcy Act.[20] A discharge may, however, be withheld until it has been shown what has become of the bankrupt's property.[21]

2. Offenses Punishable by Imprisonment. The judge shall discharge the applicant unless he has committed an offense punishable by imprisonment.[22] A person is punishable by imprisonment upon conviction of the offense of having knowingly[23]

12 Fed. Cas. No. 6,601; *In re* George, 1 Lowell (U. S.) 494, 10 Fed. Cas. No. 5,326; *In re* Eidom, 8 Fed. Cas. No. 4,315, 3 Nat. Bankr. Reg. 160.

Power to tax costs.— Courts of bankruptcy have power to "tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy." Bankr. Act (1898), § 2 (18). The Act is silent as to costs so far as contested applications for discharge are concerned; costs only being allowed in case the respondent (the bankrupt) succeeds in dismissing a petition for his bankruptcy filed against him. Bankr. Act (1898), § 3*e*.

Costs of reference.— Where references were provoked by the bankrupt and costs were legitimately incurred for referee's compensation in conducting hearings before him of specifications of objections to the bankrupt's discharge these costs should be taxed to the losing party. Bragassa *v.* St. Louis Cycle, 107 Fed. 77, 46 C. C. A. 154, 5 Am. Bankr. Rep. 700. A docket-fee is not taxable. *In re* Gaylord, 5 Am. Bankr. Rep. 805.

Fees of referee.— The duty of the referee to ascertain the facts and report thereon is performed by him in the capacity of special master in chancery, and is independent of his duties as a referee in bankruptcy; a reasonable allowance may therefore be taxed for the referee's compensation outside of the compensation allowed him by the Bankruptcy Act. Fellows *v.* Freudenthal, 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490. But see *contra*, *In re* Troth, 104 Fed. 291, 4 Am. Bankr. Rep. 780.

As to compensation of referees, generally, see *supra*, III, D, 6.

20. Smith *v.* Keegan, 111 Fed. 157, 7 Am. Bankr. Rep. 4; *In re* McCarty, 111 Fed. 151, 7 Am. Bankr. Rep. 40; *In re* Frank, 107 Fed. 272, 6 Am. Bankr. Rep. 156; Strause *v.* Hooper, 105 Fed. 590, 5 Am. Bankr. Rep. 225; *In re* Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38, 4 Am. Bankr. Rep. 468; Fellows *v.* Freudenthal, 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490; *In re* Thomas, 92 Fed. 912, 1 Am. Bankr. Rep. 515. See also *supra*, XIX, A.

Only such grounds as are specified by the objecting creditors will be considered in opposition to the discharge of a bankrupt. *In re* Adams, 104 Fed. 72, 4 Am. Bankr. Rep. 696. See also *In re* Hixon, 93 Fed. 440, 1 Am. Bankr. Rep. 610; *In re* Thomas, 92 Fed. 912, 1 Am. Bankr. Rep. 515.

Reports to commercial agencies or creditors, though false and fraudulent, are not grounds for refusing a discharge. *In re* Steed, 107 Fed. 682, 6 Am. Bankr. Rep. 73.

The pendency of an application for the discharge of a bankrupt under the Bankruptcy Act of 1867 cannot be pleaded in bar of an application by the debtor for a discharge under the Act of 1898. *In re* Herrman, 102 Fed. 753, 4 Am. Bankr. Rep. 139 [*affirmed* in 106 Fed. 987, 46 C. C. A. 77].

Where a bankrupt has induced an opposing creditor to withdraw his opposition by a purchase of his claim, the bankrupt's discharge will be refused upon the presumption that one of the statutory grounds existed. *In re* Dietz, 97 Fed. 563, 3 Am. Bankr. Rep. 316; *In re* Steindler, 5 Am. Bankr. Rep. 63. See also Blasdel *v.* Fowle, 120 Mass. 447, 21 Am. Rep. 533; Bell *v.* Leggett, 7 N. Y. 176; Tuxbury *v.* Miller, 19 Johns. (N. Y.) 311; *In re* Douglass, 11 Fed. 403; *In re* Palmer, 2 Hughes (U. S.) 177, 18 Fed. Cas. No. 10,678, 14 Nat. Bankr. Reg. 437; *Ex p.* Briggs, 2 Lowell (U. S.) 389, 4 Fed. Cas. No. 1,868.

21. *In re* Walther, 95 Fed. 941, 2 Am. Bankr. Rep. 702. See also *In re* Steed, 107 Fed. 682, 6 Am. Bankr. Rep. 73.

Allotment of homestead.— Action upon a bankrupt's application for a discharge will be suspended until the reallotment of a homestead, it appearing that the property has increased in value beyond the amount allowed as exempt by the state law. *In re* McBryde, 99 Fed. 686, 3 Am. Bankr. Rep. 729. See also *In re* Woodruff, 96 Fed. 317.

22. Bankr. Act (1898), § 14*b* (1).

23. Intent is a necessary element of the offense. *In re* Conn, 108 Fed. 525, 6 Am. Bankr. Rep. 217; *In re* Quackenbush, 102 Fed. 282, 4 Am. Bankr. Rep. 274; *In re* Dews, 101 Fed. 549, 2 Am. Bankr. Rep. 483, 3 Am. Bankr. Rep. 691; *In re* Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; *In re* Cohn, 1 Am. Bankr. Rep. 655.

Concealment unavailing.— The fact that the fraudulent concealment has proved unavailing will not benefit the bankrupt; the trustee may recover the entire amount and still the discharge must be withheld. *In re* Quackenbush, 102 Fed. 282, 4 Am. Bankr. Rep. 274.

Conducting business in name of another.— Where, a long time prior to his bankruptcy, the bankrupt has failed in business and there are judgments outstanding against him, and he thereafter conducts his business in his own name as agent for another, or in the name of another, for the purpose of preventing his creditors from reaching the product

and fraudulently[24] concealed[25] while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy;[26] or made a false oath or account in, or in relation to, any proceeding in bankruptcy;[27]

of his industry and skill, there is no such concealment as will bar a discharge in bankruptcy. *In re* Adams, 104 Fed. 72, 4 Am. Bankr. Rep. 696; *In re* Fitchard, 103 Fed. 742, 4 Am. Bankr. Rep. 609; *In re* McGurn, 102 Fed. 743, 4 Am. Bankr. Rep. 459. See also *In re* Locks, 104 Fed. 783, 5 Am. Bankr. Rep. 136.

24. **A concealment of property** by the bankrupt will not bar his discharge unless it was knowingly and fraudulently made. *In re* Slingluff, 105 Fed. 502; *In re* Bryant, 104 Fed. 789, 5 Am. Bankr. Rep. 114; *In re* Pierce, 103 Fed. 64, 4 Am. Bankr. Rep. 554; *In re* Morrow, 97 Fed. 574, 3 Am. Bankr. Rep. 263. See also *In re* Wetmore, 99 Fed. 703, 3 Am. Bankr. Rep. 700.

25. The term "conceal" is defined in the Act. Bankr. Act (1898), § 1 (22), *supra*, note 8, p. 238.

Where the bankrupt mingles his own money with that of his wife in certain banks in such a way as to make it impossible to determine which of the deposits are his and which belong to his wife, it is a concealment if the facts are sufficient to show that it was done with intent to defraud his creditors and in contemplation of bankruptcy. Bragassa *v.* St. Louis Cycle, 107 Fed. 77, 46 C. C. A. 154, 5 Am. Bankr. Rep. 700. See also *In re* Walther, 95 Fed. 941, 2 Am. Bankr. Rep. 702.

Where the concealment is by an agent of the bankrupt who had entire charge and management of the business of such bankrupt, and it appears that the bankrupt endeavored to discover to the court the assets alleged to have been concealed, the fraud of the agent will not be imputed to the bankrupt, and he should receive his discharge. *In re* Meyers, 105 Fed. 353, 5 Am. Bankr. Rep. 4; *In re* Hyman, 97 Fed. 195, 3 Am. Bankr. Rep. 169.

26. **A failure to schedule property** or surrender it to the trustee is not *ipso facto* knowingly and fraudulently concealing the same. *In re* Goodale, 109 Fed. 783, 6 Am. Bankr. Rep. 493; *In re* Marsh, 109 Fed. 602, 6 Am. Bankr. Rep. 537; *In re* Howell, 105 Fed. 594, 5 Am. Bankr. Rep. 414 note; *In re* Adams, 104 Fed. 72, 4 Am. Bankr. Rep. 696; *In re* House, 103 Fed. 616, 4 Am. Bankr. Rep. 603; *In re* Dews, 101 Fed. 549, 2 Am. Bankr. Rep. 483, 3 Am. Bankr. Rep. 691; *In re* De Leeuw, 98 Fed. 408, 3 Am. Bankr. Rep. 418; *In re* Freund, 98 Fed. 81, 3 Am. Bankr. Rep. 418; *In re* Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715. See also *In re* Morrow, 97 Fed. 574, 3 Am. Bankr. Rep. 263. But if the evidence shows that the property omitted from the schedules was fraudulently transferred by the bankrupt it constitutes a concealment. *In re* Bemis, 104 Fed. 672, 5 Am. Bankr. Rep. 36; *In re* Bragasa, 103 Fed. 936, 4 Am. Bankr. Rep. 519; *In re* Hoffmann, 102 Fed. 979, 4 Am. Bankr. Rep. 331; *In re* Quackenbush, 102 Fed. 282, 4 Am. Bankr. Rep. 274; *In re* Mendelsohn, 102 Fed. 119, 4 Am. Bankr. Rep. 103; *In re* Welch, 100 Fed. 65, 3 Am. Bankr. Rep. 93; *In re* O'Gara, 97 Fed. 932, 3 Am. Bankr. Rep. 349; *In re* Skinner, 97 Fed. 190, 3 Am. Bankr. Rep. 163; *In re* Gross, 5 Am. Bankr. Rep. 271; *In re* Steindler, 5 Am. Bankr. Rep. 63; *In re* McNamara, 2 Am. Bankr. Rep. 566; *In re* Lowenstein, 2 Am. Bankr. Rep. 193. Assets in the hands of a receiver appointed and not discharged by a state court should be included in the bankrupt's schedule; if not included it constitutes a concealment. *In re* Lesser, 108 Fed. 205, 5 Am. Bankr. Rep. 330. But shares of stock pledged for the purchase-price thereof and not included in the schedules do not constitute a concealment in the absence of evidence of fraudulent intent. *In re* Conn, 108 Fed. 525, 6 Am. Bankr. Rep. 217. See also Fellows *v.* Freudenthal, 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490.

If the bankrupt fails to account for a large sum of money shown to have been in his possession immediately prior to his bankruptcy, and is unable to satisfactorily explain the discrepancy, the offense of concealment is established and his discharge should be refused. *In re* Grossman, 111 Fed. 507, 6 Am. Bankr. Rep. 510; *In re* Cashman, 103 Fed. 67, 4 Am. Bankr. Rep. 326; *In re* Morgan, 101 Fed. 982, 4 Am. Bankr. Rep. 402; *In re* Finkelstein, 101 Fed. 418, 3 Am. Bankr. Rep. 800; *In re* Deuell, 100 Fed. 633, 4 Am. Bankr. Rep. 60; *In re* O'Gara, 97 Fed. 932, 3 Am. Bankr. Rep. 349; *In re* Meyers, 96 Fed. 408, 2 Am. Bankr. Rep. 707.

27. *In re* Wilcox, 109 Fed. 628, 48 C. C. A. 567, 6 Am. Bankr. Rep. 362; *In re* Lesser, 108 Fed. 205, 5 Am. Bankr. Rep. 330; *In re* Becker, 106 Fed. 54, 5 Am. Bankr. Rep. 438; *In re* Lewin, 103 Fed. 852, 4 Am. Bankr. Rep. 636; *In re* Dews, 101 Fed. 549, 2 Am. Bankr. Rep. 483, 3 Am. Bankr. Rep. 691; *In re* Wood, 98 Fed. 972, 3 Am. Bankr. Rep. 572; *In re* Kamsler, 97 Fed. 194; *In re* Roy, 96 Fed. 400, 3 Am. Bankr. Rep. 37; *In re* Crenshaw, 95 Fed. 632, 2 Am. Bankr. Rep. 623.

A discharge cannot be withheld on account of the falsity of an oath unless it was made with a fraudulent intent. *In re* Eaton, 110 Fed. 731, 6 Am. Bankr. Rep. 531; *In re* Freund, 98 Fed. 81, 3 Am. Bankr. Rep. 418; *In re* Crenshaw, 95 Fed. 632, 2 Am. Bankr. Rep. 623. So where property is omitted from a schedule, the oath of the bankrupt thereto is not a false oath within the meaning of the Act unless made with a fraudulent motive. *In re* Bryant, 104 Fed. 789, 4 Am. Bankr. Rep. 114; *In re* De Leeuw, 98 Fed. 408, 3 Am. Bankr. Rep. 418; *In re* Roy, 96 Fed. 400, 3

presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat the act; or extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.[28]

3. Concealment, Destruction, or Failure to Keep Books of Account. Where the bankrupt has, with fraudulent intent [29] to conceal his true financial condition and in contemplation of bankruptcy,[30] destroyed, concealed, or failed to keep

Am. Bankr. Rep. 37; *In re* Lowenstein, 2 Am. Bankr. Rep. 193. And where property fraudulently transferred is omitted from the schedule an oath is not false, because the title of the property at the time of the filing of the petition was not in the bankrupt. *In re* De Leeuw, 98 Fed. 408, 3 Am. Bankr. Rep. 418; *In re* Schreck, 1 Am. Bankr. Rep. 366. See also *In re* Fitchard, 103 Fed. 742, 4 Am. Bankr. Rep. 609. But where property was purchased by a bankrupt in his wife's name and conveyances of personal property were made to his wife for the purpose of defrauding his creditors, and it appeared that at the time of filing his petition and schedule he was actually the owner of such property, his failure to include it in his schedules is a concealment, and in swearing to such schedules he made a false oath. *In re* Welch, 100 Fed. 65, 3 Am. Bankr. Rep. 93. So where property in which the bankrupt has an equitable interest is conveyed by the bankrupt to his wife, and he fails to include such interest in his schedule, and makes oath verifying such schedule, his discharge should be refused. *In re* Grossman, 111 Fed. 507, 6 Am. Bankr. Rep. 510; *In re* Gammon, 109 Fed. 312, 6 Am. Bankr. Rep. 482.

Amendment of schedules to include property omitted and offering to deliver such property is not a conclusive answer to an objection to a discharge that the bankrupt knowingly and fraudulently made a false oath by verifying the original schedules; but a prompt acknowledgment of the mistake, accompanied by a return of the property, are circumstances tending to show good faith. *In re* Eaton, 110 Fed. 731, 6 Am. Bankr. Rep. 531.

Upon examination.— The falsity of testimony given by a bankrupt upon an examination before the referee at the first meeting of his creditors has been held not to preclude his discharge. *In re* Logan, 102 Fed. 876, 4 Am. Bankr. Rep. 525; *In re* Marx, 102 Fed. 676, 4 Am. Bankr. Rep. 521. But see *contra*, *In re* Gaylord, 7 Am. Bankr. Rep. 1. See also *In re* Goodale, 109 Fed. 783, 6 Am. Bankr. Rep. 493.

28. Bankr. Act (1898), § 29*b*.

As to offenses, generally, see *infra*, XXI.

29. **The failure to keep books of account, or their destruction or concealment,** must be with a fraudulent intent to conceal the true financial condition of the bankrupt's estate. *In re* Lafleche, 109 Fed. 307, 6 Am. Bankr. Rep. 483; *In re* Shertzer, 99 Fed. 706, 3 Am. Bankr. Rep. 699; *In re* Carmichael, 96 Fed. 594, 2 Am. Bankr. Rep. 815; *In re* Boasberg, 1 Am. Bankr. Rep. 353. The mere failure of a bankrupt merchant or trader to keep such books will not, in every case, be of itself a sufficient ground to preclude his discharge. *In re* Spear, 103 Fed. 779, 4 Am. Bankr. Rep. 617; *In re* Idzall, 96 Fed. 314, 2 Am. Bankr. Rep. 741. See also *In re* Corn, 106 Fed. 143, 5 Am. Bankr. Rep. 478; *In re* Brice, 102 Fed. 114, 4 Am. Bankr. Rep. 355; *In re* Phillips, 98 Fed. 844, 3 Am. Bankr. Rep. 542. But the circumstances under which such a bankrupt failed to keep proper books of account, or incorrectly kept such books, may be such as to warrant the inference of a fraudulent intent. *In re* Feldstein, 108 Fed. 794, 6 Am. Bankr. Rep. 458.

The intentional and fraudulent failure on the part of an agent to keep books of account from which the true financial condition of the principal can be ascertained will not preclude the discharge of the principal, unless it appear that such failure was with the knowledge of the principal. *In re* Hyman, 97 Fed. 195, 3 Am. Bankr. Rep. 169. See also *In re* Schultz, 109 Fed. 264, 6 Am. Bankr. Rep. 91; *In re* Meyers, 105 Fed. 353, 5 Am. Bankr. Rep. 4.

30. **It is not sufficient** that a failure to keep books or a destruction or concealment be with a fraudulent intent to conceal the bankrupt's true financial condition; but it must also be in contemplation of bankruptcy. *In re* Marx, 102 Fed. 676, 4 Am. Bankr. Rep. 521. The bankruptcy in the debtor's contemplation must be not merely insolvency but bankruptcy under the Bankruptcy Act. The debtor must contemplate the commission of an act which, under the bankruptcy statute, constitutes an act of bankruptcy, or he must have in mind the filing of a petition in voluntary bankruptcy. *In re* Morgan, 101 Fed. 982, 4 Am. Bankr. Rep. 402; *In re* Shertzer, 99 Fed. 706, 3 Am. Bankr. Rep. 699; *In re* Carmichael, 96 Fed. 594, 2 Am. Bankr. Rep. 815; *In re* Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; *In re* Dews, 96 Fed. 181, 3 Am. Bankr. Rep. 691; *In re* Stark, 96 Fed. 88, 2 Am. Bankr. Rep. 785; *In re* Holman, 92 Fed. 512, 1 Am. Bankr. Rep. 600.

Under the Act of 1867 it was provided that

books of account or records from which his true condition might be ascertained[31] his discharge may be refused.[32]

a transfer made by a person "in contemplation of becoming bankrupt" would bar his discharge in bankruptcy. The courts frequently construed the expression and universally held that it meant in contemplation of committing an act of bankruptcy; that the act, the commission of which must be contemplated, is such an act as the statute declares to be an act of bankruptcy. Swan *v.* Littlefield, 4 Cush. (Mass.) 574; Caryl *v.* Russell, 13 N. Y. 194; North American F. Ins. Co. *v.* Graham, 5 Sandf. (N. Y.) 197; Matter of Rowell, 21 Vt. 620; *In re* Freeman, 4 Ben. (U. S.) 245, 9 Fed. Cas. No. 5,082, 4 Nat. Bankr. Reg. 64; *In re* Goldschmidt, 3 Ben. (U. S.) 379, 10 Fed. Cas. No. 5,520, 3 Nat. Bankr. Reg. 164; *In re* Black, 2 Ben. (U. S.) 196, 3 Fed. Cas. No. 1,457, 1 Am. L. T. Bankr. Rep. 39, 1 Nat. Bankr. Reg. 353; *In re* Wolfskill, 5 Sawy. (U. S.) 385, 30 Fed. Cas. No. 17,930; *In re* Pierson, 19 Fed. Cas. No. 11,153, 10 Nat. Bankr. Reg. 107; *In re* Lawson, 15 Fed. Cas. No. 8,150, 2 Nat. Bankr. Reg. 113. And see Buckingham *v.* McLean, 13 How. (U. S.) 151, 14 L. ed. 90, decided under the Act of 1841.

The failure to keep books must have been subsequent to the passage of the Bankruptcy Act, because otherwise it could not have been in contemplation of bankruptcy. *In re* Phillips, 98 Fed. 844, 3 Am. Bankr. Rep. 542; *In re* Carmichael, 96 Fed. 594, 2 Am. Bankr. Rep. 815; *In re* Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; *In re* Dews, 96 Fed. 181, 3 Am. Bankr. Rep. 691; *In re* Shorer, 96 Fed. 90, 2 Am. Bankr. Rep. 165; Sellers *v.* Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529; *In re* Holman, 92 Fed. 512, 1 Am. Bankr. Rep. 600; *In re* Lieber, 3 Am. Bankr. Rep. 217; *In re* McNamara, 2 Am. Bankr. Rep. 566; *In re* Cohn, 1 Am. Bankr. Rep. 655; *In re* Stark, 1 Am. Bankr. Rep. 180 [*affirmed* in 96 Fed. 88, 2 Am. Bankr. Rep. 785]. But where, after the passage of the Act, the bankrupt continued in his failure to keep proper books of account his discharge may be rightfully refused. *In re* Bragasa, 103 Fed. 936, 4 Am. Bankr. Rep. 519; *In re* Ablowich, 99 Fed. 81, 3 Am. Bankr. Rep. 586 [*affirmed* in 105 Fed. 751, 5 Am. Bankr. Rep. 403]; *In re* Polakoff, 1 Am. Bankr. Rep. 358. See also *In re* Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715.

31. Bragassa *v.* St. Louis Cycle, 107 Fed. 77, 46 C. C. A. 154, 5 Am. Bankr. Rep. 700; Ablowich *v.* Stursberg, 105 Fed. 751, 45 C. C. A. 31, 5 Am. Bankr. Rep. 403 [*affirming* 99 Fed. 81, 3 Am. Bankr. Rep. 586]; *In re* Cashman, 103 Fed. 67, 4 Am. Bankr. Rep. 326; *In re* Mendelsohn, 102 Fed. 119, 4 Am. Bankr. Rep. 103. See also *In re* Bemis, 104 Fed. 672, 5 Am. Bankr. Rep. 36; *In re* Morgan, 101 Fed. 982, 4 Am. Bankr. Rep. 402; *In re* Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; *In re* Gross, 5 Am. Bankr. Rep. 271.

Where the bankrupt has not, for a long time prior to his bankruptcy, been engaged in business requiring the keeping of books of account the law does not apply. *In re* Shertzer, 99 Fed. 706, 3 Am. Bankr. Rep. 699; Sellers *v.* Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529. But where a trader is engaged in business, although small and insignificant, it is within the intent and spirit of the Bankruptcy Act that he should keep honest books of account, which, in case of business misfortune, should be accessible to the inspection and scrutiny of his creditors. *In re* Berkowitz, 4 Am. Bankr. Rep. 37. The determination of the question of the sufficiency of the books of account is to be based upon the facts and circumstances of each case and the character and condition of the bankrupt's business. *In re* Feldstein, 108 Fed. 794, 6 Am. Bankr. Rep. 458; *In re* Ganison, 5 Ben. (U. S.) 430, 10 Fed. Cas. No. 5,254, 7 Nat. Bankr. Reg. 287; *In re* Reed, 20 Fed. Cas. No. 11,639, 12 Nat. Bankr. Reg. 390, 1 N. Y. Wkly. Dig. 100; *In re* Antisdel, 1 Fed. Cas. No. 490, 18 Nat. Bankr. Reg. 289; *In re* Anketell, 1 Fed. Cas. No. 394, 19 Nat. Bankr. Reg. 268.

32. Bankr. Act (1898), § 14*b* (2).

The Act of 1867, § 29 (U. S. Rev. Stat. (1878), § 5110), provided that "if the bankrupt, being a merchant or tradesman, has not, at all times after the second day of March, eighteen hundred and sixty-seven, kept proper books of account" no discharge should be granted. Among the cases decided under this provision of the former law are: *In re* Bellis, 4 Ben. (U. S.) 53, 3 Fed. Cas. No. 1,275, 3 Nat. Bankr. Reg. 496; *In re* Gay, 1 Hask. (U. S.) 108, 10 Fed. Cas. No. 5,279, 1 Am. L. T. Bankr. Rep. 73, 2 Am. L. T. Bankr. Rep. 52, 2 Nat. Bankr. Reg. 358; *In re* Hammond, 1 Lowell (U. S.) 381, 11 Fed. Cas. No. 5,999, 3 Nat. Bankr. Reg. 273; *In re* Littlefield, 1 Lowell (U. S.) 331, 15 Fed. Cas. No. 8,398, 3 Nat. Bankr. Reg. 57, 2 Am. L. T. 122, 1 Am. L. T. Bankr. Rep. 164; *In re* Winsor, 30 Fed. Cas. No. 17,885, 16 Nat. Bankr. Reg. 152, 9 Chic. Leg. N. 402, 2 Cinc. L. Bul. 212; *In re* White, 29 Fed. Cas. No. 17,532, 1 Am. L. T. Bankr. Rep. 136, 2 Am. L. T. 105, 1 Chic. Leg. N. 326, 2 Nat. Bankr. Reg. 590, 16 Pittsb. Leg. J. (Pa.) 110; *In re* Solomon, 22 Fed. Cas. No. 13,167, 1 Chic. Leg. N. 77, 107, 2 Nat. Bankr. Reg. 285, 6 Phila. (Pa.) 481, 25 Leg. Int. (Pa.) 364; *In re* Reed, 20 Fed. Cas. No. 11,639, 12 Nat. Bankr. Reg. 390, 1 N. Y. Wkly. Dig. 100; *In re* Pierson, 19 Fed. Cas. No. 11,153, 10 Nat. Bankr. Reg. 107; *In re* Noonan, 18 Fed. Cas. No. 10,291, 3 Nat. Bankr. Reg. 267; *In re* Mackay, 16 Fed. Cas. No. 8,837, 4 Nat. Bankr. Reg. 66, 2 Chic. Leg. N. 393; *In re* Friedberg, 9 Fed.

E. Debts and Obligations Discharged — 1. In General. Except as otherwise provided in the Bankruptcy Act a discharge in bankruptcy releases a bankrupt from all his provable debts.[33]

2. Alimony. Alimony, either in arrears at the time of the adjudication in bankruptcy or accruing thereafter, is not barred by the discharge of the bankrupt husband.[34]

3. Contingent Liabilities — a. In General. Contingent liabilities, if not provable, are not affected by a discharge.[35] If provable against the estate of the bankrupt the rule is otherwise.[36]

Cas. No. 5,116, 19 Nat. Bankr. Reg. 302; *In re* Blumenthal, 3 Fed. Cas. No. 1,576, 18 Nat. Bankr. Reg. 575; *In re* Antisdel, 1 Fed. Cas. No. 490, 18 Nat. Bankr. Reg. 289; *In re* Anketell, 1 Fed. Cas. No. 394, 19 Nat. Bankr. Reg. 268.

33. Bankr. Act (1898), c. 3, § 17*a*; Coe *v.* Waters, (Colo. App. 1901) 64 Pac. 1054; Dean *v.* Justices Municipal Ct., 173 Mass. 453, 53 N. E. 893, 2 Am. Bankr. Rep. 163.

As to what constitutes a provable debt see *supra*, XI, A.

As to the effect of a discharge in bankruptcy see also Appeal and Error, 3 Cyc. 496, note 53; Apprentices, 3 Cyc. 559; Bail, *ante*, II, I, 1, h.

Debts due to aliens.—A discharge in bankruptcy releases a provable debt due to an alien. Murray *v.* De Rottenham, 6 Johns. Ch. (N. Y.) 52; Pattison *v.* Wilbur, 10 R. I. 448, 12 Nat. Bankr. Reg. 193; Ruiz *v.* Eickerman, 2 McCrary (U. S.) 259, 5 Fed. 790, 12 Centr. L. J. 60; Zarega's Case, 30 Fed. Cas. No. 18,204, 4 Law Rep. 480, 1 N. Y. Leg. Obs. 40 note.

A debt which comes into existence after the filing of a petition in bankruptcy and before discharge is not affected by the bankruptcy proceedings. *In re* Burka, 104 Fed. 326, 5 Am. Bankr. Rep. 12.

A demand for double rent incurred by a tenant for unlawfully withholding from a landlord rented premises is not provable in bankruptcy, and therefore the right of a landlord to proceed with a dispossessory warrant, and as an incident thereto to obtain a judgment for double rent, is not affected by the tenant's discharge in bankruptcy, obtained during the pendency of the dispossessory proceeding. Hamilton *v.* McCroskey, 112 Ga. 651, 37 S. E. 859.

Mere bankruptcy without a discharge does not bar an action upon a debt which was proved and upon which a creditor received a dividend. Lummus *v.* Fairfield, 5 Mass. 248.

34. Deen *v.* Bloomer, 191 Ill. 416, 61 N. E. 131; Barclay *v.* Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; Maisner *v.* Maisner, 62 N. Y. App. Div. 286, 70 N. Y. Suppl. 1107, 6 Am. Bankr. Rep. 295; Young *v.* Young, 35 Misc. (N. Y.) 335, 71 N. Y. Suppl. 944, 7 Am. Bankr. Rep. 171; People *v.* Grell, 65 N. Y. Suppl. 522; Noyes *v.* Hubbard, 64 Vt. 302, 23 Atl. 727, 33 Am. St. Rep. 928, 15 L. R. A. 394; Audubon *v.* Shufeldt, 181 U. S. 575, 21 S. Ct. 735, 45 L. ed. 1009, 5 Am. Bankr. Rep. 829; Turner *v.* Turner, 108 Fed. 785, 6 Am. Bankr. Rep. 289; *In re* Nowell, 99 Fed. 931, 3 Am. Bankr. Rep. 837; *In re* Anderson, 97 Fed. 321, 5 Am. Bankr. Rep. 858; *In re* Shepard, 97 Fed. 187, 5 Am. Bankr. Rep. 857; *In re* Smith, 3 Am. Bankr. Rep. 67. See also *In re* Garrett, 2 Hughes (U. S.) 235, 10 Fed. Cas. No. 5,252, 11 Nat. Bankr. Rep. 493; *In re* Lachemeyer, 14 Fed. Cas. No. 7,966, 18 Nat. Bankr. Rep. 270, 18 Alb. L. J. 242. But see *In re* Houston, 94 Fed. 119, 2 Am. Bankr. Rep. 107, holding that a judgment in divorce proceedings requiring defendant to pay alimony to plaintiff in fixed weekly instalments is a provable debt as to any instalment due at the date of adjudication and will be released by the discharge of the bankrupt. To same effect see Fite *v.* Fite, 22 Ky. L. Rep. 1638, 61 S. W. 26; *In re* Challoner, 98 Fed. 82, 3 Am. Bankr. Rep. 442; *In re* Van Orden, 96 Fed. 86.

As to proof of claims for alimony see *supra*, XI, A, 7.

Support of children.—A discharge in bankruptcy will not release the bankrupt from the obligation to obey an order made by a state court requiring him to pay a certain sum per week for the support of his minor children; and therefore proceedings for the enforcement of such order, so far as relates to the collection of weekly instalments due after the filing of the petition in bankruptcy, will not be stayed by the court of bankruptcy. *In re* Hubbard, 98 Fed. 710, 3 Am. Bankr. Rep. 528.

35. White *v.* Blake, 79 Me. 114, 8 Atl. 457; Robinson *v.* Soule, 56 Miss. 549; Jacobson *v.* Horne, 52 Miss. 185; Dyer *v.* Cleaveland, 18 Vt. 241; Carey *v.* Mayer, 79 Fed. 926, 51 U. S. App. 184, 25 C. C. A. 239.

36. *Massachusetts.*— Fisher *v.* Tifft, 127 Mass. 313.

Missouri.— Shelton *v.* Pease, 10 Mo. 473.

Pennsylvania.— Clarke *v.* Porter, 25 Pa. St. 141.

Rhode Island.— Fisher *v.* Tifft, 12 R. I. 56.

Vermont.— Spalding *v.* Dixon, 21 Vt. 45.

United States.— Carey *v.* Mayer, 79 Fed. 926, 51 U. S. App. 184, 25 C. C. A. 239.

See 6 Cent. Dig. tit. "Bankruptcy," § 779.

Stock-holders' liability.— A discharge releases a shareholder of a national bank from his statutory liability to creditors of the bank, where, at the time of his discharge, the claims of such creditors were provable.

b. Breach of Covenants. A discharge does not release the obligation of a bankrupt upon a covenant of warranty made prior to his bankruptcy, where the breach is subsequent to his discharge.[37] The rule is otherwise as to a breach prior to the discharge.[38]

c. Claims Against Bankrupt as Indorser or Surety. Claims against a bankrupt as indorser or surety are released by a discharge.[39]

4. Debts Created by Fraud, etc., in Official or Fiduciary Capacity. Debts which are created by the bankrupt's fraud, embezzlement, misappropriation, or defalcation, while acting as an officer or in any fiduciary capacity, are not released by his discharge.[40] The fraud of the bankrupt must be a positive fraud, or fraud in fact involving moral turpitude or intentional wrong, and not implied fraud, or fraud in law,[41] and must have existed at the time of the creation of the

Irons *v.* Manufacturers' Nat. Bank, 27 Fed. 591. See also Marr *v.* West Tennessee Bank, 4 Lea (Tenn.) 578; Carey *v.* Mayer, 79 Fed. 926, 51 U. S. App. 184, 25 C. C. A. 239. *Compare* Barre First Nat. Bank *v.* Hingham Mfg. Co., 127 Mass. 563. But a discharge of a corporation will not bar its creditors from recovering against it a judgment which will afford a basis for the enforcement of the individual liability of its directors and stock-holders. *In re* Marshall Paper Co., 95 Fed. 419, 2 Am. Bankr. Rep. 653 [*affirmed* in 102 Fed. 872, 43 C. C. A. 38, 4 Am. Bankr. Rep. 468]. See also Glenn *v.* Howard, 65 Md. 40, 3 Atl. 895.

37. *Alabama.*— Abercrombie *v.* Conner, 10 Ala. 293.

Illinois.— *Contra,* Bates *v.* West, 19 Ill. 134.

Kentucky.— Cardwell *v.* Kemple, 2 Ky. L. Rep. 320.

Massachusetts.— French *v.* Morse, 2 Gray (Mass.) 111.

Mississippi.—Burrus *v.* Wilkinson, 31 Miss. 537; Bush *v.* Cooper, 26 Miss. 599, 59 Am. Dec. 270.

Missouri.— Magwire *v.* Riggin, 44 Mo. 512. *Compare* Shelton *v.* Pease, 10 Mo. 473.

New York.— Murray *v.* De Rottenham, 6 Johns. Ch. (N. Y.) 52. *Compare* Jemison *v.* Blowers, 5 Barb. (N. Y.) 686.

Tennessee.— Wight *v.* Gottschalk, (Tenn. Ch. 1897) 48 S. W. 140.

United States.— Bush *v.* Person, 18 How. (U. S.) 82, 15 L. ed. 273.

See 6 Cent. Dig. tit. "Bankruptcy," § 781.

38. Williams *v.* Harkins, 55 Ga. 172; Bailey *v.* Moore, 21 Ill. 165; Parker *v.* Bradford, 45 Iowa 311; Dow *v.* Davis, 73 Me. 288; Merrill *v.* Schwartz, 68 Me. 514; Reed *v.* Pierce, 36 Me. 455, 58 Am. Dec. 761.

39. *Alabama.*— Jones *v.* Knox, 46 Ala. 53, 7 Am. Rep. 583. *Compare* Turner *v.* Esselman, 15 Ala. 690.

Arkansas.— Jones *v.* State, 28 Ark. 119.

Illinois.— Reitz *v.* People, 72 Ill. 435.

Indiana.— Begein *v.* Brehm, 123 Ind. 160, 23 N. E. 496; McDonald *v.* State, 77 Ind. 26.

Maine.— Fowler *v.* Kendall, 44 Me. 448.

New Hampshire.— *Compare* Eastman *v.* Hibbard, 54 N. H. 504, 20 Am. Rep. 157.

New York.— Roosevelt *v.* Mark, 6 Johns. Ch. (N. Y.) 266; Rathbone *v.* Blackford, 1 Cai. (N. Y.) 588. See also Smith *v.* Wheeler, 55 N. Y. App. Div. 170, 66 N. Y. Suppl. 780, 8 N. Y. Annot. Cas. 281, 5 Am. Bankr. Rep. 46.

North Carolina.— Simpson *v.* Simpson, 80 N. C. 245; McMinn *v.* Allen, 67 N. C. 131.

Ohio.— *Compare* Greiwe *v.* Gibbons, 8 Ohio Dec. (Reprint) 605, 9 Cinc. L. Bul. 56.

Pennsylvania.— Stone *v.* Miller, 16 Pa. St. 450; Watmough *v.* Gilliams, 1 Phila. (Pa.) 572, 12 Leg. Int. (Pa.) 263.

Tennessee.—Choate *v.* Quinichett, 12 Heisk. (Tenn.) 427; Bouie *v.* Pucket, 7 Humphr. (Tenn.) 169.

Virginia.— Saunders *v.* Com., 10 Gratt. (Va.) 494.

Wisconsin.— Davis *v.* McCurdy, 50 Wis. 569, 7 N. W. 665.

United States.— U. S. *v.* Throckmorton. 28 Fed. Cas. No. 16,516, 18 Int. Rev. Rec. 54, 8 Nat. Bankr. Reg. 309.

See 6 Cent. Dig. tit. "Bankruptcy," § 785.

40. Bankr. Act (1898), c. 3, § 17*a* (4); Gerner *v.* Yates, 61 Nebr. 100, 84 N. W. 596; Warren *v.* Robinson, 21 Utah 429, 61 Pac. 28; *In re* Cole, 106 Fed. 837, 5 Am. Bankr. Rep. 780.

The determination by a state court in an action against a bankrupt that the debt sued on was created by the fraud of defendant while acting in a fiduciary capacity, and the awarding of an execution against his body under the state statute, are not conclusive upon the court of bankruptcy on a petition for an injunction to restrain the enforcement of such execution that the debt is one from which the bankrupt will not be released by a discharge, but that question is to be determined by the court of bankruptcy for itself under the federal laws and decisions. Knott *v.* Putnam, 107 Fed. 907, 6 Am. Bankr. Rep. 80.

For defalcation of public officer see:

Kentucky.—Johnson *v.* Auditor, 78 Ky. 282.

Maine.— Richmond *v.* Brown, 66 Me. 373.

Massachusetts.— Morse *v.* Loweli, 7 Metc. (Mass.) 152.

New Hampshire.— Grantham *v.* Clark, 62 N. H. 426.

North Carolina.— Council *v.* Horton, 88 N. C. 222.

Virginia.— *Compare* Courtney *v.* Beale, 84 Va. 692, 5 S. E. 708.

See 6 Cent. Dig. tit. "Bankruptcy," § 803.

41. Bryant *v.* Kinyon, (Mich. 1901) 86 N. W. 531, 53 L. R. A. 801, 6 Am. Bankr.

debt.[42] The phrase "fiduciary capacity" implies a fiduciary relation existing previously to, or independently of, the particular transaction out of which the debt arose.[43] It does not embrace debts arising in commercial dealings between principal and agent or factor for selling goods on commission.[44]

Rep. 237; Ely *v.* Curtis, 60 N. H. 513; Upshur *v.* Briscoe, 138 U. S. 365, 11 S. Ct. 313, 34 L. ed. 931; Ames *v.* Moir, 138 U. S. 306, 11 S. Ct. 311, 34 L. ed. 951; Noble *v.* Hammond, 129 U. S. 65, 9 S. Ct. 235, 32 L. ed. 621; Strang *v.* Bradner, 114 U. S. 555, 5 S. Ct. 1038, 29 L. ed. 248; Wolf *v.* Stix, 99 U. S. 1, 25 L. ed. 309; Neal *v.* Scruggs, 95 U. S. 704, 24 L. ed. 586.

A debt created by the fraud of a member of a partnership is not released by the discharge in bankruptcy of the firm and the individual members thereof, if the firm has derived benefit from the fraudulent act. Bradner *v.* Strang, 89 N. Y. 299 [*affirmed* in 114 U. S. 555, 29 L. ed. 248]. See also Schroeder *v.* Frey, 114 N. Y. 266, 21 N. E. 410, 23 N. Y. St. 254 [*affirming* 60 Hun (N. Y.) 58, 14 N. Y. Suppl. 71, 37 N. Y. St. 945].

A representation as to a fact knowingly and fraudulently made for the purpose of obtaining money from another, and by which money is obtained, creates a debt by means of fraud involving moral turpitude and intentional wrong. Forsyth *v.* Vehmeyer, 177 U. S. 177, 20 S. Ct. 623, 44 L. ed. 723, 3 Am. Bankr. Rep. 807.

42. Brown *v.* Broach, 52 Miss. 536; Bank of North America *v.* Crandall, 87 Mo. 208; U. S. *v.* Rob Roy, 1 Woods (U. S.) 42, 27 Fed. Cas. No. 16,179, 13 Nat. Bankr. Reg. 235.

43. Bryant *v.* Kinyon, (Mich. 1901) 86 N. W. 531, 53 L. R. A. 801, 6 Am. Bankr. Rep. 237. And see State *v.* Howell, 101 N. C. 443, 8 S. E. 167; Upshur *v.* Briscoe, 138 U. S. 365, 11 S. C. 313, 34 L. ed. 931.

Agents who are employed for a particular transaction do not occupy a fiduciary capacity. Goddin *v.* Neal, 99 Ind. 334; Woodward *v.* Towne, 127 Mass. 41, 34 Am. Rep. 337; Cronan *v.* Cotting, 104 Mass. 245, 6 Am. Rep. 232; Bryant *v.* Kinyon, (Mich. 1901) 86 N. W. 531, 53 L. R. A. 801, 6 Am. Bankr. Rep. 237; Gibson *v.* Gorman, 44 N. J. L. 325; Mulock *v.* Byrnes, 129 N. Y. 23, 29 N. E. 244, 41 N. Y. St. 413; Lawrence *v.* Harrington, 122 N. Y. 408, 25 N. E. 406, 33 N. Y. St. 717; Palmer *v.* Hussey, 87 N. Y. 303; Grover, etc., Sewing Mach. Co. *v.* Clinton, 5 Biss. (U. S.) 324, 6 Chic. Leg. N. 33, 18 Int. Rev. Rec. 166, 8 Nat. Bankr. Reg. 312, 21 Pittsb. Leg. J. (Pa.) 34, 11 Fed. Cas. No. 5,845. But see Matteson *v.* Kellogg, 15 Ill. 547; Fulton *v.* Hammond, 11 Fed. 291.

An attorney at law who, in the performance of his professional duties, collects money for his client acts in a fiduciary relation. Heffren *v.* Jayne, 39 Ind. 463, 13 Am. Rep. 281; White *v.* Platt, 5 Den. (N. Y.) 269; Flanagan *v.* Pearson, 42 Tex. 1, 19 Am. Rep. 40, 14 Nat. Bankr. Reg. 37. But see *contra*, Wolcott *v.* Hodge, 15 Gray (Mass.) 547, 77 Am. Dec. 381; Williamson *v.* Dickens, 27 N. C. 259. See also McAdoo *v.* Lummis, 43 Tex. 227, holding that if an attorney received a note not in a professional character but as a gratuitous bailee, and it was attempted to impress a liability upon him for his neglect in failing to return the note, he will not be deemed to have acted in a fiduciary capacity, and the debt arising from such liability will be released by his discharge.

A banker does not occupy a fiduciary capacity. Maxwell *v.* Evans, 90 Ind. 596, 47 Am. Rep. 234; Shaw *v.* Vaughan, 52 Mich. 405, 18 N. W. 126; Green *v.* Chilton, 57 Miss. 598, 34 Am. Rep. 483.

A debt due from an executor to a legatee or from a guardian to his ward is a fiduciary debt and is not released by the discharge of the executor or guardian. Crisfield *v.* State, 55 Md. 192; Halliburton *v.* Carter, 55 Mo. 435, 10 Nat. Bankr. Reg. 359; Simpson *v.* Simpson, 80 N. C. 245; *In re* Maybin, 16 Fed. Cas. No. 9,337, 15 Nat. Bankr. Reg. 468. But if a person acting in a representative capacity guarantees the settlement of a claim against the estate which he represents, or gives his personal note in payment of a claim against such estate, which is accepted by the creditor, the debt thereby created is a personal one and is not created by him while acting in a fiduciary capacity. Coleman *v.* Davies, 45 Ga. 489; Amoskeag Mfg. Co. *v.* Barnes, 49 N. H. 312; Elliott *v.* Higgins, 83 N. C. 459. *Compare* Madison Tp. *v.* Dunkle, 114 Ind. 262, 16 N. E. 593.

44. *Alabama.*—Woolsey *v.* Cade, 54 Ala. 378, 25 Am. Rep. 711; Anstill *v.* Crawford, 7 Ala. 335.

Florida.— Chipley *v.* Frierson, 18 Fla. 639.

Georgia.— *Contra*, Gilreath *v.* Holston Salt, etc., Co., 67 Ga. 702; Meador *v.* Sharpe, 54 Ga. 125.

Indiana.— Du Pont *v.* Beck, 81 Ind. 271.

Louisiana.— *Contra*, Brown *v.* Garrard, 28 La. Ann. 870; Banning *v.* Bleakley, 27 La. Ann. 257, 21 Am. Rep. 554.

Massachusetts.— Hayman *v.* Pond, 7 Metc. (Mass.) 328.

Missouri.— *Contra*, Lemcke *v.* Booth, 47 Mo. 385, 4 Am. Rep. 326; Brooks *v.* Yocum, 42 Mo. App. 516; Brunswig *v.* Taylor, 2 Mo. App. 351.

New York.— Stratford *v.* Jones, 97 N. Y. 586.

Pennsylvania.— Scott *v.* Porter, 93 Pa. St. 38, 39 Am. Rep. 719.

Tennessee.— Pankey *v.* Nolan, 6 Humphr. (Tenn.) 154.

Texas.— Kaufman *v.* Alexander, 53 Tex. 562.

United States.— Upshur *v.* Briscoe, 138

5. Debts Due the United States, State, or Municipality. A discharge in bankruptcy does not release a bankrupt from debts due as taxes levied by the United States, or the state, county, district, or municipality in which he resides.[45] Whether debts due the United States or a state upon other grounds than for taxes were dischargeable was a question frequently considered under the Bankruptcy Act of 1867. It was finally settled that such debts were not provable in bankruptcy and were therefore not released by the discharge of the bankrupt.[46] Notwithstanding the fact that the language of the present Act differs somewhat from that of the Act of 1867, the differences are insufficient to indicate an express intention on the part of congress, in the passage of the present Act, to establish a different rule as to the divesting of the government, national or state, of its rights or remedies from that which obtained under the Act of 1867.[47]

6. Joint Debts. A discharge obtained by a joint debtor is a bar to an action by his codebtor for contribution.[48] It has also been held that an indorser for, or a surety of, a bankrupt can assert no claim against the bankrupt after his discharge, if the debt paid by such indorser or surety was provable against the estate

U. S. 365, 11 S. Ct. 313, 34 L. ed. 931; Ames *v.* Moir, 138 U. S. 306, 11 S. Ct. 311, 34 L. ed. 951; Palmer *v.* Hussey, 119 U. S. 96, 7 S. Ct. 158, 30 L. ed. 362; Hennequin *v.* Clews, 111 U. S. 676, 4 S. Ct. 576, 28 L. ed. 565; Neal *v.* Scruggs, 95 U. S. 704, 24 L. ed. 586; Chapman *v.* Forsyth, 2 How. (U. S.) 202, 11 L. ed. 236; Knott *v.* Putnam, 107 Fed. 907, 6 Am. Bankr. Rep. 80; Bracken *v.* Milner, 104 Fed. 522, 5 Am. Rep. 23; *In re* Basch, 97 Fed. 761, 3 Am. Bankr. Rep. 235; Owsley *v.* Cobin, 2 Hughes (U. S.) 433, 18 Fed. Cas. No. 10,636, 9 Chic. Leg. N. 323, 23 Int. Rev. Rec. 210, 4 L. & Eq. Rep. 49, 15 Nat. Bankr. Reg. 489, 4 N. Y. Wkly. Dig. 431; Zeperink *v.* Card, 3 McCrary (U. S.) 549, 11 Fed. 295.

See 6 Cent. Dig. tit. "Bankruptcy," § 799.

The conversion of property held by pledgees or others in similar capacities does not create a debt by the fraud of one acting in a fiduciary relation. Burnham *v.* Pidcock, 33 Misc. (N. Y.) 65, 66 N. Y. Suppl. 806, 5 Am. Bankr. Rep. 42. See also Grannis *v.* Cubbedge, 71 Ga. 582; Sumner *v.* Richie, 54 Iowa 554, 6 N. W. 752; Phillips *v.* Russell, 42 Me. 360; Campbell *v.* Perkins, 8 N. Y. 430, Seld. Notes (N. Y.) 105; Cole *v.* Roach, 37 Tex. 413; Hennequin *v.* Clews, 111 U. S. 676, 4 S. Ct. 576, 28 L. ed. 565; *In re* Basch, 97 Fed. 761, 3 Am. Bankr. Rep. 235. *Compare* Herman *v.* Lynch, 26 Kan. 435, 40 Am. Rep. 320, 39 Am. Rep. 723 note.

45. Bankr. Act (1898), § 17*a* (1); *In re* Cleanfast Hosiery Co., 4 Am. Bankr. Rep. 702.

46. U. S. *v.* Herron, 20 Wall. (U. S.) 251, 22 L. ed. 275. See also State *v.* Shelton, 47 Conn. 400; Hamilton *v.* Reynolds, 88 Ind. 191; Johnson *v.* Auditor, 78 Ky. 282; Com. *v.* McMillen, 1 Ky. L. Rep. 270; State *v.* Camden County, 51 N. J. L. 424, 18 Atl. 118; Com. *v.* Hutchinson, 10 Pa. St. 466; Saunders *v.* Com., 10 Gratt. (Va.) 494; Smith *v.* Hodson, 50 Wis. 279, 6 N. W. 812; Spalding *v.* People, 4 How. (U. S.) 21, 11 L. ed. 858 [*affirming* 7 Hill (N. Y.) 301]; *In re* Sutherland, Deady (U. S.) 416, 23 Fed. Cas. No. 13,639, 8 Am. L. Reg. N. S. 39, 3 Nat. Bankr. Reg. 314; U. S. *v.* Rob Roy, 1 Woods (U. S.) 42, 27 Fed. Cas. No. 16,179, 13 Nat. Bankr. Reg. 235; *In re* Cotton, 6 Fed. Cas. No. 3,269, 6 Law. Rep. 546, 2 N. Y. Leg. Obs. 370.

47. *In re* Baker, 96 Fed. 954, 3 Am. Bankr. Rep. 101, holding that a judgment against a putative father for the support of a bastard, obtained by a local municipal officer under a state statute, was not a debt which would be released by the discharge in bankruptcy of the putative father. See also *In re* Moore, 6 Am. Bankr. Rep. 590. But see *In re* Alderson, 98 Fed. 588, 3 Am. Bankr. Rep. 544, holding that a judgment for a fine upon an indictment for a violation of a state law, obtained against a bankrupt before he filed his petition, was a provable debt and therefore released by a discharge in bankruptcy.

48. Dean *v.* Speakman, 7 Blackf. (Ind.) 317; Frentress *v.* Markle, 2 Greene (Iowa) 553; Clarke *v.* Porter, 25 Pa. St. 141. But see Brown *v.* J. E. Stevens Co., 52 Conn. 110, holding that where, after suit is brought against several persons, one of them is adjudged a bankrupt, and is discharged, and, not pleading his bankruptcy, judgment is rendered against all of them and is paid by one of the other defendants, such defendant is entitled to contribution from the bankrupt.

A discharge is not a bar to a recovery by one cosurety against another for contribution when the right to such contribution arose subsequent to the discharge.

Illinois.— Byers *v.* Alcorn, 6 Ill. App. 39.

Indiana.— Dunn *v.* Sparks, 1 Ind. 397, 50 Am. Dec. 473. *Compare* Hays *v.* Ford, 55 Ind. 52.

Maine.— Dole *v.* Warren, 32 Me. 94, 52 Am. Dec. 640.

Missouri.— *Compare* Miller *v.* Gillespie, 59 Mo. 220.

New Jersey.— Wyckoff *v.* Gardner, (N. J. 1886) 5 Atl. 801.

New York.— *Contra*, Tobias *v.* Rogers, 2 Edm. Sel. Cas. (N. Y.) 168 [*affirmed* in 13 N. Y. 59].

Tennessee.— Goss *v.* Gibson, 8 Humphr. (Tenn.) 197. *Compare* Eberhardt *v.* Wood, 6 Lea (Tenn.) 467.

of the bankrupt.[49] But the liability of a person who is a codebtor with, or a guarantor, or in any manner a surety for, a bankrupt is not altered by the discharge of such bankrupt.[50]

7. Judgments — a. In General. A debt evidenced by a judgment is provable in bankruptcy.[51] A judgment founded upon a provable debt, which is entered after the filing of the petition and before the consideration of the bankrupt's application for a discharge, is also provable.[52] It follows, therefore, that judg-

Vermont.— Liddell *v.* Wiswell, 59 Vt. 365, 8 Atl. 680; Swain *v.* Barber, 29 Vt. 292.

Wisconsin.— Smith *v.* Hodson, 50 Wis. 279, 6 N. W. 812.

See 6 Cent. Dig. tit. "Bankruptcy," § 784.

49. *Alabama.*— Jones *v.* Knox, 46 Ala. 53, 7 Am. Rep. 583.

Arkansas.— Lipscomb *v.* Grace, 26 Ark. 231, 7 Am. Rep. 607.

Indiana.— Post *v.* Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; Hamilton *v.* Reynolds, 88 Ind. 191.

Kentucky.—Buford *v.* Crigler, 7 Ky. L. Rep. 662.

Louisiana.— Noland *v.* Wayne, 31 La. Ann. 401.

Massachusetts.— Fairbanks *v.* Lambert, 137 Mass. 373.

New York.— Crafts *v.* Mott, 4 N. Y. 604; Morse *v.* Hovey, 1 Sandf. Ch. (N. Y.) 187.

Pennsylvania.— Fulwood *v.* Bushfield, 14 Pa. St. 90; Reed *v.* Emory, 1 Serg. & R. (Pa.) 339.

Tennessee.— Hardy *v.* Carter, 8 Humphr. (Tenn.) 152.

Vermont.— Liddell *v.* Wiswell, 59 Vt. 365, 8 Atl. 680.

United States.— Mace *v.* Wells, 7 How. (U. S.) 272, 12 L. ed. 698.

See 6 Cent. Dig. tit. "Bankruptcy," § 783.

The rule is otherwise if the claim was not provable. Pogue *v.* Joyner, 6 Ark. 241, 42 Am. Dec. 693; Dunn *v.* Sparks, 7 Ind. 490; Manion *v.* Campbell, 79 Mo. 105. See also Ellis *v.* Ham, 28 Me. 385.

50. Bankr. Act (1898), § 16*a*. See also the following cases:

Alabama.— Garnett *v.* Roper, 10 Ala. 842.

Georgia.— Phillips *v.* Solomon, 42 Ga. 192; King *v.* Central Bank, 6 Ga. 257.

Illinois.— Sandusky *v.* Exchange Bank, 81 Ill. 353.

Indiana.— Post *v.* Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; Cosgrove *v.* Cosby, 86 Ind. 511; Gregg *v.* Wilson, 50 Ind. 490.

Kentucky.— Edwards *v.* Coleman, 2 A. K. Marsh. (Ky.) 249; Com. *v.* Anderson, 1 Ky. L. Rep. 275. *Compare* Payne *v.* Able, 7 Bush (Ky.) 344, 3 Am. Rep. 316.

Louisiana.— Serra é Hijs *v.* Hoffman, 30 La. Ann. 67.

Maine.— Farnham *v.* Gilman, 24 Me. 250; Craggin *v.* Bailey, 23 Me. 104; Horn *v.* Nason, 23 Me. 101.

Massachusetts.— *Compare* Johnson *v.* Collins, 117 Mass. 343, 12 Nat. Bankr. Reg. 70; Braley *v.* Boomer, 116 Mass. 527, 12 Nat. Bankr. Reg. 303; Hamilton *v.* Bryant, 114 Mass. 543, 14 Nat. Bankr. Reg. 479; Carpenter *v.* Turrell, 100 Mass. 450.

Mississippi.— Robinson *v.* Soule, 56 Miss. 549.

Missouri.— Fisse *v.* Einstein, 5 Mo. App. 78.

Nevada.— Tinkum *v.* O'Neale, 5 Nev. 93. See also Dorn *v.* O'Neale, 6 Nev. 155.

New Hampshire.— Claflin *v.* Cogan, 48 N. H. 411; Goodwin *v.* Stark, 15 N. H. 218.

New Jersey.— Linn *v.* Hamilton, 34 N. J. L. 305. *Compare* Kirby *v.* Garrison, 21 N. J. L. 179.

New York.— Knapp *v.* Anderson, 71 N. Y. 466; Wilson *v.* Field, 27 Hun (N. Y.) 46; McCombs *v.* Allen, 18 Hun (N. Y.) 190 [*affirmed* in 82 N. Y. 114]; Holyoke *v.* Adams, 1 Hun (N. Y.) 223 [*affirmed* in 59 N. Y. 233]; Bowery Sav. Bank *v.* Clinton, 2 Sandf. (N. Y.) 113; Hall *v.* Fowler, 6 Hill (N. Y.) 630.

North Carolina.— Commercial Nat. Bank *v.* Simpson, 90 N. C. 467; Jones *v.* Hagler, 51 N. C. 542.

Ohio.— Childs *v.* Childs, 10 Ohio St. 339, 75 Am. Dec. 512.

Tennessee.— *Compare* Martin *v.* Kilbourn, 12 Heisk. (Tenn.) 331.

Texas.— Pinkard *v.* Willis, 24 Tex. Civ. App. 69, 57 S. W. 891.

Vermont.— Dyer *v.* Cleaveland, 18 Vt. 241.

Wisconsin.— Hill *v.* Trainer, 49 Wis. 537, 5 N. W. 926.

United States.— Abendroth *v.* Van Dolsen, 131 U. S. 66, 9 S. Ct. 619, 33 L. ed. 57; Wolf *v.* Stix, 99 U. S. 1, 25 L. ed. 309; *In re* Marshall Paper Co., 95 Fed. 419, 2 Am. Bankr. Rep. 653; *In re* Levy, 2 Ben. (U. S.) 169, 15 Fed. Cas. No. 8,297, 1 Am. L. T. Bankr. Rep. 122, 1 Nat. Bankr. Reg. 327; *In re* Albrecht, 1 Fed. Cas. No. 145, 17 Nat. Bankr. Reg. 287.

See 6 Cent. Dig. tit. "Bankruptcy," §§ 782, 786.

As to release of surety by discharge of principal in bail-bond see Bail, II, I, 1, h [5 Cyc. 32].

Under the Act of 1867 (U. S. Rev. Stat. (1878), § 5118), it was provided that no discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise.

51. Bankr. Act (1898), § 63*a* (1); Aiken *v.* Haskins, 34 Misc. (N. Y.) 505, 70 N. Y. Suppl. 293, 6 Am. Bankr. Rep. 46.

Debts existing under the Bankruptcy Act of 1867, and kept alive by subsequent judgments, are not excepted from the operation of the Act of 1898. *In re* Herrman, 102 Fed. 753, 4 Am. Bankr. Rep. 139 [*affirmed* in 106 Fed. 987, 46 C. C. A. 77].

52. Bankr. Act (1898), § 63*a* (5). See also the following cases:

ments are released by the discharge of the judgment debtor in bankruptcy,[53] unless they are within the exceptions considered in the next section.[54] The lien of a judgment which has attached more than four months prior to the filing of the petition [55] is not, however, affected by the discharge.[56]

b. Judgments in Actions For Frauds, etc. Judgments in actions for frauds,[57] or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property [58] are not released by the dis-

Alabama.— McDougald *v.* Reid, 5 Ala. 810.
Georgia.—Anderson *v.* Anderson, 65 Ga. 518, 38 Am. St. Rep. 797.
Kansas.— Tefft *v.* Knox, 37 Kan. 37, 14 Pac. 441; Widner *v.* Yeast, 32 Kan. 400, 4 Pac. 838.
Kentucky.— Pine Hill Coal Co. *v.* Harris, 86 Ky. 421, 9 Ky. L. Rep. 633, 6 S. W. 24.
Maine.— *Compare* Pike *v.* McDonald, 32 Me. 418, 54 Am. Dec. 597; Fisher *v.* Foss, 30 Me. 459.
Massachusetts.— Huntington *v.* Saunders, 166 Mass. 92, 43 N. E. 1035. *Compare* Woodbury *v.* Perkins, 5 Cush. (Mass.) 86, 51 Am. Dec. 51.
Mississippi.— McDonald *v.* Ingraham, 30 Miss. 389, 64 Am. Dec. 166.
New Jersey.—Whyte *v.* McGovern, 51 N. J. L. 356, 17 Atl. 957; Williams *v.* Humphreys, 50 N. J. L. 500, 14 Atl. 583.
New York.— Clark *v.* Rowling, 3 N. Y. 216, 53 Am. Dec. 290; Arnold *v.* Oliver, 64 How. Pr. (N. Y.) 452.
North Carolina.— Sanderson *v.* Daily, 83 N. C. 67.
Pennsylvania.— Curtis *v.* Slosson, 6 Pa. St. 265.
Tennessee.— Lachemier *v.* Stewart, 91 Tenn. 385, 19 S. W. 21, 30 Am. St. Rep. 887; Dick *v.* Powell, 2 Swan (Tenn.) 632.
Texas.— Kaufman *v.* Alexander, 2 Tex. Unrep. Cas. 532.
Vermont.— Downer *v.* Rowell, 26 Vt. 397; Harrington *v.* McNaughton, 20 Vt. 293.
Virginia.— Blair *v.* Carter, 78 Va. 621.
West Virginia.— Zumbro *v.* Stump, 38 W. Va. 325, 18 S. E. 443.
Wisconsin.— Leonard *v.* Yohnk, 68 Wis. 587, 32 N. W. 702, 60 Am. Rep. 884.
United States.— Boynton *v.* Ball, 121 U. S. 457, 7 S. Ct. 981, 30 L. ed. 985; Braman *v.* Snider, 21 Fed. 871; *In re* Stansfield, 4 Sawy. (U. S.) 334, 22 Fed. Cas. No. 13,294, 16 Nat. Bankr. Reg. 268.
See 6 Cent. Dig. tit. "Bankruptcy," § 815.

53. *Illinois.*— Pease *v.* Ritchie, 132 Ill. 638, 24 N. E. 433, 8 L. R. A. 566.
Kentucky.— Botts *v.* Patton, 10 B. Mon. (Ky.) 452.
Mississippi.— McDonald *v.* Ingraham, 30 Miss. 389, 64 Am. Dec. 166.
Nebraska.— Smith *v.* Kinney, 6 Nebr. 447.
New York.— McDonald *v.* Davis, 105 N. Y. 508, 12 N. E. 40; Graham *v.* Pierson, 6 Hill (N. Y.) 247; Roosevelt *v.* Mark, 6 Johns. Ch. (N. Y.) 266.
North Carolina.— Wall *v.* Fairley, 77 N. C. 105.
See 6 Cent. Dig. tit. "Bankruptcy," § 814.

54. See *infra*, XIX, E, 7, b.

55. Bankr. Act (1898), § 67*f*.

56. Lien of judgment.—*Alabama.*—Rugely *v.* Robinson, 10 Ala. 702; Freeny *v.* Warl, 9 Ala. 370.
Arkansas.— Oliphant *v.* Hartley, 32 Ark. 465.
Georgia.— Darsey *v.* Mumpford, 58 Ga. 119; Barber *v.* Terrell, 54 Ga. 146; Jones *v.* Lellyett, 39 Ga. 64. See also Dozier *v.* McWhorter, 113 Ga. 584, 39 S. E. 106.
Illinois.— Wales *v.* Bogue, 31 Ill. 464.
Indiana.— Pauley *v.* Cauthorn, 101 Ind. 91.
Pennsylvania.— Alexander *v.* Stuart, 2 Kulp (Pa.) 385.
Virginia.— McCance *v.* Taylor, 10 Gratt. (Va.) 580.
See 6 Cent. Dig. tit. "Bankruptcy," § 820.
As to effect of discharge on liens, generally, see *infra*, XIX, E, 8.

57. The fraud intended involves moral turpitude or intentional wrong, and not implied fraud or fraud in law. Burnham *v.* Pidcock, 58 N. Y. App. Div. 273, 68 N. Y. Suppl. 1007; *In re* Blumberg, 94 Fed. 476, 1 Am. Bankr. Rep. 627. See also Hennequin *v.* Clews, 111 U. S. 676, 4 S. Ct. 576, 28 L. ed. 565.

58. It was not intended by the exception as to judgments in actions for wilful or malicious injury to person or property to prevent the bar of all judgments in actions for tort. An action grounded in tort is necessarily wilful. Lavery *v.* Crooke, 52 Wis. 612, 9 N. W. 599, 38 Am. Rep. 768. The term "wilful" means that the act was intentionally and designedly done. Anderson *v.* How, 116 N. Y. 336, 22 N. E. 695, 27 N. Y. St. 724; *In re* Maples, 105 Fed. 919, 5 Am. Bankr. Rep. 426. But the injury for which the judgment was obtained must be more than wilful; it must be with malice — with an evil intent and design to injure the person or property of plaintiff. *In re* Sullivan, 2 Am. Bankr. Rep. 30.
A judgment for seduction is a judgment in an action for a wilful and malicious injury to the person of another within the language of the exception. *In re* Freche, 109 Fed. 620, 6 Am. Bankr. Rep. 479; *In re* Maples, 105 Fed. 919, 5 Am. Bankr. Rep. 426. See also U. S. *v.* Coffin, 1 Sumn. (U. S.) 394, 25 Fed. Cas. No. 14,824. *Contra*, *In re* Sullivan, 2 Am. Bankr. Rep. 30.
A judgment for criminal conversation is within the exception and is not released. Colwell *v.* Tinker, 35 Misc. (N. Y.) 330, 71 N. Y. Suppl. 952, 6 Am. Bankr. Rep. 434. *Compare In re* Tinker, 99 Fed. 79, 3 Am. Bankr. Rep. 580.
A judgment for breach of promise to marry is provable, and therefore released by the dis-

charge of the bankrupt.[59] In determining whether a judgment is excepted from the effect of a discharge the form and original nature of the debt upon which the judgment is based must be considered.[60] The exception does not include a judgment in which the right of recovery is based upon an act which is not essentially fraudulent, although fraud may be incidentally shown.[61]

8. Liens. A discharge of a debtor in bankruptcy does not impair valid liens[62] acquired more than four months before the filing of the petition.[63] Accordingly a mechanic's lien,[64] a vendor's lien,[65] or the lien acquired by an attachment,[66] a

charge of defendant in bankruptcy. Finnegan *v.* Hall, 35 Misc. (N. Y.) 773, 72 N. Y. Suppl. 347, 6 Am. Bankr. Rep. 648; *In re* Fife, 109 Fed. 880, 6 Am. Bankr. Rep. 258; *In re* McCauley, 101 Fed. 223, 4 Am. Bankr. Rep. 122. And this is so although the complaint in the action contains an allegation of seduction and the fact of seduction is proved upon the trial. Disler *v.* McCauley, 66 N. Y. App. Div. 42, 73 N. Y. Suppl. 270, 7 Am. Bankr. Rep. 138 [*reversing* 6 Am. Bankr. Rep. 491].

59. Bankr. Act (1898), c. 3, § 17*a* (2); *In re* Lewensohn, 99 Fed. 73, 3 Am. Bankr. Rep. 594 [*affirmed* in 104 Fed. 1006, 44 C. C. A. 309].

60. *In re* Rhutassel, 96 Fed. 597, 2 Am. Bankr. Rep. 697. And see *In re* Patterson, 2 Ben. (U. S.) 155, 18 Fed. Cas. No. 10,817, 1 Nat. Bankr. Reg. 307, 15 Pittsb. Leg. J. (Pa.) 241; Warner *v.* Cronkhite, 6 Biss. (U. S.) 453, 29 Fed. Cas. No. 17,180, 8 Chic. Leg. N. 17, 7 Leg. Gaz. (Pa.) 329, 13 Nat. Bankr. Reg. 52, 1 N. Y. Wkly. Dig. 291.

A debt created by fraud is not so far merged in a judgment entered upon it that the nature and origin of the debt cannot be shown. Bennett *v.* Justices Municipal Ct., 166 Mass. 126, 44 N. E. 121; Huntington *v.* Saunders, 166 Mass. 92, 43 N. E. 1035; Freeland *v.* Williams, 131 U. S. 405, 9 S. Ct. 763, 33 L. ed. 193; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 8 S. Ct. 1370, 32 L. ed. 239; Boynton *v.* Ball, 121 U. S. 457, 7 S. Ct. 981, 30 L. ed. 985; Packer *v.* Whittier, 91 Fed. 511, 63 U. S. App. 37, 33 C. C. A. 658, 1 Am Bankr. Rep. 621.

61. Burnham *v.* Pidcock, 58 N. Y. App. Div. 273, 68 N. Y. Suppl. 1007; *In re* Blumberg, 94 Fed. 476, 1 Am. Bankr. Rep. 627 (holding that the mere fact that incidentally to the collection of a debt a sale of property is set aside as fraudulent does not make the debt one created by fraud, or prevent it being released by a discharge in bankruptcy). See also Collins *v.* McWalters, 35 Misc. (N. Y.) 648, 72 N. Y. Suppl. 203, 6 Am. Bankr. Rep. 593, holding that where a grantee of land, upon the assurance of her grantor that it was unnecessary, fails to record her deed and the grantor conveys the land to a third person, a judgment for plaintiff in an action by the first grantee to recover back the purchase-price is not a judgment in an action for fraud, which by the exception is exempted from the operation of a discharge in bankruptcy.

62. The release by a discharge is a personal privilege and does not operate *in rem*.

Georgia.— Clanton *v.* Estes, 77 Ga. 352, 1 S. E. 163.

Indiana.— Haggerty *v.* Byrne, 75 Ind. 499.

Kentucky.— Barnett *v.* Sayers, 11 Ky. L. Rep. 465, 12 S. W. 303; Fetter *v.* Cirode, 4 B. Mon. (Ky.) 482.

Mississippi.— Reed *v.* Bullington, 49 Miss. 223; Roach *v.* Bennett, 24 Miss. 98.

Pennsylvania.— Tintsman *v.* Flenniken, 6 Wkly. Notes Cas. (Pa.) 29.

Texas.— Boone *v.* Revis, 44 Tex. 384; Pinkard *v.* Willis, 24 Tex. Civ. App. 69, 57 S. W. 891.

Wisconsin.— Bank of Commerce *v.* Elliott, 109 Wis. 648, 85 N. W. 417.

United States.— *In re* Blumberg, 94 Fed. 476, 1 Am. Bankr. Rep. 627; Dixon *v.* Barnum, 3 Hughes (U. S.) 207, 7 Fed. Cas. No. 3,928, 2 Va. L. J. 312. See also Yeatman *v.* New Orleans Sav. Inst., 95 U. S. 764, 24 L. ed. 589.

See 6 Cent. Dig. tit. "Bankruptcy," § 808.

As to lien of judgment see *supra*, XIX, E, 7, a.

63. Bankr. Act (1898), § 67.

64. Mechanic's lien.— McCullough *v.* Caldwell, 5 Ark. 237; *In re* Emslie, 102 Fed. 291, 42 C. C. A. 350, 4 Am. Bankr. Rep. 126; *In re* Kerby-Denis Co., 94 Fed. 818, 2 Am. Bankr. Rep. 218 [*affirmed* in 95 Fed. 116].

65. Vendor's lien.— Barnett *v.* Salyers, 11 Ky. L. Rep. 465, 12 S. W. 303; Jackson *v.* Elliott, 49 Tex. 62; Elliott *v.* Booth, 44 Tex. 180, 23 Am. Rep. 593; Lewis *v.* Hawkins, 23 Wall. (U. S.) 119, 23 L. ed. 113.

66. Attachment.— *Alabama.*— Sims *v.* Jacobson, 51 Ala. 186; May *v.* Courtnay, 47 Ala. 185.

Illinois.— Hill *v.* Harding, 116 Ill. 92, 4 N. E. 361.

Kansas.—Gillett *v.* McCarthy, 23 Kan. 668.

Massachusetts.— Ives *v.* Sturgis, 12 Metc. (Mass.) 462; Davenport *v.* Tilton, 10 Metc. (Mass.) 320. *Compare* Hamilton *v.* Bryant, 114 Mass. 543; Carpenter *v.* Turrell, 100 Mass. 450.

New Hampshire.— Colby *v.* Ledden, 17 N. H. 273; Kittredge *v.* Warren, 14 N. H. 509.

New Jersey.—Vreeland *v.* Bruen, 21 N. J. L. 214.

Tennessee.— Wilson *v.* Eifler, 11 Heisk. (Tenn.) 179.

Texas.— Hancock *v.* Henderson, 45 Tex. 479.

Vermont.— Stoddard *v.* Locke, 43 Vt. 574, 5 Am. Rep. 308.

United States.— *In re* Blumberg, 94 Fed. 476, 1 Am. Bankr. Rep. 627. *Compare Ex p.*

creditor's suit,[67] or a mortgage may be enforced to the fullest extent, although no deficiency judgment can be rendered against the bankrupt.[68]

9. Omitted Claims. A discharge in bankruptcy does not release the bankrupt from a provable debt which was not duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy.[69]

10. Partnership and Individual Debts. One partner may institute proceedings looking to a discharge from the partnership as well as his individual debts, and, the proper foundation being laid,[70] may obtain a discharge effectual against

Foster, 2 Story (U. S.) 131, 9 Fed. Cas. No. 4,960, 5 Law. Rep. 55.

See 6 Cent. Dig. tit. "Bankruptcy," § 809.

67. Creditor's suit.— Phelps *v.* Curts, 80 Ill. 109; Macy *v.* Jordan, 2 Den. (N. Y.) 570; Lowry *v.* Morrison, 11 Paige (N. Y.) 327; Storm *v.* Waddell, 2 Sandf. Ch. (N. Y.) 494; McLean *v.* Lafayette Bank, 3 McLean (U. S.) 587, 16 Fed. Cas. No. 8,888.

68. Mortgage.—*Alabama.*— Carlisle *v.* Wilkins, 51 Ala. 371; Stewart *v.* Anderson, 10 Ala. 504.

Arkansas.— Oliphint *v.* Eckerley, 36 Ark. 69.

Georgia.— Price *v.* Amis, 58 Ga. 604.

Indiana.— Pierce *v.* Wilcox, 40 Ind. 70; Truitt *v.* Truitt, 38 Ind. 16.

Kentucky.— Louisville Second Nat. Bank *v.* New Jersey Nat. State Bank, 10 Bush (Ky.) 367, 11 Nat. Bankr. Reg. 49; Wolfe *v.* Bate, 9 B. Mon. (Ky.) 208.

Louisiana.— Labauve *v.* Slack, 28 La. Ann. 296.

Michigan.— Prentis *v.* Richardson, 118 Mich. 259, 76 N. W. 381.

New Hampshire.— Chamberlain *v.* Meeder, 16 N. H. 381.

Pennsylvania.— Insurance Co. *v.* Ketterlinus, 1 Wkly. Notes Cas. (Pa.) 130.

South Carolina.—Savage *v.* Kinloch, Speers Eq. (S. C.) 464.

Texas.— French *v.* Pyron, 2 Tex. Unrep. Cas. 720.

United States.— Scott *v.* Ellery, 142 U. S. 381, 12 S. Ct. 233, 35 L. ed. 1050.

See 6 Cent. Dig. tit. "Bankruptcy," § 812.

69. Bankr. Act (1898), c. 3, § 17*a* (3); Fider *v.* Mannheim, 78 Minn. 309, 81 N. W. 2; Tyrrel *v.* Hammerstein, 33 Misc. (N. Y.) 505, 67 N. Y. Suppl. 717, 6 Am. Bankr. Rep. 430.

Actual knowledge of the proceedings in bankruptcy by the creditor whose claim was omitted from the schedules must be shown by a fair preponderance of evidence. Collins *v.* McWalters, 35 Misc. (N. Y.) 648, 72 N. Y. Suppl. 203, 6 Am. Bankr. Rep. 593.

Where the schedules described a judgment creditor named George Liesum as George Liesman the bankrupt's discharge does not release the debt as against George Liesum. Liesum *v.* Kraus, 35 Misc. (N. Y.) 376, 71 N. Y. Suppl. 1022.

Under the former acts an omission from the schedules did not affect the bankrupt's right to a release. The provisions of the present Act in this respect are new. See the following cases decided under the former acts to the effect that if the notice required by the statute had been published, a debt will be released although not included in the schedules, and no notice was given to the creditor.

Alabama.— Jones *v.* Knox, 51 Ala. 367.

District of Columbia.— Hoffman *v.* Haight, 3 Mackey (D. C.) 21.

Georgia.— Heard *v.* Arnold, 56 Ga. 570, 15 Nat. Bankr. Reg. 543.

Indiana.— Hurd *v.* Indiana Mut. F. Ins. Co., 1 Ind. 162.

Iowa.—Magoon *v.* Warfield, 3 Greene (Iowa) 293.

Kentucky.— Payne *v.* Able, 7 Bush (Ky.) 344, 3 Am. Rep. 316, 4 Nat. Bankr. Reg. 220.

Louisiana.— Rogers *v.* Western M. & F. Ins. Co., 1 La. Ann. 161.

Maine.— Symonds *v.* Barnes, 59 Me. 191, 8 Am. Rep. 418, 6 Nat. Bankr. Reg. 377.

Massachusetts.— Black *v.* Blazo, 117 Mass. 17, 13 Nat. Bankr. Reg. 195; Burnside *v.* Brigham, 8 Metc. (Mass.) 75.

Michigan.—Graves *v.* Wright, 53 Mich. 425, 19 N. W. 129; Benedict *v.* Smith, 48 Mich. 593, 12 N. W. 866; Hill *v.* Robbins, 22 Mich. 475.

Missouri.—Thornton *v.* Hogan, 63 Mo. 143; Shelton *v.* Pease, 10 Mo. 473.

New York.— Campbell *v.* Perkins, 8 N. Y. 430, Seld. Notes (N. Y.) 105; Platt *v.* Parker, 4 Hun (N. Y.) 135; Briggs *v.* Angus, 1 Silv. Supreme (N. Y.) 347, 5 N. Y. Suppl. 313, 24 N. Y. St. 605.

Ohio.— Rayl *v.* Lapham, 27 Ohio St. 452; Mitchell *v.* Singletary, 19 Ohio 291.

Tennessee.— Eberhardt *v.* Wood, 6 Lea (Tenn.) 467.

Texas.— Blum *v.* Ricks, 39 Tex. 112.

Vermont.— Steele *v.* Towne, 28 Vt. 771; Downer *v.* Dana, 22 Vt. 337.

Wisconsin.— Thomas *v.* Jones, 39 Wis. 124.

United States.— Lamb *v.* Brown, 14 Fed. Cas. No. 8,011, 7 Chic. Leg. N. 363, 12 Nat. Bankr. Reg. 522, 1 N. Y. Wkly. Dig. 176.

See 6 Cent. Dig. tit. "Bankruptcy," § 775.

70. Bankr. Act (1898), § 5; and *infra*, XX.

If one, but not all, of the members of a partnership has been adjudged a bankrupt, and the other members consent to the administration in bankruptcy of the partnership property (Bankr. Act (1898), c. 3, § 5*h*), the bankrupt partner will be entitled to a discharge effectual not only against his individual creditors but also against partnership creditors (*In re* Laughlin, 96 Fed. 589,

both classes of claims.[71] Whether an individual discharge operates upon firm debts when the firm has not been brought into bankruptcy is a question, however, as to which the authorities are in conflict. A number sustain the negative of the proposition.[72] Other decisions declare that the discharge is effective unless there were partnership assets at the time of the adjudication.[73] Still other authorities maintain that the discharge operates upon partnership as well as individual debts.[74]

F. Pleading Discharge — 1. Who May Plead. The plea of a discharge in bankruptcy is personal to the bankrupt and his representatives.[75]

2. Necessity of Pleading. The discharge of the bankrupt will not be effectual as a bar in an action upon a provable debt unless pleaded.[76]

3 Am. Bankr. Rep. 1). But a discharge of a bankrupt partner from firm debts cannot be secured unless the partnership estate has been placed in the custody of the court and administered in accordance with the Act (*In re* Meyers, 97 Fed. 757, 3 Am. Bankr. Rep. 260).

71. *In re* Laughlin, 96 Fed. 589, 3 Am. Bankr. Rep. 1. See also *In re* Meyers, 97 Fed. 757, 3 Am. Bankr. Rep. 260; *In re* Russell, 97 Fed. 32, 3 Am. Bankr. Rep. 91.

Where the proceeding is against the partnership as an entity the individual partners are not entitled to a discharge. *In re* Hale, 107 Fed. 432, 6 Am. Bankr. Rep. 35.

72. Payne *v.* Able, 7 Bush (Ky.) 344, 3 Am. Rep. 316; Perkins *v.* Fisher, 3 Ky. L. Rep. 514; Corry *v.* Perry, 67 Me. 140, 24 Am. Rep. 15; Trimble *v.* More, 47 N. Y. Super. Ct. 340; Honegger *v.* Wettstein, 47 N. Y. Super. Ct. 125; *In re* Plumb, 9 Ben. (U. S.) 279, 19 Fed. Cas. No. 11,231, 17 Nat. Bankr. Reg. 76, 6 N. Y. Wkly. Dig. 70; *In re* Little, 2 Ben. (U. S.) 186, 15 Fed. Cas. No. 8,390, 1 Nat. Bankr. Reg. 341, 15 Pittsb. Leg. J. (Pa.) 268; *In re* Noonan, 3 Biss. (U. S.) 491, 18 Fed. Cas. No. 10,292, 5 Chic. Leg. N. 557, 30 Leg. Int. (Pa.) 425, 10 Nat. Bankr. Reg. 330, 21 Pittsb. Leg. J. (Pa.) 73; Hudgins *v.* Lane, 2 Hughes (U. S.) 361, 12 Fed. Cas. No. 6,827, 11 Nat. Bankr. Reg. 462; *In re* Grady, 10 Fed. Cas. No. 5,654, 3 Nat. Bankr. Reg. 227. See also *In re* Shepard, 3 Ben. (U. S.) 347, 21 Fed. Cas. No. 12,754, 3 Nat. Bankr. Reg. 172; *In re* Winkens, 30 Fed. Cas. No. 17,875, 2 Am. L. T. Bankr. Rep. 53, 1 Chic. Leg. N. 163, 2 Nat. Bankr. Reg. 349.

A discharge of a member of one firm on the petition of the firm does not release him from liability on debts due by him as a member of another firm. Perkins *v.* Fisher, 80 Ky. 11.

Where the proceedings are instituted against a single member of a firm, and the petition makes no mention of firm debts, and no notice is given to firm creditors, a discharge will only be effectual as against his individual debts. *In re* Hartman, 96 Fed. 593, 3 Am. Bankr. Rep. 65; *In re* McFaun, 96 Fed. 592, 3 Am. Bankr. Rep. 66; *In re* Laughlin, 96 Fed. 589, 3 Am. Bankr. Rep. 1.

73. *In re* Johnston, 17 Fed. 71; Crompton *v.* Conkling, 6 Fed. Cas. No. 3,408, 15 Nat. Bankr. Reg. 417; *In re* Abbe, 1 Fed. Cas. No. 4, 7 Am. L. Reg. N. S. 824, 2 Nat. Bankr. Reg. 15, 15 Pittsb. Leg. J. (Pa.) 589. See also West Philadelphia Bank *v.* Gerry, 106 N. Y. 467, 13 N. E. 453; Curtis *v.* Woodward, 58 Wis. 499, 17 N. W. 328, 46 Am. Rep. 647.

74. Mattix *v.* Leach, 16 Ind. App. 112, 43 N. E. 969; Hamilton *v.* Cutler, 9 Ohio Dec. (Reprint) 187, 11 Cinc. L. Bul. 176; Jarecki Mfg. Co. *v.* McElwaine, 107 Fed. 249; *In re* Jewett, 7 Biss. (U. S.) 328, 13 Fed. Cas. No. 7,306, 15 Nat. Bankr. Reg. 126; Wilkins *v.* Davis, 2 Lowell (U. S.) 511, 29 Fed. Cas. No. 17,664, 15 Nat. Bankr. Reg. 60.

75. Palmer *v.* Merrill, 57 Me. 26; Moyer *v.* Dewey, 103 U. S. 301, 26 L. ed. 394; *In re* Burton, 29 Fed. 637.

A widow of a bankrupt to whom his property has been transferred may avail herself of his discharge and plead it in her own defense. Upshur *v.* Briscoe, 138 U. S. 365, 11 S. Ct. 313, 34 L. ed. 931.

76. *Alabama.*— Collins *v.* Hammock, 59 Ala. 448; Ivey *v.* Gamble, 7 Port. (Ala.) 545.

Connecticut.— Brown *v.* J. & E. Stevens Co., 52 Conn. 110.

Georgia.— Smith *v.* Cook, 71 Ga. 705.

Illinois.— Horner *v.* Spelman, 78 Ill. 206.

Indiana.— Jenks *v.* Opp, 43 Ind. 108.

Kentucky.— If plaintiff alleges defendant's discharge and relies upon a new promise made after the discharge it is not necessary for defendant to plead his discharge. Green *v.* McGowan, 7 Ky. L. Rep. 661.

Louisiana.—Ludeling *v.* Felton, 29 La. Ann. 719; Palmer *v.* Moore, 3 La. Ann. 208.

Maine.— Palmer *v.* Merrill, 57 Me. 26.

Mississippi.— Jones *v.* Coker, 53 Miss. 195.

Missouri.— State Bank *v.* Franciscus, 15 Mo. 303.

New York.— McDonald *v.* Davis, 105 N. Y. 508, 12 N. E. 40; Revere Copper Co. *v.* Dimock, 90 N. Y. 33 [*affirmed* in 117 U. S. 559, 6 S. Ct. 855, 29 L. ed. 994]; Monroe *v.* Upton, 50 N. Y. 593; Cornell *v.* Dakin, 38 N. Y. 253.

Ohio.— Gardner *v.* Hengehold, 6 Ohio Dec. (Reprint) 997, 9 Am. L. Rec. 414.

Texas.— Miller *v.* Clements, 54 Tex. 351; Coffee *v.* Ball, 49 Tex. 16; Park *v.* Casey, 35 Tex. 536; Manwarring *v.* Kouns, 35 Tex. 171.

Wisconsin.— Bank of Commerce *v.* Elliott, 109 Wis. 648, 85 N. W. 417.

United States.— Fowle *v.* Park, 48 Fed. 789; *In re* Burton, 29 Fed. 637; *In re* Wesson, 4 Hughes (U. S.) 522, 88 Fed. 855; Fellows *v.* Hall, 3 McLean (U. S.) 281, 8 Fed. Cas. No. 4,722.

3. Requisites of Plea. A pleading which sets up a discharge as a defense should allege facts sufficient to show that the proceedings were regular and that the discharge was actually granted.[77]

4. Time of Pleading. A plea of a discharge in bankruptcy should be filed in due order of pleading,[78] and within the time prescribed by rule of court.[79] Laches in pleading it,[80] unless explained,[81] is fatal. If the discharge is obtained

See 6 Cent. Dig. tit. "Bankruptcy," § 825.

As to showing bankruptcy under the general issue in assumpsit see Assumpsit, Action of, IX, H, 1, a [4 Cyc. 355].

The discharge must be pleaded in a suit in equity as well as in an action at law. Fellows *v.* Hall, 3 McLean (U. S.) 281, 8 Fed. Cas. No. 4,722.

Where a judgment has been rendered against a bankrupt after his discharge and an action is brought on such judgment in another state, he cannot set up his discharge in the action brought on such judgment; his failure to plead his discharge in the first instance is a waiver of the defense. Dimock *v.* Revere Copper Co., 117 U. S. 559, 7 S. Ct. 855, 29 L. ed. 994. See also Dewey *v.* Moyer, 9 Hun (N. Y.) 473, 16 Nat. Bankr. Reg. 1.

77. Bankr. Act (1867), § 34, provided that a discharge "may be pleaded, by a simple averment that on the day of its date such discharge was granted to him, setting the same forth *in hæc verba*." See also the following cases:

Alabama.— Penn *v.* Edwards, 50 Ala. 63.

Georgia.— McNeil *v.* Knott, 11 Ga. 142.

Illinois.— Boone *v.* Stone, 8 Ill. 537.

Indiana.— Donald *v.* Kell, 111 Ind. 1, 11 N. E. 782.

Kansas.— Widner *v.* Yeast, 32 Kan. 400, 4 Pac. 838.

Kentucky.— Laidley *v.* Cummings, 83 Ky. 606.

Michigan.—Bryant *v.* Kinyon, (Mich. 1901) 86 N. W. 531, 53 L. R. A. 801, 6 Am. Bankr. Rep. 237.

Mississippi.— Hayes *v.* Flowers, 25 Miss. 169; Atkinson *v.* Fortinberry, 7 Sm. & M. (Miss.) 302.

Missouri.— Reed *v.* Vaughn, 10 Mo. 447.

New Hampshire.— Morrison *v.* Woolson, 23 N. H. 11; Johnson *v.* Ball, 15 N. H. 407.

New Jersey.— State *v.* Gaston, 52 N. J. L. 321, 19 Atl. 608; Stoll *v.* Wilson, 38 N. J. L. 198; Price *v.* Bray, 21 N. J. L. 13.

New York.— McCormick *v.* Pickering, 4 N. Y. 276; McNulty *v.* Frame, 1 Sandf. (N. Y.) 128.

Ohio.— Rowan *v.* Holcomb, 16 Ohio 463; Keene *v.* Mould, 16 Ohio 12.

Pennsylvania.— Ingalls *v.* Savage, 4 Pa. St. 224.

South Carolina.— Preston *v.* Simons, 1 Rich. (S. C.) 262.

Tennessee.— Dick *v.* Powell, 2 Swan (Tenn.) 632.

Vermont.— Downer *v.* Chamberlin, 21 Vt. 414; Harrington *v.* McNaughton, 20 Vt. 293.

Wisconsin.— Stow *v.* Parks, 2 Binn. (Wis.) 122, 1 Chandl. (Wis.) 60.

United States.— Lathrop *v.* Stuart, 5 McLean (U. S.) 167, 14 Fed. Cas. No. 8,113; White *v.* Howe, 3 McLean (U. S.) 291, 29 Fed. Cas. No. 17,549.

See 6 Cent. Dig. tit. "Bankruptcy," § 831.

The present Bankruptcy Act does not prescribe the mode of pleading a discharge.

78. Manwarring *v.* Kouns, 35 Tex. 171.

In Louisiana defendant may plead a discharge after issue joined, or at any time before judgment against him. Block *v.* Fitche, 33 La. Ann. 1094.

In Pennsylvania it has been held that defendant may add the plea of bankruptcy after the cause has been several times on the trial list on the issue of a plea of payment, at any time before or on the actual trial. Richards *v.* Nixon, 20 Pa. St. 19.

79. Hengehold *v.* Gardner, 6 Ohio Dec. (Reprint) 822, 8 Am. L. Rec. 352.

80. *Kansas.*— Tefft *v.* Firey, 22 Kan. 753.

Missouri.— State Bank *v.* Franciscus, 15 Mo. 303.

New York.— Medbury *v.* Swan, 46 N. Y. 200, 8 Nat. Bankr. Reg. 537; Henderson *v.* Savage, 46 N. Y. Super. Ct. 221; Beckhœfer *v.* Huber, 1 N. Y. City Ct. 234; Sandford *v.* Sinclair, 3 Den. (N. Y.) 269; Freeman *v.* Warren, 3 Barb. Ch. (N. Y.) 635.

Pennsylvania.— Richards *v.* Nixon, 20 Pa. St. 19; Watts *v.* Fell, 19 Wkly. Notes Cas. (Pa.) 131.

Wisconsin.— Bank of Commerce *v.* Elliott, 109 Wis. 648, 85 N. W. 417.

United States.— Doggett *v.* Emerson, 1 Woodb. & M. (U. S.) 195, 7 Fed. Cas. No. 3,962.

See 6 Cent. Dig. tit. "Bankruptcy," § 827.

On appeal.— A plea of a discharge in bankruptcy comes too late if first presented in an appellate court. Taliaferro *v.* Gay, 78 Ky. 496. And an appellate court will not take cognizance of a plea of discharge obtained after the appeal has been taken from the judgment below. Cornell *v.* Dakin, 38 N. Y. 253; Ward *v.* Tunstall, 2 Baxt. (Tenn.) 319; Riggs *v.* White, 4 Heisk. (Tenn.) 503. See also Dormire *v.* Cogly, 8 Blackf. (Ind.) 177, holding that a plea to a writ of error of the bankruptcy of the plaintiff in error showing that the judgment was rendered after he was declared a bankrupt is insufficient. But see Todd *v.* Barton, 117 Mass. 291, holding that where a defendant before judgment against him suggested his bankruptcy and filed a written motion for a continuance, he may, upon subsequently obtaining a review, plead his discharge in bar of the action.

81. Pugh *v.* York, 74 N. C. 383; Featherman *v.* Beamish, 2 C. Pl. Rep. (Pa.) 155.

subsequent to the bringing of an action upon a claim which such discharge would release, and against which it would be a defense, defendant may be permitted to amend his pleadings for the purpose of setting up such defense.[82]

G. Evidence of Discharge. A certified copy of an order granting a discharge is evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.[83]

H. Discharge in Foreign Court. The discharge of a bankrupt in the court of a foreign country will not bar an action brought in the courts of the United States by a citizen who was not a party to, and did not appear in, the bankruptcy proceedings, although the debt upon which such action is based was contracted in such foreign country and was to be there paid.[84] But if a creditor who is a citizen of the United States has voluntarily submitted himself to the jurisdiction of a bankruptcy court in a foreign country he will be bound by a discharge granted by such court.[85]

I. New Promise After Discharge — 1. In General. The discharge of the bankrupt releases him from all legal obligation to pay a debt provable in bankruptcy;[86] but the moral obligation of the bankrupt still continues. This moral obligation, united with a subsequent promise by the bankrupt to pay the debt, is sufficient to constitute a right of action against such bankrupt.[87] A new promise

82. Clinton Nat. Bank *v.* Taylor, 120 Mass. 124; Holyoke *v.* Adams, 59 N. Y. 233, 13 Nat. Bankr. Reg. 413; Lyon *v.* Isett, 11 Abb. Pr. N. S. (N. Y.) 353; Hellman *v.* Licher, 9 Abb. Pr. N. S. (N. Y.) 288; Stewart *v.* Isidor, 5 Abb. Pr. N. S. (N. Y.) 68; Scott *v.* Grant, 10 Paige (N. Y.) 485; Keene *v.* Mould, 16 Ohio 12; Banque Franco-Egyptienne *v.* Brown, 24 Fed. 106.

83. Bankr. Act (1898), § 21*f*. See also the following cases:

Georgia.— Blake *v.* Bigelow, 5 Ga. 437.

Indiana.— Hays *v.* Ford, 55 Ind. 52.

Iowa.—Viele *v.* Blanchard, 4 Greene (Iowa) 299.

Kentucky.— Waller *v.* Edwards, Litt. Sel. Cas. (Ky.) 348.

Louisiana.— Miller *v.* Chandler, 29 La. Ann. 88.

Nebraska.— Smith *v.* Kinney, 6 Nebr. 447.

New York.— Crouse *v.* Whittlesey, 66 Hun (N. Y.) 629, 20 N. Y. Suppl. 965, 49 N. Y. St. 549 [*affirmed* in 138 N. Y. 615, 33 N. E. 1083, 51 N. Y. St. 933].

Ohio.— Strader *v.* Lloyd, 1 Ohio Dec. (Reprint) 57, 1 West. L. J. 396.

Pennsylvania.— Boas *v.* Hetzel, 3 Pa. St. 298.

Texas.— Tompkins *v.* Bennett, 3 Tex. 36.

See 6 Cent. Dig. tit. "Bankruptcy," § 842.

Form of order of discharge is prescribed in U. S. Supreme Ct. Bankr. Forms, No. 59; 89 Fed. lviii.

84. The discharge of a bankrupt from his debts is by virtue of statutory enactment and can have no extraterritorial effect. Therefore, when the debtor goes beyond the limits of the country under whose laws he receives his discharge, it will afford him no protection from his original liability on a debt owing to a creditor residing in a foreign country. Phelps *v.* Borland, 103 N. Y. 406, 9 N. E. 307, 57 Am. Rep. 755; Munroe *v.* Guilleaume, 3 Abb. Dec. (N. Y.) 334, 3 Keyes (N. Y.) 30; Green *v.* Sarmiento, Pet. C. C. (U. S.) 74, 3 Wash. (U. S.) 17, 10 Fed. Cas. No. 5,760. See also Lizardi *v.* Cohen, 3 Gill (Md.) 430; Zipcey *v.* Thompson, 1 Gray (Mass.) 243; Blake *v.* Williams, 6 Pick. (Mass.) 286, 17 Am. Dec. 372; Lanfear *v.* Sumner, 17 Mass. 110, 9 Am. Dec. 119; Kelly *v.* Crapo, 45 N. Y. 86, 6 Am. Rep. 35; Hoyt *v.* Thompson, 5 N. Y. 320; Moore *v.* Horton, 32 Hun (N. Y.) 393; McMenomy *v.* Murray, 3 Johns. Ch. (N. Y.) 435; McDougall *v.* Page, 55 Vt. 187, 45 Am. Rep. 602; Baldwin *v.* Hale, 1 Wall. (U. S.) 223, 17 L. ed. 531; Booth *v.* Clark, 17 How. (U. S.) 322, 15 L. ed. 164; McMillan *v.* McNeill, 4 Wheat. (U. S.) 209, 4 L. ed. 552; Harrison *v.* Sterry, 5 Cranch (U. S.) 289, 3 L. ed. 104.

Where the debt was created within the jurisdiction of the court granting the discharge, the rule of the comity of nations requires the courts of all countries to recognize the efficacy of such discharge. Harris *v.* Mandeville, 2 Yeates (Pa.) 99, 2 Dall. (Pa.) 256, 1 L. ed. 371; Potter *v.* Brown, 5 East 124, 1 Smith K. B. 351, 7 Rev. Rep. 663. See also Ellis *v.* McHenry, L. R. 6 C. P. 228, 40 L. J. C. P. 109, 23 L. T. Rep. N. S. 861, 19 Wkly. Rep. 503; Ballantine *v.* Golding, Cooke Bankr. L. (6th ed.) 499; Ohlemacher *v.* Brown, 44 U. C. Q. B. 366.

85. Phelps *v.* Borland, 103 N. Y. 406, 9 N. E. 307, 57 Am. Rep. 755; Peck *v.* Hibbard, 26 Vt. 698, 62 Am. Dec. 605. See also Long *v.* Hammond, 40 Me. 204; Very *v.* McHenry, 29 Me. 206; May *v.* Breed, 7 Cush. (Mass.) 15, 54 Am. Dec. 700.

86. See *supra*, XIX, E.

87. *Alabama.*— Griel *v.* Solomon, 82 Ala. 85, 2 So. 322, 60 Am. Rep. 733.

Arkansas.— Apperson *v.* Stewart, 27 Ark. 619.

California.— Lambert *v.* Schmalz, 118 Cal. 33, 50 Pac. 13.

Connecticut.— *In re* Merriman, 44 Conn.

to revive a discharged debt must, however, be clear, express, distinct, and unequivocal, and without qualification or condition.[88] It need not be in writ-

587, 17 Fed. Cas. No. 9,479, 18 Nat. Bankr. Reg. 411, 26 Pittsb. Leg. J. (Pa.) 120.

Georgia.— Anderson *v.* Clark, 70 Ga. 362; Ross *v.* Jordan, 62 Ga. 298; Eaton *v.* Yarborough, 19 Ga. 82.

Indiana.— Willis *v.* Cushman, 115 Ind. 100, 17 N. E. 168; Carey *v.* Hess, 112 Ind. 398, 14 N. E. 235; Hockett *v.* Jones, 70 Ind. 227.

Iowa.— Knapp *v.* Hoyt, 57 Iowa 591, 10 N. W. 925, 42 Am. Rep. 59.

Kentucky.— Ecker *v.* Galbraith, 12 Bush (Ky.) 71; Egbert *v.* McMichael, 9 B. Mon. (Ky.) 44; Graham *v.* Hunt, 8 B. Mon. (Ky.) 7.

Louisiana.— Andrieu's Succession, 44 La. Ann. 103, 10 So. 388; Blanc *v.* Banks, 10 Rob. (La.) 115, 43 Am. Dec. 175.

Maine.— Williams *v.* Robbins, 32 Me. 181; Otis *v.* Gazlin, 31 Me. 567.

Maryland.— Yates *v.* Hollingsworth, 5 Harr. & J. (Md.) 216.

Massachusetts.— Way *v.* Sperry, 6 Cush. (Mass.) 238, 52 Am. Dec. 779; Maxim *v.* Morse, 8 Mass. 127.

Michigan.— Craig *v.* Seitz, 63 Mich. 727, 30 N. W. 347; Edwards *v.* Nelson, 51 Mich. 121, 16 N. W. 261.

Mississippi.— McWillie *v.* Kirkpatrick, 28 Miss. 802, 64 Am. Dec. 125. *Compare* Rice *v.* Maxwell, 13 Sm. & M. (Miss.) 289, 53 Am. Dec. 85.

Missouri.— Wislizenus *v.* O'Fallon, 91 Mo. 184, 3 S. W. 837; Swan *v.* Lullman, 12 Mo. App. 584.

New Hampshire.— Nashua Second Nat. Bank *v.* Wood, 59 N. H. 407; Fletcher *v.* Neally, 20 N. H. 464. See also Badger *v.* Gilmore, 33 N. H. 361, 66 Am. Dec. 729.

New Jersey.— Christie *v.* Bridgman, 51 N. J. Eq. 331, 25 Atl. 939, 30 Atl. 429; Briggs *v.* Sutton, 20 N. J. L. 581.

New York.— Dusenbury *v.* Hoyt, 53 N. Y. 521, 13 Am. Rep. 543, 10 Nat. Bankr. Reg. 313; Hopkins *v.* Ward, 67 Barb. (N. Y.) 452.

North Carolina.— Parker *v.* Grant, 91 N. C. 338; Fraley *v.* Kelly, 79 N. C. 348.

Ohio.— Turner *v.* Chrisman, 20 Ohio 332.

Pennsylvania.— Murphy *v.* Crawford, 114 Pa. St. 496, 7 Atl. 142; Kingston *v.* Wharton, 2 Serg. & R. (Pa.) 208, 7 Am. Dec. 638.

Tennessee.— Taylor *v.* Nixon, 4 Sneed (Tenn.) 352.

Vermont.— Hill *v.* Kendall, 25 Vt. 528; Farmers, etc., Bank *v.* Flint, 17 Vt. 508, 44 Am. Dec. 351.

Virginia.— Horner *v.* Speed, 2 Patt. & H. (Va.) 616.

United States.— Mutual Reserve Fund L. Assoc. *v.* Beatty, 93 Fed. 747, 35 C. C. A. 573, 2 Am. Bankr. Rep. 244.

See 6 Cent. Dig. tit. "Bankruptcy," § 858.

The indebtedness discharged is a good consideration for a subsequent promise to pay the original debt. *In re* Merriman, 44 Conn. 587, 17 Fed. Cas. No. 9,479, 18 Nat. Bankr. Reg. 411, 26 Pittsb. Leg. J. (Pa.) 120; Mason, etc., Organ Co. *v.* Bancroft, 1 Abb. N. Cas. (N. Y.) 415.

88. *Alabama.*— Griel *v.* Solomon, 82 Ala. 85, 2 So. 322, 60 Am. Rep. 733; Evans *v.* Carey, 29 Ala. 99; Mobile Branch Bank *v.* Boykin, 9 Ala. 320; Dearing *v.* Moffitt, 6 Ala. 776.

Arkansas.— Apperson *v.* Stewart, 27 Ark. 619; Samuel *v.* Cravens, 10 Ark. 380.

California.— Lambert *v.* Schmalz, 118 Cal. 33, 50 Pac. 13.

Connecticut.— *In re* Merriman, 44 Conn. 587, 17 Fed. Cas. No. 9,479, 18 Nat. Bankr. Reg. 411, 26 Pittsb. Leg. J. (Pa.) 120.

Illinois.— Katz *v.* Moessinger, 110 Ill. 372; St. John *v.* Stephenson, 90 Ill. 82; Willetts *v.* Cotherson, 3 Ill. App. 644.

Indiana.— Meech *v.* Lamon, 103 Ind. 515, 3 N. E. 159, 53 Am. Rep. 540; Hubbard *v.* Farrell, 87 Ind. 215; Shockey *v.* Mills, 71 Ind. 288, 36 Am. Rep. 196.

Kentucky.—Egbert *v.* McMichael, 9 B. Mon. (Ky.) 44; Jones *v.* Talbott, 13 Ky. L. Rep. 303; Doom *v.* Snyder, 10 Ky. L. Rep. 281; Duff *v.* Hagins, 8 Ky. L. Rep. 358; Buford *v.* Crigler, 7 Ky. L. Rep. 662.

Louisiana.— Bartlett *v.* Peck, 5 La. Ann. 669.

Maine.— Patten *v.* Ellingwood, 32 Me. 163; Porter *v.* Porter, 31 Me. 169.

Maryland.— Yate *v.* Hollingsworth, 5 Harr. & J. (Md.) 216.

Massachusetts.— Bigelow *v.* Norris, 139 Mass. 12, 29 N. E. 61; Elwell *v.* Cumner, 136 Mass. 102; Pratt *v.* Russell, 7 Cush. (Mass.) 462.

Michigan.— Brewer *v.* Boynton, 71 Mich. 254, 39 N. W. 49; Craig *v.* Seitz, 63 Mich. 727, 30 N. W. 347.

Minnesota.— Smith *v.* Stanchfield, 84 Minn. 343, 87 N. W. 917, 7 Am. Bankr. Rep. 498.

Mississippi.— La Tourrette *v.* Price, 28 Miss. 702; Prewett *v.* Caruthers, 12 Sm. & M. (Miss.) 491.

New Hampshire.— Wiggin *v.* Hodgdon, 63 N. H. 39; Stark *v.* Stinson, 23 N. H. 259.

New York.— Lawrence *v.* Harrington, 122 N. Y. 408, 25 N. E. 406, 33 N. Y. St. 717; Kiernan *v.* Fox, 43 N. Y. App. Div. 58, 59 N. Y. Suppl. 330; Scheper *v.* Briggs, 28 N. Y. App. Div. 115, 50 N. Y. Suppl. 869; Goldman *v.* Abrahams, 9 Daly (N. Y.) 223; Jersey City Ins. Co. *v.* Archer, 7 N. Y. St. 326 [*affirmed* in 122 N. Y. 376, 25 N. E. 338, 33 N. Y. St. 552]; Stern *v.* Nussbaum, 47 How. Pr. (N. Y.) 489.

North Carolina.— Riggs *v.* Roberts, 85 N. C. 151, 39 Am. Rep. 692. See also Shaw *v.* Burney, 86 N. C. 331, 41 Am. Rep. 461.

Ohio.— Turner *v.* Chrisman, 20 Ohio 332; Dyer *v.* Isham, 4 Ohio Cir. Ct. 429.

Pennsylvania.— Murphy *v.* Crawford, 114 Pa. St. 496; 7 Atl. 142; Yoxtheimer *v.* Keyser, 11 Pa. St. 364, 51 Am. Dec. 555; Breit *v.* Osner, 2 Wkly. Notes Cas. (Pa.) 601.

Rhode Island.— Bennett *v.* Everett, 3 R. I. 152, 67 Am. Dec. 498; Harris *v.* Peck, 1 R. I. 262.

South Carolina.— Lanier *v.* Tolleson, 20 S. C. 57.

ing [89] unless a state statute so requires.[90] It need not be made to the creditor himself. A promise to the agent or attorney of the creditor is sufficient to avoid the effect of the discharge.[91] The date of the new promise is also immaterial. It will be effectual if made before the bankrupt's discharge and after the filing of his petition.[92]

Tennessee.— Brown *v.* Collier, 8 Humphr. (Tenn.) 510.

Vermont.— McDougall *v.* Page, 55 Vt. 187, 45 Am. Rep. 602; Sherman *v.* Hobart, 26 Vt. 60; Warren *v.* Bishop, 22 Vt. 607.

Virginia.— Horner *v.* Speed, 2 Patt. & H. (Va.) 616.

United States.— Allen *v.* Ferguson, 18 Wall. (U. S.) 1, 21 L. ed. 854, 9 Nat. Bankr. Reg. 481.

See 6 Cent. Dig. tit. "Bankruptcy," §§ 855–857.

An acknowledgment or recognition of the debt, or a general expression of an intent to pay, is not sufficiently explicit. Porter *v.* Porter, 31 Me. 169; Brewer *v.* Boynton, 71 Mich. 254, 39 N. W. 49; Murphy *v.* Crawford, 114 Pa. St. 496, 7 Atl. 142. Thus a statement in a letter by a debtor to his creditor "Be satisfied; all will be right. I intend to pay all my just debts, if money can be made from hired labor. . . . All will be right betwixt me and my just creditors" (Allen *v.* Ferguson, 18 Wall. (U. S.) 1, 21 L. ed. 854, 9 Nat. Bankr. Reg. 481), or a statement to the effect that "we do not calculate you will suffer any loss by us," "we will do the best we can and all that is in our power to save you harmless" (Lawrence *v.* Harrington, 122 N. Y. 408, 414, 25 N. E. 406, 33 N. Y. St. 717) is not indicative of an intention to pay at all events.

The attendant circumstances may be considered in determining whether the words employed were addressed to the creditor or to third persons, and also the cause and occasion for the use of the words. Evans *v.* Carey, 29 Ala. 99. See also Church United Soc. *v.* Winkley, 7 Gray (Mass.) 460; Pratt *v.* Russell, 7 Cush. (Mass.) 462; Stewart *v.* Reckless, 24 N. J. L. 427; Fraley *v.* Kelly, 67 N. C. 78; Sherman *v.* Hobart, 26 Vt. 60.

89. *Arkansas.*— Worthington *v.* De Bardlekin, 33 Ark. 651; Apperson *v.* Stewart, 27 Ark. 619.

California.— Lambert *v.* Schmalz, 118 Cal. 33, 50 Pac. 13.

Georgia.— Ross *v.* Jordan, 62 Ga. 298.

Illinois.— Marshall *v.* Tracy, 74 Ill. 379.

Louisiana.— Blanc *v.* Banks, 10 Rob. (La.) 115, 43 Am. Dec. 175.

Maine.— *Compare* Kingley *v.* Cousins, 47 Me. 91; Otis *v.* Gazlin, 31 Me. 567; Spooner *v.* Russell, 30 Me. 454.

Massachusetts.— Way *v.* Sperry, 6 Cush. (Mass.) 238, 52 Am. Dec. 779.

Michigan.— Craig *v.* Seitz, 63 Mich. 727, 30 N. W. 347.

Minnesota.— Smith *v.* Stanchfield, 84 Minn. 343, 87 N. W. 917, 7 Am. Bankr. Rep. 498.

North Carolina.— Kull *v.* Farmer, 78 N. C. 339; Henly *v.* Lanier, 75 N. C. 172.

South Carolina.— Lanier *v.* Tolleson, 20 S. C. 57.

Texas.— Calloway *v.* Baldwin, 1 Tex. App. Civ. Cas. § 591.

Vermont.— Barron *v.* Benedict, 44 Vt. 518; Farmers', etc., Bank *v.* Flint, 17 Vt. 508, 44 Am. Dec. 351.

Virginia.— Horner *v.* Speed, 2 Patt. & H. (Va.) 616.

United States.— Mutual Reserve Fund L. Assoc. *v.* Beatty, 93 Fed. 747, 35 C. C. A. 573, 2 Am. Bankr. Rep. 244.

See, generally, FRAUDS, STATUTE OF; and 6 Cent. Dig. tit. "Bankruptcy," § 860.

90. Me. Stat. (1848), c. 52; Mass. Pub. Stat. c. 78, § 3; N. Y. Laws (1882), c. 324, § 1. And see Tompkins *v.* Hazen, 165 N. Y. 18, 58 N. E. 762, 5 Am. Bankr. Rep. 62, holding that where the new promise sought to be established rests in conversations between defendant and plaintiff and several letters written by defendant, which standing by themselves contained no promise in writing to pay the debt discharged by defendant's bankruptcy, such debt will not be revived. See also Jacobs *v.* Carpenter, 161 Mass. 16, 36 N. E. 676; Elwell *v.* Cumner, 136 Mass. 102; Kiernan *v.* Fox, 43 N. Y. App. Div. 58, 59 N. Y. Suppl. 330; Scheper *v.* Briggs, 28 N. Y. App. Div. 115, 50 N. Y. Suppl. 869.

91. *Indiana.*— Hunt *v.* Jones, 1 Ind. App. 545, 28 N. E. 98.

Kentucky.— Jones *v.* Talbott, 13 Ky. L. Rep. 303, promise to wife of creditor.

Missouri.— Reith *v.* Lullmann, 11 Mo. App. 254.

New Hampshire.— Underwood *v.* Eastman, 18 N. H. 582.

North Carolina.— Shaw *v.* Burney, 86 N. C. 331, 41 Am. Rep. 461.

Pennsylvania.— Bolton *v.* King, 105 Pa. St. 78. See also Comfort *v.* Eisenbeis, 11 Pa. St. 13.

Vermont.— Hill *v.* Kendall, 25 Vt. 528. See also Jones *v.* Sennott, 57 Vt. 355.

See 6 Cent. Dig. tit. "Bankruptcy," § 862.

A promise to a third person is not sufficient. Jones *v.* Talbott, 13 Ky. L. Rep. 303; Prewett *v.* Caruthers, 12 Sm. & M. (Miss.) 491; Underwood *v.* Eastman, 18 N. H. 582; Stewart *v.* Reckless, 24 N. J. L. 427; Moseley *v.* Caldwell, 3 Baxt. (Tenn.) 208. *Contra*, Evans *v.* Carey, 29 Ala. 99; McKinley *v.* O'Keson, 5 Pa. St. 369.

92. *Alabama.*— Griel *v.* Solomon, 82 Ala. 85, 2 So. 322, 60 Am. Rep. 733.

Arkansas.— Lanagin *v.* Nowland, 44 Ark. 84.

Illinois.— Cheney *v.* Barge, 26 Ill. App. 182; Katz *v.* Moessinger, 7 Ill. App. 536.

Iowa.— Knapp *v.* Hoyt, 57 Iowa 591, 10 N. W. 925, 42 Am. Rep. 59.

Kentucky.— *Compare* Graves *v.* McGuire,

But partial payments upon a debt discharged in bankruptcy will not revive such debt.[93]

2. Declaring on New Promise or Original Debt. The authorities are in conflict as to whether the creditor should declare on the new promise or on the original debt. According to one line of cases the original debt may be considered the cause of action, at least for the purpose of the remedy.[94] According to another line the new promise does not revive the original debt so as to reinvest it with an actionable quality, but only recognizes its moral obligation so far as to admit it as the consideration to support the new promise.[95]

J. Revocation and Impeachment of Discharge — 1. Direct Impeachment. The judge may, upon the application of parties in interest, who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.[96] In the event of the revocation of the dis-

79 Ky. 532; Ogden *v.* Redd, 13 Bush (Ky.) 581.

Maine.— Otis *v.* Gazlin, 31 Me. 567; Corliss *v.* Shepherd, 28 Me. 550.

New Hampshire.— Wiggin *v.* Hodgdon, 63 N. H. 39.

New York.—Jersey City Ins. Co. *v.* Archer, 122 N. Y. 376, 25 N. E. 338, 33 N. Y. St. 552; Stilwell *v.* Coope, 4 Den. (N. Y.) 225.

North Carolina.— Fraley *v.* Kelly, 67 N. C. 78; Hornthal *v.* McRae, 67 N. C. 21.

Pennsylvania.— Kingston *v.* Wharton, 2 Serg. & R. (Pa.) 208, 7 Am. Dec. 638.

Wisconsin.— Hill *v.* Trainer, 49 Wis. 537, 5 N. W. 926.

See 6 Cent. Dig. tit. "Bankruptcy," § 861.

93. *Alabama.*— Griel *v.* Solomon, 82 Ala. 85, 2 So. 322, 60 Am. Rep. 733.

Illinois.— Willetts *v.* Cotherson, 3 Ill. App. 644.

Iowa.—See Viele *v.* Ogilvie, 2 Greene (Iowa) 326.

Massachusetts.— Heim *v.* Chapman, 171 Mass. 347, 50 N. E. 529; Cambridge Sav. Inst. *v.* Littlefield, 6 Cush. (Mass.) 210. See also Jacobs *v.* Carpenter, 161 Mass. 16, 36 N. E. 676.

New Hampshire.— Stark *v.* Stinson, 23 N. H. 259.

New York.— Lawrence *v.* Harrington, 122 N. Y. 408, 25 N. E. 406, 33 N. Y. St. 717; Wheeler *v.* Simmons, 60 Hun (N. Y.) 404, 15 N. Y. Suppl. 462, 39 N. Y. St. 797.

Ohio.— Dyer *v.* Isham, 4 Ohio Cir. Ct. 429.

Pennsylvania.— *In re* Hazleton, 1 Wkly. Notes Cas. (Pa.) 67.

Vermont.— See Warren *v.* Bishop, 22 Vt. 607.

See 6 Cent. Dig. tit. "Bankruptcy," § 854.

94. The discharge is regarded as a discharge of the debt *sub modo* only, and the new promise as a waiver of the bar to the recovery of the debt created by the discharge.

Arkansas.— Nowland *v.* Lanagan, 45 Ark. 108.

Illinois.— Classen *v.* Schoenemann, 80 Ill. 304; Marshall *v.* Tracy, 74 Ill. 379.

Maine.— Otis *v.* Gazlin, 31 Me. 567.

Massachusetts.— See Maxim *v.* Morse, 8 Mass. 127.

Michigan.— Craig *v.* Seitz, 63 Mich. 727, 30 N. W. 347.

New Hampshire.— Badger *v.* Gilmore, 33 N. H. 361, 66 Am. Dec. 729; Underwood *v.* Eastman, 18 N. H. 582.

New York.— Dusenbury *v.* Hoyt, 53 N. Y. 521, 13 Am. Rep. 543, 10 Nat. Bankr. Reg. 313; Graham *v.* O'Hern, 24 Hun (N. Y.) 221; Depuy *v.* Swart, 3 Wend. (N. Y.) 135, 20 Am. Dec. 673.

Ohio.— Turner *v.* Chrisman, 20 Ohio 332; Clarkson *v.* Ruan, 6 Ohio Dec. (Reprint) 829, 8 Am. L. Rec. 360.

Vermont.— Farmers, etc., Bank *v.* Flint, 17 Vt. 508, 44 Am. Dec. 351.

See 6 Cent. Dig. tit. "Bankruptcy," § 863.

95. *Alabama.*—The creditor may sue on the new promise, or on the original debt. Wolffe *v.* Eberlein, 74 Ala. 99, 49 Am. Rep. 809.

California.— Lambert *v.* Schmalz, 118 Cal. 33, 50 Pac. 13.

Kentucky.— Carson *v.* Osborne, 10 B. Mon. (Ky.) 155; Egbert *v.* McMichael, 9 B. Mon. (Ky.) 44; Graham *v.* Hunt, 8 B. Mon. (Ky.) 7.

Missouri.— Fleming *v.* Lullman, 11 Mo. App. 104.

New Jersey.— Stewart *v.* Reckless, 24 N. J. L. 427.

North Carolina.— Fraley *v.* Kelly, 88 N. C. 227, 43 Am. Rep. 743.

Pennsylvania.— Murphy *v.* Crawford, 114 Pa. St. 496, 7 Atl. 142; Reeside *v.* Hadden, 12 Pa. St. 243; Earnest *v.* Parke, 4 Rawle (Pa.) 452, 27 Am. Dec. 280; Field's Estate, 2 Rawle (Pa.) 351, 21 Am. Dec. 454; Ott *v.* Perry, 1 Phila. (Pa.) 77, 7 Leg. Int. (Pa.) 118.

Virginia.— The declaration may be on the new promise or on the original debt. Horner *v.* Speed, 2 Patt. & H. (Va.) 616.

96. Bankr. Act (1898), c. 3, § 15*a*; *In re* Hansen, 107 Fed. 252, 5 Am. Bankr. Rep. 747; *In re* Shaffer, 104 Fed. 982, 4 Am. Bankr. Rep. 728; *In re* Meyers, 100 Fed. 775, 3 Am. Bankr. Rep. 722.

Courts may, in case of default, or in other

charge, the property acquired by the bankrupt in addition to his estate at the time the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.[97]

2. Collateral Impeachment. A discharge granted by a court having jurisdiction is, until set aside or reversed in a direct proceeding, conclusive upon all parties to the proceeding. It cannot therefore be attacked collaterally.[98]

XX. Partnership Cases.[99]

A. Voluntary Bankruptcy — 1. In General. The term "person" as used in the Bankruptcy Act includes a partnership.[1] Therefore a partner-

cases where justice requires it, annul or revoke an order of discharge, if application therefor is promptly made. *In re* Dupee, 2 Lowell (U. S.) 18, 8 Fed. Cas. No. 4,183, 6 Nat. Bankr. Reg. 89. *Compare In re* Buchstein, 9 Ben. (U. S.) 215, 4 Fed. Cas. No. 2,076, 17 Nat. Bankr. Reg. 1.

The fraud which will warrant the revocation of a discharge must have been connected with the application therefor, and not in respect to some transaction unconnected with such application, and long prior to the adjudication. *In re* Hoover, 105 Fed. 354, 5 Am. Bankr. Rep. 247. See also *In re* Peters, 1 Am. Bankr. Rep. 248.

Buying off opposition.— If the evidence shows that the bankrupt had bought off the opposition of a creditor to his discharge, the fact is itself *prima facie* evidence that he was not entitled to such discharge, and an order revoking the same is warranted. *In re* Dietz, 97 Fed. 563, 3 Am. Bankr. Rep. 316. See also Matter of Marshall, 3 Fed. 220.

Reference of petition.— When a petition for a revocation of a discharge makes out a *prima facie* case, and is filed in due time, it will be referred to the referee to ascertain and report upon the facts alleged, upon due notice to the bankrupt and upon hearing such evidence as may be offered by the parties. *In re* Meyers, 100 Fed. 775, 3 Am. Bankr. Rep. 722.

For revocations of discharge under prior acts see: Mall *v.* Ullrich, 37 Fed. 653; *In re* Adams, 29 Fed. 843; *In re* Bates, 27 Fed. 604; *In re* Douglass, 11 Fed. 403; *In re* Brick, 4 Fed. 804; *Ex p.* Briggs, 2 Lowell (U. S.) 389, 4 Fed. Cas. No. 1,868; *In re* Fowler, 2 Lowell (U. S.) 122, 9 Fed. Cas. No. 4,999; Tenny *v.* Collins, 23 Fed. Cas. No. 13,833, 4 Nat. Bankr. Reg. 477; *In re* Rainsford, 20 Fed. Cas. No. 11,537, 5 Nat. Bankr. Reg. 381; Pickett *v.* McGavick, 19 Fed. Cas. No. 11,126, 13 Alb. L. J. 218, 400, 3 Centr. L. J. 303, 14 Nat. Bankr. Reg. 236, 2 N. Y. Wkly. Dig. 378; *In re* Herrick, 12 Fed. Cas. No. 6,419, 7 Nat. Bankr. Reg. 341; *In re* Brown, 4 Fed. Cas. No. 1,983, 19 Nat. Bankr. Reg. 312.

97. Bankr. Act (1898), § 64*c*.

98. *Alabama.*— Jones *v.* Knox, 51 Ala. 367; Oates *v.* Parish, 47 Ala. 157.

Dakota.— Sawyer *v.* Rector, 5 Dak. 110, 37 N. W. 741.

Indiana.— Beglin *v.* Brehm, 123 Ind. 160, 23 N. E. 496; Blair *v.* Hanna, 87 Ind. 298.

Iowa.— Smith *v.* Engle, 44 Iowa 265.

Kentucky.— Payne *v.* Able, 7 Bush (Ky.) 344, 3 Am. Rep. 316; Ewell *v.* Pitman, 16 Ky. L. Rep. 299, 27 S. W. 870.

Maine.— Bailey *v.* Carruthers, 71 Me. 172; Symonds *v.* Barnes, 59 Me. 191, 8 Am. Rep. 418, 6 Nat. Bankr. Reg. 377; Corey *v.* Ripley, 57 Me. 69, 2 Am. Rep. 19, 4 Nat. Bankr. Reg. 503; Stetson *v.* Bangor, 56 Me. 274.

Massachusetts.— Black *v.* Blazo, 117 Mass. 17; Way *v.* Howe, 108 Mass. 502, 11 Am. Rep. 386, 4 Nat. Bankr. Reg. 677; Burpee *v.* Sparhawk, 108 Mass. 111, 11 Am. Rep. 320.

Michigan.— Benedict *v.* Smith, 48 Mich. 593, 12 N. W. 866; Grover *v.* Fox, 36 Mich. 453.

Mississippi.— Stevens *v.* Brown, 49 Miss. 597; Reed *v.* Bullington, 49 Miss. 223, 11 Nat. Bankr. Reg. 408.

Missouri.—Brown *v.* Covenant Mut. L. Ins. Co., 86 Mo. 51.

Nebraska.— Seymour *v.* Street, 5 Nebr. 85.

New Hampshire.— Marshall *v.* Sumner, 59 N. H. 218, 47 Am. Rep. 194; Parker *v.* Atwood, 52 N. H. 181.

New Jersey.— Linn *v.* Hamilton, 34 N. J. L. 305.

New York.— Dusenbury *v.* Hoyt, 53 N. Y. 521, 13 Am. Rep. 543, 10 Nat. Bankr. Reg. 313; Ocean Nat. Bank *v.* Olcott, 46 N. Y. 12. *Compare* Poillon *v.* Lawrence, 77 N. Y. 207.

Ohio.— Brown *v.* Kroh, 31 Ohio St. 492; Howland *v.* Carson, 28 Ohio St. 625; Rayl *v.* Lapham, 27 Ohio St. 452; Smith *v.* Ramsey, 27 Ohio St. 339.

Pennsylvania.— Richards *v.* Nixon, 20 Pa. St. 19; Farr *v.* Evans, 26 Pittsb. Leg. J. (Pa.) 141.

South Carolina.—Sinclair *v.* Smyth, 1 Brev. (S. C.) 402.

Tennessee.— Hudson *v.* Bigham, 12 Heisk. (Tenn.) 58; Morris *v.* Creed, 11 Heisk. (Tenn.) 155. *Compare* Hennessee *v.* Mills, 1 Baxt. (Tenn.) 38.

Texas.— Brown *v.* Causey, 56 Tex. 340; Alston *v.* Robinett, 37 Tex. 56.

United States.— Nicholas *v.* Murray, 5 Sawy. (U. S.) 320, 18 Fed. Cas. No. 10,223, 18 Nat. Bankr. Reg. 469.

See 6 Cent. Dig. tit. "Bankruptcy," § 843.

99. As to discharge in partnership cases see *supra*, XIX, E, 10.

1. Bankr. Act (1898), § 1 (19), *supra*, note 8, p. 238.

An association of persons claiming to be

ship which owes debts is entitled to the benefits of the Act as a voluntary bankrupt.[2]

2. PETITION. All the members of a partnership may unite in a voluntary petition, or an individual member of the firm may file a voluntary petition independent of the partnership.[3]

B. Involuntary Bankruptcy — 1. IN GENERAL. It is provided in the Bankruptcy Act of 1898 that a partnership, during the continuance of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt upon the petition of the individual members[4] of such part-

incorporated as a bank under the laws of a territory, by which such corporations were not authorized, and which has conducted business as a bank since then under the corporate name assumed, may be held, subject to the provisions of the Act, as a partnership. Davis *v.* Stevens, 104 Fed. 235, 4 Am. Bankr. Rep. 763.

2. Bankr. Act (1898), § 4*a*.

Voluntary bankruptcy after dissolution.— The existence of unpaid debts, where there are no partnership assets and the partnership has ceased to exist before the petition, is not sufficient to bring it within the intent and meaning of Bankr. Act (1898), § 5*a*, which authorizes a partnership, after its dissolution and before a final settlement of its affairs, to be adjudged a bankrupt. *In re* Altman, 1 Am. Bankr. Rep. 689. But see *In re* Levy, 95 Fed. 812, 2 Am. Bankr. Rep. 21, holding that after a dissolution of a partnership, where debts are still owed by it, although outlawed by the statute of limitations of the state in which the court of bankruptcy sits, such partnership may be adjudged a bankrupt. See also *In re* Hirsch, 97 Fed. 71, 3 Am. Bankr. Rep. 344.

The Act of 1867, § 36, provided that "where two or more persons who are partners in trade shall be adjudged bankrupt," certain rights of all creditors in the partnership property, and in case of deficiency, in the individual property, should be recognized. Under this section it was held that where a firm did not actually exist and had no assets it could not be adjudged a bankrupt. *In re* Daggett, 3 Dill. (U. S.) 83, 6 Fed. Cas. No. 3,536, 8 Nat. Bankr. Reg. 433; *In re* Work, 30 Fed. Cas. No. 18,044, 30 Leg. Int. (Pa.) 361; *In re* Wilkens, 30 Fed. Cas. No. 17,875, 2 Am. L. T. Bankr. Rep. 53, 1 Chic. Leg. N. 163, 2 Nat. Bankr. Reg. 349; Hopkins *v.* Carpenter, 12 Fed. Cas. No. 6,686, 18 Nat. Bankr. Reg. 339; *In re* Abbe, 1 Fed. Cas. No. 4, 7 Am. L. Reg. N. S. 824, 2 Nat. Bankr. Reg. 75, 15 Pittsb. Leg. J. (Pa.) 589. Other cases held that where the partnership was dissolved and had debts it could be adjudged a bankrupt although it had no assets. *In re* Noonan, 3 Biss. (U. S.) 491, 18 Fed. Cas. No. 10,292, 5 Chic. Leg. N. 557, 30 Leg. Int. (Pa.) 425, 10 Nat. Bankr. Reg. 330, 21 Pittsb. Leg. J. (Pa.) 73; *In re* Williams, 1 Lowell (U. S.) 406, 29 Fed. Cas. No. 17,703, 3 Nat. Bankr. Reg. 286; Hunt *v.* Pooke, 12 Fed. Cas. No. 6,896, 5 Nat. Bankr. Reg. 161. Still other cases held that a partnership might be adjudged a bankrupt although it did not actually exist, if there were partnership assets. *In re* Crockett, 2 Ben. (U. S.) 514, 6 Fed. Cas. No. 3,402, 2 Am. L. T. Bankr. Rep. 21, 2 Nat. Bankr. Reg. 208; *In re* Hartouch, 11 Fed. Cas. No. 6,164, 3 Nat. Bankr. Reg. 422; *Ex p.* Hall, 11 Fed. Cas. No. 5,919, 5 Law Rep. 269; *In re* Bidwell, 3 Fed. Cas. No. 1,392, 2 Nat. Bankr. Reg. 229.

3. *In re* Moore, 5 Biss. (U. S.) 79, 17 Fed. Cas. No. 9,750; *In re* Mitchell, 17 Fed. Cas. No. 9,656, 3 Nat. Bankr. Reg. 441.

Infant partner.— Upon a voluntary petition in bankruptcy presented by the adult member of a firm, the partnership, as well as the petitioning partner, may be adjudged bankrupt, and the partnership property, as well as the separate estate of the adult partner, may be administered in the bankruptcy proceedings, although no adjudication can be made against the infant partner. *In re* Duguid, 100 Fed. 274, 3 Am. Bankr. Rep. 794.

Where the partnership and the individual members thereof all become petitioners it is the practice in some courts to take proceedings as upon a single petition and administer the partnership estate as well as the estates of the individual members at the same time. *In re* Gay, 98 Fed. 870, 3 Am. Bankr. Rep. 529; *In re* Langslow, 98 Fed. 869, 3 Am. Bankr. Rep. 529. But in the eastern district of North Carolina it has been held that the filing of an involuntary petition against one partner individually does not justify any other member of the firm in coming into court and saving costs by being adjudged bankrupt even by a consent order. If the several partners desire to avail themselves of the benefits of the Bankruptcy Act they must file their individual petitions and make the deposit required to proceed *stricti juris*. Mahoney *v.* Ward, 100 Fed. 278, 3 Am. Bankr. Rep. 771. In another case in the same district where a petition was filed by a partnership to have the firm adjudged bankrupt, and also petitions by the individual members of such firm, it was held that the petitions and the accompanying schedules constituted separate and distinct cases. *In re* Barden, 101 Fed. 553, 4 Am. Bankr. Rep. 31.

Form of partnership petition is prescribed in U. S. Supreme Ct. Bankr. Forms, No. 2; 89 Fed. xxvii.

4. See *supra*, IV, B, 5; XX, A, 2.

As to separate petitions by several partners see *supra*, VI, B, 1, h, (1), (c).

A solvent partner is, as to the partnership and individual assets involved in the bank-

nership or of creditors.[5] A non-joining member is entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership.[6] The act of bankruptcy alleged in the petition may be that committed by one of the members of the partnership, while acting within the scope of delegated authority.[7]

2. ADJUDICATION. The partnership is a legal entity which may be adjudged a bankrupt in either voluntary[8] or involuntary proceedings,[9] irrespective of any adjudication of any of the individual members of the firm as bankrupts.[10] On the other hand, the language of the Act does not preclude an adjudication of the individual members of the partnership as bankrupts in proceedings against the partnership; and if there is such an adjudication there is nothing to prevent the partners from receiving a discharge individually, if they are otherwise entitled to

ruptcy proceedings, an individual creditor. *In re* Stevens, 104 Fed. 323, 5 Am. Bankr. Rep. 9.

When a petition is filed by one member of a partnership and the other members do not join, but contest the petition, the proceeding becomes, as to the non-joining members, an involuntary one. *In re* Murray, 96 Fed. 600, 3 Am. Bankr. Rep. 601. And where the petition is filed by one member of a partnership against the partnership and the members thereof, it must be clearly shown in the petition, and notice must be given to the non-joining partners before the firm can be adjudged bankrupt. *In re* Russell, 97 Fed. 32, 3 Am. Bankr. Rep. 91.

Under the Act of 1867 it has been held that a proceeding by the petition of one of two or more copartners to have such partners adjudicated bankrupt is a proceeding which is not wholly voluntary or wholly involuntary, but is partly voluntary and partly involuntary. So far as the petitioner is concerned it is voluntary; so far as the copartners not petitioning are concerned, it is not involuntary in the sense of other cases, unless the adjudication is asked for on the ground of the commission of an act of bankruptcy. *In re* Penn, 5 Ben. (U. S.) 89, 19 Fed. Cas. No. 10,927, 3 Chic. Leg. N. 225, 5 Nat. Bankr. Reg. 30; *In re* Noonan, 3 Biss. (U. S.) 491, 18 Fed. Cas. No. 10,292, 5 Chic. Leg. N. 557, 30 Leg. Int. (Pa.) 425, 10 Nat. Bankr. Reg. 330, 21 Pittsb. Leg. J. (Pa.) 73.

5. Bankr. Act (1898), § 5*a*.

Joining of creditors.— Creditors of a partnership, being also by law creditors of each member of the firm, may join in a petition to have an individual member adjudged a bankrupt. *In re* Mercur, 95 Fed. 634, 2 Am. Bankr. Rep. 626.

6. U. S. Supreme Ct. Bankr. G. O. No. 8.

Notice of the filing of the petition must be given to the non-joining member in the same manner as in the case of a petition against an individual debtor. U. S. Supreme Ct. Bankr. G. O. No. 8; *In re* Murray, 96 Fed. 600, 3 Am. Bankr. Rep. 601; *In re* Altman, 95 Fed. 263, 2 Am. Bankr. Rep. 407; and *supra*, VI, B, 4, a.

Defenses.— A non-joining member may appear at the time fixed by the court for the hearing of the petition and make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and may make all other defenses which are permitted to be made by an individual debtor. U. S. Supreme Ct. Bankr. G. O. No. 8.

Power of referee.— Where a petition praying an adjudication in bankruptcy against a firm has been presented by a part only of the partners, and referred to the proper referee, if the partners who did not join in the petition shall, upon notice, enter their appearance, and contest the adjudication of the firm, the referee cannot act on the petition, but must certify the case to the judge, before whom the issue will be heard and determined. *In re* Murray, 96 Fed. 600, 3 Am. Bankr. Rep. 601.

7. *In re* Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559, in which an assignment for the benefit of creditors, which purported to transfer all the property of the partnership, was held to be an act of bankruptcy, although the assignment itself may be void or voidable as against the firm because made by only one partner.

Where an assignment is made by the partnership and by each of the members thereof, the act of bankruptcy is committed by all of them, and the adjudication should embrace both the firm and the individual members thereof. Green River Deposit Bank *v.* Craig, 110 Fed. 137, 6 Am. Bankr. Rep. 381. And see Chemical Nat. Bank *v.* Meyer, 92 Fed. 896, 1 Am. Bankr. Rep. 565.

Where a single member of a partnership signs an admission of bankruptcy in behalf of the partnership, the authority to sign will be presumed from the acquiescence or failure to disaffirm on the part of the other members, and constitutes an unqualified act of bankruptcy for which the partnership may be held responsible. *In re* Kersten, 110 Fed. 929, 6 Am. Bankr. Rep. 516.

8. See *supra*, XX, A.

9. See *supra*, XX, B, 1.

10. Strause *v.* Hooper, 105 Fed. 590, 5 Am. Bankr. Rep. 225; *In re* Duguid, 100 Fed. 274, 3 Am. Bankr. Rep. 794; *In re* Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559; *In re* Gay, 98 Fed. 870, 3 Am. Bankr. Rep. 529; *In re* Wilcox, 94 Fed. 84, 2 Am. Bankr. Rep. 117.

A firm, as such, may be bankrupt, and the individuals composing such firm may be solvent. *In re* Sanderlin, 109 Fed. 857, 6 Am. Bankr. Rep. 384.

it under the Act.[11] But as the commission of an act of bankruptcy is indispensable to jurisdiction in an involuntary proceeding, the individual members cannot be adjudged bankrupts in such a proceeding, unless it is alleged and proved that they have committed or have been participants in committing one of the enumerated acts.[12]

3. SCHEDULES. Where the petition is filed by creditors, schedules are to be made and filed as in involuntary proceedings against individual debtors.[13]

C. Jurisdiction. The court of bankruptcy which has jurisdiction of one of the partners has jurisdiction of all the partners and of the administration of the partnership and individual property.[14]

D. Trustees. The creditors of the partnership appoint the trustee in the same manner and under the same circumstances as in cases of individuals.[15] The trustee must keep separate accounts of the partnership property and of the property belonging to the individual partners.[16]

E. Administration of Estate — 1. IN GENERAL. So far as possible the estate must be administered as provided in the Act for other estates.[17]

2. CLAIMS OF PARTNERSHIP AGAINST INDIVIDUAL ESTATES AND VICE VERSA. The court may permit the proof of the claim of the partnership estate against the individual estates and *vice versa*.[18]

11. *In re* Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559; and *supra*, XIX, A.

The adjudication of a partnership as a bankrupt draws to the court of bankruptcy for administration the individual estates of the partners, though they are not adjudged bankrupts individually. *In re* Stokes, 106 Fed. 312, 6 Am. Bankr. Rep. 262.

12. *In re* Hale, 107 Fed. 432, 6 Am. Bankr. Rep. 35, in which the petition did not allege that the members of the partnership had committed individually an act of bankruptcy, nor did anything appear in the record for which they could, as individuals, be adjudged bankrupts in involuntary proceedings. It was held that the individual members of the partnership could not be adjudged bankrupt and be given a discharge. See also *In re* Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559.

Infant partner.— If a petition is filed against a partnership and its members, and it appears that one of the members is an infant, an adjudication can be made against the firm and its members who are of age, but the petition must be dismissed as to the infant member. *In re* Dunnigan, 95 Fed. 428, 2 Am. Bankr. Rep. 628.

13. See *supra*, IX.

Non-joining members.— Where a petition is filed by one or more, but not all of the members of a partnership, and the non-joining members resist the prayer of the petition, and an adjudication of bankruptcy is made upon the petition, the non-joining members are required to file schedules of their debts and inventories of their property in the same manner as is required in cases of debtors against whom an adjudication is made. U. S. Supreme Ct. Bankr. G. O. No. 8.

14. Bankr. Act (1898), § 5*c*.

The court is authorized to adjudge bankrupt persons who have had their principal place of business, resided, or had their domicile within its jurisdiction for the greater portion of the six months preceding the filing of the petition. Bankr. Act (1898), § 2 (1); and *supra*, II, A, 2, a.

In case two or more petitions shall be filed in two or more districts by different members of the same partnership for an adjudication of the bankruptcy of such partnership, the court in which the petition is first filed having jurisdiction shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district action shall be first had upon the one first filed. U. S. Supreme Ct. Bankr. G. O. No. 6; and *supra*, VI, B, 1, h, (II), (B), (2).

The petition should state the facts as to the place of business of the firm, and the domicile and residence of the individual members thereof. *In re* Blair, 99 Fed. 76, 3 Am. Bankr. Rep. 588.

15. Bankr. Act (1898), § 5*b*; and *supra*, XII, A.

Creditors of individual members have no vote in the election of a trustee. *In re* Scheiffer, 21 Fed. Cas. No. 12,445, 1 Chic. Leg. N. 261, 1 Leg. Gaz. (Pa.) 30, 2 Nat. Bankr. Reg. 591; *In re* Phelps, 19 Fed. Cas. No. 11,071, 2 Am. L. T. Bankr. Rep. 25, 1 Nat. Bankr. Reg. 525. See also *supra*, X, C, 1.

16. Bankr. Act (1898), § 5*d*.

17. Bankr. Act (1898), § 5*b*. See also *In re* Jones, 100 Fed. 781, 4 Am. Bankr. Rep. 141.

For administration of estates, generally, see *supra*, XVIII.

18. Bankr. Act (1898), § 5*g*.

Where the partnership of which the bankrupt is a member is not insolvent and it appears that all the creditors of the firm have been, or will be, paid, the claim of the solvent member of such partnership against his bankrupt copartner is to be treated the same as the

3. Marshaling Assets. The court may marshal the assets of the partnership estate and individual estates, so as to prevent preferences and secure the equitable distribution of the property of the several estates.[19]

4. Where All Partners Are Not Adjudged Bankrupt. In the event of one or more, but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by the consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.[20]

5. Distribution of Proceeds[21] — a. In General. The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts,[22] and the net proceeds of the individual estate of each partner to the payment of his individual debts.[23] Should any surplus remain of the property of any partner

claims of other individual creditors of such bankrupt. *In re* Stevens, 104 Fed. 323, 5 Am. Bankr. Rep. 9.

Where all the partners are bankrupt, the claim of one of them against the partnership cannot be proved in competition with other creditors of the partnership, unless there is a surplus of the firm property after the payment of all the partnership debts. Amsinck *v.* Bean, 22 Wall. (U. S.) 395, 22 L. ed. 801, 11 Nat. Bankr. Reg. 495; *In re* McEwen, 6 Biss. (U. S.) 294, 16 Fed. Cas. No. 8,783, 12 Nat. Bankr. Reg. 11; *In re* Lane, 2 Lowell (U. S.) 333, 14 Fed. Cas. No. 8,044, 10 Nat. Bankr. Reg. 135. And a solvent partner will not be allowed to prove his claim against the separate estate of his bankrupt copartner until the claims of all the creditors of the partnership have been satisfied. Emery *v.* Canal Nat. Bank, 3 Cliff. (U. S.) 507, 8 Fed. Cas. No. 4,446, 5 Am. L. T. Rep. U. S. Cts. 419, 7 Nat. Bankr. Reg. 217, 6 West. Jur. 515.

Where, upon the dissolution of a partnership, one partner agrees with his retiring copartners to pay all firm debts and assume all firm liabilities, the retiring partners become sureties for the continuing partner, and when compelled to pay a debt of the firm they are subrogated to the rights of the creditor whose debt they have paid. *In re* Dillon, 100 Fed. 627, 4 Am. Bankr. Rep. 63. See also *In re* May, 16 Fed. Cas. 9,327, 17 Nat. Bankr. Reg. 192.

19. Bankr. Act (1898), § 5*g*. See also *In re* Jones, 100 Fed. 781, 4 Am. Bankr. Rep. 141.

Fraudulent transfer.— When the actions of partners, in connection with the transfer by one of his interest in the firm to the other, were fraudulent and constituted acts of bankruptcy, upon which both partners and the firm are adjudged bankrupts, the property will be marshaled, as between firm and individual creditors, as though no transfer had been made. *In re* Shapiro, 106 Fed. 495, 5 Am. Bankr. Rep. 839.

Where the bankrupt is a member of two firms, the property of each firm must be so marshaled that the creditors of each firm shall be paid from the property of the firm of which they are respectively the creditors. *In re* Leland, 5 Ben. (U. S.) 168, 15 Fed. Cas. No. 8,228, 4 Am. L. T. 185, 1 Am. L. T. Bankr. Rep. 284, 5 Nat. Bankr. Reg. 222; *In re* Hinds, 12 Fed. Cas. No. 6,516, 3 Nat. Bankr. Reg. 351. But if there is a surplus after paying the individual debts, 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* Dunkerson, 4 Biss. (U. S.) 323, 8 Fed. Cas. No. 4,159, 12 Nat. Bankr. Reg. 391, 1 N. Y. Wkly. Dig. 179. And if partners conduct business in two different places under two firm names, the two firms, in the marshaling and distributing of assets, will be treated as one firm and no notice will be taken of the debts owed by one of such firms to the other. Ballin *v.* Ferst, 55 Ga. 546; Buckner *v.* Calcote, 28 Miss. 432; *In re* Vetterlein, 5 Ben. (U. S.) 311, 28 Fed. Cas. No. 16,927.

20. Bankr. Act (1898), § 5*h*.

Infant partner.— The provision does not apply to a case where the infancy of one of the partners was the reason for excepting him from the adjudication. *In re* Duguid, 100 Fed. 274, 3 Am. Bankr. Rep. 794.

If a secret partner, whose relations are unknown to a petitioning creditor, has permitted the assets of the partnership to be taken into the custody and control of the bankruptcy court without protest, he will be deemed to have consented to an administration of the estate in bankruptcy. *In re* Harris, 4 Am. Bankr. Rep. 132.

21. **As to exemptions of partners** see *supra*, XV, A, 3.

22. **Partnership debts.**— If the debts are contracted by the partnership in the ordinary course of its business they are necessarily partnership obligations. If the debt is contracted by an individual member of a firm the question as to whether it is a firm or individual debt depends upon the character of the debt itself, and the scope of the authority delegated to such member to incur liability. See, generally, Partnership.

23. **Individual debts** are those contracted by the members of a partnership for their own purposes without regard to the business of the firm, and also such liabilities as they

after paying all his individual debts, such surplus shall be added to the partnership assets[24] and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners[25] in the proportion of their respective interests in the partnership.[26]

are by law required to liquidate. Taylor *v.* Rasch, 1 Flipp. (U. S.) 385, 23 Fed. Cas. No. 13,800, 1 Centr. L. J. 555, 31 Leg. Int. (Pa.) 365, 11 Nat. Bankr. Reg. 91. See also *In re* Lehigh Lumber Co., 101 Fed. 216, 4 Am. Bankr. Rep. 221.

Where an instrument is signed in the names of the individual members of a partnership and not in the firm name, the obligation is presumptively that of the individual members and not of the partnership itself. *In re* Roddin, 6 Biss. (U. S.) 377, 20 Fed. Cas. No. 11,989; *In re* Webb, 29 Fed. Cas. No. 17,313, 2 Am. L. T. Bankr. Rep. 87, 9 Int. Rev. Rec. 169, 2 Nat. Bankr. Reg. 614, 16 Pittsb. Leg. J. (Pa.) 43; *In re* Herrick, 12 Fed. Cas. No. 6,420, 13 Nat. Bankr. Reg. 312; *In re* Bucyrus Mach. Co., 4 Fed. Cas. No. 2,100, 5 Nat. Bankr. Reg. 303. Where the instrument is in fact a firm obligation the presumption of individual liability may be rebutted. *In re* Warren, 2 Ware (U. S.) 322, 29 Fed. Cas. No. 17,191, 5 N. Y. Leg. Obs. 327. And where a joint and several note given for money borrowed by the firm was signed in the firm name, and afterward by the individual members thereof, the debt has been held to be a firm obligation. *In re* Holbrook, 2 Lowell (U. S.) 259, 12 Fed. Cas. No. 6,588; Bush *v.* Crawford, 4 Fed. Cas. No. 2,224, 7 Nat. Bankr. Reg. 299, 9 Phila. (Pa.) 392, 29 Leg. Int. (Pa.) 365, 20 Pittsb. Leg. J. (Pa.) 65.

24. Partnership assets.— Property which is purchased with firm moneys, all debts owing to the firm, and the good-will of the firm business are assets of the firm. Marrett *v.* Murphy, 16 Fed. Cas. No. 9,103, 1 Centr. L. J. 554, 11 Nat. Bankr. Reg. 131; Hiscock *v.* Jaycox, 12 Fed. Cas. No. 6,531, 12 Nat. Bankr. Reg. 507; and, generally, PARTNERSHIP. Whether real estate standing in the name of one partner is individual or partnership property as between the copartners is a question of intent to be implied from the nature of the property, the circumstances, and the conduct of the partners. *In re* Groetzinger, 110 Fed. 366, 6 Am. Bankr. Rep. 399. See also Warriner *v.* Mitchell, 128 Pa. St. 153, 18 Atl. 337; Shafer's Appeal, 106 Pa. St. 49.

25. Individual assets.— The separate estate of an individual partner is that in which he is separately interested, to the exclusion of his copartners. *In re* Lowe, 15 Fed. Cas. No. 8,564, 11 Nat. Bankr. Reg. 221. If the surviving partner of a firm, with the knowledge and consent of the representatives of the deceased partner, converts the firm assets to his own use the property belongs to his individual estate. *In re* Mills, 17 Fed. Cas. No. 9,611, 11 Nat. Bankr. Reg. 74.

Where firm property has been transferred in good faith and for a valuable consideration to one of the partners, while the firm is solvent, the title passes and the property becomes that of the partner. *In re* Long, 7 Ben. (U. S.) 141, 15 Fed. Cas. No. 8,476, 9 Nat. Bankr. Reg. 227; *In re* Montgomery, 3 Ben. (U. S.) 565, 17 Fed. Cas. No. 9,728, 3 Nat. Bankr. Reg. 374; *In re* Wiley, 4 Biss. (U. S.) 214, 29 Fed. Cas. No. 17,656; *In re* Downing, 1 Dill. (U. S.) 33, 7 Fed. Cas. No. 4,044, 3 Nat. Bankr. Reg. 748, 17 Pittsb. Leg. J. (Pa.) 169; Shimer *v.* Huber, 21 Fed. Cas. No. 12,787, 19 Nat. Bankr. Reg. 414, 14 Phila. (Pa.) 402; *In re* Mills, 17 Fed. Cas. No. 9,611, 11 Nat. Bankr. Reg. 74; *In re* Collier, 6 Fed. Cas. No. 3,002, 12 Nat. Bankr. Reg. 266. But where the firm is insolvent and a sale or transfer is made to one partner for the purpose of permitting the creditors of the purchasing partner to obtain payment from a larger fund; or, if for any other reason the transfer is inequitable, it will be treated by the court of bankruptcy as null and void, and the property will be disposed of as if it were still partnership assets. *In re* Cook, 3 Biss. (U. S.) 116, 6 Fed. Cas. No. 3,151, 3 Chic. Leg. N. 410; Collins *v.* Hood, 4 McLean (U. S.) 186, 6 Fed. Cas. No. 3,015; *In re* Byrne, 4 Fed. Cas. No. 2,270, 7 Am. L. Reg. N. S. 499, 1 Am. L. T. Bankr. Rep. 122, 1 Nat. Bankr. Reg. 464, 15 Pittsb. Leg. J. (Pa.) 315.

26. Bankr. Act (1898), § 5*f*.

No firm assets and no solvent partner.— The decisions are in conflict as to cases where there are no firm assets and no solvent living partner. Some hold that the creditors of the partnership should share *pari passu* with the creditors of the individual members of the firm. *In re* Knight, 2 Biss. (U. S.) 518, 14 Fed. Cas. No. 7,880, 18 Int. Rev. Rec. 166, 30 Leg. Int. (Pa.) 338, 8 Nat. Bankr. Reg. 436, 21 Pittsb. Leg. J. (Pa.) 43; *In re* Downing, 1 Dill. (U. S.) 33, 7 Fed. Cas. No. 4,044, 3 Nat. Bankr. Reg. 748, 17 Pittsb. Leg. J. (Pa.) 169; *In re* Marwick, 2 Ware (U. S.) 233, 16 Fed. Cas. No. 9,181, 8 Law Rep. 169, 3 N. Y. Leg. Obs. 286; *In re* Mills, 17 Fed. Cas. No. 9,611, 11 Nat. Bankr. Reg. 74; *In re* Goedde, 10 Fed. Cas. No. 5,500, 6 Nat. Bankr. Reg. 295. Others are to the effect that when a member of a partnership is adjudged bankrupt in his individual capacity, creditors of the firm are not entitled to receive dividends out of his separate estate until his individual creditors have been paid in full, notwithstanding the fact that there are no partnership assets. *In re* Mills, 95 Fed. 269, 2 Am. Bankr. Rep. 667; *In re* Wilcox, 94 Fed. 84, 2 Am. Bankr. Rep. 117. See also Warren *v.* Farmer, 100 Ind. 593; Warren *v.* Able, 91 Ind. 107; Weyer *v.* Thornburgh, 15 Ind. 124.

Where an individual partner has been adjudged a bankrupt and no proceedings are instituted against the partnership itself, the

b. Creditors Holding Firm and Individual Obligations. Where a creditor holds the joint obligation of a firm, secured by the individual obligation of one or more members thereof, he may prove his claim against both the firm and the individual partner or partners and receive dividends from both the joint and individual estates.[27]

6. Costs. The expenses of the proceeding shall be paid from the partnership property and the individual property in such proportions as the court shall determine.[28]

XXI. Offenses Against Bankruptcy Act.[29]

A. By Bankrupt.[30] A person may be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed[31] while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath[32] or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat the Act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.[33]

rule as to the marshaling and distribution of his assets among individual and firm creditors is the same as where the partnership itself is adjudged a bankrupt. *In re* Wilcox, 94 Fed. 84, 2 Am. Bankr. Rep. 117. There was a conflict of authority as to whether an analogous provision in the Act of 1867 applied in such case. Some decisions held that it did not. *In re* Knight, 2 Biss. (U. S.) 518, 14 Fed. Cas. No. 7,880, 18 Int. Rev. Rec. 166, 30 Leg. Int. (Pa.) 338, 8 Nat. Bankr. Reg. 436, 21 Pittsb. Leg. J. (Pa.) 43; *In re* Pease, 19 Fed. Cas. No. 10,881, 13 Nat. Bankr. Reg. 168; *In re* Downing, 1 Dill. (U. S.) 33, 7 Fed. Cas. No. 4,044, 3 Am. L. T. 165, 1 Am. L. T. Bankr. Rep. 207, 2 Chic. Leg. N. 265, 3 Nat. Bankr. Reg. 748, 17 Pittsb. Leg. J. (Pa.) 169. See also *In re* Lloyd, 22 Fed. 88. Others are to the effect that it did. *In re* Blumer, 12 Fed. 489; Matter of Litchfield, 5 Fed. 47. See also *In re* Johnson, 2 Lowell (U. S.) 129, 13 Fed. Cas. No. 7,369; *In re* McLean, 16 Fed. Cas. No. 8,879, 15 Nat. Bankr. Reg. 333; *In re* Byrne, 4 Fed. Cas. No. 2,270, 7 Am. L. Reg. N. S. 499, 1 Am. L. T. Bankr. Rep. 122, 1 Nat. Bankr. Reg. 464, 15 Pittsb. Leg. J. (Pa.) 315.

27. A joint creditor having security upon the separate estate of a partner is entitled to prove against the joint estate of the partnership without giving up his security; he may prove his claim against both estates and receive a dividend from each, provided he does not receive more than the full amount of his debt. *In re* Bigelow, 3 Ben. (U. S.) 146, 3 Fed. Cas. No. 1,397, 2 Am. L. T. Bankr. Rep. 41, 2 Nat. Bankr. Reg. 371; *In re* Bradley, 2 Biss. (U. S.) 515, 3 Fed. Cas. No. 1,772; Mead *v.* Fayetteville Nat. Bank, 6 Blatchf. (U. S.) 180, 16 Fed. Cas. No. 9,366, 2 Nat. Bankr. Reg. 173; Emery *v.* Canal Nat. Bank, 3 Cliff. (U. S.) 507, 8 Fed. Cas. No. 4,446, 5 Am. L. T. Rep. U. S. Cts. 419, 7 Nat. Bankr. Reg. 217, 6 West. Jur. 515; *In re* Tesson, 23 Fed. Cas. No. 13,844, 9 Nat. Bankr. Reg. 378; Stephenson *v.* Jackson, 2 Hughes (U. S.) 204, 22 Fed. Cas. No. 13,374, 9 Nat. Bankr. Reg. 256; *In re* Howard, 12 Fed. Cas. No. 6,750, 4 Nat. Bankr. Reg. 571.

28. Bankr. Act (1898), § 5*e*.

29. Jurisdiction of offenses see *supra*, II, C, 1, b.

30. Commission of offense as ground for refusal of discharge see *supra*, XIX, D, 2.

31. "Conceal" is defined in note 8, p. 238, *supra*.

The intent to conceal must be clearly shown in order to establish the offense, although it may be proved by circumstantial evidence. *In re* Goodridge, 10 Fed. Cas. No. 5,547, 2 Nat. Bankr. Reg. 324. See also U. S. *v.* Conner, 3 McLean (U. S.) 573, 25 Fed. Cas. No. 14,847.

32. A proposed voluntary bankrupt, who has not money enough to pay the filing fees, is not required to solicit gifts or loans from his friends for that purpose; and he is not guilty of a false oath in making affidavit that he "cannot obtain" the requisite sum, although it appears that friends would have advanced him the amount if requested. Sellers *v.* Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

33. Bankr. Act (1898), § 29*b*.

For analogous decisions under former acts see U. S. *v.* Frank, 2 Biss. (U. S.) 263, 25 Fed. Cas. No. 15,159, 2 Chic. Leg. N. 236, 3 Nat. Bankr. Reg. 175, 17 Pittsb. Leg. J. (Pa.) 140; U. S. *v.* Bayer, 4 Dill. (U. S.) 407, 24 Fed. Cas. No. 14,547, 3 Centr. L. J. 11, 13

B. By Referee or Trustee. A person may be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.[34] A person may be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document[35] belonging to a bankrupt estate which came into his charge as trustee.[36]

C. Limitation of Prosecution. A person cannot be prosecuted for any offense arising under the Act unless the indictment is found or the information is filed in court within one year after the commission of the offense.[37]

D. Indictment. All matters necessary to constitute the offense as defined must be pleaded.[38]

XXII. ATTORNEY-GENERAL.

The attorney-general must annually lay before congress statistical tables showing for the whole country, and by states, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.[39]

Nat. Bankr. Reg. 400; U. S. *v.* Swett, 2 Hask. (U. S.) 310, 28 Fed. Cas. No. 16,427; U. S. *v.* Clark, 1 Lowell (U. S.) 402, 28 Fed. Cas. No. 14,806, 3 Am. L. T. 226, 1 Am. L. T. Bankr. Rep. 237, 2 Leg. Gaz. (Pa.) 294, 4 Nat. Bankr. Reg. 59; U. S. *v.* Nichols, 4 McLean (U. S.) 23, 27 Fed. Cas. No. 15,880; U. S. *v.* Smith, 27 Fed. Cas. No. 16,339, 13 Nat. Bankr. Reg. 61; U. S. *v.* Penn, 27 Fed. Cas. No. 16,025, 13 Nat. Bankr. Reg. 464; U. S. *v.* Geary, 25 Fed. Cas. No. 15,195*a*, 4 Nat. Bankr. Reg. 534; U. S. *v.* Bayer, 24 Fed. Cas. No. 14,548, 13 Nat. Bankr. Reg. 88; and 6 Cent. Dig. tit. "Bankruptcy," §§ 904–908.

34. Bankr. Act (1898), § 29*c*.

35. "Document" is defined in note 8, p. 238, *supra*.

36. Bankr. Act (1898), § 29*a*.

37. Bankr. Act (1898), § 29*d*.

38. U. S. *v.* Prescott, 2 Abb. (U. S.) 169, 2 Biss. (U. S.) 325, 27 Fed. Cas. No. 16,084, 9 Am. L. Reg. N. S. 481, 4 Nat. Bankr. Reg. 112, 18 Pittsb. Leg. J. (Pa.) 21.

Omissions from schedule.— An indictment which charges the accused with having committed perjury by falsely omitting from his schedule in bankruptcy certain of his property must not only allege that his deposition was false in that regard, but it must go further, and allege that he had other property and describe the property so omitted. Bartlett *v.* U. S., 106 Fed. 884, 46 C. C. A. 19, 5 Am. Bankr. Rep. 678.

For analogous decisions under former acts see U. S. *v.* Jackson, 2 Fed. 502; U. S. *v.* Latorre, 8 Blatchf. (U. S.) 134, 26 Fed. Cas. No. 15,567; U. S. *v.* Crane, 3 Cliff. (U. S.) 211, 25 Fed. Cas. No. 14,887; U. S. *v.* Clark, 1 Lowell (U. S.) 402, 25 Fed. Cas. No. 14,806, 3 Am. L. T. 226, 1 Am. L. T. Bankr. Rep. 237, 2 Leg. Gaz. (Pa.) 294, 4 Nat. Bankr. Reg. 59; U. S. *v.* Deming, 4 McLean (U. S.) 3, 25 Fed. Cas. No. 14,945; U. S. *v.* Chapman, 3 McLean (U. S.) 390, 25 Fed. Cas. No. 14,784; U. S. *v.* Myers, 27 Fed. Cas. No. 15,848, 16 Nat. Bankr. Reg. 387; and 6 Cent. Dig. tit. "Bankruptcy," § 911.

39. Bankr. Act (1898), § 53*a*.

Statistics of bankruptcy proceedings to be furnished.— Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the attorney-general, for statistical purposes, within ten days after being requested to do so by him. Bankr. Act (1898), § 54*a*.

BANKS AND BANKING

By Albert S. Bolles *

* Lecturer on Banking in the University of Pennsylvania and on Commercial Law and Banking in Haverford College; author of "Banks and their Depositors." "Bank Officers." "Bank Collections," "The National Bank Act and its Judicial Meaning," and "The Financial History of the United States."

CROSS-REFERENCES

For Matters Relating to:
Account Stated Between Bank and Customer, see ACCOUNTS AND ACCOUNTING.
Banks as Depositaries, see DEPOSITARIES.
Coöperative Banking Associations, see BUILDING AND LOAN SOCIETIES.
Counterfeiting, see COUNTERFEITING.
Embezzlement, see EMBEZZLEMENT.
Forgery, see FORGERY.
Larceny, see LARCENY.
Taxation of Bank Capital, Stock, or Property, see TAXATION.
For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. DEFINITIONS.

A. Bank — 1. IN GENERAL. A bank has been defined as "a place for the deposit of money;"[1] "an institution usually incorporated,[2] with power to issue its promissory notes, intended to circulate as money (known as bank notes),[3] or to receive the money of others, on general deposit,[4] to form a joint fund that shall

1. Oulton *v.* German Sav., etc., Soc., 17 Wall. (U. S.) 109, 118, 21 L. ed. 618 [*quoted* in Western Invest. Banking Co. *v.* Murray, (Ariz. 1899) 56 Pac. 728]; Bouvier L. Dict. [*quoted* in Reed *v.* People, 125 Ill. 592, 596, 18 N. E. 295, 1 L. R. A. 324]; Rapalje & L. L. Dict. [*quoted* in Wells *v.* Northern Pac. R. Co., 10 Sawy. (U. S.) 441, 23 Fed. 469, 471].

2. See Den *v.* Helmes, 3 N. J. L. 600, 606 (where it is said: "The term 'bank,' is universally understood, and where uncoupled with any other words of description, must, with us, always mean a corporate body, which loans money to others"); Exchange Bank *v.* Hines, 3 Ohio St. 1, 32 (where it is said: "The term 'banks' denotes the incorporated institution, and the term 'bankers' the unincorporated associations, exercising 'banking powers'"). But a company, partnership, or individual having an office at which deposits are received and notes are discounted is a bank or banker. People *v.* Bartow, 6 Cow. (N. Y.) 290; Com. *v.* Sponsler, 16 Pa. Co. Ct. 116, 1 Lack. Leg. N. (Pa.) 61.

A bank is a private corporation when the stock is owned by individuals. Miners' Bank *v.* U. S., 1 Greene (Iowa) 553.

3. **Necessity of power to issue notes.**— By many laws and state constitutions the primary function of banking is to issue notes. Consequently an institution that does not issue them is not a bank. Martinez Bank *v.* Hemme Orchard, etc., Co., 105 Cal. 376, 38 Pac. 963; Sonoma County Bank *v.* Fairbanks, 52 Cal. 196; People *v.* River Raisin, etc., R. Co., 12 Mich. 389, 86 Am. Dec. 64; Dearborn *v.* Northwestern Sav. Bank, 42 Ohio St. 617, 51 Am. Rep. 851; Ohio L. Ins., etc., Co. *v.* Debolt, 16 How. (U. S.) 416, 14 L. ed. 997. See also State *v.* Scougal, 3 S. D. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477.

4. **A corporation which borrows on bonds for its own use** is not a bank. Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280.

A corporation which lends only its own money is not a bank. America L. Assoc. *v.* Levy, 33 La. Ann. 1203; Hubbard *v.* New York, etc., R. Co., 36 Barb. (N. Y.) 286, 14 Abb. Pr. (N. Y.) 275; People *v.* Brewster.

be used by the institution for its own benefit, for one or more of the purposes of making temporary loans and discounts, of dealing in foreign and domestic bills of exchange, coin, bullion, credits, and the remission of money, or with both these powers, and with privileges in addition to these basic powers, of receiving deposits and making collections for the holders of negotiable paper if the institution sees fit to engage in such business;"[5] "the building, apartment, or office where such business is transacted."[6]

2. Kinds of Banks. Banks are of three kinds: Banks of deposit, which include savings-banks,[7] and all others which receive money on deposit; banks of discount, being those which loan money on collateral or by means of discounts of commercial paper; and banks of circulation, which issue bank-notes payable to bearer. But the same bank generally performs all these several operations.[8]

B. Banker. A banker has been defined as "a dealer in capital,—an intermediate party between the borrower and the lender."[9]

C. Banking. Banking is defined as "the business or employment of a banker, the business of establishing a common fund for lending money, discounting notes, issuing bills, receiving deposits, collecting the money or notes deposited, negotiating bills of exchange."[10]

4 Wend. (N. Y.) 498; Oregon, etc., Trust Invest. Co. *v.* Rathburn, 5 Sawy. (U. S.) 32, 18 Fed. Cas. No. 10,555, 6 Am. L. Rec. 523, 10 Chic. Leg. N. 58, 23 Int. Rev. Rec. 377, 4 L. & Eq. Rep. 650, 1 Tex. L. J. 39. *Contra*, Philadelphia Loan Co. *v.* Towner, 13 Conn. 249.

An express company which draws and sells bills of exchange is not a bank. Wells *v.* Northern Pac. R. Co., 10 Sawy. (U. S.) 441, 23 Fed. 469.

"The principal attributes of a bank are the right to issue negotiable notes, discount notes, and receive deposits." New York Firemen Ins. Co. *v.* Ely, 2 Cow. (N. Y.) 678; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 357, 8 Am. Dec. 243.

5. 1 Morse Banks & Banking, § 2 [*quoted* in State *v.* Comptoir National D'Escompte de Paris, 51 La. Ann. 1272, 1283, 26 So. 91].

Other definitions are: "An institution authorized to receive deposits of money, to lend money, and to issue promissory notes." Bouvier L. Dict. [*quoted* in Reed *v.* People, 125 Ill. 592, 596, 18 N. E. 295, 1 L. R. A. 324; Farmers', etc., Bank *v.* Baldwin, 23 Minn. 198, 203, 23 Am. Rep. 683].

"An association or corporation whose business it is to receive money on deposit, cash checks or drafts, discount commercial paper, make loans, and issue promissory notes payable to bearer, called 'bank-notes.'" Rapalje & L. L. Dict. [*quoted* in Wells *v.* Northern Pac. R. Co., 10 Sawy. (U. S.) 441, 23 Fed. 469, 471].

6. Rapalje & L. L. Dict. [*quoted* in Wells *v.* Northern Pac. R. Co., 10 Sawy. (U. S.) 441, 23 Fed. 469, 471].

7. **What are savings-banks** see *infra*, IV, A.

8. Rapalje & L. L. Dict. [*quoted* in Wells *v.* Northern Pac. R. Co., 10 Sawy. (U. S.) 441, 23 Fed. 469, 471]; Farmers,' etc., Bank *v.* Baldwin, 23 Minn. 198, 203, 23 Am. Rep. 683 [*quoting* Bouvier L. Dict.]; New York City Sav. Bank *v.* Field, 3 Wall. (U. S.) 495, 18 L. ed. 207. See also Reed *v.* People, 125 Ill. 592, 596, 18 N. E. 295, 1 L. R. A. 324 [*quoting* Bouvier L. Dict.].

9. Meadowcroft *v.* People, 163 Ill. 56, 65, 45 N. E. 303, 54 Am. St. Rep. 447, 35 L. R. A. 176; Curtis *v.* Leavitt, 15 N. Y. 9, 167.

10. Morse Banks & Banking, p. 38 [*quoted* in New Orleans *v.* New-Orleans Sav. Inst., 32 La. Ann. 527, 531]. See also Exchange Bank *v.* Hines, 3 Ohio St. 1, 31 (where it is said: "The business of banking, in its most enlarged signification, includes the business of receiving deposits, loaning money, and dealing in coin, bills of exchange, &c., besides that of issuing paper money"); Baker *v.* State, 54 Wis. 368, 377, 12 N. W. 12; Mercantile Nat. Bank *v.* New York City, 121 U. S. 138, 156, 7 S. Ct. 826, 30 L. ed. 895 (where it is said that "the business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations"); Warren *v.* Shook, 91 U. S. 704, 710, 23 L. ed. 421 (where the court said that "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").

Includes business of a money-broker.— Without considering the question as to how far a banker and a money-broker are the same in the common parlance and business usages of this state there is at least no doubt that the term "banker" includes all the business of a money-changer. Hinckley *v.* Belleville, 43 Ill. 183. See, generally, Money-Broker.

What is not a banking business.— Keeping a deposit in a Chicago bank, drawing checks

II. Banking Corporations and Associations.[11]

A. Organization[12] — **1. Necessity For — a. In General.** At common law banking is open to all persons,[13] but the states have unquestioned authority to forbid individuals or firms from engaging in banking unless they conform to the laws relating thereto, and the exercise of this power is not a violation of one's personal liberty.[14] A corporation organized for a specific purpose, like a railroad or an insurance company, cannot exercise banking powers.[15] Nor is authority to lend its surplus funds,[16] draw and sell drafts,[17] issue evidences of debt,[18] hold real or personal estate or any interest therein[19] sufficient.

b. Acting Without Authority — (i) *In General.* If individuals engage in banking without complying with the law,[20] hold meetings, elect directors, and the like, they may be civilly liable as partners[21] and criminally held as individuals;[22] and the president of a spurious bank is personally liable to the same extent as his

thereon in payment of obligations, and buying checks or exchange from other banks or persons to keep up the Chicago deposit is not transacting the business of a banker. Scott *v.* Burnham, 56 Ill. App. 28.

11. Scope of section.— This subdivision is intended to treat of those principles which are common to all banking concerns, whatever the form of their organization. Elsewhere in the article will be treated such matters as are peculiar to national banks (see *infra*, III), savings-banks (see *infra*, IV), loan and trust companies (see *infra*, V), and clearing-houses (see *infra*, VI).

12. Organization of national banks see *infra*, III, B.

13. People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243, 2 Johns. Ch. (N. Y.) 371; State *v.* Scougal, 3 S. D. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477; Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274.

14. Blaker *v.* Hood, 53 Kan. 499, 36 Pac. 1115, 24 L. R. A. 854; Cummings *v.* Spaunhorst, 5 Mo. App. 21; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243, 2 Johns. Ch. (N. Y.) 371; State *v.* Woodmansee, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420.

Private banking is not prohibited by the constitution of Alabama. Nance *v.* Hemphill, 1 Ala. 551. The exercise of banking powers cannot be restricted to a corporation. State *v.* Scougal, 3 S. D. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477.

15. Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129.

16. Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129; People *v.* Manhattan Co., 9 Wend. (N. Y.) 351; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243, 2 Johns. Ch. (N. Y.) 371; Memphis City Bank *v.* Tennessee, 161 U. S. 186, 16 S. Ct. 468, 40 L. ed. 664.

17. Smith *v.* State, 21 Ark. 294.

18. People *v.* River Raisin, etc., R. Co., 12 Mich. 389, 86 Am. Dec. 64.

19. State *v.* Stebbins, 1 Stew. (Ala.) 299; State *v.* Washington Social Library Co., 11 Ohio 96; State *v.* Granville Alexandrian Soc., 11 Ohio 1.

20. Necessity of showing full organization. — In a proceeding on a quo warranto against individuals exercising a banking franchise without authority in which they seek to show that they are legally acting as a banking corporation, they must prove it was fully organized (State *v.* Brown, 33 Miss. 500); but the title in the people to the franchise need not be shown (State *v.* Presbury, 13 Mo. 342).

Mere irregularities in organizing will not deprive the officers and stock-holders of the protection of the charter, or subject them to private liability when sued as unauthorized bankers. Bartholomew *v.* Bentley, 1 Ohio St. 37.

21. Pettis *v.* Atkins, 60 Ill. 454; Williams *v.* Hewitt, 47 La. Ann. 1076, 17 So. 496, 49 Am. St. Rep. 394; Vredenburg *v.* Behan, 33 La. Ann. 627; Workingmen's Accommodation Bank *v.* Converse, 29 La. Ann. 369; Field *v.* Cooks, 16 La. Ann. 153.

The promoters and organizers of a bank who attempt incorporation but do not complete it are liable as partners for debts contracted within the course of business. McLennan *v.* Anspaugh, 2 Kan. App. 269, 41 Pac. 1063.

Demand and notice.— Under the Ohio act of 1816 rendering the issuers of notes of unauthorized banks liable, the holders could recover from the issuers without proof of demand and notice, and likewise the payee and first indorser of a bill drawn by such a company was liable without a demand upon the drawer. Watson *v.* Brown, 14 Ohio 473.

22. Mills *v.* State, 23 Tex. 295; State *v.* Williams, 8 Tex. 255; Nessmith *v.* Shelden, 4 McLean (U. S.) 375, 18 Fed. Cas. No. 10,125.

What constitutes violation.—The New York act of April 21, 1818, did not preclude individuals or corporations, if otherwise authorized, from lending their funds on promissory notes by way of discount (People *v.* Brewster, 4 Wend. (N. Y.) 498), but an individual who kept an office of deposit for the purpose of discounting notes was an offender within the law (People *v.* Bartow, 6 Cow. (N. Y.) 290).

bank would have been if legally created.[23] No obligations, however, in favor of, or against, their bank, could once be enforced;[24] but now in many states if a bank does not possess authority to make a contract for the loan of money it may ignore the contract and recover the money in an action for money had and received.[25]

(II) *INDICTMENT.* An indictment for illegal banking may be against several,[26] or it may be against the president, cashier, and directors, without joining all the shareholders.[27] Such an indictment need not allege the defendants to be illegally organized where it is apparent that they were thus associated;[28] and in an indictment against one for acting as an officer of an unauthorized bank time is immaterial.[29] An indictment charging the offense in the words of the act creating it has been held sufficient.[30]

2. MANNER OF. To incorporate a bank several persons must associate and file an organization certificate containing prescribed particulars,[31] and the bank comes into being from the date of this certificate.[32] When a bank is created by special charter which requires the election of directors, the election of a president and

23. Utica Ins. Co. *v.* Pardow, 2 Hall (N. Y.) 515; Utica Ins. Co. *v.* Cadwell, 3 Wend. (N. Y.) 296; Utica Ins. Co. *v.* Hunt, 1 Wend. (N. Y.) 56; Utica Ins. Co. *v.* Kip, 8 Cow. (N. Y.) 20; Utica Ins. Co. *v.* Scott, 19 Johns. (N. Y.) 1; Central Trust Co. *v.* Cook County Nat. Bank, 15 Fed. 885.

24. *Iowa.*— Reynolds *v.* Nichols, 12 Iowa 398.

Michigan.— State *v.* How, 1 Mich. 512; Hurlbut *v.* Britain, 2 Dougl. (Mich.) 191; Smith *v.* Barstow, 2 Dougl. (Mich.) 155.

New York.— Atty.-Gen. *v.* L., etc., Ins. Co., 9 Paige (N. Y.) 470.

Ohio.— Huber *v.* United Protestant Evangelical German Congregation, 16 Ohio St. 371; Myers *v.* Manhattan Bank, 20 Ohio 283.

United States.— Nessmith *v.* Shelden, 4 McLean (U. S.) 375, 18 Fed. Cas. No. 10,125.

Valid action by unconstitutional bank.— Although a bank be unconstitutional and its contracts invalid, a deed of trust for the execution of its invalid contracts may be valid. Smith *v.* Barstow, 2 Dougl. (Mich.) 155.

25. Hauser *v.* Tate, 85 N. C. 81, 39 Am. Rep. 689.

Imperfect organization as a defense.— A debtor on a note, draft, or other paper cannot object to paying a bank which has advanced money thereon, on the ground that it is unconstitutional or not properly organized.

Alabama.— Marion Sav. Bank *v.* Dunkin, 54 Ala. 471.

Georgia.— Southern Bank *v.* Williams, 25 Ga. 534.

Illinois.—Snyder *v.* State Bank, 1 Ill. 161.

Mississippi.— Smith *v.* Mississippi, etc., R. Co., 6 Sm. & M. (Miss.) 179.

New York.— Port Jefferson Bank *v.* Darling, 91 Hun (N. Y.) 236, 36 N. Y. Suppl. 153, 72 N. Y. St. 54.

Contra, in Missouri, where, under an act to prevent illegal banking, a violation may be pleaded as a bar to any suit properly brought by the bank, without having the franchise declared forfeited on proceedings for that special purpose. North Missouri R. Co. *v.* Winkler, 33 Mo. 354.

26. Com. *v.* Dunham, Thatch. Crim. Cas. (Mass.) 538; State *v.* Presbury, 13 Mo. 342.

27. Williams *v.* State, 23 Tex. 264.

28. Williams *v.* State, 23 Tex. 264. See also Brown *v.* State, 11 Ohio 276.

29. Brown *v.* State, 11 Ohio 276.

30. State *v.* Presbury, 13 Mo. 342. *Compare* People *v.* Bartow, 6 Cow. (N. Y.) 290, holding that the indictment should, in some way, show an offense against the statute, although it is not necessary to state this in specific terms.

31. **An individual** who conducts a banking business is not a corporation. Codd *v.* Rathbone, 19 N. Y. 37; Hallett *v.* Harrower, 33 Barb. (N. Y.) 537; Cuyler *v.* Sanford, 8 Barb. (N. Y.) 225.

An unincorporated bank is not a de facto corporation and its president, who is the sole owner, may transfer its property to secure a *bona fide* creditor. Longfellow *v.* Barnard, 58 Nebr. 612, 79 N. W. 255, 76 Am. St. Rep. 117.

Conditions precedent prescribed by the act must be fulfilled before a bank can legally exist (Workingmen's Accommodation Bank *v.* Converse, 29 La. Ann. 369); but evidence of acts of user may be given for the purpose of showing such fulfilment (Williams *v.* Union Bank, 2 Humphr. (Tenn.) 339).

Effect of filing erroneous certificate.— Public policy demands that the certificate of incorporation when filed and acted on be given full effect against those who executed it, although its filing was contrary to the understanding and direction of some of them. Rehbein *v.* Rahr, 109 Wis. 136, 85 N. W. 315.

Omissions in an organization certificate may be subsequently corrected by legislation (People *v.* Perrin, 56 Cal. 345); and it has been held that although the directors of a bank be not named in a bank charter, or the institution itself be expressly called a bank, it may still have a legal existence (Mahony *v.* State Bank, 4 Ark. 620).

32. State *v.* Mason, 61 Kan. 102, 58 Pac. 978; Burrows *v.* Smith, 10 N. Y. 550, Seld. Notes (N. Y.) 115; Palmer *v.* Lawrence, 3

other officers by the stockholders will not satisfy the law, and the bank has no legal existence, even though the organization certificate be filed.[33]

3. Proof of. The existence of a bank may be proved[34] by reputation;[35] by evidence that it is doing business, has an office and officers, a name over its door, books of record of its business, and bills in circulation;[36] or by the charter itself, or a copy with proof of action thereunder.[37] In some states the charter is judicially noticed;[38] in others it must be pleaded and proved.[39]

B. Capital, Stock, and Dividends[40]— **1. Increase or Reduction of Stock.** A bank incorporated with the privilege of having a minimum and maximum amount of stock may begin business with the smaller sum and afterward issue the larger;[41] but if the amount that may be issued is limited, there can be no increase without additional authority,[42] and the manner of making the increase prescribed by stat-

Sandf. (N. Y.) 161; Valk *v.* Crandall, 1 Sandf. Ch. (N. Y.) 179.

33. Kinsela *v.* Cataract City Bank, 18 N. J. Eq. 158.

Validity of organization under special act. — A legislature authorized nine commissioners, or any three of them, to organize a bank. A majority of the entire number fraudulently transferred the franchise to the citizens of another state. Nevertheless the organization effected by three others was valid. Com. *v.* McKean County Bank, 32 Pa. St. 185.

34. When necessary. — A bank is not required to prove its existence under the general issue (Prince *v.* Commercial Bank, 1 Ala. 241, 34 Am. Dec. 773; Phenix Bank *v.* Curtis, 14 Conn. 437, 36 Am. Dec. 492; Farmers', etc., Bank *v.* Rayner, 2 Hall (N. Y.) 195; Michigan Bank *v.* Williams, 5 Wend. (N. Y.) 478; Auburn Bank *v.* Weed, 19 Johns. (N. Y.) 300; Lewis *v.* Kentucky Bank, 12 Ohio 132, 40 Am. Dec. 469); and when an action is brought by a bank in its corporate name it is an implied assertion of corporate existence, and is sufficient unless a plea in abatement is interposed (Frye *v.* State Bank, 10 Ill. 332; Adams Express Co. *v.* Hill, 43 Ind. 157; Phenix Bank *v.* Donnell, 41 Barb. (N. Y.) 571; Rees *v.* Conococheague Bank, 5 Rand. (Va.) 326, 16 Am. Dec. 755). A denial that plaintiff is a corporation duly organized as a bank under a specified law does not put the question of its existence in issue. Plattsmouth First Nat. Bank *v.* Gibson, 60 Nebr. 767, 84 N. W. 259; State *v.* Cass County, 53 Nebr. 767, 74 N. W. 254.

35. Jennings *v.* People, 8 Mich. 81; State *v.* Fitzsimmons, 30 Mo. 236.

36. *Massachusetts.* — Way *v.* Butterworth, 106 Mass. 75.

Missouri. — Farmers', etc., Bank *v.* Williamson, 61 Mo. 259.

New Hampshire. — State *v.* Carr, 5 N. H. 367.

New York. — Leonardsville Bank *v.* Willard, 25 N. Y. 574; People *v.* Chadwick, 2 Park. Crim. (N. Y.) 163; Dennis *v.* People, 1 Park. Crim. (N. Y.) 469.

Vermont. — Manchester Bank *v.* Allen, 11 Vt. 302.

37. *Arkansas.* — Gaines *v.* Mississippi Bank, 12 Ark. 769.

Maryland. — Agnew *v.* Gettysburg Bank, 2 Harr. & G. (Md.) 478.

Massachusetts. — Farmers', etc., Bank *v.* Jenks, 7 Metc. (Mass.) 592.

Mississippi. — Henderson *v.* Mississippi Union Bank, 6 Sm. & M. (Miss.) 314.

New York. — People *v.* Peabody, 25 Wend. (N. Y.) 472.

Vermont. — Manchester Bank *v.* Allen, 11 Vt. 302.

38. *Alabama.* — Jemison *v.* Planters', etc., Bank, 17 Ala. 754.

Georgia. — Terry *v.* Merchants', etc., Bank, 66 Ga. 177; Davis *v.* Fulton Bank, 31 Ga. 69.

Indiana. — Vance *v.* Farmers', etc., Bank, 1 Blackf. (Ind.) 80.

Maryland. — Towson *v.* Havre-de-Grace Bank, 6 Harr. & J. (Md.) 47, 14 Am. Dec. 254.

New York. — Utica Bank *v.* Magher, 18 Johns. (N. Y.) 341.

South Carolina. — Newberry Bank *v.* Greenville, etc., R. Co., 9 Rich. (S. C.) 495.

Tennessee. — Shaw *v.* State, 3 Sneed (Tenn.) 86; Williams *v.* Union Bank, 2 Humphr. (Tenn.) 339.

Virginia. — Hays *v.* Northwestern Bank, 9 Gratt. (Va.) 127; Stribbling *v.* Valley Bank, 5 Rand. (Va.) 132.

See also Commercial Bank *v.* Newport Mfg. Co., 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171; Northwestern Bank *v.* Machir, 18 W. Va. 271.

39. Agnew *v.* Gettysburg Bank, 2 Harr. & G. (Md.) 478; Clarion First Nat. Bank *v.* Gruber, 87 Pa. St. 468, 30 Am. Rep. 378; Buell *v.* Warner, 33 Vt. 570.

Foreign banks. — Although courts will take judicial notice of the existence of their own corporate banks they will not of that of foreign banks. Lathrop *v.* Commercial Bank, 8 Dana (Ky.) 114, 33 Am. Dec. 481; Portsmouth Livery Co. *v.* Watson, 10 Mass. 91; Lewis *v.* Kentucky Bank, 12 Ohio 132, 40 Am. Dec. 469.

40. Capital, stock, and dividends of national banks see *infra*, III, C.

41. Gray *v.* Portland Bank, 3 Mass. 364, 3 Am. Dec. 156. See also Comstock *v.* Willoughby, Lalor (N. Y.) 271.

42. Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180.

There was held to be no increase where a bank cashier having fraudulently overissued the stock of his bank, it purchased, by legis-

ute must be pursued.[43] Proper authority must also exist for lessening the amount,[44] and the capital set free by a reduction of the amount cannot be retained as a surplus fund.[45]

2. SUBSCRIPTIONS TO STOCK— a. Who May Subscribe— (I) *IN GENERAL.* Some banks have been organized and owned entirely by the state,[46] while others have had a dual ownership.[47] The right of the public to subscribe for the stock of an incorporated bank depends, therefore, on its charter.[48]

(II) *WHERE SUBSCRIPTION FORBIDDEN IN NAME OF ANOTHER.* Although a person is forbidden to subscribe in the name of another, the restriction does not prevent an attorney from subscribing in the name of his principal.[49]

b. Disposition of Unsubscribed Stock. When all the stock is not at first subscribed the balance is held by the bank in trust for all subscribers, and not simply for those who subscribed in the beginning.[50] A stock-holder entitled to a preëmption of an additional issue cannot maintain an action against the bank for its refusal to permit him to subscribe without proof of a demand and offer to subscribe therefor.[51]

c. Oversubscription. Where the law, anticipating oversubscriptions, has provided for reducing them, a subscriber cannot evade the law by subdividing his subscription among others, and in such a case the directors can go behind the face of the subscription to learn the truth.[52] When, however, the law does not provide a way, those authorized to receive subscriptions cannot act in an arbitrary manner in making reductions.[53]

3. PAYMENT FOR STOCK — a. Necessity For. When the stock of a bank is nontransferable by charter until complete payment no contract for transferring it can be executed until payment is made.[54]

lative authority, with its earnings, nearly all of this stock and nothing was ever paid on the remainder of the overissue. Com. *v.* State Bank, 9 B. Mon. (Ky.) 1.

43. McNulta *v.* Corn Belt Bank, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203.

The stock is not absolutely void where, although the law provides that "no increase of capital stock shall be valid until the whole amount of the increase proposed is paid in cash," the payment is not complete. Dunn *v.* State Bank, 59 Minn. 221, 62 N. W. 27. See also People *v.* National Sav. Bank, 129 Ill. 618, 22 N. E. 288, 11 N. E. 170.

Relation of creditors to increase.— When an increase has been determined, subsequent creditors are presumed to have trusted the bank by reason of such proposed or perfected action. Palmer *v.* Zumbrota Bank, 72 Minn. 266, 75 N. W. 380; Veeder *v.* Mudgett, 95 N. Y. 295; Handley *v.* Stutz, 139 U. S. 417, 11 S. Ct. 530, 35 L. ed. 227.

44. Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180. See also Byrne *v.* Union Bank, 9 Rob. (La.) 433.

Withdrawal of stock under the form of loans, if done with the intention of reducing the amount below the legal requirement, is a violation of law. State *v.* Essex Bank, 8 Vt. 489.

45. Seeley *v.* New York Nat. Exch. Bank, 8 Daly (N. Y.) 400, 4 Abb. N. Cas. (N. Y.) 61 [*affirmed* in 78 N. Y. 608].

Issuing certificates of deposit for stock surrendered.— A stock-holder's resolution reducing the capital stock of a bank one half and issuing long-time certificates of deposit for the stock thus surrendered only distributes the excess of the bank's assets over its liabilities and stock as reduced. Karsler *v.* Kyle, (Colo. 1901) 65 Pac. 34.

46. Nashville *v.* State Bank, 1 Swan (Tenn.) 269.

47. State *v.* Charleston Bank, Dudley (S. C.) 187.

48. State *v.* Charleston Bank, Dudley (S. C.) 187.

Charitable organizations may subscribe when authorized so to do. Hartford Charitable Soc. *v.* Farmers, etc., Bank, 26 Conn. 60; Trustees *v.* Eagle Bank, 7 Conn. 476.

49. State *v.* Lehre, 7 Rich. (S. C.) 234. See also Alexandria Mechanics Bank *v.* Seton, 1 Pet. (U. S.) 299, 7 L. ed. 152.

50. Reese *v.* Montgomery County Bank, 31 Pa. St. 78, 3 Pittsb. Leg. J. (Pa.) 412, 72 Am. Dec. 726.

By the law incorporating State Bank of Indiana those who had the right to subscribe but were not allowed by the commissioners could indeed complain, but not the state for them. McCulloch *v.* State, 11 Ind. 424.

51. Wilson *v.* Montgomery County Bank, 29 Pa. St. 537.

52. Union Bank *v.* McDonough, 5 La. 63.

53. Meads *v.* Walker, Hopk. (N. Y.) 587; Clarke *v.* Brooklyn Bank, 1 Edw. (N. Y.) 361; State *v.* Lehre, 7 Rich. (S. C.) 234.

54. Merrill *v.* Call, 15 Me. 428. See also *infra*, II, B, 5, a, (I).

Failure to pay first instalment.— If all rights acquired by subscribing for stock are forfeited by the failure to pay the first instalment no right in the stock can be trans-

b. Manner of Payment. When the law requires payment in cash or specie, payment must be so made,[55] and the giving of a note therefor will not constitute the payor a stock-holder,[56] although he may be liable on his note;[57] but where the condition of payment is for "property actually received," a note may be taken in payment.[58] Payment for stock in anything but money will not be regarded as payment except to the extent of the true value of the thing received in lieu of money.[59]

c. Time of Payment. Unless specifically required by law a subscriber need not pay at the time of subscribing;[60] and if a state can pay at a "convenient" time, payment at any time before the termination of the charter will suffice.[61]

d. Presumption of Payment. Whether shareholders have paid for the stock as the law requires must be proved by the certificate of the officers appointed to execute the law, but when a bank has been in operation several years, the presumption is that all the payments for stock have been made.[62]

4. Transfer of Stock — a. Right to Transfer — (i) *In General.* While a bank may refuse to transfer stock which is unpaid for[63] or of one otherwise indebted to the bank,[64] it has no discretionary authority in transferring its stock where application is made therefor in conformity with its by-laws by one having a *prima facie* right to have the same transferred[65] and cannot prevent a transfer by refusing to recognize the purchaser as a stock-holder.[66]

(ii) *Remedy For Refusal.* When a bank refuses to deliver a certificate to the purchaser his remedy is an action to recover the value of the stock[67] or for a conversion.[68]

ferred before paying for it. Coleman *v.* Spencer, 5 Blackf. (Ind.) 197.

Bank's non-existence no ground for not paying.—The original subscribers or their assignees (Palmer *v.* Lawrence, 3 Sandf. (N. Y.) 161) cannot deny the legal existence of their bank when required to pay for their subscription (Voorhees *v.* Circleville Bank, 19 Ohio 463). Their certificate of association in which each one has specified his ownership of shares is conclusive. Dayton *v.* Borst, 31 N. Y. 435 [*affirming* 7 Bosw. (N. Y.) 115].

55. King *v.* Elliott, 5 Sm. & M. (Miss.) 428.

56. Hayne *v.* Beauchamp, 5 Sm. & M. (Miss.) 515; Moses *v.* Ocoee Bank, 1 Lea (Tenn.) 398. *Compare* Lewis *v.* Robertson, 13 Sm. & M. (Miss.) 558.

57. Lewis *v.* Robertson, 13 Sm. & M. (Miss.) 558; Hayne *v.* Beauchamp, 5 Sm. & M. (Miss.) 515; Pine River Bank *v.* Hodsdon, 46 N. H. 114; Moses *v.* Ocoee Bank, 1 Lea (Tenn.) 398.

If a bank purchases the stock for which a note was given it can collect the note. U. S. Trust Co. *v.* Harris, 2 Bosw. (N. Y.) 75.

58. Pacific Trust Co. *v.* Dorsey, 72 Cal. 55, 12 Pac. 49.

59. Libby *v.* Tobey, 82 Me. 397, 19 Atl. 904; Boynton *v.* Hatch, 47 N. Y. 225; Nathan *v.* Whitlock, 3 Edw. (N. Y.) 215.

When a subscriber pays for his stock in depreciated bank-bills of his bank he is entitled to be credited with their value at the time of payment. Marr *v.* West Tennessee Bank, 4 Lea (Tenn.) 578.

60. Napier *v.* Poe, 12 Ga. 170.

61. Atty.-Gen. *v.* State Bank, 21 N. C. 545.

62. Agricultural Bank *v.* Burr, 24 Me. 256.

63. See *supra*, II, B, 3, a.

64. See *infra*, II, B, 5, a, (I).

65. Helm *v.* Swiggett, 12 Ind. 194; Purchase *v.* New York Exch. Bank, 3 Rob. (N. Y.) 164; State Bank *v.* Craig, 6 Leigh (Va.) 399.

Bank's option to purchase.— An agreement between a stock-holder and a bank that the board of directors shall appraise the value of his stock and have the option of purchasing it at such valuation in the event of any transfer thereof is not opposed to public policy. New England Trust Co. *v.* Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271.

Pledge of untransferable stock.— If a statute prohibits the transfer of stock for a prescribed period a pledgee may nevertheless acquire an equitable interest therein. Nesmith *v.* Washington Bank, 6 Pick. (Mass.) 324.

66. Byrne *v.* Union Bank, 9 Rob. (La.) 433.

67. Hussey *v.* Manufacturers', etc., Bank, 10 Pick. (Mass.) 415; Attica Bank *v.* Manufacturers', etc., Bank, 20 N. Y. 501; Commercial Bank *v.* Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; Shipley *v.* Mechanics' Bank, 10 Johns. (N. Y.) 484; Presbyterian Congregation *v.* Carlisle Bank, 5 Pa. St. 345; Case *v.* Louisiana Citizens' Bank, 100 U. S. 446, 25 L. ed. 695.

68. Nicollet Nat. Bank *v.* City Bank, 38 Minn. 85, 35 N. W. 577, 8 Am. St. Rep. 643.

What owner must prove.—When a bank refuses to make the transfer and the owner holds a certificate assigned in blank he must

b. Manner of Transfer.[69] A person does not become a stock-holder without his knowledge and assent, either express or implied,[70] but there may be a perfect transfer between the immediate parties, although no transfer be made on the books and the law provide that no transfer shall be voted unless it is registered.[71] Likewise a transfer on the books will suffice, although no certificate is issued to the transferee.[72]

c. Place of Transfer. If stock is transferable only on the books of the bank, which is the general rule, there can be no legal transfer except at the bank.[73] Therefore, if the parties make a transfer elsewhere, the purchaser cannot complain should the bank permit an attachment of the stock as the property of the vendor or former owner.[74]

d. Liability of Bank For Wrongful Transfer—(i) *By Attorney.* Where shares are transferred by an attorney the bank is responsible for his action[75] and is liable if the power be forged or executed by an incompetent person.[76] If stock is assigned to two persons with a power of attorney to one of them to transfer, he alone can make a valid transfer.[77]

prove his ownership of it. Dunn *v.* Commercial Bank, 11 Barb. (N. Y.) 580.

69. The sale or transfer of national bank-stock is governed by the same rules that apply to other incorporated companies. Nelson, J., in Stephens *v.* Follett, 43 Fed. 842.

70. Robinson *v.* Lane, 19 Ga. 337; Simmons *v.* Hill, 96 Mo. 679, 10 S. W. 61, 2 L. R. A. 476; Keyser *v.* Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531; Webster *v.* Upton, 91 U. S. 65, 23 L. ed. 384; Stephens *v.* Follett, 43 Fed. 842; *In re* Imperial Mercantile Credit Assoc., L. R. 3 Eq. 361. See also *infra*, II, C, 1.

71. *California.*— Weston *v.* Bear River, etc., Water, etc., Co., 5 Cal. 186, 63 Am. Dec. 186.

Indiana.— Bruce *v.* Smith, 44 Ind. 1.

Minnesota.— Nicollet Nat. Bank *v.* City Bank, 38 Minn. 85, 35 N. W. 577, 8 Am. St. Rep. 643.

Missouri.— Chouteau Spring Co. *v.* Harris, 20 Mo. 382.

New Jersey.— Mt. Holly, etc., Turnpike Co. *v.* Ferree, 17 N. J. Eq. 117; Broadway Bank *v.* McElrath, 13 N. J. Eq. 24.

New York.—Johnson *v.* Underhill, 52 N. Y. 203; Isham *v.* Buckingham, 49 N. Y. 216; McNeil *v.* New York Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30; Attica Bank *v.* Manufacturers', etc., Bank, 20 N. Y. 501; Orr *v.* Bigelow, 14 N. Y. 556; Adderly *v.* Storm, 6 Hill (N. Y.) 624; Commercial Bank *v.* Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; Gilbert *v.* Manchester Iron Mfg. Co., 11 Wend. (N. Y.) 627; Utica Bank *v.* Smalley, 2 Cow. (N. Y.) 770, 14 Am. Dec. 526.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Clarke, 29 Pa. St. 146.

Rhode Island.— Hoppin *v.* Buffum, 9 R. I. 513, 11 Am. Rep. 291.

United States.— U. S. *v.* Cutts, 1 Sumn. (U. S.) 133, 25 Fed. Cas. No. 14,912.

Transfer in blank.—A certificate may be indorsed in blank and delivered to another whereby he acquires an equitable title, and this is the usual form of transfer when stock is pledged. By the contract of pledge the pledgee may, under certain conditions, complete the transfer and acquire a legal title. Broadway Bank *v.* McElrath, 13 N. J. Eq. 24; Moore *v.* Metropolitan Nat. Bank, 55 N. Y. 41, 14 Am. Rep. 173; McNeil *v.* New York Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Commercial Bank *v.* Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317.

Rights and liabilities of unrecorded transferee.—An unrecorded transferee is liable as a stock-holder (Agricultural Bank *v.* Wilson, 24 Me. 273) and has a full right to vote (Beckett *v.* Houston, 32 Ind. 393), to receive dividends (Ellis *v.* Essex Merrimack Bridge, 2 Pick. (Mass.) 243), and to transfer the same (Davenport First Nat. Bank *v.* Gifford, 47 Iowa 575).

72. *Maine.*— Agricultural Bank *v.* Wilson, 24 Me. 273.

Massachusetts.— Comins *v.* Coe, 117 Mass. 45; Field *v.* Pierce, 102 Mass. 253.

Missouri.— Chouteau Spring Co. *v.* Harris, 20 Mo. 382.

New York.— Commercial Bank *v.* Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317.

United States.— Keyser *v.* Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531; Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. ed. 1039.

73. Vansands *v.* Middlesex County Bank, 26 Conn. 144; People's Bank *v.* Gridley, 91 Ill. 457; Lockwood *v.* Mechanics Nat. Bank, 9 R. I. 308, 11 Am. Rep. 253; Williams *v.* New Haven Mechanics' Bank, 5 Blatchf. (U. S.) 59, 29 Fed. Cas. No. 17,727, 10 Pittsb. Leg. J. (Pa.) 89. See also Planters', etc., Mut. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585.

74. Williams *v.* New Haven Mechanics' Bank, 5 Blatchf. (U. S.) 59, 29 Fed. Cas. No. 17,727, 10 Pittsb. Leg. J. (Pa.) 89.

75. Purchase *v.* New York Exch. Bank, 3 Rob. (N. Y.) 164.

76. Chew *v.* Baltimore Bank, 14 Md. 299; Pollock *v.* National Bank, 7 N. Y. 274, 57 Am. Dec. 520.

77. Plymouth Bank *v.* Norfolk Bank, 10 Pick. (Mass.) 454.

(II) *By Trustee.* When stock is conveyed by an executor or other trustee[73] for other purposes than the trust, which is known to the bank,[79] it is liable to the beneficiary for the injury resulting to him.[80]

5. Bank Lien — a. On Stock — (I) *Exists When* — (A) *In General.* A bank has no lien on the stock of its stock-holders at common law,[81] and a private unincorporated bank has no lien on the shares of its members for their indebtedness.[82]

(B) *By Charter or General Law.* By charter or general law, however, a shareholder may be prevented from selling his stock while indebted to his bank,[83] and if he sell or assign it, the purchaser or assignee acquires only an equitable

78. Requiring evidence of authority to transfer.—A bank has a right to require from a trustee evidence of his authority to transfer (Bayard *v.* Farmers', etc., Bank, 52 Pa. St. 232); and when an executor seeks to transfer bank-stock belonging to his testator several years after the period limited for settling estates a bank should look carefully into his authority (Peck *v.* Bank of America, 16 R. I. 710, 19 Atl. 369, 7 L. R. A. 826).

79. The mere use of the term "trustee" without any reference to the trust or to the beneficiary has been held not sufficient notice to a bank to render it liable if stock is wrongfully transferred by the holder. Albert *v.* Baltimore Sav. Bank, 1 Md. Ch. 407. *Contra,* Walsh *v.* Stille, 2 Pars. Eq. Cas. (Pa.) 17.

80. *Maryland.*— Chew *v.* Baltimore Bank, 14 Md. 299; Farmers', etc., Bank *v.* Wayman, 5 Gill (Md.) 336.

Massachusetts.— Shaw *v.* Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; Atkinson *v.* Atkinson, 8 Allen (Mass.) 15.

New York.— Holden *v.* New York, etc., Bank, 72 N. Y. 286.

Pennsylvania.— Bohlen's Estate, 75 Pa. St. 304; Bayard *v.* Farmers', etc., Bank, 52 Pa. St. 232.

South Carolina.— Magwood *v.* Railroad Bank, 5 S. C. 379.

Tennessee.— Covington *v.* Anderson, 16 Lea (Tenn.) 310.

Vermont.— Porter *v.* Rutland Bank, 19 Vt. 410.

United States.— Duncan *v.* Jaudon, 15 Wall. (U. S.) 165, 21 L. ed. 142; Alexandria Mechanics Bank *v.* Seton, 1 Pet. (U. S.) 299, 7 L. ed. 152; Lowry *v.* Commercial, etc., Bank, Brunn. Col. Cas. (U. S.) 331, Taney (U. S.) 310, 15 Fed. Cas. No. 8,581, 3 Am. L. J. N. S. 111, 6 West. L. J. 121.

Contra, State Bank *v.* Craig, 6 Leigh (Va.) 399.

81. *Iowa.*— Farmers', etc., Bank *v.* Wasson, 48 Iowa 336, 30 Am. Rep. 398.

Kentucky.— Fitzhugh *v.* Shepherdsville Bank, 3 T. B. Mon. (Ky.) 126, 16 Am. Dec. 90.

Maryland.— Gemmell *v.* Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. Rep. 412.

New York.—Utica Bank *v.* Smalley, 2 Cow. (N. Y.) 770, 14 Am. Dec. 526.

North Carolina.— Boyd *v.* Redd, 120 N. C. 335, 27 S. E. 35, 58 Am. St. Rep. 792; Heart *v.* State Bank, 17 N. C. 111.

Pennsylvania.—Merchants' Bank *v.* Shouse, 102 Pa. St. 488.

United States.—New Orleans Nat. Banking Assoc. *v.* Wiltz, 4 Woods (U. S.) 43, 10 Fed. 330.

82. Neale *v.* Janney, 2 Cranch C. C. (U. S.) 188, 17 Fed. Cas. No. 10,069, holding that if a member pledges his stock for a particular liability the bank has no lien thereon for other claims.

83. *Arkansas.*— Duncan *v.* Biscoe, 7 Ark. 175.

California.— Jennings *v.* State Bank, 79 Cal. 323, 21 Pac. 852, 12 Am. St. Rep. 145, 5 L. R. A. 233.

Connecticut.— Hartford First Nat. Bank *v.* Hartford L., etc., Ins. Co., 45 Conn. 22; Vansands *v.* Middlesex County Bank, 26 Conn. 144.

Delaware.— McDowell *v.* Wilmington, etc., Bank, 2 Del. Ch. 1.

Iowa.— Farmers', etc., Bank *v.* Haney, 87 Iowa 101, 56 N. W. 61.

Kentucky.— State Bank *v.* Bonnie, 102 Ky. 343, 19 Ky. L. Rep. 1372, 43 S. W. 407; German Security Bank *v.* Jefferson, 10 Bush (Ky.) 326.

Maryland.— Reese *v.* Bank of Commerce, 14 Md. 271, 74 Am. Dec. 536; Farmers Bank *v.* Iglehart, 6 Gill (Md.) 50; Hodges *v.* Planters Bank, 7 Gill & J. (Md.) 306.

Minnesota.—Dorr *v.* Life Ins. Clearing Co., 71 Minn. 38, 73 N. W. 635, 70 Am. St. Rep. 309.

New York.—Mohawk Nat. Bank *v.* Schenectady Bank, 151 N. Y. 665, 46 N. E. 1149; Leggett *v.* Sing Sing Bank, 24 N. Y. 283; Arnold *v.* Suffolk Bank, 27 Barb. (N. Y.) 424; Utica Bank *v.* Smalley, 2 Cow. (N. Y.) 770, 14 Am. Dec. 526.

Ohio.— Stafford *v.* Produce Exch. Banking Co., 61 Ohio St. 160, 55 N. E. 162, 76 Am. St. Rep. 371; White's Bank *v.* Toledo F. & M. Ins. Co., 12 Ohio St. 601; Downer *v.* Zanesville Bank, Wright (Ohio) 477.

Pennsylvania.— Klopp *v.* Lebanon Bank, 46 Pa. St. 88; Presbyterian Congregation *v.* Carlisle Bank, 5 Pa. St. 345; Mechanics' Bank *v.* Earp, 4 Rawle (Pa.) 384; Grant *v.* Mechanics' Bank, 15 Serg. & R. (Pa.) 140; Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77.

Rhode Island.— Cross *v.* Phenix Bank, 1 R. I. 39.

Vermont.— Sabin *v.* Woodstock Bank, 21 Vt. 353.

Virginia.— Bohmer *v.* City Bank, 77 Va. 445.

United States.— Cecil Nat. Bank *v.* Wat-

interest to whatever may be left after discharging the stock-holder's indebtedness to the bank.[84]

(c) *By By-Law.* A bank can also create such a lien by by-law which will bind all purchasers of its stock who know of it,[85] but a lien on bank-stock

sontown Bank, 105 U. S. 217, 26 L. ed. 1039; Bullard *v.* National Eagle Bank, 18 Wall. (U. S.) 589, 21 L. ed. 923; Brent *v.* Washington Bank, 10 Pet. (U. S.) 596, 9 L. ed. 547; Alexandria Mechanics Bank *v.* Seton, 1 Pet. (U. S.) 299, 7 L. ed. 152; Union Bank *v.* Laird, 2 Wheat. (U. S.) 390, 4 L. ed. 269; Pierson *v.* Washington Bank, 3 Cranch C. C. (U. S.) 363, 19 Fed. Cas. No. 11,155; Burford *v.* Crandell, 2 Cranch C. C. (U. S.) 86, 4 Fed. Cas. No. 2,150; *In re* Morrison, 17 Fed. Cas. No. 9,839, 6 Chic. Leg. N. 110, 10 Nat. Bankr. Reg. 105.

England.—Bradford Banking Co. *v.* Briggs, 31 Ch. D. 19, 53 L. T. Rep. N. S. 846 [*reversing* 29 Ch. D. 149].

See 6 Cent. Dig. tit. "Banks and Banking," §§ 50, 56.

Where a charter provided for making advances and "taking liens," this contemplated that the two acts should be contemporaneous, and not that the bank at any time after making an advancement could take a lien on all future purchases of the mortgagor for a general balance due on such advancements. New Hanover Bank *v.* Williams, 79 N. C. 129.

Priority of lien.— The rights of the holder of stock as collateral security on which the bank has a lien for the assignor's indebtedness are inferior to those of the bank. Union Bank *v.* Laird, 2 Wheat. (U. S.) 390, 4 L. ed. 269. So, too, as against a judgment creditor who has levied on a shareholder's stock, the bank has a lien for a note made by him before the levy but maturing afterward. Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285.

Perversion of lien.— A bank has no right to use its lien to aid one creditor to the injury of another. State Bank *v.* Bonnie, 102 Ky. 343, 19 Ky. L. Rep. 1372, 43 S. W. 407.

84. Mobile Mut. Ins. Co. *v.* Cullom, 49 Ala. 558; Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599; Stebbins *v.* Phenix F. Ins. Co., 3 Paige (N. Y.) 350; Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77; Brent *v.* Washington Bank, 10 Pet. (U. S.) 596, 9 L. ed. 547. See also New Orleans Nat. Banking Assoc. *v.* Wiltz, 4 Woods (U. S.) 43, 10 Fed. 330.

85. *Alabama.*— Planters', etc., Mut. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585; Cunningham *v.* Alabama L. Ins., etc., Co., 4 Ala. 652.

California.— People *v.* Crockett, 9 Cal. 112.

Delaware.— McDowell *v.* Wilmington, etc., Bank, 1 Harr. (Del.) 27.

Georgia.— Tuttle *v.* Walton, 1 Ga. 43.

Iowa.— Farmers', etc., Bank *v.* Wasson, 48 Iowa 336, 30 Am. Rep. 398. See also Des Moines Nat. Bank *v.* Warren County Bank, 97 Iowa 204, 66 N. W. 154.

Maryland.— Reese *v.* Bank of Commerce, 14 Md. 271, 74 Am. Dec. 536; Farmers Bank *v.* Iglehart, 6 Gill (Md.) 50.

Missouri.— Atchison County Bank *v.* Durfee, 118 Mo. 431, 24 S. W. 133, 40 Am. St. Rep. 396; Spurlock *v.* Pacific R. Co., 61 Mo. 319; Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513, 100 Am. Dec. 388; St. Louis Perpetual Ins. Co. *v.* Goodfellow, 9 Mo. 149.

New Jersey.— Young *v.* Vough, 23 N. J. Eq. 325.

New York.— Leggett *v.* Sing Sing Bank, 24 N. Y. 283; Attica Bank *v.* Manufacturers', etc., Bank, 20 N. Y. 501; Arnold *v.* Suffolk Bank, 27 Barb. (N. Y.) 424; McCready *v.* Rumsey, 6 Duer (N. Y.) 574; Stebbins *v.* Phenix Ins. Co., 3 Paige (N. Y.) 350.

North Carolina.— Heart *v.* State Bank, 77 N. C. 111.

Ohio.—Franklin Bank *v.* Commercial Bank, 5 Ohio Dec. (Reprint) 339, 4 Am. L. Rec. 705.

Pennsylvania.— Morgan *v.* Bank of North America, 8 Serg. & R. (Pa.) 73, 11 Am. Dec. 575; Tete *v.* Farmers', etc., Bank, 4 Brewst. (Pa.) 308; Geyer *v.* Western Ins. Co., 3 Pittsb. (Pa.) 41.

Rhode Island.—Lockwood *v.* Mechanics Nat. Bank, 9 R. I. 308, 11 Am. Rep. 253.

Virginia.— Bohmer *v.* City Bank, 77 Va. 445.

United States.—Brent *v.* Washington Bank, 10 Pet. (U. S.) 596, 9 L. ed. 547; *In re* Dunkerson, 4 Biss. (U. S.) 227, 8 Fed. Cas. No. 4,156; Pendergast *v.* Stockton Bank, 2 Sawy. (U. S.) 108, 19 Fed. Cas. No. 10,918, 6 Am. L. Rec. 574, 4 Am. L. T. Rep. U. S. Cts. 247; *In re* Bachman, 2 Fed. Cas. No. 707, 2 Centr. L. J. 119, 22 Int. Rev. Rec. 19, 12 Nat. Bankr. Reg. 223.

England.— Child *v.* Hudson's Bay Co., 2 P. Wms. 207.

See 6 Cent. Dig. tit. "Banks and Banking," § 56.

Although a bank is prohibited from lending on the security of its own stock, or from becoming a purchaser except to prevent a loss on a debt previously contracted in good faith, it may acquire and retain a lien thereon by by-law for a liability as principal and surety so long as it remains undischarged. Battey *v.* Eureka Bank, 62 Kan. 384; State Bank *v.* Bonnie, 102 Ky. 343, 19 Ky. L. Rep. 1372, 43 S. W. 407; Oakland County Sav. Bank *v.* State Bank, 113 Mich. 284, 71 N. W. 453, 67 Am. St. Rep. 463; Citizens' State Bank *v.* Kalamazoo County Bank, 111 Mich. 313, 69 N. W. 663; Michigan Trust Co. *v.* State Bank, 111 Mich. 306, 69 N. W. 645.

Meaning of by-law.— A by-law which provides that no transfer can be made by an indebted stock-holder and that the certificates of stock shall contain this notice does not

created by by-law will not bind those purchasers who are ignorant of its existence.[86]

(II) *Covers What Indebtedness.* The lien covers the stock-holder's indebtedness to the bank;[87] but not his indebtedness to a third person acquired by the bank,[88] or an indebtedness incurred after a transfer of his stock.[89] A bank cannot hold the stock for the assignee's indebtedness.[90]

(III) *Attaches to What Stock.* Stock standing on the books of a bank in the name of a fictitious person or of a trustee is subject to a lien for the real owner's indebtedness;[91] and a bank may refuse to transfer any of the debtor's stock, although the retention of a part would be enough to secure its debt.[92] It has been held that a lien will not attach to stock which on its face is transferable,[93] or to stock held in trust when the bank has knowledge that it is so held.[94]

(IV) *Waiver of Lien.* A bank may waive its lien, acquired by charter or

apply to an assignee of stock as collateral security who simply knows that the stock is transferable at the office of the company. Holly Springs Bank *v.* Pinson, 58 Miss. 421, 38 Am. Rep. 330.

86. *Alabama.*— Planters', etc., Mut. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585.

California.— Anglo-Californian Bank *v.* Grangers' Bank, 63 Cal. 359; People *v.* Crockett, 9 Cal. 112.

Louisiana.— Pitot *v.* Johnson, 33 La. Ann. 1286; Bryon *v.* Carter, 22 La. Ann. 98.

Minnesota.— Nicollet Nat. Bank *v.* City Bank, 38 Minn. 85, 35 N. W. 577, 8 Am. St. Rep. 643.

Mississippi.— Holly Springs Bank *v.* Pinson, 58 Miss. 421, 38 Am. Rep. 330.

Missouri.— Atchison County Bank *v.* Durfee, 118 Mo. 431, 24 S. W. 133, 40 Am. St. Rep. 396; Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249.

New York.— Driscoll *v.* West Bradley, etc., Mfg. Co., 59 N. Y. 96; Conklin *v.* Oswego Second Nat. Bank, 45 N. Y. 655; People *v.* Miller, 39 Hun (N. Y.) 557; Rosenback *v.* Salt Spring Nat. Bank, 53 Barb. (N. Y.) 495.

Pennsylvania.—Merchants' Bank *v.* Shouse, 102 Pa. St. 488; Steamship Dock Co. *v.* Heron, 52 Pa. St. 280.

United States.— Evansville Nat. Bank *v.* Metropolitan Nat. Bank, 2 Biss. (U. S.) 527, 8 Fed. Cas. No. 4,573, 10 Am. L. Reg. N. S. 774, 6 Am. L. Rev. 574, 1 Thomps. Nat. Bank Cas. 189; New Orleans Banking Assoc. *v.* Wiltz, 4 Woods (U. S.) 43, 10 Fed. 330. See also Neale *v.* Janney, 2 Cranch C. C. (U. S.) 188, 17 Fed. Cas. No. 10,069.

But see Plymouth Bank *v.* Norfolk Bank, 10 Pick. (Mass.) 454; Nesmith *v.* Washington Bank, 6 Pick. (Mass.) 324, where it is doubted if a by-law can create such a lien.

87. It includes an immatured obligation (Leggett *v.* Sing Sing Bank, 24 N. Y. 283; Grant *v.* Mechanics' Bank, 15 Serg. & R. (Pa.) 140); a contingent liability as indorser (McDowell *v.* Wilmington, etc., Bank, 2 Del. Ch. 1; Leggett *v.* Sing Sing Bank, 24 N. Y. 283; Grant *v.* Mechanics' Bank, 15 Serg. & R. (Pa.) 140; Brent *v.* Washington Bank, 10 Pet. (U. S.) 596, 9 L. ed. 547); an overdraft (Reese *v.* Bank of Commerce, 14 Md. 271, 74 Am. Dec. 536); and the bank's right is not affected by the amount of the stock-holder's deposit (Mechanics' Bank *v.* Earp, 4 Rawle (Pa.) 384).

It does not include arrears for enforced calls (Hahn *v.* St. Joseph Bank, 70 Mo. 262) or debts due by another (Presbyterian Congregation *v.* Carlisle Bank, 5 Pa. S. 345).

When a bank demands more than is due the debtor must tender at least what he admits to be due before he is entitled to a transfer. Pierson *v.* Washington Bank, 3 Cranch C. C. (U. S.) 363, 19 Fed. Cas. No. 11,155.

When a bank refuses to sell the stock of a deceased stock-holder, retained for his indebtedness, a court will order its sale on the application of the administrator and apply the proceeds on the debt. Farmers Bank Case, 2 Bland (Md.) 394. *Contra*, Tete *v.* Farmers', etc., Bank, 4 Brewst. (Pa.) 308.

88. Utica Bank *v.* Smalley, 2 Cow. (N. Y.) 770, 14 Am. Dec. 526; Boyd *v.* Redd, 120 N. C. 335, 27 S. E. 35, 58 Am. St. Rep. 792; White's Bank *v.* Toledo F. & M. Ins. Co., 12 Ohio St. 601; Cross *v.* Phenix Bank, 1 R. I. 39.

89. Reese *v.* Bank of Commerce, 14 Md. 271, 74 Am. Dec. 536; Nesmith *v.* Washington Bank, 6 Pick. (Mass.) 324; Callanan *v.* Edwards, 32 N. Y. 483; Conant *v.* Reed, 1 Ohio St. 298.

90. Helm *v.* Swiggett, 12 Ind. 194.

91. Stebbins *v.* Phenix F. Ins. Co., 3 Paige (N. Y.) 350.

92. Pierson *v.* Washington Bank, 3 Cranch C. C. (U. S.) 363, 19 Fed. Cas. No. 11,155.

93. Dana *v.* Brown, 1 J. J. Marsh. (Ky.) 304; Fitzhugh *v.* Shepherdsville Bank, 3 T. B. Mon. (Ky.) 126, 16 Am. Dec. 90; Attica Bank *v.* Manufacturers', etc., Bank, 20 N. Y. 501.

94. Alexandria Mechanics Bank *v.* Seton, 1 Pet. (U. S.) 299, 7 L. ed. 152.

When there is no indication of trust.— A lien attaches to trust stock for debts due from a trustee who holds stock in trust, but in his own name, and without any indication of the trust. New London, etc., Bank *v.* Brocklebank, 21 Ch. D. 302, 51 L. J. Ch. 711, 47 L. T. Rep. N. S. 3, 30 Wkly. Rep. 737.

general statute,[95] and a transfer[96] or the acceptance of other security[97] would be conclusive evidence of such waiver.

b. On Dividends. Whether a bank has a specific lien on the dividends of the stock of an indebted stock-holder has been decided both affirmatively[98] and negatively.[99] When it exists the bank's preference, in the event of the stock-holder's failure, is the same as that of a partnership creditor over an individual creditor in the estate of a partnership.[1]

C. Stock-Holders[2] — 1. Who Are. The one whose name appears on the stock-book is presumed to be the real owner, unless someone else is clearly shown to be.[3]

2. When They Become Such. The existence of the bank is not essential to constitute a subscriber a stock-holder if it is afterward duly organized;[4] and a

95. Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. ed. 1039. See also Bank of America *v.* McNeil, 10 Bush (Ky.) 54; Reese *v.* Bank of Commerce, 14 Md. 271, 74 Am. Dec. 536.

96. Hill *v.* Pine River Bank, 45 N. H. 300. See also Callanan *v.* Edwards, 32 N. Y. 483.

97. McLean *v.* Lafayette Bank, 3 McLean (U. S.) 587, 16 Fed. Cas. No. 8,888.

98. *Maine.*— Hagar *v.* Union Nat. Bank, 63 Me. 509.

Massachusetts.— Sargent *v.* Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306.

New Jersey.— King *v.* Paterson, etc., R. Co., 29 N. J. L. 504.

New York.— Bates *v.* New York Ins. Co., 3 Johns. Cas. (N. Y.) 238.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Cowell, 28 Pa. St. 329, 70 Am. Dec. 128.

Although only "shares and stock" be mentioned in the charter the lien attaches to dividends. Hague *v.* Dandesan, 2 Exch. 741, 17 L. J. Exch. 269.

99. Brent *v.* Washington Bank, 2 Cranch C. C. (U. S.) 517, 4 Fed. Cas. No. 1,834.

Dividends declared after the death of a stock-holder are not subject to a lien for his debts. Merchants' Bank *v.* Shouse, 102 Pa. St. 488; Brent *v.* Washington Bank, 2 Cranch C. C. (U. S.) 517, 4 Fed. Cas. No. 1,834.

1. German Security Bank *v.* Jefferson, 10 Bush (Ky.) 326.

2. Stock-holders of national banks see *infra*, III, C.

Stock-holders of savings-banks see *infra*, IV, C.

3. *California.*— O'Connor *v.* Witherby, 111 Cal. 523, 44 Pac. 227.

Maine.— Coffin *v.* Collins, 17 Me. 440.

Massachusetts.— Fisher *v.* Essex Bank, 5 Gray (Mass.) 373.

New York.— U. S. Trust Co. *v.* U. S. Fire Ins. Co., 18 N. Y. 199, 8 Abb. Pr. (N. Y.) 192; Hoagland *v.* Bell, 36 Barb. (N. Y.) 57; Gilbert *v.* Manchester Iron Mfg. Co., 11 Wend. (N. Y.) 627.

Rhode Island.— Hoppin *v.* Buffum, 9 R. I. 513, 11 Am. Rep. 291.

United States.— Turnbull *v.* Payson, 95 U. S. 418, 24 L. ed. 437; Williams *v.* American Nat. Bank, 85 Fed. 376, 56 U. S. App. 316, 29 C. C. A. 203.

Name entered but stock not accepted.— One who never accepts any stock is not a stock-holder, although his name is entered on the books. Mudgett *v.* Horrell, 33 Cal. 25; Finn *v.* Brown, 142 U. S. 56, 12 S. Ct. 136, 35 L. ed. 936. See also Keyser *v.* Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531; and *supra*, II, B, 4, b.

Record deemed conclusive.— In some of the cases it is declared that the record must be regarded as conclusive proof of ownership. Plumb *v.* Enterprise Bank, 48 Kan. 484, 29 Pac. 699; Topeka Mfg. Co. *v.* Hale, 39 Kan. 23, 17 Pac. 601; Hawkins *v.* Glenn, 131 U. S. 319, 9 S. Ct. 739, 33 L. ed. 184; Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864. See doubt of this rule expressed in Plumb *v.* Enterprise Bank, 48 Kan. 484, 29 Pac. 699.

4. *Alabama.*— Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344.

California.— Mahan *v.* Wood, 44 Cal. 462.

Connecticut.— Lane *v.* Brainerd, 30 Conn. 565.

District of Columbia.— Glenn *v.* Busey, 5 Mackey (D. C.) 233.

Illinois.— Johnston *v.* Ewing Female University, 35 Ill. 518; Tonica, etc., R. Co. *v.* McNeely, 21 Ill. 71; Cross *v.* Pinckneyville Mill Co., 17 Ill. 54.

Indiana.— New Albany, etc., R. Co. *v.* McCormick, 10 Ind. 499, 71 Am. Dec. 337.

Iowa.— Nulton *v.* Clayton, 54 Iowa 425, 6 N. W. 685, 37 Am. Rep. 213.

Kentucky.— Collier *v.* Baptist Education Soc., 8 B. Mon. (Ky.) 68; Instone *v.* Frankfort Bridge Co., 2 Bibb (Ky.) 576, 5 Am. Dec. 638.

Michigan.— Michigan Midland, etc., R. *v.* Bacon, 33 Mich. 466; Comstock *v.* Howd, 15 Mich. 237; Underwood *v.* Waldron, 12 Mich. 73.

Minnesota.— Red Wing Hotel Co. *v.* Friedrich, 26 Minn. 112, 1 N. W. 827.

New Hampshire.—Ashuelot Boot, etc., Co. *v.* Hoit, 56 N. H. 548; Low *v.* Connecticut, etc., Rivers R. Co., 46 N. H. 284.

New York.— Lake Ontario, etc., R. Co. *v.* Mason, 16 N. Y. 451; Van Rensselaer *v.* Aikin, 44 Barb. (N. Y.) 547; Hamilton, etc., Plank Road Co. *v.* Rice, 7 Barb. (N. Y.) 157.

Pennsylvania.— Bell's Appeal, 115 Pa. St. 88, 8 Atl. 177, 2 Am. St. Rep. 532.

Tennessee.— Gleaves *v.* Brick Church Turnpike Co., 1 Sneed (Tenn.) 491.

certificate need not be issued to him, for he may, by the act of subscription, or by some other act, become a stock-holder with all the rights and liabilities created by the relation.[5]

3. Rights of Stock-Holders — a. To Inspect Books. Stock-holders have a right to inspect, at reasonable times, the books of their bank;[6] but this right will not be enforced by mandamus unless a useful purpose can be effected.[7]

b. To Question Elections. Stock-holders have also a right to inquire into the validity of an election by quo warranto, except where they have been wrongful participants.[8]

4. Liability For Debts of Bank — a. Who Liable — (i) *In General.* All stock-holders are liable,[9] and no transfers can be so effectually made as to relieve them from assessment.[10]

(ii) *Where Stock Is Pledged.* If stock is pledged the statute may prescribe whether the pledgor or pledgee shall be liable. If it does not, and it still remains in the pledgor's name, he is usually held liable; but if the stock is transferred to the pledgee so is the liability.[11]

Texas.— Belton Compress Co. *v.* Saunders, 70 Tex. 699, 6 S. W. 134.

Vermont.— State Treasurer *v.* Cross, 9 Vt. 289, 31 Am. Dec. 626.

Wisconsin.— Goodhue *v.* Beloit, 21 Wis. 636.

5. Chaffin *v.* Cummings, 37 Me. 76; Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128; Schaeffer *v.* Missouri Home Ins. Co., 46 Mo. 248; Spear *v.* Crawford, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513.

6. *Louisiana.*— State *v.* New Orleans Gaslight Co., 49 La. Ann. 1556, 22 So. 815; Legendre *v.* New Orleans Brewing Assoc., 45 La. Ann. 669, 12 So. 837, 40 Am. St. Rep. 243; Martin *v.* Bienville Oil Works Co., 28 La. Ann. 204; Cockburn *v.* Union Bank, 13 La. Ann. 289; Hatch *v.* City Bank, 1 Rob. (La.) 470.

Missouri.— State *v.* Laughlin, 53 Mo. App. 542; State *v.* Sportsman's Park, etc., Assoc., 29 Mo. App. 326.

Nebraska.— Gerner *v.* Mosher, 58 Nebr. 135, 78 N. W. 384, 46 L. R. A. 244.

New Jersey.— Huylar *v.* Cragin Cattle Co., 40 N. J. Eq. 392, 2 Atl. 274.

Tennessee.— Deaderick *v.* Wilson, 8 Baxt. (Tenn.) 108.

Washington.— State *v.* Pacific Brewing, etc., Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208.

United States.— Ranger *v.* Champion Cotton-Press Co., 51 Fed. 61.

Agent's inspection.— An inspection may be made by an agent. Utica Bank *v.* Hillard, 6 Cow. (N. Y.) 62.

7. Cockburn *v.* Union Bank, 13 La. Ann. 289; Hatch *v.* City Bank, 1 Rob. (La.) 470.

8. Wiltz *v.* Peters, 4 La. Ann. 339. See also Murphy *v.* Farmers' Bank, 20 Pa. St. 415.

9. **Who are stock-holders** see *supra*, II, C, 1.

Must be owner at time action is begun.— The stock-holder who is the owner, not at the time the debt accrues, but at the time of beginning action thereon is responsible. Cleveland *v.* Burnham, 55 Wis. 598, 13 N. W. 677, 680.

10. **A married woman** is liable like any other person, and a *bona fide* sale by her husband to her would discharge him and render her liable. Simmons *v.* Dent, 16 Mo. App. 288.

Trustees and administrators in their administrative capacity are liable like absolute owners (Crease *v.* Babcock, 10 Metc. (Mass.) 525; Diven *v.* Duncan, 41 Barb. (N. Y.) 520; Glenn *v.* Farmers' Bank, 72 N. C. 626), and the trustee and not his beneficiary is the proper person to sue (Wadsworth *v.* Hocking, 61 Ill. App. 156).

11. *Colorado.*— Zang *v.* Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145.

Connecticut.— Paine *v.* Stewart, 33 Conn. 516.

Illinois.— Dupee *v.* Swigert, 127 Ill. 494, 21 N. E. 622; Munger *v.* Jacobson, 99 Ill. 349; McCarthy *v.* Lavasche, 89 Ill. 270, 31 Am. Rep. 83; Fuller *v.* Ledden, 87 Ill. 310.

Kansas.—Van Demark *v.* Barons, 52 Kan. 779, 35 Pac. 798.

Louisiana.— Thomson's Succession, 46 La. Ann. 1074, 15 So. 379.

Maine.— Maine Trust, etc., Co. *v.* Southern L. & T. Co., 92 Me. 444, 43 Atl. 24.

Maryland.— Matthews *v.* Albert, 24 Md. 527.

Michigan.— Foster *v.* Row, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565.

Minnesota.— Ueland *v.* Haugan, 70 Minn. 349, 73 N. W. 169; Harper *v.* Carroll, 62 Minn. 152, 64 S. W. 145; Allen *v.* Walsh, 25 Minn. 543.

Missouri.— Perry *v.* Turner, 55 Mo. 418.

Nebraska.— Farmers L. & T. Co. *v.* Funk, 49 Nebr. 353, 68 N. W. 520.

New York.— U. S. Trust Co. *v.* U. S. Fire Ins. Co., 18 N. Y. 199 [*affirming* 6 Abb. Pr. (N. Y.) 385]; Poughkeepsie Bank *v.* Ibbotson, 24 Wend. (N. Y.) 473; Briggs *v.* Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454.

Ohio.— Brown *v.* Hitchcock, 36 Ohio St. 667.

Pennsylvania.— Driesbach *v.* Price, 133 Pa. St. 560, 26 Wkly. Notes Cas. (Pa.) 61, 19 Atl. 569; Gunkle's Appeal, 48 Pa. St. 13.

South Carolina.— Terry *v.* Calnan, 13 S. C. 220; Sacketts' Harbour Bank *v.* Blake, 3 Rich. Eq. (S. C.) 225.

(III) *Where Stock Is Transferred* — (A) *In General.* As a rule transfers made in good faith and in accordance with legal requirements are valid and release stock-holders from subsequent liability;[12] while new purchasers are liable on the bank's failure for its indebtedness without reference to the time it was incurred.[13] In some states, however, the old stock-holders are still liable, either by statute or common law, for the bank's prior indebtedness, incurred while they were members, and the new stock-holders are liable only for the bank's indebtedness incurred after their purchase.[14]

(B) *Where Bank's Debt Is Renewed.* Where a stock-holder is regarded as the principal debtor and not the surety, the renewal of the bank's debt without his consent, or after the sale of his stock, does not affect his liability.[15] Where, however, the stock-holder is regarded as a surety, he is only secondarily liable, and the rule is otherwise.[16]

(C) *Where Notice of Sale Required.* Although a shareholder is sometimes required to give notice of the sale of his stock and is a holder for a specified period afterward,[17] his rights and obligations cease from the time of the transfer.[18]

Washington.—Wilson *v.* Book, 13 Wash. 676, 43 Pac. 939.

Wisconsin.— Booth *v.* Dear, 96 Wis. 516, 71 N. W. 816; Cleveland *v.* Burnham, 55 Wis. 598, 13 N. W. 677, 680.

It must be a clear case to subject the pledgee, for the presumption is he did not intend to make himself liable. Robinson *v.* Southern Nat. Bank, 180 U. S. 295, 21 S. Ct. 383, 45 L. ed. 536.

A pledgee with a blank power of attorney on the certificate who transfers it to a third person as trustee for both parties is not liable for an assessment. Pauly *v.* State L. & T. Co., 165 U. S. 606, 17 S. Ct. 465, 41 L. ed. 844; Anderson *v.* Philadelphia Warehouse Co., 111 U. S. 479, 4 S. Ct. 525, 28 L. ed. 478; Hayes *v.* Fidelity Ins., etc., Co., 105 Fed. 160.

12. *California.*—Anglo-Californian Bank *v.* Grangers' Bank, 63 Cal. 359.

Georgia.— Morgan *v.* Brower, 77 Ga. 627; McDougald *v.* Bellamy, 18 Ga. 411. See also Chatham Bank *v.* Brobston, 99 Ga. 801, 27 S. E. 790; Brobston *v.* Downing, 95 Ga. 505, 22 S. E. 277.

Maryland.— Matthews *v.* Albert, 24 Md. 527.

Massachusetts.— Bond *v.* Appleton, 8 Mass. 472, 5 Am. Dec. 111.

Minnesota.— Harper *v.* Carroll, 62 Minn. 152, 64 N. W. 145.

Missouri.— McClaren *v.* Franciscus, 43 Mo. 452.

New York.— Billings *v.* Robinson, 94 N. Y. 415; Isham *v.* Buckingham, 49 N. Y. 216; Cowles *v.* Cromwell, 25 Barb. (N. Y.) 413.

Pennsylvania.— Christy *v.* Sill, 131 Pa. St. 492, 25 Wkly. Notes Cas. (Pa.) 501, 19 Atl. 295, 297; Merrimac Min. Co. *v.* Levy, 54 Pa. St. 227, 93 Am. Dec. 697.

See 6 Cent. Dig. tit. "Banks and Banking," § 69.

13. Maine Trust, etc., Co. *v.* Southern L. & T. Co., 92 Me. 444, 43 Atl. 24; Curtis *v.* Harlow, 12 Metc. (Mass.) 3; Foster *v.* Row, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565; Olson *v.* Cook, 57 Minn. 552, 59 N. W. 635; Gebhard *v.* Eastman, 7 Minn. 56.

14. Brown *v.* Hitchcock, 36 Ohio St. 667 (holding that the transferee is under an implied obligation to indemnify his transferrer); Kearny *v.* Buttles, 1 Ohio St. 362. See also Wick Nat. Bank *v.* Union Nat. Bank, 62 Ohio St. 446, 57 N. E. 320, 78 Am. St. Rep. 734, holding that a stock-holder may be liable after the transfer of his stock for debts previously contracted, when the assignee fails and is unable to pay those contracted before and after his purchase, and that in such a case the assets of the new purchaser should be applied *pro rata* on both classes of debts.

Liability continued for specified period after transfer.— In some states the liability of the transferrer is continued by statute for a prescribed period after the transfer. McDougald *v.* Bellamy, 18 Ga. 411; Harper *v.* Carroll, 62 Minn. 152, 64 N. W. 145; Gager *v.* Paul, 111 Wis. 638, 87 N. W. 875. See also Paine *v.* Stewart, 33 Conn. 516.

Liability of transferee for unpaid subscriptions.— If a transferee is an innocent purchaser for value he is not subject to future calls for an unpaid balance. Keystone Bridge Co. *v.* McCluney, 8 Mo. App. 496; Messersmith *v.* Sharon Sav. Bank, 96 Pa. St. 440; West Nashville Planing-Mill Co. *v.* Nashville Sav. Bank, 86 Tenn. 252, 6 S. W. 340, 6 Am. St. Rep. 835.

15. Harger *v.* McCullough, 2 Den. (N. Y.) 119; Boice *v.* Hodge, 51 Ohio St. 236, 37 N. E. 265, 46 Am. St. Rep. 569. See also Allen v. Sewall, 2 Wend. (N. Y.) 327.

16. Hanson *v.* Donkersley, 37 Mich. 184; New England Commercial Bank *v.* Newport Steam Factory, 6 R. I. 154, 75 Am. Dec. 688.

17. Notice required.—A stock-holder in the Brunswick state bank is liable for his proportionate part of the debts of the bank after transferring his shares, unless he gave notice as required by law. Chatham Bank *v.* Brobston, 99 Ga. 801, 27 S. E. 790.

18. McDougald *v.* Bellamy, 18 Ga. 411; Lane *v.* Morris, 8 Ga. 468.

How notice may affect bank lien.—A by-law which provides that a stock-holder desiring to sell his stock shall give the bank ten

It has been held that such notice of the sale of stock need not specify the purchaser.[19]

(D) *Where Transfer Was Fraudulent.* While the law seeks to make the real stock-holder liable[20] and the record furnishes strong evidence of his ownership,[21] yet, if the original and unrecorded owner has transferred his stock in order to escape liability, he will be liable.[22]

(E) *Where Transfer Was Not Recorded Through Neglect of Bank.* If the true owner's name does not appear through the unintentional or intentional neglect of the proper officers to make the transfer, he will be liable and the former owner, although his name still appears on the book, will be released.[23] To this rule the statutory exception must be noted, wherever it exists, declaring the person in whose name the stock stands to be the holder and liable for the bank's indebtedness.[24]

b. Extent of Liability — (I) *In General.* Stock-holders are not liable at common law for the debts of their bank,[25] even though the assets have been

days' notice to find a purchaser does not operate as a waiver of the bank's right to claim a lien after its sale. Citizens' State Bank *v.* Kalamazoo County Bank, 111 Mich. 313, 69 N. W. 663; Michigan Trust Co. *v.* State Bank, 111 Mich. 306, 69 N. W. 645.

19. McDougald *v.* Bellamy, 18 Ga. 411; Lane *v.* Morris, 8 Ga. 468.

20. Pauly *v.* State L. & T. Co., 165 U. S. 606, 17 S. Ct. 465, 41 L. ed. 844; National Park Bank *v.* Harmon, 79 Fed. 891, 51 U. S. App. 148, 25 C. C. A. 214.

21. See *supra*, II, C, 1.

22. *Alabama.*— Central Agricultural, etc., Assoc. *v.* Alabama Gold L. Ins. Co, 70 Ala. 120.

California.— Moore *v.* Boyd, 74 Cal. 167, 15 Pac. 670.

Connecticut.— Paine *v.* Stewart, 33 Conn. 516.

Kentucky.— Roman *v.* Fry, 5 J. J. Marsh. (Ky.) 634.

Louisiana.— Small *v.* Saloy, 42 La. Ann. 183, 7 So. 450; Lespassier *v.* Kennedy, 36 La. Ann. 539.

Massachusetts.— Marcy *v.* Clark, 17 Mass. 330.

Missouri.— Provident Sav. Inst. *v.* Jackson Place Skating, etc., Rink, 52 Mo. 557; McClaren *v.* Franciscus, 43 Mo. 452.

New York.— Matter of Reciprocity Bank, 22 N. Y. 9; Veiller *v.* Brown, 18 Hun (N. Y.) 571; Nathan *v.* Whitlock, 9 Paige (N. Y.) 152.

Ohio.—Wehrman *v.* Reakirt, 1 Cinc. Super. Ct. (Ohio) 230.

Pennsylvania.— Aultman's Appeal, 98 Pa. St. 505; Everhart *v.* West Chester, etc., R. Co., 28 Pa. St. 339.

Vermont.— Dauchy *v.* Brown, 24 Vt. 197.

United States.— Pauly *v.* State L. & T. Co., 165 U. S. 606, 17 S. Ct. 465, 41 L. ed. 844; Adams *v.* Johnson, 107 U. S. 251, 2 S. Ct. 246, 27 L. ed. 386; Davis *v.* Stevens, 17 Blatchf. (U. S.) 259, 7 Fed. Cas. No. 3,653, 20 Alb. L. J. 490, 14 Am. L. Rev. 84, 2 Browne Nat. Bank Cas. 158, 25 Int. Rev. Rec. 378, 36 Leg. Int. (Pa.) 462, 8 Reporter 710. See also Robinson *v.* Southern Nat. Bank, 180 U. S. 295, 21 S. Ct. 383, 45 L. ed. 536; Holly *v.* P. E. Church Domestic, etc., Missionary Soc., 180 U. S. 284, 21 S. Ct. 395, 45 L. ed. 531; Johnson *v.* Laflin, 5 Dill. (U. S.) 65, 13 Fed. Cas. No. 7,393, 17 Alb. L. J. 117, 146, 6 Centr. L. J. 124, 6 N. Y. Wkly. Dig. 181, 25 Pittsb. Leg. J. (Pa.) 119, 1 Thomps. Nat. Bank Cas. 331.

23. Foster *v.* Row, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565; Cox *v.* Elmendorf, 97 Tenn. 518, 37 S. W. 387.

A stock-holder ceases to be an owner when he sells his stock and delivers his certificate duly assigned to the cashier for his action. Foster *v.* Row, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565; Johnson *v.* Laflin, 5 Dill. (U. S.) 65, 13 Fed. Cas. No. 7,393, 17 Alb. L. J. 117, 146, 6 Centr. L. J. 124, 6 N. Y. Wkly. Dig. 181, 25 Pittsb. Leg. J. (Pa.) 119, 1 Thomps. Nat. Bank Cas. 331.

When a stock-holder, before paying anything thereon, transfers his stock in good faith to another and the bank consents he is released. Cowles *v.* Cromwell, 25 Barb. (N. Y.) 413. See also Marr *v.* West Tennessee Bank, 4 Lea (Tenn.) 578.

24. Paine *v.* Stewart, 33 Conn. 516; State *v.* New England Bank, 70 Minn. 398, 73 N. W. 153, 68 Am. St. Rep. 538; Foster *v.* Lincoln, 79 Fed. 170, 45 U. S. App. 623, 24 C. C. A. 470; Cox *v.* Montague, 78 Fed. 845, 47 U. S. App. 384, 24 C. C. A. 364.

25. *Alabama.*— Smith *v.* Huckabee, 53 Ala. 191.

Arkansas.— Jones *v.* Jarman, 34 Ark. 323.

Illinois.— Peck *v.* Coalfield Coal Co., 3 Ill. App. 619.

Indiana.— Toner *v.* Fulkerson, 125 Ind. 224, 25 N. E. 218; Shaw *v.* Boylan, 16 Ind. 384.

Iowa.— Spense *v.* Iowa Valley Constr. Co., 36 Iowa 407.

Maine.— Libby *v.* Tobey, 82 Me. 397, 19 Atl. 904; Poor *v.* Willoughby, 64 Me. 379; Milliken *v.* Whitehouse, 49 Me. 527.

Massachusetts.— Norton *v.* Hodges, 100 Mass. 241; Erickson *v.* Nesmith, 4 Allen (Mass.) 233; Gray *v.* Coffin, 9 Cush. (Mass.) 192; Knowlton *v.* Ackley, 8 Cush. (Mass.) 93; Spear *v.* Grant, 16 Mass. 9; Vose *v.* Grant, 15 Mass. 505.

divided among them after dissolution, leaving debts unpaid,[26] but statutes assessing stock-holders for the debts of their bank are to be reasonably construed, not being of a penal nature.[27]

(II) *As to Amount*—(A) *In General*—(1) For Capital Withdrawn and Unpaid Subscriptions. Their stock, however, is a fund on which creditors have a right to rely.[28] Consequently stock-holders are liable to creditors[29] for all or such a portion of the sums unpaid for stock or withdrawn as may be needed to pay

New Jersey.— Salt Lake City Nat. Bank *v.* Hendrickson, 40 N. J. L. 52.

New York.— Chase *v.* Lord, 77 N. Y. 1; Lowry *v.* Inman, 46 N. Y. 119; Seymour *v.* Sturgess, 26 N. Y. 134; Bird *v.* Hayden, 1 Rob. (N. Y.) 383, 2 Abb. Pr. N. S. (N. Y.) 61; Freeland *v.* McCullough, 1 Den. (N. Y.) 414, 13 Am. Dec. 685.

Pennsylvania.— Myers *v.* Irwin, 2 Serg. & R. (Pa.) 368.

Texas.— Walker *v.* Lewis, 49 Tex. 123.

United States.—Pollard *v.* Bailey, 20 Wall. (U. S.) 520, 22 L. ed. 376.

When stock-holders are liable.— When the stock-holders of an insolvent bank authorize a trustee to borrow money to pay its debts and bind them therefor they are liable for the loan. Hanover Nat. Bank *v.* Cocke, 127 N. C. 467, 37 S. E. 507.

26. Spear *v.* Grant, 16 Mass. 9; Vose *v.* Grant, 15 Mass. 505.

27. Davidson *v.* Rankin, 34 Cal. 503; Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 14 Cal. 265; Chase *v.* Lord, 77 N. Y. 1; Lowry *v.* Inman, 46 N. Y. 119; Carver *v.* Braintree Mfg. Co., 2 Story (U. S.) 432, 5 Fed. Cas. No. 2,485, 10 Hunt. Mer. Mag. 470, 2 Robb. Pat. Cas. 141.

Deceased stock-holder.— The summary proceeding by execution cannot be enforced against the estate of a deceased stock-holder in course of settlement for his individual liability as a member of an insolvent bank. Achenbach *v.* Pomeroy Coal Co., 2 Kan. App. 357, 42 Pac. 734.

28. *Alabama.*— Smith *v.* Huckabee, 53 Ala. 191; St. Mary's Bank *v.* St. John, 25 Ala. 566; Paschall *v.* Whitsett, 11 Ala. 472; Allen *v.* Montgomery R. Co., 11 Ala. 437.

California.— Harmon *v.* Page, 62 Cal. 448.

Colorado.— Zang *v.* Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145.

Connecticut.—Crandall *v.* Lincoln, 52 Conn. 73, 52 Am. Rep. 560; Ward *v.* Griswoldville Mfg. Co., 16 Conn. 593.

Georgia.— Fouche *v.* Merchants Nat. Bank, 110 Ga. 827, 36 S. E. 256; Beck *v.* Henderson, 76 Ga. 360; Robinson *v.* Darien Bank, Ga. 65; Robinson *v.* Carey, 8 Ga. 527; Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412.

Illinois.— Beach *v.* Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291.

Indiana.— Franklin Nat. Bank *v.* Whitehead, 149 Ind. 560, 49 N. E. 592, 63 Am. St. Rep. 302, 39 L. R. A. 725; Henderson *v.* Indiana Trust Co., 143 Ind. 561, 40 N. E. 516; Crawfordsville First Nat. Bank *v.* Dovetail Body, etc., Co., 143 Ind. 534, 42 N. E. 924.

Louisiana.— Robertson *v.* Conrey, 5 La. Ann. 297.

Maine.—Maine Trust, etc., Co. *v.* Southern L. & T. Co., 92 Me. 444, 43 Atl. 24; Libby *v.* Tobey, 82 Me. 397, 19 Atl. 904; Fowler *v.* Robinson, 31 Me. 189.

Massachusetts.— Baker *v.* Atlas Bank, 9 Metc. (Mass.) 182; Spear *v.* Grant, 16 Mass. 9; Vose *v.* Grant, 15 Mass. 505.

Mississippi.— Coulter *v.* Robertson, 24 Miss. 278, 57 Am. Dec. 168; Payne *v.* Bullard, 23 Miss. 88, 55 Am. Dec. 74; Nevitt *v.* Port Gibson Bank, 6 Sm. & M. (Miss.) 513.

Nebraska.— State *v.* Commercial State Bank, 28 Nebr. 677, 44 N. W. 998.

New Hampshire.— Richards *v.* New Hampshire Ins. Co., 43 N. H. 263.

New York.— Hastings *v.* Drew, 76 N. Y. 9; Bartlett *v.* Drew, 57 N. Y. 587; Dayton *v.* Borst, 31 N. Y. 435 [*affirming* 7 Bosw. (N. Y.) 115]; Mann *v.* Pentz, 3 N. Y. 415; Hurd *v.* Tallman, 60 Barb. (N. Y.) 272; Graham *v.* Hoy, 38 N. Y. Super. Ct. 506; Briggs *v.* Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; Slee *v.* Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; Nathan *v.* Whitlock, 3 Edw. (N. Y.) 215.

Ohio.—Henry *v.* Vermillion, etc., R. Co., 17 Ohio 187; Miers *v.* Zanesville, etc., Turnpike Co., 11 Ohio 273, 13 Ohio 197; Gilmore *v.* Cincinnati Bank, 8 Ohio 62.

Pennsylvania.— Bunn's Appeal, 105 Pa. St. 49, 51 Am. Rep. 166; Messersmith *v.* Sharon Sav. Bank, 96 Pa. St. 440; Virginia Bank *v.* Adams, 1 Pars. Eq. Cas. (Pa.) 534.

South Carolina.— Dabney *v.* State Bank, 3 S. C. 124.

Tennessee.— Ohio L. Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 11 Humphr. (Tenn.) 1, 53 Am. Dec. 742.

Wisconsin.— Adler *v.* Milwaukee Patent Brick Mfg. Co., 13 Wis. 57.

United States.— Sanger *v.* Upton, 91 U. S. 56, 23 L. ed. 220; Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203; Sawyer *v.* Hoag, 16 Wall. (U. S.) 610, 21 L. ed. 731; Curran *v.* Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705; Payson *v.* Stoever, 2 Dill. (U. S.) 427, 19 Fed. Cas. No. 10,863, 5 Chic. Leg. N. 477, 2 Ins. L. J. 733; Haskins *v.* Harding, 2 Dill. (U. S.) 99, 11 Fed. Cas. No. 6,196; Union Nat. Bank *v.* Douglass, 1 McCrary (U. S.) 86, 24 Fed. Cas. No. 14,375; Wood *v.* Dummer, 3 Mason (U. S.) 308, 30 Fed. Cas. No. 17,944; Marsh *v.* Burroughs, 1 Woods (U. S.) 467, 16 Fed. Cas. No. 9,112, 10 Am. L. Reg. N. S. 718.

29. Liability to bank.— A corporate bank may recover from its stock-holders assets divided among them under a mistaken belief that enough would remain to pay its debts. Grant *v.* Ross, 100 Ky. 44, 18 Ky. L. Rep. 597, 37 S. W. 263.

their debts;[30] but an authorized reduction of stock will exonerate them from liability beyond the reduced stock on subsequent indebtedness.[31]

(2) For Par Value of Stock. In many states statutes have been passed limiting the liability of shareholders to an amount equal to the par value of their stock, thus conforming the state requirement to that imposed on national bank stock-holders.[32] Under such statutes the liability of each is several without reference to the solvency of the rest,[33] and is unaffected by the non-payment in full of their shares.[34]

30. Wood *v.* Dummer, 3 Mason (U. S.) 308, 30 Fed. Cas. No. 17,944, holding that good faith in withdrawing their stock without a thought of depriving any creditor of what belonged to him will not lessen their liability.

When stock is issued as fully paid which is not two rules apply. One of these, either by statute or common law, releases stock-holders from liability (Libby *v.* Tobey, 82 Me. 397, 19 Atl. 904; Deadwood First Nat. Bank *v.* Gustin Minerva Consol. Min. Co., 42 Minn. 327, 44 N. W. 198, 18 Am. St. Rep. 510, 6 L. R. A. 676; Enterprise Ditch Co. *v.* Moffitt, 58 Nebr. 642, 79 N. W. 560, 76 Am. St. Rep. 122, 45 L. R. A. 647; Scovill *v.* Thayer, 105 U. S. 143, 26 L. ed. 968; Northern Trust Co. *v.* Columbia Straw-Paper Co., 75 Fed. 936), while the other holds them liable for so much of the unpaid portion as may be needed to discharge the bank's indebtedness (Fouche *v.* Merchants Nat. Bank, 110 Ga. 827, 36 S. E. 256. See also Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203).

31. Stark *v.* Burke, 9 La. Ann. 341; Palfrey *v.* Paulding, 7 La. Ann. 363; Hepburn *v.* New Orleans Exch., etc., Co., 4 La. Ann. 87.

32. *Georgia.*— Chatham Bank *v.* Brobston, 99 Ga. 801, 27 S. E. 790; Brobston *v.* Downing, 95 Ga. 505, 22 S. E. 277.

Illinois.— Wheelock *v.* Kost, 77 Ill. 296.

Iowa.— Hale *v.* Walker, 31 Iowa 344, 7 Am. Rep. 137.

Maryland.— Magruder *v.* Colston, 44 Md. 349, 22 Am. Rep. 47.

Massachusetts.— Holyoke Bank *v.* Burnham, 11 Cush. (Mass.) 183; Grew *v.* Breed, 10 Metc. (Mass.) 569; Crease *v.* Babcock, 10 Metc. (Mass.) 525.

Michigan.— Foster *v.* Row, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565; Matter of Warren, 52 Mich. 557, 18 N. W. 356. See also Hanson *v.* Donkersley, 37 Mich. 184.

Missouri.— Simmons *v.* Hill, 96 Mo. 679, 10 S. W. 61, 2 L. R. A. 476.

New York.— U. S. Trust Co. *v.* U. S. Fire Ins. Co., 18 N. Y. 199, 8 Abb. Pr. (N. Y.) 192; Rosevelt *v.* Brown, 11 N. Y. 148; Adderly *v.* Storm, 6 Hill (N. Y.) 624.

Wisconsin.— Booth *v.* Dear, 96 Wis. 516, 71 N. W. 816 [*disapproving* Cleveland *v.* Burnham, 64 Wis. 347, 25 N. W. 407]; Gianella *v.* Bigelow, 96 Wis. 185, 71 N. W. 111; Terry *v.* Chandler, 23 Wis. 456; Merchants' Bank *v.* Chandler, 19 Wis. 434; Cleveland *v.* Marine Bank, 17 Wis. 545; Coleman *v.* White, 14 Wis. 700, 80 Am. Dec. 797.

United States.— Pauly *v.* State L. & T. Co., 165 U. S. 606, 17 S. Ct. 465, 41 L. ed. 844; Germania Nat. Bank *v.* Case, 99 U. S. 628, 25 L. ed. 448; Pullman *v.* Upton, 96 U. S. 328, 24 L. ed. 818; Moore *v.* Jones, 3 Woods (U. S.) 53, 17 Fed. Cas. No. 9,769, 2 Browne Nat. Bank Cas. 144.

In Minnesota a stock-holder is liable for double the amount of stock, and the liability continues for one year after its transfer. State *v.* New England Bank, 70 Minn. 398, 73 N. W. 153, 68 Am. St. Rep. 538; Harper *v.* Carroll, 62 Minn. 152, 64 S. W. 145.

Interest on the claims of creditors constitutes, in some states, part of the indebtedness for which stock-holders are liable. Zang *v.* Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145; Wheeler *v.* Millar, 90 N. Y. 353; Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864. But by N. Y. Laws (1892), c. 689, stock-holders are only chargeable with interest on the judgment fixing the amount of their liability, although they cannot be made to pay more than the par value of their stock. Mahoney *v.* Bernhard, 45 N. Y. App. Div. 499, 63 N. Y. Suppl. 642.

33. By this rule a stock-holder can be held for such a proportion of the debt as his stock bears to the whole amount of stock; and if any stock-holder fails to pay his proportion the liability of the others is not thereby increased.

Maine.— Maine Trust, etc., Co. *v.* Southern L. & T. Co., 92 Me. 444, 43 Atl. 24.

Massachusetts.— Crease *v.* Babcock, 10 Metc. (Mass.) 525.

Minnesota.— Clarke *v.* Cold Spring Opera House Co., 58 Minn. 16, 59 N. W. 632.

New York.— Matter of Hollister Bank, 27 N. Y. 393, 84 Am. Dec. 292.

Ohio.— Herrick *v.* Wardwell, 58 Ohio St. 294, 50 N. E. 903; Barrick *v.* Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798; Umsted *v.* Buskirk, 17 Ohio St. 113.

Oregon.— Brundage *v.* Monumental Gold Min. Co., 12 Oreg. 322, 7 Pac. 314.

Wisconsin.—Rehbein *v.* Rahr, 109 Wis. 136, 85 N. W. 315.

By another rule less frequently applied stock-holders have been held liable to the full face value of their stock, if need be, to satisfy the indebtedness not paid through the failure of other stock-holders to pay their proper proportions. Garrison *v.* Howe, 17 N. Y. 458; Poughkeepsie Bank *v.* Ibbotson, 24 Wend. (N. Y.) 473; Briggs *v.* Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; Rehbein *v.* Rahr, 109 Wis. 136, 85 N. W. 315.

34. Dreisbach *v.* Price, 133 Pa. St. 560, 26 Wkly. Notes Cas. (Pa.) 61, 19 Atl. 569.

(B) *When Liable as Partners.* When a statute renders stock-holders jointly and severally liable for all the debts of their bank they are liable as partners as though it had never been incorporated.[35] Their liability is primary and not secondary, and they may be sued by creditors in any state where they happen to live without regard to the place where their bank was organized.[36]

(C) *Limitation of Liability.* An agreement among stock-holders not to be held is not valid,[37] and, since personal liability must inhere in some person, a stock-holder cannot exonerate himself by transferring his stock to the bank.[38] Nor is the assessment of some stock-holders, and not all, any defense, if the assessment be for the same amount as though all had been assessed.[39] Nor can a stock-holder lessen his liability by setting off a claim of any kind that he may have against the bank.[40]

(III) *As to Duration*—(A) *In General.* Unless the statute or charter otherwise prescribes, the liability of a stock-holder expires on the dissolution of his bank;[41] but in some jurisdictions the obligation of stock-holders is regarded as similar to that of a debtor on a note or similar obligation,[42] while in others it continues for a much longer period, like that of a debtor on a specialty.[43]

(B) *When Statute of Limitations Begins to Run.* It has been held that when a stock-holder's liability is primary, and not dependent on first obtaining a judgment against the bank, the statute of limitations begins to run in his favor from the time of the maturity of the bank's indebtedness;[44] while if his liability is secondary,

35. *Connecticut.*—Deming *v.* Bull, 10 Conn. 409; Middletown Bank *v.* Magill, 5 Conn. 28; Southmayd *v.* Russ, 3 Conn. 52.

Nebraska.— White *v.* Blum, 4 Nebr. 555.

New Hampshire.— Erickson *v.* Nesmith, 46 N. H. 371.

New York.— Chase *v.* Lord, 77 N. Y. 1; Wiles *v.* Suydam, 64 N. Y. 173; Moss *v.* Averell, 10 N. Y. 449; Corning *v.* McCullough, 1 N. Y. 47, 49 Am. Dec. 287; Conklin *v.* Furman, 57 Barb. (N. Y.) 484, 8 Abb. Pr. N. S. (N. Y.) 161; Witherhead *v.* Allen, 28 Barb. (N. Y.) 661; Abbott *v.* Aspinwall, 26 Barb. (N. Y.) 202; Conant *v.* Van Schaick, 24 Barb. (N. Y.) 87; McCullough *v.* Moss, 5 Den. (N. Y.) 567; Harger *v.* McCullough, 2 Den. (N. Y.) 119; Moss *v.* Oakley, 2 Hill (N. Y.) 265; Allen *v.* Sewall, 2 Wend. (N. Y.) 327.

Rhode Island.— Moies *v.* Sprague, 9 R. I. 541; New England Commercial Bank *v.* Newport Steam Factory, 6 R. I. 154, 75 Am. Dec. 688.

South Carolina.— Planters' Bank *v.* Bivingsville Cotton Mfg. Co., 10 Rich. (S. C.) 95.

36. Derrickson *v.* Smith, 27 N. J. L. 166, and cases cited in preceding note.

In effect stock-holders within some limitations are liable as partners for the debts of their bank. Schalucky *v.* Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399; Coleman *v.* White, 14 Wis. 700, 80 Am. Dec. 797.

37. Putnam *v.* Hutchison, 4 Kan. App. 273, 45 Pac. 931; Palmer *v.* Lawrence, 3 Sandf. (N. Y.) 161.

Agreement binding among stock-holders.— Although the stock-holders of an insolvent bank may make an agreement concerning its reorganization and liability for its indebtedness which may be enforced by and among themselves, it cannot affect their statutory liability to creditors. Thompson *v.* Gross, 106 Wis. 34, 81 N. W. 1061.

If a bank has a single stock-holder he is bound for its debts if they exceed the worth of its assets. Robertson *v.* Conrey, 5 La. Ann. 297.

38. Matter of Reciprocity Bank, 22 N. Y. 9. See also Kearny *v.* Buttles, 1 Ohio St. 362.

39. Matter of Reciprocity Bank, 22 N. Y. 9.

Sale with cashier's agreement.— When stock is transferred to another, and the shareholder's liability on a note given therefor is by agreement with the cashier assumed by the purchaser, and the bank ratifies the transaction, the original shareholder is released. Mott *v.* Semmes, 24 Ga. 540.

40. Gauch *v.* Harrison, 12 Ill. App. 457; Whittington *v.* Farmers' Bank, 5 Harr. & J. (Md.) 489; U. S. Trust Co. *v.* U. S. Fire Ins. Co., 18 N. Y. 199 [*affirming* 6 Abb. Pr. (N. Y.) 385]; Bates *v.* Lewis, 3 Ohio St. 459.

41. Robison *v.* Beall, 26 Ga. 17.

42. Com. *v.* Cochituate Bank, 3 Allen (Mass.) 42; Baker *v.* Atlas Bank, 9 Metc. (Mass.) 182; Godfrey *v.* Terry, 97 U. S. 171, 24 L. ed. 944; Terry *v.* Anderson, 95 U. S. 628, 24 L. ed. 365; Carrol *v.* Green, 92 U. S. 509, 23 L. ed. 738; Terry *v.* Tubman, 92 U. S. 156, 23 L. ed. 537; Bullard *v.* Bell, 1 Mason (U. S.) 243, 4 Fed. Cas. No. 2,121.

43. Thornton *v.* Lane, 11 Ga. 459; Lawler *v.* Walker, 18 Ohio 151.

44. Redington *v.* Cornwell, 90 Cal. 49, 27 Pac. 40; Mitchell *v.* Beckman, 64 Cal. 117, 28 Pac. 110; Stilphen *v.* Ware, 45 Cal. 110; Davidson *v.* Rankin, 34 Cal. 503; Hardman *v.* Sage, 124 N. Y. 25, 26 N. E. 354, 35 N. Y. St. 54; Corning *v.* McCullough, 1 N. Y. 47, 49 Am. Dec. 287; King *v.* Duncan, 38 Hun

it begins to operate from the time of issuing an execution against the bank on the judgment obtained against it.[45] According to another rule the statute begins to run in favor of stock-holders from the time their bank closes down,[46] although they cannot plead it as a bar to an action against them unless it also bars against their bank.[47]

c. Enforcement of Liability — (1) *Condition Precedent.* In many cases it has been held that before stock-holders can be subjected to any personal liability for their unpaid subscriptions, for capital withdrawn, or for a statutory assessment, the inability of the bank to pay its creditors must be judicially established,[48]

(N. Y.) 461; Conklin *v.* Furman, 57 Barb. (N. Y.) 484, 8 Abb. Pr. N. S. (N. Y.) 161; Lawler *v.* Burt, 7 Ohio St. 340; Terry *v.* McLure, 103 U. S. 442, 26 L. ed. 403; Terry *v.* Tubman, 92 U. S. 156, 23 L. ed. 537. See also Carrol *v.* Green, 92 U. S. 509, 23 L. ed. 738; Butler *v.* Poole, 44 Fed. 586; Newberry *v.* Robinson, 41 Fed. 458.

45. Longley *v.* Little, 26 Me. 162; Handy *v.* Draper, 89 N. Y. 334. See also Baker *v.* Atlas Bank, 9 Metc. (Mass.) 182.

Liability for unpaid subscriptions is barred by the lapse of six years, when no call or assessment has been made within that period. Franklin Sav. Bank *v.* Bridges, 20 Wkly. Notes Cas. (Pa.) 43. See also Swearingen *v.* Sewickley Dairy Co., 198 Pa. St. 68, 47 Atl. 941, 53 L. R. A. 471.

46. Ames *v.* Armstrong, 6 Pa. Co. Ct. 392. See also Long *v.* Yanceyville Bank, 90 N. C. 405.

47. Fleischer *v.* Reutchler, 17 Ill. App. 402; South Carolina Mfg. Co. *v.* State Bank, 6 Rich. Eq. (S. C.) 227.

48. *California.*—Baines *v.* Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158.

Colorado.— Zang *v.* Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145.

Georgia.— Lane *v.* Harris, 16 Ga. 217; Thornton *v.* Lane, 11 Ga. 459; Lane *v.* Morris, 10 Ga. 162.

Illinois.— Harper *v.* Union Mfg. Co., 100 Ill. 225; Cutright *v.* Stanford, 81 Ill. 240.

Iowa.— Bayliss *v.* Swift, 40 Iowa 648.

Kansas.— Hoyt *v.* Bunker, 50 Kan. 574, 32 Pac. 126; Valley Bank, etc., Inst. *v.* Ladies' Cong. Sewing Soc., 28 Kan. 423.

Maine.— Baxter *v.* Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783; Hewett *v.* Adams, 54 Me. 206; Drinkwater *v.* Portland Mar. R. Co., 18 Me. 35.

Massachusetts.— Priest *v.* Essex Hat. Mfg. Co., 115 Mass. 380; Merchants' Bank *v.* Stevenson, 10 Gray (Mass.) 232.

Missouri.— McClaren *v.* Franciscus, 43 Mo. 452.

Nebraska.— Farmers L. & T. Co. *v.* Funk, 49 Nebr. 353, 68 N. W. 520; Globe Pub. Co. *v.* State Bank, 41 Nebr. 175, 59 N. W. 683, 27 L. R. A. 854.

New Jersey.— Wetherbee *v.* Baker, 35 N. J. Eq. 501.

New York.— Marshall *v.* Sherman, 148 N. Y. 9, 42 N. E. 419, 51 Am. St. Rep. 654, 34 L. R. A. 757; Auburn Nat. Bank *v.* Dillingham, 147 N. Y. 603, 42 N. E. 338, 71 N. Y. St. 253, 49 Am. St. Rep. 692; Rocky Mountain Nat. Bank *v.* Bliss, 89 N. Y. 338; Handy *v.* Draper, 89 N. Y. 334; Shellington *v.* Howland, 53 N. Y. 371; Matter of Reciprocity Bank, 22 N. Y. 9; McClave *v.* Thompson, 36 Hun (N. Y.) 365; Anderson *v.* Speers, 21 Hun (N. Y.) 568; Perkins *v.* Church, 31 Barb. (N. Y.) 84; Lindsley *v.* Simonds, 2 Abb. Pr. N. S. (N. Y.) 69; Freeland *v.* McCullough, 1 Den. (N. Y.) 414, 13 Am. Dec. 685.

Ohio.— Wright *v.* McCormack, 17 Ohio St. 86; Wehrman *v.* Reakirt, 1 Cinc. Super. Ct. (Ohio) 230.

Pennsylvania.— Means' Appeal, 85 Pa. St. 75; Patterson *v.* Wyomissing Mfg. Co., 40 Pa. St. 117.

Rhode Island.— New England Commercial Bank *v.* Newport Steam Factory, 6 R. I. 154, 75 Am. Dec. 688.

Tennessee.— Blake *v.* Hinkle, 10 Yerg. (Tenn.) 217.

Vermont.— Dauchy *v.* Brown, 24 Vt. 197.

Washington.— Wilson *v.* Book, 13 Wash. 676, 43 Pac. 939.

United States.— New York City Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 7 S. Ct. 757, 30 L. ed. 825; Stone *v.* Chisolm, 113 U. S. 302, 5 S. Ct. 497, 28 L. ed. 991; Terry *v.* Anderson, 95 U. S. 628, 24 L. ed. 365; Hornor *v.* Henning, 93 U. S. 228, 23 L. ed. 879; Toucey *v.* Bowen, 1 Biss. (U. S.) 81, 24 Fed. Cas. No. 14,107; Wood *v.* Dummer, 3 Mason (U. S.) 308, 30 Fed. Cas. No. 17,944; Hatch *v.* Burroughs, 1 Woods (U. S.) 439, 11 Fed. Cas. No. 6,203.

Canada.— Brice *v.* Munro, 5 Can. L. T. 130.

By "judicially ascertained" in Nebr. Const. art. 11, § 4, is meant that the amount of a stock-holder's liability must be "judicially ascertained" by judgment or its equivalent before the liability can be enforced. Hastings *v.* Barnd, 55 Nebr. 93, 75 N. W. 49; State *v.* German Sav. Bank, 50 Nebr. 734, 70 N. W. 221; Farmers L. & T. Co. *v.* Funk, 49 Nebr. 353, 68 N. W. 520; Globe Pub. Co. *v.* State Bank, 41 Nebr. 175, 59 N. W. 683, 27 L. R. A. 854; Commercial Nat. Bank *v.* Gibson, 37 Nebr. 750, 56 N. W. 616.

Assessment for unpaid stock and deficiency. — In the latest cases it is said that there is no substantial difference between the liability for an unpaid balance on a stock subscription and that for an unpaid deficiency of

while in others this has been held unnecessary.[49] The question really depends on the mode of regarding the stock-holder's liability. If he is primarily liable a proceeding against the bank is not a prerequisite, otherwise it is essential before proceeding against him.[50] When a bank has been adjudged a bankrupt this is sufficient proof of inability to pay its creditors, and they can proceed against the stock-holders;[51] and after judgment against the bank a stock-holder cannot question the original cause of action unless it is tainted with fraud.[52]

(II) *Form of Action.* The remedy against stock-holders which is sometimes clearly prescribed by statute is not everywhere the same. In most states a proceeding in equity will lie;[53] in others, the remedy is by an action on the

assets assumed by becoming a member of a bank. Howarth *v.* Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725; Stoddard *v.* Lum, 159 N. Y. 265, 53 N. E. 1108, 70 Am. St. Rep. 541, 45 L. R. A. 551; Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864.

49. *Alabama.*—McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120.

California.— Young *v.* Rosenbaum, 39 Cal. 646; Davidson *v.* Rankin, 34 Cal. 503.

Connecticut.— Paine *v.* Stewart, 33 Conn. 516; Deming *v.* Bull, 10 Conn. 409; Middletown Bank *v.* Magill, 5 Conn. 28; Southmayd *v.* Russ, 3 Conn. 52.

Illinois.— Fuller *v.* Ledden, 87 Ill. 310; Culver *v.* Chicago Third Nat. Bank, 64 Ill. 528.

Minnesota.—Patterson *v.* Stewart, 41 Minn. 84, 42 N. W. 926, 16 Am. St. Rep. 671, 4 L. R. A. 745.

South Carolina.— Bird *v.* Calvert, 22 S. C. 292.

By the New York act of 1875 a stock-holder can be sued before judgment against the bank, but he cannot be held liable until afterward. Walton *v.* Coe, 110 N. Y. 109, 17 N. E. 676, 16 N. Y. St. 866.

50. *California.*— Young *v.* Rosenbaum, 39 Cal. 646; Davidson *v.* Rankin, 34 Cal. 503; Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 14 Cal. 265.

Connecticut.— Southmayd *v.* Russ, 3 Conn. 52.

Georgia.— Lane *v.* Morris, 8 Ga. 468.

Illinois.— Fuller *v.* Ledden, 87 Ill. 310; Culver *v.* Chicago Third Nat. Bank, 64 Ill. 528.

Michigan.— Hanson *v.* Donkersley, 37 Mich. 184.

Missouri.— Perry *v.* Turner, 55 Mo. 418.

Ohio.— Wright *v.* McCormack, 17 Ohio St. 86.

Washington.— Wilson *v.* Book, 13 Wash. 676, 43 Pac. 939.

51. *Colorado.*— Zang *v.* Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145.

Missouri.— Perry *v.* Turner, 55 Mo. 418; State Sav. Assoc. *v.* Kellogg, 52 Mo. 583; Dryden *v.* Kellogg, 2 Mo. App. 87.

New York.— Shellington *v.* Howland, 53 N. Y. 371; Briggs *v.* Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454.

Ohio.— Barrick *v.* Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798.

Oregon.— Hodges *v.* Silver Hill Min. Co., 9 Oreg. 200.

Wisconsin.— See Cleveland *v.* Burnham, 64 Wis. 347, 25 N. W. 407, holding that a stock-holder's liability for the bank's indebtedness becomes fixed at the date of the judgment determining that its assets are insufficient for this purpose.

United States.— Terry *v.* Tubman, 92 U. S. 156, 23 L. ed. 537; Walser *v.* Seligman, 21 Blatchf. (U. S.) 130, 13 Fed. 415.

Contra, see Lamar *v.* Allison, 101 Ga. 270, 28 S. E. 686; Wehn *v.* Fall, 55 Nebr. 547, 76 N. W. 13, 70 Am. St. Rep. 397; Swan Land, etc., Co. *v.* Frank, 39 Fed. 456.

Judgment against bank and no property found.— When judgment is rendered against a bank and no property is found, the creditors can proceed at once to subject the property of stock-holders (Buist *v.* Citizens' Sav. Bank, 4 Kan. App. 700, 46 Pac. 718; Guerney *v.* Moore, 131 Mo. 650, 32 S. W. 1132; Renaud *v.* O'Brien, 35 N. Y. 99); but, in an action against a bank execution will not issue against a stock-holder's property (Lowry *v.* Inman, 46 N. Y. 119).

52. Marsh *v.* Burroughs, 1 Woods (U. S.) 463, 16 Fed. Cas. No. 9,112, 10 Am. L. Reg. N. S. 718.

53. *Alabama.*— Allen *v.* Montgomery R. Co., 11 Ala. 437.

Arkansas.— Jones *v.* Jarman, 34 Ark. 323.

California.—Baines *v.* Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158; Harmon *v.* Page, 62 Cal. 448.

Colorado.— Universal F. Ins. Co. *v.* Tabor, 16 Colo. 531, 27 Pac. 890; Zang *v.* Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145.

Connecticut.— Ward *v.* Griswoldville Mfg. Co., 16 Conn. 593.

Georgia.— Dalton, etc., R. Co. *v.* McDaniel, 56 Ga. 191; Hightower *v.* Mustian, 8 Ga. 506; Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412.

Illinois.— Hickling *v.* Wilson, 104 Ill. 54; Wincock *v.* Turpin, 96 Ill. 135; Richardson *v.* Akin, 87 Ill. 138. Formerly the rule was otherwise. Corwith *v.* Culver, 69 Ill. 502; Culver *v.* Chicago Third Nat. Bank, 64 Ill. 528.

Kentucky.— U. S. Bank *v.* Dallam, 4 Dana (Ky.) 574.

Maine.— Maine Trust, etc., Co. *v.* Southern L. & T. Co., 92 Me. 444, 43 Atl. 24.

Maryland.— Crawford *v.* Rohrer, 59 Md. 599.

Massachusetts.— Crease *v.* Babcock, 10 Metc. (Mass.) 525.

case;[54] and in others, the proceeding is statutory where the liability is founded on a statute and exclusive of any other.[55] Unless the statute clearly settles the question, the better rule perhaps is that the proceeding may be either a legal or equitable one.[56]

(III) *Parties*—(A) *Who May Sue.* In some states either the creditors or receiver can sue,[57] but when the question is not determined by statute,[58] the receiver's right to sue depends on whether the stock-holder's liability is a corporate asset. If it is he can maintain an action therefor;[59] otherwise he cannot.[60]

Missouri.— Shickle *v.* Watts, 94 Mo. 410, 7 S. W. 274.

New York.— Howarth *v.* Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725; Marshall *v.* Sherman, 148 N. Y. 9, 42 N. E. 419, 51 Am. St. Rep. 654, 34 L. R. A. 757; Auburn Nat. Bank *v.* Dillingham, 147 N. Y. 603, 42 N. E. 338, 71 N. Y. St. 253, 49 Am. St. Rep. 692; Christensen *v.* Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429; Stephens *v.* Fox, 83 N. Y. 313; Pfohl *v.* Simpson, 74 N. Y. 137; Griffith *v.* Mangam, 73 N. Y. 611; Mathez *v.* Neidig, 72 N. Y. 100; Bartlett *v.* Drew, 57 N. Y. 587; Dayton *v.* Borst, 31 N. Y. 435; Mann *v.* Pentz, 3 N. Y. 415; Van Pelt *v.* U. S. Metallic Spring, etc., Co., 13 Abb. Pr. N. S. (N. Y.) 325; Briggs *v.* Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; Morgan *v.* New York, etc., R. Co., 10 Paige (N. Y.) 290, 40 Am. Dec. 244; Judson *v.* Rossie Galena Co., 9 Paige (N. Y.) 598, 38 Am. Dec. 569.

Ohio.— Henry *v.* Vermillion, etc., R. Co., 17 Ohio 187; Miers *v.* Zanesville, etc., Turnpike Co., 11 Ohio 273.

Oregon.— Ladd *v.* Cartwright, 7 Oreg. 329.

Pennsylvania.— Johnston *v.* Markle Paper Co., 153 Pa. St. 189, 25 Atl. 560, 885; Hamilton *v.* Clarion, etc., R. Co., 144 Pa. St. 34, 23 Atl. 53, 13 L. R. A. 779; Germantown Pass. R. Co. *v.* Fitler, 60 Pa. St. 124, 100 Am. Dec. 546.

Rhode Island.— New England Commercial Bank *v.* Newport Steam Factory, 6 R. I. 154, 75 Am. Dec. 688; Atwood *v.* Rhode Island Agricultural Bank, 1 R. I. 376.

Washington.— Burch *v.* Taylor, 1 Wash. 245, 24 Pac. 438.

Wisconsin.—Rehbein *v.* Rahr, 109 Wis. 136, 85 N. W. 315; Eau Claire Nat. Bank *v.* Benson, 106 Wis. 624, 82 N. W. 604; Finney *v.* Guy, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486; Coleman *v.* White, 14 Wis. 700, 80 Am. Dec. 797; Adler *v.* Milwaukee Patent Brick Mfg. Co., 13 Wis. 57.

United States.— Whitman *v.* Oxford Nat. Bank, 176 U. S. 559, 20 S. Ct. 477, 44 L. ed. 587; Patterson *v.* Lynde, 106 U. S. 519, 1 S. Ct. 432, 27 L. ed. 265; Terry *v.* Little, 101 U. S. 216, 25 L. ed. 864; Hatch *v.* Dana, 101 U. S. 205, 25 L. ed. 885; Mills *v.* Scott, 99 U. S. 25, 25 L. ed. 294; Terry *v.* Tubman, 92 U. S. 156, 23 L. ed. 537; Sanger *v.* Upton, 91 U. S. 56, 23 L. ed. 220; Pollard *v.* Bailey, 20 Wall. (U. S.) 520, 22 L. ed. 376; Ogilvie *v.* Knox Ins. Co., 22 How. (U. S.) 380, 16 L. ed. 349; Mandeville *v.* Riggs, 2 Pet. (U. S.) 482, 7 L. ed. 493; Brown *v.* Fisk, 23 Fed. 228; Haskins *v.* Harding, 2 Dill. (U. S.) 99, 11 Fed. Cas. No. 6,196; Holmes *v.* Sherwood, 3 McCrary (U. S.) 405, 16 Fed. 725; Wood *v.* Dummer, 3 Mason (U. S.) 308, 30 Fed. Cas. No. 17,944; Faull *v.* Alaska Gold, etc., Min. Co., 8 Sawy. (U. S.) 420, 14 Fed. 657; *In re* South Mountain Consol. Min. Co., 7 Sawy. (U. S.) 30, 5 Fed. 403; Louisiana Paper Co. *v.* Waples, 3 Woods (U. S.) 34, 15 Fed. Cas. No. 8,540; Marsh *v.* Burroughs, 1 Woods (U. S.) 463, 16 Fed. Cas. No. 9,112, 10 Am. L. Reg. N. S. 718.

54. *Maine.*—Cummings *v.* Maxwell, 45 Me. 190.

Missouri.— Hodgson *v.* Cheever, 8 Mo. App. 318.

New York.— Rocky Mountain Nat. Bank *v.* Bliss, 89 N. Y. 338; Handy *v.* Draper, 89 N. Y. 334; Wiles *v.* Suydam, 64 N. Y. 173; Shellington *v.* Howland, 53 N. Y. 371.

Vermont.— Windham Provident Sav. Inst. *v.* Sprague, 43 Vt. 502.

Wisconsin.— Merchants' Bank *v.* Chandler, 19 Wis. 434.

United States.— Flash *v.* Conn, 109 U. S 371, 3 S. Ct. 263, 27 L. ed. 966; Mills *v.* Scott, 99 U. S. 25, 25 L. ed. 294; Carrol *v.* Green, 92 U. S. 509, 23 L. ed. 738.

55. *Illinois.*— Peck *v.* Coalfield Coal Co., 3 Ill. App. 619.

Minnesota.— Allen *v.* Walsh, 25 Minn. 543.

New York.— Lowry *v.* Inman, 46 N. Y. 119.

Pennsylvania.— Mansfield Iron Works *v.* Willcox, 52 Pa. St. 377; Hoard *v.* Wilcox, 47 Pa. St. 51.

United States.—Pollard *v.* Bailey, 20 Wall. (U. S.) 520, 22 L. ed. 376.

56. *California.*— Harmon *v.* Page, 62 Cal. 448.

Georgia.— Adkins *v.* Thornton, 19 Ga. 325.

Kentucky.— U. S. Bank *v.* Dallam, 4 Dana (Ky.) 574.

Michigan.— Foster *v.* Row, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565.

New York.— Bogardus *v.* Rosendale Mfg. Co., 7 N. Y. 147; Poughkeepsie Bank *v.* Ibbotson, 24 Wend. (N. Y.) 473.

57. Libby *v.* Tobey, 82 Me. 397, 19 Atl. 904; Foster *v.* Row, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565.

58. **In proceedings against stock-holders to recover assessments** the receiver can bring a suit without first obtaining an order of a court authorizing him to do so. Anderson *v.* Seymour, 70 Minn. 358, 73 N. W. 171; Ueland *v.* Haugan, 70 Minn. 349, 73 N. W. 169.

59. Dayton *v.* Borst, 31 N. Y. 435 [*affirming* 7 Bosw. (N. Y.) 115]; Means' Appeal, 85 Pa. St. 75.

60. *Colorado.*— Zang *v.* Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145.

(B) *Joinder.* The law is in a transition stage concerning the parties who must be joined in this proceeding. By one opinion all the creditors must join in suing all the stock-holders;[61] by another all, or the largest number possible, of the stock-holders must be joined, but not all the creditors need be;[62] by another a single creditor can sue one or more stock-holders;[63] and by another the stock-holders must be sued severally.[64]

Illinois.— Arenz *v.* Weir, 89 Ill. 25.

Maryland.— Colton *v.* Mayer, 90 Md. 711, 45 Atl. 874, 78 Am. St. Rep. 456, 47 L. R. A. 617.

Massachusetts.— Hancock Nat. Bank *v.* Ellis, 172 Mass. 39, 51 N. E. 207, 70 Am. St. Rep. 232, 42 L. R. A. 396; Hancock Nat. Bank *v.* Ellis, 166 Mass. 414, 44 N. E. 349, 55 Am. St. Rep. 414.

Minnesota.— *In re* People's Live Stock Ins. Co., 56 Minn. 180, 57 N. W. 468.

New York.— Farnsworth *v.* Wood, 91 N. Y. 308.

Ohio.— Wright *v.* McCormack, 17 Ohio St. 86.

United States.— Jacobson *v.* Allen, 20 Blatchf. (U. S.) 525, 12 Fed. 454; Dutcher *v.* Marine Nat. Bank, 12 Blatchf. (U. S.) 435, 8 Fed. Cas. No. 4,203, 11 Nat. Bankr. Reg. 457.

61. *Colorado.*— Zang *v.* Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145.

Minnesota.— Allen *v.* Walsh, 25 Minn. 543.

New Hampshire.— Hadley *v.* Russell, 40 N. H. 109.

New York.— Marshall *v.* Sherman, 148 N. Y. 9, 42 N. E. 419, 51 Am. St. Rep. 654, 34 L. R. A. 757; Auburn Nat. Bank *v.* Dillingham, 147 N. Y. 603, 42 N. E. 338, 71 N. Y. St. 253, 49 Am. St. Rep. 692; Hirshfeld *v.* Bopp, 145 N. Y. 84, 39 N. E. 817, 64 N. Y. St. 535; Griffith *v.* Mangam, 73 N. Y. 611; Mann *v.* Pentz, 3 N. Y. 415.

Wisconsin.— Coleman *v.* White, 14 Wis. 700, 80 Am. Dec. 797.

United States.—Stone *v.* Chisolm, 113 U. S. 302, 5 S. Ct. 497, 28 L. ed. 991; Terry *v.* Little, 101 U. S. 216, 25 L. ed. 864; Hornor *v.* Henning, 93 U. S. 228, 23 L. ed. 879; Pollard *v.* Bailey, 20 Wall. (U. S.) 520, 22 L. ed. 376; Dutcher *v.* Marine Nat. Bank, 12 Blatchf. (U. S.) 435, 8 Fed. Cas. No. 4,203, 11 Nat. Bankr. Reg. 457.

62. Wood *v.* Dummer, 3 Mason (U. S.) 308, 30 Fed. Cas. No. 17,944.

63. *Georgia.*—Branch *v.* Baker, 53 Ga. 502; Lane *v.* Harris, 16 Ga. 217.

Illinois.— Hull *v.* Burtis, 90 Ill. 213; McCarthy *v.* Lavasche, 89 Ill. 270, 31 Am. Rep. 83; Fuller *v.* Ledden, 87 Ill. 310; Corwith *v.* Culver, 69 Ill. 502; Culver *v.* Chicago Third Nat. Bank, 64 Ill. 528.

Minnesota.— Harper *v.* Carroll, 62 Minn. 152, 64 S. W. 145.

Missouri.— Hodgson *v.* Cheever, 8 Mo. App. 318.

New York.—Marshall *v.* Sherman, 148 N. Y. 9, 42 N. E. 419, 51 Am. St. Rep. 654, 34 L. R. A. 757; Auburn Nat. Bank *v.* Dillingham, 147 N. Y. 603, 42 N. E. 338, 71 N. Y. St. 253, 49 Am. St. Rep. 692; Rocky Mountain Nat. Bank *v.* Bliss, 89 N. Y. 338; Handy *v.* Draper, 89 N. Y. 334; Mathez *v.* Neidig, 72 N. Y. 100; Wiles *v.* Suydam, 64 N. Y. 173; Shellington *v.* Howland, 53 N. Y. 371; Weeks *v.* Love, 50 N. Y. 568; Abbott *v.* Aspinwall, 26 Barb. (N. Y.) 202.

North Carolina.— Von Glahn *v.* Harris, 73 N. C. 323.

Wisconsin.— Cleveland *v.* Marine Bank, 17 Wis. 545.

United States.— Flash *v.* Conn, 109 U. S. 371, 3 S. Ct. 263, 27 L. ed. 966; Terry *v.* Little, 101 U. S. 216, 25 L. ed. 864; Hornor *v.* Henning, 93 U. S. 228, 23 L. ed. 879; Circleville Bank *v.* Igiehart, 6 McLean (U. S.) 568, 2 Fed. Cas. No. 860; Wood *v.* Dummer, 3 Mason (U. S.) 308, 30 Fed. Cas. No. 17,944; Hatch *v.* Burroughs, 1 Woods (U. S.) 439, 11 Fed. Cas. No. 6,203.

In Minnesota, by Gen. Stat. § 2501, the liability of each stock-holder is several to all the creditors, but all must be joined in one action in equity brought by all the creditors. The statutory remedy is exclusive, and therefore an action by the creditors in Minnesota against the stock-holders is a bar to a subsequent action in another state. Finney *v.* Guy, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486.

Estate of deceased stock-holder.— In pursuing the estate of a deceased stock-holder for the payment of a bank debt, all the living stock-holders and representatives of estates of deceased ones should be made parties to the bill. New England Commercial Bank *v.* Newport Steam Factory, 6 R. I. 154, 75 Am. Dec. 688; Pierson *v.* Robinson, 3 Swanst. 139.

One creditor against one stock-holder.— In some states one creditor cannot maintain an action against one stock-holder. Norris *v.* Wrenschall, 34 Md. 492; Erickson *v.* Nesmith, 15 Gray (Mass.) 221; Crease *v.* Babcock, 10 Metc. (Mass.) 525.

When a bank has forfeited its charter and a creditor brings a bill in equity against a stock-holder to subject his stock to the payment of a debt the stock-holders are not necessary parties, as the commissioners who are appointed to settle the affairs of the bank represent their interests. Dana *v.* Brown, 1 J. J. Marsh. (Ky.) 304.

64. *Connecticut.*— Paine *v.* Stewart, 33 Conn. 516.

Georgia.— Adkins *v.* Thornton, 19 Ga. 325; Lane *v.* Harris, 16 Ga. 217.

Indiana.— Shafer *v.* Moriarty, 46 Ind. 9.

Kansas.— Abbey *v.* W. B. Grimes Dry Goods Co., 44 Kan. 415, 24 Pac. 426.

Massachusetts.— Crease *v.* Babcock, 10 Metc. (Mass.) 525.

(IV) *VENUE*—(A) *In General.* Where the liability of stock-holders is prescribed by statute, and the indebtedness of the bank, unless it has failed, must be judicially determined before proceedings can be begun against them, it has been held that creditors can sue only in the state where the bank is located.[65] In other cases, however, it has been declared that the liability of stock-holders under the usual statutes prescribing this liability is contractual,[66] and that therefore a creditor can proceed against a shareholder in any state where the latter may happen to live.[67]

(B) *When Receiver Sues.* Although an assignee or receiver can sue in another state for the balance of an unpaid subscription,[68] it is questioned whether he can sue elsewhere under a state statute for an assessment on the stock.[69]

Michigan.— Pettibone *v.* McGraw, 6 Mich. 441.

Missouri.— Perry *v.* Turner, 55 Mo. 418.

New York.— Poughkeepsie Bank *v.* Ibbotson, 24 Wend. (N. Y.) 473.

Tennessee.— Ohio L. Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 11 Humphr. (Tenn.) 1, 53 Am. Dec. 742.

Two or more creditors may proceed concurrently against a stock-holder, as the court possesses ample authority to protect him from paying beyond his liability. Buist *v.* Citizens' Sav. Bank, 4 Kan. App. 700, 46 Pac. 718.

65. *Illinois.*— Fowler *v.* Lamson, 146 Ill. 472, 34 N. E. 932, 37 Am. St. Rep. 163; Young *v.* Farwell, 139 Ill. 326, 28 N. E. 845; Patterson *v.* Lynde, 112 Ill. 196.

Maryland.— Plymouth First Nat. Bank *v.* Price, 33 Md. 487, 3 Am. Rep. 204. See also Norris *v.* Wrenschall, 34 Md. 492.

New Hampshire.— Crippen *v.* Laighton, 69 N. H. 540, 44 Atl. 538, 76 Am. St. Rep. 192, 46 L. R. A. 467.

New York.— Marshall *v.* Sherman, 148 N. Y. 9, 42 N. E. 419, 51 Am. St. Rep. 654, 34 L. R. A. 757; Christensen *v.* Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429; Lowry *v.* Inman, 46 N. Y. 119; Barnes *v.* Wheaton, 80 Hun (N. Y.) 8, 29 N. Y. Suppl. 830, 61 N. Y. St. 492.

Ohio.— See Cincinnati Second Nat. Bank *v.* Hall, 35 Ohio St. 158.

West Virginia.— Nimick *v.* Mingo Iron Works Co., 25 W. Va. 184.

Wisconsin.— May *v.* Black, 77 Wis. 101, 45 N. W. 949.

66. See Aldrich *v.* McClaine, 106 Fed. 791, 45 C. C. A. 631, concerning the question that a stock-holder's liability is contractual.

67. *California.*— Ferguson *v.* Sherman, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622; Dennis *v.* Los Angeles County Super. Ct., 91 Cal. 548, 27 Pac. 1031.

Connecticut.— Paine *v.* Stewart, 33 Conn. 516.

Illinois.— Queenan *v.* Palmer, 117 Ill. 619, 7 N. E. 470, 613.

Massachusetts.— Hancock Nat. Bank *v.* Ellis, 172 Mass. 39, 51 N. E. 207, 70 Am. St. Rep. 232, 42 L. R. A. 396. See also Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; Bank of North America *v.* Rindge, 154 Mass. 203, 27 N. E. 1015, 26 Am. St. Rep. 240, 13 L. R. A. 56; Halsey *v.* McLean, 12 Allen (Mass.) 438, 90 Am. Dec. 157.

Michigan.— Western Nat. Bank *v.* Laurence, 117 Mich. 669, 76 N. W. 105; Matter of Warren, 52 Mich. 557, 18 N. W. 356.

Missouri.— Guerney *v.* Moore, 131 Mo. 650, 32 S. W. 1132; Kimball *v.* Davis, 52 Mo. App. 194; Bagley *v.* Tyler, 43 Mo. App. 195; Manville *v.* Edgar, 8 Mo. App. 324; Hodgson *v.* Cheever, 8 Mo. App. 318.

Ohio.— Lawler *v.* Burt, 7 Ohio St. 340.

Pennsylvania.— Cushing *v.* Perot, 175 Pa. St. 66, 34 Atl. 447, 52 Am. St. Rep. 835, 34 L. R. A. 737; Aultman's Appeal, 98 Pa. St. 505.

South Carolina.— Terry *v.* Calnan, 13 S. C. 220; Sackett's Harbour Bank *v.* Blake, 3 Rich. Eq. (S. C.) 225.

Tennessee.—Woods *v.* Wicks, 7 Lea (Tenn.) 40.

United States.—Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 20 S. Ct. 506, 44 L. ed. 619 [*reversing* 20 R. I. 466, 40 Atl. 341]; Whitman *v.* Oxford Nat. Bank, 176 U. S. 559, 20 S. Ct. 477, 44 L. ed. 587; Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123; Hathorn *v.* Calef, 2 Wall. (U. S.) 10, 17 L. ed. 776; Nashua Sav. Bank *v.* Anglo-American Land-Mortg., etc., Co., 108 Fed. 764, 48 C. C. A. 15; Kirtley *v.* Holmes, 107 Fed. 1, 46 C. C. A. 102, 52 L. R. A. 738; Brown *v.* Trail, 89 Fed. 641; Dexter *v.* Edmands, 89 Fed. 467; Mechanics' Sav. Bank *v.* Fidelity Ins., etc., Co., 87 Fed. 113; Auer *v.* Lombard, 72 Fed. 209, 33 U. S. App. 438, 19 C. C. A. 72; McVickar *v.* Jones, 70 Fed. 754; Rhodes *v.* U. S. Nat. Bank, 66 Fed. 512, 24 U. S. App. 607, 13 C. C. A. 612, 34 L. R. A. 742; Bank of North America *v.* Rindge, 57 Fed. 279; Cuykendall *v.* Miles, 10 Fed. 342.

Bank never legally organized.— A stock-holder in Iowa was held personally liable on his stock in a Kansas savings-bank for its debts, even though it was not legally organized. Kaiser *v.* Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85.

68. Stoddard *v.* Lum, 159 N. Y. 265, 53 N. E. 1108, 70 Am. St. Rep. 541, 45 L. R. A. 551.

69. Affirmative view.— *Iowa.*— Wyman *v.* Eaton, 107 Iowa 214, 77 N. W. 865, 70 Am. St. Rep. 193, 43 L. R. A. 695.

Massachusetts.— Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301.

New Hampshire.— Tompkins *v.* Blakey, 70 N. H. 584, 49 Atl. 111.

When such action is permitted, except in the case of national bank receivers, it is by comity.[70]

(v) *Defenses*— (a) *Fraud in Organization or Procuring Subscription.* A stock-holder cannot defend on the ground of fraud or illegality in the organization of the bank,[71] or on the ground of fraud in procuring his subscription.[72]

(b) *Repeal of Statute Creating Liability.* A stock-holder cannot defeat an action against him by showing the repeal of the statute creating his liability.[73]

(c) *Set-Off.* A stock-holder cannot have his claim against the bank set off against his liability.[74]

D. Officers and Agents[75] — **1. Election or Appointment and Tenure — a. Of Directors.** The manner of selecting the directors of a bank is generally controlled by its charter;[76] but once elected their authority continues until successors are chosen and duly qualified.[77] The failure of a director to serve does not work a renunciation of his office.[78]

b. Of President and Executive Officers. The president and other executive officers are chosen by the directors, who, although chosen annually, can appoint officers for a longer period unless forbidden by positive law.[79] The election of an

New York.— Howarth *v.* Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725.

Pennsylvania.— Cushing *v.* Perot, 175 Pa. St. 66, 34 Atl. 447, 52 Am. St. Rep. 835, 34 L. R. A. 737.

United States.— Whitman *v.* Oxford Nat. Bank, 176 U. S. 559, 20 S. Ct. 447, 44 L. ed. 587; Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 11, 23; Kirtley *v.* Holmes, 107 Fed. 1, 46 C. C. A. 102, 52 L. R. A. 738; Howarth *v.* Ellwanger, 86 Fed. 54.

Negative view.— Murtey *v.* Allen, 71 Vt. 377, 45 Atl. 752, 76 Am. St. Rep. 779.

70. Booth *v.* Clark, 17 How. (U. S.) 322, 15 L. ed. 164.

71. Palmer *v.* Laurence, 3 Sandf. (N. Y.) 161; Minor *v.* Alexandria Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47.

Denial of corporate existence.— A subscriber upon condition that certain amendments shall be procured to the act under which the bank is incorporated, who makes no objection to the subsequent carrying on of the business by the bank without obtaining such amendment, is estopped to deny its corporate existence. Lehman *v.* Warner, 61 Ala. 455. But under an act to prevent illegal banking it has been held that a stock-holder sued for his subscription is not estopped to plead the violation of the act by the corporation in bar of the suit. North Missouri R. Co. *v.* Winkler, 33 Mo. 354.

72. *Connecticut.*—Litchfield Bank *v.* Church, 29 Conn. 137.

Kentucky.— Finnell *v.* Sanford, 17 B. Mon. (Ky.) 748.

Massachusetts.— Farmers, etc., Bank *v.* Jenks, 7 Metc. (Mass.) 592.

Michigan.— Bissell *v.* Heath, 98 Mich. 472, 57 N. W. 585.

Nevada.— Ross *v.* Gold Hill Bank, 20 Nev. 191, 19 Pac. 243.

New York.— Empire City Bank's Case, 6 Abb. Pr. (N. Y.) 385 [*affirmed* in 18 N. Y. 199].

England.— Stone *v.* City, etc., Bank, 3 C. P. D. 282, 47 L. J. C. P. 681, 38 L. T. Rep. N. S. 9; Tennent *v.* Glasgow Bank, 4 App. Cas. 615; Henderson *v.* Royal British Bank, 7 E. & B. 356, 1 H. & N. 685 note, 3 Jur. N. S. 111, 25 L. J. Q. B. 112, 5 Wkly Rep. 286, 90 E. C. L. 356. *Compare In re* London, etc., Bank, L. R. 7 Ch. 55.

73. Farmers, etc., Bank *v.* Jenks, 7 Metc. (Mass.) 592.

74. Empire City Bank's Case, 6 Abb. Pr. (N. Y.) 385 [*affirmed* in 18 N. Y. 199]; Parker *v.* Carolina Sav. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888.

A deposit cannot be set off by a subscriber in an action against him for an unpaid subscription. Macungie Sav. Bank *v.* Bastian, 10 Wkly. Notes Cas. (Pa.) 71.

75. Officers of national banks see *infra*, III, D.

Officers of savings-banks see *infra*, IV, D.

76. State *v.* Ashley, 1 Ark. 513 (by stockholders); Jordy *v.* Hebraid, 18 La. 455 (six to be appointed by the governor and twelve elected by the stock-holders); Prieur *v.* Commercial Bank, 7 La. 509 (eleven by the ordinary stock-holders and two by the city council, the city being a stock-holder); State *v.* Thompson, 27 Mo. 365.

77. *Delaware.*— Sparks *v.* Farmers' Bank, 3 Del. Ch. 274.

Georgia.— Milliken *v.* Steiner, 56 Ga. 251.

Missouri.— St. Louis Domicile, etc., Loan Assoc. *v.* Augustin, 2 Mo. App. 123.

Tennessee.— Nashville Bank *v.* Petway, 3 Humphr. (Tenn.) 522.

Canada.— Gilchrist *v.* Wyer, 2 N. Brunsw. 249.

When not in office.— The directors of a bank which is insolvent and doing nothing for many years are not to be regarded as continuing in office during that period, even though the charter should provide for their continuance in office until the election of their successors. Bartholomew *v.* Bentley, 1 Ohio St. 37.

78. Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308, 11 Am. Rep. 253.

79. Sparks *v.* Farmers' Bank, 3 Del. Ch. 274; Union Bank *v.* Ridgely, 1 Harr. & G.

individual to the presidency or other office by a majority of the quorum of the board is valid; and his title to his office is complete as soon as the vote of the majority of the directors is declared.[80] The suspension of an officer by order of the directors does not take effect from the time of their action, but from the time of notifying the officer.[81]

c. Of Special Agents. Besides the regular officers the directors may appoint special agents or may confer a special agency on the bank's regular officers.[82] This authority for many purposes may be created without a written power of attorney;[83] it may also be implied from the acts of the agent.[84]

2. Qualifying For Office — a. Giving Bond — (i) *In General.* All the bank officers, including sometimes the directors, president, and vice-president, are required to give bonds.[85] A bond is sufficient although no consideration is expressed,[86] and is not invalid even though not framed in the manner provided by law.[87] It must, however, be accepted to become operative.[88]

(Md.) 324; Dedham Bank *v.* Chickering, 3 Pick. (Mass.) 335.

80. Booker *v.* Young, 12 Gratt. (Va.) 303.

81. U. S. Bank *v.* McGill, 12 Wheat. (U. S.) 511, 6 L. ed. 711.

82. Murphy *v.* Gumaer, 12 Colo. App. 472, 55 Pac. 951; Cake *v.* Pottsville Bank, 116 Pa. St. 264, 9 Atl. 302, 2 Am. St. Rep. 600.

He may have authority from them to execute a deed and apply the corporate seal. Burrill *v.* Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395.

83. Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204.

Mere corporate vote sufficient.— A bank may appoint an agent to transact any business it may lawfully do by a mere corporate vote. Bates *v.* State Bank, 2 Ala. 451; New Haven Sav. Bank *v.* Davis, 8 Conn. 191.

84. *Alabama.*— McDonnell *v.* Montgomery Branch Bank, 20 Ala. 313; Holman *v.* Norfolk Bank, 12 Ala. 369.

Kentucky.—Smith *v.* White, 5 Dana (Ky.) 376.

Maine.— Badger *v.* Cumberland Bank, 26 Me. 428; Warren *v.* Ocean Ins. Co., 16 Me. 439, 33 Am. Dec. 674; Cobb *v.* Lunt, 4 Me. 503.

Maryland.—Towson *v.* Havre-de-Grace Bank, 6 Harr. & J. (Md.) 47, 14 Am. Dec. 254.

New York.—People's Bank *v.* St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 N. E. 408, 16 N. Y. St. 856.

Pennsylvania.— Valentine *v.* Packer, 5 Pa. St. 333.

South Carolina.— Planters' Bank *v.* Bivingsville Cotton Mfg. Co., 10 Rich. (S. C.) 95.

United States.— Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 5 L. ed. 631.

England.— Ludlow *v.* Charlton, 6 M. & W. 815.

85. Effect of not giving bond.— A bank director gave a bond as required by law for the discharge of his duties "while he should be a director," and was reëlected annually but never gave another bond. Although the statute forbade him from entering on his office until he had executed a bond, and also provided that he should hold office until another was appointed and qualified, nevertheless the office was considered an annual one and that he lawfully acted each year as a director. State Treasurer *v.* Mann, 34 Vt. 371, 80 Am. Dec. 688.

Effect of delay in execution.— A bond is not void because of two weeks' delay in its execution after the principal began his duties. U. S. Bank *v.* Brent, 2 Cranch C. C. (U. S.) 696, 2 Fed. Cas. No. 910.

86. New York City Fourth Nat. Bank *v.* Spinney, 47 Hun (N. Y.) 293.

87. Carlisle Bank *v.* Hopkins, 1 T. B. Mon. (Ky.) 245, 15 Am. Dec. 113; Pendleton *v.* State Bank, 1 T. B. Mon. (Ky.) 171; Grocers' Bank *v.* Kingman, 16 Gray (Mass.) 473; State Bank *v.* Locke, 15 N. C. 529; Northern Liberties Bank *v.* Cresson, 12 Serg. & R. (Pa.) 306.

Blanks.—When a bond bore no other day than the —— day of ——, 1869, it was not binding on the bondsmen until the last day of that year. Graves *v.* Lebanon Nat. Bank, 10 Bush (Ky.) 23, 19 Am. Rep. 50. The liability of one who signs a bond in blank, that is afterward completed, attaches from the time of his signature. Eyssallenne *v.* Citizens' Bank, 3 La. Ann. 663.

Director as surety.— A bond signed by a director as surety, who ought not to have signed it (Jose *v.* Hewett, 50 Me. 248), is valid if he resigned before its acceptance (Franklin Bank *v.* Cooper, 36 Me. 179).

Retroactive effect of statute.— A bond that fulfils the law at the time of its execution is not affected by subsequent legal requirements. Lionberger *v.* Krieger, 88 Mo. 160.

Acting as a bank in violation of law.— If a person becomes surety for the clerk of a company not authorized to do banking, and in violation of law it undertakes this business, the surety is not liable for any wrong of the clerk while thus acting as a bank clerk. Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129.

88. Franklin Bank *v.* Cooper, 36 Me. 179.

When formal acceptance not necessary.—If a cashier has acted for a long time his bond need not be formally accepted in order lawfully to enter on the duties of his office and render his sureties liable for his wrongs. Dedham Bank *v.* Chickering, 3 Pick. (Mass.) 335; U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64, 6 L. ed. 552.

(II) *Effect of Promotion.* If an officer is promoted, thereby incurring greater responsibility,[89] and his bond is not changed, his sureties are released for any defalcation in the higher office.[90]

(III) *Renewal.* If a bond which must be renewed[91] remains in force until given up and canceled, it is effective until the execution of the new one.[92] If a defalcation is discovered during the period covered by the first bond the sureties in this would be liable; but if the defalcation is made good by another committed

What is acceptance.— The delivery of a bond given by a cashier to the directors and its retention by them, and the putting of him in office is an acceptance, although nothing appears on the bank record.

Kentucky.— Pryse *v.* Farmers Bank, 17 Ky. L. Rep. 1056, 33 S. W. 532.

Maryland.— Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324.

Massachusetts.— Amherst Bank *v.* Root, 2 Metc. (Mass.) 522; Dedham Bank *v.* Chickering, 3 Pick. (Mass.) 335.

New York.— Bostwick *v.* Van Voorhis, 91 N. Y. 353.

United States.— U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64, 6 L. ed. 552.

Effect of acceptance.— If an obligee accept a bond he cannot afterward disagree. Newbern Bank *v.* Pugh, 8 N. C. 198.

89. If his responsibility is not thereby increased his sureties are liable for any defalcation while acting in the higher office. Detroit Sav. Bank *v.* Ziegler, 49 Mich. 157, 13 N. W. 496, 43 Am. Rep. 456; Home Sav. Bank *v.* Traube, 75 Mo. 199, 42 Am. Rep. 402.

For cases where the duty was temporarily increased and the bond held see Garnett *v.* Farmers' Nat. Bank, 91 Ky. 614, 13 Ky. L. Rep. 212, 16 S. W. 709, 34 Am. St. Rep. 246; Detroit Sav. Bank *v.* Ziegler, 49 Mich. 157, 13 N. W. 496, 43 Am. Rep. 456; Rochester City Bank *v.* Elwood, 21 N. Y. 88; Washington Bank *v.* Barrington, 2 Penr. & W. (Pa.) 27.

90. *California.*— Roberts *v.* Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; Victor Sewing Mach. Co. *v.* Scheffler, 61 Cal. 530.

Michigan.— White *v.* East Saginaw, 43 Mich. 567, 6 N. W. 86.

New York.— National Mechanics' Banking Assoc. *v.* Conkling, 90 N. Y. 116, 43 Am. Rep. 146; New York City Fourth Nat. Bank *v.* Spinney, 47 Hun (N. Y.) 293.

Pennsylvania.— Northwestern Nat. Bank *v.* Keen, 14 Phila. (Pa.) 7, 37 Leg. Int. (Pa.) 124.

Tennessee.— Mumford *v.* Memphis, etc., R. Co., 2 Lea (Tenn.) 393, 31 Am. Rep. 616.

United States.— Minor *v.* Alexandria Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47; Miller *v.* Stewart, 9 Wheat. (U. S.) 680, 6 L. ed. 189.

England.— Anderson *v.* Thornton, 3 Q. B. 271, 2 G. & D. 502, 6 Jur. 1109, 11 L. J. Q. B. 265, 43 E. C. L. 730; Skillett *v.* Fletcher, L. R. 1 C. P. 217, 1 H. & R. 197, 12 Jur. N. S. 295, 35 L. J. C. P. 154, 13 L. T. Rep. N. S. 61, 14 Wkly. Rep. 435.

Canada.— Upper Canada Bank *v.* Covert, 5 U. C. Q. B. O. S. 541.

For cases where the officer's duties were increased and the bond did not hold see as follows:

Maine.— Frankfort Bank *v.* Johnson, 23 Me. 322.

Maryland.— Baltimore First Nat. Bank *v.* Gerke, 68 Md. 449, 13 Atl. 358, 6 Am. St. Rep. 453.

New Jersey.— Manufacturers' Nat. Bank *v.* Dickerson, 41 N. J. L. 448, 32 Am. Rep. 237.

Pennsylvania.— American Tel. Co. *v.* Lennig, 139 Pa. St. 594, 21 Atl. 162; Manufacturers', etc., Sav., etc., Co. *v.* Odd Fellows' Hall Assoc., 48 Pa. St. 446; McKeesport Mut. Bldg., etc., Assoc. *v.* McMullen, 1 Pennyp. (Pa.) 431; Shackamaxon Bank *v.* Yard, 8 Pa. Co. Ct. 239.

Vermont.— State Treasurer *v.* Mann, 34 Vt. 371, 80 Am. Dec. 688.

91. Bonds of annual officers.—When persons are chosen or appointed to office annually, some courts hold that their bonds must be renewed annually, unless they contain a provision for extending their effectiveness (Sparks *v.* Farmers' Bank, 3 Del. Ch. 274; Hannibal Sav. Bank *v.* Hunt, 72 Mo. 597, 37 Am. Rep. 449; Kingston Mut. Ins. Co. *v.* Clark, 33 Barb. (N. Y.) 196), while others hold that they possess a continuing vitality, either by virtue of statute, charter, or common law (Louisiana State Bank *v.* Ledoux, 3 La. Ann. 674; Amherst Bank *v.* Root, 2 Metc. (Mass.) 522; Dedham Bank *v.* Chickering, 3 Pick. (Mass.) 335.

Continuing bonds.— In later years especially, bank bonds include more contingencies, run as long as the principal is in office, and cover promotions.

Delaware.— Sparks *v.* Farmers' Bank, 3 Del. Ch. 274.

Maryland.— Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324.

Massachusetts.— Dedham Bank *v.* Chickering, 3 Pick. (Mass.) 335; Worcester Bank *v.* Reed, 9 Mass. 267, 6 Am. Dec. 65.

Virginia.— Elam *v.* Commercial Bank, 86 Va. 92, 9 S. E. 498.

United States.— Anderson *v.* Longden, 1 Wheat. (U. S.) 85, 4 L. ed. 42; Union Bank *v.* Forrest, 3 Cranch C. C. (U. S.) 218, 24 Fed. Cas. No. 14,356.

Canada.— Royal Canadian Bank *v.* Yates, 19 U. C. C. P. 439.

If a charter is extended the bond of an official does not cover the extended period unless it contain a specific provision. Thompson *v.* Young, 2 Ohio 334. *Contra*, Hall *v.* Brackett, 62 N. H. 509, 13 Am. St. Rep. 588; Exeter Bank *v.* Rogers, 7 N. H. 21.

92. Pendleton *v.* State Bank, 1 T. B. Mon. (Ky.) 171.

during the running of the second bond, the authorities differ whether the sureties on the first or second bond are liable.[93]

b. Oath. It is sometimes required that an officer shall be sworn before entering upon his duties, but a neglect to take such oath will not vitiate his bond.[94]

3. Compensation. The compensation of the president[95] and cashier[96] is fixed by the directors and may be what they think reasonable; but the law raises no implied promise for his payment[97] and consequently he cannot recover payment for extra services however valuable they may be.[98] The vice-president is entitled to no compensation in the absence of a statute, by-law, or contract to which his own vote is not essential.[99] Unless an agreement to pay them a salary exist before their election, directors cannot authorize payment to themselves;[1] but one or more directors may be paid for extra services not of a directorial character but as agents.[2]

4. Duties and Powers — a. In General — (i) *Rules of Agency Apply* — **(a)** *In General.* Although every bank officer, including every director, is an agent, the acts of directors are regarded as corporate acts,[3] while those of other officers are governed by the general rules of agency. They have authority to act in accordance with the general usage, practice, and course of their business, and when thus acting they bind their bank in favor of third persons who have no knowledge of any narrower limitation of their powers.[4] When they act beyond

93. Cook *v.* State, 13 Ind. 154; Ingraham *v.* Maine Bank, 13 Mass. 208.

What defaults covered.—Where a bond covered defaults committed during its existence and within twelve months next and before the date of discovery, it did not cover a default committed more than twelve months prior to its discovery, although it would have been discovered within a year from its commission except for the act of the employer in falsifying the books during the year preceding the discovery. New York Fidelity, etc., Co. *v.* Consolidated Nat. Bank, 71 Fed. 116, 39 U. S. App. 26, 17 C. C. A. 641. When the condition of a bond is that the principal will be liable while in service, the continuing of the directors only one year in service will not limit the liability of the surety to the same period. Humboldt Sav., etc., Soc. *v.* Wennerhold, 81 Cal. 528, 22 Pac. 920; Louisiana State Bank *v.* Ledoux, 3 La. Ann. 674; Com. *v.* Reading Sav. Bank, 129 Mass. 73; People's Bldg., etc., Assoc. *v.* Wroth, 43 N. J. L. 70.

94. Elizabeth State Bank *v.* Chetwood, 8 N. J. L. 1.

95. Holland *v.* Lewiston Falls Bank, 52 Me. 564.

96. Implied agreement.—Where a cashier, appointed from month to month at a monthly salary of two hundred dollars, was afterward appointed annually and drew the same salary for three months and then, without any action of the bank, drew three hundred dollars a month, charged it on the books, and reported his action to the board of trustees, an implied agreement was thereby created fixing the salary at the latter sum. San Joaquin Valley Bank *v.* Bours, 65 Cal. 247, 3 Pac. 864.

If a cashier agrees to serve without compensation, yet appropriates funds from the bank to pay himself, he is liable therefor. Ft. Scott First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646.

97. Holland *v.* Lewiston Falls Bank, 52 Me. 564; Sawyer *v.* Pawners' Bank, 6 Allen (Mass.) 207.

98. Pew *v.* Gloucester First Nat. Bank, 130 Mass. 391; Leavitt *v.* Beers, Lalor (N. Y.) 221.

99. Blue *v.* Capital Nat. Bank, 145 Ind. 518, 43 N. E. 655.

1. Mobile Branch Bank *v.* Scott, 7 Ala. 107; Mobile Branch Bank *v.* Collins, 7 Ala. 95; Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788. *Contra,* Godbold *v.* Mobile Branch Bank, 11 Ala. 191, 46 Am. Dec. 211.

2. Chandler *v.* Monmouth Bank, 13 N. J. L. 255. Money may be paid to a director which is to be repaid to another for work done under his superintendence. Mobile Branch Bank *v.* Collins, 7 Ala. 95.

3. State Bank *v.* Senecal, 13 La. 525; State *v.* Commercial Bank, 6 Sm. & M. (Miss.) 218, 45 Am. Dec. 280.

4. *Alabama.*— Bates *v.* State Bank, 2 Ala. 451.

Connecticut.— New Haven Sav. Bank *v.* Davis, 8 Conn. 191; Hovey *v.* Magill, 2 Conn. 680.

Georgia.—Savannah Bank, etc., Co. *v.* Hartridge, 73 Ga. 223.

Illinois.— Durkee *v.* People, 155 Ill. 354, 40 N. E. 626, 46 Am. St. Rep. 340; Squires *v.* Monmouth First Nat. Bank, 59 Ill. App. 134.

Indiana.— Franklin Nat. Bank *v.* Whitehead, 149 Ind. 560, 49 N. E. 592, 63 Am. St. Rep. 302, 39 L. R. A. 725.

Louisiana.— Reed *v.* Powell, 11 Rob. (La.) 98.

Maine.— Badger *v.* Cumberland Bank, 26 Me. 428; Frankfort Bank *v.* Johnson, 24 Me. 490.

Michigan.— Farmers', etc., Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457.

Minnesota.— Nicollet Nat. Bank *v.* Frisk-

this sphere they must ordinarily act by resolution of the directors or by special usage or custom, and individuals who are doing business with them are bound to know at their peril to what extent unusual power has been confided to them.[5] A course of action, either brief or long continued, open and clearly showing an intent to bind the bank, will, however, suffice.[6] The law implies that they will use ordinary care and act honestly in managing the affairs of the bank;[7] as much

Turner Co., 71 Minn. 413, 74 N. W. 160, 70 Am. St. Rep. 334.

Mississippi.— State *v.* Commercial Bank, 6 Sm. & M. (Miss.) 218, 45 Am. Dec. 280.

Nebraska.— Rich *v.* State Nat. Bank, 7 Nebr. 201, 29 Am. Rep. 382.

New Hampshire.— Eastman *v.* Coos Bank, 1 N. H. 23.

New Jersey.— Fifth Ward Sav. Bank *v.* Jersey City First Nat. Bank, 48 N. J. L. 513, 7 Atl. 318.

New York.—Jemison *v.* Citizens' Sav. Bank, 122 N. Y. 135, 25 N. E. 264, 33 N. Y. St. 335, 19 Am. St. Rep. 482, 9 L. R. A. 708; Cooke *v.* State Nat. Bank, 52 N. Y. 96, 11 Am. Rep. 667; Hooker *v.* Eagle Bank, 30 N. Y. 83, 86 Am. Dec. 351; Caldwell *v.* National Mohawk Valley Bank, 64 Barb. (N. Y.) 333; Wakefield Bank *v.* Truesdell, 55 Barb. (N. Y.) 602; Adriance *v.* Roome, 52 Barb. (N. Y.) 399; Thatcher *v.* State Bank, 5 Sandf. (N. Y.) 121; Lyons Bank *v.* Demmon, Lalor (N. Y.) 398; Vergennes Bank *v.* Warren, 7 Hill (N. Y.) 91; Commercial Bank *v.* Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; Mott *v.* Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; Randall *v.* Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193.

Ohio.— Citizens' Sav. Bank *v.* Blakesley, 42 Ohio St. 645.

Pennsylvania.—Lloyd *v.* West Branch Bank, 15 Pa. St. 172, 53 Am. Dec. 581; Northern Liberties Bank *v.* Cresson, 12 Serg. & R. (Pa.) 306; Magill *v.* Kauffman, 4 Serg. & R. (Pa.) 317, 8 Am. Dec. 713.

Tennessee.— Neiffer *v.* Knoxville Bank, 1 Head (Tenn.) 162.

Virginia.— Durkin *v.* Exchange Bank, 2 Patt. & H. (Va.) 277.

West Virginia.—Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

United States.— Martin *v.* Webb, 110 U. S. 7, 3 S. Ct. 428, 28 L. ed. 49; Mahoney Min. Co. *v.* Anglo-Californian Bank, 104 U. S. 192, 26 L. ed. 707; Boston Merchants' Nat. Bank *v.* Boston State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008; Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274; Minor *v.* Alexandria Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47; U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64, 6 L. ed. 552; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 5 L. ed. 631; Alexandria Mechanics Bank *v.* Columbia Bank, 5 Wheat. (U. S.) 326, 5 L. ed. 100; Columbia Bank *v.* Patterson, 7 Cranch (U. S.) 299, 3 L. ed. 351.

See 6 Cent. Dig. tit. "Banks and Banking," § 239.

A bank is liable for a loan obtained from another bank, although the officer who borrows the money acts without the knowledge of the other officials and appropriates the money to his own use. Chemical Nat. Bank *v.* Armstrong, 59 Fed. 372, 16 U. S. App. 465, 8 C. C. A. 155, 28 L. R. A. 231.

5. Stamford Bank *v.* Benedict, 15 Conn. 437; National State Bank *v.* Sandford Fork, etc., Co., 157 Ind. 10, 60 N. E. 699; National State Bank *v.* Vigo County Nat. Bank, 141 Ind. 352, 40 N. E. 799, 50 Am. St. Rep. 330; Reed *v.* Powell, 11 Rob. (La.) 98; Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678.

Notice to surety.— A bank is not bound by an agreement made by one of its unauthorized officers to notify a surety of the default of the maker of a note left as collateral. New Hampshire Sav. Bank *v.* Downing, 16 N. H. 187.

Secret agreement.— A bank is not bound by the secret agreement of an officer. Metropolis Nat. Bank *v.* Williams, 46 Mo. 17.

Transfer of judgment.— The transfer of a judgment belonging to a bank without collecting it is presumed to be unauthorized. Cox *v.* Robinson, 70 Fed. 760.

Proof of authority.— A dealer with the officer of a bank who is vested with apparent authority to make contracts therefor, who subsequently has good reason to doubt such authority must, in order to hold the bank in any contract made afterward, prove the officer's authority to make it. Stallcup *v.* National Bank of Republic, 15 N. Y. St. 39.

6. Olney *v.* Chadsey, 7 R. I. 224; Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

To bind a bank by the action of an officer beyond the scope of his usual authority, it must in some manner be a party to the circumstances, or chargeable with a knowledge of them. Wheat *v.* Louisville Bank, 9 Ky. L. Rep. 738, 5 S. W. 305.

7. Jones *v.* Johnson, 86 Ky. 530, 9 Ky. L. Rep. 789, 6 S. W. 582; Shakers United Soc. *v.* Underwood, 9 Bush (Ky.) 609, 15 Am. Rep. 731; Manhattan Co. *v.* Lydig, 4 Johns. (N. Y.) 377, 4 Am. Dec. 289; Charitable Corp. *v.* Sutton, 2 Atk. 400, 9 Mod. 349.

When the president acts in good faith in discounting paper he is not liable for the consequences (Jones *v.* Johnson, 86 Ky. 530, 9 Ky. L. Rep. 789, 6 S. W. 582), but he is liable if he lends to a minor or other person against whom payment cannot be enforced (Brown *v.* Farmers', etc., Nat. Bank, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359).

care as would be exercised by a careful man in his own affairs of similar importance.[8]

(B) *Imputation of Declarations of Officers* — (1) GENERALLY — (a) RULE STATED. Declarations, representations, or admissions of an officer[9] made in the usual course of business bind his bank,[10] provided they are something more than incidental or casual remarks[11] and do not relate to transactions which are past and ended.[12] Concerning the place of making them the better opinion is that they need not be confined to the bank.[13]

(b) GIVING INFORMATION. In giving information it has been held that an officer's answer when given in good faith, even though erroneous, will not render his bank liable, and that should his bank suffer therefrom, it could not recover from the inquirer.[14] If, however, information is given in the due course of his business[15] on which another acts, his bank is bound thereby.[16]

(2) OF DIRECTORS. The declarations of directors usually are not binding as

8. Bay City Commercial Bank *v.* Chatfield, 121 Mich. 641, 80 N. W. 712, holding that good faith is no defense when he has been negligent.

9. Managers of branch banks are its agents, and a representation or declaration by one of them within the usual course of business may bind another branch. Canadian Bank of Commerce *v.* Coumbe, 47 Mich. 358, 11 N. W. 196.

10. *Illinois.*— New England F. & M. Ins. Co. *v.* Schettler, 38 Ill. 166.

Maryland.— Merchants' Bank *v.* Marine Bank, 3 Gill (Md.) 96, 43 Am. Dec. 300.

Massachusetts.— Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111; Wyman *v.* Hallowell, etc., Bank, 14 Mass. 58, 7 Am. Dec. 194.

Missouri.— Mechanics' Bank *v.* Schaumburg, 38 Mo. 228.

New York.— Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; Holden *v.* New York, etc., Bank, 72 N. Y. 286; U. S. Bank *v.* Davis, 2 Hill (N. Y.) 451.

Non-binding declarations.— Declarations to makers, indorsers, sureties, and others that their signatures are mere matters of form, and that they will not be liable (Whitehall First Nat. Bank *v.* Tisdale, 18 Hun (N. Y.) 151; Nephia First Nat. Bank *v.* Foote, 12 Utah 157, 42 Pac. 205; Metropolis Bank *v.* Jones, 8 Pet. (U. S.) 12, 8 L. ed. 850. See also Metropolis Nat. Bank *v.* Williams, 46 Mo. 17. *Contra,* Winston First Nat. Bank *v.* Pegram, 118 N. C. 671, 24 S. E. 487); by a cashier relating to the bank's premises (Merchants' Bank *v.* Marine Bank, 3 Gill (Md.) 96, 43 Am. Dec. 300) or to an indorser of a note discounted for the maker's accommodation that the paper is good (Mapes *v.* Titusville Second Nat. Bank, 80 Pa. St. 163); or an agreement with an accommodation indorser that he shall not be held liable (Loomis *v.* Fay, 24 Vt. 240) are not binding on the bank.

11. Grant *v.* Cropsey, 8 Nebr. 205; Puryear *v.* McGavock, 9 Heisk. (Tenn.) 461 note; Jones *v.* Planters' Bank, 9 Heisk. (Tenn.) 455. See also Stewart *v.* Huntingdon Bank, 11 Serg. & R. (Pa.) 267, 14 Am. Dec. 628.

Slander.— A bank is not liable for slander consisting of the unauthorized declarations of its cashier concerning the condition of the account of a customer. Etting *v.* Commercial Bank, 7 Rob. (La.) 459.

12. Franklin Bank *v.* Steward, 37 Me. 519.

Promise to pay second time.— The president's declarations when receiving a deposit and issuing a certificate therefor are binding, but he has no authority after its payment to agree to pay the amount a second time. Hazleton *v.* Union Bank, 32 Wis. 34.

13. Bullard *v.* Randall, 1 Gray (Mass.) 605, 61 Am. Dec. 433; Houghton *v.* Elkhorn First Nat. Bank, 26 Wis. 663, 7 Am. Rep. 107; Boston Merchants' Nat. Bank *v.* Boston State Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008. *Contra,* Merchants' Bank *v.* Rudolf, 5 Nebr. 527.

14. Herrin *v.* Franklin County Bank, 32 Vt. 274.

False information given by a cashier concerning the standing of customers does not bind his bank. Etting *v.* Commercial Bank, 7 Rob. (La.) 459; Merchants' Bank *v.* Marine Bank, 3 Gill (Md.) 96, 43 Am. Dec. 300; Harrisburg Bank *v.* Tyler, 3 Watts & S. (Pa.) 373; Metropolis Bank *v.* Jones, 8 Pet. (U. S.) 12, 8 L. ed. 850; U. S. Bank *v.* Dunn, 6 Pet. (U. S.) 51, 8 L. ed. 316.

15. Inquiry by telephone.— If a bank is thus asked whether it has issued a check in favor of a specified person, and if so, whether it is all right, and answers affirmatively, the answer applies to the drawer's signature and to the fund for paying the check, but not to any indorsement. German Sav. Bank *v.* Citizens' Nat. Bank, 101 Iowa 530, 70 N. W. 769, 63 Am. St. Rep. 399.

16. Grant *v.* Cropsey, 8 Nebr. 205; Cochecho Nat. Bank *v.* Haskell, 51 N. H. 116, 12 Am. Rep. 67; Westmoreland Bank *v.* Klingensmith, 7 Watts (Pa.) 523; Manufacturers' Bank *v.* Scofield, 39 Vt. 590.

Statement to surety that note is paid.— A declaration by the cashier to the surety on a note that it is paid, whereby he is led to surrender his security, will bind the bank. Franklin Bank *v.* Steward, 37 Me. 519; Cochecho Nat. Bank *v.* Haskell, 51 N. H. 116, 12 Am. Rep. 67.

they can act only in one way; but when they act as special agents they may bind their bank by what they say, like other agents or officers.[17]

(c) *Imputation of Knowledge of Officers* — (1) GENERALLY — (a) RULE STATED. A bank is charged with the knowledge acquired by its cashier, president, or other officers[18] pertaining to transactions within the scope of the bank's business,[19]

17. East River Bank *v.* Hoyt, 41 Barb. (N. Y.) 441; Mapes *v.* Titusville Second Nat. Bank, 80 Pa. St. 163.

18. **Must be an active officer.**— A distinction has been raised with respect to the effect of a notice, whether the officer is actively engaged in conducting the bank's affairs or not. As a cashier is always thus engaged, knowledge acquired by him is always binding, but perhaps a different rule applies to a president who is less active. See Henry *v.* Northern Bank, 63 Ala. 527; Washington Nat. Bank *v.* Pierce, 6 Wash. 491, 33 Pac. 972, 36 Am. St. Rep. 174. When he is an active officer, however, knowledge acquired by him is as binding on the bank as knowledge acquired by the cashier. Merchants' Nat. Bank *v.* McAnulty, (Tex. Civ. App. 1895) 31 S. W. 1091; Traders' Nat. Bank *v.* Smith, (Tex. Civ. App. 1893) 22 S. W. 1056; Harrington *v.* McFarland, 1 Tex. Civ. App. 289, 21 S. W. 116.

Attorneys.— This question has arisen with attorneys more frequently perhaps than with any others. Fulton Bank *v.* New York, etc., Canal Co., 4 Paige (N. Y.) 127. See, generally, ATTORNEY AND CLIENT.

Clerks.— The knowledge acquired by a clerk employed in collecting notes concerning the residence of an indorser of a note held by his bank would be imputed to it; but if acquired by a paying teller while discharging his duties it would not be. Fairfield Sav. Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319; Goodloe *v.* Godley, 13 Sm. & M. (Miss.) 233, 51 Am. Dec. 159; Wilcox *v.* Routh, 9 Sm. & M. (Miss.) 476; Fortner *v.* Parham, 2 Sm. & M. (Miss.) 151; Wilkins *v.* Commercial Bank, 6 How. (Miss.) 217.

President.—As between himself and parties not having equal means of knowledge of the bank's condition, he will be conclusively presumed to have it, whatever the truth may be. Ward *v.* Trimble, 103 Ky. 153, 19 Ky. L. Rep. 1801, 44 S. W. 450.

19. *Alabama.*— Birmingham Trust, etc., Co. *v.* Louisiana Nat. Bank, 99 Ala. 379, 13 So. 112, 20 L. R. A. 600; Huntsville Branch Bank *v.* Steele, 10 Ala. 915.

Georgia.— St. Marys' Bank *v.* Mumford, 6 Ga. 44.

Kentucky.— Bank of America *v.* McNeil, 10 Bush (Ky.) 54; Citizens Sav. Bank *v.* Walden, 21 Ky. L. Rep. 739, 52 S. W. 953.

Louisiana.— State Bank *v.* Senecal, 13 La. 525.

Massachusetts.— Fall River Union Bank *v.* Sturtevant, 12 Cush. (Mass.) 372.

Minnesota.— St. Paul Second Nat. Bank *v.* Howe, 40 Minn. 390, 42 N. W. 200, 12 Am. St. Rep. 744.

New Jersey.— Gaston *v.* American Exch. Nat. Bank, 29 N. J. Eq. 98; Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. 117.

New York.—Gibson *v.* National Park Bank, 98 N. Y. 87; New Hope, etc., Bridge Co. *v.* Phenix Bank, 3 N. Y. 156.

Ohio.— Messick *v.* Roxbury, 1 Handy (Ohio) 190, 12 Ohio Dec. (Reprint) 95.

Pennsylvania.— Boggs *v.* Lancaster Bank, 7 Watts & S. (Pa.) 331; Harrisburg Bank *v.* Tyler, 3 Watts & S. (Pa.) 373.

Tennessee.— Merchants', etc., Bank *v.* Penland, 101 Tenn. 445, 47 S. W. 693.

Texas.— Mason First Nat. Bank *v.* Ledbetter, (Tex. Civ. App. 1896) 34 S. W. 1042.

United States.— Duncan *v.* Jaudon, 15 Wall. (U. S.) 165, 21 L. ed. 142; McLeod *v.* St. Louis Fourth Nat. Bank, 20 Fed. 225.

See 6 Cent. Dig. tit. "Banks and Banking," § 282.

Applications of the rule are knowledge of: Bookkeeper of letters that are duly mailed and recorded by him. Evansville First Nat. Bank *v.* Louisville Fourth Nat. Bank, 56 Fed. 967, 16 U. S. App. 1, 6 C. C. A. 183. Cashier who, in negotiating a loan and collecting the proceeds, learns that the stock of his company has been pledged by the owner (Birmingham Trust, etc., Co. *v.* Louisiana Nat. Bank, 99 Ala. 379, 13 So. 112, 20 L. R. A. 600); of the modification of a deed to which the bank is a party (Huntsville Branch Bank *v.* Steele, 10 Ala. 915); of the execution of a deed of land by the president and cashier of a bank to the president individually (Veasey *v.* Graham, 17 Ga. 99, 63 Am. Dec. 228); that a note of a firm indorsed by a partner was taken by the cashier in payment of an individual debt (Fall River Union Bank *v.* Sturtevant, 12 Cush. (Mass.) 372); that bills will not be paid (Boggs *v.* Lancaster Bank, 7 Watts & S. (Pa.) 331); of an agreement to which his bank is a party (Stebbins *v.* Lardner, 2 S. D. 127, 48 N. W. 847). Director of an agreement made by him concerning the indorsement of a note. Twenty-sixth Ward Bank *v.* Stearns, 148 N. Y. 515, 42 N. E. 1050 [*affirming* 7 Misc. (N. Y.) 276, 27 N. Y. Suppl. 883, 58 N. Y. St. 533]. President that a payment was made by an obligor with the understanding that he was to be released (Merchants' Nat. Bank *v.* McAnulty, (Tex. Civ. App. 1895) 31 S. W. 1091), or that stock standing on the books in the name of a person is held in trust (Porter *v.* Rutland Bank, 19 Vt. 410). President or cashier of an outstanding mortgage. Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. 117; Burgoyne *v.* Clarkson, 1 Ohio Dec. (Reprint) 119, 2 West. L. J. 325; Ottaquechee Sav. Bank *v.* Truman, 58 Vt. 166, 1 Atl. 485. President or other officer relating to the discount of a note. Central Nat. Bank *v.* Levin, 6 Mo. App. 543.

although such knowledge be acquired in another transaction than that to which it relates.[20]

(b) Where Officer Acts as Agent For Two Parties. When a bank officer is acting as a president or director of another concern, or as a trustee or executor of an estate, the knowledge acquired in the latter capacity is imputed to his bank according to the most general rule.[21]

(c) Where Officer Personally Interested. When an officer is individually interested in a note or other matter, the better opinion is that his knowledge is not to be imputed to his bank, since his interest is best served by concealing it.[22]

20. Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9.

Must be given to him officially.— To charge a bank with the knowledge of the president or cashier concerning any matter, it must as a rule have been given to him officially. St. Paul Second Nat. Bank *v.* Howe, 40 Minn. 390, 42 N. W. 200, 12 Am. St. Rep. 744; Merchants' Nat. Bank *v.* Clark, 139 N. Y. 314, 34 N. E. 910, 54 N. Y. St. 593, 36 Am. St. Rep. 710. In Colorado, however, a bank is held chargeable with information acquired by an agent pertaining to the bank in pursuing his own private business if it is remembered. Campbell *v.* Denver First Nat. Bank, 22 Colo. 177, 43 Pac. 1007. See also Red River Valley Land, etc., Co. *v.* Smith, 7 N. D. 236, 74 N. W. 194.

Preacquired knowledge.— Concerning the knowledge acquired before establishing an official relation, opinion is divided, but the better opinion is that such knowledge is imputed if it was present in the officer's mind after the agency relation was established. Suit *v.* Woodhall, 113 Mass. 391; Lebanon Sav. Bank *v.* Hollenbeck, 29 Minn. 322, 13 N. W. 145; Abell *v.* Howe, 43 Vt. 403; Shafer *v.* Phœnix Ins. Co., 53 Wis. 361, 10 N. W. 381. *Contra*, Memphis Nat. Bank *v.* Sneed, 97 Tenn. 120, 36 S. W. 716, 56 Am. St. Rep. 788, 34 L. R. A. 274. If, however, an individual knows of a matter some years before the organization of a company, of which he becomes the managing officer, it does not become charged with such knowledge without proof that he had clearly retained it at the time his company is charged therewith. Fairfield Sav. Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319; National Security Bank *v.* Cushman, 121 Mass. 490; Hart *v.* Farmers, etc., Bank, 33 Vt. 252. See also Hayward *v.* National Ins. Co., 52 Mo. 181, 14 Am. Rep. 400; Red River Valley Land, etc., Co. *v.* Smith, 7 N. D. 236, 74 N. W. 194.

21. Holden *v.* New York, etc., Bank, 72 N. Y. 286; Merchants' Nat. Bank *v.* Tracy, 77 Hun (N. Y.) 443, 29 N. Y. Suppl. 77, 60 N. Y. St. 650. See also Loring *v.* Brodie, 134 Mass. 453; New York *v.* New York Tenth Nat. Bank, 111 N. Y. 446, 18 N. E. 618, 19 N. Y. St. 133; Stockdale *v.* Keyes, 79 Pa. St. 251. But see Rock Island First Nat. Bank *v.* Hoyhed, 28 Minn. 396, 10 N. W. 421: Benton *v.* German-American Nat. Bank, 122 Mo. 332, 26 S. W. 975; De Kay *v.* Hackensack Water Co., 38 N. J. Eq. 158; Wilson *v.* Pittsburgh Second Nat. Bank, (Pa. 1886) 7 Atl. 145, to the effect that where one is an officer of two corporations and they have business transactions with each other the knowledge of the common officer cannot be attributed to either corporation in a matter in which he did not represent it.

Trust collaterals.— When a bank officer knows that securities deposited by a debtor as collateral are held by him as trustee the bank is charged with this knowledge. Loring *v.* Brodie, 134 Mass. 453; Gaston *v.* American Exch. Nat. Bank, 29 N. J. Eq. 98. The same rule applies to a depositor who, with a bank officer's knowledge, deposits trust money in his own name (Bethlehem First Nat. Bank *v.* Peisert, 2 Pennyp. (Pa.) 277) or to a debtor who uses trust money with a bank officer's knowledge to pay a debt due to the bank (Hughes *v.* Settle, (Tenn. Ch. 1895, 36 S. W. 577). When a president knew that the depositor of money for a corporation, and in its name, had no authority to draw it out, the bank was not responsible for his withdrawal of it, for the president was ignorant of his intention to do this. Fulton Bank *v.* New York, etc., Canal Co., 4 Paige (N. Y.) 127.

22. *Alabama.*— Frenkel *v.* Hudson, 82 Ala. 158, 2 So. 758, 60 Am. Rep. 736; Terrell *v.* Mobile Branch Bank, 12 Ala. 502.

Illinois.—Wheeler *v.* Home Sav., etc., Bank, 188 Ill. 34, 58 N. E. 598, 80 Am. St. Rep. 161.

Iowa.— Davenport First Nat. Bank *v.* Gifford, 47 Iowa 575.

Kansas.—Wickersham *v.* Chicago Zinc Co., 18 Kan. 481, 26 Am. Rep. 784.

Kentucky.— Lyne *v.* State Bank, 5 J. J. Marsh. (Ky.) 545.

Massachusetts.— Grafton First Nat. Bank *v.* Babbidge, 160 Mass. 563, 36 N. E. 462; Innerarity *v.* Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; Loring *v.* Brodie, 134 Mass. 453; National Security Bank *v.* Cushman, 121 Mass. 490; Atlantic Nat. Bank *v.* Harris, 118 Mass. 147; Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; Washington Bank *v.* Lewis, 22 Pick. (Mass.) 24.

Missouri.—Southern Commercial Sav. Bank *v.* Slattery, (Mo. 1902) 66 S. W. 1066; Hickman *v.* Green, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39; Benton *v.* German-American Nat. Bank, 122 Mo. 332, 26 S. W. 975; Merchants' Nat. Bank *v.* Lovitt, 114 Mo. 519, 21 S. W. 825, 35 Am. St. Rep. 770; Johnston *v.* Shortridge, 93 Mo. 227, 6 S. W. 64; Mechanics' Bank *v.* Schaumburg, 38 Mo. 228; Manhattan Brass Co. *v.* Webster Glass, etc., Co., 37 Mo. App. 145; State Sav. Assoc. *v.* Nixon-Jones Printing Co., 25 Mo. App. 642.

(2) Of Directors — (a) In General. Knowledge of a material fact communicated by a bank director to the board at a regular meeting is notice to the bank;[23] but as he is not the chosen organ of communicating with the world, knowledge obtained by him in the ordinary way will not affect the bank[24] if he is not present at a board meeting[25] or is present and does not communicate it.[26]

(b) Where Required to Notify Board. Where, however, a fact is told to him as a director to communicate to the board it is his duty to do so; and if he does

New Jersey.— Hightstown First Nat. Bank *v.* Christopher, 40 N. J. L. 435, 29 Am. Rep. 262; De Kay *v.* Hackensack Water Co., 38 N. J. Eq. 158; Barnes *v.* Trenton Gas Light Co., 27 N. J. Eq. 33; Stratton *v.* Allen, 16 N. J. Eq. 229.

New York.— New York City Bank *v.* Barnard, 1 Hall (N. Y.) 70.

Texas.— Harrington *v.* McFarland, 1 Tex. Civ. App. 289, 21 S. W. 116.

Vermont.— Brandon First Nat. Bank *v.* Briggs, 70 Vt. 594, 41 Atl. 580.

Wisconsin.— *In re* Plankinton Bank, 87 Wis. 378, 58 N. W. 784.

Contra.— *Michigan.*— Tilden *v.* Barnard, 43 Mich. 376, 5 N. W. 420, 38 Am. Rep. 197.

Nebraska.— Buffalo County Nat. Bank *v.* Sharpe, 40 Nebr. 123, 58 N. W. 734.

North Carolina.— Le Duc *v.* Moore, 111 N. C. 516, 15 S. E. 888.

South Dakota.— Taylor *v.* National Bank, 6 S. D. 511, 62 N. W. 99; Black Hills Nat. Bank *v.* Kellogg, 4 S. D. 312, 56 N. W. 1071.

United States.— Blaine First Nat. Bank *v.* Blake, 60 Fed. 78.

See 6 Cent. Dig. tit. "Banks and Banking," § 285.

Sale of bonds.— A bank is not liable for the representations of its officers concerning the sale of bonds in which they are individually interested and the bank is not, and the use of the funds and credit of the bank to consummate the sale does not render the bank an interested party. Ruohs *v.* Chattanooga Third Nat. Bank, 94 Tenn. 57, 28 S. W. 303.

Transfers of stock.— Where two members of a firm, which, on the eve of its bankruptcy, conveyed its stock to a bank in fulfilment of a prior pledge, were also the president and cashier of the bank, it was held, in an action by the firm's receiver to set aside the transaction, that the knowledge of the firm's insolvency was the knowledge of the bank. Nisbit *v.* Macon Bank, etc., Co., 4 Woods (U. S.) 464, 12 Fed. 686. But the knowledge of a president in assigning his stock is not that of his bank, consequently its lien is not thereby affected. Franklin Bank *v.* Commercial Bank, 5 Ohio Dec. (Reprint) 339, 4 Am. L. Rec. 705.

23. Pittsburgh Bank *v.* Whitehead, 10 Watts (Pa.) 397, 36 Am. Dec. 186.

Effect on subsequent board.— Notice to a board of directors is binding on a subsequent board. Alexandria Mechanics' Bank *v.* Seton, 1 Pet. (U. S.) 299, 7 L. ed. 152.

24. *Connecticut.*— Farrel Foundry *v.* Dart, 26 Conn. 376; Farmers', etc., Bank *v.* Payne, 25 Conn. 444, 68 Am. Dec. 362.

Maryland.—Winchester *v.* Baltimore, etc., R. Co., 4 Md. 231.

Missouri.—Mechanics' Bank *v.* Schaumburg, 38 Mo. 228; Clerks' Sav. Bank *v.* Thomas, 2 Mo. App. 367. See also Kearney Bank *v.* Fromon, 129 Mo. 427, 31 S. W. 769, 50 Am. St. Rep. 456.

New Jersey.— Hightstown First Nat. Bank *v.* Christopher, 40 N. J. L. 435, 29 Am. Rep. 262.

New York.—Atlantic State Bank *v.* Savery, 82 N. Y. 291; Westfield Bank *v.* Cornen, 37 N. Y. 320, 4 Transcr. App. (N. Y.) 442, 93 Am. Dec. 573; U. S. Bank *v.* Davis, 2 Hill (N. Y.) 451; National Bank *v.* Norton, 1 Hill (N. Y.) 572.

Pennsylvania.—Custer *v.* Tompkins County Bank, 9 Pa. St. 27.

Wisconsin.— Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606.

United States.— Maryland Fidelity, etc., Co. *v.* Courtney, 103 Fed. 599, 42 C. C. A. 331.

See 6 Cent. Dig. tit. "Banks and Banking," § 286.

25. Farmers', etc., Bank *v.* Payne, 25 Conn. 444, 68 Am. Dec. 362; Hightstown First Nat. Bank *v.* Christopher, 40 N. J. L. 435, 29 Am. Rep. 262; St. Louis Third Nat. Bank *v.* Harrison, 3 McCrary (U. S.) 316, 10 Fed. 243.

Absence.—An interesting question arises in connection with the discount of notes whether knowledge possessed by the president, cashier, or director of some fact that would be clearly chargeable to the bank if he were present at the time of discounting them is nevertheless to be charged to the bank if, in truth, such officer was away. Perhaps the better opinion is that the bank is not to be charged with such knowledge, except where the officer is a member of a finance or discounting committee in which his duty to be present is imperative. Bank of America *v.* McNeil, 10 Bush (Ky.) 54; Memphis Nat. Bank *v.* Sneed, 97 Tenn. 120, 36 S. W. 716, 56 Am. St. Rep. 788, 34 L. R. A. 274; Waynesville Nat. Bank *v.* Irons, 8 Fed. 1.

26. *Louisiana.*— Mercier *v.* Canonge, 8 La. Ann. 37; State Bank *v.* Senecal, 13 La. 525.

Massachusetts.— Innerarity *v.* Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710.

Missouri.— Third Nat. Bank *v.* Tinsley, 11 Mo. App. 498.

New Jersey.— Hightstown First Nat. Bank *v.* Christopher, 40 N. J. L. 435, 29 Am. Rep. 262.

New York.—Atlantic State Bank *v.* Savery, 82 N. Y. 291.

Ohio.— Loomis *v.* Eagle Bank, 1 Disn. (Ohio) 285, 12 Ohio Dec. (Reprint) 625.

not, the bank is nevertheless held responsible.[27] In like manner when the fact is one that ought to be especially stated because it pertains to a fraudulent transaction, and he withholds it, his fraud is imputed to his bank.[28]

(c) Where Personally Interested. The knowledge of a bank director is not chargeable to his bank with respect to all discounts and other matters in which he is interested, for the presumption is that he will not communicate them, since his purpose would be best served by maintaining silence.[29] This rule also applies when he is interested as a director or president of another company.[30]

(d) *Ratification of Officer's Acts* — (1) In General. On many occasions the acts of officers are ratified by the directors;[31] but there can be no ratification

Pennsylvania.— Custer *v.* Tompkins County Bank, 9 Pa. St. 27.

United States.—Waynesville Nat. Bank *v.* Irons, 8 Fed. 1.

27. Union Bank *v.* Campbell, 4 Humphr. (Tenn.) 394.

28. National Security Bank *v.* Cushman, 121 Mass. 490; Hightstown First Nat. Bank *v.* Christopher, 40 N. J. L. 435, 29 Am. Rep. 262, the latter case holding that a bank in discounting a note before maturity is not chargeable with knowledge of an illegality acquired by one of the directors in an unofficial capacity if he did not act with the board in making the discount.

Director's communication with cashier.— A bank is not chargeable with the knowledge pertaining to negotiable paper possessed by a director through his recommendation to the manager to discount the same. Shaw *v.* Clark, 49 Mich. 384, 13 N. W. 786, 43 Am. Rep. 474.

29. *Alabama.*— Terrell *v.* Mobile Branch Bank, 12 Ala. 502.

Georgia.—Savannah Bank, etc., Co. *v.* Hartridge, 75 Ga. 149.

Iowa.— Hummel *v.* Monroe Bank, 75 Iowa 689, 37 N. W. 954.

Kentucky.— Lyne *v.* State Bank, 5 J. J. Marsh. (Ky.) 545.

Massachusetts.— Corcoran *v.* Snow Cattle Co., 151 Mass. 74, 23 N. E. 727; Innerarity *v.* Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; Washington Bank *v.* Lewis, 22 Pick. (Mass.) 24.

Minnesota.— Rock Island First Nat. Bank *v.* Loyhed, 28 Minn. 396, 10 N. W. 421.

Missouri.— Benton *v.* German-American Nat. Bank, 122 Mo. 332, 26 S. W. 975.

New York.— Casco Nat. Bank *v.* Clark, 139 N. Y. 307, 34 N. E. 908, 54 N. Y. St. 590, 36 Am. St. Rep. 705.

North Carolina.— Commercial Bank *v.* Burgwyn, 110 N. C. 267, 14 S. E. 623, 17 L. R. A. 326.

Ohio.— Loomis *v.* Eagle Bank, 1 Disn. (Ohio) 285, 12 Ohio Dec. (Reprint) 625.

Pennsylvania.— Wilson *v.* Pittsburgh Second Nat. Bank, (Pa. 1886) 7 Atl. 145.

Utah.— Nephi First Nat. Bank *v.* Foote, 12 Utah 157, 42 Pac. 205.

Washington.—Washington Nat. Bank *v.* Pierce, 6 Wash. 491, 33 Pac. 972, 36 Am. St. Rep. 174.

United States.—American Surety Co. *v.* Pauly, 72 Fed. 470, 37 U. S. App. 254, 18 C. C. A. 644.

Contra, Cedar Rapids First Nat. Bank *v.* Erickson, 20 Nebr. 580, 31 N. W. 387; Oak Grove, etc., Cattle Co. *v.* Foster, 7 N. M. 650, 41 Pac. 522; Union Bank *v.* Wando Min., etc., Co., 17 S. C. 339.

See 6 Cent. Dig. tit. "Banks and Banking," § 286.

30. Waynesville Nat. Bank *v.* Irons, 8 Fed. 1.

Notice of facts to a cashier of a bank, who is the manager, concerning transactions has been held to be not binding on the bank when received by the cashier in conducting the business of another company of which he is a director and whose business is in no way connected with the bank. Washington Nat. Bank *v.* Pierce, 6 Wash. 491, 33 Pac. 972, 36 Am. St. Rep. 174.

31. Acts which have been ratified are: Accepting property on condition of assuming liability. New London Bank *v.* Ketchum, 64 Wis. 7, 24 N. W. 468. Altering the nature of a debt (State Bank *v.* Reed, 1 Watts & S. (Pa.) 101; Keith *v.* Goodwin, 31 Vt. 268, 73 Am. Dec. 345) or security (Peninsular Bank *v.* Hanmer, 14 Mich. 208; Johnston *v.* South Western Rail Road Bank, 3 Strobh. Eq. (S. C.) 263). Collections. Averell *v.* Second Nat. Bank, 6 Mackey (D. C.) 358. Contracts relating to land. Akers *v.* Ray County Sav. Bank, 63 Mo. App. 316. Discounts by the president exceeding a prescribed sum (Curtis *v.* Leavitt, 15 N. Y. 9), by the president or cashier (Metropolis Nat. Bank *v.* Williams, 46 Mo. 17; Western Nat. Bank *v.* Armstrong, 152 U. S. 346, 14 S. Ct. 572, 38 L. ed. 470), or by an insufficient number of directors (Franklin Bank *v.* Steward, 37 Me. 519). Extending the time of loans and discharging the surety. Perkins *v.* State Bank, 5 La. Ann. 222. Misapplication of funds and the disposition of judgments and other acts relating to them. Goldbeck *v.* Kensington Nat. Bank, 147 Pa. St. 267, 23 Atl. 565; Winton *v.* Little, 94 Pa. St. 64, 9 Wkly. Notes Cas. (Pa.) 37. Offering rewards. Kelsey *v.* Crawford County Nat. Bank, 69 Pa. St. 426. Payments. Parker *v.* Donnally, 4 W. Va. 648. Releasing indorsers (Wing *v.* Commercial, etc., Bank, 103 Mich. 565, 61 N. W. 1009) and other debtors (Merchants' Nat. Bank *v.* McAnulty, (Tex. Civ. App. 1895) 31 S. W. 1091). Taking notes. Tradesmen's Nat. Bank *v.* Bank of Commerce, 6 N. Y. App. Div. 358, 39 N. Y. Suppl. 554.

of a contract which the bank cannot lawfully make,[32] and the ratification to be perfected must be with knowledge of all the circumstances,[33] not simply as the officers who performed the act believe them to be but as they really are.[34] If a contract is ratified at all it is ratified in its entirety.[35]

(2) How Done. Ratification may be done by resolution of the board of directors,[36] or by great variety of acts and deeds.[37]

(II) *Contracts* — (A) *In General.* In contracting an officer's authority is

32. Weston *v.* Estey, 22 Colo. 334, 45 Pac. 367; Downing *v.* Mt. Washington Road Co., 40 N. H. 230; McCullough *v.* Moss, 5 Den. (N. Y.) 567.

33. *Maryland.*— Pennsylvania, etc., Steam Nav. Co. *v.* Dandridge, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543.

Missouri.— Winsor *v.* Lafayette County Bank, 18 Mo. App. 665.

Nebraska.— Dietz *v.* City Nat. Bank, 42 Nebr. 584, 60 N. W. 896.

New York.— Baldwin *v.* Burrows, 47 N. Y. 199; Smith *v.* Tracy, 36 N. Y. 79, 3 Transcr. App. (N. Y.) 345; Seymour *v.* Wyckoff, 10 N. Y. 213; Nixon *v.* Palmer, 8 N. Y. 398.

United States.— Owings *v.* Hull, 9 Pet. (U. S.) 607, 9 L. ed. 246; Wilson *v.* Pauly, 72 Fed. 129, 37 U. S. App. 642, 18 C. C. A. 475.

Although transactions are entered on the bank books the entry does not work a ratification of them; there must be actual knowledge of them to have that effect. Ft. Scott First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646.

34. Owensboro Bank *v.* Western Bank, 13 Bush (Ky.) 526, 26 Am. Rep. 211.

35. *Colorado.*— Weston *v.* Estey, 22 Colo. 334, 45 Pac. 367.

Kentucky.— German Nat. Bank *v.* Grinstead, 21 Ky. L. Rep. 674, 52 S. W. 951.

Michigan.— Eberts *v.* Selover, 44 Mich. 519, 7 N. W. 225, 38 Am. Rep. 278.

North Carolina.— Rudasill *v.* Falls, 92 N. C. 222.

Oregon.— La Grande Nat. Bank *v.* Blum, 27 Oreg. 215, 41 Pac. 659; Coleman *v.* Stark, 1 Oreg. 115.

Vermont.— McClure *v.* Briggs, 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 557.

36. **Action as board unnecessary.**— It is not necessary for a board to act as a board in order to ratify an officer's act. Hill *v.* Seneca Bank, 87 Mo. App. 590. See also Washington Sav. Bank *v.* Butchers', etc., Bank, 107 Mo. 133, 17 S. W. 644, 28 Am. St. Rep. 405.

37. **Accepting benefits.**— When a bank accepts and retains the benefit of any officer's act it is estopped to deny his authority, and to this principle has been given the widest application.

Alabama.— Bates *v.* State Bank, 2 Ala. 451.

District of Columbia.— Averell *v.* Second Nat. Bank, 6 Mackey (D. C.) 358.

Georgia.— Bond *v.* Central Bank, 2 Ga. 92.

Kansas.— Sherman Center Town Co. *v.* Morris, 43 Kan. 282, 23 Pac. 569, 19 Am. St. Rep. 134.

Louisiana.— Perkins *v.* State Bank, 5 La. Ann. 222.

Michigan.— Peninsular Bank *v.* Hanmer, 14 Mich. 208.

Missouri.— Akers *v.* Ray County Sav. Bank, 63 Mo. App. 316.

New York.— Curtis *v.* Leavitt, 15 N. Y. 9; Tradesmen's Nat. Bank *v.* Bank of Commerce, 6 N. Y. App. Div. 358, 39 N. Y. Suppl. 554; Dallas City Nat. Bank *v.* National Park Bank, 32 Hun (N. Y.) 105.

Pennsylvania.— Goldbeck *v.* Kensington Nat. Bank, 147 Pa. St. 267, 23 Atl. 565; Kelsey *v.* Crawford County Nat. Bank, 69 Pa. St. 426; State Bank *v.* Reed, 1 Watts & S. (Pa.) 101; Steffe *v.* Conneautville Bank, 22 Pittsb. Leg. J. (Pa.) 157.

Texas.— Ft. Worth Pub. Co. *v.* Hitson, 80 Tex. 216, 14 S. W. 843, 16 S. W. 551; Merchants' Nat. Bank *v.* McAnulty, (Tex. Civ. App. 1895) 31 S. W. 1091.

Utah.— Nephi First Nat. Bank *v.* Foote, 12 Utah 157, 42 Pac. 205.

Vermont.— Keith *v.* Goodwin, 31 Vt. 268, 73 Am. Dec. 345.

Wisconsin.— New London Bank *v.* Ketchum, 64 Wis. 7, 24 N. W. 468.

United States.— Kennedy *v.* Monticello First Nat. Bank, 14 Fed. Cas. No. 7,701*a*, 5 Cinc. L. Bul. 219.

See 6 Cent. Dig. tit. "Banks and Banking," § 279.

Bringing suit.— When a bank brings an action on a note or other contract made by an officer this works a ratification of it. Singleton *v.* Monticello Bank, 113 Ga. 527, 38 S. E. 947; Planters Bank *v.* Sharp, 4 Sm. & M. (Miss.) 75, 43 Am. Dec. 470; La Grande Nat. Bank *v.* Blum, 27 Oreg. 215, 41 Pac. 659; Wilson *v.* Pauly, 72 Fed. 129, 37 U. S. App. 642, 18 C. C. A. 475. But a bank, by bringing suit on a note taken for value before maturity, signed by the cashier and others, does not thereby ratify the cashier's representations to his co-makers that the note would not be delivered to the bank until it was signed by the president. Nephi First Nat. Bank *v.* Foote, 12 Utah 157, 42 Pac. 205.

Silence.— If the acts are known, especially if they are repeated, and no dissent is shown within a reasonable time by the directors, their silence will operate as a ratification. Lime Rock Bank *v.* Macomber, 29 Me. 564; Hooker *v.* Eagle Bank, 30 N. Y. 83, 86 Am. Dec. 351; Commercial Bank *v.* Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317.

limited to such contracts as the bank can lawfully make,[38] and any other, if made, cannot be ratified.[39]

(B) *Receiving Special Deposits.* Officers cannot subject their bank to unusual liability by special contracts with depositors;[40] but when the practice of taking them is general, their bank will be regarded as the depositary, even though having no authority to receive them.[41]

(III) *Payments*—(A) *Of Deposits.* In paying deposits an officer must exercise reasonable care and diligence, although strict proof of the identity of the depositor who draws a check is not required.[42] There must be proper authority for paying the checks of corporations.[43]

(B) *Of Overdrafts.* In paying overdrafts the modern rule is different from the old one. Once, to do this was a grave offense;[44] now, its propriety depends on the ability and worthiness of the depositor.[45] It may intentionally be done as a loan, and under proper conditions is fully justified.[46]

(IV) *Transfers of Stock.* In issuing and transferring stock proper care and diligence are exercised when certificates are issued by the proper officers, under the corporate seal, after receiving value, and nothing appears to show any irregularity in issuing them.[47]

38. Mt. Sterling, etc., Turnpike Road Co. *v.* Looney, 1 Metc. (Ky.) 550, 71 Am. Dec. 491; Downing *v.* Mt. Washington Road Co., 40 N. H. 230; Genesee Bank *v.* Patchin Bank, 13 N. Y. 309; Central Bank *v.* Empire Stone Dressing Co., 26 Barb. (N. Y.) 23; McCullough *v.* Moss, 5 Den. (N. Y.) 567.

Where a bank is creditor of an estate it may contract expressly or by implication to pay one of its officers for serving as administrator of the estate. Lowe *v.* Ring, 106 Wis. 647, 82 N. W. 571.

39. See *supra*, II, D, 4, a, (I), (D), (1).

40. Lyons First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181; Lloyd *v.* West Branch Bank, 15 Pa. St. 172, 53 Am. Dec. 581.

41. *Georgia.*— Chattahoochee Nat. Bank *v.* Schley, 58 Ga. 369.

Massachusetts.— Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

New York.— Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582.

Ohio.— Mansfield First Nat. Bank *v.* Zent, 39 Ohio St. 105.

Pennsylvania.— Carlisle First Nat. Bank *v.* Graham, 79 Pa. St. 106, 21 Am. Rep. 49.

42. Sullivan *v.* Lewiston Sav. Inst., 56 Me. 507, 96 Am. Dec. 500.

43. Fulton Bank *v.* New York, etc., Canal Co., 4 Paige (N. Y.) 127.

44. *Indiana.*— Culver *v.* Marks, 122 Ind. 554, 23 N. E. 1086, 17 Am. St. Rep. 377, 7 L. R. A. 489.

Kentucky.— Pendleton *v.* State Bank, 1 T. B. Mon. (Ky.) 171.

Maine.— Franklin Bank *v.* Byram, 39 Me. 489, 63 Am. Dec. 643.

Maryland.—Eichelberger *v.* Finley, 7 Harr. & J. (Md.) 381, 16 Am. Dec. 312.

Missouri.— Union Sav. Assoc. *v.* Edwards, 47 Mo. 445; Market St. Bank *v.* Stumpe, 2 Mo. App. 545.

New Jersey.—State *v.* Stimson, 24 N. J. L. 478.

New York.— Van Dyck *v.* McQuade, 85 N. Y. 616; Union Bank *v.* Mott, 39 Barb. (N. Y.) 180.

Pennsylvania.— Lancaster Bank *v.* Woodward, 18 Pa. St. 357, 57 Am. Dec. 618.

South Carolina.— St. Mary's Bank *v.* Calder, 3 Strobh. (S. C.) 403.

United States.— Minor *v.* Alexandria Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47.

45. Jones *v.* Johnson, 86 Ky. 530, 9 Ky. L. Rep. 789, 6 S. W. 582.

A bank is not obliged to pay an overdraft. Chicago First Nat. Bank *v.* Pettit, 41 Ill. 492.

46. *Alabama.*— Selma City Nat. Bank *v.* Burns, 68 Ala. 267, 44 Am. Rep. 138.

Colorado.— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248 [*affirmed* in 96 U. S. 640, 24 L. ed. 648].

Kentucky.— Pryse *v.* Farmers Bank, 17 Ky. L. Rep. 1056, 33 S. W. 532.

New York.—Commercial Bank *v.* Ten Eyck, 48 N. Y. 305; People *v.* Clements, 42 Hun (N. Y.) 286.

Texas.—Brown *v.* Farmers, etc., Nat. Bank, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359.

Recovery of money so paid.— When an officer has no authority to permit an overdraft (Franklin Bank *v.* Byram, 39 Me. 489, 63 Am. Dec. 643; Board, etc., St. Louis Public Schools *v.* Broadway Sav. Bank, 84 Mo. 56; Tradesman's Bank *v.* Merritt, 1 Paige (N. Y.) 302) or when an overdraft occurs by mistake (McLean County Bank *v.* Mitchell, 88 Ill. 52; Thomas *v.* International Bank, 46 Ill. App. 461; Bremer County Bank *v.* Mores, 73 Iowa 289, 34 N. W. 863; Frankenberg *v.* Decatur First Nat. Bank, 33 Mich. 46; Kollock *v.* Emmert, 43 Mo. App. 566) the money can be recovered. But if the overdraft is paid to a messenger who pays the money over to the rightful person the bank cannot recover from the messenger. Penacook Sav. Bank *v.* Hubbard, 58 N. H. 167.

47. Com. *v.* Reading Sav. Bank, 137 Mass. 431; Pratt *v.* Boston, etc., R. Co., 126 Mass.

(v) *When Personally Interested in Transaction.* An officer cannot act in a transaction in which he is personally interested for both parties, and should he do so, his acts would not bind the bank and would become valid only through implied or expressed ratification. The sale of a note by a president or cashier to a bank of which he is the manager can never be valid without some act of the directory.[48]

b. Of Directors — (i) *In General* — (a) *Can Act Only as a Board* — (1) Rule Stated. The direction of a bank is in its board of directors,[49] but directors are not the officers of the bank, and have no power individually to control its management. They can act only collectively, and are not the agents of the institution.[50] Although it is usual for their action to be recorded, they may give a verbal direction to an officer that will be valid.[51]

(2) Action by Majority. Directors may bind their bank by a major vote of

443; Pratt *v.* Taunton Copper Mfg. Co., 123 Mass. 110, 25 Am. Rep. 37; Oakes *v.* Hill, 14 Pick. (Mass.) 442; Thayer *v.* Stearns, 1 Pick. (Mass.) 109; New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30; Warren County *v.* Marcy, 97 U. S. 96, 24 L. ed. 977; San Antonio *v.* Mehaffy, 96 U. S. 312, 24 L. ed. 816; Boston Merchants' Nat. Bank *v.* Boston State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008; Matter of Bahia, etc., R. Co., L. R. 3 Q. B. 584, 9 B. & S. 844, 37 L. J. Q. B. 176, 18 L. T. Rep. N. S. 467, 16 Wkly. Rep. 862; Hart *v.* Frontino, etc., South American Gold Min. Co., L. R. 5 Exch. 111, 39 L. J. Exch. 93, 22 L. T. Rep. N. S. 30.

Transfer to executor.— If an executor should ask for a transfer to another bank in his own name the bank would be liable if executing his request. Hodges *v.* Planters Bank, 7 Gill & J. (Md.) 306; Sabin *v.* Woodstock Bank, 21 Vt. 353; Lowry *v.* Commercial, etc., Bank, Brunn. Col. Cas. (U. S.) 331, Taney (U. S.) 310, 15 Fed. Cas. No. 8,581, 3 Am. L. J. N. S. 111, 6 West. L. J. 121; Davis *v.* Bank of England, 2 Bing. 393, 3 L. J. C. P. O. S. 4, 9 Moore C. P. 747, 9 E. C. L. 629.

48. *Iowa.*— Davenport First Nat. Bank *v.* Gifford, 47 Iowa 575.

Michigan.— Gallery *v.* National Exch. Bank, 41 Mich. 169, 2 N. W. 193, 32 Am. Rep. 149; Lewis *v.* Westover, 29 Mich. 14.

New York.— Voltz *v.* Blackmar, 64 N. Y. 440; Claflin *v.* Farmers', etc., Bank, 25 N. Y. 293.

South Dakota.— Staples *v.* Huron Nat. Bank, 8 S. D. 222, 66 N. W. 314.

Utah.— Nephi First Nat. Bank *v.* Foote, 12 Utah 157, 42 Pac. 205.

United States.— West St. Louis Sav. Bank *v.* Parmalee, 95 U. S. 557, 24 L. ed. 490.

49. *Colorado.*— Murphy *v.* Gumaer, 12 Colo. App. 472, 55 Pac. 951.

Kansas.— Ft. Scott First Nat. Bank *v.* Drake, 35 Kan. 564, 11 Pac. 445, 57 Am. Rep. 193.

Louisiana.— Percy *v.* Millaudon, 3 La. 568.

Michigan.— Thatcher *v.* West River Nat. Bank, 19 Mich. 196.

Pennsylvania.— Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180.

United States.— Western Nat. Bank *v.* Armstrong, 152 U. S. 346, 14 S. Ct. 572, 38 L. ed. 470; U. S. Bank *v.* Dunn, 6 Pet. (U. S.) 51, 8 L. ed. 316; Molson *v.* Hawley, 1 Blatchf. (U. S.) 409, 17 Fed. Cas. No. 9,702.

What is a legal board.— If a charter requires seven directors to make a board, and declares the president to be entitled to all the powers and privileges of a director, the president and six directors constitute a legal board within the meaning of the charter. State Bank *v.* Ruff, 7 Gill & J. (Md.) 448.

De facto director.— An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law (Mechanics Nat. Bank *v.* H. C. Burnet Mfg. Co., 32 N. J. Eq. 236), as a person elected at a meeting of five directors although by the bank's charter seven directors were required to meet for this purpose (Baird *v.* Washington Bank, 11 Serg. & R. (Pa.) 411). He can exercise authority. Farmers', etc., Bank *v.* Chester, 6 Humphr. (Tenn.) 458, 44 Am. Dec. 318. See also Milliken *v.* Steiner, 56 Ga. 251.

50. State Bank *v.* Senecal, 13 La. 525; Burrill *v.* Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; Leavitt *v.* Yates, 4 Edw. (N. Y.) 134; Pettibone *v.* Hawkins, 2 N. Y. Leg. Obs. 210.

All private or individual promises or agreements are not binding therefore on the bank. Hughes *v.* Somerset Bank, 5 Litt. (Ky.) 45; Harper *v.* Calhoun, 7 How. (Miss.) 203.

Effect of separate assent.— While the better opinion is that their separate assent is not effective (Elliot *v.* Abbot, 12 N. H. 549, 37 Am. Dec. 227. *Contra,* National State Bank *v.* Sandford Fork, etc., Co., 157 Ind. 10, 60 N. E. 699; Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359; Richardson *v.* St. Joseph Iron Co., 5 Blackf. (Ind.) 146, 33 Am. Dec. 460), yet on many occasions the advice or consent of one or more directors has justified the cashier in doing things which otherwise would have been improper and illegal (Payne *v.* Commercial Bank, 6 Sm. & M. (Miss.) 24).

51. Stamford Bank *v.* Benedict, 15 Conn. 437; Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207.

those present[52] at a regular stated meeting, or at a special meeting of which all have been notified,[53] if a quorum[54] be present.[55] Notice of a meeting for ordinary transactions need not state the object of the meeting.[56]

(B) *Effect of Custom.* If the presence of a majority of the directors or of the finance committee is required by a rule of the bank to authorize a discount, a custom for one director and the cashier to discount a note will override the rule.[57]

(II) *Specific Powers.* Directors have authority to lend or borrow money;[58] to authorize the president or cashier or both to borrow;[59] to compromise a claim[60] or authorize one of their number so to do;[61] to assign or indorse a note[62] or authorize one of their number or the president so to do;[63] to transfer a judgment belonging to the bank;[64] to declare dividends;[65] to elect suitable officers for transacting the bank's business;[66] to make an assignment without the assent of

52. Right to vote where personally interested.— A director has no right to vote in a matter pertaining to his interest. Baird *v.* Washington Bank, 11 Serg. & R. (Pa.) 411.

53. If a majority of the whole number are notified this will suffice. National Bank of Commerce *v.* Shumway, 49 Kan. 224, 30 Pac. 411.

54. A quorum consists of a majority of the board. Booker *v.* Young, 12 Gratt. (Va.) 303.

55. *Arkansas.*— Little Rock Bank *v.* McCarthy, 55 Ark. 473, 18 S. W. 759, 29 Am. St. Rep. 60.

California.— Harding *v.* Vandewater, 40 Cal. 77.

Connecticut.— Stow *v.* Wyse, 7 Conn. 214, 18 Am. Dec. 99.

Michigan.— Doyle *v.* Mizner, 42 Mich. 332, 3 N. W. 968.

New Hampshire.— Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207.

Utah.— Singer *v.* Salt Lake Copper, etc., Co., 17 Utah 143, 53 Pac. 1024, 70 Am. St. Rep. 773.

Unanimous action at casual meeting.— A bank is bound by the unanimous vote of a quorum at a casual meeting and without notice to the others, if a notice is not prescribed by the charter or by-laws. Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207.

56. New Haven Sav. Bank *v.* Davis, 8 Conn. 191.

57. National Security Bank *v.* Cushman, 121 Mass. 490.

58. State *v.* State Bank, 5 Mart. N. S. (La.) 327; Leavitt *v.* Yates, 4 Edw. (N. Y.) 134.

Lending to trustees.— Directors are justified in lending to a trustee on the pledge of trust stock, unless they believe that he intends to misapply the money. Albert *v.* Baltimore, 2 Md. 159; Field *v.* Schieffelin, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441; Lowry *v.* Commercial, etc., Bank, Brunn. Col. Cas. (U. S.) 331, Taney (U. S.) 310, 15 Fed. Cas. No. 8,581, 3 Am. L. J. N. S. 111, 6 West. L. J. 121; McLeod *v.* Drummond, 17 Ves. Jr. 152, 11 Rev. Rep. 41. But if a trustee should borrow for a commercial purpose and pledge the trust estate, the law would impute knowledge to the directors of a misapplication of the money. Loring *v.* Brodie, 134 Mass. 453; Shaw *v.* Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; Bell *v.* Farmers Deposit Nat. Bank, 131 Pa. St. 318, 18 Atl. 1079; Manhattan Bank *v.* Walker, 130 U. S. 267, 9 S. Ct. 519, 32 L. ed. 959; Baltimore Cent. Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 692; Smith *v.* Ayer, 101 U. S. 320, 25 L. ed. 955; Duncan *v.* Jaudon, 15 Wall. (U. S.) 165, 21 L. ed. 142.

59. Ridgway *v.* Farmers' Bank, 12 Serg. & R. (Pa.) 256, 14 Am. Dec. 681.

60. Wolf *v.* Bureau, 1 Mart. N. S. (La.) 162; Frankfort Bank *v.* Johnson, 24 Me. 490; Baird *v.* Washington Bank, 11 Serg. & R. (Pa.) 411; Olney *v.* Chadsey, 7 R. I. 224.

Effect of fraud.— Fraudulent conduct by directors in making a settlement with a cashier would not invalidate it unless he also was a party to the fraud (Frankfort Bank *v.* Johnson, 24 Me. 490); and a bank cannot repudiate the acceptance of land from a debtor in discharge of his debt when the transaction is tainted with fraud (Baird *v.* Washington Bank, 11 Serg. & R. (Pa.) 411).

61. Waxahachie Nat. Bank *v.* Vickery, (Tex. Civ. App. 1894) 26 S. W. 876.

Discharge of insolvent debtor.— A board cannot authorize the cashier to vote for the discharge of an insolvent debtor and thereby release him or his surety from liability. Union Bank *v.* Jones, 4 La. Ann. 236.

62. Stevens *v.* Hill, 29 Me. 133; Cross *v.* Rowe, 22 N. H. 77.

63. Northampton Bank *v.* Pepoon, 11 Mass. 288.

64. Holt *v.* Bacon, 25 Miss. 567.

65. This is a statutory requirement and they may be held liable for declaring a dividend, outside the statute, when it is clearly not justified by the bank's condition, and the payment of it would lead to embarrassment. Gunkle's Appeal, 48 Pa. St. 13.

Statute of limitations.—Dividends are payable on demand, and until this is made the bank holds them in trust for the owner, and the statute does not run against his right to them. Louisville Bank *v.* Gray, 84 Ky. 565, 8 Ky. L. Rep. 664, 2 S. W. 168.

66. Merrick *v.* Metropolis Bank, 8 Gill (Md.) 59.

the majority of the stock-holders;[67] and to appoint a finance committee to discount its paper.[68] They cannot, however, release a stock-holder from his subscription;[69] condone the fraud of an officer;[70] speculate with the funds;[71] make a private profit in discharging their official duties;[72] keep special deposits without authority;[73] or donate the property of the bank to any charitable, political, or business purpose.[74]

c. Of President and Cashier — (I) *Of President* — (A) *In General* — (1) Rule Stated. In some cases a president receives only a nominal salary, is expected to devote only a portion of his time to the business, and is not required to exercise the same degree of care and foresight as a president who is the real head and manager and who possesses all the authority of the cashier.[75] He may, however, be authorized by the directors to do anything within the authority of the bank's charter except those positive requirements that are personal and cannot be delegated;[76] but when he goes beyond the scope of his usual authority it must be shown that in some way his act was authorized by the directors.[77]

(2) During Cashier's Absence. The president's authority during the cashier's absence has been questioned, but custom rules in such matters, and whatever

67. Merrick *v.* Metropolis Bank, 8 Gill (Md.) 59; Town *v.* River Raisin Bank, 2 Dougl. (Mich.) 530; Dana *v.* U. S. Bank, 5 Watts & S. (Pa.) 223.

68. But in clothing a committee with this authority they are not justified in executing a mortgage of the bank's real estate. Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728. See also Leavitt *v.* Blatchford, 5 Barb. (N. Y.) 9.

Effect of failure to pursue power strictly.— If a committee is to consist of three persons, the president, a director, and the cashier, with power on the part of the majority to act, the failure of the bank to designate the director does not render action by the other two ineffective. Wallace *v.* Spencer Exch. Bank, 126 Ind. 265, 26 N. E. 175.

69. Chouteau Ins. Co. *v.* Floyd, 74 Mo. 286; Gill *v.* Balis, 72 Mo. 424, Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203.

70. Hazard *v.* Durant, 11 R. I. 195; Atwool *v.* Merryweather, L. R. 5 Eq. 464 note; *In re* London, etc., Discount Co., L. R. 1 Eq. 277; Foss *v.* Harbottle, 2 Hare 461, 24 Eng. Ch. 461; Preston *v.* Grand Collier Dock Co., 5 Jur. 146, 10 L. J. Ch. 73, 11 Sim. 327, 34 Eng. Ch. 327; Gray *v.* Lewis, L. R. 8 Ch. 1035, 43 L. J. Ch. 281, 29 L. T. Rep. N. S. 12, 21 Wkly. Rep. 923; Mozley *v.* Alston, 1 Phil. 790.

71. Redmond *v.* Dickerson, 9 N. J. Eq. 507, 59 Am. Dec. 418.

72. Farmers', etc., Bank *v.* Downey, 53 Cal. 466, 31 Am. Rep. 62; Bain *v.* Brown, 56 N. Y. 285.

Sale to themselves.— A bank director who purchased land of the bank far below its value, but without any fraudulent purpose, was afterward rendered liable for the difference between that amount and its true value. Millsaps *v.* Chapman, 76 Miss. 942, 26 So. 369, 71 Am. St. Rep. 549. A cashier with authority to sell bank-stock transferred it to himself on the bank-books, and afterward to the bank. The bank was declared to be not an innocent purchaser and held the same as trustee for the principal. Louisville Bank *v.* Gray, 84 Ky. 565, 8 Ky. L. Rep. 664, 2 S. W. 168.

73. Shakers United Soc. *v.* Underwood, 9 Bush (Ky.) 609, 15 Am. Rep. 731. See also Lloyd *v.* West Branch Bank, 15 Pa. St. 172, 53 Am. Dec. 581.

74. Union Bank *v.* Jones, 4 La. Ann. 236; Holt *v.* Winfield Bank, 25 Fed. 812.

75. A president with a nominal salary is only responsible for the use of ordinary care in managing the affairs of a bank. Dunn *v.* Kyle, 14 Bush (Ky.) 134.

76. Terre Haute Nat. State Bank *v.* Vigo County Nat. Bank, 141 Ind. 352, 40 N. E. 799, 50 Am. St. Rep. 330; State Bank *v.* Wheeler, 21 Ind. 90; Cooke *v.* State Nat. Bank, 52 N. Y. 96, 11 Am. Rep. 667; New Haven City Bank *v.* Perkins, 29 N. Y. 554, 86 Am. Dec. 332; Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Auten *v.* U. S. Nat. Bank, 174 U. S. 125, 19 S. Ct. 628, 43 L. ed. 920; Boston Merchants' Nat. Bank *v.* Boston State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 5 L. ed. 631; Farmers', etc., Nat. Bank *v.* Smith, 77 Fed. 129, 40 U. S. App. 690, 23 C. C. A. 80.

77. *Illinois.*— Libby *v.* Union Nat. Bank, 99 Ill. 622.

Indiana.— Terre Haute Nat. State Bank *v.* Vigo County Nat. Bank, 141 Ind. 352, 40 N. E. 799, 50 Am. St. Rep. 330.

Kentucky.— Wheat *v.* Louisville Bank, 9 Ky. L. Rep. 738, 5 S. W. 305.

Missouri.—Washington Sav. Bank *v.* Butchers', etc., Bank, 107 Mo. 133, 17 S. W. 644, 28 Am. St. Rep. 405.

New York.— Dallas City Nat. Bank *v.* National Park Bank, 32 Hun (N. Y.) 105.

Tennessee.— Neiffer *v.* Knoxville Bank, 1 Head (Tenn.) 162.

United States.— Bell *v.* Hanover Nat. Bank, 57 Fed. 821.

the cashier can do the president can during his absence if custom so ordains; and his authority is not lessened by the appointment of a temporary cashier.[78]

(3) In Mixed Transactions. The president is often concerned in the transactions of his bank, and the question arises whether he or his bank or both are liable.[79]

(B) *Specific Powers.* The president can employ counsel and conduct the bank's litigation;[80] borrow money;[81] indorse and transfer the bank's paper;[82]

78. Neiffer *v.* Knoxville Bank, 1 Head (Tenn.) 162.

79. **Bank as trustee.**—A bank cannot be held as trustee for money collected by its president and financial manager, who in thus acting is a trustee for the benefit of the creditors of the makers of notes to bank, the bank having no connection with the trust property. Alpena Nat. Bank *v.* Greenbaum, 80 Mich. 1, 44 N. W. 1123.

Bank-stock.— The president induced a person to give his note for stock, telling him that the dividends would pay the interest and that it could be sold at any time if desired to pay the note itself. The note was discounted by the bank and the amount was put to the president's credit which he drew out. None of the bank's officers knew about the contract. The bank was not bound, and the maker was compelled to pay. Kennedy *v.* Otoe County Nat. Bank, 7 Nebr. 59.

Guaranty.—A guaranty to a person against loss for signing as a surety given by a president in his own name to a note given to the bank to retire another note held by it against the surety's principal is his individual obligation and not binding on the bank. Sturgis First Nat. Bank *v.* Bennett, 33 Mich. 520.

Loans.— A president procured a banking firm to discount his individual note, notified his own bank that he had deposited the amount with the firm to the credit of his bank, and afterward authorized the firm to charge the note to the account of his bank, which was done. It was held that he could not use the bank's deposit for his own use and that the receiver in an action against the firm was entitled to it. Chrystie *v.* Foster, 61 Fed. 551, 26 U. S. App. 67, 9 C. C. A. 606. The president of a national bank applied for a loan to a Canadian bank, which declined to make an individual loan, but offered to deposit the amount desired in the other bank. This was done by means of drafts, for which security was given. The loan was held to be that of the bank and not the president's individual loan. Eastern Townships Bank *v.* Vermont Nat. Bank, 22 Blatchf. (U. S.) 498, 22 Fed. 186. A bank loaned money to another bank, which was managed by its vice-president, taking collaterals therefor, and the vice-president transferred the loan to his individual credit, yet the bank was held for the loan. Chemical Nat. Bank *v.* Armstrong, 50 Fed. 798.

Loans to himself.— A loan to himself is legal if the directors acquiesce therein (Hanover Nat. Bank *v.* American Dock, etc., Co., 148 N. Y. 612, 43 N. E. 72, 51 Am. St. Rep. 721; Providence Fifth Nat. Bank *v.* Navassa Phosphate Co., 119 N. Y. 256, 23 N. E. 737, 29 N. Y. St. 686; Reynolds *v.* Mt. Vernon Bank, 6 N. Y. App. Div. 62, 39 N. Y. Suppl. 623), and when the president is a borrower and pledges collateral security, his relationship to the bank does not dispense with giving him notice of its sale (Conyngham's Appeal, 57 Pa. St. 474).

Secret agreement.— A secret agreement between the owner of security pledged as collateral with a bank and its president that it shall not be sold is a fraud on the bank and its execution cannot be enforced. Breyfogle *v.* Walsh, 71 Fed. 898.

80. *Kansas.*—Citizens' Nat. Bank *v.* Berry, 53 Kan. 696, 37 Pac. 131, 24 L. R. A. 719.

Kentucky.— Cincinnati Sav. Bank *v.* Benton, 2 Metc. (Ky.) 240.

New York.— Oakley *v.* Working Men's Union Benev. Soc., 2 Hilt. (N. Y.) 487; Mumford *v.* Hawkins, 5 Den. (N. Y.) 355; American Ins. Co. *v.* Oakley, 9 Paige (N. Y.) 496, 38 Am. Dec. 561.

Pennsylvania.—See Citizens' Bank *v.* Keim, 1 Wkly. Notes Cas. (Pa.) 263, 32 Leg. Int. (Pa.) 90.

Texas.— Merchants Nat. Bank *v.* Eustis, 8 Tex. Civ. App. 350, 28 S. W. 227.

Virginia.— Hodge *v.* Richmond First Nat. Bank, 22 Gratt. (Va.) 51.

West Virginia.— Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

United States.— Alexandria Canal Co. *v.* Swann, 5 How. (U. S.) 83, 12 L. ed. 60.

Certifying ownership of note sued on.—The president can certify that a note on which an action is brought by his bank is its property. Bancroft *v.* State Branch Bank, 1 Ala. 230.

81. Leavitt *v.* Blatchford, 5 Barb. (N. Y.) 9; Central Trust Co. *v.* Cook County Nat. Bank, 15 Fed. 885 (holding that if a person discounts a note given by the president with the bank's indorsement thereon, supposing he is dealing with and lending to the bank, it will be liable). *Contra*, Ridgway *v.* Farmers' Bank, 12 Serg. & R. (Pa.) 256, 14 Am. Dec. 681.

82. *Illinois.*— Palmer *v.* Nassau Bank, 78 Ill. 380, holding that he can transfer title to himself.

Indiana.— Allison *v.* Hubbell, 17 Ind. 559; Jones *v.* Hawkins, 17 Ind. 550.

Maryland.— Merrick *v.* Metropolis Bank, 8 Gill (Md.) 59.

Massachusetts.— Northampton Bank *v.* Pepoon, 11 Mass. 288; Spear *v.* Ladd, 11 Mass. 94.

assign and foreclose a mortgage;[83] take collateral security for a loan;[84] receive a deposit and issue a certificate of deposit therefor;[85] receive payment of notes and other obligations due the bank;[86] assign security to a public depositor to secure it;[87] acknowledge a claim barred by the statute of limitations;[88] remit a judgment in favor of the bank on a sufficient consideration;[89] renew a debt;[90] and offer a reward.[91] It is not within the scope of his authority to make a compromise,[92] except when he is specially authorized or the general management of the bank is given up to him.[93] Nor can he discount paper when this power is reserved by the directors;[94] relieve the maker of a note or other debtors;[95] authorize the payment of a check not drawn on proper funds;[96] sell the bank's property;[97] execute a mortgage on its real estate;[98] pledge its property for the payment of a debt;[99] stay the collection of an execution against the estate of a bank's debtor;[1] waive the conditions of a contract for the sale of land;[2] certify his own check;[3] execute a conveyance of his bank's property for the benefit of its creditors when it has become insolvent;[4] agree to pay a promoter for procuring stock-holders;[5] or release a subscriber.[6]

(II) *Of Cashier* — (A) *In General* — (1) Rule Stated. The cashier is the agent of the bank and not of the directors.[7] His acts, within his official sphere,

Nebraska.— City Nat. Bank *v.* Thomas, 46 Nebr. 861, 65 N. W. 895.

New York.— Howland *v.* Myer, 3 N. Y. 290; Tennessee *v.* Davis, 50 How. Pr. (N. Y.) 447.

Ohio.— Rezner *v.* Hatch, 2 Handy (Ohio) 42, 12 Ohio Dec. (Reprint) 320.

West Virginia.— Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

United States.— Belleville People's Bank *v.* Chicago Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. ed. 907; Irons *v.* Manufacturers' Nat. Bank, 27 Fed. 591.

83. Belden *v.* Meeker, 47 N. Y. 307; Valk *v.* Crandall, 1 Sandf. Ch. (N. Y.) 179.

84. Wales *v.* State Bank, Harr. (Mich.) 308.

Authorizing sale of collateral.— He can authorize a broker to sell such collateral. Sistare *v.* Best, 16 Hun (N. Y.) 611.

85. Kilgore *v.* Bulkley, 14 Conn. 362; Allison *v.* Hubbell, 17 Ind. 559; Jones *v.* Hawkins, 17 Ind. 550; Hazleton *v.* Union Bank, 32 Wis. 34.

Although a certificate of deposit is usually signed by the cashier, such action by the president is no defense to an indorser. Kilgore *v.* Bulkley, 14 Conn. 362.

86. Reno *v.* James, 16 Ky. L. Rep. 60; Parker *v.* Donnally, 4 W. Va. 648.

87. Richard *v.* Osceola Bank, 79 Iowa 707, 45 N. W. 294, holding that his right to do this is not affected by giving a bond of his own to secure the depositor.

88. Morgan *v.* Merchants' Nat. Bank, 13 Lea (Tenn.) 234, holding that his action is unaffected by the fact that he is an individual guarantor of the debt.

89. Case *v.* Hawkins, 53 Miss. 702.

Judgment lien.— When he can release it see Winton *v.* Little, 94 Pa. St. 64.

90. Brown *v.* Mechanics', etc., Nat. Bank, 12 N. Y. Suppl. 861, 35 N. Y. St. 665.

91. Minneapolis Bank *v.* Griffin, 168 Ill. 314, 48 N. E. 154.

92. Wheat *v.* Louisville Bank, 9 Ky. L. Rep. 738, 5 S. W. 305.

93. Cake *v.* Pottsville Bank, 116 Pa. St. 264, 9 Atl. 302, 2 Am. St. Rep. 600.

94. U. S. Bank *v.* Dunn, 6 Pet. (U. S.) 51, 8 L. ed. 316.

95. Olney *v.* Chadsey, 7 R. I. 224; Loomis *v.* Fay, 24 Vt. 240; Hodge *v.* Richmond First Nat. Bank, 22 Gratt. (Va.) 51.

96. Oakland Sav. Bank *v.* Wilcox, 60 Cal. 126; Sturgis First Nat. Bank *v.* Reed, 36 Mich. 263; Dowd *v.* Stephenson, 105 N. C. 467, 10 S. E. 1101.

97. Greenawalt *v.* Wilson, 52 Kan. 109, 34 Pac. 403; Asher *v.* Sutton, 31 Kan. 286, 1 Pac. 535; Central City First Nat. Bank *v.* Lucas, 21 Nebr. 280, 31 N. W. 805.

98. Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

99. Tennessee *v.* Davis, 50 How. Pr. (N. Y.) 447. See also Rhodes *v.* Webb, 24 Minn. 292.

1. Spyker *v.* Spence, 8 Ala. 333.

2. Chadbourne *v.* Stockton Sav., etc., Soc., (Cal. 1894) 36 Pac. 127.

3. Claflin *v.* Farmers', etc., Bank, 25 N. Y. 293.

4. McKeag *v.* Collins, 87 Mo. 164.

5. Tifft *v.* Quaker City Nat. Bank, 8 Pa. Co. Ct. 606, holding that the mention of such a contract to the board of directors without any formal action is no ratification.

6. Custar *v.* Titusville Gas, etc., Co., 63 Pa. St. 381; Mead *v.* Pettigrew, 11 S. D. 529, 78 N. W. 945.

7. *Kansas.*— Asher *v.* Sutton, 31 Kan. 286, 1 Pac. 535.

Maine.— Badger *v.* Cumberland Bank, 26 Me. 428.

New York.— Bridenbecker *v.* Lowell, 32 Barb. (N. Y.) 9.

Pennsylvania.— Bissell *v.* Franklin First Nat. Bank, 69 Pa. St. 415; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180.

are binding on his bank,[8] and those who deal with him are presumed to know the extent of his general power.[9] His conduct outside his official sphere which is not criminal or contrary to public policy, if known and accepted by the bank, is binding thereon,[10] and even though contrary to law, if done by authority of the directors, it is maintained that the bank is bound.[11]

(2) When General Manager. In cases where the management of the bank is very largely given up to him the bank may be held liable by showing that he

United States.— Martin *v.* Webb, 110 U. S. 7, 3 S. Ct. 428, 28 L. ed. 49; Boston Merchants' Bank *v.* Boston State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008; Baldwin *v.* Newbury Bank, 1 Wall. (U. S.) 234, 17 L. ed. 534. *Compare* Brown *v.* Adams, 5 Biss. (U. S.) 181, 4 Fed. Cas. No. 1,986, holding that a cashier who has sold the bank's property is the agent of the board of directors, and not of the stock-holders, and is therefore not responsible to the latter.

8. *Louisiana.*—Valdetero *v.* Citizens' Bank, 51 La. Ann. 165, 26 So. 425.

Maine.— Badger *v.* Cumberland Bank, 26 Me. 428; Burnham *v.* Webster, 19 Me. 232.

Mississippi.— State *v.* Commercial Bank, 6 Sm. & M. (Miss.) 218, 45 Am. Dec. 280.

Missouri.— Hill *v.* Seneca Bank, 87 Mo. App. 590.

New York.— Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582; Wakefield Bank *v.* Truesdell, 55 Barb. (N. Y.) 602; Cooper *v.* Townsend, 13 N. Y. Suppl. 760, 37 N. Y. St. 122.

Pennsylvania.— Lloyd *v.* West Branch Bank, 15 Pa. St. 172, 53 Am. Dec. 581; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180.

United States.— West St. Louis Sav. Bank *v.* Parmalee, 95 U. S. 557, 24 L. ed. 490; U. S. *v.* Columbus City Bank, 21 How. (U. S.) 356, 16 L. ed. 130; U. S. Bank *v.* Dunn, 6 Pet. (U. S.) 51, 8 L. ed. 316; Minor *v.* Alexandria Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 5 L. ed. 631; Matthews *v.* Massachusetts Nat. Bank, Holmes (U. S.) 396, 16 Fed. Cas. No. 9,286, 10 Alb. L. J. 199, 14 Am. L. Reg. N. S. 153, 1 Am. L. T. Rep. N. S. 512, 1 Centr. L. J. 469, 20 Int. Rev. Rec. 110, 6 Leg. Gaz. (Pa.) 308, 22 Pittsb. Leg. J. (Pa.) 38.

See 6 Cent. Dig. tit. "Banks and Banking," § 243.

If questioning his authority what bank must show.—When the bank seeks to avoid the consequences of his ordinary acts it must show that he did not possess authority further, and that this was known by the other party affected by them. A verbal understanding with the directors limiting his authority will not suffice when his public conduct is contrary thereto. Caldwell *v.* National Mohawk Valley Bank, 64 Barb. (N. Y.) 333.

9. Farmers', etc., Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457; State *v.* Commercial Bank, 6 Sm. & M. (Miss.) 218, 45 Am. Dec. 280.

Illegality of appointment.— The maker of a note cannot urge as a defense the illegality of the appointment of a cashier who may have indorsed it. Cooper *v.* Curtis, 30 Me. 488; Neiffer *v.* Knoxville Bank, 1 Head (Tenn.) 162.

Limitation of general authority.— If a restriction is imposed on his general authority which is unknown by others who may deal with him they are not bound thereby. Reynolds *v.* Collins, 78 Ala. 94; Burnham *v.* Webster, 19 Me. 232; Case *v.* Louisiana Citizens' Bank, 100 U. S. 446, 25 L. ed. 695; Boston Merchants' Nat. Bank *v.* Boston State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008; Minor *v.* Alexandria Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47; Morse *v.* Massachusetts Nat. Bank, Holmes (U. S.) 209, 17 Fed. Cas. No. 9,857.

10. *Connecticut.*— Stamford Bank *v.* Benedict, 15 Conn. 437.

Georgia.— Savannah Bank, etc., Co. *v.* Hartridge, 73 Ga. 223; Robinson *v.* Bealle, 20 Ga. 275.

Illinois.— Owens *v.* Stapp, 32 Ill. App. 653. See also Squires *v.* Monmouth First Nat. Bank, 59 Ill. App. 134.

Maine.— Badger *v.* Cumberland Bank, 26 Me. 428; Medomak Bank *v.* Curtis, 24 Me. 36.

Maryland.— Ecker *v.* New Windsor First Nat. Bank, 59 Md. 291.

Mississippi.— Payne *v.* Commercial Bank, 6 Sm. & M. (Miss.) 24.

New York.— New Haven City Bank *v.* Perkins, 29 N. Y. 554, 86 Am. Dec. 332; Caldwell *v.* National Mohawk Valley Bank, 64 Barb. (N. Y.) 333.

Pennsylvania.— Carlisle First Nat. Bank *v.* Graham, 79 Pa. St. 106, 21 Am. Rep. 49; State Bank *v.* Reed, 1 Watts & S. (Pa.) 101.

Wisconsin.— Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120.

United States.— Martin *v.* Webb, 110 U. S. 7, 3 S. Ct. 428, 28 L. ed. 49; Boston Merchants' Nat. Bank *v.* Boston State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008.

See 6 Cent. Dig. tit. "Banks and Banking," § 243.

11. Donnell *v.* Lewis County Sav. Bank, 80 Mo. 165; Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189; Zugner *v.* Best, 44 N. Y. Super. Ct. 393; Vergennes Bank *v.* Warren, 7 Hill (N. Y.) 91; Hagerstown Bank *v.* Loudon Sav. Fund Soc., 3 Grant (Pa.) 135; State Bank *v.* Reed, 1 Watts & S. (Pa.) 101; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180. *Contra*, Boston Merchants' Nat. Bank *v.* Boston State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008.

is endowed with this larger power and the proof may consist of a great variety of acts.[12]

(3) In Mixed Transactions. The cashier is not infrequently engaged in outside transactions, to which his bank is also a party; and the liability of each depends on the nature of the transaction.[13]

(B) *Specific Powers.* The cashier can borrow money for the use of his bank;[14]

12. Mercantile Bank *v.* McCarthy, 7 Mo. App. 318; New Haven City Bank *v.* Perkins, 4 Bosw. (N. Y.) 420; Lamb *v.* Cecil, 25 W. Va. 288; Martin *v.* Webb, 110 U. S. 7, 3 S. Ct. 428, 28 L. ed. 49.

Discounting paper.— When he is intrusted with general authority he can rediscount paper in the usual course of business; nor is his authority limited to extraordinary occasions. Davenport *v.* Stone, 104 Mich. 521, 62 N. W. 722, 53 Am. St. Rep. 467. If a discount committee exists and the cashier nevertheless discounts paper in the usual course of business, *bona fide* indorsers who are ignorant of the existence of such a committee are not affected. Blair *v.* Mansfield First Nat. Bank, 2 Flipp. (U. S.) 111, 3 Fed. Cas. No. 1,485, 12 Bankers' Mag. (3d S.) 721, 2 Browne Nat. Bank Cas. 173, 10 Chic. Leg. N. 84, 5 Reporter 40.

Receiving special deposits.— He can receive a special deposit for safe-keeping. Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582. *Contra*, Lloyd *v.* West Branch Bank, 15 Pa. St. 172, 53 Am. Dec. 581.

A bank manager is not acting within the scope of his authority in accepting a check from one customer to deliver to another. Grieve *v.* Molsons Bank, 8 Ont. 162.

13. **Borrower.**— One who borrows money from a bank for the cashier on collaterals belonging to the latter is not entitled to credit for the amount of them after their wrongful withdrawal and conversion by the cashier. Merchants Nat. Bank *v.* Demere, 92 Ga. 735, 19 S. E. 38.

Certificate of deposit.— A bank ordered goods for third persons who were unable to pay for them. The cashier took their note and sent the seller a certificate of deposit payable in three months, regular in form, but signed with his name alone and not as cashier. This transaction was held to be not within the scope of the cashier's authority. Crystal Plate Glass Co. *v.* Livingston First Nat. Bank, 6 Mont. 303, 12 Pac. 678.

Conversion of stock.— When buying and selling stock is outside the legitimate business of a bank, it cannot be held liable in trover for the conversion by its cashier of stock bought for plaintiff on a check drawn to the cashier individually without its knowledge or authority. Preston *v.* Marquette County Sav. Bank, 122 Mich. 696, 81 N. W. 920.

Deposits.—A cashier of a bank in which are deposited the funds of a corporation of which he is treasurer cannot be held personally liable therefor, although he deposited them in his official capacity. Sprague *v.* Steam Nav. Co., 52 Me. 592.

Guaranty.— A guaranty of a note for which the bank has given a consideration, although addressed to the cashier personally, runs to the bank. Woodstock Bank *v.* Downer, 27 Vt. 482, 65 Am. Dec. 210.

Indorsement.—An indorsement by the cashier of a note belonging to the bank is voidable only and passes the legal title unless avoided by the bank. Preston *v.* Cutter, 64 N. H. 461, 13 Atl. 874.

Loan.— If a cashier obtains a note and indorsement thereon, through improper means, from the maker and indorser, which is afterward discounted by the directors, the bank cannot recover of the indorsers. Bank *v.* Irvine, 3 Penr. & W. (Pa.) 250.

Pledge of bank's credit for himself.— He has no implied authority to bind the bank by pledging its credit to secure the discount of his own notes for the benefit of a corporation of which he is a member. State Nat. Bank *v.* Newton Nat. Bank, 66 Fed. 691, 32 U. S. App. 52, 14 C. C. A. 61.

Purchase in his own name for bank's benefit.—A cashier purchased land at a mortgage sale in his own name, although for the benefit of his bank, because it could not legally do so. Nevertheless the purchaser obtained a valid title from the cashier. White *v.* Lester, 4 Abb. Dec. (N. Y.) 585, 1 Keyes (N. Y.) 316, 34 How. Pr. (N. Y.) 136.

Stock.—The stock of a bank was purchased with money borrowed from the bank for which he gave his note indorsed by the president. This agreement between them did not bind the bank; it was not required therefore to hold the note for the president's protection. Davenport First Nat. Bank *v.* Gifford, 47 Iowa 575.

14. Donnell *v.* Lewis County Sav. Bank, 80 Mo. 165; Mercantile Bank *v.* McCarthy, 7 Mo. App. 318; Barnes *v.* Ontario Bank, 19 N. Y. 152; Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120. See also Ringling *v.* Kohn, 6 Mo. App. 333, holding that proof of his acts in the ordinary course of his business is *prima facie* evidence of his authority to borrow money.

Pledge of special deposit.— Bonds were deposited with a bank for safe-keeping and afterward pledged by the cashier and sold for the bank's debt. Although the cashier was not authorized to receive them, the bank became liable therefor from the time he pledged them for its debt. Hughes *v.* Waynesburg First Nat. Bank, 110 Pa. St. 428, 1 Atl. 417. If such bonds are taken by a pledgee in good faith he acquires a valid title. Ringling *v.* Kohn, 4 Mo. App. 59.

transfer its negotiable paper;[15] extend the time for paying a note;[16] accept[17] and sell[18] notes and drafts; release a debt and mortgage when acting in conformity with the established practice and rules of the bank;[19] compromise a debt;[20]

15. *Alabama.*— Everett *v.* U. S., 6 Port. (Ala.) 166, 30 Am. Dec. 584.

Arkansas.—Auten *v.* Manistee Nat. Bank, 67 Ark. 243, 54 S. W. 337, 47 L. R. A. 329.

Georgia.— Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665.

Indiana.— State Bank *v.* Wheeler, 21 Ind. 90; Smith *v.* State Bank, 18 Ind. 327; Allison *v.* Hubbell, 17 Ind. 559; Jones *v.* Hawkins, 17 Ind. 550.

Louisiana.—Haynes *v.* Beckman, 6 La. Ann. 224.

Maine.— Cooper *v.* Curtis, 30 Me. 488; Badger *v.* Cumberland Bank, 26 Me. 428; Farrar *v.* Gilman, 19 Me. 440, 36 Am. Dec. 766; Burnham *v.* Webster, 19 Me. 232.

Massachusetts.— Folger *v.* Chase, 18 Pick. (Mass.) 63; Hartford Bank *v.* Barry, 17 Mass. 94. See also Hallowell, etc., Bank *v.* Hamlin, 14 Mass. 178.

Michigan.— Kimball *v.* Cleveland, 4 Mich. 606.

Mississippi.— Holt *v.* Bacon, 25 Miss. 567; Crockett *v.* Young, 1 Sm. & M. (Miss.) 241; Harper *v.* Calhoun, 7 How. (Miss.) 203.

Missouri.— St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421; Ringling *v.* Kohn, 6 Mo. App. 333.

New Hampshire.— Preston *v.* Cutter, 64 N. H. 461, 13 Atl. 874; Cochecho Nat. Bank *v.* Haskell, 51 N. H. 116, 12 Am. Rep. 67; Corser *v.* Paul, 41 N. H. 24, 77 Am. Dec. 753; Elliot *v.* Abbot, 12 N. H. 549, 37 Am. Dec. 227.

New York.— State Bank *v.* Muskingum Branch State Bank, 29 N. Y. 619; New Haven City Bank *v.* Perkins, 29 N. Y. 554, 86 Am. Dec. 332; Potter *v.* Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273; Genesee Bank *v.* Patchin Bank, 19 N. Y. 312; Babcock *v.* Beman, 11 N. Y. 200; Hoyt *v.* Thompson, 5 N. Y. 320; Robb *v.* Ross County Bank, 41 Barb. (N. Y.) 586; Bridenbecker *v.* Lowell, 32 Barb. (N. Y.) 9; Watervliet Bank *v.* White, 1 Den. (N. Y.) 608; Brockway *v.* Allen, 17 Wend. (N. Y.) 40.

Pennsylvania.— Bissell *v.* Franklin First Nat. Bank, 69 Pa. St. 415.

Tennessee.— Maxwell *v.* Planters' Bank, 10 Humphr. (Tenn.) 506.

West Virginia.— Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

United States.—Auten *v.* U. S. Nat. Bank, 174 U. S. 125, 19 S. Ct. 628, 43 L. ed. 920; West St. Louis Sav. Bank *v.* Parmalee, 95 U. S. 557, 24 L. ed. 490; U. S. *v.* Columbus City Bank, 21 How. (U. S.) 356, 16 L. ed. 130; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 5 L. ed. 631; Chillicothe Branch Ohio State Bank *v.* Fox, 3 Blatchf. (U. S.) 431, 5 Fed. Cas. No. 2,683; U. S. Bank *v.* Davis, 4 Cranch C. C. (U. S.) 533, 2 Fed. Cas. No. 915; Blair *v.* Mansfield First Nat. Bank, 2 Flipp. (U. S.) 111, 3 Fed. Cas. No. 1,485, 12 Bankers' Mag. (3d S.) 721, 2 Browne Nat. Bank Cas. 173, 12 Chic. Leg. N. 84, 5 Reporter 40; Lafayette Bank *v.* Illinois Bank, 4 McLean (U. S.) 208, 14 Fed. Cas. No. 7,987; U. S. *v.* Green, 4 Mason (U. S.) 427, 26 Fed. Cas. No. 15,258; Wild *v.* Passamaquoddy Bank, 3 Mason (U. S.) 505, 29 Fed. Cas. No. 17,646.

See 6 Cent. Dig. tit. "Banks and Banking," § 260.

Indorsement for collection.—He has authority to indorse for collection notes that have been discounted, or deposited for collection, or as collateral security. Corser *v.* Paul, 41 N. H. 24, 77 Am. Dec. 753; Elliot *v.* Abbot, 12 N. H. 549, 37 Am. Dec. 227; State Bank *v.* Farmers' Branch Ohio State Bank, 36 Barb. (N. Y.) 332.

Indorsement to himself.— He can indorse to himself and sue on a note payable to the bank. Young *v.* Hudson, 99 Mo. 102, 12 S. W. 632; Preston *v.* Cutter, 64 N. H. 461, 13 Atl. 874.

Place of indorsement.—He can make an indorsement in the street after banking hours. Bissell *v.* Franklin First Nat. Bank, 69 Pa. St. 415. For authority to do business away from the bank see Valdetero *v.* Citizens' Bank, 51 La. Ann. 1651, 26 So. 425.

Fraudulent indorsement.— Although he indorse the bank's paper in a fraudulent manner, the bank is bound, unless the indorsee had notice of the fraud. Auten *v.* Manistee Nat. Bank, 67 Ark. 243, 54 S. W. 337, 47 L. R. A. 329; Auten *v.* U. S. Nat. Bank, 174 U. S. 125, 19 S. Ct. 628, 43 L. ed. 920.

16. Wakefield Bank *v.* Truesdell, 55 Barb. (N. Y.) 602.

17. Berton *v.* Central Bank, 10 N. Brunsw. 493.

18. Carey *v.* Giles, 10 Ga. 9 (holding that he can transfer a negotiable security to pay a bank debt after the resignation of the board of directors, when the person acting as president is neither an officer nor director); Union Nat. Bank *v.* Delaware First Nat. Bank, 45 Ohio St. 236, 13 N. E. 884; Sturges *v.* Circleville Bank, 11 Ohio St. 153, 78 Am. Dec. 296.

19. Ryan *v.* Dunlap, 17 Ill. 40, 63 Am. Dec. 334.

20. Young *v.* Hudson, 99 Mo. 102, 12 S. W. 632; Corser *v.* Paul, 41 N. H. 24, 77 Am. Dec. 753; Eastman *v.* Coos Bank, 1 N. H. 23; Bridenbecker *v.* Lowell, 32 Barb. (N. Y.) 9; U. S. *v.* Columbus City Bank, 21 How. (U. S.) 356, 16 L. ed. 130.

Formerly he could not compromise a debt (East Tennessee Bank *v.* Hook, 1 Coldw. (Tenn.) 156) and it was declared in Sandy River Bank *v.* Merchants', etc., Bank, 1 Biss. (U. S.) 146, 21 Fed. Cas. No. 12,309, that he could not go into another state and settle an account and give a receipt in full. See also Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189.

May receive what property in satisfaction. — It has been held that a cashier is not authorized to receive other notes, or other things than money in payment of bank debts without consulting the president and directors, but

make an accommodation indorsement;[21] make loans on proper security;[22] notify parties of the non-payment of a bill of exchange;[23] permit an overdraft;[24] give a check in due course of business;[25] institute an action for his bank including attachment proceedings,[26] and employ an attorney for that purpose;[27] certify checks;[28] and credit the proceeds of checks and drafts.[29] He is also the proper officer to make collections,[30] and to that end can transfer the title to another

if he is intrusted with the general business of the bank, renewing its notes, his action is valid. To do these things in such cases express authority need not be shown; his authority can be proved by his course of action in doing these things. Mitchell *v.* Porter, 15 Ky. L. Rep. 335. But an agreement with a cashier by which a debtor assigned rents to the bank to be applied in satisfaction of his debt was held within the scope of the cashier's authority (Stebbins *v.* Lardner, 2 S. D. 127, 48 N. W. 847); and it has also been held that he can take a book account in payment of a note (Santa Fe Exch. Bank *v.* Dick, 73 Mo. App. 354; Peoples' Sav. Bank *v.* Hughes, 62 Mo. App. 576).

21. Genesee Bank *v.* Patchin Bank, 19 N. Y. 312; Houghton *v.* Elkhorn First Nat. Bank, 26 Wis. 663, 7 Am. Rep. 107, the latter case holding that the words "Geo. Buckley, Cas." are in form sufficient to bind a bank. He cannot, however, bind the bank as an accommodation indorser of his own individual note. West St. Louis Sav. Bank *v.* Parmalee, 95 U. S. 557, 24 L. ed. 490.

22. Coats *v.* Donnell, 94 N. Y. 168, holding that where a bank cashier agreed to accept the drafts of another bank on condition of keeping a proper balance to secure the accepter, on which balance the bank was to have a lien for all obligations it might incur in execution of the agreement, this was within the scope of the cashier's authority, and that on the subsequent failure of the drawer bank the other was entitled to apply the balance as against the receiver.

23. State Bank *v.* Vaughan, 36 Mo. 90.

His act is that of the bank in protesting a note. Burnham *v.* Webster, 19 Me. 232.

24. It is not negligence to pay one under some conditions (Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625), although formerly it was (Culver *v.* Marks, 122 Ind. 554, 23 N. E. 1086, 17 Am. St. Rep. 377, 7 L. R. A. 489; Lancaster Bank *v.* Woodward, 18 Pa. St. 357, 57 Am. Dec. 618); and whether he can permit an overdraft or not, his lack of authority is no defense to a recovery by the bank for the money (Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248).

25. **Cashier's check cannot be countermanded.**— As a cashier's check is a bill of exchange drawn by the bank on itself, and accepted in advance, it cannot be countermanded. Valdetero *v.* Citizen's Bank, 51 La. Ann. 1651, 26 So. 425; Drinkall *v.* Movius State Bank, (N. D. 1901) 88 N. W. 724.

When duty of payee to ascertain authority.—Where a cashier kept an account with a stock-broker who from time to time received the cashier's checks drawn on a bank that was a correspondent of his own, the proceeds of which were applied on his account, it was held that it was the broker's duty to ascertain the cashier's authority to draw these checks, for his authority could not be assumed. Anderson *v.* Kissam, 35 Fed. 699.

26. National Park Bank *v.* Whitmore, 40 Hun (N. Y.) 499.

27. Young *v.* Hudson, 99 Mo. 102, 12 S. W. 632; Southgate *v.* Atlantic, etc., R. Co., 61 Mo. 89; Western Bank *v.* Gilstrap, 45 Mo. 419; Eastman *v.* Coos Bank, 1 N. H. 23; Root *v.* Olcott, 42 Hun (N. Y.) 536.

Where there is a general attorney.—He can employ one even though the directors have appointed an attorney to take charge of the general litigation of their bank. Root *v.* Olcott, 23 N. Y. St. 994.

Where he might himself be liable.— He cannot employ one to defend a claim against another bank on which he himself might be liable. Wellington First Nat. Bank *v.* Mansfield Sav. Bank, 6 Ohio Cir. Dec. 452.

28. Cooke *v.* State Nat. Bank, 52 N. Y. 96, 11 Am. Rep. 667; Continental Nat. Bank *v.* National Bank, 50 N. Y. 575; State Bank *v.* Muskingum Branch State Bank, 29 N. Y. 619; Barnes *v.* Ontario Bank, 19 N. Y. 152; Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678; Clarke Nat. Bank *v.* Albion Bank, 52 Barb. (N. Y.) 592; Hill *v.* Nation Trust Co., 108 Pa. St. 1, 56 Am. Rep. 189; Dorsey *v.* Abrams, 85 Pa. St. 299, 27 Am. Rep. 657, 5 Wkly. Notes Cas. (Pa.) 73; Boston Merchants' Nat. Bank *v.* Boston State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008 [*reversing* 3 Cliff. (U. S.) 205, 17 Fed. Cas. No. 9,449]. *Contra*, Mussey *v.* Eagle Bank, 9 Metc. (Mass.) 306.

Cashier's check.—He cannot certify his own check. Lee *v.* Smith, 84 Mo. 304, 54 Am. Rep. 101; Mercantile Mut. Ins. Co. *v.* Hope Ins. Co., 8 Mo. App. 408; Claflin *v.* Farmers', etc., Bank, 25 N. Y. 293; West St. Louis Sav. Bank *v.* Parmalee, 95 U. S. 557, 24 L. ed. 490.

Check of unusual form.— He cannot certify a check of unusual form (Dorsey *v.* Abrams, 85 Pa. St. 299, 5 Wkly. Notes Cas. (Pa.) 73, 27 Am. Rep. 657) or a post-dated check (Pope *v.* Albion Bank, 57 N. Y. 126).

Drawer without funds.— When the holder knows that the drawer has no funds he cannot hold the bank on its certificate, for the cashier has no authority to give one in such a case. Cooke *v.* State Nat. Bank, 52 N. Y. 96, 11 Am. Rep. 667; Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678; Clarke Nat. Bank *v.* Albion Bank, 52 Barb. (N. Y.) 592.

29. German Nat. Bank *v.* Grinstead, 21 Ky. L. Rep. 674, 52 S. W. 951.

30. Warren *v.* Gilman, 17 Me. 360.

bank[31] and take adequate measures for the collection or security of debts due to the bank;[32] or to record the transfer of the bank's stock,[33] and his refusal to do this is the refusal of the bank.[34] He has no authority to sell or encumber the bank's property even to pay a debt,[35] and especially the real estate;[36] to assign collaterals, even though they belong to himself, if they are pledged to the bank for the benefit of another;[37] to transfer judgments in its favor;[38] to discharge an insolvent;[39] to release the maker of a note,[40] or a party[41] or surety thereon, even though the bank holds other security to which it can resort;[42] to accept bills of exchange for the accommodation merely of the drawers;[43] to change the relation of his bank from that of a creditor to that of an agent of a debtor;[44] to pledge a bank's assets for payment of an individual debt;[45] to purchase merchandise in the name of the bank for the benefit of a third person;[46] to promise to pay a check without funds in the bank for that purpose;[47] to issue a specie certificate of deposit to a person who has deposited no specie;[48] to accept a post-dated check with no corresponding deposit;[49] to issue a certificate of deposit to himself;[50]

31. Potter *v.* Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273.

32. Bridenbecker *v.* Lowell, 32 Barb. (N. Y.) 9.

A bank is bound by his neglect to present a bill for acceptance in consequence of which the drawer is released (Metropolis Nat. Bank *v.* Williams, 46 Mo. 17); but a cashier who receives a draft for collection and transmits it to another for that purpose cannot agree to defend in behalf of his bank an action against the first bank by the drawer for negligence in collecting it (Wellington First Nat. Bank *v.* Mansfield Sav. Bank, 10 Ohio Cir. Ct. 233).

Collusion with maker of paper.—Paper was sent to a cashier for collection, with the request to protest and return the portion that was not paid. The cashier colluded with the maker of the paper and never entered it on the bank-book or took any action to collect it. Nevertheless the wrong of the cashier was visited on his bank. National Pahquioque Bank *v.* Bethel First Nat. Bank, 36 Conn. 325, 4 Am. Rep. 80.

Note payable by cashier.— A depositor left a note for collection payable by the cashier, wrote to the cashier asking him to remit a draft to New York and apply the amount on the note, and the draft was remitted, but charged to the depositor, the president knowing of these things. When the depositor learned what the cashier had done he sued to recover his deposit and succeeded. Reynolds *v.* Kenyon, 43 Barb. (N. Y.) 585.

33. Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. ed. 1039.

He can sign a blank transfer on a certificate of stock held as collateral and deliver the certificate to the pledger on payment of the loan. Matthews *v.* Massachusetts Nat. Bank, Holmes (U. S.) 396, 16 Fed. Cas. No. 9,286, 10 Alb. L. J. 199, 14 Am. L. Reg. N. S. 153, 1 Am. L. T. Rep. N. S. 512, 1 Centr. L. J. 469, 20 Int. Rev. Rec. 110, 6 Leg. Gaz. (Pa.) 308, 22 Pittsb. Leg. J. (Pa.) 38.

34. Case *v.* Louisiana Citizens' Bank, 100 U. S. 446, 25 L. ed. 695.

35. *Kansas.*— Greenawalt *v.* Wilson, 52 Kan. 109, 34 Pac. 403; Asher *v.* Sutton, 31 Kan. 286, 1 Pac. 535.

Mississippi.— Holt *v.* Bacon, 25 Miss. 567.

New Jersey.— Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

New York.— Tennessee *v.* Davis, 50 How. Pr. (N. Y.) 447.

United States.— U. S. *v.* Columbus City Bank, 21 How. (U. S.) 356, 16 L. ed. 130.

36. Winsor *v.* Lafayette County Bank, 18 Mo. App. 665.

37. Merchants Nat. Bank *v.* Demere, 92 Ga. 735, 19 S. E. 38.

38. Holt *v.* Bacon, 25 Miss. 567. *Contra*, Vergennes Bank *v.* Warren, 7 Hill (N. Y.) 91.

39. Union Bank *v.* Jones, 4 La. Ann. 220; Union Bank *v.* Bagley, 10 Rob. (La.) 43.

40. Hodge *v.* Richmond First Nat. Bank, 22 Gratt. (Va.) 51.

41. Ecker *v.* New Windsor First Nat. Bank, 59 Md. 291.

42. *Dakota.*— Thompson *v.* McKee, 5 Dak. 172, 37 N. W. 367.

Maryland.— Ecker *v.* New Windsor First Nat. Bank, 59 Md. 291.

Mississippi.— See Payne *v.* Commercial Bank, 6 Sm. & M. (Miss.) 24.

Missouri.— Daviess County Sav. Assoc. *v.* Sailor, 63 Mo. 24; People's Sav. Bank *v.* Hughes, 62 Mo. App. 576. See also Metropolis Nat. Bank *v.* Williams, 46 Mo. 17.

Nebraska.— Merchants' Bank *v.* Rudolf, 5 Nebr. 527.

New Hampshire.— Cochecho Nat. Bank *v.* Haskell, 51 N. H. 116, 12 Am. Rep. 67.

43. Farmers', etc., Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457. See also Pendleton *v.* State Bank, 1 T. B. Mon. (Ky.) 171.

44. State Bank *v.* Reed, 1 Watts & S. (Pa.) 101.

45. Tennessee *v.* Davis, 50 How. Pr. (N. Y.) 447.

46. North Star Boot, etc., Co. *v.* Stebbins, 2 S. D. 74, 48 N. W. 833.

47. Morse *v.* Massachusetts Nat. Bank, Holmes (U. S.) 209, 17 Fed. Cas. No. 9,857.

48. Robinson *v.* Bealle, 20 Ga. 275.

49. Pope *v.* Albion Bank, 57 N. Y. 126.

50. Lee *v.* Smith, 84 Mo. 304, 54 Am. Rep. 101.

to transfer notes outside the ordinary course of business;[51] to assign notes that have been discounted to a depositor in payment of his deposit;[52] to indorse a non-negotiable note;[53] to accept, in payment of a debt due the bank, the bank's certificate of the capital stock of an insurance company;[54] to promise to pay a debt which his bank does not owe, or to admit forged bills to be genuine;[55] to represent his bank at a meeting of creditors without authority from the directors;[56] to render his bank liable contrary to its express action;[57] to execute a bond of indemnity to the sheriff who has levied on property under an execution in favor of the bank;[58] or to take in payment of a note a verbal assignment of an interest in another note.[59]

(III) *Of President and Cashier Jointly.* By charter it is provided that many acts can be done only by the joint action of the president and cashier.[60] When this provides that the funds shall in no case be liable for any contract unless it is signed by the president and countersigned by the cashier, the requirement does not apply to the ordinary duties of the cashier, like the indorsing of bills.[61]

d. Of Minor Officers. The usual assistants in a bank — tellers, bookkeepers, and others — act under special or express authority.[62] Third persons deal with them *suo periculo*[63] and their acts bind their bank only when they are within the line of authority.[64] A bank is bound by the entry in a bank-book made by the

51. Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

52. Lamb *v.* Cecil, 25 W. Va. 288.

53. Holt *v.* Bacon, 25 Miss. 567; Gillet *v.* Phillips, 13 N. Y. 114; Barrick *v.* Austin, 21 Barb. (N. Y.) 241.

54. Bank of Commerce *v.* Harte, 37 Nebr. 197, 55 N. W. 631, 40 Am. St. Rep. 479, 20 L. R. A. 780.

55. Merchants' Bank *v.* Marine Bank, 3 Gill (Md.) 96, 43 Am. Dec. 300.

56. Reed *v.* Powell, 11 Rob. (La.) 98.

57. State Bank *v.* Farmers' Branch Ohio State Bank, 36 Barb. (N. Y.) 332.

58. Watson *v.* Bennett, 12 Barb. (N. Y.) 196.

59. Piedmont Bank *v.* Wilson, 124 N. C. 561, 32 S. E. 889.

60. **Do not prevent bank acting through other agents.**—Minn. Stat. (1860), c. 133, § 19, which provides that contracts made by banks shall be signed by the president and cashier, does not prevent a bank from contracting through other agents. Dana *v.* St. Paul Bank, 4 Minn. 385.

They cannot mortgage the real estate of a bank (Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728); pledge the bank's assets for the payment of an antecedent debt (Tennessee *v.* Davis, 50 How. Pr. (N. Y.) 447); or release an indorser when the authority to discount notes is reserved by the directors to themselves (U. S. Bank *v.* Dunn, 6 Pet. (U. S.) 51, 8 L. ed. 316).

61. *Connecticut.*— Paine *v.* Stewart, 33 Conn. 516.

Georgia.— Carey *v.* McDougald, 7 Ga. 84; Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665.

Indiana.—Allison *v.* Hubbell, 17 Ind. 559; Jones *v.* Hawkins, 17 Ind. 550.

Tennessee.— Northern Bank *v.* Johnson, 5 Coldw. (Tenn.) 88.

United States.— Alexandria Mechanics' Bank *v.* Columbia Bank, 5 Wheat. (U. S.) 326, 5 L. ed. 100.

By-laws.— The by-laws of a company required the president to countersign all checks drawn by, or payable to, it, yet on several occasions the general manager alone indorsed them and they were paid by the bank, whose action was sustained. Thorold Mfg. Co. *v.* Imperial Bank, 13 Ont. 330.

62. Whitehouse *v.* Cooperstown Bank, 48 N. Y. 239.

63. Walker *v.* St. Louis Nat. Bank, 5 Mo. App. 214.

The public are not bound to inquire into the special instructions which the officers of a bank may have received about the manner of discharging their duties. Munn *v.* Burch, 25 Ill. 35. They are not supposed to know how the duties of bank officers are apportioned among themselves. If, therefore, an official who receives a note for collection, or the money in payment therefor which is offered at the counter, the person dealing with him is justified, in the absence of positive knowledge, in supposing that he has authority to act in this manner. City Nat. Bank *v.* Martin, 70 Tex. 643, 8 S. W. 507, 8 Am. St. Rep. 632.

64. Hepburn *v.* Citizens Bank, 2 La. Ann. 1007, 46 Am. Dec. 564; Mechanics', etc., Bank *v.* Banks, 11 La. 260.

Agreement concerning deposit.— A teller has no authority to make an agreement concerning a deposit. Riley *v.* Albany Sav. Bank, 103 N. Y. 669; Whitehouse *v.* Cooperstown Bank, 48 N. Y. 239.

Certification.—When a clerk can certify, his act binds the bank regardless of the condition of the drawer's account. Cooke *v.* State Nat. Bank, 52 N. Y. 96, 11 Am. Rep. 667; French *v.* Irwin, 4 Baxt. (Tenn.) 401, 27 Am. Rep. 769.

Loan.— A teller of a bank, who was short, borrowed money of the teller of a second bank, and mingled it with his own. The second bank was held to be not entitled to recover the money of the other. Charleston Bank *v.* State Bank, 13 Rich. (S. C.) 291.

proper clerk;[65] by a declaration made by one within his proper field of employment;[66] and if he acts in the place of the cashier or other administrative officer during the latter's absence, by his acts which pertain to the usual and ordinary business of the bank.[67]

5. Liability For Acts of Officers — a. Liability of Corporation — (i) *In General.* To render the bank liable for an officer's act, it must have been done for the institution.[68] If he goes beyond the range of his duties and of his own will does an unlawful thing he will be personally liable but not the bank;[69] but although an officer's wrongful act cannot be authorized or ratified,[70] the bank may sometimes be liable therefor.[71]

(ii) *For Contracts.* Although the defense of *ultra vires* will not prevent a recovery for torts, different rules apply to the contracts made by the bank's officers.[72]

See also Skinner *v.* Merchants' Bank, 4 Allen (Mass.) 290.

Receiving packages.— The receipt of a package by a minor officer, if no instructions have been given to him, binds the bank. Sweet *v.* Barney, 23 N. Y. 335; Hotchkiss *v.* Artisans' Bank, 2 Abb. Dec. (N. Y.) 403, 2 Keyes (N. Y.) 564; Pattison *v.* Syracuse Nat. Bank, 1 Hun (N. Y.) 606.

Receiving deposit.— When a bank has a receiving and a paying teller, the former only has authority to receive deposits. Thatcher *v.* State Bank, 5 Sandf. (N. Y.) 121.

Receiving deposit without pass-book.— If a teller should receive money without a deposit ticket or pass-book required by rule of the bank and, by mistake, credit the wrong person, the bank would be liable. Jackson Ins. Co. *v.* Cross, 9 Heisk. (Tenn.) 283.

Releasing borrower.—A teller cannot erase the name of one of the makers of a note, and if he does the bank is not bound by his action. Marine Bank *v.* Ferry, 40 Ill. 255.

65. False entries bind the bank. Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Union Bank *v.* Mott, 39 Barb. (N. Y.) 180. See also Washington Bank *v.* Lewis, 22 Pick. (Mass.) 24. See Van Leuven *v.* Kingston First Nat. Bank, 54 N. Y. 671, where a person left bonds with a bank for exchange which were credited on the president's account, but the entry did not prevent the owner from recovering of the bank.

66. Potter *v.* Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273.

Declaration as to genuineness of indorsement.— His statement that an indorsement on a check is genuine does not bind. Walker *v.* St. Louis Nat. Bank, 5 Mo. App. 214.

67. Certifying.— An assistant cashier who is acting as cashier and teller can certify a check. Clarke Nat. Bank *v.* Albion Bank, 52 Barb. (N. Y.) 592.

He can indorse and transmit notes for collection, but he has no power to pledge them unless they become pledged by their transmission. Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

68. Acting as agents for customers.— Officers occasionally act as agents for their customers, in making deposits (Manhattan Co. *v.* Lydig, 4 Johns. (N. Y.) 377, 4 Am. Dec. 289), paying notes (Thatcher *v.* State Bank, 5 Sandf. (N. Y.) 121), making loans, and in other ways. When they act thus the bank is not responsible for what they do, but the question is sometimes difficult to answer, whether the customer supposed the official was acting for him or for the bank in executing a request (New England Mortg. Security Co. *v.* Addison, 15 Nebr. 335, 18 N. W. 76; Olmsted *v.* New England Mortg. Security Co., 11 Nebr. 487, 9 N. W. 650; Cheney *v.* Woodruff, 6 Nebr. 151).

If a note should be left with a teller for collection, payable to his order, and the bank should receive the money, although credited to the teller's account, it would be liable to the owner for the amount. City Nat. Bank *v.* Martin, 70 Tex. 643, 8 S. W. 507, 8 Am. St. Rep. 632; Boston Merchants' Nat. Bank *v.* Boston State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008.

69. Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353; Miller *v.* Burlington, etc., R. Co., 8 Nebr. 219; Weed *v.* Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474; Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599; Thomson *v.* Sixpenny Sav. Bank, 5 Bosw. (N. Y.) 293; Clark *v.* Metropolitan Bank, 3 Duer (N. Y.) 241; Wright *v.* Wilcox, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507.

70. Memphis *v.* Memphis Gayoso Gas Co., 9 Heisk. (Tenn.) 531.

71. This happens when the other party believed, and was justified in believing, that the officer was acting within his authority, although in truth he was not, and a loss would be sustained if the contract were not executed.

Connecticut.— Goodspeed *v.* East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439.

Indiana.— Madison, etc., R. Co. *v.* Norwich Sav. Soc., 24 Ind. 457.

Missouri.— Gillett *v.* Missouri Valley R. Co., 55 Mo. 315, 17 Am. Rep. 653.

Nebraska.— Miller *v.* Burlington, etc., R. Co., 8 Nebr. 219.

New Jersey.— Brokaw *v.* New Jersey R., etc., Co., 32 N. J. L. 328, 90 Am. Dec. 659.

New York.— Clark *v.* Metropolitan Bank, 3 Duer (N. Y.) 241.

72. Contract manifestly ultra vires.— Where the contract was manifestly beyond and outside of the powers of the bank, it was

(III) *For Torts.* As the law confers no authority on corporations to do wrong, every wrongful act is technically *ultra vires*, yet in such cases it has no application and banks are liable for the acts of their servants to the same extent that individuals would be.[73]

at one time held that there could be no enforcement or recovery in any form anywhere, and in some states this rule still prevails. McNulta *v.* Corn Belt Bank, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203; Jemison *v.* Citizens' Sav. Bank, 122 N. Y. 135, 25 N. E. 264, 33 N. Y. St. 335, 19 Am. St. Rep. 482, 9 L. R. A. 708; Nassau Bank *v.* Jones, 95 N. Y. 115, 47 Am. Rep. 14.

Contract ultra vires and unexecuted.— If the contract is *ultra vires* and has not been executed by either party it cannot be enforced.

Massachusetts.— Monument Nat. Bank *v.* Globe Works, 101 Mass. 57, 3 Am. Rep. 322.

Missouri.— Matthews *v.* Skinker, 62 Mo. 329, 21 Am. Rep. 425.

New York.— Jemison *v.* Citizens' Sav. Bank, 122 N. Y. 135, 25 N. E. 264, 33 N. Y. St. 335, 19 Am. St. Rep. 482, 9 L. R. A. 708; Bridgeport City Bank *v.* Empire Stone Dressing Co., 30 Barb. (N. Y.) 421.

Wisconsin.—Rock River Bank *v.* Sherwood, 10 Wis. 230, 78 Am. Dec. 669.

United States.— Citizens' State Bank *v.* Hawkins, 71 Fed. 369, 34 U. S. App. 423, 18 C. C. A. 78.

Both parties contracting with knowledge and contract executed by one of them.— When the contract is in excess of corporate powers to the knowledge of both parties, and it has been executed by one of them, and justice, public policy, and sound morals require its execution by the other, while there can be no enforcement of, and recovery on, the contract itself, the party who has been benefited from its execution can be compelled to return the money or other property he has received.

Alabama.— Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353; Chambers *v.* Falkner, 65 Ala. 448; Marion Sav. Bank *v.* Dunkin, 54 Ala. 471.

California.— Kennedy *v.* California Sav. Bank, 101 Cal. 495, 35 Pac. 1039, 40 Am. St. Rep. 69.

Indiana.— Franklin Nat. Bank *v.* Whitehead, 149 Ind. 560, 49 N. E. 592, 63 Am. St. Rep. 302, 39 L. R. A. 725.

Maryland.— Weckler *v.* Hagerstown First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95.

Massachusetts.— Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; White *v.* Franklin Bank, 22 Pick. (Mass.) 181.

Mississippi.— Williams *v.* Bank of Commerce, 71 Miss. 858, 16 So. 238, 42 Am. St. Rep. 503.

Nebraska.— Rich *v.* State Nat. Bank, 7 Nebr. 201, 29 Am. Rep. 382; Kennedy *v.* Otoe County Nat. Bank, 7 Nebr. 59.

New Jersey.— National Trust Co. *v.* Miller, 33 N. J. Eq. 155.

Washington.— Tootle *v.* Port Angeles First Nat. Bank, 6 Wash. 181, 33 Pac. 345.

United States.—Genesee Nat. Bank *v.* Whitney, 103 U. S. 99, 26 L. ed. 443; Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. ed. 188; Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. ed. 648; American Nat. Bank *v.* National Wall Paper Co., 77 Fed. 85, 40 U. S. App. 646, 23 C. C. A. 33; Holt *v.* Winfield Bank, 25 Fed. 812; Farmers' L. & T. Co. *v.* St. Joseph, etc., R. Co., 1 McCrary (U. S.) 247, 2 Fed. 117.

But see State Bank *v.* Hammond, 1 Rich. (S. C.) 281, where a recovery on the contract was permitted.

Party contracting in ignorance of fact.— When the party contracting with a bank is ignorant of the fact that the contract is *ultra vires*, it has been held that this defense cannot be used against him.

Connecticut.— Credit Co. *v.* Howe Mach. Co., 54 Conn. 357, 8 Atl. 472, 1 Am. St. Rep. 123.

Indiana.— State Board *v.* Citizens St. R. Co., 47 Ind. 407, 17 Am. Rep. 702.

Massachusetts.— Monument Nat. Bank *v.* Globe Works, 101 Mass. 57, 3 Am. Rep. 322.

New Hampshire.— Connecticut River Sav. Bank *v.* Fiske, 60 N. H. 363.

New Jersey.— National Bank of Republic *v.* Young, 41 N. J. Eq. 531, 7 Atl. 488.

New York.— Mechanics' Banking Assoc. *v.* New York, etc., White Lead Co., 35 N. Y. 505; Genesee Bank *v.* Patchin Bank, 13 N. Y. 309; Safford *v.* Wyckoff, 4 Hill (N. Y.) 442; Vallett *v.* Parker, 6 Wend. (N. Y.) 615; Stoney *v.* American L. Ins. Co., 11 Paige (N. Y.) 635.

Party contracting with knowledge of fact.—When the contracting party knows through the bank's charter or in other ways that the contract is *ultra vires*, it has been held that there can be no recovery on the contract.

Alabama.— Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353.

Massachusetts.— Slater Woollen Co. *v.* Lamb, 143 Mass. 420, 9 N. E. 823; Bowditch *v.* New England Mut. L. Ins. Co., 141 Mass. 292, 4 N. E. 798, 55 Am. Rep. 474; Whitney *v.* Leominster Sav. Bank, 141 Mass. 85, 6 N. E. 551; Monument Nat. Bank *v.* Globe Works, 101 Mass. 57, 3 Am. Rep. 322; Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128.

New York.— Nassau Bank *v.* Jones, 95 N. Y. 115, 47 Am. Rep. 14; Woodruff *v.* Erie R. Co., 93 N. Y. 609; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62, 20 Am. Rep. 504.

Pennsylvania.— Wright *v.* Pipe Line Co., 101 Pa. St. 204, 47 Am. Rep. 701.

United States.— Genesee Nat. Bank *v.* Whitney, 103 U. S. 99, 26 L. ed. 443; Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. ed. 188.

73. *Alabama.*— Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353.

b. Liability of Officers — (I) *Civil Liability* — (A) *In General.* Officers are personally liable for their malicious or fraudulent conduct, but not for a mere nonfeasance;[74] and since no officer can authorize another to perpetrate a wrong

California.— Maynard *v.* Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672.

Colorado.— American Nat. Bank *v.* Hammond, 25 Colo. 367, 55 Pac. 1090.

Connecticut.— Goodspeed *v.* East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439.

Georgia.— Howe Mach. Co. *v.* Souder, 58 Ga. 64; Scofield Rolling Mill Co. *v.* State, 54 Ga. 635; McDougald *v.* Bellamy, 18 Ga. 411.

Louisiana.— Vinas *v.* Merchants' Mut. Ins. Co., 27 La. Ann. 367.

Maine.— Frankfort Bank *v.* Johnson, 24 Me. 490.

Maryland.— Western Maryland R. Co. *v.* Franklin Bank, 60 Md. 36; Tome *v.* Parkersburg Branch R. Co., 39 Md. 36, 17 Am. Rep. 540.

Massachusetts.— Reed *v.* Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468; Ripley *v.* McBarron, 125 Mass. 272; Skinner *v.* Merchants' Bank, 4 Allen (Mass.) 290; Atlantic Bank *v.* Merchants' Bank, 10 Gray (Mass.) 532; Stone *v.* Crocker, 24 Pick. (Mass.) 81; Thayer *v.* Boston, 19 Pick. (Mass.) 511, 31 Am. Dec. 157.

Missouri.—Alexander *v.* Relfe, 74 Mo. 495; Gillett *v.* Missouri Valley R. Co., 55 Mo. 315, 17 Am. Rep. 653; Iron Mountain Bank *v.* Mercantile Bank, 4 Mo. App. 505; Keber *v.* Mercantile Bank, 4 Mo. App. 195.

Nebraska.— Miller *v.* Burlington, etc., R. Co., 8 Nebr. 219.

New Jersey.— Evening Journal Assoc. *v.* McDermott, 44 N. J. L. 430, 43 Am. Rep. 392; Brokaw *v.* New Jersey R., etc., Co., 32 N. J. L. 328, 90 Am. Dec. 659; State *v.* Morris, etc., R. Co., 23 N. J. L. 360.

New York.— Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; Fishkill Sav. Inst. *v.* Fishkill Nat. Bank, 80 N. Y. 162, 36 Am. Rep. 595; Cutting *v.* Marlor, 78 N. Y. 454; New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30; Knickerbocker L. Ins. Co. *v.* Ecclesine, 34 N. Y. Super. Ct. 76.

Ohio.— Citizens' Sav. Bank *v.* Blakesley, 42 Ohio St. 645.

Pennsylvania.— Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684.

Tennessee.— Wheless *v.* Second Nat. Bank, 1 Baxt. (Tenn.) 469, 25 Am. Rep. 783; Nashville *v.* Brown, 9 Heisk. (Tenn.) 1, 24 Am. Rep. 289; Ohio L. Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 11 Humphr. (Tenn.) 1, 53 Am. Dec. 742; Humes *v.* Knoxville, 1 Humphr. (Tenn.) 403, 34 Am. Dec. 657.

Washington.— Pronger *v.* Old Nat. Bank, 20 Wash. 618, 56 Pac. 391.

United States.— Salt Lake City *v.* Hollister, 118 U. S. 256, 6 S. Ct. 1055, 30 L. ed. 176; Carlisle First Nat. Bank *v.* Graham, 100 U. S. 699, 25 L. ed. 750; Stewart *v.* Sonneborn, 98 U. S. 187, 25 L. ed. 116; Boston Merchants' Nat. Bank *v.* Boston State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008; Philadelphia, etc., R. Co. *v.* Quigley, 21 How. (U. S.) 202, 16 L. ed. 73; Alexandria Mechanics' Bank *v.* Columbia Bank, 5 Wheat. (U. S.) 326, 5 L. ed. 100; Nevada Bank *v.* Portland Nat. Bank, 59 Fed. 338.

England.— Mitchell *v.* Jenkins, 5 B. & Ad. 588, 3 L. J. K. B. 35, 2 N. & M. 301, 27 E. C. L. 250; Yarborough *v.* Bank of England, 16 East 6; Ranger *v.* Great Western R. Co., 5 H. L. Cas. 72, 10 Eng. Reprint 824.

Fraudulent representations.— An action of deceit may be maintained against a bank for the fraudulent representation of an officer within the scope of his authority. Mackay *v.* Commercial Bank, L. R. 5 P. C. 394, 43 L. J. P. C. 31, 30 L. T. Rep. N. S. 180, 22 Wkly. Rep. 473.

Fraudulent sale.— A bank whose managing officer, while acting in a fiduciary capacity for a customer, sells to him bonds held by the bank for a speculative purpose, and grossly misrepresents their worth, is liable therefor. Carr *v.* Watertown Nat. Bank, etc., Co., 167 N. Y. 375, 60 N. E. 649, 82 Am. St. Rep. 725.

Misapplication of funds, etc.— Where an officer who is the recipient of funds, checks, or other instruments, as a representative of a bank, misapplies them, his bank is liable.

Missouri.— Ihl *v.* St. Joseph Bank, 26 Mo. App. 129.

New Hampshire.—Concord *v.* Concord Bank, 16 N. H. 26.

New York.— Smith *v.* Anderson, 57 Hun (N. Y.) 72, 10 N. Y. Suppl. 278, 32 N. Y. St. 5; Bridenbecker *v.* Lowell, 32 Barb. (N. Y.) 9; Zugner *v.* Best, 44 N. Y. Super. Ct. 393; Thatcher *v.* State Bank, 5 Sandf. (N. Y.) 121.

Texas.— City Nat. Bank *v.* Martin, 70 Tex. 643, 8 S. W. 507, 8 Am. St. Rep. 632.

United States.— See Evansville First Nat. Bank *v.* Louisville Fourth Nat. Bank, 56 Fed. 967, 16 U. S. App. 1, 6 C. C. A. 183.

74. False representations.— They are answerable for false representations concerning the condition of their bank whereby others are led to purchase their stock and are injured.

California.— Hewlett *v.* Epstein, 63 Cal. 184.

Kansas.— State *v.* Mason, 61 Kan. 102, 58 Pac. 978.

Nebraska.—Gerner *v.* Mosher, 58 Nebr. 135, 78 N. W. 384, 46 L. R. A. 244.

New York.— Morgan *v.* Skiddy, 62 N. Y. 319; Sears *v.* Waters, 44 Hun (N. Y.) 101; Huntington *v.* Attrill, 42 Hun (N. Y.) 459; Pier *v.* George, 20 Hun (N. Y.) 210; Carley *v.* Hodges, 19 Hun (N. Y.) 187; Blake *v.* Wheeler, 18 Hun (N. Y.) 496; Cross *v.* Sackett, 2 Bosw. (N. Y.) 617, 6 Abb. Pr. (N. Y.) 247; Brockway *v.* Ireland, 61 How. Pr. (N. Y.) 372.

Ohio.— Merchants' Nat. Bank *v.* Thoms, 11 Ohio Dec. (Reprint) 632, 28 Cinc. L. Bul. 164.

Vermont.—Paddock *v.* Fletcher, 42 Vt. 389.

he cannot use such authority as a shield to a legal action.[75] When liable for filing false or misleading reports, or for neglecting to file them as required by law, the action is in the nature of a penalty and can, as a rule, be enforced only in the state where it is prescribed.[76]

(B) *Of Directors* — (1) In General. The liability of directors is in many cases prescribed by statute or charter[77] and is not extinguished by its expiration;[78] but unless so fixed the act must in some way possess an element of fraud,[79] or show the lack of knowledge they ought to have possessed when accepting office.[80]

See also Prewitt *v.* Trimble, 92 Ky. 176, 13 Ky. L. Rep. 581, 17 S. W. 356, 36 Am. St. Rep. 586; Graves *v.* Lebanon Bank, 10 Bush (Ky.) 23, 19 Am. Rep. 50.

Misapplication of funds.— The officers of a bank united in abstracting and misapplying its funds and, to accomplish this purpose, obtained the note of a friend and put it in the bank's possession. The maker was held liable thereon. Richardson *v.* Watson, 26 So. 422. A misapplication of collaterals by the president of a bank is waived by giving a new note for the original loan without abatement for the collaterals. Girard Bank *v.* Richards, 4 Phila. (Pa.) 250, 18 Leg. Int. (Pa.) 22.

75. *Illinois.*— Wheeler *v.* Home Sav., etc., Bank, 188 Ill. 34, 58 N. E. 598, 80 Am. St. Rep. 161; National Home Bldg., etc., Assoc. *v.* Home Sav. Bank, 181 Ill. 35, 54 N. E. 619, 72 Am. St. Rep. 245.

Kansas.— Ft. Scott First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646.

Kentucky.— Taylor *v.* State Bank, 2 J. J. Marsh. (Ky.) 564.

Maryland.— Engler *v.* People's F. Ins. Co., 46 Md. 322.

Missouri.— Chew *v.* Ellingwood, 86 Mo. 260, 56 Am. Rep. 429.

New York.— Rochester City Bank *v.* Elwood, 21 N. Y. 88.

Pennsylvania.— German American Bank *v.* Auth, 87 Pa. St. 419, 30 Am. Rep. 374.

Tennessee.— McMillen Marble Co. *v.* Harvey, 92 Tenn. 115, 20 S. W. 427, 36 Am. St. Rep. 71, 18 L. R. A. 252.

United States.— Minor *v.* Alexandria Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47.

England.— Cullen *v.* Thomson, 9 Jur. N. S. 85, 6 L. T. Rep. N. S. 870, 4 Macq. 431.

76. Plymouth First Nat. Bank *v.* Price, 33 Md. 487, 3 Am. Rep. 204; Derrickson *v.* Smith, 27 N. J. L. 166; Bird *v.* Hayden, 1 Rob. (N. Y.) 383, 2 Abb. Pr. N. S. (N. Y.) 61. *Contra*, Neal *v.* Moultrie, 12 Ga. 104; Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123.

77. If a charter provide that no director shall be indebted to his bank, a draft drawn by himself on the treasurer of a company of which he is president in payment of a loan would not be a violation. Penn *v.* Bornman, 102 Ill. 523.

78. Hargroves *v.* Chambers, 30 Ga. 580.

79. Fusz *v.* Spaunhorst, 67 Mo. 256.

80. They must use ordinary diligence in acquiring a knowledge and in administering the affairs of their bank, and are liable if they do not.

Alabama.—Godbold *v.* Mobile Branch Bank, 11 Ala. 191, 46 Am. Dec. 211.

Illinois.— Delano *v.* Case, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81.

Kansas.— German Sav. Bank *v.* Wulfekuhler, 19 Kan. 60.

Kentucky.— Louisville Sav. Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; Jones *v.* Johnson, 86 Ky. 530, 9 Ky. L. Rep. 789, 6 S. W. 582; Brannin *v.* Loving, 82 Ky. 370; Dunn *v.* Kyle, 14 Bush (Ky.) 134; Shakers United Soc. *v.* Underwood, 9 Bush (Ky.) 609, 15 Am. Rep. 731.

Maine.— Mutual Redemption Bank *v.* Hill, 56 Me. 385, 96 Am. Dec. 470.

Michigan.— Commercial Bank *v.* Chatfield, 121 Mich. 641, 80 N. W. 712.

Missouri.— Union Nat. Bank *v.* Hill, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615; Thompson *v.* Greeley, 107 Mo. 577, 17 S. W. 962; Fusz *v.* Spaunhorst, 67 Mo. 256.

Nebraska.— Gerner *v.* Mosher, 58 Nebr. 135, 78 N. W. 384, 46 L. R. A. 244; Merchants' Bank *v.* Rudolf, 5 Nebr. 527.

New Jersey.— Campbell *v.* Watson, (N. J. 1901) 50 Atl. 120; Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Wilkinson *v.* Dodd, 40 N. J. Eq. 123, 3 Atl. 360; Williams *v.* Halliard, 38 N. J. Eq. 373; Williams *v.* McDonald, 37 N. J. Eq. 409; Citizens Loan Assoc. *v.* Lyon, 29 N. J. Eq. 110.

New York.— Dykman *v.* Keeney, 154 N. Y. 483, 48 N. E. 894; Brinckerhoff *v.* Bostwick, 88 N. Y. 52; Hun *v.* Cary, 82 N. Y. 65, 37 Am. Rep. 546; Robinson *v.* Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212.

Pennsylvania.— Swentzel *v.* Penn Bank, 147 Pa. St. 140, 23 Atl. 405, 415, 29 Wkly. Notes Cas. (Pa.) 441, 30 Am. St. Rep. 718, 15 L. R. A. 305; Penn Bank *v.* Hopkins, 111 Pa. St. 328, 2 Atl. 83, 56 Am. Rep. 266; Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684.

Tennessee.— Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Moses *v.* Ocoee Bank, 1 Lea (Tenn.) 398.

Texas.— Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592.

Utah.— Warren *v.* Robison, 19 Utah 289, 57 Pac. 287, 75 Am. St. Rep. 734.

Virginia.— Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 17 Am. St. Rep. 84, 2 L. R. A. 534.

United States.— Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662; Martin *v.* Webb, 110 U. S. 7, 3 S. Ct. 428, 28 L. ed. 49; Warner *v.* Penoyer, 91 Fed. 587, 61 U. S. App. 372, 33 C. C. A. 222; Stearns *v.* Lawrence, 83 Fed. 738, 54 U. S. App. 532, 28 C. C. A. 66; Gibbons *v.* Anderson, 80 Fed.

The essential taint of fraud or abuse of trust may consist of the continued employment of officers who are known to be speculating, or otherwise absorbed primarily in their own personal affairs to the known detriment of those of the bank;[81] of not making the returns or reports required by the state, or of knowingly making incorrect ones;[82] of making false representations concerning their bank's condition with the view of selling their stock to better advantage or attracting business;[83] of making fraudulent issues and sales of stock;[84] of receiving deposits when their bank is in an insolvent condition;[85] of making

345; Robinson *v.* Hall, 63 Fed. 222, 25 U. S. App. 48, 12 C. C. A. 48 [*reversing* 59 Fed. 648]; Trustees Mutual Bldg. Fund, etc., Sav. Bank *v.* Borseing, 4 Hughes (U. S.) 387, 3 Fed. 817; Corbett *v.* Woodward, 5 Sawy. (U. S.) 403, 6 Fed. Cas. No. 3,223, 11 Chic. Leg. N. 246.

The rule declared in the oldest American case by the highest court of Louisiana has been more often quoted and followed than any other: "The duties of directors are those of control, and the neglect which would render them responsible for not exercising that control properly, must depend on circumstances, and in a great measure be tested by the facts of the case. If nothing has come to their knowledge, to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible." Percy *v.* Millaudon, 8 Mart. N. S. (La.) 68, 75.

In one of the latest well-considered cases in which many authorities were reviewed the court said: "It is not of course to be expected that the directors shall attend to the current business, but they must, at their peril, give such attention to and so manage the concerns of the company that they may be able at all times to know what their executive officers and other agents, as well as their fellow directors are doing." Fisher *v.* Parr, 92 Md. 245, 48 Atl. 621.

Examination of books.— For cases in which negligence was claimed or proved from not examining the books see Louisville Sav. Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; Shakers United Soc. *v.* Underwood, 9 Bush (Ky.) 609, 15 Am. Rep. 731; Swentzel *v.* Penn Bank, 147 Pa. St. 140, 29 Wkly. Notes Cas. (Pa.) 441, 23 Atl. 405, 415, 30 Am. St. Rep. 718, 15 L. R. A. 305; Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 17 Am. St. Rep. 84, 2 L. R. A. 534.

Purchase of stock.— The directors are not liable to the vendor of stock for an unauthorized purchase of it in the bank's name, which the bank repudiated. Abeles *v.* Cochran, 22 Kan. 405, 31 Am. Rep. 194.

81. Prather *v.* Kean, 29 Fed. 498.

A single unknown wrongful act of the president is not sufficient to charge directors with gross negligence. Brannin *v.* Loving, 82 Ky. 370.

82. Larsen *v.* James, 1 Colo. App. 313, 29 Pac. 183; Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121.

Participation in fraud not essential.— If directors sign a fraudulent statement of their bank's condition, they are liable to a person injured whether they participated in the fraud or not. Houston *v.* Thornton, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699; Caldwell *v.* Bates, 118 N. C. 323, 24 S. E. 481; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Kinkler *v.* Junica, 84 Tex. 116, 19 S. W. 359.

Report as evidence of officer's knowledge.— A statement of a bank's condition signed by a director is *prima facie* evidence that he knew whether it was true or false, but this presumption may be rebutted. Ward *v.* Trimble, 103 Ky. 153, 19 Ky. L. Rep. 1801, 44 S. W. 450.

83. *Nebraska.*— Gerner *v.* Yates, 61 Nebr. 100, 84 N. W. 596; Stuart *v.* Staklehurst Bank, 57 Nebr. 569, 78 N. W. 298.

New York.— Morgan *v.* Skiddy, 62 N. Y. 319.

North Carolina.—Houston *v.* Thornton, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699.

Texas.— Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592.

West Virginia.— Zinn *v.* Mendel, 9 W. Va. 580.

United States.— Prescott *v.* Haughey, 65 Fed. 653.

84. Augusta Nat. Exch. Bank *v.* Sibley, 71 Ga. 726.

If directors allow shareholders to withdraw the amount subscribed by them, this is a fraud for which each participating director is liable. St. Marys' Bank *v.* St. John, 25 Ala. 566.

85. *Alabama.*— Carr *v.* State, 104 Ala. 4, 16 So. 150.

Illinois.— Delano *v.* Case, 17 Ill. App 531.

Indiana.— State *v.* Beach, (Ind. 1896) 43 N. E. 949.

Iowa.— State *v.* Yetzer, 97 Iowa 423, 66 N. W. 737; State *v.* Cadwell, 79 Iowa 432, 44 N. W. 700.

Kansas.— State *v.* Myers, 54 Kan. 206, 38 Pac. 296.

Missouri.— State *v.* Sattley, 131 Mo. 464, 33 S. W. 41; Cummings *v.* Winn, 89 Mo. 51, 14 S. W. 512; Cummings *v.* Spaunhorst, 5 Mo. App. 21.

New York.— Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9.

Liability for special deposit.— If directors

fraudulent representations of its solvency to depositors and misleading them;[86] or of lending more money than the law will permit to a borrower.[87] Specific acts which are not within the fatal range are: Absence from board meetings, especially if a leave of absence because of ill health has been granted;[88] failure, through forgetfulness, to take a bond from a cashier or other officer;[89] good faith in taking security for a debt although it prove to be worthless;[90] errors in discounting[91] or other errors in judgment.[92] In like manner when investments are made by a legally existing finance committee the other directors may be exempt from liability attending the action of such committee.[93] Nor are they liable for withholding dividends that are earned but not declared.[94]

(2) Defenses — (a) Absence From Participation. Absence from participation in unlawful proceedings has been held to be no defense to an action against bank directors.[95]

(b) Discharge of Director Jointly Liable. When directors are jointly liable,[96]

should, after their bank's suspension, take measures to reassure the public of the continuance of their institution, and therefore receive money on special deposit, they would be responsible therefor should a receiver be subsequently appointed. Miller *v.* Howard, 95 Tenn. 407, 32 S. W. 305. When money is deposited in a bank supposing it was solvent, when it is not, no cause of action at common law arises against the directors. Duffy *v.* Byrne, 7 Mo. App. 417; Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222.

Measure of damage.— When a deposit is lost the measure of damage is the difference between the amount of the deposit with interest and the value of the claim after the failure of the bank. Baker *v.* Ashe, 80 Tex. 356, 16 S. W. 36.

Proof.— In an action against the directors for receiving a deposit when the bank was insolvent, the depositor is only bound to prove to the satisfaction of the jury that the bank was insolvent. The burden of proof that the directors did not know of its condition is on them. Dodge *v.* Mastin, 5 McCrary (U. S.) 1085, 1089, 17 Fed. 660.

86. Com. *v.* Schwartz, 13 Ky. L. Rep. 929, 18 S. W. 358, 19 S. W. 189; Tate *v.* Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719; Townsend *v.* Williams, 117 N. C. 330, 23 S. E. 461; Miller *v.* Howard, 95 Tenn. 407, 32 S. W. 305; Baker *v.* Ashe, 80 Tex. 356, 16 S. W. 36; Giddings *v.* Baker, 80 Tex. 308, 16 S. W. 33; Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592.

If their bank is embarrassed, but they believe it will eventually maintain its credit, they are not required to disclose its condition to depositors before accepting deposits from them, nor are they liable to them should the bank fail. St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 10 S. Ct. 390, 33 L. ed. 683.

87. **Neither absence nor opposition when present is any defense** if they create an indebtedness exceeding the legal amount. Banks *v.* Darden, 18 Ga. 318.

88. Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662.

89. Jones *v.* Johnson, 86 Ky. 530, 9 Ky. L. Rep. 789, 6 S. W. 582.

90. Jones *v.* Johnson, 86 Ky. 530, 9 Ky. L. Rep. 789, 6 S. W. 582. But an action may be maintained against directors for making a loan contrary to law, which proves to be worthless, without first suing the borrower. Paine *v.* Barnum, 59 How. Pr. (N. Y.) 303.

91. Godbold *v.* Mobile Branch Bank, 11 Ala. 191, 46 Am. Dec. 211.

Loans by cashier.— The directors cannot be held liable for losses through loans made by a cashier unless they knew he did not exercise reasonable prudence in making them. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

92. Jones *v.* Johnson, 86 Ky. 530, 9 Ky. L. Rep. 789, 6 S. W. 582.

They are not liable for renewing worthless paper discounted by their predecessors. Mutual Redemption Bank *v.* Hill, 56 Me. 385, 96 Am. Dec. 470.

93. Williams *v.* Halliard, 38 N. J. Eq. 373; Warner *v.* Penoyer, 91 Fed. 587, 61 U. S. App. 372, 33 C. C. A. 222.

94. Seeley *v.* New York Nat. Exch. Bank, 8 Daly (N. Y.) 405, 4 Abb. N. Cas. (N. Y.) 61 [*affirmed* in 78 N. Y. 608]; Ely *v.* Sprague, Clarke (N. Y.) 351. But if a dividend is declared it cannot afterward be retained (Reynolds *v.* Mt. Vernon Bank, 6 N. Y. App. Div. 62, 39 N. Y. Suppl. 623), and a bank cannot retain a shareholder's dividend for his indebtedness if it knew he had assigned his stock before becoming his creditor (Nesmith *v.* Washington Bank, 6 Pick. (Mass.) 324).

95. Banks *v.* Darden, 18 Ga. 318. But it has also been held competent to consider the illegal course of conduct in which managers have engaged when present with their associates in order to determine whether they are liable for similar illegal acts done by such associates in their absence. Williams *v.* McDonald, 42 N. J. Eq. 392, 7 Atl. 866; Wilkinson *v.* Dodd, 42 N. J. Eq. 234, 7 Atl. 327.

96. **If all the directors are guilty of negligence** all are equally liable, but if only some have been negligent, each will be held liable for the consequences of his own negligence. Fisher *v.* Parr, 92 Md. 245, 48 Atl. 621.

and a creditor who has a cause for action against them discharges one of them, he discharges his own claim against all.[97]

(c) Limitations. The directors can defend by showing that the action is barred by the statute of limitations.[98]

(d) Wrongful Acts of Others. Directors cannot relieve themselves from the consequences of their misconduct by the wrong-doing of others.[99]

(3) Enforcement [1] — (a) Mode of Procedure. An assignee or receiver can proceed against them in equity for their negligence; and if he refuses to do so the stock-holders and creditors can, in some jurisdictions, proceed themselves, making the bank a defendant,[2] while in others creditors cannot maintain such an action.[3]

97. Robinson *v.* Bealle, 20 Ga. 275.

Recovery against one.—A provision in the articles of a banking association that any person dealing with them "disavows having recourse, on any pretence whatever, to the person, or separate property of any present or future member of this company" does not prevent the recovery of a judgment against an individual member with whom the judgment creditor contracted. Davis *v.* Beverly, 2 Cranch C. C. (U. S.) 35, 7 Fed. Cas. No. 3,627.

98. One year where the action is *ex delicto* (Knoop *v.* Blaffer, 39 La. Ann. 23, 6 So. 9), or a penal one (Ashley *v.* Frame, 4 Kan. App. 265, 45 Pac. 927; Merchants' Nat. Bank *v.* Northwestern Mfg., etc., Co., 48 Minn. 349, 51 N. W. 117; Globe Pub. Co. *v.* State Bank, 41 Nebr. 175, 59 N. W. 683, 27 L. R. A. 854; Merchants' Bank *v.* Bliss, 35 N. Y. 412).

Six years in a case of illegal investments or overdrafts made by the president. Williams *v.* Halliard, 38 N. J. Eq. 373.

99. Thus the waste of assets by the assignee does not relieve them from liability. Hargroves *v.* Chambers, 30 Ga. 580. Nor will a compromise made by a receiver with the other party to a wrongful transaction. Wilkinson *v.* Dodd, 40 N. J. Eq. 123, 3 Atl. 360.

1. Condition precedent.— In an action by an assignee against a director for fraudulently selling his stock to the bank, no rescission of the sale is necessary. Shultz *v.* Christman, 6 Mo. App. 338.

Survival of director's liability.—An action for damages for deceit against directors does not survive at common law, and is therefore not assignable; but the officers of a bank are liable thereto for official misconduct resulting in the loss of its property, and this liability survives and is assignable. Killin *v.* Barnes, 106 Wis. 546, 82 N. W. 536. See also Dodd *v.* Wilkinson, 41 N. J. Eq. 566, 7 Atl. 357, holding that a receiver may make the executor of a director a party to an action against directors for mismanagement.

2. *Illinois.*— Delano *v.* Case, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81.

Kentucky.— Louisville Sav. Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488.

Michigan.— A bill in equity may be brought by an insolvent bank to compel the directors to answer for their negligence, and this may be done by any stock-holder when the receiver is a director. Flynn *v.* Detroit Third Nat. Bank, 122 Mich. 642, 81 N. W. 572.

Missouri.— Union Nat. Bank *v.* Hill, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615; Alexander *v.* Relfe, 74 Mo. 495; Gill *v.* Balis, 72 Mo. 424.

New Jersey.— Halsey *v.* Ackerman, 38 N. J. Eq. 501 [*affirming* 37 N. J. Eq. 356].

New York.— Brinckerhoff *v.* Bostwick, 88 N. Y. 52; Hun *v.* Cary, 82 N. Y. 65, 37 Am. Rep. 546; Greaves *v.* Gouge, 69 N. Y. 154; Van Dyck *v.* McQuade, 45 N. Y. Super. Ct. 620.

North Carolina.— Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Tate *v.* Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719.

Pennsylvania.—Penn Bank *v.* Hopkins, 111 Pa. St. 328, 2 Atl. 83, 56 Am. Rep. 266; Means' Appeal, 85 Pa. St. 75; Watts' Appeal, 78 Pa. St. 370; Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684; Gravenstine's Appeal, 49 Pa. St. 310; Maisch *v.* Seamen's Sav. Fund Soc., 5 Phila. (Pa.) 30, 19 Leg. Int. (Pa.) 140.

Tennessee.— Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

Texas.— Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592.

Vermont.— An action against directors for violating the laws may be brought by a stock-holder. Buell *v.* Warner, 33 Vt. 570.

Virginia.— Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 17 Am. St. Rep. 84, 2 L. R. A. 534.

United States.— Foster *v.* Abingdon Bank, 88 Fed. 604; Mutual Bldg. Fund, etc., Sav. Bank *v.* Bosseiux, 4 Hughes (U. S.) 387, 3 Fed. 817.

The directors' liability is not the bank's asset, susceptible of collection by the commissioner or receiver, but accrues to the creditors *ut singuli.* Lacombe *v.* Milliken, 36 La. Ann. 367.

Stock-holders cannot demand as a right that they be made parties to an action brought by the receiver against directors to recover damages caused by their misconduct. Kimball *v.* Ives, 30 Hun (N. Y.) 568.

3. Frost Mfg. Co. *v.* Foster, 76 Iowa 535, 41 N. W. 212; Union Nat. Bank *v.* Hill, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep.

(b) Pleading. In an action by a bank-creditor against a bank's officers to recover for a loss caused by their negligent and fraudulent mismanagement of its business, the complaint must allege that each defendant was an officer of the bank when the wrongful acts took place;[4] but where directors are charged with fraud and deceit in making false statements of the bank's solvency, it need not allege that they knew or believed the bank to be insolvent, such knowledge being conclusively presumed from their position.[5]

(c) *Of President.* The president, when abusing his authority, is clearly liable to the bank like any other agent to his principal.[6] He is liable therefore for discounting his own note;[7] for lending to others without proper security;[8] for permitting one to overdraw;[9] for neglecting to give proper instructions to others concerning the business of the bank whereby a loss is incurred;[10] for neglecting to take a bond from a bank official;[11] for permitting customers to take away the bank's securities for inspection;[12] and for misapplying property confided to him.[13]

(d) *Of Cashier* — (1) In General. The cashier is liable for making loans and not entering them on the books;[14] for permitting overdrafts;[15] for neglecting to demand payment of a note and thereby releasing the indorser;[16] and for misapplying or wrongfully converting funds intrusted to his keeping.[17] His liability is still greater for injury caused by his illegal, fraudulent, and tortious acts done on his sole authority,[18] and the periodical examination by the directors of the business of the bank does not estop it from taking action against him for negligence or fraud in conducting its affairs.[19] He is not liable, however, for doing a palpably illegal thing when acting under the special authority of the

615; Fusz *v.* Spaunhorst, 67 Mo. 256; Landis *v.* Sea Isle City Hotel Co., 53 N. J. Eq. 654, 33 Atl. 964; Deaderick *v.* Bank of Commerce, 100 Tenn. 457, 45 S. W. 786.

4. Gores *v.* Elliott, 108 Wis. 465, 84 N. W. 865.

5. Tate *v.* Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719. *Contra*, Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222.

6. Hinsdale *v.* Larned, 16 Mass. 65; Austin *v.* Daniels, 4 Den. (N. Y.) 299.

7. Rhodes *v.* Webb, 24 Minn. 292; Reed *v.* Newburgh Bank, 6 Paige (N. Y.) 337.

8. Sturgis First Nat. Bank *v.* Reed, 36 Mich. 263.

9. Oakland Sav. Bank *v.* Wilcox, 60 Cal. 126; Rapelie *v.* Emory, 1 Dall. (Pa.) 349, 1 L. ed. 170; Boker's Estate, 7 Phila. (Pa.) 479.

10. Fulton Bank *v.* New York, etc., Canal Co., 4 Paige (N. Y.) 127.

11. Pontchartrain R. Co. *v.* Paulding, 11 La. 41, 30 Am. Dec. 708.

12. Citizens' Bank *v.* Wiegand, 12 Phila. (Pa.) 496, 35 Leg. Int. (Pa.) 28.

13. Trust Co. *v.* Weed, 14 Phila. (Pa.) 422, 37 Leg. Int. (Pa.) 166.

Deposit.— If a president places the money of a depositor to his own account and allows the depositor to withdraw it, he is liable therefor. Boker's Estate, 7 Phila. (Pa.) 479. If he collects the interest on bonds or other securities belonging to the bank he is liable for the amount. McVeigh *v.* Old Dominion Bank, 26 Gratt. (Va.) 188.

14. San Joaquin Valley Bank *v.* Bours, 65 Cal. 247, 3 Pac. 864.

Loans and discounts in good faith.— He is not liable for losses on loans made in good faith and after proper inquiry concerning the ability of the lenders (Pryse *v.* Farmers Bank, 17 Ky. L. Rep. 1056, 33 S. W. 532); and if a by-law requires him to discount paper on two names, it is fulfilled if the names of two firms having the same partners in both are taken, and if he is required by a by-law to consult a committee in making discounts he is not responsible for not doing so if the members do not meet (Oswego Second Nat. Bank *v.* Burt, 93 N. Y. 233).

15. Pryse *v.* Farmers Bank, 17 Ky. L. Rep. 1056, 33 S. W. 532; St. Mary's Bank *v.* Calder, 3 Strobh. (S. C.) 403. But see Commercial Bank *v.* Ten Eyck, 48 N. Y. 305, holding that he is not liable on an overdraft permitted on sufficient security.

16. Bidwell *v.* Madison, 10 Minn. 13. See also Owego Bank *v.* Babcock, 5 Hill (N. Y.) 152.

Negligence in collecting proceeds of sale of collaterals.—A cashier sent collaterals to a broker for sale and drew a part of the proceeds but was negligent in collecting the balance, and the broker applied it on a claim due to him from the pledgor. As the broker, however, was liable for the balance and able to respond, the bank sustained no loss and the cashier was liable for want of care. Commercial Bank *v.* Ten Eyck, 48 N. Y. 305.

17. Merchants' Bank *v.* Jeffries, 21 W. Va. 504.

18. Ft. Scott First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646; Knapp *v.* Roche, 62 N. Y. 614; Austin *v.* Daniels, 4 Den. (N. Y.) 299; Boker's Estate, 7 Phila. (Pa.) 479.

19. San Joaquin Valley Bank *v.* Bours, 65 Cal. 247, 3 Pac. 864.

directors, but would otherwise be,[20] although the line is sometimes very close between his conduct as a mere instrument for the directors and sufficiently independent action to render him responsible therefor.[21]

(2) For Acts of Subordinates. The cashier is not an insurer of the honesty and fidelity of those who occupy subordinate positions, and therefore is not liable for misappropriations by them if he exercise reasonable diligence in supervising their work.[22]

(E) *Of Minor Officers.* Minor officers are not liable for mistakes.[23] If therefore a teller should, observing the usage of banks, receive as cash the check of an individual in good credit, he would not be personally liable therefor if the drawer had no funds.[24]

(F) *Of Special Agent.* A special agent is not liable when ordinary care has been used[25] or for a loss occasioned by his mistake on a doubtful matter of law,[26] although he would be for a palpable mistake in transacting the bank's business[27] or when he exceeds or disregards his instructions.[28]

(II) *Criminal Liability*[29] — (A) *Drawing or Paying Overdraft.* In some states the drawing or paying of an overdraft is a criminal offense.[30] The law formerly regarded this as a far more serious offense, but the cases are exceptional which are thus regarded at the present time.[31]

(B) *Embezzlement of Bank-Notes or Coin.* Where the embezzlement of the notes of a bank[32] has been made a criminal offense,[33] the indictment should describe either the number or denomination of the coins and notes, if both are

20. Pepper *v.* Planters Nat. Bank, 5 Ky. L. Rep. 85.

21. Watson *v.* Bennett, 12 Barb. (N. Y.) 196.

The president's assent to his wrongful act is no protection. Austin *v.* Daniels, 4 Den. (N. Y.) 299.

Filling blank check left by customer.—A depositor left checks signed in blank with the cashier to be used as she might direct. She was to be absent a year. After her return the following year the cashier filled out a check and drew the money but did not charge it to her account on her book. The bank could not withhold payment to her of the amount. Daniels *v.* Empire State Sav Bank, 92 Hun (N. Y.) 450, 38 N. Y. Suppl. 580, 74 N. Y. St. 207.

22. State Bank *v.* Comegys, 12 Ala. 772, 46 Am. Dec. 278; Batchelor *v.* Planters' Nat. Bank, 78 Ky. 435; Pepper *v.* Planters Nat. Bank, 5 Ky. L. Rep. 85.

23. Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 182; Union Bank *v.* Clossey, 10 Johns. (N. Y.) 271.

Losses during absence.—A teller cannot be held liable for losses in his absence. U. S. *v.* Johnson, 3 Cranch C. C. (U. S.) 228, 2 Fed. Cas. No. 919.

24. Georgetown Union Bank *v.* Mackall, 2 Cranch C. C. (U. S.) 695, 24 Fed. Cas. No. 14,359; Russell *v.* Hankey, 6 T. R. 12.

25. Thus if money should be stolen from him belonging to the bank he would not, if using ordinary care for its safe-keeping, be liable for the loss. Rechtsherd *v.* St. Louis Accommodation Bank, 47 Mo. 181.

26. Mechanics Bank *v.* Merchants Bank, 6 Metc. (Mass.) 13; Rowe *v.* Young, 2 Ball & B. 165, 2 Bligh 391, 4 Eng. Reprint 372; Chapman *v.* Walton, 10 Bing. 57, 2 L. J. C. P. 210, 3 Moore & S. 389, 25 E. C. L. 36; Pitt *v.* Yalden, 4 Burr. 2060; Baitkie *v.* Chandless, 3 Campb. 17; Park *v.* Hammond, 2 Marsh. 189, 6 Taunt. 495, 1 E. C. L. 721; Russell *v.* Hankey, 6 T. R. 12.

27. Clark *v.* Wheeling Bank, 17 Pa. St. 322.

28. Switzer *v.* Connett, 11 Mo. 88; Hays *v.* Stone, 7 Hill (N. Y.) 128; Wilson *v.* Wilson, 26 Pa. St. 393.

29. Criminal liability of national-bank officers see *infra*, III, D, 3, b.

30. In New York, Pen. Code, § 600, is aimed at bank officials, but under this statute, the knowingly overdrawing is not enough to convict the offender. He must have wrongfully obtained the money to justify his conviction. People *v.* Clements, 42 Hun (N. Y.) 286, 5 N. Y. Crim. 277.

31. Conspiracy to overdraw.— It is not an indictable offense for several persons to conspire to obtain money from a bank by drawing their checks thereon though having no money there. If this were the law every trading firm overdrawing its funds would be liable to an indictment for conspiracy. State *v.* Rickey, 9 N. J. L. 293.

32. Embezzling promissory notes or other commercial paper is not an offense within the meaning of this act. State *v.* Stimson, 24 N. J. L. 9.

33. An officer de facto is punishable within the statutes against embezzlement. State *v.* Goss, 69 Me. 22; Fortenberry *v.* State, 56 Miss. 286. See also Hamilton *v.* State, 34 Ohio St. 82; Burke *v.* State, 34 Ohio St. 79; Rainey *v.* State, 8 Tex. App. 62, 34 Am. Rep. 736.

taken, and also aver the value of the notes.[34] Under some statutes it must be averred that defendant had possession by virtue of his employment[35] but an intent to defraud the bank need not be averred.[36]

(c) *Making False Returns.* The return by a bank in obedience to the statute must be a substantial compliance, and if the statute requires the return to be true under oath and it is false the officer is guilty of perjury, but the indictment in such case must allege that the false return was wilfully made.[37]

(d) *Receiving Deposits When Bank Insolvent* — (1) In General. The most frequent modern criminal offense for which officers are liable is the receiving of deposits[38] when a bank is insolvent.[39] In some states these laws at first related only to incorporated banks,[40] but they now very generally include private bankers.[41] Neither the place where the deposit is received,[42] the receiver,[43] nor the fact that he intended to return the deposit is material.[44] If actually taken when the bank or banker was insolvent liability for the deed follows,[45] unless received contrary to the officer's instructions and such act is ratified by retention.[46]

(2) Indictment.[47] The indictment must sufficiently charge that the defendant was a banker within the meaning of the statute,[48] that at the time the bank

34. State *v.* Stimson, 24 N. J. L. 9.

35. State *v.* Winstandley, 155 Ind. 290, 58 N. E. 71. *Contra*, State *v.* Nicholls, 50 La. Ann. 699, 23 So. 980; State *v.* Stimson, 24 N. J. L. 9.

36. State *v.* Stimson, 24 N. J. L. 9.

37. Com. *v.* Dunham, Thatch. Crim. Cas. (Mass.) 519.

What is substantial compliance.—If the return must be founded on the books of the bank and contain a true statement of its condition the law is observed when the return is substantially true, although it may not be indicated by bank-books. Com. *v.* Dunham, Thatch. Crim. Cas. (Mass.) 519.

Exhibiting false book.—An indictment for knowingly exhibiting a false book under N. Y. Pen. Code, § 592, which alleged that defendant as president of a bank knowingly exhibited its cash to an officer duly authorized to investigate the affairs of the bank with the intent to deceive such officer contrary to the form of the statute was sufficient. People *v.* Helmer, 154 N. Y. 596, 49 N. E. 249.

38. **What is a deposit.**—A deposit for which a certificate is given is not a loan, but a deposit (State *v.* Cadwell, 79 Iowa 432, 44 N. W. 700); but if the depositor owes the bank a larger sum no deposit in the statutory sense exists, provided the bank has the legal right to apply the deposit to the depositor's indebtedness (Com. *v.* Schall, 12 Pa. Co. Ct. 209).

39. **As to when a bank is insolvent** see *infra*, II, F, 4, a.

The phrase "in failing circumstances" used in some of these statutes means a state of uncertainty whether the bank will be able to sustain itself, depending on favorable or unfavorable contingencies, which in the course of business may occur and over which its officers have no control. Dodge *v.* Mastin, 5 McCrary (U. S.) 404, 17 Fed. 660.

40. **Banks operating under a special charter** are just as amenable to these statutes as any others. Cummings *v.* Spaunhorst, 5 Mo. App. 21.

A bank actually, although not legally, existing is within the terms of the statute. State *v.* Buck, 108 Mo. 622, 18 S. W. 1113, 120 Mo. 479, 25 S. W. 573.

41. State *v.* Buck, 108 Mo. 622, 18 S. W. 1113; State *v.* Kelsey, 89 Mo. 623, 1 S. W. 838; Com. *v.* Sponsler, 16 Pa. Co. Ct. 116.

Partners may jointly commit the crime of receiving deposits, well knowing of their insolvent condition. State *v.* Smith, 62 Minn. 540, 64 N. W. 1022.

Trust companies have been declared not to be banks within the meaning of such a statute. State *v.* Reid, 125 Mo. 43, 28 S. W. 172.

42. State *v.* Yetzer, 97 Iowa 423, 66 N. W. 737.

43. Carr *v.* State, 104 Ala. 4, 16 So. 150; State *v.* Eifert, 102 Iowa 188, 65 N. W. 309, 71 N. W. 248, 63 Am. St. Rep. 433, 38 L. R. A. 485; State *v.* Yetzer, 97 Iowa 423, 66 N. W. 737; State *v.* Cadwell, 79 Iowa 432, 44 N. W. 700; State *v.* Sattley, 131 Mo. 464, 33 S. W. 41; Baker *v.* State, 54 Wis. 368, 12 N. W. 12.

If received by a bank clerk he also may be liable. State *v.* Clements, 82 Minn. 434, 85 N. W. 234; Baker *v.* State, 54 Wis. 368, 12 N. W. 12.

44. Com. *v.* Sponsler, 16 Pa. Co. Ct. 116.

Effect of actual return.— If the deposit is put in an envelope, marked with the owner's name, and returned to him after the bank's failure the receiver is not guilty. State *v.* Cadwallader, 154 Ind. 607, 57 N. E. 512.

45. State *v.* Beach, 147 Ind. 74, 46 N. E. 145, 36 L. R. A. 179; Com. *v.* Junkin, 170 Pa. St. 194, 32 Atl. 617, 31 L. R. A. 124.

46. State *v.* Eifert, 102 Iowa 188, 65 N. W. 309, 71 N. W. 248, 63 Am. St. Rep. 433, 38 L. R. A. 485; Com. *v.* Junkin, 170 Pa. St. 194, 32 Atl. 617, 31 L. R. A. 124.

47. **For forms of indictment** see State *v.* Eifert, 102 Iowa 188, 65 N. W. 309, 71 N. W. 248, 63 Am. St. Rep. 433, 38 L. R. A. 485; Com. *v.* Rockafellow, 163 Pa. St. 139, 29 Atl. 757.

48. Com. *v.* Delamater, 2 Pa. Dist. 118.

was actually insolvent;[49] and the unlawful conversion or appropriation of the moneys deposited, or that the same were embezzled, where the statute makes this the gist of the offense.[50] It need not be averred that loss occurred to any one by reason of such deposit.[51] An indictment in the language of the statute has been held sufficient.[52]

(3) EVIDENCE. The burden of proof is on the state to show by competent legal evidence every constituent of the offense beyond a reasonable doubt;[53] but it need not prove that the depositor was not indebted to any of the bank's officers.[54]

E. Functions and Dealings[55]— **1. CONSTRUCTION OF CHARTER.** A bank charter is a contract between the stock-holders and the state.[56] It is construed strictly against them and liberally in favor of the state; no privileges or favors will be implied,[57] except such as are necessary to the execution of its express powers.[58]

2. REGULATIONS — a. By-Laws — (I) *POWER TO MAKE.* For its more effective working, every bank is authorized to make by-laws,[59] which are regarded as contracts and to which the ordinary rules of construction apply.[60] They cannot

49. State *v.* Bardwell, 72 Miss. 535, 18 So. 377.

50. Com. *v.* Delamater, 2 Pa. Dist. 118.

51. State *v.* Myers, 54 Kan. 206, 38 Pac. 296.

52. Com. *v.* Rockafellow, 163 Pa. St. 139, 29 Atl. 757. *Contra,* State *v.* Bardwell, 72 Miss. 535, 18 So. 377.

53. Com. *v.* Schall, 12 Pa. Co. Ct. 209, holding that, in order to convict, the commonwealth must prove that defendant was a banker who, knowing himself to be insolvent, received money as a deposit.

Suspension within given time prima facie evidence of intent to defraud.—A statute which declares that the failure, suspension, or involuntary liquidation of a banker within thirty days after receiving a deposit shall be *prima facie* evidence of intent to defraud on his part is not unconstitutional as depriving defendant of the presumption of innocence. State *v.* Beach, 147 Ind. 74, 46 N. E. 145, 36 L. R. A. 179.

54. State *v.* Cadwallader, 154 Ind. 607, 57 N. E. 512.

55. Functions and dealings of national banks see *infra,* III, E.

Functions and dealings of savings-banks see *infra,* IV, E.

56. The legislature cannot control or alter the grant of authority to a bank without the consent of the corporators. State *v.* Tombeckbee Bank, 2 Stew. (Ala.) 30; Logwood *v.* Planter's, etc., Bank, Minor (Ala.) 23. A law taking away a bank's chartered power to sell and transfer negotiable paper is void as impairing the obligation of contracts. People *v.* Manhattan Co., 9 Wend. (N. Y.) 351; Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; Planters' Bank *v.* Sharp, 6 How. (U. S.) 301, 12 L. ed. 447.

57. *Georgia.*— Adkins *v.* Thornton, 19 Ga. 325.

Kentucky.— Thweatt *v.* Bank, 81 Ky. 1, 4 Ky. L. Rep. 557.

Ohio.— Bartholomew *v.* Bentley, 1 Ohio St. 37. *Contra,* Mechanics', etc., Branch State Bank *v.* Debolt, 1 Ohio St. 591.

Pennsylvania.— State Bank *v.* Com., 19 Pa. St. 144.

South Carolina.— State Bank *v.* Gibbs, 3 McCord (S. C.) 377.

Wisconsin.— Rehbein *v.* Rahr, 109 Wis. 136, 85 N. W. 315.

58. Franklin Nat. Bank *v.* Whitehead, 149 Ind. 560, 49 N. E. 592, 63 Am. St. Rep. 302, 39 L. R. A. 725; Nicollet Nat. Bank *v.* Frisk-Turner Co., 71 Minn. 413, 74 N. W. 160, 70 Am. St. Rep. 334.

59. By whom framed.— Unless by statute or custom the power is placed elsewhere, the power to make by-laws is in the general body of stock-holders (Morton Gravel Road Co. *v.* Wysong, 51 Ind. 4; Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111; Holly Springs Bank *v.* Pinson, 58 Miss. 421, 38 Am. Rep. 330; State *v.* Curtis, 9 Nev. 325) who may delegate the power to the directors (*Ex p.* Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525); but the latter cannot make them without special authority (State Sav. Assoc. *v.* Nixon-Jones Printing Co., 25 Mo. App. 642; Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249).

Effect of extending charter on existing by-laws.— In extending the powers of a bank for a specified period, the by-laws previously adopted continue in force. Campbell *v.* Watson, (N. J. 1901) 50 Atl. 120.

Repeal of a by-law cannot be presumed from long neglect to enforce it. Campbell *v.* Watson, (N. J. 1901) 50 Atl. 120.

60. *Connecticut.*— Eaves *v.* People's Sav. Bank, 27 Conn. 229, 71 Am. Dec. 59.

Massachusetts.—Goldrick *v.* Bristol County Sav. Bank, 123 Mass. 320; Levy *v.* Franklin Sav. Bank, 117 Mass. 448.

New Hampshire.— Brown *v.* Merrimack River Sav. Bank, 67 N. H. 549, 39 N. W. 336, 68 Am. St. Rep. 700; Heath *v.* Portsmouth Sav. Bank, 46 N. H. 78, 88 Am. Dec. 194.

New Jersey.— Cosgrove *v.* Provident Sav. Inst., 64 N. J. L. 39, 44 Atl. 936 [*reversed* in 64 N. J. L. 653, 46 Atl. 617].

New York.— Kummel *v.* Germania Sav. Bank, 127 N. Y. 488, 28 N. E. 398, 40 N. Y. St. 252, 13 L. R. A. 786; Allen *v.* Williamsburgh Sav. Bank, 69 N. Y. 314; Appleby *v.* Erie County Sav. Bank, 62 N. Y. 12;

affect third persons,[61] and must be reasonable and consistent with the laws in general.[62] Whether they are so is a question of law.[63]

(II) *Customer's Disregard or Ignorance of.* If a customer knows of the by-laws he is ordinarily bound by them,[64] although he cannot always be made to suffer.[65] If he is ignorant of them through his inability to read the fault is his and he has no cause of complaint against the bank;[66] but if the bank has not properly notified him of them or of changes, then it is at fault.[67]

(III) *Director's Ignorance of.* A director's ignorance of the by-laws of the bank is no defense to his disregard of them whereby it suffers loss.[68]

b. Customs and Usages — (I) *In General.* Customs or usages, if reasonable,[69]

Wilcox *v.* Onondaga County Sav. Bank, 40 Hun (N. Y.) 297.

Pennsylvania.— Burrill *v.* Dollar Sav. Bank, 92 Pa. St. 134, 37 Am. Rep. 669.

Vermont.— Gifford *v.* Rutland Sav. Bank, 63 Vt. 108, 21 Atl. 340, 25 Am. St. Rep. 744, 11 L. R. A. 794.

United States.— *In re* Dunkerson, 4 Biss. (U. S.) 227, 8 Fed. Cas. No. 4,156.

61. Mechanics', etc., Bank *v.* Smith, 19 Johns. (N. Y.) 115.

62. State *v.* Citizens' Bank, 51 La. Ann. 426, 25 So. 318; Cockburn *v.* Union Bank, 13 La. Ann. 289; Nicollet Nat. Bank *v.* City Bank, 38 Minn. 85, 35 N. W. 577, 8 Am. St. Rep. 643; Attica Bank *v.* Manufacturers', etc., Bank, 20 N. Y. 501. See also Wells *v.* Black, 117 Cal. 157, 48 Pac. 1090, 59 Am. St. Rep. 162, 37 L. R. A. 619, holding that a by-law of a bank seeking to limit the liability of the stock-holders to the creditors is void.

Reasonable by-laws.— Of the by-laws judicially declared to be reasonable are those for acting as agents in collecting checks and other instruments (*In re* State Bank, 56 Minn. 119, 57 N. W. 336, 45 Am. St. Rep. 454); for dividing the business of the bank into distinct departments and endowing a separate committee with the exclusive charge of each department (Palmer *v.* Yates, 3 Sandf. (N. Y.) 137); for receiving special deposits as loans bearing interest (Heironimus *v.* Sweeney, 83 Md. 146, 34 Atl. 823, 55 Am. St. Rep. 333, 33 L. R. A. 99); for requiring officers to give bonds (Hannibal Sav. Bank *v.* Hunt, 72 Mo. 597, 37 Am. Rep. 449); for requiring the transfer of stock (Farmers', etc., Bank *v.* Wasson, 48 Iowa 336, 30 Am. Rep. 398; Chouteau Spring Co. *v.* Harris, 20 Mo. 382); and prescribing hours for doing business (Marshall *v.* American Express Co., 7 Wis. 1, 73 Am. Dec. 381, holding that this by-law does not apply to the sending or receiving of packages and messages).

Unreasonable by-laws.— Of unreasonable by-laws may be mentioned those restricting or prohibiting the transfer of stock (Farmers', etc., Bank *v.* Wasson, 48 Iowa 336, 30 Am. Rep. 398; Moore *v.* Bank of Commerce, 52 Mo. 377. *Contra*, Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308, 11 Am. Rep. 253); or declaring the safe-keeping of special deposits to be at the depositor's risk (White *v.* Commonwealth Nat. Bank, 29 Fed. Cas. No. 17,544, 4 Brewst. (Pa.) 234), and that payments must be examined at the time of making them (Mechanics', etc., Bank *v.* Smith, 19 Johns. (N. Y.) 115).

63. Security Loan Assoc. *v.* Lake, 69 Ala. 456; State *v.* State Bank, 5 Mart. N. S. (La.) 327; Goddard *v.* Merchants' Exch., 9 Mo. App. 290.

64. Union Bank *v.* Guice, 2 La. Ann. 249.

65. Jackson Ins. Co. *v.* Cross, 9 Heisk. (Tenn.) 283, holding that if he does not present with his deposit the customary ticket it cannot if erroneously credited be withheld from him.

66. Burrill *v.* Dollar Sav. Bank, 92 Pa. St. 134, 37 Am. Rep. 669.

The law presumes that a stock-holder has notice of them. Buffalo *v.* Webster, 10 Wend. (N. Y.) 100; Mitchell *v.* Lycoming Mut. Ins. Co., 51 Pa. St. 402.

Stipulation in signature book.—A stipulation printed at the head of a signature book purporting to release the stock-holders from liability and to assent to terms on which loans and deposits will be repaid is not binding on depositors, when they sign the book without intending to be bound by the stipulation and without reading or knowing its contents. Wells *v.* Black, 117 Cal. 157, 48 Pac. 1090, 59 Am. St. Rep. 162, 37 L. R. A. 619.

67. Kimins *v.* Boston Five Cents Sav. Bank, 141 Mass. 33, 6 N. E. 242, 55 Am. Rep. 441.

68. Campbell *v.* Watson, (N. J. 1901) 50 Atl. 120.

69. Method of bookkeeping.— A custom or practice in keeping books may be shown to corroborate the testimony of a bank official that a deposit has not been received. Meighen *v.* Bank, 25 Pa. St. 288.

Mode of transferring securities.—A custom concerning the mode of transferring securities may be sufficient to put a bank on inquiry when it has not been observed. Taliaferro *v.* Baltimore First Nat. Bank, 71 Md. 200, 17 Atl. 1036.

Place of leaving notice of maturity of directors' note.—A custom that notice of the maturity of the note of directors shall be left on the cashier's desk is binding. Weld *v.* Gorham, 10 Mass. 366.

Practice of borrowing.— Custom is admissible to show the ordinary practice of borrowing money of banks in a particular place. Crain *v.* Jacksonville First Nat. Bank, 114 Ill. 516, 2 N. E. 486.

Time of depositing or returning checks.—A custom or usage of depositing checks on the day of receiving them, or on the following one; and of the immediate returning by a

have a binding force between bank and customer,[70] but like a by-law[71] a custom cannot affect a third person,[72] unless he knows thereof,[73] and a custom or usage between banks and customers living in the same place is not binding on persons living elsewhere.[74] Unreasonable customs or usages cannot stand.[75]

(II) *How Established.* A general usage is not established by proof of a single case.[76] Furthermore it rests in fact and not in judgment or opinion.[77]

3. Place of Business — a. In General. A bank has a legal home,[78] and while sometimes its contemplated operations are even more limited than the state giving

bank of any checks received from the clearing-house which cannot be covered by the deposits of the makers is reasonable. Marrett *v.* Brackett, 60 Me. 524.

70. *Connecticut.*— Lawrence *v.* Stonington Bank, 6 Conn. 521.

Maryland.— Columbia Bank *v.* Fitzhugh, 1 Harr. & G. (Md.) 239; Columbia Bank *v.* Magruder, 6 Harr. & J. (Md.) 172, 14 Am. Dec. 271.

Massachusetts.— Dorchester, etc., Bank *v.* New England Bank, 1 Cush. (Mass.) 177; Lincoln, etc., Bank *v.* Page, 9 Mass. 155, 6 Am. Dec. 52.

New York.— Security Bank *v.* National Bank of Republic, 67 N. Y. 458, 23 Am. Rep. 129; Allen *v.* Merchants' Bank, 15 Wend. (N. Y.) 482.

Pennsylvania.— Butte First Nat. Bank *v.* Fiske, 133 Pa. St. 241, 19 Atl. 554, 19 Am. St. Rep. 635, 7 L. R. A. 209.

United States.— Metropolis Bank *v.* New England Bank, 1 How. (U. S.) 234, 11 L. ed. 115; Washington Bank *v.* Triplett, 1 Pet. (U. S.) 25, 7 L. ed. 37; Renner *v.* Columbia Bank, 9 Wheat. (U. S.) 581, 6 L. ed. 166.

Presumption of customer's knowledge.— If a customer leaves a check for collection he is presumed to know the methods and customs by which collections are made, and ignorance of them is no excuse. Howard *v.* Walker, 92 Tenn. 452, 21 S. W. 897; Sahlien *v.* Lonoke Bank, 90 Tenn. 221, 16 S. W. 373.

Relation to law.—Although it will not prevail against the law generally, a custom or usage may be sufficient evidence of an agreement to dispense with a rule of law; for example, the rule relating to the transmission of checks. Bridgeport Bank *v.* Dyer, 19 Conn. 136; Kentucky Commercial Bank *v.* Varnum, 3 Lans. (N. Y.) 86; Hinton *v.* Locke, 5 Hill (N. Y.) 437; Onondaga County Bank *v.* Bates, 3 Hill (N. Y.) 53; Edie *v.* East India Co., 2 Burr. 1216.

71. See *supra*, II, E, 2, a, (I).

72. Lawrence *v.* Stonington Bank, 6 Conn. 521; Alexandria Bank *v.* Deneale, 2 Cranch C. C. (U. S.) 488, 2 Fed. Cas. No. 846.

73. *Connecticut.*— Bridgeport Bank *v.* Dyer, 19 Conn. 136.

Massachusetts.— Warren Bank *v.* Suffolk Bank, 10 Cush. (Mass.) 582.

New York.— Pope *v.* Albion Bank, 57 N. Y. 126.

Tennessee.— Sohlien *v.* Lonoke Bank, 90 Tenn. 221, 16 S. W. 373.

United States.— Renner *v.* Columbia Bank, 9 Wheat. (U. S.) 581, 6 L. ed. 166.

74. Allen *v.* St. Louis Nat. Bank, 120 U. S. 20, 7 S. Ct. 460, 30 L. ed. 573.

75. Such as a special custom of bankers in a particular locality to change values that are fixed by law (Marine Bank *v.* Chandler, 27 Ill. 525, 81 Am. Dec. 249), or a usage that a bank which certified a note as good by mistake cannot make a correction (Baltimore Second Nat. Bank *v.* Western Nat. Bank, 51 Md. 128, 34 Am. Rep. 300).

Checks.— Custom cannot change the law merchant (Shaw *v.* Jacobs, 89 Iowa 713, 55 N. W. 333, 56 N. W. 684, 48 Am. St. Rep. 411, 21 L. R. A. 440) or statute law (Montgomery First Nat. Bank *v.* Nelson, 105 Ala. 180, 16 So. 707) governing the transfer of checks. Nor can usage in issuing certificates of deposit be shown to prove a usage in certifying checks. Mussey *v.* Eagle Bank, 9 Metc. (Mass.) 306.

Mistakes concerning money.—A custom of not correcting a mistake in the receipt or payment of money unless discovered before the payor or receiver leaves the bank cannot be sanctioned. Gallatin *v.* Bradford, 1 Bibb (Ky.) 209.

Power of attorney.— Custom cannot change the legal character of a power of attorney. Baltimore First Nat. Bank *v.* Taliaferro, 72 Md. 164, 19 Atl. 364.

Presentation of draft for acceptance.— If a bank, after discounting a draft for a customer, has been in the habit of forwarding it for acceptance, although the law does not require such action, this is no just reason for compelling a bank to do so in the future. Citizens' Bank *v.* Grafflin, 31 Md. 507, 1 Am. Rep. 66.

76. Duvall *v.* Farmers Bank, 9 Gill & J. (Md.) 31; Greenfield Bank *v.* Crafts, 2 Allen (Mass.) 269.

Effect of non-adoption by single bank.—A usage existing among any number of banks will not affect one that has not adopted it. Williams *v.* Baltimore Nat. Bank, 70 Md. 343, 17 Atl. 382.

Effect of uncontradicted testimony of single witness.— If a single witness testifies explicitly to the existence of a usage and is not contradicted, it cannot be assumed as a legal conclusion that the proof is insufficient. Marston *v.* Mobile Bank, 10 Ala. 284; Robinson *v.* U. S., 13 Wall. (U. S.) 363, 20 L. ed. 653.

77. Chesapeake Bank *v.* Swain, 29 Md. 483.

78. *Ex p.* Schollenberger, 96 U. S. 369, 24 L. ed. 853.

it being,[79] it has been held that within the sphere of its action a bank can legally act in any place.[80]

b. Authority Outside State — (i) *In General.* Although the general franchise conferred by a bank charter can be exercised only within the dominion of the grantor,[81] the business of a bank cannot be wholly limited to state lines, and by state comity many outside transactions are permitted; but so far as its action is prescribed by the laws of its own state or of states outside it must act in conformity thereto when doing business within them.[82] A foreign non-banking corporation cannot transact business of a banking nature that is denied to a home bank,[83] but a foreign bank can sue on a transaction not of a banking nature.[84]

(ii) *When Is Action Foreign.* If a bank makes a loan[85] or purchases a note[86] in another state without any intention of doing business there it is not a violation of its laws pertaining to foreign banking corporations; but the establishing of a bank agency in another state is a clear violation of the law forbidding foreign banks from doing business there.[87]

79. People *v.* Oakland County Bank, 1 Dougl. (Mich.) 282.

80. Utica Bank *v.* Smedes, 3 Cow. (N. Y.) 662.

Branch banks.—Whether a bank chartered to do business in a specified place can establish a branch without express authority can be determined in an action to vacate its charter, but cannot be questioned in an action on the bond given by the cashier of the branch. Morehead Banking Co. *v.* Tate, 122 N. C. 313, 30 S. E. 341.

Contract of absent officer.— Although a cashier does not represent his bank when acting away from its domicile, an act undertaken when absent and continued without objection by the board on his return becomes the bank's act. Valdetero *v.* Citizens' Bank, 51 La. Ann. 1651, 26 So. 425.

Dealings in exchange.— If a bank is restricted to a place of business, but not in dealing in bills of exchange, it may purchase them in one place and remit them to another, receiving the proceeds at its own office (Columbus City Bank *v.* Beach, 1 Blatchf. (U. S.) 425, 5 Fed. Cas. No. 2,736); but if a bank is authorized to do business only in one county it cannot buy and sell exchange through an agent in another county (People *v.* Oakland County Bank, 1 Dougl. (Mich.) 282).

Discounting notes.—Although the business of receiving money and discounting notes is restricted to a village, yet the discounting of a note in the city of New York and the canceling there of a debt due to the bank is not a violation of its charter. Potter *v.* Ithaca Bank, 7 Hill (N. Y.) 530.

81. Lane *v.* West Tennessee Bank, 9 Heisk. (Tenn.) 419 (holding that, although the assets of a bank may be forced out of the state of its creation by a superior power, its franchise remains and cannot be expelled); Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274.

82. Metropolitan Bank *v.* Godfrey, 23 Ill. 579; Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370 (holding that it was not a violation of the New York statute of 1818 for a foreign bank to lend money and take a mortgage therefor); Lane *v.* West Tennessee Bank, 9 Heisk. (Tenn.) 419. But a foreign bank cannot discount notes in Virginia. Marietta Bank *v.* Pindall, 2 Rand. (Va.) 465.

To whom statute applies.—A statute prohibiting every individual or concern except an expressly authorized bank from receiving deposits and making loans applies to foreign corporations. Taylor *v.* Bruen, 2 Barb. Ch. (N. Y.) 301.

Consequence of violating statute.— If a foreign bank violates a statute, for example, makes an unlawful loan, it cannot recover thereon. Pennington *v.* Townsend, 7 Wend. (N. Y.) 276; Taylor *v.* Bruen, 2 Barb. Ch. (N. Y.) 301.

83. Connecticut Mut. L. Ins. Co. *v.* Albert, 39 Mo. 181.

84. Freeman *v.* Bank of Commerce, 3 Tex. App. Civ. Cas. § 338.

85. Pickaway County Bank *v.* Prather, 12 Ohio St. 497; Rezner *v.* Hatch, 2 Handy (Ohio) 42, 12 Ohio Dec. (Reprint) 320.

86. Suydam *v.* Morris Canal, etc., Co., 6 Hill (N. Y.) 217; Commercial Bank *v.* Sherman, 28 Oreg. 573, 43 Pac. 658, 52 Am. St. Rep. 811.

A note and mortgage were given in Wisconsin to secure an obligation to a bank in New York. This was not an infraction of the Wisconsin law forbidding foreign banking corporations from doing business within the state. Kennedy *v.* Knight, 21 Wis. 340, 94 Am. Dec. 543.

87. Newberry Bank *v.* Stegall, 41 Miss. 142; Taylor *v.* Bruen, 2 Barb. Ch. (N. Y.) 301; Bowman *v.* Cecil Bank, 3 Grant (Pa.) 33.

State cannot charter foreign bank.—A state has no right to charter a bank with power to establish banking companies in another state, and a company thus acting in another state is there held to be unchartered. Atterberry *v.* Knox, 4 B. Mon. (Ky.) 90. So, where a bank organized by a state in a disputed territory, which was finally held to belong to another state, continued to discount notes there, it could not collect them in the state where it actually existed. Myers *v.* Manhattan Bank, 20 Ohio 283.

4. Borrowing Money. A bank, unless restricted by statute[88] or its charter, may borrow money. Authority to receive deposits is by necessary implication authority to receive money as a loan and to assign or mortgage negotiable instruments.[89]

5. Buying and Selling Property — a. In General — (i) *Real Estate.* A bank has no authority to buy land to sell again,[90] but it may purchase and hold enough for a banking-house,[91] and to this end may buy more land and erect thereon fire-proof buildings and sell them for the better protection of its banking-house.[92] It can also mortgage its real estate,[93] and in conveying any real estate may enter into the common covenants of warranty, or make an assignment of any conveyance it may have acquired of property that has come into its possession.[94]

(ii) *Personal Property* — (a) *Notes.* A bank which has a right to discount a note has not always the right to buy one. In the case of a note discounted the compensation to be paid for the service is fixed by law; in the case of purchasing a note a bank can pay what it pleases. Hence the power in some cases has been denied,[95] in others it has been declared to exist.[96]

88. In Massachusetts, although a bank under Mass. Gen. Stat. c. 57, § 63, is not prohibited from borrowing of another bank money payable on demand with interest, it is prohibited from making such a loan payable on a fixed day. Com. *v.* Mutual Redemption Bank, 4 Allen (Mass.) 1.

89. *California.*—Magee *v.* Mokelumne Hill Canal, etc., Co., 5 Cal. 258.

Illinois.— Tuttle *v.* National Bank of Republic, 48 Ill. App. 481.

Indiana.— See James *v.* Rogers, 23 Ind. 451.

Missouri.— Donnell *v.* Lewis County Sav. Bank, 80 Mo. 165; Ringling *v.* Kohn, 6 Mo. App. 333.

New Jersey.— Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

New York.— Coats *v.* Donnell, 94 N. Y. 168; Barnes *v.* Ontario Bank, 19 N. Y. 152; Curtis *v.* Leavitt, 15 N. Y. 9; Leavitt *v.* Blatchford, 5 Barb. (N. Y.) 9; Leavitt *v.* Yates, 4 Edw. (N. Y.) 134.

Pennsylvania.—Ridgway *v.* Farmers' Bank, 12 Serg. & R. (Pa.) 256, 14 Am. Dec. 681.

Wisconsin.— Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120; Rockwell *v.* Elkhorn Bank, 13 Wis. 653.

United States.— Auten *v.* U. S. National Bank, 174 U. S. 125, 19 S. Ct. 628, 43 L. ed. 920. See also Western Nat. Bank *v.* Armstrong, 152 U. S. 346, 14 S. Ct. 572, 38 L. ed. 470.

Contra, Corunna First Nat. Bank *v.* Michigan City Bank, 8 N. D. 608, 80 N. W. 766.

Rediscounting.—A bank can rediscount paper. Cooper *v.* Curtis, 30 Me. 488; Curtis *v.* Leavitt, 15 N. Y. 9; Auten *v.* U. S. National Bank, 174 U. S. 125, 19 S. Ct. 628, 43 L. ed. 920; Charlotte First Nat. Bank *v.* National Exch. Bank, 92 U. S. 122, 23 L. ed. 679.

90. Ingraham *v.* Speed, 30 Miss. 410.

Agreement to clear title.— The want of a bank's power to purchase and hold real estate does not invalidate an arrangement whereby land on which the bank has a lien and which is otherwise encumbered is relieved of this outside encumbrance with the bank's money and is then sold and the proceeds are realized by the bank, the title not passing through the bank or trustees acting therefor. Zantzinger *v.* Gunton, 19 Wall. (U. S.) 32, 22 L. ed. 96.

91. *Indiana.*— Sparks *v.* State Bank, 7 Blackf. (Ind.) 469.

Kentucky.— Thweatt *v.* Hopkinsville Bank, 81 Ky. 1, 4 Ky. L. Rep. 557.

Michigan.— State Bank *v.* Niles, 1 Dougl. (Mich.) 401, 41 Am. Dec. 575.

New Jersey.— Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

Pennsylvania.— Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313.

92. State Bank *v.* Niles, 1 Dougl. (Mich.) 401, 41 Am. Dec. 575; State Bank *v.* Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

93. Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Jackson *v.* Brown, 5 Wend. (N. Y.) 590.

94. Talman *v.* Rochester City Bank, 18 Barb. (N. Y.) 123; Jackson *v.* Brown, 5 Wend. (N. Y.) 590.

95. Rochester First Nat. Bank *v.* Pierson, 24 Minn. 140, 31 Am. Rep. 341; Farmers', etc., Bank *v.* Baldwin, 23 Minn. 198, 23 Am. Rep. 683 [but authority now exists in that state by Minn. Gen. Stat. (1866), c. 33, § 15]; McIntyre *v.* Ingraham, 35 Miss. 25; American L. Ins., etc., Co. *v.* Dobbin, Lalor (N. Y.) 252. See also Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 5 L. ed. 631.

96. *Arkansas.*— State Bank *v.* Criswell, 15 Ark. 230.

Kansas.— Pape *v.* Capitol Bank, 20 Kan. 440, 27 Am. Rep. 183.

Kentucky.— U. S. Bank *v.* Norton, 3 A. K. Marsh. (Ky.) 422.

Massachusetts.— Prescott Nat. Bank *v.* Butler, 157 Mass. 548, 32 N. E. 909; Atlas Nat. Bank *v.* Savery, 127 Mass. 75, 34 Am. Rep. 345; National Pemberton Bank *v.* Porter, 125 Mass. 333, 28 Am. Rep. 235; Rochester First Nat. Bank *v.* Harris, 108 Mass. 514.

Missouri.— Salmon Falls Bank *v.* Leyser, 116 Mo. 51, 22 S. W. 504.

(B) *Stocks* — (1) OUTSIDE STOCKS. Banks in many cases have been denied the right to buy the shares of other corporations,[97] except for a past debt[98] or by special enactment;[99] but if a bank becomes a stock-holder in another it assumes the same liability as other stock-holders.[1]

(2) OWN STOCK. Some state banks are forbidden to purchase the stock of their own bank[2] while others can do this,[3] but even where the inhibition exists a bank can take its stock for a past debt.[4] A purchasing bank can resell and a stock-holder or director can become the purchaser;[5] and it may sell on credit and take the purchaser's note with the stock as collateral security.[6]

b. To Prevent Loss[7] on Loans. Banks possess large power to take and utilize property taken for a past debt in order to save themselves from loss.[8] The most general principle is that a bank may do whatever is necessary to render productive property it has taken for a debt.[9]

Ohio.— Smith *v.* Exchange Bank, 26 Ohio St. 141; Niagara County Bank *v.* Baker, 15 Ohio St. 68.

Pennsylvania.— This could be done under a bank's charter, provided the rate of interest prescribed thereon was observed. Com. *v.* Commercial Bank, 28 Pa. St. 383.

97. *Alabama.*— See Whetstone *v.* Montgomery Bank, 9 Ala. 875; Montgomery Branch Bank *v.* Crocheron, 5 Ala. 250.

Connecticut.— Mechanics', etc., Mut. Sav. Bank *v.* Meriden Agency Co., 24 Conn. 159.

Indiana.— Hill *v.* Nisbet, 100 Ind. 341.

Maine.— Franklin Co. *v.* Lewiston Sav-Inst., 68 Me. 43, 28 Am. Rep. 9.

Nebraska.— Bank of Commerce *v.* Hart, 37 Nebr. 197, 55 N. W. 631, 40 Am. St. Rep. 479, 20 L. R. A. 780.

New York.— Nassau Bank *v.* Jones, 95 N. Y. 115, 47 Am. Rep. 14; Talmage *v.* Pell, 7 N. Y. 328; Berry *v.* Yates, 24 Barb. (N. Y.) 199.

United States.— California Nat. Bank *v.* Kennedy, 167 U. S. 362, 17 S. Ct. 831, 42 L. ed. 198; Schofield *v.* Goodrich Bros. Banking Co., 98 Fed. 271, 39 C. C. A. 76.

In Missouri a bank that has authority to sell negotiable and non-negotiable paper can sell bonds. Mt. Vernon Bank *v.* Porter, 52 Mo. App. 244.

98. Franklin Bank *v.* Commercial Bank, 5 Ohio Dec. (Reprint) 339, 4 Am. L. Rec. 705.

99. Goddin *v.* Crump, 8 Leigh (Va.) 120.

Evidences of public debt of state.—Where a bank bought bonds issued by the state of Indiana and gave its negotiable notes therefor payable on time with interest, it was held that it had power so to do. Tracy *v.* Talmage, 18 Barb. (N. Y.) 456, 9 How. Pr. (N. Y.) 530.

Security for circulating notes.— In New York a bank could purchase stock and bonds to transfer to the comptroller as a security for its circulating notes, but this did not authorize them to purchase and sell stocks and bonds for a profit. Talmage *v.* Pell, 7 N. Y. 328; Comstock *v.* Willoughby, Lalor (N. Y.) 271. See Curtis *v.* Leavitt, 17 Barb. (N. Y.) 309.

1. McKim *v.* Glenn, 66 Md. 479, 8 Atl. 130.

2. German Sav. Bank *v.* Wulfekuhler, 19 Kan. 60; Gillet *v.* Moody, 3 N. Y. 479. See also St. Paul, etc., Trust Co. *v.* Jenks, 57 Minn. 248, 59 N. W. 299; Leavitt *v.* Blatchford, 17 N. Y. 521.

3. Robison *v.* Beall, 26 Ga. 17; Hartridge *v.* Rockwell, R. M. Charlt. (Ga.) 260; Union Nat. Bank *v.* Hunt, 7 Mo. App. 42; Taylor *v.* Miami Exporting Co., 6 Ohio 176; Farmers', etc., Bank *v.* Champlain Transp. Co., 18 Vt. 131.

4. German Sav. Bank *v.* Wulfekuhler, 19 Kan. 60; Taylor *v.* Miami Exporting Co., 6 Ohio 176.

5. Hartridge *v.* Rockwell, R. M. Charlt. (Ga.) 260.

Where a stock-holder purchased a large amount of stock and, after voting thereon, sold it to the bank and received the purchase-money, the court refused to set aside the transaction, as no fraud or loss to the bank was shown. Taylor *v.* Miami Exporting Co., 6 Ohio 176.

6. Union Nat. Bank *v.* Hunt, 7 Mo. App. 42.

7. Authority to take property when closing.— Large authority is given a bank when closing its business to take other property in payment for its banking home and other real estate it may possess. Harwood *v.* Ramsey, 15 Serg. & R. (Pa.) 31, holding that although banks were prohibited by statute from trading in bonds or judgments and purchasing preëxisting debts, this did not prevent a bank when closing its business from taking an assignment of a judgment in part payment of its banking home.

8. Farmers', etc., Bank *v.* Detroit, etc., R. Co., 17 Wis. 372. See also Logow *v.* Badollet, 1 Blackf. (Ind.) 416, 12 Am. Dec. 258.

9. Reynolds *v.* Simpson, 74 Ga. 454.

Protective action allowed.—A bank can purchase a judgment on land whereon it holds a mortgage in order to clear the title and render its own interest more valuable (Brown *v.* Hogg, 14 Ill. 219); can take merchandise and sell the same (Sackets' Harbor Bank *v.* Lewis County Bank, 11 Barb. (N. Y.) 213); can take an assignment of an account due a debtor (Bank of North America *v.* Tamblyn, 7 Mo. App. 570); can make a valid transfer of a security held to secure a debt that it owes (Gillett *v.* Campbell, 1 Den.

6. Collections — a. Right to Collect. The right to collect checks and other commercial paper is an incident of banking,[10] but when a bank is insolvent it has no such authority, and commits a fraud in undertaking the business.[11] The contract begins from the acceptance of the paper by the bank.[12]

b. Agency of Collecting Bank and Ownership of Paper — (i) *In General* — (a) *Rule Stated.* Generally the depositor is the owner[13] of the checks and other paper deposited by him for collection, and the bank performs the service of collecting as his agent.[14] While this relationship in many cases is created by

(N. Y.) 520); can purchase a stock of raw material and work it up into a different product (Lippincott *v.* Longbottom, 6 Pa. Co. Ct. 503); or can purchase any personal property at a sale on an execution in its own favor, or under a mortgage or pledge of the property taken as security for a debt (Farmers', etc., Bank *v.* Detroit, etc., R. Co., 17 Wis. 372). See also *infra*, II, E, 9, c, (II).

Protection of unlawful loan.—A bank cannot purchase property at a foreclosure sale to protect an unlawful loan. Williams *v.* McKay, 46 N. J. Eq. 25, 18 Atl. 824.

10. *Alabama.*— Birmingham First Nat. Bank *v.* Newport First Nat. Bank, 116 Ala. 520, 22 So. 976; Montgomery Branch Bank *v.* Knox, 1 Ala. 148.

Indiana.— Tyson *v.* State Bank, 6 Blackf. (Ind.) 225, 38 Am. Dec. 139.

Missouri.— Keyes *v.* Hardin Bank, 52 Mo. App. 323.

New York.— Yerkes *v.* Port Jervis Nat. Bank, 69 N. Y. 382, 25 Am. Rep. 208.

Texas.— Jockusch *v.* Towsey, 51 Tex. 129.

11. Richardson *v.* Denegre, 93 Fed. 572, 35 C. C. A. 452. See *infra*, II, E, 6, b, (II).

12. Houghton *v.* Lynch, 13 Minn. 85; Sherman *v.* Commercial Printing Co., 29 Mo. App. 31; Rodgers *v.* Stophel, 32 Pa. St. 111, 72 Am. Dec. 775; Lloyd *v.* West Branch Bank, 15 Pa. St. 172, 53 Am. Dec. 581.

Consideration.— The law presumes a good consideration; and the advantages arising from business associations and the temporary use of the money collected form a valuable consideration.

Georgia.— Bailie *v.* Augusta Sav. Bank, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74; Central Georgia Bank *v.* Cleveland Nat. Bank, 59 Ga. 667.

Illinois.— American Express Co. *v.* Pinckney, 29 Ill. 392.

Massachusetts.— Mechanics Bank *v.* Merchants Bank, 6 Metc. (Mass.) 13; Forster *v.* Fuller, 6 Mass. 58, 4 Am. Dec. 87.

Missouri.— Gerhardt *v.* Boatman's Sav. Inst., 38 Mo. 60, 90 Am. Dec. 407; Dyas *v.* Hanson, 14 Mo. App. 363.

New Jersey.— Titus *v.* Mechanics' Nat. Bank, 35 N. J. L. 588.

New York.—Yerkes *v.* Port Jervis Nat. Bank, 69 N. Y. 382, 25 Am. Rep. 208; Utica Bank *v.* McKinster, 11 Wend. (N. Y.) 473; Utica Bank *v.* Smedes, 3 Cow. (N. Y.) 662; Goshen, etc., Turnpike Road *v.* Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273; Union Turnpike Road *v.* Jenkins, 1 Cai. (N. Y.) 381; Miller *v.* Drake, 1 Cai. (N. Y.) 45.

North Carolina.— Runyon *v.* Latham, 27 N. C. 551.

Ohio.—Young *v.* Noble, 2 Disn. (Ohio) 485.

Oregon.— Kershaw *v.* Ladd, 34 Oreg. 375, 56 Pac. 402, 44 L. R. A. 236.

Pennsylvania.— Merchants' Nat. Bank *v.* Goodman, 109 Pa. St. 422, 2 Atl. 687, 58 Am. Rep. 728.

United States.— Exchange Nat. Bank *v.* New York City Third Nat. Bank, 112 U. S. 276, 5 S. Ct. 141, 28 L. ed. 722.

13. The true test of ownership is control. This may be acquired by express agreement or similar decisive action. In all cases advances create a lien which can only be discharged by payment; but when these have not been actually made, whatever may be the indorsements thereon, a bank has no real interest therein. National Butchers', etc., Bank *v.* Hubbell, 117 N. Y. 384, 22 N. E. 1031, 27 N. Y. St. 396, 15 Am. St. Rep. 515, 7 L. R. A. 852; Metropolitan Nat. Bank *v.* Loyd, 90 N. Y. 530; St. Louis Fifth Nat. Bank *v.* Armstrong, 40 Fed. 46; Balbach *v.* Frelinghuysen, 15 Fed. 675.

14. *Alabama.*— Mobile Bank *v.* Huggins, 3 Ala. 206.

Georgia.— Bailie *v.* Augusta Sav. Bank, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74; Wilson *v.* Tolson, 79 Ga. 137, 3 S. E. 900.

Iowa.— Guelich *v.* National State Bank, 56 Iowa 434, 9 N. W. 328, 41 Am. Rep. 110; Merchants' Nat. Bank *v.* McNulty, 36 Iowa 229.

Kansas.— Prescott *v.* Leonard, 32 Kan. 142, 4 Pac. 172.

Kentucky.— Ft. Worth First Nat. Bank *v.* Payne, 19 Ky. L. Rep. 839, 42 S. W. 736.

Louisiana.—McCullock *v.* Commercial Bank, 16 La. 566.

Maryland.— Tyson *v.* Western Nat. Bank, 77 Md. 412, 26 Atl. 520, 23 L. R. A. 161.

Massachusetts.— Freeman's Nat. Bank *v.* National Tube Works, 151 Mass. 413, 24 N. E. 779, 21 Am. St. Rep. 461, 8 L. R. A. 42.

Michigan.— Fuller *v.* Bennett, 55 Mich. 357, 21 N. W. 433.

Missouri.— Midland Nat. Bank *v.* Brightwell, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608; Keyes *v.* Hardin Bank, 52 Mo. App. 323.

Nebraska.— Griffin *v.* Chase, 36 Nebr. 328, 54 N. W. 572.

New York.— Yerkes *v.* Port Jervis Nat. Bank, 69 N. Y. 382, 25 Am. Rep. 208; Dickerson *v.* Wason, 47 N. Y. 439, 7 Am. Rep. 455; Scott *v.* Ocean Bank, 23 N. Y. 289; People *v.* Dansville Bank, 39 Hun (N. Y.) 187; Smith *v.* Essex County Bank, 22 Barb.

indorsement and deposit of the paper without other action, in others it is created by special agreement and indorsement of the paper.[15] In making collections for non-depositors a bank acts as an agent until the completion of the collection and return of the proceeds to the employer.[16]

(B) *Effect of Indorsement* — (1) GENERALLY — (a) IN BLANK. The depositor may part title with his paper at the time of depositing it by special agreement or by indorsing it in blank. Two different legal effects are given to this indorsement. By the federal and most state courts the first bank and any others through which it may pass, indorsing in the same manner, acquire a legal title which will justify any one of them in collecting the check and applying the proceeds on any indebtedness due from the indorser or receiver.[17] In some states, however, the

(N. Y.) 627; Oppenheim *v.* West Side Bank, 22 Misc. (N. Y.) 722, 50 N. Y. Suppl. 148.

North Dakota.— National Bank of Commerce *v.* Johnson, 6 N. D. 180, 69 N. W. 49.

Ohio.— Jones *v.* Kilbreth, 49 Ohio St. 401, 31 N. E. 346.

Virginia.—Alley *v.* Rogers, 19 Gratt. (Va.) 366.

United States.— Ward *v.* Smith, 7 Wall. (U. S.) 447, 19 L. ed. 207; Richardson *v.* Denegre, 93 Fed. 572, 35 C. C. A. 452; Circleville First Nat. Bank *v.* Monroe Bank, 33 Fed. 408; Balbach *v.* Frelinghuysen, 15 Fed. 675.

See 6 Cent. Dig. tit. "Banks and Banking," § 547.

Bank authorized to apply proceeds.—A bank which is authorized to collect a note and apply the proceeds on a debt of the owner to the bank is merely his agent in collecting it. Prescott *v.* Leonard, 32 Kan. 142, 4 Pac. 172.

Right reserved to charge off if uncollected.—Where a bank credits to the drawer the amount of a draft with the right to charge it off if it is not collected, the bank is only an agent for collection. Cotton Alpine Mills *v.* Weil, 129 N. C. 452, 40 S. E. 218.

An agreement between two banks to collect and remit daily was held to form a debtor and creditor relation between the two banks as soon as the paper was collected. Although remitting daily, the effect was held to be the same as though remitting at longer fixed periods. Richmond First Nat. Bank *v.* Davis, 114 N. C. 343, 19 S. E. 280, 41 Am. St. Rep. 795.

15. *In re* State Bank, 56 Minn. 119, 57 N. W. 336, 45 Am. St. Rep. 454; Commercial Nat. Bank *v.* Armstrong, 148 U. S. 50, 13 S. Ct. 533, 37 L. ed. 363.

16. Nurse *v.* Satterlee, 81 Iowa 491, 46 N. W. 1102; People *v.* Merchants' Bank, 92 Hun (N. Y.) 159, 36 N. Y. Suppl. 989, 72 N. Y. St. 93. *Contra*, Tinkham *v.* Heyworth, 31 Ill. 519.

17. *California.*— Sackett *v.* Johnson, 54 Cal. 107; Davis *v.* Russell, 52 Cal. 611, 28 Am. Rep. 647; Robinson *v.* Smith, 14 Cal. 94.

Colorado.—Wyman *v.* Colorado Nat. Bank, 5 Colo. 30, 40 Am. Rep. 133.

Connecticut.— Roberts *v.* Hall, 37 Conn. 205, 9 Am. Rep. 308; Bridgeport City Bank *v.* Welch, 29 Conn. 475; Brush *v.* Scribner, 11 Conn. 388, 29 Am. Dec. 303. See also Lawrence *v.* Stonington Bank, 6 Conn. 521.

Illinois.— Doppelt *v.* National Bank of Republic, 175 Ill. 432, 51 N. E. 753; Mix *v.* Bloomington Nat. Bank, 91 Ill. 20, 33 Am. Rep. 44.

Indiana.— Straughan *v.* Fairchild, 80 Ind. 598; Rathbone *v.* Sanders, 9 Ind. 217.

Kentucky.— Gaar *v.* Louisville Banking Co., 11 Bush (Ky.) 180, 21 Am. Rep. 209.

Maryland.— Maitland *v.* Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620; Miller *v.* Farmers', etc., Bank, 30 Md. 392; Cecil Bank *v.* Heald, 25 Md. 562; Cecil Bank *v.* Farmers' Bank, 22 Md. 148.

Massachusetts.— Wood *v.* Boylston Nat. Bank, 129 Mass. 358, 37 Am. Rep. 366; Fisher *v.* Fisher, 98 Mass. 303.

Michigan.— Cody *v.* City Nat. Bank, 55 Mich. 379, 21 N. W. 373.

Missouri.— Boatman's Sav. Inst. *v.* Holland, 38 Mo. 49; Millikin *v.* Shapleigh, 36 Mo. 596, 88 Am. Dec. 171; Bury *v.* Woods, 17 Mo. App. 245.

New Jersey.— Hoffman *v.* Jersey City First Nat. Bank, 46 N. J. L. 604; Armour *v.* McMichael, 36 N. J. L. 92; Allaire *v.* Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175.

Ohio.— Gordon *v.* Kearney, 17 Ohio 572; Cornwell *v.* Kinney, 1 Handy (Ohio) 496, 12 Ohio Dec. (Reprint) 255.

Oklahoma.— Winfield Nat. Bank *v.* McWilliams, 9 Okla. 493, 60 Pac. 229.

Rhode Island.— Blaine *v.* Bourne, 11 R. I. 119, 23 Am. Rep. 429; Bank of Republic *v.* Carrington, 5 R. I. 515, 73 Am. Dec. 83.

Tennessee.— Friberg *v.* Cox, 97 Tenn. 550, 37 S. W. 283.

Vermont.—Atkinson *v.* Brooks, 26 Vt. 569, 62 Am. Dec. 592.

West Virginia.— Carroll *v.* Penn Bank, 30 W. Va. 518, 4 S. E. 440, 8 Am. St. Rep. 101.

United States.— Brooklyn City, etc., R. Co. *v.* National Bank of Republic, 102 U. S. 14, 26 L. ed. 61; National Bank of Republic *v.* Millard, 10 Wall. (U. S.) 152, 19 L. ed. 897; Sweeney *v.* Easter, 1 Wall. (U. S.) 166, 17 L. ed. 681; Metropolis Bank *v.* New England Bank, 6 How. (U. S.) 212, 12 L. ed. 409; Wilson *v.* Smith, 3 How. (U. S.) 763, 11 L. ed. 820; Metropolis Bank *v.* New England Bank, 1 How. (U. S.) 234, 11 L. ed. 115; Anheuser-Busch Brewing Assoc. *v.* Clayton, 56 Fed. 759, 13 U. S. App. 295, 6 C. C. A. 108; Somerville *v.* Beal, 49 Fed. 790; St. Louis Fifth Nat. Bank *v.* Armstrong, 40 Fed. 46; Vickrey *v.* State Sav. Assoc., 21 Fed. 773; National Bank of Republic *v.* Brooklyn City,

first bank and any others through which the paper may pass and be indorsed in the same manner are justified in collecting it and applying the proceeds to reimburse themselves for present advances made thereon, but cannot apply them to extinguish past indebtedness due from an indorser.[18]

(b) In Blank Followed by Restrictive Indorsement — aa. *Generally.* Where paper is indorsed by the depositor generally, but by the first bank restrictively, it has been held that both paper and proceeds belong to it and that it cannot be divested thereof without its action and consent.[19] According to some tribunals the restrictive indorsement is a notice to subsequent indorsers or holders that the depositor is still the owner of the paper, and that they can acquire no rights in derogation of his own;[20] but according to others it does not operate retroactively, and nothing is thereby conserved to the first indorser or depositor.[21]

bb. *By Intermediate Holder.* Although an intermediate holder of paper specially indorsed to himself cannot enlarge the authority of a subsequent holder by a general indorsement, he can retain his dominion over paper generally indorsed to him by specially indorsing it to another.[22]

(c) Restrictive Indorsement — aa. *Generally.* When the depositor has indorsed his paper restrictively, thereby showing his intention to retain his ownership, the first bank is an agent to collect, possesses no title thereto, and is incapable of transferring a title by any kind of indorsement or agreement to any other; and every successive bank to which the paper may be sent is in like manner an agent to collect and remit the proceeds to the first.[23]

etc., R. Co., 14 Blatchf. (U. S.) 242, 17 Fed. Cas. No. 10,039 [*affirmed* in 102 U. S. 14, 26 L. ed. 61]; Chicago First Nat. Bank *v.* Reno County Bank, 1 McCrary (U. S.) 491, 3 Fed. 257.

18. Mayer *v.* Heidelbach, 123 N. Y. 332, 25 N. E. 416, 33 N. Y. St. 610, 9 L. R. A. 850; Dickerson *v.* Wason, 47 N. Y. 439, 7 Am. Rep. 455; McBride *v.* Farmers' Bank, 26 N. Y. 450; Scott *v.* Ocean Bank, 23 N. Y. 289; Youngs *v.* Lee, 12 N. Y. 551; West *v.* American Exch. Bank, 44 Barb. (N. Y.) 175; Arnold *v.* Clark, 1 Sandf. (N. Y.) 491; Stalker *v.* McDonald, 6 Hill (N. Y.) 93, 40 Am. Dec. 389; Rosa *v.* Brotherson, 10 Wend. (N. Y.) 86; Coddington *v.* Bay, 20 Johns. (N. Y.) 637, 11 Am. Dec. 342; Hackett *v.* Reynolds, 114 Pa. St. 328, 6 Atl. 689; Clarion First Nat. Bank *v.* Gregg, 79 Pa. St. 384; Jones *v.* Milliken, 41 Pa. St. 252.

19. Doppelt *v.* National Bank of Republic, 175 Ill. 432, 51 N. E. 753; Cody *v.* City Nat. Bank, 55 Mich. 379, 21 N. W. 373; Cornwell *v.* Kinney, 1 Handy (Ohio) 496, 12 Ohio Dec. (Reprint) 255; Hackett *v.* Reynolds, 114 Pa. St. 328, 6 Atl. 689. See also Meridian First Nat. Bank *v.* Strauss, 66 Miss. 479, 6 So. 232, 14 Am. St. Rep. 579; Stark *v.* U. S. National Bank, 41 Hun (N. Y.) 506; Vickrey *v.* State Sav. Assoc., 21 Fed. 773.

20. Miller *v.* Farmers', etc., Bank, 30 Md. 392; Stark *v.* U. S. National Bank, 41 Hun (N. Y.) 506; Van Namee *v.* Troy Bank, 5 How. Pr. (N. Y.) 161; Clarion First Nat. Bank *v.* Gregg, 79 Pa. St. 384; Jones *v.* Milliken, 41 Pa. St. 252; Blaine *v.* Bourne, 11 R. I. 119, 23 Am. Rep. 429. See also Arnold *v.* Clark, 1 Sandf. (N. Y.) 491 [*reversed* in 2 N. Y. 380].

21. Cody *v.* City Nat. Bank, 55 Mich. 379, 21 N. W. 373; Vickrey *v.* State Sav. Assoc., 21 Fed. 773.

22. *Kentucky.*—Armstrong *v.* Boyertown Nat. Bank, 90 Ky. 431, 12 Ky. L. Rep. 393, 14 S. W. 411, 9 L. R. A. 553.

Massachusetts.— Freeman's Nat. Bank *v.* National Tube Works Co., 151 Mass. 413, 24 N. E. 779, 21 Am. St. Rep. 461, 8 L. R. A. 42.

Michigan.— Cody *v.* City Nat. Bank, 55 Mich. 379, 21 N. W. 373.

New York.— Hoffman *v.* Miller, 9 Bosw. (N. Y.) 334; Arnold *v.* Clark, 1 Sandf. (N. Y.) 491.

Pennsylvania.— Hackett *v.* Reynolds, 114 Pa. St. 328, 6 Atl. 689.

23. The depositor can therefore recall his paper before collection or demand and recover the proceeds wherever they may be; and the insolvency of any agent or subagent possessing his paper or the proceeds does not affect his right to recover the same.

Alabama.— Peoples Bank *v.* Jefferson County Sav. Bank, 106 Ala. 524, 17 So. 728, 54 Am. St. Rep. 59. See also National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50.

Connecticut.—Lawrence *v.* Stonington Bank, 6 Conn. 521; Barber *v.* Brace, 3 Conn. 9, 8 Am. Dec. 149.

Georgia.— Freeman *v.* Macon Exch. Bank, 87 Ga. 45, 13 S. E. 160; Central R. Co. *v.* Lynchburg First Nat. Bank, 73 Ga. 383.

Illinois.— Fay *v.* Strawn, 32 Ill. 295.

Indiana.— Crown Point First Nat. Bank *v.* Richmond First Nat. Bank, 76 Ind. 561, 40 Am. Rep. 261.

Iowa.— Nurse *v.* Satterlee, 81 Iowa 491, 46 N. W. 1102; Claflin *v.* Wilson, 51 Iowa 15, 50 N. W. 578.

Kentucky.—Armstrong *v.* Boyertown Nat. Bank, 90 Ky. 431, 12 Ky. L. Rep. 393, 14 S. W. 411, 9 L. R. A. 553.

Louisiana.—Moore *v.* Louisiana Nat. Bank, 44 La. Ann. 99, 10 So. 407, 32 Am. St. Rep.

bb. *Interpretation of Special Indorsements.* Nearly all restrictive collection indorsements can be classified under two heads: Those "for collection," "for collection and remittance," and "for deposit," "for deposit to the credit of," or "to the account of" the depositor, which generally, although not always,[24] preserve the depositor's right to the paper and its proceeds, which cannot be impaired by any subsequent indorsements inconsistent with his own. Of course the ordinary construction given to these indorsements may be affected or changed by usage or agreement.[25] Indorsements "for collection and credit of" the indorser, and "for collection on account of" the indorser are interpreted in two ways, being some-

332; Louisiana Ice Co. *v.* State Nat. Bank, McGloin (La.) 181.

Maryland.— Tyson *v.* Western Nat. Bank, 77 Md. 412, 26 Atl. 520, 23 L. R. A. 161; Cecil Bank *v.* Farmers' Bank, 22 Md. 148.

Massachusetts.— Taft *v.* Quinsigamond Nat. Bank, 172 Mass. 363, 52 N. E. 387; Freeman's Nat. Bank *v.* National Tube Works Co., 151 Mass. 413, 24 N. E. 779, 21 Am. St. Rep. 461, 8 L. R. A. 42; Manufacturers' Nat. Bank *v.* Continental Bank, 148 Mass. 553, 20 N. E. 193, 12 Am. St. Rep. 598, 2 L. R. A. 699.

Minnesota.— Merchants' Nat. Bank *v.* Hanson, 33 Minn. 40, 21 N. W. 849, 53 Am. Rep. 5; Syracuse Third Nat. Bank *v.* Clark, 23 Minn. 263.

Missouri.—Mechanics Bank *v.* Valley Packing Co., 70 Mo. 643; Millikin *v.* Shapleigh, 36 Mo. 596, 88 Am. Dec. 171; German F. Ins. Co. *v.* Kimble, 66 Mo. App. 370; Bury *v.* Woods, 17 Mo. App. 245.

Nebraska.— Griffin *v.* Chase, 36 Nebr. 328, 54 N. W. 572; Anheuser-Busch Brewing Assoc. *v.* Morris, 36 Nebr. 31, 53 N. W. 1037.

New Jersey.— Hoffman *v.* Jersey City First Nat. Bank, 46 N. J. L. 604.

New York.— Clarke County Bank *v.* Gilman, (N. Y. 1897) 46 N. E. 1145; National Butchers', etc., Bank *v.* Hubbell, 117 N. Y. 384, 22 N. E. 1031, 27 N. Y. St. 396, 15 Am. St. Rep. 515, 7 L. R. A. 852; Naser *v.* New York City First Nat. Bank, 116 N. Y. 492, 22 N. E. 1077, 27 N. Y. St. 670; Hook *v.* Pratt, 78 N. Y. 371, 34 Am. Rep. 539; McBride *v.* Farmers' Bank, 26 N. Y. 450; Commercial Bank *v.* Marine Bank, 1 Abb. Dec. (N. Y.) 405, 3 Keyes (N. Y.) 337, 1 Transcr. App. (N. Y.) 302, 6 Abb. Pr. N. S. (N. Y.) 33, 37 How. Pr. (N. Y.) 432; Stark *v.* U. S. National Bank, 41 Hun (N. Y.) 506; Dod *v.* New York Fourth Nat. Bank, 59 Barb. (N. Y.) 265; Lindauer *v.* New York City Fourth Nat. Bank, 55 Barb. (N. Y.) 75; Van Amee *v.* Troy Bank, 8 Barb. (N. Y.) 312, 5 How. Pr. (N. Y.) 161; Hoffman *v.* Miller, 9 Bosw. (N. Y.) 334; Arnold *v.* Clark, 1 Sandf. (N. Y.) 491; Hutchinson *v.* Manhattan Co., 9 Misc. (N. Y.) 343, 29 N. Y. Suppl. 1103, 60 N. Y. St. 612; Syracuse Bank *v.* Wisconsin Mar., etc., Ins. Co., 12 N. Y. Suppl. 952, 36 N. Y. St. 584.

North Carolina.— Boykin *v.* Fayetteville Bank, 118 N. C. 566, 24 S. E. 357; Stevenson *v.* Fidelity Bank, 113 N. C. 485, 18 S. E. 695.

North Dakota.— National Bank of Commerce *v.* Johnson, 6 N. D. 180, 69 N. W. 49.

Ohio.— Jones *v.* Kilbreth, 49 Ohio St. 401, 31 N. E. 346; Reeves *v.* State Bank, 8 Ohio St. 465.

Pennsylvania.— Hackett *v.* Reynolds, 114 Pa. St. 328, 6 Atl. 689; Clarion First Nat. Bank *v.* Gregg, 79 Pa. St. 384; Jones *v.* Milliken, 41 Pa. St. 252.

Rhode Island.— Blaine *v.* Bourne, 11 R. I. 119, 23 Am. Rep. 429.

Tennessee.—Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 42 Am. St. Rep. 921, 25 L. R. A. 523.

Texas.— Sherman City Bank *v.* Weiss, 67 Tex. 331, 3 S. W. 299, 60 Am. Rep. 29.

Wyoming.— Foster *v.* Rincker, 4 Wyo. 484, 35 Pac. 470.

United States.— Evansville Old Nat. Bank *v.* German-American Nat. Bank, 155 U. S. 556, 15 S. Ct. 221, 39 L. ed. 259; Commercial Nat. Bank *v.* Armstrong, 148 U. S. 50, 13 S. Ct. 533, 37 L. ed. 363; White *v.* Miners' Nat. Bank, 102 U. S. 658, 26 L. ed. 250; Sweeney *v.* Easter, 1 Wall. (U. S.) 166, 17 L. ed. 681; Washington Bank *v.* Triplett, 1 Pet. (U. S.) 25, 7 L. ed. 37; U. S. *v.* American Exch. Nat. Bank, 70 Fed. 232; National Exch. Bank *v.* Beal, 50 Fed. 355; Commercial Nat. Bank *v.* Hamilton Nat. Bank, 42 Fed. 880; St. Louis Fifth Nat. Bank *v.* Armstrong, 40 Fed. 46; Commercial Nat. Bank *v.* Armstrong, 39 Fed. 684; *In re* Armstrong, 33 Fed. 405; Metropolis Bank *v.* Jersey City First Nat. Bank, 22 Blatchf. (U. S.) 58, 19 Fed. 301; Chicago First Nat. Bank *v.* Reno County Bank, 1 McCrary (U. S.) 491, 3 Fed. 257.

England.— Sigourney *v.* Lloyd, 8 B. & C. 622, 7 L. J. K. B. O. S. 73, 15 E. C. L. 308; Buller *v.* Harrison, 2 Cowp. 565; Treuttel *v.* Barandon, 1 Moore C. P. 543, 8 Taunt. 100, 4 E. C. L. 59.

24. Where depositor has drawn or may draw against amount.— "For deposit to the credit of" the depositor passes the absolute title to the bank, if he is accustomed or has the right to draw at once against them. National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50; Ditch *v.* Western Nat. Bank, 79 Md. 192, 29 Atl. 72, 138, 47 Am. St. Rep. 375, 23 L. R. A. 164; Security Bank *v.* Northwestern Fuel Co., 58 Minn. 141, 59 N. W. 987.

25. Crown Point First Nat. Bank *v.* Richmond First Nat. Bank, 76 Ind. 561, 40 Am. Rep. 261; Commercial Nat. Bank *v.* Armstrong, 148 U. S. 50, 13 S. Ct. 533, 37 L. ed. 363; Sweeney *v.* Easter, 1 Wall. (U. S.) 166, 17 L. ed. 681; Philadelphia Nat. Bank *v.* Dowd, 38 Fed. 172, 2 L. R. A. 480; Chicago

times construed like the others mentioned; the words "for collection" controlling the subsequent ones which by themselves seem to contradict the former;[26] and again stress is given to the crediting words and in these cases the indorser is a principal and his ownership continues until the paper is collected, when he becomes a creditor like an ordinary depositor.[27]

cc. *Evidence to Explain Special Indorsements.* The ordinary interpretation given to special indorsements does not always harmonize with the actual agreements and undertakings of the parties, and in such cases evidence may be given to show what the parties intended and the real contract when clearly understood will be enforced.[28]

dd. *Effect of Advancing.* If, notwithstanding such restrictive indorsements, advances are actually made to the depositor, the title passes, and in these cases the title can be passed on; in other words, a second bank can hold the proceeds of such paper for advances made to the first when it has advanced in like manner to the depositor. The crediting with the actual right to draw, or the actual draw-

First Nat. Bank *v.* Reno County Bank, 1 McCrary (U. S.) 491, 3 Fed. 257.

26. *Georgia.*— Freeman *v.* Macon Exch. Bank, 87 Ga. 45, 13 S. E. 160.

Kentucky.—Armstrong *v.* Boyertown Nat. Bank, 90 Ky. 431, 12 Ky. L. Rep. 393, 14 S. W. 411, 9 L. R. A. 553.

Maryland.—Wheeling Exch. Bank *v.* Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173; Tyson *v.* Western Nat. Bank, 77 Md. 412, 26 Atl. 520, 23 L. R. A. 161.

New York.—Van Amee *v.* Troy Bank, 8 Barb. (N. Y.) 312, 5 How. Pr. (N. Y.) 161.

North Dakota.— National Bank of Commerce *v.* Johnson, 6 N. D. 180, 69 N. W. 49.

United States.—White *v.* Miners' Nat. Bank, 102 U. S. 658, 26 L. ed. 250; Sweeney *v.* Easter, 1 Wall. (U. S.) 166, 17 L. ed. 681; Beal *v.* National Exch. Bank, 55 Fed. 894, 5 U. S. App. 376, 5 C. C. A. 304; Beal *v.* Somerville, 50 Fed. 647, 5 U. S. App. 14, 1 C. C. A. 598, 17 L. R. A. 291; Circleville First Nat. Bank *v.* Monroe Bank, 33 Fed. 408; *In re* Armstrong, 33 Fed. 405.

27. *Alabama.*— National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50.

Illinois.— Metropolitan Nat. Bank *v.* Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, 74 Am. St. Rep. 180; Fawsett *v.* National L. Ins. Co., 5 Ill. App. 272.

Maryland.— Ditch *v.* Western Nat. Bank, 79 Md. 192, 29 Atl. 72, 138, 47 Am. St. Rep. 375, 23 L. R. A. 164.

Massachusetts.— Freeman's Nat. Bank *v.* National Tube Works Co., 151 Mass. 413, 24 N. E. 779, 21 Am. St. Rep. 461, 8 L. R. A. 42; Manufacturers' Nat. Bank *v.* Continental Nat. Bank, 148 Mass. 553, 20 N. E. 193, 12 Am. St. Rep. 598, 2 L. R. A. 699.

North Dakota.— National Bank of Commerce *v.* Johnson, 6 N. D. 180, 69 N. W. 49.

Rhode Island.— National Park Bank *v.* Levy, 17 R. I. 746, 24 Atl. 777, 17 L. R. A. 475.

United States.— Franklin County Nat. Bank *v.* Beal, 49 Fed. 606; Wellston First Nat. Bank *v.* Armstrong, 42 Fed. 193; Elkhart First Nat. Bank *v.* Armstrong, 39 Fed. 231.

28. U. S. National Bank *v.* Geer, 53 Nebr. 67, 73 N. W. 266, 41 L. R. A. 439, 55 Nebr. 462, 75 N. W. 1088, 70 Am. St. Rep. 390; Holmes *v.* Lincoln First Nat. Bank, 38 Nebr. 326, 56 N. W. 1011, 41 Am. St. Rep. 733. See also Davis *v.* Morgan, 64 N. C. 570.

Evidence is admissible when the indorser has paid no consideration and made no advances thereon to show these facts, and thereby lay a just foundation to the owner's claim for the proceeds (Sweeney *v.* Easter, 1 Wall. (U. S.) 166, 17 L. ed. 681), or to show that the indorsement was intended to confer authority to collect the paper (Lawrence *v.* Stonington Bank, 6 Conn. 521; Barker *v.* Prentiss, 6 Mass. 430; Armour Packing Co. *v.* Davis, 118 N. C. 548, 24 S. E. 365. *Compare* Ditch *v.* Western Nat. Bank, 79 Md. 192, 29 Atl. 72, 138, 47 Am. St. Rep. 375, 23 L. R. A. 164, holding that a depositor cannot show that he regarded all checks indorsed by him "for deposit" to the credit of himself as having been deposited for collection). In some states between the immediate parties, the bank and its depositor, evidence may be admitted to show what was intended by the indorsement. Roads *v.* Webb, 91 Me. 406, 40 Atl. 128, 64 Am. St. Rep. 246; Cook *v.* Brown, 62 Mich. 473, 29 N. W. 46, 4 Am. St. Rep. 870; U. S. National Bank *v.* Geer, 55 Nebr. 462, 75 N. W. 1088, 70 Am. St. Rep. 390; Commercial State Bank *v.* Antelope County, 48 Nebr. 496, 67 N. W. 465; Holmes *v.* Lincoln First Nat. Bank, 38 Nebr. 326, 56 N. W. 1011, 41 Am. St. Rep. 733.

Evidence is not admissible when advances have been made on the paper in good faith believing that the holder had a title thereto and right to transfer it (Alabama Nat. Bank *v.* Rivers, 116 Ala. 1, 22 So. 580, 67 Am. St. Rep. 95; National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50; Freeman *v.* Macon Exch. Bank, 87 Ga. 45, 13 S. E. 160; Armour Brothers Banking Co. *v.* Riley County Bank, 30 Kan. 163, 1 Pac. 506; Haskell *v.* Mitchell, 53 Me. 468, 89 Am. Dec. 711; Leary *v.* Blanchard, 48 Me. 269; Cecil Bank *v.* Farmers' Bank, 22 Md. 148; Williams *v.* Woods, 16 Md. 220; Lancaster Nat. Bank *v.* Taylor, 100 Mass. 18, 97 Am. Dec. 70, 1 Am.

ing, may be regarded as negativing the effect of the indorsement, or of assuming the responsibility of its collection and ownership by the bank.[29]

ee. *Effect of Crediting Without Advancing.* The mere crediting of paper thus indorsed to the depositor as cash does not transfer the title.[30] If the depositor has a right to draw at once for the amount credited as though it were a cash deposit, in some states the title passes;[31] in others it does not pass until he has actually drawn.[32]

Rep. 71; Youngberg *v.* Nilson, 51 Minn. 172, 53 N. W. 629, 38 Am. St. Rep. 497; Syracuse Third Nat. Bank *v.* Clark, 23 Minn. 263; Kern *v.* Von Phul, 7 Minn. 426, 82 Am. Dec. 105; U. S. National Bank *v.* Geer, 55 Nebr. 462, 75 N. W. 1088, 70 Am. St. Rep. 390; Clark *v.* Whitaker, 50 N. H. 474, 9 Am. Rep. 286; Southard *v.* Porter, 43 N. H. 379. See also Ditch *v.* Western Nat. Bank, 79 Md. 192, 27 Atl. 72, 138, 47 Am. St. Rep. 375, 23 L. R. A. 164), or to show that a restrictive indorsement was an absolute one and thereby deprive the maker of his defense (Importers', etc., Nat. Bank *v.* Peters, 123 N. Y. 272, 25 N. E. 319, 33 N. Y. St. 182; Clark *v.* Merchants' Bank, 2 N. Y. 380).

29. *Alabama.*— National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50; City Nat. Bank *v.* Burns, 68 Ala. 267, 44 Am. Rep. 138.

Illinois.—American Exch. Nat. Bank *v.* Gregg, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 171. See also Strong *v.* King, 35 Ill. 9, 85 Am. Dec. 336.

Indiana.—Wasson *v.* Lamb, 120 Ind. 514, 22 N. E. 729, 16 Am. St. Rep. 342, 6 L. R. A. 191.

Kentucky.—Armstrong *v.* Boyertown Nat. Bank, 90 Ky. 431, 12 Ky. L. Rep. 393, 14 S. W. 411, 9 L. R. A. 553.

Maryland.— Ditch *v.* Western Nat. Bank, 79 Md. 192, 29 Atl. 72, 138, 47 Am. St. Rep. 375, 23 L. R. A. 164; Tyson *v.* Western Nat. Bank, 77 Md. 412, 26 Atl. 520, 23 L. R. A. 161.

Massachusetts.— Manufacturers' Nat. Bank *v.* Continental Bank, 148 Mass. 553, 20 N. E. 193, 12 Am. St. Rep. 598, 2 L. R. A. 679; Lynn First Nat. Bank *v.* Smith, 132 Mass. 227.

Minnesota.— Security Bank *v.* Northwestern Fuel Co., 58 Minn. 141, 59 N. W. 987; *In re* State Bank, 56 Minn. 119, 57 N. W. 336, 45 Am. St. Rep. 454.

Missouri.— Bullene *v.* Coates, 79 Mo. 426; Ayres *v.* Farmers, etc., Bank, 79 Mo. 421, 49 Am. Rep. 235; Midland Nat. Bank *v.* Roll, 60 Mo. App. 585; Kavanaugh *v.* Farmers' Bank, 59 Mo. App. 540.

New Jersey.— Hoffman *v.* Jersey City First Nat. Bank, 46 N. J. L. 604.

New York.— Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; Metropolitan Nat. Bank *v.* Loyd, 90 N. Y. 530; Justh *v.* Commonwealth Nat. Bank, 56 N. Y. 478; Dickerson *v.* Wason, 47 N. Y. 439, 7 Am. Rep. 455; Oddie *v.* National City Bank, 45 N. Y. 735, 6 Am. Rep. 160; Scott *v.* Ocean Bank, 23 N. Y. 289; Clark *v.* Merchants' Bank, 2 N. Y. 380; Riverside Bank *v.* Woodhaven Junction Land Co., 34 N. Y. App. Div. 359, 54 N. Y. Suppl. 266; People *v.* St. Nicholas Bank, 77 Hun (N. Y.) 159, 28 N. Y. Suppl. 407, 58 N. Y. St. 712; Adams *v.* McCann, 59 N. Y. Super. Ct. 59, 13 N. Y. Suppl. 424, 36 N. Y. St. 421; Walton *v.* Riverside Bank, 29 Misc. (N. Y.) 304, 60 N. Y. Suppl. 519; Moore *v.* Riverside Bank, 25 Misc. (N. Y.) 720, 55 N. Y. Suppl. 615; National Citizens' Bank *v.* Howard, 3 How. Pr. N. S. (N. Y.) 511.

North Carolina.—Armour Packing Co. *v.* Davis, 118 N. C. 548, 24 S. E. 365.

United States.—White *v.* Miners' Nat. Bank, 102 U. S. 658, 26 L. ed. 250; Cincinnati First Nat. Bank *v.* Burkhardt, 100 U. S. 686, 25 L. ed. 766; Beal *v.* Somerville, 50 Fed. 647, 5 U. S. App. 14, 1 C. C. A. 598, 17 L. R. A. 291; Elkhart First Nat. Bank *v.* Armstrong, 39 Fed. 231.

England.— *Ex p.* Thompson, 1 Mont. & M. 324, 3 Deac. & C. 612; *Ex p.* Sargeant, 1 Rose 153; Bolton *v.* Richard, 6 T. R. 139.

30. All the authorities agree to this. Armstrong *v.* Boyertown Nat. Bank, 90 Ky. 431, 12 Ky. L. Rep. 393, 14 S. W. 411, 9 L. R. A. 553; Midland Nat. Bank *v.* Brightwell, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608. See also cases cited in next two notes.

31. *Georgia.*— Cincinnati Fourth Nat. Bank *v.* Mayer, 89 Ga. 108, 14 S. E. 891.

Massachusetts.— Pacific Bank *v.* Mitchell, 9 Metc. (Mass.) 297.

Nebraska.— U. S. National Bank *v.* Geer, 53 Nebr. 67, 73 N. W. 266, 4 L. R. A. 439; Higgins *v.* Hayden, 53 Nebr. 61, 73 N. W. 280.

New Jersey.— Perth Amboy Gaslight Co. *v.* Middlesex County Bank, (N. J. 1900) 45 Atl. 704; Hoffman *v.* Jersey City First Nat. Bank, 46 N. J. L. 604; Titus *v.* Mechanics' Nat. Bank, 35 N. J. L. 588.

New York.— Clark *v.* Merchants' Bank, 2 N. Y. 380.

Tennessee.—Williams *v.* Cox, 97 Tenn. 555, 37 S. W. 282; Friberg *v.* Cox, 97 Tenn. 550, 37 S. W. 283.

England.— Bolton *v.* Richard, 6 T. R. 139.

32. *California.*—National Gold Bank, etc., Co. *v.* McDonald, 51 Cal. 64, 21 Am. Rep. 697.

Minnesota.— South Park Foundry, etc., Co. *v.* Chicago Great Western R. Co., 75 Minn. 186, 77 N. W. 796.

New Jersey.— Middlesex *v.* State Bank, 32 N. J. Eq. 467.

North Carolina.— Armour Packing Co. *v.* Davis, 118 N. C. 548, 24 S. E. 365; U. S. National Bank *v.* McNair, 114 N. C. 335, 19 S. E. 361.

(2) When Bank Is Insolvent. If the bank is insolvent at the time of depositing the paper, it is a fraud to receive it,[33] and whatever be the kind of indorsement thereon no title is acquired by the bank.[34]

(c) *Effect of Retransfer.* With few exceptions, all checks which are credited to depositors are entered with the express or implied right to charge them back if they are not paid.[35] One view of this right to retransfer is that it is inconsistent with the bank's ownership of title, even though advances be made on them. If, however, a bank divests itself of its qualified title by charging them back, it still preserves its lien for any advances actually made on them.[36] The other view is that the right to retransfer does not affect the bank's title to the paper, every indorsee having recourse to his indorser in the event of not receiving payment from the primary party.[37]

(d) *Effect of Special Instructions.* In collecting paper with special instructions the bank usually acts as agent; and these instructions bind all other agents undertaking the service and having a knowledge of them. This relationship may be disproved as in other cases by showing that, notwithstanding the instructions, advances were made and other courses pursued inconsistent with the continuance of the agency relation.[38] As between the immediate parties therefore the true contract may be proved;[39] and an indorsement, although in form general, may

Wisconsin.— Manufacturers' Nat. Bank *v.* Newell, 71 Wis. 309, 37 N. W. 420.

United States.—Beal *v.* Somerville, 50 Fed. 647, 5 U. S. App. 14, 1 C. C. A. 598, 17 L. R. A. 291; Balbach *v.* Frelinghuysen, 15 Fed. 675.

Paper deposited on agreement that it shall not be drawn against until time enough has elapsed for its collection does not become the bank's property. Importers', etc., Nat. Bank *v.* Peters, 123 N. Y. 272, 25 N. E. 319, 33 N. Y. St. 182.

33. See *supra*, II, E, 6, a.

34. Ayres *v.* Farmers, etc., Bank, 79 Mo. 421, 49 Am. Rep. 235; Importers', etc., Nat. Bank *v.* Peters, 123 N. Y. 272, 25 N. E. 319, 33 N. Y. St. 182 [*affirming* 4 N. Y. Suppl. 599, 21 N. Y. St. 98]; St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 10 S. Ct. 390, 33 L. ed. 683; Philadelphia *v.* Eckels, 98 Fed. 485; Richardson *v.* Denegre, 93 Fed. 572, 35 C. C. A. 452; Peck *v.* New York First Nat. Bank, 43 Fed. 357; Dodge *v.* Mastin, 5 McCrary (U. S.) 404, 17 Fed. 660; *Re* Canada Cent. Bank, 15 Ont. 611; Exchange Bank *v.* Montreal Coffee House Assoc., 2 Montreal L. Rep. 141.

35. *Georgia.*—Bailie *v.* Augusta Sav. Bank, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74.

Minnesota.— *In re* State Bank, 56 Minn. 119, 57 N. W. 336, 45 Am. St. Rep. 454.

New York.— National Butchers', etc., Bank *v.* Hubbell, 117 N. Y. 384, 22 N. E. 1031, 27 N. Y. St. 396, 15 Am. St. Rep. 515, 7 L. R. A. 852.

North Carolina.— Armour Packing Co. *v.* Davis, 118 N. C. 548, 24 S. E. 365.

Pennsylvania.— If a bank credits a depositor's account with a check received from a collection and pays the amount on his check, it cannot afterward change the check back on failing to collect it, for it has become the owner. Three of the seven justices dissented. Pepperday *v.* Citizens Nat. Bank, 183 Pa. St. 519, 38 Atl. 1030, 63 Am. St. Rep. 769, 39 L. R. A. 529.

United States.—Beal *v.* Somerville, 50 Fed. 647, 5 U. S. App. 14, 1 C. C. A. 598, 17 L. R. A. 291; Balbach *v.* Frelinghuysen, 15 Fed. 675; Levi *v.* Missouri Nat. Bank, 5 Dill. (U. S.) 104, 15 Fed. Cas. No. 8,289, 7 Am. L. Rec. 283, 7 Centr. L. J. 249; Trinidad First Nat. Bank *v.* Denver First Nat. Bank, 4 Dill. (U. S.) 290, 9 Fed. Cas. No. 4,810, 7 Am. L. Rec. 168, 7 Centr. L. J. 170, 10 Chic. Leg. N. 388, 26 Pittsb. Leg. J. (Pa.) 24, 6 Reporter 356, 2 Tex. L. J. 74.

England.— Giles *v.* Perkins, 9 East 12.

Canada.— Rose-Belford Printing Co. *v.* Montreal Bank, 12 Ont. 544.

36. *In re* State Bank, 56 Minn. 119, 57 N. W. 336, 45 Am. St. Rep. 454; Armour Packing Co. *v.* Davis, 118 N. C. 548, 24 S. E. 365; Beal *v.* Somerville, 50 Fed. 647, 5 U. S. App. 14, 1 C. C. A. 598, 17 L. R. A. 291; Balbach *v.* Frelinghuysen, 15 Fed. 675.

37. *Minnesota.*— *In re* State Bank, 56 Minn. 119, 57 N. W. 336, 45 Am. St. Rep. 454.

Missouri.— Ayres *v.* Farmers', etc., Bank, 79 Mo. 421, 49 Am. Rep. 235.

New York.— Metropolitan Nat. Bank *v.* Loyd, 90 N. Y. 530.

North Carolina.— Armour Packing Co. *v.* Davis, 118 N. C. 548, 24 S. E. 365.

United States.— Elkhart First Nat. Bank *v.* Armstrong, 39 Fed. 231.

38. *In re* State Bank, 56 Minn. 119, 57 N. W. 336, 45 Am. St. Rep. 454.

39. U. S. National Bank *v.* Geer, 53 Nebr. 67, 73 N. W. 266, 41 L. R. A. 439; Corbett *v.* Fetzer, 47 Nebr. 269, 66 N. W. 417; Holmes *v.* Lincoln First Nat. Bank, 38 Nebr. 326, 56 N. W. 1011, 41 Am. St. Rep. 733; Dusenbury *v.* Albright, 31 Nebr. 345, 47 N. W. 1047; Roberts *v.* Snow, 27 Nebr. 425, 43 N. W. 241; Commercial Bank *v.* Marine

be shown to have given the indorsee only a title and authority for making a collection.[40]

(E) *Attachment of Paper Deposited For Collection.* In some jurisdictions where paper has been deposited with a restrictive or regular indorsement and no advances have been made thereon, it can be garnished as the depositor's property, although not as the property of the drawer or of the bank,[41] but if advances have been made, then the lien is prior and superior to that of an attaching creditor.[42] In other states such paper cannot be garnished in favor of any one for the reason that it may never be collected;[43] but if a check thus received is drawn on the collecting bank, so as to create an absolute debt therefrom, it may be garnished.[44]

(II) *Notes.* The collecting bank is the agent of the owner or sender of paper.[45] It does not, however, become an agent by making paper payable there, but must become the possessor to establish the agency.[46] If the debtor or payor

Bank, 1 Abb. Dec. (N. Y.) 405, 3 Keyes (N. Y.) 337, 1 Transcr. App. (N. Y.) 302, 6 Abb. Pr. N. S. (N. Y.) 33, 37 How. Pr. 432; Blaine *v.* Bourn, 11 R. I. 119, 23 Am. Rep. 429.

40. Lawrence *v.* Stonington Bank, 6 Conn. 521; Barker *v.* Prentiss, 6 Mass. 430.

41. Freeman *v.* Exchange Bank, 87 Ga. 45, 13 S. E. 160; Pickering *v.* Cameron, 103 Iowa 186, 72 N. W. 447.

42. Cincinnati Fourth Nat. Bank *v.* Mayer, 89 Ga. 108, 14 S. E. 891.

43. Richards *v.* Stephenson, 99 Mass. 311; Hancock *v.* Colyer, 99 Mass. 187, 96 Am. Dec. 730.

So long as a depositor cannot by contract or usage check against the proceeds of a check deposited for collection prior to collecting it his creditors cannot secure anything by attaching it. Moors *v.* Goddard, 147 Mass. 287, 17 N. E. 532.

44. Lane *v.* Felt, 7 Gray (Mass.) 491; Meacham *v.* McCorbitt, 2 Metc. (Mass.) 352; Lupton *v.* Cutter, 8 Pick. (Mass.) 298; Wood *v.* Partridge, 11 Mass. 488.

45. Ward *v.* Smith, 7 Wall. (U. S.) 447, 19 L. ed. 207.

No authority to receive for payee without possession of paper.— If a note is made payable at a particular time and bank, and the payor is ready there to pay, but the bank has not received the note for collection, it is without authority to receive the money for the payee. Cheney *v.* Libby, 134 U. S. 68, 10 S. Ct. 498, 33 L. ed. 818.

46. *Alabama.*— Moore *v.* Meyer, 57 Ala. 20.

Illinois.— Ridgely Nat. Bank *v.* Patton, 109 Ill. 479; Wood *v.* Merchants' Sav., etc., Co., 41 Ill. 267.

Iowa.— Montreal Bank *v.* Ingerson, 105 Iowa 349, 75 N. W. 351.

Kentucky.— Caldwell *v.* Evans, 5 Bush (Ky.) 380, 96 Am. Dec. 358.

Michigan.— Pease *v.* Warren, 29 Mich. 9, 18 Am. Rep. 58.

Minnesota.— St. Paul Nat. Bank *v.* Cannon, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189.

Nebraska.— Omaha First Nat. Bank *v.* Chilson, 45 Nebr. 257, 63 N. W. 362.

New Jersey.— Adams *v.* Hackensack Imp. Commission, 44 N. J. L. 638, 43 Am. Rep. 406.

New York.— Hills *v.* Place, 48 N. Y. 520, 8 Am. Rep. 568.

Pennsylvania.— Williamsport Gas Co. *v.* Pinkerton, 95 Pa. St. 62.

Tennessee.— Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 10 Am. St. Rep. 669, 3 L. R. A. 273.

United States.—Cheney *v.* Libby, 134 U. S. 68, 10 S. Ct. 498, 33 L. ed. 818; Ward *v.* Smith, 7 Wall. (U. S.) 447, 19 L. ed. 207.

Paper payable at office.— The same rule applies to paper payable at the office of an individual. Keene Five Cents Sav. Bank *v.* Archer, 109 Iowa 419, 80 N. W. 505; Klindt *v.* Higgins, 95 Iowa 529, 64 N. W. 414; Englert *v.* White, 92 Iowa 97, 60 N. W. 224.

Effect of bank's failure before receiving paper.— If the paper is not received at maturity, and the money is there awaiting application and kept there for that purpose, and is lost afterward through the bank's insolvency, the debtor must lose, for until the paper is received by the bank it is acting solely as his agent. Indig *v.* National City Bank, 80 N. Y. 100; Turner *v.* Hayden, 4 B. & C. 1, 6 D. & R. 5, Russ. & M. 215, 10 E. C. L. 455; Sebag *v.* Abitbol, 4 M. & S. 462, 1 Stark. 79. See also Adams *v.* Hackensack Imp. Commission, 44 N. J. L. 638, 43 Am. Rep. 406.

Effect of bank's failure before application of fund.— If both money and paper are received before its maturity, and the bank fails after the paper has matured, without having applied the money, the loss falls on the maker. Sutherland *v.* Ypsilanti First Nat. Bank, 31 Mich. 230.

Effect of bank's failure after application of fund.— If the bank fails after applying the money the loss falls on the creditor (East-Haddam Bank *v.* Scovil, 12 Conn. 303; Fabens *v.* Mercantile Bank, 23 Pick. (Mass.) 330, 34 Am. Dec. 59; Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459, Seld. Notes (N. Y.) 12; Colvin *v.* Holbrook, 2 N. Y. 126; Smith *v.* Essex County Bank, 22 Barb. (N. Y.) 627; Denny *v.* Manhattan Co., 5 Den. (N. Y.) 639; Howard *v.* Ives, 1 Hill (N. Y.) 263; Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289; Allen

leaves money in the bank to pay his obligation,[47] or is a depositor and specially directs the bank to pay it, the bank also becomes his agent and is responsible to him for its safe-keeping and proper application.[48] It may too apply the depositor's funds on his notes made payable there without special direction.[49]

(III) *Special Paper* — (A) *In General.* In collecting mortgages, certificates of deposit, and other paper not usually given to banks to collect, banks serve as agents until the collection is fully completed, even though money is advanced on them or the amount is credited to the owner.[50]

(B) *Effect of Special Instructions.* In collecting drafts and other instruments deposited with specific instructions to collect and remit the proceeds to the depositor, the bank acts as agent throughout the undertaking.[51] This relation, however, may be disproved by showing that, notwithstanding such instructions, the well-understood usage prevailed of collecting the proceeds and giv-

v. Merchants' Bank, 15 Wend. (N. Y.) 482), and if the payment is credited to the owner of the paper the loss falls on him (Globe Furniture Co. *v.* School Dist. No. 22, 6 Kan. App. 889, 50 Pac. 978).

Effect of receipt of funds and paper before maturity.— If the money is received, and also the paper to which it is to be applied, before its maturity, there is a conflict of opinion whether the bank should make the application as soon as both are in its possession. Perhaps the better opinion is that this cannot be done until the maturity of the paper, and, consequently, until then the debtor's liability continues. Montreal Bank *v.* Ingerson, 105 Iowa 349, 75 N. W. 351 [*overruling* Lazier *v.* Horan, 55 Iowa 75, 7 N. W. 457, 39 Am. Rep. 167]. *Contra*, Daniel *v.* St. Louis Nat. Bank, 67 Ark. 223, 54 S. W. 214 [but see Little Rock, etc., R. Co. *v.* Wiggins, 65 Ark. 385, 46 S. W. 731]; Charleston Nat. Banking Assoc. *v.* Zorn, 14 S. C. 444. But if the agent demands payment before maturity and is paid the debtor is discharged, and if the agent fails before paying over the money to its principal he, and not the debtor, must be the loser. Bliss *v.* Cutter, 19 Barb. (N. Y.) 9.

47. With whom money should be left.— The money should be left with the proper officer of a bank and for that purpose. If left with an officer to render the service as a private affair the bank would not be liable. Thatcher *v.* State Bank, 5 Sandi. (N. Y.) 121.

48. *Illinois.*— Scott *v.* Gilkey, 153 Ill. 168, 39 N. E. 265; Wood *v.* Merchants' Sav., etc., Co., 41 Ill. 267.

Maryland.— Wheeling Exch. Bank *v.* Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173.

Minnesota.— St. Paul Nat. Bank *v.* Cannon, 46 Minn. 99, 48 N. W. 526, 24 Am. St. Rep. 189.

New Jersey.— Adams *v.* Hackensack Imp. Commission, 44 N. J. L. 638, 43 Am. Rep. 406.

New York.— Arnot *v.* Bingham, 55 Hun (N. Y.) 553, 9 N. Y. Suppl. 68, 29 N. Y. St. 878.

Tennessee.— Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626, 49 Am. St. Rep. 940, 32 L. R. A. 715. See also Columbia Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618.

United States.— Ward *v.* Smith, 7 Wall. (U. S.) 447, 19 L. ed. 207.

49. See *infra*, II, E, 10, d, (II).

50. *California.*—Henderson *v.* O'Conor, 106 Cal. 385, 39 Pac. 786.

Iowa.— Nurse *v.* Satterlee, 81 Iowa 491, 46 N. W. 1102.

Michigan.— Wallace *v.* Stone, 107 Mich. 190, 65 N. W. 113.

Missouri.— Lapeer First Nat. Bank *v.* Sanford, 62 Mo. App. 394.

Nebraska.— Griffin *v.* Chase, 36 Nebr. 328, 54 N. W. 572.

New Jersey.— Thompson *v.* Gloucester City Sav. Inst., (N. J. 1887) 8 Atl. 97.

New York.— People *v.* Bank of Dansville, 39 Hun (N. Y.) 187.

Contra, Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626, 49 Am. St. Rep. 940, 32 L. R. A. 715.

51. *Michigan.*— Sherwood *v.* Central Michigan Sav. Bank, 103 Mich. 109, 61 N. W. 352.

Missouri.— German F. Ins. Co. *v.* Kimble, 66 Mo. App. 370.

New Jersey.— Thompson *v.* Gloucester City Sav. Inst., (N. J. 1887) 8 Atl. 97.

New York.— People *v.* Dansville Bank, 39 Hun (N. Y.) 187.

Texas.— Hunt *v.* Townsend, (Tex. Civ. App. 1894) 26 S. W. 310; Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85.

United States.— Boone County Nat. Bank *v.* Latimer, 67 Fed. 27.

Among the most general forms of instruction are those to "collect and remit" and to "collect and credit." Whatever difference there may be in the meaning of these phrases, both convey the idea that the indorser is the owner and intends to retain ownership and that the one to whom the instruction is addressed is an agent. Armstrong *v.* Boyertown Nat. Bank, 90 Ky. 431, 12 Ky. L. Rep. 393, 14 S. W. 411, 9 L. R. A. 553; Hunt *v.* Townsend, (Tex. Civ. App. 1894) 26 S. W. 310.

ing the sender credit for them as in the ordinary cases.[52] Such instructions bind those to whom they are addressed or who know of them, but no other parties.[53]

(IV) *Where Subagents Are Employed* — (A) *In General* — (1) Rule Stated. In some states the agent is responsible for the conduct of every subagent assisting in a collection as fully as though it had performed the entire service itself. By this rule the depositor has no concern with any subagent so long as the agent performs its duty, or is solvent and responsible;[54] and the agent is not thereby divested of its title.[55] In many states, however, an agent in employing a subagent must select one who is competent and worthy of trust and transmit the paper to him, and having done this its duty is done and the depositor must look to the subagent for any default of which he is guilty;[56] but

52. Bowman *v.* Spokane First Nat. Bank, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870.

53. Crown Point First Nat. Bank *v.* Richmond First Nat. Bank, 76 Ind. 561, 40 Am. Rep. 261.

54. *Alabama.*— Eufaula Grocery Co. *v.* Missouri Nat. Bank, 118 Ala. 408, 24 So. 389.

Louisiana.— Masick *v.* Citizens' Bank, 34 La. Ann. 1207.

Michigan.— Simpson *v.* Waldby, 63 Mich. 439, 30 N. W. 199.

Minnesota.— Streissguth *v.* National German-American Bank, 43 Minn. 50, 44 N. W. 797, 19 Am. St. Rep. 213, 7 L. R. A. 363.

New Jersey.— Titus *v.* Mechanics' Nat. Bank, 35 N. J. L. 588.

New York.— Kirkham *v.* Bank of America, 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714; Castle *v.* Corn Exch. Bank, 148 N. Y. 122, 42 N. E. 518; St. Nicholas Bank *v.* State Nat. Bank, 128 N. Y. 26, 27 N. E. 849, 37 N. Y. St. 829, 13 L. R. A. 241; Naser *v.* New York City First Nat. Bank, 116 N. Y. 492, 22 N. E. 1077, 27 N. Y. St. 670; Ayrault *v.* Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489; Commercial Bank *v.* Union Bank, 11 N. Y. 203; Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459, Seld. Notes (N. Y.) 12; Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289.

North Dakota.— Commercial Bank *v.* Red River Valley Nat. Bank, 8 N. D. 382, 79 N. W. 859.

Ohio.— Reeves *v.* State Bank, 8 Ohio St. 465.

Utah.— Mound City Paint, etc., Co. *v.* Commercial Nat. Bank, 4 Utah 353, 9 Pac. 709.

United States.— Exchange Nat. Bank *v.* New York City Third Nat. Bank, 112 U. S. 276, 5 S. Ct. 141, 28 L. ed. 722; Washington Bank *v.* Triplett, 1 Pet. (U. S.) 25, 7 L. ed. 37; Taber *v.* Perrot, 2 Gall. (U. S.) 565, 23 Fed. Cas. No. 13,721. See also Hoover *v.* Wise, 91 U. S. 308, 23 L. ed. 392; Hyde *v.* Lacon First Nat. Bank, 7 Biss. (U. S.) 156, 12 Fed. Cas. No. 6,970, 11 Bankers' Mag. (3d S.) 140, 8 Chic. Leg. N. 262, 2 L. & Eq. Rep. 257, 2 N. Y. Wkly. Dig. 342.

If the agent becomes insolvent the agency may be revoked, and a subagent may be charged with the duty of making the collection. Reeves *v.* State Bank, 8 Ohio St. 465.

Independent contractor.— A bank may receive a claim for collection as independent contractor or collector, like a collecting claim agency; when a bank acts in this manner it is responsible for the conduct of all employed in making the collection. Morris *v.* Allegheny First Nat. Bank, 201 Pa. St. 160, 50 Atl. 1000; Siner *v.* Stearne, 155 Pa. St. 62, 25 Atl. 826; Morgan *v.* Tener, 83 Pa. St. 305; Bradstreet *v.* Everson, 72 Pa. St. 124, 13 Am. Rep. 665; Hoover *v.* Wise, 91 U. S. 308, 23 L. ed. 392.

55. Atkinson *v.* Stafford, 20 N. Y. Wkly. Dig. 49.

The subagent acquires no better title than that possessed by the agent, unless there is a *bona fide* purchase thereof, or advances are made thereon. Dickerson *v.* Wason, 47 N. Y. 439, 7 Am. Rep. 455; McBride *v.* Farmers' Bank, 26 N. Y. 450.

To vest the title absolutely in the subagent he must become responsible for the amount. Scott *v.* Ocean Bank, 23 N. Y. 289.

56. *Connecticut.*— East-Haddam Bank *v.* Scovil, 12 Conn. 303; Lawrence *v.* Stonington Bank, 6 Conn. 521.

Illinois.—Fay *v.* Strawn, 32 Ill. 295; Ætna Ins. Co. *v.* Alton City Bank, 25 Ill. 243, 79 Am. Dec. 328.

Iowa.— Guelich *v.* National State Bank, 56 Iowa 434, 9 N. W. 328, 41 Am. Rep. 110.

Kansas.— Lindsborg Bank *v.* Ober, 31 Kan. 599, 3 Pac. 324.

Maryland.— Citizens Bank *v.* Howell, 8 Md. 530, 63 Am. Dec. 714; Jackson *v.* Union Bank, 6 Harr. & J. (Md.) 146.

Massachusetts.— Warren Bank *v.* Suffolk Bank, 10 Cush. (Mass.) 582; Dorchester, etc., Bank *v.* New England Bank, 1 Cush. (Mass.) 177; Fabens *v.* Mercantile Bank, 23 Pick. (Mass.) 330, 34 Am. Dec. 59.

Mississippi.— Louisville Third Nat. Bank *v.* Vicksburg Bank, 61 Miss. 112, 48 Am. Rep. 78; Bowling *v.* Arthur, 34 Miss. 41; Agricultural Bank *v.* Commercial Bank, 7 Sm. & M. (Miss.) 592; Tiernan *v.* Commercial Bank, 7 How. (Miss.) 648, 40 Am. Dec. 83.

Missouri.— Daly *v.* Butchers', etc., Bank, 56 Mo. 94, 17 Am. Rep. 663.

Nebraska.— Omaha First Nat. Bank *v.* Moline First Nat. Bank, 55 Nebr. 303, 75

even where this rule prevails, a subagent may be employed merely as a transmitter.[57]

(2) Effect of Instructions From Agent to Subagent. The agent should convey proper instructions to the subagent to enable it to act in an intelligent manner in making the collection.[58] Having done so the subagent must follow them and is liable for neglect in executing them.[59]

(3) Effect of Payment to Subagent. Payment to a subagent is payment to the agent itself, and it at once becomes a debtor to the depositor,[60] provided the agent had authority to employ a subagent.[61]

(B) *Where Subagent Is Also Drawee.* When a check is remitted to the drawee for collection, this is not a payment of the debt, but the drawee is thereby made a collecting agent for the owner of the paper in addition to his duty to the payor-debtor to pay the same if his deposit is sufficient.[62] When the check sent for collection is charged to the drawer-debtor's account, his debt is discharged, and the subagent is responsible therefor,[63] notwithstanding the debtor has overdrawn,[64]

N. W. 843; Pawnee City First Nat. Bank *v.* Sprague, 34 Nebr. 318, 51 N. W. 846, 33 Am. St. Rep. 644, 15 L. R. A. 498.

Pennsylvania.—Hazlett *v.* Commercial Nat. Bank, 132 Pa. St. 118, 25 Wkly. Notes Cas. (Pa.) 282, 19 Atl. 55; Merchants' Nat. Bank *v.* Goodman, 109 Pa. St. 422, 2 Atl. 687, 58 Am. Rep. 728; Wingate *v.* Mechanics' Bank, 10 Pa. St. 104; Bellemire *v.* U. S. Bank, 4 Whart. (Pa.) 105, 33 Am. Dec. 46; Mechanics' Bank *v.* Earp, 4 Rawle (Pa.) 384.

Tennessee.— Columbia Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; Louisville Bank *v.* Knoxville First Nat. Bank, 8 Baxt. (Tenn.) 101.

Wisconsin.— Stacy *v.* Dane County Bank, 12 Wis. 629.

When agent may be liable under this rule. — Although the initial collecting bank is not responsible for the negligence of a subagent where the regular course of collecting is followed, it is liable where it violates this course. Omaha First Nat. Bank *v.* Moline First Nat. Bank, 55 Nebr. 303, 75 N. W. 843.

57. Naser *v.* New York City First Nat. Bank, 116 N. Y. 492, 22 N. E. 1077, 27 N. Y. St. 670.

58. Borup *v.* Nininger, 5 Minn. 523.

59. Trinidad First Nat. Bank *v.* Denver First Nat. Bank, 4 Dill. (U. S.) 290, 9 Fed. Cas. No. 4,810, 7 Am. L. Rec. 168, 7 Centr. L. J. 170, 10 Chic. Leg. N. 388, 26 Pittsb. Leg. J. 24, 6 Reporter 356, 2 Tex. L. J. 74.

60. Reeves *v.* State Bank, 8 Ohio St. 465.

61. Sherman *v.* Port Huron Engine, etc., Co., 8 S. D. 343, 66 N. W. 1077.

62. Lowenstein *v.* Bresler, 109 Ala. 326, 19 So. 860; Wheeling Exch. Bank *v.* Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173; New Hanover Bank *v.* Kenan, 76 N. C. 340; Farwell *v.* Curtis, 7 Biss. (U. S.) 168, 8 Fed. Cas. No. 4,690, 3 Centr. L. J. 352, 8 Chic. Leg. N. 267, 22 Int. Rev. Rec. 161, 2 N. Y. Wkly. Dig. 499. But see Gettysburg Nat. Bank *v.* Kuhns, 62 Pa. St. 88.

Effect of demanding payment by mail. — The owner of paper may demand payment of the drawee bank through the mail; in doing so the bank does not become his agent, it is merely the payee. Indig *v.* National City Bank, 80 N. Y. 100; People *v.* Merchants', etc., Bank, 78 N. Y. 269, 34 Am. Rep. 532.

63. If it is acting purely as an agent, the proceeds are remitted to or held for the sending bank or the creditor; if it has a right to retain them for a season, it becomes a debtor for the amount. National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50; City Nat. Bank *v.* Burns, 68 Ala. 267, 44 Am. Rep. 138; American Exch. Nat. Bank *v.* Gregg, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 171; Kirkham *v.* Bank of America, 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714; Whiting *v.* Rochester City Bank, 77 N. Y. 363, 89 N. Y. 604; Oddie *v.* National City Bank, 45 N. Y. 735, 6 Am. Rep. 160; St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 10 S. Ct. 390, 33 L. ed. 683. See also Board of Education *v.* Robinson, 81 Minn. 305, 84 N. W. 105, 83 Am. St. Rep. 374; Briggs *v.* Central Nat. Bank, 89 N. Y. 182, 42 Am. Rep. 285; Pratt *v.* Foote, 9 N. Y. 463.

64. *Alabama.*— City Nat. Bank *v.* Burns, 68 Ala. 267, 44 Am. Rep. 138.

New Jersey.— Hoffman *v.* Jersey City First Nat. Bank, 46 N. J. L. 604; Titus *v.* Mechanics' Nat. Bank, 35 N. J. L. 588; Terhune *v.* Bergen County Bank, 34 N. J. Eq. 367.

New York.— Whiting *v.* Rochester City Bank, 77 N. Y. 363; Oddie *v.* National City Bank, 45 N. Y. 735, 6 Am. Rep. 160; Market Bank *v.* Hartshorne, 3 Abb. Dec. (N. Y.) 173, 3 Keyes (N. Y.) 137.

Pennsylvania.—Levy *v.* U. S. Bank, 4 Dall. (Pa.) 234, 1 L. ed. 814.

United States.—Cincinnati First Nat. Bank *v.* Burkhardt, 100 U. S. 686, 25 L. ed. 766.

England.— Chambers *v.* Miller, 13 C. B. N. S. 125, 9 Jur. N. S. 626, 32 L. J. C. P. 30, 7 L. T. Rep. N. S. 856, 11 Wkly. Rep. 236, 106 E. C. L. 125.

Contra.— National Gold Bank, etc., Co. *v.* McDonald, 51 Cal. 64, 21 Am. Rep. 697.

Creditor-depositor's knowledge of drawer's condition. — If the receiver of a check knows

or the subsequent failure of the subagent;[65] but if, when the check was thus charged to the debtor both he and the subagent were insolvent, the check is not paid and the creditor can pursue the drawer.[66]

c. Effect of Usage. A depositor in selecting a bank as his collecting agent, thus availing himself of its facilities for doing the desired service, is bound by any reasonable usage, whether he knew of it or not, prevailing among the banks where the collection is made;[67] and if there is only one bank in a place its usages are as binding as those of several banks which are doing business in another locality.[68]

d. Duties and Powers of Collecting Bank — (i) *In General* **— (a)** *Rule Stated.* In collecting the bank must use care and diligence,[69] particularly with

that the drawer has no funds in the bank, it is a fraud to take his check and present it for payment or credit. In such a case the action of the bank is not binding. City Nat. Bank *v.* Burns, 68 Ala. 267, 44 Am. Rep. 138; Peterson *v.* Union Nat. Bank, 52 Pa. St. 206, 91 Am. Dec. 146. See also Lumsdon *v.* Gilman, 81 Hun (N. Y.) 526, 30 N. Y. Suppl. 1124, 63 N. Y. St. 261; Gettysburg Nat. Bank *v.* Kuhns, 62 Pa. St. 88; Martin *v.* Morgan, 1 B. & B. 289, Gow. 122, 3 Moore C. P. 635, 21 Rev. Rep. 603.

65. Welge *v.* Batty, 11 Ill. App. 461.

Effect of crediting check when bank is insolvent.— If a bank knowingly charges a check to the account of a debtor when it is insolvent and credits the depositor with the amount, such action is a mere jugglery of the books and not payment. Though the debtor's account may show the bank owed him money enough to pay it, yet if in truth it did not have the money on hand to use in this manner its action is a fraud of which the debtor cannot avail himself. Wheeling Exch. Bank *v.* Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173; Manufacturers' Nat. Bank *v.* Continental Bank, 148 Mass. 553, 20 N. E. 193, 12 Am. St. Rep. 598, 2 L. R. A. 699.

66. Kinney *v.* Paine, 68 Miss. 258, 8 So. 747. See also Merchants, etc., Bank *v.* Austin, 48 Fed. 25.

67. *California.*—Davis *v.* Fresno First Nat. Bank, 118 Cal. 600, 50 Pac. 666.

Connecticut.—Lawrence *v.* Stonington Bank, 6 Conn. 521.

Kentucky.— Farmers' Bank, etc., Co. *v.* Newland, 97 Ky. 464, 17 Ky. L. Rep. 329, 31 S. W. 38.

Maryland.— Columbia Bank *v.* Fitzhugh, 1 Harr. & G. (Md.) 239; Columbia Bank *v.* Magruder, 6 Harr. & J. (Md.) 172, 14 Am. Dec. 271.

Massachusetts.— Freeman's Nat. Bank *v.* National Tube Works Co., 151 Mass. 413, 24 N. E. 779, 21 Am. St. Rep. 461, 8 L. R. A. 42; Dorchester, etc., Bank *v.* New England Bank, 1 Cush. (Mass.) 177; Lincoln, etc., Bank *v.* Page, 9 Mass. 155, 6 Am. Dec. 52.

New York.— Allen *v.* Merchants' Bank, 15 Wend. (N. Y.) 482.

North Dakota.— National Bank of Commerce *v* Johnson, 6 N. D. 180, 69 N. W. 49.

Oregon.— Kershaw *v.* Ladd, 34 Oreg. 375, 56 Pac. 402, 44 L. R. A. 236.

Tennessee.— Jefferson County Sav. Bank *v.* Commercial Nat. Bank, 98 Tenn. 337, 39 S. W. 338; Howard *v.* Walker, 92 Tenn. 452, 21 S. W. 897; Sahlien *v.* Lonoke Bank, 90 Tenn. 221, 16 S. W. 373; Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 10 Am. St. Rep. 669, 3 L. R. A. 273; Dabney *v.* Campbell, 9 Humphr. (Tenn.) 680.

Washington.— Hallam *v.* Tillinghast, 19 Wash. 20, 52 Pac. 329.

United States.— Adams *v.* Otterback, 15 How. (U. S.) 539, 14 L. ed. 805; Metropolis Bank *v.* New England Bank, 1 How. (U. S.) 234, 11 L. ed. 115; Washington Bank *v.* Triplett, 1 Pet. (U. S.) 25, 7 L. ed. 37; Renner *v.* Columbia Bank, 9 Wheat. (U. S.) 581, 6 L. ed. 166.

Effect of usage on indorsement.— The meaning of an indorsement cannot be contradicted by usage or custom. White *v.* Miners' Nat. Bank, 102 U. S. 658, 26 L. ed. 250.

68. Whitney *v.* Esson, 99 Mass. 308, 96 Am. Dec. 762; National Bank of Commerce *v.* American Exch. Bank, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527; Dern *v.* Kellogg, 54 Nebr. 560, 74 N. W. 844; Sahlien *v.* Lonoke-Bank, 90 Tenn. 221, 16 S. W. 373; Dabney *v.* Campbell, 9 Humphr. (Tenn.) 680.

69. Birmingham First Nat. Bank *v.* Newport First Nat. Bank, 116 Ala. 520, 22 So. 976; Young *v.* Noble, 2 Disn. (Ohio) 485; Sahlien *v.* Lonoke Bank, 90 Tenn. 221, 16 S. W. 373; Merchants, etc., Bank *v.* Stafford Nat. Bank, 17 Fed. Cas. No. 9,438, 44 Conn. 564.

The bank must take the needful steps to secure prompt payment by presentation at maturity, and if not paid, in order to fix the liability of the drawer must have the paper protested and due notice sent to the parties interested.

Massachusetts.— Whitney *v.* Merchants' Union Express Co., 104 Mass. 152, 6 Am. Rep. 207.

Missouri.— Ivory *v.* State Bank, 36 Mo. 475, 88 Am. Dec. 150.

New York.— Kirkham *v.* Bank of America, 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714 [*affirming* 26 N. Y. App. Div. 110, 49 N. Y. Suppl. 767]; McKinster *v.* Utica Bank, 9 Wend. (N. Y.) 46; Utica Bank *v.* Smedes, 3 Cow. (N. Y.) 662; Smedes *v.* Utica Bank, 20 Johns. (N. Y.) 372.

North Carolina.— New Hanover Bank *v.* Kenan, 76 N. C. 340; Costin *v.* Rankin, 48 N. C. 387.

regard to presentation, protest, and the like. Moreover, if special instructions have been given these must be followed.[70]

(B) *Extensions.* The collecting bank has no authority to renew the debtor's obligation or to give him an extension,[71] unless expressly authorized.[72]

(C) *Receiving Payment* — (1) In General. An agent for collecting cannot accept part payment without special authority[73] and can receive money only.[74]

Ohio.— Reeves *v.* State Bank, 8 Ohio St. 465.

Oregon.— Kershaw *v.* Ladd, 34 Oreg. 375, 56 Pac. 402, 44 L. R. A. 236.

Pennsylvania.— West Branch Bank *v.* Fulmer, 3 Pa. St. 399, 45 Am. Dec. 651.

Utah.— Mound City Paint, etc., Co. *v.* Commercial Nat. Bank, 4 Utah 353, 9 Pac. 709.

Who must be notified.—A collecting bank need notify only its immediate indorser.

Louisiana.—McCullock *v.* Commercial Bank, 16 La. 566.

Massachusetts.— Phipps *v.* Millbury Bank, 8 Metc. (Mass.) 79; Eagle Bank *v.* Chapin, 3 Pick. (Mass.) 180.

New York.— State Bank *v.* Capitol Bank, 41 Barb. (N. Y.) 343; Mead *v.* Engs, 5 Cow. (N. Y.) 303.

Virginia.— Cardwell *v.* Allan, 33 Gratt. (Va.) 160.

England.— Firth *v.* Thrush, 8 B. & C. 387, 6 L. J. K. B. O. S. 355, 2 M. & R. 359, 15 E. C. L. 193; Haynes *v.* Birks, 3 B. & P. 599.

70. Central Georgia Bank *v.* Cleveland Nat. Bank, 59 Ga. 667; Butts *v.* Phelps, 90 Mo. 670, 3 S. W. 218; Texarkana First Nat. Bank *v.* Munzesheimer, (Tex. Civ. App. 1894) 26 S. W. 428.

When a negotiable note is indorsed for collection and sent to the place of payment, the collector has no power to sell or transfer it. Peoples, etc., Bank *v.* Craig, 63 Ohio St. 374, 59 N. E. 102, 81 Am. St. Rep. 639, 52 L. R. A. 872.

71. Scott *v.* Gilkey, 153 Ill. 168, 39 N. E. 265; Farwell *v.* Curtis, 7 Biss. (U. S.) 160, 8 Fed. Cas. No. 4,690, 3 Centr. L. J. 352, 8 Chic. Leg. N. 267, 22 Int. Rev. Rec. 161, 2 N. Y. Wkly. Dig. 499.

72. Central Georgia Bank *v.* Cleveland Nat. Bank, 59 Ga. 667; Omaha Nat. Bank *v.* Kiper, 60 Nebr. 33, 82 N. W. 102.

73. Lowenstein *v.* Bresler, 109 Ala. 326, 19 So. 860.

74. A certified check is not deemed an equivalent.

Colorado.— Larsen *v.* Breene, 12 Colo. 480, 21 Pac. 498.

Illinois.— Antigo Bank *v.* Union Trust Co., 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611; Brown *v.* Leckie, 43 Ill. 497; Rounds *v.* Smith, 42 Ill. 245; Bickford *v.* Chicago First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436; Continental Nat. Bank *v.* Cornhauser, 37 Ill. App. 475.

Louisiana.— Waterhouse *v.* Citizens' Bank, 25 La. Ann. 77.

Missouri.— National Bank of Commerce *v.* American Exch. Bank, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527; Midland Nat. Bank *v.* Brightwell, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608.

New York.—People *v.* Rochester City Bank, 96 N. Y. 32; Commercial Bank *v.* Union Bank, 11 N. Y. 203.

North Dakota.— National Bank of Commerce *v.* Johnson, 6 N. D. 180, 69 N. W. 49.

Pennsylvania.— Pepperday *v.* Citizens Nat. Bank, 183 Pa. St. 519, 38 Atl. 1030, 63 Am. St. Rep. 769, 39 L. R. A. 529; Paul *v.* Grimin, 165 Pa. St. 139, 30 Atl. 721, 44 Am. St. Rep. 648; Hazlett *v.* Commercial Nat. Bank, 132 Pa. St. 118, 25 Wkly. Notes Cas. (Pa.) 282, 19 Atl. 55; Pittsburgh Fifth Nat. Bank *v.* Ashworth, 123 Pa. St. 212, 16 Atl. 596, 2 L. R. A. 491; Merchants' Nat. Bank *v.* Goodman, 109 Pa. St. 422, 2 Atl. 687, 58 Am. Rep. 728.

United States.— Libby *v.* Hopkins, 104 U. S. 303, 26 L. ed. 769; Ward *v.* Smith, 7 Wall. (U. S.) 447, 19 L. ed. 207; Essex County Nat. Bank *v.* Montreal Bank, 7 Biss. (U. S.) 193, 8 Fed. Cas. No. 4,532, 5 Am. L. Rec. 49, 15 Am. L. Reg. N. S. 418, 11 Bankers' Mag. (3d S.) 142, 1 L. & Eq. Rep. 617, 3 Month. Jur. 93; Levi *v.* Missouri Nat. Bank, 5 Dill. (U. S.) 104, 15 Fed. Cas. No. 8,289, 7 Am. L. Rec. 283, 7 Centr. L. J. 249.

May receive its own paper.—A check drawn on itself based on a sufficient deposit, or its own certificate of deposit, if the bank is solvent, is equivalent to money, and may be taken in payment (British, etc., Mortg. Co. *v.* Tibballs, 63 Iowa 468, 19 N. W. 319. See also Marine Bank *v.* Chandler, 27 Ill. 525, 81 Am. Dec. 249; Drain *v.* Daggett, 41 Iowa 682; McCarver *v.* Nealey, 1 Greene (Iowa) 360. *Contra*, Francis *v.* Evans, 69 Wis. 115, 33 N. W. 93); but a note or other claim against itself that a debtor may have, however valid, cannot be taken by the bank in lieu of money (Scott *v.* Gilkey, 153 Ill. 168, 39 N. E. 265; Montreal Bank *v.* Ingerson, 105 Iowa 349, 75 N. W. 351; Midland State Bank *v.* Byrne, 97 Mich. 178, 56 N. W. 355, 37 Am. St. Rep. 332, 21 L. R. A. 753; National L. Ins. Co. *v.* Goble, 51 Nebr. 5, 70 N. W. 503; Francis *v.* Evans, 69 Wis. 115, 33 N. W. 93. But see Citizens' Bank *v.* Houston, 98 Ky. 139, 17 Ky. L. Rep. 701, 32 S. W. 397).

Effect of remitting amount.— If the collector remits the amount as though he had collected the obligation, this operates as a payment and extinguishment of it. If the payment is made with the maker's assent he is liable therefor, or on the note as a reissued obligation; otherwise he does not become liable in any manner. Peoples, etc., Bank *v.*

In some states the latter rule is imperative,[75] while in others a collecting bank is justified by usage or custom in receiving as payment the check or draft of the debtor drawn on another bank,[76] or, if the paper has been sent by the receiving bank to another, the latter may be justified in taking either money or a check drawn on itself, or a check or draft drawn on another bank, and of sending its own draft drawn on a reputable bank to the first or receiving bank in payment.[77] So too under unusual circumstances, especially when the debtor is failing, a bank may be justified in taking any security it can get for the debt.[78]

(2) Remitting Proceeds. When paper is indorsed restrictively, this is a notice to the collecting agent or any agent of its ownership, and the proceeds must be sent to the owner, either directly, or through the agent or agents whence the paper came;[79] but they cannot be sent by the collecting bank in obedience to the directions of any prior bank to another bank outside the line.[80]

(D) *Sending Paper to Drawee For Payment.* The old rule that paper may be sent to the drawee for payment[81] no longer prevails in many states, notwith-

Craig, 63 Ohio St. 374, 59 N. E. 102, 81 Am. St. Rep. 639, 52 L. R. A. 872.

75. Whitney *v.* Esson, 99 Mass. 308, 96 Am. Dec. 762; National Bank of Commerce *v.* American Exch. Bank, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527.

76. Farmers' Bank, etc., Co. *v.* Newland, 97 Ky. 464, 17 Ky. L. Rep. 329, 31 S. W. 38; Kershaw *v.* Ladd, 34 Oreg. 375, 56 Pac. 402, 44 L. R. A. 236; Jefferson County Sav. Bank *v.* Commercial Nat. Bank, 98 Tenn. 337, 39 S. W. 338.

If it follows the usual course of procedure in collecting the second paper with respect to time and place of presentation and other essentials pertaining to its payment or non-payment, its whole duty to the depositor is performed. Smith *v.* Miller, 43 N. Y. 171, 3 Am. Rep. 690; Farwell *v.* Curtis, 7 Biss. (U. S.) 160, 8 Fed. Cas. No. 4,690, 3 Centr. L. J. 352, 8 Chic. Leg. N. 267, 22 Int. Rev. Rec. 161, 2 N. Y. Wkly. Dig. 499.

Taking paper of other banks is conditional payment only.—If a check drawn on another bank or any kind of paper is taken, payable outside its own bank, such paper is only a conditional payment, like the ordinary receipt of a check for a debt, and the collecting bank is responsible until the money thereon is collected.

Illinois.— Antigo Bank *v.* Union Trust Co., 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611.

Maryland.— Anderson *v.* Gill, 79 Md. 312, 29 Atl. 527, 47 Am. St. Rep. 402, 25 L. R. A. 200.

Massachusetts.— Boylston Nat. Bank *v.* Richardson, 101 Mass. 287; Whitney *v.* Esson, 99 Mass. 308, 96 Am. Dec. 762.

Missouri.— National Bank of Commerce *v.* American Exch. Bank, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527.

New York.— Commercial Bank *v.* Union Bank, 11 N. Y. 203; Pratt *v.* Foote, 9 N. Y. 463.

Pennsylvania.—Hazlett *v.* Commercial Nat. Bank, 132 Pa. St. 118, 25 Wkly. Notes Cas. (Pa.) 282, 19 Atl. 55; Pittsburgh Fifth Nat. Bank *v.* Ashworth, 123 Pa. St. 212, 16 Atl. 596, 2 L. R. A. 491.

Wisconsin.— Canterbury *v.* Sparta Bank, 91 Wis. 53, 64 N. W. 311, 51 Am. St. Rep. 870, 30 L. R. A. 845.

When the second check or draft is not paid the owner may reclaim the first, protest it for non-payment, and notify the indorser, thereby preserving all his rights to recover his original claim, or he may take action to recover on the second check or draft. Indig *v.* National City Bank, 80 N. Y. 100; Meadville First Nat. Bank *v.* New York City Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618; Smith *v.* Miller, 43 N. Y. 171, 3 Am. Rep. 690; Burkhalter *v.* Erie Second Nat. Bank, 42 N. Y. 538; Turner *v.* Fox Lake Bank, 4 Abb. Dec. (N. Y.) 434, 3 Keyes (N. Y.) 425, 2 Transcr. App. (N. Y.) 344; Merchants' Bank *v.* Spicer, 6 Wend. (N. Y.) 443; Olcott *v.* Rathbone, 5 Wend. (N. Y.) 490; Farwell *v.* Curtis, 7 Biss. (U. S.) 160, 8 Fed. Cas. No. 4,690, 3 Centr. L. J. 352, 8 Chic. Leg. N. 267, 22 Int. Rev. Rec. 161, 2 N. Y. Wkly. Dig. 499. When a bank credits a depositor with a check drawn on another local bank and is negligent in collecting it, or in giving notice of its non-payment, the bank cannot afterward charge it back to the depositor. Kirkham *v.* Bank of America, 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714.

77. St. Nicholas Bank *v.* State Nat. Bank, 128 N. Y. 26, 27 N. E. 849, 37 N. Y. St. 829, 13 L. R. A. 241.

78. Citizens' Bank *v.* Houston, 98 Ky. 139, 17 Ky. L. Rep. 701, 32 S. W. 397.

79. See *supra*, II, E, 6, b, (I), (B), (1), (c).

80. Boykin *v.* Fayetteville Bank, 118 N. C. 566, 24 S. E. 357; Commercial Nat. Bank *v.* Hamilton Nat. Bank, 42 Fed. 880; Circleville First Nat. Bank *v.* Monroe Bank, 33 Fed. 408.

Conflicting claimants.— When a collecting agent receives and holds money which in justice belongs to a third person, the latter by giving notice before the agent pays over the money may elect to hold either. Eufaula Grocery Co. *v.* Missouri Nat. Bank, 118 Ala. 408, 24 So. 389.

81. Corn Exch. Bank *v.* Farmers' Nat. Bank, 118 N. Y. 443, 23 N. E. 923, 29 N. Y.

standing the custom of thus sending it;[82] but some states which deny the legality of the rule permit the paper to be sent to the drawee when there is no other bank in the place known by the owner and collection by a different method would be costly and inconvenient.[83] These rules may be modified of course by instructions or agreement.[84]

(E) *Suing on Paper.* In most states, the collecting bank can sue in its own name on paper which has been indorsed to it for collection, the right of action being solely in such bank, unless the indorser can prove a retransfer or that the indorsee has no interest beyond a mere agency;[85] but in some states, however,

St. 965, 7 L. R. A. 559; Indig *v.* National City Bank, 80 N. Y. 100; People *v.* Merchants', etc., Bank, 78 N. Y. 269, 34 Am. Rep. 532; Shipsey *v.* Bowery Nat. Bank, 59 N. Y. 485; Kershaw *v.* Ladd, 34 Oreg. 375, 56 Pac. 402, 44 L. R. A. 236; Trinidad First Nat. Bank *v.* Denver First Nat. Bank, 4 Dill. (U. S.) 290, 9 Fed. Cas. No. 4,810, 7 Am. L. Rec. 168, 7 Centr. L. J. 170, 10 Chic. Leg. N. 388, 26 Pittsb. Leg. J. (Pa.) 24, 6 Reporter 356, 2 Tex. L. J. 74; Heywood *v.* Pickering, L. R. 9 Q. B. 428, 43 L. J. Q. B. 145; Prideaux *v.* Criddle, L. R. 4 Q. B. 455, 10 B. & S. 515, 38 L. J. Q. B. 232, 20 L. T. Rep. N. S. 695; Bailey *v.* Bodenham, 16 C. B. N. S. 288, 10 Jur. N. S. 821, 33 L. J. C. P. 252, 10 L. T. Rep. N. S. 422, 12 Wkly. Rep. 865, 111 E. C. L. 288; Hare *v.* Henty, 10 C. B. N. S. 65, 7 Jur. N. S. 523, 30 L. J. C. P. 302, 4 L. T. Rep. N. S. 363, 9 Wkly. Rep. 738, 100 E. C. L. 65; Russell *v.* Hankey, 6 T. R. 12. See also Briggs *v.* Central Nat. Bank, 89 N. Y. 182, 42 Am. Rep. 285; McIntosh *v.* Tyler, 47 Hun (N. Y.) 99.

82. *Alabama.*— Lowenstein *v.* Bresler, 109 Ala. 326, 19 So. 860.

Arkansas.— The question is undecided. Auten *v.* Manistee Nat. Bank, 67 Ark. 243, 54 S. W. 337, 47 L. R. A. 329.

Colorado.—German Nat. Bank *v.* Burns, 12 Colo. 539, 21 Pac. 714, 13 Am. St. Rep. 247.

Illinois.— Drovers' Nat. Bank *v.* Anglo-American Provision Co., 117 Ill. 100, 7 N. E. 601, 57 Am. Rep. 855.

Kansas.— Anderson *v.* Rodgers, 53 Kan. 542, 36 Pac. 1067, 27 L. R. A. 248.

Michigan.— Chicago First Nat. Bank *v.* Citizens' Sav. Bank, 123 Mich. 336, 82 N. W. 66, 48 L. R. A. 583.

Minnesota.— Minneapolis Sash, etc., Co. *v.* Metropolitan Bank, 76 Minn. 136, 78 N. W. 980, 77 Am. St. Rep. 609, 44 L. R. A. 504.

Missouri.— American Exch. Nat. Bank *v.* Metropolitan Nat. Bank, 71 Mo. App. 451.

Nebraska.— Western Wheeled Scraper Co. *v.* Sadilek, 50 Nebr. 105, 69 N. W. 765, 61 Am. St. Rep. 550.

North Dakota.— National Bank of Commerce *v.* Johnson, 6 N. D. 180, 69 N. W. 49.

Pennsylvania.— Wagner *v.* Crook, 167 Pa. St. 259, 31 Atl. 576, 46 Am. St. Rep. 672; Hazlett *v.* Commercial Nat. Bank, 132 Pa. St. 118, 25 Wkly. Notes Cas. (Pa.) 282, 19 Atl. 55; Harvey *v.* Girard Nat. Bank, 119 Pa. St. 212, 13 Atl. 202; Merchants' Nat. Bank *v.* Goodman, 109 Pa. St. 422, 2 Atl. 687, 58 Am. Rep. 728.

Tennessee.— Givan *v.* Alexandria Bank, (Tenn. Ch. 1898) 52 S. W. 923.

Texas.— Corsicana First Nat. Bank *v.* Dallas City Nat. Bank, 12 Tex. Civ. App. 318, 34 S. W. 458.

United States.—Evansville First Nat. Bank *v.* Louisville Fourth Nat. Bank, 56 Fed. 967, 16 U. S. App. 1, 6 C. C. A. 183; Farwell *v.* Curtis, 7 Biss. (U. S.) 160, 8 Fed. Cas. No. 4,690, 3 Centr. L. J. 352, 8 Chic. Leg. N. 267, 22 Int. Rev. Rec. 161, 2 N. Y. Wkly. Dig. 499, the latter being probably the oldest case adopting that view.

Effect of fact that result would have been same if paper sent elsewhere.— On the question whether the liability of a bank is affected by the fact that the result would have been the same had the paper not been sent directly to the drawee courts differ, that of Texas holding the affirmative (Corsicana First Nat. Bank *v.* Dallas City Nat. Bank, 12 Tex. Civ. App. 318, 34 S. W. 458. See also Nebraska Nat. Bank *v.* Logan, 35 Nebr. 182, 52 N. W. 808) and those of Minnesota and Missouri holding the negative (Minneapolis Sash, etc., Co. *v.* Metropolitan Bank, 76 Minn. 136, 78 N. W. 980, 77 Am. St. Rep. 609, 44 L. R. A. 504; American Exch. Nat. Bank *v.* Metropolitan Nat. Bank, 71 Mo. App. 451).

83. Wilson *v.* Carlinville Nat. Bank, 187 Ill. 222, 58 N. E. 250, 52 L. R. A. 632; Minneapolis Sash, etc., Co. *v.* Metropolitan Bank, 76 Minn. 136, 78 N. W. 980, 77 Am. St. Rep. 609, 44 L. R. A. 504.

84. Chicago First Nat. Bank *v.* Citizens' Sav. Bank, 123 Mich. 336, 82 N. W. 66, 48 L. R. A. 583.

85. *California.*— St. Collins First Nat. Bank *v.* Hughes, (Cal. 1896) 46 Pac. 272.

Connecticut.— French *v.* Jarvis, 29 Conn. 347.

Georgia.— Freeman *v.* Macon Exch. Bank, 87 Ga. 45, 13 S. E. 160; Wilson *v.* Tolson, 79 Ga. 137, 3 S. E. 900.

Florida.— McCallum *v.* Driggs, 35 Fla. 277, 17 So. 407.

Illinois.— Laflin *v.* Sherman, 28 Ill. 391.

Iowa.— Freeman *v.* Citizens' Nat. Bank, 78 Iowa 150, 42 N. W. 632, 4 L. R. A. 422.

Massachusetts.— Freeman's Nat. Bank *v.* National Tube Works Co., 151 Mass. 413, 24 N. E. 779, 21 Am. St. Rep. 461, 8 L. R. A. 42; Lynn First Nat. Bank *v.* Smith, 132 Mass. 227.

Michigan.— Wintermute *v.* Torrent, 83 Mich. 555, 47 N. W. 358; Moore *v.* Hall, 48

the right of action on such paper is held to be still in the real owner thereof, notwithstanding the indorsement.[86]

(F) *Surrender of Bills of Lading.* When drafts are sent accompanied with bills of lading, these must be surrendered to the drawee when the drafts are drawn on time[87] and retained when the drafts are drawn on sight until they are paid;[88] but if instructions are given to do otherwise, they must be strictly followed.[89]

(II) *Where Interests Are Conflicting.* If the collecting agent has any business of his own in conflict with that of the principal it is the agent's duty to

Mich. 143, 11 N. W. 844; Boyd *v.* Corbitt, 37 Mich. 52.

Missouri.— Simmons *v.* Belt, 35 Mo. 461; Cummings *v.* Kohn, 12 Mo. App. 585.

Nebraska.— Roberts *v.* Snow, 27 Nebr. 425, 43 N. W. 241.

New Hampshire.— Edgerton *v.* Brackett, 11 N. H. 218.

Oregon.— Roberts *v.* Parrish, 17 Oreg. 583, 22 Pac. 136.

Pennsylvania.—Farmers' Deposit Nat. Bank *v.* Penn Bank, 123 Pa. St. 283, 16 Atl. 761, 2 L. R. A. 273; Ward *v.* Tyler, 52 Pa. St. 393; Brown *v.* Clark, 14 Pa. St. 469; Sterling *v.* Marietta, etc., Trading Co., 11 Serg. & R. (Pa.) 179. But see Wetherill *v.* State Bank, 1 Miles (Pa.) 399.

Rhode Island.— Cross *v.* Brown, 19 R. I. 220, 33 Atl. 147.

Tennessee.— King *v.* Fleece, 7 Heisk. (Tenn.) 273.

Vermont.— Chase *v.* Burnham, 13 Vt. 447, 37 Am. Dec. 602.

In Louisiana a collecting bank, to which a note is indorsed in blank, may sue to the use of the last indorsee, who is the equitable owner, and recover against the maker and any subsequent indorsers. State Bank *v.* Roberts, 4 La. 530. But a collecting bank is not bound to sue. Crow *v.* Mechanics', etc., Bank, 12 La. Ann. 692.

By the new negotiable instruments law (§ 67, subd. 2) the collecting bank can "bring any action thereon that the indorser could bring." Crawford Neg. Instr. Law, 38, 39; Selover Neg. Instr. Law, p. 185.

By crediting the amount of a bill at maturity to the holder's account the collecting bank succeeds to his rights and may recover against the accepter. Pacific Bank *v.* Mitchell, 9 Metc. (Mass.) 297.

86. Ft. Worth First Nat. Bank *v.* Payne, 19 Ky. L. Rep. 839, 42 S. W. 736; Rock County Nat. Bank *v.* Hollister, 21 Minn. 385; Bell *v.* Tilden, 16 Hun (N. Y.) 346; Killmore *v.* Culver, 24 Barb. (N. Y.) 656; Ryan *v.* Manufacturers', etc., Bank, 9 Daly (N. Y.) 308; Taintor *v.* Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; Harp *v.* Osgood, 2 Hill (N. Y.) 216.

87. *Delaware.*— Mears *v.* Waples, 4 Houst. (Del.) 62.

Florida.— Oxford Lake Line *v.* Pensacola First Nat. Bank, 40 Fla. 349, 24 So. 480.

Illinois.— Commercial Bank *v.* Chicago, etc., R. Co., 160 Ill. 401, 43 N. E. 756.

Louisiana.—Moore *v.* Louisiana Nat. Bank, 44 La. Ann. 99, 10 So. 407, 32 Am. St. Rep. 332; Lanfear *v.* Blossman, 1 La. Ann. 148, 45 Am. Dec. 76.

Maryland.— Schuchardt *v.* Hall, 36 Md. 590, 11 Am. Rep. 514.

Minnesota.— Security Bank *v.* Luttgen, 29 Minn. 363, 13 N. W. 151.

New York.— Marine Bank *v.* Wright, 48 N. Y. 1; Cayuga County Nat. Bank *v.* Daniels, 47 N. Y. 631.

Tennessee.— Columbia Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618.

United States.— National Bank of Commerce *v.* Merchants' Nat. Bank, 91 U. S. 92, 23 L. ed. 208; Woolen *v.* New York, etc., Bank, 12 Blatchf. (U. S.) 359, 30 Fed. Cas. No. 18,026.

England.— Coventry *v.* Gladstone, L. R. 4 Eq. 493, 37 L. J. Ch. 30, 16 Wkly. Rep. 304; Barrow *v.* Coles, 3 Campb. 92; Sheridan *v.* New Quay Co., 4 C. B. N. S. 618, 5 Jur. N. S. 248, 28 L. J. C. P. 58, 93 E. C. L. 618; Cuming *v.* Brown, 9 East 506; Coxe *v.* Harden, 4 East 211; Bryans *v.* Nix, 4 M. & W. 775.

Canada.— Wisconsin M. & F. Ins. Co. *v.* Bank of British North America, 21 U. C. Q. B. 284 [*affirmed* in 2 U. C. E. & App. 282]; Clark *v.* Montreal Bank, 13 Grant Ch. (U. C.) 211; Goodenough *v.* City Bank, 10 U. C. C. P. 51.

Bill of lading to consignor's order.— If the bill accompanying a time draft is taken to the order of the consignor, and is indorsed by him to the cashier of the bank to which it is to be transmitted for collection, the bill must be held by the collecting bank until the payment of the draft. Security Bank *v.* Luttgen, 29 Minn. 363, 13 N. W. 151; Columbia Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. ed. 214.

88. Columbia Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; National Bank of Commerce *v.* Merchants' Nat. Bank, 91 U. S. 92, 23 L. ed. 208.

89. *Louisiana.*— Ward *v.* Warfield, 3 La. Ann. 468.

Massachusetts.— Stollenwerck *v.* Thacher, 115 Mass. 224; Whitney *v.* Merchants' Union Express Co., 104 Mass. 152, 6 Am. Rep. 207.

Minnesota.— Security Bank *v.* Luttgen, 29 Minn. 363, 13 N. W. 151.

Vermont.— Fuller *v.* Ellis, 39 Vt. 345, 94 Am. Dec. 327.

decline the trust; or, if undertaking it, to give the preference to the principal. To act otherwise is deemed a fraud.[90]

e. Liabilities of Collecting Bank — (I) *In General* — (A) *Rule Stated.* A collecting bank is liable for failure to use diligence in presenting paper for acceptance[91] or payment,[92] for taking an irregular acceptance,[93] for not giving notice[94] or making protest[95] when this should have been done, and for not heeding instructions[96] and customs.[97] Although a bank cannot relieve itself by contract from the consequences of its own negligence, it may thus relieve itself from the consequences of others employed by it in making collections,[98] but if they were unfit for the service, the collecting bank may be held as neglectful in employing them.[99]

(B) *Action* — (1) Nature of. The cause of action is the bank's negligence, founded either on express or implied contract.[1] The cause of action, when it

United States.— Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. ed. 214; Courcier *v.* Ritter, 4 Wash. (U. S.) 549, 6 Fed. Cas. No. 3,282, 1 Am. Lead. Cas. 687.

England.— Shepherd *v.* Harrison, L. R. 4 Q. B. 493.

Canada.— Clark *v.* Montreal Bank, 13 Grant Ch. (U. C.) 211.

90. *Michigan.*— Finch *v.* Karste, 97 Mich. 20, 56 N. W. 123.

Nebraska.— Dern *v.* Kellogg, 54 Nebr. 560, 74 N. W. 844 [*distinguished* in U. S. National Bank *v.* Westervelt, 55 Nebr. 424, 75 N. W. 857].

North Carolina.— New Hanover Bank *v.* Kenan, 76 N. C. 340.

North Dakota.— Commercial Bank *v.* Red River Valley Nat. Bank, 8 N. D. 382, 79 N. W. 859.

Utah.— Mound City Paint, etc., Co. *v.* Commercial Nat. Bank, 4 Utah 353, 9 Pac. 709.

Contra, Freeman *v.* Citizens' Nat. Bank, 78 Iowa 150, 42 N. W. 632, 4 L. R. A. 422; Abilene First Nat. Bank *v.* Naill, 52 Kan. 211, 34 Pac. 797.

91. *Indiana.*— Citizens' Nat. Bank *v.* Greensburg Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

Iowa.— Lindley *v.* Waterloo First Nat. Bank, 76 Iowa 629, 41 N. W. 381, 14 Am. St. Rep. 254, 2 L. R. A. 709.

Massachusetts.— Murdock *v.* Mills, 11 Metc. (Mass.) 5.

Missouri.— Brinkman *v.* Hunter, 73 Mo. 172, 39 Am. Rep. 492.

New York.— Walker *v.* State Bank, 9 N. Y. 582; Allen *v.* Suydam, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555.

United States.— Exchange Nat. Bank *v.* New York City Third Nat. Bank, 112 U. S. 276, 5 S. Ct. 141, 28 L. ed. 722; Merchants', etc., Bank *v.* Stafford Nat. Bank, 17 Fed. Cas. No. 9,438, 44 Conn. 564.

92. *Kansas.*— Sprague *v.* Farmers' Nat. Bank, 63 Kan. 12, 64 Pac. 967.

Massachusetts.— Fabens *v.* Mercantile Bank, 23 Pick. (Mass.) 330, 34 Am. Dec. 59.

Nebraska.— Steele *v.* Russell, 5 Nebr. 211.

New York.— Kirkham *v.* Bank of America, 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714.

United States.— Washington Bank *v.* Triplett, 1 Pet. (U. S.) 25, 7 L. ed. 37.

93. Walker *v.* State Bank, 9 N. Y. 582; Exchange Nat. Bank *v.* New York City Third Nat. Bank, 112 U. S. 276, 5 S. Ct. 141, 28 L. ed. 722.

94. Walker *v.* State Bank, 9 N. Y. 582; Washington Bank *v.* Triplett, 1 Pet. (U. S.) 25, 7 L. ed. 37.

95. *Indiana.*— Chapman *v.* McCrea, 63 Ind. 360; American Express Co. *v.* Haire, 21 Ind. 4, 83 Am. Dec. 334.

Mississippi.— Capitol State Bank *v.* Lane, 52 Miss. 677.

Nebraska.— Steele *v.* Russell, 5 Nebr. 211.

New York.—Walker *v.* State Bank, 9 N. Y. 582; Coghlan *v.* Dinsmore, 9 Bosw. (N. Y.) 453.

Ohio.— City Nat. Bank *v.* Clinton County Nat. Bank, 49 Ohio St. 351, 30 N. E. 958.

South Carolina.— Thompson *v.* State Bank, 3 Hill (S. C.) 77, 30 Am. Dec. 354.

96. Merchants', etc., Bank *v.* Stafford Nat. Bank, 17 Fed. Cas. No. 9,438, 44 Conn. 564.

97. Sahlien *v.* Lonoke Bank, 90 Tenn. 221, 16 S. W. 373.

98. Fay *v.* Strawn, 32 Ill. 295.

99. Fay *v.* Strawn, 32 Ill. 295; Ætna Ins. Co. *v.* Alton City Bank, 25 Ill. 243, 79 Am. Dec. 328; Lindsborg Bank *v.* Ober, 31 Kan. 599, 3 Pac. 324; Girard First Nat. Bank *v.* Craig, 3 Kan. App. 166, 42 Pac. 830; Masich *v.* Citizens' Bank, 34 La. Ann. 1207; Smedes *v.* Utica Bank, 20 Johns. (N. Y.) 372.

1. *Alabama.*— Mobile Bank *v.* Huggins, 3 Ala. 206.

Colorado.— German Nat. Bank *v.* Burns, 12 Colo. 539, 21 Pac. 714, 13 Am. St. Rep. 247.

Georgia.— Georgia Nat. Bank *v.* Henderson, 46 Ga. 487, 12 Am. Rep. 590.

Indiana.— Tyson *v.* State Bank, 6 Blackf. (Ind.) 225, 38 Am. Dec. 139.

Louisiana.— Armington *v.* Gas Light, etc., Co., 15 La. 414, 35 Am. Dec. 205.

Massachusetts.— Warren Bank *v.* Suffolk Bank, 10 Cush. (Mass.) 582; Fabens *v.* Mercantile Bank, 23 Pick. (Mass.) 330, 34 Am. Dec. 59.

Minnesota.— West *v.* St. Paul Nat. Bank, 54 Minn. 466, 56 N. W. 54.

is regarded as founded purely on negligence, is one which is not capable of assignment.[2]

(2) Condition Precedent. A tender of the paper to the neglectful bank is not a condition precedent to a recovery against the institution.[3]

(3) Defenses — (a) In General. A bank cannot be charged with negligence if the depositor fails to give it the information needful to make a proper presentation of the paper and notification of all the parties liable thereon;[4] but in an action for failing to present a draft for collection and to notify the sender of its acceptance or non-acceptance, a custom between plaintiff and defendant to hold all paper against the drawee without notice of non-acceptance is no defense.[5]

(b) Limitations. The statute of limitations begins to run against the negligent bank from the time of its failure to act,[6] the gist of the action being negligence or breach of duty, and not the consequent injury.[7]

(4) Pleading — (a) Complaint, Declaration, or Petition. An averment that plaintiff had employed the defendant to collect an instrument, describing the same, for a commission or compensation,[8] followed by an averment of the bank's acceptance[9] of it for the purpose of collection in pursuance of such employment and neglect and failure to execute the undertaking,[10] is a sufficient statement of the cause of action.[11]

(b) Answer or Plea. An agreement to dispense with the custom of banks to present a draft received for collection for acceptance and notice of its non-

Mississippi.— Commercial, etc., Bank *v.* Hamer, 7 How. (Miss.) 448, 40 Am. Dec. 80.

Missouri.— Ivory *v.* State Bank, 36 Mo. 475, 88 Am. Dec. 150.

New York.— Meadville First Nat. Bank *v.* New York City Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618; Beale *v.* Parrish, 20 N. Y. 407, 75 Am. Dec. 414; Commercial Bank *v.* Union Bank, 11 N. Y. 203; Walker *v.* State Bank, 9 N. Y. 582; Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459, Seld. Notes (N. Y.) 12; Martin *v.* Home Bank, 30 N. Y. App. Div. 498, 52 N. Y. Suppl. 464; Kelley *v.* Phenix Nat. Bank, 17 N. Y. App. Div. 496, 45 N. Y. Suppl. 533; McKinster *v.* Utica Bank, 9 Wend. (N. Y.) 46; Utica Bank *v.* Smedes, 3 Cow. (N. Y.) 662.

Pennsylvania.—Miller *v.* Gettysburg Bank, 8 Watts (Pa.) 192, 34 Am. Dec. 449.

South Carolina.—Thompson *v.* State Bank, 3 Hill (S. C.) 77, 30 Am Dec. 354.

Texas.— Corsicana First Nat. Bank *v.* Dallas City Nat. Bank, 12 Tex. Civ. App. 318, 34 S. W. 458.

Utah.— Mound City Paint, etc., Co. *v.* Commercial Nat. Bank, 4 Utah 353, 9 Pac. 709.

Wisconsin.—Merchants State Bank *v.* State Bank, 94 Wis. 444, 69 N. W. 170.

United States.— Bird *v.* Louisiana State Bank, 93 U. S. 96, 23 L. ed. 818; Washington Bank *v.* Triplett, 1 Pet. (U. S.) 25, 7 L. ed. 37; Merchants Nat. Bank *v.* Stafford Nat. Bank, 17 Fed. Cas. No. 9,438, 44 Conn. 564.

2. Borup *v.* Nininger, 5 Minn. 523; Hall *v.* Robinson, 2 N. Y. 293; Gardner *v.* Adams, 12 Wend. (N. Y.) 297; People *v.* Gibbs, 9 Wend. (N. Y.) 29; Franklin *v.* Low, 1 Johns. (N. Y.) 396; O'Donnel *v.* Seybert, 13 Serg. & R. (Pa.) 54; North *v.* Turner, 9 Serg. & R. (Pa.) 244; Sommer *v.* Wilt, 4 Serg. & R. (Pa.) 19.

3. Merchants' Bank *v.* Bank of Commerce, 24 Md. 12; Meadville First Nat. Bank *v.* New York City Fourth Nat. Bank, 89 N. Y. 412.

An execution will not be issued against the bank until the instrument is deposited with the clerk. Pritchard *v.* Louisiana State Bank, 2 La. 415.

4. Chapman *v.* Union Bank, 32 How. Pr. (N. Y.) 95.

5. Citizens' Nat. Bank *v.* Greensburg Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

6. Utica Bank *v.* Childs, 6 Cow. (N. Y.) 238; Wilcox *v.* Plummer, 4 Pet. (U. S.) 172, 7 L. ed. 821.

7. Sinclair *v.* State Bank, 2 Strobh. (S. C.) 344.

8. **The consideration need not be averred** in an action against a collecting bank for wrongfully converting a note. Keyes *v.* Hardin Bank, 52 Mo. App. 323.

9. **Date of delivery.**— In an action for negligence in failing to protest a note placed with a bank for collection, an averment that it was delivered to the bank before its maturity, without specifying the date, is sufficient. Roanoke Nat. Bank *v.* Hambrick, 82 Va. 135.

10. **The complaint must show the damage sustained** by the plaintiff. Morris *v.* Eufaula Nat. Bank, 106 Ala. 383, 18 So. 11; Farmers' Bank, etc., Co. *v.* Newland, 97 Ky. 464, 17 Ky. L. Rep. 329, 31 S. W. 38; Finch *v.* Karste, 97 Mich. 20, 56 N. W. 123.

11. American Express Co. *v.* Pinckney, 29 Ill. 392.

Negativing plaintiff's knowledge of drawee's condition.— In an action for failing to collect before the drawee became insolvent, plaintiff

acceptance may be proved under the general denial;[12] but an answer alleging that the bank followed a custom established between the parties to the action with respect to presentation is insufficient when there is no averment that plaintiff constituted defendant its continuing agent.[13]

(5) Burden of Proof and Presumptions. The burden of proof is on plaintiff to show that the paper was collectable, that the bank was negligent in not collecting, and that an actual loss has followed;[14] but if a collecting bank loses paper it is presumed to be negligent.[15] This presumption, however, may be rebutted by showing that due care was used.[16]

(6) Damages. The measure of damage is the actual loss resulting from the collector's omission of duty.[17]

(II) *Of Subagent to Agent.* Where the agent is liable to the principal for

need not negative any knowledge concerning the drawee's condition. Finch *v.* Karste, 97 Mich. 20, 56 N. W. 123.

12. Citizens' Nat. Bank *v.* Greensburg Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

13. Citizens' Nat. Bank *v.* Greensburg Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

14. Borup *v.* Nininger, 5 Minn. 523; Sahlien *v.* Lonoke Bank, 90 Tenn. 221, 16 S. W. 373; Bruce *v.* Baxter, 7 Lea (Tenn.) 477.

15. *Alabama.*— Birmingham First Nat. Bank *v.* Newport First Nat. Bank, 116 Ala. 520, 22 So. 976; Prince *v.* Alabama State Fair, 106 Ala. 340, 17 So. 449, 28 L. R. A. 716; Seals *v.* Edmondson, 71 Ala. 509.

California.— Davis *v.* Fresno First Nat. Bank, 118 Cal. 600, 50 Pac. 666.

Illinois.—American Express Co. *v.* Parsons, 44 Ill. 312; McClure *v.* Osborne, 86 Ill. App. 465.

New York.— Ouderkirk *v.* Central Nat. Bank, 119 N. Y. 263, 23 N. E. 875, 29 N. Y. St. 573; Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582; Shipsey *v.* Bowery Nat. Bank, 59 N. Y. 485.

Ohio.— Mansfield First Nat. Bank *v.* Zent, 39 Ohio St. 105.

Pennsylvania.— Carlisle First Nat. Bank *v.* Graham, 85 Pa. St. 91, 27 Am. Rep. 628.

United States.—Chicopee Bank *v.* Philadelphia Seventh Nat. Bank, 8 Wall. (U. S.) 641, 19 L. ed. 422; Trinidad First Nat. Bank *v.* Denver First Nat. Bank, 4 Dill. (U. S.) 290, 9 Fed. Cas. No. 4,810, 7 Am. L. Rec. 168, 7 Centr. L. J. 170, 10 Chic. Leg. N. 388, 26 Pittsb. Leg. J. (Pa.) 24, 6 Reporter 356, 2 Tex. L. J. 74.

16. *California.*—Davis *v.* Fresno First Nat. Bank, 118 Cal. 600, 50 Pac. 666.

New York.— See Jacobsohn *v.* Belmont, 7 Bosw. (N. Y.) 14; Chapman *v.* Union Bank, 32 How. Pr. (N. Y.) 95.

Vermont.— Day *v.* Ridley, 16 Vt. 48, 42 Am. Dec. 489.

United States.—Chicopee Bank *v.* Philadelphia Seventh Nat. Bank, 8 Wall. (U. S.) 641, 19 L. ed. 422.

England.— Dawson *v.* Chamney, 5 Q. B. 164, D. & M. 348, 7 Jur. 1037, 13 L. J. Q. B. 33, 48 E. C. L. 164.

17. *Alabama.*— Mobile Bank *v.* Huggins, 3 Ala. 206.

Indiana.— Chapman *v.* McCrea, 63 Ind. 360; American Express Co. *v.* Haire, 21 Ind. 4, 83 Am. Dec. 334; Tyson *v.* State Bank, 6 Blackf. (Ind.) 225, 38 Am. Dec. 139.

Kentucky.— Farmers' Bank, etc., Co. *v.* Newland, 97 Ky. 464, 17 Ky. L. Rep. 329, 31 S. W. 38.

Louisiana.— Toole *v.* Durand, 7 Rob. (La.) 363.

Massachusetts.— Buell *v.* Chapin, 99 Mass. 594, 97 Am. Dec. 58.

Michigan.— Finch *v.* Karste, 97 Mich. 20, 56 N. W. 123.

Minnesota.— Borup *v.* Nininger, 5 Minn. 523.

Nebraska.— Omaha Nat. Bank *v.* Kiper, 60 Nebr. 33, 82 N. W. 102.

New York.— Meadville First Nat. Bank *v.* New York City Fourth Nat. Bank, 89 N. Y. 412; Indig *v.* National City Bank, 80 N. Y. 100; Blot *v.* Boiceau, 3 N. Y. 78, 51 Am. Dec. 345; Mott *v.* Havana Nat. Bank, 22 Hun (N. Y.) 354; Hoard *v.* Garner, 3 Sandf. (N. Y.) 179; Allen *v.* Suydam, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555.

North Carolina.— New Hanover Bank *v.* Kenan, 76 N. C. 340; Stowe *v.* Cape Fear Bank, 14 N. C. 355.

Pennsylvania.— Hallowell *v.* Curry, 41 Pa. St. 322.

Tennessee.— Collier *v.* Pullian, 13 Lea (Tenn.) 114; Bruce *v.* Baxter, 7 Lea (Tenn.) 477; Givan *v.* Alexandria Bank (Tenn. Ch. 1898) 52 S. W. 923.

United States.— Hambro *v.* Casey, 110 U. S. 216, 3 S. Ct. 583, 28 L. ed. 125.

In the case of a sight draft the measure of damages is *prima facie* the amount of the bill, but evidence may be introduced to reduce the recovery to a nominal amount. Citizens' Nat. Bank *v.* Greensburg Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

Loss of debt.— If there is a reasonable probability that the entire debt would have been collected had the agent not been negligent the amount is the measure of recovery. Omaha Nat. Bank *v.* Kiper, 60 Nebr. 33, 82 N. W. 102; Dern *v.* Kellogg, 54 Nebr. 560, 74 N. W. 844; Meadville First Nat. Bank *v.* New York City Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618.

No injury no recovery.— If the depositor is not injured through the acceptance by the collecting bank of a check or draft instead of

the negligence of any subagent in not properly performing the service intrusted to it,[18] the negligent subagent must in like manner answer to the agent;[19] but where the agent only selects a subagent and transmits the paper to him,[20] it cannot sue him for a neglect of duty even after voluntarily discharging the owner's claim.[21]

f. Termination of Authority — (I) *In General.* Ordinarily the authority to collect continues until the collection is completed and the proceeds are credited and remitted,[22] and as long as the bank retains possession the debtor may safely pay it;[23] but the owner may revoke the bank's authority unless it has a lien thereon for present or past advances.[24] The collection can also be judicially revoked,[25] or the bank may renounce its agency and return the paper.[26]

(II) *Insolvency.* The insolvency of a bank at once terminates its authority to proceed further,[27] and if collections are afterward made, or those previously undertaken are completed, the proceeds are held in trust for the owners.[28] If

money nothing can be recovered. Kershaw *v.* Ladd, 34 Oreg. 375, 56 Pac. 402, 44 L. R. A. 236.

18. See *supra*, II, E, 6, b, (IV), (A), (1).

19. *Connecticut.*— National Pahquioque Bank *v.* Bethel First Nat. Bank, 36 Conn. 325, 4 Am. Rep. 80.

Michigan.— Simpson *v.* Waldby, 63 Mich. 439, 30 N. W. 199.

Minnesota.— Streissguth *v.* National German-American Bank, 43 Minn. 50, 44 N. W. 797, 19 Am. St. Rep. 213, 7 L. R. A. 363.

New Jersey.— Titus *v.* Mechanics' Nat. Bank, 35 N. J. L. 588.

New York.— Ayrault *v.* Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489; Commercial Bank *v.* Union Bank, 11 N. Y. 203; Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459, Seld. Notes (N. Y.) 12.

North Dakota.— Commercial Bank *v.* Red River Valley Nat. Bank, 8 N. D. 382, 79 N. W. 859.

United States.— Exchange Nat. Bank *v.* New York City Third Nat. Bank, 112 U. S. 276, 5 S. Ct. 141, 28 L. ed. 722; Trinidad First Nat. Bank *v.* Denver First Nat. Bank, 4 Dill. (U. S.) 290, 9 Fed. Cas. No. 4,810, 7 Am. L. Rec. 168, 7 Centr. L. J. 170, 10 Chic. Leg. N. 388, 26 Pittsb. Leg. J. (Pa.) 24, 6 Reporter 356, 2 Tex. L. J. 170; Merchants, etc., Bank *v.* Stafford Nat. Bank, 17 Fed. Cas. No. 9,438, 44 Conn. 564.

End of subagent's responsibility to agent.— If a subagent collects the paper and sends the proceeds to the agent its duty is performed. In like manner if it sends a draft for the amount on a bank in good standing it is not responsible should the principal collecting bank not obtain payment of the draft in consequence of the failure of the parties to the same. St. Nicholas Bank *v.* State Nat. Bank, 128 N. Y. 26, 27 N. E. 849, 37 N. Y. St. 829, 13 L. R. A. 241.

20. See *supra*, II, E, 6, b, (IV), (A), (1).

21. Louisville Bank *v.* Knoxville First Nat. Bank, 8 Baxt. (Tenn.) 101, 35 Am. Rep. 691; Virginia Farmers' Bank *v.* Owen, 5 Cranch C. C. (U. S.) 504, 8 Fed. Cas. No. 4,662.

22. **Depository bank as sole collector.**— If the bank in which paper is deposited for collection is the sole collector without the assistance of another its agency ceases as soon as the collection is completed and the proceeds are kept as a debt like any other deposit. *In re* Madison Bank, 5 Biss. (U. S.) 515, 2 Fed. Cas. No. 890, 9 Nat. Bankr. Reg. 184.

23. Sterling *v.* Marietta, etc., Trading Co., 11 Serg. & R. (Pa.) 179; Alley *v.* Rogers, 19 Gratt. (Va.) 366.

24. Louisiana Ice Co. *v.* State Nat. Bank, McGloin (La.) 181; Balbach *v.* Frelinghuysen, 15 Fed. 675.

The mere right to draw thereon by crediting him with the amount, if not exercised, does not prevent him from revoking. Evansville First Nat. Bank *v.* Louisville Fourth Nat. Bank, 56 Fed. 967, 16 U. S. App. 1, 6 C. C. A. 183.

25. Louisiana Ice Co. *v.* State Nat. Bank, McGloin (La.) 181.

26. Evansville First Nat. Bank *v.* Louisville Fourth Nat. Bank, 56 Fed. 967, 16 U. S. App. 1, 6 C. C. A. 183.

27. **If a bank receives for collection paper drawn on itself** when it is insolvent and credits the amount its action is worthless.

Maryland.— Wheeling Exch. Bank *v.* Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173.

Massachusetts.— Manufacturers' Nat. Bank *v.* Continental Bank, 148 Mass. 553, 20 N. E. 193, 12 Am. St. Rep. 598, 2 L. R. A. 699.

New Jersey.— Middlesex County *v.* State Bank, 32 N. J. Eq. 467.

New York.— Arnold *v.* Clark, 1 Sandf. (N. Y.) 491.

Ohio.— Jones *v.* Kilbreth, 49 Ohio St. 401, 31 N. E. 346.

Virginia.— Alexandria First Nat. Bank *v.* Payne, 85 Va. 890, 9 S. E. 153, 3 L. R. A. 284.

United States.— Merchants', etc., Bank *v.* Austin, 48 Fed. 25.

28. *Indiana.*— See Crown Point First Nat. Bank *v.* Richmond First Nat. Bank, 76 Ind. 561, 40 Am. Rep. 261.

Louisiana.—Louisiana Ice Co. *v.* State Nat. Bank, McGloin (La.) 181.

Massachusetts.—Manufacturers' Nat. Bank *v.* Continental Bank, 148 Mass. 553, 20 N. E. 193, 12 Am. St. Rep. 598, 2 L. R. A. 699; Audenried *v.* Betteley, 8 Allen (Mass.) 302.

the bank at the end of the series has collected the proceeds of paper, but before sending or remitting the first bank has failed, the depositor or principal can collect the proceeds from the receiver, if these have come into his possession.[29]

7. DEPOSITS — a. In General — (I) *RIGHT TO RECEIVE OR DECLINE.* The chief business of a bank is to receive and lend money.[30] The money received is termed a deposit, although it is not strictly so, as the depositor does not expect to receive the identical thing in return, but another thing of the same kind and of equal value.[31] A bank is not, however, required to keep the deposits of every person who offers money for this purpose, but may decline to do business with those who, for any reason, it does not wish to serve,[32] and may close an account at any time by tendering to the depositor the amount due and declining to receive more.[33]

(II) *KINDS OF DEPOSITS* — (A) *General and Special Deposits.* The most primary division of deposits is into general and special deposits.[34] The former always consists of money which is mingled with other money, the entire amount

Mississippi.— Meridian First Nat. Bank *v.* Strauss, 66 Miss. 479, 6 So. 232, 14 Am. St. Rep. 579.

New Jersey.—Hoffman *v.* Jersey City First Nat. Bank, 46 N. J. L. 604.

New York.— National Butchers', etc., Bank *v.* Hubbell, 117 N. Y. 384, 22 N. E. 1031, 27 N. Y. St. 396, 15 Am. St. Rep. 515, 7 L. R. A. 852; People *v.* Rochester City Bank, 96 N. Y. 32; Cayuga County Nat. Bank *v.* Daniels, 47 N. Y. 631; Spraights *v.* Hawley, 39 N. Y. 441, 100 Am. Dec. 452; Rochester Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290; Jessop *v.* Miller, 2 Abb. Dec. (N. Y.) 449, 1 Keyes (N. Y.) 321; People *v.* Dansville Bank, 39 Hun (N. Y.) 187; Matter of Howe, 1 Paige (N. Y.) 125; Le Roy *v.* Globe Ins. Co., 2 Edw. (N. Y.) 657. See Clarke County Bank *v.* Gilman, 81 Hun (N. Y.) 486, 30 N. Y. Suppl. 1111, 63 N. Y. St. 299; Rochester Printing Co. *v.* Loomis, 45 Hun (N. Y.) 93; Stark *v.* U. S. National Bank, 41 Hun (N. Y.) 506.

Ohio.— Jones *v.* Kilbreth, 49 Ohio St. 401, 31 N. E. 346.

Pennsylvania.— Hackett *v.* Reynolds, 114 Pa. St. 328, 6 Atl. 689.

Texas.— Jackusch *v.* Towsey, 51 Tex. 129.

United States.—Libby *v.* Hopkins, 104 U. S. 303, 26 L. ed. 769; National Exch. Bank *v.* Beal, 50 Fed. 355; Wellston First Nat. Bank *v.* Armstrong, 42 Fed. 193; St. Louis Fifth Nat. Bank *v.* Armstrong, 40 Fed. 46; Balbach *v.* Frelinghuysen, 15 Fed. 675; *In re* Madison Bank, 5 Biss. (U. S.) 515, 2 Fed. Cas. No. 890, 9 Nat. Bankr. Reg. 184; Omaha First Nat. Bank *v.* Mastin Bank, 2 McCrary (U. S.) 438, 48 Fed. 433; Chicago First Nat. Bank *v.* Reno County Bank, 1 McCrary (U. S.) 491, 3 Fed. 257; German-American Bank *v.* Missouri Third Nat. Bank, 10 Fed. Cas. No. 5,359, 18 Alb. L. J. 252, 11 Chic. Leg. N. 7, 3 Cinc. L. Bul. 794, 24 Int. Rev. Rec. 316, 7 N. Y. Wkly. Dig. 279, 6 Reporter 484, 2 Tex. L. J. 169.

England.— Rose *v.* Hart, 2 Moore C. P. 547, 8 Taunt. 499, 20 Rev. Rep. 533, 4 E. C. L. 248.

Who owns check taken in payment.— If the collecting bank has taken another check or draft in payment which has not been paid the owner can claim it. Levi *v.* Missouri Nat. Bank, 5 Dill. (U. S.) 104, 15 Fed. Cas. No. 8,289, 7 Am. L. Rec. 283, 7 Centr. L. J. 249.

Who owns check given by collecting bank in payment.— If the failed bank has given its draft on another bank in payment, which has not been collected, two rules have been declared, one holding that the draft, if accepted, establishes a debtor and creditor relation (Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 42 Am. St. Rep. 921, 25 L. R. A. 523; Bowman *v.* Spokane First Nat. Bank, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870; Levi *v.* Missouri Nat. Bank, 5 Dill. (U. S.) 104, 15 Fed. Cas. No. 8,289, 7 Am. L. Rec. 283, 7 Centr. L. J. 249), the other that the collecting bank still remains as agent or trustee (Kinney *v.* Paine, 68 Miss. 258, 8 So. 747; People *v.* Dansville Bank, 39 Hun (N. Y.) 187; Mad River Nat. Bank *v.* Melhorn, 8 Ohio Cir. Ct. 191).

29. Beal *v.* National Exch. Bank, 55 Fed. 894, 5 U. S. App. 376, 5 C. C. A. 304.

30. **Right to loan** see *infra*, II, E, 9.

31. Keene *v.* Collier, 1 Metc. (Ky.) 415; Matter of Patterson, 18 Hun (N. Y.) 221; Downes *v.* Phœnix Bank, 6 Hill (N. Y.) 297; Commercial Nat. Bank *v.* Henninger, 105 Pa. St. 496; Chicago Mar. Bank *v.* Fulton County Bank, 2 Wall. (U. S.) 252, 17 L. ed. 785.

32. Thatcher *v.* State Bank, 5 Sandf. (N. Y.) 121.

33. Chicago M. & F. Ins. Co. *v.* Stanford, 28 Ill. 168, 81 Am. Dec. 270; Munn *v.* Burch, 25 Ill. 35.

34. **Special deposits are subdivided into two kinds:** (1) bonds, stocks, and other securities, and sometimes money, which are to be specifically kept and returned to the owner; (2) money deposited for a fixed period of time or on unusual conditions, which is mingled in the general fund like a general deposit and is repaid therefrom; or money which is to be applied by the bank at the depositor's request for a specific purpose; for example, the payment of a note. Brahm *v.* Adkins, 77 Ill. 263; Fishkill Nat. Bank *v.* Speight, 47 N. Y. 668; Parker *v.* Hartley, 91 Pa. St. 465.

forming a single fund from which depositors are paid.[35] A deposit is not special unless made so by the depositor, or unless made in a particular capacity.[36]

(B) *Trust Deposits* — (1) WHAT ARE — (a) CERTIFIED CHECKS. The certifying of a check is in effect merely an acceptance and creates no trust in favor of the holder and no lien on any particular assets of the certifying bank.[37]

(b) DELIVERED CHECKS. The drawing of a check on a bank does not bind the fund against which it is drawn until the bank has notice,[38] and even then it does not in all the states.[39]

(c) DEPOSITS BY TRUSTEES, PUBLIC OFFICERS, ETC. The deposits made by trustees, executors, administrators, assignees, agents, public officers, and other persons who are serving as fiduciaries, are simply general deposits, and if the bank fails to pay them, the beneficiaries have no peculiar claims or rights over other creditors. They must share like other general depositors.[40]

(d) DEPOSITS FOR COLLECTION. The deposit of mortgages and other special instruments for collection or the drawing of a draft on a debtor and giving it with specific instructions to collect and remit is a trust transaction, and the money, if collected, is of that character.[41]

(e) DEPOSITS KEPT IN NAME OF ANOTHER. If a public deposit is knowingly kept

35. Chicago Mar. Bank *v.* Fulton County Bank, 2 Wall. (U. S.) 252, 17 L. ed. 785.

36. Brahm *v.* Adkins, 77 Ill. 263; Neely *v.* Rood, 54 Mich. 134, 19 N. W. 920, 52 Am. Rep. 802; Ruffin *v.* Orange County, 69 N. C. 498.

Deposits which have been held not to be special are: A deposit by an agent of his principal's money in his own name. Keene *v.* Collier, 1 Metc. (Ky.) 415. A deposit made to protect a collateral. State Bldg., etc., Assoc. *v.* Mechanics' Sav. Bank, etc., Co., (Tenn. Ch. 1896) 36 S. W. 967. Money left with a banker to indemnify him as surety on an appeal-bond given by the depositor which is mingled with other money and on which interest is allowed. Northwest Mut. Acc. Assoc. *v.* Jacobs, 141 Ill. 261, 31 N. E. 414, 33 Am. St. Rep. 302, 16 L. R. A. 516. Money received by a bank on notes sent to it for collection. Bank of Commerce *v.* Russell, 2 Dill. (U. S.) 215, 2 Fed. Cas. No. 884. Proceeds of a note discounted at a bank by a depositor. *In re* Madison Bank, 5 Biss. (U. S.) 515, 2 Fed. Cas. No. 890, 9 Nat. Bankr. Reg. 184. See also Dearborn *v.* Washington Sav. Bank, 13 Wash. 345, 42 Pac. 1107. Money deposited by a public officer, like a clerk of a court or a railway receiver (Southern Development Co. *v.* Houston, etc., R. Co., 27 Fed. 344), nor does the adding of the word "clerk" to the name of a deposit specialize the deposit (McLain *v.* Wallace, 103 Ind. 562, 5 N. E. 911).

Although a deposit is marked "special," in the depositor's pass-book, it may be shown to be general. Carr *v.* State, 104 Ala. 43, 16 So. 155.

Under the national banking law the phrase "special deposits" embraces the public securities of the government. Carlisle First Nat. Bank *v.* Graham, 100 U. S. 699, 25 L. ed. 750.

37. People *v.* St. Nicholas Bank, 77 Hun (N. Y.) 159, 28 N. Y. Suppl. 407, 58 N. Y. St. 843.

38. Laclede Bank *v.* Schuler, 120 U. S. 511, 7 S. Ct. 644, 30 L. ed. 704.

39. Harrison *v.* Wright, 100 Ind. 515, 50 Am. Rep. 805; People *v.* St. Nicholas Bank, 77 Hun (N. Y.) 159, 28 N. Y. Suppl. 407, 58 N. Y. St. 843.

Draft given in lieu of payment.—If a check is presented to the drawer bank for payment and a draft on another bank is given in lieu of payment this does not create a trust in favor of the holder. No funds are thereby set apart for its payment. Louisville Banking Co. *v.* Paine, 67 Miss. 678, 7 So. 462; People *v.* Merchants, etc., Bank, 78 N. Y. 269, 34 Am. Rep. 532.

The holder of protested paper has no priority over the holder of unprotested paper. Shepherd *v.* Guernsey, 9 Paige (N. Y.) 357.

40. *Arkansas.*— Ringo *v.* Field, 6 Ark. 43.

Indiana.— Fletcher *v.* Sharpe, 108 Ind. 276, 9 N. E. 142.

Iowa.— Jones *v.* Chesebrough, 105 Iowa 303, 75 N. W. 97.

Kentucky.— McAfee *v.* Bland, 11 Ky. L. Rep. 1, 11 S. W. 439.

Missouri.— Powell *v.* Morrison, 35 Mo. 244; Eyerman *v.* Second Nat. Bank, 13 Mo. App. 289.

New York.— Swartwout *v.* Mechanics' Bank, 5 Den. (N. Y.) 555.

Ohio.— Shaw *v.* Bauman, 34 Ohio St. 25.

But see Board Fire, etc., Com'rs *v.* Wilkinson, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493, where a fund deposited by a city treasurer in his own private bank, in violation of a statute, and commingled with the general fund was held to be a trust fund, although the treasurer had the legal title and was authorized by a city board.

41. Ellicott *v.* Barnes, 31 Kan. 170, 1 Pac. 767; Peak *v.* Ellicott, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90; Ryan *v.* Phillips, 3 Kan. App. 704, 44 Pac. 909; People *v.* Dansville Bank, 39 Hun (N. Y.) 187; Clots *v.* Dickson, 5 Alb. L. J. 286; Hunt *v.* Townsend, (Tex. Civ. App. 1894) 26 S. W. 310.

in the name of an agent or other person it is not thereby impressed with a trust either by law or agreement with the bank, and is entitled to no higher consideration than any other general deposit.[42]

(f) Deposits to Be Specially Applied. In using deposits made for the purpose of having them applied to a particular purpose the bank acts as the agent of the depositor, and if it fail to apply it at all, or misapply it, it can be recovered as a trust deposit.[43]

(g) General Deposits. General deposits possess no trust quality, and on the debtor's failure the depositor shares with the general creditors;[44] and in like manner the holder of a certificate of deposit.[45]

(h) Savings-Bank Deposits. In some states savings bank deposits kept with other banks are stamped with a trust relation. By the proper construction of these laws they apply to deposits kept by savings institutions with the bank, and not to loans either on time or call they may make with them.[46]

(i) Special Deposits Expressly Marked. Special deposits of money which are marked in some unusual manner and can be readily identified are not general deposits, and are held by the bank as a trust for the depositor.[47]

42. *Colorado.*— Meldrum *v.* Henderson, 7 Colo. App. 256, 43 Pac. 148.

Illinois.— Otis *v.* Gross, 96 Ill. 612, 36 Am. Rep. 157; Matter of Western M. & F. Ins. Co., 38 Ill. 289.

Iowa.—Eureka Dist. Tp. *v.* Farmers' Bank, 88 Iowa 194, 55 N. W. 342.

Wisconsin.— Stevens *v.* Williams, 91 Wis. 58, 64 N. W. 422; Henry *v.* Martin, 88 Wis. 367, 60 N. W. 263.

United States.— San Diego County *v.* California Nat. Bank, 52 Fed. 59; Beal *v.* Somerville, 50 Fed. 647, 5 U. S. App. 14, 1 C. C. A. 598, 17 L. R. A. 291.

43. *California.*— Anderson *v.* Pacific Bank, 112 Cal. 598, 44 Pac. 1063, 53 Am. St. Rep. 228, 32 L. R. A. 479.

Georgia.— Mayer *v.* Chattahoochee Nat. Bank, 51 Ga. 325; Howard College *v.* Pace, 15 Ga. 486.

Illinois.— Star Cutter Co. *v.* Smith, 37 Ill. App. 212.

Kansas.— Brockmeyer *v.* Washington Nat. Bank, 40 Kan. 376, 19 Pac. 855.

Michigan.— Sherwood *v.* Milford State Bank, 94 Mich. 78, 53 N. W. 923.

South Dakota.— Kimmel *v.* Dickson, 5 S. D. 221, 58 N. W. 561, 49 Am. St. Rep. 869, 25 L. R. A. 309.

United States.— Massey *v.* Fisher, 62 Fed. 958; Illinois Trust, etc., Bank *v.* Buffalo First Nat. Bank, 21 Blatchf. (U. S.) 275, 15 Fed. 858.

England.— Cobb *v.* Becke, 6 Q. B. 930, 9 Jur. 439, 14 L. J. Q. B. 108, 51 E. C. L. 930; Wharton *v.* Walker, 4 B. & C. 163, 6 D. & R. 288, 3 L. J. K. B. O. S. 183, 10 E. C. L. 527; Owen *v.* Bowen, 4 C. & P. 93, 19 E. C. L. 423; Surtees *v.* Hubbard, 4 Esp. 204, 6 Rev. Rep. 853.

Purchase-money.— Where A sold land to B, for which payment was to be made through a banker, who, on the night of receiving the purchase-money from the vendee, failed, the latter's assets were impressed with a trust for the amount. Francis *v.* Evans, 69 Wis. 115, 33 N. W. 95.

When order for applying deposit is worthless.— If a depositor gives a check on his bank for the payment of his note, which is in the bank's possession for collection, and the bank is at that time really insolvent and receives no money to be thus applied no trust is created that can be enforced against the receiver. Sherwood *v.* Milford State Bank, 94 Mich. 78, 53 N. W. 923.

When an order is effective.—When a depositor draws his check and requests his bank to place the amount to the credit of a third person, and the bank proceeds to make the transfer, but fails before completing it, the amount is impressed with a trust in favor of the maker. Stoller *v.* Coates, 88 Mo. 514.

44. Bruyn *v.* Middle Dist. Bank, 9 Cow. (N. Y.) 413.

The sureties on a bond given to secure a deposit on which a judgment has been obtained have no prior rights over other creditors. Richards *v.* Osceola Bank, 79 Iowa 707, 45 N. W. 294.

45. Bayor *v.* American Trust, etc., Bank, 157 Ill. 62, 41 N. E. 622.

46. Rosenback *v.* Manufacturers', etc., Bank, 69 N. Y. 358; Upton *v.* New York, etc., Bank, 13 Hun (N. Y.) 269.

A bank, if duly authorized, may provide a system for securing loans and deposits by their transfer to a trustee, or by some other method of security, whereby the lenders or depositors have precedence over other creditors. Ward *v.* Johnson, 95 Ill. 215.

What not a loan.—An agreement to deposit for three years one fourth of all the deposits of a savings-bank with another bank on which a specified rate of interest is to be received does not convert such a deposit into a loan. Matter of Patterson, 18 Hun (N. Y.) 221 [*affirmed* in 78 N. Y. 608].

47. *California.*— Anderson *v.* Pacific Bank, 112 Cal. 598, 44 Pac. 1063, 53 Am. St. Rep. 228, 32 L. R. A. 479.

New York.— Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; Chaffee *v.* Fort, 2 Lans. (N. Y.) 81.

(2) Changing From Trust to Debtor Relation. When paper is received for collection a trust relation often exists in the beginning which is changed by agreement or custom into that of debtor and creditor after the collection of the proceeds, but a bank cannot divest itself of the trust relation and assume the other at its own convenience. The transformation does not affect the depositor unless it is known by him either by agreement or usage.[48]

(3) Mingled Trust and Individual Deposits. Not infrequently trustees mingle a trust fund or several trust funds with their own deposit in an individual account. Such conduct, although approved in but one case,[49] is not *per se* wrongful,[50] and a bank, although knowing that this is done, is not at fault. The circumstance, however, is suspicious and should lead the institution to exercise caution in responding to their checks, but how far it should go in making inquiry or supervising their conduct has not been determined.[51]

(iii) *Mode of Depositing* — (a) *With Whom.* The payment of a deposit to any one serving behind the counter of a bank is valid; and if he retains the money for his own use his bank is liable.[52] The same principle applies to a bank whose officers receive special deposits of bonds and other securities.[53]

(b) *Time of Depositing.* When a deposit is received after banking hours and it is entered like other deposits the debtor and creditor relation is created as

Ohio.— *In re* Commercial Bank, 2 Ohio Dec. 304, 2 Ohio N. P. 170.

United States.— San Diego County *v.* California Nat. Bank, 52 Fed. 59 (where the certificate of deposit was marked "special"); Beal *v.* Somerville, 50 Fed. 647, 5 U. S. App. 14, 1 C. C. A. 598, 17 L. R. A. 291; Montgomery First Nat. Bank *v.* Armstrong, 36 Fed. 59; Furber *v.* Stephens, 35 Fed. 17.

England.— Sadler *v.* Belcher, 2 M. & Rob. 489.

Trust deposit for a fixed period.— If a deposit is made for the benefit of another payable at a fixed period it cannot be taken sooner by any process against the beneficiary. Foxton *v.* Kucking, 55 Me. 346.

48. Circleville First Nat. Bank *v.* Monroe Bank, 33 Fed. 408.

A bank cannot transfer a company's deposits to an officer's private account without its knowledge and authority. Cushman *v.* Illinois Starch Co., 79 Ill. 281.

Effect of restrictive indorsement see *supra*, II, E, 6, b, (i), (b), (1), (c).

Effect of special instructions see *supra*, II, E, 6, b, (i), (d).

49. Goodwin *v.* American Nat. Bank, 48 Conn. 550.

50. Case *v.* Abeel, 1 Paige (N. Y.) 393; Commercial, etc., Bank *v.* Jones, 18 Tex. 811.

No part of the fund is necessarily lost by mingling, "nor has a fraud been perpetrated so long as it remains in his possession or at his command." Goodwin *v.* American Nat. Bank, 48 Conn. 550.

51. Goodwin *v.* American Nat. Bank, 48 Conn. 550; Swift *v.* Williams, 68 Md. 236, 11 Atl. 835. See Manhattan Bank *v.* Walker, 130 U. S. 267, 9 S. Ct. 519, 32 L. ed. 959 [*reversing* 25 Fed. 247]; Central Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693; Randolph *v.* Allen, 73 Fed. 23, 41 U. S. App. 117, 19 C. C. A. 353; Gray *v.* Johnston, L. R. 3 H. L. Cas. 1, 16 Wkly. Rep. 842; Keane *v.* Robarts, 4 Madd. 332, 20 Rev. Rep. 306.

Bank liable where it has knowledge of breach of trust.— If a bank receives a check payable to a depositor as a trustee and credits it to his personal account and permits him to draw it out on his personal check it is liable with him for a breach of the trust. American Exch. Bank *v.* Loretta Gold, etc., Min. Co., 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 236; Duckett *v.* National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 63 Am. St. Rep. 513, 39 L. R. A. 84. If a bank learns that a trustee is committing a breach of trust by an improper withdrawal of funds, or participates in the fraud, it is liable. Munnerlyn *v.* Augusta Sav. Bank, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159; State Nat. Bank *v.* Reilly, 124 Ill. 464, 14 N. E. 657; Duckett *v.* National Mechanics' Bank, 86 Md. 400, 39 Atl. 983, 63 Am. St. Rep. 513, 39 L. R. A. 84; Swift *v.* Williams, 68 Md. 236, 11 Atl. 835; Essex County *v.* Newark City Nat. Bank, 48 N. J. Eq. 51, 21 Atl. 185.

Presumption as to fund drawn against.— If a trustee draws checks on his bank he will be presumed to have drawn out his own funds and left those belonging to the trust. Drovers', etc., Nat. Bank *v.* Roller, 85 Md. 495, 37 Atl. 30, 60 Am. St. Rep. 344, 36 L. R. A. 767.

52. East River Nat. Bank *v.* Gove. 57 N. Y. 597; Sweet *v.* Barney, 23 N. Y. 335; Hotchkiss *v.* Artisans' Bank, 2 Abb. Dec. (N. Y.) 403, 2 Keyes (N. Y.) 564. See also Ihl *v.* St. Joseph Bank, 26 Mo. App. 129; McCann *v.* State, 4 Nebr. 324; Rich *v.* Niagara County Sav. Bank, 5 Thomps. & C. (N. Y.) 589; Jumper *v.* Commercial Bank, 39 S. C. 296, 17 S. E. 980, 48 S. C. 430, 26 S. E. 725; Bickley *v.* Commercial Bank, 39 S. C. 281, 17 S. E. 977, 39 Am. St. Rep. 721.

53. Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

in other cases. But a different relation may be created by treating the deposit in a different manner, as by putting it into a separate place of deposit and entering it in a different book.[54]

(c) *Entry in Pass-Book.* Formerly if a bank officer entered a deposit on the pass-book at the time it was made the entry was original and binding on the bank; but if the entry was by copying from the ledger or from other bank-books, it could be questioned.[55] The entry, however, was not binding on the depositor because the bank clerk was not his agent.[56] The rule now is that the rights of neither party are changed by settling a pass-book. In all cases the account is open to examination and correction.[57] A pass-book is, however, *prima facie* evidence of the matters therein, but not conclusive.[58] It is not negotiable.[59]

(iv) *Ownership of Deposit*[60] — (a) *In General.* The law presumes that a deposit belongs to the person in whose name it is entered,[61] and the bank cannot question his right thereto.[62]

(b) *Dual Relationship Between Bank and Depositor.* A bank may maintain two relations with a depositor, his debtor with respect to one thing and his agent with respect to another. Again, it may be his agent at one time and his debtor at another. When money is deposited in a bank it is said to be the debtor and the depositor the creditor. Yet in another sense the depositor is the owner and can at any time demand repayment.[63] When the depositor's account is over-

54. *Ex p.* Clutton, 1 Fonbl. 167; Sadler *v.* Belcher, 2 M. & Rob. 489. See also Aberell *v.* Second Nat. Bank, 6 Mackey (D. C.) 358.

55. Manhattan Co. *v.* Lydig, 4 Johns. (N. Y.) 377, 4 Am. Dec. 289.

56. Mechanics', etc., Bank *v.* Smith, 19 Johns. (N. Y.) 115.

57. Follansbee *v.* Parker, 70 Ill. 11; Bucklin *v.* Chapin, 1 Lans. (N. Y.) 443; Bruen *v.* Hone, 2 Barb. (N. Y.) 586; Schneider *v.* Irving Bank, 1 Daly (N. Y.) 500; Bullock *v.* Boyd, 2 Edw. (N. Y.) 293; Mechanics' Bank *v.* Earp, 4 Rawle (Pa.) 384; Washington First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. ed. 229.

58. Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 182. See also Watson *v.* Phœnix Bank, 8 Metc. (Mass.) 217, 41 Am. Dec. 500; Commercial Bank *v.* Rhind, 3 Macq. 643.

59. Witte *v.* Vincenot, 43 Cal. 325; McCaskill *v.* Connecticut Sav. Bank, 60 Conn. 300, 22 Atl. 568, 25 Am. St. Rep. 323, 13 L. R. A. 737; Stewart *v.* State, 42 Tex. 242.

60. Ownership of deposits for collection see *supra*, II, E, 6, b.

61. If it be claimed by another the burden of proof is on him to establish his ownership. Egbert *v.* Payne, 99 Pa. St. 239; Penn Bank *v.* Frankish, 91 Pa. St. 339.

62. Graham *v.* Williams, 21 La. Ann. 594; Tassell *v.* Cooper, 9 C. B. 509, 67 E. C. L. 509.

Action of bank when deposit is attached. — If therefore a deposit is attached either because its title is claimed by another, or to secure a debt due from the depositor to the attaching creditor, the bank should do nothing until the court has made an order naming the person to whom the bank should pay. German Bank *v.* Himstedt, 42 Ark. 62, 46 Ark. 537.

Effect of notice of claim. — If a deposit is claimed by another who forbids the bank from paying it to any other person than himself, the consequences of its disregard of the notice may be visited on the bank if it is proved to belong to another. Wellsborough First Nat. Bank *v.* Bache, 71 Pa. St. 213.

63. *Alabama.* — Wray *v.* Tuskegee Ins. Co., 34 Ala. 58.

Arkansas. — Himstedt *v.* German Bank, 46 Ark. 537.

Delaware. — Corbit *v.* Smyrna Bank, 2 Harr. (Del.) 235, 30 Am. Dec. 635.

Florida. — Collins *v.* State, 33 Fla. 429, 15 So. 214.

Indiana. — Union Nat. Bank *v.* Citizens Bank, 153 Ind. 44, 54 N. E. 97; McLain *v.* Wallace, 103 Ind. 562, 5 N. E. 911; Coffin *v.* Anderson, 4 Blackf. (Ind.) 395.

Louisiana. — Matter of Louisiana Sav. Bank, etc., Co., 40 La. Ann. 514, 4 So. 301; Schmidt *v.* Barker, 17 La. Ann. 261, 87 Am. Dec. 527; Matthews *v.* Their Creditors, 10 La. Ann. 344.

Maryland. — Hardy *v.* Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325.

Massachusetts. — Taft *v.* Quinsigamond Nat. Bank, 172 Mass. 363, 52 N. E. 387; Freeman's Nat. Bank *v.* National Tube Works Co., 151 Mass. 413, 24 N. E. 779, 21 Am. St. Rep. 461, 8 L. R. A. 42; Manufacturers' Nat. Bank *v.* Continental Bank, 148 Mass. 553, 20 N. E. 193, 12 Am. St. Rep. 598, 2 L. R. A. 699; Carr *v.* National Security Bank, 107 Mass. 45, 9 Am. Rep. 6; Pacific Bank *v.* Mitchell, 9 Metc. (Mass.) 297; National Bank *v.* Eliot Bank, 5 Am. L. Reg. 711.

Michigan. — Neely *v.* Rood, 54 Mich. 134, 19 N. W. 920, 52 Am. Rep. 802.

Minnesota. — St. Paul Third Nat. Bank *v.* Stillwater Gas Co., 36 Minn. 75, 30 N. W. 440.

Missouri. — Knecht *v.* U. S. Savings Inst., 2 Mo. App. 563.

New York. — Ætna Nat. Bank *v.* New York

drawn any subsequent deposit needed to repay the bank belongs absolutely to it.[64] When a deposit is put in a bank for a special purpose, or a check is deposited for collection, the bank serves as an agent in keeping the money or the check, and also in paying the note and collecting the check.[65]

(v) *Transfer of Deposits.* A deposit should not be transferred from one account to another without ample authority.[66] What is sufficient authority is a question of fact to be answered whenever it arises.[67]

(vi) *Liabilities of Bank* — (a) *For Loss of Deposits* — (1) General Deposits. A bank, being in law a debtor,[68] is absolutely liable for the loss of a general deposit, although such loss occur by events wholly beyond its control;[69] but if the bank fail a general depositor, at common law, is not a preferred creditor.[70]

(2) Special Deposits — (a) In General. If special deposits of bonds, stocks, or other property which is to be kept in specie are kept by a bank without compensation,[71] to accommodate its customers, it must exercise the same care as in keeping its own property of similar character; and is therefore not liable, unless it has taken less care than of its own. Whether proper care has been taken is a

City Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; Marsh *v.* Oneida Cent. Bank, 34 Barb. (N. Y.) 298; Gordon *v.* Rasines, 5 Misc. (N. Y.) 192, 25 N. Y. Suppl. 767; Commercial Bank *v.* Hughes, 17 Wend. (N. Y.) 94.

North Carolina.— Commercial, etc., Nat. Bank *v.* Davis, 115 N. C. 226, 20 S. E. 370; Richmond First Nat. Bank *v.* Davis, 114 N. C. 343, 19 S. E. 280, 41 Am. St. Rep. 795; Boyden *v.* Cape Fear Bank, 65 N. C. 13.

North Dakota.— National Bank of Commerce *v.* Johnson, 6 N. D. 180, 69 N. W. 49.

Ohio.— Marysville Bank *v.* Windisch-Muhlhauser Brewing Co., 50 Ohio St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660.

Pennsylvania.— North Liberties Bank *v.* Jones, 42 Pa. St. 536.

South Carolina.— Dabney *v.* State Bank, 3 S. C. 124.

Texas.— Baker *v.* Kennedy, 53 Tex. 200.

Virginia.— Robinson *v.* Gardiner, 18 Gratt. (Va.) 509.

Washington.— Hallam *v.* Tillinghast, 19 Wash. 20, 52 Pac. 329.

United States.— Commercial Nat. Bank *v.* Armstrong, 148 U. S. 50, 13 S. Ct. 533, 37 L. ed. 363; National Bank of Republic *v.* Millard, 10 Wall. (U. S.) 152, 19 L. ed. 897; Thompson *v.* Riggs, 5 Wall. (U. S.) 663, 18 L. ed. 704; Chicago Mar. Bank *v.* Fulton County Bank, 2 Wall. (U. S.) 252, 17 L. ed. 785; Kentucky Bank *v.* Wister, 2 Pet. (U. S.) 318, 7 L. ed. 437; Richmond First Nat. Bank *v.* Wilmington, etc., R. Co., 77 Fed. 401, 42 U. S. App. 232, 23 C. C. A. 200; Balbach *v.* Frelinghuysen, 15 Fed. 675; *In re* Madison Bank, 5 Biss. (U. S.) 515, 2 Fed. Cas. No. 890, 9 Nat. Bankr. Reg. 184; Bank of Commerce *v.* Russell, 2 Dill. (U. S.) 215, 2 Fed. Cas. No. 884.

England.— Goodwin *v.* Robarts, L. R. 10 Exch. 337; Sims *v.* Bond, 5 B. & Ad. 389, 2 N. & M. 608, 27 E. C. L. 168; Watts *v.* Christie, 11 Beav. 546, 13 Jur. 244, 845, 18 L. J. Ch. 173; Foley *v.* Hill, 2 H. L. Cas. 28; Pott *v.* Clegg, 11 Jur. 289, 16 L. J. Exch. 210, 16 M. & W. 321; Carr *v.* Carr, 1 Meriv. 541; Devaynes *v.* Noble, 1 Meriv. 527.

See 6 Cent. Dig. tit. "Banks and Banking," § 289.

64. Ayres *v.* Farmers, etc., Bank, 79 Mo. 421, 49 Am. Rep. 235; First Nat. Bank *v.* Crawford, 2 Cinc. Super. Ct. (Ohio) 125; Balbach *v.* Frelinghuysen, 15 Fed. 675; *In re* Madison Bank, 5 Biss. (U. S.) 515, 2 Fed. Cas. No. 890, 9 Nat. Bankr. Reg. 184.

65. Brahm *v.* Adkins, 77 Ill. 263; Fishkill Nat. Bank *v.* Speight, 47 N. Y. 668; Parker *v.* Hartley, 91 Pa. St. 465.

66. Coffin *v.* Henshaw, 10 Ind. 277.

67. Neff *v.* Greene County Nat. Bank, 89 Mo. 581, 1 S. W. 747.

68. See *supra*, II, E, 7, a, (IV), (B).

69. *Alabama.*— Wray *v.* Tuskegee Ins. Co., 34 Ala. 58.

Indiana.— McLain *v.* Wallace, 103 Ind. 562, 5 N. E. 911; McEwen *v.* Davis, 39 Ind. 109; Coffin *v.* Anderson, 4 Blackf. (Ind.) 395.

New Hampshire.—Concord *v.* Concord Bank, 16 N. H. 26.

New York.— Commercial Bank *v.* Hughes, 17 Wend. (N. Y.) 94; Matter of Franklin Bank, 1 Paige (N. Y.) 249, 19 Am. Dec. 413.

United States.— *In re* Madison Bank, 5 Biss. (U. S.) 515, 2 Fed. Cas. No. 890, 9 Nat. Bankr. Reg. 184.

70. Matter of Franklin Bank, 1 Paige (N. Y.) 249, 19 Am. Dec. 413.

71. **Consideration.**— The receiving of a commission on the dividends accruing from bonds kept by a banker would be a sufficient reward to render him liable as a bailee for hire. *In re* United Service Co., L. R. 6 Ch. 212. But the profit derived from a customer's account is not a sufficient consideration for keeping special deposits to be worthy of legal regard, and does not impose a more stringent rule on a bank for keeping them than the rule above described. Giblin *v.* McMullen, L. R. 2 P. C. 317, 38 L. J. P. C. 25, 21 L. T. Rep. N. S. 214, 17 Wkly. Rep. 445.

question of fact to be ascertained whenever a loss happens.[72] A bank may, however, like all other bailees render itself liable in any event by a special contract with the depositor.[73]

(b) Collateral Securities. In keeping collateral securities for a bank loan in which it has a direct interest more care must be taken than in gratuitously[74] keep-

72. *Arkansas.*— Dawson *v.* Real Estate Bank, 5 Ark. 283.

Georgia.— Chattahoochee Nat. Bank *v.* Schley, 58 Ga. 369.

Illinois.— Gray *v.* Merriam, 148 Ill. 179, 35 N. E. 810, 39 Am. St. Rep. 172, 32 L. R. A. 769.

Iowa.— Turner *v.* Keokuk First Nat. Bank, 26 Iowa 562.

Kansas.— Hale *v.* Rawallie, 8 Kan. 136.

Kentucky.— Dunn *v.* Kyle, 14 Bush (Ky.) 134; Ray *v.* State Bank, 10 Bush (Ky.) 344; United Shakers Soc. *v.* Underwood, 9 Bush (Ky.) 609, 15 Am. Rep. 731.

Louisiana.—Levy *v.* Pike, 25 La. Ann. 630; Hills *v.* Daniels, 15 La. Ann. 280.

Maryland.— Maury *v.* Coyle, 34 Md. 235.

Massachusetts.— Smith *v.* Westfield First Nat. Bank, 99 Mass. 605, 97 Am. Dec. 59; Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

New York.— Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582; Lyons First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181; Matter of Franklin Bank, 1 Paige (N. Y.) 249, 19 Am. Dec. 413.

Ohio.— Mansfield First Nat. Bank *v.* Zent, 39 Ohio St. 105; Griffith *v.* Zipperwick, 28 Ohio St. 388.

Pennsylvania.—Allentown First Nat. Bank *v.* Rex, 89 Pa. St. 308, 33 Am. Rep. 767; De Haven *v.* Kensington Nat. Bank, 81 Pa. St. 95; Carlisle Bank *v.* Graham, 79 Pa. St. 106, 21 Am. Rep. 49; Scott *v.* Chester County Nat. Bank, 72 Pa. St. 471, 13 Am. Rep. 711; Lancaster County Nat. Bank *v.* Smith, 62 Pa. St. 47; Lloyd *v.* West Branch Bank, 15 Pa. St. 172, 53 Am. Dec. 581; Hughes *v.* Waynesburg First Nat. Bank, 17 Wkly. Notes Cas. (Pa.) 178; Steffe *v.* Conneautville Bank, 22 Pittsb. Leg. J. (Pa.) 157.

Vermont.— Whitney *v.* Brattleboro First Nat. Bank, 55 Vt. 154, 45 Am. Rep. 598.

United States.— Manhattan Bank *v.* Walker, 130 U. S. 267, 9 S. Ct. 519, 32 L. ed. 959; Carlisle First Nat. Bank *v.* Graham, 100 U. S. 699, 25 L. ed. 750; Chicopee Bank *v.* Philadelphia Seventh Nat. Bank, 8 Wall. (U. S.) 641, 19 L. ed. 422; Wylie *v.* Northampton Nat. Bank, 15 Fed. 428; *In re* Madison Bank, 5 Biss. (U. S.) 515, 2 Fed. Cas. No. 890, 9 Nat. Bankr. Reg. 184.

England.— Giblin *v.* McMullen, L. R. 2 P. C. 317, 38 L. J. P. C. 25, 21 L. T. Rep. N. S. 214, 17 Wkly. Rep. 445; Doorman *v.* Jenkins, 2 A. & E. 256, 4 L. J. K. B. 29, 4 N. & M. 170, 29 E. C. L. 132.

Delivery of special deposit.—A bank is liable if negligent in delivering a special deposit to the wrong person (Ganley *v.* Troy City Nat. Bank, 98 N. Y. 487; Lancaster County Nat. Bank *v.* Smith, 62 Pa. St. 47) but is not liable if the loss in delivery happened through the negligence or carelessness of the owner (Fisk *v.* Germania Nat. Bank, 40 La. Ann. 820, 5 So. 532; Walker *v.* Manhattan Bank, 25 Fed. 247).

Theft by bank officers.—A bank is not liable for loss by theft or other unlawful taking by one of its own officers, unless it knew he was unworthy of confidence. Ray *v.* State Bank, 10 Bush (Ky.) 344; Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Lancaster County Nat. Bank *v.* Smith, 62 Pa. St. 47. If, however, a bank knowingly employs a thief it is negligent in so doing and is responsible for the consequences; or if it employs a cashier who is speculating, it is liable for a special deposit of bonds belonging to a customer taken by him and used for his own purpose. Monmouth First Nat. Bank *v.* Dunbar, 118 Ill. 625, 9 N. E. 186; United Shakers Society *v.* Underwood, 9 Bush (Ky.) 609, 15 Am. Rep. 731; Hughes *v.* Waynesburg First Nat. Bank, 17 Wkly. Notes Cas. (Pa.) 178; Prather *v.* Kean, 29 Fed. 498.

73. Hale *v.* Rawallie, 8 Kan. 136; Maury *v.* Coyle, 34 Md. 235.

Bank is bailee.— "Upon a special deposit the bank is merely a bailee, and is bound according to the terms of the special deposit." McLain *v.* Wallace, 103 Ind. 562, 5 N. E. 911.

Giving a receipt for a deposit does not create a different contract for its safe-keeping. Jenkins *v.* National Village Bank, 58 Me. 275.

74. *Illinois.*— Gray *v.* Merriam, 148 Ill. 179, 35 N. E. 810, 39 Am. St. Rep. 172, 32 L. R. A. 769.

Maine.— Jenkins *v.* National Village Bank, 58 Me. 275; Dearbourn *v.* Union Nat. Bank, 58 Me. 273.

Maryland.— Baltimore Third Nat. Bank *v.* Boyd, 44 Md. 47, 22 Am. Rep. 35.

New York.—Hollister *v.* Central Nat. Bank, 119 N. Y. 634, 23 N. E. 878, 29 N. Y. St. 579; Ouderkirk *v.* Central Nat. Bank, 119 N. Y. 263, 23 N. E. 875, 29 N. Y. St. 573; Cutting *v.* Marlor, 78 N. Y. 454.

Pennsylvania.—Ashton's Appeal, 73 Pa. St. 153.

South Carolina.— Scott *v.* Crews, 2 S. C. 522.

United States.— Prather *v.* Kean, 29 Fed. 498; Second Nat. Bank *v.* Ocean Nat. Bank, 11 Blatchf. (U. S.) 362, 21 Fed. Cas. No. 12,602, 30 Leg. Int. (Pa.) 433; Fleming *v.* Northampton Nat. Bank, 9 Fed. Cas. No. 4,862*a*, 62 How. Pr. (N. Y.) 177.

Misapplication of loan.—If money is loaned to a bank and wrongfully applied by one of its officers, the lender's right to recover it or the securities given by the borrower is not

ing securities; and the same care must be taken of securities sent by an applicant for a loan which is not made.[75]

(c) Paper For Collection. As a bank, either directly or indirectly, receives compensation for collecting paper left by depositors for collection, who still retain their ownership of it, a stricter rule of duty applies to a bank in keeping it than in keeping bonds and the like for accommodation. If it is lost the bank is *prima facie* presumed to have been negligent.[76]

(b) *To Owner of Trust Deposit.* The principal or true owner can, after satisfying the bank of his ownership, demand payment, and if the bank refuses bring his action to recover his deposit.[77]

b. Certificates of Deposit — (i) *Right to Issue.* Banks may issue certificates of deposit and their issue is not a violation of the national or state banking laws.[78]

(ii) *Nature of.* Whether a certificate of deposit is a note or merely a receipt for money has long puzzled the courts.[79] Such certificate, however, if

thereby affected. City Bank *v.* Perkins, 29 N. Y. 554, 86 Am. Dec. 332.

Negligence.— The omission of an inside watchman is not negligence *per se*. Erie Bank *v.* Smith, 3 Brewst. (Pa.) 9.

Perversion of deposit.— The perversion of a security from the use intended by the pledgor is unlawful. Agawam Bank *v.* Strever, 18 N. Y. 502; Voorhees *v.* National Citizens' Bank, 15 Abb. Pr. N. S. (N. Y.) 13; Stowe *v.* Hamilton First Nat. Bank, 1 Ohio Cir. Ct. 524; Mahanoy City First Nat. Bank *v.* Gorman, (Pa. 1885) 2 Atl. 51; Montreal Bank *v.* White, 154 U. S. 660, 14 S. Ct. 1191, 26 L. ed. 307. An agreement between the pledgor and a party who has furnished the security will not bind the pledgee (Maitland *v.* Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620) unless he is notified (Mahanoy City First Nat. Bank *v.* Gorman, (Pa. 1885) 2 Atl. 51).

Unlawful pledge of note left in trust.— If a note left in trust to sell is pledged as collateral for a loan, the owner can recover the surplus after its sale on duly notifying the board of his ownership before any disposition of the proceeds from the sale. Farwell *v.* Importers', etc., Nat. Bank, 90 N. Y. 483.

75. Montreal Bank *v.* White, 154 U. S. 660, 14 S. Ct. 1191, 26 L. ed. 307.

76. Birmingham First Nat. Bank *v.* Newport First Nat. Bank, 116 Ala. 520, 22 So. 976.

77. Van Alen *v.* American Nat. Bank, 52 N. Y. 1.

78. Shute *v.* Pacific Nat. Bank, 136 Mass. 487; Pelham *v.* Adams, 17 Barb. (N. Y.) 384.

79. **Affirmative view.**— *Alabama.*— Talladega Ins. Co. *v.* Woodward, 44 Ala. 287.

California.— Poorman *v.* Mills, 35 Cal. 118, 95 Am. Dec. 90; Brummagim *v.* Tallant, 29 Cal. 503, 89 Am. Dec. 61; Mills *v.* Barney, 22 Cal. 240; Welton *v.* Adams, 4 Cal. 37, 60 Am. Dec. 579.

Connecticut.— Kilgore *v.* Bulkley, 14 Conn. 362.

Georgia.— Lynch *v.* Goldsmith, 64 Ga. 42; Lowe *v.* Murphy, 9 Ga. 338; Carey *v.* McDougald, 7 Ga. 84.

Illinois.—Laughlin *v.* Marshall, 19 Ill. 390; Peiu Bank *v.* Farnsworth, 18 Ill. 563.

Indiana.— Gregg *v.* Union County Nat. Bank, 87 Ind. 238; Brown *v.* McElroy, 52 Ind. 404; National State Bank *v.* Ringel, 51 Ind. 393; Drake *v.* Markle, 21 Ind. 433, 83 Am. Dec. 358.

Iowa.— Johnson *v.* Barney, 1 Iowa 531; Bean *v.* Briggs, 1 Iowa 488, 63 Am. Dec. 464. See also Huse *v.* Hamblin, 29 Iowa 501, 4 Am. Rep. 244.

Kansas.— Blood *v.* Northup, 1 Kan. 28.

Maine.— Hatch *v.* Dexter First Nat. Bank, 94 Me. 348, 47 Atl. 908, 80 Am. St. Rep. 401.

Michigan.— Tripp *v.* Curtenius, 36 Mich. 494, 24 Am. Rep. 610; Cate *v.* Patterson, 25 Mich. 191.

New York.— Munger *v.* Albany City Nat. Bank, 85 N. Y. 580; Pardee *v.* Fish, 60 N. Y. 265, 19 Am. Rep. 176; Coleman *v.* Elmira First Nat. Bank, 53 N. Y. 388 [*criticized* in Garmire *v.* State, 104 Ind. 444, 4 N. E. 54]; Hotchkiss *v.* Mosher, 48 N. Y. 478; Barnes *v.* Ontario Bank, 19 N. Y. 152; West *v.* Elmira First Nat. Bank, 20 Hun (N. Y.) 408; Orleans Bank *v.* Merrill, 2 Hill (N. Y.) 295.

Ohio.— Citizens' Nat. Bank *v.* Brown, 45 Ohio St. 39, 11 N. E. 799, 4 Am. St. Rep. 526; Howe *v.* Hartness, 11 Ohio St. 449, 78 Am. Dec. 312.

Vermont.— Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377.

Wisconsin.— Klauber *v.* Biggerstaff, 47 Wis. 555, 3 N. W. 357, 32 Am. Rep. 773; Lindsey *v.* McClelland, 18 Wis. 481, 86 Am. Dec. 786; Platt *v.* Sauk County Bank, 17 Wis. 222; Ford *v.* Mitchell, 15 Wis. 304; O'Neill *v.* Bradford, 1 Pinn. (Wis.) 390, 42 Am. Dec. 574.

United States.— Miller *v.* Austen, 13 How. (U. S.) 218, 14 L. ed. 119; Saginaw Bank *v.* Western Pennsylvania Title, etc., Co., 105 Fed. 491.

Canada.— *Re* Central Bank, 17 Ont. 574; Voyer *v.* Richer, 13 L. C. Jur. 213, 15 L. C. Jur. 122 [*affirmed* in L. R. 5 P. C. 461].

Negative view.— Shute *v.* Pacific Nat. Bank, 136 Mass. 487; Dempsey *v.* Harm, (Pa. 1887) 12 Atl. 27; Loudon Sav. Fund Soc. *v.* Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390; Lebanon Bank *v.* Mangan, 28 Pa. St. 452; Gillespie *v.* Mather, 10 Pa. St. 28; Charnley *v.* Dulles, 8 Watts & S. (Pa.)

containing proper words to express that intention, is negotiable[80] in the usual manner by indorsement,[81] and although not negotiable in fact, if negotiable in form, it may be assigned.[82] Moreover, where they are negotiable their transfer is governed by the rules that apply to promissory notes, as is also the liability of the parties thereon.[83]

(III) *How Affected by Statute of Limitations.* In many states a certificate is a continuing security, and no action can be maintained thereon, or the statute of limitations be put into operation against it, until after making a demand for payment.[84] In others the certificate is due immediately and the statute begins to run at once without demanding the money. Where this view prevails *bona fide* holders are affected with the equities existing between persons having it prior to themselves.[85]

(IV) *Surrender on Payment.* When the owner of a certificate of deposit demands payment the issuer may insist on its delivery as a security against a future claim.[86] If it is in the possession of a third party, so that the owner cannot present it for payment, he cannot recover thereon. The risk of a demand by another and an action to determine its title cannot thus be thrown on the bank.[87]

353; Patterson v. Poindexter, 6 Watts & S. (Pa.) 227, 40 Am. Dec. 554.

Evidence to explain.— The certificate is a contract and no parol evidence of a previous or concurrent agreement is admissible to contradict or vary its legal effect (Long *v.* Straus, 107 Ind. 94, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87), but such evidence may be introduced to establish a subsequent arrangement between the parties (Woods *v.* Russell, (Pa.) 2 East Rep. 638).

80. A clearing-house certificate is not a mere certificate of deposit, but is negotiable, like a check payable to bearer. Dutton *v.* Merchants' Nat. Bank, 16 Phila. (Pa.) 94, 40 Leg. Int. (Pa.) 110.

81. Huse *v.* Hamblin, 29 Iowa 501, 4 Am. Rep. 244; Rindskoff *v.* Barrett, 11 Iowa 172; Piner *v.* Clary, 17 B. Mon. (Ky.) 645; Shanklin *v.* Madison County, 21 Ohio St. 575.

Addition of provision for interest.—A certificate of deposit in the usual form with additional words agreeing to pay interest is a negotiable instrument. Munger *v.* Albany City Nat. Bank, 85 N. Y. 580.

"In currency."— There was at one time much questioning whether certificates payable "in currency," when this greatly varied in value, were payable in money and therefore negotiable, but the question is no longer important. Drake *v.* Markle, 21 Ind. 433, 83 Am. Dec. 358; Klauber *v.* Biggerstaff, 47 Wis. 551, 3 N. W. 357, 32 Am. Rep. 773.

The term "current funds" rendered the instrument non-negotiable in some states (National State Bank *v.* Ringel, 51 Ind. 393; Conwell *v.* Pumphrey, 9 Ind. 135, 68 Am. Dec. 611; Johnson *v.* Henderson, 76 N. C. 227; McCormick *v.* Trotter, 10 Serg. & R. (Pa.) 94; Wharton *v.* Morris, 1 Dall. (Pa.) 125, 1 L. ed. 65), but not in others (Pardee *v.* Fish, 60 N. Y. 265, 19 Am. Rep. 176; Judah *v.* Harris, 19 Johns. (N. Y.) 144; Simpson *v.* Moulden, 3 Coldw. (Tenn.) 429).

82. National State Bank *v.* Ringel, 51 Ind. 393; Easton *v.* Hyde, 13 Minn. 90; Ford *v.* Mitchell, 15 Wis. 304.

83. Pardee *v.* Fish, 60 N. Y. 265, 19 Am. Rep. 176.

84. *Indiana.*— Brown *v.* McElroy, 52 Ind. 404.

Missouri.— Hodgson *v.* Cheever, 8 Mo. App. 318.

New York.— Smiley *v.* Fry, 100 N. Y. 262, 3 N. E. 186; Munger *v.* Albany City Nat. Bank, 85 N. Y. 580; Boughton *v.* Flint, 74 N. Y. 476; Howell *v.* Adams, 68 N. Y. 314; Pardee *v.* Fish, 60 N. Y. 265, 19 Am. Rep. 176; Payne *v.* Gardiner, 29 N. Y. 146; Ft. Edward Nat. Bank *v.* Washington County Nat. Bank, 5 Hun (N. Y.) 605; Downes *v.* Phœnix Bank, 6 Hill (N. Y.) 297.

Pennsylvania.— McGough *v.* Jamison, 107 Pa. St. 336; Finkbone's Appeal, 86 Pa. St. 368 [*overruling* Laforge *v.* Jayne, 9 Pa. St. 410]; Girard Bank *v.* Penn Tp. Bank, 39 Pa. St. 92, 80 Am. Dec. 507.

Vermont.— Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377.

85. Brummagim *v.* Tallant, 29 Cal. 503, 89 Am. Dec. 61; Meador *v.* Dollar Sav. Bank, 56 Ga. 605; Tripp *v.* Curtenius, 36 Mich. 494, 24 Am. Rep. 610. But see Birch *v.* Fisher, 51 Mich. 36, 16 N. W. 220.

86. Fells Point Sav. Inst. *v.* Weedon, 18 Md. 320, 81 Am. Dec. 603.

If the certificate has been lost banks generally require the owner to give it a bond of indemnity before paying him (Dutton *v.* Merchants' Nat. Bank, 16 Phila. (Pa.) 94, 40 Leg. Int. (Pa.) 110), but if the payee has lost it and never indorsed it he may maintain his action without tendering an indemnity against future liability (Citizens' Nat. Bank *v.* Brown, 45 Ohio St. 39, 11 N. E. 799, 4 Am. St. Rep. 526).

87. Cottle *v.* Marine Bank, 166 N. Y. 53, 59 N. E. 736; Munger *v.* Albany City Nat. Bank, 85 N. Y. 580; Pardee *v.* Fish, 60 N. Y. 265, 19 Am. Rep. 176; Payne *v.* Gardiner, 29 N. Y. 146; Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377.

Demand before recovery.— In the following cases it has been held that demand is not

8. LETTERS OF CREDIT. A letter of credit is a guaranty, and a bank can ordinarily recover for all advances made thereon in good faith within its terms.[88] If there is no limit in time the advancing bank is protected until receiving adequate notice to the contrary.[89]

9. LOANS AND DISCOUNTS — a. What Is a Loan or Discount. The purchase of a promissory note for a sum less than its face is a discount,[90] but one taken in payment of a preëxisting debt is not.[91] When a note is purchased or discounted the bank does not become the owner until it has paid therefor. Until then its possession is a bailment and it cannot apply the proceeds to extinguish other indebtedness of the borrower without his consent.[92] If, however, the borrower fails before drawing his money the note can be tendered back and the money retained, and the bank will not be liable to the holder of a check representing the amount, which was not presented before the holder's failure.[93]

b. Authority to Loan or Discount — (I) *IN GENERAL* — (A) *Rule Stated.* Authority to lend is defined by positive law, and most of the questions of this character are interpretations of charters or statutes.[94] When no prohibitory stat-

necessary before recovery. Hunt *v.* Divine, 37 Ill. 137; Cate *v.* Patterson, 25 Mich. 191.

88. Lafargue *v.* Harrison, 70 Cal. 380, 11 Pac. 636, 59 Am. Rep. 416; Omaha Nat. Bank *v.* St. Paul First Nat. Bank, 59 Ill. 428; Bank of British North America *v.* Cooper, 137 U. S. 473, 11 S. Ct. 160, 34 L. ed. 759.

89. White's Bank *v.* Myles, 73 N. Y. 335, 29 Am. Rep. 157.

Retaining security.— When a bank has issued a letter to another bank announcing a credit for a stated sum for the use of the holder of the letter it cannot, after learning of the insolvency of the bank to which the letter is directed, retain the funds for a debt due therefrom. Cutler *v.* American Exch. Nat. Bank, 113 N. Y. 593, 21 N. E. 710, 23 N. Y. St. 665, 4 L. R. A. 328.

Increasing security.— If a bank is authorized to draw drafts against specific merchandise it cannot hold the party conveying this authority also. Montreal Bank *v.* Rechnagel, 109 N. Y. 482, 17 N. E. 217, 16 N. Y. St. 398.

90. Atlantic State Bank *v.* Savery, 82 N. Y. 291.

91. Lime Rock Bank *v.* Hewett, 52 Me. 531.

There was not a discount where a bank purchased bonds from a state giving its certificates of deposit therefor and other bonds were taken and certificates were given and left with the state's agent to sell, who was to use the proceeds to pay the old certificates (Mitchell *v.* Cook, 7 N. Y. 538, Seld. Notes (N. Y.) 16); or when the selling bank took a time draft in payment made by the purchasing bank (Buffalo City Bank *v.* Codd, 25 N. Y. 163).

92. Parry *v.* Highley, 8 Pa. Co. Ct. 584. See also next note.

What amounts to payment.— If a note is discounted and credited to the borrower on his account this is not always payment; but if the money is checked out the bank is the owner. Dreilling *v.* Battle Creek First Nat. Bank, 43 Kan. 197, 23 Pac. 94, 19 Am. St. Rep. 126; Fox *v.* Kansas City Bank, 30 Kan. 441, 1 Pac. 789; Mann *v.* Springfield Second Nat. Bank, 30 Kan. 412, 1 Pac. 579.

93. Antigo Bank *v.* Union Trust Co., 50 Ill. App. 434; Lancaster County Nat. Bank *v.* Huver, 114 Pa. St. 216, 6 Atl. 141; Dougherty *v.* Central Nat. Bank, 93 Pa. St. 227, 39 Am. Rep. 750.

94. **Discount on amounts deposited for safe-keeping.**— The right formerly given to banks to discount on the amount of moneys deposited for safe-keeping applied only to general deposits. Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

Excessive loans.— On various occasions limitations have been imposed on the amount that might be loaned, and directors either have violated, or have been charged with violating them (Richmond Bank *v.* Robinson, 42 Me. 589; Albert *v.* Baltimore, 2 Md. 159; Pemigewassett Bank *v.* Rogers, 18 N. H. 255; Fisher *v.* Murdock, 13 Hun (N. Y.) 485; Arnold *v.* Reid, 1 Ohio Dec. (Reprint) 347, 7 West. L. J. 410); but a prohibition by a general statute does not affect a special charter (*In re* Iron, etc., Dollar Sav. Bank, 12 Pa. Co. Ct. 42; *In re* McKinley-Lanning L. & T. Co., 12 Pa. Co. Ct. 40). A loan made by a cashier for the purpose of reducing to an equal amount loans of the directors which have exceeded the legal limit is not illegal, and the parties to the substituted paper are liable. Seneca County Bank *v.* Neass, 5 Den. (N. Y.) 329.

Loans to bank officers.—When a bank is prohibited from lending to its officers, a loan to a firm, a member of which is a director of the bank, is not a violation of the law. Richmond Bank *v.* Robinson, 42 Me. 589; Fisher *v.* Murdoch, 13 Hun (N. Y.) 485. But if a charter prescribe that only such loans can be made to directors as the by-laws shall authorize, and a loan is made to a director without any by-law regulating the conditions, the loan is void and the money cannot be recovered. Arnold *v.* Reid, 1 Ohio Dec. (Reprint) 347, 7 West. L. J. 410.

Care in lending.— In discounting a negotiable note a bank is not required to exercise care to learn, beyond the paper itself, whether there are equities or defenses. Warren Deposit Bank *v.* Younglove, (Ky. 1902) 66 S. W. 749.

ute exists a commercial bank can lend money on real estate security;[95] and a bank having authority to lend on public stocks, on bond and mortgage, or on any other securities deemed ample by the board of directors can also discount on commercial paper.[96] When discounting privileges have been granted to a bank it will be presumed that it has complied with the conditional requirements.[97]

(B) *Accommodation Indorsements and Guaranties.* A bank cannot make an accommodation indorsement,[98] but it may guarantee the payment of a bond and mortgage to a party who has advanced money thereon for the benefit of the bank,[99] and if a state lends money to a bank on bonds it has power to guarantee them.[1]

(C) *Consequences of Unauthorized Loans.* When banks have made unauthorized loans the doctrine is rapidly growing that the courts will nevertheless compel unwilling debtors to pay,[2] and punish the offending lenders in some other manner than by withdrawing its aid to them to enforce payment.[3] These violations have consisted in lending to a customer in excess of the legal amount,[4] on improper securities,[5] or to improper indorsers.[6]

95. Martinez Bank *v.* Hemme Orchard, etc., Co., 105 Cal. 376, 38 Pac. 963.

96. Detroit Sav. Bank *v.* Truesdail, 38 Mich. 430.

97. Yungfleisch's Appeal, 1 Walk. (Pa.) 125.

Validity of loan.—A debtor cannot avoid payment on the ground that his loan was not made by a quorum of directors as required by law. Smith *v.* State Bank, 18 Ind. 327. See also Ayres, etc., Co. *v.* Dorsey Produce Co., 101 Iowa 141, 70 N. W. 111, 63 Am. St. Rep. 376.

98. *Connecticut.*—Ætna Nat. Bank *v.* Charter Oak L. Ins. Co., 50 Conn. 167.

Iowa.— Lucas *v.* White Line Transfer Co., 70 Iowa 541, 30 N. W. 771, 59 Am. Rep. 449.

Massachusetts.— Monument Nat. Bank *v.* Globe Works, 101 Mass. 57, 3 Am. Rep. 322.

New York.— National Park Bank *v.* German-American Mut. Warehousing, etc., Co., 116 N. Y. 281, 22 N. E. 567, 26 N. Y. St. 675, 5 L. R. A. 673; Genesee Bank *v.* Patchin Bank, 13 N. Y. 309; Bridgeport City Bank *v.* Empire Stone Dressing Co., 30 Barb. (N. Y.) 421; Morford *v.* Farmers' Bank, 26 Barb. (N. Y.) 568; Central Bank *v.* Empire Stone Dressing Co., 26 Barb. (N. Y.) 23; Farmers', etc., Bank *v.* Empire Stone Dressing Co., 5 Bosw. (N. Y.) 275.

United States.— West St. Louis Sav. Bank *v.* Parmalee, 95 U. S. 557, 24 L. ed. 490; National Bank of Commerce *v.* Atkinson, 55 Fed. 465.

99. Talman *v.* Rochester City Bank, 18 Barb. (N. Y.) 123.

Bank must be interested.—A bank cannot lend its credit to another, or pledge its property to secure the debt of another, if it has no interest therein. Wheeler *v.* Home Sav., etc., Bank, 188 Ill. 34, 58 N. E. 598, 80 Am. St. Rep. 161.

Guaranty of illegal notes.— If the notes issued by a bank are illegal and void, so is the guaranty of them. Leavitt *v.* Blatchford, 17 N. Y. 521; Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333; Tylee *v.* Yates, 3 Barb. (N. Y.) 222; Swift *v.* Beers, 3 Den. (N. Y.) 70.

1. Dabney *v.* State Bank, 3 S. C. 124.

2. Fargason *v.* Oxford Mercantile Co., 78 Miss. 65, 27 So. 877; Pratt *v.* Short, 79 N. Y. 437, 35 Am. Rep. 531; Utica Ins. Co. *v.* Bloodgood, 4 Wend. (N. Y.) 652; Utica Ins. Co. *v.* Cadwell, 3 Wend. (N. Y.) 296; Utica Ins. Co. *v.* Kip, 8 Cow. (N. Y.) 20; Utica Ins. Co. *v.* Scott, 19 Johns. (N. Y.) 1.

3. *Alabama.*— Bates *v.* State Bank, 2 Ala. 451.

Georgia.— Bond *v.* Central Bank, 2 Ga. 92.

Massachusetts.— Prescott Nat. Bank *v.* Butler, 157 Mass. 548, 32 N. E. 909. But where a bank discounted a note, the borrower agreeing that one sixth of the amount should remain on deposit, the discount was void because the entire proceeds were not payable on demand, and the bank could not recover on the note. Mills *v.* Rice, 6 Gray (Mass.) 458. Nor could it recover on a note given in renewal by the indorser. Western Bank *v.* Mills, 7 Cush. (Mass.) 539.

Minnesota.— State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510.

Mississippi.— Grand Gulf Bank *v.* Archer, 8 Sm. & M. (Miss.) 151.

Missouri.— McClintock *v.* Kansas City Cent. Bank, 120 Mo. 127, 24 S. W. 1052.

Nebraska.— Smith *v.* Chadron First Nat. Bank, 45 Nebr. 444, 63 N. W. 796.

Vermont.— Middlebury Bank *v.* Bingham, 33 Vt. 621.

United States.— Jones *v.* New York Guaranty, etc., Co., 101 U. S. 622, 25 L. ed. 1030; Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. ed. 188.

Contra, Philadelphia Loan Co. *v.* Towner, 13 Conn. 249; Workingmen's Banking Co. *v.* Rautenberg, 103 Ill. 460, 42 Am. Rep. 26.

4. Allen *v.* Freedman's Sav., etc., Co., 14 Fla. 418; Bond *v.* Central Bank, 2 Ga. 92; Smith *v.* Chadron First Nat. Bank, 45 Nebr. 444, 63 N. W. 796.

5. Bond *v.* Central Bank, 2 Ga. 92; Richmond Bank *v.* Robinson, 42 Me. 589.

6. Neillsville Bank *v.* Tuthill, 4 Dak. 295, 30 N. W. 154; St. Joseph F. & M. Ins. Co. *v.* Hauck, 71 Mo. 465; Rome Sav. Bank *v.*

(II) *For Another.* If money is left with a bank to be loaned it is an agent and not a debtor; and if it lends the money in good faith and exercises due care it is not liable to the borrower should there be any loss.[7]

c. Security For — (I) *In General.* It is a power incidental to that of discounting to secure loans[8] in any manner not prohibited by positive law.[9] A wide latitude exists in taking personal property for this purpose;[10] but banks have often been forbidden from lending on the security of their own stocks.[11]

Krug, 102 N. Y. 331, 6 N. E. 682; Pratt *v.* Short, 79 N. Y. 437, 35 Am. Rep. 531 [*reversing*, on other grounds, 53 How. Pr. (N. Y.) 506]; Vanatta *v.* State Bank, 9 Ohio St. 27.

7. Squires *v.* Monmouth First Nat. Bank, 59 Ill. App. 134; Wykoff *v.* Irvine, 6 Minn. 496, 80 Am. Dec. 461; Corlies *v.* Cumming, 6 Cow. (N. Y.) 181; Robertson *v.* Livingston, 5 Cow. (N. Y.) 473; Van Alen *v.* Vanderpool, 6 Johns. (N. Y.) 69, 5 Am. Dec. 192; McKinstry *v.* Pearsall, 3 Johns. (N. Y.) 319; Liotard *v.* Graves, 3 Cai. Cas. (N. Y.) 226*a*.

A banker who promises to exercise "careful attention" in conducting the business of his customers is bound to exercise the skill usually shown by a banker in loaning money for a customer even though the service be rendered gratuitously; but a failure to inquire carefully into the condition of a borrower would not be negligence if he was generally believed to be solvent and an inquiry would have yielded no more information. Isham *v.* Post, 141 N. Y. 100, 35 N. E. 1084, 56 N. Y. St. 656, 38 Am. St. Rep. 766, 23 L. R. A. 90.

8. If a loan be illegal, this will not affect the title to the securities transferred. Elder *v.* Ottawa First Nat. Bank, 12 Kan. 238; City Bank *v.* Perkins, 29 N. Y. 554, 86 Am. Dec. 332. *Contra*, Albert *v.* Baltimore, 2 Md. 159. The borrower cannot, therefore, while retaining the money, restrain the bank from negotiating the securities or obtain their cancellation or return. Elder *v.* Ottawa First Nat. Bank, 12 Kan. 238.

9. Commercial Bank *v.* Nolan, 7 How. (Miss.) 508.

10. Bates *v.* State Bank, 2 Ala. 451; Commercial Bank *v.* Nolan, 7 How. (Miss.) 508; Farmers', etc., Bank *v.* Detroit, etc., R. Co., 17 Wis. 372.

Bill of lading.— If a draft is discounted by a bank to which a bill of lading, properly indorsed, is attached, a special property on the merchandise described therein passes to the bank as security, which is preserved until the draft is accepted and paid.

Illinois.— Illinois Cent. R. Co. *v.* Southern Bank, 41 Ill. App. 287; Rumsey *v.* Nickerson, 35 Ill. App. 188.

Kansas.— Halsey *v.* Warden, 25 Kan. 128.

Massachusetts.— Hathaway *v.* Haynes, 124 Mass. 311; Chicago Fifth Nat. Bank *v.* Bayley, 115 Mass. 228; Stollenwerck *v.* Thacher, 115 Mass. 224; Green Bay First Nat. Bank *v.* Dearborn, 115 Mass. 219, 15 Am. Rep. 92; Cairo First Nat. Bank *v.* Crocker, 111 Mass. 163.

Missouri.— Davenport Nat. Bank *v.* Homeyer, 45 Mo. 145, 100 Am. Dec. 363; Skilling *v.* Bollman, 6 Mo. App. 76.

New York.— Commercial Bank *v.* Pfeiffer, 108 N. Y. 242, 15 N. E. 311; Canada Merchants Bank *v.* Union R., etc., Co., 69 N. Y. 373; Cincinnati First Nat. Bank *v.* Kelly, 57 N. Y. 34; Marine Bank *v.* Wright, 48 N. Y. 1; Cayuga County Nat. Bank *v.* Daniels, 47 N. Y. 631; City Bank *v.* Rome, etc., R. Co., 44 N. Y. 136; Rochester Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290; Syracuse First Nat. Bank *v.* New York Cent., etc., R. Co., 85 Hun (N. Y.) 160, 32 N. Y. Suppl. 604, 66 N. Y. St. 112; Indiana Nat. Bank *v.* Colgate, 4 Daly (N. Y.) 41; American Trust, etc., Bank *v.* Austin, 25 Misc. (N. Y.) 454, 55 N. Y. Suppl. 561.

Ohio.— Emery *v.* Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299.

Pennsylvania.— Richardson *v.* Nathan, 167 Pa. St. 513, 31 Atl. 740; Holmes *v.* Bailey, 92 Pa. St. 57; Holmes *v.* German Security Bank, 87 Pa. St. 525.

Vermont.— Tilden *v.* Minor, 45 Vt. 196.

West Virginia.— Neill *v.* Rogers Bros. Produce Co., 41 W. Va. 37, 23 S. E. 702.

Crops.— It may take a crop of cotton and ship the same to a factor to be sold. Deloach *v.* Jones, 18 La. 447.

Deposits.—A contract between two banks whereby the lending bank is to have all the collateral in its possession belonging to the other for advances includes deposits. Biebinger *v.* Continental Bank, 99 U. S. 143, 25 L. ed. 271; Fisher *v.* Continental Nat. Bank, 64 Fed. 707, 26 U. S. App. 382, 12 C. C. A. 411.

Title of pledgee.—An honest pledgee obtains a good title to the merchandise against the consignor's creditors. Petitt *v.* Memphis First Nat. Bank, 4 Bush (Ky.) 334; Forbes *v.* Boston, etc., R. Co., 133 Mass. 154; Hathaway *v.* Haynes, 124 Mass. 311.

11. If a bank cannot lend on the security of its stock, or be the purchaser, except to secure a past debt, the note cannot be collected. St. Paul, etc., Trust Co. *v.* Jenks, 57 Minn. 248, 59 N. W. 299. But the defense will not avail, when a bank has taken its own stock as security for a discount, that it has not sold it or charged the stock with the amount of the loan. Butterworth *v.* Kennedy, 5 Bosw. (N. Y.) 143.

Only prohibits loan directly to owner.— If a statute declares that a bank shall not

(II) *Real Estate.* A bank is permitted to take a mortgage to secure a debt[12] made either at the time[13] or afterward;[14] and it can afterward take such property to secure its debt either by foreclosure, by sale on execution, or by other process[15] for the purpose of selling it at better advantage.

(III) *Stock Mortgages.* In some states banks have authority to take a mortgage on land to secure the payment of their stock. Such mortgages are regarded as prior and superior to mortgages for loans, although both are made in the same instrument.[16] And the transfer of bank-stock subsequently to the transfer of real estate subject to a mortgage of this character does not affect the mortgage rights of the bank.[17]

d. Interest or Rate of Discount — (I) *In General.* With respect to the interest or rate of discount which may be charged[18] a bank, unless its charter prescribes differently, is governed by the same law as individuals,[19] and a note made in one state and discounted in another is governed by the law of the latter state.[20] If a charter prescribes a different rate from the general law the chartered rate prevails.[21]

make a loan or discount on the pledge of its own stock, this means directly to the owner, and does not forbid a discount to a third party who has no interest in the stock. Vansands *v.* Middlesex County Bank, 26 Conn. 144.

12. Anticipated liabilities.— Unless restricted by its charter a bank may take a mortgage to secure anticipated liabilities (Crocker *v.* Whitney, 71 N. Y. 161), and although the law provide that the mortgage shall be made to the president, if made to the bank itself it is equally valid, for this requirement is simply to facilitate the business and not to prohibit the bank from taking the title (Kennedy *v.* Knight, 21 Wis. 340, 94 Am. Dec. 543).

13. Sparks *v.* State Bank, 7 Blackf. (Ind.) 469; Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. 117 (holding that although a bank is forbidden by its charter to "deal or trade in anything except bills of exchange," etc., it is not forbidden from taking an assignment of a mortgage to secure a debt due to the bank); Silver Lake Bank *v.* North, 4 Johns Ch. (N. Y.) 370 (holding that a mortgage taken to secure a loan made at the time is valid where authority exists to take a mortgage to secure debts previously contracted).

14. *Arkansas.*— Magruder *v.* State Bank, 18 Ark. 9.

Indiana.— State Bank *v.* Coquillard, 6 Ind. 232.

Maine.— Thomaston Bank *v.* Stimpson, 21 Me. 195.

Michigan.— State Bank *v.* Niles, 1 Dougl. (Mich.) 401, 41 Am. Dec. 575.

Mississippi.—Ingraham *v.* Speed, 30 Miss. 410.

Missouri.— Merchant's Bank *v.* Harrison, 39 Mo. 433, 93 Am. Rep. 285.

New York.— Chautauque County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347.

Pennsylvania.— Baird *v.* Washington Bank, 11 Serg. & R. (Pa.) 411.

Wisconsin.— Farmers', etc., Bank *v.* Detroit, etc., R. Co., 17 Wis. 372.

15. Martin *v.* Decatur Branch Bank, 15 Ala. 587, 50 Am. Dec. 147; Sherry *v.* Denn, 8 Blackf. (Ind.) 542.

A conveyance of land to a bank in exchange for drafts held by it to which he was not in any way interested is not a purchase within the statute authorizing a bank to hold real estate for a part debt. State Bank *v.* Coquillard, 6 Ind. 232.

16. Citizens' Bank *v.* Nicolas, 3 La. Ann. 112.

17. Nutt *v.* Citizens' Bank, 22 La. Ann. 346.

18. The rate need not be stated in writing if the contract clearly expresses the sum that is to be paid. Cameron v. Merchants', etc., Bank, 37 Mich. 239.

19. *Indiana.*— Billingsley *v.* State Bank, 3 Ind. 375.

Maine.— Lumberman's Bank *v.* Bearce, 41 Me. 505.

Missouri.— Ritenour *v.* Harrison, 57 Mo. 502.

Tennessee.— Chafin *v.* Lincoln Sav. Bank, 7 Heisk. (Tenn.) 499.

Virginia.— Stribbling *v.* Valley Bank, 5 Rand. (Va.) 132.

Wisconsin.— Durkee *v.* Kenosha City Bank, 13 Wis. 216; Rock River Bank *v.* Sherwood, 10 Wis. 230, 78 Am. Dec. 669.

United States.—Alexandria Bank *v.* Mandeville, 1 Cranch C. C. (U. S.) 552, 2 Fed. Cas. No. 850.

Authority to lend on banking principles and usages is not a grant to exceed the legal rate. Creed *v.* Commercial Bank, 11 Ohio 489; McLean *v.* Lafayette Bank, 3 McLean (U. S.) 587, 16 Fed. Cas. No. 8,888.

Authority to make agreement.—When a bank is authorized to receive any rate by agreement, this is no authority to exceed the legal rate. Tishimingo Sav. Inst. *v.* Buchanan, 60 Miss. 496; Simonton *v.* Lanier, 71 N. C. 498.

20. Buchanan *v.* Drovers' Nat. Bank, 55 Fed. 223, 6 U. S. App. 566, 5 C. C. A. 83.

21. Clinton, etc., R. Co. *v.* Kernan, 10 Rob. (La.) 174; State Bank *v.* Sterling, 2 La. 60; Grand Gulf Bank *v.* Archer, 8 Sm. & M.

(II) *After Maturity.* According to some authorities if the agreement concerning interest is legal the agreed rate will continue after the maturity of the obligation until it is paid;[22] while by others, the rate after that event can be only the legal one regardless of the contract.[23]

(III) *Usury*—(A) *What Is.* The taking of the legal rate[24] in advance,[25] charging a reasonable premium for exchange when a note is to be paid in this manner,[26] or unintentionally taking more than the legal rate[27] is not usury. Nor

(Miss.) 151; Ewing *v.* Toledo Sav. Bank, 43 Ohio St. 31, 1 N. E. 138; Lee *v.* Hartwell, 3 Ohio Dec. (Reprint) 225, 5 Wkly. L. Gaz. 225; Farmers' Bank *v.* Buchard, 33 Vt. 346. See also International Bank *v.* Bradley, 19 N. Y. 245. *Contra,* Brower *v.* Haight, 18 Wis. 102.

The United States bank, whose rate of interest was restricted by charter in Pennsylvania, was not thereby prevented from taking a higher rate which was legal, where the note or other instrument was made. Hitchcock *v.* U. S. Bank, 7 Ala. 386; Erwin *v.* Lowry, 6 Rob. (La.) 28; Frazier *v.* Willcox, 4 Rob. (La.) 517; Knox *v.* U. S. Bank, 26 Miss. 655, 27 Miss. 65.

In Maine a usury law and a banking law went into operation at the same time and they must be construed together. Veazie Bank *v.* Paulk, 40 Me. 109.

Reduction of rate.— If a bank charter authorizes the taking of the legal rate of interest, which is afterward reduced, the bank can no longer continue to charge the original rate. Russellville Bank *v.* Coke, 20 Ky. L. Rep. 291, 45 S. W. 867.

22. State Bank *v.* Wilcox, 2 La. Ann. 344.

23. Mobile Branch Bank *v.* Strother, 15 Ala. 51; Kitchen *v.* Mobile Branch Bank, 14 Ala. 233 (holding that an agreement concerning the payment of instalments has no effect on the rate of interest which a note bears after maturity); Chambliss *v.* Robertson, 23 Miss. 302.

To what loan statute applies.— By the Louisiana bank charter act of 1832, § 24, a bank could charge ten per cent per annum, both on stock loans and on ordinary mortgage loans after maturity. Union Bank *v.* Wilson, 10 La. Ann. 601.

24. **Taking more than the specified rate** is illegal (Talbot *v.* Sioux City First Nat. Bank, 106 Iowa 361, 76 N. W. 726; State Bank *v.* Stansbury, 8 La. 257; Smith *v.* Hart, 39 Mich. 515; U. S. Bank *v.* Owens, 2 Pet. (U. S.) 527, 7 L. ed. 508), and a bank cannot stipulate for a higher rate in consideration of its forbearance to sue (Exchange, etc., Co. *v.* Boyce, 3 Rob. (La.) 307).

Although the rate of discount be legal, if there is an agreement on the part of the customer to receive depreciated notes, the transaction is usurious. Maury *v.* Ingraham, 28 Miss. 171; State Bank *v.* Ford, 27 N. C. 692; U. S. Bank *v.* Owens, 2 Pet. (U. S.) 527, 7 L. ed. 508; Gaither *v.* Georgetown Farmers', etc., Bank, 1 Pet. (U. S.) 37, 7 L. ed. 43. But if suspended bank-notes are paid and are to be received in repayment the transaction is not usurious. Curtis *v.* Leavitt, 17 Barb. (N. Y.) 309.

25. *Illinois.*— McGill *v.* Ware, 5 Ill. 21.

Indiana.— Cole *v.* Lockhart, 2 Ind. 631.

Kentucky.— Newell *v.* Somerset Nat. Bank, 12 Bush (Ky.) 57.

Massachusetts.— Maine Bank *v.* Butts, 9 Mass. 49.

New York.— Utica Bank *v.* Wagar, 8 Cow. (N. Y.) 398; New York Firemen Ins. Co. *v.* Ely, 2 Cow. (N. Y.) 678; New York Firemen Ins. Co. *v.* Sturges, 2 Cow. (N. Y.) 664; Manhattan Co. *v.* Osgood, 15 Johns. (N. Y.) 162.

Virginia.— Parker *v.* Cousins, 2 Gratt. (Va.) 372, 44 Am. Dec. 388.

United States.—Alexandria Bank *v.* Mandeville, 11 Cranch C. C. (U. S.) 552, 2 Fed. Cas. No. 850.

Contra, Mobile Branch Bank *v.* Strother, 15 Ala. 51.

Monthly and quarterly interest payments at the legal annual rate quarterly are not usurious. Mowry *v.* Shumway, 44 Conn. 493. The custom of stock-brokers of debiting and crediting interest monthly on balances is not usury. Hatch *v.* Douglas, 48 Conn. 116, 40 Am. Rep. 154. The charging of a depositor by agreement with the full rate of interest monthly on his overdraft at the end of the period is not usury. Timberlake *v.* First Nat. Bank, 43 Fed. 231.

What is not a discount.—When money is loaned at a usurious rate and a note is taken for the amount of the principal and interest payable at a future day, the transaction is not a discount within the Ala. Code, § 4140. Planters, etc., Bank *v.* Goetter, 108 Ala. 408, 19 So. 54; Youngblood *v.* Birmingham Trust, etc., Co., 95 Ala. 521, 12 So. 579, 36 Am. St. Rep. 245, 20 L. R. A. 58; Saltmarsh *v.* Planters, etc., Bank, 14 Ala. 668.

26. *Massachusetts.*— Portland Bank *v.* Storer, 7 Mass. 433.

Mississippi.— Commercial Bank *v.* Nolan, 7 How. (Miss.) 508.

Missouri.— Farmers' Bank *v.* Garten, 34 Mo. 119; Merchants' Bank *v.* Sassee, 33 Mo. 350.

New York.— International Bank *v.* Bradley, 19 N. Y. 245; Marvine *v.* Hymers, 12 N. Y. 223.

Ohio.— See Kentucky Southern Bank *v.* Brashears, 1 Disn. (Ohio) 207, 12 Ohio Dec. (Reprint) 578.

Wisconsin.— Central Bank *v.* St. John, 17 Wis. 157.

Contra, State Bank *v.* Ensminger, 7 Blackf. (Ind.) 105.

27. Doak *v.* Snapp, 1 Coldw. (Tenn.) 180; Fay *v.* Lovejoy, 20 Wis. 407; U. S. Bank *v.* Waggener, 9 Pet. (U. S.) 378, 9 L. ed. 163; Timberlake *v.* First Nat. Bank, 43 Fed. 231.

do the usury laws apply to the purchase and sale by a bank of promissory notes and other instruments.[28]

(B) *Effect of.* There has been a steady trend toward the repeal of usury laws and the lessening of the penalties in those states in which the laws have been retained.[29] In general the penalties fall under a threefold classification. The voidance of the debt;[30] of the interest only;[31] of the excess above the legal rate only.[32] A new note or bill given in renewal of an old note or balance tainted with usury is usurious.[33]

10. Payments — a. On Order of Depositor — (I) *Necessity For Written Order.* Banks everywhere require a written order from the depositor; but it has been said that the depositor can demand his deposit without a written order.[34]

An excess of five cents is not a violation of the law. Slaughter *v.* Montgomery First Nat. Bank, 109 Ala. 157, 19 So. 430.

28. *Alabama.*— Saltmarsh *v.* Planters, etc., Bank, 17 Ala. 761.

Connecticut.— Tuttle *v.* Clark, 4 Conn. 153.

Kentucky.— Metcalf *v.* Pilcher, 6 B. Mon. (Ky.) 529; Oldham *v.* Turner, 3 B. Mon. (Ky.) 67; Shackleford *v.* Morriss, 1 J. J. Marsh. (Ky.) 497.

Maine.— Lane *v.* Steward, 20 Me. 98; Farmer *v.* Sewall, 16 Me. 456; French *v.* Grindle, 15 Me. 163.

Massachusetts.—Churchill *v.* Suter, 4 Mass. 156.

New York.— Ingalls *v.* Lee, 9 Barb. (N. Y.) 647; Rapelye *v.* Anderson, 4 Hill (N. Y.) 472; Cram *v.* Hendricks, 7 Wend. (N. Y.) 569; Rice *v.* Mather, 3 Wend. (N. Y.) 62; Powell *v.* Waters, 8 Cow. (N. Y.) 669; Munn *v.* Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; Holmes *v.* Williams, 10 Paige (N. Y.) 326, 40 Am. Dec. 250; Holford *v.* Blatchford, 2 Sandf. Ch. (N. Y.) 149.

Pennsylvania.—Wycoff *v.* Longhead, 2 Dall. (Pa.) 92, 1 L. ed. 303; Musgrove *v.* Gibbs, 1 Dall. (Pa.) 217, 1 L. ed. 107.

South Carolina.— King *v.* Johnson, 3 McCord (S. C.) 365.

Tennessee.— May *v.* Campbell, 7 Humphr. (Tenn.) 450. See also Wetmore *v.* Brien, 3 Head (Tenn.) 723.

Virginia.— Hansbrough *v.* Baylor, 2 Munf. (Va.) 36.

United States.— Moncure *v.* Dermott, 13 Pet. (U. S.) 345, 10 L. ed. 193; Nichols *v.* Fearson, 7 Pet. (U. S.) 103, 8 L. ed. 623.

Note above legal rate taken for security.— A bank may take a note bearing more than the legal rate as security for a prior debt. Bailey *v.* Murphy, Walk. (Mich.) 424; Dunkle *v.* Renick, 6 Ohio St. 527.

29. See, generally, Usury.

A note given after the abolition of usury laws for money actually lent at a rate of interest usurious at the time it was borrowed is valid. Houser *v.* Planters' Bank, 57 Ga. 95.

When a bill is sold to a bank which discounts it at more than the legal rate such action is no defense against payment by the drawer. Oneida Bank *v.* Ontario Bank, 21 N. Y. 490.

30. *Alabama.*— Youngblood *v.* Birmingham Trust, etc., Co., 95 Ala. 521, 12 So. 579, 36 Am. St. Rep. 245, 20 L. R. A. 58.

Michigan.— Orr *v.* Lacey, 2 Dougl. (Mich.) 230.

North Carolina.— Faison *v.* Grandy, 126 N. C. 827, 36 S. E. 276; Smith *v.* Old Dominion Bldg., etc., Assoc., 119 N. C. 249, 26 S. E. 41; U. S. National Bank *v.* McNair, 116 N. C. 550, 21 S. E. 389; Ward *v.* Sugg, 113 N. C. 489, 18 S. E. 717, 24 L. R. A. 280.

Ohio.— Wooster Bank *v.* Stevens, 1 Ohio St. 233, 59 Am. Dec. 619; Miami Exporting Co. *v.* Clark, 13 Ohio 1; Creed *v.* Commercial Bank, 11 Ohio 489; Lee *v.* Hartwell, 3 Ohio Dec. (Reprint) 225, 5 Wkly. L. Gaz. 225.

United States.— U. S. Bank *v.* Owens, 2 Pet. (U. S.) 527, 7 L. ed. 508.

31. Grand Gulf Bank *v.* Archer, 8 Sm. & M. (Miss.) 151; Planters' Bank *v.* Sharp, 4 Sm. & M. (Miss.) 75, 43 Am. Dec. 470; Galveston, etc., Invest. Co. *v.* Grymes, (Tex. 1901) 63 S. W. 860. See also Caponigri *v.* Altieri, 29 N. Y. App. Div. 304, 51 N. Y. Suppl. 418; Hawley *v.* Kountze, 16 Misc. (N. Y.) 249, 38 N. Y. Suppl. 327, 73 N. Y. St. 788.

32. Lumberman's Bank *v.* Bearce, 41 Me. 505; Veazie Bank *v.* Paulk, 40 Me. 109; Gibbs *v.* Union Banking Co., 2 Wkly. Notes Cas. (Pa.) 472; Darby *v.* Boatman's Sav. Inst., 1 Dill. (U. S.) 141, 6 Fed. Cas. No. 3,571, 4 Am. L. T. Rep. 117, 1 Am. L. T. Bankr. Rep. 251, 3 Chic. Leg. N. 249, 1 Leg. Op. (Pa.) 146, 4 Nat. Bankr. Reg. 600.

The excess can be recovered only by the borrower and within the time limited by the statute. Osborn *v.* Athens First Nat. Bank, 175 Pa. St. 494, 34 Atl. 858; Reap *v.* Battle, 155 Pa. St. 265, 26 Atl. 439; Stayton *v.* Riddle, 114 Pa. St. 464, 7 Atl. 72; Lennig's Appeal, 93 Pa. St. 301; Miners' Trust Co. Bank *v.* Roseberry, 81 Pa. St. 309.

33. Oakes *v.* Merrifield, 93 Me. 297, 45 Atl. 31; Hay *v.* Parker, 55 Me. 355; Orr *v.* Lacey, 2 Dougl. (Mich.) 230; Schutt *v.* Evans, 109 Pa. St. 625, 1 Atl. 76.

The statute of limitations against recovering back usury is not set running by giving a renewal note which includes the usury. Louisville Trust Co. *v.* Kentucky Nat. Bank, 87 Fed. 143.

34. McEwen *v.* Davis, 39 Ind. 109; Ellis *v.* Woonsocket First Nat. Bank, 22 R. I. 565, 48 Atl. 936; Watts *v.* Christie, 11 Beav. 551, 13 Jur. 244, 845, 18 L. J. Ch. 173. See also Cambridge First Nat. Bank *v.* Hall, 119 Ala. 64, 24 So. 526; Neff *v.* Greene County Nat. Bank, 89 Mo. 581, 1 S. W. 747.

(II) *Nature and Effect of Check*—(A) *In General.* Before delivery a check is without vitality.[35] After delivery it is regarded in some jurisdictions as an assignment of the deposit *pro tanto*, but generally it does not have this effect until it has been accepted by the drawee.[36] As a check is a written contract oral declarations cannot be admitted to contradict or vary it, yet as between the original parties such evidence may be introduced to solve ambiguities, for example, to show what bank or person was intended,[37] or to show in what capacity the drawer signed.[38] If the written sum in the body of a check does not correspond with the marginal figures the former will be regarded as correct.[39]

(B) *As Payment.* A check given in the ordinary course of business for a debt is not payment until it is paid;[40] and if payment be refused without the holder's fault or negligence he may resort to the original indebtedness.[41] The holder therefore is merely the agent of the drawer in getting the money to pay his debt.[42] The acceptance of the check of a third party is regarded in the same manner.[43] In both cases, however, this presumption will yield to proof of the intention of the parties. Of course a check may be taken as payment by agreement,[44] and if it was the intention of the parties to give and receive a check as payment the law will have due regard to its execution.[45]

(C) *Post-Dated Check.* A post-dated check is one containing a later date than that of delivery. The presumption is that the maker has an inadequate fund in the bank at the time of giving it, but will have enough at the date of presentation.[46] It is valid, but a bank ought not to pay it, if presented earlier, until the date mentioned; and if it does the depositor can recover his money.[47] If transferred by the holder to another for a good consideration before the date for

35. Cowing *v.* Altman, 71 N. Y. 435, 27 Am. Rep. 70. See, generally, COMMERCIAL PAPER.

A check drawn on a failed bank is only evidence of an assignment of the deposit. Harmanson *v.* Bain, 1 Hughes (U. S.) 188, 11 Fed. Cas. No. 6,072, 15 Nat. Bankr. Reg. 173.

36. See cases cited *infra*, II, E, 10, a, (VIII), (C), (2), (A).

37. Jackson *v.* Sill, 11 Johns. (N. Y.) 201, 6 Am. Dec. 363; McCullough *v.* Wainright, 14 Pa. St. 171; Sweet *v.* Stevens, 7 R. I. 375; Cork *v.* Bacon, 45 Wis. 192, 30 Am. Rep. 712.

38. See *infra*, II, E, 10, a, (III).

39. Smith *v.* Smith, 1 R. I. 398, 53 Am. Dec. 652. But see State *v.* Western Bank, 34 Nebr. 175, 51 N. W. 749, where the cashier of one bank drew on another a draft in favor of R which stated the amount in figures as $500, and in writing "five and no 100 dollars," for which the purchaser paid five hundred dollars. The drawee refused to pay more than five dollars and the drawer bank became insolvent. It was held that R was entitled to five hundred dollars.

40. *Kansas.*— Kermeyer *v.* Newby, 14 Kan. 164.

Maine.— Marrett *v.* Brackett, 60 Me. 524.

Massachusetts.— Taylor *v.* Wilson, 11 Metc. (Mass.) 44, 45 Am. Dec. 180.

New York.—Burkhalter *v.* Erie Second Nat. Bank, 42 N. Y. 538; Bradford *v.* Fox, 38 N. Y. 289; Kelty *v.* Erie Second Nat. Bank, 52 Barb. (N. Y.) 328; Olcott *v.* Rathbone, 5 Wend. (N. Y.) 490; Porter *v.* Talcott, 1 Cow. (N. Y.) 359.

Ohio.— Merchants Nat. Bank *v.* Procter, 1 Cinc. Super. Ct. (Ohio) 1.

Pennsylvania.— Lowrey *v.* Robinson, 141 Pa. St. 189, 21 Atl. 513; Levan *v.* Wilten, 135 Pa. St. 61, 19 Atl. 945; Briggs *v.* Holmes, 118 Pa. St. 283, 12 Atl. 355, 4 Am. St. Rep. 597; Brown *v.* Scott, 51 Pa. St. 357; McIntyre *v.* Kennedy, 29 Pa. St. 448; McGiun *v.* Holmes, 2 Watts (Pa.) 121.

Virginia.— Blair *v.* Wilson, 28 Gratt. (Va.) 165.

Canada.— Hughes *v.* Canada Permanent Loan, etc., Soc., 39 U. C. Q. B. 221.

See, generally, PAYMENT.

41. Cromwell *v.* Lovett, 1 Hall (N. Y.) 56; People *v.* Howell, 4 Johns. (N. Y.) 296. And see Bradford *v.* Fox, 38 N. Y. 289.

42. Cromwell *v.* Lovett, 1 Hall (N. Y.) 56; Kobbi *v.* Underhill, 3 Sandf. Ch. (N. Y.) 277.

43. Weaver *v.* Nixon, 69 Ga. 699; Mordis *v.* Kennedy, 23 Kan. 408, 33 Am. Rep. 169; Small *v.* Franklin Min. Co., 99 Mass. 277; Fleig *v.* Sleet, 43 Ohio St. 53, 1 N. E. 24, 54 Am. Rep. 800.

44. Mullins *v.* Brown, 32 Kan. 312, 4 Pac. 305; Middlesex *v.* Thomas, 20 N. J. Eq. 39; Turner *v.* Fox Lake Bank, 4 Abb. Dec. (N. Y.) 434, 3 Keyes (N. Y.) 425, 2 Transcr. App. (N. Y.) 344; Blair *v.* Wilson, 28 Gratt. (Va.) 165.

45. Heath *v.* Page, 48 Pa. St. 130.

46. Clarke Nat. Bank *v.* Albion Bank, 52 Barb. (N. Y.) 592.

47. Wheeler *v.* Guild, 20 Pick. (Mass.) 545, 32 Am. Dec. 231; Frazier *v.* Trow's Printing, etc., Co., 24 Hun (N. Y.) 281 [*affirmed* in 90 N. Y. 678]; Godin *v.* Commonwealth Bank, 6 Duer (N. Y.) 76; Hitchcock *v.* Edwards, 60 L. T. Rep. N. S. 636; Wood *v.* Stephenson, 16 U. C. Q. B. 419.

As to acceptance of a post-dated check

demanding payment, he may recover of the maker, although there was no consideration for the check in the beginning.[48]

(D) *Memorandum Check.* The effect of a memorandum check is disputed. By one view it is a contract whereby the maker engages to pay the *bona fide* holder absolutely, without any condition concerning the presentment.[49] By the other view the marking of a check in this manner is for the purpose of indicating that it is not to be presented immediately for payment.[50]

(III) *Manner of Signing — Descriptive Words.* A check signed by an individual, with the word "Agent," "Treas.," or other descriptive term has sometimes been regarded as his individual check, and he alone was held to be bound.[51] By the modern doctrine the courts look at the intent of the signer, and if he is in fact an agent, trustee, or officer of some principal, and is in the habit of signing checks in that way when seeking to bind his principal, the court will give that effect to them.[52] When the mode of signing is ambiguous parol evidence may be introduced to show whether the signer intended to bind himself or his principal or company.[53]

(IV) *In What Payable.* A check in the ordinary form, calling for a certain number of dollars, is payable in coin or in current money to the amount of its face,[54] and the holder is not bound to take depreciated bank-notes in payment.[55]

see Washington Second Nat. Bank *v.* Averell, 2 App. Cas. (D. C.) 470, 25 L. R. A. 761.

48. Schepp *v.* Carpenter, 51 N. Y. 602; Mayer *v.* Mode, 14 Hun (N. Y.) 155; Brewster *v.* McCardel, 8 Wend. (N. Y.) 478.

Recovery on post-dated exchanged checks. —When two persons exchange checks which are post-dated, each agreeing to meet his check at maturity, the failure of one to do so is no defense to the other against a *bona fide* holder. Frazier *v.* Trow's Printing, etc., Co., 24 Hun (N. Y.) 281 [*affirmed* in 90 N. Y. 678]; Stedman *v.* Carstairs, 97 Pa. St. 234.

49. Franklin Bank *v.* Freeman, 16 Pick. (Mass.) 535.

50. Dykers *v.* Leather Manufacturers' Bank, 11 Paige (N. Y.) 612.

When persons exchange memorandum checks for mutual accommodation no right of action accrues to either until he has paid the check given by him; until then the relation between them is that of principal and surety. Burdsall *v.* Chrisfield, 1 Disn. (Ohio) 51, 12 Ohio Dec. (Reprint) 481.

51. Andenton *v.* Shoup, 17 Ohio St. 125; Barclay *v.* Pursley, 110 Pa. St. 13, 20 Atl. 411. See, generally, COMMERCIAL PAPER.

52. Carpenter *v.* Farnsworth, 106 Mass. 561, 8 Am. Rep. 360; Slawson *v.* Loring, 5 Allen (Mass.) 340, 81 Am. Dec. 750; Bank of British North America *v.* Hooper, 5 Gray (Mass.) 567, 66 Am. Dec. 390; Fuller *v.* Hooper, 3 Gray (Mass.) 334; Tripp *v.* Swanzey Paper Co., 13 Pick. (Mass.) 291; Metcalf *v.* Williams, 104 U. S. 93, 26 L. ed. 665.

The strong tendency is to hold that an official does not bind himself personally. Williams *v.* Hipple, 17 Pa. Super. Ct. 81. See also Reber's Estate, 15 Pa. Super. Ct. 122.

53. *Alabama.*— Lazarus *v.* Shearer, 2 Ala. 718.

Georgia.— Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665.

Illinois.— Hypes *v.* Griffin, 89 Ill. 134, 31 Am. Rep. 71.

Indiana.— Akron Second Nat. Bank *v.* Midland Steel Co., 155 Ind. 581, 58 N. E. 833, 52 L. R. A. 307.

New Jersey.— Kean *v.* Davis, 21 N. J. L. 683, 47 Am. Dec. 182.

New York.— Moore *v.* McClure, 8 Hun (N. Y.) 557; Hicks *v.* Hinde, 9 Barb. (N. Y.) 528.

Pennsylvania.— Roberts *v.* Austin, 5 Whart. (Pa.) 313.

United States.— Baldwin *v.* Newbury Bank, 1 Wall. (U. S.) 234, 17 L. ed. 534; Ford *v.* Williams, 21 How. (U. S.) 287, 16 L. ed. 36; New Jersey Steam Nav. Co. *v.* Boston Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465; Mechanics' Bank *v.* Columbia Bank, 5 Wheat. (U. S.) 326, 5 L. ed. 100.

54. Howes *v.* Austin, 35 Ill. 396, holding that the word "dollars" in a check means dollars in the lawful money of the United States, and cannot be explained by verbal agreement, custom, mercantile, or other usage to have any other or different signification. See, generally, COMMERCIAL PAPER; PAYMENT.

55. Howes *v.* Austin, 35 Ill. 396.

Bank must pay in current funds.— Where a bank receives as a general deposit funds which are at the time current, it must pay in current funds notwithstanding a depreciation in the meantime of the funds deposited. Cushman *v.* Carver, 51 Ill. 509; Willetts *v.* Paine, 43 Ill. 432; Marine Bank *v.* Rushmore, 28 Ill. 463; Marine Bank *v.* Birney, 28 Ill. 90; Marine Bank *v.* Chandler, 27 Ill. 525, 81 Am. Dec. 249; Chicago Mar. Bank *v.* Fulton County Bank, 2 Wall. (U. S.) 252, 17 L. ed. 785; Kentucky Bank *v.* Wister, 2 Pet. (U. S.) 318, 7 L. ed. 437.

Confederate treasury notes.— One who deposited Confederate treasury notes at the time they constituted bankable funds could not recover from the bank in money the amount so deposited after the Confederate government had ceased to exist. Foster *v.* New Orleans Bank, 21 La. Ann. 338. And see Mobile Bank

(v) *To Whom Payable.* Of course a bank must not mistake the person of the holder; the direction of the maker or subsequent indorsers must be followed at the bank's peril.[56]

(vi) *On Whose Order Payable*—(a) *In General.* A bank is protected in paying out a deposit only where it has an order from the depositor himself or one authorized to act for him.[57]

(b) *Corporation.* The president is not authorized by virtue of his office to draw corporation checks. This authority, however, may be granted by charter, by statute, or by the usage of the place where the corporation transacts business.[58]

(c) *Partnership.* A partnership deposit cannot be drawn on the check of an individual partner. A bank could justify itself in paying such a check only by showing that the money had been applied to the partnership purpose.[59]

(d) *Executors and Administrators.* Although two or more executors be serving jointly, nevertheless either of them can sign a check without the signature of his co-executor.[60] The same rule applies to administrators.[61]

(e) *Trustees.* In order to draw a trust deposit each of the trustees must sign the check.[62] But if one of them absconds a court of equity can order the bank to pay on a check of the other trustees.[63] A bank cannot knowingly permit an

v. Brown, 42 Ala. 108. At most he could recover in good money no more than the value of the Confederate money at the time of the deposit. Dabney *v.* State Bank, 3 S. C. 124.

Not entitled to payment in gold.— A depositor of gold is only entitled to recover the circulating medium of the country. Gumbel *v.* Abrams, 20 La. Ann. 568, 96 Am. Dec. 426. But see Chesapeake Bank *v.* Swain, 29 Md. 483.

56. Dodge *v.* National Exch. Bank, 20 Ohio St. 234, 5 Am. Rep. 648, 30 Ohio St. 1; State Nat. Bank *v.* Freedman's Sav., etc. Co., 2 Dill. (U. S.) 11, 22 Fed. Cas. No. 13,324, 10 Am. L. Reg. N. S. 786.

Person whose name pronounced like depositor's.— If a bank negligently pay to the wrong person supposing him to be the depositor it is liable; but whether a bank is negligent in paying to a person whose name is pronounced like the depositor's, but perhaps spelled differently is a question of fact. White *v.* Springfield Sav. Inst., 134 Mass. 232.

57. See *infra*, II, E, 10, b.

58. Fulton Bank *v.* New York, etc., Canal Co., 4 Paige (N. Y.) 127.

See, generally, CORPORATIONS.

59. Coote *v.* U. S. Bank, 3 Cranch C. C. (U. S.) 50, 6 Fed. Cas. No. 3,203; Forster *v.* Mackreth, L. R. 2 Exch. 163, 36 L. J. Exch. 94, 16 L. T. Rep. N. S. 23, 15 Wkly. Rep. 747; Emly *v.* Lye, 15 East 7, 13 Rev. Rep. 347; Nicholson *v.* Ricketts, 2 E. & E. 497, 6 Jur. N. S. 422, 29 L. J. Q. B. 55, 1 L. T. Rep. N. S. 544, 8 Wkly. Rep. 211, 105 E. C. L. 497; Kirk *v.* Blurton, 12 L. J. Exch. 117, 9 M. & W. 284; *Ex p.* Hanson, 1 Rose 156, 18 Ves. Jr. 232. See, generally, PARTNERSHIP.

On the death of a partner the survivor can draw a check for the partnership deposit either in the partnership name or in his own as surviving partner. Commercial Nat. Bank *v.* Procter, 98 Ill. 558; Backhouse *v.* Charlton, 8 Ch. D. 444.

If a new partnership be formed, the bank cannot apply its deposits to pay a debt of the old one when notice of the change has been given (Richardson *v.* International Bank, 11 Ill. App. 582); nor can a new partner transfer a deposit of the old firm to his individual account without its authority (*Ex p.* Hanson, 1 Rose 156, 18 Ves. Jr. 232).

If each partner has a right to draw checks on the partnership account, and also has an individual account at the same place, the bank has no right to inquire into the propriety of the transfer of money from one account to another. Backhouse *v.* Charlton, 8 Ch. D. 444.

60. *Alabama.*— Stewart *v.* Conner, 9 Ala. 803.

Georgia.— Wilkerson *v.* Wootten, 28 Ga. 568.

Maine.— Gilman *v.* Healy, 55 Me. 120.

Pennsylvania.— De Haven *v.* Williams, 80 Pa. St. 480, 21 Am. Rep. 107.

United States.— Edmonds *v.* Crenshaw, 14 Pet. (U. S.) 166, 10 L. ed. 402.

England.— Can *v.* Read, 3 Atk. 695; *Ex p.* Rigby, 2 Rose 224, 19 Ves. Jr. 463.

See, generally, EXECUTORS AND ADMINISTRATORS.

If executors open a joint account with a banker all must unite in a receipt or check to discharge him; this cannot be done by one of them. De Haven *v.* Williams, 80 Pa. St. 480, 21 Am. Rep. 107.

61. Prosser *v.* Wagner, 1 C. B. N. S. 289, 26 L. J. C. P. 81, 5 Wkly. Rep. 146, 87 E. C. L. 289; Clough *v.* Bond, 2 Jur. 958, 4 L. J. Ch. 51, 3 Myl. & C. 490, 14 Eng. Ch. 490; Pond *v.* Underwood, 2 Ld. Raym. 1210.

62. Swift *v.* Williams, 68 Md. 236, 11 Atl. 835; Stone *v.* Marsh, 6 B. & C. 551, 9 D. & R. 643, 5 L. J. K. B. O. S. 201, R. & M. 364, 30 Rev. Rep. 420, 13 E. C. L. 252; Husband *v.* Davis, 10 C. B. 645, 20 L. J. C. P. 118, 2 L. M. & P. 50, 70 E. C. L. 645; Innes *v.* Stephenson, 1 M. & Rob. 145. See, generally, TRUSTS.

63. Sinclair *v.* Jackson, 8 Cow. (N. Y.) 543; Vandever's Appeal, 8 Watts & S. (Pa.)

agent or trustee to use trust money to discharge his individual indebtedness to others, and ought to refuse to honor his check for diverting trust money to pay other creditors.[64] Nor should it permit him to transfer trust money to his own account, for this is often a fatal step to its use for an individual purpose.[65]

(F) *Successor of Public Officer.* When money is deposited by a public officer who is superseded in office by another, the deposit is subject to the order of the successor.[66] When rival officials or boards claim the deposit the bank may withhold payment until the court, either by a proceeding brought by them or by itself, has decided the question.[67]

(VII) *Presentment and Demand* — (A) *Uncertified Checks* — (1) Time of — (a) Where Parties Live in Same Place. If the person who received the check and the bank on which it is drawn are in the same place the check must, in the absence of special circumstances, be presented the same day, or, at the latest, the day after it is received.[68]

405, 42 Am. Dec. 305; *Ex p.* Hunter, 2 Rose 363, 1 Meriv. 408.

64. Morrill *v.* Raymond, 28 Kan. 415, 42 Am. Rep. 167; Penn Bank *v.* Frankish, 91 Pa. St. 339. *Contra,* Goodwin *v.* American Nat. Bank, 48 Conn. 550.

Principal's right to recover.— The principal of course can claim his own, and his rights are not affected by his agent's action in mingling his own money with the trust deposit (Van Alen *v.* American Nat. Bank, 52 N. Y. 1) or his lack of authority to make the deposit (Honig *v.* Pacific Bank, 73 Cal. 464, 15 Pac. 58). The bank must heed the principal's notice not to pay the agent. Merrill *v.* Norfolk Bank, 19 Pick. (Mass.) 32; Farmers, etc., Nat. Bank *v.* King, 57 Pa. St. 202, 98 Am. Dec. 215. To recover he must clearly establish his right. Frazier *v.* Erie Bank, 8 Watts & S. (Pa.) 18; Sims *v.* Bond, 5 B. & Ad. 389, 2 N. & M. 608, 27 E. C. L. 168.

When bank is protected in paying.— A bank is protected in paying trust money in good faith to others than the beneficiary. Macon City Bank *v.* Kent, 57 Ga. 283; Case *v.* Mechanics' Banking Assoc., 4 N. Y. 166.

65. Commercial, etc., Bank *v.* Jones, 18 Tex. 811.

66. Carman *v.* Franklin Bank, 61 Md. 467; Lewis *v.* Park Bank, 42 N. Y. 463. See, generally, Officers.

67. German Exch. Bank *v.* Excise Com'rs, 6 Abb. N. Cas. (N. Y.) 394. See also Bell *v.* Hunt, 3 Barb. Ch. (N. Y.) 391; Marvin *v.* Ellwood, 11 Paige (N. Y.) 365; Bleeker *v.* Graham, 2 Edw. (N. Y.) 647; Balchen *v.* Crawford, 1 Sandf. Ch. (N. Y.) 380; Badeau *v.* Tylee, 1 Sandf. Ch. (N. Y.) 270.

68. *California.*— Simpson *v.* Pacific Mut. L. Ins. Co., 44 Cal. 139; Himmelmann *v.* Hotaling, 40 Cal. 111, 6 Am. Rep. 600.

Illinois.— Bickford *v.* Chicago First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436.

Kentucky.— Cawein *v.* Browinski, 6 Bush (Ky.) 457, 99 Am. Dec. 684.

Massachusetts.—Taylor *v.* Wilson, 11 Metc. (Mass.) 44, 45 Am. Dec. 180.

Michigan.— Holmes *v.* Roe, 62 Mich. 199, 28 N. W. 864, 4 Am. St. Rep. 844.

Missouri.— Wear *v.* Lee, 87 Mo. 358.

New York.— Syracuse, etc., R. Co. *v.* Collins, 57 N. Y. 641 [*affirming* 3 Lans. (N. Y.) 29]; Kelty *v.* Erie Second Nat. Bank, 52 Barb. (N. Y.) 328; Johnson *v.* Bank of North America, 5 Rob. (N. Y.) 554; Hazelton *v.* Colburn, 1 Rob. (N. Y.) 345, 2 Abb. Pr. N. S. (N. Y.) 199; Smith *v.* Janes, 20 Wend. (N. Y.) 192, 32 Am. Dec. 527; Mohawk Bank *v.* Broderick, 13 Wend. (N. Y.) 133, 27 Am. Dec. 192 [*affirming* 10 Wend. (N. Y.) 304]; Merchants' Bank *v.* Spicer, 6 Wend. (N. Y.) 443.

North Carolina.— Charlotte First Nat. Bank *v.* Alexander, 84 N. C. 30.

Pennsylvania.— National State Bank *v.* Weil, 141 Pa. St. 457, 21 Atl. 661; Kilpatrick *v.* Home Bldg., etc., Assoc., 119 Pa. St. 30, 12 Atl. 754, 140 Pa. St. 405, 21 Atl. 397; Doherty *v.* Watson, 29 Wkly. Notes Cas. (Pa.) 32; Logan *v.* Smith, 8 Wkly. Notes Cas. (Pa.) 102.

Tennessee.—Andrews *v.* German Nat. Bank, 9 Heisk. (Tenn.) 211, 24 Am. Rep. 300; Schoolfield *v.* Moon, 9 Heisk. (Tenn.) 171.

United States.— O'Brien *v.* Smith, 1 Black (U. S.) 99, 17 L. ed. 64.

England.— Boddington *v.* Schlencker, 4 B. & Ad. 752, 2 L. J. K. B. 138, 1 N. & M. 541, 24 E. C. L. 328; Moule *v.* Brown, 1 Arn. 79, 4 Bing. N. Cas. 266, 2 Jur. 277, 7 L. J. C. P. 111, 5 Scott 694, 33 E. C. L. 703; Alexander *v.* Burchfield, C. & M. 75, 41 E. C. L. 47, 11 L. J. C. P. 253, 7 M. & G. 1061, 49 E. C. L. 1061, 3 Scott N. R. 555.

Canada.— Owens *v.* Quebec Bank, 30 U. C. Q. B. 382.

Holder living seventeen miles from bank. — This rule applies to a check-holder living seventeen miles from the drawee bank. Hamlin *v.* Simpson, 105 Iowa 125, 74 N. W. 906, 44 L. R. A. 397.

Where bank in precarious condition.— Immediate presentation must be made if the holder knows that the bank is in a precarious condition, otherwise the drawer will be released. Charlotte First Nat. Bank *v.* Alexander, 84 N. C. 30.

Check left with bank for collection.— If the holder prefers to leave the check with a bank for collection he can do so, and in this case the presentment must be made on the day of its receipt or the next one, either di-

(b) Where Parties Live in Different Places. If, however, the person who receives the check and the bank on which it is drawn are in different places, the check must, in the absence of unusual circumstances, be forwarded for presentment on the day after it is received at the latest; and the agent to whom it is forwarded must in like manner present it at the latest on the day after he receives it.[69]

(2) Failure to Present in Time — (a) Effect of — aa. *As to Indorser.* If the holder delay to demand payment within the proper time and give notice of nonpayment the indorser, if there be one, will be absolutely discharged.[70]

bb. *As to Drawer.* The drawer also will be released if he is thereby injured.[71] The law presumes he will be injured by the delay, and the burden of proof is on the holder, should he seek to recover from the drawer, to show that he has not

rectly or through the clearing-house. Willis *v.* Finley, 173 Pa. St. 28, 34 Atl. 213; Loux *v.* Fox, 171 Pa. St. 68, 33 Atl. 190.

Drawer of certified check.— The same rules also apply to the drawer of a certified check, but the certification releases him after this period. Andrews *v.* German Nat. Bank, 9 Heisk. (Tenn.) 211, 24 Am. Rep. 300; Schoolfield *v.* Moon, 9 Heisk. (Tenn.) 171.

69. *California.*—Himmelmann *v.* Hotaling, 40 Cal. 111, 6 Am. Rep. 600.

Connecticut.— Woodruff *v.* Plant, 41 Conn. 344.

Georgia.— Daniels *v.* Kyle, 5 Ga. 245.

Indiana.— Griffin *v.* Kemp, 46 Ind. 178.

Michigan.— Holmes *v.* Roe, 62 Mich. 199, 28 N. W. 864, 4 Am. St. Rep. 844; Freiberg *v.* Cody, 55 Mich. 108, 20 N. W. 813.

New York.— Burkhalter *v.* Erie Second Nat. Bank, 42 N. Y. 538; Middletown Bank *v.* Morris, 28 Barb. (N. Y.) 616; Little *v.* Phenix Bank, 2 Hill (N. Y.) 425; Smith *v.* Janes, 20 Wend. (N. Y.) 192, 32 Am. Dec. 527.

Ohio.— Werk *v.* Mad River Valley Branch State Bank, 8 Ohio St. 301.

Virginia.—Blair *v.* Wilson, 28 Gratt. (Va.) 165.

England.— Prideaux *v.* Criddle, L. R. 4 Q. B. 455, 10 B. & S. 515, 38 L. J. Q. B. 232, 20 L. T. Rep. N. S. 695; Bond *v.* Warden, 1 Coll. 583, 9 Jur. 198, 14 L. J. Ch. 154, 28 Eng. Ch. 583; Hare *v.* Henty, 10 C. B. N. S. 65, 7 Jur. N. S. 523, 30 L. J. C. P. 302, 4 L. T. Rep. N. S. 63, 9 Wkly. Rep. 738, 100 E. C. L. 65; Firth *v.* Brooks, 4 L. T. Rep. N. S. 467.

70. Comer *v.* Dufour, 95 Ga. 376, 22 S. E. 543, 51 Am. St. Rep. 89, 30 L. R. A. 300; Daniels *v.* Kyle, 1 Ga. 304, 5 Ga. 245; Northwestern Coal Co. *v.* Bowman, 69 Iowa 150, 28 N. W. 496; Veazie Bank *v.* Winn, 40 Me. 60; Martin *v.* Home Bank, 160 N. Y. 190, 54 N. E. 717; Little *v.* Phenix Bank, 2 Hill (N. Y.) 425; Harker *v.* Anderson, 21 Wend. (N. Y.) 372; Gough *v.* Staats, 13 Wend. (N. Y.) 549; Mohawk Bank *v.* Broderick, 10 Wend. (N. Y.) 304; Murray *v.* Judah, 6 Cow. (N. Y.) 484. *Contra,* Small *v.* Franklin Min. Co., 99 Mass. 277.

Where drawee has no funds of drawer.—In an action against an indorser a demand of payment from the drawee must be shown even though the latter had no funds belonging to the drawer or reasonable expectation of receiving any. Mohawk Bank *v.* Broderick, 10 Wend. (N. Y.) 304.

When an indorser pays the check without knowing that he is discharged through the holder's negligence he can recover the money. Martin *v.* Home Bank, 160 N. Y. 190, 54 N. E. 717; St. Nicholas Bank *v.* State Nat. Bank, 128 N. Y. 26, 27 N. E. 849, 37 N. Y. St. 829, 13 L. R. A. 241; Carroll *v.* Sweet, 128 N. Y. 19, 27 N. E. 763, 37 N. Y. St. 868, 13 L. R. A. 43; Lake *v.* Artisans Bank, 3 Abb. Dec. (N. Y.) 10, 3 Keyes (N. Y.) 276, 1 Transcr. App. (N. Y.) 71, 3 Abb. Pr. N. S. (N. Y.) 209, 32 How. Pr. (N. Y.) 617.

Surety not released.— When one indorses a check as a surety he is not released by the holder's failure to make prompt presentation as in the case of an indorser. Newman *v.* Kaufman, 28 La. Ann. 865, 26 Am. Rep. 114.

71. *Alabama.*—Watt *v.* Gans, 114 Ala. 264, 21 So. 1011, 62 Am. St. Rep. 99; Industrial Trust, etc., Co. *v.* Weakley, 103 Ala. 458, 15 So. 854, 49 Am. St. Rep. 45.

Connecticut.—Hoyt *v.* Seeley, 18 Conn. 353.

District of Columbia.— Deener *v.* Brown, 1 MacArthur (D. C.) 350.

Georgia.— Merritt *v.* Gate City Nat. Bank, 100 Ga. 147, 27 S. E. 979, 38 L. R. A. 749; Patten *v.* Newell, 30 Ga. 271; Daniels *v.* Kyle, 1 Ga. 304.

Illinois.— Industrial Bank *v.* Bowes, 165 Ill. 70, 46 N. E. 10, 56 Am. St. Rep. 228; Stevens *v.* Park, 73 Ill. 387; Willetts *v.* Paine, 43 Ill. 432; Howes *v.* Austin, 35 Ill. 396.

Indiana.— Fletcher *v.* Pierson, 69 Ind. 281, 35 Am. Rep. 214; Henshaw *v.* Root, 60 Ind. 220; Griffin *v.* Kemp, 46 Ind. 172.

Iowa.— Hamlin *v.* Simpson, 105 Iowa 125, 74 N. W. 906, 44 L. R. A. 397.

Kansas.— Anderson *v.* Rodgers, 53 Kan. 542, 36 Pac. 1067, 27 L. R. A. 248; Gregg *v.* George, 16 Kan. 546.

Kentucky.— Williams *v.* Rogers, 14 Bush (Ky.) 776; Cawein *v.* Browinski, 6 Bush (Ky.) 461, 99 Am. Dec. 684; Smith *v.* Jones, 2 Bush (Ky.) 103.

Maine.— Emery *v.* Hobson, 63 Me. 32.

Michigan.— Holmes *v.* Roe, 62 Mich. 199, 28 N. W. 864, 4 Am. St. Rep. 844; Perley *v.* Muskegon County, 32 Mich. 132, 20 Am. Rep. 637.

Mississippi.— Parker *v.* Reddick, 65 Miss.

been injured by the holder's failure to make presentation within the prescribed time.[72] But if not injured his liability continues,[73] and the demand can be made at any time before action is brought against him.[74]

(b) Excuses For. Under some conditions the holder is excused from making presentation. These are when the drawer has no funds and there is no ground for a reasonable expectation that the check will be paid;[75] when his funds have been withdrawn;[76] when the bank has become insolvent within the time for

242, 3 So. 575, 7 Am. St. Rep. 646; Pack *v.* Thomas, 13 Sm. & M. (Miss.) 11, 51 Am. Dec. 135.

Missouri.— Morrison *v.* McCartney, 30 Mo. 183; Graham *v.* Morstadt, 40 Mo. App. 333.

Nebraska.— Scroggin *v.* McClelland, 37 Nebr. 644, 56 N. W. 208, 40 Am. St. Rep. 520, 22 L. R. A. 110.

New Hampshire.— Cogswell *v.* Rockingham Ten Cents Sav. Bank, 59 N. H. 43.

New Jersey.— Taylor *v.* Sip, 30 N. J. L. 284.

New York.— Cowing *v.* Altman, 79 N. Y. 167; Smith *v.* Miller, 43 N. Y. 171, 3 Am. Rep. 690, 52 N. Y. 545; Buchanan Farm Oil Co. *v.* Woodman, 1 Hun (N. Y.) 639; Little *v.* Phenix Bank, 7 Hill (N. Y.) 359; Gough *v.* Staats, 13 Wend. (N. Y.) 549; Mohawk Bank *v.* Broderick, 10 Wend. (N. Y.) 304; Murray *v.* Judah, 6 Cow. (N. Y.) 484; Conroy *v.* Warren, 3 Johns. Cas. (N. Y.) 259, 2 Am. Dec. 156.

Ohio.— Stewart *v.* Smith, 17 Ohio St. 82; Morrison *v.* Bailey, 5 Ohio St. 13, 64 Am. Dec. 632.

Oregon.— Portland First Nat. Bank *v.* Linn County Nat. Bank, 30 Oreg. 296, 47 Pac. 614.

Pennsylvania.— Piece *v.* Daniel, 16 Wkly. Notes Cas. (Pa.) 35; Flemming *v.* Denny, 2 Phila. (Pa.) 111, 13 Leg. Int. (Pa.) 140.

Tennessee.— Kirkpatrick *v.* Puryear, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785; Jackson Ins. Co. *v.* Sturges, 12 Heisk. (Tenn.) 339; Planters Bank *v.* Merritt, 7 Heisk. (Tenn.) 177.

Virginia.— Purcell *v.* Allemong, 22 Gratt. (Va.) 739; Bell *v.* Alexander, 21 Gratt. (Va.) 1.

West Virginia.— Compton *v.* Gilman, 19 W. Va. 312, 42 Am. Rep. 776.

Wisconsin.— Kinyon *v.* Stanton, 44 Wis. 479, 28 Am. Rep. 601; Jones *v.* Heiliger, 36 Wis. 149.

United States.— Bull *v.* Kasson First Nat. Bank, 123 U. S. 105, 31 L. ed. 97; Boston Merchants' Nat. Bank *v.* State Nat. Bank, 10 Wall. (U. S.) 604; Bowen *v.* Needles Nat. Bank, 87 Fed. 430.

72. Kirkpatrick *v.* Puryear, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785; Betterton *v.* Roope, 3 Lea (Tenn.) 215, 31 Am. Rep. 633; Planters Bank *v.* Merritt, 7 Heisk. (Tenn.) 177.

73. Scott *v.* Meeker, 20 Hun (N. Y.) 161; Woodin *v.* Frazee, 38 N. Y. Super. Ct. 190; Harbeck *v.* Craft, 4 Duer (N. Y.) 122; Cromwell *v.* Lovett, 1 Hall (N. Y.) 56; Commercial Bank *v.* Hughes, 17 Wend. (N. Y.) 94; Gough *v.* Staats, 13 Wend. (N. Y.) 549; Murray *v.* Judah, 6 Cow. (N. Y.) 484; Rickford *v.* Ridge, 2 Campb. 537; Beeching *v.* Gower, Holt 313, 17 Rev. Rep. 644, 3 E. C. L. 129; Robson *v.* Bennett, 2 Taunt. 388, 11 Rev. Rep. 614.

For holder's right of action against drawer see *infra*, II, E, 10, a, (VIII), (C), (3).

74. Gough *v.* Staats, 13 Wend. (N. Y.) 549.

75. *Alabama.*— Industrial Trust, etc., Co. *v.* Weakley, 103 Ala. 458, 15 So. 854, 49 Am. St. Rep. 45; Hill *v.* Norris, 2 Stew. & P. (Ala.) 114.

Connecticut.—Hoyt *v.* Seeley, 18 Conn. 353.

Indiana.— Culver *v.* Marks, 122 Ind. 554, 23 N. E. 1086, 17 Am. St. Rep. 377, 7 L. R. A. 489; Fletcher *v.* Pierson, 69 Ind. 281, 35 Am. Rep. 214.

Iowa.— Hamlin *v.* Simpson, 105 Iowa 125, 74 N. W. 906, 44 L. R. A. 397.

Maine.— Foster *v.* Paulk, 41 Me. 425; True *v.* Thomas, 16 Me. 36.

Massachusetts.— Beauregard *v.* Knowlton, 156 Mass. 395, 31 N. E. 389; Stanton *v.* Blossom, 14 Mass. 116, 7 Am. Dec. 198; Bond *v.* Farnham, 5 Mass. 170, 4 Am. Dec. 47.

Nebraska.—Shaffer *v.* Maddox, 9 Nebr. 205, 2 N. W. 464.

New York.—Brush *v.* Barrett, 82 N. Y. 400, 37 Am. Rep. 569; Franklin *v.* Vanderpool, 1 Hall (N. Y.) 78; Little *v.* Phenix Bank, 2 Hill (N. Y.) 425; Gough *v.* Staats, 13 Wend. (N. Y.) 549; Robinson *v.* Ames, 20 Johns. (N. Y.) 146, 11 Am. Dec. 259.

Pennsylvania.— Case *v.* Morris, 31 Pa. St. 100.

Tennessee.— Jackson Ins. Co. *v.* Sturges, 12 Heisk. (Tenn.) 339; Planters Bank *v.* Keesee, 7 Heisk. (Tenn.) 200; Planters Bank *v.* Merritt, 7 Heisk. (Tenn.) 177.

Virginia.— Bell *v.* Alexander, 21 Gratt. (Va.) 1.

United States.— French *v.* Columbia Bank, 4 Cranch (U. S.) 141, 2 L. ed. 576.

After the insolvency of the drawer, the holder of a check need not present it. Jackson Ins. Co. *v.* Sturges, 12 Heisk. (Tenn.) 339; Planters Bank *v.* Merritt, 7 Heisk. (Tenn.) 177.

76. *District of Columbia.*— Deener *v.* Brown, 1 MacArthur (D. C.) 350.

Indiana.— Culver *v.* Marks, 122 Ind. 554, 23 N. E. 1086, 17 Am. St. Rep. 377, 7 L. R. A. 489; Fletcher *v.* Pierson, 69 Ind. 281, 35 Am. Rep. 214.

Maine.— Emery *v.* Hobson, 63 Me. 32.

Missouri.— Moody *v.* Mack, 43 Mo. 210.

New York.— Conroy *v.* Warren, 3 Johns. Cas. (N. Y.) 259, 2 Am. Dec. 156.

South Carolina.— Sutcliffe *v.* McDowell, 2 Nott & M. (S. C.) 251.

which the drawer is liable;[77] when the holder follows a well-known usage in making his presentation;[78] when presentation is prevented by extraordinary causes;[79] or, as against the drawer, where the latter has paid the check in part after it became due.[80]

(B) *Certified Checks.* The law of demand and notice has no application to certified checks, and the bank becomes so far the primary debtor that no delay, until the statute of limitations has released the certifying bank, will affect its obligation to pay the holder.[81]

(VIII) *Duty of Bank to Pay*—(A) *In General.* A bank must honor its depositor's check within a reasonable time after receiving it;[82] and the bank is always justified in paying on his order, or that of his agent or representative, until ownership of the fund is claimed by another.[83]

(B) *Where Check Exceeds Deposit.* Where the deposit is insufficient to pay the check in full the bank may decline to pay it at all,[84] although it has been said

Wisconsin.— Kinyon *v.* Stanton, 44 Wis. 479, 28 Am. Rep. 601.

United States.— *In re* Brown, 2 Story (U. S.) 502, 4 Fed. Cas. No. 1,985, 10 Hunt. Mer. Mag. 377, 6 Law Rep. 508.

Withdrawal of deposit after reasonable time.— If the drawer should withdraw his deposit before the presentation of his check for payment, although after a reasonable time had elapsed for presenting it, he would still be liable. Nothing short of the retention of his deposit there until the bank's failure, or until the statute of limitations has released him, operates as a discharge of the debt. Kinyon *v.* Stanton, 44 Wis. 479, 28 Am. Rep. 601.

77. Colton *v.* Drovers' Perpetual Bldg., etc., Assoc., 90 Md. 85, 45 Atl. 23, 78 Am. St. Rep. 431, 46 L. R. A. 388; Planters Bank *v.* Farmers, etc., Bank, 8 Gill & J. (Md.) 449; Warrensburg Co-operative Bldg. Assoc. *v.* Zoll, 83 Mo. 94; Morrison *v.* McCartney, 30 Mo. 183; Syracuse, etc., R. Co. *v.* Collins, 3 Lans. (N. Y.) 29; Kinyon *v.* Stanton, 44 Wis. 479, 28 Am. Rep. 601.

78. Marrett *v.* Brackett, 60 Me. 524; Leach *v.* Perkins, 17 Me. 462, 35 Am. Dec. 268; Williams *v.* Gilman, 3 Me. 276; American Nat. Bank *v.* Bushey, 45 Mich. 135, 7 N. W. 725; Kleekamp *v.* Meyer, 5 Mo. App. 444; Hooker *v.* Franklin, 2 Bosw. (N. Y.) 500.

79. Moody *v.* Mack, 43 Mo. 210; Morrison *v.* McCartney, 30 Mo. 183; Linville *v.* Welch, 29 Mo. 203; Adams *v.* Darby, 28 Mo. 162, 75 Am. Dec. 115.

80. Levy *v.* Sprogell, 9 Serg. & R. (Pa.) 125, 11 Am. Dec. 679.

81. *Alabama.*— National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50.

New York.— Thomson *v.* Bank of British North America, 82 N. Y. 1; Freund *v.* Importers', etc., Nat. Bank, 76 N. Y. 352; Jersey City First Nat. Bank *v.* Leach, 52 N. Y. 350, 11 Am. Rep. 708; Nolan *v.* New York Nat. Banking Assoc. Bank, 67 Barb. (N. Y.) 24; Willets *v.* Phœnix Bank, 2 Duer (N. Y.) 121.

Pennsylvania.—Seventh Nat. Bank *v.* Cook, 73 Pa. St. 483, 13 Am. Rep. 751.

Tennessee.—Andrews *v.* German Nat. Bank, 9 Heisk. (Tenn.) 211, 24 Am. Rep. 300.

United States.— Washington First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. ed. 229.

England.— Farquhar *v.* Southey, 2 C. & P. 497, M. & M. 14, 31 Rev. Rep. 689, 12 E. C. L. 697; Dingwall *v.* Dunster, Dougl. 235.

As to certification see *infra*, II, E, 10, a, (X).

Before bringing suit against the bank on a certified check the holder must demand payment. Bank of British North America *v.* Merchants' Nat. Bank, 91 N. Y. 106.

82. Northumberland First Nat. Bank *v.* McMichael, 106 Pa. St. 460, 51 Am. Rep. 529; Boyd *v.* Emerson, 2 A. & E. 184, 4 L. J. K. B. 43, 4 N. & M. 99, 29 E. C. L. 102; Kilsby *v.* Williams, 5 B. & Ald. 815, 1 D. & R. 476, 24 Rev. Rep. 564, 7 E. C. L. 443.

Check by telegram.— A bank is not bound to accept a check by telegram. Myers *v.* Union Nat. Bank, 27 Ill. App. 254.

83. McEwen *v.* Davis, 39 Ind. 109.

When the maker fails courts will go far in protecting the drawee bank in paying check-holders instead of the drawer's assignee. When the bank is in doubt it can call on the courts by an action of interpleader to answer the question. German Sav. Inst. *v.* Adae, 1 McCrary (U. S.) 501, 8 Fed. 106.

84. *Alabama.*— Lowenstein *v.* Bresler, 109 Ala. 326, 19 So. 860.

Illinois.— Antigo Bank *v.* Union Trust Co., 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611; Coates *v.* Preston, 105 Ill. 470; Harrington *v.* Marseilles First Nat. Bank, 85 Ill. App. 212; Rouse *v.* Calvin, 76 Ill. App. 362; Jacobson *v.* Bank of Commerce, 66 Ill. App. 470; Pabst Brewing Co. *v.* Reeves, 42 Ill. App. 154.

Massachusetts.— Beauregard *v.* Knowlton, 156 Mass. 395, 31 N. E. 389; Dana *v.* Boston Third Nat. Bank, 13 Allen (Mass.) 445, 90 Am. Dec. 216.

Missouri.— St. John *v.* Homans, 8 Mo. 382.

Nebraska.— Henderson *v.* U. S. National Bank, 59 Nebr. 280, 80 N. W. 893.

New York.— Murray *v.* Judah, 6 Cow. (N. Y.) 484.

Ohio.— Marysville Bank *v.* Windisch-Muhlhauser Brewing Co., 50 Ohio St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660.

United States.— *In re* Brown, 2 Story

that the bank may, if it wishes, credit the amount of such deposit on the check.[85] If the bank pays a check to a holder who has committed no fraud it cannot recover of the holder if in fact there was not a sufficient deposit, but must look to the drawer.[86]

(c) *Effect of Refusal to Pay* — (1) Liability of Bank to Drawer — (a) In General. If the bank neglect or refuse to pay on the order of a depositor, where the latter has sufficient funds on deposit and no other good excuse exists, the depositor can maintain an action against the bank for the money,[87] and is entitled to recover substantial damages for such refusal.[88]

(b) Necessity For Demand. The depositor before bringing an action to recover

(U. S.) 502, 4 Fed. Cas. No. 1,985, 10 Hunt. Mer. Mag. 377, 6 Law Rep. 508.

If a check operates as an assignment of the drawer's deposit to the amount named therein the same rule applies, and the payee cannot claim the insufficient sum. Pabst Brewing Co. *v.* Reeves, 42 Ill. App. 154; Henderson *v.* U. S. National Bank, 59 Nebr. 280, 80 N. W. 893.

Several checks presented simultaneously. — When checks are presented simultaneously for more than a bank owes a depositor, its officers are not required to settle the conflicting claims of the check-holders; and if the depositor directs the bank not to pay any and draws his entire deposit for the purpose of dividing it ratably among them, a check-holder who should demand payment of his check afterward and before the actual withdrawal of the fund would have no claim on the bank. Dykers *v.* Leather Manufacturers' Bank, 11 Paige (N. Y.) 612.

Reservation of future deposit. — A bank that declines to pay a check from lack of funds is not obliged to reserve enough of a future deposit for that purpose. Gilliam *v.* Merchants' Nat. Bank, 70 Ill. App. 592. See also Johnston *v.* Parker Sav. Bank, 101 Pa. St. 597.

85. Dana *v.* Boston Third Nat. Bank, 13 Allen (Mass.) 445, 90 Am. Dec. 216; Bromley *v.* Commercial Nat. Bank, 9 Phila. (Pa.) 522, 29 Leg. Int. (Pa.) 332.

86. Denver First Nat. Bank *v.* Devenish, 15 Colo. 229, 25 Pac. 177, 22 Am. St. Rep. 394; Manufacturers' Nat. Bank *v.* Swift, 70 Md. 515, 17 Atl. 336, 14 Am. St. Rep. 381.

Remittance to sending bank. — When a drawee bank has paid a depositor's check by remitting the amount by draft in a letter mailed to the bank from which the check was received, and afterward learns of the depositor's insolvency, or the insufficiency of his deposit to cover his check, this is usually regarded as in legal effect a delivery to the sending bank, and beyond the sender's rightful recall.

California. — Steinhart *v.* National Bank, 94 Cal. 362, 29 Pac. 717, 28 Am. St. Rep. 132.

Illinois. — Funk *v.* Lawson, 12 Ill. App. 229.

Massachusetts. — Buell *v.* Chapin, 99 Mass. 594, 97 Am. Dec. 58.

South Carolina. — Mitchell *v.* Byrne, 6 Rich. (S. C.) 171.

Tennessee. — Kirkman *v.* Bank of America, 2 Coldw. (Tenn.) 397.

England. — Sichel *v.* Borch, 2 H. & C. 954, 10 Jur. N. S. 107, 33 L. J. Exch. 179, 9 L. T. Rep. N. S. 657, 12 Wkly. 346.

Contra, Canterbury *v.* Sparta Bank, 91 Wis. 53, 64 N. W. 311, 51 Am. St. Rep. 870, 30 L. R. A. 845.

87. *Illinois.* — Schaffner *v.* Ehrman, 139 Ill. 109, 28 N. E. 917, 32 Am. St. Rep. 192, 15 L. R. A. 134; American Exch. Nat. Bank *v.* Gregg, 37 Ill. App. 425.

Kentucky. — Mt. Sterling Nat. Bank *v.* Green, 99 Ky. 262, 18 Ky. L. Rep. 178, 35 S. W. 911, 32 L. R. A. 568.

Missouri. — Kavanaugh *v.* Farmers' Bank, 59 Mo. App. 540.

New York. — Citizens' Nat. Bank *v.* Importers, etc., Bank, 119 N. Y. 195, 23 N. E. 540, 29 N. Y. St. 1; Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743.

Pennsylvania. — Saylor *v.* Bushong, 100 Pa. St. 23, 45 Am. Rep. 353; Patterson *v.* Marine Nat. Bank, 25 Wkly. Notes Cas. (Pa.) 110; Birchall *v.* Third Nat. Bank, 15 Wkly. Notes Cas. (Pa.) 174.

England. — Hopkinson *v.* Forster, L. R. 19 Eq. 74, 23 Wkly. Rep. 310; Marzetti *v.* Williams, 1 B. & Ad. 415, 8 L. J. K. B. O. S. 42, 20 E. C. L. 541; Rolin *v.* Steward, 14 C. B. 595, 2 C. L. R. 959, 18 Jur. 536, 23 L. J. C. P. 148, 2 Wkly. Rep. 467, 78 E. C. L. 595; Foley *v.* Hill, 2 H. L. Cas. 28; Schroeder *v.* London Cent. Bank, 34 L. T. Rep. N. S. 735, 24 Wkly. Rep. 710.

Canada. — Todd *v.* Union Bank, 4 Manitoba 204.

Form of action. — The depositor may sue either in assumpsit to recover his deposit (Citizens' Nat. Bank *v.* Importers', etc., Bank, 119 N. Y. 195, 23 N. E. 540, 29 N. Y. St. 1; Tamaqua First Nat. Bank *v.* Shoemaker, 117 Pa. St. 94, 11 Atl. 304, 2 Am. St. Rep. 649); or in tort for the injury (Atlanta Nat. Bank *v.* Davis, 96 Ga. 334, 23 S. E. 190, 51 Am. St. Rep. 139; Schaffner *v.* Ehrman, 139 Ill. 109, 28 N. E. 917, 32 Am. St. Rep. 192, 15 L. R. A. 134; Svendsen *v.* Duluth State Bank, 64 Minn. 40, 65 N. W. 1086, 58 Am. St. Rep. 522, 31 L. R. A. 552; J. M. James Co. *v.* Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 80 Am. St. Rep. 857, 51 L. R. A. 255.

88. *Georgia.* — Atlanta Nat. Bank *v.* Davis, 96 Ga. 334, 23 S. E. 190, 51 Am. St. Rep. 139.

Illinois. — Schaffner *v.* Ehrman, 139 Ill. 109, 28 N. E. 917, 32 Am. St. Rep. 192, 15 L. R. A. 134. See also American Exch. Nat. Bank *v.*

his money must make a demand either by check or other means.[89] The same rule applies to a certified check,[90] to a post-dated check,[91] and to a certificate of deposit.[92] But when a bank fails a demand is not essential before bringing an action to recover a deposit.[93]

(2) Liability of Bank to Holder — (a) In General. In most jurisdictions the holder of an unaccepted check has no right of action against the bank for refusing to pay such check.[94] In some states, however, a check is regarded as an

Gregg, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 171.

Kentucky.— Lebanon Nat. Bank *v.* Boles, 12 Ky. L. Rep. 422. See also Mt. Sterling Nat. Bank *v.* Green, 99 Ky. 262, 18 Ky. L. Rep. 178, 35 S. W. 911, 32 L. R. A. 568.

Minnesota.— Svendsen *v.* Duluth State Bank, 64 Minn. 40, 65 N. W. 1086, 58 Am. St. Rep. 522, 31 L. R. A. 552.

Missouri.— Kavanaugh *v.* Farmers' Bank, 59 Mo. App. 540.

Nebraska.— Bank of Commerce *v.* Goos, 39 Nebr. 437, 58 N. W. 84, 23 L. R. A. 190.

New York.— Davis *v.* Standard Nat. Bank, 50 N. Y. App. Div. 210, 63 N. Y. Suppl. 764; Burroughs *v.* Tradesmen's Nat. Bank, 87 Hun (N. Y.) 6, 33 N. Y. Suppl. 864, 67 N. Y. St. 481; Citizens' Nat. Bank *v.* Importers', etc., Nat. Bank, 44 Hun (N. Y.) 386. See also Viets *v.* Troy Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743, 2 Centr. 751; Brooke *v.* Tradesmen's Nat. Bank, 69 Hun (N. Y.) 202, 23 N. Y. Suppl. 802, 52 N. Y. St. 31.

Pennsylvania.— Patterson *v.* Marine Nat. Bank, 130 Pa. St. 419, 25 Wkly. Notes Cas. (Pa.) 110, 18 Atl. 632, 17 Am. St. Rep. 778; Birchall *v.* Third Nat. Bank, 15 Wkly. Notes Cas. (Pa.) 174.

Tennessee.—J. M. James Co. *v.* Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 80 Am. St. Rep. 857, 51 L. R. A. 255; Continental Nat. Bank *v.* Bowdre, 92 Tenn. 723, 23 S. W. 131.

England.— Prehn *v.* Royal Bank, L. R. 5 Exch. 92; Larios *v.* Y Gurety, L. R. 5 P. C. 346; Rolin *v.* Steward, 14 C. B. 595, 2 C. L. R. 959, 18 Jur. 536, 23 L. J. C. P. 148, 2 Wkly. Rep. 467, 78 E. C. L. 595; Whitaker *v.* Bank of England, 6 C. & P. 700, 1 C. M. & R. 744, 1 Gale 54, 4 L. J. Exch. 57, 5 Tyrw. 268, 25 E. C. L. 646.

Special deposit — Damages.— The damages recoverable by a non-trader for a bank's wrongful refusal to allow him to withdraw a special deposit are nominal or limited to interest on the money. Henderson *v.* Hamilton Bank, 25 Ont. 641.

89. *Alabama.*— Tobias *v.* Morris, 126 Ala. 535, 28 So. 517.

New York.— Bank of British North America *v.* Merchants' Nat. Bank, 91 N. Y. 106; Munger *v.* Albany City Nat. Bank, 85 N. Y. 580; Howell *v.* Adams, 68 N. Y. 314; Pardee *v.* Fish, 60 N. Y. 265, 19 Am. Rep. 176; Payne *v.* Gardiner, 29 N. Y. 146; Ft. Edward Nat. Bank *v.* Washington County Nat. Bank, 5 Hun (N. Y.) 605; Downes *v.* Phœnix Bank, 6 Hill (N. Y.) 297; Adams *v.* Orange County Bank, 17 Wend. (N. Y.) 514.

Pennsylvania.— Girard Bank *v.* Penn Tp. Bank, 39 Pa. St. 92, 80 Am. Dec. 507; Levy *v.* Sprogell, 9 Serg. & R. (Pa.) 125, 11 Am. Dec. 679.

Tennessee.— Brown *v.* Lusk, 4 Yerg. (Tenn.) 209.

Vermont.— Goodell *v.* Brandon Nat. Bank, 63 Vt. 303, 21 Atl. 956, 25 Am. St. Rep. 766.

United States.— Leather Manufacturers' Nat. Bank *v.* Merchants' Nat. Bank, 128 U. S. 26, 32 L. ed. 342; Washington First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. ed. 229; Chemical Nat. Bank *v.* Bailey, 12 Blatchf. (U. S.) 480, 5 Fed. Cas. No. 2,635, 21 Int. Rev. Rec. 109, Thomp. Nat. Bank Cas. 206.

See also Depositaries.

Need not demand entire deposit.— A demand for the whole of a deposit is not requisite to sustain a suit against the bank for a portion. Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743.

Demand for illegal deposit.— If the contract of deposit is illegal and not enforceable the money can be recovered back in a different form of action, and without first demanding payment of the bank. White *v.* Franklin Bank, 22 Pick. (Mass.) 181; Utica Ins. Co. *v.* Bloodgood, 4 Wend. (N. Y.) 652; Utica Ins. Co. *v.* Cadwell, 3 Wend. (N. Y.) 296; Utica Ins. Co. *v.* Scott, 19 Johns. (N. Y.) 1; Robinson *v.* Bland, 2 Burr. 1077.

90. Bank of British North America *v.* Merchants' Nat. Bank, 91 N. Y. 106.

91. Glenn *v.* Noble, 1 Blackf. (Ind.) 104.

92. Cottle *v.* Marine Bank, 166 N. Y. 53, 59 N. E. 736; Smiley *v.* Fry, 100 N. Y. 262, 3 N. E. 186; Munger *v.* Albany City Nat. Bank, 85 N. Y. 580; Boughton *v.* Flint, 74 N. Y. 476; Howell *v.* Adams, 68 N. Y. 314; Pardee *v.* Fish, 60 N. Y. 265, 19 Am. Rep. 176; Payne *v.* Gardiner, 29 N. Y. 146; Downes *v.* Phœnix Bank, 6 Hill (N. Y.) 297.

93. Farmers, etc., Bank *v.* Planters' Bank, 10 Gill & J. (Md.) 422; Watson *v.* Phœnix Bank, 8 Metc. (Mass.) 217, 41 Am. Dec. 500.

Allowance of claim proof of demand.— When a bank has failed the allowance of a depositor's claim by the receiver is sufficient proof of a demand to maintain a suit against it for his deposit. Glenn *v.* Noble, 1 Blackf. (Ind.) 104.

94. *Alabama.*— Industrial Trust, etc., Co. *v.* Weakley, 103 Ala. 458, 15 So. 854, 49 Am. St. Rep. 45; National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50.

Arizona.— Satterwhite *v.* Melczer, (Ariz. 1890) 24 Pac. 184.

Colorado.— Colorado Nat. Bank *v.* Boettcher, 5 Colo. 185, 40 Am. Rep. 142.

assignment *pro tanto* of the deposit, and where this is the case the holder is

Georgia.— Mayer *v.* Chattahoochee Nat. Bank, 51 Ga. 325.

Indiana.—Harrison *v.* Wright, 100 Ind. 515, 50 Am. Rep. 805; Rockville Nat. Bank *v.* Lafayette Second Nat. Bank, 69 Ind. 479, 35 Am. Rep. 236; Griffin *v.* Kemp, 46 Ind. 172.

Iowa.— Canton First Nat. Bank *v.* Dubuque Southwestern R. Co., 52 Iowa 378, 3 N. W. 395, 35 Am. Rep. 280 [*overruling* Roberts *v.* Corbin, 26 Iowa 315, 96 Am. Dec. 146].

Louisiana.—Case *v.* Henderson, 23 La. Ann. 49, 8 Am. Rep. 590. See also Gordon *v.* Müchler, 34 La. Ann. 604.

Maryland.— Moses *v.* Franklin Bank, 34 Md. 574.

Massachusetts.— Carr *v.* National Security Bank, 107 Mass. 45, 9 Am. Rep. 6; Dana *v.* Boston Third Nat. Bank, 13 Allen (Mass.) 445, 90 Am. Dec. 216; Bullard *v.* Randall, 1 Gray (Mass.) 605, 61 Am. Dec. 433.

Michigan.— Grammel *v.* Carmer, 55 Mich. 201, 21 N. W. 418, 54 Am. Rep. 363; Second Nat. Bank *v.* Williams, 13 Mich. 282.

Minnesota.— Northern Trust Co. *v.* Rogers, 60 Minn. 208, 62 N. W. 273, 51 Am. St. Rep. 526.

Mississippi.— Bush *v.* Foote, 58 Miss. 5, 38 Am. Rep. 310.

Missouri.— Coates *v.* Doran, 83 Mo. 337; Dickinson *v.* Coates, 79 Mo. 250, 49 Am. Rep. 228; Merchants' Nat. Bank *v.* Coates, 79 Mo. 168; Dowell *v.* Vandalia Banking Assoc., 62 Mo. App. 482.

New Jersey.—Creveling *v.* Bloomsbury Nat. Bank, 46 N. J. L. 255, 50 Am. Rep. 417; Overman *v.* Hoboken City Bank, 31 N. J. L. 563.

New York.— Kirkham *v.* Bank of America, 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714; Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743; Risley *v.* Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421; People *v.* Merchants', etc., Bank, 78 N. Y. 269, 34 Am. Rep. 532; Atty.-Gen. *v.* Continental L. Ins. Co., 71 N. Y. 325, 27 Am. Rep. 55; Duncan *v.* Berlin, 60 N. Y. 151; Tyler *v.* Gould, 48 N. Y. 682; Ætna Nat. Bank *v.* New York City Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; Ketchum *v.* Stevens, 19 N. Y. 499; Chapman *v.* White, 6 N. Y. 412, 57 Am. Dec. 464; Winter *v.* Drury, 5 N. Y. 525; Harris *v.* Clark, 3 N. Y. 93, 51 Am. Dec. 352; Judd *v.* Smith, 3 Hun (N. Y.) 190; Lunt *v.* Bank of North America, 49 Barb. (N. Y.) 221; Butterworth *v.* Peck, 5 Bosw. (N. Y.) 341; Little *v.* Phenix Bank, 2 Hill (N. Y.) 425; Harker *v.* Anderson, 21 Wend. (N. Y.) 372; Murray *v.* Judah, 6 Cow. (N. Y.) 484; Dykers *v.* Leather Manufacturers' Bank, 11 Paige (N. Y.) 612.

North Carolina.— Hawes *v.* Blackwell, 107 N. C. 196, 12 S. E. 245, 22 Am. St. Rep. 870.

Ohio.— Cincinnati, etc., R. Co. *v.* Metropolitan Nat. Bank, 54 Ohio St. 60, 42 N. E. 700, 56 Am. St. Rep. 700, 31 L. R. A. 653; Simmons *v.* Cincinnati Sav. Soc., 31 Ohio St. 457, 27 Am. Rep. 521; Dodge *v.* National Exch. Bank, 30 Ohio St. 1. But see Voorhes *v.* Hesket, 1 Ohio Cir. Ct. 1.

Oklahoma.— Guthrie Nat. Bank *v.* Gill, 6 Okla. 560, 54 Pac. 434.

Pennsylvania.— Reilly *v.* Daly, 159 Pa. St. 605, 28 Atl. 493; Hemphill *v.* Yerkes, 132 Pa. St. 545, 19 Atl. 342, 19 Am. St. Rep. 607; Maginn *v.* Dollar Sav. Bank, 131 Pa. St. 362, 18 Atl. 901; Furst *v.* Lock Haven Bldg., etc., Assoc., 128 Pa. St. 183, 18 Atl. 341; Northumberland First Nat. Bank *v.* McMichael, 106 Pa. St. 460, 51 Am. Rep. 529; Saylor *v.* Bushong, 100 Pa. St. 23, 45 Am. Rep. 353; Seventh Nat. Bank *v.* Cook, 73 Pa. St. 483, 13 Am. Rep. 751; Mt. Joy First Nat. Bank *v.* Gish, 72 Pa. St. 13; Loyd *v.* McCaffrey, 46 Pa. St. 410; Case *v.* Morris, 31 Pa. St. 100; Birchall *v.* Third Nat. Bank, 15 Wkly. Notes Cas. (Pa.) 174; Harrisburg First Nat. Bank's Appeal, 10 Wkly. Notes Cas. (Pa.) 41; Jordan's Appeal, 10 Wkly. Notes Cas. (Pa.) 37; Eby's Estate, 5 Lanc. L. Rev. 389. See also Johnston *v.* Parker Sav. Bank, 101 Pa. St. 597.

Tennessee.— Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 42 Am. St. Rep. 921, 25 L. R. A. 523; Imboden *v.* Perrie, 13 Lea (Tenn.) 504; Planters Bank *v.* Merritt, 7 Heisk. (Tenn.) 177.

Vermont.— Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377.

Virginia.— Purcell *v.* Allemong, 22 Gratt. (Va.) 739.

Washington.— Commercial Bank *v.* Chilberg, 14 Wash. 247, 44 Pac. 264, 53 Am. St. Rep. 873.

United States.— Laclede Bank *v.* Schuler, 120 U. S. 511, 30 L. ed. 704; Washington First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. ed. 229; National Bank of Republic *v.* Millard, 10 Wall. (U. S.) 152, 19 L. ed. 897; Essex County Nat. Bank *v.* Montreal Bank, 7 Biss. (U. S.) 193, 8 Fed. Cas. No. 4,532, 15 Am. L. Reg. N. S. 418; Rosenthal *v.* Mastin Bank, 17 Blatchf. (U. S.) 318, 20 Fed. Cas. No. 12,063, 21 Alb. L. J. 28, 26 Int. Rev. Rec. 13, 27 Pittsb. Leg. J. (Pa.) 160, 9 Reporter 272; German Sav. Inst. *v.* Adae, 1 McCrary (U. S.) 501, 8 Fed. 106; Sherman *v.* Comstock, 2 McLean (U. S.) 19, 21 Fed. Cas. No. 12,764; Strain *v.* Gourdin, 2 Woods (U. S.) 380, 23 Fed. Cas. No. 13,521, 11 Nat. Bankr. Reg. 156.

England.— Hopkinson *v.* Forster, L. R. 19 Eq. 74, 23 Rev. Rep. 301; Shand *v.* Du Buisson, L. R. 18 Eq. 283, 43 L. J. Ch. 508, 22 Wkly. Rep. 483; Louisiana Citizens' Bank *v.* New Orleans First Nat. Bank, L. R. 6 H. L. 352, 43 L. J. Ch. 269, 22 Wkly. Rep. 194; Bellamy *v.* Marjoribanks, 7 Exch. 389, 16 Jur. 106, 21 L. J. Exch. 70; Schroeder *v.* London Cent. Bank, 34 L. T. Rep. N. S. 735, 24 Wkly. Rep. 710.

Canada.— Lamb *v.* Sutherland, 37 U. C. Q. B. 143; Caldwell *v.* Merchants' Bank, 26 U. C. C. P. 294.

A receiver's legatee cannot recover of a

deemed to have a right of action against the bank where payment of a check on demand is refused.[95]

(b) Where Check Accepted. Where a check is accepted by the bank this operates to transfer the amount to the holder, and the latter has a right to sue the bank if it afterward refuses to pay.[96]

bank on an unaccepted check given by the executor to the legatee. O'Connor *v.* Mechanics' Bank, 124 N. Y. 324, 26 N. E. 816, 36 N. Y. St. 277.

95. *Illinois.*— Du Quoin First Nat. Bank *v.* Keith, 183 Ill. 475, 56 N. E. 179; Wyman *v.* Ft. Dearborn Nat. Bank, 181 Ill. 279, 54 N. E. 946, 72 Am. St. Rep. 259, 48 L. R. A. 565; Gage Hotel Co. *v.* Union Nat. Bank, 171 Ill. 531, 49 N. E. 420, 63 Am. St. Rep. 270, 39 L. R. A. 479; Niblack *v.* Park Nat. Bank, 169 Ill. 517, 48 N. E. 438, 61 Am. St. Rep. 203, 39 L. R. A. 159; Abt *v.* American Trust, etc., Bank, 159 Ill. 467, 42 N. E. 856, 50 Am. St. Rep. 175; Antigo Bank *v.* Union Trust Co., 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611; Metropolitan Nat. Bank *v.* Jones, 137 Ill. 634, 27 N. E. 533, 31 Am. St. Rep. 403, 12 L. R. A. 492; American Exch. Nat. Bank *v.* Chicago Nat. Bank, 131 Ill. 547, 22 N. E. 523; National Bank of America *v.* Indiana Banking Co., 114 Ill. 483; Ridgely Nat. Bank *v.* Patton, 109 Ill. 479; Union Nat. Bank *v.* Oceana County Bank, 80 Ill. 212, 22 Am. Rep. 185; Chicago Fourth Nat. Bank *v.* Grand Rapids City Nat. Bank, 68 Ill. 398; Culter *v.* Reynolds, 64 Ill. 321; Brown *v.* Leckie, 43 Ill. 497; Bickford *v.* Chicago First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436; Chicago M. & F. Ins. Co. *v.* Stanford, 28 Ill. 168, 81 Am. Dec. 270; Munn *v.* Burch, 25 Ill. 35; Merchants' Nat. Bank *v.* Ritzinger, 20 Ill. App. 27; Shaffner *v.* Edgerton, 13 Ill. App. 132.

Kansas.— Chanute Nat. Bank *v.* Crowell, 6 Kan. App. 533, 51 Pac. 575.

Kentucky.— Weinstock *v.* Bellwood, 12 Bush (Ky.) 139; Lester *v.* Given, 8 Bush (Ky.) 357; Buckner *v.* Sayre, 18 B. Mon. (Ky.) 745.

Nebraska.— Fonner *v.* Smith, 31 Nebr. 107, 47 N. W. 632, 28 Am. St. Rep. 510, 11 L. R. A. 528.

South Carolina.— Simmons Hardware Co. *v.* Greenwood Bank, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700; Fogarties *v.* State Bank, 12 Rich. (S. C.) 518, 78 Am. Dec. 468.

Texas.— Denison First Nat. Bank *v.* Randall, 1 Tex. App. Civ. Cas. § 971.

Wisconsin.— Dillman *v.* Carlin, 105 Wis. 14, 80 N. W. 932, 76 Am. St. Rep. 902; Skobis *v.* Ferge, 102 Wis. 122, 78 N. W. 426; Pease *v.* Landauer, 63 Wis. 20, 22 N. W. 847, 53 Am. Rep. 247.

Must demand payment.— If the holder has a right to sue the bank he must first demand payment. Chambers *v.* Northern Bank, 5 Ky. L. Rep. 123.

Where deposit insufficient.— No liability to pay is created unless the depositor had money enough at the time it was presented to pay it. Antigo Bank *v.* Union Trust Co., 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611.

Check payable in exchange.— No action against a bank can be maintained on a check payable in exchange. Hogue *v.* Edwards, 9 Ill. App. 148.

96. *Colorado.*— Colorado Nat. Bank *v.* Boettcher, 5 Colo. 185, 40 Am. Rep. 142.

Missouri.—Dickinson *v.* Coates, 79 Mo. 250, 49 Am. Rep. 228; Dowell *v.* Vandalia Banking Assoc., 62 Mo. App. 482.

New York.— Lunt *v.* Bank of North America, 49 Barb. (N. Y.) 221.

North Carolina.— Commercial Nat. Bank *v.* Gastonia First Nat. Bank, 118 N. C. 783, 24 S. E. 524, 54 Am. St. Rep. 753, 32 L. R. A. 712.

Pennsylvania.—Tamaqua First Nat. Bank *v.* Shoemaker, 117 Pa. St. 94, 11 Atl. 304, 2 Am. St. Rep. 649; Northumberland First Nat. Bank *v.* McMichael, 106 Pa. St. 460, 51 Am. Rep. 529. See also Maginn *v.* Dollar Sav. Bank, 131 Pa. St. 362, 18 Atl. 901.

United States.— Washington First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. ed. 229; National Bank of Republic *v.* Millard, 10 Wall. (U. S.) 152, 19 L. ed. 897.

What is an acceptance.— *Colorado.*— Colorado Nat. Bank *v.* Boettcher, 5 Colo. 185, 40 Am. Rep. 142.

Georgia.— Lester *v.* Georgia R., etc., Co., 42 Ga. 244.

Illinois.— Myers *v.* Union Nat. Bank, 128 Ill. 478, 21 N. E. 580.

Indiana.— Rockville Nat. Bank *v.* Lafayette Second Nat. Bank, 69 Ind. 479, 35 Am. Rep. 236.

New Hampshire.—Barnet *v.* Smith, 30 N. H. 256, 64 Am. Dec. 290.

New Jersey.— Overman *v.* Hoboken City Bank, 30 N. J. L. 61.

Ohio.— Kahn *v.* Walton, 46 Ohio St. 195, 20 N. E. 203.

Pennsylvania.—German Nat. Bank *v.* Farmers' Deposit Nat. Bank, 118 Pa. St. 294, 12 Atl. 303; Northumberland First Nat. Bank *v.* McMichael, 106 Pa. St. 460, 51 Am. Rep. 529; Saylor *v.* Bushong, 100 Pa. St. 23, 45 Am. Rep. 353; Seventh Nat. Bank *v.* Cook, 73 Pa. St. 483, 13 Am. Rep. 751.

Tennessee.— Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. Rep. 900, 7 L. R. A. 93.

Texas.— Henrietta Nat. Bank *v.* State Nat. Bank, 80 Tex. 648, 16 S. W. 321, 26 Am. St. Rep. 773.

Vermont.— State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201.

United States.— Washington First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. ed. 229.

The initialing of a check by the cashier is not an acceptance. Commercial Bank *v.* Fleming, 14 N. Brunsw. 36.

When promise to accept effective.— Washington Second Nat. Bank *v.* Averell, 2 App. Cas. (D. C.) 470, 25 L. R. A. 761; Nelson *v.*

(c) Where Check For Entire Deposit. If a check is given for the maker's entire deposit this works an immediate transfer of it and the holder can sue the drawee therefor.[97] This rule, however, is not recognized everywhere,[98] except in cases where the check is drawn on a specific fund.[99] To have this effect the bank must be notified that such a check has been given; until then it remains as ineffectual as in the case of an ordinary check.[1]

(3) Liability of Drawer to Holder. Of course the drawer ordinarily is liable, but, in order to maintain an action against him on the check, the holder must show a demand of payment on the drawee and a refusal thereof,[2] and notice of such non-payment to the drawer,[3] or a legal excuse for not taking such steps.[4] But a creditor can return a check received from his debtor and sue on the original cause of action without first demanding payment;[5] and if the holder return it immediately after the drawee's refusal to certify it this is a notice to the drawer that the holder has declined to receive it for his debt.[6]

Chicago First Nat. Bank, 48 Ill. 36, 95 Am. Dec. 510. *Contra*, Overman *v.* Hoboken City Bank, 30 N. J. L. 61; Morse *v.* Massachusetts Nat. Bank, 1 Holmes (U. S.) 209, 17 Fed. Cas. No. 9,857.

97. *Iowa.*— Canton First Nat. Bank *v.* Dubuque Southwestern R. Co., 52 Iowa 378, 3 N. W. 395, 35 Am. Rep. 280.

Massachusetts.— Carr *v.* National Security Bank, 107 Mass. 49, 9 Am. Rep. 6; Kingman *v.* Perkins, 105 Mass. 111.

Michigan.— Moore *v.* Davis, 57 Mich. 251, 23 N. W. 800.

Missouri.— Dowell *v.* Vandalia Banking Assoc., 62 Mo. App. 482.

North Carolina.— Hawes *v.* Blackwell, 107 N. C. 196, 12 S. E. 245, 22 Am. St. Rep. 870.

Ohio.— Covert *v.* Rhodes, 48 Ohio St. 66, 27 N. E. 94; Gardner *v.* National City Bank, 39 Ohio St. 600.

Pennsylvania.—Taylor's Estate, 154 Pa. St. 183, 25 Atl. 1061, 18 L. R. A. 855; Hemphill *v.* Yerkes, 132 Pa. St. 545, 19 Atl. 342, 19 Am. St. Rep. 607; Jermyn *v.* Moffitt, 75 Pa. St. 399; Loyd *v.* McCaffrey, 46 Pa. St. 410; Greenfield's Estate, 24 Pa. St. 232.

Virginia.— Bell *v.* Alexander, 21 Gratt. (Va.) 1.

Wisconsin.— Pease *v.* Landauer, 63 Wis. 20, 22 N. W. 847, 53 Am. Rep. 247.

United States.— Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87; Cincinnati First Nat. Bank *v.* Coates, 3 McCrary (U. S.) 9, 8 Fed. 540; German Sav. Inst. *v.* Adae, 1 McCrary (U. S.) 501, 8 Fed. 106.

98. Harrison *v.* Wright, 100 Ind. 515, 50 Am. Rep. 805; Atty.-Gen. *v.* Continental L. Ins. Co., 71 N. Y. 325, 27 Am. Rep. 55; Chapman *v.* White, 6 N. Y. 412, 57 Am. Dec. 464.

99. *Iowa.*— Des Moines County *v.* Hinkley, 62 Iowa 637, 17 N. W. 915; Canton First Nat. Bank *v.* Dubuque Southwestern R. Co., 52 Iowa 378, 3 N. W. 395, 35 Am. Rep. 280; McWilliams *v.* Webb, 32 Iowa 577; Moore *v.* Lowrey, 25 Iowa 336, 95 Am. Dec. 790.

New Jersey.— Kirtland *v.* Moore, 40 N. J. Eq. 106, 2 Atl. 269.

New York.— Hall *v.* Buffalo, 2 Abb. Dec. (N. Y.) 301, 1 Keyes (N. Y.) 193; Ballou *v.* Boland, 14 Hun (N. Y.) 355.

Oregon.— Erickson *v.* Inman, 34 Oreg. 44, 54 Pac. 949; McDaniel *v.* Maxwell, 21 Oreg. 202, 27 Pac. 952, 28 Am. St. Rep. 740.

Pennsylvania.— Com. *v.* American L. Ins. Co., 162 Pa. St. 586, 29 Atl. 660, 42 Am. St. Rep. 844; Greenfield's Estate, 24 Pa. St. 232; Nesmith *v.* Drum, 8 Watts & S. (Pa.) 9, 42 Am. Dec. 260; Clemson *v.* Davidson, 5 Binn. (Pa.) 392; Matter of Ferran, 1 Ashm. (Pa.) 319.

England.— Rodick *v.* Gandell, 12 Beav. 325, 1 De G. M. & G. 763, 13 Jur. 1087, 19 L. J. Ch. 113, 50 Eng. Ch. 591; Burn *v.* Carvalho, 9 L. J. Ch. 65, 4 Myl. & C. 690, 18 Eng. Ch. 690, 7 Sim. 109, 8 Eng. Ch. 109; Lett *v.* Morris, 1 L. J. Ch. 17, 4 Sim. 607, 6 Eng. Ch. 607.

1. Laclede Bank *v.* Schuler, 120 U. S. 511, 7 S. Ct. 644, 30 L. ed. 704.

2. *Illinois.*— Brahm *v.* Adkins, 77 Ill. 263.

Indiana.— Pollard *v.* Bowen, 57 Ind. 232.

Louisiana.— Mechanics', etc., Ins. Co. *v.* Coons, 35 La. Ann. 364.

Massachusetts.— Watson *v.* Phœnix Bank, 8 Metc. (Mass.) 217, 41 Am. Dec. 500.

New York.— Judd *v.* Smith, 3 Hun (N. Y.) 190; Downes *v.* Phœnix Bank, 6 Hill (N. Y.) 297; Little *v.* Phenix Bank, 2 Hill (N. Y.) 425; Harker *v.* Anderson, 21 Wend. (N. Y.) 372; Adams *v.* Orange County Bank, 17 Wend. (N. Y.) 514; Murray *v.* Judah, 6 Cow. (N. Y.) 484.

Pennsylvania.— Girard Bank *v.* Penn Tp. Bank, 39 Pa. St. 92, 80 Am. Dec. 507; Case *v.* Morris, 31 Pa. St. 100.

Virginia.— Purcell *v.* Allemong, 22 Gratt. (Va.) 739.

United States.— Sherman *v.* Comstock, 2 McLean (U. S.) 19, 21 Fed. Cas. No. 12,764.

Failure to present in time — Effect on drawer's liability.— See *supra*, II, E, 10, a, (VII), (A), (2), (a), bb.

3. **If a check be post-dated** the holder must give a similar notice of its dishonor by the drawee to lay the foundation of a recovery against the drawer. Bradley *v.* Delaplaine, 5 Harr. (Del.) 305.

4. Pollard *v.* Bowen, 57 Ind. 232; Griffin *v.* Kemp, 46 Ind. 172; Case *v.* Morris, 31 Pa. St. 100.

For excuses for failure to present see *supra*, II, E, 10, a, (VII), (A), (2), (b).

5. Cromwell *v.* Lovett, 1 Hall (N. Y.) 56; People *v.* Howell, 4 Johns. (N. Y.) 296.

6. Bradford *v.* Fox, 38 N. Y. 289.

(IX) *REVOCATION OF ORDER* — (A) *Uncertified Check* — (1) BY ORDER OF DRAWER. As a general rule the drawer of an uncertified check can revoke his order at any time before the bank's acceptance thereof, and the bank is bound by such revocation.[7] In such case the drawer is liable to the holder for the consequences of his conduct.[8]

(2) BY DEATH OF DRAWER. Where a check is not regarded as an assignment it has been said that the death of the drawer will work a revocation; but, notwithstanding this, if a bank pay a check after the drawer's death and before learning of the event it is not liable.[9] In those jurisdictions, however, where the check operates as an assignment, it would seem that the drawer's death would have no such effect.[10]

(B) *Certified Check.* When a certified check has been delivered the maker's power over it is gone;[11] but a direction to the bank not to pay, after certification but before delivery to the payee, would be effectual.[12]

(X) *CERTIFICATION* — (A) *Of Check* — (1) WHAT CONSTITUTES. Certification of a check is an act by the proper officer of the bank[13] recognizing it as a valid appropriation of the amount of money therein specified to the person therein named.[14] In regard to whether such acceptance may be verbal it has been held in some cases, by analogy to bills of exchange, that a verbal acceptance[15] of a

7. *Massachusetts.*— Charles River Nat. Bank *v.* Davis, 100 Mass. 413.

Missouri.— Albers *v.* Commercial Bank, 85 Mo. 173, 55 Am. Rep. 355; Famous Shoe, etc., Co. *v.* Crosswhite, 51 Mo. App. 55.

New York.— Lunt *v.* Bank of North America, 49 Barb. (N. Y.) 221; Schneider *v.* Irving Bank, 1 Daly (N. Y.) 500, 30 How. Pr. (N. Y.) 190; Dykers *v.* Leather Manufacturers' Bank, 11 Paige (N. Y.) 612.

Ohio.— Kahn *v.* Walton, 46 Ohio St. 195, 20 N. E. 203.

Pennsylvania.—German Nat. Bank *v.* Farmers' Deposit Nat. Bank, 118 Pa. St. 294, 12 Atl. 303; Saylor *v.* Bushong, 100 Pa. St. 23, 45 Am. Rep. 353.

England.— Cohen *v.* Hale, 3 Q. B. D. 371, 47 L. J. Q. B. 496, 39 L. T. Rep. N. S. 35, 26 Wkly. Rep. 680; McLean *v.* Clydesdale Banking Co., 9 App. Cas. 95.

Where check regarded as assignment.— Even in those jurisdictions where a check is regarded as an assignment (see *supra*, II, E, 10, a, (VIII), (C), (2)) payment may be stopped as between the immediate parties (Tramell *v.* Farmers' Nat. Bank, 11 Ky. L. Rep. 900. And see Public Grain, etc., Exch. *v.* Kune, 20 Ill. App. 137); but not as against a *bona fide* holder (Union Nat. Bank *v.* Oceana County Bank, 80 Ill. 212, 22 Am. Rep. 185).

Revocation too late.— Where a check delivered to the payee for accommodation without consideration was passed into the hands of another without the payee's indorsement and sent the next day to the bank for certification, it was held that a notice to the bank while the check was in its possession was too late and that the bank was bound to pay. Freund *v.* Importers', etc., Nat. Bank, 76 N. Y. 352.

8. Albers *v.* Commercial Bank, 85 Mo. 173, 55 Am. Rep. 355.

Holder's right of action against bank for refusing payment see *supra*, II, E, 10, a, (VIII), (C), (2).

9. *Alabama.*— National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50.

Louisiana.— Burke *v.* Bishop, 27 La. Ann. 465, 21 Am. Rep. 567.

Michigan.— Detroit Second Nat. Bank *v.* Williams, 13 Mich. 282.

New York.— See Fordred *v.* Seamen's Sav. Bank, 10 Abb. Pr. N. S. (N. Y.) 425.

Ohio.— Simmons *v.* Cincinnati Sav. Soc., 5 Ohio Dec. (Reprint) 527, 6 Am. L. Rec. 441.

Pennsylvania.— Saylor *v.* Bushong, 100 Pa. St. 23, 45 Am. Rep. 353.

England.— Rogerson *v.* Ladbroke, 1 Bing. 93, 1 L. J. C. P. O. S. 6, 7 Moore C. P. 412, 8 E. C. L. 418; Tate *v.* Hilbert, 2 Ves. Jr. 111.

10. Lewis *v.* International Bank, 13 Mo. App. 202; Zelle *v.* German Sav. Inst., 4 Mo. App. 401; Freund *v.* Importers', etc., Nat. Bank, 3 Hun (N. Y.) 689, 6 Thomps. & C. (N. Y.) 236.

11. National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50; Freund *v.* Importers', etc., Nat. Bank, 76 N. Y. 352.

Effect of certification, generally, see *infra*, II, E, 10, a, (X).

12. Kahn *v.* Walton, 46 Ohio St. 195, 20 N. E. 203.

Notification too late.— Freund *v.* Importers', etc., Nat. Bank, 3 Hun (N. Y.) 689, 6 Thomps. & C. (N. Y.) 236; Nolan *v.* New York Nat. Banking Assoc. Bank, 67 Barb. (N. Y.) 24; Nassau Bank *v.* Broadway Bank, 54 Barb. (N. Y.) 236.

13. Authority to certify see *supra*, II, D, 4, c, (II), (B).

14. Bouvier L. Dict. *sub voc.* "Certified Check."

15. Nelson *v.* Chicago First Nat. Bank, 48 Ill. 36, 95 Am. Dec. 510; Barnet *v.* Smith, 30 N. H. 256, 64 Am. Dec. 290; Merchants' Nat. Bank *v.* Wheeling First Nat. Bank, 7 W. Va. 544.

check will bind the bank; but other cases hold that the certification must be in writing.[16]

(2) Effect of — (a) In General. The certification of a bank check implies that the check is drawn on sufficient funds in the drawee's possession, that they have been set apart for its payment, and that they will be thus applied when the check is presented for that purpose.[17] It serves quite the same purpose as money;[18] but when given in the ordinary course of business it is not presumed to have been given as absolute payment.[19] A distinction has been drawn between certification before delivery and after delivery. When certified before delivery, the legal effect is to assure the party afterward receiving it that it is genuine and will be paid. The bank is bound as well as the drawer.[20] By certifying after-

Bank estopped to allege lack of funds.— In Pope *v.* Albion Bank, 59 Barb. (N. Y.) 226, it was said that any language, whether verbal or written, employed by an officer of a banking institution whose duty it was to know the financial standing and credit of its customers, representing that a check drawn upon it was good and would be paid, estopped the bank from thereafter alleging as against a *bona fide* holder of the check the want of funds to pay the same.

Acceptance a question of fact.— The conduct of the bank in regard to the check may operate as an acceptance. Northumberland First Nat. Bank *v.* McMichael, 106 Pa. St. 460, 51 Am. Rep. 529; Seventh Nat. Bank *v.* Cook, 73 Pa. St. 483, 13 Am. Rep. 751.

16. Espy *v.* Cincinnati First Nat. Bank, 18 Wall. (U. S.) 604, 21 L. ed. 947. And see Morse *v.* Massachusetts Nat. Bank, 1 Holmes (U. S.) 209, 17 Fed. Cas. No. 9,857. In Springfield Bank *v.* Springfield First Nat. Bank, 30 Mo. App. 271, it was held that a mere verbal statement given over the telephone that a check was "all right" did not amount to certification.

Statute of frauds.— In some jurisdictions a check is regarded as a bill of exchange within the meaning of the statute of frauds which requires the promise to be in writing, and the drawee cannot be held on a verbal acceptance (Risley *v.* Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421; Camden Nat. State Bank *v.* Lindeman, 161 Pa. St. 199, 28 Atl. 1022; Maginn *v.* Dollar Sav. Bank, 131 Pa. St. 362, 18 Atl. 901; Morse *v.* Massachusetts Nat. Bank, 1 Holmes (U. S.) 209, 17 Fed. Cas. No. 9,857), but in Illinois the law is otherwise (Nelson *v.* Chicago First Nat. Bank, 48 Ill. 36, 95 Am. Dec. 510).

17. *Alabama.*— Smith *v.* Mobile Branch Bank, 7 Ala. 880.

Illinois.— Drovers' Nat. Bank *v.* Anglo-American Packing, etc., Co., 117 Ill. 100, 7 N. E. 601, 57 Am. Rep. 855; Brown *v.* Leckie, 43 Ill. 497; Bickford *v.* Chicago First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436.

Indiana.— Born *v.* Indianapolis First Nat. Bank, 123 Ind. 78, 24 N. E. 173, 18 Am. St. Rep. 312, 7 L. R. A. 442.

Louisiana.— Helwege *v.* Hibernia Nat. Bank, 28 La. Ann. 520; Louisiana Nat. Bank *v.* Citizens' Bank, 28 La. Ann. 189, 26 Am. Rep. 92; Louisiana Ice Co. *v.* State Nat. Bank, McGloin (La.) 181.

New Hampshire.— Barnet *v.* Smith, 30 N. H. 256, 64 Am. Dec. 290.

New York.— Goshen Nat. Bank *v.* Bingham, 118 N. Y. 349, 23 N. E. 180, 28 N. Y. St. 702, 16 Am. St. Rep. 765, 7 L. R. A. 595; Bank of British North America *v.* Merchants' Nat. Bank, 91 N. Y. 106; Freund *v.* Importers', etc., Nat. Bank, 76 N. Y. 352; Marine Nat. Bank *v.* National City Bank, 59 N. Y. 67, 17 Am. Rep. 305; Jersey City First Nat. Bank *v.* Leach, 52 N. Y. 350, 11 Am. Rep. 708; Cooke *v.* State Nat. Bank, 52 N. Y. 96, 11 Am. Rep. 667; Smith *v.* Miller, 43 N. Y. 171, 3 Am. Rep. 690; Meads *v.* Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331; Barnes *v.* Ontario Bank, 19 N. Y. 152; Farmers', etc., Bank *v.* Butchers, etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678; Stevens *v.* Corn Exch. Bank, 3 Hun (N. Y.) 147, 48 How. Pr. (N. Y.) 351; Nolan *v.* New York Nat. Banking Assoc. Bank, 67 Barb. (N. Y.) 24; National Bank of Commerce *v.* National Mechanics Bank, 35 N. Y. Super. Ct. 282, 46 How. Pr. (N. Y.) 374; Willets *v.* Phœnix Bank, 2 Duer (N. Y.) 121; Merchants' L. & T. Co. *v.* Metropolis Bank, 7 Daly (N. Y.) 137; Phœnix Bank *v.* Bank of America, 1 N. Y. Leg. Obs. 26.

Pennsylvania.— Girard Bank *v.* Penn Tp. Bank, 39 Pa. St. 92, 80 Am. Dec. 507.

Tennessee.—Andrews *v.* German Nat. Bank, 9 Heisk. (Tenn.) 211, 24 Am. Rep. 300; Schoolfield *v.* Moon, 9 Heisk. (Tenn.) 171.

United States.— Boston Merchants' Nat. Bank *v.* Boston State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008.

England.—Robson *v.* Bennett, 2 Taunt. 388, 11 Rev. Rep. 614.

As to presentation for payment see *supra*, II, E, 10, a, (VII), (B).

As to revocation see *supra*, II, E, 10, a, (IX), (B).

18. Bickford *v.* Chicago First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436.

19. Born *v.* Indianapolis First Nat. Bank, 123 Ind. 78, 24 N. E. 123, 18 Am. St. Rep. 312, 7 L. R. A. 442; Lineweaver *v.* Slagle, 64 Md. 465, 2 Atl. 693, 54 Am. Rep. 775; Cincinnati Oyster, etc., Co. *v.* National Lafayette Bank, 51 Ohio St. 106, 36 N. E. 833, 46 Am. St. Rep. 560.

20. *Colorado.*— Larsen *v.* Breene, 12 Colo. 480, 21 Pac. 498.

Illinois.— Metropolitan Nat. Bank *v.* Jones, 137 Ill. 634, 27 N. E. 533, 31 Am. St. Rep.

ward, on the holder's presentation, the bank becomes his absolute debtor and the drawer is released.[21]

(b) Where Amount Raised. If a check be raised before certification the bank is not liable for the raised amount and can recover the excess[22] unless the check

403, 12 L. R. A. 492; Wood *v.* Surrells, 89 Ill. 107; Brown *v.* Leckie, 43 Ill. 497; Rounds *v.* Smith, 42 Ill. 245; Bickford *v.* Chicago First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436; Continental Nat. Bank *v.* Cornhauser, 37 Ill. App. 475. See also Wood *v.* Merchants' Sav., etc., Co., 41 Ill. 267.

Indiana.— Born *v.* Indianapolis First Nat. Bank, 123 Ind. 78, 24 N. E. 123, 18 Am. St. Rep. 312, 7 L. R. A. 442.

Louisiana.— Mutual Nat. Bank *v.* Rotge, 28 La. Ann. 933, 26 Am. Rep. 126.

Ohio.— Cincinnati Oyster, etc., Co. *v.* National Lafayette Bank, 51 Ohio St. 106, 36 N. E. 833, 46 Am. St. Rep. 560.

Tennessee.—Andrews *v.* German Nat. Bank, 9 Heisk. (Tenn.) 211, 24 Am. Rep. 300.

Distinction repudiated.— The highest federal court does not recognize this distinction. Washington First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. ed. 229.

21. *Illinois.*— Metropolitan Nat. Bank *v.* Jones, 137 Ill. 634, 27 N. E. 533, 31 Am. St. Rep. 403, 12 L. R. A. 492; Continental Nat. Bank *v.* Cornhauser, 37 Ill. App. 475.

Indiana.— Born *v.* Indianapolis First Nat. Bank, 123 Ind. 78, 24 N. E. 123, 18 Am. St. Rep. 312, 7 L. R. A. 442.

Massachusetts.— Minot *v.* Russ, 156 Mass. 458, 31 N. E. 489, 32 Am. St. Rep. 472, 16 L. R. A. 510.

New York.— Thomson *v.* Bank of British North America, 82 N. Y. 1; Freund *v.* Importers', etc., Nat. Bank, 76 N. Y. 352; Jersey City First Nat. Bank *v.* Leach, 52 N. Y. 350, 11 Am. Rep. 708; Smith *v.* Miller, 43 N. Y. 171, 3 Am. Rep. 690; Meads *v.* Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331; Farmers', etc., Bank *v.* Butchers, etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678.

Ohio.— Cincinnati Oyster, etc., Co. *v.* National Lafayette Bank, 51 Ohio St. 106, 36 N. E. 833, 46 Am. St. Rep. 560.

Pennsylvania.— Girard Bank *v.* Penn Tp. Bank, 39 Pa. St. 92, 80 Am. Dec. 507.

Tennessee.—French *v.* Irwin, 4 Baxt. (Tenn.) 401, 27 Am. Rep. 769; Andrews *v.* German Nat. Bank, 9 Heisk. (Tenn.) 211, 24 Am. Rep. 300.

United States.— Boston Merchants' Nat. Bank *v.* Boston State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008; Essex County Nat. Bank *v.* Montreal Bank, 7 Biss. (U. S.) 193, 8 Fed. Cas. No. 4,532, 5 Am. L. Rec. 49, 15 Am. L. Reg. N. S. 418, 11 Bankers' Mag. (3d S.) 142, 1 L. & Eq. Rep. 617, 3 Month. Jur. 93; Levi *v.* Missouri Nat. Bank, 5 Dill. (U. S.) 104, 15 Fed. Cas. No. 8,289, 7 Am. L. Rec. 283, 7 Centr. L. J. 249.

Canada.— Boyd *v.* Nasmith, 17 Ont. 40; Banque Nationale *v.* City Bank, 17 L. C. Jur. 197.

Failure of certifying bank.— A check was taken by the holder to a bank and certified, and the same day the bank suspended. It was held that the drawer was released. Boyd *v.* Nasmith, 17 Ont. 40.

Certification at indorser's request.— If a check is certified before delivery at an indorser's request, he is not released. Born *v.* Indianapolis First Nat. Bank, 123 Ind. 78, 24 N. E. 173, 18 Am. St. Rep. 312, 7 L. R. A. 442; Mutual Nat. Bank *v.* Rotge, 28 La. Ann. 933, 26 Am. Rep. 126.

Fictitious payee.— A valid title to a check drawn payable to a fictitious payee and afterward certified and indorsed by such payee may be acquired and the bank holden therefor. Meridian Nat. Bank *v.* Shelbyville First Nat. Bank, 7 Ind. App. 322, 34 N. E. 608. See also Armstrong *v.* Pomeroy Nat. Bank, 46 Ohio St. 512, 22 N. E. 866, 15 Am. St. Rep. 655, 6 L. R. A. 625.

Correcting a certification.— If a bank should by mistake certify a check to be good, it may be corrected before the rights or liabilities of other parties have arisen. Baltimore Second Nat. Bank *v.* Western Nat. Bank, 51 Md. 128, 34 Am. Rep. 300; Irving Bank *v.* Wetherald, 36 N. Y. 335, 2 Transcr. App. (N. Y.) 120. See also Brooklyn Trust Co. *v.* Toler, 138 N. Y. 675, 34 N. E. 515, 53 N. Y. St. 933. And see *infra*, II, E, 10, a, (x), (b).

22. *Alabama.*— Birmingham Nat. Bank *v.* Bradley, 103 Ala. 109, 15 So. 440, 49 Am. St. Rep. 17.

California.— Redington *v.* Woods, 45 Cal. 406, 13 Am. Rep. 190.

Indiana.— Parke *v.* Roser, 67 Ind. 500, 33 Am. Rep. 102.

Louisiana.— *Contra*, Louisiana Nat. Bank *v.* Citizens' Bank, 28 La. Ann. 189, 26 Am. Rep. 92. See also Merchants' Bank *v.* New Orleans Exch. Bank, 16 La. 457.

Missouri.— St. Louis Third Nat. Bank *v.* Allen, 59 Mo. 310.

Nebraska.— Orleans First Nat. Bank *v.* Alma State Bank, 22 Nebr. 769, 36 N. W. 289, 3 Am. St. Rep. 294.

New York.— National Bank of Commerce *v.* Manufacturers', etc., Bank, 122 N. Y. 367, 25 N. E. 355, 33 N. Y. St. 556; Clews *v.* New York Nat. Banking Assoc. Bank, 114 N. Y. 70, 20 N. E. 852, 22 N. Y. St. 397; Clews *v.* New York Nat. Banking Assoc. Bank, 89 N. Y. 418, 42 Am. Rep. 303; New York Security Bank *v.* National Bank of Republic, 67 N. Y. 458, 23 Am. Rep. 129; White *v.* Continental Nat. Bank, 64 N. Y. 316, 21 Am. Rep. 612; Marine Nat. Bank *v.* National City Bank, 59 N. Y. 67, 17 Am. Rep. 305; National Bank of Commerce *v.* National Mechanics' Banking Assoc., 55 N. Y. 211, 14 Am. Rep. 232; National Park Bank *v.* New York Ninth Nat. Bank, 46 N. Y. 77, 7 Am. Rep. 310; Bank of Commerce *v.* Union Bank, 3 N. Y. 230; Continental Nat. Bank *v.* Trades-

has been negligently paid.[23] Nor is the drawee bank responsible for a larger amount inserted after certification, and if by mistake such a check is paid it can recover the excess unless the holder has suffered in consequence of the mistake.[24]

(c) Where Check Forged. If a bank certify a forged check it must pay, for as someone must lose by the deceit, although unintentional, the law casts the loss on the deceiver.[25]

(d) Where Drawer Insolvent. It is a fraud for a drawer to obtain a certification after he has become insolvent. If perpetrated, the certifying bank has a right to reclaim or countermand the payment of the check unless it has been previously transferred to an innocent holder.[26]

(3) Effect of Subsequent Inquiry. If after a check has been certified, the bank is asked if the certificate is good and an affirmative answer is given, such answer has been assigned different meanings. One meaning is that the signature is good and that the bank will be responsible for the amount certified.[27] Another meaning is that the maker's signature is genuine and that his account is good for the amount but does not extend to the genuineness of the payee or to the amount written in the check.[28]

men's Nat. Bank, 36 N. Y. App. Div. 112, 55 N. Y. Suppl. 545; U. S. National Bank *v.* National Park Bank, 59 Hun (N. Y.) 495, 13 N. Y. Suppl. 411, 37 N. Y. St. 35.

Pennsylvania.— Rapp *v.* National Security Bank, 136 Pa. St. 426, 20 Atl. 508.

Texas.— Houston City Bank *v.* Houston First Nat. Bank, 45 Tex. 203.

United States.— Espy *v.* Cincinnati First Nat. Bank, 18 Wall. (U. S.) 604, 21 L. ed. 947.

England.— Hall *v.* Fuller, 5 B. & C. 750, 8 D. & R. 464, 4 L. J. K. B. O. S. 297, 29 Rev. Rep. 383, 11 E. C. L. 665.

Payment to agent.— When, however, payment has been made to an agent who has paid over the money to the principal, it cannot be recovered of the agent. National City Bank *v.* Westcott, 118 N. Y. 468, 23 N. E. 900, 29 N. Y. St. 806, 16 Am. St. Rep. 771; National Park Bank *v.* Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 22 N. Y. St. 160, 11 Am. St. Rep. 612.

23. Negligent payment.— When a bank has been negligent in paying it cannot recover. Thus if it has the evidence in its possession of the true amount of a certified draft and does not look at it before paying, the bank cannot recover the excess paid on an altered draft. Continental Nat. Bank *v.* Tradesmen's Nat. Bank, 36 N. Y. App. Div. 112, 55 N. Y. Suppl. 545.

24. National Bank of Commerce *v.* National Mechanics Banking Assoc., 55 N. Y. 211, 14 Am. Rep. 232.

25. Louisiana Nat. Bank *v.* Citizens' Bank, 28 La. Ann. 189, 26 Am. Rep. 92; Commercial, etc., Nat. Bank *v.* Baltimore First Nat. Bank, 30 Md. 11, 96 Am. Dec. 554; Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678; Hagen *v.* Bowery Nat. Bank, 6 Lans. (N. Y.) 490, 64 Barb. (N. Y.) 197; Raphael *v.* Bank of England, 17 C. B. 161, 25 L. J. C. P. 33, 4 Wkly. Rep. 10, 84 E. C. L. 161; Hern *v.* Nichols, 1 Salk. 289.

26. Bank of Republic *v.* Baxter. 31 Vt. 101.

For certified check obtained from bank by fraud see Goshen Nat. Bank *v.* Bingham, 118 N. Y. 349, 23 N. E. 180, 28 N. Y. St. 702, 16 Am. St. Rep. 765, 7 L. R. A. 595.

27. Louisiana Nat. Bank *v.* Citizens' Bank, 28 La. Ann. 189, 26 Am. Rep. 92; Clews *v.* New York Nat. Banking Assoc. Bank, 89 N. Y. 418, 42 Am. Rep. 303.

28. *Illinois.*— Chicago First Nat. Bank *v.* Northwestern Nat. Bank, 40 Ill. App. 640.

Indiana.— Parke *v.* Roser, 67 Ind. 500, 33 Am. Rep. 102.

Massachusetts.— Mussey *v.* Eagle Bank, 9 Metc. (Mass.) 306.

New York.—New York Security Bank *v.* National Bank of Republic, 67 N. Y. 458, 23 Am. Rep. 129; Marine Nat. Bank *v.* National City Bank, 59 N. Y. 67, 17 Am. Rep. 305; National Bank of Commerce *v.* National Mechanics' Banking Assoc., 55 N. Y. 211, 14 Am. Rep. 232; Irving Bank *v.* Wetherald, 36 N. Y. 335, 2 Transcr. App. (N. Y.) 120; Meads *v.* Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331; Barnes *v.* Ontario Bank, 19 N. Y. 152; Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678; Hagen *v.* Bowery Nat. Bank, 6 Lans. (N. Y.) 490; Willets *v.* Phœnix Bank, 2 Duer (N. Y.) 121; Phœnix Bank *v.* Bank of America, 1 N. Y. Leg. Obs. 26.

United States.— Espy *v.* Cincinnati First Nat. Bank, 18 Wall. (U. S.) 604, 21 L. ed. 947.

Forged check.— The answer given by a bank official to the inquirer of a certified check that it is correct in every particular does not estop the bank from afterward showing that the check is a forgery and recovering the money. New York Security Bank *v.* National Bank of Republic, 67 N. Y. 458, 23 Am. Rep. 129; Lawrence *v.* Maxwell, 53 N. Y. 19; Higgins *v.* Moore, 34 N. Y. 417; Wheeler *v.* Newbould, 16 N. Y. 392; Bargett *v.* Orient Mut. Ins. Co., 3 Bosw. (N. Y.) 385.

If the certification itself is a forgery and the official pronounces it genuine his answer binds his bank, and it must pay as though it

(B) *Of Draft or Note.* The effect of certifying a draft or note payable at the certifying bank is an admission that the bank has enough money of the accepter and maker to pay their obligations and will retain it for that purpose.[29]

b. Payment on Forged Check or Forged Indorsement — (I) *Forged Check* — (A) *Liability of Bank* — (1) To Depositor — (a) In General. A bank is presumed to know the signature of its customers, and if it pays a forged check[30] it cannot, in the absence of negligence on the part of the depositor whose check it purports to be, charge the amount to his account.[31] If, however, the drawer has prepared his check so negligently that it can be easily altered, and alterations

were genuine. Continental Bank *v.* Commonwealth Nat. Bank, 50 N. Y. 575.

29. Flour City Nat. Bank *v.* Traders' Nat. Bank, 35 Hun (N. Y.) 241; Riverside Bank *v.* First Nat. Bank, 74 Fed. 276, 38 U. S. App. 674, 20 C. C. A. 181. But see Wood *v.* Merchants' Sav., etc., Co., 41 Ill. 267, where the holder of a note presented it at the bank at maturity, at which time the maker had money on deposit sufficient to pay it, but the teller merely certified on the face of the note that it was "good," and the holder took it away without the money. It was held that the liability of the parties was in no way changed by such transaction and that the maker was not released from his liability, even though he lost his deposit by the failure of the bank on the following day.

False or erroneous certification.— A mistake in certifying a note as good can be corrected if made in time before the rights and liabilities of other parties have changed (Baltimore Second Nat. Bank *v.* Western Nat. Bank, 51 Md. 128, 34 Am. Rep. 300; Irving Bank *v.* Wetherald, 36 N. Y. 335, 2 Transcr. App. (N. Y.) 120; National Park Bank *v.* Steele, etc., Mfg. Co., 58 Hun (N. Y.) 81, 11 N. Y. Suppl. 538, 33 N. Y. St. 890), but if a teller has falsely or erroneously certified a note the bank is bound to an innocent holder (Irving Bank *v.* Wetherald, 36 N. Y. 335, 2 Transcr. App. (N. Y.) 120; Meads *v.* Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331).

30. As to what constitutes forgery see Forgery.

Effect of certifying forged check see *supra*, II, E, 10, a, (X), (A), (2), (c).

31. *California.*— Hatton *v.* Holmes, 97 Cal. 208, 31 Pac. 1131.

Connecticut.—Bristol Knife Co. *v.* Hartford First Nat. Bank, 41 Conn. 421, 19 Am. Rep. 517.

District of Columbia.— Millard *v.* National Bank of Republic, 3 MacArthur (D. C.) 54.

Illinois.— Chicago First Nat. Bank *v.* Pease, 168 Ill. 40, 48 N. E. 160; Chicago First Nat. Bank *v.* Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 43 Am. St. Rep. 247, 26 L. R. A. 289.

Iowa.— Marshalltown First Nat. Bank *v.* Marshalltown State Bank, 107 Iowa 327, 77 N. W. 1045, 44 L. R. A. 131; German Sav. Bank *v.* Citizens' Nat. Bank, 101 Iowa 530, 70 N. W. 769, 63 Am. St. Rep. 399.

Maryland.— Williams *v.* Drexel, 14 Md. 566.

Minnesota.— Germania Bank *v.* Boutell, 60 Minn. 189, 62 N. W. 327, 51 Am. St. Rep. 519, 27 L. R. A. 635; Bernheimer *v.* Marshall, 2 Minn. 78, 72 Am. Dec. 79.

New York.— Shipman *v.* State Bank, 126 N. Y. 318, 27 N. E. 371, 37 N. Y. St. 376, 22 Am. St. Rep. 821, 12 L. R. A. 791; Citizens' Nat. Bank *v.* Importers', etc., Bank, 119 N. Y. 195, 23 N. E. 540, 29 N. Y. St. 1.

Ohio.— Armstrong *v.* Pomeroy Nat. Bank, 46 Ohio St. 512, 22 N. E. 866, 15 Am. St. Rep. 655, 6 L. R. A. 625.

Pennsylvania.— Seventh Nat. Bank *v.* Cook, 73 Pa. St. 483, 13 Am. Rep. 751.

Tennessee.— Pollard *v.* Wellford, 99 Tenn. 113, 42 S. W. 23; Chism *v.* Memphis First Nat. Bank, 96 Tenn. 641, 36 S. W. 387, 54 Am. St. Rep. 863, 32 L. R. A. 778; Jackson *v.* McMinnville Nat. Bank, 92 Tenn. 154, 20 S. W. 802, 36 Am. St. Rep. 81, 18 L. R. A. 663.

Texas.—Rouvant *v.* San Antonio Nat. Bank, 63 Tex. 610; Iron City Nat. Bank *v.* Peyton, 15 Tex. Civ. App. 184, 39 S. W. 223.

Vermont.— St. Albans Bank *v.* Farmers, etc., Bank, 10 Vt. 141, 33 Am. Dec. 188.

West Virginia.— Johnston *v.* Commercial Bank, 27 W. Va. 343, 55 Am. Rep. 315.

United States.— Washington First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. ed. 229.

England.— Hall *v.* Fuller, 5 B. & C. 750, 8 D. & R. 464, 4 L. J. K. B. O. S. 297, 29 Rev. Rep. 383, 11 E. C. L. 665; Price *v.* Neal, 3 Burr. 1354, 1 W. Bl. 390; Smith *v.* Mercer, 1 Marsh. 453, 6 Taunt. 76, 16 Rev. Rep. 576, 1 E. C. L. 515.

What not negligence.— The fact that a depositor kept his check-book lying about in his office during the day, whereby a clerk employed in the office was enabled to forge a check, does not amount to such negligence as will excuse the bank from bearing the loss caused by paying such forged check. Mackintosh *v.* Eliot Nat. Bank, 123 Mass. 393.

Forged drafts paid by factor.— A factor who has received drafts from his principal drawn on him which have been discounted by a bank, and he has paid them, must stand the loss on those which are discovered to be forgeries. Howard *v.* Mississippi Valley Bank, 28 La. Ann. 727, 26 Am. Rep. 105.

Crediting a forged check to a depositor is equivalent to payment. National Bank of North America *v.* Bangs, 106 Mass. 441, 8 Am. Rep. 349; Levy *v.* U. S. Bank, 1 Binn. (Pa.) 27; St. Albans Bank *v.* Farmers, etc., Bank, 10 Vt. 141, 33 Am. Dec. 188.

are made afterward, he can blame no one but himself, and in such case he cannot hold the bank liable for the consequences of his own negligence.[32] And so, if a depositor should by words or acts cause his bank, while acting like a prudent man, to pay a forged check, he would be bound by the consequences.[33]

(b) Duty of Depositor to Examine Paid Checks. In some jurisdictions it is held to be the depositor's duty, when his pass-book has been written up and returned to him with the checks charged to his account, to examine them within a reasonable time and report any forgeries discovered. After the lapse of a reasonable time, a presumption arises that the checks are correct, and the depositor, having failed to examine them at the proper time, cannot recover from the bank the amount paid on checks subsequently discovered to be forgeries, without proving that "it could by proper care and skill have detected them."[34] Where this doctrine obtains, if the depositor intrusts the duty of examination to a confidential

32. *California.*— Redington *v.* Woods, 45 Cal. 406, 13 Am. Rep. 190.

Illinois.—Chicago First Nat. Bank *v.* Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 43 Am. St. Rep. 247, 26 L. R. A. 289; Quincy First Nat. Bank *v.* Ricker, 71 Ill. 439, 22 Am. Rep. 104.

Kentucky.— Deposit Bank *v.* Fayette Nat. Bank, 90 Ky. 10, 11 Ky. L. Rep. 803, 13 S. W. 339, 7 L. R. A. 849.

Louisiana.— Howard *v.* Mississippi Valley Bank, 28 La. Ann. 727, 26 Am. Rep. 105; Laborde *v.* Consolidated Assoc., 4 Rob. (La.) 190, 39 Am. Dec. 517.

Maine.— Neal *v.* Coburn, 92 Me. 139, 42 Atl. 348, 69 Am. St. Rep. 495.

Maryland.— Hardy *v.* Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325; Commercial, etc., Nat. Bank *v.* Baltimore First Nat. Bank, 30 Md. 11, 96 Am. Dec. 554.

Massachusetts.— Danvers First Nat. Bank *v.* Salem First Nat. Bank, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450; Wheeler *v.* Guild, 20 Pick. (Mass.) 545, 32 Am. Dec. 231; Gloucester Bank *v.* Salem Bank, 17 Mass. 33.

Nebraska.— Orleans First Nat. Bank *v.* Alma State Bank, 22 Nebr. 769, 36 N. W. 289, 3 Am. St. Rep. 294.

New Hampshire.— Star F. Ins. Co. *v.* New Hampshire Nat. Bank, 60 N. H. 442.

New York.— Crawford *v.* West Side Bank, 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152; Frank *v.* Chemical Nat. Bank, 84 N. Y. 209, 38 Am. Rep. 501; National Bank of Commerce *v.* National Mechanics' Banking Assoc., 55 N. Y. 211, 14 Am. Rep. 232; National Park Bank *v.* New York Ninth Nat. Bank, 46 N. Y. 77, 7 Am. Rep. 310; Weisser *v.* Denison, 10 N. Y. 68, 61 Am. Dec. 731; Salt Springs Bank *v.* Syracuse Sav. Inst., 62 Barb. (N. Y.) 101; Commonwealth Nat. Bank *v.* Grocers' Nat. Bank, 35 How. Pr. (N. Y.) 412; Leavitt *v.* Stanton, Lalor (N. Y.) 413.

Pennsylvania.— Rapp *v.* National Security Bank, 136 Pa. St. 426, 20 Atl. 508; Hazlett *v.* Commercial Nat. Bank, 132 Pa. St. 118, 19 Atl. 55; Worrall *v.* Gheen, 39 Pa. St. 388; Levy *v.* U. S. Bank, 4 Dall. (Pa.) 234, 1 L. ed. 814, 1 Binn. (Pa.) 27.

Tennessee.— People's Bank *v.* Franklin Bank, 89 Tenn. 299, 12 S. W. 716, 17 Am. St. Rep. 884, 6 L. R. A. 724.

United States.— U. S. Bank *v.* Georgia Bank, 10 Wheat. (U. S.) 333, 6 L. ed. 334.

England.— Young *v.* Grote, 4 Bing. 253, 5 L. J. C. P. O. S. 165, 12 Moore C. P. 484, 29 Rev. Rep. 552, 13 E. C. L. 491.

Bank clerk's forgery.— A bank clerk whose duty was to prepare exchange for the cashier to sign drew a draft for twenty-five dollars to his own order in such a way that it could be easily altered, and afterward raised the amount to twenty-five thousand dollars, indorsed it, and had the same discounted. It was held that the forgery was that of the clerk, that the bank was not negligent, and consequently not liable for the loss. Spokane Exch. Nat. Bank *v.* Little Rock Bank, 58 Fed. 140, 19 U. S. App. 152, 7 C. C. A. 111, 22 L. R. A. 686.

33. Hardy *v.* Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325. See also De Feriet *v.* Bank of America, 23 La. Ann. 310, 8 Am. Rep. 597.

34. *Alabama.*— Birmingham First Nat. Bank *v.* Allen, 100 Ala. 476, 14 So. 335, 46 Am. St. Rep. 80, 27 L. R. A. 426.

California.— Janin *v.* London, etc., Bank, 92 Cal. 14, 27 Pac. 1100, 27 Am. St. Rep. 82, 14 L. R. A. 320.

Maryland.— Hardy *v.* Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325.

Missouri.— McKeen *v.* Boatmen's Bank, 74 Mo. App. 281; Wind *v.* Fifth Nat. Bank, 39 Mo. App. 72.

Pennsylvania.—Myers *v.* Southwestern Nat. Bank, 193 Pa. St. 1, 44 Atl. 280, 74 Am. St. Rep. 672; United Security L. Ins., etc., Co. *v.* Central Nat. Bank, 185 Pa. St. 586, 40 Atl. 97.

Texas.— Weinstein *v.* Jefferson Nat. Bank, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23.

United States.— Leather Manufacturers' Nat. Bank *v.* Morgan, 117 U. S. 96, 6 S. Ct. 657, 29 L. ed. 811.

Return of book balanced is account stated. — The writing up of a depositor's pass-book and striking a balance and returning it to him with the checks constitute a rendered account, and unless objection is made thereto by the depositor within a reasonable time he is bound thereby, and it can only be opened for examination and restatement on the ground of fraud (McKeen *v.* Boatmen's Bank, 74 Mo. App. 281); but in New York it is held that although the return of the account

clerk or agent, and the latter forges checks, his knowledge of such forgery is chargeable to the depositor and the bank cannot be held liable upon the forgeries being subsequently discovered.[35] But in other states, especially in New York, this duty is not required of him, nor does such a presumption attend his inaction;[36] and the fact that the forgery was committed by a confidential clerk who was intrusted with the examination of the pass-book and vouchers will not affect the bank's liability.[37]

(2) To Other Persons. The above rule, in its full extent, applies only between the bank and its customer, the maker. Between the bank and other persons through whom a forged or altered check may pass, the bank is only responsible for the genuineness of the maker's signature.[38]

(B) *Right of Bank to Recover of Payee.* Although money paid by mistake can generally be recovered the payment of forged paper is an exception. When payment is made to the holder of paper who has come into possession of it without any fault on his part, and his situation would be rendered worse if compelled to refund than it was before receiving payment, the money cannot be recovered from him.[39] If, however, he has been negligent in any regard, he cannot retain the money. To justify him in doing so the bank alone must have been negligent.[40]

with the vouchers is an account stated, this only puts on plaintiff the burden of proving a mistake or error (Critten *v.* Chemical Nat. Bank, 60 N. Y. App. Div. 241, 70 N. Y. Suppl. 246).

No duty to examine indorsements.— There is no duty upon the depositor to examine into the correctness of the indorsements on paid checks returned to him by the bank. United Security L. Ins., etc., Co. *v.* Central Nat. Bank, 185 Pa. St. 586, 40 Atl. 97.

35. *Alabama.*— Birmingham First Nat. Bank *v.* Allen, 100 Ala. 476, 14 So. 335, 46 Am. St. Rep. 80, 27 L. R. A. 426.

Louisiana.— De Feriet *v.* Bank of America, 23 La. Ann. 310, 8 Am. Rep. 597.

Maryland.—Hardy *v.* Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325.

Massachusetts.— Dana *v.* National Bank of Commerce, 132 Mass. 156.

Pennsylvania.—Myers *v.* Southwestern Nat. Bank, 193 Pa. St. 1, 44 Atl. 280, 74 Am. St. Rep. 672.

United States.— Leather Manufacturers' Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. ed. 811.

See, generally, Principal and Agent.

36. Manufacturers' Nat. Bank *v.* Barnes, 65 Ill. 69, 16 Am. Rep. 576; German Sav. Bank *v.* Citizens Nat. Bank, 101 Iowa 530, 70 N. W. 769, 63 Am. St. Rep. 399; Leavenworth First Nat. Bank *v.* Tappan, 6 Kan. 456, 7 Am. Rep. 568; Clark *v.* National Shoe, etc., Bank, 164 N. Y. 498, 58 N. E. 659; Shipman *v.* State Bank, 126 N. Y. 318, 27 N. E. 371, 37 N. Y. St. 376, 22 Am. St. Rep. 821, 12 L. R. A. 791; Bank of British North America *v.* Merchants' Nat. Bank, 91 N. Y. 106; Frank *v.* Chemical Nat. Bank, 84 N. Y. 209, 38 Am. Rep. 501; Welsh *v.* German American Bank, 73 N. Y. 424, 29 Am. Rep. 175; Weisser *v.* Denison, 10 N. Y. 68, 61 Am. Dec. 731; Critten *v.* Chemical Nat. Bank, 60 N. Y. App. Div. 241, 70 N. Y. Suppl. 246; Wachsman *v.* Columbia Bank, 8 Misc. (N. Y.) 280, 28 N. Y. Suppl. 711, 59 N. Y. St. 232.

37. Frank *v.* Chemical Nat. Bank, 84 N. Y. 209, 38 Am. Rep. 501; Welsh *v.* German American Bank, 73 N. Y. 424, 29 Am. Rep. 175; Weisser *v.* Denison, 10 N. Y. 68, 61 Am. Dec. 731; Wachsman *v.* Columbia Bank, 8 Misc. (N. Y.) 280, 28 N. Y. Suppl. 711, 59 N. Y. St. 232.

38. Crawford *v.* West Side Bank, 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152; White *v.* Continental Nat. Bank, 64 N. Y. 316, 21 Am. Rep. 612; Marine Nat. Bank *v.* National City Bank, 59 N. Y. 67, 17 Am. Rep. 305; Bank of Commerce *v.* Union Bank, 3 N. Y. 230.

39. Weisser *v.* Denison, 10 N. Y. 68, 61 Am. Dec. 731; Goddard *v.* Merchants' Bank, 4 N. Y. 147; Bank of Commerce *v.* Union Bank, 3 N. Y. 230; Salt Springs Bank *v.* Syracuse Sav. Inst., 62 Barb. (N. Y.) 101; Commonwealth Nat. Bank *v.* Grocers' Nat. Bank, 35 How. Pr. (N. Y.) 412; Markle *v.* Hatfield, 2 Johns (N. Y.) 455, 3 Am. Dec. 446; Cocks *v.* Masterman, 9 B. & C. 902, 8 L. J. K. B. O. S. 77, 4 M. & Rob. 676, 17 E. C. L. 398; Price *v.* Neal, 3 Burr. 1354, 1 W. Bl. 390; Smith *v.* Mercer, 1 Marsh. 453, 6 Taunt. 76, 16 Rev. Rep. 576, 1 E. C. L. 515. See also cases cited in next note.

Same rules apply to United States.— The same rules relating to recovery on forged paper apply to the government as to banks and individuals. Cooke *v.* U. S., 91 U. S. 389, 23 L. ed. 237; U. S. *v.* Clinton Nat. Bank, 28 Fed. 357. See also U. S. *v.* Philadelphia Cent. Nat. Bank, 6 Fed. 134.

Pennsylvania — Right to recover given by statute.— In Pennsylvania the drawee bank can recover the money paid on a forged check by statute (Pa. Act, April 5, 1849). Peoples' Sav. Bank *v.* Cupps, 91 Pa. St. 315; Chambers *v.* Union Nat. Bank, 78 Pa. St. 205; Tradesmen's Nat. Bank *v.* Pittsburg Third Nat. Bank, 66 Pa. St. 435.

40. *Illinois.*— Quincy First Nat. Bank *v.* Ricker, 71 Ill. 439, 22 Am. Rep. 104.

Kentucky.— Georgetown Deposit Bank *v.*

If neither party has been negligent, or both have been, then the bank can recover the money.[41]

(c) *Notice of Forgery.* In giving notice of forgery after its discovery there must be reasonable diligence, but mere lapse of time, however long, between the time of payment and notice of the forgery, will not deprive the payor of his right to recover of the payee.[42]

(II) *Forged Indorsement* — (A) *Rights of Bank* — (1) As Against

Fayette Nat. Bank, 90 Ky. 10, 11 Ky. L. Rep. 803, 13 S. W. 339, 7 L. R. A. 849.

Louisiana.— Levy *v.* Bank of America, 24 La. Ann. 220, 13 Am. Rep. 124; De Feriet *v.* Bank of America, 23 La. Ann. 310, 8 Am. Rep. 597; McKleroy *v.* Southern Bank, 14 La. Ann. 458, 74 Am. Dec. 438; Smith *v.* Mechanics', etc., Bank, 6 La. Ann. 610.

Maine.— Neal *v.* Coburn, 92 Me. 139, 42 Atl. 348, 69 Am. St. Rep. 495; Belknap *v.* Davis, 19 Me. 455.

Maryland.— Commercial, etc., Nat. Bank *v.* Baltimore First Nat. Bank, 30 Md. 11, 96 Am. Dec. 554.

Massachusetts.— Dedham Nat. Bank *v.* Everett Nat. Bank, 177 Mass. 392, 59 N. E. 62, 83 Am. St. Rep. 286; Danvers First Nat. Bank *v.* Salem First Nat. Bank, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450; Welch *v.* Goodwin, 123 Mass. 71, 25 Am. Rep. 24; National Bank of Commerce *v.* Bangs, 106 Mass. 441, 8 Am. Rep. 349; Gloucester Bank *v.* Salem Bank, 17 Mass. 33; Young *v.* Adams, 6 Mass. 182. See also Belknap *v.* National Bank of North America, 100 Mass. 376, 97 Am. Dec. 105.

Minnesota.— Germania Bank *v.* Boutell, 60 Minn. 189, 62 N. W. 327, 51 Am. St. Rep. 519, 27 L. R. A. 635.

New Hampshire.— Star F. Ins. Co. *v.* New Hampshire Nat. Bank, 60 N. H. 442.

New York.— National Park Bank *v.* New York Ninth Nat. Bank, 46 N. Y. 77, 7 Am. Rep. 310; Goddard *v.* Merchants' Bank, 4 N. Y. 147; Bank of Commerce *v.* Union Bank, 3 N. Y. 230; Canal Bank *v.* Albany Bank, 1 Hill (N. Y.) 287.

Ohio.— Ellis *v.* Ohio L. Ins., etc., Co., 4 Ohio St. 628, 64 Am. Dec. 610.

Pennsylvania.— Levy *v.* U. S. Bank, 4 Dall. (Pa.) 234, 1 L. ed. 814, 1 Binn. (Pa.) 27.

Texas.— Rouvant *v.* San Antonio Nat. Bank, 63 Tex. 610.

Vermont.— St. Albans Bank *v.* Farmers, etc., Bank, 10 Vt. 141, 33 Am. Dec. 188.

United States.— U. S. Bank *v.* Georgia Bank, 10 Wheat. (U. S.) 333, 6 L. ed. 334; U. S. *v.* New York Nat. Park Bank, 6 Fed. 852.

England.— Wilkinson *v.* Johnson, 3 B. & C. 428, 5 D. & R. 403, 3 L. J. K. B. O. S. 58, 10 E. C. L. 198; Young *v.* Grote, 4 Bing. 253, 5 L. J. C. P. O. S. 165, 12 Moore C. P. 484, 29 Rev. Rep. 552, 13 E. C. L. 491.

41. Leavenworth First Nat. Bank *v.* Tappan, 6 Kan. 456, 7 Am. Rep. 568; Gloucester Bank *v.* Salem Bank, 17 Mass. 33; Bernheimer *v.* Marshall, 2 Minn. 78, 72 Am. Dec. 79; Ellis *v.* Ohio L. Ins., etc., Co., 4 Ohio St. 628, 64 Am. Dec. 610.

Effect of discounting forged note taken for debts.— R agreed to assist H in paying his debt and, to that end, delivered to him a note he held against K which was discounted by the bank and the proceeds applied accordingly. The note was considered as discounted on account of K or R, and although it was a forgery, H's debt was discharged. Grafton Bank *v.* Hunt, 4 N. H. 488.

Warranty of discounted paper.— A person who procures notes to be discounted by a bank impliedly warrants the genuineness of the makers and indorsers (Cabot Bank *v.* Morton, 4 Gray (Mass.) 156); but it has been held that a bank in discounting a draft does not warrant to the accepter the bills of lading attached thereto as security (Goetz *v.* Kansas City Bank, 119 U. S. 551, 7 S. Ct. 318, 30 L. ed. 515; Hoffman *v.* Milwaukee Nat. City Bank, 12 Wall. (U. S.) 181, 20 L. ed. 366).

Bank may sue in payee's name.— A bank that has taken a partnership note from a partner who has forged the name of the payee, and discounted the note, may maintain an action in the payee's name thereon. York Bank *v.* Asbury, 1 Biss. (U. S.) 230, 30 Fed. Cas. No. 18,142.

42. *Alabama.*— Birmingham Nat. Bank *v.* Bradley, 103 Ala. 109, 15 So. 440, 49 Am. St. Rep. 17.

Indian Territory.— Green *v.* Purcell Nat. Bank, 1 Indian Terr. 270, 37 S. W. 50.

Massachusetts.— National Bank of North America *v.* Bangs, 106 Mass. 441, 8 Am. Rep. 349.

New York.— Bank of Commerce *v.* Union Bank, 3 N. Y. 230; White *v.* Sweeny, 4 Daly (N. Y.) 223; Salomon *v.* State Bank, 28 Misc. (N. Y.) 324, 59 N. Y. Suppl. 407; Oppenheim *v.* West Side Bank, 22 Misc. (N. Y.) 722, 50 N. Y. Suppl. 148; Canal Bank *v.* Albany Bank, 1 Hill (N. Y.) 287.

England.— Cocks *v.* Masterman, 9 B. & C. 902, 8 L. J. K. B. O. S. 77, 4 M. & R. 676, 17 E. C. L. 398; Wilkinson *v.* Johnson, 3 B. & C. 428, 5 D. & R. 403, 3 L. J. K. B. O. S. 58, 10 E. C. L. 198.

What diligence required.— When a bank pays a forged acceptance and sends it by mail to the accepters whose names are forged, they are not required to examine it immediately for the purpose of ascertaining its genuineness, nor are they chargeable with neglect for not discovering the forgery immediately. But they must give notice to the bank as soon as the forgery is discovered, otherwise they would be deemed negligent. Leavenworth First Nat. Bank *v.* Tappan, 6 Kan. 456, 7 Am. Rep. 568.

Drawer. A bank which pays a check on a forged indorsement acquires no rights against the drawer, and cannot charge to his account the amount so paid out.[43]

(2) As Against True Owner. In like manner if a bank pays a check on a forged indorsement, this is no defense against a recovery by the rightful owner.[44] Moreover, an indorsement by a person bearing the same name as the payee, but not the real person, is a forgery, and payment to him will not excuse the bank from paying the true owner of the paper.[45]

43. *California.*— Hatton *v.* Holmes, 97 Cal. 208, 31 Pac. 1131.

Connecticut.— Bristol Knife Co. *v.* Hartford First Nat. Bank, 41 Conn. 421, 19 Am. Rep. 517.

District of Columbia.— Millard *v.* National Bank of Republic, 3 MacArthur (D. C.) 54.

Georgia.—Freeman *v.* Savannah Bank, etc., Co., 88 Ga. 252, 14 S. E. 577; Atlanta Nat. Bank *v.* Burke, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96.

Illinois.— Chicago First Nat. Bank *v.* Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 43 Am. St. Rep. 247, 26 L. R. A. 289.

Iowa.— German Sav. Bank *v.* Citizens' Nat. Bank, 101 Iowa 530, 70 N. W. 769, 63 Am. St. Rep. 399.

Kentucky.— Henderson Trust Co. *v.* Ragan, 21 Ky. L. Rep. 601, 52 S. W. 848; Rice *v.* Citizens Nat. Bank, 21 Ky. L. Rep. 346, 51 S. W. 454.

Maryland.—Williams *v.* Drexel, 14 Md. 566.

Massachusetts.— Belknap *v.* National Bank of North America, 100 Mass. 376, 97 Am. Dec. 105.

Missouri.— J. M. Houston Grocery Co. *v.* Farmers Bank, 71 Mo. App. 132.

New York.— Shipman *v.* State Bank, 126 N. Y. 318, 27 N. E. 371, 37 N. Y. St. 376, 22 Am. St. Rep. 821, 12 L. R. A. 791; Citizens' Nat. Bank *v.* Importers', etc., Bank, 119 N. Y. 195, 23 N. E. 540, 29 N. Y. St. 1; Corn Exch. Bank *v.* Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655; Thomson *v.* Bank of British North America, 82 N. Y. 1; Ætna Nat. Bank *v.* New York City Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; Morgan *v.* State Bank, 11 N. Y. 404.

Tennessee.— Jackson *v.* McMinnville Nat. Bank, 92 Tenn. 154, 20 S. W. 802, 36 Am. St. Rep. 81, 18 L. R. A. 663; Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. Rep. 900, 7 L. R. A. 93.

Utah.— Brixen *v.* Deseret Nat. Bank, 5 Utah 504, 18 Pac. 43.

United States.— Washington First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. ed. 229; U. S. *v.* National Exch. Bank, 45 Fed. 163.

England.— Robarts *v.* Tucker, 16 Q. B. 560, 15 Jur. 987, 20 L. J. Q. B. 270, 71 E. C. L. 560; Beeman *v.* Duck, 12 L. J. Exch. 198, 11 M. & W. 251; Mead *v.* Young, 4 T. R. 28, 2 Rev. Rep. 314.

44. *New Jersey.*— Buckley *v.* Jersey City Second Nat. Bank, 35 N. J. L. 400, 10 Am. Rep. 249.

New York.— Welsh *v.* German American Bank, 73 N. Y. 424, 29 Am. Rep. 175; Graves *v.* American Exch. Bank, 17 N. Y. 205; Morgan *v.* State Bank, 11 N. Y. 404; Coggill *v.* American Exch. Bank, 1 N. Y. 113, 49 Am. Dec. 310; Johnson *v.* Hoboken First Nat. Bank, 6 Hun (N. Y.) 124; Salomon *v.* State Bank, 28 Misc. (N. Y.) 324, 59 N. Y. Suppl. 407; Talbot *v.* Rochester Bank, 1 Hill (N. Y.) 295; Canal Bank *v.* Albany Bank, 1 Hill (N. Y.) 287.

Ohio.— Shaffer *v.* McKee, 19 Ohio St. 526.

Tennessee.— Farmer *v.* Nashville Fourth Nat. Bank, 100 Tenn. 187, 47 S. W. 234; Chism *v.* Memphis First Nat. Bank, 96 Tenn. 641, 36 S. W. 387, 54 Am. St. Rep. 863, 32 L. R. A. 778; Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. Rep. 900, 7 L. R. A. 93.

England.— Bobbett *v.* Pinkett, 1 Ex. D. 368, 45 L. J. Exch. 555, 34 L. T. Rep. N. S. 851, 24 Wkly. Rep. 711.

Public draft.— If a draft is drawn by one government agent on another and the payee's name is afterward forged and the money is paid to the wrong person, the rightful payee can demand his money of the drawee. Kimbro *v.* Washington First Nat. Bank, 1 MacArthur (D. C.) 415. A government officer gave to B's attorney a draft on a bank payable to B. The attorney forged B's indorsement and the drawee bank paid the draft to another bank which had cashed it. The government did not discover the forgery for three years, yet recovered the amount. U. S. *v.* National Bank of Republic, 2 Mackey (D. C.) 289.

Indorsement of fictitious indorsee's name.— The indorsement of a bank-draft by the payee to the order of a fictitious person, supposing him to be a real one, is not in law an indorsement to bearer; and the indorsement of the fictitious indorsee's name by a third person without authority is a forgery and does not protect the bank in paying the draft. Chism *v.* Memphis First Nat. Bank, 96 Tenn. 641, 36 S. W. 387, 54 Am. St. Rep. 863, 32 L. R. A. 778.

Procedure to collect on forged draft.— After a bank-draft which had been paid to one who held it under a forged indorsement was returned to the drawer, he redelivered it to the payee who demanded payment which was refused. Thereupon the drawer paid the draft after protest and had a right of action against the drawee for its refusal of payment. Citizens' Nat. Bank *v.* Importers', etc., Bank, 119 N. Y. 195, 23 N. E. 540, 29 N. Y. St. 1.

45. Indiana Nat. Bank *v.* Holtsclaw, 98 Ind. 85; Graves *v.* American Exch. Bank, 17

(3) As Against Presenter — (a) Where Presenter Acting For Himself. If the presenter owned the paper at the time of its payment, the money must be refunded on discovery of the forgery, provided his condition has not in the meantime changed so as to render a repayment unjust.[46]

(b) Where Acting as Agent For Another — aa. *Disclosed Agency.* Where it appears from the indorsement that the presenter is acting merely as an agent for collection, he cannot be required to refund, provided he has paid over the amount to his principal before notice of the mistake.[47] If the payment merely consists in crediting the principal for the money, and the money is really in the agent's possession, he must refund; but if, on the other hand, mutual accounts exist between the principal and agent, and the crediting operates as a genuine transfer of the money, this is regarded as payment and frees the agent from liability.[48]

bb. *Undisclosed Agency.* But where the agency of the presenter is undisclosed, and the paper is indorsed without qualification, he stands as to the paying bank in the relation of principal. His indorsement is a warranty to every subsequent holder in good faith that the instrument itself and all the signatures antecedent to his own are genuine; and when any of these are forgeries he is liable on his warranty without presentation or notice of non-payment by the holder.[49]

(B) *Rights of Successive Indorsers.* When several successive indorsers have advanced money on paper payable to order, and neither, it finally appears, had a title because the first indorsement was a forgery, each may recover from his immediate indorser.[50]

N. Y. 205; Mead *v.* Young, 4 T. R. 28, 2 Rev. Rep. 314.

46. Birmingham Nat. Bank *v.* Bradley, 103 Ala. 109, 15 So. 440, 49 Am. St. Rep. 17; Star F. Ins. Co. *v.* New Hampshire Nat. Bank, 60 N. H. 442; National Park Bank *v.* Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 22 N. Y. St. 160, 11 Am. St. Rep. 612; White *v.* Continental Nat. Bank, 64 N. Y. 316, 21 Am. Rep. 612; National Bank of Commerce *v.* National Mechanics' Banking Assoc., 55 N. Y. 211, 14 Am. Rep. 232.

47. National Park Bank *v.* Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 22 N. Y. St. 160, 11 Am. St. Rep. 612; Herrick *v.* Gallagher, 60 Barb. (N. Y.) 566; Mowatt *v.* McClelan, 1 Wend. (N. Y.) 173; La Farge *v.* Kneeland, 7 Cow. (N. Y.) 456; Commercial Nat. Bank *v.* Armstrong, 148 U. S. 50, 13 S. Ct. 533, 37 L. ed. 363; White *v.* Miners' Nat. Bank, 102 U. S. 658, 26 L. ed. 250; Sweeney *v.* Easter, 1 Wall. (U. S.) 166, 17 L. ed. 681; U. S. *v.* American Exch. Nat. Bank, 70 Fed. 232; Wells *v.* U. S., 45 Fed. 337.

If he has not paid over the money to his principal then he should return it to the paying bank. Birmingham Nat. Bank *v.* Bradley, 103 Ala. 109, 15 So. 440, 49 Am. St. Rep. 17; Allen *v.* New York Fourth Nat. Bank, 59 N. Y. 12.

48. National Park Bank *v.* Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 22 N. Y. St. 160, 11 Am. St. Rep. 612.

49. *Alabama.*— Birmingham Nat. Bank *v.* Bradley, 103 Ala. 109, 15 So. 440, 49 Am. St. Rep. 17.

Illinois.— Chicago First Nat. Bank *v.* Northwestern Nat. Bank, 40 Ill. App. 640.

Maryland.— Condon *v.* Pearce, 43 Md. 83.

Massachusetts.— Carpenter *v.* Northborough Nat. Bank, 123 Mass. 66.

Minnesota.— Crosby *v.* Wright, 70 Minn. 251, 73 N. W. 162; Brown *v.* Ames, 59 Minn. 476, 61 N. W. 448.

New Hampshire.— Star F. Ins. Co. *v.* New Hampshire Nat. Bank, 60 N. H. 442.

New York.— National Park Bank *v.* Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 22 N. Y. St. 160, 11 Am. St. Rep. 612; Susquehanna Valley Bank *v.* Loomis, 85 N. Y. 207, 39 Am. Rep. 652; White *v.* Continental Nat. Bank, 64 N. Y. 316, 21 Am. Rep. 612; Turnbull *v.* Bowyer, 40 N. Y. 456, 100 Am. Dec. 523; Erwin *v.* Downs, 15 N. Y. 575; Canal Bank *v.* Albany Bank, 1 Hill (N. Y.) 287.

England.— Vagliano *v.* Bank of England, 22 Q. B. D. 103, 53 J. P. 564, 58 L. J. Q. B. 357, 61 L. T. Rep. N. S. 419, 37 Wkly. Rep. 640; Critchlow *v.* Parry, 2 Campb. 182; Lambert *v.* Oakes, 1 Ld. Raym. 443; Lambert *v.* Pack, 1 Salk. 127.

Must disclose principal's name.— A person who is selling commercial paper impliedly guarantees that the signatures are genuine, and if he is acting as agent the name of his principal must be disclosed to relieve him from liability. Brown *v.* Ames, 59 Minn. 476, 61 N. W. 448.

50. *Georgia.*—Atlanta Nat. Bank *v.* Burke, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96.

Louisiana.— Levy *v.* Bank of America, 24 La. Ann. 220, 13 Am. Rep. 124; Vanbibber *v.* State Bank, 14 La. Ann. 481, 74 Am. Dec. 442.

Minnesota.— Lennon *v.* Brainard, 36 Minn. 330, 31 N. W. 172.

Nebraska.— Orleans First Nat. Bank *v.* Alma State Bank, 22 Nebr. 769, 36 N. W. 289, 3 Am. St. Rep. 294.

New Hampshire.— Star F. Ins. Co. *v.* New Hampshire Nat. Bank, 60 N. H. 442.

New Jersey.— Buckley *v.* Jersey City Sec-

c. Payment of Lost or Stolen Check. A *bona fide* holder of commercial paper, transferable by delivery, acquires a good title even from a thief or finder. A bank therefore is sheltered by the law when paying such paper without notice.[51]

d. Application of Deposit to Depositor's Debts — (I) *Debts Due the Bank* — (A) *Right of Bank to Apply* — (1) In General. Where at the maturity[52] of a debt due the bank from a depositor the latter's deposit is sufficient to meet the obligation,[53] and it has not been specifically appropriated by him to be held for a different purpose,[54] the bank has a right to apply such deposit to the payment of the debt.[55] In order for the bank to have this right the same mutuality

ond Nat. Bank, 35 N. J. L. 400, 10 Am. Rep. 249.

New York.— Citizens' Nat. Bank *v.* Importers', etc., Bank, 119 N. Y. 195, 23 N. E. 540, 29 N. Y. St. 1; Thomson *v.* Bank of British North America, 82 N. Y. 1; Turnbull *v.* Bowyer, 40 N. Y. 456, 100 Am. Dec. 523; Morgan *v.* State Bank, 11 N. Y. 404; Coggill *v.* American Exch. Bank, 1 N. Y. 113, 49 Am. Dec. 310; Johnson *v.* Hoboken First Nat. Bank, 6 Hun (N. Y.) 124; Canal Bank *v.* Albany Bank, 1 Hill (N. Y.) 287.

Ohio.— Dodge *v.* National Exch. Bank, 20 Ohio St. 234, 5 Am. Rep. 648, 30 Ohio St. 1; Shaffer *v.* McKee, 19 Ohio St. 526.

Tennessee.— Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. Rep. 900, 7 L. R. A. 93.

United States.— Leather Manufacturers Nat. Bank *v.* Merchants' Nat. Bank, 128 U. S. 26, 9 S. Ct. 3, 32 L. ed. 342.

Drawer not liable to holder under forged indorsement.— The drawer is not liable to any one claiming through a forged indorsement (Palm *v.* Watt, 7 Hun (N. Y.) 317), and if it be obtained from him by fraud he is not liable to an innocent indorser holding under a forged indorsement of the payee's name (Rowe *v.* Putnam, 131 Mass. 281; Carrier *v.* Sears, 4 Allen (Mass.) 336, 81 Am. Dec. 707; Peaslee *v.* Robbins, 3 Metc. (Mass.) 164; Dana *v.* Underwood, 19 Pick. (Mass.) 99; Boardman *v.* Gore, 15 Mass. 331; Rogers *v.* Ware, 2 Nebr. 29 [containing review of many cases]; Foster *v.* Shattuck, 2 N. H. 446).

51. Grant *v.* Vaughan, 3 Burr. 1516.

Check payable to drawer and indorsed in blank.— If a check is made payable to the drawer without the words "order" or "bearer" and indorsed in blank and stolen and paid by the bank, the bank is protected. Bowden *v.* Cincinnati Third Nat. Bank, 8 Ohio Dec. (Reprint) 394, 7 Cinc. L. Bul. 283.

52. **As to immatured debts** see *infra*, II, E, 10, c, (I), (A), (3).

53. **Where the deposit is insufficient** there is no obligation upon the bank to apply it to the indebtedness (see *infra*, II, E, 10, c, (I), (B)), but it may do so (Jones *v.* Montreal Bank, 29 U. C. Q. B. 448) and may apply deposits subsequently made (Muench *v.* Valley Nat. Bank, 11 Mo. App. 144).

54. **As to specifically appropriated deposits** see *infra*, II, E, 10, c, (I), (A), (2).

55. *Alabama.*— Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567.

Arkansas.— Cockrill *v.* Joyce, 62 Ark. 216, 35 S. W. 221; Merchants, etc., Bank *v.* Meyer, 56 Ark. 499, 20 S. W. 406; Dawson *v.* Real Estate Bank, 5 Ark. 283.

Illinois.— Chicago Fourth Nat. Bank *v.* Grand Rapids City Nat. Bank, 68 Ill. 398; Russell *v.* Hadduck, 8 Ill. 233, 44 Am. Dec. 693; Ft. Dearborn Nat. Bank *v.* Blumenzweig, 46 Ill. App. 297; Hayden *v.* Alton Nat. Bank, 29 Ill. App. 458; Home Nat. Bank *v.* Newton, 8 Ill. App. 563.

Indiana.— Lamb *v.* Morris, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111. And see Lafayette Second Nat. Bank *v.* Hill, 76 Ind. 223, 40 Am. Rep. 239.

Kansas.— Citizens' Bank *v.* Bowen, 21 Kan. 354.

Kentucky.— Mt. Sterling Nat. Bank *v.* Green, 99 Ky. 262, 18 Ky. L. Rep. 178, 35 S. W. 911, 32 L. R. A. 568.

Maryland.— Miller *v.* Farmers', etc., Bank, 30 Md. 392; Baltimore, etc., R. Co. *v.* Wheeler, 18 Md. 372.

Massachusetts.— Clark *v.* Northampton Nat. Bank, 160 Mass. 26, 25 N. E. 108; Wood *v.* Boylston Nat. Bank, 129 Mass. 358, 37 Am. Rep. 366; National Mahaiwe Bank *v.* Peck, 127 Mass. 298, 34 Am. Rep. 368; Neponset Bank *v.* Leland, 5 Metc. (Mass.) 259.

Missouri.— Ehlermann *v.* St. Louis Nat. Bank, 14 Mo. App. 591; Muench *v.* Valley Nat. Bank, 11 Mo. App. 144.

New York.— Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145; Grant *v.* Taylor, 35 N. Y. Super. Ct. 338; Commercial Bank *v.* Hughes, 17 Wend. (N. Y.) 94. See also Lawrence *v.* Bank of Republic, 3 Rob. (N. Y.) 142.

North Carolina.— State Bank *v.* Armstrong, 15 N. C. 519.

Ohio.— Marysville Bank *v.* Windisch-Muhlhauser Brewing Co., 50 Ohio St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660; Hakman *v.* Schaaf, 8 Ohio Dec. (Reprint) 127, 5 Cinc. L. Bul. 851.

Pennsylvania.— Lock Haven First Nat. Bank *v.* Peltz, 176 Pa. St. 513, 35 Atl. 218, 53 Am. St. Rep. 686, 36 L. R. A. 832; Mechanics', etc., Bank *v.* Seitz, 150 Pa. St. 632, 24 Atl. 356, 30 Am. St. Rep. 853; German Nat. Bank *v.* Foreman, 138 Pa. St. 474, 21 Atl. 20, 21 Am. St. Rep. 908; Commercial Nat. Bank *v.* Henninger, 105 Pa. St. 496.

Wisconsin.— Slack *v.* Northwestern Nat.

must exist between the parties as is required in other cases of set-off,[56] and the deposit must belong to the person who is indebted to the bank.[57] Thus no portion of a trust fund can be divested to pay the trustee's individual debt to the bank;[58] and the bank ordinarily gains no better title thereto by his keeping the

Bank, 103 Wis. 57, 79 N. W. 51, 74 Am. St. Rep. 841; Johnston *v.* Humphrey, 91 Wis. 76, 64 N. W. 317, 51 Am. St. Rep. 873.

United States.— Metropolis Bank *v.* New England Bank, 1 How. (U. S.) 234, 11 L. ed. 115; Schuler *v.* Laclede Bank, 27 Fed. 424; Kelly *v.* Phelan, 5 Dill. (U. S.) 228, 14 Fed. Cas. No. 7,673; Blair *v.* Allen, 3 Dill. (U. S.) 101, 3 Fed. Cas. No. 1,483.

England.— London Chartered Bank *v.* White, L. R. 4 App. 413, 48 L. J. C. P. 75; *In re* Bowes, 33 Ch. D. 586, 56 L. J. Ch. 143, 55 L. T. Rep. N. S. 260, 35 Wkly. Rep. 166; Brandao *v.* Barnett, 12 Cl. & F. 787, 8 Eng. Reprint 1622 [*reversing* 6 M. & G. 630, 46 E. C. L. 630, which *reversed* 1 M. & G. 908, 39 E. C. L. 1091]; Scott *v.* Franklin, 15 East 428; Jourdaine *v.* Lefevre, 1 Esp. 66; *Ex p.* Pease, 1 Rose 232, 19 Ves. Jr. 25; Bolland *v.* Bygrave, R. & M. 271; Davis *v.* Bowsher, 5 T. R. 488, 2 Rev. Rep. 650.

Canada.— Jones *v.* Montreal Bank, 29 U. C. Q. B. 448.

Contra, in Louisiana, where a bank has no right, without an order from the depositor, to retain out of his deposit an amount sufficient to meet an indebtedness by him to the bank. Gordon *v.* Müchler, 34 La. Ann. 604; Hancock *v.* Citizens' Bank, 32 La. Ann. 590; Murdock *v.* Citizens' Bank, 23 La. Ann. 113; Morgan *v.* Lathrop, 12 La. Ann. 257; Bogert *v.* Egerton, 11 La. Ann. 73; Breed *v.* Purvis, 7 La. Ann. 53; Bloodworth *v.* Jacobs, 2 La. Ann. 24. *Contra,* State Bank *v.* Fowler, 10 Rob. (La.) 196.

Check presented after maturity of debt.— As against a check-holder who receives his check before but presents it after the maturity of the debt, the bank can retain the deposit, although nothing be left with which to pay the check. Ft. Dearborn Nat. Bank *v.* Blumenzweig, 46 Ill. App. 297; Schuler *v.* Laclede Bank, 27 Fed. 424, where the check was presented on the same day on which the note fell due.

Where the depositor goes into bankruptcy the bank may retain his deposit in satisfaction of any debt due it from the depositor. *In re* Meyer, 107 Fed. 86; *In re* Farnsworth, 5 Biss. (U. S.) 223, 8 Fed. Cas. No. 4,673, 14 Nat. Bankr. Reg. 148; *Ex p.* Howard Nat. Bank, 2 Lowell (U. S.) 487, 12 Fed. Cas. No. 6,764, 16 Nat. Bankr. Reg. 420; Alsager *v.* Currie, 13 L. J. Exch. 203, 12 M. & W. 751. But see *In re* Warner, 29 Fed. Cas. No. 17,177, 5 Nat. Bankr. Reg. 414. See, generally, BANKRUPTCY.

56. Note executed by depositor and others. — A bank has no right to appropriate a deposit to the payment of a joint and several note executed to the bank by the depositor and others. Dawson *v.* Real Estate Bank, 5 Ark. 283.

Partnership debts.— A bank cannot charge a debt of an individual partner against the firm's account without the consent of the other partners. Coote *v.* U. S. Bank, 3 Cranch C. C. (U. S.) 95, 6 Fed. Cas. No. 3,204. Nor can it appropriate the deposit of an individual partner for a debt due it from the firm. Watts *v.* Christie, 11 Beav. 546, 13 Jur. 244, 845, 18 L. J. Ch. 173. Under the Georgia code, however, such right exists. Owsley *v.* Cumberland Bank, (Ky. 1902) 66 S. W. 33.

Deposit with new banking firm.— Where before a note held by a banking firm became due one of the partners retired, it was held that the new firm had no right to apply to such note money afterward deposited with them by the maker. Dawson *v.* Wilson, 55 Ind. 216.

57. Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145.

Deposit in another's name.—The bank may set off a debt against a deposit made by an agent of the debtor (Hayden *v.* Alton Nat. Bank, 29 Ill. App. 458); or a deposit made by the debtor in his wife's name to protect it from his creditors (Citizens' Bank *v.* Bowen, 21 Kan. 354).

Deposit by agent — Right to set off agent's debt.— A deposit was kept in a bank in the name of A but really belonged to B, the bank supposing it to belong to A. The bank held an overdue note against A, taken before the account was opened. It was held that the bank had no right to apply the deposit to the payment of the note without the consent of B, unless it had been misled by B's conduct, and believing the deposit account to be A's had carried the note and suffered it to remain uncollected, relying upon the deposit for its payment, and in consequence of such reliance had been prejudiced. Douglas *v.* Hastings First Nat. Bank, 17 Minn. 35.

Deposit transferred to debtor's executors. — Where at the death of a depositor his deposit was transferred to the credit of his executors, it was held that the bank could not set off a debt due to itself from the depositor which matured after such transfer. Tobey *v.* Manufacturers Nat. Bank, 9 R. I. 236.

No right against non-depositor.— A bank cannot set off a debt it may have against the holder of a check when presenting it for payment. As it is not payment but a means for procuring money the holder on such occasions is the drawer's agent. Brown *v.* Leckie, 43 Ill. 497.

58. *Georgia.*— Munnerlyn *v.* Augusta Sav. Bank, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159, 94 Ga. 356, 21 S. E. 575.

Indiana.—Bundy *v.* Monticello, 84 Ind. 119.

Iowa.— Armstrong *v.* Winterset Nat. Bank, 53 Iowa 752, 5 N. W. 742.

Massachusetts.— Merrill *v.* Norfolk Bank, 19 Pick. (Mass.) 32.

Michigan.— Neely *v.* Rood, 54 Mich. 134,

fund in his individual name.[59] The only cases in which it can retain such money to pay an indebtedness due to it from him are those in which it did not know, and had no reason to suppose, that the money thus taken possessed this character.[60] Even its right to do this has been strongly denied.[61]

(2) Where Deposit Made For Particular Purpose. The general lien of a bank upon a customer's deposits will not be recognized where the circumstances are inconsistent therewith.[62] Thus where securities are lodged with the bank for a particular purpose — as where they are pledged as collateral to cover a particular loan or debt — they cannot be retained by the bank for the general balance or for the payment of other claims.[63]

19 N. W. 920, 52 Am. Rep. 802; Burtnett *v.* Corunna First Nat. Bank, 38 Mich. 630.

Minnesota.— St. Paul Third Nat. Bank *v.* Stillwater Gas Co., 36 Minn. 75, 30 N. W. 440.

Mississippi.— Wood *v.* Stafford, 50 Miss. 370.

Missouri.— Clark *v.* Harrisonville First Nat. Bank, 57 Mo. App. 277; Johnson *v.* Payne, etc., Bank, 56 Mo. App. 257.

New York.— Van Alen *v.* American Nat. Bank, 52 N. Y. 1.

North Carolina.—Greensboro Bank *v.* Clapp, 76 N. C. 482; Whitley *v.* Foy, 59 N. C. 34, 78 Am. Dec. 236.

Pennsylvania.— Bethlehem First Nat. Bank *v.* Peisert, 2 Pennyp. (Pa.) 277.

Texas.— Commercial, etc., Bank *v.* Jones, 18 Tex. 811.

Virginia.—Overseers of Poor *v.* State Bank, 2 Gratt. (Va.) 544, 44 Am. Dec. 399.

United States.— Union Stock Yards Nat. Bank *v.* Gillespie, 137 U. S. 411, 11 S. Ct. 118, 34 L. ed. 724; Manhattan Bank *v.* Walker, 130 U. S. 267, 9 S. Ct. 519, 32 L. ed. 959; Baltimore Cent. Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693; Cook *v.* Tullis, 18 Wall. (U. S.) 332, 21 L. ed. 933; Veil *v.* Mitchel, 4 Wash. (U. S.) 105, 28 Fed. Cas. No. 16,908.

England.— *Ex p.* Kingston, L. R. 6 Ch. 632, 40 L. J. Bankr. 91, 25 L. T. Rep. N. S. 250, 19 Wkly. Rep. 910; Bridgman *v.* Gill, 24 Beav. 302; Pennell *v.* Deffell, 4 De G. M. & G. 372, 18 Jur. 273, 23 L. J. Ch. 115, 1 Wkly. Rep. 499, 53 Eng. Ch. 292; Bodenham *v.* Hoskyns, 2 De G. M. & G. 903, 16 Jur. 721, 21 L. J. Ch. 864, 51 Eng. Ch. 706; Frith *v.* Cartland, 2 H. & M. 417, 11 Jur. N. S. 238, 34 L. J. Ch. 301, 12 L. T. Rep. N. S. 175, 13 Wkly. Rep. 493; Adair *v.* Shaw, 1 Sch. & Lef. 262.

See, generally, Trusts.

Deposit of trust money in individual name. — It is not a conversion for the trustee to deposit trust money in a bank to his credit as agent, although the bank may have knowledge of the trust, and payment by the bank to the trustee on his checks will discharge such a deposit whether the checks be signed with or without the designation of trustee. Munnerlyn *v.* Augusta Sav. Bank, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159.

59. Bethlehem First Nat. Bank *v.* Peisert, 2 Pennyp. (Pa.) 277.

60. Greenfield School Dist. *v.* Greenfield First Nat. Bank, 102 Mass. 174; Hatch *v.* New York City Fourth Nat. Bank, 147 N. Y. 184, 41 N. E. 403, 69 N. Y. St. 534; Stephens *v.* Board of Education, 79 N. Y. 183, 35 Am. Rep. 511; Justh *v.* Commonwealth Nat. Bank, 56 N. Y. 478; Commercial, etc., Bank *v.* Jones, 18 Tex. 811; Overseers of Poor *v.* State Bank, 2 Gratt. (Va.) 544, 44 Am. Dec. 399.

61. Swift *v.* Williams, 68 Md. 236, 11 Atl. 835. In Burtnett *v.* Corunna First Nat. Bank, 38 Mich. 630, it was said that the plea of innocence would not justify such action on the part of the bank, especially when it was done without the authority of the agent or trustee himself.

62. Grant *v.* Taylor, 35 N. Y. Super. Ct. 338. In Davis *v.* Bowsher, 5 T. R. 488, 2 Rev. Rep. 650, Lord Kenyon, said: "By the general law of the land a banker has a general lien upon all the securities in his hands belonging to any particular person for his general balance, unless there be evidence to shew that he received any particular security under special circumstances, which would take it out of the common rule."

63. *Kentucky.*— Masonic Sav. Bank *v.* Bangs, 84 Ky. 135, 4 Am. St. Rep. 197.

Louisiana.— Teutonia Nat. Bank *v.* Loeb, 27 La. Ann. 110.

Massachusetts.— Brown *v.* New Bedford Sav. Inst., 137 Mass. 262; Hathaway *v.* Fall River Nat. Bank, 131 Mass. 14; National Mahaiwe Bank *v.* Peck, 127 Mass. 298, 34 Am. Rep. 368; Neponset Bank *v.* Leland, 5 Metc. (Mass.) 259.

New York.— Wyckoff *v.* Anthony, 90 N. Y. 442; Duncan *v.* Brennan, 83 N. Y. 487; Lane *v.* Bailey, 47 Barb. (N. Y.) 395; Robinson *v.* Frost, 14 Barb. (N. Y.) 536; Grant *v.* Taylor, 35 N. Y. Super. Ct. 338; Wilmering *v.* Hart, Lalor (N. Y.) 305.

Ohio.— Stowe *v.* Hamilton First Nat. Bank, 1 Ohio Cir. Ct. 524.

Pennsylvania.— Lock Haven First Nat. Bank *v.* Peltz, 176 Pa. St. 513, 35 Atl. 218, 53 Am. St. Rep. 686, 36 L. R. A. 832; Liggett Spring, etc., Co.'s Appeal, 111 Pa. St. 291, 2 Atl. 684; Bank of Commerce Appeal, 44 Pa. St. 423.

Texas.— Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85.

United States.—Biebinger *v.* St. Louis Continental Bank, 99 U. S. 143, 25 L. ed. 271; Armstrong *v.* Chemical Nat. Bank, 41 Fed. 234, 6 L. R. A. 226.

England.— Vanderzee *v.* Willis, 3 Bro. Ch.

(3) Where Debt Not Matured — (a) In General. As a general rule a bank cannot apply the deposit to an indebtedness which has not matured.[64]

(b) Insolvency of Depositor. In some jurisdictions, if the depositor become insolvent before the maturity of the debt, the bank may, as against him or his assignee, apply the deposit to the payment of its claim,[65] although the contrary view is maintained in other jurisdictions.[66] But the insolvency of the depositor gives the bank no right to retain the deposit for an immatured debt as against a

21. But see *In re* Williams, 3 Ir. Eq. R. 346, 20 L. T. Rep. N. S. 282, where it was held that a bank had a lien on a title-deed indorsed "lodged to cover overdraft" not only for the overdue bill but for money drawn out by checks.

This rule applies to savings-banks as well as other banking institutions. Brown *v.* New Bedford Sav. Inst., 137 Mass. 262.

Note left for discount.— A bank has no lien on a note left for discount and refused. Petrie *v.* Myers, 54 How. Pr. (N. Y.) 513.

Lien on substituted security.— A deposited a mortgage deed on the property of another as collateral security for his indebtedness for which he substituted a deed of sale after its foreclosure. Having paid all of his indebtedness to the bank, it had no lien on this deed for a new advance. Biebinger *v.* St. Louis Continental Bank, 99 U. S. 143, 25 L. ed. 271.

Bonds deposited to secure advances.— A New York bank authorized a New Orleans bank to draw thereon against "exchange purchases," which were to be sent to the New York bank for collection. Bonds also were deposited to secure the advances. The New Orleans bank also sent drafts of its own drawn on third persons, some of which were protested for non-payment. These drafts were not "exchange purchases," and the New York bank had no lien on the bonds pledged for advances for the payment of them. Reynes *v.* Dumont, 130 U. S. 354, 9 S. Ct. 486, 32 L. ed. 934.

Diversion of payments.— A bank which gives a customer credit to a specified amount, which is to be secured by collections, cannot divert and suspend payments made on other notes until the maturity of such credit. Molsons Bank *v.* Cooper, 26 Ont. App. 571.

64. *Alabama.*— Birmingham Nat. Bank *v.* Mayer, 104 Ala. 634, 16 So. 520.

Illinois.— Commercial Nat. Bank *v.* Proctor, 98 Ill. 558; Chicago Fourth Nat. Bank *v.* Grand Rapids City Nat. Bank, 68 Ill. 398; Merchants' Nat. Bank *v.* Ritzinger, 20 Ill. App. 27.

Indiana.— State *v.* Beach, (Ind. 1896) 43 N. E. 949.

Michigan.— Lockwood *v.* Beckwith, 6 Mich. 168, 72 Am. Dec. 65.

Missouri.— State Sav. Assoc. *v.* Boatmen's Sav. Bank, 11 Mo. App. 292; Zelle *v.* German Sav. Inst., 4 Mo. App. 401.

New York.— Richards *v.* La Tourette, 119 N. Y. 54, 23 N. E. 531, 28 N. Y. St. 609; Newcomb *v.* Almy, 96 N. Y. 308; Jordan *v.* National Shoe, etc., Bank, 74 N. Y. 467, 30 Am. Rep. 319; Martin *v.* Kunzmuller, 37 N. Y. 396, 4 Transcr. App. (N. Y.) 464; Myers *v.* Davis, 22 N. Y. 489; Beckwith *v.* Union Bank, 9 N. Y. 211; Bradley *v.* Angel, 3 N. Y. 475; Heidelbach *v.* National Park Bank, 87 Hun (N. Y.) 117, 33 N. Y. Suppl. 794, 67 N. Y. St. 438; Van Allen *v.* American Nat. Bank, 3 Lans. (N. Y.) 517; Beckwith *v.* Union Bank, 4 Sandf. (N. Y.) 604.

Ohio.— Fuller *v.* Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312.

Pennsylvania.— Jones *v.* Manufacturers' Bank, 10 Wkly. Notes Cas. (Pa.) 102 [*affirmed* in 2 Pennyp. (Pa.) 377].

Wisconsin.— Oatman *v.* Batavian Bank, 77 Wis. 501, 46 N. W. 881, 20 Am. St. Rep. 136.

65. *Georgia.*— Georgia Seed Co. *v.* Talmadge, 96 Ga. 254, 22 S. E. 1001.

Kentucky.— Kentucky Flour Co. *v.* Merchants' Nat. Bank, 90 Ky. 225, 12 Ky. L. Rep. 198, 13 S. W. 910, 9 L. R. A. 108.

Massachusetts.— Demmonn *v.* Boylston Bank, 5 Cush. (Mass.) 194.

Ohio.— Skunk *v.* Merchants Nat. Bank, 9 Ohio Dec. (Reprint) 684, 16 Cinc. L. Bul. 353.

Pennsylvania.— Chipman *v.* Ninth Nat. Bank, 21 Wkly. Notes Cas. (Pa.) 184; Stewart *v.* National Security Bank, 6 Wkly. Notes Cas. (Pa.) 399, 13 Phila. (Pa.) 146, 36 Leg. Int. (Pa.) 26.

Tennessee.— Citizens' Bank *v.* Kendrick, 92 Tenn. 437, 21 S. W. 1070, 36 Am. St. Rep. 96; Nashville Trust Co. *v.* Nashville Fourth Nat. Bank, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710.

Virginia.—Ford *v.* Thornton, 3 Leigh (Va.) 695.

See also Assignments For Benefit of Creditors, 4 Cyc. 220, note 51; Insolvency.

Under the Bankruptcy Act the bank can set off an immatured note against the deposit. *In re* Meyer, 107 Fed. 86; *Ex p.* Howard Nat. Bank, 2 Lowell (U. S.) 487, 12 Fed. Cas. No. 6,764, 16 Nat. Bankr. Reg. 420. And see, generally, Bankruptcy.

Insolvency as ground of set-off of immatured debt, in general, see Recoupment, Set-Off, and Counter-Claim.

Death of depositor before maturity of debt. — If a depositor die the bank cannot retain his deposit to discharge his liability on notes of which he was the indorsee which were discounted for his benefit, but due after his death. Farmers', etc., Bank's Appeal, 48 Pa. St. 57.

66. Kortjohn *v.* Continental Nat. Bank, 63 Mo. App. 166; Beckwith *v.* Union Bank, 9 N. Y. 211; Oatman *v.* Batavian Bank, 77 Wis. 501, 46 N. W. 881, 20 Am. St. Rep. 136. And see Assignments For Benefit of Creditors, 4 Cyc. 220, note 52.

bona fide check-holder who presents his check before the maturity of said debt[67] or as against an attaching creditor of the depositor.[68]

(4) Where Depositor Not Primarily Liable. While the bank is not bound to apply the deposit where the depositor is not primarily liable for the debt,[69] yet where a note has been discounted for an indorser's benefit, his deposit may be applied in payment at the bank's option.[70] But the deposit of a mere guarantor cannot be thus appropriated;[71] and it has been held that such application cannot be made, without the depositor's consent, in payment of a note on which he is liable as surety only.[72]

(B) Duty of Bank to Apply. While there is, in general, no legal obligation upon the bank to exercise its right in this regard, yet it has been held that where the debt is in the shape of a note or bill owned by the bank on which there are indorsers or other parties not primarily liable the bank is bound to apply the deposit for the protection of such parties,[73] provided the depositor is the party primarily liable,[74] and the deposit is sufficient at the time the debt matures[75] and has not been previously appropriated by the depositor to any other use.[76]

67. *Illinois.*— Chicago Fourth Nat. Bank *v.* Grand Rapids City Nat. Bank, 68 Ill. 398; Ft. Dearborn Nat. Bank *v.* Blumenzweig, 46 Ill. App. 297.

Kentucky.— Merchants' Nat. Bank *v.* Robinson, 97 Ky. 552, 17 Ky. L. Rep. 368, 31 S. W. 136, 28 L. R. A. 760.

Missouri.— Zelle *v.* German Sav. Inst., 4 Mo. App. 401.

Nebraska.— Columbia Nat. Bank *v.* German Nat. Bank, 56 Nebr. 803, 77 N. W. 346.

Ohio.— Skunk *v.* Merchants' Nat. Bank, 9 Ohio Dec. (Reprint) 684, 16 Cinc. L. Bul. 353.

Contra, in Georgia.— In Georgia Seed Co. *v.* Talmadge, 96 Ga. 254, 22 S. E. 1001, it was held that the bank might apply the deposit to its immatured claim as against the holder of a check drawn by the depositor but not made specifically payable out of the fund on deposit.

Where check presented after maturity of debt.— As against a check-holder who received his check before, but presented it after, maturity, the bank has a right to apply the deposit where the depositor has in the meanwhile made an assignment for the benefit of creditors. Ft. Dearborn Nat. Bank *v.* Blumenzweig, 46 Ill. App. 297; Schuler *v.* Laclede Bank, 27 Fed. 424.

68. Birmingham Nat. Bank *v.* Mayer, 104 Ala. 634, 16 So. 520; Manufacturers' Nat. Bank *v.* Jones, 2 Pennyp. (Pa.) 377.

69. See *infra*, II, E, 10, d, (I), (B).

Will not bar action against maker.— If a bank which has discounted a note for the payee charge it at maturity to his account in consequence of its non-payment the charge will not bar an action by the bank against the maker. Bank *v.* Ralston, 3 Phila. (Pa.) 328, 16 Leg. Int. (Pa.) 21.

70. Ticonic *v.* Johnson, 21 Me. 426; Bank *v.* Ralston, 3 Phila. (Pa.) 328, 16 Leg. Int. (Pa.) 21. And see Flournay *v.* Jeffersonville First Nat. Bank, 79 Ga. 810, 2 S. E. 547.

71. Lancaster First Nat. Bank *v.* Shreiner, 110 Pa. St. 188, 16 Wkly. Notes Cas. (Pa.) 552, 20 Atl. 718.

72. Lamb *v.* Morris, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111.

73. Dawson *v.* Real Estate Bank, 5 Ark. 283; Lock Haven First Nat. Bank *v.* Peltz, 176 Pa. St. 513, 35 Atl. 218, 53 Am. St. Rep. 686, 36 L. R. A. 832; Mechanics, etc., Bank *v.* Seitz, 150 Pa. St. 632, 24 Atl. 356, 30 Am. St. Rep. 853; German Nat. Bank *v.* Foreman, 138 Pa. St. 474, 21 Atl. 20, 21 Am. St. Rep. 908; Commercial Nat. Bank *v.* Henninger, 105 Pa. St. 496. But see Lafayette Second Nat. Bank *v.* Hill, 76 Ind. 223, 40 Am. Rep. 239.

74. **Where the depositor is not primarily liable** there is no obligation upon the bank to apply the deposit to the payment of the bill or note. Ticonic *v.* Johnson, 21 Me. 426; Citizens' Bank *v.* Carson, 32 Mo. 191; Lock Haven First Nat. Bank *v.* Peltz, 176 Pa. St. 513, 35 Atl. 218, 53 Am. St. Rep. 686, 36 L. R. A. 832; Mechanics, etc., Bank *v.* Seitz, 150 Pa. St. 632, 24 Atl. 356, 30 Am. St. Rep. 853; Lancaster First Nat. Bank *v.* Shreiner, 110 Pa. St. 188, 16 Wkly. Notes Cas. (Pa.) 552, 20 Atl. 718; Bank *v.* Ralston, 3 Phila. (Pa.) 328, 16 Leg. Int. (Pa.) 21.

75. **If the deposit be insufficient** to discharge the indebtedness at the time it matures, the bank is under no obligation to make such application, and a failure to do so, or to apply a subsequent deposit, will not discharge the parties secondarily liable. Voss *v.* German American Bank, 83 Ill. 599, 25 Am. Rep. 415; Martin *v.* Mechanics Bank, 6 Harr. & J. (Md.) 235; Newburgh Nat. Bank *v.* Smith, 66 N. Y. 271, 23 Am. Rep. 48; Lock Haven First Nat. Bank *v.* Peltz, 176 Pa. St. 513, 35 Atl. 218, 53 Am. St. Rep. 686, 36 L. R. A. 832; Lancaster First Nat. Bank *v.* Shreiner, 110 Pa. St. 188, 16 Wkly. Notes Cas. (Pa.) 552, 20 Atl. 718; Peoples' Bank *v.* Legrand, 103 Pa. St. 309, 49 Am. Rep. 126. *Contra*, McDowell *v.* Wilmington, etc., Bank, 1 Harr. (Del.) 369, wherein it was held that a failure of the bank to apply a deposit subsequently made discharged an indorser.

76. **If a previous appropriation has been made** by the depositor the bank has no right to apply the deposit in payment of the debt. See *supra*, II, E, 10, d, (I), (A), (2).

(II) *Notes or Acceptances Payable at Bank.* In some jurisdictions it is held that making a note or acceptance payable at a bank is equivalent to a request to the bank to pay it out of any general funds of the maker or accepter on deposit in such bank.[77] But in others it is held that the bank has no right to make such appropriation of the deposit in the absence of an order from the depositor or a custom binding upon him.[78]

e. Attachment of Deposit — (I) *In General.* As a deposit is a debt due from the bank to the depositor, it may be attached by the depositor's creditors like any other property belonging to him,[79] and when so attached it becomes the bank's duty to retain the deposit until the court has made a proper order concerning its disposition.[80] An attaching creditor, however, gains no greater rights over the depositor's money than the latter himself had.[81]

77. Bedford Bank *v.* Acoam, 125 Ind. 584, 25 N. E. 713, 21 Am. St. Rep. 258, 9 L. R. A. 560 [*distinguishing* Scott *v.* Shirk, 60 Ind. 160]; Indig *v.* National City Bank, 80 N. Y. 100; Ætna Nat. Bank *v.* New York City Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; Griffin *v.* Rice, 1 Hilt. (N. Y.) 184; Mandeville *v.* Georgetown Union Bank, 9 Cranch (U. S.) 9, 3 L. ed. 639; Robarts *v.* Tucker, 16 Q. B. 560, 15 Jur. 987, 20 L. J. Q. B. 270, 71 E. C. L. 560; Keymer *v.* Laurie, 13 Jur. 426, 18 L. J. Q. B. 218.

As to what constitutes payment of a bill or note, in general, see Commercial Paper.

Where the deposit is insufficient the bank is under no obligation to apply it to payment of the note, but may do so. Keymer *v.* Laurie, 13 Jur. 426, 18 L. J. Q. B. 218.

Deposit made after maturity of note.— Where, at the maturity of a note payable at a bank, the maker has no deposit in the bank, there is no duty upon the bank to appropriate to the part payment of such note a deposit made after its maturity. Merchants, etc., Bank *v.* Meyer, 56 Ark. 499, 20 S. W. 406.

78. Ridgely Nat. Bank *v.* Patton, 109 Ill. 479; Wood *v.* Merchants' Sav., etc., Co., 41 Ill. 267; National Exch. Bank *v.* National Bank of North America, 132 Mass. 147; Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 10 Am. St. Rep. 669, 3 L. R. A. 273. And see Montreal Bank *v.* Ingerson, 105 Iowa 349, 75 N. W. 351 [*overruling* Lazier *v.* Horan, 55 Iowa 75, 7 N. W. 457, 39 Am. Rep. 167].

A custom to authorize payment by the bank without any order from the depositor must be generally uniform and certain, and known to both parties. Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 10 Am. St. Rep. 669, 3 L. R. A. 273.

79. Stair *v.* York Nat. Bank, 55 Pa. St. 364, 93 Am. Dec. 759; Smuller *v.* Union Canal Co., 37 Pa. St. 68; U. S. Bank *v.* Macalester, 9 Pa. St. 475; Frazier *v.* Erie Bank, 8 Watts & S. (Pa.) 18; Harrisburg Bank *v.* Tyler, 3 Watts & S. (Pa.) 373. See, generally, Garnishment.

Deposit by agent.— When a deposit is made by one as "agent," it is presumed to belong to the principal, and can be taken only for the principal's debt. Northern Liberties Bank *v.* Jones, 42 Pa. St. 536. In like manner if the principal's deposit is in the agent's own name, with or without the principal's knowledge or consent, it cannot be taken for the agent's debt. Greenleaf *v.* Mumford, 50 Barb. (N. Y.) 543; Farmers', etc., Nat. Bank *v.* King, 57 Pa. St. 202, 98 Am. Dec. 215.

Certified check.— If the drawer has his check certified, this does not affect in any way the ownership of his deposit and preserve it from attachment. Bills *v.* National Park Bank, 89 N. Y. 343, 98 N. Y. 87.

The amount of a certified check which has been deposited can be held by an attaching creditor. National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50.

A check deposited for collection is not liable to attachment while it remains uncollected. National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50.

Money borrowed by a depositor and credited to his account can be attached like any other. Fuller *v.* Randall, 1 Gray (Mass.) 608.

Duration of lien.— The lien continues from the time of service until some legal disposition (Ferguson *v.* Kansas City Bank, 25 Kan. 333; Crumb *v.* Treiber, 7 Ohio Dec. (Reprint) 645, 4 Cinc. L. Bul. 616, 4 Ohio Dec. (Reprint) 492, 2 Clev. L. Rep. 257); and by no act of the debtor, or of the garnishee, or of both, can the lien be defeated (National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50; Bullard *v.* Randall, 1 Gray (Mass.) 605, 61 Am. Dec. 433; Duncan *v.* Berlin, 60 N. Y. 151).

Liability of bank to depositor.— A bank received money to sell which it sold with other money of its own, receiving a check which was attached by its own creditors. The bank was nevertheless liable to the depositor for the amount, otherwise he would have been obliged to pursue the attaching creditor. Shears *v.* Ohio L. Ins., etc., Co., 3 Ohio Dec. (Reprint) 338, L. & Bank Bul. 338.

80. Gibson *v.* National Park Bank, 98 N. Y. 87; Lawrence *v.* Bank of Republic, 35 N. Y. 320; Greenleaf *v.* Mumford, 50 Barb. (N. Y.) 543; Kelly *v.* Lane, 42 Barb. (N. Y.) 594; Mechanics', etc., Bank *v.* Dakin, 28 How. Pr. (N. Y.) 502.

81. Naser *v.* New York City First Nat. Bank, 36 Hun (N. Y.) 343; Farmers', etc.,

(II) *Effect as to Check-Holder.* Where a check is not regarded as an assignment the bank should not pay any check given previously to the attachment but presented subsequently;[82] but in jurisdictions where the giving of a check works an assignment of the deposit *pro tanto* the amount thus transferred cannot be attached by a creditor of the maker,[83] and consequently a check given before the attachment of such deposit though not presented until afterward should be paid to the holder.[84]

11. Transfer of Notes. When a charter or statute contains no restriction on the power of a bank to indorse and transfer negotiable instruments the law presumes it has the power.[85] Such a right has been specifically declared on many occasions[86] and denied on others.[87] The authority to make the transfer must be governed by the law existing at the time of making the instrument.[88] Lastly, it is held that though a bank has no power to transfer an immatured note it can transfer it after maturity.[89]

12. Reports[90] — a. In General. Where reports are required from banking concerns the law is satisfied with a substantial compliance with statutory requirements;[91] but when the report does not contain the information required by law the proper official can demand further particulars.[92]

b. Effect of Failure to Make. If a bank fails to comply with a law declaring that if it does not make reports of a definite kind it cannot sue in the courts of

Nat. Bank *v.* King, 57 Pa. St. 202, 98 Am. Dec. 215; Jackson *v.* U. S. Bank, 10 Pa. St. 61.

82. *Georgia.*—Mayer *v.* Chattahoochee Nat. Bank, 51 Ga. 325.

Massachusetts.— Terry *v.* Sisson, 125 Mass. 560.

New York.—Gibson *v.* National Park Bank, 98 N. Y. 87; Duncan *v.* Berlin, 60 N. Y. 151.

Pennsylvania.—Kuhn *v.* Warren Sav. Bank, (Pa. 1887) 11 Atl. 440; Harry *v.* Wood, 2 Miles (Pa.) 327.

Rhode Island.— Nichols *v.* Schofield, 2 R. I. 23.

Tennessee.— Imboden *v.* Perrie, 13 Lea (Tenn.) 504.

Washington.— Commercial Bank *v.* Chilberg, 14 Wash. 247, 44 Pac. 264, 53 Am. St. Rep. 873.

Where balance would exceed judgment.— A bank is not bound to honor a customer's check after a garnishee order is served thereon, even though the balance exceed the judgment. Rogers *v.* Whiteley, [1892] A. C. 118, 61 L. J. Q. B. 512, 66 L. T. Rep. N. S. 303.

Immatured debt due bank.— After the deposit has been attached the bank cannot apply it on an immatured note due itself. Birmingham Nat. Bank *v.* Mayer, 104 Ala. 634, 16 So. 520; Manufacturers' Nat. Bank *v.* Jones, 2 Pennyp. (Pa.) 377. For application of deposit to depositor's debts, generally, see *supra*, II, E, 10, c.

83. Rosenbaum *v.* Lytle, 8 Ky. L. Rep. 607; Deatheridge *v.* Crumbaugh, 8 Ky. L. Rep. 592; Pease *v.* Landauer, 63 Wis. 20, 22 N. W. 847, 53 Am. Rep. 247. See also Mayer *v.* Chattahoochee Nat. Bank, 51 Ga. 325.

84. National Bank of America *v.* Indiana Banking Co., 114 Ill. 483; Reeve *v.* Smith, 113 Ill. 47.

85. Farmers', etc., Bank *v.* Parker, 37 N. Y. 148, 4 Transcr. App. (N. Y.) 302; Robb *v.* Ross County Bank, 41 Barb. (N. Y.) 586. *Contra*, Payne *v.* Baldwin, 3 Sm. & M. (Miss.) 661; Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

86. Myers *v.* De Lee, 1 Rob. (La.) 516; Crocket *v.* Young, 1 Sm. & M. (Miss.) 241; Mississippi Planters' Bank *v.* Sharp, 6 How. (U. S.) 301, 12 L. ed. 447. See also Payne *v.* Baldwin, 3 Sm. & M. (Miss.) 661; Marvine *v.* Hymers, 12 N. Y. 223.

87. McIntyre *v.* Ingraham, 35 Miss. 25; Payne *v.* Baldwin, 3 Sm. & M. (Miss.) 661.

88. Mississippi Planters' Bank *v.* Sharp, 6 How. (U. S.) 301, 12 L. ed. 447.

89. Wade *v.* Thrasher, 10 Sm. & M. (Miss.) 358; Marvine *v.* Hymers, 12 N. Y. 223.

90. Criminal liability of officers for making false returns see *supra*, II, D, 5, b, (II), (C).

91. Bank of British North America *v.* Madison, 99 Cal. 125, 33 Pac. 762; Bank of British North America *v.* Alaska Imp. Co., 97 Cal. 28, 31 Pac. 726.

If the law requires two statements, one of capital stock and the other of assets and liabilities, the two may be put into a single document. Bank of British North America *v.* Alaska Imp. Co., 97 Cal. 28, 31 Pac. 726.

A verification by a resident agent of a foreign corporation will suffice though the law requires a verification by the chief manager who possesses actual knowledge. Bank of British North America *v.* Alaska Imp. Co., 97 Cal. 28, 31 Pac. 726.

92. People *v.* Vail, 6 Abb. N. Cas. (N. Y.) 206, 57 How. Pr. (N. Y.) 81, holding that where the report must contain "the loans and discounts due from the directors" the superintendent of banking may call on a bank to state the largest loan made to any one, and also the aggregate of loans made to or indorsed by the directors.

the state, it is not thereby prohibited from continuing business,[93] and if the law requires returns to be made by a definite time, the withholding of them until a later period is not fatal to the bank's life,[94] although the proper state official to receive them is not bound to accept them after the prescribed time has expired.[95] In some states when banks fail to make reports the stock-holders are declared liable by statute. This liability is of a penal nature and an action against them can only be in the state where the bank is located.[96]

F. Dissolution and Insolvency — 1. Voluntary Dissolution. In some states the law provides for the voluntary dissolution of banks,[97] while in others this cannot be done without legislative assent.[98] Where such dissolution is permissible a bank, notwithstanding its dissolution, can sue in its corporate name to recover its assets;[99] and for the purpose of closing its affairs can appoint a temporary cashier.[1]

2. Expiration of Charter. A bank may be dissolved by the efflux of time or limitation, and when this happens the legislature has no power to revive the rights of its creditors.[2]

3. Forfeiture of Charter — a. Grounds — (i) *In General.* Although a charter provide for a bank's continuance until a fixed period, it may nevertheless be forfeited for a violation,[3] and the state has a legal cause to proceed against a bank when it abandons its charter;[4] when it fails to require subscription for its stock to be paid up as legally required,[5] to keep the requisite amount of specie on hand to redeem its notes,[6] to pay its drafts or other liabilities,[7] or to hold annual

93. Barling *v.* Bank of British North America, 50 Fed. 260, 7 U. S. App. 194, 1 C. C. A. 510. See also Bank of British North America *v.* Madison, 99 Cal. 125, 33 Pac. 762.

94. Bank of British North America *v.* Alaska Imp. Co., 97 Cal. 28, 31 Pac. 726.

95. People *v.* Campbell, 14 Ill. 400.

96. Plymouth First Nat. Bank *v.* Price, 33 Md. 487, 3 Am. Rep. 204; Bank of North America *v.* Rindge, 154 Mass. 203, 27 N. E. 1015, 26 Am. St. Rep. 240, 13 L. R. A. 56; New Haven Horse Nail Co. *v.* Linden Spring Co., 142 Mass. 349, 7 N. E. 773; Halsey *v.* McLean, 12 Allen (Mass.) 438, 90 Am. Dec. 157; Erickson *v.* Nesmith, 15 Gray (Mass.) 221; Derrickson *v.* Smith, 27 N. J. L. 166; Cuykendall *v.* Miles, 10 Fed. 342. *Contra*, Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123.

97. People *v.* Olmsted, 45 Barb. (N. Y.) 644.

98. Mechanics' Bank *v.* Heard, 37 Ga. 401.

99. Commercial Bank *v.* Villavaso, 6 La. Ann. 542; Cooper *v.* Curtis, 30 Me. 488.

1. Cooper *v.* Curtis, 30 Me. 488.

2. State Bank *v.* Duncan, 56 Miss. 166.

Effect on pending suit.— A suit brought against a bank before the expiration of its charter was held not to abate, for its determination is needful to close the bank's affairs (Pomeroy *v.* Indiana State Bank, 1 Wall. (U. S.) 23, 17 L. ed. 500), but by the expiration of the charter of the U. S. Bank all suits abated (U. S. Bank *v.* McLaughlin, 2 Cranch C. C. (U. S.) 20, 2 Fed. Cas. No. 928).

3. Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234.

4. State *v.* Seneca County Bank, 5 Ohio St. 171.

5. People *v.* Leadville City Bank, 7 Colo. 226, 3 Pac. 214; People *v.* National Sav. Bank, 129 Ill. 618, 22 N. E. 288.

6. State *v.* Tombeckbee Bank, 2 Stew. (Ala.) 30; State *v.* Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109; State *v.* Charleston Bank, 2 McMull. (S. C.) 439, 39 Am. Dec. 135. See also Palfrey *v.* Paulding, 7 La. Ann. 363; Com. *v.* Mutual Redemption Bank, 4 Allen (Mass.) 1; People *v.* Pontiac Bank, 12 Mich. 527; Long *v.* Farmers' Bank, 1 Pa. L. J. Rep. 284, holding that a state bank can redeem its notes in those issued by the government as legal tender without exposing its franchise to forfeiture. But see Reynolds *v.* State Bank, 18 Ind. 467.

A mere suspension of specie payment does not work a forfeiture.

Louisiana.— State *v.* New Orleans Gas Light, etc., Co., 2 Rob. (La.) 529; Atchafalaya Bank *v.* Dawson, 13 La. 497.

Mississippi.— Planters' Bank *v.* State, 7 Sm. & M. (Miss.) 163; Commercial Bank *v.* State, 6 Sm. & M. (Miss.) 599.

New York.— Bank Com'rs *v.* James Bank, 9 Paige (N. Y.) 457.

Ohio.— State *v.* Commercial Bank, 10 Ohio 535.

South Carolina.— State *v.* State Bank, 1 Speers (S. C.) 433.

United States.— Circleville Bank *v.* Iglehart, 6 McLean (U. S.) 568, 2 Fed. Cas. No. 860.

See 6 Cent. Dig. tit. "Banks and Banking," § 132.

Where a general law requires a bank to redeem its notes in specie, it has been held that this must be observed notwithstanding a less imperative provision in its charter. State *v.* Tombeckbee Bank, 2 Stew. (Ala.) 30. *Contra*, Palfrey *v.* Paulding, 7 La. Ann. 363; Atchafalaya Bank *v.* Dawson, 13 La. 497.

7. Atty.-Gen. *v.* Oakland County Bank, Walk. (Mich.) 90; Bank Com'rs *v.* Buffalo Bank, 6 Paige (N. Y.) 497.

elections and elect directors;[8] when it issues notes in excess of the legal limit[9] or exchanges them for those of another bank;[10] when it grossly mismanages its affairs,[11] is insolvent,[12] or refuses to transmit the statements required by law to the proper officials;[13] or when it takes excessive interest.[14]

(II) *Waiver of.* The state, however, may waive the forfeiture and permit a bank to continue in business;[15] the legislature may also remit the forfeiture;[16] a temporary injunction prohibiting a bank from doing business may be dissolved;[17] and the court decreeing a forfeiture may reserve its judgment and permit the bank to resume.[18]

b. Proceedings For — (I) *Necessity of.* Mere neglect to comply with its charter does not *per se* operate as a forfeiture without appropriate judicial proceedings,[19] and no attack aimed at the forfeiture of its charter can be made in a collateral proceeding.[20]

(II) *Nature of.* The proceeding is a civil, not a criminal, one,[21] and the state is the proper party to institute it,[22] although in some states stock-holders may also act,[23] but not creditors.[24] If state bank commissioners exist not all need be joined.[25]

(III) *Restraint of Bank's Action.* After a bill in the nature of a quo warranto has been filed by the proper officer against a bank, a court will not restrain the bank by injunction from continuing business, unless there is positive proof that it is insolvent or has violated a positive law.[26]

8. Com. *v.* Mutual Redemption Bank, 4 Allen (Mass.) 1; State *v.* Commercial Bank, 33 Miss. 474.

9. Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; Bank Com'rs *v.* Buffalo Bank, 6 Paige (N. Y.) 497.

10. Bank Com'rs *v.* Buffalo Bank, 6 Paige (N. Y.) 497.

11. Atty.-Gen. *v.* Oakland County Bank, Walk. (Mich.) 90; State *v.* Commercial Bank, 13 Sm. & M. (Miss.) 569, 53 Am. Dec. 106; People *v.* Hudson Bank, 6 Cow. (N. Y.) 217; Bank Com'rs *v.* Rhode Island Cent. Bank, 5 R. I. 12.

A temporary suspension does not have that effect. State *v.* Louisiana Sav. Co., 12 La. Ann. 568; People *v.* Niagara Bank, 6 Cow. (N. Y.) 196.

12. State *v.* Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109; Atty.-Gen. *v.* Oakland County Bank, Walk. (Mich.) 90. *Contra,* Parmly *v.* Tenth Ward Bank, 3 Edw. (N. Y.) 395.

13. State *v.* Seneca County Bank, 5 Ohio St. 171.

14. Com. *v.* Commercial Bank, 28 Pa. St. 383. *Contra,* State *v.* Commercial Bank, 10 Ohio 535; Middlebury Bank *v.* Bingham, 33 Vt. 621.

15. State *v.* Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109; State *v.* Charleston Bank, 2 McMull. (S. C.) 439, 39 Am. Dec. 135. See also People *v.* Pontiac Bank, 12 Mich. 527.

16. Atchafalaya Bank *v.* Dawson, 13 La. 497; Nevitt *v.* Port Gibson Bank, 6 Sm. & M. (Miss.) 513.

17. Com. *v.* Mutual Redemption Bank, 4 Allen (Mass.) 1.

18. Bank Com'rs *v.* Buffalo Bank, 6 Paige (N. Y.) 497.

19. State Bank *v.* Green, 20 La. Ann. 214; Union Bank *v.* MacDonald, 15 La. 25; Atchafalaya Bank *v.* Dawson, 13 La. 497; Montgomery *v.* Merrill, 18 Mich. 338; People *v.* Pontiac Bank, 12 Mich. 527; Dewey *v.* St. Albans Trust Co., 56 Vt. 476, 48 Am. Rep. 803; Bethel First Nat. Bank *v.* National Pahquoque Bank, 14 Wall. (U. S.) 383, 20 L. ed. 840. See also Montgomery *v.* Merrill, 18 Mich. 338, holding that a bank may be dissolved by the repeal of its charter, but that when thus repealed similar proceedings must be taken to have its forfeiture judicially declared as in other cases.

Until such action is taken the bank, although never so guilty, legally continues to live (Union Bank *v.* MacDonald, 15 La. 25; Atchafalaya Bank *v.* Dawson, 13 La. 497), and may lend money, if it pleases (Maury *v.* Ingraham, 28 Miss. 171), and debtors continue to remain liable (Hughes *v.* Somerset Bank, 5 Litt. (Ky.) 45; Farmers' Bank *v.* Garten, 34 Mo. 119).

A judgment of seizure does not dissolve the bank, but the seizure has that effect. Commercial Bank *v.* Lockwood, 2 Harr. (Del.) 8; Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; Port Gibson *v.* Moore, 13 Sm. & M. (Miss.) 157; Fox *v.* Horah, 36 N. C. 358, 36 Am. Dec. 48.

20. State Bank *v.* Snelling, 35 Mo. 190.

21. Commercial Bank *v.* State, 4 Sm. & M. (Miss.) 439. *Contra,* Matter of Kuhn, 2 Ashm. (Pa.) 170.

22. Huntington *v.* Crescent City Bank, 18 La. Ann. 350; Rice *v.* National Bank, 126 Mass. 300; Murphy *v.* Farmers Bank, 20 Pa. St. 415.

23. Mitchell *v.* St. Paul Bank, 7 Minn. 252.

24. Matter of Kuhn, 2 Ashm. (Pa.) 170. *Contra,* Cleveland *v.* Marine Bank, 17 Wis. 545.

25. Bank Com'rs *v.* Buffalo Bank, 6 Paige (N. Y.) 497.

26. Atty.-Gen. *v.* Chenango Bank, Hopk. (N. Y.) 596; Atty.-Gen. *v.* Niagara Bank, Hopk. (N. Y.) 354.

c. Trustees, Commissioners, etc. Trustees, commissioners, or other officers who wind up the affairs of a bank after its forfeiture have been declared to have quite the same authority as similar officers in other cases. The assets are collected, the claims are proved, and distribution is made under the general laws providing for insolvent banking institutions.[27]

d. Effect of. The effect of forfeiture is unlike that of the common law, and is what the statute prescribes.[28] Except where their existence is continued for a specified period,[29] a bank cannot make any contract thereafter;[30] but the forfeiture does not extinguish the liability of debtors.[31] Nor does the subsequent appointment of a receiver to distribute the assets among the creditors in the state of its location prevent a creditor in another state from bringing an attachment there against the bank.[32] The assets of a dissolved bank are applied to the payment of its debts and the balance is returned to the stock-holders.[33]

4. Insolvency — a. What Constitutes. A bank is solvent when it has enough assets to pay, within a reasonable time, all of its liabilities through its own

Effect of decree.— A decree finding a bank insolvent, appointing a receiver, and restraining a bank from transacting business is not a declaration of forfeiture. Providence City Ins. Co. *v.* Commercial Bank, 68 Ill. 348. Consequently a bank's interest in property in another state cannot be reached by its creditors living there through another remedy. Finnell *v.* Burt, 2 Handy (Ohio) 202, 12 Ohio Dec. (Reprint) 403.

27. The charter of a bank was declared forfeited and the plaintiff was appointed a trustee to sue for and collect the debts due the bank. The order of the court directing him to sell the assets to the highest bidder did not prevent him from suing for and collecting a note. Bingaman *v.* Robertson, 25 Miss. 390.

Compromises are subject to the revision of the court and may be rejected or confirmed. Morris *v.* Thomas, 17 Ill. 112. See also Thomas *v.* Sloo, 15 Ill. 66, where a compromise was not sustained.

Employment of attorney.— Trustees appointed under an act repealing a bank's charter are not authorized to employ an attorney to conduct a quo warranto suit against the bank officers. Miners' Bank *v.* Thomas, 4 Greene (Iowa) 336.

Revival of judgment.— A trustee may revive a judgment in his own name on a claim of the bank, and in so doing will be regarded as the trustee of the bank. Robertson *v.* Agricultural Bank, 28 Miss. 237.

They can collect only debts belonging to the bank and cannot bring an action in their own name for the use of the holder of a note transferred by assignment before the bank's dissolution. Bacon *v.* Cohea, 12 Sm. & M. (Miss.) 516.

If the judgment of forfeiture is reversed after trustees are appointed, and meantime they have taken possession of the estate and begun proceedings against a debtor, these can nevertheless be continued. Jemison *v.* Planters', etc., Bank, 23 Ala. 168.

Such trustees are not public officers.— Persons appointed to wind up the affairs of a state bank are not public officers, but trustees. People *v.* Ridgeley, 21 Ill. 65; Commercial Bank *v.* Chambers, 8 Sm. & M. (Miss.) 9.

28. Nevitt *v.* Port Gibson Bank, 6 Sm. & M. (Miss.) 513; Lum *v.* Robertson, 6 Wall. (U. S.) 277, 18 L. ed. 743.

29. Banks are sometimes continued by statute for a specified period, after three years, after their failure or the forfeiture of their charter for the purpose of closing their affairs. During this period they have a large portion of their former authority. Connell *v.* Patteson, 28 Ind. 509; Cunningham *v.* Clark, 24 Ind. 7; Cooper *v.* Curtis, 30 Me. 488; Folger *v.* Chase, 18 Pick. (Mass.) 63. See also Savage *v.* Walshe, 26 Ala. 619; Jemison *v.* Planters', etc., Bank, 23 Ala. 168; Saltmarsh *v.* Planters, etc., Bank, 14 Ala. 668.

30. Saltmarsh *v.* Planters, etc., Bank, 14 Ala. 668; Providence City Ins. Co. *v.* Commercial Bank, 68 Ill. 348; State Bank *v.* Wrenn, 3 Sm. & M. (Miss.) 791; Miami Exporting Co. *v.* Gano, 13 Ohio 269.

It can neither sue nor be sued, and consequently a stock-holder cannot defend an action that may be brought against it (Merrill *v.* Shaw, 38 Me. 267); but if an action against the bank is prosecuted to judgment, rendering the estates of stock-holders liable if it were legal, any one of them without joining the others may seek by a proper proceeding its reversal (Rankin *v.* Sherwood, 33 Me. 509; Merrill *v.* Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649.

31. Nevitt *v.* Port Gibson Bank, 6 Sm. & M. (Miss.) 513; Lum *v.* Robertson, 6 Wall. (U. S.) 277, 18 L. ed. 743. See also Hughes *v.* Somerset Bank, 5 Litt. (Ky.) 45; Farmers' Bank *v.* Garten, 34 Mo. 119, to the effect that a debtor cannot escape payment by alleging that a bank has by mismanagement forfeited its charter.

32. Saltmarsh *v.* Planters, etc., Bank, 14 Ala. 668. See also Wilson *v.* Tesson, 12 Ind. 285.

33. Providence City Ins. Co. *v.* Commercial Bank, 68 Ill. 348; Tinkham *v.* Borst, 31 Barb. (N. Y.) 407; Hastings *v.* Drew, 50 How. Pr. (N. Y.) 254; New Albany *v.* Burke, 11 Wall. (U. S.) 96, 20 L. ed. 155; Lum *v.* Robertson,

agencies, and is insolvent when unable to meet its liabilities as they become due in the ordinary course of business, or, in shorter terms, when it cannot pay its deposits on demand in accordance with its promise.[34] In determining this question a bank's capital and surplus are considered its resources.[35]

b. Receivers — (I) *In General* — (A) *Appointment and Removal.* The appointment of receivers for insolvent banks is regulated largely by statute,[36] yet a court of equity can sometimes appoint a receiver on a stock-holder's petition,[37] or on the request of creditors.[38] It ordinarily has no power, however, to enjoin a bank and appoint a receiver on an *ex parte* application.[39] He can be removed from office for sufficient reasons on the application of the same officers who sought his appointment;[40] and stock-holders can interfere and prevent him from wasting the estate.[41]

(B) *Powers and Duties* — (1) In General. The receiver represents both bank and creditors, and can look behind its acts in asserting the rights they possess.[42] He is entitled to the bank's assets subject to all the equities existing against them,[43] but possesses no rights superior to those of the bank when it was alive.[44] The title to real estate in another state does not pass to him by virtue of

6 Wall. (U. S.) 277, 18 L. ed. 743; Curran *v.* Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705.

34. *Illinois.*— Atwater *v.* American Exch. Nat. Bank, 152 Ill. 605, 38 N. E. 1017.

Indiana.— State *v.* Beach, (Ind. 1896) 43 N. E. 949.

Iowa.— State *v.* Eifert, 102 Iowa 188, 65 N. W. 309, 71 N. W. 248, 63 Am. St. Rep. 433, 38 L. R. A. 485; State *v.* Cadwell, 79 Iowa 432, 44 N. W. 700.

Kentucky.— McAfee *v.* Bland, 11 Ky. L. Rep. 1, 11 S. W. 439.

Louisiana.—State *v.* Mechanics', etc., Bank, 35 La. Ann. 562; New Orleans Exch., etc., Co. *v.* Mudge, 6 Rob. (La.) 387.

Michigan.— Bank Com'rs *v.* Brest Bank, Harr. (Mich.) 106.

New York.— Livingston *v.* New York Bank, 26 Barb. (N. Y.) 304, 5 Abb. Pr. (N. Y.) 338; Ferry *v.* Central New York Bank, 15 How. Pr. (N. Y.) 445; Matter of Empire City Bank, 10 How. Pr. (N. Y.) 498.

Pennsylvania.— Com. *v.* Junkin, 170 Pa. St. 194, 32 Atl. 617, 31 L. R. A. 124.

United States.— Dodge *v.* Mastin, 5 McCrary (U. S.) 404, 17 Fed. 660.

Ceasing to receive deposits is not proof of failure or dissolution. Donnelly *v.* Hodgson, 14 Mo. App. 548.

Suspension of specie payments.— A bank is not insolvent if it has enough to pay all demands, though it has suspended payments in specie. Livingston *v.* State Bank, 26 Barb. (N. Y.) 304, 5 Abb. Pr. (N. Y.) 338.

35. State *v.* Myers, 54 Kan. 206, 38 Pac. 296.

36. Who may be appointed.— An officer of a bank is not a proper person to be appointed receiver. Atty.-Gen. *v.* Columbia Bank, 1 Paige (N. Y.) 511 [*affirmed* in 3 Wend. (N. Y.) 588].

Should two be appointed on the same day by different justices, as both cannot act, the one first appointed is entitled to the office regardless of the time of verifying the papers or getting possession of the assets. People *v.* Central City Bank, 53 Barb. (N. Y.) 412, 35 How. Pr. (N. Y.) 428.

Facts justifying appointment.— Barnum *v.* Pontiac Bank, Harr. (Mich.) 119; Columbia Bank *v.* Atty.-Gen., 3 Wend. (N. Y.) 588 [*affirming* 1 Paige (N. Y.) 511].

37. Dickerson *v.* Cass County Bank, 95 Iowa 392, 64 N. W. 395.

38. Dobson *v.* Simonton, 78 N. C. 63.

39. People's Home Sav. Bank *v.* San Francisco Super. Ct., 103 Cal. 27, 36 Pac. 1015; Murray *v.* American Surety Co., 70 Fed. 341, 44 U. S. App. 43, 17 C. C. A. 138 [*affirming* 59 Fed. 345].

When a bank has ceased to exercise its rights for three years and the assets have been in the possession of the directors the stock-holders are entitled to the appointment of a receiver *ex parte.* Warren *v.* Fake, 49 How. Pr. (N. Y.) 430.

40. State *v.* Claypool, 13 Ohio St. 14.

If one of three receivers resigns or is removed it is discretionary with the court to appoint another person in his stead, or allow the two remaining to act without another. Wiswell *v.* Starr, 50 Me. 381.

41. Robinson *v.* Lane, 19 Ga. 337.

42. Franklin Nat. Bank *v.* Whitehead, 149 Ind. 560, 49 N. E. 592, 63 Am. St. Rep. 302, 39 L. R. A. 725; National State Bank *v.* Vigo County Nat. Bank, 141 Ind. 352, 40 N. E. 799, 50 Am. St. Rep. 330; Farmers' L. & T. Co. *v.* Minneapolis Engine, etc., Works, 35 Minn. 543, 29 N. W. 349; Hayes *v.* Kenyon, 7 R. I. 136.

43. Baker *v.* Cooper, 57 Me. 388; Smith *v.* Lansing, 22 N. Y. 520; Lyons Bank *v.* Demmon, Lalor (N. Y.) 398; Casey *v.* Cavaroc, 96 U. S. 467, 24 L. ed. 779.

Lien.— A receiver who opens a safety deposit vault belonging to the president of a bank, by order of the court, to get bank property, cannot acquire an equitable lien on the president's individual property against a subsequent purchaser. Illinois University *v.* Globe Sav. Bank, 185 Ill. 514, 57 N. E. 417.

44. Lincoln *v.* Fitch, 42 Me. 456.

his appointment, nor are prior attachments dissolved,[45] the lien thus acquired, notwithstanding his appointment, being preserved.[46] As he is an officer of the court he may apply thereto for instruction.[47]

(2) Collection of Assets. The receiver should proceed to convert the real estate into money, prosecute all disputed claims, and in doing this a court will not ordinarily interfere with his action.[48] He is not limited to collecting a sufficiency to pay off the bank's liabilities, but should collect all the debts that are due.[49] He can maintain an action on notes belonging to the bank indorsed in his proper name as indorsee without specifying his capacity as receiver,[50] or may sue in the name of the bank;[51] and on an instrument executed to receivers, their successors may sue in their own names as equitable assignees.[52]

(c) *Effect of Appointment*—(1) On Right to Sue Bank. In some states no action can be maintained against a bank after the appointment of a receiver.[53]

(2) On Subsisting Attachment. In some states an attachment against an insolvent state bank is dissolved by the appointment of a receiver and no rights are secured by the attaching creditor, while in others an attaching creditor secures a priority by his proceeding.[54] In no case, however, can a creditor secure any priority by levying, or attempting to levy, on the assets of an insolvent bank after it has been judicially declared insolvent or steps have been taken to have it thus declared.[55]

(II) *Temporary Receivers.* The rights of a temporary receiver are greatly restricted;[56] but a depositor's rights of set-off are the same in such a case as in any other.[57]

c. Assignments For Benefit of Creditors—(I) *In General.* A bank may, either by statute or common law, make an assignment for the benefit of its creditors.[58] It has been held that the directors can make an assignment inde-

45. Providence City Ins. Co. *v.* Commercial Bank, 68 Ill. 348.

46. Von Roun *v.* San Francisco Super. Ct., 58 Cal. 358; Hubbard *v.* Hamilton Bank, 7 Metc. (Mass.) 340; Arnold *v.* Weimer, 40 Nebr. 216, 58 N. W. 709; Walling *v.* Miller, 108 N. Y. 173, 15 N. E. 65, 2 Am. St. Rep. 400.

47. People *v.* St. Nicholas Bank, 76 Hun (N. Y.) 522, 28 N. Y. Suppl. 114, 58 N. Y. St. 712; Matter of Van Allen, 37 Barb. (N. Y.) 225.

48. Matter of Van Allen, 37 Barb. (N. Y.) 225.

49. Davis *v.* Robertson, 11 La. Ann. 752.

A stock-holder's note given to make up a deficit in the bank's capital is an asset which the receiver must collect. Sickels *v.* Herold, 15 Misc. (N. Y.) 116, 36 N. Y. Suppl. 488, 71 N. Y. St. 503.

He cannot repudiate a pledge for advances and retain them. Smith *v.* Lansing, 22 N. Y. 520; Casey *v.* Cavaroc, 96 U. S. 467, 24 L. ed. 779.

Effect of prior acts of trustees.— If the trustees of an embarrassed bank who are afterward succeeded by a receiver have in good faith made an arrangement with a debtor it is the duty of the receiver to respect it. Greene *v.* A. & W. Sprague Mfg. Co., 52 Conn. 330.

Charging bank fund.— The state treasurer is a proper party defendant to a bill brought by a receiver to charge the bank fund. Danby Bank *v.* State Treasurer, 37 Vt. 541.

50. Haxtun *v.* Bishop, 3 Wend. (N. Y.) 13; De Wolf *v.* A. & W. Sprague Mfg. Co., 11 R. I. 380.

51. Chicago Fire Proofing Co. *v.* Park Nat. Bank, 145 Ill. 481, 32 N. E. 534, 536; Crews *v.* Farmers' Bank, 31 Gratt. (Va.) 348.

52. Iglehart *v.* Bierce, 36 Ill. 133.

53. Leathers *v.* Shipbuilders' Bank, 40 Me. 386; Davenport *v.* Buffalo City Bank, 9 Paige (N. Y.) 12.

In Kentucky, by putting the assets of a bank in the possession of a receiver, its functions are suspended. Statute damages therefore for allowing bills to be protested cannot after that time be recovered. Sanford *v.* Kentucky Trust Co. Bank, 1 Metc. (Ky.) 106.

In Louisiana a bank in liquidation can be sued only in the court having control of its affairs. Mudge *v.* New Orleans Exch., etc., Co., 10 Rob. (La.) 460; New Orleans Imp., etc., Co. *v.* Citizens' Bank, 10 Rob. (La.) 14.

54. Hubbard *v.* Hamilton Bank, 7 Metc. (Mass.) 340; Arnold *v.* Globe Invest. Co., 40 Nebr. 225, 58 N. W. 712; Arnold *v.* Weimer, 40 Nebr. 216, 58 N. W. 709; Hibernia Nat. Bank *v.* Lacombe, 84 N. Y. 367, 38 Am. Rep. 518; Illinois State Bank *v.* Corwith, 6 Wis. 551.

55. Crane *v.* Pacific Bank, 106 Cal. 64, 39 Pac. 215, 27 L. R. A. 562.

56. People *v.* St. Nicholas Bank, 76 Hun (N. Y.) 522, 28 N. Y. Suppl. 114, 58 N. Y. St. 712.

57. Sickels *v.* Herold, 15 Misc. (N. Y.) 116, 36 N. Y. Suppl. 488, 71 N. Y. St. 503.

58. *Arkansas.*— Ringo *v.* Biscoe, 13 Ark. 563; *Ex p.* Conway, 4 Ark. 302.

pendently of any action by the stock-holders,[59] but where the law positively provides for the appointment of a commissioner to close the affairs of a bank it must be followed.[60] An assignment may be attacked and vacated when fraudulently made,[61] or when it is *ultra vires*.[62] If the charter of a bank has been forfeited the receiver appointed to close its affairs may do this.[63]

(II) *PREFERENCES*—(A) *In General.* In some states preferences are invalid,[64]

Connecticut.—Catlin *v.* Eagle Bank, 6 Conn. 233.

Georgia.— Seay *v.* Rome Bank, 66 Ga. 609; McCallie *v.* Walton, 37 Ga. 611, 95 Am. Dec. 369.

Kentucky.— U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423.

Louisiana.— U. S. *v.* U. S. Bank, 8 Rob. (La.) 262.

Maryland.— State *v.* State Bank, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561.

Michigan.— Boynton *v.* Roe, 114 Mich. 401, 72 N. W. 257. See also Kendall *v.* Bishop, 76 Mich. 634, 43 N. W. 645; Bank Com'rs *v.* Brest Bank, Harr. (Mich.) 106.

Minnesota.— Tripp *v.* Northwestern Nat. Bank, 41 Minn. 400, 43 N. W. 60.

Missouri.— Manufacturers' Sav. Bank *v.* Big Muddy Iron Co., 97 Mo. 38, 10 S. W. 865; Chew *v.* Ellingwood, 86 Mo. 260, 56 Am. Rep. 429.

New Hampshire.— Flint *v.* Clinton Co., 12 N. H. 430.

New Jersey.— National Trust Co. *v.* Miller, 33 N. J. Eq. 155; Van Wagenen *v.* Paterson Sav. Bank, 10 N. J. Eq. 13.

New York.— Bowery Bank Case, 5 Abb. Pr. (N. Y.) 415, 16 How. Pr. (N. Y.) 56; Haxtun *v.* Bishop, 3 Wend. (N. Y.) 13.

Ohio.—Armstrong *v.* Grannis, 4 Ohio Dec. (Reprint) 54, Clev. L. Rec. 71.

Pennsylvania.— Dana *v.* U. S. Bank, 5 Watts & S. (Pa.) 223; News *v.* Shackamaxon Bank, 16 Wkly. Notes Cas. (Pa.) 207.

Tennessee.— Hopkins *v.* Gallatin Turnpike Co., 4 Humphr. (Tenn.) 402.

Vermont.—Warner *v.* Mower, 11 Vt. 385.

Washington.— Nyman *v.* Berry, 3 Wash. 734, 29 Pac. 557.

West Virginia.— Lamb *v.* Cecil, 25 W. Va. 288.

Wisconsin.—Stevens Point First Nat. Bank *v.* Knowles, 67 Wis. 373, 28 N. W. 225.

United States.— Lenox *v.* Roberts, 2 Wheat. (U. S.) 373, 4 L. ed. 264.

Canada.—Whiting *v.* Hovey, 13 Ont. App. 7; Donley *v.* Holmwood, 30 U. C. C. P. 240 [*affirmed* in 4 Ont. App. 455].

Contra, Meloy *v.* Central Nat. Bank, 7 Mackey (D. C.) 69.

See also ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 132, note 35.

See 6 Cent. Dig. tit. "Banks and Banking," § 177.

This is an incidental power conferred on a banking corporation. Town *v.* Raisin River Bank, 2 Dougl. (Mich.) 530.

59. *Connecticut.*— Chase *v.* Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64; Catlin *v.* Eagle Bank, 6 Conn. 233.

Indiana.— De Camp *v.* Alward, 52 Ind. 468.

Maryland.— Merrick *v.* Metropolis Bank, 8 Gill (Md.) 59; State *v.* State Bank, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561.

Minnesota.— Tripp *v.* Northwestern Nat. Bank, 41 Minn. 400, 43 N. W. 60.

Mississippi.— Robins *v.* Embry, Sm. & M. Ch. (Miss.) 207.

Missouri.— Hutchinson *v.* Green, 91 Mo. 367, 1 S. W. 853; Descombes *v.* Wood, 91 Mo. 196, 4 S. W. 82, 60 Am. Rep. 239; Chew *v.* Ellingwood, 86 Mo. 260, 56 Am. Rep. 429.

Pennsylvania.—Ardesco Oil Co. *v.* North American Oil, etc., Co., 66 Pa. St. 375; Dana *v.* U. S. Bank, 5 Watts & S. (Pa.) 223; Boardman *v.* Keystone Standard Watch Co., 8 Lanc. L. Rev. 25.

Contra, Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592; Bank Com'rs *v.* Brest Bank, Harr. (Mich.) 106.

See also *supra,* II, D, 4, b, (II).

President cannot make an assignment for the benefit of the creditors, and if he does a ratification by the directors is not effective against a subsequent attachment.

Alabama.— Norton *v.* Alabama Nat. Bank, 102 Ala. 420, 14 So. 872; Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592.

District of Columbia.— Meloy *v.* Central Nat. Bank, 7 Mackey (D. C.) 69.

New York.— Hoyt *v.* Thompson, 5 N. Y. 320.

Virginia.— Crump *v.* U. S. Mining Co., 7 Gratt. (Va.) 352, 56 Am. Dec. 116.

Wisconsin.—Walworth County Bank *v.* Farmers' L. & T. Co., 14 Wis. 325.

Assignment of savings-bank.— The consent of all the stock-holders of a savings-bank is not essential to an assignment of the bank's property for the benefit of its creditors. Descombes *v.* Wood, 91 Mo. 196, 4 S. W. 82, 60 Am. Rep. 239.

60. Bank Com'rs *v.* Brest Bank, Harr. (Mich.) 106.

When such a law exists, an assignment is not wholly void, but only so far as it conflicts with the commissioner's action. Rossman *v.* McFarlane, 9 Ohio St. 369.

61. Carey *v.* Giles, 10 Ga. 9.

The president who makes an assignment by order of the board of directors cannot attack it. Matter of George T. Smith Middlings Purifier Co., 86 Mich. 149, 48 N. W. 864; Covert *v.* Rogers, 38 Mich. 363, 31 Am. Rep. 319.

62. Descombes *v.* Wood, 91 Mo. 196, 4 S. W. 82, 60 Am. Rep. 239, holding that there should be no unnecessary delay in doing this.

63. Carey *v.* Giles, 10 Ga. 9.

64. *Nevada.*— Thompson *v.* Reno Sav. Bank, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797.

while in others they are valid.[65] Where preferences are legal a corporation has as wide latitude in making them as an individual.[66]

(B) *To Directors.* Even though preferences may be given to ordinary creditors, none can be given to a director.[67] The law, however, will sustain a mortgage or other lien given to him for money borrowed while the bank is solvent when entirely free from fraud.[68]

(C) *Illegal Preferences.* The legality of transactions after a bank has failed may turn on one or more of four things: exclusive knowledge by the bank offi-

New York.— National Shoe, etc., Bank *v.* Mechanics' Nat. Bank, 89 N. Y. 467; Dutcher *v.* Importers', etc., Nat. Bank, 59 N. Y. 5; Marine Bank *v.* Clements, 31 N. Y. 33; Robinson *v.* Attica Bank, 21 N. Y. 406. See also Phœnix *v.* Dey, 5 Johns. (N. Y.) 412, holding that a statute declaring against preferences did not apply to a trust company. But see Curtis *v.* Leavitt, 17 Barb. (N. Y.) 309.

Ohio.— Rouse *v.* Merchants' Nat. Bank, 46 Ohio St. 493, 22 N. E. 293, 15 Am. St. Rep. 644, 5 L. R. A. 378.

Tennessee.— Swepson *v.* Exchange, etc., Bank, 9 Lea (Tenn.) 713; State *v.* State Bank, 5 Baxt. (Tenn.) 101; Marr *v.* West Tennessee Bank, 4 Coldw. (Tenn.) 471.

Virginia.— Exchange Bank *v.* Knox, 19 Gratt. (Va.) 739; Robinson *v.* Gardiner, 18 Gratt. (Va.) 509.

Wisconsin.— Ford *v.* Plankinton Bank, 87 Wis. 363, 58 N. W. 766; Stevens Point First Nat. Bank *v.* Knowles, 67 Wis. 373, 28 N. W. 225.

65. *Arkansas.*— Ringo *v.* Biscoe, 13 Ark. 563.

Colorado.— Breene *v.* Merchants', etc., Bank, 11 Colo. 97, 17 Pac. 280.

Connecticut.— Smith *v.* Skeary, 47 Conn. 47; New Haven Sav. Bank *v.* Bates, 8 Conn. 505; Catlin *v.* Eagle Bank, 6 Conn. 233.

Illinois.— State Nat. Bank *v.* Union Nat. Bank, 168 Ill. 519, 48 N. E. 82; Blair *v.* Illinois Steel Co., 159 Ill. 350, 42 N. E. 895, 31 L. R. A. 269; Gottlieb *v.* Miller, 154 Ill. 44, 39 N. E. 992; Warren *v.* Columbus First Nat. Bank, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746. See also Warren *v.* Columbus First Nat. Bank, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746, holding that although a preference is not permitted in New York if property in Ohio is conveyed to a creditor the preference will be upheld in Illinois.

Iowa.— Buell *v.* Buckingham, 16 Iowa 284, 85 Am. Dec. 516.

Massachusetts.— Sargent *v.* Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Brewer *v.* Pitkin, 11 Pick. (Mass.) 298.

Michigan.—Austin *v.* Kalamazoo First Nat. Bank, 100 Mich. 613, 59 N. W. 597.

Mississippi.—Arthur *v.* Commercial, etc., Bank, 9 Sm. & M. (Miss.) 394, 48 Am. Dec. 719. See also State *v.* Commercial Bank, 13 Sm. & M. (Miss.) 569, 53 Am. Dec. 106.

New Jersey.— Wilkinson *v.* Bauerle, 41 N. J. Eq. 635, 7 Atl. 514.

North Carolina.— Merchants Nat. Bank *v.* Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765; Blalock *v.* Kernersville Mfg. Co., 110 N. C. 99, 14 S. E. 501.

Pennsylvania.— Dana *v.* U. S. Bank, 5 Watts & S. (Pa.) 223.

England.— Goss *v.* Neale, 5 Moore C. P. 19, 16 E. C. L. 387; Rex *v.* Watson, 3 Price 6.

The federal courts follow the rule of the state in which the assignment was made. George T. Smith Middlings Purifier Co. *v.* McGroarty, 136 U. S. 237, 10 S. Ct. 1017, 34 L. ed. 346; Chicago Union Nat. Bank *v.* Kansas City Bank, 136 U. S. 223, 10 S. Ct. 1013, 34 L. ed. 341; Peters *v.* Bain, 133 U. S. 670, 10 S. Ct. 354, 33 L. ed. 696. See also Marbury *v.* Brooks, 7 Wheat. (U. S.) 556, 5 L. ed. 522.

66. Catlin *v.* Eagle Bank, 6 Conn. 233.

67. *Georgia.*— Lowry Banking Co. *v.* Empire Lumber Co., 91 Ga. 624, 17 S. E. 968.

Illinois.— Beach *v.* Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291.

Kansas.— Hays *v.* Citizens' Bank, 51 Kan. 535, 33 Pac. 318.

Maryland.— James Clark Co. *v.* Colton, 91 Md. 195, 46 Atl. 386, 49 L. R. A. 698.

New Hampshire.— Richards *v.* New Hampshire Ins. Co., 43 N. H. 263.

New Jersey.— Montgomery *v.* Phillips, 53 N. J. Eq. 203, 31 Atl. 622.

Ohio.— Rouse *v.* Merchants' Nat. Bank, 46 Ohio St. 493, 22 N. E. 293, 15 Am. St. Rep. 644, 5 L. R. A. 378.

Pennsylvania.— Swentzel *v.* Penn Bank, 147 Pa. St. 140, 23 Atl. 405, 415, 30 Am. St. Rep. 718, 15 L. R. A. 305; Hopkins' Appeal, 90 Pa. St. 69.

Wisconsin.— Slack *v.* Northwestern Nat. Bank, 103 Wis. 57, 79 N. W. 51, 74 Am. St. Rep. 841; Hinz *v.* Van Dusen, 95 Wis. 503, 70 N. W. 657; Haywood *v.* Lincoln Lumber Co., 64 Wis. 639, 26 N. W. 184.

United States.— Drury *v.* Milwaukee, etc., R. Co., 7 Wall. (U. S.) 299, 19 L. ed. 40; Curran *v.* Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705; Sutton Mfg. Co. *v.* Hutchinson, 63 Fed. 496, 24 U. S. App. 145, 11 C. C. A. 320; Adams *v.* Kehlor Milling Co., 35 Fed. 433; Bradley *v.* Farwell, 1 Holmes (U. S.) 433, 3 Fed. Cas. No. 1,779; Corbett *v.* Woodward, 5 Sawy. (U. S.) 403, 6 Fed. Cas. No. 3,223, 11 Chic. Leg. N. 246.

68. *California.*— Farmers', etc., Bank *v.* Downey, 53 Cal. 466, 31 Am. Rep. 62.

Colorado.— St. Joe, etc., Consol. Min. Co. *v.* Aspen First Nat. Bank, 10 Colo. App. 339, 50 Pac. 1055; West *v.* Hanson Produce Co., 6 Colo. App. 467, 41 Pac. 829.

Illinois.— Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep.

cers of its condition; knowledge by the transferee; knowledge by both; or the fact that the bank was insolvent without regard to the knowledge of the parties interested concerning its condition.[69]

(III) *Include What* — (A) *In General.* An assignment is not limited to a schedule of assets that may be mentioned unless this was clearly intended to embrace all.[70] It includes the liability of stock-holders for unpaid instalments,[71] trust money invested without authority,[72] or deposited on general account.[73]

(B) *Deposits Fraudulently Received* — (1) In General. Deposits taken by an insolvent bank under circumstances which are a fraud on the depositor are not included in the assignment and may be recovered by the owner.[74]

401; Beach *v.* Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291; Harts *v.* Brown, 77 Ill. 226; Merrick *v.* Peru Coal Co., 61 Ill. 472.

Indiana.— Crawfordsville First Nat. Bank *v.* Dovetail Body, etc., Co., 143 Ind. 534, 42 N. E. 924.

New York.— Matter of State Reservation Com'rs, 122 N. Y. 177, 25 N. E. 269, 33 N. Y. St. 452; Bank Com'rs *v.* St. Lawrence Bank, 7 N. Y. 513, Seld. Notes (N. Y.) 5.

Ohio.— Bank *v.* Flour Co., 41 Ohio St. 552.

69. *Colorado.*— Walton *v.* Silverton First Nat. Bank, 13 Colo. 265, 22 Pac. 440, 16 Am. St. Rep. 200, 5 L. R. A. 765.

Georgia.— Hill *v.* Western, etc., R. Co., 86 Ga. 284, 12 S. E. 635.

Indiana.— National State Bank *v.* Sandford Fork, etc., Co., 157 Ind. 10, 60 N. E. 699; American Trust, etc., Bank *v.* McGettigan, 152 Ind. 582, 52 N. E. 793, 71 Am. St. Rep. 345; Hutchinson *v.* Michigan City First Nat. Bank, 133 Ind. 271, 30 N. E. 952, 36 Am. St. Rep. 537.

Massachusetts.— Folsom *v.* Clemence, 111 Mass. 273.

Missouri.— Roan *v.* Winn, 93 Mo. 503, 4 S. W. 736.

New Jersey.— Kinsela *v.* Cataract City Bank, 18 N. J. Eq. 158.

New York.— French *v.* O'Brien, 52 How. Pr. (N. Y.) 394.

Ohio.— Stewart *v.* Hopkins, 30 Ohio St. 502.

West Virginia.— Lamb *v.* Cecil, 25 W. Va. 288.

Illegal transfers.— A transfer to a depositor or other debtor not in the usual course of business is illegal (Atkinson *v.* Rochester Printing Co., 114 N. Y. 168, 21 N. E. 178, 23 N. Y. St. 155; Lamb *v.* Cecil, 25 W. Va. 288); but payment to a depositor during a run on a bank after the cashier has persuaded some persons not to withdraw their deposits but with the expectation that the bank will continue in business, which is not fulfilled, is not a preference (Stone *v.* Jenison, 111 Mich. 592, 70 N. W. 149, 36 L. R. A. 675. See also Dutcher *v.* Importers', etc., Nat. Bank, 59 N. Y. 5; Roberts *v.* Hill, 23 Blatchf. (U. S.) 191, 23 Fed. 311).

Knowledge of director.— A director who is a creditor and to whom securities are turned out or conveyances are made to protect him is charged with knowledge of the bank's condition. Roan *v.* Winn, 93 Mo. 503, 4 S. W. 736; Lamb *v.* Cecil, 25 W. Va. 288.

Knowledge of stock-holder.— A stock-holder who is not a director is not charged with notice. Kinsela *v.* Cataract City Bank, 18 N. J. Eq. 158.

Secret agreement.— A debtor cannot at the time of creating a debt make a secret agreement with his creditor whereby in the event of an emergency the latter shall be preferred and thus in effect have a secret mortgage on his debtor's assets. Potts *v.* Hart, 99 N. Y. 168, 1 N. E. 605; National Park Bank *v.* Whitmore, 40 Hun (N. Y.) 499.

Transfers after assignment.— Transfers after a bank has made an assignment, or begun proceedings with the view of closing its affairs, because of inability to continue business, are stamped with illegality. Gillet *v.* Moody, 3 N. Y. 479; Bradner *v.* Woodruff, 52 Hun (N. Y.) 214, 5 N. Y. Suppl. 207, 23 N. Y. St. 365; Leavitt *v.* Tylee, 1 Sandf. Ch. (N. Y.) 207. See also McAfee *v.* Bland, 11 Ky. L. Rep. 1, 11 S. W. 439.

70. *Ex p.* Conway, 4 Ark. 302; Robins *v.* Embry, Sm. & M. Ch. (Miss.) 207; Eppright *v.* Nickerson, 78 Mo. 482.

An assignment of "all and every of its property, effects, rights, and credits" passed the property to the assignee together with the right to sue for and recover the rights and credits. Hill *v.* Western, etc., R. Co., 86 Ga. 284, 12 S. E. 635. See also Stevens *v.* Hill, 29 Me. 133.

71. Eppright *v.* Nickerson, 78 Mo. 482.

72. Thus a bank president who was an executor purchased the stock of the bank with the estate's money, and just before its failure resold the stock to the bank at par and had a certificate of deposit issued for the amount. The estate had no greater rights than other creditors. Columbian Bank's Estate, 147 Pa. St. 422, 29 Wkly. Notes Cas. (Pa.) 456, 23 Atl. 625, 626, 628.

73. Fletcher *v.* Sharpe, 108 Ind. 276, 9 N. E. 142; McAfee *v.* Bland, 11 Ky. L. Rep. 1, 11 S. W. 439.

74. Grant *v.* Walsh, 145 N. Y. 502, 40 N. E. 209, 65 N. Y. St. 370, 45 Am. St. Rep. 626; Blair *v.* Hill, 50 N. Y. App. Div. 33, 63 N. Y. Suppl. 670; Spring Brook Chemical Co. *v.* Dunn, 39 N. Y. App. Div. 130, 57 N. Y. Suppl. 100; Syracuse Bank *v.* Wisconsin M. & F. Ins. Co., 12 N. Y. Suppl. 952, 36 N. Y. St. 584; Richardson *v.* New Orleans Coffee Co., 102 Fed. 785, 43 C. C. A. 583; Peck *v.* New York First Nat. Bank, 43 Fed. 357.

Checks and other instruments can be re-

(2) What Is Fraudulent Receiving. If the depositor would not have left his money had he known as much as the officers about the bank's condition, or if its condition was misrepresented to him with the view of influencing his conduct and had that effect, the taking of his deposit under these circumstances is a fraud on the depositor.[75] When the bank is in truth insolvent and this is known

covered unless they have been taken by other banks in good faith without notice on proper indorsements and credited to the insolvent sending bank. Grant *v.* Walsh, 145 N. Y. 502, 40 N. E. 209, 65 N. Y. St. 370, 45 Am. St. Rep. 626; Syracuse Bank *v.* Wisconsin M. & F. Ins. Co., 12 N. Y. Suppl. 952, 36 N. Y. St. 584; Williams *v.* Cox, 99 Tenn. 403, 42 S. W. 3; Bruner *v.* Bank, 97 Tenn. 540, 37 S. W. 286, 34 L. R. A. 532.

Money deposits can be recovered when they have not become mingled with other deposits, or when the deposits taken by the receiver in the beginning are increased to the amount thus claimed.

Illinois.— Lauterman *v.* Travous, 174 Ill. 459, 51 N. E. 805.

Nebraska.— Higgins *v.* Hayden, 53 Nebr. 61, 73 N. W. 280; Wilson *v.* Coburn, 35 Nebr. 530, 53 N. W. 466.

New Jersey.— Perth Amboy Gas Light Co. *v.* Middlesex County Bank, 60 N. J. Eq. 84, 45 Atl. 704.

New York.— Importers', etc., Nat. Bank *v.* Peters, 123 N. Y. 272, 25 N. E. 319, 33 N. Y. St. 182; Atkinson *v.* Rochester Printing Co., 114 N. Y. 168, 21 N. E. 178, 23 N. Y. St. 155; Matter of North River Bank, 60 Hun (N. Y.) 91, 14 N. Y. Suppl. 261, 37 N. Y. St. 931.

Ohio.— *In re* Commercial Bank, 2 Ohio S. & C. Pl. Dec. 304, 1 Ohio N. P. 170.

Pennsylvania.— Corn Exch. Nat. Bank *v.* Solicitors' L. & T. Co., 188 Pa. St. 330, 43 Wkly. Notes Cas. (Pa.) 184, 41 Atl. 536, 68 Am. St. Rep. 872.

Tennessee.— Bruner *v.* Johnson City First Nat. Bank, 97 Tenn. 540, 37 S. W. 286, 34 L. R. A. 532.

United States.— Richardson *v.* New Orleans Debenture Redemption Co., 102 Fed. 780, 42 C. C. A. 619, 52 L. R. A. 67; Quin *v.* Earle, 95 Fed. 728; Lake Erie, etc., R. Co. *v.* Indianapolis Nat. Bank, 65 Fed. 690; Wasson *v.* Hawkins, 59 Fed. 233; Furber *v.* Stephens, 35 Fed. 17.

Deposits that have become mingled and cannot be identified cannot be recovered. Wilson *v.* Coburn, 35 Nebr. 530, 53 N. W. 466.

Proceeds of checks.— In like manner the proceeds of checks fraudulently taken, and afterward collected by the receiver, can be recovered. Romanski *v.* Thompson, (Miss. 1892) 11 So. 828; Showalter *v.* Cox, 97 Tenn. 547, 37 S. W. 286; Richardson *v.* Denegre, 93 Fed. 572, 35 C. C. A. 452.

75. *Illinois.*— American Trust, etc., Bank *v.* Gueder, etc., Mfg. Co., 150 Ill. 336, 37 N. E. 227.

Indiana.— Crown Point First Nat. Bank *v.* Richmond First Nat. Bank, 76 Ind. 561, 40 Am. Rep. 261.

Maryland.— Cecil Bank *v.* Heald, 25 Md. 562.

Massachusetts.— Manufacturers' Nat. Bank *v.* Continental Bank, 148 Mass. 553, 20 N. E. 193, 12 Am. St. Rep. 598, 2 L. R. A. 699; Audenried *v.* Betteley, 8 Allen (Mass.) 302.

Michigan.— Sherwood *v.* Central Michigan Sav. Bank, 103 Mich. 109, 61 N. W. 352.

Mississippi.— Meridian First Nat. Bank *v.* Strauss, 66 Miss. 479, 6 So. 232, 14 Am. St. Rep. 579.

Nebraska.— Higgins *v.* Hayden, 53 Nebr. 61, 73 N. W. 280; State *v.* Wahoo State Bank, 42 Nebr. 896, 61 N. W. 252.

New Jersey.— Perth Amboy Gas Light Co. *v.* Middlesex County Bank, 60 N. J. Eq. 84, 45 Atl. 704.

New York.— Grant *v.* Walsh, 145 N. Y. 502, 40 N. E. 209, 65 N. Y. St. 370, 45 Am. St. Rep. 626; Importers', etc., Nat. Bank *v.* Peters, 123 N. Y. 272, 25 N. E. 319, 33 N. Y. St. 182; Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9 [*affirming* 14 Abb. N. Cas. (N. Y.) 409]; Anonymous, 67 N. Y. 598; Blair *v.* Hill, 50 N. Y. App. Div. 33, 63 N. Y. Suppl. 670; Spring Brook Chemical Co. *v.* Dunn, 39 N. Y. App. Div. 130, 57 N. Y. Suppl. 100; People *v.* St. Nicholas Bank, 77 Hun (N. Y.) 159, 28 N. Y. Suppl. 407, 58 N. Y. St. 712; People *v.* St. Nicholas Bank, 28 N. Y. Suppl. 421; Syracuse Bank *v.* Wisconsin F. & M. Ins. Co., 12 N. Y. Suppl. 952, 36 N. Y. St. 584.

Ohio.— Jones *v.* Kilbreth, 49 Ohio St. 401, 31 N. E. 346; *In re* Commercial Bank, 2 Ohio S. & C. Pl. Dec. 304, 1 Ohio N. P. 170.

Pennsylvania.— Corn Exch. Bank *v.* Solicitors' L. & T. Co., 188 Pa. St. 330, 41 Atl. 536, 68 Am. St. Rep. 872.

Tennessee.—In Venner *v.* Cox, (Tenn. 1895) 35 S. W. 769, although the president falsely represented the condition of the bank, on which a depositor acted, he could not recover his deposit.

Texas.— Parker *v.* Crawford, 3 Tex. Civ. App. Cas. § 365.

Virginia.— Alexandria First Nat. Bank *v.* Payne, 85 Va. 890, 9 S. E. 153, 3 L. R. A. 284.

United States.— St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 10 S. Ct. 390, 33 L. ed. 683; Martin *v.* Webb, 110 U. S. 7, 3 S. Ct. 428, 28 L. ed. 49; Richardson *v.* New Orleans Coffee Co., 102 Fed. 785, 43 C. C. A. 583; Richardson *v.* New Orleans Debenture Redemption Co., 102 Fed. 780, 42 C. C. A. 619, 52 L. R. A. 67; Hopkinsville City Bank *v.* Blackmore, 75 Fed. 771, 43 U. S. App. 617, 21 C. C. A. 514; Lake Erie, etc., R. Co. *v.* Indianapolis Nat. Bank, 65 Fed. 690; Wasson *v.* Hawkins, 59 Fed. 233; Somerville *v.* Beal, 49 Fed. 790; Merchants', etc., Bank *v.* Austen, 48 Fed. 25; Peck *v.* New York First Nat.

by the officers, but they expect to strengthen its condition and to continue, their action is not fraudulent in receiving deposits and they cannot be recovered.[76]

(c) *Trust Property.* Money, bonds, paper, and other property held by the bank in trust[77] are not included in the assignment, if in the original or a substituted form the property can be identified.[78] Many courts go further and hold

Bank, 43 Fed. 357; Illinois Trust, etc., Bank *v.* Buffalo First Nat. Bank, 21 Blatchf. (U. S.) 275, 15 Fed. 858.

Canada.— *Re* Canada Cent. Bank, 15 Ont. 611.

Cause of insolvency immaterial.— On the question of receiving deposits when insolvent it is immaterial whether the banker became insolvent by his fault, or by accident, and whether the insolvency consisted in his inability to pay depositors or other creditors, or both. Carr *v.* State, 104 Ala. 4, 16 So. 150.

76. Terhune *v.* Bergen County Bank, 34 N. J. Eq. 367; New York Breweries Co. *v.* Higgins, 79 Hun (N. Y.) 250, 29 N. Y. Suppl. 416, 61 N. Y. St. 21; Van Alstyne *v.* Crane, 4 Thomps. & C. (N. Y.) 113; Stapleton *v.* Odell, 21 Misc. (N. Y.) 94, 47 N. Y. Suppl. 13. See also Harris *v.* Johnson City First Nat. Bank, (Tenn. Ch. 1897) 41 S. W. 1084; Quin *v.* Earle, 95 Fed. 728.

Depositing after close of bank.— When a bank has filed, with a state officer, its certificate of closing and a deposit is afterward made without any knowledge of the certificate, the depositor is not precluded from recovering it. Northern Bank *v.* Zepp, 28 Ill. 180.

77. Fund must have actually existed.— A trust fund cannot be recovered unless it once actually existed. The crediting by an insolvent bank of a sum to a depositor transfers no actual property, and in such a case there is nothing to recover. Sherwood *v.* Milford State Bank, 94 Mich. 78, 53 N. W. 923.

When a check is charged to one depositor and credited to another of the same bank no trust fund is created by the operation, for the assets of the bank are not increased. Perth Amboy Gas Light Co. *v.* Middlesex County Bank, 60 N. J. Eq. 84, 45 Atl. 704.

78. *Alabama.*— St. Louis Brewing Assoc. *v.* Austin, 100 Ala. 313, 13 So. 908.

California.— Lathrop *v.* Bampton, 31 Cal. 17, 89 Am. Dec. 141.

Illinois.— Bayor *v.* Schaffner, 51 Ill. App. 180.

Indiana.— Johnson *v.* McClary, 131 Ind. 105, 30 N. E. 888.

Louisiana.— Mutual Nat. Bank *v.* Richardson, 33 La. Ann. 1312.

Massachusetts.— Little *v.* Chadwick, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570.

Michigan.— Board Fire, etc., Com'rs *v.* Wilkinson, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493; Edson *v.* Angell, 58 Mich. 336, 25 N. W. 307.

Minnesota.— Bishop *v.* Mahoney, 70 Minn. 238, 73 N. W. 6; Farwell *v.* St. Paul Trust Co., 45 Minn. 495, 48 N. W. 326, 22 Am. St. Rep. 742; St. Paul Third Nat. Bank *v.* Stillwater Gas Co., 36 Minn. 75, 30 N. W. 440; Davis *v.* Smith, 27 Minn. 390, 7 N. W. 731.

Mississippi.— Billingsley *v.* Pollock, 69 Miss. 759, 13 So. 828, 30 Am. St. Rep. 585.

Missouri.— Midland Nat. Bank *v.* Brightwell, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608.

Nebraska.— Cady *v.* South Omaha Nat. Bank, 46 Nebr. 756, 65 N. W. 906, 49 Nebr. 125, 68 N. W. 358.

New York.— Cavin *v.* Gleason, 105 N. Y. 256, 11 N. E. 504; Baker *v.* New York Nat. Exch. Bank, 100 N. Y. 31, 2 N. E. 452, 53 Am. Rep. 150; Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; Van Allen *v.* American Nat. Bank, 52 N. Y. 1; Chaffee *v.* Fort, 2 Lans. (N. Y.) 81.

North Carolina.— Whitley *v.* Fox, 59 N. C. 34, 78 Am. Dec. 236.

Ohio.— *In re* Commercial Bank, 4 Ohio S. & C. Pl. Dec. 108, 2 Onio N. P. 170.

Pennsylvania.—Lebanon Trust, etc., Bank's Estate, 166 Pa. St. 622, 31 Atl. 334; Freiberg *v.* Stoddard, 161 Pa. St. 259, 28 Atl. 1111; Farmers', etc., Nat. Bank *v.* King, 57 Pa. St. 202, 98 Am. Dec. 215.

Tennessee.— Downing *v.* Lellyett, (Tenn. Ch. 1896) 36 S. W. 890.

Texas.— Davis *v.* Panhandle Nat. Bank, (Tex. Civ. App. 1895) 29 S. W. 926.

Washington.—Blake *v.* State Sav. Bank, 12 Wash. 619, 41 Pac. 909.

Wisconsin.— Dowie *v.* Humphrey, 91 Wis. 98, 64 N. W. 315; Stevens *v.* Williams, 91 Wis. 58, 64 N. W. 422; Henika *v.* Heinemann, 90 Wis. 478, 63 N. W. 1047; Gianella *v.* Momsen, 90 Wis. 476, 63 N. W. 1018; Thuemmler *v.* Barth, 89 Wis. 381, 62 N. W. 94; Burnham *v.* Barth, 89 Wis. 362, 62 N. W. 96; Henry *v.* Martin, 88 Wis. 367, 60 N. W. 263. Once the rule was otherwise. See McLeod *v.* Evans, 66 Wis. 401, 28 N. W. 173, 214, 57 Am. Rep. 287.

Wyoming.— State *v.* Foster, 5 Wyo. 199, 38 Pac. 926, 63 Am. St. Rep. 47, 29 L. R. A. 226.

United States.— Peters *v.* Bain, 133 U. S. 670, 10 S. Ct. 354, 33 L. ed. 696; Baltimore Cent. Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693; Rogers *v.* Batchelor, 12 Pet. (U. S.) 221, 9 L. ed. 1063; Cecil Nat. Bank *v.* Thurber, 59 Fed. 913, 8 U. S. App. 496, 8 C. C. A. 365; Philadelphia Nat. Bank *v.* Dowd, 38 Fed. 172, 2 L. R. A. 480; Frelinghuysen *v.* Nugent, 36 Fed. 229; Furber *v.* Stephens, 35 Fed. 17; Illinois Trust, etc., Bank *v.* Buffalo First Nat. Bank, 21 Blatchf. (U. S.) 275, 15 Fed. 858.

England.— Kendal *v.* Wood, L. R. 6 Exch. 243, 39 L. J. Exch. 167, 23 L. T. Rep. N. S. 309; Heilbut *v.* Nevill, L. R. 4 C. P. 354, 38 L. J. C. P. 273, 20 L. T. Rep. N. S. 490, 17

that even if trust property becomes mingled with other property, yet if there is enough at the time of a bank's failure to discharge the trust it is thus impressed and can be taken by the owner,[79] and it logically follows that whatever fund there may be thus held in trust at the time of a bank's failure less than the entire amount is also impressed with a trust character and can be recovered by the true

Wkly. Rep. 853; *In re* West England, etc., Dist. Bank, 11 Ch. D. 772, 48 L. J. Ch. 600, 40 L. T. Rep. N. S. 712, 27 Wkly. Rep. 815; Frith *v.* Cartland, 2 H. & M. 417, 11 Jur. N. S. 238, 34 L. J. Ch. 301, 12 L. T. Rep. N. S. 175, 13 Wkly. Rep. 493; Sadler *v.* Belcher, 2 M. & Rob. 489.

Bonds pledged by a bank to secure overdrafts may be held by the pledgee to secure bills drawn prior to the pledgor's insolvency, but not presented for acceptance until afterward, to discharge such indebtedness. Garvin *v.* State Bank, 7 S. C. 266.

City funds received on deposit by a banker but redeposited in other banks by an agreement whereby he receives the same rate of interest as he pays the city, and which can be withdrawn only on city orders, are a trust deposit and cannot be taken by his assignee. Marquette *v.* Wilkinson, 119 Mich. 413, 78 N. W. 474, 43 L. R. A. 840.

Effect of beneficiary's acceptance of dividend.— The beneficiary's right to enforce the trust is not cut off by accepting a dividend on his claim. Wallace *v.* Stone, 107 Mich. 190, 65 N. W. 113. See also Importers', etc., Nat. Bank *v.* Peters, 123 N. Y. 272, 25 N. E. 319, 33 N. Y. St. 182.

Effect of beneficiary's ignorance of trust. — A beneficiary, although ignorant of the trust at the time of its creation, can enforce it on afterward learning of its existence. Marquette *v.* Wilkinson, 119 Mich. 413, 78 N. W. 474, 43 L. R. A. 840; Martin *v.* Funk, 75 N. Y. 134, 31 Am. Rep. 446. See also Coots *v.* McConnell, 39 Mich. 742 (where a banker just before making an assignment prepared and marked a package of money with the name of the depositor and "Private," and asked the assignee to deliver the package to the depositor, although the money had been set aside without his knowledge, and it was held that it was not covered by the assignment); *In re* Commercial Bank, 20 Ohio S. & C. Pl. Dec. 170, 1 Ohio N. P. 358.

79. *Alabama.*— St. Louis Brewing Assoc. *v.* Austin, 100 Ala. 313, 13 So. 908.

Colorado.— Central City First Nat. Bank *v.* Hummel, 14 Colo. 259, 23 Pac. 986, 20 Am. St. Rep. 257, 8 L. R. A. 788.

Indiana.—Winstandley *v.* Louisville Second Nat. Bank, 13 Ind. App. 544, 41 N. E. 956.

Iowa.— Davis *v.* Western Home Ins. Co., 81 Iowa 496, 46 N. W. 1073, 25 Am. St. Rep. 509, 10 L. R. A. 359; Nurse *v.* Satterlee, 81 Iowa 491, 46 N. W. 1102.

Kansas.— Myers *v.* Board of Education, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263; Ellicott *v.* Barnes, 31 Kan. 170, 1 Pac. 767; Peak *v.* Ellicott, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90.

Michigan.— Board Fire, etc., Com'rs *v.* Wilkinson, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493; Sherwood *v.* Central Michigan Sav. Bank, 103 Mich. 109, 61 N. W. 352.

Minnesota.— Bishop *v.* Mahoney, 70 Minn. 238, 73 N. W. 6 (holding that the fund must at all times be large enough to include the trust money); St. Paul Third Nat. Bank *v.* Stillwater Gas Co., 36 Minn. 75, 30 N. W. 440.

Mississippi.— Kinney *v.* Paine, 68 Miss. 258, 8 So. 747.

Missouri.— Midland Nat. Bank *v.* Brightwell, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608 (holding that the general fund must have been enlarged to the amount of the trust portion); Stoller *v.* Coates, 88 Mo. 514; Harrison *v.* Smith, 83 Mo. 210, 53 Am. Rep. 571; German F. Ins. Co. *v.* Kimble, 66 Mo. App. 370.

Nebraska.— Griffin *v.* Chase, 36 Nebr. 328, 54 N. W. 572; Anheuser-Busch Brewing Assoc. *v.* Morris, 36 Nebr. 31, 53 N. W. 1037.

New Jersey.—Thompson *v.* Gloucester City Sav. Inst., (N. J. 1887) 8 Atl. 97.

New York.—People *v.* Rochester City Bank, 96 N. Y. 32 [*criticized* in Cavin *v.* Gleason, 105 N. Y. 256, 11 N. E. 504; Frank *v.* Bingham, 58 Hun (N. Y.) 580, 12 N. Y. Suppl. 767, 35 N. Y. St. 714]. See also Holmes *v.* Gilman, 138 N. Y. 369, 34 N. E. 205, 52 N. Y. St. 873, 20 L. R. A. 566; People *v.* Rochester City Bank, 96 N. Y. 32; People *v.* Dansville Bank, 39 Hun (N. Y.) 187.

South Carolina.— White *v.* Commercial, etc., Bank, 60 S. C. 122, 38 S. E. 453.

Texas.— Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85.

Wyoming.— Foster *v.* Rincker, 4 Wyo. 484, 35 Pac. 470.

United States.—Richardson *v.* New Orleans Debenture Redemption Co., 102 Fed. 780, 42 C. C. A. 619, 52 L. R. A. 67; Quin *v.* Earle, 95 Fed. 728; Hopkinsville City Bank *v.* Blackmore, 75 Fed. 771, 43 U. S. App. 617, 21 C. C. A. 514; San Diego County *v.* California Nat. Bank, 52 Fed. 59. If the money in the receiver's possession is increased to the extent of the trust deposit that is enough. Commercial Nat. Bank *v.* Armstrong, 148 U. S. 50, 13 S. Ct. 533, 37 L. ed. 363; Libby *v.* Hopkins, 104 U. S. 303, 26 L. ed. 769; Boone County Nat. Bank *v.* Latimer, 67 Fed. 27; *In re* Armstrong, 33 Fed. 405.

England.— *In re* Hallett, L. R. 13 Ch. D. 696, 49 L. J. Ch. 415, 42 L. T. Rep. N. S. 421, 28 Wkly. Rep. 732; Pennell *v.* Deffell, 4 De G. M. & G. 372, 18 Jur. 273, 23 L. J. Ch. 115, 1 Wkly. Rep. 499, 53 Eng. Ch. 292; Taylor *v.* Plumer, 3 M. & S. 562, 2 Rose 415, 16 Rev. Rep. 361.

This rests on the theory that in drawing from a commingled fund a bank will draw its own first.

owners.[80] In many cases, however, in which the trust property, either in the original or substituted form does not exist, the courts will not inquire into the existence of the trust because, although the trust was established under the first rule mentioned, it could not be enforced.[81]

(iv) *Selection of Assignee.* The power to appoint an assignee may rest in the stock-holders[82] or directors[83] subject to the approval of the court. When the right rests in the stock-holders and a receiver is appointed temporarily until the shareholders have perfected their action he must immediately afterward relinquish his authority.[84]

(v) *Effect of Assignment.* It has been held that an assignment for the benefit of creditors causes the corporate powers of a bank to cease except so far as they may be continued by statute.[85]

5. Effect of Dissolution. At common law the debts to and from a bank are extinguished by its dissolution;[86] but by some statutes the debts owing by and in favor of a bank survive, and pending suits against them may proceed to judgment, while suits in their favor may be prosecuted by the trustees, receivers,

Michigan.— Sherwood *v.* Central Michigan Sav. Bank, 103 Mich. 109, 61 N. W. 352.

Minnesota.— Bishop *v.* Mahoney, 70 Minn. 238, 73 N. W. 6.

Missouri.— Harrison *v.* Smith, 83 Mo. 210, 53 Am. Rep. 571.

New York.— Importers', etc., Nat. Bank *v.* Peters, 123 N. Y. 272, 25 N. E. 319, 33 N. Y. St. 182; Baker *v.* New York Nat. Exch. Bank, 100 N. Y. 31, 2 N. E. 452, 53 Am. Rep. 150.

Texas.— Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85.

Wyoming.— State *v.* Foster, 5 Wyo. 199, 38 Pac. 926, 63 Am. St. Rep. 47, 29 L. R. A. 226.

80. Importers', etc., Nat. Bank *v.* Peters, 123 N. Y. 272, 25 N. E. 319, 33 N. Y. St. 182.

81. *Alabama.*— Florence Bank *v.* U. S. Savings, etc., Co., 104 Ala. 297, 16 So. 110.

Illinois.— Union Nat. Bank *v.* Goetz, 138 Ill. 127, 27 N. E. 907, 32 Am. St. Rep. 119.

Massachusetts.— Little *v.* Chadwick, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570.

Michigan.— Sherwood *v.* Milford State Bank, 94 Mich. 78, 53 N. W. 923.

Minnesota.— *In re* Seven Corners Bank, 58 Minn. 5, 59 N. W. 633.

New Jersey.— Perth Amboy Gas Light Co. *v.* Middlesex County Bank, 60 N. J. Eq. 84, 45 Atl. 704.

New York.— Atkinson *v.* Rochester Printing Co., 114 N. Y. 168, 21 N. E. 178, 23 N. Y. St. 155; Cavin *v.* Gleason, 105 N. Y. 256, 11 N. E. 504; Matter of North River Bank, 60 Hun (N. Y.) 91, 14 N. Y. Suppl. 261, 37 N. Y. St. 931; Frank *v.* Bingham, 58 Hun (N. Y.) 580, 12 N. Y. Suppl. 767, 35 N. Y. St. 714; Kip *v.* New York Bank, 10 Johns. (N. Y.) 63.

North Carolina.— Commercial, etc., Nat. Bank *v.* Davis, 115 N. C. 226, 20 S. E. 370.

Ohio.— Jones *v.* Kilbreth, 49 Ohio St. 401, 31 N. E. 346; Reeves *v.* State Bank, 8 Ohio St. 465; *In re* Commercial Bank, 4 Ohio S. & C. Pl. Dec. 108, 2 Ohio N. P. 170.

Pennsylvania.— Freiberg *v.* Stoddard, 161 Pa. St. 259, 28 Atl. 1111; Columbian Bank's Estate, 147 Pa. St. 422, 29 Wkly. Notes Cas. (Pa.) 456, 23 Atl. 625, 626, 628.

Rhode Island.— Slater *v.* Oriental Mills, 18 R. I. 352, 27 Atl. 443.

Wisconsin.— Thuemmler *v.* Barth, 89 Wis. 381, 62 N. W. 94; *In re* Plankinton Bank, 87 Wis. 378, 58 N. W. 784; Nonotuck Silk Co. *v.* Flanders, 87 Wis. 237, 58 N. W. 383 [*overruling* Bowers *v.* Evans, 71 Wis. 133, 36 N. W. 629; Francis *v.* Evans, 69 Wis. 115, 33 N. W. 93; McLeod *v.* Evans, 66 Wis. 401, 28 N. W. 173, 214, 57 Am. Rep. 287].

United States.— Cecil Nat. Bank *v.* Thurber, 59 Fed. 913, 8 U. S. App. 496, 8 C. C. A. 365; Philadelphia Nat. Bank *v.* Dowd, 38 Fed. 172, 2 L. R. A. 480; *In re* Coan, etc., Mfg. Co., 6 Biss. (U. S.) 315, 5 Fed. Cas. No. 2,915, 7 Chic. Leg. N. 260, 12 Nat. Bankr. Reg. 203; Illinois Trust, etc., Bank *v.* Buffalo First Nat. Bank, 21 Blatchf. (U. S.) 275, 15 Fed. 858; Bank of Commerce *v.* Russell, 2 Dill. (U. S.) 215, 2 Fed. Cas. No. 884; Trecothick *v.* Austin, 4 Mason (U. S.) 16, 24 Fed. Cas. No. 14,164; *In re* Janeway, 13 Fed. Cas. No. 7,208, 4 Brewst. (Pa.) 250, 4 Nat. Bankr. Reg. 100, 18 Pittsb. Leg. J. (Pa.) 67.

England.— Whitecomb *v.* Jacob, 1 Salk. 160.

82. Union Banking Co.'s Assignment, 12 Phila. (Pa.) 469, 34 Leg. Int. (Pa.) 230.

83. News *v.* Shackamaxon Bank, 16 Wkly. Notes Cas. (Pa.) 207, holding that when the right to appoint rests in the directors, the creditors may object to those selected on the ground of unfitness and request the appointment of others.

84. Union Banking Co.'s Assignment, 12 Phila. (Pa.) 469, 34 Leg. Int. (Pa.) 230.

85. Craig's Appeal, 92 Pa. St. 396. See also Ringo *v.* Biscoe, 13 Ark. 563, 570. *Contra*, State *v.* State Bank, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561.

86. Coulter *v.* Robertson, 24 Miss. 278, 57 Am. Dec. 168: Commercial Bank *v.* Chambers, 8 Sm. & M. (Miss.) 9; Fox *v.* Horah, 36 N. C. 358, 36 Am. Dec. 48.

Collections.— The general power of a bank

commissioners, or others authorized to settle their affairs.[87] Indeed a bank usually has all needful authority after it has discontinued business to do such things as are necessary to protect the rights of its creditors, conserve its assets, and collect and dispose of them in the most economical manner.[88]

6. Presentation of Claims and Distribution of Assets — a. In General. By some statutes a time is fixed for presenting claims against an insolvent bank, but if no positive law exists, and a judicial order is made for presenting them of which the claimant receives no notice, he may be permitted to prove his claim after the day fixed by the court.[89] A receiver should permit an issue to be framed to determine the validity of a claim instead of compelling the claimant to bring an action against the insolvent bank.[90] A creditor cannot recover twice, nor is he entitled to two judgments for the same claim under different forms.[91]

b. Interest. Interest should be allowed on claims from the date of the appointment of the trustee or receiver.[92]

c. Set-Off — (i) *In General.* Only direct and ascertained indebtedness can be properly set off against a claim due to a bank;[93] and where the debts are not due to and from the same persons in the same capacity the right of set-off does not exist.[94]

(ii) *Bank Checks.* A debtor cannot set off against his note or other

to collect paper deposited with it ceases by its suspension. Jockusch *v.* Towsey, 51 Tex. 129.

87. *Alabama.*— Huntsville Bank *v.* McGehees, 1 Stew. & P. (Ala.) 306.

Arkansas.—Underhill *v.* State Bank, 6 Ark. 135.

Illinois.— Providence City Ins. Co. *v.* Bristol Commercial Bank, 68 Ill. 348.

Indiana.—Conwell *v.* Pattison, 28 Ind. 509; Cunningham *v.* Clark, 24 Ind. 7.

Maine.— American Bank *v.* Cooper, 54 Me. 438.

Mississippi.— Commercial Bank *v.* Chambers, 8 Sm. & M. (Miss.) 9.

New York.— Talmage *v.* Pell, 9 Paige (N. Y.) 410.

Ohio.— Martin *v.* Belmont Bank, 13 Ohio 250.

Pennsylvania.— Com. *v.* Huntingdon Bank, 2 Penr. & W. (Pa.) 438.

Tennessee.—Ingraham *v.* Terry, 11 Humphr. (Tenn.) 571.

Abatement of suits by statute.— On the closing of the United States Bank all suits by the express words of its charter abated. U. S. Bank *v.* McLaughlin, 2 Cranch C. C. (U. S.) 20, 2 Fed. Cas. No. 928.

88. Saltmarsh *v.* Planters, etc., Bank, 14 Ala. 668; Conwell *v.* Pattison, 28 Ind. 509; Cunningham *v.* Clark, 24 Ind. 7; Cooper *v.* Curtis, 30 Me. 488; Folger *v.* Chase, 18 Pick. (Mass.) 63; Hallowell, etc., Bank *v.* Hamlin, 14 Mass. 178.

89. Glenn *v.* Farmer's Bank, 80 N. C. 71. See also Greeley *v.* Provident Sav. Bank, 98 Mo. 458, 11 S. W. 980, holding that such an order does not prevent a collecting officer from presenting a claim for taxes against the receiver after the time fixed by the court for presenting claims.

90. Citizens' Sav. Bank *v.* Person, 98 Mich. 173, 57 N. W. 121.

91. Latimer *v.* Wood, 73 Fed. 1001, 36 U. S. App. 581, 20 C. C. A. 251.

If he recovers his claim against the president of a bank he cannot afterward prove his debt against the bank and share with other creditors in its assets. Dobson *v.* Simonton, 95 N. C. 312.

92. Home Sav. Bank *v.* Peirce, 156 Mass. 307, 31 N. E. 483; Bank Com'rs *v.* Security Trust Co., 70 N. H. 536, 49 Atl. 113; Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864; U. S. *v.* Knox, 111 U. S. 784, 4 S. Ct. 686, 28 L. ed. 603; Commonwealth Nat. Bank *v.* Mechanics' Nat. Bank, 94 U. S. 437, 24 L. ed. 176; New York Security, etc., Co. *v.* Lombard Invest. Co., 73 Fed. 537; Chemical Nat. Bank *v.* Armstrong, 59 Fed. 372, 16 U. S. App. 465, 8 C. C. A. 155, 28 L. R. A. 231.

93. Humboldt Safe Deposit, etc., Co.'s Estate, 3 Pa. Co. Ct. 621.

94. Chapman *v.* Curtis, (Miss. 1901) 29 So. 467; Matter of Van Allen, 37 Barb. (N. Y.) 225.

Set-off between failed banks.— Bank A at the time of its failure was indebted to bank B. Subsequently bank B failed owing among others the trustee of bank A. Neither bank could set off against its indebtedness to the other its indebtedness due therefrom, but each was entitled to share *pro rata* with the other creditors. Akin *v.* Williamson, (Tenn. Ch. 1895) 35 S. W. 569.

Set-off of debt against creditor of a stockholder.— Commissioners who are winding up the affairs of a bank that has forfeited its charter cannot set off against a creditor of a stock-holder who is seeking to subject his stock to the payment of his debts a debt due to the bank by the stock-holder, the bank itself having no lien on the stock for the debt. Dana *v.* Brown, 1 J. J. Marsh. (Ky.) 304.

Set-off on note of director and cashier.— The director and cashier of a bank foreseeing its insolvency, the proceeds of notes were given to the former, who was also a depositor, and his surety, to secure them against losses.

indebtedness a check drawn in his favor by a depositor before the bank's failure,[95] especially where the holder in no event has the right to sue the bank on which it is drawn unless it has accepted the check.[96]

(III) *Claims Acquired After Bank's Failure.* A debtor cannot, after the failure of a bank, obtain an assignment of a depositor's claim to use as an offset against his indebtedness to the bank,[97] unless this is permitted by statute.[98] But the question is sometimes difficult to decide what act shall be regarded as such a suspension or closing of a bank as to defeat a subsequent assignment of a deposit. In some states this may be done after closing and before filing of a bill to wind up the bank's affairs[99] or making a voluntary assignment.[1]

(IV) *Depositor's Notes.* A depositor is often indebted to the failed bank on notes or other obligations. If his obligation has matured his liability may be reduced by setting off his deposit[2] or a claim for services[3] against the same, and this right is unaffected by the appointment of a receiver.[4] The rule is almost as general that his deposit can be thus applied even though his obligation was not due at the time of the bank's insolvency;[5] but if a debtor pays his note without

In an action against them on the notes only the dividend of the director on his deposits could be set off on the notes and not the full amount. Lamb *v.* Pannell, 28 W. Va. 663.

95. Case *v.* Marchand, 23 La. Ann. 60; Case *v.* Henderson, 23 La. Ann. 49, 8 Am. Rep. 590; Northern Trust Co. *v.* Rogers, 60 Minn. 208, 62 N. W. 273, 51 Am. St. Rep. 576. See also Butterworth *v.* Peck, 5 Bosw. (N. Y.) 341; Farmers' Deposit Nat. Bank *v.* Penn Bank, 123 Pa. St. 283, 16 Atl. 761, 2 L. R. A. 273, in which latter case, a suit by an assignee of a failed bank to recover the balance due from a bank, defendant was permitted to set off a check drawn on the insolvent bank which it held for collection.

Cashier's check.— A depositor who receives from the cashier a check against his deposit, which is marked off at the same time on his pass-book, has only changed the form of his debt and no amount has been thereby assigned to him which entitles him to a preference over other creditors. Clark *v.* Chicago Title, etc., Co., 186 Ill. 440, 57 N. E. 1061, 78 Am. St. Rep. 294, 23 L. R. A. 232 [*affirming* 85 Ill. App. 293].

96. Butterworth *v.* Peck, 5 Bosw. (N. Y.) 341.

97. *Florida.*—Robinson *v.* Aird, (Fla. 1901) 29 So. 633.

Massachusetts.— Colt *v.* Brown, 12 Gray (Mass.) 233.

Michigan.— Stone *v.* Dodge, 96 Mich. 514, 56 N. W. 75, 21 L. R. A. 280.

New York.— Van Dyck *v.* McQuade, 85 N. Y. 616.

Oregon.— *Re* Hamilton, 26 Oreg. 579, 38 Pac. 1088.

Pennsylvania.— Venango Nat. Bank *v.* Taylor, 56 Pa. St. 14.

Tennessee.— Smith *v.* Mosby, 9 Heisk. (Tenn.) 501.

Transfer to indorser.— One liable as indorser may have a deposit assigned to him between the suspension of a bank and the appointment of a receiver, but if he knew that the bank was insolvent at the time the assignment was made to him, then perhaps it will not stand. Higgins *v.* Worthington, 90 Hun (N. Y.) 436, 35 N. Y. Suppl. 815, 70 N. Y. St. 300.

98. State Bank *v.* Spangler, 32 Pa. St. 474.

99. Moseby *v.* Williamson, 5 Heisk. (Tenn.) 278.

1. Johnston *v.* Humphrey, 91 Wis. 76, 64 N. W. 317, 51 Am. St. Rep. 873.

2. *Kentucky.*—Finnell *v.* Nesbit, 16 B. Mon. (Ky.) 351.

Massachusetts.— Colt *v.* Brown, 12 Gray (Mass.) 233.

New York.— Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145; Delahunty *v.* Central Nat. Bank, 63 N. Y. App. Div. 177; Matter of Van Allen, 37 Barb. (N. Y.) 225; Equitable Bank *v.* Claassen, 3 Misc. (N. Y.) 148, 23 N. Y. Suppl. 310, 51 N. Y. St. 503; New Amsterdam Sav. Bank *v.* Tartter, 54 How. Pr. (N. Y.) 385; Platt *v.* Bentley, 20 Am. L. Reg. (N. Y.) 171.

Rhode Island.— Clarke *v.* Hawkins, 5 R. I. 219.

Wisconsin.— Merchants' Exch. Bank *v.* Fuldner, 92 Wis. 415, 66 N. W. 691.

3. Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322.

4. Matter of Middle District Bank, 1 Paige (N. Y.) 585, 19 Am. Dec. 452; Miller *v.* Franklin Bank, 1 Paige (N. Y.) 444.

5. *Georgia.*—Georgia Seed Co. *v.* Talmadge, 96 Ga. 254, 22 S. E. 1001; State *v.* Brobston, 94 Ga. 95, 21 S. E. 146, 47 Am. St. Rep. 138.

Illinois.— McCagg *v.* Woodman, 28 Ill. 84; Third Swedish M. E. Church *v.* Wetherell, 43 Ill. App. 414.

Kentucky.— Finnell *v.* Nesbit, 16 B. Mon. (Ky.) 351.

Louisiana.— Beatty *v.* Scudday, 10 La. Ann. 404.

Maryland.— Colton *v.* Drovers' Perpetual Bldg., etc., Assoc., 90 Md. 85, 45 Atl. 23, 78 Am. St. Rep. 431, 46 L. R. A. 388.

Massachusetts.—Aldrich *v.* Campbell, 4 Gray (Mass.) 284.

Missouri.— Smith *v.* Spengler, 83 Mo. 408.

Nebraska.— Salladin *v.* Mitchell, 42 Nebr. 859, 61 N. W. 127.

observing his legal right to set off his deposit against his liability he cannot afterward insist that his deposit is entitled to priority over other claims.[6]

(v) *By Indorser, Surety, or Guarantor.* An indorser, a surety, or a guarantor can set off a deposit against his liability.[7] If there are several indorsers, each is entitled to set off his deposit as against his contributive share of the note; and if some of the indorsers are insolvent, in justice and equity the receiver must adjust such share in view of the solvency of the other indorsers.[8]

d. Distribution of Assets — (i) *In General* — (a) *Order of.* The assets of an insolvent bank are distributed in the same order as the assets of other insolvent estates, except such preferences as may be prescribed.[9] The state or nation has no superior claim over other creditors;[10] and although the bank belongs to the state its assets must be applied, as in the case of any other failed bank, to the payment of its creditors.[11]

(b) *Participation in* — (1) Of Creditor Holding Collateral. Where a creditor holds collateral for his claim it is held in some jurisdictions that he can sell his collaterals, apply the proceeds on his debt, and, if they are insufficient, prove the unpaid portion of his claim on which he is entitled to a dividend like other creditors.[12] In others he can prove his entire claim as though he had no collaterals, take his dividend like other creditors, and afterward apply the proceeds of the collaterals to the balance of his claim. If the proceeds prove suffi-

New York.— Matter of Hatch, 155 N. Y. 401, 50 N. E. 49, 40 L. R. A. 664; Fera *v.* Wickham, 135 N. Y. 223, 31 N. E. 1028, 47 N. Y. St. 866, 17 L. R. A. 456; Kling *v.* Irving Nat. Bank, 21 N. Y. App. Div. 373, 47 N. Y. Suppl. 528; Clute *v.* Warner, 8 N. Y. App. Div. 40, 40 N. Y. Suppl. 392; Seymour *v.* Dunham, 24 Hun (N. Y.) 93; Fort *v.* McCully, 59 Barb. (N. Y.) 87; Matter of Van Allen, 37 Barb. (N. Y.) 225; Jones *v.* Robinson, 26 Barb. (N. Y.) 310; Berry *v.* Brett, 6 Bosw. (N. Y.) 627; Butterworth *v.* Peck, 5 Bosw. (N. Y.) 341; People *v.* Canal St. Bank, 6 Misc. (N. Y.) 319, 26 N. Y. Suppl. 794, 56 N. Y. St. 248; New Amsterdam Sav. Bank *v.* Tartter, 54 How. Pr. (N. Y.) 385.

North Carolina.— Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322.

Ohio.—Armstrong *v.* Warner, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466; Cincinnati Second Nat. Bank *v.* Hemingray, 34 Ohio St. 381; *In re* Commercial Bank, 4 Ohio S. & C. Pl. Dec. 108, 2 Ohio N. P. 170.

Pennsylvania.— Skiles *v.* Houston, 110 Pa. St. 254, 2 Atl. 30; Jordan *v.* Sharlock, 84 Pa. St. 366, 24 Am. Rep. 198; Northampton Bank *v.* Balliet, 8 Watts & S. (Pa.) 311, 42 Am. Dec. 297.

Wisconsin.— Merchants' Exch. Bank *v.* Fuldner, 92 Wis. 415, 66 N. W. 691; Jones *v.* Piening, 85 Wis. 264, 55 N. W. 413.

United States.— Scott *v.* Armstrong, 146 U. S. 499, 13 S. Ct. 148, 36 L. ed. 1059; Fisher *v.* Hanover Nat. Bank, 64 Fed. 832, 26 U. S. App. 386, 12 C. C. A. 430; Yardley *v.* Clothier, 49 Fed. 337 [*affirmed* in 51 Fed. 506, 3 U. S. App. 207, 2 C. C. A. 349, 17 L. R. A. 462].

6. *In re* Commercial Bank, 4 Ohio S. & C. Pl. Dec. 108, 2 Ohio N. P. 170.

7. Lionberger *v.* Kinealy, 13 Mo. App. 4; Arnold *v.* Niess, 1 Walk. (Pa.) 115, 36 Leg. Int. (Pa.) 437.

Effect of agreement.— The rights of indorsers may be enlarged or narrowed by special agreements which may or may not be enforceable in consequence of the bank's failure. Lamb *v.* Morris, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111; Newberry *v.* Trowbridge, 13 Mich. 263. See also Shryock *v.* Bashore, 11 Phila. (Pa.) 565, 33 Leg. Int. (Pa.) 56.

Effect of indemnity by real owner.— In no case can an indorser's deposit be set off when he is indemnified by the real debtor, nor can he be compelled to pay. Matter of Middle Dist. Bank, 1 Paige (N. Y.) 585, 19 Am. Dec. 452.

8. Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322.

9. Belcher *v.* Willcox, 40 Ga. 391.

10. Cook County Nat. Bank *v.* U. S., 107 U. S. 445, 2 S. Ct. 561, 27 L. ed. 537 [*reversing* 9 Biss. (U. S.) 55, 25 Fed. Cas. No. 14,853, 11 Chic. Leg. N. 344, 25 Int. Rev. Rec. 266, 2 Browne Nat. Bank Cas. 128, 8 Reporter 198].

A state bank can claim no priority on the ground that a debt due to the bank is due to the state. State Bank *v.* Gibson, 6 Ala. 814; State Bank *v.* Clark, 8 N. C. 36; State Bank *v.* Gibbs, 3 McCord (S. C.) 377; Kentucky Bank *v.* Wister, 2 Pet. (U. S.) 318, 7 L. ed. 437; U. S. Bank *v.* Georgia Planters' Bank, 9 Wheat. (U. S.) 904, 6 L. ed. 244.

11. State *v.* State Bank, 1 S. C. 63; Baring *v.* Dabney, 19 Wall. (U. S.) 1, 22 L. ed. 90.

12. *Iowa.*—Wurtz *v.* Hart, 13 Iowa 515.

Kansas.— Security Invest. Co. *v.* Richmond Nat. Bank, 58 Kan. 414, 49 Pac. 521; American Nat. Bank *v.* Branch, 57 Kan. 27, 45 Pac. 88; Burnham *v.* Citizens' Bank, 55 Kan. 545, 40 Pac. 912; Citizens' Bank *v.* State, 8 Kan. App. 468, 54 Pac. 510.

Maryland.— Rogers *v.* Citizens' Nat. Bank, 93 Md. 613, 49 Atl. 843; National Union Bank *v.* National Mechanics' Bank, 80 Md.

cient to extinguish his claim he loses nothing; if more than enough, then he must pay over the balance not belonging to him to the bank's trustee or receiver for the benefit of other creditors.[13]

(2) Of Officers and Stock-Holders. It has been held that an innocent officer or stock-holder of a bank is entitled to participate, like any other creditor, in the distribution of its assets,[14] notwithstanding his personal liability for its debts.[15] Stock-holders who have paid the claims of depositors and other creditors are subrogated to their rights to administer on the assets;[16] and if they buy up any claims against their bank at a discount, they are entitled to the same dividend on their face value as the original owners.[17] Nothing, however, can be repaid to them on their stock until the discharge of all the indebtedness of their bank,[18] and the rights of the creditors to these assets are complete and cannot be diverted by subsequent legislation.[19]

371, 30 Atl. 913, 45 Am. St. Rep. 350, 27 L. R. A. 476; Baltimore Third Nat. Bank *v.* Lanahan, 66 Md. 461, 7 Atl. 615.

Massachusetts.— Merchants' Nat. Bank *v.* Eastern R. Co., 124 Mass. 518; Farnum *v.* Boutelle, 13 Metc. (Mass.) 159; Amory *v.* Francis, 16 M s. 308.

New Jersey.— Vanderveer *v.* Conover, 16 N. J. L. 487; Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400, 29 Atl. 203; Bell *v.* Fleming, 12 N. J. Eq. 13.

Ohio.— Searle *v.* Brumback, 2 Ohio Dec. (Reprint) 653, 4 West. L. Month. 330.

Tennessee.— Winton *v.* Eldridge, 3 Head (Tenn.) 360; Fields *v.* Wheatley, 1 Sneed (Tenn.) 350; Nashville First Nat. Bank *v.* Williamson, (Tenn. Ch. 1895) 35 S. W. 573.

Washington.— *In re* Frasch, 5 Wash. 344, 31 Pac. 755, 32 Pac. 771.

13. *Connecticut.*— Findlay *v.* Hosmer, 2 Conn. 350.

Illinois.— Levy *v.* Chicago Nat. Bank, 158 Ill. 88, 42 N. E. 129, 30 L. R. A. 380; Furness *v.* Union Nat. Bank, 147 Ill. 570, 35 N. E. 624; Matter of Bates, 118 Ill. 524, 9 N. E. 257, 59 Am. Rep. 383.

Kentucky.— Logan *v.* Anderson, 18 B. Mon. (Ky.) 114.

Michigan.— Detroit Third Nat. Bank *v.* Haug, 82 Mich. 607, 47 N. W. 33, 11 L. R. A. 327.

Nebraska.— State *v.* Nebraska Sav. Bank, 40 Nebr. 342, 58 N. W. 976.

New Hampshire.— Bank Com'rs *v.* Security Trust Co., 70 N. H. 536, 49 Atl. 113; Moses *v.* Ranlet, 2 N. H. 488.

New York.— People *v.* Remington, 121 N. Y. 328, 24 N. E. 793, 31 N. Y. St. 289, 8 L. R. A. 458; Matter of Ives, 25 Abb. N. Cas. (N. Y.) 63, 11 N. Y. Suppl. 650; Murry *v.* Hutcheson, 8 Abb. N. Cas. (N. Y.) 423.

North Carolina.— Winston *v.* Biggs, 117 N. C. 206, 23 S. E. 316.

Oregon.— Kellogg *v.* Miller, 22 Oreg. 406, 30 Pac. 229, 29 Am. St. Rep. 618.

Pennsylvania.— Patten's Appeal, 45 Pa. St. 151, 84 Am. Dec. 479. See also Jamison's Estate, 163 Pa. St. 143, 29 Atl. 100; Graeff's Appeal, 79 Pa. St. 146; Brough's Estate, 71 Pa. St. 460; Keim's Appeal, 27 Pa. St. 42; Morris *v.* Olivine, 22 Pa. St. 441.

Rhode Island.— Green *v.* Jackson Bank, 18 R. I. 779, 30 Atl. 963; Allen *v.* Danielson, 15 R. I. 480, 8 Atl. 705 [*overruling* Knowles' Petition, 13 R. I. 90].

South Carolina.—Atlantic Phosphate Co. *v.* Law, 45 S. C. 606, 23 S. E. 955.

Texas.— Kauffman *v.* Hudson, 65 Tex. 716.

Vermont.— Walker *v.* Baxter, 26 Vt. 710; West *v.* Rutland Bank, 19 Vt. 403.

Wisconsin.— *In re* Meyer, 78 Wis. 615, 48 N. W. 55, 23 Am. St. Rep. 435, 11 L. R. A. 841.

United States.— Merrill *v.* Jacksonville Nat. Bank, 173 U. S. 131, 19 S. Ct. 360, 43 L. ed. 640; New York Security, etc., Co. *v.* Lombard Invest. Co., 73 Fed. 537.

England.— *In re* Hopkins, 18 Ch. D. 370, 45 L. T. Rep. N. S. 117, 29 Wkly. Rep. 767.

Two claims secured by same property.— If a creditor has tw^ claims, one secured by a first mortgage and the other by a second mortgage, of the same property, and this is sufficient to pay in full the first claim, no dividend will be made thereon which he can apply on the other claim. Peoria First Nat. Bank *v.* Commercial Nat. Bank, 151 Ill. 308, 37 N. E. 1019.

14. Insurance Co.'s Estate, 9 Lanc. Bar (Pa.) 119. *Contra*, in California, where a stock-holder in an insolvent bank is not permitted to share in its dividends either by subrogation or otherwise under the statute. Sacramento Bank *v.* Pacific Bank, 124 Cal. 147, 56 Pac. 787, 71 Am. St. Rep. 36, 45 L. R. A. 863.

15. Humboldt Safe Deposit, etc., Co.'s Estate, 3 Pa. Co. Ct. 621.

Deposit of insolvent bank.— If a bank applies a deposit belonging to an insolvent bank on a note held against the concern, it is entitled to a dividend like other creditors on the balance due. Georgia Seed Co. *v.* Talmadge, 96 Ga. 254, 22 S. E. 1001.

16. Macon City Bank *v.* Crossland, 65 Ga. 734.

17. Craig's Appeal, 92 Pa. St. 396.

18. Hollister *v.* Hollister Bank, 2 Abb. Dec. (N. Y.) 367, 2 Keyes (N. Y.) 245; Dabney *v.* State Bank, 3 Rich. (S. C.) 124.

Payment by a shareholder to a suspended bank to resume does not create a debt due to him. Brodrick *v.* Brown, 69 Fed. 497.

19. Coulter *v.* Robertson, 24 Miss. 278, 57 Am. Dec. 168; Nevitt *v.* Port Gibson Bank, 6 Sm. & M. (Miss.) 513.

(II) *Unexpected Assets.* If, after an assessment has been levied, there remains a sum in the receiver's possession arising from assets not anticipated at the time of the assessment, this will not be distributed among the stock-holders until the creditors have been fully paid.[20]

(III) *Surplus.* The surplus after paying all debts belongs, under every form of dissolution, to the shareholders, and should be ratably divided among them.[21]

G. Reorganization. When a bank is reorganized, but is essentially the same organization, it is responsible for the debts of the old bank;[22] but if the new bank is essentially a new organization it is not responsible.[23]

III. NATIONAL BANKS.

A. The Comptroller. The national banking law is administered by the comptroller of the currency.[24] That officer cannot submit himself or the United States to the jurisdiction of a court,[25] and has no power to compromise or settle claims of a national bank against its debtors.[26]

B. Organization[27]**— 1. Powers Before Organization.** Until fully organized[28] a national bank can transact no business except that incidental to organizing. It

20. Pruyn *v.* Van Allen, 39 Barb. (N. Y.) 354.

21. Lum *v.* Robertson, 6 Wall. (U. S.) 277, 18 L. ed. 743; Bacon *v.* Robertson, 18 How. (U. S.) 480, 15 L. ed. 499.

22. Ray *v.* State Bank, 10 Bush (Ky.) 344; Austin *v.* Tecumseh Nat. Bank, 49 Nebr. 412, 68 N. W. 628, 59 Am. St. Rep. 543, 35 L. R. A. 444; Reed Bros. Co. *v.* Weeping Water First Nat. Bank, 46 Nebr. 168, 64 N. W. 701.

If a new set of stock-holders agree with the old ones of a bank to be substituted to its rights for a sufficient consideration, the new bank is responsible for the debts of the old one. The body corporate remains the same. Island City Sav. Bank *v.* Sachtleben, 67 Tex. 420, 3 S. W. 733. See also Gresham *v.* Island City Sav. Bank, 2 Tex. Civ. App. 52, 21 S. W. 556.

Liability for deposits.— If the successor of a bank be the bank itself, it must pay the depositors of the former as though no change had occurred. Hopper *v.* Moore, 42 Iowa 563; Eans *v.* Jefferson City Exch. Bank, 79 Mo. 182; Hughes *v.* School Dist. No. 29, 72 Mo. 643; Thompson *v.* Abbott, 61 Mo. 176; Citizens' Sav. Bank *v.* Blakesley, 42 Ohio St. 645.

Maker of renewed note cannot question reorganization.— The maker or indorser of a note discounted by a bank that is renewed after reorganization cannot question the validity of the new concern as a defense. Spahr *v.* Farmers' Bank, 94 Pa. St. 429.

23. Ray *v.* State Bank, 10 Bush (Ky.) 344; New Orleans City Bank *v.* Barbarin, 6 Rob. (La.) 289; Wyman *v.* Hallowell, etc., Bank, 14 Mass. 58, 7 Am. Dec. 194; Bellows *v.* Hallowell, etc., Bank, 2 Mason (U. S.) 31, 3 Fed. Cas. No. 1,279.

Consolidation.— When a debtor bank is consolidated with another and trustees are appointed to close its offices, the new bank is not liable for the debt of the old debtor bank. Donnally *v.* Hearndon, 41 W. Va. 519, 23 S. E. 646.

Reorganization after assignment for benefit of creditors.— The creditors of a corporation which has made an assignment for their benefit release their rights thereunder when they consent to a plan of reorganization and accept the bonds of the new company in payment of their claims. Chattanooga First Nat. Bank *v.* Radford Trust Co., 80 Fed. 569, 47 U. S. App. 692, 26 C. C. A. 1.

Debts of new bank.— Debts contracted between the passage of an act providing for the revival of a bank and its acceptance are not included in the debts of the new bank. New Orleans City Bank *v.* Barbarin, 6 Rob. (La.) 289.

24. U. S. Rev. Stat. (1872), § 324 *et seq.*

The deputy comptroller acts in the place of the comptroller, and in the absence of any proof to the contrary it is presumed that his action is in conformity with law. Young *v.* Wempe, 46 Fed. 354. He may sign a certificate pertaining to the organization. Keyser *v.* Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531.

25. Case *v.* Terrell, 11 Wall. (U. S.) 199, 20 L. ed. 134; Van Antwerp *v.* Hulburd, 7 Blatchf. (U. S.) 426, 28 Fed. Cas. No. 16,826, Thomps. Nat. Bank Cas. 208, 8 Blatchf. (U. S.) 282, 28 Fed. Cas. No. 16,827, Thomps. Nat. Bank Cas. 219.

26. Case *v.* Small, 4 Woods (U. S.) 78, 10 Fed. 722.

27. Organization of banking associations, generally, see *supra*, II, A.

28. When organized.— The proposed bank does not become a corporation until the filing of the articles of association and certificate of organization with the comptroller. Regester *v.* Medcalf, 71 Md. 528, 18 Atl. 966.

Relation to national government.— National banks are private banks constituting no part of any branch of the national government (Branch *v.* U. S., 12 Ct. Cl. 281) although created to aid the government (Farmers', etc., Nat. Bank *v.* Dearing, 91 U. S. 29, 23 L. ed. 196).

cannot make a lease of its banking house,[29] cash a check,[30] or make any kind of agreement with another bank.[31]

2. Conversion From State to National Bank — a. Power to Convert. No authority other than that conferred by congress is required to enable a bank existing under a special or general state law to become a national banking association,[32] and the certificate of the comptroller of the currency is conclusive as to the regularity of the proceedings by which the conversion was effected.[33]

b. Effect of. Such conversion is a transition rather than a new creation. All of the old bank's rights of action are preserved and all of its liabilities still exist. Consequently, the new bank can sue to recover loans and is liable for debts and other obligations contracted by its predecessor.[34] Nor on the other hand can a national bank escape its liabilities by reorganizing as a state bank.[35]

29. McCormick *v.* Market Nat. Bank, 165 U. S. 538, 17 S. Ct. 433, 41 L. ed. 817.

30. Armstrong *v.* Springfield Second Nat. Bank, 38 Fed. 883.

31. Wellston First Nat. Bank *v.* Armstrong, 42 Fed. 193.

32. Casey *v.* Galli, 94 U. S. 673, 680, 24 L. ed. 168, 307.

A savings-bank in the District of Columbia could be converted into a national bank under the act of congress of June 30, 1876, although its capital was less than one hundred thousand dollars. Keyser *v.* Hitz, 2 Mackey (D. C.) 473 [*reversed*, on other grounds, in 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531].

Right of voting stock-holders to effect conversion.— Under the act of congress of June 3, 1864, a state bank, which was authorized by its charter to issue, in addition to its voting stock, non-transferable stock which carried no voting power, could be converted into a national bank by the required majority of its voting stock-holders and be transferred with its capital and assets, including non-transferable stock, to the new corporation. State *v.* Phœnix Bank, 34 Conn. 205.

As to rights of non-voting stock-holders under the Connecticut act of 1863, construed in connection with the act of congress of June 3, 1864, see State *v.* Hartford Nat. Bank, 34 Conn. 240; State *v.* Phœnix Bank, 34 Conn. 205.

Ad interim directors — Quorum.— Under the act of congress of 1864, § 44, empowering the directors of the state bank to act as such for the national bank until the election or appointment of a new board, a majority of such *ad interim* directors was held to be necessary to constitute a quorum for the transaction of business. Lockwood *v.* Mechanics Nat. Bank, 9 R. I. 308, 11 Am. Rep. 253.

33. Keyser *v.* Hitz, 2 Mackey (D. C.) 473 [*reversed*, on other grounds, in 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531]; Casey *v.* Galli, 94 U. S. 673, 680, 24 L. ed. 168, 307. And see *infra*, III, D, 3, b, (VI), (B).

34. *Massachusetts.*—Atlantic Nat. Bank *v.* Harris, 118 Mass. 147.

Missouri.— Eans *v.* Jefferson City Exch. Bank, 79 Mo. 182; Coffey *v.* National Bank, 46 Mo. 140, 2 Am. Rep. 488.

New York.— Poughkeepsie City Bank *v.* Phelps, 97 N. Y. 44, 49 Am. Rep. 513, 86 N. Y. 484 [*reversing* 16 Hun (N. Y.) 158; Claggett *v.* Metropolitan Nat. Bank, 56 Hun (N. Y.) 578, 10 N. Y. Suppl. 165, 31 N. Y. St. 937 [*affirmed* in 125 N. Y. 729, 26 N. E. 757, 35 N. Y. St. 995]; Grocers' Nat. Bank *v.* Clark, 32 How. Pr. (N. Y.) 160.

Pennsylvania.— Kelsey *v.* Crawford County Nat. Bank, 69 Pa. St. 426; Thorp *v.* Wegefarth, 56 Pa. St. 82, 93 Am. Dec. 789.

United States.— Michigan Ins. Bank *v.* Eldred, 143 U. S. 293, 12 S. Ct. 450, 36 L. ed. 162; Metropolitan Nat. Bank *v.* Claggett, 141 U. S. 520, 12 S. Ct. 60, 35 L. ed. 841 [*affirming* 125 N. Y. 729, 26 N. E. 757, 35 N. Y. St. 995].

Under the New York act of March 9, 1865, the receiver of a national bank which failed two years after its conversion from a state bank could prosecute an appeal from a judgment against the state bank, such appeal being taken within three years after the conversion. Claflin *v.* Farmers', etc., Bank, 54 Barb. (N. Y.) 228.

Under the Maryland act of 1865, c. 144, a state bank after its conversion into a national bank could issue a scire facias in its own corporate name on a judgment obtained by it before such conversion, but the new bank being the substantial plaintiff was liable for costs in case of judgment for defendant. Thomas *v.* Farmers' Bank, 46 Md. 43.

Retention of same corporate name.— The Maryland act of 1865, c. 144, allowing the bank to retain its old corporate name did not conflict with the act of congress of 1864. Thomas *v.* Farmers' Bank, 46 Md. 43.

Although in form reorganized as a new bank a national bank which is in fact organized as a successor of a state bank is entitled to hold the assets of its predecessor. Western Reserve Bank *v.* McIntire, 40 Ohio St. 528.

The right of the state to exact a bonus imposed by the charter of a state bank for the exercise of the franchise terminated upon its conversion into a national bank. State *v.* Baltimore Nat. Bank, 33 Md. 75.

Not equivalent to paying off stock.— The conversion of a state bank to a national bank under the act of congress of June 3, 1864, was not equivalent in law to an actual paying off of the state bank's stock. Maynard *v.* Mechanics' Nat. Bank, 1 Brewst. (Pa.) 483.

35. Eans *v.* Jefferson City Exch. Bank, 79 Mo. 182.

3. Extensions. Congress has provided for extending the charters of the national banks; all the obligations due to and from them have the same force as before,[36] and the committee appointed to appraise the value of the shares act simply as appraisers possessing no judicial function.[37]

C. Capital, Stock, and Dividends[38] — **1. Increase of Capital.** An attempted increase of capital without obtaining the consent of two thirds of the stock, the payment in full of the increase, and securing the comptroller's approval and certificate is invalid, and the increase to the subscriptions cannot be enforced.[39]

2. Making up Deficiency in Capital. When the capital of a national bank is impaired and it wishes to continue in business by supplying the impairment, the shareholders, and not the directors, must make the assessment required. If a stock-holder will not comply, enough of his stock must be sold to pay the assessment.[40]

3. Stock — a. Negotiability. The negotiability of national bank-stock depends on national laws.[41]

b. Transfer. The title to stock is acquired by the seller's delivery of his certificate thereof to the purchaser indorsed, or assigned, in the usual manner,[42] but the mere transfer of stock on the bank-books does not constitute the transferee a stock-holder, who must know of or ratify the transfer to make it complete.[43] On

36. National Exch. Bank *v.* Gay, 57 Conn. 224, 17 Atl. 555, 4 L. R. A. 343; Newark First Presb. Church *v.* Newark Nat. State Bank, 57 N. J. L. 27, 29 Atl. 320.

37. Clarion First Nat. Bank *v.* Brenneman, 114 Pa. St. 315, 7 Atl. 910.

38. Capital, stock, and dividends of banks, generally, see *supra*, II, B.

39. Winters *v.* Armstrong, 37 Fed. 508.

For stock-holder's liability when an increase has been made and not paid see Scott *v.* Latimer, 89 Fed. 843, 60 U. S. App. 720, 33 C. C. A. 1.

Rights of subscriber where law not observed.— If a subscriber has paid the proposed increase supposing that the requirements of the law have been observed when they have not been, or the plan fails, he can recover either the full amount paid (Winters *v.* Armstrong, 37 Fed. 508) or share with the other creditors (Nichols *v.* Stephens, 32 Mo. App. 330; Schierenberg *v.* Stephens, 32 Mo. App. 314).

Comptroller's certificate conclusive of regularity.— The comptroller's certificate relating to the increase is conclusive of the regularity of the proceeding. Rand *v.* Columbia Nat. Bank, 87 Fed. 520; Tillinghast *v.* Bailey, 86 Fed. 46; Columbia Nat. Bank *v.* Mathews, 85 Fed. 934, 56 U. S. App. 636, 29 C. C. A. 491; Latimer *v.* Bard, 76 Fed. 536.

When subscriber bound.— When the comptroller's certificate is given a subscriber cannot question the regularity of the proceedings for an increase. Schierenberg *v.* Stephens, 32 Mo. App. 314; Thayer *v.* Butler, 141 U. S. 234, 11 S. Ct. 987, 35 L. ed. 711; Pacific Nat. Bank *v.* Eaton, 141 U. S. 227, 11 S. Ct. 984, 35 L. ed. 702; Brown *v.* Tillinghast, 93 Fed. 326, 35 C. C. A. 323; Columbia Nat. Bank *v.* Mathews, 85 Fed. 934, 56 U. S. App. 636, 29 C. C. A. 491.

Increase based on fictitious valuation.— When an increase is based on a fictitious valuation of the bank's assets by the directors, the participants in the fraud are liable for all losses resulting to the creditors. Cockrill *v.* Cooper, 86 Fed. 71, 58 U. S. App. 648, 29 C. C. A. 529.

40. Hulitt *v.* Bell, 85 Fed. 98. See also Merchants Nat. Bank *v.* Fouche, 103 Ga. 351, 31 S. E. 87.

If the assessment is invalid because the directors have made it instead of the stockholders, and the bank finally ceases to do business, the paying stock-holders may be preferred to the other ones after other creditors have been paid. Armstrong *v.* Law, 11 Ohio Dec. (Reprint) 461, 27 Cinc. L. Bul. 100; *In re* Hulitt, 96 Fed. 785; Winters *v.* Armstrong, 37 Fed. 508; Witters *v.* Sowles, 24 Blatchf. (U. S.) 550, 32 Fed. 130.

41. Bath Sav. Inst. *v.* Sagadahoc Nat. Bank, 89 Me. 500, 36 Atl. 996; Central Nat. Bank *v.* Williston, 138 Mass. 244; Dickinson *v.* Central Nat. Bank, 129 Mass. 279, 37 Am. Rep. 551; Doty *v.* Larimore First Nat. Bank, 3 N. D. 9, 53 N. W. 77, 17 L. R. A. 259; Merchants' Nat. Bank *v.* State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008; Continental Nat. Bank *v.* Eliot Nat. Bank, 7 Fed. 369; Scott *v.* Pequonnock Nat. Bank, 21 Blatchf. (U. S.) 203, 15 Fed. 494.

42. Johnston *v.* Laflin, 103 U. S. 800, 26 L. ed. 532.

43. Finn *v.* Brown, 142 U. S. 56, 12 S. Ct. 136, 35 L. ed. 936; Keyser *v.* Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531; Horton *v.* Mercer, 71 Fed. 153, 36 U. S. App. 234, 18 C. C. A. 18; Stephens *v.* Follett, 43 Fed. 842.

Regularity of signing and issue presumed. — The courts will presume that a certificate bearing the bank's seal was signed and issued with due authority. Davis *v.* Watkins, 56 Nebr. 288, 76 N. W. 575.

Proof of issue as collateral.— Although a certificate be in due form the fact may be shown that it was issued to the apparent stock-holder solely as collateral security. McMahon *v.* Macy, 51 N. Y. 155; Burgess *v.*

the other hand, if a stock-holder indorses his certificate and delivers it to the cashier with directions to make a transfer, he has parted with his title and discharged his duty and is no longer liable for an assessment.[44]

c. Assessments — (I) *Who Liable* — (A) *In General.* All the stock-holders are liable for assessments;[45] and the real ones as distinguished from those whose names may appear on the record.[46] The assessment will bind a married woman who is a stock-holder,[47] the personal representative of a deceased stock-holder,[48] a donor,[49] or one holding stock for an undisclosed principal.[50]

Seligman, 107 U. S. 20, 2 S. Ct. 10, 27 L. ed. 359; Williams *v.* American Nat. Bank, 85 Fed. 376, 56 U. S. App. 316, 29 C. C. A. 203.

For effect of making out but not delivering stock certificates see Chemical Nat. Bank *v.* Havermale, 120 Cal. 601, 52 Pac. 1071, 65 Am. St. Rep. 206; Thayer *v.* Butler, 141 U. S. 234, 19 S. Ct. 987, 35 L. ed. 711.

44. Cox *v.* Elmendorf, 97 Tenn. 518, 37 S. W. 387; Whitney *v.* Butler, 118 U. S. 655, 7 S. Ct. 61, 30 L. ed. 266; Hayes *v.* Shoemaker, 39 Fed. 319.

By-law prohibiting transfer.— A by-law prohibiting a stock-holder who is indebted to the bank from transferring his stock is void notwithstanding a notice thereof indorsed on his certificate. Feckheimer *v.* Norfolk Nat. Exch. Bank, 79 Va. 80.

45. Atwater *v.* Stromberg, 75 Minn. 277, 77 N. W. 963; Atwater *v.* Smith, 73 Minn. 507, 76 N. W. 253.

Minors.— If one buys stock in the name of his minor children he is liable for an assessment (Foster *v.* Chase, 75 Fed. 797); but a minor who is a stock-holder in an insolvent bank is bound by the action of his guardian in borrowing money as a trustee to pay its debts (Hanover Nat. Bank *v.* Cocke, 127 N.C. 467, 37 S. E. 507). As the estate of a minor only is liable for an assessment, property inherited after the liability accrued cannot be taken. Clark *v.* Ogilvie, (Ky. 1901) 63 S. W. 429.

Assignee for benefit of creditors.— An assignee of a stock-holder who assigns for the benefit of his creditors after the failure of his bank must pay an assessment levied on his stock. Graham *v.* Platt, (Colo. 1901) 65 Pac. 30.

46. Cox *v.* Elmendorf, 97 Tenn. 518, 37 S. W. 387; Pauly *v.* State L. & T. Co., 165 U. S. 606, 17 S. Ct. 465, 41 L. ed. 844; Earle *v.* Coyle, 97 Fed. 410, 38 C. C. A. 226; Houghton *v.* Hubbell, 91 Fed. 453, 63 U. S. App. 31, 33 C. C. A. 574; Burt *v.* Bailey, 73 Fed. 693, 36 U. S. App. 676, 19 C. C. A. 651; Snyder *v.* Foster, 73 Fed. 136, 41 U. S. App. 95, 19 C. C. A. 406; Yardley *v.* Wilgus, 56 Fed. 965.

A transfer by the real owner to escape liability is invalid.— Adams *v.* Johnson, 107 U. S. 251, 2 S. Ct. 246, 27 L. ed. 386; Germania Nat. Bank *v.* Case, 99 U. S. 628, 25 L. ed. 448; Foster *v.* Lincoln, 79 Fed. 170, 45 U. S. App. 623, 24 C. C. A. 609; Cox *v.* Montague, 78 Fed. 845, 47 U. S. App. 384, 24 C. C. A. 364; Stuart *v.* Hayden, 72 Fed. 402, 36 U. S. App. 462, 18 C. C. A. 618; Davis *v.* Stevens, 17 Blatchf. (U. S.) 259, 7 Fed. Cas. No. 3,653, 20 Alb. L. J. 490, 14 Am. L. Rev. 84, 2 Browne Nat. Bank Cas. 158, 25 Int. Rev. Rec. 378, 36 Leg. Int. (Pa.) 462, 8 Reporter 710; Bowden *v.* Santos, 1 Hughes (U. S.) 158, 3 Fed. Cas. No. 1,716, Thomps. Nat. Bank Cas. 271.

Flaws in subscribing do not relieve the real owner. Turnbull *v.* Payson, 95 U. S. 418, 24 L. ed. 437; Scott *v.* Latimer, 89 Fed. 843, 60 U. S. App. 720, 33 C. C. A. 1.

Name in book as proof of ownership.—The fact that one's name appears in the stock-book is *prima facie* but not conclusive proof of ownership. If a stock-holder knowingly permits his name to be entered or kept there he is liable as one (Finn *v.* Brown, 142 U. S. 56, 12 S. Ct. 136, 35 L. ed. 936; Lewis *v.* Switz, 74 Fed. 381; Welles *v.* Larrabee, 36 Fed. 866, 2 L. R. A. 471), but if he did not know, or supposed that the transfer had been made when it had not been through the fault of the bank and not through his, then he is not liable (Whitney *v.* Butler, 118 U. S. 655, 7 S. Ct. 61, 30 L. ed. 266).

Where transfer not actually made.— If one has bought stock and supposes the transfer has been made to him, when in truth it has not been, he cannot escape his liability after making this discovery. Burt *v.* Bailey, 73 Fed 693, 36 U. S. App. 676, 19 C. C. A. 651.

Insolvent bank — Fraudulent sale.— If a person is wrongfully led to purchase stock of an insolvent bank, and he promptly rescinds the sale on discovery of the fraud, he cannot be held as a real stock-holder. Lantry *v.* Wallace, 97 Fed. 865, 38 C. C. A. 510; Wallace *v.* Bacon, 86 Fed. 553; Stufflebeam *v.* De Lashmutt, 83 Fed. 449; Newton Nat. Bank *v.* Newbegin, 74 Fed. 135, 40 U. S. App. 1, 20 C. C. A. 339.

47. Keyser *v.* Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531; Bundy *v.* Cocke, 128 U. S. 185, 9 S. Ct. 242, 32 L. ed. 396; *In re* St. Albans First Nat. Bank, 49 Fed. 120; Witlers *v.* Sowles, 32 Fed. 767; Hobart *v.* Johnson, 19 Blatchf. (U. S.) 359, 8 Fed. 493.

48. Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864.

An estate in the possession of an executor is liable. Tourtelot *v.* Finke, 87 Fed. 840; Zimmerman *v.* Carpenter, 84 Fed. 747; Blackmore *v.* Woodward, 71 Fed. 321, 37 U. S. App. 531, 18 C. C. A. 57; Parker *v.* Robinson, 71 Fed. 256, 33 U. S. App. 368, 18 C. C. A. 36; Wickham *v.* Hull, 60 Fed. 326; Witters *v.* Sowles, 24 Blatchf. (U. S.) 550, 32 Fed. 130.

49. Sykes *v.* Holloway, 81 Fed. 432.

50. Kerr *v.* Urie, 86 Md. 72, 37 Atl. 789, 63 Am. St. Rep. 493, 38 L. R. A. 119.

A trustee, however, is not personally liable if he be free from fraud or concealment.[51]

(B) *Liability of Pledgee.* A creditor who receives stock as collateral and takes out a new certificate in his own name as pledgee is not liable,[52] but if the stock is transferred on the books of the bank in such a manner as to show that the pledgee is the owner then he is liable.[53]

(II) *Extent of Liability.* Stock-holders are liable to be assessed equally and ratably. In other words each is assessed for such a portion of the entire indebtedness as his stock bears to the entire amount of stock. If any stock-holder fails to pay his assessment, no other pays an increased sum by reason of his delinquency.[54] If, however, the indebtedness proves to be larger than it was supposed to be when the first assessment was ordered a second assessment may be ordered for any amount, so long as the two do not aggregate more than the entire liability prescribed by law.[55]

(III) *Duration of Liability.* A stock-holder's liability ceases after the bank goes into liquidation,[56] but he may be sued for the liability he has incurred until the statute of limitations cuts off the right of recovery,[57] which is a bar in equity as well as law.[58]

51. Lucas *v.* Coe, 86 Fed. 972; Baker *v.* Beach, 85 Fed. 836; Parker *v.* Robinson, 71 Fed. 256, 33 U. S. App. 368, 18 C. C. A. 36; Beal *v.* Essex Sav. Bank, 67 Fed. 816, 33 U. S. App. 101, 15 C. C. A. 128; Yardley *v.* Wilgus, 56 Fed. 965. See also Anderson *v.* Philadelphia Warehouse Co., 111 U. S. 479, 4 S. Ct. 525, 28 L. ed. 478.

52. Pauly *v.* State L. & T. Co., 165 U. S. 606, 17 S. Ct. 465, 41 L. ed. 844; National Park Bank *v.* Harmon, 79 Fed. 891, 51 U. S. App. 148, 25 C. C. A. 214; Beal *v.* Essex Sav. Bank, 67 Fed. 816, 33 U. S. App. 101, 15 C. C. A. 128.

53. Hale *v.* Walker, 31 Iowa 344, 7 Am. Rep. 137; Magruder *v.* Colston, 44 Md. 349, 22 Am. Rep. 47; Anderson *v.* Philadelphia Warehouse Co., 111 U. S. 479, 4 S. Ct. 525, 28 L. ed. 478; Wilson *v.* Chicago Merchants' L. & T. Co., 98 Fed. 688, 39 C. C. A. 231; Baker *v.* Providence Old Nat. Bank, 86 Fed. 1006; Bowden *v.* Farmers', etc., Nat. Bank, 1 Hughes (U. S.) 307, 3 Fed. Cas. No. 1,714, 14 Bankers' Mag. 387, 2 Browne Nat. Bank Cas. 146, 25 Int. Rev. Rec. 405, 1 Wkly. Jur. 639; Moore *v.* Jones, 3 Woods (U. S.) 53, 17 Fed. Cas. No. 9,769, 2 Browne Nat. Bank Cas. 144.

54. U. S. *v.* Knox, 102 U. S. 422, 26 L. ed. 216; Sanger *v.* Upton, 91 U. S. 56, 23 L. ed. 220; Kennedy *v.* Gibson, 8 Wall. (U. S.) 498, 19 L. ed. 476; Young *v.* Wempe, 46 Fed. 354; Stanton *v.* Wilkeson, 8 Ben. (U. S.) 357, 22 Fed. Cas. No. 13,299; Bailey *v.* Sawyer, 4 Dill. (U. S.) 463, 2 Fed. Cas. No. 744, 15 Alb. L. J. 235, 11 Bankers' Mag. (3d S.) 793, 2 Browne Nat. Bank Cas. 154, 9 Chic. Leg. N. 191, 23 Int. Rev. Rec. 79.

Deficiency arising from bad management.— A stock-holder cannot be assessed to make up any deficiency arising from the bad management of the fund collected by the receiver. O'Connor *v.* Witherby, 111 Cal. 523, 44 Pac. 227; Peters *v.* Foster, 56 Hun (N. Y.) 607, 10 N. Y. Suppl. 389, 32 N. Y. St. 174; Platt *v.* Crawford, 8 Abb. Pr. N. S. (N. Y.) 297; Bushnell *v.* Leland, 164 U. S. 684, 17 S. Ct. 209, 41 L. ed. 598; Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864; Germania Nat. Bank *v.* Case, 99 U. S. 628, 25 L. ed. 448; Casey *v.* Galli, 94 U. S. 673, 24 L. ed. 168; Cadle *v.* Baker, 20 Wall. (U. S.) 650, 22 L. ed. 448; Kennedy *v.* Gibson, 8 Wall. (U. S.) 498, 19 L. ed. 476; Aldrich *v.* Skinner, 98 Fed. 375; Aldrich *v.* Campbell, 97 Fed. 663, 38 C. C. A. 347; De Weese *v.* Smith, 97 Fed. 309; Aldrich *v.* Yates, 95 Fed. 78; Brown *v.* Tillinghast, 93 Fed. 326, 35 C. C. A. 323; Columbia Nat. Bank *v.* Mathews, 85 Fed. 934, 56 U. S. App. 636, 29 C. C. A. 491; Nead *v.* Wall, 70 Fed. 806; Young *v.* Wempe, 46 Fed. 354; Welles *v.* Stout, 38 Fed. 67; Bailey *v.* Sawyer, 4 Dill. (U. S.) 463, 2 Fed. Cas. No. 744, 15 Alb. L. J. 235, 11 Bankers' Mag. (3d S.) 793, 2 Browne Nat. Bank Cas. 154, 9 Chic. Leg. N. 191, 23 Int. Rev. Rec. 79, Syllabi 151.

An assessment draws interest from the time it is payable. Davis *v.* Watkins, 56 Nebr. 288, 76 N. W. 575; Adams *v.* Johnson, 107 U. S. 251, 2 S. Ct. 246, 27 L. ed. 386; Casey *v.* Galli, 94 U. S. 673, 24 L. ed. 168.

55. Aldrich *v.* Campbell, 97 Fed. 663, 38 C. C. A. 347; Aldrich *v.* Yates, 95 Fed. 78. See also U. S. *v.* Knox, 102 U. S. 422, 26 L. ed. 216. *Contra*, De Weese *v.* Smith, 97 Fed. 309.

56. Richards *v.* Attleborough Nat. Bank, 148 Mass. 187, 19 N. E. 353, 1 L. R. A. 781; Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864.

57. Price *v.* Yates, 7 Wkly. Notes Cas. (Pa.) 51; De Weese *v.* Smith, 97 Fed. 309; Butler *v.* Poole, 44 Fed. 586.

58. Campbell *v.* Haverhill, 155 U. S. 610, 15 S. Ct. 217, 39 L. ed. 280; Aldrich *v.* Skinner, 98 Fed. 375; De Weese *v.* Smith, 97 Fed. 309; Thompson *v.* German Ins. Co., 76 Fed. 892.

The statute begins to run from the time the comptroller orders the collection of the assessment. De Weese *v.* Smith, 97 Fed. 309; Aldrich *v.* Yates, 95 Fed. 78.

(iv) *Enforcement of Assessment.* On an order from the comptroller[59] the receiver sues for the assessment.[60] Where the entire liability of a stock-holder is demanded the remedy is by an action at law,[61] but where the assessment is for less than the entire amount of the liability the proper remedy is by a bill in equity.[62]

4. Dividends — a. Right to Revoke Declaration. When a dividend has actually been declared out of the earnings of the bank it must be paid; the directors cannot reverse their action and conclude to retain the bank's earnings as a surplus.[63]

b. Where Bank Insolvent. As the capital of a bank is a trust fund for the creditors none can be distributed to their injury in the way of dividends; and if this be done, a receiver can bring a bill in equity against the stock-holders to recover them.[64]

D. Officers[65] — 1. Election or Appointment and Tenure. A national bank cannot hire one of its officers for a specified time, but only during the pleasure of the appointing power,[66] and if his bond reads in this manner his sureties are liable for any default while he holds office.[67]

59. The comptroller's action is conclusive and cannot be reviewed or collaterally attacked. Casey *v.* Galli, 94 U. S. 673, 24 L. ed. 168; Cadle *v.* Baker, 20 Wall. (U. S.) 650, 22 L. ed. 448; Kennedy *v.* Gibson, 8 Wall. (U. S.) 498, 19 L. ed. 476; Aldrich *v.* Skinner, 98 Fed. 375.

60. Peters *v.* Foster, 56 Hun (N. Y.) 607, 10 N. Y. Suppl. 389, 32 N. Y. St. 174; Platt *v.* Crawford, 8 Abb. Pr. N. S. (N. Y.) 297; Metropolis Nat. Bank *v.* Kennedy, 17 Wall. (U. S.) 19, 21 L. ed. 554; Bethel First Nat. Bank *v.* National Pahquioque Bank, 14 Wall. (U. S.) 383, 20 L. ed. 840; Kennedy *v.* Gibson, 8 Wall. (U. S.) 498, 19 L. ed. 476; Stanton *v.* Wilkeson, 8 Ben. (U. S.) 357, 22 Fed. Cas. No. 13,299, 2 Browne Nat. Bank Cas. 162, 2 N. Y. Wkly. Dig. 91.

Right to set off against assessment. — As this is a trust fund for the creditors, a stock-holder can set off against the assessment neither a dividend on his deposit (King *v.* Armstrong, 50 Ohio St. 222, 34 N. E. 163) nor the deposit itself (Delano *v.* Butler, 118 U. S. 634, 7 S. Ct. 39, 30 L. ed. 260; Case *v.* Louisiana Citizens' Bank, 100 U. S. 446, 25 L. ed. 695; Wingate *v.* Orchard, 75 Fed. 241, 44 U. S. App. 522, 21 C. C. A. 315; Sowles *v.* Witters, 39 Fed. 403. See also Aspinwall *v.* Butler, 133 U. S. 595, 10 S. Ct. 417; 33 L. ed. 779; Hobart *v.* Gould, 8 Fed. 57).

61. Kennedy *v.* Gibson, 8 Wall. (U. S.) 498, 19 L. ed. 476; Welles *v.* Stout, 38 Fed. 67.

The validity of the bank's incorporation cannot be attacked in this proceeding by the stock-holder. Davis *v.* Watkins, 56 Nebr. 288, 76 N. W. 575; Casey *v.* Galli, 94 U. S. 673, 24 L. ed. 168.

62. Kennedy *v.* Gibson, 8 Wall. (U. S.) 498, 19 L. ed. 476.

For details in determining the liability see U. S. *v.* Knox, 102 U. S. 422, 26 L. ed. 216.

Must aver order of comptroller. — The receiver must aver in his bill that the comptroller has directed the assessment to be made. O'Connor *v.* Witherby, 111 Cal. 523, 44 Pac. 227; Kennedy *v.* Gibson, 8 Wall. (U. S.) 498, 19 L. ed. 476; Welles *v.* Stout, 38 Fed. 67; Stanton *v.* Wilkeson, 8 Ben. (U. S.) 357, 22 Fed. Cas. No. 13,299, 2 Browne Nat. Bank Cas. 162, 2 N. Y. Wkly. Dig. 91; Strong *v.* Southworth, 8 Ben. (U. S.) 331, 23 Fed. Cas. No. 13,545, 2 Browne Nat. Bank Cas. 172; Bailey *v.* Sawyer, 4 Dill. (U. S.) 463, 2 Fed. Cas. No. 744, 15 Alb. L. J. 235, 11 Bankers' Mag. (3d S.) 793, 2 Browne Nat. Bank Cas. 154, 9 Chic. Leg. N. 191, 23 Int. Rev. Rec. 79, Syllabi 151, Thomps. Nat. Bank Cas. 356.

63. Seeley *v.* New York Nat. Exch. Bank, 8 Daly (N. Y.) 400.

Liability for declaring unearned dividends see *infra*, III, D, 3, a, (II), (B).

A state court can compel the directors to declare a dividend where the profits warrant such action which they in bad faith decline to take. Hiscock *v.* Lacy, 9 Misc. (N. Y.) 578, 30 N. Y. Suppl. 860, 62 N. Y. St. 228.

64. Hornor *v.* Henning, 93 U. S. 228, 23 L. ed. 879; Sawyer *v.* Hoag, 17 Wall. (U. S.) 610, 21 L. ed. 731; Hayden *v.* Williams, 96 Fed. 279, 37 C. C. A. 479; Hayden *v.* Thompson, 71 Fed. 60, 36 U. S. App. 361, 17 C. C. A. 592; Union Nat. Bank *v.* Douglass, 1 McCrary (U. S.) 86, 24 Fed. Cas. No. 14,375.

But if the bank was in fact solvent the receiver cannot recover the dividend. McDonald *v.* Williams, 174 U. S. 397, 19 S. Ct. 743, 43 L. ed. 1022.

65. Officers of banking associations, generally, see *supra*, II, D.

66. Harrington *v.* Chittenango First Nat. Bank, 1 Thomps. & C. (N. Y.) 361; Brandon First Nat. Bank *v.* Briggs, 69 Vt. 12, 37 Atl. 231, 60 Am. St. Rep. 922, 37 L. R. A. 845; Westervelt *v.* Mohrenstecher, 76 Fed. 118, 40 U. S. App. 221, 22 C. C. A. 93, 34 L. R. A. 477.

67. Phillips *v.* Bossard, 35 Fed. 99, where it was further held that a judgment against a cashier for embezzlement would not estop a bank from bringing an action on his bond to recover what he had taken by making false entries.

2. Powers and Duties — a. Of President. If a president is a nominal officer, simply presiding at board meetings and taking no larger responsibility in lending the bank's money than any other director, he does not possess much power; but the old rule that generally he possessed very little inherent power no longer applies to him,[68] for when he is the real head and manager of a bank, through and by whom its business is conducted, he can perform such business without express authority.[69] He has always had authority to conduct the bank's litigation;[70] and he can make loans on the pledge of collaterals;[71] indorse[72] and guarantee paper in the ordinary course of transferring it for value,[73] secure a debt,[74] sign a bond,[75] and borrow from his bank.[76] On the other hand he cannot bind his bank by a note made in his own name,[77] ratify a contract made with a promoter who assisted in creating the bank,[78] relinquish a debt,[79] receive in exchange an inferior security,[80] or make an unusual agreement.[81]

b. Of Vice-President. The powers of the vice-president are declared to be more limited. As in the case of the president, the correct answer depends on whether he is an active officer or not. Where he is thus daily employed he doubtless will bind his bank by his acts that are within the usual scope of his duties as fully as any other officer.[82]

c. Of Cashier. The cashier can borrow money in the regular course of the bank's business and pledge its property in payment;[83] make collections;[84] borrow from the bank for his own use;[85] certify a check drawn on a sufficient fund[86] (nor need this be done in writing);[87] and indorse the bank's

68. Greenville First Nat. Bank *v.* Sherburne, 14 Ill. App. 566; Whitehall First Nat. Bank *v.* Tisdale, 18 Hun (N. Y.) 151; Hodge *v.* Richmond First Nat. Bank, 22 Gratt. (Va.) 51.

Imputation of president's knowledge to bank.— When the president is not an active officer the knowledge acquired by him concerning the bank's affairs is rarely imputed to it (Hodge *v.* Richmond First Nat. Bank, 22 Gratt. (Va.) 51), but if he embezzle the funds of the bank kept with the reserve agent the bank is regarded as having knowledge (Detty *v.* Dominion Nat. Bank, 75 Fed. 769, 43 U. S. App. 613, 22 C. C. A. 376, where he replaced them with money borrowed on the bank's note without the director's knowledge, the money being afterward drawn to pay the bank's debts).

69. Cox *v.* Robinson, 82 Fed. 277, 283, 48 U. S. App. 388, 27 C. C. A. 120, where the court said: "It is immaterial whether such authority exists by virtue of his office, or is imposed by the course of business as conducted by the corporation." See also Bell *v.* Hanover Nat. Bank, 57 Fed. 821.

70. Guthrie Nat. Bank *v.* Earl, 2 Okla. 617, 39 Pac. 391.

71. Mahoney Min. Co. *v.* Anglo-Californian Bank, 104 U. S. 192, 26 L. ed. 707; Bell *v.* Hanover Nat. Bank, 57 Fed. 821.

72. U. S. National Bank *v.* Little Rock First Nat. Bank, 79 Fed. 296, 49 U. S. App. 67, 24 C. C. A. 597.

73. Thomas *v.* Hastings City Nat. Bank, 40 Nebr. 501, 58 N. W. 943, 24 L. R. A. 263; Auten *v.* U. S. National Bank, 174 U. S. 125, 19 S. Ct. 628, 43 L. ed. 920.

74. Thomas *v.* Hastings City Nat. Bank, 40 Nebr. 501, 58 N. W. 943, 24 L. R. A. 263; Auten *v.* U. S. National Bank, 174 U. S. 125, 19 S. Ct. 628, 43 L. ed. 920.

75. Panhandle Nat. Bank *v.* Emery, 78 Tex. 498, 15 S. W. 23.

76. Dowd *v.* Stephenson, 105 N. C. 467, 10 S. E. 1101; Blair *v.* Mansfield First Nat. Bank, 2 Flipp. (U. S.) 111, 3 Fed. Cas. No. 1,485, 12 Banker's Mag. (3d S.) 721, 2 Browne Nat. Bank Cas. 173, 10 Chic. Leg. N. 84, 5 Reporter 40.

77. National Bank of Commerce *v.* Atkinson, 55 Fed. 465.

78. Tift *v.* Quaker City Nat. Bank, 141 Pa. St. 550, 21 Atl. 660.

79. Whitehall First Nat. Bank *v.* Tisdale, 18 Hun (N. Y.) 151; Hodge *v.* Richmond First Nat. Bank, 22 Gratt. (Va.) 151.

80. Sturgis First Nat. Bank *v.* Bennett, 33 Mich. 520; Central City First Nat. Bank *v.* Lucas, 21 Nebr. 280, 31 N. W. 805.

81. Allentown First Nat. Bank *v.* Hoch, 89 Pa. St. 324, 33 Am. Rep. 769.

82. Power to act in president's absence.— If the by-laws provide that he can act as president during the latter's absence only by order of the board he cannot execute a deed while the president is away. Hanson *v.* Heard, (N. H. 1897) 38 Atl. 788.

83. Quauah City Nat. Bank *v.* Chemical Nat. Bank, 80 Fed. 859, 52 U. S. App. 209, 26 C. C. A. 195.

84. Hanson *v.* Heard, (N. H. 1897) 38 Atl. 788.

85. Dowd *v.* Stephenson, 105 N. C. 467, 10 S. E. 1101; Blair *v.* Mansfield First Nat. Bank, 2 Flipp. (U. S.) 111, 3 Fed. Cas. No. 1,485, 12 Bankers' Mag. (3d S.) 721, 2 Browne Nat. Bank Cas. 173, 10 Chic. Leg. N. 84, 5 Reporter 40.

86. Merchants' Nat. Bank *v.* Boston State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008.

87. Merchants' Nat. Bank *v.* Wheeling First Nat. Bank, 7 W. Va. 544.

paper.[88] He cannot bind his bank by any representations concerning the solvency of its debtors, especially if they are false;[89] nor can he make an unusual agreement.[90] Whether he can insure the safe-keeping of a collateral security has been questioned.[91]

d. Of Directors. The directors can act only as a board duly convened. Their assent separately is not the assent of the bank. Consequently it has been declared that they cannot ratify separately an unauthorized loan by the president or cashier.[92]

3. Liabilities — a. Civil — (i) *In General.* It is proposed to treat here of the civil liabilities of national bank officers only so far as they arise out of acts of congress. The general principles governing such liabilities independently of statutes have been already discussed.[93]

(ii) *Of Directors* — (a) *For Losses Caused by Loans.* The directors are not liable for losses caused by loans made in good faith although through erroneous judgment,[94] but they are liable when they lend more than one tenth of their bank's capital to a borrower on his own paper.[95] There is no limitation,

If the certification is contrary to law it is none the less binding on the bank. Thompson *v.* St. Nicholas Nat. Bank, 113 N. Y. 325, 21 N. E. 57, 22 N. Y. St. 929 [*affirmed* in 146 U. S. 240, 13 S. Ct. 66, 36 L. ed. 956]; Xenia First Nat. Bank *v.* Stewart, 107 U. S. 676, 2 S. Ct. 778, 27 L. ed. 592.

88. Auten *v.* U. S. National Bank, 174 U. S. 125, 19 S. Ct. 628, 43 L. ed. 929.

89. Crawford *v.* Boston Store Mercantile Co., 67 Mo. App. 39; Manistee First Nat. Bank *v.* Marshall Ilsey Bank, 83 Fed. 725, 54 U. S. App. 510, 28 C. C. A. 42. *Contra*, Nevada Bank *v.* Portland Nat. Bank, 59 Fed. 338.

False statements. — Ordinarily a bank is chargeable with the declarations made by the cashier, but this rule does not apply to false statements, for the presumption is he will not inform the bank of these. American Surety Co. *v.* Pauly, 170 U. S. 133, 18 S. Ct. 552, 42 L. ed. 977; Hadden *v.* Dooley, 92 Fed. 274, 34 C. C. A. 338.

Notice to the cashier is notice to the bank. — Mason First Nat. Bank *v.* Ledbetter, (Tex. Civ. App. 1896) 34 S. W. 1042.

90. L'Herbette *v.* Pittsfield Nat. Bank, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354; Hanson *v.* Heard, (N. H. 1897) 38 Atl. 788; Norton *v.* Derry Nat. Bank, 61 N. H. 589, 60 Am. Rep. 334; Flannagan *v.* California Nat. Bank, 56 Fed. 959, 23 L. R. A. 836.

91. Jenkins *v.* National Village Bank, 58 Me. 275.

92. Ft. Scott First Nat. Bank *v.* Drake, 35 Kan. 564, 11 Pac. 445, 57 Am. Rep. 193.

When the directors permit their managing officer to exercise absolute authority for a long period of time, and the bank has received and retained the benefits of his action, neither they nor the receiver can afterward repudiate a transaction executed in good faith by the other party. Blanchard *v.* Commercial Bank, 75 Fed. 249, 44 U. S. App. 556, 21 C. C. A. 319.

Notice to director not notice to bank. — A national bank cannot be charged with the knowledge possessed by a director of the illegal consideration of a note discounted by the bank. St. Louis Third Nat. Bank *v.* Harrison, 3 McCrary (U. S.) 316, 10 Fed. 243.

93. See *supra*, II, D, 5.

94. Witters *v.* Sowles, 31 Fed. 1.

95. Oswego Second Nat. Bank *v.* Burt, 93 N. Y. 233.

The proper remedy is in equity. — Crown *v.* Brainerd, 57 Vt. 625; Stone *v.* Chisolm, 113 U. S. 302, 5 S. Ct. 497, 28 L. ed. 991; Hornor *v.* Henning, 93 U. S. 228, 23 L. ed. 879; Stephens *v.* Overstolz, 43 Fed. 465; Welles *v.* Graves, 41 Fed. 459.

The right to maintain the action is not affected by the comptroller's revocation of the bank's charter. Stephens *v.* Overstolz, 43 Fed. 465.

Action against bank not necessary. — Action against the bank aimed at the forfeiture of its charter is not needful as a foundation for proceeding against the directors for making excessive loans in violation of the law. Cockrill *v.* Cooper, 86 Fed. 7, 57 U. S. App. 576, 29 C. C. A. 529, 86 Fed. 505, 58 U. S. App. 648, 30 C. C. A. 223; National Bank of Commerce *v.* Wade, 84 Fed. 10; Stephens *v.* Overstolz, 43 Fed. 465. *Contra*, Gerner *v.* Thompson, 74 Fed. 125; Hayden *v.* Thompson, 67 Fed. 273; Welles *v.* Graves, 41 Fed. 459.

Loan by cashier without directors' knowledge. — If a loan is made by the cashier beyond the limit without the knowledge of the directors they are not liable. Clews *v.* Bardon, 36 Fed. 617.

Not breach of cashier's bond. — The making of a loan exceeding ten per cent of a bank's capital, unless there be a fraud, is not a breach of a cashier's bond. Mohrenstecher *v.* Westervelt, 87 Fed. 157, 57 U. S. App. 618, 30 C. C. A. 584.

Transfer of securities for excessive loan. — The bank cannot be enjoined from transferring to an innocent third person securities taken to secure an excessive loan. Elder *v.* Ottawa First Nat. Bank, 12 Kan. 238; Shoemaker *v.* National Mechanics' Bank, 31 Md. 396, 100 Am. Dec. 73.

Borrower must pay. — The wrongful action of the directors is no defense to the borrow-

however, to the amount they may lend to a borrower on the paper of others either with or without his indorsement.[96]

(B) *For Declaring Unearned Dividend.* The directors are liable if they intentionally[97] declare out of the bank's capital a dividend that has not been earned.[98]

(C) *For Acts of Cashier or Other Officer.* When the directors have acted in good faith and with ordinary diligence in exercising their duty of general control and supervision, they are not liable for losses sustained through the malversations of a cashier or other officer.[99]

(D) *Proceeding to Enforce Liability.* When the directors have violated their duty their liability is an asset belonging to all the creditors[1] for which the receiver, if the bank be insolvent, must sue in equity.[2] Moreover, as this is not an express trust, the statute of limitations runs in favor of the directors.[3]

b. Criminal — (I) *In General.* It is intended to treat here of only such criminal offenses on the part of national bank officers and agents as arise out of the National Banking Act and subsequent acts of congress.[4] The general liabilities of bank officers have been considered heretofore.[5]

(II) *Statutory Offenses* — (A) *Embezzlement, Abstraction, or Wilful Misapplication.* By the National Banking Act[6] it is provided that an officer or agent[7] of a national bank who "embezzles, abstracts or wilfully misapplies[8] any

ers. They must pay just the same, and the government must do the punishing and not individuals who have had the money.

Colorado.— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 1 Colo. 531.

Iowa.— Mills County Nat. Bank *v.* Perry, 72 Iowa 15, 33 N. W. 341, 2 Am. St. Rep. 228.

Ohio.— Vining *v.* Bricker, 14 Ohio St. 331.

Oregon.— Portland Nat. Bank *v.* Scott, 20 Oreg. 421, 26 Pac. 276.

Pennsylvania.— Stephens *v.* Monongahela Nat. Bank, 88 Pa. St. 157, 7 Wkly. Notes Cas. (Pa.) 491, 32 Am. Rep. 438; Mapes *v.* Titusville Second Nat. Bank, 80 Pa. St. 163; Bly *v.* Titusville Second Nat. Bank, 79 Pa. St. 453; O'Hare *v.* Titusville Second Nat. Bank, 77 Pa. St. 96.

United States.— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. ed. 648; Weber *v.* Spokane Nat. Bank, 64 Fed. 208, 29 U. S. App. 97, 12 C. C. A. 93; Wyman *v.* Citizens' Nat. Bank, 29 Fed. 734; Stewart *v.* Maryland Nat. Union Bank, 2 Abb. (U. S.) 424, 23 Fed. Cas. No. 13,435, 4 Am. L. Rev. 397, 2 Balt. L. Transcr. 951, 10 Int. Rev. Rec. 132, Thomps. Nat. Bank Cas. 175; Shoemaker *v.* National Mechanics Bank, 2 Abb. (U. S.) 416, 1 Hughes (U. S.) 101, 21 Fed. Cas. No. 12,801, 1 Balt. L. Transcr. 195, Thomps. Nat. Bank Cas. 169.

96. See U. S. *v.* Potter, 56 Fed. 83.

97. Error of judgment.— The directors are not liable for an error of judgment in declaring a dividend. Witters *v.* Sowles, 31 Fed. 1.

98. U. S. *v.* Britton, 108 U. S. 199, 2 S. Ct. 531, 27 L. ed. 698; Hayden *v.* Thompson, 71 Fed. 60, 36 U. S. App. 361, 17 C. C. A. 592.

99. Gerner *v.* Mosher, 58 Nebr. 135, 78 N. W. 384, 46 L. R. A. 244; Brinckerhoff *v.* Bostwick, 88 N. Y. 52; Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662; Warner *v.* Penoyer, 91 Fed. 587, 61 U. S. App. 372, 33 C. C. A. 222; Gibbons *v.* Anderson, 80 Fed. 345; Robinson *v.* Hall, 63 Fed. 222, 25 U. S. App. 48, 12 C. C. A. 674.

Independently of the national law they are liable in an action for deceit for false representations and reports whereby others are injured. Stuart *v.* Staplehurst Bank, 57 Nebr. 569, 78 N. W. 298; Merchants' Nat. Bank *v.* Thoms, 1 Ohio Dec. (Reprint) 632, 28 Cinc. L. Bul. 164; Barnes *v.* Swift, 3 Ohio N. P. 291; Gerner *v.* Thompson, 74 Fed. 125; Prescott *v.* Haughey, 65 Fed. 653.

When a director is authorized to be away he is free from blame and liability. Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662.

Unauthorized use of funds.— Directors are liable for using the bank's funds for an unauthorized purpose, and all are liable without regard to the degree of dereliction of which they are guilty. Cooper *v.* Hill, 94 Fed. 582, 36 C. C. A. 402.

1. Bailey *v.* Mosher, 63 Fed. 488, 27 U. S. App. 339, 11 C. C. A. 304, wherein it was held that a single creditor could not sue and appropriate the amount of his debt.

2. Howe *v.* Barney, 45 Fed. 668.

3. Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662; Cooper *v.* Hill, 94 Fed. 582, 36 C. C. A. 402; Hayden *v.* Thompson, 71 Fed. 60, 36 U. S. App. 361, 17 C. C. A. 592.

4. U. S. Rev. Stat. (1872), § 5209; Act of Congress, July 12, 1882, c. 290, § 13.

5. See *supra*, II, D, 5, b, (II).

6. U. S. Rev. Stat. (1872), § 5209.

7. An agent who is liquidating the business of a bank may be guilty of wilful misapplication of its funds. Jewett *v.* U. S., 100 Fed. 832, 53 L. R. A. 568.

8. Terms distinguished.— An embezzlement is the unlawful conversion by a bank officer to his own use of funds intrusted to him with the intent to injure or defraud the bank. Abstraction and misapplication are a conversion to his own use of funds which are not especially intrusted to his care. U. S. *v.* Northway, 120 U. S. 327, 7 S. Ct. 580, 30 L. ed. 664; U. S. *v.* Youtsey, 91 Fed. 864; U. S. *v.*

of the moneys,[9] funds, or credits" of the bank is guilty of a misdemeanor. To constitute an offense under this provision it must appear that the funds were withdrawn[10] by defendant or someone under his direction or control,[11] without the knowledge or consent of the bank,[12] and were converted to the use and benefit of defendant or someone other than the bank,[13] with intent to injure and defraud the bank.[14]

(B) *False Entries*—(1) IN BOOKS OF BANK. A false entry includes any book entry made intentionally, either personally or by direction, to represent what is not true or does not exist. with the intent either to deceive the officers or to defraud the bank.[15]

Kenney, 90 Fed. 257; U. S. *v.* Harper, 33 Fed. 471; U. S. *v.* Fish, 24 Fed. 585; U. S. *v.* Conant, 25 Fed. Cas. No. 14,844, 2 Browne Nat. Bank Cas. 148, 9 Centr. L. J. 129, 9 Reporter 36. See also U. S. *v.* Lee, 12 Fed. 816.

The term "misapplication" is broader than embezzlement and includes the latter. Jewett *v.* U. S., 100 Fed. 832, 53 L. R. A. 568.

9. **The word "moneys"** means any currency usually and lawfully used in buying and selling, and includes national bank-notes. U. S. *v.* Johnson, 26 Fed. Cas. No. 15,483, 4 Cinc. L. Bul. 361.

10. **Must be withdrawn.**— To constitute a misapplication some portion must be withdrawn from the bank's possession or control. Mohrenstecher *v.* Westervelt, 87 Fed. 157, 57 U. S. App. 618, 30 C. C. A. 584; Dow *v.* U. S., 82 Fed. 904, 49 U. S. App. 605, 27 C. C. A. 140. Thus the receiving of a fictitious check as a deposit is not such a misapplication. Dow *v.* U. S., 82 Fed. 904, 49 U. S. App. 605, 27 C. C. A. 140.

The exact amount embezzled is of no consequence. U. S. *v.* Harper, 33 Fed. 471.

11. **Misappropriation by whom.**— The misappropriation is criminal if made by the officer or by someone under his direction or control with the intent to injure or defraud the bank. U. S. *v.* Britton, 107 U. S. 655, 2 S. Ct. 512, 27 L. ed. 520, 108 U. S. 192, 2 S. Ct. 525, 27 L. ed. 703; U. S. *v.* Harper, 33 Fed. 471.

12. U. S. *v.* Kenney, 90 Fed. 257; U. S. *v.* Harper, 33 Fed. 471; *In re* Van Campen, 2 Ben. (U. S.) 419, 28 Fed. Cas. No. 6,835, 1 Am. L. T. Rep. U. S. Cts. 67, Thomps. Nat. Bank Cas. 185.

Directors cannot authorize an embezzlement, and therefore evidence cannot be introduced to show that the discount of worthless paper by the president with the intent to defraud the bank was authorized by them. Breese *v.* U. S., 106 Fed. 680; U. S. *v.* Eno, 56 Fed. 218.

The fact that other officers knew of the misappropriation does not take the case out of the statute where defendant knowingly applied the funds in a manner forbidden by statute. U. S. *v.* Taintor, 11 Blatchf. (U. S.) 374, 28 Fed. Cas. No. 16,428, 19 Int. Rev. Rec. 4, Thomps. Nat. Bank Cas. 256.

Where authorized by directors.— Where an officer being insolvent submitted his own note with an insolvent indorser as security to the board of directors for discount, and they knowing the facts ordered it to be discounted, it was held that the use of the proceeds of the discount by the officer for his own purposes was not a wilful misapplication of the funds of the bank. U. S. *v.* Britton, 108 U. S. 193, 2 S. Ct. 526, 27 L. ed. 701.

13. **Must be conversion.**— U. S. *v.* Britton, 107 U. S. 655, 2 S. Ct. 512, 27 L. ed. 520, 108 U. S. 192, 2 S. Ct. 525, 27 L. ed. 703; U. S. *v.* Kenney, 90 Fed. 257; U. S. *v.* Harper, 33 Fed. 471.

For whose benefit.— It was the intention of congress to make criminal the misapplication and conversion of the funds of national banking associations without regard to whether or not the party so misapplying received any of the funds or other advantage directly or indirectly. U. S. *v.* Lee, 12 Fed. 816.

Overdraft.— The conversion of money acquired by a director by means of an overdraft with the intent to defraud is a misapplication. U. S. *v.* Warner, 26 Fed. 616. So is an overdraft by a firm of which the bank president was a member (U. S. *v.* Fish, 24 Fed. 585), but the payment of a check which creates an overdraft does not necessarily constitute a criminal misapplication of the bank's funds. The criminal wrong, including the intent, cannot be inferred, but must appear from all the facts surrounding the transaction (Dow *v.* U. S., 82 Fed. 904, 49 U. S. App. 605, 27 C. C. A. 140).

Declaration of unearned dividend.— Although a national bank is forbidden to declare an unearned dividend, it is not a wilful misapplication of the funds of the bank. U. S. *v.* Britton, 108 U. S. 199, 2 S. Ct. 531, 27 L. ed. 698.

Although national banks are forbidden by law to purchase their own stock, yet it is not a "wilful misapplication" of the funds of the bank where the president uses its funds to purchase shares of its own stock and holds them in trust for the bank. U. S. *v.* Britton, 107 U. S. 655, 2 S. Ct. 512, 27 L. ed. 520, 108 U. S. 192, 2 S. Ct. 525, 27 L. ed. 703.

Loans by directors.— If the directors or a committee make loans in the honest exercise of their official discretion which prove worthless they are not criminally liable; otherwise if they intend to injure and defraud the bank. U. S. *v.* Harper, 33 Fed. 471; U. S. *v.* Fish, 24 Fed. 585.

14. See *infra*, III, D, 3, b, (III).

15. Agnew *v.* U. S., 165 U. S. 36, 17 S. Ct. 235, 41 L. ed. 624; Allis *v.* U. S., 155 U. S. 117, 15 S. Ct. 36, 39 L. ed. 91; McKnight *v.*

(2) In Reports to Comptroller. In making reports[16] to the comptroller the officers who assume to make them[17] must be held responsible for the contents, unless the false entries are clearly the result of mistake. The officers cannot avoid responsibility, either civil or criminal, for the statements therein by showing that the entries were made by a clerk, and that they were not known to such officers to be false.[18] Every overdraft which is reported as a loan with criminal intent contrary to the instructions of the comptroller concerning the mode of reporting them is a false entry.[19]

(c) *Drawing Bill or Assigning Note Without Authority.* Under the act of congress[20] making it a misdemeanor for an officer without authority from the directors to draw any bill of exchange or assign any note, if a bill or note relates to the business of the association, the general authority conferred by the directors upon the officer to draw bills and assign notes would be sufficient authority; but if they relate to the individual and private business of the officer the general powers thus conferred would not be sufficient authority.[21]

(d) *Certification of Check on Insufficient Deposit.* Under the act of congress[22] making it a misdemeanor for any officer, clerk, or agent of a national bank to certify a check, where the drawer has not enough on deposit to meet it, the cer-

U. S., 97 Fed. 208, 38 C. C. A. 115; U. S. *v.* Harper, 33 Fed. 471; U. S. *v.* Fish, 24 Fed. 585.

A false entry may consist of an erasure of figures and the writing of different ones in their place (U. S. *v.* Crecilius, 34 Fed. 30); or of entry of promissory notes or a specific deposit not belonging to the bank among its assets for the purpose of deceiving the examiner (Cross *v.* North Carolina, 132 U. S. 132, 10 S. Ct. 47, 33 L. ed. 287; U. S. *v.* Peters, 87 Fed. 984).

The entry from a false deposit slip on the bank-books is a false entry. Agnew *v.* U. S., 165 U. S. 36, 17 S. Ct. 242, 41 L. ed. 624.

An honest mistake is not a false entry.— Graves *v.* U. S., 165 U. S. 323, 17 S. Ct. 393, 41 L. ed. 732 [*reversing* 53 Fed. 634]; Allis *v.* U. S., 155 U. S. 117, 15 S. Ct. 36, 39 L. ed. 91.

The entry of an overdraft, whether allowed rightfully or wrongfully, if it show just what occurred, is not a false entry. Dow *v.* U. S., 82 Fed. 910, 49 U. S. App. 605, 27 C. C. A. 140.

Directors are "officers" within the meaning of the statute, and consequently it is a misdemeanor for the president, vice-president, and cashier to make false entries for the purpose of deceiving the directors; and an intention to deceive any one director or officer is as criminal as the intention to deceive all of them. But a conviction cannot be had under this statute where it appears that the officers alleged to have been deceived were accomplices in the speculation to hide which the false entries were made. U. S. *v.* Means, 42 Fed. 599.

16. What reports included.— The reports are not confined to those mentioned in the U. S. Rev. Stat. (1872), §§ 5211, 5212. Bacon *v.* U. S., 97 Fed. 35, 38 C. C. A. 37; U. S. *v.* Booker, 80 Fed. 376. See also U. S. *v.* Polter, 56 Fed. 97.

Comptroller's request unnecessary.—The report to the comptroller need not have been made in response to a request or order from him. Bacon *v.* U. S., 97 Fed. 35, 38 C. C. A. 37; U. S. *v.* Booker, 80 Fed. 376.

17. Responsibility of directors.— The directors cannot be indicted under the statute for making false entries, because their only function is to attest such reports, and entries by them would be spoliations. U. S. *v.* Potter, 56 Fed. 83.

An assistant cashier, although not authorized to make a report of the bank's condition, may be indicted for making a false entry therein. Cochran *v.* U. S., 157 U. S. 286, 15 S. Ct. 628, 39 L. ed. 704.

The verification of a report containing false entries is not a crime; the evidence must connect the accused with the making or directing of the entries. U. S. *v.* Booker, 98 Fed. 291.

Entry at request of examiner.— A bookkeeper who makes false entries in a statement at the request of a bank examiner is not liable. U. S. *v.* Eqe, 49 Fed. 852.

18. Cochran *v.* U. S., 157 U. S. 286, 15 S. Ct. 628, 39 L. ed. 704; U. S. *v.* French, 57 Fed. 382; U. S. *v.* Allen, 10 Biss. (U. S.) 90, 47 Fed. 696.

19. Dorsey *v.* U. S., 101 Fed. 746; Bacon *v.* U. S., 97 Fed. 35, 38 C. C. A. 37; U. S. *v.* Allis, 73 Fed. 165; U. S. *v.* Graves, 53 Fed. 34.

Entry of borrowed money.— An entry in a cash-book of the amount on hand at a certain date is a false entry, when money is borrowed for a few hours to make the amount good pending a bank examiner's examination. People *v.* Helmer, 13 N. Y. App. Div. 426, 43 N. Y. Suppl. 642.

"Suspended loans."— The entry of loans thus carried under the head of "Loans and Discounts," in a report to the comptroller, is not a false entry so long as they are not regarded as worthless. U. S. *v.* Graves, 53 Fed. 634.

20. U. S. Rev. Stat. (1872), § 5209.

21. U. S. *v.* Johnson, 26 Fed. Cas. No. 15,483, 4 Cinc. L. Bul. 361.

22. Act of Congress, July 12, 1882, c. 290, § 13.

tification of an overdraft is not an offense, where done in execution of an agreement that it should be considered as a loan bearing interest and amply secured by collateral.[23]

(E) *Aiding and Abetting.* The National Banking Act makes it a misdemeanor for any person, with intent to injure or defraud, to aid or abet an officer, clerk, or agent of the bank in the commission of any of the offenses specified therein.[24]

(III) *Intent to Defraud*—(A) *An Element of the Offense.* To constitute an offense under the statute there must be an intent to defraud or deceive,[25] and mistakes in the honest exercise of official discretion are not punishable.[26]

(B) *When Intent Inferred.* A man is presumed to know the natural consequences of his act, and where an act prohibited by the statute is knowingly and intentionally done and its natural and legitimate consequences are to produce injury to the bank or benefit to the wrong-doer[27] the intent to injure and defraud the bank will be inferred.[28]

(IV) *Jurisdiction.* Jurisdiction of the offenses specified in the National Banking Act is confined to the federal courts, and the state courts have no juris-

23. Potter *v.* U. S., 155 U. S. 438, 15 S. Ct. 144, 39 L. ed. 214, where it was further held that there must be on the part of the officer knowledge and a purpose to do wrong, in addition to the certification.

24. U. S. Rev. Stat. (1872), § 5209.

To aid and abet in making a false report is an indictable offense. U. S. *v.* French, 57 Fed. 382; U. S. *v.* Potter, 56 Fed. 97.

Wrongful certification of checks.— Aiding and abetting the cashier of a national bank in wrongfully certifying the checks of persons in excess of their deposit is not an offense under the act of congress of July 12, 1882, c. 290, § 13. This is not one of the offenses enumerated in U. S. Rev. Stat. (1872), § 5209. U. S. *v.* Potter, 56 Fed. 83.

Need not be connected with bank.— The statute includes any person who has aided or abetted an officer of a national bank in violating the law, although the former be himself not an officer or agent of the institution. Coffin *v.* U. S., 156 U. S. 432, 15 S. Ct. 394, 39 L. ed. 481.

How prosecuted.—The officer or agent must be prosecuted as the principal offender and the outsider as aider and abettor. Coffin *v.* U. S., 162 U. S. 664, 16 S. Ct. 943, 40 L. ed. 1109.

25. U. S. Rev. Stat. (1872), § 5209.

Malice not necessarily involved.— The intent to injure and defraud does not necessarily imply malice or ill-will toward the bank; it is sufficient that the unlawful intent must necessarily injure or defraud the bank. U. S. *v.* Kenney, 90 Fed. 257. The statute means such an intent to defraud as may be inferred from wilfully and knowingly doing that which is illegal. U. S. *v.* Harper, 33 Fed. 471.

26. U. S. *v.* Britton, 108 U. S. 192, 2 S. Ct. 525, 27 L. ed. 703; U. S. *v.* Means, 42 Fed. 599; U. S. *v.* Harper, 33 Fed. 471; U. S. *v.* Fish, 24 Fed. 585.

27. Benefit from use of funds not material. — The advantage, direct or indirect, derived from the use of the funds misapplied does not affect the question of the intention of the wrong-doer. If he has misapplied them his intention is regarded as unlawful. U. S. *v.* Allen, 47 Fed. 696; U. S. *v.* Fish, 24 Fed. 585; U. S. *v.* Lee, 12 Fed. 816; U. S. *v.* Voorhees, 9 Fed. 143; U. S. *v.* Taintor, 11 Blatchf. (U. S.) 374, 28 Fed. Cas. No. 16,428, 19 Int. Rev. Rec. 4, Thomps. Nat. Bank Cas. 256.

28. Agnew *v.* U. S., 165 U. S. 36, 17 S. Ct. 242, 41 L. ed. 624; U. S. *v.* Youtsey, 91 Fed. 864; U. S. *v.* Means, 42 Fed. 599; U. S. *v.* Harper, 33 Fed. 471; U. S. *v.* Lee, 12 Fed. 816; U. S. *v.* Taintor, 11 Blatchf. (U. S.) 374, 28 Fed. Cas. No. 16,428, 19 Int. Rev. Rec. 4, Thomps. Nat. Bank Cas. 256.

An intent to defraud may be inferred from the fact of embezzlement.— U. S. *v.* Allis, 73 Fed. 165; *In re* Van Campen, 2 Ben. (U. S.) 419, 28 Fed. Cas. No. 16,835, 1 Am. L. T. Rep. U. S. Cts. 67, Thomps. Nat. Bank Cas. 185. See also Peters *v.* U. S., 94 Fed. 127, 36 C. C. A. 105.

Check not drawn against funds.— If checks are not drawn against funds, but are drawn with the expectation and understanding that they are to be fraudulently paid out of the funds of the bank, the accused is guilty of an intent to injure and defraud the bank. U. S. *v.* Kenney, 90 Fed. 257.

Correct instruction as to intent.— An instruction to the jury that if an entry was made by the accused with the intention of circumventing, misleading, and deceiving the officers of the bank to his own advantage and benefit the intention was fraudulent is correct. Shipp *v.* Com., 101 Ky. 518, 19 Ky. L. Rep. 634, 41 S. W. 856.

Evidence inadmissible to disprove fraudulent intent.— The entry of money in the bank-book with the consent of the directors is inadmissible to negative the averments of an indictment against the accused that the funds were used with an intent to injure and defraud the institution. U. S. *v.* Taintor, 11 Blatchf. (U. S.) 374, 28 Fed. Cas. No. 16,428, 19 Int. Rev. Rec. 4, Thomps. Nat. Bank Cas. 256.

diction.[29] Nor can a state declare a national bank officer liable to a misdemeanor who engages in any other profession, occupation, or calling.[30] A state, however, can enact a law making an offense criminal concerning which the national law is silent, as in receiving deposits when the bank is insolvent.[31]

(v) *Indictment* — (a) *Necessity For.* The commission of one of the acts prohibited by the statute in question[32] is an "infamous crime" which must be charged by the indictment of a grand jury, and not by a mere information filed by a prosecuting officer.[33]

(b) *Form and Sufficiency* — (1) In General. Every indictment should charge the alleged crime with precision, and every ingredient should be accurately and clearly stated. If the offense is purely statutory the indictment is sufficient when the acts are fully set forth in the substantial words of the statute. The true test of its sufficiency is whether it contains every element of the offense, thereby apprising the accused of what he must be prepared to meet.[34] If one count is sufficient the judgment will stand, for the presumption is that the court awarded judgment on the good count.[35]

(2) Averment of Organization. The indictment must aver the organization of the bank.[36]

(3) For Embezzlement, Abstraction, or Wilful Misapplication. Embezzlement, abstraction, and wilful misapplication constitute three separate offenses. They may be joined in one indictment, but must be stated in separate counts.[37]

29. Com. *v.* Felton, 101 Mass. 204; People *v.* Fonda, 62 Mich. 401, 29 N. W. 26; *In re* Eno, 54 Fed. 669; U. S. *v.* Buskey, 38 Fed. 99.

Discharge on habeas corpus.— If a state court should convict one of an offense punishable by national law he could be discharged on a motion in a habeas corpus proceeding. *Ex p.* Houghton, 8 Fed. 897.

Where same act violates federal and state laws.— Where the same act constitutes one crime against the United States and another against a state the offender is amenable both to the federal and state laws; but if there is only one crime, though punishable by both federal and state law, the United States has exclusive jurisdiction. People *v.* Fonda, 62 Mich. 401, 29 N. W. 26; Com. *v.* Luberg, 94 Pa. St. 85. See also Farmers', etc., Nat. Bank *v.* Dearing, 91 U. S. 29, 23 L. ed. 196; *In re* Eno, 54 Fed. 669; U. S. *v.* Buskey, 38 Fed. 99. But see Hoke *v.* People, 122 Ill. 511, 13 N. E. 823, where it was held that a state court had jurisdiction over a national bank clerk for forgery, notwithstanding he was punishable for the same act under U. S. Rev. Stat. (1872), § 5209.

If an offense against this statute is begun in one state and completed in another the federal court in the latter state has jurisdiction. Putnam *v.* U. S., 162 U. S. 687, 16 S. Ct. 923, 40 L. ed. 1118.

30. Com. *v.* Felton, 101 Mass. 204; Allen *v.* Carter, 119 Pa. St. 192, 13 Atl. 70; Com. *v.* Ketner, 92 Pa. St. 372, 37 Am. Rep. 692; *Ex p.* Houghton, 8 Fed. 897.

31. *Connecticut.*—State *v.* Tuller, 34 Conn. 280.

Iowa.— State *v.* Fields, 98 Iowa 748, 62 N. W. 653.

Massachusetts.— Com. *v.* Barry, 116 Mass. 1; Com. *v.* Tenney, 97 Mass. 50.

Mississippi.— State *v.* Bardwell, 72 Miss. 535, 18 So. 377.

Pennsylvania.— Luberg *v.* Com., 37 Leg. Int. (Pa.) 339.

Where not intended to apply.— If a law punishing insolvent banks for receiving deposits was not intended for application to national banks it cannot be applied to them. State *v.* Menke, 56 Kan. 77, 42 Pac. 350.

32. U. S. Rev. Stat. (1872), § 5209.

33. U. S. *v.* Hade, 26 Fed. Cas. No. 15,274, 10 Chic. Leg. N. 22.

34. Cochran *v.* U. S., 157 U. S. 286, 15 S. Ct. 628, 39 L. ed. 704; Batchelor *v.* U. S., 156 U. S. 426, 15 S. Ct. 446, 39 L. ed. 478; Potter *v.* U. S., 155 U. S. 438, 15 S. Ct. 144, 39 L. ed. 214; Evans *v.* U. S., 153 U. S. 584, 14 S. Ct. 934, 38 L. ed. 830; Pettibone *v.* U. S., 148 U. S. 197, 13 S. Ct. 542, 37 L. ed. 419; U. S. *v.* Hess, 124 U. S. 483, 8 S. Ct. 571, 31 L. ed. 516; U. S. *v.* Carll, 105 U. S. 611, 26 L. ed. 1135; U. S. *v.* Simmons, 96 U. S. 360, 24 L. ed. 819; Peters *v.* U. S., 94 Fed. 127, 36 C. C. A. 105.

35. Claasen *v.* U. S., 142 U. S. 140, 12 S. Ct. 169, 35 L. ed. 966; Bond *v.* Dustin, 112 U. S. 604, 5 S. Ct. 296, 28 L. ed. 835; Snyder *v.* U. S., 112 U. S. 216, 5 S. Ct. 118, 28 L. ed. 697; Clifton *v.* U. S., 4 How. (U. S.) 242, 11 L. ed. 957; Locke *v.* U. S., 7 Cranch (U. S.) 339, 3 L. ed. 364.

36. Sufficient averment.—An averment that the bank is "duly organized and doing business" at a named village is a sufficient averment of the organization. U. S. *v.* Northway, 120 U. S. 327, 7 S. Ct. 580, 30 L. ed. 664. See also Peters *v.* U. S., 94 Fed. 127, 36 C. C. A. 105.

37. U. S. *v.* Cadwallader, 59 Fed. 677.

Sufficient indictments.— Claasen *v.* U. S., 142 U. S. 140, 12 S. Ct. 169, 35 L. ed. 966; U. S. *v.* Northway, 120 U. S. 327, 7 S. Ct. 580, 30 L. ed. 664.

Indictment good on motion in arrest.— An indictment in which the misapplication is

The indictment must allege defendant's official character,[38] describe the property embezzled or misapplied,[39] and charge its wrongful conversion[40] with intent to defraud.[41] Where the offense charged is "wilful misapplication" there must be averments showing how the wilful misapplication was made and that it was unlawful.[42] Where "embezzlement" is the crime charged, the indictment must show that the accused was in lawful possession of the funds which he is charged with embezzling.[43]

(4) For Making False Entries — (a) In Books of Bank. An indictment for this offense should aver that the accused was the president, cashier, or other officer; that he made in a book, a report, or a statement of the bank a false entry, describing it; that it was made with intent to injure and defraud the bank, or to deceive an agent, describing him, appointed to examine the book; and the time and place of making such entries.[44]

alleged to have been done on many different days and times between named dates covering a period of nearly three years is not bad on a motion in arrest of judgment. U. S. *v.* McClure, 107 Fed. 268.

38. Sufficient allegation of official character.— An indictment which charges the accused as having committed an offense as "president and agent" of a particular bank is a sufficient description of his action in an official capacity. U. S. *v.* Northway, 120 U. S. 327, 7 S. Ct. 580, 30 L. ed. 664.

39. Claasen *v.* U. S., 142 U. S. 140, 12 S. Ct. 169, 35 L. ed. 966; U. S. *v.* Britton, 107 U. S. 655, 2 S. Ct. 512, 27 L. ed. 520; U. S. *v.* Berry, 85 Fed. 208.

Insufficient description.—An indictment for embezzlement which charges the accused with having and receiving "certain of the moneys and funds" of the bank lacks definiteness, as "funds" include several species of property. U. S. *v.* Greve, 65 Fed. 488.

That the money embezzled was lawful tender money is surplusage. Porter *v.* U. S., 91 Fed. 494.

40. Sufficient averment of conversion.—An indictment charging the accused with wrongfully using the bank's money for the purpose of bribing city officials in his own interest is a sufficient statement of its conversion to his own use. McKnight *v.* U. S., 97 Fed. 208, 38 C. C. A. 115. See also Coffin *v.* U. S., 156 U. S. 432, 15 S. Ct. 594, 39 L. ed. 481, where the indictment was held to allege sufficiently an actual conversion.

Sufficient certainty.— An indictment which alleges that the accused did "unlawfully, fraudulently, and wilfully misapply and convert to his own use the assets of the bank, with intent then and thereby to injure and defraud the association," which "conversion was done by some means and in some manner to the jurors unknown" is not void for want of certainty. Jewett *v.* U. S., 100 Fed. 832, 837, 53 L. R. A. 568.

The words used to describe larceny need not be used in describing this offense. U. S. *v.* Northway, 120 U. S. 327, 7 S. Ct. 580, 30 L. ed. 664.

41. Need not negative every possibility of honest motive.— An indictment charging a fraudulent misapplication of the bank's funds, describing them specifically, with the intent to defraud the bank, need not negative every possible theory consistent with an honest purpose in disposing of the funds. Evans *v.* U. S., 153 U. S. 584, 608, 14 S. Ct. 934, 939, 38 L. ed. 830, 839.

Intent to defraud, generally, see *supra*, III, D, 3, b, (III).

42. Batchelor *v.* U. S., 156 U. S. 426, 15 S. Ct. 446, 39 L. ed. 478; Evans *v.* U. S., 153 U. S. 584, 14 S. Ct. 934, 939, 38 L. ed. 830; U. S. *v.* Northway, 120 U. S. 327, 7 S. Ct. 580, 30 L. ed. 664; U. S. *v.* Britton, 107 U. S. 655, 2 S. Ct. 512, 27 L. ed. 520; U. S. *v.* Eno, 56 Fed. 218.

Fraudulent purchase of bank's shares.— A count charging the president with the fraudulent purchase of the bank's shares but omitting to state for whom the purchase was made, or that it was to prevent loss on a previously contracted debt does not allege an offense under the statute. U. S. *v.* Britton, 107 U. S. 655, 2 S. Ct. 512, 27 L. ed. 520.

43. Claasen *v.* U. S., 142 U. S. 140, 12 S. Ct. 169, 35 L. ed. 966; U. S. *v.* Northway, 120 U. S. 327, 7 S. Ct. 580, 30 L. ed. 664; U. S. *v.* Johnson, 26 Fed. Cas. No. 15,483, 4 Cinc. L. Bul. 361. See, generally, Embezzlement.

44. U. S. *v.* Britton, 107 U. S. 655, 2 S. Ct. 512, 27 L. ed. 520, 108 U. S. 192, 2 S. Ct. 525, 27 L. ed. 703; Peters *v.* U. S., 94 Fed. 127, 36 C. C. A. 105; U. S. *v.* Allis, 73 Fed. 165; U. S. *v.* Harper, 33 Fed. 471; U. S. *v.* Fish, 24 Fed. 585. See also Cochran *v.* U. S., 157 U. S. 286, 15 S. Ct. 628, 39 L. ed. 704.

Receiving and crediting worthless checks.— An indictment charging the receiving teller with the making of false entries in the books of a bank by receiving and crediting checks drawn on the bank by parties who had no funds there should set forth a description of the checks with an averment of the reasons why they are false or valueless. Dow *v.* U. S., 82 Fed. 904, 49 U. S. App. 605, 27 C. C. A. 140.

Books usually kept by another officer.—Allegations that false entries were made by the president of a bank in the books usually kept in the exclusive possession of the paying teller do not invalidate the indictment. U. S. *v.* Potter, 56 Fed. 97.

How advantage taken of defect.—If an indictment charging a national bank official

(b) In Reports to Comptroller. An indictment for making false entries in a report to the comptroller must set out the false entries fully enough to inform the accused clearly of the offense charged and describe the report sufficiently to identify it;[45] but it is not necessary to allege that the false entries were published or transmitted to the comptroller,[46] or that the report was made on the request of the comptroller or according to the form or time prescribed by him.[47]

(5) For Drawing Bills or Assigning Notes Without Authority. An indictment of an officer for drawing bills of exchange and assigning notes without authority from the directors need not allege such drawing and assigning to have been with intent to injure and defraud such association; nor need it set out copies of the bills and notes if they are otherwise described with sufficient particularity.[48]

(6) For Wrongfully Certifying Check. In an indictment for wrongfully certifying a check, where the drawer had not enough on deposit to meet it, it is not necessary to allege the delivery of the check after certification.[49]

(7) For Aiding and Abetting. An indictment charging a person with aiding and abetting the director of a national bank with misapplying its funds must state enough facts to show the misapplication by him,[50] as well as by the officer or agent he is accused of abetting,[51] but it is not necessary to aver that defendant knew the person so aided and abetted to be a specified bank officer.[52]

(vi) *Proof*—(a) *In General.* The proof must of course correspond with the allegations of the indictment,[53] but where the offense charged is embezzlement,

with making false entries for the purpose of deceiving the examiner should be of doubtful validity, the doubt should be decided on a motion in arrest of judgment and not on a motion to quash the indictment. U. S. *v.* Bartow, 20 Blatchf. (U. S.) 351, 10 Fed. 874.

45. Dorsey *v.* U. S., 101 Fed. 746; U. S. *v.* Work, 57 Fed. 391; U. S. *v.* French, 57 Fed. 382.

The report need not be described with technical accuracy.— Cochran *v.* U. S., 157 U. S. 286, 15 S. Ct. 628, 39 L. ed. 704.

Averment of intent in making false entries.— It is sufficient to charge that they were made "with intent to injure and defraud" the bank, naming it, "and certain persons to the grand jurors unknown." U. S. *v.* Britton, 107 U. S. 655, 2 S. Ct. 512, 27 L. ed. 520; U. S. *v.* Potter, 56 Fed. 97.

Verification and attestation.— It must be alleged that the report was verified and attested by the cashier. U. S. *v.* Potter, 56 Fed. 97. See also Cochran *v.* U. S., 157 U. S. 286, 15 S. Ct. 628, 39 L. ed. 704.

Charging several offenses in same indictment.—An officer may be charged with making at different times false entries in the books, reports, or statements in different counts of the same indictment. U. S. *v.* Berry, 96 Fed. 842.

Sufficient indictment.— If an indictment allege that the president of a specified bank did knowingly, wrongfully, and unlawfully, make or cause to be made false entries in a report or statement of the bank to the comptroller setting forth the report in full and the particulars of the false entries this is sufficient. U. S. *v.* Hughitt, 45 Fed. 47.

46. Potter *v.* U. S., 155 U. S. 438, 15 S. Ct. 144, 39 L. ed. 214.

47. U. S. *v.* Hughitt, 45 Fed. 47.

48. U. S. *v.* Johnson, 26 Fed. Cas. No. 15,483, 4 Cinc. L. Bul. 361.

49. Potter *v.* U. S., 155 U. S. 438, 15 S. Ct. 144, 39 L. ed. 214.

What not charge of separate offenses.— In charging the accused in a single count with certifying a check "before the amount thereof had been entered to the credit of the party drawing the check on the books of the bank," and when the drawer did not "have on deposit an amount of money equal to the amount of the check," two separate offenses are not included. U. S. *v.* Potter, 56 Fed. 83.

50. U. S. *v.* Warner, 26 Fed. 616. For other cases involving questions relating to the indictment for aiding and abetting see Evans *v.* U. S., 153 U. S. 584, 14 S. Ct. 934, 38 L. ed. 830; U. S. *v.* Northway, 120 U. S. 327, 7 S. Ct. 580, 30 L. ed. 664; U. S. *v.* Work, 57 Fed. 391; U. S. *v.* French, 57 Fed. 382.

False entries — Need not specify acts.—An indictment charging one with aiding and abetting in making false entries need not specify the acts by which the aiding and abetting were accomplished. Coffin *v.* U. S., 156 U. S. 432, 15 S. Ct. 394, 39 L. ed. 481.

51. **In charging a person not connected with the bank** with aiding and abetting a director in misapplying its funds the indictment must state facts showing a misapplication of them by the director. U. S. *v.* Warner, 26 Fed. 616. See also Dow *v.* U. S., 82 Fed. 904, 49 U. S. App. 605, 27 C. C. A. 140.

52. Coffin *v.* U. S., 156 U. S. 432, 15 S. Ct. 394, 39 L. ed. 481, 162 U. S. 664, 16 S. Ct. 943, 40 L. ed. 1109; U. S. *v.* Northway, 120 U. S. 327, 7 S. Ct. 580, 30 L. ed. 664.

53. **False entries — Variance.**— An indictment charging the accused with making a false entry in a report to the comptroller with intent to injure and defraud the asso-

the proof need not show that the exact amount embezzled was the same as that charged in the indictment.[54] What evidence is admissible under the indictment is a question depending for the most part upon the general rules of evidence.[55] Evidence will not be admitted on behalf of a defendant charged with misappropriation to show that the offense was committed in an effort to secure the bank against losses through former misapplications.[56]

(B) *Of Organization of Bank.* The comptroller's certificate of the organization of the bank is admissible to prove that it was organized, and constitutes conclusive evidence thereof.[57]

E. Functions and Dealings[58] — **1. Place of Business.** The place where a national bank transacts its business and its officers reside is regarded as the home of the bank.[59]

2. Powers — a. In General. A national bank can purchase notes and bills;[60]

ciation and the stock-holders is not sustained by proof that it was done with the intent to deceive the creditors, depositors, comptroller, or the public. U. S. *v.* Allen, 47 Fed. 696. A charge of having made a false entry in the accounts of an individual with a bank is not sustained by proof that the account was with him in an official capacity. Williams *v.* State, 51 Nebr. 630, 71 N. W. 313.

Sufficient to support charge of abstraction. — Evidence that the cashier and director of a bank procured the making of two worthless notes for large amounts by an irresponsible employee of the bank and then appropriated an equal sum of the bank's money is sufficient to support a verdict on a charge of unlawful abstraction. Dorsey *v.* U. S., 101 Fed. 746.

54. U. S. *v.* Harper, 33 Fed. 471. See also U. S. *v.* Fish, 24 Fed. 585.

Proof that a check is for dollars and not for pounds sterling is not a material variance. Coffin *v.* U. S., 156 U. S. 432, 15 S. Ct. 394, 39 L. ed. 481.

55. Proof of defendant's conduct in performing duties. — On a charge of embezzlement or misapplication evidence may be introduced to show how the accused conducted himself in performing his duties as teller. Tyler *v.* U. S., 106 Fed. 137.

Use of funds taken. — Evidence that some of the money drawn out by the accused was for his children is not admissible to determine the character of the transaction. Breese *v.* U. S., 106 Fed. 680.

Evidence of former reports to show intent. — To show the intent with which the alleged false entries are made evidence of prior reports attested by the accused and containing false statements may be admitted. Bacon *v.* U. S., 97 Fed. 35, 38 C. C. A. 37.

Letter from comptroller to accused. — A letter written by the national comptroller to the president of a bank and forming part of its official correspondence may be used against the president in a trial for making a false entry in a report to the comptroller, even though it was kept with the president's private papers. Bacon *v.* U. S., 97 Fed. 35, 38 C. C. A. 37.

An opinion concerning the guaranty of a president who is charged with converting the funds of his bank to his own use by purchasing worthless bonds with them, and giving the bank his guaranty therefor is inadmissible. Agnew *v.* U. S., 165 U. S. 36, 17 S. Ct. 235, 41 L. ed. 624.

Bank-books admissible without proof. — Proof that books containing the record of a bank's regular daily transactions are kept by its regularly appointed officers raises the presumption that they are admissible without further proof. Bacon *v.* U. S., 97 Fed. 35, 38 C. C. A. 37.

Expert testimony. — A bank examiner, who is a skilled accountant, may testify to the results of his investigation of the books, but cannot form conclusions from the statements of clerks and officers of the bank. U. S. *v.* Allen, 47 Fed. 696.

Refreshing memory. — A bank teller when called as a witness against the president for abstracting or misapplying its funds may refresh his memory by examining entries in the bank-books and then testify, even though some of the entries are not in his own handwriting. Breese *v.* U. S., 106 Fed. 680.

56. U. S. *v.* Harper, 33 Fed. 471.

57. Citizens' Nat. Bank *v.* Great Western Elevator Co., 13 S. D. 1, 82 N. W. 186; Quinlan *v.* Houston, etc., R. Co., 89 Tex. 356, 34 S. W. 738; Tyler *v.* U. S., 106 Fed. 137. See also cases cited *supra*, III, B, 2, a.

58. Functions and dealings of banks, generally, see *supra*, II, E.

59. Armstrong *v.* Springfield Second Nat. Bank, 38 Fed. 883.

Place of business of banks, generally, see *supra*, II, E, 3.

If it has an office for receiving deposits in another state it is not situated there. National State Bank *v.* Pierce, 5 Wkly. Notes Cas. (Pa.) 344.

"Place" means town or city. — By the provisions of U. S. Rev. Stat. (1872), § 5134, subs. 2, requiring an association formed for the purpose of conducting a national bank, to designate in its organization certificate "the place where its operations of discount and deposits are to be carried on" the town or city is meant, and not the office or building. McCormick *v.* Market Nat. Bank, 162 Ill. 100, 44 N. E. 381 [*affirming* 61 Ill. App. 33].

60. *Illinois.* — Greenville First Nat. Bank *v.* Sherburne, 14 Ill. App. 566.

Kansas. — Pape *v.* Capitol Bank, 20 Kan. 440, 27 Am. Rep. 183.

rediscount notes which it has discounted;[61] collect notes;[62] lend on collateral security;[63] borrow on its own notes;[64] deal in national bonds;[65] compromise a debt;[66] pay money and take securities in settlement;[67] receive special deposits beside those usually received by banks;[68] indorse and guarantee paper;[69] and

Kentucky.— Nicholson *v.* Newcastle Nat. Bank, 92 Ky. 251, 13 Ky. L. Rep. 478, 17 S. W. 627, 16 L. R. A. 223.

Massachusetts.—Atlas Nat. Bank *v.* Savery, 127 Mass. 75, 34 Am. Rep. 345; National Pemberton Bank *v.* Porter, 125 Mass. 333, 28 Am. Rep. 235; Rochester First Nat. Bank *v.* Harris, 108 Mass. 514.

Minnesota.— Merchants' Nat. Bank *v.* Hanson, 33 Minn. 40, 21 N. W. 849, 53 Am. Rep. 5. *Compare* Rochester First Nat. Bank *v.* Pierson, 24 Minn. 140, 31 Am. Rep. 341.

New York.—Atlantic State Bank *v.* Savery, 82 N. Y. 291.

Ohio.— Smith *v.* Pittsburg Exch. Bank, 26 Ohio St. 141. See also Shinkle *v.* Ripley First Nat. Bank, 22 Ohio St. 516.

South Carolina.— Union Nat. Bank *v.* Rowan, 23 S. C. 339, 55 Am. Rep. 26.

United States.— Danforth *v.* Elizabeth Nat. State Bank, 48 Fed. 271. 3 U. S. App. 7, 1 C. C. A. 62, 17 L. R. A. 622.

In Maryland the bank's authority to purchase notes has been questioned. Lazear *v.* National Union Bank, 52 Md. 78, 36 Am. Rep. 355.

61. Auten *v.* U. S. National Bank, 174 U. S. 125, 19 S. Ct. 628, 43 L. ed. 920; U. S. National Bank *v.* Little Rock First Nat. Bank, 79 Fed. 296, 49 U. S. App. 67, 24 C. C. A. 597.

62. Mound City Paint, etc., Co. *v.* Commercial Nat. Bank, 4 Utah 353, 9 Pac. 709.

63. *California.*— Chemical Nat. Bank *v.* Havermale, 120 Cal. 601, 52 Pac. 1071, 65 Am. St. Rep. 206.

Illinois.— Morris *v.* Dixon Nat. Bank, 55 Ill. App. 298.

Iowa.— Ayres, etc., Co. *v.* Dorsey Produce Co., 101 Iowa 141, 70 N. W. 111, 63 Am. St. Rep. 376.

Maryland.— Baltimore Third Nat. Bank *v.* Boyd, 44 Md. 47, 22 Am. Rep. 35.

Ohio.— Cleveland *v.* Shoeman, 40 Ohio St. 176.

Pennsylvania.— Montgomery Nat. Bank *v.* McCleaster, 2 Pa. Dist. 546.

United States.— California Nat. Bank *v.* Kennedy, 167 U. S. 362, 17 S. Ct. 831, 42 L. ed. 198.

64. Peters *v.* Brown, 41 Bankers' Mag. 131.

65. Leach *v.* Hale, 31 Iowa 69, 7 Am. Rep. 112; Yerkes *v.* Port Jervis Nat. Bank, 69 N. Y. 382, 25 Am. Rep. 208.

Also other stocks and bonds.— Williamson *v.* Mason, 12 Hun (N. Y.) 97; North Bennington First Nat. Bank *v.* Bennington, 16 Blatchf. (U. S.) 53, 9 Fed. Cas. No. 4,807, 2 Browne Nat. Bank Cas. 437.

66. Charlotte First Nat. Bank *v.* Baltimore Nat. Exch. Bank, 92 U. S. 122, 23 L. ed. 679.

67. Ottawa First Nat. Bank *v.* Ottawa, 43 Kan. 294, 23 Pac. 485; Charlotte First Nat. Bank *v.* Baltimore Nat. Exch. Bank, 92 U. S. 122, 23 L. ed. 679.

68. *Georgia.*— Chattahoochee Nat. Bank *v.* Schley, 58 Ga. 369.

Illinois.— Monmouth First Nat. Bank *v.* Strang, 138 Ill. 347, 27 N. E. 903.

Iowa.— Turner *v.* Keokuk First Nat. Bank, 26 Iowa 562.

Kansas.—American Nat. Bank *v.* Presnall, 58 Kan. 69, 48 Pac. 556; Kansas Nat. Bank *v.* Quinton, 57 Kan. 750, 48 Pac. 20; Interstate Nat. Bank *v.* Ferguson, 48 Kan. 732, 30 Pac. 237.

Massachusetts.— Smith *v.* Westfield First Nat. Bank, 99 Mass. 605, 97 Am. Dec. 59.

Missouri.— Coffey *v.* National Bank, 46 Mo. 140, 2 Am. Rep. 488.

New York.— Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582; Bushnell *v.* Chautauqua County Nat. Bank, 10 Hun (N. Y.) 378.

Ohio.— Mansfield First Nat. Bank *v.* Zent, 39 Ohio St. 105.

Pennsylvania.— De Haven *v.* Kensington Nat. Bank, 81 Pa. St. 95; Scott *v.* Chester Valley Nat. Bank, 72 Pa. St. 471, 13 Am. Rep. 711; Lancaster County Nat. Bank *v.* Smith, 62 Pa. St. 47.

South Dakota.—Sykes *v.* Canton First Nat. Bank, 2 S. D. 242, 49 N. W. 1058.

United States.— Carlisle First Nat. Bank *v.* Graham, 100 U. S. 699, 25 L. ed. 750 [*affirming* 79 Pa. St. 106, 21 Am. Rep. 49]; Nebraska *v.* Orleans First Nat. Bank, 88 Fed. 947; U. S. *v.* Asheville Nat. Bank, 73 Fed. 379; Prather *v.* Kean, 29 Fed. 498.

It was once questioned whether a national bank had the right to take special deposits. Lyons First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181; Whitney *v.* Brattleboro First Nat. Bank, 50 Vt. 388, 28 Am. Rep. 503.

69. Thomas *v.* Hastings City Nat. Bank, 40 Nebr. 501, 58 N. W. 943, 24 L. R. A. 263; Rich *v.* Lincoln State Nat. Bank, 7 Nebr. 201, 29 Am. Rep. 382; Norton *v.* Derry Nat. Bank, 61 N. H. 589, 60 Am. Rep. 334; Hutchins *v.* Planters' Nat. Bank, 128 N. C. 72, 38 S. E. 252; Belleville People's Bank *v.* Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. ed. 907; Commercial Nat. Bank *v.* Pirie, 82 Fed. 799, 49 U. S. App. 596, 27 C. C. A. 171; Farmers', etc., Nat. Bank *v.* Smith, 77 Fed. 129, 40 U. S. App. 690, 23 C. C. A. 80; St. Joseph State Nat. Bank *v.* Newton Nat. Bank, 66 Fed. 691, 32 U. S. App. 52, 14 C. C. A. 61; National Bank of Commerce *v.* Kansas City First Nat. Bank, 61 Fed. 809, 27 U. S. App. 88, 10 C. C. A. 87; Flannagan *v.* California Nat. Bank, 56 Fed. 959, 23 L. R. A. 836. See also Bowen *v.* Needles Nat. Bank, 94 Fed. 925, 36 C. C. A. 553.

issue a certificate of deposit.[70] It cannot indorse a note for compensation;[71] be garnished for a trust deposit;[72] become an accommodation indorser[73] or guarantor;[74] devote money to charity, exhibitions, manufacturing corporations, and the like;[75] receive deposits when insolvent;[76] deal as a broker in securities and especially in guaranteeing them,[77] or purchase its own stock.[78]

b. What Security May Be Taken — (i) *For Present Loans.* A national bank cannot take as security for a present loan either real estate[79] or its own stock;[80] but if it does the borrower can be compelled to return the money, while

70. Monmouth First Nat. Bank *v.* Brooks, 22 Ill. App. 238.

For certificates of deposit fraudulently issued the bank is liable. Resh *v.* Allentown First Nat. Bank, 93 Pa. St. 397; Ziegler *v.* Allentown First Nat. Bank, 93 Pa. St. 393; Steckel *v.* Allentown First Nat. Bank, 93 Pa. St. 376, 39 Am. Rep. 758.

71. Gloversville Nat. Bank *v.* Burr, 27 Hun (N. Y.) 109.

72. Havens *v.* Brooklyn Nat. City Bank, 6 Thomps. & C. (N. Y.) 346.

73. National Bank of Commerce *v.* Kansas City First Nat. Bank, 61 Fed. 809, 27 U. S. App. 88, 10 C. C. A. 87; National Bank of Commerce *v.* Atkinson, 55 Fed. 465.

74. Thilmany *v.* Iowa Paper Bag Co., 108 Iowa 357, 79 N. W. 261, 75 Am. St. Rep. 259.

75. McCoy *v.* World's Columbian Exposition, 186 Ill. 356, 57 N. E. 1043, 78 Am. St. Rep. 288; McCrory *v.* Chambers, 48 Ill. App. 445; Robertson *v.* Buffalo County Nat. Bank, 40 Nebr. 235, 58 N. W. 715.

76. Standard Oil Co. *v.* Hawkins, 74 Fed. 395, 46 U. S. App. 115, 20 C. C. A. 468, 33 L. R. A. 739; Fisher *v.* U. S. National Bank, 64 Fed. 710, 26 U. S. App. 448, 12 C. C. A. 413; Fisher *v.* Continental Nat. Bank, 64 Fed. 707, 26 U. S. App. 382, 12 C. C. A. 411; Beal *v.* Somerville, 50 Fed. 647, 5 U. S. App. 14, 1 C. C. A. 598, 17 L. R. A. 291; Somerville *v.* Beal, 49 Fed. 790; Peck *v.* New York First Nat. Bank, 43 Fed. 357; Furber *v.* Stephens, 35 Fed. 17; Balbach *v.* Frelinghuysen, 15 Fed. 675; Illinois Trust, etc., Bank *v.* Buffalo First Nat. Bank, 21 Blatchf. (U. S.) 275, 15 Fed. 858.

77. *Arkansas.*— Grow *v.* Cockrill, 63 Ark. 418, 39 S. W. 60, 36 L. R. A. 89.

Maryland.— Weckler *v.* Hagerstown First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95.

Massachusetts.— Dresser *v.* Traders' Nat. Bank, 165 Mass. 120, 42 N. E. 567.

Pennsylvania.—First Nat. Bank *v.* Hoch, 89 Pa. St. 324, 33 Am. Rep. 769.

United States.— Logan County Nat. Bank *v.* Townsend, 139 U. S. 67, 11 S. Ct. 496, 35 L. ed. 107; Farmers', etc., Nat. Bank *v.* Smith, 77 Fed. 129, 40 U. S. App. 690, 23 C. C. A. 80.

78. Wallace *v.* Hood, 89 Fed. 11 [*affirmed* in 97 Fed. 983].

79. *Illinois.*— Fudley *v.* Bowen, 87 Ill. 151.

Iowa.— Spafford *v.* Tama City First Nat. Bank, 37 Iowa 181, 18 Am. Rep. 6.

Missouri.— Kentucky Bank *v.* Clark, 4 Mo. 59, 28 Am. Dec. 345.

New York.— Crocker *v.* Whitney, 71 N. Y. 161.

Pennsylvania.— Woods *v.* Peoples' Nat. Bank, 83 Pa. St. 57; Fowler *v.* Scully, 72 Pa. St. 456, 13 Am. Rep. 699.

United States.— Chicago Merchants' Nat. Bank *v.* Mears, 8 Biss. (U. S.) 158, 17 Fed. Cas. No. 9,450; Ripley *v.* Harris, 3 Biss. (U. S.) 199, 20 Fed. Cas. No. 11,853, 5 Chic. Leg. N. 13, 16 Int. Rev. Rec. 118; Kansas Valley Nat. Bank *v.* Rowell, 2 Dill. (U. S.) 371, 14 Fed. Cas. No. 7,611, Thomps. Nat. Bank Cas. 264.

Mortgage to secure loan.— It has been more recently held that a mortgage given to secure a present loan is not invalid. Skowhegan First Nat. Bank *v.* Maxfield, 83 Me. 576, 22 Atl. 479; Grand Rapids Fifth Nat. Bank *v.* Pierce, 117 Mich. 376, 75 N. W. 1058; Butterworth *v.* Kritzer Milling Co., 115 Mich. 1, 72 N. W. 990; Graham *v.* New York Nat. Bank, 32 N. J. Eq. 804.

Real estate in form of stock.— The stock of a corporation whose property consists entirely of real estate may be taken as collateral security for a loan. Baldwin *v.* Canfield, 26 Minn. 43, 1 N. W. 261.

80. *Kentucky.*— Louisville Second Nat. Bank *v.* New Jersey Nat. State Bank, 10 Bush (Ky.) 367.

New Jersey.— Delaware, etc., R. Co. *v.* Oxford Iron Co., 38 N. J. Eq. 340.

New York.—Conklin *v.* Oswego Second Nat. Bank, 45 N. Y. 655.

Texas.— Goodbar *v.* Sulphur Springs City Nat. Bank 78 Tex. 461, 14 S. W. 851.

Virginia.— Feckheimer *v.* Norfolk Nat. Exch. Bank, 79 Va. 80.

United States.— Bullard *v.* Eagle Nat. Bank, 18 Wall. (U. S.) 589, 21 L. ed. 923; South Bend First Nat. Bank *v.* Lamar, 11 Wall. (U. S.) 369, 20 L. ed. 172.

Cases criticized.— The following cases are not in harmony with those above and have been criticized on several occasions. Bath Sav. Inst. *v.* Sagadahoc Nat. Bank, 89 Me. 500, 36 Atl. 996; Young *v.* Vough, 23 N. J. Eq. 325; Lockwood *v.* Mechanics Nat. Bank, 9 R. I. 308, 11 Am. Rep. 253; *In re* Bigelow, 2 Ben. (U. S.) 469, 3 Fed. Cas. No. 1,395, 1 Nat. Bankr. Reg. 667; *In re* Dunkerson, 4 Biss. (U. S.) 323, 8 Fed. Cas. No. 4,159, 12 Nat. Bankr. Reg. 391, 1 N. Y. Wkly. Dig. 179; Evansville Nat. Bank *v.* Metropolitan Nat. Bank, 2 Biss. (U. S.) 527, 8 Fed. Cas. No. 4,573, 10 Am. L. Reg. N. S. 774, 6 Am. L. Rev. 574, Thomps. Nat. Bank Cas. 189; Knight *v.* Old Nat. Bank, 3 Cliff. (U. S.) 429, 14 Fed. Cas. No. 7,885, 4 Am. L. T. Rep. U. S. Cts. 240; Pendergast *v.* Stockton Bank, 2 Sawy. (U. S.) 108, 19 Fed. Cas. No. 10,918, 6 Am. L. Rec. 574, 4 Am. L. T. Rep. U. S. Cts. 247.

the government can redress the public injury if it pleases by taking away, on proper proceedings, the bank's charter.[81]

(II) *To Secure Past Advances.* To secure past advances a national bank may take real estate[82] or its own stock.[83] A very wide latitude is given to a bank to take property to prevent the loss of a debt and to use and improve it temporarily until an advantageous disposition can be made of it.[84]

c. Power to Sue and Be Sued. By the law of 1888 national banks are put in the same category as individuals in suits by and against them. When an individual can sue in a state or federal court a national bank can do the same thing; and when the federal courts are not open to individuals they are not to national banks.[85]

3. Interest and Usury — a. Power of Congress to Fix Rate. The power vested in congress to establish a bank and to authorize it to lend money includes

81. *Illinois.*— Penn *v.* Bornman, 102 Ill. 523; Mapes *v.* Scott, 94 Ill. 379; Warner *v.* De Witt County Nat. Bank, 4 Ill. App. 305.

Indiana.— Turner *v.* Madison First Nat. Bank, 78 Ind. 19. See also Hirsch *v.* Norton, 115 Ind. 341, 17 N. E. 612.

Iowa.— Waterloo First Nat. Bank *v.* Elmore, 52 Iowa 541, 3 N. W. 547.

Missouri.— Wherry *v.* Hale, 77 Mo. 20; Thornton *v.* National Exch. Bank, 71 Mo. 221; Matthews *v.* Skinker, 62 Mo. 329, 21 Am. Rep. 425.

New Jersey.— Graham *v.* New York Nat. Bank, 32 N. J. Eq. 804.

New York.— Walden Nat. Bank *v.* Birch, 130 N. Y. 221, 29 N. E. 127, 41 N. Y. St. 275, 14 L. R. A. 211; Simons *v.* Union Springs First Nat. Bank, 93 N. Y. 269; Buffalo German Ins. Co. *v.* Buffalo Third Nat. Bank, 19 Misc. (N. Y.) 564, 43 N. Y. Suppl. 550.

North Carolina.— Oldham *v.* Wilmington First Nat. Bank, 85 N. C. 240.

Pennsylvania.—Winton *v.* Little, 94 Pa. St. 64.

Virginia.— Wroten *v.* Armat, 31 Gratt. (Va.) 228.

United States.—Genesee Nat. Bank *v.* Whitney, 103 U. S. 99, 26 L. ed. 443.

82. *Illinois.*— Worcester Nat. Bank *v.* Cheeney, 87 Ill. 602.

Kansas.— Ornn *v.* Merchants Nat. Bank, 16 Kan. 341.

Nebraska.— Richards *v.* Kountze, 4 Nebr. 200.

New York.— Third Nat. Bank *v.* Blake, 73 N. Y. 260; Weir *v.* Birdsall, 27 N. Y. App. Div. 404, 50 N. Y. Suppl. 275.

Ohio.— Allen *v.* Xenia First Nat. Bank, 23 Ohio St. 97.

Pennsylvania.—McCartney *v.* Kipp, 171 Pa. St. 644, 33 Atl. 233; Woods *v.* Peoples' Nat. Bank, 83 Pa. St. 57.

Washington.— Aberdeen First Nat. Bank *v.* Andrews, 7 Wash. 261, 34 Pac. 913, 38 Am. St. Rep. 885.

United States.— Fortier *v.* New Orleans Nat. Bank, 112 U. S. 439, 5 S. Ct. 234, 28 L. ed. 764; Reynolds *v.* Crawfordsville First Nat. Bank, 112 U. S. 405, 5 S. Ct. 213, 28 L. ed. 733; Swope *v.* Leffingwell, 105 U. S. 3, 26 L. ed. 939.

A usurious note may be thus secured.—Allen *v.* Xenia First Nat. Bank, 23 Ohio St. 97.

83. Lee *v.* Citizens' Nat. Bank, 2 Cinc. Super. Ct. (Ohio) 298; South Bend First Nat. Bank *v.* Lanier, 11 Wall. (U. S.) 369, 20 L. ed. 172.

If the security is sold to pay the debt the borrower cannot recover the money. Xenia First Nat. Bank *v.* Stewart, 107 U. S. 676, 2 S. Ct. 778, 27 L. ed. 592.

84. What bank may do.— To this end a bank can purchase the land mortgaged (Heath *v.* Lafayette Second Nat. Bank, 70 Ind. 106); and also other land not covered by the mortgage to preserve or enhance the value of the other (Libby *v.* Union Nat. Bank, 99 Ill. 622; Mapes *v.* Scott, 88 Ill. 352; Upton *v.* South Reading Nat. Bank, 120 Mass. 153; New York Mut. L. Ins. Co. *v.* Yates County Nat. Bank, 35 N. Y. App. Div. 218, 54 N. Y. Suppl. 743; Reynolds *v.* Crawfordsville First Nat. Bank, 112 U. S. 405, 5 S. Ct. 213, 28 L. ed. 733; Cockrill *v.* Cooper, 86 Fed. 505, 58 U. S. App. 648, 30 C. C. A. 223). It can also purchase a prior mortgage. Holmes *v.* Boyd, 90 Ind. 332.

Improvements and repairs.— A bank can cut timber on the land to secure itself against loss (John A. Roebling Sons' Co. *v.* Richmond First Nat. Bank, 30 Fed. 744); can repair the property (Cooper *v.* Hill, 94 Fed. 582, 36 C. C. A. 402); and can grow a crop of wheat (Great Bend First Nat. Bank *v.* Bannister, 7 Kan. App. 787, 54 Pac. 20).

85. Petri *v.* Commercial Nat. Bank, 142 U. S. 644, 12 S. Ct. 325, 35 L. ed. 1144; Wichita Nat. Bank *v.* Smith, 72 Fed. 568, 36 U. S. App. 530, 19 C. C. A. 42; Burnham *v.* Leoti First Nat. Bank, 53 Fed. 163, 10 U. S. App. 485, 3 C. C. A. 486.

Suit outside district of location.— A federal district court has no jurisdiction of a suit brought by a bank on a promissory note in a district outside its location. Farmers' Nat. Bank *v.* McElhinney, 42 Fed. 801.

An action for money against a national bank is not an action arising under laws of the United States. Ulster County Sav. Inst. *v.* New York Fourth Nat. Bank, 5 Silv. Supreme (N. Y.) 144, 8 N. Y. Suppl. 162, 28 N. Y. St. 24.

Sufficient averment of incorporation.— An allegation that "the plaintiff is a national bank doing business under the act of congress" is a sufficient averment that it is a corporation. Joseph Holmes Fuel, etc., Co. *v.*

the power to fix the rate of interest it may take and to prescribe the penalties for taking a greater.[86]

b. What Rate May Be Charged. By the National Banking Act,[87] national banks are permitted to charge interest at the rate provided for individuals or local banks by the law of the state or territory in which such bank is located,[88] and where a higher rate is allowed by the state law in the case of "banks of issue" organized under the local laws, such rate is allowed for the national banks.[89] When no rate of interest is fixed by the state laws the national banks may charge at a rate not exceeding seven per cent.[90]

c. What Constitutes Usury. The statute applies to discounts of commercial

Commercial Nat. Bank, 23 Colo. 210, 211, 47 Pac. 289, and cases cited; Gill *v.* First Nat. Bank, (Tex. Civ. App. 1898) 47 S. W. 751.

86. Peterborough First Nat. Bank *v.* Childs, 133 Mass. 248, 43 Am. Rep. 509. And see Columbus First Nat. Bank *v.* Garlinghouse, 22 Ohio St. 492, 10 Am. Rep. 751.

Interest and usury charged by banks other than national banks see *supra*, II, E, 9, d; and, generally, USURY.

How far state laws binding.— The rates of interest prescribed by states for their institutions or the public generally are binding on national banks located in such states only so far as they are made so by act of congress. Mt. Pleasant First Nat. Bank *v.* Duncan, 9 Fed. Cas. No. 4,804, 24 Int. Rev. Rec. 206, 35 Leg. Int. (Pa.) 251, 7 N. Y. Wkly. Dig. 63, 25 Pittsb. Leg. J. (Pa.) 169, 6 Reporter 69, 6 Wkly. Notes Cas. (Pa.) 158.

87. U. S. Rev. Stat. (1872), § 5197.

For an analysis of this provision see opinion of Swayne, J., in Farmers', etc., Nat. Bank *v.* Dearing, 91 U. S. 29, 32, 23 L. ed. 196.

88. *Arizona.*—Daggs *v.* Phœnix Nat. Bank, (Ariz. 1898) 53 Pac. 201.

California.—California Nat. Bank *v.* Ginty, 108 Cal. 148, 41 Pac. 38; Farmers' Nat. Gold Bank *v.* Stover, 60 Cal. 387; Hinds *v.* Marmolejo, 60 Cal. 229.

Colorado.— Rockwell *v.* Farmers' Nat. Bank, 4 Colo. App. 562, 36 Pac. 905.

Indiana.—Wiley *v.* Starbuck, 44 Ind. 298.

Ohio.— La Dow *v.* New London First Nat. Bank, 51 Ohio St. 234, 37 N. E. 11. *Compare* Shunk *v.* Galion First Nat. Bank, 22 Ohio St. 508, 10 Am. Rep. 762, where it was held that a national bank could charge no greater rate of interest than was permitted by the banking laws of the state in which it did business, although a greater rate was allowed by the laws of that state to parties other than state banks.

Pennsylvania.— Lebanon Nat. Bank *v.* Karmany, 98 Pa. St. 65.

South Dakota.— Guild *v.* Deadwood First Nat. Bank, 4 S. D. 566, 57 N. W. 499.

Texas.— Jefferson Nat. Bank *v.* Bruhn, 64 Tex. 571, 53 Am. Rep. 771.

Washington.—Wolverton *v.* Spokane Exch. Nat. Bank, 11 Wash. 94, 39 Pac. 247; Yakima Nat. Bank *v.* Knipe, 6 Wash. 348, 33 Pac. 834.

United States.— Tiffany *v.* Missouri Nat. Bank, 18 Wall. (U. S.) 409, 21 L. ed. 862; Mt. Pleasant First Nat. Bank *v.* Tinstman, 9 Fed. Cas. No. 4,805, 2 Browne Nat. Bank Cas. 182, 36 Leg. Int. (Pa.) 228, 26 Pittsb. Leg. J. (Pa.) 95.

Law of what state applies.— If a note is made in one state and discounted in another the legality of the rate of interest is determined by the law of the latter state. Leavenworth Second Nat. Bank *v.* Smoot, 2 MacArthur (D. C.) 371, where it was also said that the making of such a note must not be a mere device to evade the usury law of the state where the money was to be repaid and where the rate was lower than that taken.

89. Tiffany *v.* Missouri Nat. Bank, 18 Wall. (U. S.) 409, 21 L. ed. 862; Mt. Pleasant First Nat. Bank *v.* Tinstman, 9 Fed. Cas. No. 4,805, 2 Browne Nat. Bank Cas. 182, 36 Leg. Int. (Pa.) 228, 26 Pittsb. Leg. J. (Pa.) 95; Mt. Pleasant First Nat. Bank *v.* Duncan, 9 Fed. Cas. No. 4,804, 24 Int. Rev. Rec. 206, 35 Leg. Int. (Pa.) 251, 7 N. Y. Wkly. Dig. 63, 25 Pittsb. Leg. J. (Pa.) 169, 6 Reporter 69, 6 Wkly. Notes Cas. (Pa.) 158 [*reversing* 8 Fed. Cas. No. 4,135, 15 Alb. L. J. 330, 11 Bankers' Mag. (3d S.) 787, 26 Pittsb. Leg. J. (Pa.) 129, Thomps. Nat. Bank Cas. 360].

When provision applies.—Where under the state law ten per cent interest could be charged by all persons except banks of issue which were limited to eight per cent, it was held that a national bank could charge ten per cent as the provision allowing such banks to charge the same rate as state banks of issue was intended to apply only when such banks were by law allowed to charge a higher rate than other persons. Tiffany *v.* Missouri Nat. Bank, 18 Wall. (U. S.) 409, 21 L. ed. 862. But see Shunk *v.* Galion First Nat. Bank, 22 Ohio St. 508, 10 Am. Rep. 762.

Savings and deposit banks are not "banks of issue" within the meaning of the statute. Clarion First Nat. Bank *v.* Gruber, 87 Pa. St. 468, 30 Am. Rep. 378.

Privilege given by special or general law.— It is immaterial whether the privilege given to state banks of issue be given by general or special law. Mt. Pleasant First Nat. Bank *v.* Duncan, 9 Fed. Cas. No. 4,804, 24 Int. Rev. Rec. 206, 35 Leg. Int. (Pa.) 251, 7 N. Y. Wkly. Dig. 63, 25 Pittsb. Leg. J. (Pa.) 169, 6 Reporter 69, 6 Wkly. Notes Cas. (Pa.) 158.

90. If no state law exist, a national bank cannot exceed seven per cent without violating the national law. Gloversville Nat. Bank *v.* Johnson, 104 U. S. 271, 26 L. ed. 742; Crocker *v.* Chetopa First Nat. Bank, 4 Dill. (U. S.) 358, 6 Fed. Cas. No. 3,397, 11 Am. L.

paper as well as to loans,[91] and the fact that paper was transferred by delivery instead of indorsement will not take the case out of the statute;[92] but the charging of the current rate of exchange in addition to legal interest does not constitute the offense of usury.[93]

d. Consequences of Taking Usury — (i) *Only Those Prescribed by Federal Laws.* The National Banking Act provides that a national bank which charges usurious interest shall forfeit the entire interest; or if the usury has been paid, then twice the amount thereof may be recovered.[94] This provision is exclusive of state laws relating to the subject, and the only remedies available against a national bank are those prescribed therein.[95] The principal contract and all the

Rev. 169, 3 Am. L. T. Rep. N. S. 350, 3 Centr. L. J. 527, 1 Cinc. L. Bul. 350, 3 N. Y. Wkly. Dig. 105, 24 Pittsb. Leg. J. (Pa.) 73, Thomps. Nat. Bank Cas. 317.

Where state law allows parties to fix rate. —A state law providing that it shall be lawful to contract for any rate of interest agreed on between the parties "allows" and "fixes" the rate within the meaning of the National Banking Act allowing national banks to charge interest "at the rate allowed by the laws of the state," etc., and under such law a national bank may take any rate agreed on.

California.—California Nat. Bank *v.* Ginty, 108 Cal. 148, 41 Pac. 38; Farmers' Nat. Gold Bank *v.* Stover, 60 Cal. 387; Hinds *v.* Marmolejo, 60 Cal. 229.

Colorado.— Rockwell *v.* Farmers' Nat. Bank, 4 Colo. App. 562, 36 Pac. 905.

South Dakota.— Guild *v.* Deadwood First Nat. Bank, 4 S. D. 566, 57 N. W. 499.

Texas.— Jefferson Nat. Bank *v.* Bruhn, 64 Tex. 571, 53 Am. Rep. 771.

Washington.—Wolverton *v.* Spokane Exch. Nat. Bank, 11 Wash. 94, 39 Pac. 247.

United States.— Mt. Pleasant First Nat. Bank *v.* Duncan, 9 Fed. Cas. No. 4,804, 24 Int. Rev. Rec. 206, 35 Leg. Int. (Pa.) 251, 7 N. Y. Wkly. Dig. 63, 25 Pittsb. Leg. J. (Pa.) 169, 6 Reporter 69, 6 Wkly. Notes Cas. (Pa.) 158.

91. Gloversville Nat. Bank *v.* Johnson, 104 U. S. 271, 26 L. ed. 742. And see Johnson *v.* Gloversville Nat. Bank, 74 N. Y. 329, 30 Am. Rep. 302.

Commission.— If the lender is to receive a commission on the money, thus bringing the total above the legal rate, this is usury (Union Nat. Bank *v.* Louisville, etc., R. Co., 145 Ill. 208, 34 N. E. 135); but a bank can legally receive a commission for procuring the discount of a note by another bank (Gloversville Nat. Bank *v.* Wells, 15 Hun (N. Y.) 51).

Must be a loan.— The statute does not apply to a transaction in which there was no "money lent." Clarion Second Nat. Bank *v.* Morgan, 165 Pa. St. 199, 35 Wkly. Notes Cas. (Pa.) 484, 30 Atl. 957, 44 Am. St. Rep. 652.

If a portion of the proceeds are to remain with the discounting bank the transaction is not thereby rendered usurious. Mt. Joy First Nat. Bank *v.* Gish, 72 Pa. St. 13. See Union Nat. Bank *v.* Louisville, etc., R. Co., 145 Ill. 208, 34 N. E. 135.

An agreement to pay an attorney fee of ten per cent on the amount due on a note which has been discounted by a national bank, if a suit is brought to enforce payment, is void, exceeding the power of a national bank. Merchants' Nat. Bank *v.* Sevier, 14 Fed. 662.

92. Nicholson *v.* Newcastle Nat. Bank, 92 Ky. 251, 13 Ky. L. Rep. 478, 17 S. W. 627, 16 L. R. A. 223; Danforth *v.* Elizabeth Nat. State Bank, 48 Fed. 271, 3 U. S. App. 7, 1 C. C. A. 62, 17 L. R. A. 622. But see Importers', etc., Nat. Bank *v.* Littell, 47 N. J. L. 233; Bramhall *v.* Atlantic Nat. Bank, 36 N. J. L. 243; National State Bank *v.* Brainard, 61 Hun (N. Y.) 339, 16 N. Y. Suppl. 123, 40 N. Y. St. 640; Smith *v.* Pittsburg Exch. Nat. Bank, 26 Ohio St. 141.

93. U. S. Rev. Stat. (1872), § 5197; Wheeler *v.* Pittsburg Union Nat. Bank, 96 U. S. 268, 24 L. ed. 833.

94. U. S. Rev. Stat. (1872), § 5198.

Where bank acts as agent or collector only. —When the note on which usurious interest was paid has been sold in good faith, the penalty for usury cannot be recovered of the bank acting as agent or collector. North Bend First Nat. Bank *v.* Miltonberger, 33 Nebr. 847, 51 N. W. 232.

95. *Alabama.*— Slaughter *v.* Montgomery First Nat. Bank, 109 Ala. 157, 19 So. 430; Florence R., etc., Co. *v.* Chase Nat. Bank, 106 Ala. 364, 17 So. 720.

Colorado.— Rockwell *v.* Farmers' Nat. Bank, 4 Colo. App. 562, 36 Pac. 905.

Georgia.— Dalton First Nat. Bank *v.* McEntire, 112 Ga. 232, 37 S. E. 381.

Indiana.—Wiley *v.* Starbuck, 44 Ind. 298.

Kentucky.— Farrow *v.* First Nat. Bank, 20 Ky. L. Rep. 1413, 47 S. W. 594.

Massachusetts.— Peterborough First Nat. Bank *v.* Childs, 130 Mass. 519, 39 Am. Rep. 474, 133 Mass. 248, 43 Am. Rep. 509; Davis *v.* Randall, 115 Mass. 547, 15 Am. Rep. 146; Central Nat. Bank *v.* Pratt, 115 Mass. 539, 15 Am. Rep. 138.

Nebraska.— Tobias First Nat. Bank *v.* Barnett, 51 Nebr. 397, 70 N. W. 937; Norfolk Nat. Bank *v.* Schwenk, 46 Nebr. 381, 64 N. W. 1073.

New Hampshire.— Barker *v.* Rochester Nat. Bank, 59 N. H. 310.

New Jersey.— Importers', etc., Nat. Bank *v.* Littell, 46 N. J. L. 506.

New York.— Hintermister *v.* Chittenango First Nat. Bank, 64 N. Y. 212 [*modifying* 3 Hun (N. Y.) 345, 5 Thomps. & C. (N. Y.) 484]. The doctrine enunciated in the earlier cases of Whitehall First Nat. Bank *v.* Lamb, 50 N. Y. 95, 10 Am. Rep. 438 [*reversing* 57

usual incidents which are connected therewith are held to be unimpaired by this provision.[96]

(II) *Forfeiture of Unpaid Interest*—(A) *In General.* When the interest has not been paid then the entire amount, if the rate is usurious, is forfeited, and only the original sum loaned can be recovered.[97] In like manner the interest

Barb. (N. Y.) 429] and Farmers' Bank *v.* Hale, 59 N. Y. 53, was overruled by Buffalo Farmers', etc., Nat. Bank *v.* Dearing, 91 U. S. 29, 23 L. ed. 196.

North Carolina.— Oldham *v.* Wilmington First Nat. Bank, 85 N. C. 240; Merchants', etc., Nat. Bank *v.* Meyers, 74 N. C. 514.

Ohio.— Higley *v.* Beverly First Nat. Bank, 26 Ohio St. 75, 20 Am. Rep. 759; Columbus First Nat. Bank *v.* Garlinghouse, 22 Ohio St. 492, 10 Am. Rep. 751; Huntington *v.* Krejci, 3 Ohio Dec. (Reprint) 532, Ohio L. J. 532.

Pennsylvania.— Clarion First Nat. Bank *v.* Gruber, 91 Pa. St. 377; Cake *v.* Lebanon First Nat. Bank, 86 Pa. St. 303.

Tennessee.— Hawbright *v.* Cleveland Nat. Bank, 3 Lea (Tenn.) 40, 31 Am. Rep. 629 [*overruling* Steadman *v.* Redfield, 8 Baxt. (Tenn.) 337].

Vermont.— Hill *v.* Barre Nat. Bank, 56 Vt. 582.

United States.—Oates *v.* Montgomery First Nat. Bank, 100 U. S. 239, 25 L. ed. 580; Barnet *v.* Muncie Nat. Bank, 98 U. S. 555, 25 L. ed. 212; Farmers', etc., Nat. Bank *v.* Dearing, 91 U. S. 29, 23 L. ed. 196; *In re* Eno, 54 Fed. 669. See also Stephens *v.* Monongahela Nat. Bank, 111 U. S. 197, 4 S. Ct. 336, 28 L. ed. 399; Mt. Pleasant First Nat. Bank *v.* Duncan, 9 Fed. Cas. No. 4,804, 24 Int. Rev. Rec. 206, 35 Leg. Int. (Pa.) 251, 7 N. Y. Wkly. Dig. 63, 25 Pittsb. Leg. J. (Pa.) 169, 6 Reporter 69, 6 Wkly. Notes Cas. (Pa.) 158; Citizens' Nat. Bank *v.* Leming, 5 Fed. Cas. No. 2,733, 8 Int. Rev. Rec. 132.

Criminal prosecution under state statute. — In State *v.* Clark First Nat. Bank, 2 S. D. 568, 51 N. W. 587, it was held that a national bank was liable under a state statute making it a misdemeanor to take illegal interest, and that the National Banking Act did not prevent the operation of the police laws of the state.

96. *Indiana.*—Wiley *v.* Starbuck, 44 Ind. 298.

Kentucky.— Nicholson *v.* Newcastle Nat. Bank, 92 Ky. 251, 13 Ky. L. Rep. 478, 17 S. W. 627, 16 L. R. A. 223; Newell *v.* Somerset First Nat. Bank, 13 Ky. L. Rep. 775.

New York.— Hintermister *v.* Chittenango First Nat. Bank, 64 N. Y. 212 [*overruling* Whitehall First Nat. Bank *v.* Lamb, 50 N. Y. 95, 10 Am. Rep. 438].

Ohio.— Allen *v.* Xenia First Nat. Bank, 23 Ohio St. 97; Columbus First Nat. Bank *v.* Garlinghouse, 22 Ohio St. 492, 10 Am. Rep. 751.

United States.—Oates *v.* Montgomery First Nat. Bank, 100 U. S. 239, 25 L. ed. 580; Farmers', etc., Nat. Bank *v.* Dearing, 91 U. S. 29, 23 L. ed. 196; National Exch. Bank *v.* Moore, 2 Bond (U. S.) 170, 17 Fed. Cas. No. 10,041, 1 Am. L. T. Bankr. Rep. 74, 1 Nat. Bankr. Reg. 470.

Negotiability — Indorser and surety.— As the contract is unimpaired, any indorser or surety is held as in any other case; and the negotiability of the instrument is unaffected. Dalton First Nat. Bank *v.* McEntire, 112 Ga. 232, 37 S. E. 381; Nicholson *v.* Newcastle Nat. Bank, 92 Ky. 251, 13 Ky. L. Rep. 478, 17 S. W. 627, 16 L. R. A. 223.

97. *Illinois.*— Ellis *v.* Olney First Nat. Bank, 11 Ill. App. 275.

Indiana.—Wiley *v.* Starbuck, 44 Ind. 298.

Kansas.— Fraker *v.* Cullum, 24 Kan. 679; Hutchinson First Nat. Bank *v.* McInturff, 3 Kan. App. 536, 43 Pac. 839.

Massachusetts.— Peterborough Nat. Bank *v.* Childs, 133 Mass. 248, 43 Am. Rep. 509; Davis *v.* Randall, 115 Mass. 547, 15 Am. Rep. 146; Central Nat. Bank *v.* Pratt, 115 Mass. 539, 15 Am. Rep. 138.

Nebraska.—Norfolk Nat. Bank *v.* Schwenk, 46 Nebr. 381, 64 N. W. 1073; McGhee *v.* Tobias First Nat. Bank, 40 Nebr. 92, 58 N. W. 537; Hall *v.* Fairfield First Nat. Bank, 30 Nebr. 99, 46 N. W. 150; Schuyler Nat. Bank *v.* Bollong, 24 Nebr. 821, 825, 40 N. W. 411, 413.

New York.—Auburn Nat. Bank *v.* Lewis, 81 N. Y. 15; Hintermister *v.* Chittenango First Nat. Bank, 64 N. Y. 212; Elizabeth Nat. State Bank *v.* Brainard, 61 Hun (N. Y.) 339, 16 N. Y. Suppl. 123, 40 N. Y. St. 640.

Ohio.— Hade *v.* McVay, 31 Ohio St. 231; Shunk *v.* Galion First Nat. Bank, 22 Ohio St. 508, 10 Am. Rep. 762; Columbus First Nat. Bank *v.* Garlinghouse, 22 Ohio St. 492, 10 Am. Rep. 751; Huntington *v.* Krejci, 3 Ohio Dec. (Reprint) 532, Ohio L. J. 532.

Pennsylvania.— Overholt *v.* Mt. Pleasant Nat. Bank, 82 Pa. St. 490; Lucas *v.* Government Nat. Bank, 78 Pa. St. 228, 21 Am. Rep. 17; Brown *v.* Erie Second Nat. Bank, 72 Pa. St. 209; Titusville Second Nat. Bank's Appeal, 6 Wkly. Notes Cas. (Pa.) 153.

United States.— Farmers', etc., Nat. Bank *v.* Dearing, 91 U. S. 29, 23 L. ed. 196; Madison Nat. Bank *v.* Davis, 8 Biss. (U. S.) 100, 17 Fed. Cas. No. 10,038, 6 Centr. L. J. 106, 10 Chic. Leg. N. 156, 5 Reporter 258, Thomps. Nat. Bank Cas. 350.

Overdraft.— If usurious interest is charged on an overdraft the bank can recover no interest. Philadelphia Third Nat. Bank *v.* Miller, 90 Pa. St. 241, 7 Wkly. Notes Cas. (Pa.) 496.

Forfeiture extends only to date of action. — Interest is forfeited only until the date of the action for recovering the principal. Richmond Second Nat. Bank *v.* Fitzpatrick, (Ky. 1901) 63 S. W. 459.

In an action against an indorser of paper discounted at a usurious rate only the original amount can be recovered. Lucas *v.* Government Nat. Bank, 78 Pa. St. 228, 21 Am. Rep. 17.

accruing on such a note after maturity is forfeited;[98] and no portion of the interest of a renewal note that contains usury can be recovered. The taint of usury in the original note vitiates the entire amount in that and in every renewal, and all must be deducted.[99]

(B) *Enforcement of Forfeiture.* A forfeiture of interest under the National Banking Act can be enforced only in an action brought to collect the principal,[1] and consequently the two years' limitation on actions to recover back usurious interest which has been paid does not apply to a forfeiture.[2] Any party who is

98. *Kansas.*— Shafer *v.* Russell First Nat. Bank, 53 Kan. 614, 36 Pac. 998; Meade Center First Nat. Bank *v.* Grimes, 49 Kan. 219, 30 Pac. 474.

Kentucky.— Sydner *v.* Mt. Sterling Nat. Bank, 94 Ky. 231, 5 Ky. L. Rep. 4, 21 S. W. 1050; Alves *v.* Henderson Nat. Bank, 89 Ky. 126, 12 Ky. L. Rep. 69, 9 S. W. 504.

New York.— Elizabeth Nat. State Bank *v.* Brainard, 61 Hun (N. Y.) 339, 16 N. Y. Suppl. 123, 40 N. Y. St. 640.

Ohio.— Shunk *v.* Galion First Nat. Bank, 22 Ohio St. 508, 10 Am. Rep. 762.

United States.— Brown *v.* Marion Nat. Bank, 169 U. S. 416, 18 S. Ct. 390, 42 L. ed. 801 [*reversing* 92 Ky. 607, 18 S. W. 635]; Danforth *v.* Elizabeth Nat. State Bank, 48 Fed. 271, 3 U. S. App. 7, 1 C. C. A. 62, 17 L. R. A. 622; Uniontown First Nat. Bank *v.* Stauffer, 1 Fed. 187.

Agreement for legal rate after maturity.— If a bank is to receive more than the legal rate during the proper life of a note and only the legal rate after maturity the entire amount is forfeited. Shafer *v.* Russell First Nat. Bank, 53 Kan. 614, 36 Pac. 998.

99. *Iowa.*—Winterset Nat. Bank *v.* Eyre, 52 Iowa 114, 2 N. W. 995.

Kansas.— Meade Center First Nat. Bank *v.* Grimes, 49 Kan. 219, 30 Pac. 474.

Kentucky.— Citizens' Nat. Bank *v.* Forman, (Ky. 1901) 63 S. W. 454; Sydner *v.* Mt. Sterling Nat. Bank, 94 Ky. 231, 15 Ky. L. Rep. 4, 21 S. W. 1050; Brown *v.* Marion Nat. Bank, 92 Ky. 607, 13 Ky. L. Rep. 812, 18 S. W. 635; Alves *v.* Henderson Nat. Bank, 89 Ky. 126, 12 Ky. L. Rep. 69, 9 S. W. 504; Peoples *v.* Stanford First Nat. Bank, 15 Ky. L. Rep. 748.

Missouri.— Moniteau Nat. Bank *v.* Miller, 73 Mo. 187.

New York.—Auburn Nat. Bank *v.* Lewis, 75 N. Y. 516, 31 Am. Rep. 484.

Ohio.— Cadiz Bank *v.* Slemmons, 34 Ohio St. 142, 32 Am. Rep. 364; Higley *v.* Beverly First Nat. Bank, 26 Ohio St. 75, 20 Am. Rep. 759.

Pennsylvania.—Cake *v.* Lebanon First Nat. Bank, 86 Pa. St. 303; Overholt *v.* Mt. Pleasant Nat. Bank, 82 Pa. St. 490; Brown *v.* Erie Second Nat. Bank, 72 Pa. St. 209. And see Osborn *v.* Athens First Nat. Bank, 175 Pa. St. 494, 38 Wkly. Notes Cas. (Pa.) 341, 34 Atl. 858.

United States.— Brown *v.* Marion Nat. Bank, 169 U. S. 420, 18 S. Ct. 390, 42 L. ed. 801; Farmers', etc., Bank *v.* Hoagland, 7 Fed. 159; Madison Nat. Bank *v.* Davis, 8 Biss. (U. S.) 100, 17 Fed. Cas. No. 10,038, 6 Centr. L. J. 106, 10 Chic. Leg. N. 156, 5 Reporter 258, Thomps. Nat. Bank Cas. 350.

The borrower cannot set off usurious interest paid on former notes in payment of the principal of the last of the series. Fayette County Nat. Bank *v.* Dushane, 96 Pa. St. 340; Driesbach *v.* Wilkesbarre Second Nat. Bank, 104 U. S. 52, 26 L. ed. 658; Barnet *v.* Muncie Nat. Bank, 98 U. S. 555, 25 L. ed. 212; Farmers', etc., Bank *v.* Hoagland, 7 Fed. 159. In some cases this has been done (Hade *v.* McVay, 31 Ohio St. 231; Cake *v.* Lebanon First Nat. Bank, 86 Pa. St. 303; Overholt *v.* Mt. Pleasant Nat. Bank, 82 Pa. St. 490; Lucas *v.* Government Nat. Bank, 78 Pa. St. 228, 21 Am. Rep. 17; Stephens *v.* Monongahela Nat. Bank, 7 Wkly. Notes Cas. (Pa.) 491; Madison Nat. Bank *v.* Davis, 8 Biss. (U. S.) 100, 17 Fed. Cas. No. 10,038, 6 Centr. L. J. 106, 10 Chic. Leg. N. 156, 5 Reporter 258, Thomps. Nat. Bank Cas. 350), but this is not the correct rule (Fayette County Nat. Bank *v.* Dushane, 96 Pa. St. 340; Barnet *v.* Muncie Nat. Bank, 98 U. S. 555, 25 L. ed. 212).

If a note be renewed with legal interest in which the usurious interest of former notes has been included the principal and interest can be collected, but twice the amount of usurious interest paid on the former notes can then be recovered by the borrower in a proper action. Shinkle *v.* Ripley First Nat. Bank, 22 Ohio St. 516. By another view only the original debt can be recovered. Farmers', etc., Bank *v.* Hoagland, 7 Fed. 159.

1. Peterborough First Nat. Bank *v.* Childs, 130 Mass. 519, 39 Am. Rep. 474; Hintermister *v.* Chittenango First Nat. Bank, 64 N. Y. 212.

Forfeiture may be set up in state court.— Kinser *v.* Farmers' Nat. Bank, 58 Iowa 728, 13 N. W. 59; Peterborough First Nat. Bank *v.* Childs, 130 Mass. 519, 39 Am. Rep. 474, 133 Mass. 248, 43 Am. Rep. 509; Schuyler Nat. Bank *v.* Bollong, 28 Nebr. 684, 45 N. W. 164, 32 Nebr. 70, 48 N. W. 826, 37 Nebr. 620, 56 N. W. 209; Tecumseh First Nat. Bank *v.* Overman, 22 Nebr. 116, 34 N. W. 107; Lynch *v.* Merchants' Nat. Bank, 22 W. Va. 554, 46 Am. Rep. 520.

Price paid may be shown.— A national bank can show in an action to recover the amount of a note the price paid therefor. Springfield First Nat. Bank *v.* Haulenbeek, 65 Hun (N. Y.) 54, 19 N. Y. Suppl. 567, 47 N. Y. St. 255.

2. Pickett *v.* Merchants' Nat. Bank, 32 Ark. 346; Ellis *v.* Olney First Nat. Bank, 11 Ill. App. 275; Peterborough First Nat. Bank *v.*

liable for the principal can set up the forfeiture,[3] but it must be clearly shown that the bank knowingly received an amount exceeding the legal rate.[4]

(III) *Penalty Where Interest Actually Paid*—(A) *Amount Recoverable.* Where usurious interest has been actually paid,[5] the amount which may be recovered is twice the full amount of interest paid, and is not limited to twice the excess of interest paid above the legal rate.[6]

Childs, 130 Mass. 519, 39 Am. Rep. 474. And see Moniteau Nat. Bank *v.* Miller, 73 Mo. 187.

3. Auburn Nat. Bank *v.* Lewis, 75 N. Y. 516, 31 Am. Rep. 484; Danforth *v.* Elizabeth Nat. State Bank, 48 Fed. 271, 3 U. S. App. 7, 19, 1 C. C. A. 62, 17 L. R. A. 622.

The accepter of a draft may use this defense. Danforth *v.* Elizabeth Nat. State Bank, 48 Fed. 271, 3 U. S. App. 7, 1 C. C. A. 62, 17 L. R. A. 622. *Contra*, Smith *v.* Pittsburg Exch. Bank, 26 Ohio St. 141.

The maker of a note may set up, in an action thereon by the bank, the usury of the bank in discounting it for the payee. Guthrie *v.* Reid, 107 Pa. St. 251.

A state corporation, although having no such defense under its state law, can take advantage of the national law. Union Nat. Bank *v.* Louisville, etc., R. Co., 145 Ill. 208, 34 N. E. 135; *In re* Wild, 11 Blatchf. (U. S.) 243, 29 Fed. Cas. No. 17,645, 8 Alb. L. J. 235, 10 Nat. Bankr. Reg. 568, Thomps. Nat. Bank Cas. 246.

A bank director whose note has been discounted in his own bank can interpose this defense like any other person. Cadiz Bank *v.* Slemmons, 34 Ohio St. 142, 32 Am. Rep. 364.

Indorser on renewal note.— A note bearing usurious interest was indorsed for accommodation. The indorser gave a renewal with an indorser. The last indorser could not set off the usurious interest paid on the original note. Bly *v.* Titusville Second Nat. Bank, 79 Pa. St. 453.

4. Wheeler *v.* Union Nat. Bank, 96 U. S. 268, 24 L. ed. 833.

Usury must be shown by pleading.— The usurious contract must be so pleaded as that it may appear what an amount of interest was taken or secured, and on what sum, and for what time; and a corrupt intent must also be alleged. Metropolis Nat. Bank *v.* Orcutt, 48 Barb. (N. Y.) 256.

5. **Must have been actually paid.**— There can be no recovery of twice the amount unless the interest has been actually paid. Hall *v.* Fairfield First Nat. Bank, 30 Nebr. 99, 46 N. W. 150; Brown *v.* Erie Second Nat. Bank, 72 Pa. St. 209; Davey *v.* Deadwood First Nat. Bank, 8 S. D. 214, 66 N. W. 122.

As to application of part payments to principal see *infra*. III, E, 3, d, (IV).

Charges and manipulation of accounts which do not result in actual payment are not regarded as payment. Talbot *v.* Sioux City First Nat. Bank, 106 Iowa 361, 76 N. W. 726; Osborn *v.* Athens First Nat. Bank, 175 Pa. St. 494, 38 Wkly. Notes Cas. (Pa.) 341, 34 Atl. 858.

Excessive charge in making renewals.— A charge of interest by a national bank in excess of the legal rate in making renewals is not equivalent to payment, and does not render the bank liable for the loss of double the amount. Osborn *v.* Athens First Nat. Bank, 175 Pa. St. 494, 34 Atl. 858.

Although the state law allow no recovery where usury has been actually paid, yet an action will lie against a national bank in such case under the Banking Act. Tobias First Nat. Bank *v.* Barnett, 51 Nebr. 397, 70 N. W. 937.

6. *Kansas.*— Hutchinson First Nat. Bank *v.* McInturff, 3 Kan. App. 536, 43 Pac. 839.

Kentucky.— Richmond Second Nat. Bank *v.* Fitzpatrick, (Ky. 1901) 63 S. W. 459; Lancaster Nat. Bank *v.* Johnson, 91 Ky. 181, 12 Ky. L. Rep. 759, 15 S. W. 134; Henderson Nat. Bank *v.* Alves, 91 Ky. 142, 12 Ky. L. Rep. 732, 15 S. W. 132.

Nebraska.—Norfolk Nat. Bank *v.* Schwenk, 46 Nebr. 381, 64 N. W. 1073; Schuyler Nat. Bank *v.* Bollong, 28 Nebr. 684, 45 N. W. 164.

Pennsylvania.—Lebanon Nat. Bank *v.* Karmany, 98 Pa. St. 65; Stephens *v.* Monongahela Nat. Bank, 88 Pa. St. 157, 7 Wkly. Notes Cas. (Pa.) 491, 32 Am. Rep. 438.

United States.— Hill *v.* Barre Nat. Bank, 21 Blatchf. (U. S.) 258, 15 Fed. 432; Markson *v.* Kansas City First Nat. Bank, 16 Fed. Cas. No. 9,097, 9 Chic. Leg. N. 108; Crocker *v.* Chetopa First Nat. Bank, 4 Dill. (U. S.) 358, 6 Fed. Cas. No. 3,397, 11 Am. L. Rev. 169, 3 Am. L. T. Rep. N. S. 350, 3 Centr. L. J. 527, 1 Cinc. L. Bul. 350, 3 N. Y. Wkly. Dig. 105, 24 Pittsb. Leg. J. (Pa.) 73, Thomps. Nat. Bank Cas. 317.

Contra, Hintermister *v.* Chittenango First Nat. Bank, 64 N. Y. 212; Bobo *v.* People's Nat. Bank, 92 Tenn. 444, 21 S. W. 888, in which cases it was held that only twice the amount of the interest paid in excess of the legal rate was recoverable.

When usurious interest has been included in a series of usurious notes and finally paid in discharging the last note twice the entire amount can be recovered. Fayette County Nat. Bank *v.* Dushane, 96 Pa. St. 340.

Interest on penalty.— As the double amount that is recoverable is in the nature of a penalty, interest cannot be allowed thereon. Higley *v.* Beverly First Nat. Bank, 26 Ohio St. 75, 20 Am. Rep. 759; Columbia Nat. Bank *v.* Bletz, 2 Pennyp. (Pa.) 169. But interest may be allowed from the date of the petition to recover the penalty. Richmond Second Nat. Bank *v.* Fitzpatrick, (Ky. 1901) 63 S. W. 459.

Number of payments not material.— The party is entitled to recover whether the amount was paid in one or in several payments. Hintermister *v.* Chittenango First Nat. Bank, 64 N. Y. 212.

(B) *What Courts Have Jurisdiction.* Jurisdiction of such actions is not confined to the federal courts but may also be exercised by the state courts.[7]

(C) *Who May Sue.* The proceeding may be instituted by the person who paid the usurious interest or his legal representatives.[8]

7. *Arkansas.*— Pickett *v.* Merchants' Nat. Bank, 32 Ark. 346.

Iowa.— Winterset Nat. Bank *v.* Eyre, 52 Iowa 114, 2 N. W. 995.

Kentucky.— Lancaster Nat. Bank *v.* Johnson, 91 Ky. 181, 12 Ky. L. Rep. 759, 15 S. W. 134, 11 Ky. L. Rep. 904; Henderson Nat. Bank *v.* Alves, 91 Ky. 142, 12 Ky. L. Rep. 722, 15 S. W. 132; Peoples *v.* Stanford First Nat. Bank, 15 Ky. L. Rep. 748.

Maryland.— Ordway *v.* Central Nat. Bank, 47 Md. 217, 28 Am. Rep. 455.

Massachusetts.— Peterborough First Nat. Bank *v.* Childs, 130 Mass. 519, 39 Am. Rep. 474, 133 Mass. 248, 43 Am. Rep. 509.

Nebraska.—Schuyler Nat. Bank *v.* Bollong, 24 Nebr. 821, 40 N. W. 411, 28 Nebr. 684, 45 N. W. 164, 32 Nebr. 70, 48 N. W. 826, 37 Nebr. 620, 56 N. W. 209; Tecumseh First Nat. Bank *v.* Overman, 22 Nebr. 116, 34 N. W. 107.

North Carolina.—Morgan *v.* Charlotte First Nat. Bank, 93 N. C. 352.

Ohio.— Hade *v.* McVay, 31 Ohio St. 231.

Pennsylvania.—Lebanon Nat. Bank *v.* Karmany, 98 Pa. St. 65; Clarion First Nat. Bank *v.* Gruber, 91 Pa. St. 377; Stephens *v.* Monongahela Nat. Bank, 88 Pa. St. 157, 7 Wkly. Notes Cas. (Pa.) 491, 32 Am. Rep. 438; Gruber *v.* Clarion First Nat. Bank, 87 Pa. St. 465; Bletz *v.* Columbia Nat. Bank, 87 Pa. St. 87, 30 Am. Rep. 343.

Vermont.—Dow *v.* Irasburgh Nat. Bank, 50 Vt. 112, 28 Am. Rep. 493.

United States.— Claflin *v.* Houseman, 93 U. S. 130, 23 L. ed. 833.

Action by foreign corporation.— In Missouri River Tel. Co. *v.* Sioux City First Nat. Bank, 74 Ill. 217, it was held that a state court had no jurisdiction of an action by a foreign corporation against a national bank for taking usurious interest.

8. U. S. Rev. Stat. (1872), § 5198; Barbour *v.* National Exch. Bank, 45 Ohio St. 133, 12 N. E. 5; National Bank *v.* Trimble, 40 Ohio St. 629; Tiffany *v.* Missouri Nat. Bank, 18 Wall. (U. S.) 409, 21 L. ed. 862; Wright *v.* Greensburg First Nat. Bank, 8 Biss. (U. S.) 243, 30 Fed. Cas. No. 18,078, 18 Alb. L. J. 115, 2 Browne Nat. Bank Cas. 138, 10 Chic. Leg. N. 348, 18 Nat. Bankr. Reg. 87, 6 N. Y. Wkly. Dig. 543, 26 Pittsb. Leg. J. (Pa.) 11, 6 Reporter 229; Crocker *v.* Chetopa First Nat. Bank, 4 Dill. (U. S.) 358, 6 Fed. Cas. No. 3,397, 11 Am. L. Rev. 169, 3 Am. L. T. Rep. N. S. 350, 3 Centr. L. J. 527, 1 Cinc. L. Bul. 350, 3 N. Y. Wkly. Dig. 105, 24 Pittsb. Leg. J. (Pa.) 73, Thomps. Nat. Bank Cas. 317.

The payee of a note discounted for him by a national bank at a usurious rate may recover twice the amount of interest paid. Gloversville Nat. Bank *v.* Johnson, 104 U. S. 271, 26 L. ed. 742.

Who is a legal representative.— The following have been held to be "legal representatives" within the meaning of the statute: Executors and administrators (Osborn *v.* Athens First Nat. Bank, 175 Pa. St. 494, 38 Wkly. Notes Cas. (Pa.) 341, 34 Atl. 858); a receiver of an insolvent corporation (Barbour *v.* National Exch. Bank, 45 Ohio St. 133, 12 N. E. 5); an assignee in bankruptcy (Monongahela Nat. Bank *v.* Overholt, 96 Pa. St. 327; Wright *v.* Greensburg First Nat. Bank, 8 Biss. (U. S.) 243, 30 Fed. Cas. No. 18,078, 18 Alb. L. J. 115, 2 Browne Nat. Bank Cas. 138, 10 Chic. Leg. N. 348, 18 Nat. Bankr. Reg. 87, 6 N. Y. Wkly. Dig. 543, 26 Pittsb. Leg. J. (Pa.) 11, 6 Reporter 229; Crocker *v.* Chetopa First Nat. Bank, 4 Dill. (U. S.) 358, 6 Fed. Cas. No. 3,397, 11 Am. L. Rev. 169, 3 Am. L. T. Rep. N. S. 350, 3 Centr. L. J. 527, 1 Cinc. L. Bul. 350, 3 N. Y. Wkly. Dig. 105, 24 Pittsb. Leg. J. (Pa.) 73, Thomps. Nat. Bank Cas. 317; Markson *v.* Kansas City First Nat. Bank, 16 Fed. Cas. No. 9,097, 9 Chic. Leg. N. 108. But see Barnett *v.* Muncie Nat. Bank, 2 Fed. Cas. No. 1,026, 1 Cinc. L. Bul. 45 [*affirmed* in 98 U. S. 555, 25 L. ed. 212]).

Who not legal representative.— The following have been held not to be "legal representatives": The indorser of a bill of exchange (Barnett *v.* Muncie Nat. Bank, 2 Fed. Cas. No. 1,026, 1 Cinc. L. Bul. 45 [*affirmed* in 98 U. S. 555, 25 L. ed. 212]); a judgment creditor is not a legal representative (Barrett *v.* Shelbyville Nat. Bank, 85 Tenn. 426, 3 S. W. 117); an assignee for the benefit of creditors (Osborn *v.* Athens First Nat. Bank, 175 Pa. St. 494, 38 Wkly. Notes Cas. (Pa.) 341, 34 Atl. 858 [*distinguishing* Monongahela Nat. Bank *v.* Overholt, 96 Pa. St. 327]).

A joint maker of a note cannot recover the penalty if the interest was paid by another maker. Concordia First Nat. Bank *v.* Rowley, 52 Kan. 394, 34 Pac. 1049; Teague *v.* Salina First Nat. Bank, 5 Kan. App. 300, 48 Pac. 603; Timberlake *v.* First Nat. Bank, 43 Fed. 231.

An indorser who has paid a note including usurious interest cannot recover from the lender twice the amount of interest paid (Bly *v.* Titusville Second Nat. Bank, 79 Pa. St. 453) and he can recover of the maker only the original amount (Citizens' Nat. Bank *v.* Leming, 5 Fed. Cas. No. 2,733, 8 Int. Rev. Rec. 132).

Another action pending — Beneficial owner. — Where it appeared that plaintiff in an action against a national bank to recover usurious interest was the beneficial owner of the notes discounted, the fact that a joint maker had brought suit in another court for the recovery of such usurious interest was no bar to the action. Clarion First Nat. Bank *v.* Gruber, 91 Pa. St. 377.

(D) *In What Proceeding Recoverable.* The penalty for taking usurious interest can be recovered only in an action of debt or a suit of that nature, as provided by the National Banking Act, and cannot be recovered by way of set-off or counterclaim in an action by the bank.[9]

(E) *Pleading Usury.* The pleading setting up the usury must allege that the act was knowingly done.[10] It need not aver that there are no state banks which are allowed by law to charge the rate claimed to be usurious.[11]

(F) *Limitation of Action.* The action must be commenced within two years after the occurrence of the usurious transaction,[12] and the limitation begins to run

9. *California.*— Farmers' Nat. Gold Bank *v.* Stover, 60 Cal. 387.

Illinois.— Ellis *v.* Olney First Nat. Bank, 11 Ill. App. 275.

Indiana.— Wiley *v.* Starbuck, 44 Ind. 298.

Iowa.— Grundy Center First Nat. Bank *v.* Moore, 83 Iowa 740, 48 N. W. 1072.

Kansas.— Fraker *v.* Cullum, 24 Kan. 679.

Massachusetts.— Peterborough First Nat. Bank *v.* Childs, 133 Mass. 248, 43 Am. Rep. 509 [*overruling* 130 Mass. 519, 39 Am. Rep. 474].

Nebraska.—Norfolk Nat. Bank *v.* Schwenk, 46 Nebr. 381, 64 N. W. 1073.

New York.— Auburn Nat. Bank *v.* Lewis, 81 N. Y. 15 [*modifying* 75 N. Y. 516]; Chase Nat. Bank *v.* Faurot, 72 Hun (N. Y.) 373, 25 N. Y. Suppl. 447, 55 N. Y. St. 179; Newark Nat. State Bank *v.* Boylan, 2 Abb. N. Cas. (N. Y.) 216.

Ohio.— Hade *v.* McVay, 31 Ohio St. 231; Higley *v.* Beverly First Nat. Bank, 26 Ohio St. 75, 20 Am. Rep. 759; Shinkle *v.* Ripley First Nat. Bank, 22 Ohio St. 516.

Pennsylvania.— Fayette County Nat. Bank *v.* Dushane, 96 Pa. St. 340; Clarion First Nat. Bank *v.* Gruber, 91 Pa. St. 377. The contrary doctrine held in Brown *v.* Erie Second Nat. Bank, 72 Pa. St. 209, and Lucas *v.* Government Nat. Bank, 78 Pa. St. 228, 21 Am. Rep. 17, was regarded as overruled by Barnet *v.* Muncie Nat. Bank, 98 U. S. 555, 25 L. ed. 212.

South Carolina.— Childs *v.* Alexander, 22 S. C. 169.

Texas.— Huggins *v.* Citizens' Nat. Bank, 6 Tex. Civ. App. 33, 24 S. W. 926.

United States.— Stephens *v.* Monongahela Nat. Bank, 111 U. S. 197, 4 S. Ct. 336, 28 L. ed. 399; Driesbach *v.* Wilkesbarre Second Nat. Bank, 104 U. S. 52, 26 L. ed. 658; Barnet *v.* Muncie Nat. Bank, 98 U. S. 555, 25 L. ed. 212; Cox *v.* Beck, 83 Fed. 269; Danforth *v.* Elizabeth Nat. State Bank, 48 Fed. 271, 3 U. S. App. 7, 1 C. C. A. 62, 17 L. R. A. 622; Farmers', etc., Bank *v.* Hoagland, 7 Fed. 159.

Non-payment of principal no defense.— A failure to pay the principal is no defense to an action to recover twice the amount illegally paid. Kinser *v.* Farmers' Nat. Bank, 58 Iowa 728, 13 N. W. 59; National Bank *v.* Trimble, 40 Ohio St. 629; Lebanon Nat. Bank *v.* Karmany, 98 Pa. St. 65; Monongahela Nat. Bank *v.* Overholt, 96 Pa. St. 327; Stout *v.* Ennis Nat. Bank, 69 Tex. 384, 8 S. W. 808. Payment of the loan is not a condition precedent to the borrower's right to maintain an action for the penalty. Exeter Nat. Bank *v.* Orchard, 43 Nebr. 579, 583, 61 N. W. 833, 834.

Right of bank to set off.— In an action to recover twice the amount of interest paid the lender cannot set off a judgment against the borrower. Lebanon Nat. Bank *v.* Karmany, 98 Pa. St. 65. Nor can the bank set off the principal due on the last one of a series of notes in an action to recover the interest paid on the others. Morehouse *v.* Oswego Second Nat. Bank, 30 Hun (N. Y.) 628.

Exchange may be set off.— Although the principal cannot be set off against usurious interest in an action to recover it the expense of exchange may be. Barrett *v.* Shelbyville Nat. Bank, 85 Tenn. 426, 3 S. W. 117.

The form of the action must be determined by the law of the place where the action is brought. Osborn *v.* Athens First Nat. Bank, 175 Pa. St. 494, 38 Wkly. Notes Cas. (Pa.) 341, 34 Atl. 858.

10. Henderson Nat. Bank *v.* Alves, 91 Ky. 142, 12 Ky. L. Rep. 722, 15 S. W. 132; Schuyler Nat. Bank *v.* Bollong, 24 Nebr. 821, 40 N. W. 411; Auburn Nat. Bank *v.* Lewis, 75 N. Y. 516, 31 Am. Rep. 484.

Sufficient complaint.— A complaint which alleges that defendant knowingly and usuriously received from plaintiff for interest a certain sum, being at a rate, stating it, exceeding the legal one, and also the time, states a good cause of action. Guild *v.* Deadwood First Nat. Bank, 4 S. D. 566, 57 N. W. 499.

11. Morgan *v.* Charlotte First Nat. Bank, 93 N. C. 352.

12. U. S. Rev. Stat. (1872), § 5198; Norfolk Nat. Bank *v.* Schwenk, 46 Nebr. 381, 64 N. W. 1073; Newark Nat. State Bank *v.* Boylan, 2 Abb. N. Cas. (N. Y.) 216; Higley *v.* Beverly First Nat. Bank, 26 Ohio St. 75, 20 Am. Rep. 759; Shinkle *v.* Ripley First Nat. Bank, 22 Ohio St. 516; Madison Nat. Bank *v.* Davis, 8 Biss. (U. S.) 100, 17 Fed. Cas. No. 10,038, 6 Centr. L. J. 106, 10 Chic. Leg. N. 156, 5 Reporter 258, Thomps. Nat. Bank Cas. 350.

Series of notes infected with usury.— No action can be maintained on the last of a series of notes containing usurious interest if the interest sought to be recovered was paid more than two years before bringing the action. Talbot *v.* Sioux City First Nat. Bank, 106 Iowa 361, 76 N. W. 726; Madison Nat. Bank *v.* Davis, 8 Biss. (U. S.) 100, 17 Fed. Cas. No. 10,038, 6 Centr. L. J. 106, 10

from the time the usurious interest is actually paid or judgment therefor is entered.[13]

(iv) *Part Payments Applied to Principal.* When a loan is tainted with the vice of usury, any part payment will, in the absence of a different agreement between the parties,[14] be regarded as payment of the principal and not of the interest.[15]

Chic. Leg. N. 156, 5 Reporter 258, Thomps. Nat. Bank Cas. 350.

A state statute of limitation does not apply, the matter being governed by the National Banking Act. Lucas *v.* Government Nat. Bank, 78 Pa. St. 228, 21 Am. Rep. 17.

13. *Alabama.*— Gadsden First Nat. Bank *v.* Denson, 115 Ala. 650, 22 So. 518.

Iowa.— Kinser *v.* Farmers' Nat. Bank, 58 Iowa 728, 13 N. W. 59.

Kentucky.— Lancaster Nat. Bank *v.* Johnson, 91 Ky. 181, 12 Ky. L. Rep. 759, 15 S. W. 134; Henderson Nat. Bank *v.* Alves, 91 Ky. 142, 12 Ky. L. Rep. 722, 15 S. W. 132.

Nebraska.— Lanham *v.* Crete First Nat. Bank, 42 Nebr. 757, 60 N. W. 1041; Smith *v.* Crete First Nat. Bank, 42 Nebr. 687, 60 N. W. 866; Dorchester First Nat. Bank *v.* Smith, 36 Nebr. 199, 54 N. W. 254.

New Jersey.— Rahway Nat. Bank *v.* Carpenter, 52 N. J. L. 165, 19 Atl. 181 [*reversing*, on other grounds, 50 N. J. L. 6, 11 Atl. 478].

Ohio.— Shinkle *v.* Ripley First Nat. Bank, 22 Ohio St. 516.

Pennsylvania.— Stephens *v.* Monongahela Nat. Bank, 88 Pa. St. 157, 7 Wkly. Notes Cas. (Pa.) 491, 32 Am. Rep. 438; Brown *v.* Erie Second Nat. Bank, 72 Pa. St. 209.

Tennessee.— Bobo *v.* People's Nat. Bank, 92 Tenn. 444, 21 S. W. 888.

Texas.— Stout *v.* Ennis Nat. Bank, 69 Tex. 384, 8 S. W. 808.

West Virginia.— Lynch *v.* Merchants Nat. Bank, 22 W. Va. 554, 46 Am. Rep. 520.

United States.— Duncan *v.* Mt. Pleasant First Nat. Bank, 8 Fed. Cas. No. 4,135, 15 Alb. L. J. 330, 11 Bankers' Mag. (3d S.) 787, 26 Pittsb. Leg. J. (Pa.) 129, Thomps. Nat. Bank. Cas. 360.

What constitutes payment of interest.— The transfer of commercial paper to a bank and discount by it at a greater than the legal rate and the crediting to the transferrer of the net proceeds after deducting the interest charged constitutes a payment of the interest within the meaning of the statute providing a limitation of two years. Rahway Nat. Bank *v.* Carpenter, 52 N. J. L. 165, 19 Atl. 181. And see Danforth *v.* Elizabeth Nat. State Bank, 48 Fed. 271, 3 U. S. App. 7, 1 C. C. A. 62, 17 L. R. A. 622.

"The usurious transaction occurred" within the meaning of the statute at the time the bank retained the usurious interest, and not at the time when the discounted note fell due or judgment was rendered thereon. Bobo *v.* People's Nat. Bank, 92 Tenn. 444, 21 S. W. 888.

Partial payments are, in the absence of a different agreement, regarded as applied to the principal debt, and the statute will not begin to run until such payments exceed the principal (Gadsden First Nat. Bank *v.* Denson, 115 Ala. 650, 22 So. 518; Stout *v.* Ennis Nat. Bank, 69 Tex. 384, 8 S. W. 808. And see cases cited *infra*, III, E, 3, d, (iv)); but where it is agreed between the parties that the payment shall be applied to the usurious interest the statute begins to run from the time of such payment (Stout *v.* Ennis Nat. Bank, 69 Tex. 384, 8 S. W. 808).

14. Where the parties agree that the payment shall be applied to the usurious interest it constitutes a payment of interest and not a part payment of the principal. Stout *v.* Ennis Nat. Bank, 69 Tex. 384, 8 S. W. 808.

15. *Alabama.*— Gadsden First Nat. Bank *v.* Denson, 115 Ala. 650, 22 So. 518.

Iowa.— Kinser *v.* Farmers' Nat. Bank, 58 Iowa 728, 13 N. W. 59.

Kansas.— Hutchinson First Nat. Bank *v.* McInturff, 3 Kan. App. 536, 43 Pac. 839; Newton First Nat. Bank *v.* Turner, 3 Kan. App. 352, 42 Pac. 936.

Massachusetts.— Peterborough First Nat. Bank *v.* Childs, 130 Mass. 519, 39 Am. Rep. 474.

Missouri.— Moniteau Nat. Bank *v.* Miller, 73 Mo. 187.

Nebraska.— Tobias First Nat. Bank *v.* Barnett, 51 Nebr. 397, 70 N. W. 937; Norfolk Nat. Bank *v.* Schwenk, 46 Nebr. 381, 64 N. W. 1073; Hall *v.* Fairfield First Nat. Bank, 30 Nebr. 99, 46 N. W. 150; Blackwell *v.* Wright, 27 Nebr. 269, 43 N. W. 116, 20 Am. St. Rep. 662; Nelson *v.* Hurford, 11 Nebr. 465, 9 N. W. 648.

Ohio.— Cadiz Bank *v.* Slemmons, 34 Ohio St. 142, 32 Am. Rep. 364; Higley *v.* Beverly First Nat. Bank, 26 Ohio St. 75, 20 Am. Rep. 759.

Texas.— Stout *v.* Ennis Nat. Bank, 69 Tex. 384, 8 S. W. 808.

United States.—Danforth *v.* Elizabeth Nat. State Bank, 48 Fed. 271, 3 U. S. App. 7, 1 C. C. A. 62, 17 L. R. A. 622.

A bank cannot appropriate a payment made by the accepter of a draft having an illegal rate, which is thereby forfeited, to the payment of it. Adams *v.* Mohnken, 41 N. J. Eq. 332, 7 Atl. 435; Greene *v.* Tyler, 39 Pa. St. 361; Gill *v.* Rice, 13 Wis. 549; Danforth *v.* Elizabeth Nat. State Bank, 48 Fed. 271, 3 U. S. App. 7, 1 C. C. A. 62, 17 L. R. A. 622.

Applied pro rata to principal and interest. — A borrower of large sums from a national bank at usurious interest made payments from time to time, and at occasional settlements gave notes for the balance. In an action to recover double interest paid, it was held that his payments had been applied *pro rata* to the principal and interest. Kinser *v.*

F. Reports and Examinations. The oath of a director concerning his knowledge of the affairs of the bank relates only to such knowledge as he acquires in the exercise of his ordinary duties. The knowledge of an active officer, president, cashier, or manager possesses more significance.[16] A national bank examiner is not an officer or agent of the bank and has no authority to act for it in any manner;[17] nor is a letter addressed to him from a stock-holder inquiring about its condition a privileged communication.[18]

G. Attachment Against National Banks. No attachment before final judgment can be issued against a national bank. The proceeding is void and no lien is thereby acquired on the property of the bank.[19]

H. Dissolution and Insolvency[20] — **1. Expiration of Charter.** A national bank continues after the close of the time fixed in its charter as a person in law capable of suing and being sued, until its affairs are completely settled.[21]

Farmers' Nat. Bank, 58 Iowa 728, 13 N. W. 59.

16. Gerner *v.* Mosher, 58 Nebr. 135, 78 N. W. 384, 46 L. R. A. 244.

False entries in reports see *supra*, III, D, 3, b, (II), (B).

What must appear in report.— A note, the payment of which is guaranteed by the bank, must appear in its report to the comptroller. Cochran *v.* U. S., 157 U. S. 286, 15 S. Ct. 628, 39 L. ed. 704.

17. Witters *v.* Sowles, 32 Fed. 762.

Not agent of bank.—A bank examiner who takes charge of the assets of a national bank under the direction of the comptroller is not the agent of the bank in any negotiation that may be undertaken for resuming business. Tecumseh Nat. Bank *v.* Chamberlain Banking House, (Nebr. 1901) 88 N. W. 186.

18. Cox *v.* Montague, 78 Fed. 845, 47 U. S. App. 384, 24 C. C. A. 364.

19. U. S. Rev. Stat. (1872), § 5242.

Colorado.—Woodward *v.* Ellsworth, 4 Colo. 580.

Georgia.— Planters Loan, etc., Bank *v.* Berry, 91 Ga. 264, 18 S. E. 137.

Illinois.— McDonald *v.* Marquette First Nat. Bank, 41 Ill. App. 368. But see Norris *v.* Merchants Nat. Bank, 30 Ill. App. 54.

Maryland.— Chesapeake Bank *v.* Baltimore First Nat. Bank, 40 Md. 269, 17 Am. Rep. 601.

Minnesota.— Kasson First Nat. Bank *v.* La Due, 39 Minn. 415, 40 N. W. 367.

New York.—Montreal Bank *v.* Fidelity Nat. Bank, 1 N. Y. Suppl. 852, 17 N. Y. St. 88 [*affirmed* in 112 N. Y. 667, 20 N. E. 414, 20 N. Y. St. 979]. In the earlier cases the statute was held to apply only where the bank was insolvent or in contemplation of insolvency. Raynor *v.* Pacific Nat. Bank, 93 N. Y. 371; National Shoe, etc., Bank *v.* Mechanics' Nat. Bank, 89 N. Y. 467; Robinson *v.* Newberne Nat. Bank, 81 N. Y. 385, 37 Am. Rep. 508 [*affirming* 19 Hun (N. Y.) 477, 58 How. Pr. (N. Y.) 306]; Market Nat. Bank *v.* Pacific Nat. Bank, 30 Hun (N. Y.) 50 [*affirmed* in 93 N. Y. 648]; Rhoner *v.* Allentown First Nat. Bank, 14 Hun (N. Y.) 126; Market Nat. Bank *v.* Pacific Nat. Bank, 2 N. Y. Civ. Proc. 330, 64 How. Pr. (N. Y.) 1; People's Bank *v.* Mechanics' Nat. Bank, 62 How. Pr. (N. Y.) 422; Central Nat. Bank *v.* Richland Nat. Bank, 52 How. Pr. (N. Y.) 136; Bowen *v.* Medina First Nat. Bank, 34 How. Pr. (N. Y.) 408.

Pennsylvania.— Bank of Commerce *v.* Chicago City Nat. Bank, 12 Phila. (Pa.) 189, 34 Leg. Int. (Pa.) 115.

Vermont.— Safford *v.* Plattsburgh First Nat. Bank, 61 Vt. 373, 17 Atl. 748.

United States.— Pacific Nat. Bank *v.* Mixter, 124 U. S. 721, 8 S. Ct. 718, 31 L. ed. 567; Selma First Nat. Bank *v.* Colby, 21 Wall. (U. S.) 609, 22 L. ed. 687 [*reversing* 46 Ala. 435]; Garner *v.* Providence Second Nat. Bank, 66 Fed. 369; Harvey *v.* Allen, 16 Blatchf. (U. S.) 39, 11 Fed. Cas. No. 6,177, 2 Browne Nat. Bank Cas. 439, 25 Int. Rev. Rec. 95.

Statute applies whether bank solvent or insolvent.— In Pacific Nat. Bank *v.* Mixter, 124 U. S. 721, 8 S. Ct. 718, 31 L. ed. 567, the doctrine was settled that national banks are exempt from attachment whether they be solvent or insolvent. The court referring to the statute said: "It operates as a prohibition upon all attachments against national banks under the authority of the state courts. . . . It operates as well on the courts of the United States as on those of the States."

Bank may be garnished.— A national bank or its receiver may be summoned as a garnishee. Conway *v.* Schall, 42 Wkly. Notes Cas. (Pa.) 328; Com. *v.* Long, 42 Wkly. Notes Cas. (Pa.) 199. See, generally, Garnishment.

Attachment of stock.— A levy may be made on the stock of a stock-holder and it may be sold under an execution against the owner. Oldacre *v.* Butler, 116 Ala. 652, 23 So. 3; Winter *v.* Baldwin, 89 Ala. 483, 7 So. 734; Braden's Estate, 165 Pa. St. 184, 30 Atl. 746.

A levy on national bank-stock is not effective in a state in which national bank-stock is not included. Sowles *v.* National Union Bank, 82 Fed. 696.

20. Dissolution and insolvency of banks, generally, see *supra*, II, F.

21. Farmers Nat. Bank *v.* Backus, 74 Minn. 264, 77 N. W. 142; Baltimore Cent. Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693.

Cashier's authority at an end.— Where a state bank surrenders its charter as such on

2. Voluntary Liquidation. Two thirds of the stock-holders may vote to liquidate the bank contrary to the wishes or interests of the minority.[22] By such action its capacity to collect its assets and close its affairs is not affected.[23] It may sue and be sued, and a valid judgment may be obtained against the bank.[24] While liquidating, the officers of the bank have no authority to transact any business in the name of the bank which can bind its stock-holders except that relating to the closing of the bank's affairs.[25]

3. Insolvency — a. When Bank in Contemplation of Insolvency. When it is reasonably apparent to the officers of a bank that it must be presently unable to meet its obligations, it is legally in contemplation of insolvency.[26]

b. Preferences. What is a preference is a question not always easily answered. The transfer of property to a creditor to avoid paying his debt and thus postpone the bank's failure is an illegal preference;[27] and this is true of the payment of some creditors to the exclusion of others.[28] But with respect to trust funds,[29]

being changed into a national bank, its corporate existence ceases on the expiration of the period during which it was authorized to do business as a national bank. Therefore the cashier's authority is at an end, and process cannot be served on him in an action against either the state bank or the national bank. Hayden *v.* Syracuse Bank, 15 N. Y. Suppl. 48, 36 N. Y. St. 899.

22. Watkins *v.* Lawrence Nat. Bank, 51 Kan. 254, 32 Pac. 914.

Liquidation dividends belong to the holders of the stock whether these are recorded on the books or not, and must be paid to them. Bath Sav. Inst. *v.* Sagadahoc Nat. Bank, 89 Me. 500, 36 Atl. 996.

Effect of accepting dividend.— When a stock-holder receives a dividend from such a bank and keeps it he cannot afterward deny the validity of the liquidation. Watkins *v.* Lawrence Nat. Bank, 51 Kan. 254, 32 Pac. 914.

New bank — Who not stock-holder.— A stock-holder who refused to join with the others in organizing a new national bank under a different name when the old bank had gone into voluntary liquidation, and who had accepted dividends from the proceeds of nearly the entire assets of the old bank cannot claim to be a stock-holder in the new bank. Centralia First Nat. Bank *v.* Marshall, 26 Ill. App. 440.

23. Merchants' Nat. Bank *v.* Gaslin, 41 Minn. 552, 43 N. W. 483.

24. Merchants' Nat. Bank *v.* Gaslin, 41 Minn. 552, 43 N. W. 483; Norwood *v.* Inter State Nat. Bank, 92 Tex. 268, 48 S. W. 3; Shappard *v.* Cage, 19 Tex. Civ. App. 206, 46 S. W. 839; Pritchard *v.* Barnes, 101 Wis. 86, 76 N. W. 1106; Chemical Nat. Bank *v.* Hartford Deposit Co., 161 U. S. 1, 16 S. Ct. 439, 40 L. ed. 595; Baltimore Cent. Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693.

Suits by and against liquidating agent.— The federal courts have the same jurisdiction of suits by and against liquidating agents as in suits by and against receivers. McConville *v.* Gilmour, 36 Fed. 277, 1 L. R. A. 498.

25. Watkins *v.* Lawrence Nat. Bank, 51 Kan. 254, 32 Pac. 914; Schrader *v.* Chicago Manufacturers' Nat. Bank, 133 U. S. 67, 10 S. Ct. 238, 33 L. ed. 564.

Powers of liquidating agent.— A liquidating trustee can become a purchaser at the sale of the assets of the bank (Shappard *v.* Cage, 19 Tex. Civ. App. 206, 46 S. W. 839) and can sue a stock-holder on an unpaid note (Norwood *v.* Inter State Nat. Bank, 92 Tex. 268, 48 S. W. 3 [*reversing*, on other grounds, 45 S. W. 927]), but he cannot, after all the debts have been compromised or paid, enforce the individual liability of stock-holders (Church *v.* Ayer, 80 Fed. 543).

26. Stapylton *v.* Stockton, 91 Fed. 326, 63 U. S. App. 412, 33 C. C. A. 542; Irons *v.* Manufacturers' Nat. Bank, 6 Biss. (U. S.) 301, 13 Fed. Cas. No. 7,068, Thomps. Nat. Bank Cas. 203; Roberts *v.* Hill, 23 Blatchf. (U. S.) 312, 24 Fed. 571.

Borrowing not proof of insolvency.— If a bank need and borrow money this is no proof of insolvency, and the loan is valid. Stapylton *v.* Stockton, 91 Fed. 326, 63 U. S. App. 412, 33 C. C. A. 542.

27. Roberts *v.* Hill, 23 Blatchf. (U. S.) 312, 24 Fed. 571.

Instances of illegal preferences are a draft on another bank (Jewett *v.* Yardley, 81 Fed. 920) or a mortgage, executed after the bank's failure, to secure a depositor (Gatch *v.* Fitch, 34 Fed. 566).

A county fund has no preference over any other deposit. Multnomah County *v.* Oregon Nat. Bank, 61 Fed. 912; Spokane County *v.* Clark, 61 Fed. 538.

A savings-bank deposit is entitled to no preference, although having priority by state law. Davis *v.* Elmira Sav. Bank, 161 U. S. 275, 16 S. Ct. 502, 40 L. ed. 700.

28. Irons *v.* Manufacturers' Nat. Bank, 6 Biss. (U. S.) 301, 13 Fed. Cas. No. 7,068, Thomps. Nat. Bank Cas. 203. See also Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864; National Security Bank *v.* Price, 22 Fed. 697.

29. Flint Road Cart Co. *v.* Stephens, 32 Mo. App. 341; Commercial Nat. Bank *v.* Armstrong, 148 U. S. 50, 13 S. Ct. 533, 37 L. ed. 363; Beard *v.* Pella City Independent Dist., 88 Fed. 375, 60 U. S. App. 372, 380, 31 C. C. A. 562; Massey *v.* Fisher, 62 Fed. 958;

and collections which have not been completed,[30] it has been held that these are not within the law.

c. Receiver — (i) *Appointment.* The receiver is appointed by the comptroller, whose action cannot be reviewed.[31] He is a federal officer,[32] and represents both the bank and the creditors.[33] His appointment does not work a dissolution of the bank.[34]

(ii) *Control of Property.* The receiver is vested with all the property of the bank, which must be converted into money and distributed to the creditors.[35] It is a trust fund for their benefit.[36] Checks in process of collection must be returned, or the assets if the collection is completed, unless the bank was the owner of them.[37] If deposits were received when the bank was knowingly insolvent these must be returned to their owners.[38] He holds the notes taken by the bank subject to the same defenses.[39]

(iii) *Dealings With Receiver.* A person in dealing with a receiver must have knowledge of the latter's authority, and therefore acts at his own peril.[40] The receiver cannot compromise a debt.[41]

Wasson *v.* Hawkins, 59 Fed. 233; Frelinghuysen *v.* Nugent, 36 Fed. 229.

30. McDonald *v.* Chemical Nat. Bank, 174 U. S. 610, 19 S. Ct. 743, 43 L. ed. 1106; *In re* Armstrong, 41 Fed. 381.

For checks in process of clearing see National Security Bank *v.* Butler, 129 U. S. 223, 9 S. Ct. 281, 32 L. ed. 682; Philadelphia *v.* Aldrich, 98 Fed. 487; Boone County Nat. Bank *v.* Latimer, 67 Fed. 27.

31. Casey *v.* Galli, 94 U. S. 673, 24 L. ed. 168; Kennedy *v.* Gibson, 8 Wall. (U. S.) 498, 19 L. ed. 476; Washington Nat. Bank *v.* Eckels, 57 Fed. 870.

The secretary of the treasury is presumed to approve the comptroller's action until the contrary appears. Stanton *v.* Wilkeson, 8 Ben. (U. S.) 357, 22 Fed. Cas. No. 3,299. See also Cadle *v.* Baker, 20 Wall. (U. S.) 650, 22 L. ed. 448; Price *v.* Abbott, 17 Fed. 506.

A provisional receiver may be appointed by the comptroller to examine into the affairs of a bank. Jackson *v.* New York Fidelity, etc., Co., 75 Fed. 359, 41 U. S. App. 552, 21 C. C. A. 394; American Surety Co. *v.* Pauly, 72 Fed. 484, 38 U. S. App. 280, 18 C. C. A. 657.

Appointment by court.— Sometimes a receiver is appointed by the court on the application of a creditor for reasons which would not justify the comptroller in thus acting. Irons *v.* Manufacturers' Nat. Bank, 6 Biss. (U. S.) 301, 13 Fed. Cas. No. 7,068, Thomps. Nat. Bank Cas. 203; Wright *v.* Merchants' Nat. Bank, 1 Flipp. (U. S.) 568, 30 Fed. Cas. No. 18,084, 3 Centr. L. J. 351, 1 Cinc. L. Bul. 198, 22 Int. Rev. Rec. 248, 2 L. & Eq. Rep. 638, 2 N. Y. Wkly. Dig. 539, Thomps. Nat. Bank Cas. 321.

32. Ellis *v.* Little, 27 Kan. 707, 41 Am. Rep. 434; Davis *v.* Watkins, 56 Nebr. 288, 76 N. W. 575; Kennedy *v.* Gibson, 8 Wall. (U. S.) 498, 19 L. ed. 476.

33. Case *v.* Terrell, 11 Wall. (U. S.) 199, 20 L. ed. 134; Cockrill *v.* Cooper, 86 Fed. 505, 58 U. S. App. 648, 30 C. C. A. 223.

34. Green *v.* Walkill Nat. Bank, 7 Hun (N. Y.) 63; New York City Security Bank *v.* Commonwealth Nat. Bank, 2 Hun (N. Y.) 287; Hutchison *v.* Crutcher, 98 Tenn. 421, 39 S. W. 725, 37 L. R. A. 89; Chemical Nat. Bank *v.* Hartford Deposit Co., 161 U. S. 1, 16 S. Ct. 439, 40 L. ed. 595; Baltimore Cent. Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693; Bethel First Nat. Bank *v.* National Pahquioque Bank, 14 Wall. (U. S.) 383, 20 L. ed. 840; Denton *v.* Baker, 79 Fed. 189, 48 U. S. App. 235, 24 C. C. A. 476.

The bank still remains liable for rent under a lease, although the receiver may have surrendered the premises. Hutchison *v.* Crutcher, 98 Tenn. 421, 39 S. W. 725, 37 L. R. A. 89.

Insolvency extinguishes the bank's power to do business.— Chemical Nat. Bank *v.* World's Columbian Exposition, 170 Ill. 82, 48 N. E. 331.

35. Corn Exch. Bank *v.* Blye, 101 N. Y. 303, 4 N. E. 635; Robinson *v.* Newberne Nat. Bank, 81 N. Y. 385, 37 Am. Rep. 508; Scott *v.* Armstrong, 146 U. S. 499, 13 S. Ct. 148, 36 L. ed. 1059; U. S. *v.* Knox, 111 U. S. 784, 4 S. Ct. 686, 28 L. ed. 603; Rosenblatt *v.* Johnston, 104 U. S. 462, 26 L. ed. 832; Wilmington *v.* Ricaud, 90 Fed. 214, 61 U. S. App. 630, 32 C. C. A. 580.

36. Riddle *v.* Butler First Nat. Bank, 27 Fed. 503.

37. Montgomery First Nat. Bank *v.* Armstrong, 36 Fed. 59.

38. Fisher *v.* Tradesmen's Nat. Bank, 64 Fed. 706, 26 U. S. App. 418, 12 C. C. A. 409.

39. Corcoran *v.* Batchelder, 147 Mass. 541, 18 N. E. 420; Hutchison *v.* Crutcher, 98 Tenn. 421, 39 S. W. 725, 37 L. R. A. 89; Hatch *v.* Johnson L. & T. Co., 79 Fed. 828; Yardley *v.* Clothier, 51 Fed. 506, 3 U. S. App. 207, 2 C. C. A. 345, 17 L. R. A. 462; Casey *v.* La Societe de Credit Mobilier, 2 Woods (U. S.) 77, 5 Fed. Cas. No. 2,496, 7 Chic. Leg. N. 313, 21 Int. Rev. Rec. 219, Thomps. Nat. Bank Cas. 285.

40. Ellis *v.* Little, 27 Kan. 707, 41 Am. Rep. 434; Barrett *v.* Henrietta Nat. Bank, 78 Tex. 222, 14 S. W. 569; Beckham *v.* Shackelford, 8 Tex. Civ. App. 660, 29 S. W. 200.

41. He cannot compound an uncollectable assessment (*In re* Earle, 96 Fed. 678); nor

(iv) *Suits by Receiver.* The receiver is authorized to sue in his own name or in the name of the bank for the purpose of collecting its assets and enforcing the liability of the stock-holders.[42] He has the same rights in court that the bank had.[43]

(v) *Suits Against Receiver.* If a suit is pending against the bank at the time of the receiver's appointment, he can be substituted in place of the bank.[44] If it is sued afterward he is the real party and the bank is only the nominal one.[45] As he is an officer of the United States, an action may be brought against him in a federal court,[46] although a state court may also have jurisdiction.[47]

d. Claims — (i) *Determination of.* The claims of creditors are to be determined as of the date of the declaration of insolvency, irrespective of the question whether particular creditors have security or not.[48]

(ii) *Priorities.* The government has no priority over other creditors,[49] nor has a creditor whose claim arises through the fraud of the bank's officers in direct connection with the wrecking of the bank.[50]

(iii) *Set-Off.* The right to set off must be governed by the state of things existing at the moment of a bank's insolvency.[51] The deposit of a depositor may be set off against his note, matured and immatured, owned by the bank; but a claim cannot be acquired after the bank's insolvency and set off.[52]

will the court order him to do so (*In re* California Nat. Bank, 53 Fed. 38).

Sale of securities.— The receiver can apply to a court of record for an order to sell securities without making a formal application to the comptroller and obtaining his consent. Richardson *v.* Turner, 52 La. Ann. 1613, 28 So. 158.

Pledged securities.— The court cannot order the receiver to sell pledged securities at private sale. *In re* Earle, 92 Fed. 22.

42. Case *v.* Berwin, 22 La. Ann. 321; Hepburn *v.* Kincannon, 74 Miss. 691, 21 So. 569; Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662; Metropolis Nat. Bank *v.* Kennedy, 17 Wall. (U. S.) 19, 21 L. ed. 554; Bethel First Nat. Bank *v.* National Pahquioque Bank, 14 Wall. (U. S.) 383, 20 L. ed. 840; Kennedy *v.* Gibson, 8 Wall. (U. S.) 498, 19 L. ed. 476; Cockrill *v.* Cooper, 86 Fed. 505, 58 U. S. App. 698, 30 C. C. A. 223; Howe *v.* Barney, 45 Fed. 668; McConville *v.* Gilmour, 36 Fed. 277, 1 L. R. A. 498; Armstrong *v.* Trautman, 36 Fed. 275; Armstrong *v.* Ettlesohn, 36 Fed. 209; Price *v.* Abbott, 17 Fed. 506; Frelinghuysen *v.* Baldwin, 12 Fed. 395; Stanton *v.* Wilkeson, 8 Ben. (U. S.) 357, 22 Fed. Cas. No. 13,299, 2 Browne Nat. Bank Cas. 162, 2 N. Y. Wkly. Dig. 91.

43. Petri *v.* Commercial Nat. Bank, 142 U. S. 644, 12 S. Ct. 325, 35 L. ed. 1144.

44. Sioux Falls Nat. Bank *v.* Sioux Falls First Nat. Bank, 6 Dak. 113, 50 N. W. 829.

45. Grant *v.* Spokane Nat. Bank, 47 Fed. 673.

46. Auten *v.* U. S. National Bank, 174 U. S. 125, 19 S. Ct. 628, 43 L. ed. 920; Gilbert *v.* McNulta, 96 Fed. 83.

47. Corn Exch. Bank *v.* Blye, 101 N. Y. 303, 4 N. E. 635; Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; Arnot *v.* Bingham, 55 Hun (N. Y.) 553, 9 N. Y. Suppl. 68, 29 N. Y. St. 878; Cragie *v.* Smith, 14 Abb. N. Cas. (N. Y.) 409.

Right to remove cause.—After an action for tort had been begun against a national bank a federal receiver was appointed. It was held that although he could defend in behalf of the bank the cause could not be removed to a federal court. Speckert *v.* German Nat. Bank, 98 Fed. 151, 38 C. C. A. 682. See also Petri *v.* Commercial Nat. Bank, 142 U. S. 644, 12 S. Ct. 325, 35 L. ed. 1144; Leather Manufacturers' Nat. Bank *v.* Cooper, 120 U. S. 778, 7 S. Ct. 777, 30 L. ed. 816.

48. Merrill *v.* Jacksonville Nat. Bank, 173 U. S. 131, 19 S. Ct. 360, 43 L. ed. 640; Chemical Nat. Bank *v.* Armstrong, 59 Fed. 372, 16 U. S. App. 465, 8 C. C. A. 155, 28 L. R. A. 231.

Action to establish claim.—An action to establish the validity of a claim may be brought against both the insolvent bank and the receiver, or against either. In no case is a mandamus the proper remedy to employ against the receiver to compel the payment of a claim. Denton *v.* Baker, 79 Fed. 189, 48 U. S. App. 235, 24 C. C. A. 476.

49. Cook County Nat. Bank *v.* U. S., 107 U. S. 445, 2 S. Ct. 561, 27 L. ed. 537.

50. Citizens' Nat. Bank *v.* Dowd, 35 Fed. 340.

Money lent to preserve a bank from insolvency is entitled to no priority. If a company is formed for the same purpose it becomes a creditor like all others for its advances or assistance. Fisher *v.* Adams, 63 Fed. 674, 28 U. S. App. 39, 11 C. C. A. 396.

51. Cook County Nat. Bank *v.* U. S., 107 U. S. 445, 2 S. Ct. 561, 27 L. ed. 537.

52. *Kentucky.*— Kentucky Flour Co. *v.* Merchants' Nat. Bank, 90 Ky. 225, 12 Ky. L. Rep. 198, 13 S. W. 910, 9 L. R. A. 108.

Missouri.— Stephens *v.* Schuckmann, 32 Mo. App. 333.

Montana.— Mercer *v.* Dyer, 15 Mont. 317, 39 Pac. 314.

New Jersey.— Camden Nat. Bank *v.* Green, 45 N. J. Eq. 546, 17 Atl. 689.

Ohio.— Armstrong *v.* Warner, 49 Ohio St.

(iv) *Interest.* As against the insolvent bank the debt of the creditor continues to bear interest. As against the assets interest is calculated only to the date of the suspension and the vesting of the title of the assets in the receiver.[53]

e. Dividends. In declaring dividends secured by collaterals claimants are entitled to the same dividends as other creditors. The sums received from the sale of their collaterals are also applied, and if these with the dividends received are more than enough the balance is delivered to the receiver.[54]

IV. SAVINGS-BANKS.

A. What Are. A savings-bank is an institution only partially embodying the features of a bank in the full sense of the term, the purpose of which is to promote the prosperity of persons of small means and limited opportunities of investing them, by receiving their savings in even trivial sums, and lending them in larger amounts, whereby interest may be gained, to be divided among the depositors.[55] Whether a bank possesses this character depends, not on its designation, but on its functions.[56] A bank therefore which does a commercial banking business is not a savings-bank.[57]

B. Power of Courts to Control. Savings-banks are subject to the control of courts of equity.[58]

C. Stock-Holders.[59] The liability of each stock-holder in a savings-bank for the shares of stock subscribed by him is several and not joint with the other subscribers.[60] A stock-holder may defend a suit for the redemption of deposits by showing that, prior to the commencement of suit, he had discharged his obligation by paying other depositors than plaintiff an amount equal to the full proportion that his stock bears to the whole amount due to depositor.[61]

D. Officers — 1. Powers — a. In General. The trust character of a savings-bank is more clearly marked than that of a bank of discount, and its officers have more limited powers.[62]

b. Of Managing Officers. In many banks the treasurer is the chief managing

376, 31 N. E. 877, 17 L. R. A. 466; Armstrong *v.* Law, 11 Ohio Dec. (Reprint) 461, 27 Cinc. L. Bul. 100.

Texas.— Beckham *v.* Shackelford, 8 Tex. Civ. App. 660, 29 S. W. 200.

United States.— Scott *v.* Armstrong, 146 U. S. 499, 13 S. Ct. 148, 36 L. ed. 1059; Stapylton *v.* Cie des Phosphates de France, 88 Fed. 53, 52 U. S. App. 589, 31 C. C. A. 383; Adams *v.* Spokane Drug Co., 57 Fed. 888, 23 L. R. A. 334; Yardley *v.* Clothier, 49 Fed. 337; Louis Snyder's Sons Co. *v.* Armstrong, 37 Fed. 18. See also Balbach *v.* Frelinghuysen, 15 Fed. 675. But see U. S. Bung Mfg. Co. *v.* Armstrong, 34 Fed. 94.

53. Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864; U. S. *v.* Knox, 111 U. S. 784, 4 S. Ct. 686, 28 L. ed. 603.

If the assets are more than sufficient to pay all debts then the creditors are allowed dividends to pay the interest due from the debtor bank. Commonwealth Nat. Bank *v.* Mechanics' Nat. Bank, 94 U. S. 437, 24 L. ed. 176. See Chemical Nat. Bank *v.* Armstrong, 59 Fed. 372, 16 U. S. App. 465, 8 C. C. A. 155, 28 L. R. A. 231.

When a dividend has been paid on some claims while others are in adjudication, interest should be paid on them, if their legality is established, from the date fixed for paying the dividend until they are paid, in order to equalize the amounts received by all creditors. Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 10 S. Ct. 450, 33 L. ed. 747.

54. Merrill *v.* Jacksonville Nat. Bank, 173 U. S. 131, 19 S. Ct. 360, 43 L. ed. 640.

Effect of accepting dividend.— If a creditor accept a dividend on a part of his claim, he is not thereby estopped from suing on the part disallowed. Gadsden First Nat. Bank *v.* Denson, 15 Ala. 650, 22 So. 518.

55. Abbott L. Dict.

56. State *v.* Lincoln Sav. Bank, 14 Lea (Tenn.) 42.

57. Mitchell *v.* Beckman, 64 Cal. 117, 28 Pac. 110.

58. Portland Sav. Inst. *v.* Makin, 23 Me. 360; Matter of Newark Sav. Inst., 28 N. J. Eq. 552, the latter case holding that they may regulate the distribution of the bank's assets.

59. Stock-holders in banking corporations and associations generally see *supra*, II, C.

60. Herron *v.* Vance, 17 Ind. 595.

61. Jones *v.* Wiltberger, 42 Ga. 575, holding that he cannot, after one depositor has commenced suit, defeat such suit by paying other depositors than plaintiff such amount.

62. Zimmerman *v.* Miller, 2 Pennyp. (Pa.) 226.

officer, and when thus acting he has authority to collect the bank's debts,[63] and to that end can conduct the bank's litigation;[64] to extend the time for paying a debt;[65] to take possession of land acquired under a mortgage;[66] or to receive special deposits;[67] and if a party in dealing with the treasurer acts strictly by the record he is protected, even though this is falsified by the treasurer.[68] He is specially authorized to sell and transfer stocks[69] and mortgages;[70] and his authority to indorse notes may be inferred from the conduct of the trustees without any express direction from them.[71] Unless specially authorized he cannot execute a release,[72] indorse or transfer a note,[73] or borrow money and pledge the bank's assets.[74] Nor does authority to assign mortgages under the direction of the investment committee confer on him authority to assign mortgages generally.[75]

c. Ratification. The trustees or directors can ratify the conduct of the treasurer or other officers.[76]

2. Duties and Liabilities — a. Of Trustees and Directors — (i) *In General.* The general rule applying to the trustees and directors of savings-banks is the same rule that applies to the directors of other banking institutions.[77] They must observe good faith and ordinary prudence in executing the trust reposed in them.[78] If they invest their bank's funds on personal security, or in any other

63. North Brookfield Sav. Bank *v.* Flanders, 161 Mass. 335, 37 N. E. 307.

64. Bristol County Sav. Bank *v.* Keavy, 128 Mass. 298.

Presumption as to authority to sue.—An action brought by a savings-bank is presumed to be brought with the bank's authority. Bangor Sav. Bank *v.* Wallace, 87 Me. 28, 32 Atl. 716.

65. New Hampshire Sav. Bank *v.* Ela, 11 N. H. 335.

66. Bangor Sav. Bank *v.* Wallace, 87 Me. 28, 32 Atl. 716.

67. Zugner *v.* Best, 44 N. Y. Super. Ct. 393.

If he did not enter it, and thus show that the bank had received it, the bank would not be liable therefor. Greeley *v.* Nashua Sav. Bank, 63 N. H. 145.

68. Com. *v.* Reading Sav. Bank, 137 Mass. 431.

69. May employ broker.—When the directors authorize the treasurer, president, or other manager to sell stock belonging to the bank for its best interest he can employ a broker to sell it on the stock exchange and make a conditional sale. Sistare *v.* Best, 88 N. Y. 527.

When a bank requires the affirmative vote of five trustees to effect a sale or transfer of a security, a sale or transfer, though in good faith, by the treasurer in any other manner does not bind the bank. Zimmerman *v.* Miller, 2 Pennyp. (Pa.) 226. See also Holden *v.* Metropolitan Nat. Bank, 138 Mass. 48.

70. North Brookfield Sav. Bank *v.* Flanders, 161 Mass. 335, 37 N. E. 307.

Effect of fraud toward bank.—When he has authority to execute an assignment of a mortgage in the name of the bank and to indorse the note to a *bona fide* purchaser, the title passes even though he defrauds the bank by making the transfer and retaining the money. Whiting *v.* Wellington, 10 Fed. 810.

71. Chase *v.* Hathorn, 61 Me. 505.

72. Dedham Sav. Inst. *v.* Slack, 6 Cush. (Mass.) 408.

73. Holden *v.* Upton, 134 Mass. 177; Bradlee *v.* Warren Five Cents Sav. Bank, 127 Mass. 107, 34 Am. Rep. 351.

74. Jersey City Fifth Ward Sav. Bank *v.* Jersey City First Nat. Bank, 47 N. J. L. 357, 1 Atl. 478.

75. Holden *v.* Phelps, 135 Mass. 61.

Although a by-law authorizes him to draw all necessary papers and discharge all obligations of the bank, he cannot bind it by transferring a forged book of deposit. Com. *v.* Reading Sav. Bank, 133 Mass. 16, 43 Am. Rep. 495.

76. North Brookfield Sav. Bank *v.* Flanders, 161 Mass. 335, 37 N. E. 307. See also Holden *v.* Metropolitan Nat. Bank, 138 Mass. 48.

77. See *supra*, II, D, 5, b, (I), (B).

78. Union Nat. Bank *v.* Hill, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615; Dodd *v.* Wilkinson, 42 N. J. Eq. 647, 9 Atl. 685; Williams *v.* McDonald, 42 N. J. Eq. 392, 7 Atl. 866; Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Williams *v.* McDonald, 37 N. J. Eq. 409; Maisch *v.* Saving Fund, 5 Phila. (Pa.) 30, 19 Leg. Int. (Pa.) 140.

If trustees declare dividends that have not been earned they are liable at common law; but if a trustee votes for a dividend less than the whole amount of profits earned, although they have not been collected, without any deduction for expenses, he is not guilty in the absence of any statute on the subject. Van Dyck *v.* McQuade, 57 How. Pr. (N. Y.) 62.

Liability for deposits.— Directors are liable to depositors for the proper care of deposits intrusted to them. Leffman *v.* Flanigan, 5 Phila. (Pa.) 155, 20 Leg. Int. (Pa.) 148.

Absence.— Directors who have never taken their seats and against whom depositors allege no misconduct are not liable. Maisch *v.* Saving Fund, 5 Phila. (Pa.) 30, 19 Leg. Int.

manner contrary to law, they are liable.[79] So are they if guilty of improvidence or reckless extravagance.[80] No distinction can be drawn between their duties to general and special depositors; nor can they shield themselves by an honest misconception of their charter.[81]

(II) *Remedy.* The usual remedy is a bill in equity, which may be brought by the depositors; but as the damages recovered would be assets the receiver is a necessary party.[82] If their liability is limited to an excessive loan, the amount of which is known, an action at law will lie against them.[83]

b. Of Managing Officer. The president, treasurer, manager, or other leading officer may become liable for disregarding his plain duty. This is especially true of any leading officer who makes an investment contrary to law and without the sanction of the finance committee when one exists for making investments.[84]

E. Functions and Dealings — 1. Adopting and Amending By-Laws. All savings-banks adopt by-laws to regulate the payment of their deposits,[85] and so far as these are reasonable they form a contract binding both bank and depositor, unless the bank is negligent.[86] In no case, however, can a negligent bank by any regulation escape the consequences of its act.[87] Ordinarily a by-law cannot be

(Pa.) **140.** Nor are they liable for loans made in their absence. Hun *v.* Cary, 82 N. Y. 65, 37 Am. Rep. 546.

Ignorance.—When an excuse see Williams *v.* McKay, 46 N. J. Eq. 25, 18 Atl. 824.

79. Williams *v.* McKay, 46 N. J. Eq. 25, 18 Atl. 824; Knapp *v.* Roche, 44 N. Y. Super. Ct. 247; Paine *v.* Barnum, 59 How. Pr. (N. Y.) 303.

Liability for loans.— The directors are liable for a loss caused by lending a person a larger amount than that prescribed by law (Thompson *v.* Swain, 107 Mo. 594, 17 S. W. 967; Thompson *v.* Greeley, 107 Mo. 577, 17 S. W. 962); for taking inadequate security (Williams *v.* McDonald, 42 N. J. Eq. 392, 7 Atl. 866. See also Williams *v.* McKay, 46 N. J. Eq. 25, 18 Atl. 824; Williams *v.* Riley, 34 N. J. Eq. 398); and for loans habitually made by the president in disregard of the charter and by-laws (Williams *v.* McKay, 46 N. J. Eq. 25, 18 Atl. 824). They are not liable for loans made in good faith that have proved unproductive (Williams *v.* McDonald, 37 N. J. Eq. 409) or for loans made by a bookkeeper without their knowledge (Knapp *v.* Roche, 44 N. Y. Super. Ct. 247).

Illegal investment — Release from liability. — A trustee may be released from liability for an illegal investment on paying the loss. Hun *v.* Van Dyck, 26 Hun (N. Y.) 567 [*affirmed* in 92 N. Y. 660].

80. Hun *v.* Cary, 82 N. Y. 65, 37 Am. Rep. 546; Paine *v.* Irwin, 59 How. Pr. (N. Y.) 316. See also French *v.* Redman, 13 Hun (N. Y.) 502.

81. Williams *v.* McKay, 46 N. J. Eq. 25, 18 Atl. 824.

82. Dodd *v.* Wilkinson, 41 N. J. Eq. 566, 7 Atl. 337; Chester *v.* Halliard, 34 N. J. Eq. 341.

Demurrer.—When a bill in equity aims at a long course of misconduct the trustees cannot demur on the ground that it was not traced to them, for it will be presumed they knew of it. Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775.

Joinder.— The trustees may be sued for making an unsafe loan without joining the borrowers as parties defendant. Dodd *v.* Wilkinson, 41 N. J. Eq. 566, 7 Atl. 337; Paine *v.* Barnum, 59 How. Pr. (N. Y.) 303.

83. Thompson *v.* Greeley, 107 Mo. 577, 17 S. W. 962.

84. Williams *v.* Riley, 34 N. J. Eq. 398.

If the president and manager release a security above the legal limit without the knowledge of the trustees only they two are liable. Williams *v.* McKay, 46 N. J. Eq. 25, 18 Atl. 824.

85. See *infra*, IV, E, 3, a, (III), (A).

86. Heath *v.* Portsmouth Sav. Bank, 46 N. H. 78, 88 Am. Dec. 194; Warhus *v.* Bowery Sav. Bank, 21 N. Y. 543; Mitchell *v.* Home Sav. Bank, 38 Hun (N. Y.) 255; Israel *v.* Bowery Sav. Bank, 9 Daly (N. Y.) 507.

Necessity of depositor having knowledge.— A depositor is not bound by a by-law in the beginning unless he knows of it (Ackenhausen *v.* People's Sav. Bank, 110 Mich. 175, 68 N. W. 118, 64 Am. St. Rep. 338, 33 L. R. A. 408. See also Eaves *v.* People's Sav. Bank, 27 Conn. 229, 71 Am. Dec. 59), but if the depositor cannot read he should get someone to read the rules to him (Geitelsohn *v.* Citizens' Sav. Bank, 17 Misc. (N. Y.) 574, 40 N. Y. Suppl. 662; Burrill *v.* Dollar Sav. Bank, 92 Pa. St. 134, 37 Am. Rep. 669).

87. *Maine.*— Sullivan *v.* Lewiston Sav. Inst., 56 Me. 507, 96 Am. Dec. 500.

Massachusetts.— Donlan *v.* Provident Sav. Inst., 127 Mass. 183, 34 Am. Rep. 358; Goldrick *v.* Bristol County Sav. Bank, 123 Mass. 320; Levy *v.* Franklin Sav. Bank, 117 Mass. 448; Wall *v.* Provident Sav. Inst., 3 Allen (Mass.) 96, 6 Allen (Mass.) 320.

Michigan.— See Ackenhausen *v.* People's Sav. Bank, 110 Mich. 175, 68 N. W. 118, 64 Am. St. Rep. 338, 33 L. R. A. 408.

New Hampshire.— Brown *v.* Merrimack River Sav. Bank, 67 N. H. 549, 39 N. W. 336, 68 Am. St. Rep. 700; Kimball *v.* Norton, 59 N. H. 1, 47 Am. Rep. 171.

New York.— Kummel *v.* Germania Sav. Bank, 127 N. Y. 488, 23 N. E. 398, 40 N. Y. St. 252, 13 L. R. A. 786; Smith *v.* Brooklyn

amended without the depositor's knowledge and consent;[88] although this may be implied from many circumstances;[89] but if the by-laws provide for amending them without notifying depositors, this may be done.[90]

2. Borrowing Money. A savings-bank has implied authority to borrow money in the course of its business and to make negotiable paper therefor and pledge its securities in payment.[91]

3. Deposits — a. In General — (I) *Amount Receivable.* The amount receivable on deposit from any one individual is sometimes regulated by statute[92] and more frequently by by-laws.[93]

(II) *Bank's Relation to Depositor* — (A) *Generally.* In one sense a bank's relation to its depositors is that of a trust defined by statute or charter, which cannot be changed even by a court of equity.[94] In another sense the relation is that of debtor and creditor, and the profits on its loans are the bank's property, and it can in consequence negotiate or pledge any of its securities.[95] A depositor is not a stock-holder.[96]

(B) *In Case of Special Deposits.* A savings-bank may receive a special deposit,[97] and in such case, is an agent and not a debtor and must restore it.[98]

Sav. Bank, 101 N. Y. 58, 4 N. E. 123, 54 Am. Rep. 653; Allen *v.* Williamsburgh Sav. Bank, 69 N. Y. 314; Appleby *v.* Erie County Sav. Bank, 62 N. Y. 12; Podmore *v.* South Brooklyn Sav. Inst., 48 N. Y. App. Div. 218, 62 N. Y. Suppl. 961; Wall *v.* Emigrant Industrial Sav. Bank, 64 Hun (N. Y.) 249, 19 N. Y. Suppl. 194, 46 N. Y. St. 601; Clark *v.* Saugerties Sav. Bank, 62 Hun (N. Y.) 346, 17 N. Y. Suppl. 215, 42 N. Y. St. 285; Farmer *v.* Manhattan Sav. Inst., 60 Hun (N. Y.) 462, 15 N. Y. Suppl. 235, 39 N. Y. St. 523; Saling *v.* German Sav. Bank, 15 Daly (N. Y.) 386, 7 N. Y. Suppl. 642, 27 N. Y. St. 975; Israel *v.* Bowery Sav. Bank, 9 Daly (N. Y.) 507; Kelly *v.* Emigrant Industrial Sav. Bank, 2 Daly (N. Y.) 227; Rosen *v.* State Bank, 32 Misc. (N. Y.) 231, 65 N. Y. Suppl. 666; Geitelsohn *v.* Citizens' Sav. Bank, 20 Misc. (N. Y.) 84, 45 N. Y. Suppl. 90; Abramowitz *v.* Citizens' Sav. Bank, 17 Misc. (N. Y.) 297, 40 N. Y. Suppl. 385; Tobin *v.* Manhattan Sav. Inst., 6 Misc. (N. Y.) 110, 26 N. Y. Suppl. 14, 57 N. Y. St. 856; Kress *v.* East Side Sav. Bank, 21 N. Y. Suppl. 652, 50 N. Y. St. 273; Cornell *v.* Emigrant Industrial Sav. Bank, 9 N. Y. St. 72.

Wisconsin.— Wegner *v.* Second Ward Sav. Bank, 76 Wis. 242, 44 N. W. 1096.

88. Kimins *v.* Boston Five Cents Sav. Bank, 141 Mass. 33, 6 N. E. 242, 55 Am. Rep. 441; French *v.* O'Brien, 52 How. Pr. (N. Y.) 394.

When a by-law is new and not an amendment.— A by-law provided for security to non-stock-holder depositors. A new by-law, reported by a committee on revision of by-laws, reported one that did not provide such security, which was passed. This was regarded as a new by-law, and the old one was no longer in force. Murphy *v.* Pacific Bank, 130 Cal. 542, 62 Pac. 1059.

89. Gifford *v.* Rutland Sav. Bank, 63 Vt. 108, 21 Atl. 340, 25 Am. St. Rep. 744, 11 L. R. A. 794.

90. Kimins *v.* Boston Five Cents Sav. Bank, 141 Mass. 33, 6 N. E. 242, 55 Am. Rep. 441, holding that if no such by-law exists, and a deposit is made after a by-law is made which is unknown to him, he is not bound by it.

91. Jersey City Fifth Ward Sav. Bank *v.* Jersey City First Nat. Bank, 48 N. J. L. 513, 7 Atl. 318. See also Ward *v.* Johnson, 5 Ill. App. 30.

92. Taylor *v.* Empire State Sav. Bank, 66 Hun (N. Y.) 538, 21 N. Y. Suppl. 643, 50 N. Y. St. 269, holding that notwithstanding such a statute a depositor of an amount in excess is not therefor prevented from recovering the full amount of his deposit, although he cannot receive interest on such excess.

93. See *infra*, IV, E, 3, b, (II).

94. Makin *v.* Portland Sav. Inst., 23 Me. 350, 41 Am. Dec. 349; Dickson *v.* Kittson, 75 Minn. 168, 77 N. W. 820, 74 Am. St. Rep. 447; Dodd *v.* Una, 40 N. J. Eq. 672, 5 Atl. 155; Hun *v.* Cary, 82 N. Y. 65, 37 Am. Rep. 546.

95. Ward *v.* Johnson, 5 Ill. App. 30.

Deposits may be garnished as belonging to the original depositor until notice of their transfer. Com. *v.* Scituate Sav. Bank, 137 Mass. 301; Nichols *v.* Schofield, 2 R. I. 123.

Not a bailment.— A depositor's claim against his bank for his deposit is a chose in action and not a bailment. Lund *v.* Seaman's Sav. Bank, 37 Barb. (N. Y.) 129, 20 How. Pr. (N. Y.) 461.

96. New-London Sav. Bank *v.* New-London, 20 Conn. 111.

97. A savings-bank can make an agreement with a special depositor not to draw out interest on his deposit, but let it remain and accumulate. Heironimus *v.* Sweeney, 83 Md. 146, 34 Atl. 823, 55 Am. St. Rep. 333, 33 L. R. A. 99.

98. Lund *v.* Seaman's Sav. Bank, 37 Barb. (N. Y.) 129, 20 How. Pr. (N. Y.) 461.

Ultra vires no defense.—A savings-bank having received special deposits out of the ordinary course cannot defend in an action to recover them that the contract was *ultra vires.* Cogswell *v.* Rockingham Ten Cents Sav. Bank, 59 N. H. 43.

(III) *Payment of Deposits* — (A) *Conditions Precedent* — (1) In General — (a) Notice to Pay. Savings-banks generally require depositors to give notice of their wish to withdraw their deposit; but if a bank refuses to pay on the ground that the money has been already paid to another such notice need not be given.[99]

(b) Production of Pass-Book. In most savings-banks there is a rule that payments made to the person producing the pass-book shall discharge the bank. Such a by-law is reasonable and discharges the bank when it has exercised care in paying, even though the presenter was a thief.[1]

(2) When Pass-Book Is Lost. If a rule provides that if a pass-book is lost the deposit will not be paid without satisfactory proof of loss and adequate indemnity it is reasonable and may be enforced.[2] Most savings-banks also require the depositor to give notice of the loss of his book. This is a reasonable rule; and if not regarded the depositor cannot recover should the bank pay his deposit to another on his production of his book unless it has not made proper inquiry before paying.[3]

(B) *On Presentation of Pass-Book and Order.* Banks often pay on the presentation of an order from the depositor accompanied with the book. When using proper care in thus paying the bank is not liable even though it pay to the wrong person, or on a forged order.[4]

When not received.—A bank may claim that a special deposit, a bond, was never received when it was given by the owner to a clerk who never put it into the possession of the bank. Greeley *v.* Nashua Sav. Bank, 63 N. H. 145.

99. Townsend *v.* Webster Five Cents Sav. Bank, 143 Mass. 147, 9 N. E. 521; Abramowitz *v.* Citizens' Sav. Bank, 17 Misc. (N. Y.) 297, 40 N. Y. Suppl. 385.

Necessity of showing non-existence of such rule.— In an action to recover his deposit a depositor need not show that by the rules of the bank he is entitled to his money without notice. Weld *v.* Eliot Five Cents Sav. Bank, 158 Mass. 339, 33 N. E. 519. See Lowe *v.* Harwood, 139 Mass. 133, 29 N. E. 538.

1. *Connecticut.*— Eaves *v.* People's Sav. Bank, 27 Conn. 234, 71 Am. Dec. 59.

Massachusetts.— Wall *v.* Provident Sav. Inst., 6 Allen (Mass.) 320; Wallace *v.* Lowell Sav. Inst., 7 Gray (Mass.) 134; White *v.* Franklin Bank, 22 Pick. (Mass.) 181.

Michigan.— Ackenhausen *v.* People's Sav. Bank, 110 Mich. 175, 68 N. W. 118, 64 Am. St. Rep. 338, 33 L. R. A. 408.

New Hampshire.— Heath *v.* Portsmouth Sav. Bank, 46 N. H. 78, 88 Am. Dec. 194.

New Jersey.— Cosgrove *v.* Provident Sav. Inst., 64 N. J. L. 653, 46 Atl. 617.

New York.— Kummel *v.* Germania Sav. Bank, 127 N. Y. 488, 28 N. E. 398, 40 N. Y. St. 252, 13 L. R. A. 786; Allen *v.* Williamsburgh Sav. Bank, 69 N. Y. 314; Appleby *v.* Erie County Sav. Bank, 62 N. Y. 12; Wall *v.* Emigrant Industrial Sav. Bank, 64 Hun (N. Y.) 249, 19 N. Y. Suppl. 194, 46 N. Y. St. 601; Clark *v.* Saugerties Sav. Bank, 62 Hun (N. Y.) 346, 17 N. Y. Suppl. 215, 42 N. Y. St. 285; Mitchell *v.* Home Sav. Bank, 38 Hun (N. Y.) 255; Saling *v.* German Sav. Bank, 15 Daly (N. Y.) 386, 7 N. Y. Suppl. 642, 27 N. Y. St. 975; Kelly *v.* Emigrant Industrial Sav. Bank, 2 Daly (N. Y.) 227; Abramowitz *v.* Citizens' Sav. Bank, 17 Misc. (N. Y.) 297, 40 N. Y. Suppl. 385; Geitelsohn *v.* Citizens' Sav. Bank, 17 Misc. (N. Y.) 57, 39 N. Y. Suppl. 840; Tobin *v.* Manhattan Sav. Inst., 6 Misc. (N. Y.) 110, 26 N. Y. Suppl. 14, 57 N. Y. St. 856; Kress *v.* East Side Sav. Bank, 21 N. Y. Suppl. 652, 50 N. Y. St. 273; Cornell *v.* Emigrant Industrial Sav. Bank, 9 N. Y. St. 72; Hayden *v.* Brooklyn Sav. Bank, 15 Abb. Pr. N. S. (N. Y.) 297.

Pennsylvania.— People's Sav. Bank *v.* Cupps, 91 Pa. St. 315.

2. Sullivan *v.* Lewiston Sav. Inst., 56 Me. 507, 96 Am. Dec. 500; Wall *v.* Provident Sav. Inst., 3 Allen (Mass.) 96, 6 Allen (Mass.) 320; Heath *v.* Portsmouth Sav. Bank, 46 N. H. 78, 88 Am. Dec. 194; Warhus *v.* Bowery Sav. Bank, 21 N. Y. 543; Mitchell *v.* Home Sav. Bank, 38 Hun (N. Y.) 255.

A reasonable interpretation must be given to the rule, and if the depositor is unable to give a bond, yet can prove the loss of his book, the bank cannot withhold from him payment. Wagner *v.* Howard Sav. Inst., 52 N. J. L. 225, 19 Atl. 212. See also Wallace *v.* Lowell Sav. Inst., 7 Gray (Mass.) 134.

The depositor's administrator may recover the deposit although the book is withheld from him by the depositor's family without giving a bond of indemnity. Palmer *v.* Providence Sav. Inst., 14 R. I. 68, 51 Am. Rep. 341.

3. Eagle, etc., **Mfg. Co.** *v.* Belcher, 89 Ga. 218, 15 S. E. 482; Goldrick *v.* Bristol County Sav. Bank, 123 Mass. 320; Levy *v.* Franklin Sav. Bank, 117 Mass. 448; Wegnor *v.* Second Ward Sav. Bank, 76 Wis. 242, 44 N. W. 1096. See also Donlan *v.* Providence Sav. Inst., 127 Mass. 183, 34 Am. Rep. 358.

4. The bank was not negligent in Cosgrove *v.* Provident Sav. Inst., 64 N. J. L. 653, 46 Atl. 617; Schoenwald *v.* Metropolitan Sav.

(c) *On Presumption of Death.* Even though the bank pay to one who has been appointed administrator of a depositor, supposing he is dead from an absence of seven years without any knowledge of him, and on presentation of his book, yet the true depositor can recover.[5]

(d) *Where Deposit Made in Assumed Name.* The bank must pay a deposit, even though it be made in an assumed name, on presentation of the book and proper proof of ownership.[6]

(iv) *Ownership of Deposits.* Entries upon the books of a savings-bank and upon the pass-book issued by it to a depositor are not conclusive evidence of the ownership of a deposit.[7] In the case of a joint deposit of a joint fund belonging to two depositors, title thereto vests in the survivor on the death of one of the depositors.[8]

(v) *Assignment of Deposits.*[9] A pass-book may be assigned,[10] although the assignee cannot maintain an action thereon in his own name;[11] but the book is not negotiable, even though a by-law provide that it may be transferable to order.[12]

b. Trust Deposits[13] — (i) *In General.* According to some cases where money

Bank, 57 N. Y. 418; Gifford *v.* Rutland Sav. Bank, 63 Vt. 108, 21 Atl. 340, 25 Am. St. Rep. 744, 11 L. R. A. 794.

The bank was negligent in Eaves *v.* People's Sav. Bank, 27 Conn. 229, 71 Am. Dec. 59; Gearns *v.* Bowery Sav. Bank, 135 N. Y. 557, 32 N. E. 249, 48 N. Y. St. 562; Kummel *v.* Germania Sav. Bank, 127 N. Y. 488, 28 N. E. 398, 40 N. Y. St. 252, 13 L. R. A. 786; Allen *v.* Williamsburgh Sav. Bank, 69 N. Y. 314; Appleby *v.* Erie County Sav. Bank, 62 N. Y. 12; Saling *v.* German Sav. Bank, 15 Daly (N. Y.) 386, 7 N. Y. Suppl. 642, 27 N. Y. St. 975; Geitelsohn *v.* Citizens' Sav. Bank, 17 Misc. (N. Y.) 574, 40 N. Y. Suppl. 662; Hager *v.* Buffalo Sav. Bank, 10 Misc. (N. Y.) 455, 31 N. Y. Suppl. 448, 64 N. Y. St. 25; Tobin *v.* Manhattan Sav. Inst., 6 Misc. (N. Y.) 110, 26 N. Y. Suppl. 14, 57 N. Y. St. 856. See also Clark *v.* Saugerties Sav. Bank, 62 Hun (N. Y.) 346, 17 N. Y. Suppl. 215, 42 N. Y. St. 285, holding that where a deposit was marked "special," and the depositor told the cashier to pay it to no one but herself, the bank was negligent in paying it to her husband.

Insane depositor.— If a bank pays a depositor without knowing that he is insane, exercising reasonable care in doing so, it is not liable. Riley *v.* Albany Sav. Bank, 36 Hun (N. Y.) 513 [*affirmed* in 103 N. Y. 669].

5. Jochumsen *v.* Suffolk Sav. Bank, 3 Allen (Mass.) 87.

6. Davenport *v.* Savings Bank, 36 Hun (N. Y.) 303.

7. Kennebec Sav. Bank *v.* Fogg, 83 Me. 374, 22 Atl. 251.

8. Mulcahey *v.* Emigrant Industrial Sav. Bank, 89 N. Y. 435, where, however, under the peculiar circumstances of the case, representatives of the deceased depositor were held entitled to recover a share of the deposit previously paid to the survivor.

The fact that a book is made out in the joint names of two persons is evidence simply of the depositor's intent that the deposit could be drawn out by either of the persons named, the only presumption being that the depositor so arranged for the purpose of convenience. Burke *v.* Slattery, 10 Misc. (N. Y.) 754, 31 N. Y. Suppl. 825, 64 N. Y. St. 631 [*following* Matter of Bolin, 136 N. Y. 177, 32 N. E. 626, 49 N. Y. St. 59]. See also Matter of Brooks, 5 Dem. Surr. (N. Y.) 326; Roman Catholic Orphan Asylum *v.* Strain, 2 Bradf. Surr. (N. Y.) 34; and, generally, Gifts.

9. **Gift of deposits** see Gifts.

10. Taft *v.* Bowker, 132 Mass. 277 (holding that a delivery of the book as collateral security, although unaccompanied by a written assignment, transfers an equitable title, and will prevail against a subsequent trustee process); Gammond *v.* Bowery Sav. Bank, 15 Daly (N. Y.) 483, 8 N. Y. Suppl. 856, 29 N. Y. St. 136.

An order by a depositor in favor of a third person for a good consideration is a valid assignment of the entire amount of the deposit and prevails over trustee process against the depositor. Kingman *v.* Perkins, 105 Mass. 111.

11. Howard *v.* Windham County Sav. Bank, 40 Vt. 597.

12. Witte *v.* Vincenot, 43 Cal. 325; McCaskill *v.* Connecticut Sav. Bank, 60 Conn. 300, 22 Atl. 568, 25 Am. St. Rep. 323, 13 L. R. A. 737; Smith *v.* Brooklyn Sav. Bank, 101 N. Y. 58, 4 N. E. 123, 54 Am. Rep. 653.

13. **Evidence to explain trust.**—When one deposits money to the credit of another, retaining the book and having noted thereon that the money could be paid to the beneficiary, evidence *aliunde* is admissible on the trustee's death to show her intent in making the deposit.

Connecticut.— Minor *v.* Rogers, 40 Conn. 512, 16 Am. Rep. 69.

Maine.— Northrop *v.* Hale, 72 Me. 275; Hill *v.* Stevenson, 63 Me. 364, 18 Am. Rep. 231.

Massachusetts.— Gerrish *v.* New Bedford Sav. Inst., 128 Mass. 159, 35 Am. Rep. 365.

is deposited by one in trust for another, if the beneficiary is ignorant of the existence of the trust, he has no claim on the deposit after the trustee's death;[14] but by another view the beneficiary can claim it, even though he did not know of the trust in the trustee's lifetime.[15] When the beneficiary knows of the deposit, especially by the trustee's express announcement, he is entitled thereto.[16]

(II) *To Evade Law.* Where a deposit is made in trust to evade a law forbidding one from depositing more than a specific sum in his own name, the depositor is entitled thereto, as no real trust exists.[17]

4. **Investments.** Savings-banks are required by positive law to lend their deposits in a prescribed manner, usually on the security of land, bonds, or stocks;[18] but lack of authority to lend money, or to lend it in a particular manner will not prevent the bank from recovering it,[19] and in some states they can

New Hampshire.— Bartlett *v.* Remington, 59 N. H. 364.

Rhode Island.— Ray *v.* Simmons, 11 R. I. 266, 23 Am. Rep. 447.

Proceedings by several claimants.—In New York by recent statutes greater liberty has been given to persons claiming deposits to make themselves parties to actions that have been instituted for recovering them. In such an action the claimant must state the facts on which his claim is founded, but the application is not in interpleader. Mahro *v.* Greenwich Sav. Bank, 16 Misc. (N. Y.) 275, 38 N. Y. Suppl. 126, 74 N. Y. St. 580. In an action by the assignee of a savings-bank deposit against the bank, it sought to have other persons substituted as defendants who claimed that the deposit had been fraudulently procured from them. It was held that the bank retained the money as a bailee or agent of the depositor under a personal contract to restore it and therefore the substitution could not be made. Lund *v.* Seaman's Sav. Bank, 20 How. Pr. (N. Y.) 461.

14. Getchell *v.* Biddeford Sav. Bank, 94 Me. 452, 47 Atl. 895, 80 Am. St. Rep. 408; Norway Sav. Bank *v.* Merriam, 88 Me. 146, 33 Atl. 840; Northrop *v.* Hale, 73 Me. 66; Robinson *v.* Ring, 72 Me. 140, 39 Am. Rep. 308; Clark *v.* Clark, 108 Mass. 522; Brabrook *v.* Boston Five Cents Sav. Bank, 104 Mass. 228, 6 Am. Rep. 222. See also Kennebec Sav. Bank *v.* Fogg, 83 Me. 374, 22 Atl. 251.

15. Boone *v.* Citizens' Sav. Bank, 84 N. Y. 83, 9 Abb. N. Cas. (N. Y.) 146, 38 Am. Rep. 498; Fowler *v.* Bowery Sav. Bank, 47 Hun (N. Y.) 399; Weaver *v.* Emigrant, etc., Sav. Bank, 17 Abb. N. Cas. (N. Y.) 82.

16. McCarthy *v.* Provident Sav. Inst., 159 Mass. 527, 34 N. E. 1073; Gerrish *v.* New Bedford Sav. Inst., 128 Mass. 159, 35 Am. Rep. 365; Blasdel *v.* Locke, 52 N. H. 238; Boone *v.* Citizens' Sav. Bank, 84 N. Y. 83, 9 Abb. N. Cas. (N. Y.) 146, 38 Am. Rep. 498; Weaver *v.* Emigrant, etc., Sav. Bank, 17 Abb. N. Cas. (N. Y.) 82.

When control of fund retained.—When a deposit is in the depositor's name in trust for another, who is no party thereto, and the depositor retains the control of the fund the trust is an executory one. Bartlett *v.* Remington, 59 N. H. 364.

17. Brabrook *v.* Boston Five Cents Sav. Bank, 104 Mass. 228, 6 Am. Rep. 222; Weber *v.* Weber, 9 Daly (N. Y.) 211.

18. **Call loan of deposits.**— A contract whereby a savings-bank is to keep ten per cent of its deposits on call with another bank on which interest is to be paid is not a loan in violation of the statute prescribing the security on which savings-bank loans must be made. Erie County Sav. Bank *v.* Coit, 104 N. Y. 532, 11 N. E. 54.

Loan out of state.—A savings-bank with authority to loan money on security in or out of the state may hold a mortgage on land in Minnesota and enforce payment of it in the courts of that state. Lebanon Sav. Bank *v.* Hollenbeck, 29 Minn. 322, 13 N. W. 145.

Notes and mortgages.—Authority to keep one third of the deposits of a bank "on interest or otherwise, in such available form as the trustees may direct" in order to meet payments does not authorize them to lend this on notes and mortgages. Paine *v.* Barnum, 59 How. Pr. (N. Y.) 303, 308.

Personal security.— If a bank is prohibited from lending on personal security, a note with a pledge of stock (U. S. Trust Co. *v.* Brady, 20 Barb. (N. Y.) 119) or on the security of a bond and mortgage (Auburn Sav. Bank *v.* Brinkerhoff, 44 Hun (N. Y.) 142) will satisfy the law.

Public stocks.— If a loan can be made on public stocks as security, the note of the borrower secured by a pledge of bank-stock is valid. Mott *v.* U. S. Trust Co., 19 Barb. (N. Y.) 568.

Real estate loans.—If the security required is real estate with double the sum invested above all encumbrances this means real estate worth double the investment and double the encumbrances. Williams *v.* McKay, 46 N. J. Eq. 25, 18 Atl. 824.

19. Farmington Sav. Bank *v.* Fall, 71 Me 49; United German Bank *v.* Katz, 57 Md. 128; Pratt *v.* Short, 79 N. Y. 437, 35 Am. Rep. 531; Auburn Sav. Bank *v.* Brinkerhoff, 44 Hun (N. Y.) 142.

Recovery on bond.—A gave a bank a bond for a sum of money if it would continue in operation for a specified period. In an action by the receiver on the bond, *ultra vires* was not a good defense. Hurd *v.* Kelly, 78 N. Y. 588, 34 Am. Rep. 567.

discount[20] and purchase[21] paper. A savings-bank cannot make a valid contract with a broker for the purchase and sale of stock for a speculative purpose;[22] but if it should receive stock as security for a loan, which it is not authorized to make, the title would be merely voidable.[23]

F. Insolvency — 1. Appointment of Receiver. When a savings-bank is insolvent a receiver may be appointed to adjust its affairs,[24] but he need not be when the officers and depositors can agree among themselves.[25]

2. Rights of Depositors — a. In General. In some states, upon the failure of a savings-bank, depositors are considered general creditors like all others;[26] while in others they are not to be paid until after all other debts for management, etc., are discharged.[27] As such banks are only agencies for receiving and investing the money of depositors, one depositor cannot ordinarily bring an action to recover the full amount,[28] and if the deposits are scaled the adjustment will be deemed proper.[29]

b. Preferences. Attempts are often made to hold a deposit as special and

20. *Kansas.*— Pape *v.* Capitol Bank, 20 Kan. 440, 27 Am. Rep. 183.

Maryland.—Duncan *v.* Maryland Sav. Inst., 10 Gill & J. (Md.) 299. *Contra*, United German Bank *v.* Katz, 57 Md. 128.

Mississippi.— Tishimingo Sav. Inst. *v.* Buchanan, 60 Miss. 496.

Missouri.— Aull Sav. Bank *v.* Lexington, 74 Mo. 104.

New York.— Rome Sav. Bank *v.* Kramer, 32 Hun (N. Y.) 270. *Contra*, Pratt *v.* Eaton, 79 N. Y. 449.

21. Pape *v.* Capitol Bank, 20 Kan. 440, 27 Am. Rep. 183.

City warrants.—A savings-bank that can discount notes can also purchase city warrants. Aull Sav. Bank *v.* Lexington, 74 Mo. 104.

The purchase of a bond at its full face value is not a discount in violation of law. Auburn Sav. Bank *v.* Brinkerhoff, 44 Hun (N. Y.) 142.

22. Jemison *v.* Citizens' Sav. Bank, 122 N. Y. 135, 25 N. E. 264, 33 N. Y. St. 335, 19 Am. St. Rep. 482, 9 L. R. A. 708. See also Heironimus *v.* Sweeney, 83 Md. 146, 34 Atl. 823, 55 Am. St. Rep. 333, 33 L. R. A. 99. *Contra*, Sistare *v.* Best, 88 N. Y. 527.

23. Sistare *v.* Best, 88 N. Y. 527.

24. Sufficiency of petition for receiver.— A petition by a stock-holder alleging the bank to be insolvent and the directors to be inefficient and about to make an assessment for their own gain, but not charging fraud, is not a sufficiently clear case to justify the appointment of a receiver. Gorman *v.* Guardian Sav. Bank, 4 Mo. App. 180.

Duty to convert assets into cash.—When courts of equity are required to protect the interests of depositors they should convert the assets into cash as rapidly as possible without sacrifice and distribute it among the depositors without delay. Matter of Dime Sav. Inst., 29 N. J. Eq. 109.

A receiver may sue in his own name, or in that of the bank. Hobart *v.* Bennett, 77 Me. 401; Hall *v.* Bracket, 60 N. H. 215. He may maintain a bill against the assignee of a mortgage which the treasurer had no authority to assign. Holden *v.* Phelps, 135 Mass. 61. See also Holden *v.* Whiting, 29 Fed. 881.

25. Lewis *v.* Lynn Sav. Inst., 148 Mass. 235, 19 N. E. 365, 12 Am. St. Rep. 535, 1 L. R. A. 785.

26. Robinson *v.* Aird, (Fla. 1901) 29 So. 633; Reed *v.* Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468; Cogswell *v.* Rockingham Ten Cents Sav. Bank, 59 N. H. 43; People *v.* Mechanics', etc., Sav. Inst., 92 N. Y. 7.

After assignees have taken possession depositors cannot maintain a creditors' bill against a debtor to their bank. Brown *v.* Folsom, 62 N. H. 527.

27. Stockton *v.* Mechanics', etc., Sav. Bank, 32 N. J. Eq. 163.

28. Bunnell *v.* Collinsville Sav. Soc., 38 Conn. 203, 9 Am. Rep. 380; Lewis *v.* Lynn Sav. Inst., 148 Mass. 235, 19 N. E. 365, 12 Am. St. Rep. 535, 1 L. R. A. 785. See also Makin *v.* Portland Sav. Inst., 23 Me. 350, 41 Am. Dec. 349.

Collection of checks.— If a check is deposited in a savings-bank which fails before its collection, the depositor is usually entitled to the proceeds, if these are afterward collected by the assignee or receiver. Brooks *v.* Bigelow, 142 Mass. 6, 6 N. E. 766.

29. Lewis *v.* Lynn Sav. Inst., 148 Mass. 235, 19 N. E. 365, 12 Am. St. Rep. 535, 1 L. R. A. 785; Simpson *v.* City Sav. Bank, 56 N. H. 466, 22 Am. Rep. 491 (holding that if, after the scaling, the remainder of a deposit is withdrawn and the books are balanced, the depositor cannot long afterward recover the other portion).

In New Hampshire by statute (N. H. Gen. Laws, c. 170) the depositors are the equitable owners in common after the deposits have been scaled. Consequently a depositor's withdrawal of the reduced amount is not a gift of his share of the property to the other depositors. Francestown Sav. Bank's Case, 63 N. H. 138.

In New York the courts are authorized by N. Y. Laws (1882), c. 409, to scale the deposits of banks and permit them to resume business. People *v.* Ulster County Sav. Inst., 31 N. E. 738.

entitled to a preference, but a deposit, although special, is not always entitled to a preference, and generally a special depositor fares no better than others.[30]

c. To Bind Other Depositors. The right of some depositors to bind the rest by formal action with respect to the adjustment of its affairs has arisen especially after the failure of a bank. They often act under the advice of the court, and when thus acting they are sustained.[31]

d. To Set Off Deposit Against Debt. Unless allowed by statute,[32] a depositor, who is also a debtor, cannot have his deposit set off against his debt,[33] but if he has deposited a special fund to be thus applied its application will be made.[34]

V. LOAN AND TRUST COMPANIES.

A. Stock-Holders. The liability of stock-holders in loan and trust companies is dependent upon the statutes under which such companies are organized.[35]

B. Powers — 1. In General. The powers of trust companies differ greatly in the states and even in the same state, but the tendency is to enlarge their powers.[36] If a trust company can do a banking business it may employ any appropriate method for paying general deposits which are received.[37] A foreign

30. Stockton *v.* Mechanics', etc., Sav. Bank, 32 N. J. Eq. 163.

Deposit as a loan.—When a deposit is in effect a loan to a savings-bank it may be regarded as special and entitled to a preference. Heironimus *v.* Sweeney, 83 Md. 146, 34 Atl. 823, 55 Am. St. Rep. 333, 33 L. R. A. 99.

Deposits in trust.—When a closed savings-bank resumed business and received deposits in trust to be used only in paying checks drawn on these new accounts, the new depositors were not special depositors but only creditors on an equality with the old ones. *In re* Mutual Bldg. Fund Soc., etc., Sav. Bank, 2 Hughes (U. S.) 374, 17 Fed. Cas. No. 9,976, 5 Am. L. Rec. 571, 15 Nat. Bankr. Reg. 44. If a bank lawfully executes a trust, deposits growing out of it do not differ from other deposits and are not entitled to any preference in payment. Vail *v.* Newark Sav. Inst., 32 N. J. Eq. 627.

Special capital.— The charter of a savings-bank provided that a special capital should be used as security for the depositors, yet after the bank's failure it could not be claimed exclusively by them. Fox's Appeal, 93 Pa. St. 406. The promise of a bank to use specified securities for the benefit of its savings depositors does not create a trust or lien in their favor. Ward *v.* Johnson, 95 Ill. 215.

Illegal preference.— If a savings-bank which is managed exclusively by the officers of a national bank becomes insolvent a transfer of money and collaterals to the latter bank is an illegal preference. Slack *v.* Northwestern Nat. Bank, 103 Wis. 57, 79 N. W. 51, 74 Am. St. Rep. 841.

31. Dewey *v.* St. Albans Trust Co., 60 Vt. 1, 12 Atl. 224, 6 Am. St. Rep. 84.

32. **Allowed by statute.**— North Bridgewater Sav. Bank *v.* Soule, 129 Mass. 528; New Amsterdam Sav. Bank *v.* Tartter, 4 Abb. N. Cas. (N. Y.) 215.

33. Osborn *v.* Byrne, 43 Conn. 155, 21 Am. Rep. 641; Hall *v.* Paris, 59 N. H. 71; Cogswell *v.* Rockingham Ten Cents Sav. Bank, 59 N. H. 43; Hannon *v.* Williams, 34 N. J. Eq. 255, 38 Am. Rep. 378; Stockton *v.* Mechanics', etc., Sav. Bank, 32 N. J. Eq. 163.

An agreement to hold the deposit of one as security for the overdraft of another cannot be enforced by the debtor after the bank's insolvency. Van Dyck *v.* McQuade, 86 N. Y. 38.

34. Osborn *v.* Byrne, 43 Conn. 155, 21 Am. Rep. 641; Hall *v.* Paris, 59 N. H. 71.

35. Thus in Minnesota an annuity, safe deposit, and trust company is not a corporation embracing banking privileges, and consequently the liability of its members for the company's indebtedness is not the same as the liability of the stock-holders of a bank. International Trust Co. *v.* American L. & T. Co., 62 Minn. 501, 65 N. W. 78, 632.

36. **Deposits.**— In some jurisdictions they can receive deposits (Venner *v.* Farmers' L. & T. Co., 54 N. Y. App. Div. 271, 66 N. Y. Suppl. 773) and issue certificates of deposit (Saginaw Bank *v.* Western Pennsylvania Title, etc., Co., 105 Fed. 491); but in Missouri a trust company cannot receive money in the way of general deposits and pay them out on demand on the check of the depositor, thereby establishing the ordinary relation of debtor and creditor that exists between banks and their depositors. But it can buy and sell bills of exchange (State *v.* Lincoln Trust Co., 144 Mo. 562, 46 S. W. 593).

Discounts.— In New York under the earlier statutes they could not discount notes (Pratt *v.* Short, 79 N. Y. 437, 35 Am. Rep. 531; New York L. & T. Co. *v.* Helmer, 77 N. Y. 64); but by the law of 1892 they can (Binghamton Trust Co. *v.* Auten, 68 Ark. 294, 57 S. W. 936; Binghamton Trust Co. *v.* Clark, 32 N. Y. App. Div. 151, 52 N. Y. Suppl. 941).

37. State *v.* Lincoln Trust Co., 144 Mo. 562, 46 S. W. 593.

trust company cannot act in another state as a trustee without complying with the laws which regulate trust companies in such state.[38]

2. Consequences of Exceeding Powers. Formerly if a trust company exceeded its powers in lending money the security could not be enforced,[39] but the money loaned could be recovered.[40] But now the contract can be enforced when justice requires unless this would be plainly contrary to public policy, and the state will recognize the public offense and take such action as the law has prescribed.[41]

C. Liabilities. A trust company which sells bonds of another company, certifying on their face how they are issued and secured, assumes no liability for any breach of trust of the original issuing company.[42]

D. Trust Funds. When a trust company mingles several trust funds and uses a part of them in its private business, the amount belonging to each fund is its proportionate share of the whole.[43]

E. Dissolution. When a trust company becomes insolvent[44] the assignee or receiver can sue for and recover assets which have been improperly sold;[45] and if he attempt to foreclose a mortgage taken in payment of a subscription, the mortgagor cannot defend on the ground that the company had authority to receive only money.[46]

VI. Clearing-Houses.

A. Nature. A clearing-house, although occasionally issuing certificates which circulate to a limited extent and chiefly in discharging balances due from one bank to another,[47] is not a bank.[48]

38. Farmers' L. & T. Co. *v.* Lake St. El. R. Co., 173 Ill. 439, 51 N. E. 55; Pennsylvania L. Ins. Co. *v.* Bauerle, 143 Ill. 459, 33 N. E. 166.

39. Pratt *v.* Short, 79 N. Y. 437, 35 Am. Rep. 531; New York State L. & T. Co. *v.* Helmer, 77 N. Y. 64; New York L. Ins., etc., Co. *v.* Beebe, 7 N. Y. 364.

40. Pratt *v.* Short, 79 N. Y. 437, 35 Am. Rep. 531; Davis Sewing Mach. Co. *v.* Best, 30 Hun (N. Y.) 638. *Contra, In re* Jaycox, 12 Blatchf. (U. S.) 209, 13 Fed. Cas. No. 7,237, 13 Nat. Bankr. Reg. 122.

41. Contracts against public policy.— Contracts of investment, securities, debentures, or certificates, which cannot be reasonably expected to accumulate a reserve fund equal to the stipulated endowment values within the stated period without aid from lapses or appropriation from premiums on new business, are contrary to public policy and void. State *v.* Interstate Sav. Invest. Co., 64 Ohio St. 283, 60 N. E. 220, 83 Am. St. Rep. 754.

42. Bauernschmidt *v.* Maryland Trust Co., 89 Md. 507, 43 Atl. 790.

43. St. Paul Trust Co. *v.* Kittson, 62 Minn. 408, 64 N. W. 74.

If the treasurer issues a certificate to the effect that specified bonds are loaned to the company, which it afterward sells, holding the proceeds, the company is estopped to set up his want of authority to give the certificate. Callendar *v.* Kelly, 190 Pa. St. 455, 42 Atl. 957.

44. Application of trust fund.—A trust company held as trustee for another company a guaranty fund. At that time it was selling corporate obligations but afterward it sold debenture bonds and created other trust funds to secure them. After its failure the trust fund in the trust company's possession was applicable to the obligations first sold, but not to the debenture bonds. American L. & T. Co. *v.* Northwestern Guaranty Loan Co., 166 Mass. 337, 44 N. E. 340.

Preferences.— The charter of a trust company provided that, in the event of dissolution, minors, insane persons, and married women should be preferred creditors. The company became insolvent, but only in the sense of inability to meet present obligations, and did not lose its right to resume business. There was not such a dissolution as to prefer the above-mentioned persons in discharging its indebtedness. Dewey *v.* St. Albans Trust Co., 56 Vt. 476, 48 Am. Rep. 803.

Who may have affairs closed.—A certificate holder of a bond or investment or debenture company has no right to have its affairs closed on the ground that it is insolvent unless authority is given by statute. North Fairmount Bldg., etc., Co. *v.* Rehn, 8 Ohio S. & C. Pl. Dec. 594.

45. Pratt *v.* Short, 79 N. Y. 437, 35 Am. Rep. 531.

46. Leavitt *v.* Pell, 27 Barb. (N. Y.) 322.

47. A clearing-house due-bill is not a mere certificate of deposit, but is negotiable, like a check payable to bearer. Dutton *v.* Merchants' Nat. Bank, 16 Phila. (Pa.) 94, 40 Leg. Int. (Pa.) 110.

48. Crane *v.* Fourth St. Nat. Bank, 173 Pa. St. 566, 38 Wkly. Notes Cas. (Pa.) 113, 34 Atl. 296.

Right of national bank to participate in government.—A national bank does not violate its charter in joining a clearing-house and assisting in its management, even to the extent of participating in the issue of certificates issued by it. As they are issued on

B. Regulations. Banks may make rules for securing the payment of balances that may be found due from one member to another;[49] but the rules and usages[50] of a clearing-house are for the benefit of its members, and their customers can neither claim the benefit of, nor be injured by, them.[51]

C. Powers — 1. Clearing For Non-Members. Members are permitted to clear for other banks or trust companies, in the same city or vicinity, by complying with rules that are established for the protection of clearing-house members.[52] Such a contract between the two banks does not impose the same liability on the clearing-house bank to pay the checks drawn on the other as the law imposes on the drawee bank itself.[53] Again, the non-member is bound by the refunding of a

the deposit of securities, they possess a real value and the rightful possessor of them is therefore an owner for value. Philler *v.* Patterson, 168 Pa. St. 468, 36 Wkly. Notes Cas. (Pa.) 416, 32 Atl. 26, 47 Am. St. Rep. 896.

49. Philler *v.* Jewett, 166 Pa. St. 456, 31 Atl. 205; Philler *v.* Yardley, 62 Fed. 645, 17 U. S. App. 647, 10 C. C. A. 562, 25 L. R. A. 824.

Entries and marks.— Entries of checks, cuts, or other marks made by the receiving bank previously to the time fixed for returning them, if they are not to be passed, will not prevent their return or work an acceptance or payment of them. German Nat. Bank *v.* Farmers' Deposit Nat. Bank, 118 Pa. St. 294, 12 Atl. 303.

Payment of notes.—When the rules provide that checks and drafts payable through any member must be paid in accordance with those rules, and that any error or mistake must be corrected by the parties to the transaction, and a certified note is paid by one member to another, the paying bank is not precluded from recovering of the other on the discovery of an error in the certification. Mt. Morris Bank *v.* Twenty-third Ward Bank, 60 N. Y. App. Div. 205, 70 N. Y. Suppl. 78. See National Exch. Bank *v.* National Bank of North America, 132 Mass. 147. A rule of the clearing-house that notes must be returned by twelve o'clock, for example, and if they are not, their conditional payment will become absolute, does not violate the rights of holders or the duties of collecting banks. Atlas Nat. Bank *v.* National Exch. Bank, 176 Mass. 300, 57 N. E. 605.

Recalling mutual credits.— Mutual credits given in settlement cannot, without notice before the hour when banks usually pass checks to the credit of the depositors, be recalled by either party to the detriment of the other. Blaffer *v.* Louisiana Nat. Bank, 35 La. Ann. 251.

Time for rectifying errors.—A rule of the Philadelphia clearing-house that, on the discovery that checks received in the morning exchanges are not good or are informal, they must be returned by noon of the same day does not apply to forged paper. Corn Exch. Nat. Bank *v.* National Bank of Republic, 78 Pa. St. 233. Another rule that errors shall be adjusted before a fixed time does not apply to an overdrawn account. Tradesmen's Nat. Bank *v.* Third Nat. Bank, 66 Pa. St. 435; Banque Nationale *v.* Merchants' Bank, 7 Montreal Super. Ct. 336. For cases in which a correction after the time was allowed see Merchants' Nat. Bank *v.* Commonwealth Nat. Bank, 139 Mass. 513, 2 N. E. 89; Manufacturers' Nat. Bank *v.* Thompson, 129 Mass. 438, 37 Am. Rep. 376. For cases in which a correction was not permitted see Merchants' Nat. Bank *v.* National Eagle Bank, 101 Mass. 281, 100 Am. Dec. 120; Preston *v.* Canadian Bank of Commerce, 23 Fed. 179.

50. **Usages** of a clearing-house, if not in conflict with law, bind its members in the same way that a general usage of trade binds those who deal with reference to it. Atlas Nat. Bank *v.* National Exch. Bank, 176 Mass. 300, 57 N. E. 605; Robson *v.* Bennett, 2 Taunt. 388; Banque Nationale *v.* Merchants' Bank, 7 Montreal Super. Ct. 336. See also Commercial, etc., Nat. Bank *v.* Baltimore First Nat. Bank, 30 Md. 11, 96 Am. Dec. 554. When the practice of collecting checks through the clearing-house prevails only among banks which make their exchanges in this manner the practice is not a general custom and does not affect other banks or trust companies. Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 89 N. Y. 412.

51. Blaffer *v.* Louisiana Nat. Bank, 35 La. Ann. 251; Louisiana Ice Co. *v.* New Orleans State Nat. Bank, McGloin (La.) 181; Merchants' Nat. Bank *v.* Commonwealth Nat. Bank, 139 Mass. 513, 2 N. E. 89; Manufacturers' Nat. Bank *v.* Thompson, 129 Mass. 438, 37 Am. Rep. 376; People *v.* St. Nicholas Bank, 77 Hun (N. Y.) 159, 28 N. Y. Suppl. 407, 58 N. Y. St. 712; Tradesmen's Nat. Bank *v.* Third Nat. Bank, 66 Pa. St. 435. See also Overman *v.* Hoboken City Bank, 30 N. J. L. 61, holding that a holder of a check cannot hold the drawee, which is a clearing-house bank, amenable to a rule if the holder is not a member.

52. National City Bank *v.* New York Gold Exch. Bank, 101 N. Y. 595, 5 N. E. 463.

When this relation is established with an outside bank a deposit or security of some kind is kept with the clearing-house member for the protection of all concerned. If a bank clears for another on the deposit of the security required by the rules of the clearing-house, this cannot be diverted in the event of the failure of the non-member until all the checks and other obligations of the members on such non-members have been paid. O'Brien *v.* Grant, 146 N. Y. 163, 40 N. E. 871, 66 N. Y. St. 282, 28 L. R. A. 361.

53. Grant *v.* MacNutt, 12 Misc. (N. Y.) 20, 33 N. Y. Suppl. 62, 66 N. Y. St. 719.

check by the other, even though this be done later than the time fixed by the clearing-house.[54]

2. Suits. A clearing-house may sue and be sued in the name of the committee who manages its business.[55]

D. Liabilities. A clearing-house is not responsible to the owner of a draft sent for collection to a bank which presents it on the same day. Nor does the mode of receiving payment by the medium of balances due from the debtor banks affect the liability of the clearing-house.[56]

BANQUETTE. A sidewalk.[1] (See, generally, Municipal Corporations.)

BAPTISM. A sacrament or ordinance of the Christian church, consisting in the immersion of the person in water, or in the application of water to the person by affusion or by sprinkling, by an authorized administrator, "in the name of the Father, and of the Son, and of the Holy Ghost."[2] (Baptism: Certificate of, as Evidence, see Evidence. To Prove Legitimacy, see Bastards.)

BAR. The place in court which counselors or advocates occupy while addressing the court or jury, and where prisoners are brought for the purpose of being arraigned or sentenced;[3] the members of the legal profession;[4] a plea or peremptory exception of a defendant, sufficient to destroy the plaintiff's action;[5] an impediment, obstacle, or preventive barrier;[6] a barrier or counter from which liquors and food are passed to customers, hence the portion of the room behind the counter where liquors for sale are kept; a room or counter where liquors or refreshments are dispensed, as in a public house.[7] (Bar: Admission to, see Attorney and Client. Of Action by — Award, see Arbitration and Award; Former Adjudication, see Judgments; Limitation, see Limitations of Actions. Of Dower, see Dower. Pleas in, Generally, see Equity; Pleading.)

BAR ASSOCIATIONS. Associations of lawyers united for the purpose of furthering the interests of their profession.[8]

BARBAROUS. Cruel; ferocious; inhuman.[9] (Barbarous: Treatment as Ground For Divorce, see Divorce.)

BARBED WIRE. See Fences.

BARBERS. See Licenses; Sunday.

BAR-FEE. A payment taken by a sheriff from an acquitted prisoner.[10]

BARGAIN. Mutual agreement;[11] an agreement between persons concerning the loan, exchange or sale of property;[12] a contract or agreement between two parties, the one to sell goods or lands, and the other to buy them.[13] (See, generally, Contracts; Frauds, Statute of.)

BARGAIN AND SALE. A real contract on a valuable consideration, for passing or transferring lands from one to another;[14] a real contract upon a valuable

54. Stuyvesant Bank *v.* National Mechanics' Banking Assoc., 7 Lans. (N. Y.) 197.

55. Yardley *v.* Philler, 58 Fed. 746, 62 Fed. 645, 17 U. S. App. 647, 10 C. C. A. 562, 25 L. R. A. 824.

Evidence.— When the clearing-house sheets containing a daily record of transactions are destroyed at regular intervals, the entries made from them by the clearing-house are competent evidence of the facts therein stated. Prout *v.* Chisolm, 21 N. Y. App. Div. 54, 47 N. Y. Suppl. 376.

56. Crane *v.* Clearing-House Assoc., 13 Pa. Co. Ct. 550.

1. Century Dict.

2. Century Dict.

3. Burrill L. Dict.

4. Anderson L. Dict.

Opposed to Bench, *q. v.*

5. Jacob L. Dict. [*quoted* in Norton *v.* Winter, 1 Oreg. 47, 48, 62 Am. Dec. 297]. See also Huston *v.* Barstow, 19 Pa. St. 169, 170, where it is said: "A bar is a peremptory legal exception to a demand."

6. Black L. Dict.

7. Leesburg *v.* Putnam, 103 Ga. 110, 113, 29 S. E. 602, 68 Am. St. Rep. 80 [*citing* Standard Dict.; Webster Dict.]

8. Anderson L. Dict.

9. Century Dict.

10. Wharton L. Lex.

11. Sage *v.* Wilcox, 6 Conn. 81, 92.

Distinguished from "agree."— See Agree, 2 Cyc. 52, note 43.

12. Grand Gulf Bank *v.* Archer, 8 Sm. & M. (Miss.) 151, 192.

13. Hunt *v.* Adams, 5 Mass. 358, 360, 4 Am. Dec. 68.

14. Claiborne *v.* Henderson, 3 Hen. & M. (Va.) 322, 349 [*citing* Sheppard Touchstone, 218].

consideration for passing lands by deed indented;[15] a real contract, whereby a person bargains and sells his lands to another, for a pecuniary consideration, in consequence of which a use arises to the bargainee, and the statute of uses immediately transfers the legal estate and actual possession to *cestui que use*, without any entry or other act on his part;[16] a kind of a real contract, whereby the bargainer, for some pecuniary consideration, bargains and sells, that is, contracts to convey the land to the bargainee, and becomes by such a bargain trustee for, or seized to the use of, the bargainee, and then the statute of uses completes the purchase;[17] the transfer and delivery of personal or real property, or chose in action, by one person to another, in consideration of a price agreed upon between them, as the value of the property sold.[18] (See, generally, SALES; VENDOR AND PURCHASER.)

BARGE. A pleasure boat, or boat 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; a flat-bottomed vessel of burden for the loading and unloading of ships;[19] a double-decked passenger and freight vessel without sails or power, and towed by a steamboat;[20] the name of a flat-bottomed vessel of burden used on rivers for conveying goods from one place to another or for loading and unloading ships.[21] (Barge: Admiralty Jurisdiction of, see ADMIRALTY. Collision By or With, see COLLISIONS. Lien, see MARITIME LIENS.)

BARLEYCORN. A third of an inch.[22]

BARMOTE COURTS. Courts held in certain mining districts belonging to the duchy of Lancaster for regulation of the mines, and for deciding questions of title and other matters relating thereto.[23]

BARN. A covered building for securing grain, hay, flax, and other productions of the earth;[24] a building on a farm, used to receive the crop, the stabling of animals, and other purposes.[25] (Barn: Burglary From, see BURGLARY. Burning of, see ARSON.)

BARON. The fifth and lowest degree of nobility;[26] a husband.[27] (Baron: Et Feme, see HUSBAND AND WIFE.)

BARON COURT. See COURT BARON.

BARONET. An hereditary dignity created by letters patent, and usually descendible to the issue male.[28]

BARONS OF THE CINQUE PORTS. Members of the house of commons elected by the Cinque Ports.[29]

BARONS OF THE EXCHEQUER. The six barons of the English court of exchequer.[30]

BARONY OF LAND. A quantity of land amounting to fifteen acres.[31]

BARRATOR. See BARRATRY.

BARRATROUS. Fraudulent; having the character of BARRATRY,[32] *q. v.*

15. 2 Coke Inst. 672 [*quoted* in Guest *v.* Farley, 19 Mo. 147, 150].
16. Slifer *v.* Beates, 9 Serg. & R. (Pa.) 166, 177 [*citing* 2 Coke Inst. 672].
17. 2 Bl. Comm. 338 [*quoted* in Love *v.* Miller, 53 Ind. 294, 296, 21 Am. Rep. 192].
18. Freeman *v.* Brittin, 17 N. J. L. 191, 231.
19. Webster Dict. [*quoted* in The Mamie, 5 Fed. 813, 819].
20. Webster Dict. [*quoted* in Steinhoff *v.* Royal Canadian Ins. Co., 42 U. C. Q. B. 307, 323].
21. Falconer Marine Dict. [*quoted* in Steinhoff *v.* Royal Canadian Ins. Co., 42 U. C. Q. B. 307, 323], where it is said to have various names as "wear barge," "west country barge," "sand barge," "row barge," etc.
22. Wharton L. Lex.
23. Sweet L. Dict.
24. Webster Dict. [*quoted* in State *v.* Smith, 28 Iowa 565, 568; State *v.* Laughlin, 53 N. C. 354, 355, 53 N. C. 455, 458].
25. Bouvier L. Dict. [*quoted* in State *v.* Smith, 28 Iowa 565, 568; State *v.* Laughlin, 53 N. C. 455, 458].
26. Wharton L. Lex.
27. Burrill L. Dict.
28. Burrill L. Dict.
29. Wharton L. Lex.
30. Burrill L. Dict.
31. Wharton L. Lex.
32. Burrill L. Dict.

Used in the expression "And this depends exclusively upon the consideration, . . . for it is conceded on all sides that the conduct of the master was barratrous, if he was in a situation to commit that offense," per Story, J., in Marcardier *v.* Chesapeake Ins. Co., 8 Cranch (U. S.) 39, 49, 3 L. ed. 481.

BARRATRY

EDITED BY ROBERT F. WALKER*

CROSS-REFERENCES

For Matters Relating to:

Barratry in Maritime Law:

As Affecting Insurance, see MARINE INSURANCE.

Liability of Master For, see SHIPPING.

Champerty and Maintenance, see CHAMPERTY AND MAINTENANCE.

For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. DEFINITIONS.

Barratry[1] is the offense of frequently exciting and stirring up quarrels and suits, either at law, or otherwise;[2] an act committed by the master or mariners of a ship for some unlawful or fraudulent purpose, contrary to duty, whereby the latter sustains an injury;[3] and in Scotland the crime of a judge who is induced by bribery to pronounce a judgment.[4] A barrator or common barrator

1. **"Barratry" and "barretry"** are terms used interchangeably by the courts. It is said, however, that the former is derived from *barrataria* — fraud, deceit, etc. — and more properly applies to the acts of a master in shipping, while the latter is from *barretta* — a contention, quarrel, or wrangle — and is more properly used in the sense of an intermeddler. Adams Gloss. *sub voc.* Barretry.

2. 4 Bl. Comm. 134; 4 Stephen Comm. 262.

Code definition.— In California the offense is defined as "the practice of exciting groundless judicial proceedings." Cal. Pen. Code, § 158 [*quoted* in Lucas *v.* Pico, 55 Cal. 126, 128]. Similar statutory provisions exist in many other jurisdictions.

Distinguished from maintenance.— Barratry consists in the habit or practice of stirring up strife, while only one such act would be maintenance. Voorhees *v.* Dorr, 51 Barb. (N. Y.) 580, 586.

3. Story, J., in Marcardier *v.* Chesapeake Ins. Co., 8 Cranch (U. S.) 39, 49, 3 L. ed. 481.

Barratry as affecting insurance see MARINE INSURANCE.

Liability of ship's master for barratry see SHIPPING.

4. Wharton L. Lex.

*Sometime Attorney-General of Missouri, and member of the commission for the revision of the laws of Missouri in 1889.

is a common mover, exciter, or maintainer of suits and quarrels, either in courts of justice or in the country.[5]

II. Nature and Elements of Offense.

A. The Quarrel or Suit — 1. At Law — a. Civil Suits — (I) *In General.* While by statute it is sometimes required that the suit be groundless,[6] this was not necessary at common law, and inducing others to commence just suits would be barratrous, if done with a ruinous or oppressive motive.[7]

(II) *Aid in Prosecution* — (A) *In General.* It was, however, held at common law that one could in respect to poverty use money in behalf of another to enable him to recover a just right;[8] and that an attorney who prosecuted a groundless action would not be guilty of the offense, provided he was in no way connected with the institution of such suit.[9]

(B) *Information of Land Titles.* It is not barratry for one to sell his information concerning the title to lands held adversely by another.[10]

(III) *Malicious Institution of Suits in Own Right.* It was at one time held that the institution of any number of false actions brought by one in his own right would not be barratry,[11] but this view is repudiated by the later authorities.[12]

b. Criminal Prosecutions. Inasmuch as it is not only the privilege but the duty of every citizen and officer to bring violators of the law to justice, it has been argued that this offense ought not be extended to criminal prosecutions; but it is held otherwise.[13]

2. In the Country. While in some jurisdictions the offense is confined by statute to the exciting of groundless judicial proceedings,[14] at common law the offense extended to disturbances of the peace, the taking or detaining of the possession of houses, lands, or goods, which were in question or controversy, not only by force, but also by subtlety or deceit, and to the invention and sowing of calumny, rumors, and reports, whereby discord and disquiet arise between neighbors.[15]

B. Necessity of Three Acts. Before one can be properly convicted of this offense it is necessary that he be shown to be guilty of at least three distinct acts of malicious intermeddling,[16] the evil design or intent being a necessary element;[17]

5. Com. *v.* Davis, 11 Pick. (Mass.) 432, 434; Case of Barretry, 8 Coke 36*b*; Coke Litt. 368*a*; 1 Hawkins P. C. c. 81, § 1. See also Taylor *v.* Starkey, Cro. Car. 192.

6. See *supra*, I, note 2.

7. State *v.* Chitty, 1 Bailey (S. C.) 379, 401, where it is said: "The pursuit of right, whether public or private, can never be an offence, where justice alone is the end in view; but every perversion of the machinery of the law to other purposes, by coupling with it improper objects, is reprehensible." See also Rex *v.* ———, 3 Mod. 97.

8. Rex *v.* ———, 3 Mod. 97.

9. Rex *v.* ———, 3 Mod. 97; 1 Hawkins P. C. c. 81, § 4.

10. Lucas *v.* Pico, 55 Cal. 126.

11. 1 Rolle Abr. 355*a* [*cited* in 1 Hawkins P. C. c. 81, § 3].

12. Com. *v.* McCulloch, 15 Mass. 227; State *v.* Chitty, 1 Bailey (S. C.) 379; 1 Hawkins P. C. c. 81, § 3 (where the writer, after citing 1 Rolle Abr. 355*a*, says: "If such Actions be merely groundless and vexatious without any Manner of Colour, and brought only with a Design to oppress the Defendants, I do not see why a Man may not as properly be called a Barrator for bringing such Actions himself, as for stirring up others to bring them").

13. State *v.* Chitty, 1 Bailey (S. C.) 379, 398 (where the court, per Johnson, J., said: "The offence, as I understand it, does not consist, . . . in promoting either private suits or public prosecutions, when the sole object is the attainment of public justice, or private right; . . . He who brings a public offender to justice, does well; but he who uses a public prosecution as a means of gratifying a passion for mischief, or for the sake of filthy lucre, or oppression, is an offender of no ordinary magnitude"); Case of Barretry, 8 Coke 36*b*.

14. See *supra*, I, note 2.

15. Case of Barretry, 8 Coke 36*b*; 1 Hawkins P. C. c. 81, § 2.

16. Lucas *v.* Pico, 55 Cal. 126; Com. *v.* Davis, 11 Pick. (Mass.) 432; Com. *v.* McCulloch, 15 Mass. 227; State *v.* Chitty, 1 Bailey (S. C.) 379.

17. Com. *v.* McCulloch, 15 Mass. 227, 229, where the court said: "The commencing of three suits, where one would have served every justifiable purpose, might have been evidence of three acts of barratry, had he given

but the three acts given in evidence on the trial need not be the same as those upon which the indictment was found.[18]

III. INDICTMENT.

A. In General.[19] An indictment for barratry is one of the few exceptions to the general rule that the indictment must distinctly and accurately set forth the particular acts constituting the offense charged.[20] It is sufficient, as well as necessary,[21] to charge defendant with being a "common barrator," [22] without showing the place where,[23] or the cause for which,[24] he is a common barrator. The indictment must conclude *contra pacem*.[25]

B. Bill of Particulars. Owing to the generality of the charge in the indictment and as a means of guarding defendant against surprise[26] and to enable him to prepare a defense against such an uncertain charge,[27] the prosecutor is required to furnish him with a bill of particulars, designating the particular acts of barratry which will be relied upon to prove the general charge.[28] Without such bill the prosecution cannot proceed to trial.[29] It is, however, no part of the record[30] and the acts designated in the bill need not be the same as those upon which the indictment was found;[31] but the evidence introduced must be confined to the particular acts designated in the bill.[32]

particular directions therefor, with a malicious design to harass and oppress the debtor." But where he simply directed that the note be sued on, leaving the manner of suing to his attorney, in the absence of evidence of his direction he cannot be held for barratry though the evidence shows without question an indictable offense.

18. Com. *v.* Davis, 11 Pick. (Mass.) 432.

19. Joint indictment.— In Rex *v.* Philips, 2 Str. 921, it was said that two cannot be jointly indicted for barratry.

20. J'Anson *v.* Stuart, 1 T. R. 748, 754.

21. The words are a term of art which cannot be supplied by words which may import as much. Roy *v.* Hardwicke, Sid. 282.

The reason of this exception, which is of ancient date, was not understood by early writers (Buller, J., in J'Anson *v.* Stuart, 1 T. R. 748, 754), but it arises from the fact that the offense does not consist of the acts themselves but of the practice or habit of inciting trouble (Com. *v.* Pray, 13 Pick. (Mass.) 359, 362; State *v.* Chitty, 1 Bailey (S. C.) 379; Rex *v.* Mason, 2 T. R. 581). Inasmuch as the plaintiff is required to furnish defendant with a bill of particulars (see *infra*, III, B) the exception becomes immaterial (Lambert *v.* People, 9 Cow. (N. Y.) 578, 587).

22. Com. *v.* Snelling, 15 Pick. (Mass.) 321, 330; Com. *v.* Davis, 11 Pick. (Mass.) 432; Lambert *v.* People, 9 Cow. (N. Y.) 578, 587; Palfrey's Case, Cro. Jac. 527; Reg. *v.* Hannon, 6 Mod. 311; Rex *v.* Urlyn, 2 Saund. 308; J'Anson *v.* Stuart, 1 T. R. 748, 754; 1 Hawkins P. C. c. 81, § 5.

23. Parcel's Case, Cro. Eliz. 195; Rex *v.* Clayton, 2 Keb. 409; 1 Hawkins P. C. c. 81, § 11. *Contra*, Man's Case, Latch 194.

24. Parcel's Case, Cro. Eliz. 195.

25. Palfrey's Case, Cro. Jac. 527; 1 Hawkins P. C. c. 81, § 12.

26. State *v.* Chitty, 1 Bailey (S. C.) 379.

27. Lambert *v.* People, 9 Cow. (N. Y.) 578; State *v.* Chitty, 1 Bailey (S. C.) 379; Rex *v.* Grove, 5 Mod. 18; Rex *v.* Urlyn, 2 Saund. 308; J'Anson *v.* Stuart, 1 T. R. 748, 754; 1 Hawkins P. C. c. 81, § 13.

28. Com. *v.* Davis, 11 Pick. (Mass.) 432; State *v.* Chitty, 1 Bailey (S. C.) 379; Rex *v.* Urlyn, 2 Saund. 308; 1 Hawkins P. C. c. 81, § 13.

Sufficiency of bill.— A bill of particulars will be sufficient if it describes the alleged acts and proceedings with such certainty that defendant is not prejudicially misled thereby. Com. *v.* Davis, 11 Pick. (Mass.) 432, where one who was indicted as a common barrator was furnished with a bill of particulars, stating that evidence would be produced on the part of the state concerning complaints before certain magistrates against certain individuals for certain offenses, but not stating the time when the complaints were made, and giving only the surnames of the magistrates. It was held that after conviction exceptions for the want of certainty could not be sustained.

Remedy for defective bill.— Where one is misled by the uncertainty of the bill, it should be shown as ground for a postponement of the trial and not as an exception for want of certainty in a motion for arrest of judgment after trial. Com. *v.* Davis, 11 Pick. (Mass.) 432.

29. Rex *v.* Grove, 5 Mod. 18; Rex *v.* Urlyn, 2 Saund. 308.

30. Com. *v.* Davis, 11 Pick. (Mass.) 432; State *v.* Chitty, 1 Bailey (S. C.) 379, the latter case holding that it cannot furnish ground for a motion in arrest of judgment.

31. Com. *v.* Davis, 11 Pick. (Mass.) 432.

32. State *v.* Chitty, 1 Bailey (S. C.) 379; Rex *v.* Urlyn, 2 Saund. 308.

IV. DEFENSES.

It is no defense that defendant is an officer, and that the barratrous acts could have been reached by an action for malfeasance in office,[33] or that the prosecution was not commenced within the time fixed for prosecuting embracery, champerty, and like offenses.[34]

V. EVIDENCE.

On trial of an officer for barratry, evidence that defendant exacted illegal fees as the condition of compounding prosecutions which were incited by him is admissible to show the motive for the exciting of such suits;[35] but mere evidence of an oppressive disposition in collecting money on executions cannot be construed as evidence of a previous direction or assent in the manner of commencing the suits.[36] An order of a magistrate requiring the one complained against by defendant to appear before a proper court is not conclusive evidence of probable cause for making the complaint.[37]

VI. PUNISHMENT.

The punishment for barratry, at common law, was by fine and imprisonment at the discretion of the court, and if committed by an attorney, by disbarment.[38]

BARREL. A measure of quantity[1] equal to thirty-six gallons;[2] a vessel of a certain kind and capacity.[3]

BARRENNESS. Incapacity to propagate or bear children.[4] (Barrenness: As Ground For Divorce, see DIVORCE.)

BARRETRY. See BARRATRY.

BARRICADE. An obstruction; an actual impediment to travel.[5]

BARRIER. In mining law, a wall of coal left between two mines.[6]

BARRISTER. See ATTORNEY AND CLIENT.

BAR-ROOM. A room containing a bar or counter at which liquors are sold; a room with a bar where liquors and refreshments are served;[7] a place for the sale of intoxicating liquors by retail for consumption at the place of sale;[8] a tavern; a drinking shop.[9] (See, generally, BAR; INTOXICATING LIQUORS.)

33. State *v.* Chitty, 1 Bailey (S. C.) 379, 408, where the court said: "Barratry is a substantive and distinct offence, and in no wise necessarily connected with the office of magistrate, and is not, therefore, merged in an offence committed in that office."

34. State *v.* Chitty, 1 Bailey (S. C.) 379, 409, where the court said that barratry "is made up of many acts, committed at different times, and in tracing the circumstances, it would be impossible to fix upon the precise time when it began, or when it was consummated; . . . It is the aggregate of all the barretrous acts which constitute barretry; and the longer the list, and the more extended in point of time, the more aggravated is the offence."

35. State *v.* Chitty, 1 Bailey (S. C.) 379.

36. Com. *v.* McCulloch, 15 Mass. 227.

37. Com. *v.* Davis, 11 Pick. (Mass.) 432, 436, where the court, per Shaw, C. J., said: "To hold that the order of the magistrate in that prosecution, which may have been occasioned by the false representations and malicious and artful contrivances of the defendant himself, was conclusive of his innocence and purity in the matter, could be justified upon no principle or authority."

38. State *v.* Chitty, 1 Bailey (S. C.) 379; Rex *v.* Urlyn, 2 Saund. 308 (where, it appearing that the prosecution was malicious and had been pending for a great length of time, the court reduced the punishment to a small fine); 1 Hawkins P. C. c. 81, § 14.

1. Miller *v.* Stevens, 100 Mass. 518, 522, 97 Am. Dec. 123, 1 Am. Rep. 139.

2. Bouvier L. Dict.

3. Miller *v.* Stevens, 100 Mass. 518, 522, 97 Am. Dec. 123, 1 Am. Rep. 139.

4. Rapalje & L. L. Dict.

Distinguished from "impotency."—"'Barrenness,' however, is in no sense the synonym of 'impotency.'" Anonymous, 89 Ala. 291, 292, 7 So. 100, 18 Am. St. Rep. 116, 7 L. R. A. 425 [*citing* 1 Bishop Marriage & Div. (6th ed.) §§ 322–338*a*].

5. American Water-Works Co. *v.* Dougherty, 37 Nebr. 373, 376, 55 N. W. 1051.

6. Sweet L. Dict.

7. Leesburg *v.* Putnam, 103 Ga. 110, 113, 29 S. E. 602, 68 Am. St. Rep. 80 [*citing* Standard Dict.; Webster Dict.].

8. Beiser *v.* State, 79 Ga. 326, 328, 4 S. E. 257. See also Army, etc., Club *v.* District of Columbia, 8 App. Cas. (D. C.) 544, 550.

9. Matter of Schneider, 11 Oreg. 288, 297, 8 Pac. 289.

BARTER. The exchange of one commodity or article of property for another;[10] a contract by which the parties exchange goods.[11] (See, generally, EXCHANGE OF PROPERTY.)

BAS. Low; base; inferior.[12]

BASE. Low; inferior;[13] adulterated;[14] and, in chemistry, a compound substance which unites with an acid to form a salt.[15]

BASE-BALL. A game of ball, so called from the bases or bounds (usually four in number) which designate the circuit which each player must make after striking the ball.[16] (Base-ball: Prohibition of on Sunday, see SUNDAY.)

BASE COURT. Any inferior court that is not of record.[17]

BASE ESTATE. That estate which base tenants have in their land.[18]

BASE or QUALIFIED FEE. A fee which hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end.[19] (Base Fee: Creation of by — Deed, see DEEDS; Will, see WILLS. Nature and Requisites of, see ESTATES.)

BASE TENANTS. Tenants who held at the will of the lord as distinguished from frank tenants or freeholders.[20]

BASILICA. A new body of law, framed A. D. 880 by the emperor Basilicus, and published by his successor.[21]

BASIN. A part of the sea inclosed in rocks.[22]

10. Meyer *v.* Rousseau, 47 Ark. 460, 463, 2 S. W. 112; Cooper *v.* State, 37 Ark. 412, 418 [*citing* Burrill L. Dict.].
11. Speigle *v.* Meredith, 4 Biss. (U. S.) 120, 123, 22 Fed. Cas. No. 13,227.
12. Burrill L. Dict.
13. Burrill L. Dict.
14. Gabe *v.* State, 6 Ark. 540, 544.
15. *In re* Schaeffer, 2 App. Cas. (D. C.) 1, 4.
16. Webster Dict. [*quoted* in State *v.* O'Rourk, 35 Nebr. 614, 620, 53 N. W. 591, 17 L. R. A. 830].
17. Burrill L. Dict.
18. Burrill L. Dict.
19. 2 Bl. Comm. 109 [*quoted* in Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 94 Ill. 83, 93; Bryan *v.* Spires, 3 Brewst. (Pa.) 580, 583; U. S. *v.* Reese, 5 Dill. (U. S.) 405, 411, 27 Fed. Cas. No. 16,137, 8 Centr. L. J. 453].
20. Burrill L. Dict.
21. Wharton L. Lex. [*citing* 1 Colquhoun Roman Civ. Law, § 77].
22. U. S. *v.* Morel, Brunn. Col. Cas. (U. S.) 373, 379, 26 Fed. Cas. No. 15,807, 13 Am. Jur. 279.

BASTARDS

By Frank E. Jennings

CROSS-REFERENCES

For Administration of Estate of Deceased Bastard, see EXECUTORS AND ADMINISTRATORS.
Adoption of Bastard, see ADOPTION.
Apprenticing of Bastard, see APPRENTICES.
Citizenship of Foreign-Born Bastard, see CITIZENS.
Concealment of Birth or Death of Bastard, see CONCEALMENT OF BIRTH OR DEATH.
Devise in Favor of Bastard, see WILLS.
Escheat of Property of Bastard, see ESCHEAT.
Legacy in Favor of Bastard, see WILLS.
Settlement of Bastard Under Poor Laws, see POOR PERSONS.

I. WHO ARE ILLEGITIMATE.

A. In General. At common law a bastard is one who is born neither in lawful wedlock,[1] nor within a competent time after its termination;[2] or under circumstances which render it impossible that the husband of his mother can be his father.[3]

B. Issue of Void Marriage. In the absence of a statute declaring the issue of marriages void in law legitimate,[4] such issue are illegitimate.[5] So, also, if no marriage was in fact celebrated, the statute requiring a ceremony.[6]

1. Timmins *v.* Lacy, 30 Tex. 115, 135; 2 Bl. Comm. 247.

Other definitions are: One begotten and born out of lawful wedlock. 2 Kent Comm. 208.

Those who are born out of marriage. La. Rev. Civ. Code (1900), art. 180.

Adulterous bastards see 1 Cyc. 949.

By the Roman law a "distinction was made between illegitimates born of a concubine, and those born of a prostitute. The former were styled *naturales*, the latter, *spurii*." Dickinson's Appeal, 42 Conn. 491, 501, 19 Am. Rep. 553.

2. Co. Litt. 123*b*.

3. Com. *v.* Shepherd, 6 Binn. (Pa.) 283, 6 Am. Dec. 449; Smith *v.* Perry, 80 Va. 563; Bouvier L. Dict.

The true test when the mother is married "is whether the husband of the woman who gives birth to the child is its father; . . . While a legitimate child is one born in lawful wedlock, and a bastard is one begotten and born out of lawful wedlock, yet it does not follow that every child born in lawful wedlock is legitimate, nor does it require one to be both begotten and born out of lawful wedlock to be a bastard." Per Simpson, C. J., in Wilson *v.* Babb, 18 S. C. 59, 69.

4. See *infra*, III, C, 2.

5. Sneed *v.* Ewing, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41; Peyran's Succession, 11 La. Ann. 694; Zule *v.* Zule, 1 N. J. Eq. 96; 2 Esp. N. P. 62.

Where the evidence is not clear as to the illegality of a marriage, and there is evidence of the approval of the match by the father, the issue will not be declared illegitimate after a lapse of fifty years. Harrison *v.* Southampton, 4 De G. M. & G. 137, 18 Jur. 1, 22 L. J. Ch. 722, 1 Wkly. Rep. 422, 53 Eng. Ch. 137.

6. Kelley *v.* Kitsap County, 5 Wash. 521, 32 Pac. 554; Matter of McLaughlin, 4 Wash.

C. Issue of Voidable Marriage. The issue of marriages which are merely voidable, and have not been declared a nullity, are legitimate.[7]

II. EVIDENCE OF LEGITIMACY.

A. Presumptions — 1. In General. A child is presumed to be legitimate until the contrary is shown.[8] In case of conflicting presumptions that in favor of legitimacy will prevail.[9] There is no presumption that one who marries the mother of a bastard is its father.[10]

2. From Birth During Wedlock. Every child born in wedlock is by law presumed to be legitimate.[11] So firm was this presumption originally that it

570, 30 Pac. 651, 16 L. R. A. 699; Blackburn *v.* Crawford, 3 Wall. (U. S.) 175, 18 L. ed. 186.

The issue of a marriage which is performed outside a state for the purpose of evading the law is legitimate within such state. Stevenson *v.* Gray, 17 B. Mon. (Ky.) 193; Van Voorhis *v.* Brintnall, 86 N. Y. 18, 40 Am. Rep. 505 [*reversing* 23 Hun (N. Y.) 260]. See also Matter of Hall, 61 N. Y. App. Div. 266, 70 N. Y. Suppl. 406, holding that where a wife secured a divorce according to the laws of the place wherein she is living, and thereafter marries another, to whom a child is born, such child is legitimate everywhere, though the divorce and remarriage may not be recognized as legal elsewhere.

7. Eubanks *v.* Banks, 34 Ga. 407; Niles *v.* Sprague, 13 Iowa 198; Sneed *v.* Ewing, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41. See also 1 Bl. Comm. 434.

8. Strode *v.* Magowan, 2 Bush (Ky.) 621; Fox *v.* Burke, 31 Minn. 319, 17 N. W. 861; Caujolle *v.* Ferrié, 23 N. Y. 90; *In re* Robb, 37 S. C. 19, 16 S. E. 241; Dinkins *v.* Samuel, 10 Rich. (S. C.) 66; Vaughan *v.* Rhodes, 2 McCord (S. C.) 227, 13 Am. Dec. 713.

Antenuptial conception does not weaken the presumption of legitimacy arising from a post-nuptial birth. Page *v.* Dennison, 1 Grant (Pa.) 377. *Contra*, Wright *v.* Hicks, 15 Ga. 160, 60 Am. Dec. 687.

Where the evidence by which filiation is established also proves illegitimacy, the presumption of legitimacy fails. Weatherford *v.* Weatherford, 20 Ala. 548, 56 Am. Dec. 206.

9. Johnson *v.* Dudley, 4 Ohio S. & C. Pl. Dec. 243; Senser *v.* Bower, 1 Penr. & W. (Pa.) 450.

The presumption of the continuance of a valid marriage will yield after long desertion of a wife by her first husband, and a second marriage by both parties, in favor of the presumption of legitimacy of the wife's child by her second marriage. Wile's Estate, 6 Pa. Super. Ct. 435, 41 Wkly. Notes Cas. (Pa.) 572. So also may the presumption that an intercourse illicit in its origin continued to be of that character be repelled by a contrary presumption in favor of marriage, and of the legitimacy of offspring, although the circumstances fail to show when or how the change from concubinage to matrimony took place. Caujolle *v.* Ferrié, 23 N. Y. 90 [*affirming* 26 Barb. (N. Y.) 177].

10. Janes' Estate, 147 Pa. St. 527, 30 Wkly. Notes Cas. (Pa.) 166, 23 Atl. 892.

11. *Alabama.*— Bullock *v.* Knox, 96 Ala. 195, 11 So. 339.

California.— Sharboro's Estate, Myr. Prob. (Cal.) 255.

Georgia.— Sullivan *v.* Hugly, 32 Ga. 316; Wright *v.* Hicks, 15 Ga. 160, 60 Am. Dec. 687, 12 Ga. 155, 56 Am. Dec. 451.

Illinois.— Smith *v.* Henline, 174 Ill. 184, 51 N. E. 227; Metheny *v.* Bohn, 160 Ill. 263, 43 N. E. 380; Drennan *v.* Douglas, 102 Ill. 341, 40 Am. Rep. 595; Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 315.

Indiana.— Brock *v.* State, 85 Ind. 397; Bailey *v.* Boyd, 59 Ind. 292.

Iowa.— Niles *v.* Sprague, 13 Iowa 198.

Kentucky.— Remmington *v.* Lewis, 8 B. Mon. (Ky.) 606.

Louisiana.— Dejol *v.* Johnson, 12 La. Ann. 853; Vernon *v.* Vernon, 6 La. Ann. 242; Eloi *v.* Mader, 1 Rob. (La.) 581, 38 Am. Dec. 192; Tate *v.* Penne, 7 Mart. N. S. (La.) 548.

Maine.— Grant *v.* Mitchell, 83 Me. 23, 21 Atl. 178.

Maryland.— Scanlon *v.* Walshe, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488.

Massachusetts.— Phillips *v.* Allen, 2 Allen (Mass.) 453; Hemmenway *v.* Towner, 1 Allen (Mass.) 209.

Mississippi.— Herring *v.* Goodson, 43 Miss. 392.

Missouri.— Johnson *v.* Johnson, 30 Mo. 72, 77 Am. Dec. 598.

New York.— Caujolle *v.* Ferrié, 23 N. Y. 90 [*affirming* 26 Barb. (N. Y. 177]; Cross *v.* Cross, 3 Paige (N. Y.) 139, 23 Am. Dec. 778.

North Carolina.— Erwin *v.* Bailey, 123 N. C. 628, 31 S. E. 844; State *v.* McDowell, 101 N. C. 734, 7 S. E. 785; State *v.* Rose, 75 N. C. 239; Rhyne *v.* Hoffman, 59 N. C. 335; Johnson *v.* Chapman, 45 N. C. 213; State *v.* Herman, 35 N. C. 502; Gurvin *v.* Cromartie, 33 N. C. 174, 53 Am. Dec. 406; State *v.* Pettaway, 10 N. C. 623.

Ohio.— Sutphin *v.* Cox, 2 Ohio Dec. (Reprint) 90, 1 West. L. Month. 346.

Pennsylvania.— Janes' Estate, 147 Pa. St. 527, 30 Wkly. Notes Cas. (Pa.) 166, 23 Atl. 892; Page *v.* Dennison, 1 Grant (Pa.) 377; Com. *v.* Shepherd, 6 Binn. (Pa.) 283, 6 Am. Dec. 449; Com. *v.* Wentz, 1 Ashm. (Pa.) 269.

South Carolina.— Wilson *v.* Babb, 18 S. C. 59; Shuler *v.* Bull, 15 S. C. 421; State *v.* Shumpert, 1 S. C. 85.

could not be rebutted unless the husband was incapable of procreation or was absent beyond the four seas during the whole period of the wife's pregnancy.[12] This ancient rule has been so far relaxed that in modern times this presumption may be overcome by showing that the husband had no opportunity for intercourse, and the jury, from all the facts, are to infer whether intercourse did, or did not, take place.[13]

3. As Affected by Separation or Divorce. If the husband and wife voluntarily separate and live apart the legitimacy of children subsequently born will be presumed until the contrary is shown.[14] In case of a divorce, however, the courts will presume obedience to their decree and that children subsequently born are bastards.[15]

4. After Lapse of Time. The fact that an assumed legitimacy has remained

Tennessee.— Cannon *v.* Cannon, 7 Humphr. (Tenn.) 410.

Virginia.—Watkins *v.* Carlton, 10 Leigh (Va.) 586; Bowles *v.* Bingham, 2 Munf. (Va.) 442, 5 Am. Dec. 497.

United States.— Patterson *v.* Gaines, 6 How. (U. S.) 550, 12 L. ed. 553; Stegall *v.* Stegall, 2 Brock. (U. S.) 256, 22 Fed. Cas. No. 13,351.

England.— Bury *v.* Phillpot, 2 Myl. & K. 349, 7 Eng. Ch. 349; Head *v.* Head, 1 L. J. Ch. O. S. 105, 1 Sim. & St. 150, 1 Eng. Ch. 150; Banbury Peerage Case, 1 Sim. & St. 153, 24 Rev. Rep. 159, 1 Eng. Ch. 153.

See 6 Cent. Dig. tit. "Bastards," § 4.

Reason of rule.— The presumption that a child born in wedlock is legitimate results from the principles of natural justice; it rests simply on the supposition of the virtuous conduct of the mother — a branch of that equitable rule which assumes the innocence of a party until proof be brought of actual guilt. Cannon *v.* Cannon, 7 Humphr. (Tenn.) 410.

12. Shelley *v.* ———, 13 Ves. Jr. 56.

"If the husband be within the foure seas, that is within the jurisdiction of the king of England, if the wife hath issue, no proofe is to be admitted to prove the childe a bastard, (for in that case *filiatio non potest probari*) unlesse the husband hath an apparent impossibilitie of procreation; as if the husband be but eight years old, or under the age of procreation, such issue is bastard, albeit he be borne within marriage. But if the issue be borne within a moneth or a day after mariage, betweene parties of full lawfull age, the child is legitimate." 2 Coke Litt. 244*a*.

13. *Georgia.*—Wright *v.* Hicks, 12 Ga. 155, 56 Am. Dec. 451.

Illinois.— Orthwein *v.* Thomas, (Ill. 1887) 13 N. E. 564.

Indiana.— Dean *v.* State, 29 Ind. 483.

Louisiana.—Vernon *v.* Vernon, 6 La. Ann. 242.

Maryland.— Scanlon *v.* Walshe, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488.

Mississippi.— Herring *v.* Goodson, 43 Miss. 392.

New York.—Cross *v.* Cross, 3 Paige (N. Y.) 139, 23 Am. Dec. 778.

North Carolina.— Mebane *v.* Capehart, 127 N. C. 44, 37 S. E. 84; Erwin *v.* Bailey, 123 N. C. 628, 31 S. E. 844; State *v.* McDowell, 101 N. C. 734, 7 S. E. 785; State *v.* Rose, 75 N. C. 239; State *v.* Pettaway, 10 N. C. 623.

Pennsylvania.— Page *v.* Dennison, 1 Grant (Pa.) 377; Com. *v.* Shepherd, 6 Binn. (Pa.) 283, 6 Am. Dec. 449; Com. *v.* Wentz, 1 Ashm. (Pa.) 269.

South Carolina.— Shuler *v.* Bull, 15 S. C. 421; State *v.* Shumpert, 1 S. C. 85.

Tennessee.— Cannon *v.* Cannon, 7 Humphr. (Tenn.) 410.

Vermont.— Pittsford *v.* Chittenden, 58 Vt. 49, 3 Atl. 323.

United States.—Stegall *v.* Stegall, 2 Brock. (U. S.) 256, 22 Fed. Cas. No. 13,351.

England.— Rex *v.* Maidstone, 12 East 550; Rex *v.* Luffe, 8 East 193, 9 Rev. Rep. 406; Head *v.* Head, 1 L. J. Ch. O. S. 105, 1 Sim. & St. 150, 1 Eng. Ch. 150; Pendrell *v.* Pendrell, 2 Str. 925; Shelley *v.* ———, 13 Ves. Jr. 56.

See 6 Cent. Dig. tit. "Bastards," § 5.

As to sufficiency of evidence to rebut presumption see *infra*, II, D.

14. Tate *v.* Penne, 7 Mart. N. S. (La.) 548; Morris *v.* Davies, 5 Cl. & F. 163, 1 Jur. 911, 7 Eng. Reprint 365; Sidney *v.* Sidney, 3 P. Wms. 269; Pendrell *v.* Pendrell, 2 Str. 925.

The conduct of the wife under such circumstances may, however, be such that the presumption will be held inapplicable. Cope *v.* Cope, 5 C. & P. 604, 1 M. & Rob. 269, 24 E. C. L. 730.

15. Sidney *v.* Sidney, 3 P. Wms. 269; 2 Esp. N. P. 66 [*citing* St. George's Parish *v.* St. Margaret's Parish, 1 Salk. 123].

The legitimacy of a child begotten before the commencement of a suit for a divorce must be presumed until the contrary is shown. Cross *v.* Cross, 3 Paige (N. Y.) 139, 23 Am. Dec. 778. See also Drennan *v.* Douglas, 102 Ill. 341, 40 Am. Rep. 595, holding 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 it is doubtful whether she can maintain a bastardy proceeding against one as the putative father of the child, the presumption being 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.

uncontroverted for a great length of time strengthens the presumption regarding it.[16] This is especially true after the death of the parties.[17]

B. Burden of Proof. Those who assume the fact of illegitimacy have cast upon them the burden of establishing it.[18] One may, however, while protected by the presumption of legitimacy, have the burden upon him to prove his kinship.[19]

C. Admissibility — 1. Baptismal or Marriage Certificate. Entries in a baptismal register may be used to prove the fact and date of baptism, but are inadmissible to affect legitimacy.[20] Likewise a marriage certificate is admissible, and is corroborative proof of the date of an alleged marriage.[21]

2. Declarations of Parents. As a rule the declarations or admissions of husband or wife concerning children born in wedlock are inadmissible to prove the illegitimacy of such children.[22] Thus such admissions are not admissible to establish

16. *Arkansas.*— Kelly *v.* McGuire, 15 Ark. 555.

District of Columbia.— Green *v.* Norment, 5 Mackey (D. C.) 80.

Kentucky.— Stevenson *v.* Gray, 17 B. Mon. (Ky.) 193.

Louisiana.— Clapier *v.* Banks, 10 La. 60.

Tennessee.— Rogers *v.* Park, 4 Humphr. (Tenn.) 480.

England.— Harrison *v.* Southampton, 4 De G. M. & G. 137, 18 Jur. 1, 22 L. J. Ch. 722, 1 Wkly. Rep. 422, 53 Eng. Ch. 137.

17. Johnson *v.* Johnson, 30 Mo. 72, 77 Am. Dec. 598; *In re* Robb, 37 S. C. 19, 16 S. E. 241; Johnson *v.* Johnson, 1 Desauss. (S. C.) 595.

18. *Alabama.*— Weatherford *v.* Weatherford, 20 Ala. 548, 56 Am. Dec. 206.

Illinois.— Metheny *v.* Bohn, 160 Ill. 263, 43 N. E. 380; Orthwein *v.* Thomas, (Ill. 1887) 13 N. E. 564; Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 315.

Kentucky.— Dannelli *v.* Dannelli, 4 Bush (Ky.) 51; Strode *v.* Magowan, 2 Bush (Ky.) 621; Remmington *v.* Lewis, 8 B. Mon. (Ky.) 606.

Louisiana.— Simon *v.* Richard, 42 La. Ann. 842, 8 So. 629.

New York.—Matter of Matthews, 153 N. Y. 443, 47 N. E. 901 [*affirming* 1 N. Y. App. Div. 231, 37 N. Y. Suppl. 308, 72 N. Y. St. 620]; Caujolle *v.* Ferrié, 23 N. Y. 90 [*affirming* 26 Barb. (N. Y.) 177].

Pennsylvania.— Pickens' Estate, 163 Pa. St. 14, 29 Atl. 875, 25 L. R. A. 477; Wiles' Estate, 6 Pa. Super. Ct. 435, 41 Wkly. Notes Cas. (Pa.) 572.

Texas.— Odom *v.* Woodward, 74 Tex. 41, 11 S. W. 925.

United States.— Patterson *v.* Gaines, 6 How. (U. S.) 550, 12 L. ed. 553.

England.— Gardner *v.* Gardner, 2 App. Cas. 723; Sidney *v.* Sidney, 3 P. Wms. 269; Banbury Peerage Case, 1 Sim. & St. 153, 24 Rev. Rep. 159, 1 Eng. Ch. 153.

See 6 Cent. Dig. tit. "Bastards," § 6.

Where legitimacy through recognition or acknowledgment is sought to be established, the burden is on the party alleging such legitimation to prove that the recognition was sufficient under the statute. Watson *v.* Richardson, 110 Iowa 673, 80 N. W. 407.

19. Pickens' Estate, 163 Pa. St. 14, 29 Atl. 875, 25 L. R. A. 477.

20. **The reason being** that as a rule the law requires only the date and certain other data to be made. Hence any other statements would be surplusage. Hubee's Succession, 20 La. Ann. 97; Ferrie *v.* Public Administrator, 4 Bradf. Surr. (N. Y.) 28; Blackburn *v.* Crawford, 3 Wall. (U. S.) 175, 18 L. ed. 186.

The certificate of birth and baptism of a child, showing its presentation for baptism and alleged maternity, does not preclude the testimony of witnesses to the same fact. Jobert *v.* Pitot, 4 La. Ann. 305.

21. Gaines *v.* Green Pond Iron Min. Co., 32 N. J. Eq. 86; Davis *v.* Houston, 2 Yeates (Pa.) 289 [*citing* Goodright *v.* Moss, Cowp. 591].

It is only corroborative, however, and evidence of the father's conduct toward a child tending to prove legitimacy is admissible in derogation of such evidence. Viall *v.* Smith, 6 R. I. 417.

The statement of a priest that no official registry of marriages was kept, but that he kept a private memorandum for himself, and that the alleged marriage did not appear in it; that he was aware that the law imposed a penalty for performing the ceremony without a license; that he never married parties without a license; that he always required the presence of two witnesses; and that he never celebrated a secret marriage between parties living in sin, one or both of whom could only be married on the condition that such marriage was to be kept secret, are admissible on the question of whether or not he ever celebrated a marriage at a certain church between parties living in fornication. Blackburn *v.* Crawford, 3 Wall. (U. S.) 175, 18 L. ed. 186.

22. *District of Columbia.*—U. S. *v.* Bowen, 3 MacArthur (D. C.) 64.

Iowa.— Niles *v.* Sprague, 13 Iowa 198.

Louisiana.— Dejol *v.* Johnson, 12 La. Ann. 853; Eloi *v.* Mader, 1 Rob. (La.) 581, 38 Am. Dec. 192; Tate *v.* Penne, 7 Mart. N. S. (La.) 548.

Maine.— Grant *v.* Mitchell, 83 Me. 23, 21 Atl. 178.

Maryland.— Scanlon *v.* Walshe, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488; Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323.

non-access of the husband,[23] the showing of circumstances from which non-access may be inferred only being allowable.[24] It has been held, however, that the declarations of a mother and putative father are admissible to prove that no lawful marriage has in fact ever taken place, though the proof of such fact would be the bastardizing of the issue.[25] So too declarations of a deceased parent con-

New York.— Matter of Taylor, 9 Paige (N. Y.) 611; Cross *v.* Cross, 3 Paige (N. Y.) 139, 23 Am. Dec. 778.

North Carolina.— Johnson *v.* Chapman, 45 N. C. 213.

Pennsylvania.— Dennison *v.* Page, 29 Pa. St. 420, 72 Am. Dec. 644.

Rhode Island.— *Compare* Viall *v.* Smith, 6 R. I. 417.

Texas.— Simon *v.* State, 31 Tex. Crim. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

Wisconsin.— Shuman *v.* Shuman, 83 Wis. 250, 53 N. W. 455.

United States.—Stegall *v.* Stegall, 2 Brock. (U. S.) 256, 22 Fed. Cas. No. 13,351.

England.— Rex *v.* Luffe, 8 East 193, 9 Rev. Rep. 406; Goodright *v.* Moss, Cowp. 591.

Canada.— Ryan *v.* Miller, 21 U. C. Q. B. 202.

See 6 Cent. Dig. tit. "Bastards," § 8.

Letters from the mother of an illegitimate child to its nurse are admissible for the purpose of showing her assent to its care and disposition, but are inadmissible for the purpose of proving paternity. Matter of Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594. So also has a will, duly executed, though never probated, been admitted to show that plaintiffs therein mentioned by the testator were his natural children. Remy *v.* Municipality, No. 2, 8 La. Ann. 27.

The marriage of a woman with one alleged to be the father of children born to her while living in lawful wedlock with a former husband is not evidence of their illegitimacy, but is admissible after proof of illegitimacy to show paternity. Scanlon *v.* Walshe, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488.

23. *Michigan.*— Egbert *v.* Greenwalt, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260.

New York.— People *v.* Ontario County Ct. Sess., 45 Hun (N. Y.) 54; Cross *v.* Cross, 3 Paige (N. Y.) 139, 23 Am. Dec. 778.

North Carolina.— Boykin *v.* Boykin, 70 N. C. 262, 16 Am. Rep. 776; State *v.* Herman, 35 N. C. 502; State *v.* Wilson, 32 N. C. 131; State *v.* Pettaway, 10 N. C. 623.

Oklahoma.— Bell *v.* Territory, 8 Okla. 75, 56 Pac. 853.

Pennsylvania.— Tioga County *v.* South Creek Tp., 75 Pa. St. 433; Dennison *v.* Page, 29 Pa. St. 420, 72 Am. Dec. 644; Com. *v.* Shepherd, 6 Binn. (Pa.) 283, 6 Am. Dec. 449.

Wisconsin.— Shuman *v.* Shuman, 83 Wis. 250, 53 N. W. 455; Mink *v.* State, 60 Wis. 583, 19 N. W. 445, 50 Am. Rep. 386.

England.— Cope *v.* Cope, 5 C. & P. 604, 1 M. & Rob. 269, 24 E. C. L. 730; Rex *v.* Kea, 11 East 132, 10 Rev. Rep. 448; Rex *v.* Reading, Hardw. Cas. 82 [*cited* in Dennison *v.* Page, 29 Pa. St. 420, 72 Am. Dec. 644]; Pendrell *v.* Pendrell, 2 Str. 925; Rex *v.* Rook, Wils. Exch. 340; 2 Esp. N. P. 66.

Contra.— Cuppy *v.* State, 24 Ind. 389, by statute.

Reason for rule.— In Rex *v.* Luffe, 8 East 193, 202, 9 Rev. Rep. 406, Lord Ellenborough says: "This objection is grounded upon a principle of public policy, which prohibits the wife from being examined against her husband in any matter affecting his interest or character."

The proceedings in an action for divorce, instituted by the husband showing the wife's refusal of intercourse, are not admissible in a subsequent proceeding affecting the property rights of a child begotten during the marriage to bastardize such child. Shuman *v.* Shuman, 83 Wis. 250, 53 N. W. 455. Nor can the husband, in an action for divorce, testify to his non-access with her, thereby bastardizing the issue. Corson *v.* Corson, 44 N. H. 587. To same effect see Chamberlain *v.* People, 23 N. Y. 85, 80 Am. Dec. 255.

Harmless error.— The admission of such evidence is not, however, ground for reversal, where the judges certify that they found the non-access of the husband from evidence of others, and that the testimony of the wife had nothing to do with their finding. Yates *v.* Chippindale, 11 C. B. N. S. 512, 103 E. C. L. 512.

24. Hawes *v.* Draeger, 23 Ch. D. 173, 52 L. J. Ch. 449, 48 L. T. Rep. N. S. 518, 31 Wkly. Rep. 576. See also State *v.* McDowell, 101 N. C. 734, 7 S. E. 785.

Where there is evidence to show non-access of the husband, evidence as to how another man, at whose house the mother was living at and before the birth of the child, treated the latter is admissible to show that he was its father. Woodward *v.* Blue, 107 N. C. 407, 12 S. E. 453, 22 Am. St. Rep. 897, 10 L. R. A. 662.

25. Niles *v.* Sprague, 13 Iowa 198; Barnum *v.* Barnum, 42 Md. 251; Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323; Haddock *v.* Boston, etc., R. Co., 3 Allen (Mass.) 298, 81 Am. Dec. 656; Rex *v.* St. Peter, Burr. Sett. Cas. 25, Bull. N. P. 112; Rex *v.* Bramley, 6 T. R. 330; Standen *v.* Edwards, 1 Yes. Jr. 133. And see Gaines *v.* Green Pond Iron Min. Co., 32 N. J. Eq. 86.

Evidence of the unchastity of the mother during wedlock has by some courts been excluded. Hemmenway *v.* Towner, 1 Allen (Mass.) 209; Warlick *v.* White, 76 N. C. 175; Macbride *v.* Macbride, 4 Esp. 242. In other courts it has been admitted, though alone insufficient for the purpose offered. Grant *v.* Mitchell, 83 Me. 23, 21 Atl. 178; Cross *v.* Cross, 3 Paige (N. Y.) 139, 23 Am. Dec. 778. See also Morris *v.* Swaney, 7 Heisk. (Tenn.) 591. But if such evidence be offered merely as corroborating evidence of non-access it would be admissible. Goss *v.* Froman, 89 Ky. 318, 11 Ky. L. Rep. 631, 12 S. W. 387, S

cerning relationship, birth, or marriage are admissible, though legitimacy or illegitimacy be thereby affected.[26]

3. NEIGHBORHOOD REPUTATION. The general reputation and common report of the neighborhood is generally held to be admissible in questions of legitimacy.[27] But after cohabitation has ceased general reputation as to the nature of such intercourse is not admissible to bastardize the issue.[28]

4. RESEMBLANCE OF CHILD TO PUTATIVE FATHER. Evidence of the resemblance of the child to the putative father has been held competent.[29] And where a mulatto child is born to white parents, evidence that in the course of nature a white man and woman cannot procreate a mulatto is admissible.[30]

D. Sufficiency. Evidence which will rebut the presumption of the legitimacy of issue born in wedlock must be clear and conclusive,[31] suspicions, or

L. R. A. 102, the court, per Bennett, J., saying: "Where access is either expressly or impliedly admitted, such proof is ordinarily inadmissible, unless it is such proof as unquestionably establishes the fact of illegitimacy," as the birth of a mulatto from white parents; "but where the proof shows that the husband is not capable of performing the sexual act, or that the parties have abstained from performing the sexual act, then it is competent to prove adultery on the part of the wife as corroborating the main fact."

26. *Georgia.*—Wright *v.* Hicks, 15 Ga. 160, 60 Am. Dec. 687.

Kansas.— Shorten *v.* Judd, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 587.

Kentucky.— Sale *v.* Crutchfield, 8 Bush (Ky.) 636.

Maryland.— Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752; Barnum *v.* Barnum, 42 Md. 251; Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323.

Massachusetts.— Haddock *v.* Boston, etc., R. Co., 3 Allen (Mass.) 298, 81 Am. Dec. 656.

Pennsylvania.— Kenyon *v.* Ashbridge, 35 Pa. St. 157.

England.— Goodright *v.* Moss, Cowp. 591.

27. *Georgia.*— See Wright *v.* Hicks, 15 Ga. 160, 60 Am. Dec. 687, in which it was held that, while common report of the neighborhood is not admissible, general reputation in the family is.

Iowa.— *Compare* Watson *v.* Richardson, 110 Iowa 673, 80 N. W. 407.

Kentucky.— Sneed *v.* Ewing, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41.

Maryland.— Boone *v.* Purnell, 28 Md. 607, 92 Am. Dec. 713.

Massachusetts.— *Compare* Haddock *v.* Boston, etc., R. Co., 3 Allen (Mass.) 298, 81 Am. Dec. 656.

North Carolina.—*Compare* Erwin *v.* Bailey, 123 N. C. 628, 31 S. E. 844.

South Carolina.— Cooley *v.* Cooley, 58 S. C. 168, 36 S. E. 563.

Tennessee.— Morris *v.* Swaney, 7 Heisk. (Tenn.) 591.

United States.— Stegall *v.* Stegall, 2 Brock. (U. S.) 256, 22 Fed. Cas. No. 13,351.

See 6 Cent. Dig. tit. "Bastards," § 7.

28. Matter of Taylor, 9 Paige (N. Y.) 611. **Evidence that a party was an adulterine bastard,** and therefore could not be lawfully legitimated, is not admissible if such party be a defendant with legal possession. But if the party be a plaintiff seeking to establish his right, such evidence is properly admissible against him. Fletcher's Succession, 11 La. Ann. 59. Or if the parties, in showing their maternal descent, show also their paternal origin, it may be shown in rebuttal that they are adulterine. Peyran's Succession, 11 La. Ann. 694. See also Jobert *v.* Pitot, 4 La. Ann. 305.

29. Wright *v.* Hicks, 15 Ga. 160, 60 Am. Dec. 687; Marr *v.* Marr, 3 U. C. C. P. 36.

As to admissibility in bastardy proceedings see *infra,* VII, K, 3, g.

For this purpose pictures of the putative father or of the illegitimate child are admissible. Matter of Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; Shorten *v.* Judd, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 587.

30. Bullock *v.* Knox, 96 Ala. 195, 11 So. 339; Raby *v.* Batiste, 27 Miss. 731; Watkins *v.* Carlton, 10 Leigh (Va.) 586.

31. *Alabama.*— Bullock *v.* Knox, 96 Ala. 195, 11 So. 339.

Illinois.—Orthwein *v.* Thomas, 127 Ill. 554, 21 N. E. 430, 11 Am. St. Rep. 159, 4 L. R. A. 434.

Louisiana.— Bothick *v.* Bothick, 45 La. Ann. 1382, 14 So. 293.

Massachusetts.— Phillips *v.* Allen, 2 Allen (Mass.) 453.

Minnesota.— Fox *v.* Burke, 31 Minn. 319, 17 N. W. 861.

New York.— Mace *v.* Mace, 24 N. Y. App. Div. 291, 48 N. Y. Suppl. 831; Matter of Seabury, 1 N. Y. App. Div. 231, 37 N. Y. Suppl. 308, 72 N. Y. St. 620 [*affirmed* in 153 N. Y. 443, 47 N. E. 901]; Lavelle *v.* Corrignio, 86 Hun (N. Y.) 135, 33 N. Y. Suppl. 376, 67 N. Y. St. 122.

Ohio.— Sutphin *v.* Cox, 2 Ohio Dec. (Reprint) 90, 1 West. L. Month. 346.

Oklahoma.— Bell *v.* Territory, 8 Okla. 75, 56 Pac. 853.

Pennsylvania.—Pickens' Estate, 163 Pa. St. 14, 29 Atl. 875, 25 L. R. A. 477.

South Carolina.— Wilson *v.* Babb, 18 S. C. 59.

Virginia.—Watkins *v.* Carlton, 10 Leigh (Va.) 586; Bowles *v.* Bingham, 2 Munf. (Va.) 442, 5 Am. Dec. 497.

Wisconsin.—Watts *v.* Owens, 62 Wis. 512, 22 N. W. 728.

England.— Morris *v.* Davies, 5 Cl. & F. 163,

rumors,[32] or improbability of access of the husband being insufficient.[33] Proof of impossibility of paternity, such as impotency of the husband or non-access near the period of conception, is required.[34] Evidence of the wife's adultery while cohabiting with her husband is not enough.[35] For the purpose of sustaining legitimacy a marriage may be inferred from cohabitation, reputation, and other circumstances;[36] though when an actual marriage has been proved such evi-

1 Jur. 911, 7 Eng. Reprint 365; Banbury Peerage Case, 1 Sim. & St. 153, 24 Rev. Rep. 159, 1 Eng. Ch. 153; Goodright *v.* Saul, 4 T. R. 356.

See 6 Cent. Dig. tit. "Bastards," § 10.

A record of an action against deceased for seduction of plaintiff's mother, in which the mother swore she was not married to deceased, and in which judgment was rendered, does not preclude plaintiff from claiming as the legitimate son and only heir of such deceased. Eisenlord *v.* Clum, 126 N. Y. 552, 27 N. E. 1024, 38 N. Y. St. 446, 12 L. R. A. 836 [*reversing* 49 Hun (N. Y.) 340, 2 N. Y. Suppl. 123, 17 N. Y. St. 449]. Nor can a subsequent marriage or acknowledgment be taken as proof of illegitimacy, between contesting heirs. Grant *v.* Mitchell, 83 Me. 23, 21 Atl. 178. Neither does the record of a divorce obtained by the husband for desertion estop a child born during the period of alleged desertion from claiming legitimacy. Kleinert *v.* Ehlers, 38 Pa. St. 439.

32. Caujolle *v.* Ferrié, 26 Barb. (N. Y.) 177 [*affirmed* in 23 N. Y. 90]; Dinkins *v.* Samuel, 10 Rich. (S. C.) 66; Vaughan *v.* Rhodes, 2 McCord (S. C.) 227, 13 Am. Dec. 713.

33. Stegall *v.* Stegall, 2 Brock. (U. S.) 256, 22 Fed. Cas. No. 13,351.

After proof has been given of access of the husband by which, from the laws of nature, he might be the father of the child, no evidence can be received except it tend to falsify the proof that such intercourse had taken place. Banbury Peerage Case, 1 Sim. & St. 153, 24 Rev. Rep. 159, 1 Eng. Ch. 153.

The presumption of access from opportunity is not conclusive but may be rebutted by evidence tending to show non-access. Goss *v.* Froman, 89 Ky. 318, 11 Ky. L. Rep. 631, 12 S. W. 387, 8 L. R. A. 102.

Where one's mother was an Indian, proof that he was a colored man will not be sufficient to overcome the presumption of legitimacy, as the color will be referred to that derived from the mother. Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 315.

34. *Georgia.*— Sullivan *v.* Hugly, 32 Ga. 316; Wright *v.* Hicks, 15 Ga. 160, 60 Am. Dec. 687.

Kentucky.— Goss *v.* Froman, 89 Ky. 318, 11 Ky. L. Rep. 631, 12 S. W. 387, 8 L. R. A. 102.

Louisiana.—Vernon *v.* Vernon, 6 La. Ann. 242.

Mississippi.— Herring *v.* Goodson, 43 Miss. 392.

North Carolina.— State *v.* McDonell, 101 N. C. 734, 7 S. E. 785; State *v.* Rose, 75 N. C. 239; Rhyne *v.* Hoffman, 59 N. C. 335; State *v.* Pettaway, 10 N. C. 623.

Pennsylvania.— Page *v.* Dennison, 1 Grant (Pa.) 377; Com. *v.* Shepherd, 6 Binn. (Pa.) 283, 6 Am. Dec. 449; Com. *v.* Wentz, 1 Ashm. (Pa.) 269.

South Carolina.—State *v.* Shumpert, 1 S. C. 85.

Virginia.— Scott *v.* Hillenberg, 85 Va. 245, 7 S. E. 377; Bowles *v.* Bingham, 2 Munf. (Va.) 442, 5 Am. Dec. 497.

United States.— Patterson *v.* Gaines, 6 How. (U. S.) 550, 12 L. ed. 553.

England.— Cope *v.* Cope, 5 C. & P. 604, 1 M. & Rob. 269, 24 E. C. L. 730; Rex *v.* Luffe, 8 East 193, 9 Rev. Rep. 406; Foxcroft's Case, 1 Rolle Abr. 359 [*cited* in Dennison *v.* Page, 29 Pa. St. 420, 72 Am. Dec. 644]; Banbury Peerage Case, 1 Sim. & St. 153, 24 Rev. Rep. 159, 1 Eng. Ch. 153; Head *v.* Head, 1 L. J. Ch. O. S. 105, 1 Sim. & St. 150, 1 Eng. Ch. 150; Rex *v.* Bedell, 2 Str. 1076; Lomax *v.* Holmden, 2 Str. 940.

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 has access only a fortnight before the birth. Rex *v.* Luffe, 8 East 193, 9 Rev. Rep. 406. To a similar effect see Pendrell *v.* Pendrell, 2 Str. 925; Rex *v.* Lubbenham, 4 T. R. 251.

35. Grant *v.* Mitchell, 83 Me. 23, 21 Atl. 178; Hemmenway *v.* Towner, 1 Allen (Mass.) 209. And although established at about the commencement of the usual period of gestation. Van Aernam *v.* Van Aernam, 1 Barb. Ch. (N. Y.) 375; Cross *v.* Cross, 3 Paige (N. Y.) 139, 23 Am. Dec. 778; Bury *v.* Phillpot, 2 Myl. & K. 349, 7 Eng. Ch. 349.

"Access is such access as affords an opportunity of sexual intercourse; and where the fact of such access between a husband and wife, within a period capable of raising the legal inference as to the legitimacy of an after-born child, is not disputed, probabilities can have no weight; . . . If it were proved that she slept every night with her paramour from the period of her separation from her husband, I must still declare the children to be legitimate. The interest of the public depends upon a strict adherence to the rule of law." Bury *v.* Phillpot, 2 Myl. & K. 349, 352, 7 Eng. Ch. 349.

36. Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 315; Caujolle *v.* Ferrié, 23 N. Y. 90 [*affirming* 26 Barb. (N. Y.) 177]; Clayton *v.* Wardell, 5 Barb. (N. Y.) 214 [*affirmed* in 4 N. Y. 230]; Kaise *v.* Lawson, 38 Tex. 160; and, generally, MARRIAGE.

Mere rumor of illegitimacy is not sufficient to require proof of marriage. Strode *v.* Magowan, 2 Bush (Ky.) 621.

dence is not sufficient to establish a prior subsisting marriage of one of the parties.[37]

III. LEGITIMATION.

A. Definition. Legitimation is the act of changing the status of a bastard to that of a lawfully born child.[38]

B. At Common Law. Under the common law a bastard could be legitimated only by a special act of parliament.[39]

C. By Statute — 1. In General. The legislative power to legitimate a bastard child has long been recognized both in England and in the United States.[40]

2. Issue of Void Marriage. Statutes in many states provide that the issue of null and void marriages shall nevertheless be deemed to be legitimate,[41] especially

37. Clayton *v.* Wardell, 5 Barb. (N. Y.) 214 [*affirmed* in 4 N. Y. 230].

Proof that a father always treated witness and her sister as his daughters, and that he called the sister's children his grandchildren and they called him grandfather does not establish the sister's paternity. Badillo *v.* Tio, 6 La. Ann. 129.

38. Abbott L. Dict.

Other definitions are: Act of giving the character of legitimate children to those who are not so born. Bouvier L. Dict.

A fiction of the law whereby one born out of wedlock is considered the offspring of the marriage between the parents. Caballero's Succession, 24 La. Ann. 573.

Changing the civil status of a bastard to the status of a lawful child. Anderson L. Dict.

Distinguished from adoption.— Adoption properly considered refers to persons who are strangers in blood; legitimation to persons where the blood relation exists. Blythe *v.* Ayres, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40. See also, generally, Adoption, 1 Cyc. 914.

39. Beall *v.* Beall, 8 Ga. 210; Brock *v.* State, 85 Ind. 397; Swanson *v.* Swanson, 2 Swan (Tenn.) 445; 2 Kent Comm. 209; 1 Bl. Comm. 459.

History of legislation.— An act of parliament in the fourteenth century legitimating the three sons and a daughter of John of Gaunt, begotten of Catharine Swynford, a governess of his children, seems to be the beginning of such enactments, but history records many other acts of legitimation in the two succeeding centuries. McGunnigle *v.* McKee, 77 Pa. St. 81, 18 Am. Rep. 428. The process of legitimating by special act was frequently resorted to in the United States, though by the intervention of general statutes such special legislation became much less frequent and unnecessary. See Beall *v.* Beall, 8 Ga. 210; Lee *v.* Shankle, 51 N. C. 313; Swanson *v.* Swanson, 2 Swan (Tenn.) 445.

"By the Roman law there are two modes by which children illegitimate by birth may be rendered legitimate. The one is *per subsequens matrimonium* — the other *rescripto principiis*; by the subsequent marriage of the parents, or by the letters of the sovereign." Swanson *v.* Swanson, 2 Swan (Tenn.) 445, 453.

40. *Georgia.*— Beall *v.* Beall, 8 Ga. 210.

New York.— Miller *v.* Miller, 91 N. Y. 315, 43 Am. Rep. 669.

Pennsylvania.— McGunnigle *v.* McKee, 77 Pa. St. 81, 18 Am. Rep. 428.

Tennessee.— Swanson *v.* Swanson, 2 Swan (Tenn.) 445.

United States.— Brewer *v.* Blougher, 14 Pet. (U. S.) 178, 10 L. ed. 408, where the court held a statute of Maryland declaring illegitimate children capable of inheriting from their mother to extend to those begotten in incestuous connection.

Establishment of paternity by implication. —A statute stating certain children to be the illegitimate offspring of one Perry, changed their name to Perry and declared them "legitimated and made capable to inherit in as full and ample a manner as if born in lawful wedlock," by necessary implication legitimated them as the children of Perry. Perry *v.* Newsom, 36 N. C. 28. But see Edmondson *v.* Dyson, 7 Ga. 512, where upon almost precisely the same state of facts a different view was held. A statute, however, giving capacity to the mother and her illegitimate child to inherit from each other as next of kin and heirs, does not legitimate such child in the sense that its mother's brothers and sisters can take its property as next of kin to the mother after it (the child) dies intestate. Such property escheats to the state. Grubb's Appeal, 58 Pa. St. 55. See also Neil's Appeal, 92 Pa. St. 193.

41. *Arizona.*— *In re* Walker, (Ariz. 1896) 46 Pac. 67.

California.— Graham *v.* Bennet, 2 Cal. 503.

Kansas.— Brown *v.* Belmarde, 3 Kan. 35.

Kentucky.— Leonard *v.* Braswell, 99 Ky. 528, 18 Ky. L. Rep. 395, 36 S. W. 684, 36 L. R. A. 707; Harris *v.* Harris, 85 Ky. 49, 8 Ky. L. Rep. 727, 2 S. W. 549; Sneed *v.* Ewing, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41; Swinney *v.* Klippert, 20 Ky. L. Rep. 2014, 50 S. W. 841; Workman *v.* Harold, 8 Ky. L. Rep. 605, 2 S. W. 679.

Missouri.— Green *v.* Green, 126 Mo. 17, 28 S. W. 752, 1008; Dyer *v.* Brannock, 66 Mo. 391, 27 Am. Rep. 359; Buchanan *v.* Harvey, 35 Mo. 276; Lincecum *v.* Lincecum, 3 Mo. 441; Pratt *v.* Pratt, 5 Mo. App. 539.

Ohio.—Wright *v.* Lore, 12 Ohio St. 619.

Texas.— Hartwell *v.* Jackson, 7 Tex. 576.

Virginia.— Heckert *v.* Hile, 90 Va. 390, 18 S. E. 841; Greenhow *v.* James, 80 Va. 636, 56 Am. Rep. 603.

in cases where such marriages were contracted in good faith by the parties thereto.[42]

3. Recognition or Acknowledgment — a. In General. In some states a child may be legitimated by the recognition or acknowledgment of it by the putative father as his own. The usual requirement of such legitimation is that the recognition or acknowledgment be general and notorious or in writing.[43]

b. Sufficiency of Recognition or Acknowledgment — (i) *In Pais.* While one may by his acts be held to have sufficiently recognized a child to legitimate it,[44] loose acts of occasional recognition,[45] or an occasional apparent recognition during the first years of the child's life at the home of its foster parents have been held insufficient.[46] Where a public acknowledgment and

Wisconsin.— Watts *v.* Owens, 62 Wis. 512, 22 N. W. 728.

United States.— McCalla *v.* Bane, 45 Fed. 828, construing Oregon statute.

Exception in statutes.— In some states an exception to this general rule is made excluding the issue of incestuous marriages, or of those between persons of different color. *In re* Walker, (Ariz. 1896) 46 Pac. 67; Harris *v.* Harris, 85 Ky. 49, 8 Ky. L. Rep. 727, 2 S. W. 549.

Necessity of decree.— In Missouri, where the statute provides that the issue of all marriages decreed null in law shall be legitimate, a decree annulling the marriage is not necessary in order to legitimate the children, there being evidence which would justify such annulment. Green *v.* Green, 126 Mo. 17, 28 S. W. 752, 1008.

The reason for the nullity of the marriage is immaterial so far as the legitimacy of the offspring, by virtue of the statute, is concerned. The fact that a former subsisting marriage of one of the parties is the cause of its invalidity is no defense. Swinney *v.* Klippert, 20 Ky. L. Rep. 2014, 50 S. W. 841; Workman *v.* Harold, 8 Ky. L. Rep. 605, 2 S. W. 679; Wright *v.* Lore, 12 Ohio St. 619; Heckert *v.* Hile, 90 Va. 390, 18 S. E. 841.

42. *Kentucky.*— Harris *v.* Harris, 85 Ky. 49, 8 Ky. L. Rep. 727, 2 S. W. 549.

Louisiana.— Harrington *v.* Barfield, 30 La. Ann. 1297; Navarro's Succession, 24 La. Ann. 298; Patton *v.* Philadelphia, 1 La. Ann. 98.

Massachusetts.— Glass *v.* Glass, 114 Mass. 563.

Missouri.— Green *v.* Green, 126 Mo. 17, 28 S. W. 752, 1008.

Texas.— Lee *v.* Smith, 18 Tex. 141.

Washington.— Kelley *v.* Kitsap County, 5 Wash. 521, 32 Pac. 554.

United States.— Gaines *v.* Hennen, 24 How. (U. S.) 553, 16 L. ed. 770, construing Louisiana code.

See 6 Cent. Dig. tit. "Bastards," § 3.

A sufficient reason for believing a former husband dead would arise if he had been absent and unheard from for seven years after starting on a whaling expedition. Glass *v.* Glass, 114 Mass. 563.

43. Matter of Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; Watson *v.* Richardson, 110 Iowa 673, 80 N. W. 407; Markey *v.* Markey, 108 Iowa 373, 79 N. W. 258; Blair *v.* Howell, 68 Iowa 619, 28 N. W. 199.

Consent of mother.— In California the consent of the mother is not necessary to an adoption of an illegitimate child by its father by acts of recognition, etc., without legal proceedings. Matter of Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594.

Minor child.— Cal. Civ. Code, § 230, providing for legitimating an illegitimate child by acts of the father, applies only to illegitimate minor children. Matter of Pico, 52 Cal. 84.

When such acknowledgment is once properly made it is conclusive upon the father. Binns *v.* Dazey, 147 Ind. 536, 44 N. E. 644.

44. Bailey *v.* Harshman, 60 Ind. 273; Bailey *v.* Boyd, 59 Ind. 292; Blair *v.* Howell, 68 Iowa 619, 28 N. W. 199.

45. Sharboro's Estate, Myr. Prob. (Cal.) 255.

Statements by the putative father that he had a boy somewhere whose mother he had ruined and that he intended to send her money do not constitute general and notorious recognition. McCorkendale *v.* McCorkendale, 111 Iowa 314, 82 N. W. 754. See also Duncan *v.* Pope, 47 Ga. 445.

46. Watson *v.* Richardson, 110 Iowa 673, 80 N. W. 407.

The degree of public recognition required is not satisfied by evidence that plaintiff was reared at the home of deceased in Ireland when not employed elsewhere until he reached the age of ninete n or twenty, when he came to the United States at the expense of deceased and went to his home, where he remained for two years, that deceased provided for him, collected his wages, and introduced him as his son to some few persons. Markey *v.* Markey, 108 Iowa 373, 79 N. W. 258. But see Alston *v.* Alston, (Iowa 1901) 86 N. W. 55, in which it appeared that a putative father visited plaintiff on various occasions, spoke to him as his son, and was addressed by him as a son would address a father. The father often referred to him as his son, placed him with a family for adoption, and not long before his death gave him a farm of one hundred and twenty acres, for the expressed consideration of one dollar. It was held sufficient to show that the father generally and notoriously recognized the son as such.

reception into one's family is required the public acknowledgment alone is insufficient.[47]

(II) *In Writing.* The sufficiency of a writing to constitute an acknowledgment must be determined by the statutes of the particular state. In some jurisdictions it has been held that the writing must be made for such express purpose, and be in strict compliance with the statute.[48] In other jurisdictions a collateral writing is sufficient,[49] and it need not appear on the face of such papers that the child is the father's illegitimate offspring.[50]

c. What Law Governs. The sufficiency of the acts of a father to constitute legitimation is determined by the laws of his domicile and not of the child's.[51]

4. Subsequent Marriage of Parents. The civil and canon law, in contradistinction to the common law, allowed the subsequent marriage of the parents to legitimate previously born issue,[52] and the statutes of the different states, in

47. Garner *v.* Judd, (Cal. 1901) 64 Pac. 1076.

An acknowledgment of the child by the father is not sufficient where the statute provides a different method of legitimation which has not been complied with. Willoughby *v.* Motley, 83 Ky. 297, 7 Ky. L. Rep. 259.

It is not necessary that the father shall have recognized the illegitimate as entitled to inherit, but only that he shall recognize him as his child. The rights and privileges of legitimacy necessarily follow. Alston *v.* Alston, (Iowa 1901) 86 N. W. 55. See also Matter of Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; Van Horn *v.* Van Horn, 107 Iowa 247, 77 N. W. 846, 45 L. R. A. 93; Starr *v.* Peck, 1 Hill (N. Y.) 270; and *infra*, III, D.

By the Spanish law proof of birth is equivalent to an acknowledgment by the mother of natural children, and proof of cohabitation with her as sole concubine equal to an acknowledgment of paternity. Lange *v.* Richoux, 6 La. 560.

48. Watson *v.* Richardson, 110 Iowa 673, 80 N. W. 407; Dupre *v.* Caruthers, 6 La. Ann. 156; Liautaud *v.* Baptiste, 3 Rob. (La.) 441; Hunt *v.* Hunt, 37 Me. 333; Childress *v.* Cutter, 16 Mo. 24.

Illustrations.— A letter by a father of illegitimate children to their mother, with whom he was living, requesting her to "kiss our boys for me" was held a sufficient recognition in writing to establish their heirship. Brown *v.* Iowa L. of H., 107 Iowa 439, 78 N. W. 73. See also Crane *v.* Crane, 31 Iowa 296. But a contract signed by decedent and a nurse, wherein the nurse agreed to nurse "a female child" of decedent, and that decedent "can take his creature whenever he pleases" was held to be an insufficient recognition. Sandford's Estate, 4 Cal. 12. Likewise a letter from deceased to a young man referring to the latter as "my boy" and "my son" and to himself as "his father" and a list of school children in a school district, sworn to by deceased with the name of deceased opposite the young man's name in the column for the names of "parent or guardian" is an insufficient acknowledgment under the laws of Nebraska. Lind *v.* Burke, 56 Nebr. 785, 77 N. W. 444. So the mere joining of the words "my daughter" to the name of the child in a will does not raise the presumption that it was the intention of the father to elevate an illegitimate child to the condition of his heir. Pina *v.* Peck, 31 Cal. 359.

Form of acknowledgment is set out in Llula's Succession, 41 La. Ann. 87, 6 So. 555.

49. Matter of Rohrer, 22 Wash. 151, 60 Pac. 122, 50 L. R. A. 350, where the statute which required that the writing be signed in the presence of competent witnesses was held to be duly complied with when deceased, a few years before, had, before a notary, duly certified that plaintiff was his daughter, in prosecuting a party for her seduction. See also Matter of Blythe, 110 Cal. 229, 42 Pac. 642, where it was held that the witnesses to such writing need not subscribe the same. Thus where the putative father wrote letters to one, addressing her as "My darling child" and signing himself "From your loving father" and also wrote her grandfather with reference to having her baptized and christened with his name, such acts constituted a complete acknowledgment.

50. Matter of Gregory, 13 Misc. (N. Y.) 363, 35 N. Y. Suppl. 105, 69 N. Y. St. 478. *Contra*, Pina *v.* Peck, 31 Cal. 359.

A public will acknowledging a natural child, though void for informality, has been held good as an acknowledgment of paternity. Remy *v.* Municipality No. 2, 11 La. Ann. 148; Sterlin *v.* Gros, 5 La. 100. See also Jones *v.* Hunter, 6 Rob. (La.) 235.

51. Blythe *v.* Ayres, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40.

52. 1 Burge Colonial Law 92 [*cited* in Swanson *v.* Swanson, 2 Swan (Tenn.) 445]; Brock *v.* State, 85 Ind. 397; Brewer *v.* Hamor, 83 Me. 251, 22 Atl. 161; Ross *v.* Ross, 129 Mass. 243, 37 Am. Rep. 321.

Comparison of canon and common law.— "The civil and canon laws do not allow a child to remain a bastard, if the parents afterward intermarry; and herein they differ most materially from our law, which . . . makes it an indispensable condition, to make it legitimate, that it shall be born after lawful wedlock. And the reason of our English law is surely much superior to that of the Roman if we consider the principal end and

mitigating the severity of the common law, have generally adopted this principle.[53] These statutes, being remedial, are held to operate in a retrospective sense to the extent of legitimating those whose parents had married before the passage of the act,[54] but have been held not to affect the property relations of husband and wife.[55]

design of establishing the contract of marriage which end and design is to ascertain and fix upon some certain person to whom the care, the protection, the maintenance, and the education of the children should belong, this end is undoubtedly better answered by legitimating all issue born after wedlock. . . . 1. Because of the very great uncertainty there will generally be in the proof that the issue was generally begotten by the same man, whereas by confining the proof to the birth and not to the begetting, our law has rendered it perfectly certain what child is legitimate and who is to take care of the child. 2. Because by the Roman Law a child may be continued a bastard or made legitimate at the option of the father and mother by a marriage *ex post facto*, thereby opening a door to many frauds and partialities, which by our law are prevented. 3. Because by those laws a man may remain a bastard till forty years of age, and then become legitimate by the subsequent marriage of his parents whereby the main end of marriage, the protection of infants, is totally frustrated. 4. Because this rule of the Roman Law admits of no limitations as to the time or number of bastards so to be legitimated. . . . whereas our constitutions guard against this indecency, and at the same time give sufficient allowance to the frailties of human nature . . . by allowing a child begotten before wedlock to be legitimate if the parties but marry before its birth." 1 Bl. Comm. 445 [*cited* in *In re* Goodman, 17 Ch. D. 266, 50 L. J. Ch. 425, 44 L. T. Rep. N. S. 527, 29 Wkly. Rep. 586].

53. *Alabama.*— Butler *v.* Elyton Land Co., 84 Ala. 384, 4 So. 675; Hunter *v.* Whitworth, 9 Ala. 965.

Indiana.— Binns *v.* Dazey, 147 Ind. 536, 44 N. E. 644; Brock *v.* State, 85 Ind. 397.

Kentucky.— Dannelli *v.* Dannelli, 4 Bush (Ky.) 51; Jackson *v.* Moore, 8 Dana (Ky.) 170. But see Sams *v.* Sams, 85 Ky. 396, 9 Ky. L. Rep. 24, 3 S. W. 593, holding that the statute does not apply to children of a married man begotten and born of another woman than his wife during his wife's life.

Louisiana.— Colwell's Succession, 34 La. Ann. 265; Hart *v.* Hoss, 26 La. Ann. 90.

Maine.— Brewer *v.* Hamor, 83 Me. 251, 22 Atl. 161.

Maryland.— Hawbecker *v.* Hawbecker, 43 Md. 516, holding that the statute is not limited to the children of those who are capable of contracting lawful marriage, but extends to the issue of an adulterous connection.

Massachusetts.— Adams *v.* Adams, 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275 (holding, however, that the marriage must in every respect be valid); Monson *v.* Palmer, 8 Allen (Mass.) 551.

New York.— Wissel *v.* Ott, 34 N. Y. App. Div. 159, 54 N. Y. Suppl. 605; Townsend *v.* Van Buskirk, 33 Misc. (N. Y.) 287, 68 N. Y. Suppl. 512; Davis *v.* Davis, 27 Misc. (N. Y.) 455, 59 N. Y. Suppl. 223.

Ohio.— Ives *v.* McNicoll, 59 Ohio St. 402, 53 N. E. 60, 69 Am. St. Rep. 780, 43 L. R. A. 772 [*affirming* 12 Ohio Cir. Ct. 297]; Sutphin *v.* Cox, 2 Ohio Dec. (Reprint) 90, 1 West. L. Month. 346.

Pennsylvania.— *In re* Oliver, 184 Pa. St. 306, 39 Atl. 72; McGunnigle *v.* McKee, 77 Pa. St. 81, 18 Am. Rep. 428. See also Adam's Estate, 6 Pa. Co. Ct. 591.

Texas.— Carroll *v.* Carroll, 20 Tex. 731; Nichols *v.* Stewart, 15 Tex. 226.

Vermont.— Rockingham *v.* Mt. Holly, 26 Vt. 653.

Virginia.— Greenhow *v.* James, 80 Va. 636, 56 Am. Rep. 603; Sleigh *v.* Strider, 5 Call (Va.) 439.

United States.— *In re* Matthias, 63 Fed. 523; McCalla *v.* Bane, 45 Fed. 828; U. S. *v.* Skam, 5 Cranch C. C. (U. S.) 367, 27 Fed. Cas. No. 16,308, construing Maryland statute.

See 6 Cent. Dig. tit. "Bastards," § 14.

Under a statute providing for the legitimation of the issue by the subsequent marriage and cohabitation of the parties it was shown that the parents of a bastard were married but subsequently separated by agreement; that the father visited the wife some four or eight times, remaining with her from Sunday until Monday on each occasion, and frequently recognized the child as his. After six months the visits ceased and the parties were divorced. The "cohabitation" was held sufficient to legitimate the offspring. Clauer's Appeal, 11 Wkly. Notes Cas. (Pa.) 427.

54. Brower *v.* Bowers, 1 Abb. Dec. (N. Y.) 214; Sleigh *v.* Strider, 3 Hen. & M. (Va.) 229 note, 5 Call (Va.) 439. But see Morgan *v.* Perry, 51 N. H. 559, holding that a statute providing that "where the parents of children born before marriage afterward intermarry and recognize such children as their own, such children shall . . . be deemed legitimate," did not legitimate a son who was born and whose parents intermarried before the passage of the act. See also Stevenson *v.* Sullivant, 5 Wheat. (U. S.) 207, 5 L. ed. 70, holding that where recognition by the father, in connection with a marriage of the parties, is declared to be necessary to legitimate the issue, some recognition must be made after the passage of the act to render it operative. Hence where the father died before the passage of the act his previous recognition was insufficient.

55. Hatch *v.* Ferguson, 68 Fed. 43, 15 C. C. A. 201, 33 L. R. A. 759. Nor will it apply when the estate which the child, who was born and died before the passage of the act, claimed had no existence until after the repeal of the act. Brown *v.* Belmarde, 3 Kan. 35.

5. JUDICIAL PROCEEDINGS. In some states proceedings may be instituted to obtain a judicial declaration of legitimacy.[56]

D. Effect of Legitimation. In the absence of restrictions in the statute legitimation places an illegitimate child, so far as inheritable blood is concerned, on the same footing as offspring born in lawful wedlock.[57] But an estate that has already descended to the legal heir cannot be divested and given to a bastard by a subsequent act of legitimation.[58]

IV. REPUDIATION OF LEGITIMACY.

The right to disavow or repudiate a child, where legitimacy is presumed, is peculiar to the father and must be exercised by him or his heirs within the prescribed time.[59] Such disavowal must be by a judicial proceeding to which the child is a party.[60]

56. Henderson *v.* Shiflett, 105 Ga. 303, 31 S. E. 186; Craige *v.* Neely, 51 N. C. 170; Murphy *v.* Portrum, 95 Tenn. 605, 32 S. W. 633, 30 L. R. A. 263; McReynolds *v.* McCallie, 1 Lea (Tenn.) 260.

Requisites of petition.— A petition to establish legitimacy should show strong circumstances tending to such fact and be supported by depositions. Stegall *v.* Stegall, 2 Brock. (U. S.) 256, 22 Fed. Cas. No. 13,351. A petition to have a party declared illegitimate should not only positively aver his illegitimacy but also that there was no antenuptial conception. Wright *v.* Hicks, 15 Ga. 160, 60 Am. Dec. 687.

Objections to petition.— The mother has a right to file objections to a petition brought by the father for such purpose. Henderson *v.* Shiflett, 105 Ga. 303, 31 S. E. 186.

Conclusiveness of decree.— The finding of a probate (Blackburn *v.* Crawford, 3 Wall. (U. S.) 175, 18 L. ed. 186) or county or superior court upon the question of legitimacy is conclusive between the parties (Craige *v.* Neely, 51 N. C. 170).

57. *California.*— Matter of Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1025, 6 L. R. A. 594.

Georgia.— See Hicks *v.* Smith, 94 Ga. 809, 22 S. E. 153.

Illinois.— Elder *v.* Bales, 127 Ill. 425, 21 N. E. 621.

Indiana.— Harvey *v.* Ball, 32 Ind. 98.

Iowa.— Crane *v.* Crane, 31 Iowa 296.

Kentucky.— Jackson *v.* Moore, 8 Dana (Ky.) 170. See also Drain *v.* Violett, 2 Bush (Ky.) 155.

Louisiana.— Natural children, unlike legitimate issue, are not seized of the ancestor's estate at his death, but have only a right to sue for possession on a proper showing of their status. Castagnie *v.* Bouliris, 43 La. Ann. 943, 10 So. 1; Fletcher's Succession, 11 La. Ann. 59. And when legitimated otherwise than by a subsequent marriage of their parents they have not the right of forced heirs. Marionneaux *v.* Dupuy, 48 La. Ann. 496, 19 So. 466.

Maine.— Brewer *v.* Hamor, 83 Me. 251, 22 Atl. 161. See also Lyon *v.* Lyon, 88 Me. 395, 34 Atl. 180.

Massachusetts.— Ross *v.* Ross, 129 Mass. 243, 37 Am. Rep. 321; Monson *v.* Palmer, 8 Allen (Mass.) 551.

North Carolina.— *Compare* King *v.* Davis, 91 N. C. 142. See also Lee *v.* Shankle, 51 N. C. 313.

Ohio.— Kniffin *v.* Schaffer, 12 Ohio Cir. Ct. 753, 4 Ohio Cir. Dec. 62.

Pennsylvania.— McGunnigle *v.* McKee, 77 Pa. St. 81, 18 Am. Rep. 428; Com. *v.* Stump, 53 Pa. St. 132, 91 Am. Dec. 198; Miller's Appeal, 52 Pa. St. 113; Killam *v.* Killam, 39 Pa. St. 120.

Tennessee.— McKamie *v.* Baskerville, 86 Tenn. 459, 7 S. W. 194; Williams *v.* Williams, 11 Lea (Tenn.) 652; Swanson *v.* Swanson, 2 Swan (Tenn.) 445. *Compare* Murphy *v.* Portrum, 95 Tenn. 605, 32 S. W. 633, 30 L. R. A. 263.

Texas.— Carroll *v.* Carroll, 20 Tex. 731.

Vermont.— See Safford *v.* Houghton, 48 Vt. 236; Moore *v.* Moore, 35 Vt. 98.

Virginia.— Ash *v.* Way, 2 Gratt. (Va.) 203; Stones *v.* Keeling, 3 Hen. & M. (Va.) 228 note, 5 Call (Va.) 143.

England.— Brown *v.* McDouall, 7 Cl. & F. 817, 7 Eng. Reprint 1279.

See 6 Cent. Dig. tit. "Bastards," §§ 263, 264.

58. Ferrie *v.* Public Administrator, 3 Bradf. Surr. (N. Y.) 249; Killam *v.* Killam, 39 Pa. St. 120; Norman *v.* Heist, 5 Watts & S. (Pa.) 171, 40 Am. Dec. 493.

59. McNeely *v.* McNeely, 47 La. Ann. 1321, 17 So. 928; Saloy's Succession, 44 La. Ann. 433, 10 So. 872; Dejol *v.* Johnson, 12 La. Ann. 853; Eloi *v.* Mader, 1 Rob. (La.) 581, 38 Am. Dec. 192.

Estoppel.— One may by his own conduct be estopped from denying the legitimacy of his issue. Thus, where the reputed father of a child introduced the mother as his wife and the child as his son, he will not be permitted to afterward bastardize such issue. Green *v.* Green, 14 La. Ann. 39.

Self-repudiation.— One born in marriage will not be allowed to repudiate his own legitimacy. Eloi *v.* Mader, 1 Rob. (La.) 581, 38 Am. Dec. 192.

60. Saloy's Succession, 44 La. Ann. 433, 10 So. 872; Dejol *v.* Johnson, 12 La. Ann. 853.

Collateral proceeding.— Children cannot be bastardized in a collateral proceeding by showing the voidability of the marriage of their parents. Niles *v.* Sprague, 13 Iowa 198.

V. CUSTODY AND SUPPORT.

A. Right to Custody — 1. RIGHT OF MOTHER. The mother's right, as natural guardian, to the custody and control of a bastard is superior to that of any one else.[61] She cannot be deprived of such right by an appointment by the court of another guardian, unless she be given previous notice of the intended action.[62] The mother may, however, defeat her right to the custody by ill treatment or abuse of the child.[63]

2. RIGHT OF FATHER. The putative father of a bastard is entitled to its custody against all but the mother.[64] On legitimation the child is subject to the custody

61. *Georgia.*— Alfred *v.* McKay, 36 Ga. 440, holding that without legal reason the ordinary cannot apprentice the child to another.

Illinois.— *Compare* Wright *v.* Bennett, 7 Ill. 587.

Indiana.— Copeland *v.* State, 60 Ind. 394; Dalton *v.* State, 6 Blackf. (Ind.) 357.

Iowa.— Pratt *v.* Nitz, 48 Iowa 33.

Kentucky.— Baker *v.* Winfrey, 15 B. Mon. (Ky.) 499.

Louisiana.— Acosta *v.* Robin, 7 Mart. N. S. (La.) 387.

Massachusetts.— Petersham *v.* Dana, 12 Mass. 429; Somerset *v.* Dighton, 12 Mass. 383.

Minnesota.— Olson *v.* Johnson, 23 Minn. 301.

New Hampshire.— Hudson *v.* Hills, 8 N. H. 417.

New Jersey.—Friesner *v.* Symonds, 46 N. J. Eq. 521, 20 Atl. 257.

New Mexico.— Bustamento *v.* Analla, 1 N. M. 255.

New York.— Robalina *v.* Armstrong, 15 Barb. (N. Y.) 247; People *v.* Kling, 6 Barb. (N. Y.) 366; Carpenter *v.* Whitman, 15 Johns. (N. Y.) 208; People *v.* Landt, 2 Johns. (N. Y.) 375; Matter of Doyle, 1 Clarke (N. Y.) 154.

Pennsylvania.— Com. *v.* Fee, 6 Serg. & R. (Pa.) 255.

Tennessee.— Lawson *v.* Scott, 1 Yerg. (Tenn.) 92.

Texas.— Timmins *v.* Lacy, 30 Tex. 115.

England.— Rex *v.* Hopkins, 7 East 579, 3 Smith K. B. 577, 8 Rev. Rep. 686; Rex *v.* Moseley, 5 East 224 note, 7 Rev. Rep. 695; Rex *v.* Soper, 5 T. R. 278.

See 6 Cent. Dig. tit. "Bastards," § 19.

In legal contemplation a bastard is generally considered as the relative of no one, but to provide for his support and education the mother has a right to the custody and control of him, and is bound to maintain him, as his natural guardian. In a moral view he is considered the child of his mother so far that their intermarriage is unlawful, and any sexual intercourse between them would be incestuous. Parsons, C. J., in Wright *v.* Wright, 2 Mass. 109.

62. Dalton *v.* State, 6 Blackf. (Ind.) 357, holding further that a gift of the child would not deprive her of her right to its subsequent custody.

A written surrender of all her rights of custody to one who educates and provides for the child will not preclude the court from appointing another guardian with the mother's consent. Gloucester *v.* Page, 105 Mass. 231. The court may, however, under such circumstances decline to interfere. Reg. *v.* Armstrong, 1 Ont. Pr. 6. See also Matter of Bush, 47 Kan. 264, 27 Pac. 1003, holding that custody will not be granted to a mother upon a showing that she was under eighteen years of age when she assented to the child's adoption and has since married, where it appears that the adoptive parents have become greatly attached to the child and are furnishing it a reasonably good home.

63. Bustamento *v.* Analla, 1 N. M. 255; People *v.* Kling, 6 Barb. (N. Y.) 366; People *v.* Landt, 2 Johns. (N. Y.) 375; *In re* Holeshed, 5 Ont. Pr. 251.

The best interests of the child will always be considered by the court where the legal right to custody is not fully and satisfactorily established, or where the court conceives the party to whom the custody should properly be given an unfit person for such a charge. Matter of Nofsinger, 25 Mo. App. 116; People *v.* Kling, 6 Barb. (N. Y.) 366; *In re* Holeshed, 5 Ont. Pr. 251. See also Dodge County *v.* Kermnitz, 32 Nebr. 238, 49 N. W. 226, 38 Nebr. 554, 57 N. W. 385. If the child is of sufficient age to understandingly choose the custody it desires the court may, in its discretion, submit her disposition to her own choosing, and will not allow such choice to be disturbed by a displeased parent. *In re* Lloyd, 3 M. & G. 547, 5 Jur. 1198, 4 Scott N. R. 200, 42 E. C. L. 288.

64. Pote's Appeal, 106 Pa. St. 574, 51 Am. Rep. 540; Com. *v.* Anderson, 1 Ashm. (Pa.) 55; Rex *v.* Cornforth, 2 Str. 1162; O'Rourke *v.* Campbell, 13 Ont. 563. See also Adams *v.* Adams, 50 Vt. 158, holding that a putative father, who has paid a judgment against himself for breach of his bond to a town for the support of a child, and has taken such child with the authority of the selectmen, has the right to its custody as against the overseers of the poor.

Hence the father cannot bind him as an apprentice without the mother's consent. Timmins *v.* Lacy, 30 Tex. 115. See also APPRENTICES, III, A, 2 [3 Cyc. 543].

Right of third persons.— A surety on a bond given to indemnify a town for the support of a bastard child has no right to the custody of such child. Falls *v.* Belknap, 1 Johns. (N. Y.) 486. But a duly appointed guardian is entitled to a bastard's custody, notwithstanding the mother in her lifetime

and control of the father to the same extent as in the case of a legitimate child.[65]

B. Duty to Support — 1. Duty of Father. In the absence of statutory regulations the father is under no legal obligation to support his illegitimate child.[66] His statutory liability, which is perhaps universal,[67] rests upon the fact that he is the father,[68] and can be enforced only to the extent[69] and in the manner indicated by the statute.[70]

2. Duty of Mother. At common law there was no liability on the part of a mother to maintain her illegitimate child.[71] In the United States the duty seems to be inferred as incidental to her guardianship of the child.[72]

3. Duty of Municipal Authorities. A bastard may become a public charge.[73]

C. Contracts For Support — 1. Implied Contracts. The father of a bastard child cannot be charged with an implied promise for its support.[74] But if he

intrusted the child to another with whom she desired it to remain till its majority. And the illiteracy of the guardian, the desire of the child, and its good treatment by the other party are no defense to the action to procure its custody. Johns *v.* Emmert, 62 Ind. 533. See also *In re* Smith, 8 Ont. Pr. 23, wherein the court refused to order the removal of a child from a Protestant institution to that of a Roman Catholic, it having been consigned by the mother to the former, though just before her death she requested that it be transferred to the latter.

65. Graham *v.* Bennet, 2 Cal. 503; Adams *v.* Adams, 36 Ga. 236; Matter of Celina, 7 La. Ann. 162. But see Lawson *v.* Scott, 1 Yerg. (Tenn.) 92, holding that the legitimating of a child by the court, at the instance of the father, does not entitle him to the custody, if the mother is able and willing to support the child.

An order of filiation, declaring the paternity of a child and making an order against the putative father for its support, does not entitle him to its custody. Rex *v.* Soper, 5 T. R. 278.

66. *Alabama.*— Simmons *v.* Bull, 21 Ala. 501, 56 Am. Dec. 257.

Illinois.— Glidden *v.* Nelson, 15 Ill. App. 297.

Indiana.— Marlett *v.* Wilson, 30 Ind. 240.

Ohio.— Moore *v.* Baughman, 8 Ohio S. & C. Pl. Dec. 396, 7 Ohio N. P. 149.

England.— Cameron *v.* Baker, 1 C. & P. 268, 12 E. C. L. 161; Furillio *v.* Crowther, 7 D. & R. 612, 29 Rev. Rep. 467, 16 E. C. L. 302.

See 6 Cent. Dig. tit. "Bastards," § 22.

67. See *infra*, VII, B.

68. State *v.* Lavin, 80 Iowa 555, 46 N. W. 553; Duffies *v.* State, 7 Wis. 672.

69. Marlett *v.* Wilson, 30 Ind. 240.

Under the Louisiana code the father of an acknowledged illegitimate child may be sued for alimony for its support by the mother. Gibney *v.* Fitzsimmons, 5 La. Ann 250.

The father of a child is not liable for its support, under the bastardy acts, where the mother, after conception, and during pregnancy, marries another man who has full knowledge of her condition, since the latter thereby consents to stand *in loco parentis* to such child, and is presumed to be its father. State *v.* Shoemaker, 62 Iowa 343, 17 N. W. 589, 49 Am. Rep. 146; State *v.* Romaine, 58 Iowa 46, 11 N. W. 721; Miller *v.* Anderson, 43 Ohio St. 473, 3 N. E. 605, 54 Am. Rep. 823. But see Overseers of Poor *v.* Cox, 7 Cow. (N. Y.) 235, holding that a husband is not bound to maintain the bastard children of his wife born before marriage.

70. Simmons *v.* Bull, 21 Ala. 501, 56 Am. Dec. 257; Nixon *v.* Perry, 77 Ga. 530, 3 S. E. 253.

Thus an action of assumpsit for the support and maintenance of a bastard does not lie against the reputed father after an order of affiliation, in the absence of a promise, either expressed or implied, the remedy being by a proceeding in the name of the overseer or superintendent of the poor. Moncrief *v.* Ely, 19 Wend. (N. Y.) 405; Furillio *v.* Crowther, 7 D. & R. 612, 29 Rev. Rep. 467, 16 E. C. L. 302.

71. Ruttinger *v.* Temple, 4 B. & S. 491, 9 Jur. N. S. 1239, 33 L. J. Q. B. 1, 9 L. T. Rep. N. S. 256, 12 Wkly. Rep. 9, 116 E. C. L. 491.

The liability is created by 4 & 5 Wm. IV, c. 76, § 71, and is limited to the time during which the child is under the age of sixteen and the mother remains unmarried or a widow. Ruttinger *v.* Temple, 4 B. & S. 491, 9 Jur. N. S. 1239, 33 L. J. Q. B. 1, 9 L. T. Rep. N. S. 256, 12 Wkly. Rep. 9, 116 E. C. L. 491.

72. Petersham *v.* Dana, 12 Mass. 429; Somerset *v.* Dighton, 12 Mass. 383; Wright *v.* Wright, 2 Mass. 109; Hudson *v.* Hills, 8 N. H. 417; Friesner *v.* Symonds, 46 N. J. Eq. 521, 20 Atl. 257; Nine *v.* Starr, 8 Oreg. 49.

73. See Poor Persons.

In Georgia it has been held that a county is not liable for the keeping of a bastard child until so sanctioned by the court or overseers. Justices Heard County Inferior Ct. *v.* Chapman, 16 Ga. 89.

74. Wiggins *v.* Keizer, 6 Ind. 252. See also *supra*, V, B, 1.

Assumpsit by the mother who supported the child will lie against an overseer of the poor who had compromised a bastardy proceeding and applied the proceeds to the town. Drake *v.* Sharon, 40 Vt. 35. But see Stevens *v.* Howard, 12 Johns. (N. Y.) 195, holding that, after an order of filiation and maintenance has been made against the putative father, an action of assumpsit will not lie

adopts or acknowledges it such promise may be implied so long as the adoption continues.[75]

2. Express Contracts — a. In General. Contracts wherein the putative father agrees to contribute to his illegitimate child's support, in lieu of the statutory remedy, are valid,[76] and cannot be repudiated by the father without reasonable cause.[77] Such contracts are not within the statute of frauds requiring a writing,[78] and being in discharge of an obligation imposed by law may be enforced against a minor.[79]

b. Consideration. The obligation imposed upon the father by statute to support his bastard child is a sufficient consideration for his promise so to do.[80] His moral obligation alone to do so, however, is insufficient.[81]

VI. RIGHTS AND DISABILITIES.

A. Capacity to Inherit — 1. At Common Law. By the common law a bastard

against the overseers of the poor by the one who supports the child, without showing either an express promise or that the overseers had received money under the order.

75. Nochole *v.* Allen, 3 C. & P. 36, 14 E. C. L. 438; Hesketh *v.* Gowing, 5 Esp. 131. To a similar effect see Cameron *v.* Baker, 1 C. & P. 268, 12 E. C. L. 161.

The implied promise terminates when the adoption is renounced. Monerief *v.* Ely, 19 Wend. (N. Y.) 405. And see Furillio *v.* Crowther, 7 D. & R. 612, 29 Rev. Rep. 467, 16 E. C. L. 302.

76. Flanegan *v.* Garrison, 28 Ga. 136; Clerke *v.* McFarland, 5 Dana (Ky.) 45; Puthuff *v.* Sewards, 9 Ky. L. Rep. 578. See also Hamden *v.* Merwin, 54 Conn. 418, 8 Atl. 670; Benge *v.* Hiatt, 82 Ky. 666, 56 Am. Rep. 912.

Such obligation may be made payable to the mother in her own right, or for the child's benefit. Hook *v.* Pratt, 78 N. Y. 371, 34 Am. Rep. 539 [*affirming* 14 Hun (N. Y.) 396].

77. Repudiation.—Frolick *v.* Schonwald, 52 N. C. 427.

Adoption of child.— In an action on an alleged contract for the support of a bastard a defense that plaintiff had adopted the child must be clearly proved. Burt *v.* Long, 106 Mich. 210, 64 N. W. 60.

An executory contract, wherein the parties in contemplation of marriage agree to settle property of the wife upon her illegitimate child, may be enforced in equity. Kimborough *v.* Davis, 16 N. C. 71.

78. Not within statute of frauds.— Stowers *v.* Hollis, 83 Ky. 544; McLees *v.* Hale, 10 Wend. (N. Y.) 426; Knowlman *v.* Bluett, L. R. 9 Exch. 1, 43 L. J. Exch. 29, 29 L. T. Rep. N. S. 462, 22 Wkly. Rep. 77. See, generally, Frauds, Statute of.

79. Enforcement against infant.— Stowers *v.* Hollis, 83 Ky. 544. See, generally, Infants.

80. *Arkansas.*— Davis *v.* Herrington, 53 Ark. 5, 13 S. W. 215.

Georgia.— Davis *v.* Moody, 15 Ga. 175; Hargroves *v.* Freeman, 12 Ga. 342.

Illinois.— A promise by the father of a child born of a woman while lawfully married to another to pay her for its support is not founded on a legal consideration. Vetten *v.* Wallace, 39 Ill. App. 390.

Indiana.— Allen *v.* Davison, 16 Ind. 416.

New York.— Todd *v.* Weber, 95 N. Y. 181, 47 Am. Rep. 20; Bunn *v.* Winthrop, 1 Johns. Ch. (N. Y.) 329.

Pennsylvania.— Shenk *v.* Mingle, 13 Serg. & R. (Pa.) 29.

England.— Knowlman *v.* Bluett, L. R. 9 Exch. 1, 43 L. J. Exch. 29, 29 L. T. Rep. N. S. 462, 22 Wkly. Rep. 77; Smith *v.* Roche, 6 C. B. N. S. 223, 5 Jur. N. S. 918, 28 L. J. C. P. 237, 7 Wkly. Rep. 413, 95 E. C. L. 223; Kicks *v.* Gregory, 8 C. B. 378, 65 E. C. L. 378.

See, generally, Contracts; and 6 Cent. Dig. tit. "Bastards," § 25.

The death of the child is not a failure of consideration in the sense that it will defeat the enforcement of an otherwise valid contract. Potter *v.* Earnest, 45 Ind. 416; Smith *v.* Roche, 6 C. B. N. S. 223, 5 Jur. N. S. 918, 28 L. J. C. P. 237, 7 Wkly. Rep. 413, 95 E. C. L. 223; James *v.* Tallent, 5 B. & Ald. 889, 1 D. & R. 548, 24 Rev. Rep. 608, 7 E. C. L. 483.

As to effect of death as abatement of bastardy proceeding see *infra*, VII, D, 2, a.

Future cohabitation between the parties, as a consideration, will invalidate. Crawford *v.* Gordon, 9 Ohio Dec. (Reprint) 160, 11 Cinc. L. Bul. 121. See, generally, Contracts. Such purpose must, however, be clearly proved, and is not to be inferred from a previous cohabitation between the parties, with the knowledge of the promisee. Trovinger *v.* McBurney, 5 Cow. (N. Y.) 253.

81. Mercer *v.* Mercer, 87 Ky. 30, 9 Ky. L. Rep. 884, 7 S. W. 401; Easley *v.* Gordon, 51 Mo. App. 637; Nine *v.* Starr, 8 Oreg. 49.

Thus a note given by the maker for the sole purpose of maintaining the bastard child of the payee, of which the maker's son was the alleged father, is without consideration, the court saying: "He had no purpose to, and did not settle any claim of the payee against his son. . . . He was under no legal obligations to aid in its support. . . . She neither surrendered nor postponed her claim or right to prosecute the alleged father of her child." Potter *v.* Marine, 50 Ind. 444; Pot-

was *nullius filius*, and was incapable of inheriting, either from his putative father or his mother.[82]

2. By Statute — a. In General. Most of the states have statutes mitigating in a degree the rigors of the common law and conferring rights which that law denied.[83] But terms of kindred in a statute will include only those who are legitimate, unless a different intent clearly appears.[84] Hence a description of those who may take as "child" or "children" would exclude illegitimate issue.[85] Where prohibited from taking as an heir, it has been held that a bastard cannot take as legatee.[86]

b. From Each Other. By statutory provision in many of the states one bastard is allowed to inherit from another of the same mother.[87]

ter *v.* Earnest, 45 Ind. 416. But *compare* K. X. *v.* A. Y., 34 Wkly. Notes Cas. (Pa.) 145.

82. *Alabama.*— Butler *v.* Elyton Land Co., 84 Ala. 384, 4 So. 675.

Connecticut.—Dickinson's Appeal, 42 Conn. 491, 19 Am. Rep. 553; New Haven *v.* Newtown, 12 Conn. 165.

Georgia.— Hicks *v.* Smith, 94 Ga. 809, 22 S. E. 153.

Illinois.— Bales *v.* Elder, 118 Ill. 436, 11 N. E. 421; Blacklaws *v.* Milne, 82 Ill. 505, 25 Am. Rep. 339.

Kentucky.— Stover *v.* Boswell, 3 Dana (Ky.) 232.

Maine.— Lyon *v.* Lyon, 88 Me. 395, 34 Atl. 180.

Massachusetts.— Ross *v.* Ross, 129 Mass. 243, 37 Am. Rep. 321; Cooley *v.* Dewey, 4 Pick. (Mass.) 93, 16 Am. Dec. 326.

Missouri.— Bent *v.* St. Vrain, 30 Mo. 268.

North Carolina.—Howell *v.* Tyler, 91 N. C. 207.

Pennsylvania.— Killam *v.* Killam, 39 Pa. St. 120; Davis *v.* Houston, 2 Yeates (Pa.) 289.

South Carolina.— Barwick *v.* Miller, 4 Desauss. (S. C.) 434.

Tennessee.— McKamie *v.* Baskerville, 86 Tenn. 459, 7 S. W. 194.

United States.— McCool *v.* Smith, 1 Black (U. S.) 459, 17 L. ed. 218.

England.— *In re* Goodman, 17 Ch. D. 266, 50 L. J. Ch. 425, 44 L. T. Rep. N. S. 527, 29 Wkly. Rep. 586; *In re* Wilcocks, 1 Ch. D. 229.

See 6 Cent. Dig. tit. "Bastards," § 246.

The origin of the rule has been asserted to be the discouragement of illicit intercourse between the sexes. Butler *v.* Elyton Land Co., 84 Ala. 384, 4 So. 675.

Limitation of rule.— The common-law rule that a bastard is *nullius filius* applies only to the case of inheritance. Garland *v.* Harrison, 8 Leigh (Va.) 368; Hains *v.* Jeffell, 1 Ld. Raym. 68; Rex *v.* Hodnett, 1 T. R. 96.

The Roman law was much less severe and imposed fewer disabilities upon bastards than the common law. Bastards could inherit from their mothers. Dickinson's Appeal, 42 Conn. 491, 19 Am. Rep. 553.

83. See the statutes of the several states and *infra*, VI, A, 2, b, c, d.

Such laws are "intended to remedy the cruel and rigorous policy of the common law in reference to bastards, by which was visited on these unfortunates a stigma which more properly belonged to their parents, and at the same time to deal with the erring mother in a more liberal spirit of justice as well as of Christian charity." Per Somerville, J., in Butler *v.* Elyton Land Co., 84 Ala. 384, 390, 4 So. 675.

84. Matter of Magee, 63 Cal. 414; Floyd *v.* Floyd, 97 Ga. 124, 24 S. E. 451; Scroggin *v.* Allan, 2 Dana (Ky.) 363; McCool *v.* Smith, 1 Black (U. S.) 459, 17 L. ed. 218. See, generally, Wills.

Under a statutory provision that "the word 'issue,' as applied to the descent of real estate, shall be construed to include all the 'lawful lineal descendants of the ancestor,'" all persons who might lawfully inherit were held to be included, and a bastard child was allowed to take. Cherry *v.* Mitchell, 21 Ky. L. Rep. 1547, 55 S. W. 689. See also Drain *v.* Violett, 2 Bush (Ky.) 155; Gibson *v.* McNeely, 11 Ohio St. 131; Dennis *v.* Dennis, 105 Tenn. 86, 58 S. W. 284, holding that "children" and "issue" includes all who are by law capable of inheriting.

85. Orthwein *v.* Thomas, (Ill. 1897) 13 N. E. 564; Lyon *v.* Lyon, 88 Me. 395, 34 Atl. 180; Porter *v.* Porter, 7 How. (Miss.) 106, 40 Am. Dec. 55; Hargraft *v.* Keegan, 10 Ont. 272. *Compare* Howell *v.* Tyler, 91 N. C. 207, in which it was held that in as much as the illegitimate children were then born, and known to the testator, and without their inclusion his intention would obviously be defeated, that the intention of the testator would overcome the technical construction of the word "heirs," which by statute was made synonymous with "children."

Thus where the statute of descents, which directs that the property of an intestate shall descend among the intestate's "children" and their descendants, illegitimate children cannot take. Blacklaws *v.* Milne, 82 Ill. 505, 25 Am. Rep. 339.

Under a statute providing, that unless the omission of a child in a will is clearly intentional, it shall nevertheless take, the omission of an illegitimate child from a will precludes him from taking though no motive for the omission appears. Kent *v.* Barker, 2 Gray (Mass.) 535. *Contra*, Matter of Wardell, 57 Cal. 484.

86. Bennett *v.* Cane, 18 La. Ann. 590. See, generally, Wills.

87. *Alabama.*—Butler *v.* Elyton Land Co., 84 Ala. 384, 4 So. 675.

c. From Mother. Statutes in most states also make a bastard capable of inheriting from the mother.[88] A statute allowing an illegitimate child to inherit from his mother does not, however, allow him to inherit from her ancestors,[89] or from her collateral kindred.[90]

d. From Father. Where the language of the statute in express terms allows

California.— Matter of Magee, 63 Cal. 414; Harrison's Estate, Myr. Prob. (Cal.) 121.

Connecticut.— Brown *v.* Dye, 2 Root (Conn.) 280.

Georgia.— Allen *v.* Donaldson, 12 Ga. 332.

Illinois.— Miller *v.* Williams, 66 Ill. 91.

Kentucky.— Blankenship *v.* Ross, 95 Ky. 306, 15 Ky. L. Rep. 708, 25 S. W. 268; Sutton *v.* Sutton, 87 Ky. 216, 10 Ky. L. Rep. 136, 8 S. W. 337, 12 Am. St. Rep. 476; Allen *v.* Ramsey, 1 Metc. (Ky.) 635.

Louisiana.— Illegitimate children inherit from each other where their parents die before the child, from whom the estate descends. Layre *v.* Pasco, 5 Rob. (La.) 9; Laclotte *v.* Labarre, 11 La. 179. So also if the mother were not married. Lauge *v.* Richoux, 6 La. 560.

Missouri.— The statute providing that bastards shall be capable of inheriting and transmitting inheritance on the part of their mother in like manner as if they had been lawfully begotten of such mother does not render a bastard capable of transmitting an estate by descent to his mother or to his illegitimate brothers. Bent *v.* St. Vrain, 30 Mo. 268.

North Carolina.—McBryde *v.* Patterson, 78 N. C. 412; Coor *v.* Starling, 54 N. C. 243; Flintham *v.* Holder, 16 N. C. 349.

Ohio.— Lewis *v.* Eutsler, 4 Ohio St. 354.

Pennsylvania.— The act of 1855, giving illegitimate children the right to inherit from the mother and the mother from the children, does not enable the children to inherit from each other. Woltemate's Appeal, 86 Pa. St. 219.

Rhode Island.— Grundy *v.* Hadfield, 16 R. I. 579, 18 Atl. 186 (in which case one's nephews, sons of his illegitimate deceased half-sister, were allowed to inherit her portion directly, and not indirectly through her mother); Briggs *v.* Greene, 10 R. I. 495.

Vermont.— Burlington *v.* Fosby, 6 Vt. 83, 27 Am. Dec. 535.

Virginia.— Garland *v.* Harrison, 8 Leigh (Va.) 368.

See 6 Cent. Dig. tit. "Bastards," § 251.

From half-brothers or sisters.—A statute permitting inheritance by bastards from each other would not authorize their inheriting from legitimate half brothers or sisters Woodward *v.* Duncan, 1 Coldw. (Tenn.) 561; Bacon *v.* McBride, 32 Vt. 585. And see Ehringhaus *v.* Cartwright, 30 N. C. 39, which holds that, while an illegitimate brother could inherit from his illegitimate sister of the same mother, he could not inherit from a legitimate daughter of the sister. See also Sawyer *v.* Sawyer, 28 N. C. 407. *Contra,* Messer *v.* Jones, 88 Me. 349, 34 Atl. 177.

88. *Alabama.*— Alexander *v.* Alexander, 31 Ala. 241.

Connecticut.—Dickinson's Appeal, 42 Conn. 491, 19 Am. Rep. 553; Heath *v.* White, 5 Conn. 228.

Florida.— Keech *v.* Enriquez, 28 Fla. 597, 10 So. 91.

Illinois.— Miller *v.* Williams, 66 Ill. 91. See also Elder *v.* Bales, 127 Ill. 425, 21 N. E. 621, 118 Ill. 436, 11 N. E. 421.

Indiana.— Parks *v.* Kimes, 100 Ind. 148; Krug *v.* Davis, 87 Ind. 590.

Iowa.— McGuire *v.* Brown, 41 Iowa 650.

Kentucky.— Black *v.* Cartmell, 10 B. Mon. (Ky.) 188; Stover *v.* Boswell, 3 Dana (Ky.) 232; Scroggin *v.* Allan, 2 Dana (Ky.) 363.

Maryland.— Earle *v.* Dawes, 3 Md. Ch. 230.

Massachusetts.— Haraden *v.* Larrabee, 113 Mass. 430; Kent *v.* Barker, 2 Gray (Mass.) 535.

New York.— Bunce *v.* Bunce, 14 N. Y. Suppl. 659, 20 N. Y. Civ. Proc. 332, 27 Abb. N. Cas. (N. Y.) 61; Ferrie *v.* Public Administrator, 3 Bradf. Surr. (N. Y.) 249.

North Carolina.— Waggoner *v.* Miller, 26 N. C. 480.

Ohio.— Bruner *v.* Briggs, 39 Ohio St. 478; Gibson *v.* McNeely, 11 Ohio St. 131.

Pennsylvania.—Seitzinger's Estate, 170 Pa. St. 500, 37 Wkly. Notes Cas. (Pa.) 211, 32 Atl. 1097; Opdyke's Appeal, 49 Pa. St. 373; Ringler's Estate, 1 Woodw. (Pa.) 328. But the children are legitimate for no other purpose. Neil's Appeal, 92 Pa. St. 193; Grubb's Appeal, 58 Pa. St. 55.

Virginia.— Garland *v.* Harrison, 8 Leigh (Va.) 368.

See 6 Cent. Dig. tit. "Bastards," §§ 254, 255.

89. From ancestors of mother.—*Kentucky.* — Jackson *v.* Jackson, 78 Ky. 390, 39 Am. Rep. 246; Hogan *v.* Hogan, 19 Ky. L. Rep. 1960, 44 S. W. 953; Powell *v.* Gray, 5 Ky. L. Rep. 248.

New Hampshire.—See Goodwin *v.* Colby, 64 N. H. 401, 13 Atl. 866, wherein an illegitimate son of a deceased female legatee was allowed to take.

New York.— Matter of Mericlo, 63 How. Pr. (N. Y.) 62.

North Carolina.— Waggoner *v.* Miller, 26 N. C. 480.

Pennsylvania.— Steckel's Appeal, 64 Pa. St. 493.

Tennessee.— Brown *v.* Kerby, 9 Humphr. (Tenn.) 460.

Contra, Parks *v.* Kimes, 100 Ind. 148; McGuire *v.* Brown, 41 Iowa 650; Lawton *v.* Lane, 92 Me. 170, 42 Atl. 352.

90. From collateral kindred of mother.— Williams *v.* Kimball, 35 Fla. 49, 16 So. 783, 48 Am. St. Rep. 238, 26 L. R. A. 746; Berry *v.* Owens, 5 Bush (Ky.) 452; Allen *v.* Ramsey, 1 Metc. (Ky.) 635; Pratt *v.* Atwood, 108 Mass. 40; Moore *v.* Moore, 35 Vt. 98.

a bastard to inherit from his father he cannot take from a grandfather,[91] or from his stepmother.[92]

3. What Law Governs. According to some decisions no one can take land by descent unless recognized as a legitimate heir by the laws of the state wherein the land is situated.[93] The general current of modern authority, however, favors the doctrine that, where an illegitimate child has been legitimated, such legitimacy follows the child wherever it may go and entitles it to all the rights flowing from such status.[94]

B. Capacity to Transmit — 1. At Common Law. At common law a bastard could transmit property to the heirs of his body only.[95] In the absence of such heirs his estate would escheat.[96]

2. By Statute — a. To Brothers or Sisters. In some jurisdictions a bastard's property goes to the legitimate as well as illegitimate issue of his mother.[97] If at

91. Hicks *v.* Smith, 94 Ga. 809, 22 S. E. 153; Safford *v.* Houghton, 48 Vt. 236.

As to effect of legitimation see *supra*, III, D.

The statutes of Indiana allow a bastard to inherit in cases where the father dies intestate and without heirs resident in the United States. Cox *v.* Rash, 82 Ind. 519. See also Thornton's Ind. Stat. (1897), § 2681.

Heirship need not first be established by a direct proceeding; but an illegitimate child may, on showing his relationship and recognition by their common father, maintain a partition suit against lawful children. Alston *v.* Alston, (Iowa 1901) 86 N. W. 55.

Permitting illegitimate children to inherit from their father in no way shields, supports, or countenances polygamy. Matter of Pratt, 7 Utah 278, 26 Pac. 576; Cope *v.* Cope, 137 U. S. 682, 11 S. Ct. 222, 34 L. ed. 832 [*reversing In re* Cope, 7 Utah 63, 24 Pac. 677; *In re* Handley, 7 Utah 49, 24 Pac. 693].

92. Drain *v.* Violett, 2 Bush (Ky.) 155.

93. *Alabama.*— Lingen *v.* Lingen, 45 Ala. 410.

Florida.— Williams *v.* Kimball, 35 Fla. 49, 16 So. 783, 48 Am. St. Rep. 238, 26 L. R. A. 746.

Illinois.— Stolz *v.* Doering, 112 Ill. 234.

Kentucky.— Leonard *v.* Braswell, 99 Ky. 528, 18 Ky. L. Rep. 395, 36 S. W. 684, 36 L. R. A. 707; Sneed *v.* Ewing, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41.

Ohio.— Ives *v.* McNicoll, 12 Ohio Cir. Ct. 297.

Pennsylvania.— Smith *v.* Derr, 34 Pa. St. 126, 75 Am. Dec. 641.

England.— Doe *v.* Vardill, 5 B. & C. 438, 11 E. C. L. 531; Birtwhistle *v.* Vardill, 9 Bligh N. S. 32, 5 Eng. Reprint 1207, 7 Cl. & F. 895, 7 Eng. Reprint 1308, 4 Jur. 1076, West H. L. 500.

94. *Iowa.*— Van Horn *v.* Van Horn, 107 Iowa 247, 77 N. W. 846, 45 L. R. A. 93.

Louisiana.— Scott *v.* Key, 11 La. Ann. 232.

Massachusetts.— Ross *v.* Ross, 129 Mass. 243, 37 Am. Rep. 321.

Mississippi.— Smith *v.* Kelly, 23 Miss. 167, 55 Am. Dec. 87.

New Jersey.— Dayton *v.* Adkisson, 45 N. J. Eq. 603, 17 Atl. 964, 14 Am. St. Rep. 769, 4 L. R. A. 488.

New York.— Miller *v.* Miller, 91 N. Y. 315, 43 Am. Rep. 669 [*reversing* 18 Hun (N. Y.) 507]; Bates *v.* Virolet, 33 N. Y. App. Div. 436, 53 N. Y. Suppl. 893, 54 N. Y. Suppl. 475; Stack *v.* Stack, 10 N. Y. St. 690, 6 Dem. Surr. (N. Y.) 280.

See 6 Cent. Dig. tit. "Bastards," § 247.

Rights of inheritance are governed by the laws in force at the death of the parent. Brewer *v.* Hamor, 83 Me. 251, 22 Atl. 161 [*distinguishing* Curtis *v.* Hewins, 11 Metc. (Mass.) 294]; Seitzinger's Estate, 170 Pa. St. 500, 37 Wkly. Notes Cas. (Pa.) 211, 32 Atl. 1097; Carroll *v.* Carroll, 20 Tex. 731.

95. *Kentucky.*— Stover *v.* Boswell, 3 Dana (Ky.) 232.

Massachusetts.— Cooley *v.* Dewey, 4 Pick. (Mass.) 93, 16 Am. Dec. 326.

Missouri.— Bent *v.* St. Vrain, 30 Mo. 268.

Pennsylvania.— McCully's Estate, 12 Pa. Super. Ct. 78.

South Carolina.— Jones *v.* Burden, 4 Desauss. (S. C.) 439; Barwick *v.* Miller, 4 Desauss. (S. C.) 434.

England.— Co. Litt. 243*b*.

See 6 Cent. Dig. tit. "Bastards," § 259.

The death of the illegitimate before descent cast will not preclude his issue from receiving the estate which would have vested in him and be thereby transmitted to his issue were he alive. Johnson *v.* Bodine, 108 Iowa 594, 79 N. W. 348; Mathis *v.* Mathis, 12 Ky. L. Rep. 941; Ash *v.* Way, 2 Gratt. (Va.) 203. But *compare* Curtis *v.* Hewins, 11 Metc. (Mass.) 294.

96. Doe *v.* Bates, 6 Blackf. (Ind.) 533; Bent *v.* St. Vrain, 30 Mo. 268; McCully's Estate, 12 Pa. Super. Ct. 78. See also Escheat.

97. *Alabama.*— The property of a bastard dying without issue and intestate goes to his mother and his half brothers and sisters, half and half respectively. Ward *v.* Mathews, 122 Ala. 188, 25 So. 50.

California.—The property of a bastard goes to his illegitimate half-brothers or half-sisters of his mother to the exclusion of illegitimate half-kin on his father's side. Harrison's Estate, Myr. Prob. (Cal.) 121.

Georgia.— See Allen *v.* Donaldson, 12 Ga. 332.

Indiana.— Ellis *v.* Hatfield, 20 Ind. 101.

North Carolina.—McBryde *v.* Patterson, 78 N. C. 412; Flintham *v.* Holder, 16 N. C. 349.

Ohio.— Lewis *v.* Eutsler, 4 Ohio St. 354.

the death of the bastard, his brothers and sisters are all dead, their children take *per capita*.[98]

b. To Father. The father cannot take from his bastard child unless he has lawfully acknowledged it.[99] And it has been held that a statute declaring that an illegitimate child shall in all respects, both in law and equity, be upon an equal footing with the father's other children does not enable the father to inherit from him.[1]

c. To Husband or Wife. Statutes often provide that the estate of an illegitimate, dying intestate and without issue, shall descend to the surviving wife [2] or husband.[3]

d. To Mother. While it is sometimes provided that if a bastard die intestate and without issue his estate shall go to his mother,[4] or to her and his bastard brothers and sisters together,[5] it has been held that she will not be included within the term "kindred," [6] and that a statute declaring that bastards shall be capable of inheriting from and through their mothers and of transmitting estates, as though born in wedlock, will not give a bastard capacity to transmit his estate through his deceased mother to her heirs.[7]

Tennessee.— Riley *v.* Byrd, 3 Head (Tenn.) 19.

See also *supra*, VI, A, 2, b; and 6 Cent. Dig. tit. "Bastards," § 262.

Issue of incestuous marriage.— The statute allowing illegitimates to transmit to brothers and sisters takes no note of the degree of crime of which they are the fruits. Thus on the death of an illegitimate son without issue his property may go to his illegitimate brothers and sisters, though they be the issue of a father with his own daughter by a former wife. Brewer *v.* Blougher, 14 Pet. (U. S.) 178, 10 L. ed. 408.

98. Matter of Magee, 63 Cal. 414; Houston *v.* Davidson, 45 Ga. 574; Coor *v.* Starling, 54 N. C. 243. *Compare* Jenkins *v.* Drane, 121 Ill. 217, 12 N. E. 684, wherein it is held that where a mother who, if she had survived her son, would have inherited his property, dies before him, leaving an illegitimate daughter, who died before the son, leaving lawful issue, such issue would inherit the son's property.

99. Pigeau *v.* Duvenay, 4 Mart. (La.) 265. See also Wood *v.* January, 15 La. Ann. 516.

1. McCormick *v.* Cantrell, 7 Yerg. (Tenn.) 614. *Compare* Dyer *v.* Brannock, 66 Mo. 391, 27 Am. Rep. 359.

In North Carolina, where the collateral relatives of a child on its mother's side are excluded because of the illegitimacy of the mother, the collateral kin of such child's predeceased father will take the inheritance. Sawyer *v.* Sawyer, 28 N. C. 407.

2. *Alabama.*— Ward *v.* Mathews, 122 Ala. 188, 25 So. 50.

District of Columbia.— Brooks *v.* Francis, 3 MacArthur (D. C.) 109.

Illinois.— Evans *v.* Price, 118 Ill. 593, 8 N. E. 854.

Indiana.— Doe *v.* Bates, 6 Blackf. (Ind.) 533.

Louisiana.—Montegut *v.* Bacas, 42 La. Ann. 158, 7 So. 449; Miller's Succession, 27 La. Ann. 574; Duplessis *v.* Young, 11 La. Ann. 120; Briscoe's Succession, 2 La. Ann. 268; Victor *v.* Tagiasco, 6 La. 642.

Michigan.— The intestate must leave no mother or descendants of his mother to entitle his wife to take. Keeler *v.* Dawson, 73 Mich. 600, 41 N. W. 700.

Ohio.— Little *v.* Lake, 8 Ohio 289.

Pennsylvania.— Ditsche's Estate, 11 Phila. (Pa.) 15, 32 Leg. Int. (Pa.) 50; Kennedy's Estate, 9 Pa. Co. Ct. 230.

Tennessee.—Webb *v.* Webb, 3 Head (Tenn.) 68.

See 6 Cent. Dig. tit. "Bastards," § 258.

3. Southgate *v.* Annan, 31 Md. 113; Scoggins *v.* Barnes, 8 Baxt. (Tenn.) 560.

Such descent has been upheld, though another section of the statute enabled bastards to transmit "inheritance on the part of their mother, in like manner as if they had been born in lawful wedlock." Hawkins *v.* Jones, 19 Ohio St. 22; Gibson *v.* McNeely, 11 Ohio St. 131; Little *v.* Lake, 8 Ohio 289. *Contra*, Powers *v.* Kite, 83 N. C. 156.

4. Langmade *v.* Tuggle, 78 Ga. 770, 3 S. E. 666; Lewis *v.* Mynatt, 105 Tenn. 508, 58 S. W. 857; Murphy *v.* Portrum, 95 Tenn. 605, 32 S. W. 633, 30 L. R. A. 263; Webb *v.* Webb, 3 Head (Tenn.) 68; Bettus *v.* Dawson, 82 Tex. 18, 17 S. W. 714.

Under the Massachusetts statute where an illegitimate child dies leaving no issue, wife, or mother, and has surviving him his mother's brother and sister, and children of her deceased brothers, the mother's brother and sister take to the exclusion of the children of her deceased brothers. Parkman *v.* McCarthy, 149 Mass. 502, 21 N. E. 760.

Retroactive effect.— A statute providing that a bastard's estate shall descend to his mother in default of issue has no retroactive effect, and the estate of an intestate must be distributed according to the laws in force at the time of the death. Hughes *v.* Decker, 38 Me. 153.

5. Ward *v.* Mathews, 122 Ala. 188, 25 So. 50; Garland *v.* Harrison, 8 Leigh (Va.) 368.

6. Hughes *v.* Decker, 38 Me. 153. See also Cooley *v.* Dewey, 4 Pick. (Mass.) 93, 16 Am. Dec. 326, and *supra*, VI, A, 2, a.

7. Croan *v.* Phelps, 94 Ky. 213, 14 Ky. L. Rep. 915, 21 S. W. 874, 23 L. R. A. 753; McCully *v.* Warrick, 61 N. J. Eq. 606, 46 Atl.

C. Gifts. The right of a parent to make a gift to an illegitimate child is sometimes restricted by statute.[8]

VII. PROCEEDINGS UNDER BASTARDY LAWS.

A. Nature of Proceedings. By the weight of authority proceedings under the bastardy laws are considered in substance as civil suits.[9] They are, however, often spoken of as quasi-criminal[10] or quasi-civil,[11] and many courts have been inclined to deem them more as a criminal proceeding than otherwise.[12]

949; Little *v.* Lake, 8 Ohio 289; Blair *v.* Adams, 59 Fed. 243.

8. In Louisiana natural children, or acknowledged illegitimate children, cannot receive from their natural parents by donations *inter vivos* or *mortis causa* beyond what is strictly necessary to procure them sustenance, or an occupation or profession which may maintain them, whenever the father or the mother who has thus disposed in their favor leaves legitimate children or descendants. La. Rev. Civ. Code (1900), art. 1483; Fowler *v.* Morgan, 25 La. Ann. 206; Bennett *v.* Cane, 18 La. Ann. 590; Badillo *v.* Tio, 6 La. Ann. 129; Robinett *v.* Verdun, 14 La. 542; Jung *v.* Doriocourt, 4 La. 175. Gaines *v.* Hennen, 24 How. (U. S.) 553, 16 L. ed. 770.

In South Carolina, if any person who is an inhabitant of the state, or who has any estate therein, shall beget any bastard child, or shall live in adultery with a woman, the said person having a wife or lawful children of his own living, and shall give, by legacy or devise, for the use and benefit of the said woman with whom he lives in adultery, or of his bastard child or children, any larger or greater proportion of the real clear value of his estate, real or personal, after paying of his debts, than one-fourth part thereof, such legacy or devise shall be null and void for so much of the amount or value thereof as shall or may exceed such fourth part of his real and personal estate. S. C. Rev. Stat. (1893), § 1999; Gore *v.* Clarke, 37 S. C. 537, 16 S. E. 614, 20 L. R. A. 465; Canady *v.* George, 6 Rich. Eq. (S. C.) 103; Ford *v.* McElray, 1 Rich. Eq. (S. C.) 474; Breithaupt *v.* Bauskett, 1 Rich. Eq. (S. C.) 465; Bradley *v.* Lowry, Speers Eq. (S. C.) 1, 39 Am. Dec. 142; King *v.* Johnson, 2 Hill Eq. (S. C.) 624. If the father has no wife or children a devise of all his property to his bastard child will be upheld. Harten *v.* Gibson, 4 Desauss. (S. C.) 139. Such statute does not preclude a devise for a sufficient consideration. Canady *v.* George, 6 Rich. Eq. (S. C.) 103.

9. Civil proceeding.— *Alabama.*— Williams *v.* State, 117 Ala. 199, 23 So. 42.

Arkansas.— Chambers *v.* State, 45 Ark. 56.

Connecticut.— Naugatuck *v.* Smith, 53 Conn. 523, 3 Atl. 550; Hinman *v.* Taylor, 2 Conn. 357.

Illinois.— Scharf *v.* People, 134 Ill. 240, 24 N. E. 761; Lewis *v.* People, 82 Ill. 104.

Indiana.— Reynolds *v.* State, 115 Ind. 421, 17 N. E. 909; Powell *v.* State, 96 Ind. 108.

Iowa.— State *v.* Johnson, 89 Iowa 1, 56 N. W. 404; State *v.* Severson, 78 Iowa 653, 43 N. W. 533.

Kentucky.— Head *v.* Martin, 85 Ky. 480, 9 Ky. L. Rep. 45, 3 S. W. 622; Chandler *v.* Com., 4 Metc. (Ky.) 66.

Maine.— Hodge *v.* Sawyer, 85 Me. 285, 27 Atl. 153; Knowles *v.* Scribner, 57 Me. 495.

Massachusetts.— Young *v.* Makepeace, 103 Mass. 50; Williams *v.* Campbell, 3 Metc. (Mass.) 209.

Michigan.— People *v.* Harty, 49 Mich. 490, 13 N. W. 829; People *v.* Cantine, 1 Mich. N. P. 140.

Minnesota.— State *v.* Nichols, 29 Minn. 357, 13 N. W. 153; State *v.* Worthingham, 23 Minn. 528.

Nebraska.— *In re* Walker, 61 Nebr. 803, 86 N. W. 510; Stoppert *v.* Nierle, 45 Nebr. 105, 63 N. W. 382.

New Hampshire.— Ford *v.* Smith, 62 N. H. 419; Stokes *v.* Sanborn, 45 N. H. 274.

New Jersey.— State *v.* Overseer of Poor, 43 N. J. L. 406.

North Carolina.— State *v.* Edwards, 110 N. C. 511, 14 S. E. 741; State *v.* Crouse, 86 N. C. 617.

Ohio.— Carter *v.* Krise, 9 Ohio St. 402; Perkins *v.* Mobley, 4 Ohio St. 668.

Oklahoma.— *In re* Comstock, (Okla. 1900) 61 Pac. 921; Bell *v.* Territory, 8 Okla. 75, 56 Pac. 853.

Rhode Island.— State *v.* Bowen, 14 R. I. 165; State *v.* Sullivan, 12 R. I. 212.

South Dakota.— State *v.* Knowles, 10 S. D. 471, 74 N. W. 201.

Tennessee.— Stovall *v.* State, 9 Baxt. (Tenn.) 597.

Vermont.— Gray *v.* Fulsome, 7 Vt. 452; Robie *v.* McNiece, 7 Vt. 419.

See 6 Cent. Dig. tit. "Bastards," § 35½.

Proceedings in bastardy are *sui generis.* State *v.* Hunter, 67 Ala. 81; Hill *v.* Wells, 6 Pick. (Mass.) 104; State *v.* Jager, 19 Wis. 235.

10. Quasi-criminal.— Miller *v.* State, 110 Ala. 69, 20 So. 392; *Ex p.* Charleston, 107 Ala. 688, 18 So. 224; State *v.* Hunter, 67 Ala. 81; E. N. E. *v.* State, 25 Fla. 268, 6 So. 58; People *v.* Phalen, 49 Mich. 492, 13 N. W. 830; Matter of Cannon, 47 Mich. 481, 11 N. W. 280; Semon *v.* People, 42 Mich. 141, 3 N. W. 304; Hodgson *v.* Nickell, 69 Wis. 308, 34 N. W. 118; Baker *v.* State, 65 Wis. 50, 26 N. W. 167; Van Tassel *v.* State, 59 Wis. 351, 18 N. W. 328; Baker *v.* State, 56 Wis. 568, 14 N. W. 718; State *v.* Jager, 19 Wis. 235; State *v.* Mushied, 12 Wis. 561.

11. Quasi-civil.— Chapel *v.* White, 3 Cush. (Mass.) 537.

12. Criminal proceeding.—*Arkansas.*—Jackson *v.* State, 29 Ark. 62.

B. Purpose of Proceedings. It is generally said that the object of these proceedings is not the imposition of a penalty for an immoral or unlawful act, but merely to compel the putative father to provide for the support of his offspring and thus secure the public against such support.[13] In some jurisdictions, however, the courts hold, as at common law,[14] that punishment of the father is as much the aim of the statute as the immunity of the public from the child's support.[15] In others the benefit of the mother is held to be the intended aim.[16]

C. Conditions Precedent — 1. Birth of Child Within State. The place of birth[17] or of the begetting of the child is generally immaterial.[18] If, however, the object of the proceeding is a punishment for fornication it is necessary that the child be begotten within the state.[19]

2. Residence of Mother Within State. As a rule it is not necessary that the mother be a resident of the state, in order to prosecute a bastardy proceeding therein.[20]

Illinois.— Holcomb *v.* People, 79 Ill. 409; Kelly *v.* People, 29 Ill. 287.

Kentucky.— Com. *v.* Porter, 1 A. K. Marsh. (Ky.) 44.

Maryland.— Plunkard *v.* State, 67 Md. 364, 10 Atl. 225, 309; Bake *v.* State, 21 Md. 422; Owens *v.* State, 10 Md. 164; State *v.* Phelps, 9 Md. 21; Oldham *v.* State, 5 Gill (Md.) 90; Root *v.* State, 10 Gill & J. (Md.) 374.

Massachusetts.— Southward *v.* Kimball, 5 Allen (Mass.) 301; Smith *v.* Hayden, 6 Cush. (Mass.) 111; Hyde *v.* Chapin, 2 Cush. (Mass.) 77; Cummings *v.* Hodgdon, 13 Metc. (Mass.) 246; Hill *v.* Wells, 6 Pick. (Mass.) 104.

New York.— People *v.* Carney, 29 Hun (N. Y.) 47. They are special proceedings of a criminal nature. People *v.* Colegrove, 18 N. Y. Suppl. 370, 45 N. Y. St. 100.

North Carolina.— State *v.* Bruce, 122 N. C. 1040, 30 S. E. 141; State *v.* Ballard, 122 N. C. 1024, 29 S. E. 899; State *v.* Wynne, 116 N. C. 981, 21 S. E. 35; State *v.* Cagle, 114 N. C. 835, 19 S. E. 766; Myers *v.* Stafford, 114 N. C. 234, 19 S. E. 764; State *v.* Burton, 113 N. C. 655, 18 S. E. 657.

Vermont.— Sweet *v.* Sherman, 21 Vt. 23.

England.— Rex *v.* Bowen, 5 T. R. 156; Rex *v.* Archer, 2 T. R. 270.

13. *Alabama.*—State *v.* Hunter, 67 Ala. 81.

Arkansas.— Chambers *v.* State, 45 Ark. 56.

Illinois.— Scharf *v.* People, 134 Ill. 240, 24 N. E. 761; Rawlings *v.* People, 102 Ill. 475; Kolbe *v.* People, 85 Ill. 336; Pease *v.* Hubbard, 37 Ill. 257.

Kansas.— Matter of Lee, 41 Kan. 318, 21 Pac. 282.

Maine.— Knowles *v.* Scribner, 57 Me. 495.

Maryland.— Plunkard *v.* State, 67 Md. 364, 10 Atl. 225, 309.

Massachusetts.—Wilbur *v.* Crane, 13 Pick. (Mass.) 284.

Nebraska.— *In re* Walker, 61 Nebr. 803, 86 N. W. 510; Jones *v.* State, 14 Nebr. 210, 14 N. W. 901; Cottrell *v.* State, 9 Nebr. 125, 1 N. W. 1008.

New Hampshire.— Marston *v.* Jenness, 11 N. H. 156.

North Carolina.— State *v.* Edwards, 110 N. C. 511, 14 S. E. 741; State *v.* Price, 81 N. C. 516; State *v.* Brown, 46 N. C. 129; State *v.* Pate, 44 N. C. 244.

Ohio.— Carter *v.* Krise, 9 Ohio St. 402; Perkins *v.* Mobley, 4 Ohio St. 668.

Tennessee.— Stovall *v.* State, 8 Baxt. (Tenn.) 597.

See 6 Cent. Dig. tit. "Bastards," § 40.

14. Thus 18 Eliz., c. 3, § 2, enacts that, "Two justices . . . shall and may by their Discretion take Order, as well for the Punishment of the Mother and reputed Father of such Bastard Child, as also for the better Relief of every such Parish." See also Rex *v.* Bowen, 5 T. R. 156.

15. Bake *v.* State, 21 Md. 422; Owens *v.* State, 10 Md. 164; State *v.* Phelps, 9 Md. 21; Oldham *v.* State, 5 Gill (Md.) 90. See also State *v.* Wynne, 116 N. C. 981, 21 S. E. 35; State *v.* Cagle, 114 N. C. 835, 19 S. E. 766; Myers *v.* Stafford, 114 N. C. 689, 19 S. E. 764; State *v.* Burton, 113 N. C. 655, 18 S. E. 657.

16. Burgen *v.* Straughan, 7 J. J. Marsh. (Ky.) 583; Scantland *v.* Com., 6 J. J. Marsh. (Ky.) 585; Com. *v.* Withers, 4 T. B. Mon. (Ky.) 510; Schooler *v.* Com., Litt. Sel. Cas. (Ky.) 88.

17. **Place of birth.**— Cooper *v.* State, 4 Blackf. (Ind.) 316. See also Com. *v.* Gurley, 45 Pa. St. 392. *Contra,* Tanner *v.* Allen, Litt. Sel. Cas. (Ky.) 25.

The birth of the child during a temporary absence of the mother will not defeat the right of action. Hodge *v.* Sawyer, 85 Me. 285, 27 Atl. 153; Davis *v.* Carpenter, 172 Mass. 167, 51 N. E. 530; Egleson *v.* Battles, 26 Vt. 548.

Child born dead.— The proceeding if deferred until after birth cannot be instituted where the child is still-born. Canfield *v.* State, 56 Ind. 168; Schramm *v.* Stephan, 133 Mass. 559; Patterson *v.* Bucy, 6 Ohio Dec. (Reprint) 723, 7 Am. L. Rec. 566.

18. **Place of begetting.**—McFadden *v.* Frye, 13 Allen (Mass.) 472. *Compare* Grant *v.* Barry, 9 Allen (Mass.) 459.

19. Sheay *v.* State, 74 Md. 52, 21 Atl. 607; Owens *v.* State, 10 Md. 164.

20. *Illinois.*— Mings *v.* People, 111 Ill. 98; Kolbe *v.* People, 85 Ill. 336; La Plant *v.* People, 60 Ill. App. 340.

Indiana.— State *v.* Gray, 8 Blackf. (Ind.) 274. Before the revision of 1843 another

D. Bar or Abatement of Proceedings — 1. Bar of Proceedings — a. Former Acquittal or Conviction. While an acquittal on the merits is of course a bar to a subsequent proceeding on the same charge,[21] a plea that a former indictment for the offense has been quashed,[22] or of a former acquittal of the charge of fornication and adultery with the mother of the bastard[23] will not be a sufficient defense. And as the province of a justice of the peace is usually confined to an examination only as to probable cause, and a requirement of security to appear for trial, an acquittal by such justice constitutes no bar to a subsequent prosecution.[24] On the other hand if the statute confers the proper jurisdiction an acquittal by the justice may be properly pleaded.[25]

rule prevailed, however. See Smith *v.* State, 4 Blackf. (Ind.) 188.

Kansas.— Moore *v.* State, 47 Kan. 772, 28 Pac. 1072, 17 L. R. A. 714.

Maryland.— Sheay *v.* State, 74 Md. 52, 21 Atl. 607.

Massachusetts.— Hill *v.* Wells, 6 Pick. (Mass.) 104. But see Grant *v.* Barry, 9 Allen (Mass.) 459, holding that if the child is begotten and born in another state, and the mother has never become a resident, the action will not lie.

New Jersey.—*Compare* Richardson *v.* Overseers of Poor, 33 N. J. L. 190.

Ohio.— McGary *v.* Bevington, 41 Ohio St. 280.

Rhode Island.— State *v.* Hussey, 12 R. I. 477.

Wisconsin.— Duffies *v.* State, 7 Wis. 672.

Contra, Sutfin *v.* People, 43 Mich. 37, 4 N. W. 509; Egleson *v.* Battles, 26 Vt. 548; Graham *v.* Monsergh, 22 Vt. 543.

See 6 Cent. Dig. tit. "Bastards," § 80.

21. Burnett *v.* Com., 4 T. B. Mon. (Ky.) 106.

A judgment on a recognizance for failing to appear and answer to a prosecution in bastardy is no bar to another prosecution for the same charge. Com. *v.* Thompson, 3 Litt. (Ky.) 284.

An acquittal on the ground that the time of birth was incorrectly stated in the warrant will not bar a subsequent proceeding on another warrant. Burnett *v.* Com., 4 T. B. Mon. (Ky.) 106.

Necessity of pleading.— If defendant desires to take advantage of a former proceeding as a defense it is necessary that he plead it as a bar. State *v.* Overseer of Poor, 43 N. J. L. 406; Fowler *v.* Zimmerman, 4 Ohio Dec. (Reprint) 271, 1 Clev. L. Rep. 195.

22. Neff *v.* State, 57 Md. 385.

The dismissal of a former proceeding for want of jurisdiction will not bar a subsequent proceeding. Lynn *v.* State, 84 Md. 67, 35 Atl. 21; State *v.* Giles, 103 N. C. 391, 9 S. E. 433.

Discontinuance of former proceedings.—An answer alleging a former proceeding before a justice, which was discontinued by relator upon defendant's providing for the support of the child, is good. Britton *v.* State, 54 Ind. 535; Gipe *v.* State, 40 Ind. 158. But where an appeal is taken by defendant from the order of the justices a subsequent discontinuance of the action by the overseers of the poor who made the complaint does not preclude the overseers of any other town, which is or is likely to become chargeable with the support of such child, from instituting another proceeding. Stowell *v.* Overseers of Poor, 5 Den. (N. Y.) 98.

23. Davis *v.* State, 58 Ga. 170.

An acquittal on an indictment for seduction is a bar to a subsequent indictment for fornication and bastardy founded on the same act, under the statutes of Pennsylvania. Dinkey *v.* Com., 17 Pa. St. 126, 55 Am. Dec. 542. Likewise a father who has been indicted for fornication and bastardy in the county where the child was begotten, and convicted of the fornication, cannot afterward be tried for bastardy in the county of the child's birth. Com. *v.* Lloyd, 141 Pa. St. 28, 21 Atl. 411.

24. *Alabama.*— Nicholson *v.* State, 72 Ala. 176.

Georgia.— Hyden *v.* State, 40 Ga. 476.

Illinois.— People *v.* Weiss, 67 Ill. App. 320 [*affirmed* in 170 Ill. 488, 48 N. E. 1054].

Indiana.— Davis *v.* State, 6 Blackf. (Ind.) 494.

Kansas.— Matter of Parker, 44 Kan. 279, 24 Pac. 338.

Massachusetts.— See Barnes *v.* Ryan, 174 Mass. 117, 54 N. E. 492, 75 Am. St. Rep. 288, wherein it is held that proceedings in the police court are preliminary in their nature, and hence a discharge after hearing is not a bar to a subsequent complaint.

Minnesota.— State *v.* Linton, 42 Minn. 32, 43 N. W. 571.

Nebraska.— Munro *v.* Callahan, 41 Nebr. 849, 60 N. W. 97.

New Hampshire.— Marston *v.* Jenness, 11 N. H. 156.

Contra, State *v.* Braun, 31 Wis. 600.

See 6 Cent. Dig. tit. "Bastards," § 49.

25. Maker *v.* State, 123 Ind. 378, 24 N. E. 128; Britton *v.* State, 54 Ind. 535; Gipe *v.* State, 40 Ind. 158; Thayer *v.* Overseers of Poor, 5 Hill (N. Y.) 443. Such judgment must, however, be rendered upon the merits. State *v.* Barbour, 17 Ind. 526.

A disagreement of two justices as to defendant's guilt, where the justice court has jurisdiction to try bastardy cases, does not constitute an acquittal and is not a bar to a subsequent proceeding before other justices. People *v.* Crowley, 25 N. Y. App. Div. 175, 49 N. Y. Suppl. 214. Nor would a proceeding where the justice, upon agreement of the parties and payment of costs by defendant, burned the papers and did not docket the

b. Limitations. A proceeding in bastardy is usually held not to fall within the provisions of statutes limiting the time within which actions or prosecutions may be brought.[26] The proceeding must be instituted within the time prescribed by the statute relating thereto.[27]

c. Release or Settlement — (I) *Before Institution of Proceedings.* A fair settlement by the mother with the alleged father, founded upon a sufficient consideration, precludes her from subsequently maintaining a proceeding against him.[28] It is held, however, in some jurisdictions that a settlement by the mother will not bar a proceeding by the public authorities.[29]

(II) *After Institution of Proceedings.* As a rule the statutes relating to bastardy do not permit the mother, after instituting a bastardy proceeding, to compromise or settle it, unless the consent of the court[30] or the consent

warrant or other proceedings, constitute a "former trial and conviction," and bar a subsequent prosecution on the same charge. State *v.* Robertson, 122 N. C. 1045, 29 S. E. 223.

26. Kenisten *v.* Rowe, 16 Me. 38; Wheelwright *v.* Greer, 10 Allen (Mass.) 389.

Thus it is not within the meaning of a statute regulating actions for misdemeanors (State *v.* Hunter, 67 Ala. 81), or for statutory penalties (State *v.* Laughlin, 73 Iowa 351, 35 N. W. 448; State *v.* Sarratt, 14 Rich. (S. C.) 29), or of a provision relative to crimes and punishments (State *v.* Stafford, 2 Blackf. (Ind.) 412. See also State *v.* Hedgepeth, 122 N. C. 1039, 30 S. E. 140; State *v.* Perry, 122 N. C. 1043, 30 S. E. 139).

An exception arises where the proceeding is considered of a purely criminal nature. It must then be brought within the time prescribed for other offenses of the same grade. Bake *v.* State, 21 Md. 422. Such statute begins to run at the birth and not the begetting of the child. Neff *v.* State, 57 Md. 385. But under such provision if defendant leaves his residence within the state, and conceals himself to avoid arrest for the offense, the statute does not begin to run in his favor till his return to his customary residence, though his hiding-place be within the state. Com. *v.* Blackburn, 3 Pa. Co. Ct. 464.

27. State *v.* Ledbetter, 26 N. C. 242; *Ex p.* Currie, 26 N. Brunsw. 576.

Infancy of mother.—Where the statute required that the proceeding be begun within two years from the birth of the child, the fact that the mother was an infant will not excuse a compliance therewith, notwithstanding a general provision of the code that persons under legal disability may bring actions within two years after the disability be removed. State *v.* Pavey, 82 Ind. 543.

The institution of the proceeding within the prescribed time is sufficient. Thus where the complaint and warrant in a bastardy proceeding were lost before service on defendant (Burt *v.* State, 79 Ind. 359), or the escape of defendant after arrest but before trial (Patterson *v.* State, 91 Ind. 364), the proceeding was sufficiently begun to enable a prosecution after the statutory time.

28. *Connecticut.*— Spalding *v.* Felch, 1 Root (Conn.) 319, holding the rule to be true though the settlement is made during pregnancy, and upon confinement she gives birth to more than one child.

Illinois.— Hendrix *v.* People, 9 Ill. App. 42.

Iowa.— Black Hawk County *v.* Cotter, 32 Iowa 125; Holmes *v.* State, 2 Greene (Iowa) 501.

Kentucky.— See Burgen *v.* Straughan, 7 J. J. Marsh. (Ky.) 583.

North Dakota.— Ingwaldson *v.* Skrivseth, 7 N. D. 388, 75 N. W. 772.

Pennsylvania.—Rohrheimer *v.* Winters, 126 Pa. St. 253, 17 Atl. 606; Com. *v.* Weaver, 9 Pa. Dist. 427.

Vermont.— Humphrey *v.* Kasson, 26 Vt. 760; Sherman *v.* Johnson, 20 Vt. 567.

See 6 Cent. Dig. tit. "Bastards," § 46.

The settlement must plainly show a discharge of defendant from his liability. Wallace *v.* Rappleye, 103 Ill. 229; Allen *v.* Davison, 16 Ind. 416.

Forms of release or compromise are set out in Hamden *v.* Merwin, 54 Conn. 418, 8 Atl. 670; People *v.* Kuechler, 87 Ill. App. 487; Fry *v.* State, 81 Ind. 465; Noble *v.* State, 39 Ind. 352.

29. *Iowa.*— *Compare* State *v.* Baker, 89 Iowa 188, 56 N. W. 425; State *v.* Noble, 70 Iowa 174, 30 N. W. 396; Black Hawk County *v.* Cotter, 32 Iowa 125.

Kentucky.— Com. *v.* Turner, 4 Dana (Ky.) 511.

Minnesota.— State *v.* Dougher, 47 Minn. 436, 50 N. W. 475.

Pennsylvania.— Com. *v.* Wicks, 2 Pa. Dist. 17; Com. *v.* Scott, 42 Wkly. Notes Cas. (Pa.) 407, 29 Pittsb. Leg. J. N. S. (Pa.) 77.

Vermont.— Humphrey *v.* Kasson, 26 Vt. 760; Sherman *v.* Johnson, 20 Vt. 567. See also Hale *v.* Turner, 29 Vt. 350.

See 6 Cent. Dig. tit. "Bastards," § 47.

30. *Alabama.*— A compromise of the proceedings will preclude further action either by the mother or the public. Martin *v.* State, 62 Ala. 119; Wilson *v.* Judge Pike County Ct., 18 Ala. 757.

Illinois.— The mother cannot release the liability of the father for a less sum than four hundred dollars without the approval of the court. Jones *v.* People, 77 Ill. App. 660.

Indiana.— Malson *v.* State, 75 Ind. 142; Reeves *v.* State, 37 Ind. 441; State *v.* Reynearson, 19 Ind. 211; Pickler *v.* State, 18 Ind. 266. And see State *v.* Wilson, 16 Ind. 134.

of the proper public authorities[31] is first obtained to such compromise or settlement.

(III) *Enforcement.* A forbearance to institute a bastardy proceeding,[32] or dismissing or ceasing to further prosecute a proceeding, is a good consideration to support a note or promise given therefor.[33] The death of the child before its support has cost the amount for which the note was given is no defense to an action thereon.[34] And a settlement may be enforced by the mother, notwithstand-

Kentucky.— Com. *v.* Davis, 6 Bush (Ky.) 295.

New York.— Rheel *v.* Hicks, 25 N. Y. 289.

Ohio.— Perkins *v.* Mobley, 4 Ohio St. 668.

See 6 Cent. Dig. tit. "Bastards," § 52.

Entering compromise of record.—While the compromise when properly made constitutes a complete bar to another action on the same cause (Carter *v.* State, 32 Ind. 404), under a statute providing that "the prosecuting witness may, at any time before the final judgment, dismiss such suit, if she shall enter of record an admission, that provision for the maintenance of the child has been made to her satisfaction; such entry shall be a bar to all other prosecutions for the same cause," any agreement prosecutrix may make out of court while an infant will not operate as a bar (Pickler *v.* State, 18 Ind. 266. And see State *v.* Wilson, 16 Ind. 134). Nor will the agreement operate as a bar until it is entered of record with the consent of the mother; the fact that she filed the agreement in court being not of itself sufficient to constitute a bar. Fisher *v.* State, 65 Ind. 51; State *v.* Wilson, 21 Ind. 273. Thus where prosecutrix dies after she had made and signed a release and acknowledgment, but before it has been entered on record, the prosecution of the suit in the name of the child is not barred. Harness *v.* State, 57 Ind. 1.

31. Dennett *v.* Nevers, 7 Me. 399; New York *v.* Celia, 23 Misc. (N. Y.) 138, 50 N. Y. Suppl. 637; Getzlaff *v.* Seliger, 43 Wis. 297.

An objection by the overseers of the poor to the compromise of the action is held to be in season if made at the trial of respondent on the complaint. Eames *v.* Gray, 61 Me. 405.

If the town does not assume the control and management of the suit within a certain time after it is begun by the mother she may compromise or dismiss it. Hurd *v.* Seeker, 12 Vt. 364. See also Haley *v.* Whalen, 121 Mass. 533; Billingsley *v.* Clelland, 41 W. Va. 234, 23 S. E. 812.

32. Forbearance to prosecute.—*Georgia.*— Jackson *v.* Finney, 33 Ga. 512; Hays *v.* McFarlan, 32 Ga. 699, 79 Am. Dec. 317.

Indiana.— Medcalf *v.* Brown, 77 Ind. 476; Abshire *v.* Mather, 27 Ind. 381; Harter *v.* Johnson, 16 Ind. 271.

Kentucky.— Clarke *v.* McFarland, 5 Dana (Ky.) 45; Burgen *v.* Straughan, 7 J. J. Marsh. (Ky.) 583.

North Carolina.— Self *v.* Clark, 55 N. C. 309.

England.— Linnegar *v.* Hodd, 5 C. B. 437, 17 L. J. C. P. 106, 57 E. C. L. 437.

See 6 Cent. Dig. tit. "Bastards," § 45.

33. Dismissal of proceeding.— *Alabama.*— Merritt *v.* Flemming, 42 Ala. 234; Ashburne *v.* Gibson, 9 Port. (Ala.) 549; Robinson *v.* Crenshaw, 2 Stew. & P. (Ala.) 276.

Georgia.— Hargroves *v.* Freeman, 12 Ga. 342.

Illinois.— Coleman *v.* Frum, 4 Ill. 378.

Indiana.— Nicewanger *v.* Bevard, 17 Ind. 621.

Massachusetts.— The statute requiring the complainant's husband, if she be married, to be made a party, dismissing a suit in which the husband is not joined, will not be sufficient consideration. Wilbur *v.* Crane, 13 Pick. (Mass.) 284.

Pennsylvania.— Pflaum *v.* McClintock, 130 Pa. St. 369, 18 Atl. 734.

Vermont.— Holcomb *v.* Stimpson, 8 Vt. 141; Knight *v.* Priest, 2 Vt. 507; Haven *v.* Hobbs, 1 Vt. 238, 18 Am. Dec. 678.

West Virginia.— Billingsley *v.* Clelland, 41 W. Va. 234, 23 S. E. 812.

See 6 Cent. Dig. tit. "Bastards," § 55.

Agreement by third party.— A written agreement by which defendant and another were to pay all damages arising from the complaint for bastardy, and further stipulating that no further damage should accrue against the respondent, is a sufficient consideration for a promissory note, and proof that the injured woman agreed to be satisfied with such arrangement is no more than proof of the execution of the agreement, and is admissible in an action on the note. Taylor *v.* Dansby, 42 Mich. 82, 3 N. W. 267.

Duress.— A party who, while under arrest on a charge of bastardy, but not actually in prison, or even under such restraint as would prevent him from going where he pleased, executes his promissory note in settlement of the charge is not under such duress as would enable him to avoid the contract. Heaps *v.* Dunham, 95 Ill. 583.

34. Death of child.— Eaton *v.* Burns, 31 Ind. 390; Marshall *v.* Bell, 1 Ind. App. 506, 27 N. E. 988; Maxwell *v.* Campbell, 8 Ohio St. 265; Maurer *v.* Mitchell, 9 Watts & S. (Pa.) 69; Moyer *v.* Folk, Harp. (S. C.) 50. See also Kammermeyer *v.* Hilz, 107 Wis. 101, 82 N. W. 689.

Liability not limited to life of maker.— Where defendant, in consideration of prosecutrix's discontinuing pending actions against him and releasing him from all claims and demands, agreed to pay all costs and relieve her "from any cost or expense in the support and maintenance of said child, and to see that it was well taken care of," it was held that it continued so long as the mother's obligation to support the child continued, and

ing her infancy,[35] or the infancy of the obligor.[36] It is a good defense, however, that prosecutrix, well knowing that she was not pregnant,[37] or that another than defendant was the father,[38] obtained the notes.

(iv) *SETTING ASIDE.* Plaintiff may always avoid a release or settlement pleaded in bar by showing that it was obtained from her through fraud.[39] Plaintiff must, however, return, or offer to return, any consideration paid her in the procurement of such release.[40]

2. ABATEMENT OF PROCEEDINGS — a. Death. The death of the child[41] or of the mother[42] will not abate the proceeding. But in the absence of express statutory provisions to the contrary the rule is otherwise upon the death of defendant.[43]

that the executors of the maker were bound to perform so much of the contract as had not been performed. Stumpf's Appeal, 116 Pa. St. 33, 8 Atl. 866.

35. Infancy of mother.— Garner *v.* Cook, 30 Ind. 331. Or if on account of the infancy of prosecutrix the note is made payable to her mother it may be enforced; the payee being the natural guardian of the mother and charged with her support. Jenkins *v.* Neighbors, 6 Ky. L. Rep. 736. Likewise a note given in settlement to the father of plaintiff may be sued upon in the name of the father, though he be but a trustee for his daughter. Cutter *v.* Collins, 12 Cush. (Mass.) 233.

The mother may disaffirm any settlement made during her infancy when urged as a bar to her action. Wilson *v.* Judge Pike County Ct., 18 Ala. 757.

36. Infancy of obligor.— Gavin *v.* Burton, 8 Ind. 69.

37. Spohr *v.* Holloway, 8 Blackf. (Ind.) 45.

38. Nicewanger *v.* Bevard, 17 Ind. 621. See also Carpenter *v.* Groff, 5 Serg. & R. (Pa.) 162, holding that, where plaintiff in procuring a compromise bond swore that none other than defendant had ever had carnal knowledge of her body, defendant should be allowed to show, in a subsequent action on such bond, that plaintiff's evidence was false regarding her chastity, it being proper to infer that such testimony would greatly influence defendant in giving the bond.

39. Gurley *v.* People, 31 Ill. App. 465; Ice *v.* State, 123 Ind. 590, 24 N. E. 682; Gresley *v.* State, 123 Ind. 72, 24 N. E. 332; State *v.* Young, 32 Kan. 292, 4 Pac. 309; Kezartee *v.* Cartmell, 31 Ohio St. 522.

Burden of proof.— A receipt given by the mother, expressed to be in full settlement of a case of bastardy, is *prima facie* evidence of a full settlement, and the burden of proof is upon her in seeking to impeach it. McElhaney *v.* People, 1 Ill. App. 550.

Where the compromise is obtained by permission of the court, it must be shown that it too was deceived by the representations of defendant as to the provisions which had been made for the benefit of the child. Maker *v.* State, 123 Ind. 378, 24 N. E. 128; State *v.* Carlisle, 21 Ind. App. 438, 52 N. E. 711.

Where defendant makes a motion to dismiss the action on ground of a release from complainant, and she resists such motion, it is the duty of the court to deny the motion, make up an issue, and allow defendant to plead the release in bar, and prosecutrix to obviate it may show infancy, or that it was obtained by fraud, or any other defense thereto. People *v.* Kuechler, 87 Ill. App. 487; Gurley *v.* People, 31 Ill. App. 465.

40. Maker *v.* State, 123 Ind. 378, 24 N. E. 128; State *v.* Carlisle, 21 Ind. App. 438, 52 N. E. 711.

41. *Alabama.*— See Satterwhite *v.* State, 32 Ala. 578, wherein it was held that the child's death, after issue joined, while it did not give defendant a right to demand a dismissal by the court, would be proper matter for a plea *puis darrein continuance.*

Illinois.— Hauskins *v.* People, 82 Ill. 193.

Indiana.— Malson *v.* State, 75 Ind. 142; Evans *v.* State, 58 Ind. 587.

Maine.— Smith *v.* Lint, 37 Me. 546.

Nebraska.— Hanisky *v.* Kennedy, 37 Nebr. 618, 56 N. W. 208.

North Carolina.— State *v.* Beatty, 66 N. C. 648.

Ohio.— Hinton *v.* Dickinson, 19 Ohio St. 583.

Wisconsin.— The death of the child prior to the commencement of the suit is no objection to the maintenance of the suit. Jerdee *v.* State, 36 Wis. 170.

See 6 Cent. Dig. tit. "Bastards," § 64.

As to abatement by death of party, generally, see ABATEMENT AND REVIVAL, III [1 Cyc. 47].

Where child is born dead.— If the complainant is not by the statute entitled to lying-in expenses the action will abate upon the birth of a dead child. State *v.* Beatty, 61 Iowa 307, 16 N. W. 149. See also Helfer *v.* Nelson, 7 Ohio Cir. Ct. 263, 4 Ohio Cir. Dec. 587. But under a statute authorizing the court to give judgment "for such sum as should be deemed just" a judgment against defendant for one hundred dollars was upheld, where the child was born dead. Evans *v.* State, 58 Ind. 587. To a similar effect is Robinson *v.* State, 128 Ind. 397, 27 N. E. 750.

42. People *v.* Nixon, 45 Ill. 353; People *v.* Smith, 17 Ill. App. 597; Dodge County v. Kemnitz, 28 Nebr. 224, 44 N. W. 184. But see *contra*, Rollins *v.* Chalmers, 49 Vt. 515.

Death of overseer.— In Rhode Island a bastardy complaint abates by the death of the overseer of the poor who made it. State *v.* Sullivan, 12 R. I. 212.

43. McKenzie *v.* Lombard, 85 Me. 224, 27 Atl. 110; State *v.* Durham, 52 N. C. 100.

b. Marriage of Complainant. The intermarriage of the parties pending the proceedings may properly be treated as an abatement thereof.[44] But the marriage of complainant to a third person while prosecuting a bastardy proceeding is not ground for abatement.[45]

c. Pendency of Another Proceeding. The mere issuance of a warrant upon complaint of prosecutrix, where it has not been served nor any proceedings had thereon, is not a "pending suit" in such sense as to abate a subsequent proceeding.[46]

E. Who May Institute Proceedings — 1. Mother — a. In General. The mother, and in some jurisdictions only the mother, may institute the proceeding.[47] The fact that the mother is a married woman will not preclude her from instituting it.[48] It has also been held in a number of jurisdictions that the infancy of

In Indiana the survival of the right of action is provided for by statute. State *v.* Williams, 8 Ind. 191.

44. Moran *v.* State, 73 Ind. 208; Gordon *v.* Amidon, 36 Vt. 735. But it has been held otherwise where defendant deserts the mother and denies his paternity. Law *v.* Albert, 16 Ohio Cir. Ct. 159, 8 Ohio Cir. Dec. 784.

If the child be legitimated by the marriage of its parents no proceedings can afterward be begun against the father (Doyle *v.* State, 61 Ind. 324), though the marriage was entered into by the father solely to escape prosecution and with intent to abandon the woman and child (Brock *v.* State, 85 Ind. 397).

45. Austin *v.* Pickett, 9 Ala. 102; Roth *v.* Jacobs, 21 Ohio St. 646; State *v.* Ingram, 4 Hayw. (Tenn.) 220. See also Swett *v.* Stubbs, 34 Me. 178.

46. Meredith *v.* Wall, 14 Allen (Mass.) 155.

As to pendency of another suit as ground for abatement, generally, see ABATEMENT AND REVIVAL, II [1 Cyc. 21].

After a mistrial in a bastardy suit the filing of a new complaint before another justice operates as a discontinuance of the first proceeding, without a formal motion for that purpose, and such former proceeding cannot be set up as a pending action. Kirkpatrick *v.* Crowley, 20 Misc. (N. Y.) 160, 45 N. Y. Suppl. 824. See also People *v.* Hamilton, 95 Mich. 210, 54 N. W. 874.

47. *Illinois.*— Jones *v.* People, 53 Ill. 366.

Indiana.— Harter *v.* Johnson, 16 Ind. 271.

Kentucky.— Burgen *v.* Straughan, 7 J. J. Marsh. (Ky.) 583.

Massachusetts.— Com. *v.* Cole, 5 Mass. 517.

North Carolina.— It is optional with the mother whether she will institute proceedings. State *v.* Crouse, 86 N. C. 617.

West Virginia.— Billingsley *v.* Clelland, 41 W. Va. 234, 23 S. E. 812.

See 6 Cent. Dig. tit. "Bastards," § 69.

Estoppel of mother to prosecute.—A mother who, on her oath, refuses to declare the father of her bastard child, but executes the prescribed bond and security to indemnify the county, is estopped from afterward instituting proceedings against the putative father to compel his maintenance of the child. State *v.* Price, 81 N. C. 516; State *v.* Brown, 46 N. C. 129. So a mother who has released herself from liability to support her child by a valid contract with a third person for its support cannot prosecute the putative father to compel him to aid in its maintenance. Young *v.* State, 53 Ind. 536.

Woman of color.— Before the abolition of slavery the right of colored women to institute bastardy proceedings was limited, in some states, to free women of color. Williams *v.* Blincoe, 5 Litt. (Ky.) 171; State *v.* Long, 31 N. C. 488. *Compare* State *v.* Lee, 29 N. C. 265. Since its abolition the color of complainant is immaterial. Allen *v.* Harris, 40 Ga. 220; Francis *v.* Com., 3 Bush (Ky.) 4. *Contra*, Plunkard *v.* State, 67 Md. 364, 10 Atl. 225, 309.

Waiver of objection.— If one goes to trial on a complaint by a person other than the mother he cannot urge the irregularity as grounds for an arrest of judgment. Jones *v.* People, 3 Ill. 477.

48. **Married woman.**— *Illinois.*—See Drennan *v.* Douglas, 102 Ill. 341, 40 Am. Rep. 595.

Indiana.— Cuppy *v.* State, 24 Ind. 389. But see Smith *v.* State, 4 Blackf. (Ind.) 188; Poulk *v.* Slocum, 3 Blackf. (Ind.) 421.

New Hampshire.— Parker *v.* Way, 15 N. H. 45.

New Jersey.— State *v.* Overseer of Poor, 24 N. J. L. 533.

North Carolina.— State *v.* Allison, 61 N. C. 346; State *v.* Wilson, 32 N. C. 131; State *v.* Pettaway, 10 N. C. 623; Wilkie *v.* West, 5 N. C. 319.

England.— Rex *v.* Luffe, 8 East 193, 9 Rev. Rep. 406; Rex *v.* Bedall, 2 Str. 1076.

Contra, Judge Limestone County Ct. *v.* Kerr, 17 Ala. 328; Pruitt *v.* Judge Barbour County Ct., 16 Ala. 705; Sword *v.* Nestor, 3 Dana (Ky.) 453; Haworth *v.* Gill, 30 Ohio St. 627; State *v.* Brill, 3 Ohio S. & C. Pl. Dec. 685, 6 Ohio S. & C. Pl. Dec. 14; Gaffery *v.* Austin, 8 Vt. 70.

See 6 Cent. Dig. tit. "Bastards," § 72.

Joinder of husband.— In some jurisdictions the joinder of the husband with the wife is held to be necessary. Keniston *v.* Rowe, 16 Me. 38. And if the marriage takes place pending an appeal the husband may be made a party by amendment. Oneal *v.* State, 2 Sneed (Tenn.) 214. In others this necessity is dispensed with. Sullivan *v.* Kelly, 3 Allen (Mass.) 148; Parker *v.* Way, 15 N. H. 45.

The term "unmarried" is held to apply to the mother at the time of making the complaint, and is not limited to her status at the time of delivery. Williams *v.* State, 29

the mother does not necessitate a prosecution of the proceeding by her guardian or by her next friend.[49]

b. Accusation in Travail. In some jurisdictions an accusation of defendant during the mother's travail has been held to be a condition precedent to her right to institute the proceeding against him.[50] In others such accusation is not necessary, but if made constitutes a *prima facie* case against defendant.[51]

2. Public Authorities. On the mother's refusal or neglect to prosecute, the municipal authorities liable for the support of the child are generally empowered to do so.[52]

F. Jurisdiction. The proceeding being statutory, reference should be had to the statutes of the particular state to determine the court in which it should be instituted. In some jurisdictions it may be instituted before a justice of the peace;[53] in others before a police or city court;[54] in others before a county court.[55]

Ala. 9; Willetts *v.* Jeffries, 5 Kan. 470; Sword *v.* Nestor, 3 Dana (Ky.) 453; Roth *v.* Jacobs, 21 Ohio St. 646; Devinney *v.* State, Wright (Ohio) 564.

49. Infancy of mother.— *Alabama.*— Miller *v.* State, 110 Ala. 69, 20 So. 392; Hanna *v.* State, 60 Ala. 100.

Indiana.— Dehler *v.* State, 22 Ind. App. 385, 53 N. E. 850.

Kentucky.—Francis *v.* Com., 3 Bush (Ky.) 4.

Maine.— Low *v.* Mitchell, 18 Me. 372.

Massachusetts.— Conefy *v.* Holland, 175 Mass. 469, 56 N. E. 701.

Vermont.— See Coomes *v.* Knapp, 11 Vt. 543, holding that the court may allow a *prochein ami* to enter as prosecutor, after a motion to dismiss has been made by defendant.

Contra, Hinman *v.* Taylor, 2 Conn. 357. See also Benton *v.* Starr, 58 Conn. 285, 20 Atl. 450.

See 6 Cent. Dig. tit. "Bastards," § 71.

50. Mann *v.* Maxwell, 83 Me. 146, 21 Atl. 844; Payne *v.* Gray, 56 Me. 317; Totman *v.* Forsaith, 55 Me. 360; Dennett *v.* Kneeland, 6 Me. 460; Murphy *v.* Spence, 9 Gray (Mass.) 399; Stiles *v.* Eastman, 21 Pick. (Mass.) 132; Drowne *v.* Stimpson, 2 Mass. 441.

51. Robbins *v.* Smith, 47 Conn. 182; Booth *v.* Hart, 43 Conn. 480.

52. *Connecticut.*— Hopkins *v.* Plainfield, 7 Conn. 286; Fuller *v.* Hampton, 5 Conn. 416; Hollister *v.* White, 2 Conn. 338.

Massachusetts.— Jones *v.* Thompson, 8 Allen (Mass.) 334. See also Noonan *v.* Brogan, 3 Allen (Mass.) 481.

New Hampshire.— Warren *v.* Glynn, 36 N. H. 424; R. R. *v.* J. M., 3 N. H. 135.

New Jersey.— See Garwood *v.* Overseers of Poor, 27 N. J. L. 436.

North Carolina.— See State *v.* Crouse, 86 N. C. 617.

Rhode Island.— State *v.* Hussey, 12 R. I. 477, mother a non-resident.

Vermont.— Overseer of Poor *v.* Yarrington, 20 Vt. 473.

Wisconsin.— Baker *v.* State, 65 Wis. 50, 26 N. W. 167.

See 6 Cent. Dig. tit. "Bastards," § 77.

Where the mother, after instituting suit, neglects it, no request that she proceed need be shown. Callinan *v.* Coffey, 3 Allen (Mass.) 477.

53. Justice of the peace.—*Alabama.*—Williams *v.* State, 29 Ala. 9.

Arkansas.— Jackson *v.* State, 29 Ark. 62.

Connecticut.— Naugatuck *v.* Smith, 53 Conn. 523, 3 Atl. 550.

Maine.— McFadden *v.* Bubier, 66 Me. 270.

Maryland.— Cushwa *v.* State, 20 Md. 277; Eccleston *v.* State, 7 Gill & J. (Md.) 316.

Massachusetts.— Woodman *v.* Jarvis, 12 Gray (Mass.) 190.

North Carolina.— State *v.* Mize, 117 N. C. 780, 23 S. E. 330; State *v.* Waldrop, 63 N. C. 507.

Ohio.— Hamm *v.* Wickline, 26 Ohio St. 81.

See 6 Cent. Dig. tit. "Bastards," § 84.

Disqualification of justice.— The mere interest of the justice when complainant is a pauper does not disqualify him from trying the cause. M. J. J. *v.* J. C. B., 47 N. H. 362. But if one of the justices be a cousin to prosecutrix (State *v.* Gariss, 38 N. J. L. 200), or a son-in-law of the overseer at whose instance the proceeding is instituted (Rivenburgh *v.* Henness, 4 Lans. (N. Y.) 208) he would be disqualified.

A notary public, with *ex-officio* powers of a justice of the peace, has the same jurisdiction in bastardy proceedings as a justice. Bell *v.* State, 124 Ala. 94, 27 So. 414; Douglass *v.* State, 117 Ala. 185, 23 So. 142.

Where the statute provided that "any justice of the peace" should have jurisdiction, jurisdiction was denied to a justice's court presided over by two justices of the peace. Renew *v.* State, 79 Ga. 162, 4 S. E. 19.

54. Police or city court.— *Georgia.*— Darden *v.* State, 74 Ga. 842.

Maine.—See Robinson *v.* Swett, 26 Me. 378.

Massachusetts.— Southward *v.* Kimball, 5 Allen (Mass.) 301; Hill *v.* Wells, 6 Pick. (Mass.) 104.

Michigan.— People *v.* Kaminsky, 73 Mich. 637, 41 N. W. 833; People *v.* Phalen, 49 Mich. 492, 13 N. W. 830.

New Hampshire.— Locke *v.* Leavitt, 62 N. H. 61.

New York.— People *v.* Higgins, 151 N. Y. 570, 45 N. E. 1033.

See 6 Cent. Dig. tit. "Bastards," § 85.

55. County court.— Stoppert *v.* Nierle, 45 Nebr. 105, 63 N. W. 382; Ingram *v.* State, 24 Nebr. 33, 37 N. W. 943; State *v.* Hughes, 8 S. D. 338, 66 N. W. 1076; State *v.* Bunker, 7 S. D. 639, 65 N. W. 33; State *v.* Scott, 7

G. Venue — 1. In General. Proceedings under the bastardy acts are generally deemed to be transitory.[56] In some jurisdictions they must be instituted in the county wherein the putative father resides;[57] in others in the county wherein the mother resides;[58] in others in the county in which the child is likely to become a charge.[59]

2. Change of Venue. The venue may, in a proper case, be changed.[60] Statutes or rules of court governing a change must, however, be observed.[61]

H. Preliminary Proceedings — 1. Complaint. The complaint before the justice should be in writing,[62] signed by complainant,[63] and verified.[64] It need not

S. D. 619, 65 N. W. 31. See also Dobson *v.* State, 69 Ark. 376, 63 S. W. 796.

56. Transitory nature of proceedings.— Matter of Lee, 41 Kan. 318, 21 Pac. 282; Dennett *v.* Kneeland, 6 Me. 460; Williams *v.* Campbell, 3 Metc. (Mass.) 209; Hill *v.* Wells, 6 Pick. (Mass.) 104; Com. *v.* Cole, 5 Mass. 517; Knox *v.* Weber, 5 Ohio Dec. (Reprint) 138, 5 Cinc. L. Bul. 889; Fowler *v.* Zimmerman, 4 Ohio Dec. (Reprint) 271, 1 Clev. L. Rep. 195.

57. County of father's residence.— Morris *v.* State, 115 Ind. 282, 16 N. E. 632, 17 N. E. 598; Carter *v.* Kilburn, 1 A. K. Marsh. (Ky.) 463; Gallary *v.* Holland, 15 Gray (Mass.) 50; Williams *v.* Campbell, 3 Metc. (Mass.) 209.

The affidavit of the mother may properly be secured and transmitted to such county for this purpose. State *v.* Chaney, 93 Md. 71, 48 Atl. 1057; Root *v.* State, 10 Gill & J. (Md.) 374.

58. County of mother's residence.—*Georgia.* — Where the begetting, birth, and preliminary proceeding before the justice were in another county, the proceeding cannot be further prosecuted in the county wherein the mother resided. Huff *v.* State, 29 Ga. 424.

Maine.— Hodge *v.* Sawyer, 85 Me. 285, 27 Atl. 153.

Maryland.— Norwood *v.* State, 45 Md. 68.

Nebraska.— Ingram *v.* State, 24 Nebr. 33, 37 N. W. 943.

New Jersey.— Ruff *v.* Kebler, 62 N. J. L. 186, 40 Atl. 626.

New York.— Keller *v.* Mertens, 37 N. Y. App. Div. 497, 55 N. Y. Suppl. 1043.

North Carolina.— State *v.* Hales, 65 N. C. 244; State *v.* Roberts, 32 N. C. 350.

Pennsylvania.—Com. *v.* Davidheiser, 20 Pa. Co. Ct. 200.

Vermont.— Allen *v.* Ford, 11 Vt. 367.

See 6 Cent. Dig. tit. "Bastards," § 93.

59. County liable for support of child.— Williams *v.* State, 67 Ga. 187; Davis *v.* State, 58 Ga. 170; Clark *v.* Carey, 41 Nebr. 780, 60 N. W. 78; State *v.* Elam, 61 N. C. 460; State *v.* Jenkins, 34 N. C. 121; State *v.* Roberts, 32 N. C. 350.

At common law it must appear that the child was born in the parish for whose relief the order in bastardy is made. Rex *v.* Sweet, 9 East 25; Rex *v.* Butcher, 1 Str. 437. See also Rex *v.* Price, 6 T. R. 147. Following this rule see Hawkins *v.* State, 21 N. J. L. 630; Dally *v.* Woodbridge Tp., 21 N. J. L. 491; State *v.* Bidleman, 17 N. J. L. 20.

60. Saint *v.* State, 68 Ind. 128, holding that the state, as plaintiff, may demand the change.

At common law the parties had no right to a change of venue. State *v.* Smith, 55 Ind. 385.

In Wisconsin the power of a justice to grant a change of venue in a bastardy case has been denied. Duffies *v.* State, 7 Wis. 672.

61. Reitz *v.* State, 33 Ind. 187; Riggen *v.* Com., 3 Bush (Ky.) 493.

62. Written complaint.— Maynard *v.* People, 135 Ill. 416, 25 N. E. 740; Cross *v.* People, 10 Mich. 24; State *v.* Simons, 30 Vt. 620; Graves *v.* Adams, 8 Vt. 130. *Contra*, Jones *v.* People, 53 Ill. 366; Smith *v.* Hayden, 6 Cush. (Mass.) 111; State *v.* Overseer of Poor, 24 N. J. L. 533.

Amendment.—A complaint may be amended. Robie *v.* McNiece, 7 Vt. 419. See also *infra*, VII, J, 3.

The complaint need not be separate and apart from the accusation. Woodward *v.* Shaw, 18 Me. 304.

Forms of complaint or affidavit are set out in whole or in part in

Alabama.— Walker *v.* State, 108 Ala. 56, 19 So. 353.

Connecticut.— Fuller *v.* Hampton, 5 Conn. 416; Hinman *v.* Taylor, 2 Conn. 357.

Florida.— Thomas *v.* State, 37 Fla. 378, 20 So. 529; William H. T. *v.* State, 18 Fla. 883.

Illinois.— Maynard *v.* People, 135 Ill. 416, 25 N. E. 740; Harrison *v.* People, 81 Ill. App. 93.

Indiana.— Smith *v.* State, 125 Ind. 440, 25 N. E. 598; Kinder *v.* State, 70 Ind. 284; Dibble *v.* State, 48 Ind. 470.

Iowa.— State *v.* McGlothlen, 56 Iowa 544, 9 N. W. 893.

Michigan.— Cross *v.* People, 10 Mich. 24.

Minnesota.— State *v.* Snure, 29 Minn. 132, 12 N. W. 347.

North Carolina.— State *v.* Perry, 122 N. C. 1043, 30 S. E. 139.

Vermont.— Sisco *v.* Harmon, 9 Vt. 129.

63. Signature of complainant.— Graves *v.* Adams, 8 Vt. 130.

A complaint in the name of the state, on the relation of prosecutrix, may be properly signed by the prosecutrix. Kinder *v.* State, 70 Ind. 284, 68 Ind. 454.

The failure of complainant to sign, though good cause for quashing the proceedings, if objected to in time, cannot be regarded as one of substance and taken advantage of after verdict. Ramo *v.* Wilson, 24 Vt. 517.

64. Verification of complaint.— Graves *v.* Adams, 8 Vt. 130.

state at what time and place the child was begotten,[65] nor that prosecutrix is a resident of the county in which the proceeding is brought,[66] nor need it conclude *contra formam statuti*.[67] If the right to prosecute is limited to unmarried women it should be alleged that complainant is unmarried.[68] The complaint must also allege that prosecutrix is "pregnant or delivered of a child who by law would be deemed and held a bastard," or the equivalent thereof, if the statute so requires.[69]

2. Examination of Complainant. The examination of the prosecutrix before the justice should be taken down in writing.[70] The examination should also be

A complaint sworn to by the woman and by her father, but subscribed by him only, is a sufficient compliance with a statute requiring the injured woman to "complain on oath to a justice . . . against the person she charges with being the father of such child." Benton *v.* Starr, 58 Conn. 285, 20 Atl. 450.

If made by a town the oath of one selectman is sufficient. Chaplin *v.* Hartshorne, 6 Conn. 41.

Jurat.— If it appear in the body of the accusation that it was taken on oath before a justice it is sufficient without the words "before me" in his certificate at the close. Cross *v.* People, 10 Mich. 24. See, generally, Acknowledgments, XII [1 Cyc. 571].

Oath administered by notary.— In Indiana the complaint in a bastardy proceeding may be sworn to before a notary public. Sample *v.* State, 53 Ind. 28.

Where the proper verification is not fully clear the presumption of regularity in the proceedings will prevail. Tacey *v.* Noyes, 143 Mass. 449, 9 N. E. 830.

65. Time and place of begetting child.— *Michigan.*—Hamilton *v.* People, 46 Mich. 186, 9 N. W. 247.

Minnesota.— State *v.* Brathovde, 81 Minn. 501, 84 N. W. 340.

Nebraska.— Robb *v.* Hewitt, 39 Nebr. 217, 58 N. W. 88.

New Hampshire.— Warner *v.* Wheeler, 62 N. H. 385; Littleton *v.* Perry, 50 N. H. 29.

Rhode Island.— State *v.* Hackett, 14 R. I. 162.

Wisconsin.— Zweifel *v.* State, 27 Wis. 396.

See also *supra*, VII, C, 1; and 6 Cent. Dig. tit. "Bastards," § 101.

Accusation during travail.— As the complaint may be made before plaintiff's confinement it need not be alleged that she accused defendant during her travail. Beals *v.* Furbish, 39 Me. 469; Dennett *v.* Kneeland, 6 Me. 460.

The sex of the child need not be stated in the complaint. Richmond *v.* State, 19 Wis. 307. And an allegation that the child "is a bastard" implies that it is alive at the time of making the complaint. State *v.* Snure, 29 Minn. 132, 12 N. W. 347.

66. Residence of prosecutrix.— Dibble *v.* State, 48 Ind. 470; State *v.* Demoss, 4 Ind. 189; Neff *v.* State, 3 Ind. 564; State *v.* Gray, 8 Blackf. (Ind.) 274; Beeman *v.* State, 5 Blackf. (Ind.) 165; State *v.* Allen, 4 Blackf. (Ind.) 269; Zweifel *v.* State, 27 Wis. 396. See also *supra*, VII, C, 2.

67. Conclusion.— Hopkins *v.* Plainfield, 7 Conn. 286; Com. *v.* Moore, 3 Pick. (Mass.) 194; State *v.* Peeples, 108 N. C. 768, 13 S. E. 8.

68. Showing that complainant is unmarried.— *Alabama.*— Walker *v.* State, 108 Ala. 56, 19 So. 353; Smith *v.* State, 73 Ala. 11.

Florida.— E. D. P. *v.* State, 18 Fla. 175; Andrew G. *v.* Catherine A., 16 Fla. 830.

Georgia.— *Compare* Smith *v.* State, 28 Ga. 19.

Illinois.— Maynard *v.* People, 135 Ill. 416, 25 N. E. 740. See also Eshelman *v.* People, 52 Ill. App. 621.

North Carolina.—*Compare* State *v.* Peeples, 108 N. C. 768, 13 S. E. 8.

Ohio.— Devinney *v.* State, Wright (Ohio) 564.

Vermont.— *Compare* Robie *v.* McNiece, 7 Vt. 419.

As to right of married woman to institute proceeding see *supra*, VII, E, 1, a.

It is not necessary to allege that plaintiff was unmarried at the time of conception, such fact being matter of proof. William H. T. *v.* State, 18 Fla. 883; Zweifel *v.* State, 27 Wis. 396. The allegation that plaintiff is a single woman and that the child when born will be "deemed to be a bastard" is sufficient. Thomas *v.* State, 37 Fla. 378, 20 So. 529.

69. *Ex p.* Hays, 25 Fla. 279, 6 So. 64.

A failure to allege in precise terms that complainant had been delivered of a bastard child may be cured by verdict, the presumption being that such fact was proved on trial. Chapel *v.* White, 3 Cush. (Mass.) 537. So a complaint by plaintiff in which she swears that defendant got her with child, and that he is the father of her child, is sufficient after verdict, though it is not distinctly alleged that she is pregnant or has been delivered. Robie *v.* McNiece, 7 Vt. 419.

70. Poulk *v.* Slocum, 3 Blackf. (Ind.) 421; Sayles *v.* Fanning, 13 Gray (Mass.) 538; Altschuler *v.* Algaza, 16 Nebr. 631, 21 N. W. 401; Howard *v.* Overseers of Poor, 1 Rand. (Va.) 464; Mann *v.* Com., 6 Munf. (Va.) 452.

Examination on oath.— The examination will be defective if it does not appear that it was taken under oath. State *v.* Ledbetter, 26 N. C. 245.

Form of examination before justice is set out in State *v.* Higgins, 72 N. C. 226.

authenticated.[71] As the right of defendant to have the prosecutrix examined is for his benefit it may be waived by him.[72]

3. WARRANT. The warrant for the arrest of defendant should show either the jurisdictional facts essential to support a proceeding in bastardy or that such facts have been determined by the justice.[73] If not expressly required by statute it need not be under seal,[74] and it need not conclude *contra formam statuti*.[75] It is not limited in its operation to the township[76] or county[77] from which it issues, and may be served by an officer authorized to serve warrants in criminal cases.[78]

4. DECISION. A finding by a justice that said complaint is true,[79] or that respondent is guilty,[80] is equivalent to a finding that he was the father of the child. It has also been held that a requirement from defendant of a bond to appear before the higher court implies such finding.[81]

5. RETURN TO HIGHER COURT. The original papers are not indispensable in the higher court, but the proceedings may be continued on certified copies of same.[82]

71. Altschuler *v.* Algaza, 16 Nebr. 631, 21 N. W. 401.

Sufficiency of authentication.— While the signature of the justices before whom the examination is held is the proper authentication of the proceedings, yet a warrant issued by them on the same paper and connected with it has been held sufficient. State *v.* Thompson, 26 N. C. 484. And where the proceeding was before two justices, one of whom omitted his signature, the court to which the proceedings were returned may permit the justice then to sign the examination. State *v.* Thomas, 27 N. C. 366. See also Sayles *v.* Fanning, 13 Gray (Mass.) 538.

72. Unruh *v.* State, 105 Ind. 117, 4 N. E. 453; Smith *v.* State, 67 Ind. 61; Strickler *v.* Grass, 32 Nebr. 811, 49 N. W. 804.

Material defects in an examination may be waived. State *v.* Carson, 19 N. C. 368. Thus the right to demand an opportunity to confront and cross-examine prosecutrix during such examination may be waived. State *v.* Rogers, 119 N. C. 793, 26 S. E. 142.

73. Collins *v.* State, 78 Ala. 433; Williams *v.* State, 29 Ala. 9.

The warrant need not show that complainant is unmarried where the evidence shows such fact. Francis *v.* Com., 3 Bush (Ky.) 4. And where the statute provided that "any unmarried woman may go before a justice of any township of her county, in which she has resided for the next preceding year," the period of residence was held to refer to the time before the making of the complaint and not to the birth of the child, and that the warrant need not show a residence of complainant in the township for a year preceding the birth of her child. Tennant *v.* Brookover, 12 W. Va. 337. But under a statute requiring that the warrant state the correct time of the birth of the bastard, a proceeding wherein the warrant failed to thus state the time is void. Burnett *v.* Com., 4 T. B. Mon. (Ky.) 106.

Unnecessary statements in the warrant may be rejected as surplusage. Luce *v.* Burbank, 56 Me. 414.

The commitment of defendant on a defective warrant does not deprive the magistrate committing him of power to restrain him by virtue of a valid warrant subsequently executed. People *v.* McFarline, 50 N. Y. App. Div. 95, 63 N. Y. Suppl. 622, 15 N. Y. Crim. 23.

74. Millett *v.* Baker, 42 Barb. (N. Y.) 215.

75. State *v.* Peeples, 108 N. C. 768, 13 S. E. 8.

Amendment.— Where the warrant charged that the child was begotten on June 2, 1891, and was born on March 2, 1895, it was error not to permit the latter date to be changed to March 2, 1892, as stated in prosecutrix's complaint. Com. *v.* Cantrell, 20 Ky. L. Rep. 24, 45 S. W. 72.

76. Morris *v.* State, 115 Ind. 282, 16 N. E. 632, 17 N. E. 598.

77. Matter of Lee, 41 Kan. 318, 21 Pac. 282.

78. Castles *v.* Welch, 63 N. H. 369. *Compare* Bassett *v.* Howorth, 104 Mass. 224.

A delay in the service of the warrant until after the term of court before which defendant was commanded to furnish security for his appearance will not vitiate the warrant. Luce *v.* Burbank, 56 Me. 414. See also Baker *v.* State, 56 Wis. 568, 14 N. W. 718, wherein it was held that an officer having failed to serve a warrant, and neglected to deliver it to his successor, a second warrant might issue on the original complaint.

Return.— It is not necessary that the return be made to the justice who issued the warrant. Hopkins *v.* Plainfield, 7 Conn. 286; Williams *v.* Copeland, 5 Allen (Mass.) 209.

79. Abshire *v.* State, 52 Ind. 99.

Insufficient findings.— Where the justices do not find whether a child alleged to be a bastard was born in wedlock or not, nor whether, if born in wedlock, the facts existed which would still render it a bastard, it was held that there were sufficient grounds for quashing the proceedings. State *v.* Herman, 35 N. C. 502.

80. Murphy *v.* Spence, 9 Gray (Mass.) 399. See also Hopkins *v.* Plainfield, 7 Conn. 286.

81. Smith *v.* State, 67 Ind. 61; State *v.* Barbour, 17 Ind. 526.

82. Biggane *v.* Ross, 126 Mass. 233; Kennedy *v.* Shea, 110 Mass. 152; Ramo *v.* Wilson, 24 Vt. 517.

Time of filing.—A certified copy of the proceedings may be filed in the higher court at

A transcript of the proceedings has been held sufficient, though a copy of the complaint[83] or warrant[84] be omitted. While the recognizance for appearance of defendant should be transmitted,[85] it has been held that if there has been a failure to exact such recognizance the appearance may be enforced by a capias.[86]

I. Security For Appearance —1. **Necessity.** It is generally the duty of the justice, when he finds that there is probable cause to believe that defendant is the father of the child, to require him to give bond for his appearance for trial.[87]

2. **Who May Take.** The right to take security is generally given to the committing magistrate.[88]

3. **Requisites and Validity.** If the statute is silent as to the effect of a departure from the prescribed form of bond the principles of the common law will govern.[89] It follows that if there be no material mistake in the substantive matter of the bond, a mere misrecital or informality will not invalidate it.[90]

any time before the trial begins. Hawes *v.* Gustin, 2 Allen (Mass.) 402; Packard *v.* Lawrence, 15 Gray (Mass.) 483. See also Allen *v.* State, 4 Blackf. (Ind.) 122; Altschuler *v.* Algaza, 16 Nebr. 631, 21 N. W. 401. Or an entry *nunc pro tunc* may be allowed by the court. Dineen *v.* Williams, 138 Mass. 367.

The neglect of the justice to file a transcript, or even the fact that the papers are lost, does not render it obligatory upon the court to grant a continuance. A new transcript may be substituted, and the testimony which was taken may be proved by parol. Burt *v.* State, 79 Ind. 359; Hoff *v.* Fisher, 26 Ohio St. 7. But *compare* Bingham *v.* Marcy, 32 Vt. 278, in which case, though the proceedings were admitted to be civil, the rules allowing the filing of a new declaration upon the loss of the original complaint and warrant were held not to be applicable.

83. Mobley *v.* State, 83 Ind. 92; Com. *v.* Hazlerigg, 18 B. Mon. (Ky.) 29.

The certification and transmission of a paper not required by the direct terms of the statute will not invalidate the return; and such paper may be treated as a part of the record, should it be material in showing the jurisdiction of the lower court. Williams *v.* State, 29 Ala. 9.

84. Berryman *v.* Judge Lawrence County Ct., 9 Ala. 455.

In Illinois it is held that only the warrant for arrest and recognizance for appearance are required. Curran *v.* People, 35 Ill. App. 275.

85. State *v.* Lewis, 4 Blackf. (Ind.) 20; Norwood *v.* State, 45 Md. 68.

86. State *v.* Green, 71 N. C. 172.

87. New Haven *v.* Rogers, 32 Conn. 221; Hopkins *v.* Plainfield, 7 Conn. 286; Matter of Carleton, 11 Nebr. 99, 7 N. W. 755; Mather *v.* Clark, 2 Aik. (Vt.) 209.

The infancy of defendant does not affect the rule. McCall *v.* Parker, 13 Metc. (Mass.) 372, 46 Am. Dec. 735.

A justice may, on an adjournment, require defendant to enter into a recognizance for his future appearance. New Haven *v.* Rogers, 32 Conn. 221.

When defendant has given security, or has been committed in default thereof, the justice has no authority to subsequently discharge him under a compromise. Getzlaff *v.* Seliger, 43 Wis. 297.

88. New Haven *v.* Rogers, 32 Conn. 221; People *v.* Green, 58 Ill. 236.

Right of sheriff to exact.— In the absence of express authority the sheriff cannot exact security. Grogan *v.* State, 58 Ga. 196; Keller *v.* Com., 2 Mon. (Pa.) 757.

89. Erlinger *v.* People, 36 Ill. 458. And see People *v.* Meighan, 1 Hill (N. Y.) 298, in which case the statute provided that an irregularity would invalidate the entire bond.

Nature of security.— In some jurisdictions the security for appearance must be a bond, and a recognizance has been held improper. Mariner *v.* Dyer, 2 Me. 165; Merrill *v.* Prince, 7 Mass. 396; Johnson *v.* Randall, 7 Mass. 340. Other jurisdictions allow either the taking of a recognizance or a bond. New Haven *v.* Rogers, 32 Conn. 221; Hamilton *v.* Com., 3 T. B. Mon. (Ky.) 212.

Forms of security for appearance are set out in whole or in part in Walker *v.* State, 108 Ala. 56, 19 So. 353; Erlinger *v.* People, 36 Ill. 458; Fry *v.* State, 81 Ind. 465; Turner *v.* State, 66 Ind. 210; Burr *v.* Wilson, 50 Ind. 587; Sowders *v.* State, 37 Kan. 209, 14 Pac. 865; Robinson *v.* Swett, 26 Me. 378; State *v.* Moran, 18 Nebr. 536, 26 N. W. 357; Davis *v.* State, 47 N. J. L. 341; Neininger *v.* State, 50 Ohio St. 394, 34 N. E. 633, 40 Am. St. Rep. 674.

90. *Alabama.*— Hanna *v.* State, 60 Ala. 100; State *v.* Castleberry, 23 Ala. 85.

Connecticut.— New Haven *v.* Rogers, 32 Conn. 221; Hopkins *v.* Plainfield, 7 Conn. 286.

Illinois.— Erlinger *v.* People, 36 Ill. 458.

Indiana.— State *v.* Bradley, 1 Blackf. (Ind.) 83.

Massachusetts.— Locke *v.* Johnson, 3 Allen (Mass.) 153; Chapel *v.* Congdon, 18 Pick. (Mass.) 257.

Nebraska.— State *v.* Moran, 24 Nebr. 103, 38 N. W. 29; State *v.* Moran, 18 Nebr. 536, 26 N. W. 357.

New York.— People *v.* Tilton, 13 Wend. (N. Y.) 597. Nor would the validity be affected by the fact that one of the justices before whom the proceedings are had, and the bond given, had been previously employed by defendant as his counsel in the case. People *v.* Clark, 21 Barb. (N. Y.) 214.

There should, however, be a substantial compliance with the requirements of the statute.[91]

4. Performance and Breach. A bond conditioned that defendant shall appear and abide the order of the court is not fulfilled by his mere appearance.[92] He must pay such money as the court may order for the maintenance of the child,[93] or give bond for its payment.[94] By the weight of authority his submission to prison, in lieu of security for the performance of the court's final order, will be a discharge.[95] A failure to appear, however, at a different term than that specified is no breach of the bond.[96]

5. Rights and Liabilities of Sureties. Sureties may surrender their principal to the custody of the law, and terminate their liability.[97] To operate as a discharge, however, the surrender must be at the time,[98] and in the manner, pre-

Ohio.— Proseck *v.* State, 38 Ohio St. 606; Porter *v.* State, 23 Ohio St. 320; Jedlicka *v.* State, 4 Ohio Dec. (Reprint) 463, 2 Clev. L. Rep. 196.

Rhode Island.— State *v.* Sullivan, 12 R. I. 212.

See 6 Cent. Dig. tit. "Bastards," § 130.

91. State *v.* Smith, Tapp. (Ohio) 175. See also Seale *v.* McClanahan, 21 Ala. 345, holding that if the bond does not conform to the statute in requiring defendant to appear at "the next term" after it is taken it is void.

If given under duress the bond will be void. Fisher *v.* Shattuck, 17 Pick. (Mass.) 252.

Where the justice by mistake takes a recognizance from defendant to indemnify the county against all charges for the maintenance of the child, when in fact defendant desired to, and supposed he did, enter into a recognizance to appear at the circuit court, to contest the charge, equity will grant relief, provided defendant use due diligence in having the mistake corrected. Huyett *v.* Slick, 43 Md. 284.

92. People *v.* Phalen, 49 Mich. 492, 13 N. W. 830; People *v.* Jayne, 27 Barb. (N. Y.) 58. But see Dunbarton *v.* Palfry, 27 N. H. 171, holding that the bond is satisfied where accused appears, answers the complaint, is ready to abide the order of the court, and the court adjourns the cause without the consent of the accused.

Illustrations.— Where defendant appears, answers, and demands a jury trial, but is thereafter defaulted for non-appearance for trial (Tracy *v.* Howe, 119 Mass. 228), or where, after verdict is rendered against him, he escapes (People *v.* Ogden, 10 Ill. App. 226; Turner *v.* State, 66 Ind. 210; Jackson *v.* State, 30 Kan. 88, 1 Pac. 317; Wintersoll *v.* Com., 1 Duv. (Ky.) 177; Davis *v.* State, 47 N. J. L. 341. See also New Haven *v.* Rogers, 32 Conn. 221), a breach results.

93. Hodge *v.* Hodgdon, 8 Cush. (Mass.) 294.

94. Corson *v.* Tuttle, 19 Me. 409; Taylor *v.* Hughes, 3 Me. 433; Constable *v.* Kennedy, 21 N. Y. App. Div. 97, 47 N. Y. Suppl. 452.

95. *Connecticut.*— Naugatuck *v.* Bennett, 51 Conn. 497.

Kansas.— Wheeler *v.* State, 39 Kan. 163, 17 Pac. 856; McGarry *v.* State, 37 Kan. 9, 14 Pac. 491.

Massachusetts.— Power *v.* Fenno, 10 Gray (Mass.) 249; Towns *v.* Hale, 2 Gray (Mass.) 199.

North Carolina.— State *v.* Thompson, 48 N. C. 365.

Ohio.— Gebhart *v.* Drake, 24 Ohio St. 177; Porter *v.* State, 23 Ohio St. 320.

Contra, Corson *v.* Tuttle, 19 Me. 409; Taylor *v.* Hughes, 3 Me. 433.

See 6 Cent. Dig. tit. "Bastards," § 132.

96. People *v.* Higgins, 151 N. Y. 570, 45 N. E. 1033; People *v.* Swales, 33 Hun (N. Y.) 208; Grieve *v.* Freytag, 31 Ohio St. 147. See also People *v.* Boardman, 24 How. Pr. (N. Y.) 512, holding that, on an adjournment, the bond which the justices can exact for defendant's reappearance can require him to appear only before the justices taking it. His refusal to appear at an adjourned day before a partly different *personnel* of justices would not be a breach.

Setting aside forfeiture.—A forfeiture of a bond for non-appearance will be set aside if defendant appears next day and shows a reasonable excuse therefor, and that the default was not wilful. Riggen *v.* Com., 3 Bush (Ky.) 493.

97. Turner *v.* Wilson, 49 Ind. 581; Runner *v.* Com., 78 Ky. 556 [*overruling* Com. *v.* Douglas, 11 Bush (Ky.) 607]; Fitzpatrick *v.* Nordstrom, 176 Mass. 231, 57 N. E. 343; Simmons *v.* Adams, 15 Vt. 677; Gray *v.* Fulsome, 7 Vt. 452. See, generally, Bail, 5 Cyc. 1.

Extent of liability.— A recognizance requiring defendant to abide the judgments and orders of the court does not mean that sureties shall satisfy the final judgment rendered in the case. McGarry *v.* State, 37 Kan. 9, 14 Pac. 491; Gebhart *v.* Drake, 24 Ohio St. 177; Porter *v.* State, 23 Ohio St. 320. And a surety for appearance of defendant incurs no liability for the maintenance of the child. Wilson *v.* Wilson, 1 Dana (Ky.) 98.

Where the sureties have made a proper surrender of defendant to the court, and are subsequently proceeded against on the bond, they should plead such surrender as matter of discharge and not of performance. Gray *v.* Fulsome, 7 Vt. 452.

98. Breet *v.* Murphy, 80 Me. 358, 14 Atl. 934; Doyen *v.* Leavitt, 76 Me. 247; Gray *v.* Fulsome, 7 Vt. 452.

Surrender after action on bond.— Sureties

scribed by statute.[99] If the proceeding is continued without a new bond,[1] or without the sureties consent they are discharged.[2]

6. Enforcement — a. In General. The declaration in an action on a bond for appearance should show defendant's default.[3] Proof that the judgment has been fully satisfied is a sufficient defense.[4]

b. Amount of Recovery. The amount recoverable is generally the penal sum named in the bond,[5] with interest from the date of forfeiture.[6]

J. Pleading and Indictment — 1. New or Supplemental Complaint. Under the practice of some states it is customary to file a new or supplemental complaint before going to trial in the higher court.[7] Such complaint should aver all

cannot discharge their liability by a surrender of their principal after an action has been brought against them on the bond. Locke *v.* Johnson, 3 Allen (Mass.) 153.

Surrender after final judgment.— As the finding of paternity and the order for support constitute the "final judgment," no surrender of the principal subsequent thereto will discharge the sureties. Corson *v.* Dunlap, 83 Me. 32, 21 Atl. 173, 12 L. R. A. 90; Brett *v.* Murphy, 80 Me. 358, 14 Atl. 934; Corson *v.* Dunlap, 80 Me. 354, 14 Atl. 933; Garvin *v.* Walsh, 54 Vt. 367.

99. Corson *v.* Tuttle, 19 Me. 409; Doherty *v.* Clark, 3 Allen (Mass.) 151.

There must be an actual surrender of the principal into the custody of the officers of the court and an *exoneretur* entered upon the record. Humphrey *v.* Kasson, 26 Vt. 760; Blood *v.* Morrill, 17 Vt. 598.

1. Burr *v.* Wilson, 50 Ind. 587. But *compare* People *v.* Millham, 100 N. Y. 273, 3 N. E. 196 [*reversing* 29 Hun (N. Y.) 151].

2. State *v.* Newton, 22 Wis. 536. But see Proseck *v.* State, 38 Ohio St. 606, where, however, the statute expressly provided that a continuance for cause should operate as a renewal of the recognizance. *Compare* Gebhart *v.* Drake, 24 Ohio St. 177.

Defendant's compliance with the conditions prescribed by the statutory bond will discharge his sureties. State *v.* Castleberry, 23 Ala. 85; State *v.* Fletcher, 1 Ind. App. 581, 28 N. E. 111. Thus a surety is discharged by paying the amount which his principal was bound to pay, regardless of the amount which he himself had agreed to pay, as under the statute the surety could not be held for a greater sum than his principal. People *v.* Morrison, 75 Mich. 30, 42 N. W. 531.

Discharge by compromise of suit.— The judge and clerk before whom a bastardy suit was pending notified the sureties that a settlement had been effected and that no further proceedings would be had. Afterward, by a fraudulent conspiracy between plaintiff and accused, the case was removed to the superior court without the sureties' knowledge. It was held that the filing of the compromise operated to discharge the sureties. Haley *v.* Whalen, 121 Mass. 533.

3. People *v.* Green, 58 Ill. 236; State *v.* Chesley, 4 N. H. 366.

An allegation that costs were taxed by the court is not a descriptive averment but only an averment of a fact; and if it appears from the record, when produced, that costs were not taxed it is no ground of objection upon a plea of *nul tiel record*. Blood *v.* Morrill, 17 Vt. 598.

In Ohio and Tennessee the action on a bond for appearance should be brought in the name of the state. Clark *v.* Petty, 29 Ohio St. 452; State *v.* Gassaway, 11 Humphr. (Tenn.) 202.

4. State *v.* Fletcher, 1 Ind. App. 581, 28 N. E. 111.

An answer that the justice made a fraudulent record as to the forfeiture (Rooksby *v.* State, 92 Ind. 71), or that defendant surrendered the accused in open court, and requested a release from the recognizance, without stating whether this was before the forfeiture or before final judgment in the bastardy suit, is insufficient (Proseck *v.* State, 38 Ohio St. 606).

Parol evidence is admissible to prove defendant's presence in court pending a bastardy suit and at the passing of the final order. Power *v.* Fenno, 10 Gray (Mass.) 249.

5. *Indiana.*— Rooksby *v.* State, 92 Ind. 71.

Maine.— Judgment on a bastardy bond for appearance is properly rendered for the penalty; but such bond may be chancered. Brett *v.* Murphy, 80 Me. 358, 14 Atl. 934.

Massachusetts.— After the forfeiture of a bond given for the appearance of a defendant in bastardy is established, the obligor is entitled to a hearing in equity, on which the judgment shall be entered, not for the penalty of the bond but for such sum as shall be equitably due. Jordan *v.* Lovejoy, 20 Pick. (Mass.) 86.

Nebraska.— Myers *v.* Baughman, 61 Nebr. 818, 86 N. W. 507.

New Jersey.—Proof must be made that the township has actually incurred expenses to the amount of recovery sought. Leconey *v.* Center Tp., 52 N. J. L. 361, 19 Atl. 791.

New York.— People *v.* Tilton, 13 Wend. (N. Y.) 597; People *v.* Relyea, 16 Johns. (N. Y.) 155.

Ohio.— Clark *v.* Petty, 29 Ohio St. 452; Porter *v.* State, 23 Ohio St. 320.

See 6 Cent. Dig. tit. "Bastards," § 136.

Evidence of the insolvency of the principal cannot be given in mitigation. Rooksby *v.* State, 92 Ind. 71; Brett *v.* Murphy, 80 Me. 358, 14 Atl. 934.

6. Myers *v.* Baughman, 61 Nebr. 818, 86 N. W. 507; Clark *v.* Petty, 29 Ohio St. 452; Porter *v.* State, 23 Ohio St. 320.

7. Easdale *v.* Reynolds, 143 Mass. 126, 9 N. E. 13; Dineen *v.* Williams, 138 Mass. 367;

the facts necessary to sustain the proceeding.[8] It may be made in the name of complainant and may be signed by her attorney,[9] and it need not be sworn to.[10]

2. INDICTMENT. The indictment should distinctly allege that defendant is the father of the child,[11] and show the residence of the child.[12] It need not allege that the child is likely to become a charge upon the town.[13]

3. AMENDMENTS. The complaint may in a proper case be amended on the trial.[14]

4. ISSUES AND PROOF — VARIANCE. A variance between the proof and the complaint as to the exact time when,[15] or the place where,[16] the child was begotten is immaterial except for the purpose of affecting the mother's credibility.[17]

Burt *v.* Ayers, 116 Mass. 263; Smith *v.* Hayden, 6 Cush. (Mass.) 111; Chapel *v.* White, 3 Cush. (Mass.) 537; Rice *v.* Chapin, 10 Metc. (Mass.) 5.

If the former complaint avers every fact necessary to charge defendant the supplemental one may be dispensed with. Lenahen *v.* Desmond, 150 Mass. 292, 22 N. E. 903.

Cause for new complaint.— The birth of the child pending the trial does not so change its nature as to make a new complaint necessary. State *v.* Harris, 112 Iowa 589, 84 N. W. 681; State *v.* Hackett, 14 R. I. 162. *Contra*, Penfield *v.* Norton, 1 Root (Conn.) 345. Nor would the intervention of the overseers of the poor, or other authorized persons, where the mother has refused or neglected to further prosecute, necessitate a new complaint. Wheelwright *v.* Greer, 10 Allen (Mass.) 389.

Form of supplemental complaint is set out in Burt *v.* Ayers, 116 Mass. 263.

8. Jones *v.* Thompson, 8 Allen (Mass.) 334; Rice *v.* Chapin, 10 Metc. (Mass.) 5.

Accusation during travail.— If it is necessary that the mother should have accused defendant of being the father during the time of her travail, such fact of accusation must be alleged. Loring *v.* O'Donnell, 12 Me. 27; Foster *v.* Beaty, 1 Me. 304; Rice *v.* Chapin, 10 Metc. (Mass.) 5; Stiles *v.* Eastman, 21 Pick. (Mass.) 132.

A variance from the former complaint in the statement of the time at which the child was begotten is not a fatal defect. Kaler *v.* Tufts, 81 Me. 63, 16 Atl. 336. Such variance only affects the credit of the complainant. Sayles *v.* Fanning, 13 Gray (Mass.) 538.

9. Burt *v.* Ayers, 116 Mass. 263.

10. Sabins *v.* Jones, 119 Mass. 167.

11. Hudson *v.* State, 104 Ga. 723, 30 S. E. 947; Huff *v.* State, 29 Ga. 424 (where it is held that the allegation should charge him as the "actual" and not the "putative" father); Locke *v.* State, 3 Ga. 534. See also State *v.* Caspary, 11 Rich. (S. C.) 356, where judgment was arrested on an indictment alleging that defendant was "farther" of a bastard.

In Pennsylvania an indictment need not allege the birth of the child. Gorman *v.* Com., 124 Pa. St. 536, 23 Wkly. Notes Cas. (Pa.) 405, 17 Atl. 26; Com. *v.* Wentz, 1 Ashm. (Pa.) 269; Com. *v.* Menefee, 14 Wkly. Notes Cas. (Pa.) 170, 2 Del. Co. (Pa.) 55. And where an indictment contains two counts, one for fornication and bastardy and the other for adultery, it is proper to allow the prosecution, when called on to elect, to strike out the charge of fornication, and to amend the second count so as to include the charge of bastardy. Gorman *v.* Com., 124 Pa. St. 536, 23 Wkly. Notes Cas. (Pa.) 405, 17 Atl. 26.

Upon the birth of twins the indictment may allege but one offense (Davis *v.* State, 58 Ga. 170), or two indictments may be laid (State *v.* Derrick, 1 McMull. (S. C.) 338).

Forms of indictment are set out in whole or in part in Walker *v.* State, 5 Ga. 491; Root *v.* State, 10 Gill & J. (Md.) 374; State *v.* Wynne, 116 N. C. 981, 21 S. E. 35; State *v.* Crawford, 10 Rich. (S. C.) 361.

12. Robinson *v.* State, 68 Md. 617, 13 Atl. 378; Root *v.* State, 10 Gill & J. (Md.) 374.

The preliminary proceedings before the magistrate form no part of the record, and need not be set out in the indictment. Norwood *v.* State, 45 Md. 68. *Compare* Walker *v.* State, 5 Ga. 491.

13. State *v.* McDonald, 2 McCord (S. C.) 299. But if the information is not given by the mother, but by a third party, it must appear either in the information or indictment that the child was likely to become a charge. State *v.* Crawford, 10 Rich. (S. C.) 361.

14. *Alabama.*— Miller *v.* State, 110 Ala. 69, 20 So. 392.

Illinois.— Maynard *v.* People, 135 Ill. 416, 25 N. E. 740; Harrison *v.* People, 81 Ill. App. 93; Eshelman *v.* People, 52 Ill. App. 621.

Massachusetts.— Jones *v.* Thompson, 8 Allen (Mass.) 334; Bailey *v.* Chesley, 10 Cush. (Mass.) 284.

Michigan.— People *v.* Cole, 113 Mich. 83, 71 N. W. 455.

New Hampshire.— Ford *v.* Smith, 62 N. H. 419.

North Carolina.— State *v.* Giles, 103 N. C. 391, 9 S. E. 433; State *v.* Higgins, 72 N. C. 226.

Contra, E. D. P. *v.* State, 18 Fla. 175.

See 6 Cent. Dig. tit. "Bastards," § 145.

15. *Indiana.*— Spivey *v.* State, 8 Ind. 405.

Maine.— Holbrook *v.* Knight, 67 Me. 244; Beals *v.* Furbish, 39 Me. 469.

Maryland.— Neff *v.* State, 57 Md. 385.

Massachusetts.—Francis *v.* Rosa, 151 Mass. 532, 24 N. E. 1024.

Rhode Island.— State *v.* Hackett, 14 R. I. 162.

See 6 Cent. Dig. tit. "Bastards," § 146.

16. Kennedy *v.* Shea, 110 Mass. 152; People *v.* Keefer, 103 Mich. 83, 61 N. W. 338.

17. Holcomb *v.* People, 79 Ill. 409; Ross *v.* People, 34 Ill. App. 21. But see Hull *v.*

K. Evidence —1. **Burden of Proof.** While the burden of proof to establish paternity is upon complainant,[18] yet where the statute provides that the oath and examination of prosecutrix before the justice shall be *prima facie* evidence of defendant's guilt, the burden is on defendant to exonerate himself from the charge.[19]

2. **Competency of Mother as Witness.** At common law, the mother being an interested party, was incompetent as a witness. The rule is changed, however, by the statutes of most, if not all, states,[20] such interest affecting her credibility only.[21]

3. **Admissibility** — a. **In General.** Evidence tending to show the motive of complainant in accusing defendant,[22] or evidence tending to show defendant's impotency[23] or an alibi[24] is admissible. But hearsay evidence,[25] or evidence of the mother's financial condition or the child's estate is inadmissible.[26]

People, 41 Mich. 167, 2 N. W. 175, holding that where the complaint sets out with particularity the time, place, and circumstances of the connection causing the pregnancy, it is error to permit the prosecutrix on the trial to show that such connection occurred at another time and place. See also State *v.* Ryan, 78 Minn. 218, 80 N. W. 962.

A complaint is supported by proof that the parties not only had intercourse at the time and place named, but at another time and place, though the complainant does not know at which of these times the child was begotten. Bassett *v.* Abbott, 4 Gray (Mass.) 69.

Proof of matters not pleaded.— Evidence that the child has been born is admissible, though the complaint merely avers pregnancy. Miller *v.* State, 110 Ala. 69, 20 So. 392. Defendant must, however, plead an agreement of compromise to entitle him to give evidence thereof on the trial. Malson *v.* State, 75 Ind. 142.

18. Overlock *v.* Hall, 81 Me. 348, 17 Atl. 169.

As to place of birth.— In those jurisdictions where it is essential that the place of birth be correctly stated and proved, it has been held that the mere recital in the order of the justice that the birth took place within a certain township is insufficient upon an appeal by the putative father, and the burden is on respondent to affirmatively prove the place. Dally *v.* Woodbridge Tp., 21 N. J. L. 491; State *v.* Bidleman, 17 N. J. L. 20; Rex *v.* Knill, 12 East 50; Rex *v.* Newbury, 4 T. R. 475, Nolan 25. *Contra*, Sweet *v.* Overseers of Poor, 3 Johns. (N. Y.) 23.

19. State *v.* Mitchell, 119 N. C. 784, 25 S. E. 783, 1020; State *v.* Cagle, 114 N. C. 835, 19 S. E. 766.

20. *Alabama.*— Satterwhite *v.* State, 32 Ala. 578.

Indiana.— State *v.* Han, 23 Ind. 539.

Kentucky.— Earp *v.* Com., 9 Dana (Ky.) 301.

Pennsylvania.— Com. *v.* Betz, 2 Woodw. (Pa.) 210.

South Carolina.— State *v.* Adams, 1 Brev. (S. C.) 279.

Vermont.— Mather *v.* Clark, 2 Aik. (Vt.) 209.

United States.— U. S. *v.* Collins, 1 Cranch C. C. (U. S.) 592, 25 Fed. Cas. No. 14,835, construing Maryland statute.

See 6 Cent. Dig. tit. "Bastards," § 141.

Accusation during travail.— Some statutes, in first modifying the common-law rule, provided as a prerequisite to the mother's competency that she accuse the father of his paternity during the time of her travail. Warner *v.* Willey, 2 Root (Conn.) 490; Hitchcock *v.* Grant, 1 Root (Conn.) 107; Beals *v.* Furbish, 39 Me. 469; Blake *v.* Junkins, 35 Me. 433; Bradford *v.* Paul, 18 Me. 30; Loring *v.* O'Donnell, 12 Me. 27; Tillson *v.* Bowley, 8 Me. 163; Dennett *v.* Kneeland, 6 Me. 460; Bailey *v.* Chesley, 10 Cush. (Mass.) 284; McManagil *v.* Ross, 20 Pick. (Mass.) 99; Bacon *v.* Harrington, 5 Pick. (Mass.) 63; Com. *v.* Cole, 5 Mass. 517; Drowne *v.* Stimpson, 2 Mass. 441; Rodimon *v.* Reding, 18 N. H. 431; R. R. *v.* J. M., 3 N. H. 135. Such requirement has, however, been very generally dispensed with. Booth *v.* Hart, 43 Conn. 480; Payne *v.* Gray, 56 Me. 317; Savage *v.* Reardon, 11 Gray (Mass.) 376; Murphy *v.* Spence, 9 Gray (Mass.) 399; Heath *v.* Heath, 58 N. H. 292.

21. Earp *v.* Com., 9 Dana (Ky.) 301.

22. **Motive of complainant.**—State *v.* Karver, 65 Iowa 53, 21 N. W. 161.

Opinion evidence.— A question to a complainant whether the child was begotten at the time of a certain act of intercourse testified to does not necessarily call for an opinion. State *v.* Snure, 29 Minn. 132, 12 N. W. 347. So the question "How do you know the defendant is the father of the child?" may properly be asked of complainant. Barnett *v.* State, 16 Ark. 530. But evidence that it is highly improbable that impregnation could be produced by the first act of intercourse is too uncertain and hypothetical to be admitted. Anonymous, 37 Miss. 54.

The record of a judgment in an action of seduction by the relatrix against defendant is not admissible to prove the fact of sexual intercourse. Glenn *v.* State, 46 Ind. 368.

23. **Impotency of defendant.**— State *v.* Broadway, 69 N. C. 411.

24. **Alibi.**— Sample *v.* State, 53 Ind. 28.

25. **Hearsay evidence.**— Farrell *v.* Weitz, 160 Mass. 288, 35 N. E. 783; Wilkins *v.* Metcalf, 71 Vt. 103, 41 Atl. 1035.

26. **Mother's financial condition.**— State *v.* Lavin, 80 Iowa 555, 46 N. W. 553. See also Corcoran *v.* People, 27 Ill. App. 638, holding

b. Acts, Character, and Declarations of Prosecutrix — (i) *In General.* Evidence may be given on the part of defendant showing prosecutrix to be unworthy of credit.[27] So her moral character[28] or her general reputation as to chastity[29] may be shown as affecting her credibility.

(ii) *Association With Other Men.* Evidence that plaintiff kept company with other men at the time when the child might have been begotten is not competent unless offered to show sexual connection with such men.[30]

(iii) *Attempt to Procure Abortion.* Evidence that the mother desired, or consulted a physician with regard to, an abortion is inadmissible.[31]

(iv) *Declarations.* Declarations of prosecutrix tending to corroborate her testimony are generally inadmissible.[32] Accusation of defendant during her travail

that evidence that the mother was too poor to buy clothes for the child before it was born is not admissible.

27. Lord *v.* Schweiring, Thach. Crim. Cas. (Mass.) 26; State *v.* Floyd, 35 N. C. 382; State *v.* Coatney, 8 Yerg. (Tenn.) 210; Sterling *v.* Sterling, 41 Vt. 80.

Exception to rule.— Where the statute makes the examination of the mother before the justice *prima facie* evidence against defendant, he cannot attack her credibility, but can only introduce evidence to show that he is not guilty. State *v.* Patton, 27 N. C. 180.

Rebutting evidence.—After an attempt has been made to discredit plaintiff she may then introduce testimony of her own good character for truth. Lusk *v.* State, (Ala. 1901) 30 So. 33; Lord *v.* Schweiring, Thach. Crim. Cas. (Mass.) 26; Sweet *v.* Sherman, 21 Vt. 23.

28. Sword *v.* Nestor, 3 Dana (Ky.) 453; State *v.* Coatney, 8 Yerg. (Tenn.) 210.

But the inquiry should be, not what her moral character was at any former period but what it is at the time of trial. Walker *v.* State, 6 Blackf. (Ind.) 1.

29. *Delaware.*— Short *v.* State, 4 Harr. (Del.) 568.

Indiana.— Rawles *v.* State, 56 Ind. 433.

Iowa.— State *v.* Seevers, 108 Iowa 738, 78 N. W. 705. See also State *v.* Borie, 79 Iowa 605, 44 N. W. 824; State *v.* Karver, 65 Iowa 53, 21 N. W. 161.

Massachusetts.— Evidence that the general character of complainant for chastity previous to her connection with respondent was bad is inadmissible. Com. *v.* Moore, 3 Pick. (Mass.) 194. See also Paull *v.* Padelford, 16 Gray (Mass.) 263.

Nebraska.— Evidence of the unchastity of complainant outside the period of gestation is irrelevant. Davison *v.* Cruse, 47 Nebr. 829, 66 N. W. 823.

Vermont.— The inquiry is limited to her general reputation for truth. Morse *v.* Pineo, 4 Vt. 281.

West Virginia.— The character of complainant for chastity is not involved. Swisher *v.* Malone, 31 W. Va. 442, 7 S. E. 439.

Wisconsin.— The testimony of the woman cannot be impeached by showing her bad reputation for chastity. Bookhout *v.* State, 66 Wis. 415, 28 N. W. 179.

See 6 Cent. Dig. tit. "Bastards," § 162.

30. Houser *v.* State, 93 Ind. 228; Haverstick *v.* State, 6 Ind. App. 595, 32 N. E. 785; State *v.* Ginger, 80 Iowa 574, 46 N. W. 657; Eddy *v.* Gray, 4 Allen (Mass.) 435.

Association with other men under suspicious circumstances near the period of conception should be allowed to be considered by the jury. Maynard *v.* People, 135 Ill. 416, 25 N. E. 740; Odewald *v.* Woodsum, 142 Mass. 512, 8 N. E. 347; Humphrey *v.* State, 78 Wis. 569, 47 N. W. 836. See also Burris *v.* Court, 34 Nebr. 187, 51 N. W. 745, 48 Nebr. 179, 66 N. W. 1131, holding that where the testimony is conflicting as to the paternity of the child it is competent for defendant to prove that about the time the alleged intercourse was had the complainant, while alone, was frequently visited by another man from a half hour to an hour and a half each time. *Compare* Wilkins *v.* Metcalf, 71 Vt. 103, 41 Atl. 1035.

Evidence that prosecutrix was at one time seen to associate with another person who had previously given birth to a bastard is irrelevant. Miller *v.* State, 110 Ala. 69, 20 So. 392.

31. Sterling *v.* Sterling, 41 Vt. 80; Sweet *v.* Sherman, 21 Vt. 23.

Evidence that defendant procured drugs for such purpose (McIlvain *v.* State, 80 Ind. 69. See also Young *v.* Makepeace, 103 Mass. 50), or favored its commission (Miller *v.* State, 110 Ala. 69, 20 So. 392; Nicholson *v.* Collins, 72 Ala. 176), is admissible.

32. *Indiana.*— If defendant has put in evidence plaintiff's declarations to impeach her testimony she may then put in evidence her self-serving declarations. Ramey *v.* State, 127 Ind. 243, 26 N. E. 818.

Maine.— Sidelinger *v.* Bucklin, 64 Me. 371.

Massachusetts.— Ray *v.* Coffin, 123 Mass. 365. *Compare* Mange *v.* Holmes, 7 Allen (Mass.) 136.

Minnesota.— State *v.* Spencer, 73 Minn. 101, 75 N. W. 893.

Nebraska.— Stoppert *v.* Nierle, 45 Nebr. 105, 63 N. W. 382.

Vermont.— Wilkins *v.* Metcalf, 71 Vt. 103, 41 Atl. 1035. *Compare* Nash *v.* Doyle, 40 Vt. 96.

Contra, Harty *v.* Malloy, 67 Conn. 339, 35 Atl. 259; Benton *v.* Starr, 58 Conn. 285, 20 Atl. 450; Robbins *v.* Smith, 47 Conn. 182.

See 6 Cent. Dig. tit. "Bastards," § 159.

Declarations of her affections for other men, and evidence that she received presents from them are inadmissible. Rawles *v.* State, 56 Ind. 433.

may, however, be shown in corroboration of her evidence,[33] and her declarations may be shown as tending to impeach her testimony.[34]

(v) *Intercourse With Other Men.* Evidence of acts of intercourse with others than defendant at a time when in the course of nature the child could have been begotten is admissible.[35] Such evidence must, however, be confined to that period.[36]

c. Acts, Character, and Declarations of Defendant — (i) *In General.* Declarations of the alleged father tending to show an admission of paternity,[37] or that he has had intercourse with her at a time from which it is possible he

Dying declarations.— The mother's deathbed declarations as to who was the father of her bastard child are inadmissible. Com. *v.* Reed, 5 Phila. (Pa.) 528, 21 Leg. Int. (Pa.) 4, 2 Pittsb. (Pa.) 470. But see Colby *v.* Storrs [*cited* in R. R. *v.* J. M., 3 N. H. 135], wherein it is held that defendant might be charged at the suit of the town upon proof of the mother's dying declarations and other circumstances.

33. Scott *v.* Donovan, 153 Mass. 378, 26 N. E. 871; Leonard *v.* Bolton, 148 Mass. 66, 18 N. E. 879; Tacey *v.* Noyes, 143 Mass. 449, 9 N. E. 830; Bowers *v.* Wood, 143 Mass. 182, 9 N. E. 534; Hawes *v.* Gustin, 2 Allen (Mass.) 402; Savage *v.* Reardon, 11 Gray (Mass.) 376; R. R. *v.* J. M., 3 N. H. 135; Easley *v.* Com., (Pa. 1887) 11 Atl. 220. *Contra*, State *v.* Tipton, 15 Mont. 74, 38 Pac. 222; Richmond *v.* State, 19 Wis. 307.

34. *Florida.*— E. N. E. *v.* State, 25 Fla. 268, 6 So. 58.

Illinois.— Johnson *v.* People, 140 Ill. 350, 29 N. E. 895.

Indiana.— Houser *v.* State, 93 Ind. 228; Meyncke *v.* State, 68 Ind. 401; Thompson *v.* State, 15 Ind. 473.

Michigan.— People *v.* White, 53 Mich. 537, 19 N. W. 174.

Minnesota.— State *v.* Worthingham, 23 Minn. 528.

35. *Alabama.*—Williams *v.* State, 113 Ala. 58, 21 So. 463.

Illinois.— Pike *v.* People, 34 Ill. App. 112.

Indiana.— Benham *v.* State, 91 Ind. 82; Walker *v.* State, 6 Blackf. (Ind.) 1.

Kentucky.— Scantland *v.* Com., 6 J. J. Marsh. (Ky.) 585; Ginn *v.* Com., 5 Litt. (Ky.) 300.

Maine.— The complainant is not obliged to answer whether or not she had illicit intercourse with another man about the time of her condition with the respondent. Low *v.* Mitchell, 18 Me. 372.

Michigan.— People *v.* Kaminsky, 73 Mich. 637, 41 N. W. 833.

Mississippi.— Anonymous, 37 Miss. 54.

Nebraska.— Stoppert *v.* Nierle, 45 Nebr. 105, 63 N. W. 382; Masters *v.* Marsh, 19 Nebr. 458, 27 N. W. 438.

North Carolina.— Evidence that another man had connection with prosecutrix at about the proper time for begetting the child is not competent, unless coupled with evidence that defendant had no connection with her during the probable time. State *v.* Warren, 124 N. C. 807, 32 S. E. 552; State *v.* Perkins, 117 N. C. 698, 23 S. E. 274; State *v.* Giles, 103 N. C. 391, 9 S. E. 433; State *v.* Parish, 83 N. C. 613; State *v.* Britt, 78 N. C. 439; State *v.* Bennett, 75 N. C. 305.

Pennsylvania.— Com. *v.* Fritz, 4 Pa. L. J. Rep. 219.

Virginia.— See Fall *v.* Overseers of Poor, 3 Munf. (Va.) 495.

United States.— U. S. *v.* Collins, 1 Cranch C. C. (U. S.) 592, 25 Fed. Cas. No. 14,835.

See 6 Cent. Dig. tit. "Bastards," § 163.

36. *Illinois.*— Holcomb *v.* People, 79 Ill. 409; Hobson *v.* People, 72 Ill. App. 436; Scharf *v.* People, 34 Ill. App. 400.

Indiana.— Meyncke *v.* State, 68 Ind. 401; Duck *v.* State, 17 Ind. 210; O'Brian *v.* State, 14 Ind. 469; Townsend *v.* State, 13 Ind. 357; Walker *v.* State, 6 Blackf. (Ind.) 1; State *v.* Phillipi, 5 Ind. App. 122, 31 N. E. 476; Goodwine *v.* State, 5 Ind. App. 63, 31 N. E. 554.

Iowa.— State *v.* Seevers, 108 Iowa 738, 78 N. W. 705; State *v.* Johnson, 89 Iowa 1, 56 N. W. 404; State *v.* Granger, 87 Iowa 355, 54 N. W. 79; State *v.* Lavin, 80 Iowa 555, 46 N. W. 553; State *v.* Read, 45 Iowa 469.

Massachusetts.— Easdale *v.* Reynolds, 143 Mass. 126, 9 N. E. 13; Ronan *v.* Dugan, 126 Mass. 176; Force *v.* Martin, 122 Mass. 5; Sabins *v.* Jones, 119 Mass. 167; Parker *v.* Dudley, 118 Mass. 602; Bowen *v.* Reed, 103 Mass. 46; Eddy *v.* Gray, 4 Allen (Mass.) 435; Paull *v.* Padelford, 16 Gray (Mass.) 263.

Michigan.— Hamilton *v.* People, 46 Mich. 186, 9 N. W. 247.

Nebraska.— Davison *v.* Cruse, 47 Nebr. 829, 66 N. W. 823; Stoppert *v.* Nierle, 45 Nebr. 105, 63 N. W. 382; Alson *v.* Peterson, 33 Nebr. 358, 50 N. W. 155; Sang *v.* Beers, 20 Nebr. 365, 30 N. W. 258; Masters *v.* Marsh, 19 Nebr. 458, 27 N. W. 438.

New York.— People *v.* Schildwachter, 87 Hun (N. Y.) 363, 34 N. Y. Suppl. 352, 68 N. Y. St. 436.

Ohio.— Ely *v.* Ott, 14 Ohio Cir. Ct. 619, 7 Ohio Cir. Dec. 677.

Tennessee.— Crawford *v.* State, 7 Baxt. (Tenn.) 41.

Vermont.— Knight *v.* Morse, 54 Vt. 432; Sterling *v.* Sterling, 41 Vt. 80.

West Virginia.— Swisher *v.* Malone, 31 W. Va. 442, 7 S. E. 439.

Wisconsin.— Duffies *v.* State, 7 Wis. 672.

37. Miller *v.* State, 110 Ala. 69, 20 So. 392; Moore *v.* People, 13 Ill. App. 248; Phillips *v.* Hoyle, 4 Gray (Mass.) 568; Robb *v.* Hewitt, 39 Nebr. 217, 58 N. W. 88.

might be the father[38] are admissible. So evidence that defendant promised to marry complainant is competent.[39] But evidence of an offer of compromise is not admissible against defendant as an admission of guilt.[40]

(II) *Character of Defendant.* Defendant cannot offer evidence of his general good character.[41]

d. Declarations of Third Person. Declarations of a third person admitting his paternity of the child are inadmissible on behalf of defendant.[42]

e. Intimacy of the Parties. Evidence of the intimate relations existing between plaintiff and defendant is admissible.[43] So evidence of pre-

The fact that after prosecutrix became pregnant, and defendant knew it, they had a conversation as to what name the child should have is competent as a circumstance showing that he thought he was the father. Hobson *v.* People, 72 Ill. App. 436.

Acts and declarations of relatives.— The fact that a brother of one charged with bastardy attempted to settle the matter without the latter's knowledge cannot be received as evidence of guilt. People *v.* Hawks, 107 Mich. 249, 65 N. W. 100. Neither can evidence of what a brother said, in the absence of evidence showing the relation of agency, be received. Prince *v.* Gundaway, 157 Mass. 417, 32 N. E. 653. Nor is evidence competent that the accused's relatives acknowledged the child as his. Boyle *v.* Burnett, 9 Gray (Mass.) 251.

38. Dehler *v.* State, 22 Ind. App. 385, 53 N. E. 850; Eddy *v.* Gray, 4 Allen (Mass.) 435; U. S. *v.* Collins, 1 Cranch C. C. (U. S.) 592, 25 Fed. Cas. No. 14,835.

39. Laney *v.* State, 109 Ala. 34, 19 So. 531; Woodward *v.* Shaw, 18 Me. 304. *Contra,* Chandler *v.* Com., 4 Metc. (Ky.) 66. See also Lisy *v.* State, 50 Nebr. 226, 69 N. W. 768, holding that if the offer is made in a spirit of compromise, with a view to the settlement of proceedings, threatened or commenced, it is not admissible.

Evidence that defendant, upon learning of her pregnancy, tried to get her married to another man is admissible. State *v.* Bottorff, 82 Ind. 538.

40. *Alabama.*— Martin *v.* State, 62 Ala. 119.

Connecticut.— *Compare* Fuller *v.* Hampton, 5 Conn. 416.

Illinois.— Miene *v.* People, 37 Ill. App. 589.

Iowa.— State *v.* Lavin, 80 Iowa 555, 46 N. W. 553.

Nebraska.— Olson *v.* Peterson, 33 Nebr. 358, 50 N. W. 155.

See, generally, Compromise and Settlement; and 6 Cent. Dig. tit. "Bastards," § 169.

Attempt to coerce settlement.— It is not error to permit prosecutrix to prove that soon after the child was born she was arrested for attempting to poison a witness for defendant; there being evidence tending to show that such arrest and prosecution was instituted by defendant to influence the bastardy proceeding which was then pending. State *v.* Seevers, 108 Iowa 738, 78 N. W. 705.

41. Houser *v.* State, 93 Ind. 228; Walker *v.* State, 6 Blackf. (Ind.) 1; Low *v.* Mitchell, 18 Me. 372; Stoppert *v.* Nierle, 45 Nebr. 105, 63 N. W. 382. *Contra,* Hawkins *v.* State, 21 N. J. L. 630; Dally *v.* Woodbridge Tp., 21 N. J. L. 491.

42. Benton *v.* Starr, 58 Conn. 285, 20 Atl. 450. See also Young *v.* Makepeace, 103 Mass. 50, holding that declarations of a third person that he himself was the father of the child, and his acts relative to procuring an abortion on complainant, if not made or done in the presence or with the knowledge of complainant, are inadmissible to prove a conspiracy between him and complainant to charge defendant with the child's paternity. So evidence showing improper relations between a third person and a female witness, claimed to be parties to a conspiracy to extort money from defendant, is immaterial in the absence of proof of the conspiracy. O'Brine *v.* McNulty, 122 Mass. 474.

Acts of third person.— Where it is shown that the mother of defendant received a letter referring to her son's relations with complainant, evidence to show what action the mother took on receipt of the letter is admissible. Wilkins *v.* Metcalf, 71 Vt. 103, 41 Atl. 1035. Nor is it error to permit the mother to testify that the brothers of defendant had carried a witness out of the state. Wiggins *v.* Com., 21 Ky. L. Rep. 939, 53 S. W. 649.

43. *Alabama.*— Miller *v.* State, 110 Ala. 69, 20 So. 392.

Indiana.— Marks *v.* State, 101 Ind. 353; Gemmill *v.* State, 16 Ind. App. 154, 43 N. E. 909; Goodwine *v.* State, 5 Ind. App. 63, 31 N. E. 554.

Massachusetts.—Francis *v.* Rosa, 151 Mass. 532, 24 N. E. 1024.

Nebraska.— Strickler *v.* Grass, 32 Nebr. 811, 49 N. W. 804.

Pennsylvania.—Com. *v.* Burk, 2 Pa. Co. Ct. 12.

England.— Cole *v.* Manning, 2 Q. B. D. 611, 46 L. J. M. C. 175, 35 L. T. Rep. N. S. 941.

See 6 Cent. Dig. tit. "Bastards," § 170.

It may be shown that prosecutrix received attentions from no man other than defendant. Curran *v.* People, 35 Ill. App. 275.

Letters written by defendant to prosecutrix, tending to show an undue or suspicious intimacy between them, are admissible. Williams *v.* State, 113 Ala. 58, 21 So. 463; Scharf *v.* People, 34 Ill. App. 400; Walker *v.* State, 92 Ind. 474; Sullivan *v.* Hurley, 147

vious[44] or subsequent intercourse is competent to show the probability of the particular act having occurred,[45] though defendant can only be convicted on proof of the particular act of intercourse charged in the complaint.[46]

f. Preliminary Proceedings. In the absence of a statute making them competent evidence,[47] the complaint, warrant, or recognizance in the proceedings before the justice are inadmissible,[48] except to show the regularity of the proceedings.[49] But the testimony of the complainant taken by the justice may be introduced in evidence.[50]

g. Resemblance of Child to Putative Father. Evidence of the resemblance of the child to the alleged father, being but matter of opinion, is inadmissible.[51] As to the propriety of introducing the child before the jury, and permitting them to consider its resemblance to the alleged father in determining its paternity, the authorities are in conflict. Some decisions permit[52] the introduc-

Mass. 387, 18 N. E. 3; Beers *v.* Jackman, 103 Mass. 192.

Rumors of intimacy are properly excluded. Saint *v.* State, 68 Ind. 128.

44. *Connecticut.*— Harty *v.* Malloy, 67 Conn. 339, 35 Atl. 259; Norfolk *v.* Gaylord, 28 Conn. 309.

Indiana.— La Matt *v.* State, 128 Ind. 123, 27 N. E. 346. And corroboratory evidence of such intercourse is admissible. Ramey *v.* State, 127 Ind. 243, 26 N. E. 818.

Michigan.— People *v.* Jamieson, 124 Mich. 164, 82 N. W. 835; People *v.* Schilling, 110 Mich. 412, 68 N. W. 233; People *v.* Keefer, 103 Mich. 83, 61 N. W. 338.

Pennsylvania.— Com. *v.* Burk, 2 Pa. Co. Ct. 12.

Wisconsin.— Baker *v.* State, 69 Wis. 32, 33 N. W. 52.

See 6 Cent. Dig. tit. "Bastards," § 171.

45. Gemmill *v.* State, 16 Ind. App. 154, 43 N. E. 909; People *v.* Jamieson, 124 Mich. 164, 82 N. W. 835; State *v.* Smith, 47 Minn. 475, 50 N. W. 605; State *v.* Klitzke, 46 Minn. 343, 49 N. W. 54. But see Boyle *v.* Burnett, 9 Gray (Mass.) 251.

The limit of time outside of which acts of intercourse may not be shown is not well defined. In Thayer *v.* Davis, 38 Vt. 163, evidence of intercourse three years previous to the time the child was begotten was admitted. But in Barnett *v.* State, 16 Ark. 530, the court holds that such evidence ought not to be admitted at all, unless confined to a period of time when, according to the course of nature, the child could have been begotten.

46. People *v.* Schilling, 110 Mich. 412, 68 N. W. 233.

47. Davis *v.* State, 58 Ga. 170; Maloney *v.* Piper, 105 Mass. 233; Gallary *v.* Holland, 15 Gray (Mass.) 50; Oneal *v.* State, 2 Sneed (Tenn.) 214; Goddard *v.* State, 2 Yerg. (Tenn.) 96.

A failure to strictly comply with the statute in the procurement or transmission of such papers will render them inadmissible. State *v.* Chaney, 93 Md. 71, 48 Atl. 1057.

48. Harrison *v.* People, 81 Ill. App. 93; Hicks *v.* State, 83 Ind. 483; Broyles *v.* State, 64 Ind. 460; Dunwiddie *v.* Com., Hard. (Ky.) 290. See also Miller *v.* Com., 1 Bibb (Ky.) 404.

49. Walker *v.* State, 5 Ga. 491; Sidelinger *v.* Bucklin, 64 Me. 371; Bailey *v.* Chesley, 10 Cush. (Mass.) 284.

50. Hicks *v.* State, 83 Ind. 483; Wolf *v.* State, 11 Ind. 231; Stoppert *v.* Nierle, 45 Nebr. 105, 63 N. W. 382; Dodge County *v.* Kemnitz, 32 Nebr. 238, 49 N. W. 226, 38 Nebr. 554, 57 N. W. 385; Masters *v.* Marsh, 19 Nebr. 458, 27 N. W. 438; Miller *v.* Busick, 56 Ohio St. 437, 47 N. E. 248; Jerdee *v.* State, 36 Wis. 170.

In New York the admissibility of such testimony is limited to cases wherein the mother, upon trial in the higher court, has died or become insane. People *v.* Schildwachter, 87 Hun (N. Y.) 363, 34 N. Y. Suppl. 352, 68 N. Y. St. 436.

The former testimony is not conclusive, but evidence is admissible to discredit it. Holmes *v.* State, 1 Greene (Iowa) 150. And as a foundation for such impeachment defendant may show that he had applied without success to the justice before whom the examination was taken for the examination. Tyrrell *v.* Overseers of Poor, 27 N. J. L. 416. But *compare* Broyles *v.* State, 47 Ind. 251.

51. *Alabama.*— *Compare* Paulk *v.* State, 52 Ala. 427.

Maine.— Keniston *v.* Rowe, 16 Me. 38.

Maryland.— Jones *v.* Jones, 45 Md. 144.

Massachusetts.— Eddy *v.* Gray, 4 Allen (Mass.) 435.

New York.— People *v.* Carney, 29 Hun (N. Y.) 47.

North Carolina.—Defendant may show that the child does not resemble him. State *v.* Bowles, 52 N. C. 579. See also State *v.* Britt, 78 N. C. 439.

United States.— U. S. *v.* Collins, 1 Cranch C. C. (U. S.) 592, 25 Fed. Cas. No. 14,835.

See 6 Cent. Dig. tit. "Bastards," § 172.

Points of dissimilarity not implying a difference of race cannot be shown. Young *v.* Makepeace, 103 Mass. 50.

52. *Maryland.*—Jones *v.* Jones, 45 Md. 144.

Massachusetts.— Scott *v.* Donovan, 153 Mass. 378, 26 N. E. 871; Finnegan *v.* Dugan, 14 Allen (Mass.) 197.

New Hampshire.— Gilmanton *v.* Ham, 38 N. H. 108.

New Jersey.— Graunt *v.* State, 50 N. J. L. 490, 14 Atl. 600.

North Carolina.— State *v.* Woodruff, 67 N. C. 89.

tion of the child for such purpose. Other authorities deny the right to so introduce the child.[53]

4. Weight and Sufficiency — a. Corroboration of Prosecutrix. In the absence of a statute requiring it corroboration of the prosecutrix is not necessary,[54] but where connection with another man about the time of conception has been shown, her evidence alone has been held insufficient.[55]

b. Degree of Proof. It is not necessary to establish the guilt of defendant to a moral certainty,[56] or beyond a reasonable doubt, but a preponderance of evidence is sufficient.[57]

Ohio.— Crow *v.* Jordon, 49 Ohio St. 655, 32 N. E. 750.

See 6 Cent. Dig. tit. "Bastards," § 173.

Where the putative father is of a different race than prosecutrix, the child may be exhibited to show a resemblance in racial characteristics to defendant. Morrison *v.* People, 52 Ill. App. 482; Clark *v.* Bradstreet, 80 Me. 454, 15 Atl. 56, 6 Am. St. Rep. 221; State *v.* Saidell, 70 N. H. 174, 46 Atl. 1083; Warlick *v.* White, 76 N. C. 175.

53. *Illinois.*— Harrison *v.* People, 81 Ill. App. 93; Robnett *v.* People, 16 Ill. App. 299.

Indiana.— La Matt *v.* State, 128 Ind. 123, 27 N. E. 346; Reitz *v.* Reitz, 33 Ind. 187; Risk *v.* State, 19 Ind. 152.

Iowa.— State *v.* Harvey, 112 Iowa 416, 84 N. W. 535, 52 L. R. A. 500; State *v.* Danforth, 48 Iowa 43, 30 Am. Rep. 387. *Compare* State *v.* Smith, 54 Iowa 104, 6 N. W. 153, 37 Am. Rep. 192.

Maine.— Overlock *v.* Hall, 81 Me. 348, 17 Atl. 169; Clark *v.* Bradstreet, 80 Me. 454, 15 Atl. 56, 6 Am. St. Rep. 221.

Minnesota.— State *v.* Brathovde, 81 Minn. 501, 84 N. W. 340.

Nebraska.— Ingram *v.* State, 24 Nebr. 33, 37 N. W. 943; Hutchinson *v.* State, 19 Nebr. 262, 27 N. W. 113.

Wisconsin.— Hanawalt *v.* State, 64 Wis. 84, 24 N. W. 489, 54 Am. Rep. 588.

54. *Illinois.*— McElhaney *v.* People, 1 Ill. App. 550.

Iowa.— State *v.* McGlothlen, 56 Iowa 544, 9 N. W. 893.

Minnesota.— State *v.* Nichols, 29 Minn. 357, 13 N. W. 153.

Montana.— State *v.* Tipton, 15 Mont. 74, 38 Pac. 222.

Nebraska.— Robb *v.* Hewitt, 39 Nebr. 217, 58 N. W. 88; Kremling *v.* Lallman, 16 Nebr. 280, 20 N. W. 383.

New York.— People *v.* Lyon, 83 Hun (N. Y.) 303, 31 N. Y. Suppl. 942, 64 N. Y. St. 737.

Pennsylvania.— Com. *v.* Betz, 2 Woodw. (Pa.) 210.

Wisconsin.— Kenney *v.* State, 74 Wis. 260, 42 N. W. 213.

See 6 Cent. Dig. tit. "Bastards," § 175.

The written examination of complainant, taken in connection with her testimony, is sufficient to determine a preponderance in her favor where the other evidence is balanced and of equal credibility. Noonan *v.* Brogan, 3 Allen (Mass.) 481; State *v.* Williams, 109 N. C. 846, 13 S. E. 880; State *v.* Rogers, 79 N. C. 609.

55. Com. *v.* McCarty, 2 Pa. L. J. Rep. 315, 4 Pa. L. J. 136. But see Altschuler *v.* Algaza, 16 Nebr. 631, 21 N. W. 401, holding that the sufficiency of the evidence in such case is a proper question for the jury.

56. Bell *v.* State, 124 Ala. 94, 27 So. 414; Miller *v.* State, 110 Ala. 69, 20 So. 392.

57. *Alabama.*— Lusk *v.* State, (Ala. 1901) 30 So. 33; Dorgan *v.* State, 72 Ala. 173.

Delaware.— *Compare* Vail *v.* State, 1 Pennew. (Del.) 8, 39 Atl. 451.

Florida.— E. N. E. *v.* State, 25 Fla. 268, 6 So. 58.

Illinois.— Cox *v.* People, 109 Ill. 457; Lewis *v.* People, 82 Ill. 104; Peak *v.* People, 76 Ill. 289; People *v.* Christman, 66 Ill. 162; Allison *v.* People, 45 Ill. 37; Mann *v.* People, 35 Ill. 467; Gehm *v.* People, 87 Ill. App. 158.

Indiana.— Reynolds *v.* State, 115 Ind. 421, 17 N. E. 909; Harper *v.* State, 101 Ind. 109; Walker *v.* State, 6 Blackf. (Ind.) 1.

Iowa.— State *v.* Severson, 78 Iowa 653, 43 N. W. 533; State *v.* Romaine, 58 Iowa 46, 11 N. W. 721; State *v.* McGlothlen, 56 Iowa 544, 9 N. W. 893.

Maine.— Knowles *v.* Scribner, 57 Me. 495.

Maryland.— The *corpus delicti* must be proved beyond a reasonable doubt. Norwood *v.* State, 45 Md. 68.

Massachusetts.— Young *v.* Makepeace, 103 Mass. 50; Richardson *v.* Burleigh, 3 Allen (Mass.) 479.

Michigan.— Semon *v.* People, 42 Mich. 141, 3 N. W. 304; People *v.* Cantine, 1 Mich. N. P. 140.

Minnesota.— State *v.* Nichols, 29 Minn. 357, 13 N. W. 153.

Nebraska.— Davison *v.* Cruse, 47 Nebr. 829, 66 N. W. 823; Dukehart *v.* Coughman, 36 Nebr. 412, 54 N. W. 680; Olson *v.* Peterson, 33 Nebr. 358, 50 N. W. 155; Strickler *v.* Grass, 32 Nebr. 811, 49 N. W. 804; Altschuler *v.* Algaza, 16 Nebr. 631, 21 N. W. 401.

North Carolina.— *Compare* State *v.* Rogers, 119 N. C. 793, 26 S. E. 142.

Rhode Island.— State *v.* Bowen, 14 R. I. 165.

South Dakota.— State *v.* Bunker, 7 S. D. 639, 65 N. W. 33.

Tennessee.— Stovall *v.* State, 9 Baxt. (Tenn.) 597.

Wisconsin.— Defendant must be proved beyond a reasonable doubt to be the father of the child. Van Tassel *v.* State, 59 Wis. 351, 18 N. W. 328; Baker *v.* State, 47 Wis. 111, 2 N. W. 110.

See 6 Cent. Dig. tit. "Bastards," § 174.

c. Period of Gestation. It is not essential to support a verdict of guilty that the period of gestation was of the usual length if the evidence is otherwise satisfactory in that respect.[58]

L. Trial — 1. Term of Court. The trial should be had before the civil[59] or criminal term of the court,[60] dependent upon the nature of the proceeding in the particular jurisdiction as civil or criminal.

2. Appearance of Defendant — a. Necessity. The trial may be had without the appearance of defendant.[61] Defendant must, however, have some notice of the suit. A proceeding without his having been arrested, or constructively notified by publication, is irregular.[62]

b. Effect. As a rule defendant, by appearing and pleading to the charge, waives his right to object to any defect or irregularity in the prior proceedings in the cause.[63]

3. Plea or Answer. The regular form of a common-law proceeding not being

58. Cook *v.* People, 51 Ill. 143; Peterson *v.* People, 74 Ill. App. 178; Hull *v.* State, 93 Ind. 128; Com. *v.* Hoover, 3 Pa. L. J. Rep. 514, 6 Pa. L. J. 195.

Evidence of premature birth is not, however, corroborative of the prosecutrix merely because sufficient time had elapsed after the connection, as testified to by her, to make such a birth possible. State *v.* Smith, 61 Iowa 538, 16 N. W. 585.

59. People *v.* Stevens, 19 Ill. App. 405; Smith *v.* Lint, 37 Me. 546.

In Illinois it has been held that the trial may be had at the probate terms of the county court. Rose *v.* People, 81 Ill. App. 128.

In Iowa it has been held that the trial could be had only at regular session of the county court, though this defect could be waived by an appearance and plea of the general issue. Mills County *v.* Hamaker, 11 Iowa 206.

A proceeding before the criminal term, where the action is held to be of a civil nature, is void. Mahoney *v.* Crowley, 36 Me. 486.

60. Hyde *v.* Chapin, 2 Cush. (Mass.) 77; Cummings *v.* Hodgdon, 13 Metc. (Mass.) 246; State *v.* Cagle, 114 N. C. 835, 19 S. E. 766.

61. *Alabama.*— Seale *v.* McClanahan, 21 Ala. 345; Trawick *v.* Davis, 4 Ala. 328.

Connecticut.— Naugatuck *v.* Smith, 53 Conn. 523, 3 Atl. 550.

Indiana.—Hunter *v.* State, 6 Blackf. (Ind.) 383.

Kentucky.— Chandler *v.* Com., 4 Metc. (Ky.) 66.

Ohio.— Grieve *v.* Freytag, 2 Ohio Dec. (Reprint) 304, 2 Cinc. L. Bul. 93.

See 6 Cent. Dig. tit. "Bastards," § 115.

Appearance by attorney.— Defendant may, if he choose, appear by attorney, have a jury trial, and introduce and cross-examine witnesses in like manner as if actually present. Stone *v.* State, 33 Ind. 538.

Regularity of appearance.— Where defendant upon a hearing before a justice was recognized to appear at the next term of the circuit court, and after being defaulted for non-appearance was subsequently brought into court on a bench-warrant, whereupon he recognized for his appearance from day to day, it was held that such proceedings at that term of the court were irregular, and that defendant's recognizance under the bench-warrant could not be taken as an appearance to the case so as to heal the irregularity. Parlan *v.* State, 19 Ind. 455.

If present, it is not error to require defendant to join in the issue formed. Douglass *v.* State, 117 Ala. 185, 23 So. 142.

62. Melton *v.* State, 9 Ind. 452.

63. *Alabama.*— Williams *v.* State, 113 Ala. 58, 21 So. 463; Wilson *v.* Judge Pike County Ct., 18 Ala. 757; Pruitt *v.* Judge Barbour County Ct., 16 Ala. 705; Trawick *v.* Davis, 4 Ala. 328.

Illinois.— Cook *v.* People, 51 Ill. 143; Rose *v.* People, 81 Ill. App. 128.

Indiana.— Unruh *v.* State, 105 Ind. 117, 4 N. E. 453; Tholke *v.* State, 50 Ind. 355.

Iowa.— State *v.* Johnson, 89 Iowa 1, 56 N. W. 404; Mills County *v.* Hamaker, 11 Iowa 206.

Kentucky.— Schooler *v.* Com., Litt. Sel. Cas. (Ky.) 88; Walker *v.* Com., 3 A. K. Marsh. (Ky.) 355; Miller *v.* Com., 1 Bibb (Ky.) 404.

Maine.— Luce *v.* Burbank, 56 Me. 414; Cooper *v.* Littlefield, 45 Me. 549; Mariner *v.* Dyer, 2 Me. 165.

Maryland.— Norwood *v.* State, 45 Md. 68.

Massachusetts.— Conefy *v.* Holland, 175 Mass. 469, 56 N. E. 701; Prince *v.* Gundaway, 157 Mass. 417, 32 N. E. 653; Davis *v.* McEnaney, 150 Mass. 451, 23 N. E. 221; Duhamell *v.* Ducette, 118 Mass. 569; Thompson *v.* Kenney, 110 Mass. 317; Hawes *v.* Gustin, 2 Allen (Mass.) 402; Collins *v.* Conners, 15 Gray (Mass.) 49; Hyde *v.* Chapin, 6 Cush. (Mass.) 64.

South Carolina.—State *v.* Sarratt, 14 Rich. (S. C.) 29.

Vermont.— Carruth *v.* Tighe, 32 Vt. 626; Quow *v.* Conlin, 31 Vt. 620.

Wisconsin.— Owen *v.* State, 12 Wis. 559.

See 6 Cent. Dig. tit. "Bastards," § 117.

An appearance by attorney is sufficient to constitute a waiver. Thompson *v.* Kenney, 110 Mass. 317.

essential,[64] if defendant elects to appear, it is not incumbent upon him to file a plea or answer.[65]

4. CONTINUANCE. The proceeding may be continued from term to term and the accused be required to recognize for his appearance.[66]

5. TRIAL BY JURY. Defendant, on a proper demand, is entitled to a trial by jury.[67] The oath administered to the jury will be that administered in criminal[68] or civil cases,[69] according as the proceeding is deemed a criminal or civil one.

6. ARGUMENTS OF COUNSEL. It has been held to be competent for the attorney of prosecutrix to comment, in argument, upon defendant's failure to testify.[70] Counsel cannot, however, comment on the child's resemblance to defendant.[71]

7. INSTRUCTIONS. The charge should be construed as an entirety.[72] It must

64. Cross *v.* People, 10 Mich. 24. See also People *v.* Woodside, 72 Ill. 407, holding that formal pleading is not essential.

65. De Priest *v.* State, 68 Ind. 569; Dehler *v.* State, 23 Ind. App. 385, 53 N. E. 850; Grieve *v.* Freytag, 2 Ohio Dec. (Reprint) 304, 2 Cinc. L. Bul. 93; State *v.* Bunker, 7 S. D. 639, 65 N. W. 33.

As to pleas in abatement or in bar see *supra*, VII, D.

A written plea may be required by the court where the proceeding is in its nature criminal and is tried before a court of criminal jurisdiction. Smith *v.* Hayden, 6 Cush. (Mass.) 111.

66. Davis *v.* Com., 4 T. B. Mon. (Ky.) 113; Conefy *v.* Holland, 175 Mass. 469, 56 N. E. 701; Porter *v.* State, 23 Ohio St. 320. See also State *v.* Homey, 44 Wis. 615, holding that a statute providing for an adjournment "not exceeding ten days at one time" is solely for the benefit of the accused and may be waived by him. A longer adjournment at his request does not deprive the court of jurisdiction.

An affidavit for a continuance ought to deny the truth of the charge and disclose some defense in bar of the action. Fish *v.* People, 86 Ill. App. 408. Where the affidavit was because of the absence of a witness who was the servant of a physician, and merely stated that the fact that such servant would testify as stated was made known to affiant by such physician the day before the affidavit was made, and that her name and address were unknown to the affiant but were known to such physician, as affiant was informed and believed, and could be secured for the purpose of obtaining her evidence, it was held that the affidavit failed to show sufficient probability of securing the testimony of such witness. Post *v.* State, 14 Ind. App. 452, 42 N. E. 1120.

Grounds for continuance.— The absence of a material witness, due diligence being shown, is ground for a continuance. Common *v.* People, 28 Ill. App. 230. But it is no abuse of discretion to deny a continuance because of the absence of defendant, where there is no showing that he is a necessary witness in his own behalf. Clark *v.* Carey, 41 Nebr. 780, 60 N. W. 78. Defendant's absence in the army does not entitle him to a continuance. Chandler *v.* Com., 4 Metc. (Ky.) 66. An objection to a continuance, because of the absence of a witness whose testimony if objected to would be inadmissible, sufficiently shows a purpose to object to such testimony, and the continuance should not be granted. Post *v.* State, 14 Ind. App. 452, 42 N. E. 1120. See also Powell *v.* State, 96 Ind. 108.

67. Alley *v.* State, 76 Ind. 94.

In Kentucky it has been held that a jury is neither necessary nor proper. Scantland *v.* Com., 6 J. J. Marsh. (Ky.) 585.

In Tennessee under the act of 1822, c. 29, providing that on the filing by defendant of an affidavit denying that he is the father of the child, the court shall hear proof, and determine the matter, it has been held that defendant is not entitled to demand a jury trial. Kirkpatrick *v.* State, Meigs (Tenn.) 124; Goddard *v.* State, 2 Yerg. (Tenn.) 96. But if the court so desires it may submit the case to a jury. Kirkpatrick *v.* State, Meigs (Tenn.) 124; State *v.* Coatney, 8 Yerg. (Tenn.) 210.

Waiver.— The right to a trial by jury may be waived. Trawick *v.* Davis, 4 Ala. 328; Jerdee *v.* State, 36 Wis. 170. See also *In re* Walker, 61 Nebr. 803, 86 N. W. 510, wherein it is held that, if defendant fails to appear and enters no plea to the complaint, a trial may be properly had without a jury.

68. Smith *v.* Hayden, 6 Cush. (Mass.) 111.

69. State *v.* Worthingham, 23 Minn. 528.

70. State *v.* Snure, 29 Minn. 132, 12 N. W. 347; Ingram *v.* State, 24 Nebr. 33, 37 N. W. 943.

If complainant's examination taken before the justice be not introduced as evidence neither party can refer to it in argument. Walker *v.* State, 6 Blackf. (Ind.) 1.

71. Hanawalt *v.* State, 64 Wis. 84, 24 N. W. 489, 54 Am. Rep. 588. *Contra*, Gilmanton *v.* Ham, 38 N. H. 108.

In opening the case to the jury the prosecution must not anticipate the defense. Baker *v.* State, 69 Wis. 32, 33 N. W. 52.

A statement by counsel in opening that "the object of this bastardy statute is to prevent bastard children from being thrown on the county for support, and to make the father of bastard children support them" is but the statement of an inference, and no ground for reversal. Guinea *v.* People, 37 Ill. App. 450.

72. Harper *v.* State, 101 Ind. 109; Decker *v.* State, 53 Ind. 552; State *v.* Black, 89 Iowa 737, 55 N. W. 105.

not, however, be argumentative;[73] it must not confine or limit the consideration of the jury to a part only of the testimony;[74] it must not pass on the credibility of the witnesses;[75] and it must not express or suggest an opinion of fact.[76] If evidence of an attempt to compromise has been introduced the jury should be instructed that an offer of compromise should not be regarded as an admission of guilt.[77]

8. QUESTIONS FOR JURY. The paternity of the child being the fact to be determined by the jury[78] the credibility of the witnesses,[79] the opportunities for intercourse,[80] the duration of the period of gestation,[81] and the fact that a bastard child has been born[82] are all matters which may be considered by them in arriving at their verdict.

9. VERDICT. A verdict which in substance finds defendant guilty of being the father of the child is sufficient.[83]

M. New Trial. The court may set aside the verdict on the ground that it is against the weight of evidence and grant a new trial.[84] A new trial may also

73. Bell *v.* State, 124 Ala. 94, 27 So. 414; Williams *v.* State, 113 Ala. 58, 21 So. 463; Miller *v.* State, 110 Ala. 69, 20 So. 392.

Thus, where criminally intimate relations were shown to have existed between defendant and the prosecutrix, a charge is properly refused, as being a mere argument which instructs the jury that the fact that the defendant had sexual intercourse with the prosecutrix makes no difference if defendant is not the father of the child. Lusk *v.* State, (Ala. 1901) 30 So. 33.

74. Miller *v.* State, 110 Ala. 69, 20 So. 392; State *v.* Ryan, 78 Minn. 218, 80 N. W. 962; Daegling *v.* State, 56 Wis. 586, 14 N. W. 593.

75. *Alabama.*— Miller *v.* State, 110 Ala. 69, 20 So. 392.

Indiana.— Morris *v.* State, 101 Ind. 560, 1 N. E. 70; McCullough *v.* State, 14 Ind. 391. See also Unruh *v.* State, 105 Ind. 117, 4 N. E. 453; Dailey *v.* State, 28 Ind. 285.

Kansas.— See State *v.* Reed, 46 Kan. 501, 26 Pac. 956.

Minnesota.— State *v.* Nestaval, 72 Minn. 415, 75 N. W. 725.

Nebraska.— Altschuler *v.* Algaza, 16 Nebr. 631, 21 N. W. 401.

A refusal to charge that the sexes are equally credible as witnesses is not prejudicial. Miene *v.* People, 37 Ill. App. 589.

76. *Alabama.*— Miller *v.* State, 110 Ala. 69, 20 So. 392.

Illinois.— Heindselman *v.* People, 52 Ill. App. 542.

Indiana.— Jones *v.* State, 78 Ind. 217; Cunningham *v.* State, 65 Ind. 377.

Kansas.— State *v.* Reed, 46 Kan. 501, 26 Pac. 956.

Wisconsin.— Dingman *v.* State, 48 Wis. 485, 4 N. W. 668.

77. Martin *v.* State, 62 Ala. 119; State *v.* Lavin, 80 Iowa 555, 46 N. W. 553. See, generally, COMPROMISE AND SETTLEMENT.

78. Lewis *v.* People, 87 Ill. App. 588; Woodard *v.* Blue, 103 N. C. 109, 9 S. E. 492.

In Alabama, under the act of 1811, as modified by the act of 1816, the question of paternity need not be presented to the jury unless the reputed father demand it. Trawick *v.* Davis, 4 Ala. 328.

79. Wilson *v.* People, 26 Ill. 434; O'Brian *v.* State, 14 Ind. 469.

80. Goodwine *v.* State, 5 Ind. App. 63, 31 N. E. 554.

Where there is evidence that defendant has a venereal disease, and that relatrix has not, the jury, in determining whether defendant had intercourse with relatrix at or about the time the child was begotten, may consider whether he had such disease, whether it was contagious, the probability of its being communicated to relatrix, and whether she had it. Dehler *v.* State, 22 Ind. App. 385, 53 N. E. 850.

81. Harty *v.* Malloy, 67 Conn. 339, 35 Atl. 259; Davison *v.* Cruse, 47 Nebr. 829, 66 N. W. 823.

82. Goodwine *v.* State, 5 Ind. App. 63, 31 N. E. 554.

83. *Alabama.*— Berryman *v.* Judge Lawrence County Ct., 9 Ala. 455.

Illinois.— Davis *v.* People, 50 Ill. 199.

Indiana.— Mobley *v.* State, 83 Ind. 92; Cunningham *v.* State, 35 Ind. 373.

Kentucky.— A verdict against defendant for a certain sum per year for twelve years for the support of the child is substantially a finding that defendant is guilty, and is sufficient to support a judgment against him. Faber *v.* Com., 21 Ky. L. Rep. 1067, 54 S. W. 7.

Pennsylvania.— Com. *v.* Walker, 2 Pa. Dist. 727.

See 6 Cent. Dig. tit. "Bastards," § 188.

Insufficient findings.— A finding that the child was "still-born" will not support an allegation that relatrix was "delivered of a bastard child." Canfield *v.* State, 56 Ind. 168. Nor is a verdict that defendant is the reputed father a sufficient finding. Devinney *v.* State, Wright (Ohio) 564. Where, however, the statute provided that the issue submitted should be whether defendant is the father of the child, but the court submitted as an issue whether defendant was the father "of said child," and the verdict followed the language of the issue submitted, it was held that the plea and verdict should be referred to the complaint and the irregularity disregarded. Austin *v.* Pickett, 9 Ala. 102.

84. Eaton *v.* Elliot, 28 Me. 436.

be granted for newly discovered evidence which is not cumulative in its character.[85]

N. Judgment — 1. Form of Judgment. A substantial compliance with the statute as to the form of the judgment is sufficient.[86] If the statute determines with certainty who the plaintiff must be it is not error if the entry omits to state in whose favor the judgment is rendered.[87]

2. Award For Support and Expenses — a. Amount of Award. While the maximum amount which defendant may be adjudged to pay for the support of the child is often fixed by the statute,[88] the amount of the award, if below such sum, or if no provision be made, is within the sound discretion of the court.[89] In

Defendant cannot claim to be surprised by the introduction of evidence relating to intercourse at other places than he expected, so as to entitle him to a new trial. Gardner *v.* State, 94 Ind. 489.

Harmless error.— A new trial will not be granted for an irregularity in the proceeding, if defendant has been in no way prejudiced. Hutchinson *v.* State, 19 Nebr. 262, 27 N. W. 113.

The question of excessive damages, as fixed by the court, is matter occurring after conclusion of the trial, and cannot be raised by motion for a new trial. Hamilton *v.* State, 117 Ind. 348, 20 N. E. 252; Scott *v.* State, 102 Ind. 277, 1 N. E. 691; McIlvain *v.* State, 80 Ind. 69.

85. Jones *v.* State, 78 Ind. 217; Witters *v.* State, 26 Ind. 192.

It must appear to the court that the evidence sought to be produced is credible. Thus where the affidavit of such evidence is disputed by respectable witnesses, and the statements contained therein are in many respects improbable, the motion is properly overruled. State *v.* Seevers, 108 Iowa 738, 78 N. W. 705. And see Holcomb *v.* People, 79 Ill. 409. And evidence of admissions of prosecutrix, being admissible for purpose of impeachment only, are insufficient. Harper *v.* State, 101 Ind. 109; Tholke *v.* State, 50 Ind. 355. So an affidavit setting forth newly discovered evidence which would fall within the objection of being hearsay is insufficient. State *v.* Quinton, 59 Iowa 362, 13 N. W. 328. See also Dingman *v.* State, 48 Wis. 485, 4 N. W. 668, wherein it is held that laxity or neglect in a party to procure a witness whom he has been told could give material testimony in his favor may properly be considered by the court in refusing to grant a new trial.

86. Comstock *v.* Weed, 2 Conn. 155; Rich *v.* People, 66 Ill. 513; Fogarty *v.* Connell, 153 Mass. 369, 26 N. E. 880. See also Neff *v.* State, 3 Ind. 564.

If a certain phraseology is required by statute, as that it be distinctly declared that defendant is "the putative father of the child," such form must be adhered to. Com. *v.* Clark, 2 Mass. 156; Devinney *v.* State, Wright (Ohio) 564; Spurgeon *v.* Clemmons, 6 Nebr. 307; Speiger *v.* State, 32 Wis. 400. But if the verdict contains a special finding that "defendant is the father of the child," the judgment need not formally adjudge him so to be. Berryman *v.* Judge Lawrence County Ct., 9 Ala. 455; Dean *v.* State, 29 Ind. 483.

A conditional judgment, as where the court commits defendant "until he find surety," is valid, if in compliance with the statute. State *v.* Wynne, 116 N. C. 981, 21 S. E. 35.

Forms of judgment or orders to support may be found in whole or in substance in Bennett *v.* Hall, 1 Conn. 417; Britton *v.* State, 54 Ind. 535; Eccleston *v.* State, 7 Gill & J. (Md.) 316; Matter of Murphy, 23 N. J. L. 180; *In re* Comstock, (Okla. 1900) 61 Pac. 921.

87. Yarborough *v.* Judge Shelby County Ct., 15 Ala. 556.

A clerical error in writing up the judgment, where the omission or mistake can be remedied by reference to an undisputed record of the proceedings, will not invalidate it. Woodard *v.* People, 56 Ill. App. 45. See also Wilson *v.* Judge Pike County Ct., 18 Ala. 757; Neff *v.* State, 3 Ind. 564. So harmless surplusage in the rendition is not ground for reversal. People *v.* Leavitt, 15 N. Y. Suppl. 618, 39 N. Y. St. 716.

Where the record shows the facts necessary to sustain the jurisdiction the entry may fail to disclose them. Wilson *v.* Judge Pike County Ct., 18 Ala. 757.

88. Wilson *v.* Judge Pike County Ct., 18 Ala. 757; Kelly *v.* People, 29 Ill. 287; Morrison *v.* People, 52 Ill. App. 482.

A pardon after a conviction, and before sentence, suspends the jurisdiction of the court, and it has no power to make a subsequent order of maintenance. Duncan *v.* Com., 4 Serg. & R. (Pa.) 449. See also Com. *v.* Ahl, 43 Pa. St. 53.

89. *Alabama.*— Wilson *v.* Judge Pike County Ct., 18 Ala. 757.

Illinois.— Kelly *v.* People, 29 Ill. 287.

Indiana.— Jean *v.* State, 25 Ind. App. 339, 58 N. E. 209; Dehler *v.* State, 22 Ind. App. 385, 53 N. E. 850; Goodwine *v.* State, 5 Ind. App. 63, 31 N. E. 554.

Iowa.— State *v.* Ginger, 80 Iowa 574, 46 N. W. 657.

Kentucky.— Evarts *v.* Com., 2 B. Mon. (Ky.) 55; Turner *v.* Com., 1 B. Mon. (Ky.) 205; Com. *v.* Sanford, 5 Litt. (Ky.) 289.

Nebraska.— Clark *v.* Carey, 41 Nebr. 780, 60 N. W. 78. See also Wurdeman *v.* Schultz, 54 Nebr. 404, 74 N. W. 951.

North Carolina.— State *v.* Beatty, 66 N. C. 648.

determining this amount the court may consider the wealth and condition in life of the parties.[90] The award, however, should be for a specific amount[91] and be limited to a certain time.[92] It may include the necessary lying-in expenses incidental to child-birth.[93]

b. To Whom Payable. The order should make the award payable to the person designated by statute to receive the same.[94] The person usually designated is the mother.[95]

Pennsylvania.— Addis *v.* Com., 4 Binn. (Pa.) 541.

Wisconsin.— Rindskopf *v.* State, 34 Wis. 217; Hoffman *v.* State, 17 Wis. 596.

See 6 Cent. Dig. tit. "Bastards," § 197.

In case of twins, while the father on conviction is chargeable for the maintenance of both (Hall *v.* Com., Hard. (Ky.) 479), yet judgment for the same amount as if only one child had been born cannot be objected to by defendant (Connelly *v.* People, 81 Ill. 379).

The court may direct that deferred payments of instalments so ordered shall draw interest. Morris *v.* State, 115 Ind. 282, 16 N. E. 632, 17 N. E. 598.

90. Jean *v.* State, 22 Ind. App. 339, 58 N. E. 209; Dehler *v.* State, 22 Ind. App. 385, 53 N. E. 850; Clark *v.* Carey, 41 Nebr. 780, 60 N. W. 78; Rindskopf *v.* State, 34 Wis. 217; Hoffman *v.* State, 17 Wis. 596. And see Lyle *v.* Overseers of Poor, 8 Gratt. (Va.) 20.

91. Hunter *v.* State, 6 Blackf. (Ind.) 383; Cross *v.* People, 10 Mich. 24.

An order against the father and mother jointly must designate the amount to be furnished by the father. Cross *v.* People, 10 Mich. 24. It is, however, no objection that an order of maintenance is made against the father alone. Tyrrel *v.* Overseers of Poor, 27 N. J. L. 416. What is not directed to be performed by the father remains for the mother. Hull *v.* People, 41 Mich. 167, 2 N. W. 175.

92. Johnson *v.* State, 102 Ga. 613, 29 S. E. 916.

An order that the father make certain regular payments until the further order of the court is erroneous. Benedict *v.* Roberts, 2 Root (Conn.) 496; Cheesborough *v.* Baldwin, 1 Root (Conn.) 229; People *v.* Jamieson, 124 Mich. 164, 82 N. W. 835; People *v.* Wing, 115 Mich. 698, 74 N. W. 179; Rex *v.* Thomas, 2 Show. 129. *Contra*, Mariner *v.* Dyer, 2 Me. 165; State *v.* Eichmiller, 35 Minn. 240, 28 N. W. 503.

Life of child.— While it is proper for the judgment to expressly limit defendant's liability, within the time prescribed by the order, to so long only as the child shall live (Judson *v.* Blanchard, 3 Conn. 579), yet such limitation is unnecessary to its validity. A judgment omitting such proviso is valid, the obligation being terminated by implication upon the death of the child (Rindskopf *v.* State, 34 Wis. 217).

Time of payment.—It is not necessary that the exact time of payment be specified. Page *v.* Com., 1 Litt. (Ky.) 157. Such judgments are subject to future orders by the court, and the date of payment may be made more definite. State *v.* Eichmiller, 35 Minn. 240, 28 N. W. 503. Hence it is not error to amend a judgment *nunc pro tunc*, changing the date of payment from the first day of January to the first Monday in January as the statute requires. Williams *v.* State, 29 Ala. 9.

93. *Connecticut.*— Judson *v.* Blanchard, 4 Conn. 557; Comstock *v.* Weed, 2 Conn. 155; Bennett *v.* Hall, 1 Conn. 417. But burial expenses of the child cannot be allowed. Harty *v.* Malloy, 67 Conn. 339, 35 Atl. 259.

Florida.— See Andrew G. *v.* Catherine A., 16 Fla. 830; John D. C. *v.* State, 16 Fla. 554.

Iowa.— No lying-in expenses can be allowed if the child is born dead. State *v.* Beatty, 61 Iowa 307, 16 N. W. 149.

Massachusetts.— *Compare* Com. *v.* Cole, 5 Mass. 517.

Minnesota.— State *v.* Eichmiller, 35 Minn. 240, 28 N. W. 503; State *v.* Zeitler, 35 Minn. 238, 28 N. W. 501.

Pennsylvania.— Com. *v.* Gurley, 45 Pa. St. 392; Philippi *v.* Com., 18 Pa. St. 116; Sheffer *v.* Rempublicam, 3 Yeates (Pa.) 39.

Tennessee.— Steele *v.* Register, 3 Hayw. (Tenn.) 37.

Wisconsin.— Speiger *v.* State, 32 Wis. 400.

Contra.— Allen *v.* State, 4 Blackf. (Ind.) 122. See also Canfield *v.* State, 56 Ind. 168.

94. Dickerson *v.* Gray, 2 Blackf. (Ind.) 230. See also Richards *v.* State, 1 Ind. 53.

If the person who should receive the payment for part maintenance be dead the amount should be awarded to his legal representatives. Bright *v.* Sexton, 18 Ind. 186; Sheffer *v.* Rempublicam, 3 Yeates (Pa.) 39.

Under a statute providing that if the mother be indigent the justices shall specify in the order of filiation, "the sum to be paid by the defendant for her support during her confinement and recovery" the order need not specify to whom the money for the support of the mother shall be paid. The amount would be properly payable to the overseers of the poor. People *v.* Leavitt, 15 N. Y. Suppl. 618, 39 N. Y. St. 716.

95. If the mother is an improper person to receive the money the court may direct its payment to some other person, and an order so directing its payment need not expressly state that the mother is unfit. State *v.* Christian, 18 Ind. App. 11, 47 N. E. 395.

The mother is but a trustee of the funds for the support of the child. She cannot by compromise change the amount or time of payment (State *v.* Mormon, 2 Ohio Dec. (Reprint) 286, 2 West. L. Month. 308), or assign the judgment rendered in her favor for

3. ARREST OF JUDGMENT. A motion in arrest of judgment should not be allowed except for some material defect in the record.[96]

4. VACATION OF JUDGMENT. The court may in its discretion open or vacate the judgment after it has been formally pronounced.[97]

O. Enforcement of Order For Support — 1. IN GENERAL. An order of maintenance may be enforced by an action of debt,[98] by scire facias,[99] or by execution.[1]

2. IMPRISONMENT — a. In General. The imprisonment of defendant is permissible as a means of enforcing an order of maintenance.[2] Such imprisonment

the benefit of her bastard child as collateral security for her individual debt when the child has been legally taken from her and a guardian appointed. In such case the guardian is entitled to the payments (Heritage *v.* Hedges, 72 Ind. 247). Nor can her husband in any way release such payments (Philippi *v.* Com., 18 Pa. St. 116).

96. Jones *v.* People, 53 Ill. 366.

After a verdict of guilty has been rendered, judgment will not be arrested because the examination taken before the magistrate was not signed by complainant, if the complaint be duly signed. Williams *v.* Copeland, 5 Allen (Mass.) 209. Nor will judgment be arrested on the ground that the indictment did not state the true date of the offense, and avoid the statute of limitations, by alleging defendant's flight and concealment, if defendant has been allowed to avail himself of his defense of limitation and has been in no way prejudiced in his defense. Com. *v.* Blackburn, 3 Pa. Co. Ct. 464. If the arrest be desired on the ground that one of the jurors is, through his interest in the suit, disqualified, it must be affirmatively shown that defendant has no knowledge of such relationship before the verdict. Manion *v.* Flynn, 39 Conn. 330.

97. State *v.* Sowders, 42 Kan. 312, 22 Pac. 425; Keith *v.* McCaffrey, 145 Mass. 18, 12 N. E. 419; Kremling *v.* Lallman, 16 Nebr. 280, 20 N. W. 383.

After defendant has pleaded guilty, and been ordered to make certain payments into court, a subsequent order releasing him from further payments does not discharge his general obligation to maintain the child. State *v.* Hastings, 74 Iowa 574, 38 N. W. 421.

98. **Debt.**—Cooper *v.* State, 4 Blackf. (Ind.) 316; Harrington *v.* Ferguson, 2 Blackf. (Ind.) 42; Stokes *v.* Sanborn, 45 N. H. 274; Wallsworth *v.* Mead, 9 Johns. (N. Y.) 367. See also Com. *v.* Kyler, 1 Pa. Co. Ct. 159, 17 Wkly. Notes Cas. (Pa.) 123, wherein it is held that debt or execution is the only remedy to enforce payments falling due after defendant has been discharged in bankruptcy.

Necessity of demand.— The order is conclusive when unappealed from, and the overseers of the poor may sue thereon without any further demand. Wallsworth *v.* Mead, 9 Johns. (N. Y.) 367.

Pleading.— It must appear by the declaration and proof that the party suing has actually been subjected to the expense of maintenance. Stanfield *v.* Fetters, 7 Blackf. (Ind.) 558; Eby *v.* Burkholder, 17 Serg. & R. (Pa.) 9. See also Hellings *v.* Amey, 1 Whart. (Pa.) 63. *Contra*, Hebron *v.* Ely, Lalor (N. Y.) 379; Willard *v.* Overseers of Poor, 9 Gratt. (Va.) 139. An averment of a breach of the condition of the recognizance has, however, been held unnecessary. State *v.* Chesley, 4 N. H. 366.

99. **Scire facias.**—Cooper *v.* State, 4 Blackf. (Ind.) 316; Harrington *v.* Ferguson, 2 Blackf. (Ind.) 42; Eccleston *v.* State, 7 Gill & J. (Md.) 316; McGrath *v.* Conway, 116 Mass. 360; Freeman *v.* Batchelder, 35 Vt. 13.

On a mere order that defendant give security, a scire facias will not lie. Woodcock *v.* Walker, 14 Mass. 386.

1. **Execution.**— Darby *v.* Carson, 9 Ohio 149. But see Isaacs *v.* Judge Jefferson County Ct., 5 Stew. & P. (Ala.) 402, holding that a judgment that "defendant pay not exceeding the sum of fifty dollars" sustained by no evidence of a bond except the clerk's testimony that none could be found in his office, but that defendant's sureties said they had executed one, was insufficient to authorize an execution.

A discharge under the insolvent act, upon a commitment for failure to give bond, will not defeat the right of execution. McLaughlin *v.* Whitten, 32 Me. 21; Com. *v.* Snyder, 4 Pa. Co. Ct. 261.

2. *Alabama.*— Yarborough *v.* Judge Shelby County Ct., 15 Ala. 556. See also Bell *v.* State, 124 Ala. 77, 27 So. 271.

Georgia.— Parsons *v.* State, 97 Ga. 73, 24 S. E. 845; Shiver *v.* State, 23 Ga. 230.

Illinois.—Livingston *v.* People, 48 Ill. App. 109.

Indiana.— Holderman *v.* Thompson, 105 Ind. 112, 5 N. E. 175; Reynolds *v.* Lamount, 45 Ind. 308. *Compare* Patterson *v.* Pressley, 70 Ind. 94.

Maine.— Mariner *v.* Dyer, 2 Me. 165.

Massachusetts.— Woodcock *v.* Walker, 14 Mass. 386.

Michigan.— People *v.* Wing, 115 Mich. 698, 74 N. W. 179.

New Hampshire.—State *v.* Chesley, 4 N. H. 366.

New York.— People *v.* Stowell, 2 Den. (N. Y.) 127; Roy *v.* Targee, 7 Wend. (N. Y.) 359.

North Carolina.— State *v.* Palin, 63 N. C. 471. See also State *v.* Nelson, 119 N. C. 797, 25 S. E. 863.

Ohio.— Welty *v.* Furley, 2 Ohio Dec. (Reprint) 399, 2 West. L. Month. 596.

Oklahoma.— It must be shown that defendant is in contempt of the court by his

is not imprisonment for debt within the meaning of a constitutional provision prohibiting imprisonment for debt.[3]

b. Discharge. One imprisoned cannot be released on habeas corpus by showing that another person is the father,[4] or that he has no money or property with which to pay the judgment or procure bail.[5] The relief granted by insolvency laws may, however, be extended,[6] and upon a strict compliance with the statute defendant may be discharged.[7]

P. Bonds For Support — 1. Necessity. Defendant is usually required, on a judgment against him, to give security to perform the orders of the court for the support of the child.[8]

failure to indemnify. *In re* Comstock, (Okla. 1900) 61 Pac. 921.

Pennsylvania.— Eby *v.* Burkholder, 17 Serg. & R. (Pa.) 9.

Rhode Island.—Canning's Petition, 11 R. I. 257.

South Carolina.— State *v.* Brewer, 38 S. C. 263, 16 S. E. 1001, 37 Am. St. Rep. 752, 19 L. R. A. 362.

Wisconsin.— Hodgson *v.* Nickell, 69 Wis. 308, 34 N. W. 118.

See 6 Cent. Dig. tit. "Bastards," § 209.

No writ other than the order of the court is necessary to authorize defendant's imprisonment upon his failure to give security for support. State *v.* Mullen, 50 Ind. 598. See also Young *v.* Makepeace, 103 Mass. 50.

Place of imprisonment.— Such imprisonment being for the purpose of procuring bond and not as punishment, confinement in a prison provided for those convicted of offenses is illegal. Matter of Kaminsky, 70 Mich. 653, 38 N. W. 659. *Compare* Pease *v.* People, 66 Ill. App. 584.

Form of order of commitment in default of payment of fine and costs see Myers *v.* Stafford, 114 N. C. 234, 19 S. E. 764.

3. *Alabama.*— Paulk *v.* State, 52 Ala. 427.

Florida.— *Ex p.* J. C. H., 17 Fla. 362.

Illinois.— Rich *v.* People, 66 Ill. 513; People *v.* Cotton, 14 Ill. 414.

Indiana.— McIlvain *v.* State, 87 Ind. 602 [*overruling* Byers *v.* State, 20 Ind. 47]; Turner *v.* Wilson, 49 Ind. 581; Reynolds *v.* Lamount, 45 Ind. 308; *Ex p.* Teague, 41 Ind. 278; Lower *v.* Wallick, 25 Ind. 68.

Kansas.— Matter of Wheeler, 34 Kan. 96, 8 Pac. 276.

Minnesota.— State *v.* Becht, 23 Minn. 1.

Mississippi.— *Ex p.* Bridgforth, 77 Miss. 418, 27 So. 622, 78 Am. St. Rep. 532.

Nebraska.— *Ex p.* Donahoe, 24 Nebr. 66, 38 N. W. 28; *Ex p.* Cottrell, 13 Nebr. 193, 13 N. W. 174.

North Carolina.—State *v.* Wynne, 116 N. C. 981, 21 S. E. 35; State *v.* Giles, 103 N. C. 391, 9 S. E. 433.

Ohio.—Nusser *v.* Stewart, 21 Ohio St. 353; Welty *v.* Furley, 2 Ohio Dec. (Reprint) 399, 2 West. L. Month. 596.

South Carolina.— State *v.* Brewer, 39 S. C. 263, 16 S. E. 1001, 37 Am. St. Rep. 752, 19 L. R. A. 362.

Contra.— Holmes *v.* State, 2 Greene (Iowa) 501.

See 6 Cent. Dig. tit. "Bastards," § 211.

Involuntary servitude.— A sentence that defendant work upon the public road in default of payment of a fine is not in conflict with U. S. Const. art. 13, § 1, prohibiting involuntary servitude except as a punishment for crime whereof the party has been duly convicted. Myers *v.* Stafford, 114 N. C. 234, 19 S. E. 764. See also State *v.* Adams, 1 Brev. (S. C.) 279.

4. Reynolds *v.* Lamount, 45 Ind. 308.

5. Reynolds *v.* Lamount, 45 Ind. 308; *Ex p.* Teague, 41 Ind. 278.

A statute authorizing the county commissioners to discharge from prison, without a proceeding under the insolvent laws, convicts who have served out their terms but have failed to pay costs, etc., does not apply to one who has been sentenced for fornication and bastardy to a term of imprisonment and a fine, and to pay a certain allowance per week and furnish security to keep the child off the county. Com. *v.* Bird, 2 Pa. Co. Ct. 577.

6. State *v.* Heathman, Wright (Ohio) 690.

7. Corson *v.* Tuttle, 19 Me. 409; Doherty *v.* Clark, 3 Allen (Mass.) 151; State *v.* White, 125 N. C. 674, 34 S. E. 532; State *v.* Ostwalt, 118 N. C. 1208, 24 S. E. 660, 32 L. R. A. 396; State *v.* Parsons, 115 N. C. 730, 20 S. E. 511; State *v.* Burton, 113 N. C. 655, 18 S. E. 657; State *v.* Bryan, 83 N. C. 611; Fahey's Case, 8 Pa. Co. Ct. 457. See also State *v.* Woodward, 123 Ind. 30, 23 N. E. 968.

After discharge the court cannot impose upon him any further penalty which it might have imposed at the former sentence (State *v.* Burton, 113 N. C. 655, 18 S. E. 657; Com. *v.* Cook, (Pa. 1886) 10 Atl. 411), nor can he be imprisoned for non-payment of subsequently accruing instalments (Com. *v.* Kyler, 1 Pa. Co. Ct. 159, 17 Wkly. Notes Cas. (Pa.) 123; Com. *v.* Cook, 4 Wkly. Notes Cas. (Pa.) 333 [*overruling* Com. *v.* Miller, 3 Wkly. Notes Cas. (Pa.) 301]).

8. Austin *v.* Pickett, 9 Ala. 102; Trimble *v.* State, 4 Blackf. (Ind.) 42; State *v.* Sarratt, 14 Rich. (S. C.) 29; State *v.* Darby, 7 Rich. (S. C.) 362; U. S. *v.* Collins, 1 Cranch C. C. (U. S.) 592, 25 Fed. Cas. No. 14,835.

In the absence of statutory requirement the exaction of security from defendant to indemnify the mother or the town for the support of the child is discretionary. Madison *v.* Gray, 72 Me. 254. A judgment would be sufficient without it. Beeman *v.* State, 5 Blackf. (Ind.) 165; Cooper *v.* State, 4 Blackf. (Ind.) 316.

2. REQUISITES AND VALIDITY. The bond must be so framed as to effect the object contemplated.[9] Though not in conformity to statute it may be good as a common-law bond,[10] but it should not contain requirements not authorized by the statute.[11]

3. LIABILITY ON BOND — a. In General. Defendant cannot relieve himself from his liability by any agreement which he may make with other persons for the support of the child,[12] nor will the mother's removal from the state,[13] or his demand for the custody of the child, and an offer to support it,[14] discharge him. The liability of the sureties, though unaffected by the death of the father,[15] will be terminated as to future support by the death of the child.[16]

b. Enforcement. The bond may be enforced as bonds and recognizances generally are enforced. Thus an action of debt will lie;[17] a scire facias may be

The court may, upon the insolvency of the surety, require a new recognizance. Oldham *v.* State, 5 Gill (Md.) 90.

The judgment may require security to indemnify the town, and omit to order security for a compliance with the judgment. Bennett *v.* Hall, 1 Conn. 417.

9. State *v.* Bright, 14 S. C. 7.

Inclusion of sums overdue.— A bond for support and to perform the orders of the court is not void in that it includes instalments overdue at the time it is taken. Eccleston *v.* State, 7 Gill & J. (Md.) 316; Hand *v.* Allen, 25 Vt. 103.

To whom payable.— The provisions of the statute directing to whom the bond should be made payable must be observed. Thus where the bond should be made payable to the clerk of the court it is error to substitute the county judge as payee. Moore *v.* People, 13 Ill. App. 248. If given to indemnify the town it must be for the town or county which by the record is shown to be the residence of the child and will be liable for its support. Root *v.* State, 10 Gill & J. (Md.) 374. See also Dorsey *v.* Com., 8 Serg. & R. (Pa.) 261. Where no payee is designated by the statute it should be made payable to the state. Commissioners of Poor *v.* Gains, 1 Treadw. (S. C.) 459.

Forms of bonds for support may be found in East Hartford *v.* Hunn, 29 Conn. 500; Such *v.* State, 55 N. J. L. 289, 26 Atl. 896.

10. Thompson *v.* Buckhannon, 2 J. J. Marsh. (Ky.) 416; Thompson *v.* Com., 4 T. B. Mon. (Ky.) 484; State *v.* Mayson, 2 Nott & M. (S. C.) 425.

A bond voluntarily given for maintenance will be supported under the common law. Commissioners of Poor *v.* Gilbert, 2 Strobh. (S. C.) 152.

11. Lester *v.* Worden, 8 N. Y. App. Div. 216, 40 N. Y. Suppl. 436, 74 N. Y. St. 868 (where it is held that a requirement to pay a certain sum per week, instead of an order to pay said sum, or such sum as the court of sessions may order, is an undue requirement); People *v.* Meighan, 1 Hill (N. Y.) 298.

A condition providing for the education of the child is authorized by a statute requiring a bond for support or maintenance. State *v.* Such, 53 N. J. L. 351, 21 Atl. 852; Hellings *v.* Directors of Poor, 15 Pa. St. 409.

Alternative conditions.—A bond conditioned to pay such sums as shall have been ordered for the support of the child, "or" to appear at the next court of sessions to answer the charge is void in that it is conditioned in the alternative. Standring *v.* Moore, 16 Misc. (N. Y.) 106, 38 N. Y. Suppl. 813, 74 N. Y. St. 492.

Where the precise language of the statute is pursued it is valid, though at the time it is taken some part of the prescribed condition cannot be enforced. People *v.* Mitchell, 4 Sandf. (N. Y.) 466.

12. Barber *v.* State, 24 Md. 383. See also People *v.* Mitchell, 44 Barb. (N. Y.) 245, holding that a compromise by the father with the overseers of the poor, whereby the father was to be released from the condition of the bond by taking and supporting the child, was void.

13. Com. *v.* Williams, 1 J. J. Marsh. (Ky.) 308.

This is true though after such removal she remarries, deserts the child, and the putative father is willing and able, and offers to rear and educate the child, and to give security that it will not become a county charge. Olson *v.* Johnson, 23 Minn. 301.

14. Hudson *v.* Hills, 8 N. H. 417; Carpenter *v.* Whitman, 15 Johns. (N. Y.) 208; Directors of Poor *v.* Dungan, 64 Pa. St. 402. *Contra*, Wright *v.* Bennett, 7 Ill. 587.

15. State *v.* Such, 53 N. J. L. 351, 21 Atl. 852. *Contra*, Philadelphia *v.* Haslitt, 14 Phila. (Pa.) 138, 37 Leg. Int. (Pa.) 386.

The surety may petition the court upon the death of the father for a discharge from his obligation on the bond, and if, from all the circumstances of the case, the court are of the opinion that his obligation is no longer warranted, he may be discharged by order of court. Hoch *v.* Lord, Thach. Crim. Cas. (Mass.) 263.

16. State *v.* Mitchell, Wright (Ohio) 464.

17. Com. *v.* Hoch, 1 Woodw. (Pa.) 332.

Defenses.— Defendant being under a legal obligation to furnish a bond for support cannot, as defense to an action thereon, plead his infancy. Bordentown Tp. *v.* Wallace, 50 N. J. L. 13, 11 Atl. 267; People *v.* Moores, 4 Den. (N. Y.) 518, 47 Am. Dec. 272. Nor, if the instrument be considered a voluntary bond, will irregularities in the statutory proceedings under which it was given avail de-

issued;[18] or recovery may be had by motion under the statute.[19] Judgment should be entered for the penalty, but execution should issue only for the damages which have accrued up to such time.[20]

Q. Review of Proceedings — 1. In General. In jurisdictions where the proceeding is considered as civil, the rules governing appeals in civil cases usually apply[21] in the absence of special statutory provisions regulating a review.[22] Statutes limiting the right of appeal by the state apply, however, in jurisdictions where the proceeding is considered criminal.[23]

2. Modes of Review. A review may be had by appeal,[24] writ of error,[25] or certiorari,[26] depending upon the practice or statutes of the particular state.

fendant. Bordentown Tp. *v.* Wallace, 50 N. J. L. 13, 11 Atl. 267. So a defense that the father had made provisions for the child, of which the town had notice, is insufficient, unless it be shown that the child was in the custody of the town and that its officers refused to allow the father to support it. Lyman *v.* Lull, 4 N. H. 495.

Though statutes relating to the support of bastards do not have a retroactive effect (Wheelwright *v.* Greer, 10 Allen (Mass.) 389; People *v.* Superintendents of Poor, 3 Hill (N. Y.) 116), the method of enforcing the father's liability for support may be changed, and applied where the child is born after the change, though begotten before (Willetts *v.* Jeffries, 5 Kan. 470; State *v.* Hughes, 8 S. D. 338, 66 N. W. 1076; State *v.* Bunker, 7 S. D. 639, 65 N. W. 33).

18. Mong *v.* State, 10 Gill & J. (Md.) 380; *Ex p.* Harrington, 1 Nott & M. (S. C.) 203.

Form of scire facias upon a recognizance to support a bastard child is set out in Mong *v.* State, 10 Gill & J. (Md.) 380.

19. Gillin *v.* Pence, 4 T. B. Mon. (Ky.) 304; Bell *v.* Chapell, 2 T. B. Mon. (Ky.) 151, 4 T. B. Mon. (Ky.) 485; Freeman *v.* Batchelder, 36 Vt. 292.

Statutory remedy not exclusive.— A statute giving a particular and summary remedy against the father alone on a bastardy bond does not impair the common-law right to sue all or either of the obligors. Justices *v.* Stewart, 18 N. C. 412.

Where the bond is not in conformity to the statute, enforcement by motion under the statute is improper. Thompson *v.* Buckhannon, 2 J. J. Marsh. (Ky.) 416; Thompson *v.* Com., 4 T. B. Mon. (Ky.) 484.

20. Corson *v.* Dunlap, 83 Me. 32, 21 Atl. 173, 12 L. R. A. 90 [*modifying* Brett *v.* Murphy, 80 Me. 358, 14 Atl. 934; Philbrook *v.* Burgess, 52 Me. 271]; Barnes *v.* Chase, 128 Mass. 211; McGrath *v.* Conway, 116 Mass. 360. And see Freeman *v.* Batchelder, 35 Vt. 13.

Judgment for the penalty stands as a security for the payment of future instalments. Roll *v.* Maxwell, 5 N. J. L. 580. Thus where an instalment was due when the writ issued, but an affidavit of defense was filed showing that all the costs and instalments had been paid before it was filed, judgment was nevertheless issued for the penalty, to stand as security for future performance of the conditions. Com. *v.* Hoch, 1 Woodw. (Pa.) 332.

21. *Indiana.*—Powell *v.* State, 96 Ind. 108; Reed *v.* State, 66 Ind. 70; Galvin *v.* State, 56 Ind. 51; Glenn *v.* State, 46 Ind. 368; Walker *v.* State, 6 Blackf. (Ind.) 1.

Minnesota.— State *v.* Klitzke, 46 Minn. 343, 49 N. W. 54.

New Hampshire.— Richmond *v.* Bowen, 54 N. H. 99.

New Jersey.—Hildreth *v.* Overseers of Poor, 13 N. J. L. 5.

North Carolina.— State *v.* Edwards, 110 N. C. 511, 14 S. E. 741; State *v.* Crouse, 86 N. C. 617; State *v.* Wilkie, 85 N. C. 513.

South Dakota.—State *v.* Knowles, 10 S. D. 471, 74 N. W. 201.

See 6 Cent. Dig. tit. "Bastards," § 229.

The proceeding, though civil, is not an action "ex-contractu" nor is the judgment a penalty within the meaning of a general statute regulating appeals in such suits. Common *v.* People, 137 Ill. 601, 27 N. E. 533; Scharf *v.* People, 134 Ill. 240, 24 N. E. 761 [*overruling* Rawlings *v.* People, 102 Ill. 475].

22. Oneal *v.* State, 2 Sneed (Tenn.) 214. See also People *v.* Lindsay, 53 Hun (N. Y.) 234, 6 N. Y. Suppl. 38, 25 N. Y. St. 519.

23. State *v.* Bruce, 122 N. C. 1040, 30 S. E. 141; State *v.* Ballard, 122 N. C. 1024, 29 S. E. 899; State *v.* Ostwalt, 118 N. C. 1208, 24 S. E. 660, 32 L. R. A. 396.

Special verdict.— A finding by a justice that defendant had intercourse with prosecutrix; that eight months thereafter she was delivered of a child, the result of such intercourse; that the child was living; and that the justice did not believe an eight months' child could live, is not a special verdict, and the acquittal of defendant was not an erroneous judgment of law on a special verdict, from which the state could appeal. State *v.* Bruce, 122 N. C. 1040, 30 S. E. 141.

24. **Appeal.**— State *v.* Cassidy, 38 N. J. L. 437; People *v.* Ontario County Ct. Sess., 45 Hun (N. Y.) 54; State *v.* Ledbetter, 26 N. C. 242. See, generally, Appeal and Error, 2 Cyc. 474.

25. **Writ of error.**— Peak *v.* People, 76 Ill. 289; People *v.* Noxon, 40 Ill. 30; Heikes *v.* Com., 26 Pa. St. 513; State *v.* Mushied, 12 Wis. 561. See, generally, Appeal and Error, 2 Cyc. 474.

The general statute must be complied with in the procurement of the writ. Bond *v.* State, 34 Fla. 45, 15 So. 591.

26. **Certiorari.**— *Delaware.*—Cloud *v.* State, 2 Harr. (Del.) 361.

Massachusetts.— Com. *v.* Moore, 3 Pick.

3. Decisions Reviewable. A judgment of a justice that defendant be discharged is a final adjudication from which an appeal may be taken.[27]

4. Bonds. When the state appeals from a judgment no appeal-bond is necessary.[28]

5. Scope and Extent of Review. It will be presumed upon appeal, in the absence of a showing to the contrary, that the statutory requirements have been complied with and that the proceedings are regular.[29] Matters discretionary with the trial court will not be reviewed.[30] So error without prejudice in the admission or exclusion of evidence is not ground for reversal.[31] And a finding by the jury will not be set aside as against the weight of the evidence unless in a very clear case.[32]

(Mass.) 194; Gile *v.* Moore, 2 Pick. (Mass.) 386; Drowne *v.* Stimpson, 2 Mass. 441.

Michigan.— Cross *v.* People, 8 Mich. 113.

New Jersey.— Sutton *v.* Overseer of Poor, 32 N. J. L. 295; State *v.* Overseer of Poor, 24 N. J. L. 533.

New York.— Sweet *v.* Overseers of Poor, 3 Johns. (N. Y.) 23. But see People *v.* Ontario County Ct. Sess., 45 Hun (N. Y.) 54, wherein, the writ having been abolished as to special and criminal proceedings, it is held that appeal is the proper method.

North Carolina.— State *v.* Warren, 100 N. C. 489, 5 S. E. 662 (using writ of recordari and certiorari interchangeably); State *v.* Long, 31 N. C. 488.

Ohio.— Baxter *v.* Columbia Tp., 16 Ohio 56.

Tennessee.— Lawson *v.* Scott, 1 Yerg. (Tenn.) 92.

Vermont.— Claflin *v.* Hubbard, Brayt. (Vt.) 38.

See, generally, Certiorari; and 6 Cent. Dig. tit. "Bastards," § 240.

27. McCoy *v.* State, 121 Ind. 160, 22 N. E. 986; Britton *v.* State, 54 Ind. 535; Askren *v.* State, 51 Ind. 592. *Compare* State *v.* Brown, 44 Ind. 329.

An order refusing to dismiss the proceeding does not terminate the action and prevent judgment, and is therefore not appealable. Hobbs *v.* Beckwith, 6 Ohio St. 252.

If the power of the justice be limited to a mere hearing of the cause, and a requirement of security for appearance, and he has no power either to acquit or convict, his discharge of defendant after examination is not a final adjudication and is not reviewable. State *v.* Linton, 42 Minn. 32, 43 N. W. 571.

28. Dibble *v.* State, 48 Ind. 470; Risk *v.* State, 19 Ind. 152; Neff *v.* State, 3 Ind. 564; Walker *v.* State, 6 Blackf. (Ind.) 1.

In the absence of statutory requirements an appeal-bond in bastardy should be conditioned on the payment of all costs and charges awarded against defendant on appeal, and in case of dismissal of the appeal or of affirmance of the judgment, on defendant's abiding by and performing the judgment or surrendering himself a prisoner in execution thereof. State *v.* Allrick, 63 Minn. 328, 65 N. W. 639.

Insufficient bond.— Where the appeal-bond given by defendant is, by non-compliance with the statute (People *v.* Lindsay, 53 Hun (N. Y.) 234, 6 N. Y. Suppl. 38, 25 N. Y. St. 519; Ramsey *v.* Childs, 34 Hun (N. Y.) 329), or by a failure to describe the judgment rendered or show any undertaking for the costs (Williams *v.* State, 26 Ala. 85), rendered invalid, the appeal should be dismissed.

The mother, as relator, may have the right of appeal without giving security upon affidavit *in forma pauperis*. Oneal *v.* State, 2 Sneed (Tenn.) 214. Likewise the writ of recordari, as a substitute for an appeal, may be issued without requiring security from prosecutrix, where the appeal is lost through fault and neglect of the justice. State *v.* Warren, 100 N. C. 489, 5 S. E. 662.

29. *Indiana.*— Morris *v.* State, 115 Ind. 282, 16 N. E. 632, 17 N. E. 598; McReynolds *v.* State, 52 Ind. 391; Wolf *v.* State, 11 Ind. 231; Beeman *v.* State, 5 Blackf. (Ind.) 165.

Kentucky.— Com. *v.* Hazlerigg, 18 B. Mon. (Ky.) 29; Turner *v.* Com., 1 B. Mon. (Ky.) 205.

Massachusetts.— Hyde *v.* Chapin, 6 Cush. (Mass.) 64; Com. *v.* Moore, 3 Pick. (Mass.) 194.

New Jersey.— Gaskill *v.* Overseer of Poor, 36 N. J. L. 356.

New York.— Overseer of Poor *v.* Cox, 7 Cow. (N. Y.) 235.

Ohio.— Grieve *v.* Freytag, 2 Ohio Dec. (Reprint) 304, 2 Cinc. L. Bul. 94.

See 6 Cent. Dig. tit. "Bastards," § 236.

30. Medler *v.* State, 26 Ind. 171; State *v.* Quinton, 59 Iowa 362, 13 N. W. 328; Ruff *v.* Kebler, 62 N. J. L. 186, 40 Atl. 626; State *v.* Overseer of Poor, 43 N. J. L. 406.

31. *Illinois.*— Holcomb *v.* People, 79 Ill. 409.

Indiana.— La Matt *v.* State, 128 Ind. 123, 27 N. E. 346; Hull *v.* State, 93 Ind. 128; Reitz *v.* State, 33 Ind. 187.

Iowa.— State *v.* Seevers, 108 Iowa 738, 78 N. W. 705; State *v.* Black, 89 Iowa 737, 55 N. W. 105; State *v.* Severson, 78 Iowa 653, 43 N. W. 533; State *v.* Pratt, 40 Iowa 631.

Nebraska.— Ingram *v.* State, 24 Nebr. 33, 37 N. W. 943.

South Dakota.— State *v.* Hughes, 8 S. D. 338, 66 N. W. 1076.

See 6 Cent. Dig. tit. "Bastards," § 238.

32. *Georgia.*—West *v.* State, 84 Ga. 527, 10 S. E. 731.

Illinois.— Common *v.* People, 39 Ill. App. 31.

R. Costs —1. In General. The disposition of costs depends upon statutory provisions with express reference to the proceeding,[33] or upon its analogy to actions wherein costs are awarded by a general provision of the statute.[34]

2. Persons Liable. The person upon whom the paternity of the child is fixed is usually held liable for the costs.[35] While defendant upon acquittal should not be held for the costs,[36] the proceeding, though often prosecuted in the name of the state, is civil in the sense that upon acquittal the costs cannot be taxed against the state.[37]

3. Amount of Award. The award should include only such costs as may be properly taxed.[38]

Indiana.— Rinehart *v.* State, 23 Ind. App. 419, 55 N. E. 504; Goodwine *v.* State, 5 Ind. App. 63, 31 N. E. 554.

Iowa.— State *v.* Seevers, 108 Iowa 738, 78 N. W. 705; State *v.* Johnson, 89 Iowa 1, 56 N. W. 404.

Kentucky.— Earp *v.* Com., 9 Dana (Ky.) 391.

Minnesota.— State *v.* Veek, 80 Minn. 221, 83 N. W. 141.

Nebraska.— Dukehart *v.* Coughman, 36 Nebr. 412, 54 N. W. 680; Planck *v.* Bishop, 26 Nebr. 589, 42 N. W. 723; Denham *v.* Watson, 24 Nebr. 779, 40 N. W. 308; Hutchinson *v.* State, 19 Nebr. 262, 27 N. W. 113; Altschuler *v.* Algaza, 16 Nebr. 631, 21 N. W. 401 [*distinguishing* Spurgeon *v.* Clemmons, 6 Nebr. 307].

New York.— People *v.* Tripicersky, 4 N. Y. App. Div. 613, 38 N. Y. Suppl. 696, 74 N. Y. St. 125.

North Dakota.— State *v.* Peoples, 9 N. D. 146, 82 N. W. 749; State *v.* McKnight, 7 N. D. 444, 75 N. W. 790.

Vermont.— Conklin *v.* Niles, 62 Vt. 104, 18 Atl. 1043.

Wisconsin.— Kenney *v.* State, 74 Wis. 260, 42 N. W. 213.

See 6 Cent. Dig. tit. "Bastards," § 237.

33. People *v.* Fulton County, 70 Hun (N. Y.) 560, 24 N. Y. Suppl. 397, 53 N. Y. St. 796; Baker *v.* State, 69 Wis. 32, 33 N. W. 52.

34. Berryman *v.* Judge Lawrence County Ct., 9 Ala. 455; Schooler *v.* Com., Litt. Sel. Cas. (Ky.) 88; Jones *v.* State, 14 Nebr. 210, 14 N. W. 901; Mayham *v.* Allen, 50 Hun (N. Y.) 343, 3 N. Y. Suppl. 100, 19 N. Y. St. 811; Superintendents of Poor *v.* Moore, 12 Wend. (N. Y.) 273.

A bastardy process is not an "original suit" or "bill in equity" within the meaning of a statute requiring an indorsement of the writ to secure the costs of such suits when plaintiff is a non-resident. Woodman *v.* Jarvis, 12 Gray (Mass.) 190.

35. Berryman *v.* Judge Lawrence County Ct., 9 Ala. 455; Wiggins *v.* Com., (Ky. 1901) 63 S. W. 31; Schooler *v.* Com., Litt. Sel. Cas. (Ky.) 88; Baker *v.* State, 69 Wis. 32, 33 N. W. 52. *Contra*, Booth *v.* McQueen, 1 Dougl. (Mich.) 41; Tyrrel *v.* Overseers of Poor, 27 N. J. L. 416.

A pardon by the governor of a person convicted of fornication and bastardy, when pleaded before sentence, discharges defendant from liability for costs. Com. *v.* Ahl, 43 Pa. St. 53.

36. State *v.* Pate, 47 N. C. 14.

In Nebraska a defendant may be adjudged to pay the costs notwithstanding his acquittal. Jones *v.* State, 14 Nebr. 210, 14 N. W. 901.

Dismissal of proceeding.— Where prosecutrix, pending the proceeding, files a statement admitting that provision has been made for the support of the child and dismisses the suit, a judgment against defendant for costs is error. Dodd *v.* State, 30 Ind. 76.

37. State *v.* Blackburn, 61 Ark. 407, 33 S. W. 529; Gleason *v.* McPherson County, 30 Kan. 53, 492, 1 Pac. 384, 2 Pac. 644.

Liability of county.— The county cannot be considered a party in interest to the extent of being held liable for the costs. McAndrew *v.* Madison County, 67 Iowa 54, 24 N. W. 590.

Liability of mother.— In Kentucky the mother is not liable in any event for costs. Francis *v.* Com., 3 Bush (Ky.) 4. In Vermont it has been held that a general statute which provides "that when any person after causing process to be served upon another, shall discontinue the action or become nonsuit therein, the costs of defendant may be recovered against such plaintiff," includes an action of bastardy, and costs against complainant upon being nonsuited are properly awarded. Allard *v.* Bingham, 8 Vt. 470. Under a provision of the bastardy act, however, if the discontinuance be by reason of miscarriage defendant is not entitled to costs. Eagan *v.* Bergen, 56 Vt. 589.

38. Mayham *v.* Allen, 50 Hun (N. Y.) 343, 3 N. Y. Suppl. 100, 19 N. Y. St. 811; Fellows *v.* Lane, 67 How. Pr. (N. Y.) 435; Superintendents of Poor *v.* Moore, 12 Wend. (N. Y.) 273.

In New York the clerk, and not the court, should tax the costs. Fellows *v.* Lane, 67 How. Pr. (N. Y.) 435.

Attorney's fees may be taxed as costs. Neary *v.* Robinson, 98 N. Y. 81 [*reversing* 27 Hun (N. Y.) 145]. *Contra*, Abshire *v.* State, 52 Ind. 99; Sperger *v.* State, 32 Wis. 400.

Enforcement of award.— Execution in the form usual in civil cases is a proper mode of enforcing a judgment for costs. Young *v.* Makepeace, 108 Mass. 233. And see Goddard *v.* Com., 6 Serg. & R. (Pa.) 282.

BASTARDUS NON POTEST HABERE HÆREDEM NISI DE CORPORE SUO LEGITIME PROCREATUM. A maxim meaning "A bastard can have no heir unless it be one lawfully begotten of his own body."[1]

BASTARDY. The offense of begetting an illegitimate child;[2] the state or condition of a bastard.[3] (See, generally, BASTARDS.)

BASTARDY PROCESS. The method prescribed by statute for proceeding against the putative father of a bastard to procure a proper maintenance therefor.[4] (See, generally, BASTARDS.)

BATAILLE. In old English law, BATTEL,[5] *q. v.*

BATTEL. A species of trial or judicial combat.[6]

BATTERY. See ASSAULT AND BATTERY.

BATTURE. A marine term, used to denote a bottom of sand, stone, or rock mixed together, and rising towards the surface of the water; but in its grammatical sense, as a technical word, and in common parlance, an elevation of the bed of a river, under the surface of the water, since it is rising towards it — although sometimes 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;[7] alluvion; land formed by accretion.[8] (Batture: Ownership of, see NAVIGABLE WATERS; WATERS.)

BAWD. One who procures opportunities for persons of opposite sexes to cohabit in an illicit manner.[9] (See, generally, PROSTITUTION.)

BAWDY-HOUSE. A house of ill-fame, kept for the resort and convenience of lewd people of both sexes;[10] a house of ill-fame, kept for the resort and unlawful commerce of lewd people of both sexes;[11] a house used for lewdness and prostitution; a brothel.[12] (See, generally, DISORDERLY HOUSES.)

BAY.[13] An opening into the land where the water is shut in on all sides except at the entrance;[14] an inlet of the sea;[15] an arm of the sea, distinct from a river;[16] a bending or curving of the shore of the sea or of a lake;[17] a pond-head made of a great height to keep in water for the supply of a mill, etc.[18]

BAYLEY. An old form of BAILIFF,[19] *q. v.*

BAYOU. An outlet from a swamp, pond, or lagoon to a river or the sea.[20]

BAY-WINDOW or **BOW-WINDOW.** A window built so as to project from a

1. Trayner Lat. Max. [*quoted* in Black L. Dict.].
2. Anderson L. Dict.
3. Maynard *v.* People, 135 Ill. 416, 427, 25 N. E. 740.
4. Bouvier L. Dict.
5. Burrill L. Dict.
6. 3 Bl. Comm. 337.

This form of trial was last demanded in 1818 in Ashford *v.* Thornton, 1 B. & Ald. 405, and was abolished by 59 Geo. III, c. 46. Wharton L. Lex.

7. Morgan *v.* Livingston, 6 Mart. (La.) 19, 216 [*quoted* in Hollingsworth *v.* Chaffe, 33 La. Ann. 547, 551; New Orleans *v.* Morris, 3 Woods (U. S.) 115, 117, 18 Fed. Cas. No. 10,183], where it is said: "Its etymology is from the verb *battre*, to beat: because a batture is beaten by the water."
8. New Orleans *v.* Morris, 3 Woods (U. S.) 115, 117, 18 Fed. Cas. No. 10,183.
9. Dyer *v.* Morris, 4 Mo. 214, 216, where it is said that such an one "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 fornication."
10. State *v.* Porter, 38 Ark. 637, 638; State *v.* Boardman, 64 Me. 523, 529 [*quoting* Bouvier L. Dict.]. See also McAlister *v.* Clark, 33 Conn. 91, 92; State *v.* Smith, 29 Minn. 193, 195, 12 N. W. 524.
11. Harwood *v.* People, 26 N. Y. 190, 191, 84 Am. Dec. 175 [*citing* Bouvier L. Dict.].
12. Worcester Dict. [*quoted* in State *v.* Boardman, 64 Me. 523, 529].
13. The word "is 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." State *v.* Gilmanton, 14 N. H. 467, 477.
14. U. S. *v.* Morel, Brunn. Col. Cas. (U. S.) 373, 379, 26 Fed. Cas. No. 15,807, 13 Am. Jur. 279.
15. Johnson *v.* State, 74 Ala. 537, 538.
16. Atty.-Gen. *v.* Delaware, etc., R. Co., 27 N. J. Eq. 631, 634. See also Tillotson *v.* Hudson River R. Co., 9 N. Y. 575, 580, where the word is used to denote an indentation in the shore of a river where there is no entering stream.
17. State *v.* Gilmanton, 14 N. H. 467, 477.
18. Wharton L. Lex.
19. Burrill L. Dict.
20. Burrill L. Dict.

wall.[21] (Bay-Window: Covenants Against Erection of, see COVENANTS. Regulation of, see MUNICIPAL CORPORATIONS.)

BEACH. The territory lying between the lines of high water and low water, over which the tide ebbs and flows;[22] the space between ordinary high and low water mark, or the space over which the tide usually ebbs and flows;[23] the shore of the sea, or of a lake, which is washed by tide waters and waves;[24] the shore; the strand;[25] the coast.[26] (Beach: As Boundary of Lands, see BOUNDARIES.)

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.[27] (See, generally, SHIPPING.)

BEACONAGE. Money paid toward the maintenance of beacons.[28]

BEADLE. In English ecclesiastical law, an officer attached to a church, who is chosen by the vestry, and whose business is to attend the vestry, to give notice of its meetings to the parishioners and execute its orders, to assist the constable in apprehending vagrants, etc.[29]

BEADSMEN. In ancient times persons who devoted themselves to prayer — not merely on their own account, but for the benefit also of others.[30]

BEAM. A common balance of weights.[31]

BEAR. In the language of the stock exchange, one who speculates for a fall in the market.[32]

BEARER. One who bears or carries a thing from one person to another.[33] (Bearer: Effect of in Bill or Check, see COMMERCIAL PAPER. Of Challenge, see DUELING.)

BEARERS. Persons who bore down and oppressed others.[34]

BEARING ARMS. See WEAPONS.

BEARING DATE. Dated; having a date on its face.[35]

BEAST-GATE. In Suffolk, in England, land and common for one beast.[36]

BEASTS. See ANIMALS.

BEASTS OF THE CHASE. Properly the buck, doe, fox, martin, and roe, but in a common and legal sense, all the BEASTS OF THE FOREST,[37] *q. v.*

BEASTS OF THE FOREST. Properly the hart, hind, buck, hare, boar, and wolf, but legally all wild beasts of venery.[38]

BEASTS OF THE PLOUGH. An ancient term signifying animals employed in the ordinary uses of husbandry, or other actual labor in a lawful and useful industry.[39]

BEASTS OF THE WARREN. The hare, coney, and roe.[40]

21. Century Dict.

22. Doane *v.* Willcutt, 5 Gray (Mass.) 328, 335, 66 Am. Dec. 369 [*quoted* in Hodge *v.* Boothby, 48 Me. 68, 71; East Hampton *v.* Kirk, 6 Hun (N. Y.) 257, 259 (*reversed*, on other grounds, in 68 N. Y. 459)]. But see Merwin *v.* Wheeler, 41 Conn. 14, 26, where it is said: "The word 'beach' has no such inflexible meaning that it must denote land between high and low water mark."

23. Niles *v.* Patch, 13 Gray (Mass.) 254, 257.

24. Littlefield *v.* Littlefield, 28 Me. 180, 184 [*citing* Webster Dict.].

25. Littlefield *v.* Littlefield, 28 Me. 180, 184 [*cited* in East Hampton *v.* Kirk, 6 Hun (N. Y.) 257, 259 (*reversed*, on other grounds, in 68 N. Y. 459)]; Cutts *v.* Hussey, 15 Me. 237, 241 [*quoted* in East Hampton *v.* Kirk, 6 Hun (N. Y.) 257, 259 (*reversed*, on other grounds, in 68 N. Y. 459)].

26. Littlefield Littlefield, 28 Me. 180, 184 [*cited* in East Hampton *v.* Kirk, 6 Hun (N. Y.) 257, 259 (*reversed*, on other grounds, in 68 N. Y. 459)].

27. Wharton L. Lex.

28. Jacob L. Dict. *sub voc.* Beacon.

29. Burrill L. Dict. [*citing* 3 Stephen Comm. 93, note *s*].

30. Cockburn, C. J., in Faulkner *v.* Upper Boddington, 3 C. B. N. S. 412, 419, 4 Jur. N. S. 692, 27 L. J. C. P. 20, 6 Wkly. Rep. 101, 91 E. C. L. 41.

31. Jacob L. Dict.

32. Wharton L. Lex.

33. Burrill L. Dict.

34. Jacob L. Dict.

They were classed with maintainers by 4 Edw. III, c. 11. Burrill L. Dict. See, generally, CHAMPERTY AND MAINTENANCE.

35. Burrill L. Dict.

"Bearing date the 18th day," is no averment that an instrument was then executed and issued. Latham *v.* Lawrence, 11 N. J. L. 322, 325.

36. Bennington *v.* Goodtitle, 2 Str. 1084.

37. Coke Litt. 233*a*.

38. Coke Litt. 233*a*.

39. Somers *v.* Emerson, 58 N. H. 48, 49.

40. Coke Litt. 233*a*.

BEAT. A subdivision of a county, corresponding to the township or town of some states.[41]

BED. The space subjacent to the river through which it flows;[42] the space contained between the banks of a river;[43] the space between the boundaries of a river which contain its waters at their highest flow;[44] the channel of a stream; the part between the banks worn by the regular flow of the water;[45] 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;[46] a layer, a stratum, an extended mass of anything, whether upon the earth or within it;[47] the right of cohabitation or marital intercourse;[48] to lay in a stratum, to stratify, to lay in order or flat.[49]

BEDEL. A cryer or messenger of a court, who cites men to appear and answer;[50] a BEADLE,[51] *q. v.*

BEDELARY. The jurisdiction of a bedel.[52]

BEEF. An animal of the cow species,[53] including the bull, cow, and ox, in their full grown state;[54] the flesh of such animal when killed.[55]

BEER. A malt liquor;[56] a fermented liquor made from any malted grain,

41. Williams *v.* Pearson, 38 Ala. 299, 308.

42. Harlan, etc., Co. *v.* Paschall, 5 Del. Ch. 435, 463.

43. Pulley *v.* Municipality No. 2, 18 La. 278, 282.

44. Wayne, J., in Howard *v.* Ingersoll, 13 How. (U. S.) 381, 415, 14 L. ed. 189. See also Paine Lumber Co. *v.* U. S., 55 Fed. 854, 864.

45. Dayton *v.* Cooper Hydraulic Co., 10 Ohio S. & C. Pl. Dec. 192, 7 Ohio N. P. 495 [*quoting* Bouvier L. Dict.].

46. Curtis, J., in Howard *v.* Ingersoll, 13 How. (U. S.) 381, 427, 14 L. ed. 189 [*quoted* in St. Louis, etc., R. Co. *v.* Ramsey, 53 Ark. 314, 322, 13 S. W. 931, 22 Am. St. Rep. 195, 8 L. R. A. 559; Gibbs *v.* Williams, 25 Kan. 214, 221, 37 Am. Rep. 241].

Need not always be covered by water.— "To constitute a part of the bed, it is not necessary that it should be always covered by water." Haight *v.* Keokuk, 4 Iowa 199, 212. But that only "is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes." *In re* Minnetonka Lake Improvement, 56 Minn. 513, 522, 58 N. W. 295, 45 Am. St. Rep. 494. See also Houghton *v.* Chicago, etc., R. Co., 47 Iowa 370, 374 [*quoted* in St. Louis, etc., R. Co. *v.* Ramsey, 53 Ark. 314, 322, 13 S. W. 931, 22 Am. St. Rep. 195, 8 L. R. A. 559], where it is said: "What the river does not occupy long enough to wrest from vegetation, so far as to destroy its value for agriculture, is not river bed;" and Alabama *v.* Georgia, 23 How. (U. S.) 505, 513, 16 L. ed. 556, to the effect that: "It is the running water of a river that makes its bed; for it is that, and that only, which leaves its indelible mark to be readily traced by the eye; and wherever that mark is left, there is the river's bed. It may not be there to-day, but it was there yesterday; and when the occasion comes, it must and will — unobstructed — again fill its own natural bed."

47. State *v.* Willis, 104 N. C. 764, 769, 10 S. E. 764 [*citing* Century Dict.; Webster Dict.].

48. Black L. Dict.

"To go to bed with, is to be in bed with. . . . In all times, in every age, and by all writers sacred and profane, in the language of scripture, and in the language of the law, these words except as between man and wife, significantly impute illicit intercourse, and with them it imports the rite of hallowed love." Walton *v.* Singleton, 7 Serg. & R. (Pa.) 449, 452, 10 Am. Dec. 472.

49. State *v.* Willis, 104 N. C. 764, 769, 10 S. E. 764 [*citing* Century Dict.; Webster Dict.].

50. Jacob L. Dict.

51. Burrill L. Dict.

52. Wharton L. Lex.

53. Davis *v.* State, 40 Tex. 134, 135 [*quoted* in Moore *v.* State, 2 Tex. App. 350, 351].

54. Webster Dict. [*quoted* in Maier *v.* Randolph, 33 Kan. 340, 342, 6 Pac. 625; Smith *v.* State, 24 Tex. App. 290, 299, 6 S. W. 40].

55. Century Dict. See also Mayor *v.* Davis, 6 Watts & S. (Pa.) 269, 279.

56. Netso *v.* State, 24 Fla. 363, 5 So. 8, 14 L. R. A. 825; Welsh *v.* State, 126 Ind. 71, 73, 25 N. E. 883, 9 L. R. A. 664; Myers *v.* State, 93 Ind. 251, 252; Kerkow *v.* Bauer, 15 Nebr. 150, 156, 18 N. W. 27; Maier *v.* State, 2 Tex. Civ. App. 296, 300, 21 S. W. 974 [*quoting* Webster Dict.]. See also Murphy *v.* Montclair, 39 N. J. L. 673, 675.

"A variety of kinds are made; those in use at present are distinguished by the names of ale, porter, or strong beer, table beer, and small beer, which differ little except in strength and the mode of preparation in their manufacture." Kerkow *v.* Bauer, 15 Nebr. 150, 155, 18 N. W. 27 [*quoting* Craig Dict.]. See also State *v.* Quinlan, 40 Minn. 55, 59, 41 N. W. 299.

Distinguished from ale see 2 Cyc. 78, note 21.

"Lager bier is, and has been for many years, a familiar beverage in this country. . . . It is a malt liquor of the lighter sort, and differs from ordinary beers or ales, not so much in its ingredients as in the processes

with hops and other bitter flavoring matter;[57] a fermented liquor made from the malt of barley, and flavored with hops;[58] an alcoholic liquor made from any farinaceous grain, but generally from barley;[59] a spirituous liquor made from any farinaceous grain, but generally from barley;[60] a fermented extract of the roots and other parts of various plants as spruce, ginger, sassafras, etc.[61] (Beer: Regulation of Manufacture, Sale, and Use of, see Intoxicating Liquors. Taxation of, see Internal Revenue.)

BEER-HOUSE. A place where beer is sold to be consumed on the premises.[62]

BEER-SHOP. A shop where beer is sold independently of any other circumstance.[63]

BEES. See Animals.

BEFORE. Earlier than; previous to.[64] It may, however, be used in an inclusive as well as exclusive sense.[65]

BEGGING. See Vagrancy.

BEGIN. To do the first act;[66] to enter upon.[67]

BEGOTTEN. Procreated; generated;[68] borne.[69]

BEHALF. In the name of; on account of; benefit; advantage; interest; profit; defense; vindication.[70]

BEHOOF. Use; service; profit; advantage.[71]

of fermentation." State *v.* Goyette, 11 R. I. 592. It "is so called because it is contemplated that it has been stored some time after being made." U. S. *v.* Ellis, 51 Fed. 808, 812. See also U. S. *v.* Ducournau, 54 Fed. 138, 139.

Process of brewing.— The barley or other grain "is first malted and ground, and its fermentable substance extracted by hot water. This extract or infusion is evaporated by boiling in caldrons, and hops or some other plant of agreeable bitterness added. The liquor is then suffered to ferment in vats." Nevin *v.* Ladue, 3 Den. (N. Y.) 43, 44 [*quoting* Webster Dict. and *reversed* in 3 Den. (N. Y.) 437]. See also U. S. *v.* Ellis, 51 Fed. 808, 812 [*quoting* Century Dict.].

A history of the use of beer is given, and its great antiquity pointed out, in Nevin *v.* Ladue, 3 Den. (N. Y.) 437 [*reversing* 3 Den. (N. Y.) 43].

57. Webster Dict. [*quoted* in Hansberg *v.* People, 120 Ill. 21, 24, 8 N. E. 857, 60 Am. Rep. 549; Myers *v.* State, 93 Ind. 251, 252; State *v.* Jenkins, 32 Kan. 477, 480, 4 Pac. 809; State *v.* Besheer, 69 Mo. App. 72, 75; Maier *v.* State, 2 Tex. Civ. App. 296, 300, 21 S. W. 974]; Welsh *v.* State, 126 Ind. 71, 73, 25 N. E. 883, 9 L. R. A. 664; State *v.* Quinlan, 40 Minn. 55, 59, 41 N. W. 299. See also U. S. *v.* Ducournau, 54 Fed. 138, 139.

58. Kerkow *v.* Bauer, 15 Nebr. 150, 155, 18 N. W. 27 [*quoting* Craig Dict.], where it is said: "It may be called the wine of barley."

59. Century Dict. [*quoted* in U. S. *v.* Ellis, 51 Fed. 808, 812].

60. Webster Dict. [*quoted* in Nevin *v.* Ladue, 3 Den. (N. Y.) 43, 44 (*reversed* in 3 Den. (N. Y.) 437)].

61. Webster Dict. [*quoted* in Hansberg *v.* People, 120 Ill. 21, 24, 8 N. E. 857, 60 Am. Rep. 549; State *v.* Besheer, 69 Mo. App. 72, 75; Maier *v.* State, 2 Tex. Civ. App. 296, 300, 21 S. W. 974].

62. Holt *v.* Collyer, 16 Ch. D. 718, 721, 50 L. J. Ch. 311, 44 L. T. Rep. N. S. 214, 29 Wkly. Rep. 502; London, etc., R. Co. *v.* Garnett, L. R. 9 Eq. 26, 27, 39 L. J. Ch. 25, 21 L. T. Rep. N. S. 352, 18 Wkly. Rep. 246 [*quoting* Burn Justice of the Peace].

63. Nicoll *v.* Fenning, 19 Ch. D. 258, 267, 51 L. J. Ch. 166, 45 L. T. Rep. N. S. 738, 30 Wkly. Rep. 95. But see London, etc., Land, etc., Co. *v.* Field, 16 Ch. D. 645, 648, 50 L. J. Ch. 549, 44 L. T. Rep. N. S. 444 (where it is said that a beer-shop "means a place where beer is sold by retail, and it does not matter whether the beer is consumed on the premises or not. The word includes a beer house, but it also includes a shop where beer is sold to be consumed off the premises"); St. Albans *v.* Battersby, 3 Q. B. D. 359, 362. *Compare* Holt *v.* Collyer, 16 Ch. D. 718, 721, 50 L. J. Ch. 311, 44 L. T. Rep. N. S. 214, 29 Wkly. Rep. 502, where the word is defined as "a place where beer is sold to be consumed off the premises."

64. Hooper *v.* Young, 58 Ala. 585, 589.

65. Webster *v.* French, 12 Ill. 302, 304.

66. U. S. *v.* Ybanez, 53 Fed. 536, 538; Charge to Grand Jury, 5 McLean (U. S.) 306, 307, 30 Fed. Cas. No. 18,267.

67. U. S. *v.* Ybanez, 53 Fed. 536, 538.

68. Doe *v.* Hallett, 1 M. & S. 124, 135.

"The words 'begotten' and 'to be begotten,' are the same, as well upon construction of wills, as settlements." Cook *v.* Cook, 2 Vern. 545 [*quoted* in Doe *v.* Hallett, 1 M. & S. 124, 135]. See also Wager *v.* Wager, 1 Serg. & R. (Pa.) 374, 378 [*citing* Coke Litt. 20*b*], where it is said: "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."

69. Doe *v.* Provoost, 4 Johns. (N. Y.) 61, 64, 4 Am. Dec. 249.

70. Webster Dict. [*quoted* in State *v.* Eggerman, 81 Tex. 569, 572, 16 S. W. 1067; Hill County *v.* Atchison, 19 Tex. Civ. App. 664, 665, 49 S. W. 141].

71. Stiles *v.* Japhet, 84 Tex. 91, 96, 19 S. W. 450.

BEHRING SEA FISHERIES. See Fish and Game.

BEING. Existing in a certain state,[72] but sometimes taken in the future tense.[73]

BELIEF.[74] A persuasion of the truth, or an assent of the mind to the truth of a declaration, proposition, or alleged fact;[75] a persuasion of the truth of a fact, formed in the way of inference from some other fact;[76] an actual conclusion drawn from information;[77] partial assurance without positive knowledge or absolute certainty.[78] (Belief: Affidavits on Information and, see Affidavits; Attachment; Discovery; New Trial. As to Age of — Female as Defense to Abduction, see Abduction; Infant as Defense to Sale of Intoxicating Liquors, see Intoxicating Liquors. As to Legality of Marriage as Affecting Adultery, see Adultery.)

BELIEVE.[79] To put credit or confidence in the veracity of testimony;[80] to apprehend;[81] to find;[82] to satisfy;[83] to suppose;[84] to think;[85] to understand.[86]

BELLIGERENCY. See War.

BELLO PARTA CEDUNT REIPUBLICÆ. A maxim meaning "Things acquired in war belong to the state."[87]

72. Green, J., in dissenting opinion in State *v.* Bissell, 4 Greene (Iowa) 328, 333 [*quoting* Webster Dict.].

73. Case LXXIX, 3 Leon. 54, 55. See also Haigh *v.* Brooks, 10 A. & E. 309, 9 L. J. Q. B. 194, 3 P. & D. 452, 37 E. C. L. 180. But see dissenting opinion of Green, J., in State *v.* Bissell, 4 Greene (Iowa) 328, 333.

74. Degrees of belief.—"Without recurring to the books of metaphysicians, let any man of plain common sense, examine the operations of his own mind, he will assuredly find that on different subjects his belief is different. I have a firm belief that the moon revolves 'round 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." Tilghman, C. J., in Thompson *v.* White, 4 Serg. & R. (Pa.) 135, 137.

Distinguished from "intention."— See 3 Cyc. 1047, note 41.

Distinguished from "knowledge."—Between "belief" and "knowledge" "the difference is, after all, nothing more than in the degree of certainty. With regard to things which make not a very deep impression on the memory, it may be called 'belief.' 'Knowledge' is nothing more than a man's firm belief. The difference is ordinarily merely in the degree." Hatch *v.* Carpenter, 9 Gray (Mass.) 271, 274. See also Iron Silver Min. Co. *v.* Reynolds, 124 U. S. 374, 8 S. Ct. 598, 31 L. ed. 466.

Distinguished from "opinion."—"An opinion is not the exact equivalent of a belief. It may be simply a judgment formed upon a given statement of facts, which will yield when the facts stated disappear." Curley *v.* Com., 84 Pa. St. 151, 156. But see Day *v.* Southwell, 3 Wis. 657, 661, where it is said: "The nice philological distinctions between the words, 'opinion' and 'belief,' are too subtle and refined to form a basis on which to ground substantial justice."

75. Keller *v.* State, 102 Ga. 506, 514, 31 S. E. 92 [*citing* Webster Dict.].

76. Burrill L. Dict. [*quoted* in State *v.* Grant, 76 Mo. 236, 246].

77. Humphreys *v.* McCall, 9 Cal. 59, 62, 70 Am. Dec. 621.

78. Webster Dict. [*quoted* in State *v.* Grant, 76 Mo. 236, 246].

79. Distinguished from "imagine."—"It imports a more certain and fixed conviction to say I believe, than it does to say I imagine." Giddens *v.* Mirk, 4 Ga. 364, 370.

Distinguished from "presume."— "Presume" is a weaker term, "for it means, according to the lexicons, to believe without examination." Hammock *v.* McBride, 6 Ga. 178, 184.

Distinguished from "suspect."—"The words 'suspect,' and 'believe' are not technical words, and have not, by the approved usage of the language, the same meaning. . . . 'Suspecting is not believing.' 'That may be a ground for suspicion, which will not induce belief.'" Com. *v.* Certain Lottery Tickets, 5 Cush. (Mass.) 369, 373 [*quoting* Smith *v.* Boucher. See Hardw. 62, 69, Ridg. t. Hard. 4, 136, 2 Str. 993].

80. Hammock *v.* McBride, 6 Ga. 178, 184.

81. See Apprehend, 3 Cyc. 538.

82. State *v.* O'Hagan, 38 Iowa 504, 505. See also Spotten *v.* Keeler, 22 Abb. N. Cas. (N. Y.) 105, 110, 12 N. Y. St. 385, where it is said: "It is understood that the import of the word 'believed' as here used, is the same as 'should find.'"

83. Braddy *v.* Kansas City, etc., R. Co., 47 Mo. App. 519, 523, where in an instruction, "unless you are satisfied," was held equivalent to "if you shall believe."

84. Parker *v.* Enslow, 102 Ill. 272, 277, 40 Am. Rep. 588 [*quoting* Webster Unabr. Dict.].

85. Parker *v.* Enslow, 102 Ill. 272, 277, 40 Am. Rep. 588 [*quoting* Webster Unabr. Dict.]; People *v.* Martell, 138 N. Y. 595, 599, 33 N. E. 838, 51 N. Y. St. 675.

86. Fraser *v.* Davie, 11 S. C. 56, 68.

87. Burrill L. Dict.

Applied in The Brig Joseph, 1 Gall. (U. S.) 545, 558, 13 Fed. Cas. No. 7,533; The Elsebe, 5 C. Rob. 173, 181.

BELONG. To be the property of.[88]

BELONGING. Being the property of;[89] appertaining;[90] that which is connected with a principal or greater thing; an APPENDAGE, *q. v.*; an APPURTENANCE,[91] *q. v.*

BELOW. Under; beneath;[92] inferior; preliminary;[93] and used in the sense of "beyond" in the expression "below low water mark."[94]

BELT RAILROAD. A railroad encircling a city, or other restricted territory, intersected by other railroads, not having a common right of way into the territory, for the purpose of transferring and switching cars from one railroad to another with which it is not otherwise connected, or for transferring cars between such railroads and industrial plants located in the neighborhood of, but not on such railroads.[95]

BENCH. The seat occupied by the judges in court;[96] the whole body of judges, or a particular class of them, as opposed to BAR,[97] *q. v.*; the aggregate body of bishops.[98]

BENCHERS. Members of the INNS OF COURT, *q. v.*, to whom is chiefly committed the government and ordering of the house.[99]

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.[1] (Bench-Warrant: Compelling Attendance of Witnesses, see WITNESSES. Issue — In Contempt Proceedings, see CONTEMPT; On Return of Indictment, see CRIMINAL LAW.)

BENEATH. Lower in place, with something directly over or under.[2]

BENEDICTA EST EXPOSITIO QUANDO RES REDIMITUR A DESTRUCTIONE. A maxim meaning "That is a blessed interpretation when a thing is saved from destruction."[3]

BENEFICE. An ecclesiastical living and promotion; a fief in the feudal system.[4]

BENEFICENT. Doing well.[5]

BENEFICIAL. Of benefit or advantage; producing or attended with profit or advantage; having or enjoying a benefit or profit.[6] (Beneficial: Associations or Societies, see MUTUAL BENEFIT INSURANCE. Devises, see WILLS. Powers, see POWERS.)

BENEFICIARIES. Persons for whose benefit property is held by trustees, executors, etc.;[7] persons named in insurance policies to whom the insurance is payable upon the happening of the event insured against.[8] (Beneficiaries: In Insurance, see ACCIDENT INSURANCE; INSURANCE. Of Trust, see TRUSTS.)

88. Gammon *v.* Gammon, 153 Ill. 41, 47, 38 N. E. 890; Bragg *v.* Chicago, 73 Ill. 152, 154; State *v.* Fox, 80 Iowa 312, 313, 45 N. W. 874, 20 Am. St. Rep. 425; Com. *v.* Hamilton, 15 Gray (Mass.) 480, 82 [*quoting* Webster Dict.].

89. Webster Dict. [*quoted* in Com. *v.* Hamilton, 15 Gray (Mass.) 480, 482].

90. Barlow *v.* Rhodes, 3 Tyrw. 280, 284.

91. Webster Int. Dict. [*quoted* in People *v.* Chicago Theological Seminary, 174 Ill. 177, 182, 51 N. E. 198]. See also 3 Cyc. 987, note 21.

92. Donnell *v.* Joy, 85 Me. 118, 26 Atl. 1017.

93. Burrill L. Dict.

94. Donnell *v.* Joy, 85 Me. 118, 119, 26 Atl. 1017 [*citing* Gerrish *v.* Union Wharf, 26 Me. 384, 46 Am. Dec. 568].

"**But this is not the ordinary signification** of the word." Lee *v.* Stahl, 13 Colo. 174, 178, 22 Pac. 436.

95. South, etc., Alabama R. Co. *v.* Highland Ave., etc., R. Co., 117 Ala. 395, 412, 23 So. 973, where it is said that "such connections are usually made by the belt railroad in the suburbs, or near the outskirts, of the city."

96. Burrill L. Dict.

97. Sweet L. Dict.

98. Wharton L. Lex.

99. Sweet L. Dict.

They decide questions as to calling persons to the bar and of disbarring those who have been called. 1 Stephen Comm. 19.

1. Burrill L. Dict.

2. Webster Dict. [*quoted* in Truman *v.* Deere Implement Co., 80 Fed. 109, 116].

3. Burrill L. Dict.

Applied in Melwich *v.* Lutes, 4 Coke 26.

4. Wharton L. Lex. See also 4 Bl. Comm. 107.

5. Hinckley's Estate, 58 Cal. 457, 508 [*quoting* Webster Dict.].

6. Burrill L. Dict.

7. Sweet L. Dict.

8. Bouvier L. Dict. See also dissenting opinion of Lumpkin, P. J., in Union Fraternal League *v.* Walton, 109 Ga. 1, 11, 34 S. E.

BENEFIT.[9] Advantage;[10] profit;[11] gain;[12] account; interest;[13] use;[14] whatever contributes to promote prosperity or add value to property.[15] (Benefit: Associations or Societies, see MUTUAL BENEFIT INSURANCE. Building Societies, see BUILDING AND LOAN SOCIETIES. Of Clergy, see CRIMINAL LAW.)

BENEFITS. Increased value.[16] (Benefits: Assessment of, see MUNICIPAL CORPORATIONS. By Laying Out Streets and Highways, see STREETS AND HIGHWAYS. Deduction of From Damages Caused by Taking Property, see CANALS; EMINENT DOMAIN.)

BENERTH. A service which a tenant rendered to his lord with his plow and cart.[17]

BENEVOLENCE. An extraordinary aid granted by freemen to their sovereign as a voluntary gratuity;[18] disposition to do good.[19]

BENEVOLENT. A word of wide range and somewhat indefinite meaning[20]

317, 77 Am. St. Rep. 350, 46 L. R. A. 424.

9. Distinguished from "support."— "The word 'benefit' is a much broader word than 'support,' and has no such limited meaning as the latter word." Winthrop Co. *v.* Clinton, 196 Pa. St. 472, 477, 46 Atl. 435, 79 Am. St. Rep. 729. "The word 'benefit' and its synonyms mean more than simply 'support'; they mean any purpose to which the absolute owner of property can devote it." Stowell *v.* Hastings, 59 Vt. 494, 497, 8 Atl. 738, 59 Am. Rep. 748.

10. *New York.*— Fitch *v.* Bates, 11 Barb. (N. Y.) 471, 473 [*citing* Webster Dict.].

Pennsylvania.— Winthrop Co. *v.* Clinton, 196 Pa. St. 472, 477, 46 Atl. 435, 79 Am. St. Rep. 729 [*quoting* Worcester Dict.].

South Dakota.— Synod of Dakota *v.* State, 2 S. D. 366, 374, 50 N. W. 632, 14 L. R. A. 418 [*quoting* Webster Dict.].

Vermont.—Stowell *v.* Hastings, 59 Vt. 494, 497, 8 Atl. 738, 59 Am. Rep. 748.

Wisconsin.—Lawe *v.* Hyde, 39 Wis. 345, 359.

11. Fitch *v.* Bates, 11 Barb. (N. Y.) 471, 473 [*citing* Webster Dict.]; Winthrop Co. *v.* Clinton, 196 Pa. St. 472, 477, 46 Atl. 435, 79 Am. St. Rep. 729 [*quoting* Worcester Dict.]; Synod of Dakota *v.* State, 2 S. D. 366, 374, 50 N. W. 632, 14 L. R. A. 418 [*quoting* Webster Dict.]; Stowell *v.* Hastings, 59 Vt 494, 497, 8 Atl. 738, 59 Am. Rep. 748.

12. Winthrop Co. *v.* Clinton, 196 Pa. St. 472, 477, 46 Atl. 435, 79 Am. St. Rep. 729 [*quoting* Worcester Dict.]; Stowell *v.* Hastings, 59 Vt. 494, 497, 8 Atl. 738, 59 Am. Rep. 748.

13. Stowell *v.* Hastings, 59 Vt. 494, 497, 8 Atl. 738, 59 Am. Rep. 748.

14. Turner *v.* Eldridge, 6 Ala. 821, 822.

15. Webster Dict. [*quoted* in Synod of Dakota *v.* State, 2 S. D. 366, 374, 50 N. W. 632, 14 L. R. A. 418].

16. Garrett *v.* St. Louis, 25 Mo. 505, 511, 69 Am. Dec. 475.

"The word 'benefits,' when used unqualifiedly, is a comprehensive term, including direct or special benefits, and indirect or general. But when the connection in which it is used, and the subject matter to which it is applied, are such as to indicate that it is used in a limited or qualified sense, it is the duty of the court to give it that interpretation." Ferguson *v.* Stamford, 60 Conn. 432, 446, 22 Atl. 782.

"The term 'general benefits,' when unqualified, should probably be accepted in the same sense as the term 'common benefits'; that is to say, when there is no limitation expressed, it should be deemed applicable to the general public rather than as embracing as general but a limited part of the public." Kirkendall *v.* Omaha, 39 Nebr. 1, 6, 57 N. W. 752.

"The term 'special benefits' implies benefits such as are conferred especially upon private property by public improvement, as distinguished from such benefits as the general public is entitled to receive therefrom. In common with the general public the owner of adjacent property is entitled to travel upon an improved highway, and although by reason of the improvement such travel may be rendered easier or more pleasant, yet the benefit is general, because it is enjoyed by the public in common with the owners of adjacent property. If the improvement should result in an increase in the value to adjacent property, which increase is enjoyed by other adjacent property owners as to the property of each exclusively, the benefit is special, and it is none the less so because several adjacent lot owners derive in like manner special benefits each to his own individual property." Kirkendall *v.* Omaha, 39 Nebr. 1, 7, 57 N. W. 752.

17. Burrill L. Dict.

18. Burrill L. Dict.

19. Century Dict.

"Benevolence is wider than charity in its legal signification." Thomson *v.* Norris, 20 N. J. Eq. 489, 523.

20. Distinguished from "charitable."— It is a word of larger meaning than "charitable" (St. Joseph's Hospital Assoc. *v.* Ashland County, 96 Wis. 636, 639, 72 N. W. 43), even when coupled with it (De Camp *v.* Dobbins, 31 N. J. Eq. 671, 695 [*affirming* 29 N. J. Eq. 36], where Beasley, C. J., said: "Nor can I go with that process of reasoning that concludes that when the word 'benevolent' is conjoined to the word 'charitable' the two words become identical in meaning, as that implies that one of the terms is to be dispensed with, or that the lesser term swallows up the larger one"). See also Suter *v.* Hilliard, 132 Mass. 412, 413, 42 Am. Rep. 444; Chamberlain *v.* Stearns, 111 Mass. 267, 269 [*quoted* in Adye *v.* Smith, 44 Conn. 60,

which has been defined as meaning "well-wishing;[21] intended for the conferring of benefits as distinguished from the making of profit."[22] (Benevolent: Associations or Societies, see MUTUAL BENEFIT INSURANCE. Purposes, Bequests For, see CHARITIES.)

BENIGNÆ FACIENDÆ SUNT INTERPRETATIONES, PROPTER SIMPLICITATEM LAICORUM UT RES MAGIS VALEAT QUAM PEREAT; ET VERBA INTENTIONI, NON E CONTRA, DEBENT IN SERVIRE. A maxim meaning "A liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties."[23]

BENIGNIOR SENTENTIA IN VERBIS GENERALIBUS SEU DUBIIS EST PREFERENDA. A maxim meaning "Of general or doubtful words, the more liberal interpretation is preferred."[24]

BENIGNIUS LEGES INTERPRETANDÆ SUNT QUO VOLUNTAS EARUM CONSERVETUR. A maxim meaning "Laws are to be more liberally interpreted, in order that their intent may be preserved."[25]

BENZINE. A liquid consisting mainly of the lighter and more volatile hydrocarbons of petroleum, used as a solvent and for cleaning soiled fabrics.[26] (See, generally, FIRE INSURANCE.)

BEQUEATH. To give by will.[27]

BEQUEST. A gift of personal property by will;[28] but it may mean "any gift by will whether it consists of personal or real property."[29] (See, generally, CHARITIES; WILLS.)

BERM-BANK. The bank or side of a canal which is opposite to the tow-path.[30]

BESIDES. In addition to; over and above; outside of; separately from.[31]

BESOT. To stupefy; to make dull or senseless; to make to dote.[32]

BEST. Of the highest quality, excellence, or standing.[33] (Best: Evidence, see CRIMINAL LAW; EVIDENCE.)

69, 26 Am. Rep. 424]; Goodale *v.* Mooney, 60 N. H. 528, 533, 49 Am. Rep. 334.

Distinguished from "charitable" or "religious."—"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." Norris *v.* Thomson, 19 N. J. Eq. 307, 313.

21. Hinckley's Estate, 58 Cal. 457, 508 [*quoting* Webster Dict.]; St. Joseph's Hospital Assoc. *v.* Ashland County, 96 Wis. 636, 639, 72 N. W. 43.

22. Century Dict.

23. Broom Leg. Max.

24. Trayner Leg. Max.

25. Burrill L. Dict.

26. Phœnix Ins. Co. Flemming, 65 Ark. 54, 58, 44 S. W. 464, 67 Am. St. Rep. 900, 39 L. R. A. 789 [*quoting* Webster Int. Dict.].

"It is used in the arts as a solvent for fats, resins and certain alkaloids." Phœnix Ins. Co. *v.* Flemming, 65 Ark. 54, 59, 44 S. W. 464, 67 Am. St. Rep. 900, 39 L. R. A. 789 [*citing* Century Dict.].

27. Mills *v.* Franklin, 128 Ind. 444, 447, 28 N. E. 60.

"Technically the word 'bequeath' relates to personal property more properly than real estate" (Mills *v.* Franklin, 128 Ind. 444, 447, 28 N. E. 60), but from the context it may be construed to mean "give" (Shumate *v.* Bailey, 110 Mo. 411, 415, 20 S. W. 178), "devise" (Dow *v.* Dow, 36 Me. 211, 216; Shumate *v.* Bailey, 110 Mo. 411, 415, 20 S. W. 178; Chandler's Appeal, 34 Wis. 505, 512 [*citing* Webster Dict.]. See also Ogle *v.* Tayloe, 49 Md. 158, 175 [*citing* Worcester Dict.]; Leighton *v.* Sheldon, 16 Minn. 243; Lasher *v.* Lasher, 13 Barb. (N. Y.) 106, 109; Whicker *v.* Hume, 14 Beav. 509, 518), or "devise and bequeath" (Vining *v.* Willis, 40 Kan. 609, 619, 20 Pac. 232; Barry *v.* Barry, 15 Kan. 587, 590. See also Laing *v.* Barbour, 119 Mass. 523, 525).

28. Burrill L. Dict.

29. Evans *v.* Price, 118 Ill. 593, 599, 8 N. E. 854. See also Ladd *v.* Harvey, 21 N. H. 514, 528; Thompson *v.* Gaut, 14 Lea (Tenn.) 310, 313.

30. McCarty *v.* New York Cent., etc., R. Co., 76 N. Y. Suppl. 321, 322. See also Morris Canal, etc., Co. *v.* Fagin, 22 N. J. Eq. 430, 437, where a witness is quoted as saying: "It forms . . . the canal, and holds the water; it is a hitching-place for boats when not in motion; forms a place for boatmen and canal repairers to walk along the canal; may be used to widen the canal, the waterway, if necessary, is of use to keep nuisances from the canal; is a place to load and unload cargoes; is a place to pass to and from, to keep the canal in order and repair when necessary."

31. Matter of Beckett, 103 N. Y. 167, 177, 8 N. E. 506.

32. Gates *v.* Meredith, 7 Ind. 440, 441.

33. Century Dict.

"Things may be 'best' in the sense of ranking in the very first class, without being

BESTIALITY. See SODOMY.

BESTOWED. Used; placed.[34]

BET.[35] 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;[36] the mutual agreement and tender of a gift of something valuable, which is to belong to the one or the other of the contracting parties, according to the result of the trial of chance or skill, or both combined;[37] a wager;[38] to put to hazard a sum ascertained upon a future happening of some event then uncertain;[39] the thing or sum wagered.[40]

BETROTHMENT. A mutual promise or compact between two parties by which they bind themselves to marry.[41]

BETTERMENTS. Beneficial improvements made upon lands by the occupant or possessor, in building, fencing, draining, etc.;[42] additional value which property acquires from its proximity to a public improvement.[43] (Betterments: Allowance of or Compensation For — Generally, see EJECTMENT; PARTITION; TRESPASS TO TRY TITLE; On Assignment of Dower, see DOWER; Upon Redemption of Land, see MORTGAGES. By Trustees, see TRUSTS. On Demised Premises, see LANDLORD AND TENANT. Public Improvements, see MUNICIPAL CORPORATIONS. Reimbursement For — As Between Tenants in Common, see TENANCY IN COMMON; As Between Vendor and Purchaser, see VENDOR AND PURCHASER; Of Defeated Purchaser at Judicial Sale, see EXECUTIONS; JUDICIAL SALES; Of Mortgagee in Possession, see MORTGAGES. Rights as Between Life Tenant and Remainderman, see LIFE ESTATES; REMAINDERS.)

BETTING. The putting of a certain sum of money or other valuable thing at stake on the happening or not happening of some uncertain event.[44] (See, generally, GAMING.)

BETWEEN.[45] In the intermediate space, without regard to distance;[46] extending or passing from one place to another;[47] belonging to two as a mutual relation.[48] The word is properly applicable only to two objects,[49] but it is not infre-

superior to each other." Whittemore *v.* Weiss, 33 Mich. 348, 354.

34. Macomber *v.* Bigelow, 126 Cal. 9, 14, 58 Pac. 312, where it is said that it "never means 'performed.'"

35. **Distinguished from "premium" or "reward."**—"In a wager or a 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 reward, 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." Alvord *v.* Smith, 63 Ind. 58, 62 [*quoted* in Misner *v.* Knapp, 13 Oreg. 135, 139, 9 Pac. 65, 57 Am. Rep. 6].

36. Harris *v.* White, 81 N. Y. 532, 538 [*quoted* in Hankins *v.* Ottinger, 115 Cal. 454, 458, 47 Pac. 254, 40 L. R. A. 76].

37. Long *v.* State, 22 Tex. App. 194, 195, 2 S. W. 541, 58 Am. Rep. 633 [*citing* Stearnes *v.* State, 21 Tex. 692, 694]. See also 38 Tex. Crim. 199, 200, 42 S. W. 291, 38 L. R. A. 719.

38. State *v.* Welch, 7 Port. (Ala.) 463, 465 [*quoted* in Rich *v.* State, 38 Tex. Crim. 199, 200, 42 S. W. 291, 38 L. R. A. 719]; Woodcock *v.* McQueen, 11 Ind. 14, 16; Harris *v.* White, 81 N. Y. 532, 538 [*quoted* in Hankins *v.* Ottinger, 115 Cal. 454, 458, 47 Pac. 254, 40 L. R. A. 76]; Cassard *v.* Hinman, 1 Bosw. (N. Y.) 207, 212; Lescallett *v.* Com., 89 Va. 878, 882, 17 S. E. 546.

A wager is not necessarily a bet.—Cassard *v.* Hinman, 1 Bosw. (N. Y.) 207, 212.

39. Martin *v.* State, 71 Miss. 87, 89, 14 So. 530 [*quoted* in Rich *v.* State, 38 Tex. Crim. 199, 200, 42 S. W. 291, 38 L. R. A. 719].

40. Woodcock *v.* McQueen, 11 Ind. 14, 16.

41. Burrill L. Dict.

42. Burrill L. Dict.

43. Anderson L. Dict.

44. Shaw *v.* Clark, 49 Mich. 384, 388, 13 N. W. 786, 43 Am. Rep. 474.

45. **Accounting between,** allegation of, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 389, note 19.

46. Delaware, etc., Canal Co. *v.* Camden, etc., R. Co., 16 N. J. Eq. 321, 368. See also Brown *v.* Brown, 6 Watts (Pa.) 54, 56.

47. Delaware, etc., Canal Co. *v.* Camden, etc., R. Co., 16 N. J. Eq. 321, 364. See also Harrold *v.* Simcoe County, 18 U. C. C. P. 9, 13 [*affirming* 16 U. C. C. P. 43].

48. Bouvier L. Dict. [*quoted* in Records *v.* Fields, 155 Mo. 314, 322, 55 S. W. 1021].

49. *Connecticut.*— Lockwood's Appeal, 55 Conn. 157, 165, 10 Atl. 517, where it is said: "The word 'between' rhetorically considered is more applicable to two classes than to a greater number of individuals."

quently used as equivalent to "among."[50] Strictly, when used with reference to a period of time bounded by two other specified periods of time, the periods of time named as boundaries are excluded;[51] and when used with reference to locality it is exclusive of the termini,[52] but in common use it does not always exclude the places to which it relates.[53]

BEVERAGE. Liquor to be drank; drink;[54] liquor for drinking.[55] (Beverage: Use of Intoxicating Liquors as, see INTOXICATING LIQUORS.)

BEYOND THE SEAS. See LIMITATIONS OF ACTIONS.

BIAS.[56] A leaning of the mind; prepossession;[57] inclination;[58] propensity toward an object, not leaving the mind indifferent;[59] bent;[60] a particular influential power, which sways the judgment; the inclination of the mind towards a particular object;[61] that which sways the mind toward one opinion rather than another;[62] anything which turns a man to a particular course; propension.[63] (Bias: Of Arbitrators, see ARBITRATION AND AWARD. Of Judge, see JUDGES. Of Jury, see JURIES. Of Witness, see WITNESSES.)

BIBLE. See EVIDENCE.

Massachusetts.— Haskell *v.* Sargent, 113 Mass. 341, 343.

Missouri.— Records *v.* Fields, 155 Mo. 314, 322, 55 S. W. 1021 [*quoting* Century Dict.], where it is said: "'Between' is literally applicable only to two objects; but it may be and commonly is used of more than two where they are spoken of distributively, or so that they can be thought of as divided into two parts or categories, or with reference to the action or being of each individually as compared with that of any other or all the others. When more than two objects are spoken of collectively or individually, 'among' is the proper word."

New Jersey.— Stoutenburgh *v.* Moore, 37 N. J. Eq. 63, 69, where the court say: "The word 'between' is commonly used in reference to two only." See also Ward *v.* Tomkins, 30 N. J. Eq. 3, 4.

Pennsylvania.— Ihrie's Estate, 162 Pa. St. 369, 372, 29 Atl. 750.

50. *Connecticut.*— Lord *v.* Moore, 20 Conn. 122.

Missouri.— Records *v.* Fields, 155 Mo. 314, 322, 55 S. W. 1021.

New York.— Myers *v.* Myers, 23 How. Pr. (N. Y.) 410, 415.

Pennsylvania.— Hicks' Estate, 134 Pa. St. 507, 508, 19 Atl. 705 [*affirming* 25 Wkly. Notes Cas. (Pa.) 499, 500]. See also Ihrie's Estate, 162 Pa. St. 369, 372, 29 Atl. 750.

Virginia.— Senger *v.* Senger, 81 Va. 687, 689.

See, generally, AMONG.

51. *Illinois.*— Winans *v.* Thorp, 87 Ill. App. 297, 298.

Indiana.— Cook *v.* Gray, 6 Ind. 335, 337.

Iowa.— Robinson *v.* Foster, 12 Iowa 186, 188.

Massachusetts.— Kendall *v.* Kingsley, 120 Mass. 94, 95; Atkins *v.* Boylston F. & M. Ins. Co., 5 Metc. (Mass.) 439, 39 Am. Dec. 692.

Nebraska.— Weir *v.* Thomas, 44 Nebr. 507, 510, 62 N. W. 871, 48 Am. St. Rep. 741.

New York.— Bunce *v.* Reed, 16 Barb. (N. Y.) 347, 352. See also Fowler *v.* Rigney, 5 Abb. Pr. N. S. (N. Y.) 182.

52. State *v.* Godfrey, 12 Me. 361, 366; Revere *v.* Leonard, 1 Mass. 91; Philadelphia *v.* Citizens' Pass. R. Co., 151 Pa. St. 128, 137, 24 Atl. 1099.

53. Morris, etc., R. Co. *v.* New Jersey Cent. R. Co., 31 N. J. L. 205, 206, 212.

54. Worcester Dict. [*quoted* in People *v.* Hinchman, 75 Mich. 587, 588, 42 N. W. 1006, 4 L. R. A. 207]; Matter of Breslin, 45 Hun (N. Y.) 210, 212 [*citing* Webster Dict.; Worcester Dict.].

55. Webster Dict. [*quoted* in People *v.* Hinchman, 75 Mich. 587, 588, 42 N. W. 1006, 4 L. R. A. 207].

56. "'Bias' is not synonymous with 'prejudice;' . . . A man cannot be prejudiced against another, without being biased against him, but he may be biased without being prejudiced." Willis *v.* State, 12 Ga. 444, 449. See also State *v.* Barton, 71 Mo. 288, 296; and, generally, PREJUDICE.

57. Webster Dict. [*quoted* in State *v.* Barton, 71 Mo. 288, 296; Mitchell *v.* State, 36 Tex. Crim. 278, 319, 33 S. W. 367, 36 S. W. 456; Withers *v.* State, 30 Tex. App. 383, 385, 17 S. W. 936; Pierson *v.* State, 18 Tex. App. 524, 558]; Maddox *v.* State, 32 Ga. 581, 587, 79 Am. Dec. 307.

58. Webster Dict. [*quoted* in State *v.* Barton, 71 Mo. 288, 296; Mitchell *v.* State, 36 Tex. Crim. 278, 319, 33 S. W. 367, 36 S. W. 456; Withers *v.* State, 30 Tex. App. 383, 385, 17 S. W. 936; Pierson *v.* State, 18 Tex. App. 524, 558]; Hudgins *v.* State, 2 Ga. 173, 176.

59. Webster Dict. [*quoted* in State *v.* Barton, 71 Mo. 288, 296; Mitchell *v.* State, 36 Tex. Crim. 278, 319, 33 S. W. 367, 36 S. W. 456; Withers *v.* State, 30 Tex. App. 383, 385, 17 S. W. 936; Pierson *v.* State, 18 Tex. App. 524, 558].

60. Webster Dict. [*quoted* in Mitchell *v.* State, 36 Tex. Crim. 278, 319, 33 S. W. 367, 36 S. W. 456; Withers *v.* State, 30 Tex. App. 383, 385, 17 S. W. 936; Pierson *v.* State, 18 Tex. App. 524, 558].

61. Bouvier L. Dict. [*quoted* in Willis *v.* State, 12 Ga. 444, 449].

62. Olive *v.* State, 11 Nebr. 1, 23, 7 Nebr. 444.

63. Hudgins *v.* State, 2 Ga. 173, 176.

BICYCLE.[64] A two-wheeled velocipede;[65] a light vehicle or carriage.[66] (Bicycle: Collision with Street Car, see STREET RAILROADS. License of, see LICENSES; MUNICIPAL CORPORATIONS. Regulations as to Use, see MUNICIPAL CORPORATIONS. Rights and Liabilities on Highways, see STREETS AND HIGHWAYS. Transportation by Carriers, see CARRIERS.)

BID. An offer to perform a contract for work and labor or supplying materials at a specified price.[67] (Bid: At Auction Sale, see AUCTIONS AND AUCTIONEERS. At Execution Sale, see EXECUTIONS. At Judicial Sale, see JUDICIAL SALES. For Contract, see CONTRACTS; COUNTIES; MUNICIPAL CORPORATIONS; STATES; TOWNS.)

BIDDING. Making an offer; the making of an offer at an auction.[68]

BIENNIAL. Happening or taking place once in two years.[69]

BIENNIALLY. Every two years.[70]

BIENS. Property of every description, except estates of freehold and inheritance;[71] GOODS,[72] *q. v.*

64. **Assault and battery.**— Riding a bicycle against a person on a sidewalk in such a rude and reckless manner as to show a disregard of consequences is an assault and battery. Mercer *v.* Corbin, 117 Ind. 76, 20 N. E. 132, 10 Am. St. Rep. 76, 3 L. R. A. 221. So a person riding a bicycle in a wanton and furious manner, and thereby causing injuries to any person, may be convicted under 24 & 25 Vict. c. 100, § 35. Reg. *v.* Parker, 59 J. P. 793.

65. Webster Dict. [*quoted* in Mercer *v.* Corbin, 117 Ind. 450, 454, 20 N. E. 132, 10 Am. St. Rep. 76, 3 L. R. A. 221]. See also State *v.* Missouri Pac. R. Co., 71 Mo. App. 385, 391.

66. State *v.* Missouri Pac. R. Co., 71 Mo. App. 385, 391 [*citing* Century Dict.; Webster Int. Dict.; Worcester Dict.]. But see Richardson *v.* Danvers, 176 Mass. 413, 414, 57 N. E. 688, 79 Am. St. Rep. 320, 50 L. R. A. 127 [*citing* Murray Dict.], where it is said: "A bicycle is more properly a machine than a carriage."

67. Bouvier L. Dict.

68. Eppes *v.* Mississippi, etc., R. Co., 35 Ala. 33, 56.

69. State *v.* Smith, 42 Mo. 506, 507, where it is said: "The word 'biennial' is derived from the Latin words *bis*, twice, and *annus*, year."

70. People *v.* Tremain, 9 Hun (N. Y.) 573, 577 [*affirmed* in 68 N. Y. 628].

The word does not signify duration of time, but defines a period for the happening of some event. People *v.* Kilbourn, 68 N. Y. 479, 482; People *v.* Tremain, 9 Hun (N. Y.) 573, 576 [*affirmed* in 68 N. Y. 628].

71. Bouvier L. Dict. [*quoted* in Adams *v.* Akerlund, 168 Ill. 632, 635, 48 N. E. 454].

Real estate is included in the term as employed by the civilian and continental jurists. Adams *v.* Akerlund, 168 Ill. 632, 636, 48 N. E. 454 [*citing* Bouvier L. Dict.; Story Conflict of Laws (8th ed.), §§ 13, 146 note]. See also Eddy *v.* Davis, 35 Vt. 247, 248 [*citing* Coke Litt. 118*b*].

72. Coke Litt. 118*b*.

BIGAMY

By Paul Pizey

CROSS-REFERENCES

For Matters Relating to:
Adultery, see ADULTERY.
Bigamous Cohabitation, see LEWDNESS.
Validity of Marriage, Generally, see MARRIAGE.
For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. DEFINITION.

Bigamy is the wilfully and knowingly contracting a second marriage when the contracting party knows that the first is still subsisting;[1] the state of a man who has two wives, or of a woman who has two husbands, living at the same time;[2] and in canon law the marriage of a second wife after the death of the first, or the marriage of a widow, either of which was considered as bringing a man under some incapacities for ecclesiastical offices.[3]

II. NATURE AND ELEMENTS OF OFFENSE.

A. Nature. At common law bigamy was considered as an offense of ecclesiastical cognizance exclusively, and not punishable by an ordinary common-law tribunal;[4] but by statute[5] the benefit of clergy was taken away from the

1. Black L. Dict.

2. Bouvier L. Dict. [*quoted* in Com. *v.* McNerny, 10 Phila. (Pa.) 206, 207, 31 Leg. Int. (Pa.) 172]. See also Gise *v.* Com., 81 Pa. St. 428, 430, 2 Wkly. Notes Cas. (Pa.) 589.

"Polygamy" is a more just term to use as denoting the state referred to in the text, since bigamy properly signifies being twice married (Scoggins *v.* State, 32 Ark. 205, 211 [*citing* 1 Russell Crimes, 186, note *a*]; Com. *v.* McNerny, 10 Phila. (Pa.) 206, 207, 31 Leg. Int. (Pa.) 172; O'Hagan, J., in Reg. *v.* Fanning, 10 Cox C. C. 411, 416, 17 Ir. C. L. 289, 14 Wkly. Rep. 701; 4 Bl. Comm. 163; Coke Litt. (Butler and Hargraves Notes) 80*b*, note 1); and it is so designated in a number of states (Com. *v.* McNerny, 10 Phila. (Pa.) 206, 207, 31 Leg. Int. (Pa.) 172).

3. Burrill L. Dict. [*quoted* in Com. *v.* McNerny, 10 Phila. (Pa.) 206, 207, 31 Leg. Int. (Pa.) 172]. See also Niece *v.* Territory, 9 Okla. 535, 541, 60 Pac. 300 [*citing* 4 Bl. Comm. 163]; O'Hagan, J., in Reg. *v.* Fanning, 10 Cox C. C. 411, 416, 17 Ir. C. L. 289, 14 Wkly. Rep. 701.

4. Barber *v.* State, 50 Md. 161; State *v.* Barnett, 83 N. C. 615; Reynolds *v.* U. S. 98 U. S. 145, 25 L. ed. 244 [*affirming* 1 Utah 226].

5. **Stat. De Bigamis,** 4 Edw. I, c. 5.

offense; and during the existence of that statute the ecclesiastical offense was frequently used as the subject of counterplea, in the common-law courts, to a claim of the benefit of clergy in the prosecution of clergyable offenses.[6] Later, however, bigamy was by statute declared to be no longer an impediment to receiving the benefit of clergy,[7] and this was the state of the law upon the subject until more modern times,[8] when bigamy was made a felony punishable in the civil courts.[9] As this statute was limited in its operation to England and Wales it was at a very early period reënacted, generally with some modifications, in all the colonies;[10] was expressly continued after the Revolution by many states of the United States;[11] and is still in force, unless repealed or modified by some positive legislation.[12]

B. Elements of Offense — 1. In General. To constitute the offense of bigamy there must have been a prior valid marriage,[13] coupled with an entering,

6. Barber *v.* State, 50 Md. 161.

7. Barber *v.* State, 50 Md. 161 [*citing* 1 Edw. VI, c. 12, § 167].

8. Barber *v.* State, 50 Md. 161 [*citing* 1 Jac. I, c. 11].

9. Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244 [*affirming* 1 Utah 226]. See also People *v.* Whigham, 1 Wheel. Crim. (N. Y.) 115.

10. Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244 [*affirming* 1 Utah 226].

Slight amendments of 1 Jac. I, c. 11, were contained in 9 Geo. IV, c. 31, § 22, and 24 & 25 Vict. c. 100, § 57.

Validity of Canadian statute.— The legislature of the Dominion of Canada has power to legislate concerning the punishment of bigamy. *In re* Bigamy Sections Criminal Code, 27 Can. Supreme Ct. 461; Reg. *v.* Pierce, 13 Ont. 226. *Contra*, Reg. *v.* Plowman, 25 Ont. 656.

11. In the District of Columbia the English statute was in modified force until the act of congress of July 1, 1862, c. 126, revised and incorporated in U. S. Rev. Stat. (1872), § 5352, which is a full substitute in every respect for the English statute, except as regards the grade of the offense, which is, under the act of congress, a misdemeanor. Knight *v.* U. S., 6 App. Cas. (D. C.) 1. But see U. S. *v.* Crawford, 6 Mackey (D. C.) 319, holding this statute and amendments thereto inapplicable in the District of Columbia.

In Maryland the English statute is modified with respect to the punishment but not as to the grade of the offense. Barber *v.* State, 50 Md. 161. See also U. S. *v.* Jennegen, 4 Cranch C. C. (U. S.) 118, 26 Fed. Cas. No. 15,474.

In North Carolina the law, which declared the offense to be a felony, was enacted in 1790, and found its prototype in the English statute. In 1854 bigamy was made a misdemeanor, but in 1884 again became a felony. State *v.* Burns, 90 N. C. 707.

In Virginia the English statute was reënacted. Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244 [*affirming* 1 Utah 226].

12. Barber *v.* State, 50 Md. 161.

Constitutionality of statutes.— The constitutional provision against the making of laws respecting religion is not violated by U. S. Rev. Stat. (1872), § 5352, defining and providing for the punishment of bigamy. Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244 [*affirming* 1 Utah 226]. See also Davis *v.* Beason, 133 U. S. 333, 10 S. Ct. 299, 33 L. ed. 637; Murphy *v.* Ramsey, 114 U. S. 15, 5 S. Ct. 747, 29 L. ed. 47. So a territorial law punishing bigamy is not unconstitutional, because the person committing it might be punishable also under the laws of the United States. *In re* Murphy, 5 Wyo. 297, 40 Pac. 398.

13. *Alabama.*— Cooley *v.* State, 55 Ala. 162; Beggs *v.* State, 55 Ala. 108; Williams *v.* State, 44 Ala. 24.

Arkansas.— Johnson *v.* State, 60 Ark. 308, 30 S. W. 31; Halbrook *v.* State, 34 Ark. 511, 36 Am. Rep. 17.

Georgia.— Dale *v.* State, 88 Ga. 552, 15 S. E. 287.

Illinois.— Canale *v.* People, 177 Ill. 219, 52 N. E. 310.

Michigan.— People *v.* McQuaid, 85 Mich. 123, 48 N. W. 161; Kopke *v.* People, 43 Mich. 41, 4 N. W. 551.

Missouri.— State *v.* Cooper, 103 Mo. 226, 15 S. W. 327.

New York.— Hayes *v.* People, 25 N. Y. 390, 82 Am. Dec. 364 [*affirming* 15 Abb. Pr. (N. Y.) 163, 5 Park. Crim. (N. Y.) 325]; People *v.* Chase, 27 Hun (N. Y.) 256.

Ohio.— State *v.* Moore, 1 Ohio Dec. (Reprint) 171, 3 West. L. J. 134.

South Carolina.— State *v.* Whaley, 10 S. C. 500.

Tennessee.— Bashaw *v.* State, 1 Yerg. (Tenn.) 176.

England.— Reg. *v.* Chadwick, 11 Q. B. 173, 2 Cox C. C. 381, 12 Jur. 174, 17 L. J. M. C. 33, 63 E. C. L. 173; Reg. *v.* Bowen, 2 C. & K. 227, 61 E. C. L. 227; Reg. *v.* Millis, 10 Cl. & F. 534, 8 Eng. Reprint 844; Sunderland's Case, 2 Lewin 109.

See 6 Cent. Dig. tit. "Bigamy," § 1.

Invalidity of prior marriage alleged in indictment.— The fact that a valid marriage subsisted at the time the first marriage alleged in the indictment was entered into is a good defense, because the marriage alleged in the indictment is in such case void.

Arkansas.—Halbrook *v.* State, 34 Ark. 511, 36 Am. Rep. 17.

New York.— People *v.* Corbett, 49 N. Y. App. Div. 514, 63 N. Y. Suppl. 460; People

by one of the parties thereto, into a second marriage,[14] while to his or her knowledge[15] the other party to the prior marriage is alive,[16] and such marriage is still

v. Crawford, 62 Hun (N. Y.) 160, 16 N. Y. Suppl. 575, 41 N. Y. St. 809 [*affirmed* in 133 N. Y. 535, 30 N. E. 1148, 44 N. Y. St. 929]; People *v.* Chase, 27 Hun (N. Y.) 256.

Ohio.— State *v.* Moore, 1 Ohio Dec. (Reprint) 171, 3 West. L. J. 134.

Tennessee.—Keneval *v.* State, (Tenn. 1901) 64 S. W. 897.

Vermont.— State *v.* Sherwood, 68 Vt. 414, 35 Atl. 352.

West Virginia.— State *v.* Goodrich, 14 W. Va. 834.

England.— Reg. *v.* Wilson, 3 F. & F. 119.

Impotency of first spouse.— Impotency of the first spouse has been pleaded as a defense in bigamy, but no ruling was made. Masterton, 1 Swin. Jus. Cas. 427.

Invalidity of prior marriage — How pleaded. — In a prosecution for bigamy a special plea setting up that the alleged marriage with the woman alleged to be defendant's wife at the time of the bigamous marriage was in fact void, as defendant had a wife living at the time, may be properly stricken out, as such defense may be given in evidence under the general issue of not guilty. Keneval *v.* State, (Tenn. 1901) 64 S. W. 897.

14. *Alabama.*— Cox *v.* State, 117 Ala. 103, 23 So. 806, 67 Am. St. Rep. 166, 41 L. R. A. 760; Jones *v.* State, 67 Ala. 84; McConico *v.* State, 49 Ala. 6.

Arkansas.— Russell *v.* State, 66 Ark. 185, 49 S. W. 821, 74 Am. St. Rep. 78; Halbrook *v.* State, 34 Ark. 511, 36 Am. Rep. 17; Scoggins *v.* State, 32 Ark. 205.

California.— People *v.* Beevers, 99 Cal. 286, 33 Pac. 844.

Florida.— Cathron *v.* State, 40 Fla. 468, 24 So. 496; Green *v.* State, 21 Fla. 403, 58 Am. Rep. 670.

Iowa.— State *v.* Nadal, 69 Iowa 478, 29 N. W. 451.

Kentucky.— Johnson *v.* Com., 86 Ky. 122, 58 S. W. 365, 9 Am. St. Rep. 269.

Louisiana.— State *v.* Barrow, 31 La. Ann. 691.

Maryland.— Barber *v.* State, 50 Md. 161.

Nevada.— State *v.* Zichfeld, 23 Nev. 304, 46 Pac. 802, 62 Am. St. Rep. 800, 34 L. R. A. 784.

New York.— Hayes *v.* People, 25 N. Y. 390, 82 Am. Dec. 364 [*affirming* 15 Abb. Pr. (N. Y.) 163, 5 Park. Crim. (N. Y.) 325]; People *v.* Whigham, 1 Wheel. Crim. (N. Y.) 115.

North Carolina.— State *v.* Burns, 90 N. C. 707; State *v.* Norman, 13 N. C. 222.

Ohio.— Swartz *v.* State, 13 Ohio Cir. Ct. 62.

Oklahoma.—Niece *v.* Territory, 9 Okla. 535, 60 Pac. 300.

Pennsylvania.— Gise *v.* Com., 81 Pa. St. 428, 2 Wkly. Notes Cas. (Pa.) 589; Com. *v.* McNerny, 10 Phila. (Pa.) 206, 31 Leg. Int. (Pa.) 172.

Rhode Island.— State *v.* Gallagher, 20 R. I. 266, 38 Atl. 655.

United States.— Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244 [*affirming* 1 Utah 226].

England.— Reg. *v.* Millis, 10 Cl. & F. 534, 8 Eng. Reprint 844; Reg. *v.* Fanning, 10 Cox C. C. 411, 17 Ir. C. L. 289, 14 Wkly. Rep. 701.

Canada.— *In re* Bigamy Sections Criminal Code, 27 Can. Supreme Ct. 461.

15. *Alabama.*— Dotson *v.* State, 62 Ala. 141, 34 Am. Rep. 2.

California.— People *v.* Feilen, 58 Cal. 218, 41 Am. Rep. 258.

Iowa.— State *v.* Nadal, 69 Iowa 478, 29 N. W. 451.

Massachusetts.— Com. *v.* Caponi, 155 Mass. 534, 30 N. E. 82.

Nevada.— State *v.* Zichfeld, 23 Nev. 304, 46 Pac. 802, 62 Am. St. Rep. 800, 34 L. R. A. 784.

New York.— People *v.* Meyer, 8 N. Y. St. 256.

Texas.— Gorman *v.* State, 23 Tex. 646.

16. *Alabama.*— Cox *v.* State, 117 Ala. 103, 23 So. 806, 67 Am. St. Rep. 166, 41 L. R. A. 760; Parker *v.* State, 77 Ala. 47, 54 Am. Rep. 43; Jones *v.* State, 67 Ala. 84; Dotson *v.* State, 62 Ala. 141, 34 Am. Rep. 2; McConico *v.* State, 49 Ala. 6.

Arkansas.— Russell *v.* State, 66 Ark. 185, 49 S. W. 821, 74 Am. St. Rep. 78; State *v.* Ashley, 37 Ark. 403; Halbrook *v.* State, 34 Ark. 511, 36 Am. Rep. 17; Walls *v.* State, 32 Ark. 565; Scoggins *v.* State, 32 Ark. 205.

California.— People *v.* Beevers, 99 Cal. 286, 33 Pac. 844; People *v.* Feilen, 58 Cal. 218, 41 Am. Rep. 258.

Florida.— Green *v.* State, 21 Fla. 403, 58 Am. Rep. 670.

Illinois.— Prichard *v.* People, 149 Ill. 50, 36 N. E. 103.

Indiana.— Squire *v.* State, 46 Ind. 459.

Iowa.— State *v.* Nadal, 69 Iowa 478, 29 N. W. 451; State *v.* Hughes, 58 Iowa 165, 11 N. W. 706.

Kansas.— State *v.* Hughes, 35 Kan. 626, 12 Pac. 28, 57 Am. Rep. 195.

Kentucky.— Johnson *v.* Com., 86 Ky. 122, 5 S. W. 365, 9 Am. St. Rep. 269; Davis *v.* Com., 13 Bush (Ky.) 318.

Louisiana.— State *v.* Barrow, 31 La. Ann. 691.

Maryland.— Barber *v.* State, 50 Md. 161.

Massachusetts.— Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318; Com. *v.* Caponi, 155 Mass. 534, 30 N. E. 82; Com. *v.* McGrath, 140 Mass. 296, 6 N. E. 515; Com. *v.* Mash, 7 Metc. (Mass.) 472.

Minnesota.— State *v.* Armington, 25 Minn. 29.

Mississippi.— Gibson *v.* State, 38 Miss. 313.

Nebraska.— Reynolds *v.* State, 58 Nebr. 49, 78 N. W. 483.

Nevada.— State *v.* Zichfeld, 23 Nev. 304, 46

undissolved.[17] Persons who are guilty of counseling, aiding, and abetting a

Pac. 802, 62 Am. St. Rep. 800, 34 L. R. A. 784.

New York.— People *v.* Meyer, 8 N. Y. St. 256; People *v.* Whigham, 1 Wheel. Crim. (N. Y.) 115; Van Pelt's Case, 1 City Hall Rec. (N. Y.) 137.

North Carolina.— State *v.* Burns, 90 N. C. 707; State *v.* Patterson, 24 N. C. 346, 38 Am. Dec. 699; State *v.* Norman, 13 N. C. 222.

Oklahoma.—Niece *v.* Territory, 9 Okla. 535, 60 Pac. 300.

Pennsylvania.— Gise *v.* Com., 81 Pa. St. 428, 2 Wkly. Notes Cas. (Pa.) 589.

Rhode Island.— State *v.* Gallagher, 20 R. I. 266, 38 Atl. 655; Watson's Petition, 19 R. I. 342, 33 Atl. 873.

South Carolina.— State *v.* Barefoot, 2 Rich. (S. C.) 209.

Texas.— Gorman *v.* State, 23 Tex. 646; Hull *v.* State, 7 Tex. App. 593; May *v.* State, 4 Tex. App. 424.

West Virginia.— State *v.* Goodrich, 14 W. Va. 834.

United States.— Cannon *v.* U. S., 116 U. S. 55, 6 S. Ct. 278, 29 L. ed. 561.

England.— Reg. *v.* Tolson, 23 Q. B. D. 168, 16 Cox C. C. 629, 54 J. P. 4, 58 L. J. M. C. 97, 60 L. T. Rep. N. S. 899, 37 Wkly. Rep. 716; Reg. *v.* Jones, 11 Q. B. D. 118, 15 Cox C. C. 284, 47 J. P. 535, 52 L. J. M. C. 96, 48 L. T. Rep. N. S. 768, 31 Wkly. Rep. 800; Reg. *v.* Willshire, 6 Q. B. D. 366, 14 Cox C. C. 541, 45 J. P. 375, 50 L. J. M. C. 57, 44 L. T. Rep. N. S. 222, 29 Wkly. Rep. 473; Reg. *v.* Curgerwen, L. R. 1 C. C. 1, 10 Cox C. C. 152, 11 Jur. N. S. 984, 35 L. J. M. C. 58, 13 L. T. Rep. N. S. 383, 14 Wkly. Rep. 55; Reg. *v.* Jones, C. & M. 614, 41 E. C. L. 333; Reg. *v.* Cullen, 9 C. & P. 681, 38 E. C. L. 396; Reg. *v.* Heaton, 3 F. & F. 819; Reg. *v.* Cross, 1 F. & F. 510; Reg. *v.* Dane, 1 F. & F. 323; Reg. *v.* Ellis, 1 F. & F. 309; Reg. *v.* Bennett, 14 Cox C. C. 45; Reg. *v.* Moore, 13 Cox C. C. 544; Reg. *v.* Gibbons, 12 Cox C. C. 237; Reg. *v.* Jones, 11 Cox C. C. 358; Reg. *v.* Turner, 9 Cox C. C. 145; Reg. *v.* Briggs, 7 Cox C. C. 175, Dears. & B. 98, 2 Jur. N. S. 1195, 26 L. J. M. C. 7, 5 Wkly. Rep. 53.

Canada.— Reg. *v.* Smith, 14 U. C. Q. B. 565; Reg. *v.* Fontaine, 15 L. C. Jur. 141; Reg. *v.* Debay, 3 Nova Scotia Dec. 540; *In re* Bigamy Sections Criminal Code, 27 Can. Supreme Ct. 461.

Actual death or absence beyond seas of the former spouse, unheard of for a statutory period varying in different jurisdictions, prior to the entering into the second marriage is a good defense.

Alabama.— Parker *v.* State, 77 Ala. 47, 54 Am. Rep. 43; Jones *v.* State, 67 Ala. 84.

Arkansas.— Walls *v.* State, 32 Ark. 565.

Illinois.— Prichard *v.* People, 149 Ill. 50, 36 N. E. 103.

Maryland.— Barber *v.* State, 50 Md. 161.

Massachusetts.— Com. *v.* Mash, 7 Metc. (Mass.) 472.

Minnesota.— State *v.* Armington, 25 Minn. 29.

Mississippi.— Gibson *v.* State, 38 Miss. 313.

New York.— Van Pelt's Case, 1 City Hall Rec. (N. Y.) 137.

North Carolina.— State *v.* Patterson, 24 N. C. 346, 38 Am. Dec. 699.

Rhode Island.— Watson's Petition, 19 R. I. 342, 33 Atl. 873.

United States.— Cannon *v.* U. S., 116 U. S. 55, 6 S. Ct. 278, 29 L. ed. 561.

England.— Reg. *v.* Tolson, 23 Q. B. D. 168, 16 Cox C. C. 629, 54 J. P. 4, 58 L. J. M. C. 97, 60 L. T. Rep. N. S. 899, 37 Wkly. Rep. 716; Reg. *v.* Cullen, 9 C. & P. 681, 38 E. C. L. 396.

Belief in the existence of the first spouse deprives defendant of the benefit of an absence for the statutory period, if the second marriage is contracted while such spouse is in fact alive. People *v.* Mayer, 8 N. Y. St. 256.

Whether an honest and reasonable belief in the death of the prior spouse is a defense is unsettled. Some authorities hold that it is (State *v.* Stank, 9 Ohio Dec. (Reprint) 8, 10 Cinc. L. Bul. 16; Reg. *v.* Tolson, 23 Q. B. D. 168, 16 Cox C. C. 629, 54 J. P. 4, 58 L. J. M. C. 97, 60 L. T. Rep. N. S. 899, 37 Wkly. Rep. 716; Reg. *v.* Moore, 13 Cox C. C. 544; Reg. *v.* Horton, 11 Cox C. C. 670; Reg. *v.* Turner, 9 Cox C. C. 145; *In re* Bigamy Sections Criminal Code, 27 Can. Supreme Ct. 401), while others hold that it is not (Jones *v.* State, 67 Ala. 84; Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318; Com. *v.* Mash, 7 Metc. (Mass.) 472; Reg. *v.* Bennett, 14 Cox C. C. 45; Reg. *v.* Gibbons, 12 Cox C. C. 237 [*overruling* Reg. *v.* Horton, 11 Cox C. C. 670]).

17. *Alabama.*— Cooley *v.* State, 55 Ala. 162; Beggs *v.* State, 55 Ala. 108; McConico *v.* State, 49 Ala. 6; Thompson *v.* State, 28 Ala. 12.

Arkansas.— Walls *v.* State, 32 Ark. 565.

California.— People *v.* Beevers, 99 Cal. 286, 33 Pac. 844.

Illinois.— Tucker *v.* People, 122 Ill. 583, 13 N. E. 809.

Indiana.— Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21; Squire *v.* State, 46 Ind. 459.

Iowa.— State *v.* Hughes, 58 Iowa 165, 11 N. W. 706.

Kentucky.— Johnson *v.* Com., 86 Ky. 122, 5 S. W. 365, 9 Am. St. Rep. 269; Davis *v.* Com., 13 Bush (Ky.) 318.

Massachusetts.— Com. *v.* Lane, 113 Mass. 458, 18 Am. Rep. 509.

Michigan.— People *v.* Brown, 34 Mich. 339, 22 Am. Rep. 531; People *v.* Dawell, 25 Mich. 247, 12 Am. Rep. 260; People *v.* Slack, 15 Mich. 193.

Mississippi.— Crawford *v.* State, 73 Miss. 172, 18 So. 848, 35 L. R. A. 224.

Nevada.— State *v.* Zichfeld, 23 Nev. 304, 46 Pac. 802, 62 Am. St. Rep. 800, 34 L. R. A. 784.

party in the contracting of a bigamous marriage have been held to be also punishable.[18]

2. Prior Marriage — a. Validity of. Provided the prior marriage is valid according to the law of the country in which it took place,[19] its validity in

New York.— People *v.* Faber, 92 N. Y. 146, 44 Am. Rep. 357 [*reversing* 29 Hun (N. Y.) 320]; People *v.* Baker, 76 N. Y. 78, 32 Am. Rep. 274 [*reversing* 15 Hun (N. Y.) 256]; People *v.* Weed, 29 Hun (N. Y.) 628, 1 N. Y. Crim. 349 [*affirmed* in 96 N. Y. 625]; People *v.* Chase, 28 Hun (N. Y.) 310; People *v.* Hovey, 5 Barb. (N. Y.) 117; Baker *v.* People, 2 Hill (N. Y.) 325; Coleman's Case, 6 City Hall Rec. (N. Y.) 3.

North Carolina.— State *v.* Parker, 106 N. C. 711, 11 S. E. 517.

Ohio.— Van Fossen *v.* State, 37 Ohio St. 317, 41 Am. Rep. 507; Shafher *v.* State, 20 Ohio 1; State *v.* Stank, 9 Ohio Dec. (Reprint) 8, 10 Cinc. L. Bul. 16.

Pennsylvania.— Gise *v.* Com., 81 Pa. St. 428, 2 Wkly. Notes Cas. (Pa.) 589; Com. *v.* McNerny, 10 Phila. (Pa.) 206, 31 Leg. Int. (Pa.) 172.

South Carolina.—State *v.* Barefoot, 2 Rich. (S. C.) 209.

Wisconsin.— State *v.* Cone, 86 Wis. 498, 57 N. W. 50.

England.— Kingston's Case, 1 Leach 148; Rex *v.* Jacobs, 1 Moody 140.

Canada.— *In re* Bigamy Sections Criminal Code, 27 Can. Supreme Ct. 461.

A valid and absolute divorce from the first spouse prior to the second marriage is a good defense (McConico *v.* State, 49 Ala. 6; Thompson *v.* State, 28 Ala. 12; Davis *v.* Com., 13 Bush (Ky.) 318; Com. *v.* Lane, 113 Mass. 458, 18 Am. Rep. 509; Crawford *v.* State, 73 Miss. 172, 18 So. 848, 35 L. R. A. 224; People *v.* Faber, 92 N. Y. 146, 44 Am. Rep. 357 [*reversing* 29 Hun (N. Y.) 320, *overruling* People *v.* Hovey, 5 Barb. (N. Y.) 117]; People *v.* Chase, 28 Hun (N. Y.) 310; Kingston's Case, 1 Leach 148), but an honest and reasonable belief that a divorce had been granted is not, as a general rule, a defense (Russell *v.* State, 66 Ark. 185, 49 S. W. 821, 74 Am. St. Rep. 78; Davis *v.* Com., 13 Bush (Ky.) 318; Reynolds *v.* State, 58 Nebr. 49, 78 N. W. 483; State *v.* Sherwood, 68 Vt. 414, 35 Atl. 352. *Contra*, State *v.* Stank, 9 Ohio Dec. (Reprint) 8, 10 Cinc. L. Bul. 16).

Under decrees prohibiting remarriage after divorce it has been held that the party remarrying in contravention of the decree is guilty of bigamy (Park *v.* Barron, 20 Ga. 702, 65 Am. Dec. 641; People *v.* Faber, 92 N. Y. 146, 44 Am. Rep. 357 [*reversing* 29 Hun (N. Y.) 320, *overruling* People *v.* Hovey, 5 Barb. (N. Y.) 1117]), at any rate where such party goes from a state with intent to avoid its law and then returns thereto (Com. *v.* Lane, 113 Mass. 458, 18 Am. Rep. 509). It has been held, however, that such person is not guilty of bigamy, but merely subjects himself to a penalty. Crawford *v.* State, 73 Miss. 172, 18 So. 848, 35 L. R. A. 224.

Where a voidable marriage was avoided prior to the alleged bigamous marriage this is defense. Walls *v.* State, 32 Ark. 565; State *v.* Barefoot, 2 Rich. (S. C.) 209; Rex *v.* Jacobs, 1 Moody 140.

Separation by mutual consent is not a defense. McConico *v.* State, 49 Ala. 6. Nor is the fact that after entering into articles of separation from the other spouse the party remarrying had legal advice that he was free to marry again. State *v.* Hughes, 58 Iowa 165, 11 N. W. 706; People *v.* Weed, 29 Hun (N. Y.) 628, 1 N. Y. Crim. 349 [*affirmed* in 96 N. Y. 625].

18. Boggus *v.* State, 34 Ga. 275 (where a friend of the actual bigamist, who was aware of the circumstances and present at the marriage, was held guilty of bigamy in the second degree); Reg. *v.* Brawn, 1 C. & K. 144, 1 Cox C. C. 33, 47 E. C. L. 144 (where it is held that a person who knows at the time of his marriage that the other party is married is guilty of bigamy).

19. *Alabama.*— Beggs *v.* State, 55 Ala. 108.

Arizona.— U. S. *v.* Tenney, (Ariz. 1885) 8 Pac. 295, 11 Pac. 472.

Arkansas.— Walls *v.* State, 32 Ark. 565.

California.— People *v.* Beevers, 99 Cal. 286, 33 Pac. 844.

Georgia.— Dale *v.* State, 88 Ga. 552, 15 S. E. 287.

Kentucky.—Robinson *v.* Com., 6 Bush (Ky.) 309.

Missouri.— State *v.* Cooper, 103 Mo. 226, 15 S. W. 327.

Nebraska.— Hills *v.* State, 61 Nebr. 589, 85 N. W. 836.

New York.— Hayes *v.* People, 25 N. Y. 390, 82 Am. Dec. 364 [*affirming* 15 Abb. Pr. (N. Y.) 163, 5 Park. Crim. (N. Y.) 325]; Coleman's Case, 6 City Hall Rec. (N. Y.) 3.

North Carolina.—State *v.* Parker, 106 N. C. 711, 11 S. E. 517; State *v.* Robbins, 28 N. C. 23, 44 Am. Dec. 64.

Ohio.— Carmichael *v.* State, 12 Ohio St. 553.

Virginia.— Bird *v.* Com., 21 Gratt. (Va.) 800.

Wisconsin.— State *v.* Com., 86 Wis. 498, 57 N. W. 50; Weinberg *v.* State, 25 Wis. 370.

A common-law marriage is sufficient (People *v.* Beevers, 99 Cal. 286, 33 Pac. 844; Dale *v.* State, 88 Ga. 552, 15 S. E. 287; State *v.* Cooper, 103 Mo. 226, 15 S. W. 327; Hayes *v.* People, 25 N. Y. 390, 82 Am. Dec. 364 [*affirming* 15 Abb. Pr. (N. Y.) 163, 5 Park. Crim. (N. Y.) 325]; State *v.* Melton, 120 N. C. 591, 26 S. E. 933; Carmichael *v.* State, 12 Ohio St. 553), even where there is a statute on the subject, unless the statute contains express words of nullity (Carmichael *v.* State, 12 Ohio St. 553).

A marriage solemnized by an unauthorized person is sufficient (Robinson *v.* Com., 6

the country where the second marriage is celebrated is a question of no importance.[20]

b. Time and Place of. The time when, and the place at which, the prior marriage took place are not material ingredients of the offense,[21] because the second marriage alone is unlawful, the first having nothing criminal in it, and being merely of a transitory nature.[22]

3. Subsequent Marriage — a. Validity of. The second marriage is always void.[23] Whether, however, the second marriage must be one which, but for the suit, would have been as binding as that one, is a point upon which the authorities differ; the weight of authority being that, where the form of ceremony of marriage with another person is gone through, there is a sufficient marriage on which to predicate a charge of bigamy.[24] This does not mean, however, that any fan-

Bush (Ky.) 309; State *v.* Davis, 109 N. C. 780, 14 S. E. 55; Carmichael *v.* State, 12 Ohio St. 553), provided such marriage was made in good faith and consummated (Robinson *v.* Com., 6 Bush (Ky.) 309).

A marriage solemnized without due publication of banns is sufficient. Rex *v.* Hind, R. & R. 189, 15 Rev. Rep. 740.

A marriage under the age of consent is sufficiently valid (Cooley *v.* State, 55 Ala. 162; Beggs *v.* State, 55 Ala. 108; Walls *v.* State, 32 Ark. 565; People *v.* Beevers, 99 Cal. 286, 33 Pac. 844; Coleman's Case, 6 City Hall Rec. (N. Y.) 3; State *v.* Parker, 106 N. C. 711, 11 S. E. 517; State *v.* Cone, 86 Wis. 498, 57 N. W. 50; Reg. *v.* Clark, 2 Cox C. C. 183; Rex *v.* Jacobs, 1 Moody 140), unless such marriage has been judicially annulled because contracted under the statutory age of consent (Cooley *v.* State, 55 Ala. 162; Beggs *v.* State, 55 Ala. 108; Walls *v.* State, 32 Ark. 565; People *v.* Beevers, 99 Cal. 286, 33 Pac. 844; State *v.* Cone, 86 Wis. 498, 57 N. W. 50; Rex *v.* Jacobs, 1 Moody 140), there was a separation with the consent of the minor before attaining majority (People *v.* Slack, 15 Mich. 193), or the marriage was not confirmed by cohabiting after arriving at the age of consent (Shafher *v.* State, 20 Ohio 1).

A marriage without a license is sufficient. State *v.* Robbins, 28 N. C. 23, 44 Am. Dec. 64.

Under statutes legalizing marriages of former slaves continuing to cohabit after emancipation cohabitation without any ceremony is sufficient (Scoggins *v.* State, 32 Ark. 205; Williams *v.* State, 67 Ga. 260; Kirk *v.* State, 65 Ga. 159; King *v.* State, 40 Ga. 244; State *v.* Melton, 120 N. C. 591, 26 S. E. 933; State *v.* Whaley, 10 S. C. 500; McReynolds *v.* State, 5 Coldw. (Tenn.) 18), even though there was a failure to acknowledge of record prior cohabitation and the time when it commenced, in accordance with a statutory requirement (State *v.* Whitford, 86 N. C. 636).

20. People *v.* Chase, 28 Hun (N. Y.) 310; State *v.* Palmer, 18 Vt. 570; Reg. *v.* Griffin, 14 Cox C. C. 308, 4 L. R. Ir. 497; Reg. *v.* Povey, 6 Cox C. C. 83, Dears. 32, 17 Jur. 120, 22 L. J. M. C. 19, 1 Wkly. Rep. 40.

21. *California.*— People *v.* Giesea, 61 Cal. 53.

Indiana.— Hutchins *v.* State, 28 Ind. 34.

Iowa.— State *v.* Nadal, 69 Iowa 478, 29 N. W. 451; State *v.* Hughes, 58 Iowa 165, 11 N. W. 706.

Kansas.— State *v.* Hughes, 35 Kan. 626, 12 Pac. 28, 57 Am. Rep. 195.

Massachusetts.— Com. *v.* McGrath, 140 Mass. 296, 6 N. E. 515; Com. *v.* Johnson, 10 Allen (Mass.) 196.

Minnesota.— State *v.* Armington, 25 Minn. 29.

New York.— People *v.* Chase, 28 Hun (N. Y.) 310.

North Carolina.— State *v.* Bray, 35 N. C. 289.

Vermont.— State *v.* Palmer, 18 Vt. 570.

Marriage in foreign state or country.— Under Mass. Gen. Stat. c. 165, §§ 4, 5, the fact that the prior marriage took place in a foreign state or country is not material. Com. *v.* Johnson, 10 Allen (Mass.) 196. See also Com. *v.* Kenney, 120 Mass. 387.

22. 1 Hawkins P. C. c. 43, § 7; 2 Hawkins P. C. c. 25, § 37.

23. Johnson *v.* State, 61 Ga. 305; People *v.* Mendenhall, 119 Mich. 404, 78 N. W. 325, 75 Am. St. Rep. 408; People *v.* Brown, 34 Mich. 339, 22 Am. Rep. 531; Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244 [*affirming* 1 Utah 226].

24. Robinson *v.* Com., 6 Bush (Ky.) 309; People *v.* Mendenhall, 119 Mich. 404, 78 N. W. 325, 75 Am. St. Rep. 408; People *v.* Brown, 34 Mich. 339, 22 Am. Rep. 531; Reg. *v.* Allen, L. R. 1 C. C. 367, 12 Cox C. C. 193, 41 L. J. M. C. 97, 26 L. T. Rep. N. S. 664, 20 Wkly. Rep. 756; Reg. *v.* Brawn, 1 C. & K. 144, 1 Cox C. C. 33, 47 E. C. L. 144; Rex *v.* Penson, 5 C. & P. 412, 24 E. C. L. 631. *Contra*, Reg. *v.* Fanning, 10 Cox C. C. 411, 17 Ir. C. L. 289, 14 Wkly. Rep. 701. See also Burt *v.* Burt, 29 L. J. P. & M. 133, 2 L. T. Rep. N. S. 439, 2 Sw. & Tr. 88, 8 Wkly. Rep. 552; per Tindall, C. J., in Reg. *v.* Millis, 10 Cl. & F. 534, 8 Eng. Reprint 844.

Where parties to second marriage are incapacitated to contract marriage.— The ground on which the subsequent marriage is penal is that it involves a breach of public decency and morals, and creates a public scandal by the prostitution of a solemn ceremony, which the law allows only to be applied to a legitimate union, to a marriage at best but colorable and fictitious, and which may be made, and too often is made, the means of

tastic form of marriage to which a person might think proper to resort would be sufficient.[25]

b. Place of. The place where the second marriage was performed is material, since by the common law the place only in which the criminal marriage was solemnized has jurisdiction.[26] Where, however, the statutes so provide, the place of the second marriage is not important, and it may have been solemnized elsewhere than within the jurisdiction of the country or state where the charge of bigamy is made.[27]

c. Cohabitation — (I) *In General.* Cohabitation under the second marriage is not requisite, but the offense of bigamy is created when the second marriage is completed.[28]

(II) *Under Edmunds-Tucker Act.* The fact of cohabitation, whether ostensible or secret, is, under the Edmunds-Tucker law, the gist of that clause of the act which deals with polygamy.[29]

4. Intent. A criminal intent is not essential to the crime of bigamy,[30] no other intent being necessary to support a conviction for bigamy than that which must be inferred from the fact of a party marrying a second time, with a knowledge that the first consort is still alive, or with no reasonable belief in his or her death.[31]

the most cruel and wicked deception. It is obvious that the breach and the scandal involved in such a proceeding will not be the less because the parties to the second marriage may be under some special incapacity to contract marriage. The deception will not be the less atrocious because the one party may have induced the other to go through a form of marriage known to be generally binding but inapplicable to their particular case. Reg. *v.* Allen, L. R. 1 C. C. 367, 12 Cox C. C. 193, 41 L. J. M. C. 97, 26 L. T. Rep. N. S. 664, 20 Wkly. Rep. 756. See also People *v.* Brown, 34 Mich. 339, 22 Am. Rep. 531, where it was argued that if the second marriage took place between parties who, if single, would be incapable of contracting marriage, defendant could not be said to have been married the second time at all, and Cooley, C. J., said that the court could not understand of what importance it could be "that there are two elements of illegality in the case instead of one, or why the party should be relieved from the consequences of violating one statute because the act of doing so was a violation of another also."

25. Reg. *v.* Allen, L. R. 1 C. C. 367, 12 Cox C. C. 193, 41 L. J. M. C. 97, 26 L. T. Rep. N. S. 664, 20 Wkly. Rep. 756 [*citing* Burt *v.* Burt, 29 L. J. P. & M. 133, 2 L. T. Rep. N. S. 439, 2 Sw. & Tr. 88, 8 Wkly. Rep. 552].

Added formalities not necessary where mutual consent alone constitutes matrimony. People *v.* Mendenhall, 119 Mich. 404, 78 N. W. 325, 75 Am. St. Rep. 408 [*citing* Bishop Statutory Crimes, § 592].

26. *Alabama.*— Brewer *v.* State, 59 Ala. 101; Beggs *v.* State, 55 Ala. 108.

Kentucky.— Johnson *v.* Com., 86 Ky. 122, 5 S. W. 365, 9 Am. St. Rep. 269.

New York.— People *v.* Mosher, 2 Park. Crim. (N. Y.) 195.

North Carolina.— State *v.* Barnett, 83 N. C. 615.

England.— 1 Hale P. C. 693 [*citing* Le Roy *v.* ———, Sid. 171]; 1 Hawkins P. C. c. 43, § 7, the latter authority, however, denying the propriety of the rule.

27. Reg. *v.* Topping, 7 Cox C. C. 103, Dears. 647, 2 Jur. N. S. 428, 25 L. J. M. C. 72, 4 Wkly. Rep. 482.

In many states the offense of cohabitation under a vicious marriage, contracted in another state, is punishable as bigamy in the state where such cohabitation continues. This offense, however, is not bigamy, and is treated elsewhere. See Lewdness.

28. *Alabama.*— Cox *v.* State, 117 Ala. 103, 23 So. 806, 67 Am. St. Rep. 166, 41 L. R. A. 760; Beggs *v.* State, 55 Ala. 108.

Arkansas.— Scoggins *v.* State, 32 Ark. 205.

Georgia.— Nelms *v.* State, 84 Ga. 466, 10 S. E. 1087, 20 Am. St. Rep. 377.

Kentucky.— Johnson *v.* Com., 86 Ky. 122, 5 S. W. 365, 9 Am. St. Rep. 269.

Missouri.— State *v.* Smiley, 98 Mo. 605, 12 S. W. 247.

North Carolina.— State *v.* Patterson, 24 N. C. 346, 38 Am. Dec. 699.

Pennsylvania.— Gise *v.* Com., 81 Pa. St. 428, 2 Wkly. Notes Cas. (Pa.) 589.

See 6 Cent. Dig. tit. "Bigamy," § 12.

29. U. S. *v.* Clark, 6 Utah 120, 21 Pac. 463; U. S. *v.* Peay, 5 Utah 263, 14 Pac. 342; U. S. *v.* Smith, 5 Utah 232, 14 Pac. 291, 5 Utah 273, 15 Pac. 1; U. S. *v.* Snow, 4 Utah 295, 9 Pac. 686, 4 Utah 313, 9 Pac. 697; Cannon *v.* U. S., 116 U. S. 55, 6 S. Ct. 278, 29 L. ed. 561 [*affirming* 4 Utah 122, 7 Pac. 369].

30. State *v.* Armington, 25 Minn. 29.

31. Dotson *v.* State, 62 Ala. 141, 34 Am. Rep. 2.

No intent is involved in bigamy, except the intent to do "the thing forbidden to be done by the statute." State *v.* Zichfeld, 23 Nev. 304, 46 Pac. 802, 62 Am. St. Rep. 800, 34 L. R. A. 784 [*overruling* State *v.* Gardner, 5 Nev. 377]. See also Jones *v.* State, 67 Ala. 84; Com. *v.* Mash, 48 Mass. 472; Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244 [*affirming* 1 Utah 226].

III. DEFENSES.

A. In General. The person accused may defend by showing the absence of one or more of the constituent elements of the offense.[32]

B. Ignorance of Law. Ignorance of the law is not a defense.[33]

C. Religious Belief. A belief that it is not wrong to have two or more wives at the same time is not a defense.[34]

IV. PROSECUTION.

A. Who May Make Complaint. It seems well established that, unless the statutes regard the first husband or wife as a competent witness against the other,[35] no complaint for bigamy may be made by either of them as the case may be.[36]

B. Limitations Upon. A statute of limitation begins to run upon the completion of the second marriage, or when the offense becomes known;[37] and the prosecution must be commenced within the statutory limit or it will be barred.[38]

C. Indictment, Information, or Complaint[39]**— 1. In General — a. Charging Offense.** The indictment, information, or complaint should, in general, allege every material element of the offense,[40] but it is sufficient if it charges the offense in the terms and language of the statute creating it,[41] unless the statute fails

Ignorance of fact, but not of law, may tend to show a lack of criminal intent. Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244 [*affirming* 1 Utah 226].

32. See *supra*, II, B, 1.

33. *Alabama.*— McConico *v.* State, 49 Ala. 6.

Massachusetts.—Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318; Com. *v.* Mash, 7 Metc. (Mass.) 472.

New York.— People *v.* Weed, 29 Hun (N. Y.) 628, 1 N. Y. Crim. 349 [*affirmed* in 96 N. Y. 625]; People *v.* Meyer, 8 N. Y. St. 256; Van Pelt's Case, 1 City Hall Rec. (N. Y.) 137.

North Carolina.— State *v.* Robbins, 28 N. C. 23, 44 Am. Dec. 64.

Texas.— Medrano *v.* State, 32 Tex. Crim. 214, 22 S. W. 684, 40 Am. St. Rep. 775; Watson *v.* State, 13 Tex. App. 76.

34. Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244 [*affirming* 1 Utah 226].

35. Competency of first husband or wife as witness see *infra*, IV, D.

36. People *v.* Turner, 116 Mich. 390, 74 N. W. 519; People *v.* Quanstrom, 93 Mich. 254, 53 N. W. 165, 17 L. R. A. 723.

Waiver of objection.— By pleading not guilty to a complaint made by the first spouse, defendant waives the objection. People *v.* Turner, 116 Mich. 390, 74 N. W. 519.

37. Dale *v.* State, 88 Ga. 552, 15 S. E. 287; Com. *v.* McNerny, 10 Phila. (Pa.) 206, 31 Leg. Int. (Pa.) 172.

38. Scoggins *v.* State, 32 Ark. 205; Dale *v.* State, 88 Ga. 552, 15 S. E. 287; Gise *v.* Com., 81 Pa. St. 428, 2 Wkly. Notes Cas. (Pa.) 589.

39. For forms of indictments in whole or in part see the following cases:

Alabama.— McConico *v.* State, 49 Ala. 6.

Arizona.— U. S. *v.* Tenney, (Ariz. 1885) 8 Pac. 295.

Arkansas.— Walls *v.* State, 32 Ark. 565; Scoggins *v.* State, 32 Ark. 205.

Georgia.— Kirk *v.* State, 65 Ga. 159; King *v.* State, 40 Ga. 244.

Illinois.— Prichard *v.* People, 149 Ill. 50, 36 N. E. 103; Tucker *v.* People, 122 Ill. 583, 13 N. E. 809.

Kansas.— State *v.* Hughes, 35 Kan. 626, 12 Pac. 28, 57 Am. Rep. 195.

Kentucky.— Faustre *v.* Com., 92 Ky. 34, 13 Ky. L. Rep. 347, 17 S. W. 189; Davis *v.* Com., 13 Bush (Ky.) 318.

Maryland.— Barber *v.* State, 50 Md. 161.

Massachusetts.— Com. *v.* McGrath, 140 Mass. 296, 6 N. E. 515.

Minnesota.— State *v.* Armington, 25 Minn. 29; State *v.* Johnson, 12 Minn. 476, 93 Am. Dec. 241.

Missouri.— State *v.* Jenkins, 139 Mo. 535, 41 S. W. 220.

New Hampshire.— State *v.* Clark, 54 N. H. 456.

New York.— People *v.* Chase, 27 Hun (N. Y.) 256; Hayes *v.* People, 5 Park. Crim. (N. Y.) 325.

North Carolina.— State *v.* Norman, 13 N. C. 222.

Texas.— May *v.* State, 4 Tex. App. 424.

40. Niece *v.* Territory, 9 Okla. 535, 60 Pac. 300.

41. *Arizona.*—U. S. *v.* Tenney, (Ariz. 1885) 8 Pac. 295, holding that where, in an indictment under the Edmunds act, the offense of polygamy is charged substantially in the language of the act, the fact that in the same count cohabitation is charged as following a polygamous marriage will not render the indictment bad.

Louisiana.— State *v.* Hayes, 105 La. 352, 29 So. 937.

Minnesota.— State *v.* Armington, 25 Minn. 29.

Missouri.— State *v.* Gonce, 79 Mo. 600.

definitively to describe all the essential elements of the offense.[42] In a jurisdiction where bigamy is a misdemeanor the offense must not be alleged to have been committed feloniously.[43]

b. Negativing Exceptions. It is not requisite to negative any exceptions, unless the exception is part of the description of the offense and in the enacting clause, or incorporated with it by words of reference.[44]

2. Particular Averments — a. Venue.[45] The venue should be laid in the county where the second marriage was celebrated,[46] unless the statutes allow a trial in the county where defendant is apprehended[47] or regard bigamous cohabitation as bigamy, in which case the venue may be laid in the county where such cohabitation takes place.[48] Where a statute permits defendant to be tried in the

Oklahoma.— Niece *v.* Territory, 9 Okla. 535, 60 Pac. 300.

Texas.— Esser *v.* State, (Tex. Crim. 1902) 66 S. W. 776; McAfee *v.* State, 38 Tex. Crim. 124, 41 S. W. 627.

Necessity of defining meaning of word used in statute.— In an indictment under U. S. Rev. Stat. § 5352, relating to bigamy and polygamy, it is sufficient to use the word "cohabit" as used in the statute without defining its meaning. U. S. *v.* Cozzens, 2 Ida. 452, 21 Pac. 409; U. S. *v.* Kuntze, 2 Ida. 446, 21 Pac. 407.

A special demurrer is, in California, the proper mode of objecting to an information that does not substantially conform to the requirements of the statute. Such an information would be good on general demurrer, and is not ground for a motion in arrest of judgment. People *v.* Feilen, 58 Cal. 218, 41 Am. Rep. 258.

42. Davis *v.* Com., 13 Bush (Ky.) 318 [*overruling* Com. *v.* Whaley, 6 Bush (Ky.) 266]; McAfee *v.* State, 38 Tex. Crim. 124, 41 S. W. 627.

The word "bigamy" is so universally understood that a description of the offense in a statute providing for the punishment of bigamy would not express more than the word itself. State *v.* Hayes, 105 La. 352, 29 So. 937.

43. State *v.* Darrah, 1 Houst. Crim. Cas. (Del.) 112.

44. *Iowa.*— State *v.* Williams, 20 Iowa 98.

Kentucky.— Com. *v.* Whaley, 6 Bush (Ky.) 266.

Louisiana.— State *v.* Barrow, 31 La. Ann. 691.

Maryland.— Barber *v.* State, 50 Md. 161.

Massachusetts.— Com. *v.* Jennings, 121 Mass. 47, 23 Am. Rep. 249.

Michigan.— Kopke *v.* People, 43 Mich. 41, 4 N. W. 551.

Minnesota.— State *v.* Johnson, 12 Minn. 476, 93 Am. Dec. 241.

Missouri.— State *v.* Jenkins, 139 Mo. 535, 41 S. W. 220.

New York.— Fleming *v.* People, 27 N. Y. 329 [*affirming* 5 Park. Crim. (N. Y.) 353].

North Carolina.— State *v.* Davis, 109 N. C. 780, 14 S. E. 55 [*citing* State *v.* Norman, 13 N. C. 222].

Ohio.— Stanglein *v.* State, 17 Ohio St. 453.

Rhode Island.— State *v.* Gallagher, 20 R. I. 266, 38 Atl. 655.

Vermont.— State *v.* Abbey, 29 Vt. 60, 67 Am. Dec. 754, where it is held that the exceptions contained in Vt. Comp. Stat. c. 108, § 5, although expressly referred to in a former section, need not be negatived. See also State *v.* Palmer, 18 Vt. 570.

See 6 Cent. Dig. tit. "Bigamy," § 23.

45. Amendment.— The indictment may be amended to show the county in which the offense took place (People *v.* Perriman, 72 Mich. 184, 40 N. W. 425), or to show that defendant is in custody in the county where the venue is laid (Reg. *v.* Smith, 1 F. & F. 36).

46. *Alabama.*—Beggs *v.* State, 55 Ala. 108.

Arkansas.— Walls *v.* State, 32 Ark. 565.

Missouri.— State *v.* Smiley, 98 Mo. 605, 12 S. W. 247. But see State *v.* Fitzgerald, 75 Mo. 571.

New York.— People *v.* Mosher, 2 Park. Crim. (N. Y.) 195.

Tennessee.—Finney *v.* State, 3 Head (Tenn.) 544.

Texas.— Brown *v.* State, (Tex. Crim. 1894) 27 S. W. 137.

United States.—U. S. *v.* Jernegan, 4 Cranch C. C. (U. S.) 1, 26 Fed. Cas. No. 15,477.

47. State *v.* Sweetsir, 53 Me. 438; State *v.* Griswold, 53 Mo. 181; Reg. *v.* Whiley, 2 Moody 186 [*reversing* 1 C. & K. 150, 47 E. C. L. 150]; Rex *v.* Fraser, 1 Moody 407; Rex *v.* Gordon, R. & R. 36.

In New York, under the statute providing that one charged with bigamy may be tried in any county where he is apprehended, the venue cannot be laid in a county where the unlawful marriage did not take place, or where he is not apprehended. Collins *v.* People, 1 Hun (N. Y.) 610, 4 Thomps. & C. (N. Y.) 77.

Statutes allowing trial in county of apprehension.— In some jurisdictions statutes permitting the venue to be laid in a county where accused is apprehended are regarded as not constitutional. Walls *v.* State, 32 Ark. 565; State *v.* Smiley, 98 Mo. 605, 12 S. W. 247. In Maine, however, the common-law right of trial and indictment in the county where the offense is committed is not infringed by Me. Rev. Stat. c. 124, § 4, providing that an indictment for polygamy may be found and tried in the county where the offender resides, or where he is apprehended, because the word "may" is permissive merely. State *v.* Sweetsir, 53 Me. 438.

48. State *v.* Hughes, 58 Iowa 165, 11 N. W. 706. See, generally, Lewdness.

county of his apprehension, the indictment should allege facts which show a taking within the jurisdictional limits.[49]

b. Description of Defendant. The defendant need not be described by color ;[50] and under a statute providing for the punishment of polygamy by a male person, the indictment need not specifically allege that defendant is a male person.[51]

c. Prior Marriage — (i) *In General.* The indictment should sufficiently allege that there was a prior marriage ;[52] but it is not necessary to allege the name of the person who solemnized the marriage[53] or as a general rule the time and place of the first marriage[54] or the name of the first spouse.[55]

49. State *v.* Griswold, 53 Mo. 181; Houser *v.* People, 46 Barb. (N. Y.) 33, the latter case holding that an omission of such averment is not cured by a statement of the jurisdictional fact in the caption of the indictment or in the record of conviction.

50. Kirk *v.* State, 65 Ga. 159.

51. U. S. *v.* Eldredge, 5 Utah 161, 13 Pac. 673, 5 Utah 189, 14 Pac. 42; U. S. *v.* Musser, 4 Utah 153, 7 Pac. 389; Cannon *v.* U. S., 116 U. S. 55, 6 S. Ct. 278, 29 L. ed. 561 [*affirming* 4 Utah 122, 7 Pac. 369].

52. Sauser *v.* People, 8 Hun (N. Y.) 302; State *v.* Davis, 109 N. C. 780, 14 S. E. 55, the latter case holding that the first marriage was sufficiently averred where it was alleged that defendant wilfully, unlawfully, and feloniously, being a married man, did marry a named person during the life of his first wife, then and there well knowing that the first wife was living, and he not having been at the time of his second marriage lawfully divorced from his first wife.

It need not be alleged that the marriage was lawful where it is alleged as a fact, such an averment implying that the marriage was lawful. State *v.* Hughes, 58 Iowa 165, 11 N. W. 706; Konke *v.* People, 43 Mich. 41, 4 N. W. 551; Hills *v.* State, 61 Nebr. 589, 85 N. W. 836. *Contra,* King *v.* State, 40 Ga. 244.

53. Hutchins *v.* State, 28 Ind. 34.

54. *California.*— People *v.* Giesea, 61 Cal. 53.

Florida.— Cathron *v.* State, 40 Fla. 468, 24 So. 496.

Indiana.— Hutchins *v.* State, 28 Ind. 34.

Iowa.— State *v.* Hughes, 58 Iowa 165, 11 N. W. 706.

Kansas.— State *v.* Hughes, 35 Kan. 626, 12 Pac. 28, 57 Am. Rep. 195.

Massachusetts.— Com. *v.* McGrath, 140 Mass. 296, 6 N. E. 515.

Michigan.— People *v.* Perriman, 72 Mich. 184, 40 N. W. 425.

Minnesota.— State *v.* Armington, 25 Minn. 29.

North Carolina.— State *v.* Bray, 35 N. C. 289.

Contra, Davis *v.* Com., 13 Bush (Ky.) 318; State *v.* La Bore, 26 Vt. 765, the latter case stating it to be a uniform rule of pleading applicable to an indictment that every traversable fact must be directly alleged with time and place, and that the first marriage in prosecutions for bigamy is always traversable.

See 6 Cent. Dig. tit. "Bigamy," § 26.

Where accused had at the time of the second marriage a wife living it is immaterial at what particular date the first marriage is alleged to have occurred. Faustre *v.* Com., 92 Ky. 34, 13 Ky. L. Rep. 347, 17 S. W. 189.

Where time and place of the marriage are set out the proof must correspond (Keneval *v.* State, (Tenn. 1901) 64 S. W. 897), but there is no variance if the marriage took place within the state where the indictment is found, even if the allegation as to place is incorrect (People *v.* Calder, 30 Mich. 85).

Amendment.—It is not erroneous to amend an information when the case is called to trial but before trial, by changing the name of the county of another state in which the prior marriage is averred to have taken place, even if no application for a continuance is made. People *v.* Perriman, 72 Mich. 184, 40 N. W. 425.

55. *Arkansas.*— Johnson *v.* State, 60 Ark. 308, 30 S. W. 31.

Indiana.— Hutchins *v.* State, 28 Ind. 34.

Minnesota.— State *v.* Armington, 25 Minn. 29.

New Hampshire.— State *v.* Kean, 10 N. H. 347, 34 Am. Dec. 162.

North Carolina.—State *v.* Melton, 120 N. C. 591, 26 S. E. 933; State *v.* Davis, 109 N. C. 780, 14 S. E. 55.

Tennessee.—Keneval *v.* State, (Tenn. 1901) 64 S. W. 897.

Contra, Davis *v.* Com., 13 Bush (Ky.) 318; McAfee *v.* State, 38 Tex. Crim. 124, 41 S. W. 627 [*overruling* Watson *v.* State, 13 Tex. App. 76].

See 6 Cent. Dig. tit. "Bigamy," § 27.

Where the name of the former spouse is stated the proof must correspond (Keneval *v.* State, (Tenn. 1901) 64 S. W. 897); but there is no variance where the indictment charges a marriage to Mary I., and the proof shows a marriage to Mary (Tucker *v.* People, 122 Ill. 583, 13 N. E. 809), where the names of the first wife as alleged and proved are *idem sonans* (Com. *v.* Warren, 143 Mass. 568, 10 N. E. 178), or in any case where the person can be identified (Com. *v.* Caponi, 155 Mass. 534, 30 N. E. 82; State *v.* Davis, 109 N. C. 780, 14 S. E. 55; Reg. *v.* Gooding, C. & M. 297, 41 E. C. L. 165).

A variance as to description may be cured, where defendant admits marriage with a person other than, and prior to, the one named in the indictment. State *v.* Clark, 54 N. H. 456.

Where the name is omitted but the fact

(II) *Existence of Former Spouse.* It should be stated positively that the first wife or husband was alive at the date of the second marriage,[56] unless it is alleged that a lawful marriage relation still exists.[57] It is unnecessary to allege that the former marriage was binding at the time of the second, if the fact of the first spouse being alive is alleged.[58]

d. With Force and Arms. It does not seem necessary to allege that the offense was committed with force and arms.[59]

e. Subsequent Marriage — (I) *In General.* The indictment must allege a second marriage,[60] and, both at common law and under statute, that the second marriage was unlawful.[61]

(II) *Time and Place of.* The time and place of the second marriage should be alleged,[62] the time being laid as of a date prior to the indictment.[63]

(III) *Description of Second Spouse.* Generally the second husband or wife must be so described as to be capable of identification, but where the name of the second husband or wife is alleged in a particular manner, and the proof shows a different name by which such a person can be identified the allegation is sufficient.[64] Under statutes, however, making it bigamy to marry "any other person" within a certain time after a divorce is obtained from a former spouse it must be alleged that the second wife or husband is "any other person" from the first one.[65]

f. Conclusion. The indictment should conclude *contra formam statuti*[66] and against the peace, etc.[67]

D. Competency of Witnesses — 1. At Common Law. On a trial for bigamy the true spouse cannot be a witness either for[68] or against[69] defendant, but the

that the name is unknown to the grand jurors is averred, evidence of the true name may be given at the trial, but the indictment is sufficient. Nelms *v.* State, 84 Ga. 466, 10 S. E. 1087, 20 Am. St. Rep. 377.

The indictment may be altered, before it is returned by the grand jury, to show the name of the lawful wife. State *v.* Hughes, 58 Iowa 165, 11 N. W. 706.

56. *Georgia.*— King *v.* State, 40 Ga. 244.

Illinois.— Prichard *v.* People, 149 Ill. 50, 36 N. E. 103.

Massachusetts.— Com. *v.* McGrath, 140 Mass. 296, 6 N. E. 515.

Oklahoma.— Niece *v.* Territory, 9 Okla. 535, 60 Pac. 300.

England.— Reg. *v.* Apley, 1 Cox C. C. 71.

57. State *v.* Hughes, 58 Iowa 165, 11 N. W. 706.

58. Hiler *v.* People, 156 Ill. 511, 41 N. E. 181, 47 Am. St. Rep. 221; State *v.* Norman, 13 N. C. 222; Murray *v.* Reg., 7 Q. B. 700, 1 Cox C. C. 202, 9 Jur. 596, 14 L. J. Q. B. 357, 53 E. C. L. 700.

59. State *v.* Kean, 10 N. H. 347, 34 Am. Dec. 162.

60. Watson's Petition, 19 R. I. 342, 33 Atl. 873.

61. Parker *v.* State, 77 Ala. 47, 54 Am. Rep. 43.

62. Cathron *v.* State, 40 Fla. 468, 24 So. 496.

63. Scoggins *v.* State, 32 Ark. 205.

64. State *v.* Williams, 20 Iowa 98; Robinson *v.* Com., 88 Ky. 386, 10 Ky. L. Rep. 972, 11 S. W. 210; State *v.* Armington, 25 Minn. 29; U. S. *v.* Miles, 2 Utah 19 [*reversed*, on other grounds, in 103 U. S. 304, 26 L. ed. 481].

Where the maiden name of the second wife and the name of a former husband from whom she has been divorced are used by her indifferently it is sufficient to allege the latter name. Robinson *v.* Com., 88 Ky. 386, 10 Ky. L. Rep. 972, 11 S. W. 210.

Where the second wife was described as a widow, but she was in fact a single woman, there was a fatal variance, even though such description was unnecessary. Rex *v.* Deeley, 4 C. & P. 579, 1 Moody 303, 19 E. C. L. 658.

65. Niece *v.* Territory, 9 Okla. 535, 60 Pac. 300.

66. See Damon's Case, 6 Me. 148.

67. State *v.* Kean, 10 N. H. 347, 34 Am. Dec. 162, holding that a slight varying from this form is immaterial. See also Damon's Case, 6 Me. 148.

68. Peat's Case, 2 Lewin 111; Reg. *v.* Madden, 14 U. C. Q. B. 588.

69. *Alabama.*— Williams *v.* State, 44 Ala. 24.

Delaware.— State *v.* Ryan, 1 Pennew. (Del.) 81, 39 Atl. 777.

Georgia.— Williams *v.* State, 67 Ga. 260.

Illinois.— Hiler *v.* People, 156 Ill. 511, 41 N. E. 181, 47 Am. St. Rep. 221.

Louisiana.— State *v.* McDavid, 15 La. Ann. 403.

Missouri.— State *v.* Ulrich, 110 Mo. 350, 19 S. W. 656.

England.— Peat's Case, 2 Lewin 111.

Canada.— Reg. *v.* Fontaine, 15 L. C. Jur. 141; Reg. *v.* Madden, 14 U. C. Q. B. 588.

Where defendant consents the testimony is admissible. State *v.* Ulrich, 110 Mo. 350, 19 S. W. 656.

The true spouse may contradict statements

bigamous consort may, for he or she is not legally the consort of defendant, although the ceremony of marriage may have passed between them,[70] but not until the prior marriage alleged in the indictment is proved.[71]

2. Under Statute. By statute, however, the lawful spouse may, in some jurisdictions, testify against defendant.[72]

E. Evidence — 1. Presumptions and Burden of Proof — a. Presumptions — (i) *Validity of Former Marriage.* The presumption is generally in favor of the validity of the prior marriage[73] when there is no evidence to the contrary.[74]

(ii) *Continuance of Life of Former Spouse.* Where the proof shows that a former spouse, abandoned by defendant, was living at a certain time before the bigamous marriage, it is presumed that such party was living at the date of the second marriage.[75] Where, however, there is no direct evidence as to the existence of the first spouse at the time of the second marriage, and the only evidence is that the first spouse was alive some years previously to the second mar-

made by defendant to the effect that such spouse stated to him or her that she or he was married at the time of marriage to defendant. State *v.* Ryan, 1 Pennew. (Del.) 81, 39 Atl. 777.

Competency of husband and wife to testify, the one against the other, in general, see Witnesses.

70. Reg. *v.* Madden, 14 U. C. Q. B. 588.

71. *Illinois.*— Lowery *v.* People, 172 Ill. 466, 50 N. E. 165, 64 Am. St. Rep. 50.

Pennsylvania.— Com. *v.* Wyman, 3 Brewst. (Pa.) 338.

Tennessee.—Finney *v.* State, 3 Head (Tenn.) 544.

United States.— Miles *v.* U. S., 103 U. S. 304, 26 L. ed. 481 [*reversing* 2 Utah 19].

England.— Reg. *v.* Ayley, 15 Cox C. C. 328.

The fact of the first marriage cannot be proved by the bigamous wife or husband, since he or she cannot be admitted to prove a fact to the jury which must be established or not controverted before such consort can testify at all, and he or she can only be a witness to the second marriage. Lowery *v.* People, 172 Ill. 466, 50 N. E. 165, 64 Am. St. Rep. 50 [*citing* Miles *v.* U. S., 103 U. S. 304, 26 L. ed. 481].

72. *Iowa.*— State *v.* Sloan, 55 Iowa 217, 7 N. W. 516.

Massachusetts.— Com. *v.* Lee, 143 Mass. 100, 9 N. E. 11.

Nebraska.— Hills *v.* State, 61 Nebr. 589, 85 N. W. 836.

North Carolina.— State *v.* Melton, 120 N. C. 591, 26 S. E. 933; State *v.* Patterson, 24 N. C. 346, 38 Am. Dec. 699.

Texas.— Dumas *v.* State, 14 Tex. App. 464, 46 Am. Rep. 241.

United States.— Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244 [*affirming* 1 Utah 226].

The testimony may be compelled under a statute permitting the lawful spouse to testify against her husband in cases where the one has committed a crime against the other. Dumas *v.* State, 14 Tex. App. 464, 46 Am. Rep. 241.

73. State *v.* Nadal, 69 Iowa 478, 29 N. W. 451; Com. *v.* Kenney, 120 Mass. 387; Gibson *v.* State, 38 Miss. 313; State *v.* Davis, 109 N. C. 780, 14 S. E. 55.

Where two successive marriages are charged to have taken place the presumption in favor of the legality of each is equal. Lowery *v.* People, 172 Ill. 466, 50 N. W. 165, 64 Am. St. Rep. 50.

Presumption one of fact not of law.— The fact that a man and woman have lived together for a long time, pass and introduce each other and live together as man and wife, and say they are married, may raise a presumption that the parties were in fact married, but the presumption is one of fact and not of law. State *v.* Cooper, 103 Mo. 266, 15 S. W. 327.

Presumption as to identity of marriage laws.— The laws of the state where the marriage was solemnized will not be presumed to be the same as the laws of the state in which the trial takes place. People *v.* Lambert, 5 Mich. 349, 72 Am. Dec. 49; People *v.* Chase, 28 Hun (N. Y.) 310. *Contra*, State *v.* Nadal, 69 Iowa 478, 29 N. W. 451.

Presumption of marriage arising from cohabitation does not obtain in criminal law. Green *v.* State, 21 Fla. 403, 50 Am. Rep. 670.

74. State *v.* Nadal, 69 Iowa 478, 29 N. W. 451.

Validity of foreign marriage not presumed. — Under a foreign law providing that to constitute a valid legal marriage it must be entered into as a civil contract before a civil magistrate, there is no presumption of a civil ceremony, from evidence showing that after a civil marriage the parties commonly had a religious marriage ceremony in addition, but that the celebration of a religious marriage without the civil marriage having been first performed was prohibited, and from evidence that defendant was married by a religious ceremony. Weinberg *v.* State, 25 Wis. 370.

Presumption of validity of a marriage under the laws where consummated is overcome by proof that the marriage was not under those laws. Canale *v.* People, 177 Ill. 219, 52 N. E. 310.

75. Parker *v.* State, 77 Ala. 47, 54 Am. Rep. 43; Com. *v.* Caponi, 155 Mass. 534, 30 N. E. 82; Gorman *v.* State, 23 Tex. 646.

riage, the presumption of continuance of life is neutralized by the presumption of the innocence of defendant.[76]

(III) *Continuance of Marriage Relation.* Where a marriage relation has once commenced it is presumed to continue.[77]

b. Burden of Proof. The prosecution must prove a valid first marriage contracted by defendant[78] and that the lawful spouse of defendant was living at the time the second marriage was contracted by him.[79] Where the defense is that the first spouse was at the time of his or her marriage to defendant incapacitated to marry, because he or she was at that time a party to a valid marriage then subsisting, that marriage must be proved by defendant.[80] The burden of proof also rests on him in all cases where he relies upon any statutory exception,[81] or to rebut any presumption of the existence of the former spouse at the time of the second marriage, where such presumption has been raised by the evidence of the prosecution.[82]

2. Admissibility — a. Admissions, Declarations, Conduct, and Reputation — (I) *In General.* As a general rule evidence of admissions, declarations, conduct, and reputation is admissible to show either marriage.[83]

(II) *Admissions and Declarations* — (A) *As to Prior Marriage.* Admissions, declarations, or confessions of defendant are held to be admissible as evidence of the prior marriage,[84] without the production of the record of such former

76. Squire *v.* State, 46 Ind. 459.

77. State *v.* Melton, 120 N. C. 591, 26 S. E. 933; Whalen *v.* State, 12 Ohio Cir. Ct. 584.

A lawful marriage followed by birth of children raises a *prima facie* presumption of matrimonial cohabitation. U. S. *v.* Clark, 5 Utah 226, 14 Pac. 288. So there is a presumption that a man lives and cohabits with his lawful wife. U. S. *v.* Smith, 5 Utah 232, 14 Pac. 291, 5 Utah 273, 15 Pac. 1.

78. Fornshill *v.* Murray, 1 Bland (Md.) 479, 18 Am. Dec. 344; Phelan's Case, 6 City Hall Rec. (N. Y.) 91; Coleman's Case, 6 City Hall Rec. (N. Y.) 3; Steers' Case, 2 City Hall Rec. (N. Y.) 111; State *v.* La Bore, 26 Vt. 765.

79. Parker *v.* State, 77 Ala. 47, 54 Am. Rep. 43.

80. Phelan's Case, 6 City Hall Rec. (N. Y.) 91.

81. Fleming *v.* People, 5 Park. Crim. (N. Y.) 353 [*affirmed* in 27 N. Y. 329].

Divorce.— Where defendant relies on a divorce as a justification of a second marriage, the burden of proving such divorce is upon him or her. Com. *v.* Boyer, 7 Allen (Mass.) 306.

82. Parker *v.* State, 77 Ala. 47, 54 Am. Rep. 43.

83. *Arkansas.*—Halbrook *v.* State, 34 Ark. 511, 36 Am. Rep. 17.

Kentucky.— Com. *v.* Jackson, 11 Bush (Ky.) 679, 21 Am. Rep. 225.

Minnesota.— State *v.* Armington, 25 Minn. 29. *Contra,* State *v.* Johnson, 12 Minn. 476, 93 Am. Dec. 241.

Missouri.— State *v.* Ulrich, 110 Mo. 350, 19 S. W. 656; State *v.* Gonce, 79 Mo. 600.

New York.— People *v.* Wentworth, 4 N. Y. Crim. 207.

South Carolina.— State *v.* Hilton, 3 Rich. (S. C.) 434, 45 Am. Dec. 783; State *v.* Britton, 4 McCord (S. C.) 256.

Texas.— Dumas *v.* State, 14 Tex. App. 464, 46 Am. Rep. 241.

Utah.— U. S. *v.* Harris, 5 Utah 436, 17 Pac. 75; U. S. *v.* Peay, 5 Utah 263, 14 Pac. 342; U. S. *v.* Miles, 2 Utah 19 [*reversed,* on other grounds, in 103 U. S. 304, 26 L. ed. 481].

Virginia.— Oneale *v.* Com., 17 Gratt. (Va.) 582.

Where a certified copy of the first marriage license is not available a public acknowledgment by defendant is, under Tenn. Code, § 5651, admissible as evidence of the first marriage. Such acknowledgment may be by confession or by conduct in the presence of others, and need not be made before a court or public tribunal. Crane *v.* State, 94 Tenn. 86, 28 S. W. 317.

Proof of polygamy.— Under the Edmunds act evidence that a woman to whom defendant has been legally married lives near him, bears his name, and is visited and partly supported by him is admissible to show cohabitation. U. S. *v.* Harris, 5 Utah 436, 17 Pac. 75.

84. *Alabama.*—Williams *v.* State, 54 Ala. 131, 25 Am. Rep. 665.

Indiana.— Squire *v.* State, 46 Ind. 459; State *v.* Seals, 16 Ind. 352.

Iowa.— State *v.* Sanders, 30 Iowa 582.

Minnesota.— State *v.* Plym, 43 Minn. 385, 45 N. W. 848.

Ohio.— Stanglein *v.* State, 17 Ohio St. 453; Wolverton *v.* State, 16 Ohio 173, 47 Am. Dec. 373.

Pennsylvania.— Com. *v.* Murtagh, 1 Ashm. (Pa.) 272; Com. *v.* Henning, 10 Phila. (Pa.) 209, 31 Leg. Int. (Pa.) 172.

Utah.— U. S. *v.* Simpson, 4 Utah 227, 7 Pac. 257; U. S. *v.* Miles, 2 Utah 19 [*reversed,* on other grounds, in 103 U. S. 304, 26 L. ed. 481].

Virginia.— Warner *v.* Com., 2 Va. Cas. 95.

marriage,[85] and although made before the second marriage;[86] but defendant's declarations made in his own favor with regard to the first marriage, where no part of the *res gestæ* or of any statement or conversation called out by the prosecution, are not admissible for the defense.[87]

(B) *As to Subsequent Marriage.* Admissions of a second or polygamous marriage are admissible to prove such marriage,[88] or to corroborate proof of the fact of such marriage.[89]

(III) *Conduct* — (A) *In General.* The conduct of defendant toward the women he married before the time stated in the indictment is admissible to show the relation which he bore to them during that time.[90]

(B) *Cohabitation.* Cohabitation with a woman as his wife is admissible as evidence of the first marriage,[91] or of a polygamous marriage.[92]

(IV) *Reputation.* General reputation in a community[93] of the existence of a marriage relation may be admitted as tending to prove such relation.[94]

b. Documentary Evidence — (I) *Divorce Proceedings.* A valid decree of divorce may be admitted to show the marriage,[95] and a petition for divorce filed by defendant against the first spouse is admissible to show a prior marriage[96] or that the former spouse was alive when the bigamous marriage was contracted.[97]

See 6 Cent. Dig. tit. "Bigamy," § 43.

Admissions relative to certificate of foreign marriage.— Where a paper purporting to be a certificate of marriage to defendant's first wife and to contain a record that a child by such wife had been circumcised was shown to defendant, who thereupon admitted that he had been wrong and said that he would procure a divorce, it was held that an English translation of the paper, with evidence as to the admissions, were admissible against him. Com. *v.* Henning, 10 Phila. (Pa.) 209, 31 Leg. Int. (Pa.) 172.

85. Parker *v.* State, 77 Ala. 47, 54 Am. Rep. 43; Williams *v.* State, 54 Ala. 131, 25 Am. Rep. 665.

86. Stanglein *v.* State, 17 Ohio St. 453.

87. State *v.* Hughes, 35 Kan. 626, 12 Pac. 28, 57 Am. Rep. 195.

Evidence of inquiries by defendant at the time of a second marriage to ascertain whether or not the former spouse was dead, and evidence of the receipt of a letter stating that such spouse was dead, is irrelevant and should be excluded. Rand *v.* State, (Ala. 1901) 29 So. 844.

88. U. S. *v.* Christofferson, (Ariz. 1886) 11 Pac. 480; U. S. *v.* Tenney, (Ariz. 1886) 11 Pac. 472.

89. State *v.* Nadal, 69 Iowa 478, 29 N. W. 451.

Statements of intention not to give up polygamy.— Where it was proved that defendant married two women named in the indictment, the first of whom was a lawful wife and not divorced from defendant, and that defendant lived with the polygamous wife, the prosecution was allowed to show language of defendant tending to prove his intention not to give up polygamy. U. S. *v.* Smith, 5 Utah 232, 14 Pac. 291, 5 Utah 273, 15 Pac. 1.

90. U. S. *v.* Peay, 5 Utah 263, 14 Pac. 342; U. S. *v.* Smith, 5 Utah 232, 14 Pac. 291, 5 Utah 273, 15 Pac. 1.

91. Warner *v.* Com., 2 Va. Cas. 95.

92. U. S. *v.* Christofferson, (Ariz. 1886) 11 Pac. 480; U. S. *v.* Tenney, (Ariz. 1886) 11 Pac. 472; U. S. *v.* Musser, 4 Utah 153, 7 Pac. 389; U. S. *v.* Cannon, 4 Utah 122, 7 Pac. 369.

93. **Where defendant came from a foreign country,** evidence is admissible of the general reputation in such country as to the fact of a marriage there. Com. *v.* Johnson, 10 Allen (Mass.) 196.

94. U. S. *v.* Tenney, (Ariz. 1885) 8 Pac. 295; U. S. *v.* Higgerson, 46 Fed. 750.

In California, under Pen. Code, § 1106, testimony tending to show that defendant and the woman alleged to be his first wife were generally reputed to be husband and wife in the community where they lived is admissible. People *v.* Hartman, 130 Cal. 487, 62 Pac. 823.

In Texas the fact of marriage cannot be proved by mere reputation under Pen. Code, art. 428, but reputation may be proved in connection with other facts, and therefore evidence of reputation is admissible. Patterson *v.* State, 17 Tex. App. 102.

Evidence of general repute of the guilt of defendant in the place where he resides is not admissible to establish that guilt, but the facts themselves must be shown. U. S. *v.* Langford, 2 Ida. 519, 21 Pac. 409.

95. Halbrook *v.* State, 34 Ark. 511, 36 Am. Rep. 17; State *v.* Goodrich, 14 W. Va. 834.

Where an appeal is pending and the defense is that the first marriage was illegal, a decree of divorce made in a suit for divorce by the first spouse against accused is not admissible. People *v.* Beevers, 99 Cal. 286, 33 Pac. 844.

The indorsements on a bill for divorce against a former spouse to show the date of its filing are not admissible. Eldridge *v.* State, 126 Ala. 63, 25 So. 580.

96. Adkisson *v.* State, 34 Tex. Crim. 296, 30 S. W. 357.

97. State *v.* Ashley, 37 Ark. 403.

(II) *Letters.* Letters written by defendant are admissible against him to show the relation that defendant bore to the first spouse,[98] after they have been properly identified by the person receiving them.[99]

(III) *Marriage License and Certificate.* The marriage license is admissible as corroborative evidence of the marriage.[1] So a certificate of marriage is admissible against defendant when made so by statute,[2] if properly authenticated under statutory requirements.[3]

(IV) *Marriage Records.* Record proof of a marriage is admissible[4] where such records are kept in accordance with statutory requirements.[5]

c. Weight and Sufficiency — (I) *Admissions, Declarations, and Reputation.* It has been said that the first marriage must be established by positive proof of the very fact of marriage,[6] as distinguished from a marriage that may be inferred from circumstances,[7] in the event of such proof being obtainable.[8] The authorities, however, are not in unison as to whether admissions, reputation, and cohabitation are respectively sufficient to establish such marriage,[9] but it seems

98. Tucker *v.* People, 122 Ill. 583, 13 N. E. 809; Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318.

99. Com. *v.* Caponi, 155 Mass. 534, 30 N. E. 82.

1. Tucker *v.* People, 122 Ill. 583, 13 N. E. 809; Squire *v.* State, 46 Ind. 459; Foster *v.* State, 31 Tex. Crim. 409, 20 S. W. 823.

In Alabama, under Code, §§ 2846, 2847, certified copies of a marriage license issued to defendant, and of a marriage certificate appended to such license, and referring to them for the names of the parties is admissible on a trial for bigamy. Eldridge *v.* State, 126 Ala. 63, 28 So. 580.

Bond for license.— On the part of the prosecution a bond given to obtain a marriage license in another state is not admissible (U. S. *v.* Lambert, 2 Cranch C. C. (U. S.) 137, 26 Fed. Cas. No. 15,554), but where such bond is identified by the person who officially executed the license it is admissible as corroborative evidence of the marriage (People *v.* Perriman, 72 Mich. 84, 40 N. W. 425).

2. Moore *v.* Com., 9 Leigh (Va.) 639.

3. People *v.* Crawford, 62 Hun (N. Y.) 160, 16 N. Y. Suppl. 575, 41 N. Y. St. 809 [*affirmed* in 133 N. Y. 535, 30 N. E. 1148, 44 N. Y. St. 929]; Patterson *v.* State, 17 Tex. App. 102. See also State *v.* Horn, 43 Vt. 20.

4. *Arkansas.*— Johnson *v.* State, 60 Ark. 308, 30 S. W. 31.

Connecticut.— State v. Dooris, 40 Conn. 145.

Illinois.— Tucker *v.* People, 122 Ill. 583, 13 N. E. 809.

Iowa.— State *v.* Matlock, 70 Iowa 229, 30 N. W. 495.

Kansas.— State *v.* White, 19 Kan. 445, 27 Am. Rep. 137.

Kentucky.— Faustre *v.* Com., 92 Ky. 34, 13 Ky. L. Rep. 347, 17 S. W. 189.

Tennessee.— Rice *v.* State, 7 Humphr. (Tenn.) 14.

5. State *v.* Dooris, 40 Conn. 145; Tucker *v.* People, 117 Ill. 88, 7 N. E. 51; Faustre *v.* Com., 92 Ky. 34, 13 Ky. L. Rep. 347, 17 S. W. 189; People *v.* Perriman, 72 Mich. 184, 40 N. W. 425.

The records are not conclusive but are subject to impeachment. Rice *v.* State, 7 Humphr. (Tenn.) 14.

In Missouri the record books of marriages, and certified copies thereof, are, under Mo. Rev. Stat. § 3140, evidence of marriage in cases of bigamy. State *v.* Edmiston, 160 Mo. 500, 61 S. W. 193.

6. State *v.* Johnson, 12 Minn. 476, 93 Am. Dec. 241; State *v.* Cooper, 103 Mo. 266, 15 S. W. 327 [*distinguishing* Dyer *v.* Brannock, 66 Mo. 391, 27 Am. Rep. 359; Cargile *v.* Wood, 63 Mo. 501].

7. State *v.* Hodgskins, 19 Me. 155, 36 Am. Dec. 742; People *v.* Whigham, 1 Wheel. Crim. (N. Y.) 115.

8. State *v.* La Bore, 26 Vt. 765.

Where the first marriage was celebrated abroad, not only a marriage in fact must be shown, but a marriage valid by the foreign law. People *v.* Lambert, 5 Mich. 349, 72 Am. Dec. 49. See also Oneale *v.* Com., 17 Gratt. (Va.) 582.

9. Defendant's admissions are not sufficient (State *v.* Johnson, 12 Minn. 476, 93 Am. Dec. 241; State *v.* Cooper, 103 Mo. 266, 15 S. W. 327 [*distinguishing* Dyer *v.* Brannock, 66 Mo. 391, 27 Am. Rep. 359; Cargile *v.* Wood, 63 Mo. 501]; People *v.* Edwards, 25 N. Y. Suppl. 480; Coleman's Case, 6 City Hall Rec. (N. Y.) 3; State *v.* Whaley, 10 S. C. 500), unless coupled with proof of continued cohabitation (State *v.* Hughes, 35 Kan. 626, 12 Pac. 28, 57 Am. Rep. 195; State *v.* Britton, 4 McCord (S. C.) 256; Crane *v.* State, 94 Tenn. 86, 28 S. W. 317; U. S. *v.* Harris, 5 Utah 621, 19 Pac. 197; U. S. *v.* Smith, 5 Utah 232, 14 Pac. 291, 5 Utah 273, 15 Pac. 1; Warner *v.* Com., 2 Va. Cas. 95).

Defendant's admissions are sufficient (Williams *v.* State, 54 Ala. 131, 25 Am. Rep. 665; Com. *v.* Murtagh, 1 Ashm. (Pa.) 272; Com. *v.* Wyman, 3 Brewst. (Pa.) 338), at any rate, if the marriage was in another state or country (Cayford's Case, 7 Me. 57; State *v.* Wylde, 110 N. C. 500, 15 S. E. 5), and without proof of cohabitation or other corroborating circumstances (State *v.* Wylde, 110 N. C. 500, 15 S. E. 5).

Mere cohabitation is not sufficient (Case *v.* Case, 17 Cal. 598; State *v.* Johnson, 12 Minn.

generally held that a combination of such evidence is sufficient.[10] In like manner an admission of the fact of the second marriage has been held sufficient proof thereof.[11]

(II) *Testimony of Eye-Witnesses.* The testimony of an eye-witness present at the time of marriage is sufficient proof of the fact of marriage.[12]

F. Trial — 1. Challenge to Jury. It is ground for a challenge for cause that a juror is or has been living in polygamy.[13]

2. Questions of Law and Fact. Whether there was a valid first marriage,[14] whether there was a subsisting marriage at the time of the first one alleged in the indictment,[15] whether at the time of the second marriage defendant had an honest and reasonable belief in the death of the first spouse,[16] any question as to the identity of the first spouse,[17] and the value of any admission by defendant[18] must be determined by the jury.

3. Instructions. The court may call the attention of the jury to the character and nature of the offense,[19] and should duly define marriage in accordance with the statute relative to bigamy,[20] should state what constitutes a marriage valid in law,[21] should state the law respecting the fact of a divorce from the former

476, 93 Am. Dec. 241; State *v.* Cooper, 103 Mo. 266, 15 S. W. 327 [*distinguishing* Dyer *v.* Brannock, 66 Mo. 391, 27 Am. Rep. 359; Cargile *v.* Wood, 63 Mo. 501]), but precludes only the necessity for documentary or record evidence of marriage (Case *v.* Case, 17 Cal. 598).

Reputation of marriage is not sufficient. Adkisson *v.* State, 34 Tex. Crim. 296, 30 S. W. 357.

10. *Kansas.*— State *v.* Hughes, 35 Kan. 626, 12 Pac. 28, 57 Am. Rep. 195.

South Carolina.— State *v.* Britton, 4 McCord (S. C.) 256.

Tennessee.— Crane *v.* State, 94 Tenn. 86, 28 S. W. 317.

Utah.— U. S. *v.* Harris, 5 Utah 621, 19 Pac. 197; U. S. *v.* Smith, 5 Utah 232, 14 Pac. 291, 5 Utah 273, 15 Pac. 1.

Virginia.— Bird *v.* Com., 21 Gratt. (Va.) 800; Warner *v.* Com., 2 Va. Cas. 95.

United States.— U. S. *v.* Higgerson, 46 Fed. 750.

11. State *v.* Goodrich, 14 W. Va. 834.

12. *Iowa.*— State *v.* Nadal, 69 Iowa 478, 29 N. W. 451; State *v.* Hughes, 58 Iowa 165, 11 N. W. 706; State *v.* Williams, 20 Iowa 98.

Maine.— State *v.* Hodgskins, 19 Me. 155, 36 Am. Dec. 742.

Massachusetts.— Com. *v.* Hayden, 163 Mass. 45? 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318.

Michigan.— People *v.* Perriman, 72 Mich. 184, 40 N. W. 425.

New York.— People *v.* Whigham, 1 Wheel. Crim. (N. Y.) 115; Coleman's Case, 6 City Hall Rec. (N. Y.) 3; Steer's Case, 2 City Hall Rec. (N. Y.) 111.

Tennessee.— Bashaw *v.* State, 1 Yerg. (Tenn.) 176.

England.— Reg. *v.* Flaherty, 2 C. & K. 782, 61 E. C. L. 782; Reg. *v.* Simpson, 15 Cox C. C. 323; Reg. *v.* Savage, 13 Cox C. C. 178; Reg. *v.* Mainwaring, 7 Cox C. C. 192, Dears. & B. 132, 2 Jur. N. S. 1236, 26 L. J. M. C. 10, 5 Wkly. Rep. 119; Reg. *v.* Wilson, 3 F. & F. 119; Rex *v.* Allison, R. & R. 81.

Canada.— Reg. *v.* Brierly, 14 Ont. 525.

See 6 Cent. Dig. tit. "Bigamy," § 50.

13. Miles *v.* U. S., 103 U. S. 304, 26 L. ed. 481 [*reversing*, on other grounds, 2 Utah 19]; Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244 [*affirming* 1 Utah 226].

14. Faustre *v.* Com., 92 Ky. 34, 13 Ky. L. Rep. 347, 17 S. W. 189.

15. People *v.* Crawford, 62 Hun (N. Y.) 160, 16 N. Y. Suppl. 575, 41 N. Y. St. 809 [*affirmed* in 133 N. Y. 535, 30 N. E. 1148, 44 N. Y. St. 929].

16. Reg. *v.* Turner, 9 Cox C. C. 145.

17. Com. *v.* Caponi, 155 Mass. 534, 30 N. E. 82; Com. *v.* Warren, 143 Mass. 568, 10 N. E. 178.

18. Com. *v.* Wyman, 3 Brewst. (Pa.) 338; U. S. *v.* Miles, 2 Utah 19 [*reversed*, on other grounds, in 103 U. S. 304, 26 L. ed. 481].

19. Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244 [*affirming* 1 Utah 226].

An instruction that criminal intent is presumed when a statute has made it criminal to do any act under certain circumstances, and defendant voluntarily does it, is not erroneous on the ground that it is misleading, and an incorrect exposition of the doctrine of criminal intent as applicable to bigamy (State *v.* Cain, 106 La. 708, 31 So. 300), and it is proper to refuse an instruction that bigamy results from a joint operation of act and intent, and that if defendant believed that he or she was not married to one person at the time of a marriage to another there should be an acquittal (People *v.* Hartman, 130 Cal. 487, 62 Pac. 823).

20. State *v.* Cooper, 103 Mo. 266, 15 S. W. 327.

21. Taylor *v.* State, 52 Miss. 84.

An issue as to the authority of a witness claiming to have solemnized a marriage between defendant and one of the women whom he is alleged to have married is not important and need not be submitted to the jury. Hearne *v.* State, (Tex. Crim. 1900) 58 S. W. 1009. See also State *v.* Davis, 109 N. C. 780, 14 S. E. 55.

spouse being a good defense[22] and the law respecting the guilt of defendant, if in fact he knew the first spouse was alive at the time of the second marriage,[23] and should define the proper care that should have been used by defendant to ascertain the fact of the life or death of the former spouse.[24] In like manner it is necessary to instruct the jury as to the degree of evidence that is requisite to shift the burden of proof from the prosecution to defendant[25] and to determine whether the facts proved are sufficient to warrant a finding that defendant was in fact married.[26] No instruction, however, is good which invades the province of the jury.[27]

G. New Trial. A new trial may be granted where there is newly discovered evidence as to the identity of defendant with the person alleged to have been previously married.[28]

V. PUNISHMENT.

Bigamy was at one time a capital offense, punishable by death,[29] imprisonment and burning in the hand,[30] or by transportation.[31] At the present day, however, the punishment is generally imprisonment or fine for a term and amount varying in different jurisdictions.[32]

BIJOU. A little work of ornament, valuable for its workmanship or by its material.[1]

BILAN. A BALANCE-SHEET,[2] *q. v.*

BILATERAL CONTRACT. A contract in which both the contracting parties are bound to fulfil obligations reciprocally toward each other.[3]

BILBOES. A punishment at sea answering to the stocks on land.[4]

BILGED. That state of the ship, in which water is freely admitted through holes and breaches made in the planks of the bottom, occasioned by injuries, whether the ship's timbers are broken or not.[5]

BILINE. Collateral.[6]

22. Squire *v.* State, 46 Ind. 459.

Instructing that there can be no dissolution of the first marriage by consent is proper. McConico *v.* State, 49 Ala. 6.

23. Crane *v.* State, 94 Tenn. 86, 28 S. W. 317; Reg. *v.* Briggs, 7 Cox C. C. 175, Dears. & B. 98, 2 Jur. N. S. 1195, 26 L. J. M. C. 7, 5 Wkly. Rep. 53.

24. Watson *v.* State, 13 Tex. App. 76.

25. State *v.* Cooper, 103 Mo. 266, 15 S. W. 327. See also Mitchell *v.* State, 63 Ga. 222.

26. Com. *v.* Jackson, 11 Bush (Ky.) 679, 21 Am. Rep. 225; Taylor *v.* State, 52 Miss. 84.

27. Hull *v.* State, 7 Tex. App. 593, holding that where a person was shown to have been living at a certain time there is a presumption of his continued existence for seven years thereafter.

28. Dale *v.* State, 88 Ga. 552, 15 S. E. 287.

29. Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244 [*affirming* 1 Utah 226].

30. U. S. *v.* Lambert, 2 Cranch C. C. (U. S.) 137, 26 Fed. Cas. No. 15,554. But burning in the hand might be dispensed with. U. S. *v.* Jennegen, 4 Cranch C. C. (U. S.) 118, 26 Fed. Cas. No. 15,474.

A peer of the realm was not subject to capital punishment, imprisonment, or burning in the hand. Kingston's Case, 1 Leach 148.

31. Murray *v.* Reg., 7 Q. B. 700, 1 Cox C. C. 202, 9 Jur. 596, 14 L. J. Q. B. 357, 53 E. C. L. 700.

32. **Where there is more than one indictment, and a conviction upon each,** punishment in respect to more than one conviction cannot be inflicted, because the offense is single and entire between the earliest and latest days in any one of the indictments. *Ex p.* Snow, 120 U. S. 274, 7 S. Ct. 556, 30 L. ed. 658.

In Louisiana, under Rev. Stat. § 800, par. 1, providing that one convicted of bigamy shall pay a fine and be imprisoned not exceeding two years, and under a later statute providing that any person convicted of bigamy shall be imprisoned for not more than five years or less than one year, and repealing all laws in conflict with such statute, it is held that the only effect of the later statute is to substitute the penalty provided thereby for that provided by the earlier statute. State *v.* Cain, 106 La. 708, 31 So. 300.

Disqualification for office as an effect of conviction see State *v.* Smiley, 98 Mo. 605, 12 S. W. 247; Cannon *v.* U. S., 116 U. S. 55, 6 S. Ct. 278, 29 L. ed. 561 [*affirming* 4 Utah 122, 7 Pac. 369].

1. Com. *v.* Stephens, 14 Pick. (Mass.) 370, 373 [*citing* Dict. de l'Acad.].

2. Black L. Dict.

The name given in Louisiana to a book in which merchants keep account of their assets and liabilities. Century Dict. And see Dauphin *v.* Soulie, 3 Mart. N. S. (La.) 446.

3. Wharton L. Lex.

4. Wharton L. Lex.

5. Peele *v.* Merchants' Ins. Co., 3 Mason (U. S.) 27, 39, 19 Fed. Cas. No. 10,905.

6. Burrill L. Dict.

BILINGUIS. One who uses two tongues or languages; a jury, part Englishmen and part foreigners, which used to try a foreigner for crime.[7]

BILL. A formal statement or declaration of a thing in writing; a formal written statement of complaint to a court of justice;[8] a written accusation of one or more persons of a crime or misdemeanor lawfully presented to a grand jury;[9] a common engagement for money, given by one man to another;[10] a note for the absolute payment of money, under seal;[11] an order drawn by one person on another to pay a third a certain sum of money, absolutely and at all events;[12] a form or draft of a law, presented to a legislature, but not yet enacted, or before it is enacted; a proposed or rejected law;[13] an account of charges and particulars of indebtedness by the creditor to his debtor.[14] (Bill: Broker, see BROKERS. De Bene Esse, see DEPOSITIONS. For Foreclosure, see MORTGAGES. Obligatory, see BILL OBLIGATORY. Of — Adventure, see BILL OF ADVENTURE; Attainder, see BILL OF ATTAINDER; Costs, see COSTS; Credit, see BILL OF CREDIT; Debt, see BILL OF DEBT; Discovery, see DISCOVERY; Entry, see BILL OF ENTRY; Exchange, see COMMERCIAL PAPER; Exceptions, see BILL OF EXCEPTIONS; Health, see SHIPPING; Indictment, see BILL OF INDICTMENT; Interpleader, see INTERPLEADER; Lading, see BILL OF LADING; Middlesex, see BILL OF MIDDLESEX; Mortality, see BILL OF MORTALITY; Pains and Penalties, see BILL OF PAINS AND PENALTIES; Particulars, see PLEADING; Peace, see BILL OF PEACE; Privilege, see BILL OF PRIVILEGE; Review, see EQUITY; Revivor, see ABATEMENT AND REVIVAL; EQUITY; Rights, see CONSTITUTIONAL LAW; Sale,[15] see SALES; Store, see BILL OF STORE; Sufferance, see BILL OF SUFFERANCE; In Chancery or Equity, see EQUITY. Posting, see MUNICIPAL CORPORATIONS. Quia Timet, see QUIETING TITLE. Single, see BILL SINGLE. To — Enforce or Impeach Decree, see EQUITY; JUDGMENTS; Marshal Assets or Securities, see MARSHALING ASSETS AND SECURITIES; Perpetuate Testimony, see DEPOSITIONS; Remove Cloud, see QUIETING TITLE.)

BILLA. An old form of BILL,[16] *q. v.*

BILLA EXONERATIONIS. In old English law, a BILL OF LADING,[17] *q. v.*

BILLA VERA. A true bill.[18] (Billa Vera: Indorsement on Indictment, see INDICTMENTS AND INFORMATIONS.)

BILLIARDS. A game played by two or more persons, on a rectangular table of special construction, with ivory balls, which the players, by means of cues, cause to strike against each other.[19] (Billiards: Prohibition of Gaming by, see GAMING. Regulation of by Cities, see MUNICIPAL CORPORATIONS.)

7. Wharton L. Lex.

8. Burrill L. Dict.

9. Bouvier L. Dict. *sub voc.* Indictment [*quoted* in Arapahoe County *v.* Graham, 4 Colo. 201, 202].

Distinguished from "indictment."— "Strictly speaking, an indictment is not so called until it has been found 'a true bill' by the grand jury. Before that it is termed a bill only." 1 Archbold Crim. Pl. 230, note 1 [*quoted* in Arapahoe County *v.* Graham, 4 Colo. 201, 202]. See also State *v.* Mathews, 2 Brev. (S. C.) 82, 83.

10. Jacob L. Dict. [*quoted* in Tracy *v.* Talmage, 18 Barb. (N. Y.) 456, 462, 9 How. Pr. (N. Y.) 530, 12 N. Y. Leg. Obs. 302].

11. Owen *v.* Owen, 3 Humphr. (Tenn.) 325, 326.

12. Munger *v.* Shannon, 61 N. Y. 251, 255 [*quoted* in Schmittler *v.* Simon, 101 N. Y. 554, 560, 5 N. E. 452, 54 Am. Rep. 737]. See also Westminster Bank *v.* Wheaton, 4 R. I. 30, 33.

13. Webster Dict. [*quoted* in May *v.* Rice, 91 Ind. 546, 549]. See also Sedgwick County *v.* Bailey, 13 Kan. 600, 608; Southwark Bank *v.* Com., 26 Pa. St. 446, 450; and, generally, STATUTES.

Distinguished from "act" see 1 Cyc. 632, note 34.

14. State *v.* Murphy, 46 La. Ann. 415, 419, 14 So. 920. See, generally, ACCOUNTS AND ACCOUNTING.

15. **Admissibility to show title on claim to attached property** see ATTACHMENT, 4 Cyc. 745, note 91.

As affecting right to attachment see ATTACHMENT, 4 Cyc. 453, note 88.

As preference on assignment for benefit of creditors see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 170, note 88.

Necessity for acknowledging before admissible as evidence see ACKNOWLEDGMENTS, 1 Cyc. 537, note 34.

Purchasing animals without see ANIMALS, 2 Cyc. 436.

16. Burrill L. Dict.

Used in the expression "concluding with a *petit judic. de billa, et quod billa cassetur*," — prayer for judgment of the bill and that the bill be quashed, in Rosiere *v.* Sawkins, 12 Mod. 399.

17. Burrill L. Dict.

Used in Rex *v.* Stocker, 5 Mod. 137.

18. Wharton L. Lex.

19. Century Dict.

BILL OBLIGATORY. A bond, without a condition; sometimes called a single-bill, and differing from a promissory note, in nothing but the seal which is affixed to it.[20] (See, generally, BILL OF DEBT; BONDS.)

BILL OF ADVENTURE. A writing signed by a merchant, stating that the property in goods shipped in his name belongs to another, to the aventure or chance of which the person so named is to stand, with a covenant from the merchant to account to him for the produce.[21] (See, generally, ADVENTURE.)

BILL OF ATTAINDER. A legislative act, which inflicts punishment without trial.[22] (See, generally, CONSTITUTIONAL LAW; CRIMINAL LAW.)

BILL OF CREDIT. A paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money;[23] a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society.[24] (Bill of Credit: Prohibition Against Emission by State, see STATES.)

BILL OF DEBT. A writing by a merchant acknowledging himself in debt to another, in such a sum to be paid at such a day, and subscribed at a day and place certain; a BILL OBLIGATORY,[25] *q. v.*

BILL OF ENTRY. An account of the goods entered at the custom-house, both inwards and outwards.[26]

BILL OF EXCEPTIONS. A formal statement in writing, of exceptions taken to the opinion, decision or direction of a judge, delivered during the trial of a cause; setting forth the proceedings on the trial, the opinion or decision given, and the exception taken thereto, and sealed by the judge in testimony of its correctness;[27] a written statement of objections to the decision of the court upon points of law, made by a party to the cause, and properly certified by the judge or court making the decision;[28] a statement of the questions made and exceptions taken to the ruling of the court or judge on the trial of the cause before a jury;[29] a statement of the objections made by the parties to the ruling of the court;[30] a written statement, settled and signed by the judge, of what the ruling was, the facts in view of which it was made, and the protest of counsel.[31] (See, generally, APPEAL AND ERROR.)

BILL OF INDICTMENT. A written accusation of one or more persons, of some crime or misdemeanor, preferred to, and presented upon oath by, a grand jury.[32]

20. Tilghman, C. J., in dissenting opinion in Farmers,' etc., Bank *v.* Greiner, 2 Serg. & R. (Pa.) 114, 115.

21. Wharton L. Lex.

22. Cummings *v.* Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; *In re* Yung Sing Hee, 13 Sawy. (U. S.) 482, 36 Fed. 437, 439. See also *Ex p.* Law, 35 Ga. 285, 298 (where it is said that bills of attainder are "statutes enacted by the supreme legislative power, *pro re nata,* inflicting capital penalties, *ex post facto,* without conviction in the regular course of administration through courts of justice"); Doe *v.* Buford, 1 Dana (Ky.) 481, 509 (where they are defined as "acts of the supreme power, pronouncing capital sentences, where the legislature assumes judicial magistracy"); dissenting opinion of Mason, J., in Green *v.* Shumway, 39 N. Y. 418, 431.

The term is generic and comprehends a BILL OF PAINS AND PENALTIES, *q. v.* Doe *v.* Buford, 1 Dana (Ky.) 481, 509; Drehman *v.* Stifle, 8 Wall. (U. S.) 595, 19 L. ed. 508; *Ex p.* Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; *In re* Yung Sing Hee, 13 Sawy. (U. S.) 482, 36 Fed. 437, 439 [*citing* Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 138, 3 L. ed. 162]. See also Anderson *v.* Baker, 23 Md. 531, 623 [*citing* Story Const. § 1344], where bills of attainder are said to be "such special Acts of Legislation, as inflict capital punishments (or pains or penalties,) upon persons supposed to be guilty of high offences, without any conviction in the ordinary course of judicial proceedings."

23. Briscoe *v.* Kentucky Com. Bank, 11 Pet. (U. S.) 257, 314, 9 L. ed. 709 [*quoted* in Baily *v.* Milner, 35 Ga. 330, 333].

24. Craig *v.* Missouri, 4 Pet. (U. S.) 410, 432, 7 L. ed. 903 [*quoted* in Lucas *v.* San Francisco, 7 Cal. 463, 477].

25. Comyns Dig. tit. Merchant, (F 2).

26. Wharton L. Lex.

27. Burrill L. Dict. [*quoted* in Galvin *v.* State, 56 Ind. 51, 56; Everman *v.* Hyman, (Ind. App. 1891) 28 N. E. 1022, 1023]; 2 Works Pr. § 1075 [*quoted* in Bowen *v.* State, 108 Ind. 411, 414, 9 N. E. 378].

28. Huddleston *v.* State, 7 Baxt. (Tenn.) 55, 56. See also St. Croix Lumber Co. *v.* Pennington, 2 Dak. 467, 470, 11 N. W. 497.

29. Berly *v.* Taylor, 5 Hill (N. Y.) 577, 579.

30. Sacket *v.* McCord, 23 Ala. 851, 854 [*quoting* Bouvier L. Dict.].

31. People *v.* Torres, 38 Cal. 141, 142.

32. Burrill L. Dict.

BILL OF LADING. 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;[33] a similar acknowledgment made by a carrier by land.[34] (See, generally, CARRIERS; SHIPPING.)

BILL OF MIDDLESEX. A form of civil process, peculiar to the court of king's bench, by which personal actions in that court were formerly commenced.[35]

BILL OF MORTALITY. A written statement or account of the number of deaths which have occurred in a certain district during a given time.[36]

BILL OF PAINS AND PENALTIES. An act of the supreme power, pronouncing less than capital punishments, where the legislature assumes judicial magistracy.[37] (See, generally, BILL OF ATTAINDER; CONSTITUTIONAL LAW; CRIMINAL LAW.)

BILL OF PEACE. A bill brought by a person to establish and perpetuate a right which he claims, and which from its nature may be controverted by different persons, at different times, and by different actions, or where separate attempts have been made to overthrow the same right, and justice requires that the party should be quieted in his right.[38] (See, generally, EQUITY; INJUNCTIONS; QUIETING TITLE.)

BILL OF PRIVILEGE. The form of process formerly employed in proceeding against attorneys and officers of courts.[39]

BILL OF STORE. A kind of license, granted by the English custom-house to merchants, to carry such stores and provisions as are necessary for their voyage free of duty.[40]

BILL OF SUFFERANCE. A license granted to a merchant to suffer him to trade from one English port to another, without paying custom.[41]

BILL SINGLE. A written engagement under seal, for the payment of money, either on demand, or at a future day.[42] (See, generally, BONDS.)

BILLS RECEIVABLE. Promissory notes, bills of exchange, bonds, and other evidences or securities, which a merchant or trader holds, and which are payable to him; the assets of a business man or of an estate.[43]

BINDERS. The secondary or inside wrappers of a cigar, which hold together the loose material which constitutes the filling.[44]

BINDING OUT. Obligating as an apprentice.[45] (See, generally, APPRENTICES.)

BINDING OVER. The act of requiring a person to enter into a recognizance or furnish bail to appear for trial, to keep the peace, or to attend as a witness.[46] (See, generally, BAIL; BREACH OF THE PEACE; WITNESSES.)

BIPARTITE. Of two parts; divided in two.[47]

33. McMillan *v.* Michigan, etc., R. Co., 16 Mich. 79, 113, 93 Am. Dec. 208 [*citing* Abbott Shipp. 322]; The Bark Delaware *v.* Oregon Iron Co., 14 Wall. (U. S.) 579, 600, 20 L. ed. 779 [*citing* Abbott Shipp. 323]; The Tongoy, 55 Fed. 329, 331.

Other definitions are: "The contract of the master of a vessel, to deliver the property to the person to whom the consignor or shipper shall order the delivery." Merchants', etc., Bank *v.* Hewitt, 3 Iowa 93, 103, 66 Am. Dec. 49.

"The written evidence of a contract, for the carriage and delivery of goods sent by sea, for a certain freight." Covill *v.* Hill, 4 Den. (N. Y.) 323, 330; Mason *v.* Lickbarrow, 1 H. Bl. 357, 359.

"The written evidence of the contract between the owner of the goods and the master or owner of the vessel for the carriage and delivery of the goods at a certain freight, when sent by sea or other public waters." Creery *v.* Holly, 14 Wend. (N. Y.) 26, 28.

34. Bouvier L. Dict.

35. Burrill L. Dict.

It was abolished by 2 Wm. IV, c. 39. Wharton L. Lex.

36. Burrill L. Dict.

37. Doe *v.* Buford, 1 Dana (Ky.) 481, 509. See also Drehman *v.* Stifle, 8 Wall. (U. S.) 595, 19 L. ed. 508; *In re* Yung Sing Hee, 13 Sawy. (U. S.) 482, 36 Fed. 437, 439.

38. Ritchie *v.* Dorland, 6 Cal. 33, 37.

39. Burrill L. Dict.

40. Burrill L. Dict.

41. Wharton L. Lex.

42. Burrill L. Dict.

43. State *v.* Robinson, 57 Md. 486, 501 [*citing* Abbott L. Dict.; Bouvier L. Dict.].

Bills payable are the debts and are made to mean the converse of bills receivable. State *v.* Robinson, 57 Md. 486, 501 [*citing* Abbott L. Dict.].

44. Falk *v.* Robertson, 137 U. S. 225, 11 S. Ct. 41, 34 L. ed. 645.

45. Anderson L. Dict.

46. Black L. Dict.

47. Burrill L. Dict.

BIRDS. See Animals.

BIRTH. The act of being wholly brought into the world.[48] (Birth: As Determining Alienage, see Aliens. Causing Premature, see Abortion. Concealment of, see Concealment of Birth or Death. Of Issue as Determining Rights — Of Inheritance, see Descent and Distribution; Under Wills, see Wills. Report of, see Health.)

BIS. Twice.[49]

BIS DAT QUI CITO DAT. A maxim meaning "He gives twice who gives quickly."[50]

BISHOP. The chief of the clergy in his diocese or jurisdiction.[51] (See, generally, Religious Societies.)

BISHOPRIC. The diocese of a bishop, or the circuit in which he has jurisdiction; the office of a bishop.[52]

BISHOP'S COURT. An ecclesiastical court held in the cathedral of each diocese, the judge whereof is the bishop's chancellor, who judges by the civil canon law.[53]

BITCH. A female dog, wolf or fox; an opprobrious name for a woman, especially a lewd woman;[54] a wench; a hussy.[55] (See, generally, Libel and Slander.)

BITTERS. See Intoxicating Liquors.

BLACK ACRE or WHITE ACRE. Fictitious names applied to pieces of land, and used as examples in the old books.[56]

BLACK CAP. A part of the judicial full dress, worn by the judges on occasions of especial state.[57]

BLACKLEG. A person who gets his living by frequenting racecourses and places where games of chance are played; getting the best odds and giving the least he can; but not necessarily cheating.[58]

BLACK-LIST. Any list of persons who are for any reason deemed objectionable by the makers or users of the list.[59] (Black-List: Conspiracy in Circulating, see Conspiracy. Injunction Against Circulating, see Injunctions. Liability For Damages From, see Conspiracy; Libel and Slander;[60] Master and Servant.)

BLACKMAIL.[61] A certain rent of money, coin, or other thing paid to persons upon or near the borders, being men of influence, and allied with certain robbers and brigands, to be protected from their devastation;[62] the wrongful exaction of money;[63] extortion — the exaction of money, either for the performance of a duty, the prevention of an injury, or the exercise of an influence;[64] the extortion of money from a person by threats of accusation, or exposure, or opposition in the public prints.[65] (See, generally, Conspiracy; Threats.)

BLACK RENTS. Rents reserved in work, grain, provisions, or baser money,

48. Bouvier L. Dict.
49. Burrill L. Dict.
50. Morgan Leg. Max.
51. Wharton L. Lex.
52. Burrill L. Dict.
53. Wharton L. Lex.
54. Webster Unabr. Dict. [*quoted* in State *v.* Harwell, 129 N. C. 550, 553, 40 S. E. 48].
55. Bailey *v.* Bailey, 94 Iowa 598, 63 N. W. 341.
56. Burrill L. Dict.
57. Wharton L. Lex., where it is said: "It is a vulgar error that the head dress worn by the judge in pronouncing sentence of death is assumed as an emblem of the sentence."
58. Pollock, C. B., in Barnett *v.* Allen, 1 F. & F. 125, 3 H. & N. 376, 379, 3 H. & N. 488, 27 L. J. Exch. 412.
59. Century Dict.
60. **Liability of merchants protective association for circulating black-list** see Associations, 4 Cyc. 312, note 65.
61. "**From Maille,** French, signifying a small coin." Edsall *v.* Brooks, 2 Rob. (N. Y.) 29, 34, 17 Abb. Pr. (N. Y.) 221, 26 How. Pr. (N. Y.) 426 [*citing* Wharton L. Lex.].
62. Edsall *v.* Brooks, 2 Rob. (N. Y.) 29, 34, 3 Rob. (N. Y.) 284, 17 Abb. Pr. (N. Y.) 221, 26 How. Pr. (N. Y.) 426 [*citing* Wharton L. Lex.]. See also Life Assoc. of America *v.* Boogher, 3 Mo. App. 173, 175.
63. Mitchell *v.* Sharon, 51 Fed. 424, 425.
64. Edsall *v.* Brooks, 2 Rob. (N. Y.) 29, 34, 3 Rob. (N. Y.) 284, 17 Abb. Pr. (N. Y.) 221, 26 How. Pr. (N. Y.) 426; Mitchell *v.* Sharon, 51 Fed. 424, 425. See also Life Assoc. of America *v.* Boogher, 3 Mo. App. 173, 175.
65. Hess *v.* Sparks, 44 Kan. 465, 467, 24 Pac. 979, 21 Am. St. Rep. 300. See also Mitchell *v.* Sharon, 51 Fed. 424, 425.

in contradistinction to those which were reserved in white money or silver, which were termed white rents.[66]

BLACKSMITH SHOP. See NUISANCES.

BLANC SEING. 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 seing*, giving him power to file it with what he may think proper, according to agreement.[67]

BLANK. Lacking something essential to completeness; unrestricted;[68] a part of an instrument not written upon or filled up.[69] (Blank: Acceptance in, see COMMERCIAL PAPER. Bar, see BLANK BAR. Clauses in Accident Insurance Policy, see ACCIDENT INSURANCE. Execution of Instrument[70] In — Generally, see BONDS;[71] COMMERCIAL PAPER; DEEDS; As Negligence, see ALTERATIONS OF INSTRUMENTS. Filling[72] — As Alteration of Instrument, see ALTERATIONS OF INSTRUMENTS; As Forgery, see FORGERY. Indorsement of Instrument In, see BONDS; COMMERCIAL PAPER. In Process, see PROCESS.)

BLANK BAR. The old name of a plea in bar in an action of trespass, put in to oblige plaintiff to assign the certain place where the trespass was committed.[73]

BLANKET BALLOT. See ELECTIONS.

BLANKET POLICY. See INSURANCE.

BLANKET VEIN. See MINES AND MINERALS.

66. Burrill L. Dict.

67. Musson *v.* U. S. Bank, 6 Mart. (La.) 707, 718.

68. Anderson L. Dict.

69. Burrill L. Dict.

70. **Blank in certificate of acknowledgment** see ACKNOWLEDGMENTS, 1 Cyc. 596, note 74; 1 Cyc. 597, note 76.

71. **Blank in appeal-bond** see APPEAL AND ERROR, 2 Cyc. 839, note 35; 2 Cyc. 899, note 17.

Blank in attachment bond see ATTACHMENT, 4 Cyc. 531, note 75.

72. **Filling blank after signing award** see ARBITRATION AND AWARD, 3 Cyc. 627, note 86.

73. Burrill L. Dict.

BLASPHEMY

Edited by James H. Malone

CROSS-REFERENCES

For Matters Relating to:

Breach of the Peace, see Breach of the Peace.

Disorderly Conduct, see Disorderly Conduct.

Profanity, see Profanity.

For General Matters Relating to Criminal Law and Criminal Procedure, see Criminal Law.

I. Definition.

Blasphemy, according to the most concise definition, is the malicious reviling of God or religion.[1] It consists in reviling God or in wantonly or maliciously

1. People *v.* Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335.

Etymologically, to blaspheme is to speak ill or evil of. Anderson L. Dict.; Century Dict.

Blackstone, according to his usual mode of describing each offense in the shortest possible terms in which it may be made intelligible, speaks of it as "blasphemy against the Almighty, by denying his being or providence." 4 Bl. Comm. 59 [*cited* in Com. *v.* Kneeland, 20 Pick. (Mass.) 206].

Bouvier thus defines blasphemy, "To attribute to God that which is contrary to his nature, and does not belong to him, and to deny what does. A false reflection uttered with a malicious design of reviling God." Bouvier L. Dict. (Rawles ed.).

Profanity distinguished.— Blasphemy and profanity agree in expressing the irreverent use of words, but the former is the stronger and the latter the wider. Profanity is language irreverent toward God or holy things, covering especially all oaths that, literally interpreted, treat lightly the attributes or acts of God. Blasphemy is generally more direct, intentional, and defiant in its impiety, and is directed toward the most sacred things in religion. Century Dict. It is in this latter sense that blasphemy is considered here. Yet the expression is also sometimes used as characterizing terms employed by one who is charged with profanity or profane cursing, in the sense of profanity as above interpreted, as where the charge is of profanely and blasphemously swearing in a public place, it being obvious that the offense charged is not a direct attempt to revile the Deity, or the christian religion, and that the contempt into which these sacred things are brought by the use of the language employed is only an incident to the actual offense. See, for example, Young *v.* State, 10 Lea (Tenn.) 165; State *v.* Steele, 3 Heisk. (Tenn.) 135; State *v.* Graham, 3 Sneed (Tenn.) 133. In Com. *v.* Spratt, 14 Phila. (Pa.) 365, 37 Leg. Int. (Pa.) 234, the indictment charged that the defendant "did wickedly, wilfully, premeditatedly and despitefully, utter and with a loud voice, and in the presence and hearing of divers of the citizens of the commonwealth of Pennsylvania aforesaid, did publicly and proclaim of and concerning Jesus Christ, the false, scandalous, malicious, wicked, and blasphemous words following, to wit, Jesus Christ, to the great dishonor and contempt of Almighty God," and this was said to be an indictment for blasphemy.

attacking the christian religion individually, for the purpose of exposing its doctrines to contempt and ridicule.[2]

But in this state there were two statutes, one against profanity, the other against blasphemy, the former providing a punishment for persons over a certain age who should "profanely curse or swear by the name of God, Jesus Christ, or the Holy Ghost," and the latter providing a punishment for any person who should "wilfully, premeditatedly and despitefully, blaspheme or speak wilfully and profanely of Almighty God, Jesus Christ, the Holy Ghost, or the Scriptures of Truth," and in Com. *v.* Linn, 158 Pa. St. 22, 27 Atl. 843, 22 L. R. A. 353, upon an indictment charging that the defendant "did, on the public streets and highways, profanely curse and swear and take the name of God in vain, to the evil example and to the common nuisance," etc., it was held that the indictment could not be sustained under the statute against blasphemy, because it did not charge that offense; that it could not be sustained under the statute against profanity, because it was not framed under that act, and that it could not be sustained as charging a common-law offense, because it did not charge the facts and circumstances necessary to make the swearing a common nuisance. These kindred offenses, however, seem to be punishable upon the same general principle. "The general doctrine seems to be, that, under one name or another, every oral or written representation whereby men's reverence for the Power which controls them and the world is ruthlessly shocked or impaired, is indictable at the common law." 2 Bishop New Crim. L. § 76 note. See also *infra*, note 5; BREACH OF THE PEACE; DISORDERLY CONDUCT; PROFANITY.

Relaxation of oaths.—In Reg. *v.* Hetherington, 5 Jur. 529, it was argued that to cast disgrace upon the old testament was not blasphemy, because it was no longer necessary that witnesses should be sworn on the bible or new testament, but the court held that this proposition could not be acceded to without saying that there was no mode by which religion holds society together but by the administration of oaths, which is not so.

2. *Ex p.* Delaney, 43 Cal. 478; State *v.* Chandler, 2 Harr. (Del.) 553; Com. *v.* Kneeland, 20 Pick. (Mass.) 206.

Illustrations of blasphemous language.—"Jesus Christ was a bastard, and his mother must be a whore." People *v.* Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335, where it was held that these words import wantonness and a wicked and malicious disposition in their utterance, and that after conviction it will be intended that the words were so uttered, and were not uttered in a serious discussion upon any controverted point in religion.

"Christ is a whoremaster, and religion is a cheat, and profession a cloak, . . . fear neither God, Devil, nor man: . . . Christ is a bastard, and damn all Gods of the Quakers," etc. Rex *v.* Tayler, 3 Keb. 607, Vent. 293.

"The virgin Mary was a whore and Jesus Christ was a bastard." State *v.* Chandler, 2 Harr. (Del.) 553.

A publication stating Jesus Christ to be an impostor and a murderer in principle. Rex *v.* Waddington, 1 B. & C. 26, 8 E. C. L. 12, in which case it seems the court dealt particularly with the question whether the offense was punishable as a temporal one, but before the verdict was pronounced one of the jurors asked whether a work which denied the divinity of Christ was a libel, and the court answered that the work speaking of Jesus Christ in the language used in the publication in question was a libel, christianity being a part of the law of the land. But see Rex *v.* Bradlaugh, 15 Cox C. C. 217, *infra*, notes 9, 10.

Discourses on the miracles of Christ in which defendant maintained that they were not to be taken in a literal sense but that the whole religion of the life of Christ in the new testament was an allegorical one. Rex *v.* Woolston, Fitzg. 64, 2 Str. 834. And in Cowan *v.* Milbourn, L. R. 2 Exch. 230, 36 L. J. Exch. 124, 16 L. T. Rep. N. S. 290, 15 Wkly. Rep. 750, it was held that a discourse maintaining that the character of Christ is defective and his teachings misleading and that the bible is no more inspired than any other book is blasphemy, and that therefore a contract to let rooms could be avoided by defendant who is sued thereon, where the purpose of plaintiff was to use the rooms for the purpose of delivering such lectures.

In Nayler's Case, 5 How. St. Tr. 802, in 1656, defendant was convicted of horrid blasphemy, in a proceeding in the house of commons, for having assumed the gesture, words, honor, worship, and miracles of the blessed Saviour, and the names and incommunicable attributes and titles of the blessed Saviour. A part of his offense consisted in having ridden through a town, his company spreading their garments and singing "Holy, Holy" before him, and going bareheaded before his horse.

A publication which questions or casts disgrace upon the old testament. Reg. *v.* Hetherington, 5 Jur. 529.

A statement, that "the Holy Scriptures were a mere fable: that they were a contradiction, and that although they contained a number of good things, yet they contained a great many lies." Updegraph *v.* Com., 11 Serg. & R. (Pa.) 394. And in Reg. *v.* Petcherini, 7 Cox C. C. 79, the defendant was convicted upon an indictment charging him with having contemptuously and blasphemously burned and destroyed a certain authorized version of the holy scriptures, it appearing that the only fact submitted to the jury was whether any copy of the holy scriptures or any bible of the authorized version was burned, the court holding that any conduct tending to bring christianity or the christian religion into disrespect or to expose it to hatred and contempt is an offense both

II. NATURE AND ELEMENTS.

A. Written or Oral. The writing, printing, and publishing of blasphemous language will constitute blasphemous libel.[3] But while the libel may be technically a distinct offense from blasphemy committed by spoken words, and may be differently charged, yet the same act may be, and often does, constitute both offenses, and the charge of blasphemy may be predicated of words written as well as of words spoken orally.[4]

B. Temporal Common-Law Offense — 1. In General. Blasphemy is not punished in temporal courts as an offense against God, but is treated independently of religious establishment as affecting the essential interests of civil society only; as imperiling the good order of society, or as tending directly to a breach of the

against God and the common law of the land.

Publication of Paine's Age of Reason. Williams' Case, 26 How. St. Tr. 654, 655. In an opinion to the society whose object was the preservation of the morals of the people, before the institution of these proceedings, Mr. Bayley said: "We do not meddle about any differences in opinion, and . . . we interpose only where the very root of Christianity itself is struck at, as it plainly is, by this allegorical scheme. The New Testament, and the whole relation of the life and miracles of Christ being denied." He seems to have been speaking with reference to whether the publication in question was punishable as a temporal offense, but on the trial Lord Kenyon, in summing up virtually left the jury no discretion but to convict, which they did instantly, and he considered christianity a part of the law of the land in the sense that to asperse it was to violate the law. So in Eaton's Case, 31 How. St. Tr. 927, which also was a prosecution for the publication of Paine's Age of Reason, similar to the case last mentioned with respect to the trial and the attitude of the court upon the questions involved. But see *infra*, notes 9, 10.

Somewhat apart from the English cases above cited are Reg. *v.* Bradlaugh, 15 Cox C. C. 217, and Reg. *v.* Ramsay, 1 Cab. & El. 126, 15 Cox C. C. 231, 48 L. T. Rep. N. S. 733 (*infra*, notes 9, 10), in which the alleged libel consisted of the publication in a paper called the Freethinker, of these words: "The God whom Christians love and adore is depicted in the Bible with a character more bloodthirsty than a Bengal tiger or a Bashi-Bazouk. He is credited with all the vices and scarcely any of the virtues of a painted savage. Wanton cruelty and heartless barbarity are his essential characteristics. If any despot at the present time tried to emulate, at the expense of his subjects, the misdeeds of Jehovah, the great majority of Christian men would denounce his conduct in terms of indignation." Coleridge, C. J., left the question of intent to the jury. Referring to the last case, Mr. Bishop says: "Therefore, with us, while probably the English case just cited would be followed, the older ones can be received only in a sort of general way, not as being in all particulars applicable here and now. For example, it is not probable that generally in our courts a conviction could be obtained against a publisher of Paine's 'Age of Reason.' And as we have no established form of religion, libels on particular formalities of worship might not be indictable here to the extent to which they formerly would have been and perhaps would be now in England, if directed against the formalities of the English Church." 2 Bishop New Crim. L. p. 46 note.

3. Blasphemous libel.— Rex *v.* Carlile, 3 B. & Ald. 167, 5 E. C. L. 104; Rex *v.* Carlile, 3 B. & Ald. 161, 5 E. C. L. 101; Rex *v.* Waddington, 1 B. & C. 26, 8 E. C. L. 12; Reg. *v.* Bradlaugh, 15 Cox C. C. 217; Eaton's Case, 31 How. St. Tr. 927; Williams' Case, 26 How. St. Tr. 654.

A correct account of proceedings in court cannot be published if such account contains matter of a scandalous, a blasphemous, or an immoral tendency; and it is a ground for a criminal information. See Rex *v.* Carlile, 3 B. & Ald. 167, 5 E. C. L. 104, and opinion of Mr. Bayley in Williams' Case, 26 How. St. Tr. 654.

Separate publications by several sales of copies.— Every copy of a libel sold by a defendant is a separate publication, and subjects him to a distinct prosecution. Rex *v.* Carlile, 1 Chit. 451, 18 E. C. L. 248.

Application of general exculpatory statute. — The provision in Lord Campbell's Libel Act [6 & 7 Vict. c. 96, § 7], "If on the trial of any indictment for the publication of a libel, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person, or by his authority, it shall be competent for such defendant to prove that such publication was made without his authority, consent, or knowledge, and that it did not arise from want of due care and caution on his part," being quite general in its terms, was held to apply to a prosecution for the publication of a blasphemous libel. Reg. *v.* Bradlaugh, 15 Cox C. C. 217.

4. *Ex p.* Delaney, 43 Cal. 478; State *v.* Chandler, 2 Harr. (Del.) 553 (where it was said that a written publication of blasphemous words would undoubtedly be considered as an aggravation of the offense); Com. *v.* Kneeland, 20 Pick. (Mass.) 206; People *v.* Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335.

peace. In this sense it was punishable as a common-law offense,[5] though it has been the subject of statute both in England and in this country.[6]

2. Christianity As Part of Law of Land. The cases generally approve the statement, in connection with the offense under consideration, that christianity, the prevailing religion of the country, is parcel of the law.[7] This must be taken, however, in connection with what has been said as to the nature of the offense as

5. State *v.* Chandler, 2 Harr. (Del.) 553; People *v.* Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Updegraph *v.* Com., 11 Serg. & R. (Pa.) 394; Rex *v.* Carlile, 3 B. & Ald. 161, 5 E. C. L. 101; Rex *v.* Waddington, 1 B. & C. 26, 8 E. C. L. 12; Shore *v.* Wilson, 9 Cl. & F. 355, 8 Eng. Reprint 450; Rex *v.* Woolston, Fitzg. 64, 2 Str. 834; Williams' Case, 26 How. St. Tr. 654; Reg. *v.* Hetherington, 5 Jur. 529; Rex *v.* Tayler, 3 Keb. 607, Vent. 293; Atty.-Gen. *v.* Pearson, 3 Meriv. 353, 17 Rev. Rep. 100. See also Goree *v.* State, 71 Ala. 7; *Ex p.* Delaney, 43 Cal. 478; Rex *v.* Curl, 2 Str. 788.

Misdemeanor.— Blasphemy was a misdemeanor at common law. Rex *v.* Carlile, 3 B. & Ald. 161, 5 E. C. L. 101; Rex *v.* Tayler, 3 Keb. 607, Vent. 293.

Ecclesiastical jurisdiction distinguished.— The ecclesiastical tribunals assumed jurisdiction of all offenses purely against God and the holy scriptures, *pro salute animæ*, without reference to the mere effect of such offenses on the peace of society, which the common law never did. See Caudrey's Case, 5 Coke 1; Rex *v.* Curl, 2 Str. 788. Indictments for maliciously blaspheming God or the founder of the christian religion were sustained because such blasphemy tended to subvert peace and good order which it was bound to protect, but no indictment for a mere sin against God as a common-law offense was sustained where this object of its care was not affected. While the ecclesiastical courts punished blasphemy as an offense against God, their punishments superseded the necessity for any procedure at common law for a mere temporal offense, but when the ecclesiastical courts had jurisdiction of the offense against God, the common law had jurisdiction of the temporal offense. But the common-law judges, by yielding up that jurisdiction to the ecclesiastical courts and refusing to reverse or revise their decisions when incidentally or collaterally presented in a common-law court, did no more intend by that to acknowledge the laws of holy church as common law than they intended to acknowledge admiralty law as common law when they gave faith and credit to an admiralty decision. State *v.* Chandler, 2 Harr. (Del.) 553.

6. Resort to common law when not defined in statute.— Where, as a part of the general statute for the punishment of crimes and misdemeanors, it was provided that if any person should be guilty of the crime of blasphemy, he should, upon conviction, be punished in a certain manner, it was held that as the statute did not define blasphemy, the court should go to the common law for the legal definition of the crime. State *v.* Chandler, 2 Harr. (Del.) 553.

Cumulative statute.—In New Jersey it was held that the Crimes Act in that state [N. J. Gen. Stat. (1895), p. 1061, § 66] prohibiting blasphemy did not abrogate the common law, and that therefore a blasphemer might be indicted under either law. State *v.* Rosenstrauch, 5 N. J. L. J. 186. In England it was held that 9 & 10 Wm. III was to give security to the government by rendering men who entertained opinions hostile to the established religion incapable of holding office, the only penalty imposed being the exclusion from office, and that penalty being incurred by any manifestation of the dangerous opinion without proof of the intention either to induce others to be of that opinion or in any manner to disturb persons of a different persuasion, and that the common-law offense of blasphemy remained. Rex *v.* Carlile, 3 B. & Ald. 161, 5 E. C. L. 101; Rex *v.* Woolston, Fitzg. 64, 2 Str. 834; Atty.-Gen. *v.* Pearson, 3 Meriv. 353, 17 Rev. Rep. 100. So 53 Geo. III, which removed the penalties imposed by 9 & 10 Wm. III on persons denying the Trinity and extending to such persons the benefits conferred upon all other protestant dissenters by 1 W. & M., did not alter the common law as to blasphemous libel. Rex *v.* Waddington, 1 B. & C. 26, 8 E. C. L. 12. See also Atty.-Gen. *v.* Pearson, 3 Meriv. 353, 17 Rev. Rep. 100.

7. People *v.* Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Updegraph *v.* Com., 11 Serg. & R. (Pa.) 394; Rex *v.* Waddington, 1 B. & C. 26, 28, 8 E. C. L. 12 (where, upon holding a publication a blasphemous libel at common law and that the statute which made other penalties was merely cumulative, Best, J., said that "the legislature has never altered this law, nor can it ever do so whilst the Christian religion is considered to be the basis of that law"); Lord Hale in Rex *v.* Tayler, 3 Keb. 607, Vent. 293. In a speech in Chamberlain of London *v.* Evans [*cited* in State *v.* Chandler, 2 Harr. (Del.) 553, 556, and Updegraph *v.* Com., 11 Serg. & R. (Pa.) 394, 401] Lord Mansfield is reported to have said: "The true principles of natural religion are part of the common law; the essential principles of revealed religion are part of the common law; so that a person vilifying, subverting or ridiculing them may be prosecuted at common law."

Other religions.—"A person may, without being liable to prosecution for it, attack Judaism, or Mahomedanism, or even any sect of the Christian Religion, (save the established religion of the country); and the only reason why the latter is in a different situation from the others is, because it is the form established by law, and is therefore a part of the constitution of the country. In like manner, and for the same reason, any

a temporal one,[8] and, it is apprehended, means, not that the violation of religious precepts is to be punished as a temporal offense, but that notice is to be taken of the prevailing religion of the country for the purpose of punishing such attacks as tend to destroy the peace of society.[9]

C. Intent — 1. In General. The rule is, that the utterance or publication must be with an impious purpose to derogate from the divine majesty of the Deity, or purposely to hold up the christian religion to contempt or ridicule.[10]

general attack on Christianity is the subject of criminal prosecution, because Christianity is the established religion of the country." Alderson, B., in Gathercole's Case, 2 Lewin 237, 254. The same principle as to the right to attack other religions, as judaism and mohammedanism, is recognized in State *v.* Chandler, 2 Harr. (Del.) 553, and in People *v.* Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335. The reason is stated "that the case assumes that we are a christian people, and the morality of the country is deeply ingrafted upon christianity."

8. See *supra*, note 5.

9. State *v.* Chandler, 2 Harr. (Del.) 553 (where it is said that the people of the state have a full and perfect constitutional right to change their religion as often as they see fit, and whatever religion they thus prefer the offense of blasphemy would be committed by publicly reviling it, upon the principle that the religion of the choice of the people must thus be protected, in order to protect the peace and welfare of society); Zeisweiss *v.* James, 63 Pa. St. 465, 3 Am. Rep. 558 (where Sharswood, J., said, *obiter*, referring to the constitutional guaranty of religious freedom, that it was in entire consistency to hold that even if christianity is no part of the law of the land, it is the popular religion of the country, an insult to which would be indictable as directly tending to destroy the public peace).

Admission of divine origin and truth. — In Vidal *v.* Philadelphia, 2 How. (U. S.) 127, 11 L. ed. 205, it was said that christianity, though a part of the common law of the state, is only so in the qualified sense that "its divine origin and truth are admitted," and for that reason it could not be openly and maliciously reviled to the annoyance of the christian people of the state, etc. Cooley pertinently doubts if the punishment of blasphemy is based necessarily upon an admission of the divine origin or truth of the christian religion, or is incapable of being otherwise justified. Cooley Const. Lim. (3d ed.) p. 472. And in Reg. *v.* Bradlaugh, 15 Cox C. C. 217, 225, Coleridge, C. J., referring to the view that any attack upon the fundamental principles of the christian religion and any discussion hostile to the inspiration or perfect purity of the Hebrew scriptures was against the law of the land, refused to assent thereto, and said: "It is founded, as it seems to me, upon misunderstood expressions in the judgments of great judges in former times, who have said, no doubt, that, inasmuch as Christianity is in a sense part of the law of the land, and as Christianity adopts and assumes the truth, in some sense or other, of inspiration, and in some sense or other assumes the purity of the Hebrew Scriptures, anything which assails the truth of Christianity, or asperses the purity of the Hebrew Scriptures, however respectfully, is a breach of the law. I fail to see the consequence from the premises, because you may attack anything that is part of the law of the land, in respectful terms, without committing a crime or a misdemeanour, otherwise no alteration in any part of the law could ever be advocated by anybody. Monarchy is part of the law of the land; primogeniture is part of the law of the land; the laws of marriage are part of the law of the land; and deliberate and respectful discussion upon the first principles of government, upon the principles of the law of inheritance, upon the principles which should govern the union of the sexes, on that principle, so far as I can see, would be an indictable libel. The consequence appears to me so extreme and untenable as to show that the premises must be wrong."

10. State *v.* Chandler, 2 Harr. (Del.) 553; Cooley Const. Lim. (3d ed.) p. 474.

Question for jury. — The question of intent is one for the jury. Reg. *v.* Ramsay, 1 Cab. & El. 126, 15 Cox C. C. 231, 48 L. T. Rep. N. S. 733; Reg. *v.* Bradlaugh, 15 Cox C. C. 217, in both of which cases Lord Coleridge adopts the rule from Starkie on Libel (4th ed.) 599, that "a wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or wilful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt."

By statute the offense is sometimes defined as the "wilful" use of certain language. See Updegraph *v.* Com., 11 Serg. & R. (Pa.) 394, and the statute therein referred to. And in Com. *v.* Kneeland, 20 Pick. (Mass.) 206, the word "wilfully" was held to mean not merely "voluntarily" but with a bad purpose, and in the blasphemy statute was construed to mean an intended design to disparage the Supreme Being and to destroy the veneration due to him.

Statutory charge — Common-law elements. — Notwithstanding the indictment is founded on a statute which merely prescribes a punishment for the offense of "blasphemy," the court will go to the common law for the definition of this offense, and whether expressly laid in the indictment, or whether the indictment follows the words of the statute, malice or intent is traversable as an essential

2. Respectful Discussion — Religious Freedom. At an early date it was intimated that blasphemy did not embrace disputes between learned men upon controverted points.[11] But in more modern times the doctrine is recognized, both in England[12] and in the American cases, that, as contradistinguished from utterances or publications which in an indecent and malicious spirit assail and asperse religion or the Deity, any man may soberly and reverently examine and question the truth of the doctrines of christianity, however fundamental, without subjecting himself to penal consequences.[13]

D. Publication or Utterance in Presence of Others. So however blasphemous in itself the particular language may be, yet if it is never uttered in the hearing of other persons, or published, the crime of blasphemy cannot be founded upon it.[14]

III. Prosecution.

A. Indictment.[15] An indictment may be considered both as a charge of composing, printing, and publishing a blasphemous libel, and also as a direct charge of the crime of blasphemy,[16] and it is no objection that the offense is characterized in the charge by words which indicate a spiritual offense, so long as the gist of the temporal offense is contained in the charge.[17] It seems that the words them-

part of the offense. State *v.* Chandler, 2 Harr. (Del.) 553.

Drunkenness, it has been held, is no excuse but only aggravates the offense. People *v.* Porter, 2 Park. Crim. (N. Y.) 14. But see as to this Criminal Law.

11. Rex *v.* Woolston, Fitzg. 64, 2 Str. 834. See also Gathercole's Case, 2 Lewin 237, *supra*, note 7.

Heresy distinguished.— In Naylor's Case, 5 How. St. Tr. 802, 826, Lord Commissioner Whitelocke in his opinion on the debate upon the question whether Nayler should be punished with death, distinguished heresy and blasphemy: "They are offences of a different nature: Heresy is *Crimen Judicii*, an erroneous opinion: Blasphemy is *Crimen Malitiæ*, a reviling the name and honour of God. Heresy was to be declared in particular, and by the four first general Councils. But the Blasphemy in this Vote is general; and I do not find it reckoned in those Councils for Heresy."

12. Reg. *v.* Ramsay, 1 Cab. & El. 126, 15 Cox C. C. 231, 48 L. T. Rep. N. S. 733; Reg. *v.* Bradlaugh, 15 Cox C. C. 217. See also *supra*, notes 9, 10.

13. Com. *v.* Kneeland, 20 Pick. (Mass.) 206; People *v.* Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335. It is to be collected from the offensive levity, scurrilous and opprobrious language, and other circumstances whether the act of the party was malicious. Updegraph *v.* Com., 11 Serg. & R. (Pa.) 394.

Infidelity no defense.— The law denies to infidels, as well as to any other person, the right to blaspheme, and it is no defense that the defendant was of opinion that the words used by him were true. If one class of persons may thus do an act tending to a breach of the peace all must have the same immunity from punishment. State *v.* Chandler, 2 Harr. (Del.) 553.

Constitutional freedom of press and religious toleration.— In this country the constitutional safeguards which are thrown about the freedom of the press and the liberty of conscience in the matter of religious opinions and worship are recognized as a protection to the extent of guaranteeing the rights as announced in the text, and the cases cited in this note may be taken as authority for this, but to this extent only; for they also hold that such constitutional provisions do not legalize wilful or profane scoffing, or stand in the way of legislative enactments for the punishment of such acts. See also Zeisweiss *v.* James, 63 Pa. St. 465, 3 Am. Rep. 558; Cooley Const. Lim. (3d ed.), pp. 422–474.

14. State *v.* Chandler, 2 Harr. (Del.) 553 (where it was said that if a writing which might be a libel is permitted to sleep in the writer's desk until it is dragged forth by the ministers of the law it cannot be indictable, although it may be a great sin against God); People *v.* Porter, 2 Park. Crim. (N. Y.) 14.

15. Form of indictment in whole, in substance, or in part see State *v.* Chandler, 2 Harr. (Del.) 553; Com. *v.* Kneeland, 20 Pick. (Mass.) 206; People *v.* Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Reg. *v.* Bradlaugh, 15 Cox C. C. 217; Williams' Case, 26 How. St. Tr. 654.

As to the form and requisites of indictments generally see Indictments and Informations.

16. Com. *v.* Kneeland, 20 Pick. (Mass.) 206.

17. State *v.* Chandler, 2 Harr. (Del.) 553, holding that an indictment is not defective because it charges the offense to have been done "to the dishonor of Almighty God, and in contempt of religion," for the gist of the misdemeanor is contained in the charge that the words were published unlawfully and blasphemously against the peace, etc., which of itself imports that the offense was committed wantonly and maliciously.

selves, the utterance or publication of which constitutes the offense, must be set out.[18] If the offense may be committed in one of several ways, the commission may be alleged to have been in one or more of such ways.[19]

B. Evidence. Oral blasphemy must be proved to have been spoken in the hearing of others and a blasphemous libel must be shown to have been published,[20] and the fact of the commission of the offense, upon conflicting testimony, is for the determination of the jury.[21] If the offense may be committed in one of

18. See Updegraph *v.* Com., 11 Serg. & R. (Pa.) 394 (where the learned judge delivering the opinion thought, though the point was not decided, that it was not sufficient to allege the words in substance); Rex *v.* Sparling, 1 Str. 497. See also dictum in Lagrone *v.* State, 12 Tex. App. 426.

19. Com. *v.* Kneeland, 20 Pick. (Mass.) 206 (in which the use of the several epithets employed in the statute to characterize the manner of committing the offense are considered); Reg. *v.* Bradlaugh, 15 Cox C. C. 217, 223 (holding that an indictment charging that the defendant "published or caused to be published," etc., and that the publication was in a printed "paper or newspaper," etc., is not bad for uncertainty). But in Updegraph *v.* Com., 11 Serg. & R. (Pa.) 394, under a statute providing that if any person "shall wilfully, premeditatedly and despitefully blaspheme, and speak loosely and profanely of Almighty God, Christ Jesus, the Holy Spirit, or the Scripture of Truth," such person, etc., it was held that an indictment which charged that the defendant did "unlawfully, wickedly, and premeditatedly, despitefully and blasphemously," say, etc., was bad, because it did not charge the words to have been used profanely; that though the words "blasphemously" and "despitefully" may be synonymous with "profanely," and tantamount in common understanding, yet, as the legislature had adopted this word as a description or definition of the crime, the omission was fatal; that the indictment could not be sustained as for blasphemy at common law, because the sentence was founded on this act of assembly. See also Com. *v.* Spratt, 14 Phila. (Pa.) 365, 37 Leg. Int. (Pa.) 234.

20. See *supra*, II, D.

For illustration of proof of publication of libel by showing purchase by the purchaser from defendant of the book containing the blasphemous matter charged, see Williams' Case, 26 How. St. Tr. 654. In Eaton's Case, 31 How. St. Tr. 927, upon the witness delivering over the book, an offer was made to read the title page of the Age of Reason, which was permitted only for the purpose of showing the *quo animo* and because it stated that the work was published by the defendant.

A confession made out of court that the defendant made use of the words charged in the indictment is not by itself sufficient evidence upon which to convict of blasphemy; if any one heard the words spoken this must be proved, because if they were not heard the crime could not have been committed. Furthermore, if this confession were legal evidence to prove a crime committed, it would not be sufficient if it did not admit that the words were spoken within the time of limitation, or that they were spoken within the county or state. People *v.* Porter, 2 Park. Crim. (N. Y.) 14.

Qualified confession of authorship.— In an information for a libel against the doctrine of the Trinity, the witness for the crown, who produced the libel, swore that it was shown to the defendant, who owned himself the author of that book, errors of the press and some small variations excepted. The counsel for the defendant objected that this evidence would not entitle Mr. Attorney to read the book, because the confession was not absolute, and therefore amounted to a denial that he was the author of that identical book. But the chief justice allowed it to be read, saying he would put it upon the defendant to show that there were material variances. Rex *v.* Hall, 1 Str. 416.

Under Libel Act.— On the trial of two persons on an indictment for publishing blasphemous libels in a certain paper upon which their names were given, one as printer and the other as publisher, proof of their identity with the persons whose names were so given, or evidence merely connecting them with the paper was held not sufficient to fix them with liability, under the statute [6 & 7 Vict. c. 76, § 7], which provided that on such a trial, upon evidence to establish a presumptive case of publication against defendant by the act of any other person, or by his authority, it shall be competent for such defendant to prove that such publication was made without his authority, consent, or knowledge, etc. It was further held that evidence that one of the parties published the paper made a sufficient *prima facie* case as against him without express evidence that he knew of the libels, but that express evidence as to the other that he was editor was not sufficient evidence that he directed the insertion of the libels. Reg. *v.* Ramsay, 1 Cab. & El. 126, 15 Cox C. C. 231, 48 L. T. Rep. N. S. 733.

21. In Bell's Case, 6 City Hall Rec. (N. Y.) 38, an indictment for blasphemy charged defendant with saying that "God Almighty was a damned fool for creating such men as composed the Hartford Convention." On the trial prosecutor and his son testified that defendant spoke the words in the presence of themselves and two others, while others testified that during an intemperate political dispute defendant said, with reference to the Hartford convention men, that "it was a disgrace to God Almighty to let such men live," but that he did not speak the words

several ways, a charge that it was committed in two of the modes may be supported by proof that it was committed in either way.[22]

BLASTING. The operation of splitting rocks by the use of explosives.[1] (Blasting: Generally, see EXPLOSIVES. As Nuisance, see NUISANCES. Right of, as Against Adjoining Landowner, see ADJOINING LANDOWNERS.)

BLENDED FUND. See CONFUSION OF GOODS; CONVERSION.

BLIND. Destitute of the sense of sight.[2] (Blind: Persons — Contracts of, see CONTRACTS; Deeds of, see DEEDS; Duty of Carrier to, see CARRIERS; Negligence Causing Injury to, see NEGLIGENCE; RAILROADS; Wills of, see WILLS.)

BLOCK. A square or portion of a city inclosed by streets, whether occupied by buildings or composed of vacant lots.[3] (See, generally, DEEDS.)

BLOCKADE.[4] To shut up by obstruction;[5] the shutting up of a place by surrounding it with hostile troops or ships, or by posting them at all the avenues to prevent escape and hinder supplies or provisions and ammunition from entering with a view to compel a surrender by hunger and want without regular attacks;[6] the shutting up of a place, blocking of a harbor, line of coast, frontier, etc., by hostile forces or ships, so as to stop ingress and egress, and prevent the entrance of provisions and ammunition, in order to compel a surrender from hunger or want, without a regular attack;[7] the act of surrounding a town with a hostile army, or, if it be on the seacoast, of placing a hostile army around its landward side and ships of war in front of its sea defenses; so as, if possible, to prevent supplies of food and ammunition from entering it by land or water;[8] a sort of circumvallation round a place, by which all foreign connexion and correspondence is, as far as human force can effect it, to be entirely cut off.[9] (Blockade: Effect on Insurance, see MARINE INSURANCE. Generally, see WAR.)

BLOOD. The fluid which circulates in the arteries and veins;[10] kindred; relation by natural descent from a common ancestor; consanguinity.[11] (Blood: As Determining Rights — Of Inheritance, see DESCENT AND DISTRIBUTION; Under Wills, see WILLS. Spitting of, in Insurance Policies, see LIFE INSURANCE. Stains as Evidence, see CRIMINAL LAW; HOMICIDE.)

charged in the indictment. As touching the animus of the prosecution, it was shown that after the time laid in the indictment prosecutor and defendant had a difficulty which had resulted in defendant filing a complaint against prosecutor for assault and battery. It was shown that defendant was in the habit of attending church, and often expressed his conviction of the truth of the doctrine of universal salvation. It was held that the evidence authorized an acquittal, the weight of it having been left to the jury. See also People *v.* Porter, 2 Park. Crim. (N. Y.) 14; and *supra*, note 10.

22. Com. *v.* Kneeland, 20 Pick. (Mass.) 206.

Divisible averments as to intent.— Under an indictment charging the use of certain blasphemous words with intent to blaspheme God, and also with intent to revile the christian religion, it was held that these two averments were divisible, and that either of these intents, being found by the jury, was sufficient to sustain the indictment, and that a verdict of guilty, with the exception that the defendant was not guilty of the intent to blaspheme God, was a finding of guilty of blasphemy. State *v.* Chandler, 2 Harr. (Del.) 553.

1. Century Dict.
2. Century Dict.
3. Webster Dict. [*quoted* in Fraser *v.* Ott, 95 Cal. 661, 666, 30 Pac. 793; Harrison *v.* People, 195 Ill. 466, 470, 63 N. E. 191; Olsson *v.* Topeka, 42 Kan. 709, 713, 21 Pac. 219; Ottawa *v.* Barney, 10 Kan. 270, 278].

4. **Distinction between simple and public blockades.**—"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." Hunter *v.* U. S., 2 Wall. (U. S.) 135, 160, 17 L. ed. 796.

5. Johnson Dict. [*quoted* in The Olinde Rodrigues, 91 Fed. 274, 278].
6. Imperial Dict. [*quoted* in The Olinde Rodrigues, 91 Fed. 274, 278].
7. New English (Oxford) Dict. [*quoted* in The Olinde Rodrigues, 91 Fed. 274, 278].
8. American Encyclopædic Dict. [*quoted* in the Olinde Rodrigues, 91 Fed. 274, 278].
9. The Vrouw Judith, 1 C. Rob. 150, 151.
10. Century Dict.
11. Burrill L. Dict.

BLUDGEON. A short stick with one end loaded, used as an offensive weapon.[12] (Bludgeon: Use of — In Assault and Battery, see ASSAULT AND BATTERY; In Homicide, see HOMICIDE.)

BLUE LAWS. Any rigid Sunday laws or religious regulations.[13]

BOARD. To receive food as a lodger, or without lodgings, for a compensation;[14] a body of men constituting a quorum; a court or council.[15] (Board: Of Aldermen, see MUNICIPAL CORPORATIONS. Of County Commissioners, see COUNTIES. Of Directors[16] of — Banks, see BANKS AND BANKING; Building and Loan Societies, see BUILDING AND LOAN SOCIETIES; Corporations, Generally, see CORPORATIONS; Railroads, see RAILROADS. Of Education, see MUNICIPAL CORPORATIONS; SCHOOLS AND SCHOOL DISTRICTS. Of Equalization, see TAXATION. Of Health, see HEALTH. Of Police, see COUNTIES; MUNICIPAL CORPORATIONS. Of Public Works, see MUNICIPAL CORPORATIONS. Of Supervisors, see COUNTIES; TOWNS. Of Trade, see EXCHANGES.)

BOARDER. One who has food or diet and lodging in another's family, for reward;[17] one who has food and lodging in another's house or family for a stipulated price.[18] (See, generally, INNKEEPERS.)

BOARDING-HOUSES. See INNKEEPERS.

BOARD MEASURE. The number of feet of board which a log will produce when sawed.[19]

BOAT.[20] A small open vessel, commonly wrought by oars.[21] (See, generally, ADMIRALTY; COLLISION; MARITIME LIENS; SHIPPING.)

BODILY HEIRS. Heirs begotten of the body; lineal descendants;[22] children;[23] descendants.[24] (See, generally, DESCENT AND DISTRIBUTION; WILLS.)

BODILY INFIRMITY. See ACCIDENT INSURANCE.

BODY. The trunk of the man, in distinction from his head and limbs;[25] that part of a human being between the upper part of the thighs or hips and his neck, excluding his arms;[26] a person, whether natural or artificial.[27] (Body: Dead, see DEAD BODIES. Execution Against, see EXECUTIONS. Heirs of, see DESCENT AND DISTRIBUTION; WILLS.)

12. Worcester Dict. [*quoted* in State *v.* Phillips, 104 N. C. 786, 789, 10 S. E. 463]. *Compare* Reg. *v.* Sutton, 13 Cox C. C. 648, 649, where Lindley, J., said: "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."

13. Bouvier L. Dict.

14. Pollock *v.* Landis, 36 Iowa 651, 652.

Does not include fuel.—"The word 'boarding' does not, in its ordinary sense, . . . include the furnishing of fuel." Marion County *v.* Reissner, 58 Ind. 260, 262. *Compare* Scattergood *v.* Waterman, 2 Miles (Pa.) 323, where it is said: "The term 'board' includes the ordinary necessaries of life, and must be considered as being synonymous with the word 'entertainment.'"

15. Broadwell *v.* People, 76 Ill. 554, 557 [*quoting* Webster Dict.].

16. **Of associations** see ASSOCIATIONS, 4 Cyc. 309, note 51.

17. Ambler *v.* Skinner, 7 Rob. (N. Y.) 561, 563.

18. Burrill L. Dict. [*quoted* in Ullman *v.* State, 1 Tex. App. 220, 222, 28 Am. Rep. 405].

19. Destrehan *v.* Louisiana Cypress Lumber Co., 45 La. Ann. 920, 927, 13 So. 230, 40 Am. St. Rep. 265.

20. **Distinguished from "vessel."**—"The term 'vessel' is never, or at least very rarely, used, to designate any watercraft without a deck; but the term 'boat' is constantly used to designate such small vehicles of this nature, as are without a deck." U. S. *v.* Open Boat, 5 Mason (U. S.) 120, 137, 27 Fed. Cas. No. 15,967.

21. Mortimer Commercial Dict. [*quoted* in U. S. *v.* Open Boat, 5 Mason (U. S.) 120, 137, 27 Fed. Cas. No. 15,967].

22. Clarkson *v.* Hatton, 143 Mo. 47, 56, 44 S. W. 761, 65 Am. St. Rep. 635, 39 L. R. A. 748 [*quoting* Anderson L. Dict.], where it is said: "The words 'children,' 'issue,' and 'heirs' are not synonymous terms." See also Donnell *v.* Mateer, 40 N. C. 7, 9.

23. Mitchell *v.* Simpson, 88 Ky. 125, 126, 10 S. W. 372; Righter *v.* Forrester, 1 Bush (Ky.) 278, 282.

24. Righter *v.* Forrester, 1 Bush (Ky.) 278, 282.

25. Sanchez *v.* People, 22 N. Y. 147, 149 [*quoted* in Walker *v.* State, 34 Fla. 167, 173, 16 So. 86, 43 Am. St. Rep. 186; State *v.* Edmundson, 64 Mo. 398, 402].

26. Walker *v.* State, 34 Fla. 167, 173, 16 So. 86, 43 Am. St. Rep. 186. See also Long's Case, 5 Coke 120*a*, 121*b*, where it is said: "For *corpus* . . . is to be intended of the trunk of the body, between the neck and the thighs, which is the usual and vulgar meaning of the body."

27. Black L. Dict.

BODY CORPORATE. A corporation.[28] (See, also, BODY POLITIC.)

BODY POLITIC. The collective body of a nation or state as politically organized, or as exercising political functions; a corporation;[29] a body to take in succession, framed as to its capacity by policy.[30] (See, also, BODY CORPORATE.)

BOHEA. A generic term, including under it all the black teas.[31]

BOILARY. Water arising from a salt well belonging to a person who is not the owner of the soil.[32]

BOILER INSURANCE. A species of casualty insurance[33] against the explosion of, or accident to, steam-boilers and their appliances, and against loss or damage resulting therefrom, which does not cover losses caused by fire which is the immediate consequence of such explosion or accident[34] or explosions and accidents which are the proximate and legal results of a fire.[35] (See, generally, INSURANCE.)

BOMBAZINE. A fabric composed of worsted and silk.[36]

BONA. See PROPERTY.

BONÆ FIDEI POSSESSOR IN ID TANTUM QUOD AD SE PERVENERIT TENETUR. A maxim meaning "A *bona fide* possessor is bound for that only which has come to him."[37]

BONA FIDE. In good faith, without fraud or deception;[38] good faith, honesty, as distinguished from bad faith.[39]

BONA FIDE POSSESSOR. One who not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is contested by some other person claiming a better right to it;[40] one who, being in actual possession, is excusably ignorant of the facts which show he is not entitled to possess.[41] (See, generally, ADVERSE POSSESSION.)

BONA FIDE PURCHASER. 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, and purchases in the honest belief that his vendor had a right to sell, without notice, actual or constructive, of any adverse rights, claims, interest, or equities of others in and to the property sold;[42] one who buys property of another without notice that some third person has a right to, or interest in, such property, and pays a full and fair price for the same, at the time of such purchase, or before he has notice of the claim or interest of such other in the property;[43] one who has bought property

28. Burrill L. Dict.

"It is called a . . . body corporate, because the persons are made into a body politic and are of capacity to take, grant, &c., by a particular name." Coyle *v.* McIntire, 7 Houst. (Del.) 44, 90, 30 Atl. 728, 40 Am. St. Rep. 109; Warner *v.* Beers, 23 Wend. (N. Y.) 103, 142; People *v.* Morris, 13 Wend. (N. Y.) 325, 334.

29. Webster Dict. [*quoted* in Ervin *v.* State, 150 Ind. 332, 337, 48 N. E. 249].

30. Coyle *v.* McIntire, 7 Houst. (Del.) 44, 90, 30 Atl. 728, 40 Am. St. Rep. 109; People *v.* Morris, 13 Wend. (N. Y.) 325, 334.

31. Two Hundred Chests of Tea, 9 Wheat. (U. S.) 430, 438, 6 L. ed. 128.

32. Wharton L. Lex.

33. Joyce Ins. § 9.

34. Western Refrigerator Co. *v.* American Casualty Ins., etc., Co., 51 Fed. 155.

Declaration on policy.—A declaration on such a policy which attempts to state a cause of action without stating that the loss was not caused directly or indirectly by fire is demurrable. Western Refrigerator Co. *v.* American Casualty Ins., etc., Co., 51 Fed. 155.

35. American Steam Boiler Ins. Co. *v.* Chicago Sugar Refining Co., 57 Fed. 294, 9 U. S. App. 186, 6 C. C. A. 336, 21 L. R. A. 572 [*reversing* 48 Fed. 198].

36. U. S. *v.* Clarke, 5 Mason (U. S.) 30, 32, 25 Fed. Cas. No. 14,813.

37. Burrill L. Dict.

38. Webster Unabr. Dict. [*quoted* in Phillips *v.* Dobbins, 56 Ga. 617, 623]. See also Ware *v.* Hylton, 3 Dall. (U. S.) 199, 241, 1 L. ed. 568, where it is said that it "signifies a thing done really, with a good faith, without fraud, or deceit, or collusion or trust."

39. Bouvier L. Dict. [*quoted* in Phillips *v.* Dobbins, 56 Ga. 617, 624].

40. McLaughlin *v.* Barnum, 31 Md. 425, 454 [*quoting* Green *v.* Biddle, 8 Wheat. (U. S.) 1, 79, 5 L. ed. 547]; Sartain *v.* Hamilton, 12 Tex. 219, 222, 62 Am. Dec. 524.

41. Lindt *v.* Uihlein, (Iowa 1902) 89 N. W. 214, 216 [*quoting* Adams Gloss.].

42. 1 Perry Trusts, § 239 [*quoted* in Woolridge *v.* Thiele, 55 Ark. 45, 47, 17 S. W. 340; Fargason *v.* Edrington, 49 Ark. 207, 214, 4 S. W. 763; Alden *v.* Trubee, 44 Conn. 455, 459].

43. Spicer *v.* Waters, 65 Barb. (N. Y.) 227, 231 [*quoted* in Alden *v.* Trubee, 44 Conn. 455, 459].

without notice of the claims of third parties thereto, upon the faith that no such claims exist, and who has therefore actually paid or parted with some valuable consideration or has in some way altered his legal condition for the worse;[44] one who purchases for value without notice of the equities of third parties.[45] (Bona Fide Purchaser: Assignee For Benefit of Creditors as, see Assignments For Benefit of Creditors. Cancellation of Instruments as Against, see Cancellation of Instruments. Mortgagee as, see Chattel Mortgages; Mortgages. Of Bill of Lading, see Carriers. Of Bill or Note, see Commercial Paper. Of Bond, see Bonds. Of Goods, see Sales. Of Land, see Vendor and Purchaser. Of Mortgage, see Chattel Mortgages; Mortgages. Of Property Fraudulently Conveyed, see Fraudulent Conveyances. Of Public Lands, see Public Lands. Of Stock, see Corporations. Reformation of Instrument as Against, see Reformation of Instruments.)

BONA FIDES. Good faith.[46] (Bona Fides: As Affecting Validity of Assignment, see Assignments For Benefit of Creditors. As Excuse For Violating Injunction, see Injunctions. Of Complainant in Equity, see Equity; Specific Performance.)

BONA FIDES EXIGIT UT QUOD CONVENIT FIAT. A maxim meaning "Good faith demands that what is agreed upon shall be done."[47]

BONA FIDES NON PATITUR UT BIS IDEM EXIGATUR. A maxim meaning "Good faith does not suffer the same thing to be demanded twice."[48]

BONDED WAREHOUSE. See Customs Duties; Internal Revenue.

44. Hayden *v.* Charter Oak Driving Park, 63 Conn. 142, 147, 27 Atl. 232.
45. Bowman *v.* Griffith, 35 Nebr. 361, 366, 53 N. W. 140.
46. Tolbert *v.* Horton, 31 Minn. 518, 521, 18 N. W. 647.
47. Burrill L. Dict.
48. Burrill L. Dict.

BONDS

By Joseph A. Joyce* and Howard C. Joyce†

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* Author of "A Treatise on Marine, Fire, Life, Accident, and Other Insurances"; and joint author of "A Treatise on Electric Law."
† Joint author of "A Treatise on Electric Law."

CROSS-REFERENCES

For Abstracter's Bond, see ABSTRACTS OF TITLE.
Administrator's Bond, see EXECUTORS AND ADMINISTRATORS.
Acknowledgment of Bond, see ACKNOWLEDGMENTS.
Alteration of Bond, see ALTERATIONS OF INSTRUMENTS.
Appearance Bond, see BAIL.
Assignee's Bond, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; INSOLVENCY.
Auctioneer's Bond, see AUCTIONS AND AUCTIONEERS.
Bail Bond, see BAIL.
Bank Officer's Bond, see BANKS AND BANKING.
Bonds in:
Admiralty Proceedings, see ADMIRALTY.
Appellate Proceedings, see APPEAL AND ERROR.
Arbitration Proceedings, see ARBITRATION AND AWARD.
Arrest Proceedings, see ARREST.
Attachment Proceedings, see ATTACHMENT.
Audita Querela Proceedings, see AUDITA QUERELA.
Bankruptcy Proceedings, see BANKRUPTCY.
Bastardy Proceedings, see BASTARDS.
Certiorari Proceedings, see CERTIORARI.
Detinue Proceedings, see DETINUE.
Execution Proceedings, see EXECUTIONS.
Garnishment Proceedings, see GARNISHMENT.
Injunction Proceedings, see INJUNCTIONS.
Insolvency Proceedings, see INSOLVENCY.
Ne Exeat Proceedings, see NE EXEAT.
Partition Proceedings, see PARTITION.
Probate Proceedings, see EXECUTORS AND ADMINISTRATORS.
Proceedings to Remove Cause, see REMOVAL OF CAUSES.
Replevin Proceedings, see REPLEVIN.
Scire Facias Proceedings, see SCIRE FACIAS.
Sequestration Proceedings, see SEQUESTRATION.
Taxation Proceedings, see TAXATION.
Bond to Make Will, see WILLS.
Bottomry Bond, see SHIPPING.
Cancellation of Bond, see CANCELLATION OF INSTRUMENTS.

For Claim Bond, see Admiralty; Attachment; Executions.
Clerk's Bond, see Clerks of Courts.
Collector's Bond, see Internal Revenue; Taxation.
Constable's Bond, see Sheriffs and Constables.
Consul's Bond, see Ambassadors and Consuls.
Contractor's Bond, see Builders and Architects; Municipal Corporations.
Coroner's Bond, see Coroners.
Corporate Bond, see Corporations; Municipal Corporations.
Cost Bond, see Costs.
Curator's Bond, see Absentees.
Customs Bond, see Customs Duties.
Delivery Bond, see Attachment; Executions; Replevin.
Depositary's Bond, see Depositaries.
Dissolution Bond, see Attachment.
Equitable Relief From Bond, see Equity.
Estoppel by Bond, see Estoppel.
Executor's Bond, see Executors and Administrators.
Forthcoming Bond, see Attachment; Executions; Landlord and Tenant; Replevin.
General Average Bond, see Shipping.
Government Bond, see States; Territories; United States.
Guardian's Bond, see Guardian and Ward; Insane Persons.
Indemnity Bond, see Attachment; Executions; Indemnity; Liens; Lost Instruments; Mechanics' Liens; Sheriffs and Constables.
Infant's Bond, see Infants.
Injunction Bond, see Injunctions.
Insane Person's Bond, see Insane Persons.
Jail-Liberties Bond, see Executions.
Judge's Bond, see Judges.
Justice's Bond, see Justices of the Peace.
Liquor Bond, see Intoxicating Liquors.
Lost Bond, see Lost Instruments.
Married Woman's Bond, see Husband and Wife.
Marshal's Bond, see United States Marshals.
Municipal Bond, see Counties; Municipal Corporations; Towns.
Officer's Bond, see Counties; Officers.
Overseer's Bond, see Poor Persons.
Partnership Bond, see Partnership.
Peace Bond, see Breach of the Peace.
Poor Debtor's Bond, see Arrest; Executions.
Postmaster's Bond, see Post-Office.
Prison Limits Bond, see Arrest; Executions.
Probate Bond, see Executors and Administrators.
Receiver's Bond, see Receivers.
Recognizance, see Recognizances.
Redelivery Bond, see Appeal and Error.
Reformation of Bond, see Reformation of Instruments.
Rent Bond, see Landlord and Tenant.
Restitution Bond, see Appeal and Error.
Rights and Liabilities of Guarantor, see Guaranty.
Rights and Liabilities of Surety, see Principal and Surety.
Sheriff's Bond, see Sheriffs and Constables.
Support Bond, see Bastards; Husband and Wife; Poor Persons.
Title Bond, see Vendor and Purchaser.
Trustee's Bond, see Bankruptcy; Trusts.
Undertaking, see Undertaking.

See also, generally, Contracts.

I. DEFINITION.

Technically a bond is a deed or obligatory instrument, in writing, whereby one doth bind himself to another, to pay a sum of money, or to do some other act;[1] but in popular language any instrument in writing that legally binds a party to do a certain thing may be called a bond.[2] As a verb the word "bond" is used in the sense of "to give bond for; to secure payment of duties by giving bond."[3]

II. REQUISITES AND VALIDITY.

A. In General. A voluntary bond properly executed[4] and delivered[5] which is founded upon a sufficient consideration[6] and is entered into by competent parties[7] without fraud or unlawful compulsion,[8] for a purpose not legally prohibited,[9] will be valid at common law, though not authorized by statute.[10] And by

1. Boyd *v.* Boyd, 2 Nott & M. (S. C.) 125, 126 [*quoted* in Duncan *v.* Charleston, 60 S. C. 532, 39 S. E. 265]. See also Duncan *v.* Charleston, 60 S. C. 532, 555, 39 S. E. 265 [*citing* 1 Rapalje & L. L. Dict.], where it is said: "A bond is nothing more than an agreement or contract under seal to pay money, 'or to do some other thing.'"

Other definitions are: "A deed whereby the obligor obliges himself, his heirs, executors or administrators, to pay a certain sum of money at a day appointed." Williams *v.* State, 25 Fla. 734, 740, 6 So. 831, 6 L. R. A. 821 [*citing* 2 Bl. Comm. 340].

"Contracts under seal with collateral conditions for the delivery of specific articles." Owen *v.* Owen, 3 Humphr. (Tenn.) 325, 326.

Bonds are single or double, simple or conditional, according as the obligor binds himself, his heirs, etc., to pay a certain sum to another at a specified date or adds a condition that if he does or forbears to do some act the obligation shall be void. Black L. Dict. See also BILL OBLIGATORY.

Bonds are negotiable or non-negotiable according as they pass by mere delivery or require a formal transfer. Anderson L. Dict. See also, generally, *infra*, IV.

A covenant is distinguished from a bond in Matter of Fitch, 3 Redf. Surr. (N. Y.) 457.

Distinguished from recognizance.— The only material respect in which a recognizance differs from another bond is that an ordinary bond is the creation of an original debt or an obligation *de novo*. A recognizance is the acknowledgment of a former debt upon record. Matter of Brown, 35 Minn. 307, 29 N. W. 131 [*quoting* 2 Bl. Comm. 341]; Lawton *v.* State, 5 Tex. 270 [*citing* Bacon Abr.; Tomlins L. Dict.].

2. Courand *v.* Vollmer, 31 Tex. 397. See also Ide *v.* Passumpsic, etc., Rivers R. Co., 32 Vt. 297, 299, where it is said: "We are not prepared to say that the word bond, *ex vi termini*, implies a contract under seal. The term is used in various significations in popular language, as importing the substantive action expressed by the verb to bind. If one is bound, he is in bonds or under bonds. In that sense it implies nothing more than a binding contract, in whatever form. And although, in the phraseology of the law, the term usually denotes a specialty, we do not think it necessarily implies that."

Necessity of seal see *infra*, II, E, 2, d.

Convertible terms.—"The legislature has used the words 'bond,' 'obligation,' and 'instrument in writing,' as convertible terms, and as meaning the same thing." Courand *v.* Vollmer, 31 Tex. 397, 401.

3. Burrill L. Dict. See, generally, CUSTOMS DUTIES; INTERNAL REVENUE.

4. **As to the proper execution** of a bond see *infra*, II, E, 2.

5. **As to delivery** of a bond see *infra*, II, E, 3.

6. **As to the consideration** of a bond see *infra*, II, F.

7. **As to the parties** to a bond see *infra*, II, D.

8. **As to the validity of assent** see *infra*, II, G.

9. **Intent to defraud creditors.**—A bond is void which is given for the purpose of defrauding creditors of the obligor. McFarland *v.* Garber, 10 Ind. 151; Powell *v.* Inman, 53 N. C. 436, 82 Am. Dec. 426.

The giving of a bond to redeem paper illegally issued will not affect its validity, since payment of such paper may be enforced against the persons issuing it. York County *v.* Small, 1 Watts & S. (Pa.) 315.

10. *Alabama.*— Munter *v.* Reese, 61 Ala. 395; Williamson *v.* Woolf, 37 Ala. 298; Gayle *v.* Martin, 3 Ala. 593.

California.— Palmer *v.* Vance, 13 Cal. 553; Baker *v.* Bartol, 7 Cal. 551.

Florida.—Archer *v.* Hart, 5 Fla. 234.

Illinois.— Barnes *v.* Brookman, 107 Ill. 317; Wolfe *v.* McClure, 79 Ill. 564.

Indiana.— Tucker *v.* State, 72 Ind. 242; Pay *v.* Shanks, 56 Ind. 554.

Kentucky.— Terry *v.* Hazlewood, 1 Duv. (Ky.) 104; Duncan *v.* Pendleton County Ct., 4 Ky. L. Rep. 829.

Missouri.— Lionberger *v.* Krieger, 88 Mo. 160; Rubelman Hardware Co. *v.* Greve, 18 Mo. App. 6.

New Jersey.— Bordentown Tp. *v.* Wallace, 50 N. J. L. 13, 11 Atl. 267.

North Dakota.— Braithwaite *v.* Jordan, 5 N. D. 196, 65 N. W. 701, 31 L. R. A. 238.

the common law a bond may be valid and may be enforced by a suit, though no beneficial interest therein exists in favor of the obligee,[11] or though the obligee hold no part in fixing the amount of the penalty, provided it was accepted and acted upon by him.[12]

B. By What Law Governed. The law of place of execution governs the validity of a bond so far as the capacity of the parties to enter into such a contract is concerned.[13] But if a bond is partly executed in one state the final act, however, to render it valid and enforceable, such as delivery to the obligee, being done in another state, the validity of the bond may be determined by the laws of the latter state.[14] And where a bond is executed in one state but relates to a transaction in another state which is illegal by the laws of that state the bond will be void.[15]

C. Certainty. Though the wording of a bond may be vague or uncertain, yet, if, considering the purpose for which given and in connection with evidence to explain the language used,[16] the terms and conditions can be made clear and certain, the instrument will be valid.[17]

Ohio.—American Exch. Bank *v.* Brenzinger, 10 Ohio S. & C. Pl. Dec. 208.

Pennsylvania.— McCarty *v.* Gordon, 4 Whart. (Pa.) 321; Long *v.* Laufman, 2 Rawle (Pa.) 154.

South Carolina.— Cavender *v.* Ward, 28 S. C. 470, 6 S. E. 302.

Tennessee.— Marshall *v.* Hill, 6 Humphr. (Tenn.) 234.

Wisconsin.— Milwaukee County *v.* Pabst, 45 Wis. 311.

United States.— Rogers *v.* U. S., 32 Fed. 890; U. S. *v.* Rogers, 28 Fed. 607; U. S. *v.* Garlinghouse, 4 Ben. (U. S.) 194, 25 Fed. Cas. No. 15,189, 2 Chic. Leg. N. 131, 139, 11 Int. Rev. Rec. 11; Greathouse *v.* Dunlap, 3 McLean (U. S.) 303, 10 Fed. Cas. No. 5,742; U. S. *v.* Humason, 5 Sawy. (U. S.) 537, 26 Fed. Cas. No. 15,420, 11 Chic. Leg. N. 328, 25 Int. Rev. Rec. 208, 8 Reporter 70.

See 8 Cent. Dig. tit. "Bonds," § 40½.

Particular illustrations.— So though no bonds are required by statute a voluntary bond will be good and enforceable at common law, where given for the discharge of a public or official duty (Bordentown Tp. *v.* Wallace, 50 N. J. L. 13, 11 Atl. 267; Rogers *v.* U. S., 32 Fed. 890; U. S. *v.* Garlinghouse, 4 Ben. (U. S.) 194, 25 Fed. Cas. No. 15,189, 2 Chic. Leg. N. 131, 139, 11 Int. Rev. Rec. 11 [but see Stevens *v.* Hay, 6 Cush. (Mass.) 229, explained in Sweetser *v.* Hay, 2 Gray (Mass.) 49]; U. S. *v.* Humason, 5 Sawy. (U. S.) 537, 26 Fed. Cas. No. 15,420, 11 Chic. Leg. N. 328, 25 Int. Rev. Rec. 208, 8 Reporter 70), for the performance of a contract for a public improvement (Long *v.* Laufman, 2 Rawle (Pa.) 154), in consideration of the relinquishment of a lien upon a vessel (Gayle *v.* Martin, 3 Ala. 593 [see also Cavender *v.* Ward, 28 S. C. 470, 6 S. E. 302]), where chattels have been levied upon by the county treasurer for delinquent taxes (Pay *v.* Shanks, 56 Ind. 554), for the delivery by the sheriff of attached property (Palmer *v.* Vance, 13 Cal. 553), and where, provided a bond is filed, the court refuses to appoint a receiver (Baker *v.* Bartol, 7 Cal. 551). And though the name of one of the signers has been forged it has been held that a bond voluntarily executed by defendants may be enforced as a common-law bond. Terry *v.* Hazlewood, 1 Duv. (Ky.) 104. But such a bond, if without consideration and executed for the sole purpose of evading creditors, cannot be so enforced. Lequeux *v.* Oliver, 3 Desauss. (S. C.) 535.

Statutory bond does not become a voluntary bond by the mere omission of a condition required by the statute, where the purpose for which the bond is given renders such condition unnecessary. Milwaukee County *v.* Pabst, 45 Wis. 311.

11. Hoxie *v.* Weston, 19 Me. 322.

12. Marshal *v.* Hamilton, 41 Miss. 229.

13. Alcalda *v.* Morales, 3 Nev. 132; Harman *v.* Harman, Baldw. (U. S.) 129, 11 Fed. Cas. No. 6,071; U. S. *v.* Garlinghouse, 4 Ben. (U. S.) 194, 25 Fed. Cas. No. 15,189, 2 Chic. Leg. N. 131, 139, 11 Int. Rev. Rec. 11; Story Confl. Laws, §§ 241, 242, 263. See also, generally, CONTRACTS.

14. Smith *v.* Frame, 3 Ohio Cir. Ct. 587, 2 Ohio Cir. Dec. 339; Alcalda *v.* Morales, 3 Nev. 132.

15. Hayden *v.* Davis, 3 McLean (U. S.) 276, 11 Fed. Cas. No. 6,259.

The court will presume that a bond is to be performed in the state where made if no other place is named, and therefore if in such a case a bond is void by the laws of a state where made it cannot be enforced in another state. Titus *v.* Scantling, 4 Blackf. (Ind.) 89.

16. **As to interpretation** of bonds see *infra*, III.

17. *Maine.*— Trescott *v.* Moan, 50 Me. 347.

Massachusetts.— Merrill *v.* McIntire, 13 Gray (Mass.) 157.

Minnesota.— Longfellow *v.* McGregor, 56 Minn. 312, 57 N. W. 629.

New York.— Troy City Bank *v.* Bowman, 43 Barb. (N. Y.) 639, 19 Abb. Pr. (N. Y.) 18.

South Carolina.— Jamison *v.* Knotts, 12 Rich. (S. C.) 190.

See 8 Cent. Dig. tit. "Bonds," § 7; and, generally, CONTRACTS.

Rule applied.— So it has been held that a

D. Parties[18] — **1. Obligors and Obligees.** A bond to be valid, like any other contract, requires at least two contracting parties, one called the obligor and the other the obligee.[19] But a person can enter into no legal obligation to himself, cannot maintain a suit against himself, and therefore cannot be both the obligor and obligee in a bond;[20] and a bond so executed will be a nullity so far as it affects one who occupies thereunder this dual relation.[21]

2. Sureties[22] — **a. Number of.** A bond with but one surety instead of two as required by statute will be good as a common-law bond, unless the statute expressly provides that a bond executed in any other manner than therein designated shall be void.[23]

b. Qualifications of. Certain requirements are generally imposed as essential

bond is not void for uncertainty which is conditioned to indemnify the obligee "against all loss, cost, damage and expense to which he may be subjected by reason of his becoming bail in the United States Court." Connor *v.* Harlan, 130 Mass. 265. But see Hale *v.* Hall, 2 Brev. (S. C.) 316. Nor is one to devise "all our personal estate, of every description, as well what we now have in possession as what we may receive at the decease of our mother" the obligor to keep possession of the property during his life. Jenkins *v.* Stetson, 9 Allen (Mass.) 128. But a bond has been held to be void for uncertainty which is conditioned to convey a certain number of acres out of a tract of land without any designation or description of the part to be conveyed so that it can be located. Huntt *v.* Gist, 2 Harr. & J. (Md.) 498.

18. As to the designation of the parties in the bond see *infra*, II, E, 1, c.

19. There must be at least two parties, one, the obligor, being bound to the other, the obligee, requiring something to be done which if not done can be compensated by an action on the bond. State *v.* Briggs, 34 Vt. 501. See also *supra*, I; and, generally, Contracts.

A conveyance bond is not void because of want of obligees in existence at the time of its delivery. So held where, in consideration of the location of a county-seat, a bond was given to convey lands to a board not in existence at the time of its delivery. Sargeant *v.* Indiana State Bank, 4 McLean (U. S.) 339, 21 Fed. Cas. No. 12,360 [*affirmed* in 12 How. (U. S.) 371, 13 L. ed. 1028]. See also, generally, Vendor and Purchaser.

Corporation obligee.— Where no form is prescribed by statute for a bond to be taken by a corporation it may be taken in the name of the individual members thereof and will be valid and enforceable if legally sufficient in other respects. Greenfield *v.* Yeates, 2 Rawle (Pa.) 158. Nor is a bond invalid because given to a corporation not authorized by its charter to take the same. State Bank *v.* Hammond, 1 Rich. (S. C.) 281. But no liability is incurred, it has been held, upon a bond given by an agent to secure the faithful performance of his duties where his principal to whom the bond is given is a corporation of another state, and is not authorized to do business within the state in which the bond is entered into. Daniels *v.* Barney, 22 Ind. 207 (failure to comply with requirements of a statute); Newberry Bank *v.* Stegall, 41 Miss. 142. See also, generally, Corporations.

The United States of America being a corporation endowed with the capacity to sue and be sued and to convey and receive property a bond will be valid and binding at common law which is made payable to the "United States of America." Dixon *v.* U. S., 1 Brock. (U. S.) 177, 7 Fed. Cas. No. 3,934.

20. Debard *v.* Crow, 7 J. J. Marsh. (Ky.) 7, 22 Am. Dec. 113; Crabtree *v.* Johnson, 6 Ky. L. Rep. 360. See also, generally, Contracts.

From mere identity of names, however, it is not a necessary deduction that the obligor and obligee are the same person. Allin *v.* Shadburne, 1 Dana (Ky.) 68, 25 Am. Dec. 121.

21. Cecil *v.* Laughlin, 4 B. Mon. (Ky.) 30; Allin *v.* Shadburne, 1 Dana (Ky.) 68, 25 Am. Dec. 121.

So a bond executed by several persons to one of their number has been declared to be unenforceable in law. Smith *v.* Lusher, 5 Cow. (N. Y.) 688; Chowan Justices *v.* Bonner, 14 N. C. 256. *Contra*, Morrison *v.* Stockwell, 9 Dana (Ky.) 172; Allin *v.* Shadburne, 1 Dana (Ky.) 68, 25 Am. Dec. 121.

But if the bond is executed to several persons, one of whom is also obligor in the same instrument, it will be void only so far as such person purports to be an obligor to himself. Cecil *v.* Laughlin, 4 B. Mon. (Ky.) 30. And a bond given to the directors of a corporation as a class, by the treasurer who is also a director, is not invalid and it may be enforced in equity, though an action thereon cannot lie at law. Durburow *v.* Niehoff, 37 Ill. App. 403.

22. As to sureties on bonds see also Appeal and Error, VII, D, 2, c [2 Cyc. 829]; Attachment, VII, E, 2, d, (I), (B) [4 Cyc. 535]; Bail, II, G, 2, c [*ante*, p. 22]; Bail, III, F, 2, d [*ante*, p. 108].

23. Justices Scriven County Inferior Ct. *v.* Ennis, 5 Ga. 569; People *v.* Johr, 22 Mich. 461; Shaw *v.* Tobias, 3 N. Y. 188; Jacobs *v.* Shannon, 1 Tex. Civ. App. 395, 21 S. W. 386. But see Cutler *v.* Roberts, 7 Nebr. 4, 29 Am. Rep. 371.

The beneficiary of a bond cannot question its validity because an agreement between the principal obligor and sole surety not to

to the qualification of a person as a surety and to render the bond valid.[24] So the surety must ordinarily justify in an amount equal to or greater than the amount of the penalty.[25] A surety who is a non-resident of the state will be insufficient,[26] though it has been declared that the non-residence of a surety is no objection if he has sufficient property within the state.[27]

E. Formal Requisites — 1. Form and Contents — a. In General. While it is essential to the validity of a bond that the instrument should be written either on paper or parchment,[28] it has been declared generally that in order to make a writing under seal obligatory no particular words are necessary, provided there be words acknowledging an indebtedness or binding the maker to pay a debt.[29]

b. Condition. A bond should receive a reasonable interpretation if the intention of the parties can be ascertained from the language used,[30] but where the condition of a bond is omitted no liability will be incurred.[31]

c. Recitals as to Parties — (I) *Obligors.* The question has been raised in numerous cases whether a bond is valid if the names of some or all the parties are omitted in the body of the instrument. In this connection it should be remembered that it is the intent which controls, and it is sufficient if the intent appear, though not fully and particularly expressed. Therefore such an omission will not affect the validity where the parties whose names are thus omitted have executed the bond, for a full intent is to be found from the act of executing and signing the instrument, and a mere technical objection should not avail to discharge a contract into which a party has voluntarily entered. And

file it until another surety was procured was not complied with. Arrowsmith *v.* Gleason, 129 U. S. 86, 9 S. Ct. 237, 32 L. ed. 630.

24. See *infra*, note 25 *et seq.*

The name of a partnership may be signed to a bond as a surety, for in an action on the bond the names of the partners may be shown under proper pleadings and judgment recovered against each. Jacobs *v.* Shannon, 1 Tex. Civ. App. 395, 21 S. W. 386.

25. Lane *v.* Goldsmith, 23 Iowa 240; Carroll *v.* Sand, 10 Paige (N. Y.) 298.

Affidavit that surety is worth the penalty must be made by the surety and if made by another is not sufficient. Lane *v.* Goldsmith, 23 Iowa 240.

If one surety becomes insolvent the question whether the bond shall remain or a new one be given is declared to be a matter of judicial discretion. Willett *v.* Stringer, 6 Duer (N. Y.) 686, 15 How. Pr. (N. Y.) 310. See also Eiseman *v.* Swan, 11 Abb. Pr. (N. Y.) 112.

26. **Non-residence.**— *Ex p.* Buckley, 53 Ala. 42; Potter *v.* Richardson, 1 Mart. N. S. (La.) 276.

27. Herd *v.* Cist, (Ky. 1889) 12 S. W. 466.

28. Boyd *v.* Boyd, 2 Nott & M. (S. C.) 125; West *v.* Eau Claire, 89 Wis. 31, 61 N. W. 313.

The writing must precede the signing and sealing of the bond. Boyd *v.* Boyd, 2 Nott & M. (S. C.) 125. *Compare infra*, II, E, 2, g, as to execution of bonds in blank.

Inserting name of new obligor.— If after the execution of a bond by certain obligors the name of a new obligor is inserted by interlineation and he executes such bond as a surety without the consent of the other sureties it has been decided that the bond will be void as to them. Long *v.* Oneale, 1 Cranch C. C. (U. S.) 233, 15 Fed. Cas. No. 8,481. See also, generally, Alterations of Instruments, 2 Cyc. 137.

29. Wood *v.* Chetwood, 44 N. J. Eq. 64, 14 Atl. 21 [*affirmed* in 45 N. J. Eq. 369, 19 Atl. 622]; West *v.* Eau Claire, 89 Wis. 31, 61 N. W. 313.

The principle applicable in the construction of contracts, that is, that they are to be so construed if possible that the subject matter may have effect and that the end be promoted rather than defeated, applies also in the construction of bonds, and though words and clauses may be omitted the bond may nevertheless be enforced. So a bond has been held binding though the word "ourselves," in the clause "bind ourselves, our heirs," etc., be omitted (Wood *v.* Coman, 56 Ala. 283), or though there is an omission of the clause "*in cujus rei*" (Dardenne *v.* Bennett, 4 Ark. 458). Again it has been declared that though the *solvendum* be wrong yet if the *teneri* be right the bond is good. Wilkinson *v.* McLochlin, 1 Call (Va.) 49. And the omission of the formal conclusion will not invalidate a bond, where there is a substantial compliance with the statute and the condition intended by the parties is manifest. Rose *v.* Winn, 51 Tex. 545. See also *infra*, III, D; and, generally, Contracts.

30. See *infra*, III, D, F.

31. Fitzgerald *v.* Staples, 88 Ill. 234, 30 Am. Rep. 551. But *compare* Rose *v.* Winn, 51 Tex. 545.

The bond should contain a condition to be performed. Matter of Fitch, 3 Redf. Surr. (N. Y.) 457; Boyd *v.* Boyd, 2 Nott & M. (S. C.) 125. And it has been declared that the time limited for the performance of the condition should be mentioned. Boyd *v.* Boyd, 2 Nott & M. (S. C.) 125.

though the bond be a statutory instrument it is immaterial, unless the enactment contain some mandatory provision from which there is no escape.[32] Again, as a general rule, while the court will never extend relief against sureties, it will not on the other hand relieve them of a plain obligation within the letter and spirit of their bond.[33]

(II) *Obligees.* The weight of authority supports the rule that a bond with a blank left for the name of the obligee is a nullity, and proof of delivery to a particular person is not sufficient, as by mere delivery no rights are conferred on the person who receives it.[34] The omission, however, to expressly designate a person as obligee will not in all cases render a bond void.[35] So an incorrect designation of the obligee may not be considered as fatal.[36] But where a bond is given in

32. *Alabama.*— Grimmet *v.* Henderson, 66 Ala. 521; Martin *v.* Dortch, 1 Stew. (Ala.) 479.

Arkansas.— Hodgkin *v.* Holland, 34 Ark. 203.

Colorado.— Case *v.* Daniels, 1 Colo. App. 116, 27 Pac. 886.

Indiana.— Scheid *v.* Leibshultz, 51 Ind. 38; Potter *v.* State, 23 Ind. 550.

Iowa.— Moore *v.* McKinley, 60 Iowa 367, 14 N. W. 768.

Kentucky.—Blakey *v.* Blakey, 2 Dana (Ky.) 460.

Louisiana.— Union Bethel African M. E. Church *v.* Civil Sheriff, 33 La. Ann. 1461.

Maine.— Fournier *v.* Cyr, 64 Me. 32.

Massachusetts.— Ahren *v.* Odiorne, 125 Mass. 50, 28 Am. Rep. 199; Smith *v.* Crooker, 5 Mass. 538.

Michigan.— Walbridge *v.* Spalding, 1 Dougl. (Mich.) 451.

Minnesota.—Wheeler *v.* Paterson, 64 Minn. 231, 66 N. W. 964, 58 Am. St. Rep. 527; Campbell *v.* Rotering, 42 Minn. 115, 43 N. W. 795, 6 L. R. A. 278.

Missouri.— Cunningham *v.* State, 14 Mo. 402; Johnson *v.* Steamboat Lehigh, 13 Mo. 539, 53 Am. Dec. 162; Keeton *v.* Spradling, 13 Mo. 321. *Contra,* Adams *v.* Wilson, 10 Mo. 341.

New Hampshire.— Pequawkett Bridge *v.* Mathes, 7 N. H. 230, 26 Am. Dec. 737.

New York.— Williams *v.* Barnaman, 19 Abb. Pr. (N. Y.) 69; *Ex p.* Fulton, 7 Cow. (N. Y.) 484.

North Carolina.— State *v.* Parsons, 89 N. C. 230; Vanhook *v.* Barnett, 15 N. C. 268.

Ohio.— Partridge *v.* Jones, 38 Ohio St. 375; McLain *v.* Simington, 37 Ohio St. 484.

South Carolina.— Joyner *v.* Cooper, 2 Bailey (S. C.) 199; Stone *v.* Wilson, 4 McCord (S. C.) 203; Gray *v.* Rumph, 2 Hill Eq. (S. C.) 6.

Tennessee.— Williams *v.* Greer, 4 Hayw. (Tenn.) 235.

Texas.— San Roman *v.* Watson, 54 Tex. 254; Cooke *v.* Crawford, 1 Tex. 9, 46 Am. Dec. 93; Hirams *v.* Coit, Dall. (Tex.) 449; Weis *v.* Chipman, 3 Tex. Civ. App. 106, 22 S. W. 225.

Vermont.— Campbell *v.* Campbell, Brayt. (Vt.) 38.

Virginia.— Luster *v.* Middlecoff, 8 Gratt. (Va.) 54, 56 Am. Dec. 129; Beery *v.* Homan, 8 Gratt. (Va.) 48; Beale *v.* Wilson, 4 Munf. (Va.) 380; Bartley *v.* Yates, 2 Hen. & M. (Va.) 398.

United States.— George *v.* Tate, 102 U. S. 564, 26 L. ed. 232.

See 8 Cent. Dig. tit. "Bonds," § 27.

33. This principle has been applied where a person who acted as a special receiver or custodian was incorrectly designated in the bond given by him as a "guardian." Findley *v.* Findley, 42 W. Va. 372, 26 S. E. 433. See also, generally, Principal and Surety.

34. *Arkansas.*— Pelham *v.* Grigg, 4 Ark. 141.

North Carolina.— Phelps *v.* Call, 29 N. C. 262, 47 Am. Dec. 327.

Ohio.— State *v.* Watson, 4 Ohio Dec. (Reprint) 526, 2 Clev. L. Rep. 314.

Rhode Island.— Garrett *v.* Shove, 15 R. I. 538, 9 Atl. 901.

Texas.— Sacra *v.* Hudson, 59 Tex. 207.

Virginia.—Preston *v.* Hull, 23 Gratt. (Va.) 600, 14 Am. Rep. 153.

Wisconsin.—The name of the obligee should be recited. West *v.* Eau Claire, 89 Wis. 31, 61 N. W. 313.

But see Allen *v.* Coy, 7 U. C. Q. B. 419.

See 8 Cent. Dig. tit. "Bonds," § 27.

But in New York it has been decided that delivery of a bond with a blank left for the name of the payee is equivalent to making the bond payable to bearer until the blank has been filled by a *bona fide* holder. Manhattan Sav. Inst. *v.* New York Nat. Exch. Bank, 42 N. Y. App. Div. 147, 59 N. Y. Suppl. 51.

35. Illustrations.—So a bond to secure the payment of a note is not invalid because no obligee is named, where the bond sets out the names of the payor and payee, the amount and date of note, for what given, when due and payable, and rate of interest. Leach *v.* Flemming, 85 N. C. 447. And where a bond was given to one creditor for an amount sufficient for his debt and that of the other creditors who were not named therein, it was held to be valid if they sanctioned the transaction and the one to whom it was given agreed to account to them. Nickerson *v.* Hazel, 1 Houst. (Del.) 176.

36. Incorrect but not fatal designation.— And in a bond which is in fact and by its terms manifestly for the benefit of a county to which it should run, the fact that it appears to run to the state is not a variance which

pursuance of an order directing the execution thereof to be approved by the court, the obligee should be described in the capacity designated in such order, and where not so described and a recovery in the capacity designated would not come within the protection thereof, such bond is not made good by the approval of the court, since in approving the bond the court has no power to modify the order.[37]

d. Recitals as to Penalty or Amount. A bond will be void in which the amount or penalty thereof is omitted and a judgment thereon cannot be sustained, such omission being a defect which cannot be supplied by oral proof of the amount intended.[38] Under some circumstances, however, it has been decided that the only effect of such an omission is to make the bond commensurate with the condition.[39] But where the amount is expressed, the mere omission of the word dollars or sign therefor will not affect the validity of the bond.[40]

2. Execution — a. In General. Generally speaking, a bond may be said to be executed when the obligation has been reduced to writing,[41] and has been properly signed [42] and sealed by the obligor.[43]

b. Date. The fact that a bond is erroneously dated, or bears no date at all, will not affect its validity, if other essentials necessary to give it a legal and binding effect have been complied with.[44]

will be fatal. Brown, etc., Co. *v.* Ligon, 92 Fed. 851. Again, though a bond to the state does not designate the state as obligee in the exact terms of the statute, yet it will be sufficient if the term used is descriptive of the same sovereignty. So held where bond was made payable to "the people of the state of California" instead of "the state of California." People *v.* Love, 19 Cal. 676; Tevis *v.* Randall, 6 Cal. 632, 65 Am. Dec. 547.

37. Witherbee *v.* Witherbee, 55 N. Y. App. Div. 181, 66 N. Y. Suppl. 1036.

38. *Alabama.*— Copeland *v.* Cunningham, 63 Ala. 394.

Illinois.— Church *v.* Noble, 24 Ill. 291.

Louisiana.— Canal St., etc., R. Co. *v.* Armstrong, 27 La. Ann. 433.

Oregon.— Evarts *v.* Steger, 6 Oreg. 55.

Virginia.—Bragg *v.* Murray, 6 Munf. (Va.) 32.

See 8 Cent. Dig. tit. "Bonds," § 28.

But see Nelson *v.* Howe Mach. Co., 10 Ky. L. Rep. 37, wherein it was held that the penalty being fixed at "——— thousand dollars" would be construed as limited to one thousand dollars.

The bond should contain a clause with a fixed sum or penalty binding the obligor to pay the same, conditioned, however, that the payment of the penalty may be avoided by the performance by some one or more of the parties of certain acts. Matter of Fitch, 3 Redf. Surr. (N. Y.) 457; Boyd *v.* Boyd, 2 Nott & M. (S. C.) 125.

39. Thus it has been so held in the case of a bond given by a guardian conditioned on his accounting for moneys received from a sale of his ward's land (Dodge *v.* St. John, 96 N. Y. 260), and similarly in the case of a bond given for payment of the board of one confined in an insane asylum (State Lunatic Asylum *v.* Douglas, 77 Mo. 647).

40. Grant *v.* Brotherton, 7 Mo. 458.

41. See *supra*, II, E, 1, a.

42. See *infra*, II, E, 2, c.

43. See *infra*, II, E, 2, d.

Enforcement of execution.— If no penalty is prescribed for refusal to execute bonds required by law the execution of such bonds cannot be enforced. Immigration Com'rs *v.* Brandt, 26 La. Ann. 29.

44. *Indiana.*— Larned *v.* Maloney, 19 Ind. App. 199, 49 N. E. 278.

Maine.— Fournier *v.* Cyr, 64 Me. 32.

New Hampshire.—Pierce *v.* Richardson, 37 N. H. 306.

North Carolina.— State *v.* Baird, 118 N. C. 854, 24 S. E. 668.

South Carolina.— Soloman *v.* Evans, 3 McCord (S. C.) 274.

Texas.— Harper *v.* Golden, (Tex. Civ. App. 1897) 39 S. W. 623.

West Virginia.— Simmons *v.* Trumbo, 9 W. Va. 358.

See 8 Cent. Dig. tit. "Bonds," § 9.

Blanks.— So though the blanks for the numbers of the day and month are not filled up it is immaterial if the bond is otherwise regular. Simmons *v.* Trumbo, 9 W. Va. 358. But where the only date to a bond was the ——— day of ——— 1869, it was declared that the legal presumption was that it would not become binding on the bondsmen until the last day of the year. Graves *v.* Lebanon Nat. Bank, 10 Bush (Ky.) 23, 19 Am. Rep. 50. See also *infra*, II, E, 2, g, as to execution of bonds in blank.

If there is an alteration in the date of a bond for performing an award, whereby the time for performance is extended, the legal effect thereof is to destroy it as a prëxisting obligation, but the bond may be declared on as dated and made on the original date or as dated that day and made afterward. Tompkins *v.* Corwin, 9 Cow. (N. Y.) 255. See also, generally, Alterations of Instruments, 2 Cyc. 137.

Bonds by surety companies being in terms prescribed by them should in case of doubtful language be construed against the surety and in favor of the indemnity which the assured had reasonable ground to expect, and therefore the date when it purports to have been made will control and date of acceptance

c. Signature — (I) *In General.* While the proper place for the signature of the obligors is at the foot of the agreement, yet independent of any statutory requirement the manner and form of the signature is immaterial, provided it is made by the surety for the purpose and with the intention of binding himself.[45] And it has been decided that if a bond is sealed and delivered it is not essential to its validity that it be signed.[46] Again, where the parties have signed the bond properly it is not essential to its validity that their names also appear in the body of the bond.[47] The order of signatures as to time of signing the instrument is immaterial, provided the bond is fully executed by all who purport to be parties.[48]

(II) *By Agent.* Though an obligor did not attend in person the execution of the bond, yet he will be bound thereby where his signature was affixed by another authorized in writing by him to so act.[49] And it has been decided that if a bond is required by statute to be executed by a person, "his agent, or attorney" it may be executed by the agent or attorney, describing himself as such, in his own name and be in form his personal obligation.[50]

is immaterial. Supreme Council Catholic Knights of America *v.* New York Fidelity, etc., Co., 63 Fed. 48, 22 U. S. App. 439, 11 C. C. A. 96.

45. Intent governs.— State *v.* Wallis, 57 Ark. 74, 20 S. W. 811; Donnell Mfg. Co. *v.* Repass, 75 Mo. App. 420; Hinsaman *v.* Hinsaman, 52 N. C. 510; Union Guaranty, etc., Co. *v.* Robinson, 79 Fed. 420, 49 U. S. App. 148, 24 C. C. A. 650. See also *infra*, III, D, 1.

Manner of signing.—A person may be bound who signs a bond by making his mark. Terry *v.* Johnson, 22 Ky. L. Rep. 1210, 60 S. W. 300, construing Ky. Civ. Code, § 732, subs. 7. And coupons of bonds will be valid where signed by a printed facsimile of the maker's autograph. Pennington *v.* Baehr, 48 Cal. 565. Again, though a person in signing uses a name other than his own, he may be bound. Dodd *v.* Butler, 7 Mo. App. 583.

Place of signing.— The fact that the signatures are not opposite the scrolls for seals will not impair the validity of the bond (Biery *v.* App, (Pa. 1886) 4 Atl. 198); nor will the fact that one obligor signed on the right side and another on the left side of the instrument (Steininger *v.* Hoch, 39 Pa. St. 263, 80 Am. Dec. 521); nor that the name is signed in the body of the bond as between the penal part and the condition (Fournier *v.* Cyr, 64 Me. 32; Reed *v.* Drake, 7 Wend. (N. Y.) 345; Taylor *v.* State, 16 Tex. App. 514; Argenbright *v.* Campbell, 3 Hen. & M. (Va.) 144). But where one whose name did not appear in the body of the bond signed a slip of paper, with no seal to the signature, and this paper was subsequently attached by wafers to the foot of the bond, it was held that he did not thereby become bound. Gramling *v.* Woodward, 2 Rich. (S. C.) 621.

46. Signing, when unnecessary.—*Arkansas.* — Jeffery *v.* Underwood, 1 Ark. 108.

Kentucky.— Gilchrist *v.* Catlett, 2 J. J. Marsh. (Ky.) 43; Curd *v.* Forts, 2 A. K. Marsh. (Ky.) 119.

Mississippi.— State *v.* Martin, 56 Miss. 108.

Ohio.— Mason *v.* Montgomery, Wright (Ohio) 722.

South Carolina.— Boyd *v.* Boyd, 2 Nott & M. (S. C.) 125.

But see Seymour *v.* Harvey, 8 Conn. 63.

See 8 Cent. Dig. tit. "Bonds," § 10.

Where, however, a statute provides that the execution of an instrument shall consist in the signing and delivery thereof, if the bond is not subscribed by the obligor there is not such a compliance with the statute as will constitute the instrument a valid bond. Wild Cat Branch *v.* Ball, 45 Ind. 213. See also Boreman *v.* Jung Brewing Co., 23 Ind. App. 399, 55 N. E. 495.

The erasure before delivery of the name of an obligor who signed and sealed the bond will release him. Lodge *v.* Boone, 3 Harr. & J. (Md.) 218.

47. Names of signers need not appear in instrument.— Scheid *v.* Leibshultz, 51 Ind. 38; Perkins *v.* Goodman, 21 Barb. (N. Y.) 218; *Ex p.* Fulton, 7 Cow. (N. Y.) 484.

48. Order of signing.—Rundell *v.* La Fleur, 6 Allen (Mass.) 480.

49. Basham *v.* Com., 13 Bush (Ky.) 36. See also, generally, PRINCIPAL AND AGENT.

A signature by a person as agent of another, if without proper authority, will as to the latter be treated as mere surplusage. Gable *v.* Brooks, 48 Md. 108. See also Kennerly *v.* Weed, 1 Mo. 672; Middleboro Nat. Bank *v.* Richards, 55 Nebr. 682, 76 N. W. 528.

Ratification.— A person will not be bound by the signing of his name to a bond by another having no authority to so sign, but if after knowledge of the fact that his signature has been so affixed he ratifies the act of such person in signing his name thereto the bond will be considered as if executed by him and he will be bound thereby. Rhode *v.* Louthain, 8 Blackf. (Ind.) 413; Manhattan L. Ins. Co. *v.* Alexander, 89 Hun (N. Y.) 449, 35 N. Y. Suppl. 325, 69 N. Y. St. 724; Winham *v.* Crutcher, 10 Lea (Tenn.) 610; Hill *v.* Scales, 7 Yerg. (Tenn.) 409.

50. Walbridge *v.* Spalding, 1 Dougl. (Mich.) 451.

(III) *By Partnership.* Bonds by a partnership may be signed in the firm name, it not being necessary that the individual members sign the same.[51]

(IV) *Conditional Signature.* A bond which is signed by a person upon condition that it shall not be delivered until certain other persons have affixed their signatures thereto will not bind the one so signing if delivered before such signatures are obtained, provided the obligee had notice of such condition.[52]

d. Seal — (I) *Necessity of.* The term "bond" *ex vi termini* imports a sealed instrument, and as a general rule, independent of any statute providing otherwise, sealing is necessary to constitute a perfect bond.[53] And in the absence of a seal an instrument will not be construed as a sealed bond, though there be a recital in the body thereof that the obligors and parties have set their hands and seals thereto.[54] In several states, however, though a bond is not sealed it may nevertheless be enforced, it being declared in some cases that it is a valid obligation at common law, while in others it is declared that the omission of the seal is a mere irregularity;[55] and again in some states it is provided by statute

51. Claflin *v.* Hoover, 20 Mo. App. 314. See, also, generally, Partnership.

52. *Arkansas.*— State *v.* Wallis, 57 Ark. 64, 20 S. W. 811; State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880.

Colorado.—Byers *v.* Gilmore, 10 Colo. App. 79, 50 Pac. 370.

Indiana.—Spencer *v.* McLean, 20 Ind. App. 626, 50 N. E. 769.

Nebraska.— Hart *v.* Mead Invest. Co., 53 Nebr. 153, 73 N. W. 458.

Pennsylvania.— Sharp *v.* U. S., 4 Watts (Pa.) 21, 28 Am. Dec. 676.

United States.— Butler *v.* U. S., 21 Wall. (U. S.) 272, 22 L. ed. 614; Pawling *v.* U. S., 4 Cranch (U. S.) 219, 2 L. ed. 601.

But see Richardson *v.* Rogers, 50 How. Pr. (N. Y.) 403. And *compare* Arrowsmith *v.* Gleason, 129 U. S. 86, 9 S. Ct. 237, 32 L. ed. 630.

It is sufficient notice, it has been declared, that the names of those not signing are given in the bond. State *v.* Wallis, 57 Ark. 64, 20 S. W. 811.

53. *Alabama.*—Skinner *v.* McCarty, 2 Port. (Ala.) 19.

Florida.— Williams *v.* State, 25 Fla. 734, 6 So. 831, 6 L. R. A. 821.

Georgia.— See Hargroves *v.* Cooke, 15 Ga. 321.

Illinois.— Chilton *v.* People, 66 Ill. 501.

Indiana.— Deming *v.* Bullitt, 1 Blackf. (Ind.) 241.

Maine.— Boothbay *v.* Giles, 68 Me. 160. See also Lane *v.* Embden, 72 Me. 354 [*citing* Scipio *v.* Wright, 101 U. S. 665, 25 L. ed. 1037; Humboldt Tp. *v.* Long, 92 U. S. 642, 23 L. ed. 752; Venice *v.* Murdock, 92 U. S. 494, 23 L. ed. 583], where it is also said [*quoting* Augusta Bank *v.* Augusta, 49 Me. 507] that the term "bond" has a great variety of significations, and in law it does not necessarily import a seal as the word is ordinarily used.

Maryland.— State *v.* Humbird, 54 Md. 327.

Missouri.— State *v.* Eldridge, 65 Mo. 584; State *v.* Thompson, 49 Mo. 188; Donnell Mfg. Co. *v.* Repass, 75 Mo. App. 420.

Pennsylvania.— Taylor *v.* Glaser, 2 Serg. & R. (Pa.) 502.

South Carolina.— Cantey *v.* Duren, Harp. (S. C.) 434; Boyd *v.* Boyd, 2 Nott & M. (S. C.) 125.

Vermont.— Barnet *v.* Abbott, 53 Vt. 120. See also Ide *v.* Passumpsic, etc., Rivers R. Co., 32 Vt. 297, 299, where it is said: "Terms of this kind vary somewhat in their import with reference to the subject matter. Jail bond, and sheriff's bond, when the statute requires them to be executed under seal, would naturally enough imply sealing and signing, as has been held in regard to the term 'writing obligatory.'"

Wisconsin.— West *v.* Eau Claire, 89 Wis. 31, 61 N. W. 313.

United States.—Harman *v.* Harman, Baldw. (U. S.) 129, 11 Fed. Cas. No. 6,071.

Canada.— Leith *v.* Freeland, 24 U. C. Q. B. 133; Provincial Ins. Co. *v.* Walton, 16 U. C. C. P. 62.

See 8 Cent. Dig. tit. "Bonds," § 14; and *supra*, I; and also, generally, Seals.

Extent of rule.—An instrument under seal with a penalty or forfeiture is not necessarily implied by the term "bonds." Boothbay *v.* Giles, 68 Me. 160 [*citing* Stone *v.* Bradbury, 14 Me. 185].

An offer to amend by affixing seals has been held to be allowable in New York. People *v.* Rensselaer, 11 Wend. (N. Y.) 174.

54. *Alabama.*— Williams *v.* Young, 3 Ala. 145.

Florida.— Williams *v.* State, 25 Fla. 734, 6 So. 831, 6 L. R. A. 821.

Illinois.— Chilton *v.* People, 66 Ill. 501.

Indiana.— Deming *v.* Bullitt, 1 Blackf. (Ind.) 241.

Maine.— Boothbay *v.* Giles, 68 Me. 160.

Maryland.— State *v.* Humbird, 54 Md. 327.

Pennsylvania.— Taylor *v.* Glaser, 2 Serg. & R. (Pa.) 502.

Contra, Metropolitan L. Ins. Co. *v.* Bender, 124 N. Y. 47, 26 N. E. 345, 35 N. Y. St. 49, 11 L. R. A. 708 [*reversing* 41 Hun (N. Y.) 142]. And see Denton *v.* Adams, 6 Vt. 40, wherein it is declared that the words "writing obligatory" imply signing and sealing and are sufficient.

55. *California.*— Sacramento County *v.* Bird, 31 Cal. 66.

that a seal is not essential to give a bond the force and effect of a sealed instrument.[56]

(II) *Sufficiency of*—(A) *In General.* Where the name of an obligor is followed by a scroll, the words "witness my hand and seal" contained in the bond sufficiently show that such scroll was intended as his seal;[57] and it has been declared that a bond will be construed as a sealed instrument where there is a scroll inclosing the word "seal" at the end of the signature, though there is no *in testimonium* clause.[58] And again it has been held that an obligation will be construed as a bond where there is a scroll after the signature, though the instrument does not purport to be a bond upon its face.[59]

(B) *One Seal and Several Signatures.* It is not in all cases essential to the validity of a bond that there be a separate seal to each signature, for one seal may be adopted by two or more signers, and in those cases where the number of seals is less than the number of signers the existence in the bond of the clause "Sealed with our seals" will raise the presumption that two or more of the signers adopted one seal.[60]

Missouri.— Saline County *v.* Sappington, 64 Mo. 72; Schuster *v.* Weissman, 63 Mo. 552; Donnell Mfg. Co. *v.* Repass, 75 Mo. App. 420.

New York.— Stegman *v.* Hollingsworth, 14 N. Y. Suppl. 465, 39 N. Y. St. 18; People *v.* Groat, 22 Hun (N. Y.) 164; Gould *v.* Venice, 29 Barb. (N. Y.) 442; Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152; People *v.* Lowber, 7 Abb. Pr. (N. Y.) 158.

Ohio.— Bobe *v.* Mood Bldg. Assoc., 8 Ohio Dec. (Reprint) 164, 6 Cinc. L. Bul. 124.

Texas.— Courand *v.* Collmer, 31 Tex. 397; Cayce *v.* Curtis, Dall. (Tex.) 403.

Vermont.— Brandon First Nat. Bank *v.* Briggs, 69 Vt. 12, 37 Atl. 231, 60 Am. St. Rep. 922, 37 L. R. A. 845; Probate Ct. *v.* May, 52 Vt. 182; Ide *v.* Passumpsic, etc., Rivers R. Co., 32 Vt. 297; Rutland *v.* Paige, 24 Vt. 181.

See 8 Cent. Dig. tit. "Bonds," § 14.

56. Bancroft *v.* Stanton, 7 Ala. 351; Handley *v.* Rankins, 4 T. B. Mon. (Ky.) 554; Hughes *v.* Parks, 4 Bibb (Ky.) 60; McKinney *v.* Muller, 19 Mich. 142. See also, generally, SEALS.

57. Force *v.* Craig, 7 N. J. L. 272.

58. Cummins *v.* Woodruff, 5 Ark. 116; Bertrand *v.* Byrd, 4 Ark. 195; Jeffery *v.* Underwood, 1 Ark. 108.

But in Alabama it has been held that there must be some recital in the bond of an intention to make a sealed instrument, the mere use of a seal or a scroll with the word "seal" inclosed not being sufficient. Lytle *v.* Dothan Bank, 121 Ala. 215, 26 So. 6; Lindsay *v.* State, 15 Ala. 43; Lee *v.* Adkins, Minor (Ala.) 187. So, under a statute in Alabama providing that all contracts in writing "which import on their face to be under seal" shall be deemed sealed instruments without regard to scrawls or seals, it was held that a contract could not be construed as a sealed instrument, even under this statute, where it was subscribed with no previous reference to sealing "In testimony of which, we have hereunto annexed our respective signatures. . . . J. W. W. [L. S.] A. G." Waddel *v.* Glassel, 11 Ala. 568.

59. Harden *v.* Webster, 29 Ga. 427. *Contra*, Fish *v.* Brown, 17 Conn. 341. In this connection see Benoist *v.* Carondelet, 8 Mo. 250, wherein it was held that an instrument with the corporate seal attached must be declared on as a bond, though such instrument itself states that it is a note.

Evidence of sealing.— Where by the plea of *non est factum* the execution and delivery of a bond are put in issue the fact of the obligee's possession thereof, together with proof of the obligor's signature, is not *prima facie* evidence that such bond was sealed by the obligor. Keedy *v.* Moats, 72 Md. 325, 19 Atl. 965.

60. *Alabama.*— Martin *v.* Dortch, 1 Stew. (Ala.) 479.

Arkansas.— McKiel *v.* Porter, 4 Ark. 534; Mapes *v.* Newman, 2 Ark. 469.

Delaware.— Warder, etc., Co. *v.* Stewart, 2 Marv. (Del.) 275, 36 Atl. 88.

Florida.— Baars *v.* Gordon, 21 Fla. 25.

Illinois.— Trogdon *v.* Cleveland Stone Co., 53 Ill. App. 206.

Indiana.—Flood *v.* Yandes, 1 Blackf. (Ind.) 102.

Maine.— Cumberland Bank *v.* Bugbee, 19 Me. 27.

Mississippi.— New Orleans, etc., R. Co. *v.* Burke, 53 Miss. 200, 24 Am. Rep. 689.

New Hampshire.— Northumberland *v.* Cobleigh, 59 N. H. 250; Pequawkett Bridge *v.* Mathes, 7 N. H. 230, 26 Am. Dec. 737.

Ohio.—Citizens' Bldg. Assoc. *v.* Cummings, 45 Ohio St. 664, 16 N. E. 841.

Tennessee.— Hollis *v.* Pond, 7 Humphr. (Tenn.) 221.

But see State *v.* Humbird, 54 Md. 327, where it is held that one seal may be adopted by two or more signers but that the words "sealed with our seals" are not sufficient to show that it was so adopted.

See 8 Cent. Dig. tit. "Bonds," § 15.

Where a bond is subsequently signed without seals by two or more persons after it has been executed by one with his individual name and seal attached, it has been held that it could not be inferred that the seal of the original signer was adopted by the subse-

e. Acknowledgment and Attestation.[61] One cannot question the validity of a bond on the ground that it was not acknowledged by him or proved at the time of delivery, where he has signed,[62] sealed, and delivered the same as his bond, unless there is a statute which makes the acknowledgment or proof in court essential to its validity. This general principle is applicable alike to all bonds.[63] And it has been decided that the bond will not be void where a person who was neither present at the execution of the bond nor duly authorized to attest the same was procured to sign it as an attesting witness, provided it was not done with a fraudulent purpose.[64]

f. Affixing Revenue Stamps. By the act of congress of 1864, known as the Stamp Act,[65] bonds were in certain cases required to be stamped,[66] but those given in legal proceedings were expressly exempted by such act.[67] And under such an act the question whether process is void or valid for want of a revenue stamp is immaterial after appearance and answer to the action, and after the parties have gone to trial without objection.[68] Again under the act just referred to the question of intent was held to be immaterial, and therefore the penalties applied as

quent ones. Hess' Estate, 150 Pa. St. 346, 30 Wkly. Notes Cas. (Pa.) 465, 24 Atl. 676.

61. See, generally, ACKNOWLEDGMENTS, 1 Cyc. 506.

62. **But if the bond was not subscribed in the regular way,** and there does not appear to have been any intention to authenticate it, it will not be binding. State *v.* Wallis, 57 Ark. 64, 20 S. W. 811.

Manner of signing.— It is not necessary, however, that the signature be written by the obligor, for if he acknowledges the signature to be his there is sufficient execution of the bond. Manhattan L. Ins. Co. *v.* Alexander, 89 Hun (N. Y.) 449, 35 N. Y. Suppl. 325, 69 N. Y. St. 724 [*affirmed* in 158 N. Y. 732, 53 N. E. 1127].

63. Washington County *v.* Dunn, 27 Gratt. (Va.) 608.

Authenticating bond for record.—A bond may in the absence of any law to the contrary be properly authenticated for record at a time subsequent to the execution thereof. So where a bond was authenticated for record ten years after date of execution it was held proper and legal. Stramler *v.* Coe, 15 Tex. 211.

64. Adams *v.* Frye, 3 Metc. (Mass.) 103. But see Foust *v.* Renno, 8 Pa. St. 378. See Allen *v.* Martin, 4 N. C. 42, where it is held that the bond will be treated as if there was no subscribing witness where the name of a person who was not present at the execution was signed by the obligor as a witness.

65. **Compliance with act — Bond lost.**— Where a revenue stamp was necessary to the validity of a trustee's bond which had been lost but the contents of which had been proved by parol, it was held that the affixing to a paper setting forth the loss of the bond, with the consent of the court, the requisite stamp and canceling the same and the filing the paper in place of the bond was a substantial compliance with the acts of congress and gave the bond validity *ab initio.* Dowler *v.* Cushwa, 27 Md. 354.

Where a stamp law is repealed and validity given to all contracts previously made on unstamped paper, such repeal has a retroactive effect, and where such an act is passed pending an appeal from a judgment given in an action on a bond in which the court had refused to admit the bond in evidence for want of a stamp the judgment should be reversed. State *v.* Norwood, 12 Md. 195.

66. **Date of affixing stamp.**— If a bond when introduced in evidence had the proper stamp thereon the defendant cannot show that such stamp was not upon the bond at the date of execution but was subsequently affixed without his knowledge, or consent, for this latter may have been done and still not contrary to the revenue law, and, in absence of proof showing this, the court will presume the stamp to have been properly and legally placed on the bond. Myers *v.* McGraw, 5 W. Va. 30.

Date of execution shown by parol.— Though the date given in a bond is during a period when under the internal revenue laws it should be stamped the fact that it was not actually executed on the date mentioned may be shown. Biery *v.* App, (Pa. 1886) 4 Atl. 198.

67. **Under this exception** it was decided that a bond to dissolve an attachment need not be stamped. Bowers *v.* Beck, 2 Nev. 139. And although it was provided that writs or other process on appeal from the justice's court should be stamped, yet where no writ or other process was required on such appeal no stamp was necessary on the bond, it being within the exception just noted. Topf *v.* King, 26 Ind. 391; Anderson *v.* Coble, 26 Ind. 329; Violet *v.* Heath, 26 Ind. 178.

Bonds to state.— General acts of the legislature are meant to regulate the rights of citizens and the reasoning applicable to them would apply in most cases with a different and perhaps contrary force to the government itself. General words of a statute should not include the government or affect its rights, unless from the words of the act such construction be clear and indisputable. So this principle is applicable to an act declaring void all bonds not stamped and bonds given to the state need not be stamped under a general state law, unless required as already stated. State *v.* Milburn, 9 Gill (Md.) 105.

68. Topf *v.* King, 26 Ind. 391.

well to instruments executed without intent to evade such act as to those executed with such intent.[69]

g. Execution in Blank. A bond is said to take effect by delivery, and therefore where one executes a bond and delivers the same to another he will be bound thereby,[70] and his liability will not be affected by the fact that there were blanks in the instrument when executed, provided he executed it with knowledge thereof and in the absence of fraud in filling up such blanks, since he consents by implication in such case that they may be so filled.[71] This rule is, however, modified in some cases, in favor of the surety, by holding that a bond so executed and subsequently filled up will not be binding in the absence of authority to perform such subsequent act.[72] And it has been held that, where authority is given to fill blanks left in a bond, if such authority is revoked the bond, if subsequently filled up, will be void, even in the hands of the obligee who took it with no notice of the revocation.[73]

h. Partial Execution. Though a joint and several bond is signed by a part only of the obligors it will not on this account be void as to them,[74] unless their

69. Muscatine *v.* Sterneman, 30 Iowa 526, 6 Am. Rep. 685.

Authority to remit penalties.—A deputy collector was held to have no authority under this act to remit penalties for failure to affix stamps, unless he acted by special authority and his act was authenticated. Muscatine *v.* Sterneman, 30 Iowa 526, 6 Am. Rep. 685.

70. As to delivery of bonds see *infra*, II, E, 3.

71. *Alabama.*— Boardman *v.* Gore, 1 Stew. (Ala.) 517, 18 Am. Dec. 73.

California.— Dolbeer *v.* Livingston, 100 Cal. 617, 35 Pac. 328.

Colorado.— Palacios *v.* Brasher, 18 Colo. 593, 34 Pac. 251, 36 Am. St. Rep. 305.

Indiana.— State *v.* Pepper, 31 Ind. 76.

Kansas.— Rose *v.* Douglass Tp., 52 Kan. 451, 34 Pac. 1046, 39 Am. St. Rep. 354.

Kentucky.— Yocum *v.* Barnes, 8 B. Mon. (Ky.) 496; Clarke *v.* Bell, 2 Litt. (Ky.) 162; Lockart *v.* Roberts, 3 Bibb (Ky.) 361.

Louisiana.— Bell *v.* Keefe, 13 La. Ann. 524; Eyssallenne *v.* Citizens' Bank, 3 La. Ann. 663; Breedlove *v.* Johnston, 2 Mart. N. S. (La.) 517.

Maine.— South Berwick *v.* Huntress, 53 Me. 89, 87 Am. Dec. 535.

Massachusetts.— Smith *v.* Crooker, 5 Mass. 538.

Missouri.— Greene County *v.* Wilhite, 29 Mo. App. 459.

New York.— *Ex p.* Kerwin, 8 Cow. (N. Y.) 118.

Pennsylvania.— Bugger *v.* Cresswell, (Pa. 1888) 12 Atl. 829; Hultz *v.* Com., 3 Grant (Pa.) 61; Wiley *v.* Moor, 17 Serg. & R. (Pa.) 438, 17 Am. Dec. 696.

South Carolina.— Treasury Com'rs *v.* Yongue, 1 Brev. (S. C.) 22.

Contra.— *Mississippi.*— Dickson *v.* Hamer, Freem. (Miss.) 284.

North Carolina.— Barden *v.* Southerland, 70 N. C. 528.

South Carolina.— Perminter *v.* McDaniel, 1 Hill (S. C.) 267, 26 Am. Dec. 179; Boyd *v.* Boyd, 2 Nott & M. (S. C.) 125.

Tennessee.— McNutt *v.* McMahan, 1 Head (Tenn.) 98.

Virginia.— Penn *v.* Hamlett, 27 Gratt. (Va.) 337.

See 8 Cent. Dig. tit. "Bonds," § 17; and also, generally, ALTERATIONS OF INSTRUMENTS, V, C [2 Cyc. 159].

A forthcoming bond executed in blank and subsequently filled up with a description of property not in existence is void. Long *v.* U. S. Bank, Freem. (Miss.) 375.

A person to whom a paper signed in blank by another has been delivered, such paper to be filled up for a sum of money, has no authority to seal and deliver such paper as the bond of the person who signed the same. Manning *v.* Norwood, 1 Ala. 429.

Must be subsequently adopted.— In Maryland it has been held that delivery in blank is insufficient, but that the bond after the blanks have been filled must be subsequently recognized or adopted by the person or persons so executing it. Edelin *v.* Sanders, 8 Md. 118; Byers *v.* McClanahan, 6 Gill & J. (Md.) 250.

72. Cross *v.* State Bank, 5 Ark. 525; Graham *v.* Holt, 25 N. C. 300, 40 Am. Dec. 408.

Authority may be by parol.— Authority to fill up the blanks in a bond may be conferred and revoked by parol. Gibbs *v.* Frost, 4 Ala. 720; Lee County *v.* Welsing, 70 Iowa 198, 30 N. W. 481; *Ex p.* Kerwin, 8 Cow. (N. Y.) 118; Gourdin *v.* Commander, 6 Rich. (S. C.) 497. In some jurisdictions, however, this doctrine is denied (Cross *v.* State Bank, 5 Ark. 525; Preston *v.* Hull, 23 Gratt. (Va.) 600, 14 Am. Rep. 153); while in others it is held that unless a bond is redelivered which has been filled up under parol authority it will be invalid (Boyd *v.* Boyd, 2 Nott & M. (S. C.) 125; Wynne *v.* Governor, 1 Yerg. (Tenn.) 149, 24 Am. Dec. 448; Gilbert *v* Anthony, 1 Yerg. (Tenn.) 69, 24 Am. Dec. 439).

Authority to fill up a bond executed in blank should be proved where such authority is necessary to the validity of the bond. Clendaniel *v.* Hastings, 5 Harr. (Del.) 408.

73. Gourdin *v.* Read, 8 Rich. (S. C.) 230.

74. *California.*—Stimson Mill Co. *v.* Riley, (Cal. 1895) 42 Pac. 1072; Kurtz *v.* Forquer,

signatures were affixed thereto on the express condition that the bond should not be binding on them unless it was also signed by the others.[75]

3. Delivery and Acceptance — a. Necessity of Delivery. A bond is not perfected until delivery thereof, and therefore delivery is essential to its validity, and it takes effect from that date.[76]

b. Mode and Sufficiency of Delivery — (1) *In General.* There is no precise or set form in which delivery must be made, in the absence of a statutory provision designating the manner thereof.[77] The essence of the question whether or not there has been a delivery consists in the intent of the obligor to perfect the instrument and make it at once the absolute property of the obligee. And where there is such an intent coupled with acts or words evincing the same and showing the intention to consummate and complete the bond and to part absolutely and unconditionally with it and the right over it, it will be given legal existence. The delivery may be by both words and acts, or there may be a valid delivery either by words without acts or by acts without words.[78] And it need

94 Cal. 91, 29 Pac. 413; Cal. Code Civ. Proc. § 383.

Maine.— Haskins *v.* Lombard, 16 Me. 140, 33 Am. Dec. 645.

Massachusetts.— Herrick *v.* Johnson, 11 Metc. (Mass.) 26; Adams *v.* Bean, 12 Mass. 137, 7 Am. Dec. 44; Cutler *v.* Whittemore, 10 Mass. 442.

Missouri.— State *v.* Sandusky, 46 Mo. 377.

Nebraska.—Mullen *v.* Morris, 43 Nebr. 596, 62 N. W. 74.

New Hampshire.—Davis *v.* Gillett, 52 N. H. 126.

New Jersey.—Wood *v.* Ogden, 16 N. J. L. 453.

Ohio.— State *v.* Bowman, 10 Ohio 445.

Washington.— Young *v.* Union Sav. Bank, etc., Co., 23 Wash. 360, 63 Pac. 247.

See 8 Cent. Dig. tit. "Bonds," § 16.

As to partial invalidity see *infra*, II, J, 2.

In some cases, however, it has been declared that if a bond is drawn up containing the names of several persons as obligors and it is signed by a part only, the presentation of the bond to such as signed amounts to a representation that it will be signed by all named therein, and in the absence of proof of knowledge and assent by those who signed they will not be bound. Pepper *v.* State, 22 Ind. 399, 85 Am. Dec. 430; Cincinnati *v.* Scott, 1 Ohio Dec. (Reprint) 219, 4 West. L. J. 528.

Principal obligor need not sign to make the bond binding on the coöbligors. Williams *v.* Marshall, 42 Barb. (N. Y.) 524. *Contra*, Wood *v.* Washburn, 2 Pick. (Mass.) 24.

75. Exception to rule.— Los Angeles *v.* Mellus, 59 Cal. 444; Sacramento *v.* Dunlap, 14 Cal. 421; Haskins *v.* Lombard, 16 Me. 140, 33 Am. Dec. 645; State *v.* Sandusky, 46 Mo. 377; Fales *v.* Tilley, 2 Mo. App. 345. *Contra*, Garvey *v.* Marks, 134 Mo. 1, 34 S. W. 1108, 38 S. W. 79.

76. *Alabama.*— Forst *v.* Leonard, 116 Ala. 82, 22 So. 481.

Kentucky.— Carswell *v.* Renick, 7 J. J. Marsh. (Ky.) 281.

Michigan.— Hall *v.* Parker, 37 Mich. 590, 26 Am. Rep. 540.

Missouri.— McPherson *v.* Meek, 30 Mo. 345.

New Jersey.— Yeareance *v.* Blake, (N. J. 1899) 44 Atl. 858.

North Carolina.— Parker *v.* Latham, 44 N. C. 138.

Pennsylvania.— Com. *v.* Kendig, 2 Pa. St. 448; Taylor *v.* Glaser, 2 Serg. & R. (Pa.) 502.

South Carolina.— Boyd *v.* Boyd, 2 Nott & M. (S. C.) 125.

West Virginia.— Van Winkle *v.* Blackford, 28 W. Va. 670.

Wisconsin.— Kenosha City Bank *v.* McClellan, 21 Wis. 112. See also West *v.* Eau Claire, 89 Wis. 31, 61 N. W. 313.

See 8 Cent. Dig. tit. "Bonds," § 21.

77. Compliance with order.— And though one for whose benefit an order is made requiring a bond to be given may insist on strict compliance with the order, yet if voluntarily delivered and accepted it will be binding and the obligee may enforce the same. So held where a bond was only signed by one surety when the order required two sureties. Gyger *v.* Courtney, 59 Nebr. 555, 81 N. W. 437. So where an order is made which requires one party to execute a bond to another it is a sufficient compliance therewith if, when the bond is duly made, it is filed with the clerk of the court by which such order was issued. Rice *v.* Whitlock, 15 Abb. Pr. (N. Y.) 419.

The indorsement "securities justified before me" by the clerk on a judicial bond is held to be evidence that the sureties were present and delivered the bond. Turnbull *v.* Mann, 99 Va. 41, 37 S. E. 288, 2 Va. S. Ct. 673.

78. *Connecticut.*—Ward's Appeal, 35 Conn. 161.

Louisiana.— Morgan *v.* Richmond, 28 La. Ann. 838.

Maryland.— Ryers *v.* McClanahan, 6 Gill & J. (Md.) 250.

Massachusetts.— Johnson *v.* Gerald, 169 Mass. 500, 48 N. E. 764; Bird *v.* Washburn, 10 Pick. (Mass.) 223.

Nevada.—Alcalda *v.* Morales, 3 Nev. 132.

New Jersey.— Fisher *v.* National Bank, 48 N. J. L. 390, 4 Atl. 444, 57 Am. Rep. 561; Folly *v.* Vantuyl, 9 N. J. L. 153.

not be personally delivered by the obligor to the obligee.[79] Again, though the legal title to a bond may be in one person delivery to the one holding the equitable interest will be sufficient.[80]

(II) *Of Bond Executed by Part Only of Obligors.* Though a bond may be executed by a part only of the obligors, yet if delivered by such as executed it, it will be binding on them.[81]

c. Acceptance — (I) *In General.* The intention of the parties must be gathered from their language or their conduct or both,[82] and the legal effect of what they say and do cannot be altered or modified by the undisclosed intention or secret understanding of either. So the question of acceptance cannot be determined from such an intention or understanding.[83] If a bond is accepted conditionally on the day of date to become absolute upon the happening of some event, it will upon the occurrence of such event be considered as delivered and accepted on day dated.[84] And when once accepted by the obligee he cannot subsequently disagree to it so as to make it void.[85] But there is no acceptance where a bond is returned because of a defective acknowledgment.[86] The fact, however, that a bond is rejected does not render a reëxecution of it necessary in case of a subsequent acceptance.[87]

North Carolina.— Phillips *v.* Houston, 50 N. C. 302.

Ohio.— Duckwall *v.* Rogers, 15 Ohio St. 544.

South Carolina.— Fogg *v.* Middleton, 2 Hill Eq. (S. C.) 591.

Tennessee.— McNutt *v.* McMahan, 1 Head (Tenn.) 98; Hansard *v.* State Bank, 5 Humphr. (Tenn.) 52.

See 8 Cent. Dig. tit. "Bonds," § 22.

Delivery to a clerk of the court has been declared to be sufficient where made in the street, delivery in his office not being necessary. Hansard *v.* State Bank, 5 Humphr. (Tenn.) 52.

Depositing a bond in a trunk used in common by the obligor and obligee, who were sisters, where done in the belief that it was a sufficient delivery, has been also declared sufficient. Ward's Appeal, 35 Conn. 161.

Holding the bond out in the hand and saying, "Here is your bond, what shall I do with it," has been held a sufficient delivery. Folly *v.* Vantuyl, 9 N. J. L. 153.

Redelivery of an invalid bond should be of the same character as an original delivery McNutt *v.* McMahan, 1 Head (Tenn.) 98.

The delivery may be conditional; to be enforceable only in case certain other persons sign the same or upon the happening of some event, in which case compliance with the condition is a prerequisite to its validity. Bibb *v.* Reid, 3 Ala. 88; Weed Sewing Mach. Co. *v.* Jeudevine, 39 Mich. 590; Newlin *v.* Beard, 6 W. Va. 110; Stuart *v.* Livesay, 4 W. Va. 45. But see Byers *v.* Gilmore, 10 Colo. App. 79, 50 Pac. 370; Madison, etc., Plankroad Co. *v.* Stevens, 10 Ind. 1.

79. Delivery to a third person where accepted by him may be sufficient, unless the obligee refuse to ratify such delivery. Iredell *v.* Barbee, 31 N. C. 250. See also Wichard *v.* Jordan, 51 N. C. 54. But a delivery of a bond to a third person to be delivered to the obligee has been held insufficient. State *v.* Oden, 2 Harr. & J. (Md.) 108 note.

Delivery to the clerk of the court of a bond which is invalid as a statutory bond has been held not a delivery to the obligee. Harris *v.* Regester, 70 Md. 109, 16 Atl. 386.

Where a bond is put into possession of the obligee by one who has no authority to deliver it an action cannot be maintained thereon by the former. Fay *v.* Richardson, 7 Pick. (Mass.) 91.

80. Sykes *v.* Lewis, 17 Ala. 261. See also Fogg *v.* Middleton, 2 Hill Eq. (S. C.) 591, where delivery to the trustee of a bond executed to him for the benefit of another is held sufficient.

81. Grim *v.* Jackson Tp., 51 Pa. St. 219; Keyser *v.* Keen, 17 Pa. St. 327. See also Lovett *v.* Adams, 3 Wend. (N. Y.) 380.

82. National Bldg., etc., Assoc. *v.* Day, 23 Ky. L. Rep. 599, 63 S. W. 590. See also *infra*, III, D, 1.

Acceptance may be presumed from the fact of its being found in the possession of the party for whose benefit it was made. Mallers *v.* Crane Co., 92 Ill. App. 514; Wood *v.* Chetwood, 44 N. J. Eq. 64, 14 Atl. 21.

Bringing an action by the obligee affirms and treats it as a valid obligation and is sufficient evidence of acceptance. Bird *v.* Washburn, 10 Pick. (Mass.) 223; Tidball *v.* Eichoff, 66 Tex. 58, 17 S. W. 263.

So where property has been transferred by reason of the giving of a bond to recover possession of goods in the hands of a receiver the fact that it was not accepted will not prevent liability thereon. Larsen *v.* Winder, 20 Wash. 419, 55 Pac. 563.

83. National Bldg., etc., Assoc. *v.* Day, 23 Ky. L. Rep. 599, 63 S. W. 590.

84. Conditional acceptance.— Seymour *v.* Van Slyck, 8 Wend. (N. Y.) 403.

85. Newbern Bank *v.* Pugh, 8 N. C. 198.

86. Weber Co. *v.* Chicago, etc., R. Co., 92 Iowa 364, 60 N. W. 637.

87. Pequawkett Bridge *v.* Mathes, 8 N. H. 139.

(II) *Notice of.* Sureties are not entitled to express notice of the acceptance of their obligation, where the bond is absolute in terms and is executed contemporaneously with the contract it is intended to secure and as a part of the same transaction.[88]

F. Consideration — 1. In General. The general principles applicable to contracts generally with respect to consideration apply likewise in the case of bonds.[89] But while a consideration is essential to the validity of a contract, the common law distinguishes between agreements by specialty and by parol. If the contract be by parol, and in this class are included written agreements not under seal, consideration must be proved in order to make it binding. The general rule is that a sufficient consideration may arise by reason of a benefit to the party promising or to a third person by the act of the promisee at the promisor's request, or in case of the promisee sustaining any loss or inconvenience or subjecting himself to any charge or obligation at the instance of the promisor, although the latter obtain no advantage therefrom. The principle upon which this is sustained is the reciprocal undertaking on the part of the promisor and promisee. Where, however, a bond is under seal it is not necessary, in order to make it obligatory, that a consideration appear, the seal itself

88. Chester *v.* Leonard, 68 Conn. 495, 37 Atl. 397; Bryant *v.* Stout, 16 Ind. App. 380, 44 N. E. 68. See also Amherst Bank *v.* Root, 2 Metc. (Mass.) 522; Cox *v.* Weed Sewing Mach. Co., 57 Miss. 350; Hagood *v.* Harley, 8 Rich. (S. C.) 325.

89. Barnett *v.* Franklin College, 10 Ind. App. 103, 37 N. E. 427; Wilson *v.* New York Baptist Education Soc., 10 Barb. (N. Y.) 308; Harwood *v.* Crowell, 3 N. C. 595. See also, generally, Contracts. But *compare* Harrell *v.* Watson, 63 N. C. 454.

As to what may constitute a sufficient consideration see the following cases:

Alabama.— Barnes *v.* Peck, 1 Port. (Ala.) 187.

Arkansas.— State *v.* Nichols, 22 Ark. 61.

California.— Metropolitan Loan Assoc. *v.* Esche, 75 Cal. 513, 17 Pac. 675.

Indiana.— La Rose *v.* Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805; McAlister *v.* Howell, 42 Ind. 15.

Iowa.— Benton County Sav. Bank *v.* Boddicker, 105 Iowa 548, 75 N. W. 632, 67 Am. St. Rep. 310, 45 L. R. A. 321.

Louisiana.— Fickling *v.* Marshall, 22 La. Ann. 504.

Missouri.— State Invest., etc., Co. *v.* Quinlan, 53 Mo. App. 357.

New York.— Eder *v.* Gildersleeve, 85 Hun (N. Y.) 411, 32 N. Y. Suppl. 1056, 66 N. Y. St. 408; Spore *v.* Vaughn, 20 N. Y. Suppl. 152, 47 N. Y. St. 515.

North Carolina.— Woolard *v.* Grist, 25 N. C. 453; Geddy *v.* Stainback, 21 N. C. 475.

Ohio.— Bobe *v.* Moon Bldg. Assoc., 8 Ohio Dec. (Reprint) 164, 6 Cinc. L. Bul. 124.

South Carolina.— Fogg *v.* Middleton, 2 Hill Eq. (S. C.) 591.

Washington.— Larsen *v.* Winder, 20 Wash. 419, 55 Pac. 563.

See 8 Cent. Dig. tit. "Bonds," §§ 29, 30; and also, generally, Contracts.

Particular instances of sufficiency of consideration.—"Love and affection," though not as between uncle and niece (Mark *v.* Clark, 11 B. Mon. (Ky.) 44), an agreement to assign a judgment against a third person (Ware *v.* Pennington, 15 Ark. 226), the cancellation of a contract (Oregon Pac. R. Co. *v.* Forrest, 128 N. Y. 83, 28 N. E. 137, 38 N. Y. St. 837 [*affirming* 11 N. Y. Suppl. 8, 32 N. Y. St. 178]), the giving of a bond as consideration for a stay of proceedings (Whereatt *v.* Ellis, 103 Wis. 348, 79 N. W. 416, 74 Am. St. Rep. 865), the granting of a new trial (American Exch. Bank *v.* Brenzinger, 10 Ohio S. & C. Pl. Dec. 208), the issuance of a writ of error and supersedeas on condition that a party execute a bond (Bosley *v.* Bruner, 24 Miss. 457), the signing of an appeal-bond on condition to hold harmless on a release bond (Conery *v.* Cannon, 26 La. Ann. 123), have been held to be sufficient consideration to support bonds. So a bond given by a son to secure the debt of his father is supported by a sufficient consideration. Bissinger *v.* Lawson, 57 Miss. 36; Murrell *v.* Greenland, 1 Desauss. (S. C.) 332. Again the deposit of money in a bank is sufficient consideration for the giving of a bond for the payment of checks drawn against such deposit. Comstock *v.* Gage, 91 Ill. 328. And the consideration is sufficient for the giving of bond by the inhabitants of a town that some benefit results to the community. Carpenter *v.* Mather, 4 Ill. 374. So also a bond given to a bank to enable it to continue in business is supported by a sufficient consideration, where the bank does in fact continue in business and incurs new obligations incident thereto. Hurd *v.* Kelly, 78 N. Y. 588, 34 Am. Rep. 567 [*affirming* 17 Hun (N. Y.) 327 note]; Hurd *v.* Green, 17 Hun (N. Y.) 327.

Want of consideration.— Recovery upon a bond may be prevented by a want of consideration. Mt. Pleasant *v.* Hobart, 25 Kan. 719; Lee *v.* Wisner, 38 Mich. 82; State *v.* Bartlett, 30 Miss. 624; Long *v.* Gilliam, 28 Mo. 560; Aberdeen *v.* Honey, 8 Wash. 251, 35 Pac. 1097. *Contra*, Meek *v.* Frantz, 171 Pa. St. 632, 38 Wkly. Notes Cas. (Pa.) 117, 33 Atl. 413. So a plea of want of consideration has been sustained, where it appeared that

being evidence thereof,[90] and every bond from the solemnity of the instrument is said to carry with it an internal evidence of good consideration which will be sufficient to support the agreement.[91]

the consideration was the sale of a patent right to a certain article for which no patent had ever been issued (Brown *v.* Wright, 17 Ark. 9), and in case of a meritorious consideration as the duty to provide for a wife or child (Matter of James, 146 N. Y. 78, 40 N. E. 876, 66 N. Y. St. 246, 48 Am. St. Rep. 774 [*affirming* 78 Hun (N. Y.) 121, 28 N. Y. Suppl. 992, 60 N. Y. St. 184]), and where the consideration was *ultra vires* (Wimer *v.* Overseers of Poor, 104 Pa. St. 317), and where the obligor's name was forged (McHugh *v.* Schuylkill, 67 Pa. St. 391, 5 Am. Rep. 445). Again a bond executed to release a steamboat seized under proceedings of which the court had no jurisdiction has been held to be without consideration. Ford *v.* Fuget, 29 Ind. 52. And the simple liability as surety has been declared not to be a valuable consideration sufficient to sustain a bond for the payment of a sum of money as a debt. Jefferson *v.* Tunnell, 2 Del. Ch. 135. But if no consideration was contemplated by the parties it has been decided that equity will not relieve a principal or surety from liability merely for want of consideration. Meek *v.* Frantz, 171 Pa. St. 632, 38 Wkly. Notes Cas. (Pa.) 117, 33 Atl. 413. And a bond will not be invalid because no consideration passed directly between the obligor and obligee, it being sufficient if some consideration passed to a coöbligor. Robertson *v.* Findley, 31 Mo. 384.

Bond exceeding requirements.— A bond which exceeds the requirements either of an order of court therefor or of the agreement between the parties will, so far as it exceeds such requirements, be considered as without consideration. Young *v.* Schlosser, 65 Ind. 225; Wanters *v.* Van Vorst, 28 N. J. Eq.103.

Contractors' bonds.— A bond entered into and given concurrent with the execution and delivery of a contract, and as a part thereof, is supported by a sufficient consideration, as it will also be if subsequently given, provided the giving of the contract was conditioned for the execution of a bond. Mackenzie *v.* Edinburg School Trustees, 72 Ind. 189; Smith *v.* Molleson, 148 N. Y. 241, 42 N. E. 669 [*affirming* 74 Hun (N. Y.) 606, 26 N. Y. Suppl. 653, 57 N. Y. St. 250]. But if the giving of the bond be subsequent to the awarding of a contract and was no inducement thereto, in the absence of a new consideration the bond will be considered as a mere gratuity and invalid. Ring *v.* Kelly, 10 Mo. App. 411. See also Peck *v.* Harris, 57 Mo. App. 467. But see Winfield *v.* Paulus Architectural Co., 77 Mo. App. 370.

Substitution of bond for another.— If a bond is executed without any consideration and subsequently another security is given in exchange or substitution therefor, the original want of consideration follows and attaches to the subsequent bond and renders it void. McDaniel *v.* Grace, 15 Ark. 465; Campbell *v.* Cypress Hills Cemetery, 41 N. Y. 34.

Where a bottomry bond has been accepted as security for an advance, a bond subsequently executed as security for such sum and in consideration thereof is invalid for want of consideration, unless such subsequent bond was a part of the same transaction. Davies *v.* Soelberg, 24 Wash. 308, 64 Pac. 540.

90. Wilson *v.* New York Baptist Education Soc., 10 Barb. (N. Y.) 308.

Seal imports a consideration in case of a bond.

Alabama.— Doe *v.* Crane, 16 Ala. 570.

Arkansas.— Cross *v.* State Bank, 5 Ark. 525.

California.— Mulford *v.* Estudillo, 17 Cal. 618; McCarty *v.* Beach, 10 Cal. 461.

Delaware.— Garden *v.* Derrickson, 2 Del. Ch. 386, 95 Am. Dec. 286.

Illinois.— Evans *v.* Edwards, 26 Ill. 279.

Kansas.— Northern Kansas Town Co. *v.* Oswald, 18 Kan. 336.

Kentucky.—Steele *v.* Mitchell, Ky. Dec. 37.

Maryland.— Bond *v.* Conway, 11 Md. 512; Edelin *v.* Sanders, 8 Md. 118; Edelen *v.* Gough, 5 Gill (Md.) 103.

Massachusetts.— Page *v.* Trufant, 2 Mass. 159, 3 Am. Dec. 41.

Michigan.— Dye *v.* Mann, 10 Mich. 291.

New Jersey.— Farnum *v.* Burnett, 21 N. J. Eq. 87; Wanmaker *v.* Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748.

New York.— Mutual L. Ins. Co. *v.* Yates County Nat. Bank, 35 N. Y. App. Div. 218, 54 N. Y. Suppl. 743; Hurd *v.* Green, 17 Hun (N. Y.) 327.

Ohio.— Reddish *v.* Harrison, Wright (Ohio) 221.

Oregon.— Paddock *v.* Hume, 6 Oreg. 82.

Pennsylvania.— Cosgrove *v.* Cummings, 195 Pa. St. 497, 46 Atl. 69; Grubb *v.* Willis, 11 Serg. & R. (Pa.) 106.

Vermont.— Barrett *v.* Carden, 65 Vt. 431, 26 Atl. 530, 36 Am. St. Rep. 876.

Virginia.—Harris *v.* Harris, 23 Gratt. (Va.) 737.

See 8 Cent. Dig. tit. "Bonds," § 31.

91. *Connecticut.*— Holdridge *v.* Allin, 2 Root (Conn.) 139, 1 Am. Dec. 63.

Kentucky.—Coyle *v.* Fowler, 3 J. J. Marsh. (Ky.) 472.

Massachusetts.— Page *v.* Trufant, 2 Mass. 159, 3 Am. Dec. 41.

New York.— Dorr *v.* Munsell, 13 Johns. (N. Y.) 430; Vrooman *v.* Phelps, 2 Johns. (N. Y.) 177.

North Carolina.— Harrell *v.* Watson, 63 N. C. 454; Guy *v.* McLean, 12 N. C. 46; Lester *v.* Zachary, 4 N. C. 50.

South Carolina.— Carter *v.* King, 11 Rich. (S. C.) 125; Cross *v.* Gabeau, 1 Bailey (S. C.) 211.

Tennessee.—Roper *v.* Stone, Cooke (Tenn.) 497.

2. Failure of Consideration. In case of a failure of consideration, as where it proves to be a mere nullity, or where though good at the time of entering into the agreement it wholly fails before either party has received any benefit or sustained any loss or detriment thereunder, the agreement will not be binding.[92]

3. Illegal Consideration. It is a general proposition that if the consideration is illegal the bond will be void. As in contracts, however, the question of entirety of consideration would probably be a factor in determining the validity of the bond, for if incapable of severance if part is illegal it will all be, but if the consideration be such that it is capable of division and the illegal fact can be eliminated from the rest, leaving an entire and sufficient consideration, the bond may nevertheless be enforced.[93]

G. Validity of Assent — 1. Effect of Duress. Bonds executed under duress are void.[94] If, however, all the parties to the bond did not execute it under duress then the bond will be only void as to those who so executed it.[95] And the burden of proof is upon the party claiming duress to establish his contention.[96]

2. Effect of Fraud. It is a general principle of the common law that fraud vitiates all contracts, and this rule applies likewise in the case of bonds.[97] And

Virginia.— Harris *v.* Harris, 23 Gratt. (Va.) 737.

92. See the following cases in support of this general principle, though in none of them was there held to be a failure of consideration under the particular facts.

Indiana.— Hazelett *v.* Butler University, 84 Ind. 230.

Kentucky.—Carter *v.* Leeper, 5 Dana (Ky.) 261.

Massachusetts.— Shattuck *v.* Adams, 136 Mass. 34.

New Jersey.— Cornish *v.* Bryan, 10 N. J. Eq. 146.

Pennsylvania.— Fulton *v.* Hood, 34 Pa. St. 365, 75 Am. Dec. 664.

West Virginia.— Matthews *v.* Dunbar, 3 W. Va. 138.

See 8 Cent. Dig. tit. "Bonds," § 34.

93. That illegal consideration vitiates bond see the following cases:

Kentucky.— Morton *v.* Fletcher, 2 A. K. Marsh. (Ky.) 137, 12 Am. Dec. 366.

Massachusetts.— Page *v.* Trufant, 2 Mass. 159, 3 Am. Dec. 41.

New York.— Wilson *v.* New York Baptist Education Soc., 10 Barb. (N. Y.) 308; Newburgh *v.* Galatian, 4 Cow. (N. Y.) 340; Bruce *v.* Lee, 4 Johns. (N. Y.) 410; Dorlan *v.* Sammis, 2 Johns. (N. Y.) 179 note; Vrooman *v.* Phelps, 2 Johns. (N. Y.) 177.

Ohio.— Goudy *v.* Gebhart, 1 Ohio St. 262.

Canada.— Peoples' Bank *v.* Johnson, 20 Can. Supreme Ct. 541.

That bond is good if part of consideration is good see Jarvis *v.* Peck, 10 Paige (N. Y.) 118. See also, as to partial invalidity, *infra*, II, J, 2.

94. *Georgia.*— Governor *v.* Williams, Dudley (Ga.) 244.

Massachusetts.— Fisher *v.* Shattuck, 17 Pick. (Mass.) 252.

New York.— Thompson *v.* Lockwood, 15 Johns. (N. Y.) 256.

Pennsylvania.— Avery *v.* Layton, 119 Pa. St. 604, 13 Atl. 528.

Canada.— St. Thomas *v.* Yearsley, 22 Ont. App. 340.

See 8 Cent. Dig. tit. "Bonds," § 46; and, generally, Contracts.

What constitutes duress.—A bond will be void for duress where executed under fear of unlawful imprisonment (Whitefield *v.* Longfellow, 13 Me. 146), or to obtain release therefrom (Bowker *v.* Lowell, 49 Me. 429). But the fact that a person is unlawfully detained in custody does not, it has been decided, avoid a bond voluntarily and freely given by him. Whitefield *v.* Longfellow, 13 Me. 146. See Pflaum *v.* McClintock, 130 Pa. St. 369, 18 Atl. 734. Again a bond has been held void for duress where given to secure the release of property which has been illegally levied upon. Perry *v.* Hensley, 14 B. Mon. (Ky.) 381, 61 Am. Dec. 164; Collins *v.* Westbury, 2 Bay (S. C.) 211, 1 Am. Dec. 643; Sasportas *v.* Jennings, 1 Bay (S. C.) 470. *Contra*, Hazelrigg *v.* Donaldson, 2 Metc. (Ky.) 445. But a bond required of a public officer as a condition to the retention of his position is not void for duress (Smith *v.* U. S., (Ariz. 1896) 45 Pac. 341; Howgate *v.* U. S., 3 App. Cas. (D. C.) 277; State *v.* Harney, 57 Miss. 863; Sooy *v.* State, 41 N. J. L. 394); nor is a bond given to secure a valid lien on goods, possession of which the salvors are entitled to and have, but transfer the same on the giving of the bond (Jones *v.* Bridge, 2 Sweeny (N. Y.) 431); nor where taken by authority of law by an officer who holds property by virtue of legal process (Shirley *v.* Byrnes, 34 Tex. 625). Nor does a threat of resorting to legal prosecution of a person constitute duress. Hamilton *v.* Lockhart, 158 Pa. St. 452, 27 Atl. 1077; Fulton *v.* Hood, 34 Pa. St. 365, 75 Am. Dec. 664.

95. Tucker *v.* State, 72 Ind. 242; Thompson *v.* Lockwood, 15 Johns. (N. Y.) 256; Spaulding *v.* Crawford, 27 Tex. 155.

96. Gibson *v.* Patterson, 75 Ga. 549.

97. Watriss *v.* Pierce, 32 N. H. 560; Hoitt *v.* Holcomb, 23 N. H. 535; Campbell *v.* Cypress Hills Cemetery, 41 N. Y. 34; Bruce *v.* Lee, 4 Johns. (N. Y.) 410; McHugh *v.* Schuylkill, 67 Pa. St. 391, 5 Am. Rep. 445. See also Franklin *v.* Ridenhour, 58 N. C. 420.

if there is at the time a bond is entered into any wilful misrepresentation of circumstances or concealment of facts, so that the surety enters into a covenant or contract which he otherwise would not, fraud being thus in fact practised upon him, he will be discharged from liability on his undertaking.[98] But to constitute fraud under such circumstances it has been declared that the misstatement must be false and known to be such, and of a matter material to the contract not equally within the knowledge of the party imposed upon and relied upon by him to his injury; and in case of concealment it must likewise be of a matter material to the contract, known to the fraudulent party but not to the other, and not equally within his power to know.[99] A bond cannot, however, be impeached by an obligor who has knowledge of the fraud before he executes the contract,[1] and the fraud of a coöbligor in inducing a person to execute a bond will not relieve him from liability where the obligee did not participate therein,[2] nor will the fraud of a third party.[3]

3. Effect of Mistake. A bond should be construed and given an effect according to the lawful intention of the parties thereto; and where such intention can be ascertained from the terms of the bond it will not be invalidated by a mere technical defect or clerical error.[4]

But see Vrooman *v.* Phelps, 2 Johns. (N. Y.) 177. And in Armstrong *v.* McConnell, 1 Yerg. (Tenn.) 32, a similar doctrine is asserted, it being declared that relief must be sought in a court of equity.

Bond signed by intoxicated person.— No liability will be incurred on a bond by a person who is induced to sign the same while in such an intoxicated condition that he does not know what he is about. Hyman *v.* Moore, 48 N. C. 416; King *v.* Bryant, 3 N. C. 591.

98. **Misrepresentations or concealment of facts.**—*Arkansas.*— Fenter *v.* Obaugh, 17 Ark. 71.

New Hampshire.— Watriss *v.* Pierce, 32 N. H. 560; Hoitt *v.* Holcomb, 23 N. H. 535.

North Carolina.— Boyd *v.* King, 57 N. C. 152: Graham *v.* Little, 56 N. C. 152.

Pennsylvania.—Schuylkill *v.* Copley, 67 Pa. St. 386, 5 Am. Rep. 441; Hall *v.* Tobin, 10 Pa. Co. Ct. 105.

Rhode Island.— Atlas Bank *v.* Brownell, 9 R. I. 168, 11 Am. Rep. 231.

Virginia.— Guarantee Co. of North America *v.* Lynchburg First Nat. Bank, 95 Va. 480, 28 S. E. 909; Brown *v.* Rice, 76 Va. 629.

United States.— Bell *v.* Nimmo, 5 McLean (U. S.) 109, 3 Fed. Cas. No. 1,258.

See 8 Cent. Dig. tit. "Bonds," § 44; and, generally, Contracts.

Illiterate obligors.— The rule stated in the text has been applied in the case of an illiterate obligor to whom there have been misrepresentations made as to the contents of the bond. Schuylkill County *v.* Copley, 67 Pa. St. 386, 5 Am. Rep. 441; Green *v.* North Buffalo Tp., 56 Pa. St. 110; Hall *v.* Tobin, 10 Pa. Co. Ct. 105.

99. Hoitt *v.* Holcomb, 23 N. H. 535; Fulton *v.* Hood, 34 Pa. St. 365, 75 Am. Dec. 664; Atlas Bank *v.* Brownell, 9 R. I. 168, 11 Am. Rep. 231 [*distinguishing* Franklin Bank *v.* Cooper, 36 Me. 179].

A misrepresentation as to the nature of the instrument will not relieve the sureties on a bond from liability, where they are men of ordinary intelligence, able to read and write, have ample opportunity to read the instrument, and a mere casual inspection would show it to be a bond. Engstad *v.* Syverson, 72 Minn. 188, 75 N. W. 125.

1. Higgs *v.* Smith, 3 A. K. Marsh. (Ky.) 338.

2. Bigelow *v.* Comegys, 5 Ohio St. 256. See also, as to partial invalidity, *infra*, II, J, 2.

3. Morrison *v.* Clay, Hard. (Ky.) 421.

That resort must be had to court of equity in such cases see Armstrong *v.* McConnell, 1 Yerg. (Tenn.) 32; Taylor *v.* King, 6 Munf. (Va.) 358, 8 Am. Dec. 746. See also, generally, Fraud.

4. Flinn *v.* Carter, 59 Ala. 364; Penniman *v.* Barrymore, 6 Mart. N. S. (La.) 494; Peck *v.* Critchlow, 8 Miss. 243; Collins *v.* Chastain, (Tex. Civ. App. 1896) 36 S. W. 503.

A bond will not be vitiated by the omission of a necessary word, where such word may be clearly understood from the context. De Soto County *v.* Dickson, 34 Miss. 150. So the word "dollars" may be supplied where omitted. Herman *v.* Howe, 27 Gratt. (Va.) 676. Again the word "or" may be construed as "and," where used between the names of the obligees. Brittin *v.* Mitchell, 4 Ark. 92.

A mistake in the name of a party to a bond will not avoid it, where it can be shown who was the party intended.

California.— Morgan *v.* Thrift, 2 Cal. 562.

Georgia.—Shaver *v.* McLendon, 26 Ga. 228.

Illinois.— Schill *v.* Reisdorf, 88 Ill. 411; Hibbard *v.* McKindley, 28 Ill. 240.

Maine.— Green *v.* Walker, 37 Me. 25.

Massachusetts.— Leonard *v.* Speidel, 104 Mass. 356; Colburn *v.* Downes, 10 Mass. 20.

New Jersey.— Giles *v.* Halsted, 24 N. J. L. 366, 61 Am. Dec. 668; Upper Alloways Creek Tp. *v.* String, 10 N. J. L. 323.

New York.—Wiser *v.* Blachly, 1 Johns. Ch. (N. Y.) 607.

Vermont.— Weed *v.* Abbott, 51 Vt. 609; Richmond *v.* Woodard, 32 Vt. 833.

United States.— Dolton *v.* Cain, 14 Wall. (U. S.) 472, 20 L. ed. 830.

H. Validity of Bonds Exacted Colore Officii. A bond exacted by a judge or other public officer under the pretended authority of his office, and which he is not legally authorized to require, will be void.[5] It has been held, however, in other cases that though a bond is taken which is not authorized by any statute such bond, if it possesses the requisites of a common-law bond, may be enforced as such.[6]

See 8 Cent. Dig. tit. "Bonds," § 42.

Where a name is wrongly stated it has been held that a bond will not be vitiated by the erasure of such name and the insertion of the proper name. Turner *v.* Billagram, 2 Cal. 520.

Where mistake is one of law.— A plea that the bond was executed under a mistaken impression of its legal effect made on the defendant's mind by the plaintiff is bad. Miller *v.* Elliott, 1 Ind. 484, 50 Am. Dec. 475.

5. *Alabama.*— Counts *v.* Harlan, 78 Ala. 551; Whitsett *v.* Womack, 8 Ala. 466.

Arkansas.— Walker *v.* Fetzer, 62 Ark. 135, 34 S. W. 536.

California.— People *v.* Cabannes, 20 Cal. 525; Benedict *v.* Bray, 2 Cal. 251, 56 Am. Dec. 332.

Georgia.— McLendon *v.* Smith, 68 Ga. 36.

Indiana.— Caffrey *v.* Dudgeon, 38 Ind. 512, 10 Am. Rep. 126; Byers *v.* State, 20 Ind. 47.

Kentucky.—Florrance *v.* Goodin, 5 B. Mon. (Ky.) 111; Moore *v.* Allen, 3 J. J. Marsh. (Ky.) 612; Couchman *v.* Lisle, 15 Ky. L. Rep. 543.

Louisiana.— Alexander *v.* Silbernagel, 27 La. Ann. 557.

Mississippi.— Mitchell *v.* Drake, 57 Miss. 605.

New Jersey.— Smith *v.* Allen, 1 N. J. Eq. 43, 21 Am. Dec. 33.

New York.— People *v.* Mitchell, 4 Sandf. (N. Y.) 466; People *v.* Locke, 3 Sandf. (N. Y.) 443; Hoogland *v.* Hudson, 8 How. Pr. (N. Y.) 343; People *v.* Meighan, 1 Hill (N. Y.) 298; Sullivan *v.* Alexander, 19 Johns. (N. Y.) 233.

Texas.— Leona Irrigation, etc., Co. *v.* Roberts, 62 Tex. 615.

Virginia.— Com. *v.* Jackson, 1 Leigh (Va.) 485.

See 8 Cent. Dig. tit. "Bonds," § 41.

Application of rule illustrated.— Bonds containing conditions not imposed by statute or different conditions are declared in New York to be included in the rule stated in the text and therefore void. People *v.* Mitchell, 4 Sandf. (N. Y.) 466; People *v.* Locke, 3 Sandf. (N. Y.) 443; Hoogland *v.* Hudson, 8 How. Pr. (N. Y.) 343; People *v.* Meighan, 1 Hill (N. Y.) 298; Sullivan *v.* Alexander, 19 Johns. (N. Y.) 233. And a bond purporting to be an appeal-bond in a criminal case which substantially conforms to such a bond in civil actions but which is not required nor authorized by law creates no liability on the part of the sureties. People *v.* Cabannes, 20 Cal. 525. Again where a justice of the peace has no jurisdiction of the action a bond taken by him for the return or release of property seized in replevin proceedings will be void. Caffrey *v.* Dudgeon, 38 Ind. 512, 10 Am. Rep. 126; Florrance *v.* Goodin, 5 B. Mon. (Ky.) 111. See also Counts *v.* Harlan, 78 Ala. 551, construing Ala. Code, §§ 4005, 4021, as to execution of a search warrant requiring the property to be taken before a magistrate but giving no authority to take a forthcoming bond. And such a bond will be given no validity by the fact that it is executed in conformity with an order of court directing the release of property in judicial custody upon the execution of a bond. Alexander *v.* Silbernagel, 27 La. Ann. 557. But it has been decided in another case that though a bond is given in pursuance of an order of a court which has no authority to issue such an order yet, if the bond conforms to the statute, it is valid as a statutory bond and may be enforced as such. McCrosky *v.* Riggs, 9 Sm. & M. (Miss.) 107. Again, where a party who was not entitled to a new trial as a matter of strict legal right was granted the same by the court, in the exercise of its discretion, upon grounds not enumerated in the statute, it was declared that the court might require a bond to be executed in order to protect the prevailing party from losing his rights under the judgment already rendered, and such a bond was held not to be exacted *colore officii* and therefore not invalid. Brenzinger *v.* American Exch. Bank, 19 Ohio Cir. Ct. 536, 10 Ohio Cir. Dec. 775. And the execution of a bond for a larger amount than required and with one surety instead of two will not render it void as taken *colore officii* (Adee *v.* Adee, 16 Hun (N. Y.) 46); nor will the fact that it is not according to statute (McGowen *v.* Deyo, 8 Barb. (N. Y.) 340). So also the taking of a bond by the overseers of the poor as an indemnity against the expenses of supporting a poor person has been held not to be a violation of a statute prohibiting an officer from taking any security by color of his office. Turner *v.* Hadden, 62 Barb. (N. Y.) 480.

"Color of office" construed.— Under a New York act bonds taken in that state by officers by color of office were declared void. As used in this act the words "color of office" were construed as meaning some wrongful act committed by an officer under the pretended authority of his office. Decker *v.* Judson, 16 N. Y. 439, construing 2 N. Y. Rev. Stat. p. 286, § 59.

6. **When may operate as common-law bond.** — Warfield *v.* Davis, 14 B. Mon. (Ky.) 33; Hanna *v.* McKenzie, 5 B. Mon. (Ky.) 314, 43 Am. Dec. 122. Thus it has been so held where such a bond has been taken in replevin (Wolfe *v.* McClure, 79 Ill. 564); where a bond has been given for the appearance of a person and he has been discharged thereunder (State *v.* Cannon, 34 Iowa 322); where given

I. Validity of Statutory Bonds — 1. In General. A bond to be good as a statutory bond should in general comply in respect to its conditions and execution with the requirements of the act under which given.[7] But an obligor will not be permitted to take advantage of an omission of a condition where such omission is beneficial to him.[8]

2. Complying Substantially With Statute. As a general rule if a statute prescribes what the substance of a bond shall be, the fact that it slightly varies from the form prescribed will not invalidate it, provided it includes substantially such obligations as are imposed by the act and allows every defense given by law.[9] But if a statute declares all bonds void which do not comply with the requirements therein prescribed, the statute in such a case should be strictly followed.[10]

to pay money into court at the return of a fieri facias (Lampton *v.* Taylor, Litt. Sel. Cas. (Ky.) 273); and where possession of property has been retained or obtained thereby (Brady *v.* Butts, 15 Ky. L. Rep. 127; Todd *v.* Gordy, 29 La. Ann. 498).

As to when statutory bonds may operate as valid common-law bonds see *infra*, II, I, 4; and *infra*, III, B, 2.

7. *Maine.*— Howard *v.* Brown, 21 Me. 385.

Mississippi.— Amos *v.* Allnutt, 7 How. (Miss.) 215; McIntyre *v.* White, 5 How. (Miss.) 298.

New York.— Davis *v.* Kruger, 4 E. D. Smith (N. Y.) 350.

Texas.— Lawton *v.* State, 5 Tex. 270; Mays *v.* Lewis, 4 Tex. 1.

United States.— U. S. *v.* Howell, 4 Wash. (U. S.) 620, 26 Fed. Cas. No. 15,405, 2 Am. Lead. Cas. (5th ed.) 419; Dixon *v.* U. S., 1 Brock. (U. S.) 177, 7 Fed. Cas. No. 3,934.

See 8 Cent. Dig. tit. "Bonds," § 38.

If a bond is in the precise language of a statute which requires its execution it will not be invalid because part of the condition cannot be enforced. People *v.* Mitchell, 4 Sandf. (N. Y.) 466.

The omission of a statutory requirement is held in some cases, however, to render the bond not void but merely voidable. Shaw *v.* Tobias, 3 N. Y. 188; Smith *v.* McFall, 18 Wend. (N. Y.) 521. And again it has been held that where a condition required by statute is omitted it may be supplied. Slocomb *v.* Robert, 16 La. 173; Boswell *v.* Lainhart, 2 La. 397.

Where the statute does not employ words of severalty a joint bond may be sufficient. Baars *v.* Gordon, 21 Fla. 25.

8. Justices Columbia Inferior Ct. *v.* Wynn, Dudley (Ga.) 22; Seeligson *v.* De Witt County, 1 Tex. App. Civ. Cas. § 820.

9. *Alabama.*— Boring *v.* Williams, 17 Ala. 510.

Arkansas.— Nunn *v.* Goodlett, 10 Ark. 89.

Connecticut.— Holbrook *v.* Bentley, 32 Conn. 502.

Georgia.— Central Bank *v.* Kendrick, Dudley (Ga.) 66.

Illinois.— Purcell *v.* Bear Creek, 138 Ill. 524, 28 N. E. 1085; Schill *v.* Reisdorf, 88 Ill. 411; Ballingall *v.* Carpenter, 5 Ill. 306.

Kentucky.— Cobb *v.* Com., 3 T. B. Mon. (Ky.) 391.

Maryland.— Waters *v.* Riley, 2 Harr. & G. (Md.) 305, 18 Am. Dec. 302.

Minnesota.— Lanier *v.* Irvine, 21 Minn. 447.

Mississippi.—Boykin *v.* State, 50 Miss. 375.

Missouri.— Wimpey *v.* Evans, 84 Mo. 144; Newton *v.* Cox, 76 Mo. 352; Flint *v.* Young, 70 Mo. 221; Graves *v.* McHugh, 58 Mo. 499; Hoshaw *v.* Gullett, 53 Mo. 208.

New Jersey.— McEachron *v.* New Providence Tp., 35 N. J. L. 528; Smith *v.* Allen, 1 N. J. Eq. 43, 21 Am. Dec. 33.

New York.— McGowen *v.* Deyo, 8 Barb. (N. Y.) 340; Ring *v.* Gibbs, 26 Wend. (N. Y.) 502; Van Deusen *v.* Hayward, 17 Wend. (N. Y.) 67; Allegany County *v.* Van Campen, 3 Wend. (N. Y.) 48.

North Carolina.— Governor *v.* Miller, 20 N. C. 41; Rhodes *v.* Vaughan, 9 N. C. 167; Judges *v.* Deans, 9 N. C. 93.

Ohio.— Davisson *v.* Burgess, 31 Ohio St. 78; The Propeller Ogontz *v.* Wick, 12 Ohio St. 333; Bentley *v.* Dorcas, 11 Ohio St. 398; Creighton *v.* Harden, 10 Ohio St. 579; State *v.* Findley, 10 Ohio 51; Collier *v.* Johnson, 7 Ohio 235; Reynolds *v.* Rogers, 5 Ohio 169; Insolvent Com'rs *v.* Way, 3 Ohio 103; Gardener *v.* Woodyear, 1 Ohio 170.

Pennsylvania.—Com. *v.* Laub, 1 Watts & S. (Pa.) 261.

Rhode Island.— Tripp *v.* Barton, 13 R. I. 130.

South Carolina.—State Treasurers *v.* Bates, 2 Bailey (S. C.) 362.

Tennessee.— State *v.* Witherspoon, 9 Humphr. (Tenn.) 393.

Texas.— Ward *v.* Hubbard, 62 Tex. 559.

Vermont.—Grand Isle Probate Ct. *v.* Strong, 27 Vt. 202, 65 Am. Dec. 190.

Virginia.— White *v.* Clay, 7 Leigh (Va.) 68.

Washington.— Ihrig *v.* Scott, 5 Wash. 584, 32 Pac. 466.

Wisconsin.—Conover *v.* Washington County, 5 Wis. 438; Yale *v.* Flanders, 4 Wis. 96.

United States.— U. S. *v.* Hodson, 10 Wall. (U. S.) 395, 19 L. ed. 937.

Non-compliance with statutory requirements may avoid a bond where, by the evasion of the statute, a fraud upon the obligors is intended (Ward *v.* Hubbard, 62 Tex. 559); or where the non-compliance is not merely in language or form but in signification (Johnson *v.* Erskine. 9 Tex. 1).

10. Whitsett *v.* Womack, 8 Ala. 466; Central Bank *v.* Kendrick, Dudley (Ga.) 66;

3. CONTAINING CONDITIONS NOT REQUIRED. A statutory bond will not be void because it contains conditions in excess of those prescribed by statute, but such conditions, where severable from the rest, may be rejected as surplusage and the instrument will be valid as to those which comply with the statutory requirements, unless the act under which it is executed prescribes the form of the bond and provides that it shall be taken in no other form.[11] But where the authority to take the bond is wholly derived from statute it has been decided that if it contains conditions not required thereby, or is in a penalty greater than prescribed and is not voluntarily given, the entire bond will be void.[12]

4. VALIDITY AS COMMON-LAW BONDS. A statutory bond may be good at common law, though insufficient under the statute because of non-compliance with its requirements, provided it does not violate public policy or contravene any statute.[13]

Justices Columbia Inferior Ct. *v.* Wynn, Dudley (Ga.) 22; Ward *v.* Hubbard, 62 Tex. 559; U. S. *v.* Brown, Gilp. (U. S.) 155, 24 Fed. Cas. No. 14,663.

11. *Alabama.*— Walker *v.* Chapman, 22 Ala. 116; Sanders *v.* Rives, 3 Stew. (Ala.) 109.

District of Columbia.— District of Columbia *v.* Waggaman, 4 Mackey (D. C.) 328.

Illinois.— Purcell *v.* Steele, 12 Ill. 93.

Kansas.— Atchison, etc., R. Co. *v.* Cuthbert, 14 Kan. 212.

Kentucky.— Com. *v.* Hawkins, 83 Ky. 246; Johnson *v.* Vaughan, 9 B. Mon. (Ky.) 217.

Louisiana.—Welsh *v.* Barrow, 9 Rob. (La.) 535; Slocomb *v.* Robert, 16 La. 173; Boswell *v.* Lainhart, 2 La. 397.

Maine.— Union Wharf *v.* Mussey, 48 Me. 307; Franklin Bank *v.* Cooper, 36 Me. 179.

Massachusetts.— Hall *v.* Cushing, 9 Pick. (Mass.) 395.

Missouri.— Woods *v.* State, 10 Mo. 698.

Oklahoma.— Lowe *v.* Guthrie, 4 Okla. 287, 44 Pac. 198.

Pennsylvania.— Shunk *v.* Miller, 5 Pa. St. 250; Speck *v.* Com., 3 Watts & S. (Pa.) 324; Philadelphia *v.* Shallcross, 14 Phila. (Pa.) 135, 37 Leg. Int. (Pa.) 273.

South Carolina.— Anderson *v.* Foster, 2 Bailey (S. C.) 500.

Tennessee.— Polk *v.* Plummer, 2 Humphr. (Tenn.) 500, 37 Am. Dec. 566; Ranning *v.* Reeves, 2 Tenn. Ch. 263.

Texas.— Williford *v.* State, 17 Tex. 653.

United States.— U. S. *v.* Hodson, 10 Wall. (U. S.) 395, 19 L. ed. 937; U. S. *v.* Mynderse, 11 Blatchf. (U. S.) 1, 27 Fed. Cas. No. 15,851, 12 Int. Rev. Rec. 104 [*affirmed* in 154 U. S. 580, 14 S. Ct. 1213, 20 L. ed. 241]; Dixon *v.* U. S., 1 Brock. (U. S.) 177, 7 Fed. Cas. No. 3,934; U. S. *v.* Humason, 5 Sawy. (U. S.) 537, 26 Fed. Cas. No. 15,420, 10 Chic. Leg. N. 328, 25 Int. Rev. Rec. 208, 8 Reporter 70.

See 8 Cent. Dig. tit. "Bonds," § 38.

12. *Alabama.*— Whitsett *v.* Womack, 8 Ala. 466.

Kentucky.— Shuttleworth *v.* Levi, 13 Bush (Ky.) 195.

New York.— People *v.* Mitchell, 4 Sandf. (N. Y.) 466; People *v.* Locke, 3 Sandf. (N. Y.) 443; Hoogland *v.* Hudson, 8 How. Pr. (N. Y.) 343; People *v.* Meighan, 1 Hill (N. Y.) 298.

Pennsylvania.— Power *v.* Graydon, 53 Pa. St. 198.

Texas.— Janes *v.* Langham, 29 Tex. 413; Turner *v.* State, 14 Tex. App. 168.

United States.— U. S. *v.* Gordon, 7 Cranch (U. S.) 287, 3 L. ed. 347, 1 Brock. (U. S.) 190, 25 Fed. Cas. No. 15,232; U. S. *v.* Morgan, 3 Wash. (U. S.) 10, 26 Fed. Cas. No. 15,809.

See 8 Cent. Dig. tit. "Bonds," § 38.

13. *Alabama.*— Adler *v.* Potter, 57 Ala. 571; Russell *v.* Locke, 57 Ala. 420; Mitchell *v.* Ingram, 38 Ala. 395; Williamson *v.* Woolf, 37 Ala. 298; Whitsett *v.* Womack, 8 Ala. 466; Butler *v.* O'Brien, 5 Ala. 316; Reed *v.* Brashers, 3 Port. (Ala.) 378; Sugg *v.* Burgess, 2 Stew. (Ala.) 509.

Arizona.— Finley *v.* Tucson, (Ariz. 1900) 60 Pac. 872.

Arkansas.— Nunzesheimer *v.* Byrne, 56 Ark. 116, 19 S. W. 320.

California.— Central Lumber, etc., Co. *v.* Center, 107 Cal. 193, 40 Pac. 334.

Georgia.— Crawford *v.* Howard, 9 Ga. 314; Stephens *v.* Crawford, 3 Ga. 499.

Illinois.— Richardson *v.* People, 85 Ill. 495; Hotz *v.* Bollman Bros Co., 47 Ill. App. 378; People *v.* Shannon, 10 Ill. App. 355; Turner *v.* Armstrong, 9 Ill. App. 24.

Iowa.— Garretson *v.* Reeder, 23 Iowa 21.

Kentucky.—Cotton *v.* Wolf, 14 Bush (Ky.) 238; Christian Justices *v.* Smith, 2 J. J. Marsh. (Ky.) 472; Thompson *v.* Buckhannon, 2 J. J. Marsh. (Ky.) 416; Thompson *v.* Com., 4 T. B. Mon. (Ky.) 484; Hoy *v.* Rogers, 4 T. B. Mon. (Ky.) 225.

Maine.— Patten *v.* Kimball, 73 Me. 497; Cleaves *v.* Dockray, 67 Me. 118; Pettingill *v.* Pettingill, 60 Me. 411; Athens *v.* Ware, 39 Me. 345; Ware *v.* Jackson, 24 Me. 166; Lord *v.* Lancey, 21 Me. 468; Baker *v.* Haley, 5 Me. 240; Winthrop *v.* Dockendorff, 3 Me. 156.

Massachusetts.— McIntire *v.* Linehan, 178 Mass. 263, 59 N. E. 767; Farr *v.* Rouillard, 172 Mass. 303, 52 N. E. 443; Holbrook *v.* Klenert, 113 Mass. 268; Brighton Bank *v.* Smith, 5 Allen (Mass.) 413; Sweetser *v.* Hay, 2 Gray (Mass.) 49; Pratt *v.* Gibbs, 9 Cush. (Mass.) 82; Burroughs *v.* Lowder, 8 Mass. 373.

Michigan.— Board of Education *v.* Grant, 107 Mich. 151, 64 N. W. 1050; Lustfield *v.* Ball, 103 Mich. 17, 61 N. W. 339.

And it may be enforced by common-law remedies.[14] But it cannot be so enforced where it has never been delivered to, or ratified by, the obligee,[15] or where the condition upon which it was executed has not been complied with.[16] And a bond given to a judge of probate by one acting as trustee under an illegal appointment is not good as a common-law bond against the coöbligors, where it was signed by them under the belief that the trustee was subject to the jurisdiction of the probate court.[17] Again, where because of the giving of a bond the court appointed a certain person as curator of an estate, it was decided that as the court had no power to make such an appointment the bond could not be sustained even as a common-law bond.[18]

5. When Statute Has Been Amended or Repealed. Though a statute under which a bond is executed may be subsequently amended or repealed the validity and force of the bond will not be thereby affected, for though it may be insufficient as a statutory bond by the subsequent act, a common-law action may nevertheless be maintained thereon.[19] And a bond void by the act under which it is executed will not be validated by a subsequent general act.[20]

Mississippi.— State *v.* Bartlett, 30 Miss. 624; Tucker *v.* Hart, 23 Miss. 548.

Missouri.—State *v.* O'Gorman, 75 Mo. 370; State *v.* Sappington, 67 Mo. 529; Williams *v.* Coleman, 49 Mo. 325; Selmes *v.* Smith, 21 Mo. 526; State *v.* Thomas, 17 Mo. 503; Gathwright *v.* Callaway County, 10 Mo. 663; Grant *v.* Brotherton, 7 Mo. 458.

New Jersey.— Ordinary *v.* Heishon, 42 N. J. L. 15.

New York.— Carr *v.* Sterling, 114 N. Y. 558, 22 N. E. 37, 24 N. Y. St. 521; Ryan *v.* Webb, 39 Hun (N. Y.) 435; Warner *v.* Ross, 9 Abb. N. Cas. (N. Y.) 385; Davis *v.* Haffner, 2 Abb. Pr. (N. Y.) 187.

North Carolina.— Reid *v.* Humphreys, 52 N. C. 258; State *v.* McAlpin, 26 N. C. 140; Ricks *v.* Hayworth, 15 N. C. 584; Davis *v.* Somerville, 15 N. C. 382; Vanhook *v.* Barnett, 15 N. C. 268; Williams *v.* Ehringhaus, 14 N. C. 263; Currituck Justices *v.* Dozier, 14 N. C. 255; Cumberland Justices *v.* Armstrong, 14 N. C. 252; Governor *v.* Witherspoon, 10 N. C. 42.

North Dakota.— Braithwaite *v.* Jordan, 5 N. D. 196, 65 N. W. 701, 31 L. R. A. 238.

Ohio.— Duckwall *v.* Rogers, 15 Ohio St. 544; Miller *v.* Montgomery County, 1 Ohio 271; Shelden *v.* Sharpless, 2 Ohio Dec. (Reprint) 1, 1 West. L. Month. 42.

Oregon.— Williams *v.* Shelby, 2 Oreg. 144.

Pennsylvania.— Wright *v.* Keyes, 103 Pa. St. 567; Koons *v.* Seward, 8 Watts (Pa.) 388; Claasen *v.* Shaw, 5 Watts (Pa.) 468, 30 Am. Dec. 338.

South Carolina.— State *v.* Mayson, 2 Nott & M. (S. C.) 425; Walker *v.* Crosland, 3 Rich. Eq. (S. C.) 23; Lee *v.* Waring, 3 Desauss. (S. C.) 57.

Tennessee.— Maddox *v.* Shacklett, (Tenn. Ch. 1895) 36 S. W. 731; Governor *v.* Allen, 8 Humphr. (Tenn.) 176; Boughton *v.* State, 7 Humphr. (Tenn.) 192; Cannon *v.* Snowdon, 4 Humphr. (Tenn.) 359; Jones *v.* Wiley, 4 Humphr. (Tenn.) 145; Goodrum *v.* Carroll, 2 Humphr. (Tenn.) 489, 37 Am. Dec. 564; Hibbits *v.* Canada, 10 Yerg. (Tenn.) 465.

Texas.— Jacobs *v.* Daugherty, 78 Tex. 682, 15 S. W. 160; Colorado City Nat. Bank *v.* Lester, 73 Tex. 542, 11 S. W. 626. But see in this state Johnson *v.* Erskine, 9 Tex. 1.

Virginia.— Dabney *v.* Catlett, 12 Leigh (Va.) 383; Hooe *v.* Tebbs, 1 Munf. (Va.) 501; Johnsons *v.* Meriwether, 3 Call (Va.) 523.

West Virginia.— Hall *v.* Wadsworth, 35 W. Va. 375, 14 S. E. 4; Adler *v.* Green, 18 W. Va. 201.

Wisconsin.— Platteville *v.* Hooper, 63 Wis. 385, 23 N. W. 583.

United States.— Stephenson *v.* Monmouth Min., etc., Co., 84 Fed. 114, 54 U. S. App. 499, 28 C. C. A. 292; U. S. *v.* Maurice, 2 Brock. (U. S.) 96, 26 Fed. Cas. No. 15,747; U. S. *v.* Four Part Pieces Woollen Cloth, 1 Paine (U. S.) 435, 25 Fed. Cas. No. 15,150.

See 8 Cent. Dig. tit. "Bonds," § 40.

14. Enforceable by common-law remedies. — *Alabama.*— Miller *v.* Vaughan, 78 Ala. 323; Bell *v.* Thomas, 8 Ala. 527; Hester *v.* Keith, 1 Ala. 316.

Illinois.— Barnes *v.* Brookman, 107 Ill. 317.

Massachusetts.— Grocers' Bank *v.* Kingman, 16 Gray (Mass.) 473; Burroughs *v.* Lowder, 8 Mass. 373.

Missouri.— Rubelman Hardware Co. *v.* Greve, 18 Mo. App. 6.

New Jersey.— Ordinary *v.* Cooley, 30 N. J. L. 179.

Ohio.— Croy *v.* State, Wright (Ohio) 135.

Oregon.— Bunneman *v.* Wagner, 16 Oreg. 433, 18 Pac. 841, 8 Am. St. Rep. 306.

15. Reilly *v.* Atchinson, (Ariz. 1893) 32 Pac. 262; Gregory *v.* Goldthwaite, 2 Tex. Civ. App. 287, 21 S. W. 413.

As to delivery see *supra*, II, E, 3.

As to acceptance see *supra*, II, E, 3.

16. Edwards *v.* Pomeroy, 8 Colo. 254, 6 Pac. 829.

17. Conant *v.* Newton, 126 Mass. 105.

18. Couchman *v.* Lisle, 17 Ky. L. Rep. 1295, 33 S. W. 940.

19. Lane *v.* Kasey, 1 Metc. (Ky.) 410; Tucker *v.* Stokes, 5 Sm. & M. (Miss.) 124; Darling *v.* Peck, 15 Ohio 65; Lewis *v.* Stout, 22 Wis. 234.

20. Morton *v.* Rutherford, 18 Wis. 298.

6. Where Statute Is Unconstitutional. If the statute which authorizes the execution of a bond and in conformity to which it is given is unconstitutional the bond will be void.[21]

J. What Is the Effect of Invalidity — 1. In General. While, under the rule that the law will not lend aid to the enforcement of a contract void *in toto*, and a bond wholly invalid must ordinarily be considered as inoperative,[22] it has been decided that a defective or invalid bond may be enforced where defects have been cured by waiver,[23] or where the parties thereto have ratified the contract, recognized its validity, or estopped themselves from objecting to the defects or invalidity.[24] Again, though a bond may be fatally defective it may be permissible under a statute to remedy the defect by the execution of a new bond.[25]

2. Partial Invalidity. Where the conditions of a bond consist of several different parts, and those which are not sustainable are severable from those which are, the bond, though void as to the former, will be good as to the latter.[26] And this rule applies in the case of statutory bonds which conform in part only to the requirements of the statute, unless it is expressly declared by such enactment that bonds shall be void which are not in conformity therewith,[27] in which case the entire bond will be void.[28] Again, a bond may be valid as to part of the obligors and void as to the rest.[29]

III. Construction and Operation.

A. In General. A bond or obligation is a deed at the common law,[30] and is to be construed like other contracts.[31]

21. Byers *v.* State, 20 Ind. 47; Cassel *v.* Scott, 17 Ind. 514; Poole *v.* Kermit, 59 N. Y. 554.

22. See, generally, Contracts.

23. **By the signing of a bond** the parties have been held to waive defects therein. State *v.* Winfree, 12 La. Ann. 643. See also State *v.* Wallis, 57 Ark. 64, 20 S. W. 811; Manhattan L. Ins. Co. *v.* Alexander, 89 Hun (N. Y.) 449, 35 N. Y. Suppl. 325, 69 N. Y. St. 724 [*affirmed* in 158 N. Y. 732, 53 N. E. 1127]; Washington County *v.* Dunn, 27 Gratt. (Va.) 608.

As to signature, generally, see *supra*, II, E, 2, c.

24. **Bringing suit.**—In some cases the bond may be voidable at the election of the obligee, and under such circumstances the bringing of an action by him on the bond is a ratification of the contract. Cohea *v.* State, 34 Miss. 179. See also *infra*, VI; and, generally, Alterations of Instruments, VI [2 Cyc. 172].

Consent to additions.— Again, where with the consent of all the parties additions are made to a bond it is not thereby invalidated. Berry *v.* Berry, 7 J. J. Marsh. (Ky.) 487. See also Alterations of Instruments, V, B [2 Cyc. 155].

Estoppel.— See Justices Columbia Inferior Ct. *v.* Wynn, Dudley (Ga.) 22; Higgs *v.* Smith, 3 A. K. Marsh. (Ky.) 338; Seeligson *v.* De Witt County, 1 Tex. App. Civ. Cas. § 820; and, generally, Estoppel.

25. **New bond.**— Alderson *v.* Trent, 79 Ky. 259.

26. *Alabama.*— Montgomery *v.* Montgomery, etc., Plank-Road Co., 31 Ala. 76; Whitted *v.* Governor, 6 Port. (Ala.) 335.

Iowa.— Seeberger *v.* Wyman, 108 Iowa 527, 79 N. W. 290.

Maine.— Pettingill *v.* Patterson, 32 Me. 569.

Missouri.— Presbury *v.* Fisher, 18 Mo. 50.

Ohio.— State *v.* Findley, 10 Ohio 51.

Pennsylvania.— Chaffee *v.* Sangston, 10 Watts (Pa.) 265.

Virginia.— Pratt *v.* Wright, 13 Gratt. (Va.) 175, 67 Am. Dec. 767.

United States.— U. S. *v.* Mora, 97 U. S. 413, 24 L. ed. 1013; U. S. *v.* Hodson, 10 Wall. (U. S.) 395, 19 L. ed. 937; U. S. *v.* Mynderse, 27 Fed. Cas. No. 15,850*a*, 12 Int. Rev. Rec. 94; Fry *v.* Grigg, 9 Fed. Cas. No. 5,139, 1 Wkly. Notes Cas. (Pa.) 73.

Contra.— Lindsay *v.* Smith, 78 N. C. 328, 24 Am. Rep. 463, where it is declared that in such a case the bond is void *in toto* if executed for a single consideration.

27. **Rule applies to statutory bonds.**— *Alabama.*— Whitsett *v.* Womack, 8 Ala. 466.

Delaware.— Lambden *v.* Conoway, 5 Harr. (Del.) 1; State *v.* Layton, 4 Harr. (Del.) 512.

Georgia.— Stephens *v.* Crawford, 1 Ga. 574, 44 Am. Dec. 680.

Tennessee.—Triplet *v.* Gray, 7 Yerg. (Tenn.) 15.

United States.— U. S. *v.* Hodson, 10 Wall. (U. S.) 395, 19 L. ed. 937.

28. Mackie *v.* Cairns, 5 Cow. (N. Y.) 547, 15 Am. Dec. 477.

29. Burger *v.* Belsley, 45 Ill. 72; Dickey *v.* Sleeper, 13 Mass. 244. See also *supra*, II, E, 2, h, as to partial execution.

30. **A deed at common law.**— Provincial Ins. Co. *v.* Walton, 16 U. C. C. P. 62. See also, generally, Deeds.

31. Lewis *v.* Dwight, 10 Conn. 95; Scofield *v.* Moore, 11 N. Y. Suppl. 303, 33 N. Y. St. 676. See also, generally, Contracts.

B. What Kind of Contract — 1. Whether Bond or Not. Resort to the rules of construction may be necessary to determine whether an instrument is a bond or other contract.[32]

2. Whether Common-Law or Statutory Bond.[33] The form is not essential,[34] for a writing may upon its face and standing by itself constitute one kind of an instrument and yet by indorsement thereon it may be changed into a penal bond. In such case the material question is as to the effect of the agreement and that must be based upon a consideration of the language of the condition as well as of that in the body of the contract since it is the entire writing which expresses what the parties intended.[35] And if a bond is given under a statutory requirement it is not a necessary requisite to its validity that it should be conditioned in the precise language of the statute.[36] So, where a bond is not in the language of the statute yet contains the substance of such language the rest may be disregarded as mere redundance.[37] But in the absence of anything showing a differ-

Court of equity will construe a penal bond even though a court of law may have done so previously. Clamorgan *v.* Guisse, 1 Mo. 141. See also, generally, EQUITY.

32. Juliaetta Tramway Co. *v.* Vollmer, (Ida. 1895) 39 Pac. 1115, where, although the contention of respondent was that the writing was a contract for the sale of land, it was held to be a bond.

As to rules of construction see *infra*, III, D.

Illustrations.—So if the parties bind themselves each to the other in a penal sum to do certain things the obligation may constitute a bond. Wood *v.* Willis, 110 Mass. 454. And the agreement may have the force and effect of a delivery bond where a certain sum of money is to be paid on default of an obligation to deliver property on a specified day. Leverenz *v.* Haines, 32 Ill. 357. And although an obligation sued on purports to be a final bill yet if the sums named in the penalty and condition correspond it will be treated as a simple obligation or single bill; and in such case it is not error to render a verdict and judgment therein for the amount of the bond with continuing interest from the date the same fell due. Fleming *v.* Toler, 7 Gratt. (Va.) 310.

33. As to defective statutory bonds valid as common-law bonds see *supra*, II, I, 4.

34. As to form and contents see *supra*, II, E, 1.

35. As where the obligation on the back of a promissory note was: "This note is given on the condition that the signer will cause trustees to assess damages . . . the award of said trustees to be subtracted from the amount of within note." In such a case the payee cannot recover the amount by merely setting up the instrument and alleging breach of contract but must plead his actual damages. Ellett *v.* Eberts, 74 Iowa 597, 598, 38 N. W. 426.

As to intent of parties, generally, see *infra*, III, C, 1.

36. U. S. *v.* Hodson, 10 Wall. (U. S.) 395, 19 L. ed. 937. See also McGowen *v.* Deyo, 8 Barb. (N. Y.) 340; Van Deusen *v.* Hayward, 17 Wend. (N. Y.) 67; and *supra*, II, I, 2, 3.

Contra.— A statutory bond to be valid and effectual must in every essential particular strictly conform to the statute so that a bond directed by statute to be taken to the state is void when taken payable to the governor. Lawton *v.* State, 5 Tex. 270. See also Sullivan *v.* Alexander, 19 Johns. (N. Y.) 233.

Illustrations.— The fact that a conservator's bond is taken to the people of the state instead of to the county treasurer does not invalidate it, and it is good as a common-law obligation and may be enforced, especially so where no law is violated and public policy is not contravened. Richardson *v.* People, 85 Ill. 495. So where a collector by virtue of a bond not in the form required by the statute obtained money he and his sureties were estopped from denying its validity, and where it was a good common-law bond and was not prohibited by public policy or by statute it was obligatory. Coons *v.* People, 76 Ill. 383. So where a bond was not in conformity with the statute but was entirely variant from the condition prescribed therein, it was regarded as a voluntary common-law bond. Abrahams *v.* Jones, 20 Ill. App. 83. A bond given under a statute is valid where it is given to the treasurer instead of to the town in its corporate name, even though it names no individual and the statute requires that it shall be to the town in its corporate name. Judd *v.* Read, 6 U. C. C. P. 362 [*affirmed* in Todd *v.* Perry, 20 U. C. Q. B. 649].

37. Probate Judge *v.* Ordway, 23 N. H. 198. See also Bell *v.* Furbush, 56 Me. 178; and *supra*, II, I, 2.

A bond which contains the conditions required by statute and also conditions in excess of those specified by statute is valid so far as it imposes obligations authorized by statute but the stipulations which are in excess of it may be rejected as surplusage. A different rule prevails where the bond falls so far short of the statutory requirements as to be invalid as an official bond. It may then be obligatory as a common-law bond unless prohibited by statute or against public policy. Lowe *v.* Guthrie, 4 Okla. 287, 44 Pac. 198 [*citing* Barnes *v.* Brookman, 107 Ill. 317; Murfree Off. Bonds, § 61]. See also *supra*, II, I, 3.

ent intention in the giving of a statutory bond it will be presumed that the intention of the parties was to execute such a bond as the law required, and although its terms may bear a broader construction the liability of sureties will be confined to the liability contemplated by the law in requiring such bond.[38] And if the form in which a bond is given is not prohibited by statute or the law, is not contrary to public policy but is founded upon a sufficient consideration, is intended to subserve a lawful purpose, and is entered into by competent parties, it is a valid contract at common law.[39] Again a statutory requirement that certain persons "shall give bond" does not impress upon the instrument given in conformity therewith the character implied by the word "shall," for if there is no coercion or duress[40] such bond is a voluntary one.[41]

C. What Law Governs.[42] It may fairly be inferred that a contract is made with reference to the law of the country where the parties happen to be, but if the contract is made with reference to the law of another country the law of the latter ordinarily governs in preference to that of the former. If, then, the law of the place of contract is intended to be invoked it must appear that the parties contracted in view of that law, or at least it must not appear that they contracted without such reference.[43] If, however, a bond is made in one state conditioned

38. Lowe *v.* Guthrie, 4 Okla. 287, 44 Pac. 198.

A voluntary bond, not an official one, is enforceable as a common-law bond, even though the conditions are more onerous than that required by statute for a bond for the same purpose. Johnson *v.* Dun, 75 Minn. 533, 78 N. W. 98 [*citing* Gardner *v.* Donnelly, 86 Cal. 367, 24 Pac. 1072; Central Mills Co. *v.* Stewart, 133 Mass. 461; Slutter *v.* Kirkendall, 100 Pa. St. 307]. See also *supra*, II, A.

39. U. S. *v.* Hodson, 10 Wall. (U. S.) 395, 19 L. ed. 937. See also Archer *v.* Hart, 5 Fla. 234 [*citing* U. S. *v.* Linn, 15 Pet. (U. S.) 290, 10 L. ed. 742; U. S. *v.* Tingey, 5 Pet. (U. S.) 115, 8 L. ed. 66]. See also *supra*, II, A; and Bell *v.* Furbush, 56 Me. 178, as to when a bond should be construed by its language to be a common-law and not a statutory obligation, so that a compliance with its conditions is a satisfaction, and the obligor is not compelled to perform other acts prescribed by the statute but not so expressed.

That bond is valid as a common-law or voluntary bond though not in conformity with the exact wording of the statute. See Richardson *v.* People, 85 Ill. 495; Coons *v.* People, 76 Ill. 383; Abrahams *v.* Jones, 20 Ill. App. 83; Judd *v.* Read, 6 U. C. C. P. 362 [*affirmed* in Todd *v.* Perry, 20 U. C. Q. B. 649]; and *supra*, II, I, 4. So a bond by an assistant postmaster to a postmaster is for his benefit, and is not the statutory bond required by U. S. Rev. Stat. (1878), § 3838. Wills *v.* Hurst, 101 Tenn. 656, 49 S. W. 740. And a guardian's bond not signed by the principal is not a statutory bond. Painter *v.* Mauldin, 119 Ala. 88, 24 So. 769, 72 Am. St. Rep. 902.

When bond is not a statutory but a common-law bond see Palmer *v.* Vance, 13 Cal. 553; Bell *v.* Furbush, 56 Me. 178; Richardson *v.* Prince George Justices, 11 Gratt. (Va.) 190. And examine Finley *v.* Tucson, (Ariz. 1900) 60 Pac. 872. See also *supra*, II, I, 4.

An appeal-bond, though it does not conform with the statute, may be enforced as a common-law obligation. Coughran *v.* Sundback, 13 S. D. 115, 82 N. W. 507, 79 Am. St. Rep. 886.

Bond to pay a judgment is not a statutory bond under the Connecticut statute but a common-law bond, even though the attachment was released. Johnson *v.* Dun, 75 Minn. 533, 78 N. W. 98.

The official bond of a city clerk is a statutory and not a common-law bond. Lowe *v.* Guthrie, 4 Okla. 287, 44 Pac. 198.

40. **As to validity of assent** see *supra*, II, G.

41. U. S. *v.* Hodson, 10 Wall. (U. S.) 395, 19 L. ed. 937.

42. **As to what law governs the validity** of a bond see *supra*, II, B.

43. Carneal *v.* Day, Litt. Sel. Cas. (Ky.) 492; Turpin *v.* Povall, 8 Leigh (Va.) 93; Crumlish *v.* Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872, 23 L. R. A. 120; Scudder *v.* Chicago Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245; Green *v.* Sarmiento, Pet. C. C. (U. S.) 74, 3 Wash. (U. S.) 17, 10 Fed. Cas. No. 5,760. See also, generally, CONTRACTS.

A bond given under an act of congress must be construed with regard to such act and the general principles of law which are applicable, and such bond is not therefore governed either as to its character or effect by the local law. U. S. *v.* Stephenson, 1 McLean (U. S.) 462, 27 Fed. Cas. No. 16,386.

A second or substituted bond containing the same stipulations as another bond is not the execution or making of a contract, but can only be regarded in the light of evidence of the contract and if, until the substituted bond was executed, neither the writings nor the proof furnished the slightest information that the contract was to be performed anywhere else than at the place where it was entered into, then its binding efficacy must be determined by the laws of that place. Broughton *v.* Bradley, 36 Ala. 689.

to be construed by the laws of another state, and no points in the law of the latter are shown to differ from those of the former in regard to the legal effect of the bond, its construction will be determined according to the laws of the state where the instrument is made.[44]

D. Rules of Construction — 1. Intention — a. In General. The contract of guaranty or of surety is subject to the same rules of interpretation as other contracts requiring the bond to be enforced according to the parties' intention;[45] and the cardinal rule of construction necessitates that such intention be ascertained because of its fundamental and preëminent importance.[46] The court must therefore endeavor to so construe a bond as to effectuate the meaning of the parties at the time the paper was executed embodying their evident purpose;[47] and if the contract is not ambiguous but plain the parties must abide thereby,[48] although the letter of the condition will be departed from to carry into effect such intention,[49] which will be enforced, even though it differs from the literal wording of the bond.[50]

The penal laws of one state cannot operate or be enforced in another state, for they are strictly local and consequently limited to that which they reach, and this rule applies to a bond subjecting the obligors to a statutory penalty. Indiana *v.* John, 5 Ohio 217.

44. Scottish Commercial Ins. Co. *v.* Plummer, 70 Me. 540.

But a letter of guaranty written in this country to a house in England, and which was an engagement to be executed there, must be construed and have effect according to the laws of that country, and the same rule would apply as to different states of this Union. Bell *v.* Bruen, 1 How. (U. S.) 169, 11 L. ed. 89.

45. Scofield *v.* Moore, 11 N. Y. Suppl. 303, 33 N. Y. St. 676 [*citing* Insurance Co. *v.* Holt, 21 N. Y. Wkly. Dig. 118], applying the principle to a bond to executors to pay debts and expenses and holding that it was the obvious intention of the parties to exonerate the executors from all responsibility and expense, and that there was no ambiguity in the instrument. See also Lewis *v.* Dwight, 10 Conn. 95.

46. Intention of the parties governs and the obligation should be so construed as to effectuate such intention if possible.

California.— Swain *v.* Graves, 8 Cal. 549.

Idaho.— Juliaetta Tramway Co. *v.* Vollmer, (Ida. 1895) 39 Pac. 1115.

Indiana.— Sturgis *v.* Rogers, 26 Ind. 1.

Iowa.— Ellett *v.* Eberts, 74 Iowa 597, 38 N. W. 426.

Maryland.— Strawbridge *v.* Baltimore, etc., R. Co., 14 Md. 360, 74 Am. Dec. 541.

New Hampshire.— Probate Judge *v.* Ordway, 23 N. H. 198.

North Carolina.— Mullen *v.* Whitmore, 74 N. C. 477; Parker *v.* Carson, 64 N. C. 563; Iredell *v.* Barbee, 31 N. C. 250; Bennehan *v.* Webb, 28 N. C. 57.

Oklahoma.— Lowe *v.* Guthrie, 4 Okla. 287, 44 Pac. 198.

Oregon.—Oregon R., etc., Co. *v.* Swinburne, 22 Oreg. 574, 30 Pac. 322.

Pennsylvania.— Elliott *v.* Ellis, 14 Phila. (Pa.) 188, 37 Leg. Int. (Pa.) 83.

Tennessee.— Kincannon *v.* Carroll, 9 Yerg. (Tenn.) 10, 30 Am. Dec. 391.

England.— Pentland *v.* Stoakes, 2 Ball & B. 73; Stadhard *v.* Lee, 3 B. & S. 364, 9 Jur. N. S. 908, 32 L. J. Q. B. 75, 7 L. T. Rep. N. S. 815, 11 Wkly. Rep. 361, 113 E. C. L. 364; Goodtitle *v.* Bailey, Cowp. 597; Rogers *v.* Hadley, 2 H. & C. 227, 9 Jur. N. S. 898, 32 L. J. Exch. 241, 9 L. T. Rep. N. S. 292, 11 Wkly. Rep. 1074; Cholmondeley *v.* Clinton, 2 Jac. & W. 1, 22 Rev. Rep. 84; Arundell *v.* Arundell, Coop. t. Br. 139, 2 L. J. Ch. 77, 1 Myl. & K. 316, 7 Eng. Ch. 316.

Canada.— Nichols *v.* Madill, 6 U. C. Q. B. 415; Canada Permanent Bldg., etc., Soc. *v.* Lewis, 8 U. C. C. P. 352.

See 8 Cent. Dig. tit. "Bonds," § 50; and, generally, Contracts.

47. Juliaetta Tramway Co. *v.* Vollmer, (Ida. 1895) 39 Pac. 1115; Strawbridge *v.* Baltimore, etc., R. Co., 14 Md. 360, 74 Am. Dec. 541.

A construction inconsistent with the true intention of the parties to the obligation of a bond will not be given. Vickery *v.* Welch, 19 Pick. (Mass.) 523, where the principle was applied to a bond to convey and assure to obligee a factory and certain secret arts of manufacturing.

So the manifest intention should be carried out if it can be done without violence to the language of the bond. Nichols *v.* Tifft, 56 N. Y. 644 [*reversing* 2 Thomps. & C. (N. Y.) 314]. And the intention is to be ascertained by the words used, and the agreement should be enforced according to the mutual understanding of the parties at the time. Gyles *v.* Valk, 2 Speers (S. C.) 460.

48. Ralphsnyder *v.* Ralphsnyders, 17 W. Va. 28, where the principle was applied to a bond for the payment of money and for support and maintenance.

49. Swain *v.* Graves, 8 Cal. 549; Cooke *v.* Graham, 3 Cranch (U. S.) 229, 2 L. ed. 420.

50. Cooke *v.* Graham, 3 Cranch (U. S.) 229, 2 L. ed. 420.

Punctuation of a bond, while it may shed light upon, will not be allowed to overrule, the plain meaning of the words employed. Hawes *v.* Sternheim, 57 Ill. App. 126. See also Holmes *v.* Phenix Ins. Co., 98 Fed. 240, 39 C. C. A. 45, 47 L. R. A. 308, as to punctuation of contracts.

b. Attendant Circumstances and Situation of Parties. In case of ambiguity or doubtful construction the obligation should be construed in the light of the circumstances surrounding the execution of the bond, the object to be accomplished, the situation of the parties, the relations existing, and the evident intention of the parties in making the bond.[51] So the nature of the duty of the obligor and the character of the obligee must also be regarded as explanatory of the intent.[52]

c. Entire Instrument Considered. The entire instrument is what expresses the actual contract, therefore the whole writing must be considered and regard must be had to all its parts so that the intention may, if possible, be gathered therefrom.[53]

d. Law and Custom or Usage. If a bond is given under authority of a law, that which is not expressed but should have been incorporated is included in the bond, while that which is not required by law is excluded.[54] So a bond given under a code provision incorporates a condition of such code therein as fully as if it were made expressly a part thereof, for when an agreement is silent or obscure as to a particular subject, the law and usage[55] become a portion of it, constitute a

51. *Connecticut.*— Tomlinson *v.* Ousatonic Water Co., 44 Conn. 99.

Georgia.— Steele Lumber Co. *v.* Laurens Lumber Co., 98 Ga. 329, 24 S. E. 755, holding that the circumstances under which a bond to a receiver is given may be such as to affect the character of a judgment, and that a bond conditioned to pay eventual condemnation money on the final trial of a case is controlled in its application by the circumstances legally affecting the enforcement of the condition, and will therefore comprehend only such decree as is legally possible.

Idaho.— Juliaetta Tramway Co. *v.* Vollmer, (Ida. 1895) 39 Pac. 1115.

Maryland.— German Lutheran Evangelical St. Matthew's Congregation *v.* Heise, 44 Md. 453, holding that in determining the liability upon a bond for the execution of a building contract the question depends largely upon the evidence as to what has been done under the contract as well as upon non-performance.

New York.—Western New York L. Ins. Co. *v.* Clinton, 66 N. Y. 326 [*reversing* 5 Hun (N. Y.) 118]; Nichols *v.* Tifft, 56 N. Y. 644 [*reversing* 2 Thomps. & C. (N. Y.) 314]; Bundy *v.* Newton, 65 Hun (N. Y.) 619, 19 N. Y. Suppl. 734, 47 N. Y. St. 242, 29 Abb. N. Cas. (N. Y.) 66 (where it was declared that in view of the circumstances the construction should not be to the injury of the plaintiff); McKillip *v.* McKillip, 8 Barb. (N. Y.) 552.

Oregon.—Oregon R., etc., Co. *v.* Swinburne, 22 Oreg. 574, 30 Pac. 322.

Virginia.— In Columbian College *v.* Clopton, 7 Gratt. (Va.) 168, the circumstances were fully considered, although the rule was not stated.

West Virginia.— Ralphsnyder *v.* Ralphsnyders, 17 W. Va. 28, where the contract was considered with other obligations and circumstances.

See also, generally, CONTRACTS.

52. Strawbridge *v.* Baltimore, etc., R. Co., 14 Md. 360, 74 Am. Dec. 541; McKillip *v.* McKillip, 8 Barb. (N. Y.) 552. And a slight breach of a contract for support and maintenance generally affords no ground of forfeiture. Smith *v.* Smith, 34 Wis. 320. So it may be evident from letters of a party that a bond was intended as a continuing security for further advances in addition to the sum originally advanced. Wells *v.* Ritchie, 6 U. C. Q. B. O. S. 13.

As to nature and extent of duties in bonds of agents or employees see *infra*, III, F, 8, c.

53. If upon such consideration the real meaning of the parties is clearly apparent or ascertained, the court should construe the obligation in accordance therewith. This rule applies not only to the bond itself, but to the language of the condition of a bond.

Illinois.—Mallers *v.* Crane Co., 191 Ill. 181, 60 N. E. 804 [*affirming* 92 Ill. App. 514], where the word "claims" was construed in connection with the language of the instrument as meaning a valid claim for actual indebtedness.

Iowa.— Ellett *v.* Eberts, 74 Iowa 597, 38 N. W. 426.

New Hampshire.— New Hampshire Bank *v.* Willard, 10 N. H. 210.

North Carolina.— Bennehan *v.* Webb, 28 N. C. 57; Gordon *v.* Rainey, 19 N. C. 487.

South Carolina.— Gyles *v.* Valk, 2 Speers (S. C.) 460.

Canada.— Nichols *v.* Madill, 6 U. C. Q. B. 415; Canada Permanent Bldg., etc., Soc. *v.* Lewis, 8 U. C. C. P. 352.

Secret understandings between the other parties not communicated to the plaintiff cannot be imported into the bond so as to affect him. Belloni *v.* Freeborn, 63 N. Y. 383. See also *supra*, II, E, 3, c, (I).

When bond not indivisible.— Although a bond may be an entire contract upon its face yet a partial failure of consideration may make the contract not indivisible. Nye *v.* Raymond, 16 Ill. 153. See also *supra*, II, F; II, J, 2.

54. Macready *v.* Schenck, 41 La. Ann. 456, 6 So. 517. See also O'Brien *v.* Murphy, 175 Mass. 253, 56 N. E. 283, 78 Am. St. Rep. 487.

55. **It is also decided, however,** that the construction of written documents cannot be

supplement to it, and interpret it; and this applies to a code provision which constitutes a limitation upon a surety's liability.[56]

e. Transposition, Rejection, and Addition of Words. In construing a bond or the conditions thereof the court will, where the intention is manifest from the instrument itself, transpose or reject meaningless and contradictory words and supply by addition an accidental omission to give effect to the real meaning of the parties, but ordinarily this does not include the addition of words not in the obligation or the rejection of written words in order to supply an intent different from that which is manifest.[57] But enough should remain, where useless and unnecessary words are rejected, to make the bond sensible.[58]

f. When Intention May Affect Bond's Taking Effect. A bond takes effect and speaks from the date of delivery not from the date of the bond, in the absence of something to indicate a different intention;[59] but where it appears from the language of the instrument that it was intended to cover a certain period or incur a certain liability, although anterior to its delivery it will, when delivered, relate back to and take effect in accordance with the terms and intention of the parties.[60]

altered or varied by custom. Menzies *v.* Lightfoot, L. R. 11 Eq. 459, 40 L. J. Ch. 561, 24 L. T. Rep. N. S. 695, 19 Wkly. Rep. 578. See also, generally, CONTRACTS; CUSTOMS AND USAGES.

56. Burris *v.* Peacock, 2 Ohio Dec. (Reprint) 482, 3 West. L. Month. 264. See also Lowe *v.* Guthrie, 4 Okla. 287, 44 Pac. 198. That law and usage may be construed into a bond see O'Brien *v.* Murphy, 175 Mass. 253, 56 N. E. 283, 78 Am. St. Rep. 487, 488; and, generally, CUSTOMS AND USAGES.

"Judgment of court" means, when used in a bond to abide thereby, the court which ultimately decides the cause. Archer *v.* Hart, 5 Fla. 234.

Law existing at time of performance may govern an undertaking, for a contract may be entered into subject to the power of the legislature to change the law in respect to what the judgment might include. This rule was applied to an undertaking given for the payment of such judgment as might thereafter be awarded in an action. So held in Horner *v.* Lyman, 2 Abb. Dec. (N. Y.) 399, 4 Keyes (N. Y.) 237. See Post *v.* Doremus, 60 N. Y. 371. But that the law in force at the time of the execution of a contract governs see Anderson *v.* Dwyer, 30 Misc. (N. Y.) 793, 63 N. Y. Suppl. 201 [*affirming* 61 N. Y. Suppl. 1114].

That the intent of the statute should be considered see Chladek *v.* Brown, 58 Ill. App. 379.

That the statute affords a light as to the parties' intentions see Probate Judge *v.* Ordway, 23 N. H. 198.

57. *California.*— Swain *v.* Graves, 8 Cal. 549.

New Hampshire.— Probate Judge *v.* Ordway, 23 N. H. 198.

North Carolina.— Iredell *v.* Barbee, 31 N. C. 250; Bennehan *v.* Webb, 28 N. C. 57; Gully *v.* Gully, 8 N. C. 20.

Oklahoma.— Lowe *v.* Guthrie, 4 Okla. 287, 44 Pac. 198.

Tennessee.— Kincannon *v.* Carroll, 9 Yerg. (Tenn.) 10, 30 Am. Dec. 391.

England.— See Langston *v.* Langston, 8 Bligh N. S. 167, 5 Eng. Reprint 908, 2 Cl. & F. 194, 6 Eng. Reprint 1128; Whyte *v.* Burnby, 16 L. J. Q. B. 156; Parkhurst *v.* Smith, Willes 327; Colmore *v.* Tyndall, 2 Y. & J. 605.

Illustrations.— So the word **"or"** may be read "and." Parker *v.* Carson, 64 N. C. 563; Elliott *v.* Ellis, 14 Phila. (Pa.) 188, 37 Leg. Int. (Pa.) 83. If a bond is taken to "A or B," who are agents, to settle an estate and make distribution, the conjunction "or" in said bond will be construed "and." Outlaw *v.* Farmer, 71 N. C. 31. And the word "pounds" may be supplied in a bond, where it is evident that that kind of money was intended. Coles *v.* Hulme, 8 B. & C. 568, 7 L. J. K. B. O. S. 29, 3 M. & R. 86, 32 Rev. Rep. 486, 15 E. C. L. 282. Again, if a bond omits to say expressly to where the money secured by it is to be paid, and it is plain from the context, the court supplies the words in the particular place where they ought to have been by intendment from the rest of the instrument. Allen *v.* Coy, 7 U. C. Q. B. 419. And see note to Coles *v.* Hulme, 8 B. & C. 568, 7 L. J. K. B. O. S. 29, 3 M. & R. 86, 32 Rev. Rep. 486, 15 E. C. L. 282. So where the final conclusion "then this obligation to be void" was wanting, it appearing to have been accidentally omitted, the defendant pleaded that the plaintiff did not pay the sums of money mentioned in the condition, assuming that such breach of the condition made the bond void, according to the evident intent, though not so expressed. To this the plaintiff demurred generally. The court determined on the authority of Avery *v.* White, 1 Ld. Raym. 38, and Mauleverer *v.* Hawxby, 2 Saund. 78, that the plea was a good bar and gave judgment for defendant. Day *v.* Spafford, 5 U. C. Q. B. O. S. 57.

58. Iredell *v.* Barbee, 31 N. C. 250.

59. See *supra*, II, E, 3.

60. Oregon R., etc., Co. *v.* Swinburne, 22 Oreg. 574, 30 Pac. 322.

The expression "does hereby undertake and agree" is commonly used to create an

g. With Respect to Statutory and Judicial Bonds. Although the presumption exists that the parties intended to execute such a bond as the law required,[61] and notwithstanding a statutory obligation has in general the effect which in reason must have been intended by the statute,[62] yet it will not be assumed that the legislative enactment was intended to import to an instrument an effect different from that intended by the parties.[63] But the statute must be considered in construing the language used, as must also the intention of the law, the court, and the parties;[64] and an instrument executed in pursuance of a decree of the court is to be construed according to the intention of the tribunal which directed its execution.[65]

2. Memoranda and Indorsements. Memoranda or indorsements made upon a bond at the time of its execution may become a part thereof, where it is evidently so intended by the parties.[66]

3. Particular and General Words or Recitals. The condition of a bond is frequently preceded by a recital of certain explanatory terms, and these recitals will frequently operate in restraint of the condition, though the words of it imply a greater liability than the recital contemplates, and the general words of a clause

obligation, and not to acknowledge one already created. Tomlinson *v.* Ousatonic Water Co., 44 Conn. 99.

61. Lowe *v.* Guthrie, 4 Okla. 287, 44 Pac. 198. See also *supra*, II, I; III, B, 2.

62. Chladek *v.* Brown, 58 Ill. App. 379.

63. Sturgis *v.* Rogers, 26 Ind. 1. So it is decided that in construing the obligations of a deputy sheriff's bond the intent of the parties governs and not the rules governing the construction of the sheriff's official bond. Mullen *v.* Whitmore, 74 N. C. 477.

As to the maxim applicable to other deeds and contracts, namely, *Modus et conventio vincunt legem*, the form of the agreement and the convention of the parties overrule the law. See Gott *v.* Gandy, 2 C. L. R. 392, 2 E. & B. 845, 4 H. & N. 343, 18 Jur. 310, 23 L. J. Q. B. 1, 2 Wkly. Rep. 38, 75 E. C. L. 845.

If, however, there are two constructions, one with the law, and the other against it, the intendment will be assumed to be that in favor of the law. Fussell *v.* Daniel, 10 Exch. 581, 24 L. J. Exch. 130.

64. Statute to what extent considered.— "We notice the kind of bond the law authorises the judge to receive, and requires him to exact. Thus we know what the parties must have intended, much better than by any general rules of construction; and we are bound to give to the language used, such construction as will give effect to the intention of the law, and of the court, and of the parties concerned, if it can be done consistently with the language used, however unskillfully the instrument may be drawn, and though some of the expressions used might even be understood to import a different meaning, if they were to be construed merely by the ordinary rules of interpretation, and without that same light which the statutes afford us as to the intention of the parties and the probate court." Probate Judge *v.* Ordway, 23 N. H. 198, 206.

65. Bond under order of court.— Irvine *v.* Barrett, 2 Grant (Pa.) 73. And where a bond was not given in pursuance of an order of court, but under an agreement and was "to abide and perform" the decree in the suit it was declared to be not merely equivalent to a bond "to abide" the event of the suit. Griswold's Petition, 13 R. I. 125.

66. Osborne *v.* Fulton, 1 Blackf. (Ind.) 233 (words were written across the end); Hughes *v.* Sanders, 3 Bibb (Ky.) 360; Nichols *v.* Douglass, 8 Mo. 49; Shermer *v.* Beale, 1 Wash. (Va.) 11 (indorsement was signed by the parties). So an indorsement for a particular purpose and limiting liability on the bonds becomes a part thereof for the purpose specified (Harnsberger *v.* Geiger, 3 Gratt. (Va.) 138); and the general condition of a bond may be qualified by a clause added at the end of the formal part of a bond (Holmes *v.* Hubbard, 60 N. Y. 183); and the rule that it constitutes part of the bond holds good even though such memoranda is without date, and is signed only by the obligee (Gordon *v.* Frasier, 2 Wash. (Va.) 130).

Qualifications of rule.— But the indorsement must be made at the time of the execution of the bond (Nichols *v.* Douglass, 8 Mo. 49), although where the memoranda was signed by the parties it was held a part of the bond, even though made a day after its execution (Shermer *v.* Beale, 1 Wash. (Va.) 11); and it was decided in an early case that a defeasance must be of equal dignity with the writing and therefore a memorandum without seal indorsed upon a bond does not vary its condition (Creswell *v.* Dean, 1 Hill (S. C.) 227).

When not a part of bond.—A note or memorandum, made before signing, of the insertion of certain words is not a part of the bond. White *v.* Johns, 24 Minn. 387. Nor is a memorandum a part thereof as between the plaintiff and the signers when written on the left of, and opposite to, or below, the signatures in these words: "We pay our *pro rata* share according to our amount of goods sold." Cockroft *v.* Claflin, 64 Barb. (N. Y.) 464.

Indorsement may be matter of defense, though not a part of the original instrument.

may be restrained by a particular recital.[67] Although a recital not plainly inconsistent with the condition of a bond will not control or limit its operation,[68] and a condition which is not repugnant to such condition will not be rendered nugatory by the recitals.[69] So recitals may be merely descriptive of a person's legal capacity.[70]

4. Reference to Other Papers. It may be generally stated that a bond may incorporate, by reference expressly made thereto, other contracts, papers, or written instruments, or it may be conditioned for the performance of certain specific agreements set forth in such instruments, so as to embody the same therein as a part of the obligation thereof with all the stipulations, limitations, or restrictions mentioned in the referred-to papers, in which case the bond and the papers referred to should be read together and construed as a whole, although if only specific parts of another contract be referred to, only so much of said writing is incorporated as it is evident the parties intended to embody or rely upon.[71]

Carter *v.* Noland, 86 Va. 568, 10 S. E. 605, 6 L. R. A. 693.

67. *Massachusetts.*—General words may be limited by a recital. O'Brien *v.* Murphy, 175 Mass. 253, 56 N. E. 283, 78 Am. St. Rep. 487. A general condition cannot control or vary the condition of a bond. Lehan *v.* Good, 8 Cush. (Mass.) 302.

Nebraska.— See Lombard *v.* Mayberry, 24 Nebr. 674, 40 N. W. 271, 8 Am. St. Rep. 234.

North Carolina.— Bennehan *v.* Webb, 28 N. C. 57.

Oklahoma.— Lowe *v.* Guthrie, 4 Okla. 287, 44 Pac. 198.

South Carolina.— Gyles *v.* Valk, 2 Speers (S. C.) 460.

Virginia.— See Columbian College *v.* Clopton, 7 Gratt. (Va.) 168.

United States.— Bell *v.* Bruen, 1 How. (U. S.) 169, 11 L. ed. 89.

England.— Walsh *v.* Trevanion, 15 Q. B. 733, 14 Jur. 1134, 19 L. J. Q. B. 458, 69 E. C. L. 733; Bailey *v.* Lloyd, 5 Russ. 330, 29 Rev. Rep. 30, 5 Eng. Ch. 330; Orr *v.* Mitchell, [1893] A. C. 238, 1 Reports 147; Jenner *v.* Jenner, L. R. 1 Eq. 361, 12 Jur. N. S. 138, 35 L. J. Ch. 329, 14 Wkly. Rep. 305; Selby *v.* Crystal Palace Gas Co., 30 Beav. 606; Holliday *v.* Overton, 14 Beav. 467, 16 Jur. 346, 21 L. J. Ch. 769; Solly *v.* Forbes, 4 Moore C. P. 448, 22 Rev. Rep. 641, 2 Ball & B. 38; Gillett *v.* Abbott, 7 A. & E. 783, 2 Jur. 300, 7 L. J. Q. B. 61, 3 N. & P. 24, 1 W. W. & H. 89, 34 E. C. L. 410.

Canada.— Fleury *v.* Moore, 34 U. C. Q. B. 319. "I am of opinion that the recital does not so override and restrain the condition, as to render void and nugatory that part of it, the breach of which is the foundation of this suit. The various authorities on this point seem to me to resolve themselves into determining that the intention of the parties, as expressed in the whole instrument, shall govern, and that when the court can clearly gather that intention, they will construe the condition accordingly, and that it shall be restrained by the recital for that purpose. Such is Lord Ellenborough's exposition of the law in Parker *v.* Wise, (6 M. & S. 239, 18 Rev. Rep. 359.) He observes that all the cases from Lord Arlington *v.* Merrick, downwards, agree that the condition shall be taken with reference to the recital, and may be explained and restrained by it. 'But all this imports that it is to be gathered from the recital that the intention of the parties requires the condition should be qualified.' And in Comyn's Digest, Parols A. 19, it is said, 'a recital does not confine subsequent words by which the intent appears more large.'" Canada Permanent Bldg., etc., Soc. *v.* Lewis, 8 U. C. C. P. 352, 353.

See also, generally, Contracts.

Matter put by way of recital may amount to an agreement when the recital is called into action to discover and give effect to the intention. Gyles *v.* Valk, 2 Speers (S. C.) 460.

The enumeration of one thing is the exclusion of others, and general terms are limited by the enumeration of particulars. Probate Judge *v.* Ordway, 23 N. H. 198, per Bell, J.; Burris *v.* Peacock, 2 Ohio Dec. (Reprint) 482, 3 West. L. Month. 264.

68. Australian Joint Stock Bank *v.* Bailey, [1899] A. C. 396, 68 L. J. P. C. 95. But the condition is to be considered in connection with the obligatory part of a bond. Gyles *v.* Valk, 2 Speers (S. C.) 460. And where a bond refers in its recital to a bill of exchange as the principal security, even though the bond is a specialty yet it will be construed only as a collateral security. Bank of Ireland *v.* Beresford, 6 Dowl. 234, 19 Rev. Rep. 50.

69. American Surety Co. *v.* Thorn-Halliwell Cement Co., 9 Kan. App. 8, 57 Pac. 237. See also *infra*, III, F, 4.

70. Sheridan *v.* Pease, 93 Ill. App. 219.

71. *Alabama.*— Forst *v.* Leonard, 112 Ala. 296, 20 So. 587.

California.— Humboldt Sav., etc., Soc. *v.* Wennerhold, 81 Cal. 528, 22 Pac. 920.

District of Columbia.— Feake *v.* U. S., 16 App. Cas. (D. C.) 415.

Florida.— Booske *v.* Gulf Ice Co., 24 Fla. 550, 5 So. 247.

Indiana.— Weed Sewing Mach. Co. *v.* Winchel, 107 Ind. 260, 7 N. E. 881; Mackenzie *v.* Edinburg School Trustees, 72 Ind. 189; Dunlap *v.* Eden, 15 Ind. App. 575, 44 N. E. 560.

Iowa.—Jordan *v.* Kavanaugh, 63 Iowa 152, 18 N. W. 851; Noyes *v.* Granger, 51 Iowa 227, 1 N. W. 519.

5. Strict or Liberal Construction — a. In General. Ordinarily a claim against sureties is *strictissimi juris*, and no implications are to be made in giving construction to the terms of an obligation not clearly embraced within the language used;[72] nor is the contract to be extended beyond the fair scope of its terms, for it is well settled that sureties are only chargeable according to the strict terms of the bond.[73] It has also been decided that the construction of bonds taken under

Michigan.— Locke *v.* McVean, 33 Mich. 473.

Missouri.—State *v.* Tiedemann, 69 Mo. 515; Cochrane *v.* Stewart, 63 Mo. 424.

Montana.— Watson *v.* O'Neill, 14 Mont. 197, 35 Pac. 1064.

New Hampshire.—New Hampshire Bank *v.* Willard, 10 N. H. 210.

New York.— New York *v.* New York Refrigerating Constr. Co., 82 Hun (N. Y.) 553, 31 N. Y. Suppl. 714, 64 N. Y. St. 392; Matson *v.* Blossom, 2 N. Y. Suppl. 551, 4 N. Y. Suppl. 489, 18 N. Y. St. 726.

Utah.— Victor Sewing Mach. Co. *v.* Crockwell, 3 Utah 152, 1 Pac. 470.

Virginia.— Caskie *v.* Harrison, 76 Va. 85.

Wisconsin.— W. W. Kimball Co. *v.* Baker, 62 Wis. 526, 22 N. W. 730.

United States.— Ætna L. Ins. Co. *v.* American Surety Co., 34 Fed. 291; U. S. *v.* Maurice, 2 Brock. (U. S.) 96, 26 Fed. Cas. No. 15,747 (bond referring to paper which specifies purposes for which given, embodies such purposes therein); Finley *v.* Lynn, 6 Cranch (U. S.) 238, 3 L. ed. 211 (bond executed in pursuance of articles is restrained by them); U. S. *v.* Tillotson, 1 Paine (U. S.) 305, 28 Fed. Cas. No. 16,524 (bond construed with same limitations and restrictions only as that of contract referred to).

See 8 Cent. Dig. tit. "Bonds," § 51; and, generally, Contracts.

Illustrations of rule.— The validity of a referred-to agreement may be imported by the words "has executed unto." Bagley *v.* McMickle, 9 Cal. 430. And a bond may operate as security for loss actually sustained by the refusal to take back goods under a referred-to agreement of purchase, and so does not constitute a bond for stipulated damages. Jester *v.* Murphy, 2 Del. Ch. 171. So a bond for the execution of a building contract will be construed in consideration of what has or has not been performed under the latter. German Lutheran Evangelical St. Matthew's Congregation *v.* Heise, 44 Md. 453. And a bond which may appear void for uncertainty may be made clear as to intent by reading it as part of court or judicial proceedings connected therewith and to which it relates. Jamison *v.* Knotts, 12 Rich. (S. C.) 190. Again, a bond may be construed with a will upon which it is based (Lanterman *v.* Lanterman, 42 N. J. Eq. 319, 5 Atl. 132; Columbian College *v.* Clopton, 7 Gratt. (Va.) 168); or with specifications of a contract directly referred to (Wheeler *v.* Everett Land Co., 14 Wash. 630, 45 Pac. 316).

A bond given by a contractor should be construed in connection with the contract or undertaking it is intended to secure, and where such contract or undertaking provides that there shall be no claims because of labor or materials from any source whatsoever, a bond to erect a structure conditioned on the performance by the contractor of his contract and for the payment of all claims for material furnished is valid, and inures to the benefit of materialmen whose claims are not paid. Brown *v.* Markland, 22 Ind. App. 652, 53 N. E. 295; American Surety Co. *v.* Lauber, 22 Ind. App. 326, 53 N. E. 793.

Bond signed by parties not signing referred-to paper does not prevent the instruments being construed together. Forst *v.* Leonard, 112 Ala. 296, 20 So. 587.

72. Western New York Ins. Co. *v.* Clinton, 66 N. Y. 326 [*reversing* 5 Hun (N. Y.) 118]; Miller *v.* Stewart, 9 Wheat. (U. S.) 680, 6 L. ed. 189. See also cases cited *infra*, note 73.

Fidelity insurance bond which is not in a form tendered by a private surety, but which in form and essence resembles an insurance contract, should be placed in the general class of insurance policies and be construed by the same general principles; that is most strongly against the company, and most favorably to their general intent and essential purpose. Tarboro Bank *v.* Fidelity, etc., Co., 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682, 126 N. C. 320, 35 S. E. 588, 83 Am. St. Rep. 682; 1 Joyce Ins. § 222.

73. **The liability of sureties is not to be extended by implication;** they are bound in the manner, to the extent and under the circumstances specified or legally applicable and no further. The very terms of their contract are those which measure the extent of their liability, and upon these they have a right to stand.

Florida.— Robinson *v.* Epping, 24 Fla. 237, 4 So. 812.

Illinois.— Field *v.* Rawlings, 6 Ill. 581.

Kansas.— Wells *v.* Mehl, 25 Kan. 205.

Massachusetts.—A condition includes what is in the precise words of the obligation; where it neither in terms nor by implication limits the obligation to the sole liabilities of a party but by strong implication extends it to joint, to conditional, and collateral liabilities, it will be so construed as to effectuate the intent. Singer Mfg. Co. *v.* Allen, 122 Mass. 467.

Michigan.— When parties have specifically provided what shall be done the court will not add more. Tucker *v.* Tucker, 35 Mich. 365.

New Hampshire.— Erskine *v.* Erskine, 13 N. H. 436.

United States.—Miller *v.* Stewart, 9 Wheat. (U. S.) 680, 6 L. ed. 189 [*cited* in Smith *v.*

the provisions of the law is more rigorous than that of bonds taken voluntarily,[74] although it has been asserted that statutory bonds taken by an officer of the court in the absence of the obligee are to be liberally construed.[75] But in construing the covenants of a voluntary common-law bond not given in conformity with the statute, the intention of such statute becomes immaterial and the liability of the obligor will not be extended beyond the precise terms of the undertaking which is to be strictly construed.[76]

b. Against or For Obligor. A recital may operate against the parties to a bond as a conclusive admission of the facts recited, and the construction should also be most strongly against the obligor, where the bond is a single one. If the bond has a condition annexed with a doubtful meaning, such condition being for his benefit should be taken most strongly in favor of the obligor.[77] So if two constructions may be given, one making the obligors liable the other not, that which makes against the obligors will be taken, since they will not be permitted to escape liability because equivocal expressions have been employed.[78]

E. With Respect to Parties — 1. In General. The rights and obligations of parties to a bond and their capacity and character thereunder must depend largely upon the rules of construction applicable to the particular case, so that it is impossible to assert a definite guiding and controlling rule comprehensive enough to embrace all the various contingencies which may arise.[79]

U. S., 2 Wall. (U. S.) 219, 17 L. ed. 788; Martin *v.* Thomas, 24 How. (U. S.) 315, 16 L. ed. 689; Leggett *v.* Humphreys, 21 How. (U. S.) 66, 16 L. ed. 50; McMicken *v.* Webb, 6 How. (U. S.) 299, 12 L. ed. 443; U. S. *v.* Boyd, 15 Pet. (U. S.) 187, 10 L. ed. 706].

See also, generally, PRINCIPAL AND SURETY.

Applications of the rule to particular conditions in bonds may be seen in the following cases:

California.—Crocker *v.* Fields Biscuit, etc., Co., 93 Cal. 532, 29 Pac. 225.

Connecticut.— Lewis *v.* Dwight, 10 Conn. 95.

Georgia.— Steele Lumber Co. *v.* Laurens Lumber Co., 98 Ga. 329, 24 S. E. 755.

Illinois.—Gould *v.* Warne, 27 Ill. App. 651.

Indiana.— Simms *v.* Powell, 17 Ind. 302.

Maine.— Luques *v.* Thompson, 26 Me. 514.

Maryland.—Sloss *v.* Galloway, 3 Harr. & M. (Md.) 204.

Massachusetts.—Vickery *v.* Welch, 19 Pick. (Mass.) 523.

Missouri.— Montgomery *v.* Harker, 81 Mo. 63.

Nebraska.—Lombard *v.* Mayberry, 24 Nebr. 674, 40 N. W. 271, 8 Am. St. Rep. 234.

New Hampshire.—Berry *v.* Harris, 43 N. H. 376.

New York.— Bennett *v.* Draper, 139 N. Y. 266, 34 N. E. 791, 54 N. Y. St. 553 [*affirming* 62 Hun (N. Y.) 524, 17 N. Y. Suppl. 98, 42 N. Y. St. 921]; Bundy *v.* Newton, 19 N. Y. Suppl. 734, 47 N. Y. St. 242, 29 Abb. N. Cas. (N. Y.) 66; Scofield *v.* Moore, 11 N. Y. Suppl. 303, 33 N. Y. St. 676; Thomson *v.* Sanders, 26 N. Y. Wkly. Dig. 387; Thompson *v.* Hazard, 25 N. Y. Wkly. Dig. 481.

North Carolina.— Gordon *v.* Rainey, 19 N. C. 487, holding that under a bond which recited a contract to furnish a steam-engine, etc., it was the duty to furnish everything necessary which the entire work mentioned in the condition required to be furnished, and also all the articles required, and to have the whole work done in a workmanlike manner at the time mentioned.

Oregon.—Oregon R., etc., Co. *v.* Swinburne, 22 Oreg. 574, 30 Pac. 322.

Pennsylvania.—Crawford *v.* Evans, 158 Pa. St. 390, 33 Wkly. Notes Cas. (Pa.) 283, 27 Atl. 1105; Shroder *v.* Hatz, 47 Pa. St. 528.

South Carolina.— Luces *v.* O'Neale, Riley (S. C.) 30.

Tennessee.— Moss *v.* Fowlkes, 14 Lea (Tenn.) 382, where under this principle distributees receiving funds to which they were not entitled were held bound to refund all they had received.

74. Hanks *v.* Horton, 5 Tex. 103.

75. Claytor *v.* Anthony, 15 Gratt. (Va.) 518.

76. Abrahams *v.* Jones, 20 Ill. App. 83 [*citing* Chase *v.* Ries, 10 Cal. 518; Ovington *v.* Smith, 78 Ill. 250; Waters *v.* Simpson, 7 Ill. 570; Lang *v.* Pike, 27 Ohio St. 498; Miller *v.* Stewart, 9 Wheat. (U. S.) 680, 6 L. ed. 189].

77. Bennehan *v.* Webb, 28 N. C. 57. See also, generally, CONTRACTS.

78. Richardson *v.* People, 85 Ill. 495. See St. Landry State Bank *v.* Meyers, 52 La. Ann. 1769, 28 So. 136, as to general rule.

As to the maxim, Verba chartarum fortius accepiuntur contra preferentum, the words of an instrument shall be taken most strongly against the party employing them, see Gillet *v.* Bank of America, 160 N. Y. 549, 55 N. E. 292; Edgar Foundry, etc., Works *v.* U. S., 34 Ct. Cl. 205; Alexander *v.* Sizer, L. R. 4 Exch. 102; Bastifell *v.* Lloyd, 1 H. & C. 388, 31 L. J. Exch. 413, 10 Wkly. Rep. 721.

79. **The principal elements, however, are** the terms of the bond, the consideration, mutuality, object to be accomplished, or the purpose or legally ascertainable intent of the parties. These being determined a basis ex-

2. Joint, Several, and Joint and Several Bonds.[80] In determining whether the parties are bound jointly, severally, or jointly and severally, recourse must first be had to the exact language used to evidence the intention, although the terms employed are not of themselves necessarily conclusive. If the words unequivocally express joinder then no difficulty would ordinarily be experienced, but there may be words of severance or the obvious meaning of the parties may show a several interest; intention and interest therefore are of primary importance.[81] So a bond may be joint as to part of the obligors and several as to part, and in this connection the assent and knowledge of the others as to the execution by an obligor is important as is also the time of said execution.[82] In the case of joint and several bonds, however, the words most frequently used are "jointly and severally"[83] and "we bind ourselves" or "we bind ourselves and each of us," etc., and even though the words "we bind ourselves," etc., "severally" are employed, yet the bond may be a joint and several one. Again, the fact that each surety signs for a certain sum will make them none the less jointly and

ists for the ascertainment of the relative situation, rights, and duties of the parties as well as the character sustained by them under the bond and the exact nature and extent of liabilities, if any exist, with the limitations and restraints imposed, if any. Thus a bond from A to C may impose no restraint on C as to the purposes specified in the bond. Presbury *v.* Fisher, 18 Mo. 50. And where it does not appear that there was any benefit to the plaintiff, or that he was in the minds of the parties to the bond and guaranty, and that the obligation was not to pay plaintiff, but another, he can maintain no action. Simson *v.* Brown, 68 N. Y. 355 [*reversing* 6 Hun (N. Y.) 251]. So a bond from two guardians may bind each other equally as between themselves, where there is no proof that one was a surety. Kincaid *v.* McLain, 7 Humphr. (Tenn.) 68. And if upon the whole bond the intent is not to bind the heirs of the obligors they will not be bound. Huston *v.* Cantril, 11 Leigh (Va.) 142. Again a coöbligor, though described as surety, may be bound to perform the condition. Ward *v.* Johnston, 1 Munf. (Va.) 45. And a bond to "trustees" may run to individuals who are trustees. Van Winkle *v.* Blackford, 28 W. Va. 670. So a bond which omits the payee's name is payable to bearer. Keene Five-Cent Sav. Bank *v.* Lyon County, 90 Fed. 523.

See also, generally, Contracts; and *supra*, III, D.

80. **An undertaking may be joint as to the obligors and not joint** as to the persons to or for whose benefit it is given, dependent upon whether their interests are joint or several. Cunningham *v.* White, 5 How. Pr. (N. Y.) 486. See, generally, Contracts.

81. People *v.* Breyfogle, 17 Cal. 504; Boyd *v.* Kienzle, 46 Md. 294, per Bartol, C. J.; Besore *v.* Potter, 12 Serg. & R. (Pa.) 154; Lockhart *v.* Bell, 2 Hill (S. C.) 422. "A contract will be construed as joint or several, according to the interests of the parties appearing upon the face of the obligation, if the words are capable of such a construction." St. Louis, etc., R. Co. *v.* Coultas, 33 Ill. 188. If the language of a bond to an employer by a bonding company is not joint it will not be so held, but will bind the company alone. American Bonding, etc., Co. *v.* Milwaukee Harvester Co., 91 Md. 733, 48 Atl. 72. See also *infra*, III, F, 6.

Signers of a bond may be principals and jointly and severally liable, as in case of signers of a bond for the admission of a person to the insane hospital as a paying patient conditioned to pay all charges. Enslen *v.* Alabama Insane Hospital, 113 Ala. 658, 21 So. 74. So a bond given by a school-district treasurer and joined in by others as sureties is several as well as joint. Com. *v.* Joyce, 3 Pa. Super. Ct. 616, 40 Wkly. Notes Cas. (Pa.) 191.

The rule applied to administrators and guardians.— Whether a bond will have the effect to make each co-administrator liable for the acts of the other will depend upon the intention of the parties to be gathered from the instrument itself, although, generally, if they execute a joint bond, they are liable for the acts of each other. Litte *v.* Knox, 15 Ala. 576, 50 Am. Dec. 145. And this rule applies to guardians and executors unless the bond itself shows a contrary purpose. Williams *v.* Harrison, 19 Ala. 277. And a surviving guardian comes within the rule, although one acting as sole guardian before the execution of the joint bond is not subject thereto. Williams *v.* Harrison, 19 Ala. 277. See also, generally, Executors and Administrators; Guardian and Ward.

82. **Joint as to part and several as to part.** — Baber *v.* Cook, 11 Leigh (Va.) 635. See also Lockhart *v.* Bell, 2 Hill (S. C.) 422; Nash *v.* Fugate, 24 Gratt. (Va.) 202, 18 Am. Rep. 640.

83. **Under an early decision a rule has been stated** as follows: The words "jointly and severally" must be construed distributively so as to apply as well to the obligors as to their heirs. "We bind ourselves" makes them joint obligors. "We bind our heirs, executors, and administrators" binds them jointly and "We bind each and every of them" binds them severally. Mitchell *v.* Darricott, 3 Brev. (S. C.) 145.

severally liable.[84] If the bond is joint in its terms and there is nothing indicating a several interest or liability, and the instrument in all its parts evidences a joint purpose, then it is a joint bond or the liability thereon is joint,[85] and this, even though the obligation is executed at different times, provided the other obligors had knowledge.[86] If a several interest is expressly or by construction clearly evidenced by the terms and conditions of the bond as being that exclusively intended by the parties it will be deemed a several obligation, even though a part of the language used is that of a joint or a joint and several obligation.[87]

3. Representative Capacity — a. In General. When a bond is given by or to persons in a representative capacity, the first consideration is the character and authority of the representative; the next, is the form and purpose of the bond and its validity. These being ascertained and the obligation being legal and valid in these respects, the next inquiry is upon whom does the liability fall, what is the nature and extent of such liability, and whether it is limited to the representative capacity indicated or is a personal or individual obligation. If the recitals or other parts of the bond show the representative capacity of one and his authority, and the intent to bind the person for whom he acts is manifest, then the principal will be bound, even though the instrument is signed by the agent with his own seal.[88] On the other hand the recitals and signature may expressly indicate the agency, and yet the agent be personally liable;[89] although

84. *California.*— People *v.* Love, 25 Cal. 521; People *v.* Breyfogle, 17 Cal. 504, where each surety signed for a sum named; they were held jointly and severally liable with the obligor, and the latter liable for the aggregate of the sums.

Connecticut.— Carter *v.* Carter, 2 Day (Conn.) 442, 2 Am. Dec. 113.

Indiana.— Willey *v.* State, 3 Ind. 500.

Michigan.— St. Joseph County *v.* Coffenbury, 1 Mich. 355.

New York.— Morange *v.* Mudge, 6 Abb. Pr. (N. Y.) 243, condition being "we hereby undertake and become bound."

Ohio.— Short *v.* Lancaster, 17 Ohio 96.

Pennsylvania.— Wood *v.* Hummel, 4 Watts (Pa.) 50; Besore *v.* Potter, 12 Serg. & R. (Pa.) 154.

See 8 Cent. Dig. tit. "Bonds," § 57; and, generally, Contracts.

The words above noted are nevertheless not an exclusive test, for the bond may be joint and several although the language is "I do bind myself," and it is signed by several. Leith *v.* Bush, 61 Pa. St. 395; Knisely *v.* Shenberger, 7 Watts (Pa.) 193.

85. *California.*— People *v.* Hartley, 21 Cal. 585, 82 Am. Dec. 758, the words here being "we" and are held "in the several sums" for which "we severally bind ourselves, our heirs," etc.

Indiana.— Hansel *v.* Morris, 1 Blackf. (Ind.) 307.

Maine.— Clark *v.* Winslow, 17 Me. 349.

New York.— Wood *v.* Fisk, 63 N. Y. 245, 20 Am. Rep. 528.

Pennsylvania.— Pecker *v.* Julius, 2 Browne (Pa.) 31 (condition was "we bind ourselves, our heirs," etc., "and every of them"); Moser *v.* Libenguth, 1 Rawle (Pa.) 255.

Virginia.—Atwell *v.* Towles, 1 Munf. (Va.) 175, where there was a writing appended which was construed with the bond making the obligation joint.

See 8 Cent. Dig. tit. "Bonds," § 57; and, generally, Contracts.

A joint obligation implies unity, of time, of act, and extent of obligation. The obligation on all must take effect at the same time; but all need not sign and seal at the same time, for if others afterward execute the bond it may be good as to them, although not void as to the others, but it is not in such case joint as to all. Baber *v.* Cook, 11 Leigh (Va.) 635, per Tucker, P. But see Lockhart *v.* Bell, 2 Hill (S. C.) 422.

86. Lockhart *v.* Bell, 2 Hill (S. C.) 422. See also cases cited *supra*, note 85.

87. *Illinois.*— St. Louis, etc., R. Co. *v.* Coultas, 33 Ill. 188.

Maryland.— Boyd *v.* Kienzle, 46 Md. 294.

New Jersey.— Brinkerhof *v.* Doremus, 10 N. J. L. 119; Middletown *v.* McCormick, 3 N. J. L. 92.

Rhode Island.— Commercial Nat. Bank *v.* Gorham, 11 R. I. 162.

Texas.— Green *v.* Banks, 24 Tex. 508.

Canada.— Essex *v.* Bullock, 11 U. C. C. P. 323, where the bond read that the parties were "jointly and severally held," etc., "in the several penal sums," etc., "for which several payments," etc., and it was decided to be a several and not a joint or joint and several bond.

88. Deming *v.* Bullitt, 1 Blackf. (Ind.) 241.

Form of signature.—The liability of a principal upon negotiable bonds does not depend upon the form of the signature. Franklin Ave. German Sav. Inst. *v.* Board of Education, 75 Mo. 408; St. Louis County *v.* Manufacturers' Bank, 69 Minn. 421, 72 N. W. 701.

89. See Stewart *v.* Katz, 30 Md. 334 (where the bond was also signed by the agent and sureties and the words were "We bind ourselves" and "we have hereunto set our

an inquiry may be necessary where an agent acts under an ostensible authority merely.[90]

b. Trustees. In the case of trustees, the obligatory clause of the bond, the condition as expressed, the form of the signatures, the nature, character, and purposes of the instrument, the extent of the trustees' authority, and even extrinsic evidence are to be considered in determining whether the trustees are liable as such or individually responsible. So the character of the persons whom they purport to represent, as whether it is an individual, a private, or a municipal, quasi-municipal or similar corporation, may affect the result.[91]

F. With Respect to Scope of Conditions and Extent of Liability — 1. In General. It is a general rule that one incurs the precise liability nominated in the bond, and he can relieve himself by performance of the conditions,[92] and a

hands and seals"); Grubbs *v.* Wiley, 9 Sm. & M. (Miss.) 29 (where the bond was held to be executed by the agent only); Bryson *v.* Lucas, 84 N. C. 680, 37 Am. Rep. 634 (where the agent was held to be individually liable); Holland *v.* Clark, 67 N. C. 104 (where it was held that action would lie against the principal). Again, if A executes a bond for B and C, it is the bond of A only. Kennerly *v.* Weed, 1 Mo. 672. And if a bond is given by two persons composing a firm and two others as sureties, it is the bond of the signers individually and not of the firm. U. S. *v.* Lawrence, 14 Blatchf. (U. S.) 229, 26 Fed. Cas. No. 15,574. But where in a bond for a title A signed as "attorney in fact" for B, B was held liable and not A. Eckhart *v.* Reidel, 16 Tex. 62.

Where a cashier of a bank wishes to evade personal liability on a bond signed by him, the signatures being followed by the word "cashier" he must not only show that it was signed by him for or on behalf of the bank, but also that the bank had power to execute such an instrument, that he had authority to sign it, and that such facts were known and understood by the obligee. Gardner *v.* Cooper, 9 Kan. App. 587, 58 Pac. 230, 60 Pac. 540.

90. If an agent executes a bond without authority this cannot bind the sureties in favor of one who makes no inquiry of them as to genuineness of the bond before he acts thereunder to his disadvantage. Malic *v.* Fox, (Cal. 1893) 33 Pac. 441.

91. Outside of these considerations and the general rules of construction, hereinbefore noted, which may be applicable, no definite governing rule can be deduced from the decisions on bonds which cover trustees' liability.

Georgia.— Bowen *v.* Penny, 76 Ga. 743, a forthcoming bond where trustee was held to be individually liable.

Indiana.— Hobbs *v.* Cowden, 20 Ind. 310, township trustee personally liable.

New Jersey.— Dayton *v.* Warne, 43 N. J. L. 659, church trustees; where it was held to be the personal bond of the individuals named and not of the corporation.

New York.— St. Peter's Episcopal Church *v.* Varian, 28 Barb. (N. Y.) 644 (where upon description in bond and signature, the trustees were liable and not the president of the board, personally); Taft *v.* Brewster, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280 (a case of church trustees; and bond was decided to be that of the individuals and not of the society).

Texas.— Elwell *v.* Tatum, 6 Tex. Civ. App. 397, 24 S. W. 71, 25 S. W. 434, where the trustees were not personally bound, in view of understanding at time bond executed.

See also, generally, Trusts.

Court commissioners who execute a bond for titles should not exceed their authority, but should fulfil the conditions of the bond or the obligors will be personally bound. Whiteside *v.* Jennings, 19 Ala. 784.

Executrix.— Although a bond is given to "Sophia Moss, executrix, and Ralph Moss and David Moss, executors," etc., "to them and each of them severally and individually" to indemnify them in case of a devastavit, yet the words "executrix," etc., are *descriptio personæ* merely and the bond runs to the obligees personally. Moss *v.* Cohen, 11 Misc. (N. Y.) 184, 32 N. Y. Suppl. 1078, 66 N. Y. St. 332.

Nature or class of corporation may affect the condition and validity of a bond. See Board of Education *v.* Robinson, 81 Minn. 305, 84 N. W. 105, 83 Am. St. Rep. 374; Green *v.* Dyersburg, 2 Flipp. (U. S.) 477, 10 Fed. Cas. No. 5,756.

92. Collins *v.* Schlichter, 11 Phila. (Pa.) 349, 33 Leg. Int. (Pa.) 238.

Applications of rule, generally.—This principle would also apply where a bond is given to pay debts, for it is decided that such a bond includes the debts paid by the obligee and those which he is liable to pay, even though for the latter he would have a remedy over. Johnson *v.* Smith, 2 Root (Conn.) 414. And a bond which admits an existing indebtedness conditioned to pay a fixed sum, unless the obligors surrender a certain note, is a principal obligation to pay the sum admitted as due, subject to a resolutive condition which is the surrender of the note. Lenoir *v.* Kain, 1 Rob. (La.) 233. But words may be construed in such a manner as will signify the right to recover rather than the fact of recovery. Parham *v.* Cobb, 7 La. Ann. 157. And a bond to pay assessments covers those levied under a subsequent proceeding having the same general object as that pending when the bond was executed. Holmes *v.* Standard Oil Co., 183 Ill. 70, 55 N. E. 647 [*affirming* 82 Ill. App. 476]. And

responsibility so incurred cannot be evaded by a party by showing that he has entered into similar obligations with others, for he is responsible upon each, if each is broken.[93] This rule also acts as a limitation upon liability, for one has a right to prescribe the terms upon which his liability is to depend, and when not acting, so as to mislead or deceive others, he is entitled to the letter and spirit of his undertaking.[94] Again, the ordinary and reasonable import of the language used should govern, and a bond which confers upon the obligee a right to do certain things depending upon the exercise of his judgment or discretion means a

conditions unknown to the obligee cannot be set up by the surety. U. S. *v.* Boyd, 8 App. Cas. (D. C.) 440. So a bond may have the force and effect of a stay bond, and as such a valid enforceable obligation, where it does not by its terms, or by implication constitute an exclusive remedy. Seeberger *v.* Wyman, 108 Iowa 527, 79 N. W. 290. And a non-performance of a condition to deliver property makes the bond a liquidated demand for the amount thereof. Shelton *v.* Jackson, 20 Tex. Civ. App. 443, 49 S. W. 415. So a bond providing for the application of moneys to a specific debt, and assumed in consideration thereof, does not prevent the payment of the same by the obligee and his recovery of the amount of the bond. Skinner *v.* Mitchell, 5 Kan. App. 366, 48 Pac. 450.

Attorneys' fees.— A bond to pay a note will include attorney's fees (Morrison Stove Works *v.* Jones, (Tenn. Ch. 1899) 53 S. W. 217); and a building contract bond may include attorney's fees, notwithstanding Burns' Rev. Stat. Ind. (1894), § 7532, making conditional agreements for the payment of such fees void, if made part of any written evidence of indebtedness (American Surety Co. *v.* Lauber, 22 Ind. App. 326, 53 N. E. 793).

Bonds to secure indebtedness may be limited to present indebtedness or cover future debts according to the terms employed. Thus, where the words "all notes and other indebtedness" on which he "is liable" are used, only debts existing at the date of the bond are covered and not notes which were not renewable, afterward executed, and a condition to cover notes is not evidenced merely by an expression of opinion which does not show an agreement as to what is covered. Matter of Neff, 185 Pa. St. 98, 39 Atl. 830. But the express language may be such as to cover renewals of existing indebtedness as well as that in the future, and this notwithstanding a recital that the principals "shall pay the full amount of their indebtedness." Benton County Sav. Bank *v.* Boddicker, 105 Iowa 548, 75 N. W. 632, 67 N. Y. St. 310, 45 L. R. A. 321.

Bond to secure deposits of county funds under a statute relates to the date of its taking and covers current amounts due the county therefrom, whether arising from deposits made before or thereafter, the condition being to "pay any and all deposits which may be deposited with it." Brown *v.* Wyandotte County, 58 Kan. 672, 50 Pac. 888 [*citing* Van Rensselaer *v.* Penniman, 6 Wend. (N. Y.) 569; *Ex p.* Smith, 2 Montagu, D. & De G. 587; Wilkinson *v.* Adam, 1 Ves. & B. 422]. And a bond by a state bank to keep account for all moneys deposited in the bank by a board of commissioners, and to pay the same, etc., covers a deposit evidenced by a time certificate irrespective of the board's authority to make a time deposit. Board Courthouse, etc., Com'rs *v.* Irish-American Bank, 68 Minn. 470, 71 N. W. 674.

Contractor's bonds.— A government contractor's bond to make full payments to all persons supplying him with labor and materials does not include unpaid wages due from a subcontractor, who has supplied materials and been paid in full (U. S. *v.* Farley, 91 Fed. 474), nor does a similar condition authorize a recovery to the use of laborers and materialmen (Lancaster *v.* Frescoln, 192 Pa. St. 452, 43 Atl. 961, 30 Pittsb. Leg. J. N. S. (Pa.) 35), nor does such a condition cover scrapers nor any other tools or implements (Kilbourne, etc., Mfg. Co. *v.* Glann, 17 Ohio Cir. Ct. 162), and if a bond is merely that one contract to perform work and pay for labor material, it will not be construed so as to make him perform the work, etc. (Union Sewer Pipe, etc., Co. *v.* Olson, 82 Minn. 187, 84 N. W. 956). But the obligatory terms of builder's bond may include by reference to the contract a stipulation to satisfy the claims of materialmen and laborers (Morton *v.* Harvey, 57 Nebr. 304, 77 N. W. 808), and a condition to pay all claims for work and labor before liens should be filed provides for indemnification for liens whether valid or not which should be established on the property (Todd *v.* Phœnix Loan Assoc., 8 Kan. App. 254, 55 Pac. 501).

93. Collins *v.* Schlichter, 11 Phila. (Pa.) 349, 33 Leg. Int. (Pa.) 238. Nor will the express liability clearly contained in the body of the bond be restricted by the addition of figures to the sureties' names, nor by recitals in subsequent affidavits. Cordray *v.* State, 55 Tex. 140. See also Grand Rapids Fourth Nat. Bank *v.* Olney, 63 Mich. 58, 29 N. W. 573.

94. Hall *v.* Smith, 14 Bush (Ky.) 604, where a bond to account for and pay over money collected was decided to include only those moneys collected. See also People *v.* Breyfogle, 17 Cal. 504, 508, where Baldwin, J., says: "The true meaning of the cases is, that no strained construction is to be given to the obligations of sureties, and that it is not permissible to go beyond the fair import of the terms they employ in order to fasten upon them a liability."

Bond executed by order of court creates no

reasonable and honest exercise thereof and not a wanton and capricious exercise of the right.[95] So the object of a penalty is to limit the obligation of the signers.[96]

2. COMMENCEMENT AND DURATION OF LIABILITY. General and indefinite words will be controlled by a recital specifying the time in which a condition is to be performed, and this will also limit the sureties' liability and determine whether it is a continuing one.[97] But notwithstanding the recitals in the bond, the time will not be extended by an implied condition beyond that which it was evidently intended by the terms of the obligation to cover.[98] As to bonds in general, however, resort must be had to the language employed and the intention and purposes contemplated to determine what time is covered by the condition. If upon its face it refers exclusively to the time of execution, then that time governs the acts and subject-matter,[99] or the liability specified may be that incurred simultaneously with the delivery and not simply a liability existing at the time the bond was delivered;[1] or the condition may include acts done before the execution;[2] or between the date and formal delivery;[3] or the obligation may extend beyond the time specified;[4] and ordinarily the condition will cover all transactions intended during the specific time mentioned,[5] and is limited thereto;[6] for the

greater liability than is decided in the order, although the terms of the bond are of greater scope. Elmendorf *v.* Lansing, 5 Cow. (N. Y.) 468. But the bond and the order should be construed together. Sonneborn *v.* Libbey, 102 N. Y. 539, 7 N. E. 813 [*reversing* 12 Daly (N. Y.) 509].

95. Berry *v.* Harris, 43 N. H. 376.

96. Morrison *v.* Boggs, 44 Nebr. 248, 62 N. W. 473.

97. O'Brien *v.* Murphy, 175 Mass. 253, 56 N. E. 283, 78 Am. St. Rep. 487. See also *supra*, III, D, 3.

A bond to pay debts may by its terms operate as a continuing obligation. Lewis *v.* Dwight, 10 Conn. 95.

As to imposition of additional obligations as affecting validity see Boring *v.* Williams, 17 Ala. 510.

98. Bennett *v.* Draper, 62 Hun (N. Y.) 524, 17 N. Y. Suppl. 98, 42 N. Y. St. 921 [*affirmed* in 139 N. Y. 266, 34 N. E. 791, 54 N. Y. St. 553]. See further, as to continuing obligation and test thereof, White's Bank *v.* Myles, 73 N. Y. 335, 29 Am. Rep. 157; Crist *v.* Burlingame, 62 Barb. (N. Y.) 351; Wagman *v.* Hoag, 14 Barb. (N. Y.) 232.

A fair construction should be given and not an arbitrary one extending the acts to be done over an indefinite period without reference to the necessities likely to exist preventing performance. Tucker *v.* Tucker, 35 Mich. 365.

A similar principle, namely, that there is no implied condition that the guaranty shall be a continuing one beyond the existence of a corporation is sustained in Lorillard *v.* Clyde, 142 N. Y. 456, 37 N. E. 489, 59 N. Y. St. 781, 24 L. R. A. 113 [*reversing* 61 N. Y. Super. Ct. 428, 20 N. Y. Suppl. 433, 48 N. Y. St. 575].

99. Barstow *v.* Pine Bluff, etc., R. Co., 57 Ark. 334, 21 S. W. 652; Skelton *v.* Ward, 51 Ind. 46. See also *supra*, III, D.

1. Belloni *v.* Freeborn, 63 N. Y. 383.

2. Allibone *v.* Ames, 9 S. D. 74, 68 N. W. 165, 33 L. R. A. 585. But not so where the express terms are otherwise. Rouget *v.* Haight, 79 Hun (N. Y.) 613, 29 N. Y. Suppl. 408, 61 N. Y. St. 13.

3. Oregon R. etc., Co. *v.* Swinburne, 22 Oreg. 574, 30 Pac. 322.

4. Austin *v.* Simpson, 1 Cheves (S. C.) 180.

Extent and limits of rule.— But a bond given for the payment of certain notes or a single renewal of them does not cover subsequent renewals. Moorehead *v.* Duncan, 82 Pa. St. 488. And the construction may evidence an intention that there should be a penalty and recovery for a breach of the contract, after the expiration of the time specified, but that the undertaking should not mature and that there should be no recovery before that time. Martin *v.* Murphy, 129 Ind. 464, 28 N. E. 1118. Although the time of maturity of an obligation stated in a mortgage bond may be shortened by the trustee declaring the principal due for non-payment of interest. Dougan *v.* Evansville, etc., R. Co., 15 N. Y. App. Div. 483, 44 N. Y. Suppl. 503. In the absence of "something to indicate a different intention, a deed or instrument in writing speaks and takes effect from the date of delivery, and not from its date; but where it appears from the language of the instrument that it was intended to cover a certain period or incur a certain liability, although anterior to its actual delivery, it will, when delivered, relate back and take effect in accordance with its terms and the intention of the parties." Oregon R., etc., Co. *v.* Swinburne, 22 Oreg. 574, 577, 30 Pac. 322 [*citing* Hatch *v.* Attleborough, 97 Mass. 533; Dawes *v.* Edes, 13 Mass. 177; Ætna L. Ins. Co. *v.* American Surety Co., 34 Fed. 291].

5. Witte *v.* Wolfe, 16 S. C. 256.

And this would apply to the commencement and duration of liability in so far as the specific act to be performed is concerned. New York City Third Nat. Bank *v.* Travelers' Ins. Co., 38 N. Y. App. Div. 518, 56 N. Y. Suppl. 668.

6. Thus one may be liable only for notes discounted during the time specified, even though not maturing until afterward. Davis

controlling principle generally deducible from the decisions is that the terms of the undertaking limit a surety's liability.[7] The time conditioned for the doing of the specified act may, however, be affected by extrinsic acts done under a statute.[8]

3. Express, Implied, and Alternative Conditions. In the absence of express conditions a liability will not be construed into a bond which was not intended by the parties;[9] nor in the absence of mistake will a new condition be added where the express conditions clearly evidence that the bond is complete on its face.[10] And the meaning of words will not be enlarged so as to impose a duty other than that warranted by the legal construction thereof according to the obvious intent,[11] although that which is clearly implied as intended under the law to be done in performance of the express condition will be deemed a part of the obligation.[12] Conditions may, however, be expressly or impliedly in the alternative, and will be construed accordingly.[13]

4. Impossible, Illegal, or Repugnant Conditions. Any apparent repugnance in the condition of a bond must be reconciled by giving it effect according to the evident intent of the whole instrument;[14] and if some of the conditions are illegal and others legal and they are severable and separable the former may be disregarded and the latter enforced.[15] Again, where a bond is conditioned to do one of two things and one becomes impossible it is no reason for non-performance of the other.[16]

5. Independent and Dependent Conditions. In determining whether conditions are independent or dependent, technical expressions must yield to the real intention apparent from the instrument itself, and mutual covenants or acts are to be

v. Copeland, 67 N. Y. 127 [*affirming* 6 Daly (N. Y.) 221].

7. Scott *v.* Tyler, 14 Barb. (N. Y.) 202. See also Ward *v.* Stahl, 81 N. Y. 406.

8. Shaupe *v.* Shaupe, 12 Serg. & R. (Pa.) 9.

9. Swanson *v.* Ball, Hempst. (U. S.) 39, 23 Fed. Cas. No. 13,676*a*. See Lloyd *v.* Lloyd, 5 L. J. Ch. 191, 6 L. J. Ch. 135, 2 Myl. & C. 192, 14 Eng. Ch. 192; Pordage *v.* Cole, 1 Saund. 319*h*.

10. Dunlap *v.* Eden, 15 Ind. App. 575, 44 N. E. 560.

11. Erskine *v.* Erskine, 13 N. H. 436.

12. Hanks *v.* Pickett, 27 Tex. 97.

A bond to perfect title which is clear upon its face requires the doing of such acts as will "perfect" title and binds the obligors to remove encumbrances. Montgomery *v.* Harker, 81 Mo. 63.

13. Whetstone *v.* Ottawa University, 13 Kan. 320; Barrett *v.* Barron, 13 N. H. 150.

14. Nichols *v.* Madill, 6 U. C. Q. B. 415.

"A nonsensical or repugnant condition will not affect an obligation, even though the entire condition be incongruous or uncertain:—*a fortiori*, an uncertain or repugnant stipulation, or expression in a condition consistent and certain in other respects, can not change or materially affect the import and effect of the contract." Stockton *v.* Turner, 7 J. J. Marsh. (Ky.) 192. See Lloyd *v.* Lloyd, 5 L. J. Ch. 191, 6 L. J. Ch. 135, 2 Myl. & C. 192, 14 Eng. Ch. 192; Pordage *v.* Cole, 1 Saund. 319*h*.

Condition "not to pay."—The condition of a bond (reciting a debt) not to pay is repugnant. Wells *v.* Tregufan, 2 Salk. 463.

15. U. S. *v.* Hodson, 10 Wall. (U. S.) 395, 19 L. ed. 937. See also Seeberger *v.* Wyman, 108 Iowa 527, 79 N. W. 290. See also *supra*, II, J, 2.

A bad condition will not affect the residue. Jamison *v.* Knotts, 12 Rich. (S. C.) 190.

Bond may be valid as to part of things conditioned to be performed, even though one of said things is void at common law. Newman *v.* Newman, 4 M. & S. 66, 1 Stark. 101, 16 Rev. Rep. 386. See Yale *v.* Rex, 6 Bro. P. C. 31; Anonymous, 5 N. & M. 378. See *supra*, II, J, 2.

16. Impossible performance.— Da Costa *v.* Davis, 1 B. & P. 242, 4 Rev. Rep. 795. See Anonymous, 5 N. & M. 378; Brown *v.* London, 9 C. B. N. S. 726, 7 Jur. N. S. 755, 30 L. J. C. P. 225, 3 L. T. Rep. N. S. 813, 9 Wkly. Rep. 336, 99 E. C. L. 726 [*affirmed* in 13 C. B. N. S. 828, 8 Jur. N. S. 1103, 31 L. J. C. P. 280, 10 Wkly. Rep. 522, 106 E. C. L. 828]. The fact that a condition, an event upon the happening of which the bond would become void, is incapable of performance at the time of the execution of the obligation only invalidates the condition but does not extinguish the obligation or indebtedness created thereby. Ward *v.* Hood, 124 Ala. 570, 27 So. 245, 82 Am. St. Rep. 205 [*citing* Hughes *v.* Edwards, 9 Wheat. (U. S.) 489, 6 L. ed. 142; Coke Litt. 206*a*]. The obligors must show performance of the condition, or that performance was prevented by act of God, or by act of the law, or by the act of the obligee himself. Lehan *v.* Good, 8 Cush. (Mass.) 302. See also, generally, Contracts.

Inconvenience.— As to the argument of inconvenience see *In re* Alma Spinning Co., 16 Ch. D. 681, 50 L. J. Ch. 167, 43 L. T. Rep. N. S. 620, 26 Wkly. Rep. 133.

construed to be dependent unless a contrary intention appears.[17] Irrespective, however, of this general rule the determination of this question is beset with difficulties, for there are numerous conflicting decisions. If the intention is clear to make the contract either dependent or independent, the courts will enforce the obligation as made; but it is difficult to determine whether one promise be the consideration for another, or whether the performance and not the mere promise be the consideration. Again, in case of covenants, if part of the money is to be paid before performance on either side, or if part of the consideration has been received by the promisor, the covenants are independent. But this rule does not prevail where a different intention is apparent and the part unperformed is the essential consideration.[18]

6. Joint, Several, and Joint and Several Liability.[19] A joint bond may be treated in equity as several so far as to make the representatives of a deceased obligor proportionately liable.[20] So chancery will decree contribution for losses sustained and surplus advances made in case of joint obligors and the bankruptcy of one,[21] and a successful plea in an action against one of several on a bond discharges the other defendants unless infancy, bankruptcy, or other defense of a personal nature is pleaded.[22]

7. Performance[23]**— a. In General** — (i) *Place.* If no place is mentioned, the obligation must be performed to the obligee in person, but the subject-matter of the contract or the nature of the bond may work an exception,[24] although collateral circumstances may be considered to ascertain the intent in certain cases, as to the place of performance.[25]

(ii) *Time.* If no time is fixed for doing the act, then the law implies that a reasonable time was intended.[26] But time may be of the essence of the contract so that the party in default will not be released from performance except in case of accident or mistake.[27] So, if a day certain is specified within which an act may be done the whole period is meant,[28] and if a day positive is named subject to a

17. Stavers *v.* Curling, 3 Bing. N. Cas. 355, 2 Hodges 237, 6 L. J. C. P. 41, 3 Scott 740, 32 E. C. L. 169; Baylis *v.* Le Gros, 4 C. B. N. S. 537, 4 Jur. N. S. 513, 93 E. C. L. 537; Sibthorp *v.* Brunel, 3 Exch. 826. In Green *v.* Dyersburg, 2 Flipp. (U. S.) 477, 10 Fed. Cas. No. 5,756, it is said that the intention apparent on the face of the instrument coupled with the application of common sense must govern, that particular expressions are controlled by the whole instrument in ascertaining the intention and every part must have effect and mutual covenants or acts are to be construed as dependent in the absence of a contrary intention.

18. Green *v.* Dyersburg, 2 Flipp. (U. S.) 477, 10 Fed. Cas. No. 5,756. See also Clifford *v.* Smith, 4 Ind. 377 (holding the conditions not dependent, although the principle is not discussed); Allard *v.* Belfast, 40 Me. 369 (holding the stipulations independent upon the authority of Lord *v.* Belknap, 1 Cush. (Mass.) 279, and of Pordage *v.* Cole, 1 Saund. 319*h*). But in Green *v.* Dyersburg, 2 Flipp. (U. S.) 477, 10 Fed. Cas. No. 5,756, it is said that the courts have met great difficulties in applying Sergeant Williams' rules in the Pordage case, and the general doctrine is exhaustively discussed therein.

Condition creates independent original obligation where it is annexed to a contract in the form of a bond, and is unnecessary thereto. Tomlinson *v.* Ousatonic Water Co., 44 Conn. 99.

19. See also *supra*, III, E, 2.

20. Smith *v.* Martin, 4 Desauss. (S. C.) 148.

21. Hyde *v.* Tracy, 2 Day (Conn.) 491.

22. Gordon *v.* State, 11 Ark. 12.

23. See also *infra*, V, A.

24. Currier *v.* Currier, 2 N. H. 75, 9 Am. Dec. 43 (also specifying the delivery of cumbersome articles as within the exception); McKillip *v.* McKillip, 8 Barb. (N. Y.) 552 (holding that the place of support of the obligee is at the obligor's own dwelling-house, if it can there be done in a suitable manner); Irvine *v.* Barrett, 2 Grant (Pa.) 73 (holding that a bond given under decree of court must be performed where the court exercises jurisdiction [on this last point see also Currier *v.* Currier, 2 N. H. 75, 9 Am. Dec. 43]).

25. Currier *v.* Currier, 2 N. H. 75, 9 Am. Dec. 43.

Limitation as to place. — If it is apparent from the bond that the acts specified in the condition are limited to the right to demand their performance at a certain place, then the condition is limited by such intention. Luques *v.* Thompson, 26 Me. 514.

26. Green *v.* Dyersburg, 2 Flipp. (U. S.) 477, 10 Fed. Cas. No. 5,756 [*citing* Cock *v.* Taylor, 2 Overt. (Tenn.) 49, 5 Am. Dec. 650; Davis *v.* Gray, 16 Wall. (U. S.) 203, 21 L. ed. 447].

27. Martin *v.* Melville, 11 N. J. Eq. 222.

28. Blake *v.* Niles, 13 N. H. 459, 38 Am. Dec. 506.

condition, the bond becomes absolute on that day, unless it has been ascertained before then that the subject-matter of the condition exists.[29] Again, if the condition is to pay money to a named person on a certain day, and if a specified contingency happens, then to pay another, the happening of the contingency does not make the money due immediately,[30] and when the act on which the condition rests is to be done between certain dates, the obligation matures at the close of the day preceding the last named date.[31] So where the condition is for the benefit of the obligor, the obligee to perform the first act, he must do or concur in doing such act before he can demand the penalty.[32] Again, a bond may become due by death of the obligor, though the contingency specified may not have occurred,[33] and presentment for payment of a time certificate of deposit properly indorsed need not be made to a receiver of a bank to mature a right of action on a bond for safety of deposits which includes such time deposit and is conditioned to pay over on demand.[34] But the time specified in the bond may be enlarged or waived,[35] and if no time for ultimate performance is fixed by the waiver, the original contract must be consulted to ascertain what constitutes a reasonable time.[36]

b. Payment — (i) *Amount*[37] — *Interest*.[38] Payment may be fixed by condition upon a *pro rata* basis.[39] And interest may be allowed, although not provided for by the contract;[40] or it may become payable from demand where a liability is incurred;[41] or the rate of interest may be governed by the statute, express agreement, or both,[42] or interest may be payable annually where it is so

29. Gamble *v.* Beeson, 50 N. C. 128.

A tender is not a performance of a condition for delivery of personal property on the day specified. Smith *v.* Stinson, 1 Brev. (S. C.) 1.

30. Matter of Garlock, 8 N. Y. App. Div. 341, 40 N. Y. Suppl. 791, 75 N. Y. St. 168.

31. Shelton *v.* Jackson, 20 Tex. Civ. App. 443, 49 S. W. 415.

32. Tyrer *v.* Chew, 7 App. Cas. (D. C.) 175.

33. Lentz's Estate, 12 Montg. Co. Rep. (Pa.) 177.

34. Board Courthouse, etc., Com'rs *v.* Irish-American Bank, 68 Minn. 470, 71 N. W. 674.

35. Fleming *v.* Gilbert, 3 Johns. (N. Y.) 528. See also Haynes *v.* Fuller, 40 Me. 162. And so even by parol. Fleming *v.* Gilbert, 3 Johns. (N. Y.) 528. So waiver of non-performance of a guaranty and consent to further performance will extend the liability. Central Gas, etc., Fixture Co. *v.* Kohn, 3 Misc. (N. Y.) 235, 22 N. Y. Suppl. 758, 52 N. Y. St. 129 [*affirming* 1 Misc. (N. Y.) 224, 20 N. Y. Suppl. 884, 49 N. Y. St. 212]. But see Cincinnati Fifth Nat. Bank *v.* Woolsey, 21 Misc. (N. Y.) 757, 48 N. Y. Suppl. 148.

36. Haynes *v.* Fuller, 40 Me. 162.

37. See also *infra*, V; and VI, F, 1, 2.

38. See also, generally, Interest.

39. Pistel *v.* Imperial Mut. L. Ins. Co., 88 Md. 552, 42 Atl. 210, 43 L. R. A. 219.

40. U. S. *v.* Gurney, 4 Cranch (U. S.) 333, 2 L. ed. 638.

And if no time of payment is mentioned of the sum due, and nothing is said as to interest, nevertheless it is recoverable. Purdy *v.* Philips, 11 N. Y. 406 [*affirming* 1 Duer (N. Y.) 369].

If, however, a bond is payable after date and no interest is stipulated, it does not bear interest until after maturity. Wilson *v.* Anthony, 19 Ark. 16.

41. Payable from demand.— Frink *v.* Southern Express Co., 82 Ga. 33, 8 S. E. 862, 3 L. R. A. 482, holding also that where no demand is made interest will become due from the service of summons in an action on the bond. So if the penalty of a bond has not been demanded, or there is no acknowledgment that the same is due, interest is recoverable from the commencement of the suit. U. S. Bank *v.* Magill, 1 Paine (U. S.) 661, 2 Fed. Cas. No. 929 [*affirmed* in 12 Wheat. (U. S.) 511, 6 L. ed. 711]. And where bonds are made payable at a particular place and no demand is there made and no funds are there to meet them at maturity, interest thereon continues. Skinker *v.* Butler County, 112 Mo. 332, 20 S. W. 613.

42. Rate generally.— The rate of interest on a bond executed in the state is a question of fact. Davidson *v.* Gohagin, 2 Bibb (Ky.) 634. And the legal rate should govern in a contract to pay interest on a specified sum and not the rate received by the obligor from investments of the money, the bond being one conditioned for support of B out of said interest and a payment of unexpended principal and interest to C on B's death. Granger *v.* Pierce, 112 Mass. 244.

Stipulated rate.— If a bond expressly stipulates for a specified rate of interest for a balance due to a bank after a certain date, for moneys advanced, such interest will be collected on such balance, even though interest at a greater rate had been charged and compounded on daily balances. Oxford Bank *v.* Bobbitt, 108 N. C. 525, 13 S. E. 177. So the contract rate should govern from the period specified (Barbour *v.* Tompkins, 31 W. Va. 410, 7 S. E. 1), for interest must be

expressed, even though there are contrary words relating to the principal or instalments thereof,[43] or it may be payable after breach of the condition as well as before,[44] or before or after maturity, or both, according to the agreement.[45] It is therefore upon the stipulations and conditions of each particular contract or bond[46] that the determination of the various questions relating to interest must

computed according to the agreement (Miller *v.* Burroughs, 4 Johns. Ch. (N. Y.) 436).

Stipulated rate or legal rate.— If the value of bonds is recovered in replevin the legal rate of interest from the date of demand and not the rate the bonds bear is recoverable. Govin *v.* De Miranda, 140 N. Y. 474, 35 N. E. 626, 55 N. Y. St. 837. But if the specified rate is less than the legal rate the former is the rate recoverable after maturity. Elmira Iron, etc., Rolling Mill Co. *v.* Elmira, 5 Misc. (N. Y.) 194, 25 N. Y. Suppl. 657.

Effect of statute upon rate or specified rate.— If the agreement fixes the interest at such rate as is then or may thereafter be legal, and a statute subsequently enacted increases the legal rate, such increased rate is recoverable not by virtue of the statute but of the agreement. Mucklar *v.* Cross, 32 N. J. L. 423. But if a bond is forfeited prior to the passage of a statute increasing the rate, the per cent fixed by statute does not govern. Austin *v.* Townes, 10 Tex. 24. And if a judgment allows only five per cent the fact that it was given after a statutory enactment allowing six per cent does not change the rate recoverable. Brooke *v.* Roane, 1 Call (Va.) 205. So an agreement may change an express statutory provision fixing the rate of interest on bonds. Newport, etc., Bridge Co. *v.* Douglass, 12 Bush (Ky.) 673.

43. **Interest payable annually.**— Although the principal sum is to be due in two years with annual interest, such interest will be due in one year (Smith *v.* Holmes, 19 N. Y. 271), and this is so where interest is expressly conditioned to be paid yearly, even though instalments are to be paid only every two years commencing the second year (Fake *v.* Eddy, 15 Wend. (N. Y.) 76). If interest is to be paid yearly on the first day of a certain month of each year, interest will commence on the first day of the named month next following the date of the bond. Fake *v.* Eddy, 15 Wend. (N. Y.) 76. See further Wilson *v.* Kelly, 19 S. C. 160; Watkins *v.* Lang, 17 S. C. 13.

44. Miller *v.* Burroughs, 4 Johns. Ch. (N. Y.) 436.

45. **Before or after maturity, or both.**— If interest is payable annually, annual interest will be due on agreed-upon instalments as well after maturity as before. Watkins *v.* Lang, 17 S. C. 13. So the principal will bear interest after maturity as well as before at the special rate expressed in the bond. Jackson, etc., Co. *v.* Burlington, etc., R. Co., 29 Fed. 474. And in case of instalments the specified rate in the bond will be given on each instalment from its maturity until payment in full. Ellis *v.* Sanders, 32 S. C. 584, 10 S. E. 824. Although where interest is payable annually, it may, under the agreement, only draw annual interest until maturity and simple interest afterward until paid. Wilson *v.* Kelly, 19 S. C. 160.

Interest is recoverable not as damages but as interest on a bond with a penal sum conditioned for interest, and it can be recovered from date of the bond to date of payment. *In re* Dixon, [1900] 2 Ch. 561, 69 L. J. Ch. 609, 83 L. T. Rep. N. S. 129, 48 Wkly. Rep. 665.

46. **Arrears or accrued interest.**— The fact that it is expressly agreed that yearly interest on a certain sum shall be paid until a specified act is performed does not prevent the collection of arrears of yearly interest, even though the condition remains unperformed, and notwithstanding the statute of limitations, but interest on the sums payable yearly is not recoverable. Henderson *v.* Hamilton, 1 Hall (N. Y.) 314. And a stipulation exonerating the obligor from interest on part payments does not exonerate him from payment of interest accrued at the time of such part payment, but only for interest thereafter. Stone *v.* Bennett, 8 Mo. 41. So the payment of instalments due after interest commences, and which are paid when due, will not bar the recovery of interest accrued up to the time of payment of such instalments. Fake *v.* Eddy, 15 Wend. (N. Y.) 76.

Bond to secure note includes principal and interest. Morristown Stove Works *v.* Jones, (Tenn. Ch. 1899) 53 S. W. 217.

Default in payment of interest.— Judgment may be entered on the whole penalty of a bond in default of the payment of the first year's interest. Warwick *v.* Matlack, 7 N. J. L. 165.

Direction to jury to compute interest.— The court may in a proper case, when justified by the verdict, and where it appears that the computation of interest was omitted, direct the jury to compute the same up to the time of trial. People's Sav. Bank *v.* Norwalk, 56 Conn. 547, 16 Atl. 257.

Error to include interest on bond for performance of covenant for renewal of lease. John Polhemus Printing Co. *v.* Hallenbeck, 46 N. Y. App. Div. 563, 61 N. Y. Suppl. 1056, construing New York Code of Civil Procedure.

Executors must account for interest of money received and retained by their intestate, and on which there is a refusal to pay interest, where they are obligated under their contract with the executors of the obligor of bonds secured by mortgage to account therefor. Hylton *v.* Hunter, Wythe (Va.) 195.

Instalments or principal not punctually paid.— Where the bond read "without interest but with interest if not punctually paid" upon non-payment of the first instalment interest runs from the date of the bond and not from the date when the several instal-

rest, having in view those rules of construction which are applicable and which have been fully considered under preceding sections of this article.

(II) *MODE.* If a bond is payable in gold, silver, "lawful money," specie or any specifically named currency, such designation is of binding force to the extent of the terms of the obligation, subject to such conditions and limitations as are contained in the contract.[47] So the term "lawful money" means such money as shall be lawful when payment is actually made.[48]

(III) *TIME.* If a bond is conditioned for the payment of money on a certain day, the whole debt accrues on the day specified, even though the bond appears to have been given by way of indemnity.[49] But the whole day is meant,[50]

ments become payable. Wakefield *v.* Beckley, 3 McCord (S. C.) 480. But where the condition is "with interest from date if not punctually paid" and the bond is one with a penalty, the interest is an additional penalty and not recoverable. Waller *v.* Long, 6 Munf. (Va.) 71.

Interest in gold.— The payment of interest in gold may be enforced where so stipulated, even though the bond is payable in currency. Pollard *v.* Pleasant Hill, 3 Dill. (U. S.) 195, 19 Fed. Cas. No. 11,253, 1 Centr. L. J. 155.

Judgment may allow interest on a bond from a date specified to the date of the judgment and in the same judgment the words "no interest to be collected thereon" mean past and not future interest. Stuart *v.* Troutman, (Ky. 1888) 7 S. W. 535. And where a penal bond was given and the money was not due when the judgment was recovered, but only when the condition upon which the payment of the money rested was fulfilled, interest only runs from that date. Wilhite *v.* Roberts, 4 Dana (Ky.) 172. So interest on the aggregate amount of principal and interest found due in a commissioner's report may be allowed, at the rate stipulated in the bond, from the date of the completion of the report until paid. Barbour *v.* Tompkins, 31 W. Va. 410, 7 S. E. 1.

Judgment may cover penalty, and interest after liability to pay penalty accrues. Holmes *v.* Standard Oil Co., 183 Ill. 70, 55 N. E. 647 [*affirming* 82 Ill. App. 476].

Judgment — Subsequently enacted statute does not affect rate of interest in judgment. See Brooke *v.* Roane, 1 Call (Va.) 205. And that contract ceases to operate as to interest by being merged in decree see Miller *v.* Burroughs, 4 Johns. Ch. (N. Y.) 436.

Part payment may operate by stipulation to relieve the obligor from interest on the sum paid. Stone *v.* Bennett, 8 Mo. 41. For rule for computing interest in case of part payment under a decision in 1848 see Singleton *v.* Allen, 2 Strobh. Eq. (S. C.) 166.

Relief under such condition.— Such a condition as that last specified may make time of the essence of the contract and the obligee may be relieved in case of mistake or waiver of default. Martin *v.* Melville, 11 N. J. Eq. 222. And the collection of the penalty will not be permitted if inequitable, even though there be such a condition. Western Bank *v.* Sherwood, 29 Barb. (N. Y.) 383.

Tender is sufficient to stop the running of interest if the obligor makes a deposit for the payment of the bonds at the time and place stipulated and in accordance with the condition. Bailey *v.* Buchanan County, 115 N. Y. 297, 22 N. E. 155, 26 N. Y. St. 128, 6 L. R. A. 562 [*reversing* 54 N. Y. Super. Ct. 237]. And if the condition is for reconveyance, if payment is made within a specified time, the interest ought to be tendered when the note given for the money actually falls due. Buffum *v.* Buffum, 11 N. H. 451.

47. Hoys *v.* Tuttle, 8 Ark. 124, 46 Am. Dec. 309 (bond was payable in "Arkansas currency"); Lackey *v.* Miller, 61 N. C. 26 (where current bank-money was decided to mean current bank-bills); Turpin *v.* Sledd, 23 Gratt. (Va.) 238 (where the payment was to be in gold or silver or the equivalent thereof); Boulware *v.* Newton, 18 Gratt. (Va.) 708 (where current funds was construed to mean the currency of the day of demand, although the money borrowed was in Confederate treasury notes). As to demand for lawful money and tender of "current bankable funds" for loan of Confederate money during Civil War see Gavinzel *v.* Crump, 22 Wall. (U. S.) 308, 22 L. ed. 783.

48. O'Neil *v.* McKewn, 1 Rich. (S. C.) 147. And even though a bond executed in 1863, payable four years after date, expressly provided that it should not be demanded in specie, a tender by the obligor of the amount of the bond in Confederate money at its execution was decided to have been properly refused. White *v.* Jones, 88 N. C. 166.

Condition as to particular currency—When available.— It is determined that if a bond is payable in a particular currency the debtor must seek the creditor if within the state and tender payment, otherwise the privilege of paying in such currency will not be of avail, and a tender thereof after maturity of the bond is not a compliance with the condition, for if the bond is not paid as specified it becomes a specie debt. Hoys *v.* Tuttle, 8 Ark. 124, 46 Am. Dec. 309.

49. Hogan *v.* Calvert, 21 Ala. 194.

Rule qualified.— It is decided that payment made before action brought, even though not within the time specified, may save the condition to pay on or before a certain day. Gage *v.* Gannett, 11 Mass. 217; Bond *v.* Cutler, 10 Mass. 419.

Periodical payments.— A bond may be conditioned so as to bind the obligors for periodical payments and not merely for the penalty. Helena *v.* Fitzpatrick, 36 Ark. 583.

50. Zachery *v.* Brown, 17 Ark. 442.

although a fixed time for payment may be varied by conditions.[51] But if no time is specified for the payment of a sum certain the money is due immediately without demand,[52] and where a bond is payable in express terms on demand it is payable on the day of its date,[53] or immediately,[54] unless the demand is dependent upon conditions, as that payment shall be made on demand after a specified time,[55] although the obligor need not wait until demand made, but may pay it prior thereto, even though it is conditioned that a reasonable time after demand shall be given to pay.[56]

8. Where Bond Is That of Agent or Employee — a. In General. A bond covering the contract of agency or other employment rests upon the general rules of construction elsewhere fully considered[57] and which are unnecessary to repeat

51. Illustrations.— If a bond is for a sum certain to be paid on a day fixed, conditioned that it may be discharged if a smaller specified sum is paid sooner and the condition is not complied with, the bond is good for the larger sum. Craig *v.* Morton, Hard. (Ky.) 299. But the time of payment is not postponed on railroad bonds redeemable twenty years from date by a provision therein making them redeemable at the pleasure of the legislature. Opinion of Ct. in Response to Governor, 49 Mo. 216. And if the bond is conditioned to be paid on a particular day with a condition as to indemnity which is indefinite as to time, the indemnity is not a condition precedent to the payment of the money. Wellborn *v.* James, 20 N. C. 310. So a bond by four may be made payable when three of them should be required to pay it. Carl *v.* Com., 9 Serg. & R. (Pa.) 63. Again, a bond conditioned to pay out of the income a certain sum after certain debts were paid is enforceable when, with reasonable diligence, there was a net income sufficient to pay the bond. Fogg *v.* Middleton, 2 Hill Eq. (S. C.) 591.

52. Purdy *v.* Philips, 1 Duer (N. Y.) 369; Rhoads *v.* Reed, 89 Pa. St. 436, even though such bond purports to be given for the price of goods to be delivered at a subsequent day. Watson *v.* Bledsoe, 60 N. C. 249.

53. Austin *v.* Burbank, 2 Day (Conn.) 474, 2 Am. Dec. 119.

Demand in absence.— A written demand of the money left at one's house in his absence is invalid, although the party has promised to pay on that day, unless he knew that the demand was to be made and left to avoid the demand, and where one was summoned as a trustee of the plaintiff and the demand for agreed-upon payment was made during the pendency of such process, if foreign attachment, there is no breach. Erskine *v.* Erskine, 13 N. H. 436.

54. Omohundro *v.* Omohundro, 21 Gratt. (Va.) 626.

A bond payable at the option of the obligee becomes absolutely payable on his death. Odenwelder's Estate, 10 Pa. Co. Ct. 591.

A bond payable on "call" is payable immediately. Bowman *v.* McChesney, 22 Gratt. (Va.) 609.

55. Boulware *v.* Newton, 18 Gratt. (Va.) 708. See also Omohundro *v.* Omohundro, 21 Gratt. (Va.) 626.

Illustrations.— But if a bond is payable on demand conditioned that if interest is punctually paid the debt should not be collected for five years, such provision as to time does not change its character in respect to the interest, and it should be computed as of its date. Moon *v.* Richardson, 24 Gratt. (Va.) 219. Where a bond given during the Civil War was not payable except on demand, and in case of inability then to pay it was to be continued two years and become absolutely payable subject to a certain condition that tender might be made to the obligee's attorney, if he should be in Richmond, it was held that neither the obligee nor his attorney was compelled to be in Richmond to receive the money. Gavinzel *v.* Crump, 22 Wall. (U. S.) 308, 22 L. ed. 783.

56. Stover *v.* Hamilton, 21 Gratt. (Va.) 273. But the condition of the bond may be such that the obligee need not receive payment except at his pleasure. Boulware *v.* Newton, 18 Gratt. (Va.) 708.

57. See *supra*, III, D; Chicago, etc., R. Co. *v.* Bartlett, 120 Ill. 603, 11 N. E. 867; Burns *v.* Singer Mfg. Co., 87 Ind. 541; and cases cited *infra*, note 58 *et seq.*

Bond is not joint when executed by bonding company, an employee to employer. American Bonding, etc., Co. *v.* Milwaukee Harvester Co., 91 Md. 733, 48 Atl. 72. See *supra*, III, E, 2.

Insurance agents' bonds.— Sureties are not liable on a bond for the failure of agents to repay advancements by the company where they are not a claim for which the agent is previously liable. North-western Mut. L. Ins. Co. *v.* Mooney, 108 N. Y. 118, 15 N. E. 303. And weekly payments are not compensation to an agent, but merely advances where such is the intention induced by the condition. New York L. Ins. Co. *v.* Slesinger, 2 Pennew. (Del.) 443, 47 Atl. 620. Again it was determined in Rockford Ins. Co. *v.* Rogers, 15 Colo. App. 23, 60 Pac. 956, that moneys collected by agents are not applicable to a fair indebtedness, and that sureties are not liable where the agents had not directed such application. And see also in this connection 3 Joyce Ins. § 2766; 1 Joyce Ins. §§ 708–712.

Stipulation for attorney's fees is void in fidelity bonds. Singer Mfg. Co. *v.* Armstrong, 7 Kan. App. 314, 54 Pac. 571, construing a Kansas statute.

here except to notice generally that the scope and extent of the engagement is determined by the terms of the contract and the nature of the transaction according to what was contemplated at the time of entering into the same,[58] for a surety's contract is to receive a strict interpretation in accordance with the obligation implied,[59] and the rule that the recitals may control general words is of importance.[60] In applying, however, the above and general rules of construction the character of the agency or employment, the duties imposed,[61] and also the fact whether an official bond relates to private or public officials are distinctions necessary to be observed. Again the statutes and charters or fundamental law upon which corporate existence depends, and also such by-laws, regulations, or governing rules and records of such corporations as exist and are pertinent and relevant are usually resorted to as aids to interpretation and to ascertaining the intent and the law.[62]

b. Commencement of Liability.[63] The liability on a bond may accrue by relation as of its date,[64] or the bond may include within or from its date matters fairly intended as coming within the terms thereof,[65] even though the transaction out of which the matter arose had its inception before said date, but the liability accrued thereafter.[66] But acts of an agent between the date and delivery of the bond do not raise a liability thereon.[67]

c. Nature and Extent of Duties — (i) *In General.* The nature and extent of the duties required under the obligation depends primarily upon the character of the agency or employment, the present and past relations of the parties, the degree of responsibility imposed by law, and the contract having in view the intention in executing the bond,[68] and where an officer or an agent executes a

58. See *supra*, III, D, E.

Liability is that covered by bond and will not be extended.— The bond of an agent covers all that is with the condition, and notes given for an indebtedness are within the words "all other obligations" which the agent is to pay. Parham Sewing Mach. Co. *v.* Brock, 113 Mass. 194. And a bond conditioned for the payment by the principal of "every indebtedness now existing or which may hereafter be incurred" means indebtedness in the business of the agency, and does not contemplate indebtedness for the purchase of goods incurred after termination of the agency, after all liabilities are settled. Burns *v.* Singer Mfg. Co., 87 Ind. 541. So a corporate agent's bond has been held not to cover advances made to him by the company. Burlington Ins. Co. *v.* Johnston, 24 Ill. App. 565. And where the language used shows an intention to employ an express messenger as agent solely, the bond will not be construed so as to extend the liability of such messenger to that of a common carrier. Southern Express Co. *v.* Frink, 67 Ga. 201. Nor does the obligation on the bond of an agent extend to acts of partnership of which such agent subsequently becomes a member, conducting the same business with the consent of the obligee. White Sewing Mach. Co. *v.* Hines, 61 Mich. 423, 28 N. W. 157. But see Hayden *v.* Hill, 52 Vt. 259.

59. See *supra*, III, D, 5.

60. See *supra*, III, D, 3.

61. Chicago, etc., R. Co. *v.* Bartlett, 120 Ill. 603, 11 N. E. 867; and cases cited *infra*, note 68 *et seq.*

62. See cases cited *infra*, note 64 *et seq.*; and, generally, Corporations; Municipal Corporations; Officers; Principal and Agent.

63. See also *supra*, III, F, 2.

64. Ætna L. Ins. Co. *v.* American Surety Co., 34 Fed. 291. See also 1 Joyce Ins. § 708.

Where two bonds are given, one at a later date providing for apportionment of any loss in case the company held any other bond concurrently therewith, and the company had retained the first bond, and a loss occurred during the period of the latter bond, the two bonds were held not concurrent. Ætna L. Ins. Co. *v.* American Surety Co., 34 Fed. 291.

65. **Thus moneys in an agent's hands at the date** of the bond, and which ought to have been reported as collected, but were not, will be included. Mutual L. Ins. Co. *v.* Wilcox, 8 Biss. (U. S.) 197, 17 Fed. Cas. No. 9,979, 10 Chic. Leg. N. 268, 6 Reporter 8. And funds remaining in a treasurer's hands from prior terms may be included in a bond given on reëlection. De Hart *v.* McGuire, 10 Phila. (Pa.) 359, 32 Leg. Int. (Pa.) 248.

66. As in case of an indebtedness to the principal. Prudential Ins. Co. *v.* Berger, 16 N. Y. Suppl. 515, 42 N. Y. St. 31.

67. Hyatt *v.* Grover, etc., Sewing Mach. Co., 41 Mich. 225, 1 N. W. 1037. See further as to previous acts Ingraham *v.* Maine Bank, 13 Mass. 208 (sureties liable); Ward *v.* Hassell, 66 N. C. 389 (sureties not liable); Sabine Tram Co. *v.* Bancroft, (Tex. Civ. App. 1896) 39 S. W. 177 (previous acts not included).

As to subsequent acts see *infra*, III, F, 8, c.

68. Chicago, etc., R. Co. *v.* Bartlett, 120 Ill. 603, 11 N. E. 867, where a paymaster's bond was determined not to include a loss by

bond in general terms for the faithful performance of his duties, it extends to and covers all acts done within the general scope and authority of the officer or agent.[69] It is also the settled rule as to official bonds that they extend to all such duties as may at any time be added to the office or imposed upon the officer, for these are held to be within the contemplation and liability of the obligor.[70]

(II) *Additional or New Duties.* The last rule does not permit the imposition of such new or additional duties or such a change thereof, or such an increase of responsibility as that the nature of the obligation is altered and the liability of the sureties is increased.[71] The general rule is that the bond of an officer or employee of a private corporation for the faithful performance of his

theft of money without negligence on his part, and it was declared by the court that, although a bond will be so construed as to give force and effect to all the words contained, it is limited by a construction which will effectuate the parties' intention, and in determining whether the bond made the sureties insurers of the agent, this rule applies, and the agent's relation to the company, the nature of his existing employment, the duties it imposed, and the degree of responsibility which the law annexed thereto, should all be considered. The employment was one of confidence and trust, which required of him the handling and paying out of money, and accounting therefor, and with respect to the moneys he was a mere bailee for hire, and the measure of his legal liability was good faith, ordinary skill, care, and diligence in the performance of the duties of his employment, and taking the bond could not change the character of his responsibility, and make him an absolute insurer of all moneys in his hands, irrespective of his legal duties under his employment.

Receipt and temporary custody of moneys of an association by its general manager is covered by bond to secure "honesty in the performance of his duties in the position," and the nature of his duties may be shown in connection with his application and the by-laws. Harrisburg Sav., etc., Assoc. *v.* U. S. Fidelity, etc., Co., 197 Pa. St. 177, 46 Atl. 910.

69. Tyler *v.* Old Post Bldg. Assoc., 87 Ind. 323, holding that bond of secretary of a corporation covers all money received by him in his official capacity.

So the words "well and truly," referring to duties, covers honesty, reasonable skill, and diligence. If there is want of capacity or negligence or unskilfulness then and there, the duties are not "well and truly" performed. Minor *v.* Alexandria Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47.

An agent's bond may cover an entire balance at the close of his agency based upon an indebtedness carried through the term of agency. Zinns Mfg. Co. *v.* Mendelson, 89 Wis. 133, 61 N. W. 302. But see Rockford Ins. Co. *v.* Rogers, 15 Colo. App. 23, 60 Pac. 956.

A bond to pay balance may cover costs on an unnecessary "account rendered." Holmes *v.* Frost, 125 Pa. St. 328, 17 Atl. 424.

So where a cashier converts securities which call for money or notes he is liable for the nominal amount without regard to depreciation in value. Pendleton *v.* State Bank, 1 T. B. Mon. (Ky.) 171.

The bond of a bank messenger covers theft of the bank's money, whether he was acting at the time within the scope of his employment or not. German American Bank *v.* Auth, 87 Pa. St. 419, 30 Am. Rep. 374.

Time limited for discovery excludes acts and defaults not discovered within specific time limited, even though such discovery is prevented by acts of the employee in falsifying the books. New York Fidelity, etc., Co. *v.* Consolidated Nat. Bank, 71 Fed. 116, 39 U. S. App. 26, 17 C. C. A. 641 [*reversing* 67 Fed. 874]. See Byrne *v.* Muzio, 8 L. R. Ir. 396 [*cited* in 3 Joyce Ins. § 2766].

70. **Official bonds.**— Board of Education *v.* Quick, 99 N. Y. 138, 1 N. E. 533. So the bond of a bank cashier covers all duties which are annexed to the office from time to time by those authorized to annex them. Minor *v.* Alexandria Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47 [*cited* in U. S. *v.* Powell, 14 Wall. (U. S.) 493, 20 L. ed. 726]. See also Detroit Sav. Bank *v.* Ziegler, 49 Mich. 157, 13 N. W. 496, 43 Am. Rep. 456, 22 Am. L. Reg. N. S. 249. And where the bond is for the faithful performance of such duties of the office as are or may be imposed upon an agent, it covers additional duties imposed by reason of the increase of business and connections of the company. Eastern R. Co. *v.* Loring, 138 Mass. 381.

As to new duties imposed by statute see Com. *v.* Holmes, 25 Gratt. (Va.) 771.

71. If the office held by the principal is altered by new duties the surety is discharged, but when the principal is appointed to a new office, the surety is not thereby discharged. Home Sav. Bank *v.* Traube, 75 Mo. 199, 42 Am. Rep. 402 [*citing* Skillett *v.* Fletcher, L. R. 2 C. P. 469, 36 L. J. C. P. 206, 16 L. T. Rep. N. S. 426, 15 Wkly. Rep. 876]. But a bank clerk's bond given when he was assistant cashier does not cover a defalcation of the clerk if after the execution of the bond and before the defalcation the position of the clerk was several times changed, whereby his responsibility was increased. Baltimore First Nat. Bank *v.* Gerke, 68 Md. 449, 13 Atl. 358, 6 Am. St. Rep. 453. And new arrangements of an agent's duties are not within the condition "during his continuance" in office. Boston Hat Manufactory *v.* Messinger, 2 Pick. (Mass.) 223. Again, where the agency is confined to a particular

duties relates to the office then contemplated within the terms of the contract, and does not extend to losses occasioned by his employment outside of the capacity for which the bond may by a fair, reasonable, and legal interpretation be held to have been given; provided, however, that the loss was not due to such employment, but rather arose out of the conduct of the office which is covered by the bond or was covered alone by the non-performance or wrongful performance by the officer of the regular duties of his office.[72]

(III) *Conditioned to Cover Duties Not Specified.* A bond may, however, be so conditioned as to cover the particular agency and other duties than those specified.[73]

(IV) *Duration of Liability*—(A) *In General.* The general rule is that the duration of the bond to secure faithful performance of the duties of an office is coextensive with the duration of such office.[74]

(B) *As Affected by Term For Which Elected or Appointed*—(1) Generally. A bond should be restricted by the term of the office, so that every new election should be considered the choice of a new officer, and a new bond should

place, new duties in a new place are not covered. Wheeler, etc., Mfg. Co. *v.* Brown, 65 Wis. 99, 25 N. W. 427, 26 N. W. 564.

72. Garnett *v.* Farmers' Nat. Bank, 91 Ky. 614, 13 Ky. L. Rep. 212, 16 S. W. 709, 34 Am. St. Rep. 246. But see Detroit Sav. Bank *v.* Ziegler, 49 Mich. 157, 13 N. W. 496, 43 Am. Rep. 456, 22 Am. L. Reg. N. S. 249.

Illustrations.— Where a clerk who is occasionally employed as cashier is thereby enabled to perpetuate a fraud, and the loss caused to the bank thereby has no connection with and cannot be fairly made a sequence of his occasional performance of a cashier's duties, the sureties on his bond for the faithful performance of his duties as clerk are liable but they are not liable for losses directly arising from wrongful acts committed solely by reason of his employment as cashier in matters which he as clerk had no right to handle and which were in exclusive control of the regular cashier. Garnett *v.* Farmers' Nat. Bank, 91 Ky. 614, 13 Ky. L. Rep. 212, 16 S. W. 709, 34 Am. St. Rep. 246. And sureties for the faithful performance of the duties of the bookkeeper of a bank are liable for his errors in that capacity, although he also performs the duties of teller, unless the errors were connected with or induced by the latter employment. Home Sav. Bank *v.* Traube, 75 Mo. 199, 42 Am. Rep. 402. So a bond of an assistant bookkeeper covers false entries made by him in a "credit journal" to conceal embezzlements, although at the time of his appointment such book was kept by the teller. Rochester City Bank *v.* Elwood, 21 N. Y. 88.

Promotion.— If the character of the employment is specifically designated the sureties are not liable for the employee's acts after promotion. Manufacturers' Nat. Bank *v.* Dickerson, 41 N. J. L. 448, 32 Am. Rep. 237; National Mechanics' Banking Assoc. *v.* Conkling, 90 N. Y. 116, 15 N. Y. Wkly. Dig. 243, 43 Am. Rep. 146, 42 Am. Rep. 405 note [*affirming* 24 Hun (N. Y.) 496, 61 How. Pr. (N. Y.) 76, 12 N. Y. Wkly. Dig. 275]; American Tel. Co. *v.* Lennig, 139 Pa. St. 594, 21 Atl. 162. But *contra*, where the condition is "or if he shall be appointed to any other office, duty or employment" (New York City Fourth Nat. Bank *v.* Spinney, 120 N. Y. 560, 24 N. E. 816, 31 N. Y. St. 846 [*affirming* 47 Hun (N. Y.) 293, 14 N. Y. St. 216]); or where the condition is "or in whatever capacity he may serve" (Union Dime Sav. Inst. *v.* Neppert, 3 N. Y. Suppl. 797, 21 N. Y. St. 723 [*affirmed* in 123 N. Y. 627, 25 N. E. 952, 33 N. Y. St. 1027]; Union Dime Sav. Inst. *v.* Feltz, 3 N. Y. Suppl. 797, 4 N. Y. Suppl. 607, 21 N. Y. St. 723, 729, 25 Abb. N. Cas. (N. Y.) 357 [*affirmed* in 123 N. Y. 627, 25 N. E. 952, 33 N. Y. St. 1027]).

73. Prudential Ins. Co. *v.* Berger, 16 N. Y. Suppl. 515, 42 N. Y. St. 31.

Collections not specifically authorized are covered by provision as to other duties. Cumberland Bldg. Loan Assoc. *v.* Gibbs, 119 Mich. 318, 78 N. W. 138.

Specific duty not designated.— Another exception to or qualification of the rule would also exist in case the specific duty is not designated, either in the appointment or the bond, and the latter is given for the faithful discharge of duties. Here the sureties may be liable, although the employee acts in different capacities at different times. So held in Vogeley's Appeal, (Pa. 1888) 15 Atl. 878. So a bond may cover by its express terms the duties of a cashier which have been, are, or may be prescribed by direction. Durkin *v.* Virginia Exch. Bank, 2 Patt. & H. (Va.) 277.

74. South Carolina Soc. *v.* Johnson, 1 McCord (S. C.) 41, 10 Am. Dec. 644.

Restoration or extension of charter.— Where a charter is forfeited, but is thereafter revived and continued, it is determined that defaults of a cashier after the passing of the statute of revival are not within his bond given before forfeiture of the charter. Washington Bank *v.* Barrington, 2 Penr. & W. (Pa.) 27. And where the charter expires by limitation, this limits the duration of the bond which does not cover a subsequent breach thereof after such expiration, even though the charter be extended. Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324. And

be taken.[75] If the obligation of the sureties is not by the terms of the condition or by any recital in the bond limited to a definite period, but is for his good behavior as an official, the sureties' obligation is coextensive with the duration of the office, but only so long as he should hold the office by virtue of the election for which the bond is given, and the obligation of the bond will cease as well upon election and qualification for a new term of office as upon the election and qualification of another person as his successor.[76] Again, notwithstanding the generality of the language, the obligation of a bond cannot be extended beyond the term of the first appointment irrespective of the fact whether the duration of the office is mentioned in the bond or not, since if it is not it may be shown by evidence *aliunde*.[77] And even where there is language in the condition carrying the liability beyond the time for which the principal is elected it is construed with considerable strictness, and the sureties are held only for such time as is plainly and explicitly therein specified. The same rule has been applied where an office or employment is by law or usage limited to a certain time even if the fact be not recited in the bond.[78]

even though the charter is extended before its expiration this does not extend to default of a bond after expiration of the original charter. Thompson *v.* Young, 2 Ohio 334. It is decided, however, that a bond may cover acts done under an extension of a charter. Georgetown Union Bank *v.* Forrest, 3 Cranch C. C. (U. S.) 218, 24 Fed. Cas. No. 14,356.

75. If the words extend to an indefinite period, but by the recital it appears that the office is annual, the obligation refers to the limited office, and where it appears by the records of a corporation that the office by their regulation is an annual one, the bond should be restricted, and all this is based upon the parties' intent. Dedham Bank *v.* Chickering, 3 Pick. (Mass.) 335.

Sureties are bound for the conduct of the officer during the term to which his then appointment extends and no longer. Dover *v.* Twombly, 42 N. H. 59 [*citing* Dedham Bank *v.* Chickering, 3 Pick. (Mass.) 335; Bigelow *v.* Bridge, 8 Mass. 275; Moss *v.* State, 10 Mo. 338, 47 Am. Dec. 116; Exeter Bank *v.* Rogers, 7 N. H. 21]; Grand Lodge, etc. *v.* Freifeld, 20 Misc. (N. Y.) 276, 45 N. Y. Suppl. 420 (even though indorsed as to time); South Carolina Soc. *v.* Johnson, 1 McCord (S. C.) 41, 10 Am. Dec. 644; U. S. *v.* Kirkpatrick, 9 Wheat. (U. S.) 720, 6 L. ed. 199; St. Saviour's Wardens *v.* Bostock, 5 B. & P. N. R. 175; Leadley *v.* Evans, 2 Bing. 32, 2 L. J. C. P. O. S. 108, 9 Moore C. P. 102, 9 E. C. L. 469; Hassell *v.* Long, 2 M. & S. 363; Pearsall *v.* Summersett, 4 Taunt. 593.

Sureties are not liable after expiration of definitely specified term. Richardson School Fund *v.* Dean, 130 Mass. 242. Nor are they liable where the office is annual for defaults after the first term; condition here was "while he should be a director." State Treasurer *v.* Mann, 34 Vt. 371, 80 Am. Dec. 688. See also Welch *v.* Seymour, 28 Conn. 387; O'Brien *v.* Murphy, 175 Mass. 253, 56 N. E. 283, 78 Am. St. Rep. 487.

76. Sparks *v.* Farmers' Bank, 3 Del. Ch. 274.

77. Kitson *v.* Julian, 4 E. & B. 854, 24 L. J. Q. B. 202, 1 Jur. N. S. 754, 3 Wkly. Rep. 371, 82 E. C. L. 854, 30 Eng. L. & Eq. 326, where the language was "so long as he shall continue to hold the said office or employment."

If the terms of the condition of an official bond be general they may be restrained to the period for which the particular office existed. Kitson *v.* Julian, 4 E. & B. 854, 24 L. J. Q. B. 202, 1 Jur. N. S. 754, 3 Wkly. Rep. 371, 82 E. C. L. 854, 30 Eng. L. & Eq. 326.

It is a legal inference that an official bond making use of general language is given with reference to the specific election then made, and no other. Welch *v.* Seymour, 28 Conn. 387.

Even though the natural and grammatical construction of the language of a bond may extend the liability of a surety beyond the year for which a principal is appointed to an office, and even though such may appear to have been the intention of the parties, yet, the liability may only continue for the time for which the principal is bound. If there is a recital of the limited time for which the principal is appointed the surety is no longer liable. Kitson *v.* Julian, 4 E. & B. 854, 24 L. J. Q. B. 202, 1 Jur. N. S. 754, 3 Wkly. Rep. 371, 82 E. C. L. 854, 30 Eng. L. & Eq. 326.

78. O'Brien *v.* Murphy, 175 Mass. 253, 56 N. E. 283, 78 Am. St. Rep. 487.

Continuing bond.—In Anderson *v.* Longden, 1 Wheat. (U. S.) 85, 4 L. ed. 42, the bond was given to directors who were chosen yearly and the obligors were declared liable after the year had expired. And the liability continues beyond the definite term for which elected under a condition providing "whether of the present term . . . or of any succeeding terms," etc. Mutual Bldg., etc., Assoc. *v.* Hammell, 43 N. J. L. 78; People's Bldg., etc., Assoc. *v.* Wroth, 43 N. J. L. 70. So if the condition is for a specific term or until discharged it covers a continuance in office except the employment ceases. Worcester Bank *v.* Reed, 9 Mass. 267, 6 Am. Dec. 65. And if the language discloses no intention to

(2) Principal Holding Over. If an official bond is in general language and the principal holds over, nevertheless courts will not extend the obligation beyond that intended.[79] There is, however, a line of decisions which extend the liability of sureties so as to cover either a holding over or permit a reasonable time in which to elect a new official or to reëlect the one in office or until a successor is elected and qualified. So that although the office be elective for one year only yet the surety will be liable for the official's acts, if he continue in office after the year where the term of office created by statute or by charter does not

limit or restrict the period of service, it will be construed accordingly, even though other words of securing restriction or limitation follow, and the words may also be such as to refer to the office rather than to the period of service. Ulster County Sav. Inst. *v.* Young, 161 N. Y. 23, 55 N. E. 483 [*affirming* 15 N. Y. App. Div. 181, 44 N. Y. Suppl. 493]. And a customs bond under Kan. Gen. Stat. (1889), par. 1419, with no limitation as to time, covers defaults before and after expiration of a year. Merchants Bank *v.* Honey, 58 Kan. 603, 50 Pac. 871.

During pleasure or at will.— Where the treasurer is to hold office during the pleasure of the trustees, the obligation ceases only where the treasurer ceases to act. Com. *v.* Reading Sav. Bank, 129 Mass. 73. See also New German Loan, etc., Co. *v.* Kuehnert, 6 Ohio S. & C. Pl. Dec. 502. So where the office was that of note clerk and the bond was conditioned, "during the will of the present, or any future board of directors." The directors were to be elected annually, and such a condition does not limit the obligation of the sureties to one year only for the office of note clerk was not controlled by the limited term of office of directors, and there was nothing in the by-laws of the bank limiting the duration of place of note clerk and his reappointment is general. Louisiana State Bank *v.* Ledoux, 3 La. Ann. 674, 678.

Reëlection — Particular decisions.— If a bond is conditioned "during the time for which he has been elected, and for and during such further time as he may continue therein by any reëlection or otherwise" this covers defaults only during a continuous holding of office. Middlesex Mfg. Co. *v.* Lawrence, 1 Allen (Mass.) 339. And all acts under successive elections are covered under a condition "so long as he should continue in office." Dedham Bank *v.* Chickering, 3 Pick. (Mass.) 335 [*distinguished* in Sparks *v.* Farmers' Bank, 3 Del. Ch. 274, 293] and Slidell, J., in Louisiana State Bank *v.* Ledoux, 3 La. Ann. 674, 678, says of this case: "The words of the bond were general, that there was nothing in it to show that a restriction was intended, and nothing in the records or regulations of the bank indicating that the office was annual." In Hannibal Sav. Bank *v.* Hunt, 72 Mo. 597, 37 Am. Rep. 449, it was held that if the officer is reëlected and no new bond is given the old bond does not cover a subsequent defalcation, while in Mutual Bldg., etc., Assoc. *v.* McMillen, 1 Pennyp. (Pa.) 431, the sureties were held liable only during the year, and not for acts after reëlection, and to the same effect is Manufacturers', etc., Sav., etc., Co. *v.* Odd Fellows' Hall Assoc., 48 Pa. St. 446. But in Elam *v.* Commercial Bank, 86 Va. 92, 9 S. E. 498, the bond was declared to create a continuing obligation, even though the cashier was annually reëlected, the corporation having no by-laws changing the office to an annual one, and the bond not being limited as to duration, but the sureties were directors of the bank, and did not require a new bond.

Reappointment; particular decisions.—Acts due after reappointment and giving a new bond are not covered. Frankfort Bank *v.* Johnson, 23 Me. 322. And where the condition is until "another" officer is appointed, the bond does not cover the reappointment of the original appointee. Citizens' Loan Assoc. *v.* Nugent, 40 N. J. L. 215, 29 Am. Rep. 230. But where the bond was conditioned "so long as he shall continue in said office," and the officer was duly chosen several times thereafter, and he having continuously acted, the sureties were held liable for treaties nine years after date of the bond, it not appearing in the charter, or the regulations of the bank or the bond that the office was annual. Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324; Dedham Bank *v.* Chickering, 3 Pick. (Mass.) 335. See also McCormick Harvesting Mach. Co. *v.* Laster, 70 Ill. App. 425. And after reappointment the sureties on the bond were held liable for money previously embezzled under the particular circumstances of the case. Ingraham *v.* Maine Bank, 13 Mass. 208. Although a bond given on reappointment will not relate back so as to cover matters occurring four years before the date of the bond. Ward *v.* Hassell, 66 N. C. 389. But an appointment of an agent under a new contract will not abrogate a bond given prior thereto expressly conditioned for such appointment. Boogher *v.* New York L. Ins. Co., 103 U. S. 90, 26 L. ed. 310. And an interval of three days during which a bank teller continued to act without reappointment does not prevent liability for want of care after such interval, and although the condition was that the officer should be appointed or elected yearly, yet such yearly appointment was declared unnecessary under the condition that the obligation should be in force so long as such teller should act as teller. Georgetown Union Bank *v.* Forrest, 3 Cranch C. C. (U. S.) 218, 24 Fed. Cas. No. 14,356.

79. Arlington *v.* Merricke, 2 Saund. 404. The language here was "during all the time that he the said Thomas Jenkins shall continue deputy postmaster" and the surety was held not liable, the principal holding over.

expire by limitation at a fixed time or upon a specified event, but continues until a successor is elected and qualified, or if the official is himself reëlected and qualifies for a second term the liability on the old bond ceases.[80]

G. Cancellation, Rescission, and Revocation. The obligation of a bond may be discharged, through negligence or inadvertence of the obligee's attorney;[81] or by an actual cancellation or by its delivery to the obligor or to a stranger with the intention that it should be canceled;[82] or by the cancellation of a contract which is a part of the bond, unless the latter is excepted from the operation thereof.[83] But a bond is not *per se* extinguished where it is canceled through fraud or evident mistake.[84] Nor does a mere agreement to cancel render a bond void without an actual cancellation;[85] nor is there an extinguishment of the debt created by a bond by the mere unexecuted testamentary direction for the destruction of the bond;[86] nor does a notice terminate the obligation where it is not given in conformity with the requirements of a provision therefor in the bond;[87] nor can a judicial bond be canceled by the court on a mere notice of the obligors.[88] Again, the character of the bond may be such as to be irrevocable.[89]

80. Sparks *v.* Farmers' Bank, 3 Del. Ch. 274, holding also that a failure to renew the bond after reëlection does not estop the bank from proceeding on the bond, it not appearing that the sureties' expectation that the bond was in force only for a year was due to the representation of the bank, for the extension of the term of office in consequence of an omission either to reëlect or to qualify the officer reëlected was one of the contingencies comprehended. So the general rule has been affirmed and qualified as follows: The limit of the liability of a surety is the term of office of the principal. If this is an annual office that limits the time, and such further time as may be reasonably necessary for the election and qualification of his successor, and no longer. And the words "during his continuance in office" mean only under his then election, and for a legal term and not an indefinite period, and construction must be had in view of the statutory or charter period of office, etc. Mutual Loan, etc., Assoc. *v.* Miles, 16 Fla. 204, 26 Am. Rep. 703. So in a Massachusetts case the bond was held to cover acts for the year, and for such further time as was necessary for a reëlection. Chelmsford *v.* Demarest, 7 Gray (Mass.) 1. This case is considered in Mutual Loan, etc., Assoc. *v.* Miles, 16 Fla. 204, 26 Am. Rep. 703 (last above cited), and in Welch *v.* Seymour, 28 Conn. 387, 394, it was said that the decision depended upon statute merely. So where a bond was given in 1831, and the cashier was reappointed in 1832 for the "year ensuing," defaults in 1836 were held to be covered. Amherst Bank *v.* Root, 2 Metc. (Mass.) 522 [*distinguished* in Sparks *v.* Farmers' Bank, 3 Del. Ch. 274, and in Welch *v.* Seymour, 28 Conn. 387, where the decision was declared to rest upon a peculiar statute providing that officers should continue in office until removed which did away with distinctions as to annual offices and those unlimited as to duration, and also that said principal case admitted and approved the common-law rules]. In another case there was a continuous holding of office of cashier from 1809 until 1830, and the sureties were held liable during the entire holding of the office. Exeter Bank *v.* Rogers, 7 N. H. 21 [*distinguished* in Welch *v.* Seymour, 28 Conn. 387, as placing the decision upon peculiar circumstances rather than as a departure from the rule holding the sureties liable for the term or year]. In Lexington, etc., R. Co. *v.* Elwell, 8 Allen (Mass.) 371, the sureties were held not liable for a default after an omission to reëlect at a regular meeting, although a vote postponing the meeting for five weeks was held not to defeat the bond.

Contra.— Dover *v.* Twombly, 42 N. H. 59, was a suit against a surety upon the bond of an annual officer, holding until qualification of his successor, and it was determined that the official bond of an agent for the sale of spirituous liquors covered only the official year, even though there might be a holding over or a reappointment.

So defaults after directors have ceased to elect annually are not covered, even though the cashier is permitted to hold over with reëlection. Shackamaxon Bank *v.* Yard, 8 Pa. Co. Ct. 239.

81. Chapman *v.* Lothrop, 39 Me. 431.

82. Albert *v.* Ziegler, 29 Pa. St. 50; Licey *v.* Licey, 7 Pa. St. 251, 47 Am. Dec. 513; Piercy *v.* Piercy, 5 W. Va. 199.

83. Funk *v.* Urton, 44 Mo. App. 607.

84. U. S. *v.* Williams, 1 Ware (U. S.) 173, 28 Fed. Cas. No. 16,724.

85. Barrett *v.* Barron, 13 N. H. 150, nor was the agreement to cancel proven in this case.

86. Albert *v.* Ziegler, 29 Pa. St. 50.

87. McFall *v.* Howe Sewing Mach. Co., 90 Ind. 148.

88. Napier *v.* Gidiere, 7 Rich. Eq. (S. C.) 254.

Court of equity may cancel a bond where the circumstances are such as to justify the exercise of its powers or it may enforce a bond more enforceable at law, and refuse to cancel the same. Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517; Noah *v.* Webb, 1 Edw. (N. Y.) 604. See also, generally, CANCELLATION OF INSTRUMENTS.

89. As where it is to pay a sum of money

IV. NEGOTIABILITY AND TRANSFER.

A. Negotiability — 1. In General. In determining the question of negotiability it is necessary to understand what is meant by the term "negotiable," for that being resolved it may then be ascertained whether the nature and form of the obligation[90] is such that the constituent elements of negotiability are covered. A thing is negotiable which may be transferred by assignment or by a sale and indorsement and delivery.[91]

2. By What Law Governed.[92] It is decided that the indorsement of a bond is in itself a distinctive and substantive contract and will be governed by the *lex loci contractu*, if it does not look to any other place;[93] and a bond in one state, not payable at any particular place without the same, may be indorsed in another state so as to be enforced in the state where given. So a bond given in another state where there is no statute making bonds negotiable may be indorsed anywhere where bonds are negotiable so as to give a right of action thereon.[94]

3. Effect of Statutory Provisions. In this connection the effect of statutes relating to negotiability must be considered. But statutes must not be construed beyond the import of their words so as to alter the common law or as making an innovation therein, and because an instrument is thereby made negotiable all the consequences do not necessarily follow which are incident and attach to bills and notes before maturity.[95]

on death of the obligor, and is drawn up in absolute terms, and unconditionally delivered. Mack's Appeal, 68 Pa. St. 231.

Consideration.— The surrender of a bond to an obligor and the cancellation thereof constitute a deed and may be valid without a consideration. Paxton *v.* Wood, 77 N. C. 11. And the sufficiency of the consideration may be determined by what has been done, having reference to the purposes for which the bond has been given. Mann *v.* Betterly, 21 Vt. 326.

90. See *infra*, IV, A, 4.

91. Anderson L. Dict.

The word "negotiability" is peculiarly applicable to the nature of the assignment or transfer (2 Bl. Comm. (1 Cooley 4th ed. 802) 468 note), for it includes more than was covered by mere assignment at the common law or by the law merchant; the terms "negotiation," "negotiability" express . . . the mode and effect of transfer. The payee has a property and the transfer is of the ownership and the right to sue. Anderson L. Dict. [*citing* Shaw *v.* St. Louis Merchants' Nat. Bank, 101 U. S. 557, 25 L. ed. 892]; 2 Bl. Comm. (1 Cooley 4th ed. 780, 802) 442, 443, 467, 468.

Distinguished from commercial paper.—Under some of the decisions bonds have not been placed upon the exact footing of commercial paper as to the equities between the assignor and other parties binding the assignee. Junction R. Co. *v.* Cleneay, 13 Ind. 161; Conover *v.* Van Mater, 18 N. J. L. 481; White *v.* Vermont, etc., R. Co., 21 How. (U. S.) 575, 16 L. ed. 221; Union Bank *v.* New Orleans, 24 Fed. Cas. No. 14,351, 5 Am. L. Reg. N. S. 555. But see Brainerd *v.* New York, etc., R. Co., 25 N. Y. 496; Lexington *v.* Butler, 14 Wall. (U. S.) 282, 20 L. ed. 809; and also *infra*, IV, C. Again an obligation payable to a certain person, his heirs, etc., which is called a "bond," may be in the nature of negotiable paper, so that an action thereon is to be governed in all respects by the rules applicable to commercial paper. Blake *v.* Livingston County, 61 Barb. (N. Y.) 149. But see Salisbury First Nat. Bank *v.* Michael, 96 N. C. 53, 1 S. E. 855. But bonds not payable at an incorporated bank cannot be placed on the footing of foreign bills of exchange. Louisville Banking Co. *v.* Ogden, 22 Ky. L. Rep. 1591, 61 S. W. 289. See also, generally, Commercial Paper.

92. As to what law governs the interpretation of bonds see *supra*, III, C.

As to what law governs the validity of bonds see *supra*, II, B.

93. Miller *v.* McIntyre, 9 Ala. 638. As to assignment in Louisiana of bond in Mississippi and its effect *quœre*. Natchez *v.* Minor, 9 Sm. & M. (Miss.) 544, 48 Am. Dec. 727. But if a bond is executed and is negotiable in one state but the place of delivery and of performance is in another state, not being negotiable there it will be so regarded in the courts of the former state. Curtiss *v.* Hutchinson, 4 Ohio Dec. (Reprint) 19, Clev. L. Rec. 19. See Pittsburgh, etc., R. Co. *v.* Lynde, 55 Ohio St. 23, 44 N. E. 596. See also, generally, Commercial Paper.

94. Grace *v.* Hannah, 51 N. C. 94.

If overdue coupons are purchased in good faith for value in a foreign country and are sent to a state here for collection their collection may be enforced here according to the law of such state. Wylie *v.* Speyer, 62 How. Pr. (N. Y.) 107. See Florida Cent. R. Co. *v.* Schutte, 103 U. S. 118, 26 L. ed. 327, as to relief to purchasers of bonds negotiated in foreign countries.

95. Shaw *v.* St. Louis Merchants' Nat. Bank, 101 U. S. 557, 25 L. ed. 892.

4. Form and Nature of Bond as a Controlling Element — a. Generally. The negotiability or non-negotiability of a bond must rest largely upon the character thereof, the consideration, the purposes covered, the provisions or conditions therein or in such papers as are legally a part thereof by construction, the character of the persons, as whether they are individuals or corporations, and also, but not necessarily, the form of the instrument.[96]

Statutory provisions.— The statute may place bonds as to negotiability and the right of the assignee to sue in his own name upon the same footing as bills and notes. Bradford *v.* Williams, 4 How. (U. S.) 576, 11 L. ed. 1109. As to statutory provisions relating to assignability of written instruments see Assignments, I, D [4 Cyc. 9].

Alabama.— So a manufacturing company's bonds may be made negotiable by a statute which specifically authorizes the issue thereof where such enactment contemplates the issue of instruments having all the qualities, elements, and characteristics of negotiable paper which can be introduced into commercial markets circulating and passing as such paper in the usual course of business. Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567.

Massachusetts.— And bonds of a corporation under seal payable to bearer are negotiable under Mass. Pub. Stat. (1882) c. 77, § 4, even though they show on the face that the obligor is required to keep a sinking fund for their redemption and may pay them before the day stipulated. Union Cattle Co. *v.* International Trust Co., 149 Mass. 492, 21 N. E. 962. But under section 9 of the same statute bonds of a street railway corporation with interest coupons attached are not negotiable promissory notes so as to be entitled to days of grace entered on the bonds or coupons. Chaffee *v.* Middlesex R. Co., 146 Mass. 224, 16 N. E. 34.

Mississippi.—A sealed bond is, however, negotiable under the express provisions of the Mississippi code. Skinner *v.* Collier, 4 How. (Miss.) 396.

New York.— Instruments without seals for the construction of a railroad are negotiable, even though the statute does not prescribe their form nor provide for their being negotiable. Gould *v.* Venice, 29 Barb. (N. Y.) 442.

North Carolina.— Bonds payable in whole or in part in specific articles are not negotiable within the act of 1786. Campbell *v.* Mumford, 2 N. C. 459; Jamieson *v.* Farr, 2 N. C. 210.

Ohio.—Although a statute makes bonds negotiable by indorsement and enables the indorser to sue in his own name, a subsequent enactment may restrict such negotiable character to bonds payable to order of bearer. Logue *v.* Smith, Wright (Ohio) 10.

Rhode Island.— R. I. Pub. Stat. c. 142, §§ 6, 7, as to negotiable paper covers the bonds of a corporation under seal and secured by mortgage payable to bearer. American Nat. Bank *v.* American Wood Paper Co., 19 R. I. 149, 32 Atl. 305, 61 Am. St. Rep. 746, 29 L. R. A. 103.

96. *Georgia.*— If a bond is under seal it is negotiable and may be assigned by indorsement in blank or transferred by assignment not under seal. Prioleau *v.* South Western Railroad Bank, 16 Ga. 582.

Kansas.— If stipulations which, if inserted in the bond, would make it non-negotiable are made a part thereof by express reference they have a like effect. Lockrow *v.* Cline, 4 Kan. App. 716, 46 Pac. 720.

Kentucky.— A bond executed to a corporation payable to it or bearer and secured by mortgage on real estate is not negotiable. Hefferman *v.* Brierly, 23 Ky. L. Rep. 304, 62 S. W. 852.

Louisiana.— The fact that past-due interest coupons are attached does not destroy the negotiability of bonds not yet due. Fairex *v.* Bier, 37 La. Ann. 821.

Missouri.— Bonds due in twenty years but redeemable after five years are negotiable. Fogg *v.* Sedalia School Dist., 75 Mo. App. 159.

New York.— A bond may be negotiable although the statute does not prescribe the form. Gould *v.* Venice, 29 Barb. (N. Y.) 442.

North Carolina.— A bond otherwise negotiable under section 41 of the code is not made non-negotiable by a reference in the body of the bond to the consideration on which it is based. Salisbury First Nat. Bank *v.* Michael, 96 N. C. 53, 1 S. E. 855.

United States.—If a bond has not the marks of negotiability but is described in an annexed paper as a registered bond a purchaser is estopped from claiming it as negotiable; nor is a bond negotiable which is issued by a county in the form of a single bill executed under seal and made payable to an obligee and assigns. Cronin *v.* Patrick County, 89 Fed. 79.

A county bond to be "transferred by the signature" of its president is negotiable by his indorsement to "bearer." Wilson County *v.* Nashville Third Nat. Bank, 103 U. S. 770, 26 L. ed. 488.

A sealed bond issued by a private individual may be negotiable. Fairbanks *v.* Sargent, 39 Hun (N. Y.) 588.

Bonds of corporations.— A condition in a bond that it might "be registered and made payable by transfer only on the books of the company" does not *per se* make such bond non-negotiable by manual transfer. Savannah, etc., R. Co. *v.* Lancaster, 62 Ala. 555. And an instrument in writing in the form of an ordinary bond issued by a corporation may be in legal effect a promissory note governed by the law merchant. Aurora *v.* West, 22 Ind. 88, 85 Am. Dec. 413. So corporation bonds are negotiable though under seal and payable to bearer on a day certain or sooner after five years. American Nat. Bank *v.* American Wood Paper Co., 19 R. I. 149, 32 Atl. 305, 61 Am. St. Rep. 746, 29 L. R. A. 103. And a

b. Certainty. In measuring the negotiability of bonds by the qualities, elements, and characteristics of negotiable paper there should also be considered the factors of certainty as to the parties,[97] certainty as to the amount payable,[98] and

corporation instrument under seal indorsed after maturity under seal in consideration of forbearance to a date named to pay a higher rate of interest constitutes the indorsement a new contract upon consideration and it is negotiable. Marine, etc., Phosphate Min., etc., Co. *v.* Bradley, 105 U. S. 175, 26 L. ed. 1034.

Municipal bonds do not become non-negotiable simply because they are sealed. Manhattan Sav. Inst. *v.* New York Nat. Exch. Bank, 42 N. Y. App. Div. 147, 59 N. Y. Suppl. 51.

Railroad bonds.—Railroad coupon bonds are negotiable and their transferee is *prima facie* a holder for value. Gibson *v.* Lenhart, 101 Pa. St. 522. If separate agreements accompany railroad bonds when issued and they become separated before purchase they are nevertheless negotiable. Hotchkiss *v.* National Shoe, etc., Bank, 21 Wall. (U. S.) 354, 22 L. ed. 645. See also Pittsburgh, etc., R. Co. *v.* Lynde, 55 Ohio St. 23, 44 N. E. 596.

United States "5-20" bonds are negotiable. Ringling *v.* Kohn, 4 Mo. App. 59.

97. Certainty as to parties.— Corporate bonds must be payable unconditionally to a person named, or to order, or to bearer. McClelland *v.* Norfolk Southern R. Co., 110 N. Y. 469, 18 N. E. 237, 18 N. Y. St. 344, 6 Am. St. Rep. 397, 1 L. R. A. 299 [*reversing* 3 N. Y. St. 250]. See also cases cited *infra*, this note.

Payable in blank.— Coupon bonds issued and put on the market with the payee's name in blank are negotiable. Boyd *v.* Kennedy, 38 N. J. L. 146, 20 Am. Rep. 376. And bonds payable in blank with the words after the blank "his executors," etc., are negotiable. Dutchess County Mut. Ins. Co. *v.* Hachfield, 1 Hun (N. Y.) 675, 4 Thomps. & C. (N. Y.) 158, 47 How. Pr. (N. Y.) 330. See also Blake *v.* Livingston County, 61 Barb. (N. Y.) 149; Gould *v.* Venice, 29 Barb. (N. Y.) 442. Again railroad bonds issued in one state, payable in blank, issued to a citizen in another state may be filled out by a citizen of still another state payable to himself or order. White *v.* Vermont, etc., R. Co., 21 How. (U. S.) 575, 16 L. ed. 221.

Payable to bearer.— Bonds may be and are made payable to bearer and are negotiable.

Alabama.— Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567; Savannah, etc., R. Co. *v.* Lancaster, 62 Ala. 555.

Indiana.—Aurora *v.* West, 22 Ind. 88, 85 Am. Dec. 413.

Massachusetts.— Union Cattle Co. *v.* International Trust Co., 149 Mass. 492, 21 N. E. 962.

New York.— Blake *v.* Livingston County, 61 Barb. (N. Y.) 149; Gould *v.* Venice, 29 Barb. (N. Y.) 442.

Rhode Island.—American Nat. Bank *v.* American Wood Paper Co., 19 R. I. 149, 32 Atl. 305, 61 Am. St. Rep. 746, 29 L. R. A. 103.

United States.—Wilson County *v.* Nashville Third Nat. Bank, 103 U. S. 770, 26 L. ed. 488.

And such bonds possess all the qualities of negotiable paper (Morris Canal, etc., Co. *v.* Lewis, 12 N. J. Eq. 323; Mason *v.* Frick, 105 Pa. St. 162, 51 Am. Rep. 191; Langston *v.* South Carolina R. Co., 2 S. C. 248; Thompson *v.* Lee County, 3 Wall. (U. S.) 327, 18 L. ed. 177; *In re* Leland, 6 Ben. (U. S.) 175, 15 Fed. Cas. No. 8,229); and are transferable by delivery so that a holder can sue in his own name (Reid *v.* Mobile Bank, 70 Ala. 199; Craig *v.* Vicksburg, 31 Miss. 216; Carr *v.* Le Fevre, 27 Pa. St. 413; Carpenter *v.* Rommel, 5 Phila. (Pa.) 34, 19 Leg. Int. (Pa.) 148. Again coupon bonds so payable, although not negotiable by the law merchant, are so by usage and pass complete title by delivery. Morris Canal, etc., Co. *v.* Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423.

Penal bonds are negotiable so as to enable an indorsee to sue on his own name under a statute, providing that all bonds, etc., payable "to any person," his order, or bearer are negotiable by indorsement. Logue *v.* Smith, Wright (Ohio) 10.

Railroad bonds are negotiable by the usage and practice of the companies and of capitalists and business men of the community and the repeated decisions and recognition of the courts. White *v.* Vermont, etc., R. Co., 21 How. (U. S.) 575, 16 L. ed. 221.

Railroad bonds payable to A B or holder, even though under seal, pass by delivery (Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 9, 26 How. Pr. (N. Y.) 225), although such bonds payable to A B or assignees are declared to be in the nature of commercial paper only negotiable by delivery under an assignment in blank and not a specialty subject to equities. Brainerd *v.* New York, etc., R. Co., 25 N. Y. 496.

So corporation bonds, though under seal, have the qualities of negotiable instruments and recovery may be had thereon with interest and exchange at the place where payable. Myer *v.* Muscatine, 1 Wall. (U. S.) 384, 17 L. ed. 564; Gelpecke *v.* Dubuque, 1 Wall. (U. S.) 175, 17 L. ed. 520; Mercer County *v.* Hackett, 1 Wall. (U. S.) 83, 17 L. ed. 548. But conditional corporation debenture bonds are not. Crouch *v.* Credit Foncier, L. R. 8 Q. B. 374, 42 L. J. Q. B. 183, 29 L. T. Rep. N. S. 259, 21 Wkly. Rep. 946. Although statutory corporation bonds may have the incidents of negotiable paper. New Albany, etc., Plank-road Co. *v.* Smith, 23 Ind. 353. And one who buys the bond after issuance to another may sue thereon in his own name. Strauss *v.* United Telegram Co., 164 Mass. 130, 41 N. E. 57.

So sealed bonds payable to bearer are negotiable. Ide *v.* Passumpsic, etc., Rivers R. Co., 32 Vt. 297.

98. McClelland *v.* Norfolk Southern R. Co., 110 N. Y. 469, 18 N. E. 237, 18 N. Y. St. 344,

certainty as to the time of payment, as uncertainty in these particulars may materially affect the negotiability of a bond.[99]

c. Interest Coupons. It may be generally stated that interest coupons are negotiable instruments.[1] The general rule has, however, been qualified by the statement that there must be some statutory provision or some negotiable word or words or language used from which negotiability may be inferred as intended or as creating an obligation distinct from, and independent of, the bonds to which they were severally attached, otherwise they are not negotiable.[2] Again, the question

6 Am. St. Rep. 397, 1 L. R. A. 299 [*reversing* 3 N. Y. St. 250].

Uncertainty of amount payable may be a defect which deprives the bond of its negotiable character. Parsons *v.* Jackson, 90 U. S. 434, 25 L. ed. 457. And a bond to pay money and to do something else, as to feed and clothe a slave, is not negotiable. Sutton *v.* Owen, 65 N. C. 123; Knight *v.* Wilmington, etc., R. Co., 46 N. C. 357. See Skinner *v.* Collier, 4 How. (Miss.) 396; Rev. Code, p. 464, § 9; Campbell *v.* Mumford, 2 N. C. 459; Jamieson *v.* Farr, 2 N. C. 210. See also next following note. But the negotiability of bonds due on or before a certain date is not defeated by a provision making them redeemable by instalments determined by drawings. Dickerman *v.* Northern Trust Co., 176 U. S. 181, 20 S. Ct. 311, 44 L. ed. 423, Adv. S. U. S. 311.

99. Must be payable at a time capable of exact ascertainment.— McClelland *v.* Norfolk Southern R. Co., 110 N. Y. 469, 18 N. E. 237, 18 N. Y. St. 344, 6 Am. St. Rep. 397, 1 L. R. A. 299 [*reversing* 3 N. Y. St. 250]. If a bond is payable at a fixed date it may provide for redemption by the obligor before maturity and it is not thereby made so uncertain as to time or amount as to make it non-negotiable. Union L. & T. Co. *v.* Southern California Motor Road Co., 51 Fed. 840. See also Union Cattle Co. *v.* International Trust Co., 149 Mass. 492, 21 N. E. 962; Pittsburgh, etc., R. Co. *v.* Lynde, 55 Ohio St. 23, 44 N. E. 596; American Nat. Bank *v.* American Wood Paper Co., 19 R. I. 149, 32 Atl. 305, 61 Am. St. Rep. 746, 29 L. R. A. 103; Marine, etc., Phosphate Min., etc., Co. *v.* Bradley, 105 U. S. 175, 26 L. ed. 1034. But it is also decided that a bond payable at a time certain with a provision shortening the time is uncertain and non-negotiable. Chouteau *v.* Allen, 70 Mo. 290.

Government and state bonds.— The bonds and treasury notes of the United States are commercial paper negotiable and transferable as such and subject to the law relating thereto, when payable to holder or bearer at a future time certain. If taken when overdue the purchaser takes such paper subject to the rights of prior holders the same as in cases of other paper taken after maturity, and this rule cannot be contravened by usage or custom of bankers or brokers. This rule has been applied to treasury notes taken after maturity. Vermilye *v.* Adams Express Co., 21 Wall. (U. S.) 138, 22 L. ed. 609. This case is cited in Morgan *v.* U. S., 113 U. S. 476, 5 S. Ct. 588, 28 L. ed. 1044, where the obligations of the government under the "5-20" bonds consols of 1865 were declared within the law merchant as to negotiable securities, except possibly when modified by the law authorizing their issue. The rules of negotiable paper as to maturity, its being payable on demand, and what constitutes a demand were considered, and it was also held that such "5-20" bonds were unquestionably stamped with the character of negotiability. This last decision is also of further importance in overruling Texas *v.* White, 7 Wall. (U. S.) 700, 19 L. ed. 227, and denies the right of the state legislature to restrict the negotiability of bonds of which it was the owner by legislative enactment.

1. *Connecticut.*— Fox *v.* Hartford, etc., R. Co., 70 Conn. 1, 38 Atl. 871.

Illinois.— Johnson *v.* Stark County, 24 Ill. 75.

New Jersey.— Morris Canal, etc., Co. *v.* Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423.

New York.— Evertson *v.* Newport Nat. Bank, 4 Hun (N. Y.) 692 [*reversed* in 66 N. Y. 14, 23 Am. Rep. 9]; Rolston *v.* Central Park, etc., R. Co., 20 Misc. (N. Y.) 656, 46 N. Y. Suppl. 383.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Fidelity Ins., etc., Co., 105 Pa. St. 216; Philadelphia, etc., R. Co. *v.* Smith, 105 Pa. St. 195; Beaver County *v.* Armstrong, 44 Pa. St. 63.

Tennessee.— Nashville *v.* First Nat. Bank, 1 Baxt. (Tenn.) 402.

United States.— Ketchum *v.* Duncan, 96 U. S. 659, 24 L. ed. 868; Murray *v.* Lardner, 2 Wall. (U. S.) 110, 17 L. ed. 857.

See 8 Cent. Dig. tit. "Bonds," § 81.

Compare Ritchie *v.* Cralle, 22 Ky. L. Rep. 160, 56 S. W. 963, where it is said that coupon bonds executed to a private corporation for money loaned and payable to bearer are mere promissory notes, and not being payable at a bank or discounted these are not, as to defenses, upon the footing of bills of exchange.

2. Jackson *v.* York, etc., R. Co., 48 Me. 147 [*partially disapproved* in Evertson *v.* Newport Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9]. See also Augusta Bank *v.* Augusta, 49 Me. 507. So coupons to municipal bonds are negotiable if they have proper words of negotiability. Lexington *v.* Butler, 14 Wall. (U. S.) 282, 20 L. ed. 809.

Proof in such cases.— If such bond is not negotiable upon its face it will not be so held upon proof that similar coupons have been passed as negotiable (Augusta Bank *v.* Augusta, 49 Me. 507), although proof of custom has been declared admissible in the question of negotiability (Jackson *v.* York, etc., R. Co., 48 Me. 147).

of negotiability also rests in many cases upon the fact whether or not such coupons are detached from the bond itself. If they are attached to the bond, they are to be taken in connection with the bonds themselves and negotiability determined thereby,[3] and it has also been decided that they are negotiable and transferable by delivery if detached, and this seems to be a general rule,[4] pro-

Particular qualificative decisions.— Interest coupons in the form of orders to pay money are not to be regarded as bills of exchange. Arents *v.* Com., 18 Gratt. (Va.) 750. Nor is such coupon negotiable where no payee is named and the only one that could be intended would be a purchaser of the bond and specified by number on the face of the coupon. Wright *v.* Ohio, etc., R. Co., 1 Disn. (Ohio) 465, 12 Ohio Dec. (Reprint) 736. And if coupons are taken after maturity they are subject to all equities which attached to them in the hands of the first. Union Bank *v.* New Orleans, 24 Fed. Cas. No. 14,351, 5 Am. L. Reg. N. S. 555. In a case which has been extensively cited it is decided that coupon bonds payable to bearer, and which are of the ordinary kind, pass by delivery giving a good title to a purchaser in good faith irrespective of the vendor's title, and if the possession is assailed the burden of proof rests upon him who questions the same. Murray *v.* Lardner, 2 Wall. (U. S.) 110, 17 L. ed. 857 [*following* Goodman *v.* Simonds, 20 How. (U. S.) 343, 15 L. ed. 934; *approving* Goodman *v.* Harvey, 4 A. & E. 870, 6 L. J. K. B. 260, 6 N. & M. 372, 31 E. C. L. 381; and *denying* Gill *v.* Cubitt, 3 B. & C. 466, 5 D. & R. 324, 3 L. J. K. B. O. S. 48, 10 E. C. L. 215]. See also Lytle *v.* Lansing, 147 U. S. 59, 13 S. Ct. 254, 37 L. ed. 78 (municipal bonds); Kneeland *v.* Lawrence, 140 U. S. 209, 11 S. Ct. 786, 35 L. ed. 492 (coupon bonds of a railroad company); Pana *v.* Bowler, 107 U. S. 529, 2 S. Ct. 704, 27 L. ed. 424 (municipal bonds); Montclair Tp. *v.* Ramsdell, 107 U. S. 147, 2 S. Ct. 391, 27 L. ed. 431 (municipal bonds); Indiana, etc., R. Co. *v.* Sprague, 103 U. S. 756, 26 L. ed. 554 (railroad bonds); Pompton Tp. *v.* Cooper Union, 101 U. S. 196, 25 L. ed. 803 (municipal bonds); Orleans *v.* Platt, 99 U. S. 676, 25 L. ed. 404 (township bonds to aid railroad); Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681 (municipal bonds; holding also that attached interest coupons overdue and unpaid, the bond having several years to run, are not dishonored paper and subject to defenses which might have been valid against prior holders); Hotchkiss *v.* National Shoe, etc., Bank, 21 Wall. (U. S.) 354, 22 L. ed. 645 (railroad bonds, certificates were detached, but the bonds were held negotiable and such fact of detachment did not necessitate inquiry).

3. Attached to bond.— Buffalo Loan, etc., Co. *v.* Medina Gas, etc., Co., 162 N. Y. 67, 56 N. E. 505 [*affirming* 12 N. Y. App. Div. 199, 42 N. Y. Suppl. 781, holding that unpaid interest coupons attached to corporate bonds do not destroy their negotiability]; Evertson *v.* Newport Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9 (holding that so attached and being negotiable they are entitled to grace); Bailey *v.* Buchanan County, 54 N. Y. Super. Ct. 237 (holding that attached interest coupons ripen as they mature and are not made on demand into new and independent obligations of the obligor in the hands of the holder); Lexington *v.* Butler, 14 Wall. (U. S.) 282, 20 L. ed. 809 (holding that when attached to interest warrants they as well as the bonds to which they are attached are transferable by delivery when payable to order and indorsed in blank or are made payable to bearer, and also deciding that the holders are shielded from the defense of prior equities between the original parties the same as in case of other negotiable instruments, when such equities were unknown to the holders at the time of transfer); McCoy *v.* Washington County, 3 Wall. Jr. (U. S.) 381, 15 Fed. Cas. No. 8,731, 7 Am. L. Reg. 193, 3 Phila. (Pa.) 290, 15 Leg. Int. (Pa.) 388 (holding also that they pass by delivery and partake of the instrument to which they are attached).

4. Detached coupons.— Internal Imp. Fund *v.* Lewis, 34 Fla. 424, 16 So. 325, 43 Am. St. Rep. 209, 26 L. R. A. 743 (holding that detached interest coupons not surrendered on payment before maturity give good title to a subsequent *bona fide* holder); Haven *v.* Grand Junction R., etc., Co., 109 Mass. 88 (holding also that they may be enforced against the corporation by any holder in good faith); Evertson *v.* Newport Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9 (holding that their negotiability is not destroyed by their being detached, and they are declared by their terms to be for interest on bonds specified by their numbers, and that one purchasing them from another without production of the bonds obtains title, since they are subject to the same rules as other negotiable instruments and are transferable by delivery, being regarded as bank-bills, so that a *bona fide* holder for value without notice will be protected, even though such coupons were overdue when sold and were stolen by the party disposing of them for value). See further Spooner *v.* Holmes, 102 Mass. 503, 3 Am. Rep. 491 (detached government coupons); Mason *v.* Frick, 105 Pa. St. 162, 51 Am. Rep. 191; North Bennington First Nat. Bank *v.* Mt. Tabor, 52 Vt. 87, 36 Am. Rep. 734; Sewall *v.* Brainerd, 38 Vt. 364; Walnut *v.* Wade, 103 U. S. 683, 26 L. ed. 526 (holding that municipal coupons when severed from their bonds are negotiable and pass by delivery, and this principle is also asserted in connection with the application of the statute of limitations in Koshkonong *v.* Burton, 104 U. S. 668, 26 L. ed. 886); Hotchkiss *v.* National Shoe, etc., Bank, 21 Wall. (U. S.) 354, 22 L. ed. 645 (where the certificate was detached and the bonds were held negotiable). And bonds need not be produced to maintain

vided — as it has been determined in many of the cases — such detached coupons are payable to bearer or order.[5]

B. Transfer — 1. Mode and Form of[6] **— a. By Indorsement.**[7] Bonds may be indorsed in blank,[8] or by the obligee, payable to bearer.[9] There must, however, be a delivery either to the indorsee or to some one for him, even though the indorsement is in full;[10] and proof of execution may be necessary to render the indorsement admissible in evidence.[11] But an indorsement under a statute making bonds assignable thereby, so that the assignee may sue in his own name, need not be under seal.[12] Again, it is sufficient that the official character and position appear explicitly in the body of the attestation clause, for the addition of the official title or of the office to the signature is unnecessary in such a case.[13] So words which merely import a consideration will not make the indorser an accommodation indorser or guarantor.[14]

b. Without Indorsement — (i) *In General.* While it has been expressly decided that an indorsement in writing is necessary to transfer the legal interest in a bond,[15] under other decisions the title to a bond passes by delivery.[16]

an action on coupons. Knox County *v.* Aspinwall, 21 How. (U. S.) 539, 16 L. ed. 208.

Contra, in the absence of an intention to make them negotiable appearing on the face of the instrument, unless there is a statute to that effect. Myers *v.* York, etc., R. Co., 43 Me. 232.

5. So held in Evertson *v.* Newport Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9, payable here to bearer at a specified time and place, holding also that when not payable to bearer or order they are not negotiable when detached, even though the bonds are themselves negotiable. See further as to coupons payable to bearer being negotiable Internal Imp. Fund *v.* Lewis, 34 Fla. 424, 16 So. 325, 43 Am. St. Rep. 209, 26 L. R. A. 743; Mason *v.* Frick, 105 Pa. St. 162, 51 Am. Rep. 191; U. S. Bank *v.* Macalester, 9 Pa. St. 475; North Bennington First Nat. Bank *v.* Mt. Tabor, 52 Vt. 87, 36 Am. Rep. 734; Sewall *v.* Brainerd, 38 Vt. 364; Lexington *v.* Butler, 14 Wall. (U. S.) 282, 20 L. ed. 809; McCoy *v.* Washington County, 3 Wall. Jr. (U. S.) 381, 15 Fed. Cas. No. 8,731, 7 Am. L. Reg. 193, 3 Phila. (Pa.) 290, 15 Leg. Int. (Pa.) 388; Rockmulh *v.* Pittsburgh, 20 Fed. Cas. No. 11,982, 8 Pittsb. Leg. J. (Pa.) 146, holding that where a bond on its face states that the interest is to be paid on presentation of the coupons annexed it is equivalent to making the coupons payable to bearer.

Reference to other papers.—If coupons payable to bearer refer to the bonds for the interest and the bonds refer to a mortgage for conditions limiting and explaining them the coupons are not negotiable. McClelland *v.* Norfolk Southern R. Co., 110 N. Y. 469, 18 N. E. 237, 18 N. Y. St. 344, 6 Am. St. Rep. 397, 1 L. R. A. 299 [*reversing* 3 N. Y. St. 250].

6. See also, generally, Assignments, III, C [4 Cyc. 37].

7. See also, generally, Commercial Paper.

8. Nevill *v.* Hancock, 15 Ark. 511 (under statute, and so indorsed they transfer all the assignee's interest); Jordan *v.* Thornton, 7 Ark. 224, 44 Am. Dec. 546 (bonds payable to order so indorsed entitle indorsee to sue in his own name); McNulty *v.* Cooper, 3 Gill & J. (Md.) 214 (blank indorsement and delivery gives right to sue in assignor's name); Wiggins *v.* Rector, 1 Mo. 478 (blank indorsement must, however, be filled up at or before trial). Any lawful holder by delivery or transfer may fill his own name as payee in the blank. Hubbard *v.* New York, etc., R. Co., 36 Barb. (N. Y.) 286, 14 Abb. Pr. (N. Y.) 275.

9. Marsh *v.* Brooks, 33 N. C. 409, even though in its inception it must be made payable to some certain obligee.

10. Nelson *v.* Nelson, 41 N. C. 409.

11. As where it is unregistered, undated, and unwitnessed. Shaffer *v.* Bledsoe, 118 N. C. 279, 23 S. E. 1000. But presumption of payment from lapse of time applicable when the indorsement was made constitutes no objection thereto. McLean *v.* McDugald, 53 N. C. 383.

12. Montgomery *v.* Dillingham, 3 Sm. & M. (Miss.) 647. And a like statute does not include bonds for the performance of any act or service. Shackleford *v.* Franks, 25 Miss. 49.

13. Levy *v.* Burgess, 64 N. Y. 390 [*reversing* 38 N. Y. Super. Ct. 431], applied to signature of governor to a state bond.

Omission of middle name of assignor in signature is immaterial where the execution of the assignment is averred and not denied. Snelling *v.* Boyds, 2 T. B. Mon. (Ky.) 132.

14. As where the words "value received" are in an indorsement guaranteeing the payment by one railroad company of the interest coupons or warrants of another corporation. Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 9, 26 How. Pr. (N. Y.) 225.

15. Chadsey *v.* Lewis, 6 Ill. 153; Taliaferro *v.* Baltimore First Nat. Bank, 71 Md. 200, 17 Atl. 1036 (applied to registered Virginia consols); Fairly *v.* McLean, 33 N. C. 158 (applied to a bond payable to A or to A or order). So in Arnold *v.* Barrow, 2 Patt. & H. (Va.) 1, it is decided that a written assignment is necessary on a delivery of the bond either to the party himself or to some person for him.

16. Title passing by delivery.—*Alabama.*—Savannah, etc., R. Co. *v.* Lancaster, 62 Ala. 555.

(II) *By Assignment* — (A) *Assignability.* It may be stated as a general rule that the assignability of a bond rests upon a consideration of the character of the instrument, its conditions, form, and purposes, and also upon the nature and effect of governing statutes as well as upon the rights formerly given by an assignment of certain instruments and the subsequent changes made in regard to negotiable paper.[17] Outside of this general rule the decisions generally rest upon factors peculiar to the individual case or to the especial law upon which the decision itself is based or upon particular governing circumstances.[18]

Maine.— Vose *v.* Handy, 2 Me. 322.

Mississippi.— Craig *v.* Vicksburg, 31 Miss. 216.

Missouri.— Ringling *v.* Kohn, 4 Mo. App. 59.

New York.— Blake *v.* Livingston County, 61 Barb. (N. Y.) 149; Connecticut Mut. L. Ins. Co. *v.* Cleveland R. Co., 41 Barb. (N. Y.) 9, 26 How. Pr. (N. Y.) 225; Brainerd *v.* New York, etc., R. Co., 10 Bosw. (N. Y.) 332.

Ohio.— Pittsburgh, etc., R. Co. *v.* Lynde, 55 Ohio St. 23, 44 N. E. 596.

Pennsylvania.— Carr *v.* Le Fevre, 27 Pa. St. 413; Carpenter *v.* Rommel, 5 Phila. (Pa.) 34, 19 Leg. Int. (Pa.) 148.

Tennessee.— Robinson *v.* Williams, 3 Head (Tenn.) 540.

See 8 Cent. Dig. tit. "Bonds," § 83.

17. See *supra*, III, A.

18. Effect of statute.— The statute may enable the assignee of a bond not payable to assigns to sue on it in his own name. Farmer *v.* Baker, 4 S. C. 752. Ky. Stat. (1899) § 474, is not restricted in its application to such instruments as were not assignable at common law so as to vest a right of action in the assignee and does not leave bonds, etc., just as they stood before it was enacted. Ritchie *v.* Cralle, 22 Ky. L. Rep. 160, 56 S. W. 963. But a statute making bonds assignable does not apply to those executed prior to its passage. Wilkinson *v.* Wright, 1 N. C. 422. But it is also decided that such an act is retrospective as to instruments made assignable but prospective as to the assignments authorized. Ford *v.* Hale, 1 T. B. Mon. (Ky.) 23. See also, generally, Assignments, I, D [4 Cyc. 9].

What bonds assignable.— A bond to convey land is assignable and the assignee may sue thereon in his own name (Brown *v.* Chambers, 12 Ala. 697 (under act 1828); Neyfong *v.* Wells, Hard. (Ky.) 561; Conn *v.* Jones, Hard. (Ky.) 8), and such a bond may be assigned after forfeiture (Ensign *v.* Kellogg, 4 Pick. (Mass.) 1). And a title bond may be assigned. Skinner *v.* Bedell, 32 Ala. 44. So may a bond for a deed to a person named "his heirs, executors, and administrators" (Fulcher *v.* Daniel, 80 Ga. 74, 4 S. E. 259), and also a bond for the payment of rent (Steele *v.* Mills, 68 Iowa 406, 27 N. W. 294), and a bond to a sheriff or his assigns for property bought at an attachment sale (Hale *v.* Schults, 3 McCord (S. C.) 218), or a bond with a collateral condition (Waterman *v.* Frank, 21 Mo. 108), or a bond conditioned that an injunction shall be dissolved upon payment of a judgment (Alexander *v.* Pringle, 27 Miss. 558), and a bond required to be taken in equity on granting an injunction and the assignees may sue in their own name (Cay *v.* Galliott, 4 Strobh. (S. C.) 282), or a bond for the payment of money conditioned for a deed, so that the assignee may himself sue thereon (Minor *v.* Edwards, 10 Mo. 671), or an agreement under seal indorsed by the sureties on an ordinary money bond and part of the condition thereof may be assigned so that the assignee may sue thereon (Folk *v.* Cruikshanks, 4 Rich. (S. C.) 243), or a bond of corporation payable to an obligee or his assigns and the assignee may sue thereon (Bunting *v.* Camden, etc., R. Co., 81 Pa. St. 254), or a bond for the payment of a specific sum in lumber (Knighton *v.* Tufli, 12 Mo. 531, 51 Am. Dec. 174). So the interest of an obligee is assignable by common law and statute (Melton *v.* Smith, 65 Mo. 315), and a bond may be assigned though not payable to an obligee or his assign (Sheppard *v.* Stites, 7 N. J. L. 90).

What bonds not assignable.— It has been decided that a bond for the conveyance of land (Buckmaster *v.* Eddy, 1 Ill. 381), a replevin bond, unless taken in distress for rent (Waples *v.* Adkins, 5 Harr. (Del.) 381), a bond to the sheriff under the Trover Act of 1827 (Smith *v.* Cook, 2 McMull. (S. C.) 58), a bond to the sheriff and a holder of a judgment given in injunction proceeding for the bond is personal (Burgett *v.* Paxton, 15 Ill. App. 379), a bond to a purchaser of a business given by the seller with a condition that can only be enforced for the buyer's protection (Hillman *v.* Shannahan, 4 Oreg. 163, 18 Am. Rep. 281), a supersedeas bond (Yantes *v.* Smith, 12 B. Mon. (Ky.) 395), a guardianship bond (Cobb *v.* Williams, 1 Hill (S. C.) 375), a bond in an action where a breach must be assigned and a jury called to assess damages (Lewis *v.* Harwood, 6 Cranch (U. S.) 82, 3 L. ed. 160), a railroad bond coupon containing the numbers of the coupon and the bond for a named sum payable at a certain date on the coupon at a certain place (Jackson *v.* York, etc., R. Co., 48 Me. 147), a bond which is not for the payment of money but for the performance of some other act (Duncan *v.* Wilbanks, 3 Brev. (S. C.) 10), or a bond dischargeable partly in money and partly in specific acts (Jamieson *v.* Farr, 2 N. C. 210) is not assignable, at least so as to enable the assignee to sue thereon in his own name. See also Force *v.* Thomason, 2 Litt. (Ky.) 166; Sutton *v.* Owen, 65 N. C. 123; Campbell *v.* Mumford, 2 N. C. 459; Mc-

(B) *Requisites and Sufficiency.*[19] A bond may be assigned by deed or other writing or without writing so as to give the assignee a right to receive the debt, to release it, or to sue thereon in the name of the obligee; but in general the instrument itself should be delivered to the assignee.[20] A mere written direction to pay the amount of a bond does not, however, constitute an assignment,[21] although an intent to sell may be inferred from payment by a third person.[22] But an assignment of a bond is good though not under seal,[23] and if under seal it need show no consideration.[24] Again, special authority is necessary to enable one of several obligees to assign a bond in his own name and that of the others,[25] although there will be an equitable assignment to effectuate that which ought to have been done.[26] So the terms of a special assignment will not vary the nature of the undertaking, nor affect the assignor's liability as it existed by the mere operation of the law in the absence of an express stipulation to the contrary.[27]

2. RIGHTS AND LIABILITIES OF PARTIES — a. In General. Generally the liability of the maker and indorser of a bond is the same as in the case of bills and notes.[28]

Cutchen *v.* Keith, 2 Ohio 262; and, generally, ASSIGNMENTS, 4 Cyc. 1.

A bond of suretyship for the completion of a contract to perform work, and not payable to the assigns or obligee and providing for notice of default, cannot be assigned without the surety's assent before breach. Citizens' Trust, etc., Co. *v.* Howell, 10 Pa. Dist. 65.

A corporation bond, although assignable in equity by parol delivery, cannot be sued on in the assignee's name. Bunting *v.* Camden, etc., R. Co., 81 Pa. St. 254.

An obligation to collect money and pay it over to the obligee is not assignable. Force *v.* Thomason, 2 Litt. (Ky.) 166.

19. See also, generally, ASSIGNMENTS, III [4 Cyc. 29].

20. Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372.

A deed or writing may not be necessary to enable the assignee to sue in his own name. Allen *v.* Pancoast, 20 N. J. L. 68. Nor is a written assignment necessary where the bond is assigned by parol before action begun. Hoffman *v.* Smith, 94 Iowa 495, 63 N. W. 182.

21. **A written direction** by the obligor to the obligee to pay a third party an indebtedness out of the proceeds collected upon a bond, and which contains no words of transfer or assignment, operates neither as an equitable assignment to the extent of the debt nor constitutes the bond a security therefor, especially where the obligee does not accept the direction to pay when the writing is presented to him. Clayton *v.* Fawcett, 2 Leigh (Va.) 19.

22. **An intent to sell coupons may be inferred** when the holder has actual notice that purchase and not payment is being made, and when having such notice he consents to take his money. So the same result follows if the holder acquiesces in the transaction, on being informed subsequently that pay is not made by the debtor but by a third person who intends to purchase and keep said coupons subsisting and uncanceled, although the holder can repudiate the transaction, return the money, and demand possession, otherwise the presumption is that he acquiesces in the transfer. Duncan *v.* Mobile, etc., R. Co., 3 Woods (U. S.) 567, 8 Fed. Cas. No. 4,138 [*affirmed* in 96 U. S. 659, 24 L. ed. 868, four judges dissenting and see opinion of Strong, J., as to intent to sell not needing to be express but may be implied, and also as to nature, etc., of interest coupons].

23. Cotten *v.* Williams, 1 Fla. 42; Gregory *v.* Freeman, 22 N. J. L. 405; Morange *v.* Edwards, 1 E. D. Smith (N. Y.) 414.

24. Gregory *v.* Freeman, 22 N. J. L. 405.

25. Stevens *v.* Bowers, 16 N. J. L. 16.

One of two obligees cannot assign his separate interest so as to render his assignee and the coöbligee legal holders of the bond. Boyd *v.* Holmes, 1 Ind. 480. Although if a bond is assigned by one executor of the obligee against the other executor, who was also surviving executor of the obligor, a suit by the assignee will be supported in the absence of a plea in abatement. Chalfont *v.* Johnston, 3 Yeates (Pa.) 16. And the obligor is bound and also one who signs and seals an appended writing whereby he is joined in the obligation and is security for the obligor, where the assignment is "I assign the within obligation." Atwell *v.* Towles, 1 Munf. (Va.) 175.

26. White *v.* Follin, 1 Hill Eq. (S. C.) 187.

So equity as well as the law will enforce the sale of a bond for less than its nominal value, there being no fraud or usury. Kenner *v.* Hord, 2 Hen. & M. (Va.) 14.

27. Goodall *v.* Stuart, 2 Hen. & M. (Va.) 105.

28. Nevill *v.* Hancock, 15 Ark. 511. See also, generally, COMMERCIAL PAPER.

Indorser does not become principal debtor by reason of his indorsement. Hill *v.* Glasgow R. Co., 41 Fed. 610.

Indorsement in blank by the obligee does not make him liable to the holder in case of the debtor's insolvency. Parker *v.* Kennedy, 1 Bay (S. C.) 398. If a suit is brought against the indorser in blank of assignable paper seeking to make him primarily liable the instrument and indorsement are necessary evidence, even though insufficient of themselves to maintain the suit. Wells *v.* Jackson, 6 Blackf. (Ind.) 40.

But a liability may exist against an indorser or guarantor of interest coupons, even though the bonds are void.[29] If an indorsee after maturity of a bond seeks recourse against the indorser reasonable diligence in making demand upon the maker for payment and notice to the indorser of non-payment are required.[30] Again, if the maker and indorser are sued jointly and a successful defense is made by the former on the ground of want of demand and notice the holder may still recover against the maker.[31] But an indorsee for value of a bond payable to himself cannot set up any infirmities therein in an action by the indorsee.[32]

b. By Assignment or Sale[33]— (i) *In General.* One who sells a bond without assigning it is presumed in the absence of fraud not to be liable thereon.[34] But generally an unconditional assignment constitutes the assignor a guarantor, but not absolutely at all events;[35] and one may become bound by the voluntary gift to another of a bond,[36] and an invalid bond may be a good consideration for a purchase note.[37] Where a bond has been assigned in general terms with a verbal

Indorsement may be limited as to time, and if so the indorser's obligation is thereby restricted. Johnson *v.* Olive, 60 N. C. 213.

29. Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 9, 26 How. Pr. (N. Y.) 225. See also Harvey *v.* Dale, 96 Cal. 160, 31 Pac. 14; Morton *v.* Fletcher, 2 A. K. Marsh. (Ky.) 137, 12 Am. Dec. 366.

30. Ellis *v.* Dunham, 14 Ark. 127.

Demand and notice should be alleged or some sufficient legal excuse for not doing so be shown in an action against the indorser of a bond brought under a statute. Hicks *v.* Vann, 4 Ark. 526. But an allegation that "the instrument was duly presented to the maker" is supported by proof that he could not be found on diligent search, nor need there be a special averment of such facts. Taylor *v.* Branch, 1 Stew. & P. (Ala.) 249, 23 Am. Dec. 293.

If diligence is unsuccessfully used to recover the money of the obligor a transferee without assignment may sue, for money had and received, the person from whom the instrument was received, and the latter can only defend by express stipulation **to the contrary.** Mackie *v.* Davis, 2 Wash. (Va.) 219, 1 Am. Dec. 482.

Liability as to interest coupons not detached is fixed if the indorser's liability upon the bond is fixed by due demand and notice. Lane *v.* East Tennessee, etc., R. Co., 13 Lea (Tenn.) 547.

So a railroad corporation may, where proper steps have been taken, be charged as indorser of negotiable municipal corporation bonds which the latter has failed to pay or demand at maturity and the indorsement is unqualified. Bonner *v.* New Orleans, 2 Woods (U. S.) 135, 3 Fed. Cas. No. 1,631.

Under the Alabama statute of 1820 it must appear that a suit against the obligor has proved unproductive in order to sustain an action against the indorser by an indorsee. Ivey *v.* Sanderson, 6 Port. (Ala.) 420.

31. Nevill *v.* Hancock, 15 Ark. 511.

32. Henderson *v.* Lemly, 79 N. C. 169.

Accommodation indorser.— The assignor of a bond may be liable in assumpsit either as assignor or guarantor, where he assigns it by indorsement in blank to enable another to obtain credit and the latter becomes insolvent before payment of the credit. Hopkins *v.* Richardson, 9 Gratt. (Va.) 485. If the state becomes simply an accommodation indorser of railroad bonds as required by statute after the performance of certain conditions by the railroad the liability thereon does not antedate such performance except to a *bona fide* holder for value. Gilman *v.* New Orleans, etc., R. Co., 72 Ala. 566.

33. See also, generally, Assignments, VII [4 Cyc. 79].

34. Porter *v.* Breckenridge, Hard. (Ky.) 21.

35. **In an unconditional assignment** of a bond or claim the assignor is held to be a guarantor of the legality of the bond or thing assigned and of the solvency of the maker of the bond or claim, but he is not a guarantor of the solvency or honesty of the assignee's attorney whom he employs to collect the debt, and an assignee cannot recover against the assignor or his estate a debt which is collected from the execution debtor by the assignee's own attorneys or by the sheriff or constable and subsequently appropriated or embezzled by such attorneys, especially where the assignee suffers said attorney to retain the money. Kerlin *v.* Kerlin, 85 Va. 475, 7 S. E. 849. And an assignment without recourse is a guaranty that the instrument evidences a debt not paid, and the assignee is not prevented from recovering on the bond because of its payment and discharge before assignment. Mays *v.* Callison, 6 Leigh (Va.) 230.

36. **Gift.**— If a bond for the conveyance of land is voluntarily given to another and the gift is based upon the consideration of natural affection and is executed by assignment and delivery, or by assenting to the delivery, it constitutes a contract which a court of equity has no power to set aside, and an intention to modify the assignment and to claim such bond comes too late after rights have accrued thereunder. Pawling *v.* Speed, Litt. Sel. Cas. (Ky.) 77, 12 Am. Dec. 269.

37. **The fact that a bond is invalid** because of non-compliance with statutory requirements does not constitute a failure of consideration which can be availed of in an action upon a promissory note given for the purchase thereof, and all who purchase such a

agreement that the assignor shall not be responsible, this operates as a limitation even as to a subsequent assignee without notice.[38] But a bond not delivered is not the subject of a sale on execution,[39] although a sale of bonds may be made upon an option to return.[40]

(II) *Interest or Title Passing* — (A) *In General.* The assignee takes the legal title and not a mere equitable interest;[41] and the presumption exists that a holder of corporate bonds payable to bearer is the rightful owner, nor is he obligated in order to recover thereon to show the manner in which they were obtained either by himself or by prior holders.[42] Another rule of importance is that the transfer of a debt or obligation carries with it as an incident all securities for its payment.[43] So the assignment of one of a series of collateral securities

bond buy it subject to the rule *caveat emptor*. Harvey *v.* Dale, 96 Cal. 160, 31 Pac. 14.

38. Stubbs *v.* Burwell, 2 Hen. & M. (Va.) 536.

39. **Bonds which have never been issued,** although prepared and made complete in form, are not the subject of attachment or of sale upon execution, for until delivery they have no validity and are not in any sense property; otherwise, however, as to bonds delivered. Sickles *v.* Richardson, 23 Hun (N. Y.) 559.

40. **If a sale of bonds is made with the option** given to return them upon a certain condition the vendee's option is not impaired by his sale of said bonds to another with the same reservation and option, and where it is a part of the original agreement to refund the money paid for the bonds the original vendee has a right to the consideration upon return and this irrespective of the consideration of the second sale. If there is a refusal to accept the return of said bonds an action for the purchase-money, as upon a rescission of the contract, may be brought and the vendee is not obliged to prove that he has sustained damage to entitle him to exercise his option. Wooster *v.* Sage, 67 N. Y. 67 [*affirming* 6 Hun (N. Y.) 285].

41. Long *v.* Baker, 3 N. C. 291; Robb *v.* Parker, 3 S. C. 60. But see Garland *v.* Richeson, 4 Rand. (Va.) 266.

Prior agreements.— If a bond is payable to bearer the holder is not affected by an agreement between the obligor and obligee that the latter should provide for the payment of interest thereon, but he has a right to presume that such bond was issued and transferred in the mode agreed upon between the original parties. Com. *v.* Pittsburgh, 34 Pa. St. 496.

Purchase from attorney or holder for special purpose.— If the statute provides that title can only be passed by an assignment in writing made and executed in the name and under the hand and seal of obligee, either by himself in person or by his attorney in fact legally authorized to do so, an assignment of a bond is invalid when made by such attorney in fact in terms different from those warranted by its contents. Strohecker *v.* Farmers' Bank, 8 Watts (Pa.) 188.

Purchaser from one who is not the obligee's agent but the holder merely of the bond for a special purpose only acquires no title and cannot recover thereon. McMinn *v.* Freeman, 68 N. C. 341.

The legal effect of the sale and delivery of a bond without indorsement is not to pass legal title, for the vendor may if he thinks proper release it to the maker of the bond. But the purchaser is the vendor's agent to receive the money and it vests in him as legal owner when received, for this reception of the money extinguishes the chose in action, and where the purchaser obtains judgment in the vendor's name which is collected and paid to the vendor after notice by the purchaser, the former is liable therefor to the purchaser. Hoke *v.* Carter, 34 N. C. 324.

Title under contract to procure assignment.— If a proposition is made to another on consideration to procure an assignment the contract is not fulfilled unless the instrument be produced, especially where the terms of the promise imply a delivery. Such a contract is one to pay if the bond is produced and an authority to receive payment is shown, or if it has been duly assigned or delivered or its non-production is accounted for by loss from time, accident, or other cause. It is not enough to show a loss of the bond merely, it must be shown to have been lost after delivery. It was also declared in this case that it was unimportant whether the promise be made before or after the assignment, provided such assignment be obtained in pursuance of such promise and within a reasonable time, and that what is a reasonable time depends upon the situation of the parties and the subject-matter of the contract. Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372.

42. Chicago, etc., Railroad Land Co. *v.* Peck, 112 Ill. 408.

43. **Carries securities.**— Craig *v.* Parkis, 40 N. Y. 181, 100 Am. Dec. 469 (and so even though not transferred in terms. In this case a guaranty of collection passed by the assignment of the bond); Smith *v.* Starr, 4 Hun (N. Y.) 123, 6 Thomps. & C. (N. Y.) 387; Reed *v.* Garvin, 12 Serg. & R. (Pa.) 100 (includes a guaranty by the assignor); Taylor *v.* Memphis, etc., R. Co., 11 Lea (Tenn.) 186 (guaranty of payment of interest passes); Louisville, etc., R. Co. *v.* Ohio Valley Imp., etc., Co., 69 Fed. 431, 75 Fed. 433, 43 U. S. App. 550, 22 C. C. A. 378 (guaranty on railroad bond passes and is not within Ky. Gen. Stat. c. 22, §§ 6, 13, 14, making assignments

assigns them all,[44] and title to coupons passes with bonds.[45] So the assignment of a bond transfers a guaranty of payment.[46] But a personal guaranty does not pass.[47]

(B) *Effect of Payment, Satisfaction, or Release After Assignment.* Whether or not a payment, release, or satisfaction of a bond after assignment is valid and effective depends largely upon notice. If the payment, etc., is made after notice of the assignment it is not binding upon the assignee nor may the obligee then release the obligor.[48] This rule has been extended so that if the circumstances under which payment is made to the obligee are such as should have put a man of ordinary caution on inquiry and so have enabled him to ascertain that the bond had been assigned, a recovery by the assignee is not defeated in an action against the obligor.[49] If, however, a bond has been assigned and the obligor has had no notice thereof at the time of his payment to the obligee such payment is valid and discharges the debt.[50] So it may be shown, irrespective of the obligee's intentions in making the assignment, that payment was made *bona fide* to one in possession of a bond assigned in blank;[51] and one of the joint obligees may discharge an action on the bond brought by an assignee of one of them in the name

of obligations subject to defenses); George *v.* Tate, 102 U. S. 564, 26 L. ed. 232 (bond to release attached property passes [*citing* Claflin *v.* Ostrom, 54 N. Y. 581; Craig *v.* Parkis, 40 N. Y. 181, 100 Am. Dec. 469; Hosmer *v.* True, 19 Barb. (N. Y.) 106; Dintruff *v.* Crittenden, 1 Thomps. & C. (N. Y.) 143; Bowdoin *v.* Colman, 6 Duer (N. Y.) 182; Pattison *v.* Hull, 9 Cow. (N. Y.) 747]).

Qualificative decisions.— But it is also decided that a guaranty which is no part of the bond does not pass, for the statute which gives an action to the legal assignee of the bond does not give him an action on a contract which though ancillary is not collateral to it, and to have the benefit of that he must use the assignor's name. Beckley *v.* Eckert, 3 Pa. St. 292. So a promise to procure an assignment necessitates a production of the instrument and an assignment of the debt is not an assignment of the deed. Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372.

44. Ruth *v.* Loos, 2 Woodw. (Pa.) 308.

45. Fox *v.* Hartford, etc., R. Co., 70 Conn. 1, 38 Atl. 871.

46. Wooley *v.* Moore, 61 N. J. L. 16, 38 Atl. 758 [*criticizing* Hayden *v.* Weldon, 43 N. J. L. 128, 39 Am. Rep. 551, *citing* Lemmon *v.* Strong, 59 Conn. 448, 22 Atl. 293, 21 Am. St. Rep. 123, 12 L. R. A. 270]; Stillman *v.* Northrup, 109 N. Y. 473, 17 N. E. 379, 16 N. Y. St. 417; Claflin *v.* Ostrom, 54 N. Y. 581; Craig *v.* Parkis, 40 N. Y. 181, 100 Am. Dec. 469.

47. Smith *v.* Starr, 4 Hun (N. Y.) 123, 6 Thomps. & C. (N. Y.) 387.

"Assigns" not personal.— In Douglas *v.* Hennessy, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583, it was declared that the bond was not intended to confer a privilege on the obligee which was purely personal but was intended to be assignable, and that the word "assigns" in the condition of a bond includes an administrator as assignee by act of law who is entitled to performance of the condition.

48. *Georgia.*— Priolean *v.* South Western Railroad Bank, 16 Ga. 582, and cannot operate to defeat third persons' rights under such assignment.

New York.— Andrews *v.* Beecker, 1 Johns. Cas. (N. Y.) 411.

North Carolina.— Ellis *v.* Amason, 17 N. C. 273, and the obligee becomes trustee of the money for the assignee's use.

Pennsylvania.— Wheeler *v.* Hughes, 1 Dall. (Pa.) 23, 1 L. ed. 20.

Tennessee.— Cowan *v.* Shields, 1 Overt. (Tenn.) 314, obligee cannot release after notice of assignment and judgment.

Virginia.— Wilson *v.* Davisson, 5 Munf. (Va.) 178, holding that if a bond is assigned before the assignor's effects are attached and suit is brought upon it by the assignee before payment made a plea of payment before notice of assignment is insufficient.

Compare Decker *v.* Adams, 28 N. J. L. 511, 78 Am. Dec. 65; and see 8 Cent. Dig. tit. "Bonds," § 93.

49. Tritt *v.* Colwell, 31 Pa. St. 228.

50. Preston *v.* Grayson County, 30 Gratt. (Va.) 496. See also Brindle *v.* McIlvaine, 9 Serg. & R. (Pa.) 74; Bury *v.* Hartman, 4 Serg. & R. (Pa.) 175. It is a good plea of payment that the obligor without knowledge of the assignment and before the bond became due had been obligated to pay sums exceeding the amount of the bond for which he had become bound as surety for the obligee. Frants *v.* Brown, 17 Serg. & R. (Pa.) 287. So an assignee of a bond is entitled to the amount thereof, unless it is paid before notice of his interest, or unless it has been assigned to a third person whose interest is superior to his. Mason *v.* Nelson, 11 Leigh (Va.) 234. And where a bond becomes payable and is thereafter assigned but afterward and before notice of the assignment the maker becomes surety for the obligee for another debt and is obliged to pay the same after the obligee's insolvency, he is entitled in equity to set off such payment against his own bond in the assignee's hands. Feazle *v.* Dillard, 5 Leigh (Va.) 30.

51. Stoney *v.* McNeill, Harp. (S. C.) 156.

of both.[52] Again, an agreement with the assignee of a part of a certain number of bonds which stipulates to abide by a prior contract for payment in instalments by the obligor does not cover payments made prior to said stipulation on other bonds than those assigned.[53]

(c) *Taking Subject to Equities.*[54] It is the general rule that the assignee of a bond takes it subject to the equities between the obligor and obligee existing at the time of the assignment;[55] and the assignee of an equity takes it subject to

52. Shaw *v.* Keep, 34 Me. 199.

53. Ott *v.* Lyons, 2 Whart. (Pa.) 441.

54. As to *bona fide* purchasers see *infra*, IV, B, 2, c.

55. *Connecticut.*— Bacon *v.* Warner, 1 Root (Conn.) 349.

Maryland.— Estep *v.* Watkins, 1 Bland (Md.) 486. See Pub. Gen. Laws, art. 8, § 3.

Mississippi.—Natchez *v.* Minor, 9 Sm. & M. (Miss.) 544, 48 Am. Dec. 727, holding also that it includes all equities which may arise up to the time of notice to the maker.

New Jersey.— Cornish *v.* Bryan, 10 N. J. Eq. 146.

New York.— Evertson *v.* Newport Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9 (applied to purchaser of non-negotiable interest coupons); Bixby *v.* Barklie, 26 Hun (N. Y.) 275; Western Bank *v.* Sherwood, 29 Barb. (N. Y.) 383.

Pennsylvania.— Eldred *v.* Hazlett, 33 Pa. St. 307; Houk *v.* Foley, 2 Penr. & W. (Pa.) 245; Metzgar *v.* Metzgar, 1 Rawle (Pa.) 227 (applied to secured assignees); Bury *v.* Hartman, 4 Serg. & R. (Pa.) 175; Solomon *v.* Kimmel, 5 Binn. (Pa.) 232; Rundle *v.* Ettwein, 2 Yeates (Pa.) 23; Inglis *v.* Inglis, 2 Dall. (Pa.) 45, 1 L. ed. 282; Wheeler *v.* Hughes, 1 Dall. (Pa.) 23, 1 L. ed. 20.

South Carolina.— Da Costa *v.* Shrewsbury, 1 Bay (S. C.) 211.

Tennessee.— Johnson *v.* Pryor, 5 Hayw. (Tenn.) 243.

Virginia.— Meredith *v.* Salmon, 21 Gratt. (Va.) 762; Stockton *v.* Cook, 3 Munf. (Va.) 68, 5 Am. Dec. 504; Mayo *v.* Giles, 1 Munf. (Va.) 533 (but such equities must be clearly established to affect an assignee without notice); Picket *v.* Morris, 2 Wash. (Va.) 255; Norton *v.* Rose, 2 Wash. (Va.) 233; Buckner *v.* Smith, 1 Wash. (Va.) 296, 1 Am. Dec. 463.

United States.— Withers *v.* Greene, 9 How. (U. S.) 213, 13 L. ed. 109; Scott *v.* Shreeve, 12 Wheat. (U. S.) 605, 6 L. ed. 744; Bell *v.* Nimmo, 5 McLean (U. S.) 109, 3 Fed. Cas. No. 1,258, even though bonds are assignable by the state laws.

See 8 Cent. Dig. tit. "Bonds," § 92.

Qualificative decisions.— It is decided that an equity between the obligor and his assignee cannot be urged successfully, where there has been no fraud and the debt is justly due. Duncan *v.* Wray, 4 Yeates (Pa.) 371. So the obligor who has equitable discounts against the bond ought to inform the assignee of his claims when notice of the assignment is given to him. Scott *v.* Jones, 1 Brock. (U. S.) 244, 21 Fed. Cas. No. 12,536. And equities of a third person of which the assignee has no notice are not within the rule. Moore *v.* Holcombe, 3 Leigh (Va.) 597, 24 Am. Dec. 683. Nor are equities included which are between the original parties subsequent to the assignment and notice. Newman *v.* Crocker, 1 Bay (S. C.) 246. But if the transactions commenced before notice, even though not then complete, they are covered. Northampton Bank *v.* Balliet, 8 Watts & S. (Pa.) 311, 42 Am. Dec. 297.

What is not a defense.—The obligor cannot defend on the ground of a usurious contract between the obligee and the assignees. Littell *v.* Hord, Hard. (Ky.) 81. And giving time on a note is no defense where the bond is given to protect one against the debt and a bond is thereupon made to guarantee performance of the former one. Kennedy *v.* Goss, 38 N. Y. 330. So a purchaser or pledgee of railroad bonds who has complete title from a contractor can recover the full value, even though the condition of the bonds is only partly performed and the pledgee has full knowledge of the condition and the part performance only, since the intention was that the bonds should be issued in order that the contractor might proceed with his work. Mercantile Trust Co. *v.* Zanesville, etc., R. Co., 52 Fed. 342. And an objection to the capacity of a county court to buy a bond secured by a lien is not available, where the lienholder and assignor consented to the enforcement of the lien in favor of the county. Moore *v.* Bath County Ct., 7 Bush (Ky.) 177. And if a bond is payable to bearer possession is sufficient. Galbreath *v.* Knoxville, (Tenn. Ch. 1900) 59 S. W. 178.

Invalidity.—The principle that a bill drawn by a partner upon his own house and a firm note given by him payable to his own order are both valid in the hands of a *bona fide* holder applies where obligees assign a bond and one of them is also one of the obligors and so cannot sue himself, for whatever invalidity exists in law is obviated by a statutory right of the assignee to sue in his own name. Bradford *v.* Williams, 4 How. (U. S.) 576, 11 L. ed. 1109.

Waiver or estoppel.— The obligor may waive any special defense in an action on the bond by the assignee. Montgomery *v.* Dillingham, 3 Sm. & M. (Miss.) 647. But payment by the obligor of interest on a bond after assignment does not prevent setting up a defense against the bond which he had against the obligee. Harper *v.* Jeffries, 5 Whart. (Pa.) 26. And one is not bound by acknowledging his liability after an assignment, where he has a good defense against the original obligee. Ludwick *v.* Croll, 2 Yeates (Pa.) 464, 1 Am. Dec. 362. Again one who believes that he has an equitable defense against his bond and who does not accede to or absolutely

all the rebutting equity attached to it in the hands of the assignor.[55] There are, however, exceptions to the general rule, and circumstances may place the assignee in a better situation than his assignor and the conduct of the latter may change the relations that existed between him and the assignee and deprive him of an equity he had against the assignor. If deceit is practised upon the assignee and he is induced to believe that the bond to be assigned will be paid by the obligor whereby he is led to take the assignment, the assignee is deceived and the obligor cannot set up a concealed equity between him and the assignor.[57] Again, an assignment or sale obtained by fraud, artifice, or false representations cannot be sustained;[58] nor can a *bona fide* purchaser for value be deprived of his rights by reason of a mutual mistake.[59] But an assignee is not obligated to accept payment in lands of a bond assigned as collateral.[60] If, however, an assignor after notice of assignment receives credits he is liable therefor to a surety who pays a judgment obtained by the assignee.[61]

(III) *Rights of Assignee or Transferee* — (A) *Generally.* An assign-

refuse a proposition to discount against an indebtedness from a holder before assignment does not waive his right to the discount, and the assignee takes it subject to the right. Picket *v.* Morris, 2 Wash. (Va.) 255. If there is more than one obligor all must join in the act of waiver relied on as a defense as against an assignee. Columbia Bridge Co. *v.* Kline, 4 Pa. L. J. Rep. 39, 6 Pa. L. J. 317.

New bond extending the day of payment does not bar an equity then unknown against the obligee, where the statute provides that an assignment carries with it all the equities to which the bonds were subject in the obligee's hands, for the new bond is not a new contract. Pile *v.* Shannon, Hard. (Ky.) 53.

Security inuring to assignee — Cancellation. — If a bond and mortgage are assigned and the mortgagor without notice thereof pays his debt to the mortgagee, and takes a bond conditioned for the payment of the mortgage debt to the assignee and to save the mortgagor harmless, the security inures to the benefit of the assignee who is the real party in interest, the mortgagor having been discharged by the payment, and especially where there is an extinguishment of the bond and guaranty by an instrument of cancellation from the mortgagor, even though it purports to be based upon consideration but is not so in fact, and the subsequent transfer thereafter by the mortgagor conveys no interest. Simson *v.* Brown, 68 N. Y. 355 [*reversing* 6 Hun (N. Y.) 251].

56. Porter *v.* Breckenridge, Hard. (Ky.) 21.

57. Kemp *v.* McPherson, 7 Harr. & J. (Md.) 320; Eldred *v.* Hazlett, 33 Pa. St. 307; Buckner *v.* Smith, 1 Wash. (Va.) 296, 1 Am. Dec. 463. See also Morton *v.* Fletcher, 2 A. K. Marsh. (Ky.) 137, 12 Am. Dec. 366; Montgomery *v.* Dillingham, 3 Sm. & M. (Miss.) 647; Houk *v.* Foley, 2 Penr. & W. (Pa.) 245; Frantz *v.* Brown, 1 Penr. & W. (Pa.) 257; Davis *v.* Barr, 9 Serg. & R. (Pa.) 137; Mayo *v.* Giles, 1 Munf. (Va.) 533. *Contra*, as to promise to pay. Da Costa *v.* Shrewsbury, 1 Bay (S. C.) 211.

Agreement which tends to contradict the written contract is insufficient. Richardson *v.* Bennethum, 1 Woodw. (Pa.) 494.

58. **Artifice or fraud.** — If an assignee who makes a purchase of a bond obtains the indorsement by fraud and artifice or false representations his claim has no equity and cannot prevail against a subsequent assignment to the rightful owner, although the latter derived his right through several parol contracts. McCormac *v.* Smith, 3 T. B. Mon. (Ky.) 429. And it may be proven in reduction of damages that a sale of a chattel was effected through false representations on the part of the payee as to the value of the chattel where the suit is by the assignee of the bond. Withers *v.* Greene, 9 How. (U. S.) 213, 13 L. ed. 109. Although an assignee of a bond for payment of land who has notice of fraud in the sale of the land is in no worse position than his assignor the vendor as to payment of the purchase-money. Highland *v.* Highland, 5 W. Va. 63.

Threats. — A plea that the assignment was extorted from the obligee by threats is not good in any action by the assignee, even though the obligor had notice from the obligee and was required not to pay the assignee. McCausland *v.* Drake, 3 Stew. (Ala.) 344.

59. **Mistake or ignorance** in regard to the premium on government bonds which is not of the essence of the contract nor its procuring cause does not avoid a sale thereof, and where such bonds are deposited in a bank which purchases them in good faith at par and both parties are ignorant that they were then selling at a premium the depositor cannot recover such premium and the sale is valid. Sankey *v.* Mifflinburg First Nat. Bank, 78 Pa. St. 48.

60. **If a bond is assigned as collateral security** for a debt from the assignor, the assignee is not obligated to accept an offer by the obligor with the consent of the assignor of the payment in lands where such obligor is in embarrassed circumstances and subsequently before payment becomes insolvent, especially where insolvency is within the meaning of the stipulation between the parties, and especially so where the title is extremely questionable. Rhinelander *v.* Barrow, 17 Johns. (N. Y.) 538.

61. Roberts *v.* Jordans, 3 Munf. (Va.) 488.

ment cannot be altered or changed except upon consent;[62] nor does cancellation without consent revest title;[63] nor will a coöbligor be permitted by purchase of the bond to secure an inequitable advantage over the others.[64] In case of two obligees each may assign his own interest but he cannot dispose of that of the other without the latter's consent;[65] and if only one of several knows of the transfer the assignment will be revoked as to the others by the assignor's death.[66] If assignees of a bond are alone beneficially interested in a covenant to do certain things it is competent for them to give notice of the breach and request performance of the condition, and the rights of the assignee will be protected.[67]

(B) *As to Filling Blanks.*[68] A bond issued in blank may be filled in by the purchaser with his own name.[69] If, however, the blank is filled in by a payee with his own name in the absence and without the knowledge of one of two obligors the bond is invalid as to him,[70] and the place of payment cannot be filled in where the blank constitutes a want of certainty under the conditions of the bond.[71]

(C) *Implied Warranties.* In case of a bond or coupon there is an implied warranty by the vendor that it is genuine and binds the obligor; but otherwise

62. **After an assignment is once made** or has become complete the assignor has no power to release the debt or any part thereof. He has thereafter no control over the contract and no right to strike out or erase such assignment because thereby by its delivery all the interest becomes vested in the assignee, nor can such assignor then do any act that will change the nature of the defense that the obligor may have at law against himself or against the assignee. An assignor has no right or authority to alter or change the contract of assignment to the prejudice of the assignee or obligor without their consent or agreement. These rights are vested by the assignment and pass by delivery of the writing obligatory upon which the assignment is made, and being vested in them by statute or otherwise they cannot be divested of them without an express or implied agreement on their part. Block *v.* Walker, 2 Ark. 4, per Lacy, J.; Reed *v.* Nevins, 38 Me. 193.

As to alterations in instruments, generally, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 137.

63. **A cancellation** by the assignee of a bond without the knowledge or consent of the obligee does not revest the legal ownership of the bond in such obligee, for the law does not permit a cancellation when the interests of the obligee will be affected by it. Davis *v.* Christy, 8 Mo. 569, decided under a statute which made the assignee of a bond the legal owner so that no suit could be maintained after the assignment in the name of the obligee or payee.

As to cancellation see *supra*, III, G.

64. **If coöbligors,** in order to protect one from paying a bond on which he had become an obligor, deposit money in his hands therefor and he purchases the bond such purchase inures to the benefit of all, and surplus moneys of the deposit over the amount of the purchase must be returned, for an obligor cannot thus speculate with his cosureties. Davis *v.* Levy, 28 La. Ann. 834.

65. Brown *v.* Dickenson, 27 Gratt. (Va.) 690. But one of two assignees of a penal bond cannot by a separate assignment transfer to a third person the legal title to his moiety. Skinner *v.* Bedell, 32 Ala. 44.

66. **In order to constitute a binding contract** the minds of the contracting parties must assent to its terms, and if a bond is assigned to several and only one of them knows of the transfer or accepts its provisions the assignment is revoked by the assignor's death as to all who have not assented. Ellis *v.* Smith, 38 Me. 114.

67. Van Vechten *v.* Graves, 4 Johns. (N. Y.) 403.

Tender — Subrogation.— And a surety who is liable as co-principal is upon tender of the amount of the bond entitled to an assignment from the holder, and this cannot be refused on the ground that an inequitable use might be made of it, and such surety is in equity entitled to subrogation upon such tender. Merriken *v.* Godwin, 2 Del. Ch. 236.

68. As to execution of bonds in blank see *supra*, II, E, 2, g.

69. Boyd *v.* Kennedy, 38 N. J. L. 146, 20 Am. Rep. 376; White *v.* Vermont, etc., R. Co., 21 How. (U. S.) 575, 16 L. ed. 221. And so where it is assigned in blank (Aiken *v.* Cheesborough, 1 Hill (S. C.) 172); or the name of some other party may be filled in as payee (Gourdin *v.* Commander, 6 Rich. (S. C.) 497); or the name of any lawful holder may be inserted where the intent is obvious that the bond should be transferred by delivery (Hubbard *v.* New York, etc., R. Co., 36 Barb. (N. Y.) 286, 14 Abb. Pr. (N. Y.) 275).

Place of payment cannot be filled in by the holder where the bond is payable in currency dependent upon said place and the terms of the bond are such that the designation in blank makes it non-negotiable for want of certainty in that respect. Parsons *v.* Jackson, 99 U. S. 434, 25 L. ed. 457. And see as to stolen bonds and inability to fill in blank Ledwich *v.* McKim, 53 N. Y. 307.

70. Preston *v.* Hull, 23 Gratt. (Va.) 600, 14 Am. Rep. 153.

71. Parsons *v.* Jackson, 99 U. S. 434, 25 L. ed. 457. And see as to stolen bonds Ledwich *v.* McKim, 53 N. Y. 307.

where all the facts connected with its execution and delivery are disclosed and the vendee agrees to take it at his own risk, or where there is an express stipulation overriding the implication;[72] although it is decided as to bonds payable to order or bearer that the only implied warranty of the vendor is that they belong to him and are not forgeries.[73] The principal rule has been further qualified by a ruling that the implied covenant arising from the assignment is not a guaranty but only that the assignee shall receive the money from the obligor to his own use, and if the obligee should receive it that then the assignor would be answerable over for it. If, however, the assignor has dealt in good faith his responsibilities cease as to the bond;[74] nor does the seller impliedly warrant that bonds are legally issued.[75]

(D) *Recourse Against Assignor*—(1) GENERALLY. The simple assignment of a bond operates as to the assignor's liability not otherwise than a mere sale of

72. Smith *v.* McNair, 19 Kan. 330, 27 Am. Rep. 117; McCay *v.* Barber, 37 Ga. 423; Flynn *v.* Allen, 57 Pa. St. 482; Meyer *v.* Richards, 163 U. S. 385, 16 S. Ct. 1148, 41 L. ed. 199 (where warranty is declared to be of the nature though not of the essence of the contract of sale and is implied in the absence of a stipulation *contra*); Otis *v.* Cullum, 92 U. S. 447, 23 L. ed. 496. And the implied warranty may cover a deficiency after recourse and due diligence. Peay *v.* Morrison, 10 Gratt. (Va.) 149. Again an assignment imports a debt due from the assignor to the assignee. Drummond *v.* Crutcher, 2 Wash. (Va.) 218. And a representation that payment was or would be guaranteed implies a warranty. Callanan *v.* Brown, 31 Iowa 333. But in the absence of fraud an implied undertaking of payment does not enable the assignee to recover against the assignor, where there is not due diligence against the obligor. Graham *v.* Gondy, Add. (Pa.) 55. The agreement may, however, be such that there is a sale of a right to take bonds on certain conditions to a certain amount without any warranty being implied. Corcoran *v.* Henshaw, 8 Gray (Mass.) 267.

73. **This rule is, however, subject to the same exception** above mentioned of a stipulation *contra*. Otis *v.* Cullum, 92 U. S. 447, 23 L. ed. 496 [*distinguished* in Meyer *v.* Richards, 163 U. S. 385, 16 S. Ct. 1148, 41 L. ed. 199].

74. Lloyd *v.* McNamara, 19 Pa. St. 130; Elliott *v.* Miller, Add. (Pa.) 269; Cummings *v.* Lynn, 1 Dall. (Pa.) 444, 1 L. ed. 215.

75. Ruohs *v.* Chattanooga Third Nat. Bank, 94 Tenn. 57, 28 S. W. 303. So it may be shown that the seller supposed the bonds to be genuine and that both he and the vendee made inquiries at the time and that the seller refused any guaranty except that the bonds were not stolen. Porter *v.* Bright, 82 Pa. St. 441. It is also determined that the implied warranty of the genuineness and validity of a bond is broken as soon as made as in case of other warranties of title, if in point of fact the bond is not a valid security, and that the assignee's right of action accrues immediately against the assignor without waiting until the bond is due. Flynn *v.* Allen, 57 Pa. St. 482.

Warranty and covenants.— Whether the representations in a certificate annexed to railroad bonds constitute a warranty depends upon all the attendant circumstances. It is essential to the existence of such a contract that the party purchasing should have received and relied upon the affirmation in assenting to or in consummating the sale and purchase of the bond as between himself and the corporation. If he did not so receive or rely upon it and was not influenced by it and did not act upon the faith of it in making the bargain there was no warranty by the vendors, and their affirmation constituted no part of the consideration. Edwards *v.* Marcy, 2 Allen (Mass.) 486. So non-performance of covenants of warranty and failure of consideration in that a good title to bonds has not been given is demurrable. Worthington *v.* Curd, 15 Ark. 491. But it is also held that failure to perform covenants which constitute the consideration constitutes a good defense. Western Bank *v.* Sherwood, 29 Barb. (N. Y.) 383. But a condition to protect the vendee from payment of a purchase-money note by the vendor for the land conveyed is not a warranty of title, and unless the purchaser has paid the note or other lien there can be no recovery. Clayton *v.* Franco-Texan Land Co., 15 Tex. Civ. App. 365, 39 S. W. 645.

Constitutional invalidity.—Where the bonds are valid in the contemplation of both the vendor and the vendee, but they are void by a constitutional provision adopted after the issuance thereof, and are not void because of the want of power to enact the law under which they were issued, nor because they are *ultra vires*, nor for any other legal cause, and there is nothing on their face indicating invalidity, there is a breach of the implied warranty of identity and the vendor may recover. Meyer *v.* Richards, 163 U. S. 385, 16 S. Ct. 1148, 41 L. ed. 199 [*distinguishing* Otis *v.* Cullum, 92 U. S. 447, 23 L. ed. 496]. See further as to void bonds Hedges *v.* Dixon County, 150 U. S. 182, 14 S. Ct. 71, 37 L. ed. 1044; Ætna L. Ins. Co. *v.* Middleport, 124 U. S. 534, 8 S. Ct. 625, 31 L. ed. 537.

Counterfeit bonds.— One who purchases such United States bonds which have been redeemed by the government may recover back what he has paid therefor before he has returned them or repaid the government. Brewster *v.* Burnett, 125 Mass. 68, 28 Am. Rep. 203.

other property,[76] and the consideration received is the measure of the assignor's responsibility.[77] What has been said, however, in regard to an indorser's liability and recourse against him[78] applies here to the extent that an assignee in order to charge the assignor should make demand and give notice according to law and should use at least due and reasonable diligence to obtain payment from the obligor, unless he is out of the commonwealth and such absence was not within the assignor's or assignee's contemplation, nor should there be any laches or unreasonable delay in seeking recourse or in pursuing the necessary legal remedies.[79]

Usurious bonds.— A sale of such bonds impliedly warrants their validity, where the holder knows that they are void for usury. Ross *v.* Terry, 63 N. Y. 613.

76. Stout *v.* Stevenson, 4 N. J. L. 206. And it does not entitle the assignee to sue the assignor in case the obligor fails to pay the assignee. Garretsie *v.* Vanness, 2 N. J. L. 17, 2 Am. Dec. 333.

77. Duncan *v.* Littell, 2 Bibb (Ky.) 424.

This principle governs and is fully illustrated by the following decisions: Bush *v.* Bush, 3 J. J. Marsh. (Ky.) 501; Herwig *v.* Richardson, 44 La. Ann. 703, 11 So. 135; Pugh *v.* Moore, 44 La. Ann. 209, 10 So. 710; Lloyd *v.* McNamara, 19 Pa. St. 130; Kauffelt *v.* Leber, 9 Watts & S. (Pa.) 93; Waring *v.* Cheesborough, 1 Hill (S. C.) 187. If a bond is given by a continuing to an outgoing partner, with a surety conditioned for the payment of the firm's debts, and the assignee sue the obligor and surety, only such sum can be recovered as is due after allowance of the sums allowable against the assignor. Merrill *v.* Green, 66 Barb. (N. Y.) 582 [*affirmed* in 55 N. Y. 270].

Agreement that assignor not responsible made at the time of the assignment between the assignor and assignee relieves him from liability even to a subsequent assignee without notice, the assignment being in general terms. Stubbs *v.* Burwell, 2 Hen. & M. (Va.) 536.

Failure of consideration.— In an action on a guaranty of payment brought by a second assignee, the first assignor may show a failure of consideration between him and the first assignee. Waring *v.* Cheesborough, 1 Hill (S. C.) 187.

Invalid bonds—Estoppel.—Although bonds are unconstitutional the holder may nevertheless bind himself and his property for their payment, and having thus given them currency he cannot repudiate his pledge at the expense of his transferee. Jamison *v.* Griswold, 6 Mo. App. 405. As to estoppel of assignor to deny validity see Moncure *v.* Dermott, 5 Cranch C. C. (U. S.) 445, 17 Fed. Cas. No. 9,707 [*reversed* in 13 Pet. (U. S.) 345, 10 L. ed. 193].

78. See *supra*, IV, B, 2, a.

79. Demand and notice, and reasonable diligence.— The holder of a bond before it is due must make demand and give notice of non-payment to hold a remote indorser; but after it is due by several indorsements the immediate indorser may be held by reasonable demand and notice but not a remote indorser as to whom a period of diligence has elapsed. Ellis *v.* Dunham, 14 Ark. 127. But notice to the assignor is not necessary in an action of covenant on the assignment, where the obligees assign and guarantee payment. Sibley *v.* Stull, 15 N. J. L. 332. And in Alabama it was unnecessary prior to the statute of 1832 to demand payment at the bank. Woodcock *v.* Campbell, 2 Port. (Ala.) 456. Although the assignee may sue if he has used due diligence without success (Ivey *v.* Sanderson, 6 Port. (Ala.) 420; Lewis *v.* Hoblitzell, 6 Gill & J. (Md.) 259; Mackie *v.* Davis, 2 Wash. (Va.) 219, 1 Am. Dec. 482); or where there is proof of the inutility of such prosecution (Lewis *v.* Hoblitzell, 6 Gill & J. (Md.) 259). Nor does a mortgage of indemnity from the obligor to the assignor excuse due diligence. Trimble *v.* Webb, 1 T. B. Mon. (Ky.) 100. So the assignee cannot show that the obligor was unable to pay, or could not be found in the county of his abode, or that some other thing or casualty happened precluding recovery against the obligor notwithstanding due diligence. Boyer *v.* Turner, 3 Harr. & J. (Md.) 285. And there must also be proof of due diligence. Parrott *v.* Gibson, 1 Harr. & J. (Md.) 398. So not only due diligence is required but every compulsory process of the law, unless the debtor was out of the commonwealth and such absence was not contemplated by the assignee and assignor. Smallwood *v.* Woods, 1 Bibb (Ky.) 542. And the remedy at law must be exhausted, nor does the principal's death excuse proceeding against the representatives. Hume *v.* Long, 6 T. B. Mon. (Ky.) 116. But recourse may be had after execution returned *nulla bona*, even though failure to collect was due to the sheriff's negligence or malfeasance. Smith *v.* Triplett, 4 Leigh (Va.) 590. See further as to judgment and execution James *v.* Nicholson, 6 Blackf. (Ind.) 288; Johnston *v.* Hackley, 6 Munf. (Va.) 448. But the assignee cannot recover against the assignor where judgment was enforced but was not shown to be perpetual. McClung *v.* Arbuckle, 6 Munf. (Va.) 315. Although upon suit in equity where funds in a trustee's hands were insufficient to satisfy the claim the balance may be recovered in a suit against the obligor's debtor, and in default of funds in whole or part the assignor may be proceeded against. Taylor *v.* Ficklin, 5 Munf. (Va.) 25. But unreasonable delay or want of diligence against a solvent obligor releases the assignor from liability to the assignee. Tribble *v.* Davis, 3 J. J. Marsh. (Ky.) 633; Bedal *v.* Stith, 3 T. B. Mon. (Ky.) 290; Moredock *v.* Rawlings, 3 T. B.

(2) In Case of Insolvency of Obligor. In case of the insolvency of the obligor the assignor is liable to the assignee.[80] Nor can an obligor escape liability by proof of the assignment by a corporation in contemplation of insolvency.[81]

(E) *Suits by Assignee*[82]—(1) Parties. An assignee of a bond could not at the common law sue thereon in his own name, even though it was payable to the obligee or his assigns.[83] But where the statute has abrogated the common-law rule an action lies in the name of the assignee in all cases within the statute.[84]

Mon. (Ky.) 73; Dougherty *v.* Maple, 4 Bibb (Ky.) 557. And there may be laches from failure to sue the assignor in one year. Greenlee *v.* Young, 2 N. C. 5. And so of a failure to sue out capias ad satisfaciendum for five months after return of fieri facias. Smith *v.* Blunt, 2 A. K. Marsh. (Ky.) 522. But where fieri facias is returned *nulla bona* and the debtor is arrested on capias ad satisfaciendum and released for want of security for costs there is no laches, unless the debtor had property not within reach of fieri facias. Young *v.* Cosby, 3 Bibb (Ky.) 227.

80. Smallwood *v.* Woods, 1 Bibb (Ky.) 542. *Contra*, see Anderson *v.* Bradford, 5 J. J. Marsh. (Ky.) 69; Coiner *v.* Hansbarger, 4 Leigh (Va.) 452.

Particular decisions.— Fieri facias need not precede a capias ad satisfaciendum to entitle the assignee to a remedy against the assignor, where no property can be found under the schedule and the insolvency may be proved by parol. Bryan *v.* Perry, 5 T. B. Mon. (Ky.) 275. And the obligor's discharge from capias ad satisfaciendum under the insolvent law does not release the assignor. Greer *v.* Blackledge, 1 N. C. 73. And a return of *nulla bona* on an execution against the obligor is sufficient. Harrison *v.* Raines, 5 Munf. (Va.) 456; Goodall *v.* Stuart, 2 Hen. & M. (Va.) 105. *Contra*, Eddings *v.* Glascock, 1 Nott & M. (S. C.) 295. If the obligor is notoriously insolvent, the assignee is not bound to sue him before recourse to an assignor. Saunders *v.* Marshall, 4 Hen. & M. (Va.) 455. See Coiner *v.* Hansbarger, 4 Leigh (Va.) 452, upon this point, and it was also decided that the assignor's promise to pay binds him, although a promise must be based on sufficient consideration. Hopkins *v.* Richardson, 9 Gratt. (Va.) 485. If the obligor is insolvent an action lies by the last assignee in the name of the first assignee against the assignor to recover back the amount paid for the bond. Dunn *v.* Price, 11 Leigh (Va.) 210. So if obligees are insolvent at the time of the first instalment due the assignor is liable, and an assignment under the Absconding Debtors Act evidences the insolvency, and the failure to prove the amount against the insolvent's estate does not avail the assignor. Ten Eyck *v.* Tibbits, 1 Cai. (N. Y.) 427. But if the obligee, on assigning, covenants with the assignee to stand as security for payment it covers the obligor's insolvency, provided the assignee uses due diligence. Rudy *v.* Wolf, 16 Serg. & R. (Pa.) 79. See also Campbell *v.* Hopson, 1 A. K. Marsh. (Ky.) 228.

81. Mann *v.* Eckford, 15 Wend. (N. Y.) 502. N. J. Laws (1825), p. 448, § 6, made void all assignments of property by a corporation in contemplation of insolvency, but this was for the benefit of creditors only.

82. See also, generally, Assignments, VIII, B [4 Cyc. 99].

83. At common law.—Skinner *v.* Somes, 14 Mass. 107; Sheppard *v.* Stites, 7 N. J. L. 90; Smock *v.* Taylor, 1 N. J. L. 206.

84. By statute.— *Arkansas.*— Buckner *v.* Greenwood, 6 Ark. 200.

Iowa.— Jordan *v.* Kavanaugh, 63 Iowa 152, 18 N. W. 851; Conyngham *v.* Smith, 16 Iowa 471.

Maine.— Warren *v.* Wheeler, 21 Me. 484, assignee may maintain assumpsit.

Maryland.— Dorsey *v.* Barnes, 2 Harr. & M. (Md.) 477.

Missouri.— Smith *v.* Dean, 19 Mo. 63, where assignee is real party in interest.

Pennsylvania.— Wheeler *v.* Hughes, 1 Dall. (Pa.) 23, 1 L. ed. 20.

South Carolina.— Coachman *v.* Hunt, 2 Rich. (S. C.) 450.

Virginia.— Winn *v.* Bowles, 6 Munf. (Va.) 23.

United States.— Chew *v.* Brumagen, 13 Wall. (U. S.) 497, 20 L. ed. 663, construing New York statute.

See 8 Cent. Dig. tit. "Bonds," § 97.

Particular instances.— The assignee may sue in his own name where the bond is payable to blank (Chapin *v.* Vermont, etc., R Co., 8 Gray (Mass.) 575); where payable to the obligee or his heirs (Carhart *v.* Miller 5 N. J. L. 675); where the bond is held as collateral (Chew *v.* Brumagen, 13 Wall. (U. S.) 497, 20 L. ed. 663); where the bond is not one of indemnity but of direct covenant (Salmon Falls Bank *v.* Leyser, 116 Mo. 51, 22 S. W. 504); or where one is the assignee of an assignee, even though the first assignment was not in terms to assigns (Allen *v.* Pancoast, 20 N. J. L. 68). See also Bennington Iron Co. *v.* Rutherford, 18 N. J. L. 158. And the statute giving the right to sue in the assignee's name and the assignment itself may remove the inability of an obligee to sue himself as obligor. Bradford *v.* Williams, 4 How. (U. S.) 576, 11 L. ed. 1109. So bonds transferred to secure an indebtedness makes the plaintiff the real party in interest. New York City Ninth Nat. Bank *v.* Ralls Co., 20 Fed. 374. And a suit lies in one state in the name of an assignee of an administrator appointed in another state. Leake *v.* Gilchrist, 13 N. C. 73.

If a bond is void for turpitude of consideration, it being assignable may be enforced by the assignee and considerations *malum*

Again, the assignee of a bond may in equity sue thereon in his own name,[85] although the statute is declared to be applicable to bonds for the payment of money only.[86] And notwithstanding the statutory right, action may be brought in the assignor's name;[87] and a bond conditioned for the performance of an act beneficial to the obligee may be sued on for a subsequent purchaser's benefit.[88] So a holder of one of several bonds may under the circumstances be a necessary party to a suit by the assignee of the remaining bonds.[89]

(2) Pleading. In an action against the obligors a declaration is not demurrable which sets up the bond, the condition, its performance by the obligee and non-performance by the obligor and consequent indebtedness, which was not paid, and the assignment of such bond and indebtedness.[90] But consideration for

in se and *malum prohibitum* are not distinguished. Henderson *v.* Shannon, 12 N. C. 147.

Suit by assignor for use of assignee does not lie (Block *v.* Walker, 2 Ark. 4; Gamblin *v.* Walker, 1 Ark. 220), unless there is a consent or request of the party in interest (Reed *v.* Nevins, 38 Me. 193. But see Beckley *v.* Eckert, 3 Pa. St. 292).

85. In equity.— Young *v.* Person, 3 N. C. 398 (but he must allege that the assignment was for value); Winn *v.* Bowles, 6 Munf. (Va.) 23 (and the statutory right is merely cumulative). So the equitable assignee by delivery may sue in his own name, even though there is no formal assignment. Kiff *v.* Weaver, 94 N. C. 274, 55 Am. Rep. 601. And the assignee may assert his equitable title acquired by statute either in his own name or in that of the obligee. Garland *v.* Richeson, 4 Rand. (Va.) 266. So the assignee of an interest of a co-assignee who was an executrix may maintain a bill in equity against the executor and executrix of the obligor. Crawford *v.* Childress, 1 Ala. 482.

86. Richardson *v.* Beaumont, 20 N. J. L. 578.

87. Coachman *v.* Hunt, 2 Rich. (S. C.) 450.

When action in assignor's name.— The assignee cannot sue in his own name, notwithstanding the statute, where a bond is payable to bearer and transferred merely by delivery. Buckner *v.* Greenwood, 6 Ark. 200. So action must be brought in the assignor's name and he must join all the obligors, where his right of recovery is limited to one of three in a joint obligation. Lyon *v.* Ross, 1 A. K. Marsh. (Ky.) 308. And the assignor's name may be used where the assignment is by one of two obligees. Dougherty *v.* Maple, 4 Bibb (Ky.) 557. Again an extension of time of performance indorsed upon the bond by agreement with the assignee does not entitle him to sue in his own name. Cole *v.* Bodfish, 17 Me. 310. So suit may be brought on a money bond in the name of the obligee or of his personal representative in case of death. Lowndes *v.* King, 1 S. C. 102. And the suit must be brought irrespective of the party in interest in the name of the assignor or obligee, in an action of debt on the bond. Waller *v.* Adams, 1 Hayw. & H. (U. S.) 218, 29 Fed. Cas. No. 17,107.

88. Webster *v.* Buss, 61 N. H. 40, 60 Am. Rep. 317.

89. Armentrout *v.* Gibbons, 25 Gratt. (Va.) 371.

90. Booske *v.* Gulf Ice Co., 24 Fla. 550, 5 So. 247.

Assignment — Delivery and ownership.— Notice of assignment must be averred in suit on bond to convey lands upon payment of a certain note. Burt *v.* Henry, 10 Ala. 874. And transfer of title to bond must be alleged. Hardie *v.* Mills, 20 Ark. 153. But an allegation of assignment imports delivery which need not be otherwise alleged. Feimster *v.* Smith, 10 Ark. 494. So an averment that one is the owner and holder is sufficient. Gardner *v.* Haney, 86 Ind. 17. And profert of the assignment is necessary. Alston *v.* Whiting, 6 Ark. 402. So a reply to a plea of former recovery and satisfaction is sufficient which sets up the assignment and notice thereof to defendant and notice of non-prosecution of the former action for the assignee's benefit. Dawson *v.* Coles, 16 Johns. (N. Y.) 51. But a plea of a prior assignment to another is insufficient if it does not show that the other was owner of the bond when action was commenced (Marvin *v.* Bolles, 18 N. J. L. 365); although an assignment need not be drawn *secundum artem* (Haile *v.* Richardson, 2 Strobh. (S. C.) 114). And how the title is acquired need not be stated where the bond is payable to bearer. Gardner *v.* Haney, 86 Ind. 17. A plea denying the assignment should be verified by oath (Sevier *v.* Wilson, 8 Ark. 496); and so of a plea denying its validity (Prewett *v.* Vaughn, 21 Ark. 417); and so verified it is sufficient (Jordan *v.* Mewborn, 8 Ark. 502). If assignment is denied the replication should not be a departure. Jordan *v.* Mewborn, 8 Ark. 502. Again a plea of *non est factum* admits the assignment (Davis *v.* Imboden, 10 Mo. 340); although it is also decided that upon such a plea it must be proven (——— *v.* Wright, 3 N. C. 327; McMurtry *v.* Campbell, 1 Ohio 262 [see Ford *v.* Vandyke, 33 N. C. 227]); and also that such a plea will be stricken out as not answering the averment (Richards *v.* Morris Canal, etc., Co., 18 N. J. L. 250). But if after oyer a date is added to the assignment previously indorsed on the bond this does not defeat recovery. Lowndes *v.* King, 1 S. C. 102. Again, an averment of authority to assign for another if not ques-

the assignment should be averred;[91] although if there is a dependent condition it is sufficient if its non-performance be alleged;[92] and execution by several must be averred.[93] But the statute giving the right to the assignee to sue need not be stated;[94] nor need the assignee set forth the fact that he sues in that capacity;[95] and negativing payment to the assignor before transfer is sufficient, even though payment to the assignee is not negatived.[96] There should, however, be an affirmative allegation by the maker in his plea of equities that he had no notice thereof before transfer.[97] So a plea setting up matters of defense against a prior holder is not good unless it appears that plaintiff did not become a *bona fide* holder for value.[98]

(3) Evidence. The execution of the bond need not be proven;[99] nor the consideration for the assignment in an action by the assignee;[1] nor the handwriting of prior indorsers.[2] And evidence of a fact that would impeach the validity of a bond will not constitute the basis of a decree where it is not alleged that the assignor knew the fact or concealed his knowledge thereof from the assignee.[3] But where ownership by the assignor is material there should be sufficient proof thereof.[4] Again, in case of proof of payment there should be no variance.[5]

c. Bona Fide Purchasers — (1) *In General.* As a rule[6] one is a *bona fide*

tioned below is good on appeal. Hubble *v.* Mullanphy, Hard. (Ky.) 294. And if it is stated that plaintiff is the legal holder as trustee this sufficiently shows title. Smith *v.* Dean, 19 Mo. 63.

91. Duncan *v.* Littell, 2 Bibb (Ky.) 424; Hall *v.* Smith, 3 Munf. (Va.) 550. An averment that an assignment was made for value received is only an allegation of the consideration and not that the assignment is so written, but if it is not there is no variance. McWilliams *v.* Smith, 1 Call (Va.) 123.

92. Ferguson *v.* Harwood, 7 Cranch (U. S.) 408, 3 L. ed. 386.

93. Roberts *v.* Elliott, 3 T. B. Mon. (Ky.) 395.

And the plea non est factum is held to go to the execution and not the assignment, although if case were brought the general issue would deny both execution and assignment. Ford *v.* Vandyke, 33 N. C. 227.

94. Gano *v.* Slaughter, Hard. (Ky.) 76.

95. Brooks *v.* Whiting, 5 Ark. 18; Bennington Iron Co. *v.* Rutherford, 18 N. J. L. 158.

96. Wiggins *v.* Fisher, 21 Ark. 521.

Averment of non-payment to the obligee before and to the assignee after the assignment is necessary, and in case of joint and several obligors named in an action against one it should be alleged that neither of them had paid. Gregory *v.* Freeman, 22 N. J. L. 405. So a failure to pay the obligee and each of the assignees should be alleged. Braxton *v.* Lipscomb, 2 Munf. (Va.) 282. And although there is an averment of non-payment to the plaintiff the complaint is defective if it fails to allege non-payment to the assignor before notice of assignment, and such defect is not cured by verdict. Green *v.* Dulany, 2 Munf. (Va.) 518. Again, in debt on bond by a survivor of joint assignees, it must be averred not only that there has been no payment to the obligee or plaintiff but also that there was no payment to the deceased assignee in his lifetime. Nicholson *v.* Dixon, 5 Munf. (Va.) 198. And in such an action by an administrator of the assignee against the administrator of the obligor a charge of non-payment to the assignor before notice of assignment or to the assignee in his lifetime afterward is defective. Mitchell *v.* Thompson, 2 Patt. & H. (Va.) 424.

97. Natchez *v.* Minor, 9 Sm. & M. (Miss.) 544, 48 Am. Dec. 727.

98. Craig *v.* Vicksburg, 31 Miss. 216.

99. Parrott *v.* Gibson, 1 Harr. & J. (Md.) 398, under acts 1763, c. 23.

1. Howell *v.* Bulkley, 1 Nott & M. (S. C.) 249.

Only a valuable consideration and not an adequate one need be proven. Huson *v.* Pitman, 3 N. C. 504.

2. McWilliams *v.* Smith, 1 Call (Va.) 123.

3. Coffman *v.* Allin, Litt. Sel. Cas. (Ky.) 200.

Assignee's ignorance of release by assignor at the time of the assignment entitles him to recover from the assignor on a guaranty of payment of the balance due given after the release to one of the obligors on payment of his share. Willson *v.* Winn, 2 Bay (S. C.) 517.

4. Bailey *v.* Chamberlain, 22 N. Y. Suppl. 144, 51 N. Y. St. 295 [*affirmed* in 144 N. Y. 652, 39 N. E. 493, 64 N. Y. St. 865].

5. Barr *v.* Ward, 36 Nebr. 905, 55 N. W. 282; Phelps *v.* Frazer, 3 Rand. (Va.) 103. Although under plea of payment it may be shown that the bond was given for lands to which the obligee had no title. Solomon *v.* Kimmel, 5 Binn. (Pa.) 232.

Obligee is incompetent witness to show partial payment to him by obligor. Cantey *v.* Sumter, 1 Brev. (S. C.) 17.

6. **In applying this rule,** however, the nature of the bond, its character as to negotiability or transfer, to whom payable, as to bearer, to order, or in blank, etc., and the purposes of the issuance and transfer, and in

purchaser or holder of bonds, who obtains them for value in the usual course of business before actual or apparent maturity, without notice of equities or defenses or of facts affecting their validity in his hands, or where the circumstances are not such as that he is obligated in good faith to make inquiry. Title and rights involve the question of validity and this may relate to the inception of the bonds, the authority to issue them, or to fraudulent or other acts which may or may not affect *bona fide* purchasers according to the circumstances. Thus corporation bonds may not as to their issuance be exactly in conformity with charter requirements and yet be valid in the hands of transferees holding in good faith.[7] So

certain cases the statutory authority under which issued are all important, as are also the facts whether or not they are clearly tainted with suspicion, the legal character of the party transferring, and the nature of the indorsement if indorsed. Thus "*Bona fide* purchaser" includes:

A bank without notice of infirmity of corporate bonds where it has given value. Stainback *v.* Junk Bros. Lumber, etc., Co., 98 Tenn. 306, 39 S. W. 530. See Tompkins County Nat. Bank *v.* Bunnell, etc., Invest. Co., 8 N. Y. App. Div. 90, 40 N. Y. Suppl. 411, 74 N. Y. St. 857.

A banker who obtains them in good faith without notice of fraud. Smith *v.* Harlow, 64 Me. 510.

A creditor who is a transferee for value before maturity and without notice of equities. Tyrell *v.* Cairo, etc., R. Co., 7 Mo. App. 294.

A holder of collateral in the usual course of business without notice of defects. Rockville Nat. Bank *v.* Citizens Gas Light Co., 72 Conn. 576, 45 Atl. 361.

A purchaser before maturity of interest coupons payable to bearer at a specified time and place. Evertson *v.* Newport Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9.

A purchaser in good faith for value of government securities transferable by delivery. Seybell *v.* National Currency Bank, 2 Daly (N. Y.) 383, 4 Abb. Pr. N. S. (N. Y.) 352 [*affirmed* in 54 N. Y. 288, 13 Am. Rep. 583].

As against a creditor, a purchaser of bonds payable to bearer without notice or knowledge of facts affecting his rights. Lebeck *v.* Ft. Payne Bank, 115 Ala. 447, 22 So. 75, 67 Am. St. Rep. 51.

Assignees of purchase-money bonds for land without notice. Moore *v.* Holcombe, 3 Leigh (Va.) 597, 24 Am. Dec. 683.

Bona fide holders of state bonds purporting to be "certificates of stock" payable to bearer. Delafield *v.* Illinois, 26 Wend. (N. Y.) 192.

Innocent purchasers of school-district bonds, though sold by an agent to refund the same. Fogg *v.* Sedalia School Dist., 75 Mo. App. 159.

One in possession of a bond payable to bearer. Galbreath *v.* Knoxville, (Tenn. Ch. 1900) 59 S. W. 178.

One who in the usual course of business exchanges stock for statutory guaranteed railroad bonds, and so irrespective of market value. Gilman *v.* New Orleans, etc., R. Co., 72 Ala. 566.

Purchasers of negotiable instruments in good faith for value without notice or knowledge. State *v.* Brown, 64 Md. 199, 1 Atl. 54, 6 Atl. 172.

As to due inquiry and good faith see *infra*, IV, B, 2, c, (VII).

But the nature of the instruments and the circumstances attending its purchase may through a failure to investigate preclude recovery. Kulb *v.* U. S., 18 Ct. Cl. 560. Holders of coupon bonds executed to a private corporation and payable to bearer do not stand upon the footing of holders of bills of exchange as to defenses. Ritchie *v.* Cralie, 22 Ky. L. Rep. 160, 56 S. W. 963.

Bona fide holders of non-negotiable bonds to which are attached interest coupons payable to bearer take subject to defenses. Richardson *v.* Woodruff, 20 Nebr. 132, 29 N. W. 308. So of county bonds in the form of a single bill executed under seal and payable to an obligee or assigns. Cronin *v.* Patrick County, 89 Fed. 79. So of bonds executed to a corporation payable to it or bearer and secured by a mortgage on realty. Hefferman *v.* Brierly, 22 Ky. L. Rep. 304, 62 S. W. 852.

Bona fide purchasers of corporation coupon bonds are not obliged to see that the proceeds are applied to corporate purposes. Fox *v.* Iron Co., 17 Leg. Int. (Pa.) 149.

Equity will not, after assignment, reform a bond to the prejudice of a *bona fide* purchaser. Foster *v.* Kingsley, 67 Me. 152.

Holder for antecedent debt with notice of sale to third person is not *bona fide* holder. Farmers' L. & T. Co. *v.* Oregon, etc., R. Co., 58 Fed. 639. As to bonds taken as collateral for preëxisting debt see *infra*, IV, B, 2, c, (VIII).

7. Harrison *v.* Annapolis, etc., R. Co., 50 Md. 490.

An estoppel may arise against a corporation in favor of *bona fide* holders by the recitals upon the face of the bonds as to authority, etc. Gunnison County *v.* Rollins, 173 U. S. 255, 19 S. Ct. 390, 43 L. ed. 689; Moultrie *v.* Fairfield, 105 U. S. 370, 26 L. ed. 945; Ottawa *v.* Portsmouth First Nat. Bank, 105 U. S. 342, 26 L. ed. 1127; Pompton Tp. *v.* Cooper Union, 101 U. S. 196, 25 L. ed. 803; Calhoun County *v.* Galbraith, 99 U. S. 214, 25 L. ed. 410; Hackett *v.* Ottawa, 99 U. S. 86, 25 L. ed. 363; Warren County *v.* Marcy, 97 U. S. 96, 24 L. ed. 977 (if valid on face *bona fide* holder may presume issue valid of county bonds); San Antonio *v.* Mehaffy, 96 U. S. 312, 24 L. ed. 816; Coloma *v.* Eaves, 92 U. S. 484, 23 L. ed. 579; Mercer County *v.*

bonds may be expressly voided by the constitution of a state, and the invalidity attach thereto in the hands of *bona fide* holders or purchasers.[8] And a presumption of knowledge arises against holders of government bonds as to the laws by the authority of which they are created as well also as of all lawful acts done thereunder.[9] Again the unlawful alteration of a state bond will invalidate it even in the hands of an innocent purchaser for value;[10] and the fraudulent reissue before sale of such bonds is a defense.[11] But ordinarily the title and rights of a holder in good faith and for value are not affected by fraud, error, or mistake of which he has no notice, unless the circumstances are such as that the failure to inquire constitutes bad faith.[12] Thus negotiable railroad bonds payable

Hackett, 1 Wall. (U. S.) 83, 17 L. ed. 548; Moran *v.* Miami County, 2 Black (U. S.) 722, 17 L. ed. 342; Knox County *v.* Aspinwall, 21 How. (U. S.) 539, 16 L. ed. 208 (purchasers need not look beyond recitals). *Contra*, Lake County *v.* Graham, 130 U. S. 674, 9 S. Ct. 654, 32 L. ed. 1065; Carrol County *v.* Smith, 111 U. S. 556, 4 S. Ct. 539, 28 L. ed. 517. And in Buchanan *v.* Litchfield, 102 U. S. 278, 26 L. ed. 138, it is decided that notwithstanding recitals in municipal bonds *bona fide* holders cannot sue on unpaid coupons.

If bonds are regular upon their face and are in the hands of *bona fide* holders without actual notice the non-organization of the corporation within the time presented by charter is no defense, nor that when the bonds were issued a suit to restrain such issue was pending, nor is evidence of irregularities or even fraud in the issuance admissible. Macon County *v.* Shores, 97 U. S. 272, 24 L. ed. 889. Although it seems that the pleading must show for what purpose the bond was made, where the town has authority to issue bonds only for special purposes. Hopper *v.* Covington, 118 U. S. 148, 6 S. Ct. 1025, 30 L. ed. 190. Negotiable security of a corporation appearing on its face to have been duly and regularly issued is decided to be valid in the hands of a purchaser in good faith without notice, although issued in fact at a place and for a purpose not authorized by the charter. Marshall County *v.* Schenck, 5 Wall. (U. S.) 772, 18 L. ed. 556. But in Barnett *v.* Denison, 145 U. S. 135, 12 S. Ct. 819, 36 L. ed. 652, it was decided that where a municipal bond was not for a purpose specified in the charter no protection was afforded. And in Ottawa *v.* Carey, 108 U. S. 110, 2 S. Ct. 361, 27 L. ed. 669, it was determined that municipal bonds invalidly issued were void in the hands of one not an innocent *bona fide* holder without notice. While in Provident L. & T. Co. *v.* Mercer County, 170 U. S. 593, 18 S. Ct. 788, 42 L. ed. 1156, it was declared that *bona fide* holders of county bonds issued to aid a railroad were entitled to recover even if conditions as to delivery were not performed. Evidently the distinction in these decisions is whether or not the corporation has power at all to issue bonds. Lexington *v.* Butler, 14 Wall. (U. S.) 282, 20 L. ed. 809; Marshall County *v.* Schenck, 5 Wall. (U. S.) 772, 18 L. ed. 556; Gelpecke *v.* Dubuque, 1 Wall. (U. S.) 175, 17 L. ed. 520.

Ultra vires is no defense where the stockholders allow the bonds to be sold and receive the benefits therefrom, the bonds being negotiable. Tyrell *v.* Cairo, etc., R. Co., 7 Mo. App. 294.

Where a city has no power to issue negotiable bonds neither they nor their coupons are valid even in the hands of *bona fide* holders. Brenham *v.* German-American Bank, 144 U. S. 173, 549, 12 S. Ct. 559, 975, 36 L. ed. 390. See also Merrill *v.* Monticello, 138 U. S. 673, 11 S. Ct. 441, 34 L. ed. 1069, 72 Fed. 462, 34 U. S. App. 615, 18 C. C. A. 636.

8. State *v.* Hart, 46 La. Ann. 54, 14 So. 430.

9. Morgan *v.* U. S., 113 U. S. 476, 5 S. Ct. 588, 28 L. ed. 1044.

Subsequent decisions cannot invalidate in the hands of *bona fide* holders bonds valid under prior adjudications in the same state. Kenosha *v.* Lawson, 9 Wall. (U. S.) 477, 19 L. ed. 725 [*following* Gelpecke *v.* Dubuque, 1 Wall. (U. S.) 175, 17 L. ed. 520]; Marshal *v.* Elgin, 8 Fed. 783. See Anderson *v.* Santa Anna, 116 U. S. 356, 6 S. Ct. 413, 29 L. ed. 633; Burgess *v.* Seligman, 107 U. S. 20, 2 S. Ct. 10, 27 L. ed. 359; Taylor *v.* Ypsilanti, 105 U. S. 60, 26 L. ed. 1008.

10. State *v.* Hart, 46 La. Ann. 40, 14 So. 507.

So a non-negotiable "registered" bond cannot by erasures and filling up of blanks be made negotiable and give valid title as such. Cronin *v.* Patrick County, 89 Fed. 79.

But the fraudulent alteration of numbers of a negotiable bond payable to bearer does not void the title of a subsequent holder in good faith. Com. *v.* Emigrant Industrial Sav. Bank, 98 Mass. 12, 93 Am. Dec. 126.

11. Herwig *v.* Richardson, 44 La. Ann. 703, 11 So. 135; Pugh *v.* Moore, 44 La. Ann. 209, 10 So. 710.

12. *Alabama.*— State *v.* Cobb, 64 Ala. 127, fraud or mistake in overissue of railroad bonds.

Iowa.— Des Moines Gas Co. *v.* Charter Oak L. Ins. Co., 51 Iowa 705, 1 N. W. 693 (delivered to A by mistake and hypothecated); Des Moines Gas Co. *v.* West, 50 Iowa 16 (fraudulent acts of president).

Louisiana.— Buckingham *v.* Board Liquidation, 39 La. Ann. 343, 1 So. 653 (overissue through error or fraud of state boards); Manning *v.* Board Liquidation, 39 La. Ann. 327, 1 So. 654.

New York.— Leavitt *v.* Dabney, 7 Rob. (N. Y.) 350, bonds of foreign government wrongfully put in circulation.

to bearer are valid in the hands of a *bona fide* purchaser, though they are sold by a trustee or agent in violation of his trust and although the semiannual attached interest coupons are past due.[13] If association aid bonds are issued by a state it becomes the principal and sole obligor, and *bona fide* holders are entitled to receive in exchange new consolidated bonds of the state.[14]

(II) *Bona Fide Purchasers From Bona Fide Purchasers.* A purchaser who succeeds to the title of a *bona fide* holder of bonds is entitled as a rule to stand on such title, even though he is not himself a *bona fide* holder[15] and has notice of a claim of a third person, the seller being free from such notice.[16] And the same rule applies to knowledge or notice of irregularity in the issue.[17] But if negotiable bonds are fraudulent reissues of genuine ones the *bona fide* owner is not, in the absence of any warranty, liable to one who purchases them from him for the amount paid therefor.[18]

(III) *Purchasers After Maturity.* Bonds purchased after maturity are subject to equities and defenses, and to all defects invalidating them in the hands of the original holder;[19] and the purchaser takes them subject to antecedent holders' rights the same as in case of other negotiable paper purchased after

United States.—Kennicott *v.* Wayne County, 6 Biss. (U. S.) 138, 14 Fed. Cas. No. 7,710, 7 Chic. Leg. N. 41 (a case of non-admissibility of evidence to impeach bonds); Muscatine *v.* Mississippi, etc., R. Co., 1 Dill. (U. S.) 536, 17 Fed. Cas. No. 9,971 (fraud of payee). And see Smith *v.* Sac County, 11 Wall. (U. S.) 139, 20 L. ed. 102, as to fraud and burden of proof.

See 8 Cent. Dig. tit. "Bonds," § 107.

13. Long Island L. & T. Co. *v.* Columbia, etc., R. Co., 65 Fed. 455.

14. Forstall *v.* Board Liquidation, 30 La. Ann. 1151.

15. Porter *v.* Pittsburg Bessemer Steel Co., 122 U. S. 267, 7 S. Ct. 1206, 30 L. ed. 1210; Montclair Tp. *v.* Ramsdell, 107 U. S. 147, 2 S. Ct. 391, 27 L. ed. 431; Rollins *v.* Gunnison County, 80 Fed. 692, 49 U. S. App. 399, 26 C. C. A. 91; Foote *v.* Hancock, 15 Blatchf. (U. S.) 343, 9 Fed. Cas. No. 4,911. See also Lytle *v.* Lansing, 147 U. S. 59, 13 S. Ct. 254, 37 L. ed. 78; Scotland County *v.* Hill, 132 U. S. 107, 10 S. Ct. 26, 33 L. ed. 261.

An honest purchaser from an agent can give good title to another, although the bonds had become due before the last transfer. Grand Rapids, etc., R. Co. *v.* Sanders, 54 How. Pr. (N. Y.) 214 [*reversed* in 17 Hun (N. Y.) 552].

16. Porter *v.* Pittsburg Bessemer Steel Co., 122 U. S. 267, 7 S. Ct. 1206, 30 L. ed. 1210; and cases cited *supra*, note 15.

But want of good faith exists where there is a knowledge of the seller's want of title or a means of knowledge to which the purchaser wilfully shuts his eyes. Seybell *v.* National Currency Bank, 2 Daly (N. Y.) 383, 4 Abb. Pr. N. S. (N. Y.) 352 [*affirmed* in 54 N. Y. 288, 13 Am. Rep. 583]; Lytle *v.* Lansing, 147 U. S. 59, 13 S. Ct. 254, 37 L. ed. 78. See Thompson *v.* Sioux Falls Nat. Bank, 150 U. S. 231, 14 S. Ct. 94, 37 L. ed. 1063, as to burden of proof in such cases.

17. Scotland County *v.* Hill, 132 U. S. 107, 10 S. Ct. 26, 33 L. ed. 261.

18. Meyer *v.* Richards, 46 Fed. 727 [*following* Otis *v.* Cullum, 92 U. S. 447, 23 L. ed. 496].

19. Belo *v.* Forsythe County, 76 N. C. 489.

And this applies to an assignee of bonds on which there are past-due instalments unpaid (Goldman *v.* Ehrenreich, 33 Misc. (N. Y.) 433, 68 N. Y. Suppl. 424); to corporation bonds overdue (Higgins *v.* Lansingh, 154 Ill. 301, 40 N. E. 362); to public securities past due and coupons of state bonds (Stern *v.* Germania Nat. Bank, 34 La. Ann. 1119. See also Union Bank *v.* New Orleans, 24 Fed. Cas. No. 14,351, 5 Am. L. Reg. N. S. 555); to interest coupons payable to bearer (McKim *v.* King, 58 Md. 502, 42 Am. Rep. 340); to overdue railroad coupons as a material fact in connection with other circumstances (Farmers' L. & T. Co. *v.* Oregon, etc., R. Co., 58 Fed. 639. See also Washington, etc., R. Co. *v.* Cazenove, 83 Va. 744, 3 S. E. 433). And no title passes to past-due coupons to corporate bonds, even though the bonds are purchased before maturity. Gilbough *v.* Norfolk, etc., R. Co., 1 Hughes (U. S.) 410, 10 Fed. Cas. No. 5,419. But see McLane *v.* Placerville, etc., R. Co., 66 Cal. 606, 6 Pac. 748; Buffalo Loan, etc., Co. *v.* Medina Gas, etc., Co., 162 N. Y. 67, 56 N. E. 505 [*affirming* 12 N. Y. App. Div. 199, 42 N. Y. Suppl. 781]. And as to attached unpaid coupons see Simmons *v.* Taylor, 38 Fed. 682. But examine further as to overdue coupons passing title State *v.* Cobb, 64 Ala. 127; Chouteau *v.* Allen, 70 Mo. 290; Lyon *v.* New York, etc., R. Co., 14 Daly (N. Y.) 489, 15 N. Y. St. 348 [*affirming* 13 N. Y. St. 732]; McClelland *v.* Norfolk Southern R. Co., 3 N. Y. St. 250 [*reversed* in 110 N. Y. 469, 18 N. E. 237, 18 N. Y. St. 344, 6 Am. St. Rep. 397, 1 L. R. A. 299]; Thompson *v.* Perrine, 106 U. S. 589, 1 S. Ct. 564, 27 L. ed. 298, 103 U. S. 806, 26 L. ed. 612; Indiana, etc., R. Co. *v.* Sprague, 103 U. S. 756, 26 L. ed. 554; Parsons *v.* Jackson, 99 U. S. 434, 25 L. ed. 457; Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681; Long Island L. & T. Co. *v.* Columbus, etc., R. Co., 65 Fed.

maturity, and this applies to bonds or treasury notes of the United States payable to holder or bearer at a future time certain.[20]

(iv) *Purchasers For Value.* It is a valuable consideration where bonds are taken before maturing for an antecedent debt,[21] or where an attachment is released,[22] or where one has changed his position to his injury.[23] But if bonds are purchased at a price far less than the market or actual value or at an exorbitant discount, it is a circumstance which has been considered upon the question of good faith or notice, in connection with other relevant and material facts,[24] although it is decided that the original consideration cannot be inquired into in an action on the bond by a *bona fide* holder;[25] that the presumption of purchase for value exists and if the defense necessitates proof thereof the holder need not show that he paid it, for if any prior holder gave value it is sufficient;[26] that if fraud in the origin is shown proof of payment of value before maturity is required;[27] that such a purchaser for value of bonds wrongfully put in circulation is not restricted to the amount paid therefor but may recover the whole amount secured thereby;[28] and that the fact that there is no consideration or a failure of consideration constitutes no defense against an assignee for value without notice.[29]

(v) *Purchasers of Accommodation Bonds.* An accommodation maker of

455. And one is not an innocent purchaser for value who has notice of demand and refusal to pay semiannual coupons, whereby they have become due in accordance with conditions to which the bond is subject. Morton *v.* New Orleans, etc., R. Co., 79 Ala. 590. Again the rule applies to stolen government bonds after maturing of the calls (Von Hoffman *v.* U. S., 18 Ct. Cl. 386); to government bonds payable to bearer purchased after date when redeemable (Texas *v.* White, 7 Wall. (U. S.) 700, 19 L. ed. 227, 25 Tex. Suppl. 465 [*overruled* in Morgan *v.* U. S., 113 U. S. 476, 5 S. Ct. 588, 28 L. ed. 1044, limiting the rule to cases where title is acquired with notice of the defect or under circumstances discrediting the instrument, as in cases of negotiable paper]. See Washington First Nat. Bank *v.* Texas, 20 Wall. (U. S.) 72, 22 L. ed. 295); and to overdue railroad mortgage bonds in connection with other facts (American L. & T. Co. *v.* St. Louis, etc., R. Co., 42 Fed. 819).

20. Vermilye *v.* Adams Express Co., 21 Wall. (U. S.) 138, 22 L. ed. 609.

And the burden of defeating it rests upon the one disputing it, although the legal title passes. Washington First Nat. Bank *v.* Texas, 20 Wall. (U. S.) 72, 22 L. ed. 295.

21. Rockville Nat. Bank *v.* Citizens Gas Light Co., 72 Conn. 576, 45 Atl. 361.

22. Crump *v.* McMurtry, 8 Mo. 408.

23. Varick *v.* Norwich Second Nat. Bank, 15 N. Y. St. 127. Neither a present parting with property nor losing any right of action is necessary. Baker *v.* Guarantee Trust, etc., Co., (N. J. 1895) 31 Atl. 174.

24. Grand Rapids, etc., R. Co. *v.* Sanders, 54 How. Pr. (N. Y.) 214 [*reversed* in 17 Hun (N. Y.) 552]; Exum *v.* Bowden, 39 N. C. 281; Stewart *v.* Lansing, 104 U. S. 505, 26 L. ed. 866; Parsons *v.* Jackson, 99 U. S. 434, 25 L. ed. 457; American L. & T. Co. *v.* St. Louis, etc., R. Co., 42 Fed. 819; Simmons *v.* Taylor, 38 Fed. 682; Lansing *v.* Lytle, 38 Fed. 204; Riggs *v.* Pennsylvania, etc., R. Co., 16 Fed. 804; Kulb *v.* U. S., 18 Ct. Cl. 560. But see Gilman *v.* New Orleans, etc., R. Co., 72 Ala. 566.

25. *In re* Leland, 6 Ben. (U. S.) 175, 15 Fed. Cas. No. 8,229.

26. Montclair Tp. *v.* Ramsdell, 107 U. S. 147, 2 S. Ct. 391, 27 L. ed. 431. See also Lytle *v.* Lansing, 147 U. S. 59, 13 S. Ct. 254, 37 L. ed. 78; Scotland County *v.* Hill, 132 U. S. 107, 10 S. Ct. 26, 33 L. ed. 261; Porter *v.* Pittsburg Bessemer Steel Co., 122 U. S. 267, 7 S. Ct. 206, 30 L. ed. 1210. And in Thompson *v.* Sioux Falls Nat. Bank, 150 U. S. 231, 14 S. Ct. 94, 37 L. ed. 1063, the same rule was asserted, although applied to other negotiable paper.

27. Smith *v.* Sac County, 11 Wall. (U. S.) 139, 20 L. ed. 102. But see Washington First Nat. Bank *v.* Texas, 20 Wall. (U. S.) 72, 22 L. ed. 295.

28. Grand Rapids, etc., R. Co. *v.* Sanders, 17 Hun (N. Y.) 552 [*reversing* 54 How. Pr. (N. Y.) 214].

29. Parker *v.* Flora, 63 N. C. 474.

Decisions contra and in qualification of rule.— A gambling consideration voids the bond in the hands of a *bona fide* holder for value, except when taken without notice and on the obligor's promise to pay. Woodson *v.* Barrett, 2 Hen. & M. (Va.) 80, 3 Am. Dec. 612. So bonds founded on an illegal consideration are void in the hands of a *bona fide* purchaser for value without notice. York *v.* McNutt, 16 Tex. 13, 67 Am. Dec. 607. And where a claim of a *bona fide* holder of bonds is paid in treasury notes expressly fundable in state bonds to be delivered, but which are never delivered, such claim is based upon an illegal consideration and is not recoverable. Rand *v.* State, 65 N. C. 194, 6 Am. Rep. 741.

Obligor is estopped to plead want of consideration where he gives bonds to a corporation to raise money, and the burden of proving that fact is upon the purchaser. Hefferman *v.* Brierly, 23 Ky. L. Rep. 304, 62 S. W. 852.

bonds is liable for the whole amount to a *bona fide* purchaser thereof without notice, even though purchased at a discount.[30]

(VI) *Purchasers of Stolen Bonds.* In the case of negotiable securities which are stolen, a *bona fide* holder or innocent purchaser before maturity for value is protected and the owner has no title against such purchaser.[31] So a *bona fide* purchaser without notice of a lost bond is entitled to recover the amount thereof.[32] But the burden of proof is shifted upon the holder under a recent decision.[33]

30. Hansbrough *v.* Baylor, 2 Munf. (Va.) 36. So the state is liable as an accommodation indorser of railroad bonds to a *bona fide* holder for value who acquires them in the usual course of business without notice that they were originally misapplied in violation of the statute. Morton *v.* New Orleans, etc., R. Co., 79 Ala. 590.

But if the obligee has refused to accept an accommodation bond it is void in a third person's hands, even though he is a purchaser for value. Parker *v.* McDowell, 95 N. C. 219, 59 Am. Rep. 235.

Estoppel to question validity of coupon bonds in the hands of an innocent purchaser arises against one who executes them to another in order to obtain money advances, but it should appear with reasonable certainty that the obligor had notice of sale; if he had no notice and the purchaser had notice of the facts no estoppel arises. Waggoner *v.* German-American Title Co., 22 Ky. L. Rep. 215, 56 S. W. 961.

31. *Louisiana.*— Planters Consol. Assoc. *v.* Avegno, 28 La. Ann. 552.

New Jersey.— Boyd *v.* Kennedy, 38 N. J. L. 146, 20 Am. Rep. 376 (bonds payable to blank and bought in the market *bona fide* for value); Elizabeth *v.* Force, 29 N. J. Eq. 587.

New York.— Dutchess County Mut. Ins. Co. *v.* Hachfield, 73 N. Y. 226 [*reversing* 1 Hun (N. Y.) 675, 4 Thomps. & C. (N. Y.) 158, 47 How. Pr. (N. Y.) 330]; Newton *v.* Porter, 69 N. Y. 133, 25 Am. Rep. 152; Evertson *v.* Newport Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9, bonds payable to bearer.

Pennsylvania.— Carpenter *v.* Rommel, 5 Phila. (Pa.) 34, 19 Leg. Int. (Pa.) 148.

Texas.— Texas Banking, etc., Co. *v.* Turnley, 61 Tex. 365.

United States.—Wylie *v.* Missouri Pac. R. Co., 41 Fed. 623 (negotiable railroad bonds); Brown *v.* U. S., 20 Ct. Cl. 416 (United States bonds had numbers altered).

See 8 Cent. Dig. tit. "Bonds," § 110; and also *infra*, VI, E, 1, e.

Decisions contra and in qualification of rule.— If stolen property is received merely as collateral for a preëxisting debt it is not held for value against the real owner; otherwise as to converted bonds. Smith *v.* Harlow, 64 Me. 510 (a case merely of converted bonds); Varick *v.* Norwich Second Nat. Bank, 15 N. Y. St. 127 [*affirmed* in 121 N. Y. 667, 24 N. E. 1093, 30 N. Y. St. 1014]. So if bonds are stolen before delivery a *bona fide* purchaser for value obtains no title. Germania Sav. Bank *v.* Suspension Bridge, 73 Hun (N. Y.) 590, 26 N. Y. Suppl. 98, 56 N. Y. St. 178. So if railroad bonds, conditioned not to be valid until certified, are stolen before certification but after being signed by the proper officers the company is not liable to one who purchased them for value upon a forged certification. Maas *v.* Missouri, etc., R. Co., 83 N. Y. 223. Nor are bonds valid in the hands of a *bona fide* purchaser where they are payable in certain currency to be determined by the place fixed for payment and they are merely indorsed in blank without the place being fixed. Such holder has no authority to fill the blank. Ledwich *v.* McKim, 53 N. Y. 307 [*affirming* 35 N. Y. Super. Ct. 304]; Parsons *v.* Jackson, 99 U. S. 234, 25 L. ed. 457; Jackson *v.* Vicksburg, etc., R. Co., 2 Woods (U. S.) 141, 13 Fed. Cas. No. 7,150, 13 Alb. L. J. 353, 22 Int. Rev. Rec. 160, 1 La. L. J. 118, 2 N. Y. Wkly. Dig. 262, 23 Pittsb. Leg. J. (Pa.) 159. And an express company from which treasury notes of the United States are stolen and sold after they are sold to a purchaser for value may be recovered by said company. Vermilye *v.* Adams Express Co., 21 Wall. (U. S.) 138, 22 L. ed. 609. Again a failure to inquire may preclude recovery of stolen United States gold certificates, especially when bought for less than their value. Kulb *v.* U. S., 18 Ct. Cl. 560. And if stolen called bonds of the United States payable to bearer are purchased after maturity of the calls no title is acquired against the owner. Von Hoffman *v.* U. S., 18 Ct. Cl. 386. Nor can the state be compelled to fund coupon bonds stolen after redemption and fraudulently reissued, even though in the hands of a *bona fide* holder for value without notice of the theft. Branch *v.* Sinking Fund, 80 Va. 427, 56 Am. Rep. 596.

32. New Orleans, etc., R. Co. *v.* Mississippi College, 47 Miss. 560.

33. Manhattan Sav. Inst. *v.* New York Nat. Exch. Bank, 42 N. Y. App. Div. 147, 59 N. Y. Suppl. 51.

Notice and proof.— A bank taking municipal bonds as collateral is not bound by notice of theft published in newspapers eighteen years before. Manhattan Sav. Inst. *v.* New York Nat. Exch. Bank, 42 N. Y. App. Div. 147, 59 N. Y. Suppl. 51. And it may be shown by a bank which has purchased stolen government bonds that although a printed circular describing the bonds and stating that they were stolen was left with the bank nevertheless such notices were ordinarily disregarded, since they were so numerous that it would be impracticable to keep track of them. Seybell *v.* National Currency Bank, 2 Daly

(VII) *PURCHASERS WITHOUT NOTICE* — (A) *In General.* Notice may be actual or constructive; and in determining whether a holder of bonds is a *bona fide* purchaser without notice the character of the bonds, the known purpose for which issued, knowledge of statutory limitations, or actual notice of defenses may be important.[34]

(B) *Due Inquiry and Good Faith.* What facts necessitate due inquiry and what constitutes such inquiry must rest largely upon individual cases.[35] It seems,

(N. Y.) 383, 4 Abb. Pr. N. S. (N. Y.) 352 [*affirmed* in 54 N. Y. 288, 13 Am. Rep. 583]. It is also decided, however, that bankers and brokers who receive notice of loss, after maturity, identifying the paper, should make some memoranda or use other reasonable means whereby they may refer to the service of the notice. Vermilye *v.* Adams Express Co., 21 Wall. (U. S.) 138, 22 L. ed. 609. But failure of the owner to give notice is not fatal where the condition in the bonds is such as to put a purchaser on inquiry. Maas *v.* Missouri, etc., R. Co., 83 N. Y. 223. And see Ledwich *v.* McKim, 53 N. Y. 307 [*affirming* 35 N. Y. Super. Ct. 304, as to implied notice].

34. *Alabama.*—Lines drawn across the face of a bond raise a presumption of their satisfaction subject to rebuttal. Pitcher *v.* Patrick, 1 Stew. & P. (Ala.) 478. If new mortgage bonds of a a railroad are issued to take up old bonds the purchasers thereof are charged with notice of encumbrances, the old bonds not being taken up. Spence *v.* Mobile, etc., R. Co., 79 Ala. 576.

Kentucky.— Where there is notice from the obligee and from the recitals in the mortgage to secure the bonds coupled with other facts. Waggoner *v.* German-American Title Co., 22 Ky. L. Rep. 215, 56 S. W. 961. And a bond which is non-negotiable is subject to defenses which the obligor had against the original holder before notice of assignment. Hefferman *v.* Brierly, 23 Ky. L. Rep. 304, 62 S. W. 852.

Maine.— Notice to the original holder of a mistake in the amount of the bond is decided to bind every subsequent holder. Goodwin *v.* Bath, 77 Me. 462, 1 Atl. 244.

New Jersey.— Baker *v.* Guarantee Trust, etc., Co., (N. J. 1895) 31 Atl. 174.

North Carolina.— The obligor of a bond cannot set up against an indorsee for value before maturity and without notice a defense that the payee, prior to transfer, agreed to release him from liability. Christian *v.* Parrott, 114 N. C. 215, 19 S. E. 151.

Pennsylvania.—Where an obligee on taking a bond with a warrant of attorney agreed by a separate writing not to enter up judgment or permit it to be done, an assignee for a valuable consideration without notice is not bound. Davis *v.* Barr, 9 Serg. & R. (Pa.) 137. A *bona fide* purchaser of coupon bonds of a corporation for value without notice is free from prior equities. Fox *v.* Iron Co., 17 Leg. Int. (Pa.) 149.

South Carolina.— The record of a mortgage of personal property is not notice to the purchaser of a bond which contains no reference thereto. Green *v.* Warrington, 1 Desauss. (S. C.) 430.

Virginia.—A purchaser from one of two obligees has notice of the interest of the other obligee. Brown *v.* Dickenson, 27 Gratt. (Va.) 690. After a *bona fide* assignment and notice thereof to the obligor he cannot be restrained from paying the debt to the assignee. Tazewell *v.* Barrett, 4 Hen. & M. (Va.) 259. See also Picket *v.* Morris, 2 Wash. (Va.) 255; Norton *v.* Rose, 2 Wash. (Va.) 233.

United States.— Scott *v.* Shreeve, 12 Wheat. (U. S.) 605, 6 L. ed. 744. One who takes with notice of a previous sale to a third person and for an antecedent debt has no claim where he is assignee of overdue railroad coupons. Farmers' L. & T. Co. *v.* Oregon, etc., R. Co., 58 Fed. 639. Implied notice arises in case of bonds given to a firm member where another member thereof had participated in the fraud invalidating the bonds. Smith *v.* Florida Cent., etc., R. Co., 43 Fed. 731. Knowledge of an equitable lien binds the purchaser. Hervey *v.* Illinois Midland R. Co., 28 Fed. 169. But *bona fide* holders of state bonds for value indorsed by the governor referring to his statutory authorization have no constructive notice that the bonds are not first mortgage bonds as required by the act. Young *v.* Montgomery, etc., R. Co., 2 Woods (U. S.) 606, 30 Fed. Cas. No. 18,166, 3 Am. L. T. Rep. N. S. 91.

Notice to agent or attorney.—A trustee of notes given to a corporation to raise money and held by him as security for the liquidation of bonds issued at the same time is not an agent of subsequent purchasers of the bonds so as to bind them with his knowledge of collateral agreements. Kinkel *v.* Harper, 7 Colo. App. 45, 42 Pac. 173. And an investment company making as agent loans on bonds, etc., payable to investors and guaranteed by it is not an innocent holder for value, where it takes up said bonds at maturity. Elwell *v.* Tatum, 6 Tex. Civ. App. 397, 24 S. W. 71, 25 S. W. 434. So if one through his attorney purchases bonds from an agent, who, together with his principal, knew of their invalidity, and said attorney is also the legal adviser of said principal, said holder is not a *bona fide* purchaser. Carter *v.* Ottawa, 24 Fed. 546. But if the purchaser's agent is treasurer of the company making the bonds which were illegally issued and such bonds are turned over in satisfaction of a note for money loaned, said purchaser is a *bona fide* holder for value. Thomson-Houston Electric Co. *v.* Capitol Electric Co., 65 Fed. 341, 12 C. C. A. 643.

35. Morton *v.* New Orleans, etc., R. Co., 79 Ala. 590; Spence *v.* Mobile, etc., R. Co., 79 Ala. 576; New Orleans, etc., R. Co. *v.* Mississippi College, 47 Miss. 560; Cheever *v.*

however, that something more than mere suspicion, or probable or possible knowledge, or gross negligence is necessary to preclude the claim that one is a *bona fide* holder. There must be bad faith or fraud, or at least circumstances showing the absence of good faith to have such effect, and where the bonds are taken in the usual course of business for value bad faith is not imputed merely because there is a failure to make a close and critical examination and due inquiry. Nor is a purchaser of bonds bound to make inquiry as to the seller's

Pittsburgh, etc., R. Co., 150 N. Y. 59, 44 N. E. 701, 55 Am. St. Rep. 646, 34 L. R. A. 69 [*reversing* 72 Hun (N. Y.) 380, 25 N. Y. Suppl. 449, 55 N. Y. St. 181]; Dutchess County Mut. Ins. Co. *v.* Hachfield, 73 N. Y. 226 [*reversing* 1 Hun (N. Y.) 675, 4 Thomps. & C. (N. Y.) 158, 47 How. Pr. (N. Y.) 330]; Welch *v.* Sage, 47 N. Y. 143, 7 Am. Rep. 423; Birdsall *v.* Russell, 29 N. Y. 220 [*reversing* 1 Rob. (N. Y.) 538]; Seybell *v.* National Currency Bank, 2 Daly (N. Y.) 383, 4 Abb. Pr. N. S. (N. Y.) 352 [*affirmed* in 54 N. Y. 288, 13 Am. Rep. 583].

Illustrations.— If the invalidity of bonds appears by recitals therein *bona fide* holders cannot recover. Bates County *v.* Winters, 97 U. S. 83, 24 L. ed. 933. And bonds which contain provisions which amount to notice of non-negotiability are subject to defenses in innocent holders' hands. Pepper *v.* Saline County, 4 Dill. (U. S.) 270 note, 19 Fed. Cas. No. 10,972. So bonds with unpaid coupons nearly equal to the face value, with an action pending for unpaid principal and interest, and bought merely for speculative purposes, are not purchased *bona fide*, except as to those which were enforceable by the seller. Simmons *v.* Taylor, 38 Fed. 682. Nor is one a *bona fide* holder of bonds bought at auction who knows that they have been the subject of litigation and that ten years' interest on them is unpaid, the seller having knowledge of such facts as prevents him from obtaining title and the purchaser occupying no better position. Trask *v.* Jacksonville, etc., R. Co., 124 U. S. 515, 8 S. Ct. 574, 31 L. ed. 521. Nor can holders of interest coupons detached from bonds recover where default in payment is expressly waived according to the mortgage stipulations. McClelland *v.* Norfolk Southern R. Co., 3 N. Y. St. 250 [*reversed* in 110 N. Y. 469, 18 N. E. 237, 18 N. Y. St. 344, 6 Am. St. Rep. 397, 1 L. R. A. 299]. But if an action for the interest coupons is not prohibited by the terms of the mortgage the rule permits action in such case. Lyon *v.* New York, etc., R. Co., 14 Daly (N. Y.) 489, 15 N. Y. St. 348 [*affirming* 13 N. Y. St. 732]. Again bonds with past-due coupons attached are dishonored paper (Chouteau *v.* Allen, 70 Mo. 290), although if some of the attached coupons are past due one who purchases in good faith before maturity at the market rate is a *bona fide* holder. McLane *v.* Placerville, etc., R. Co., 66 Cal. 606, 6 Pac. 748.

Question for jury.— The question whether one is a *bona fide* holder is for the jury. Mann *v.* Brooklyn, 17 N. Y. Suppl. 643, 45 N. Y. St. 14 [*affirmed* in 138 N. Y. 637, 53 N. Y. St. 929, 34 N. E. 512]. But see Dutchess County Mut. Ins. Co. *v.* Hachfield, 1 Hun (N. Y.) 675, 4 Thomps. & C. (N. Y.) 158, 47 How. Pr. (N. Y.) 330.

What necessitates inquiry or constitutes notice.— Overdue interest does (St. Paul First Nat. Bank *v.* Scott County, 14 Minn. 77, 100 Am. Dec. 194. See Simmons *v.* Taylor, 38 Fed. 682), or a reference to a mortgage (Caylus *v.* New York, etc., R. Co., 10 Hun (N. Y.) 295), or a name and referred-to order under which the bond is issued (Lewis *v.* Bourbon County, 12 Kan. 186), or the word "trustee" in mortgage bonds payable to a trust company as "trustees" (Louisville Banking Co. *v.* Ogden, 22 Ky. L. Rep. 1591, 61 S. W. 289), or a public statute referred to on the face of coupon bonds payable to bearer (Virginia *v.* State, 32 Md. 501), or the word "consolidated" designating first mortgage bonds as such and referring to the mortgage for the purpose for which the bonds are intended (Caylus *v.* New York, etc., R. Co., 10 Hun (N. Y.) 295), or where it appears on the bond that a certain signature is essential to complete the instrument (Fales *v.* Filley, 2 Mo. App. 345), or where it is payable to one as guardian (Exum *v.* Bowden, 39 N. C. 281), or is indorsed by an assignment to an insane person and is pledged by two guardians (Langdon *v.* Baxter Nat. Bank, 57 Vt. 1, 52 Am. Rep. 113), or where it is payable in certain currency depending upon the place of payment which is left blank and therefore uncertain (Parsons *v.* Jackson, 99 U. S. 434, 25 L. ed. 457), or where the first instalment is to be paid "at the sealing and delivery of this bond" (Cox *v.* Edwards, 8 S. C. 1), or where the purchase is from the vice-president of a company in a receiver's possession and there are suspicious circumstances (American L. & T. Co. *v.* St. Louis, etc., R. Co., 42 Fed. 819), or where one of the firm had read hand-bills describing the stolen bonds and had received personal warning not to buy them, and there was no sufficient rebuttal (Lord *v.* Wilkinson, 2 Thomps. & C. (N. Y.) 179).

What does not necessitate due inquiry or constitute notice.—A purchaser is not charged with notice of equities by dishonor of unpaid coupons (State *v.* Cobb, 64 Ala. 127); nor is he obligated to examine notices of theft left at his place of business where he has no actual knowledge or notice (Seybel *v.* National Currency Bank, 54 N. Y. 288, 13 Am. Rep. 583 [*affirming* 2 Daly (N. Y.) 383, 4 Abb. Pr. N. S. (N. Y.) 352]); nor does the mere absence of certificates referred to in the body of the bond necessitate inquiry in the absence of fraud or bad faith (Welch *v.* Sage, 47 N. Y. 143, 7 Am. Rep. 423; Hotch-

right and title thereto, or to take any special precautionary measures to ascertain or protect others' interests.[36]

(VIII) *TAKING AS COLLATERAL SECURITY.* One is a *bona fide* holder for value, even though he takes negotiable bonds as collateral security for a preëxisting debt;[37] and this applies to bonds payable to bearer acquired in the regular course of business as collateral for current indebtedness and upon which there are thereafter actual advances made by the holder;[38] and a *bona fide* holder of bonds payable to bearer hypothecated for a debt is entitled to demand payment of coupons falling due before maturity of the debt which the bonds were pledged

kiss *v.* Tradesmen's Nat. Bank, 10 Blatchf. (U. S.) 384, 12 Fed. Cas. No. 6,719 [*affirmed* in 21 Wall. (U. S.) 354, 22 L. ed. 645]); nor does a change in the numbering of the bond constitute a notice of larceny (Birdsall *v.* Russell, 29 N. Y. 220 [*reversing* 1 Rob. (N. Y.) 538]); nor does the fact that some of the coupons have been cut off and pasted on its face and that it is stained and soiled necessitate inquiry (Cornell *v.* District of Columbia, 20 Ct. Cl. 229); nor is an act of congress which is uncertain in its terms as to the number of shares to be delivered to the secretary of the treasury and relating to their sale sufficient notice of an equity of the United States (U. S. *v.* Alexandria, 19 Fed. 614).

36. Seybel *v.* National Currency Bank, 54 N. Y. 288, 13 Am. Rep. 583 [*affirming* 2 Daly (N. Y.) 383, 4 Abb. Pr. N. S. (N. Y.) 352].

37. Hayden *v.* Lincoln City Electric R. Co., 43 Nebr. 680, 62 N. W. 73; American File Co. *v.* Garrett, 110 U. S. 288, 4 S. Ct. 90, 28 L. ed. 149; Allen *v.* Dallas, etc., R. Co., 3 Woods (U. S.) 316, 1 Fed. Cas. No. 221.

Particular applications of rule.—So the rule has been applied where the holder has no notice of prior arrangements between the seller and owner which might otherwise constitute a defense (Tompkins County Nat. Bank *v.* Bunnell, etc., Invest. Co., 8 N. Y. App. Div. 90, 40 N. Y. Suppl. 411, 74 N. Y. St. 857 [*affirmed* in 163 N. Y. 579, 57 N. E. 1126]), or where he has parted with value and changed his position to his injury and the bond is merely converted (Varick *v.* Norwich Second Nat. Bank, 15 N. Y. St. 127), or where he has received them in the usual course of business without notice of defects and for a consideration, such bonds being payable to bearer and being apparently still due upon their face, the plaintiff having no knowledge that they had been paid and defendant having been negligent in not having them canceled and in not taking precautionary measures to prevent their circulation through accident or fraud (Rockville Nat. Bank *v.* Citizens' Gas Light Co., 72 Conn. 576, 45 Atl. 361). And the rule applies to negotiable bonds payable to bearer and not due deposited as collateral for the loan of money, and title to the extent of the loan is given (Beall *v.* Southern Bank, 57 Ga. 274), and to bonds deposited as collateral before insolvency (Coster *v.* Griswold, 4 Edw. (N. Y.) 364). So as to bonds pledged as collateral without authority by a bank president, even though given to secure forged notes. Fifth Ward Sav. Bank *v.* Jersey City First Nat. Bank, 48 N. J. L. 513, 7 Atl. 318. So as to corporation bonds issued by authority and transferred as collateral by authority, although certain stockholders had no knowledge of the indebtedness and the transferees were also stockholders. Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567. And railroad corporation bonds overissued or to pay for construction work other than that specified in the incorporation articles are valid in the hands of innocent holders for value, even though taken as security for preëxisting debts without any present parting with property or losing any right of action or otherwise. Baker *v.* Guarantee Trust, etc., Co., (N. J. 1895) 31 Atl. 174. *Contra*, Reid *v.* Mobile Bank, 70 Ala. 199. See Garrard *v.* Pittsburgh, etc., R. Co., 29 Pa. St. 154.

Qualifications of rule.— The holder takes such bond subject to equities existing in the hands of the assignor, even though the former had no notice, except there are new advances made or some advantage surrendered (Holderby *v.* Blum, 22 N. C. 51. See also Bostwick *v.* Dry Goods Bank, 67 Barb. (N. Y.) 449; Thomson-Houston Electric Co. *v.* Capitol Electric Co., 56 Fed. 849), or consent or authority given by the real owner (Bostwick *v.* Dry Goods Bank, 67 Barb. (N. Y.) 449). And a bank which holds as collateral county bonds, from a trustee to whom they have been delivered in direct violation of the statute, and said bonds were defective and had not been sold at public sale as required by statute, is not a *bona fide* holder, where the officers have explicit notice of their non-negotiability. Duckett *v.* Baltimore Nat. Bank, 88 Md. 8, 41 Atl. 161, 1062. So an assignee only for bringing suit obtains no better title than the real owner. Elwell *v.* Tatum, 6 Tex. Civ. App. 397, 24 S. W. 71, 25 S. W. 434. And a holder partly in payment of a precedent debt and partly for a present consideration does not hold *bona fide* for value beyond the sum actually advanced. Taft *v.* Chapman, 50 N. Y. 445.

Bond as collateral to bottomry bond but which does not recite that it is in lieu of the bottomry bond does not entitle the lender to recover, since such bond would only mature on arrival of the vessel. Davies *v.* Soelberg, 24 Wash. 308, 64 Pac. 540.

38. Thompson *v.* St. Nicholas Nat. Bank, 146 U. S. 240, 13 S. Ct. 66, 36 L. ed. 956 [*affirming* 113 N. Y. 325, 22 N. Y. St. 929, 21 N. E. 57 (*affirming* 47 Hun (N. Y.) 621, 15 N. Y. St. 110)].

to secure.[39] Again, if bonds issued by the governor are sold or pledged by those to whom they are delivered to raise funds for construction of public works they are valid in the hands of a *bona fide* purchaser for value;[40] and if an agent, contrary to the purpose for which bonds are placed in his hands, pledges them as collateral security for his own debts, and such bonds are negotiable in form the pledgee who has taken them without notice holds in good faith and for value.[41]

V. PERFORMANCE AND BREACH OF CONDITION.

A. Performance — 1. In General. As bonds are subject to the same rules of construction as are other contracts,[42] and the language of the instrument is supposed to be expressive of the parties' intention and it is their intention which is to govern,[43] the question whether there has been a performance of the terms of a condition must depend upon the facts of the particular case.[44]

2. Election as to Manner of Performance. If the condition of a bond is in the alternative, the obligor may elect which alternative shall be complied with,[45] unless the election is given to the obligee.[46] But a bond conditioned in the alternative for the payment of a certain sum of money or of some property, without designating the value of the latter, requires that if the obligor elects to tender the property it must be equal in value to the money;[47] and the obligor cannot, where there is no alternative condition, elect to refuse performance and incur the penalty.[48]

3. Payment — a. In General. Payment is the delivery by a debtor to a creditor of the amount due or of that which the parties contract shall be accepted as payment.[49] It may be by money, which is the ordinary medium of payment, but this is not necessary in all cases, for negotiable paper,[50] the payment of obli-

39. Warner *v.* Rising Fawn Iron Co., 3 Woods (U. S.) 514, 29 Fed. Cas. No. 17,188.

40. State *v.* Clinton, 28 La. Ann. 219.

41. Tompkins County Nat. Bank *v.* Bunnell, etc., Invest. Co., 8 N. Y. App. Div. 90, 40 N. Y. Suppl. 411, 74 N. Y. St. 857 [*affirmed* in 163 N. Y. 579, 57 N. E. 1126].

42. See, generally, *supra*, III; and Contracts.

43. See *supra*, III, D, 1.

44. As to what constitutes performance in particular instances see the following cases where the question has been considered in the case of a bond given by the devisee of land to pay an annuity to a widow having a dower interest therein (Hoerath *v.* Hogan, 41 Ill. App. 472); of a bond to maintain and support the obligee (Washburn *v.* Titus, 10 Vt. 306); to pay where cause mentioned is decided in favor of plaintiff (Kittrell *v.* Hawkins, 74 N. C. 412); to marry within a certain time (Barnett *v.* Kimmell, 35 Pa. St. 13, 17 Leg. Int. (Pa.) 100); to execute articles of dissolution of a firm (Wright *v.* Taylor, 9 Wend. (N. Y.) 538 [*affirming* 1 Edw. (N. Y.) 226]); to cut down the waste way of a mill-dam (Quinby *v.* Sprague, 17 Me. 226); in payment for territory in which to sell a patented article (Spence *v.* Smith, 101 N. C. 234, 7 S. E. 712); for the redelivery of certain property to the sheriff (Case *v.* Johnson, 19 Pa. St. 174); for the fidelity of the paying teller of a bank (New Orleans Nat. Bank *v.* Wells, 28 La. Ann. 736, 26 Am. Rep. 107); to pay a certain sum for the right to flow land (McFarlane *v.* Cushman, 19 Wis. 357); for the surrender of a person to the custody of the sheriff (Mounsey *v.* Drake, 10 Johns. (N. Y.) 27); and that the obligor and his wife should live together as husband and wife (Axtell *v.* Caldwell, 24 Pa. St. 88).

45. Standring *v.* Moore, 16 Misc. (N. Y.) 106, 38 N. Y. Suppl. 813, 74 N. Y. St. 492; Gray *v.* Young, 6 N. C. 123.

46. U. S. *v.* Thompson, 1 Gall. (U. S.) 388, 28 Fed. Cas. No. 16,486.

47. Gray *v.* Young, 6 N. C. 123.

48. Middletown *v.* Newport Hospital, 16 R. I. 319, 15 Atl. 800, 1 L. R. A. 191, wherein it was so held where a purchaser of a beach from a town gave a bond conditioned to allow the inhabitants of such town to gather sand and seaweed on such beach forever.

49. Anderson L. Dict.

50. **Payment in negotiable paper.**— So the acceptance of a bill of exchange may be a payment (Cox *v.* Robinson, 2 Stew. & P. (Ala) 91; Knott *v.* Whitfield, 99 N. C. 76, 5 S. E. 664; Ligon *v.* Dunn, 28 N. C. 133); or of the note of the obligor (Smith *v.* Jackson, 97 Iowa 112, 66 N. W. 80; Parsons *v.* Gaylord, 3 Johns. (N. Y.) 463. See also Shumway *v.* Reed, 34 Me. 560, 56 Am. Dec. 679); but otherwise if the evidence shows that such note was not accepted as a discharge of the debt (Price *v.* Barnes, (Ind. App. 1892) 31 N. E. 809). And the notes of an insolvent bank have been held not a payment (Jefferson *v.* Holland, 1 Del. Ch. 116), and also a note not paid (McEvoy *v.* Baltimore, 3 Harr. & J. (Md.) 193). Nor does the lifting of notes by renewals thereof to secure the payment of which a bond was given operate as a novation and satisfy the condition of the bond. Shrewsbury Sav. Inst.'s Appeal, 94 Pa. St. 309.

gations or debts of the obligee,[51] the transfer of property,[52] the substitution of other bonds,[53] or some other means[54] will be sufficient, provided such medium is accepted by the creditor as payment. But in case the obligor unreasonably delays and refuses to pay a bond, which is payable partly in goods and partly in money, he may be compelled to pay the whole bond in money.[55] Payment may also be presumed from lapse of time in the absence of some acknowledgment or circumstance to rebut such presumption.[56]

b. Effect of Payment. An overpayment by one of several obligors, each bound for himself alone, does not inure to the benefit of the others;[57] but a payment of the full amount of the bond by one of several joint obligors will operate as a satisfaction thereof;[58] and where a bond has been fully discharged equity will decree its cancellation.[59] But for the retention of a bond by the obligee after it has been paid no action will lie.[60]

c. Extension of Time For Payment. An extension of time for the payment of a bond may be validly made by a parol agreement.[61] And where after maturity an agreement is made between one of the obligors and the obligee as to

Again, where a note is conditioned that the obligor shall have credit upon returning a note to the obligee a plea of payment is not sustained by a return of such note at the time of trial. Bryan *v.* Drake, 20 N. C. 56. But where a note which is payable in specific articles is assigned as collateral security to a bond and a new contract is made between the assignee and the maker all parties to the bond are thereby discharged. Wales *v.* Cooke, 13 N. C. 183.

51. Payment of obligee's debts.— The payment by the obligor of a bond on which the obligee is indebted to a third party may operate as a payment. Huffmans *v.* Walker, 26 Gratt. (Va.) 314. Again, where a bond with a certain fixed penalty was conditioned for the payment by the obligor of all the debts of a firm, it was held that the bond was satisfied, where it appeared that the obligor had, for the purpose of indemnifying the plaintiff, who was one of the firm, against such debts, paid an amount in excess of such penalty. Spencer *v.* Perry, 18 Mich. 394.

52. Transfer of property.— Payment may be by a deed to lands. Miller *v.* Kerr, 1 Bailey (S. C.) 4. But a verbal agreement to deliver property at a future day will not operate as a payment. Rhodes *v.* Chesson, 44 N. C. 336. The disposition, however, by the obligee with the consent of one of the obligors of property, for the delivery of which within a certain time the bond is conditioned, will not be construed as a prevention by the obligee of the performance of the condition but rather as a payment *pro tanto* of the sum which the bond was given to secure. Wildes *v.* Wade, 8 Cush. (Mass.) 579.

53. Substitution of other bonds.— Bush *v.* Kilcrease, 1 Strobh. (S. C.) 419. See also Vanhook *v.* Williams, 19 N. C. 259. But see Bailey *v.* Wright, 3 McCord (S. C.) 484; Texas *v.* White, 10 Wall. (U. S.) 68, 19 L. ed. 839.

54. So delivery to a bond creditor of property of a testator has been decided to be a payment of the bond, though delivered to him as residuary legatee (Stephenson *v.* Axson, 1 Bailey Eq. (S. C.) 274); as has also a receipt to one of the obligors on a joint and several bond, such receipt being one half of the amount of the judgment recovered in full of the defendant's part thereof (Brown *v.* Ayer, 24 Ga. 288). So again there was held to be *prima facie* a satisfaction of a bond, where the executor of the principal obligor paid the same and took an assignment thereof to himself. Richardson *v.* Mitchell, 2 Hill (S. C.) 352. And it has also been held that the payment of the costs in a suit pending between the parties in accordance with a parol agreement between such parties that the bond should be surrendered when the obligor paid such costs is a sufficient discharge of the bond. Walters *v.* Walters, 34 N. C. 28, 55 Am. Dec. 401. But a bond will not be discharged by an agreement under seal that, on payment of a less sum than the real debt mentioned in the condition, it shall be void. Inman *v.* Griswold, 1 Cow. (N. Y.) 199.

55. Cotton *v.* Campbell, Ky. Dec. 24.

56. Fleming *v.* Rothwell, 5 Harr. (Del.) 46; Derham *v.* Greenly, 2 Harr. (Del.) 124; Bartlett *v.* Bartlett, 9 N. H. 398; Atkinson *v.* Dance, 9 Yerg. (Tenn.) 424, 30 Am. Dec. 422.

57. Pettingill *v.* Pettingill, 64 Me. 350.

58. Carroll *v.* Bowie, 7 Gill (Md.) 34, where it is held that the only remedy of the obligor in such a case is to recover from the other sureties their proportionate share on the whole sum from the principal.

As to payment by one surety operating as a discharge see also State *v.* Blakemore, 7 Heisk. (Tenn.) 638. But see McCormick *v.* Irwin, 35 Pa. St. 111, wherein it is held that equity will restrain an obligor who ought to have paid the bond from urging that the bond is discharged by reason of the payment of the full amount by another obligor.

59. Mershon *v.* Commonwealth Bank, 6 J. J. Marsh. (Ky.) 438.

60. Winans *v.* Denman, 2 N. J. L. 116.

61. Van Syckel *v.* O'Hearn, 50 N. J. Eq. 173, 24 Atl. 1024; Bell *v.* Romaine, 30 N. J. Eq. 24; Vanhouten *v.* McCarty, 4 N. J. Eq. 141.

an extension of time for payment, in terms more beneficial to the latter, the bond will not be invalidated as to the other obligee because of such agreement.[62] And an acceptance of a payment of part of the obligation received by the bond may operate as granting an extension of time for the payment of the balance, but such extension would be for a reasonable time only.[63]

d. Indorsement of Payment. An indorsement of a credit on a bond is *prima facie* evidence of a payment of the amount indorsed.[64] But where the debt is payable in instalments an indorsement of the payment of a particular instalment is not evidence of the payment of prior instalments.[65]

e. To Whom Made. A person in possession of a negotiable bond is *prima facie* the owner thereof with the right to accept payment in discharge of the same,[66] and this principle is applicable to the case of possession by an agent.[67] Where, however, the person in possession of the bond had wrongfully abstracted it from a sealed package left in his possession payment to him was held invalid.[68]

4. Strict or Substantial Performance. A strictly literal compliance with the terms of a condition is not in all cases essential, but a compliance which accomplishes the substantial object of the undertaking may be sufficient.[69] The doctrine, however, as to partial performance of mutual covenants which go to a part only of the consideration on both sides, where the part unperformed can be compensated in damages, has been declared inapplicable in the case of a penal bond for the payment of money on the performance of a condition precedent.[70]

5. What Will Excuse Performance — a. In General. Numerous decisions are to the effect that if at the time of the execution of a bond its condition is impossible of performance the bond becomes absolute as if no condition had been imposed, but where it is possible at the time of execution but subsequently becomes impossible either by act of God, or of the law,[71] or of the obligee[72] the bond is

62. *In re* Hutchinson, 2 Hughes (U. S.) 245, 12 Fed. Cas. No. 6,954.

63. Litchfield *v.* Litchfield, 49 Me. 107.

64. Clark *v.* Simmons, 4 Port. (Ala.) 14, where it was so held, though an attempt had been made to erase the same. Where, however, the holder of a bond payable to C allowed and entered a set-off thereon in favor of B, the obligor, it was held not a part payment as to C. Woodhouse *v.* Simmons, 73 N. C. 30.

65. Sennett *v.* Johnson, 9 Pa. St. 335.

66. Keeney *v.* Chilis, 4 Greene (Iowa) 416; Stoney *v.* McNeill, Harp. (S. C.) 156.

67. Morton *v.* Fox, 4 Bibb (Ky.) 392; Williams *v.* Walker, 2 Sandf. Ch. (N. Y.) 325, 3 N. Y. Leg. Obs. 204. But see Brown *v.* Taylor, 32 Gratt. (Va.) 135.

68. Lawson *v.* Nicholson, 52 N. J. Eq. 821, 31 Atl. 386. See also *supra*, IV, B, 2, c, (VI).

69. **This principle has been applied** in the case of a bond for a stay of proceedings until the return of a commission issued to take a deposition where, though the deposition was obtained, it was never returned but the witness himself appeared. Wing *v.* Rogers, 138 N. Y. 361, 34 N. E. 194, 52 N. Y. St. 888 [*reversing* 62 Hun (N. Y.) 38, 17 N. Y. Suppl. 153, 42 N. Y. St. 331]. And again, where a bond was given to pay a certain sum in case the obligor was cleared of several suits in the superior court, and he was cleared of all but one, in which he was convicted but an appeal was taken, judgment reversed and obligor discharged. Candler *v.* Trammell, 29 N. C. 125. So also where a bond was given conditioned on the completion of a railroad to a certain village and it was completed to the outskirts of such village. O'Neal *v.* King, 48 N. C. 517.

70. Rives *v.* Baptiste, 25 Ala. 382.

And the discontinuance of an action against one of two principals has been held not to discharge a bond to dissolve an attachment against the goods of both, conditioned for the payment of "the amount, if any, which he shall recover in such action." Poole *v.* Dyer, 123 Mass. 363.

71. **That by operation of the law** a bond is discharged see the following cases:

Iowa.— Daniels *v.* Bowe, 25 Iowa 403, 95 Am. Dec. 797.

Mississippi.— Brown *v.* Dillahunty, 4 Sm. & M. (Miss.) 713, 43 Am. Dec. 499.

Missouri.— Olive *v.* Alter, 14 Mo. 185.

New York.— People *v.* Bartlett, 3 Hill (N. Y.) 570.

Ohio.— Harter *v.* Morris, 18 Ohio St. 492; Secrest *v.* Barbee, 17 Ohio St. 425.

Pennsylvania.— Bain *v.* Lyle, 68 Pa. St. 60.

Tennessee.— Green *v.* Smith, 4 Coldw. (Tenn.) 436.

United States.— U. S. *v.* Humason, 6 Sawy. (U. S.) 199, 26 Fed. Cas. No. 15,421, 8 Am. L. Rec. 466, 12 Chic. Leg. N. 138, 26 Int. Rev. Rec. 12, 9 Reporter 107.

72. **Act of obligee** rendering performance impossible will excuse non-performance of condition. Pindar *v.* Upton, 44 N. H. 358; Detroit *v.* Burr, 56 N. Y. 665 [*affirming* 35 N. Y. Super. Ct. 522]; Stewart *v.* Cuyler, 17 Barb. (N. Y.) 482; Giles *v.* Crosby, 5 Bosw. (N. Y.) 389; Gibson *v.* Dunnam, 1 Hill (S. C.) 289, 26 Am. Dec. 180. The act of the obligee

discharged.[73] But where the conditions of the bond clearly require the performance of certain acts the intent as expressed must control; performance cannot be excused by extrinsic circumstances, except as already noted, which would tend to show an intent other than that expressed.[74] And performance of the condition will not be excused by a voluntary act on the part of the obligor.[75]

b. Waiver of Performance. Performance of the conditions of a bond cannot be released or waived by a parol executory agreement;[76] but after a breach a right of action on the bond may, however, be waived by parol,[77] and performance may be accepted thereafter which will save forfeiture of the penalty.[78] Again, a refusal of the obligor to accept a sufficient tender of performance of conditions imposed on the obligee will not affect the right of the latter to maintain an action on the bond.[79]

B. Breach of Condition — 1. In General. It is a general rule that to save the bond the condition must be performed,[80] and in the absence thereof, a breach being established, recovery may be had against the obligors.[81] In determining

may also excuse performance in the case of a bond conditioned to support him at a certain place, where he leaves such place (Jenkins *v.* Stetson, 91 Mass. 128; Howe *v.* Howe, 10 N. H. 88; Hawley *v.* Morton, 23 Barb. (N. Y.) 255); and likewise where he fails to perform his part of a contract in consideration of which the bond was executed (Bagley *v.* Clarke, 7 Bosw. (N. Y.) 94); or violates the conditions of a bond similarly executed (Davies *v.* Beadle, 37 Iowa 390).

73. *Alabama.*—Falls *v.* Weissinger, 11 Ala. 801.

Kentucky.— Keas *v.* Yewell, 2 Dana (Ky.) 248.

Massachusetts.— Badlam *v.* Tucker, 1 Pick. (Mass.) 284; Baylies *v.* Fettyplace, 7 Mass. 325.

Mississippi.— Irion *v.* Hume, 50 Miss. 419.

New York.— Mounsey *v.* Drake, 10 Johns. (N. Y.) 27.

United States.— U. S. *v.* Mitchell, 3 Wash. (U. S.) 95, 26 Fed. Cas. No. 15,792; U. S. *v.* Dixey, 3 Wash. (U. S.) 15, 25 Fed. Cas. No. 14,967.

See 8 Cent. Dig. tit. "Bonds," § 116.

Rule applied in particular cases.—An overflow of land will not excuse performance of a condition to have such land cleared of timber by a certain time. Sillivant *v.* Reardon, 5 Ark. 140. Nor will the fact that a bridge is washed away excuse performance of a condition to build and keep in repairs. Gathwright *v.* Callaway County, 10 Mo. 663. And a contract extending the time of performance is no excuse for non-performance where such contract is not performed. Washburn *v.* Mosely, 22 Me. 160. Nor will an agreement between the obligee and a third person release the obligor from his liability. Baylor *v.* Morrison, 2 Bibb (Ky.) 103. But where a bond was conditioned upon sufficient consideration for the payment of a certain sum of money to a son-in-law, provided he lost a certain situation before the remarriage of the obligor, such obligation cannot be enforced where the obligee voluntarily resigns his position before such remarriage. Shafer *v.* Senseman, 125 Pa. St. 310, 24 Wkly. Notes Cas. (Pa.) 208, 17 Atl. 350.

74. Meriwether *v.* Lowndes County, 89 Ala. 362, 7 So. 198; Engler *v.* People's F. Ins. Co., 46 Md. 322.

75. So enlistment in the army is not an excuse for the failure of an insolvent to appear according to his bond (State *v.* Reaney, 13 Md. 230); or absence from the state, for in such a case it is his duty to appoint an agent to act for him (Tasker *v.* Bartlett, 5 Cush. (Mass.) 359). So again the default of the obligor will not excuse the performance of the conditions of a bond with covenants. Miller *v.* Nichols, 1 Bailey (S. C.) 226.

76. Haynes *v.* Fuller, 40 Me. 162. See also Levy *v.* Very, 12 Ark. 148.

77. Levy *v.* Very, 12 Ark. 148.

But where the condition of a bond provided that the obligor would accept orders of the obligee to a specified amount, upon conveyance of land to him as security therefor, the obligor to reconvey such land upon payment of his advances and services, it was held that past breaches were not waived where the obligee procured a third person to accept for the benefit of the obligee a reconveyance of the land from the obligor. Small *v.* Breed, 3 Allen (Mass.) 200.

78. Hogins *v.* Arnold, 15 Pick. (Mass.) 259.

79. Boardman *v.* Keeler, 21 Vt. 77.

80. As to performance see *supra*, V, A.

81. Condition for payment of instalments. — Where a bond is conditioned for the payment of certain instalments a failure to pay the first instalment will constitute a breach of the condition. Cocke *v.* Stuart, 2 Overt. (Tenn.) 231; Nailor *v.* Kearney, 1 Cranch C. C. (U. S.) 112, 17 Fed. Cas. No. 10,004. See also Hopkins *v.* Deaves, 2 Browne (Pa.) 93; Talbot *v.* Hodson, 2 Marsh. 527, 7 Taunt. 251, 2 E. C. L. 348; Judd *v.* Evans, 6 T. R. 399; Coates *v.* Hewit, 1 Wils. K. B. 80. But see *contra*, State *v.* Scoggin, 10 Ark. 326.

Condition not to engage in business.— Again a frequent condition is that the obligor shall not engage in a certain line of business within a certain district. So a condition that the obligor shall not open or keep another shop in the same town is broken by the pur-

whether there has been a breach of the condition of a bond the same general principles control as upon the question of performance;[82] the intent of the parties should govern, and this being determined the question depends upon the act or acts of the obligor in the particular case, or in some instances the act of the obligee.[83] It is not necessary in a penal bond to expressly provide that in case of a breach of the condition the entire bond shall become forfeited, for such a result is implied in case of a breach.[84] And where the condition has been broken a subsequent tender of performance will not relieve the obligor from liability

chase of a shop already in operation. Burrill *v.* Daggett, 77 Me. 545, 1 Atl. 677. And a condition not to engage in the sale of fish is broken by engaging in the sale of oysters. Caswell *v.* Johnson, 58 Me. 164. And owning stock in a corporation engaged in the same line of business is also a breach of a condition not to engage in such business. Whitney *v.* Slayton, 40 Me. 224. But the taking of an order for merchants in the same town, the goods to be sent to a distant city, and the selling of goods a few times in such merchants' store as a matter of accommodation while they were absent is not a breach of a condition not to engage in business in a certain town. Levitsky *v.* Johnson, 35 Cal. 41.

Condition to pay debts of obligee.— So, too, the question has arisen in the case of a bond which is conditioned that the obligor shall pay certain debts of the obligee, in which instance the condition is broken by non-payment (Pierce *v.* Plumb, 74 Ill. 326; Shattuck *v.* Adams, 136 Mass. 34; Kohler *v.* Mattlage, 42 N. Y. Super. Ct. 247; Browne *v.* French, 3 Tex. Civ. App. 445, 22 S. W. 581); or where the debt is a note by non-payment at maturity (Stewart *v.* Clark, 11 Metc. (Mass.) 384. See Fish *v.* Dana, 10 Mass. 46).

Condition to support another.— Again a condition that the obligor shall support another is broken by failure to furnish such support. Empie *v.* Empie, 35 N. Y. App. Div. 51, 54 N. Y. Suppl. 402; Scheive *v.* Kaiser, 52 Barb. (N. Y.) 109, 36 How. Pr. (N. Y.) 193; Shaffer *v.* Lee, 8 Barb. (N. Y.) 412. But where the condition is that the obligor shall support the obligee at the former's house, there is no breach where the obligee remains away without any cause therefor, but a demand and refusal for support will, however, constitute a breach. Farnum *v.* Bartlett, 52 Me. 570. And the condition will be broken where the treatment of the obligee is such as to compel him to leave. Smith *v.* Smith, 34 Wis. 320.

Other illustrations.— As to what constitutes a breach see the following decisions wherein, under the particular facts, there has been held no breach of a bond conditioned for the payment of all costs and damages (Thayer *v.* Hurlburt, 5 Iowa 521; Murrell *v.* Johnson, 1 Hen. & M. (Va.) 450); for the satisfaction of a judgment (Huntress *v.* Burbank, 111 Mass. 213); to keep a bridge in repair and continuously safe for a certain period (Meriwether *v.* Lowndes County, 89 Ala. 362, 7 So. 198); that a wall should last a certain period of time (Ready *v.* Tuskaloosa, 6 Ala. 327); for failure to return a boat in as good a condition as when leased (Clifford *v.* Smith, 4 Ind. 377); for failure to complete and deliver a vessel (Crowell *v.* Brown, 9 Gray (Mass.) 274); to pay a certain sum when a certain person shall cease to act as minister of a specified church (Bacon *v.* Lane, 21 Pick. (Mass.) 130 note); to pay a certain sum in case a decision is rendered in favor of the obligee as to his right to a share in certain property (Gyles *v.* Valk, 2 Speers (S. C.) 460); to perform work and labor (Boardman *v.* Keeler, 21 Vt. 77); to reconvey land upon the payment of certain debts due the obligor (Douglas *v.* Hennessy, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583); that a seaman shall proceed to sea and in default thereof pay advances (Backman *v.* Hanson, 2 E. D. Smith (N. Y.) 391; Woodside *v.* Pender, 2 E. D. Smith (N. Y.) 390); by grantee of land not to permit a canal to be dug across such land (Bennet *v.* Kennedy, 7 Wend. (N. Y.) 163); of commissioner in partition proceedings to sell real estate and account for proceeds (Williams *v.* State, 87 Ind. 527); and by a private banker for repayment of funds deposited with him (Poor *v.* Merrill, 68 Iowa 436, 27 N. W. 367).

On the other hand, for cases holding that there has been under the particular facts of the case no breach of the condition see the following citations, wherein the question has been considered in the case of a bond conditioned on the discharge of obligee from all claims held against him (Bignall *v.* Gould, 119 U. S. 495, 7 S. Ct. 294, 30 L. ed. 491); to pay taxes (Smith *v.* Smith, 34 Wis. 320); to pay a note indorsed by obligee (Franks *v.* Hamilton, 29 Ga. 139); to repay money paid and advanced to obligor's wife (Evans *v.* Leis, 2 Pennyp. (Pa.) 55); to erect and deliver a structure free from mechanics' liens (Hahn *v.* Wickham, 55 Iowa 545, 8 N. W. 358); to perform order or decree of court (Morgan *v.* Morgan, 4 Gill & J. (Md.) 395); to save harmless from an attachment (Tufts *v.* Hayes, 31 N. H. 138); to abide by the constitution of an association (Troy Mfg. Co. *v.* Star Knitting Co., 67 Hun (N. Y.) 611, 22 N. Y. Suppl. 435, 51 N. Y. St. 346); to not withdraw a proposal as to the furnishing of supplies (U. S. *v.* McAleer, 68 Fed. 146, 32 U. S. App. 335, 15 C. C. A. 326); for the forthcoming of property (Trotter *v.* White, 26 Miss. 88; Hall *v.* Paschall, 27 N. C. 668. See also Jacobs *v.* Daugherty, 78 Tex. 682, 15 S. W. 160); and for the performance of an award within a certain time (Eames *v.* Carlisle, 4 N. H. 201).

82. See *supra*, V, A.
83. See cases cited *supra*, note 81.
84. Quintard *v.* Corcoran, 50 Conn. 34.

where unaccepted.[85] Again, though a bond may be valid as to only one of the obligors and invalid as to the rest, yet if the condition be broken by the one as to whom it is valid the entire penalty will be forfeited.[86]

2. Failure to Exhaust Legal Remedies Against Principal. In the case of a condition imposed upon the holder of a bond that he will exhaust all legal remedies against the principal before suing the sureties it is not violated where suit is brought in the first instance against the latter, the principal being insolvent.[87]

3. Non-Payment of Interest. Non-payment of annual or semiannual instalments of interest due before the bonds mature is not a breach of a condition to pay bonds at maturity, where no reference is made to the payment of such instalments, though they are promised by the bonds, and there can be no breach of the condition until the time named for paying the principal arrives.[88] But where a bond is conditioned that, upon failure to pay any instalment of interest when due or within a stipulated time thereafter, the entire principal sum shall become due at the option of the obligee, a failure to pay interest operates as a breach of the condition;[89] and the option may be exercised within a reasonable time after default.[90] But if the non-payment of interest is due to some act of the obligee there is no breach of the condition.[91] And a mistake as to the condition may also relieve from forfeiture.[92] Relief will not, however, be granted from a forfeiture caused by the negligence or carelessness of the obligor.[93]

4. Where Bond Is That of Agent or Employee — a. In General. A bond for the faithful performance of the duties of an agent or employee in a particular line of employment is to be construed as an undertaking for his fidelity and honesty commensurate with the scope of his duties.[94] The intent of the parties as apparent from the terms of the instrument should control.[95] And the liability of the sureties cannot be extended by implication.[96] And a bond conditioned that an

85. Bolster *v.* Post, 57 Iowa 698, 11 N. W. 637.

86. Presbury *v.* Fisher, 18 Mo. 50.

87. Heralson *v.* Mason, 53 Mo. 211.

88. U. S. *v.* Union Pac. R. Co., 91 U. S. 72, 23 L. ed. 224.

89. Baldwin *v.* Van Vorst, 10 N. J. Eq. 577; Rubens *v.* Prindle, 44 Barb. (N. Y.) 336; Ferris *v.* Ferris, 28 Barb. (N. Y.) 29; People *v.* New York City Super. Ct., 19 Wend. (N. Y.) 104; Makin *v.* Worrell, 1 Del. Co. (Pa.) 339; Berrinkott *v.* Traphagen, 39 Wis. 219; Wood *v.* Consolidated Electric Light Co., 36 Fed. 538; Marlor *v.* Texas, etc., R. Co., 19 Fed. 867. See also Rozenkrantz *v.* Durling, 29 N. J. L. 191.

90. Berrinkott *v.* Traphagen, 39 Wis. 219.

91. De Groot *v.* McCotter, 19 N. J. Eq. 531. So held where funds are at a place designated for payment but no presentation or demand is made by the obligee. Warner *v.* Rising Fawn Iron Co., 3 Woods (U. S.) 514, 29 Fed. Cas. No. 17,188. And also where no place is named for payment and the obligee is absent from the state, the obligor, however, being ready and willing to pay within the state. Hale *v.* Patton, 60 N. Y. 233, 19 Am. Rep. 168.

92. Martin *v.* Melville, 11 N. J. Eq. 222.

93. De Groot *v.* McCotter, 19 N. J. Eq. 531.

94. So held in the case of a bond given by the secretary of an insurance company. Engler *v.* Peoples F. Ins. Co., 46 Md. 322.

As to "faithful performance" see also Frink *v.* Southern Express Co., 82 Ga. 33, 8 S. E. 862, 3 L. R. A. 482, which was an action on a bond given by an express messenger, and money intrusted to his care being taken in his absence the sureties on the bond were held liable.

And where a bond given by a coroner is conditioned for the "faithful performance" of his duties, the taking, on a writ against one person, of the property of another, is a breach of such condition. Harris *v.* Hanson, 11 Me. 241.

95. So a bond of the secretary of a building association covers all moneys received by him in such capacity, whether or not they are paid to him weekly as provided in the by-laws. Tyler *v.* Old Post Bldg. Assoc., 87 Ind. 323.

And where an agent collects moneys which he pays to the principal with instructions to apply them to the accounts of other debtors from whom he had collected and misappropriated money prior to the period covered by the bond this has been held to be a defalcation rendering the sureties liable. American Bonding, etc., Co. *v.* Milwaukee Harvester Co., 91 Md. 733, 48 Atl. 72.

96. Chicago, etc., R. Co. *v.* Higgins, 58 Ill. 128, wherein the rule was applied in an action on the bond of a freight agent, the sureties being held not liable for deficits in his accounts arising from default of his subordinates appointed by the company. See also Humboldt Sav., etc., Soc. *v.* Wennerhold, 81 Cal. 528, 22 Pac. 920, where sureties on bond of a secretary of a society were held not lia-

agent shall pay over and account for all moneys received by him as agent is not to be construed as an insurance of the company's funds against inevitable accident or theft without any negligence on the agent's part.[97]

b. Bank Officer's Bond. A condition in the bond of a bank official that he shall well and truly execute the duties of his office includes not only honesty but reasonable skill and diligence, and therefore if those duties are performed negligently and unskilfully, or if they are violated by the official from want of capacity or want of care, they cannot be said to have been well and truly executed and the condition is broken;[98] and this rule has been applied to the bond of the president,[99] of the cashier,[1] and of the teller,[2] as well as to the bond of the account-

ble for moneys taken by him which did not belong to the society though in its vaults.

Again, where the bond of an insurance agent was conditioned that he should "receive and forward applications for and deliver policies, and receive and forward premiums upon the same," it was held that the sureties on such bond were not liable for premiums received by him from parties insured by a former agent. Crapo *v.* Brown, 40 Iowa 487.

97. Chicago, etc., R. Co. *v.* Bartlett, 20 Ill. App. 96; Baltimore, etc., R. Co. *v.* Jackson, (Pa. 1886) 3 Atl. 100. Liability, however, was held to be incurred on a bond conditioned for the faithful discharge of the duties of an express messenger, where he locked the money in a safe in a car standing considerable distance from a depot with no house near, in a locality frequented by gamblers and roughs, and remained away for several hours, during which the money was taken. Frink *v.* Southern Express Co., 82 Ga. 33, 8 S. E. 862, 3 L. R. A. 482.

98. *Kentucky.*—Batchelor *v.* Planters Nat. Bank, 78 Ky. 435.

Louisiana.— Union Bank *v.* Thompson, 8 Rob. (La.) 227.

Massachusetts.— American Bank *v.* Adams, 12 Pick. (Mass.) 303.

New Jersey.— Elizabeth State Bank *v.* Chetwood, 8 N. J. L. 1.

Pennsylvania.— Barrington *v.* Washington Bank, 14 Serg. & R. (Pa.) 405.

United States.— Minor *v.* Alexandria Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47; Union Bank *v.* Forrest, 3 Cranch C. C. (U. S.) 218, 24 Fed. Cas. No. 14,356.

See 8 Cent. Dig. tit. "Bonds," § 121; and, generally, BANKS AND BANKING, *ante*, p. 419.

But see *contra*, Morris Canal, etc., Co. *v.* Van Vorst, 21 N. J. L. 100; Union Bank *v.* Clossey, 10 Johns. (N. Y.) 271; U. S. Bank *v.* Brent, 2 Cranch C. C. (U. S.) 696, 2 Fed. Cas. No. 910; Alexandria *v.* Corse, 2 Cranch C. C. (U. S.) 363, 1 Fed. Cas. No. 183.

99. Bond of president.—Where a bank president permits a customer to take away securities for inspection and a loss ensues as a result of such act liability will be incurred on a bond given by the president for the faithful discharge of his duties and evidence that such an act was customary among banks is inadmissible. Citizens' Bank *v.* Wiegand, 12 Phila. (Pa.) 496, 35 Leg. Int. (Pa.) 28.

1. Bond of cashier.— The sureties on a cashier's bond are not liable thereon for money of which he has been violently robbed while in the discharge of his duty (Planters' Bank *v.* Hill, 1 Stew. (Ala.) 201, 18 Am. Dec. 39); nor for losses occurring through the delinquency of other officers who are given access to the property lost (La Rose *v.* Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805); nor for his not accounting for money collected by him as an attorney at law (Dedham Bank *v.* Chickering, 4 Pick. (Mass.) 314); nor where shares of stock pledged by him as security for the payment of notes to the bank are surreptitiously transferred by him to a third party (Dedham Bank *v.* Chickering, 4 Pick. (Mass.) 314). But they are responsible for money lost by him in speculation utterly unauthorized, though he had exclusive authority to transact all the bank's business (Wallace *v.* Spencer Exch. Bank, 126 Ind. 265, 26 N. E. 175); where he exceeds his authority by changing securities of the bank (Barrington *v.* Washington Bank, 14 Serg. & R. (Pa.) 405); where new bills made by consent of the directors and intended to be privately kept and surreptitiously issued by the cashier in violation of a statute are embezzled by him (Dedham Bank *v.* Chickering, 4 Pick. (Mass.) 314); where he embezzled the bank's funds under pretense of borrowing them (McShane *v.* Howard Bank, 73 Md. 135, 20 Atl. 877, 10 L. R. A. 552); where his salary being paid in advance he pays himself a second time (Menard *v.* Davidson, 3 La. Ann. 480); where he does not account for moneys received by him for deposit out of the bank or not in banking hours (Pendleton *v.* State Bank, 1 T. B. Mon. (Ky.) 171); where he omits to credit to another bank money received by him with directions to so credit it (State Bank *v.* Locke, 15 N. C. 529); where he so misappropriates stock put in a separate envelope for the purpose of evading the national banking laws, the stock being assigned to him as security for a loan from the bank (Walden Nat. Bank *v.* Birch, 130 N. Y. 221, 29 N. E. 127, 41 N. Y. St. 275, 14 L. R. A. 211 [*affirming* 7 N. Y. Suppl. 934, 28 N. Y. St. 98]); or where he omits to forward to a state treasurer duties on dividends declared by the bank (Washington Bank *v.* Barrington, 2 Penr. & W. (Pa.) 27). And where he neglects to perform the duty of being sworn before he enters upon the duties of his office it will constitute a breach of the bond. Elizabeth State Bank *v.* Chetwood, 8 N. J. L. 1.

2. Bond of teller.— Where damage has been sustained owing to want of care on the

ant,[3] bookkeeper,[4] and bank messenger.[5] And a breach of such a condition cannot be excused by any act or vote of the directors of the bank which is contrary to their duties and in fraud of the rights and interests of the stockholders.[6]

VI. ACTIONS.[7]

A. Right of Action and Defenses — 1. Right of Action — a. Nature and Grounds of Action — (I) *Generally.* There may be a recovery in different suits for different breaches, though arising out of the same bond of indemnity.[8] But to maintain an action for breach of the condition of a penal bond it must be alleged and proved that damage has been sustained.[9] Where, however, a bond is conditioned for the performance of some act, as for instance to erect a structure or build fences, the necessity of such structure or fences need not be alleged or proved.[10] And though an obligor has lost collateral security placed in the hands of the obligee by his negligence, it will not prevent the maintenance of the action, it not being available as a set-off or in defense thereto.[11]

(II) *Divisible Agreements.* Where there are two distinct agreements, one may subsist though the other be impossible of performance, and an action may be maintained on the one capable of being performed.[12]

(III) *Time of Performance Extended.* Where by an agreement between

part of a teller the liability of the sureties cannot be controlled by a usage among banks to require of such officer only that degree of care which an ordinarily prudent man would exercise where the bond is expressly conditioned against such damage. Union Bank *v.* Forrest, 3 Cranch C. C. (U. S.) 218, 24 Fed. Cas. No. 14,356. And the neglect of the cashier to settle the daily accounts of the teller will not relieve from liability for failure of the latter to make good a certain amount to the bank. Union Bank *v.* Forrest, 3 Cranch C. C. (U. S.) 218, 24 Fed. Cas. No. 14,356. And concealment of deficiencies that first arose from mistake will constitute a breach of the bond. Union Bank *v.* Clossey, 11 Johns. (N. Y.) 182. But a custom of a bank to receive as cash checks on other banks by individuals in good credit will save a breach of the teller's bond, where that officer receives such a check which is never paid. Union Bank *v.* Mackall, 2 Cranch C. C. (U. S.) 695, 24 Fed. Cas. No. 14,359.

3. Bond of accountant. — The sureties on an accountant's bond which is conditioned for the faithful performance by him of the duties of that office but who is not intrusted with or put in possession of any moneys of the bank are not liable for moneys taken by him from the teller's drawer. Allison *v.* Farmers' Bank, 6 Rand. (Va.) 204.

4. Bond of bookkeeper. — The sureties on a bookkeeper's bond conditioned for faithful performance by him of the duties of his office and all other duties required of him in said bank are liable for money misappropriated by him. Planters' Bank *v.* Lamkin, R. M. Charlt. (Ga.) 29; Rochester City Bank *v.* Elwood, 21 N. Y. 88.

5. Bond of messenger. — Where the bond of a bank messenger is conditioned "that he shall in all things conduct himself honestly and faithfully as such messenger" a larceny of the bank's money by him will operate as a breach of such condition, whether he was acting within the scope of his employment or not (German American Bank *v.* Auth, 87 Pa. St. 419, 30 Am. Rep. 374); and intrusting him with the keys of the bank's vault and the combination of its safe is not negligence (German American Bank *v.* Auth, 87 Pa. St. 419, 30 Am. Rep. 374).

6. Minor *v.* Alexandria Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47.

7. As to actions by assignee of bond see *supra*, IV, B, 2, b, (III), (E).

8. Orendorff *v.* Utz, 48 Md. 298; New Holland Turnpike Co. *v.* Lancaster County, 71 Pa. St. 442. *Contra*, Black *v.* Caruthers, 6 Humphr. (Tenn.) 87.

9. Kelley *v.* Seay, 3 Okla. 527, 41 Pac. 615. See also Curtiss *v.* Hutchinson, 4 Ohio Dec. (Reprint) 19, Clev. L. Rec. 19. So in a bond to secure the payment of another's debts mere legal liability of the obligor to pay such debts is insufficient, but payment by him or that which the law considers equivalent to payment or some loss or damage resulting to him by reason of the non-payment by the debtor must be shown. Harvey *v.* Daniel, 36 Ga. 562.

Though the issue of non est factum is found for plaintiff in an action of debt on the bond, yet if it appears from the other pleadings that the condition has not been broken, or if broken has been adjusted, there can be no recovery. Cheshire Bank *v.* Robinson, 2 N. H. 126.

Where a bond has been adjudged void by the court, an action for breach thereof or non-performance of the agreement cannot be maintained. Rhoads *v.* Jones, 95 Ind. 341.

10. Farley *v.* Moran, (Cal. 1892) 31 Pac. 158.

11. Franklin Bank *v.* Bartlet, Wright (Ohio) 741.

12. Eaton *v.* Stone, 7 Mass. 312. See also *supra*, III, E, 2; III, F, 4, 6.

In case of a bond for the payment of a specific sum with interest, the demand for prin-

the parties to a bond the time of performance is extended, the remedy is not on the bond for the penalty, but on the agreement which substantially incorporates in it all the stipulations in the bond.[13]

b. Nature and Form of Remedy — (I) *Covenant or Debt.* Covenant will not lie on the words of a penal bond, such words being inserted by way of condition or defeasance by the performance of some collateral act,[14] unless the breach assigned is non-payment of the penalty and not non-performance of the condition.[15] An action of debt which is an action founded on an express contract in which the certainty of the sum duly appears or may be readily determined is the proper remedy to recover the penalty of a bond.[16]

(II) *Remedy in Equity* — (A) *Generally.* The inability of one of the obligees in a bond who is also an obligor to sue himself thereon amounts only to an objection to a recovery in a court of law, and the bond may be enforced in equity,[17] and a suit by an equitable owner of bonds to recover such bonds or their value is properly brought in equity,[18] as is also a suit by one having a lien on a bond but not the possession,[19] or an action not only for a money judgment, but to adjudicate the priorities of liens against the obligor's lands for which lien-holders, not parties to the bond, are joined as defendants,[20] or where a bond has been lost.[21] But both at law or in equity, if one of two joint obligors who are sureties merely die the debt is extinguished as to him and his estate cannot be pursued and the remaining obligor is alone chargeable,[22] but otherwise where both are principals.[23]

(B) *Bonds of Fiduciaries.* The chancery jurisdiction of suits on bonds of fiduciaries for failure of the principal to account for moneys received, conferred by a constitutional provision,[24] embraces only technical trusts where bonds are required by law, and confers no jurisdiction of suits on bonds for breach of a condition for faithful performance of service under a private contract.[25]

cipal and interest being divisible, the holder of such bond may sue for the principal alone, and need not notice in his declaration the contract for interest. McClure *v.* Cole, 6 Blackf. (Ind.) 290.

13. Ford *v.* Campfield, 11 N. J. L. 327, 20 Am. Dec. 589. See also *supra*, V, A, 3, c.

14. State *v.* Woodward, 8 Mo. 353; Summers *v.* Watson, 1 Cranch C. C. (U. S.) 254, 23 Fed. Cas. No. 13,605; U. S. *v.* Brown, 1 Paine (U. S.) 422, 24 Fed. Cas. No. 14,670. See also, generally, Covenant, Action of.

15. U. S. *v.* Brown, 1 Paine (U. S.) 422, 24 Fed. Cas. No. 14,670. See also Douglas *v.* Hennessy, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 533, holding that covenant will lie where the promise to pay in a bond with a condition of defeasance is expressed in the words "to which payment well and truly to be made I bind myself."

Where a bond is conditioned for payment in current bank money, or in a particular currency, as of a specified state, covenant is the proper remedy. Lackey *v.* Miller, 61 N. C. 26; Dungan *v.* Henderlite, 21 Gratt. (Va.) 149; Beirne *v.* Dunlap, 8 Leigh (Va.) 514.

16. Powell *v.* Clark, 3 N. J. L. 110; McFadgen *v.* Eisensmidt, 10 Humphr. (Tenn.) 566. See also, generally, Debt, Action of.

Bond payable in cotton.— Where a bond is so payable an action of debt has been held proper. Bollinger *v.* Thurston, 2 Mill Const. (S. C.) 447.

Nature of seal as affecting.—An impression of the seal of a corporation made upon the paper of instruments issued by it as bonds and purporting to be under seal is a sufficient seal to make the instruments specialties on which debt may be maintained. Allen *v.* Sullivan R. Co., 32 N. H. 446. And where a bond is signed with an L. S. instead of a seal debt will lie. Meredith *v.* Hinsdale, 2 Cai. (N. Y.) 362 [*overruled* in Andrews *v.* Herriot, 4 Cow. (N. Y.) 508].

17. Glenn *v.* Caldwell, 4 Rich. Eq. (S. C.) 168; Bradford *v.* Williams, 4 How. (U. S.) 576, 11 L. ed. 1109.

The creditors of an obligee for the payment of whose debts a bond has been given may, by a proceeding in equity, obtain the benefit thereof. Kimball *v.* Noyes, 17 Wis. 695.

Where one of two obligees on a bond becomes the administrator of one of several sureties on the same bond, though the remedy at law is suspended as to such deceased surety, the right of the obligees to sue the principal obligor in a court of law is not impaired. McDowell *v.* Butler, 56 N. C. 311.

18. Phelps *v.* Elliott, 29 Fed. 53.

19. Harrison *v.* Burgess, 5 T. B. Mon. (Ky.) 417.

20. Crisfield *v.* Murdock, 55 Hun (N. Y.) 143, 8 N. Y. Suppl. 593, 28 N. Y. St. 460.

21. Foster *v.* Williams, 5 B. Mon. (Ky.) 197.

22. Pickersgill *v.* Lahens, 15 Wall. (U. S.) 140, 21 L. ed. 119.

23. Harrison *v.* Field, 2 Wash. (Va.) 136.

24. See Miss. Const. § 161.

25. Barnard *v.* Sykes, 72 Miss. 297, 18 So. 450.

(iii) *Statutory Bond Enforceable at Common Law.* An action upon a bond to enforce it as a common-law obligation is not prevented by the mere fact that it may be a good statutory bond and enforceable in the method provided by statute.[26]

c. Time to Sue — (i) *Generally.* There must be a breach of the condition of a bond in order that an action thereon may be maintained.[27] The question, however, whether there has been a breach which will enable the obligee to sue must depend upon the wording in each particular case, as showing the intent of the parties,[28] though in some cases the time of bringing suit may depend also on the terms of a statute referring to a particular class of bonds which includes the one in question.[29] Again, where the time of performance is in the alternative at the election of the obligee, an action may be maintained on the bond for a breach of the condition though both periods have not elapsed where the obligee has elected the earlier period for performance.[30]

(ii) *Time as Affected by Covenant or Agreement.* Where a bond has matured suit may be brought thereon notwithstanding a covenant not to sue until the happening of a contingency, but a special action may be brought and damages recovered on the covenant.[31]

26. Bullock *v.* Traweek, (Tex. Civ. App. 1892) 20 S. W. 724.

27. Leonard *v.* Ross, 23 Kan. 292; Rockfeller *v.* Donnelly, 8 Cow. (N. Y.) 623; Spear *v.* Stacy, 26 Vt. 61.

28. **Thus, where a bond is conditioned** that the obligor shall leave the obligee all the personal estate of which he shall die possessed, a different disposition of his property by a will which is proved and allowed in the probate court constitutes a breach of the condition, and an action may be brought at once. Jenkins *v.* Stetson, 9 Allen (Mass.) 128. And where an executor gives a bond to his surety for the payment to the latter of one half the commissions as they are allowed to the former, upon a failure to pay one half of any particular commission, an action may be brought without waiting until the settlement of the estate. Culbertson *v.* Stillinger, Taney (U. S.) 75, 6 Fed. Cas. No. 3,463. But where the obligor agreed to conduct a certain business for a period of years, keep an exact account, and when demanded deliver to the obligee one tenth part of the product, it was held that for a failure to keep an account and deliver to plaintiff on demand an action would not lie until the end of the term. Cottle *v.* Payne, 3 Day (Conn.) 289. And an action on a bond conditioned for the payment of a judgment is premature if brought pending an appeal. Heagney *v.* Hopkins, 22 Misc. (N. Y.) 549, 49 N. Y. Suppl. 1018. See also McArthur *v.* Barnes, 10 Tex. Civ. App. 318, 31 S. W. 212. And where a bond is conditioned that certain notes in the hands of a third person shall be paid an action against the obligor cannot be brought immediately, but he must be given a reasonable time in which to perform the condition. Hart *v.* Bull, Kirby (Conn.) 396.

As to what constitutes a breach of the condition of a bond see *supra*, V, B.

29. Hubbard *v.* Rodger, 75 Hun (N. Y.) 220, 27 N. Y. Suppl. 47, 58 N. Y. St. 675, wherein it is decided that under N. Y. Laws (1850), c. 278, § 3, which provide that sureties on bonds given by contractors for public work to pay laborers shall not be liable "unless proceedings shall be commenced within thirty days after the completion of the labor," an action must be commenced within the period stated after the performance of labor by the one seeking to recover therefor, and does not mean the completion of the entire contract.

30. Hurd *v.* Kelly, 78 N. Y. 588, 34 Am. Rep. 567 [*affirming* 17 Hun (N. Y.) 327].

31. Line *v.* Nelson, 38 N. J. L. 358; Hoffman *v.* Brown, 6 N. J. L. 429 [*citing* Deux *v.* Jefferies, Carth. 63, Cro. Eliz. 352, 5 Bacon Abr. 683].

Where by an agreement under seal between the vendor and vendee of land it was agreed that the former would not sue on the bond for the purchase-money until a certain question should be determined by suit, it was held that an action prematurely brought would be restrained by a court of equity. Bullitt *v.* Songster, 3 Munf. (Va.) 54.

If a bond provides that the principal shall become due at the holder's election in case of a default in payment of the interest, the commencement of an action to recover the principal and interest and the production of the bond are sufficient proof of such election. Rice *v.* Edwards, 131 U. S. Appendix clxxv, 25 L. ed. 976.

Death of surety.— A stipulation in a bond that a suit for breach of condition must be brought within a certain time should be complied with, and where brought within the time stipulated and during the pendency of the suit the surety dies and suit against the administrators of the estate is not brought until after the expiration of the period stipulated, such action may be maintained where due diligence was used in bringing the suit as soon as possible after the administrators were appointed. Eliot Nat. Bank *v.* Beal, 141 Mass. 566, 6 N. E. 742.

(III) *Limitation of Actions.* The statute of limitations may be a good defense to an action on a bond.[32]

d. Conditions Precedent[33]—(I) *Generally.* Conditions are in many cases inserted in a bond in the nature of conditions precedent to liability thereon, and where so inserted a performance of or compliance therewith is a prerequisite to the maintenance of an action to recover on such instrument.[34] And where a bond is conditioned that certain acts shall be done concurrently both by the obligor and obligee, an action cannot be maintained by the latter without showing a tender of performance by him or a waiver thereof by the obligor, or an excuse owing to disability.[35] Courts, however, will not unreasonably limit the rights of the obligee to sue by extending the construction of a condition precedent beyond what the parties clearly intended should be its operation and effect,[36]

32. Dugan *v.* Champion Coal, etc., Co., 105 Ky. 821, 20 Ky. L. Rep. 1641, 49 S. W. 958; and, generally, Limitation of Actions.

Interest coupons though detached are not outlawed until the bonds are. Kelly *v.* Forty-Second St., etc., R. Co., 37 N. Y. App. Div. 500, 55 N. Y. Suppl. 1096.

If there are several breaches, the statute will run only as to each breach, and though an action on one or more breaches may be barred others may not be within the limitation. Midway's Deposit Bank *v.* Hearne, 104 Ky. 819, 20 Ky. L. Rep. 1019, 48 S. W. 160.

33. As to conditions precedent, generally, see Actions, I, N [1 Cyc. 692].

34. *Alabama.*— Rives *v.* Baptiste, 25 Ala. 382.

Kansas.— Noble *v.* Bowman, 35 Kan. 15, 10 Pac. 143.

Maryland.— Pistel *v.* Imperial Mut. L. Ins. Co., 88 Md. 552, 42 Atl. 210, 43 L. R. A. 219.

Missouri.—Weed Sewing Mach. Co. *v.* Philbrick, 70 Mo. 646.

New York.— Ferris *v.* Purdy, 10 Johns. (N. Y.) 359; Gouverneur *v.* Tillotson, 3 Edw. (N. Y.) 348.

See 8 Cent. Dig. tit. "Bonds," § 135.

Illustrations.—Where a bond is conditioned to pay money in conformity to an order of court, an action thereon cannot be maintained until such order has been made. Thompson *v.* State, 4 Gill (Md.) 163. And no action will lie on a bond to pay such damages as shall be recovered, until a judgment has been obtained. Davis *v.* Gully, 19 N. C. 360. See also Barnes *v.* Peck, 1 Port. (Ala.) 187. So, where the liability to pay is made dependent on condemnation proceedings, the prosecution of such proceedings must be shown. People *v.* Stuart, 97 Ill. 123. So also where an obligor's agreement is to refund any overpayment which may have been made, such an overpayment must be ascertained before an action can be brought. Cowles *v.* Garrett, 30 Ala. 341. And where a bond is given for the payment of money, when satisfactory evidence has been given that a certain amount was necessarily expended, such evidence must be furnished before a recovery can be had. Giles *v.* Crosby, 5 Bosw. (N. Y.) 389. And where a bond is conditioned on the corroboration of plaintiff's claim by a third party, an action may be maintained thereon, upon showing that his claim has been so corroborated. Brackett *v.* Osborne, 31 Minn. 454, 18 N. W. 153.

35. Babb *v.* Kennedy, 19 Me. 267; Drummond *v.* Churchill, 17 Me. 325.

36. So where a bond is conditioned for payment of a designated sum whenever the obligee is compelled to pay a certain note, compulsory payment by suit is not necessary to authorize a recovery on the bond, but actual payment will be sufficient. Luckett *v.* Moore, 4 Bibb (Ky.) 205. And it is not a condition precedent to collection of a bond given toward the endowment of a professorship that such professorship be established and endowed. Barnett *v.* Franklin College, 10 Ind. App. 103, 37 N. E. 427, 10 Ind. App. 697, 37 N. E. 432. And in case of a breach of a bond by a railroad to build fences along plaintiff's land, the construction of such fences by plaintiff is not a necessary prerequisite before an action can be brought. Farley *v.* Moran, (Cal. 1892) 31 Pac. 158. So a statutory proceeding to condemn the property is not a condition precedent to an action on the bond of a corporation to pay all damages arising from its entrance on the obligee's land and construction of its works thereon. Pennsylvania Natural Gas Co. *v.* Cook, 123 Pa. St. 170, 23 Wkly. Notes Cas. (Pa.) 52, 16 Atl. 762. And in the absence of a statute requiring the sheriff to return "forfeited" a bond taken in a suit in chancery, the obligee may maintain an action thereon without showing such a return. Falls *v.* Weissinger, 11 Ala. 801. Nor is it necessary to show that an execution was issued and returned *nulla bona* on a decree rendered in a suit in order that the obligee may maintain an action on a bond given to secure the payment of such sum as might be rendered in that suit. McLeod *v.* Scott, 38 Ark. 72. Nor need the obligee wait until actual dispossession from land purchased from the obligor in order to maintain an action on the latter's bond conditioned to pay a judgment against the land in case it is not reversed on appeal, but a sale under the judgment is sufficient. Frank *v.* Jenkins, 11 Wash. 611, 40 Pac. 220. So where a bond is conditioned to pay a certain sum due from the obligee to a third party, the obligee may sue thereon without showing payment by him or injury by the obligor's failure to pay. Jones *v.* Thomas, 21 Gratt. (Va.) 96.

and words in the nature of a mere proviso or defeasance will not be so construed,[37] nor will the courts so construe a statute where an intention to have it so operate is not clearly manifest.[38] And though a statute may be applicable as a condition precedent at the time of the execution of a bond, yet where subsequently rendered inapplicable it cannot operate to prevent an action thereon.[39]

(II) *Demand.* A bond which is payable on demand is due immediately on execution, and a previous demand is not necessary to the maintenance of a suit thereon;[40] and if a bond is conditioned generally for the payment of a specified sum, with interest, an action may be brought thereon, though no demand has been made.[41] So where a bond is made payable or to be performed on a stated day at a place named therein, it is unnecessary to allege or prove a demand for payment or performance at the time and place named.[42] Again if the covenant in a bond is an express and absolute one for payment, subject only to avoidance by performing the conditions of the bond, a demand for performance is unnecessary.[43] But where a bond with a penalty is conditioned for the payment of a sum of money on the performance of some act and by the terms of the bond a demand of payment or performance is required in order to put the obligors in default and fix their liability a demand must be made before an action can be maintained on the bond.[44]

(III) *Notice of Default to Coöbligors.* The coöbligors in a bond stand only as sureties as between themselves and the principal, but they occupy

37. Jarvis *v.* Sewall, 40 Barb. (N. Y.) 449.

38. **So where a bridge is guaranteed by the bond** of a bridge builder to stand for a stipulated time, a code provision that upon the fact of the washing away of such bridge being made known by any freeholder to the commissioners' court, it may order him to rebuild, and, in case of refusal, commence an action on his bond (Ala. Code (1886), § 1457) the giving of such information by a freeholder is not a condition precedent to the commencing of the action. Meriwether *v.* Lowndes County, 89 Ala. 362, 7 So. 198.

39. **So held where a statute requires that before bringing an action on a bond payment of which is secured by a mortgage,** the mortgage shall be foreclosed (N. J. Act, March 23, 1881) and such statute is not applicable because the existence of the mortgage is terminated before the action on the bond is commenced. Seigman *v.* Streeter, 64 N. J. L. 169, 44 Atl. 888.

40. Husbands *v.* Vincent, 5 Harr. (Del.) 268; Cotton *v.* Reavill, 2 Bibb (Ky.) 99; Knight *v.* Braswell, 70 N. C. 709; Omohundro *v.* Omohundro, 21 Gratt. (Va.) 626. See also Pueblo County *v.* Sloan, 5 Colo. 38.

41. Knight *v.* Braswell, 70 N. C. 709; Gibbs *v.* Southam, 5 B. & Ad. 911, 3 N. & M. 155, 27 E. C. L. 384.

42. *Indiana.*— Midland R. Co. *v.* State, 11 Ind. App. 433, 38 N. E. 57.

Ohio.— Cairnes *v.* Knight, 17 Ohio St. 68.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Johnson, 54 Pa. St. 127; Helmbold *v.* Delaware, etc., R. Co., 14 Wkly. Notes Cas. (Pa.) 128.

South Carolina.— Langston *v.* South Carolina R. Co., 2 S. C. 248.

Wisconsin.— Truman *v.* McCollum, 20 Wis. 360.

United States.—Smith *v.* Tallapoosa County, 2 Woods (U. S.) 574, 22 Fed. Cas. No. 13,113.

43. *Connecticut.*— Bulkley *v.* Finch, 37 Conn. 71.

Maine.—McCarthy *v.* Mansfield, 56 Me. 538.

Missouri.—Gathwright *v.* Callaway County, 10 Mo. 663.

Rhode Island.— Douglas *v.* Hennessy, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583.

Texas.— Red River, etc., R. Co. *v.* Blount, 3 Tex. Civ. App. 282, 22 S. W. 930.

See 8 Cent. Dig. tit. "Bonds," § 136.

44. *California.*—Morgan *v.* Menzies, 65 Cal. 243, 3 Pac. 807.

Delaware.— Husbands *v.* Vincent, 5 Harr. (Del.) 268.

Iowa.— Poor *v.* Merrill, 68 Iowa 436, 27 N. W. 367.

Maine.— Gammon *v.* Dow, 16 Me. 426.

New Hampshire.— Stickney *v.* Stickney, 21 N. H. 61; Erskine *v.* Erskine, 13 N. H. 436.

New York.— Nelson *v.* Bostwick, 5 Hill (N. Y.) 37, 40 Am. Dec. 310.

Vermont.— Boardman *v.* Keeler, 21 Vt. 77.

United States.—Wood *v.* Consolidated Electric Light Co., 36 Fed. 538.

England.— Carter *v.* Ring, 3 Campb. 459, 14 Rev. Rep. 808; Thorn *v.* Jenkins, 1 Dowl. & L. 604, 14 L. J. Exch. 76, 12 M. & W. 614; Sicklemore *v.* Thistleton, 6 M. & S. 9, 18 Rev. Rep. 280.

Canada.— See Port Elgin Public School Board *v.* Eby, 26 Ont. 73.

The demand need not be made of all the obligors, though the bond be joint, where by statute joint bonds are to have the same effect as if they were joint and several, it being sufficient in such a case to prove a demand of the obligor against whom suit is brought. Whitsett *v.* Womack, 8 Ala. 466. See also Citizens' Bank *v.* Los Angeles Iron, etc., Co., 131 Cal. 187, 63 Pac. 462, 82 Am. St. Rep. 341, holding that where a demand merely is alleged the failure to state of whom made is a matter of defense, as is also the fact that

the relation of principals to the obligee therein, and where the principal obligor is not entitled to any notice or request none need be given to the coöbligors, as a prerequisite to an action on the bond.[45]

e. Joinder of Causes. Where several bonds are given by the same persons to the same obligee, there may be a recovery upon all the bonds in one action.[46]

f. Action on Interest Coupons. Where interest coupons attached to bonds are separable therefrom and negotiable, an action may be maintained thereon by the owner without producing the bond from which they were detached.[47] Again, though several coupons may be due at the time of recovery on one, such recovery will not bar a suit on the others;[48] and a demand by the holder of coupons is unnecessary where liability for both principal and interest is denied by the obligor of the bond.[49]

2. Defenses — a. Generally. The general principles as to defenses to actions are applicable in actions upon bonds, and the sufficiency of the defense is to be determined in the application of the general principles to the particular facts of each case.[50] It is further to be observed that the assignee of a non-negotiable

it was not made of the proper person or was otherwise insufficient.

45. Bulkley *v.* Finch, 37 Conn. 71; Fish *v.* Dana, 10 Mass. 46; Elizabeth State Bank *v.* Chetwood, 8 N. J. L. 1; Bush *v.* Critchfield, 4 Ohio 103.

46. Sugg *v.* Burgess, 2 Stew. (Ala.) 509; State *v.* Parsons, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430; Wood *v.* Hayward, 13 Pick. (Mass.) 269; State *v.* Schneider, 35 Mo. 533.

Where the obligors in a bond are bound in a stated amount in case of a breach of the conditions, a complaint which alleges several breaches states but one cause of action for the recovery of the specified sum. Lyman *v.* Broadway Garden Hotel, etc., Co., 33 N. Y. App. Div. 130, 53 N. Y. Suppl. 347. See also Northern Assur. Co. *v.* Hotchkiss, 90 Wis. 415, 63 N. W. 1020.

47. *Florida.*—Internal Imp. Fund *v.* Lewis, 34 Fla. 424, 16 So. 325, 43 Am. St. Rep. 209, 26 L. R. A. 743.

Illinois.— Johnson *v.* Stark County, 24 Ill. 75.

Kentucky.— Peter *v.* Taylor County, 5 Ky. L. Rep. 315.

New York.— Evertson *v.* Newport Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9; McClelland *v.* Norfolk Southern R. Co., 3 N. Y. St. 250.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Fidelity Ins., etc., Co., 105 Pa. St. 216; Philadelphia, etc., R. Co. *v.* Smith, 105 Pa. St. 195; Beaver County *v.* Armstrong, 44 Pa. St. 63.

South Carolina.— Walker *v.* State, 12 S. C. 200.

Vermont.— North Bennington First Nat. Bank *v.* Mt. Tabor, 52 Vt. 87, 36 Am. Rep. 734.

United States.— Kenosha *v.* Lamson, 9 Wall. (U. S.) 477, 19 L. ed. 725; Thompson *v.* Lee County, 3 Wall. (U. S.) 327, 18 L. ed. 177; Kennard *v.* Cass County, 3 Dill. (U. S.) 147, 14 Fed. Cas. No. 7,697, 1 Centr. L. J. 35; McCoy *v.* Washington County, 3 Wall. Jr. (U. S.) 381, 15 Fed. Cas. No. 8,731, 7 Am. L. Reg. 193, 3 Phila. (Pa.) 290, 15 Leg. Int. (Pa.) 388. *Contra,* Knox County *v.* Aspinwall, 21 How. (U. S.) 539, 16 L. ed. 208.

See 8 Cent. Dig. tit. "Bonds," § 138.

The possession of coupons is *prima facie* evidence that the one holding them was also the holder of the bond when they were detached and entitled to receive payment thereof. McCoy *v.* Washington County, 3 Wall. Jr. (U. S.) 381, 15 Fed. Cas. No. 8,731, 7 Am. L. Reg. 193, 3 Phila. (Pa.) 290, 15 Leg. Int. (Pa.) 388.

48. Butterfield *v.* Ontario, 44 Fed. 171.

After the principal of the bond is paid, interest being merely an incident to the bond cannot be recovered in a separate action. Moore *v.* Fuller, 47 N. C. 205.

49. Beaver County *v.* Armstrong, 44 Pa. St. 63.

50. What is a sufficient defense.— The following defenses have been held sufficient: Non-performance of condition precedent (Patterson *v.* Salmon, 3 Blackf. (Ind.) 131. See also Ripley County *v.* Hill, 115 Ind. 316, 16 N. E. 156); signature conditional on other signers being obtained and such condition known to obligee (American Button-Hole, etc., Co. *v.* Murray, 1 Fed. Cas. No. 292, Syllabi 109); seal torn off where bond joint (Rittenhouse *v.* Levering, 6 Watts & S. (Pa.) 190); plaintiff not the owner, holder, and bearer of the bond as alleged in declaration (Pendleton County *v.* Amy, 13 Wall. (U. S.) 297, 20 L. ed. 579); and deed not valid in law, the bond being conditioned for payment in case such deed is so valid (Hays *v.* Muir, 1 Ind. 174). And in an action on a bond defendant may show that he is not liable for the full amount thereof in accordance with a stipulation on the back of such bond, providing for a deduction under certain circumstances. Wilmington, etc., R. Co. *v.* High, 89 Pa. St. 282.

What is not a defense.— The following defenses have been held insufficient: Mistaken belief as to the legal effect of a bond (Miller *v.* Elliott, 1 Ind. 484, 50 Am. Dec. 475); given without knowledge of an alleged defense (U. S. *v.* McKewan, 4 Blatchf. (U. S.) 383, 26 Fed. Cas. No. 15,692); non-performance by

bond holds it subject to the same defenses as existed in the hands of the original holder.[51]

b. Fraud or Misrepresentation — (i) *As to Execution.* The rule of law that fraud vitiates a contract applies where the execution of a bond is induced by fraud and misrepresentation, and this will be a good defense to an action thereon.[52] But to avoid a bond on such grounds it should appear that the obligee participated in or had notice thereof.[53] That false representations were made to induce the execution of the bond is not a defense, where the falsity of such statements could have been ascertained at the time the bond was given,[54] and where the fraudulent act was that of defendants it is no defense,[55] nor can a person repudiate his obligations on a bond on the ground of fraud, where he retains the benefits derived thereunder.[56]

(ii) *As to Consideration.* In an action on a bond it is no defense at law that the obligee made fraudulent representations as to the consideration for which it was given, in the absence of some statute which allows such defense.[57] But where the consideration of a bond is a sale in fraud of the obligee's creditors, and

defendant of conditions (Wemhaner *v.* Parker, 32 Mo. App. 282); limitation of the amount of bond given on appeal (Sanger *v.* Miner, 54 N. Y. App. Div. 54, 66 N. Y. Suppl. 282); facts known to defendant at time of execution of bond (Pottinger *v.* Cameron, Litt. Sel. Cas. (Ky.) 115); denial of delivery to plaintiff and also of any knowledge or information sufficient to form a belief that plaintiff is or is not the owner or holder thereof (Bronson *v.* Chicago, etc., R. Co., 40 How. Pr. (N. Y.) 48); wrecking of obligor company by obligee where acts of obligee were legal (Shelby *v.* Bohn, 25 Ind. App. 473, 57 N. E. 566); defenses available in original suit in which bond was given to secure payment of judgment recovered (McDermott *v.* Isbell, 4 Cal. 113; Patterson *v.* Parker, 2 Hill (N. Y.) 598; Jacobs *v.* Daugherty, 78 Tex. 682, 15 S. W. 160; Hazard *v.* Griswold, 21 Fed. 178; Greathouse *v.* Dunlap, 3 McLean (U. S.) 303, 10 Fed. Cas. No. 5,742); conveyance to third party in action on bond to convey property (Sherburne *v.* Tebbetts, 62 N. H. 691); that fulfilment of the bond is charged on real estate (Pettingill *v.* Patterson, 32 Me. 569); that forged bonds are in circulation not distinguishable from the genuine (Wood *v.* Consolidated Electric Light Co., 36 Fed. 538); that property was not in good repair when taken, where bond provided for its return in as good condition as when leased (Clifford *v.* Smith, 4 Ind. 377); or that obligor is able to pay the debt in an action on a bond conditioned for the delivery by the obligor of certain obligations as collateral (Stratton *v.* Henderson, 26 Ill. 68).

51. Curtiss *v.* Hutchinson, 4 Ohio Dec. (Reprint) 19, Clev. L. Rec. 19. See also Tyson *v.* Williamson, 96 Va. 636, 32 S. E. 42, wherein it is held that a bond executed by a third person to a vendor of land, for such land, on the representation of the vendee that such vendor is still the owner, and he (the vendee) is his agent is subject to the same defenses as if the bond had been executed to the vendee and by him assigned to plaintiff.

52. *Indiana.*—Huston *v.* Williams, 3 Blackf. (Ind.) 170, 25 Am. Dec. 84.

Kentucky.— Nelson *v.* Howe Mach. Co., 10 Ky. L. Rep. 37.

Massachusetts.— Hazard *v.* Irwin, 18 Pick. (Mass.) 95.

New Jersey.— See Leigh *v.* Clark, 11 N. J. Eq. 110.

New York.— Dale *v.* Roosevelt, 9 Cow. (N. Y.) 307; Franchot *v.* Leach, 5 Cow. (N. Y.) 506; Dorr *v.* Munsell, 13 Johns. (N. Y.) 430; Van Valkenburgh *v.* Rouk, 12 Johns. (N. Y.) 337.

North Carolina.—Gwynn *v.* Hodge, 49 N. C. 168.

Rhode Island.— Phillips *v.* Potter, 7 R. I. 289, 82 Am. Dec. 598.

Vermont.— Davis *v.* Cole, 1 Tyler (Vt.) 262.

Virginia.— Tyson *v.* Williamson, 96 Va. 636, 32 S. E. 42; Taylor *v.* King, 6 Munf. (Va.) 358, 8 Am. Dec. 746.

See 8 Cent. Dig. tit. "Bonds," § 141; and also, *supra*, II, G, 2.

53. Carr *v.* Moore, 2 Ind. 602; Jenners *v.* Howard, 6 Blackf. (Ind.) 240; Dangler *v.* Baker, 35 Ohio St. 673.

Fraud of third person.— Where the obligee of a bond was a creditor of a third party to whom the obligor was indebted, and in consideration of which indebtedness the bond was given, the obligor cannot be relieved from liability on the bond because of fraud committed by such third party in his contract with him, unless the obligee was privy thereto. Morrison *v.* Clay, Hard. (Ky.) 421.

54. Dubois *v.* Loper, 1 N. J. L. 438.

55. U. S. *v.* Quantity of Distilled Spirits, 4 Ben. (U. S.) 349, 27 Fed. Cas. No. 16,099.

56. Thomson *v.* Sanders, 26 N. Y. Wkly. Dig. 387. See also Tyson *v.* Williamson, 96 Va. 636, 32 S. E. 42.

57. *Alabama.*— Outlaw *v.* Cook, Minor (Ala.) 257.

Indiana.— Huston *v.* Williams, 3 Blackf. (Ind.) 170, 25 Am. Dec. 84.

Kentucky.—West *v.* Morrison, 2 Bibb (Ky.) 376.

New Jersey.— Dubois *v.* Loper, 1 N. J. L. 438.

both parties have participated in the fraudulent intent, such fraud may be set up as a defense by defendant,[58] and though fraudulent representations as to the consideration may operate as a bar in some jurisdictions, yet it cannot be so pleaded where the contract has not been rescinded and the consideration has not entirely failed, but in such a case it may tend to reduce the amount of plaintiff's recovery.[59]

c. Payment, Release, Cancellation, or Discharge. Defendant may show in defense to an action on a bond that the obligation thereof is absolved by a rescission of the contract of which it was evidence,[60] or that it has been paid,[61] or that there has been a discharge of the bond,[62] or a surrender and cancellation,[63] or where the bond is a joint one that the remedy against all is defeated by the discharge of one of the obligors on a ground not personal to himself.[64]

d. Performance or Tender of Performance. Performance or a proper tender thereof in accordance with the conditions of the bond is a sufficient defense to an action thereon.[65] But a tender of performance after a breach of the condition will not so operate.[66]

e. Want or Failure of Consideration. At common law the general rule is that defendant cannot show a want of or a failure of consideration as a bar to an

New York.— Stevens *v.* Judson, 4 Wend. (N. Y.) 471; Dale *v.* Roosevelt, 9 Cow. (N. Y.) 307; Franchot *v.* Leach, 5 Cow. (N. Y.) 506; Dorr *v.* Munsell, 13 Johns. (N. Y.) 430; Vrooman *v.* Phelps, 2 Johns. (N. Y.) 177.

North Carolina.— Hall *v.* Guilford County, 74 N. C. 130; Guy *v.* McLean, 12 N. C. 46.

Virginia.— Gordon *v.* Jeffery, 2 Leigh (Va.) 410; Wyche *v.* Macklin, 2 Rand. (Va.) 426; Taylor *v.* King, 6 Munf. (Va.) 358, 8 Am. Dec. 746.

See 8 Cent. Dig. tit. "Bonds," § 141.

Contra.— Casey *v.* Smales, 4 Mo. 77; Solomon *v.* Kimmel, 5 Binn. (Pa.) 232; Swift *v.* Hawkins, 1 Dall. (Pa.) 17, 1 L. ed. 18; Waring *v.* Cheeseborough, 1 Hill (S. C.) 187; State *v.* Gaillard, 2 Bay (S. C.) 11, 1 Am. Dec. 628; Gray *v.* Handkinson, 1 Bay (S. C.) 278.

58. Goudy *v.* Gebhart, 1 Ohio St. 262. See also Harvin *v.* Weeks, 11 Rich. (S. C.) 601.

59. Lord *v.* Brookfield, 37 N. J. L. 552.

60. Moore *v.* Dial, 3 Stew. (Ala.) 155.

As to cancellation, rescission, or revocation of bonds see *supra*, III, G.

61. Payment by one joint and several obligor may be pleaded in defense to an action against another. Mitchell *v.* Gibbes, 2 Bay (S. C.) 475.

Payment after breach where accepted will operate as a discharge *pro tanto*. Toucey *v.* Schell, 15 Misc. (N. Y.) 350, 37 N. Y. Suppl. 879, 72 N. Y. St. 858. But see Hart *v.* Meeker, 1 Sandf. (N. Y.) 623, holding that a bond for the performance of a duty and for indemnity is not within a statutory provision which allows payment after breach to be pleaded to a bond having a condition by which it is to become void on payment of a less sum.

Payment by third party.— Payment need not be made by the obligor, but if by a third person at his request it will be sufficient, and in such a case a suit cannot be maintained in the name of the obligee for the use of the person for whom it was made. Simmons *v.* Walker, 18 Ala. 664. But a bond to secure the payment to an insurance company of all moneys paid to a local agent is not discharged by a settlement made by the general agent with the company. Hough *v.* Ætna L. Ins. Co., 57 Ill. 318, 11 Am. Rep. 18.

62. Warner *v.* Dunham, Lalor (N. Y.) 206. See also Allen *v.* Coxe, 7 N. J. L. 89. But a plea that the parties had agreed by writing obligatory to discharge the bond on certain conditions has been held insufficient. Cammack *v.* Rupert, 4 Blackf. (Ind.) 153. Nor will a covenant not to sue one of the obligors be a defense. Bowne *v.* Mt. Holly Nat. Bank, 45 N. J. L. 360. Nor will a release by one obligee affect the rights of the others. Blakey *v.* Blakey, 2 Dana (Ky.) 460.

63. Paxton *v.* Wood, 77 N. C. 11.

64. Brown *v.* Johnson, 13 Gratt. (Va.) 644, in which it is also held that a statute making the personal representatives of a deceased joint obligor liable does not apply under such circumstances.

65. Tracy *v.* Strong, 2 Conn. 659; McHard *v.* Whetcroft, 3 Harr. & M. (Md.) 85; Gray *v.* Gidiere, 5 Rich. (S. C.) 386.

As to performance, generally, see *supra*, V, A.

Tender of performance of an agreement to pay a debt is no bar to an action on a bond given subsequent to such agreement. State Bank *v.* Littlejohn, 18 N. C. 563.

Waiver of performance.— Defendant may show in defense to an action on the bond that there has been a waiver of the performance required by the condition (Filer *v.* Bissel, 2 Root (Conn.) 347; Franklin F. Ins. Co. *v.* Hainell, 5 Md. 170), or an extension of time for performance (Joslyn *v.* Taylor, 33 Vt. 470. But see Chandler *v.* Herrick, 19 Johns. (N. Y.) 129). But performance in accordance with an agreement with one only of the obligors by which the time of performance is extended is no bar to the action where not in accordance with the terms of the bond. Cox *v.* Way, 3 Blackf. (Ind.) 328.

66. Boardman *v.* Keeler, 21 Vt. 77.

action on a bond;[67] but such a defense is allowable by statute in some jurisdictions.[68]

f. To Actions on Bonds of Agents or Employees.[69] In an action on the bond of an agent or employee given to secure the payment to the principal of moneys handled by him it is no defense that plaintiff corporation was not authorized to do business in the state,[70] or that the money was derived from a business transaction, unauthorized or prohibited by the corporation's charter,[71] or that the cashier of the corporation consented to the defalcation or overdrafts, and the directors were negligent.[72]

B. Parties — 1. Plaintiffs — a. Generally. At common law an action on a bond can be brought only by the obligee named therein, or by his legal representatives.[73] But where the name of the obligee is incorrectly stated he may

67. *Alabama.*— Gilchrist *v.* Dandridge, Minor (Ala.) 165.

Delaware.— Garden *v.* Derrickson, 2 Del. Ch. 386, 95 Am. Dec. 286.

Illinois.— See Nye *v.* Raymond, 16 Ill. 153.

Indiana.—Leonard *v.* Bates, 1 Blackf. (Ind.) 172.

Maine.—Van Valkenburgh *v.* Smith, 60 Me. 97.

Maryland.— Mitchell *v.* Williamson, 6 Md. 210.

Missouri.— Bates *v.* Hinton, 4 Mo. 78.

New Hampshire.— Hoitt *v.* Holcomb, 23 N. H. 535.

New York.— Home Ins. Co. *v.* Watson, 59 N. Y. 390; Wilson *v.* New York Baptist Education Soc., 10 Barb. (N. Y.) 308; Center *v.* Billinghurst, 1 Cow. (N. Y.) 33; Dorr *v.* Munsell, 13 Johns. (N. Y.) 430; Dorlan *v.* Sammis, 2 Johns. (N. Y.) 179, note *a*; Vrooman *v.* Phelps, 2 Johns. (N. Y.) 177.

North Carolina.— Winslow *v.* Wood, 70 N. C. 430.

West Virginia.— Huffman *v.* Callison, 6 W. Va. 301; Payne *v.* Bowlin, 6 W. Va. 273; Ludington *v.* Tiffany, 6 W. Va. 11.

See 8 Cent. Dig. tit. "Bonds," § 140.

As to consideration of bond see *supra*, II, F.

Failure of consideration may be shown in some jurisdictions, but not want thereof. Anderson *v.* Best, 176 Pa. St. 498, 38 Wkly. Notes Cas. (Pa.) 501, 35 Atl. 194; Carter *v.* King, 11 Rich. (S. C.) 125; Thompson *v.* McCord, 2 Bay (S. C.) 76; Harris *v.* Harris, 23 Gratt. (Va.) 737.

That illegality of consideration may be shown see Barker *v.* Parker, 23 Ark. 390.

68. *Alabama.*— Giles *v.* Williams, 3 Ala. 316, 37 Am. Dec. 692.

Indiana.—Leonard *v.* Bates, 1 Blackf. (Ind.) 172; Flack *v.* Cunningham, 1 Blackf. (Ind.) 107.

Kentucky.— Minor *v.* Kelly, 5 T. B. Mon. (Ky.) 272; Rudd *v.* Hanna, 4 T. B. Mon. (Ky.) 528; Peebles *v.* Stephens, 1 Bibb (Ky.) 500. But that no consideration is no bar see Hook *v.* Hook, 3 J. J. Marsh. (Ky.) 111.

Missouri.— Smith *v.* Busby, 15 Mo. 388, 57 Am. Dec. 207.

New York.— Home Ins. Co. *v.* Watson, 59 N. Y. 390.

Ohio.— Judy *v.* Louderman, 48 Ohio St. 562, 29 N. E. 181.

Notice of this defense must be given.— Hollenbeck *v.* Breakey, 127 Mich. 555, 86 N. W. 1055.

69. As to construction and effect of bonds of agents and employees see *supra*, III, F, 8.

As to what constitutes a breach of bond of agent or employee see *supra*, V, B, 4.

70. Singer Mfg. Co. *v.* Hardee, 4 N. M. 175, 16 Pac. 605.

71. Morehead Banking, etc., Co. *v.* Tate, 122 N. C. 313, 30 S. E. 341; Juegling *v.* Arbeiter Bund, 6 Ohio Dec. (Reprint) 777, 8 Am. L. Rec. 94; Washington Bank *v.* Barrington, 2 Penr. & W. (Pa.) 27. See also Engler *v.* Peoples' F. Ins. Co., 46 Md. 322.

72. Chew *v.* Ellingwood, 86 Mo. 260, 56 Am. Rep. 429.

Where a bond was given by an agent to secure the payment of the proceeds of all sales by him, in an action thereon, it is no defense that the company knew that such agent had parties interested with him in such sales, where all transactions on the part of the company were with such agent, and the partners were never in any way recognized as agents. Palmer *v.* Bagg, 64 Barb. (N. Y.) 641. Nor where a cashier of a bank has discounted a note in violation of orders from the board of directors is the bank estopped from suing on his bond because it made efforts to collect such note. Cassell *v.* Mercer Nat. Bank, 22 Ky. L. Rep. 1009, 59 S. W. 504.

73. *California.*— See Walsh *v.* Soule, 66 Cal. 443, 6 Pac. 82.

Connecticut.— Sanford *v.* Sanford, 2 Day (Conn.) 559.

Illinois.— Phillips *v.* Singer Mfg. Co., 88 Ill. 305; Buck *v.* Eaman, 18 Ill. 529; Lovejoy *v.* Stelle, 18 Ill. App. 281; Sandusky *v.* Neal, 2 Ill. App. 624.

Maine.— Packard *v.* Brewster, 59 Me. 404; Lyon *v.* Parker, 45 Me. 474; Luques *v.* Thompson, 26 Me. 514.

Maryland.— See Ayres *v.* Toland, 7 Harr. & J. (Md.) 3.

Massachusetts.— Sanders *v.* Filley, 12 Pick. (Mass.) 554; Watson *v.* Cambridge, 15 Mass. 286; Montague *v.* Smith, 13 Mass. 396.

Michigan.— People *v.* Laidlaw, 120 Mich. 358, 79 N. W. 576.

Missouri.— Jeffries *v.* McLean, 12 Mo. 538.

New Hampshire.— Bassett *v.* Brown, 61 N. H. 602.

New Jersey.— See Chancellor *v.* Hoxsey, 41 N. J. L. 217.

show that the bond was made to him by the name therein mentioned;[74] and though the obligee in a bond did not himself sign or seal such instrument he may sue thereon.[75]

b. Joinder. Where the covenants or conditions in a bond run to the obligees jointly, and there is nothing in the instrument showing the interest of such obligees to be several, they should all join as plaintiffs in an action thereon.[76] And they may so join where it appears that the bond is joint in form merely, but distinct obligations are assumed therein as to the different obligees,[77] though in such case it has also been held that separate actions may be maintained by each.[78]

c. Rights of Parties in Interest. One who is designated in a bond as the obligee is entitled to sue thereon, though the bond may be for the use and benefit of a third party, and the fact that the obligee designated in the bond has no beneficial interest therein is immaterial.[79] In some jurisdictions, however, the action may be brought in the name of the real party in interest, whether he pos-

New York.—Henricus *v.* Englert, 137 N. Y. 488, 33 N. E. 550, 51 N. Y. St. 200.

North Carolina.— Williams *v.* Bryan, 33 N. C. 613. See also Waddell *v.* Moore, 24 N. C. 261.

Pennsylvania.— Crawford *v.* Stewart, 38 Pa. St. 34; Leber *v.* Kauffelt, 5 Watts & S. (Pa.) 440.

See 8 Cent. Dig. tit. "Bonds," § 148; and, generally, PARTIES.

On a bond to the committee of a corporation, the latter may sue. New York African Soc. *v.* Varick, 13 Johns. (N. Y.) 38.

On a bond to the committee of an ecclesiastical society and successors, the latter may sue. Bailey *v.* Lewis, 3 Day (Conn.) 450.

On a bond to the governor and his successors, the latter may sue.

Alabama.— Chaudron *v.* Fitzpatrick, 19 Ala. 649.

Arkansas.— Thorn *v.* Yell, 8 Ark. 121.

New Jersey.— Livingston *v.* Combs, 1 N. J. L. 50.

North Carolina.— Governor *v.* Welch, 25 N. C. 249.

Texas.— Ward *v.* Hubbard, 62 Tex. 559.

74. Jenness *v.* Black Hawk, 2 Colo. 578.

75. Smith *v.* Kerr, 3 N. Y. 144.

Though one of the obligees in a bond is also the obligor therein, if separate duties are required of the other obligees they may sue alone on such bond. Cecil *v.* Laughlin, 4 B. Mon. (Ky.) 30. But an obligor who becomes executor or administrator upon the estate of the obligee cannot maintain an action against the other obligors. Carroll *v.* Durham, 23 N. C. 36.

76. *Alabama.*— Masterson *v.* Phinizy, 56 Ala. 336.

Georgia.— Phillips *v.* Poole, 96 Ga. 515, 23 S. E. 504.

Illinois.— Burns *v.* Follansbee, 20 Ill. App. 41. See also Stevens *v.* Partridge, 88 Ill. App. 665.

Kentucky.— Sims *v.* Harris, 8 B. Mon. (Ky.) 55.

Maryland.— Wallis *v.* Dilley, 7 Md. 237.

Mississippi.— Loyd *v.* Doll, (Miss. 1892) 11 So. 608; McMahon *v.* Webb, 52 Miss. 424.

Missouri.— Bailey *v.* Powell, 11 Mo. 414.

North Carolina.— Richardson *v.* Jones, 23 N. C. 296; Williams *v.* Ehringhaus, 13 N. C. 511.

Pennsylvania.— Sweigart *v.* Berk, 8 Serg. & R. (Pa.) 308.

West Virginia.— Ralphsnyder *v.* Ralphsnyder, 5 W. Va. 503.

See 8 Cent. Dig. tit. "Bonds," § 151; and, generally, PARTIES.

Where part of obligees refuse to join others may sue. Cook *v.* Hadly, 3 Tenn. 465.

77. *Alabama.*— Miller *v.* Garrett, 35 Ala. 96; Boyd *v.* Martin, 10 Ala. 700; Gayle *v.* Martin, 3 Ala. 593.

Kentucky.— Lillard *v.* Lillard, 5 B. Mon. (Ky.) 340.

North Carolina.— Haughton *v.* Bayley, 31 N. C. 337.

Tennessee.— Dechard *v.* Edwards, 2 Sneed (Tenn.) 93.

Vermont.— Lillie *v.* Lillie, 55 Vt. 470.

West Virginia.— Peerce *v.* Athey, 4 W. Va. 22.

United States.— Farni *v.* Tesson, 1 Black (U. S.) 309, 17 L. ed. 67.

78. *Kentucky.*— Lillard *v.* Lillard, 5 B. Mon. (Ky.) 340; Cecil *v.* Laughlin, 4 B. Mon. (Ky.) 30; Daniel *v.* Crooks, 3 Dana (Ky.) 64.

Minnesota.— Sprague *v.* Wells, 47 Minn. 504, 50 N. W. 535.

Nevada.— Deegan *v.* Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742.

New York.—Hees *v.* Nellis, 65 Barb. (N. Y.) 440, 1 Thomps. & C. (N. Y.) 118; Ehle *v.* Purdy, 6 Wend. (N. Y.) 629.

Tennessee.— Renkert *v.* Elliott, 11 Lea (Tenn.) 235; White *v.* Bowman, 10 Lea (Tenn.) 55.

Sureties and principal cannot join to coerce payment from a third person. Whitaker *v.* Degraffenreid, 6 Ala. 303.

Where a bond is executed to several insurance companies in a certain sum to each they cannot all join in an action for a breach thereof. Germania F. Ins. Co. *v.* Hawks, 55 Ga. 674.

79. *Illinois.*— Chadsey *v.* Lewis, 6 Ill. 153.

Indiana.— Owen *v.* State, 25 Ind. 107. See also Maxedon *v.* State, 24 Ind. 370.

Maine.— Washington County *v.* Brown, 33 Me. 442.

sesses the legal title or not.[80] Where, however, a statute requires actions on certain bonds to be prosecuted in the name of the people or of a specified officer, they must be so sued on, though it may also be provided generally by statute that actions shall be prosecuted in the name of the real party in interest.[81]

d. Effect of Death of an Obligee. In case of the death of one or more of the joint obligees in a bond an action thereon should be brought in the name of the survivor or survivors.[82] And upon the death of the last surviving obligee his representatives may sue.[83]

2. Defendants — a. Generally. In an action on a bond to remove an encumbrance on land or to pay the price therefor, the holder of such encumbrance or those claiming title adversely to plaintiff need not be made parties;[84] and where the heirs of the obligor are not expressly bound by the terms of a bond an action of debt will not lie against them on such bond.[85]

b. Joinder — (i) *In General.* An action may be maintained against any one or more of the obligors of a joint and several bond at the option of plaintiff;[86]

Maryland.— Kiersted *v.* State, 1 Gill & J. (Md.) 231.

Massachusetts.— Northampton *v.* Elwell, 4 Gray (Mass.) 81.

Mississippi.— Beard *v.* Griffin, 10 Sm. & M. (Miss.) 586.

Pennsylvania.— Irish *v.* Johnston, 11 Pa. St. 483.

Texas.— Ward *v.* Hubbard, 62 Tex. 559.

See 8 Cent. Dig. tit. "Bonds," § 150.

Creditor of deceased person is not entitled to have sued a bond to the state conditioned to deliver all goods of deceased coming into obligor's possession to such person or persons "as have right to demand the same." State *v.* Wright, 4 Harr. & J. (Md.) 148.

Executor of obligee cannot sue on bond to such obligee for use of another. Tait *v.* Parkman, 15 Ala. 253.

80. *Alabama.*— Glassell *v.* Mason, 32 Ala. 719.

Arkansas.— Files *v.* Reynolds, 66 Ark. 314, 50 S. W. 509.

California.— Baker *v.* Bartol, 7 Cal. 551.

Iowa.— Moorman *v.* Collier, 32 Iowa 138; Huntington *v.* Fisher, 27 Iowa 276; Sheppard *v.* Collins, 12 Iowa 570.

Louisiana.—Duchamp *v.* Nicholson, 2 Mart. N. S. (La.) 672; Hernandez *v.* Montgomery, 2 Mart. N. S. (La.) 422.

A contractor's bond inures to benefit of persons furnishing work or material and may be sued on by them. Young *v.* Young, 21 Ind. App. 509, 52 N. E. 776; American Surety Co. *v.* Thorn-Halliwell Cement Co., 9 Kan. App. 8, 57 Pac. 237; People *v.* Cotteral, 115 Mich. 43, 73 N. W. 19, 74 N. W. 183; Kansas City School Dist. *v.* Livers, 147 Mo. 580, 49 S. W. 507. But see People *v.* Laidlaw, 120 Mich. 358, 79 N. W. 576, wherein the bond ran to city instead of to people as required by How. Anno. Stat. § 8411*b*.

81. People *v.* Norton, 9 N. Y. 176; Hoogland *v.* Hudson, 8 How. Pr. (N. Y.) 343.

82. *Alabama.*— Bebee *v.* Miller, Minor (Ala.) 364.

Kentucky.— Carneal *v.* Day, Litt. Sel. Cas. (Ky.) 492.

Massachusetts.— Donnell *v.* Manson, 109 Mass. 576.

Michigan.— Jackson *v.* People, 6 Mich. 154.

Tennessee.— But see Perkins *v.* Hadley, 4 Hayw. (Tenn.) 148.

Texas.— Red River, etc., R. Co. *v.* Blount, 3 Tex. Civ. App. 282, 22 S. W. 930.

United States.— Farni *v.* Tesson, 1 Black (U. S.) 309, 17 L. ed. 67. See also Dana *v.* Parker, 27 Fed. 263.

See also Abatement and Revival, III, A, 5, a [1 Cyc. 70]; and 8 Cent. Dig. tit. "Bonds," § 152.

Where a condition is several in its legal effect to joint obligees on the death of one, the survivor may sue for the benefit of himself and the representatives of the deceased obligee. Wallace *v.* Hanley, 3 Dana (Ky.) 72.

83. Bebee *v.* Miller, Minor (Ala.) 364.

84. Scobey *v.* Finton, 39 Ind. 275; McDonald *v.* Morris, 89 N. C. 99.

85. Taylor *v.* Grace, 6 N. C. 66.

86. *Alabama.*— McKee *v.* Griffin, 60 Ala. 427.

California.— People *v.* Edwards, 9 Cal. 286.

Connecticut.— Bulkley *v.* Wright, 2 Root (Conn.) 70.

Georgia.— Poullain *v.* Brown, 80 Ga. 27, 5 S. E. 107; Spratlin *v.* Hudspeth, Dudley (Ga.) 155.

Illinois.— People *v.* Harrison, 82 Ill. 84.

Indiana.— State *v.* Bennett, 24 Ind. 383.

Kentucky.— Allin *v.* Shadburne, 1 Dana (Ky.) 68, 25 Am. Dec. 121.

Louisiana.— Valentine *v.* Christie, 1 Rob. (La.) 298.

New Jersey.— Crane *v.* Alling, 15 N. J. L. 423.

New York.— Field *v.* Van Cott, 5 Daly (N. Y.) 308, 15 Abb. Pr. N. S. (N. Y.) 349; Toucey *v.* Schell, 15 Misc. (N. Y.) 350, 37 N. Y. Suppl. 879, 72 N. Y. St. 858; People *v.* Corbett, 8 Wend. (N. Y.) 520.

Ohio.— King *v.* Nichols, 2 Ohio Dec. (Reprint) 564, 4 West. L. Month. 25.

Pennsylvania.— Miller *v.* Reed, 3 Grant (Pa.) 51; Walter *v.* Ginrich, 2 Watts (Pa.) 204; Bensalem School Dist. *v.* Bilbrough, 10 Phila. (Pa.) 542, 31 Leg. Int. (Pa.) 358.

South Carolina.— Hatfield *v.* Kennedy, 1 Bay (S. C.) 501.

and sureties on a bond may be joined with the sureties on a subsequent bond executed as additional security for the performance of the same contract.[87]

(II) *Objections For Misjoinder or Non-Joinder.* A misjoinder or non-joinder of parties to an action on a bond may be pleaded in abatement.[88]

c. Effect of Death of an Obligor. The weight of authority supports the rule that in case of the death of one of the obligors a joint action cannot be maintained against the survivor or survivors, and the representatives of the deceased obligor in the absence of a statutory enactment which permits or authorizes such an action.[89] In some jurisdictions, however, the action may be so brought,[90] though even then the personal representatives are not necessary parties.[91]

C. Pleadings — 1. Declaration, Complaint, or Petition — a. Requisites and Sufficiency — (I) *Generally.* All the material facts constituting the cause of action must be set forth in the complaint in an action on a bond.[92]

Tennessee.— McMinn Academy *v.* Reneau, 2 Swan (Tenn.) 94.

See, generally, Parties; and 8 Cent. Dig. tit. "Bonds," § 154.

As to when a bond is joint, several, or joint and several see III, E, 2.

That suit must be against one or all see Blair *v.* Parker, 6 J. J. Marsh. (Ky.) 630; Leonard *v.* Speidel, 104 Mass. 356; Minor *v.* Alexandria Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47; Dowlin *v.* Standifer, Hempst. (U. S.) 290, 7 Fed. Cas. No. 4,041*a*; Chandler *v.* Byrd, Hempst. (U. S.) 222, 5 Fed. Cas. No. 2,591*b*.

Guarantor and obligor cannot be joined. Preston *v.* Davis, 8 Ark. 167; Wallis *v.* Carpenter, 13 Allen (Mass.) 19.

Insolvent obligor need not be made party. Watts *v.* Gayle, 20 Ala. 817; Friberg *v.* Donovan, 23 Ill. App. 58.

87. Singer Mfg. Co. *v.* Pouder, 82 Tex. 653, 18 S. W. 152; Deutschman *v.* Battaile, (Tex. Civ. App. 1896) 36 S. W. 489.

88. *Arkansas.*— Taylor *v.* Auditor, 2 Ark. 174.

Maine.— Richmond *v.* Toothaker, 69 Me. 451.

Michigan.— Porter *v.* Leache, 56 Mich. 40, 22 N. W. 104.

New Jersey.— St. Mary's Protestant Episcopal Church *v.* Wallace, 10 N. J. L. 311.

United States.— Minor *v.* Alexandria Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47.

See 8 Cent. Dig. tit. "Bonds," § 156.

If non-joinder is not taken advantage of by plea in abatement, it will be considered as waived. Richmond *v.* Toothaker, 69 Me. 451; Porter *v.* Leache, 56 Mich. 40, 22 N. W. 104; Minor *v.* Alexandria Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47.

Misjoinder.— If the administrator of a deceased obligor upon a several or joint and several bond is sued with the survivor the misjoinder will be bad on error. Eggleston *v.* Buck, 31 Ill. 254.

89. *Alabama.*— Reed *v.* Summers, 79 Ala. 522.

Colorado.—Metz *v.* People, 6 Colo. App. 57, 40 Pac. 51.

Illinois.— Eggleston *v.* Buck, 31 Ill. 254; Lutz *v.* Schmidt, 16 Ill. App. 477.

Kentucky.— Gillin *v.* Pence, 4 T. B. Mon. (Ky.) 304; Clark *v.* Parish, 1 Bibb (Ky.) 547.

Maryland.— State *v.* Banks, 48 Md. 513; Waters *v.* Riley, 2 Harr. & G. (Md.) 305, 18 Am. Dec. 302.

Massachusetts.— Ricker *v.* Gerrish, 124 Mass. 316.

New Jersey.— Sigler *v.* Interest, 3 N. J. L. 295.

New York.— Puckhafer *v.* White, 33 N. Y. Super. Ct. 267; Brown *v.* Babcock, 3 How. Pr. (N. Y.) 305, 1 Code Rep. (N. Y.) 66.

Pennsylvania.— Miller *v.* Reed, 3 Grant (Pa.) 51; Walter *v.* Ginrich, 2 Watts (Pa.) 204; Pecker *v.* Julius, 2 Browne (Pa.) 31.

Virginia.— Grymes *v.* Pendleton, 4 Call (Va.) 130; Watkins *v.* Tate, 3 Call (Va.) 521.

See, generally, Abatement and Revival, III, B, 8, e [1 Cyc. 96]; and 8 Cent. Dig. tit. "Bonds," § 155.

Where obligor dies insolvent suit may be brought against survivors. Hall *v.* Woolley, 59 Ga. 755.

90. *California.*— Lawrence *v.* Doolan, 68 Cal. 309, 5 Pac. 484, 9 Pac. 159.

Indiana.— Ferguson *v.* State, 90 Ind. 38.

South Carolina.— Trimmier *v.* Thomson, 10 S. C. 164; Boykin *v.* Watson, 3 Brev. (S. C.) 260, 1 Treadw. (S. C.) 157.

Tennessee.— Taylor *v.* Taylor, 5 Humphr. (Tenn.) 110.

United States.— U. S. *v.* Tracy, 8 Ben. (U. S.) 1, 28 Fed. Cas. No. 16,536; U. S. *v.* Lawrence, 14 Blatchf. (U. S.) 229, 26 Fed. Cas. No. 15,574; The Octavia, 1 Mason (U. S.) 149, 18 Fed. Cas. No. 10,423.

91. Williams *v.* State, 87 Ind. 527; Hunt *v.* Gaylor, 25 Ohio St. 620; Claiborne *v.* Goodloe, 2 Hayw. (Tenn.) 391; Montague *v.* Turpin, 8 Gratt. (Va.) 453.

Executor may on application be made a party defendant. Green *v.* Conrad, 114 Mo. 651, 21 S. W. 839.

92. Vilhac *v.* Stockton, etc., R. Co., 53 Cal. 208.

Allegations of the execution of the bond, setting out the conditions and assigning the breaches, are sufficient. State *v.* Pace, 34 Mo. App. 458.

Legal effect.— The declaration on a bond must state its legal effect so far as pertinent.

(II) *AVERMENTS AS TO CONSIDERATION.* Consideration need not be averred in a declaration on a sealed bond.[93]

(III) *AVERMENTS AS TO DAMAGES.* The complaint should show the extent of the damage suffered,[94] and the items thereof may be specified.[95] In an action on a penal bond actual damages should be averred.[96]

(IV) *AVERMENTS AS TO EXECUTION AND DELIVERY.* Execution of the bond must be averred in substance.[97] The authorities are in conflict as to the necessity of alleging delivery of the bond. Some hold that such fact must be averred.[98] Others hold that an averment of delivery is unnecessary.[99]

(V) *AVERMENTS AS TO PARTIES AND CAPACITY TO SUE.* Who are the parties to the action and their capacity to sue should sufficiently appear.[1]

State *v.* McGuire, 46 W. Va. 328, 33 S. E. 313, 76 Am. St. Rep. 822. See also Brown *v.* Champlin, 66 N. Y. 214.

93. *Illinois.*— Evans *v.* Edwards, 26 Ill. 279.

Michigan.— Dye *v.* Mann, 10 Mich. 291.

Missouri.— Montgomery County *v.* Auchley, 92 Mo. 126, 4 S. W. 425.

New York.— Bush *v.* Stevens, 24 Wend. (N. Y.) 256.

Ohio.—Reddish *v.* Harrison, Wright (Ohio) 221.

Vermont.— Barrett *v.* Carden, 65 Vt. 431, 26 Atl. 530, 36 Am. St. Rep. 876.

Wisconsin.— Northern Assur. Co. *v.* Hotchkiss, 90 Wis. 415, 63 N. W. 1020.

See 8 Cent. Dig. tit. "Bonds," § 168.

If no consideration is recited in bond it must be alleged. Hall *v.* York, 22 Tex. 641.

It is only when equity is invoked that consideration need be shown. Scott *v.* Jones, 75 N. C. 112.

94. U. S. *v.* Maloney, 4 App. Cas. (D. C.) 505.

In assigning a breach of a bond it is not necessary to set forth any damages. Palmer *v.* Stebbins, 3 Pick. (Mass.) 188, 15 Am. Dec. 204. But if plaintiff assigns a sufficient breach of the condition he may then specify the items of damage that he has sustained. Williams *v.* Maden, 9 Wend. (N. Y.) 240.

Nominal damages may be recovered, although it is not alleged that plaintiff has been damaged, where a breach of the covenant is assigned in the words thereof. Albany Dutch Church *v.* Vedder, 14 Wend. (N. Y.) 165.

95. Williams *v.* Maden, 9 Wend. (N. Y.) 240.

96. Doane *v.* Chicago City R. Co., 51 Ill. App. 353; Horner *v.* Harrison, 37 Iowa 378. But see Allison *v.* Farmers' Bank, 6 Rand. (Va.) 204, holding that it is not necessary to state that damages have been sustained in action for penalty, nor to allege that plaintiff has been injured by the breaches.

The fact that damages are claimed in excess of those covered by the bond does not make the complaint bad. Offterdinger *v.* Ford, 92 Va. 636, 24 S. E. 246. See also Com. *v.* Lynd, 14 Phila. (Pa.) 144, 37 Leg. Int. (Pa.) 512. Nor is a complaint demurrable because in the prayer a penalty is asked which is not authorized. Ventura County *v.* Clay, 114 Cal. 242, 46 Pac. 9.

97. Brown *v.* Ready, 14 Ky. L. Rep. 583, 20 S. W. 1036.

It is sufficient to aver that defendant made his certain writing obligatory (Martin *v.* Davis, 2 Colo. 313; State *v.* Rush, 77 Mo. 586; Denton *v.* Adams, 6 Vt. 40), or that he executed the bond by his agent (Gilmer *v.* Allen, 9 Ga. 208), or that it was sealed with the company's seal (Curd *v.* Forts, 2 A. K. Marsh. (Ky.) 119), or that the bond was "made and delivered" (Hazelet *v.* Holt County, 51 Nebr. 716, 71 N. W. 717).

An averment of execution by the principals does not charge the sureties, even though the bond is made a part of the complaint. Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156.

Where the objection is available that the declaration does not allege execution by the other obligors on a joint and several bond it must be by demurrer, plea in abatement, or a special plea. Tapley *v.* Goodsell, 122 Mass. 176.

98. Garcia *v.* Satrustegui, 4 Cal. 244; Brown *v.* Ready, 14 Ky. L. Rep. 583, 20 S. W. 1036.

It is sufficient averment of delivery that "defendants bound themselves by a writing under seal." Jacobs *v.* Curtiss, 67 Conn. 497, 35 Atl. 501; La Fayette Ins. Co. *v.* Rogers, 30 Barb. (N. Y.) 491. And if the complaint follows the statutory form, a statement that it was executed implies a delivery. Goodyear Dental Vulcanite Co. *v.* Bacon, 148 Mass. 542, 20 N. E. 175.

99. Spence *v.* Rutledge, 11 Ala. 590; Auditor *v.* Woodruff, 2 Ark. 73, 33 Am. Dec. 368.

If profert is made delivery need not be alleged. Boyer *v.* Sowles, 109 Mich. 481, 67 N. W. 530. So also where a copy is set out, and it is declared that defendant made his certain bond sealed, and non-payment is alleged, averment of delivery is not required. La Fayette Ins. Co. *v.* Rogers, 30 Barb. (N. Y.) 491.

A bond without date or an impossible one may be declared on as made on any day when proven to have been delivered. Ross *v.* Overton, 3 Call (Va.) 309, 2 Am. Dec. 552.

1. If the character in which plaintiff sues appears at the conclusion it is sufficient. It need not appear at the commencement of the complaint, although that is proper. State *v.* Ritter, 9 Ark. 244; Porter *v.* State, 9 Ark. 226.

And matters of description which are mere surplusage will not vitiate.[2] If there are several plaintiffs a *prima facie* title in them all to sue should be shown.[3] And if the joinder of parties is essential non-joinder should be excused or it is fatal.[4]

(VI) *Description of Bond.* So much of the bond must be set out as relates to the cause of action,[5] for it is not enough to merely refer to the bond as filed and file it with the petition.[6] The instrument, however, need not be set out in *hæc verba*,[7] since if the declaration shows a good common-law bond it is sufficient.[8]

If the bond is payable to a committee of a corporation, and the action is brought in the latter's name, it must be averred that the bond was made to the corporation in the name of the committee. New York African Soc. *v.* Varick, 13 Johns. (N. Y.) 38. A want of legal capacity to sue is not a ground of objection, where the words used imply that plaintiff is a corporation. Mackenzie *v.* Edinburg School Trustees, 72 Ind. 189.

Partnership name in bond and in declaration is sufficient, even though individual members are also named in the latter. Armstrong *v.* Robinson, 5 Gill & J. (Md.) 412.

For whose use or benefit the bond was given should be stated. Governor *v.* Throckmorton, 3 Bibb (Ky.) 243. But in describing for whose use the action is brought the party to whom it is payable should sufficiently appear, for if it is uncertain in that respect it is sufficient. Dean *v.* Boyd, 9 Dana (Ky.) 169. Where it appears by the declaration that the bond was given for plaintiffs' benefit it need not be averred that it was executed in their behalf. Shaw *v.* Tobias, 3 N. Y. 188. So a suit by a "county judge" sufficiently shows that he sues for the benefit of the county. Day *v.* Johnson, (Tex. Civ. App. 1895) 33 S. W. 675. And a bond for the use and benefit of plaintiff entitles him as a proper party to sue. State *v.* Kaye, 83 Mo. App. 678.

2. Schott *v.* Youree, 142 Ill. 233, 31 N. E. 591.

3. Strange *v.* Lowe, 8 Blackf. (Ind.) 243.

Legal and equitable owners.— If the declaration shows plaintiffs were the legal owners and also shows that others were the equitable owners of the land the complaint is not bad. Pierce *v.* St. Anne, 30 Fed. 36.

4. Watts *v.* Gayle, 20 Ala. 817; Annapolis Sav. Inst. *v.* Bannion, 68 Md. 458, 13 Atl. 353; Strange *v.* Floyd, 9 Gratt. (Va.) 474; Newman *v.* Graham, 3 Munf. (Va.) 187.

Extent of interests of other obligees should be alleged where the action is by one of several, and it is necessary under the condition of the bond to determine the relative and respective rights of plaintiff. St. Louis, etc., R. Co. *v.* Coultas, 33 Ill. 188.

5. Collins *v.* Blackburn, 14 B. Mon. (Ky.) 203. See also Hart *v.* Tolman, 6 Ill. 1.

Only that part of the instrument which contains the foundation of the action need be set forth. The penal part of the bond need not be stated. Prentiss *v.* Spalding, 2 Dougl. (Mich.) 84. But see Holley *v.* Acre, 23 Ala. 603; Burkholder *v.* Lapp, 31 Pa. St. 322.

The condition of the bond should be set forth. Pike County *v.* Hanchey, 119 Ala. 36, 24 So. 751; Harrington *v.* Brown, 7 Pick. (Mass.) 232; Bridge *v.* Ford, 4 Mass. 641; Woods *v.* Rainey, 15 Mo. 484; Baltimore, etc., R. Co. *v.* Bitner, 15 W. Va. 455, 36 Am. Rep. 820. See also Waterman *v.* Dockray, 56 Me. 52. If, however, the suit is on a bond conditioned for the performance of covenants, plaintiff may declare as on a common bond, without setting out the condition. State *v.* Leonard, 6 Blackf. (Ind.) 173. And the condition need not be noticed where in debt on bond the count is on the penalty alone. Holley *v.* Acre, 23 Ala. 603. See also Burkholder *v.* Lapp, 31 Pa. St. 322. Nor need the declaration make it appear there is a condition, where a copy of the bond is annexed. Brown *v.* Warden, 44 N. J. L. 177. And the covenants and promises of the obligors sufficiently appear where the bond is copied into the complaint. Hazelet *v.* Holt County, 51 Nebr. 716, 71 N. W. 717. So if the condition is averred, but set out carelessly, it is sufficient if a copy of the bond is annexed and referred to in the complaint. Palestine Bldg. Assoc. *v.* Spengeman, (N. J. 1899) 43 Atl. 653.

Misdescription.— If the instrument is set out a wrongful designation of the bond as a note does not render it insufficient. Magruder *v.* Slater, 12 Ark. 171.

Uncertainty as to which bond is sought to be recovered on is not available by special plea, where the principal and sureties in a sequestration and replevin bond are the same and breaches of said bonds are alleged. McArthur *v.* Barnes, 10 Tex. Civ. App. 318, 31 S. W. 212.

6. Collins *v.* Blackburn, 14 B. Mon. (Ky.) 203.

Exhibits should be made a part of a count by definite averments. Pike County *v.* Hanchey, 119 Ala. 36, 24 So. 751; and, generally, Pleading.

7. Drake *v.* State, (Tex. Civ. App. 1893) 23 S. W. 398.

If the bond is not set out in hæc verba and oyer is not prayed it cannot be determined whether plaintiff has misconceived the legal effect of the bond, and defendant cannot avail himself of an error in this respect. Gathwright *v.* Callaway County, 10 Mo. 663.

8. Boyer *v.* Sowles, 109 Mich. 481, 67 N. W. 530. See also State *v.* Leonard, 6 Blackf. (Ind.) 173.

If the complaint is upon a statutory bond it is not sufficient to aver that it corresponds with the statute. Mills *v.* Gleason, 21 Cal. 274. Compliance with code forms is neces-

(vii) *Description of Coupons.* Coupons should be identified on the face of the complaint by the number, date, sum, and time of payment.[9]

(viii) *Negativing Defenses.* Matters of defense need not be negatived,[10] unless they are a qualification of the original obligation.[11]

(ix) *Performance of Conditions Precedent.* Ordinarily, performance of conditions precedent should be averred, although the facts constituting such performance need not be stated.[12] A distinction has been made, however, between a demand for property and the payment of money, such demand not being necessary in the former case but otherwise in the latter.[13] Again, where concurrent acts are to be performed at the same time, it need only be alleged that there is a readiness and willingness to perform without averring an opportunity to perform, and that the other was requested to perform but refused and neglected so to do.[14]

(x) *Setting Out Copy of Bond.* If the contents of the bond and a breach thereof are substantially set forth in the complaint, it is not necessary to attach to it a copy of the bond itself,[15] although if a copy is annexed it must be referred to in the body of the pleading as so annexed.[16] But if the original or a copy is required by statute to be filed with the complaint it must be done or a demurrer lies for want of sufficiency.[17]

(xi) *Setting Out Instrument Referred to in Bond.* If an instrument

sary. Pike County *v.* Hanchey, 119 Ala. 36, 24 So. 751.

The circumstances under which the bond was given need not be stated. It is sufficient to charge the legal effect of the instrument. Brown *v.* Champlin, 66 N. Y. 214; Burkholder *v.* Lapp, 31 Pa. St. 322. See also State *v.* McGuire, 46 W. Va. 328, 33 S. E. 313, 76 Am. St. Rep. 822.

9. Kennard *v.* Cass County, 3 Dill. (U. S.) 147, 14 Fed. Cas. No. 7,697, 1 Centr. L. J. 35.

Under the code, if the bond and interest coupon are set out at large, and an indebtedness is averred it is sufficient. Veeder *v.* Lima, 11 Wis. 419.

10. Mix *v.* Page, 14 Conn. 329; Romer *v.* Conter, 53 Minn. 171, 54 N. W. 1052; Mason *v.* Montgomery, Wright (Ohio) 722.

Matter of defeasance need not be set out but must be availed of by plea. Booth *v.* Comegys, Minor (Ala.) 201.

A proviso which is not a part of the covenanting clause need not be negatived in a declaration on the guaranty in a bond that the obligee should be able to collect a debt. Adams *v.* Way, 33 Conn. 419.

11. Mix *v.* Page, 14 Conn. 329.

12. *Indiana.*— Hicks *v.* Zion, 58 Ind. 548, payment of special tax in aid of railroad.

Nebraska.— Barr *v.* Ward, 36 Nebr. 905, 55 N. W. 282, condition to pay for all goods furnished.

New York.—Hatch *v.* Peet, 23 Barb. (N. Y.) 575 (discontinuance of certain suits); McKillip *v.* McKillip, 8 Barb. (N. Y.) 552 (request to perform or refusal to pay not alleged); Whitney *v.* Spencer, 4 Cow. (N. Y.) 39 (condition to pay judgment in certain time).

Vermont.— Jones *v.* Cooper, 2 Aik. (Vt.) 54, 16 Am. Dec. 678.

Virginia.—Smith *v.* Lloyd, 16 Gratt. (Va.) 295.

Washington.— Larson *v.* Winder, 14 Wash. 647, 45 Pac. 315.

See 8 Cent. Dig. tit. "Bonds," § 162.

Coupons.— If irrigation district bonds are conditioned to pay a certain sum of money at a specified time and place a failure of the proper authorities to raise the funds and so perform their duty need not be averred in an action on detached coupons. Herring *v.* Modesto Irrigation Dist., 95 Fed. 705. If coupons are past due, presentation, demand, and refusal of payment at the time and place specified need not be averred. New South Brewing, etc., Co. *v.* Price, 21 Ky. L. Rep. 11, 50 S. W. 963.

Where non-performance of service contracted for is averred a cause of action is stated. Starr *v.* U. S., 8 App. Cas. (D. C.) 552.

13. Mitchell *v.* Merrill, 2 Blackf. (Ind.) 87, 18 Am. Dec. 128.

If the covenant is to pay on request a special request must be alleged. Bush *v.* Stevens, 24 Wend. (N. Y.) 256. *Contra,* see Austin *v.* Burbank, 2 Day (Conn.) 474, 2 Am. Dec. 119.

14. Tinney *v.* Ashley, 15 Pick. (Mass.) 546, 26 Am. Dec. 620.

15. Gibson *v.* Robinson, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250.

16. Brown *v.* Warden, 44 N. J. L. 177; Harrison *v.* Vreeland, 38 N. J. L. 366.

If a bond is copied into the complaint, and its execution and delivery are alleged it is sufficient. Hazelet *v.* Holt County, 51 Nebr. 716, 71 N. W. 717.

Identification.— If there is a particular description of the bond in the complaint followed by an averment that a copy is filed and it appears following the complaint it is sufficiently identified. Blackburn *v.* Crowder, 108 Ind. 238, 9 N. E. 108. So if the copy is wrongly referred to but is otherwise identified it is sufficient. Wall *v.* Galvin, 80 Ind. 447.

17. State *v.* Adams, 15 Ind. App. 304, 44 N. E. 47. But see Walburn *v.* Chenault, 43 Kan. 352, 23 Pac. 657.

or obligation referred to in a bond or its condition are material and necessary to be averred to warrant a recovery they should sufficiently appear.[18]

b. Assignment of Breaches — (I) *Necessity.* It may be stated, generally, that breaches should be assigned in a declaration or complaint in an action on a bond.[19] The distinction is made, however, that in bonds other than for the payment of money the breach of the condition relied on must be specifically alleged in the declaration.[20]

(II) *Sufficiency* — (A) *Generally.* In averring breaches it is generally sufficient if they are set forth in a reasonably specific manner, so that defendant may be fully apprised of what is relied on as the breach and the same strictness is not required as in setting out the bond itself.[21] But a cause of action must be shown,[22] and an intelligible breach of the condition be disclosed[23] within which such breach must be brought by the averment.[24] Again, the assignment must be such as to show the character and extent of the obligation,[25] and of the damage sustained.[26] So, if many things are required by a condition, the omission of any one of which would constitute a breach, a particular breach should be assigned.[27] A single averment, however, may be sufficient.[28] Nor need the substance of the bond be alleged in connection with every breach assigned;[29] but separate and distinct breaches should not be generally assigned.[30] The rule also applies that when a subject comprehends multiplicity of matter in order to avoid prolixity of pleading the law allows of general pleading.[31] But the claim cannot be sustained that the breaches assigned are too general, vague, and uncertain where they are as specific

18. Portage Canal, etc., Co. *v.* Crittenden, 17 Ohio 436; Kamping *v.* Horan, 4 N. Y. Suppl. 51, 21 N. Y. St. 418.

Assessment.— The complaint need not set forth the whole of an assessment in an action on a bond conditioned for the payment of an assessment. U. S. *v.* O'Neill, 19 Fed. 567.

Modified contract.— If the action is on a bond for breach of a modified contract, the omission to declare thereon is not cured by allegations in the reply to the answer. Potts *v.* Hartman, 101 Ind. 359.

Recitals in an annexed penal bond do not serve the purpose of an allegation that the facts are as recited. Sprague *v.* Wells, 47 Minn. 504, 50 N. W. 535.

19. *Arkansas.*— Phillips *v.* Governor, 2 Ark. 382.

Illinois.— Hibbard *v.* McKindley, 28 Ill. 240; Hart *v.* Tolman, 6 Ill. 1; Wilson *v.* Isom, 3 Ill. App. 246.

Iowa.— Homer *v.* Harrison, 37 Iowa 378; Ryder *v.* Thomas, 32 Iowa 56.

New York.— Beers *v.* Shannon, 73 N. Y. 292; Reed *v.* Drake, 7 Wend. (N. Y.) 345.

South Carolina.— Chalmers *v.* Glenn, 18 S. C. 469.

Virginia.— Ward *v.* Fairfax Justices, 4 Munf. (Va.) 494; Shelton *v.* Pollock, 1 Hen. & M. (Va.) 423.

See 8 Cent. Dig. tit. "Bonds," § 172.

That breaches need not be assigned see Anderson *v.* Dickson, 8 Ala. 733 (fact admitted by bond itself); Herndon *v.* Forney, 4 Ala. 243 (action on penal bond); Vandagrift *v.* Tate, 4 Blackf. (Ind.) 174 (bond between parties to justice suit); Gordon *v.* Atkinson, Morr. (Iowa) 195; James *v.* State, 3 Md. 211; Laidler *v.* State, 2 Harr. & G. (Md.) 277; Williams *v.* Willson, 1 Vt. 266.

Instalments.— When bond is conditioned for the payment of money by instalments, breaches need not be assigned under the statute. Harmon *v.* Dedrick, 3 Barb. (N. Y.) 192; Spaulding *v.* Millard, 17 Wend. (N. Y.) 331.

20. State *v.* Lane, 4 Ind. 163; Western Bank *v.* Sherwood, 29 Barb. (N. Y.) 383; Reed *v.* Drake, 7 Wend. (N. Y.) 345; Munro *v.* Alaire, 2 Cai. (N. Y.) 320. And see Fulkerson *v.* Steen, 3 Mo. 377.

Plaintiff has election to declare for penalty or to set out the condition and assign breaches (Governor *v.* Wiley, 14 Ala. 172; Anderson *v.* Dickson, 8 Ala. 733; Postmaster General *v.* Cochran, 2 Johns. (N. Y.) 413; Munro *v.* Alaire, 2 Cai. (N. Y.) 320); or he may assign breaches in his replication (Governor *v.* Wiley, 14 Ala. 172; Postmaster General *v.* Cochran, 2 Johns. (N. Y.) 413; Munro *v.* Alaire, 2 Cai. (N. Y.) 320. See also Van Voorst *v.* Morris Canal, etc., Co., 20 N. J. L. 167; Chetwood *v.* Elizabeth State Bank, 7 N. J. L. 32); or he may declare on the bond without noticing the breach, and if plaintiff would compel him to assign a breach he must plead performance (Shelton *v.* French, 33 Conn. 489).

21. McCarthy *v.* Chicago, 53 Ill. 38.

22. Garrett *v.* Logan, 19 Ala. 344.

23. Palestine Bldg. Assoc. *v.* Spengeman, (N. J. 1899) 43 Atl. 653.

24. Equitable Acc. Ins. Co. *v.* Stout, 135 Ind. 444, 33 N. E. 623.

25. Sargent *v.* Moore, 1 Disn. (Ohio) 99, 12 Ohio Dec. (Reprint) 511.

26. U. S. *v.* Maloney, 4 App. Cas. (D. C.) 505.

27. Com. *v.* Fry, 4 W. Va. 721.

28. Wheeling *v.* Black, 25 W. Va. 266.

29. Sugden *v.* Beasley, 9 Ill. App. 71.

30. Iowa County *v.* Vivian, 31 Wis. 217.

31. Morris Canal, etc., Co. *v.* Van Vorst, 23 N. J. L. 98.

as possible, and all the information on the subject is in possession of defendants.[32] So an assignment may not be good as being too general and yet sufficient in view of preceding allegations.[33] If the breach constitutes the basis of an action in a suit for a penalty it should be clearly and particularly averred.[34]

(B) *Alternative Conditions.* If conditions are in the alternative, so that performance of either discharges the obligation, a breach is bad which assigns nonperformance of one only.[35]

(C) *Following Language of Condition.* In assigning breaches it is sufficient to aver the intention of the parties apparent from the entire instrument, and the precise language in which such intention is expressed need not be used.[36] An assignment which uses and negatives the language of the condition is good.[37]

32. Elam *v.* Commercial Bank, 86 Va. 92, 9 S. E. 498.

33. Guy *v.* McDaniel, 51 S. C. 436, 29 S. E. 196.

For sufficient assignments of breaches see: *Arkansas.*— McLaughlin *v.* Sproul, 14 Ark. 178.

California.— A. F. Sharpleigh Hardware Co. *v.* Knippenberg, 133 Cal. 308, 65 Pac. 621.

Indiana.— Doherty *v.* Chase, 64 Ind. 73; Scobey *v.* Finton, 39 Ind. 275.

Massachusetts.— Tinney *v.* Ashley, 15 Pick. (Mass.) 546, 26 Am. Dec. 620; American Bank *v.* Adams, 12 Pick. (Mass.) 303.

Michigan.— Robson *v.* Dayton, 111 Mich. 440, 69 N. W. 834.

Minnesota.— Bates *v.* Watson, 76 Minn. 332, 79 N. W. 309; Sprague *v.* Wells, 47 Minn. 504, 50 N. W. 535.

Missouri.— Bricker *v.* Stone, 47 Mo. App. 530.

Nebraska.— Hazelet *v.* Holt County, 51 Nebr. 716, 71 N. W. 717.

New Jersey.— Morris Canal, etc., Co. *v.* Van Vorst, 23 N. J. L. 98.

New York.— Bostwick *v.* Van Voorhis, 91 N. Y. 353; Dale *v.* Roosevelt, 9 Cow. (N. Y.) 307; Gale *v.* O'Brian, 13 Johns. (N. Y.) 189.

Oregon.— Bailey *v.* Wilson, 34 Oreg. 186, 55 Pac. 973.

South Carolina.— State *v.* Scheper, 33 S. C. 562, 11 S. E. 643, 12 S. E. 564, 816.

Texas.— Edmiston *v.* Concho County, 21 Tex. Civ. App. 339, 51 S. W. 353; Kohlberg *v.* Fett, (Tex. Civ. App. 1895) 29 S. W. 944; McArthur *v.* Barnes, 10 Tex. Civ. App. 318, 31 S. W. 212.

Virginia.—Guarantee Co. of North America *v.* Lynchburg First Nat. Bank, 95 Va. 480, 28 S. E. 909; Elam *v.* Commercial Bank, 86 Va. 92, 9 S. E. 498.

Wisconsin.— Germania Spar, etc. *v.* Flynn, 92 Wis. 201, 66 N. W. 109; Northern Assur. Co. *v.* Hotchkiss, 90 Wis. 415, 63 N. W. 1020; Webster *v.* Tibbits, 19 Wis. 438.

See 8 Cent. Dig. tit. "Bonds," § 174.

For insufficient assignments of breaches see: *Alabama.*— Pike County *v.* Hanchey, 119 Ala. 36, 24 So. 751.

Illinois.— Safford *v.* Miller, 59 Ill. 205.

Indiana.— Tate *v.* Booe, 9 Ind. 13.

Maryland.—Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324.

Missouri.— Schuyler *v.* Chittenden, 47 Mo. 65.

New York.— Kamping *v.* Horan, 4 N. Y. Suppl. 51, 21 N. Y. St. 418; McKillip *v.* McKillip, 8 Barb. (N. Y.) 552.

South Carolina.—State *v.* Seabrook, 31 S. C. 605, 9 S. E. 802.

Texas.— Hagans *v.* McClain, (Tex. Civ. App. 1896) 36 S. W. 818.

Virginia.— Syme *v.* Griffin, 4 Hen. & M. (Va.) 277.

West Virginia.— Jackson County *v.* Leonard, 16 W. Va. 470.

United States.— Cabot *v.* McMasters, 55 Fed. 722.

34. Campbell *v.* Strong, Hempst. (U. S.) 265, 4 Fed. Cas. No. 2,367*a*.

In proceeding on a penal bond after performance of defendant's contract in part it is sufficient to aver non-performance of the residue. Watts *v.* Sheppard, 2 Ala. 425. So in action on a penal bond, if the breach shows a good cause of action, defectively stated in form, but not deficient in substance, it is good. Taylor *v.* State, 23 Ark. 225.

35. Shaefer *v.* Minor, 1 How. (Miss.) 218; People *v.* Tilton, 13 Wend. (N. Y.) 597.

Breach must be assigned specially. If only the common breach be assigned special demurrer lies. Richardson *v.* Beaumont, 20 N. J. L. 578.

36. Watts *v.* Sheppard, 2 Ala. 425.

The breach may be assigned in the words of the covenant where it consists in the omission or commission of a single act, but if the condition may be broken in various ways the particular breach should be assigned. Greene County *v.* Bledsoe, 12 Ill. 267.

Words of condition need not be followed. State *v.* Scheper, 33 S. C. 562, 11 S. E. 643, 12 S. E. 564, 816; State *v.* Witherspoon, 9 Humphr. (Tenn.) 393; Barrett *v.* Carden, 65 Vt. 431, 26 Atl. 530, 36 Am. St. Rep. 876.

37. *Arkansas.*—Porter *v.* State, 9 Ark. 226; Cunningham *v.* Cheatham, 8 Ark. 187.

Michigan.— Van Middlesworth *v.* Van Middlesworth, 32 Mich. 183.

New Jersey.— Rozenkrantz *v.* Durling, 29 N. J. L. 191; Hanness *v.* Smith, 22 N. J. L. 332; Condit *v.* Baldwin, 19 N. J. L. 143.

New York.— Jones *v.* Hurbaugh, 5 N. Y. Leg. Obs. 19.

Virginia.— Winslow *v.* Com., 2 Hen. & M. (Va.) 459; Craghill *v.* Page, 2 Hen. & M. (Va.) 446.

United States.— Berger *v.* Williams, 4 McLean (U. S.) 577, 3 Fed. Cas. No. 1,341;

(D) *Non-Payment.* A direct and express allegation of neglect and refusal to pay and the continuance thereof is sufficient.[38] A demand for payment may be alleged while other matters relating thereto and which are not stated may constitute a matter of defense,[39] and a defective averment of non-payment may be cured.[40] If the action is against several on a bond conditioned that one pay it must be alleged that he has not paid;[41] and if the promise to pay depends upon a condition of ability so to do the averment must meet the contingency.[42] So non-payment of the penalty should be averred in debt where the bond is payable to an individual.[43]

(E) *Several Breaches.* Under a statute so permitting, plaintiff may assign breaches of all the covenants broken on which he claims damages,[44] or as many breaches as he chooses,[45] or more than one breach.[46] But each one assigned must be perfect in itself, and not by reference to others,[47] although if one is insufficient the whole complaint is not bad if other assignments are good.[48] It has further

U. S. *v.* Spalding, 2 Mason (U. S.) 478, 27 Fed. Cas. No. 16,365.

See 8 Cent. Dig. tit. "Bonds," § 175.

It is insufficient to negative performance in the words of the condition unless it necessarily constitutes a breach thereof. Dale *v.* Dean, 16 Conn. 579; Julliand *v.* Burgott, 11 Johns. (N. Y.) 6; Smith *v.* Jansen, 8 Johns. (N. Y.) 111; Hughes *v.* Smith, 5 Johns. (N. Y.) 168.

38. Gardner *v.* Donnelly, 86 Cal. 367, 24 Pac. 1072.

Non-payment may sufficiently appear from averments which do not so directly or expressly set it forth. Payne *v.* Mattox, 1 Bibb (Ky.) 164 (holding that a declaration that defendant by his writing obligatory acknowledged himself indebted, but omitting to state when the money was to be paid is good); Thomas *v.* Allen, 1 Hill (N. Y.) 145 (holding that a breach alleging that the same became due and was unpaid was well assigned).

39. Citizens Bank *v.* Los Angeles Iron, etc., Co., 131 Cal. 187, 63 Pac. 462, 82 Am. St. Rep. 341.

40. Hibbard *v.* McKindley, 28 Ill. 240, as where the general breach is considered as a continuance of the special breaches.

41. Pinney *v.* Hershfield, 1 Mont. 367.

The breach laid should be as broad as the obligation and aver a failure of all the obligors to pay. Vandiver *v.* Hyre, 5 W. Va. 414; Robins *v.* Pope, Hempst. (U. S.) 219, 20 Fed. Cas. No. 11,931*a*. *Contra*, see Taylor *v.* Auditor, 2 Ark. 174; Reynolds *v.* Hurst, 18 W. Va. 648. See also Crane *v.* Alling, 15 N. J. L. 423, holding that a declaration that one of the obligors has not paid without reference to the other is not defective, as it declares on the instrument as a several bond.

Negativing payment to the obligee other than plaintiff is necessary. Strange *v.* Floyd, 9 Gratt. (Va.) 474.

Payment in two instalments at different times. Allegation of default in one of the payments without specifying which one is insufficient. Carpenter *v.* Alexander, 9 Johns. (N. Y.) 291.

42. Pistel *v.* Imperial Mut. L. Ins. Co., 88 Md. 552, 42 Atl. 210, 43 L. R. A. 219.

43. State *v.* McClane, 2 Blackf. (Ind.) 192; Rigg *v.* Parsons, 29 W. Va. 522, 2 S. E. 81; Reynolds *v.* Hurst, 18 W. Va. 648. But see Clark *v.* Russell, 2 Day (Conn.) 112.

Not necessary in covenant.— McLaughlin *v.* Hutchins, 3 Ark. 207; Hughes *v.* Houlton, 5 Blackf. (Ind.) 180.

Averment of giving bond and breach thereof "whereby an action hath accrued to the plaintiff against the defendant to recover the said sum" sufficiently shows penalty is due and unpaid. Stanley *v.* Montgomery, 102 Ind. 102, 26 N. E. 213.

Breach of condition is also necessary to be shown, as mere averment of non-payment of penalty is insufficient. Hazel *v.* Waters, 3 Cranch C. C. (U. S.) 682, 11 Fed. Cas. No. 6,284.

Demand and refusal to pay need not be alleged where the action is on an injunction bond. Montana Min. Co. *v.* St. Louis Min., etc., Co., 19 Mont. 313, 48 Pac. 305.

44. Van Benthuysen *v.* De Witt, 4 Johns. (N. Y.) 213; Munro *v.* Alaire, 2 Cai. (N. Y.) 320.

45. People *v.* Harmon, 15 Ill. App. 189; Marvin *v.* Bell, 41 Vt. 607.

46. Munro *v.* Alaire, 2 Cai. (N. Y.) 320.

At common law more than one breach assigned made declaration bad. Taft *v.* Brewster, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280; Munro *v.* Alaire, 2 Cai. (N. Y.) 320.

47. State *v.* Holleman, 21 Ark. 413; State *v.* Hammett, 7 Ark. 492.

Allegations of the breaches of other covenants should be stricken out. Shelton *v.* Durham, 76 Mo. 434.

48. *Alabama.*—Coleman *v.* Pike County, 83 Ala. 326, 3 So. 755, 3 Am. St. Rep. 746; Flournoy *v.* Lyon, 70 Ala. 308; Williamson *v.* Woolf, 37 Ala. 298; Wilson *v.* Cantrell, 19 Ala. 642; Watts *v.* Sheppard, 2 Ala. 425.

Arkansas.— Adams *v.* State, 6 Ark. 497.

Illinois.— Henrickson *v.* Reinback, 33 Ill. 299; Hibbard *v.* McKindley, 28 Ill. 240; People *v.* Gregory, 11 Ill. App. 370.

Indiana.— McFall *v.* Howe Sewing Mach. Co., 90 Ind. 148; State *v.* Scott, 12 Ind. 529; Kintner *v.* State, 3 Ind. 86; Rock *v.* Gordon, 6 Blackf. (Ind.) 192; Redpath *v.* Nottingham, 5 Blackf. (Ind.) 267.

Kentucky.—*Compare* Carlisle Bank *v.* Hopkins, 1 T. B. Mon. (Ky.) 245, 15 Am. Dec. 113, holding that although good on general

been decided that several breaches may be assigned in one count of a declaration or complaint.[49]

2. PLEA, ANSWER, OR AFFIDAVIT OF DEFENSE — a. In General. In view of the different systems of pleading[50] the difficulty in stating a general rule is obvious for many of the technicalities as to the several steps prerequisite to an issue have at least as to form given way before such code provisions as exist. Under the decisions, however, it may be generally stated that a plea must be true at the time it is pleaded.[51] Nor should it be hypothetical, or a plea only applicable to a different kind of bond than that declared upon.[52] And if another instrument is relied upon as furnishing an equitable defense it should be set out according to its terms and legal effect by a proper plea.[53] But the plea should not set up a contract different from and contradictory to that stated in the bond, and with reference to which the latter was made.[54] And facts should not be specially pleaded which can be proven under the general issue.[55]

b. Denial or Traverse of Breach. The alleged breach should be directly, and not inferentially, denied;[56] and should be traversed as charged, and not by a plea that the obligors have not violated the conditions to the extent alleged in the declaration.[57] So the averments must be such that the court may see whether the matters assigned as breaches were within the conditions or not.[58] And where

demurrer, yet if a general verdict be rendered for plaintiff the judgment may be arrested.

Missouri.— Hayden *v.* Sample, 10 Mo. 215; State *v.* Porter, 9 Mo. 356.

New York.— People *v.* Brush, 6 Wend. (N. Y.) 454; People *v.* Russell, 4 Wend. (N. Y.) 570.

Virginia.—Martin *v.* Sturm, 5 Rand. (Va.) 693.

See 8 Cent. Dig. tit. "Bonds," § 179.

49. *Alabama.*— Sloss Iron, etc., Co. *v.* Macon County, 111 Ala. 554, 20 So. 400.

Colorado.— Sopris *v.* Lilly, 1 Colo. 266.

Illinois.— Hibbard *v.* McKindley, 28 Ill. 240.

Indiana.— McFall *v.* Howe Sewing Mach. Co., 90 Ind. 148; Richardson *v.* State, 55 Ind. 381.

Kansas.—Barton County *v.* Plumb, 20 Kan. 147.

Missouri.— State *v.* Davis, 35 Mo. 406.

United States.— U. S. *v.* Truesdell, 2 Bond (U. S.) 78, 28 Fed. Cas. No. 16,543, 5 Int. Rev. Rec. 102.

Contra.— State *v.* Rives, 12 Ark. 721; Abrahams *v.* Jones, 20 Ill. App. 83.

50. See, generally, PLEADING.

The conclusion.— Under an early decision the conclusion of *non est factum* was to the contrary. Cleaton *v.* Chambliss, 6 Rand. (Va.) 86. So also of a denial of an award for the performance of which the bond was given. Henries *v.* Stiers, 8 N. J. L. 364.

51. Bryan *v.* Drake, 20 N. C. 56, holding that a condition in the nature of a defeasance cannot be made available by performance at the time of trial.

52. American Bldg., etc., Co. *v.* Booth, 17 R. I. 736, 24 Atl. 779.

53. Howell *v.* Cowles, 6 Gratt. (Va.) 393.

So a denial of a condition in a referred-to instrument in a declaration on a bond is insufficient, without setting forth the words of said instrument or negotiating an alleged like condition in the bond. Dunton *v.* Dunn, 15 N. Y. 498 [*reversing* 8 How. Pr. (N. Y.) 16].

So a plea of leave and license, which does not allege such leave and license to have been given by deed, is bad in an action on a bond under seal. Miller *v.* Elliott, 1 Ind. 484, 50 Am. Dec. 475.

54. Booske *v.* Gulf Ice Co., 24 Fla. 550, 5 So. 247.

Again if a subsequent and not a precedent condition, contradictory of the bond, is set up it is no defense. White Sewing Mach. Co. *v.* Feeley, 72 Conn. 181, 43 Atl. 36.

55. Governor *v.* Lagow, 43 Ill. 134; Sluyter *v.* Union Cent. L. Ins. Co., 3 Ind. App. 312, 29 N. E. 608; Elizabeth State Bank *v.* Chetwood, 8 N. J. L. 1.

Special plea amounting to general denial is demurrable. Wallace *v.* Spencer Exch. Bank, 126 Ind. 265, 26 N. E. 175. "A special plea in bar, amounting to the general issue — that is, a plea alleging new matter which is, in effect, a denial of the truth of the declaration — is, in general, improper and inadmissible. It goes in denial, not in avoidance; but it is good in substance, and bad in form only. But this latter rule is subject to this exception: A special plea amounting to a justification — in other words, an entire special plea answering the whole declaration, and alleging matter of justification — is good, although as to part it amounts to the general issue; for matter of justification is matter of law which ought to be referred by plea to the court." American Buttonhole Overseaming Sewing Mach. Co. *v.* Burlack, 35 W. Va. 647, 658, 14 S. E. 319.

56. Thompson *v.* Means, 11 Sm. & M. (Miss.) 604.

57. **Rule applied to penal bond.** U. S. *v.* Dair, 4 Biss. (U. S.) 280, 25 Fed. Cas. No. 14,913.

58. **Rule applied to agent's acts** in action on his bond. Accident Ins. Co. of North America *v.* Baker, 34 W. Va. 667, 12 S. E. 834.

a plea is to the whole declaration on a penal bond it should sufficiently meet all breaches which are well assigned.[59] So a substantial part of the breach must be answered.[60] But in case of several breaches, defendant may deny or confess and avoid in several pleas the facts severally assigned as if they were separate counts, although the entire assignment must be answered;[61] and some of the breaches may be met by plea and others by demurrer, where the assignment consists of a single count.[62]

c. Impeaching Consideration. While the doctrine of estoppel may operate to preclude setting up a failure of consideration,[63] yet where it may be availed of, the facts showing the same must be stated,[64] and they must be set forth with sufficient certainty,[65] and be good in substance and form.[66] Nor must the plea be too indefinite to apprise the plaintiff of the particular illegality relied on;[67] and a complete failure must be alleged in debt on a bond,[68] since if a part only of the consideration is impeached it is an insufficient pleading.[69] Again a special plea is necessary, where the bond is executed under seal, nor can the issue of its validity be raised by objecting to its admission in evidence,[70] and if fraud in the consideration is relied on it should be pleaded in bar[71] with an offer to return the thing within a reasonable time.[72]

But plea is good which avers that defendant had not broken his said covenant in manner and form complained of. Miller *v.* Elliott, 1 Ind. 484, 50 Am. Dec. 475.

59. Sopris *v.* Lilly, 1 Colo. 266.

Failure to specifically deny a material allegation in an answer to the whole complaint is demurrable. German Mut. Ins. Co. *v.* Glasco, 14 Ind. App. 95, 42 N. E. 493.

Plea to whole declaration is bad which only answers one of two breaches assigned. People *v.* McClellan, 137 Ill. 352, 27 N. E. 181 [*reversing* 38 Ill. App. 162].

60. Clifford *v.* Smith, 4 Ind. 377. See also Shelby *v.* Bohn, 25 Ind. App. 473, 57 N. E. 566, where the pleading was defective where it sought to avoid liability by setting up plaintiff's neglect in prosecuting his claim against the obligee's estate.

61. Sugden *v.* Beasley, 9 Ill. App. 71.

Plea insufficient as to one of several breaches is bad as a whole, where it purports to answer entire complaint. State *v.* Roche, 94 Ind. 372.

Words "partial defense" unnecessary, where the purpose of the answer clearly appears on its face, and so even though the N. Y. Code Civ. Proc. § 508, requires a partial defense to be expressly stated as such. Howd *v.* Cole, 74 Hun (N. Y.) 121, 26 N. Y. Suppl. 431, 55 N. Y. St. 876.

62. Citizens' Bank *v.* Wiegand, 11 Phila. (Pa.) 326, 33 Leg. Int. (Pa.) 100.

Joint demurrer is fatal if bad as to one. Guy *v.* McDaniel, 51 S. C. 436, 29 S. E. 196. But see as to the general principle Hirshfeld *v.* Weill, 121 Cal. 13, 53 Pac. 402.

63. **Estoppel to so plead** arises where one lends his credit to another in the form of a coupon bond to be sold to raise funds, and it comes into the hands of an assignee. Ritchie *v.* Cralle, 22 Ky. L. Rep. 160, 56 S. W. 963.

64. Abraham *v.* Gray, 14 Ark. 301; Dickson *v.* Burks, 6 Ark. 412, 44 Am. Dec. 521; Mobile Sav. Bank *v.* Oktibbeha County, 24 Fed. 110.

65. Craig *v.* Blow, 3 Stew. (Ala.) 448.

When plea good.— Leonard *v.* Bates, 1 Blackf. (Ind.) 172, consideration was the making of a good and sufficient deed; averred that plaintiff had no title.

66. Grover *v.* Gaunt, 6 Sm. & M. (Miss.) 317.

Insufficient pleas.— Prewett *v.* Vaughn, 21 Ark. 417 (want of consideration and failure to tender deed without alleging that the vendor agreed to convey the land or that he was under a dependent agreement to convey as a condition precedent); Nixon *v.* Bumpass, 5 Yerg. (Tenn.) 16, 26 Am. Dec. 249 (plea as to failure to obtain title to land); Tyson *v.* Williamson, 96 Va. 636, 32 S. E. 42 (plea that land for which bond given was worthless).

67. Boyt *v.* Cooper, 6 N. C. 286.

68. Willett *v.* Forman, 3 J. J. Marsh. (Ky.) 292.

69. Edward *v.* Taylor, 2 A. K. Marsh. (Ky.) 148.

70. Johnson *v.* Caffey, 59 Ala. 331.

Special plea necessary.— Neely *v.* Chinn, 8 Blackf. (Ind.) 84; Morton *v.* Fletcher, 2 A. K. Marsh. (Ky.) 137, 12 Am. Dec. 366; Candiff *v.* Thighen, 30 Miss. 180; Ragsdale *v.* Thorn, 1 McMull. (S. C.) 335; Bollinger *v.* Thurston, 2 Mill Const. (S. C.) 447.

Want of affidavit to plea.—Impeaching consideration should be taken advantage of by an objection to its filing and not by demurrer. Patrick *v.* Conrad, 2 A. K. Marsh. (Ky.) 43.

71. Lord *v.* Brookfield, 37 N. J. L. 552; Mason *v.* Evans, 1 N. J. L. 211.

That representations are fraudulent should be alleged as to consideration of bond for improvement on land; also that no benefit was ever received by obligor under the sale, or that the means of knowledge were inaccessible to him, otherwise a plea of failure of consideration is bad. Ferguson *v.* McCain, 23 Ark. 210.

72. Willett *v.* Forman, 3 J. J. Marsh. (Ky.) 292. See also Bruffey *v.* Brickey, 5 Mo. 395.

d. Nil Debet. This is not a good plea in debt on a bond,[73] where said bond is the gist of the action, otherwise where it is the mere inducement thereto.[74]

e. Non Est Factum. This plea is the general issue in the action of debt on a bond, but not always so in covenant, although in the former action if defendant wishes to separate the law from the facts so that the court may pass upon the sufficiency of any special ground why it is not his deed he must allege such facts specially;[75] and notice of special matter may be annexed to the plea.[76] So likewise that the bond was delivered in escrow, and it is good pleading in bar.[77]

73. *Alabama.*—Ansly *v.* Mock, 8 Ala. 444.

Colorado.— Gargan *v.* School Dist. No. 15, 4 Colo. 53; Anderson *v.* Sloan, 1 Colo. 484.

Illinois.— Kilgour *v.* Drainage Com'rs, 111 Ill. 342; Caldwell *v.* Richmond, 64 Ill. 30.

Indiana.— Shook *v.* State, 6 Ind. 113; Parish *v.* State, 3 Ind. 209; Hooker *v.* State, 7 Blackf. (Ind.) 272; Noel *v.* State, 6 Blackf. (Ind.) 523; Smith *v.* Stewart, 6 Blackf. (Ind.) 162; Eakle *v.* Oliver, 5 Blackf. (Ind.) 3; Love *v.* Kidwell, 4 Blackf. (Ind.) 553; Trimble *v.* State, 4 Blackf. (Ind.) 435.

Kentucky.— Hanna *v.* McKenzie, 5 B. Mon. (Ky.) 314, 43 Am. Dec. 122; Bradford *v.* Ross, 3 Bibb (Ky.) 238.

Maine.— Miller *v.* Moses, 56 Me. 128.

Mississippi.— Butler *v.* Alcus, 51 Miss. 47.

Missouri.— Crigler *v.* Quarles, 10 Mo. 324; Parks *v.* State, 7 Mo. 194; Boynton *v.* Reynolds, 3 Mo. 79.

New Jersey.—Allen *v.* Smith, 12 N. J. L. 159.

New York.— Bullis *v.* Giddens, 8 Johns. (N. Y.) 82.

Pennsylvania.— Bauer *v.* Roth, 4 Rawle (Pa.) 83.

Vermont.— Dyer *v.* Cleaveland, 18 Vt. 241.

See 8 Cent. Dig. tit. "Bonds," § 182.

Nil debet bad if there are no common counts in declaration. Mix *v.* People, 92 Ill. 549; Terre Haute, etc., R. Co. *v.* Peoria, etc., R. Co., 81 Ill. App. 435. Bond for discharge of goods attached; plea of *nil debet* bad. Blydenburgh *v.* Carpenter, Lalor (N. Y.) 169.

Plea which does not deny owing the sum named in declaration in United States money, said declaration being on a bond conditioned to pay in pounds sterling, and which traverses no issuable fact which goes to the merits is bad. Gurney *v.* Hoge, 6 Blatchf. (U. S.) 499, 11 Fed. Cas. No. 5,875.

74. King *v.* Ramsay, 13 Ill. 619; Davis *v.* Burton, 4 Ill. 41, 36 Am. Dec. 511; Minton *v.* Woodworth, 11 Johns. (N. Y.) 474; Dyer *v.* Cleaveland, 18 Vt. 241; Sneed *v.* Wister, 8 Wheat. (U. S.) 690, 5 L. ed. 717.

Demurrer can only raise question whether *nil debet* is properly pleaded to declaration on penal bond. U. S. *v.* Spencer, 2 McLean (U. S.) 405, 27 Fed. Cas. No. 16,368.

Motion to quash plea of *nil debet* to debt on bond will not be granted. Eakle *v.* Oliver, 5 Blackf. (Ind.) 3.

Plea of nil debet irregular, but if plaintiff tries issue he is bound. Belser *v.* Irvine, 4 McCord (S. C.) 380.

75. American Buttonhole Overseaming Sewing Mach., etc., Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319, plea should conclude with an "*et sic non est factum.*"

Bond sued on not original bond; plea of *non est factum* is good. Galbreath *v.* Knoxville, (Tenn. Ch. 1900) 59 S. W. 178.

Bond taken unlawfully; plea that seeks to avoid a bond on such ground must specially state the facts that show illegality unless they appear on the face of the condition. U. S. *v.* Sawyer, 1 Gall. (U. S.) 86, 27 Fed. Cas. No. 16,227.

Joint plea of non est factum in action of debt on bond against principal and sureties must be sustained as to all or fail as to all. U. S. *v.* Halsted, 6 Ben. (U. S.) 205, 26 Fed. Cas. No. 15,287.

On a voidable bond non est factum is not a good plea. Bollinger *v.* Thurston, 2 Mill Const. (S. C.) 447.

Plea that bond executed by partner without authority from copartners can only be raised by *non est factum.* Greene County *v.* Wilhite, 29 Mo. App. 459.

Plea that one signed as agent and director and not otherwise, without alleging his authority, is bad. White *v.* Skinner, 13 Johns. (N. Y.) 307, 7 Am. Dec. 381.

Plea that seals affixed without consent of defendant, without alleging that they were affixed with the knowledge or by authority of plaintiff, is insufficient. U. S. *v.* Luin, 1 How. (U. S.) 104, 11 L. ed. 64.

Plea that signature was forged without alleging knowledge of forgery is demurrable. Jacobs *v.* Curtiss, 67 Conn. 497, 35 Atl. 501.

Plea uncertain and argumentative as to signature is defective. Manning *v.* Norwood, 1 Ala. 429.

All other pleas and replications are surplusage.— Where no other form of pleading will entitle plaintiff to recover, the issue in debt on a bond being accepted upon pleas of *non est factum* and *nil debet.* Ryan *v.* People, 165 Ill. 143, 46 N. E. 206 [*affirming* 62 Ill. App. 355].

76. Beach *v.* Springer, 4 Wend. (N. Y.) 519.

77. Hicks *v.* Goode, 12 Leigh (Va.) 479, 37 Am. Dec. 677.

Special non est factum that defendants delivered the instrument as an escrow on a condition not performed is a good plea. Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324. But such a plea is bad, unless it aver that the condition has not been performed. U. S. *v.* Dair, 4 Biss. (U. S.) 280, 25 Fed. Cas. No. 14,913.

f. Nul Tiel Record. This is a good plea to an action of debt on an appeal-bond.[78]

g. Plea of Payment. Pleading conditions performed to debt on bond for money amounts substantially to a plea payment.[79] But the payment should ordinarily be pleaded to be available, although this is not an absolute rule and the sufficiency, insufficiency, or necessity of such a plea must depend upon the averments of the complaint; outside of this statement no specific or certain rule can be laid down.[80]

h. Plea of Performance — (i) *Generally.* In order to plead performance, oyer of the condition should be craved where it is not set out in the declaration.[81] But where the condition is in general terms, yet comprehends a multiplicity of matters, or multifarious particulars all in the affirmative, performance may be pleaded to avoid prolixity.[82] And generally such a plea is an answer to the whole cause of action.[83] So if a complete performance of all conditions of the bond is averred the plea is not demurrable.[84] But each breach should be answered and the time, place, and manner of performance be set forth where the breaches are specifically assigned, for in such case a general plea is insufficient.[85] And if the condition is in the disjunctive, the defendant's pleading must show which part he has performed.[86] Again if the plea of performance is too narrow or contains a

78. Bohannon *v.* Broadwell, 7 J. J. Marsh. (Ky.) 32. *Contra,* Herrick *v.* Swartwout, 72 Ill. 340.

79. Hammitt *v.* Bullett, 1 Call (Va.) 567.

80. **When plea good.**—Funkhouser *v.* Purdy, 1 Blackf. (Ind.) 294 (payment of a certain sum averred and also that amount due and interest depended upon condition which was still unperformed); Crawford *v.* McLellan, 87 N. C. 169 (facts pleaded from which the presumption of payment arose); Watson *v.* Joslyn, 27 Vt. 611 (on demurrer plea was of payment and acceptance of a sum of money as satisfaction before suit brought); Cooke *v.* Graham, 5 Munf. (Va.) 172 (payment averred in accordance with the condition).

Instalment due.—Plea of payment *puis darrein continuance* is a good bar to an action on a penal bond, but does not prevent actions for future instalments. Jones *v.* Griffin, 1 Strobh. (S. C.) 31. But obligor cannot plead in bar that he paid part of the instalments after they fell due and that the others are not yet due. Rozenkrantz *v.* Durling, 29 N. J. L. 191.

Extends only to part due.— Thatcher *v.* Taylor, 3 Munf. (Va.) 249.

Payment of all sums for which mortgage given is bad plea to action on bond to secure same. Eason *v.* Fisher, 1 Ark. 90.

Payment on subsequent day without averring it to be of the whole sum then due is bad. U. S. *v.* Gurney, 4 Cranch (U. S.) 333, 2 L. ed. 638.

Bond for performance of duty and indemnity.— Breach should be admitted and payment averred of sums claimed in declaration, and a plea is bad which only avers payment of all that plaintiff has paid and expended. Hart *v.* Meeker, 1 Sandf. (N. Y.) 623.

81. Anderson *v.* Barry, 2 J. J. Marsh. (Ky.) 265; Burkholder *v.* Lapp, 31 Pa. St. 322; U. S. *v.* Arthur, 5 Cranch (U. S.) 257, 3 L. ed. 94.

82. Mills *v.* Skinner, 13 Conn. 436; Bailey *v.* Rogers, 1 Me. 186; Dawes *v.* Gooch, 8 Mass. 488.

83. State *v.* Hays, 30 W. Va. 107, 3 S. E. 177.

General performance is a good plea. Dawes *v.* Gooch, 8 Mass. 488; Jackson *v.* Rundlet, 1 Woodb. & M. (U. S.) 381, 13 Fed. Cas. No. 7,145. But it is not a good plea under a condition that a third person shall pay to the obligee such sums as he shall recover against him, for this is not an affirmation that such third person has paid. Freeland *v.* Ruggles, 7 Mass. 511. Nor is it good under a condition not to practice or settle within certain limits, where the breach assigned is that the obligor had practised within such limits. Thompson *v.* Means, 11 Sm. & M. (Miss.) 604.

Bank teller's bond when answer insufficient to declaration alleging failure to account. Georgetown Union Bank *v.* Forrest, 3 Cranch C. C. (U. S.) 218, 24 Fed. Cas. No. 14,356.

Condition to pay judgment; when plea good as to recovery thereof. Bond *v.* Cutler, 10 Mass. 419.

84. Musgrave *v.* Muscatine County, 1 Greene (Iowa) 446.

85. *Alabama.*— Reid *v.* Nash, 23 Ala. 733; Tait *v.* Parkman, 15 Ala. 253.

Illinois.— People *v.* McHatton, 7 Ill. 731.

Maine.— Bailey *v.* Rogers, 1 Me. 186.

Maryland.— Gott *v.* State, 44 Md. 319.

Massachusetts.— Tinney *v.* Ashley, 15 Pick. (Mass.) 546, 26 Am. Dec. 620.

Mississippi.— Marshal *v.* Hamilton, 41 Miss. 229; Emanuel *v.* Laughlin, 3 Sm. & M. (Miss.) 342.

New York.— Postmaster-General *v.* Cochran, 2 Johns. (N. Y.) 413.

See 8 Cent. Dig. tit. "Bonds," § 188.

Plea should answer specially, in debt on bond, to every particular mentioned in the condition, where it is to do several distinct things, being something other than the performance of covenants. Bailey *v.* Rogers, 1 Me. 186.

86. Tucker *v.* Lee, 3 Cranch C. C. (U. S.) 684, 24 Fed. Cas. No. 14,221.

Condition in alternative; general plea of

flat negative pregnant it is bad.[87] If readiness and willingness to perform are relied upon, the plea should set forth the same with all the essentials as to time, place, and ability, and including, when requisite, the production or tender of the thing itself; all these should, however, rest upon the requirements of the condition.[88]

(II) *Non-Damnificatus.* This plea is substantially the equivalent of one of conditions performed;[89] and although it may be applicable to an indemnity bond,[90] or to one for penalty or forfeiture,[91] it is not good pleading to a count assigning breaches,[92] or where the conditions are multifarious,[93] or in debt on bond the condition of which is in the alternative,[94] or to pay another bond,[95] or for faithful performance of an agent's,[96] or a jailer's duties,[97] or for the performance of a particular act.[98]

i. Sham or Evasive Pleas. Sham, frivolous, irrelevant, or evasive pleading should be stricken out.[99]

j. Setting Up Fraud.[1] A general plea of fraud and covin is good without setting forth the particulars thereof;[2] but it should also be alleged that it was in consideration of the execution of the instrument;[3] and if the fraud could have been avoided by reading the instrument alleged to have been procured thereby,

performance is bad. But under such a condition the use of disjunctive words does not necessarily make the clause an alternative one. Bailey *v.* Rogers, 1 Me. 186.

Covenant not made negative by the mere occurrence of negative words, so that a general plea of performance would be bad if they are in affirmance of a precedent affirmative or if the whole clause taken together is essentially affirmative. Bailey *v.* Rogers, 1 Me. 186.

87. U. S. *v.* Sawyer, 1 Gall. (U. S.) 86, 27 Fed. Cas. No. 16,227.

88. Fretageot *v.* Owen, 7 Blackf. (Ind.) 231 (plea was bad in this case, which was in debt on an obligation promising to pay on a specified day or convey land); English *v.* Finicey, 5 Blackf. (Ind.) 298 (plea declared bad in debt on bond with a penalty, for delivery of goods); Cox *v.* Way, 3 Blackf. (Ind.) 143 (in debt on bond for performance of work plea should show that refusal was prior to expiration of time specified for doing the work); Savary *v.* Goe, 3 Wash. (U. S.) 140, 21 Fed. Cas. No. 12,388 (bond was to deliver goods at certain time and place, plea should aver that defendant was at the place in person or by his agent and ready to deliver. If "all" the month is specified readiness at the last convenient hour of the last day should be pleaded).

Answer of tender of good and sufficient deed executed by the parties in whom title then was is sufficiently certain. Bateman *v.* Johnson, 10 Wis. 1.

Uncore prist (still ready) need not be pleaded in such a case as that last above cited, the bond being for money and the delivery of the goods being in the condition only. Savary *v.* Goe, 3 Wash. (U. S.) 140, 21 Fed. Cas. No. 12,388.

89. Elam *v.* Commercial Bank, 86 Va. 92, 9 S. E. 498; Archer *v.* Archer, 8 Gratt. (Va.) 539.

90. American Bldg., etc., Co. *v.* Booth, 17 R. I. 736, 24 Atl. 779.

91. Heisen *v.* Westfall, 86 Ill. App. 576.

92. Jenkins *v.* Hay, 28 Md. 547; Hart *v.* Brady, 1 Sandf. (N. Y.) 626.

93. Elizabeth State Bank *v.* Chetwood, 8 N. J. L. 1.

94. Barrett *v.* Barron, 13 N. H. 150.

95. Douglass *v.* Clark, 14 Johns. (N. Y.) 177.

96. American Bldg., etc., Co. *v.* Booth, 17 R. I. 736, 24 Atl. 779.

97. McClure *v.* Erwin, 3 Cow. (N. Y.) 313.

98. *Colorado.*— Hayes *v.* New York Gold Min. Co., 2 Colo. 273.

Illinois.— Terre Haute, etc., R. Co. *v.* Peoria, etc., R. Co., 81 Ill. App. 435; Sears *v.* Nagler, 18 Ill. App. 547.

Indiana.— State *v.* Greshan, 1 Ind. 190.

Missouri.— Ingram *v.* Wilson, 11 Rich. (S. C.) 461.

Virginia.—Archer *v.* Archer, 8 Gratt. (Va.) 539.

99. **What are sham, etc., pleadings** within the rule. Crane *v.* Andrews, 10 Colo. 265, 15 Pac. 331; Deloatch *v.* Vinson, 108 N. C. 147, 12 S. E. 895.

What are not sham, etc., pleadings within the rule. Dickinson *v.* Auld, 23 Hun (N. Y.) 275; Dail *v.* Harper, 83 N. C. 4.

1. As to fraud impeaching consideration see *supra*, VI, C, 2, c.

2. Pence *v.* Smock, 2 Blackf. (Ind.) 315; Montgomery *v.* Tipton, 1 Mo. 446; Mason *v.* Evans, 1 N. J. L. 211.

3. Tomlinson *v.* Mason, 6 Rand. (Va.) 169.

Double plea of procuring by misrepresentations as to previous state of employee's accounts, and that employer knew or could have known that the former was a defaulter is bad. Supreme Council Catholic K. of A. *v.* New York Fidelity, etc., Co., 63 Fed. 48, 22 U. S. App. 439, 11 C. C. A. 96.

Plea is bad, in debt on bond, that plaintiff falsely asserted that defendant was legally liable to pay him a certain sum and induced him to execute the bond in question. Dubois *v.* Loper, 1 N. J. L. 438.

there should be averments of acts or device of the obligee used to prevent such reading, and signing, or of some abuse of confidence reposed in him.[4]

k. What Is Admitted. A plea admitting a breach of part of the condition is bad.[5] Nor can the contents of the obligation be denied if its execution, delivery, and approval are admitted;[6] nor is it necessary to produce the instrument where there is a plea of payment,[7] or of general performance of a bond with a collateral condition,[8] or an admission of the truth of an allegation setting out the condition,[9] or a plea of *non est factum*, the signature being thereafter proved, and the bond being read.[10] So in covenant with oyer, pleading payment, accord, and satisfaction, admits all the allegations of the complaint and precludes objection to the admission of the bond on the ground of variance.[11] But a denial of indebtedness, and that the instrument was not a bond but a private writing not properly executed nor binding, does not admit any liability on the obligation.[12]

l. Where There Is More Than One Defense — (I) *Inconsistent Pleas.* Pleas which are inconsistent cannot be pleaded together.[13] Although, if there is no apparent inconsistency in the allegations or pleas, they should not be stricken out.[14]

(II) *Severance of Defenses.* There may be a severance of defenses.[15]

m. Affidavit of Defense. If the bond is not an instrument for the payment of money within a statute or the rules of court no affidavit of defense is required;[16] but such affidavit is required on instruments so payable.[17] A sufficient defense should be stated to enable the court to pass upon the merits, at least to the extent of determining whether or not there is a defense in law; but the sufficiency or insufficiency of such affidavit must rest largely upon what appears in each particular case.[18]

4. McIlroy *v.* Buckner, 35 Ark. 555.

5. Fitzgerald *v.* Hart, 4 Mass. 429; Sevey *v.* Blacklin, 2 Mass. 541.

6. Milburn *v.* State, 1 Md. 1.

7. Baily *v.* Wallen, 1 Overt. (Tenn.) 197. And so even though there are erasures and interlineations on the face of the bond. Connell *v.* Crawford County, 59 Pa. St. 196.

8. Reid *v.* Wethered, 1 Harr. & J. (Md.) 448.

9. State *v.* Scheper, 33 S. C. 562, 11 S. E. 643, 12 S. E. 564, 816, and so without stating a variance between the original complaint and the copy served.

10. Clanton *v.* Laird, 12 Sm. & M. (Miss.) 568.

11. Dickinson *v.* Burr, 7 Ark. 34.

12. Board Administrators *v.* McKowen, 48 La. Ann. 251, 19 So. 553, 55 Am. St. Rep. 275.

13. **Denying execution and alleging performance** is bad. Pope *v.* Latham, 1 Ark. 66.

Non est factum and non-performance caused by wilful concealment and consequent release are inconsistent. Accident Ins. Co. of North America *v.* Baker, 34 W. Va. 667, 12 S. E. 834.

Non est factum and nil debet in a single plea in debt are inconsistent. Muzzy *v.* Shuttuck, 1 Den. (N. Y.) 233.

14. **Pleas not inconsistent but sufficient; non est factum** and special plea of cancellation. Tindal *v.* Bright, Minor (Ala.) 103. *Non est factum* and *nul tiel record.* Brown *v.* Bickle, 7 Ark. 410; Grand Chute *v.* Winegar, 15 Wall. (U. S.) 355, 21 L. ed. 170. *Non est factum* and performance. Hamilton *v.* Waring, 2 Brev. (S. C.) 163. *Non est factum* and full settlement. Accident Ins. Co. of North America *v.* Baker, 34 W. Va. 667, 12 S. E. 834. *Non est factum* and prior plea of payment. Jackson *v.* Webster, 6 Munf. (Va.) 462.

15. **Each may sever** and plead as many pleas as are necessary, where suit is brought against the principal and sureties. Williams *v.* Hinkle, 15 Ala. 713.

Joint plea of duress as to one defendant is bad in action on joint and several bond, where relationship is not averred. Bordentown *v.* Wallace, 50 N. J. L. 13, 11 Atl. 267.

One of several cannot sever and plead matters of personal discharge after joinder in pleas in bar. Andrus *v.* Waring, 20 Johns. (N. Y.) 153.

16. Rule applied to a refunding bond (Linderman *v.* Linderman, 1 Woodw. (Pa.) 56), to bond for the faithful discharge of a duty (Montgomery Lodge No. 59 *v.* Waid, 1 Woodw. (Pa.) 39; Dauphin, etc., Coal Co. *v.* Dasher, 1 Pearson (Pa.) 148. But see Koelle *v.* Engbert, 4 Wkly. Notes Cas. (Pa.) 202), and to a claim property bond (Eldred *v.* Richardson, 7 Wkly. Notes Cas. (Pa.) 130).

17. Thus appeal-bonds (Myers *v.* Shoneman, 90 Ill. 80; Mestling *v.* Hughes, 89 Ill. 389; Coursen *v.* Browning, 86 Ill. 57); coupon bonds payable to bearer (Copeland *v.* Iron Co., 13 Phila. (Pa.) 8, 36 Leg. Int. (Pa.) 202); and bonds payable to survivor (Gerhart *v.* Kaufman, 1 Woodw. (Pa.) 367).

Rule for judgment for want of affidavit of defense discharged on bond for payment indorsed and principal and interest guaranteed. Camden, etc., R. Co. *v.* Pennypacker, 21 Wkly. Notes Cas. (Pa.) 118.

18. **Affidavit declared sufficient** in Shriver *v.* McIntire, 130 Pa. St. 459, 18 Atl. 644, a suit on a bond to defend a suit and hold plain-

3. SUBSEQUENT PLEADINGS — a. Replication or Reply — (I) *GENERALLY.* A replication or reply is unnecessary if the plea is of a character to complete the issue as in case of *non est factum*,[19] or if there is matter of avoidance which is deemed to be controverted.[20] If, however, such reply or replication is necessary it should sufficiently answer the plea,[21] but the particulars of an alleged fraud in obtaining a release need not be set out therein,[22] nor should it contain any averment against the express condition of the bond.[23] Departure and repugnancy are bad,[24] as is also duplicity or double pleading,[25] or affirmative matter in avoidance of a plea of no consideration.[26]

(II) *ASSIGNMENT OF BREACHES.* Plaintiff may declare generally and assign breaches in his replication in actions on bonds with conditions other than for the payment of money,[27] so in suits on bonds with collateral conditions,[28] and so after defendant has pleaded general performance.[29] But after he has by his pleadings defeated plaintiff the latter cannot assign new breaches,[30] and if those assigned

tiffs harmless for damages; affidavit alleged a conspiracy to prevent a proper defense.

Affidavits insufficient.— Com. *v.* Snyder, 1 Pa. Super. Ct. 286 (affidavit averred compliance with condition in part by payment and by release as to other part); Pennock *v.* Kennedy, 153 Pa. St. 577, 32 Wkly. Notes Cas. (Pa.) 99, 26 Atl. 15 (averment that defendant believed he never signed said bond nor authorized any one to do it for him). See also as to insufficiency Clapier *v.* Maupay, 2 Miles (Pa.) 137; State Cent. Sav., etc., Assoc. *v.* Sheets, 2 Pearson (Pa.) 217; Keffer *v.* Robinson, 2 Wkly. Notes Cas. (Pa.) 689; Cressman *v.* Koffel, 1 Wkly. Notes Cas. (Pa.) 82.

19. Brown *v.* Ready, 14 Ky. L. Rep. 583, 20 S. W. 1036 [*distinguishing* Kentucky Female Orphan School *v.* Fleming, 10 Bush (Ky.) 234].

20. Stanton *v.* Hughes, 97 N. C. 318, 1 S. E. 852.

21. Gray *v.* Gidiere, 5 Rich. (S. C.) 386.

Replication is good in debt on bond which replies a mortgage which was to be taken as part of the subject-matter of the contract, as shown by the condition of the bond and as part of the condition in effect. Rives *v.* Toulmin, 19 Ala. 288. So, where the making, execution, and acceptance of a note in satisfaction is pleaded, a replication is good which, after special inducement, traverses the making and execution of said note in satisfaction and not the acceptance. Morris Canal, etc., Co. *v.* Van Vorst, 23 N. J. L. 98. And on a bond to indemnify against costs given to an assignee of a bankrupt, the plea being that the assignee had received more than sufficient to cover all legal expenses, a reply that he had not recovered the costs is sufficient. Waddell *v.* Delaplaine, 11 Barb. (N. Y.) 284. So on a plea of release or payment reply may be an assignment of the bond to a third person and notice thereof before release or payment. Andrews *v.* Beecker, 1 Johns. Cas. (N. Y.) 411.

For replications insufficient see Funkhouser *v.* Purdy, 1 Blackf. (Ind.) 294 (tender of deed when title not complete); Warner *v.* Dunham, Lalor (N. Y.) 206 (declaration assigned a subsequent judgment, plea was of a release; reply was that judgment was assigned to a third person before release); Jarrett *v.* Nickell, 4 W. Va. 276 (replication as to consideration).

A collateral condition should be stated in the replication where not set out in a declaration in debt or made a part thereof by oyer. Graham *v.* Graham, 4 Munf. (Va.) 205.

22. Hoitt *v.* Holcomb, 23 N. H. 535.

23. Humphrey *v.* Watson, 1 Root (Conn.) 256.

24. Smith *v.* Kirkland, 81 Ala. 345, 1 So. 276; Sibley *v.* Brown, 4 Pick. (Mass.) 137; Joslyn *v.* Taylor, 33 Vt. 470.

25. U. S. *v.* Gurney, 1 Wash. (U. S.) 446, 26 Fed. Cas. No. 15,271. But see Jackson *v.* Rundlet, 1 Woodb. & M. (U. S.) 381, 13 Fed. Cas. No. 7,145, holding that a replication to a plea of general performance in an action on an official bond was not double.

26. McDaniel *v.* Grace, 15 Ark. 465.

27. Van Voorst *v.* Morris Canal, etc., Co., 20 N. J. L. 167.

Breaches should be assigned in the replication where they are not set forth in the declaration. State *v.* Campbell, 8 Blackf. (Ind.) 138; Laidler *v.* State, 2 Harr. & G. (Md.) 277; Postmaster-General *v.* Cochran, 2 Johns. (N. Y.) 413; Munro *v.* Alaire, 2 Cai. (N. Y.) 320.

Verification is required where a particular breach constitutes new matter. Campbell *v.* Strong, Hempst. (U. S.) 265, 4 Fed. Cas. No. 2,367*a*.

28. Scott *v.* State, 2 Md. 284; Kerr *v.* State, 3 Harr. & J. (Md.) 560.

29. Doogan *v.* Tyson, 6 Gill & J. (Md.) 453. And if an insufficient breach is alleged, after plea of performance and issue joined, judgment will be arrested. Probate Judge *v.* Briggs, 5 N. H. 66. And replication is bad which alleges no particular breach after such plea. Cheshire Bank *v.* Robinson, 2 N. H. 126. Or where only one breach is alleged on a bond conditioned to prosecute suit to effect, etc. Reynolds *v.* Torrance, 1 Treadw. (S. C.) 125.

Plea admitting non-performance and relying on matter of excuse, breach need not be assigned. English *v.* Finicey, 5 Blackf. (Ind.) 298.

30. Gentry *v.* Barnett, 6 T. B. Mon. (Ky.) 113.

differ in the declaration and the replication it is bad.[31] So duplicity may constitute a ground for demurrer.[32]

b. Rejoinder and Surrejoinder. Where the several facts asserted are connected and dependent, all tending to the point of defense sought to be introduced, a rejoinder is not double.[33] But it will be bad where there is a departure in the pleading.[34] Again, a rejoinder of general performance to a replication assigning breaches is defective.[35] But issue may be taken on the most material fact set forth, even though such rejoinder is insufficient in substance.[36] A surrejoinder is bad on special demurrer, where it is evasive and tenders an immaterial issue and does not answer the material averments of the rejoinder, otherwise where the issue is tendered on a material fact.[37]

4. Amendments. The pleadings may be amended by adding the name of a party;[38] by inserting a necessary allegation, even though by its omission the declaration is defective;[39] by correcting a variance between the declaration and the bond, even though the former be not actually altered;[40] by setting out special matter upon proper affidavit filed and showing made, and by changing a too indefinite plea upon seasonable notice of the nature of the defense.[41] And an amendment may be allowed after trial, where it does not change the cause of action;[42] or is necessary to sustain the judgment;[43] but not after judgment,[44] and close of the term,[45] except upon consent of the parties.[46] So the court may in its discretion refuse to allow the same after the evidence is closed, and substantially another cause of action would be substituted.[47] But an amended declaration does not change the burden of proof or admit the truth of a plea in defense, where facts are not averred therein which would have that effect.[48]

D. Issues, Proof, and Variance — 1. Issues Raised — a. In General. A general denial puts in issue an averment of the declaration that the damages were liquidated.[49] But the recitals in the instrument and all material traversable matters assigned in the breaches and not traversed are admitted.[50] Again, a petition may be subject to objections on account of the generality of the allegations, and

31. Henries *v.* Stiers, 8 N. J. L. 364. But see Governor *v.* Wiley 14 Ala. 172.

32. Sevey *v.* Blacklin, 2 Mass. 541; Mooney *v.* Demerrit, 1 N. H. 187.

Replication not double because several breaches are assigned. Vance *v.* State, 6 Blackf. (Ind.) 80.

33. McClure *v.* Erwin, 3 Cow. (N. Y.) 313.

34. *Connecticut.*— Warren *v.* Powers, 5 Conn. 373.

Maryland.— Burroughs *v.* Clarke, 3 Gill (Md.) 196; State *v.* Dorsey, 3 Gill & J. (Md.) 75.

Mississippi.—Mathews *v.* Hamblin, 28 Miss. 611.

New Hampshire.— Tarleton *v.* Wells, 2 N. H. 306.

New York.— Andrus *v.* Waring, 20 Johns. (N. Y.) 153.

Pennsylvania.—McSherry *v.* Askew, 1 Yeates (Pa.) 79.

South Carolina.— Ordinary *v.* Bracey, 1 Brev. (S. C.) 191.

See 8 Cent. Dig. tit. "Bonds," § 201.

35. Lloyd *v.* Burgess, 4 Gill (Md.) 187.

To a plea of performance on bond conditioned to perform the duties of a trustee, a rejoinder is bad that defendant was ordered by a decree to pay over a sum found due on audit, and that on a certain day his appointment as trustee was revoked. Butler *v.* State, 5 Gill & J. (Md.) 511.

36. Andrus *v.* Waring, 20 Johns. (N. Y.) 153.

37. Andrus *v.* Waring, 20 Johns. (N. Y.) 153.

38. Weedon *v.* Jones, 106 Ala. 336, 17 So. 454.

As to amendment of pleadings, generally, see Pleading.

Name misspelled.— Amendment of a pleading may be allowed by the court on proof of identity and on items prescribed by Me. Rev. Stat. c. 82, § 19. Colton *v.* Stanwood, 67 Me. 25.

39. Moore *v.* Lothrop, 75 Me. 301.

40. Fulkerson *v.* State, 14 Mo. 49.

41. Boyt *v.* Cooper, 6 N. C. 286.

42. O'Gorman *v.* Sabin, 62 Minn. 46, 64 N. W. 84.

43. Field *v.* Van Cott, 15 Abb. Pr. N. S. (N. Y.) 349.

44. Bash *v.* Van Osdol, 75 Ind. 186; Randal *v.* State, 1 Ind. 395.

45. Bash *v.* Van Osdol, 75 Ind. 186.

46. Randal *v.* State, 1 Ind. 395.

47. Singer Mfg. Co. *v.* Givens, 35 Mo. App. 602.

48. Home Bldg., etc., Assoc. *v.* Van Pelt, 92 Ga. 501, 17 S. E. 771.

49. Walsh *v.* Mehrback, 5 Hun (N. Y.) 448.

50. U. S. *v.* Maloney, 4 App. Cas. (D. C.) 505.

if the plaintiff fails to declare upon his bond a judgment cannot be entered.[51] And a traverse of a plea of acceptance of a deed in accord and satisfaction does not admit proof of fraud in said deed, a special replication being necessary therefor.[52] But an averment of want of knowledge or information sufficient to form a belief as to the signing and execution of the bond does not deny said execution, where it is also admitted by defendant that he signed a paper substantially of the tenor and effect set forth in the complaint, and therefore it cannot be shown on trial that the bond was not filled out or sealed when defendant signed it.[53]

b. Execution of the Bond — (I) *Generally.* Proof of execution of the bond sued on is unnecessary, where it is not put in issue, the defenses of performance and limitations merely being set up.[54] But where the bond is set forth in the complaint as the ground of the action and it purports to have been executed by defendants and neither its consideration nor execution is impeached by plea it is admissible in evidence;[55] and fraud in obtaining a cosurety's signature must be pleaded as a defense by the other sureties to be available.[56]

(II) *Under Verified Denial* — (A) *Generally.* Affidavit of the truth of defendant's plea is necessary, otherwise execution of the bond need not be proved.[57]

(B) *Non Est Factum.* The plea of *non est factum* should be sworn to, or accompanied with an affidavit of its truth, or it is a nullity and may be stricken out.[58]

2. Proof Under Pleadings — a. In General. The evidence should support the allegations,[59] and if it does not prove an averment which is the gist of the action and essential to sustain the same there can be no recovery.[60] So if the breaches are not well assigned it is error to admit proof thereof or of facts not properly

51. Hill *v.* Dons, (Tex. Civ. App. 1896) 37 S. W. 638.

52. Campbell *v.* Hyde, 1 D. Chipm. (Vt.) 65.

53. Commercial Union Assur. Co. *v.* Bauer, 58 Hun (N. Y.) 63, 11 N. Y. Suppl. 372, 33 N. Y. St. 827.

54. State *v.* Duvall, 83 Md. 123, 34 Atl. 831.

55. Bryan *v.* Kelly, 85 Ala. 569, 5 So. 346, even though executed without statutory authority.

56. And failure so to do does not enable them to urge their release on appeal because of a favorable verdict on that ground for said cosurety. Hart *v.* Mead Invest. Co., 53 Nebr. 153, 73 N. W. 458.

57. *Alabama.*—Coleman *v.* Pike County, 83 Ala. 326, 3 So. 755, 3 Am. St. Rep. 746.

Illinois.—Herrick *v.* Swartwout, 72 Ill. 340; Horner *v.* Boyden, 27 Ill. App. 573.

Indiana.— Wilson *v.* Merkle, 6 Blackf. (Ind.) 118.

Ohio.— McMurtry *v.* Campbell, 1 Ohio 262; Carrington *v.* Davis, Wright (Ohio) 735; Baker *v.* Spangler, Tapp. (Ohio) 210.

Texas.—Burleson *v.* Burleson, 15 Tex. 423. See 8 Cent. Dig. tit. "Bonds," § 207.

Where the statute or rule of court requires a denial of such execution under oath it is essential that it should be done. Union Cent. L. Ins. Co. *v.* Howell, 101 Mich. 332, 59 N. W. 599 (cannot show that it was executed after alleged breach except denial under oath by the rule); McGill *v.* Wallace, 22 Mo. App. 675 (not so denied execution stands confessed by statute); Pierce *v.* Wright, 33 Tex. 631; Chambers County *v.* Clews, 21 Wall. (U. S.) 317, 22 L. ed. 517; Bradford *v.* Williams, 4 How. (U. S.) 576, 11 L. ed. 1109.

But necessity of producing bond in evidence is not dispensed with by failure to deny under oath or by affidavit. Boden *v.* Dill, 58 Ind. 273.

Does not apply to replication.— Parks *v.* Greening, Minor (Ala.) 178; Tindal *v.* Bright, Minor (Ala.) 103.

58. *Alabama.*— Garnett *v.* Roper, 10 Ala. 842; Parks *v.* Greening, Minor (Ala.) 178; Tindal *v.* Bright, Minor (Ala.) 103.

Arkansas.— McFarland *v.* State Bank, 4 Ark. 44, 37 Am. Dec. 761.

Colorado.— Anderson *v.* Sloan, 1 Colo. 484, affidavit must follow plea so far as to deny the execution.

Missouri.— Smith *v.* Hart, 1 Mo. 273, holding also that advantage cannot be taken on general demurrer. *Contra,* Snowden *v.* McDaniel, 7 Mo. 313.

Ohio.— Baker *v.* Spangler, Tapp. (Ohio) 210.

But a plea need not be verified which is not a *non est factum.* Elwell *v.* Tatum, 6 Tex. Civ. App. 397, 24 S. W. 71, 25 S. W. 434.

Not bound to prove execution unless put in issue by plea of *non est factum.* Justices Irwin County Inferior Ct. *v.* Sloan, 7 Ga. 31.

Declaration amended; verifying anew is necessary of plea *non est factum.* Lehman *v.* Siggeman, 40 Ill. App. 276.

59. Reitz *v.* Board Trustees, 3 Ill. App. 448. See also *infra,* VI, D, 3.

60. U. S. *v.* Simon, 98 Fed. 73, 38 C. C. A. 659.

in issue;[61] and special matter of impeachment of consideration is inadmissible under an indefinite plea of illegality thereof;[62] nor may it be shown why certain acts were done or what was said prior to the execution of the bond, where there is no ambiguity therein and no averment of fraud in obtaining the signature of the surety.[63] But if the condition of a bond under the pleadings is dependent as to its breach upon acts done before a certain date the evidence is limited thereby, although if it relates to a subsequent time it may be admissible, where it tends to prove the relied-upon breach;[64] and absolute delivery prior to the date of the writ may be proven under a plea of in escrow.[65] Again, payment of interest cannot be shown under a plea or notice of set-off as so much money had and received.[66] And where the object of the action is the subject-matter of a bond to a third person evidence of the instrument is inadmissible, except on proof of assignment to defendant.[67] But agreements concerning the admissibility of evidence may preclude the necessity of suggesting breaches before the bond can be introduced.[68]

b. Nil Debet. Under a plea of *nil debet* any fact may be proven which tends to reduce the indebtedness where issue is joined without demurring;[69] and if this plea contains a notice of set-off any evidence is admissible which could be given under the latter pleading.[70]

c. Non Est Factum. It is apparent from the authorities that *non est factum* extends to the inducement only and not to special matter in evasion, which ought to be specially pleaded.[71] It puts in issue only the execution of the deed[72] or of such bond as is declared on,[73] and admits evidence merely of matters proving it to be void.[74]

61. Lewis *v.* Woolfolk, 2 Pinn. (Wis.) 209, 1 Chandl. (Wis.) 171.

Objection is too general and indefinite to the admissibility of a bond because the declaration did not state the cause of action against both obligors. Van Middlesworth *v.* Van Middlesworth, 32 Mich. 183.

62. Boyt *v.* Cooper, 6 N. C. 286.

But validity of consideration may be shown where failure of consideration is averred, even though the proof varies as to the character of the consideration. McDowell *v.* Meredith, 4 Whart. (Pa.) 311.

63. White Sewing Mach. Co. *v.* Fargo, 3 N. Y. Suppl. 494, 20 N. Y. St. 416.

64. Anaheim Union Water Co. *v.* Parker, 101 Cal. 483, 35 Pac. 1048.

65. Carswell *v.* Renick, 7 J. J. Marsh. (Ky.) 281.

If time when instrument becomes valid affect the merits of the case, time of delivery should be alleged and proved, otherwise where time is immaterial. Tompkins *v.* Corwin, 9 Cow. (N. Y.) 255.

66. Livingston *v.* Romaine, Anth. N. P. (N. Y.) 199.

67. Dearmond *v.* Curtis, 1 La. 93.

68. State *v.* Norwood, 12 Md. 177.

69. Miller *v.* Moses, 56 Me. 128.

70. Meyer *v.* Wiltshire, 92 Ill. 395.

71. See cases cited *infra*, this note, and in note 72 *et seq.*

What is not admissible.—Defendant cannot prove anything in defense under the conditions of the bond (Rice *v.* Thomson, 2 Bailey (S. C.) 339); nor that the signature was conditional (Hall *v.* Smith, 14 Bush (Ky.) 604), or was wrongfully or fraudulently obtained (Patterson *v.* Patterson, 2 Penr. & W. (Pa.) 200); nor the signature of one of several to bind the others (Kuykendall *v.* Ruckman, 2 W. Va. 332); nor delivery as an escrow (Anonymous, 3 N. C. 497), or conditionally; nor matters which must be specially pleaded (American Buttonhole Overseaming Sewing Mach. Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319); nor failure of consideration (Neely *v.* Chinn, 8 Blackf. (Ind.) 84; Ragsdale *v.* Thorn, 1 McMull. (S. C.) 335; Bollinger *v.* Thurston, 2 Mill Const. (S. C.) 447); nor misrepresentations which should be pleaded *per fraudem* (Evans *v.* Hudson, 5 Harr. (Del.) 366); nor mistake in name and description (Nicholay *v.* Kay, 6 Ark. 59, 42 Am. Dec. 680); nor that its bond was illegally assigned (Soloman *v.* Evans, 3 McCord (S. C.) 274), or was not taken in conformity with the statute, which should be pleaded specially (Poor Com'rs *v.* Hainon, 1 Nott & M. (S. C.) 554); nor that it was executed on Sunday, which should also be specially pleaded (Fox *v.* Mensch, 3 Watts & S. (Pa.) 444); nor partiality, friendship, and the character of coöbligors (Heileg *v.* Dumas, 65 N. C. 214); nor the amount of damages (Graham *v.* Allen, 2 Nott & M. (S. C.) 492); nor parol discharge of a joint bond (Dewey *v.* Derby, 20 Johns. (N. Y.) 462).

72. Sugden *v.* Beasley, 9 Ill. App. 71; State *v.* Ferguson, 9 Mo. 288; State *v.* Mayson, 2 Nott & M. (S. C.) 425; Adams *v.* Wylie, 1 Nott & M. (S. C.) 78.

73. Plaintiff need not prove therefore the averments or breaches in the declaration, and this rule applies to the plea that the defendant never gave such a writing. Legg *v.* Robinson, 7 Wend. (N. Y.) 194. See also Pritchett *v.* People, 6 Ill. 525.

74. Adams *v.* Wylie, 1 Nott & M. (S. C.) 78.

d. Plea of Payment. The evidence should support the plea of payment.[75] But payment of a smaller sum and acceptance thereof in full of all demands may be proven, and unless contradicted it may be inferred that the whole was paid;[76] and where notice of matter of defense is also given, mistake, fraud, or want of consideration are admissible.[77] Again, general payment may be first shown and then its application to the specific object,[78] or special matter may be proven, where leave is given, even though there is no notice thereof as required by rule of court.[79] So any matter that bars the action since judgment may be shown;[80] and payment by one of the coöbligors is admissible in evidence.[81]

e. Plea of Performance. The plea of performance in an action on a bond with a collateral condition controverts the right to recover at all and calls for proof of every material allegation in issue, except that it admits execution of the bond.[82]

3. Variance — a. In General. Ordinarily a variance will not be held fatal unless it is of matters legally essential to the issue or claim, so as to materially and injuriously affect the substantial rights of the parties, or is misleading

What may be proven.— Any ground of defense showing that the bond was never legally valid (Downer *v.* Dana, 19 Vt. 338); the bond itself in debt against part of joint and several obligors (Webber *v.* Libby, 70 Me. 412); the original bond which may go to the jury without explaining apparent alterations (Connor *v.* Fleshman, 4 W. Va. 693); signing and delivery (Cully *v.* People, 73 Ill. App. 501); signature of one of the defendants as against him alone (Kuykendall *v.* Ruckman, 2 W. Va. 332); what was said and done at the time of signing (State *v.* Gregory, 132 Ind. 387, 31 N. E. 952); a conditional signing (Stuart *v.* Livesay, 4 W. Va. 45); non-delivery (Treman *v.* Morris, 9 Ill. App. 237); non-delivery, where none of the evidence is special matter requiring notice (Moyer *v.* Fisher, 24 Pa. St. 513); want of consideration (Bollinger *v.* Thurston, 2 Mill Const. (S. C.) 447); settlement of all demands (Wheeler, etc., Mfg. Co. *v.* Tinsley, 75 Mo. 458); anything which shows that the instrument was originally void at common law, as coverture, fraud, or delivery in escrow on a condition not performed, or that the bond has become void since its execution by erasures or alterations (Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324); fraud in so far as relates to the execution (Huston *v.* Williams, 3 Blackf. (Ind.) 170, 25 Am. Dec. 84; Dale *v.* Roosevelt, 9 Cow. (N. Y.) 307; Dorr *v.* Munsell, 13 Johns. (N. Y.) 430; Van Valkenburgh *v.* Ronk, 12 Johns. (N. Y.) 337; Perry *v.* Fleming, 4 N. C. 344; Taylor *v.* King, 6 Munf. (Va.) 358, 8 Am. Dec. 746; American Buttonhole Overseaming Sewing Mach. Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319); performance when notice given (Shelton *v.* French, 33 Conn. 489).

75. Lee *v.* Hughes, 3 A. K. Marsh. (Ky.) 39.

Bond to one alone in suit against two is not admissible issue, not being joined on plea of *non est factum* or *nil debet* but of payment by one of the two charged. Bell *v.* Allen, 3 Munf. (Va.) 118.

Official reports or statements rendered to, received, and acted upon by the proper authority are admissible under a general or special plea of payment in an action on a bond to secure a contract for hiring convicts. Sloss Iron, etc., Co. *v.* Macon County, 111 Ala. 554, 20 So. 400.

On plea of payment to lost note variance between it and the note or bond described cannot be shown. Rogers *v.* Kincannon, 3 Humphr. (Tenn.) 251.

Payment post diem by administrator is not admissible under the plea *solvit ad diem* by an intestate. Denham *v.* Crowell, 1 N. J. L. 534.

Variance in name of description does not prevent the evidence in support of the declaration on the plea of payment. Whitlock *v.* Ramsey, 2 Munf. (Va.) 510.

76. Henderson *v.* Moore, 5 Cranch (U. S.) 11, 3 L. ed. 22.

Delivery of goods and assignment of debts, a part of which had been lost by plaintiff's negligence, may be proven under plea of payment. Buddicum *v.* Kirk, 3 Cranch (U. S.) 293, 2 L. ed. 444.

That payment of part by one of those signing the bond has been acknowledged may be shown. Stegar *v.* Eggleston, 5 Call (Va.) 449.

77. Baring *v.* Shippen, 2 Binn. (Pa.) 154; Sparks *v.* Garrigues, 1 Binn. (Pa.) 152; Swift *v.* Hawkins, 1 Dall. (Pa.) 17, 1 L. ed. 18.

78. Summers *v.* Loder, 12 N. J. L. 104.

79. Bryson *v.* Ker, 4 Serg. & R. (Pa.) 308.

80. Hartzell *v.* Reiss, 1 Binn. (Pa.) 289.

81. Mitchell *v.* Gibbes, 2 Bay (S. C.) 475.

82. Altizer *v.* Buskirk, 44 W. Va. 256, 28 S. E. 789.

Although plea of performance is inappropriate, yet if issue is taken special performance is set up and any evidence is admissible thereunder tending to defeat the recovery. Wakeman *v.* Newton, 21 Wend. (N. Y.) 260.

Evidence in mitigation of damages by facts showing a less price or value when payment was to have been made see Grieve *v.* Annin, 6 N. J. L. 461.

Evidence of services rendered and of declarations by the obligee that she wanted no

and prejudicial in character. Thus a clerical error as to name which could in no manner injure the defendants will be disregarded;[83] and the rule applies to a description of the parties defendant,[84] to the names of the obligors,[85] to the names of the obligees or payees,[86] and to joint, joint and several, or several obligations and parties.[87]

b. With Respect to Bond or Copy Thereof. In addition to the rule just stated[88] it may be generally asserted that the proof should correspond with the allegations in all essential legal requirements. If the code so provides no variance between the pleading and proof is material unless it actually misled the adverse party, and this applies where certain words are omitted in the condition;[89] and

more settlements is inadmissible under a plea of covenants performed except notice of special matter be given as required by rules of court. Daniel *v.* Wilver, 24 Pa. St. 516.

Evidence to excuse non-performance is inadmissible. Washburn *v.* Mosely, 22 Me. 160.

Tender and refusal are not admissible where bond conditioned to pay a certain sum in goods at a fixed time. Grieve *v.* Annin, 6 N. J. L. 461.

83. Thalheimer *v.* Crow, 13 Colo. 397, 22 Pac. 779; Hopkins *v.* State, 53 Md. 502.

84. Wells *v.* Jackson, 6 Blackf. (Ind.) 40 (bad on demurrer); Evans *v.* Smith, 1 Wash. (Va.) 72 (no variance).

85. *Alabama.*— Robbins *v.* Governor, 6 Ala. 839 (bond executed "Jas. W. Yarborough" admissible under declaration "James W. Yarborough"); Taylor *v.* Rogers, Minor (Ala.) 197 (signature "Pilip Taylor" supports declaration upon bond signed "Philip Taylor").

Arkansas.— Miller *v.* Bell, 12 Ark. 135 ("Mathew S. Miller" supports "M. S. Miller"); Rector *v.* Taylor, 12 Ark. 128 ("Henry M. Rector" supports "H. M. Rector"); Semon *v.* Hill, 7 Ark. 70 (signed by Semons and others and bond produced was signed by Semon and others variance was fatal, but a signature by A B by his mark and an allegation of signature by A B is not fatal); Irvin *v.* Sebastian, 6 Ark. 33 (variance immaterial).

California.— Kurtz *v.* Forguer, 94 Cal. 91, 29 Pac. 413, not material.

Indiana.— State *v.* Geddes, 1 Ind. 577, Smith (Ind.) 290, bond executed by "Stephen S. Colins" cannot be proven by bond signed "Stephen H. Colins."

Massachusetts.— Herrick *v.* Johnson, 11 Metc. (Mass.) 26; Bean *v.* Parker, 17 Mass. 591, bond executed by two as sureties does not support declaration on bond executed by one as principal and two others as sureties.

Virginia.— Beasley *v.* Robinson, 24 Gratt. (Va.) 325, "James Sims" and "Jas Sins" not a material variance.

See 8 Cent. Dig. tit. "Bonds," § 215.

86. *Alabama.*— Hundley *v.* Chadick, 109 Ala. 575, 19 So. 845 (action by C, with allegation that bond was made payable to plaintiff under the name of C & Co.; bond to "C & Co." is admissible on proof of identity); Gayle *v.* Hudson, 10 Ala. 116 ("Hudson and Jones" and "Hudson and James" constitute a variance).

Connecticut.— Brainard *v.* Fowler, 2 Root (Conn.) 318, name of B without addition of "sheriff" is supported by a bond given to B as sheriff.

Illinois.— Phillips *v.* Singer Mfg. Co., 88 Ill. 305, allegation was that bond payable to a corporation; bond was payable to a corporation and others; held a variance.

Indiana.— Ft. Wayne *v.* Jackson, 7 Blackf. (Ind.) 36 ("The president and Trustees of the Town of Fort Wayne" and "The president and Trustees of the Fort Wayne corporation" constitute a fatal variance); Boles *v.* McCarty, 6 Blackf. (Ind.) 427 (variance as to the words of his successors in office is immaterial).

Mississippi.— Kingkendall *v.* Perry, 25 Miss. 228, no variance.

Missouri.— International Ins. Co. *v.* Davenport, 57 Mo. 289, immaterial variance.

United States.— Huff *v.* Hutchinson, 14 How. (U. S.) 586, 14 L. ed. 553, bond to the "marshal for the State of Wisconsin" and allegation was of bond to the "marshal of the District of Wisconsin;" no variance.

See 8 Cent. Dig. tit. "Bonds," § 215.

87. When no variance.— Legate *v.* Marr, 8 Blackf. (Ind.) 404 (alleged to be joint but was not sealed by one); Grant *v.* Whiteman, 5 Blackf. (Ind.) 67 (declared on as joint but was joint and several). See also Colton *v.* Stanwood, 67 Me. 25; Henderson *v.* Stringer, 6 Gratt. (Va.) 130 (alleged that defendant bound himself but bond was "I bind my heirs"); Dickinson *v.* Smith, 5 Gratt. (Va.) 135 (alleged that obligors bound themselves, but in the bond they bound themselves jointly and severally).

When variance fatal.—Sherry *v.* Foresman, 6 Blackf. (Ind.) 56 (described as joint and several but was joint); Lockhart *v.* Bell, 2 Hill (S. C.) 422 (declaration against one of several bond purported to be joint but was executed by the obligors at different times); Kemp *v.* McGuigin, Tapp. (Ohio) 50 (declaration described the bond as payable to one, etc., and bond was "We bind ourselves" without stating to whom); Postmaster General *v.* Ridgway, Gilp. (U. S.) 135, 19 Fed. Cas. No. 11,313 (one obligor was sued as jointly and severally liable but bond was joint).

88. See *supra*, VI, D, 3, a.

89. State *v.* Scheper, 33 S. C. 562, 11 S. E. 643, 12 S. E. 564, 816. So if certain words are in the bond but are omitted in the declaration it is not a material variance. Powers *v.* Browder, 13 Mo. 155.

a slight difference in the words of the obligation is immaterial.[90] So also as to matters which are not substantial and which could not have surprised defendant.[91] And where a copy is annexed it is no objection that some of the legal formalities have not been complied with.[92] But if there are incorrect recitals the variances arising therefrom cannot be avoided by innuendoes in the declaration on the bond giving such recitals a different meaning from what their language imports.[93] Again, the omission to declare specially on the obligation may be fatal,[94] as may a wrong description of its character.[95]

c. With Respect to Instrument Referred to in Bond. If the subject-matter described in the contract and the bond is identical, and no one has been misled, or prejudiced by the inaccuracy, the action is not defeated by a variance in the description of the parties with the referred-to instrument;[96] or of the terms of the condition of the contract, the action being upon the bond only,[97] or of the record of the judgment where the difference is slight;[98] or where the discrepancy as to the subject-matter is of no substantial importance;[99] or where the recital as to a

The general principles stated in the text have been applied to a difference in time of performance (McKay *v.* Craig, 6 Blackf. (Ind.) 168, variance fatal); to a plea relying upon non-performance to show want of consideration where bond on oyer was different (McDorman *v.* Jellison, 7 Blackf. (Ind.) 304, plea was bad); to a seal (Auditor *v.* Woodruff, 2 Ark. 73, 33 Am. Dec. 368, variance fatal); Fish *v.* Brown, 17 Conn. 341, no variance. And see Every *v.* Merwin, 6 Cow. (N. Y.) 360; where the bond, although dated on the day declared upon, took effect upon a different day (U. S. *v.* Le Baron, 4 Wall. (U. S.) 642, 18 L. ed. 309, no variance); to a condition as to payment (Irish *v.* Irish, 6 Blackf. (Ind.) 438); and as to the amount of the bond (there was no variance in Wiggins *v.* Fisher, 21 Ark. 521; Vandever *v.* Clark, 16 Ark. 331; Payne *v.* Snell, 4 Mo. 238; Usry *v.* Snit, 91 N. C. 406. But see Adams *v.* Spear, 2 N. C. 245); or the date thereof (variance fatal in Cheadle *v.* Riddle, 6 Ark. 480; Comparet *v.* State, 7 Blackf. (Ind.) 553; Bennett *v.* Giles, 6 Leigh (Va.) 316; Gordon *v.* Browne, 3 Hen. & M. (Va.) 219; Cooke *v.* Graham, 3 Cranch (U. S.) 229, 2 L. ed. 420); not fatal in Rector *v.* Taylor, 12 Ark. 128; Howgate *v.* U. S., 3 App. Cas. (D. C.) 277; Componovo *v.* State, (Tex. Civ. App. 1897) 39 S. W. 1114; Moses *v.* U. S., 166 U. S. 571, 17 S. Ct. 682, 41 L. ed. 1119).

No recovery can be had in case of a variance as to the amount of the bond and its character unless the declaration is amended so as to make it describe the bond even though an alteration was made by a stranger without plaintiff's knowledge. Chicago, etc., R. Co. *v.* Evans, 57 Kan. 286, 46 Pac. 303.

Finding that contractor furnished "labor and material" is not supported by evidence that he "advanced money." Cadenasso *v.* Antonelle, 127 Cal. 382, 59 Pac. 765.

90. Henry *v.* Brown, 19 Johns. (N. Y.) 49.

91. Applied to difference as to the time when payable. Walker *v.* Welch, 14 Ill. 277.

92. Duchamp *v.* Nicholson, 2 Mart. N. S. (La.) 672.

Declaration on bond with a profert is not sustained by evidence of a lost bond. Chamberlin *v.* Sawyer, 19 Ohio 360.

If the contract is set out substantially according to its legal effect without professing to set it out *in hæc verba* there is no variance. Hughes *v.* Houlton, 5 Blackf. (Ind.) 180.

Must set out substance of condition in debt on bond with a condition under allegation that it is lost or proof of a bond with a condition is fatal. Rand *v.* Rand, 4 N. H. 267.

Where record contains a copy there is no variance. Peveler *v.* Peveler, 54 Tex. 53.

93. Lovejoy *v.* Bright, 8 Blackf. (Ind.) 206.

Recitals; variance is fatal where description was of ejectment commenced "on the demise of said defendant, and his wife B. W." and recital in bond produced was of ejectment "on the demise of my wife, B. W. formerly B. D." Wilhite *v.* Roberts, 4 Dana (Ky.) 172.

Variance between description and recitals of a copy filed with the complaint is controlled by the copy. Blackburn *v.* Crowder, 108 Ind. 238, 9 N. E. 108; Leutz *v.* Martin, 75 Ind. 228; Hurlburt *v.* State, 71 Ind. 154.

94. Crosby *v.* New London, etc., R. Co., 26 Conn. 121.

95. Neale *v.* Fowler, 31 Md. 155, described as for the payment of money when the condition was to consign certain property to be sold on commission and the proceeds applied to plaintiff's debt.

Proof of promissory note does not sustain declaration on a bond. Davis *v.* McWhorter, 122 Ala. 570, 26 So. 119.

96. Peake *v.* U. S., 16 App. Cas. (D. C.) 415.

97. Brown *v.* Rounsavell, 78 Ill. 589.

98. Smith *v.* Eubanks, 9 Yerg. (Tenn.) 20.

But contra as to judgment, where the variance is matter of description as to amount, since such judgment cannot be received in evidence. Smith *v.* Frazer, 61 Ill. 164.

99. Forst *v.* Leonard, 112 Ala. 296, 20 So. 587.

So also as to description of notes.—Everts *v.* Bostwick, 4 Vt. 349.

previous contract of sale differs therewith as to the date, the execution thereof being admitted.[1]

E. Evidence — 1. Presumptions and Burden of Proof — a. In General. Where a bond is conditioned for the payment of a penal sum at a specified time a *prima facie* case for the plaintiff for the full amount thereof will be established by the introduction of the bond in evidence.[2] And it has been decided that it is not necessary to sustain an action on a bond that proof of damage by reason of a breach thereof be shown.[3] But it is declared that the plaintiff will be held to strict proof of damages, where the claim arising out of a breach is a stale one.[4] Again, where a bond is conditioned for the repayment of reasonable sums, the reasonableness of the amount for which plaintiff seeks to charge defendant must be proved.[5] So also where a plaintiff seeks to recover on a bond from the heirs of an obligor he must show that they were bound by the bond.[6] And in an action by a principal to recover on the bond of an agent he must show that the latter was acting as his agent.[7] But where a bond is conditioned to bear interest from a day anterior to its date it will be presumed to have been given for a debt existing at the time from which the interest begins to run.[8]

b. As to Consideration. If the defendant in an action on the bond attacks the consideration therefor on the ground of want, failure, or illegality thereof he has the burden of proof to establish such fact.[9] But where he traverses the consideration generally and plaintiff replies a special consideration it has been declared that the latter must show such special consideration.[10]

c. As to Execution. In an action on a bond the burden of proof is on the plaintiff to show the execution of the instrument, and it is declared that in the absence of such proof a judgment thereon cannot be sustained.[11] But where the execution thereof is admitted or proved the burden then rests on the defendant

1. Serviss *v.* Stockstill, 30 Ohio St. 418.
2. Hoxsey *v.* Patterson, 59 Ill. 522.
3. Quintard *v.* Corcoran, 50 Conn. 34. But see Webb *v.* Webb, 16 Vt. 636.
4. Cottle *v.* Payne, Brunn. Col. Cas. (U. S.) 59, 6 Fed. Cas. No. 3,268, 3 Day (Conn.) 289.
5. Oregon R., etc., Co. *v.* Swinburne, 26 Oreg. 262, 37 Pac. 1030.
6. Piper *v.* Douglas, 3 Gratt. (Va.) 354.
7. Southern Express Co. *v.* Moeller, 85 Mo. 208, wherein it was held that an express company, to recover on the bond of an agent for failure to forward a package received by him, must show that the package was received by him as its agent.
8. Walker *v.* Pierce, 21 Gratt. (Va.) 722.
9. *Arkansas.*— Dickson *v.* Burks, 11 Ark. 307; Rankin *v.* Badgett, 5 Ark. 345.
Indiana.— Beeson *v.* Howard, 44 Ind. 413.
New Jersey.— Wanmaker *v.* Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748.
New York.— Jarvis *v.* Peck, 10 Paige (N. Y.) 118.
North Carolina.— Brown *v.* Kinsey, 81 N. C. 245.
See 8 Cent. Dig. tit. "Bonds," § 221.
Proof of consideration is unnecessary to entitle plaintiff to recover. Scott *v.* Jones, 75 N. C. 112.
That consideration not conclusively imported since abolition of private seals see Luce *v.* Foster, 42 Nebr. 818, 60 N. W. 1027.
Where bonds of plaintiff are fraudulently deposited with defendant by former's agent defendant must show consideration therefor. Pittsburgh, etc., R. Co. *v.* Barker, 29 Pa. St. 160.
10. Bullitt *v.* Ralston, 1 A. K. Marsh. (Ky.) 331.
11. *District of Columbia.*— U. S. *v.* Boyd, 8 App. Cas. (D. C.) 440.
Indiana.— Killian *v.* State, 15 Ind. App. 261, 43 N. E. 955.
Kentucky.— Com. *v.* Campbell, 20 Ky. L. Rep. 54, 45 S. W. 89. See also Francis *v.* Hazlerig, 1 A. K. Marsh. (Ky.) 93.
Michigan.— People *v.* Cotteral, 115 Mich. 43, 73 N. W. 19, 74 N. W. 183.
North Carolina.— Otey *v.* Hoyt, 47 N. C. 70.
See 8 Cent. Dig. tit. "Bonds," § 219.
Bond of railroad company.— If valid on its face, the party attacking its validity must show that the bond is invalid. Nichols *v.* Mase, 94 N. Y. 160.
Bond taken under statute will be presumed to have been taken by proper officer, where bond is not set out on oyer and nothing to show the contrary. State *v.* Wetherspoon, 9 Humphr. (Tenn.) 393.
On plea of non est factum it devolves on plaintiff to prove signing, sealing, and delivery (Frantz *v.* Smith, 5 Gill (Md.) 280; Newlin *v.* Beard, 6 W. Va. 110); though it has been held that if signatures are proved to be genuine execution by signing and sealing will be presumed (Manning *v.* Norwood, 1 Ala. 429).
That signature was conditioned on other signatures being obtained the defendant has burden of showing. Mullen *v.* Morris, 43 Nebr. 596, 62 N. W. 74.

to show that it is not binding.[12] The usual mode of proof of the execution of a bond is by the testimony of an attesting witness, but if there be none it may be by proof of the handwriting of the obligors, though this is not exclusive of other modes.[13]

d. As to Performance or Breach — (I) *In General.* Although it is said that to place upon the plaintiff the burden of proving a breach of the condition of a bond involves both in form and substance the proof of a negative,[14] yet it may be stated generally that where a plaintiff alleges a breach of the condition of a bond it is incumbent upon him to introduce evidence showing such breach.[15] But it has been decided that evidence which raises a presumption of failure to comply with the conditions will be sufficient to throw the burden upon the defendant to establish a compliance.[16] The question, however, upon whom the burden of proof rests depends in many cases upon the pleadings.[17] Performance of the condition of a bond may also be presumed from lapse of time.[18]

(II) *Payment* — (A) *Generally.* In an action on a bond given to secure a payment by the obligor to a third party the obligee need not show that he has been compelled to make such payment, it being sufficient to show that the indebtedness has matured and has not been paid,[19] and the burden is on a defendant who pleads payment to prove the same.[20] Possession of the bond, however, by the obligor raises a presumption of payment.[21] And where a bond is payable by instalments in an action by the assignees who are required to take all legal measures against the obligors immediately after the instalments respectively fall due the first instalment will be presumed to have been paid where not demanded.[22] So also where several bonds are given which fall due at different periods, if on payment of one falling due at an intermediate period there is an overpayment and the excess is credited on the bond next falling due it will be presumed that the prior bond or bonds have been paid.[23] And on a bond to secure monthly settlements as called for by a contract, a note accepted in fulfilment of the contract is *prima facie* payment of the amount due on such settlement.[24] Again, whatever weight the jury may give to the fact that a payment indorsed on the bond has been obliterated by the holder there is no legal or technical presumption of payment of more than appears to have been in fact paid.[25]

12. Onderdonk *v.* Voorhis, 36 N. Y. 358, 2 Transcr. App. (N. Y.) 41.

Admission of signature will not throw burden on defendant, where it is contended that the body of the bond is forged. Otey *v.* Hoyt, 47 N. C. 70.

13. Blume *v.* Bowman, 24 N. C. 338; Cornish *v.* Sheek, 20 N. C. 48.

Identification by subscribing witness of his own signature throws burden of proving non-execution on defendant. Green *v.* Maloney, 7 Houst. (Del.) 22, 30 Atl. 672.

14. Young *v.* Stephens, 9 Mich. 500.

15. McFall *v.* Howe Sewing Mach. Co., 90 Ind. 148; Holliday *v.* Cooper, 1 Sm. & M. (Miss.) 633; Lipscomb *v.* Seegers, 22 S. C. 407.

Mere introduction of bond does not make prima facie case. — Barrett *v.* Douglas Park Bldg. Assoc., 75 Ill. App. 98.

16. Young *v.* Stephens, 9 Mich. 500; Washington Bank *v.* Barrington, 2 Penr. & W. (Pa.) 27; Georgetown Union Bank *v.* Forrest, 3 Cranch C. C. (U. S.) 218, 24 Fed. Cas. No. 14,356. See also Wood *v.* Friendship Lodge, 20 Ky. L. Rep. 2002, 50 S. W. 836.

17. *Maine.* — Philbrook *v.* Burgess, 52 Me. 271.

Mississippi. — Holliday *v.* Cooper, 1 Sm. & M. (Miss.) 633.

New Hampshire. — Exeter Bank *v.* Rogers, 6 N. H. 142.

North Carolina. — Judges *v.* Deans, 9 N. C. 93.

Rhode Island. — Douglas *v.* Hennessy, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583.

South Carolina. — Jamison *v.* Knotts, 12 Rich. (S. C.) 190.

Vermont. — Webb *v.* Webb, 16 Vt. 636.

See 8 Cent. Dig. tit. "Bonds," § 223.

18. Ordinary *v.* Steedman, 1 Harp. (S. C.) 287, 18 Am. Dec. 652.

19. Pierce *v.* Plumb, 74 Ill. 326.

20. Clifford *v.* Smith, 4 Ind. 377. See Jones *v.* Mengel, 1 Pa. St. 68.

21. Carroll *v.* Bowie, 7 Gill (Md.) 34; Porter *v.* Nelson, 121 Pa. St. 628, 15 Atl. 852.

May be rebutted. — Kelly *v.* Forty-second St., etc., R. Co., 48 N. Y. App. Div. 627, 62 N. Y. Suppl. 650.

22. Ten Eyck *v.* Tibbits, 1 Cai. (N. Y.) 427.

23. Lindsay *v.* McCormick, 82 Va. 479, 5 S. E. 534.

24. American Button-Hole Overseaming, etc., Mach. Co. *v.* Gurnee, 44 Wis. 49.

25. Simms *v.* Paschall, 27 N. C. 276.

(B) *Presumed From Lapse of Time*—(1) GENERALLY. Under the common law and in many states by express statutory provision a certain period of time is designated as a reasonable one in which to assert a legal right, and after such period has passed it cannot be enforced. So in actions on bonds payment thereof may be presumed from lapse of time.[26] But it is not necessary in order to raise a presumption of payment that the full period which of itself will create such a presumption shall have passed, for payment may be presumed by the lapse of a less period of time in connection with other circumstances.[27]

(2) REBUTTAL. The presumption as to payment from lapse of time is not in all cases conclusive, but may be rebutted by proper and sufficient evidence.[28]

26. *Delaware.*— Durham *v.* Greenly, 2 Harr. (Del.) 124.

Indiana.— O'Brien *v.* Coulter, 2 Blackf. (Ind.) 421.

New Hampshire.— Bartlett *v.* Bartlett, 9 N. H. 398.

North Carolina.— Rogers *v.* Clements, 98 N. C. 180, 3 S. E. 512; Hall *v.* Gibbs, 87 N. C. 4.

Pennsylvania.— Reed *v.* Reed, 46 Pa. St. 239.

South Carolina.— Agnew *v.* Renwick, 27 S. C. 562, 4 S. E. 223; Willingham *v.* Chick, 14 S. C. 93; Frazer *v.* Perdrieau, 1 Bailey (S. C.) 172; Winstanley *v.* Savage, 2 McCord Eq. (S. C.) 435; Kennedy *v.* Denoon, 3 Brev. (S. C.) 476.

Vermont.—Mattocks *v.* Bellamy, 8 Vt. 463; Rogers *v.* Judd, 5 Vt. 236, 26 Am. Dec. 301.

Virginia.— Booker *v.* Booker, 29 Gratt. (Va.) 605, 26 Am. Rep. 401; Tinsley *v.* Anderson, 3 Call (Va.) 329.

United States.— Higginson *v.* Mein, 4 Cranch (U. S.) 415, 2 L. ed. 664.

See 8 Cent. Dig. tit. "Bonds," § 225.

In case of war, for jury to consider strength of presumption. Brewton *v.* Cannon, 1 Bay (S. C.) 482. See Norwell *v.* Little, 79 Va. 141.

Where bond was executed in another state presumption arising from lapse of time is that allowed in state where action brought. Haws *v.* Cragie, 49 N. C. 394.

Where debt payable by instalments presumption of payment from lapse of time applies to each instalment as it falls due. State *v.* Lobb, 3 Harr. (Del.) 421.

27. *Delaware.*— Fleming *v.* Rothwell, 5 Harr. (Del.) 46.

Kentucky.— Moore *v.* Pogue, 1 Duv. (Ky.) 327.

Maryland.— Boyd *v.* Harris, 2 Md. Ch. 210.

New York.— Bander *v.* Snyder, 5 Barb. (N. Y.) 63; Clark *v.* Hopkins, 7 Johns. (N. Y.) 556; Flagg *v.* Ruden, 1 Bradf. Surr. (N. Y.) 192; Farrington *v.* King, 1 Bradf. Surr. (N. Y.) 182.

Pennsylvania.— Mertz's Appeal, (Pa. 1886) 7 Atl. 187; Hughes *v.* Hughes, 54 Pa. St. 240.

South Carolina.— Wightman *v.* Butler, 2 Speers (S. C.) 357.

Tennessee.— Thompson *v.* Thompson, 2 Head (Tenn.) 405; Blackburn *v.* Squib, Peck (Tenn.) 59.

Virginia.— Norwell *v.* Little, 79 Va. 141; Perkins *v.* Hawkins, 9 Gratt. (Va.) 649. See also in this state Clendenning *v.* Thompson, 91 Va. 518, 22 S. E. 233.

West Virginia.— Calwell *v.* Prindle, 11 W. Va. 307.

See 8 Cent. Dig. tit. "Bonds," § 225.

Bond of third party given by debtor to creditor for collection, unless returned or offered to be returned in a reasonable time, will be presumed paid. Day *v.* Clarke, 1 A. K. Marsh. (Ky.) 521.

Lapse of less period and departure from state is not sufficient. Dehart *v.* Gard, Add. (Pa.) 344.

Lapse of less period without suit is not sufficient. McCarty *v.* Gordon, 4 Whart. (Pa.) 321.

28. Tinsley *v.* Anderson, 3 Call (Va.) 329; Higginson *v.* Mein, 4 Cranch (U. S.) 415, 2 L. ed. 664.

Presumption of payment may be rebutted by a part payment within the period by an obligor (Lowe *v.* Sowell, 48 N. C. 67; McKeethan *v.* Atkinson, 46 N. C. 421); or by an assignee in bankruptcy (Belo *v.* Spach, 85 N. C. 122; Hamlin *v.* Hamlin, 56 N. C. 191); but not by an heir at law in a suit against the executor (Blake *v.* Quash, 3 McCord (S. C.) 340); or by one obligor after the death of the other so as to affect the latter's estate (Shubrick *v.* Adams, 20 S. C. 49).

Admission of obligor is sufficient.— Cartwright *v.* Kerman, 105 N. C. 1, 10 S. E. 870; North *v.* Drayton, Harp. Eq. (S. C.) 34. But see Rowland *v.* Windley, 86 N. C. 36, wherein it is held that the admission of a joint obligor is inadmissible for this purpose.

As to effect of statements by obligor see Lowe *v.* Sowell, 49 N. C. 235; Wilfong *v.* Cline, 46 N. C. 499; Walker *v.* Walker, 35 N. C. 335.

Commencement and discontinuance of suit is no rebuttal. Palmer *v.* Dubois, 1 Mill Const. (S. C.) 178.

Demand and acknowledgment of debt may be shown. Stout *v.* Levan, 3 Pa. St. 235.

Evidence of a judgment confessed by one of two obligors does not rebut. Frazer *v.* Perdrieau, 1 Bailey (S. C.) 172. See also Langston *v.* Shands, 23 S. C. 149.

Former action between the same parties, and that answer in such action did not deny averment in complaint that bond was unpaid

But in order to rebut the presumption the proof offered should run through the entire period, and evidence showing non-payment during a portion of the time only will be insufficient;[29] and where affirmative proof that a bond has not been paid is given the question of its sufficiency in rebuttal is said to be for the court.[30]

e. With Respect to Bona Fide Holders. As a general rule a negotiable bond passes by delivery and the burden of proof that the possessor thereof is not a *bona fide* holder is on him who assails the possession.[31] And a similar rule prevails in an action to recover the possession of bonds by one claiming to be the owner, where the holder alleges that he bought them in the ordinary course of business, in good faith, and without notice of any claim of the plaintiff thereto.[32] But where it is shown that the bonds have been stolen, illegally issued, or fraudulently diverted from their purpose the holder then has the burden of proving either that he is, or some one under whom he claims was, a *bona fide* holder.[33]

2. Admissibility — a. In General. The proceedings on which a bond are given are admissible in evidence as to its validity,[34] and a contract to which a bond refers and to secure the performance of which it is given may be admissible for the purpose of proving its provisions.[35] Again, in an action upon a bond, if there is no issue which imposes upon the plaintiff the onus of proving its genuineness, it should not be rejected as evidence because it has interlineations which he does

may be shown in rebuttal. Grant *v.* Gooch, 105 N. C. 278, 11 S. E. 571. See also Wilson *v.* Pearson, 102 N. C. 290, 9 S. E. 707.

Incapacity of parties interested to sue will rebut. Lynde *v.* Denison, 3 Conn. 387. But see Boyce *v.* Lake, 17 S. C. 481, 43 Am. Rep. 618.

Indorsement of a credit on the bond by obligee will rebut. Dabney *v.* Dabney, 2 Rob. (Va.) 622, 40 Am. Dec. 761. But see Cremer's Estate, 5 Watts & S. (Pa.) 331.

Interest regularly paid rebuts presumption. Nixon *v.* Bynum, 1 Bailey (S. C.) 148.

Letter from obligor to third party which acknowledges an indebtedness but does not connect such indebtedness with the bond is not sufficient. Alston *v.* Hawkins, 105 N. C. 3, 11 S. E. 164, 18 Am. St. Rep. 874.

That pendency of civil war did not rebut see Boyce *v.* Lake, 17 S. C. 481, 43 Am. Rep. 618.

That there was no one in esse to sue is sufficient to rebut. Long *v.* Clegg, 94 N. C. 763.

29. Rowland *v.* Windley, 86 N. C. 36.

30. Reed *v.* Reed, 46 Pa. St. 239.

31. Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Dec. 678; Rice *v.* Southern Pennsylvania Iron, etc., Co., 9 Phila. (Pa.) 294, 31 Leg. Int. (Pa.) 5; Walker *v.* State, 12 S. C. 200; Washington First Nat. Bank *v.* Texas, 20 Wall. (U. S.) 72, 22 L. ed. 295; Texas *v.* White, 7 Wall. (U. S.) 700, 19 L. ed. 227; Murray *v.* Laidner, 2 Wall. (U. S.) 110, 17 L. ed. 857; Kennicott *v.* Wayne County, 6 Biss. (U. S.) 138, 14 Fed. Cas. No. 7,710, 7 Chic. Leg. N. 41; Duncan *v.* Mobile, etc., R. Co., 3 Woods (U. S.) 567, 8 Fed. Cas. No. 4,138 [*affirmed* in 96 U. S. 659, 24 L. ed. 868].

To throw burden on plaintiff to show that he is a *bona fide* holder defendant must show either that the plaintiff took the instrument overdue, or had notice, or gave no value. Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Dec. 678.

Sealed power of attorney to transfer a bond which recites value received relieves the transferee from the burden of proving that he paid value therefor at the time. Pennsylvania Co.'s Appeal, 86 Pa. St. 102.

That assignment was before maturity will be presumed where execution of bond is proved, and its assignment to plaintiff for full consideration without notice of defenses. Parker *v.* Flora, 63 N. C. 474.

32. Birdsall *v.* Russell, 29 N. Y. 220.

33. *Louisiana.*— State *v.* Gaines, 46 La. Ann. 431, 15 So. 174.

Maine.— Goodwin *v.* Bath, 77 Me. 462, 1 Atl. 244.

Massachusetts.— Hinckley *v.* Merchants' Nat. Bank, 131 Mass. 147.

New York— Northampton Nat. Bank *v.* Kidder, 106 N. Y. 221, 12 N. E. 577, 60 Am. Rep. 443 [*affirming* 49 N. Y. Super. Ct. 338]; Dutchess County Mut. Ins. Co. *v.* Hachfield, 47 How. Pr. (N. Y.) 330.

United States.—John Hancock Mut. L. Ins. Co. *v.* Huron, 100 Fed. 1001, 40 C. C. A. 683 [*affirming* 80 Fed. 652]; Jamison *v.* Rock Rapids Independent School Dist., 90 Fed. 387; Lansing *v.* Lytle, 38 Fed. 204; Bailey *v.* Lansing, 13 Blatchf. (U. S.) 424, 2 Fed. Cas. No. 738, 2 N. Y. Wkly. Dig. 562.

But see Gilman *v.* New Orleans, etc., R. Co., 72 Ala. 566; Walker *v.* State, 12 S. C. 200.

As to purchase of stolen bonds see *supra*, IV, B, 2, c, (VI).

34. Butts *v.* Davis, 50 Mich. 310, 15 N. W. 486.

35. Kurtz *v.* Forquer, 94 Cal. 91, 29 Pac. 413.

So also papers shown by the evidence to have been attached to the bond at the time of its execution and to which the bond refers as "hereto attached" are admissible. Wheeler *v.* Meyer, 108 Mich. 297, 66 N. W. 46.

not account for.[36] And the record of a suit in chancery for the settlement of a partnership account may be admissible upon the question of liability on a bond given to secure one of the partners from loss.[37] But evidence of previous litigation is inadmissible where immaterial.[38] And all contemporaneous parol agreements tending to vary, add to, or contradict the terms of a bond are inadmissible.[39] So also declarations of an obligor are not admissible to affect the validity of a bond as against the obligee, unless accompanied with proof of such confederacy between the parties as would in other cases make the acts of one the acts of the other.[40] Again, where a forthcoming bond is only a common-law obligation the value for which the obligors in a bond make themselves liable is the value as established by the rules of evidence known to the common law.[41]

b. As to Consideration. Evidence which does not vary the transaction as appears from the face of the bond is admissible,[42] as is also evidence showing consideration and the history of the transaction.[43] Again, where it is claimed that the execution was procured by fraud, evidence showing want of consideration is relevant.[44] So also where, under a statute, the defendant is permitted to impeach the consideration it is competent for this purpose to show that the execution of the instrument was induced by false and fraudulent representations, and the consideration expressed in the instrument is not the real one which induced its execution.[45] And where a bond is given for money loaned evidence showing the inability of the obligor to make such a loan has been held admissible.[46]

c. As to Delivery and Acceptance. The burden of proving the delivery of a bond is on the plaintiff.[47] But it may be inferred from the acts of the parties;[48] and where the bond is in the possession of the obligee such fact is *prima facie* evidence of delivery,[49] and also of acceptance by him.[50]

d. As to Execution. Execution of a lost bond may be proved by evidence

36. Whitsett *v.* Womack, 8 Ala. 466.

37. Beeson *v.* Stephenson, 7 Leigh (Va.) 107.

38. Evidence of previous litigation between a landowner and commissioners of highways as to whether a road had been legally established held inadmissible in an action on a bond to such commissioners conditioned for the payment of damages to landowners. Memhaner *v.* Parker, 32 Mo. App. 282.

39. Dick Bros. Quincy Brewing Co. *v.* Finnell, 39 Mo. App. 276.

40. Bredin *v.* Bredin, 3 Pa. St. 81.

41. Sheriff's appraisement is not admissible in such case. Jacobs *v.* Daugherty, 78 Tex. 682, 15 S. W. 160.

42. Blewett *v.* Front St. Cable R. Co., 49 Fed. 126.

43. Wheeler *v.* Meyer, 108 Mich. 297, 66 N. W. 46.

44. Burkholder *v.* Plank, 69 Pa. St. 225.

45. Gage *v.* Lewis, 68 Ill. 604.

46. McDowell *v.* Crawford, 11 Gratt. (Va.) 377.

47. Edelin *v.* Sanders, 8 Md. 118; Benedict *v.* Penfield, 42 Hun (N. Y.) 176.

Description of a bond in deed of trust to same person as bond is made payable to is no evidence of delivery thereof. Whichard *v.* Jordan, 51 N. C. 54.

Proof of seal is not evidence of delivery. Hamilton *v.* Eaton, 1 Hughes (U. S.) 249, 11 Fed. Cas. No. 5,980.

48. St. Louis Brewing Assoc. *v.* Hayes, 97 Fed. 859, 38 C. C. A. 449.

49. *Alabama.*— Firemen's Ins. Co. *v.* McMillan, 29 Ala. 147; Spence *v.* Rutledge, 11 Ala. 590.

California.— Blankman *v.* Vallejo, 15 Cal. 638.

Florida.— State *v.* Suwannee County, 21 Fla. 1.

Maryland.— Edelin *v.* Sanders, 8 Md. 118; Glenn *v.* Grover, 3 Md. 212; Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324; Clarke *v.* Ray, 1 Harr. & J. (Md.) 318.

New Jersey.— Chetwood *v.* Wood, 45 N. J. Eq. 369, 19 Atl. 622; Wood *v.* Chetwood, 44 N. J. Eq. 64, 14 Atl. 21.

New York.— Bostwick *v.* Van Voorhis, 91 N. Y. 353; Kranichfelt *v.* Slattery, 12 Misc. (N. Y.) 96, 33 N. Y. Suppl. 27, 66 N. Y. St. 526; Seymour *v.* Van Slyck, 8 Wend. (N. Y.) 403.

Pennsylvania.— Grim *v.* Jackson Tp., 51 Pa. St. 219.

Virginia.—Ward *v.* Churn, 18 Gratt. (Va.) 801, 98 Am. Dec. 749.

West Virginia.—Newlin *v.* Beard, 6 W. Va. 110.

See 8 Cent. Dig. tit. "Bonds," § 220.

Where delivery conditional possession by obligee does not shift from him burden of proving delivery (Whitsell *v.* Mebane, 64 N. C. 345); but otherwise in absence of all evidence as to condition (Ward *v.* Churn, 18 Gratt. (Va.) 801, 98 Am. Dec. 749).

50. Engler *v.* Peoples F. Ins. Co., 46 Md. 322; Wilson *v.* Ireland, 4 Md. 444; Milburn *v.* State, 1 Md. 1; Elizabeth State Bank *v.* Chetwood, 8 N. J. L. 1; State *v.* Ingram, 27

of the clerk or other person before whom acknowledged;[51] and that it was procured by fraud may also be shown, but to affect the obligee it must appear he had an agency therein.[52] So also evidence is admissible to show that there never was such an instrument because never completely executed.[53] And approval by the obligee may be shown by presumptive evidence.[54]

e. As to Performance or Breach — (I) *Generally.* A bond should be construed by itself and parol evidence to contradict, vary, or add to it is not admissible;[55] and where it is claimed that there has been a breach the evidence, if neither material, relevant, nor pertinent to the issue, is inadmissible.[56] But in an action on the bond of an agent or employee acts, declarations, or admissions of such agent or employee are admissible, where done or made in the course of his duty.[57]

(II) *Payment.* Evidence from which the jury may infer payment to one legally authorized to receive it is admissible.[58] And a bond may be evidence of part payment of an earlier bond.[59] Again where a bond is conditioned for the repayment of deposits the payment must be in legal tender unless otherwise provided.[60]

f. With Respect to Amount of Recovery. In an action on the bond of a bank teller a daily balance-book kept by him may be admitted.[61] And evidence of debts against the estate of deceased may be admissible in an action on a probate bond;[62] as may also an inventory of the estate, where a breach is alleged of a bond conditioned that obligor shall exhibit all papers as to estate of deceased.[63] Again, evidence of expenses incurred is sometimes admissible.[64] And a bond may be evidence of the amount of money advanced, though void for usury.[65] But in absence of proof entitling a recovery beyond the amount of the penalty evidence is inadmissible, in an action on a bond to procure a conveyance of land, of the value of such land.[66]

3. Sufficiency — a. In General. The evidence to authorize a recovery should

N. C. 441; State *v.* McAlpin, 26 N. C. 140; McLean *v.* State, 8 Heisk. (Tenn.) 22.

51. Rowland *v.* Day, 17 Ala. 681.

52. Jenners *v.* Howard, 6 Blackf. (Ind.) 240.

Sufficiency of evidence showing fraud see Keedy *v.* Moats, 72 Md. 325, 19 Atl. 965; Tracy *v.* Maloney, 105 Mass. 90.

53. For this purpose evidence may be given showing that the bond was signed on condition that other persons named therein also sign it. State *v.* Wallis, 57 Ark. 64, 20 S. W. 811.

54. Pryse *v.* Farmers Bank, 17 Ky. L. Rep. 1056, 33 S. W. 532; Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324; U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64, 6 L. ed. 552.

55. Robinson *v.* Heard, 15 Me. 296.

56. Applications of rule.— For inadmissible evidence see Sloss Iron, etc., Co. *v.* Macon County, 111 Ala. 554, 20 So. 400 (action on bond for hiring of convicts); Pryse *v.* Farmers Bank, 17 Ky. L. Rep. 1056, 33 S. W. 532 (cashier's bond); Pendleton *v.* State Bank, 1 T. B. Mon. (Ky.) 171 (cashier's bond). For admissible evidence see Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324 (cashier's bond); Quimby *v.* Melvin, 35 N. H. 198 (bond to in good faith abide by agreement as to having and perfecting a reference); Georgetown Union Bank *v.* Forrest, 3 Cranch C. C. (U. S.) 218, 24 Fed. Cas. No. 14,356 (teller's bond).

57. Bond of agent or employee.—Accounts rendered and notes executed by him are admissible (Weed Sewing Mach. Co. *v.* Kaulback, 3 Thomps. & C. (N. Y.) 304); and also entries in books kept under his supervision (Standard Oil Co. *v.* Fidelity, etc., Co., 21 Ky. L. Rep. 399, 51 S. W. 571); and evidence as to the reception and indorsement of checks by him is competent (Standard Oil Co. *v.* Fidelity, etc., Co., 21 Ky. L. Rep. 399, 51 S. W. 571).

Bond of treasurer.— Treasurer's report admissible but not the stub of his private checkbook. Barry *v.* Screwmen's Benev. Assoc., 67 Tex. 250, 3 S. W. 261.

Cashier's bonds.—Admissions at time of semi-weekly statement may be shown (Brighton Bank *v.* Smith, 12 Allen (Mass.) 243, 90 Am. Dec. 144); but not declarations subsequent to the act complained of (Stetson *v.* City Bank, 2 Ohio St. 167).

58. Kinney *v.* Etheridge, 27 N. C. 34.

59. Allen *v.* Allen, 114 N. C. 121, 19 S. E. 269.

60. Comstock *v.* Gage, 91 Ill. 328.

61. State Bank *v.* Johnson, 1 Mill Const. (S. C.) 404, 12 Am. Dec. 645.

62. Clark *v.* Mix, 15 Conn. 152.

63. Halkerstone *v.* Hawkins, 1 Gill & J. (Md.) 437.

64. Brookfield *v.* Reed, 152 Mass. 568, 26 N. E. 138.

65. Campbells *v.* Patterson, 11 Leigh (Va.) 117.

66. Sweem *v.* Steele, 10 Iowa 374.

show a liability upon the bond;[67] and where the burden of proof is thrown upon the defendant by the pleading or evidence he must fully meet and overcome the same to justify a verdict in his behalf.[68] Again, where the answer puts in issue the condition of the bond a judgment for plaintiff cannot be sustained where the bond is not filed and no evidence given of its contents.[69] But under a plea of *non est factum* a recovery may be permitted on proof of execution of the instrument;[70] and where the only plea is payment the bond need not be produced.[71]

b. To Show Delivery. To prove delivery there must be some act, words, or statements showing an intention to deliver the instrument. It may be by delivery to the obligor and generally possession by the obligee is evidence thereof.[72] But delivery of a bond to a clerk of the obligor without any evidence of instructions or declarations showing an intention to deliver is insufficient.[73]

c. To Show Execution. Any evidence tending to prove the execution of a bond is sufficient to entitle it to be read to the jury.[74] An ordinary method of proof is by the testimony of a subscribing witness.[75] But facts and circumstances from which the jury may infer that a bond was or was not executed are also admissible in evidence;[76] and the existence of a bond may be proved by writings of the plaintiff.[77] Again, in an action of trover the plaintiff may prove execution by evidence of one of the obligors;[78] and the execution of an appeal-bond by a railway company is sufficiently shown, where the secretary and president have signed the same and the corporate seal is attached thereto.[79]

F. Damages — 1. Measure and Amount of — a. In General. The measure of damages or amount of recovery in an action on a bond depends largely upon the intent of the parties as expressed in the instrument. If it appear clearly that the sum mentioned therein is to be liquidated damages, then there may be a recovery of the whole amount, where such recovery is not inconsistent with the policy of the law. If, however, the sum mentioned was intended as a penalty, then the measure of damages should be the actual loss which has been sustained as a result of the breach, where this can be ascertained. Parties may stipulate for a certain sum to be paid as liquidated damages and courts will not interfere

67. McFall *v.* Howe Sewing Mach. Co., 90 Ind. 148.

An indorsement of forfeiture is sufficient. Ohmstead *v.* Thompson, 91 Ala. 127, 8 So. 346.

Effect of admission by letter of agent in action on his bond see Singer Mfg. Co. *v.* Ponder, 82 Tex. 653, 18 S. W. 152.

On bond for successful prosecution of suit entire record thereof should be introduced. Lewis *v.* Bullard, 3 Humphr. (Tenn.) 207.

On bond to produce articles of a certain value evidence of price received at auction not conclusive. Butler *v.* Baird, 5 Rich. (S. C.) 154.

68. Union Pac. R. Co. *v.* Pratt, 86 Iowa 194, 53 N. W. 98 (action on cashier's bond); American Bank *v.* Adams, 12 Pick. (Mass.) 303 (action on teller's bond); Phenix Ins. Co. *v.* Weymouth, 34 Nebr. 202, 51 N. W. 752 (action on bond of agent).

As to sufficiency of evidence showing payment in particular cases see Knott *v.* Whitfield, 99 N. C. 76, 5 S. E. 664; Gunster *v.* Jessup, 192 Pa. St. 223, 43 Atl. 994; Leith *v.* Carter, 83 Va. 889, 5 S. E. 584; Green *v.* Buckner, 6 Leigh (Va.) 82.

Compliance with bond to vacate judgment is shown by a subsequent trial of the cause and a new judgment. Colchen *v.* Ninde, 120 Ind. 88, 22 N. E. 94.

69. State *v.* Smit, 12 Mo. App. 572.

70. Fitzsimmons *v.* Hall, 84 Ill. 538; Perry *v.* Clymore, 3 McCord (S. C.) 245.

71. State *v.* McGuire, 46 W. Va. 328, 33 S. E. 313, 76 Am. St. Rep. 822.

72. State *v.* Ingram, 27 N. C. 441.

73. Chase *v.* Breed, 5 Gray (Mass.) 440.

74. Hicks *v.* Chouteau, 12 Mo. 341.

75. **Bond of ancestor of defendants** may be so proved. Carneal *v.* Day, Litt. Sel. Cas. (Ky.) 492.

Recollection of seeing it executed not essential. Miller *v.* Honey, 4 Harr. & J. (Md.) 241.

That obligor signed on condition that others sign may be proved by subscribing witness. State Bank *v.* Evans, 15 N. J. L. 155, 28 Am. Dec. 400.

Where testimony insufficient see Edelin *v.* Gough, 5 Gill (Md.) 103.

76. Sides *v.* Schwebly, 3 Harr. & M. (Md.) 243.

A bond signed and delivered by one obligor to another merely as a form for a bond and not as to be obligatory and also without proof of acknowledgment will not bind him. Asberry *v.* Calloway, 1 Wash. (Va.) 72.

77. Day *v.* Leal, 14 Johns. (N. Y.) 404.

78. Smith *v.* Robertson, 4 Harr. & J. (Md.) 30.

79. Keithsburg, etc., R. Co. *v.* Henry, 90 Ill. 255.

where such sum is not unreasonably in excess of the actual loss or unjust or oppressive; but parties cannot evade the jurisdiction of the courts by the mere designation of a sum as liquidated damages, where it is in fact a penalty. And generally the courts have construed the sum mentioned in a bond as a penalty, considering it merely as a security for the damage actually sustained by the breach of the condition, and have limited the recovery to an amount compensatory therefor.[80] But where the measure of damages equals the penalty it may be recovered in full.[81] And where the sum mentioned is in the nature of a statutory penalty for the non-performance of a statutory duty, it is not necessary to show

80. *Alabama.*— Jemison *v.* Governor, 47 Ala. 390.

Arizona.— Finley *v.* Tucson, (Ariz. 1900) 60 Pac. 872.

Arkansas.— Sillivant *v.* Reardon, 5 Ark. 140.

Georgia.— Ripley *v.* Eady, 106 Ga. 422, 32 S. E. 343; Dart *v.* Southwestern Bldg., etc., Assoc., 99 Ga. 794, 27 S. E. 171.

Illinois.— Wales *v.* Bogue, 31 Ill. 464.

Iowa.— State *v.* McGlothlin, 61 Iowa 312, 16 N. W. 137.

Louisiana.— Union Bank *v.* Thompson, 8 Rob. (La.) 227.

Maine.— Philbrook *v.* Burgess, 52 Me. 271.

Maryland.— Baltimore First Nat. Bank *v.* Taliaferro, 72 Md. 164, 19 Atl. 364; Rawlings *v.* Adams, 7 Md. 26; Kiersted *v.* State, 1 Gill & J. (Md.) 231.

Michigan.— Wheeler *v.* Meyer, 95 Mich. 36, 54 N. W. 689.

Minnesota.— Longfellow *v.* McGregor, 61 Minn. 494, 63 N. W. 1032.

Mississippi.— Lanier *v.* Trigg, 6 Sm. & M. (Miss.) 641, 45 Am. Dec. 293.

Missouri.— Salmon Falls Bank *v.* Leyser, 116 Mo. 51, 22 S. W. 504; State *v.* Kaye, 83 Mo. App. 678; Wagner *v.* Dette, 2 Mo. App. 254.

New Hampshire.—Berry *v.* Harris, 43 N. H. 376.

New Jersey.— People's Bldg., etc., Assoc. *v.* Wroth, 43 N. J. L. 70.

North Carolina.— McRae *v.* McNair, 69 N. C. 12.

Ohio.— Cairnes *v.* Knight, 17 Ohio St. 68.

Pennsylvania.— Scott *v.* Phillips, 140 Pa. St. 51, 21 Atl. 241; Columbia Bridge Co. *v.* Kline, 4 Pa. L. J. Rep. 39, 6 Pa. L. J. 317.

South Carolina.— McKeegan *v.* McSwiney, 2 S. C. 191; Miller *v.* Nichols, 1 Bailey (S. C.) 226; State Bank *v.* Johnson, 1 Mill Const. (S. C.) 404, 12 Am. Dec. 645.

Tennessee.—Williams *v.* Patterson, 2 Overt. (Tenn.) 229.

Texas.— Chambers *v.* Ft. Bend County, 14 Tex. 34.

Vermont.— Spear *v.* Stacy, 26 Vt. 61.

Virginia.— McDowell *v.* Burwell, 4 Rand. (Va.) 317.

Washington.—Aberdeen *v.* Honey, 8 Wash. 251, 35 Pac. 1097.

United States.—Massey *v.* Schott, Pet. C. C. (U. S.) 132, 16 Fed. Cas. No. 9,262.

See 8 Cent. Dig. tit. "Bonds," § 238; and, generally, CONTRACTS.

Such a measure of damages has been held proper in actions on bonds for conveyance of real estate (Rawlings *v.* Adams, 7 Md. 26); of insolvent debtor (Kiersted *v.* State, 1 Gill & J. (Md.) 231); of contractors (Dunavant *v.* Caldwell, etc., R. Co., 122 N. C. 999, 29 S. E. 837); to rebuild (Longfellow *v.* McGregor, 61 Minn. 494, 63 N. W. 1032); to deliver goods (Littlejohn *v.* Gilchrist, 3 N. C. 589); to pay an annuity (Cairnes *v.* McKnight, 17 Ohio St. 68); and also in actions to recover on the bond of a cashier (Barrington *v.* Washington Bank, 14 Serg. & R. (Pa.) 405) or bank teller (State Bank *v.* Johnson, 1 Mill Const. (S. C.) 404, 12 Am. Dec. 645).

Bond to build is subject to same rule. United Real Estate Co. *v.* McDonald, 140 Mo. 605, 41 S. W. 913; Hirt *v.* Hahn, 61 Mo. 496. And where such a bond is given by a purchaser to a vendor of land, evidence as to the effect the erection of the building would have had on other property of the obligee in the same locality is irrelevant, nor is there any presumption that if erected they would have increased the value of the land to the extent of their cost. United Real Estate Co. *v.* McDonald, 140 Mo. 605, 41 S. W. 913.

Bond to pay insurance premiums.— In an action on such a bond recovery should be for the overdue premiums and costs (Scott *v.* Phillips, 140 Pa. St. 51, 21 Atl. 241), though in a decision in New York a recovery of the full penalty was allowed under the facts of that particular case (Gerard *v.* Cowperthwait, 2 Misc. (N. Y.) 371, 21 N. Y. Suppl. 1092, 50 N. Y. St. 492).

Bond to support.— The rule also applies in this case. Wright *v.* Wright, 49 Mich. 624, 14 N. W. 571. And there may be a recovery for future as well as past damages. Shaffer *v.* Lee, 8 Barb. (N. Y.) 412.

When sum recoverable as liquidated damages for breach of contract see Shelby *v.* Bohn, 25 Ind. App. 473, 57 N. E. 566.

Where medium of payment is designated as government bonds, notes of a particular bank, or current bank money, the measure of damages is the value of such medium on the day of the breach. Lanier *v.* Trigg, 6 Sm. & M. (Miss.) 641, 45 Am. Dec. 293; Lackey *v.* Miller, 61 N. C. 26; Wigg *v.* Garden, 1 Bay (S. C.) 357.

Acceptance by obligee of forthcoming bond of part of property is no election to measure his recovery by the value of the residue. Brumby *v.* Barnard, 60 Ga. 292.

81. Blewett *v.* Front St. Cable R. Co., 51 Fed. 625, 7 U. S. App. 285, 2 C. C. A. 415 [*affirming* 49 Fed. 126].

actual damage, and the whole sum may be recovered.[82] If, however, the sum designated in the bond is in excess of that required by statute, there can be no recovery beyond what would have been allowed if it had conformed thereto.[83] On covenants running to the obligees jointly only such damages are recoverable as all are interested in.[84] But where there is a change in the obligees with the consent of the obligor he will be liable for damages from breaches occurring after such change.[85]

b. Damages Limited — (I) *By Pleadings.* It has been decided that the plaintiff's recovery in an action of debt is not limited to the amount of damages laid in the declaration but may be in excess of such sum,[86] and where under the law of the particular jurisdiction the plaintiff's recovery is thus limited a judgment allowing a larger amount cannot be objected to where the excess is remitted and the final judgment does not exceed the amount of the penalty.[87]

(II) *To Amount of Penalty.* The general rule is that the damages allowable to a plaintiff should not exceed the penalty of the bond.[88] In some jurisdictions, however, a recovery in excess of such sum has been allowed,[89] as where the action is for the debt and not for the penalty.[90]

c. Nominal Damages. Nominal damages at least are recoverable where there is shown to be a breach of the condition,[91] and such damages only are recoverable

82. Clark *v.* Barnard, 108 U. S. 436, 2 S. Ct. 878, 27 L. ed. 780.

83. Menken *v.* Frank, 57 Miss. 732.

84. Burns *v.* Follansbee, 20 Ill. App. 41.

85. Smith *v.* Wainwright, 24 Vt. 97.

86. Byrd *v.* State, 15 Ark. 175; Allen *v.* Smith, 12 N. J. L. 159; Payne *v.* Ellzey, 2 Wash. (Va.) 143; Peerce *v.* Athey, 4 W. Va. 22. But see Tennant *v.* Gray, 5 Munf. (Va.) 494, wherein it is held that the damages cannot exceed those laid in the suit.

87. Gibbs *v.* French, 30 Ill. App. 292; Hunt *v.* Reeves, 5 Blackf. (Ind.) 177; Gibson *v.* Governor, 11 Leigh (Va.) 629.

88. *Alabama.*— Tyson *v.* Sanderson, 45 Ala. 364.

Indiana.— State *v.* Ford, 5 Blackf. (Ind.) 392.

Iowa.— Sweem *v.* Steele, 5 Iowa 352, 10 Iowa 374; Bruce *v.* Sweatland, Morr. (Iowa) 494.

Kansas.— Simmons *v.* Garrett, McCahon (Kan.) 82. But see Burchfield *v.* Haffey, 34 Kan. 42, 7 Pac. 548.

Maryland.— State *v.* Wayman, 2 Gill & J. (Md.) 254.

Massachusetts.— Huntress *v.* Burbank, 111 Mass. 213.

Missouri.— Turner *v.* Lord, 92 Mo. 113, 4 S. W. 420; Showles *v.* Freeman, 81 Mo. 540; State *v.* Sandusky, 46 Mo. 377; Farrar *v.* Christy, 24 Mo. 453; Rayburn *v.* Deaver, 8 Mo. 104.

New Jersey.—Webb *v.* Fish, 4 N. J. L. 431.

New York.— Hovey *v.* Rubber Tip Pencil Co., 38 N. Y. Super. Ct. 428; Pevey *v.* Sleight, 1 Wend. (N. Y.) 518; Lewis *v.* Ball, 6 Cow. (N. Y.) 583.

North Carolina.— Warden *v.* Nielson, 5 N. C. 275, 3 Am. Dec. 691.

South Carolina.— Ellis *v.* Sanders, 34 S. C. 236, 13 S. E. 417; Daniels *v.* Moses, 12 S. C. 130; Saunders *v.* Hughes, 2 Bailey (S. C.) 504; Hale *v.* Hall, 2 Brev. (S. C.) 316.

Tennessee.—Muse *v.* Swayne, 2 Lea (Tenn.) 251, 31 Am. Rep. 607.

Texas.— Grand Lodge A. O. U. W. *v.* Cleghorn, 20 Tex. Civ. App. 134, 48 S. W. 750.

West Virginia.—State *v.* Purcell, 31 W. Va. 44, 5 S. E. 301.

United States.— U. S. *v.* Arnold, 1 Gall. (U. S.) 348, 24 Fed. Cas. No. 14,469; Lawrence *v.* U. S., 2 McLean (U. S.) 581, 15 Fed. Cas. No. 8,145; U. S. Bank *v.* Magill, 1 Paine (U. S.) 661, 2 Fed. Cas. No. 929 [*affirmed* in 12 Wheat. (U. S.) 511, 6 L. ed. 711]; Goldhawk *v.* Duane, 2 Wash. (U. S.) 323, 10 Fed. Cas. No. 5,511.

See 8 Cent. Dig. tit. "Bonds," § 241.

An amount awarded in excess of the penalty may be remitted and judgment had for the residue. Ehrman *v.* Stanfield, 80 Ala. 118.

Though part of the sum intended as penalty is omitted it will not affect the rule if instrument free from ambiguity. Rayburn *v.* Deaver, 8 Mo. 104.

Though penalty more than double amount intended to be secured recovery may be had to amount mentioned. Daniels *v.* Moses, 12 S. C. 130.

89. New Holland Turnpike Co. *v.* Lancaster County, 71 Pa. St. 442; Stroble *v.* Large, 3 McCord (S. C.) 112; Roulain *v.* McDowall, 1 Bay (S. C.) 490.

May be a recovery for each breach as it occurs though beyond the penalty. Meinert *v.* Bottcher, 60 Minn. 204, 62 N. W. 276.

May be recovered in equity.— Robbins *v.* Long, 16 N. J. Eq. 59.

90. Sweem *v.* Steele, 5 Iowa 352; Hughes *v.* Hughes, 54 Pa. St. 240; Stroble *v.* Large, 3 McCord (S. C.) 112; Roulain *v.* McDowall, 1 Bay (S. C.) 490; Martin *v.* Taylor, 1 Wash. (U. S.) 1, 16 Fed. Cas. No. 9,166.

Where bond is conditioned for payment of sum of money specified in condition, such sum is the measure of damages, though in excess of the penalty. Moss *v.* Wood, R. M. Charlt. (Ga.) 42.

91. Fidelity, etc., Co. *v.* Colvin, 83 Mo. App. 204.

for a technical breach, where no actual damage is shown to have been sustained;[92] and it has also been decided that such damages only can be recovered on a bond to the state for the performance of some act for a third person, where there is no authority for the taking of the bond.[93]

2. INTEREST. Interest is an element which may properly be considered in estimating the amount recoverable.[94] And there may be an allowance therefor, though the amount so allowed, together with the principal sum recovered, may exceed the penalty named in the bond.[95] But it has been determined that

92. *Colorado.*— Turck *v.* Marshall Silver Min. Co., 8 Colo. 113, 5 Pac. 838.

Illinois.— Wallis *v.* Keeney, 88 Ill. 370; Karr *v.* Peter, 60 Ill. App. 209.

Indiana.— Tate *v.* Booe, 9 Ind. 13; Schooley *v.* Stoops, 4 Ind. 130.

Iowa.— Linder *v.* Lake, 6 Iowa 164.

Maryland.— Rawlings *v.* Adams, 7 Md. 26.

Massachusetts.— Pollard *v.* Porter, 3 Gray (Mass.) 312; Pond *v.* Merrifield, 12 Cush. (Mass.) 181.

Minnesota.— Sprague *v.* Wells, 47 Minn. 504, 50 N. W. 535.

Missouri.—Middleton *v.* Moore, 36 Mo. App. 627.

New York.— Hodges *v.* Suffelt, 2 Johns. Cas. (N. Y.) 406.

See 8 Cent. Dig. tit. "Bonds," § 239.

So such damages were only allowed for failure to complete a building exactly according to time and terms, where the value of the building was increased by extra work and labor (Pond *v.* Merrifield, 12 Cush. (Mass.) 181); so also where a teller had falsified his accounts during the term of the bond to conceal a deficit occurring before such contract was entered into (State *v.* Atherton, 40 Mo. 209); and where the condition was performed after breach (Shattuck *v.* Adams, 136 Mass. 34). Again, where only one of the sureties was a resident householder such damages only were allowed. State *v.* Dunn, 60 Mo. 64.

That nominal damages are not recoverable where party for whose benefit a suit is brought is not injured see Taylor *v.* Mygatt, 26 Conn. 184. But see Tate *v.* Booe, 9 Ind. 13.

93. Com. *v.* Bassford, 1 E. D. Smith (N. Y.) 218.

94. *Indiana.*— Shook *v.* State, 6 Ind. 113.

Kentucky.— Bingham *v.* Vanbuskirk, 6 B. Mon. (Ky.) 197; Gatewood *v.* Gatewood, 3 J. J. Marsh. (Ky.) 117.

Maryland.— Richardson *v.* State, 2 Gill (Md.) 439.

Virginia.— Bailey *v.* James, 11 Gratt. (Va.) 468, 62 Am. Dec. 659; Smith *v.* Harmanson, 1 Wash. (Va.) 6.

United States.— U. S. *v.* Gurney, 4 Cranch (U. S.) 333, 2 L. ed. 638.

See 8 Cent. Dig. tit. "Bonds," § 243; and *supra*, III, F, 7, b.

Method and time of computing.— In an action on a bond for the payment of money interest may be recovered on the sum really due up to the time of payment, even after judgment (Trice *v.* Turrentine, 35 N. C. 212), or until a satisfaction of judgment (State Bank *v.* Bowie, 3 Strobh. (S. C.) 439). But where the judgment is for the penalty with interest it should not be computed on the sum secured. Mann *v.* Taylor, 1 McCord (S. C.) 171. And where a surety on an appeal-bond has been compelled to pay the judgment he should not, it is held, be allowed interest on the damages and costs of appeal, but only on the original judgment. McClung *v.* Beirne, 10 Leigh (Va.) 410, 34 Am. Dec. 739. Again, interest may only be recoverable from the commencement of the suit in the absence of demand or acknowledgment of indebtedness (U. S. Bank *v.* Magill, 1 Paine (U. S.) 661, 2 Fed. Cas. No. 929 [*affirmed* in 12 Wheat. (U. S.) 511, 6 L. ed. 711]), and it may be computed at the rate payable in the bond (Adams *v.* Way, 33 Conn. 419; Pickens *v.* McCoy, 24 W. Va. 344).

Bonds with interest coupons attached.— In actions upon either the bonds or interest coupons interest may be allowed. Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 9. See also Welsh *v.* First Div. St. Paul, etc., R. Co., 25 Minn. 314. But it should be computed according to the laws of the state where the same and the mortgage to secure them were executed, and the parties resided unless there is a provision for payment elsewhere. Kavanaugh *v.* Day, 10 R. I. 393, 14 Am. Rep. 691.

The accrual of interest may be prevented where a bond is conditioned for performance by a certain day by a tender of performance on such day. Smith *v.* Stinson, 1 Brev. (S. C.) 1.

Where action is on sequestration bond interest is not allowable. Bonner *v.* Copley, 15 La. Ann. 504.

95. *Alabama.*—Tyson *v.* Sanderson, 45 Ala. 364.

Connecticut.— Washington County Ins. Co. *v.* Colton, 26 Conn. 42; Lewis *v.* Dwight, 10 Conn. 95; Carter *v.* Carter, 4 Day (Conn.) 30, 4 Am. Dec. 177.

Kansas.— Burchfield *v.* Haffey, 34 Kan. 42, 7 Pac. 548 [*overruling* Simmons *v.* Garrett, McCahon (Kan.) 82].

Kentucky.— Carter *v.* Thorn, 18 B. Mon. (Ky.) 613.

Maine.— Wyman *v.* Robinson, 73 Me. 384, 40 Am. Rep. 360.

Maryland.— State *v.* Wayman, 2 Gill & J. (Md.) 254.

Massachusetts.— Brighton Bank *v.* Smith, 12 Allen (Mass.) 243, 90 Am. Dec. 144; Warner *v.* Thurlo, 15 Mass. 154; Harris *v.* Clap, 1 Mass. 308, 2 Am. Dec. 27.

Nebraska.— Mullen *v.* Morris, 43 Nebr. 596, 62 N. W. 74.

New Hampshire.— Probate Judge *v.* Heydock, 8 N. H. 491.

circumstances may be taken into consideration which will justify a disallowance of interest.[96]

3. THE ASSESSMENT. It has been declared that as a foundation for the assessment of damages a breach of the bond must be suggested in the pleadings or upon the roll;[97] but in lieu thereof plaintiff may substitute a confession of damages by the defendant.[98] It may be stated generally, however, that in the absence of any agreement between the parties or of any statutory or other legal requirement providing otherwise the damages should be assessed by the jury.[99] And in the absence of any evidence by defendant as to the amount of plaintiff's damages it has been held that such amount cannot be fixed by the jury at a less sum than the penalty of the bond.[1] In some cases, however, this question may be determined by the court;[2] or in a manner provided by statute in which case there should be a compliance therewith.[3] Again, an excessive assessment may be reduced.[4] And after a verdict and judgment for the penal sum payments made by the defendant on the bond may in some jurisdictions be shown.[5] But where breaches have been assigned in an action on a bond conditioned for the payment of money by instalments it has been declared that the plain-

New Jersey.— Gloucester City *v.* Eschbach, 54 N. J. L. 150, 23 Atl. 360; Robbins *v.* Long, 16 N. J. Eq. 59.

New York.— Steinbock *v.* Evans, 122 N. Y. 551, 25 N. E. 929, 34 N. Y. St. 138 [*affirming* 55 N. Y. Super. Ct. 278, 18 N. Y. St. 325]; Brainard *v.* Jones, 18 N. Y. 35; Lyon *v.* Clark, 8 N. Y. 148, Seld. Notes (N. Y.) 73 [*affirming* 1 E. D. Smith (N. Y.) 250]; Ringle *v.* O'Matthiessen, 39 N. Y. Suppl. 92; Cook *v.* Tousey, 3 Wend. (N. Y.) 444; Smedes *v.* Hooghtaling, 3 Cai. (N. Y.) 48, 2 Am. Dec. 250; Mower *v.* Kip, 6 Paige (N. Y.) 88, 29 Am. Dec. 748; Mower *v.* Kip, 2 Edw. (N. Y.) 165.

Pennsylvania.— New York L. Ins. Co. *v.* Seckel, 8 Phila. (Pa.) 92.

Rhode Island.— Walcott *v.* Harris, 1 R. I. 404.

South Carolina.— Smith *v.* Macon, 1 Hill Eq. (S. C.) 339.

Texas.— Grand Lodge A. O. U. W. *v.* Cleghorn, 20 Tex. Civ. App. 134, 48 S. W. 750.

Virginia.— Baker *v.* Morris, 10 Leigh (Va.) 294.

West Virginia.—State *v.* Purcell, 31 W. Va. 44, 5 S. E. 301; Perry *v.* Horn, 22 W. Va. 381.

United States.— Blewett *v.* Front St. Cable R. Co., 51 Fed. 625, 7 U. S. App. 285, 2 C. C. A. 415 [*affirming* 49 Fed. 126]; Perit *v.* Wallis, 2 Dall. (U. S.) 252, 1 L. ed. 370.

See 8 Cent. Dig. tit. "Bonds," § 243.

But see *contra,* People's Sav. Bank *v.* Campau, 124 Mich. 106, 82 N. W. 803; Bonsall *v.* Taylor, 1 McCord (S. C.) 503; Rhea *v.* McCorkle, 11 Heisk. (Tenn.) 415; State *v.* Blakemore, 7 Heisk. (Tenn.) 638.

96. Blewett *v.* Front St. Cable R. Co., 51 Fed. 625, 7 U. S. App. 285, 2 C. C. A. 415 [*affirming* 49 Fed. 126].

When not so recoverable.— Where interest is made payable by the terms of a bond, it is held that the recovery of interest before default made cannot exceed the penalty. Brainard *v.* Jones, 18 N. Y. 35. And it cannot be recovered beyond the penalty until the amount due has been fixed by decree. Richardson *v.* Richardson, McMull. Eq. (S. C.) 103.

97. Brown *v.* Hart, 7 Blackf. (Ind.) 429; Clammer *v.* State, 9 Gill (Md.) 279.

98. Clammer *v.* State, 9 Gill (Md.) 279.

99. *Arkansas.*— Outlaw *v.* Yell, 8 Ark. 345.

Illinois.— McDole *v.* McDole, 106 Ill. 452.

Indiana.—McKay *v.* Craig, 6 Blackf. (Ind.) 168; Tannehill *v.* Thomas, 1 Blackf. (Ind.) 144.

Maine.— Hathaway *v.* Crosby, 17 Me. 448.

Maryland.— Sasscer *v.* Walker, 5 Gill & J. (Md.) 102, 25 Am. Dec. 272.

New York.— Van Benthuysen *v.* De Witt, 4 Johns. (N. Y.) 213.

South Carolina.— Cowan *v.* McCullough, 2 Mill Const. (S. C.) 165; Howard *v.* Gale, 2 Brev. (S. C.) 95.

United States.— Davidson *v.* Brown, 1 Cranch C. C. (U. S.) 250, 7 Fed. Cas. No. 3,601; U. S. *v.* White, 4 Wash. (U. S.) 414, 28 Fed. Cas. No. 16,686.

See 8 Cent. Dig. tit. "Bonds," § 244.

Writ of inquiry.— Damages may be ascertained by a writ of inquiry, where uncertain and testimony is necessary. Peacock *v.* Haney, 37 N. J. L. 179. And on a verdict for plaintiff on an issue where no breaches have been assigned they may be afterward assigned and damages so assessed. Rogers *v.* Coleman, 3 Cow. (N. Y.) 62. But see Tuxbury *v.* Miller, 19 Johns. (N. Y.) 311. *Compare* Ellis *v.* State, 2 Ind. 262.

1. Carwile *v.* Harvey, 15 Rich. (S. C.) 314.

2. Philbrook *v.* Burgess, 52 Me. 271; Hathaway *v.* Crosby, 17 Me. 448.

Court may assess the damages where the amount due is ascertained or can be from the instrument itself (Witt *v.* State, 14 Ark. 173); or by agreement of the parties (State *v.* Cross, 6 Ind. 387).

3. McLaughlin *v.* Sproul, 14 Ark. 178.

4. Morris Bldg. Assoc. No. 2 *v.* Altmaier, 10 Pa. Co. Ct. 645.

5. Merrill *v.* McIntire, 13 Gray (Mass.) 157.

tiff is not entitled to a scire facias to have his damages for further breaches assessed.[6]

G. Costs and Attorney's Fees.[7] It may be stated generally that costs are recoverable, and that they may be allowed in addition to the penalty.[8] The question, however, as to their allowance is generally controlled by statute, the amount allowable therefor being ordinarily dependent upon the amount of the recovery or judgment. And where a statute fixes an amount necessary to an allowance of costs, a judgment for the penalty, if in excess of such sum, will carry costs, though execution be issued for less,[9] and the right thereto where a judgment has been recovered for interest merely, and there is no allegation that the plaintiff has elected to make the principal sum due will not be affected by an unaccepted offer to allow judgment for such sum.[10] So sureties who have joined in a motion for an order that the judgment be satisfied of record which is granted but reversed on appeal, having submitted themselves to the jurisdiction of the court, are liable for costs on appeal.[11] Again, costs may be allowed where defendant confesses forfeiture in an action on a bond, though it appear in a hearing in equity that nothing is due.[12] And where several breaches are assigned, if plaintiff succeed in any one breach, the defendant will not be entitled to costs, though there is a failure to establish other breaches alleged.[13] But a settlement of a suit with part only of the obligors in a joint and several bond does not prevent an allowance of costs to others, where they defend severally.[14] Several defendants may for good reasons *bona fide* sever their defenses and employ separate counsel.[15] But, although attorney's fees are stipulated for in a bond given to secure payment of a sum certain, and other items which could not then be determined, such fees are not recoverable contrary to the statute, where items are charged against which a plea is sustained.[16] And if a collection fee of a certain per cent is authorized by the obligation it can be computed only on the amount of the debt left due when judgment is entered.[17]

H. Trial — 1. **Filing Bond.** Where it is not required by statute that a bond must be filed in court when judgment is rendered it has been declared that it is sufficient if it is then produced.[18] But the court may order a bond filed for inspection of defendant and others, on affidavit that it is a forgery.[19]

2. **Nonsuit or Dismissal.** A suit may be dismissed where there is a plea of *non est factum* and no evidence showing the bond to be that of the defendant,[20]

6. Harmon *v.* Dedrick, 3 Barb. (N. Y.) 192.

7. As to costs, generally, see Costs.

8. State *v.* Wylie, 2 Strobh. (S. C.) 113; Dwyer *v.* U. S., 93 Fed. 616, 35 C. C. A. 488.

Costs may be taxed by items and not limited to a fixed sum. Merritt *v.* Gosman, 2 How. Pr. (N. Y.) 83, 2 Den. (N. Y.) 186; Bull *v.* Ketchum, 2 Den. (N. Y.) 188.

Effect of performance of condition after action brought see Hudson *v.* Tenney, 6 N. H. 456.

Tender of amount due before judgment may prevent allowance (Howe *v.* Goodrich, 18 Wend. (N. Y.) 560; Wells *v.* Feeter, 5 Wend. (N. Y.) 133); but otherwise where the amount due is disputed and the condition of the bond does not furnish data from which it can be ascertained by calculation (People *v.* Sternburg, 1 Den. (N. Y.) 635).

9. Fisk *v.* Gray, 100 Mass. 191; Grosvenor *v.* Rogers, 3 Den. (N. Y.) 267; Pearson *v.* Bailey, 10 Johns. (N. Y.) 219. *Contra*, State *v.* Arnold, 43 N. J. L. 144.

Applicable where nominal damages recovered.— Godfry *v.* Vancott, 13 Johns. (N. Y.) 345; Hodges *v.* Suffelt, 2 Johns. Cas. (N. Y.) 406.

Not applicable where reduced by set-off and judgment for balance and not for penalty. Harvey *v.* Bardwell, 6 Cow. (N. Y.) 57; Fairlie *v.* Lawson, 5 Cow. (N. Y.) 424. But see Alendorf *v.* Stickle, 2 Cow. (N. Y.) 412; Van Antwerp *v.* Ingersoll, 2 Cai. (N. Y.) 107.

10. Howard *v.* Farley, 3 Rob. (N. Y.) 599.

11. Higgins *v.* Callahan, 2 N. Y. Civ. Proc. 302.

12. Lyman *v.* Warren, 12 Mass. 412.

13. Fairbanks *v.* Camp, 20 Wend. (N. Y.) 600.

14. Clark *v.* Wood, 9 Wend. (N. Y.) 435.

15. Bridgeport F. & M. Ins. Co. *v.* Wilson, 7 Bosw. (N. Y.) 699.

16. Goodrich *v.* Atlanta, etc., Nat. Bldg. Assoc., 96 Ga. 803, 22 S. E. 585.

17. Anderson *v.* Best, 176 Pa. St. 498, 38 Wkly. Notes Cas. (Pa.) 501, 35 Atl. 194.

18. Hallyburton *v.* Robinson, 19 Ark. 680.

19. McGibboney *v.* Mills, 35 N. C. 163.

20. Blackmore *v.* Guarantee Co. of North America, 71 Fed. 363, 37 U. S. App. 444, 18 C. C. A. 77.

or where the suit has been brought without the obligee's authority.[21] And a valid order of dismissal may be made after the usee's death and before revivor.[22] But a suit should not be dismissed on a ground which is for the jury to decide.[23] Again, it has been decided that a suit may be discontinued as to all but one defendant, where plaintiff has sued part of several joint and several obligors.[24] But a joint motion to dismiss by all where one is improperly joined is held to be bad, as is also such a motion by the one alone improperly joined.[25] And where, by default in the payment of interest, a bond conditioned for the payment of a sum of money becomes due defendant is not entitled to have the case discontinued on bringing the arrears of interest into court and paying the costs.[26] Again a nonsuit is proper where, pending litigation, action is brought on a bond taken under order of court for the security of the parties;[27] or where plaintiff fails to show the quantity of interest intended to be interchanged in an action on a bond conditioned to deliver certain land, provided certain other land should be delivered to the obligor.[28]

3. Suggesting Breaches. Where the declaration contains no assignment of breaches they may be assigned after issue joined on the plea of *non est factum*,[29] and also after judgment by default or by demurrer.[30] And after judgment and assessment of damages a subsequent assignment of breaches has been permitted, which it is said is to be regarded as a part of the original suit.[31]

4. Questions of Law and Fact. The general rule is that questions of law are for the court to determine while questions of fact are for the jury. In the application of this general rule to actions on bonds it has been determined that the issue on a plea of *nul tiel record* should be tried by the court.[32] Again, the scope of the authority of an agent is generally a question of law for the court;[33] as is also the question whether the assignee of a bond has used due diligence to collect it, the facts being found by the jury.[34] And the court may instruct the jury as to the interest to be allowed.[35] But it is for the jury to determine the question whether a purchaser is a *bona fide* holder,[36] or whether a person in filling out and delivering a bond to the obligee acted as the obligor's agent,[37] or whether a bond was delivered as an escrow,[38] or whether it was repudiated,[39] or whether notice of

21. Washington Corp. *v.* Young, 10 Wheat. (U. S.) 406, 6 L. ed. 352.

22. American Burial Case Co. *v.* Shaughnessy, 59 Miss. 398.

23. Ming *v.* Corbin, 19 N. Y. Suppl. 580, 47 N. Y. St. 236.

24. Bomar *v.* Williams, 2 Rich. (S. C.) 12.

Where a bond is joint as to the obligors it is declared in early decisions that the plaintiff cannot dismiss his action as to one and proceed against the others. Hardwick *v.* McKee, 2 Bibb (Ky.) 595; Lockhart *v.* Bell, 2 Hill (S. C.) 422. But see Bensalem School Dist. *v.* Bilbrough, 10 Phila. (Pa.) 542, 31 Leg. Int. (Pa.) 358. Though the defendant may before the cause is called make application for separate trials. Anderson *v.* Hunt, 12 N. C. 298.

25. State *v.* Cunningham, 101 Ind. 461.

26. People *v.* New York City Super. Ct., 19 Wend. (N. Y.) 104.

27. Napier *v.* Gidiere, 7 Rich. Eq. (S. C.) 254.

28. Rogers *v.* Mariner, 30 Ga. 515.

29. Seeright *v.* Fletcher, 6 Blackf. (Ind.) 380; West *v.* Caldwell, 23 N. J. L. 736.

30. Governor *v.* Wiley, 14 Ala. 172; Clark *v.* Goodwin, 1 Blackf. (Ind.) 74. See also Smith *v.* Jansen, 8 Johns. (N. Y.) 111, wherein it is held that in case of demurrer, *nil dicit*, or confession, suggestion of breaches may be entered on the record before formal entry of judgment.

31. People *v.* Compher, 14 Ill. 447. See also Dent *v.* Davison, 52 Ill. 109.

But in early cases in the federal courts it is decided that breaches must be assigned before judgment, and that a judgment entered without so doing will be erroneous. Robins *v.* Pope, Hempst. (U. S.) 219, 20 Fed. Cas. No. 11,931*a*; Burnett *v.* Wylie, Hempst. (U. S.) 197, 4 Fed. Cas. No. 2,172*a*.

32. Thompson *v.* Williams, 7 Sm. & M. (Miss.) 270.

33. Pryse *v.* Farmers Bank, 17 Ky. L. Rep. 1056, 33 S. W. 532.

34. Thompson *v.* Caldwell, 2 Bibb (Ky.) 290; Spratt *v.* McKinney, 1 Bibb (Ky.) 595; Smallwood *v.* Woods, 1 Bibb (Ky.) 542; Collins *v.* Warburton, 3 Mo. 202.

35. Fine *v.* Cockshut, 6 Call (Va.) 16.

36. Tracey *v.* Phelps, 23 Blatchf. (U. S.) 71, 22 Fed. 634.

37. Sigfried *v.* Levan, 6 Serg. & R. (Pa.) 308, 9 Am. Dec. 427.

38. State *v.* Bodly, 7 Blackf. (Ind.) 355.

As to delivery on condition that others sign see Spencer *v.* McLean, 20 Ind. App. 626, 50 N. E. 769, 67 Am. St. Rep. 271.

39. National Bldg., etc., Assoc. *v.* Day, 23 Ky. L. Rep. 599, 63 S. W. 590.

refusal to furnish support was given,[40] or where the bond contains an erasure or alteration, whether from the evidence it is the contract declared on or its identity has been destroyed,[41] or as to the identity of a contract referred to in the bond,[42] or whether default of an officer occurred before the execution of the bond.[43] And the jury should also inquire into the truth of the breaches,[44] and they may presume that a credit indorsed was properly entered.[45] But it is error to submit the question of new consideration to the jury, in the absence of evidence to warrant a finding that there was a new one.[46]

5. VERDICT AND FINDINGS — a. Form and Sufficiency. It has been declared that in an action of debt on a bond the verdict should find "the amount of the penalty, as the debt, and the amount of the recovery in the action referred to in the condition, as the damages."[47] And where in an action on a bond to recover the amount of a judgment, if such judgment exceeds the penalty, the verdict should be either for the full amount of the penalty or for defendant.[48] Again, where part of a bond has been paid it should specify the exact sum that remains due.[49] And a special finding should state the amount due, though failure to do so is not fatal, if data for computing it are given.[50] But where no breaches are found untrue a verdict need not particularize the breaches on which damages are assessed.[51] And it has been held that it is not irregular where it finds "for plaintiff, that the condition of the bond is broken," etc.,[52] or "that the defendant is indebted to the said plaintiff" in a designated sum.[53] So also an execution will not be set aside because of a mere informality in the verdict in referring the damages to the detention of the debt instead of assessing them for the breaches.[54] And a verdict has been held sufficient which finds that bonds were issued and delivered "in the manner set forth in the complaint," though it fails to find that the security has been given to the corporation issuing them as required by law.[55] Again, it has been decided that the court may amend the verdict,[56] and a finding not required may be rejected as surplusage,[57] as may also unnecessary words used in describing the obligee where a corporation.[58]

b. Verdict Directed by Court. The court may properly direct a verdict for the full amount of the penalty, where by uncontradicted evidence it appears that damage in excess of that sum has been sustained;[59] and it may direct a verdict for plaintiff, where the evidence offered fails to support an allegation of fraud which is relied on as a defense.[60]

I. Judgment — 1. IN GENERAL. If the bond is conditioned for the payment of money generally there cannot be a recovery on a judgment payable in gold coin.[61] And a judgment upon all the pleadings for the defendant is erroneous,

40. Ramsey *v.* Ramsey, 15 Pa. Super. Ct. 214.
41. State *v.* Bodly, 7 Blackf. (Ind.) 355; Barrington *v.* Washington Bank, 14 Serg. & R. (Pa.) 405.
42. Suburban Mut. Bldg., etc., Assoc. *v.* Paulus, 80 Mo. App. 36.
43. Anaheim Union Water Co. *v.* Parker, 101 Cal. 483, 35 Pac. 1048.
44. McLain *v.* Taylor, 9 Ark. 358; Phillips *v.* Governor, 2 Ark. 382.
45. Rivers *v.* Loving, 1 Stew. (Ala.) 395.
46. Pittsburgh, etc., R. Co. *v.* Barker, 29 Pa. St. 160.
47. Toles *v.* Cole, 11 Ill. 562. See also Austin *v.* People, 11 Ill. 452; Hinckley *v.* West, 9 Ill. 136.
48. Smyth *v.* Lynch, 7 Colo. App. 383, 43 Pac. 670.
49. Richman *v.* Richman, 10 N. J. L. 114.
50. Wesson *v.* Saline County, 73 Fed. 917, 34 U. S. App. 680, 20 C. C. A. 227.
51. Gibson *v.* Windsor, 19 N. C. 27.
52. Bartlett *v.* Hunt, 17 Wis. 214.
53. Coulter *v.* Western Theological Seminary, 29 Md. 69.
54. Updegroff *v.* Judges Niagara Ct. C. Pl., 3 Cow. (N. Y.) 31.
55. Mills *v.* Jefferson, 20 Wis. 50.
56. Roulain *v.* McDowall, 1 Bay (S. C.) 490, wherein it appeared that the verdict did not distinguish between the penalty and the damages. But see Frazier *v.* Laughlin, 6 Ill. 347, wherein it was held that the court could not amend the verdict by adding the amount of the penalty of the bond as the debt when omitted by the jury.
57. State *v.* Moses, 18 S. C. 366.
58. Morehead Banking Co. *v.* Tate, 122 N. C. 313, 30 S. E. 341.
59. Ladd *v.* Smith, (Ala. 1892) 10 So. 836.
60. Jewell *v.* Gagné, 82 Me. 430, 19 Atl. 917.
61. Mendocino County *v.* Morris, 32 Cal. 145.

where there is a materially faulty replication.[62] But where several breaches are alleged which constitute but one cause of action it is not necessary for the judgment to specify the breach upon which it is founded.[63]

2. Form and Requisites — a. In General. The general rule affirmed by early decisions is that the judgment in an action on a penal bond should be for the penalty as the debt, to be discharged by the payment of such damages as may be proved,[64] though a judgment merely for the damages assessed has been held proper.[65] Again, in other decisions it has been declared that in an action of debt the judgment should be for the plaintiff to recover the amount of the debt found, to be discharged by the payment of the damages found or assessed and costs.[66]

b. With Respect to Parties — (I) *In General.* A judgment in favor of the obligee should conform in the designation of such person to that in the bond.[67] And where an action is brought in the name of the commonwealth for the benefit of an individual a judgment which attaches the recovery to that person to the exclusion of all others is erroneous.[68]

(II) *Joinder.* If it appears from the face of a bond that one defendant is principal and the others sureties, it has been held proper to enter judgment against the former as principal and the others as sureties; but in a joint action no greater judgment should be rendered against the principal than the sureties,[69]

62. Lane *v.* Harrison, 6 Munf. (Va.) 573.

63. State *v.* Berning, 74 Mo. 87.

64. *Arkansas.*— Taylor *v.* State, 23 Ark. 225.

Colorado.— Davis *v.* Wannamaker, 2 Colo. 637.

Illinois.— Parisher *v.* Waldo, 72 Ill. 71; Freeman *v.* People, 54 Ill. 153; Freeland *v.* Jasper County, 27 Ill. 303; Stose *v.* People, 25 Ill. 600; Mathison *v.* Stephens, 9 Ill. App. 435.

Iowa.— Nelson *v.* Gray, 2 Greene (Iowa) 397; Cameron *v.* Boyle, 2 Greene (Iowa) 154.

Maine.— Whitney *v.* Slayton, 40 Me. 224; Gardner *v.* Niles, 16 Me. 279.

Maryland.— Gott *v.* State, 44 Md. 319; State *v.* Tabler, 41 Md. 236.

Massachusetts.—Waldo *v.* Fobes, 1 Mass. 10.

Mississippi.— Rubon *v.* Stephan, 25 Miss. 253.

Missouri.— State *v.* Cooper, 79 Mo. 464; State *v.* Ruggles, 20 Mo. 99; Mutual Ben. Ins. Co. *v.* Brown, 80 Mo. App. 459; State *v.* Frank, 22 Mo. App. 46.

New York.—Western Bank *v.* Sherwood, 29 Barb. (N. Y.) 383; New York *v.* Lyons, 1 Daly (N. Y.) 296.

Ohio.— Smith *v.* Licking County, 2 Ohio 312.

Pennsylvania.— Sparks *v.* Garrigues, 1 Binn. (Pa.) 152; Kiehl *v.* Com., 18 Wkly. Notes Cas. (Pa.) 505, 6 Atl. 389.

South Carolina.— Durkey *v.* Hammond, 2 Mill Const. (S. C.) 151.

Virginia.— Moore *v.* Fenwick, Gilm. (Va.) 214; Atwell *v.* Towles, 1 Munf. (Va.) 175; Overstreet *v.* Marshall, 1 Hen. & M. (Va.) 381; Terrell *v.* Ladd, 2 Wash. (Va.) 150.

Wisconsin.— Warren *v.* Gordon, 10 Wis. 499; Rich *v.* Warner, 1 Pinn. (Wis.) 646.

United States.—Campbell *v.* Pope, Hempst. (U. S.) 271, 4 Fed. Cas. No. 2,365*a*.

See 8 Cent. Dig. tit. "Bonds," § 253.

In New York under the statute it has been held that where a judgment is entered for the penalty on a bond conditioned otherwise than for the payment of money there must be a further judgment for the damages assessed. Beers *v.* Shannon, 73 N. Y. 292.

Judgment for the penalty and also for the damages assessed is erroneous as to that part for the damages assessed. Armstrong *v.* State, 7 Blackf. (Ind.) 81; Smith *v.* Jansen, 8 Johns. (N. Y.) 111. *Compare* Garnett *v.* Yoe, 17 Ala. 74; Wilson Sewing Mach. Co. *v.* Lewis, 10 Ill. App. 191.

65. Moore *v.* Harton, 1 Port. (Ala.) 15; Bradford *v.* Curlee, 41 Miss. 558; Howard *v.* Farley, 18 Abb. Pr. (N. Y.) 260; Wilson *v.* Spencer, 11 Leigh (Va.) 271; Grays *v.* Hines, 4 Munf. (Va.) 437; Early *v.* Moore, 4 Munf. (Va.) 262. *Contra,* Suburban Mut. Bldg., etc., Assoc. *v.* Paulus, 80 Mo. App. 36.

66. *Illinois.*— Eggleston *v.* Buck, 31 Ill. 254; Toles *v.* Cole, 11 Ill. 562; Austin *v.* People, 11 Ill. 452.

Indiana.— Mitchell *v.* Porter, 3 Blackf. (Ind.) 499.

Maryland.— State *v.* Tabler, 41 Md. 236.

Missouri.—Mutual Ben. Ins. Co. *v.* Brown, 80 Mo. App. 459, bond for payment of money.

North Carolina.— Trice *v.* Turrentine, 35 N. C. 212.

Tennessee.— Hutchinson *v.* Fulghum, 4 Heisk. (Tenn.) 550; Haslet *v.* Pryor, 5 Hayw. (Tenn.) 33.

Virginia.—Harper *v.* Smith, 6 Munf. (Va.) 389; Williams *v.* Howard, 3 Munf. (Va.) 277; Thatcher *v.* Taylor, 3 Munf. (Va.) 249.

See 8 Cent. Dig. tit. "Bonds," § 253.

67. **So a bond to the "people of the United States"** will not sustain a judgment in favor of the "people of the United States of the territory of Idaho," and the latter should be reformed. U. S. *v.* Shoup, 2 Ida. 459, 21 Pac. 656.

68. Bibb *v.* Cauthorne, 1 Wash. (Va.) 91.

69. Lafler *v.* Monroe Cir. Judge, 118 Mich. 677, 77 N. W. 265; Day *v.* Johnson, (Tex. Civ. App. 1895) 33 S. W. 676.

and where they are each bound in separate sums a separate judgment against each may be rendered.[70] But if an action is brought jointly against all the obligors on a joint or a joint and several bond the judgment should generally be against all or none,[71] unless a separate defense be set up, in which case it has been decided that the judgment should be against those to whom the defense does not apply.[72] Or it may be against an intermediate number of the obligors in a joint and several bond according to the declaration.[73]

3. Operation and Effect. A judgment may, by reason of the condition of the bond, operate as a continuing security for future breaches.[74] And parties may by a stipulation agree that breaches not litigated on the trial may be subsequently assigned and recovered for, and in such case the previous judgment will be no bar.[75]

4. Reversal,[76] Setting Aside, Amendment, and Correction. A judgment regarded as informal may be reversed on error.[77] So it should not be for an amount in excess of the penalty, and where so entered it is decided that it is such an irregularity as will justify a motion to set it aside.[78] The court, however, in entering a judgment may reduce a verdict which is in excess of the penalty.[79] A judgment for an amount in excess of the penalty may be amended so as to limit it to that amount;[80] and where it is erroneously entered for the debt instead of the penalty it may likewise be amended,[81] as may also one in which the period from which the allowance of interest is to commence is wrongly stated.[82] But where the declaration on a bond averred it to be for a less sum than the actual amount, and defendant confessed judgment for the debt in the declaration mentioned, and it was entered for such amount, it was held that it could not be amended.[83]

J. Execution Upon Judgment. The execution on a judgment for the penalty should not, it is declared, issue for more than the amount of the condition with interest and costs.[84] And where a bond not due is forfeited for non-pay-

70. People *v.* Edwards, 9 Cal. 286. See also Briggs *v.* McDonald, 166 Mass. 37, 43 N. E. 1003; Mass. Pub. Stat. c. 167, § 4.

71. Morrow *v.* People, 25 Ill. 330; McConnel *v.* Swailes, 3 Ill. 571; True *v.* Clark, 3 Bibb (Ky.) 295; Hardwick *v.* McKee, 2 Bibb (Ky.) 595; Probate Judge *v.* Webster, 46 N. Y. 518. *Contra*, New York *v.* Price, 4 Sandf. (N. Y.) 616, under N. Y. Code Proc. § 136.

Exceptions to rule.—A return on non-inhabitant as to one, whether bond be joint or joint and several, will justify an abatement as to him and judgment may be taken against the others. Sebree *v.* Clay, 3 A. K. Marsh. (Ky.) 552; Pegram *v.* U. S., 1 Brock. (U. S.) 261, 19 Fed. Cas. No. 10,906. So also where one pleads bankruptcy (Smith *v.* Lozano, 1 Ill. App. 171); or it is impossible to get service (Armstrong *v.* Poole, 30 W. Va. 666, 5 S. E. 257 [but see Lockart *v.* Roberts, 3 Bibb (Ky.) 361]).

A judgment against an infant and others jointly is irregular where bond joint and several. Carnahan *v.* Allderdice, 4 Harr. (Del.) 99.

A judgment confessed severally on a joint bond cannot be amended by adding the name of the coöbligor. Brown *v.* Smyth, 4 Harr. (Del.) 204.

That judgment should be joint against all named jointly and several against the several ones. People *v.* Bugbee, 1 Ida. 88.

Where, after answer filed by one joint obligor, others appear and withdraw their appearance, judgment against those who withdraw, before recovery is had against those defending, is erroneous. Wilson *v.* Blakeslee, 16 Oreg. 43, 16 Pac. 872.

72. Morrow *v.* People, 25 Ill. 330.

73. Moss *v.* Moss, 4 Hen. & M. (Va.) 293.

74. Waldo *v.* Fobes, 1 Mass. 10; Silverthorn *v.* Hollister, 87 Pa. St. 431.

75. People *v.* Harmon, 15 Ill. App. 189.

76. See, generally, Appeal and Error, 2 Cyc. 474.

77. Wales *v.* Bogue, 31 Ill. 464.

78. Showles *v.* Freeman, 81 Mo. 540.

79. Cohea *v.* State, 34 Miss. 179.

80. Sherry *v.* Priest, 57 Ala. 410; Seamans *v.* White, 8 Ala. 656; State *v.* Estes, 101 N. C. 541, 8 S. E. 347.

81. Kiehl *v.* Com., 18 Wkly. Notes Cas. (Pa.) 505, 6 Atl. 389.

82. Eubank *v.* Rall, 4 Leigh (Va.) 308.

83. Compton *v.* Cline, 5 Gratt. (Va.) 137.

84. Clark *v.* Goodwin, 1 Blackf. (Ind.) 74; Van Wyck *v.* Montrose, 12 Johns. (N. Y.) 350; Bergen *v.* Boerum, Col. Cas. (N. Y.) 404, Col. & C. Cas. (N. Y.) 402.

Appointment of person to determine amount for which execution shall issue is in discretion of the court. Fisk *v.* Gray, 100 Mass. 191.

Effect of assignment of a judgment on the bond to a coöbligor see Norwood *v.* Norwood, 2 Harr. & J. (Md.) 238.

Execution is for debt and costs but is indorsed to levy the amount of damages assessed and costs. Mitchell *v.* Porter, 3 Blackf. (Ind.) 499.

ment of interest and judgment is given for the whole penalty, on a payment of costs and interest execution will be stayed, the judgment standing as security.[85] And it can only issue for the amount due, on bonds conditioned for the payment of sums falling due at different periods, the judgment likewise standing as security for future sums;[86] so also in the case of notes.[87] But where an execution has been satisfied the judgment will not operate to give subsequent executions on the same bond a preference over another execution delivered to the sheriff before them.[88]

BONDSMAN. A surety.[1] (See, generally, Bail; Bonds; Principal and Surety.)

BONI JUDICIS EST AMPLIARE JURISDICTIONEM.[2] A maxim meaning "It is the duty of a judge, when requisite, to amplify the limits of his jurisdiction."[3]

BONI JUDICIS EST CAUSAS LITIUM DIRIMERE. A maxim meaning "It is the duty of a good judge to remove the causes of litigation."[4]

BONI JUDICIS EST JUDICIUM SINE DILATIONE MANDARE EXECUTIONI. A maxim meaning "It is the duty of a good judge to cause judgment to be executed without delay."[5]

BONI JUDICIS EST LITES DIRIMERE, NE LIS EX LITE ORIATUR. A maxim meaning "It is the duty of a good judge to put an end to litigation, that suit may not grow out of suit."[6]

BONIS NON AMOVENDIS. Literally, that the goods be not removed. A writ addressed to the sheriff, where error is brought, commanding that the person against whom judgment is obtained be not suffered to remove his goods, till the error be tried and determined.[7]

BONITAS TOTA ÆSTIMABITUR CUM PARS EVINCITUR. A maxim meaning "The value of the whole may be estimated when a part is proved."[8]

BONUM NECESSARIUM EXTRA TERMINOS NECESSITATIS NON EST BONUM. A maxim meaning "A good thing required by necessity is not good beyond the limits of such necessity."[9]

BONUM VACANS. Property without an owner of any sort.[10] (See, generally, Abandonment; Finding Lost Goods.)

BONUS. Good;[11] a definite sum, to be paid at one time, for a loan of money

On a hearing to determine the amount for which execution shall issue no defects or admissions in previous pleadings can operate to prejudice of either party. Hatch *v.* Attleborough, 97 Mass. 533.

Scire facias may be brought to have further execution of a judgment. Potter *v.* Webb, 2 Me. 257. And it is held to be necessary to the further ascertainment of damages before execution can issue. Adams *v.* Bush, 5 Watts (Pa.) 289. But after judgment in debt on a bond for payment of an annuity it may issue without a scire facias for subsequent arrears. Wood *v.* Wood, 3 Wend. (N. Y.) 454. And it is also held unnecessary where judgment for the penalty is entered by virtue of a warrant of attorney. Com. *v.* Joyce, 18 Pa. Co. Ct. 193.

Should not issue for penalty on finding for plaintiff with six cents damages and costs. Caverly *v.* Nichols, 4 Johns. (N. Y.) 189.

85. Bowne *v.* Hallet, 1 Cai. (N. Y.) 517.

86. Young *v.* Reynolds, 4 Md. 375; Ridgely *v.* Lee, 3 Harr. & M. (Md.) 94; Longstreth *v.* Gray, 1 Watts (Pa.) 60; Sparks *v.* Garrigues, 1 Binn. (Pa.) 152; Rich *v.* Warner, 1 Pinn. (Wis.) 646.

Must have a scire facias in such case. Young *v.* Reynolds, 4 Md. 375.

Must move the court for execution to recover future amounts. Sparks *v.* Garrigues, 1 Binn. (Pa.) 152.

87. Hopkins *v.* Deaves, 2 Browne (Pa.) 93.

88. Northampton Tp. *v.* Woodward, 5 N. J. L. 924.

1. Wharton L. Lex.

2. "The true text is '*boni judicis est, ampliari justitiam;*' (not '*jurisdictionem,*' as it has been often cited)." Ld. Mansfield, C. J., in Rex *v.* Philips, 1 Burr. 292, 304.

3. Broom Leg. Max.

Applied in Evans *v.* Adams, 15 N. J. L. 373, 380; Tichenor *v.* Hewson, 14 N. J. L. 26, 30.

4. Burrill L. Dict.

5. Burrill L. Dict.

6. Burrill L. Dict.

7. Wharton L. Lex.

8. Tayler L. Gloss.

9. Burrill L. Dict.

10. Vansickle *v.* Haines, 7 Nev. 249, 258.

11. Leslie *v.* Leslie, 50 N. J. Eq. 103, 112, 24 Atl. 319.

for a specified period, distinct from, and independently of, the interest;[12] a premium for a loan;[13] a premium given for a loan or a charter or other privilege granted to a company;[14] a premium paid to a grantor or vendor; a consideration given for what is received;[15] a sum paid for services or upon a consideration in addition to or in excess of that which would ordinarily be given;[16] price.[17] (Bonus: Exaction by Agent, see PAYMENT. For Loan — As Usury, see USURY; By Building and Loan Society, see BUILDING AND LOAN SOCIETIES. To Manufacturing Company, see MANUFACTURES. To Railroad, see RAILROADS. To Stock-Holder, see CORPORATIONS.)

BONUS JUDEX SECUNDUM ÆQUUM ET BONUM JUDICAT, ET ÆQUITATEM STRICTO JURI PRÆFERT. A maxim meaning "A good judge decides according to justice and right, and prefers equity to strict law."[18]

BOODLE. Money fraudulently obtained in public service; especially money given to or received by officials in bribery, or gained by collusive contracts, appointments, etc.; by extension, gain from public cheating of any kind; often used attributively.[19]

BOOK.[20] Any printed literary compilation; a collection of sheets bound together containing manuscript entries or intended to contain such entries; the name of several important papers prepared in the progress of a cause, although entirely written and not at all in book form.[21] (Book: As Subject of Copyright, see COPYRIGHT. Of Account — As Evidence, see CRIMINAL LAW; EVIDENCE; Generally, see ACCOUNTS AND ACCOUNTING; Production of For Examination, see DISCOVERY; To Refresh Witness's Memory, see WITNESSES. Of Science as Evidence, see EVIDENCE.)

BOOK-ACCOUNT. See ACCOUNTS AND ACCOUNTING.

BOOK-DEBT. See ACCOUNTS AND ACCOUNTING.

BOOKKEEPING. The art of recording, in a systematic manner, the transactions of merchants, traders, and other persons engaged in pursuits connected with money; the art of keeping accounts.[22]

BOOK-MAKING. See GAMING.

BOOK OF ACTS. A term applied to the records of a surrogate's court.[23]

BOOM COMPANIES. See LOGGING.

BOOMS. See LOGGING.

BOOTY. Captures of personal property by land forces on land.[24] (See, generally, WAR.)

BORAX. A salt formed by boracic acid and soda.[25]

12. Mechanics, etc., Mut. Sav. Bank, etc., Assoc. *v.* Wilcox, 24 Conn. 147.

13. Leslie *v.* Leslie, 50 N. J. Eq. 103, 112, 24 Atl. 319.

14. Webster Dict. [*quoted* in Kenicott *v.* Wayne County, 16 Wall. (U. S.) 452, 21 L. ed. 319].

15. Bouvier L. Dict. [*quoted* in Com. *v.* Erie, etc., Transp. Co., 107 Pa. St. 112, 115; Consolidated Bank *v.* State, 5 La. Ann. 44, 57].

16. Kenicott *v.* Wayne County, 16 Wall. (U. S.) 452, 21 L. ed. 319.

17. Leslie *v.* Leslie, 50 N. J. Eq. 103, 112, 24 Atl. 319.

18. Peloubet Leg. Max.

19. Century Dict. [*quoted* in Boehmer *v.* Detroit Free Press Co., 94 Mich. 7, 9, 53 N. W. 822, 34 Am. St. Rep. 318]. See also Byrnes *v.* Mathews, 12 N. Y. St. 74, 83.

20. Derivation.— "I may remark what is well known, that the Latin word '*liber*'— book — had no reference to the collection of writings in a volume, but primarily signifies the bark of a tree. Webster, in his dictionary, says our word 'book' is derived from the Saxon, 'boc,' meaning 'a beech-tree'; and in other languages of the north of Europe, it has the same derivation. The supposition is, that either the bark of the beech, or what is more probable, thin polished plates of the wood of that tree, were used for writing." Drury *v.* Ewing, 1 Bond (U. S.) 540, 7 Fed. Cas. No. 4,095. See also Hime *v.* Dale, 2 Campb. 27, note *b*.

21. Burrill L. Dict.

22. Western Assur. Co. *v.* Altheimer, 58 Ark. 565, 573, 25 S. W. 1067.

23. Burrill L. Dict.

24. U. S. *v.* Two Hundred and Sixty-Nine and One-Half Bales of Cotton, Woolw. (U. S.) 236, 261, 28 Fed. Cas. No. 16,583, 25 Law Rep. 451, Rev. Cas. 1.

25. *In re* Schaeffer, 2 App. Cas. (D. C.) 1, 8.

BORDER. To approach; to come near to; to verge.[26]

BOROUGH COURTS. Private and limited tribunals, held by prescription, charter, or act of parliament, in particular districts for the convenience of the inhabitants, that they may prosecute small suits, and receive justice at home.[27]

BOROUGH ENGLISH. A particular custom prevailing in certain ancient English boroughs and copyhold manors, by which land descended to the youngest son instead of the eldest, or, if the owner had no issue, to his youngest brother.[28]

BOROUGH-REEVE. The chief municipal officer in certain unincorporated English towns.[29]

BOROUGHS. See MUNICIPAL CORPORATIONS.

BORROW. To take or receive from another on trust, with the intention of returning or giving an equivalent for; to take from another for one's own use; to adopt from a foreign source; to appropriate; to assume.[30]

BOSCAGE. The food which wood and trees yield to cattle.[31]

BOSS. Master.[32] (See, generally, MASTER AND SERVANT.)

BOTE. ESTOVERS,[33] *q. v.*

BOTH. The one and the other; the two; the pair or couple; without exception of either.[34]

BOTTLES. See TRADE-MARKS AND TRADE-NAMES.

BOTTOM. Vessel.[35] (See, generally, SHIPPING.)

BOTTOMRY. See SHIPPING.

BOUGHT AND SOLD NOTES. Documents which are usually delivered by brokers to their principals on the conclusion of a contract of sale and purchase, the bought note being delivered to the buyer, and the sold note to the seller.[36] (Bought and Sold Notes: As Evidence to Satisfy Statute of Frauds, see FRAUDS, STATUTE OF. Generally, see FACTORS AND BROKERS.)

BOULEVARD. Originally, a bulwark or rampart of a fortification or fortified town; hence, a public walk or street occupying the site of demolished fortifications. The name is now sometimes extended to any street or walk encircling a town, and also to a street which is of especial width, is given a parklike appearance by reserving spaces at the sides or center for shade trees, flowers, seats, and the like, and is not used for heavy teaming;[37] a broad street, promenade, or walk, planted with rows of trees;[38] a broad promenade or street;[39] a public walk or street occupying the site of demolished fortifications; hence, a broad avenue in or around a city;[40] a broad city avenue specially designed for pleasure walking or driving, generally planted with trees, often in the center.[41] (See, generally, MUNICIPAL CORPORATIONS.)

BOUND. Limit; border.[42]

26. Handy *v.* Maddox, 85 Md. 547, 553, 37 Atl. 222.
27. Wharton L. Lex.
28. Burrill L. Dict.
29. Wharton L. Lex.
30. Webster Dict. [*quoted* in State *v.* School Dist. No. 4, 13 Nebr. 82, 88, 12 N. W. 812; Philadelphia, etc., R. Co. *v.* Stichter, 11 Wkly. Notes Cas. (Pa.) 325, 328].
31. Wharton L. Lex.
32. Grueber *v.* Lindenmeier, 42 Minn. 99, 101, 43 N. W. 964.
33. Burrill L. Dict.
34. Kuehner *v.* Freeport, 143 Ill. 92, 104, 32 N. E. 372, 17 L. R. A. 774 [*quoting* Webster Dict.; Worcester Dict.].
35. Griffith *v.* Insurance Co. of North America, 5 Binn. (Pa.) 464, 466.
36. Sweet L. Dict.
37. Century Dict. [*quoted* in West Chicago Park Com'rs *v.* Farber, 171 Ill. 146, 160, 49 N. E. 427; Howe *v.* Lowell, 171 Mass. 575, 581, 51 N. E. 536].
38. Murray New English Dict. [*quoted* in West Chicago Park Com'rs *v.* Farber, 171 Ill. 146, 160, 49 N. E. 427].
39. Worcester Dict. [*quoted* in West Chicago Park Com'rs *v.* Farber, 171 Ill. 146, 160, 49 N. E. 427].
40. Webster Dict. [*quoted* in West Chicago Park Com'rs *v.* Farber, 171 Ill. 146, 160, 49 N. E. 427]. See also People *v.* Green, 52 How. Pr. (N. Y.) 440, 445.
41. Standard Dict. [*quoted* in West Chicago Park Com'rs *v.* Farber, 171 Ill. 146, 160, 49 N. E. 427].
42. Barney *v.* Dayton, 8 Ohio Cir. Ct. 480, 481.

BOUNDARIES

By J. Breckinridge Robertson

CROSS-REFERENCES

For Matters Relating to:
Boundaries of:
Geographical or Political Divisions, see COUNTIES; ELECTIONS; MUNICIPAL CORPORATIONS; SCHOOLS AND SCHOOL DISTRICTS; STATES; TERRITORIES; TOWNS; UNITED STATES.
Indian Reservations, see INDIANS.
Mining Claims, see MINES AND MINERALS.
Ownership of Trees on Boundaries, see ADJOINING LANDOWNERS.
Rights and Liabilities of Owners of Land Bounded by:
Streets and Highways, see STREETS AND HIGHWAYS.
Waters, see NAVIGABLE WATERS; WATERS.
Rights, Duties, and Liabilities of Adjoining Landowners:
As to Fences, see FENCES.
As to Party-Walls, see PARTY-WALLS.
Generally, see ADJOINING LANDOWNERS.

I. DEFINITION.

A boundary is a line or object indicating the limit or furthest extent of a tract of land or territory; a separating or dividing line between countries, states, districts of territory, or tracts of land.[1]

II. DESCRIPTION.

A. General Rules of Construction — 1. CONTROLLING FORCE OF INTENT. The general rules of construction as applied to deeds and grants are applicable in the case of boundaries.[2] Intention, whether express or shown by surrounding circumstances, is all controlling; and that which is most certain and definite will prevail over the less certain and indefinite. Ambiguous or patently erroneous descriptions may be rejected, and the land located by other calls.[3]

1. Burrill L. Dict.
2. See, generally, DEEDS; MORTGAGES; PUBLIC LANDS.
3. *Connecticut.*— Chatham *v.* Brainerd, 11 Conn. 60.
Kentucky.—Baker *v.* Hardin, 3 Bibb (Ky.) 414; Vance *v.* Marshall, 3 Bibb (Ky.) 148; Finnie *v.* Clay, 2 Bibb (Ky.) 351; Frye *v.* Essry, Hughes (Ky.) 103.
Massachusetts.— Beahan *v.* Stapleton, 13

2. Use of Particular Words and Terms. While as a general rule words are to be construed according to their ordinary meaning and common acceptation, certain words and terms of frequent use in the description of boundaries have acquired more or less fixed meanings.[4]

Gray (Mass.) 427; Bosworth *v.* Sturtevant, 2 Cush. (Mass.) 392; Thatcher *v.* Howland, 2 Metc. (Mass.) 41.

Missouri.— Johnson *v.* Bowlware, 149 Mo. 451, 51 S. W. 109; Union R., etc., Co. *v.* Skinner, 9 Mo. App. 189.

New Jersey.— Fuller *v.* Carr, 33 N. J. L. 157; Den *v.* Cubberly, 12 N. J. L. 308.

New York.— Waugh *v.* Waugh, 28 N. Y. 94; Weiant *v.* Rockland Lake Trap Rock Co., 61 N. Y. App. Div. 383, 70 N. Y. Suppl. 713; Benson *v.* Townsend, 4 N. Y. Suppl. 860, 22 N. Y. St. 820 [*modified* in 4 Silv. Supreme (N. Y.) 22, 7 N. Y. Suppl. 162, 26 N. Y. St. 644]; Brookhaven *v.* Smith, 6 N. Y. St. 742.

North Carolina.— Tucker *v.* Satterthwaite, 123 N. C. 511, 31 S. E. 722; Hough *v.* Dumas, 20 N. C. 390.

Ohio.— See McKinney *v.* McKinney, 8 Ohio St. 423.

Oregon.— Albert *v.* Salem, 39 Oreg. 466, 65 Pac. 1068, 66 Pac. 233.

South Carolina.— Scates *v.* Henderson, 44 S. C. 548, 22 S. E. 724.

Tennessee.— Bleidorn *v.* Pilot Mountain Coal, etc., Co., 89 Tenn. 166, 15 S. W. 737.

Texas.—Warden *v.* Harris, (Tex. Civ. App. 1898) 47 S. W. 834.

Vermont.— Hull *v.* Fuller, 7 Vt. 100.

United States.—Jones *v.* Johnston, 18 How. (U. S.) 150, 15 L. ed. 320.

See 8 Cent. Dig. tit. "Boundaries," § 1.

A boundary may be rejected when it is manifest from all the circumstances of the case that it was inadvertently inserted, and that a tract of land with definite boundaries was bargained for and intended to be conveyed. Thatcher *v.* Howland, 2 Metc. (Mass.) 41. So, too, where two objects are found which answer the description of those called for in a preëmption land claim, and it cannot be determined which was intended, they will both be disregarded and the claim located by means of the other calls. Frye *v.* Essry, Hughes (Ky.) 103. But if the starting-point given by a deed can be found, and the lines actually run and determined by the courses and distances of the deed, the boundaries must be settled by their course. Waugh *v.* Waugh, 28 N. Y. 94.

Control of United States surveys.— All disputes as to the boundaries of land are to be governed by the United States surveys, unless there is some statute to the contrary. Taylor *v.* Fomby, 116 Ala. 621, 22 So. 910, 67 Am. St. Rep. 149.

Date of deed controls date of plat.— Where lands are conveyed, bounded upon a watercourse or other varying limit, and reference is also made to a plan, the date of the conveyance, and not the date of the plan, is to be considered in determining the question of the true boundary of the land upon the water limit, and the claim for alluvion. Jones *v.* Johnston, 18 How. (U. S.) 150, 15 L. ed. 320.

The possible intention of a party in running a line of a grant will not control courses and distances as recited in the grant. Tucker *v.* Satterthwaite, 123 N. C. 511, 31 S. E. 722.

4. "Adjoining," in the description of the premises conveyed, has been held to mean "next to" or "in contact with" and to exclude the idea of any intervening space. Yard *v.* Ocean Beach Assoc., 49 N. J. Eq. 306, 312, 24 Atl. 729. See also Adjoining, 1 Cyc. 765.

"As laid out by Saulsberry Haley" in the official map of a town means "as surveyed by Haley" and includes a reference to the monuments erected by him. Penry *v.* Richards, 52 Cal. 496, 499.

"Bounded north of" may be construed to mean "bounded north by," if necessary to aid the description. Hannum *v.* Kingsley, 107 Mass. 355.

"East" construed as "west."— In a call for a line in a grant, "east" will be construed to mean "west," where such correction is obviously required by the other calls and an annexed plat. Mizell *v.* Simmons, 79 N. C. 182. See also Johnson *v.* Bowlware, 149 Mo. 451, 51 S. W. 109; Warden *v.* Harris, (Tex. Civ. App. 1898) 47 S. W. 834.

"East" read "easterly."— Where the courses called for in a deed were described as "east," "west," "south," and "north," but were controlled by other well-defined and certain descriptions, it was held that in order to harmonize all the terms of the deeds these words might be read "easterly," "westerly," "southerly," and "northerly." Faris *v.* Phelan, 39 Cal. 612. But see Craig *v.* Hawkins, 1 Bibb (Ky.) 53, where it was held that the word "northwardly" was not synonymous with "north." See also Reed *v.* Knights, 87 Me. 181, 32 Atl. 870.

"'Line' in surveying and dividing grounds means *prima facie*, a mathematical line, without breadth; yet this theoretic idea of a line may be explained, by the facts referred to, and connected with the division, to mean a wall, a ditch, a crooked fence, or a hedge, a line having breadth." Baker *v.* Talbott, 6 T. B. Mon. (Ky.) 179, 182.

"More or less" in the boundary in a deed of land are merely words of description to prevent the parties from being prejudiced from inaccuracies. They do not have the effect to extend the grantee's boundary beyond the line fixed by a visible monument, or a map referred to in the deed. Brady *v.* Hennion, 8 Bosw. (N. Y.) 528. And see Dodd *v.* Burchell, 1 H. & C. 113, 8 Jur. N. S. 1180, 31 L. J. Exch. 364; Dendy *v.* Simpson, 7 Jur. N. S. 1058, 9 Wkly. Rep. 743.

"'Stretching,' in its common use in grants,

B. Methods and Elements of — 1. Artificial or Natural Monuments — a. Natural Monuments — (I) *What Are.* Natural monuments are such natural or permanent objects as streams and rivers, ponds, shores, beaches, highways, streets, and the like.[5]

(II) *Identification.* Where a natural monument is called for in the description of the boundaries of land, the identification of the object intended by the description is to be determined by a fair and reasonable construction of the whole instrument, regard being had in all cases to the true intent of the parties as expressed therein.[6]

during the early periods of the English colonial government here, was applied either to the extent of a single line, or of a rolling location, in which the breadth being described by lines on surfaces, was carried with such breadth, to the object described as its terminus." Van Gorden *v.* Jackson, 5 Johns. (N. Y.) 440, 462.

"To," "from," "by," and "on" when used to express boundaries are always to be understood as terms of exclusion, unless there is something in the connection which makes it manifest that they were used in a different sense. Municipality No. 2 *v.* Municipality No. 1, 17 La. 574; Thompson *v.* Blackwell, 5 La. 465; Bonney *v.* Morrill, 52 Me. 252; Bradley *v.* Rice, 13 Me. 198, 29 Am. Dec. 501; Williston *v.* Morse, 10 Metc. (Mass.) 17; Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491; Bailey *v.* White, 41 N. H. 337; Peaslee *v.* Gee, 19 N. H. 273. *Compare* Wilson *v.* Inloes, 6 Gill (Md.) 121, where it was held that the word "by," when descriptively used in a grant, does not mean "in immediate contact with," but "near" to the object to which it relates.

"To" construed "toward."—A description in a deed in the words "thence running to the rear of the said" land does not necessarily mean that the granted parcel is bounded by the rear line of the land referred to, but may simply indicate the direction of the boundary as if the word "toward" were used instead of "to." Moran *v.* Lezotte, 54 Mich. 83, 19 N. W. 757.

An entry calling to lie "in the fork of the first fork of Licking" was held to mean the first division of the first considerable stream flowing into the Licking, as one passes up the river from its mouth. Bibb *v.* Pickett, Litt. Sel. Cas. (Ky.) 309.

Assuming that the expression "thence N.," in describing in a conveyance a line run from a certain point, means due north, and is not used to express generally a northerly direction, it will be given such construction only when it is necessary for certainty, or when there is nothing else to show that it was not used in that strict sense. Martin *v.* Lloyd, 94 Cal. 195, 29 Pac. 491.

Rejection of unnecessary words.— In ascertaining a place to be found by its distance from another place, by its description in an entry, the words "about" or "nearly" and the like are to be discarded, if there are no words making it necessary to retain them, and the distance mentioned is to be taken positively. Johnson *v.* Pannel, 2 Wheat. (U. S.) 206, 4 L. ed. 221. See also Sanders *v.* Morrison, 2 T. B. Mon. (Ky.) 109, 15 Am. Dec. 140; Whitaker *v.* Hall, 1 Bibb (Ky.) 72; and About, 1 Cyc. 196.

5. 3 Washburn Real Prop. (6th ed.) § 2332.

A "clearing" is a permanent object within the rule that monuments control courses and distances. Jackson *v.* Widger, 7 Cow. (N. Y.) 723.

A savanna is a natural boundary in the sense in which that term is used in the construction of deeds. Stapleford *v.* Brinson, 24 N. C. 311.

A street, opened and long acquiesced in, should be regarded as a fixed monument. Van Den Brooks *v.* Correon, 48 Mich. 283, 12 N. W. 206.

Burying hill.— Where an ancient town grant described land as being bounded "southwest by the skirts of the burying hill as far as is laid out and marked round" and gave the grantees liberty to feed on the burying hill, it was held that the burying hill should be considered as a monument and boundary and not as a lot excepted out of the grant. Charlestown *v.* Tufts, 111 Mass. 348.

Culturable lands.— A requirement in a grant that the boundary lines shall be run so as to include certain culturable lands is a call for a natural object which will control courses and distances. Clark *v.* Hills, 67 Tex. 141, 2 S. W. 356.

The boundary line of another tract of land is a natural boundary within the rule that natural boundaries control courses and distances. Graybeal *v.* Powers, 76 N. C. 66.

What are not permanent monuments.— A covenant is a deed that the premises are free from encumbrances, "except a right, which is reserved, to draw water at the well on the west line of said land," where the description in the deed located the well about eleven feet from the line, was held to create an easement against the grantee, and not to make the well a monument fixing the west line of the premises. Maguire *v.* Sturtevant, 140 Mass. 258, 5 N. E. 644. So it was held that a deed which called for "the middle of the creek in its natural bed when the pond is exhausted" made a shifting boundary and not a fixed landmark. Primm *v.* Walker, 38 Mo. 94.

6. *California.*— Irving *v.* Cunningham, 58 Cal. 306.

Kentucky.—Thurston *v.* Masterson, 9 Dana (Ky.) 228; Reid *v.* Langford, 3 J. J. Marsh. (Ky.) 420; Lillard *v.* Henderson, 3 A. K.

b. Artificial Monuments and Marks — (i) *What Are.* Artificial monuments are landmarks or signs erected by the hand of man.[7]

(ii) *Identification.* The determination of what monument is intended by the description is a question of construction dependent upon the terms of the entry, patent, or conveyance; its identity being a question of fact determinable by the jury.[8]

(iii) *Relocation of Lost Monument.* When monuments designating the boundaries of land are obliterated and cannot be found, they are to be relocated by the field-notes and plats of the original survey.[9]

Marsh. (Ky.) 585; Smith *v.* Reed, 1 A. K. Marsh. (Ky.) 259; Marshall *v.* Bullitt, 1 Bibb (Ky.) 2; Smith *v.* Evans, Hughes (Ky.) 169; Herndon *v.* Hogan, Hughes (Ky.) 3.

Maine.— Nelson *v.* Butterfield, 21 Me. 220.

New Hampshire.— Bowman *v.* Farmer, 8 N. H. 402.

New York.— Frier *v.* Jackson, 8 Johns. (N. Y.) 495.

North Carolina.—Jones *v.* Bunker, 83 N. C. 324; Brooks *v.* Britt, 15 N. C. 481; Den *v.* Foster, 2 N. C. 271.

Ohio.— Benner *v.* Platter, 6 Ohio 504.

United States.— Horne *v.* Smith, 159 U. S. 40, 15 S. Ct. 988, 40 L. ed. 68; Reynolds *v.* McArthur, 2 Pet. (U. S.) 417, 7 L. ed. 470; Meredith *v.* Picket, 9 Wheat. (U. S.) 573, 6 L. ed. 163.

See 8 Cent. Dig. tit. "Boundaries," § 43.

Common consent and general reputation.— Where an entry calls for the main fork of a creek, and there are three forks or branches of nearly equal size, the locator is at liberty to take as the main fork the one fixed on as such by common consent and general reputation, although nature had not distinguished it as such. Whitaker *v.* Hall, 1 Bibb (Ky.) 72.

Control of matter of record.— In Mosby *v.* Carland, 1 Bibb (Ky.) 84, it was held that where an expression equally fits two natural objects, one a matter of record and the other not, that of record shall be understood as intended.

Numerical identification.— Where the third creek from the mouth of a river is called for in an entry, the creek intended must be taken according to the numerical order of creeks, unless some other stream, from general reputation and notoriety, has been so considered. Watts *v.* Lindsey, 7 Wheat. (U. S.) 158, 5 L. ed. 423. See also McClure *v.* Byne, 1 Bibb (Ky.) 56.

7. *California.*— Wise *v.* Burton, 73 Cal. 166, 14 Pac. 678, house.

Colorado.— Pollard *v.* Shively, 5 Colo. 309, where it was held that a stump, hewed and marked, might be adopted as a location post, but that the descriptive survey should give both its real and assigned character.

Connecticut.— See Law *v.* Hempstead, 10 Conn. 23, where, under the circumstances of the case, a post not referred to in the deed was rejected as an artificial monument.

Iowa.— Sayers *v.* Lyons, 10 Iowa 249, railroad.

Kansas.—Abbey *v.* McPherson, 1 Kan. App. 177, 41 Pac. 978, adjoining corner.

Maine.— Abbott *v.* Abbott, 51 Me. 575, line of adjoining tract.

Maryland.— Carroll *v.* Norwood, 5 Harr. & J. (Md.) 155 (line of adjoining tract); Pennington *v.* Bordley, 4 Harr. & J. (Md.) 450 (line of another tract).

Missouri.— Jones *v.* Poundstone, 102 Mo. 240, 14 S. W. 824 (stakes); St. Louis *v.* Meyer, 87 Mo. 276 (lines of survey of another tract).

North Carolina.— Smith *v.* Murphey, 3 N. C. 382, line of another tract. *Compare* Mann *v.* Taylor, 49 N. C. 272, 69 Am. Dec. 750; Reed *v.* Shenck, 14 N. C. 65, which hold that stakes are not such permanent boundaries of land as to control calls for course and distance, being generally regarded as imaginary boundaries.

Ohio.— Alshire *v.* Hulse, Wright (Ohio) 170, post between adjoiners.

Pennsylvania.— Pennsylvania Canal Co. *v.* Harris, 101 Pa. St. 80, where it was held that in determining the exact location of ground taken by the commonwealth for the use of a canal, a sharply defined cut in the bank or rock on the side of the canal may be taken as a monument. *Compare* Cox *v.* Freedley, 33 Pa. St. 124, 75 Am. Dec. 584, where stakes were rejected.

Texas.— Marshall *v.* Crawford, 2 Tex. Unrep. Cas. 477, line of another tract.

See 8 Cent. Dig. tit. "Boundaries," § 44½.

It is immaterial by whom a stake was set, where a boundary is determinable upon its location and existence. Lampe *v.* Kennedy, 56 Wis. 249, 14 N. W. 43.

Call for adjoiner does not include monument.— Where each block of surveys is separate and complete of itself, the call of a tract in one block for an adjoiner in another does not make the monument of the adjoiner the monument of the later block. Grier *v.* Pennsylvania Coal Co., 128 Pa. St. 79, 25 Wkly. Notes Cas. (Pa.) 85, 18 Atl. 480.

8. *Connecticut.*—Fitzgerald *v.* Brennan, 57 Conn. 511, 18 Atl. 743.

Massachusetts.— White *v.* Bliss, 8 Cush. (Mass.) 510.

New Hampshire.— Sanborn *v.* Clough, 40 N. H. 316.

New Jersey.— Opdyke *v.* Stephens, 28 N. J. L. 83.

Texas.— Williams *v.* Beckham, 6 Tex. Civ. App. 739, 26 S. W. 652.

9. Sawyer *v.* Cox, 63 Ill. 130; McClintock *v.* Rogers, 11 Ill. 279; Otis *v.* Moulton, 20 Me. 205; Diehl *v.* Zanger, 39 Mich. 601.

Effect of practical location.— Where the monuments of the original survey have disap-

2. Corners — a. In General — (i) *Manner of Locating.* As far as practicable[10] the actual course of the surveyor, as shown by marked lines or monuments, will be followed in locating corners, but where these do not exist or cannot be established the courses and distances called for will govern.[11] The general rules as to the measurement of distance govern[12] where a corner is described as being located a certain distance from a given point.[13]

(ii) *Identification* — (a) *In General.* What constitutes the true corner called for in an entry, grant, or conveyance, is a question of construction for the court; its identification a question of fact for the jury.[14] Where a corner called for is a known and ascertained point or one that can be ascertained and fixed

peared, the question where they were located is to be determined by the practical location of the lines, made at a time when the original monuments were presumably in existence, and probably well known. Diehl *v.* Zanger, 39 Mich. 601.

In relocating lost monuments designating the boundaries of government lands, resort must be had to other known lines and monuments as a basis of survey. Sawyer *v.* Cox, 63 Ill. 130.

Object of resurvey.— A resurvey made after monuments of the original survey have disappeared is for the purpose of determining where they were, and not where they ought to have been. Diehl *v.* Zanger, 39 Mich. 601.

Where two monuments and the length and course of the line between them are given, but one of the monuments cannot be found, the location of the lost monument is to be ascertained by measuring the given length of line from the known monument on its course, and not by a reference to, and in conformity with, the length of other corresponding lines on the same tract, on which monuments have been preserved. Otis *v.* Moulton, 20 Me. 205.

10. **In case of uncertainty** the intention of the parties, as shown by the instrument, in connection with the surrounding circumstances, will control. Anderson *v.* Scott, 75 Mich. 300, 42 N. W. 991.

Practical location.— In Stewart *v.* Patrick, 68 N. Y. 450, it was held that describing a boundary line as commencing at a tree does not necessarily fix the point as at the center of the tree, but that with proof of an actual division and occupation upon a line beginning at the outer surface or near the tree, the deed may be interpreted in conformity with the practical effects so given it by the parties.

11. Carter *v.* Hornback, 139 Mo. 238, 40 S. W. 893; Morse *v.* Rollins, 121 Pa. St. 537, 15 Atl. 645; Ayers *v.* Watson, 113 U. S. 594, 5 S. Ct. 641, 28 L. ed. 1093.

Meridian followed.— In Vance *v.* Marshall, 3 Bibb (Ky.) 148, the magnetic and not the true meridian was held to be the proper guide for ascertaining the beginning of a survey.

Test surveys.— When the accuracy of the starting-points taken for test surveys is merely matter of speculation, they cannot be used to fix a disputed boundary between two lots, when the dispute arises from a discrepancy which affects all the lots in the block, and which must therefore be apportioned among them. Reimers *v.* Quinnin, 49 Mich. 449, 13 N. W. 813.

12. See *infra*, II, B, 3, b.

13. *Maine.*— Bradley *v.* Wilson, 58 Me. 357.

Massachusetts.—Wellfleet *v.* Truro, 9 Allen (Mass.) 137; Cleaveland *v.* Flagg, 4 Cush. (Mass.) 76.

Minnesota.— Chan *v.* Brandt, 45 Minn. 93, 47 N. W. 461.

New Hampshire.— Kendall *v.* Green, 67 N. H. 557, 42 Atl. 178.

Tennessee.—Burns *v.* Greaves, Cooke (Tenn.) 75.

14. *Indiana.*— Montgomery *v.* Hines, 134 Ind. 221, 33 N. E. 1100.

Kentucky.—McCracken *v.* Bowmar, 1 A. K. Marsh. (Ky.) 137.

Maryland.— Rieman *v.* Baltimore Belt R. Co., 81 Md. 68, 31 Atl. 444; Hanson *v.* Campbell, 20 Md. 223; Wilson *v.* Inloes, 6 Gill (Md.) 121.

New Hampshire.— Thompson *v.* Ela, 60 N. H. 562.

New York.— Raynor *v.* Timerson, 46 Barb. (N. Y.) 518.

North Carolina.— Safret *v.* Hartman, 52 N. C. 199; Becton *v.* Chesnut, 20 N. C. 396.

Oregon.—Rayburn *v.* Winant, 16 Oreg. 318, 18 Pac. 588.

Tennessee.— Tellico Mfg. Co. *v.* Williams, (Tenn. Ch. 1900) 59 S. W. 1075.

Texas.— Davidson *v.* Killen, 68 Tex. 406, 4 S. W. 561; Davis *v.* Coleman, 16 Tex. Civ. App. 310, 40 S. W. 606.

Vermont.— Newton *v.* Eddy, 23 Vt. 319.

Washington.— Isensee *v.* Peabody, 8 Wash. 660, 36 Pac. 700; Edson *v.* Knox, 8 Wash. 642, 36 Pac. 698.

West Virginia.— Bowers *v.* Dickinson, 30 W. Va. 709, 6 S. E. 335.

See 8 Cent. Dig. tit. "Boundaries," § 60.

A misdescription in a deed of the boundary as beginning at the northwest corner and running west was held immaterial, being evidently intended for the northeast corner. Thompson *v.* Ela, 60 N. H. 562.

Beginning upon street.— Where, according to the description in the deed, land conveyed begins on a certain street, at the division line between the lot conveyed and the next continuous lot, the true import is the point where that division line intersects the marginal line of said street. Hanson *v.* Campbell, 20 Md. 223. See also Montgomery *v.* Hines, 134 Ind. 221, 33 N. E. 1100; Rieman *v.* Baltimore Belt R. Co., 81 Md. 68, 31 Atl. 444; Sibley *v.* Holden, 10 Pick. (Mass.) 249, 20 Am. Dec. 521. *Compare* Dean *v.* Lowell, 135 Mass. 55.

upon the ground by proper examinations or surveys, the true location of such corner is the one referred to in the grant or conveyance.[15] In cases of uncertainty the general rules as to the relative importance of conflicting calls[16] apply in full force.[17]

(B) *Reëstablishment of Lost Corner.* The rule for determining lost corners of a survey, when some remain, is to run the lost lines according to the courses and distances in the survey, unless the lines so run do not close the survey with the corners remaining, in which case the courses in the survey must be followed and the distances disregarded, and if the survey cannot then be made to close the courses themselves must be deviated from.[18]

15. *California.*—Powers *v.* Jackson, 50 Cal. 429.

Maine.— Wiswell *v.* Marston, 54 Me. 270; Moore *v.* Griffin, 22 Me. 350; Pride *v.* Lunt, 19 Me. 115.

Massachusetts.— Sparhawk *v.* Bagg, 16 Gray (Mass.) 583; Cleaveland *v.* Flagg, 4 Cush. (Mass.) 76; Cornell *v.* Jackson, 9 Metc. (Mass.) 150.

Michigan.— Verplank *v.* Hall, 27 Mich. 79.

Missouri.— Coe *v.* Ritter, 86 Mo. 277.

New Jersey.— Smith *v.* State, 23 N. J. L. 712; Smith *v.* State, 23 N. J. L. 130; Den *v.* Van Houten, 22 N. J. L. 61.

Tennessee.— Rucker *v.* Vaughan, Peck (Tenn.) 271; Hitchcock *v.* Southern Iron, etc., Co., (Tenn. Ch. 1896) 38 S. W. 588.

Texas.— Morgan *v.* Mowles, (Tex. Civ. App. 1901) 61 S. W. 155; Cox *v.* Finks, (Tex. Civ. App. 1897) 41 S. W. 95.

Virginia.— Smith *v.* Chapman, 10 Gratt. (Va.) 445.

Wisconsin.—Parkinson *v.* McQuaid, 54 Wis. 473, 11 N. W. 682; Gove *v.* White, 20 Wis. 425.

United States.— Rutledge *v.* Buchanan, Brunn. Col. Cas. (U. S.) 237, 21 Fed. Cas. No. 12,177, Cooke (Tenn.) 363; Hartshorn *v.* Wright, Pet. C. C. (U. S.) 64, 11 Fed. Cas. No. 6,169.

See 8 Cent. Dig. tit. "Boundaries," § 60.

The actual corner called for is the true one, rather than an imaginary corner not known at the time of the grant or conveyance, but discovered by a subsequent survey. Smith *v.* State, 23 N. J. L. 712; Smith *v.* State, 23 N. J. L. 130; Den *v.* Van Houten, 22 N. J. L. 61. See also Raynor *v.* Timerson, 46 Barb. (N. Y.) 518.

Sufficiency of description.— To establish a beginning and other corners of a grant, it is not indispensably necessary that they should be marked, if they can be established by other descriptions sufficiently certain to enable the surveyor, chainbearer, or others to find them. Rucker *v.* Vaughan, Peck (Tenn.) 271. See also Coe *v.* Ritter, 86 Mo. 277.

The marking of a tree for the beginning of a location is not competent evidence to prove the corner called for in a grant, unless by some expression in the grant it is evident that the tree which it calls for is the one marked in the location. Rutledge *v.* Buchanan, Brunn. Col. Cas. (U. S.) 237, 21 Fed. Cas. No. 12,177, Cooke (Tenn.) 363.

16. See *infra*, II, C.

17. *California.*— Reyburn *v.* Booker, (Cal. 1893) 32 Pac. 594; Gordon *v.* Booker, 97 Cal. 586, 32 Pac. 593. See also Reynier *v.* Elton, 133 Cal. 304, 65 Pac. 743.

Kentucky.— Thornberry *v.* Churchill, 4 T. B. Mon. (Ky.) 29, 16 Am. Dec. 125; Wishart *v.* Cosby, 1 A. K. Marsh. (Ky.) 382.

Maryland.—Wilson *v.* Inloes, 6 Gill (Md.) 121; Boreing *v.* Singery, 4 Harr. & M. (Md.) 398; Helms *v.* Howard, 2 Harr. & M. (Md.) 57.

New York.— Muhlker *v.* Ruppert, 124 N. Y. 627, 26 N. E. 313, 35 N. Y. St. 215 [*affirming* 55 N. Y. Super. Ct. 359, 14 N. Y. St. 734].

Pennsylvania.— Parks *v.* Boynton, 98 Pa. St. 370.

Tennessee.— Holland *v.* Overton, 4 Yerg. (Tenn.) 481.

Texas.— Booker *v.* Hart, 77 Tex. 146, 12 S. W. 16; McAninch *v.* Freeman, 69 Tex. 445, 4 S. W. 369; Hunt *v.* O'Brien, (Tex. Civ. App. 1899) 50 S. W. 487.

Virginia.— Marlow *v.* Bell, 13 Gratt. (Va.) 527.

See 8 Cent. Dig. tit. "Boundaries," § 60.

Evidence based upon courses and distances from other known points is admissible to fix a corner where no corner is found, but never to change the location of an original corner when found. Gordon *v.* Booker, 97 Cal. 586, 32 Pac. 593.

Where no corner was ever made and no lines appear running from the other corners toward the one desired, the place where the courses and distances will intersect is the corner. If, however, a marked line can be found, it must be pursued as far as may be, but if it does not extend to the intersection then the course of the patent must be taken until the intersection is made. Thornberry *v.* Churchill, 4 T. B. Mon. (Ky.) 29, 16 Am. Dec. 125; Wishart *v.* Cosby, 1 A. K. Marsh. (Ky.) 382.

18. *Alabama.*— Billingsley *v.* Bates, 30 Ala. 376, 68 Am. Dec. 126.

Kentucky.— Bryan *v.* Beckley, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276; Beckley *v.* Bryan, Ky. Dec. 91; Buckner *v.* Hendrick, 8 Ky. L. Rep. 347, 1 S. W. 646.

Louisiana.— Zeringue *v.* Harang, 17 La. 349.

Maryland.—Webb *v.* Beard, 1 Harr. & J. (Md.) 349.

Tennessee.— Garner *v.* Norris, 1 Yerg. (Tenn.) 61.

(iii) *Control of Beginning Corner.* While in some jurisdictions the beginning corner, when established, is held to be of controlling authority,[19] and while, as a general proposition, it is undoubtedly true that mistakes are less likely to occur in relation to the starting-point than in respect to succeeding calls,[20] nevertheless, the true rule seems to be that when the succeeding calls are as readily ascertained and are as little liable to mistake they are of equal dignity with, and may control, the first.[21]

b. Government Corners — (i) *Conclusiveness.* Original corners as established by the government surveyors, if they can be found, or the places where they

Texas.—Knippa *v.* Umlang, (Tex. Civ. App. 1894) 27 S. W. 915.

Wisconsin.— Lewis *v.* Prien, 98 Wis. 87, 73 N. W. 654.

See 8 Cent. Dig. tit. "Boundaries," § 61.

Allowances to be made.— In renewing lost corners allowance should be made for variation in the magnetic needle since the date of the original survey, and the courses and distances not departed from, except when necessary. In making measurements allowance should be made for unevenness of the ground. Bryan *v.* Beckley, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276; Beckley *v.* Bryan, Ky. Dec. 91.

From what corner survey must start.— In determining the location of lost corners of a survey when some remain, the surveyor may in his discretion proceed from the corner which can most easily be found. He is not limited to that one which was the beginning of the survey, and he may also proceed either to the right or to the left from such corner. Beckley *v.* Bryan, Ky. Dec. 91. See also *infra*, II, B, 3, a, (III).

If there is obliteration of only a portion of one of the boundary lines leading to the lost corner, the remaining portion, whether straight or not as marked, must be considered as established; and the corner must be presumed, in the absence of evidence to the contrary, to be at the point where the marked line, if continued, would intersect the next line. But if the lost corner is proved to have been at another point the lost portion of the boundary must be ascertained by running a straight line from the point at which the marks disappear to that corner. Billingsley *v.* Bates, 30 Ala. 376, 68 Am. Dec. 126.

Where vestiges of an ancient boundary are to be seen new posts should be fixed, but they must be placed where the former limit or fence stood, without regard merely to the title papers. Zeringue *v.* Harang, 17 La. 349.

19. Ocean Beach Assoc. *v.* Yard, 48 N. J. Eq. 72, 20 Atl. 763; White's Bank *v.* Nichols, 64 N. Y. 65; English *v.* Brennan, 60 N. Y. 609; Elliott *v.* Lewis, 10 Hun (N. Y.) 486; Syracuse Gas Light Co. *v.* Rome, etc., R. Co., 11 N. Y. Civ. Proc. 239; Wendell *v.* Jackson, 8 Wend. (N. Y.) 183, 22 Am. Dec. 635; Jackson *v.* Wendell, 5 Wend. (N. Y.) 142; Jackson *v.* Wilkinson, 17 Johns. (N. Y.) 146; Gove *v.* White, 20 Wis. 425.

It is immaterial how many natural monuments there may be in the courses given, the place of beginning is the controlling point, and if rendered certain, no matter in what manner, it cannot be abandoned and another position assumed as the starting-point. Jackson *v.* Wendell, 5 Wend. (N. Y.) 142.

Paper surveys.— Although it is a fundamental rule that the actual beginning corner must control in locating original surveys, yet when a survey is made upon paper, and not upon the ground, the intention of the parties making the survey should control, which intention is to be ascertained from all the facts and circumstances connected with the case. Ocean Beach Assoc. *v.* Yard, 48 N. J. Eq. 72, 20 Atl. 763.

20. Walsh *v.* Hill, 38 Cal. 481.

21. *California.*— Oreña *v.* Santa Barbara, 91 Cal. 621, 28 Pac. 268; Walsh *v.* Hill, 38 Cal. 481.

Kentucky.— Pearson *v.* Baker, 4 Dana (Ky.) 321; Beckley *v.* Bryan, Ky. Dec. 91.

Maryland.— Rogers *v.* Moore, 7 Harr. & J. (Md.) 141.

Minnesota.— See Yanish *v.* Tarbox, 49 Minn. 268, 51 N. W. 1051.

North Carolina.—See Cowles *v.* Reavis, 109 N. C. 417, 13 S. E. 930.

Tennessee.— See McNairy *v.* Hightour, 2 Overt. (Tenn.) 302.

Texas.— Miles *v.* Sherwood, 84 Tex. 485, 19 S. W. 853; Luckett *v.* Scruggs, 73 Tex. 519, 11 S. W. 529; Lancaster *v.* Ayers, (Tex. 1889) 12 S. W. 163; Scott *v.* Pettigrew, 72 Tex. 321, 12 S. W. 161; Hord *v.* Olivari, (Tex. 1887) 5 S. W. 57; Ayers *v.* Lancaster, 64 Tex. 305; Ayers *v.* Harris, 64 Tex. 296; Jones *v.* Andrews, 62 Tex. 652; Davis *v.* Smith, 61 Tex. 18; Phillips *v.* Ayers, 45 Tex. 601; Duren *v.* Presberry, 25 Tex. 512; Cox *v.* Finks, (Tex. Civ. App. 1897) 41 S. W. 95; Ayers *v.* Beaty, 5 Tex. Civ. App. 491, 24 S. W. 366.

United States.—Ayers *v.* Watson, 137 U. S. 584, 11 S. Ct. 201, 34 L. ed. 803.

See 8 Cent. Dig. tit. "Boundaries." § 65.

Effect should be given to all the corners if it can be done, and a second or third corner may be as useful in locating a survey as the beginning corner. Hord *v.* Olivari, (Tex. 1887) 5 S. W. 57.

The corner of an adjoining survey, called for as a beginning point, does not necessarily control, but will yield to other satisfactory indicia as to where the true line was in fact run. Jones *v.* Andrews, 62 Tex. 652. See also Duren *v.* Presberry, 25 Tex. 512.

The closing line of a survey must run to the beginning point, if established, irrespective of course and distance. Cowles *v.* Reavis, 109 N. C. 417, 13 S. E. 930.

were originally established, if they can be definitely determined, are conclusive, without regard to whether they were located correctly or not.[22]

(II) *Relocation.* In case of lost corners on town or range lines, the lines should be resurveyed between the nearest known government monuments on either side of the lost corner or corners, and the section corners relocated on straight lines between such monuments at the distances indicated in the field-notes and the lost quarter posts at equal distances between the section corners.[23] In interior sections corners are always established, where the original corners cannot be found, at a point equidistant from the corresponding corners of the section.[24] In all cases the chain used in making the resurvey must be made to cor-

22. *Alabama.*— Walters *v.* Commons, 2 Port. (Ala.) 38.

California.— Powers *v.* Jackson, 50 Cal. 429; Maxey *v.* Thurman, 50 Cal. 321.

Indiana.— Bailey *v.* Chamblin, 20 Ind. 33.

Iowa.— Doolittle *v.* Bailey, 85 Iowa 398, 52 N. W. 337; Messelrode *v.* Parish, 59 Iowa 570, 13 N. W. 746; Vittoe *v.* Richardson, 58 Iowa 575, 12 N. W. 603.

Michigan.—Thompson Tp. Highway Com'rs *v.* Beebe, 61 Mich. 1, 27 N. W. 713; Verplank *v.* Hall, 27 Mich. 79. *Compare* Hess *v.* Meyer, 88 Mich. 339, 50 N. W. 290.

Minnesota.— Beardsley *v.* Crane, 52 Minn. 537, 54 N. W. 740.

Missouri.— Liberty *v.* Burns, 114 Mo. 426, 19 S. W. 107, 21 S. W. 728; Major *v.* Watson, 73 Mo. 661; Climer *v.* Wallace, 28 Mo. 556, 75 Am. Dec. 135.

South Dakota.— Arneson *v.* Spawn, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783.

Washington.— Greer *v.* Squire, 9 Wash. 359, 37 Pac. 545 [*modifying* Squire *v.* Greer, 2 Wash. 209, 26 Pac. 222]; Cadeau *v.* Elliott, 7 Wash. 205, 34 Pac. 916.

United States.— Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566; Bates *v.* Illinois Cent. R. Co., 1 Black (U. S.) 204, 17 L. ed. 158.

See 8 Cent. Dig. tit. "Boundaries," § 63.

Corners of adjacent township.— A survey of the western line of a township is necessarily a survey of the eastern line of the next township to the west, and when no other survey has been made of the latter township, or of the section of it in controversy, the quarter post in a section of the eastern township, set on the township line, is necessarily the quarter post of the adjacent section, and governs the location of the quarter line in the section last named. Thompson Tp. Highway Com'rs *v.* Beebe, 61 Mich. 1, 27 N. W. 713.

Corners of subdivisions of fractional sections.— 2 U. S. Stat. at L. 313 and 3 U. S. Stat. at L. 366, relating to the survey of public lands of the United States, do not make the corners of subdivisions of fractional sections, as fixed by the United States surveyors, conclusive as to the true location of such corners, but they ought to be placed equally distant from the section corners on the same line, so that if the original United States surveyor has made a mistake in the location the corner may be changed. Nolen *v.* Palmer, 24 Ala. 391. See also Lewen *v.* Smith, 7 Port. (Ala.) 428.

Variance with description in plat or field-notes.— In construing a deed describing land by government survey, the corners of the survey as actually established and not as they ought to have been established, are the true corners, notwithstanding their location may not be such as is designated in the plat or field-notes. Greer *v.* Squire, 9 Wash. 359, 37 Pac. 545 [*modifying* Squire *v.* Greer, 2 Wash. 209, 26 Pac. 222].

Where a deed described the land by adopting the corner of a subdivision according to the United States survey as a starting-point, that corner is a monument and will control, although the party selling, at the time of sale, by actual survey, fixed the stake at a different point and ran the lines accordingly. Powers *v.* Jackson, 50 Cal. 429.

23. O'Hara *v.* O'Brien, 107 Cal. 309, 40 Pac. 423; Hess *v.* Meyer, 73 Mich. 259, 41 N. W. 422, 88 Mich. 339, 50 N. W. 290; Major *v.* Watson, 73 Mo. 661.

By course and distance.— In reëstablishing lost government corners, where all traces of them are gone and there are no fixed monuments called for, the courses and distances called for in the field-notes of the original government surveys should be observed. Major *v.* Watson, 73 Mo. 661.

Relocation on base or correction lines.— The United States interior department, by a circular issued in March, 1883, gives the following method for the restoration of lost or obliterated corners of government surveys on base and correction lines: "Run a right line between the nearest existing corners on such line, whether base or correction line, which corners must, however, be fully identified, and at the point proportionate to the distance given in the field-notes of the original survey establish a new corner. This point should be verified by measurements to the nearest known corners north or south of the base or correction line, or both." A corner so established is not conclusive, and is not to be preferred to a survey between two fully identified corners, with which upon actual measurement it fails to verify. Hess *v.* Meyer, 88 Mich. 339, 50 N. W. 290.

24. Moreland *v.* Page, 2 Iowa 139; Edinger *v.* Woodke, 127 Mich. 41, 86 N. W. 397; Hess *v.* Meyer, 73 Mich. 259, 41 N. W. 422; Lemmon *v.* Hartsook, 80 Mo. 13; Coe *v.* Griggs, 79 Mo. 35; Frazier *v.* Bryant, 59 Mo. 121; Knight *v.* Elliott, 57 Mo. 317.

respond to that used by the government, by testing it with distances on the ground between two or more known monuments.[25]

3. Courses and Distances — a. Courses — (I) *Determination of* — (A) *In General.* In locating courses the intent of the party, as derived from the instrument itself, is to govern;[26] but independently of a showing to the contrary courses are to be run as called for.[27] Where a line is described as running toward one of the cardinal points, it must run directly in that course, unless it is controlled by some object,[28] and in all cases the magnetic meridian is to be fol-

25. Hess *v.* Meyer, 73 Mich. 259, 41 N. W. 422.

26. *Kentucky.*— Stephens *v.* Hedden, 4 Bibb (Ky.) 107; Carland *v.* Rowland, 3 Bibb (Ky.) 125. And see Hite *v.* Harrison, Hughes (Ky.) 29.

Maine.— Mitchell *v.* Smith, 67 Me. 338.

Massachusetts.— Bond *v.* Fay, 8 Allen (Mass.) 212, 12 Allen (Mass.) 86; Curtis *v.* Francis, 9 Cush. (Mass.) 427. See also Barden *v.* Felch, 109 Mass. 154.

North Carolina.—Buckner *v.* Anderson, 111 N. C. 572, 11 S. E. 424; Shultz *v.* Young, 25 N. C. 385, 40 Am. Dec. 413.

Texas.— Farley *v.* Deslonde, 69 Tex. 458, 6 S. W. 786 [*approving* 58 Tex. 588]; Barnard *v.* Good, 44 Tex. 638; Elliot *v.* Mitchell, 28 Tex. 105; Galveston *v.* Menard, 23 Tex. 349.

United States.— Winnipiseogee Paper Co. *v.* New Hampshire Land Co., 59 Fed. 542 [*distinguishing* Bartlett Land, etc., Co. *v.* Saunders, 103 U. S. 316, 26 L. ed. 546].

See 8 Cent. Dig. tit. "Boundaries," § 47.

"The intention which the court are to regard is not that loose and general purpose floating in the mind of the party, but that precise intent which the language of the deed requires to be inferred, when it speaks in plain language." Curtis *v.* Francis, 9 Cush. (Mass.) 427, 436. See also Cornell *v.* Jackson, 9 Metc. (Mass.) 150; Dawes *v.* Prentice, 16 Pick. (Mass.) 435.

27. *California.*— Currier *v.* Nelson, 96 Cal. 505, 31 Pac. 531, 746, 31 Am. St. Rep. 239; Martin *v.* Lloyd, 94 Cal. 195, 29 Pac. 491; Irwin *v.* Towne, 42 Cal. 326; Fratt *v.* Woodward, 32 Cal. 219, 91 Am. Dec. 573.

Kentucky.— Bryan *v.* Beckley, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276.

Maine.— Haynes *v.* Jackson, 59 Me. 386; Loring *v.* Norton, 8 Me. 61.

Massachusetts.—Iverson *v.* Swan, 169 Mass. 582, 48 N. E. 282; Boston *v.* Richardson, 13 Allen (Mass.) 146.

Michigan.— Brown *v.* Reddick, 99 Mich. 242, 58 N. W. 231.

Missouri.— Hoffman *v.* Riehl, 27 Mo. 554.

New York.— Avery *v.* Empire Woolen Co., 82 N. Y. 582; Brandt *v.* Ogden, 1 Johns. (N. Y.) 156.

Ohio.— Ginn *v.* Brandon, 29 Ohio St. 656.

Tennessee.—Lewis *v.* Harwell, Peck (Tenn.) 294; Sevier *v.* Wilson, Peck (Tenn.) 146, 14 Am. Dec. 741. See also Montgomery *v.* Lipscomb, 105 Tenn. 144, 58 S. W. 306. *Compare* Christian *v.* Cope, (Tenn. Ch. 1899) 56 S. W. 1030.

Texas.— Griffith *v.* Rife, 72 Tex. 185, 12 S. W. 168; Boott *v.* Strippleman, 26 Tex. 436; George *v.* Thomas, 16 Tex. 74, 67 Am. Dec. 612; Williams *v.* Beckham, 6 Tex. Civ. App. 739, 26 S. W. 652.

Washington.— Reed *v.* Tacoma Bldg., etc., Assoc., 2 Wash. 198, 26 Pac. 252, 26 Am. St. Rep. 851.

See 8 Cent. Dig. tit. "Boundaries," § 47.

Other courses unaffected by mistake in one. — In restoring and renewing lost lines and corners of a survey, a mistake in one course, evidenced by applying the patent to the ground, cannot be applied, or be made by presumption, to affect any other course named. A mistake in one course does not necessarily or probably argue a mistake in running any other course. Bryan *v.* Beckley, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276. But see Lewis *v.* Harwell, Peck (Tenn.) 294; Sevier *v.* Wilson, Peck (Tenn.) 146, 14 Am. Dec. 741, which hold that if, in running the lines of a grant, one line be found marked, which is admitted or proved to be a line of the grant, and which will run with a variation from the calls of the grant, if no other marked lines be found, the other calls should be run with the same variation as that found on the marked line, to ascertain the land granted.

Where the original mile corners in a certain block can be clearly identified, the courses of the lines of subdivision within the block cannot be determined by proof of monuments, blazes, or other witness found in other blocks of the township. Ginn *v.* Brandon, 29 Ohio St. 656.

28. *Alabama.*—Hagan *v.* Campbell, 8 Port. (Ala.) 9, 33 Am. Dec. 267.

California.— Bosworth *v.* Danzien, 25 Cal. 296.

Kentucky.— Moore *v.* Randolph, Ky. Dec. 18. *Compare* Craig *v.* Hawkins, 1 Bibb (Ky.) 53, where it was held that the word "northwardly" was not synonymous with "north."

New York.— Brandt *v.* Ogden, 1 Johns. (N. Y.) 156; Jackson *v.* Reeves, 3 Cai. (N. Y.) 293; Jackson *v.* Lindsey, 3 Johns. Cas. (N. Y.) 86.

North Carolina.— Tucker *v.* Satterthwaite, 123 N. C. 511, 31 S. E. 722; Spruill *v.* Davenport, 46 N. C. 203.

See 8 Cent. Dig. tit. "Boundaries," § 47.

The rule does not apply where other words are used for the purpose of qualifying the meaning of the expressions "northerly," "easterly," etc. Where such is the case, instead of meaning "due north," etc., they will mean precisely what the qualifying word makes them mean. Fratt *v.* Woodward, 32 Cal. 219, 91 Am. Dec. 573.

lowed, making due allowance for variation, in the absence of a showing that the course has been run according to the true meridian.[29]

(B) *Continuous Line.* A boundary line whose commencement is given must be continued in the same direction, if possible, unless the contrary be shown.[30]

(C) *Straight Line.* Where a line is described as running from one point to another, it is presumed, unless a different line is described in the instrument, to be a straight line, so that by ascertaining the points at the angles of a parcel of land the boundary lines can at once be determined.[31]

(D) *Meander Line.* Numerous well-considered cases support the doctrine that unless, from the terms used in the description of a boundary line running up, down, or with a stream, the intent of the parties is clearly otherwise,[32]

29. *Kentucky.*— Young *v.* Leiper, 4 Bibb (Ky.) 503. See also Vance *v.* Marshall, 3 Bibb (Ky.) 148.

Louisiana.— Hickman *v.* Hudson, 4 La. 520.

Missouri.— Hoffman *v.* Riehl, 27 Mo. 554.

New Hampshire.— Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

North Carolina.— Gaylord *v.* Gaylord, 48 N. C. 367; Norcom *v.* Leary, 25 N. C. 49.

Ohio.— See McKinney *v.* McKinney, 8 Ohio St. 423.

United States.—McIver *v.* Walker, 9 Cranch (U. S.) 173, 3 L. ed. 694.

See 8 Cent. Dig. tit. "Boundaries," § 47.

30. *Connecticut.*— Armstrong *v.* Wheeler, 52 Conn. 428.

Kentucky.— Thornberry *v.* Churchill, 4 T. B. Mon. (Ky.) 29, 16 Am. Dec. 125; Brown *v.* Hobson, 3 A. K. Marsh. (Ky.) 380, 13 Am. Dec. 187.

Louisiana.— Henderson *v.* St. Charles Church, 7 Mart. N. S. (La.) 117.

Massachusetts.— Needham *v.* Judson, 101 Mass. 155; Dawes *v.* Prentice, 16 Pick. (Mass.) 435.

New York.— Rockwell *v.* Adams, 6 Wend. (N. Y.) 467.

South Carolina.— Richardson *v.* Moodie, 2 Brev. (S. C.) 442. *Compare* Martin *v.* Simpson, Harp. (S. C.) 454.

Tennessee.—Gallatin Turnpike Co. *v.* State, 16 Lea (Tenn.) 36.

Texas.— George *v.* Thomas, 16 Tex. 74, 67 Am. Dec. 612.

See 8 Cent. Dig. tit. "Boundaries," § 48.

In a plan of division of flats below high-water mark, where the upland divisional line extended intersects the shore line at substantially a right angle, the line should be so extended. Armstrong *v.* Wheeler, 52 Conn. 428.

31. *California.*— Fratt *v.* Woodward, 32 Cal. 219, 91 Am. Dec. 573. See also Moss *v.* Shear, 30 Cal. 467.

Kansas.—Abbey *v.* McPherson, 1 Kan. App. 177, 41 Pac. 978, holding that where a line is described as running from a certain point east to a certain located corner, the line should be a straight line, running from the point named to the corner, although the line would run in a southeasterly direction, and the quantity of land conveyed would be about thirty-five acres instead of thirty acres, more or less, as given in the conveyance.

Kentucky.—Baker *v.* Talbott, 6 T. B. Mon. (Ky.) 179; Thornberry *v.* Churchill, 4 T. B. Mon. (Ky.) 29, 16 Am. Dec. 125; Landrum *v.* Hite, 1 A. K. Marsh. (Ky.) 419; Young *v.* Leiper, 4 Bibb (Ky.) 503; Yoder *v.* Swope, 3 Bibb (Ky.) 204; Cowan *v.* Fauntleroy, 2 Bibb (Ky.) 261; Lyon *v.* Ross, 1 Bibb (Ky.) 466; Crutcher *v.* Shelby Railroad Dist., 3 Ky. L. Rep. 533.

Massachusetts.— Jenks *v.* Morgan, 6 Gray (Mass.) 448; Curtis *v.* Francis, 9 Cush. (Mass.) 427; Clark *v.* Burt, 4 Cush. (Mass.) 396; Allen *v.* Kingsbury, 16 Pick. (Mass.) 235.

Michigan.— Palmer *v.* Montgomery, 59 Mich. 338, 26 N. W. 535.

New York.— Kingsland *v.* Chittenden, 6 Lans. (N. Y.) 15 [*affirmed* in 61 N. Y. 618].

North Carolina.— Burnett *v.* Thompson, 51 N. C. 210, 52 N. C. 407; Slade *v.* Etheridge, 35 N. C. 353, 57 Am. Dec. 557; Wynne *v.* Alexander, 29 N. C. 237, 47 Am. Dec. 326; Hough *v.* Horn, 20 N. C. 305, the last case holding that where a grant calls for a certain course from one established corner to another, without saying by a line of marked trees, the direct line from one corner to the other is the boundary line, although there may be a line of marked trees between the corners, but varying in some places from the direct line.

Tennessee.—Burns *v.* Greaves, Cooke (Tenn.) 75. But see Christian *v.* Cope, (Tenn. Ch. 1899) 56 S. W. 1030.

Virginia.— Smith *v.* Davis, 4 Gratt. (Va.) 50.

West Virginia.— Tompkins *v.* Vintroux, 3 W. Va. 148, 100 Am. Dec. 735.

See 8 Cent. Dig. tit. "Boundaries," § 49.

Where a line has been marked only part of the way, the boundary of the residue of the distance should be a direct line from the termination of the marked line to the corner called for. Thornberry *v.* Churchill, 4 T. B. Mon. (Ky.) 29, 16 Am. Dec. 125; Young *v.* Leiper, 4 Bibb (Ky.) 503; Cowan *v.* Fauntleroy, 2 Bibb (Ky.) 261.

32. Taylor *v.* Watkins, 7 J. J. Marsh. (Ky.) 363; Yoder *v.* Swope, 3 Bibb (Ky.) 204; Rains *v.* Rains, 14 Ky. L. Rep. 650, 20 S. W. 1099; Hammond *v.* Ridgely, 5 Harr. & J. (Md.) 245, 9 Am. Dec. 522; Wharton *v.* Brick, 49 N. J. L. 289, 6 Atl. 442, 8 Atl. 529 (holding that a line described as running from a fixed monument on the edge of a branch, up the same, by a single course, to another fixed monument on said branch, should be construed to follow the straight line called

such boundary line will follow and be determined by the meanderings of the stream.[33]

(E) *Parallel Line.* While there is no general presumption of law that an undescribed boundary is to be run parallel with a known fixed line,[34] yet such a presumption will be sustained if it will most nearly conform to the true intent of the parties.[35]

(II) *Angles to Be Adopted.* As a rule a specific and definite call for an angle must be observed,[36] but where the call is general and descriptive merely, the line may be deflected from the angle called for, if thereby the intention shown in the language of the instrument, in the light of the situation of the land, and the circumstances of the case, will be best subserved.[37]

for, from monument to monument, and not to follow the windings of the branch, unless the words "the several courses thereof," or "the general course being," or some such language be used); Bryant *v.* Vinson, 3 N. C. 145.

33. *California.*— Hicks *v.* Coleman, 25 Cal. 122, 85 Am. Dec. 103.

Kentucky.— Calk *v.* Stribling, 1 Bibb (Ky.) 122; Craig *v.* Hawkins, 1 Bibb (Ky.) 53.

Maine.— Robinson *v.* White, 42 Me. 209; Brown *v.* Chadbourne, 31 Me. 9, 50 Am. Dec. 641.

Maryland.— Budd *v.* Brooke, 3 Gill (Md.) 198, 43 Am. Dec. 321; Duvall *v.* Jones, 5 Harr. & J. (Md.) 253 note ; Hammond *v.* Ridgely, 5 Harr. & J. (Md.) 245, 9 Am. Dec. 522; Smallwood *v.* Hatton, 4 Md. Ch. 95.

Massachusetts.—Newhall *v.* Ireson, 13 Gray (Mass.) 262; Cold Spring Iron Works *v.* Tolland, 9 Cush. (Mass.) 492; Com. *v.* Alger, 7 Cush. (Mass.) 53; Lunt *v.* Holland, 14 Mass. 149.

New York.— Luce *v.* Carley, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637; Jackson *v.* Louw, 12 Johns. (N. Y.) 252; Frier *v.* Jackson, 8 Johns. (N. Y.) 495; Jackson *v.* Denis, 2 Cai. (N. Y.) 177.

North Carolina.— Den *v.* Mabe, 15 N. C. 180.

Ohio.— Buckley *v.* Blackwell, 10 Ohio 508.

Oregon.—Rayburn *v.* Winant, 16 Oreg. 318, 18 Pac. 588.

Tennessee.— Weakly *v.* Legrand, 1 Overt. (Tenn.) 265.

Vermont.— Newton *v.* Eddy, 23 Vt. 319.

West Virginia.—Camden *v.* Creel, 4 W. Va. 365.

United States.— Hills *v.* Homton, 4 Sawy. (U. S.) 195, 12 Fed. Cas. No. 6,508.

See 8 Cent. Dig. tit. "Boundaries," § 51.

"Up" equivalent to "with."— A call, in a grant from a bound on a river, "west up the river, to a stake," is in law equivalent to "with the river" and the line must pursue the course of the stream. Den *v.* Mabe, 15 N. C. 180.

Where a grant called for land lying two miles on each side of a creek, the lines should be run up so that at every point they will be two miles from the stream in some direction, although at a greater or less distance in other directions, and not by parallel lines running from points two miles distant from the stream on a line traversing it. Jackson *v.* Dennis, 2 Cai. (N. Y.) 177.

34. Live Yankee Co. *v.* Oregon Co., 7 Cal. 41.

35. Deal *v.* Cooper, 94 Mo. 62, 6 S. W. 707; Bloom *v.* Ferguson, 128 Pa. St. 362, 25 Wkly. Notes Cas. (Pa.) 91, 18 Atl. 488. See also Airey *v.* Kunkle, 7 Pa. Super. Ct. 112.

In the subdivision of a lot rectangular in form, it will be presumed, in the absence of evidence to the contrary, that the exterior lines of the subdivisions will be parallel with the exterior lines of the lot subdivided. Austrian *v.* Davidson, 21 Minn. 117; Rich *v.* Elliot, 10 Vt. 211; Beecher *v.* Parmele, 9 Vt. 352, 31 Am. Dec. 633.

Where a line is described as running parallel with a stream or broken line, it will be construed to run parallel to the windings of the stream or to the broken line, and not parallel to their general course. Fratt *v.* Woodward, 32 Cal. 219, 91 Am. Dec. 573; Hicks *v.* Coleman, 25 Cal. 122, 85 Am. Dec. 103; Stephens *v.* Hedden, 4 Bibb (Ky.) 107; Keith *v.* Reynolds, 3 Me. 393.

36. Hall *v.* Eaton, 139 Mass. 217, 29 N. E. 660.

To run a line at a given angle to a tortuous stream or irregular shore, a straight line must first be established as a base. This can only be done by ascertaining and reducing to a straight line, either the general course of the stream from its source to its mouth, or the general course of the shore line, or that portion of the stream or shore line which shall appear to have been in the contemplation of the parties at the time of the execution of the grant or conveyance. Hall *v.* Shotwell, 66 Cal. 379, 5 Pac. 683; Irwin *v.* Towne, 42 Cal. 326; Hicks *v.* Coleman, 25 Cal. 122, 85 Am. Dec. 103.

37. Platt *v.* Jones, 43 Cal. 219; Ladies' Seamen's Friend Soc. *v.* Halstead, 58 Conn. 144, 19 Atl. 658; Craig *v.* Hawkins, 1 Bibb (Ky.) 53; Smith *v.* Grimes, Hughes (Ky.) 35.

Closing open line.— If all four of the courses of a four-sided survey be made, but the closing line left open, the course must be so varied as to strike the corners. Brown *v.* Hobson, 3 A. K. Marsh. (Ky.) 380, 13 Am. Dec. 187.

Where an entry gives a base line, and calls to run off from that base "northwardly,"

(iii) *Reversing Course.* Where a disputed or lost line or corner can thereby be established more nearly in conformity with the terms of the instrument and with the intent of the parties as gathered therefrom, it is competent to ascertain such line or corner by first ascertaining the position of some other bound and tracing the line back from that by reversing the course and distance;[38] but a line will not be reversed for the purpose of showing the termination of a prior line unless the description of the posterior line is more definite than that of the prior line, and a mistake in the prior line can be clearly shown.[39]

b. Distances — (i) *In General.* Unless controlled by other calls, calls for distances must be strictly observed.[40] A line between given points or monuments must be the shortest distance between them,[41] but in the absence of terminating monuments lines ought to be run upon the exact courses and distances stated.[42] Where the distances on the lines called for are not expressly given, or are vague

"southwardly," etc., these expressions are construed as a general description of the side of the base line on which the land is to lie, and the survey should be constructed at right angles thereto. Craig *v.* Hawkins, 1 Bibb (Ky.) 53.

38. *California.*—Walsh *v.* Hill, 38 Cal. 481.

Kentucky.— Pearson *v.* Baker, 4 Dana (Ky.) 321; Thornberry *v.* Churchill, 4 T. B. Mon. (Ky.) 29, 16 Am. Dec. 125; Simpkins *v.* Wells, 61 Ky. L. Rep. 113, 26 S. W. 587.

Maine.—Noyes *v.* Dyer, 25 Me. 468; Seidensparger *v.* Spear, 17 Me. 123, 35 Am. Dec. 234.

Maryland.— Wilson *v.* Inloes, 6 Gill (Md.) 121; Dulany *v.* Jennings, 1 Harr. & M. (Md.) 92.

New Hampshire.— Coburn *v.* Coxeter, 51 N. H. 158.

North Carolina.— Dobson *v.* Finley, 53 N. C. 495; Safret *v.* Hartman, 52 N. C. 199. *Compare* Duncan *v.* Hall, 117 N. C. 443, 23 S. E. 362; Norwood *v.* Crawford, 114 N. C. 513, 19 S. E. 349.

Tennessee.— Phillips *v.* Crabtree, (Tenn. Ch. 1899) 52 S. W. 787.

Texas.— Miles *v.* Sherwood, 84 Tex. 485, 19 S. W. 853; Swenson *v.* Willsford, 84 Tex. 424, 19 S. W. 613; Ayers *v.* Lancaster, 64 Tex. 305; Burge *v.* Poindexter, (Tex. Civ. App. 1900) 56 S. W. 81; Griffin *v.* Roe, 2 Tex. Unrep. Cas. 511.

Washington.—Edson *v.* Knox, 8 Wash. 642, 36 Pac. 698.

United States.— Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417, 12 S. Ct. 239, 35 L. ed. 1063; Ayers *v.* Watson, 137 U. S. 584, 11 S. Ct. 201, 34 L. ed. 803; Platt *v.* Vermillion, 99 Fed. 356, 39 C. C. A. 555; Ellinwood *v.* Stancliff, 42 Fed. 316.

See 8 Cent. Dig. tit. "Boundaries," § 52.

In order to locate an intermediate post in a survey of land, which was run also by courses and distances, the footsteps of the surveyor should be followed instead of taking a reverse course. Blackburn *v.* Nelson, 100 Cal. 336, 34 Pac. 775.

Only when the lines of a survey were actually run and measured on the ground can the calls be reversed to ascertain the boundaries. Ayers *v.* Lancaster, 64 Tex. 305. See also Ayers *v.* Watson, 137 U. S. 584, 11 S. Ct. 201, 34 L. ed. 803.

The rule does not apply when the only evidence tending to identify any corner or line of the disputed land is evidence in reference to one corner, and the other boundary can be established by running course and distance. Pierce *v.* Schram, (Tex. Civ. App. 1899) 53 S. W. 716.

39. Ring *v.* King, 20 N. C. 250; Harry *v.* Graham, 18 N. C. 76, 27 Am. Dec. 226. See also Tucker *v.* Satterthwaite, 123 N. C. 511, 31 S. E. 722.

40. Thomasson *v.* Hanna, 13 Ky. L. Rep. 700, 18 S. W. 227. See also Smith *v.* Hutchison, 104 Tenn. 394, 58 S. W. 226.

41. Grant *v.* Black, 53 Me. 373; Caraway *v.* Chancy, 51 N. C. 361; Campbell *v.* Branch, 49 N. C. 313; Bradberry *v.* Hooks, 4 N. C. 443; Best *v.* Hammond, 55 Pa. St. 409; Smith *v.* Davis, 4 Gratt. (Va.) 50. *Compare* Burns *v.* Greaves, Cooke (Tenn.) 75, where it was held that if an entry calls to begin on a river three fourths of a mile below the mouth of a creek, the beginning must be ascertained by measuring down the river by its meanders.

When an ascertained and natural monument is of an extensive character, such as another tract of land, a river, or a swamp, the line must be to the nearest point of such object. Caraway *v.* Chancy, 51 N. C. 361; Campbell *v.* Branch, 49 N. C. 313; Bradberry *v.* Hooks, 4 N. C. 443; Best *v.* Hammond, 55 Pa. St. 409.

42. *Maine.*— Lincoln *v.* Edgecomb, 28 Me. 275; Cutts *v.* King, 5 Me. 482; Scamman *v.* Sawyer, 4 Me. 429; Keith *v.* Reynolds, 3 Me. 393. *Compare* Moulton *v.* Powers, 32 Me. 375, where it was held that where, by the registered title, the divisional line of lands is described to be at a mark a given distance from a monument, and the place of the mark is not identified, such given distance may be controlled by other evidence of the locality of the line.

Maryland.— Mitchell *v.* Mitchell, 8 Gill (Md.) 98.

Massachusetts.— Blaney *v.* Rice, 20 Pick. (Mass.) 62, 32 Am. Dec. 204.

New York.— Jackson *v.* Lucett, 2 Cai. (N. Y.) 363.

Tennessee.— Montgomery *v.* Lipscomb, 105 Tenn. 144, 58 S. W. 306.

By the use of the term "about" in de-

and indefinite, they must be ascertained by construction,[43] giving full effect to the apparent intention of the locator and to the descriptive words of the grant or conveyance.[44]

(II) *Measurement by Meander of Stream or Road.* As a general rule the distances called for from point to point on navigable waters, large non-navigable streams, or roads ought to be run by their meanders;[45] but in the case of small non-navigable streams the distances will generally be run from point to point in a direct line.[46] No fixed rule, however, can be laid down, since each case depends upon the intention of the locator or grantor, to be arrived at from the calls of his entry or conveyance, in connection with the surrounding circumstances.[47]

(III) *Scale of Measurement.* The scale of measurement to be used in locating lines by distance depends upon the circumstances of the case. Where surface, rather than horizontal, measurement has customarily been employed by the surveyors of a locality, the same measurement should be adopted in relocating the lines, and *vice versa*.[48] Similarly where a grant is made of land, and bounded by monuments named as existing upon the earth, and by distances between them, and not by monuments and distances named on the plan only, the admeasurement should be made upon the earth and not by the scale upon the plan.[49]

4. Designation, Quantity, and Location of Land — a. Designation — (I) *In General.* A general designation of the land to be granted or conveyed, by its name or number, as being owned by, or in the possession of, a certain person, as being the same land mentioned in another grant or conveyance, or otherwise, is a sufficient description of itself, without specific locative calls, if thereby the land

scribing the length of line in the deed of conveyance, it is understood that exact precision is not intended; but if the place where a monument stood by which the distance was controlled and determined cannot be ascertained, the grantee must be limited to the number of rods or feet given. Cutts *v.* King, 5 Me. 482. See also Blaney *v.* Rice, 20 Pick. (Mass.) 62, 32 Am. Dec. 204.

43. Millar *v.* Frame, 1 A. K. Marsh. (Ky.) 284; Haight *v.* Hamor, 83 Me. 453, 22 Atl. 369; Millett *v.* Fowle, 8 Cush. (Mass.) 150.

44. *Kentucky.*— Violet *v.* Bowman, 1 A. K. Marsh. (Ky.) 282.

Maine.— Centre St. Church *v.* Machias Hotel Co., 51 Me. 413; Graves *v.* Fisher, 5 Me. 69, 17 Am. Dec. 203.

Massachusetts.— Dunham *v.* Gannett, 126 Mass. 151; Dall *v.* Brown, 5 Cush. (Mass.) 289.

North Carolina.— Osborne *v.* Anderson, 89 N. C. 261.

Ohio.— Buckley *v.* Gilmore, 12 Ohio 63.

Tennessee.— Wilson *v.* Bass, 5 Hayw. (Tenn.) 110.

See 8 Cent. Dig. tit. "Boundaries," § 56.

45. *California.*— People *v.* Henderson, 40 Cal. 29.

Kentucky.— Gore *v.* Steele, 4 T. B. Mon. (Ky.) 505; Hite *v.* Graham, 2 Bibb (Ky.) 141; Preble *v.* Vanhoozer, 2 Bibb (Ky.) 118; Whitaker *v.* Hall, 1 Bibb (Ky.) 72.

Oregon.—Rayburn *v.* Winant, 16 Oreg. 318, 18 Pac. 588.

Tennessee.—Massengill *v.* Boyles, 4 Humphr. (Tenn.) 205; Burns *v.* Greaves, Cooke (Tenn.) 75.

United States.—Johnson *v.* Pannel, 2 Wheat. (U. S.) 206, 4 L. ed. 221; Bodley *v.* Taylor, 5 Cranch (U. S.) 191, 3 L. ed. 75.

See 8 Cent. Dig. tit. "Boundaries," § 57.

46. Stephens *v.* Hedden, 4 Bibb (Ky.) 107; Carland *v.* Rowland, 3 Bibb (Ky.) 125; Buckley *v.* Gilmore, 12 Ohio 63.

47. Maxey *v.* Thurman, 50 Cal. 321; Kimball *v.* Semple, 25 Cal. 440; Thurston *v.* Masterson, 9 Dana (Ky.) 228; Webb *v.* Bedford, 2 Bibb (Ky.) 354; Johnson *v.* Brown, Ky. Dec. 49; Littlepage *v.* Fowler, 11 Wheat. (U. S.) 215, 6 L. ed. 458.

48. In Pennsylvania, it has been held that in measuring distances called for in an original survey of land warrants, surface measurement, being the kind in practice by surveyors in that state, will be used, in the absence of proof that any other kind of measurement was in use when the original survey was made. Boyton *v.* Urian, 55 Pa. St. 142.

In Tennessee it is held that calls for distance should be surveyed, in the absence of other controlling calls, by horizontal, not by surface, measurement. Bleidorn *v.* Pilot Mountain Coal, etc., Co., 89 Tenn. 166, 15 S. W. 737.

49. Otis *v.* Moulton, 20 Me. 205. *Compare,* however, Loring *v.* Norton, 8 Me. 61, where the conveyance in question was of certain land according to a plan. No monuments were named in it, and the decision of the court was, on such a state of facts, that the length of the lines was to be ascertained by applying the scale by which the plan was protracted.

contemplated by the parties can be identified with certainty.[50] Where there is both a particular description by metes and bounds, or by courses and distances, and a general descriptive designation, the latter as a rule yields to the former;[51] but if the particular description is uncertain or indefinite,[52] or if used rather in the sense of reiteration or affirmation than in the sense of restriction,[53] the general description will prevail. In all cases, however, the intention of parties as gathered from a consideration of the whole instrument is of controlling authority,[54] and such construction will be given it as will, if possible, satisfy each of several descriptions.[55]

(II) *By Name of Occupant or Owner.* Where land is described by metes and bounds, or courses and distances, and also as being, or having been, in the possession or occupation of a named person, and the two descriptions conflict, the determination of what land is intended to be conveyed is a question of construction upon the whole instrument. If it is clearly the grantor's intention to convey the land as so described by ownership or occupancy that description will prevail;[56] but where such reference is merely descriptive, it will yield to the more certain and definite locative calls.[57]

50. Millett *v.* Fowle, 8 Cush. (Mass.) 150; White *v.* Gay, 9 N. H. 126, 31 Am. Dec. 224; Armstrong *v.* Boyd, 3 Penr. & W. (Pa.) 458; Doddridge *v.* Thompson, 9 Wheat. (U. S.) 469, 6 L. ed. 137. See also Robinson *v.* Atkins, 105 La. 790, 30 So. 231; Dyne *v.* Nutley, 14 C. B. 122, 2 C. L. R. 81, 78 E. C. L. 122; and, generally, DEEDS; PUBLIC LANDS.

A conveyance of land described as a tract surveyed to a particular person passes all within the bound of the survey. It is in fact a conveyance by reference to courses and distances or metes and bounds, which are as operative to define the subject of the grant as if they were included in the deed. Armstrong *v.* Boyd, 3 Penr. & W. (Pa.) 458.

51. *Maine.*— Hathorn *v.* Hinds, 69 Me. 326; Stewart *v.* Davis, 63 Me. 539; Esty *v.* Baker, 50 Me. 325, 79 Am. Dec. 616; Haynes *v.* Young, 36 Me. 557; Crosby *v.* Bradbury, 20 Me. 61.

Massachusetts.— Old South Soc. *v.* Wainwright, 141 Mass. 443, 5 N. E. 843; Treat *v.* Joslyn, 139 Mass. 94, 29 N. E. 653; Stowell *v.* Buswell, 135 Mass. 340; Stone *v.* Stone, 116 Mass. 279; Melvin *v.* Merrimack River Locks, etc., 5 Metc. (Mass.) 15, 38 Am. Dec. 384.

Minnesota.— Austrian *v.* Davidson, 21 Minn. 117.

Missouri.— Grandy *v.* Casey, 93 Mo. 595, 6 S. W. 376.

New Hampshire.— White *v.* Gay, 9 N. H. 126, 31 Am. Dec. 224.

New York.— Griffiths *v.* Morrison, 106 N. Y. 165, 12 N. E. 580; Loomis *v.* Jackson, 19 Johns. (N. Y.) 449.

Texas.— Koenigheim *v.* Miles, 67 Tex. 113, 2 S. W. 81.

Vermont.— Sowles *v.* Butler, 71 Vt. 271, 44 Atl. 355.

Virginia.— Seamonds *v.* McGinnis, 3 Gratt. (Va.) 305.

Wisconsin.— Wilson *v.* Hunter, 14 Wis. 683, 80 Am. Dec. 795.

See 8 Cent. Dig. tit. "Boundaries," § 77.

52. Weller *v.* Barber, 110 Mass. 44; Ide *v.* Pearce, 9 Gray (Mass.) 350; Sawyer *v.* Kendall, 10 Cush. (Mass.) 241. See also Hathorn *v.* Hinds, 69 Me. 326.

A reference is more important where the description is imperfect without the reference, and where it is aided rather than controlled by it. Weller *v.* Barber, 110 Mass. 44.

53. Piper *v.* True, 36 Cal. 606; Chesley *v.* Holmes, 40 Me. 536.

54. *Alabama.*— Hagan *v.* Campbell, 8 Port. (Ala.) 9, 33 Am. Dec. 267.

Illinois.— Miller *v.* Beeler, 25 Ill. 163.

Maine.— Abbott *v.* Abbott, 51 Me. 575.

Maryland.— Norris *v.* Pottee, 4 Harr. & M. (Md.) 508.

Massachusetts.— Adams *v.* Marshall, 138 Mass. 228, 52 Am. Rep. 271.

Missouri.— St. Louis Public Schools *v.* Hammond, 21 Mo. 238.

Texas.— Swisher *v.* Grumbles, 18 Tex. 164.

Vermont.— Morse *v.* Weymouth, 28 Vt. 824.

Wisconsin.— Mariner *v.* Schulte, 13 Wis. 692.

See 8 Cent. Dig. tit. "Boundaries," § 77.

55. Law *v.* Hempstead, 10 Conn. 23; Thompson *v.* Robertson, 9 B. Mon. (Ky.) 383.

56. *California.*— Wade *v.* Deray, 50 Cal. 376.

Kentucky.— Thompson *v.* Robertson, 9 B. Mon. (Ky.) 383.

New Jersey.— Conover *v.* Wardell, 22 N. J. Eq. 492.

South Carolina.— Birchfield *v.* Bonham, 2 Speers (S. C.) 62.

Virginia.— Southall *v.* McKeand, Wythe (Va.) 95.

See 8 Cent. Dig. tit. "Boundaries," § 79.

57. *Alabama.*— Wright *v.* Wright, 34 Ala. 194.

Connecticut.— Law *v.* Hempstead, 10 Conn. 23.

Maine.— Hathorn *v.* Hinds, 69 Me. 326.

(III) *By Name of Tract.* When there are two descriptions in a deed, one of which describes the premises conveyed generally by number or name, and the other giving a particular description by metes and bounds, or courses and distances, which is erroneous, the latter will be rejected.[58]

(IV) *By Reference to Adjoining or Adjacent Lands.* Lands are frequently described by reference to adjoining or adjacent lands and in the absence of other controlling calls[59] a call for adjoiners fixes the boundary so described, which is to be run coincident with, or at the prescribed distance from, the line of adjoiners.[60] In construing such calls, the true line of the adjoiner, irrespective of errors in location, is to be understood as meant.[61] What constitutes the adjoining land called for is a question of construction for the court; its actual location a question of fact for the jury.[62]

Massachusetts.— Whiting *v.* Dewey, 15 Pick. (Mass.) 428.

North Carolina.— Cox *v.* McGowan, 116 N. C. 131, 21 S. E. 108; Proctor *v.* Pool, 15 N. C. 370.

New York.— See Mason *v.* White, 11 Barb. (N. Y.) 173.

See 8 Cent. Dig. tit. "Boundaries," § 79.

58. *California.*—Haley *v.* Amestoy, 44 Cal. 132.

New York.— Case *v.* Dexter, 106 N. Y. 548, 13 N. E. 449; Lush *v.* Druse, 4 Wend. (N. Y.) 313.

Ohio.— See Richardson *v.* Curtiss, 33 Ohio St. 359.

Rhode Island.— Doyle *v.* Mellen, 15 R. I. 523, 8 Atl. 709.

Virginia.— Southall *v.* McKeand, Wythe (Va.) 95.

See 8 Cent. Dig. tit. "Boundaries," § 80.

59. **Relative importance of conflicting calls** see *infra*, II, C.

60. *Iowa.*— Hyatt *v.* Clever, 104 Iowa 338, 73 N. W. 831.

Kentucky.— McCrackin *v.* Steele, 1 Bibb (Ky.) 46; Swearingem *v.* Briscoe, Hughes (Ky.) 91.

Louisiana.— Archinard *v.* Miller, 8 Mart. (La.) 713.

North Carolina.—Dula *v.* McGhee, 34 N. C. 332.

Pennsylvania.— Medara *v.* Du Bois, 187 Pa. St. 431, 41 Atl. 322; Salmon Creek Lumber, etc., Co. *v.* Dusenbury, 110 Pa. St. 446, 1 Atl. 635; Northumberland Coal Co. *v.* Clement, 95 Pa. St. 126; Bellas *v.* Cleaver, 40 Pa. St. 260; Mathers *v.* Hegarty, 37 Pa. St. 64; Ormsby *v.* Ihmsen, 34 Pa. St. 462; Lambourn *v.* Hartswick, 13 Serg. & R. (Pa.) 113.

South Carolina.— Connor *v.* Johnson, 53 S. C. 90, 30 S. E. 833; Bond *v.* Quattlebaum, 1 McCord (S. C.) 584, 10 Am. Dec. 702.

Texas.— See Koch *v.* Poerner, (Tex. Civ. App. 1900) 55 S. W. 386; Burnett *v.* Gault, (Tex. Civ. App. 1899) 54 S. W. 268.

See 8 Cent. Dig. tit. "Boundaries," § 92.

Necessity of locating line of older grant.— Where there is a call for the line of an older grant, the rule is that before the call may be ascertained the line of the older grant must be located. Dula *v.* McGhee, 34 N. C. 332.

Necessity of proving return of older survey.— When a surveyor in his return calls for an old survey the owner need not prove that the latter was returned, as it is immaterial whether it was returned, why it was not returned, or even why it was abandoned. The only question was whether there was *de facto* such a boundary as might be referred to. Lambourn *v.* Hartswick, 13 Serg. & R. (Pa.) 113.

61. *California.*— Umbarger *v.* Chaboya, 49 Cal. 525.

Kentucky.— Sinclair *v.* Singleton, Hughes (Ky.) 176.

Maine.—White *v.* Jones, 67 Me. 20; Faught *v.* Holway, 50 Me. 24.

Massachusetts.—Sanborn *v.* Rice, 129 Mass. 387; Sparhawk *v.* Bagg, 16 Gray (Mass.) 583; Cleaveland *v.* Flagg, 4 Cush. (Mass.) 76; Cornell *v.* Jackson, 3 Cush. (Mass.) 506, 9 Metc. (Mass.) 150; Sparhawk *v.* Bullard, 1 Metc. (Mass.) 95; Crosby *v.* Parker, 4 Mass. 110.

Missouri.— Manter *v.* Picot, 33 Mo. 490.

New York.— Northrop *v.* Sumney, 27 Barb. (N. Y.) 196. See also Cornes *v.* Minot, 42 Barb. (N. Y.) 60.

Ohio.— Galloway *v.* Brown, 16 Ohio 428.

Pennsylvania.— Fisher *v.* Kaufman, 170 Pa. St. 444, 33 Atl. 137.

Texas.— Davidson *v.* Killen, 68 Tex. 406, 4 S. W. 561; Bennett *v.* Latham, 18 Tex. Civ. App. 403, 45 S. W. 934; Waggoner *v.* Daniels, (Tex. Civ. App. 1898) 44 S. W. 946.

See 8 Cent. Dig. tit. "Boundaries," § 93.

62. *Kentucky.*— Weathers *v.* Helm, 1 A. K. Marsh. (Ky.) 145; Smith *v.* Walton, 3 Bibb (Ky.) 152.

Maine.— Jewett *v.* Hussey, 70 Me. 433.

Massachusetts.— Eddy *v.* Chace, 140 Mass. 471, 5 N. E. 306; Crosby *v.* Parker, 4 Mass. 110.

New York.— Mason *v.* White, 11 Barb. (N. Y.) 173.

Ohio.— Nash *v.* Atherton, 10 Ohio 163.

Pennsylvania.— Bellas *v.* Cleaver, 40 Pa. St. 260.

Rhode Island.— Segar *v.* Babcock, 18 R. I. 203, 26 Atl. 257.

South Carolina.— Kirkland *v.* Way, 3 Rich. (S. C.) 4, 45 Am. Dec. 752; Peay *v.* Briggs, 2 Mill Const. (S. C.) 98, 12 Am. Dec. 656.

(v) *By Reference to Description in Other Grant or Conveyance.* When land is described in a grant or conveyance by reference to another grant or conveyance, the description contained in the latter is regarded as adopted by and incorporated into the former, and the land therein described will pass.[63] The reference, however, must be definite and specific in order to control a specific description which, in itself, is plain and unequivocal.[64]

b. Reservations and Exceptions. Reservations and exceptions from land granted or conveyed are governed by the same rules as govern the boundaries of lands granted or conveyed.[65] Mere uncertainty of the exclusions from the

Texas.— Moore *v.* McCown, (Tex. Civ. App. 1892) 20 S. W. 1112.

See 8 Cent. Dig. tit. "Boundaries," § 94.

An entry to adjoin certain persons by name is tantamount to a call to adjoin the lands of such persons. In such cases the lands granted, and not the entries, are to be adjoined. McCrackin *v.* Steele, 1 Bibb (Ky.) 46.

Former ownership satisfies call for present ownership.— Where a deed describing premises conveyed bounds them on one side by lands mentioned as owned by another person, speaking in the present tense, when in fact at the date of the deed there is no land owned by such person in that place, the land recently owned by him will be intended and the deed should receive this construction *ut res magis valeat quam pereat.* Mason *v.* White, 11 Barb. (N. Y.) 173.

Whether lands owned or occupied intended. — In Crosby *v.* Parker, 4 Mass. 110, land was described in a conveyance as being bounded by B's land. B owned at the time a piece of land, and had contracted to purchase another piece adjoining, which he occupied as his own, but had received no conveyance at the time of the conveyance to plaintiff, although he had paid the price for it. It was held that plaintiff's land was bounded by the land owned by B and not by that occupied by him. See also Jewett *v.* Hussey, 70 Me. 433; Cleaveland *v.* Flagg, 4 Cush. (Mass.) 76; Segar *v.* Babcock, 18 R. I. 203, 26 Atl. 257.

63. *California.*— Vance *v.* Fore, 24 Cal. 435.

Massachusetts.— Langmaid *v.* Higgins, 129 Mass. 353; Perry *v.* Binney, 103 Mass. 156; Allen *v.* Taft, 6 Gray (Mass.) 552; Jenks *v.* Ward, 4 Metc. (Mass.) 404; Foss *v.* Crisp, 20 Pick. (Mass.) 121; Allen *v.* Bates, 6 Pick. (Mass.) 460; Boylston *v.* Carver, 11 Mass. 515.

Missouri.— McCune *v.* Hull, 24 Mo. 570.

New Jersey.— Wuesthoff *v.* Seymour, 22 N. J. Eq. 66.

Rhode Island.— Waterman *v.* Andrew, 14 R. I. 589.

Tennessee.— See Dyer *v.* Yates, 1 Coldw. (Tenn.) 135, where it was held that when calls of a deed of land conform to those of the original grant of the land, the deed will pass the land included in the calls given in the survey and entry.

Texas.— Hunter *v.* Morse, 49 Tex. 219.

Vermont.— Lippett *v.* Kelley, 46 Vt. 516.

See 8 Cent. Dig. tit. "Boundaries," § 78.

The description in a former deed repeated in terms in a later one retains the same meaning in the later deed which it had in the former. Wilson *v.* Underhill, 108 Mass. 360.

64. Brunswick Sav. Inst. *v.* Crossman, 76 Me. 577; Lovejoy *v.* Lovett, 124 Mass. 270; Needham *v.* Judson, 101 Mass. 155; Melvin *v.* Merrimack River Locks, etc., 5 Metc. (Mass.) 15, 38 Am. Dec. 384; Thatcher *v.* Howland, 2 Metc. (Mass.) 41; Whiting *v.* Dewey, 15 Pick. (Mass.) 428; Steiner *v.* Baughman, 12 Pa. St. 106; Whitehill *v.* Gotwalt, 3 Penr. & W. (Pa.) 313.

A particular description in a later deed will not be controlled by a general reference to a former deed containing a different and more restricted description. Ide *v.* Pearce, 9 Gray (Mass.) 350; Whiting *v.* Dewey, 15 Pick. (Mass.) 428; Howell *v.* Saule, 5 Mason (U. S.) 410, 12 Fed. Cas. No. 6,782.

Control of courses and distances.— Where a deed describes the land by courses and distances, as given in a resurvey, and further as that tract which had passed to him by a chain of conveyances, the covenant of warranty extends to the entire quantity included by the courses and distances, although variant from the lines of the original survey actually marked out. Steiner *v.* Baughman, 12 Pa. St. 106.

Not necessarily conclusive.— A statement in a deed that the granted premises are the same that were conveyed to the grantor by a certain deed is not necessarily conclusive that the grantor intended to convey the whole of the premises to which he acquired title by the deed referred to, where the subsequent deed shows, with reasonable certainty, by a particular description of metes and bounds, that he intended to convey a smaller lot. Lovejoy *v.* Lovett, 124 Mass. 270.

65. *California.*— Martin *v.* Lloyd, 94 Cal. 195, 29 Pac. 491.

Kentucky.— Howe *v.* Saddler, 15 Ky. L. Rep. 765, 25 S. W. 277.

Maine.— Foster *v.* Foss, 77 Me. 279.

Massachusetts.— Cronin *v.* Richardson, 8 Allen (Mass.) 423.

New Hampshire.— Andrews *v.* Todd, 50 N. H. 565.

New York.— Thayer *v.* Finton, 108 N. Y. 394, 15 N. E. 615.

See 8 Cent. Dig. tit. "Boundaries," § 83.

boundary granted will not avoid a patent, where the outside lines are fixed and certain by courses, distances, and natural objects.[66]

c. Quantity Called For — (i) *In General.* Where an intention is clearly shown to grant or convey a specifically designated quantity of land, the boundaries will be so located, if possible, as to contain the quantity called for;[67] but mere proof of an overplus of land is not sufficient to change boundaries that are marked by monuments.[68]

(ii) *In Government Surveys.* In ascertaining the boundaries of land sold under government surveys, the sections and their subdivisions are to be considered as containing the exact quantity expressed in the returns of the surveyors, whatever may be the actual quantity contained in such sections or subdivisions.[69]

d. Location of Land — (i) *In General.* Location of land is a question of evidence and cannot be reduced to fixed and definite rules. A correct location consists in the application of any one or all of the rules of construction to the particular case; and when they lead to contrary results, that must be adopted which is most consistent with the intention apparent on the face of the grant or conveyance, to give effect to which the agreed-on line therein described may be corrected so as to correspond with the fact.[70]

66. West *v.* Chamberlain, 22 Ky. L. Rep. 687, 58 S. W. 584.

67. *California.*— Cox *v.* Hayes, 64 Cal. 32, 27 Pac. 785.

Louisiana.— Bourgeat *v.* Bourgeat, 12 La. 139; Henderson *v.* St. Charles' Church, 7 Mart. N. S. (La.) 117; Bourguignon *v.* Boudousquie, 6 Mart. N. S. (La.) 697; Williams *v.* Hall, 9 Mart. (La.) 80.

Maine.— Patterson *v.* Trask, 30 Me. 28, 50 Am. Dec. 610; Purinton *v.* Sedgley, 4 Me. 283. *Compare* Pierce *v.* Faunce, 37 Me. 63.

New York.— Moore *v.* Jackson, 4 Wend. (N. Y.) 58.

Ohio.— Hubbard *v.* Carman, 4 Ohio Dec. (Reprint) 44, Clev. L. Rec. (Ohio) 57.

Rhode Island.— Waterman *v.* Andrews, 14 R. I. 589.

South Carolina.— Dyson *v.* Leek, 2 Rich. (S. C.) 543.

Texas.— Henry *v.* Whitaker, 82 Tex. 5, 17 S. W. 509; Johnson *v.* Garrett, 25 Tex. Suppl. 13.

Virginia.— Richards *v.* Mercer, 1 Leigh (Va.) 125. *Compare* Seamonds *v.* McGinnis, 3 Gratt. (Va.) 305.

United States.—Croghan *v.* Nelson, 3 How. (U. S.) 187, 11 L. ed. 554.

See also *infra*, II, C, 10; and 8 Cent. Dig. tit. "Boundaries," § 84.

Estimated quantity.— In Pierce *v.* Faunce, 37 Me. 63, one deed in a chain of title described the land as a tract "containing sixty-seven acres, more or less, and being on the north side of" a certain lot. A subsequent deed described the land as "containing twenty-five acres, more or less," and as being the same land conveyed by the former deed. The lot itself contained sixty-seven acres, and it was held that the latter deed conveyed the whole lot, the number of acres mentioned being regarded as an estimate of the quantity merely rather than a designation of the extent of the tract conveyed.

"More or less."— A description in a deed of the quantity of the land conveyed as so many acres, "more or less," is not conclusive as to the exact quantity of land in the tract conveyed. Hodges *v.* Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87.

68. Brudin *v.* Onglis, 121 Mich. 410, 80 N. W. 115.

69. *Alabama.*— Stein *v.* Ashby, 24 Ala. 521.

Mississippi.—Fulton *v.* Doe, 5 How. (Miss.) 751.

Missouri.— Campbell *v.* Clark, 8 Mo. 553.

Ohio.— June *v.* Purcell, 36 Ohio St. 396.

Wisconsin.— Prentiss *v.* Brewer, 17 Wis. 635, 86 Am. Dec. 730.

See 8 Cent. Dig. tit. "Boundaries," § 85.

70. Grover *v.* Drummond, 25 Me. 185; Clement *v.* Northumberland Coal Co., 87 Pa. St. 291; Lewellen *v.* Gardner, 13 Rich. (S. C.) 242; Norwood *v.* Byrd, 1 Rich. (S. C.) 135, 42 Am. Dec. 406; Colclough *v.* Richardson, 1 McCord (S. C.) 167; Coats *v.* Mathews, 2 Nott & M. (S. C.) 99.

Insufficient description.— In Andrews *v.* Todd, 50 N. H. 565, a deed conveyed premises, "reserving about three fourths of an acre of land in and about the graveyard on said premises, as now staked out." No graveyard was ever actually staked out on the premises, but at the date of the deed there was a graveyard on the farm about four rods square, inclosed by stone posts and chains, and it was held that the three fourths of an acre could not be located in a square form about the small graveyard, because the words, "as now staked out," constituted a material part of the description which the court could not reject.

Where land is conveyed to be afterward located within specified bounds, the first rightful location determines its bounds forever. Farrar *v.* Cooper, 34 Me. 394. See also Hall *v.* Pickering, 40 Me. 548.

(II) *Public Land* — (A) *In General.* In locating public lands the same general rules apply as in the location of other lands.[71]

(B) *Locating as Blocks.* In Pennsylvania, where several tracts are surveyed at the same time, by the same surveyor, under warrants of the same date, and are returned into the land-office as one body, the surveys are not to be treated as separate and individual, nor can each tract be located independently of the rest by its own individual lines or calls, or courses and distances, but such surveys are to be located together as a block or large tract.[72]

(III) *Surveying in Square.* Where there are no calls to control a rectangular figure, that form, if possible a square, must be given a survey.[73]

5. Lines — a. In General — (I) *Manner of Locating* — (A) *In General.* In locating boundary lines a line actually marked must be adhered to, although it

71. Greenup *v.* Coburn, Hughes (Ky.) 200; Sinclair *v.* Singleton, Hughes (Ky.) 176; Swearingen *v.* Higgins, Hughes (Ky.) 7; Kirkpatrick *v.* Kyger, 1 Harr. & J. (Md.) 298; Van Gorden *v.* Jackson, 5 Johns. (N. Y.) 440; McIver *v.* Walker, 9 Cranch (U. S.) 173, 3 L. ed. 694.

The patent does not locate the tract, but it defines how much land the tract is to contain when it is located. Hagerty *v.* Mathers, 31 Pa. St. 348.

Lines returned into the land-office determine the location only where no adjoining survey and no natural monument is called for by the younger, and no lines can be found upon the ground. Quinn *v.* Heart, 43 Pa. St. 337.

Lines run and marked on the ground are the true survey, and when they can be found, will control the calls for a fixed boundary, and establish the survey. Packer *v.* Schrader Min., etc., Co., 97 Pa. St. 379; Malone *v.* Sallada, 48 Pa. St. 419; Quinn *v.* Heart, 43 Pa. St. 337.

Where a younger survey calls for an elder, and no division line is found to have been marked on the ground for the younger when it was surveyed, it may be located according to its calls, instead of its official lines. Malone *v.* Sallada, 48 Pa. St. 419; Quinn *v.* Heart, 43 Pa. St. 337. See also Packer *v.* Schrader Min., etc., Co., 97 Pa. St. 379.

72. Christ *v.* Thompson, (Pa. 1886) 4 Atl. 8; Northumberland Coal Co. *v.* Clement, 95 Pa. St. 126; Boynton *v.* Urian, 55 Pa. St. 142; Mathers *v.* Hagerty, 37 Pa. St. 64; Fox *v.* Lyon, 33 Pa. St. 474; Hagerty *v.* Mathers, 31 Pa. St. 348; Clement *v.* Packer, 125 U. S. 309, 8 S. Ct. 907, 31 L. ed. 721. And see Ferguson *v.* Bloom, 144 Pa. St. 549, 23 Atl. 49.

Control of leading warrant.— The location of a series of land warrants surveyed on the same day is determined by courses and distances from the leading warrant, where no lines are to be found on the ground, and there is no call for the line fixed for the boundary of an adjoining warrant. Boynton *v.* Urian, 55 Pa. St. 142.

If the lines and corners can be found on the ground, they fix the location of the block, even to the disregard of a call for adjoiners, since they apply to each and every tract of the block as much as they do to the particular tract to which they are joined. Clement *v.* Packer, 125 U. S. 309, 8 S. Ct. 907, 31 L. ed. 721.

73. *Georgia.*— Ray *v.* Pease, 95 Ga. 153, 22 S. E. 190.

Iowa.— Morris *v.* Stuart, 1 Greene (Iowa) 375, holding that, where a given number of acres are sold off of one side of a quarter section of land, the premises should be surveyed into an oblong square, and that if sold out of a corner of a quarter section they should be surveyed into a square.

Kentucky.— Stevens *v.* Terrel, 3 T. B. Mon. (Ky.) 131; Reid *v.* Corbin, 2 A. K. Marsh. (Ky.) 185; Smith *v.* Norvel, 2 A. K. Marsh. (Ky.) 161; Smith *v.* Reed, 1 A. K. Marsh. (Ky.) 259; Zachary *v.* Brown, 3 Bibb (Ky.) 139; Webb *v.* Bedford, 2 Bibb (Ky.) 354; Lockheart *v.* Trabue, 2 Bibb (Ky.) 249; Kincaid *v.* Taylor, 2 Bibb (Ky.) 122; Black *v.* Botts, 1 Bibb (Ky.) 95; Calk *v.* Hart, Hard. (Ky.) 432; Bradford *v.* McClelland, Hughes (Ky.) 195; Sinclair *v.* Singleton, Hughes (Ky.) 176; Bryan *v.* Bradford, Hughes (Ky.) 108; Frye *v.* Essry, Hughes (Ky.) 103; Miller *v.* Fox, Hughes (Ky.) 100; Walker *v.* Orr, Hughes (Ky.) 38; Smith *v.* Grimes, Hughes (Ky.) 35. *Compare* Handley *v.* Young, 4 Bibb (Ky.) 376, holding that, where an act required surveys to be made "as nearly in a square as the interfering claims will admit," if there were interfering claims, although neither valid nor of record, it was sufficient to justify a departure from a square in making the survey.

Louisiana.— See Williamson *v.* Hymel, 11 La. 182; Curtis *v.* Muse, 7 Mart. (La.) 234.

New Hampshire.— See Andrews *v.* Todd, 50 N. H. 565.

New York.— Jackson *v.* Vickory, 1 Wend. (N. Y.) 406, 19 Am. Dec. 522.

North Carolina.— State *v.* King, 20 N. C. 543.

Ohio.— Walsh *v.* Ringer, 2 Ohio 327, 15 Am. Dec. 555.

South Carolina.— Colclough *v.* Richardson, 1 McCord (S. C.) 167.

Tennessee.— Hodge *v.* Blanton, 1 Head (Tenn.) 560; Sappington *v.* Hill, 4 Hayw. (Tenn.) 120.

Wisconsin.— Hartung *v.* Witte, 59 Wis. 285, 18 N. W. 175.

varies from the course called for, and is not a right line from corner to corner.[74] Lines not run and marked must be ascertained by course and distance,[75] unless these are controlled by natural or artificial monuments.[76] In all cases the real question is, where the line was in fact located, not where it ought to have been located,[77] and in determining this resort may be had to every kind of evidence to which it is competent to have recourse in proving any question of fact.[78] Manifest intention as shown by the grant or conveyance, and by the circumstances surrounding the transaction is a controlling factor.[79]

(B) *By Reference to Adjoiners.* Where the lines of a survey are not marked on the ground, and cannot be located by its own calls and field-notes, they may be established by adjacent surveys referred to in its field-notes.[80]

United States.— Holmes *v.* Trout, 7 Pet. (U. S.) 171, 8 L. ed. 647; Shipp *v.* Miller, 2 Wheat. (U. S.) 316, 4 L. ed. 248; Massie *v.* Watts, 6 Cranch (U. S.) 148, 3 L. ed. 181.

See 8 Cent. Dig. tit. "Boundaries," § 89.

An express call, to extend "up the creek on both sides for quantity," must, owing to the peculiar curves of the creek, control the general rule of surveying entries in a square. Reid *v.* Corbin, 2 A. K. Marsh. (Ky.) 185.

74. George *v.* Thomas, 16 Tex. 74, 67 Am. Dec. 612, where it was held that if the line cannot be traced in its whole extent still it is to be observed, and cannot be departed from where it can be found and traced, especially after long-continued occupancy in reference to it.

Adopted lines.— Where a surveyor does not run on the ground some of the lines of the survey when he makes the location, but adopts lines run by a former surveyor, such lines must be followed as if he actually ran them on the ground. Lester *v.* Hays, 14 Tex. Civ. App. 643, 38 S. W. 52.

75. *Missouri.*—Schuster *v.* Myers, 148 Mo. 422, 50 S. W. 103.

New Hampshire.—Kenniston *v.* Hannaford, 55 N. H. 268.

North Carolina.— Gaylord *v.* Gaylord, 48 N. C. 367.

Pennsylvania.— Warfel *v.* Knott, 128 Pa. St. 528, 24 Wkly. Notes Cas. (Pa.) 513, 18 Atl. 390.

Texas.— Bullard *v.* Watkins, (Tex. Civ. App. 1900) 58 S. W. 205.

Vermont.— Brooks *v.* Tyler, 2 Vt. 348.

United States.— McEwen *v.* Den, 24 How. (U. S.) 242, 16 L. ed. 672; McIver *v.* Walker, 9 Cranch (U. S.) 173, 3 L. ed. 694.

See 8 Cent. Dig. tit. "Boundaries," § 66.

Sufficiency of description.— A right angle, erected at a given point upon a given line, certainly locates a line with mathematical precision, the only condition being that the line adopted as a base shall be precisely located. Kenniston *v.* Hannaford, 55 N. H. 268.

76. Martin *v.* Cooper, 87 Cal. 97, 25 Pac. 262; Hovey *v.* Sawyer, 5 Allen (Mass.) 554; Allen *v.* Kingsbury, 16 Pick. (Mass.) 235; Gove *v.* White, 20 Wis. 425. See also Smith *v.* Dean, 15 Nebr. 432, 19 N. W. 642.

Control of intermediate monument.— Where a boundary line is described as beginning at a post and running "thence southerly in as straight a line as possible over the highest part of said hill, to a large white pine tree," the method of ascertaining the boundary is to run a straight line from the post to the highest part of the hill, and another straight line from the highest part of the hill to the tree. Hovey *v.* Sawyer, 5 Allen (Mass.) 554.

77. Evans *v.* Foster, 79 Tex. 48, 15 S. W. 170. See also Rice *v.* McKune, 63 Cal. 124.

Control of actual location.— Where the calls of the field-notes of the title papers under which both parties claim begin at the corner of a certain survey, and plaintiff's title papers locate that corner at a rock set in the ground, which is there at the time of trial, but the survey made by order of court shows that this rock is not at the place where the calls in the original survey would place it, the line is not to be determined by the recent survey, or by the course and distance of the original survey, but it is to be located by the jury where it appears from the evidence to have been actually located originally. Evans *v.* Foster, 79 Tex. 48, 15 S. W. 170.

78. Scott *v.* Yard, 46 N. J. Eq. 79, 18 Atl. 359. See also Hitchcock *v.* Southern Iron, etc., Co., (Tenn. Ch. 1896) 38 S. W. 588.

79. *Maine.*—Perkins *v.* Aldrich, 77 Me. 96.

Massachusetts.—Gerrish *v.* Gary, 120 Mass. 132.

New Hampshire.— Heywood *v.* Wild River Lumber Co., 70 N. H. 24, 47 Atl. 294.

New Jersey.— Huffman *v.* Hummer, 18 N. J. Eq. 83.

New York.— Hoff *v.* Tobey, 66 Barb. (N. Y.) 347; Breen *v.* Stone, 5 N. Y. Suppl. 5, 25 N. Y. St. 1012.

Tennessee.— Hodge *v.* Blanton, 1 Head (Tenn.) 560.

Texas.— Lincoln *v.* Waddell, (Tex. Civ. App. 1900) 59 S. W. 613.

Wisconsin.— Coats *v.* Taft, 12 Wis. 388.

Presumption of intention.— Where lines are to be run at a certain distance from a rectangular building, and there is nothing in the deed or situation of the land to indicate the contrary, it is fair to presume that the parties intended that the exterior lines should be run so as to correspond with the lines of the building. Perkins *v.* Aldrich, 77 Me. 96. See also Hodge *v.* Blanton, 1 Head (Tenn.) 560.

80. *Kentucky.*— See Whiting *v.* Taylor, 8 Dana (Ky.) 403.

(c) *Running to Include Quantity.* While calls for quantity are merely descriptive, and yield to all other calls,[81] yet such calls may be made locative and controlling, as where there is a call for a line, or lines, to run so as to include the quantity called for. In such a case the line, or lines, must be located in such a manner as to include the specified quantity as nearly as possible, in the absence of other controlling calls.[82]

(II) *Identification*— (A) *In General.* Lines actually run and surveyed, when located, constitute the true lines of a survey;[83] but in the absence of monu-

Maine.— Jewett *v.* Hussey, 70 Me. 433; Alden *v.* Noonen, 32 Me. 113.

Maryland.— Mitchell *v.* Mitchell, 8 Gill (Md.) 98, where it was held that one may locate a boundary by proof of the location of a particular boundary of an adjacent tract, without locating all the latter's boundaries. See also Houck *v.* Loveall, 8 Md. 63.

New Jersey.— See Rieglesville Delaware Bridge Co. *v.* Bloom, 48 N. J. L. 368, 7 Atl. 478.

New York.— Jackson *v.* Vickory, 1 Wend. (N. Y.) 406, 19 Am. Dec. 522.

Pennsylvania.— Smith *v.* Horn, 168 Pa. St. 372, 31 Atl. 1078; Boynton *v.* Urian, 55 Pa. St. 142; Malone *v.* Sallada, 48 Pa. St. 419; Dreer *v.* Carskadden, 48 Pa. St. 38.

Texas.— Kuechler *v.* Wilson, 82 Tex. 638, 18 S. W. 317; Longoria *v.* Shaeffer, 77 Tex. 547, 14 S. W. 160.

Compare Quick *v.* Nitschelm, 139 Ill. 251, 28 N. E. 926. And see Fuller *v.* Worth, 91 Wis. 406, 64 N. W. 995, where it was held that evidence that a fence is in line with fences on adjoining farms is inadmissible to show that it is on the true boundary line between two adjacent farms.

See 8 Cent. Dig. tit. "Boundaries," § 67.

Any of the marks of an older survey may be appealed to in fixing the location of a younger one, and it is the duty of the surveyors under younger warrants to adopt such ancient marks rather than establish new ones. Dreer *v.* Carskadden, 48 Pa. St. 38.

Where a series of land warrants were surveyed on the same day, the external boundary line of the warrant furthest from the first or leading warrant must be determined by beginning from such leading warrant and measuring therefrom the distance of each succeeding warrant in consecutive order unless such boundary line is fixed by a line on the ground as the boundary of the warrant, or as the boundary of another prior warrant adjoining thereto. Boynton *v.* Urian, 55 Pa. St. 142.

81. See *infra*, II, C.

82. *California.*— Hostetter *v.* Los Angeles Terminal R. Co., 108 Cal. 38, 41 Pac. 330.

Kentucky.— Landrum *v.* Hite, 1 A. K. Marsh. (Ky.) 419; Young *v.* Wither, 4 Bibb (Ky.) 160; Calk *v.* Stribling, 1 Bibb (Ky.) 122; Bush *v.* Todd, 1 Bibb (Ky.) 64.

Maine.— Dunn *v.* Hayes, 21 Me. 76.

North Carolina.— Long *v.* Long, 73 N. C. 370.

Texas.— Lenon *v.* Walker, 2 Tex. Unrep. Cas. 568.

United States.— Glen Mfg. Co. *v.* Weston Lumber Co., 80 Fed. 242; U. S. *v.* Central Pac. R. Co., 26 Fed. 479; Jones *v.* Martin, 13 Sawy. (U. S.) 314, 35 Fed. 348.

See 8 Cent. Dig. tit. "Boundaries," § 68.

Where three sides and the number of acres are known, and it is disputed whether the fourth side is a straight or meandering line, the straight line will be adopted, when the tract thus inclosed contains the number of acres called for, and when the acreage would be largely increased if the meandering line were adopted. Hostetter *v.* Los Angeles Terminal R. Co., 108 Cal. 38, 41 Pac. 330. See also U. S. *v.* Central Pac. R. Co., 26 Fed. 479.

83. *Alabama.*— Taylor *v.* Fomby, 116 Ala. 621, 22 So. 910, 67 Am. St. Rep. 149.

Kentucky.— Dimmitt *v.* Lashbrook, 2 Dana (Ky.) 1; Bodley *v.* Hernden, 3 A. K. Marsh. (Ky.) 21; Ross *v.* Veech, 22 Ky. L. Rep. 578, 58 S. W. 475. See also Ralston *v.* McClurg, 9 Dana (Ky.) 338, where the closing line as described by the surveyor, but not actually surveyed, was rejected and the line fixed by the courses and distances of the patent.

Mississippi.— Bonney *v.* McLeod, 38 Miss. 393.

New Hampshire.— Hall *v.* Davis, 36 N. H. 569.

North Carolina.— Deaver *v.* Jones, 119 N. C. 598, 26 S. E. 156; Blount *v.* Benbury, 3 N. C. 542.

Pennsylvania.— Norris *v.* Hamilton, 7 Watts (Pa.) 91. *Compare* Rifener *v.* Bowman, 53 Pa. St. 313, where it was held that where the courses and distances in deeds from a father to his children make an equal division of the land, and the lines as run on the ground do not, the jury is justified in presuming that the lines first run were rejected and those mentioned in the deed adopted. See also Mineral R., etc., Co. *v.* Auten, 188 Pa. St. 568, 43 Wkly. Notes Cas. (Pa.) 158, 41 Atl. 327.

Texas.— Allen *v.* Koepsel, 77 Tex. 505, 14 S. W. 151; Duff *v.* Moore, 68 Tex. 270, 4 S. W. 530; Bartlett *v.* Hubert, 21 Tex. 8.

See 8 Cent. Dig. tit. "Boundaries," § 71.

Lines established by government survey are conclusively correct.

Alabama.— Lewen *v.* Smith, 7 Port. (Ala.) 428.

California.— Hubbard *v.* Dusy, 80 Cal. 281, 22 Pac. 214.

Missouri.—Goltermann *v.* Schiermeyer, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161.

ments and marks, or in case of repugnancy between them, the determination of what are the true lines called for in an entry, grant, or conveyance is a pure question of construction, dependent upon the intention of the parties, as shown by the instrument and the circumstances of the transaction.[84]

(B) *Relocation of Lost Line.* The rules as to the reëstablishment of lost corners[85] apply to the relocation of lost lines. Visible and actual landmarks are to be preferred, but if they cannot be ascertained, resort must be then had to the courses and distances,[86] from which no departure should be made, except in cases of necessity, when distances will, as a rule, yield to courses.[87] In running these latter, allowance must be made for magnetic variation from the true meridian.[88]

b. Closing Line. Generally a survey is to be carried to its calls, unless there

Ohio.— Bayless *v.* Rupert, Wright (Ohio) 634; Hunt *v.* McHenry, Wright (Ohio) 599.

Oregon.— Goodman *v.* Myrick, 5 Oreg. 65.

Pennsylvania.— See Quinn *v.* Heart, 43 Pa. St. 337, where it was held that the lines returned into the land-office determined the location only where no adjoining survey and no natural monument is called for by the younger survey, and no lines can be found on the ground.

Wisconsin.— Neff *v.* Paddock, 26 Wis. 546.

United States.— See Garcia *v.* Lee, 12 Pet. (U. S.) 511, 9 L. ed. 1176.

See 8 Cent. Dig. tit. "Boundaries," § 72.

84. *California.*— Wise *v.* Burton, 73 Cal. 166, 14 Pac. 678; Chapman *v.* Excelsior Canal Co., 17 Cal. 231; De Rutte *v.* Muldrow, 16 Cal. 505.

Indiana.— Hunt *v.* Francis, 5 Ind. 302.

Iowa.— Russell *v.* Lode, 1 Greene (Iowa) 566.

Kentucky.— Harkleroads *v.* Trosper, 18 Ky. L. Rep. 4, 35 S. W. 116; Wheeler *v.* Cist, 17 Ky. L. Rep. 1424, 21 S. W. 1052; Elliott *v.* Gibson, 16 Ky. L. Rep. 708, 29 S. W. 620.

Maine.— Grant *v.* Black, 53 Me. 373; Eaton *v.* Knapp, 29 Me. 120.

Massachusetts.— Lovejoy *v.* Lovett, 124 Mass. 270; Cook *v.* Babcock, 7 Cush. (Mass.) 526.

New Hampshire.— Hanson *v.* Russel, 28 N. H. 111; Marsh *v.* Marshall, 19 N. H. 301, 49 Am. Dec. 156.

New Jersey.— De Veney *v.* Gallagher, 20 N. J. Eq. 33.

North Carolina.— Pender *v.* Coor, 1 N. C. 140.

Oregon.— Hale *v.* Cottle, 21 Oreg. 580, 28 Pac. 901.

Tennessee.— McAdoo *v.* Sublett, 1 Humphr. (Tenn.) 105; Polk *v.* Gentry, 1 Overt. (Tenn.) 269; Duffield *v.* Spence, (Tenn. Ch. 1897) 51 S. W. 492.

Texas.— Ayers *v.* Lancaster, 64 Tex. 305; Ayers *v.* Harris, 64 Tex. 296.

Vermont.— Fullam *v.* Foster, 68 Vt. 590, 35 Atl. 484.

Virginia.— Hunter *v.* Hume, 88 Va. 24, 13 S. E. 305, 15 Va. L. J. 490.

See 8 Cent. Dig. tit. "Boundaries," § 70.

Control of line first run.— In tracing a survey controlling importance need not be given to the line first run. Ayers *v.* Harris, 64 Tex. 296. See also *supra*, II, B, 3, a, (III).

Call for subsequently established line.— A conveyed land to B, describing it as bounded "north, on the line of said Blandford." The line of the town of Blandford was subsequently established by act of the legislature, after which B conveyed to C by a similar description, and the line so established was held to be the northern boundary of the land included in the deed from B to C. Cook *v.* Babcock, 7 Cush. (Mass.) 526.

Line of street.— Where a deed calls for the line of a street as the monument, the line of the street as it is opened and built upon will be held to be the line intended. De Veney *v.* Gallagher, 20 N. J. Eq. 33.

Presumption from coincident surveys.— In an action of ejectment, where the question is the boundary line between two ranches, there having been two surveys starting from points directly opposite, the distance between the calls, the monuments, and length of the lines run being exactly the same, the presumption will be conclusive that both surveys are of the same line, and that it is the true boundary line. Wise *v.* Burton, 73 Cal. 166, 14 Pac. 678.

Where there are two boundary lines known by the same name, and a deed calls for "McCulloch's corner, a red oak," and such corner and oak stood in one of such lines, that line will be considered as designated by the call. McAdoo *v.* Sublett, 1 Humphr. (Tenn.) 105. So, too, an owner of private property may show that the line of his grant is a different line from the jurisdictional line established between two towns, although both are designated by the same name. Hanson *v.* Russel, 28 N. H. 111.

Where there are two objects or lines answering the calls of a deed, and it appears that the grantor owns up to the first, but does not own the space between the two, that which the call first meets is the boundary. Hunt *v.* Francis, 5 Ind. 302.

85. See *supra*, II, B, 2, a, (II), (B).

86. Bryan *v.* Beckley, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276.

87. Bryan *v.* Beckley, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276; Beckley *v.* Bryan, Ky. Dec. 91. See also *infra*, II, C, 9, a.

88. Bryan *v.* Beckley, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276; Bodley *v.* Hernden, 3

be actual lines on the ground excluding them, when such lines, constituting the survey, will control the calls; but when there are no natural monuments or lines called for, by which the closing line is to be fixed and ascertained, and no line on the ground, the survey is to be closed by a direct line between the termini of the lines on the ground, or as fixed by the courses and distances returned to ascertain these termini.[89]

c. Of Riparian or Littoral Holdings. Lines of flats or of the shore or bed of a watercourse are located by running them at the required angle from the upland to the utmost limit of the land granted or conveyed, whether that limit be low-water mark or the thread of the stream.[90]

A. K. Marsh. (Ky.) 21; Beckley *v.* Bryan, Ky. Dec. 91; Sevier *v.* Wilson, Peck (Tenn.) 146, 14 Am. Dec. 741.

A magnetic line adopted by a survey is the true line and is independent of the true meridian and of subsequent variation in the magnetic meridian. Bodley *v.* Hernden, 3 A. K. Marsh. (Ky.) 21. See also Vance *v.* Marshall, 3 Bibb (Ky.) 148.

89. Wharton *v.* Garvin, 34 Pa. St. 340; Eubanks *v.* Harris, 1 Speers (S. C.) 183; Walsh *v.* Holmes, 1 Hill (S. C.) 12; Welch *v.* Phillips, 1 McCord (S. C.) 215; Colclough *v.* Richardson, 1 McCord (S. C.) 167; Coats *v.* Mathews, 2 Nott & M. (S. C.) 99; Ruffner *v.* Hill, 31 W. Va. 428, 7 S. E. 13; McEwen *v.* Den, 24 How. (U. S.) 242, 16 L. ed. 672.

As between two points from which a survey may be closed without violating any principle of location, that is to be adopted which is most favorable to the grantee. Johnson *v.* McMillan, 1 Strobh. (S. C.) 143. So, other things being equal, the lines in conflicting grants should be closed in the method most favorable to the older grant. Stokes *v.* Holliday, 1 McCord (S. C.) 255.

Where all the calls cannot be observed, but the beginning point is established, lines should be run in both directions as far as possible and the gap closed as seems most consistent with all the calls. Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079.

90. *Alabama.*— The side lines of land below high-water mark are to be run by extending the side lines of the upland without variation of course to the margin of the channel of the river. Hagan *v.* Campbell, 8 Port. (Ala.) 9, 33 Am. Dec. 267.

California.— Quantity being given, without specifying length of line on stream, the required quantity of land is to be located by making the first line follow the meanderings of the stream from the starting-point named in the deed until, reduced to a straight line, it shall be of sufficient length to form one side of a square large enough to contain the required quantity; and this square is to be formed by projecting straight lines at right angles from the ends of the first straight line to such a distance that a line drawn from one to the other, parallel with such first line, will include the required quantity between it and the stream. Hicks *v.* Coleman, 25 Cal. 122, 85 Am. Dec. 103.

Connecticut.— The rule for the division of flats is to run perpendicularly to the shore line from the point of division at high-water mark to low-water mark. In determining the curve of the shore its general trend for a considerable distance is to be considered, omitting to notice small indentations and projections. Morris *v.* Beardsley, 54 Conn. 338, 8 Atl. 139. See also Armstrong *v.* Wheeler, 52 Conn. 428 [*disapproving* Emerson *v.* Taylor, 9 Me. 42, 23 Am. Dec. 531]; New Haven Steamboat Co. *v.* Sargent, 50 Conn. 199, 47 Am. Rep. 632. *Compare* Lowndes *v.* Wicks, 69 Conn. 15, 36 Atl. 1072.

Kentucky.— Alluvion is apportioned between coterminous proprietors, by extending the original river frontage of the respective lots as nearly as practicable at right angles with the course of the river to the thread of the stream. Miller *v.* Hepburn, 8 Bush (Ky.) 326.

Louisiana.—The proportionate area or acreage system for division of alluvion between riparian proprietors is not adopted. Each proprietor of original tracts takes between the lines of his new frontage on the watercourse, measured back to the old frontage. Course or direction of said lines is of no consequence. The extent of old frontage on the watercourse determines the extent of the new frontage. Newell *v.* Leathers, 50 La. Ann. 162, 23 So. 243, 69 Am. St. Rep. 395.

Maine.— The mode of ascertaining the side lines of water lots from the upland to low-water mark under the colonial ordinance of 1641, where they have not been otherwise settled by the parties, is to draw a base line from one corner of each lot to the other, at the margin of the upland, and run a line from each of these corners at right angles with such base line to low-water mark. If the line of the shore is straight the side lines of the lots thus drawn to low-water mark will be identical; but if by reason of the curvature of the shore they either diverge from or conflict with each other the land inclosed by both lines, or excluded as the case may be, is to be equally divided between the adjoining proprietors. Emerson *v.* Taylor, 9 Me. 42, 23 Am. Dec. 531. See also Call *v.* Carroll, 40 Me. 31; Treat *v.* Chipman, 35 Me. 34. In Kennebec Ferry Co. *v.* Bradstreet, 28 Me. 374, certain upland was conveyed adjoining easterly upon a river where the tide ebbed and flowed, one of the side

d. Partition or Division Line. Practically the same rules which govern the lines running at a right angle with the river, and the other so as to leave the land toward the river of less extent than at the other end,— "together with all the flats and water privileges adjoining to, being at and having the width of the easterly end of said land, as bounded by the river aforesaid." The bank of the river at that place was convex. It was held that the extent and position of the flats were to be determined by drawing a straight line from the southeast and northeast corners of the land at high-water mark, and extending lines from the ends of that line, and at right angles with it, from high to low-water mark.

Massachusetts.— The general rules for the division of alluvion or flats between coterminous proprietors, as deduced from the adjudged cases, may be stated as follows: (1) The intention of the ordinance of 1647 was, "if practicable, to give to every proprietor the flats in front of his upland of equal width with his lot at high-water mark." Gray *v.* Deluce, 5 Cush. (Mass.) 9, 12. See also Deerfield *v.* Arms, 17 Pick. (Mass.) 41, 28 Am. Dec. 276. (2) The nearest channel from which the tide never ebbs, although not adapted to navigation, is the limit. Atty.-Gen. *v.* Boston Wharf Co., 12 Gray (Mass.) 553; Walker *v.* Boston, etc., R., 3 Cush. (Mass.) 1; Ashby *v.* Eastern R. Co., 5 Metc. (Mass.) 368, 38 Am. Dec. 426; Sparhawk *v.* Bullard, 1 Metc. (Mass.) 95. (3) The direction of the side lines of the flats is not governed by that of the side lines of the upland (Curtis *v.* Francis, 9 Cush. (Mass.) 427; Piper *v.* Richardson, 9 Metc. (Mass.) 155; Rust *v.* Boston Mill Corp., 6 Pick. (Mass.) 158) unless expressly so agreed by the parties (Dawes *v.* Prentice, 16 Pick. (Mass.) 435). (4) Where there is no cove or headland a straight line is to be drawn according to the general course of the shore at high water, and the side lines of the lots extended at right angles with the shore line. Winnisimmet Co. *v.* Wyman, 11 Allen (Mass.) 432; Porter *v.* Sullivan, 7 Gray (Mass.) 441; Knight *v.* Wilder, 2 Cush. (Mass.) 199, 48 Am. Dec. 660; Sparhawk *v.* Bullard, 1 Metc. (Mass.) 95; Deerfield *v.* Arms, 17 Pick. (Mass.) 41, 28 Am. Dec. 276. (5) Flats situate in a tidal river at a point in its course above the line of low tide are to be divided among the adjoining properties by drawing lines from the termini of the latter on the banks at the ordinary stage of water to, and at right angles with, the center line of the river. Tappan *v.* Boston Water Power Co., 157 Mass. 24, 31 N. E. 703, 16 L. R. A. 353. (6) Around a headland the lines dividing the flats must diverge toward low-water mark. Porter *v.* Sullivan, 7 Gray (Mass.) 441; Gray *v.* Deluce, 5 Cush. (Mass.) 9. See also Emerson *v.* Taylor, 9 Me. 42, 23 Am. Dec. 531. (7) In a shallow cove where there is no channel a base line will be run across the mouth of the cove, and parallel lines drawn at right angles with the base line, from the ends of the division lines of the upland to low-water mark. Gray *v.* Deluce, 5 Cush. (Mass.) 9. See also Wonson *v.* Wonson, 14 Allen (Mass.) 71; Atty.-Gen. *v.* Boston Wharf Co., 12 Gray (Mass.) 553. (8) A deep cove out of which the tide entirely ebbs at low water is to be divided by drawing a line across its mouth, giving to each proprietor a width upon the base line proportional to the width of his shore line, and then drawing straight convergent lines from the divisions at the shore to the corresponding points on the base line. Rust *v.* Boston Mill Corp., 6 Pick. (Mass.) 158. See also Wheeler *v.* Stone, 1 Cush. (Mass.) 313; Ashby *v.* Eastern R. Co., 5 Metc. (Mass.) 368, 38 Am. Dec. 426; Sparhawk *v.* Bullard, 1 Metc. (Mass.) 95; Deerfield *v.* Arms, 17 Pick. (Mass.) 41, 28 Am. Dec. 276. (9) The direction of the side lines of flats in a cove may be modified by the course of the channel bounding them, or by the position of other channels of the upland. Atty.-Gen. *v.* Boston Wharf Co., 12 Gray (Mass.) 553; Porter *v.* Sullivan, 7 Gray (Mass.) 441; Com. *v.* Alger, 7 Cush. (Mass.) 53. (10) It seems that after passing the mouth or narrowest part of a cove the lines may diverge, if necessary to preserve the proportions of different estates. Walker *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 1. (11) An agreement of coterminous proprietors as to the direction of their boundaries may be proved or presumed from their acts, and those of public authorities. Atty.-Gen. *v.* Boston Wharf Co., 12 Gray (Mass.) 553; Adams *v.* Boston Wharf Co., 10 Gray (Mass.) 521; Curtis *v.* Francis, 9 Cush. (Mass.) 427; Com. *v.* Alger, 7 Cush. (Mass.) 53; Wheeler *v.* Stone, 1 Cush. (Mass.) 313; Piper *v.* Richardson, 9 Metc. (Mass.) 155; Sparhawk *v.* Bullard, 1 Metc. (Mass.) 95; Valentine *v.* Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; Brimmer *v.* Long Wharf, 5 Pick. (Mass.) 131.

Michigan.— The boundary between adjoining riparian owners, as to the land under the water, is to be determined by extending a line from the boundary at the shore perpendicularly to the general course of the stream opposite that point. Clark *v.* Campau, 19 Mich. 325. See also Blodgett, etc., Lumber Co. *v.* Peters, 87 Mich. 498, 49 N. W. 917, 24 Am. St. Rep. 175; Bay City Gas Light Co. *v.* Industrial Works, 28 Mich. 182.

New Hampshire.— Land formed by alluvion in a river is, in general, to be divided among the several riparian proprietors entitled to it, according to the following rule: Measure the whole extent of their ancient line on the river and ascertain how many feet each proprietor owned on this line; divide the newly formed river line into equal parts, and appropriate to each proprietor as many of these parts as he owned feet on the old line; and then draw lines from the points at which the proprietors respectively bounded

location of lines generally[91] govern the location of partition or division lines.[92]

on the old, to the points thus determined as the points of division on the newly formed shore. Batchelder *v.* Keniston, 51 N. H. 496, 12 Am. Rep. 143 [*following* Deerfield *v.* Arms, 17 Pick. (Mass.) 41, 28 Am. Dec. 276].

New Jersey.— A riparian owner, when he extends his shore front, must, if the high-water line is substantially straight, so extend his side lines as to make them rectangular with such high-water line. Delaware, etc., R. Co. *v.* Hannon, 37 N. J. L. 276. See also Stockham *v.* Browning, 18 N. J. Eq. 390.

New York.— In determining the boundary lines between coterminous proprietors of land made from the bed of a river or bay, each riparian proprietor should receive his ratable share of front on the outer or new water line, and the boundary lines between coterminous proprietors are to be drawn at right angles or divergent or convergent to the shore, according to whether the new exterior line equals, exceeds, or falls short of the old shore line. O'Donnell *v.* Kelsey, 4 Sandf. (N. Y.) 202 [*affirmed* in 10 N. Y. 412, Seld. Notes (N. Y.) 22]. See also People *v.* Woodruff, 30 N. Y. App. Div. 43, 51 N. Y. Suppl. 515; Nott *v.* Thayer, 2 Bosw. (N. Y.) 10. But see People *v.* Schermerhorn, 19 Barb. (N. Y.) 540, where it was held that the lateral lines must be drawn perpendicular to the general course of the shore.

North Carolina.— Persons owning lands on navigable streams may erect wharves next to their lands up to deep water, and may make entry and obtain titles as in any other case, subject to the regulation that they must not obstruct navigation, and that they shall be confined to the straight lines from their water fronts. Bond *v.* Wool, 107 N. C. 139, 12 S. E. 281.

Pennsylvania.— The owner of land on a navigable stream is entitled to claim to low-water mark by lines running directly from his extreme bank marks, if any such he has, to the beach, and this without regard to the courses of the side lines of his survey. Kreiter *v.* Bigler, 101 Pa. St. 94 [*limiting* Wood *v.* Appal, 63 Pa. St. 210].

Rhode Island.— In determining title to land formed by filling in from a former shore line, where the upland boundary, if prolonged, would meet the harbor line obliquely, in the absence of any agreement or facts working an estoppel, the line will be drawn from the termination of the line on the old shore to meet the harbor line perpendicularly. Manchester *v.* Point St. Iron Works, 13 R. I. 355; Aborn *v.* Smith, 12 R. I. 370. *Compare* Thornton *v.* Grant, 10 R. I. 477, 14 Am. Rep. 701, where the rule adopted is this: Draw a line along the main channel in the direction of the general course of the current in front of the two estates, and from the lines so drawn and at right angles with it draw a line to meet the original division line on the shore.

Vermont.— When alluvion is formed on lands bordering on an unnavigable river, owned by coterminous proprietors, the rule for distribution of the accretions is to extend the side lines of each owner to the nearest river bank, giving to each that part of the accretion formed in front of his own land. Hubbard *v.* Manwell, 60 Vt. 235, 14 Atl. 693, 6 Am. St. Rep. 110. *Compare* Newton *v.* Eddy, 23 Vt. 319.

Virginia.— In making an apportionment of flats between coterminous owners, the rule of division is, as the whole shore line of the coterminous owners at low-water mark is to the whole line of navigability, so is each one's share of the shore line to his share of the line of navigability. Groner *v.* Foster, 94 Va. 650, 27 S. E. 493.

Wisconsin.— The rule is the same as in New Hampshire. Northern Pine Land Co. *v.* Bigelow, 84 Wis. 157, 54 N. W. 496, 21 L. R. A. 776 [*following* Deerfield *v.* Arms, 17 Pick. (Mass.) 41, 28 Am. Dec. 276].

United States.— The United States courts have adopted the rule for fixing boundary lines in a small bay or cove as declared in Deerfield *v.* Arms, 17 Pick. (Mass.) 41, 28 Am. Dec. 276; Jones *v.* Johnston, 18 How. (U. S.) 150, 15 L. ed. 320; Johnston *v.* Jones, 1 Black (U. S.) 209, 17 L. ed. 117; South Shore Lumber Co. *v.* C. C. Thompson Lumber Co., 94 Fed. 738, 37 C. C. A. 387. *Compare* U. S. *v.* Ruggles, 5 Blatchf. (U. S.) 35, 27 Fed. Cas. No. 16,204.

91. See *supra*, II, B, 5, a, (I).

92. *California.*— Hubbard *v.* Dusy, 80 Cal. 281, 22 Pac. 214.

Georgia.—Summerville Macadamized Graded, etc., Road Co. *v.* Baker, 68 Ga. 412.

Kansas.— Tarpenning *v.* Cannon, 28 Kan. 665.

Kentucky.— Morgan *v.* Givens, 14 Ky. L. Rep. 93, 19 S. W. 582.

Maine.— Mitchell *v.* Smith, 67 Me. 338.

New York.— Norton *v.* Hughes, 17 Abb. N. Cas. (N. Y.) 287 note.

North Carolina.— Stewart *v.* Salmonds, 74 N. C. 518; McCall *v.* Gillespie, 51 N. C. 533.

Pennsylvania.— Ferguson *v.* Bloom, 144 Pa. St. 549, 23 Atl. 49; Kreiter *v.* Bigler, 101 Pa. St. 94 [*limiting* Wood *v.* Appal, 63 Pa. St. 210]; Darrah *v.* Bryant, 56 Pa. St. 69; Walker *v.* Smith, 2 Pa. St. 43.

Virginia.— Smith *v.* Davis, 4 Gratt. (Va.) 50.

See 8 Cent. Dig. tit. "Boundaries," § 74.

Control of intention.— Where a description in a deed refers to an avenue line, and there are two avenue lines, one being the original line of the avenue and the other the line of said avenue as widened, although not opened, and either line may be meant, the line which was intended to be referred to by the parties should control the description. Norton *v.* Hughes, 17 Abb. N. Cas. (N. Y.) 287 note.

Control of marked line.— The fact that

6. Maps, Plats, and Field-Notes. When maps, plats, or field-notes are referred to in a grant or conveyance they are to be regarded as incorporated into the instrument and as furnishing the true description of the boundaries of the land,[93] in the absence of other controlling calls.[94]

7. Waters and Watercourses — a. In General — (i) *What Law Governs.* The boundaries of land located on navigable waters are under state control, subject to the regulations of congress concerning commerce and navigation.[95]

two surveys call for each other for a common boundary line is not so controlling as to justify the establishment of a common line, where the lines of each survey are actually marked on the ground, and as marked leave an area of ground between the surveys. Walker *v.* Smith, 2 Pa. St. 43. *Compare* Smith *v.* Davis, 4 Gratt. (Va.) 50, where the known intention of the parties was held to control the line marked on the land.

In the absence of marked lines and monuments the proper mode of locating such lines is to divide the land proportionately between the parties, in compliance with the order of court, under which the partition is made, or with the expressed intention of the instrument. McAlpine *v.* Reicheneker, 27 Kan. 257; Long *v.* Merrill, 24 Pick. (Mass.) 157; Runlett *v.* Demeritt, 8 N. H. 296. See also Au Gres Boom Co. *v.* Whitney, 26 Mich. 42.

Where the description calls for a subdivision of a government survey and the quarter section corners have never been established or are lost, the division lines of the fractions of the sections are determined by a division *pro rata* of the lines of the sections as they appear on the ground. Eshleman *v.* Malter, 101 Cal. 233, 35 Pac. 860; Miller *v.* Topeka Land Co., 44 Kan. 354, 24 Pac. 420; Packscher *v.* Fuller, 6 Wash. 534, 33 Pac. 875. *Compare* Beardsley *v.* Crane, 52 Minn. 537, 54 N. W. 740, where it was held that where, owing to meandered lakes, but one quarter post had been established upon the ground upon the boundary lines of a certain section, which post was on the south line thereof, the division lines between the southeast and southwest quarters of said section must be ascertained by running a line due north from the quarter post to the lake upon the north side of the section.

93. *California.*— Buckley *v.* Mohr, 125 Cal. xix, 58 Pac. 261; Hudson *v.* Irwin, 50 Cal. 450.

Illinois.— Ely *v.* Brown, 183 Ill. 575, 56 N. E. 181; Mendel *v.* Whiting, 142 Ill. 348, 31 N. E. 431. *Compare* McClintock *v.* Rogers, 11 Ill. 279, holding that field-notes are to be relied on as evidence only to assist in ascertaining the exact situation of the monuments.

Indiana.— Rowley *v.* Doe, Smith (Ind.) 335.

Kansas.—Armstrong *v.* Brownfield, 32 Kan. 116, 4 Pac. 185.

Kentucky.— See Patrick *v.* Spradlin, 19 Ky. L. Rep. 1038, 42 S. W. 919.

Maine.— Knowles *v.* Bean, 87 Me. 331, 32 Atl. 1017; Palmer *v.* Dougherty, 33 Me. 502, 54 Am. Dec. 636; Thomas *v.* Patten, 13 Me. 329; Pike *v.* Dyke, 2 Me. 213.

Maryland.— Carroll *v.* Smith, 4 Harr. & J. (Md.) 128; Buchanan *v.* Steuart, 3 Harr. & J. (Md.) 329.

Massachusetts.— Magoun *v.* Lapham, 21 Pick. (Mass.) 135; Blaney *v.* Rice, 20 Pick. (Mass.) 62, 32 Am. Dec. 204; Davis *v.* Rainsford, 17 Mass. 207.

Minnesota.— Nicolin *v.* Schneiderhan, 37 Minn. 63, 33 N. W. 33.

Missouri.— St. Louis *v.* Missouri Pac. R. Co., 114 Mo. 13, 21 S. W. 202; Turner *v.* Union Pac. R. Co., 112 Mo. 542, 20 S. W. 673; Burnett *v.* McCluey, 78 Mo. 676.

New York.—See Jackson *v.* Freer, 17 Johns. (N. Y.) 29.

North Carolina.— Davidson *v.* Arledge, 97 N. C. 172, 2 S. E. 378.

Pennsylvania.— Robinson *v.* Myers, 67 Pa. St. 9; Rifener *v.* Bowman, 53 Pa. St. 313.

South Carolina.— Evans *v.* Corley, 8 Rich. (S. C.) 315; Peay *v.* Briggs, 2 Nott & M. (S. C.) 184.

Texas.— Rand *v.* Cartwright, 82 Tex. 399, 18 S. W. 794; Hurt *v.* Evans, 49 Tex. 311; McCombs *v.* Sheldon, (Tex. Civ. App. 1894) 26 S. W. 1114.

Wisconsin.—Shufeldt *v.* Spaulding, 37 Wis. 662.

United States.— Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566; Parker *v.* Kane, 22 How. (U. S.) 1, 16 L. ed. 286; Cleveland *v.* Bigelow, 98 Fed. 242, 39 C. C. A. 47.

See 8 Cent. Dig. tit. "Boundaries," §§ 90, 91.

Agreement with ancient maps.—Where the original surveys agree with maps that have been in use for many years, they should not be held erroneous because they do not agree with resurveys made long afterward, and based upon the assumption that information furnished by living persons as to the locality of lines and corners is absolutely correct. McCombs *v.* Sheldon, (Tex. Civ. App. 1894) 26 S. W. 1114.

Field-notes named in a decree of partition as determining the boundaries are conclusive among the parties thereto, although a plat of the commissioners in conflict therewith also forms part of the decree. Hurt *v.* Evans, 49 Tex. 311.

In construing maps of official surveys courts will give effect to the meaning expressed by their outlines as well as by their language. St. Louis *v.* Missouri Pac. R. Co., 114 Mo. 13, 21 S. W. 202.

94. **Relative importance of conflicting calls** see *infra*, II, C.

95. *Alabama.*—Webb *v.* Demopolis, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62.

(II) *Presumption as to Rights Passed* — (A) *In General.* In construing the description in a conveyance which bounds the lands conveyed upon a body of water courts incline strongly to such an interpretation of the language as will pass all the riparian rights to the grantee,[96] and it will be presumed, in the absence of a clear showing to the contrary, that the adjacent flats and shore, to the extent of the grantor's rights therein, pass as appurtenant to the highland.[97] On the other hand, a grant or conveyance of flats or shore passes no title to upland by presumption.[98]

(B) *When Bounded by Natural Waters* — (1) In General — (a) Ocean,

Iowa.— Haight *v.* Keokuk, 4 Iowa 199.

Minnesota.— Lamprey *v.* State, 52 Minn. 182, 53 N. W. 1139, 38 Am. St. Rep. 541, 18 L. R. A. 670.

Mississippi.— See Morgan *v.* Reading, 3 Sm. & M. (Miss.) 366, where it was held that under the act of congress establishing the Mississippi river as the western boundary of the Mississippi territory, and adopting the common law for the government of the territory, the boundaries of land bordering on the river should be determined by the common law.

United States.— Kaukauna Water Power Co. *v.* Green Bay, etc., Canal Co., 142 U. S. 254, 12 S. Ct. 173, 35 L. ed. 1004; Hardin *v.* Jordan, 140 U. S. 371, 11 S. Ct. 808, 838, 35 L. ed. 428 [*reversing* 16 Fed. 823]; St. Louis *v.* Rutz, 138 U. S. 226, 11 S. Ct. 337, 34 L. ed. 941 [*affirming* 35 Fed. 188]; Packer *v.* Bird, 137 U. S. 661, 11 S. Ct. 210, 34 L. ed. 819; Barney *v.* Keokuk, 94 U. S. 324, 24 L. ed. 224; Rundle *v.* Delaware, etc., Canal Co., 14 How. (U. S.) 80, 14 L. ed. 335; Goodtitle *v.* Kibbe, 9 How. (U. S.) 471, 13 L. ed. 220; Pollard *v.* Hagan, 3 How. (U. S.) 212, 11 L. ed. 565.

See 8 Cent. Dig. tit. "Boundaries," § 96.

Effect of admission of territory.— Under the acts of congress of April 18, 1818, and March 6, 1820, providing respectively for the organization and admission of Illinois and Missouri as states of the Union, and declaring that the western boundary of Illinois and the eastern boundary of Missouri shall be the "middle of the main channel of the Mississippi River," the question whether a riparian owner held the fee to the middle thread of the stream or to the river's bank, was held to be governed by the law of the states. St. Louis *v.* Rutz, 138 U. S. 226, 11 S. Ct. 337, 34 L. ed. 941 [*affirming* 35 Fed. 188].

Effect of grant by United States.— In Haight *v.* Keokuk, 4 Iowa 199, it was held that where land bounded on a navigable stream has been granted to individuals by the United States, the question whether the land extends to high water, to low water, or to the middle of the stream, is to be determined under the laws of the state and not by the laws of the United States. See also Lamprey *v.* State, 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541, 18 L. R. A. 670.

96. *Connecticut.*—Agawam Canal Co. *v.* Edwards, 36 Conn. 476.

Illinois.— Ballance *v.* Peoria, 180 Ill. 29, 54 N. E. 428 [*reversing* 70 Ill. App. 546].

Louisiana.—Michon *v.* Gravier, 11 La. Ann. 596; Cambre *v.* Kohn, 8 Mart. N. S. (La.) 572; Morgan *v.* Livingston, 6 Mart. (La.) 19.

Maine.— Morrison *v.* Skowhegan First Nat. Bank, 88 Me. 155, 33 Atl. 782.

Massachusetts.— King *v.* King, 7 Mass. 496.

New Jersey.— State *v.* Brown, 27 N. J. L. 13.

New York.— Van Buren *v.* Baker, 12 N. Y. St. 209; Rogers *v.* Jones, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493; Varick *v.* Smith, 9 Paige (N. Y.) 547.

United States.— Paine *v.* Consumers' Forwarding, etc., Co., 71 Fed. 626, 37 U. S. App. 539, 19 C. C. A. 99; Whitehurst *v.* McDonald, 52 Fed. 633, 8 U. S. App. 164, 3 C. C. A. 214.

Compare Birmingham *v.* Anderson, 48 Pa. St. 253; Gratz *v.* Beate, 45 Pa. St. 495.

See 8 Cent. Dig. tit. "Boundaries," § 95.

97. *Maine.*— Freeman *v.* Leighton, 90 Me. 541, 38 Atl. 542; Snow *v.* Mt. Desert Island Real Estate Co., 84 Me. 14, 24 Atl. 429, 30 Am. St. Rep. 331, 17 L. R. A. 280; Hill *v.* Lord, 48 Me. 83. *Compare* Roberts *v.* Richards, 84 Me. 1, 24 Atl. 425.

Massachusetts.—Adams *v.* Boston Wharf Co., 10 Gray (Mass.) 521; Cook *v.* Farrington, 10 Gray (Mass.) 70; Porter *v.* Sullivan, 7 Gray (Mass.) 441; Saltonstall *v.* Boston Pier, 7 Cush. (Mass.) 195; Green *v.* Chelsea, 24 Pick. (Mass.) 71; Storer *v.* Freeman, 6 Mass. 435, 4 Am. Dec. 155; Doane *v.* Broad St. Assoc., 6 Mass. 332. See also Chapman *v.* Edmands, 3 Allen (Mass.) 512, where it was held that the peculiar phraseology of the deed took the case out of the general rule.

New York.— People *v.* Jones, 112 N. Y. 597, 20 N. E. 577, 21 N. Y. St. 820.

Oregon.—Astoria Exch. Co. *v.* Shively, 27 Oreg. 104, 39 Pac. 398, 40 Pac. 92; Bowlby *v.* Shively, 22 Oreg. 410, 30 Pac. 154 [*affirmed* in 152 U. S. 1, 14 S. Ct. 548, 38 L. ed. 331].

Pennsylvania.— Jones *v.* Janney, 8 Watts & S. (Pa.) 436, 42 Am. Dec. 309.

United States.— Thomas *v.* Hatch, 3 Sumn. (U. S.) 170, 23 Fed. Cas. No. 3,899.

See 8 Cent. Dig. tit. "Boundaries," § 100.

Islands.— The principle of law that a deed of land adjoining a stream or body of water carries with it adjoining flats applies to islands as well as to the mainland. Hill *v.* Lord, 48 Me. 83.

98. Church *v.* Meeker, 34 Conn. 421.

Seas, and Arms Thereof. At common law the shore between high and low-water marks belongs to the state, and consequently grants or conveyances of lands bounded upon tide waters are presumed to extend to high-water mark only.[99]

(b) Ponds and Lakes — aa. *In General.* Littoral owners take title to the middle line of the smaller navigable lakes,[1] to the edge of the water of the Great Lakes

99. *Alabama.*— Boulo *v.* New Orleans, etc., R. Co., 55 Ala. 480; Hagan *v.* Campbell, 8 Port. (Ala.) 9, 33 Am. Dec. 267.

California.— Long Beach Land, etc., Co. *v.* Richardson, 70 Cal. 206, 11 Pac. 695; More *v.* Massini, 37 Cal. 432; Rondell *v.* Tay, 32 Cal. 354; People *v.* Morrill, 26 Cal. 336; Teschemacher *v.* Thompson, 18 Cal. 11, 79 Am. Dec. 151. See also Brumagin *v.* Bradshaw, 39 Cal. 24; Ward *v.* Mulford, 32 Cal. 365.

Connecticut.— State *v.* Sargent, 45 Conn. 358; Mather *v.* Chapman, 40 Conn. 382, 16 Am. Rep. 46; Simons *v.* French, 25 Conn. 346. *Compare* Lockwood *v.* New York, etc., R. Co., 37 Conn. 387; Chapman *v.* Kimball, 9 Conn. 38, 21 Am. Dec. 707; Middletown *v.* Sage, 8 Conn. 221; East-Haven *v.* Hemingway, 7 Conn. 186.

Illinois.— See School Trustees *v.* Schroll, 120 Ill. 509, 12 N. E. 243, 60 Am. Rep. 575.

Mississippi.— Martin *v.* O'Brien, 34 Miss. 21.

New Jersey.— Camden, etc., Land Co. *v.* Lippincott, 45 N. J. L. 405; State *v.* Brown, 27 N. J. L. 13; Townsend *v.* Brown, 24 N. J. L. 80; Bell *v.* Gough, 23 N. J. L. 624; Gough *v.* Bell, 22 N. J. L. 441; Yard *v.* Ocean Beach Assoc., 49 N. J. Eq. 306, 24 Atl. 729.

New York.— De Lancey *v.* Piepgras, 63 Hun (N. Y.) 169, 17 N. Y. Suppl. 681, 45 N. Y. St. 41 [*affirmed* in 138 N. Y. 26, 33 N. E. 822, 53 N. Y. St. 930]; Lowndes *v.* Dickerson, 34 Barb. (N. Y.) 586; Wiswall *v.* Hall, 3 Paige (N. Y.) 313. See also Oakes *v.* De Lancey, 133 N. Y. 227, 30 N. E. 974, 28 Am. St. Rep. 628, 44 N. Y. St. 686 [*affirming* 59 N. Y. Super. Ct. 497, 15 N. Y. Suppl. 561, 40 N. Y. St. 70 (*affirming* 14 N. Y. Suppl. 294)]; Oakes *v.* De Lancey, 71 Hun (N. Y.) 49, 24 N. Y. Suppl. 539, 54 N. Y. St. 87; Rogers *v.* Jones, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493, in which cases, however, low-water mark was held to be the true boundary.

Pennsylvania.— Ball *v.* Slack, 2 Whart. (Pa.) 508, 30 Am. Dec. 278.

Rhode Island.— Bailey *v.* Burges, 11 R. I. 330.

Texas.— Galveston City Surf Bathing Co. *v.* Heidenheimer, 63 Tex. 559; Bland *v.* Smith, (Tex. Civ. App. 1897) 43 S. W. 49.

Washington.— Board Harbor Line Com'rs *v.* State, 2 Wash. 530, 27 Pac. 550, 4 Wash. 816, 30 Pac. 734.

United States.— Barney *v.* Keokuk, 94 U. S. 324, 24 L. ed. 224; U. S. *v.* Pacheco, 2 Wall. (U. S.) 587, 17 L. ed. 865; Coburn *v.* San Mateo County, 75 Fed. 520; Jones *v.* Martin, 13 Sawy. (U. S.) 314, 35 Fed. 348.

England.— Lowe *v.* Govertt, 3 B. & Ad. 863, 1 L. J. K. B. 224, 23 E. C. L. 376; Somerset *v.* Fogwell, 5 B. & C. 875, 8 D. & R. 747, 5 L. J. K. B. O. S. 49, 29 Rev. Rep. 449, 11 E. C. L. 719; Smith *v.* Stair, 6 Bell Sc. App. 487; Bagott *v.* Orr, 2 B. & P. 472, 5 Rev. Rep. 668; Atty.-Gen. *v.* Chambers, 4 De G. M. & G. 206, 18 Jur. 779, 23 L. J. Ch. 662, 2 Wkly. Rep. 636, 53 Eng. Ch. 159; Smith *v.* Officers, 13 Jur. 713; Lord *v.* Sydney, 12 Moore P. C. 473, 7 Wkly. Rep. 267, 14 Eng. Reprint 991; Royal Piscerie of Baune, Davies 55.

Canada.— Parker *v.* Elliott, 1 U. C. C. P. 470; Cheney *v.* Guptill, 13 N. Brunsw. 378.

See 8 Cent. Dig. tit. "Boundaries," § 109.

In Maine and Massachusetts, under colonial ordinances, the owners of uplands bounded on tidal waters own the adjacent flats to low-water mark, where the tide does not ebb above one hundred rods. For cases construing this ordinance see Snow *v.* Mt. Desert Island Real Estate Co., 84 Me. 14, 24 Atl. 429, 30 Am. St. Rep. 331, 17 L. R. A. 280; Babson *v.* Tainter, 79 Me. 368, 10 Atl. 63; King *v.* Young, 76 Me. 76, 49 Am. Rep. 596; Dillingham *v.* Roberts, 75 Me. 469, 46 Am. Rep. 419; Clancey *v.* Houdlette, 39 Me. 451; Pike *v.* Munroe, 36 Me. 309, 58 Am. Dec. 751; Partridge *v.* Luce, 36 Me. 16; Winslow *v.* Patten, 34 Me. 25; Littlefield *v.* Maxwell, 31 Me. 134, 50 Am. Dec. 653; Gerrish *v.* Union Wharf, 26 Me. 384, 46 Am. Dec. 568; Low *v.* Knowlton, 26 Me. 128, 45 Am. Dec. 100; Duncan *v.* Sylvester, 24 Me. 482, 41 Am. Dec. 400; Tappan *v.* Boston Water Power Co., 157 Mass. 24, 31 N. E. 703, 16 L. R. A. 353; Litchfield *v.* Scituate, 136 Mass. 39; Hathaway *v.* Wilson, 123 Mass. 359; Boston *v.* Richardson, 105 Mass. 351; Atty.-Gen. *v.* Boston Wharf Co., 12 Gray (Mass.) 553; Doane *v.* Willcutt, 5 Gray (Mass.) 328, 66 Am. Dec. 369; Com. *v.* Alger, 7 Cush. (Mass.) 53; Sale *v.* Pratt, 19 Pick. (Mass.) 191; Barker *v.* Bates, 13 Pick. (Mass.) 255, 23 Am. Dec. 678; Lufkin *v.* Haskell, 3 Pick. (Mass.) 356; Com. *v.* Charlestown, 1 Pick. (Mass.) 180, 11 Am. Dec. 161; Storer *v.* Freeman, 6 Mass. 435, 4 Am. Dec. 155; Adams *v.* Frothingham, 3 Mass. 352, 3 Am. Dec. 151; Austin *v.* Carter, 1 Mass. 231.

In New Hampshire it seems that the Massachusetts ordinance of 1641 remained in force after the organization of a separate government in 1679. Nudd *v.* Hobbs, 17 N. H. 524. See also Clement *v.* Burns, 43 N. H. 609.

In Virginia the boundary is low-water mark under Va. Code (1887), § 1339. Waverly Water-Front, etc., Co. *v.* White, 97 Va. 176, 33 S. E. 534, 45 L. R. A. 227.

1. Webber *v.* Pere Marquette Boom Co., 62 Mich. 626, 30 N. W. 469; Cobb *v.* Davenport, 32 N. J. L. 369; Smith *v.* Rochester, 92 N. Y.

as it usually stands when free from disturbing elements,[2] and to low-water mark on Lake Champlain, unless otherwise limited by the terms of their grants.[3] With respect to land bordering on unnavigable ponds or lakes, it is held in some jurisdictions that the littoral owner, as such, takes only to the natural shore of the pond or lake, or to low-water mark;[4] while in others the title of such owner is held to extend to the center of the lake, unless the contrary appears.[5]

bb. *Where Sectionized.* Where a lake has been surveyed and sectionized by the government, without reference to its character as waters, and as though it were dry land, an abutting owner's boundary will be confined to the literal terms of his deed, without regard to the center of the body of water.[6]

(c) Rivers and Streams — aa. *When Navigable and Tidal.* At common law the boundaries of lands lying upon navigable rivers, that is, rivers in which the tide ebbs and flows, extend to high-water mark, the shore between high and low-water marks and the bed of the stream being vested in the crown;[7] and this rule is gen-

463, 44 Am. Rep. 393; Hardin *v.* Jordan, 140 U. S. 371, 11 S. Ct. 808, 838, 35 L. ed. 428. *Compare* Rice *v.* Ruddiman, 10 Mich. 125, holding that the ownership of lands bordering on Lake Muskegon carries with it the ownership of the land under the shallow water so far out as it is susceptible of beneficial private use, subordinate to the paramount public right of navigation, and the other public rights incident thereto.

2. Seaman *v.* Smith, 24 Ill. 521; Sloan *v.* Biemiller, 34 Ohio St. 492; Slauson *v.* Goodrich Transp. Co., 94 Wis. 642, 69 N. W. 990. *Compare* Lincoln *v.* Davis, 53 Mich. 375, 19 N. W. 103, 51 Am. Rep. 116, holding that in Michigan riparian rights on the Great Lakes are, in theory, the same as on navigable streams (see *infra*, II, B, 7, a, (II), (B), (1), (c)), and are not governed by any such proprietary division as high and low-water mark. The submerged lands are appurtenant to the upland so far as their limits can be reasonably identified, but in public waters the state law must determine how far rights in such lands can be exercised consistently with the easement of navigation.

3. Champlain, etc., R. Co. *v.* Valentine, 19 Barb. (N. Y.) 484; McBurney *v.* Young, 67 Vt. 574, 32 Atl. 492, 29 L. R. A. 539; Austin *v.* Rutland R. Co., 45 Vt. 215; Jakeway *v.* Barrett, 38 Vt. 316; Fletcher *v.* Phelps, 28 Vt. 257.

Land near a lake, bounded by the bank of a creek whose waters rise and fall with those of the lake, extends to the low-water line of the creek. Fletcher *v.* Phelps, 28 Vt. 257.

4. *Illinois.*— School Trustees *v.* Schroll, 120 Ill. 509, 12 N. E. 243, 60 Am. Rep. 575. See also Bristol *v.* Carroll County, 95 Ill. 84, where it was held that the United States having conveyed to the several states all the swamp and overflowed lands a government patent of land bounded on a lake conveys no title to the bed thereof.

Iowa.— Noyes *v.* Collins, 92 Iowa 566, 61 N. W. 250, 54 Am. St. Rep. 571, 26 L. R. A. 609.

Maine.— Stevens *v.* King, 76 Me. 197, 49 Am. Rep. 609; Robinson *v.* White, 42 Me. 209.

Michigan.— Clute *v.* Fisher, 65 Mich. 48, 31 N. W. 614.

New Jersey.— Kanouse *v.* Slockbower, 48 N. J. Eq. 42, 21 Atl. 197.

North Carolina.— See Hodges *v.* Williams, 95 N. C. 331, 59 Am. Rep. 242.

Wisconsin.— Diedrich *v.* Northwestern Union R. Co., 42 Wis. 248, 24 Am. Rep. 399; Mariner *v.* Schulte, 13 Wis. 692.

United States.— Indiana *v.* Milk, 11 Biss. (U. S.) 197, 11 Fed. 389.

See 8 Cent. Dig. tit. "Boundaries," § 114.

5. *Indiana.*— Ridgway *v.* Ludlow, 58 Ind. 248.

Missouri.— Primm *v.* Raboteau, 56 Mo. 407 [*following* Primm *v.* Walker, 38 Mo. 94]; Mincke *v.* Skinner, 44 Mo. 92; Kirkpatrick *v.* Yates Ice Co., 45 Mo. App. 335.

New York.— Gouverneur *v.* National Ice Co., 134 N. Y. 355, 31 N. E. 865, 47 N. Y. St. 601, 30 Am. St. Rep. 669, 18 L. R. A. 695 [*reversing* 57 Hun (N. Y.) 474, 11 N. Y. Suppl. 87, 33 N. Y. St. 1; and *distinguishing* and *disapproving* Wheeler *v.* Spinola, 54 N. Y. 377]; Smith *v.* Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Wilcox *v.* Bread, 92 Hun (N. Y.) 9, 37 N. Y. Suppl. 867, 73 N. Y. St. 28; Ledyard *v.* Ten Eyck, 36 Barb. (N. Y.) 102. And see People *v.* Jones, 112 N. Y. 597, 20 N. E. 577, 21 N. Y. St. 820.

Ohio.— Lembeck *v.* Nye, 47 Ohio St. 336, 24 N. E. 686, 21 Am. St. Rep. 828, 8 L. R. A. 578.

United States.— Hardin *v.* Jordan, 140 U. S. 371, 11 S. Ct. 808, 838, 35 L. ed. 428; Kirwan *v.* Murphy, 83 Fed. 275, 49 U. S. App. 658, 28 C. C. A. 348.

See 8 Cent. Dig. tit. "Boundaries," § 114.

Where the description is by metes and bounds, no reference being made therein to the non-navigable lake which forms one boundary, only the land included within the lines as fixed by the terms used by the parties to the deed will pass to the grantee. Lembeck *v.* Nye, 47 Ohio St. 336, 24 N. E. 686, 21 Am. St. Rep. 828, 8 L. R. A. 578. See also People *v.* Jones, 112 N. Y. 597, 20 N. E. 577, 21 N. Y. St. 820.

6. Kirkpatrick *v.* Yates Ice Co., 45 Mo. App. 335.

7. Abraham *v.* Great Northern R. Co., 16 Q. B. 586, 15 Jur. 855, 20 L. J. Q. B. 322, 71 E. C. L. 586; Atty.-Gen. *v.* Terry, L. R. 9 Ch. 423, 30 L. T. Rep. N. S. 215, 22 Wkly. Rep.

erally applied in the United States to the boundaries of land lying upon tidal rivers which are navigable in fact.[8]

bb. *When Navigable and Non-Tidal.* At common law, a conveyance of land bounded upon a river or stream in which the tide does not ebb or flow, although navigable in fact, is presumed to carry title to the thread of the stream;[9] but in the United States, where the test of navigability is navigability in fact, the decisions with reference to the boundaries of lands lying upon non-tidal navigable rivers are hopelessly in conflict. Some, following the spirit of the common-law rule, hold that the right of a riparian owner extends to high-water mark only;[10]

395; Carlisle *v.* Graham, L. R. 4 Exch. 361, 38 L. J. Exch. 226, 21 L. T. Rep. N. S. 133, 18 Wkly. Rep. 318; Rex *v.* Montague, 4 B. & C. 598, 6 D. & R. 616, 4 L. J. K. B. O. S. 21, 28 Rev. Rep. 420, 10 E. C. L. 719; Carter *v.* Murcot, 4 Burr. 2162; Gann *v.* Whitstable Free Fishers, 20 C. B. N. S. 1, 11 H. L. Cas. 192, 35 L. J. C. P. 29, 12 L. T. Rep. N. S. 150, 13 Wkly. Rep. 589, 115 E. C. L. 803; Rex *v.* Smith, 2 Dougl. 425; Penryn *v.* Holm, 2 Ex. D. 328, 46 L. J. Exch. 506, 37 L. T. Rep. N. S. 133, 25 Wkly. Rep. 498; Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. Rep. (N. S.) 93, 12 Wkly. Rep. 178; Fitzwalter's Case, 3 Keb. 242, 1 Mod. 105; Rex *v.* Trinity House, 1 Keb. 331, Sid. 86; Lord Advocate *v.* Hamilton, 1 Macq. 46 [*cited* in Murphy *v.* Ryan, Ir. R. 2 C. L. 143, 16 Wkly. Rep. 678]; Warren *v.* Mathews, 6 Mod. 73, 1 Salk. 357; Bulstrode *v.* Hall, Sid. 148; Royal Piscerie of Baune, Davies 55. *Compare* Vooght *v.* Winch, 2 B. & Ald. 662, 21 Rev. Rep. 446; Miles *v.* Rose, 1 Marsh. 313, 5 Taunt. 705, 15 Rev. Rep. 623, 1 E. C. L. 361.

"**The principle which gives the land between high and low-water mark to the crown** is said, in the case of Atty.-Gen. *v.* Chambers, 27 Eng. L. & Eq. 242, to be 'that it is land not capable of ordinary cultivation or occupation; or, according to the description of Lord Hale, as generally dry and manurable; and so it is in the nature of unappropriated soil. Lord Hale gives as his reason for thinking that lands only covered by the high spring tides do not belong to the crown, that such lands are for the most part dry and manurable; and taking this passage as the only authority at all capable of guiding us, the reasonable conclusion is that the crown's right is limited to lands which are, for the most part, not dry or manurable.'" Lorman *v.* Benson, 8 Mich. 18, 77 Am. Dec. 435.

8. *Alabama.*— Mobile Transp. Co. *v.* Mobile, 128 Ala. 335, 30 So. 645; Hagan *v.* Campbell, 8 Port. (Ala.) 9, 33 Am. Dec. 267.

California.— Heckman *v.* Swett, 99 Cal. 303, 33 Pac. 1099; Wright *v.* Seymour, 69 Cal. 122, 10 Pac. 323.

Delaware.— Bailey *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593.

Maine.— Stone *v.* Augusta, 46 Me. 127.

Massachusetts.— See Dill *v.* Wareham, 7 Metc. (Mass.) 438.

New Jersey.— State *v.* Jersey City, 25 N. J. L. 525; Gough *v.* Bell, 21 N. J. L. 156; Jersey Co. *v.* Jersey City, 8 N. J. Eq. 715. See also Delaware, etc., R. Co. *v.* Hannon, 37 N. J. L. 276.

New York.— People *v.* Tibbetts, 19 N. Y. 523; Stillman *v.* Burfeind, 21 N. Y. App. Div. 13, 47 N. Y. Suppl. 280; Gould *v.* Hudson River R. Co., 12 Barb. (N. Y.) 616; *Ex p.* Jennings, 6 Cow. (N. Y.) 518, 16 Am. Dec. 447. See also Breen *v.* Locke, 46 Hun (N. Y.) 291.

United States.— Shively *v.* Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. ed. 331; Weber *v.* State Harbor Com'rs, 18 Wall. (U. S.) 57, 21 L. ed. 798; Oblenis *v.* Creeth, 67 Fed. 303; Dunlap *v.* Stetson, 4 Mason (U. S.) 349, 8 Fed. Cas. No. 4,164.

Contra, Flanagan *v.* Philadelphia, 42 Pa. St. 219; Jones *v.* Janney, 8 Watts & S. (Pa.) 436, 42 Am. Dec. 309; Smucker *v.* Pennsylvania R. Co., 6 Pa. Super. Ct. 521; McDonald *v.* Whitehurst, 47 Fed. 757 [construing Va. Code (1887), § 1339].

As between a state and the United States the title to the soil covered by navigable waters is in the state. Griffing *v.* Gibb, 1 McAll. (U. S.) 212, 11 Fed. Cas. No. 5,819.

Under a United States patent of lands bordering on a stream in which the tide ebbs and flows, the grantee, in the absence of an intent appearing in the patent to the contrary, does not acquire title to any land below high-water mark. Wright *v.* Seymour, 69 Cal. 122, 10 Pac. 323.

9. Devonshire *v.* Pattinson, 20 Q. B. D. 263, 52 J. P. 276, 57 L. J. Q. B. 189, 58 L. T. Rep. N. S. 392; Tilbury *v.* Silva, 45 Ch. D. 98, 62 L. T. Rep. N. S. 254; Micklethwait *v.* Newlay Bridge Co., 33 Ch. D. 133, 51 J. P. 132, 55 L. T. Rep. N. S. 336. And see Ecroyd *v.* Coulthard, [1897] 2 Ch. 554, 61 J. P. 791, 66 L. J. Ch. 751, 77 L. T. Rep. N. S. 357, 46 Wkly. Rep. 119.

10. *Arkansas.*—Wallace *v.* Driver, 61 Ark. 429, 33 S. W. 641, 31 L. R. A. 317; St. Louis, etc., R. Co. *v.* Ramsey, 53 Ark. 314, 13 S. W. 931, 22 Am. St. Rep. 195, 8 L. R. A. 559.

Iowa.— Chicago, etc., R. Co. *v.* Kelley, 105 Iowa 106, 74 N. W. 935; Haight *v.* Keokuk, 4 Iowa 199.

Kansas.—Wood *v.* Fowler, 26 Kan. 682, 40 Am. Rep. 330.

Louisiana.— Morgan *v.* Livingston, 6 Mart. (La.) 19.

New Jersey.—Delaware, etc., R. Co. *v.* Hannon, 37 N. J. L. 276; State *v.* Jersey City, 25 N. J. L. 525; Gough *v.* Bell, 21 N. J. L. 156; Jersey Co. *v.* Jersey City, 8 N. J. Eq. 715; Paterson, etc., R. Co. *v.* Stevens, 10 Am. L. Reg. N. S. 165.

others, following the letter of the rule, extend his right to the middle or thread of the stream, subject to the public right of navigation;[11] others limit his right to

Oregon.— Johnson *v.* Knott, 13 Oreg. 308, 10 Pac. 418.

United States.—Barney *v.* Keokuk, 94 U. S. 324, 24 L. ed. 224; Bowman *v.* Wathen, 2 McLean (U. S.) 376, 3 Fed. Cas. No. 1,740.

11. *Delaware.*— Delaney *v.* Boston, 2 Harr. (Del.) 489.

Florida.— By the act of Dec. 27, 1856, the right of riparian owners was extended to the edge of the channel. Previously high-water mark was the limit. See Rivas *v.* Solary, 18 Fla. 122.

Georgia.— Jones *v.* Columbus Water Lot Co., 18 Ga. 539; Young *v.* Harrison, 6 Ga. 130; Hendrick *v.* Cook, 4 Ga. 241.

Illinois.— McCartney *v.* Chicago, etc., R. Co., 112 Ill. 611; Washington Ice Co. *v.* Shortall, 101 Ill. 46, 40 Am. Rep. 196; Houck *v.* Yates, 82 Ill. 179; Chicago, etc., R. Co. *v.* Stein, 75 Ill. 41; Braxon *v.* Bressler, 64 Ill. 488; Chicago *v.* Laflin, 49 Ill. 172; Ensminger *v.* People, 47 Ill. 384, 95 Am. Dec. 495; Board Trustees Illinois, etc., Canal *v.* Haven, 11 Ill. 554; Middleton *v.* Pritchard, 4 Ill. 510, 38 Am. Dec. 112; Griffin *v.* Kirk, 47 Ill. App. 258.

Kentucky.—Kentucky Lumber Co. *v.* Green, 87 Ky. 257, 10 Ky. L. Rep. 139, 8 S. W. 439; Williamsburg Boom Co. *v.* Smith, 84 Ky. 372, 8 Ky. L. Rep. 369, 1 S. W. 765; Miller *v.* Hepburn, 8 Bush (Ky.) 326. But see Hogan *v.* McMurtry, 5 T. B. Mon. (Ky.) 181.

Maine.— Granger *v.* Avery, 64 Me. 292; Brown *v.* Chadbourne, 31 Me. 9, 50 Am. Dec. 641; Spring *v.* Russell, 7 Me. 273.

Massachusetts.— Boston *v.* Richardson, 105 Mass. 351; Pratt *v.* Lamson, 2 Allen (Mass.) 275; Lunt *v.* Holland, 14 Mass. 149; King *v.* King, 7 Mass. 496.

Michigan.— Butler *v.* Grand Rapids, etc., R. Co., 85 Mich. 246, 48 N. W. 569, 24 Am. St. Rep. 84; Atty.-Gen. *v.* Evart Booming Co., 34 Mich. 462; Watson *v.* Peters, 26 Mich. 508; Ryan *v.* Brown, 18 Mich. 196, 100 Am. Dec. 155; Lorman *v.* Benson, 8 Mich. 18, 77 Am. Dec. 435; Morris *v.* Hill, 1 Mich. 202.

Mississippi.— New Orleans, etc., R. Co. *v.* Frederic, 46 Miss. 1; Steamer Magnolia *v.* Marshall, 39 Miss. 109; Morgan *v.* Reading, 3 Sm. & M. (Miss.) 366.

New Hampshire.— Norway Plains Co. *v.* Bradley, 52 N. H. 86.

New Jersey.— Kanouse *v.* Slockbower, 48 N. J. Eq. 42, 21 Atl. 197; Atty.-Gen. *v.* Delaware, etc., R. Co., 27 N. J. Eq. 1.

New York.— Smith *v.* Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Chenango Bridge Co. *v.* Paige, 83 N. Y. 178, 38 Am. Rep. 407; Morgan *v.* King, 30 Barb. (N. Y.) 9; Champlain, etc., R. Co. *v.* Valentine, 19 Barb. (N. Y.) 484; Demeyer *v.* Legg, 18 Barb. (N. Y.) 14; Canal Fund Com'rs *v.* Kempshall, 26 Wend. (N. Y.) 404; *Ex p.* Jennings, 6 Cow. (N. Y.) 518, 16 Am. Dec. 447; Varick *v.* Smith, 5 Paige (N. Y.) 137, 28 Am. Dec. 417, 9 Paige (N. Y.) 547; Arthur *v.* Case, 1 Paige (N. Y.) 447.

North Carolina.— Williams *v.* Buchanan, 23 N. C. 535, 35 Am. Dec. 760; Ingram *v.* Threadgill, 14 N. C. 59. See also Hodges *v.* Williams, 95 N. C. 331, 59 Am. Rep. 242. But see Wilson *v.* Forbes, 13 N. C. 30.

Ohio.— Lake Shore, etc., R. Co. *v.* Platt, 53 Ohio St. 254, 41 N. E. 243, 29 L. R. A. 52; Day *v.* Pittsburgh, etc., R. Co., 44 Ohio St. 406, 7 N. E. 528; June *v.* Purcell, 36 Ohio St. 396; Walker *v.* Board Public Works, 16 Ohio 540; Lamb *v.* Rickets, 11 Ohio 311; Gavit *v.* Chambers, 3 Ohio 495; Pollock *v.* Cleveland Ship Bldg. Co., 2 Ohio S. & C. Pl. Dec. 305, 1 Ohio N. P. 296.

Pennsylvania.— See Coovert *v.* O'Conner, 8 Watts (Pa.) 470, where it was held that a grant by the commonwealth of land bounded by a river, not declared navigable by law, passes the land to the middle of the same.

South Carolina.— McCullough *v.* Wall, 4 Rich. (S. C.) 68, 53 Am. Dec. 715. See also Cates *v.* Wadlington, 1 McCord (S. C.) 580, 10 Am. Dec. 699, where it was held that the owner of land bounded by a stream which is merely capable of being made navigable owns to the middle of the river bed.

Tennessee.— Stuart *v.* Clark, 2 Swan (Tenn.) 9, 58 Am. Dec. 49.

Vermont.— Miller *v.* Mann, 55 Vt. 475.

Wisconsin.—Chandos *v.* Mack, 77 Wis. 573, 46 N. W. 803, 20 Am. St. Rep. 139, 10 L. R. A. 207; Norcross *v.* Griffiths, 65 Wis. 599, 27 N. W. 606, 56 Am. Rep. 642; Delaplain *v.* Chicago, etc., R. Co., 42 Wis. 214, 24 Am. Rep. 386; Olson *v.* Merrill, 42 Wis. 203; Wisconsin River Imp. Co. *v.* Lyons, 30 Wis. 61; Arnold *v.* Elmore, 16 Wis. 509; Mariner *v.* Schulte, 13 Wis. 692; Walker *v.* Shepardson, 4 Wis. 486, 64 Am. Dec. 324.

United States.—St. Louis *v.* Rutz, 138 U. S. 226, 11 S. Ct. 337, 34 L. ed. 941; Scranton *v.* Wheeler, 57 Fed. 803, 16 U. S. App. 152, 6 C. C. A. 585.

Government conveyance.— Where the government conveys land on the bank of a navigable stream without reservation, the land over which the stream flows as far as the middle line of the stream and all unsurveyed islands between this line and the back pass by the grant. Butler *v.* Grand Rapids, etc., R. Co., 85 Mich. 246, 48 N. W. 569, 24 Am. St. Rep. 84; Chandos *v.* Mack, 77 Wis. 573, 46 N. W. 803, 20 Am. St. Rep. 139, 10 L. R. A. 207.

Islands.— The owner of land on both sides of a river above tide waters owns the islands therein to the extent of the length of his lands opposite to them. Granger *v.* Avery, 64 Me. 292.

Line of navigation.— A conveyance of lands on a navigable stream by a description establishing a boundary line coincident with the line of navigation conveys the grantor's

low-water mark;[12] while others again limit him to the water's edge[13] or the margin of the water at its ordinary stage.[14]

cc. *When Non-Navigable.* A grant or conveyance of land bounded by a non-navigable stream carries with it the bed of the stream to its center, unless a contrary intention is manifest from the grant or conveyance itself.[15]

title to the central thread of the stream. Lake Shore, etc., R. Co. *v.* Platt, 53 Ohio St. 254, 41 N. E. 243, 29 L. R. A. 52.

Streams navigable in modified sense.— The riparian owner on a stream navigable only in a modified sense for floating logs and lumber presumably owns to the center of the stream. Atty.-Gen. *v.* Evart Booming Co., 34 Mich. 462. *Contra,* Shoemaker *v.* Hatch, 13 Nev. 261.

Under the Roman law the air, the running water, the sea, and the shores of the sea were common to all men by the laws of nature. Justinian Inst. lib. 2, tit. 1, § 1. But see Lorman *v.* Benson, 8 Mich. 18, 77 Am. Dec. 435, where Campbell, J., says that by the Roman law the title to river beds belongs to riparian owners, subject to the public easement of passage and of moorage on the banks.

12. *Alabama.*—Webb *v.* Demopolis, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62; Howard *v.* Ingersoll, 17 Ala. 780; Doe *v.* Jones, 11 Ala. 63; Mobile *v.* Eslava, 9 Port. (Ala.) 577, 33 Am. Dec. 325; Bullock *v.* Wilson, 2 Port. (Ala.) 436. See also Hess *v.* Cheney, 83 Ala. 251, 3 So. 791; Williams *v.* Glover, 66 Ala. 189.

Connecticut.—Chapman *v.* Kimball, 9 Conn. 38, 21 Am. Dec. 707; East-Haven *v.* Hemingway, 7 Conn. 186; Peck *v.* Lockwood, 5 Day (Conn.) 22.

Indiana.—Martin *v.* Evansville, 32 Ind. 85; Bainbridge *v.* Sherlock, 29 Ind. 364, 95 Am. Rep. 644; Stinson *v.* Butler, 4 Blackf. (Ind.) 285.

Kentucky.— Hogan *v.* McMurtry, 5 T. B. Mon. (Ky.) 181, decided under the terms of a specific grant.

Minnesota.— Union Depot, etc., Co. *v.* Brunswick, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789; St. Paul, etc., R. Co. *v.* First Division St. Paul, etc., R. Co., 26 Minn. 31, 49 N. W. 303; Brisbine *v.* St. Paul, etc., R. Co., 23 Minn. 114; Schurmeier *v.* St. Paul, etc., R. Co., 10 Minn. 82, 88 Am. Dec. 59 [*affirmed* in 7 Wall. (U. S.) 272, 19 L. ed. 74].

Montana.— Gibson *v.* Kelly, 15 Mont. 417, 39 Pac. 517.

Nevada.—Shoemaker *v.* Hatch, 13 Nev. 261.

New Hampshire.— Clement *v.* Burns, 43 N. H. 609.

New York.— New York *v.* Hart, 95 N. Y. 443; Canal Com'rs *v.* People, 5 Wend. (N. Y.) 423.

North Carolina.—Wilson *v.* Forbes, 13 N. C. 30.

Pennsylvania.— Fulmer *v.* Williams, 122 Pa. St. 191, 15 Atl. 726, 9 Am. St. Rep. 88, 1 L. R. A. 603; Philadelphia *v.* Scott, 81 Pa. St. 80, 22 Am. Rep. 738; Poor *v.* McClure, 77 Pa. St. 214; Stover *v.* Jack, 60 Pa. St. 339, 100 Am. Dec. 566; Bailey *v.* Miltenberger, 31 Pa. St. 37; Lehigh Valley R. Co. *v.* Trone, 28 Pa. St. 206; Shrunk *v.* Schuylkill Nav. Co., 14 Serg. & R. (Pa.) 71; Carson *v.* Blazer, 2 Binn. (Pa.) 475, 4 Am. Dec. 463.

Tennessee.—Martin *v.* Nance, 3 Head (Tenn.) 648; Elder *v.* Burrus, 6 Humphr. (Tenn.) 358. See also Stuart *v.* Clark, 2 Swan (Tenn.) 9, 58 Am. Dec. 49.

Virginia.— See Va. Code (1887), § 1339. *Compare* Home *v.* Richards, 4 Call (Va.) 441, 2 Am. Dec. 574.

United States.— Rundle *v.* Delaware, etc., Canal Co., 14 How. (U. S.) 80, 14 L. ed. 335.

A qualified right.— The owner of land adjoining a navigable river owns the soil to low-water mark, subject to the public right of navigation to high-water mark as it exists naturally. Lehigh Valley R. Co. *v.* Trone, 28 Pa. St. 206.

13. *California.*— Packer *v.* Bird, 71 Cal. 134, 11 Pac. 873; Lux *v.* Haggin, 69 Cal. 255, 10 Pac. 694; People *v.* Gold Run Ditch, etc., Co., 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80.

Michigan.— La Plaisance Bay Harbor Co. *v.* Monroe, Walk. (Mich.) 155.

Minnesota.— St. Paul, etc., R. Co. *v.* First Division St. Paul, etc., R. Co., 26 Minn. 31, 49 N. W. 303.

Missouri.— Cooley *v.* Golden, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300; Rees *v.* McDaniel, 115 Mo. 145, 21 S. W. 913; Benson *v.* Morrow, 61 Mo. 345; Meyers *v.* St. Louis, 8 Mo. App. 266.

Virginia.— Home *v.* Richards, 4 Call (Va.) 441, 2 Am. Dec. 574. But see Va. Code (1887), § 1339.

United States.— Packer *v.* Bird, 137 U. S. 661, 11 S. Ct. 210, 34 L. ed. 819; Rundle *v.* Delaware, etc., Canal Co., 14 How. (U. S.) 80, 14 L. ed. 335.

14. Hess *v.* Cheney, 83 Ala. 251, 3 So. 791; Williams *v.* Glover, 66 Ala. 189; La Branch *v.* Montegut, 47 La. Ann. 674, 17 So. 247.

15. *Alabama.*— Sullivan *v.* Spotswood, 82 Ala. 163, 2 So. 716.

California.— Lux *v.* Haggin, 69 Cal. 255, 10 Pac. 674. See also Taylor *v.* McConigle, 120 Cal. 123, 52 Pac. 159.

Colorado.—Hanlon *v.* Hobson, 24 Colo. 284, 51 Pac. 433, 42 L. R. A. 502; Denver *v.* Pearce, 13 Colo. 383, 22 Pac. 774, 6 L. R. A. 541.

Connecticut.— Chapman *v.* Kimball, 9 Conn. 38, 21 Am. Dec. 707; Bissel *v.* Southworth, 1 Root (Conn.) 269.

Delaware.—Redden *v.* Smith, 5 Harr. (Del.) 389.

Georgia.— Stanford *v.* Mangin, 30 Ga. 355.

Illinois.— Piper *v.* Connelly, 108 Ill. 646; Hubbard *v.* Bell, 54 Ill. 110, 5 Am. Rep. 98; Ensminger *v.* People, 47 Ill. 384, 95 Am. Dec. 495; Stolp *v.* Hoyt, 44 Ill. 219; Board Trus-

dd. *When Status of Waters Is Changed.* Where boundary lines have once been fixed a subsequent change in the status of the waters, whether by artifi-

tees Illinois, etc., Canal *v.* Haven, 10 Ill. 548, 11 Ill. 554; Middleton *v.* Pritchard, 4 Ill. 510, 38 Am. Dec. 112; Adams *v.* Slater, 8 Ill. App. 72. See also School Trustees *v.* Shroll, 120 Ill. 509, 12 N. E. 243, 60 Am. Rep. 575.

Indiana.— Ross *v.* Faust, 54 Ind. 471, 23 Am. Rep. 655.

Iowa.—Moffett *v.* Brewer, 1 Greene (Iowa) 348.

Kentucky.— Louisville *v.* U. S. Bank, 3 B. Mon. (Ky.) 138; Runion *v.* Alley, 19 Ky. L. Rep. 268, 39 S. W. 849.

Maine.— Bradford *v.* Cressey, 45 Me. 9; Nickerson *v.* Crawford, 16 Me. 245; Morrison *v.* Keen, 3 Me. 474.

Maryland.— Browne *v.* Kennedy, 5 Harr. & J. (Md.) 195, 9 Am. Dec. 503.

Massachusetts.— Newhall *v.* Ireson, 13 Gray (Mass.) 262; Hopkins Academy *v.* Dickinson, 9 Cush. (Mass.) 544; Knight *v.* Wilder, 2 Cush. (Mass.) 199, 48 Am. Dec. 660; Bardwell *v.* Ames, 22 Pick. (Mass.) 333; Ingraham *v.* Wilkinson, 4 Pick. (Mass.) 268, 16 Am. Dec. 342; Hatch *v.* Dwight, 17 Mass. 289, 9 Am. Dec. 145; Lunt *v.* Holland, 14 Mass. 149; King *v.* King, 7 Mass. 496; Storer *v.* Freeman, 6 Mass. 435, 4 Am. Dec. 155.

Michigan.— Goff *v.* Congle, 118 Mich. 307, 76 N. W. 489, 42 L. R. A. 161; Norris *v.* Hill, 1 Mich. 202.

Mississippi.— Morgan *v.* Reading, 3 Sm. & M. (Miss.) 366.

New Hampshire.— Kimball *v.* Schoff, 40 N. H. 190; Nichols *v.* Suncook Mfg. Co., 34 N. H. 345; Greenleaf *v.* Kilton, 11 N. H. 530; State *v.* Gilmanton, 9 N. H. 461; Rix *v.* Johnson, 5 N. H. 520, 22 Am. Dec. 472; Claremont *v.* Carlton, 2 N. H. 369, 9 Am. Dec. 88.

New Jersey.— Arnold *v.* Mundy, 6 N. J. L. 1, 10 Am. Dec. 356.

New York.— Smith *v.* Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Seneca Nation *v.* Knight, 23 N. Y. 498; Corning *v.* Troy Iron, etc., Factory, 34 Barb. (N. Y.) 529, 22 How. Pr. (N. Y.) 212; Orendorff *v.* Steele, 2 Barb. (N. Y.) 126; Van Buren *v.* Baker, 12 N. Y. St. 209; Canal Fund Com'rs *v.* Kempshall, 26 Wend. (N. Y.) 404; Luce *v.* Carley, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637; Starr *v.* Child, 20 Wend. (N. Y.) 149; People *v.* Canal Appraisers, 13 Wend. (N. Y.) 355; People *v.* Seymour, 6 Cow. (N. Y.) 579; *Ex p.* Jennings, 6 Cow. (N. Y.) 518, 16 Am. Dec. 447; People *v.* Platt, 17 Johns. (N. Y.) 195, 8 Am. Dec. 382; Palmer *v.* Mulligan, 3 Cai. (N. Y.) 307, 2 Am. Dec. 270.

North Carolina.— Hodges *v.* Williams, 95 N. C. 331, 59 Am. Rep. 242; State *v.* Glen, 52 N. C. 321; Williams *v.* Buchanan, 23 N. C. 535, 35 Am. Dec. 760; Ingram *v.* Threadgill, 14 N. C. 59; Harramond *v.* McGlaughon, 1 N. C. 84.

Ohio.— Benner *v.* Platter, 6 Ohio 504.

Oregon.— Shaw *v.* Oswego Iron Co., 10 Oreg. 371, 45 Am. Rep. 146.

Pennsylvania.— Fulmer *v.* Williams, 122 Pa. St. 191, 15 Atl. 726, 9 Am. St. Rep. 88, 1 L. R. A. 603; Barclay R., etc., Co. *v.* Ingham, 36 Pa. St. 194; Bailey *v.* Miltenberger, 31 Pa. St. 37; Ball *v.* Slack, 2 Whart. (Pa.) 508, 30 Am. Dec. 278; Coovert *v.* O'Conner, 8 Watts (Pa.) 470.

South Carolina.— Cates *v.* Wadlington, 1 McCord (S. C.) 580, 10 Am. Dec. 699; Noble *v.* Cunningham, McMull. Eq. (S. C.) 289.

Tennessee.— Stuart *v.* Clark, 2 Swan (Tenn.) 9, 58 Am. Dec. 49.

Vermont.— Adams *v.* Barney, 25 Vt. 225.

Virginia.— Mead *v.* Haynes, 3 Rand. (Va.) 33; Hayes *v.* Bowman, 1 Rand. (Va.) 417; Home *v.* Richards, 4 Call (Va.) 441, 2 Am. Dec. 574.

West Virginia.—Camden *v.* Creel, 4 W. Va. 365.

Wisconsin.— Lampman *v.* Van Alstyne, 94 Wis. 417, 69 N. W. 171.

United States.— St. Paul, etc., R. Co. *v.* Schurmeier, 7 Wall. (U. S.) 272, 19 L. ed. 74; Indiana *v.* Milk, 11 Biss. (U. S.) 197, 11 Fed. 389; Tyler *v.* Wilkinson, 4 Mason (U. S.) 397, 24 Fed. Cas. No. 14,312.

England.— Devonshire *v.* Pattinson, 20 Q. B. D. 263, 52 J. P. 276, 57 L. J. Q. B. 189, 58 L. T. Rep. N. S. 392; Brickett *v.* Morris, L. R. 1 H. L. Sc. 47; Miller *v.* Little, L. R. 2 Ir. 304; Carter *v.* Murcot, 4 Burr. 2162; Tilbury *v.* Silva, 45 Ch. D. 98, 62 L. T. Rep. N. S. 254; Micklethwait *v.* Newlay Bridge Co., 33 Ch. D. 133, 51 J. P. 132, 55 L. T. Rep. N. S. 336; Dwyer *v.* Rich, Ir. R. 4 C. L. 424; Murphy *v.* Ryan, Ir. R. 2 C. L. 143, 16 Wkly. Rep. 678; Wishart *v.* Wyllie, 1 Macq. 389; Rex *v.* Wharton, Holt 499, 12 Mod. 510; Lord *v.* Sydney, 12 Moore P. C. 473, 7 Wkly. Rep. 267, 14 Eng. Reprint 991. See also Ecroyd *v.* Coulthard, [1898] 2 Ch. 358.

Canada.— Robertson *v.* Steadman, 16 N. Brunsw. 621.

See 8 Cent. Dig. tit. "Boundaries," § 113.

Islands between bank and thread.— A conveyance of land bounded on a river not navigable conveys the land to the middle line of the river, including any island situated on that side of such line (Stanford *v.* Mangin, 30 Ga. 355; Kimball *v.* Schoff, 40 N. H. 190); but where the mainland and island have been separately surveyed and purchased by different parties as distinct tracts, the grantees of the mainland cannot claim the island as included in their grant (Wiggenhorn *v.* Kountz, 23 Nebr. 690, 37 N. W. 603, 8 Am. St. Rep. 150).

Intention controls presumption.— Where the probate judge advertises and sells a lot bounded on an unnavigable stream, and on the same day, and as part of the same sale, sells the bed of the stream to another person, the deeds for the two parcels being executed the same day and containing the same recitals, the intention thus shown to separate the ownership of the bed of the stream from the ownership of the lot will overcome the

cial means or through natural causes, will not have the effect of shifting the boundaries.[16]

ee. *When Watercourse Is National or State Boundary.* When a watercourse forms a national or state boundary, there is a conflict of opinion as to the rights of the riparian owner.[17]

(2) Meandered Waters. The general rule adopted by both state and federal courts is that meander lines are not run as boundaries of the tract surveyed, but for the purpose of defining the sinuosities of the banks of the stream or other body of water, and as a means of ascertaining the quantity of land embraced in the survey. The stream, or other body of water, and not the meander line as actually run on the ground, is the boundary,[18] and the rules adopted in the vari-

presumption that a deed to a lot bounded on an unnavigable stream carries the title to the bed of the stream to its center. Denver *v.* Pearce, 13 Colo. 383, 22 Pac. 774, 6 L. R. A. 541. See also Hall *v.* Whitehall Water-Power Co., 103 N. Y. 129, 8 N. E. 509.

16. *Iowa.*— Chicago, etc., R. Co. *v.* Porter, 72 Iowa 426, 34 N. W. 286; Steele *v.* Sanchez, 72 Iowa 65, 33 N. W. 366, 2 Am. St. Rep. 233; Serrin *v.* Greefe, 67 Iowa 196, 25 N. W. 227; Wood *v.* Chicago, etc., R. Co., 60 Iowa 456, 15 N. W. 284.

Kansas.— Wood *v.* Fowler, 26 Kan. 682, 40 Am. Rep. 330.

Minnesota.— Hall *v.* Connecticut Mut. L. Ins. Co., 76 Minn. 401, 79 N. W. 497.

New York.— Wheeler *v.* Spinola, 54 N. Y. 377; People *v.* Tibbetts, 19 N. Y. 523.

Pennsylvania.— Coovert *v.* O'Conner, 8 Watts (Pa.) 470.

Wisconsin.— Allen *v.* Weber, 80 Wis. 531, 50 N. W. 514, 27 Am. St. Rep. 51, 14 L. R. A. 361.

England.— Hargreaves *v.* Diddams, L. R. 10 Q. B. 582, 44 L. J. M. C. 178, 32 L. T. Rep. N. S. 600, 23 Wkly. Rep. 828; Mussett *v.* Burch, 35 L. T. Rep. N. S. 486.

Statutory change.— The owners of land bounded by a river declared by act of congress to be a navigable stream do not, upon a repeal of that act, acquire title to the bed of the river. Chicago, etc., R. Co. *v.* Porter, 72 Iowa 426, 34 N. W. 286. See also Allen *v.* Weber, 80 Wis. 531, 50 N. W. 514, 27 Am. St. Rep. 51, 14 L. R. A. 361, where a non-navigable stream was declared navigable by statute.

17. **In Georgia** it has been held that a grant of land bounded by the Chattahoochee river carries to the opposite bank, that being the eastern boundary of Alabama. Jones *v.* Columbus Water Lot Co., 18 Ga. 539.

In New York it is held that the riparian owner of land bounded on the Niagara river takes only to the water. Kingman *v.* Sparrow, 12 Barb. (N. Y.) 201. See also Morgan *v.* King, 30 Barb. (N. Y.) 9.

18. *Illinois.*— Fuller *v.* Dauphin, 124 Ill. 542, 16 N. E. 917, 7 Am. St. Rep. 388; Houck *v.* Yates, 82 Ill. 179; Board Trustees Illinois, etc., Canal *v.* Haven, 10 Ill. 548; Middleton *v.* Pritchard, 4 Ill. 510, 38 Am. Dec. 112.

Indiana.— Sizor *v.* Logansport, 151 Ind. 626, 50 N. E. 377, 44 L. R. A. 814; Tolleston Club *v.* Clough, 146 Ind. 93, 43 N. E. 647; Tolleston Club *v.* State, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690; Sphung *v.* Moore, 120 Ind. 352, 22 N. E. 319; Ridgway *v.* Ludlow, 58 Ind. 248; Ross *v.* Faust, 54 Ind. 471, 23 Am. Rep. 655.

Iowa.— Welch *v.* Browning, (Iowa 1901) 87 N. W. 430; Schlosser *v.* Cruickshank, 96 Iowa 414, 65 N. W. 344; Grant *v.* Hemphill, 92 Iowa 218, 59 N. W. 263, 60 N. W. 618; Ladd *v.* Osborne, 79 Iowa 93, 44 N. W. 235; Steele *v.* Sanchez, 72 Iowa 65, 33 N. W. 366, 2 Am. St. Rep. 233; Musser *v.* Hershey, 42 Iowa 356; Boynton *v.* Miller, 22 Iowa 579; Kraut *v.* Crawford, 18 Iowa 549, 87 Am. Dec. 414.

Kentucky.—Hunter *v.* Witt, 21 Ky. L. Rep. 35, 50 S. W. 985. See also Penrod *v.* Bruce, 22 Ky. L. Rep. 1697, 61 S. W. 1, where it was held that the rule does not apply where the grantor has by deed of record previously conveyed the bed of the stream to another.

Michigan.— Butler *v.* Grand Rapids, etc., R. Co., 85 Mich. 246, 48 N. W. 569, 24 Am. St. Rep. 84; Palmer *v.* Dodd, 64 Mich. 474, 31 N. W. 209; Webber *v.* Pere Marquette Boom Co., 62 Mich. 626, 30 N. W. 469; Fletcher *v.* Thunder Bay River Boom Co., 51 Mich. 277, 16 N. W. 645; Pere Marquette Boom Co. *v.* Adams, 44 Mich. 403, 6 N. W. 857; Twogood *v.* Hoyt, 42 Mich. 609, 4 N. W. 445; Maxwell *v.* Bay City Bridge Co., 41 Mich. 453, 2 N. W. 639; Bay City Gas Light Co. *v.* Industrial Works, 28 Mich. 182; Lorman *v.* Benson, 8 Mich. 18, 77 Am. Dec. 435.

Minnesota.— Olson *v.* Thorndike, 76 Minn. 399, 79 N. W. 399; Everson *v.* Waseca, 44 Minn. 247, 46 N. W. 405; St. Paul, etc., R. Co. *v.* First Division St. Paul, etc., R. Co., 26 Minn. 31, 49 N. W. 303; Schurmeier *v.* St. Paul, etc., R. Co., 10 Minn. 82, 88 Am. Dec. 59 [*affirmed* in 7 Wall. (U. S.) 272, 19 L. ed. 74].

Missouri.— Benson *v.* Morrow, 61 Mo. 345.

Nevada.— Shoemaker *v.* Hatch, 13 Nev. 261.

North Dakota.— Heald *v.* Yumisko, 7 N. D. 422, 75 N. W. 806.

Ohio.— June *v.* Purcell, 36 Ohio St. 396; Gavit *v.* Chambers, 3 Ohio 495. See also James *v.* Howell, 41 Ohio St. 696; Dayton *v.* Cooper Hydraulic Co., 10 Ohio S. & C. Pl. Dec. 192, 7 Ohio N. P. 495.

Oklahoma.— Provins *v.* Lovi, 6 Okla. 94, 50 Pac. 81.

Oregon.— Weiss *v.* Oregon Iron, etc., Co.,

ous states as to the extent of the title of the owner of land bounded upon rivers and other bodies of water apply in the case of land bounded upon meandered waters.[19] The meander line will, however, be the boundary where it is run with regard to a supposed body of water which does not, in fact, exist,[20] where the land between such line and the water is platted as a separate survey,[21] or where the surveyor omits to include large tracts of land lying between the meander line as surveyed, or as pretended to have been run on the ground, and the stream or other body of water.[22]

(c) *When Bounded by Artificial Waters* — (1) In General — (a) Canals, Ditches, and Mill-Races. The owners of land lying upon canals, ditches, or mill-races will usually take to the center line thereof,[23] in the absence of a clear show-

13 Oreg. 496, 11 Pac. 255; Johnson *v.* Knott, 13 Oreg. 308, 10 Pac. 418; Moore *v.* Willamette Transp., etc., Co., 7 Oreg. 355; Minto *v.* Delaney, 7 Oreg. 337.

Pennsylvania.— Wood *v.* Appal, 63 Pa. St. 210.

South Dakota.—Olson *v.* Huntamer, 6 S. D. 364, 61 N. W. 479.

Utah.— Hinckley *v.* Peay, 22 Utah 21, 60 Pac. 1012; Knaudsen *v.* Omanson, 10 Utah 124, 37 Pac. 250; Poynter *v.* Chipman, 8 Utah 442, 32 Pac. 690.

Washington.— Maynard *v.* Puget Sound Nat. Bank, 24 Wash. 455, 64 Pac. 754.

Wisconsin.—Lally *v.* Rossman, 82 Wis. 147, 51 N. W. 1132; Whitney *v.* Detroit Lumber Co., 78 Wis. 240, 47 N. W. 425; Menasha Wooden Ware Co. *v.* Lawson, 70 Wis. 600, 36 N. W. 412; Boorman *v.* Sunnuchs, 42 Wis. 233; Shufeldt *v.* Spaulding, 37 Wis. 662; Wright *v.* Day, 33 Wis. 260; Jones *v.* Pettibone, 2 Wis. 308.

United States.— Mitchell *v.* Smale, 140 U. S. 406, 11 S. Ct. 819, 840, 35 L. ed. 442; Harden *v.* Jordan, 140 U. S. 371, 11 S. Ct. 808, 838, 35 L. ed. 428 [*affirming*, on this point, 16 Fed. 823]; Kirwan *v.* Murphy, 83 Fed. 275, 49 U. S. App. 658, 28 C. C. A. 348; Coburn *v.* San Mateo County, 75 Fed. 520; Whitehurst *v.* McDonald, 47 Fed. 757, 52 Fed. 633, 8 U. S. App. 164, 3 C. C. A. 214; Forsyth *v.* Smale, 7 Biss. (U. S.) 201, 9 Fed. Cas. No. 4,950, 8 Chic. Leg. N. 322, 7 Reporter 262; Quicksilver Min. Co. *v.* Hicks, 4 Sawy. (U. S.) 688, 20 Fed. Cas. No. 11,508.

Contra, Harrison *v.* Stipes, 34 Nebr. 431, 51 N. W. 976; Bissell *v.* Fletcher, 19 Nebr. 725, 28 N. W. 303; Lammers *v.* Nissen, 4 Nebr. 245; Granger *v.* Swart, 1 Woolw. (U. S.) 88, 10 Fed. Cas. No. 5,685.

See 8 Cent. Dig. tit. "Boundaries," § 121.

Correspondence of line and quantity.— The fact that the number of acres recited in a government patent corresponds with the quantity within the meander line along a navigable lake will not prevent the patentee from claiming the land between the meander line and the shore line. Schlosser *v.* Cruickshank, 96 Iowa 414, 65 N. W. 344.

The term "fractional," as used in describing a section of land partly within and partly without a meander line, refers simply to the circumstance that the section does not contain six hundred and forty acres of dry land, and does not bound the same by the meander line. Tolleston Club *v.* State, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690.

19. *Illinois.*—Fuller *v.* Shedd, 161 Ill. 462, 44 N. E. 286, 52 Am. St. Rep. 380, 33 L. R. A. 146 (non-navigable lake); Fuller *v.* Dauphin, 124 Ill. 542, 16 N. E. 917, 7 Am. St. Rep. 388 (slough); McCormick *v.* Huse, 78 Ill. 363 (where it was held that the purchaser of a fractional section bordering on a navigable stream takes only to the meander lines as fixed by the government survey); Board Trustees Illinois, etc., Canal *v.* Haven, 10 Ill. 548 (non-navigable stream).

Indiana.— Tolleston Club *v.* State, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690 (non-navigable river); Stoner *v.* Rice, 121 Ind. 51, 22 N. E. 968, 6 L. R. A. 387 (non-navigable lake); Ross *v.* Faust, 54 Ind. 471, 23 Am. Rep. 655 (non-navigable stream).

Kansas.— Wood *v.* Fowler, 26 Kan. 682, 40 Am. Rep. 330, navigable river. See also Steinbuchel *v.* Lane, 59 Kan. 7, 51 Pac. 886.

Michigan.— Goff *v.* Congle, 118 Mich. 307, 76 N. W. 489, 42 L. R. A. 161; Grand Rapids Ice, etc., Co. *v.* South Grand Rapids Ice Co., 102 Mich. 227, 60 N. W. 681, 47 Am. St. Rep. 516, 25 L. R. A. 815 (navigable lake); Jones *v.* Lee, 77 Mich. 35, 43 N. W. 855 (navigable lake); Clute *v.* Fisher, 65 Mich. 48, 31 N. W. 614 (inland lake); Twogood *v.* Hoyt, 42 Mich. 609, 4 N. W. 445 (river). But see La Plaisance Bay Harbor Co. *v.* Monroe, Walk. (Mich.) 155, where it was held that on meandered streams the riparian owner takes no part of the bed.

Wisconsin.—Boorman *v.* Sunnuchs, 42 Wis. 233 (non-navigable lake); Jones *v.* Pettibone, 2 Wis. 308 (navigable stream).

United States.— Indiana *v.* Milk, 11 Biss. (U. S.) 197, 11 Fed. 389, non-navigable lake.

20. Grant *v.* Hemphill, 92 Iowa 218, 59 N. W. 263, 60 N. W. 618.

21. James *v.* Howell, 41 Ohio St. 696.

22. Olson *v.* Thorndike, 76 Minn. 399, 79 N. W. 399; Little *v.* Pherson, 35 Oreg. 51, 56 Pac. 807; Barnhart *v.* Ehrhart, 33 Oreg. 274, 54 Pac. 195.

23. *Connecticut.*— Goodyear *v.* Shanahan, 43 Conn. 204 (canal); Agawam Canal Co. *v.* Edwards, 36 Conn. 476 (canal); Warner *v.* Southworth, 6 Conn. 471 (ditch).

Maine.— Morrison *v.* Keen, 3 Me. 474, mill stream.

Massachusetts.— See Boston *v.* Richardson, 13 Allen (Mass.) 146.

ing to the contrary in the grant or conveyance from which such owners derive their title.[24]

(b) Ponds. Subject always to a manifest intention to the contrary, apparent upon the face of the instrument,[25] a grant or conveyance of land bounded generally upon an artificial pond will be construed as extending to the middle or thread of the original stream.[26] Where a boundary is fixed at the bank of a pond, a subsequent change in the height of the water will not affect the boundary as so fixed.[27]

(2) Natural Bodies Artificially Maintained. Land bounded on a pond extends only to the margin, and the margin of the pond as it existed at the time of the conveyance is the limit, whether the pond was then in its natural state, or raised above it by a dam, or depressed below it by the deepening of its outlet;[28] but when the margin varies at different seasons of the year, a grant bounded by a pond will include all the land that is uncovered when the water is at its lowest,[29] and where the artificial obstruction is subsequently removed and the water recedes to its original state the grantee will take to the water's edge.[30]

(iii) *What Constitutes High or Low-Water Mark.* In tide waters, high and low-water marks are the limits within which the tide ordinarily ebbs and flows.[31] In streams, lakes, or ponds in which the tide does not ebb or flow low-

New Hampshire.— Dunklee *v.* Wilton R. Co., 24 N. H. 489, raceway.

North Carolina.— Cansler *v.* Henderson, 64 N. C. 469, ditch.

Wisconsin.—Lawson *v.* Mowry, 52 Wis. 219, 9 N. W. 280, canal.

Contra, Morgan *v.* Bass, 14 Fed. 454, canal. See 8 Cent. Dig. tit. "Boundaries," § 119.

24. *Alabama.*— Jenkins *v.* Cooper, 50 Ala. 419.

Connecticut.— Bishop *v.* Seeley, 18 Conn. 389.

Massachusetts.— Whitman *v.* Boston, etc., R. Co., 3 Allen (Mass.) 133.

Michigan.— Nichols *v.* New England Furniture Co., 100 Mich. 230, 59 N. W. 155.

New York.—Hoff *v.* Tobey, 66 Barb. (N. Y.) 347 [*affirmed* in 56 N. Y. 633].

West Virginia.—Carter *v.* Chesapeake, etc., R. Co., 26 W. Va. 644, 53 Am. Rep. 116.

Reference to map or plan.— A deed of a lot bounded on a canal, and referring to a plan by which the boundary appears to be on the side of the canal, conveys title to the land merely up to the walls of the canal as they then existed and were delineated on the plan. Whitman *v.* Boston, etc., R. Co., 3 Allen (Mass.) 133. See also Hoff *v.* Tobey, 66 Barb. (N. Y.) 347 [*affirmed* in 56 N. Y. 633].

25. Kingsland *v.* Chittenden, 61 N. Y. 618 [*affirming* 6 Lans. (N. Y.) 15]; Jones *v.* Parker, 99 N. C. 18, 5 S. E. 383; Allen *v.* Weber, 80 Wis. 531, 50 N. W. 514, 27 Am. St. Rep. 51, 14 L. R. A. 361.

26. *Connecticut.*— Mill River Woolen Mfg. Co. *v.* Smith, 34 Conn. 462.

Maine.— Mansur *v.* Blake, 62 Me. 38; Lowell *v.* Robinson, 16 Me. 357, 33 Am. Dec. 671. *Compare* Stevens *v.* King, 76 Me. 197, 49 Am. Rep. 609.

Massachusetts.— Phinney *v.* Watts, 9 Gray (Mass.) 269, 69 Am. Dec. 288.

New York.— Wheeler *v.* Spinola, 54 N. Y. 377.

Vermont.— Holden *v.* Chandler, 61 Vt. 291, 18 Atl. 310.

Contra, Boardman *v.* Scott, 102 Ga. 404, 30 S. E. 982, 51 L. R. A. 178.

27. Cook *v.* McClure, 58 N. Y. 437, 17 Am. Rep. 270; Holden *v.* Chandler, 61 Vt. 291, 18 Atl. 310; Eddy *v.* St. Mars, 53 Vt. 462, 38 Am. Rep. 695. See also Hull *v.* Fuller, 4 Vt. 199, where it was held that a deed describing a boundary line of land as running up a river to a certain falls "thence continuing to run in such a direction, as to include a mill yard, and the whole of a mill pond, which may be raised by a dam on said falls, to a certain road," determines the boundary of the land itself, and the height to which the pond may be raised.

28. Bradley *v.* Rice, 13 Me. 198, 29 Am. Dec. 501.

29. Wood *v.* Kelley, 30 Me. 47; Paine *v.* Woods, 108 Mass. 160; Boston *v.* Richardson, 105 Mass. 351. *Compare* Waterman *v.* Johnson, 13 Pick. (Mass.) 261.

30. Hathorne *v.* Stinson, 12 Me. 183, 28 Am. Dec. 167.

31. *California.*— Ward *v.* Mulford, 32 Cal. 365; Roudell *v.* Fay, 32 Cal. 354; People *v.* Morrill, 26 Cal. 336; Teschemacher *v.* Thompson, 18 Cal. 11, 79 Am. Dec. 151.

Connecticut.— Church *v.* Meeker, 34 Conn. 421; East-Haven *v.* Hemingway, 7 Conn. 186.

Illinois.— Seaman *v.* Smith, 24 Ill. 521.

Maine.— Gerrish *v.* Union Wharf, 26 Me. 384, 46 Am. Dec. 568.

New Jersey.— Gough *v.* Bell, 22 N. J. L. 441, 23 N. J. L. 624; New Jersey Zinc, etc., Co. *v.* Morris Canal, etc., Co., 44 N. J. Eq. 398, 15 Atl. 227, 1 L. R. A. 133.

Rhode Island.— Providence Steam-Engine Co. *v.* Providence, etc., Steamship Co., 12 R. I. 348, 34 Am. Rep. 652.

United States.— Howard *v.* Ingersoll, 13 How. (U. S.) 381, 14 L. ed. 189; Walker *v.* Marks, 2 Sawy. (U. S.) 152, 29 Fed. Cas. No. 17,078.

water mark is the point to which the water recedes at its lowest ordinary stage;[32] high-water mark, the point to which the water rises at its average highest stage.[33]

(iv) *What Constitutes Thread of Stream.* The thread of a stream is the line midway between the opposite shore lines, when the water is in its natural and ordinary stage, at medium height, and neither swollen by freshets nor shrunken by droughts. In locating the thread no account is taken of the main channel or current.[34]

b. Effect of Particular Calls — (i) *In General.* Certain terms employed in the descriptions of boundaries of riparian and littoral lands have acquired more

England.— Harvey *v.* Lyme Regis, L. R. 4 Exch. 260, 38 L. J. Exch. 141, 17 Wkly. Rep. 892; Blundell *v.* Catterall, 5 B. & Ald. 268, 24 Rev. Rep. 353, 7 E. C. L. 152; Lowe *v.* Govett, 3 B. & Ad. 863, 1 L. J. K. B. 224, 23 E. C. L. 376; Atty.-Gen. *v.* Chambers, 4 De G. M. & G. 206, 13 Jur. 779, 23 L. J. Ch. 662, 2 Wkly. Rep. 636, 53 Eng. Ch. 159, 4 De G. & J. 55, 5 Jur. N. S. 745, 7 Wkly. Rep. 404, 61 Eng. Ch. 44.

Canada.— Doe *v.* Hill, 7 N. Brunsw. 587.

Under the colonial ordinance of 1641 low-water mark in Massachusetts means the extreme, not the ordinary, point to which the tide recedes. Sewall, etc., Co. *v.* Boston Water Power Co., 147 Mass. 61, 16 N. E. 782; Atty.-Gen. *v.* Woods, 108 Mass. 436, 11 Am. Rep. 380; Wonson *v.* Wonson, 14 Allen (Mass.) 71; Atty.-Gen. *v.* Boston Wharf Co., 12 Gray (Mass.) 553; Com. *v.* Roxbury, 9 Gray (Mass.) 451; Sparhawk *v.* Bullard, 1 Metc. (Mass.) 95. But in Maine, under the same ordinance, low-water mark is the point to which the tide ordinarily recedes. Gerrish *v.* Union Wharf, 26 Me. 384, 46 Am. Dec. 568.

Under the civil law the shore of a sea or bay is the line of the highest tide in the winter. Galveston *v.* Menard, 23 Tex. 349. See also La. Civ. Code, art. 4.

32. McBurney *v.* Young, 67 Vt. 574, 32 Atl. 492, 29 L. R. A. 539; Howard *v.* Ingersoll, 13 How. (U. S.) 381, 14 L. ed. 189. See also Ledyard *v.* Ten Eyck, 36 Barb. (N. Y.) 102; Kingman *v.* Sparrow, 12 Barb. (N. Y.) 201; Canal Appraisers *v.* People, 17 Wend. (N. Y.) 571; Canal Com'rs *v.* People, 5 Wend. (N. Y.) 423; Slauson *v.* Goodrich Transp. Co., 94 Wis. 642, 69 N. W. 990.

33. *Iowa.*— Welch *v.* Browning, (Iowa 1901) 87 N. W. 430; Houghton *v.* Chicago, etc., R. Co., 47 Iowa 370; Musser *v.* Hershey, 42 Iowa 356.

Maine.— Morrison *v.* Skowhegan First Nat. Bank, 88 Me. 155, 33 Atl. 782.

Pennsylvania.—Wainwright *v.* McCullough, 63 Pa. St. 66; Stover *v.* Jack, 60 Pa. St. 339, 100 Am. Dec. 566; McCullough *v.* Wainright, 14 Pa. St. 171.

United States.— Howard *v.* Ingersoll, 13 How. (U. S.) 381, 14 L. ed. 189.

Canada.— Plumb *v.* McGannon, 32 U. C. Q. B. 8.

Front line of bank.— In Dunlap *v.* Stetson, 4 Mason (U. S.) 349, 8 Fed. Cas. No. 4,164, it was held that the words, "to high-water mark" could have no other rational meaning than as indicating the front line of the bank itself.

High-water mark is determined by the change in the vegetation and the character of the soil. St. Louis, etc., R. Co. *v.* Ramsey, 53 Ark. 314, 13 S. W. 931, 22 Am. St. Rep. 195, 8 L. R. A. 559.

Statute construed.— In Wainwright *v.* McCullough, 63 Pa. St. 66, it was held that the Pennsylvania act of 1858 authorizing a commission to fix the high and low-water lines of certain rivers was not applicable to disputed boundaries between private owners, but was intended to regulate the respective rights of the public and the landowners over whose property the right of navigation extended between high and low-water marks.

34. *Massachusetts.*— Pratt *v.* Lamson, 2 Allen (Mass.) 275; Hopkin's Academy *v.* Dickinson, 9 Cush. (Mass.) 544.

New Hampshire.— Kimball *v.* Schoff, 40 N. H. 191; Plymouth *v.* Holderness [*cited* in State *v.* Canterbury, 28 N. H. 195, 217]; Boscawen *v.* Canterbury, 23 N. H. 188.

Ohio.— Dayton *v.* Cooper Hydraulic Co., 10 Ohio S. & C. Pl. Dec. 192, 7 Ohio N. P. 495.

South Carolina.— McCullough *v.* Wall, 4 Rich. (S. C.) 68, 53 Am. Dec. 715.

Wisconsin.— West *v.* Fox River Paper Co., 82 Wis. 647, 52 N. W. 803.

See also Shoemaker *v.* Hatch, 13 Nev. 261.

Islands in rivers fall under the same rule as to the ownership of the soil and its incidents as the soil under water does. If not otherwise lawfully appropriated they belong to the riparian proprietor on one side, or are divided in severalty between the proprietors on both sides, according to the original dividing line, or *filum aquæ*, as it would run if the islands were under water. *Filum aquæ* is ascertained by measurement across from ordinary low-water mark on one side to the same on the other side, without regard to the channels or depth of water. When the island is appropriated the boundary is then midway between that and the mainland. McCullough *v.* Wall, 4 Rich. (S. C.) 68, 53 Am. Dec. 715. See also Bellefontaine Imp. Co. *v.* Niedringhaus, 181 Ill. 426, 55 N. E. 184, 72 Am. St. Rep. 269; Ludwig *v.* Overly, 19 Ohio Cir. Ct. 709, 6 Ohio Cir. Dec. 690; West *v.* Fox River Paper Co., 82 Wis. 647, 52 N. W. 803.

or less definite meanings;[35] and in the absence of a clear showing of a contrary intention it will be presumed that parties use them in their technical sense.[36]

(II) *For Edge, Bank, or Shore.* While always a question of construction, depending upon the true intent of the parties as derived from a consideration of the whole instrument, specific calls in a description of the boundaries of land for the edge, bank, or shore of a watercourse, pond, or lake will, as a rule, be construed to limit the grant or conveyance to the water's edge.[37]

35. See Bank; Basin; Bay; Beach; Bed; Bounded Tree; Bounders; Bounds; Flat; Sea-Shore; Shore; Strand.

"Brook."— Where the boundary of land is described in a deed as running on the bank of a certain brook, and such brook has both a main and auxiliary channel, "brook" means the main channel, in the absence of evidence that the parties did not use the word according to its ordinary signification when referring to one of the two branches of the stream. Pike *v.* Hood, 67 N. H. 171, 27 Atl. 139.

The "head" of a stream called for in a boundary is the highest point on the stream which furnishes a continuous stream of water and not necessarily its longest prong. Uhl *v.* Reynolds, 23 Ky. L. Rep. 759, 64 S. W. 498.

"Swamp" means, when called for as a boundary, the creek or main stream of the swamp, and not the water edge or margin of low, marshy land that frequently bounds the main stream. Felder *v.* Bonnett, 2 McMull. (S. C.) 44, 37 Am. Dec. 545.

"Thence down the swamp" was held to mean "along the swamp." Hartsfield *v.* Westbrook, 2 N. C. 297.

36. Hathaway *v.* Wilson, 123 Mass. 359.

37. *Alabama.*—Hagan *v.* Campbell, 8 Port. (Ala.) 9, 33 Am. Dec. 267, where it was held that a grant of land on the west side of the river Mobile, "terminated by the bank of said river on the east side," passed a title to the grantee to high-water mark only.

California.— Freeman *v.* Bellegarde, 108 Cal. 179, 41 Pac. 289, 49 Am. St. Rep. 76; Heilbron *v.* Kings River Canal Co., 76 Cal. 11, 17 Pac. 933.

Florida.— Axline *v.* Shaw, 35 Fla. 305, 17 So. 411, 28 L. R. A. 391.

Illinois.— People *v.* Madison County, 125 Ill. 9, 17 N. E. 147; Rockwell *v.* Baldwin, 53 Ill. 19.

Indiana.— Brophy *v.* Richeson, 137 Ind. 114, 36 N. E. 424.

Iowa.— Murphy *v.* Copeland, 51 Iowa 515, 1 N. W. 691, 58 Iowa 409, 10 N. W. 786, 43 Am. Rep. 118.

Kentucky.— Fleming *v.* Kenney, 4 J. J. Marsh. (Ky.) 155; Sanders *v.* McCracken, Hard. (Ky.) 258.

Maine.— Brown *v.* Heard, 85 Me. 294, 27 Atl. 182; Montgomery *v.* Reed, 69 Me. 510; Bradford *v.* Cressey, 45 Me. 9; Clancey *v.* Houdlette, 39 Me. 451; Lincoln *v.* Wilder, 29 Me. 169; Nickerson *v.* Crawford, 16 Me. 245. See also Erskine *v.* Moulton, 84 Me. 243, 24 Atl. 841. *Compare* Moore *v.* Griffin, 22 Me. 350, where it was held that where land conveyed is described as one half of a particular tract of land, "being that part next to and adjoining a particular river," the land granted extends to the river, notwithstanding a particular description by which it is "bounded round by the shore."

Massachusetts.— Niles *v.* Patch, 13 Gray (Mass.) 254; Hatch *v.* Dwight, 17 Mass. 289, 9 Am. Dec. 145. See also Harlow *v.* Fisk, 12 Cush. (Mass.) 302; Jackson *v.* Boston, etc., R. Corp., 1 Cush. (Mass.) 575; Mayhew *v.* Norton, 17 Pick. (Mass.) 357, 28 Am. Dec. 300, in all of which the clear intention of the grantors was held to overcome the limiting descriptions.

New Hampshire.— Daniels *v.* Cheshire R. Co., 20 N. H. 85; Alcock *v.* Little [*cited* in Rix *v.* Johnson, 5 N. H. 520, 523, 22 Am. Dec. 472]. But see Sleeper *v.* Laconia, 60 N. H. 201, 49 Am. Rep. 311, where it was held that a deed bounding by a line running "northwesterly to the river, thence north-easterly by the river shore," conveys to the center of the river.

New Jersey.— Kanouse *v.* Slockbower, 48 N. J. Eq. 42, 21 Atl. 197.

New York.— Yates *v.* Van De Bogert, 56 N. Y. 526; Halsey *v.* McCormick, 13 N. Y. 296; Babcock *v.* Utter, 1 Abb. Dec. (N. Y.) 27, 1 Keyes (N. Y.) 115, 397, 32 How. Pr. (N. Y.) 439; Matter of Rochester, 8 N. Y. App. Div. 609, 40 N. Y. Suppl. 1007; Kingman *v.* Sparrow, 12 Barb. (N. Y.) 201; Child *v.* Starr, 4 Hill (N. Y.) 369 [*reversing* 20 Wend. (N. Y.) 149]; Jackson *v.* Halstead, 5 Cow. (N. Y.) 216.

North Carolina.— Rowe *v.* Cape Fear Lumber Co., 128 N. C. 301, 38 S. E. 896, 39 S. E. 748.

Ohio.— Hopkins *v.* Kent, 9 Ohio 13. *Compare* Buckley *v.* Gilmore, 12 Ohio 63 (where an entry of so much land described as "beginning at a certain point on the lower side of a certain creek, running west a certain distance, and from each end of this line north, for quantity," was held to include land on both sides of the creek, which was small and non-navigable; although preceding this description was a statement that the locators entered so many acres "on the lower side of the creek"); Lamb *v.* Rickets, 11 Ohio 311 (where it was held that in computing the number of acres in a survey, "from, to, and with" the "bank" of a stream, in the description of the tract by mark and bounds, means low-water mark).

Pennsylvania.— Wood *v.* Appal, 63 Pa. St. 210; Klingensmith *v.* Ground, 5 Watts (Pa.) 458.

(III) *For Monument or Corner on Bank.* The mere mention of a monument on the bank of a stream as the place of beginning or end of a line is not of itself sufficient to control the ordinary presumption that the grantee will hold to the thread of the stream,[38] or in the case of navigable rivers in some jurisdictions to low-water mark.[39] Where, however, the intention is clearly apparent to limit the boundary by the monument, the instrument will be so construed.[40]

(IV) *For Thread of Stream.* A specific call for the thread of a stream fixes the thread as the boundary,[41] and in case the stream has two channels the thread of the main channel is the limit.[42]

(V) *For Quantity.* The quantity of land intended to be included in a grant or conveyance will not, of itself, either enlarge or limit the boundaries of riparian lands, but in doubtful cases, where the boundaries are not definitely fixed, it may be considered in arriving at a true construction of the instrument.[43]

c. Effect of Shifting of Channel or Shore. Where, by a sudden and violent or artificial change, the channel or shore upon which riparian or littoral lands are bounded is shifted, the boundaries of such lands are unaffected, and remain in their original position;[44] but where the change is gradual and imperceptible, whether caused by accretion, reliction, or encroachment, the boundaries shift with the shifting of the channel or shore.[45]

West Virginia.—Carter *v.* Chesapeake, etc., R. Co., 26 W. Va. 644, 53 Am. Rep. 116.

United States.— St. Clair County *v.* Lovingston, 23 Wall. (U. S.) 46, 23 L. ed. 59; Dunlap *v.* Stetson, 4 Mason (U. S.) 349, 8 Fed. Cas. No. 4,164; Thomas *v.* Hatch, 3 Sumn. (U. S.) 170, 23 Fed. Cas. No. 13,899. *Compare* St. Louis *v.* Rutz, 138 U. S. 226, 11 S. Ct. 337, 34 L. ed. 941 [*affirming* 35 Fed. 188].

Contra, Castle *v.* Elder, 57 Minn. 289, 59 N. W. 197.

See 8 Cent. Dig. tit. "Boundaries," § 104.

38. *Kentucky.*— Berry *v.* Snyder, 3 Bush (Ky.) 266, 96 Am. Dec. 219; Runion *v.* Alley, 19 Ky. L. Rep. 268, 39 S. W. 849; Asher Lumber Co. *v.* Lunsford, 17 Ky. L. Rep. 245, 30 S. W. 968.

Maine.— Low *v.* Tibbetts, 72 Me. 92, 39 Am. Rep. 303; Herrick *v.* Hopkins, 23 Me. 217; Lowell *v.* Robinson, 16 Me. 357, 33 Am. Dec. 671.

Massachusetts.— Lunt *v.* Holland, 14 Mass. 149.

New Hampshire.—Kent *v.* Taylor, 64 N. H. 489, 13 Atl. 419; Rix *v.* Johnson, 5 N. H. 520, 22 Am. Dec. 472.

New York.— Seneca Nation *v.* Knight, 23 N. Y. 498; Nichols *v.* Howland, 52 Hun (N. Y.) 287, 5 N. Y. Suppl. 252, 23 N. Y. St. 945; Child *v.* Starr, 4 Hill (N. Y.) 369; Luce *v.* Carley, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637.

South Carolina.— Noble *v.* Cunningham, McMull. Eq. (S. C.) 289.

See 8 Cent. Dig. tit. "Boundaries," § 106.

39. Grant *v.* White, 63 Pa. St. 271; Hart *v.* Hill, 1 Whart. (Pa.) 124; Martin *v.* Nance, 3 Head (Tenn.) 648; Brown Oil Co. *v.* Caldwell, 35 W. Va. 95, 13 S. E. 42, 29 Am. St. Rep. 793.

40. Fleming *v.* Kenney, 4 J. J. Marsh. (Ky.) 155; Babcock *v.* Utter, 1 Abb. Dec. (N. Y.) 27, 1 Keyes (N. Y.) 115, 397, 32 How. Pr. (N. Y.) 439; McCullock *v.* Aten, 2 Ohio 307; Turner *v.* Parker, 14 Oreg. 340, 12 Pac. 495.

41. Muller *v.* Landa, 31 Tex. 265, 98 Am. Dec. 529.

42. Branham *v.* Bledsoe Creek Turnpike Co., 1 Lea (Tenn.) 704, 27 Am. Rep. 789, where the stream was divided by an island.

43. Brophy *v.* Richeson, 137 Ind. 114, 36 N. E. 424; Walton *v.* Tifft, 14 Barb. (N. Y.) 216; Orendorff *v.* Steele, 2 Barb. (N. Y.) 126; Miller *v.* Mann, 55 Vt. 475.

44. *Kentucky.*— Degman *v.* Elliott, 9 Ky. L. Rep. 982, 8 S. W. 10.

Massachusetts.— Macdonald *v.* Morrill, 154 Mass. 270, 28 N. E. 259.

Nebraska.— Bouvier *v.* Stricklett, 40 Nebr. 792, 59 N. W. 550.

North Carolina.— Lynch *v.* Allen, 20 N. C. 160, 32 Am. Dec. 671.

Ohio.—Willey *v.* Lewis, 11 Ohio Dec. (Reprint) 607, 28 Cinc. L. Bul. 104; Maddux *v.* West, 6 Ohio Dec. (Reprint) 1010, 5 Cinc. L. Bul. 832.

Texas.— Collins *v.* State, 3 Tex. App. 323, 30 Am. Rep. 142.

Virginia.— Mitchell *v.* Baratta, 17 Gratt. (Va.) 445.

United States.— Nebraska *v.* Iowa, 143 U. S. 359, 12 S. Ct. 396, 36 L. ed. 186, 145 U. S. 519, 12 S. Ct. 976, 36 L. ed. 798; St. Louis *v.* Rutz, 138 U. S. 226, 11 S. Ct. 337, 34 L. ed. 941 [*affirming* 35 Fed. 188]; Bates *v.* Illinois Cent. R. Co., 1 Black (U. S.) 204, 17 L. ed. 158.

See 8 Cent. Dig. tit. "Boundaries," § 99.

45. *Nebraska.*— Bouvier *v.* Stricklett, 40 Nebr. 792, 59 N. W. 550. *Compare* Bissell *v.* Fletcher, 19 Nebr. 725, 28 N. W. 303, where, in an action of ejectment, it appeared that plaintiff's lands had formerly extended to the meander line, and the testimony showed that there had been a change in the channel of the river of about three fourths of a mile, but no

8. Ways, Roads, and Public Grounds — a. Presumption as to Rights Passed — (i) *When Bounded by Highway or Street* — (a) *In General.* A grant or conveyance of land described as bounded by a highway or street will be construed to mean the middle of such highway or street, unless such construction is contradicted either expressly or by necessary implication.[46]

accretion to plaintiff's land, and it was held that the boundaries of his land did not extend to the new channel.

New Jersey.— See Nixon *v.* Walter, 41 N. J. Eq. 103, 3 Atl. 385.

New York.— East Hampton *v.* Kirk, 84 N. Y. 215, 38 Am. Rep. 505; Halsey *v.* McCormick, 13 N. Y. 296.

Ohio.— Niehaus *v.* Shepherd, 26 Ohio St. 40.

Texas.— Collins *v.* State, 3 Tex. App. 323, 30 Am. Rep. 142.

United States.—Nebraska *v.* Iowa, 143 U. S. 359, 12 S. Ct. 396, 36 L. ed. 186, 145 U. S. 519, 12 S. Ct. 976, 36 L. ed. 798; East Omaha Land Co. *v.* Jeffries, 40 Fed. 386. See also Hartshorn *v.* Wright, Pet. C. C. (U. S.) 64, 11 Fed. Cas. No. 6,169.

England.— Scratton *v.* Brown, 4 B. & C. 485, 6 D. & R. 536, 28 Rev. Rep. 344, 10 E. C. L. 670.

See 8 Cent. Dig. tit. "Boundaries," § 99.

46. *Alabama.*— Moore *v.* Johnston, 87 Ala. 220, 6 So. 50; Columbus, etc., R. Co. *v.* Witherow, 82 Ala. 190, 3 So. 23.

Arkansas.— Taylor *v.* Armstrong, 24 Ark. 102.

California.—Watkins *v.* Lynch, 71 Cal. 21, 11 Pac. 808; Weyl *v.* Sonoma Valley R. Co., 69 Cal. 202, 10 Pac. 510; Webber *v.* California, etc., R. Co., 51 Cal. 425; Moody *v.* Palmer, 50 Cal. 31; Kittle *v.* Pfeiffer, 22 Cal. 484.

Connecticut.— Gear *v.* Barnum, 37 Conn. 229; Read *v.* Leeds, 19 Conn. 182; Champlin *v.* Pendleton, 13 Conn. 23; Chatham *v.* Brainerd, 11 Conn. 60; Peck *v.* Smith, 1 Conn. 103, 6 Am. Dec. 216; Stiles *v.* Curtis, 4 Day (Conn.) 328. See also Watrous *v.* Southworth, 5 Conn. 305.

Florida.— Florida Southern R. Co. *v.* Brown, 23 Fla. 104, 1 So. 512.

Georgia.— Chewning *v.* Shumate, 106 Ga. 751, 32 S. E. 544; Silvey *v.* McCool, 86 Ga. 1, 12 S. E. 175. See also Johnson *v.* Arnold, 91 Ga. 659, 18 S. E. 370.

Illinois.— Helmer *v.* Castle, 109 Ill. 664; Chicago *v.* Rumsey, 87 Ill. 348; Board Trustees Illinois, etc., Canal *v.* Haven, 11 Ill. 554.

Indiana.— Warbritton *v.* Demorett, 129 Ind. 346, 27 N. E. 730, 28 N. E. 613; Cox *v.* Louisville, etc., R. Co., 48 Ind. 178. See also Simonton *v.* Thompson, 55 Ind. 87.

Iowa.— Dubuque *v.* Maloney, 9 Iowa 450, 74 Am. Dec. 358.

Kentucky.— Schneider *v.* Jacob, 86 Ky. 101, 9 Ky. L. Rep. 382, 5 S. W. 350; Hawesville *v.* Lauder, 8 Bush (Ky.) 679; Carpenter *v.* Buckman, 19 Ky. L. Rep. 700, 41 S. W. 579.

Maine.— Wellman *v.* Dickey, 78 Me. 29, 2 Atl. 133; Oxton *v.* Groves, 68 Me. 371, 28 Am. Rep. 75; Webber *v.* Overlock, 66 Me. 177; Stinchfield *v.* Gerry, 64 Me. 200; Hunt *v.* Rich, 38 Me. 195; Bangor House Proprietary *v.* Brown, 33 Me. 309; Bucknam *v.* Bucknam, 12 Me. 463; Spring *v.* Russell, 7 Me. 273.

Maryland.— Foreman *v.* Baltimore Presb. Soc., (Md. 1894) 30 Atl. 1114.

Massachusetts.— Gould *v.* Eastern R. Co., 142 Mass. 85, 7 N. E. 543; Hamlin *v.* Pairpoint Mfg. Co., 141 Mass. 51, 6 N. E. 531; Garvin *v.* Dean, 115 Mass. 577; Boston *v.* Richardson, 13 Allen (Mass.) 146; Hollenbeck *v.* Rowley, 8 Allen (Mass.) 473; Morton *v.* Moore, 15 Gray (Mass.) 573; Smith *v.* Slocomb, 11 Gray (Mass.) 280; Phillips *v.* Bowers, 7 Gray (Mass.) 21; Newhall *v.* Ireson, 8 Cush. (Mass.) 595, 54 Am. Dec. 790. See also Phelps *v.* Webster, 134 Mass. 17; Brainard *v.* Boston, etc., R. Co., 12 Gray (Mass.) 407. *Contra*, Tyler *v.* Hammond, 11 Pick. (Mass.) 193; Sibley *v.* Holden, 10 Pick. (Mass.) 249, 20 Am. Dec. 521; Alden *v.* Murdock, 13 Mass. 256; Clap *v.* McNeil, 4 Mass. 589. But see O'Linda *v.* Lothrop, 21 Pick. (Mass.) 292, 32 Am. Dec. 261, where it was said that perhaps all of these cases might be sustained without any interference with the general rule, owing to the fact that in some, if not all, the description was so specific as necessarily to exclude the ways.

Michigan.— Pukiss *v.* Benson, 28 Mich. 538.

Missouri.— Thomas *v.* Hunt, 134 Mo. 392, 35 S. W. 581, 32 L. R. A. 857; Grant *v.* Moon, 128 Mo. 43, 30 S. W. 328.

New Hampshire.— Woodman *v.* Spencer, 54 N. H. 507; Goodeno *v.* Hutchinson, 54 N. H. 159; *In re* Reed, 13 N. H. 381. See also Thompson *v.* Major, 58 N. H. 242; Richardson *v.* Palmer, 38 N. H. 212.

New Jersey.— Ayres *v.* Pennsylvania R. Co., 48 N. J. L. 44, 3 Atl. 885, 57 Am. Rep. 538; Salter *v.* Jonas, 39 N. J. L. 469, 23 Am. Rep. 229; Lewis *v.* Pennsylvania R. Co., (N. J. 1896) 33 Atl. 932; Winter *v.* Peterson, 24 N. J. L. 524, 61 Am. Dec. 678; Higbee *v.* Camden, etc., R. Co., 19 N. J. Eq. 276; Glasby *v.* Morris, 18 N. J. Eq. 72; Hinchman *v.* Paterson Horse R. Co., 17 N. J. Eq. 75, 86 Am. Dec. 252.

New York.— Matter of Ladue, 118 N. Y. 213, 23 N. E. 465, 28 N. Y. St. 821; Matter of Brooklyn, 73 N. Y. 179; Sherman *v.* McKeon, 38 N. Y. 266; Bissell *v.* New York Cent. R. Co., 23 N. Y. 61; Mangam *v.* Sing Sing, 26 N. Y. App. Div. 464, 50 N. Y. Suppl. 647 [*affirmed* in 164 N. Y. 560, 58 N. E. 1089]; Matter of New York, 20 N. Y. App. Div. 404, 46 N. Y. Suppl. 832; Cheney *v.* Syracuse, etc., R. Co., 8 N. Y. App. Div. 620,

(B) *Effect of Grantor's Ownership.* A grant or conveyance of land bounded on a highway or street carries the fee in the highway or street to the middle of it, if the grantor at the time owns to the middle and there are no

40 N. Y. Suppl. 1103 [*affirmed* in 158 N. Y. 739, 53 N. E. 1123]; Edsall *v.* Howell, 86 Hun (N. Y.) 424, 33 N. Y. Suppl. 892, 67 N. Y. St. 621; Tinker *v.* Metropolitan El. R. Co., 81 Hun (N. Y.) 591, 30 N. Y. Suppl. 1014, 63 N. Y. St. 208; Gorham *v.* Eastchester Electric Co., 80 Hun (N. Y.) 290, 30 N. Y. Suppl. 125, 61 N. Y. St. 839; Greer *v.* New York Cent., etc., R. Co., 37 Hun (N. Y.) 346; Dunham *v.* Williams, 36 Barb. (N. Y.) 136; Wetmore *v.* Law, 34 Barb. (N. Y.) 515, 22 How. Pr. (N. Y.) 130; People *v.* Law, 34 Barb. (N. Y.) 494, 22 How. Pr. (N. Y.) 109; Sizer *v.* Devereux, 16 Barb. (N. Y.) 160; Adams *v.* Saratoga, etc., R. Co., 11 Barb. (N. Y.) 414; Adams *v.* Rivers, 11 Barb. (N. Y.) 390; Stewart *v.* Metropolitan El. R. Co., 56 N. Y. Super. Ct. 377, 4 N. Y. Suppl. 445, 21 N. Y. St. 472; Pollock *v.* Morris, 51 N. Y. Super. Ct. 112; Miner *v.* New York, 37 N. Y. Super. Ct. 171; Van Amringe *v.* Barnett, 8 Bosw. (N. Y.) 357; Hammond *v.* McLaughlin, 1 Sandf. (N. Y.) 323; Pell *v.* Pell, 35 Misc. (N. Y.) 472, 71 N. Y. Suppl. 1092; McCruden *v.* Rochester R. Co., 5 Misc. (N. Y.) 59, 25 N. Y. Suppl. 114; Willoughby *v.* Jenks, 20 Wend. (N. Y.) 96; Jackson *v.* Hathaway, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263; Cortelyou *v.* Van Brundt, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439; Potter *v.* Boyce, 27 N. Y. L. J. 1109. See also English *v.* Brennan, 60 N. Y. 609; Mattlage *v.* New York El. R. Co., 14 Misc. (N. Y.) 291, 35 N. Y. Suppl. 704, 70 N. Y. St. 439 [*affirmed* in 157 N. Y. 708, 52 N. E. 1124]. But see Graham *v.* Stern, 51 N. Y. App. Div. 406, 64 N. Y. Suppl. 728. *Compare* Watson *v.* New York, 34 Misc. (N. Y.) 701, 70 N. Y. Suppl. 1033.

Ohio.— Williams *v.* Sparks, 24 Ohio St. 141.

Oregon.— McQuaid *v.* Portland, etc., R. Co., 18 Oreg. 237, 22 Pac. 899.

Pennsylvania.— Rice *v.* Clear Spring Coal Co., 186 Pa. St. 49, 40 Atl. 149; Hines *v.* Kingston Coal Co., 186 Pa. St. 43, 40 Atl. 151; Firmstone *v.* Spaeter, 150 Pa. St. 616, 30 Wkly. Notes Cas. (Pa.) 570, 25 Atl. 41, 30 Am. St. Rep. 851; Kohler *v.* Kleppinger, (Pa. 1886) 5 Atl. 750; Ott *v.* Kreiter, 110 Pa. St. 370, 1 Atl. 724; Fransue *v.* Sell, 105 Pa. St. 604; Spackman *v.* Steidel, 88 Pa. St. 453; Trutt *v.* Spotts, 87 Pa. St. 339; Falls *v.* Ries, 74 Pa. St. 439; Cox *v.* Freedley, 33 Pa. St. 124, 75 Am. Dec. 584; Grier *v.* Sampson, 27 Pa. St. 183; Paul *v.* Carver, 26 Pa. St. 223, 67 Am. Dec. 413. See also Union Burial Ground Soc. *v.* Robinson, 5 Whart. (Pa.) 18; Snider *v.* Snider, 3 Phila. (Pa.) 158, 15 Leg. Int. (Pa.) 213.

Rhode Island.— Clark *v.* Providence, 10 R. I. 437.

South Carolina.— Witter *v.* Harvey, 1 McCord (S. C.) 67, 10 Am. Dec. 650.

South Dakota.— Edmison *v.* Lowry, 3 S. D. 77, 52 N. W. 583, 44 Am. St. Rep. 774, 17 L. R. A. 275.

Tennessee.—Spaine *v.* Railway Co., Thomps. Cas. (Tenn.) 253. See also Hamilton County *v.* Rape, (Tenn. 1898) 47 S. W. 416.

Vermont.— Marsh *v.* Burt, 34 Vt. 289; Morrow *v.* Willard, 30 Vt. 118; Buck *v.* Squiers, 22 Vt. 484. And see Cole *v.* Haynes, 22 Vt. 588.

Wisconsin.— Brown *v.* Baraboo, 98 Wis. 273, 74 N. W. 223; Andrews *v.* Youmans, 78 Wis. 56, 47 N. W. 304; Pettibone *v.* Hamilton, 40 Wis. 402; Hegar *v.* Chicago, etc., R. Co., 26 Wis. 624; Gove *v.* White, 20 Wis. 425; Ford *v.* Chicago, etc., R. Co., 14 Wis. 609, 80 Am. Dec. 791; Mariner *v.* Schulte, 13 Wis. 692; Milwaukee *v.* Milwaukee, etc., R. Co., 7 Wis. 85; Kimball *v.* Kenosha, 4 Wis. 321.

United States.— Harris *v.* Elliott, 10 Pet. (U. S.) 25, 9 L. ed. 333.

England.— Reg. *v.* Strand Dist. Bd. of Works, 4 B. & S. 526, 33 L. J. M. C. 33, 6 L. T. Rep. N. S. 374, 12 Wkly. Rep. 46, 116 E. C. L. 526; Berridge *v.* Ward, 10 C. B. N. S. 400, 7 Jur. N. S. 876, 30 L. J. C. P. 218, 100 E. C. L. 400; Headlam *v.* Hedley, Holt N. P. 463, 3 E. C. L. 184; *In re* White's Charities, [1898] 1 Ch. 659, 67 L. J. Ch. 430, 78 L. T. Rep. N. S. 550, 46 Wkly. Rep. 479; Lord *v.* Sydney, 12 Moore P. C. 473, 7 Wkly. Rep. 267, 14 Eng. Reprint 991; Steel *v.* Prickett, 2 Stark. 463, 20 Rev. Rep. 717, 3 E. C. L. 490; Grose *v.* West, 7 Taunt. 39, 17 Rev. Rep. 437, 2 E. C. L. 250.

See 8 Cent. Dig. tit. "Boundaries," § 123.

A matter of construction.— The question whether the highway passes to the grantee is in all cases a matter of construction merely, to be determined from a consideration of the language used by the parties and such surrounding circumstances as are proper to be considered in ascertaining their intent. Codman *v.* Evans, 1 Allen (Mass.) 443; Pennsylvania R. Co. *v.* Pittsburgh Grain Elevator Co., 50 Pa. St. 499; Buck *v.* Squiers, 22 Vt. 484. The employment of the words "by," "upon," or "along" a road manifests an intention to include the road in the grant to the center line. Mott *v.* Mott, 68 N. Y. 246; Cochran *v.* Smith, 73 Hun (N. Y.) 597, 26 N. Y. Suppl. 103, 56 N. Y. St. 227. But where a deed describes land by courses and distances, the line beginning at a certain point and running "to the road," and thence "in the line of the road," the measurement being exact, and extending only to the margin of the road, the title to no part of the road passes. Cole *v.* Haynes, 22 Vt. 588. See also Tyler *v.* Hammond, 11 Pick. (Mass.) 193; English *v.* Brennan, 60 N. Y. 609; Jackson *v.* Hathaway, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263.

words showing a contrary intent;[47] but where the title to a street is in the government or municipality, a deed of land bounded by such street will carry title only to the line and not to the center of the street;[48] and where the grantor is a corporation, holding a street for public purposes and disposing of the adjacent lots for private use, the boundary of the private property by that held for public purposes will be the dividing line between the two the same as when one lot is bounded by another.[49]

(c) *Effect of Location, Dedication, or Occupation* — (1) In General. When a highway or street is referred to in a grant or other conveyance, the way as opened[50] and actually used, rather than as platted, is construed to be the boundary intended by the parties;[51] but where the grant or conveyance refers to a map

47. *Florida.*— Jacksonville, etc., R. Co. *v.* Lockwood, 33 Fla. 573, 15 So. 327.

Illinois.— Gebhardt *v.* Reeves, 75 Ill. 301.

Maine.— Webber *v.* Overlock, 66 Me. 177; Palmer *v.* Dougherty, 33 Me. 502, 54 Am. Dec. 636; Johnson *v.* Anderson, 18 Me. 76.

Maryland.— Foreman *v.* Baltimore Presb. Assoc., (Md. 1894) 30 Atl. 1114; Gump *v.* Sibley, 79 Md. 165, 28 Atl. 977.

Massachusetts.— Gould *v.* Eastern R. Co., 142 Mass. 85, 7 N. E. 543.

Missouri.— Thomas *v.* Hunt, 134 Mo. 392, 35 S. W. 581, 32 L. R. A. 857.

New Jersey.— Ayres *v.* Pennsylvania R. Co., 48 N. J. L. 44, 3 Atl. 885, 57 Am. Rep. 538.

New York.— Terrett *v.* New York, etc., Steam Saw Mill, etc., Co., 49 N. Y. 666; Dunham *v.* Williams, 37 N. Y. 251, 4 Transcr. App. (N. Y.) 209; Stevens *v.* New York, 46 N. Y. Super. Ct. 274; Putzel *v.* Van Brunt, 40 N. Y. Super. Ct. 501; Mattlage *v.* New York El. R. Co., 14 Misc. (N. Y.) 291, 35 N. Y. Suppl. 704, 70 N. Y. St. 439.

Pennsylvania.—Cox *v.* Freedley, 33 Pa. St. 124, 75 Am. Dec. 584; Paul *v.* Carver, 24 Pa. St. 207, 64 Am. Dec. 649; Flick's Estate, 6 Kulp (Pa.) 329.

See 8 Cent. Dig. tit. "Boundaries," § 125.

If the grantor own the fee on one side only, and the whole road, either actual or contemplated, is upon the margin of his tract, the proprietor on the opposite side not having any interest in its ownership, a conveyance of the tract as bounded by the margin of the road will pass the fee in the whole road. Peck *v.* Smith, 1 Conn. 103, 6 Am. Dec. 216; Johnson *v.* Arnold, 91 Ga. 659, 18 S. E. 370; Thompson *v.* Major, 58 N. H. 242. See also Taylor *v.* Armstrong, 24 Ark. 102; Richardson *v.* Palmer, 38 N. H. 212. But see Palmer *v.* Dougherty, 33 Me. 502, 54 Am. Dec. 636, where it was held that where a deed described land as bounded by a street contemplated on a certain plan, but not actually made, the soil thereof, although owned by the grantor, did not pass to the grantee.

Whole street in grantor.— Where the grantor, prior to the location of a highway, owned the land for its entire width, and his deed of the land described it as bounding on the street, it was held that, on the vacation of the street, the grantee's tract included the entire highway, and not merely to the center. Healey *v.* Babbitt, 14 R. I. 533. *Compare* Hobson *v.* Philadelphia, 150 Pa. St. 595, 31 Wkly. Notes Cas. (Pa.) 9, 24 Atl. 1048, where the deed described the land conveyed as bounded by the "north-easterly side" of W street, "together with the free and common use, right, liberty and privilege of said Wright street," and the whole of such street was on grantor's land, it was held that the grantee took the fee only to the side line of the street, with a right of way over the whole street.

48. Helm *v.* Webster, 85 Ill. 116; Gebhardt *v.* Reeves, 75 Ill. 301; Board Trustees Illinois, etc., Canal *v.* Haven, 11 Ill. 554; Dunham *v.* Williams, 37 N. Y. 251, 4 Transcr. App. (N. Y.) 209; Burbach *v.* Schweinler, 56 Wis. 386, 14 N. W. 449.

49. Wetmore *v.* Story, 22 Barb. (N. Y.) 414.

50. **Opening by statutory proceedings.**— The presumption that the owner of lots abutting on a public way owns the fee to the middle of the way is not rebutted by the fact that the street was opened by statutory proceedings. Hochhalter *v.* Manhattan R. Co., 9 N. Y. Suppl. 341, 31 N. Y. St. 112.

51. *Connecticut.*— Falls Village Water-Power Co. *v.* Tibbetts, 31 Conn. 165.

Florida.— Winter *v.* Payne, 33 Fla. 470, 15 So. 211.

Indiana.—Cleveland *v.* Obenchain, 107 Ind. 591, 8 N. E. 624. *Compare* Reid *v.* Klein, 138 Ind. 484, 37 N. E. 967, where it was held that a deed describing land as beginning at a point "ranging" with the south line of a street referred to the street as extended to the property on a recorded plat, and not as it actually existed some distance away.

Maine.— Brown *v.* Heard, 85 Me. 294, 27 Atl. 182; Sproul *v.* Foye, 55 Me. 162; Tebbetts *v.* Estes, 52 Me. 560. See also Dorman *v.* Bates Mfg. Co., 82 Me. 438, 19 Atl. 915, where it was held that the grantee of land bounded on a street "as at present defined and located" by his grantor, cannot claim a right of way over the street as located by a former owner, not his grantor, where no reference is made to such location in the grant to him.

New Jersey.— O'Brien *v.* King, 49 N. J. L. 79, 7 Atl. 34.

New York.— Blackman *v.* Riley, 138 N. Y. 318, 34 N. E. 214, 52 N. Y. St. 865; Singer

the line of the way as actually surveyed is held to determine the boundary of the land.[52]

(2) Dedication — (a) Necessity of Accepting. Where land is dedicated to the public for the purposes of a highway or street, a vendee of land abutting thereon does not take title in fee to the center of the street unless the dedication has been accepted by the public.[53]

(b) Conflict Between Dedication and Plat. Where a plat describes the boundaries of lots and streets, and specifies their size, but the dedication prescribes that the lots are bounded by the middle of the streets on which they are situated, the lot owners own the soil to the middle of the streets and alleys subject to the public uses.[54]

(c) Vacation of. A deed describing land by reference to a plat which shows it bounded by a street carries the fee in the land to the middle of the street opposite it, although the dedication of the street has been vacated and the specific dimensions of the land do not include the street.[55]

(3) Change of Location. Where a change is made in the location of a highway or street, it will not affect boundaries fixed according to the original location;[56] but grants made subsequently to such change, referring to the highway or street as a boundary, will be construed to mean the way as located at that time, unless an intention to bound on the original way is manifested.[57]

(d) *Effect of Non-Opening.* The grantee of land described as bounded on a street will take to the middle of a street as contemplated, although it has not been extended or opened;[58] but if the street is never in fact opened and used, and is not a public highway or dedicated to public use, the grantee does not take title in fee to its center.[59]

(e) *Effect of Way Being Bounded by Watercourse.* The fact that a highway or street bounding land is itself bounded by a body of water, or that a watercourse bounding land is itself bounded by a highway or street, will have no effect upon the boundary of the land, which is to be determined as if the outer boundary did not exist;[60] but the mere reservation of a right of way along the bank

v. New York, 47 N. Y. App. Div. 42, 62 N. Y. Suppl. 347 [*affirmed* in (N. Y. 1901) 59 N. E. 1130].

Rhode Island.—Aldrich *v.* Billings, 14 R. I. 233.

Vermont.— Wead *v.* St. Johnsbury, etc., R. Co., 64 Vt. 52, 24 Atl. 361.

See 8 Cent. Dig. tit. "Boundaries," § 124.

52. Oreña *v.* Santa Barbara, 91 Cal. 621, 28 Pac. 268; Andreu *v.* Watkins, 26 Fla. 390, 7 So. 876.

53. Willoughby *v.* Jenks, 20 Wend. (N. Y.) 96.

In Kansas the fee of all streets, alleys, and other public grounds which have been dedicated to the use of the public by the proprietors of any town or city is vested in the county in which said streets, alleys, or public grounds are situated, and not in the abutting or adjacent owners. Randal *v.* Elder, 12 Kan. 257.

54. Haight *v.* Keokuk, 4 Iowa 199.

55. Paine *v.* Consumers' Forwarding, etc., Co., 71 Fed. 626, 37 U. S. App. 539, 19 C. C. A. 99.

56. Brantly *v.* Huff, 62 Ga. 532.

57. Tebbetts *v.* Estes, 52 Me. 566; Stearns *v.* Rice, 14 Pick. (Mass.) 411; McShane *v.* Main, 62 N. H. 4; Glover *v.* Shields, 32 Barb. (N. Y.) 374.

58. Johnson *v.* Arnold, 91 Ga. 659, 18 S. E. 370; Matter of Brooklyn, 73 N. Y. 179; Matter of Lehigh St., 81* Pa. St. 85; Falls *v.* Reis, 74 Pa. St. 439; Patterson *v.* Harlan, 5 Pa. Co. Ct. 211, 3 Pa. Co. Ct. 560. See also Payne *v.* English, 101 Cal. 10, 35 Pac. 348. *Contra*, Palmer *v.* Dougherty, 33 Me. 502, 54 Am. Dec. 636; O'Linda *v.* Lothrop, 21 Pick. (Mass.) 292, 32 Am. Dec. 261.

59. Spackman *v.* Steidel, 88 Pa. St. 453; Union Burial Ground Soc. *v.* Robinson, 5 Whart. (Pa.) 18.

60. *Connecticut.*— Goodyear *v.* Shanahan, 43 Conn. 204, where a canal was constructed partly upon a highway and partly upon land bounded by the highway, and it was held that a subsequent conveyance of the land as bounded by the canal extended the title of the grantee to the center of the canal only.

Illinois.— Board Trustees Illinois, etc., Canal *v.* Haven, 11 Ill. 554.

Indiana.— Haslett *v.* New Albany Belt, etc., R. Co., 7 Ind. App. 603, 34 N. E. 845.

Massachusetts.— Codman *v.* Winslow, 10 Mass. 146.

Michigan.— Nichols *v.* New England Furniture Co., 100 Mich. 230, 59 N. W. 155.

New York.— Nott *v.* Thayer, 2 Bosw. (N. Y.) 10.

in a grant of lands bounded by a river will not prevent the fee in the land from vesting in the grantee or limit his riparian rights.[61]

(II) *When Bounded by Alley.* Where a deed describes land as bounded upon an alley, the grantee's title extends to the center line thereof.[62]

(III) *When Bounded by Private Way*—(A) *In General.* A grant of land bounded by a private way conveys the soil to the center line of the way,[63] notwithstanding a clause giving the use thereof in common with the grantor, his heirs, and assigns,[64] unless a different intention appears by the other parts of the deed, or by the locality to which the description applies.[65] When no way

Pennsylvania.— Lotz *v.* Reading Iron Co., 10 Pa. Co. Ct. 497.

United States.— Banks *v.* Ogden, 2 Wall. (U. S.) 57, 17 L. ed. 818.

Contra, Morgan *v.* Livingston, 6 Mart. (La.) 19 (where it was held that the fact that a highway intervenes between the bank of the river and the tract conveyed does not prevent the vendee from acquiring the batture arising before the estate, where it was the intention to convey a riparian estate, and the owner of the land is bound to repair the highway, the soil of which is at his risk); Wait *v.* May, 48 Minn. 453, 51 N. W. 471; Mariner *v.* Schulte, 13 Wis. 692. See also Smith *v.* Chicago, etc., R. Co., 83 Wis. 271, 50 N. W. 497, 53 N. W. 550.

See 8 Cent. Dig. tit. "Boundaries," § 135.

When a lake boundary so limits a street as to reduce it to less than one half its regular width, the street so reduced must still be divided by its center line between the grantee of the lot bounded by it and the original proprietor. Banks *v.* Ogden, 2 Wall. (U. S.) 57, 17 L. ed. 818.

61. Hagan *v.* Campbell, 8 Port. (Ala.) 9, 33 Am. Dec. 267.

62. *Kentucky.*—Jacob *v.* Woolfolk, 90 Ky. 426, 12 Ky. L. Rep. 400, 14 S. W. 415, 9 L. R. A. 551.

Maryland.— See Albert *v.* Thomas, 73 Md. 181, 20 Atl. 912, where it was held that where a deed conveying a platted lot of land, subject to an easement granted in an alley at one end, gave the distances as including the alley, a deed of the grantee describing the lot generally, but giving the boundary as "an alley reserved" for the easement stated, conveyed the fee to the alley.

Minnesota.— Gilbert *v.* Emerson, 60 Minn. 62, 61 N. W. 820.

Missouri.— Snoddy *v.* Bolen, 122 Mo. 479, 24 S. W. 142, 25 S. W. 932, 24 L. R. A. 507; St. Charles First Presb. Church *v.* Kellar, 39 Mo. App. 441.

Nevada.— Lindsay *v.* Jones, 21 Nev. 72, 25 Pac. 297.

New Jersey.—Freeman *v.* Sayre, 48 N. J. L. 37, 2 Atl. 650.

New York.— Hennessy *v.* Murdock, 137 N. Y. 317, 33 N. E. 330, 50 N. Y. St. 717.

Pennsylvania.— Abrahams *v.* Alsberg, 173 Pa. St. 383, 34 Atl. 514; Bliem *v.* Daubenspreck, 169 Pa. St. 282, 32 Atl. 337.

See 8 Cent. Dig. tit. "Boundaries," § 132.

Land abutting on gangway.— A deed to a lot abutting on a gangway which describes the lot as only extending thereto conveys an interest in the gangway to the extent that the grantor's ancestors had rights therein. Baker *v.* Barry, 22 R. I. 471, 48 Atl. 795.

63. *Massachusetts.*— Crocker *v.* Cotting, 166 Mass. 183, 44 N. E. 214, 33 L. R. A. 245; Gould *v.* Eastern R. Co., 142 Mass. 85, 7 N. E. 543; Hooper *v.* Farnsworth, 128 Mass. 487; Motley *v.* Sargent, 119 Mass. 231; Clark *v.* Parker, 106 Mass. 554; Winslow *v.* King, 14 Gray (Mass.) 321; Fisher *v.* Smith, 9 Gray (Mass.) 441. See also Old South Soc. *v.* Wainwright, 141 Mass. 443, 5 N. E. 843.

New York.— Pitney *v.* Huested, 8 N. Y. App. Div. 105, 40 N. Y. Suppl. 407.

North Carolina.— Hays *v.* Askew, 53 N. C. 226.

South Carolina.— Witter *v.* Harvey, 1 McCord (S. C.) 67, 10 Am. Dec. 650.

Wisconsin.— Pettibone *v.* Hamilton, 40 Wis. 402.

Contra, Winslow *v.* Reed, 89 Me. 67, 35 Atl. 1017; Ames *v.* Hilton, 70 Me. 36; Bangor House Proprietary *v.* Brown, 33 Me. 309. See also Stockwell *v.* Fitzgerald, 70 Vt. 468, 41 Atl. 504.

See 8 Cent. Dig. tit. "Boundaries," § 131.

Right of way.— Although when land is conveyed by deed, and a building is one of the boundaries, the parties are presumed to intend that the line shall be wholly on one side of every portion of the building, yet in the case of a right of way, even if created by express grant, the presumption is that it was intended to extend under the projecting finish of a building. Farnsworth *v.* Rockland, 83 Me. 508, 22 Atl. 394.

64. Motley *v.* Sargent, 119 Mass. 231; Stark *v.* Coffin, 105 Mass. 328.

65. Ledford *v.* Cummins, 20 Ky. L. Rep. 393, 46 S. W. 507; Crocker *v.* Cotting, 168 Mass. 183, 44 N. E. 214, 33 L. R. A. 245; Ganley *v.* Looney, 100 Mass. 359; Codman *v.* Evans, 1 Allen (Mass.) 443; Stearns *v.* Mullen, 4 Gray (Mass.) 151; Mott *v.* Mott, 68 N. Y. 246 [*reversing* 8 Hun (N. Y.) 474]; Jones *v.* Cowman, 2 Sandf. (N. Y.) 234; Cushing *v.* Hathaway, 10 R. I. 514. See also Hunt *v.* Raplee, 44 Hun (N. Y.) 149.

A division of land held in common by deeds of release between cotenants, giving the precise measurements of each parcel, describing each as bounded on a passageway, and designating them by letters and figures according to a plat, lets the passageway remain as an estate in common. Morgan *v.* Moore, 3 Gray (Mass.) 319.

in fact exists the deed is to be construed irrespective of the supposed way mentioned.[66]

(B) *Railroad.* Where land is bounded generally upon a railroad, the grantee will be presumed to take as far as his grantor owns.[67] Where, however, the grant is clearly limited to the right of way,[68] to the side of the road,[69] or to a "cut,"[70] the grantee is restricted to such bound.

(IV) *When Bounded by Public Grounds.* Lands bounded upon public grounds other than highways and streets are limited to the outer lines of such grounds.[71]

b. Effect of Particular Calls — (I) *For Monument or Corner on Way.* In the case of a call for a monument or point of beginning on the side of a highway or street, the intention is all controlling. Such a call does not necessarily exclude the extension of the grant to the center,[72] if the grantor owns so far;[73] but in many cases the description is so expressed as to show a manifest intention to limit the grantee to the side line.[74]

(II) *For Side Line.* Land expressly described as being bounded by the side line of a highway or street is so bounded, and not by the center line;[75] but the

66. Treat *v.* Joslyn, 139 Mass. 94, 29 N. E. 653.

67. Williams *v.* Savannah, etc., R. Co., 94 Ga. 540, 20 S. E. 487; Richardson *v.* Palmer, 38 N. H. 212; Church *v.* Stiles, 59 Vt. 642, 10 Atl. 674; Maynard *v.* Weeks, 41 Vt. 617. See also Buffalo, etc., R. Co. *v.* Stigeler, 61 N. Y. 348.

Change of location.— Where the deed to a railroad company describes the land conveyed by reference to the line of the road of such company as then located, but not built, the boundary lines are not affected by a subsequent change in location of the road. King *v.* Norfolk, etc., R. Co., 90 Va. 210, 17 S. E. 868.

68. Georgia R., etc., Co. *v.* Hamilton, 59 Ga. 171; Church *v.* Stiles, 59 Vt. 642, 10 Atl. 674; Maynard *v.* Weeks, 41 Vt. 617; Williams *v.* Western Union R. Co., 50 Wis. 71, 5 N. W. 482.

69. Reid *v.* Klein, 138 Ind. 484, 37 N. E. 967. See also Perry *v.* Keith, 93 Me. 433, 45 Atl. 511.

70. Newton *v.* Louisville, etc., R. Co., 110 Ala. 474, 19 So. 19.

71. McMahon *v.* Taylor, 2 Mill Const. (S. C.) 175. *Compare* Perrin *v.* New York Cent. R. Co., 36 N. Y. 120, 1 Transcr. App. (N. Y.) 253 [*reversing* 40 Barb. (N. Y.) 65], where it was held that where lots are sold as bounded on a "park," so designated on the map, but which is the only means of access to such lots, they ought to be considered as bounded by the center of the space so designated.

Location of grounds — Evidence.— Where the boundaries of a tract depend upon the location of a public lot, the record of such location made by commissioners appointed by court is proper evidence of such location. Gillerson *v.* Small, 45 Me. 17.

72. Low *v.* Tibbetts, 72 Me. 92, 39 Am. Rep. 303; Cottle *v.* Young, 59 Me. 105; Dean *v.* Lowell, 135 Mass. 55; O'Connell *v.* Bryant, 121 Mass. 557; White *v.* Godfrey, 97 Mass. 472; Salter *v.* Jonas, 39 N. J. L. 469, 23 Am. Rep. 229; Kings County F. Ins. Co. *v.* Stevens, 87 N. Y. 287, 41 Am. Rep. 361; Holloway *v.* Delano, 64 Hun (N. Y.) 27, 18 N. Y. Suppl. 700, 45 N. Y. St. 886, 28 Abb. N. Cas. (N. Y.) 183; Adams *v.* Saratoga, etc., R. Co., 11 Barb. (N. Y.) 414; Holloway *v.* Southmayd, 18 N. Y. Suppl. 703, 707, 45 N. Y. St. 898.

73. Somerville *v.* Johnson, 36 N. J. Eq. 211.

74. *Illinois.*— Chicago *v.* Rumsey, 87 Ill. 348.

Maine.— Walker *v.* Pearson, 40 Me. 152.

Maryland.—Neal *v.* Hopkins, 87 Md. 19, 39 Atl. 322; Hunt *v.* Brown, 75 Md. 481, 23 Atl. 1029; Peabody Heights Co. *v.* Sadtler, 63 Md. 533, 52 Am. Rep. 519.

Massachusetts.— Foley *v.* McCarthy, 157 Mass. 474, 32 N. E. 669; Chadwick *v.* Davis, 143 Mass. 7, 8 N. E. 601; Dodd *v.* Witt, 139 Mass. 63, 29 N. E. 475, 52 Am. Rep. 700; Smith *v.* Slocomb, 9 Gray (Mass.) 36, 69 Am. Dec. 274; Phillips *v.* Bowers, 7 Gray (Mass.) 21; Sibley *v.* Holden, 10 Pick. (Mass.) 249, 20 Am. Dec. 521.

New Jersey.— Hoboken Land, etc., Co. *v.* Kerrigan, 31 N. J. L. 13.

New York.— Blackman *v.* Riley, 138 N. Y. 318, 34 N. E. 214, 52 N. Y. St. 865; White's Bank *v.* Nichols, 64 N. Y. 65; Deering *v.* Riley, 38 N. Y. App. Div. 164, 56 N. Y. Suppl. 704; Morison *v.* New York El. R. Co., 74 Hun (N. Y.) 398, 26 N. Y. Suppl. 641, 57 N. Y. St. 245; Lee *v.* Lee, 27 Hun (N. Y.) 1; Wetmore *v.* Law, 34 Barb. (N. Y.) 515, 22 How. Pr. (N. Y.) 130.

75. *California.*— Alameda Macadamizing Co. *v.* Williams, 70 Cal. 534, 12 Pac. 530; Severy *v.* Central Pac. R. Co., 51 Cal. 194.

Kentucky.— Hoffman *v.* Sheperdsville, 18 Ky. L. Rep. 302, 36 S. W. 522.

Maine.—Cottle *v.* Young, 59 Me. 105; Warren *v.* Blake, 54 Me. 276, 89 Am. Dec. 748.

Maryland.— Baltimore, etc., R. Co. *v.* Gould, 67 Md. 60, 8 Atl. 754.

Massachusetts.— Holmes *v.* Turner's Falls Co., 142 Mass. 590, 8 N. E. 646; Hamlin *v.*

mere fact that land is described as lying on the side of a highway or street does not exclude the highway or street, since it merely indicates the location of the land with reference to the way without defining its exterior lines.[76]

(III) *For Quantity.* Where the quantity intended to be conveyed as set forth in the deed can only be obtained by measuring from the center of a highway or street the measurement must be made from that line;[77] and the same is true where the point of beginning is itself on the center line,[78] although the grantee in either case receives the stated quantity subject to the public easement as to a portion of it. But where the required quantity can be obtained by beginning at the side of the highway or street, and such is clearly the intent of the instrument, the grantee will take the quantity contracted for irrespective of the center line, although his title under the deed extends to such line.[79]

(IV) *Reference to Map or Plat.* Although the contrary has been held in some jurisdictions,[80] the weight of authority is to the effect that when land is conveyed by reference to a map or plat, by which it is shown to be bounded by a highway or street, the grant extends to the center of such highway or street, in the absence of a clear showing to the contrary, if the grantor owns so far.[81]

Pairpoint Mfg. Co., 141 Mass. 51, 6 N. E. 531; Alden *v.* Murdock, 13 Mass. 256.

Michigan.— Grand Rapids, etc., R. Co. *v.* Heisel, 38 Mich. 62, 31 Am. Rep. 306.

New Jersey.— See Lewis *v.* Pennsylvania R. Co., (N. J. 1896) 33 Atl. 932.

New York.— Holloway *v.* Southmayd, 139 N. Y. 390, 34 N. E. 1047, 1052, 54 N. Y. St. 676, 686, 687 [*affirming* 64 Hun (N. Y.) 34, 18 N. Y. Suppl. 704, 45 N. Y. St. 891, 28 Abb. N. Cas. (N. Y.) 190]; De Witt *v.* Van Schoyk, 35 Hun (N. Y.) 103; De Peyster *v.* Mali, 27 Hun (N. Y.) 439; Augustine *v.* Britt, 15 Hun (N. Y.) 395; Wetmore *v.* Law, 34 Barb. (N. Y.) 515, 22 How. Pr. (N. Y.) 130; Sizer *v.* Devereux, 16 Barb. (N. Y.) 160; Mead *v.* Riley, 50 N. Y. Super. Ct. 20; Tag *v.* Keteltas, 48 N. Y. Super. Ct. 241; Coster *v.* Peters, 5 Rob. (N. Y.) 192; Anderson *v.* James, 4 Rob. (N. Y.) 35; Van Amringe *v.* Barnett, 8 Bosw. (N. Y.) 357; Fearing *v.* Irwin, 4 Daly (N. Y.) 385; Dexter *v.* Riverside, etc., Mills, 15 N. Y. Suppl. 374, 39 N. Y. St. 933; Clark *v.* Rochester City, etc., R. Co., 2 N. Y. Suppl. 563, 18 N. Y. St. 903; Patten *v.* New York El. R. Co., 3 Abb. N. Cas. (N. Y.) 306.

Pennsylvania.— Pennsylvania R. Co. *v.* Pittsburgh Grain Elevator Co., 50 Pa. St. 499.

Rhode Island.— Hughes *v.* Providence, etc., R. Co., 2 R. I. 493.

Tennessee.— Iron Mountain R. Co. *v.* Bingham, 87 Tenn. 522, 11 S. W. 705, 4 L. R. A. 622.

Vermont.— Buck *v.* Squiers, 22 Vt. 484. But see Marsh *v.* Burt, 34 Vt. 289.

Contra, Woodman *v.* Spencer, 54 N. H. 507.

See 8 Cent. Dig. tit. "Boundaries," § 128.

Side line of alley.— In a deed describing a lot as bounded by the east line of the alley, the rule of construction as to boundaries by "a stream" or "a way" does not apply. Lough *v.* Machlin, 40 Ohio St. 332.

76. Greer *v.* New York Cent., etc., R. Co., 37 Hun (N. Y.) 346.

77. Cochran *v.* Smith, 73 Hun (N. Y.) 597, 26 N. Y. Suppl. 103, 56 N. Y. St. 227.

78. Henderson *v.* Hatterman, 146 Ill. 555, 34 N. E. 1041.

79. Fraser *v.* Ott, 95 Cal. 661, 30 Pac. 793.

80. Sutherland *v.* Jackson, 32 Me. 80; Merrill *v.* Newton, 99 Mich. 225, 58 N. W. 70; Tingley *v.* Providence, 8 R. I. 493.

81. *Indiana.*— Cox *v.* Louisville, etc., R. Co., 48 Ind. 178.

Iowa.— Dubuque *v.* Maloney, 9 Iowa 450, 74 Am. Dec. 358.

Massachusetts.— Peck *v.* Denniston, 121 Mass. 17.

Minnesota.— Matter of Robbins, 34 Minn. 99, 24 N. W. 356, 57 Am. Rep. 40.

New Jersey.—Pennsylvania R. Co. *v.* Ayres, 50 N. J. L. 660, 14 Atl. 901.

New York.— Perrin *v.* New York Cent. R. Co., 36 N. Y. 120, 1 Transcr. App. (N. Y.) 253; Bissell *v.* New York Cent. R. Co., 23 N. Y. 61; Lozier *v.* New York Cent. R. Co., 42 Barb. (N. Y.) 465; Stevens *v.* New York, 46 N. Y. Super. Ct. 274; Herring *v.* Fisher, 1 Sandf. (N. Y.) 344; McCruden *v.* Rochester R. Co., 5 Misc. (N. Y.) 59, 25 N. Y. Suppl. 114 [*affirmed* in 77 Hun (N. Y.) 607, 28 N. Y. Suppl. 1135]. *Compare* Lee *v.* Lee, 27 Hun (N. Y.) 1.

Pennsylvania.— Dobson *v.* Hohenadel, 148 Pa. St. 367, 23 Atl. 1128.

Wisconsin.— Jarstadt *v.* Morgan, 48 Wis. 245, 4 N. W. 27; Kneeland *v.* Van Valkenburgh, 46 Wis. 434, 1 N. W. 63, 32 Am. Rep. 719; Pettibone *v.* Hamilton, 40 Wis. 402. See also Burbach *v.* Schweinler, 56 Wis. 386, 14 N. W. 449.

United States.— Paine *v.* Consumers' Forwarding, etc., Co., 71 Fed. 626, 37 U. S. App. 539, 19 C. C. A. 99.

See 8 Cent. Dig. tit. "Boundaries," § 129.

Street on margin of tract.— Where the owner of a tract of land caused it to be platted into lots and streets, and laid out a street on the margin of the tract wholly on his own land and next adjoining unplatted

C. Relative Importance of Conflicting Elements — 1. In General. While no inflexible rule can be laid down with regard to the relative weight to be given to the conflicting elements in a description of boundaries, it may be stated generally that when all the calls of an entry, survey, deed, or grant cannot be complied with because some are vague or repugnant, such vague or repugnant calls may be rejected or controlled by other consistent and certain material calls.[82]

land belonging to another, it was held that his conveyances of lots bounded on such street carried the fee in the entire street opposite the lots, as it was not to be presumed that he intended to retain an interest in any portion of the street fronting the lots so conveyed. Matter of Robbins, 34 Minn. 99, 24 N. W. 356, 57 Am. Rep. 40.

Plat made subsequently to conveyance.— The doctrine that the grantee of a lot in a recorded plat, except where the terms of his deed or the plat expressly exclude that construction, takes to the center of adjoining public ways, applies in favor of one who took a deed describing land only by such metes and bounds as afterward formed the boundary of a designated lot, exclusive of public ways, upon a plat subsequently made and recorded by his grantor. Pettibone *v.* Hamilton, 40 Wis. 402.

Unrecorded or defective plat.— When the owner of land laid out into blocks and lots bounded by what are represented on an unrecorded or defective plat as streets, conveys a lot, referring in the deed to the plat as containing the true description of the premises, his grantee takes, as against the grantor and his assigns, to the center of the street on which the lot abuts. Jarstadt *v.* Morgan, 48 Wis. 245, 4 N. W. 27.

Vacation of plat.— A deed conveying lots by their numbers upon a vacated plat, which plat shows the lots bounded upon a street, the dedication of which has been vacated at the time, carries the fee of the land to the middle of such street, although the dimensions given on the plat do not include it. Paine *v.* Consumers' Forwarding, etc., Co., 71 Fed. 626, 37 U. S. App. 539, 19 C. C. A. 99.

82. *California.*— Martin *v.* Lloyd, 94 Cal. 195, 29 Pac. 491; Walsh *v.* Hill, 38 Cal. 481; Piercy *v.* Crandall, 34 Cal. 334.

Connecticut.— Beach *v.* Whittlesey, 73 Conn. 530, 48 Atl. 350; Benedict *v.* Gaylord, 11 Conn. 332, 29 Am. Dec. 299.

Illinois.— Stevens *v.* Wait, 112 Ill. 544.

Indiana.— Gano *v.* Aldridge, 27 Ind. 294; Gray *v.* Stiver, 24 Ind. 174.

Kentucky.— Moseley *v.* Jamison, 1 A. K. Marsh. (Ky.) 606; Shannon *v.* Buford, 2 Bibb (Ky.) 114; McConnell *v.* Kenton, Hughes (Ky.) 257; Pawling *v.* Merewether, Hughes (Ky.) 26.

Maine.—Ricker *v.* Barry, 34 Me. 116; Herrick *v.* Hopkins, 23 Me. 217; Moore *v.* Griffin, 22 Me. 350; Vose *v.* Handy, 2 Me. 322.

Maryland.— Friend *v.* Friend, 64 Md. 321, 1 Atl. 865.

Massachusetts.— Stevenson *v.* Erskine, 99 Mass. 367; Bond *v.* Fay, 12 Allen (Mass.) 86; Parks *v.* Loomis, 6 Gray (Mass.) 467; Sawyer *v.* Kendall, 10 Cush. (Mass.) 241.

Michigan.— Ives *v.* Kimball, 1 Mich. 308.

Minnesota.— Owings *v.* Freeman, 48 Minn. 483, 51 N. W. 476.

Missouri.— West *v.* Bretelle, 115 Mo. 653, 22 S. W. 705; Cooley *v.* Warren, 53 Mo. 166; Jamison *v.* Fopiano, 48 Mo. 194; Gibson *v.* Bogy, 28 Mo. 478.

New Hampshire.— Hall *v.* Davis, 36 N. H. 569; Nutting *v.* Herbert, 35 N. H. 120; White *v.* Gay, 9 N. H. 126, 31 Am. Dec. 224.

New Jersey.—Wharton *v.* Brick, 49 N. J. L. 289, 6 Atl. 442, 8 Atl. 529; McEowen *v.* Lewis, 26 N. J. L. 451.

New York.— Townsend *v.* Hayt, 51 N. Y. 656 [*affirming* 51 Barb. (N. Y.) 334]; People *v.* Saxton, 15 N. Y. App. Div. 263, 44 N. Y. Suppl. 211; Seaman *v.* Hogeboom, 21 Barb. (N. Y.) 398; Muhlker *v.* Ruppert, 55 N. Y. Super. Ct. 359, 14 N. Y. St. 734 [*affirmed* in 124 N. Y. 627, 26 N. E. 313, 35 N. Y. St. 215]; Patten *v.* Stitt, 6 Rob. (N. Y.) 431; Loomis *v.* Jackson, 18 Johns. (N. Y.) 81, 19 Johns. (N. Y.) 449.

Pennsylvania.— Malone *v.* Sallada, 48 Pa. St. 419.

South Carolina.— Johnson *v.* McMillan, 1 Strobh. (S. C.) 143.

Tennessee.— Funa *v.* Manning, 11 Humphr. (Tenn.) 311; Bell *v.* Hickman, 6 Humphr. (Tenn.) 398; Wright *v.* Mabry, 9 Yerg. (Tenn.) 55; Den *v.* Cunningham, Mart. & Y. (Tenn.) 67.

Texas.— Jones *v.* Andrews, 62 Tex. 652; Bass *v.* Mitchell, 22 Tex. 285; Hubert *v.* Bartlett, 9 Tex. 97; Besson *v.* Richards, 24 Tex. Civ. App. 64, 58 S. W. 611; Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079; Robertson *v.* Mooney, 1 Tex. Civ. App. 379, 21 S. W. 143.

Vermont.— Clement *v.* Rutland Bank, 61 Vt. 298, 17 Atl. 717, 4 L. R. A. 425.

West Virginia.— Bowers *v.* Dickinson, 30 W. Va. 709, 6 S. E. 335; Adams *v.* Alkire, 20 W. Va. 480.

United States.— Shipp *v.* Miller, 2 Wheat. (U. S.) 316, 4 L. ed. 248; Massie *v.* Watts, 6 Cranch (U. S.) 148, 3 L. ed. 181; Howell *v.* Saule, 5 Mason (U. S.) 410, 12 Fed. Cas. No. 6,782.

England.— Doe *v.* Galloway, 5 B. & Ad. 43, 2 L. J. K. B. 182, 2 N. & M. 240, 27 E. C. L. 28; Lambe *v.* Reaston, 1 Marsh. 23, 5 Taunt. 207, 1 E. C. L. 113.

See 8 Cent. Dig. tit. "Boundaries," § 5.

Special or locative calls must control those which are merely directory and general, and no accumulation of such general calls will control locative calls. Bell *v.* Hickman, 6 Humphr. (Tenn.) 398.

Inferential calls may be used in locating a line only when the natural or artificial calls

Thus course and distance will yield to known visible and definite objects, whether natural or artificial, and will themselves control a call of quantity.[83] In all cases, however, those calls most consistent with the intention of the parties will if practicable be adopted.[84]

are lost. Friend *v.* Friend, 64 Md. 321, 1 Atl. 865.

Where there is an inaccuracy in a portion of a particular description and it is obscure and uncertain, the general description, if it renders the particular clear and certain, will govern. Herrick *v.* Hopkins, 23 Me. 217. See also Martin *v.* Lloyd, 94 Cal. 195, 29 Pac. 491; Sawyer *v.* Kendall, 10 Cush. (Mass.) 241.

83. *Alabama.*— Taylor *v.* Tomby, 116 Ala. 621, 22 So. 910, 67 Am. St. Rep. 149.

Illinois.— Ambrose *v.* Raley, 58 Ill. 506.

Indiana.— Allen *v.* Kersey, 104 Ind. 1, 3 N. E. 557; Simonton *v.* Thompson, 55 Ind. 87.

Iowa.— Sayers *v.* Lyons, 10 Iowa 249.

Kentucky.— Woods *v.* Kennedy, 5 T. B. Mon. (Ky.) 174; Washington *v.* Arnold, 3 A. K. Marsh. (Ky.) 606; Cissell *v.* Rapier, 3 Ky. L. Rep. 690.

Louisiana.— Riddell *v.* Jackson, 14 La. Ann. 135.

Maine.— Chandler *v.* Green, 69 Me. 350; Talbot *v.* Copeland, 32 Me. 251.

Maryland.— Friend *v.* Friend, 64 Md. 321, 1 Atl. 865; Wilson *v.* Inloes, 6 Gill (Md.) 121; Thomas *v.* Godfrey, 3 Gill & J. (Md.) 142.

Massachusetts.— Hall *v.* Eaton, 139 Mass. 217, 29 N. E. 660; Powell *v.* Clark, 5 Mass. 355, 4 Am. Dec. 67.

Minnesota.— Yanish *v.* Talbox, 49 Minn. 268, 51 N. W. 1051.

New York.— Jackson *v.* McConnell, 19 Wend. (N. Y.) 175, 32 Am. Dec. 439; Doe *v.* Thompson, 5 Cow. (N. Y.) 371. See also Seaman *v.* Hogeboom, 21 Barb. (N. Y.) 398.

North Carolina.— Cowles *v.* Reavis, 109 N. C. 417, 13 S. E. 930.

Ohio.— Avery *v.* Baum, Wright (Ohio) 576; Ziska *v.* Schutt, 19 Ohio Cir. Ct. 625, 10 Ohio Cir. Dec. 289.

Pennsylvania.— Pringle *v.* Rogers, 193 Pa. St. 94, 44 Atl. 275; Duncan *v.* Madara, 106 Pa. St. 562.

South Carolina.— Fulwood *v.* Graham, 1 Rich. (S. C.) 491; Amick *v.* Holman, 3 Strobh. (S. C.) 122; Wash *v.* Holmes, 1 Hill (S. C.) 12; Commissioner in Equity *v.* Thompson, 4 McCord (S. C.) 434.

Texas.— Randall *v.* Gill, 77 Tex. 351, 14 S. W. 134; Luckett *v.* Scruggs, 73 Tex. 519, 11 S. W. 529; Stafford *v.* King, 30 Tex. 257, 94 Am. Dec. 304; Bolton *v.* Lann, 16 Tex. 96; Tison *v.* Smith, 8 Tex. 147; Warden *v.* Harris, (Tex. Civ. App. 1898) 47 S. W. 834.

Vermont.— Bundy *v.* Morgan, 45 Vt. 46.

Wisconsin.— Racine *v.* J. I. Case Plow Co., 56 Wis. 539, 14 N. W. 599.

United States.— Ulman *v.* Clark, 100 Fed. 180; Garrard *v.* Silver Peak Mines, 82 Fed. 578.

See 3 Cent. Dig. tit. "Boundaries," § 3.

In locating lands the following rules are resorted to, and generally in the order stated: (1) Natural boundaries; (2) artificial marks; (3) adjacent boundaries; (4) course and distance. Neither rule, however, occupies an inflexible position, for when it is plain that there was a mistake an inferior means of location may control a higher. Fulwood *v.* Graham, 1 Rich. (S. C.) 491. See also Avery *v.* Baum, Wright (Ohio) 576.

If any of the abuttals or calls of the deed are found they cannot be disregarded, although the others may not be found. Those which are found, if not inconsistent with each other, are elements in the rights of the parties and cannot be departed from to substitute the subordinate description by courses and distances given in the deed. Talbot *v.* Copeland, 32 Me. 251.

A call "to include the improvement" makes the improvement essential, and the survey must be so varied as to include the improvement, although the beginning be certain and the courses definite. Washington *v.* Arnold, 3 A. K. Marsh. (Ky.) 606.

Rejection of inapplicable call.— Where all the calls in a deed except one may be applied on the face of the earth, making a true and intelligible description of the lot to which they are thus applied, the one not applicable will be controlled by the others and may be rejected. Chandler *v.* Green, 69 Me. 350.

84. *Arizona.*— U. S. *v.* Cameron, (Ariz. 1889) 21 Pac. 177.

California.— Serrano *v.* Rawson, 47 Cal. 52.

Colorado.— Murray *v.* Hobson, 10 Colo. 66, 13 Pac. 921.

Kentucky.— Preston *v.* Bowmar, 2 Bibb (Ky.) 493; Morriso *v.* Coghill, Ky. Dec. 322.

Maine.—Beal *v.* Gordon, 55 Me. 482; Hamilton *v.* Foster, 45 Me. 32; Herrick *v.* Hopkins, 23 Me. 217.

Massachusetts.— Murdock *v.* Chapman, 9 Gray (Mass.) 156.

Missouri.— Schultz *v.* Lindell, 40 Mo. 330.

New Hampshire.— Driscoll *v.* Green, 59 N. H. 101; Bell *v.* Woodward, 46 N. H. 315; White *v.* Gay, 9 N. H. 126, 31 Am. Dec. 224.

New York.— Robinson *v.* Kime, 70 N. Y. 147; Buffalo, etc., R. Co. *v.* Stigeler, 61 N. Y. 348; Danziger *v.* Boyd, 53 N. Y. Super. Ct. 398, 55 N. Y. Super. Ct. 537, 12 N. Y. St. 64; Ehrenreich *v.* Froment, 27 N. Y. L. J. 1093.

North Carolina.—Miller *v.* Bryan, 86 N. C. 167; Cooper *v.* White, 46 N. C. 389.

Ohio.— Wolfe *v.* Scarborough, 2 Ohio St. 361.

Pennsylvania.— Holmes *v.* Mealy, 1 Phila. (Pa.) 339, 9 Leg. Int. (Pa.) 50.

Rhode Island.— Waterman *v.* Andrews, 14 R. I. 589.

2. CONTROL OF PRIOR DESCRIPTION. Where a full and complete description of the subject-matter of a deed or grant is followed by another description in the same instrument, the first description will control, even though the second is equally full and complete.[85]

3. CONTROL OF LINES MARKED OR SURVEYED — a. In General. Where the lines of a survey have been run, and can be found, they constitute the true boundaries which must not be departed from or made to yield to any less certain and definite matter of description or identity.[86]

South Carolina.— Johnson *v.* McMillan, 1 Strobh. (S. C.) 143.

Tennessee.— Mayse *v.* Lafferty, 1 Head (Tenn.) 60.

Texas.— Talkin *v.* Anderson, (Tex. 1892) 19 S. W. 350; Arambula *v.* Sullivan, 80 Tex. 615, 16 S. W. 436; Brown *v.* Bedinger, 72 Tex. 247, 10 S. W. 90; Harrell *v.* Morris, (Tex. 1887) 5 S. W. 625 (holding that when two descriptive calls are given in a survey, both of equal dignity, as a call for a corner and a marked line, preference will be given to that one which is most consistent with the intention to be derived from the entire description); Browning *v.* Atkinson, 37 Tex. 633; Bragg *v.* Lockhart, 11 Tex. 160. See also Luckett *v.* Scruggs, 73 Tex. 519, 11 S. W. 529.

Vermont.—Gates *v.* Lewis, 7 Vt. 511; Hull *v.* Fuller, 7 Vt. 100. But see Owen *v.* Foster, 13 Vt. 263, holding that where courses and distances alone are given in a survey the needle must govern the one and the chain the other, and the intention of those making the survey is not to be let in to vary the result.

Wisconsin.—Rioux *v.* Cormier, 75 Wis. 566, 44 N. W. 654; Wilson *v.* Hunter, 14 Wis. 683, 80 Am. Dec. 795.

United States.— White *v.* Luning, 93 U. S. 514, 23 L. ed. 938; Croghan *v.* Nelson, 3 How. (U. S.) 187, 11 L. ed. 554; Holmes *v.* Trout, 7 Pet. (U. S.) 171, 8 L. ed. 647; Jackson *v.* Sprague, Paine (U. S.) 494, 13 Fed. Cas. No. 7,148.

See 8 Cent. Dig. tit. "Boundaries," § 4.

In order to ascertain the true intent of the parties to a conveyance and carry it into effect, the court will give a reasonable construction to all the calls of the instrument and will reject no part of the description unless found repugnant to the manifest purpose of the grant. Bell *v.* Woodward, 46 N. H. 315. See also Herrick *v.* Hopkins, 23 Me. 217; Miller *v.* Bryan, 86 N. C. 167.

In the absence of monuments, courses, and distances the intent of the parties will not fail, if there be other matter in the deed which shows the intent as to the boundary. Schultz *v.* Lindell, 40 Mo. 330.

85. Roe *v.* Lidwell, 11 Ir. C. L. 320; Llewellyn *v.* Jersey, 12 L. J. Exch. 243, 11 M. & W. 183. And see, generally, DEEDS.

86. *Alabama.*— Lewen *v.* Smith, 7 Port. (Ala.) 428.

Georgia.— Riley *v.* Griffin, 16 Ga. 141, 60 Am. Dec. 726.

Illinois.— Kuglin *v.* Bock, 181 Ill. 165, 54 N. E. 907; Fisher *v.* Bennehoff, 121 Ill. 426, 13 N. E. 150.

Iowa.—Messer *v.* Reginnitter, 32 Iowa 312.

Kentucky.— Buford *v.* Cox, 5 J. J. Marsh. (Ky.) 582; Baxter *v.* Evett, 7 T. B. Mon. (Ky.) 329; Thornberry *v.* Churchill, 4 T. B. Mon. (Ky.) 29, 16 Am. Dec. 125; Young *v.* Leiper, 4 Bibb (Ky.) 503; Cowan *v.* Fauntleroy, 2 Bibb (Ky.) 261; Lyon *v.* Ross, 1 Bibb (Ky.) 466; Kaut *v.* Rice, 21 Ky. L. Rep. 1365, 55 S. W. 203.

Maine.— Herrick *v.* Hopkins, 23 Me. 217.

Massachusetts.—Lunt *v.* Holland, 14 Mass. 149.

North Carolina.— Gause *v.* Perkins, 47 N. C. 222; Norcom *v.* Leary, 25 N. C. 49; Cherry *v.* Slade, 7 N. C. 82; Bustin *v.* Christie, 1 N. C. 68. And see Caraway *v.* Chancy, 51 N. C. 361, where it was held that the running and marking of a line variant from that answering the calls of a mesne conveyance cannot control it, unless such running and marking were contemporaneous with the deed.

Ohio.— Reed *v.* Marsh, 8 Ohio 147.

Pennsylvania.— Pruner *v.* Brisbin, 98 Pa. St. 202; Craft *v.* Yeaney, 66 Pa. St. 210; Wharton *v.* Garvin, 34 Pa. St. 340; Younkin *v.* Cowan, 34 Pa. St. 198; Ogden *v.* Porterfield, 34 Pa. St. 191; Walker *v.* Smith, 2 Pa. St. 43. *Compare* Kuhns *v.* Fennell, (Pa. 1888) 15 Atl. 920.

Texas.— Moore *v.* Whitcomb, (Tex. 1887) 4 S. W. 373; Bolton *v.* Lann, 16 Tex. 96; Galloway *v.* Ft. Worth State Nat. Bank, (Tex. Civ. App. 1900) 56 S. W. 236; Burge *v.* Poindexter, (Tex. Civ. App. 1900) 56 S. W. 81; Marshall *v.* Crawford, 2 Tex. Unrep. Cas. 477. See also Boon *v.* Hunter, 62 Tex. 582.

Wisconsin.—Martin *v.* Carlin, 19 Wis. 454, 88 Am. Dec. 696.

United States.— McIver *v.* Walker, 4 Wheat. (U. S.) 444, 4 L. ed. 611; McIver *v.* Walker, 9 Cranch (U. S.) 173, 3 L. ed. 694; Platt *v.* Vermillion, 99 Fed. 356, 39 C. C. A. 555.

See *infra*, II, C, 4, a; and 8 Cent. Dig. tit. "Boundaries," § 25.

A marked line of another tract which can be established by its memorials must be run to, disregarding distance, when called for in a conveyance; but where such line cannot be established the distance run must govern. Gause *v.* Perkins, 47 N. C. 222. See also Norcom *v.* Leary, 25 N. C. 49.

Experimentally located line.— A marked line, experimentally located by a surveyor in

b. Over Natural Objects. Lines actually surveyed and marked, when found, will control calls for natural or other fixed objects.[87]

c. Over Maps, Plats, or Field-Notes. In case of a discrepancy between lines actually marked or surveyed, and those called for in maps, plats, or field-notes, those marked or surveyed will control.[88]

d. Over Calls For Adjoiners. As a rule lines marked on the ground for the survey or adopted by the surveyor are to be regarded rather than calls for adjoiners; and when there is a discrepancy such lines govern.[89]

e. Over Courses and Distances. Lines actually marked or surveyed and capable of identification[90] will, according to well-settled principles of law,

attempting to divide a tract of land, not mentioned in the deed, and disagreeing with its courses and distances, as well as with a plot therein referred to, will not control the description in the deed. Kuhns *v.* Fennell, (Pa. 1888) 15 Atl. 920.

Necessity of actual survey.— A line or corner of another survey called for in field-notes without an actual survey may be disregarded, when evidently called for by mistake, and to observe it would be inconsistent with all other calls, with the course and distance called for, and the manifest intention of the parties. Boon *v.* Hunter, 62 Tex. 582.

United States surveys.— In executing surveys under the laws of the United States the mere marking of a corner by the surveyor establishes no boundary; but such marked corner is controlled by the actual division line subsequently made, field-notes of which are subsequently returned to the proper offices and preserved according to law. Reed *v.* Marsh, 8 Ohio 147.

Where several tracts have been surveyed in block, and returned to the land-office, the lines and corners marked upon the ground in any part of it are to be considered as belonging to each and every tract of which it is composed. If sufficient lines and corners thus marked can be found they determine the location of the whole block and of every tract in it, without regard to the calls for adjoiners or for waters, if such calls conflict with the lines actually run upon the ground and returned. Pruner *v.* Brisbin, 98 Pa. St. 202.

87. Baxter *v.* Wilson, 95 N. C. 137; Malone *v.* Sallada, 48 Pa. St. 419; Quinn *v.* Heart, 43 Pa. St. 337; Younkin *v.* Cowan, 34 Pa. St. 198; Hall *v.* Tanner, 4 Pa. St. 244, 45 Am. Dec. 686; Walker *v.* Smith, 2 Pa. St. 43; Kelly *v.* Graham, 9 Watts (Pa.) 116; James *v.* Brooks, 6 Heisk. (Tenn.) 150. See also Massengill *v.* Boyles, 4 Humphr. (Tenn.) 205; Lutcher, etc., Lumber Co. *v.* Hart, (Tex. Civ. App. 1894) 26 S. W. 94.

88. *California.*— Whiting *v.* Gardner, 80 Cal. 78, 22 Pac. 71.

Illinois.— Sawyer *v.* Cox, 63 Ill. 130.

Iowa.— Thrush *v.* Graybill, 110 Iowa 585, 81 N. W. 798; Root *v.* Cincinnati, 87 Iowa 202, 54 N. W. 206.

Maine.— Stetson *v.* Adams, 91 Me. 178, 39 Atl. 575; Bean *v.* Bachelder, 78 Me. 184, 3 Atl. 279; Talbot *v.* Copeland, 38 Me. 333; Williams *v.* Spaulding, 29 Me. 112; Bussey *v.* Grant, 20 Me. 281; Machias *v.* Whitney, 16 Me. 343; Heaton *v.* Hodges, 14 Me. 66, 30 Am. Dec. 731; Thomas *v.* Patten, 13 Me. 329; Ripley *v.* Berry, 5 Me. 24, 17 Am. Dec. 201; Brown *v.* Gay, 3 Me. 126.

Nebraska.— Holst *v.* Streitz, 16 Nebr. 249, 20 N. W. 307.

New Hampshire.— Richardson *v.* Chickering, 41 N. H. 380, 77 Am. Dec. 769.

New York.— Townsend *v.* Hayt, 51 Barb. (N. Y.) 334; Jackson *v.* Smith, 9 Johns. (N. Y.) 100; Voorhees *v.* De Myer, 3 Sandf. Ch. (N. Y.) 614.

Pennsylvania.— Riddlesburg Coal, etc., Co. *v.* Rogers, 65 Pa. St. 416; Kron *v.* Daugherty, 9 Pa. Super. Ct. 163; Taylor *v.* Blake, 2 Am. L. J. N. S. 94.

Tennessee.— Mayse *v.* Lafferty, 1 Head (Tenn.) 60.

Texas.— Smith *v.* Boone, 84 Tex. 526, 19 S. W. 702; Utley *v.* Smith, (Tex. Civ. App. 1895) 32 S. W. 906.

See 8 Cent. Dig. tit. "Boundaries," § 27.

The rule does not apply where the survey is made subsequently to the plan. Thomas *v.* Patten, 13 Me. 329.

89. Darrah *v.* Bryant, 56 Pa. St. 69; McGinnis *v.* Porter, 20 Pa. St. 80; Thomas *v.* Mowrer, 15 Pa. St. 139; Matlack *v.* Hogue, 13 Pa. Co. Ct. 214; Castleman *v.* Pouton, 51 Tex. 84; Burnett *v.* Burriss, 39 Tex. 501; Mitchell *v.* Burdett, 22 Tex. 633; Busk *v.* Manghum, 14 Tex. Civ. App. 621, 37 S. W. 459; Bowers *v.* Dickinson, 30 W. Va. 709, 6 S. E. 335; Platt *v.* Vermillion, 99 Fed. 356, 39 C. C. A. 555. But see Fruit *v.* Brower, 9 N. C. 337; Nash *v.* Atherton, 10 Ohio 163; Martz *v.* Hartley, 4 Watts (Pa.) 261 [*explained* and *qualified* in Walker *v.* Smith, 2 Pa. St. 43]; Anderson *v.* Stamps, 19 Tex. 460.

The rule will not be varied because a call is made to run to the line of an older survey, if that line was never reached in the survey actually made, but the surveyor stopped at another line, which was mistaken for it. Burnett *v.* Burriss, 39 Tex. 501.

Where two surveys call for each other, there can be no vacancy unless the lines marked on the ground contradict the call, and in such case the marked lines must govern. McGinnis *v.* Porter, 20 Pa. St. 80.

90. Where the lines called for are of doubtful identity, course and distance should be resorted to as furnishing the best evidence the case is susceptible of, since it is only when lines called for in a deed are actually marked and can be identified that they con-

control calls for course and distance in the determination and location of a boundary.[91]

f. Over Quantity. In locating boundaries a call for quantity, inserted in the instrument by way of description, must yield to lines marked or surveyed.[92]

4. Control of Natural or Permanent Objects — a. In General. The general, although not universal, rule is that calls for natural or permanent objects in an

trol calls for course and distance. Browning *v.* Atkinson, 37 Tex. 633. See also Dimmitt *v.* Lashbrook, 2 Dana (Ky.) 1; Lyon *v.* Ross, 1 Bibb (Ky.) 466; Johnson *v.* Archibald, 78 Tex. 96, 14 S. W. 266, 22 Am. St. Rep. 27; Duff *v.* Moore, 68 Tex. 270, 4 S. W. 530; Gerald *v.* Freeman, 68 Fed. 201, 4 S. W. 256.

Time of running.— Course and distance from an established point will prevail over a supposed line and corner which at the time of the grant had not been run and established. May *v.* Sanders, 6 J. J. Marsh. (Ky.) 349; Galloway *v.* Brown, 16 Ohio 428; McCown *v.* Hill, 26 Tex. 369. See also Woodbury *v.* Venia, 114 Mich. 251, 72 N. W. 189.

91. *California.*— Castro *v.* Barry, 79 Cal. 443, 21 Pac. 946; Walsh *v.* Hill, 38 Cal. 481.

Delaware.— Nivin *v.* Stevens, 5 Harr. (Del.) 272.

Georgia.— Riley *v.* Griffin, 16 Ga. 141, 60 Am. Dec. 726.

Illinois.— Bolden *v.* Sherman, 110 Ill. 418.

Kentucky.— Terrill *v.* Herron, 4 J. J. Marsh. (Ky.) 519; Bryan *v.* Beckley, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276; Morriso *v.* Coghill, Ky. Dec. 322; Willoughby *v.* Willoughby, 20 Ky. L. Rep. 1061, 48 S. W. 427.

Maine.— Mosher *v.* Berry, 30 Me. 83, 50 Am. Dec. 614.

Maryland.— Carroll *v.* Norwood, 5 Harr. & J. (Md.) 155.

Massachusetts.— Flagg *v.* Thurston, 13 Pick. (Mass.) 145.

Missouri.— Kellogg *v.* Mullen, 45 Mo. 571; Kronenberger *v.* Hoffner, 44 Mo. 185; Campbell *v.* Clark, 8 Mo. 553.

New Hampshire.— Richardson *v.* Chickering, 41 N. H. 380, 77 Am. Dec. 769; Hall *v.* Davis, 36 N. H. 569.

New Jersey.—Smith *v.* Negbauer, 42 N. J. L. 305.

New York.— Seneca Nation *v.* Hugaboom, 132 N. Y. 492, 30 N. E. 983, 44 N. Y. St. 759; Robinson *v.* Kime, 70 N. Y. 147; Bates *v.* Tymason, 13 Wend. (N. Y.) 300.

North Carolina.— Gilchrist *v.* McLaughlin, 29 N. C. 310; Hough *v.* Horne, 20 N. C. 305; ——— *v.* Beatty, 2 N. C. 432; Standen *v.* Bains, 2 N. C. 273; Bustin *v.* Christie, 1 N. C. 68.

Pennsylvania.— Fuller *v.* Weaver, 175 Pa. St. 182, 38 Wkly. Notes Cas. (Pa.) 186, 34 Atl. 634; Burkholder *v.* Markley, 98 Pa. St. 37; Riddlesburg Iron, etc., Co. *v.* Rogers, 65 Pa. St. 416; Darrah *v.* Bryant, 56 Pa. St. 69; Quinn *v.* Heart, 43 Pa. St. 337; Dawson *v.* Mills, 32 Pa. St. 302; Willis *v.* Swartz, 28 Pa. St. 413; Heath *v.* Armstrong, 12 Pa. St. 178; Thompson *v.* McFarland, 6 Pa. St. 478; Blasdell *v.* Bissell, 6 Pa. St. 258.

South Carolina.— Bradford *v.* Pitts, 2 Mill Const. (S. C.) 115.

Tennessee.— Fly *v.* East Tennessee College, 2 Sneed (Tenn.) 688; Hale *v.* Darter, 10 Humphr. (Tenn.) 91; McAdoo *v.* Sublett, 1 Humphr. (Tenn.) 105; Hickman *v.* Tait, Cooke (Tenn.) 459; Simms *v.* Baker, Cooke (Tenn.) 146; McNairy *v.* Hightour, 2 Overt. (Tenn.) 302; Blount *v.* Medlin, 2 Overt. (Tenn.) 199. *Compare* Childress *v.* Holland, 3 Hayw. (Tenn.) 273.

Texas.— Montague County *v.* Clay County Land, etc., Co., 80 Tex. 392, 15 S. W. 902; Fagan *v.* Stoner, 67 Tex. 286, 3 S. W. 44; Woods *v.* Robinson, 58 Tex. 655; Williams *v.* Mayfield, 57 Tex. 364; Buford *v.* Gray, 51 Tex. 331; McCown *v.* Hill, 26 Tex. 359; Booth *v.* Upshur, 26 Tex. 64; Bartlett *v.* Hubert, 21 Tex. 8; Anderson *v.* Stamps, 19 Tex. 460; Dalby *v.* Booth, 16 Tex. 563; Wiley *v.* Lindley, (Tex. Civ. App. 1900) 56 S. W. 1001; Worsham *v.* Chisum, (Tex. Civ. App. 1894) 28 S. W. 905; Shelton *v.* Bone, (Tex. Civ. App. 1894) 26 S. W. 224; Worsham *v.* Morgan, (Tex. Civ. App. 1893) 28 S. W. 918.

Virginia.— Dogan *v.* Seekright, 4 Hen. & M. (Va.) 125.

West Virginia.— Gwynn *v.* Schwartz, 32 W. Va. 487, 9 S. E. 880.

United States.— Newsom *v.* Pryor, 7 Wheat. (U. S.) 7, 5 L. ed. 382.

See 8 Cent. Dig. tit. "Boundaries," § 28.

Government surveys are subject to the rule as stated. Campbell *v.* Clark, 8 Mo. 553.

Call for other known line.— Where, in describing a boundary line, another known line is called for, and the distance gives out before reaching the line called for, the distance is to be disregarded. Gilchrist *v.* McLaughlin, 29 N. C. 310. See also Worsham *v.* Chisum, (Tex. Civ. App. 1894) 28 S. W. 905.

In restoring lost lines and corners of a survey, lines which are extant, or whose bearings are ascertained by existing corners, govern, however variant from the courses called for. Bryan *v.* Beckley, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276.

92. *Louisiana.*— Le Breton *v.* McDonough, 2 Rob. (La.) 461; Blanc *v.* Duplessis, 13 La. 334; Williamson *v.* Hymel, 11 La. 182.

Maine.— Clark *v.* Scammon, 62 Me. 47.

New York.— Robinson *v.* Kime, 70 N. Y. 147; Jackson *v.* Cole, 16 Johns. (N. Y.) 257.

Pennsylvania.—Ogden *v.* Porterfield, 34 Pa. St. 191; Hunt *v.* Devling, 8 Watts (Pa.) 403.

South Carolina.—Sturgeon *v.* Floyd, 3 Rich. (S. C.) 80; Altman *v.* McBride, 4 Strobh. (S. C.) 208 (holding that where a reserva-

entry, survey, or conveyance will control other and conflicting calls. Where, however, such a call is clearly erroneous and manifestly contrary to the intention of the parties, it will yield to other calls consistent with the true intent.[93] As between several monuments which are incompatible with one another, that which is most certain and prominent must prevail.[94]

tion was made in a deed of "one square acre, containing my family burying ground," and before a delivery of the deed the lot reserved was staked out at the request of the grantee, the boundaries so fixed by the parties must govern the quantity conveyed). And see Welch *v.* Phillips, 1 McCord (S. C.) 215.

Texas.— Baker *v.* Light, 80 Tex. 627, 16 S. W. 330; Garrison *v.* Crowell, 67 Tex. 626, 4 S. W. 69; Bunton *v.* Cardwell, 53 Tex. 408; Buford *v.* Gray, 51 Tex. 331; Burnett *v.* Burriss, 39 Tex. 501.

West Virginia.— Gwynn *v.* Schwartz, 32 W. Va. 487, 9 S. E. 880.

See 8 Cent. Dig. tit. "Boundaries," § 29.

Where one purchases an indefinite quantity, he cannot claim beyond a line which existed long before his purchase and which is referred to in the description and *procès verbal* of sale. Williamson *v.* Hymel, 11 La. 182.

93. *California.*— Hostetter *v.* Los Angeles Terminal R. Co., 108 Cal. 38, 41 Pac. 330; De Arguello *v.* Greer, 26 Cal. 615; Hicks *v.* Coleman, 25 Cal. 122, 85 Am. Dec. 103. See also Hall *v.* Shotwell, 66 Cal. 379, 5 Pac. 683.

Connecticut.— Rathbun *v.* Geer, 64 Conn. 421, 30 Atl. 60. See also Beach *v.* Whittlesey, 73 Conn. 530, 48 Atl. 350.

Illinois.— Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871.

Indiana.— Simonton *v.* Thompson, 55 Ind. 87.

Kentucky.— Magowan *v.* Branham, 95 Ky. 581, 26 S. W. 803; Simpkins *v.* Wells, 19 Ky. L. Rep. 881, 42 S. W. 348.

Maine.— Robinson *v.* White, 42 Me. 209.

Missouri.— Jamison *v.* Fopiano, 48 Mo. 194; Shelton *v.* Maupin, 16 Mo. 124.

North Carolina.— Wiseman *v.* Green, 127 N. C. 288, 37 S. E. 272; Clark *v.* Moore, 126 N. C. 1, 35 S. E. 125; Clarke *v.* Wagner, 76 N. C. 463; Den *v.* Sawyer, 9 N. C. 226.

Ohio.— Wyckoff *v.* Stephenson, 14 Ohio 13.

Pennsylvania.— Pruner *v.* Brisbin, 98 Pa. St. 202.

South Carolina.— Bradford *v.* Pitts, 2 Mill Const. (S. C.) 115.

Tennessee.— Bleidorn *v.* Pilot Mountain Coal, etc., Co., 89 Tenn. 166, 15 S. W. 737.

Texas.— Jones *v.* Andrews, 72 Tex. 5, 9 S. W. 170, where it was held that an instruction that a call for a natural object, such as a creek, or for an artificial object, such as a well-marked and long-established public road, will control course and distance and also the lines of the survey, unless such lines are actually marked upon the ground, was properly refused where the calls for the creek and road in the survey are incidental, and so to locate the survey would force it two thousand five hundred varas away from all its other connections.

Utah.— Park *v.* Wilkinson, 21 Utah 279, 60 Pac. 945.

West Virginia.— Gwynn *v.* Schwartz, 32 W. Va. 487, 9 S. E. 880.

Wisconsin.—Hrouska *v.* Janke, 66 Wis. 252, 28 N. W. 166; Shufeldt *v.* Spaulding, 37 Wis. 662. And see Mack *v.* Bensley, 63 Wis. 80, 23 N. W. 97.

United States.— Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566; Barclay *v.* Howell, 6 Pet. (U. S.) 498, 8 L. ed. 477; Belding *v.* Hebard, 103 Fed. 532, 43 C. C. A. 296; Ellinwood *v.* Stancliff, 42 Fed. 316; Field *v.* Columbet, 4 Sawy. (U. S.) 523, 9 Fed. Cas. No. 4,764. See also King *v.* Watkins, 98 Fed. 913.

See 8 Cent. Dig. tit. "Boundaries," § 6.

Conflict of natural boundaries.— While natural boundaries will control courses and distances and require a straight line from one corner to another, yet where the grant has other descriptions by natural boundaries such as the boundary of an island, which will require a departure from a straight line, such latter boundaries will control. Clarke *v.* Wagner, 76 N. C. 463.

94. *California.*— Hubbard *v.* Dusy, 80 Cal. 281, 22 Pac. 214.

Kentucky.—Allen *v.* Crocket, 2 Bibb (Ky.) 618; Green *v.* Watson, 1 Bibb (Ky.) 105; Mosby *v.* Carland, 1 Bibb (Ky.) 84; Whitaker *v.* Hall, 1 Bibb (Ky.) 72; McClure *v.* Byne, 1 Bibb (Ky.) 56.

Maine.— Lincoln *v.* Wilder, 29 Me. 169.

Missouri.— Page *v.* Scheibel, 11 Mo. 167.

New York.— Clark *v.* Baird, 9 N. Y. 183, Seld. Notes (N. Y.) 187.

South Carolina.— Shoolbred *v.* Vanderhorst, 1 Brev. (S. C.) 315.

Tennessee.— Blount *v.* Ramsey, Cooke (Tenn.) 489.

United States.—Watts *v.* Lindsey, 7 Wheat. (U. S.) 158, 5 L. ed. 423.

See 8 Cent. Dig. tit. "Boundaries," §§ 42, 43.

Extreme monuments control.— In a grant of land the grantee ought to be confined to natural points noted and established as extreme or terminating points in his plat and grant, although another natural boundary may be called for, if it appears that the surveyor has gone to it, and both cannot be established. Shoolbred *v.* Vanderhorst, 1 Brev. (S. C.) 315.

Monuments described in a deed control other monuments pointed out on actual location, if those in the deed cannot be reconciled with those pointed out. Clark *v.* Baird, 9 N. Y. 183, Seld. Notes (N. Y.) 187.

No difference in value of natural monuments.— In ascertaining the boundaries of a tract of land, one kind of natural objects called for is not, as a matter of law, entitled

b. Over Artificial Monuments, Marks, or Lines. In case of a conflict between calls those for natural or permanent objects will control those for artificial monuments, marks, or lines,[95] except where there is some doubt as to the natural boundaries which can certainly be removed by artificial marks, when the latter will have effect, although of inferior degree.[96]

c. Over Maps, Plats, and Field-Notes. A natural monument, fixed, certain, and enduring, will control a reference to maps, plats, or field-notes in the same instrument,[97] except when the intention of the parties was obviously otherwise,[98] where the reference to such monument was made by mistake,[99] or where a statute provides to the contrary.[1]

d. Over Courses and Distances. In the absence of marked and established boundaries,[2] natural objects called for as the boundary of a survey, being more certain and permanent, control calls for courses and distances;[3] but this rule will

to more respect or of more importance than another. Patton *v.* Alexander, 52 N. C. 603.

95. *Kentucky.*— Hopkins *v.* Patton, 4 Dana (Ky.) 36.

Missouri.— Myers *v.* St. Louis, 82 Mo. 367.

New Jersey.— Blackman *v.* Doughty, 40 N. J. L. 319.

New York.— Jones *v.* Holstein, 47 Barb. (N. Y.) 311.

Tennessee.— Posey *v.* James, 7 Lea (Tenn.) 98; Shute *v.* Buchanon, 3 Hayw. (Tenn.) 206.

Texas.— Jones *v.* Leath, 32 Tex. 329.

See 8 Cent. Dig. tit. "Boundaries," § 7.

96. Sasser *v.* Alford, 3 N. C. 322; Felder *v.* Bonnett, 2 McMull. (S. C.) 44, 37 Am. Dec. 545.

97. Jamison *v.* Cornell, 5 Thomps. & C. (N. Y.) 628. See also Campbell *v.* Laclede Gas Light Co., 84 Mo. 352, where a natural boundary called for in a deed was held to control the calls in a plat of the land, such natural boundary clearly corresponding with the expressed intent of the grantor.

98. Alden *v.* Pinney, 12 Fla. 348; Erskine *v.* Moulton, 66 Me. 276; Lincoln *v.* Wilder, 29 Me. 169.

Incorporation of map, etc., shows an intention to have it control. Schenley *v.* Pittsburgh, 104 Pa. St. 472.

Where the description is otherwise incomplete this shows an intention to have the map control. Com. *v.* McDonald, 16 Serg. & R. (Pa.) 390.

99. New York, etc., Land Co. *v.* Thomson, 83 Tex. 169, 17 S. W. 920.

1. McCormick *v.* Huse, 78 Ill. 363.

2. Bruce *v.* Morgan, 1 B. Mon. (Ky.) 26; Disney *v.* Coal Creek Min., etc., Co., 11 Lea (Tenn.) 607; Massengill *v.* Boyles, 4 Humphr. (Tenn.) 205, 11 Humphr. (Tenn.) 112. See also *supra*, II, C. 3.

In order that a call for course and distance shall control one for a natural object it is not sufficient that the line called for has for years been considered as the right boundary, and that such line was run by the surveyor, it being further necessary that such line be actually marked. Massengill *v.* Boyles, 4 Humphr. (Tenn.) 205, 11 Humphr. (Tenn.) 112.

3. *California.*— Freeman *v.* Bellegarde, 108 Cal. 179, 41 Pac. 289, 49 Am. St. Rep. 76; Stoll *v.* Beecher, 94 Cal. 1, 29 Pac. 327; Adair *v.* White, 85 Cal. 313, 24 Pac. 663; Castro *v.* Barry, 79 Cal. 443, 21 Pac. 946; Beaudry *v.* Doyle, 68 Cal. 105, 8 Pac. 694; Spring *v.* Hewston, 52 Cal. 442; More *v.* Massini, 37 Cal. 432; Colton *v.* Seavey, 22 Cal. 496.

Colorado.— Pollard *v.* Shively, 5 Colo. 309.

Connecticut.— Higley *v.* Bidwell, 9 Conn. 447.

Delaware.— Quillen *v.* Betts, 1 Pennew. (Del.) 53, 39 Atl. 595; Dale *v.* Smith, 1 Del. Ch. 1, 12 Am. Dec. 64.

Florida.— Daggett *v.* Willey, 6 Fla. 482.

Georgia.— Riley *v.* Griffin, 16 Ga. 141, 60 Am. Dec. 726.

Illinois.— Kamphouse *v.* Gaffner, 73 Ill. 453; Miller *v.* Beeler, 25 Ill. 163.

Indiana.— Shepherd *v.* Nave, 125 Ind. 226, 25 N. E. 220.

Iowa.— Sayers *v.* Lyons, 10 Iowa 249; Gaveny *v.* Hinton, 2 Greene (Iowa) 344.

Kentucky.— Reid *v.* Langford, 3 J. J. Marsh. (Ky.) 420; Bruce *v.* Taylor, 2 J. J. Marsh. (Ky.) 160; Baxter *v.* Evett, 7 T. B. Mon. (Ky.) 329; Cockrell *v.* McQuinn, 4 T. B. Mon. (Ky.) 61; Tilford *v.* Henderson, 1 A. K. Marsh. (Ky.) 483; Marshall *v.* Russell, 1 A. K. Marsh. (Ky.) 271; Jefferson Seminary *v.* Wagnon, 1 A. K. Marsh. (Ky.) 243; Preston *v.* Bowmar, 2 Bibb (Ky.) 493; Helm *v.* Small, Hard. (Ky.) 369; Wisconsin Chair Co. *v.* Columbia Furnace, etc., Co., 22 Ky. L. Rep. 1374, 60 S. W. 717; Asher Lumber Co. *v.* Duff, 22 Ky. L. Rep. 956, 59 S. W. 489; Vaughn *v.* Foster, 20 Ky. L. Rep. 682, 47 S. W. 333; Pittman *v.* Nunnelly, 17 Ky. L. Rep. 793, 32 S. W. 606; Logan *v.* Evans, 16 Ky. L. Rep. 745, 29 S. W. 636; Bailey *v.* McConnell, 12 Ky. L. Rep. 473, 14 S. W. 337; Ball *v.* Pursefull, 3 Ky. L. Rep. 396.

Louisiana.— Booth *v.* Buras, 104 La. 614, 29 So. 260; Wells *v.* Compton, 3 Rob. (La.) 171.

Maine.— Robinson *v.* White, 42 Me. 209.

Maryland.—Wood *v.* Ramsey, 71 Md. 9, 17 Atl. 563; Thomas *v.* Godfrey, 3 Gill & J. (Md.) 142.

Massachusetts.— Hall *v.* Eaton, 139 Mass. 217, 29 N. E. 660.

Michigan.— Turner *v.* Holland, 65 Mich. 453, 33 N. W. 283; Bruckner *v.* Lawrence, 1 Dougl. (Mich.) 19.

not be enforced when either the instrument itself or the clearly expressed intention of the parties would be thereby defeated, or when the rejection of a call or calls for natural objects would reconcile other parts of the description and leave enough to identify the land.[4]

Minnesota.— Yanish *v.* Tarbox, 49 Minn. 268, 51 N. W. 1051.

Missouri.— Burnham *v.* Hilt, 143 Mo. 414, 45 S. W. 368; Clamorgan *v.* Baden, etc., R. Co., 72 Mo. 139; Clamorgan *v.* Hornsby, 13 Mo. App. 550.

New Hampshire.— Bellows *v.* Jewell, 60 N. H. 420; Rix *v.* Johnson, 5 N. H. 520, 22 Am. Dec. 472.

New Jersey.— Delaware, etc., R. Co. *v.* Hannon, 37 N. J. L. 276.

New York.— Harris *v.* Oakley, 130 N. Y. 1, 28 N. E. 530, 40 N. Y. St. 485 [*reversing* 4 Silv. Supreme (N. Y.) 155, 7 N. Y. Suppl. 232, 26 N. Y. St. 824]; Yates *v.* Van de Bogert, 56 N. Y. 526; Greenleaf *v.* Brooklyn, etc., R. Co., 5 Silv. Supreme (N. Y.) 279, 8 N. Y. Suppl. 30, 28 N. Y. St. 745, 3 N. Y. Suppl. 222, 21 N. Y. St. 946; Wendell *v.* Jackson, 8 Wend. (N. Y.) 183, 22 Am. Dec. 635; Jackson *v.* Moore, 6 Cow. (N. Y.) 706; Jackson *v.* Frost, 5 Cow. (N. Y.) 346; Frier *v.* Jackson, 8 Johns. (N. Y.) 495; Jackson *v.* Carey, 2 Johns. Cas. (N. Y.) 350; Cudney *v.* Early, 4 Paige (N. Y.) 209.

North Carolina.— Echerd *v.* Johnson, 126 N. C. 409, 35 S. E. 1036; Bowen *v.* Gaylord, 122 N. C. 816, 29 S. E. 340; Scull *v.* Pruden, 92 N. C. 168; Credle *v.* Hays, 88 N. C. 321; Strickland *v.* Draughan, 88 N. C. 315; Dickson *v.* Wilson, 82 N. C. 487; Campbell *v.* Branch, 49 N. C. 313; Literary Fund *v.* Clark, 31 N. C. 58; McPhaul *v.* Gilchrist, 29 N. C. 169; Becton *v.* Chesnut, 20 N. C. 396; Slade *v.* Neal, 19 N. C. 61; Brooks *v.* Britt, 15 N. C. 481; Carroway *v.* Witherington, 4 N. C. 694; Smith *v.* Auldridge, 3 N. C. 581; Johnston *v.* House, 3 N. C. 491; Swain *v.* Bell, 3 N. C. 374; Witherspoon *v.* Blanks, 2 N. C. 571; ——— *v.* Beatty, 2 N. C. 432; Den *v.* Harris, 2 N. C. 291; Harramond *v.* McGlaughon, 1 N. C. 84; Witherspoon *v.* Dlanks, 1 N. C. 65.

Ohio.— Hare *v.* Harris, 14 Ohio 529; McCoy *v.* Galloway, 3 Ohio 282, 17 Am. Dec. 591; Neff *v.* City, etc., Bldg., etc., Co., 1 Ohio S. & C. Pl. Dec. 120, 1 Ohio N. P. 96.

Pennsylvania.— Com. *v.* Young Men's Christian Assoc., 169 Pa. St. 24, 32 Atl. 121.

South Carolina.— Sturgeon *v.* Floyd, 3 Rich. (S. C.) 80; Johnson *v.* McMillan, 1 Strobh. (S. C.) 143.

Tennessee.— Morris *v.* Milner, 104 Tenn. 485, 58 S. W. 125; Turnage *v.* Kenton, (Tenn. 1899) 52 S. W. 174; Webb *v.* Haley, 7 Baxt. (Tenn.) 600; Whiteside *v.* Singleton, Meigs (Tenn.) 207; Hickman *v.* Tait, Cooke (Tenn.) 459; Duffield *v.* Spence, (Tenn. Ch. 1897) 51 S. W. 492. *Compare* Smith *v.* Hutchison, 104 Tenn. 394, 58 S. W. 226, where it was held that the rule does not apply where the natural object is shown to be variable in position.

Texas.— Jackel *v.* Reiman, 78 Tex. 588, 14 S. W. 1001; Johnson *v.* Archibald, 78 Tex. 96, 14 S. W. 266, 22 Am. St. Rep. 27; Gerald *v.* Freeman, 68 Tex. 201, 4 S. W. 256; Clark *v.* Hills, 67 Tex. 141, 2 S. W. 356; Davis *v.* Smith, 61 Tex. 18; Johns *v.* Schutz, 47 Tex. 578; Phillips *v.* Ayres, 45 Tex. 601; Galveston County *v.* Tankersley, 39 Tex. 651; Anderson *v.* Stamps, 19 Tex. 460; Hubert *v.* Bartlett, 9 Tex. 97; Urquhart *v.* Burleson, 6 Tex. 502; Bland *v.* Smith, (Tex. Civ. App. 1894) 26 S. W. 773; Coughran *v.* Alderete, (Tex. Civ. App. 1894) 26 S. W. 109; Meade *v.* Leon, etc., Land Co., (Tex. Civ. App. 1893) 22 S. W. 298.

Virginia.— Clarkston *v.* Virginia Coal, etc., Co., 93 Va. 258, 24 S. E. 937.

West Virginia.— Teass *v.* St. Albans, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802.

Wisconsin.— Borkenhagen *v.* Vianden, 82 Wis. 206, 52 N. W. 260; Du Pont *v.* Davis, 30 Wis. 170.

United States.— Hignera *v.* U. S., 5 Wall. (U. S.) 827, 18 L. ed. 469; Brown *v.* Huger, 21 How. (U. S.) 305, 16 L. ed. 125 [*affirming* 4 Fed. Cas. No. 2,013, 1 Quart. L. J. 55]; Holmes *v.* Trout, 7 Pet. (U. S.) 171, 8 L. ed. 647; Barclay *v.* Howell, 6 Pet. (U. S.) 498, 8 L. ed. 477; Newsom *v.* Pryor, 7 Wheat. (U. S.) 7, 5 L. ed. 382; Preston *v.* Bowmar, 6 Wheat. (U. S.) 580, 5 L. ed. 336; McIver *v.* Walker, 4 Wheat. (U. S.) 444, 4 L. ed. 611; McIver *v.* Walker, 9 Cranch (U. S.) 173, 3 L. ed. 694; Ellinwood *v.* Stancliff, 42 Fed. 316; Forsyth *v.* Smale, 7 Biss. (U. S.) 201, 9 Fed. Cas. No. 4,950, 8 Chic. Leg. N. 322, 7 Reporter 262; Simms *v.* Baker, Brunn. Col. Cas. (U. S.) 205, 22 Fed. Cas. No. 12,868, Cooke (Tenn.) 146; Robinson *v.* Moore, 4 McLean (U. S.) 279, 20 Fed. Cas. No. 11,960; Nelson *v.* Hall, 1 McLean (U. S.) 518, 17 Fed. Cas. No. 10,107; Quicksilver Min. Co. *v.* Hicks, 4 Sawy. (U. S.) 688, 20 Fed. Cas. No. 11,508; Cleveland *v.* Smith, 2 Story (U. S.) 278, 5 Fed. Cas. No. 2,874.

See 8 Cent. Dig. tit. "Boundaries," § 12.

"**The reason of the rule** is, that it is the intention of the grant to convey the land actually surveyed, and mistakes in courses or distances are more probable and more frequent than in marked trees, mountains, rivers or other natural objects capable of being clearly designated and accurately described." Marshall, C. J., in McIver *v.* Walker, 9 Cranch (U. S.) 173, 178, 3 L. ed. 694. See also Hall *v.* Eaton, 139 Mass. 217, 29 N. E. 660.

Grant per aversionem.— Where a Spanish grant described the property, which laid on the Mississippi, and extended back to the sea marsh, as "about two leagues" from one bayou, the name of which was given, to another bayou, the name of which was also given, it was held that the grant was *per aversionem*, and that the boundaries thus named controlled the superficial and lineal measurements. Booth *v.* Buras, 104 La. 614, 29 So. 260.

4. Williston *v.* Morse, 10 Metc. (Mass.) 17; People *v.* Jones, 49 Hun (N. Y.) 365, 2 N. Y.

e. Over Quantity. A statement of the quantity of land supposed to be conveyed, and inserted in a deed by way of description, must yield to natural or permanent objects called for in the conveyance.[5]

5. Control of Artificial Monuments and Marks — a. In General. After natural and permanent objects, artificial monuments and marks, unless clearly erroneous, control other and inconsistent calls for boundaries.[6] In case of con-

Suppl. 148, 17 N. Y. St. 586; New York, etc., Land Co. *v.* Thomson, 83 Tex. 169, 17 S. W. 920; Linney *v.* Wood, 66 Tex. 22, 17 S. W. 244; Jones *v.* Burgett, 46 Tex. 284; White *v.* Luning, 93 U. S. 514, 23 L. ed. 938; Ulman *v.* Clark, 100 Fed. 180.

5. *New York.*—Roat *v.* Puff, 3 Barb. (N. Y.) 353.

Pennsylvania.— Miller *v.* Cramer, 190 Pa. St. 315, 42 Atl. 690; Ardery *v.* Rowles, 71 Pa. St. 359; Large *v.* Penn, 6 Serg. & R. (Pa.) 488.

Tennessee.—Wilson *v.* Bass, 5 Hayw. (Tenn.) 110.

Texas.— Ayers *v.* Harris, 64 Tex. 293.

West Virginia.— Gwynn *v.* Schwartz, 32 W. Va. 487, 9 S. E. 880.

See 8 Cent. Dig. tit. "Boundaries," § 13.

It will be presumed that visible objects mentioned in a deed as boundaries have been examined by the parties, and they will control a call for quantity. Roat *v.* Puff, 3 Barb. (N. Y.) 353.

6. *California.*— Bullard *v.* Kempff, 119 Cal. 9, 50 Pac. 780. See also Harrington *v.* Boehmer, 134 Cal. 196, 66 Pac. 214, 489.

Connecticut.— Nichols *v.* Turney, 15 Conn 101; Higley *v.* Bidwell, 9 Conn. 447.

Georgia.— Harris *v.* Hull, 70 Ga. 831.

Illinois.— Decatur *v.* Niedermeyer, 168 Ill. 68, 48 N. E. 72; Bauer *v.* Gottmanhausen, 65 Ill. 499.

Indiana.— Richwine *v.* Jones, 140 Ind. 289, 39 N. E. 460.

Kentucky.— Baxter *v.* Evett, 7 T. B. Mon. (Ky.) 329; Woods *v.* Kennedy, 5 T. B. Mon. (Ky.) 174; Preston *v.* Bowmar, 2 Bibb (Ky.) 493; Frey *v.* Baker, 7 Ky. L. Rep. 663; Curtis *v.* Kinkead, 2 Ky. L. Rep. 60.

Maine.— Emery *v.* Fowler, 38 Me. 99; Call *v.* Barker, 12 Me. 320.

Maryland.— Hammond *v.* Ridgely, 5 Harr. & J. (Md.) 245, 9 Am. Dec. 522; Carroll *v.* Norwood, 5 Harr. & J. (Md.) 155; Howard *v.* Moale, 2 Harr. & J. (Md.) 249; Calhoun *v.* Hall, 2 Harr. & M. (Md.) 416; Chamberlaine *v.* Crawford, 1 Harr. & M. (Md.) 355.

Massachusetts.— Morse *v.* Rogers, 118 Mass. 572; Frost *v.* Spaulding, 19 Pick. (Mass.) 445, 31 Am. Dec. 150; Mayhew *v.* Norton, 17 Pick. (Mass.) 357, 28 Am. Dec. 300; Brimmer *v.* Long Wharf, 5 Pick. (Mass.) 131; Folger *v.* Mitchell, 3 Pick. (Mass.) 396; Davis *v.* Rainsford, 17 Mass. 207; Gerrish *v.* Bearce, 11 Mass. 193; Pernam *v.* Wead, 6 Mass. 131; Aiken *v.* Sanford, 5 Mass. 494; Howe *v.* Bass, 2 Mass. 380, 3 Am. Dec. 59.

Michigan.— Brudin *v.* Inglis, 121 Mich. 410, 80 N. W. 115; Bruckner *v.* Lawrence, 1 Dougl. (Mich.) 19.

Mississippi.— Newman *v.* Foster, 3 How. (Miss.) 383, 34 Am. Dec. 98.

Missouri.— Campbell *v.* Clark, 8 Mo. 553.

Nevada.— Terry *v.* Berry, 13 Nev. 514.

New Hampshire.— Bartlett *v.* La Rochelle, 68 N. H. 211, 44 Atl. 302; Hall *v.* Davis, 36 N. H. 569; Smith *v.* Dodge, 2 N. H. 303; Lerned *v.* Morrill, 2 N. H. 197.

New Jersey.—Smith *v.* Negbauer, 42 N. J. L. 305.

New York.— Drew *v.* Swift, 46 N. Y. 204; Thomson *v.* Wilcox, 7 Lans. (N. Y.) 376; Mattlage *v.* New York El. R. Co., 14 Misc. (N. Y.) 291, 35 N. Y. Suppl. 704, 70 N. Y. St. 439; Clark *v.* Wethey, 19 Wend. (N. Y.) 320; Van Wyck *v.* Wright, 18 Wend. (N. Y.) 157; Wendell *v.* Jackson, 8 Wend. (N. Y.) 183, 22 Am. Dec. 635; Jackson *v.* Ives, 9 Cow. (N. Y.) 661; Jackson *v.* Widger, 7 Cow. (N. Y.) 723; Jackson *v.* Camp, 1 Cow. (N. Y.) 605. See also James *v.* Lewis, 50 N. Y. Suppl. 230.

North Carolina.— Cherry *v.* Slade, 7 N. C. 82.

North Dakota.— Bradford *v.* Johnson, 8 N. D. 182, 77 N. W. 601.

Ohio.—Avery *v.* Baum, Wright (Ohio) 576.

Oregon.— Lewis *v.* Lewis, 4 Oreg. 177.

Pennsylvania.— Morrison *v.* Seaman, 183 Pa. St. 74, 38 Atl. 710; Watson *v.* Jones, 85 Pa. St. 117; Rook *v.* Greenwalt, 17 Pa. Co. Ct. 642.

South Carolina.—Wash *v.* Holmes, 1 Hill (S. C.) 12; Bradford *v.* Pitts, 2 Mill Const. (S. C.) 115; Sumter *v.* Bracey, 2 Bay (S. C.) 515.

South Dakota.— Dowdle *v.* Cornue, 9 S. D. 126, 68 N. W. 194.

Tennessee.—Massengill *v.* Boyles, 4 Humphr. (Tenn.) 205; Kittrell *v.* Biles, (Tenn. Ch. 1898) 52 S. W. 783. See also Martin *v.* Nance, 3 Head (Tenn.) 648. *Compare* Posey *v.* James, 7 Lea (Tenn.) 98.

Texas.— Mitchell *v.* Burdett, 22 Tex. 633.

Vermont.— Bundy *v.* Morgan, 45 Vt. 46.

Virginia.— Herbert *v.* Wise, 3 Call (Va.) 239.

Wisconsin.— Wollman *v.* Ruehle, 104 Wis. 603, 80 N. W. 919.

United States.— Ulman *v.* Clark, 100 Fed. 180; U. S. *v.* Murray, 41 Fed. 862; Cleveland *v.* Smith, 2 Story (U. S.) 278, 5 Fed. Cas. No. 2,874.

See 8 Cent. Dig. tit. "Boundaries," § 14.

Where a monument does not exist at the time a deed is made and the parties afterward fairly erect such a monument with intent to conform to the deed such monument will control. Blaney *v.* Rice, 20 Pick. (Mass.) 62, 32 Am. Dec. 204; Makepeace *v.* Bancroft, 12 Mass. 469; Lerned *v.* Morrill, 2 N. H. 197. But see Posey *v.* James, 7 Lea (Tenn.) 98; Martin *v.* Nance, 3 Head (Tenn.) 648 (where it was held that to control the description of land in a deed or grant it must be shown that

fiict, that monument or mark which is best identified and most conformable to the expressed or supposed intent of the instrument is to be adopted.[7]

b. Over Maps, Plats, and Field-Notes. In a case of conflict with maps, plats, or field-notes, artificial monuments and marks control, unless the calls for monuments or marks are clearly incorrect.[8]

c. Over Calls For Adjoiners. In case of conflict calls for adjoiners will as a rule yield to calls for artificial monuments and marks.[9]

d. Over Courses and Distances. If capable of identification,[10] artificial monuments and marks will generally control conflicting calls for courses and distances.[11]

the monuments of boundary were made at the time of its execution).

A witness or bearing tree is not an established corner, but merely a designated object from which, in connection with the field-notes, the location of the corner may be ascertained. Stadin *v.* Helin, 76 Minn. 496, 79 N. W. 537, 602.

7. Monument corresponding to course and distance.— Although known and fixed monuments control where they conflict with the courses and distances, yet where there are two conflicting monuments, one of which corresponds with the courses and distances, that one should be taken and the other rejected as surplusage. Zeibold *v.* Foster, 118 Mo. 349, 24 S. W. 155.

Monuments found at the two extremes of a township line are entitled to no more controlling influence, in determining the actual location of an intermediate line, than the section corners along the line; but all original monuments established in connection with the field-notes and plats must be referred to in order to define the locality of the line. McClintock *v.* Rogers, 11 Ill. 279.

8. *California.*— Penry *v.* Richards, 52 Cal. 496.

Illinois.— Decatur *v.* Niedermeyer, 168 Ill. 68, 48 N. E. 72; Ogilvie *v.* Copeland, 145 Ill. 98, 33 N. E. 1085; Murphy *v.* Riemenschneider, 104 Ill. 520; Bauer *v.* Gottmanhausen, 65 Ill. 499; McClintock *v.* Rogers, 11 Ill. 279.

Maine.— Esmond *v.* Tarbox, 7 Me. 61, 20 Am. Dec. 346; Ripley *v.* Berry, 5 Me. 24, 17 Am. Dec. 201; Brown *v.* Gay, 3 Me. 126. *Compare* Thomas *v.* Patten, 13 Me. 329, where a survey and plan were made in 1801, but the surveyor went upon the land in 1802, made another survey, and put down stakes and monuments, not intending to conform to the plan and designedly varying from it, but made no new plan or alteration in the original; a conveyance was made in 1803, in which the only description in the deed was a certain lot on the original plan, and it was held that the extent of the grant was to be ascertained by the plan, and not by the monuments subsequently erected.

Minnesota.— Turnbull *v.* Schroeder, 29 Minn. 49, 11 N. W. 137.

Missouri.— Granby Min., etc., Co. *v.* Davis, 156 Mo. 422, 57 S. W. 126; Brown *v.* Carthage, 128 Mo. 10, 30 S. W. 312.

Nebraska.— Peterson *v.* Skjelver, 43 Nebr. 663, 62 N. W. 43; Woods *v.* West, 40 Nebr. 307, 58 N. W. 938.

New Hampshire.— Hall *v.* Davis, 36 N. H. 569; Tenny *v.* Beard, 5 N. H. 58.

New Mexico.— Canavan *v.* Dugan, (N. M. 1900) 62 Pac. 971.

Oregon.— Robinson *v.* Laurer, 27 Oreg. 315, 40 Pac. 1012.

Wisconsin.— Fleischfresser *v.* Schmidt, 41 Wis. 223; Marsh *v.* Mitchell, 25 Wis. 706.

Contra, O'Herrin *v.* Brooks, 67 Miss. 266, 6 So. 844 (holding that a call for a lot by the name and number which it bears on a plat will prevail ordinarily over calls for monuments); Nash *v.* Wilmington, etc., R. Co., 67 N. C. 413 (holding that where lots are described by plat numbers, and also as bounded by certain named streets, the former description will control).

See 8 Cent. Dig. tit. "Boundaries," § 17.

9. Frost *v.* Angier, 127 Mass. 212; Marsh *v.* Marshall, 19 N. H. 301, 49 Am. Dec. 156; Grier *v.* Pennsylvania Coal Co., 128 Pa. St. 79, 25 Wkly. Notes Cas. (Pa.) 85, 18 Atl. 480; Connor *v.* Johnson, 59 S. C. 115, 37 S. E. 240; Douglass *v.* Fernandis, 2 Bailey (S. C.) 78. But see White *v.* Jones, 67 Me. 20; Breneiser *v.* Davis, 134 Pa. St. 1, 19 Atl. 433.

10. *Kentucky.*—Preston *v.* Bowmar, 2 Bibb (Ky.) 493.

Maine.—Whitcomb *v.* Dutton, 89 Me. 212, 36 Atl. 67; Chandler *v.* McCard, 38 Me. 564; Heaton *v.* Hodges, 14 Me. 66, 30 Am. Dec. 731.

Maryland.— Budd *v.* Brooke, 3 Gill (Md.) 198, 43 Am. Dec. 321.

Massachusetts.—Wilson *v.* Hildreth, 118 Mass. 578.

Missouri.— Hoffman *v.* Riehl, 27 Mo. 554.

New York.— Seaman *v.* Hogeboom, 21 Barb. (N. Y.) 398.

North Carolina.—Brown *v.* House, 118 N. C. 870, 24 S. E. 786; Cansler *v.* Fite, 50 N. C. 424; Harry *v.* Graham, 18 N. C. 76, 27 Am. Dec. 226.

South Dakota.— Hanson *v.* Red Rock Tp., 4 S. D. 358, 57 N. W. 11.

Texas.— Tippen *v.* McCampbell, (Tex. Civ. App. 1894) 26 S. W. 647.

Vermont.— Bagley *v.* Morrill, 46 Vt. 94.

United States.— Chinoweth *v.* Haskell, 3 Pet. (U. S.) 92, 7 L. ed. 614.

See 8 Cent. Dig. tit. "Boundaries," § 18.

11. *Alabama.*— Doe *v.* Riley, 28 Ala. 164, 65 Am. Dec. 334.

California.— Gordon *v.* Booker, 97 Cal. 586, 32 Pac. 593; Anderson *v.* Richardson, 92 Cal. 623, 28 Pac. 679; Tognazzini *v.* Morganti, 84

This rule, however, is not an inflexible one. If by reason of mistake or where

Cal. 159, 23 Pac. 1085; Black *v.* Sprague, 54 Cal. 266; Mills *v.* Lux, 45 Cal. 273; Piercy *v.* Crandall, 34 Cal. 334.

Colorado.— Cullacott *v.* Cash Gold, etc., Min. Co., 8 Colo. 179, 6 Pac. 211.

Connecticut.— Church *v.* Steele, 42 Conn. 69; Chatham *v.* Brainerd, 11 Conn. 60; Belden *v.* Seymour, 8 Conn. 19. *Compare* Kashman *v.* Parsons, 70 Conn. 295, 39 Atl. 179.

Florida.—Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139.

Illinois.— England *v.* Vandermark, 147 Ill. 76, 35 N. E. 465; Kruse *v.* Wilson, 79 Ill. 233; Lull *v.* Chicago, 68 Ill. 518; Miller *v.* Beeler, 25 Ill. 163.

Indiana.— Hedge *v.* Sims, 29 Ind. 574; Evansville *v.* Page, 23 Ind. 525. And see Hunt *v.* Francis, 5 Ind. 302.

Iowa.— Walrod *v.* Flanigan, 75 Iowa 365, 39 N. W. 645; Bradstreet *v.* Dunham, 65 Iowa 248, 21 N. W. 592; Sanders *v.* Eldridge, 46 Iowa 34; Sayers *v.* Lyons, 10 Iowa 249; Sargent *v.* Herod, 3 Iowa 145; Moreland *v.* Page, 2 Iowa 139; Gaveny *v.* Hinton, 2 Greene (Iowa) 344.

Kansas.— McAlpine *v.* Reicheneker, 27 Kan. 257.

Kentucky.— Johnson *v.* Gresham, 5 Dana (Ky.) 542; Buford *v.* Cox, 5 J. J. Marsh. (Ky.) 582; Wallace *v.* Maxwell, 1 J. J. Marsh. (Ky.) 447; Baxter *v.* Evett, 7 T. B. Mon. (Ky.) 329; Tilford *v.* Henderson, 1 A. K. Marsh. (Ky.) 483; McCracken *v.* Stayton, 1 A. K. Marsh. (Ky.) 469; Logan *v.* Evans, 16 Ky. L. Rep. 745, 29 S. W. 636.

Maine.— Tyler *v.* Fickett, 73 Me. 410; Chadbourne *v.* Mason, 48 Me. 389; Melcher *v.* Merryman, 41 Me. 601; Chandler *v.* McCard, 38 Me. 564; Haynes *v.* Young, 36 Me. 557; Call *v.* Barker, 12 Me. 320.

Maryland.—Wilson *v.* Inloes, 6 Gill (Md.) 121; Thomas *v.* Godfrey, 3 Gill & J. (Md.) 142.

Massachusetts.— Olson *v.* Keith, 162 Mass. 485, 39 N. E. 410; Devine *v.* Wyman, 131 Mass. 73; Woodward *v.* Nims, 130 Mass. 70; Miles *v.* Barrows, 122 Mass. 579; Bosworth *v.* Sturtevant, 2 Cush. (Mass.) 392; Melvin *v.* Merrimack River Locks, etc., 5 Metc. (Mass.) 15, 38 Am. Dec. 384; Frost *v.* Spaulding, 19 Pick. (Mass.) 445, 31 Am. Dec. 150; Brimmer *v.* Long Wharf, 5 Pick. (Mass.) 131; Pernam *v.* Wead, 6 Mass. 131.

Michigan.— Brown *v.* Morrill, 91 Mich. 29, 51 N. W. 700; Diehl *v.* Zanger, 39 Mich. 601; Britton *v.* Ferry, 14 Mich. 53.

Minnesota.— Yanish *v.* Tarbox, 49 Minn. 268, 51 N. W. 1051.

Mississippi.— Potts *v.* Canton Cotton Warehouse Co., 70 Miss. 462, 12 So. 147.

Missouri.— Harding *v.* Wright, 119 Mo. 1, 24 S. W. 211; Smith *v.* Catlin Land, etc., Co., 117 Mo. 438, 22 S. W. 1083; Whitehead *v.* Ragan, 106 Mo. 231, 17 S. W. 307; Jones *v.* Poundstone, 102 Mo. 240, 14 S. W. 824; Jacobs *v.* Moseley, 91 Mo. 457, 4 S. W. 135; Kronenberger *v.* Hoffner, 44 Mo. 185; Mellon *v.* Hammond, 17 Mo. 191; McGill *v.* Somers, 15 Mo. 80; Campbell *v.* Clark, 8 Mo. 553; O'Neil *v.* St. Louis, 8 Mo. App. 416.

Nebraska.— Peterson *v.* Skjelver, 43 Nebr. 663, 62 N. W. 43; Thompson *v.* Harris, 40 Nebr. 230, 58 N. W. 712; Johnson *v.* Preston, 9 Nebr. 474, 4 N. W. 83.

New Hampshire.— Cunningham *v.* Curtis, 57 N. H. 157; Kenniston *v.* Hannaford, 55 N. H. 268; Griffin *v.* Bixby, 12 N. H. 454, 37 Am. Dec. 225.

New Jersey.— Platt *v.* Bente, 49 N. J. L. 679, 10 Atl. 283; Curtis *v.* Aaronson, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584; Kalbfleisch *v.* Standard Oil Co., 43 N. J. L. 259; Smith *v.* Negbauer, 42 N. J. L. 305; Jackson *v.* Perrine, 35 N. J. L. 137; Opdyke *v.* Stephens, 28 N. J. L. 83; McCullough *v.* Absecon Beach Land, etc., Co., 48 N. J. Eq. 170, 21 Atl. 481 [*affirmed* in 49 N. J. Eq. 593, 27 Atl. 435].

New York.—White *v.* Williams, 48 N. Y. 344 [*reversing* 48 Barb. (N. Y.) 222]; Lovejoy *v.* Tietjen, 47 Hun (N. Y.) 321; Greer *v.* New York Cent., etc., R. Co., 37 Hun (N. Y.) 346; Seaman *v.* Hogeboom, 21 Barb. (N. Y.) 398; Smith *v.* McAllister, 14 Barb. (N. Y.) 434; Jones *v.* Carroll, 5 Thomps. & C. (N. Y.) 631; Mattlage *v.* New York El. R. Co., 14 Misc. (N. Y.) 291, 35 N. Y. Suppl. 704, 70 N. Y. St. 439; Wendell *v.* Jackson, 8 Wend. (N. Y.) 183, 22 Am. Dec. 635; Jackson *v.* Camp, 1 Cow. (N. Y.) 605; Town *v.* Needham, 3 Paige (N. Y.) 545, 24 Am. Dec. 246.

North Carolina.— Norwood *v.* Cranford, 114 N. C. 513, 19 S. E. 349; West *v.* Shaw, 67 N. C. 483; Safret *v.* Hartman, 52 N. C. 199; Laughter *v.* Biddy, 46 N. C. 469; Hough *v.* Horne, 20 N. C. 305; Ingram *v.* Colson, 14 N. C. 520; Doe *v.* Rascoe, 10 N. C. 21; Den *v.* Green, 9 N. C. 218; Carroway *v.* Witherington, 4 N. C. 694; Johnston *v.* House, 3 N. C. 491; Smith *v.* Murphey, 3 N. C. 382; Witherspoon *v.* Dlanks, 1 N. C. 65.

Ohio.—Alseire *v.* Hulse, 5 Ohio 534, Wright (Ohio) 170.

Oregon.— Kanne *v.* Otty, 25 Oreg. 531, 36 Pac. 537; Anderson *v.* McCormick, 18 Oreg. 301, 22 Pac. 1062.

Pennsylvania.— Grier *v.* Pennsylvania Coal Co., 128 Pa. St. 79, 25 Wkly. Notes Cas. (Pa.) 85, 18 Atl. 480; Lodge *v.* Barnett, 46 Pa. St. 477; Mills *v.* Buchanan, 14 Pa. St. 59; Hall *v.* Powel, 4 Serg. & R. (Pa.) 456, 8 Am. Dec. 722; Rook *v.* Greenwalt, 17 Pa. Co. Ct. 642.

South Carolina.— Nelson *v.* Frierson, 1 McCord (S. C.) 232.

Tennessee.— Lewis *v.* Oakley, 10 Heisk. (Tenn.) 483.

Texas.— Davis *v.* Baylor, (Tex. 1892) 19 S. W. 523; Johnson *v.* Archibald, 78 Tex. 96, 14 S. W. 266, 22 Am. St. Rep. 27; McAninch *v.* Freeman, 69 Tex. 445, 4 S. W. 369; Gerald *v.* Freeman, 68 Tex. 201, 4 S. W. 256; Davis *v.* Smith, 61 Tex. 18; Robinson *v.* Doss, 53 Tex. 496; Johns *v.* Schutz, 47 Tex. 578; Welder *v.* Hunt, 34 Tex. 44; Robertson *v.*

otherwise the apparent intention of the parties would be defeated, courses and distances may control monuments in the location of a boundary.[12]

e. Over Quantity. Where lands are described in an entry, patent, or conveyance both by artificial monuments or marks and by quantity, the call for quantity yields to the more definite call for monuments and marks, in case of conflict.[13]

6. Control of Maps, Plats, and Field-Notes — a. In General. Where maps, plats, or field-notes are referred to in descriptions of land,[14] they are to be regarded

Mosson, 26 Tex. 248; Coughran *v.* Alderete, (Tex. Civ. App. 1894) 26 S. W. 109. *Compare* Bell *v.* Preston, 19 Tex. Civ. App. 375, 47 S. W. 375, 753.

Vermont.— Church *v.* Stiles, 59 Vt. 642, 10 Atl. 674; Clary *v.* McGlynn, 46 Vt. 347; Keenan *v.* Cavanaugh, 44 Vt. 268; Barnard *v.* Russell, 19 Vt. 334.

Wisconsin.— Miner *v.* Brader, 65 Wis. 537, 27 N. W. 313; Lampe *v.* Kennedy, 49 Wis. 601, 6 N. W. 311; Du Pont *v.* Davis, 30 Wis. 170; Vroman *v.* Dewey, 23 Wis. 530; Gove *v.* White, 20 Wis. 425.

United States.— Bartlett Land, etc., Co. *v.* Saunders, 103 U. S. 316, 26 L. ed. 546; White *v.* Luning, 93 U. S. 514, 23 L. ed. 938; Higueras *v.* U. S., 5 Wall. (U. S.) 827, 18 L. ed. 469; McEwen *v.* Den, 24 How. (U. S.) 242, 16 L. ed. 672; Hughes *v.* Cawthorn, 35 Fed. 248; McPherson *v.* Foster, 4 Wash. (U. S.) 45, 16 Fed. Cas. No. 8,921.

See 8 Cent. Dig. tit. "Boundaries," § 18.

Monuments must be fixed and known.— The rule that monuments will control courses and distances prevails only when the boundaries are fixed and known, and unquestioned monuments exist, but where the boundary is not fixed and known and the location of monuments is in dispute, courses and distances will be considered in fixing the boundaries. Hanson *v.* Red Rock Tp., 4 S. D. 358, 57 N. W. 11. See also Chinoweth *v.* Haskell, 3 Pet. (U. S.) 92, 7 L. ed. 614. Streets which are well defined and designated by some natural and artificial monuments must govern course and distance in fixing the boundaries of land; but streets which, in the infancy of a city or town, are only undefined portions of land dedicated to public use, themselves requiring to be located, would furnish very uncertain guides in arriving at the boundaries of other lands. Doe *v.* Riley, 28 Ala. 164, 65 Am. Dec. 334. See also Church *v.* Steele, 42 Conn. 69.

Government surveys.— The rule that monuments control courses and distances applies to discrepancies in government surveys between the courses and distances and the witness trees called for in the field-notes. England *v.* Vandermark, 147 Ill. 76, 35 N. E. 465.

12. Effect of mistake.— Where it is apparent from the face of the grant that such monuments or objects were inserted by mistake or laid down by conjecture and without regard to rule courses and distances will control. Robinson *v.* Doss, 53 Tex. 496.

Where otherwise the apparent intent would be defeated, courses and distances may control monuments. Danziger *v.* Boyd, 53 N. Y. Super. Ct. 398, 55 N. Y. Super. Ct. 537, 12 N. Y. St. 64. See also Hamilton *v.* Foster, 45 Me. 32; Murdock *v.* Chapman, 9 Gray (Mass.) 156; Buffalo, etc., R. Co. *v.* Stigeler, 61 N. Y. 348.

In a case where no mistake could reasonably be supposed in the courses and distances the reason of the rule was held to fail and the rule itself was not applied. Thus a line of "one ft. and three in." in describing land in one of the main streets in Boston was held to control the boundary mentioned. Davis *v.* Rainsford, 17 Mass. 207. See also Higinbotham *v.* Stoddard, 72 N. Y. 94 [*affirming* 9 Hun (N. Y.) 1].

Unmentioned monuments.— Where in the original survey by cotenants for the purpose of partition, the lines between the lots were located by artificial monuments, which were hidden, but no reference thereto was made in the plat, the description of the lots therein being merely by courses and distances, it was held, as between one of the cotenants and a grantee of a lot, whose deed referred to the plat for a description, and who was unaware of the existence of the monuments, the courses and distances therein called for controlled the monuments. Whitehead *v.* Atchison, 136 Mo. 485, 37 S. W. 928. And see Kashman *v.* Parsons, 70 Conn. 295, 39 Atl. 179, where it was held that fences not referred to in a deed cannot control the distances therein stated.

13. *California.*— Mahon *v.* Richardson, 50 Cal. 333.

Illinois.— Cottingham *v.* Parr, 93 Ill. 233.

Maine.— Emery *v.* Fowler, 38 Me. 99.

Massachusetts.— Hooten *v.* Comerford, 152 Mass. 591, 26 N. E. 407, 23 Am. St. Rep. 861.

New York.—Allerton *v.* Johnson, 3 Sandf. Ch. (N. Y.) 72.

Wisconsin.— McEvoy *v.* Loyd, 31 Wis. 142.

See 8 Cent. Dig. tit. "Boundaries," § 19.

Exact statement of quantity.—Monuments erected as bounds by mutual consent control all statements in the deed even such as "containing exactly one acre." Emery *v.* Fowler, 38 Me. 99.

Where land is conveyed according to the government description and the monuments established by the original surveys can be found, these are controlling, although the division may exceed or fall short of the requisite number of acres. McEvoy *v.* Loyd, 31 Wis. 142.

14. Where there is a variance between the plat and field-notes of the original survey of public lands, the former must control, since it represents the land and corners as fixed by the surveyor-general, and by which the land was sold. Beaty *v.* Robertson, 130 Ind. 589, 30 N. E. 706. But see Harrington *v.* Boehmer, 134 Cal. 196, 66 Pac. 214, 489.

as incorporated into the descriptions,[15] and in case of a conflict of calls, the usual rules of construction are to be applied and those calls which are most certain and definite or most in accord with the true intent of the parties are to be adopted.[16]

b. Over Calls For Adjoiners. In case of a conflict between a call for adjoiners and a map or plan referred to in the description of land, the map or plan will ordinarily govern.[17]

c. Over Metes and Bounds. Maps, plats, or field-notes may control a description by metes and bounds,[18] but that call will be adopted which has the greater certainty, and is more in accord with the supposed intent of the parties.[19]

d. Over Courses and Distances. Where in a description of land a reference is made in the instrument by which it is granted to a map, plat, or field-notes, together with calls for courses and distances, the latter will generally[20] yield to

15. See *supra*, II, B, 6.

16. *California.*— Hudson *v.* Irwin, 50 Cal. 450; Powers *v.* Jackson, 50 Cal. 429; Mayo *v.* Mazeaux, 38 Cal. 442; Vance *v.* Fore, 24 Cal. 435.

Georgia.— Summerlin *v.* Hesterly, 20 Ga. 689, 65 Am. Dec. 639.

Illinois.— McClintock *v.* Rogers, 11 Ill. 279.

Kentucky.—Steele *v.* Taylor, 3 A. K. Marsh. (Ky.) 225, 13 Am. Dec. 151.

Louisiana.— Millikin *v.* Minnis, 12 La. 539.

Maine.— Haynes *v.* Young, 36 Me. 557; Lincoln *v.* Wilder, 29 Me. 169; Kennebec Purchase *v.* Tiffany, 1 Me. 219, 10 Am. Dec. 60.

Massachusetts.—Morse *v.* Rogers, 118 Mass. 572; Davis *v.* Rainsford, 17 Mass. 207; Lunt *v.* Holland, 14 Mass. 149.

Michigan.— Bower *v.* Earl, 18 Mich. 367.

Missouri.— McKinney *v.* Doane, 155 Mo. 287, 56 S. W. 304; Dolde *v.* Bodicka, 49 Mo. 98; Union R., etc., Co. *v.* Skinner, 9 Mo. App. 189.

North Carolina.— Literary Fund *v.* Clark, 31 N. C. 58.

Pennsylvania.— Birmingham *v.* Anderson, 48 Pa. St. 253.

Tennessee.— Bell *v.* Hickman, 6 Humphr. (Tenn.) 398.

Texas.— Schaeffer *v.* Berry, 62 Tex. 705; Boggess *v.* Allen, (Tex. Civ. App. 1900) 56 S. W. 195 [*affirmed* in 94 Tex. 83, 58 S. W. 833]; Ratliff *v.* Burleson, 7 Tex. Civ. App. 621, 25 S. W. 983, 26 S. W. 1003.

Wisconsin.— Lampe *v.* Kennedy, 45 Wis. 23.

United States.— Parker *v.* Kane, 22 How. (U. S.) 1, 16 L. ed. 286; Scaife *v.* Western North Carolina Land Co., 90 Fed. 238, 61 U. S. App. 647, 33 C. C. A. 47.

See 8 Cent. Dig. tit. "Boundaries," § 34.

A mistake in the calls of a patent may be corrected by reference to the plat and certificate of survey. The survey is a matter of record, and of equal dignity with the patent. Steele *v.* Taylor, 3 A. K. Marsh. (Ky.) 225, 13 Am. Dec. 151.

United States patents.— Where, as in a patent from the United States, the land is only described in the conveyance by numbers and quarters, the court will look at the plat and field-notes of the public surveys in order to locate the land, and these are considered as part of the patent itself. McClintock *v.* Rogers, 11 Ill. 279.

17. Magoun *v.* Lapham, 21 Pick. (Mass.) 135; Province *v.* Crow, 70 Pa. St. 199. *Compare* Allaire *v.* Ketcham, 55 N. J. Eq. 168, 35 Atl. 900; Atkinson *v.* Anderson, 3 McCord (S. C.) 223, in which latter case it was held that a grant must follow the line of an adjacent tract called for as its boundary, however much it may meander, although it is represented as a straight line in the surveyor s plat.

18. U. S. *v.* Sutter, 21 How. (U. S.) 170, 16 L. ed. 119.

A designation of lots by number on a plan will control a description by metes and bounds. Davidson *v.* Arledge, 97 N. C. 172, 2 S. E. 378. But where lands are incorrectly described by government numbers, but correctly by metes and bounds, the latter description controls. Chadwick *v.* Carson, 78 Ala. 116.

19. Cannon *v.* Emmans, 44 Minn. 294, 46 N. W. 356; Coles *v.* Yorks, 36 Minn. 388, 31 N. W. 353; Rutherford *v.* Tracy, 48 Mo. 325, 8 Am. Rep. 104.

A purchaser of government lands acquires, by his patent, title to all of the land embraced within the boundary lines of the tract purchased, even though the survey be inaccurate, for the boundaries, when found, must control the notes and plat of survey. Lewen *v.* Smith, 7 Port. (Ala.) 428; Sawyer *v.* Cox, 63 Ill. 130.

20. Control of intention.— Where the evidence shows that it was the intention of the parties to a deed that only the land comprised within the description by course and distance should be included, such description will control one by number of lot and block. Mullaly *v.* Noyes, (Tex. Civ. App. 1894) 26 S. W. 145.

Incidental calls, noted in field-notes as such in passing, unless specifically designated in such manner as to show an intention to make them locative, will not ordinarily have precedence over calls for courses and distances. Hanson *v.* Red Rock Tp., 4 S. D. 358, 57 N. W. 11.

Where a fractional lot is conveyed the grantee is bound by the distances given even if reference is made to an official map. Hostetter *v.* Los Angeles Terminal R. Co., 108 Cal. 38, 41 Pac. 330.

Where an original plat was not the result of actual survey and there was palpable mistakes therein in the calls for natural or artificial monuments, courses and distances will be permitted to prevail over such monuments in

the former in case there is a conflict or discrepancy between them and control the location of the boundary.[21]

e. Over Quantity. Calls for quantity yield to maps, plats, or field-notes referred to in the description of lands entered, patented, or conveyed.[22]

7. Control of Calls For Adjoiners — a. In General. In the absence of calls for natural or artificial monuments, calls for adjoiners will, as a rule, control other and conflicting calls.[23] Where, however, such calls are manifestly erroneous they will be disregarded.[24]

b. Over Courses and Distances. In locating boundaries, calls for adjoiners control calls for courses and distances,[25] except where the former are clearly

locating the plat. Evans *v.* Weeks, 6 Rich. (S. C.) 83.

21. *California.*—Vance *v.* Fore, 24 Cal. 435.

Maine.— Heaton *v.* Hodges, 14 Me. 66, 30 Am. Dec. 731.

Minnesota.— Nicolin *v.* Schneiderhan, 37 Minn. 63, 33 N. W. 33; Coles *v.* Yorks, 36 Minn. 388, 31 N. W. 353; Colter *v.* Mann, 18 Minn. 96.

Mississippi.— O'Herrin *v.* Brooks, 67 Miss. 266, 6 So. 844.

New York.—Brown *v.* McEvey, 5 N. Y. Leg. Obs. 19.

Ohio.— Wolfe *v.* Scarborough, 2 Ohio St. 361.

Pennsylvania.— Birmingham *v.* Anderson, 48 Pa. St. 253.

Washington.— State *v.* Whatcom County, 5 Wash. 425, 32 Pac. 97, 775.

See 8 Cent. Dig. tit. "Boundaries," § 35.

22. Wadhams *v.* Swan, 109 Ill. 46; Ufford *v.* Wilkins, 33 Iowa 110; Williams *v.* Spaulding, 29 Me. 112; Hathaway *v.* Power, 6 Hill (N. Y.) 453. *Compare* Lamar *v.* Minter, 13 Ala. 31.

23. *Kentucky.*— Church *v.* Macey, 1 A. K. Marsh. (Ky.) 274.

Missouri.— Clamorgan *v.* Hornsby, 94 Mo. 83, 6 S. W. 651.

New Hampshire.—Bailey *v.* White, 41 N. H. 337.

North Carolina.— Dula *v.* McGhee, 34 N. C. 332.

Pennsylvania.— Stroup *v.* McClosky, (Pa. 1886) 10 Atl. 421, 481; Quinn *v.* Heart, 43 Pa. St. 337.

Texas.— Bigham *v.* McDowell, 69 Tex. 100, 7 S. W. 315; Moore *v.* Reiley, 68 Tex. 668, 5 S. W. 618.

See 8 Cent. Dig. tit. "Boundaries," § 30.

24. Slater *v.* Rawson, 1 Metc. (Mass.) 450; Gregg *v.* Hill, 82 Tex. 495, 17 S. W. 838; Texas Town-Site Co. *v.* Hunnicutt, (Tex. Civ. App. 1895) 31 S. W. 520; Layton *v.* New York, etc., Land Co., (Tex. Civ. App. 1895) 29 S. W. 1120; Aransas Pass Colonization Co. *v.* Flippen, (Tex. Civ. App. 1895) 29 S. W. 813.

25. *Connecticut.*—Elliott *v.* Weed, 44 Conn. 19; Roberti *v.* Atwater, 43 Conn. 540.

Florida.— Simmons *v.* Spratt, 20 Fla. 495; Hogans *v.* Carruth, 19 Fla. 84.

Georgia.— Ford *v.* Williams, 73 Ga. 106; Riley *v.* Griffin, 16 Ga. 141, 60 Am. Dec. 726.

Illinois.— Miller *v.* Beeler, 25 Ill. 163.

Iowa.— Sayers *v.* Lyons, 10 Iowa 249.

Louisiana.—Brand *v.* Daunoy, 8 Mart. N. S. (La.) 159, 19 Am. Dec. 176.

Maine.— Bryant *v.* Maine Cent. R. Co., 79 Me. 312, 9 Atl. 736; Haynes *v.* Young, 36 Me. 557.

Massachusetts.— George *v.* Wood, 7 Allen (Mass.) 14.

Michigan.— Howell *v.* Merrill, 30 Mich. 282.

Missouri.— Smith *v.* Catlin Land, etc., Co., 117 Mo. 438, 22 S. W. 1083; Whittelsey *v.* Kellogg, 28 Mo. 404.

New Hampshire.— Cunningham *v.* Curtis, 57 N. H. 157; Breck *v.* Young, 11 N. H. 485.

New Jersey.— Passage *v.* McVeigh, 23 N. J. L. 729.

New York.— Northrop *v.* Sumney, 27 Barb. (N. Y.) 196; Casey *v.* Dunn, 57 N. Y. Super. Ct. 381, 8 N. Y. Suppl. 305, 29 N. Y. St. 355; Bates *v.* Tymason, 13 Wend. (N. Y.) 300; Cudney *v.* Early, 4 Paige (N. Y.) 209.

North Carolina.— Bowen *v.* Gaylord, 122 N. C. 816, 29 S. E. 340; Smith *v.* Headrick, 93 N. C. 210; Cansler *v.* Fite, 50 N. C. 424; Topping *v.* Sadler, 50 N. C. 357; Corn *v.* McCrary, 48 N. C. 496; Cherry *v.* Slade, 7 N. C. 82; ——— *v.* Heritage, 3 N. C. 496; Smith *v.* Murphey, 3 N. C. 382.

Ohio.— Calhoun *v.* Price, 17 Ohio St. 96.

Pennsylvania.— Airey *v.* Kunkle, 190 Pa. St. 196, 42 Atl. 533 [*affirming* 18 Pa. Co. Ct. 620, 6 Pa. Dist. 1, 7 Pa. Super. Ct. 112]; Ake *v.* Mason, 101 Pa. St. 17; Koch *v.* Dunkel, 90 Pa. St. 264; Darrah *v.* Bryant, 56 Pa. St. 69; Quinn *v.* Heart, 43 Pa. St. 337; Caldwell *v.* Holler, 40 Pa. St. 160; Younkin *v.* Cowan, 34 Pa. St. 198; Hagerty *v.* Mathers, 31 Pa. St. 348; Cox *v.* Couch, 8 Pa. St. 147.

South Carolina.— Connor *v.* Johnson, 59 S. C. 115, 37 S. E. 240.

Tennessee.— Phillips *v.* Crabtree, (Tex. Ch. 1899) 52 S. W. 787.

Texas.— Maddox *v.* Fenner, 79 Tex. 279, 15 S. W. 237; Duff *v.* Moore, 68 Tex. 270, 4 S. W. 530; Woods *v.* Robinson, 58 Tex. 655; Fordtran *v.* Ellis, 58 Tex. 245; Freeman *v.* Mahoney, 57 Tex. 621; Ragsdale *v.* Robinson, 48 Tex. 379; Bolton *v.* Lann, 16 Tex. 96; Besson *v.* Richards, 24 Tex. Civ. App. 64, 58 S. W. 611; Langermann *v.* Nichols, (Tex. Civ. App. 1893) 32 S. W. 124.

Vermont.— Fullam *v.* Foster, 68 Vt. 590, 35 Atl. 484; Graves *v.* Mattison, 67 Vt. 630, 32 Atl. 498; Park *v.* Pratt, 38 Vt. 545.

incorrect, or are so vague and uncertain as to be incapable of definite ascertainment.[26]

c. Over Quantity. In construing descriptions of land by boundaries calls for adjoiners control a call for quantity.[27]

8. Control of Metes and Bounds — a. In General. Where land is described by clear and distinct metes and bounds, from which the boundaries can be readily ascertained, such description will control any general words of description added thereto.[28]

b. Over Courses and Distances. In the location of boundary lines metes and bounds always control courses and distances.[29]

c. Over Quantity. A recital of quantity in a description of lands must yield to metes and bounds, unless an intention is clearly shown that the call for quantity is to control the boundaries given.[30]

West Virginia.— Miller *v.* Holt, 47 W. Va. 7, 34 S. E. 956.

United States.— Bartlett Land, etc., Co. *v.* Saunders, 103 U. S. 316, 26 L. ed. 546; Morrow *v.* Whitney, 95 U. S. 551, 24 L. ed. 456.

See 8 Cent. Dig. tit. "Boundaries," § 32.

As a matter of interpretation and construction alone, without reference to any extrinsic facts in case of a conveyance by a boundary, by a specified course and distance, "more or less," from a given point to the lands of a third person, named, it is held that the line of such lands, and not the specified distance, will govern. Howell *v.* Merrill, 30 Mich. 282.

A call for the marked line of an older adjoining survey will prevail over a call for distance, the presumption being that the surveyor identified the line called for by the marks on the ground, and that the mistake occurred in the measurement or calculation of the distance. Duff *v.* Moore, 68 Tex. 270, 4 S. W. 530.

Call for open line.— A call in a survey for the line of another survey, which is an open line on the prairie at the point of intersection, will not yield to a conflicting call for distances, when the location of the open line is certainly determined by natural objects, marked lines, and fixed corners of abutting surveys. Fordtran *v.* Ellis, 58 Tex. 245. Where the line of another tract is called for in a deed, the line must be run regardless of distances, although it may have to be ascertained by course and distance. Cansler *v.* Fite, 50 N. C. 424.

Whether the line called for is marked or unmarked is immaterial. Corn *v.* McCrary, 48 N. C. 496. Thus where a patent calls for unmarked lines of surrounding surveys, the position of which can be accurately ascertained, and there is no evidence as to how the survey was actually made, such unmarked lines will prevail over courses and distances, in case of a conflict. Maddox *v.* Fenner, 79 Tex. 279, 15 S. W. 237.

26. *North Carolina.*—Brown *v.* House, 116 N. C. 859, 21 S. E. 938; Carson *v.* Mills, 18 N. C. 546, 30 Am. Dec. 143.

Pennsylvania.— Brolaskey *v.* McClain, 61 Pa. St. 146.

South Carolina.—Starke *v.* Johnson, 2 Mill Const. (S. C.) 9.

Texas.— Boon *v.* Hunter, 62 Tex. 582; Oliver *v.* Mahoney, 61 Tex. 610; Tippen *v.* McCampbell, (Tex. Civ. App. 1894) 26 S. W. 647.

Vermont.— Day *v.* Wilder, 47 Vt. 583.

See 8 Cent. Dig. tit. "Boundaries," § 32.

27. *Georgia.*— Beall *v.* Berkhalter, 26 Ga. 564.

Louisiana.— Gughlielhmi *v.* Geismar, 46 La. Ann. 280, 14 So. 501.

Massachusetts.—Clark *v.* Munyan, 22 Pick. (Mass.) 410, 33 Am. Dec. 752. *Compare* Slater *v.* Rawson, 1 Metc. (Mass.) 450.

New York.— Doe *v.* Thompson, 5 Cow. (N. Y.) 371.

Pennsylvania.— Koch *v.* Dunkel, 90 Pa. St. 264; Bear *v.* Bear, 13 Pa. St. 529.

South Carolina.—Gourdin *v.* Davis, 2 Rich. (S. C.) 481, 45 Am. Dec. 745.

28. *Alabama.*— Guilmartin *v.* Wood, 76 Ala. 204; Hallett *v.* Doe, 7 Ala. 882.

Iowa.— See Palmer *v.* Osborne, (Iowa 1901) 87 N. W. 712.

Massachusetts.— Dana *v.* Middlesex Bank, 10 Metc. (Mass.) 250. See also Sawyer *v.* Kendall, 10 Cush. (Mass.) 241.

Missouri.— Adkins *v.* Quest, 79 Mo. App. 36.

New Jersey.— Conover *v.* Wardell, 22 N. J. Eq. 492.

New York.— Jones *v.* Smith, 73 N. Y. 205; Lewis *v.* Upton, 52 N. Y. App. Div. 617, 65 N. Y. Suppl. 263.

Pennsylvania.— Taylor *v.* Seeley, 1 Phila. (Pa.) 341, 9 Leg. Int. (Pa.) 51.

South Carolina.— Bratton *v.* Clawson, 3 Strobh. (S. C.) 127.

Texas.— Franks *v.* Hancock, 1 Tex. Unrep. Cas. 554.

See 8 Cent. Dig. tit. "Boundaries," § 20.

Effect of uncertainty.— If the description of land in a deed by metes and bounds is so uncertain that it is impossible to ascertain by it the precise land granted, a general description in the deed, which is intelligible, will govern. Sawyer *v.* Kendall, 10 Cush. (Mass.) 241.

29. Friend *v.* Friend, 64 Md. 321, 1 Atl. 865; Heck *v.* Remka, 47 Md. 68; Owen *v.* Bartholomew, 9 Pick. (Mass.) 520; Johnson *v.* McIlwain, 1 Rice (S. C.) 368.

30. *Alabama.*— Thompson *v.* Sheppard, 85 Ala. 611, 5 So. 334; Dozier *v.* Duffee, 1 Ala. 320.

9. Control of Courses and Distances — a. In General. In the absence of monuments or of lines actually marked and surveyed, the courses and distances

Arkansas.— Doe *v.* Porter, 3 Ark. 18, 36 Am. Dec. 448.

California.— Winans *v.* Cheney, 55 Cal. 567; Stanley *v.* Green, 12 Cal. 148; Chipman *v.* Briggs, 5 Cal. 76.

Connecticut.— Nichols *v.* Turney, 15 Conn. 101; Belden *v.* Seymour, 8 Conn. 19; Snow *v.* Chapman, 1 Root (Conn.) 528.

Florida.— Jackson *v.* Magbee, 21 Fla. 622.

Georgia.— Ray *v.* Pease, 95 Ga. 153, 22 S. E. 190; Benton *v.* Horsley, 71 Ga. 619.

Illinois.— Kruse *v.* Scripps, 11 Ill. 98.

Indiana.— Richwine *v.* Jones, 140 Ind. 289, 39 N. E. 460; Silver Creek Cement Corp. *v.* Union Lime, etc., Co., 138 Ind. 297, 35 N. E. 125, 37 N. E. 721; Porter *v.* Reid, 81 Ind. 569. See also Maguire *v.* Bissell, 119 Ind. 345, 21 N. E. 326.

Kentucky.— Eubank *v.* Hampton, 1 Dana (Ky.) 343; Wallace *v.* Maxwell, 1 J. J. Marsh. (Ky.) 447; Steele *v.* Williams, 12 Ky. L. Rep. 770, 15 S. W. 49.

Louisiana.— Davis *v.* Millandon, 17 La. Ann. 97, 87 Am. Dec. 517; Surgi *v.* Shooter, 17 La. Ann. 68; Barrow *v.* Miller, 16 La. Ann. 114; Labiche *v.* Jahan, 9 Rob. (La.) 30; Hoover *v.* Richards, 1 Rob. (La.) 34; Prejean *v.* Giroir, 19 La. 422; Harman *v.* O'Moran, 18 La. 526; Brazeale *v.* Bordelon, 16 La. 333; Gormley *v.* Oakey, 7 La. 452; Johnston *v.* Quarles, 3 La. 90, 22 Am. Dec. 163; Marigny *v.* Nivet, 2 La. 498; Cuny *v.* Archinard, 5 Mart. N. S. (La.) 238.

Maine.— Chandler *v.* McCard, 38 Me. 564; Allen *v.* Allen, 14 Me. 387.

Maryland.— Mundell *v.* Perry, 2 Gill & J. (Md.) 193.

Massachusetts.— Pernam *v.* Wead, 6 Mass. 131; Powell *v.* Clark, 5 Mass. 355, 4 Am. Dec. 67; Howe *v.* Bass, 2 Mass. 380, 3 Am. Dec. 59.

Michigan.— Moran *v.* Lezotte, 54 Mich. 83, 19 N. W. 757, where it was held that it, in a deed, the description of fixed lines and monuments is ambiguous, and circumstances indicate that the statement of quantity is least likely to be wrong, such statement may control.

Mississippi.— Carmichael *v.* Foley, 1 How. (Miss.) 591.

Missouri.— Campbell *v.* Johnson, 44 Mo. 247; Clark *v.* Hammerle, 36 Mo. 620; Gray *v.* Temple, 35 Mo. 494; Orrick *v.* Bower, 29 Mo. 210; Marshall *v.* Bompart, 18 Mo. 84; Campbell *v.* Clark, 6 Mo. 219; Mires *v.* Sommerville, 85 Mo. App. 183.

New Hampshire.—Smith *v.* Dodge, 2 N. H. 303; Perkins *v.* Webster, 2 N. H. 287.

New Jersey.— Andrews *v.* Rue, 34 N. J. L. 402.

New York.— Thayer *v.* Finton, 108 N. Y. 394, 15 N. E. 615; Wendell *v.* Jackson, 8 Wend. (N. Y.) 183, 22 Am. Dec. 635; Jackson *v.* Ives, 9 Cow. (N. Y.) 661; Jackson *v.* Widger, 7 Cow. (N. Y.) 723; Jackson *v.* Barringer, 15 Johns. (N. Y.) 471; Jackson *v.* Ogden, 7 Johns. (N. Y.) 238; Mann *v.* Pearson, 2 Johns. (N. Y.) 37; Jackson *v.* Defendorf, 1 Cai. (N. Y.) 493. And see Voorhees *v.* De Meyer, 2 Barb. (N. Y.) 37.

North Carolina.— Reddick *v.* Leggat, 7 N. C. 539.

Pennsylvania.— Petts *v.* Gaw, 15 Pa. St. 218; Large *v.* Penn, 6 Serg. & R. (Pa.) 488; Smith *v.* Evans, 6 Binn. (Pa.) 102, 6 Am. Dec. 436.

South Carolina.—Gourdin *v.* Davis, 2 Rich. (S. C.) 481, 45 Am. Dec. 745; Lorick *v.* Hawkins, 1 Rich. (S. C.) 417; Bratton *v.* Clawson, 3 Strobh. (S. C.) 127; Jones *v.* Bauskett, 2 Speers (S. C.) 68; Barksdale *v.* Toomer, Harp. (S. C.) 290; Peay *v.* Briggs, 2 Mill Const. (S. C.) 98, 12 Am. Dec. 656.

Tennessee.— See Harper *v.* Lindsey, Meigs (Tenn.) 310.

Texas.— Dalton *v.* Rust, 22 Tex. 133.

Vermont.— Fletcher *v.* Clark, 48 Vt. 211; Beach *v.* Stearns, 1 Aik. (Vt.) 325.

Virginia.— Hunter *v.* Hume, 88 Va. 24, 13 S. E. 305, 15 Va. L. J. 490.

West Virginia.— Teass *v.* St. Albans, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802; Holly River Coal Co. *v.* Howell, 36 W. Va. 489, 15 S. E. 214; Gwynn *v.* Schwartz, 32 W. Va. 487, 9 S. E. 880; Tompkins *v.* Vintroux, 3 W. Va. 148, 100 Am. Dec. 735.

United States.— Tobin *v.* Walkinshaw, McAll. (U. S.) 151, 23 Fed. Cas. No. 14,069; Jackson *v.* Sprague, Paine (U. S.) 494, 13 Fed. Cas. No. 7,148.

See 8 Cent. Dig. tit. "Boundaries," § 24.

A sale of a certain number of acres between certain boundaries, but qualified by the expression "so as to include the said number of acres," does not convey to the grantee the land to the boundaries, but only the stipulated number of acres. Hoover *v.* Richards, 1 Rob. (La.) 34.

Construction of warranty.— In Lorick *v.* Hawkins, 1 Rich. (S. C.) 417, a warranty deed was to a certain definite number of acres, contained within certain metes and bounds, "having such form and marks as the plat annexed represents." The description as to metes and bounds and the number of acres was the same in the plat as in the deed. It was held that the description as to metes and bounds controlled the designation as to quantity, so that the warranty was only as to metes and bounds, and not as to quantity.

Description by government surveys.— Where the land conveyed is described by the government surveys, and as containing so many acres more or less, it is a sale by metes and bounds; and, in the absence of fraud, the actual quantity, whether more or less than the estimate at the purchase, will not avail either party. Dozier *v.* Duffee, 1 Ala. 320.

Where land is not sold by any definite quantity, a statement of the quantity will yield to boundary lines. Richwine *v.* Jones,

called for in a description of the boundaries of land must control.[31] When a departure from either course or distance becomes necessary the distance must yield,[32]

140 Ind. 289, 39 N. E. 460. See also Gormley *v.* Oakey, 7 La. 452.

31. *Georgia.*— Riley *v.* Griffin, 16 Ga. 141, 60 Am. Dec. 726.

Kentucky.— Bryan *v.* Beckley, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276.

Maine.—Chadbourne *v.* Mason, 48 Me. 389; Mosher *v.* Berry, 30 Me. 83, 50 Am. Dec. 614; Machias *v.* Whitney, 16 Me. 343.

Maryland.— Hammond *v.* Ridgely, 5 Harr. & J. (Md.) 245, 9 Am. Dec. 522; Carroll *v.* Norwood, 5 Harr. & J. (Md.) 163; Howard *v.* Moale, 2 Harr. & J. (Md.) 249.

Michigan.—Bruckner *v.* Lawrence, 1 Dougl. (Mich.) 19.

Missouri.— Adkins *v.* Quest, 79 Mo. App. 36.

New Jersey.— Negbauer *v.* Smith, 44 N. J. L. 672; Opdyke *v.* Stephens, 28 N. J. L. 83.

New York.— Burnett *v.* Wadsworth, 57 N. Y. 634; Drew *v.* Swift, 46 N. Y. 204; Ratcliffe *v.* Gray, 4 Abb. Dec. (N. Y.) 4, 3 Keyes (N. Y.) 510, 3 Transcr. App. (N. Y.) 117. *Compare* Masten *v.* Olcott, 101 N. Y. 152, 4 N. E. 274.

North Carolina.— Muse *v.* Caddell, 126 N. C. 265, 35 S. E. 466; Deaver *v.* Jones, 119 N. C. 598, 26 S. E. 156; Deming *v.* Gainey, 95 N. C. 528; Mizell *v.* Simmons, 79 N. C. 182; Spruill *v.* Davenport, 44 N. C. 134; Kissam *v.* Gaylord, 44 N. C. 116; Ring *v.* King, 20 N. C. 250; Carson *v.* Mills, 18 N. C. 546, 30 Am. Dec. 143; Den *v.* Shenck, 13 N. C. 415; Bradford *v.* Hill, 2 N. C. 30, 1 Am. Dec. 546.

Pennsylvania.— Green *v.* Shrack, 17 Pa. Super. Ct. 6.

South Carolina.— Evans *v.* Weeks, 6 Rich. (S. C.) 83; Johnson *v.* McMillan, 1 Strobh. (S. C.) 143; Coats *v.* Mathews, 2 Nott & M. (S. C.) 99; Bradford *v.* Pitts, 2 Mill Const. (S. C.) 115.

Tennessee.— Hickman *v.* Tait, Cooke (Tenn.) 459; Frazier *v.* Basset, 1 Overt. (Tenn.) 297.

Texas.— Lilly *v.* Blum, 70 Tex. 704, 6 S. W. 279; Bigham *v.* McDowell, 69 Tex. 100, 7 S. W. 315; Ayers *v.* Harris, 64 Tex. 296; Ratliff *v.* Burleson, 7 Tex. Civ. App. 621, 25 S. W. 983, 26 S. W. 1003; Roberts *v.* Helm, 1 Tex. Civ. App. 100, 20 S. W. 1004; Webb *v.* Brown, 2 Tex. Unrep. Cas. (Tex.) 36. *Compare* Machon *v.* Randle, 66 Tex. 282, 17 S. W. 477.

Vermont.— Bagley *v.* Morrill, 46 Vt. 94.

Virginia.— Clements *v.* Kyles, 13 Gratt. (Va.) 468; Smith *v.* Chapman, 10 Gratt. (Va.) 445; Overton *v.* Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544.

United States.— Chinoweth *v.* Haskell, 3 Pet. (U. S.) 96, 7 L. ed. 614; McIver *v.* Walker, 4 Wheat. (U. S.) 444, 4 L. ed. 611, 9 Cranch (U. S.) 173, 3 L. ed. 694; Nelson *v.* Hall, 1 McLean (U. S.) 518, 17 Fed. Cas. No. 10,107.

See 8 Cent. Dig. tit. "Boundaries," § 38.

Although courses and distances are the lowest in dignity and importance of calls employed in grants, yet, when the land can be more certainly identified by running the courses and distances, the grant should be so determined. Bigham *v.* McDowell, 69 Tex. 100, 7 S. W. 315.

Indefinite calls.— Courses and distances must prevail as against calls rendered uncertain by such qualifying expressions as "supposed," "to," or "near." Mizell *v.* Simmons, 79 N. C. 182 [*following* Carson *v.* Mills, 18 N. C. 546, 30 Am. Dec. 143].

Overlapping grants.—Where a grantor conveys adjoining tracts or courses and distances to different grantees so that the tract described in one deed overlaps that described in the other, but the description in each deed calls for a certain definite line between the tracts, such line when ascertained will govern regardless of distances. Gould *v.* Lyman, 48 Me. 129.

Reversing course and distance.— In Ellinwood *v.* Stancliff, 42 Fed. 316, it was held that on a question as to the true location of a land patent boundaries fixed by revising the courses and distances must govern when found to coincide with the natural calls of the patent.

Where a state line called for can be found it will govern calls for courses and distances. Redmond *v.* Stepp, 100 N. C. 212, 6 S. E. 727.

32. *Kentucky.*— Pearson *v.* Baker, 4 Dana (Ky.) 321; Bryan *v.* Beckley, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276.

Maryland.—Wilson *v.* Inloes, 6 Gill (Md.) 121; Gibson *v.* Smith, 1 Harr. & J. (Md.) 253.

Massachusetts.— Henshaw *v.* Mullens, 121 Mass. 143.

Mississippi.— Doe *v.* King, 3 How. (Miss.) 125.

New Jersey.— Curtis *v.* Aaronson, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584.

North Carolina.— Miller *v.* White, 1 N. C. 135, 1 Am. Dec. 591.

South Carolina.— Eubanks *v.* Harris, 1 Speers (S. C.) 183.

Texas.— Rand *v.* Cartwright, 82 Tex. 399, 18 S. W. 794; Wyatt *v.* Foster, 79 Tex. 413, 15 S. W. 679.

United States.— U. S. *v.* Murray, 41 Fed. 862.

Compare McClintock *v.* Rogers, 11 Ill. 279 (where it is said that the law cannot satisfactorily determine, in all cases, whether the courses or distances shall govern when they do not correspond, but they must be determined by concurring testimony and the circumstances of each particular case); Ricker *v.* Barry, 34 Me. 116; Loring *v.* Norton, 8 Me. 61.

See 8 Cent. Dig. tit. "Boundaries," § 40.

unless it is evident from the calls that the distance is the only and controlling object.[33]

b. Over Quantity. The statement of the quantity of land supposed to be conveyed and inserted in a deed or patent by way of description must yield to courses and distances,[34] unless there is a clearly expressed intention to the contrary.[35]

10. Control of Quantity. Quantity, although less reliable and last to be resorted to of all descriptions of boundaries, may, nevertheless, in doubtful cases, have weight as a circumstance in aid of other calls, and in the absence of other definite description it may have a controlling force.[36]

D. Relative Importance of Conflicting Grants. Where there is a clash of boundaries in two deeds from the same grantor, the title of the grantee in the deed first executed is, to the extent of the conflict, superior;[37] but when the elder

33. Blight *v.* Atwell, 4 J. J. Marsh. (Ky.) 279; Calvert *v.* Fitzgerald, Litt. Sel. Cas. (Ky.) 388; Scott *v.* Weisburg, 3 Tex. Civ. App. 46, 21 S. W. 769.

34. *Delaware.*— Quillen *v.* Betts, 1 Penew. (Del.) 53, 39 Atl. 595.

Illinois.— Kruse *v.* Scripps, 11 Ill. 98.

Maryland.— Carroll *v.* Norwood, 1 Harr. & J. (Md.) 167.

Massachusetts.— Melvin *v.* Merrimack River Locks, etc., 5 Metc. (Mass.) 15, 38 Am. Dec. 384.

Nebraska.— Pohlman *v.* Evangelical Lutheran Trinity Church, 60 Nebr. 364, 83 N. W. 201.

New York.— Wilcox *v.* Bread, 92 Hun (N. Y.) 9, 37 N. Y. Suppl. 867, 73 N. Y. St. 28 [*affirmed* in 157 N. Y. 713, 53 N. E. 1133].

Pennsylvania.— Boar *v.* McCormick, 1 Serg. & R. (Pa.) 166.

Texas.— Rand *v.* Cartwright, 82 Tex. 399, 18 S. W. 794; Ayers *v.* Harris, 77 Tex. 108, 13 S. W. 768; Johnson *v.* Garrett, 25 Tex. Suppl. 13.

Vermont.— Grand Trunk R. Co. *v.* Dyer, 49 Vt. 74; Gilman *v.* Smiths, 12 Vt. 150.

West Virginia.— Gwynn *v.* Schwartz, 32 W. Va. 487, 9 S. E. 880.

See 8 Cent. Dig. tit. "Boundaries," § 39.

35. Sanders *v.* Godding, 45 Iowa 463; Carson *v.* Hanway, 3 Bibb (Ky.) 160.

Where it is impossible to close a survey by courses and distances and no lines are found actually marked out, a further description by quantity, being the southern end and remaining part of a certain tract yet unsold, will control. Duncan *v.* Madara, 106 Pa. St. 562.

36. *Arkansas.*— Montgomery *v.* Johnson, 31 Ark. 74; Doe *v.* Porter, 3 Ark. 18, 36 Am. Dec. 448.

California.— Winans *v.* Cheney, 55 Cal. 567.

Illinois.— McClintock *v.* Rogers, 11 Ill. 279; Kruse *v.* Scripps, 11 Ill. 98.

Louisiana.— Derouen *v.* Davidson, 43 La. Ann. 942, 10 So. 7; Fiske *v.* Fleming, 15 La. 202; Innis *v.* McCrummin, 12 Mart. (La.) 425, 13 Am. Dec. 379; Macarty *v.* Foucher, 12 Mart. (La.) 114.

Maine.— Pierce *v.* Faunce, 37 Me. 63.

Massachusetts.— Wheeler *v.* Randall, 6 Metc. (Mass.) 529.

Michigan.— Hoffman *v.* Port Huron, 102 Mich. 417, 60 N. W. 831.

Missouri.— Davis *v.* Hess, 103 Mo. 31, 15 S. W. 324.

New York.— Case *v.* Dexter, 106 N. Y. 548, 13 N. E. 449.

North Carolina.— Baxter *v.* Wilson, 95 N. C. 137.

Pennsylvania.— Petts *v.* Gaw, 15 Pa. St. 218.

South Carolina.—Kirkland *v.* Way, 3 Rich. (S. C.) 4, 45 Am. Dec. 752.

Tennessee.— Hickman *v.* Tait, Cooke (Tenn.) 459.

Texas.— Welder *v.* Hunt, 34 Tex. 44.

United States.— Field *v.* Columbet, 4 Sawy. (U. S.) 523, 9 Fed. Cas. No. 4,764.

See 8 Cent. Dig. tit. "Boundaries," § 41.

Absence of express averments or covenants. — Where, in a deed, there are no express averments or covenants as to quantity, a statement as to the number of acres conveyed will yield to the actual area as ascertained by reference to the plat, field-notes, monuments, or other certain descriptions of the premises conveyed. Dashiel *v.* Harshman, 113 Iowa 283, 85 N. W. 85.

37. *Georgia.*— Adams *v.* Powell, 87 Ga. 138, 13 S. E. 280.

Kentucky.— Flynn *v.* Sparks, 10 Ky. L. Rep. 960, 11 S. W. 206.

Louisiana.— Williams *v.* Bernstein, 51 La. Ann. 115, 25 So. 411; Keller *v.* Shelmire, 42 La. Ann. 323, 7 So. 587; Porche *v.* Lang, 16 La. Ann. 312; Lacour *v.* Watson, 12 La. Ann. 214.

Maryland.— Bryan *v.* Harvey, 18 Md. 113.

Massachusetts.— See Thacker *v.* Guardenier, 7 Metc. (Mass.) 484.

Missouri.— Kellogg *v.* Mullen, 45 Mo. 571.

North Carolina.— Hedrick *v.* Gobble, 61 N. C. 348.

Pennsylvania.— Thompson *v.* Kauffelt, 110 Pa. St. 209, 1 Atl. 267.

South Carolina.— Faulkenberry *v.* Truesdell, 5 Strobh. (S. C.) 221.

Tennessee.— Hitchcock *v.* Southern Iron, etc., Co., (Tenn. Ch. 1896) 38 S. W. 588.

Compare Miles *v.* Sherwood, 84 Tex. 485, 19 S. W. 853, where it was held that the fact that the owner of two surveys conveyed one prior to the other is immaterial on an issue

grantee's deed and plat are obscure, the doctrine that the elder grant is to be more favorably located will not be strained in his favor.[38]

E. Relative Importance of Conflicting Surveys. Where survey lines conflict the lines of the elder survey will prevail over those of the junior,[39] and this is particularly so where the junior is bounded with express reference to the elder;[40] but a call for the well-established corner of an older survey is of equal dignity with a call for the established line of another survey, and in a case where plaintiff shows no ground for a recovery except a conflict in the two calls he is not entitled to recover;[41] and where two surveys are contemporaneous, neither can claim any advantage over the other from mere priority in the date of the final title.[42]

III. ESTABLISHMENT.

A. By Act of Parties — 1. By Agreement — a. In General. Adjoining landowners may agree upon the division line between them and each will own up to the agreed line as fully as if it were a natural boundary, or as if their respective deeds or grants called for it.[43] Such an agreement may be implied as well as

whether, as originally surveyed, there is a conflict as between them.

See 8 Cent. Dig. tit. "Boundaries," § 136.

A subsequent settler cannot object to the boundary of a prior adjoining settler, where he has assented thereto on making his entry. Syphers *v.* Neighen, 22 Pa. St. 125.

A younger grant on an older special entry will prevail over an older grant on a younger general entry. Hitchcock *v.* Southern Iron, etc., Co., (Tenn. Ch. 1896) 38 S. W. 588.

Controversies between state and citizens.— The rule that where boundaries, under titles of different dates, lap, the junior claimant has no color of title to the lappage without actual possession thereof, applies to controversies between the state and citizens who claim under mesne conveyances which extend the boundaries of the original grant. Hedrick *v.* Gobble, 61 N. C. 348.

Doubtful words of boundary in a partition in the probate court are not to receive a construction peculiarly favorable to the person whose lot is described first. Mann *v.* Dunham, 5 Gray (Mass.) 511.

38. Faulkenberry *v.* Truesdell, 5 Strobh. (S. C.) 221.

Priority of specific over floating grant.—A grant of land identified by specific boundaries, or having such descriptive features as to render its identification a matter of absolute certainty, gives a better right to the premises in determining controversy in regard thereto, caused by the overlapping of two patents, than would a floating grant, although the latter be first surveyed and patented. Hale *v.* Akers, 69 Cal. 160, 10 Pac. 385.

39. *Indiana.*— Edwards *v.* Ogle, 76 Ind. 302.

Kentucky.—Busse *v.* Central Covington, 19 Ky. L. Rep. 157, 38 S. W. 865, 39 S. W. 848.

Maryland.— Dorsey *v.* Hammond, 1 Harr. & J. (Md.) 190.

Michigan.— Brown *v.* Milliman, 119 Mich. 606, 78 N. W. 785; Wilmarth *v.* Woodcock, 66 Mich. 331, 33 N. W. 400; Case *v.* Trapp, 49 Mich. 59, 12 N. W. 908.

New Jersey.— Lippincott *v.* Souder, 8 N. J. L. 161.

Oregon.— See Albert *v.* Salem, 39 Oreg. 466, 65 Pac. 1068, 66 Pac. 233.

Pennsylvania.— Bellas *v.* Cleaver, 40 Pa. St. 260; Carbon Run Imp. Co. *v.* Rockafeller, 25 Pa. St. 49; Wray *v.* Miller, 14 Pa. St. 289.

South Carolina.— Bradford *v.* Pitts, 2 Mill Const. (S. C.) 115.

Tennessee.— Nolen *v.* Wilson, 5 Sneed (Tenn.) 332.

Texas.— Griffith *v.* Rife, 72 Tex. 185, 12 S. W. 168; Byrne *v.* Fagan, 16 Tex. 391; Stanus *v.* Smith, 8 Tex. Civ. App. 685, 30 S. W. 262; Fenley *v.* Flowers, 5 Tex. Civ. App. 191, 23 S. W. 749.

United States.— Ulman *v.* Clark, 100 Fed. 180. See also Martin *v.* Hughes, 90 Fed. 632, 61 U. S. App. 427, 33 C. C. A. 198.

See 8 Cent. Dig. tit. "Boundaries," § 137.

Statute construed.— The Texas act of Feb. 1, 1845, requiring owners of land by titles from the Mexican government, the lines of which were not correctly marked, to have the same resurveyed and plats returned to the land-office, which plats would be delineated on the county maps, after which they were to be recorded as the only true boundaries of said land, not being compulsory, where the owner of such a grant fails to avail himself of it, and the land is patented to another, the elder grant, if capable of identification, must prevail. Byrne *v.* Fagan, 16 Tex. 391.

40. Van Amburgh *v.* Randall, 115 Mo. 607, 22 S. W. 636; Manhattan Coal Co. *v.* Green, 73 Pa. St. 310.

41. Morgan *v.* Mowles, (Tex. Civ. App. 1901) 61 S. W. 155.

42. Welder *v.* Carroll, 29 Tex. 317.

43. *Arkansas.*— Cox *v.* Dougherty, 62 Ark. 629, 36 S. W. 184.

California.— Hastings *v.* Stark, 36 Cal. 122.

Illinois.— La Mont *v.* Dickinson, 189 Ill. 628, 60 N. E. 40.

Indiana.— Kinsey *v.* Satterthwaite, 88 Ind. 342.

expressed,[44] and in either case the definite settlement of a boundary not previously defined is a good and sufficient consideration to uphold the agreement.[45]

b. Who May Make. As a general rule only the owners of adjoining lands are competent to agree upon their dividing line.[46]

c. Validity of Oral Agreement — (i) *In General.* An oral agreement between adjoining owners establishing a dividing line between their land is not prohibited by the statute of frauds, nor is it within the meaning of the provisions of the law that regulate the manner of conveying real estate.[47] In numerous

Louisiana.—See Kittridge *v.* Landry, 2 Rob. (La.) 72, where it was held that a private agreement that certain lines should form a boundary between the lands claimed by the parties thereto, not recorded in the office of the parish judge, is void as to third persons or innocent purchasers without notice.

Massachusetts.— Drake *v.* Curtis, 9 Cush. (Mass.) 445 note.

Missouri.— Brummell *v.* Harris, 148 Mo. 430, 50 S. W. 93. See also Lemmons *v.* McKinney, 162 Mo. 525, 63 S. W. 922.

New Hampshire.— Eaton *v.* Rice, 8 N. H. 378; Sawyer *v.* Fellows, 6 N. H. 107, 25 Am. Dec. 452.

Ohio.— Hills *v.* Ludwig, 46 Ohio St. 373, 24 N. E. 596.

South Carolina.— Perry *v.* Jefferies, 61 S. C. 292, 39 S. E. 515.

Texas.— Lecomte *v.* Toudouze, 82 Tex. 208, 17 S. W. 1047, 27 Am. St. Rep. 870. See also Dement *v.* Williams, 44 Tex. 158.

Wisconsin.— Parkinson *v.* McQuaid, 54 Wis. 473, 11 N. W. 682.

Construction of agreement.— Where landowners agree to select men to run a division line and that, having run the line from one of its terminal points to the other, the men should run and retrace it to the beginning point, the retracing forms a substantial part of the agreement and cannot be dispensed with except by the consent of the owners. Wheeler *v.* State, 109 Ala. 56, 19 So. 993.

A mere license by the owner of one tract of land permitting the owner of an adjacent tract, the boundary line between which and the former tract is disputed, to fence and occupy over the true line will not amount to an agreement accepting the line claimed by the licensee as the boundary, although his possession extends up to the line so claimed. Wright *v.* Lassiter, 71 Tex. 640, 10 S. W. 295.

A verbal agreement for a division of public land when either party should enter it, but indefinite as to time, where no trust is created between the parties and there are no peculiar circumstances that would make it unconscionable for either party to resist a specific performance, is not entitled to favorable consideration because clearly against public policy. Baker *v.* Hollobaugh, 15 Ark. 322.

44. Clayton *v.* Feig, 179 Ill. 534, 54 N. E. 149; Eaton *v.* Rice, 8 N. H. 378; Rockwell *v.* Adams, 6 Wend. (N. Y.) 467, 7 Cow. (N. Y.) 761; Jackson *v.* Ogden, 7 Johns. (N. Y.) 238.

Implied agreements see *infra*, III, A, 2; III, A, 4.

45. Hunter *v.* Heath, 67 Me. 507; McCoy *v.* Hutchinson, 8 Watts & S. (Pa.) 66; Zane *v.* Zane, 6 Munf. (Va.) 406.

46. *Arkansas.*— Jordan *v.* Deaton, 23 Ark. 704, holding that a settler upon public land may agree with his adjoiner upon the dividing line.

California.— Cavanaugh *v.* Jackson, 91 Cal. 580, 27 Pac. 931; Sneed *v.* Osborn, 25 Cal. 619.

Illinois.— Crowell *v.* Maughs, 7 Ill. 419, 43 Am. Dec. 62.

Massachusetts.— Adams *v.* Boston Wharf Co., 10 Gray (Mass.) 521.

New Hampshire.— Merrill *v.* Hilliard, 59 N. H. 481.

Tennessee.— Wright *v.* Wright, 2 Baxt. (Tenn.) 469; Rogers *v.* White, 1 Sneed (Tenn.) 68; Lewallen *v.* Overton, 9 Humphr. (Tenn.) 76.

Wisconsin.— Northern Pine Land Co. *v.* Bigelow, 84 Wis. 157, 54 N. W. 496, 21 L. R. A. 776.

See 8 Cent. Dig. tit. "Boundaries," § 219.

An agreement of the remainderman as to the location of a boundary will not be binding on the owner of the particular estate, unless the former acted on the authority of the latter. Doe *v.* Thompson, 5 Cow. (N. Y.) 371.

Beneficiaries under devise of land to be sold. — Where a testator devised his real estate to his executor to be sold and the proceeds divided among his children, the latter have such an interest in the land as to entitle them to settle a question of boundary with an adjoining owner, if such settlement do not affect the rights of creditors. Rice *v.* Bixler, 1 Watts & S. (Pa.) 445.

Possession and assertion of ownership under a contract to purchase are sufficient to constitute the occupant an adjoining owner for the purposes of agreed boundary lines and to enable him to make a valid agreement for such lines. Silvarer *v.* Hansen, 77 Cal. 579, 20 Pac. 136. See also Cavanaugh *v.* Jackson, 91 Cal. 580, 27 Pac. 931.

The mortgagor of real estate, as against all except the mortgagee and those holding his rights, is the owner of the estate mortgaged; and being in possession he may make an agreement establishing the boundaries of his land which will be binding upon all except those who claim by the mortgage. Orr *v.* Hadley, 36 N. H. 575.

47. *Arkansas.*— Jordan *v.* Deaton, 23 Ark. 704.

California.— Adair *v.* Crane, (Cal. 1885) 8 Pac. 512.

jurisdictions, however, it is held, either expressly or by clear implication, that a parol agreement establishing a boundary in order to be binding must be followed by acquiescence and possession.[48]

(II) *Necessity of Controversy or Doubt.* In order to the validity of a parol agreement establishing a boundary it is necessary, however, that there be doubt and uncertainty as to its true location,[49] and in some cases it has been held

Delaware.— Lindsay *v.* Springer, 4 Harr. (Del.) 547.

Illinois.— Grim *v.* Murphy, 110 Ill. 271; Cutler *v.* Callison, 72 Ill. 113.

Kentucky.—Jamison *v.* Petit, 6 Bush (Ky.) 669; Campbell *v.* Campbell, 23 Ky. L. Rep. 869, 64 S. W. 458; Duff *v.* Cornett, 23 Ky. L. Rep. 297, 62 S. W. 895; Gayheart *v.* Cornett, 19 Ky. L. Rep. 1052, 42 S. W. 730; Ferguson *v.* Crick, 15 Ky. L. Rep. 461, 23 S. W. 668; Grigsby *v.* Combs, 14 Ky. L. Rep. 651, 21 S. W. 37; Threlkeld *v.* Winston, 2 Ky. L. Rep. 63. *Contra,* Phillips *v.* Eades, 1 Ky. L. Rep. 425.

Mississippi.— Natchez *v.* Vandervelde, 31 Miss. 706, 66 Am. Dec. 581.

Missouri.— Turner *v.* Baker, 64 Mo. 218, 27 Am. Rep. 226, 76 Mo. 343; Blair *v.* Smith, 16 Mo. 273; Betts *v.* Brown, 3 Mo. App. 20.

New Hampshire.— Hitchcock *v.* Libby, 70 N. H. 399, 47 Atl. 269; Clough *v.* Bawman, 15 N. H. 504; Gray *v.* Berry, 9 N. H. 473; Sawyers *v.* Fellows, 6 N. H. 107, 25 Am. Dec. 452.

New York.— Jackson *v.* Dysling, 2 Cai. (N. Y.) 198.

Ohio.— Bobo *v.* Richmond, 25 Ohio St. 115. See also Walker *v.* Devlin, 2 Ohio St. 593, where it was held that, while proprietors of adjacent lands may by verbal agreement and occupancy fix a disputed and uncertain boundary, there must not be a plain and wide departure from the boundary of a natural object under pretext of fixing the boundary.

Texas.— Lecomte *v.* Toudouze, 82 Tex. 208, 17 S. W. 1047, 27 Am. St. Rep. 870; McArthur *v.* Henry, 35 Tex. 801; Masterson *v.* Bokel, (Tex. Civ. App. 1899) 51 S. W. 39.

United States.— Glen Mfg. Co. *v.* Weston Lumber Co., 80 Fed. 242; Jenkins *v.* Trager, 40 Fed. 726.

But see Cornell *v.* Jackson, 9 Metc. (Mass.) 150.

See also Adverse Possession, 1 Cyc. 1035, note 86.

See, generally, Frauds, Statute of; and 8 Cent. Dig. tit. "Boundaries," § 215.

"The reason of this rule evidently is based upon the idea that the parties do not undertake to acquire and pass the title to real estate, as must be done by written contract or conveyance; but they simply by agreement fix and determine the situation and location of the thing that they already own; the purpose being simply by something agreed upon to identify their several holdings and make certain that which they regarded as uncertain." Lecomte *v.* Toudouze, 82 Tex. 208, 214, 17 S. W. 1047, 27 Am. St. Rep. 870. See also Adverse Possession, 1 Cyc. 1035, note 87.

Effect of rule of court.— Tex. Dist. Ct. Rule, No. 47 (20 S. W. xv), providing that no agreement between the parties touching any suit pending will be enforced unless in writing, does not apply where parties to a suit to settle a boundary dispute, pending the same, agree to a survey, and a line is run in accordance with the agreement by the surveyor chosen. Masterson *v.* Bokel, (Tex. Civ. App. 1899) 51 S. W. 39.

48. *Connecticut.*— Rathbun *v.* Geer, 64 Conn. 421, 30 Atl. 60.

Delaware.— Lindsay *v.* Springer, 4 Harr. (Del.) 547.

Illinois.— Berghoefer *v.* Frazier, 150 Ill. 577, 37 N. E. 914.

Indiana.— Tate *v.* Foshee, 117 Ind. 322, 20 N. E. 241; Meyers *v.* Johnson, 15 Ind. 261.

Kentucky.— Robinson *v.* Corn, 2 Bibb (Ky.) 124; Smith *v.* Stewart, 7 Ky. L. Rep. 287; Thacker *v.* Crawford, 5 Ky. L. Rep. 770.

Missouri.— Ernsting *v.* Gleason, 137 Mo. 594, 39 S. W. 70; Atchison *v.* Pease, 96 Mo. 566, 10 S. W. 159; Turner *v.* Baker, 8 Mo. App. 583.

Pennsylvania.— Adamson *v.* Potts, 4 Pa. St. 234.

Tennessee.— Nichol *v.* Lytle, 4 Yerg. (Tenn.) 456, 26 Am. Dec. 240.

West Virginia.— Teass *v.* St. Albans, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802; Gwynn *v.* Schwartz, 32 W. Va. 487, 9 S. E. 880.

United States.— Glen Mfg. Co. *v.* Weston Lumber Co., 80 Fed. 242; Jenkins *v.* Trager, 40 Fed. 726.

Contra, Lecomte *v.* Toudouze, 82 Tex. 208, 17 S. W. 1047, 27 Am. St. Rep. 870; Cooper *v.* Austin, 58 Tex. 494.

See 8 Cent. Dig. tit. "Boundaries," § 217.

Why this should be deemed necessary if such agreements are not within the statute of frauds is not apparent, although it is possibly due to an erroneous impression that their allowance is really a judicially created exception to the statute. Archer *v.* Helm, 69 Miss. 730, 11 So. 3. And see, generally, Frauds, Statute of.

49. *California.*— Thaxter *v.* Inglis, 121 Cal. 593, 54 Pac. 86; Sharp *v.* Blankenship, 67 Cal. 441, 7 Pac. 848.

Georgia.—Carstarphen *v.* Holt, 96 Ga. 703, 23 S. E. 904; Miller *v.* McGlaun, 63 Ga. 435.

Illinois.— Clayton *v.* Feig, 179 Ill. 534, 54 N. E. 149.

New York.— Vosburgh *v.* Teator, 32 N. Y. 561; Ambler *v.* Cox, 13 Hun (N. Y.) 295; Davis *v.* Townsend, 10 Barb. (N. Y.) 333.

Pennsylvania.— McCoy *v.* Hutchinson, 8 Watts & S. (Pa.) 66.

Tennessee.— Gilchrist *v.* McGee, 9 Yerg.

that there must be an actual dispute or controversy between the parties.[50] It is not necessary, however, that an actual interference of boundary lines be shown by the title papers.[51]

d. Proof of Agreement. An agreement fixing a boundary line need not be shown by direct evidence, but may be inferred from conduct, and especially from long acquiescence.[52]

e. Effect of Agreement — (i) *In General.* Where the proprietors of adjoining lands agree upon a division line between them, the presumption is that it is the true line according to the original location,[53] and the calls in their respective deeds will attach to all the land up to the line so established;[54] but an agreement to establish boundaries is of no effect until executed,[55] and when executed cannot affect the rights of an adjoiner of either party, not himself a party to the agreement.[56]

(ii) *Persons Bound.* A valid agreement between adjoining owners establishing their division line is binding upon themselves and those claiming under them;[57] but an agreement by one of several coöwners is not binding on the

(Tenn.) 455; Wilson *v.* Hudson, 8 Yerg. (Tenn.) 397; Nichol *v.* Lytle, 4 Yerg. (Tenn.) 456, 26 Am. Dec. 240; Houston *v.* Matthews, 1 Yerg. (Tenn.) 115.

Texas.— Levy *v.* Maddox, 81 Tex. 210, 16 S. W. 877; Harn *v.* Smith, 79 Tex. 310, 15 S. W. 240, 23 Am. St. Rep. 340; Houston *v.* Sneed, 15 Tex. 307.

United States.— Boyd *v.* Graves, 4 Wheat. (U. S.) 513, 4 L. ed. 628.

See 8 Cent. Dig. tit. "Boundaries," § 216.

50. *Michigan.*— Olin *v.* Henderson, 120 Mich. 149, 79 N. W. 178.

New York.— Sweet *v.* Warner, 14 N. Y. St. 312.

Oregon.— Lennox *v.* Hendricks, 11 Oreg. 33, 4 Pac. 515.

Tennessee.— Lewallen *v.* Overton, 9 Humphr. (Tenn.) 76.

Wisconsin.— Hartung *v.* Witte, 59 Wis. 285, 18 N. W. 175.

Contra, Thaxter *v.* Inglis, 121 Cal. 593, 54 Pac. 86; Silvarer *v.* Hansen, 77 Cal. 579, 20 Pac. 136; Helm *v.* Wilson, 76 Cal. 476, 18 Pac. 604.

See 8 Cent. Dig. tit. "Boundaries," § 216.

51. Gayheart *v.* Cornett, 19 Ky. L. Rep. 1052, 42 S. W. 730.

52. *Massachusetts.*— Atty.-Gen. *v.* Boston Wharf Co., 12 Gray (Mass.) 553.

Michigan.— Jones *v.* Pashby, 67 Mich. 459, 35 N. W. 152, 11 Am. St. Rep. 589; Diehl *v.* Zanger, 39 Mich. 601.

Missouri.— Brummell *v.* Harris, 148 Mo. 430, 50 S. W. 93; Ernsting *v.* Gleason, 137 Mo. 594, 39 S. W. 70; Jacobs *v.* Moseley, 91 Mo. 457, 4 S. W. 135; Turner *v.* Baker, 64 Mo. 218, 27 Am. Rep. 226, 76 Mo. 343 [*affirming* 8 Mo. App. 583].

New Hampshire.— Dudley *v.* Elkins, 39 N. H. 78; Smith *v.* Powers, 15 N. H. 546.

New York.— Baldwin *v.* Brown, 16 N. Y. 359; Clark *v.* Wethey, 19 Wend. (N. Y.) 320; Dibble *v.* Rogers, 13 Wend. (N. Y.) 536.

Texas.— Wiley *v.* Lindley, (Tex. Civ. App. 1900) 56 S. W. 1001.

Vermont.— Ackley *v.* Buck, 18 Vt. 395.

West Virginia.— Gwynn *v.* Schwartz, 32 W. Va. 487, 9 S. E. 880.

53. Sparhawk *v.* Bullard, 1 Metc. (Mass.) 95; Clark *v.* Tabor, 28 Vt. 222.

Conveyance by privies.— Where an agreement has established a disputed boundary, a subsequent conveyance by the privies to the parties to the agreement, by the same description as that under which the title was acquired and possession held prior to the agreement, will pass the title according to the agreed boundary. Smith *v.* Catlin Land, etc., Co., 117 Mo. 438, 22 S. W. 1083. But see Robinson *v.* Miller, 37 Me. 312.

54. Turner *v.* Baker, 64 Mo. 218, 27 Am. Rep. 226.

An agreement "to abide by the line established by the surveyor and according to our deeds" does not bind the parties as to any land not described in their deeds, and only in so far as the line is run according to the deeds. McCombs *v.* Wall, 66 Ark. 336, 50 S. W. 876.

55. Berghoefer *v.* Frazier, 150 Ill. 577, 37 N. E. 914; Dyer *v.* Eldridge, 136 Ind. 654, 36 N. E. 522; Evans *v.* Foster, 79 Tex. 48, 15 S. W. 170; Bridges *v.* Johnson, 69 Tex. 714, 7 S. W. 506. See also Wood *v.* Lafayette, 68 N. Y. 181.

56. Bohny *v.* Petty, 81 Tex. 524, 17 S. W. 80.

57. *Georgia.*— Adams *v.* Powell, 87 Ga. 138, 13 S. E. 280.

Illinois.—Corrington *v.* Pierce, 28 Ill. App. 211, where it was held that where several adjacent landowners agree to accept a boundary line as located by a surveyor, each is separately bound, and a breach by one of them cannot destroy the obligation existing between the others.

Kentucky.—Orr *v.* Foote, 10 B. Mon. (Ky.) 387.

Michigan.—Dart *v.* Barbour, 32 Mich. 267.

Missouri.— Cramer *v.* Stethem, 1 Mo. App. 144.

New Hampshire.— Hitchcock *v.* Libby, 70 N. H. 399, 47 Atl. 269; Bartlett *v.* Young, 63 N. H. 265.

Pennsylvania.— Morrison *v.* Howell, 37 Pa. St. 58; Hagey *v.* Detweiler, 35 Pa. St. 409.

others unless they consent thereto,[58] and as a general rule all parties interested in the lands must be parties to the agreement.[59]

(III) *Conclusiveness* — (A) *In General.* An agreement between adjoining owners establishing an uncertain or disputed boundary line is, in general, conclusive upon them and all persons claiming under them;[60] but where the intention was to establish the line according to the true boundary, and by mistake the parties agreed on a line which does not conform to such boundary, the line so agreed upon is not conclusive,[61] unless perhaps by prescription[62] or by reason of the intervention of rights of third persons.[63] Similarly, if either party is deceived

Texas.—Mitchell *v.* Nix, 1 Tex. Unrep. Cas. 126.

See also Adverse Possession, 1 Cyc. 1036, notes 88, 89; and 8 Cent. Dig. tit. "Boundaries," § 220.

Agreement between guardian and adult.— If lines be fairly made between adjoining tracts by a guardian on behalf of an infant and an adult, the latter, or those claiming under him, cannot object on the ground of the infancy. Brown *v.* Caldwell, 10 Serg. & R. (Pa.) 114, 13 Am. Dec. 660.

An agreement between tenants by curtesy initiate and their wives may be binding between the husbands, although void as between the wives for want of a privy examination. Osborne *v.* Mull, 91 N. C. 203. And see Fortier *v.* Roane, 104 La. 90, 28 So. 994, where it was held that an agreement by a husband as to the boundaries of his wife's land was not binding upon her, there being no evidence that he was her agent.

An agreement by a life-tenant may become binding upon the remainderman, if acquiesced in and ratified by him upon the determination of the life-estate. Smith *v.* McCorkle, 105 Mo. 135, 16 S. W. 602.

Effect of want of notice.—A written agreement compromising a dispute in reference to the lines of adjoining lands, made by one who has parted with his title but who retains the actual possession, is good against his vendee, where no notice of the change of ownership is brought home to the party with whom the agreement is made. McGinnis *v.* Porter, 20 Pa. St. 80.

58. Strickley *v.* Hill, 22 Utah 257, 62 Pac. 893, 83 Am. St. Rep. 786.

59. Donaldson *v.* Rall, 14 Tex. Civ. App. 336, 37 S. W. 16; Langermann *v.* Nichols, (Tex. Civ. App. 1893) 32 S. W. 124; Pickett *v.* Nelson, 79 Wis. 9, 47 N. W. 936.

60. *California.*—Hastings *v.* Stark, 36 Cal. 122.

Delaware.— Lindsay *v.* Springer, 4 Harr. (Del.) 547.

Florida.— Daggett *v.* Willey, 6 Fla. 482.

Georgia.— Phillips *v.* O'Neal, 87 Ga. 727, 13 S. E. 819.

Illinois.— Grim *v.* Murphy, 110 Ill. 271.

Kentucky.—Orr *v.* Foote, 10 B. Mon. (Ky.) 387; Young *v.* Woolett, 16 Ky. L. Rep. 767, 29 S. W. 879; Culbertson *v.* McCullum, 4 Ky. L. Rep. 824.

Louisiana.— Arceneaux *v.* De Benoit, 21 La. Ann. 673.

Maine.— Colby *v.* Norton, 19 Me. 412.

Michigan.— Hayes *v.* Livingston, 34 Mich. 384, 22 Am. Rep. 533.

Mississippi.—Archer *v.* Helm, 70 Miss. 874, 12 So. 702.

New Hampshire.— Dudley *v.* Elkins, 39 N. H. 78; Orr *v.* Hadley, 36 N. H. 575; Whitehouse *v.* Bickford, 29 N. H. 471; Clough *v.* Bowman, 15 N. H. 504; Gray *v.* Berry, 9 N. H. 473; Eaton *v.* Rice, 8 N. H. 378; Enfield *v.* Day, 7 N. H. 457, 28 Am. Dec. 360; Sawyer *v.* Fellows, 6 N. H. 107, 25 Am. Dec. 452.

New York.— Vosburgh *v.* Teator, 32 N. Y. 561.

North Carolina.— Palmer *v.* Anderson, 63 N. C. 365.

Ohio.—McAfferty *v.* Conover, 7 Ohio St. 99, 70 Am. Dec. 57.

Pennsylvania.— Kerr *v.* Wright, 37 Pa. St. 196; McCoy *v.* Hutchinson, 8 Watts & S. (Pa.) 66; Dixon *v.* Crist, 17 Serg. & R. (Pa.) 54; Breinig *v.* Whitely, 1 Pittsb. (Pa.) 340.

Virginia.— Jones *v.* Carter, 4 Hen. & M. (Va.) 184.

See 8 Cent. Dig. tit. "Boundaries," § 222.

61. *California.*— Guedici *v.* Boots, 42 Cal. 452.

Georgia.— Bailey *v.* Jones, 14 Ga. 384.

Maine.— Gove *v.* Richardson, 4 Me. 327.

Massachusetts.— Thayer *v.* Bacon, 3 Allen (Mass.) 163, 80 Am. Dec. 59; Brewer *v.* Boston, etc., R. Corp., 5 Metc. (Mass.) 478, 39 Am. Dec. 694; Boston, etc., R. Corp. *v.* Sparhawk, 5 Metc. (Mass.) 469; Whitney *v.* Holmes, 15 Mass. 152.

Missouri.— McKinney *v.* Doane, 155 Mo. 287, 56 S. W. 304; Hedges *v.* Pollard, 149 Mo. 216, 50 S. W. 889; Kincaid *v.* Dormey, 51 Mo. 552; Menkens *v.* Blumenthal, 27 Mo. 198.

New York.— Coon *v.* Smith, 29 N. Y. 392; Terry *v.* Chandler, 16 N. Y. 354, 69 Am. Dec. 707.

Pennsylvania.— Davis *v.* Russell, 142 Pa. St. 426, 21 Atl. 870.

Vermont.— Turner Falls Lumber Co. *v.* Burns, 71 Vt. 354, 45 Atl. 896.

Contra, Hills *v.* Ludwig, 46 Ohio St. 373, 24 N. E. 596; Lecomte *v.* Toudouze, 82 Tex. 208, 17 S. W. 1047, 27 Am. St. Rep. 870; Harn *v.* Smith, 79 Tex. 310, 15 S. W. 240, 23 Am. St. Rep. 340; Harrell *v.* Houston, 66 Tex. 278, 17 S. W. 731; Cooper *v.* Austin, 58 Tex. 494.

See 8 Cent. Dig. tit. "Boundaries," § 222.

62. Gray *v.* Couvillon, 12 La. Ann. 730.

63. Knowlton *v.* Smith, 36 Mo. 507, 88 Am. Dec. 152.

by the misrepresentations, whether fraudulent or not, of the other, the agreed line is not binding upon him.[64]

(B) *Where Followed by Acquiescence and Possession.* Where an agreement establishing a dividing line between adjoining proprietors is followed by acquiescence and possession, the parties are concluded by their agreement;[65] and when the acquiescence and possession have continued for the period of time prescribed by the statute of limitations a perfect title by adverse possession is acquired.[66]

(C) *Where Followed by Improvements.* Where adjoining landowners agree upon a boundary line and enter into possession and improve the lands according to the line thus agreed upon, they will be concluded from afterward disputing that the line agreed upon is the true line,[67] even when the statute of limitations has not run.[68]

(D) *Where Followed by Practical Location.*[69] An agreement between adjoining owners, followed by practical location of the line as agreed on, or an agreement adopting an existing location as the true line, is conclusive upon the parties and their privies;[70] but a practical location made subject to the subsequent estab-

64. Bailey *v.* Jones, 14 Ga. 384.

65. *Georgia.*— Riley *v.* Griffin, 16 Ga. 141, 60 Am. Dec. 726.

Illinois.— St. Bede College *v.* Weber, 168 Ill. 324, 48 N. E. 165.

Louisiana.— Zeringue *v.* White, 4 La. Ann. 301.

Michigan.— White *v.* Peabody, 106 Mich. 144, 64 N. W. 41; Jones *v.* Pashby, 67 Mich. 459, 35 N. W. 152, 11 Am. St. Rep. 589.

Missouri.— Atchison *v.* Pease, 96 Mo. 566, 10 S. W. 159; Schad *v.* Sharp, 95 Mo. 573, 8 S. W. 549; Jacobs *v.* Moseley, 91 Mo. 457, 4 S. W. 135; Turner *v.* Baker, 64 Mo. 218, 27 Am. Rep. 226, 76 Mo. 343; Majors *v.* Rice, 57 Mo. 384; Blair *v.* Smith, 16 Mo. 273; Taylor *v.* Zepp, 14 Mo. 482, 55 Am. Dec. 113.

New Hampshire.— Hobbs *v.* Cram, 22 N. H. 130.

New York.— Sweet *v.* Warner, 14 N. Y. St. 312; Jackson *v.* Van Corlaer, 11 Johns. (N. Y.) 123; Decker *v.* Haner, 4 Alb. L. J. 316. *Compare* Reed *v.* McCourt, 41 N. Y. 435, where it was held that occupation and acquiescence for a few months only would not conclude the parties.

Ohio.—Avery *v.* Baum, Wright (Ohio) 576.

Pennsylvania.—Brown *v.* Caldwell, 10 Serg. & R. (Pa.) 114, 13 Am. Dec. 660.

Texas.— Coleman *v.* Smith, 55 Tex. 254; Bailey *v.* Baker, 4 Tex. Civ. App. 395, 23 S. W. 454; Eberling *v.* Weyel, 2 Tex. Unrep. Cas. 501.

Wisconsin.—Pickett *v.* Nelson, 71 Wis. 542, 37 N. W. 836.

United States.— See Wakefield *v.* Ross, 5 Mason (U. S.) 16, 28 Fed. Cas. No. 17,050.

Compare Archer *v.* Helm, 70 Miss. 874, 12 So. 702.

See 8 Cent. Dig. tit. "Boundaries," § 225.

66. *Georgia.*— Glover *v.* Wright, 82 Ga. 114, 8 S. E. 452.

Kentucky.— Crutchlow *v.* Beatty, 15 Ky. L. Rep. 464, 23 S. W. 960.

Maine.— Walker *v.* Simpson, 80 Me. 143, 13 Atl. 580, where it was held that a line so established is not waived by a subsequent reference resulting in a void award.

Massachusetts.— Liverpool Wharf *v.* Prescott, 7 Allen (Mass.) 494.

New Hampshire.— Berry *v.* Garland, 26 N. H. 473.

New York.— Hunt *v.* Johnson, 19 N. Y. 279; Miner *v.* New York, 37 N. Y. Super. Ct. 171.

Pennsylvania.— Martz *v.* Hartley, 4 Watts (Pa.) 261.

Vermont.— Holton *v.* Whitney, 30 Vt. 405; Ackley *v.* Buck, 18 Vt. 395.

United States.—Wakefield *v.* Ross, 5 Mason (U. S.) 16, 28 Fed. Cas. No. 17,050.

See also ADVERSE POSSESSION, 1 Cyc. 1034, note 84.

67. *Illinois.*— Kernan *v.* Moore, 33 Ill. App. 229.

Massachusetts.— See Boston, etc., R. Corp. *v.* Sparhawk, 5 Metc. (Mass.) 469.

Michigan.— Pittsburgh, etc., Iron Co. *v.* Lake Superior Iron Co., 118 Mich. 109, 76 N. W. 395; Jones *v.* Pashby, 67 Mich. 459, 35 N. W. 152, 11 Am. St. Rep. 589.

Missouri.— Majors *v.* Rice, 57 Mo. 384; Dolde *v.* Vodicka, 49 Mo. 98.

New York.— Corkhill *v.* Landers, 44 Barb. (N. Y.) 218; Laverty *v.* Moore, 32 Barb. (N. Y.) 347. See also Dewey *v.* Bordwell, 9 Wend. (N. Y.) 65, where a lessee was held concluded by an agreement with an adjoiner, who put in crops up to the agreed line.

Texas.— Houston *v.* Sneed, 15 Tex. 307.

Wisconsin.— Gove *v.* White, 23 Wis. 282.

See 8 Cent. Dig. tit. "Boundaries," § 224.

68. Pittsburgh, etc., Iron Co. *v.* Lake Superior Iron Co., 118 Mich. 109, 76 N. W. 395. See also ADVERSE POSSESSION, 1 Cyc. 1036, note 92.

69. What constitutes practical location see *infra*, III, A, 3, a.

70. *Georgia.*— Clark *v.* Hulsey, 54 Ga. 608.

Illinois.— Bloomington *v.* Bloomington Cemetery Assoc., 126 Ill. 221, 18 N. E. 298; Kerr *v.* Hitt, 75 Ill. 51.

Nebraska.— Trussel *v.* Lewis, 13 Nebr. 415, 14 N. W. 155, 42 Am. Rep. 767.

New Hampshire.— Thompson *v.* Major, 58 N. H. 242; Sawyer *v.* Fellows, 6 N. H. 107, 25 Am. Dec. 452.

lishment of the true line,[71] or a location made by one owner without a previous agreement with his adjoiner is not binding.[72]

f. Cancellation or Modification of Agreement. A parol agreement for the establishment of the dividing line between adjoining owners may be afterward rescinded or modified by agreement,[73] or may be revoked by either party at any time before it is fully executed.[74] So too a party is entitled to have his agreement canceled where it has been entered into through ignorance or mistake.[75]

2. By Estoppel[76] — a. In General. In controversies concerning boundaries estoppels may arise either by matter of record or by deed,[77] or by acts or declarations of a party,[78] by reason of which another has been led to change his position for the worse, or has been in any manner injured to the benefit of the party against whom the estoppel is claimed;[79] but no estoppel arises in favor of

New York.— Sherman *v.* Kane, 86 N. Y. 57; Williams *v.* Montgomery, 16 Hun (N. Y.) 50. But see Sweet *v.* Warner, 14 N. Y. St. 312, where it was held that acquiescence in the line as located must have continued for twenty years in order to render such location conclusive.

Pennsylvania.— See Fisher *v.* Pennsylvania Co., (Pa. 1886) 2 Atl. 878, where the facts were held not to show practical location.

See 8 Cent. Dig. tit. "Boundaries," § 223.

Agreement and location by minors.— A boundary line agreed on by heirs while under age, to be ratified by conveyance on their becoming of age, marked with a division fence built by both parties, and soon after repudiated by the heirs on the ground that they had since found out that defendant had no title to the land embraced therein, is not conclusive on a grantee of the heirs. Wilson *v.* Hoffman, 70 Mich. 552, 38 N. W. 558.

71. Quinn *v.* Windmiller, 67 Cal. 461, 8 Pac. 14.

72. Allen *v.* Reed, 51 Cal. 362; U. S. *v.* Murray, 41 Fed. 862.

73. Wynn *v.* Garland, 19 Ark. 23, 68 Am. Dec. 190; Gray *v.* Berry, 9 N. H. 473.

But if the new agreement is never consummated the previous agreement remains in force. Schwartzer *v.* Gebhardt, 157 Mo. 99, 57 S. W. 782.

74. Davis *v.* Townsend, 10 Barb. (N. Y.) 333; Patten *v.* Findlay, 18 N. Y. Suppl. 683, 45 N. Y. St. 402.

Abandonment.— In an action of ejectment an order was entered stating that it was agreed by the parties that the M line was the true line, and that the surveyor should go on the land and establish the line. The order was never carried into effect, and the case was dismissed without any line being established, the parties remaining in possession as they were before, and some of the defendants never being brought before the court. It was held that the agreement was abandoned and that the order was not conclusive as to the rights of the parties. Four Mile Land, etc., Coal Co. *v.* Gibson, 20 Ky. L. Rep. 1670, 49 S. W. 954.

75. Morrill *v.* Bartlett, 58 Tex. 644.

76. **Distinction between estoppel and limitation.**— A distinction should be made between those cases where the location of a boundary line or fence has been held to raise an estoppel, and those where the parties have been held concluded by actual occupation up to a mistaken line, whereby title has been acquired under the statute of limitations.

Alabama.—Alexander *v.* Wheeler, 69 Ala. 332.

Arkansas.— Cox *v.* Dougherty, 62 Ark. 629, 36 S. W. 184.

Maine.—Walker *v.* Simpson, 80 Me. 143, 13 Atl. 580.

Massachusetts.— Halloran *v.* Halloran, 149 Mass. 298, 21 N. E. 374.

Missouri.—Ward *v.* Ihler, 132 Mo. 375, 34 S. W. 251.

Pennsylvania.— Reiter *v.* McJunkin, 173 Pa. St. 82, 33 Atl. 1012.

United States.— Boyd *v.* Graves, 4 Wheat. (U. S.) 513, 4 L. ed. 628.

See also *supra*, III, A, 1, e, (I); and Adverse Possession, 1 Cyc. 1036, note 92.

77. Leonard *v.* Quinlan, 121 Mass. 579; Root *v.* Crock, 7 Pa. St. 378.

78. **Unauthorized acts or declarations of third persons** cannot conclude an owner from asserting his true boundary line.

California.— O'Hara *v.* O'Brien, 107 Cal. 309, 40 Pac. 423; Franklin *v.* Dorland, 28 Cal. 175, 87 Am. Dec. 111.

Florida.— Daggett *v.* Willey, 6 Fla. 482.

Illinois.— Quick *v.* Nitschelm, 139 Ill. 251, 28 N. E. 926.

New York.— Raynor *v.* Timerson, 51 Barb. (N. Y.) 517.

Texas.— Love *v.* Barber, 17 Tex. 312.

See 8 Cent. Dig. tit. "Boundaries," § 231.

79. *California.*— Oreña *v.* Santa Barbara, 91 Cal. 621, 28 Pac. 268.

Illinois.— Winslow *v.* Cooper, 104 Ill. 235.

Maine.—Stanwood *v.* McLellan, 48 Me. 275.

Massachusetts.— Com. *v.* Pejepscut Proprietors, 10 Mass. 155, where it was held that a resolve of the commonwealth, fixing the boundaries of certain lands, estops the commonwealth to deny those boundaries.

Missouri.— Smith *v.* St. Louis, 21 Mo. 36.

New Jersey.— Haring *v.* Van Houten, 22 N. J. L. 61.

New York.— Creque *v.* Sears, 17 Hun (N. Y.) 123.

Ohio.— McAfferty *v.* Conover, 7 Ohio St. 99, 70 Am. Dec. 57; Brachman *v.* Smith, 1 Cinc. Super. Ct. (Ohio) 342.

Pennsylvania.— Ormsby *v.* Ihmsen, 34 Pa. St. 462; Beaupland *v.* McKeen, 28 Pa. St. 124,

strangers to the transaction,[80] and declarations and statements made to uninterested persons will not conclude the party making them.[81]

b. Where Erroneous Representations Are Made — (i) *In General.* A person who, by his conduct or by erroneous statements and representations as to the boundaries of land, induces another to purchase in reliance on such conduct or statements will be concluded thereby.[82] Conversely, where a person purchased according to boundaries specifically pointed out, marked on the ground, he is estopped subsequently to claim other boundaries to the injury of others.[83]

(ii) *Through Mistake.* A landowner who, in good faith, points out to the owner of adjoining land an incorrect division line, both parties being ignorant of the true line, is not estopped to deny that such line is the true boundary.[84]

70 Am. Dec. 115; Harvey *v.* Harbach, 4 Phila. (Pa.) 49, 17 Leg. Int. (Pa.) 124.

Texas.— Griffith *v.* Rife, 72 Tex. 185, 12 S. W. 168.

See 8 Cent. Dig. tit. "Boundaries," § 227; and, generally, ESTOPPEL.

A request for a resurvey by the county surveyor does not estop the party making it from insisting on the original corners if dissatisfied with the resurvey. Granby Min., etc., Co. *v.* Davis, 156 Mo. 422, 57 S. W. 126.

Claim under deed to given line of survey.— A party's concession that he claims under his deed to a given line of a survey does not admit that such line is elsewhere than where defined by his title, and does not preclude him from showing that the line asserted by an adverse claimant is not the true line. Jones *v.* Andrews, 62 Tex. 652.

Disclaimer of title.—A landowner and those claiming under him are estopped by his parol disclaimer of title beyond certain boundaries, where third persons act and expend their money on the faith of such disclaimer. Boles *v.* Smith, Thomps. Cas. (Tenn.) 214.

Silent acquiescence.— The principle applies as well to silent acquiescence as to open assent. Acton *v.* Dooley, 6 Mo. App. 323. But silence without knowledge creates no estoppel. Acton *v.* Dooley, 74 Mo. 63. See also Collins *v.* Rogers, 63 Mo. 515; Hill *v.* Epley, 31 Pa. St. 331. *Compare* Evans *v.* Snyder, 64 Mo. 516.

Facts not constituting estoppel.— In the following cases it was held that the facts were not sufficient to constitute an estoppel.

Alabama.— Formby *v.* Hood, 119 Ala. 231, 24 So. 359.

Louisiana.— Fortier *v.* Roane, 104 La. 90, 28 So. 994.

Massachusetts.— Cunningham *v.* Boston, etc., R. Co., 153 Mass. 506, 27 N. E. 660.

New York.— Jackson *v.* Woodruff, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525.

Pennsylvania.— Thompson's Appeal, 126 Pa. St. 367, 17 Atl. 643; Brown *v.* Willey, 42 Pa. St. 205.

United States.— King *v.* Watkins, 98 Fed. 913.

80. Glasgow *v.* Baker, 72 Mo. 441; Glasgow *v.* Lindell, 50 Mo. 60; Cottle *v.* Sydnor, 10 Mo. 763; Lovelace *v.* Carpenter, 115 N. C. 424, 20 S. E. 511.

81. Crutchlow *v.* Beatty, 15 Ky. L. Rep. 464, 23 S. W. 960.

82. *California.*— Stanley *v.* Green, 12 Cal. 148; McGee *v.* Stone, 9 Cal. 600.

Kentucky.—Aills *v.* Grahams, Litt. Sel. Cas. (Ky.) 440; Byersdorfer *v.* Shultz, 5 Ky. L. Rep. 928.

Maine.— Colby *v.* Norton, 19 Me. 412.

Michigan.— Mowers *v.* Evers, 117 Mich. 93, 75 N. W. 295.

Missouri.— McKinney *v.* Doane, 155 Mo. 287, 56 S. W. 304.

New Hampshire.— Richardson *v.* Chickering, 41 N. H. 380, 77 Am. Dec. 769.

New Jersey.— Tomlin *v.* Cox, 19 N. J. L. 76; Swayze *v.* Carter, 41 N. J. Eq. 231, 3 Atl. 706.

Pennsylvania.— Root *v.* Crock, 7 Pa. St. 378; Buchanan *v.* Moore, 13 Serg. & R. (Pa.) 304, 15 Am. Dec. 601.

Tennessee.— Merriwether *v.* Larmon, 3 Sneed (Tenn.) 447; Spears *v.* Walker, 1 Head (Tenn.) 166.

Texas.— Hefner *v.* Downing, 57 Tex. 576.

Vermont.—Louks *v.* Kenniston, 50 Vt. 116; Halloran *v.* Whitcomb, 43 Vt. 306; Spiller *v.* Scribner, 36 Vt. 245.

Virginia.— See Trammell *v.* Ashworth, 99 Va. 646, 39 S. E. 593.

Wisconsin.—Weisbrod *v.* Chicago, etc., R. Co., 18 Wis. 35, 86 Am. Dec. 743.

See 8 Cent. Dig. tit. "Boundaries," § 228.

Must rely on conduct or statements.—Manifestly no estoppel arises in favor of a purchaser who does not show that he acted in reliance on the conduct or statements of the adverse party. Wells *v.* Hall, (Tenn. Ch. 1898) 49 S. W. 61; Koenigheim *v.* Sherwood, 79 Tex. 508, 16 S. W. 23; Davidson *v.* Pickard, (Tex. Civ. App. 1896) 37 S. W. 374; Stanus *v.* Smith, 8 Tex. Civ. App. 685, 30 S. W. 262.

83. Bolton *v.* Eggleston, 61 Iowa 163, 16 N. W. 62; Briscoe *v.* Puckett, (Tex. 1889) 12 S. W. 978; Crislip *v.* Cain, 19 W. Va. 438. *Compare* Titus *v.* Morse, 40 Me. 348, 63 Am. Dec. 665.

84. *Illinois.*— Francois *v.* Maloney, 56 Ill. 399.

Iowa.— Heinz *v.* Cramer, 84 Iowa 497, 51 N. W. 173.

Maine.— Colby *v.* Norton, 19 Me. 412.

Massachusetts.— Brewer *v.* Boston, etc., R. Corp., 5 Metc. (Mass.) 478, 39 Am. Dec. 694.

Michigan.— De Long *v.* Baldwin, 111 Mich. 466, 69 N. W. 831.

Minnesota.— Combs *v.* Cooper, 5 Minn. 254.

c. Where Improvements by Adjoiner Are Permitted. One who knows the true boundary between himself and an adjoiner, but allows the latter, without protest, to make improvements up to what he supposes to be the true line will be estopped to dispute such line.[85] Where, however, there is a *bona fide* mistake as to the location of the true line no estoppel arises.[86]

3. By Practical Location — a. What Constitutes — (I) *In General.* A practical location[87] is but an actual designation by the parties upon the ground of the monuments and bounds called for by their deeds.[88] It is, in fact, merely the result of an agreement[89] between the parties shown by the location of monuments and marks upon the ground.[90]

Mississippi.— Evans *v.* Miller, 58 Miss. 120, 38 Am. Rep. 313.

New Hampshire.— Clough *v.* Bauman, 15 N. H. 504; Parker *v.* Brown, 15 N. H. 176.

New York.— Raynor *v.* Timerson, 54 N. Y. 639; Miner *v.* New York, 37 N. Y. Super. Ct. 171; Jackson *v.* Douglas, 8 Johns. (N. Y.) 367.

Ohio.— Detwiler *v.* Toledo, 13 Ohio Cir. Ct. 572.

Texas.— Carley *v.* Parton, 75 Tex. 98, 12 S. W. 950; Hollingsworth *v.* Fowlkes, 6 Tex. Civ. App. 64, 22 S. W. 1110, 24 S. W. 708.

Virginia.— Stuart *v.* Luddington, 1 Rand. (Va.) 403, 10 Am. Dec. 550.

United States.—Winnipiseogee Paper Co. *v.* New Hampshire Land Co., 59 Fed. 542; Cheeney *v.* Nebraska, etc., Stone Co., 41 Fed. 740.

But see Ormsby *v.* Ihmsen, 34 Pa. St. 462, where it was held that if both parties were ignorant of the true boundaries of the lands of which partition was made, the adoption of a particular line in plaintiff's petition would partake of the nature of a compromise of a doubtful right and, if acted upon by the other parties, might constitute an estoppel *in pais.*

See 8 Cent. Dig. tit. "Boundaries," § 230.

85. *Indiana.*— Peterson *v.* Sohl, 141 Ind. 466, 40 N. E. 910.

Iowa.— Ross *v.* Ferree, 95 Iowa 604, 64 N. W. 683.

Missouri.— Evans *v.* Snyder, 64 Mo. 516; Collins *v.* Rogers, 63 Mo. 515; Majors *v.* Rice, 57 Mo. 384; Rutherford *v.* Tracy, 48 Mo. 325, 8 Am. Rep. 104; Acton *v.* Dooley, 6 Mo. App. 323.

New Jersey.— Sumner *v.* Seaton, 47 N. J. Eq. 103, 19 Atl. 884; De Veney *v.* Gallagher, 20 N. J. Eq. 33; McKelway *v.* Armour, 10 N. J. Eq. 115, 64 Am. Dec. 445.

New York.— Laverty *v.* Moore, 32 Barb. (N. Y.) 347 [*affirmed* in 33 N. Y. 658]; Blumenduer *v.* O'Connor, 32 Misc. (N. Y.) 17, 66 N. Y. Suppl. 137 [*affirmed* in 62 N. Y. App. Div. 618, 71 N. Y. Suppl. 1133].

Ohio.— Burt *v.* Creppel, 5 Ohio Dec. (Reprint) 330, 4 Am. L. Rec. 622.

Pennsylvania.—Willis *v.* Swartz, 28 Pa. St. 413; Marsh *v.* Weckerly, 13 Pa. St. 250; McKelvey *v.* Truby, 4 Watts & S. (Pa.) 323; Roos *v.* Connell, 7 Kulp (Pa.) 113.

Tennessee.— Boles *v.* Smith, Thomps. Cas. (Tenn.) 214.

Texas.— Garza *v.* Brown, (Tex. 1889) 11 S. W. 920.

See 8 Cent. Dig. tit. "Boundaries," § 229.

Where both parties have equal means of knowledge of the true line, each has a right to assume that the other will know that he stood upon his right, and in pursuance of that assumption may erect an ordinary fence without renouncing title or warranting the other in supposing that he renounced title beyond it, if he should turn out to have a title by deed. Iverson *v.* Swan, 169 Mass. 582, 48 N. E. 282. See also Maye *v.* Yappen, 23 Cal. 306.

86. Mullaney *v.* Duffy, 145 Ill. 559, 33 N. E. 750; Iverson *v.* Swan, 169 Mass. 582, 48 N. E. 282; Proctor *v.* Putnam Mach. Co., 137 Mass. 159; Liverpool Wharf *v.* Prescott, 7 Allen (Mass.) 494; Cronin *v.* Gore, 38 Mich. 381; Minneapolis Mill Co. *v.* Minneapolis, etc., R. Co., 51 Minn. 304, 53 N. W. 639.

87. The "term 'actual locations' is identical with practical location, subsequently adopted, including adverse holdings." Hubbell *v.* McCulloch, 47 Barb. (N. Y.) 287, 296.

88. Actual and continued possession of the premises adjoining the located line is not essential to the existence of a practical location. It does not depend on a *pedis possessio* of the land adjoining, but its existence may be established by any competent evidence of the fact. Ratcliffe *v.* Cary, 4 Abb. Dec. (N. Y.) 4, 3 Keyes (N. Y.) 510, 3 Transcr. App. (N. Y.) 117. See also Wiley *v.* Lindley, (Tex. Civ. App. 1900) 56 S. W. 1001.

89. The mutual act and acquiescence of the parties is necessary. The line must be actually located and acquiesced in for a long time, probably not less than twenty years. Corning *v.* Troy Iron, etc., Factory, 44 N. Y. 577. See also Stevens *v.* New York, 46 N. Y. Super. Ct. 274.

90. Jenks *v.* Morgan, 6 Gray (Mass.) 448; Kellogg *v.* Smith, 7 Cush. (Mass.) 375; Cleaveland *v.* Flagg, 4 Cush. (Mass.) 76; Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575; Colby *v.* Collins, 41 N. H. 301; Sanborn *v.* Clough, 40 N. H. 316; Peaslee *v.* Gee, 19 N. H. 273; Jones *v.* Smith, 64 N. Y. 180; Corning *v.* Troy Iron, etc., Factory, 44 N. Y. 577; Whan *v.* Steingotter, 54 N. Y. App. Div. 83, 66 N. Y. Suppl. 289, 8 N. Y. Annot. Cas. 162; Swettenham *v.* Leary, 18 Hun (N. Y.) 284; Jamison *v.* Cornell, 3 Hun (N. Y.) 557, 5 Thomps. & C. (N. Y.) 628; Smith *v.* McAllister, 14 Barb. (N. Y.) 434; Robinson *v.* Phillips, 1 Thomps. & C. (N. Y.) 151; McCormac *v.* Barnum, 10

(II) *Erecting Monuments or Fences or Making Improvements.* If adjoining proprietors deliberately erect monuments or fences, or make improvements on a line between their lands upon the understanding that it is the true line, it will amount to a practical location;[91] but the mere fact that an owner sets his fence within his boundary line does not give his adjoiner a right to the land fenced out.[92]

Wend. (N. Y.) 104 [*citing* Rockwell *v.* Adams, 6 Wend. (N. Y.) 467]; Knapp *v.* Marlboro, 29 Vt. 282. See also Clough *v.* Bowman, 15 N. H. 504. But see Baldwin *v.* Brown, 16 N. Y. 359, 363, where it was said: "The rule seems to have been adopted as a rule of repose, with a view to the quieting of titles; and rests upon the same reason as our statute prohibiting the disturbance of an adverse possession which has continued for twenty years."

Origin of doctrine.—"In searching for its origin, and introduction into the cases reported, we find it originally derived from a long acquiescence by the parties, in a line known and understood between them, for such a period of time, as to be identical with 'time immemorial,' or 'time out of memory'; and like the rule in easements, of title by prescription, rather than disturb such an ancient line, it was the policy of the law, that it was better to presume a grant than to incur litigation dependent upon the infirmity of memory or loss of muniments of title, at a period so far removed from the date of its settlement. One of the earliest cases upon which practical location is claimed to be traced, was a possession of thirty-six years, (Jackson *v.* Bowen, 1 Cai. (N. Y.) 358, 2 Am. Dec. 193) where Thompson, J., said the parties had used them during that period adversely to any other claim, and recognized them by acts of use, and declarations, during all that time; that this was sufficient to protect the possession against the action." Hubbell *v.* McCulloch, 47 Barb. (N. Y.) 287, 295. See also Baldwin *v.* Brown, 16 N. Y. 359.

A mere intention to locate in a particular place is not sufficient, where in fact the parties locate the line somewhere else. Stevens *v.* New York, 46 N. Y. Super. Ct. 274.

In New York in order to establish a boundary line by practical location it must be held and marked by a fence or other inclosure or the land occupied adversely up to it as a recognized one for a sufficient period to bar an entry. Jamison *v.* Cornell, 3 Hun (N. Y.) 557, 5 Thomps. & C. (N. Y.) 628. See also Baldwin *v.* Brown, 16 N. Y. 359; Clark *v.* Baird, 9 N. Y. 183, Seld. Notes (N. Y.) 187; Robinson *v.* Phillips, 1 Thomps. & C. (N. Y.) 151.

91. *Iowa.*— Miller *v.* Mills County, 111 Iowa 654, 82 N. W. 1038; Sherman *v.* Hastings, 81 Iowa 372, 46 N. W. 1084.

Louisiana.— Lyons *v.* Dobbins, 26 La. Ann. 580.

Maine.— Gilbert *v.* Curtis, 37 Me. 45; Mosher *v.* Berry, 30 Me. 83, 50 Am. Dec. 614; Kennebec Purchase *v.* Tiffany, 1 Me. 219, 10 Am. Dec. 60.

Massachusetts.—Waterman *v.* Johnson, 13 Pick. (Mass.) 261; Davis *v.* Rainsford, 17 Mass. 207; Makepeace *v.* Bancroft, 12 Mass. 469.

Michigan.— Le Compte *v.* Lueders, 90 Mich. 495, 51 N. W. 542, 30 Am. St. Rep. 450; Jones *v.* Lee, 77 Mich. 35, 43 N. W. 855; Flynn *v.* Glenny, 51 Mich. 580, 17 N. W. 65. But see Hockmoth *v.* Des Grand Champs, 71 Mich. 520, 39 N. W. 737; Chapman *v.* Crooks, 41 Mich. 595, 2 N. W. 924.

Missouri.— Evans *v.* Kunze, 128 Mo. 670, 31 S. W. 123.

New Hampshire.— Lerned *v.* Morrill, 2 N. H. 197.

New Jersey.— Meeks *v.* Willard, 57 N. J. L. 22, 29 Atl. 318.

New York.— Blumenauer *v.* O'Connor, 32 Misc. (N. Y.) 17, 66 N. Y. Suppl. 137; Ford *v.* Schlosser, 13 Misc. (N. Y.) 205, 34 N. Y. Suppl. 12, 67 N. Y. St. 868. See also Jamison *v.* Cornell, 3 Hun (N. Y.) 557, 5 Thomps. & C. (N. Y.) 628. *Compare* Jackson *v.* Zimmerman, 2 Cai. (N. Y.) 146, where it was held that where an owner erects a fence and shows it as the boundary of his land, he is not thereby precluded from ascertaining the true line, when at the time and constantly thereafter he maintained that he ought to have had more land.

Pennsylvania.— Westchester, etc., R. Co.'s Appeal, (Pa. 1888) 13 Atl. 214; Willis *v.* Swartz, 28 Pa. St. 413.

Texas.— Davis *v.* Smith, 61 Tex. 18.

United States.— McKey *v.* Hyde Park, 37 Fed. 389.

See 8 Cent. Dig. tit. "Boundaries," § 248.

Laying tracks by street railroad company. — Where a grant of a right of way on a street to a street railroad company by abutting owners does not prescribe the location, the laying of the tracks is a practical location of the grant and it cannot afterward be changed without the consent of the grantors. McCruden *v.* Rochester R. Co., 5 Misc. (N. Y.) 59, 25 N. Y. Suppl. 114 [*affirmed* in 77 Hun (N. Y.) 609, 28 N. Y. Suppl. 1135, 59 N. Y. St. 892].

Reference to non-existing monuments.— If a conveyance of land refer for its boundaries to monuments not actually existing at the time, and the parties afterward deliberately erect monuments as and for those intended, they will be bound by them in the same manner as if erected before the conveyance. Kennebec Purchase *v.* Tiffany, 1 Me. 219, 10 Am. Dec. 60; Waterman *v.* Johnson, 13 Pick. (Mass.) 261; Davis *v.* Rainsford, 17 Mass. 207; Makepeace *v.* Bancroft, 12 Mass. 469; Lerned *v.* Morrill, 2 N. H. 197.

92. Reiter *v.* McJunkin, 8 Pa. Super. Ct. 164; Fisher *v.* Pennsylvania Co., 3 Walk. (Pa.) 390.

b. Effect — (i) *In General.* A practical location not induced by fraud or mistake[93] will conclude the parties and their privies,[94] although it may subsequently, after long acquiescence, be ascertained to vary from the course called for in the deeds or grants under which the parties claimed prior to agreeing upon the line;[95] but a line run through pure mistake and ignorance is not a practical location, even though silently acquiesced in by an adjoining owner.[96]

(ii) *When Made by Mutual Grantor.* A practical location made by the common grantor of the division line between the tracts granted is binding upon the grantees.[97]

4. By Recognition and Acquiescence — a. In General. Recognition of, and acquiescence in, a line as the true boundary line of one's land, not induced by mistake, and continued through a considerable period of time, affords strong, if not conclusive, evidence that the line so recognized is in fact the true line;[98] but

93. *Florida.*— Andreu *v.* Watkins, 26 Fla. 390, 7 So. 876.

Missouri.—Goltermann *v.* Schiermeyer, 125 Mo. 291, 28 S. W. 616.

New York.—Lamb *v.* Coe, 15 Wend. (N. Y.) 642.

Ohio.— McAfferty *v.* Conover, 7 Ohio St. 99, 70 Am. Dec. 57.

West Virginia.— Hatfield *v.* Workman, 35 W. Va. 578, 14 S. E. 153.

Wisconsin.— Warner *v.* Fountain, 28 Wis. 405.

94. *Connecticut.*— Raymond *v.* Nash, 57 Conn. 447, 18 Atl. 714; Becket *v.* Clark, 40 Conn. 485.

Maine.— Knowles *v.* Toothaker, 58 Me. 172.

New Jersey.— Haring *v.* Van Houten, 22 N. J. L. 61.

New York.— Laverty *v.* Moore, 33 N. Y. 658 [*affirming* 32 Barb. (N. Y.) 347]; Whan *v.* Steingotter, 54 N. Y. App. Div. 83, 66 N. Y. Suppl. 289, 8 N. Y. Annot. Cas. 162; Cramer *v.* Benton, 64 Barb. (N. Y.) 522; Rockwell *v.* Adams, 7 Cow. (N. Y.) 761; Jackson *v.* Widger, 7 Cow. (N. Y.) 723; Jackson *v.* Treer, 17 Johns. (N. Y.) 29.

Tennessee.—Davis *v.* Smith, 1 Yerg. (Tenn.) 495.

Texas.— Eddie *v.* Tinnin, 7 Tex. Civ. App. 371, 26 S. W. 732.

But see Lacour *v.* Watson, 12 La. Ann. 214.

See 8 Cent. Dig. tit. "Boundaries," § 246.

95. *Massachusetts.*— Hathaway *v.* Evans, 108 Mass. 267.

North Carolina.— Caraway *v.* Chancy, 51 N. C. 361.

Pennsylvania.— Hill *v.* Roderick, 7 Pa. St. 95.

South Carolina.— Jarrot *v.* McIlvaine, 1 Rich. (S. C.) 14.

Tennessee.— Mayse *v.* Lafferty, 1 Head (Tenn.) 60 (where it was held that a line to be marked as a boundary must have the usual designations on the trees, or distinct and visible indications showing with reasonable certainty that it is a boundary line); Williamson *v.* Buchannan, 2 Overt. (Tenn.) 278.

Texas.— Timon *v.* Whitehead, 58 Tex. 290; Browning *v.* Atkinson, 46 Tex. 605; Blumberg *v.* Mauer, 37 Tex. 2; Hoxey *v.* Clay, 20 Tex. 582.

Vermont.— White *v.* Everest, 1 Vt. 181.

Variance from courses and distances.— The actual establishment of monuments by agreement of the parties subsequently to the execution of the deed will bind them and those who claim under them, notwithstanding the monuments may vary from the courses and distances in the deed. Prescott *v.* Hawkins, 12 N. H. 19.

96. Blake *v.* Shrieve, 5 Dana (Ky.) 369; Hubbell *v.* McCulloch, 47 Barb. (N. Y.) 287; Carroway *v.* Chancey, 47 N. C. 170, 64 Am. Dec. 577; Schraeder Min., etc., Co. *v.* Packer, 129 U. S. 688, 9 S. Ct. 385, 32 L. ed. 760.

97. *California.*— McGee *v.* Stone, 9 Cal. 600.

Louisiana.— Lebeau *v.* Bergeron, 14 La. Ann. 489; Savage *v.* Foy, 7 La. Ann. 573.

Tennessee.— Ross *v.* Turner, 5 Yerg. (Tenn.) 338.

Texas.— Holland *v.* Thompson, 12 Tex. Civ. App. 471, 35 S. W. 19.

Vermont.— White *v.* Everest, 1 Vt. 181.

See 8 Cent. Dig. tit. "Boundaries," § 247.

98. *California.*— Sneed *v.* Osborn, 25 Cal. 619.

Connecticut.— Lowndes *v.* Wicks, 69 Conn. 15, 36 Atl. 1072.

Illinois.— Lourance *v.* Goodwin, 170 Ill. 390, 48 N. E. 903.

Kentucky.— Hall *v.* Conlee, 23 Ky. L. Rep. 177, 62 S. W. 899; Byersdorfer *v.* Schultz, 8 Ky. L. Rep. 601, 2 S. W. 492; Beal *v.* Arnold, 1 Ky. L. Rep. 403.

Louisiana.— Lyons *v.* Dobbins, 26 La. Ann. 580; Lecomte *v.* Smart, 19 La. 484.

Maine.— Treat *v.* Chipman, 35 Me. 34.

Massachusetts.— Charlton City M. E. Soc. *v.* Akers, 167 Mass. 560, 46 N. E. 381; Barrett *v.* Murphy, 140 Mass. 133, 2 N. E. 833; Kellogg *v.* Smith, 7 Cush. (Mass.) 375; Stone *v.* Clark, 1 Metc. (Mass.) 378, 35 Am. Dec. 370.

Michigan.— Fahey *v.* Marsh, 40 Mich. 236.

Nebraska.— Coy *v.* Miller, 31 Nebr. 348, 47 N. W. 1046.

New Hampshire.— See Heywood *v.* Wild River Lumber Co., 70 N. H. 24, 47 Atl. 294.

New Jersey.— Stockham *v.* Browning, 18 N. J. Eq. 390.

New York.— Baldwin *v.* Brown, 16 N. Y. 359; Bell *v.* Hayes, 60 N. Y. App. Div. 382, 69 N. Y. Suppl. 898; Nott *v.* Thayer, 2 Bosw. (N. Y.) 10; O'Donnell *v.* Kelsey, 4 Sandf.

a mere license or passive acquiescence on the part of a landowner in an encroachment by his adjoiner will not conclude him;[99] and where a line is recognized and acquiesced in through a mutual mistake the parties will not be estopped to assert the true division line.[1]

b. What Constitutes — (i) *In General.* Acquiescence in a division line may be proven by any evidence which would satisfy a person that in point of fact such line had been accepted by both of the adjoining landowners as a dividing line between them.[2]

(ii) *Effect of Existence of Division Fence.* The mere existence of a fence between adjoining landowners is not of itself sufficient to establish the line between them,[3] although long acquiescence will warrant a conclusion that it is

(N. Y.) 202 [*affirmed* in 10 N. Y. 412, Seld. Notes (N. Y.) 22]; Rockwell *v.* Adams, 6 Wend. (N. Y.) 467; Jackson *v.* Schoonmaker, 7 Johns. (N. Y.) 12.

Pennsylvania.— Glen *v.* Glen, 4 Serg. & R. (Pa.) 488.

Rhode Island.— Brown *v.* Goddard, 13 R. I. 76.

Tennessee.— Gilchrist *v.* McGee, 9 Yerg. (Tenn.) 455.

Texas.— Bohny *v.* Petty, 81 Tex. 524, 17 S. W. 80; Wardlow *v.* Harmon, (Tex. Civ. App. 1898) 45 S. W. 828. *Compare* Vogt *v.* Geyer, (Tex. Civ. App. 1898) 48 S. W. 1100.

Virginia.— Voight *v.* Raby, 90 Va. 799, 20 S. E. 824.

Wisconsin.— Hartung *v.* Witte, 59 Wis. 285, 18 N. W. 175 (where it was held that an estoppel by acquiescence in a wrong boundary can arise only where there is an uncertainty as to the true line, and some controversy or question about it which can be settled by such acquiescence); Pickett *v.* Nelson, 71 Wis. 542, 37 N. W. 836.

United States.— Buel *v.* Tuley, 4 McLean (U. S.) 268, 4 Fed. Cas. No. 2,101.

See 8 Cent. Dig. tit. "Boundaries," § 232.

99. Schieble *v.* Hart, 11 Ky. L. Rep. 607, 12 S. W. 628; Buchanan *v.* Ashdown, 71 Hun (N. Y.) 327, 24 N. Y. Suppl. 1122, 55 N. Y. St. 47; Christianson *v.* Sinfard, 19 Abb. Pr. (N. Y.) 221. See also McArthur *v.* Henry, 35 Tex. 801. But see Liddon *v.* Hodnett, 22 Fla. 442, where it was held that mere passive acquiescence will be sufficient to make a boundary binding, where the adjoining owners occupied their lands with reference to such line with intent to claim up to such line, it being unnecessary that there be an express agreement, or acts amounting to an implied agreement.

1. *Iowa.*— Jordan *v.* Ferree, 101 Iowa 440, 70 N. W. 611.

Missouri.— Schad *v.* Sharp, 95 Mo. 573, 8 S. W. 549; Kincaid *v.* Dormey, 51 Mo. 552. *Compare* Lowenberg *v.* Bernd, 47 Mo. 297.

New York.— Hinkley *v.* Crouse, 125 N. Y. 730, 26 N. E. 452, 35 N. Y. St. 442. *Compare* Dibble *v.* Rogers, 13 Wend. (N. Y.) 536.

Ohio.— Broadwell *v.* Phillips, 30 Ohio St. 255; Yetzer *v.* Thoman, 17 Ohio St. 130, 91 Am. Dec. 122; Avery *v.* Baum, Wright (Ohio) 576.

Texas.— Stier *v.* Latreyte, (Tex. Civ. App. 1899) 50 S. W. 589.

United States.— Ulman *v.* Clark, 100 Fed. 180.

2. *Missouri.*— Acton *v.* Dooley, 74 Mo. 63.

New York.— O'Donnell *v.* Kelsey, 10 N. Y. 412, Seld. Notes (N. Y.) 22 [*affirming* 4 Sandf. (N. Y.) 202]; Van Wyck *v.* Wright, 18 Wend. (N. Y.) 157; Jackson *v.* Smith, 9 Johns. (N. Y.) 100.

Pennsylvania.— Moyer *v.* Rick, 2 Mon. (Pa.) 256. See also Reiter *v.* McJunkin, 8 Pa. Super. Ct. 164.

Tennessee.— Mynatt *v.* Smart, (Tenn. Ch. 1898) 48 S. W. 270.

Texas.— Bohny *v.* Petty, 81 Tex. 524, 17 S. W. 80; Vogt *v.* Geyer, (Tex. Civ. App. 1898) 48 S. W. 1100.

Vermont.— Hull *v.* Fuller, 7 Vt. 100.

West Virginia.— Gwynn *v.* Schwartz, 32 W. Va. 487, 9 S. E. 880.

See 8 Cent. Dig. tit. "Boundaries," § 233.

Question for jury.— While acquiescence in a line by the parties interested is entitled to weight in ascertaining the location of the line, its effect is for the jury, and the court cannot, as a matter of law, instruct that an acquiescence for any period will amount to an estoppel. Bohny *v.* Petty, 81 Tex. 524, 17 S. W. 80.

3. *Connecticut.*— Wetherell *v.* Newington, 54 Conn. 67, 5 Atl. 858.

Iowa.— Palmer *v.* Osborne, (Iowa 1901) 87 N. W. 712.

Maine.— Blackington *v.* Sumner, 69 Me. 136.

Missouri.— West *v.* St. Louis, etc., R. Co., 59 Mo. 510.

New Hampshire.— Knight *v.* Coleman, 19 N. H. 118, 49 Am. Dec. 147.

New York.— Jones *v.* Smith, 3 Hun (N. Y.) 351, 5 Thomps. & C. (N. Y.) 490; Lamb *v.* Coe, 15 Wend. (N. Y.) 642.

Ohio.— Brachman *v.* Smith, 1 Cinc. Super. Ct. (Ohio) 342.

Pennsylvania.— Omensetter *v.* Kemper, 6 Pa. Super. Ct. 309, 41 Wkly. Notes Cas. (Pa.) 501.

Vermont.— Clark *v.* Dustin, 52 Vt. 568.

See 8 Cent. Dig. tit. "Boundaries," § 235.

"Rodeo boundaries" under the customs and acknowledged usages which prevailed in California constituted as notorious evidence of the possession of land as a cultivation or fencing in an old and settled country. Boyreau *v.* Campbell, 1 McAll. (U. S.) 119, 3 Fed. Cas. No. 1,760.

upon the true line,[4] a presumption which becomes conclusive where possession has been had for the statutory period.[5]

(III) *Effect of Lapse of Time.* Although the presumption in favor of a boundary line acquiesced in by adjoining proprietors is strengthened by lapse of time, there is no period short of the statute of limitations which will render the presumption conclusive. Each case must furnish its own rule, according to its own circumstances, modifying the conclusiveness of the presumption.[6] Where, however, the recognition and acquiescence have continued beyond the period fixed by the statute of limitations the presumption becomes conclusive.[7]

4. *Illinois.*— Thomas *v.* Sayles, 63 Ill. 363. See also La Mont *v.* Dickinson, 189 Ill. 628, 60 N. E. 40.

Kentucky.— Robards *v.* Rogers, 20 Ky. L. Rep. 1017, 48 S. W. 154.

Maine.— Whitcomb *v.* Dutton, 89 Me. 212, 36 Atl. 67; Cutts *v.* King, 5 Me. 482.

Michigan.— Diehl *v.* Zanger, 39 Mich. 601.

Missouri.— Brummell *v.* Harris, 148 Mo. 430, 50 S. W. 93.

Pennsylvania.— Rook *v.* Greenwalt, 17 Pa. Co. Ct. 642.

West Virginia.— Bowman *v.* Buling, 39 W. Va. 619, 20 S. E. 567.

See 8 Cent. Dig. tit. "Boundaries," § 235.

Better evidence than resurvey after monuments lost.— A long-established fence is better evidence of actual boundaries settled by practical location than a survey made after the monuments of the original survey have disappeared. Diehl *v.* Zanger, 39 Mich. 601.

5. *California.*— Burris *v.* Fitch, 76 Cal. 395, 18 Pac. 864.

Illinois.— McNamara *v.* Seaton, 82 Ill. 498.

Indiana.— Palmer *v.* Dosch, 148 Ind. 10, 47 N. E. 176; Dyer *v.* Eldridge, 136 Ind. 654, 36 N. E. 522.

Iowa.— Kulas *v.* McHugh, (Iowa 1901) 86 N. W. 288.

Kentucky.— Byersdorfer *v.* Shultz, 5 Ky. L. Rep. 928.

Massachusetts.— Holloran *v.* Holloran, 149 Mass. 298, 21 N. E. 374; Pettingill *v.* Porter, 3 Allen (Mass.) 349; Burrell *v.* Burrell, 11 Mass. 294.

Michigan.— Tritt *v.* Hoover, 116 Mich. 4, 74 N. W. 177; Stewart *v.* Carleton, 31 Mich. 270.

New Jersey.— State *v.* Ford, 1 N. J. L. 64.

New York.— Pearsall *v.* Westcott, 30 N. Y. App. Div. 99, 51 N. Y. Suppl. 663; Pierson *v.* Mosher, 30 Barb. (N. Y.) 81.

Pennsylvania.— McCoy *v.* Hance, 28 Pa. St. 149.

West Virginia.— Bowman *v.* Duling, 39 W. Va. 619, 20 S. E. 567.

See 8 Cent. Dig. tit. "Boundaries," § 235.

6. Francois *v.* Maloney, 56 Ill. 399; Beardsley *v.* Crane, 52 Minn. 537, 54 N. W. 740; Harrell *v.* Houston, 66 Tex. 278, 17 S. W. 731; Medlin *v.* Wilkens, 60 Tex. 409; Floyd *v.* Rice, 28 Tex. 341. *Compare* Ball *v.* Cox, 7 Ind. 453, where it was held that twenty years' acquiescence is necessary to support an implied agreement in respect to a boundary varying from that expressed in the title deeds.

Weight dependent upon lapse of time.— Acquiescence in a marked line as forming the boundary between adjoining owners furnishes some evidence that it is a true line, but its weight is dependent on the period of acquiescence. Miller *v.* Mills County, 111 Iowa 654, 82 N. W. 1038.

7. *California.*— Oreña *v.* Santa Barbara, 91 Cal. 621, 28 Pac. 268; Burris *v.* Fitch, 76 Cal. 395, 18 Pac. 864; Columbet *v.* Pacheco, 48 Cal. 395; Hastings *v.* Stark, 36 Cal. 122; Smeed *v.* Osborn, 25 Cal. 619.

Connecticut.— Perry *v.* Pratt, 31 Conn. 433.

Georgia.— Cleveland *v.* Treadwell, 68 Ga. 835.

Idaho.— Idaho Land Co. *v.* Parsons, 2 Ida. 1191, 31 Pac. 791.

Illinois.— Sheets *v.* Sweeney, 136 Ill. 336, 26 N. E. 648; Darst *v.* Enlow, 116 Ill. 475, 6 N. E. 215; Hubbard *v.* Stearns, 86 Ill. 35; Bauer *v.* Gottmanhausen, 65 Ill. 499; Pitts *v.* Looby, 46 Ill. App. 54. See also Joliet *v.* Werner, 166 Ill. 34, 46 N. E. 780.

Indiana.— Wingler *v.* Simpson, 93 Ind. 201; Ball *v.* Cox, 7 Ind. 453.

Iowa.— Axmear *v.* Richards, 112 Iowa 657, 84 N. W. 686.

Kentucky.— Hibbs *v.* Evans, 3 Bush (Ky.) 661; Guyton *v.* Shane, 7 Dana (Ky.) 498; Finn *v.* Rochford, 6 Ky. L. Rep. 654.

Louisiana.— Savage *v.* Foy, 7 La. Ann. 573.

Maine.— Knowles *v.* Toothaker, 58 Me. 172.

Massachusetts.— Adams *v.* Boston Wharf Co., 10 Gray (Mass.) 521.

Michigan.— Husted *v.* Willoughby, 117 Mich. 56, 75 N. W. 279; Flynn *v.* Glenny, 51 Mich. 580, 17 N. W. 65; Bunce *v.* Bidwell, 43 Mich. 542, 5 N. W. 1023; Duponte *v.* Starring, 42 Mich. 492, 4 N. W. 190; Joyce *v.* Williams, 26 Mich. 332; Smith *v.* Hamilton, 20 Mich. 433, 4 Am. Rep. 398.

Minnesota.— Beardsley *v.* Crane, 52 Minn. 537, 54 N. W. 740.

Mississippi.— Butler *v.* Vicksburg, (Miss. 1895) 17 So. 605.

Missouri.— Lindell *v.* McLaughlin, 30 Mo. 28, 77 Am. Dec. 593.

New Jersey.— Smith *v.* State, 23 N. J. L. 130; Haring *v.* Van Houten, 22 N. J. L. 61; Southmayd *v.* McLaughlin, 24 N. J. Eq. 181; Stockham *v.* Browning, 18 N. J. Eq. 390.

New York.— Katz *v.* Kaiser, 154 N. Y. 294, 48 N. E. 532 [*affirming* 10 N. Y. App. Div. 137, 41 N. Y. Suppl. 776, 75 N. Y. St. 1172]; Sherman *v.* Kane, 86 N. Y. 57; Reed *v.* Farr, 35 N. Y. 113; Baldwin *v.* Brown, 16 N. Y. 359; Clark *v.* Baird, 9 N. Y. 183, Seld. Notes (N. Y.) 187; Buchanan *v.* Ashdown, 71 Hun (N. Y.) 327, 24 N. Y. Suppl. 1122, 55 N. Y.

(iv) *Effect of Possession by Adjoiner.* Possession, although by no means conclusive, is strong presumptive evidence that a landowner holds by right, where his adjoiner acquiesces in and recognizes the line up to which he holds.[8]

c. Effect — (i) *In General.* Lines and corners long recognized and acquiesced in by adjoining owners will control courses and distances called for in their title deeds or grants.[9]

(ii) *Persons Bound.* Only the actual parties or their privies are bound by acquiescence.[10]

St. 47; Smith *v.* Faulkner, 48 Hun (N. Y.) 186, 15 N. Y. St. 637; Jones *v.* Smith, 3 Hun (N. Y.) 351, 5 Thomps. & C. (N. Y.) 490; Smith *v.* McNamara, 4 Lans. (N. Y.) 169; Emerick *v.* Kohler, 29 Barb. (N. Y.) 165; Smith *v.* McAllister, 14 Barb. (N. Y.) 434; Dale *v.* Jackson, 5 Silv. Supreme (N. Y.) 515, 8 N. Y. Suppl. 715, 30 N. Y. St. 373; Rock *v.* Doerr, 15 N. Y. Suppl. 14, 38 N. Y. St. 723; Sweet *v.* Warner, 14 N. Y. St. 312; Clark *v.* Davis, 28 Abb. N. Cas. (N. Y.) 135, 19 N. Y. Suppl. 191; Pangburn *v.* Miles, 10 Abb. N. Cas. (N. Y.) 42; Jackson *v.* McConnell, 19 Wend. (N. Y.) 175, 32 Am. Dec. 439; Adams *v.* Rockwell, 16 Wend. (N. Y.) 285; Kip *v.* Norton, 12 Wend. (N. Y.) 127, 27 Am. Dec. 120; McCormick *v.* Barnum, 10 Wend. (N. Y.) 105; Moore *v.* Jackson, 4 Wend. (N. Y.) 58; Jackson *v.* Widger, 7 Cow. (N. Y.) 723; Jackson *v.* Hubble, 1 Cow. (N. Y.) 613; Jackson *v.* Dieffendorf, 3 Johns. (N. Y.) 269; Jackson *v.* Vedder, 3 Johns. (N. Y.) 8.

Pennsylvania.— Culbertson *v.* Duncan, (Pa. 1888) 13 Atl. 966; Chew *v.* Morton, 10 Watts (Pa.) 321.

Rhode Island.— O'Donnell *v.* Penney, 17 R. I. 164, 20 Atl. 305.

South Carolina.— Cain *v.* Hodge, 3 Strobh. (S. C.) 115.

Tennessee.— Galbraith *v.* Lunsford, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522.

Texas.— Horst *v.* Herring, (Tex. 1888) 8 S. W. 306; Davis *v.* Mitchell, 65 Tex. 623; King *v.* Mitchell, 1 Tex. Civ. App. 701, 21 S. W. 50.

Utah.— Larsen *v.* Onesite, 21 Utah 38, 59 Pac. 234.

Vermont.— Davis *v.* Judge, 46 Vt. 655; Spaulding *v.* Warren, 25 Vt. 316; Brown *v.* Edson, 23 Vt. 435; Burton *v.* Lazell, 16 Vt. 158; Crowell *v.* Bebee, 10 Vt. 33, 33 Am. Dec. 172.

Virginia.— Coles *v.* Wooding, 2 Patt. & H. (Va.) 189.

Washington.— Denny *v.* Northern Pac. R. Co., 19 Wash. 298, 53 Pac. 341.

Wisconsin.—Woollman *v.* Ruehle, 100 Wis. 31, 75 N. W. 425; Welton *v.* Poynter, 96 Wis. 346, 71 N. W. 597; Hass *v.* Plautz, 56 Wis. 105, 14 N. W. 65, 43 Am. Rep. 699; Whitney *v.* Robinson, 53 Wis. 309, 10 N. W. 512; Messer *v.* Oestreich, 52 Wis. 684, 10 N. W. 6.

See 8 Cent. Dig. tit. "Boundaries," § 237; and, generally, Adverse Possession.

8. *Connecticut.*—French *v.* Pearce, 8 Conn. 439, 21 Am. Dec. 680.

Florida.— Liddon *v.* Hodnett, 22 Fla. 442.

Maine.— Faught *v.* Holway, 50 Me. 24.

New York.— Southampton *v.* Post, 4 N. Y. Suppl. 75, 22 N. Y. St. 823; Ausable Co. *v.* Hargraves, 1 N. Y. Suppl. 42, 16 N. Y. St. 318; Adams *v.* Rockwell, 16 Wend. (N. Y.) 285; Jackson *v.* Bowen, 1 Cai. (N. Y.) 358, 2 Am. Dec. 193.

Vermont.— Sheldon *v.* Perkins, 37 Vt. 550; Brown *v.* Edson, 23 Vt. 435.

See 8 Cent. Dig. tit. "Boundaries," § 234.

Actual possession unnecessary.— The mere acquiescence in a line as a dividing line between adjoining proprietors for fifteen years, although but one of the proprietors, and perhaps neither, is in actual possession, is sufficient to establish that line as the true line of division, if known and claimed by both proprietors. Brown *v.* Edson, 23 Vt. 435.

9. *Georgia.*— Roberts *v.* Ivey, 63 Ga. 622.

Louisiana.— Lebeau *v.* Bergeron, 14 La. Ann. 489; Lemoin *v.* Moncla, 9 La. Ann. 515; Williamson *v.* Hymel, 11 La. 182.

New Hampshire.— Richardson *v.* Chickering, 41 N. H. 380, 77 Am. Dec. 769.

New Jersey.— Smith *v.* State, 23 N. J. L. 130.

North Carolina.— McNeill *v.* Massey, 10 N. C. 91.

See 8 Cent. Dig. tit. "Boundaries," § 238.

10. *Kentucky.*— Sebastian *v.* Keeton, 16 Ky. L. Rep. 501, 29 S. W. 23.

Missouri.—Smith *v.* McCorkle, 105 Mo. 135, 16 S. W. 602.

Tennessee.—Chadwell *v.* Chadwell, 93 Tenn. 201, 23 S. W. 973; King *v.* Mabry, 3 Lea (Tenn.) 237; Gillespie *v.* Cunningham, 2 Humphr. (Tenn.) 18.

Texas.— Lagow *v.* Glover, 77 Tex. 448, 14 S. W. 141; Anderson *v.* Jackson, (Tex. 1889) 13 S. W. 30; George *v.* Thomas, 16 Tex. 74, 67 Am. Dec. 612.

Utah.— Switzgable *v.* Worseldine, 5 Utah 315, 15 Pac. 144.

Vermont.— May *v.* Adams, 58 Vt. 74, 3 Atl. 187; Sawyer *v.* Coolidge, 34 Vt. 303.

See 8 Cent. Dig. tit. "Boundaries," § 239.

Acquiescence by infant after age.— If an infant acquiesces in the settlement of boundaries after coming of age he is bound thereby. George *v.* Thomas, 16 Tex. 74, 67 Am. Dec. 612.

Married women.—Where one of the owners of adjoining lands is a married woman, and the line is run fairly and honestly and is acquiesced in by her, it ought to be as binding on her as on others. George *v.* Thomas, 16 Tex. 74, 67 Am. Dec. 612.

5. By Submission to Arbitrators — a. In General. A question as to boundary may be submitted to arbitration or reference.[11]

b. Effect[12] — (i) *In General.* Where the location of a boundary has been submitted to arbitrators their award on that question is conclusive,[13] but the parties are not concluded by an award exceeding the authority of the arbitrators under the submission.[14]

(ii) *Persons Bound.* As between the parties and their privies an award is entitled to the same respect which is due to a judgment of a court of last resort. It is in fact a final adjudication by a court of the parties' own choice, and until impeached upon sufficient grounds in an appropriate proceeding an award which is regular upon its face is conclusive upon the merits of a controversy submitted.[15]

6. By Survey — a. In General. Boundaries may be established by private survey, but such an establishment is at most effective only amongst the parties thereto.[16]

b. Effect — (i) *In General.* A private survey is not as a rule conclusive upon the parties,[17] although if the rights of third persons, acquired in reliance thereon, would be injuriously affected by a repudiation an estoppel will arise.[18]

Acquiescence by husband.— A wife's rights as to lands owned by her as a separate estate cannot be affected by her husband's acquiescence in line, fence, and boundaries of the land. Sawyer *v.* Coolidge, 34 Vt. 303.

11. Veasey *v.* Williams, 6 Houst. (Del.) 563; Harber *v.* Scudder, 7 Ky. L. Rep. 663. And see Arbitration and Award, 3 Cyc. 594, note 64.

12. Defeats operation of statute of limitations. See Arbitration and Award, 3 Cyc. 608, note 12.

13. *Massachusetts.*— Thayer *v.* Bacon, 3 Allen (Mass.) 163, 80 Am. Dec. 59; Searle *v.* Abbe, 13 Gray (Mass.) 409; Goodridge *v.* Dustin, 5 Metc. (Mass.) 363.

New York.—Robertson *v.* McNiel, 12 Wend. (N. Y.) 578.

North Carolina.— Gaylord *v.* Gaylord, 48 N. C. 367.

Pennsylvania.—Evars *v.* Kamphaus, 59 Pa. St. 379; Armstrong *v.* Hall, 15 Pa. St. 23; Bowen *v.* Cooper, 7 Watts (Pa.) 311; Davis *v.* Havard, 15 Serg. & R. (Pa.) 165, 16 Am. Dec. 537; Hall *v.* Wallford, 2 Am. L. Reg. 181.

Vermont.— Stuart *v.* Cass, 16 Vt. 663, 42 Am. Dec. 534.

See 8 Cent. Dig. tit. "Boundaries," § 251.

Requisites of award see Arbitration and Award, 3 Cyc. 512.

14. Morton *v.* Dresser, 108 Mass. 71.

Extent of award on submission of question of boundaries see Arbitration and Award, 3 Cyc. 678, note 42.

15. Waterman *v.* Smith, 13 Cal. 373; Davis *v.* Henry, 121 Mass. 150; Kennedy *v.* Farley, 82 Hun (N. Y.) 227, 31 N. Y. Suppl. 274, 63 N. Y. St. 592; and see, generally, Arbitration and Award. But see Hitchcock *v.* Libby, 70 N. H. 399, 47 Atl. 269.

16. *California.*— Spring *v.* Hewston, 52 Cal. 442.

Louisiana.— Bach *v.* Slidell, 2 La. Ann. 626; Buisson *v.* Grant, 4 Rob. (La.) 360.

Maine.— Haskell *v.* Allen, 23 Me. 448.

Massachusetts.— Thayer *v.* Bacon, 3 Allen (Mass.) 163, 80 Am. Dec. 59.

Tennessee.— Woodfolk *v.* Cornwell, 1 Head (Tenn.) 272; Riggs *v.* Parker, 1 Meigs (Tenn.) 43.

Texas.— Saunders *v.* Hart, 57 Tex. 8; Kampmann *v.* Heintz, (Tex. Civ. App. 1893) 24 S. W. 329.

See also *infra*, III, A, 6, b, (I).

State lands.— The boundary of land, the legal title to which is in the state, cannot be fixed, as against the state, by a surveyor merely employed to survey it and who makes a mistake in the boundary line, nor by failure to correct the mistake, as the state cannot be bound by estoppel. Saunders *v.* Hart, 57 Tex. 8.

17. *California.*—Spring *v.* Hewston, 52 Cal. 442.

Florida.— Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139.

Louisiana.— Bach *v.* Slidell, 2 La. Ann. 626.

Michigan.— Cronin *v.* Gore, 38 Mich. 381.

North Carolina.— Addington *v.* Jones, 52 N. C. 582.

Pennsylvania.— Waters *v.* Starr, 142 Pa. St. 418, 21 Atl. 865. *Compare* Lilly *v.* Kitzmiller, 1 Yeates (Pa.) 28.

Tennessee.— Gilchrist *v.* McGee, 9 Yerg. (Tenn.) 455; White *v.* Hembree, 1 Overt. (Tenn.) 529. But see Davis *v.* Smith, 1 Yerg. (Tenn.) 495; Howston *v.* Pillow, 1 Yerg. (Tenn.) 481.

Texas.— Wiley *v.* Lindley, (Tex. Civ. App. 1900) 56 S. W. 1001. See also Blackburn *v.* Norman, (Tex. Civ. App. 1895) 30 S. W. 718.

Vermont.— Burnell *v.* Maloney, 39 Vt. 579, 94 Am. Dec. 358.

United States.— King *v.* Watkins, 98 Fed. 913.

Contra, Hobbs *v.* Cram, 22 N. H. 130.

See 8 Cent. Dig. tit. "Boundaries," § 266.

18. Caruthers *v.* Crockett, 7 Lea (Tenn.) 91; Yarborough *v.* Abernathy, 1 Meigs (Tenn.) 413; New York, etc., Land Co. *v.*

So, too, where adjoiners agree upon the line and employ a surveyor to run it, the line so run and established will be conclusive upon them.[19]

(II) *When Acquiesced In.* Mere acquiescence in a line erroneously run by a private surveyor will not conclude the parties;[20] but where long continued[21] or for a period beyond the statute of limitations[22] it becomes conclusive.

B. By Act of Public Authorities — 1. By Commissioners or Processioners — a. In General. The issuing of commissions to establish lost boundaries is a very ancient branch of equity jurisdiction,[23] but where no equitable consideration intervenes jurisdiction is conferred and defined by statutes which have been very generally enacted, and usually provide for the appointment by a designated tribunal of commissioners, processioners, or surveyors, who are to go upon the land, ascertain, run, and mark the lines, and make due report of their proceedings.[24]

b. Grounds For Appointment. The usual grounds for appointing commissioners or processioners are that the boundaries are either lost, doubtful, or disputed;[25] and where the facts are admitted and the only dispute is as to a rule of law, there is no ground for the appointment of a commission.[26]

c. Proceedings For — (I) *In General.* Proceedings under an act for processioning land must be construed with strictness.[27]

(II) *Parties.* To a bill for a commission to ascertain boundaries all persons

Gardner, (Tex. Civ. App. 1894) 25 S. W. 737.

19. Gullett *v.* Phillips, 153 Ind. 227, 54 N. E. 804.

20. Wesley *v.* Sargent, 38 Me. 315; Sanford *v.* McDonald, 53 Hun (N. Y.) 263, 6 N. Y. Suppl. 613, 25 N. Y. St. 721; Pickett *v.* Nelson, 79 Wis. 9, 47 N. W. 936.

21. Jackson *v.* McConnell, 12 Wend. (N. Y.) 421.

22. Main *v.* Killinger, 90 Ind. 165; Jackson *v.* Hogeboom, 11 Johns. (N. Y.) 163; Jackson *v.* Dysling, 2 Cai. (N. Y.) 198; Stark *v.* Homuth, (Tex. Civ. App. 1898) 45 S. W. 761; Boyd *v.* Graves, 4 Wheat. (U. S.) 513, 4 L. ed. 628.

23. Perry *v.* Pratt, 31 Conn. 433; Ely *v.* Kenrick, Bunb. 322; Speer *v.* Crawter, 2 Meriv. 410, 16 Rev. Rep. 191. And see 1 Story Eq. Jur. 610.

24. *Connecticut.*— Carney *v.* Wilkinson, 67 Conn. 345, 35 Atl. 261.

Georgia.— Christian *v.* Weaver, 97 Ga. 406, 7 S. E. 261; Martin *v.* Cauthen, 77 Ga. 491; Watson *v.* Bishop, 69 Ga. 51.

Kentucky.— Johnson *v.* Norton, 3 B. Mon. (Ky.) 429; Moredock *v.* Rawlings, 3 T. B. Mon. (Ky.) 73.

New York.— Jackson *v.* Murphy, 3 Cai. (N. Y.) 82.

North Carolina.— Porter *v.* Durham, 90 N. C. 55; Britt *v.* Benton, 79 N. C. 177.

Oregon.— See Sellwood *v.* Henneman, 36 Oreg. 575, 60 Pac. 12.

Tennessee.— Pyatt *v.* Gallaher, 3 Lea (Tenn.) 289; Chouning *v.* Simmons, 5 Humphr. (Tenn.) 298.

See 8 Cent. Dig. tit. "Boundaries," § 252.

Lands situated in different counties.— The Illinois act of March 25, 1869, providing for the establishment of boundary lines by a commission of surveyors, embraces persons and lands in the county where the court is held, and consequently gives the court no jurisdiction for the appointment of the commission when the disputed line is between lands situated in different counties, and the owners reside in different counties. Tallon *v.* Schempf, 67 Ill. 472.

Constitutionality of statute.— In Britt *v.* Benton, 79 N. C. 177, it was held that the act for processioning land having been in operation since 1723, the long acquiescence of the courts raised a presumption of its constitutionality, which at all events could not be questioned by one who had voluntarily submitted his claim to the statutory tribunal.

The purpose of the act concerning the processioning of land is to establish the boundaries thereby, and a complete survey with plat, certificate, etc., is indispensable to the fulfilment of the statutory requirements. Porter *v.* Durham, 90 N. C. 55.

25. Plank *v.* Reinhart, 81 Iowa 756, 46 N. W. 1005; Strait *v.* Cook, 46 Iowa 57; Boyd *v.* Dowie, 65 Barb. (N. Y.) 237. *Compare* Robinson *v.* Laurer, 27 Oreg. 315, 40 Pac. 1012, holding that, under Hill's Code Oreg. § 508, requiring the court at the time of entering a decree locating a boundary to appoint a commission to mark out on the ground the boundary as ascertained by the court, it is error not to appoint such commission, although the evidence showed that the boundary was already plainly indicated by a fence.

Where no boundary line had been located or established between adjoining property owners, the running and marking of the lines by processioners was without authority of law. Crawford *v.* Wheeler, 111 Ga. 870, 36 S. E. 954.

26. Smith *v.* Scoles, 65 Iowa 733, 23 N. W. 146.

27. Chouning *v.* Simmons, 5 Humphr. (Tenn.) 298, holding that when such resurvey is set up in bar of the right even of the person at whose instance it was made, it must be shown that it was in conformity

having any interest in the property are necessary parties;[28] and such a commission should not be issued where minors are interested.[29] The statutes contemplate that only the owner shall have the right to petition for the appointment of commissioners or processioners.[30]

(III) *Notice of Application.* Where notice of the filing of an application for the appointment of commissioners is required to be served on defendant it is in the nature of process and cannot be served by the applicant.[31]

(IV) *Pleadings* — (A) *Petition.* The petition for the appointment of commissioners to procession lands must definitely describe the disputed lines, and the ground of contest must clearly appear.[32]

(B) *Answer.* In a proceeding to permanently locate a disputed line or corner an answer may be interposed to the petition as in any other case.[33]

(C) *Note of Claim.* Where a bill is filed and issue directed to settle the boundaries of a tract of land, each party must, on the trial, give a note of the bounds he intends to claim.[34]

(VI) *Objection to Commissioners.* An objection to any of the commissioners appointed by the court is in the nature of a challenge and should be brought forward when the appointment is about to be made.[35]

d. Oath of Commissioners or Processioners. Unless called for by statute commissioners or processioners need not be sworn.[36]

e. Powers and Duties of Commissioners or Processioners — (I) *In General.* The powers of commissioners and processioners extend only to locating and establishing lost or doubtful boundaries, and they can in no event disturb title or rights of possession or establish new lines.[37] In doing this they must follow the mode prescribed by the order or decree of appointment,[38] and from a known and established corner or monument should run out the lines by course and distance according to their original location.[39] They are at liberty, however, to survey

with the requisitions specified in the act, either by proof of their performance or by presumption arising from long acquiescence in the line run and re-marked.

28. Atkins *v.* Hatton, 2 Anstr. 386; Bayley *v.* Best, 1 Russ. & M. 659, 5 Eng. Ch. 659.

29. *In re* O'Brien, 3 Ir. Eq. 161, construing 5 Geo. II, c. 9.

30. Dickinson County *v.* Fouse, 112 Iowa 21, 83 N. W. 804; Pyatt *v.* Gallaher, 3 Lea (Tenn.) 289. See also Jackson *v.* Murphy, 3 Cai. (N. Y.) 82.

31. Lee *v.* Cox, 89 Ill. 226.

32. Forney *v.* Williamson, 98 N. C. 329, 4 S. E. 483.

33. Harrah *v.* Conley, 82 Ill. 48.

Setting forth title.— On a dispute as to the boundaries, or where there is unity of possession, defendant must set forth in his answer how he is entitled, especially where he has not demurred to this part of the bill. Champernoon *v.* Totness, 2 Atk. 112.

34. Letheuilier *v.* Castlemaine, Sel. Cas. Ch. 60, 1 Dick. 46. See also Metcalfe *v.* Beckwith, 2 P. Wms. 376.

35. Miller *v.* Heart, 26 N. C. 23.

36. Johnson *v.* Norton, 3 B. Mon. (Ky.) 429. See also Moredock *v.* Rawlings, 3 T. B. Mon. (Ky.) 73.

37. *Georgia.*— Crawford *v.* Wheeler, 111 Ga. 870, 36 S. E. 954; Bower *v.* Jackson, 101 Ga. 817, 29 S. E. 40; Amos *v.* Parker, 88 Ga. 754, 16 S. E. 200; Christian *v.* Weaver, 79 Ga. 406, 7 S. E. 261.

Illinois.— Irvin *v.* Rotramel, 68 Ill. 11; Martz *v.* Williams, 67 Ill. 306. See also Allmon *v.* Stevens, 68 Ill. 89.

Indiana.— Brown *v.* Anderson, 90 Ind. 93. See also Williams *v.* Atkinson, 152 Ind. 98, 52 N. E. 603.

Iowa.— Cuthbertson *v.* Locke, 70 Iowa 49, 30 N. W. 13. See also Davis *v.* Curtis, 68 Iowa 66, 25 N. W. 932.

Louisiana.— Frederick *v.* Brulard, 7 La. Ann. 655.

New Jersey.— State *v.* Ford, 1 N. J. L. 64.

North Carolina.— Midgett *v.* Midgett, 129 N. C. 21, 39 S. E. 722.

38. Colvin *v.* Fell, 40 Ill. 418.

39. Irvin *v.* Rotramel, 68 Ill. 11; Martz *v.* Williams, 67 Ill. 306; Neary *v.* Jones, 89 Iowa 556, 56 N. W. 675; Matter of Harrington, 54 Iowa 33, 6 N. W. 125.

Adoption of previous survey.— In a survey ordered by the court a surveyor may adopt a previous survey if he knows it to be correct, but it is not the duty of the court to oblige him to adopt one shown to be incorrect. Horton *v.* Pace, 9 Tex. 81.

Establishment of artificial bound.— Where the mouth of a creek marking a boundary became obstructed, which caused the line of the creek to change, the committee properly fixed a bound as near the true line as they were able to ascertain it, not by opening the creek at its former mouth but by establishing an artificial bound. Perry *v.* Pratt, 31 Conn. 433.

whatever lines may be necessary in order to find and establish the true location of the line in dispute.[40] It is their duty to take all material evidence,[41] and they may examine witnesses under oath.[42]

(II) *Notice of Meeting and Proceedings.* Where required by statute,[43] notice of the meeting and proceedings of commissioners or processioners must be served on the parties.[44] Where, however, the persons interested are in attendance notice is unnecessary.[45]

(III) *Report*[46] — (A) *In General.* The report of commissioners or processioners must be full and complete, and should show upon its face a compliance with the law and the order or decree of court under which they acted.[47] It should not undertake to contain conclusions of law.[48]

(B) *Review by Court.* The extent of review of the proceedings of commis-

40. Faucher *v.* Tutewiller, 76 Ill. 194.

41. Nesselroad *v.* Parrish, 52 Iowa 269, 3 N. W. 45.

42. Townsend *v.* Radcliffe, 63 Ill. 9.

43. **If the statute does not provide for notifying** the parties, notice is not jurisdictional. Nesselroad *v.* Parrish, 52 Iowa 269, 3 N. W. 45. See also Neary *v.* Jones, 89 Iowa 556, 56 N. W. 675.

44. Phillips *v.* Chapman, 78 Ga. 163, 1 S. E. 427; Williams *v.* Atkinson, 152 Ind. 98, 52 N. E. 603; Davis *v.* Howell, 47 N. J. L. 280; State *v.* Ford, 1 N. J. L. 64; Barnes *v.* Brown, (Tenn. Ch. 1898) 48 S. W. 326.

Upon attorney of absent party.— In an action involving a boundary, a report of survey cannot be objected to on the ground that notice of the survey was not given to the attorney of defendant, although the latter had removed from the state, as it is not the duty of the attorney to concern himself with anything relating to the survey. Bowling *v.* Helm, 1 Bibb (Ky.) 88.

Of adjournment.— On a proceeding to procession land, if the ten days' written notice, required by Ga. Code, § 2385, of the time fixed for marking the line is given, such marking may, upon the day appointed, be postponed for cause, upon actual notice, verbal or written, given to the adverse party. Phillips *v.* Chapman, 78 Ga. 163, 1 S. E. 427.

45. Johnson *v.* Norton, 3 B. Mon. (Ky.) 429; Miller *v.* Heart, 26 N. C. 23.

46. **For forms** of reports of commissioners or processioners see Post *v.* Williams, 33 Conn. 147; Miller *v.* Heart, 26 N. C. 23.

47. *Connecticut.*— Post *v.* Williams, 33 Conn. 147, where it was held that they are not required to report all the facts on which they found their conclusions as to the true boundaries, but that it is sufficient to report the conclusions of fact as to the boundary itself.

Georgia.— Watson *v.* Bishop, 69 Ga. 51. See also Rattaree *v.* Morrow, 71 Ga. 578.

Louisiana.— Lindsay *v.* Wright, 27 La. Ann. 565 (where it was held that it must affirmatively appear that the surveyors gave the owners notice in writing, to enable them to attend and witness the survey); Union Bank *v.* Guillotte, 4 La. Ann. 382 (where it was held that where the plan annexed to a defective report is not in conformity with the titles the report should be rejected and a new survey ordered).

Maryland.— Lowes *v.* Holbrook, 1 Harr. & J. (Md.) 153, where it was held that it must appear that sufficient notice has been given to the parties interested.

North Carolina.— The report must show, not only that the lines between the parties are in dispute but also what the dispute is. Roberts *v.* Dickey, 110 N. C. 67, 14 S. E. 645; Euliss *v.* McAdams, 101 N. C. 391, 7 S. E. 725; Hoyle *v.* Wilson, 29 N. C. 466; Matthews *v.* Matthews, 26 N. C. 155; Carpenter *v.* Whitworth, 25 N. C. 204; Willson *v.* Shufford, 7 N. C. 504.

Texas.— See Westbrook *v.* Guderian, 3 Tex. Civ. App. 406, 22 S. W. 59, where it was held that where a surveyor appointed, in an action of trespass to try title, to survey the land and determine the true location of a boundary line that was in dispute, made a report in which he attempted to determine questions of fact and to gather up and report evidence it was proper to quash his report.

Virginia.— Bradford *v.* Bradford, Jeff. (Va.) 86, where it was held that the record must show that the parties were present.

England.— See Carbery *v.* Mansell, Vern. & S. 112.

See 8 Cent. Dig. tit. "Boundaries," § 259.

Signing report.— In a proceeding under the processioning act in North Carolina it is not necessary that the processioner should sign the report of the freeholders. It is sufficient if it appear affirmatively from the report that he was present participating with them. Britt *v.* Benton, 79 N. C. 177.

Exceptions to report.— The report of a surveyor appointed by the court, like that of a commissioner, should be excepted to and decided on before the hearing. Moredock *v.* Rawlings, 3 T. B. Mon. (Ky.) 73.

Right to jury trial.— Under the Illinois act of March 25, 1869, providing for the survey of lands to ascertain the boundaries by a commission to be appointed by the court on petition of any owner, an objection being filed to the report of the commission, the parties are entitled to a jury trial. Huston *v.* Atkins, 74 Ill. 474. See also Townsend *v.* Radcliffe, 63 Ill. 9.

48. Norwood *v.* Crawford, 114 N. C. 513, 19 S. E. 349.

sioners or processioners is regulated by the various statutes. As a rule, however, the court may adopt, reject, modify, or amend the report, or, in a proper case, order a new survey.[49]

f. Costs. In proceedings for establishing doubtful or disputed boundaries by commissioners or processioners the costs will be apportioned among the parties in interest in the absence of special circumstances.[50]

g. Effect — (I) *In General.* The effect of the determination of commissioners or processioners is dependent upon the provisions of the statutes under which they act. In some jurisdictions the determination is of *prima facie* weight only,[51] while in others it is conclusive.[52] Where the determination is confirmed judicially the parties are of course concluded.[53]

(II) *Persons Bound.* Only the parties to the proceeding to establish boundaries by processioning are bound by the determination of the commissioners.[54]

2. By Survey — a. In General. Both the national and state governments have enacted laws providing for the official survey of lands, and the proper

49. *Connecticut.*— Perry *v.* Pratt, 31 Conn. 433, where it was held that the court, acting as a court of equity, might dismiss the bill where the facts reported were not sufficient to justify a decree for the petitioner.

Georgia.—Amos *v.* Parker, 88 Ga. 754, 16 S. E. 200; Miller *v.* Medlock, 68 Ga. 822.

Illinois.—Atkins *v.* Huston, 106 Ill. 492 [*reversing* 5 Ill. App. 326].

Indiana.—Wingler *v.* Simpson, 93 Ind. 201.

Iowa.—Williams *v.* Tschantz, 88 Iowa 126, 55 N. W. 202; Doolittle *v.* Bailey, 85 Iowa 398, 52 N. W. 337; Yocum *v.* Haskins, 81 Iowa 436, 46 N. W. 1065; Mitchell *v.* Wilson, 70 Iowa 332, 30 N. W. 588; Cuthbertson *v.* Locke, 70 Iowa 49, 30 N. W. 13; Caldwell *v.* Nash, 68 Iowa 658, 27 N. W. 812; Coombs *v.* Quinn, 66 Iowa 469, 23 N. W. 928.

Kentucky.— McIntire *v.* Gettings, 15 B. Mon. (Ky.) 172, where it was held that the county court has no power to reject or confirm the report of processioners.

Pennsylvania.— Perot *v.* Packer, 2 Ashm. (Pa.) 155.

See 8 Cent. Dig. tit. "Boundaries," § 260.

50. *Illinois.*— Stevens *v.* Allman, 68 Ill. 245.

Iowa.— Neary *v.* Jones, 89 Iowa 556, 56 N. W. 675; Bohall *v.* Neiwalt, 75 Iowa 109, 39 N. W. 217.

Louisiana.—Tircuit *v.* Pelanne, 14 La. Ann. 215.

Massachusetts.—King, Petitioner, 129 Mass. 413.

England.— Morris *v.* Le Neve, 3 Atk. 82. *Compare* Metcalfe *v.* Beckwith, 2 P. Wms. 376.

See, generally, Costs.

Denial of necessity of proceeding.— Where defendant, in a proceeding to fix a boundary, denies the necessity of the action, costs follow judgment for plaintiff. Gaude *v.* Williams, 47 La. Ann. 1325, 17 So. 844.

51. *Georgia.*— Howland *v.* Brown, 92 Ga. 513, 17 S. E. 806.

Illinois.— Townsend *v.* Radcliffe, 63 Ill. 9.

Kentucky.— Warmoth *v.* Tobin, 6 Ky. L. Rep. 586.

Maine.— Magoon *v.* Davis, 84 Me. 178, 24 Atl. 809.

Massachusetts.— Breed *v.* Breed, 117 Mass. 593. *Compare* Harlow *v.* French, 9 Mass. 192.

See 8 Cent. Dig. tit. "Boundaries," § 263.

52. *Connecticut.*— Mosman *v.* Sanford, 52 Conn. 23.

Indiana.— Herbst *v.* Smith, 71 Ind. 44. *Compare* Cleveland *v.* Obenchain, 107 Ind. 591, 8 N. E. 624.

Louisiana.— Williams *v.* Bernstein, 51 La. Ann. 115, 25 So. 411; Daniels *v.* Hall, 22 La. Ann. 532.

Maryland.— Crow *v.* Scott, 1 Harr. & M. (Md.) 182.

Missouri.— Allen *v.* Hickan, 156 Mo. 49, 56 S. W. 309.

North Carolina.— Hoyle *v.* Wilson, 29 N. C. 466.

Pennsylvania.—Godshall *v.* Mariam, 1 Binn. (Pa.) 352.

Tennessee.— Overton *v.* Cannon, 2 Humphr. (Tenn.) 264; Whiteside *v.* Singleton, 1 Meigs (Tenn.) 207; Singleton *v.* Whiteside, 5 Yerg. (Tenn.) 18; McKean *v.* Tait, 1 Overt. (Tenn.) 199.

Vermont.— Hull *v.* Fuller, 7 Vt. 100.

See 8 Cent. Dig. tit. "Boundaries," § 263.

53. Howland *v.* Brown, 92 Ga. 513, 17 S. E. 806; Ellis *v.* Whan, 91 Ill. 77; State *v.* Beckman, 58 N. H. 399.

54. *Indiana.*— Brown *v.* Anderson, 90 Ind. 93.

Kentucky.—Liter *v.* Sherley, 18 Ky. L. Rep. 107, 35 S. W. 550.

Maine.—Whitcomb *v.* Dutton, 89 Me. 212, 36 Atl. 67.

Missouri.— St. Louis *v.* Meyer, 13 Mo. App. 367.

North Carolina.— Miller *v.* Heart, 26 N. C. 23.

Tennessee.— Overton *v.* Cannon, 2 Humphr. (Tenn.) 264.

See 8 Cent. Dig. tit. "Boundaries," § 262.

Proof of authority.— In order to bind a person by a processional survey an authority from such person to the surveyor to make such survey must be proved, and in the absence of proof the law presumes that it is unauthorized. Overton *v.* Cannon, 2 Humphr. (Tenn.) 264.

preservation and recording of such surveys. Such laws, however, do not preclude the establishment of boundaries by unofficial surveys.[55]

b. What Constitutes. It is the acts done on the ground by the surveyor in pursuance of lawful authority which constitute the survey. The certificate or plat made by him thereafter may be corrected for fraud or mistake.[56]

c. Rights, Powers, and Duties of Surveyor — (i) *In General.* The public surveyor cannot procession and re-mark land without the owner's consent,[57] which may be impliedly withdrawn.[58] He has no authority outside of the limits of his jurisdiction,[59] and where he is appointed for a particular purpose his authority ceases upon its accomplishment.[60] In the discharge of his official duties he is not subject to equitable control,[61] and is presumed to have knowledge of the art of surveying.[62]

(ii) *Method of Making Survey.* In the case of government surveys specific rules as to the manner in which they shall be made have been enacted by congress[63] which should be followed in those states in which the lands were originally so laid off.[64] As a rule, however, the survey should be actually run and marked on the ground,[65] and where a new line is run by courses and distances the plat and field-notes should show the magnetic variation from the true meridian.[66] Allowance should be made for a variation in the base line in running the other lines.[67]

(iii) *Fees.* The fees of public surveyors are fixed by law,[68] and when improperly charged and received may be recovered by action.[69]

55. Buisson *v.* Grant, 4 Rob. (La.) 360.

Private surveys see *supra*, III, A, 6.

56. Slayden *v.* Boswell, 1 Bush (Ky.) 421; Wallace *v.* Maxwell, 1 J. J. Marsh. (Ky.) 447; Gratz *v.* Hoover, 16 Pa. St. 232.

57. Whiteside *v.* Singleton, 1 Meigs (Tenn.) 207.

58. Overton *v.* Cannon, 2 Humphr. (Tenn.) 264.

59. Hammond *v.* Ridgely, 5 Harr. & J. (Md.) 245, 9 Am. Dec. 522; Cox *v.* Houston, etc., R. Co., 68 Tex. 226, 4 S. W. 455.

Consolidation of districts.— A line made as a district line dividing two deputy surveyors' districts is legally obliterated after the union of the districts, and the deputy surveyor of the new district is not bound to notice it in making surveys. Darrah *v.* Bryant, 56 Pa. St. 69.

60. Jackson *v.* Cole, 16 Johns. (N. Y.) 257.

61. Fussell *v.* Hughes, 113 U. S. 565, 5 S. Ct. 639, 28 L. ed. 998; Fussell *v.* Griegg, 113 U. S. 550, 5 S. Ct. 631, 28 L. ed. 993.

62. Ashe *v.* Lanham, 5 Ind. 434.

63. U. S. Rev. Stat. (1872), § 2395.

64. Fugate *v.* Smith, 4 Colo. App. 201, 35 Pac. 283; Gerke *v.* Lucas, 92 Iowa 79, 60 N. W. 538; Newman *v* Foster, 3 How. (Miss.) 383, 34 Am. Dec. 98; Randall *v.* Burk Tp., 9 S. D. 534, 70 N. W. 837.

65. Lambourn *v.* Hartswick, 13 Serg. & R. (Pa.) 113. See also Covert *v.* Irwin, 3 Serg. & R. (Pa.) 283, where it was held unnecessary to re-mark the trees upon a resurvey of an old tract.

Adoption of earlier survey.— Where a surveyor had a short time previously made a survey of the tract which he was directed to survey, it was held that a resurvey was unnecessary, but that he might adopt the survey already made by him. Ayers *v.* Harris, 77 Tex. 108, 13 S. W. 768. Hence a chamber survey is not *ipso facto* a void act, but if it is made by the adoption of the line of older surveys, made under authority of law, to the same extent that is necessary to make a good survey on the ground, it is as valid as though done by running and marking the lines afresh. Packer *v.* Schrader Min., etc., Co., 97 Pa. St. 379; Glass *v.* Gilbert, 58 Pa. St. 266; Parshall *v.* Jones, 55 Pa. St. 153. See also Quin *v.* Brady, 8 Watts & S. (Pa.) 139.

The ascertainment of any one corner is sufficient in making a resurvey, where the courses and distances are given; and in order to ascertain a corner the surveyor is not confined to the discovery of the landmarks called for in the field-notes, but may resort to other aids. Reinert *v.* Brunt, 42 Kan. 43, 21 Pac. 807; De Leon *v.* White, 9 Tex. 598.

Throwing off lines for quantity.— A surveyor may, by protraction in making out his plat and certificate, throw off lines to make the proper quantity. In such case the court will not pursue the marked lines over the land excluded and protracted off. Bishop *v.* Arnold, Peck (Tenn.) 366. See also Mineral R., etc., Co. *v.* Auten, 188 Pa. St. 568, 43 Wkly. Notes Cas. (Pa.) 158, 41 Atl. 327.

Where a division line strikes the bend of a river the surveyor may go around the bend and continue his line at a point on the river directly in the course of the line he was running, so as to obtain the proper quantity. Tucker *v.* Smith, 68 Tex. 473, 3 S. W. 671.

66. Kincaid *v.* Dormey, 47 Mo. 337.

67. Gilchrist *v.* McGee, 9 Yerg. (Tenn.) 455.

68. Swoope *v.* Moody, 73 Miss. 82, 18 So. 799; Com. *v.* Close, 2 Phila. (Pa.) 187, 13 Leg. Int. (Pa.) 364.

69. State *v.* Keller, 11 Lea (Tenn.) 399; Hays *v.* Stewart, 8 Tex. 358.

d. Effect — (I) *In General.* Unless so declared by statute[70] a survey is not to be deemed conclusive because made by an official surveyor;[71] but government surveys are conclusively presumed to be mathematically true as to the lines run and marked, the corners established, and the contents returned,[72] and in the case of other official surveys there is a *prima facie* presumption in favor of their correctness and regularity.[73]

(II) *Where Acquiesced In.* Long acquiescence in a line run by an official surveyor will conclude the parties,[74] but no agreement or acquiescence between the parties fixing a division line can have any effect upon the true boundary, where the line in dispute has been created by an original survey under governmental authority.[75]

e. Review. In Indiana an appeal lies to the circuit court within three years from the action of the county surveyor establishing boundaries.[76] Similarly, in Kansas an owner of land affected by a survey made by the county surveyor, on publication, may come in and apply to open the judgment and defend within three years after the judgment is entered.[77]

70. *Alabama.*—Billingsley *v.* Bates, 30 Ala. 376, 68 Am. Dec. 126; Nolin *v.* Parmer, 21 Ala. 66; Minge *v.* Smith, 1 Ala. 415.

California.— Gallagher *v.* Riley, 49 Cal. 473.

Florida.— Miller *v.* White, 23 Fla. 301, 2 So. 614; Giddon *v.* Hodnett, 22 Fla. 442.

Indiana.— Sinn *v.* King, 131 Ind. 183, 31 N. E. 48; Russell *v.* Senior, 118 Ind. 520, 21 N. E. 292; Waltman *v.* Rund, 109 Ind. 366, 10 N. E. 117; Hunter *v.* Eichel, 100 Ind. 463; Grover *v.* Paddock, 84 Ind. 244. *Compare* Spacy *v.* Evans, 152 Ind. 431, 52 N. E. 605; Williams *v.* Atkinson, 152 Ind. 98, 52 N. E. 603.

Louisiana.— Wells *v.* Caldwell, 23 La. Ann. 607; Lawrence *v.* Burris, 13 La. Ann. 611.

Mississippi.— May *v.* Baskin, 12 Sm. & M. (Miss.) 428.

Missouri.— Granby Min., etc., Co. *v.* Davis, 156 Mo. 422, 57 S. W. 126.

Montana.— Neill *v.* Jordan, 15 Mont. 47, 38 Pac. 223.

United States.— Greer *v.* Mezes, 24 How. (U. S.) 268, 16 L. ed. 661.

See 8 Cent. Dig. tit. "Boundaries," § 272.

71. *Arkansas.*— Smith *v.* Leach, 44 Ark. 287.

Iowa.— Strait *v.* Cook, 46 Iowa 57.

Kansas.—See Schwab *v.* Stoneback, 49 Kan. 607, 31 Pac. 142, where the survey was held inconclusive because the provisions of the statute (Kan. Gen. Stat. (1889), par. 1836) had not been strictly complied with.

Kentucky.— Mercer *v.* Bate, 4 J. J. Marsh. (Ky.) 334; Heffington *v.* White, 1 Bibb (Ky.) 115.

North Carolina.— Addington *v.* Jones, 52 N. C. 582.

Texas.— Bass *v.* Mitchell, 22 Tex. 285.

United States.— Conn *v.* Penn, Pet. C. C. (U. S.) 496, 6 Fed. Cas. No. 3,104.

See 8 Cent. Dig. tit. "Boundaries," § 272.

72. Lewen *v.* Smith, 7 Port. (Ala.) 428; Breen *v.* Donnelly, 74 Cal. 301, 15 Pac. 845; U. S. Rev. Stat. (1872), § 2396. See also *supra*, II, B, 2, b.

73. *Indiana.*— Ashe *v.* Lanham, 5 Ind. 434.

Iowa.— Strait *v.* Cook, 46 Iowa 57.

Kentucky.— Mercer *v.* Bate, 4 J. J. Marsh. (Ky.) 334; Carson *v.* Hanway, 3 Bibb (Ky.) 160.

Pennsylvania.— Bellas *v.* Cleaver, 40 Pa. St. 260.

South Dakota.— Webster *v.* White, 8 S. D. 479, 66 N. W. 1145; Hanson *v.* Red Rock Tp., 4 S. D. 358, 57 N. W. 11; Arneson *v.* Spawn, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783.

Tennessee.— White *v.* Hembree, 1 Overt. (Tenn.) 529.

Texas.— Cox *v.* Houston, etc., R. Co., 68 Tex. 226, 4 S. W. 455.

Contra, Hess *v.* Meyer, 73 Mich. 259, 41 N. W. 422.

See 8 Cent. Dig. tit. "Boundaries," § 274.

Presumption of recording.— Where the law requires a survey to be recorded within three months after it is made, it will be presumed to be of record after that time, and a call for it in another entry will render the description in the certificate a part of the description in the adjoining entry. Carson *v.* Hanway, 3 Bibb (Ky.) 160.

Waiver.— The conclusive effect of a survey establishing a boundary between adjoining owners made pursuant to statute may be waived by the parties by agreement or by a new survey. Spacy *v.* Evans, (Ind. 1897) 48 N. E. 355.

74. Diehl *v.* Zanger, 39 Mich. 601; Benson *v.* Daly, 38 Nebr. 155, 56 N. W. 788; Nieman *v.* Ward, 1 Watts & S. (Pa.) 68.

75. Houghs *v.* Wheeler, 76 Cal. 230, 18 Pac. 386. But see Yates *v.* Shaw, 24 Ill. 367.

76. No pleadings are necessary, the appeal being triable in the same manner as an appeal from a justice of the peace. Cleveland *v.* Obenchain, 89 Ind. 274.

Evidence.—It is competent to prove acts of the landowners fixing the boundaries or creating an estoppel. Horton *v.* Brown, 130 Ind. 113, 29 N. E. 414; Cleveland *v.* Obenchain, 89 Ind. 274. The onus lies on the party appealing to show that the survey is incorrect. Findley *v.* McCormick, 50 Ind. 19.

77. Lackey *v.* Wilson, (Kan. 1901) 64 Pac. 978, construing Kansas Civ. Code, § 77.

C. By Judicial Proceedings — 1. In General — a. Right of Action. The right of action to establish boundaries is in the owner of the land,[78] and the action lies, not only when two contiguous estates have never been separated, and the limits determined, but also when the bounds, although once properly fixed, have become confused or obliterated.[79] The action may also be maintained where the deed of one tract which was granted out of a larger tract does not ascertain the boundaries of the land conveyed, but merely gives a description by which they may be ascertained, and where the owner of the other tract will not permit the line to be run.[80] Where, however, a division line has been already run and marked by the parties or their privies, a suit cannot be maintained to have such line run;[81] and if, in the course of the trial, the parties litigant fail to establish title to contiguous tracts or bodies of land, the action will be dismissed.[82]

b. Defenses — (I) *Adverse Possession.* In an action to determine a boundary it is ordinarily a good defense that defendant has by adverse possession acquired title to the land in dispute,[83] but this defense cannot be made in a statutory proceeding to establish a lost government corner.[84]

(II) *Judicial or Statutory Settlement.* An action of boundary may be repelled by showing that the boundary between the two properties had been settled by judicial decree or by a survey made by a surveyor in conformity to statutory requirements.[85]

2. Jurisdiction — a. In General. Jurisdiction to determine questions of disputed boundary rests in the courts[86] of the jurisdiction where the land lies;[87] and

78. Dickinson County *v.* Fouse, 112 Iowa 21, 83 N. W. 804; Durst *v.* Amyx, 12 Ky. L. Rep. 246, 13 S. W. 1087; Booth *v.* Buras, 104 La. 614, 29 So. 260; Cushing *v.* Miller, 62 N. H. 517.

In Louisiana an action of boundary may be brought by the owner, or by any one in possession of the land as owner. Sprigg *v.* Hooper, 9 Rob. (La.) 248.

A tenant in common in possession may, in a case where equity has jurisdiction, maintain a bill against the owner of adjoining lines to establish the boundaries. Cushing *v.* Miller, 62 N. H. 517.

It is not a misjoinder of parties plaintiff or of causes of action, in a proceeding to establish section corners, to join as plaintiffs owners within the section interested in the southwest corner only, with owners interested in the northwest corner only. Rollins *v.* Davidson, 84 Iowa 237, 50 N. W. 1061.

79. Andrews *v.* Knox, 10 La. Ann. 604; Zeringue *v.* Harang, 17 La. 349.

80. George *v.* Thomas, 16 Tex. 74, 67 Am. Dec. 612, such a suit being in the nature of a suit for specific performance.

81. George *v.* Thomas, 16 Tex. 74, 67 Am. Dec. 612.

82. Booth *v.* Buras, 104 La. 614, 29 So. 260.

83. Stadin *v.* Helin, 76 Minn. 496, 79 N. W. 537, 602.

In Louisiana an action of boundary pure and simple is imprescriptible, although an action for a rectification of boundaries is not. Williams *v.* Bernstein, 51 La. Ann. 115, 25 So. 411.

84. Mitchell *v.* Wilson, 70 Iowa 332, 30 N. W. 588.

85. Williams *v.* Bernstein, 51 La. Ann. 115, 25 So. 411.

86. **A city council** has no jurisdiction to establish boundaries, or to fix rules of evidence in relation thereto. Oreña *v.* Santa Barbara, 91 Cal. 621, 28 Pac. 268.

Fence-viewers have no official authority to establish disputed boundary lines, and their action in so doing amounts merely to an oral submission or parol contract, and is not conclusive unless followed by acquiescence for fifteen years. Camp *v.* Camp, 59 Vt. 667, 10 Atl. 748. See also Boyd *v.* Shoop, 107 Iowa 10, 77 N. W. 482, construing Iowa Code (1873), §§ 1490–1492.

The general court, as the law stood in Kentucky in 1807, might take jurisdiction by consent of parties, when the bounds of land came in question. Madison *v.* Wallace, 2 J. J. Marsh. (Ky.) 581.

87. **Land claimed under United States.**— The state courts have jurisdiction, although both parties claim under the United States. Sprigg *v.* Hooper, 9 Rob. (La.) 248.

Land not within any county.— Jurisdiction for surveying purposes over land which is not within any county, but which was included in the land district of a county that has become disorganized is conferred by an act attaching the disorganized county to an adjoining county for "judicial and other purposes." Kimmarle *v.* Houston, etc., R. Co., 76 Tex. 686, 12 S. W. 698.

Part of land in another county.— It is immaterial that some of the land to be affected lies in another county than that in which the proceeding is brought. Tooman *v.* Hidlebaugh, 83 Iowa 130, 49 N. W. 79.

By consent of parties the district court may take and exercise jurisdiction on a question of boundary of land in another county than that in which the land lies. Thompson *v.* Alford, 20 Tex. 491.

such a question does not involve the title to real estate,[88] although the court may examine the titles for the purpose of fixing the boundaries.[89] Where the amount involved becomes important as a test of jurisdiction, the value of the strip in dispute, and not the value of either or both of the adjacent estates, is the criterion.[90]

b. Of Courts of Law. Unless some special ground for equitable interference is shown[91] courts of law are the proper tribunals for the establishment of disputed boundaries;[92] but a court of law can render judgment establishing a boundary only when damages or possession are sought in the same action.[93]

c. Of Courts of Equity. The mere fact that a boundary line is in dispute is not of itself sufficient to confer jurisdiction on a court of equity, but there must be some additional ground of distinct equity jurisdiction;[94] and even where facts are averred which would authorize the interference of a court of equity to estab-

88. Evens, etc., Brick Co. *v.* St. Louis Smelting, etc., Co., 48 Mo. App. 636. See also Hammontree *v.* Huber, 39 Mo. App. 326.

89. Sprigg *v.* Hooper, 9 Rob. (La.) 248.

90. State *v.* Lapeyrollerie, 38 La. Ann. 264.

91. See *infra*, III, C, 2, c.

92. *Nebraska.*— Kittell *v.* Jenssen, 37 Nebr. 685, 56 N. W. 487.

New Jersey.— Higbee *v.* Camden, etc., R., etc., Co., 20 N. J. Eq. 435.

Oregon.— Lewis *v.* Lewis, 4 Oreg. 177.

Pennsylvania.— Norris' Appeal, 64 Pa. St. 275.

Virginia.— Lange *v.* Jones, 5 Leigh (Va.) 192.

United States.— Conn *v.* Penn, Pet. C. C. (U. S.) 496, 6 Fed. Cas. No. 3,104.

See 8 Cent. Dig. tit. "Boundaries," § 140.

Correction of mistakes.— When the mistakes of a surveyor are shown by satisfactory proof, courts of law as well as courts of equity look beyond the patent to correct them. Conn *v.* Penn, Pet. C. C. (U. S.) 496, 6 Fed. Cas. No. 3,104.

93. Scott *v.* Means, 80 Ky. 460, 4 Ky. L. Rep. 298.

94. *Alabama.*— Guice *v.* Barr, 130 Ala. 570, 30 So. 563; Ashurst *v.* McKenzie, 92 Ala. 484, 9 So. 262.

California.— Beatty *v.* Dixon, 56 Cal. 619; Wetherbee *v.* Dunn, 36 Cal. 249.

Connecticut.—Wolcott *v.* Robbins, 26 Conn. 236. See also Perry *v.* Pratt, 31 Conn. 433.

Florida.— Pendry *v.* Wright, 20 Fla. 828; Doggett *v.* Hart, 5 Fla. 215, 58 Am. Dec. 464.

Kentucky.— Walker *v.* Leslie, 90 Ky. 642, 12 Ky. L. Rep. 581, 14 S. W. 682; Scott *v.* Means, 80 Ky. 460, 4 Ky. L. Rep. 298; Fraley *v.* Peters, 12 Bush (Ky.) 469; McMillin *v.* McMillin, 7 T. B. Mon. (Ky.) 560; Harrod *v.* Cowan, Hard. (Ky.) 542.

Maine.— Haskell *v.* Allen, 23 Me. 448.

Michigan.— Bresler *v.* Pitts, 58 Mich. 347, 25 N. W. 311; Kilgannon *v.* Jenkinson, 51 Mich. 240, 16 N. W. 390.

Nevada.— Humboldt County *v.* Lander County, 22 Nev. 248, 38 Pac. 578, 58 Am. St. Rep. 750, 26 L. R. A. 749.

New Jersey.— Higbee *v.* Camden, etc., R., etc., Co., 20 N. J. Eq. 435; Dickerson *v.* Stoll, 8 N. J. Eq. 294.

New York.— Boyd *v.* Dowie, 65 Barb. (N. Y.) 237.

North Carolina.— Merriman *v.* Russell, 55 N. C. 470; Hough *v.* Martin, 22 N. C. 379, 34 Am. Dec. 403.

Ohio.— Wolfe *v.* Scarborough, 2 Ohio St. 361.

Oregon.— School Dist. No. 70 *v.* Price, 23 Oreg. 294, 31 Pac. 657; Dice *v.* McCauley, 22 Oreg. 456, 30 Pac. 160; Love *v.* Morrill, 19 Oreg. 545, 24 Pac. 916. See also Miner *v.* Caples, 23 Oreg. 303, 31 Pac. 655; King *v.* Brigham, 23 Oreg. 262, 31 Pac. 601, 18 L. R. A. 361.

Pennsylvania.— Tillmes *v.* Marsh, 67 Pa. St. 507, Norris' Appeal, 64 Pa. St. 275; McDonald *v.* Bromley, 6 Phila. (Pa.) 302, 24 Leg. Int. (Pa.) 157.

Rhode Island.— Aborn *v.* Smith, 11 R. I. 594. See also Washington Co. *v.* Matteson, 11 R. I. 550.

Tennessee.— Topp *v.* Williams, 7 Humphr. (Tenn.) 569; Hale *v.* Darter, 5 Humphr. (Tenn.) 78.

Texas.— Nye *v.* Hawkins, 65 Tex. 600.

Virginia.— Robinson *v.* Moses, (Va. 1899) 34 S. E. 48; Collins *v.* Sutton, 94 Va. 127, 26 S. E. 415; Lange *v.* Jones, 5 Leigh (Va.) 192; Stuart *v.* Coalter, 4 Rand. (Va.) 74, 15 Am. Dec. 731.

West Virginia.— Watson *v.* Ferrell, 34 W. Va. 406, 12 S. E. 724; Cresap *v.* Kemble, 26 W. Va. 603; Hill *v.* Proctor, 10 W. Va. 59.

England.— St. Luke *v.* St. Leonard, 2 Anstr. 395, 1 Bro. C. C. 40, Dick. 550; Atkins *v.* Hatton, 2 Anstr. 386; Wake *v.* Conyers, 2 Cox Ch. 362, 1 Eden 331; Chapman *v.* Spencer, 2 Eq. Cas. Abr. 163; Miller *v.* Warmington, 1 Jac. & W. 484, 21 Rev. Rep. 217; Willis *v.* Parkinson, 2 Meriv. 507, 1 Swanst. 9 (a consent decree); Speer *v.* Crawter, 2 Meriv. 410, 16 Rev. Rep. 191; Metcalfe *v.* Beckwith, 2 P. Wms. 376; Grierson *v.* Eyre, 9 Ves. Jr. 341; Aston *v.* Exeter, 6 Ves. Jr. 288; Leeds *v.* Strafford, 4 Ves. Jr. 180; Strode *v.* Blackburne, 3 Ves. Jr. 222; Atty.-Gen. *v.* Fullerton, 2 Ves. & B. 263, 13 Rev. Rep. 76. See also Shovel *v.* Bogan, 2 Eq. Cas. Abr. 688; O'Hara *v.* Strange, 11 Ir. Eq. 262.

See 8 Cent. Dig. tit. "Boundaries," § 139.

Grounds of equity jurisdiction see EQUITY.

Confusion of boundaries.— Where a millrace was conveyed and afterward filled up and plowed over by one who had acquired an interest in the land, a court of equity took

lish a disputed boundary that relief will not be granted when complainant is already in possession of the land.[95]

3. Conditions Precedent. Without proper service of process the court does not acquire jurisdiction over defendant in a proceeding to establish boundaries,[96] and where service is had by publication the record must show the facts rendering such service necessary.[97] It is not necessary for the court to first determine whether there is in fact a lost or uncertain boundary.[98]

4. Parties. The owners of the adjoining lands and all persons having a direct interest in the result of a proceeding to establish boundaries should be made parties,[99] but a defendant cannot, under an allegation that if the boundary claimed by plaintiff be established his own will be so altered as to include land held by third persons, have the latter made parties to the suit.[1]

5. Pleadings — a. Complaint, Declaration, Petition, or Bill. The complaint, declaration, petition, or bill in a proceeding to establish boundaries must state the facts in dispute sufficiently to enable the court to determine the nature of the controversy,[2] and to show the jurisdiction of the court.[3] Exceptions for insuffi-

jurisdiction and granted relief, "under a well-settled head of equity jurisdiction — confusion of boundaries." Merriman *v.* Russell, 55 N. C. 470. But there is no "confusion of boundaries" such as to give jurisdiction in equity of a suit to settle boundary lines where the question presented is a mere naked question of title, and the fact that the bill charges fraud in attempting to establish a line other than the true line does not give jurisdiction. Pendry *v.* Wright, 20 Fla. 828.

Correction of mistake.— A mistake in the call for a boundary may be corrected in equity, where the instrument on its face, as well as the situation of the land, furnishes the correction. McMillin *v.* McMillin, 7 T. B. Mon. (Ky.) 560. But a trivial mistake in running the dividing line between two persons in making their original surveys, no fraud being alleged, is not a cause for altering that line after patents have issued on those surveys, and the party can have no relief in equity. Harrod *v.* Cowan, Hard. (Ky.) 542.

Equity will not enjoin a party from building over an alleged line, where the true location of the line is in dispute. McDonald *v.* Bromley, 6 Phila. (Pa.) 302, 24 Leg. Int. (Pa.) 157. But where a boundary has been uniformly established by various judgments rendered through a considerable time, a court of equity will enjoin its assailants from harassing, by a suit at law, those asserting it, even though such judgments did not relate to the same pieces of ground, provided they were between the same parties or their privies in estate. Primm *v.* Raboteau, 56 Mo. 407.

95. Ashurst *v.* McKenzie, 92 Ala. 484, 9 So. 262; Wilson *v.* Hart, 98 Mo. 618, 12 S. W. 294.

96. Lee *v.* Fox, 89 Ill. 226.

97. Nesselroad *v.* Parrish, 52 Iowa 269, 3 N. W. 45.

98. West Hartford Ecclesiastical Soc. *v.* West Hartford First Baptist Church, 35 Conn. 117.

99. Rollins *v.* Davidson, 84 Iowa 237, 50 N. W. 1061; Durst *v.* Amyx, 12 Ky. L. Rep. 246, 13 S. W. 1087; Blanc *v.* Cousin, 8 La. Ann. 71; Sprigg *v.* Hooper, 9 Rob. (La.) 248.

Parties plaintiff see *supra*, III, C, 1, a.

Change to petitory action.— When, by the act of defendant and the acquiescence of plaintiff, an action of boundary is changed into a petitory action, defendant in the original suit becomes plaintiff in the petitory action. Blanc *v.* Cousin, 8 La. Ann. 71.

1. Duplessis *v.* Lastrapes, 11 Rob. (La.) 451.

2. Smith *v.* Scoles, 65 Iowa 733, 23 N. W. 146; Andrews *v.* Knox, 10 La. Ann. 604.

Color of title.— It is not necessary to allege that plaintiff has held under color of title, where facts are stated which sufficiently show that he has so held. Burr *v.* Smith, 152 Ind. 469, 53 N. E. 469.

Demand on defendant.—Where a complaint fails to allege that defendant was ever requested to establish boundary lines it is not good for that purpose. Morgan *v.* Lake Shore, etc., R. Co., 130 Ind. 101, 28 N. E. 548.

Description of land.— In boundary cases plaintiff should set out the land in dispute by metes and bounds (Edwards *v.* Smith, 71 Tex. 156, 9 S. W. 77), but it is no objection to a prayer for an order of survey that the land to be surveyed is indefinite (Andrews *v.* Knox, 10 La. Ann. 604).

Injury sustained.— In an action of boundary it is not necessary to aver what injury plaintiff has sustained, or is likely to sustain, by reason of the alleged refusal of defendant to permit the line to be run. George *v.* Thomas, 16 Tex. 74, 67 Am. Dec. 612, where it was held that this was a matter of which the court might judicially take notice.

Plaintiff's ownership.— A complaint to restrain an adjoining owner from encroaching on land must allege plaintiff's ownership of the land. Burr *v.* Smith, 152 Ind. 469, 53 N. E. 469.

3. Scott *v.* Means, 80 Ky. 460, 4 Ky. L. Rep. 298, where, in an action in equity for the purpose of ascertaining the boundary and quieting the title to certain lands which plaintiff alleged belonged to him, it was held

ciency of the allegations as to the matters in controversy may be interposed as in any other case.[4]

b. Answer. In a proceeding to permanently locate a disputed line or corner an answer may be interposed as in any other case.[5]

6. Evidence — a. Burden of Proof and Presumptions — (I) *Burden of Proof* — (A) *In General.* As a rule the burden of proof in proceedings to ascertain and establish boundaries is on plaintiff or claimant,[6] but by the interposition of a substantive claim of right by defendant the burden may be shifted to him.[7]

(B) *As to Agreement Settling Boundary.* A party setting up an agreement settling the boundary line between adjacent tracts must prove affirmatively the agreement relied on.[8]

(C) *As to Monuments.* The burden of proof to establish particular objects as the monuments called for in a grant or other conveyance, or to show that an ascertained monument is incorrect rests upon the party asserting that fact.[9]

(D) *As to Surveys.* One claiming under a survey, or disputing the accuracy of a survey, has the burden of proving the truth of his contention.[10]

that the petition did not state a cause of action within the equitable jurisdiction of the court, where it merely alleged that defendant had trespassed on plaintiff's land and slandered his title, and prayed an injunction against further trespass and that the lines be made definite and certain and plaintiff quieted in his title and possession.

4. Harrah *v.* Conley, 82 Ill. 48.

5. Harrah *v.* Conley, 82 Ill. 48.

Affidavit treated as answer.— In North Carolina, in a proceeding to establish a boundary under N. C. Laws (1893), c. 22, which requires the answer to contain only a denial of the line set out in the petition, an affidavit entitled in the cause, and making such denial will be treated as an answer, none other having been filed, although its original purpose was to procure time to answer, it being desired to make a survey and incorporate the results in the answer. Scott *v.* Kellum, 117 N. C. 664, 23 S. E. 180.

6. *Florida.*— Seymour *v.* Creswell, 18 Fla. 29.

Indiana.— Bennett *v.* Simon, 152 Ind. 490, 53 N. E. 649.

Maine.— Black *v.* Grant, 50 Me. 364.

Maryland.— Wood *v.* Ramsey, 71 Md. 9, 17 Atl. 563; Boreing *v.* Singery, 4 Harr. & M. (Md.) 398.

New York.— Matter of Brooklyn, 73 N. Y. 179.

Tennessee.— Clay *v.* Sloan, 104 Tenn. 401, 58 S. W. 229.

Texas.— Dangerfield *v.* Paschal, 11 Tex. 579; Holland *v.* Thompson, 12 Tex. Civ. App. 471, 35 S. W. 19.

United States.— Whitney *v.* U. S., 167 U. S. 529, 17 S. Ct. 857, 42 L. ed. 263; Hays *v.* Steiger, 156 U. S. 387, 15 S. Ct. 412, 39 L. ed. 463; Hill *v.* Weir, 33 Fed. 100.

England.— Webb *v.* Banks, 2 Eq. Cas. Abr. 164; Godfrey *v.* Littel, 2 Russ. & M. 630, 31 Rev. Rep. 79, 11 Eng. Ch. 630.

See 8 Cent. Dig. tit. "Boundaries," § 149.

Denial that street is public highway.— The burden of proof is on one asserting it to show that a street called for as a boundary is not in fact a legal highway. Matter of Brooklyn, 73 N. Y. 179.

Identity of plan referred to.— Where a grantee, by his deed, if no plan had been mentioned therein, would have been entitled to a certain tract, one who seeks to diminish the quantity by the exhibition of a plan has the burden of proving it to be the plan referred to in the deed. Black *v.* Grant, 50 Me. 364.

Where claim is founded upon possession alone.— Plaintiffs relying upon the presumption of law of a valid title arising from possession alone must prove the boundaries of their claim or that it has been invaded by the other party, or they are not entitled to recover. Dangerfield *v.* Paschal, 11 Tex. 579.

7. Wyman *v.* Taylor, 124 N. C. 426, 32 S. E. 740; Henry *v.* Huff, 143 Pa. St. 548, 22 Atl. 1046; Buck *v.* Squiers, 22 Vt. 484.

8. Dashiel *v.* Harshman, 113 Iowa 283, 85 N. W. 85; Jones *v.* Pashby, 67 Mich. 459, 35 N. W. 152, 11 Am. St. Rep. 589; Archer *v.* Helm, 70 Miss. 874, 12 So. 702.

9. *Maine.*—Robinson *v.* White, 42 Me. 209.

Massachusetts.— Ashby *v.* Eastern R. Co., 5 Metc. (Mass.) 368, 38 Am. Dec. 426.

New York.— Demeyer *v.* Legg, 18 Barb. (N. Y.) 14.

Ohio.— Maddux *v.* West, 6 Ohio Dec. (Reprint) 1010, 9 Am. L. Rec. 484, 8 Ohio Dec. (Reprint) 126, 5 Cinc. L. Bul. 832.

Oregon.— Robinson *v.* Laurer, 27 Oreg. 315, 40 Pac. 1012.

Pennsylvania.— Henry *v.* Huff, 143 Pa. St. 548, 22 Atl. 1046; Wiggins *v.* Hunt, 6 Kulp (Pa.) 375.

See 8 Cent. Dig. tit. "Boundaries," § 150.

As to monument upon adjoining tract.— Where the call in a certificate of survey is to a tree as the beginning tree of another tract of land, the party need only prove it to be the tree called for, and is not obliged to prove that it is the beginning or other tree of the land of which it is described to be a boundary. Boreing *v.* Singery, 4 Harr. & M. (Md.) 398.

10. *Michigan.*— Smith *v.* Rich, 37 Mich. 549.

(II) *Presumptions* — (A) *In General.* All grants and conveyances are presumed to be made with reference to an actual view of the premises by the parties [11] and in proceedings to establish boundaries, it will be presumed that purchasers who have taken possession of and inclosed land according to bounds pointed out by the proprietor have done so according to the lines of the actual survey; [12] that the grantor of lands bounded by a highway owned to the center; [13] that boundaries once fixed continue, in the absence of intervening deeds fixing others; [14] that in partition an indivisible improvement lies wholly upon one side of the dividing line; [15] and that an unlocated section line is to be run according to statute.[16] On the other hand every presumption will be made against a party who has neglected to locate his patent for an unreasonable period of time,[17] and no presumption can arise from a mere claim without possession; [18] from the boundaries of adjacent tracts owned by the grantors, but unreferred to in a conveyance; [19] from a map not referred to; [20] from a mistake in one course that there is a mistake in another; [21] or as to the date of a mark upon a witness tree from the number of its subsequent concentric layers of wood; [22] and evidence that a certain improvement called for in an entry was known as the second improvement raises no presumption that it was generally known and reputed as such.[23]

(B) *As to Monuments.* Monuments called for [24] in an entry, patent, or conveyance will be presumed to have existed at the time of the execution of the instrument; [25] and where a monument actually existed at that time, such as a located highway,[26] that will be presumed to be the monument called for, although not located according to its survey.[27]

(C) *As to Surveys.* In the absence of proof to the contrary by marked lines, monuments, or other competent evidence, the lines of a survey will be presumed to have been run and the corners to have been established as returned; [28] and

Pennsylvania.— Kron *v.* Daugherty, 9 Pa. Super. Ct. 163.

Texas.—Worthington *v.* Baughman, 84 Tex. 480, 19 S. W. 770; Scott *v.* Pettigrew, 72 Tex. 321, 12 S. W. 161; Moore *v.* Stewart, (Tex. 1887) 7 S. W. 771; Schaeffer *v.* Berry, 62 Tex. 705.

Vermont.— Downer *v.* Tarbell, 61 Vt. 530, 17 Atl. 482; Beach *v.* Fay, 46 Vt. 337.

Virginia.— Greif *v.* Norfolk, etc., R. Co., (Va. 1898) 30 S. E. 438.

Washington.— Greer *v.* Squier, 9 Wash. 359, 37 Pac. 545.

See 8 Cent. Dig. tit. "Boundaries," § 152.

Vacancies between adjoining surveys.—The burden of proof is on one claiming a strip of land between two surveys calling for each other to show that there is a vacancy, and the mere fact that there is a slight excess in area in one or more of the surveys is not sufficient to show that fact. Moore *v.* Stewart, (Tex. 1887) 7 S. W. 771.

11. Schoonmaker *v.* Davis, 44 Barb. (N. Y.) 463; Wendell *v.* Jackson, 8 Wend. (N. Y.) 183, 22 Am. Dec. 635.

12. Root *v.* Cincinnati, 87 Iowa 202, 54 N. W. 206. See also Welton *v.* Poynter, 96 Wis. 346, 71 N. W. 597, where it was held that evidence of undisputed occupation and fencing, in accordance with a line of thirty years' standing, not only of the lands in controversy, but of other parcels in the immediate neighborhood, raises a presumption that it is the true line.

13. Jacksonville, etc., R. Co. *v.* Lockwood, 33 Fla. 573, 15 So. 327. See also *supra*, II, B, 8, a, (I), (A).

14. Van Blarcom *v.* Kip, 26 N. J. L. 351.

15. Lyons *v.* Dobbins, 26 La. Ann. 580. See also Riddell *v.* Jackson, 14 La. Ann. 135.

16. Hamil *v.* Carr, 21 Ohio St. 258.

17. Jackson *v.* Schoonmaker, 7 Johns. (N. Y.) 12.

18. Dancy *v.* Sugg, 19 N. C. 515.

19. Talbot *v.* Copeland, 38 Me. 333.

20. Haberman *v.* Baker, 128 N. Y. 253, 28 N. E. 370, 40 N. Y. St. 104, 13 L. R. A. 611.

21. Bryan *v.* Beckley, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276.

22. Patterson *v.* McCausland, 3 Bland (Md.) 69.

23. McClure *v.* Byne, 1 Bibb (Ky.) 56.

24. **A line not called for** in a grant may be presumed, where there is a marked corner at which said line might terminate, and a line agreeing with the grant extending from such corner. Jordan *v.* Payne, Peck (Tenn.) 319.

25. Carland *v.* Rowland, 3 Bibb (Ky.) 125; Green *v.* Watson, 1 Bibb (Ky.) 105; Washington Co. *v.* Matteson, 11 R. I. 550; Kuechler *v.* Wilson, 82 Tex. 638, 18 S. W. 317.

26. **Where the true boundary line of a highway is in controversy,** there is no presumption that the immediate line over which the chain was carried is the center of the highway. Cloud County *v.* Morgan, 7 Kan. App. 213, 52 Pac. 896.

27. Hoffman *v.* Port Huron, 102 Mich. 417, 60 N. W. 831.

28. *North Dakota.*— Radford *v.* Johnson, 8 N. D. 182, 77 N. W. 601.

Pennsylvania.—Salmon Creek Lumber, etc., Co. *v.* Dusenbury, 110 Pa. St. 446, 1 Atl. 635;

where the boundaries are indefinite and uncertain, if they are run out and marked by the owner, it will be presumed as against him that it was correctly done.[29] The presumption of correctness has no application, however, where both parties claim by lines and corners marked on the ground.[30]

b. Admissibility — (I) *In General* — (A) *Rule Stated.* Boundaries may be proved by every kind of evidence admissible to establish any other controverted fact.[31]

(B) *Hearsay* — (1) In General. Hearsay evidence as to boundaries is admissible when there has been so great a lapse of time as to render it difficult to prove the original boundary lines by the existence of the primitive landmarks.[32]

Packer *v.* Schrader Min., etc., Co., 97 Pa. St. 379; Glass *v.* Gilbert, 58 Pa. St. 266; Gratz *v.* Beates, 45 Pa. St. 495; Bellas *v.* Cleaver, 40 Pa. St. 260; Ormsby *v.* Ihmsen, 34 Pa. St. 462; Schnable *v.* Doughty, 3 Pa. St. 392; Norris *v.* Hamilton, 7 Watts (Pa.) 91.

Texas.—Worthington *v.* Baughman, 84 Tex. 480, 19 S. W. 770; Stanus *v.* Smith, 8 Tex. Civ. App. 685, 30 S. W. 262; Marshall *v.* Crawford, 2 Tex. Unrep. Cas. 477.

Vermont.— Beach *v.* Fay, 46 Vt. 337.

Washington.— Greer *v.* Squires, 9 Wash. 359, 37 Pac. 545.

United States.—Harris *v.* Burchan, 1 Wash. (U. S.) 191, 11 Fed. Cas. No. 1,617.

See 8 Cent. Dig. tit. "Boundaries," § 148.

Effect of lapse of time.— In Pennsylvania, after a survey has been returned more than twenty-one years, the presumption that it has been legally made is conclusive and cannot be contradicted. Ormsby *v.* Ihmsen, 34 Pa. St. 462. *Compare* Salmon Creek Lumber, etc., Co. *v.* Dusenbury, 110 Pa. St. 446, 1 Atl. 635, holding that after twenty-one years the presumption arises that the lines of a chamber survey were run as described in the official draft, but that this is merely a presumption and will not of itself control the actual calls of the survey.

Meridian used.—In Washington it has been held that, in the absence of proof to the contrary, it will be presumed that courses have been run according to the true meridian. Clark *v.* Tacoma Bldg., etc., Assoc., 2 Wash. 203, 26 Pac. 253; Reed *v.* Tacoma Bldg., etc., Assoc., 2 Wash. 198, 26 Pac. 252, 26 Am. St. Rep. 851.

29. Cunningham *v.* Roberson, 1 Swan (Tenn.) 138.

30. Keller *v.* Over, 136 Pa. St. 1, 26 Wkly. Notes Cas. (Pa.) 247, 20 Atl. 25, where it was held that in such a case the rule that after the lapse of twenty-one years there is a presumption that a survey was actually made as returned and located was not applicable.

31. *Connecticut.*— Harris *v.* Ansonia, 73 Conn. 359, 47 Atl. 672.

Kentucky.— Smith *v.* Nowells, 2 Litt. (Ky.) 159; Smith *v.* Prewit, 2 A. K. Marsh. (Ky.) 155.

Maine.— Chapman *v.* Twitchell, 37 Me. 59, 58 Am. Dec. 773.

Maryland.— Budd *v.* Brooke, 3 Gill (Md.) 198, 43 Am. Dec. 321; Helen *v.* Smith, 4 Harr. & M. (Md.) 389.

Michigan.— Hoffman *v.* Harrington, 44 Mich. 183, 6 N. W. 225; Twogood *v.* Hoyt, 42 Mich. 609, 4 N. W. 445.

Nebraska.— Morrison *v.* Neff, 18 Nebr. 133, 24 N. W. 555.

New Hampshire.—Andrews *v.* Todd, 50 N. H. 565; Gibson *v.* Poor, 21 N. H. 440, 53 Am. Dec. 216.

New Jersey.— Opdyke *v.* Stephens, 28 N. J. L. 83.

North Dakota.— Radford *v.* Johnson, 8 N. D. 182, 77 N. W. 601.

Ohio.— Lloyd *v.* Giddings, Wright (Ohio) 694.

Pennsylvania.— See Lilly *v.* Kitzmiller, 1 Yeates (Pa.) 28 (where it was held that evidence of an independent fact, not bearing upon the question of boundary, was inadmissible); Urket *v.* Corgell, 5 Watts & S. (Pa.) 60.

Texas.— Edwards *v.* Smith, 71 Tex. 156, 9 S. W. 77; Bartlett *v.* Hubert, 21 Tex. 8.

Wisconsin.— Lego *v.* Medley, 79 Wis. 211, 48 N. W. 375, 24 Am. St. Rep. 706.

United States.— Hedrick *v.* Hughes, 15 Wall. (U. S.) 123, 21 L. ed. 52.

England.— Brisco *v.* Lomax, 8 A. & E. 198, 2 Jur. 682, 7 L. J. Q. B. 148, 3 N. & P. 308, 1 W. W. & H. 235, 35 E. C. L. 551; Newcastle *v.* Broxtowe, 4 B. & Ad. 273, 2 L. J. M. C. 47, 1 N. & M. 598, 24 E. C. L. 126; Plaxton *v.* Dare, 10 B. & C. 17, 8 L. J. K. B. O. S. 98, 5 M. & R. 1, 21 E. C. L. 18; Waterpark *v.* Fennell, 7 H. L. Cas. 650, 5 Jur. N. S. 1135, 7 Wkly. Rep. 634.

See 8 Cent. Dig. tit. "Boundaries," § 153; and, generally, Evidence.

Admissions of a third person are receivable in evidence as to boundaries against a party who has expressly referred another to him for information in regard to an uncertain or disputed fact. Chapman *v.* Twitchell, 37 Me. 59, 58 Am. Dec. 773.

Affidavits may be read to establish boundaries. See Affidavits, 2 Cyc. 35, note 94.

Parol evidence is admissible to show the true intention of the parties. Lego *v.* Medley, 79 Wis. 211, 48 N. W. 375, 24 Am. St. Rep. 706.

Where record evidence is shown to be lost or destroyed, other evidence is admissible to prove the location of the land in controversy. Hedrick *v.* Hughes, 15 Wall. (U. S.) 123, 21 L. ed. 52.

32. *Connecticut.*— Kinney *v.* Farnsworth, 17 Conn. 355; Wooster *v.* Butler, 13 Conn. 309; Higley *v.* Bidwell, 9 Conn. 447.

(2) Declarations of Deceased Surveyors. The declarations of the surveyor who located the land or of one who assisted him in making the original survey, deceased at the time of trial, are admissible to prove the lines and corners actually run and established, but not to fix the locality of the survey.[33]

(3) Reputation or Tradition. Reputation or tradition is very generally held to be admissible in evidence to prove an ancient boundary, whether public or private,[34] although in England and a few of the United States its admissibility

Florida.— Daggett *v.* Willey, 6 Fla. 482.

Georgia.— Riley *v.* Griffin, 16 Ga. 141, 60 Am. Dec. 726.

Kentucky.— Cherry *v.* Boyd, Litt. Sel. Cas. (Ky.) 7, where hearsay evidence was held admissible only where it amounts to common tradition.

Maryland.— Scott *v.* Ollabaugh, 3 Harr. & M. (Md.) 511; Long *v.* Pellett, 1 Harr. & M. (Md.) 531.

Massachusetts.— Daggett *v.* Shaw, 5 Metc. (Mass.) 223. But see Boston Water Power Co. *v.* Hanlon, 132 Mass. 483; Hall *v.* Mayo, 97 Mass. 416, which held *contra* as to private boundaries.

Missouri.— St. Louis Public Schools *v.* Risley, 40 Mo. 356.

New Hampshire.— Gibson *v.* Poor, 21 N. H. 440, 53 Am. Dec. 216; Smith *v.* Powers, 15 N. H. 546; Lawrence *v.* Haynes, 5 N. H. 33, 20 Am. Dec. 554.

North Carolina.— The rule admitting hearsay to prove the boundaries of land is confined to declarations of deceased persons. Gervin *v.* Meredith, 4 N. C. 439.

Pennsylvania.— Nieman *v.* Ward, 1 Watts & S. (Pa.) 68; Hamilton *v.* Menor, 2 Serg. & R. (Pa.) 70.

South Carolina.— Spear *v.* Coate, 3 McCord (S. C.) 227, 15 Am. Dec. 627.

Vermont.— Wood *v.* Willard, 37 Vt. 377, 86 Am. Dec. 716.

United States.— Boardman *v.* Reed, 6 Pet. (U. S.) 328, 8 L. ed. 415; Mima Queen *v.* Hepburn, 7 Cranch (U. S.) 290, 3 L. ed. 348; Conn *v.* Penn, Pet. C. C. (U. S.) 496, 6 Fed. Cas. No. 3,104.

See 8 Cent. Dig. tit. "Boundaries," § 154.

33. *California.*— Morton *v.* Folger, 15 Cal. 275.

Kentucky.— See McNeil *v.* Dixon, 1 A. K. Marsh. (Ky.) 365, 10 Am. Dec. 740.

Maryland.— Snavely *v.* McPherson, 5 Harr. & J. (Md.) 150. See also Stoddert *v.* Manning, 2 Harr. & G. (Md.) 147.

Missouri.— Evans *v.* Greene, 21 Mo. 170.

New Hampshire.—Adams *v.* Blodgett, 47 N. H. 219, 90 Am. Dec. 569; Wallace *v.* Goodall, 18 N. H. 439.

Pennsylvania.— Kramer *v.* Goodlander, 98 Pa. St. 366; Birmingham *v.* Anderson, 40 Pa. St. 506; Bender *v.* Pitzer, 27 Pa. St. 333; Caufman *v.* Cedar Spring Presb. Congregation, 6 Binn. (Pa.) 59.

South Carolina.— Blythe *v.* Sutherland, 3 McCord (S. C.) 258; Spear *v.* Coate, 3 McCord (S. C.) 227, 15 Am. Dec. 627. See also Lynn *v.* Thomson, 17 S. C. 129, which confines the admissibility to lateral boundaries, so as to exclude the admission of declarations as to the height of a mill-dam.

Texas.— The declarations must have been made on the ground at the time of the original survey. Russell *v.* Hunnicutt, 70 Tex. 657, 8 S. W. 500; Welder *v.* Hunt, 34 Tex. 44; Clay County Land, etc., Co. *v.* Montague County, 8 Tex. Civ. App. 575, 28 S. W. 704; Angle *v.* Young, (Tex. Civ. App. 1894) 25 S. W. 798; Cottingham *v.* Seward, (Tex. Civ. App. 1894) 25 S. W. 797. See also Daniels *v.* Fitzhugh, 13 Tex. Civ. App. 300, 35 S. W. 38.

Virginia.— Smith *v.* Chapman, 10 Gratt. (Va.) 445; Overton *v.* Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544. See also Fry *v.* Stowers, 92 Va. 13, 22 S. E. 500.

United States.— Clement *v.* Packer, 125 U. S. 309, 8 S. Ct. 907, 31 L. ed. 721. But see Ellicott *v.* Pearl, 1 McLean (U. S.) 206, 8 Fed. Cas. No. 4,386 [*affirmed* in 10 Pet. (U. S.) 412, 9 L. ed. 475].

See 8 Cent. Dig. tit. "Boundaries," § 156.

Declarations contradicting return.— The declarations of a surveyor which contradict his official return are not admissible in evidence. Barclay *v.* Howell, 6 Pet. (U. S.) 498, 8 L. ed. 477. See also Overton *v.* Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544.

Declarations on resurvey.— In Pennsylvania, the declarations of a deceased surveyor on a resurvey, as to his location of land warrants twenty-one years before and the identity of the boundaries of the original and the resurvey, are admissible. Clement *v.* Packer, 125 U. S. 309, 8 S. Ct. 907, 31 L. ed. 721.

Deposition as declaration.— In Morton *v.* Folger, 15 Cal. 275, the deposition of a deceased surveyor, who surveyed the land and made a map thereof, which deposition was taken in another action and contained the surveyor's declarations as to the boundaries of the land, was held to be admissible in evidence. See also McNeil *v.* Dixon, 1 A. K. Marsh. (Ky.) 365, 10 Am. Dec. 740.

34. *Alabama.*— Shook *v.* Pate, 50 Ala. 91; Morgan *v.* Mobile, 49 Ala. 349. See also Doe *v.* Mobile, 8 Ala. 279.

California.—Muller *v.* Southern Pac. Branch R. Co., 83 Cal. 240, 23 Pac. 265; Lay *v.* Neville, 25 Cal. 545.

Connecticut.— Kinney *v.* Farnsworth, 17 Conn. 355; Wooster *v.* Butler, 13 Conn. 309.

Illinois.— Mullaney *v.* Duffy, 145 Ill. 559, 33 N. E. 750; Holbrook *v.* Debo, 99 Ill. 372.

Iowa.— Klinkner *v.* Schmidt, (Iowa 1901) 87 N. W. 661.

Kansas.— Stetson *v.* Freeman, 35 Kan. 523, 11 Pac. 431.

Kentucky.— Smith *v.* Shackleford, 9 Dana (Ky.) 452; Beaty *v.* Hudson, 9 Dana (Ky.) 322; Cherry *v.* Boyd, Litt. Sel. Cas. (Ky.) 7; Smith *v.* Nowells, 2 Litt. (Ky.) 159; Smith *v.* Prewit, 2 A. K. Marsh. (Ky.) 155.

to prove a private boundary is limited to cases where it is shown that such boundary is coincident with a public or quasi-public one.[35] Such reputation or tradition must, however, be ascertained as to the subject-matter as direct evidence would be,[36] and is not admissible to contradict evidence of record;[37] and in all cases proof of ancient boundaries by common reputation must have reference to a time *ante litem motam*.[38]

(II) *Deeds and Grants* — (A) *In General.* It may be stated as a general rule that any deed or grant having a tendency to identify and fix a disputed boundary is admissible in evidence.[39] Thus the title deeds of the par-

Louisiana.— Lecomte *v.* Smart, 19 La. 484.
Maryland.— Howell *v.* Tilden, 1 Harr. & M. (Md.) 84.
Minnesota.— Thoen *v.* Roche, 57 Minn. 135, 58 N. W. 686, 47 Am. St. Rep. 600.
Mississippi.— Nixon *v.* Porter, 34 Miss. 697, 69 Am. Dec. 408.
New Hampshire.— State *v.* Vale Mills, 63 N. H. 4; Wendell *v.* Abbott, 45 N. H. 349.
New Jersey.— Townsend *v.* Johnson, 3 N. J. L. 279.
New York.— Ratcliffe *v.* Gray, 4 Abb. Dec. (N. Y.) 4, 3 Keyes (N. Y.) 510, 3 Transcr. App. (N. Y.) 117; Jones *v.* Smith, 3 Hun (N. Y.) 351, 5 Thomps. & C. (N. Y.) 490.
North Carolina.— Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154; Murray *v.* Spencer, 88 N. C. 357; Mendenhall *v.* Cassells, 20 N. C. 36; Sasser *v.* Herring, 14 N. C. 300; Den *v.* Southard, 8 N. C. 45.
Oregon.— Goddard *v.* Parker, 10 Oreg. 102.
Pennsylvania.— Kramer *v.* Goodlander, 98 Pa. St. 353.
Tennessee.— McCloud *v.* Mynatt, 2 Coldw. (Tenn.) 163.
Texas.— Stroud *v.* Springfield, 28 Tex. 649.
Virginia.—Cline *v.* Catron, 22 Gratt. (Va.) 378; Harriman *v.* Brown, 8 Leigh (Va.) 697; Ralston *v.* Miller, 3 Rand. (Va.) 44, 15 Am. Dec. 704.
United States.— Shutte *v.* Thompson, 15 Wall. (U. S.) 151, 21 L. ed. 123; Morris *v.* Harmer, 7 Pet. (U. S.) 554, 8 L. ed. 781; Boardman *v.* Reed, 6 Pet. (U. S.) 328, 8 L. ed. 415; Nelson *v.* Hall, 1 McLean (U. S.) 518, 17 Fed. Cas. No. 10,107; Ellicott *v.* Pearl, 1 McLean (U. S.) 206, 8 Fed. Cas. No. 4,386.
See 8 Cent. Dig. tit. "Boundaries," § 155.

Limitation of rule.— A party offering in evidence reputation to prove ancient boundaries must confine his proof to the declarations of persons having a competent knowledge of the matter and who are since deceased. Lay *v.* Neville, 25 Cal. 546.

A mere report or neighborhood reputation, unfortified by evidence of enjoyment or acquiescence that a man's paper title covers certain land will not be received as evidence in questions of boundary. Mendenhall *v.* Cassells, 20 N. C. 36.

Family traditions are admissible as to a boundary, but not to prove or disprove a title. Cline *v.* Catron, 22 Gratt. (Va.) 378.

United States surveys.— Evidence of common repute is admissible on the question of boundaries established by the United States surveys, where the monuments set in making those surveys have disappeared. Thoen *v.* Roche, 57 Minn. 135, 58 N. W. 686, 47 Am. St. Rep. 600.

35. *Maine.*— Chapman *v.* Twitchell, 37 Me. 59, 58 Am. Dec. 773.
Massachusetts.— Boston Water Power Co. *v.* Hanlon, 132 Mass. 483; Hall *v.* Mayo, 97 Mass. 416.
Missouri.— St. Louis Public Schools *v.* Risley, 40 Mo. 356.
New Jersey.— Curtis *v.* Aaronson, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584. See also Runk *v.* Ten Eyck, 24 N. J. L. 756.
England.— Thomas *v.* Jenkins, 6 A. & E. 525, 1 Jur. 261, 6 L. J. K. B. 163, 1 N. & P. 587, W. W. & D. 265, 33 E. C. L. 285. See also Dunraven *v.* Llewellyn, 15 Q. B. 791, 19 L. J. Q. B. 388, 69 E. C. L. 791; Evans *v.* Rees, 10 A. & E. 151, 2 P. & D. 626, 37 E. C. L. 101; Reg. *v.* Bedfordshire, 4 E. & B. 535, 3 C. L. R. 442, 6 Cox C. C. 505, 1 Jur. N. S. 208, 24 L. J. Q. B. 81, 3 Wkly. Rep. 205, 82 E. C. L. 535; Weeks *v.* Sparke, 1 W. & S. 679, 14 Rev. Rep. 546.
See 8 Cent. Dig. tit. "Boundaries," § 155.

36. Nixon *v.* Porter, 34 Miss. 697, 69 Am. Dec. 408.

37. McCoy *v.* Galloway, 3 Ohio 283, 17 Am. Dec. 591.

38. Stroud *v.* Springfield, 28 Tex. 649.

39. *California.*— Cutter *v.* Caruthers, 48 Cal. 178; Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738.
Colorado.— Murray *v.* Hobson, 10 Colo. 66, 13 Pac. 921.
Kentucky.— Miller *v.* Pryse, 20 Ky. L. Rep. 1544, 49 S. W. 776; Buckner *v.* Hendrick, 8 Ky. L. Rep. 347, 1 S. W. 646.
Maine.— Chase *v.* White, 41 Me. 228.
Massachusetts.— Hale *v.* Silloway, 1 Allen (Mass.) 21; Saltonstall *v.* Proprietors Boston Pier, 7 Cush. (Mass.) 195; Owen *v.* Bartholomew, 9 Pick. (Mass.) 519.
New Hampshire.— Hackett *v.* Sawyer, 14 N. H. 65.
New Jersey.— Winter *v.* Peterson, 24 N. J. L. 524, 61 Am. Dec. 678.
New York.—Hunt *v.* Johnson, 19 N. Y. 279; Winne *v.* Ulster County Sav. Inst., 11 N. Y. St. 853.
Ohio.— Crane *v.* Buckles, 5 Ohio S. & C. Pl. Dec. 539, 1 Ohio N. P. 51.
Oregon.— Sperry *v.* Wesco, 26 Oreg. 483, 38 Pac. 623.
Texas.— Windus *v.* James, (Tex. 1892) 19 S. W. 873.
Vermont.— Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57.
See 8 Cent. Dig. tit. "Boundaries," § 160.

ties,[40] earlier deeds forming links in their chains of title,[41] or ancient deeds, under which neither party to the action claims,[42] are admissible; but a prior deed is inadmissible to locate a boundary of land conveyed by an older deed,[43] and to render a deed admissible in evidence upon the question of the boundary of a tract or grant other than the one described therein, it must contain a call for a corner or boundary line common to the two tracts, or must itself be called for as an adjoiner, and in the absence of such call it cannot be rendered admissible by parol evidence that the two tracts had in fact a common corner or boundary.[44] It is not necessary that the party offering an earlier deed to the same land shall connect himself therewith;[45] and deeds not admissible to show title,[46] patently erroneous in the description of land,[47] or unrecorded[48] may yet be introduced to prove boundaries.

(B) *Contract of Sale.* A written contract of sale under which a party has gone into possession is admissible in evidence to prove boundaries in a controversy thereto.[49]

(C) *Entry.* An entry may be given in evidence to fix the boundaries of lands granted by patent,[50] but the entry cannot be admitted to counteract the plain calls of the patent.[51]

(III) *Former Establishment of Boundary*—(A) *By Act of Parties*—(1) Agreement and Practical Location—(a) In General. In order to establish a boundary it is always permissible to show an agreement between the parties and its practical location by them.[52]

A patent made posterior to the running of the lines on the plots filed in the action, and reciting a copy of the certificate of survey, is evidence of the running of the lines located on the plots. King *v.* Tarlton, 2 Harr. & M. (Md.) 473.

Deeds used as basis of survey.—Where the controversy is whether a mutual mistake was made in the conveyance of land in including therein part of a public highway bounding the tract, a deed giving a description of the premises, and used as the basis of a survey is admissible to enable the jury to understand and apply the oral evidence. Silvey *v.* McCool, 86 Ga. 1, 12 S. E. 175.

40. Wineman *v.* Grummond, 90 Mich. 280, 51 N. W. 509.

41. Heinrichs *v.* Terrell, 65 Iowa 25, 21 N. W. 171; Wood *v.* Lafayette. 68 N. Y. 181.

42. Hathaway *v.* Evans, 113 Mass. 264; Morris *v.* Callanan, 105 Mass. 129; Sparhawk *v.* Bullard, 1 Metc. (Mass.) 95; Wendell *v.* Abbott, 43 N. H. 68; Townsend *v.* Johnson, 3 N. J. L. 279.

43. Sullivan *v.* Lowder, 11 Me. 426; Euliss *v.* McAdams, 108 N. C. 507, 13 S. E. 162. But see State *v.* Cooper, (Tenn. Ch. 1899) 53 S. W. 391, where it was held, in a contest arising from conflicting state land grants, that the calls in one grant tending to locate the prior grant are competent evidence in aiding the location of the prior grant.

44. *California.*— Cutter *v.* Caruthers, 48 Cal. 178; Sneed *v.* Woodward, 30 Cal. 430.

Illinois.— School Trustees *v.* Schroll, 120 Ill. 509, 12 N. E. 243, 60 Am. Rep. 575.

Indiana.— Behler *v.* Weyburn, 59 Ind. 143.

Massachusetts.— Barrett *v.* Murphy, 140 Mass. 233, 2 N. E. 833; Devine *v.* Wyman, 131 Mass. 73; Frost *v.* Angier, 127 Mass. 212; Pettingill *v.* Porter, 8 Allen (Mass.) 1, 85 Am. Dec. 671; Sparhawk *v.* Bullard, 1 Metc. (Mass.) 95.

Michigan.— Guentherodt *v.* Ross, 121 Mich. 47, 79 N. W. 920.

New York.— Donohue *v.* Whitney, 15 N. Y. Suppl. 622, 39 N. Y. St. 706 [*affirmed* in 133 N. Y. 178, 30 N. E. 848, 44 N. Y. St. 508].

United States.— King *v.* Watkins, 98 Fed. 913.

See 8 Cent. Dig. tit. "Boundaries," § 161.

In case of public grants the boundaries of a given tract may be shown by those of adjoining tracts. Owen *v.* Bartholomew, 9 Pick. (Mass.) 519; Fisher *v.* Kaufman, 170 Pa. St. 444, 33 Atl. 137.

45. Stumpf *v.* Osterhage, 94 Ill. 115.

46. Hedger *v.* Ward, 15 B. Mon. (Ky.) 106; Lander *v.* Reynolds, 3 Litt. (Ky.) 14; Dresback *v.* McArthur, 7 Ohio 146; Cavazos *v.* Trevino, 6 Wall. (U. S.) 773, 18 L. ed. 813.

47. Coffey *v.* Hendricks, 66 Tex. 676, 2 S. W. 47.

48. Hackett *v.* Sawyer, 14 N. H. 65.

49. Helm *v.* Wilson, 76 Cal. 476, 18 Pac. 604; Koch *v.* Dunkel, 90 Pa. St. 264.

50. Smith *v.* Buchannon, 2 Overt. (Tenn.) 304; Brown *v.* Huger, 4 Fed. Cas. No. 2,013, 1 Quart. L. J. 55.

51. Harriman *v.* Brown, 8 Leigh (Va.) 697.

52. *Indiana.*— Harris *v.* Doe, 4 Blackf. (Ind.) 369.

Kentucky.— Taylor *v.* Arnold, 13 Ky. L. Rep. 516, 17 S. W. 361. *Compare* Cissell *v.* Rapier, 3 Ky. L. Rep. 690, where it was held that it is only in case the description is ambiguous or doubtful that parol evidence of the practical construction given by the parties is admissible in aid of the interpretation.

Louisiana.— Blanc *v.* Duplessis, 13 La. 334.

Massachusetts.— Lovejoy *v.* Lovett, 124 Mass. 270.

(b) Written Agreement. A writing showing an agreement between adjoining proprietors as to what is to be considered the true boundary between their land is also admissible in evidence.[53]

(2) Submission to Arbitrators. The awards of arbitrators or referees fixing boundary lines are admissible in evidence in subsequent boundary disputes between the parties or those claiming under them,[54] unless it appear that the fact in controversy could not rightfully have been determined under the submission.[55]

(B) *By Commissioners or Processioners.* The proceedings of commissioners, processioners, or other officers duly appointed to run boundaries are admissible in evidence between the parties and those claiming under them,[56] and evi-

Michigan.— See Dondero *v.* Frumveller, 61 Mich. 440, 28 N. W. 712.

Missouri.— Brummell *v.* Harris, 148 Mo. 430, 50 S. W. 93; Krider *v.* Milner, 99 Mo. 145, 12 S. W. 461, 17 Am. St. Rep. 549; Atchison *v.* Pease, 96 Mo. 566, 10 S. W. 159; Schad *v.* Sharp, 95 Mo. 573, 8 S. W. 549; Jacobs *v.* Moseley, 91 Mo. 457, 4 S. W. 135; Turner *v.* Baker, 64 Mo. 218, 27 Am. Rep. 226, 76 Mo. 343; Blair *v.* Smith, 16 Mo. 273; Taylor *v.* Zepp, 14 Mo. 482, 55 Am. Dec. 113.

New Hampshire.— Hitchcock *v.* Libby, 70 N. H. 399, 47 Atl. 269; Heywood *v.* Wild River Lumber Co., 70 N. H. 24, 47 Atl. 294; Andrews *v.* Todd, 50 N. H. 565; Whitehouse *v.* Bickford, 29 N. H. 471.

New Jersey.— Baldwin *v.* Shannon, 43 N. J. L. 596 (holding that evidence of practical location is permissible only where there is an ambiguity in the description or uncertainty as to the premises granted, or where the location operates as an estoppel *in pais*); Jackson *v.* Perrine, 35 N. J. L. 137; Haring *v.* Van Houten, 22 N. J. L. 61.

North Carolina.— Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154.

Tennessee.— Houston *v.* Matthews, 1 Yerg. (Tenn.) 116.

United States.— Boyd *v.* Graves, 4 Wheat. (U. S.) 513, 4 L. ed. 628.

Contra, Adams *v.* Rockwell, 16 Wend. (N. Y.) 285.

See 8 Cent. Dig. tit. "Boundaries," § 163.

Establishment of boundary by agreement of parties see *supra,* III, A, 1.

Establishment by practical location see *supra,* III, A, 3.

Proof or agreement as to boundary see *supra,* III, A, 1, d.

An unexecuted oral agreement to join in a conveyance of the land in dispute cannot be shown on an issue as to the location of the boundary line between two tracts. Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154.

Rights of third persons unaffected.— Although the owners of two lots separated by a range line agreed on the boundary, whether as a matter of convention or from inquiry as to its true location, this agreement is not evidence in an action between owners of other lots separated by the same range line to prove its position. Wallace *v.* Goodall, 18 N. H. 439.

53. Orr *v.* Foote, 10 B. Mon. (Ky.) 387; Hunt *v.* Johnson, 19 N. Y. 279; National Commercial Bank *v.* Gray, 71 Hun (N. Y.) 295, 24 N. Y. Suppl. 997, 54 N. Y. St. 737. *Compare* McDermott *v.* Hoffman, 70 Pa. St. 31, where, however, the agreement had reference to the boundary line between two blocks of a public survey.

Rights of third parties.— A written agreement between owners of adjoining land under which their boundary is fixed will not affect the rights of a third adjoiner not a party thereto. Anderson *v.* Jackson, 69 Tex. 346, 6 S. W. 575. See also Knudsen *v.* Omanson, 10 Utah 124, 37 Pac. 250.

54. Byam *v.* Robbins, 6 Allen (Mass.) 63; Robertson *v.* McNiel, 12 Wend. (N. Y.) 578. See, generally, Arbitration and Award, 3 Cyc. 735.

Establishment by submission to arbitrators see *supra,* III, A, 5.

Revocation of submission.— In an action to determine the actual location of a line alleged to have been adopted in an agreement of arbitration evidence of the revocation of the submission to arbitration is admissible. Wood *v.* Lafayette, 46 N. Y. 484.

55. Hackett *v.* Sawyer, 14 N. H. 65; Gaylord *v.* Gaylord, 48 N. C. 367.

56. *Kentucky.*— McLawrin *v.* Salmons, 11 B. Mon. (Ky.) 96, 52 Am. Dec. 563.

Maryland.— Pattison *v.* Chew, 1 Harr. & J. (Md.) 586 note.

Mississippi.— Vick *v.* Peck, 4 How. (Miss.) 407.

New Hampshire.— Adams *v.* Stanyan, 24 N. H. 405; Lawrence *v.* Haynes, 5 N. H. 33, 20 Am. Dec. 554.

North Carolina.— Hobbs *v.* Outlaw, 51 N. C. 174.

Pennsylvania.—Haupt *v.* Haupt, (Pa. 1888) 15 Atl. 700.

See 8 Cent. Dig. tit. "Boundaries," § 170.

Establishment by commissioners or processioners see *supra,* III, B, 1.

A defectively executed land commission is not admissible in evidence to prove boundaries. Lowes *v.* Holbrook, 1 Harr. & J. (Md.) 153; Gittings *v.* Hall, 1 Harr. & J. (Md.) 14, 2 Am. Dec. 502; Nelm *v.* Smith, 4 Harr. & M. (Md.) 389; Weems *v.* Disney, 4 Harr. & M. (Md.) 156; Johnson *v.* Kraner, 2 Harr. & M. (Md.) 243.

A report of processioners duly made and returned, although not recorded as required by law, is admissible in evidence as proof of boundary. McLawrin *v.* Salmons, 11 B. Mon. (Ky.) 96, 52 Am. Dec. 563.

Failure of commissioners to agree.— Where

dence of such officers is receivable in support of an incomplete report.[57] The acts of fence-viewers or highway commissioners, however, are inadmissible to locate private boundaries.[58]

(c) *By Judicial Proceedings* — (1) In General. In a controversy as to boundaries former adjudications as to such boundaries between the parties or their privies are admissible in evidence;[59] and even strangers to a judgment may rely on it by way of estoppel for their protection as against parties to it, when they have acted on the faith of its recitals to their injury.[60]

(2) Sheriff's Return of Extent. Where an actual entry and seizin are proved, a sheriff's return of an extent on real estate to satisfy an execution may be evidence of the boundaries of the land possessed by the occupant, where he relies on a title by disseizin.[61]

(d) *Certificate of Commissioner of Land-Office.* In a suit to establish a boundary a certificate of the commissioner of the land-office is admissible in evidence.[62]

(iv) *Location of Monuments and Marks* — (a) *In General.* Where monuments or marks called for in a deed or grant are lost or otherwise uncertain, their location may be proved either by direct parol evidence,[63] by evidence of sur-

commissioners certify in their return that they had taken the deposition of witnesses, caused a survey to be made of the land, settled and adjusted the location thereof, and marked and bounded the same, but that after duly considering the evidence, etc., they could not agree and therefore made no establishment or further return, it was held that the commission and the return were no evidence to prove the location of the tract. Green *v.* McClellan, 4 Harr. & J. (Md.) 200.

Perambulations of the land between two towns, made by the selectmen of such towns, are competent evidence of the true line in a suit between individuals owning land on the opposite sides of the line. Adams *v.* Stanyan, 24 N. H. 405; Lawrence *v.* Haynes, 5 N. H. 33, 20 Am. Dec. 554.

57. Mosman *v.* Sanford, 52 Conn. 23.

58. Corlis *v.* Little, 13 N. J. L. 229; Camp *v.* Camp, 59 Vt. 667, 10 Atl. 748.

59. *California.*— See Burton *v.* Todd, 72 Cal. 351, 13 Pac. 877.

Kentucky.— Smith *v.* Shackleford, 9 Dana (Ky.) 452.

Massachusetts.— Hathaway *v.* Evans, 113 Mass. 264; Curtis *v.* Francis, 9 Cush. (Mass.) 427.

North Carolina.— Gilchrist *v.* McLaughlin, 29 N. C. 310.

Texas.— Reast *v.* Donald, 84 Tex. 648, 19 S. W. 795. See also Kimmarle *v.* Houston, etc., R. Co., 76 Tex. 686, 12 S. W. 698.

See 8 Cent. Dig. tit. "Boundaries," § 168.

Line between two towns.— In Lawrence *v.* Haynes, 5 N. H. 33, 20 Am. Dec. 554, it was held that an adjudication of the court of sessions establishing the line between two towns is not evidence of the true line in a suit between individuals who owned land on the opposite sides of the dividing line of the towns, neither one of them being in any way a party to those proceedings.

60. Medlin *v.* Wilkins, 60 Tex. 409, where a recital in a consent decree recognizing a certain line as a boundary line between the parties thereto was held admissible in favor of a stranger to the decree as tending to establish the true line.

61. Bott *v.* Burnell, 11 Mass. 163, but such a return is not conclusive evidence of an actual seizin against a lawful owner, against the debtor in the transaction, or against one claiming by privity of title. See also Fetrow *v.* Kochenour, 3 Brewst. (Pa.) 138.

62. Petrucio *v.* Gross, (Tex. Civ. App. 1898) 47 S. W. 43.

63. *Indiana.*— Caspar *v.* Jamison, 120 Ind. 58, 21 N. E. 743.

Iowa.— Williams *v.* Tschantz, 88 Iowa 126, 55 N. W. 202.

Kansas.—McAlpine *v.* Reicheneker, 27 Kan. 257.

Kentucky.— Wallace *v.* Maxwell, 1 J. J. Marsh. (Ky.) 447.

Massachusetts.— Barrett *v.* Murphy, 140 Mass. 133, 2 N. E. 833.

Minnesota.— Borer *v.* Lange, 44 Minn. 281, 46 N. W. 358; Turnbull *v.* Schroeder, 29 Minn. 49, 11 N. W. 137.

Nebraska.— Morrison *v.* Neff, (Nebr. 1884) 20 N. W. 254.

New Jersey.— Blackman *v.* Doughty, 40 N. J. L. 319.

New York.— Robinson *v.* Kime, 70 N. Y. 147. But see Seaman *v.* Hogeboom, 21 Barb. (N. Y.) 398.

North Carolina.— Lewis *v.* Roper Lumber Co., 113 N. C. 55, 18 S. E. 52; Dugger *v.* McKesson, 100 N. C. 1, 6 S. E. 746; Topping *v.* Sadler, 50 N. C. 357. *Compare* Wilhelm *v.* Burleyson, 106 N. C. 381, 11 S. E. 590.

Ohio.— McCoy *v.* Galloway, 3 Ohio 282, 17 Am. Dec. 591; Alshire *v.* Hulse, Wright (Ohio) 170.

Pennsylvania.— Mills *v.* Buchanan, 14 Pa. St. 59.

Tennessee.— Hughlett *v.* Conner, 12 Heisk. (Tenn.) 83.

Texas.— Smith *v.* Russell, 37 Tex. 247; Vogt *v.* Geyer, (Tex. Civ. App. 1898) 48 S. W. 1100.

Vermont.— Patch *v.* Keeler, 28 Vt. 332.

rounding circumstances,[64] and the location of junior surveys which call for the same monuments or marks;[65] but the mere conclusions of a witness as to the location of boundaries are not admissible.[66]

(B) *Adjoining Tracts.* On an issue as to the identity and location of a survey testimony as to the relative location and calls of an adjoining survey is competent.[67]

(C) *County or Town Lines.* For the purpose of determining the location of a municipal line, as affecting private parties who claim such line as a boundary for their lands, not only the language of the law fixing the line must be considered but the public practice is to be looked to in connection with the levying of taxes, selecting jurors, serving process, official surveys, and similar matters.[68]

(D) *Fences.* The maintenance of fences between adjoining proprietors is competent evidence to go to the jury in a dispute as to their true boundary line,[69] but evidence of division fences upon adjoining tracts is inadmissible.[70]

(E) *Lines Run and Marked.* Lines actually run and marked on the ground are the best evidence of the true location of a survey,[71] and these may be proved by any evidence, direct or circumstantial, competent to prove any other disputed

Virginia.— Greif *v.* Norfolk, etc., R. Co., (Va. 1898) 30 S. E. 438.

Wisconsin.— See Pickett *v.* Nelson, 79 Wis. 9, 47 N. W. 936, where it was held that parol evidence is inadmissible when the field-notes of the survey afford sufficient data for running the lines.

See 8 Cent. Dig. tit. "Boundaries," § 178.

Government corner.— When a corner-stone of a recent government survey has been recently removed, its original location may be identified by oral evidence, if possible, and in such case the plat or field-notes ought not to be admitted in evidence to show the location of the corner-stone, and thus dispute its actual location as proved. Morrison *v.* Neff, (Nebr. 1884) 20 N. W. 254.

Marks not called for.— In locating a patent of ancient date evidence in respect to marked trees, although not called for in the grant, is admissible. Topping *v.* Sadler, 50 N. C. 357.

64. Such as the actual condition and situation of the land, buildings, passages, watercourses, and other local objects. Salisbury *v.* Andrews, 19 Pick. (Mass.) 250. See also Baker *v.* McArthur, 54 Mich. 139, 19 N. W. 923; Arneson *v.* Spawn, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783.

65. Mitchell *v.* Mitchell, 8 Gill (Md.) 98.

66. Beecher *v.* Galvin, 71 Mich. 391, 39 N. W. 469; Titterington *v.* Trees, 78 Tex. 567, 14 S. W. 692.

67. *Kentucky.*— Whalen *v.* Nisbet, 95 Ky. 464, 16 Ky. L. Rep. 52, 26 S. W. 188.

Maryland.— Mitchell *v.* Mitchell, 8 Gill (Md.) 98.

North Carolina.— Deming *v.* Gainey, 95 N. C. 528.

Pennsylvania.— Tyrone Min., etc., Co. *v.* Cross, 128 Pa. St. 636, 25 Wkly. Notes Cas. (Pa.) 97, 18 Atl. 519; Bellas *v.* Cleaver, 40 Pa. St. 260; Collins *v.* Barclay, 7 Pa. St. 67.

South Carolina.— Birchfield *v.* Bonham, 2 Speers (S. C.) 62.

Texas.— Coleman *v.* Smith, 55 Tex. 254.

See 8 Cent. Dig. tit. "Boundaries," § 182.

68. Dugger *v.* McKesson, 100 N. C. 1, 6 S. E. 746; Hecker *v.* Sterling, 36 Pa. St. 423. See also Hathaway *v.* Evans, 113 Mass. 264.

Evidence of occupation.— On an issue as to the location of the boundary line between two towns claimed by private parties as the division line between their private lands, testimony of persons that they had occupied land up to the town line claimed by plaintiff as the true line is competent. Aldrich *v.* Griffith, 66 Vt. 390, 29 Atl. 376.

The minutes of the commissioners' court regarding a county road purporting to be laid out on the boundary line in dispute, showing the proceedings for its opening, and designating a part of the center line thereof as the western boundary of plaintiff's land, and showing 'so an order granted to a road overseer for the removal of obstructions thereon may be admitted, in connection with other facts, to show acquiescence in the line. Vogt *v.* Geyer, (Tex. Civ. App. 1898) 48 S. W. 1100.

69. Miles *v.* Barrows, 122 Mass. 579; Coyle *v.* Cleary, 116 Mass. 208; Hollenbeck *v.* Rowley, 8 Allen (Mass.) 473; Hoffman *v.* Port Huron, 102 Mich. 417, 60 N. W. 831; Hockmoth *v.* Des Grand Champs, 71 Mich. 520, 39 N. W. 737; Knight *v.* Coleman, 19 N. H. 118, 49 Am. Dec. 147; Smith *v.* Hosmer, 7 N. H. 436, 28 Am. Dec. 354. But see Cogan *v.* Cook, 22 Minn. 137.

70. Fairfield *v.* Barrette, 73 Wis. 463, 41 N. W. 624. See also Ostrander *v.* Washburn, 60 Hun (N. Y.) 580, 14 N. Y. Suppl. 584, 38 N. Y. St. 45.

71. *Massachusetts.*— Allen *v.* Kingsbury, 16 Pick. (Mass.) 235.

New Hampshire.— Hall *v.* Davis, 36 N. H. 569.

North Carolina.— Euliss *v.* McAdams, 108 N. C. 507, 13 S. E. 162.

Pennsylvania.— Burkholder *v.* Markley, 98 Pa. St. 37; Hunt *v.* Devling, 8 Watts (Pa.) 403; Culver *v.* Haslett, 13 Pa. Super. Ct. 323; Kron *v.* Daugherty, 9 Pa. Super. Ct. 163.

South Carolina.— See Alexander *v.* Gossett, 29 S. C. 421, 7 S. E. 814.

Vermont.— Stiles *v.* Estabrook, 66 Vt. 535, 29 Atl. 961; Clary *v.* McGlynn, 46 Vt. 347.

See 8 Cent. Dig. tit. "Boundaries," § 179.

fact.[72] Conversely it is competent to prove that a line claimed to have been run was never in fact marked on the ground.[73]

(F) *Streets and Ways.* Where the location of a street or way becomes important in determining a disputed boundary, such location is admissible in evidence, and may be proved by the proceedings to open such street or way or by evidence as to its boundaries as actually opened and used.[74]

(V) *Long-Continued Possession.* In cases of disputed boundaries evidence of long-continued occupancy and acquiescence is admissible, in the absence of any certain monuments or data, to determine courses and distances.[75]

(VI) *Maps and Plats*—(A) *In General.* As a rule, in order that a map or plat may be admitted in evidence on a question of boundary, it must either be official,[76] have been recognized as correct by the former owner of the land,[77] or have been referred to, either expressly or by clear implication, in the deed or grant;[78] but in some states an ancient map or plat, when duly authenticated, is

72. *Kentucky.*— Smith *v.* Prewit, 2 A. K. Marsh. (Ky.) 155.

Michigan.— Baker *v.* McArthur, 54 Mich. 139, 19 N. W. 923.

Missouri.— Weaver *v.* Robinett, 17 Mo. 459.

Tennessee.— Hughlett *v.* Conner, 12 Heisk. (Tenn.) 83.

Washington.— Tacoma Bldg., etc., Assoc. *v.* Clark, 8 Wash. 289, 36 Pac. 135.

See 8 Cent. Dig. tit. "Boundaries," § 179.

Discrepancy between calls and marks.— In ejectment against an adjoining lot-owner to recover a disputed strip a discrepancy between calls of a plat and marks on the ground may be explained by evidence that the tract is larger than the plat called for, and that the lots as then occupied were of a certain length corresponding to the original tract. Kron *v.* Daugherty, 9 Pa. Super. Ct. 163.

Line established by processioning.— While the proper evidence of proceedings to establish a line by processioning land is a registered plat and certificate, or a copy thereof, of the survey made by the county surveyor and registered as required by Tenn. Code, § 2020, yet parol evidence is admissible to show the locality of the line or of the boundaries already established. Hughlett *v.* Conner, 12 Heisk. (Tenn.) 83.

Lines not connected with disputed boundary.— Lines which are established and undisputed, although not connected with the land in controversy, are competent evidence whenever they tend to elucidate the subject in dispute. Gibson *v.* Poor, 21 N. H. 440, 53 Am. Dec. 216. See also Boston *v.* Richardson, 13 Allen (Mass.) 146.

Where the boundary is fixed by reference to an established line, evidence of measurements from other points not referred to in the deed is inadmissible, unless it is shown that the position of the established line cannot be ascertained. Liverpool Wharf *v.* Prescott, 4 Allen (Mass.) 22.

73. Rice *v.* Bixler, 1 Watts & S. (Pa.) 445.

74. Oreña *v.* Santa Barbara, 91 Cal. 621, 28 Pac. 268; Partridge *v.* Russell, 2 N. Y. Suppl. 529, 18 N. Y. St. 685. *Compare* Major *v.* Watson, 73 Mo. 661.

Private way.— Where land was conveyed by a deed as bounded on a private way belonging to the grantor, but no way was then laid out, although a culvert was built by the grantor across a piece of the land retained by him and a fence was erected, it was held that the location of the way was a matter of fact, in determining which the conduct and declarations of the parties, the nature and position of the fence and culvert, and the purposes for which they were built were competent evidence. Crafts *v.* Judson, 119 Mass. 521.

Vacated proceedings.— Under a claim that a certain street marks a boundary line it is error to admit in evidence proceedings to open such street, the judgment of which has been vacated for the want of jurisdiction. St. Louis *v.* Meyer, 87 Mo. 276 [*affirming* 13 Mo. App. 367].

75. Owen *v.* Bartholomew, 9 Pick. (Mass.) 519; Rockwell *v.* Adams, 6 Wend. (N. Y.) 467; Nys *v.* Biemeret, 44 Wis. 104. *Compare* Bynum *v.* Thompson, 25 N. C. 578.

76. *California.*— Galvin *v.* Palmer, 113 Cal. 46, 45 Pac. 172.

Iowa.— See Heinrichs *v.* Terrell, 65 Iowa 25, 21 N. W. 171, construing Iowa Code, §§ 1950, 3653, 3702, and holding that under these sections the plat-book kept by the county assessor is not admissible in evidence in aid of a defective description of premises claimed by plaintiff in a controversy involving a question of boundary.

Kentucky.— Buckner *v.* Hendrick, 8 Ky. L. Rep. 347, 1 S. W. 646.

Nebraska.— Morrison *v.* Neff, 18 Nebr. 133, 24 N. W. 555.

New Jersey.— Haring *v.* Van Houten, 22 N. J. L. 61.

North Carolina.— Redmond *v.* Mullenax, 113 N. C. 505, 18 S. E. 708.

United States.— Martin *v.* Hughes, 98 Fed. 556, 39 C. C. A. 160.

77. Nichols *v.* Turney, 15 Conn. 101; Webb *v.* Hall, 18 N. C. 278; Gratz *v.* Beates, 45 Pa. St. 495. See also Thrush *v.* Graybill, 110 Iowa 585, 81 N. W. 798.

Plat made at instance of owner.— A plat of a tract of land made at the instance of the owner is admissible in evidence as an admission against him and all persons claiming the land under him. Webb *v.* Hall, 18 N. C. 278.

78. *California.*— Olsen *v.* Rogers, 120 Cal. 225, 52 Pac. 486; Taylor *v.* McConigle, 120 Cal. 123, 52 Pac. 159.

admissible to prove a disputed boundary,[79] and a map or plat referred to in the testimony is admissible as explanatory of it.[80] In all cases the map or plat should be verified,[81] and where one offered in evidence is unintelligible to the court and jury it should be rejected.[82]

(B) *Of Cities, Towns, and Counties.* Where a map of a city, town, or county is referred to in a deed or grant, it is admissible in evidence on the question of boundary.[83] So too where lands of individuals are bounded on public lands, ancient maps of the latter made by public authority are competent evidence in controversies between such individuals,[84] and a county map required to be kept in the surveyor's office is competent between the state and an individual.[85] Where such maps or plats are offered it must be shown when, how, by whom, and for what purpose they were made.[86]

(VII) *Records and Certificates.* When made in compliance with statutory requirements, records and certificates of surveyors, together with attached drafts and plats, are admissible in evidence on a question of boundary.[87]

Michigan.— Atwood *v.* Canrike, 86 Mich. 99, 48 N. W. 950.

Missouri.— Brewington *v.* Jenkins, 85 Mo. 57; Soulard *v.* Allen, 18 Mo. 590.

Nebraska.— Hanlon *v.* Union Pac. R. Co., 40 Nebr. 52, 58 N. W. 590.

New York.— Kingsland *v.* Chittenden, 6 Lans. (N. Y.) 15; Crawford *v.* Loper, 25 Barb. (N. Y.) 449.

United States.— See Jones *v.* Johnston, 18 How. (U. S.) 150, 15 L. ed. 320.

Effect of loss — Admission of substitute.— Where a map which is referred to in a deed for the boundaries and location of the land confirmed has been lost, another map proved to be one of three originals is admissible in evidence. Soulard *v.* Allen, 18 Mo. 590. *Compare* Jones *v.* Johnston, 18 How. (U. S.) 150, 15 L. ed. 320, where it was held that where reference is made in a deed to the recorded plan, a plan not recorded and varying from that which is of record is not admissible evidence of the true boundaries of the land.

Implied reference.— Where the description in a deed contains a call to and along a line, the true location of which is uncertain, maps in common use at the time are admissible to show the location and name of the line. Hanlon *v.* Union Pac. R. Co., 40 Nebr. 52, 58 N. W. 590.

While a plat not executed or acknowledged as the law requires is not competent evidence to establish the location of a disputed line, it may be admissible as a memorandum, it having been referred to in the deed. Brewington *v.* Jenkins, 85 Mo. 57.

79. *California.*— Taylor *v.* McConigle, 120 Cal. 123, 52 Pac. 159.

Massachusetts.— Whitman *v.* Shaw, 166 Mass. 451, 44 N. E. 333; Chapman *v.* Edmands, 3 Allen (Mass.) 512.

New Hampshire.— Gibson *v.* Poor, 21 N. H. 440, 53 Am. Dec. 216. *Compare* Whitney *v.* Smith, 10 N. H. 43.

New York.—Donohue *v.* Whitney, 133 N. Y. 178, 30 N. E. 848, 44 N. Y. St. 508; Hunt *v.* Johnson, 19 N. Y. 279.

Pennsylvania.— McCausland *v.* Fleming, 63 Pa. St. 36; Huffman *v.* McCrea, 56 Pa. St. 95; Penny Pot Landing *v.* Philadelphia, 16 Pa. St. 79.

United States.— Harmer *v.* Morris, 1 McLean (U. S.) 44, 11 Fed. Cas. No. 6,076 [*affirmed* in 7 Pet. (U. S.) 554, 8 L. ed. 781].

England.— See Wilkinson *v.* Allott, 3 Bro. P. C. 684.

80. *California.*— Taylor *v.* McConigle, 120 Cal. 123, 52 Pac. 159.

Connecticut.— Beach *v.* Whittlesey, 73 Conn. 530, 48 Atl. 350.

Illinois.— Justen *v.* Schaaf, 175 Ill. 45, 51 N. E. 695.

Louisiana.— Boedicker *v.* East, 26 La. Ann. 209.

Missouri.— Williamson *v.* Fischer, 50 Mo. 198.

Oregon.— Rowland *v.* McCown, 20 Oreg. 538, 26 Pac. 853.

Pennsylvania.— Hoey *v.* Furman, 1 Pa. St. 295, 44 Am. Dec. 129. See also Sample *v.* Robb, 16 Pa. St. 305.

Texas.— Ostrom *v.* Layer, (Tex. Civ. App. 1898) 48 S. W. 1095.

Vermont.— Hale *v.* Rich, 48 Vt. 217.

81. Free *v.* James, 27 Conn. 77; Dunn *v.* Hayes, 21 Me. 76.

82. Budd *v.* Brooke, 3 Gill (Md.) 198, 43 Am. Dec. 321.

83. Fleischfresser *v.* Schmidt, 41 Wis. 223.

But a city map not made until after plaintiffs acquire title to their lot, and which shows the lot to be smaller than it is described to be in their deed, and smaller than it appears to be by an official map made before the execution of the deed is not admissible against plaintiffs to prove the true boundaries of the lot. Payne *v.* English, 79 Cal. 540, 21 Pac. 952. See also Donohue *v.* Whitney, 133 N. Y. 178, 30 N. E. 848, 44 N. Y. St. 508.

84. Adams *v.* Stanyan, 24 N. H. 405; Aldrich *v.* Griffith, 66 Vt. 390, 29 Atl. 376.

85. Boon *v.* Hunter, 62 Tex. 582.

86. Donohue *v.* Whitney, 133 N. Y. 178, 30 N. E. 848, 44 N. Y. St. 508.

87. *Indiana.*—Bonewits *v.* Wygant, 75 Ind. 41.

Kansas.—Holliday *v.* Maddox, 39 Kan. 359, 18 Pac. 299, where it was held that the record of a survey, although not legally made, was competent to show the location of the line in dispute.

Kentucky.— Alexander *v.* Lively, 5 T. B.

(VIII) *SURVEYS* — (A) *In General.* Surveys of lands whose boundaries are in controversy are generally admissible,[88] but authority to make them must be shown;[89] and in no case is a private survey admissible against one who, or whose privies, took no part therein, or had no notice thereof,[90] or to contradict or modify

Mon. (Ky.) 159, 17 Am. Dec. 50; Steele *v.* Taylor, 3 A. K. Marsh. (Ky.) 225, 13 Am. Dec. 151; Bodley *v.* Hernden, 3 A. K. Marsh. (Ky.) 21; Carland *v.* Rowland, 3 Bibb (Ky.) 125. See also Redd *v.* Bohannon, 3 A. K. Marsh. (Ky.) 602.

Louisiana.— Latiolais *v.* Mouton, 23 La. Ann. 529; Lebeau *v.* Bergeron, 14 La. Ann. 489.

Michigan.— Van Der Groef *v.* Jones, 108 Mich. 65, 65 N. W. 602; Hess *v.* Meyer, 73 Mich. 259, 41 N. W. 422; Smith *v.* Rich, 37 Mich. 549.

Mississippi.— Carmichael *v.* School Land Trustees, 3 How. (Miss.) 84.

New Jersey.— Curtis *v.* Aaronson, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584.

Pennsylvania.— Goundie *v.* Northampton Water Co., 7 Pa. St. 233.

Tennessee.—Disney *v.* Cold Creek Min., etc., Co., 11 Lea (Tenn.) 607; Tate *v.* Gray, 1 Swan (Tenn.) 73; Bell *v.* Hickman, 6 Humphr. (Tenn.) 398; Den *v.* Cunningham, Mart. & Y. (Tenn.) 67.

A record of a petition and resurvey of a tract of land subsequent to the grant of it is not admissible to vary the boundaries and monuments of the original grant. Den *v.* Coward, 6 N. C. 77.

A surveyor's report is evidence as to facts he can officially notice but is no evidence as to an extraneous matter (Bodley *v.* Hernden, 3 A. K. Marsh. (Ky.) 21), of objects called for in the entry at the date of the report (Carland *v.* Rowland, 3 Bibb (Ky.) 125), or of the courses and distances and the present existence of the objects to and from which the lines are reported to run (Heffington *v.* White, 1 Bibb (Ky.) 115).

Where property is described as bounded on a public way, the return of the surveyors who laid out such way is competent evidence to establish such boundary without showing their appointment, or whether the highway was legally laid out. Merrill *v.* Kalamazoo, 35 Mich. 211; Haring *v.* Van Houten, 22 N. J. L. 61. See also Vogt *v.* Geyer, (Tex. Civ. App. 1898) 48 S. W. 1100, where it was held that where plaintiff made no objection to a surveyor's testifying that he laid out a county road purporting to be on the boundary line in dispute, he cannot object to the introduction of the minutes of the commissioners' court regarding the road.

88. *Alabama.*— Hess *v.* Cheney, 83 Ala. 251, 3 So. 791.

California.— Burdell *v.* Taylor, 89 Cal. 613, 26 Pac. 1094.

Illinois.— Wiggins Ferry Co. *v.* Louisville, etc., R. Co., 178 Ill. 473, 53 N. E. 411.

Indiana.— Doe *v.* Hilldreth, 2 Ind. 214.

Iowa.— Rollins *v.* Davidson, 84 Iowa 237, 30 N. W. 1061.

Kentucky.— Burgin *v.* Chenault, 9 B. Mon. (Ky.) 285.

Michigan.— Manistee Mfg. Co. *v.* Cogswell, 103 Mich. 602, 61 N. W. 884.

Missouri.— Coe *v.* Griggs, 79 Mo. 35.

New Jersey.—Emmett *v.* Briggs, 21 N. J. L. 53.

New York.—Hunt *v.* Johnson, 19 N. Y. 279.

North Carolina.— Graybeal *v.* Powers, 76 N. C. 66.

Tennessee.— Garner *v.* Norris, 1 Yerg. (Tenn.) 61.

Texas.— Schunior *v.* Russell, 83 Tex. 83, 18 S. W. 484; Lumpkin *v.* Draper, (Tex. 1891) 18 S. W. 1058; Wyatt *v.* Duncan, (Tex. Civ. App. 1893) 22 S. W. 665.

Vermont.— Hull *v.* Fuller, 7 Vt. 100.

Virginia.— Clements *v.* Kyles, 13 Gratt. (Va.) 468; Overton *v.* Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544.

West Virginia.— McMullin *v.* Lewis, 5 W. Va. 144.

Wisconsin.—See Schlei *v.* Struck, 109 Wis. 598, 85 N. W. 430.

United States.— Les Bois *v.* Bramell, 4 How. (U. S.) 449, 11 L. ed. 1051.

See 8 Cent. Dig. tit. "Boundaries," § 171.

Contemporaneous surveys of other tracts. — Calls and descriptions of a survey made by the same surveyor about the same time with the survey of the land in dispute may be evidence upon the question of boundary or locality. Overton *v.* Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544 [*explained* in Clements *v.* Kyles, 13 Gratt. (Va.) 468; and *followed* in McMullin *v.* Lewis, 5 W. Va. 144]. See also King *v.* Watkins, 98 Fed. 913.

Evidence contradicting survey.— Evidence cannot be given that the surveyor, when running lines to make any plot, ran them differently from the lines located on the plots. Carroll *v.* Smith, 4 Harr. & J. (Md.) 128. See also Mundell *v.* Hugh, 2 Gill & J. (Md.) 193.

Evidence of the usual practice of surveyors to overrun the exact measures is admissible to show that the boundaries of an ancient grant by the commonwealth in an adjacent town, described by courses and distances, exceeded the distance given. Owen *v.* Bartholomew, 9 Pick. (Mass.) 519.

89. Free *v.* James, 27 Conn. 77; Wilson *v.* Stoner, 9 Serg. & R. (Pa.) 39, 11 Am. Dec. 664.

90. *Alabama.*— Avary *v.* Searcy, 50 Ala. 54. See also Bridges *v.* McClendon, 56 Ala. 327.

Kentucky.— Sowder *v.* McMillan, 4 Dana (Ky.) 456; Ewing *v.* Savary, 3 Bibb (Ky.) 235.

North Carolina.— Jones *v.* Huggins, 12 N. C. 223, 17 Am. Dec. 567.

a government survey.[91] Resurveys, when made agreeably to the requirements of law, are also admissible to show boundaries.[92]

(B) *Field-Notes.* The field-notes of an authorized[93] survey, when duly authenticated, are properly admitted in evidence to show the true location of the disputed lines.[94]

(C) *Of Adjoining Tracts.* Surveys of adjoining tracts are often admissible in evidence on questions of disputed boundary, as where the two tracts are derived from the same grantor and have been surveyed by the same surveyor at about the same time,[95] where it is shown that a line run in a particular way will disturb and conflict with ancient and well-established boundaries of other tracts,[96] or where a junior survey made long before the inception of the controversy calls for an older survey whose marks were not then obliterated;[97] but a survey made

South Carolina.— Underwood *v.* Evans, 2 Bay (S. C.) 437.

Virginia.— Lee *v.* Tapscott, 2 Wash. (Va.) 276.

91. Chapman *v.* Polack, 70 Cal. 487, 11 Pac. 764; Cecil *v.* Amberson, Add. (Pa.) 359.

92. Stoddert *v.* Manning, 2 Harr. & G. (Md.) 147; Hunt *v.* McHenry, Wright (Ohio) 599; Martin *v.* Hughes, 98 Fed. 556, 39 C. C. A. 160. See also Burns *v.* Martin, 45 Mich. 22, 7 N. W. 219.

93. Where a survey is made without legal authority, copies of the field-notes thereof, although certified from the general land-office, are inadmissible. Von Rosenberg *v.* Haynes, 85 Tex. 357, 20 S. W. 143.

94. *Alabama.*—Dailey *v.* Fountain, 35 Ala. 26.

Indiana.— Doe *v.* Hildreth, 2 Ind. 274.

Massachusetts.— Boston Water Power Co. *v.* Hanlon, 132 Mass. 483.

Michigan.— Olin *v.* Henderson, 120 Mich. 149, 79 N. W. 178.

Nebraska.—Morrison *v.* Neff, 18 Nebr. 133, 24 N. W. 555.

New Hampshire.— Morse *v.* Emery, 49 N. H. 239 note; Smith *v.* Forrest, 49 N. H. 230.

New York.— Hunt *v.* Johnson, 19 N. Y. 279.

North Carolina.—Dugger *v.* McKesson, 100 N. C. 1, 6 S. E. 746.

Texas.— Irvin *v.* Bevil, 80 Tex. 332, 16 S. W. 21; Moore *v.* Stewart, (Tex. 1887) 7 S. W. 771; Poor *v.* Boyce, 12 Tex. 440; Stewart *v.* Crosby, (Tex. Civ. App. 1899) 56 S. W. 433; Petrucio *v.* Gross, (Tex. Civ. App. 1898) 47 S. W. 43; Daniels *v.* Fitzhugh, 13 Tex. Civ. App. 300, 35 S. W. 38; Jackson *v.* Cable, (Tex. Civ. App. 1894) 27 S. W. 201.

United States.— Ayers *v.* Watson, 137 U. S. 584, 11 S. Ct. 201, 34 L. ed. 803.

See 8 Cent. Dig. tit. "Boundaries," § 172.

Calls in the field-notes of another survey, although made at the same time and by the same surveyor, cannot be resorted to in case no conflict arises from the survey in question, when applied to the objects called for as actually found on the ground. Thompson *v.* Langdon, 87 Tex. 254, 28 S. W. 931.

Canceled survey.—Where part of the boundaries of an old survey made by a deceased surveyor, who surveyed the tract in suit, are identical with some of the boundaries of that tract, although such old survey has been canceled, the surveyor's field-notes showing the boundaries thereof are admissible to show the boundaries as originally established by him. Stanus *v.* Smith, 8 Tex. Civ. App. 685, 30 S. W. 262.

Effect of erroneous call.— Field-notes of a survey should not be excluded from evidence because of error in a call, when such error can be readily corrected by comparing other calls in said notes with a colonial map or plat of survey in evidence. Pierce *v.* Schram, (Tex. Civ. App. 1899) 53 N. W. 716.

Extrinsic evidence to identify calls.— A boundary mark or name in a survey may be shown by extrinsic evidence to be that called for, although by a different name, in the field-notes returned to the land-office. Buford *v.* Bostrick, 50 Tex. 371.

Notes of deputy surveyor.— On an issue as to the boundary between front and rear concessions the field-notes of a deputy United States surveyor in surveying both concessions are admissible to show the location of the witness trees, and that the establishment of the land as claimed by the owner of the former concession would give the owner of the latter all the land his patent called for. Olin *v.* Henderson, 120 Mich. 149, 79 N. W. 178. *Compare* Doe *v.* Hildreth, 2 Ind. 274, where it was doubted whether the original notes of a deputy surveyor are admissible as evidence of boundaries.

The field-notes of a resurvey corresponding with the original survey are admissible in evidence. Petrucio *v.* Gross, (Tex. Civ. App. 1898) 47 S. W. 43.

95. *California.*— Olsen *v.* Rogers, 120 Cal. 225, 52 Pac. 486; Adair *v.* White, (Cal. 1893) 34 Pac. 338.

Kentucky.—Buckner *v.* Hendrick, 8 Ky. L. Rep. 347, 1 S. W. 646.

Pennsylvania.— Sweigart *v.* Richards, 8 Pa. St. 436; Hoover *v.* Gonzalus, 11 Serg. & R. (Pa.) 314.

Texas.— Bell *v.* Preston, 19 Tex. Civ. App. 375, 47 S. W. 375, 753.

Virginia.— Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347.

West Virginia.— Kain *v.* Young, 41 W. Va. 618, 24 S. E. 554.

96. Baker *v.* McArthur, 54 Mich. 139, 19 N. W. 923; Hobbs *v.* Outlaw, 51 N. C. 174.

97. Fisher *v.* Kaufman, 170 Pa. St. 444, 43 Atl. 137.

of an adjoining tract at the instance of a stranger, and not acquiesced in by the adjoinee, is inadmissible.[98]

c. Weight and Sufficiency. To prove the location of a disputed boundary it is not necessary for plaintiff to prove the line contended for by him beyond a reasonable doubt. A mere preponderance of evidence is sufficient to establish it,[99] and the evidence need not be direct and positive. A boundary may be proved by circumstantial, as well as by direct, evidence.[1]

7. Competency of Witnesses — a. Landowner. A landowner is a competent witness as to the particulars of a survey, where he was present at the survey and testifies from his own knowledge of the facts,[2] but unless he is a surveyor he cannot testify in a controversy between other parties as to the significance of boundary lines on the plat put there by his directions when the plat was made, the surveyor having since died.[3]

b. Surveyors — (i) *In General.* A surveyor[4] may testify to facts within his personal knowledge relating to the lines, corners, or monuments of lands,[5] but not as to the location of a line which he has run from an ancient map, where he

But an indescriptive warrant calling for an adjoining tract as a boundary, and a survey thereunder, made ten years after a location and survey of such an adjoining tract, are not competent evidence to prove such boundary. Clement *v.* Wright, 40 Pa. St. 250.

98. Sneed *v.* Woodward, 30 Cal. 430; Sutton *v.* Blount, 3 N. C. 524. See also Bailey *v.* Baker, (Tex. Civ. App. 1897) 42 S. W. 124.

99. Bitter *v.* Saathoff, 98 Ill. 266; Hopper *v.* Justice, 111 N. C. 418, 16 S. E. 626; Scott *v.* Pettigrew, 72 Tex. 321, 12 S. W. 161; Briggs *v.* Pierson, 7 Tex. Civ. App. 638, 26 S. W. 467; Daskam *v.* Beemer, 64 Wis. 13, 24 N. W. 485.

1. Daggett *v.* Willey, 6 Fla. 482; Noble *v.* Chrisman, 88 Ill. 186; Samuels *v.* Simmons, 19 Ky. L. Rep. 1686, 44 S. W. 395; Jones *v.* McCracken, 13 Ky. L. Rep. 522, 17 S. W. 626.

2. Wheeler *v.* State, 114 Ala. 22, 21 So. 941.

Former owner.— It is competent to show by a witness who owned the premises in controversy for many years that during his ownership there was no controversy about the matter, and no claim to the contrary within his knowledge. Leach *v.* Bancroft, 61 N. H. 411. See also Smith *v.* Forrest, 49 N. H. 230.

3. State *v.* Crocker, 49 S. C. 242, 27 S. E. 49, where it was held that such lines, under the circumstances, were merely the declarations of an interested party.

4. Assistant.— On an issue as to the location of the true boundary of a given survey, one who assisted in the survey is competent to testify as to how it was made so as to enable the court to trace the course of the surveyor; such evidence not contradicting the original field-notes. Smith *v.* Leach, 70 Tex. 493, 7 S. W. 767. See also Houx *v.* Batteen, 68 Mo. 84.

5. *Arkansas.*— Jeffries *v.* Hargis, 50 Ark. 65, 6 S. W. 328.

Connecticut.— Beach *v.* Whittlesey, (Conn. 1901) 48 Atl. 350.

Kentucky.— Busse *v.* Central Covington, 19 Ky. L. Rep. 157, 38 S. W. 865, 39 S. W. 848.

Massachusetts.— Stetson *v.* Dow, 16 Gray (Mass.) 372.

Michigan.— Olin *v.* Henderson, 120 Mich. 149, 79 N. W. 178; Woodbury *v.* Venia, 114 Mich. 251, 72 N. W. 189; Hess *v.* Meyer, 73 Mich. 259, 41 N. W. 422; Stewart *v.* Carleton, 31 Mich. 270. See also Beeman *v.* Black, 49 Mich. 598, 14 N. W. 560.

Missouri.— Houx *v.* Batteen, 68 Mo. 84; Johnson *v.* Boonville, 85 Mo. App. 199.

New Hampshire.— Barron *v.* Cobleigh, 11 N. H. 557, 35 Am. Dec. 505.

New York.— Ratcliffe *v.* Gray, 4 Abb. Dec. (N. Y.) 4, 3 Keyes (N. Y.) 510, 3 Transcr. App. (N. Y.) 117.

Texas.— Smith *v.* Leach, 70 Tex. 493, 7 S. W. 767; Wardlow *v.* Harmon, (Tex. Civ. App. 1898) 45 S. W. 828; Whitman *v.* Rhomberg, (Tex. Civ. App. 1894) 25 S. W. 451.

Vermont.— Martyn *v.* Curtis, 68 Vt. 397, 35 Atl. 333.

See 8 Cent. Dig. tit. "Boundaries," § 157.

As to ambiguity of deed.— A surveyor is competent to testify to the ambiguity of the terms of a deed in respect to location and that all the lines given in the deed are shorter than as found by actual survey. Ratcliffe *v.* Gray, 4 Abb. Dec. (N. Y.) 4, 3 Keyes (N. Y.) 510, 3 Transcr. App. (N. Y.) 117.

Oral evidence of the acts of a county surveyor who runs a new line departing from the old line is not admissible. Beeman *v.* Black, 49 Mich. 598, 14 S. W. 560.

Report of surveyor.—Under Tex. Rev. Stat. (1895), art. 5264, making it evidence, unless rejected for good cause, the report of a surveyor appointed by the court to run a boundary, and who has testified to the survey, is admissible in an action to establish such boundary. Wardlow *v.* Harmon, (Tex. Civ. App. 1898) 45 S. W. 828.

Return of surveyor.—Where a deed bounds property on a public highway, the return of surveyors who laid out such highway is competent evidence on the question of bound-

had no means of verifying his survey,[6] or as to his intention in running the survey;[7] nor can he give his opinion as a surveyor as to the true location of the land in controversy.[8] Surveyors may properly be questioned, as experts, upon subjects with which they are peculiarly acquainted, and which cannot be made known to the jury except by such testimony.[9] They can, however, testify only in regard to facts, never in regard to conclusions of fact[10] or in regard to conclusions

ary, without showing their appointment. Haring *v.* Van Houten, 22 N. J. L. 61.

6. Carpenter *v.* Fisher, 12 N. Y. App. Div. 622, 43 N. Y. Suppl. 418.

7. Blackwell *v.* Coleman County, 94 Tex. 216, 59 S. W. 530.

8. *Maryland.*— Kelso *v.* Stigar, 75 Md. 376, 24 Atl. 18.

Michigan.—O'Brien *v.* Cavanaugh, 61 Mich. 368, 28 N. W. 127; Case *v.* Trapp, 49 Mich. 59, 12 N. W. 908; Cronin *v.* Gore, 38 Mich. 381; Stewart *v.* Carleton, 31 Mich. 270.

Missouri.— Schultz *v.* Lindell, 30 Mo. 310.

North Dakota.— Radford *v.* Johnson, 8 N. D. 182, 77 N. W. 601.

Pennsylvania.— Ormsby *v.* Ihmsen, 34 Pa. St. 462.

"**Bounds and starting points** are questions of fact to be determined by testimony, and surveyors have no more authority than other men to determine them on their own notions." Radford *v.* Johnson, 8 N. D. 182, 77 N. W. 601.

9. *Alabama.*— Bridges *v.* McClendon, 56 Ala. 327; Shook *v.* Pate, 50 Ala. 91; Brantly *v.* Swift, 24 Ala. 390 (that a particular line was marked by government surveyors); Nolin *v.* Parmer, 21 Ala. 66 (in all of which cases it was held that a surveyor may testify as an expert that a survey made by himself was correctly made).

Connecticut.— McGann *v.* Hamilton, 58 Conn. 69, 19 Atl. 376, where it was held that the surveyor might testify that two stakes, each having a nail in its top, found near the survey in dispute were surveyors' stakes.

Iowa.—Messer *v.* Reginnitter, 32 Iowa 312, where it was held that a surveyor might testify as to the correctness of a plat made by himself.

Louisiana.— Bowman *v.* Flower, 7 La. 106, where it was held that a surveyor may be questioned as to the appearance of old lines, marks upon trees, his opinion as to the age of certain marks upon trees, and similar facts connected with his profession.

Massachusetts.— Knox *v.* Clark, 123 Mass. 216 (as to whether mark is such as surveyor would make); Davis *v.* Mason, 4 Pick. (Mass.) 156 (whether certain piles of stones and marks on trees were monuments of boundaries).

Michigan.— Hockmoth *v.* Des Grand Champs, 71 Mich. 520, 39 N. W. 737, where it was held that a surveyor may testify that corners are according to the original government survey.

Missouri.— Campbell *v.* Wood, 116 Mo. 196, 22 S. W. 796; Cummings *v.* Powell, 97 Mo. 524, 10 S. W. 819 (in which cases it was held that a surveyor may show the meaning of certain cross lines on a map); Mincke *v.* Skinner, 44 Mo. 92 (as to correctness of survey made by himself).

New Hampshire.— Jones *v.* Tucker, 41 N. H. 546; Barron *v.* Cobleigh, 11 N. H. 505, 35 Am. Dec. 505; Peterborough *v.* Jaffrey, 6 N. H. 462, in which it was held that surveyors may testify as to whether marks on trees or piles of stone or other marks on the ground are monuments.

New York.—Pope *v.* Hanmer, 74 N. Y. 240 (that the boundary claimed is necessary to give the quantity called for); Ratcliffe *v.* Gray, 4 Abb. Dec. (N. Y.) 4, 3 Keyes (N. Y.) 510, 3 Transcr. App. (N. Y.) 117 (that courses and distances are incongruous, and that lines indicated by monuments differ in length from the calls); Culver *v.* Haslam, 7 Barb. (N. Y.) 314 (as to marks on trees, piles of stone, or other marks upon ground).

North Carolina.—Dugger *v.* McKesson, 100 N. C. 1, 6 S. E. 746 (as to why marks were placed in a particular position, and also that in surveys under old grants streams not called for as termini or crossings are usually omitted); Clegg *v.* Fields, 52 N. C. 37, 75 Am. Dec. 450; Stevens *v.* West, 51 N. C. 49 (that certain marks on trees claimed as a corner were corner lines or marks).

Pennsylvania.— Northumberland Coal Co. *v.* Clement, 95 Pa. St. 126 (permitted to state where he would locate a warrant similar to that under which defendant held); Forbes *v.* Caruthers, 3 Yeates (Pa.) 527 (as to correct manner of running resurveys).

Texas.— Coffey *v.* Hendricks, 66 Tex. 676, 2 S. W. 47 (as to effect of change of figure in field-notes); Angle *v.* Young, (Tex. Civ. App. 1894) 25 S. W. 798 (as to identity of unmarked trees called for).

Wisconsin.— Toomey *v.* Kay, 62 Wis. 104, 22 N. W. 286, where the surveyor was allowed to testify as to whether a corner located by him was the true quarter section corner.

See 8 Cent. Dig. tit. "Boundaries," § 159.

Declarations of deceased expert.—The opinion given by a surveyor, formed on an inspection of marks on trees, as to the boundaries of lots is inadmissible, although he has since deceased. Wallace *v.* Goodall, 18 N. H. 439.

10. Burt *v.* Busch, 82 Mich. 506, 46 N. W. 790; Stewart *v.* Carleton, 31 Mich. 270; Roberts *v.* Lynch, 15 Mo. App. 456; Pennsylvania, etc., Canal, etc., R. Co. *v.* Roberts, 8 Wkly. Notes Cas. (Pa.) 6; Reast *v.* Donald, 84 Tex. 648, 19 S. W. 795; Randall *v.* Gill, 77 Tex. 351, 14 S. W. 134; Bugbee Land, etc., Co. *v.* Brents, (Tex. Civ. App. 1895) 31 S. W. 695.

Where a section line or other starting-point actually exists is always a question

of law, as such matters are for the determination of the jury or the court as the case may be.[11]

(II) *As to Survey of Tract in Controversy.* One who has himself surveyed land, or been an assistant at the survey, is a competent witness to prove its boundaries,[12] and may give parol evidence explanatory of his map.[13]

8. Trial — a. In General. The conduct of an action involving boundaries is ordinarily governed by the same rules as other civil actions,[14] but where a special proceeding is provided by law the provisions of the law must be complied with.[15]

b. Province of Court and Jury — (I) *In General.* What are boundaries is a matter of law for the court;[16] where they are, a matter of fact for the determination of the jury, under proper instructions from the court.[17]

of fact and not of theory, and cannot be left to an expert for final decision. Stewart *v.* Carleton, 31 Mich. 270.

Whether a survey was actually located on the ground or was an office survey is a matter on which the surveyor should not be allowed to express an opinion, but should be determined by the jury of all facts in evidence. Reast *v.* Donald, 84 Tex. 648, 19 S. W. 795.

Whether one survey conflicts with another is a question of fact to be determined by the jury, upon which an expert may not testify. Bugbee Land, etc., Co. *v.* Brents, (Tex. Civ. App. 1895) 31 S. W. 695.

11. Northumberland Coal Co. *v.* Clement, 95 Pa. St. 126; Ormsby *v.* Ihmsen, 34 Pa. St. 462.

12. *Alabama.*— Bullock *v.* Wilson, 2 Port. (Ala.) 436.

Connecticut.—Beach *v.* Whittlesey, 73 Conn. 530, 48 Atl. 350.

Georgia.— Gunn *v.* Harris, 88 Ga. 439, 14 S. E. 593.

Iowa.— Steyer *v.* Curran, 48 Iowa 580; Messer *v.* Reginnitter, 32 Iowa 312. *Compare* McAnich *v.* Hulse, 113 Iowa 58, 84 N. W. 914.

Kentucky.—Bowling *v.* Helm, 1 Bibb (Ky.) 88.

Maryland.— Tenant *v.* Hambleton, 3 Harr. & J. (Md.) 233. See also Richardson *v.* Milburn, 17 Md. 67, where it was held that the fact that a surveyor ran a certain line in a certain locality may be proved as well by one who saw him do it as by the surveyor himself.

Michigan.— Wineman *v.* Grummond, 90 Mich. 280, 51 N. W. 509.

New Hampshire.— Hitchcock *v.* Libby, 70 N. H. 399, 47 Atl. 269.

Pennsylvania.— Pruner *v.* Brisbin, 98 Pa. St. 202; Hoover *v.* Gonzalus, 11 Serg. & R. (Pa.) 314.

Texas.— Henry *v.* Whitaker, 82 Tex. 5, 17 S. W. 509; Booth *v.* Upshur, 26 Tex. 64; McCreary *v.* Douglass, 5 Tex. Civ. App. 492, 24 S. W. 367; Schley *v.* Blum, (Tex. Civ. App. 1893) 22 S. W. 264.

Wisconsin.— Toomey *v.* Kay, 62 Wis. 104, 22 N. W. 286.

See 8 Cent. Dig. tit. "Boundaries," § 158.

13. Cundiff *v.* Orms, 7 Port. (Ala.) 58.

14. See, generally, Trial.

Amendments.—Supplemental pleadings and amendments are allowed in actions of boundary as in other civil actions. Watson *v.* Bishop, 69 Ga. 51; Mitchell *v.* Wilson, 70 Iowa 332, 30 N. W. 588.

Taking evidence to jury room.— In an action to establish a boundary it is proper to permit the jury, when it retires, to take with it the report of a surveyor appointed to run such boundary, and a map of the premises attached to such report, to which reference had been made to explain testimony. Wardlow *v.* Harmon, (Tex. Civ. App. 1898) 45 S. W. 828.

15. McDonogh *v.* De Gruys, 4 La. Ann. 33.

16. *Alabama.*— McGee *v.* Doe, 22 Ala. 699.

Kentucky.—Cissell *v.* Rapier, 3 Ky. L. Rep. 690.

Maine.— Royal *v.* Chandler, 83 Me. 150, 21 Atl. 842.

Maryland.— Kelso *v.* Stigar, 75 Md. 376, 24 Atl. 18; Wilson *v.* Inloes, 6 Gill (Md.) 121.

New York.— Danziger *v.* Boyd, 120 N. Y. 628, 24 N. E. 482, 30 N. Y. St. 889 [*affirming* 54 N. Y. Super. Ct. 365].

North Carolina.— Tucker *v.* Satterthwaite, 126 N. C. 958, 36 S. E. 188; Johnson *v.* Ray, 72 N. C. 273.

United States.— Barclay *v.* Powell, 6 Pet. (U. S.) 498, 8 L. ed. 477.

See 8 Cent. Dig. tit. "Boundaries," § 196.

17. *Alabama.*— Taylor *v.* Fomby, 116 Ala. 621, 22 So. 910, 67 Am. St. Rep. 149; Humes *v.* Bernstein, 72 Ala. 546; Doe *v.* Cullum, 4 Ala. 576.

California.— Vaughan *v.* Knowlton, 112 Cal. 151, 44 Pac. 478; Higgins *v.* Ragsdale, 83 Cal. 219, 23 Pac. 316; Reynolds *v.* West, 1 Cal. 322.

Colorado.— Cullacott *v.* Cash Gold, etc., Min. Co., 8 Colo. 179, 6 Pac. 211.

Georgia.— Shiels *v.* Lamar, 58 Ga. 590.

Illinois.—Macauley *v.* Cunningham, 60 Ill. App. 28.

Iowa.— Fisher *v.* Muecke, 82 Iowa 547, 48 N. W. 936.

Kentucky.— Burgin *v.* Chenault, 9 B. Mon. (Ky.) 285; Dimmitt *v.* Lashbrook, 2 Dana (Ky.) 1; Cockrell *v.* McQuinn, 4 T. B. Mon. (Ky.) 61; Ashcraft *v.* Cox, 21 Ky. L. Rep. 31, 50 S. W. 986.

Maine.— Oliver *v.* Brown, 80 Me. 542, 15 Atl. 599; Greeley *v.* Weaver, (Me. 1888) 13 Atl. 575; Ames *v.* Hilton, 70 Me. 36; Tibbetts *v.* Estes, 52 Me. 566; Abbott *v.* Abbott, 51 Me. 575; Madden *v.* Tucker, 46 Me. 367. See also Carter *v.* Clark, 92 Me. 225, 42 Atl. 398.

Maryland.— Wilson *v.* Inloes, 6 Gill (Md.) 121; Carroll *v.* Norwood, 5 Harr. & J. (Md.) 155; Thompson *v.* Brown, 1 Harr. & J. (Md.) 335.

(II) *Where Calls Conflict.* In case of conflicting calls the true boundaries should be left to the jury under proper instructions as to the relative importance of conflicting calls.[18] So, the application of a general description of land in a deed or grant to the subject-matter intended to be conveyed, or the determina-

Massachusetts.— Smith *v.* Smith, 110 Mass. 302; Williston *v.* Morse, 10 Metc. (Mass.) 17.

Michigan.— Woodbury *v.* Venia, 114 Mich. 251, 72 N. W. 189; Brown *v.* Morrill, 91 Mich. 29, 51 N. W. 700; Jones *v.* Pashby, 62 Mich. 614, 29 N. W. 374; Cronin *v.* Gore, 38 Mich. 381.

Missouri.— Whitehead *v.* Ragan, 106 Mo. 231, 17 S. W. 307; Robertson *v.* Drane, 100 Mo. 273, 13 S. W. 405; St. Louis *v.* Meyer, 87 Mo. 276 [*affirming* 13 Mo. App. 367]; Whittelsey *v.* Kellogg, 28 Mo. 404; Ott *v.* Soulard, 9 Mo. 581.

Nebraska.— Kittell *v.* Jenssen, 37 Nebr. 685, 56 N. W. 487; Horbach *v.* Miller, 4 Nebr. 31.

New Hampshire.—Tasker *v.* Cilley, 59 N. H. 575; Andreus *v.* Todd, 50 N. H. 565.

New Jersey.—Allen *v.* Ponitz, (N. J. 1899) 43 Atl. 981; Passage *v.* McVeigh, 23 N. J. L. 729.

New York.— Ratcliffe *v.* Cary, 4 Abb. Dec. (N. Y.) 4, 3 Keyes (N. Y.) 510, 3 Transcr. App. (N. Y.) 117; Egerer *v.* New York Cent., etc., R. Co., 39 N. Y. App. Div. 652, 57 N. Y. Suppl. 133; Roth *v.* Rochester, 90 Hun (N. Y.) 606, 35 N. Y. Suppl. 336, 69 N. Y. St. 747; Brown *v.* Fishel, 83 Hun (N. Y.) 103, 31 N. Y. Suppl. 361, 63 N. Y. St. 845; Cochran *v.* Smith, 73 Hun (N. Y.) 597, 26 N. Y. Suppl. 103, 56 N. Y. St. 227; Schuyler *v.* Marsh, 37 Barb. (N. Y.) 350; Seneca Nation *v.* Hugaboom, 9 N. Y. Suppl. 699, 30 N. Y. St. 586.

North Carolina.— Williams *v.* Shoemaker, 127 N. C. 182, 37 S. E. 203; Williams *v.* Hughes, 124 N. C. 3, 32 S. E. 325; Deaver *v.* Jones, 119 N. C. 598, 26 S. E. 156; Davidson *v.* Shuler, 119 N. C. 582, 26 S. E. 340; Buckner *v.* Anderson, 111 N. C. 572, 16 S. E. 424; Marsh *v.* Richardson, 106 N. C. 539, 11 S. E. 522 [*distinguishing* Baxter *v.* Wilson, 95 N. C. 137]; Bonaparte *v.* Carter, 106 N. C. 534, 11 S. E. 262; Roberts *v.* Preston, 106 N. C. 411, 10 S. E. 983; Dobson *v.* Whisenhant, 101 N. C. 645, 8 S. E. 126; Redmond *v.* Stepp, 100 N. C. 212, 6 S. E. 727; Scull *v.* Pruden, 92 N. C. 168; Young *v.* Griffith, 84 N. C. 715; McAllister *v.* Devane, 76 N. C. 57; Clark *v.* Wagoner, 70 N. C. 706; Osborne *v.* Johnston, 65 N. C. 22; Dobson *v.* Finley, 53 N. C. 495; McDonald *v.* McCaskill, 53 N. C. 158; Hill *v.* Mason, 52 N. C. 551; Rodman *v.* Gaylord, 52 N. C. 262; Spruill *v.* Davenport, 46 N. C. 203; Marshall *v.* Fisher, 46 N. C. 111; Burnett *v.* Thompson, 35 N. C. 379; Houser *v.* Belton, 32 N. C. 358, 51 Am. Dec. 391; Massey *v.* Belisle, 24 N. C. 170; Becton *v.* Chesnut, 20 N. C. 396; Hough *v.* Horne, 20 N. C. 305; Hurley *v.* Morgan, 18 N. C. 425, 28 Am. Dec. 579; Brooks *v.* Britt, 15 N. C. 481; Doe *v.* Paine, 11 N. C. 64, 15 N. C. 507; Fruit *v.* Brower, 9 N. C. 337; Den *v.* Greenlee, 7 N. C. 556; Den *v.* Morrison, 7 N. C. 551; Den *v.* Leggat, 7 N. C. 539.

Ohio.— Chatfield *v.* Cincinnati, 7 Ohio Dec. (Reprint) 111, 1 Cinc. L. Bul. 125.

Oregon.— Dice *v.* McCauley, 25 Oreg. 469, 36 Pac. 530.

Pennsylvania.— Humphrey *v.* Cooper, 183 Pa. St. 432, 41 Wkly. Notes Cas. (Pa.) 304, 38 Atl. 994; Wilson *v.* Marvin, 172 Pa. St. 30, 33 Atl. 275; Bushey *v.* South Mountain Min., etc., Co., 136 Pa. St. 541, 26 Wkly. Notes Cas. (Pa.) 543, 20 Atl. 549; Berry *v.* Watson, 122 Pa. St. 210, 15 Atl. 618; Keizer *v.* Beemer, (Pa. 1888) 13 Atl. 909; Kellum *v.* Smith, 65 Pa. St. 86; Greeley *v.* Thomas, 56 Pa. St. 35; Brown *v.* Willey, 42 Pa. St. 205; Hunt *v.* McFarland, 38 Pa. St. 69; Mathers *v.* Hegarty, 37 Pa. St. 64; Hecker *v.* Sterling, 36 Pa. St. 423; Gratz *v.* Hoover, 16 Pa. St. 232; Nourse *v.* Lloyd, 1 Pa. St. 229; Comegys *v.* Carley, 3 Watts (Pa.) 280, 27 Am. Dec. 356; Kron *v.* Daugherty, 9 Pa. Super. Ct. 163; Wood *v.* Fishburn, 17 Leg. Int. (Pa.) 396.

South Carolina.— Johnson *v.* Hannahan, 3 Strobh. (S. C.) 425; Baynard *v.* Eddings, 2 Strobh. (S. C.) 374.

South Dakota.— White *v.* Amrhien, 14 S. D. 270, 85 N. W. 191; Dowdle *v.* Cornue, 9 S. D. 126, 68 N. W. 194.

Texas.— New York, etc., Land Co. *v.* Votaw, 91 Tex. 282, 42 S. W. 969; Lecomte *v.* Toudouze, 82 Tex. 208, 17 S. W. 1047, 27 Am. St. Rep. 870; Adams *v.* Crenshaw, 74 Tex. 111, 11 S. W. 1082; Moore *v.* Stewart, (Tex. 1887) 7 S. W. 771; Koepsel *v.* Allen, 68 Tex. 446, 4 S. W. 856; Linney *v.* Wood, 66 Tex. 22, 17 S. W. 244; Hawkins *v.* Nye, 59 Tex. 97; Farley *v.* Deslonde, 58 Tex. 588; Bolton *v.* Lann, 16 Tex. 96; Wiley *v.* Lindley, (Tex. Civ. App. 1900) 56 S. W. 1001; Eberling *v.* Schneider, 2 Tex. Unrep. Cas. 757; Giltner *v.* Waters, 2 Tex. Unrep. Cas. 513.

Vermont.— Oatman *v.* Andrew, 43 Vt. 466.

Virginia.— Greif *v.* Norfolk, etc., R. Co., (Va. 1898) 30 S. E. 438.

Wisconsin.— Schlei *v.* Struck, 109 Wis. 598, 85 N. W. 430; Menasha Wooden Ware Co. *v.* Lawson, 70 Wis. 600, 36 N. W. 412.

United States.— McKey *v.* Hyde Park, 134 U. S. 84, 10 S. Ct. 512, 33 L. ed. 860; Ayers *v.* Watson, 113 U. S. 594, 5 S. Ct. 641, 28 L. ed. 1093; Koons *v.* Bryson, 69 Fed. 297, 25 U. S. App. 368, 16 C. C. A. 227.

England.— See Ireland *v.* Wilson, 1 Ir. Ch. 623.

See 8 Cent. Dig. tit. "Boundaries," § 196 *et seq.*

On a question of variations the jury is the proper tribunal to decide whether any and what variations should be allowed in the location of lands. Wilson *v.* Inloes, 6 Gill (Md.) 121.

18. *Maine.*— Greeley *v.* Weaver, (Me. 1888) 13 Atl. 575.

tion whether a specific quantity called for is included in the lands in controversy, is a question of fact for the determination of the jury, under proper instructions from the court.[19]

(III) *Where Previous Settlement Is Claimed.* Where it is claimed that a line has been established by agreement, acquiescence, or by practical location, such establishment is a question of fact to be submitted to the jury.[20]

c. Instructions. It is the duty of the court to instruct the jury as to what constitutes the boundary in controversy and as to the relative importance of conflicting calls — these being questions of law for the court, but it is improper for it to infringe upon the province of the jury and to instruct as to the actual location of the boundary in dispute,[21] and rules as to the test of the relative dignity

New Jersey.— Opdyke *v.* Stephens, 28 N. J. L. 23.

North Carolina.— Murray *v.* Spencer, 88 N. C. 357; Safret *v.* Hartman, 50 N. C. 185; Icehour *v.* Rives, 32 N. C. 256; Pender *v.* Coor, 1 N. C. 140.

Pennsylvania.— Bentley *v.* Rickabaugh, 62 Pa. St. 281.

Texas.— Bell *v.* Preston, 19 Tex. Civ. App. 375, 47 S. W. 375, 753.

Wisconsin.— Reilly *v.* Howe, 101 Wis. 108, 76 N. W. 1114.

See 8 Cent. Dig. tit. "Boundaries," § 197.

19. *Kentucky.*— Vanable *v.* McDonald, 4 Dana (Ky.) 336; Layson *v.* Galloway, 4 Bibb (Ky.) 100.

Maryland.— Shields *v.* Miller, 4 Harr. & J. (Md.) 1; Howard *v.* Cromwell, 1 Harr. & J. (Md.) 115; Helms *v.* Howard, 2 Harr & M. (Md.) 57.

Massachusetts.— Pettingill *v.* Porter, 3 Allen (Mass.) 349; Williston *v.* Morse, 10 Metc. (Mass.) 17.

New Hampshire.— Bell *v.* Woodward, 46 N. H. 315.

New Jersey.— Curtis *v.* Aaronson, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584.

New York.— Frier *v.* Jackson, 8 Johns. (N. Y.) 495.

North Carolina.— Hurley *v.* Morgan, 18 N. C. 425, 28 Am. Dec. 579.

Pennsylvania.— Stroup *v.* McCloskey, (Pa. 1886) 10 Atl. 421, 481; Christ *v.* Thompson, (Pa. 1886) 4 Atl. 8; Packer *v.* Schrader, Min., etc., Co., 97 Pa. St. 379; Quinn *v.* Heart, 43 Pa. St. 337; Bellas *v.* Cleaver, 40 Pa. St. 260; Ramage *v.* Peterman, 25 Pa. St. 349; Cassidy *v.* Conway, 25 Pa. St. 240.

South Carolina.— Coats *v.* Mathews, 2 Nott & M. (S. C.) 99.

Tennessee.— Swan *v.* Parker, 7 Yerg. (Tenn.) 489, 27 Am. Dec. 522.

Texas.— Scott *v.* Pettigrew, 72 Tex. 321, 12 S. W. 161; Booth *v.* Upshur, 26 Tex. 64; Camley *v.* Stanfield, 10 Tex. 546, 60 Am. Dec. 219; Holland *v.* Thompson, 12 Tex. Civ. App. 471, 35 S. W. 19.

Vermont.— Lippett *v.* Kelley, 46 Vt. 516.

United States.— Reed *v.* Merrimac River Locks, etc., 8 How. (U. S.) 274, 12 L. ed. 1077.

See 8 Cent. Dig. tit. "Boundaries," § 203.

20. *Alabama.*— Wheeler *v.* State, 109 Ala. 56, 19 So. 993.

Illinois.— Bitter *v.* Saathoff, 98 Ill. 266.

Kentucky.— Huffman *v.* Williamson, 14 Ky. L. Rep. 657, 20 S. W. 820.

Maine.— Blackington *v.* Sumner, 69 Me. 136; Dennett *v.* Crocker, 8 Me. 239.

Massachusetts.— Burrell *v.* Burrell, 11 Mass. 294.

Michigan.— Manistee Mfg. Co. *v.* Cogswell, 103 Mich. 602, 61 N. W. 884; Bunce *v.* Bidwell, 43 Mich. 542, 5 N. W. 1023.

New Hampshire.— Enfield *v.* Day, 7 N. H. 457, 28 Am. Dec. 360.

New York.— Ratcliffe *v.* Gray, 4 Abb. Dec. (N. Y.) 4, 3 Keyes (N. Y.) 510, 3 Transcr. App. (N. Y.) 117; Becken *v.* Weeks, 15 N. Y. Suppl. 585, 39 N. Y. St. 786 [*affirmed* in 133 N. Y. 665, 31 N. E. 624, 45 N. Y. St. 929]; Hill *v.* Edie, 1 N. Y. Suppl. 480, 17 N. Y. St. 255.

Pennsylvania.— Grove *v.* McAlevy, (Pa. 1887) 8 Atl. 210.

Texas.— Koenigheim *v.* Sherwood, 79 Tex. 508, 16 S. W. 23.

See 8 Cent. Dig. tit. "Boundaries," § 204.

21. *California.*— Helm *v.* Wilson, 89 Cal. 593, 26 Pac. 1103, holding that an instruction that the agreed boundary line claimed by defendant in ejectment must have been "distinctly agreed on" is not misleading as impliedly excluding evidence to prove the agreed line from the acts, situation, acquiescence, and relation of the parties.

District of Columbia.— District of Columbia *v.* Robinson, 14 App. Cas. (D. C.) 512.

Illinois.— Clayton *v.* Feig, 179 Ill. 534, 54 N. E. 149; Henderson *v.* Dennis, 177 Ill. 547, 53 N. E. 65; Elgin *v.* Beckwith, 119 Ill. 367, 10 N. E. 558; Kamphouse *v.* Gaffner, 73 Ill. 453.

Kentucky.— Wallace *v.* Manwell, 1 J. J. Marsh. (Ky.) 447; Thornberry *v.* Churchill, 2 T. B. Mon. (Ky.) 54.

Maine.— Chase *v.* Martin, (Me. 1888) 15 Atl. 68; Blackington *v.* Sumner, 69 Me. 136.

Massachusetts.—Davis *v.* Sherman, 7 Gray (Mass.) 291.

Missouri.— Granby Min., etc., Co. *v.* Davis, 136 Mo. 422, 57 S. W. 126; Coleman *v.* Drane, 116 Mo. 387, 22 S. W. 801; St. Louis *v.* Meyer, 13 Mo. App. 367.

New Jersey.— Kipp *v.* Den, 24 N. J. L. 854; Den *v.* Emerson, 10 N. J. L. 279.

New York.— Winne *v.* Ulster County Sav. Inst., 11 N. Y. St. 853.

North Carolina.—Williams *v.* Hughes, 124 N. C. 3, 32 S. E. 325; Osborne *v.* Johnston, 65 N. C. 22.

of calls having no application to the case at issue between the parties should not be given.[22]

d. Verdict, Findings, or Judgment. The verdict, findings, or judgment establishing a disputed boundary should be so definite that the line can be accurately run in accordance therewith,[23] and where the disputed boundary cannot be established otherwise a new survey should be ordered.[24] Where an action of trespass is turned by the pleadings into one for the determination of boundaries, judgment may be given for land as well as for a money compensation,[25] but under a statute providing that possession shall be sufficient to entitle a party to relief the judgment should omit all reference to the title to the lands in controversy.[26]

9. Review. Jurisdiction to entertain appeals and writs of error in boundary proceedings is conferred by statute,[27] and the principles governing appeal and error generally[28] are applicable.[29] All parties in interest below must be made parties to the appellate proceedings,[30] and no objections not raised in the lower court, unless of a jurisdictional character, will be considered by the higher court.[31] Where the evidence is conflicting, but there is some evidence to support the verdict of the jury or the findings of the court below, the appellate court will not review such verdict or findings and pass upon the facts,[32] and a judgment or decree

Oregon.— Barnhart *v.* Ehrhart, 33 Oreg. 274, 54 Pac. 195.

Pennsylvania.— Smith *v.* Horn, 168 Pa. St. 372, 31 Atl. 1078; Tyrone Min., etc., Co. *v.* Cross, 128 Pa. St. 636, 25 Wkly. Notes Cas. (Pa.) 97, 18 Atl. 519; Grier *v.* Pennsylvania Coal Co., 128 Pa. St. 79, 25 Wkly. Notes Cas. (Pa.) 85, 18 Atl. 480; Cross *v.* Tyrone Min., etc., Co., 121 Pa. St. 387, 15 Atl. 643; Pennsylvania Canal Co. *v.* Harris, 101 Pa. St. 80.

South Carolina.— Connor *v.* Johnson, 53 S. C. 90, 30 S. E. 833.

Tennessee.— McColgan *v.* Langford, 6 Lea (Tenn.) 108.

Texas.— King *v.* Mansfield, (Tex. 1892) 19 S. W. 858; Reast *v.* Donald, 84 Tex. 648, 19 S. W. 795; Titterington *v.* Trees, 78 Tex. 567, 14 S. W. 692; Boydston *v.* Sumpter, 78 Tex. 402, 14 S. W. 996; Mayfield *v.* Williams, 73 Tex. 508, 11 S. W. 530; Jones *v.* Andreus, 62 Tex. 652; Pierce *v.* Schram, (Tex. Civ. App. 1899) 53 S. W. 716; Vogt *v.* Geyer, (Tex. Civ. App. 1898) 48 S. W. 1100; Branch *v.* Simons, (Tex. Civ. App. 1898) 48 S. W. 40; Mock *v.* Hatcher, (Tex. Civ. App. 1897) 43 S. W. 30. *Compare* Huff *v.* Crawford, 89 Tex. 214, 34 S. W. 606.

Vermont.— Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57.

United States.— New York, etc., Land Co. *v.* Votaw, 150 U. S. 24, 14 S. Ct. 1, 37 L. ed. 983; Ayers *v.* Watson, 137 U. S. 584, 11 S. Ct. 201, 34 L. ed. 803.

See 8 Cent. Dig. tit. "Boundaries," § 205.

22. Best *v.* Splawn, (Tex. Civ. App. 1896) 33 S. W. 1005.

23. Foreman *v.* Redman, 9 Ky. L. Rep. 531, 5 S. W. 556; Hagey *v.* Detweiler, 35 Pa. St. 409; Jones *v.* Leath, 32 Tex. 329; Farnandes *v.* Schiermann, 23 Tex. Civ. App. 343, 55 S. W. 378; Cavitt *v.* Reed, (Tex. Civ. App. 1900) 55 S. W. 349; Muncy *v.* Mattfield, (Tex. Civ. App. 1897) 40 S. W. 345; Best *v.* Splawn, (Tex. Civ. App. 1896) 33 S. W. 1005; Beckwith *v.* Thompson, 18 W. Va. 103. See also Finley *v.* Curd, 22 Ky. L. Rep. 1912, 62 S. W. 501.

24. Booth *v.* Buras, 35 La. Ann. 552.

25. Eberling *v.* Weyel, 2 Tex. Unrep. Cas. 501.

26. Williams *v.* Hughes, 124 N. C. 3, 32 S. E. 325.

27. Atkins *v.* Huston, 5 Ill. App. 326; Richards *v.* Schneider, (Iowa 1898) 76 N. W. 711; Yocum *v.* Haskins, 81 Iowa 436, 46 N. W. 1065.

The United States supreme court, under the Judiciary Act of 1789, § 25, cannot review an adjudication of a state court upon the mere question of the location of a private boundary, where no question of title is involved, although the land is held by titles derived under acts of congress. Lanfear *v.* Hunley, 4 Wall. (U. S.) 204, 18 L. ed. 325.

28. See, generally, Appeal and Error, 2 Cyc. 474.

29. Oster *v.* Devereaux, (Iowa 1901) 87 N. W. 512; Bushnell *v.* Brown, 8 Mart. N. S. (La.) 157; Wilson *v.* Inloes, 6 Gill (Md.) 121; Giraud *v.* Ellis, (Tex. Civ. App. 1894) 24 S. W. 967. And see Piercy *v.* Crandall, 34 Cal. 334.

Amount in controversy in action relating to boundaries see Appeal and Error, 2 Cyc. 577, note 32.

30. Blanc *v.* Cousin, 8 La. Ann. 71, holding that where an action of boundary is changed into a petitory action, and plaintiff in the original suit cites his vendors in warranty, the latter on an appeal by defendant in the original suit must be made parties in the appellate court.

31. Tucker *v.* Lefebre, 5 La. Ann. 122; Culver *v.* Rodgers, 33 Ohio St. 537.

32. *California.*— Ponet *v.* Wills, (Cal. 1897) 48 Pac. 483; Foss *v.* Hinkell, 91 Cal. 194, 25 Pac. 762, 27 Pac. 644, 861; Mills *v.* Lux, 45 Cal. 273.

Colorado.— Fugate *v.* Smith, 4 Colo. App. 201, 35 Pac. 283.

Illinois.— Green *v.* Mumper, 138 Ill. 434,

will not be disturbed for error which resulted in no prejudice to the party seeking to take advantage of it.[33]

IV. APPORTIONMENT OF EXCESS OR DEFICIENCY.

A. In General. Where a tract of land is subdivided and is subsequently found to contain either more or less than the aggregate amount called for in the surveys of the tracts within it, the proper course is to apportion the excess or deficiency among the several tracts.[34] If, however, the original tract is subdivided by distinct and separate surveys the second survey is subservient to the first, and must bear any subsequently discovered deficiency.[35] So too where a tract is conveyed in parcels without reference to any plan or the avowal of a purpose to divide land according to any definite proportion, any excess or deficiency will go to, or be borne by, the last grantee;[36] and if a tract is divided

28 N. E. 1075; Francois *v.* Maloney, 56 Ill. 399.

Iowa.— Maher *v.* Shenhall, 96 Iowa 634, 65 N. W. 978; Greer *v.* Powell, 89 Iowa 740, 56 N. W. 440; Freeman *v.* Herwig, 84 Iowa 435, 51 N. W. 169; Walrod *v.* Flanigan, 75 Iowa 365, 39 N. W. 645; Bohall *v.* Neiwalt, 75 Iowa 109, 39 N. W. 217; Anderson *v.* Peterson, 74 Iowa 482, 38 N. W. 386; Matter of Harrington, 54 Iowa 33, 6 N. W. 125; Strait *v.* Cook, 46 Iowa 57. *Compare* Yocum *v.* Haskins, 81 Iowa 436, 46 N. W. 1065.

Kentucky.— Pearl *v.* Pittman, 15 Ky. L. Rep. 16, 22 S. W. 81; Scott *v.* Means, etc., Iron Co., 13 Ky. L. Rep. 911, 18 S. W. 1012, 19 S. W. 189; Howard *v.* Lewis, 13 Ky. L. Rep. 508, 17 S. W. 362.

Minnesota.— Loveridge *v.* Omrodt, 38 Minn. 1, 35 N. W. 564.

Missouri.— Skinker *v.* Haagsma, 99 Mo. 208, 12 S. W. 659.

New Hampshire.— Leach *v.* Bancroft, 61 N. H. 411.

New York.— Silliman *v.* Paine, 1 N. Y. Suppl. 75, 16 N. Y. St. 324.

Pennsylvania.— Leach *v.* Armitage, 1 Yeates (Pa.) 104.

South Dakota.—Dowdle *v.* Cornue, 9 S. D. 514, 70 N. W. 633.

Texas.— Cable *v.* Dignowitty, (Tex. 1891) 17 S. W. 33; Brooks *v.* Allen, (Tex. 1891) 16 S. W. 798; Reeves *v.* Roberts, 62 Tex. 550; Childress County Land, etc., Co. *v.* Baker, 23 Tex. Civ. App. 451, 56 S. W. 756; Taylor *v.* Brown, (Tex. Civ. App. 1897) 39 S. W. 312; Heaton *v.* Stewart, (Tex. Civ. App. 1895) 33 S. W. 144; Day Land, etc., Co. *v.* New York, etc., Land Co., (Tex. Civ. App. 1894) 25 S. W. 1089. *Compare* Cage *v.* Danks, 13 La. Ann. 128; Amick *v.* Holman, 3 Strobh. (S. C.) 122; Cain *v.* Hodge, 3 Strobh. (S. C.) 115.

See 8 Cent. Dig. tit. "Boundaries," § 210.

33. *Illinois.*— Henderson *v.* Dennis, 177 Ill. 547, 53 N. E. 65.

Iowa.— Mitchell *v.* Wilson, 70 Iowa 332, 30 N. W. 588.

North Carolina.—Johnson *v.* Ray, 72 N. C. 273.

Pennsylvania.— Eister *v.* Paul, 54 Pa. St. 196; Schnable *v.* Doughty, 3 Pa. St. 392.

Texas.—Gallon *v.* Van Wormer, (Tex. Civ. App. 1892) 21 S. W. 547.

See 8 Cent. Dig. tit. "Boundaries," § 211.

34. *Illinois.*— Martz *v.* Williams, 67 Ill. 306; Francois *v.* Maloney, 56 Ill. 399.

Iowa.— Newcomb *v.* Lewis, 31 Iowa 488; Moreland *v.* Page, 2 Iowa 139.

Kansas.— Miller *v.* Topeka Land Co., 44 Kan. 354, 24 Pac. 420; McAlpine *v.* Reicheneker, 27 Kan. 257.

Kentucky.— Respass *v.* Parmer, 5 J. J. Marsh. (Ky.) 648.

Maine.— Lincoln *v.* Edgecomb, 28 Me. 275; Wyatt *v.* Savage, 11 Me. 429; Witham *v.* Cutts, 4 Me. 31.

Michigan.— Quinnin *v.* Reimeis, 46 Mich. 605, 10 N. W. 35.

Missouri.— Porter *v.* Gaines, 151 Mo. 560, 52 S. W. 376. See also Williams *v.* St. Louis, 120 Mo. 403, 25 S. W. 561.

Ohio.— Marsh *v.* Stephenson, 7 Ohio St. 264, 70 Am. Dec. 72.

Pennsylvania.— Parks *v.* Boynton, 98 Pa. St. 370.

Texas.— Sellers *v.* Reed, 46 Tex. 377; Welder *v.* Carroll, 29 Tex. 317; Knippa *v.* Umlang, (Tex. Civ. App. 1894) 27 S. W. 915; Ware *v.* McQuinn, 7 Tex. Civ. App. 107, 26 S. W. 126. *Compare* Halsell *v.* McCutchen, (Tex. Civ. App. 1901) 64 S. W. 72.

Wisconsin.— Pereless *v.* Magoon, 78 Wis. 27, 46 N. W. 1047, 23 Am. St. Rep. 389; O'Brien *v.* McGrane, 27 Wis. 446; Jones *v.* Kimble, 19 Wis. 429.

United States.— Haydel *v.* Dufresne, 17 How. (U. S.) 23, 15 L. ed. 115.

Compare Jackson *v.* Cole, 16 Johns. (N. Y.) 257.

See 8 Cent. Dig. tit. "Boundaries," § 278.

35. Robeson *v.* Howell, 23 La. Ann. 601; Brown *v.* Potter, 44 N. C. 461. But see Sugar Valley Lumbering Co. *v.* Barber, 87 Pa. St. 313.

Where two grants of land lap upon each other so that both cover in part the same land, the possession of the lappage is, in law, to him who has the better title, unless there be by the party claiming under the other an actual possession, or *possessio pedis*, thereon. Brown *v.* Potter, 44 N. C. 461.

36. Bloch *v.* Pfaff, 101 Mass. 535.

into a certain number of lots of a uniform size, and an irregular surplus is also divided into two or more lots, any deficiency will fall upon the latter lots.[37]

B. Of Government Sections. In the case of government sections interior lines in the extreme northern or western tiers of quarter sections containing either more or less than the regular quantity are to be twenty chains wide, and the excess or deficiency of measurement is always to be thrown on the exterior lots; elsewhere the assumed subdivisional corner will always be a point equidistant from the established corners.[38] This rule, however, has no application when the original surveys are found to be erroneous, in which case the excess or deficiency is to be apportioned to each subdivision within the boundaries where the corners are lost.[39]

V. REMOVING LANDMARK.

A. Civil Liability. Where lines and trees are destroyed by one of the adjoining proprietors, trespass lies by the other, whether his interest be several or as tenant in common.[40]

B. Criminal Liability. At common law there was no criminal liability for removing a landmark,[41] but statutes have been very generally passed making it a criminal offense to remove or obliterate landmarks set up by public authority, or other boundaries that have acquired a known character and reputation as such.[42] An indictment[43] for removing or destroying a landmark must distinctly charge the elements of the offense prohibited by the statute and that the acts were done with the intent therein mentioned.[44]

BOUND-BAILIFF. An officer who arrests debtors.[1] (See, generally, BUM-BAILIFF.)

37. Baldwin *v.* Shannon, 43 N. J. L. 596.

38. Manual of Surveying Instruction, p. 26. See also Grover *v.* Paddock, 84 Ind. 244; Keesling *v.* Truitt, 30 Ind. 306; Vaughn *v.* Taite, 64 Mo. 491; Knight *v.* Elliott, 57 Mo. 317; Westphal *v.* Schultz, 48 Wis. 75, 4 N. W. 136.

39. Caylor *v.* Luzadder, 137 Ind. 319, 36 N. E. 909, 45 Am. St. Rep. 183; Bailey *v.* Chamblin, 20 Ind. 33; Jones *v.* Kimble, 19 Wis. 429.

40. Dubois *v.* Beaver, 25 N. Y. 123, 82 Am. Dec. 326 [*affirming* 34 Barb. (N. Y.) 547]. See also State *v.* Burroughs, 7 N. J. L. 426.

41. State *v.* Burroughs, 7 N. J. L. 426; Young *v.* Miller, 3 Hill (N. Y.) 21.

42. Stratton *v.* State, 45 Ind. 468; Ruth *v.* State, 20 Md. 436; State *v.* Ferguson, 82 Mo. App. 583; State *v.* Malloy, 34 N. J. L. 410.

Necessity of wrongful and unlawful purpose.— Mo. Rev. Stat. (1899), § 3597, provides that every person who shall wilfully or maliciously remove any monument of stone created for the purpose of designating the corner or boundary of any tract of land with intent to destroy the boundary shall be guilty of a misdemeanor. Under this statute it has been held that evidence that defendant intentionally removed a corner-stone was not sufficient to support a conviction, since the act must have been shown wrongfully and committed for an unlawful purpose. State *v.* Ferguson, 82 Mo. App. 583.

43. For form of indictment for removing landmark see State *v.* Malloy, 34 N. J. L. 410.

44. State *v.* Malloy, 34 N. J. L. 410; State *v.* Bryant, 111 N. C. 693, 16 S. E. 326; Woolsey *v.* State, 14 Tex. App. 57.

Averment of intent.— An indictment under a statute making it a misdemeanor "to wilfully destroy, deface or alter any established line, corner," etc., of a survey, which omits the use of the word "wilfully," is fatally defective, and the defect is not supplied by the averment, in general terms, that the acts were "contrary to the form of the statute," etc. Woolsey *v.* State, 14 Tex. App. 57.

Conjunctive statement.—Although the statute makes the offense to consist in altering, defacing, or removing a landmark, an indictment thereunder may properly charge the offense in the conjunctive. State *v.* Bryant, 111 N. C. 693, 16 S. E. 326.

Failure to negative exception.— An indictment under N. C. Code, § 1063, which alleges that defendant "wilfully and unlawfully did alter, deface and remove a certain landmark, to-wit, a corner tree," is not defective for failing to negative the proviso contained in such section, which excepts from its operation creeks or other small streams which the interests of agriculture might require to be altered or turned from their channels, as it goes without saying that a corner tree is neither a creek nor a small stream. State *v.* Bryant, 111 N. C. 693, 16 S. E. 326.

1. Wharton L. Lex.

Sheriff's officers are so called from their being usually bound to the sheriff in an obli-

BOUNDED TREE. A tree used as a bound of lands, particularly as a point or mark from which the boundary lines are drawn.[2] (See, generally, BOUNDARIES.)

BOUNDERS. Visible marks or objects at the ends of the lines drawn in surveys of land, showing the courses and distances.[3] (See, generally, BOUNDARIES.)

BOUNDS. The legal, imaginary line by which different parcels of land are divided.[4] (See, generally, BOUNDARIES.)

gation with sureties for the due execution of their office. 1 Bl. Comm. 345, 346.

2. Burrill L. Dict.

3. Burrill L. Dict.

4. Walton *v.* Tifft, 14 Barb. (N. Y.) 216, 221.

BOUNTIES

By Robert Grattan

CROSS-REFERENCES

For Bounty Lands, see PUBLIC LANDS.
Pensions to Soldiers, see PENSIONS.
Rewards, see REWARDS.
Right of:
Apprentice to Bounty, see APPRENTICES.
Minor to Bounty, see PARENT AND CHILD.
Right to Bounty of Deceased Soldier, see DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; WILLS.

I. DEFINITION AND NATURE.

"Bounty," in the widest acceptation of the term, may be defined as a gratuity,[1] or an unusual or additional benefit conferred upon, or compensation paid to, a class of persons.[2] But the term, according to its more common and received usage, signifies money paid or a premium offered to encourage or promote an object or procure a particular act or thing to be done.[3] Among bounties which have been offered and concerning which rights have been adjudicated are bounties for enlistment in army,[4] naval bounties,[5] bounties to stimulate manufactures,[6] fish bounties,[7] bounties for planting trees and hedges,[8] bounties for sinking artesian wells,[9] and bounties for the destruction of animals.[10]

II. BOUNTIES FOR ENLISTMENT IN ARMY.

A. Offer and Payment — 1. Offer — a. In General.

As municipal corpo-

1. **Bounties are never pure donations,** but are allowed either in consideration of services rendered or to be rendered, objects of public interest to be obtained, production or manufacture to be stimulated, or moral obligation to be recognized. Allen *v.* Smith, 173 U. S. 389, 19 S. Ct. 446, 43 L. ed. 741 [*reversing* 49 La. Ann. 1096, 22 So. 319]; Calder *v.* Henderson, 54 Fed. 802, 2 U. S. App. 627, 4 C. C. A. 584. But see Eichelberger *v.* Sifford, 27 Md. 320.

2. Black L. Dict. 260; Bouvier L. Dict. 148. And *compare* Eichelberger *v.* Sifford, 27 Md. 320.

Bounty has also been defined to be "a sum of money or other things given, generally by the government, to certain persons for some service they have done or are about to do to the public"; as bounty upon the culture of silk; the bounty given to an enlisted soldier; and the like. Ingram *v.* Colgan, 106 Cal. 113, 38 Pac. 315, 39 Pac. 437, 46 Am. St. Rep. 221, 28 L. R. A. 187; Abbe *v.* Allen, 39 How. Pr. (N. Y.) 481.

Distinction between "bounty" and "reward."— "The terms 'bounty' and 'reward' are nearly allied in meaning, the distinction being the former is said to be the appropriate term where the services or action of many persons are desired, and each who acts upon the offer may entitle himself to the promised gratuity without prejudice from or to the claims of others; while a reward applies to the case of a single service, which can be only once performed, and therefore will be earned only by the person or co-operating persons who succeed while others fail." Ingram *v.* Colgan, 106 Cal. 113, 124, 38 Pac. 315, 39 Pac. 437, 46 Am. St. Rep. 221, 28 L. R. A. 187. See also, generally, REWARDS.

3. **Such is the meaning of the word** when used in connection with the enlistment of soldiers. Fowler *v.* Danvers, 8 Allen (Mass.) 80. See also State *v.* Howard County Ct., 39 Mo. 375. In Eichelberger *v.* Sifford, 27 Md. 320, 330, the court said: "The word 'bounty' *ex vi termini,* implies a gratuity, not compensation, an inducement to enlist. It was not paid only to the man who volunteered and served, but to every drafted man who furnished a substitute." See also, generally, *infra,* II.

Not gratuity for past services.— In Kidder *v.* Stewartstown, 48 N. H. 290, 292, the court said: "The very term bounty used in the law would ordinarily imply that the money so raised was to be used as an inducement to enter the service, and not as a gratuity or acknowledgment for services already rendered, and such was the view entertained by the court in Fowler *v.* Danvers, 8 Allen (Mass.) 80."

Nature and origin.— The bounty system, while of ancient origin, was never until late years the object of very serious consideration by the courts of the United States, and the system as understood and exemplified by the present law of the several states of the Union may be said to have grown out of the exigencies of the late Civil War, and of the voluntary efforts of the people to relieve themselves of drafting for military service. Washington County *v.* Berwick, 56 Pa. St. 466.

4. See *infra,* II.
5. See *infra,* III.
6. See *infra,* VII.
7. See *infra,* VIII.
8. See *infra,* V.
9. See *infra,* VI.
10. See *infra,* IV.

rations can exercise no powers, except such as are granted to them, or such as are necessary to enable them to discharge their duties and carry into effect the objects and purposes of their creation,[11] they have no power, in the absence of authority so conferred, to appropriate money for gratuities to men drafted for military service,[12] or power to raise or appropriate money for the purpose of the payment of bounties.[13] Notwithstanding such conceded lack of authority, it has never been doubted that such right might be delegated to municipal corporations in aid of the general welfare and for the furtherance of a public purpose.[14] In recognition of such right, many enabling and confirmatory statutes were passed during the Civil War.[15] In some cases legislative acts were passed

11. Power limited to objects of creation.— Booth *v.* Woodbury, 32 Conn. 118; Abendroth *v.* Greenwich, 29 Conn. 356; Oliver *v.* Keightley, 24 Ind. 514; Alley *v.* Edgecomb, 53 Me. 446; and, generally, MUNICIPAL CORPORATIONS.

Measures for public defense.— Towns are under no obligation to provide for the public defense, and have no power to take measures for that purpose, or bind themselves by any promise or undertaking relating thereto. Hart *v.* Holden, 55 Me. 572. They are not bound to furnish soldiers or materials of war, as it is no part of the duty or right imposed upon them, by the nature of their power, or the original purpose of their creation. Winchester *v.* Corinna, 55 Me. 9.

12. Gratuities for military service.—O'Connor *v.* Waterbury, 69 Conn. 206, 37 Atl. 499; Oliver *v.* Keightley, 24 Ind. 514 [*citing* Abendroth *v.* Greenwich, 29 Conn. 356; Alley *v.* Edgecomb, 53 Me. 446].

13. Payment of bounty money.— Alley *v.* Edgecomb, 53 Me. 446; Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145; Huntress *v.* Stratham, 46 N. H. 409; Stone *v.* Danbury, 46 N. H. 139; Crowell *v.* Hopkinton, 45 N. H. 9; Davis *v.* Putney, 43 Vt. 582.

14. *Connecticut.*— Booth *v.* Woodbury, 32 Conn. 118.

Illinois.—Johnson *v.* Campbell, 49 Ill. 316; Stebbins *v.* Leaman, 47 Ill. 352; Misner *v.* Bullard, 43 Ill. 470; State *v.* Sullivan, 43 Ill. 412; Briscoe *v.* Allison, 43 Ill. 291; Henderson *v.* Lagow, 42 Ill. 360; Taylor *v.* Thompson, 42 Ill. 9.

Indiana.— Miami County *v.* Bearss, 25 Ind. 110; Coffman *v.* Keightley, 24 Ind. 509.

Maine.— Winchester *v.* Corinna, 55 Me. 9.

Maryland.—State *v.* Baltimore, 52 Md. 398.

Massachusetts.— Freeland *v.* Hastings, 10 Allen (Mass.) 570; Lowell *v.* Oliver, 8 Allen (Mass.) 247.

New Hampshire.—Shackford *v.* Newington, 46 N. H. 415; Crowell *v.* Hopkinton, 45 N. H. 9.

New Jersey.—State *v.* Demarest, 32 N. J. L. 528.

Ohio.— State *v.* Richland Tp., 20 Ohio St. 362; State *v.* Wilkesville Tp., 20 Ohio St. 288; State *v.* Harris, 17 Ohio St. 608; Cass Tp. *v.* Dillon, 16 Ohio St. 38.

Pennsylvania.— Hilbish *v.* Catherman, 64 Pa. St. 154; Washington County *v.* Berwick, 56 Pa. St. 466; Ahl *v.* Gleim, 52 Pa. St. 432; Speer *v.* Blairsville, 50 Pa. St. 150; Felty *v.* Uhler, 10 Phila. (Pa.) 512, 30 Leg. Int. (Pa.) 330.

Vermont.—Laughton *v.* Putney, 43 Vt. 485; Butler *v.* Putney, 43 Vt. 481.

Wisconsin.— State *v.* Tappan, 29 Wis. 664, 9 Am. Rep. 622; Dinehart *v.* La Fayette, 19 Wis. 677; Brodhead *v.* Milwaukee, 19 Wis. 624, 88 Am. Dec. 711.

See 8 Cent. Dig. tit. "Bounties," § 2.

The power of a town to raise and appropriate money for the purpose of encouraging enlistments is derived from statute, and is limited to the cases prescribed in it. Crowell *v.* Hopkinton, 45 N. H. 9.

15. Opinion of Justices, 69 Me. 585; Barker *v.* Dixmont, 53 Me. 575; State *v.* Baltimore, 52 Md. 398; Leonard *v.* Wiseman, 31 Md. 201; State *v.* Aplin, 80 Mich. 205, 45 N. W. 136; State *v.* Quartermaster-General, 14 Mich. 23; Crittenden *v.* Robertson, 13 Mich. 58; Powers *v.* Shepard, 48 N. Y. 540 [*affirming* 49 Barb. (N. Y.) 418 (*reversing* 45 Barb. (N. Y.) 524, 1 Abb. Pr. N. S. (N. Y.) 129, 30 How. Pr. (N. Y.) 8)].

History.— At an early period of the late war, when the several states were being called upon by the general government for soldiers, the inhabitants of the several towns were very desirous of procuring volunteers to enlist from their respective towns, under the belief that, whatever system or plan for raising the necessary troops should ultimately be adopted, such enlistments would inure to the benefit of their towns, by reducing the number that they in the future would be required to furnish. Some towns voted to raise money by taxation, and the officers of other towns borrowed money to be expended in procuring volunteers, before the legislature had taken action on the subject. But the idea generally prevailed that the towns, as such, by virtue of the general authority conferred upon them by the legislature, had no power to raise money by taxation to pay bounties to volunteers. To obviate this difficulty the legislatures passed what are generally called enabling acts, authorizing the several towns to "grant and vote, such sums of money as they might judge best." Butler *v.* Putney, 43 Vt. 481.

Policy of statutes.— Statutes authorizing the payment of bounties by municipal corporations are usually prospective and not retrospective. The policy of such statutes is to induce enlistment and to save the country from a draft, and such fact constitutes the

before, or at the time, the power was exercised;[16] while in other cases the exercise of such power was confirmed by subsequent enactment.[17] In such cases counties, townships, and cities were considered public agencies in the system of the state government; and were employed by the legislatures as mere instrumentalities to raise a tax for a public object, and to effect an equitable distribution of the proceeds of such tax among those for whom it was

consideration for which the bounty is paid. Briscoe *v.* Allison, 43 Ill. 291.

16. Prospective statutes.—*Illinois.*—Greenwood *v.* De Kalb County, 90 Ill. 600; Johnson *v.* Campbell, 49 Ill. 316; State *v.* Sullivan, 43 Ill. 412; Grundy County *v.* Hughes, 8 Ill. App. 34.

Maine.— Chapman *v.* Limerick, 69 Me. 53; Winchester *v.* Corinna, 55 Me. 9.

Massachusetts.— Rand *v.* Worcester, 98 Mass. 126.

Missouri.—Watson *v.* Buchanan County, 44 Mo. 422; State *v.* Howard County Ct., 39 Mo. 375.

New Hampshire.—Kidder *v.* Stewartstown, 48 N. H. 290; Upton *v.* Stoddard, 47 N. H. 167.

New Jersey.—Hoboken *v.* Bailey, 37 N. J. L. 519; State *v.* Demarest, 32 N. J. L. 528.

Ohio.— State *v.* Wilkesville Tp., 20 Ohio St. 288; Cass Tp. *v.* Dillon, 16 Ohio St. 38.

Pennsylvania.— Scarlet *v.* Robeson Tp. School Dist., 2 Woodw. (Pa.) 25.

Vermont.— Harvey *v.* Peacham, 42 Vt. 287.

Wisconsin.— Grubb *v.* Menomonee, 21 Wis. 594; Dinehart *v.* La Fayette, 19 Wis. 677; Brodhead *v.* Milwaukee, 19 Wis. 624, 88 Am. Dec. 711.

17. The legislatures of the several states were prompt in validating unauthorized offers of bounty, and in satisfying all loans of money made, warrants issued, or contracts entered into to procure the enlistment of volunteers under the several calls made by the federal authorities.

Connecticut.— Stuart *v.* Warren, 37 Conn. 225; Potter *v.* Canaan, 37 Conn. 222; Ferrett *v.* Sharon, 34 Conn. 105; Bartholomew *v.* Harwinton, 33 Conn. 408; Waldo *v.* Portland, 33 Conn. 363; Baldwin *v.* North Branford, 32 Conn. 47.

Illinois.— Briscoe *v.* Allison, 43 Ill. 291; Taylor *v.* Thompson, 42 Ill. 9.

Indiana.— Sithin *v.* Shelby County, 66 Ind. 109; McCuaig *v.* White County, 48 Ind. 222; State *v.* Buckles, 39 Ind. 272; Miller *v.* Putnam County, 29 Ind. 75; King *v.* Course, 25 Ind. 202; Miami County *v.* Bearss, 25 Ind. 110; Oliver *v.* Keightley, 24 Ind. 514; Coffman *v.* Keightley, 24 Ind. 509.

Maine.— Bessey *v.* Unity Plantation, 65 Me. 342; Thompson *v.* Pittston, 59 Me. 545; Perkins *v.* Milford, 59 Me. 315; Hart *v.* Holden, 55 Me. 572; French *v.* Sangerville, 55 Me. 69; Winchester *v.* Corinna, 55 Me. 9; Barker *v.* Dixmont, 53 Me. 575; Ferrin *v.* Portland, 53 Me. 458; Allen *v.* Edgecomb, 53 Me. 446.

Massachusetts.— Marsh *v.* Scituate, 153 Mass. 34, 26 N. E. 412, 10 L. R. A. 202; Barker *v.* Chesterfield, 102 Mass. 127; Carr *v.* Warren, 98 Mass. 329; James *v.* Scituate, 11 Allen (Mass.) 93; Grover *v.* Pembroke, 11 Allen (Mass.) 88; Fowler *v.* Danvers, 8 Allen (Mass.) 80.

Michigan.—Miller *v.* Grandy, 13 Mich. 540; People *v.* Hammond, 13 Mich. 247; Crittenden *v.* Robertson, 13 Mich. 58.

Minnesota.— McCutchen *v.* Freedom, 15 Minn. 217; Comer *v.* Folsom, 13 Minn. 219; Kunkle *v.* Franklin, 13 Minn. 127, 97 Am. Dec. 226.

New Hampshire.— Pittsburg *v.* Danforth, 56 N. H. 272.

New Jersey.—State *v.* Demarest, 32 N. J. L. 528.

New York.— People *v.* Martin, 58 Barb. (N. Y.) 286; People *v.* Westford, 53 Barb. (N. Y.) 555, 38 How. Pr. (N. Y.) 23; Northrup *v.* Pittsfield, 2 Thomps. & C. (N. Y.) 108.

Ohio.— State *v.* Harris, 17 Ohio St. 608.

Pennsylvania.— Hilbish *v.* Catherman, 64 Pa. St. 154; Washington County *v.* Berwick, 56 Pa. St. 486; Speer *v.* Blairsville, 50 Pa. St. 150; Felty *v.* Uhler, 10 Phila. (Pa.) 512, 30 Leg. Int. (Pa.) 330.

Wisconsin.— State *v.* Tappan, 29 Wis. 664, 9 Am. Rep. 622; Brodhead *v.* Milwaukee, 19 Wis. 624, 88 Am. Dec. 711.

See 8 Cent. Dig. tit. "Bounties," § 5.

Limited ratification.— By statutes in some states bounty contracts entered into by municipal authorities were ratified only for a limited space of time and prohibited in the future, and in order to claim bounties under such municipal orders a party must bring himself within the time limit set by the ratifying statute. Marsh *v.* Scituate, 153 Mass. 34, 26 N. E. 412, 10 L. R. A. 202; Howes *v.* Middleborough, 108 Mass. 123; Carr *v.* Warren, 98 Mass. 329; James *v.* Scituate, 11 Allen (Mass.) 93; Curtis *v.* Pembroke, 11 Allen (Mass.) 92; Grover *v.* Pembroke, 11 Allen (Mass.) 88.

Cure of irregularities.— Not only were the acts of municipal corporations legalized by such statutes but irregularities and informalities were also cured (Stuart *v.* Warren, 37 Conn. 225; Baldwin *v.* North Branford, 32 Conn. 47; Sithin *v.* Shelby County, 66 Ind. 109; Nave *v.* King, 27 Ind. 356; Crittenden *v.* Robertson, 13 Mich. 58; Northrup *v.* Pittsfield, 2 Thomps. & C. (N. Y.) 108), provided the claims did not arise from the unchecked and irregular action of persons, in no way conforming to any rule or measure adopted or sanctioned by the general authority (Sanborn *v.* Machias Port, 53 Me. 82; People *v.* Blackman, 14 Mich. 336; Miller *v.* Grandy, 13 Mich. 540).

Revival of contracts.— Where contracts of towns to pay bounties to soldiers furnished by them are subsequently ratified and made

intended.[18] As a general rule there was nothing mandatory in these acts. They merely gave the power to levy taxes to pay bounties. They were merely enabling acts, and the authority conferred was to be exercised according to the discretion of the officers in whose hands such authority was vested.[19]

b. Correspondence of Vote With Notice of Town-Meeting. In most cases where bounties were offered by towns, a town-meeting was first called to ascertain the views of the voters. Such meetings were usually held upon notice, setting out the objects and purposes of the meeting and the time when action would be taken.[20] As the warrants or notices of the town-meeting constituted the groundwork or foundation upon which an offer of bounty could be made, the vote should correspond with, and be confined to, the objects and purposes stated in such warrants or notices.[21]

c. Construction of Vote. In giving construction to votes granting bounties, the same principle of interpretation has been applied as in the case of statutes.[22]

valid by statute, such statute cannot be construed to revive contracts which have been put an end to, and have not since been renewed by the town. Grover *v.* Pembroke, 11 Allen (Mass.) 88.

18. **Agents of general government.**— State *v.* Richland Tp., 20 Ohio St. 362.

Such duty did not arise out of any contract relation supposed to exist between the municipality and the volunteer, but was devolved upon it by the legislature in the exercise of the taxing power of the state and of the power of apportioning taxation. State *v.* Richland Tp., 20 Ohio St. 362; State *v.* Harris, 17 Ohio St. 608.

19. **Statutes not mandatory.**— Misner *v.* Bullard, 43 Ill. 470; Grundy County *v.* Yarnell, 8 Ill. App. 43; Grundy County *v.* Hughes, 8 Ill. App. 34; Rand *v.* Worcester, 98 Mass. 126; Amity Tp. *v.* Reed, 62 Pa. St. 442; Guilford School Dist. *v.* Zumbro, 55 Pa. St. 432; Foulke *v.* West Bethlehem Tp., 53 Pa. St. 221; Scarlet *v.* Robeson Tp. School Dist., 2 Woodw. (Pa.) 25; Butler *v.* Putney, 43 Vt. 481. See also Booth *v.* Woodbury, 32 Conn. 118; McCuaig *v.* White County, 48 Ind. 222; State *v.* Baltimore, 52 Md. 398; People *v.* Quartermaster-General, 14 Mich. 23.

Acting upon the authority, the designated officers were at liberty to fix the amounts of money to be raised and paid, and to select not individual recipients, but the classes of beneficiaries, provided they did not transcend the limits of power which the acts conferred. Scarlet *v.* Robeson Tp. School Dist., 2 Woodw. (Pa.) 25. See also People *v.* Quartermaster-General, 14 Mich. 23, holding that where a bounty is offered under a statute providing that the governor may in his discretion cause to be paid from the war fund such uniform bounty as he should deem necessary to each person volunteering and mustered into the service of the United States, the bounty must be paid to all persons included within the terms of the offer; and the governor cannot discriminate and pay the bounties to some, and withhold it from others.

Where the act is imperative and directory, its terms must be strictly followed, and where the officers in whose hands its execution is intrusted have failed or neglected to perform their duty they may be compelled to do so. State *v.* Harris, 17 Ohio St. 608.

20. **The object of specific articles in a warrant calling a town-meeting** is to give information to the voters of the subject-matters to be acted upon in the meeting, so that the voters may be enabled to act deliberately and intelligently. Pittsburg *v.* Danforth, 56 N. H. 272.

Sufficiency of warrant.— A warrant issued by town officers for a town-meeting is not to be construed with the same strictness as a power of attorney or penal statute. If it gives intelligible notice of the subjects to be acted upon it is sufficient. Grover *v.* Pembroke, 11 Allen (Mass.) 88.

Suspension of general statutes.— Where a provisional statute required a shorter time for notice of the meeting of the town authorities, for the purpose of raising bounties, it was held that the general statutes theretofore regulating the length of such notice were *pro tanto* suspended. Miller *v.* Grandy, 13 Mich. 540.

21. Kittredge *v.* Walden, 40 Vt. 211; Blush *v.* Colchester, 39 Vt. 193. See also Mudgett *v.* Johnson, 42 Vt. 423.

Bounty for drafted men furnishing substitutes.— A warning "to see what action the town will take in regard to the expected draft soon to be made" and to "see whether the town will vote to pay bounties" is sufficient to authorize a town to vote a bounty to "each man liable to draft who shall furnish a substitute" or who has furnished a substitute. Hickok *v.* Shelburne, 41 Vt. 409.

Vote limited to amount stated in warning. — An article in a warrant for a town-meeting "to see if the town will vote to pay the same bounty to those who may enlist after" a specified time "as is now paid by the town to those who enlisted before that time" does not authorize a vote to pay a larger bounty, since the vote is limited to the amount stated in the warning, and cannot exceed that sum. Austin *v.* York, 57 Me. 304.

Warning to tax — Vote to borrow money. — A warning to see if a town will vote a tax for the payment of a bounty does not authorize a vote to borrow money for that purpose, and a vote at a subsequent meeting to pay an additional bounty will not confirm and legalize the former invalid vote. Atwood *v.* Lincoln, 44 Vt. 332.

22. **Where the intention is plain,** it is the

d. Authority of Municipal Officers and Agents. Officers and agents of a town are bound by the terms of the offer as voted upon by the town or ratified by statute.[23] One selectman, acting without the knowledge or consent of his brother officers, cannot bind the town by entering into a bounty contract.[24]

e. Power to Rescind Offer. Where a vote has been taken and a bounty offered under a legally called meeting, it is binding on the town when accepted, and such offer cannot be subsequently rescinded.[25] But where an offer has been reconsidered or postponed before any action has been taken by the claimant, there is no such binding offer as will entitle him to recover.[26]

duty of the court so to construe the vote as to carry out these intentions; where the language used will fairly admit of such construction where the meaning of the words used is doubtful, or they are susceptible of a doubtful construction, that sense is to be adopted which best harmonizes with the context, and the apparent policy and object of the vote. Upton *v.* Stoddard, 47 N. H. 167.

Ambiguous vote.— A vote of a town "to instruct the selectmen to pay three hundred and twenty-five dollars for each volunteer to fill our quota," under a warning of a meeting "to see if the town will authorize their selectmen to pay a bounty to volunteers to fill the quota of [the town]," is ambiguous, and inapplicable to future calls on the town for volunteers. Scott *v.* Cabot; 44 Vt. 167.

Grammatical precision and verbal accuracy are not to be expected in the records of the proceedings of town-meetings, and the want of them vitiates nothing, provided the true intent can be truly ascertained, looking at the record in the light afforded by a knowledge of the purpose, occasion, and circumstances of the proceedings. Hart *v.* Holden, 55 Me. 572. See also Pottle *v.* Maidstone, 39 Vt. 70.

Subsequent enlistments.— Where the warning was "to consider the propriety of paying bounties to such persons as may enlist" to fill an existing quota, and the vote was "to pay to each volunteer to fill the required quota," etc., it was held that the vote had reference to those who should thereafter enlist. Sargent *v.* Ludlow, 42 Vt. 726.

23. It is competent for the town to prescribe the terms and conditions upon which bounties shall be paid, and the selectmen cannot waive a material condition in the offer, or make a different contract in relation thereto than the one authorized. Carley *v.* Highgate, 45 Vt. 273; Collins *v.* Burlington, 44 Vt. 16.

An unauthorized offer of bounty by the selectmen of a town, in their official capacity, to one who knows that the offer is unauthorized will not render them personally liable. Leet *v.* Shedd, 42 Vt. 277.

Oral promises made by officers unauthorized by any vote of the town cannot bind the town. Barker *v.* Chesterfield, 102 Mass. 127.

24. Hunkins *v.* Johnson, 45 Vt. 131.

Misunderstanding of contract.—Where two of a board of three selectmen went together to procure the enlistment of plaintiff, and one of the selectmen, by consent of the other, negotiated with plaintiff concerning the amount of bounty, the town, after availing itself of plaintiff's credit, cannot repudiate the contract entered into because the two selectmen, who did not actually participate in making the contract, did not correctly understand the contract with reference to the amount. Earle *v.* Wallingford, 44 Vt. 367.

Promise by recruiting officer.— A promise of bounty made by a recruiting agent being within the general line of his authority, and one of the selectmen having participated in perfecting the enlistment of plaintiff with full knowledge of the contract with him by the agent is sufficient to entitle plaintiff to recover. Stiles *v.* Danville, 42 Vt. 282 [*following* Haven *v.* Ludlow, 41 Vt. 418]. But where a town is not bound to pay a bounty under its vote, it cannot be held bound by a subsequent promise, made by one of its officers, who is also a recruiting officer of the town. Livingston *v.* Albany, 40 Vt. 666. See also Hartwell *v.* Newark, 41 Vt. 337.

When authorized, the contract of one selectman is as legal and binding as when made by all. Guyette *v.* Bolton, 46 Vt. 228.

25. Josselyn *v.* Ludlow, 44 Vt. 534; Swift *v.* Elmore, 44 Vt. 87; Laughton *v.* Putney, 43 Vt. 485; Seymour *v.* Marlboro, 40 Vt. 171; Pottle *v.* Maidstone, 39 Vt. 70. See 8 Cent. Dig. tit. "Bounties," § 4.

Offer for credit received.— A vote to pay a certain sum for a soldier's credit, which the town had already received, is such a completion of the contract as placed it out of the power of the town to rescind it by a subsequent vote without his consent. Haven *v.* Ludlow, 41 Vt. 418; Cox *v.* Mt. Tabor, 41 Vt. 28.

Subsequent vote.— One who reënlists to the credit of a town, under an assurance from its authorized recruiting agent that he will receive as much pay as the town paid others, probably five hundred dollars, is entitled to recover a bounty under a subsequent vote of the town to pay reënlisted veterans a bounty of five hundred dollars, and an attempt on the part of the town to rescind is inoperative. Haven *v.* Ludlow, 41 Vt. 418.

26. Foulke *v.* West Bethlehem Tp., 53 Pa. St. 221.

Where a town voted to pay a bounty to volunteers to the number of eighteen when mustered into the service of the United States, and at a subsequent meeting instructed its selectmen to pay no bounty to those who enlisted before the date of the previous vote, it was held that as there was no article in the warning under which the second meeting was held which authorized such action, the former vote was not rescinded thereby. Chase *v.* Middlesex, 43 Vt. 679.

2. Repayment of Money Advanced by Individuals. A municipal corporation has no inherent power to reimburse money voluntarily paid by individuals for recruiting purposes.[27] In many cases, however, municipal corporations were expressly authorized by statute to refund the money thus advanced and levy a tax in furtherance of that purpose.[28] Such statutes usually imposed no duty upon municipal corporations, but only conferred on them an authority, the exercise of which was left wholly discretionary.[29] In the consideration of such statutory authority the courts have made a distinction between money advanced for a public and a private purpose.[30] Where the advance partakes strictly of the former nature, its repayment has usually been upheld,[31] while advances of the latter character have been considered entirely voluntary and without consideration.[32] So, too, the distinction has been drawn between money actually advanced,[33] upon an express or implied promise of repayment,[34] and money paid over only

27. Priest *v.* Farneman, 33 Ind. 397; Miami County *v.* Bearss, 25 Ind. 110; Oliver *v.* Keightley, 24 Ind. 514; Copeland *v.* Huntington, 99 Mass. 525; People *v.* Onondaga, 16 Mich. 254; West Donegal Tp. *v.* Oldweiler, 55 Pa. St. 257; Tyson *v.* Halifax Tp., 51 Pa. St. 9; Grubb *v.* Liverpool, 6 Phila. (Pa.) 424, 24 Leg. Int. (Pa.) 253; Heiser *v.* Casselberry, 6 Phila. (Pa.) 194, 23 Leg. Int. (Pa.) 340. See also *supra*, II, A, 1, a.

Where individuals act upon their own account in advancing money for bounty purposes, they must be considered as doing what they are willing to consider their own part toward the public welfare, and they cannot shift their voluntary burden upon others. Whether they have been impelled by interest or by devotion, their private contributions occupy the same position with their other personal expenditures. Miller *v.* Grandy, 13 Mich. 540.

28. *Illinois.*— See Johnson *v.* Campbell, 49 Ill. 316; State *v.* Sullivan, 43 Ill. 412.

Maine.— Chapman *v.* Limerick, 69 Me. 53; Perkins *v.* Milford, 59 Me. 315.

Massachusetts.— Copeland *v.* Huntington, 99 Mass. 525; Cole *v.* Bedford, 97 Mass. 326 note; Estey *v.* Westminster, 97 Mass. 324; Andrews *v.* Prouty, 13 Allen (Mass.) 93; Shepard *v.* Turner, 13 Allen (Mass.) 92; Freeland *v.* Hastings, 10 Allen (Mass.) 570.

Michigan.— Miller *v.* Grandy, 13 Mich. 540.

Pennsylvania.— West Donegal Tp. *v.* Oldweiler, 55 Pa. St. 257; Weister *v.* Hade, 52 Pa. St. 474; Tyson *v.* Halifax Tp., 51 Pa. St. 9; Grubb *v.* Liverpool, 6 Phila. (Pa.) 424, 24 Leg. Int. (Pa.) 253; Heiser *v.* Casselberry, 6 Phila. (Pa.) 194, 23 Leg. Int. (Pa.) 340.

See 8 Cent. Dig. tit. "Bounties," § 11.

29. Estey *v.* Westminster, 97 Mass. 324; State *v.* Tappan, 29 Wis. 664, 9 Am. Rep. 662.

30. In Oliver *v.* Keightley, 24 Ind. 514, 518, the court said: "We can readily understand how the payment of a bounty to volunteers, thereby inducing men to enter promptly into the military service of the government, and thus increase the strength and power of her armies in the field, at an earlier date and at less expense than could be accomplished by a draft, would 'aid the government.' But no aid was afforded to the government in suppressing the rebellion by the re-payment to individuals of the money they had expended to relieve the men drafted, or the citizens or townships from the draft. The original expenditure of the money may have accomplished that result, but upon its re-payment, the existence of the rebellion did not perceptibly depend. The payment of $400 to men drafted under the former call for troops, when the men were already mustered into the army of the United States, and were then rendering most efficient aid to the government in suppressing the rebellion, clearly does not come within the intent or the letter of the statute."

31. Hilbish *v.* Catherman, 64 Pa. St. 154; Weister *v.* Hade, 52 Pa. St. 474; Felty *v.* Uhler, 10 Phila. (Pa.) 512, 30 Leg. Int. (Pa.) 330.

32. In People *v.* Blackman, 14 Mich. 336 [*following* Miller *v.* Grandy, 13 Mich. 540], it was held that a statute legalizing the actions of certain townships in paying bounties, etc., did not extend to advances made by individuals on their own account and not on the credit of the townships, and any vote to refund such advances must be held unauthorized and void.

Voluntary payment by association.—An act directing the repayment of money voluntarily paid by an association in aid of its own members would not be legislation, but would be in the nature of judicial action, without notice to the parties to be affected by it, hearing, trial, and all that gives sanction to judicial proceedings. Such an act would be unconstitutional in declaring an obligation where none previously existed, and then decreeing payment by directing the money or property of the people to be sequestered to make the payment. Tyson *v.* Halifax Tp., 51 Pa. St. 9.

33. **The word "advancement"** should be understood in its commercial sense, implying that money or property was paid over upon a promise or expectation of reimbursement. Tyson *v.* Halifax Tp., 51 Pa. St. 9; Heiser *v.* Casselberry, 6 Phila. (Pa.) 194, 23 Leg. Int. (Pa.) 340.

34. Perkins *v.* Milford, 59 Me. 315; Estey *v.* Westminster, 97 Mass. 324.

What constitutes assurance of repayment. —A declaration at a meeting of a bounty association, by its president, that "all payments of money to be considered as loaned to the township, in the belief that the legislature

for the purpose of saving a draft, or for the exemption of the parties so advancing the money.[35]

3. Recovery Back of Bounty. Bounty money paid under a fraudulent misrepresentation of fact may be recovered back in an action against the person perpetrating the fraud.[36]

B. Right to Bounty — 1. As Dependent Upon Nature of Offer — a. In General. In many of the offers of bounty made, the ultimate disposition of the bounty fund was either intrusted to the discretion of the municipal authorities,[37] or was to be disposed of only by contract made through themselves or their authorized agents.[38] In such cases the right of recovery is purely one of contract;[39] and in order to show himself entitled to the bounty the claimant must show some act amounting to a contract or agreement for the payment of the bounty claimed,[40] and even though his enlistment operated to the benefit of the town and saved it

will so amend the law as to enable us to throw the expense on the township," is not an assurance of repayment as is contemplated by statute. Tyson *v.* Halifax Tp., 51 Pa. St. 9.

35. Miller *v.* Grandy, 13 Mich. 540; West Donegal Tp. *v.* Oldweiler, 55 Pa. St. 257; Tyson *v.* Halifax Tp., 51 Pa. St. 9; Heiser *v.* Casselberry, 6 Phila. (Pa.) 194, 23 Leg. Int. (Pa.) 340.

Agreement by public officers.— It was not the intent of the legislature to create a municipal liability or to validate loans or advances of money to procure volunteers upon any authority or understanding of private parties. The agreement or authority must proceed from the corporate or public officers. Hartman *v.* Mt. Joy School Dist., 68 Pa. St. 441.

Relief of district in its corporate capacity. — No tax can be levied under such statutes for the repayment of such advances unless in the discharge of an existing obligation and unless the claims of those to be reimbursed arose from advancements made for the relief of the district in its corporate capacity, and not for their own exemption. Tyson *v.* Halifax Tp., 51 Pa. St. 9; Heiser *v.* Casselberry, 6 Phila. (Pa.) 194, 23 Leg. Int. (Pa.) 340.

36. Canaan *v.* Derush, 47 N. H. 212. See also Com. *v.* Cutler, 13 Allen (Mass.) 393.

A municipal corporation cannot recover back amounts expended where it has retained the credit of the soldiers for whose services it was originally paid. Franklin County *v.* McIlvain, 24 Ind. 382.

37. People *v.* Quartermaster-General, 14 Mich. 23. See also Hoboken *v.* Bailey, 37 N. J. L. 519; and *supra*, II, A, 1, a.

38. Sanders *v.* Bolton, 47 Vt. 276; Poquet *v.* North Hero, 44 Vt. 91; Slack *v.* Craftsbury, 43 Vt. 657; Johnson *v.* Bolton, 43 Vt. 303.

39. Recovery founded on contract.— In Frey *v.* Fond du Lac, 24 Wis. 204, 206, the court said: "There seems to be no other ground upon which such an action can be sustained, except that of contract. In all those cases where actions have been brought for bounty offered before the party enlisted, the liability of the town or city has been maintained upon the express ground that, having offered the bounty, and the party having accepted it, and enlisted on the faith of it, there was a contract between them. No other ground upon which such a liability could be maintained, has been suggested." See also Scott *v.* Cabot, 44 Vt. 167.

Nature of contract.— Statutes authorizing towns to raise and appropriate money, either by assessment in the usual way or by credit pursuant to a vote, for the purpose of enabling them to furnish their assigned quota of men, are not only to enable towns to discharge a corporate duty under the law, but to relieve the inhabitants in respect to drafts and military service. Any contract, or agreement therefore, express or implied, entered into for this purpose and to this end is obligatory, and the town can stand upon no different footing than an ordinary individual with respect to an ordinary contract. Seymour *v.* Marlboro, 40 Vt. 171.

40. Sanders *v.* Bolton, 47 Vt. 276; Poquet *v.* North Hero, 44 Vt. 91; Chase *v.* Middlesex, 43 Vt. 679; Johnson *v.* Bolton, 43 Vt. 303; James *v.* Starksboro, 42 Vt. 602; Frey *v.* Fond du Lac, 24 Wis. 204. See also Mifflin School Dist. *v.* Learn, 53 Pa. St. 180.

The consideration for such bounty contracts lies in the acceptance of credit by the municipality. Carver *v.* Creque, 48 N. Y. 385 [*affirming* 46 Barb. (N. Y.) 507]. And a volunteer having enlisted to the credit of a town, and been applied to its quota, is a sufficient consideration to support a promise to pay a bounty subsequently made. Josselyn *v.* Ludlow, 44 Vt. 534; Swift *v.* Elmore, 44 Vt. 87; Collins *v.* Burlington, 44 Vt. 16; Laughton *v.* Putney, 43 Vt. 485; Cox *v.* Mt. Tabor, 41 Vt. 28; Seymour *v.* Marlboro, 40 Vt. 171.

Presumption arising from enlistment.— Where a statute confers authority to pay bounties, but imposes no duty, no presumption arises from the enlistment of a volunteer before an offer of bounty is made that he enlisted in consideration of his receiving a bounty. Debolt *v.* Dunkard School Dist., 53 Pa. St. 214.

Question for jury.— Liability of towns to pay bounty arises only upon proof of an express contract; therefore the evidence bearing upon the question as to whether there was such contract should be submitted to the jury. Poquet *v.* North Hero, 44 Vt. 91. See also *infra*, note 89.

the necessity of procuring another man, this gives no legal claim upon the town, unless it has agreed to pay.[41]

b. Unconditional Offer. But where the vote offering the bounty is general and unconditional in its terms, offering a bounty to whoever may enlist and apply himself under the quota of the town, such vote constitutes a general and direct offer to any one who performs its conditions,[42] and no contract is necessary to entitle the claimant to a recovery.[43] It has also been held that a volunteer is entitled to his bounty under an unconditional offer, even where he enlisted in ignorance that such offer had been made.[44]

c. Conditional or Restricted Offer — (i) *In General.* The claimant must show that he has accepted the offer under which he sues to recover by complying with the conditions and restrictions thereto attached and performing the services therein contemplated,[45] and that he is within the class of persons contemplated by the vote or the ratifying statute.[46] Thus he must show that he has given the

41. Poquet *v.* North Hero, 44 Vt. 91 [*citing* Blodgett *v.* Springfield, 43 Vt. 626; Hatch *v.* Fairfield, 43 Vt. 321].

42. McLean County *v.* Augustus, 63 Ill. 40; Larimer *v.* McLean County, 47 Ill. 36; Madison County *v.* Miller, 87 Ind. 257; Sithin *v.* Shelby County, 66 Ind. 109; Hart *v.* Holden, 55 Me. 572; Hunkins *v.* Johnson, 45 Vt. 131; Chase *v.* Middlesex, 43 Vt. 679; Butler *v.* Putney, 43 Vt. 481; Davis *v.* Landgrove, 43 Vt. 442; Jackman *v.* New Haven, 42 Vt. 591; Hill *v.* Eden, 41 Vt. 195; Steinberg *v.* Eden, 41 Vt. 187. See 8 Cent. Dig. tit. "Bounties," § 14.

Neglect to levy tax.—A contract formed by resolution of a county board offering a bounty to each soldier enlisting in the army, and the acceptance of such offer by a soldier by actually enlisting, is not affected by neglect of the county to levy a tax to pay an order issued for such bounty. Clark County *v.* Lawrence, 63 Ill. 32.

A volunteer is entitled to a bounty under a county resolution offering bounties to volunteers, on showing that he had knowledge of the offer made by the county and volunteered with reference thereto, and that he had fulfilled all the requirements of the resolution, and was actually credited to the county quota, although he did not give notice to the county of his acceptance of the terms of the resolution, and did not receive notice of the resolution from the county authorities. McLean County *v.* Augustus, 63 Ill. 40; Larimer *v.* McLean County, 47 Ill. 36.

43. Hunkins *v.* Johnson, 45 Vt. 131; Davis *v.* Landgrove, 43 Vt. 442; Jackman *v.* New Haven, 42 Vt. 591; Steinberg *v.* Eden, 41 Vt. 187.

Omission of mustering officers.— Under a vote to pay a bounty to each volunteer to fill a certain quota, if a soldier is mustered in while the deficiency is outstanding against the town, his right was unaffected by the omission of the adjutant-general to reckon him on the town's deficiency, if it existed at the time of his muster-in; the object of the adjutant-general's books being to show the standing of the town with the government, not of the soldier with the town. Steinberg *v.* Eden, 41 Vt. 187.

Signature of enlistment contract.— Upon a vote to pay three hundred dollars to "the first six men who shall enlist into the service of the United States to save the draft," the first six to perfect their enlistments by a muster into the service, are the six entitled to the benefit of the offer even though others signed enlistment contracts before them. Hill *v.* Eden, 41 Vt. 195.

44. Madison County *v.* Miller, 87 Ind. 257; Sithin *v.* Shelby County, 66 Ind. 109; Chase *v.* Middlesex, 43 Vt. 679; Davis *v.* Landgrove, 43 Vt. 442.

Recovery cannot be had against a draft association, formed for the purpose of relieving a district from a draft for military purposes, by one who enlisted without regard to the bounty offered by such association, and with the full knowledge that he would not receive it if he did so enlist, and who was induced to enlist by the hope of receiving the state and county bounties. Sparrow *v.* Grove, 31 Md. 214.

Where the claimant has made no effort to have himself applied until after the quota has been filled, the situation of the town will be considered, and his right to bounty denied. Davis *v.* Windsor, 46 Vt. 210; Witherell *v.* Fletcher, 42 Vt. 409. See also State *v.* Brown, 20 Wis. 287.

45. People *v.* Board of Examiners, 34 Cal. 647; Miami County *v.* Hochstetter, 26 Ind. 48; Daggett *v.* Cushing, 56 Me. 422; Carley *v.* Highgate, 45 Vt. 273; Sargent *v.* Ludlow, 42 Vt. 726; James *v.* Starksboro, 42 Vt. 602; Davis *v.* St. Albans, 42 Vt. 585.

Right not affected by numbers.— Where a person is mustered in under a call and a *bona fide* offer of bounty, the mere fact that more than enough men to fill the quota were mustered in with him at the same time does not affect his right to recover. Kittredge *v.* Walden, 40 Vt. 211; Pottle *v.* Maidstone, 39 Vt. 70.

46. French *v.* Sangerville, 55 Me. 69; Hilliard *v.* Stewartstown, 48 N. H. 280; Burnham *v.* Chelsea, 43 Vt. 69.

Commissioned officer.—One who entered the army as a commissioned officer of volunteers is not entitled to the bounty voted by a town under a statute which authorized towns to

required notice,[47] and that he has enlisted within the time set in the offer.[48] So if the offer of a bounty is limited to the residents of a certain district or municipality, or requires a legal residence to entitle an applicant to share therein, such residence is a condition precedent to the right of recovery.[49]

(II) *Enlistment Under Particular Call or Quota.* As a general rule an offer of bounty was made to provide for the exigencies of a particular call for men, and in order to claim thereunder it must be shown that the enlistment was made under the particular call or quota designated.[50] An enlistment after the

raise and appropriate money "to encourage enlistments in the army," the court holding that in such a case the term "enlisted man" could not be taken either in its technical or popular sense to include a commissioned officer. Hilliard *v.* Stewartstown, 48 N. H. 280.

Drafted non-combatants.— The vote of a town to pay a bounty to drafted "non-combatants" who were credited to the town's quota, though discharged under act of congress, Feb. 24, 1864, § 17, was not ratified by Me. Pub. Laws (1865), c. 298, § 1, ratifying acts in favor of volunteers, drafted men, or substitutes of drafted men. French *v.* Sangerville, 55 Me. 69.

47. Davis *v.* Windsor, 46 Vt. 210; Atwood *v.* Lincoln, 44 Vt. 332. See also Warren *v.* Daum, 73 Pa. St. 433.

Notice unaccompanied by evidence.—Where one enlisted in the service of the United States and had himself credited to a certain town, and notified the town officers of the fact, it was not necessary, in order to entitle him to a bounty offered by the town, that he should "accompany such notice with evidence sufficient to warrant the officers in paying him the bounty." It was sufficient that the proofs were furnished before the bounty was paid. Welch *v.* Sugar Creek, 28 Wis. 618.

Negligence in giving notice.— In Mudgett *v.* Johnson, 42 Vt. 423, it was held that where a person had been induced to reënlist upon the application of the selectmen of a town, such selectmen could not exclude him from the benefit of a bounty by subsequently and before receiving notice of his reënlistment filling the quota with other men, unless there had been culpable negligence on the part of said person in giving notice of his reënlistment.

48. Greenwood *v.* De Kalb County, 90 Ill. 600; Miami County *v.* Hochstetter, 26 Ind. 48; Watson *v.* Buchanan County, 44 Mo. 422; Bucklin *v.* Sudbury, 43 Vt. 700; Chase *v.* Middlesex, 43 Vt. 679.

Reasonable time.— Where no time is limited in the offer in which the claimant shall be mustered into service, the law will give him such time as would be deemed reasonable under the circumstances. Mann *v.* Fairlee, 44 Vt. 672. In Gale *v.* Jamaica, 39 Vt. 610, it was held that two weeks was a reasonable time for notification by a soldier in the field.

Inquiry on part of town.— The mere failure of plaintiff to inform the town of his enlistment will not deprive him of his bounty, where it does not appear but that the town might have learned of it on inquiry at the office of the adjutant-general, to whom, it is to be presumed, the enlistment was officially reported. Hill *v.* Eden, 41 Vt. 195. See also Gale *v.* Jamaica, 39 Vt. 610.

49. Upton *v.* Stoddard, 47 N. H. 167. But see Hoboken *v.* Bailey, 37 N. J. L. 519; Hawthorne *v.* Hoboken, 35 N. J. L. 247, which cases hold that this requirement will not be enforced where the terms of the offer do not distinctly require the condition, and where the claimant has been accepted by the corporate authorities and performed his part of the contract.

Transfer without consent.— One who enlisted at P. and was credited to that town, with the knowledge and consent of its authorities, is entitled to a bounty under an offer of bounty to those enlisted "from the town of Pittsfield," although not a resident of that place, and the fact that he was subsequently transferred to another town without his consent will not relieve the town that was primarily liable. Northrup *v.* Pittsfield, 2 Thomps. & C. (N. Y.) 108.

50. Gardon *v.* Readfield, 58 Me. 293; Hatch *v.* Fairfield, 43 Vt. 321; Seymour *v.* Marlboro, 40 Vt. 171. See also Bucklin *v.* Sudbury, 43 Vt. 700.

Attempt to change credit.— The fact that a claimant, after having volunteered to fill a quota under the vote of a certain town, attempted to get his credit changed before he is actually mustered in does not prejudice his right of recovery against the town, where such attempt proved a failure owing to the neglect of his superior officer, and where he has served out his full term of enlistment credited to the town under which he first volunteered. Chandler *v.* Bristol, 45 Vt. 330.

Enlistment in particular regiment.—Where a county offered a bounty for enlistment in a particular regiment and the claimant enlisted in that regiment, but was afterward, without his consent, mustered into another, it was held that he was entitled to the bounty. Hackleman *v.* Henry County, 78 Ind. 162. But where a town voted a bounty to each man who should enlist into the old regiments to fill the town quota under a given call, it was held that one who enlisted into a new regiment, but was applied on the quota, could not recover the bounty, even though he intended to comply with the offer, and erroneously believed the selectmen could waive a material condition thereof. Carley *v.* Highgate, 45 Vt. 273.

Particular call not specified.— Under the resolution of a county to pay a bounty to volunteers enlisted to the credit of the quota of the county "under the (then) present call,

particular quota named in the vote has been filled will not inure to the benefit of the subsequently applied volunteer.[51]

d. Enlistment Prior to Offer. As the right to a bounty is supposed to be founded upon a contract,[52] an enlistment prior to an offer is usually void of consideration and cannot be enforced.[53] Nor is a municipal corporation legally justified in extending to him the benefit of a bounty by any such subsequent action.[54]

2. Persons Entitled to Bounty — a. Drafted Men. In the absence of statute or express agreement a drafted man has no claim upon a bounty fund,[55] and especially is this so, where, after being drafted, he has paid commutation money in lieu of actual service.[56] In many instances, however, bounties were provided

or to fill any call that might thereafter be made," the county is liable to persons who enlist in any other quota than that due from the county at the time of adoption and publication of the resolution, and the fact that one half of the bounty was to be paid at a fixed date would not affect the rule. Sowers *v.* Page County, 32 Iowa 530.

51. Miami County *v.* Hochstetter, 26 Ind. 48; Preble *v.* Gilead, 63 Me. 321; Jones *v.* Waterbury, 44 Vt. 113; Davis *v.* St. Albans, 42 Vt. 585; Wrisley *v.* Waterbury, 42 Vt. 228.

Part of appropriation unused.— Where a county court under authority of statute appropriated a sum of money to be applied in payment of bounties, and made an order providing for the distribution of the money to volunteers credited to the county under the "late call," a soldier volunteering under a subsequent call is not entitled to a bounty under such order, though a part of the appropriation remains unused. Watson *v.* Buchanan County, 44 Mo. 422.

Proclamation as to full quota.— In Mayweather *v.* Scott County, 36 Iowa 143, it was held that a proclamation by the governor announcing that the quota was full, issued and published three days before plaintiff enlisted under an offer of bounty by the county, would not, in the absence of notice thereof to plaintiff, bar a recovery, and that the proclamation and its publication in a daily paper in the county would not as a matter of law constitute notice of its contents.

52. See *supra*, II, B, 1, a.

53. *Illinois.*—Greenwood *v.* De Kalb County, 90 Ill. 600.

Iowa.— Wells *v.* Scott County, 36 Iowa 141.

Maine.— Alley *v.* Edgecomb, 53 Me. 446.

Maryland.— Park *v.* Baltimore, 29 Md. 277.

Massachusetts.— Fowler *v.* Danvers, 8 Allen (Mass.) 80.

Missouri.— Ritchie *v.* Buchanan County, 60 Mo. 562.

New Hampshire.— Kidder *v.* Stewartstown, 48 N. H. 290; Shackford *v.* Newington, 46 N. H. 415; Huntress *v.* Stratham, 46 N. H. 409; Crowell *v.* Hopkinton, 45 N. H. 9.

New York.— *Compare* Carver *v.* Creque, 48 N. Y. 385 [*affirming* 46 Barb. (N. Y.) 507].

Pennsylvania.—Amity Tp. *v.* Reed, 62 Pa. St. 442; Susquehanna Depot *v.* Barry, 61 Pa. St. 317; Washington County *v.* Berwick, 56 Pa. St. 466; Mifflin School Dist. *v.* Learn, 53 Pa. St. 180.

Vermont.— Chase *v.* Middlesex, 43 Vt. 679; Hatch *v.* Fairfield, 43 Vt. 321; Sargent *v.* Ludlow, 42 Vt. 726.

Wisconsin.— Frey *v.* Fond du Lac, 24 Wis. 204.

See 8 Cent. Dig. tit. "Bounties," § 20.

54. Amity Tp. *v.* Reed, 62 Pa. St. 442; Susquehanna Depot *v.* Barry, 61 Pa. St. 317.

Want of authority and consideration.— A resolution of a board of supervisors, promising to pay a bounty to persons who had previously enlisted in the military service of the United States, without any assurance of a bounty before enlisting, will create no indebtedness, for want of a consideration to support the promise, and for the want of legal authority in the board to make the same. Greenwood *v.* De Kalb County, 90 Ill. 600.

A town which voted to pay a bounty to those who should enlist under an existing call for troops and be applied on its quota is bound to pay those who enlisted previous to the vote, but were mustered in subsequent thereto, to the credit of such town, where they had the right at the time of muster to be credited to any town they chose. Johnson *v.* Newfane, 40 Vt. 9; Gale *v.* Jamaica, 39 Vt. 610.

55. Guilford School Dist. *v.* Zumbro, 55 Pa. St. 432; Wahlschlager *v.* Liberty, 23 Wis. 362.

Where resolutions to pay bounties to drafted men were passed after the war and after the men had been discharged from service, it was held that there was no obligation to compel payment of bounty, not even a moral obligation to support a promise, and that such orders in favor of drafted men under the resolutions were mere gratuities and could be revoked before payment, being supported by no consideration. Amity Tp. *v.* Reed, 62 Pa. St. 442.

56. *Connecticut.*— Tomlinson *v.* Huntington, 39 Conn. 28.

Maine.— Moulton *v.* Raymond, 60 Me. 121; Thompson *v.* Pittston, 59 Me. 545; Barbour *v.* Camden, 51 Me. 608.

New Hampshire.— Gould *v.* Raymond, 59 N. H. 260; Bowles *v.* Landaff, 59 N. H. 164.

New York.— *Compare* People *v.* Westford, 53 Barb. (N. Y.) 555, 38 How. Pr. (N. Y.) 23.

Pennsylvania.— Kelly *v.* Marshall, 69 Pa. St. 319; Scarlet *v.* Robeson Tp. School Dist., 2 Woodw. (Pa.) 25.

Vermont.— Davis *v.* Putney, 43 Vt. 582.

for this class of persons who were actually mustered into service, and in such cases the ordinary rules applicable to the volunteer were enforced. Thus the drafted man must go to fill the quota under which the offer was made,[57] and be mustered into the service with all the formality usual in such cases.[58]

b. Substitutes. A substitute is not a volunteer within the meaning of statutes providing for bounties to such class of persons,[59] and in the absence of agreement all bounties are the property of his principal,[60] who may recover the same to his own use.[61]

See 8 Cent. Dig. tit. "Bounties," § 16.

A municipal corporation cannot constitutionally pay a bounty to a drafted man who has paid commutation in lieu of actual service, as it would in effect be payment of the commutation money by the municipality. Moulton *v.* Raymond, 60 Me. 121; Gould *v.* Raymond, 59 N. H. 260; Bowles *v.* Landaff, 59 N. H. 164; Kelly *v.* Marshall, 69 Pa. St. 319. See also State *v.* Jackson, 33 N. J. L. 450.

57. A recovery cannot be had on a town bond given to one who had furnished a substitute to apply on the town's quota, the bond being issued under a resolution to pay bounties to drafted men which was adopted after the quota of the town was filled. Susquehanna Depot *v.* Barry, 61 Pa. St. 317.

No actual military service.— A town, at a regular meeting, voted to pay a certain sum "for each man drafted to fill their quota." Plaintiff, a resident of the town, was drafted and accepted, but furloughed to continue his work in the navy-yard where he had been employed, and was never called upon for actual military service. It was held that plaintiff was not within the vote, and since he had not gone "to fill the quota" could not recover against the town. Bickford *v.* Brooksville, 55 Me. 89.

58. Acceptance by board of examiners.— Where a town authorized the selectmen to pay a certain sum to every citizen of the town drafted into the United States service "and accepted by the board of examiners, who shall enter said service or procure an accepted substitute," and plaintiff was drafted, but before the examination he procured a substitute who was accepted, it was held that plaintiff was not entitled to recover for the sum granted by the town to drafted men, because he was not "accepted by the board of examiners." Reed *v.* Sharon, 35 Conn. 191.

Furlough after acceptance.— In Mahoney *v.* Lincolnville, 56 Me. 450, plaintiff having been examined and accepted and allowed upon the quota, was permitted to go home upon condition that he return at a specified time. Upon his return he was informed of the surrender of the Confederate army and that he might return home and remain there until further notice. He received pay as a soldier and was finally discharged in the regular way. It was held that he had entered the service within the meaning of a vote for bounty, and that he was entitled to the same.

59. People *v.* Quartermaster-General, 25 Mich. 340, 12 Am. Rep. 274. See also Usher *v.* Colchester, 33 Conn. 567.

Substitutes furnished by draft associations. —Act of Congress, March 3, 1865, provided that where an association procured the enlistment of men to the credit of its district, such men might be counted as substitutes in the event that members of such association were afterward drafted. Under a resolution to pay bounties to volunteers, it was held that payment was properly made to recruits furnished by such an association; that such recruits were volunteers, and the mere fact that they were liable to serve as substitutes, upon the event of drafting of members of the association, did not bar their right to the bounty. McClure's Estate, 63 Pa. St. 226. See also Foley *v.* Tovey, 54 Pa. St. 190.

60. Miller *v.* Putnam County, 29 Ind. 75; Rogers *v.* Shelburne, 42 Vt. 550 [*following* Bingham *v.* Springfield, 41 Vt. 32]; Hickok *v.* Shelburne, 41 Vt. 409.

Application to assigned quota.—N. Y. Laws (1865), c. 29, § 6, providing that a bounty "shall be paid to any person who has furnished or who shall furnish an acceptable substitute to apply on the quota under the call of December 19, 1864, . . . which substitute shall have been accepted by the authorities of the United States and credited to the town, city or county in which said person shall be enrolled and which substitute shall go to reduce the quota in such town or county," was held to apply only to such principals as furnished substitutes whose enlistments applied on the assigned quota of men and went to reduce such quotas, by so far actually filling them. Taber *v.* Erie County, 131 N. Y. 432, 30 N. E. 177, 43 N. Y. St. 177 [*reversing* 14 N. Y. Suppl. 211, 38 N. Y. St. 283].

61. Rogers *v.* Shelburne, 42 Vt. 550; Hickok *v.* Shelburne, 41 Vt. 409; Bingham *v.* Springfield, 41 Vt. 32.

Substitute for no particular person.— In pursuance of Wis. Laws (1865), c. 14, a town voted to pay two hundred dollars to each volunteer to be credited to its quota, etc. Plaintiffs, six in number, being residents of the town subject to military duty, entered into a contract with three persons, by which plaintiffs jointly agreed to pay to each of said other parties three hundred dollars, for which each of said other parties agreed to volunteer into the service of the United States to the credit of said town. Plaintiffs claimed as persons furnishing substitutes and as assignees of said volunteers. It was held that as no one of these three volunteers entered the service as the substitute of any particular person, and as they neither

c. Veteran Volunteers. As it was thought desirable to retain upon the several quotas the services of veterans who had previously enlisted, in many cases special inducements were held out by way of bounties to such persons who answered to that description;[62] and such veteran bounties were also offered by the United States payable at regular intervals of six months, until the expiration of three years of service.[63]

d. Effect of Desertion — (I) *In General.* Where a volunteer has enlisted in contemplation of an offered bounty his right to the same is perfected when he is mustered in.[64] Hence the fact of his subsequent desertion will not defeat such right,[65] unless there is some provision in the contract or statute under which he enlisted to that effect.[66]

(II) *Bounty Payable in Instalments.* Bounties which are made payable either in instalments or at times subsequent to the date when the soldier enlisted or joined his regiment are dependent upon faithful service actually rendered according to the terms of the enlistment,[67] and at no time and in no manner can a military deserter claim future instalments of bounty.[68]

3. Amount Recoverable — a. In General. The amount of bounty recoverable

of them knew of the offer of the town at the time, plaintiffs could not recover. Grubb *v.* Menomonee, 21 Wis. 594.

62. State *v.* Washington Tp., 24 Ohio St. 603; State *v.* Richland Tp., 20 Ohio St. 362; Brecknock School Dist. *v.* Frankhouser, 58 Pa. St. 380; Washington County *v.* Berwick, 56 Pa. St. 466; Petersburg *v.* Noss, 52 Pa. St. 448; Haven *v.* Ludlow, 41 Vt. 418. See 8 Cent. Dig. tit. "Bounties," § 17.

Credit for services.— A vote "to pay the veteran soldiers three hundred dollars bounty, and seven dollars per month as long as they remain in the service," without specifying what veterans are meant, will be construed to apply only to the veterans whose services stood to the credit of the town that passed the vote and that amount to each. Cox *v.* Mt. Tabor, 41 Vt. 28.

Unexpired enlistment.—A town vote to pay "veterans re-enlisting in the field" was held to mean an offer to pay soldiers who reënlisted while they were yet held to service under a former unexpired enlistment, and not to pay soldiers who reënlisted after having been discharged from service. Sargent *v.* Ludlow, 42 Vt. 726.

Veterans in the field.— Under the Ohio act, April 16, 1867, as amended April 16, 1880, the class of volunteers designated as "re-enlisted veteran volunteers" does not embrace "veteran volunteers" who were not in the field at the time of their enlistment as veteran volunteers, and hence they are not entitled to the bounty provided by statute. State *v.* Oglevie, 36 Ohio St. 394.

63. See Philbrook *v.* U. S., 8 Ct. Cl. 523.

64. Hunkins *v.* Johnson, 45 Vt. 131; Steinberg *v.* Eden, 41 Vt. 187.

Where a person enlisted in one town, and on account of a larger offer he deserted and reënlisted in another, it was held that even though he was withdrawn from the latter town and compelled to serve out his term under the first enlistment, yet such first town was liable for the bounty, since it had received the benefit of the contract. Bonnett *v.* Guildhall, 38 Vt. 232.

65. Terrell *v.* Colebrook, 35 Conn. 188; Eichelberger *v.* Sifford, 27 Md. 320; Rogers *v.* Shelburne, 42 Vt. 550; Bingham *v.* Springfield, 41 Vt. 32.

Desertion by substitute.— The fact that a substitute deserted is no bar to an action by the person who furnished the substitute against the town on the quota of which he was credited for bounty. Rogers *v.* Shelburne, 42 Vt. 550.

66. Effect of subsequent pardon.— Where the vote of a town offering a bounty contained a proviso that nothing should be paid to any soldier who should desert, one who deserted could not claim the bounty, although he was afterward pardoned by the president, and returned to the service, and was honorably discharged. Barnes *v.* Rutland, 42 Vt. 622. See also Harvey *v.* Peacham, 42 Vt. 287.

An honorable discharge of a soldier (who had been a deserter), at the end of his service, is a formal final judgment passed by the government upon the entire military record of the soldier, and an authoritative declaration by it that he had left the service in a status of honor, and removes any charge or impediment in the way of his receiving bounty. U. S. *v.* Kelly, 15 Wall. (U. S.) 34, 21 L. ed. 106; Lander *v.* U. S., 9 Ct. Cl. 242. See also Cole *v.* U. S., 34 Ct. Cl. 446.

67. Philbrook *v.* U. S., 8 Ct. Cl. 523.

68. State *v.* U. S., 20 Ct. Cl. 394.

Recovery by assignee.— When it is agreed that a state, to promote enlistments, shall advance the bounty promised by the government and take an assignment from the recruits, and that the government "shall pay the bounties to the State or town instead of to the men at the time and in the manner they are to be paid to the soldiers respectively," the assignee stands in the place of the assignor. The claim for bounty is not enlarged nor the time of payment changed. Therefore the state cannot recover from the government instalments forfeited by reason of desertion. State *v.* U. S., 20 Ct. Cl. 394.

is dependent upon the amount offered in each individual case,[69] or the length of time for which the person volunteered to serve.[70] By some statutes the bounty was to be paid upon enlistment and the remainder at the expiration of his term of service,[71] while all bounty claims under the surplus remaining from state equalization funds were dependent upon the time of service.[72]

b. Additional Pay and Equipment. In addition to the bounties payable upon enlistment and muster, municipalities in certain states further provided certain gratuities or additional pay to those volunteering for service.[73]

c. Money Paid Broker. Money paid a broker as consideration for procuring volunteers is not bounty money, and the soldier enlisted has no claim upon such money as for bounty.[74]

4. Assignment of Claim. A claim for bounty has its own degree, measure, or extent, its conditions and its limitations. With such surroundings it passes to the assignee.[75]

69. Shackford *v.* Newington, 46 N. H. 415; Hills *v.* Marlboro, 40 Vt. 648.

Conditional bounty.— In Bishop *v.* Rochester, 93 Mass. 84, a vote was passed by a town "that all men belonging to the town and enlisting into the service of the United States, and who shall be accepted and mustered into the service of the same, shall receive a bounty from the town of one hundred and twenty-five dollars," and "that shall the full quota required of the town be enlisted and accepted as aforesaid, an additional sum of seventy-five dollars shall be paid each man thus enlisting, but should there be a failure in making up the full quota of nine months' men, then those enlisting and being accepted and mustered as aforesaid shall receive only the sum of one hundred and twenty-five dollars." In consequence of these votes, certain citizens of the town were enlisted and mustered into the United States service, but not enough to fill the quota, and after about three months a draft was ordered. The town then averted the draft by filling the quota with recruits from abroad. It was held that the quota was not filled so as to entitle the citizens so enlisted to the additional sum of seventy-five dollars. See also Ferrin *v.* Portland, 53 Me. 458.

There is a marked difference between an absolute offer of a certain sum and the offer of a bounty not exceeding a certain sum. The former is definite and certain and can be satisfied, if accepted, only by the payment of the fixed sum. The latter is variable and indefinite and capable of satisfaction with any sum less than the fixed amount. Hence, it cannot be accepted so as to create an obligation to pay any definite sum without further negotiation. Blodgett *v.* Springfield, 43 Vt. 626.

70. Burbee *v.* Winhall, 41 Vt. 694.

71. State *v.* Baltimore, 52 Md. 398; Bowman *v.* U. S., 10 Ct. Cl. 408; Philbrook *v.* U. S., 8 Ct. Cl. 523.

72. McGuire *v.* Linneus, 74 Me. 344; Riggs *v.* Lee, 61 Me. 499.

73. Winchester *v.* Corinna, 55 Me. 9; Marsh *v.* Scituate, 153 Mass. 34, 26 N. E. 412, 10 L. R. A. 202; Howes *v.* Middleborough, 108 Mass. 123; Carr *v.* Warren, 98 Mass. 329; James *v.* Scituate, 11 Allen (Mass.) 93; Curtis *v.* Pembroke, 11 Allen (Mass.) 92; Grover *v.* Pembroke, 11 Allen (Mass.) 88.

Statute prohibiting future bounties.— A town voted that it would guarantee to all members of a company of volunteers, citizens of the town, to pay "twenty-six dollars per month while in service," and would furnish to "each volunteer soldier" a uniform, and pay him a daily sum while drilling, and "when the company of volunteer citizens of this town are called into service, they shall have one month's pay in advance." It was held that the guaranty of monthly pay had reference only to service under the authority of the United States, and where the claimant was mustered into such service, after the passage of an act prohibiting further municipal bounties, he could not recover. Howes *v.* Middleborough, 108 Mass. 123.

The state aid which the family of a soldier has received from the treasury of the town, under the statutes of the commonwealth, is in no sense a payment of or substitute for the sum which the town had promised to pay to him individually during the term of his enlistment. Grover *v.* Pembroke, 11 Allen (Mass.) 88.

74. Abbe *v.* Allen, 39 How. Pr. (N. Y.) 481. See also Vrancx *v.* Ross, 98 Mass. 591.

An enlisted soldier may recover from a broker any of the bounty money due himself and which has been withheld from him by false representations or fraud. Sullivan *v.* Fitzgerald, 94 Mass. 482.

75. State *v.* U. S., 20 Ct. Cl. 394.

A valid parol assignment of a soldier's bounty by a substitute to his principal will have the right of action over a subsequent written assignment to a third person, especially where such third person had reason to know of the prior assignment. Sprague *v.* Frankfort, 60 Me. 253.

Contract not conforming to foreign law.— Where a volunteer, before enlisting, assigns his bounty, for a consideration received and retained, without fraud or misrepresentation, and the assignee incurs expenditures and risks on the faith of the agreement, and receives the money as his own by consent of the assignor, the fact that the written contract is invalid, as not conforming to the laws of the foreign country in which it was

C. Proceedings to Recover Bounty — 1. Form of Remedy — a. In General. Where a person has enlisted upon the faith of a bounty offer and has fulfilled his part of the agreement or contract the proper remedy to recover his claim is by action.[76] The form of action in a great measure depends upon the agreement sought to be enforced and the jurisdiction whose aid is invoked. The action may be one of contract,[77] or for money had and received according to the nature of the claim.[78]

b. Mandamus. While courts will not attempt by writ of mandamus to enforce simple common-law rights between individuals, such as the payment of money, where there is another adequate legal remedy,[79] mandamus is the proper remedy where an officer or board of officers refuse or neglect to audit a claim for bounty which is properly due and owing.[80] Mandamus is also the proper remedy to compel commissioners to proceed to levy a tax for the payment of bounties when so directed by a statute.[81]

2. Limitations of Actions. The time within which an action for a bounty may be maintained depends upon the law of the state in which the same is sought to be collected.[82] The time during which a soldier is absent from the state in military service is to be deducted in determining whether the statute of limitations has run against his claim.[83]

executed, is no ground for a recovery of the bounty by the assignor from the assignee, especially where there is proof in the action independent of the instrument. Vrancx *v.* Ross, 98 Mass. 591.

The desertion of a person who had enlisted and been enrolled in the army, and who for a valuable consideration had assigned a state bounty, to which he was entitled, does not bar the payment of said bounty to his assignee. Eichelberger *v.* Sifford, 27 Md. 320.

76. *Illinois.*—McLean County *v.* Augustus, 63 Ill. 40; Larimer *v.* McLean County, 47 Ill. 36; Grundy County *v.* Yarnell, 8 Ill. App. 43; Grundy County *v.* Hughes, 8 Ill. App. 34.

Maine.— McGuire *v.* Linneus, 74 Me. 344; Riggs *v.* Lee, 61 Me. 499.

Missouri.— State *v.* Howard County Ct., 39 Mo. 375.

New York.— Northrup *v.* Pittsfield, 2 Thomps. & C. (N. Y.) 108.

Vermont.—Wood *v.* Springfield, 43 Vt. 617; Rogers *v.* Shelburne, 42 Vt. 550; Hickok *v.* Shelburne, 41 Vt. 409.

See 8 Cent. Dig. tit. "Bounties," § 28.

77. Wilkinson *v.* Martin, 29 Wis. 471.

78. Wilkinson *v.* Martin, 29 Wis. 471.

Two or more claimants.— Where two or more persons claim to be entitled to the same bounty, and such bounty is paid to the one not entitled thereto, an action cannot be maintained against him for money had and received by the party to whom it was really due, or his assignee. Such payment does not oust the real owner of his just claim, and he may recover the bounty from the authority which originally offered it. Decker *v.* Saltzman, 59 N. Y. 275.

79. State *v.* Howard County Ct., 39 Mo. 375; and, generally, Mandamus.

80. State *v.* Buckles, 39 Ind. 272; Dayton Tp. *v.* Rounds, 27 Mich. 82; People *v.* Westford, 53 Barb. (N. Y.) 555, 38 How. Pr. (N. Y.) 23.

The right to the bounty must be entirely free and clear of all legal dispute. Northrup *v.* Pittsfield, 2 Thomps. & C. (N. Y.) 108.

Delivery of script.— Where bonds, certificates, or script in the hands of an officer of a municipal corporation are withheld or refused by one of its officers, the better and more effective remedy is to apply for a mandamus to compel their delivery provided there has been a sufficient proof of claim. Dayton Tp. *v.* Rounds, 27 Mich. 82; People *v.* Martin, 58 Barb. (N. Y.) 286.

81. State *v.* Harris, 17 Ohio St. 608.

82. Sturtevant *v.* Pembroke, 130 Mass. 373; Wood *v.* Springfield, 43 Vt. 617.

In Michigan, by statute, limitations does not constitute a bar to any claim by a "soldier, or his widow, children, or legal representatives." Smith *v.* Aplin, 80 Mich. 205, 45 N. W. 136.

The bounty given by 14 U. S. Stat. p. 322, § 12, is a gratuity, which may be taken away by act of congress, and if a bounty claim is not presented within the time and in the form prescribed by statute it is void. Bowman *v.* U. S., 10 Ct. Cl. 408.

When statute begins to run.— The act of enlisting includes the entire process by which a person becomes a member of the army, and a cause of action, for a bounty previously voted, accrues at the moment of enlistment. Wood *v.* Springfield, 43 Vt. 617. A claim for bounty due when a soldier is mustered out of service under the United States bounty statutes accrues then, and from that date the statute of limitations begins to run. Bowman *v.* U. S., 10 Ct. Cl. 408. As the excess in the sum received by a town from the state for the equalization of bounties belonged to the soldiers who served on the town's quota without any such reward, the town received the excess as a trustee, and the statute of limitations does not begin to run against a soldier's claim until the town repudiated the trust. McGuire *v.* Linneus, 74 Me. 344.

83. Wood *v.* Springfield, 43 Vt. 617.

3. Pleading. All that is required in actions for the recovery of bounty money is that the declaration or complaint shall state facts sufficient to constitute a cause of action, and show that the claimant is entitled to recover.[84] Where such claim depends for its validity upon a contract express or implied, the contract relied upon must be averred.[85]

4. Evidence. Evidence tending to directly affirm or disaffirm the contract under which the bounty was offered or accepted is admissible;[86] but declarations[87]

84. Moore *v.* Monroe County, 59 Ind. 516. See also Grant County *v.* Wood, 69 Ind. 356; Young *v.* Franklin County, 25 Ind. 295; and 8 Cent. Dig. tit. "Bounties," § 30.

Averment of credit.— The Illinois act of January 18, 1865, in relation to payment of bounties by counties to volunteers in the military service of the United States only authorized the levy of a tax to pay indebtedness that had been or might be incurred for bounties to volunteers, who had or should enlist and be credited to the quota of the county. Therefore a declaration in a suit against a county to recover such bounty is fatally defective if it does not aver that plaintiff's enlistment was credited to the county. Greenwood *v.* De Kalb County, 90 Ill. 600.

Averment of residence.— An act of congress having provided that all persons mustered into the military service, etc., should be credited to the ward or township where such persons belonged by actual residence, in an action for bounty money a declaration setting forth that plaintiff was credited to a certain city is a sufficient averment that he resided in such city. Hawthorne *v.* Hoboken, 32 N. J. L. 172.

Complete compliance with offer.— In a suit to recover a bounty offered by a county to those, to the number of one hundred and four, who should enter the military service otherwise than as commissioned officers, an allegation in the complaint that plaintiff "had in all things complied with the terms of said offered bounty" is a sufficient averment that plaintiff was not a commissioned officer. Vermillion County *v.* Hammond, 83 Ind. 453.

85. Cole *v.* Economy Tp., 13 Pa. Co. Ct. 549.

In proceedings by mandamus to compel a township board to meet and audit and allow a claim for money advanced for the purpose of filling the township's quota of troops under a certain call, the petition must set forth a state of facts which, under the law, imposes upon the board the duty of which he seeks to compel the performance. People *v.* Woodhull, 14 Mich. 28.

86. Warren *v.* Daum, 73 Pa. St. 433.

Military records of state.— In an action to collect a bounty a copy of the military records of the state, certified by the adjutant-general of the state, and showing plaintiff's enlistment, muster into, and discharge from the military service is admissible in evidence. Monroe County *v.* May, 67 Ind. 562. The books and records in the office of the adjutant-general of the state, and not the date of the muster-in, control as to who are entitled to bounty under a vote of a town to pay a bounty to those who should apply on a quota under a given call. Moore *v.* Warren, 45 Vt. 199; Hunkins *v.* Johnson, 45 Vt. 131; Spalding *v.* Waitsfield, 45 Vt. 20; Bucklin *v.* Sudbury, 43 Vt. 700. And as the official record of a soldier's desertion is the best evidence of that fact, parol evidence of such desertion is inadmissible, where the record is in existence. Terrell *v.* Colebrook, 35 Conn. 188. *Compare* Harvey *v.* Peacham, 42 Vt. 287, where it was held that it was not necessary to produce the record of conviction by a court-martial, but the fact of desertion might be established by general evidence. See also Lebanon *v.* Heath, 47 N. H. 353.

Oral evidence of contract.—Where a volunteer sues the selectmen of a town on a personal offer of bounty, the fact that he entered into a written contract of enlistment with them in behalf of the town will not render oral evidence of the contract with the selectmen inadmissible. Leet *v.* Shedd, 42 Vt. 277.

Payment to persons of same class.— The payment of bounty money by a town to a number of volunteers is in the nature of an admission that they were entitled to it; and evidence of the fact should be admitted in an action against the town on a similar claim, by a person precisely similarly situated, as tending to prove a promise to pay plaintiff. Knowlton *v.* Sanbornton, 48 N. H. 333.

87. Declarations of agent without authority.— Declarations of a recruiting agent appointed by vote of the town made at a town-meeting after his agency had ceased, in respect to what bounty he promised plaintiff when he enlisted and made when plaintiff was not present, and long after the contract to which they related was made are not admissible in an action to recover the bounty, although they were made at a town-meeting and the one who made them is dead. Stiles *v.* Danville, 42 Vt. 282. So promises made by an agent of the state are not admissible against the town, he not being shown to be its agent. Bogue *v.* Montville, 69 Conn. 472, 37 Atl. 1078.

Declarations of acting agents.— In an action to recover a bounty offered by certain resolutions of the board of supervisors of a county to persons enlisting in the military service, the declarations of one of a committee appointed by the board, respecting such bounty, made while acting as such, are admissible against the county for the purpose of showing that the committee acted, although such declarations were after the enlistment in question. Keough *v.* Scott County, 28 Iowa 337.

or private agreements made in the absence of one of the parties to the suit are inadmissible as under the ordinary rules of evidence.[88]

5. Questions For Jury. The question as to whether an offer of bounty was made, and the terms and amount thereof, is for the jury.[89]

III. Head Money.

Head money or bounty within the meaning of the United States statutes, providing that a certain bounty shall be paid by the government for each person on board any vessel of war belonging to the enemy at the commencement of an engagement, which shall be sunk or otherwise destroyed by any vessel belonging to the United States,[90] is not prize under the law, but a gratuity which the government has promised to distribute under the direction of the secretary of the navy, in the same manner as prize-money is distributed.[91] The amount of the bounty depends upon the superiority or inferiority of the force with which the claimants are called upon to contend.[92]

IV. Bounties For Destruction of Animals.

In many states bounties are provided by statute for the destruction of certain animals deemed destructive to stock or crops.[93] Such statutes have been held to come within the purview of the police power of the state, as securing the general comfort, health, and prosperity.[94] All of such statutes require the presentation

88. Private agreement.— In an action against a member of a board of enrolment to recover money deposited with such member to be paid as a bounty to plaintiff as a substitute for a drafted man, evidence of an agreement between plaintiff and the person depositing the money, not known to defendant, is inadmissible. Gates *v.* Thatcher, 11 Minn. 204.

89. Sparrow *v.* Grove, 31 Md. 214; Andrews *v.* Moretown, 45 Vt. 1; Poquet *v.* North Hero, 44 Vt. 91; Leet *v.* Shedd, 42 Vt. 277.

90. U. S. Rev. Stat. (1878), § 4635.

Vessel not engaged.— The officers and men of a naval vessel which was not engaged in the destruction of the vessels of the enemy, but which was within signal distance of the vessels of the American fleet, or of the flagship of the commanding officer which did participate in such destruction, and able to render effective aid if required, are entitled to bounty, under U. S. Rev. Stat. (1878), § 4635, authorizing a bounty for each person on board an enemy's vessel which is destroyed in an engagement by any United States vessel. Sampson *v.* U. S., 35 Ct. Cl. 578.

91. Matter of Farragut, 7 D. C. 94; U. S. Rev. Stat. (1878), § 4642.

Such bounty, in lieu of prize-money, applies only to successes achieved by the navy alone, without the assistance of the army, and solely by maritime force. U. S. *v.* War Steam Vessels, 106 U. S. 607, 1 S. Ct. 539, 27 L. ed. 286.

92. Under U. S. Rev. Stat. (1878), § 4635, a bounty of one hundred dollars is provided if the enemy's vessels are of inferior force and of two hundred dollars if of equal or superior force, to be divided among the officers and crew in the same manner as prize-money. See Dewey *v.* U. S., 35 Ct. Cl. 172.

The force specified is that of the enemy's vessel, disjoined from the force arising from forts and batteries on the shore, and torpedoes and mines; hence, in the engagement at Manila bay between the United States naval forces and the Spanish fleet, the force of the vessels of the Spanish fleet being inferior to the American vessels, the claim for bounty is within the provision allowing one hundred dollars for each person on board the vessels sunk and destroyed. Dewey *v.* U. S., 35 Ct. Cl. 172.

93. *California.*— Ingram *v.* Colgan, 106 Cal. 113, 38 Pac. 315, 39 Pac. 437, 46 Am. St. Rep. 221, 28 L. R. A. 187.

Colorado.— *In re* Bounties, 18 Colo. 273, 32 Pac. 423. See also Mute, etc., Inst. *v.* Henderson, 18 Colo. 98, 31 Pac. 714, 18 L. R. A. 398.

Florida.— De Vaughn *v.* Jackson County, 31 Fla. 60, 12 So. 212; Johns *v.* Orange County, 28 Fla. 626, 10 So. 96.

Iowa.— Bourrett *v.* Palo Alto County, 104 Iowa 350, 73 N. W. 838; Murray *v.* Jones County, 72 Iowa 286, 33 N. W. 684.

Kansas.— Clark *v.* Wallace County, 54 Kan. 634, 39 Pac. 225.

Montana.—State *v.* Rickards, 17 Mont. 440, 43 Pac. 504.

Texas.— Weaver *v.* Scurry County, (Tex. Civ. App. 1894) 28 S. W. 836.

See 8 Cent. Dig. tit. "Bounties," § 42.

94. Ingram *v.* Colgan, 106 Cal. 113, 38 Pac. 315, 39 Pac. 437, 46 Am. St. Rep. 221, 28 L. R. A. 187; Weaver *v.* Scurry County, (Tex. Civ. App. 1894) 28 S. W. 836.

To make such appropriations valid within the meaning of the constitution the statute must not only designate the amount, but also the fund out of which it shall be paid. Ingram *v.* Colgan, 106 Cal. 113, 38 Pac. 315, 39 Pac. 437, 46 Am. St. Rep. 221, 28 L. R. A. 187.

of evidence of claim to some board or officer mentioned therein;[95] and in order to entitle himself to the bounty provided, the claimant must bring himself within the terms of the statute under which he seeks to recover.[96]

V. Bounties For Planting Trees and Hedges.

Bounties have in some instances been granted for the planting of certain trees and hedges, the cultivation of which is supposed to redound to the public welfare.[97]

VI. Bounties For Sinking Artesian Wells.

A bounty has been declared by statute in some states in favor of those sinking artesian wells.[98]

VII. Bounties on Manufactured Products.

A bounty has in some cases been provided by statute to stimulate the production of certain manufactured articles or products in the manufacture or consumption of which the public is interested.[99] These bounties have been offered

95. De Vaughn *v.* Jackson County, 31 Fla. 60, 12 So. 212; Johns *v.* Orange County, 28 Fla. 626, 10 So. 96; Bourrett *v.* Palo Alto County, 104 Iowa 350, 73 N. W. 838; Murray *v.* Jones County, 72 Iowa 286, 33 N. W. 684.

Presentation to proper officers.— Cal. act March 31, 1891, providing for the payment out of the general fund of a bounty to any one killing a coyote, and for taking proof and issuing a certificate by the county supervisors, and that "such certificate may be presented to the controller of the state, who may draw his warrant on the general fund in the state treasury," does not exempt such claims from the necessity of presenting them for audit before the state board of examiners, in accordance with Cal. Pol. Code, § 660, requiring claims against the state to be so presented, nor from the provision in section 672, forbidding the controller to draw his warrant for any claim unless it has been approved by such board. Ingram *v.* Colgan, 106 Cal. 113, 38 Pac. 315, 39 Pac. 437, 46 Am. St. Rep. 221, 28 L. R. A. 187.

96. Evidence satisfactory to officer.— All that is required is that the officer shall be satisfied that the claimant has brought himself within the terms of the statute. Johns *v.* Orange County, 28 Fla. 626, 10 So. 96; Bourrett *v.* Palo Alto County, 104 Iowa 350, 73 N. W. 838; Murray *v.* Jones County, 72 Iowa 286, 33 N. W. 684.

Insufficient certificate.— Under Fla. Laws, c. 3763, providing for the payment of a bounty for the killing of wildcats, and requiring the county commissioners to issue a warrant in payment of the bounty upon the certificate of the county judge that the person killing the wildcat exhibited its scalp to him within ten days after the killing, it was held that a certificate that a person named therein exhibited to the judge the scalp of a wildcat, "which he represented as having been killed" within the time prescribed by the statute was insufficient. Johns *v.* Orange County, 28 Fla. 626, 10 So. 96 [*followed* in De Vaughn *v.* Jackson County, 31 Fla. 60, 12 So. 212].

97. Atty.-Gen. *v.* Judges, 38 Cal. 291; Marion County *v.* Hoch, 24 Kan. 778; Jefferson County *v.* Hudson, 20 Kan. 71; Smith *v.* Nobles County, 37 Minn. 535, 35 N. W. 383. See also Mute, etc., Inst. *v.* Henderson, 18 Colo. 98, 31 Pac. 714, 18 L. R. A. 398.

Division of plantation.— Under the California act of 1868, for the encouragement of silk culture, and offering a premium for "each plantation of five thousand mulberry trees of the age of two years," it was intended that the owner of a farm or assemblage of mulberry trees, of the age of two years, amounting to five thousand or more, should be entitled to the premium, and if he has more than one such farm or plantation, they being entirely separate or distinct, to a premium for each, but no one is entitled to a premium for one half a plantation. Atty.-Gen. *v.* Judges, 38 Cal. 291.

Such statutes have been held unconstitutional as granting public money for an individual use. Deal *v.* Mississippi County, 107 Mo. 464, 18 S. W. 24, 14 L. R. A. 622.

98. In order to claim the benefit of the bounty thus provided the claimant must bring himself within the terms of the statute, both as to the time limit set and the capacity of the well. State *v.* Horton, 21 Nev. 300, 30 Pac. 876.

99. East Saginaw Mfg. Co. *v.* East Saginaw, 19 Mich. 259, 2 Am. Rep. 82 [*affirmed* in 13 Wall. (U. S.) 373, 20 L. ed. 611]; People *v.* State Auditors, 9 Mich. 327; *Ex p.* Burnet, 6 Hill (N. Y.) 397; Allen *v.* Smith, 173 U. S. 389, 19 S. Ct. 446, 43 L. ed. 741 [*reversing* 49 La. Ann. 1096, 22 So. 319]; U. S. *v.* Realty Co., 163 U. S. 427, 16 S. Ct. 1120, 41 L. ed. 215; Calder *v.* Henderson, 54 Fed. 802, 2 U. S. App. 627, 4 C. C. A. 584; Taylor *v.* U. S., 33 Ct. Cl. 393; Glynn *v.* U. S., 32 Ct. Cl. 82.

Constitutionality of statutes.— Statutes providing for this class of bounties have been held unconstitutional as taxation for other

both by the state[1] and the federal authorities.[2] Such statutes usually require a preliminary application from the prospective claimant and a license from the government,[3] and to prove himself entitled to the offer the claimant must show that he is one of the class contemplated by the statute under which he seeks to recover.[4]

VIII. FISH BOUNTIES.

Bounties have been provided by statute for persons engaged in a certain kind of fishing.[5] To recover a bounty under such statutes the owner of the vessel engaged must make oath to the facts provided by the statute.[6]

BOUNTY LANDS. Portions of the public domain given to soldiers for military services, by way of bounty.[1]

BOURG. In old English, a BOROUGH,[2] *q. v.*

BOUWERYE. In old New York law, a farm on which the farmer's family resided.[3]

than a public purpose. Michigan Sugar Co. *v.* Auditor General, 124 Mich. 674, 83 N. W. 625, 83 Am. St. Rep. 354. Whatever doubt existed as to the validity of the Sugar Bounty Act of 1890 has been settled by its repeal under the act of 1894. Allen *v.* Smith, 173 U. S. 389, 19 S. Ct. 446, 43 L. ed. 741; U. S. *v.* Realty Co., 163 U. S. 427, 16 S. Ct. 1120, 41 L. ed. 215.

1. Cole *v.* Carroll First Nat. Bank, 56 Kan. 571, 44 Pac. 8; East Saginaw Mfg. Co. *v.* East Saginaw, 19 Mich. 259, 2 Am. Rep. 32 [*affirmed* in 13 Wall. (U. S.) 373, 20 L. ed. 611]; People *v.* State Auditors, 9 Mich. 327; State *v.* Moore, 50 Nebr. 88, 69 N. W. 373, 61 Am. St. Rep. 538; *Ex p.* Burnet, 6 Hill (N. Y.) 397.

2. U. S. *v.* Realty Co., 163 U. S. 427, 16 S. Ct. 1120, 41 L. ed. 215; Calder *v.* Henderson, 54 Fed. 802, 2 U. S. App. 627, 4 C. C. A. 584; Taylor *v.* U. S., 33 Ct. Cl. 393.

3. Allen *v.* Smith, 173 U. S. 389, 19 S. Ct. 446, 43 L. ed. 741 [*reversing* 49 La. Ann. 1096, 22 So. 319]; U. S. *v.* Realty Co., 163 U. S. 427, 16 S. Ct. 1120, 41 L. ed. 215.

Estoppel to deny application.— Where the government issued a license for the manufacture of sugar, under which a claimant invested time and capital, it is estopped from denying the sufficiency of the application, notice, and bond upon which the license was granted. Glynn *v.* U. S., 32 Ct. Cl. 82.

4. Cole *v.* Carroll First Nat. Bank, 56 Kan. 571, 44 Pac. 8.

Mortgage for advancements.— One who advanced money to sugar-planters to enable them to produce a crop, taking a mortgage on the crop to be raised, and by contract having the sugar manufactured and sold in his name, with the agreement that the license under the act of Oct. 1, 1890, should be taken out in his name, and that he should receive the bounty, is a producer of sugar, within the purview of the law. Suthon *v.* U. S., 81 Fed. 810, 52 U. S. App. 365, 26 C. C. A. 628. See also Barrow *v.* Milliken, 74 Fed. 612, 41 U. S. App. 332, 20 C. C. A. 559.

Reservation of equitable lien.— A sugar grower in Louisiana may, by contract with the manufacturer to whom he sells the cane, reserve an equitable lien on the sugar bounties becoming due under the act of Oct. 1, 1890, which may be enforced to the exclusion of general creditors, unaffected by the state laws. Burdon Cent. Sugar-Refining Co. *v.* Payne, 81 Fed. 663, 52 U. S. App. 312, 26 C. C. A. 552 [*reversing* 78 Fed. 417].

5. U. S. *v.* Nickerson, 17 How. (U. S.) 204, 15 L. ed. 219; The Harriet, 1 Story (U. S.) 251, 11 Fed. Cas. No. 6,099 [*affirming* 1 Ware (U. S.) 348, 11 Fed. Cas. No. 6,100]; The Swallow, 1 Ware (U. S.) 13, 23 Fed. Cas. No. 13,666.

6. **Certificate of sailing days.**— Under the act of congress of July 29, 1813, providing a bounty for those engaged in cod-fishing, and requiring that the owner of a vessel before receiving the bounty shall produce to the collector the original agreement made with his fisherman, and a certificate of the days of sailing and return, "to the truth of which" he shall swear, it was held that both agreement and certificate must be sworn to. U. S. *v.* Nickerson, 17 How. (U. S.) 204, 15 L. ed. 219.

Evidence of sailing days.— In a proceeding to obtain a forfeiture under the act of July 29, 1813, and the act of March 3, 1819, relating to the bounty upon vessels and boats employed in the fisheries, an almanac was offered as evidence of the particular days on which the vessel sailed and returned, wherein the letters R and S and dots were placed against particular days, as being the very days of her sailing and returning. It was held, that such a document was not a proper journal or memorandum book thereof entitled to credit. For this purpose, an exact journal or memorandum of the actual days of her sailing and returning should be kept, in the nature of a log book. The Harriet, 1 Story (U. S.) 251, 11 Fed. Cas. No. 6,099 [*affirming* 1 Ware (U. S.) 348, 11 Fed. Cas. No. 6,100].

1. Rapalje & L. L. Dict.
2. Burrill L. Dict.
3. Burrill L. Dict.

BOUWMEESTER. In old New York law, a farmer.[4]

BOVATA TERRÆ. As much land as one ox can plow.[5]

BOW-WINDOW. See Bay-Window.

BOX-CAR. An inclosed and covered freight-car.[6]

BOXING-MATCH. See Prize-Fighting.

BOY. A male child from birth to the age of puberty; but, in general, applied to males under ten or twelve years of age.[7]

BOYCOTT.[8] A combination of many to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them;[9] an organized effort to exclude a person from business relations with others by persuasion, intimidation, and other acts which tend to violence, and thereby coerce him, through fear of resulting injury, to submit to dictation in the management of his affairs;[10] a combination between persons to suspend or discontinue dealings or patronage with another person or persons because of refusal to comply with a request of him or them.[11] (Boycott:[12] Generally, see Conspiracy. Injunction Against, see Injunctions.)

BRACERY. See Champerty and Maintenance.

BRACES. Suspenders.[13]

BRACKETS. Two marks [ ] used to inclose a note, reference, explanation, or the like, and thus separate it from the context.[14]

BRAKEMAN. See Master and Servant.

BRANCH. Something resembling a branch in its relation to the trunk; con-

4. Burrill L. Dict.

5. Jacob L. Dict.

6. Century Dict. [*quoted* in State *v.* Green, 15 Mont. 424, 426, 39 Pac. 322].

7. Webster Dict. [*quoted* in Zachary *v.* State, 7 Baxt. (Tenn.) 1, 3; Bell *v.* State, 18 Tex. App. 53, 56, 51 Am. Rep. 293, 21 Centr. L. J. 221].

8. **Origin of term.**— "Captain Boycott was an Englishman, an agent of Lord Earne, and a farmer of Lough Mark, 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 the armed constabulary ever at their heels. The Orangemen of the north heard of Captain Boycott and his sufferings, and the way in 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 Mark, and Captain Boycott's harvests were brought in and his potatoes dug by the armed Ulster laborers, guarded always by the little army." McCarthy's "England under Gladstone" [*quoted* in State *v.* Glidden, 55 Conn. 46, 76, 8 Atl. 890, 3 Am. St. Rep. 23; Crump *v.* Com., 84 Va. 927, 939, 6 S. E. 620, 10 Am. St. Rep. 895].

9. Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 730, 738, 19 L. R. A. 387 [*quoted* in Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 525, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407; Matthews *v.* Shankland, 25 Misc. (N. Y.) 604, 611, 56 N. Y. Suppl. 123].

10. Brace *v.* Evans, 5 Pa. Co. Ct. 163, 171, 35 Pittsb. Leg. J. (Pa.) 399, 3 R. & Corp. L. J. 561 [*quoted* in Matthews *v.* Shankland, 25 Misc. (N. Y.) 604, 611, 56 N. Y. Suppl. 123; Casey *v.* Cincinnati Typographical Union No. 3, 45 Fed. 135, 143, 12 L. R. A. 193].

11. Anderson L. Dict. [*quoted* in Matthews *v.* Shankland, 25 Misc. (N. Y.) 604, 610, 56 N. Y. Suppl. 123].

12. **Arrest in action for damages arising from** see Arrest, 3 Cyc. 904, note 38.

Liability of members of association for damages from see Associations, 4 Cyc. 312, note 65.

13. Arthur *v.* Davies, 96 U. S. 135, 24 L. ed. 810.

14. Century Dict.

"**The ordinary use of brackets in printing,** is to enclose a parenthesis." Early *v.* Wilkinson, 9 Gratt. (Va.) 68, 72.

Indicating objectionable instructions by inclosing in brackets see Appeal and Error, 3 Cyc. 96, note 43.

sisting of or constituting a branch.[15] (Branch: Bank, see Banks and Banking. Railroad, see Railroads.)

BRAND. To stamp; to mark;[16] a mark made by burning with a hot iron.[17] (Brand: On — Fertilizers, see Agriculture; Live Stock, see Animals; Logs, see Logging. Use as Trade-Mark, see Trade-Marks and Trade-Names.)

BRANDING. The punishment of marking convicted felons with a hot iron on the hand or face.[18]

BRANDY. A liquor made chiefly in France, and extracted from the lees of wine.[19] (Brandy: Regulation of Use of, see Intoxicating Liquors. Taxation of, see Internal Revenue.)

BRASS. An alloy of copper and tin or copper and zinc.[20]

BRASS KNUCKLES. A certain weapon used for offense and defense, worn upon the hand to strike with as if striking with the fist.[21] (Brass Knuckles: Carrying as Weapons, see Weapons. Use of in Commission of — Assault, see Assault and Battery; Homicide, see Homicide.)

BRAWLS. Tumults.[22] (See, generally, Affray; Breach of the Peace; Disorderly Conduct; Disturbance of Public Meetings; Riot.)

BREACH. The breaking or violating of a law, right, or duty, either by commission or omission; the breaking or forcible passing through or over a material object; that part of the declaration immediately preceding the *ad damnum* clause, in which the violation of defendant's contract is stated.[23] (Breach: Of Blockade, see War. Of Close, see Forcible Entry and Detainer; Trespass. Of Condition of Bond,[24] see Bonds. Of Contract — Generally, see Contracts; Of Sale, see Sales; Vendor and Purchaser. Of Covenant, see Covenants. Of Pound, see Animals. Of Prison, see Escape; Rescue. Of Privilege, see States. Of Promise to Marry, see Breach of Promise to Marry. Of the Peace, see Breach of the Peace. Of Trust, see Trusts. Of Warranty, see Covenants; Sales.)

15. Century Dict.

16. Dibble *v.* Hathaway, 11 Hun (N. Y.) 571, 575.

17. Century Dict.

18. Burrill L. Dict.

19. Jacob L. Dict.

20. U. S. *v.* Ullman, 4 Ben. (U. S.) 547, 28 Fed. Cas. No. 16,593, 13 Int. Rev. Rec. 68.

21. Harris *v.* State, 22 Tex. App. 677, 678, 3 S. W. 477, where it is said: "This weapon, when first known and used, was commonly made of brass, but is now made of steel, platinum or other heavy metal, as well as of brass, but is still known and called brass knuckles, no matter what it is made of."

22. State *v.* Perkins, 42 N. H. 464, 465.

23. Burrill L. Dict.

Allegation of breach in assumpsit see Assumpsit, Action of, 4 Cyc. 343.

24. Breach of condition of appeal-bond see Appeal and Error, 2 Cyc. 933.

BREACH OF PROMISE TO MARRY

By Gilbert E. Roe

CROSS-REFERENCES

For Matters Relating to:
Arrest in Action For Breach of Promise, see ARREST.
Attachment in Action For Breach of Promise, see ATTACHMENT.
Capacity of Parties to Marry, see MARRIAGE.
Execution Against Person of Defendant, see EXECUTIONS.
Jurisdiction of Justices of the Peace, see JUSTICES OF THE PEACE.
Release of Judgment by Reason of Bankruptcy, see BANKRUPTCY.
Seduction Under Promise of Marriage, see SEDUCTION.

I. AGREEMENT TO MARRY.

A. Nature of. An agreement to marry can only be made between a man and a woman, and is essentially different from every other contract known to the law, its objects being totally unlike the purposes to be accomplished by any other kind of contract which can be entered into, and the relation it has in view being wholly distinct from the relation which any other contract could contemplate. Moreover the contract has its origin in natural law and is the foundation of society.[1]

1. Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385. See also Tefft *v.* Marsh, 1 W. Va. 38.

To put a contract to marry on the same footing as a bargain for a horse or a bale of hay is not in accordance with the general feeling of mankind, and is supported by no authority. Hall *v.* Wright, E. B. & E. 746, 6 Jur. N. S. 193, 29 L. J. Q. B. 43, 1 L. T. Rep. N. S. 230, 8 Wkly. Rep. 160, 96 E. C. L. 746.

A marriage contract is not in restraint of marriage because its terms are intended to restrain the woman from marriage with any other man, and the man from marriage with any other woman. Brown *v.* Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660.

History of law as to promises of marriage. — It was said in Morgan *v.* Yarborough, 5 La. Ann. 316, that the usage of sponsatia or promises of marriage among the Romans was of very ancient origin; that it was spoken

B. Who May Make — 1. In General. Personal capacity to enter into an agreement to marry depends on the law of domicile.[2]

2. Infants. The capacity of infants to enter into a contract to marry has been said to be far less restricted as to age than their capacity to enter into any other agreement,[3] but a contract to marry entered into by an infant is voidable by him or her.[4]

C. Requisites and Validity — 1. In General. To constitute a contract to marry there must be a meeting of the minds of the contracting parties,[5] that is, there must be an offer on the one part and an acceptance on the other.[6] The contract may be unspoken[7] and unwritten;[8] but enough must appear to show

of in the Theodosian Code, in Justinian's, and in the decree of Gratian [*citing* Merlin Repertoire, *verbo* Fiançailles: Pothier Pandects, bk. 23, tit. 1]; and that if the promise was not fulfilled an action was permitted [*citing* Mackeldey, Droit Romain, 263]. The same authority says that Pothier, in his treatise on marriage, claims that the usage of Fiançailles existed among the Greeks and ancient Hebrews; and that under the Spanish law the ecclesiastical tribunals would take cognizance of a breach of promise, and punish the party until a consent to fulfil the promise was obtained [*citing* Partida 4, tit. 1, law vii]. Again, it is stated that in France a reciprocal promise of marriage is considered as producing a reciprocal obligation to contract a marriage, but that if one of the two fiancés refuses to accomplish the promise, neither the ecclesiastical nor lay tribunals can constrain a specific performance, the obligation resolving itself into damages, upon which a civil tribunal can alone decide, the damages being assessed with reference to the actual injury which the party sustained, and not to the advantage lost [*citing* Merlin Repertoire, *verbo* Fiançailles; Pothier Traite du Mariage, No. 53]; and that the Civil Code, by its silence on the subject of Fiançailles, leaves them in the general category of contracts, and they are consequently submitted to the rules of ordinary agreements [*citing* Merlin Repertoire, *verbo* Fiançailles, § 11]. So in a note to Wightman *v.* Coates, 15 Mass. 1, 6, 8 Am. Dec. 77, it is said that by the custom of Scotland the party refusing to fulfil may be either compelled to celebrate the marriage or to pay damages; that in Germany promises of marriage made with certain formalities are actionable; and that in the two Sicilies a promise of marriage produced no civil obligation, unless made before an officer of state in the prescribed manner, in which case an action might be maintained for the recovery of damages in case of non-performance of such promise.

2. Campbell *v.* Crampton, 18 Blatchf. (U. S.) 150, 2 Fed. 417, where it was said that the domicile which the parties contemplated was the very essence of the contract, and that, although consanguinity of the parties might not render a marriage between them voidable in New York, an agreement to marry between parties, whose consanguinity was such that they could not marry within a state where the agreement was made, should not be sanctioned in New York even if marriage was possible.

In a state where kinship is not an impediment to lawful marriage, parties akin may contract to marry. Alberts *v.* Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584.

3. Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

4. McConkey *v.* Barnes, 42 Ill. App. 511; Develin *v.* Riggsbee, 4 Ind. 464; Warwick *v.* Cooper, 5 Sneed (Tenn.) 658.

The common law is not affected by statutes legalizing the marriage of infants. McConkey *v.* Barnes, 42 Ill. App. 511; Frost *v.* Vought, 37 Mich. 65; Rush *v.* Wick, 31 Ohio St. 521, 27 Am. Rep. 523.

5. *Alabama.*— Espy *v.* Jones, 37 Ala. 379.

Indiana.— King *v.* Kersey, 2 Ind. 402.

Kentucky.— Allard *v.* Smith, 2 Metc. (Ky.) 297.

Louisiana.— Morgan *v.* Yarborough, 5 La. Ann. 316.

Missouri.— Standiford *v.* Gentry, 32 Mo. 477.

New York.—Yale *v.* Curtiss, 151 N. Y. 598, 45 N. E. 1125 [*reversing* 71 Hun (N. Y.) 436, 24 N. Y. Suppl. 981, 54 N. Y. St. 538]; Homan *v.* Earle, 53 N. Y. 267 [*affirming* 13 Abb. Pr. N. S. (N. Y.) 402].

England.—Harvey *v.* Johnston, 6 C. B. 295, 6 Dowl. & L. 120, 12 Jur. 981, 17 L. J. C. P. 298, 60 E. C. L. 295.

See 8 Cent. Dig. tit. "Breach of Marriage Promise," § 2.

6. Morgan *v.* Yarborough, 5 La. Ann. 316; Yale *v.* Curtiss, 151 N. Y. 598, 45 N. E. 1125 [*reversing* 71 Hun (N. Y.) 436, 24 N. Y. Suppl. 981, 54 N. Y. St. 538].

Rendering services in expectation of marriage, but without a promise, is not sufficient. Robinson *v.* Shistel, 23 U. C. C. P. 114.

A promise under duress is not binding. McCrum *v.* Hildebrand, 85 Ind. 204; Tilley *v.* Damon, 11 Cush. (Mass.) 247.

Fraud and deception on the part of one party will not invalidate the contract as to the other. Prescott *v.* Guyler, 32 Ill. 312; Yale *v.* Curtiss, 151 N. Y. 598, 45 N. E. 1125.

Time of assent.— Although the assent to the engagement on both sides need not appear to have been strictly concurrent, it must appear to have been within a reasonable time. Vineall *v.* Veness, 4 F. & F. 344.

Proof of promise see *infra*, II, I, 3, a.

7. Daniel *v.* Bowles, 2 C. & P. 553, 12 E. C. L. 728.

8. Morgan *v.* Yarborough, 5 La. Ann. 316.

that the minds of the parties meet, and to fix the fact that the parties are to marry as clearly as if put in formal words of offer and acceptance.[9]

2. **Consideration.** The promises being mutual each is usually the consideration for the other,[10] but it is not the only possible consideration.[11] It is not sufficient if the sole consideration is immoral,[12] or against public policy,[13] but if other a previous promise had been made and broken. Pyle *v.* Piercy, 122 Cal. 383, 55 Pac. 141.

Statute of frauds.— A promise to marry is not within the clause of the statute of frauds relating to contracts made in consideration of marriage. Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; Ogden *v.* Ogden, 1 Bland (Md.) 284; Harrison *v.* Cage, 1 Ld. Raym. 386 [*overruling* Philpott *v.* Wallet, 3 Lev. 65]; Cork *v.* Baker, 1 Str. 34. It has been held, however, that the agreement, if not to be performed within one year, is within a clause requiring contracts of that character to be in writing (Nichols *v.* Weaver, 7 Kan. 373; Derby *v.* Phelps, 2 N. H. 515; Ullman *v.* Meyer, 10 Fed. 241. *Contra*, Blackburn *v.* Mann, 85 Ill. 222 [*cited* in Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; Nearing *v.* Van Fleet, 151 N. Y. 643]; Brick *v.* Gannar, 36 Hun (N. Y.) 52); the cases, of course, turning upon the construction of the different statutes involved (Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385). Where there is a possibility of the marriage being performed within a year, and there is no stipulation that it should not be, the statute does not apply. Lawrence *v.* Cooke, 56 Me. 187, 26 Am. Dec. 443; Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

9. Yale *v.* Curtiss, 151 N. Y. 598, 45 N. E. 1125 [*reversing* 71 Hun (N. Y.) 436, 24 N. Y. Suppl. 981, 54 N. Y. St. 538].

Time for performance.— A contract definite and certain in every element and part, except as to the time of consummation which is made to depend upon an event which in the course of nature must inevitably occur, is not void for indefiniteness and uncertainty. Brown *v.* Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, holding that a contract to marry upon the death of a divorced consort of defendant is reasonably definite and certain, since the possibility that one or both of the contracting parties might die in advance of that event is the same as if the marriage had been set for the first day of the next month, or of the next year, and in neither of these cases would that possibility render the contract void for indefiniteness or uncertainty. The promise may be to marry at a fixed time (Halloway *v.* Griffith, 32 Iowa 409, 7 Am. Rep. 208), in general terms, that is, to marry within a reasonable time (Blackburn *v.* Mann, 85 Ill. 222; Cannon *v.* Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709), or to marry on the recovery of health (McConahey *v.* Griffey, 82 Iowa 564, 48 N. W. 983).

10. Harvey *v.* Johnston, 6 C. B. 295, 6 Dowl. & L. 120, 12 Jur. 981, 17 L. J. C. P. 298, 60 E. C. L. 295; Harrison *v.* Cage, 5 Mod. 411; Cock *v.* Richards, 10 Ves. Jr. 429.

Effect of previous broken promise.— The consideration is not affected by the fact that

11. Harvey *v.* Johnston, 6 C. B. 295, 6 Dowl. & L. 120, 12 Jur. 981, 17 L. J. C. P. 298, 60 E. C. L. 295.

Sufficient considerations.— A promise to marry is supported by a promise to go to a certain place for the purpose of marrying (Harvey *v.* Johnston, 6 C. B. 295, 6 Dowl. & L. 120, 12 Jur. 981, 17 L. J. C. P. 298, 60 E. C. L. 295) or by a promise to remain unmarried (Millward *v.* Littlewood, 5 Exch. 775, 20 L. J. Exch. 2, 1 Eng. L. & Eq. 408; Wild *v.* Harris, 7 C. B. 999, 7 Dowl. & L. 114, 13 Jur. 961, 19 L. J. C. P. 297, 62 E. C. L. 999); and a bond, conditioned for damages in a case of a failure to marry, given by one, is a good consideration for an agreement that in the event of his or her failure to marry after a certain time the other shall have all his or her property (Cock *v.* Richards, 10 Ves. Jr. 429).

12. **Sexual intercourse** is not a good consideration (Boigneres *v.* Boulon, 54 Cal. 146; Hanks *v.* Naglee, 54 Cal. 51, 35 Am. Rep. 67; Judy *v.* Sterrett, 52 Ill. App. 265; Saxon *v.* Wood, 4 Ind. App. 242, 30 N. E. 797; Button *v.* Hibbard, 82 Hun (N. Y.) 289, 31 N. Y. Suppl. 483, 64 N. Y. St. 80; Steinfeld *v.* Levy, 16 Abb. Pr. N. S. (N. Y.) 26; McDonald *v.* McCann, 4 City Hall Rec. (N. Y.) 63; Lewis *v.* Goetschius, 20 N. Y. Wkly. Dig. 140; Goodal *v.* Thurman, 1 Head (Tenn.) 208; Burke *v.* Shaver, 92 Va. 345, 23 S. E. 749); but the contract is not vitiated if the intercourse be had before (Hotchkins *v.* Hodge, 38 Barb. (N. Y.) 117) or after (Fleetford *v.* Barnett, 11 Colo. App. 77, 52 Pac. 293; Powell *v.* Moeller, 107 Mo. 471, 18 S. W. 884; Kelley *v.* Highfield, 15 Oreg. 277, 14 Pac. 744; Spellings *v.* Parks, 104 Tenn. 351, 58 S. W. 126) the promise.

13. **Public policy would be contravened by** a promise to marry another person after the death of a living consort (Noice *v.* Brown, 38 N. J. L. 228, 20 Am. Rep. 388; Davis *v.* Pryor, 112 Fed. 274, 50 C. C. A. 579 [*reversing* (Indian Terr. 1900) 58 S. W. 660]; Millward *v.* Littlewood, 5 Exch. 775, 20 L. J. Exch. 2, 1 Eng. L. & Eq. 408) or when a divorce should be obtained (Paddock *v.* Robinson, 63 Ill. 99, 14 Am. Rep. 112; Noice *v.* Brown, 38 N. J. L. 228, 20 Am. Rep. 388 [*affirmed* in 39 N. J. L. 133, 23 Am. Rep. 213]); but it seems that one may make a valid promise to marry upon the death of a parent (Frost *v.* Knight, L. R. 7 Exch. 111, 41 L. J. Exch. 78, 26 L. T. Rep. N. S. 77, 20 Wkly. Rep. 471), or upon the death of a divorced consort of defendant (Brown *v.* Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660).

promises were made free from the immoral or unlawful taint the contract will be upheld on such other promises.[14]

D. Abrogation, Release, or Rescission. An agreement to marry may, like other agreements, be abrogated, released, or rescinded.[15]

II. ACTION FOR BREACH OF AGREEMENT.

A. Accrual of Right. Where the contract is not performed in accordance with the agreement there is a right of action.[16] Where the contract was to marry at a certain time, suit may be brought immediately upon the renunciation of the contract before the expiration of such time,[17] or upon discovery that performance by one party is impossible;[18] and where no time of performance was fixed action may be brought after a reasonable time.[19]

14. Judy *v.* Sterrett, 52 Ill. App. 265; Kurtz *v.* Frank, 76 Ind. 594, 40 Am. Rep. 275; Button *v.* Hibbard, 82 Hun (N. Y.) 289, 31 N. Y. Suppl. 483, 64 N. Y. St. 80.

The rule that a contract is void, if part of the consideration is illegal, or against sound morals or public policy, is not applicable to agreements to marry. Thus where an executrix, as part consideration of a promise of marriage, agreed to compromise a suit which she had instituted in her fiduciary character, the contract was held valid. Donallen *v.* Lennox, 6 Dana (Ky.) 89.

15. Allard *v.* Smith, 2 Metc. (Ky.) 297; Dean *v.* Skiff, 128 Mass. 174.

Contract not speedily carried out considered abandoned.— When persons of different sexes contract to marry each other, but do not marry immediately, there is always some reason or other against it, as disapprobation of friends and relations, inequality of circumstances, or the like. "Both sides ought to continue free; otherwise such contracts may be greatly abused, as by putting woman's virtue in danger by too much confidence in men, or by young men living with women without being married. Therefore these contracts are not to be extended by implication." Davis *v.* Bomford, 6 H. & N. 245, 249, 30 L. J. Exch. 139, 3 L. T. Rep. N. S. 279 [*citing* Lowe *v.* Peers, 4 Burr. 2225].

Returning an engagement ring does not waive or release a right of action for a failure to marry. Kraxberger *v.* Roiter, 91 Mo. 404, 3 S. W. 872, 60 Am. Rep. 262; Ortiz *v.* Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581.

Who may rescind or release.— A parent or guardian cannot avoid an infant's promise to marry (Parks *v.* Maybee, 2 U. C. C. P. 257), but a minor may release the promise if competent under statute to contract marriage (Develin *v.* Riggsbee, 4 Ind. 464). As to a release by infants, generally, see INFANTS.

Acknowledgment of release see 1 Cyc. 618, note 13.

16. Blackburn *v.* Mann, 85 Ill. 222; Short *v.* Stotts, 58 Ind. 29; Wightman *v.* Coates, 15 Mass. 1, 8 Am. Dec. 77; Johnson *v.* Smith, 3 Pittsb. (Pa.) 184.

Where by one party's religion marriage was forbidden on the day fixed for the marriage and it had been agreed that the marriage should be celebrated in accordance with the religious custom, it was held that an action based on the refusal to marry on that day could not be maintained. Stone *v.* Appel, 12 Ill. App. 582.

17. *Illinois.*— Zatlin *v.* Davenport, 71 Ill. App. 292.

Iowa.— Halloway *v.* Griffith, 32 Iowa 409, 7 Am. Rep. 208.

Kansas.— Kennedy *v.* Rodgers, 2 Kan. App. 764, 44 Pac. 47.

Kentucky.—Clark *v.* Phillips, 4 Ky. L. Rep. 826.

Maryland.— Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

New York.— Burtis *v.* Thompson, 42 N. Y. 246, 1 Am. Rep. 516.

England.— Frost *v.* Knight, L. R. 7 Exch. 111, 41 L. J. Exch. 78, 26 L. T. Rep. N. S. 77, 20 Wkly. Rep. 471; Donoghue *v.* Marshall, 32 L. T. Rep. N. S. 310.

Where no intention to perform is shown action may be brought directly after the time fixed for performance, it not being requisite to wait until defendant is cured of a disease which would under ordinary circumstances entitle defendant to a postponement whether plaintiff consented thereto or not. Trammell *v.* Vaughan, 158 Mo. 214, 59 S. W. 79, 81 Am. St. Rep. 302, 51 L. R. A. 854.

18. *Alabama.*— Clements *v.* Moore, 11 Ala. 35.

Indiana.— Hunter *v.* Hatfield, 68 Ind. 416; King *v.* Kersey, 2 Ind. 402.

Michigan.—Sheahan *v.* Barry, 27 Mich. 217.

Missouri.— Schroeder *v.* Michel, 98 Mo. 43, 11 S. W. 314.

New York.— Kerns *v.* Hagenbuchle, 60 N. Y. Super. Ct. 222, 17 N. Y. Suppl. 367.

Wisconsin.— McCarville *v.* Boyle, 89 Wis. 651, 62 N. W. 517.

England.— Short *v.* Stone, 8 Q. B. 358, 3 Dowl. & L. 580, 10 Jur. 245, 15 L. J. Q. B. 143, 55 E. C. L. 358; Caines *v.* Smith, 3 Dowl. & L. 462, 15 L. J. Exch. 106, 15 M. & W. 189.

19. Stevenson *v.* Pettis, 4 Wkly. Notes Cas. (Pa.) 151, 12 Phila. (Pa.) 468, 34 Leg. Int. (Pa.) 176.

What is a reasonable time must be determined by the age of the parties, their financial ability, and other circumstances.

Alabama.— Clements *v.* Moore, 11 Ala. 35.

Connecticut.— Clark *v.* Pendleton, 20 Conn. 495.

B. Defenses — 1. In General. The fact that there was a mutual rescission of the contract is a good defense;[20] but plaintiff's consent to postpone the wedding-day,[21] the fact that defendant thought the proposed marriage would not tend to the happiness of both parties,[22] or an adjudication in a former action against defendant for seduction[23] is not.

2. Character and History of Plaintiff. A defense is good which sets up the unchastity of plaintiff occurring and becoming known to defendant subsequently to the promise,[24] or existing at the time of the promise and coming to the knowledge of defendant for the first time after such promise,[25] if immediately upon acquiring such knowledge he or she repudiated the contract;[26] but the unchastity of plaintiff is not a defense where committed with defendant, after the latter's engaging to marry plaintiff,[27] or where defendant knew of the misconduct before the engagement, or learning it subsequently, failed to act promptly in disavowing the promise.[28] Defendant cannot, however, take advantage of undesirable traits, conduct, characteristics, or other causes,[29] except in mitigation of dam-

Illinois.— Blackburn *v.* Mann, 85 Ill. 222; Prescott *v.* Guyler, 32 Ill. 312.

Indiana.— Haymond *v.* Saucer, 84 Ind. 3.

Kentucky.— Martin *v.* Patton, 1 Litt. (Ky.) 233; Cannon *v.* Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709.

Michigan.— Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442.

Pennsylvania.—Wagenseller *v.* Simmers, 97 Pa. St. 465.

Vermont.— Clement *v.* Skinner, 72 Vt. 159, 47 Atl. 788.

20. *Indiana.*— Mabin *v.* Webster, 129 Ind. 430, 28 N. E. 863, 28 Am. St. Rep. 199; Shellenbarger *v.* Blake, 67 Ind. 75.

Kentucky.—Allard *v.* Smith, 2 Metc. (Ky.) 297.

Massachusetts.— Dean *v.* Skiff, 128 Mass. 174.

Wisconsin.— Kellett *v.* Robie, 99 Wis. 303, 74 N. W. 781.

England.— Davis *v.* Bomford, 6 H. & N. 245, 30 L. J. Exch. 139, 3 L. T. Rep. N. S. 279; King *v.* Gillett, 10 L. J. Exch. 164, 7 M. & W. 55.

21. Kelly *v.* Renfro, 9 Ala. 325, 44 Am. Dec. 441; Clark *v.* Pendleton, 20 Conn. 495; Nearing *v.* Van Fleet, 71 Hun (N. Y.) 137, 24 N. Y. Suppl. 531, 54 N. Y. St. 308.

22. Coolidge *v.* Neat, 129 Mass. 146, holding that such a proposition is equivalent to saying that defendant may recede from his contract if he is disinclined to fulfil it.

23. Ireland *v.* Emmerson, 93 Ind. 1, 47 Am. Rep. 364, holding that this rule is not changed even though plaintiff alleged, in the complaint for seduction, that defendant had accomplished his purpose under promise of marriage.

24. Kelley *v.* Highfield, 15 Oreg. 277, 14 Pac. 744.

25. *Alabama.*— Espy *v.* Jones, 37 Ala. 379.

Connecticut.— Smith *v.* Hall, 69 Conn. 651, 38 Atl. 386.

Illinois.— Burnett *v.* Simpkins, 24 Ill. 264; Butler *v.* Eschleman, 18 Ill. 44.

Maine.— Berry *v.* Bakeman, 44 Me. 164.

Missouri.— Markham *v.* Herrick, 82 Mo. App. 327.

Nebraska.— Stratton *v.* Dole, 45 Nebr. 472, 63 N. W. 875.

North Carolina.— Gaskill *v.* Dixon, 3 N. C. 536.

Pennsylvania.— Van Storch *v.* Griffin, 77 Pa. St. 504.

South Carolina.— Capehart *v.* Carradine, 4 Strobh. (S. C.) 42.

Tennessee.— Goodal *v.* Thurman, 1 Head (Tenn.) 208.

Vermont.— Foster *v.* Hanchett, 68 Vt. 319, 35 Atl. 316, 54 Am. St. Rep. 886.

England.— Young *v.* Murphy, 3 Bing. N. Cas. 54, 2 Hodges 144, 16 L. J. C. P. 180, 3 Scott 379, 32 E. C. L. 35; Bench *v.* Merrick, 1 C. & K. 463, 47 E. C. L. 463; Irving *v.* Greenwood, 1 C. & P. 350, 12 E. C. L. 209; Baddeley *v.* Mortlock, Holt N. P. 151, 3 E. C. L. 67.

See 8 Cent. Dig. tit. "Breach of Marriage Promise," § 4.

26. Burnett *v.* Simpkins, 24 Ill. 264; Bowman *v.* Bowman, 153 Ind. 498, 55 N. E. 422.

Reformation of plaintiff subsequent to promise does not bar this defense. La Porte *v.* Wallace, 89 Ill. App. 517.

27. Dunn *v.* Trout, 87 Ill. App. 432; Bowman *v.* Bowman, 153 Ind. 498, 55 N. E. 422; Boynton *v.* Kellogg, 3 Mass. 189, 3 Am. Dec. 122; Johnson *v.* Smith, 3 Pittsb. (Pa.) 184.

28. *Alabama.*—Espy *v.* Jones, 37 Ala. 379.

Illinois.— Butler *v.* Eschleman, 18 Ill. 44.

Indiana.— Bowman *v.* Bowman, 153 Ind. 498, 55 N. E. 422.

Iowa.— Denslow *v.* Van Horn, 16 Iowa 476.

Maine.— Berry *v.* Bakeman, 44 Me. 164; Snowman *v.* Wardwell, 32 Me. 275.

New York.— Rich *v.* Mayer, 7 N. Y. Suppl. 69, 26 N. Y. St. 107, 109.

Oregon.— Kelley *v.* Highfield, 15 Oreg. 277, 14 Pac. 744.

Pennsylvania.— Johnson *v.* Smith, 3 Pittsb. (Pa.) 184.

England.— Bench *v.* Merrick, 1 C. & K. 463, 47 E. C. L. 463; Irving *v.* Greenwood, 1 C. & P. 350, 12 E. C. L. 209.

See 8 Cent. Dig. tit. "Breach of Marriage Promise," § 4.

29. *Maine.*— Berry *v.* Bakeman, 44 Me. 164.

Massachusetts.— Van Houten *v.* Morse, 162 Mass. 414, 38 N. E. 705, 44 Am. St. Rep. 373, 26 L. R. A. 430; McCarty *v.* Coffin, 157 Mass.

ages,[30] unless there was a fraudulent concealment of the facts on the part of plaintiff.[31]

3. Disease or Physical Incapacity. Disease or physical disability rendering it unsafe or improper to marry, and which has developed in either party to the contract without intervening fault on his or her part, between the date of the contract and the date appointed for the marriage, entitles either party to postpone the marriage until cured,[32] and, if such disease or disability is of a permanent character, to refuse to carry out the contract,[33] and it is proper so to do.[34] In like manner, it is a defense when the disease or disability existed previously to the promise and reappeared before the date fixed for the marriage, if defendant believed that it was cured before the promise was made.[35] Where, however,

478, 32 N. E. 649; Sherman *v.* Rawson, 102 Mass. 395.

Michigan.— Simmons *v.* Simmons, 8 Mich. 318.

New York.— Button *v.* McCauley, 38 Barb. (N. Y.) 413.

Wisconsin.—Alberts *v.* Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584.

England.— Baker *v.* Cartwright, 10 C. B. N. S. 124, 7 Jur. N. S. 1247, 30 L. J. C. P. 364, 100 E. C. L. 124.

See 8 Cent. Dig. tit. "Breach of Marriage Promise," § 4.

Drinking to excess is not a defense. Button *v.* McCauley, 38 Barb. (N. Y.) 413.

Insanity of plaintiff and consequent confinement in an asylum before the engagement is not a defense. Baker *v.* Cartwright, 10 C. B. N. S. 124, 7 Jur. N. S. 1247, 30 L. J. C. P. 364, 100 E. C. L. 124.

Keeping a house of ill-fame by plaintiff's brother is not a defense. Sherman *v.* Rawson, 102 Mass. 395.

Negro ancestry of plaintiff is not a defense. Van Houten *v.* Morse, 162 Mass. 414, 38 N. E. 705, 44 Am. St. Rep. 373, 26 L. R. A. 430.

30. Kelley *v.* Highfield, 15 Oreg. 277, 14 Pac. 744.

31. *Indiana.*— Bell *v.* Eaton, 28 Ind. 468, 92 Am. Dec. 329.

Maryland.— Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

Massachusetts.— Van Houten *v.* Morse, 162 Mass. 414, 38 N. E. 705, 44 Am. St. Rep. 373, 26 L. R. A. 430 [*cited* in Smith *v.* Smith, 171 Mass. 404, 50 N. E. 933, 68 Am. St. Rep. 440, 41 L. R. A. 800].

Michigan.— Goddard *v.* Westcott, 82 Mich. 180, 46 N. W. 242; Simmons *v.* Simmons, 8 Mich. 318.

England.— Foote *v.* Hayne, 1 C. & P. 545, R. & M. 165, 28 Rev. Rep. 788, 12 E. C. L. 313; Wharton *v.* Lewis, 1 C. & P. 529, 28 Rev. Rep. 785, 12 E. C. L. 305.

Where plaintiff undertakes without inquiry from defendant to state facts relating to the circumstances of his or her history or life, to his or her parentage or family, or to his or her former or present position, those facts if material must not only be stated truly, but defendant is also bound not to suppress or conceal any facts necessary to a correct understanding on the part of defendant of the facts which are stated, and if there is a wilful concealment and suppression of such facts whereby defendant was led to believe that the matters to which such statement related were different from what they actually were plaintiff is guilty of a fraudulent concealment. Van Houten *v.* Morse, 162 Mass. 414, 38 N. E. 705, 44 Am. St. Rep. 373, 26 L. R. A. 430.

32. Trammell *v.* Vaughan, 158 Mo. 214, 59 S. W. 79, 81 Am. St. Rep. 302, 51 L. R. A. 854.

Effect of refusing on other grounds.—Physical disability is available, even if refusal to marry has been placed upon other grounds. Kantzler *v.* Grant, 2 Ill. App. 236.

33. Kantzler *v.* Grant, 2 Ill. App. 236; Shackleford *v.* Hamilton, 93 Ky. 80, 14 Ky. L. Rep. 11, 19 S. W. 5, 40 Am. St. Rep. 166, 15 L. R. A. 531; Gardner *v.* Arnett, 21 Ky. L. Rep. 1, 50 S. W. 840; Allen *v.* Baker, 86 N. C. 91, 41 Am. Rep. 444; Sanders *v.* Coleman, 97 Va. 690, 34 S. E. 621, 47 L. R. A. 581.

Impotency of defendant.— The fact that by statute the marriage of a person incurably impotent is absolutely void constitutes a valid defense. Gulick *v.* Gulick, 41 N. J. L. 13.

34. Trammell *v.* Vaughan, 158 Mo. 214, 59 S. W. 79, 81 Am. St. Rep. 302, 51 L. R. A. 854.

Where disease develops after agreement, and before breach, it has been held that defendant cannot avail himself of the fact even if plaintiff had notice thereof, since performance is not impossible, and it is not enough to show in answer to an action upon a contract that its performance is inconvenient or may be dangerous. Delicacy of health alleged as an excuse is defendant's "misfortune, not to be visited beyond what is inevitable" upon plaintiff. "If either party is to have the option of breaking off the match it ought to be" plaintiff. Hall *v.* Wright, E. B. & E. 746, 6 Jur. N. S. 193, 29 L. J. Q. B. 43, 1 L. T. Rep. N. S. 230, 8 Wkly. Rep. 160, 96 E. C. L. 746.

35. Gardner *v.* Arnett, 21 Ky. L. Rep. 1, 50 S. W. 840.

An abscess in the breast of one party of which the other is ignorant at the time of promise excuses a refusal to perform the promise. Atchinson *v.* Baker, Peake Add. Cas. 103.

A structural malformation of which plaintiff informed defendant upon agreeing to

defendant knew, or ought to have known, of such disease or disability at the time of the promise it is not a defense.[36]

4. Engagement of Plaintiff. It is not a defense that plaintiff was at the time of the promise engaged to marry another than defendant.[37]

5. Infancy. Infancy is a valid defense to an action for breach of a marriage promise,[38] unless plaintiff is a minor and defendant an adult.[39]

6. Subsequent Offer to Perform. Defendant's offer to marry after breach is as a rule no defense.[40]

7. Subsisting Marriage of Defendant. The fact that defendant was married at time of the promise is not necessarily a defense,[41] although it may be if plaintiff knew at the time of promise that defendant had a consort living and not divorced.[42]

C. Form of Action. The ecclesiastical courts from a very remote period had power to decree a performance of the marriage in the event of a failure to carry out the promise,[43] but when this power was taken away the common-law courts began to entertain civil actions for a breach of the contract to marry,[44]

marry, but promised to have the same remedied has, in the event of a failure so to do before the time fixed for the marriage, been held a defense. Gring *v.* Lerch, 112 Pa. St. 244, 3 Atl. 841, 56 Am. Rep. 314.

36. Walker *v.* Johnson, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100; Gring *v.* Lerch, 112 Pa. St. 244, 3 Atl. 841, 56 Am. Rep. 314.

37. Doubet *v.* Kirkman, 15 Ill. App. 622; Roper *v.* Clay, 18 Mo. 383, 59 Am. Dec. 314.

38. Cannon *v.* Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709; Frost *v.* Vought, 37 Mich. 65; Leichtweiss *v.* Treskow, 21 Hun (N. Y.) 487; Rush *v.* Wick, 31 Ohio St. 521, 27 Am. Rep. 523.

Not affected by fact of intercourse.— This is true, notwithstanding defendant had intercourse with plaintiff by reason of the promise. Leichtweiss *v.* Treskow, 21 Hun (N. Y.) 487.

39. Reish *v.* Thompson, 55 Ind. 34; Warwick *v.* Cooper, 5 Sneed (Tenn.) 658.

Absence of a guardian's necessary consent to the solemnization of a minor's marriage is said to be an excuse. Cannon *v.* Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709.

40. Kurtz *v.* Frank, 76 Ind. 594, 40 Am. Rep. 275; Holloway *v.* Griffith, 32 Iowa 409, 7 Am. Rep. 208 (where it is said that such offer cannot be considered even in mitigation); Liefman *v.* Soloman, 7 Abb. Pr. (N. Y.) 409 note; Southard *v.* Rexford, 6 Cow. (N. Y.) 254. See also Wood *v.* Hagan, 13 Ky. L. Rep. 173.

Where defendant bona fide offers to marry plaintiff, although defendant's conduct previous thereto was such as would justify plaintiff in terminating the engagement, but plaintiff has not signified an intention so to do, it is a defense. Kelley *v.* Renfro, 9 Ala. 325, 44 Am. Dec. 441.

Where the parties actually intermarry the action abates. Harris *v.* Tison, 63 Ga. 629, 36 Am. Rep. 126.

41. *Indian Territory.*— Davis *v.* Pryor, (Indian Terr. 1900) 58 S. W. 660.

Massachusetts.— Kelley *v.* Riley, 106 Mass. 339, 8 Am. Rep. 336.

New York.— Blattmacher *v.* Saal, 29 Barb. (N. Y.) 22, 7 Abb. Pr. (N. Y.) 409; Kerns *v.* Hagenbuchle, 60 N. Y. Super. Ct. 222, 17 N. Y. Suppl. 367, 42 N. Y. St. 210; Cammerer *v.* Muller, 14 N. Y. Suppl. 511, 38 N. Y. St. 583 [*affirmed* in 133 N. Y. 623, 30 N. E. 1147, 44 N. Y. St. 932].

Pennsylvania.—Stevenson *v.* Pettis, 4 Wkly. Notes Cas. (Pa.) 151, 12 Phila. (Pa.) 468, 34 Leg. Int. (Pa.) 176.

Vermont.— Pollock *v.* Sullivan, 53 Vt. 507, 38 Am. Rep. 702.

England.— Wild *v.* Harris, 7 C. B. 999, 7 Dowl. & L. 114, 13 Jur. 961, 18 L. J. C. P. 297, 62 E. C. L. 999; Millward *v.* Littlewood, 5 Exch. 775, 20 L. J. Exch. 2, 1 Eng. L. & Eq. 408.

42. Haviland *v.* Halstead, 34 N. Y. 643; Kerns *v.* Hagenbuchle, 60 N. Y. Super. Ct. 222, 17 N. Y. Suppl. 367, 42 N. Y. St. 210; Cammerer *v.* Muller, 14 N. Y. Suppl. 511, 38 N. Y. St. 583.

Knowledge of common-law marriage.— Where one party has knowledge that the other has for many years lived and cohabited with another person in the relation of husband and wife, an action for breach of contract on the ground that the person so cohabiting represented himself or herself to be unmarried is not maintainable. Davis *v.* Pryor, 112 Fed. 274, 50 C. C. A. 579 [*reversing* (Indian Terr. 1900) 58 S. W. 660].

43. Morgan *v.* Yarborough, 5 La. Ann. 316; Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385 [*citing* Bacon Abr. tit. Marriage and Divorce, B]; Cheney *v.* Arnold, 15 N. Y. 345, 69 Am. Dec. 609.

The court of chancery evinced a disposition to assume jurisdiction to enforce the specific performance of the contract in the reign of Charles I, but it does not appear that the power was ever exercised. Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385 [*citing* 2 Campbell Lives of Lord Chancellors, 138].

44. Short *v.* Stotts, 58 Ind. 29 [*citing* Holcroft *v.* Dickenson, Cart. 233; Stretcher *v.* Parker, 1 Rolle Abr. 22; Y. B. 45 Edw. III,

although, where resort was had to the ecclesiastical court a suit for damages could not be entertained by the common-law courts, and *e converso*.[45] The whole system of ecclesiastical courts as separate from the civil is, however, foreign to the institutions of this country. Accordingly, specific performance of an agreement to marry cannot be decreed,[46] and an action for breach of promise is in form an action founded on contract, and is treated as an action for breach of contract;[47] but the injury is regarded as entirely personal and the action, although in form one for breach of contract, is really one for a breach arising from the personal conduct of defendant and affecting the personality of plaintiff.[48]

D. Jurisdiction. Where the contract was made in a foreign country it has been doubted whether an action can be maintained in the country where the breach occurs, unless the jurisdiction of such country is submitted to.[49]

E. Conditions Precedent — 1. LIMITATIONS. Action should be brought before the statute of limitations has run.[50]

2. REQUEST FOR, OR TENDER OF, PERFORMANCE. Request for performance of the promise is not necessary before suit, where the promise has been renounced,[51] but where no time and place for marriage were fixed, it is held that a breach does not occur until there has been an offer to fix a time and place for fulfilment of the promise.[52]

F. Parties — 1. PLAINTIFF. Action may be brought as well by the man as the

24]; Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385 [*citing* Holt *v.* Clarencieux, 2 Str. 937].

45. Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

46. Short *v.* Stotts, 58 Ind. 29.

47. *Kansas.*— Cole *v.* Hoeburg, 36 Kan. 263, 13 Pac. 275.

Louisiana.— Smith *v.* Braun, 37 La. Ann. 225.

Michigan.— People *v.* Ingham County Cir. Judge, 38 Mich. 243.

Ohio.— White *v.* Thomas, 12 Ohio St. 312, 80 Am. Dec. 347.

Rhode Island.— Malone *v.* Ryan, 14 R. I. 614.

Vermont.— Pollock *v.* Sullivan, 53 Vt. 507, 38 Am. Rep. 702.

West Virginia.— McKinsey *v.* Squires, 32 W. Va. 41, 9 S. E. 55.

England.— Finlay *v.* Chirney, 20 Q. B. D. 494, 52 J. P. 324, 57 L. J. Q. B. 247, 58 L. T. Rep. N. S. 664, 36 Wkly. Rep. 534.

See 8 Cent. Dig. tit. "Breach of Marriage Promise," § 18.

Assumpsit will lie. People *v.* Ingham County Cir. Judge, 38 Mich. 243; Donovan *v.* Foley, 5 Pa. Dist. 91, 17 Pa. Co. Ct. 112, 11 Montg. Co. Rep. (Pa.) 213.

In West Virginia a suit in equity may be maintained under W. Va. Code (1887), c. 106, § 1. McKinsey *v.* Squires, 32 W. Va. 41, 9 S. E. 55.

48. Finlay *v.* Chirney, 20 Q. B. D. 494, 52 J. P. 324, 57 L. J. Q. B. 247, 58 L. T. Rep. N. S. 664, 36 Wkly. Rep. 534, where it is said that the right of action does not survive, and that damages are recoverable as in tort. See also Pollock *v.* Sullivan, 53 Vt. 507, 38 Am. Rep. 702.

As to survivorship on death see *infra*, II, F, 2; and ABATEMENT AND REVIVAL, 1 Cyc. 60, note 13.

49. Durham *v.* Spence, L. R. 6 Exch. 46, 40 L. J. Exch. 3, 23 L. T. Rep. N. S. 500, 19 Wkly. Rep. 162; Cherry *v.* Thompson, L. R. 7 Q. B. 573, 41 L. J. Q. B. 243, 26 L. T. Rep. N. S. 791, 20 Wkly. Rep. 1029.

50. Chamness *v.* Cox, 131 Ind. 118, 30 N. E. 901; Lehman *v.* Scott, 113 Ind. 76, 14 N. E. 914; Rime *v.* Rater, 108 Iowa 61, 78 N. W. 835; Hanson *v.* Elton, 38 Minn. 493, 38 N. W. 614; Flint *v.* Gilpin, 29 W. Va. 740, 3 S. E. 33.

Limitations begin to run from time of the breach and not from the time of promise. Hanson *v.* Elton, 38 Minn. 493, 38 N. W. 614.

51. *Illinois.*— Greenup *v.* Stoker, 8 Ill. 202.

Indiana.— Kurtz *v.* Frank, 76 Ind. 594, 40 Am. Rep. 275; Folz *v.* Wagner, 24 Ind. App. 694, 57 N. E. 564.

Oregon.— Lahey *v.* Knott, 8 Oreg. 193.

Virginia.— Burke *v.* Shaver, 92 Va. 345, 23 S. E. 749.

Wisconsin.— Olson *v.* Solveson, 71 Wis. 663, 38 N. W. 329.

See 8 Cent. Dig. tit. "Breach of Marriage Promise," § 12.

Where the conduct of defendant showed an intention to abandon all intimate relations with plaintiff, a tender of performance is not necessary. Wagenseller *v.* Simmers, 97 Pa. St. 46. So, where defendant agreed to marry plaintiff in a specified place, and afterward there was an agreement that plaintiff should go to another place for the ceremony and plaintiff so did, but while there, for the purpose of marriage, defendant contracted a marriage with another person, no request or offer to marry was necessary to entitle plaintiff to recover. Lahey *v.* Knott, 8 Oreg. 198.

52. Fible *v.* Caplinger, 13 B. Mon. (Ky.) 464.

woman,[53] but as a general rule not by the personal representative of either.[54] A person incapacitated to marry, because a party to a subsisting and valid marriage, cannot maintain an action for a breach of a marriage promise,[55] and a person aware of a disability on the part of the other party which would render the marriage void cannot maintain an action on the promise made by such other party.[56]

2. DEFENDANT. The action will not as a general rule lie against the personal representatives of a decedent promisor, except there be special damage,[57] or against a minor,[58] notwithstanding that statutes authorize their marriage;[59] but one incapable of entering into the marriage relation may be sued.[60]

53. Harrison *v.* Cage, 12 Mod. 214.

As the promise of an infant to marry is beneficial in its nature, it is not void but voidable only; and accordingly the infant or his representative may sue an adult defendant. Cannon *v.* Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709.

Joinder of parties.— It is not necessary to join as a party plaintiff the husband of a plaintiff married pending suit. Shuler *v.* Millsaps, 71 N. C. 297.

54. Finlay *v.* Chirney, 20 Q. B. D. 494, 52 J. P. 324, 57 L. J. Q. B. 247, 58 L. T. Rep. N. S. 664, 36 Wkly. Rep. 534; Chamberlain *v.* Williamson, 2 M. & S. 408, 15 Rev. Rep. 295.

55. Drennan *v.* Douglas, 102 Ill. 341, 40 Am. Rep. 595; Eve *v.* Rogers, 12 Ind. App. 623, 40 N. E. 25.

56. Gulick *v.* Gulick, 41 N. J. L. 13.

Where the promise was made when both parties were married to the knowledge of each other neither party can sue. Paddock *v.* Robinson, 63 Ill. 99, 14 Am. Rep. 112; Wright *v.* Skinner, 17 U. C. C. P. 317.

Under a statute prohibiting a divorced person from remarriage, when the divorce was granted on the ground of such person's adultery, one to whom a promise of marriage was made by a person so divorced cannot sue for breach thereof in the state where such statute exists (Haviland *v.* Halstead, 34 N. Y. 643), but suit might be brought in a foreign state if the action were otherwise maintainable (Van Storch *v.* Griffin, 71 Pa. St. 240).

57. French *v.* Seamans, 27 N. Y. App. Div. 612, 50 N. Y. Suppl. 776; Finlay *v.* Chirney, 20 Q. B. D. 494, 52 J. P. 324, 57 L. J. Q. B. 247, 58 L. T. Rep. N. S. 664, 36 Wkly. Rep. 534, in which latter case it was said that special damages could only exist where, besides the promise to marry, there was at the making of the contract another promise affecting the personal property of the one party or the other. See also ABATEMENT AND REVIVAL, 1 Cyc. 60, note 13.

Judgment will not be arrested on the ground that the action does not lie against personal representatives, after a verdict against executors or administrators for a breach of marriage promise made by their decedent. Davy *v.* Myers, Taylor (U. C.) 89.

58. *Illinois.*— McConkey *v.* Barnes, 42 Ill. App. 511.

Michigan.— Frost *v.* Vought, 37 Mich. 65.

New York.— Leichtweiss *v.* Treskow, 21 Hun (N. Y.) 487; Hamilton *v.* Lomax, 26 Barb. (N. Y.) 615; Hunt *v.* Peake, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475.

South Carolina.— Evans *v.* Terry, 1 Brev. (S. C.) 80.

Tennessee.— Warwick *v.* Cooper, 5 Sneed (Tenn.) 658.

Texas.— Wells *v.* Hardy, 21 Tex. Civ. App. 454, 51 S. W. 503.

Vermont.—Pool *v.* Pratt, 1 D. Chipm. (Vt.) 252.

The father of a minor is not a proper defendant on the ground that he caused a breach of the promise, where it appears that the minor *sua sponte* refused to carry out the proposed marriage. Delage *v.* Normandeau, 9 Quebec Q. B. 93.

59. McConkey *v.* Barnes, 42 Ill. App. 511; Frost *v.* Vought, 37 Mich. 65; Wells *v.* Hardy, 21 Tex. Civ. App. 454, 51 S. W. 503.

Defense of infancy see *supra*, II, B, 5.

In England, the Infants' Relief Act (37 & 38 Vict. c. 62, § 2), providing that no action shall be brought whereby to charge any person upon any ratification made after full age of any promise or contract made during infancy, applies to promises of marriage. Coxhead *v.* Mullis, 3 C. P. D. 439, 47 L. J. C. P. 761, 39 L. T. Rep. N. S. 349, 27 Wkly. Rep. 136. See also Holmes *v.* Brierley, 36 Wkly. Rep. 795 [*reversing* 59 L. T. Rep. N. S. 70, 52 J. P. 711].

60. *Indian Territory.*— Davis *v.* Pryor, (Indian Terr. 1900) 58 S. W. 660.

Massachusetts.— Killey *v.* Riley, 106 Mass. 339, 8 Am. Rep. 336.

New York.— Kerns *v.* Hagenbuchle, 60 N. Y. Super. Ct. 222, 17 N. Y. Suppl. 367, 42 N. Y. St. 210; Cammerer *v.* Muller, 14 N. Y. Suppl. 511, 38 N. Y. St. 583 [*affirmed* in 133 N. Y. 623, 30 N. E. 1147, 44 N. Y. St. 932].

Pennsylvania.— Stevenson *v.* Pettis, 4 Wkly. Notes Cas. (Pa.) 151, 12 Phila. (Pa.) 468, 34 Leg. Int. (Pa.) 176.

Vermont.—Pollock *v.* Sullivan, 53 Vt. 507, 38 Am. Rep. 702.

England.— Wild *v.* Harris, 7 C. B. 999, 7 Dowl. & L. 114, 13 Jur. 961, 18 L. J. C. P. 297, 62 E. C. L. 999.

Effect of failure to repudiate on learning of incapacity.—The fact that a party, becoming aware of the other's incapacity after the promise, does not repudiate the contract but agrees to marry upon the removal of the incapacity does not affect defendant's liability. Coover *v.* Davenport, 1 Heisk. (Tenn.) 368, 2 Am. Rep. 706.

G. Process. It has been held that the summons should afford defendant generally the same information as the declaration, should contain its substance,[61] and should be in conformity with any statutory requirements.[62]

H. Pleading — 1. Complaint, Declaration, or Petition — a. In General. The complaint, declaration, or petition should set out all facts which are relied upon as constituting the cause of action,[63] clearly alleging both the promises to marry and their terms,[64] and defendant's breach.[65] These comprise all the issuable facts

61. Grant *v.* Durgin, 45 N. H. 167.

62. McDonald *v.* Walsh, 5 Abb. Pr. (N. Y.) 68; McNeff *v.* Short, 14 How. Pr. (N. Y.) 463.

Under N. Y. Code Proc. § 129, subs. 1, the proper form of summons is that plaintiff will take judgment for a sum specified therein. Williams *v.* Miller, 4 How. Pr. (N. Y.) 94, 2 Code Rep. (N. Y.) 55; Leopold *v.* Poppenheimer, 1 Code Rep. (N. Y.) 39.

63. Buzzard *v.* Knapp, 12 How. Pr. (N. Y.) 504; Glasscock *v.* Shell, 57 Tex. 215; McCarville *v.* Boyle, 89 Wis. 651, 62 N. W. 517.

A declaration counting tort-wise for fraud is good on demurrer. Pollock *v.* Sullivan, 53 Vt. 507, 38 Am. Rep. 702.

64. Any language showing a mutuality of contract is sufficient.

Indiana.— Jones *v.* Layman, 123 Ind. 569, 24 N. E. 363; Adams *v.* Byerly, 123 Ind. 368, 24 N. E. 130; Walters *v.* Stockberger, 20 Ind. App. 277, 50 N. E. 763.

Iowa.— Olmstead *v.* Hoy, 112 Iowa 349, 83 N. W. 1056; Edwards *v.* Edwards, 93 Iowa 127, 130, 61 N. W. 413, the latter case holding that on motion in arrest of judgment, an allegation that defendant entered into a verbal contract by which he promised "and agreed to marry this plaintiff" is sufficient to show the mutuality.

Minnesota.— Tamke *v.* Vangsnes, 72 Minn. 236, 75 N. W. 217.

Missouri.— Roper *v.* Clay, 18 Mo. 383, 59 Am. Dec. 314.

New York.— Blattmacher *v.* Saal, 29 Barb. (N. Y.) 22, 7 Abb. Pr. (N. Y.) 409; Getzelson *v.* Bernstein, 15 Misc. (N. Y.) 627, 37 N. Y. Suppl. 220, 72 N. Y. St. 799; Dunning *v.* Thomas, 11 How. Pr. (N. Y.) 281.

Ohio.— Dalton *v.* Barchand, 4 Ohio Dec. (Reprint) 375, 2 Clev. L. Rep. 57.

Oregon.— Lahey *v.* Knott, 8 Oreg. 198.

Texas.— Lohner *v.* Coldwell, 15 Tex. Civ. App. 444, 39 S. W. 591.

Wisconsin.— McCarville *v.* Boyle, 89 Wis. 651, 62 N. W. 517.

See 8 Cent. Dig. tit. "Breach of Marriage Promise," § 21.

Date of promise.— An allegation that the contract to marry was made on a named date, and at and on divers other dates before commencing suit, is a sufficient designation of time. Spelling *v.* Parks, 104 Tenn. 351, 58 S. W. 126.

Time of performance.— A definite time for performance need not be alleged (Clark *v.* Reese, (Tex. Civ. App. 1901) 64 S. W. 783. See also Clements *v.* Moore, 11 Ala. 35), and where the declaration does not lay a time or place for performance of the promise proof that any time or place was agreed on is unnecessary (Martin *v.* Patton, 1 Litt. (Ky.) 233). An allegation of an agreement to marry in a reasonable time, and a further allegation of a subsequent agreement to marry, as aforesaid, to wit, on a specified date, charges a promise to marry on such date. Haymond *v.* Saucer, 84 Ind. 3.

The contract alleged in the complaint must be proved where there is an answer of general denial (Paris *v.* Strong, 51 Ind. 339), but where the date of promise was laid on a given date in the year 1869, and on divers times prior to that date in the years 1868 and 1869, proof of a promise in 1866 is not fatally variant therefrom unless defendant is misled thereby (Fowler *v.* Martin, 1 Thomps. & C. (N. Y.) 377 [*affirmed* in 56 N. Y. 676]). An allegation of a promise to marry generally is supported by a promise to marry on request, or in a reasonable time (Clark *v.* Pendleton, 20 Conn. 495), but not by proof of a promise to marry at a specified future time, or on the "happening of a contingency" (Clark *v.* Pendleton, 20 Conn. 495; Atchinson *v.* Baker, Peake Add. Cas. 103); but a promise to marry in a reasonable time is supported by proof of a promise to marry plaintiff in the following spring (Prescott *v.* Guyler, 32 Ill. 312). Where an unconditional promise to marry is alleged, proof of a conditional promise is fatally variant. Conrad *v.* Williams, 6 Hill (N. Y.) 444. Under averments of a promise to marry on request within a reasonable time, and generally, plaintiff may show a promise to marry when certain work should be finished where the promise was only a part of what passed between the parties. Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442.

Aided by verdict.— A petition, failing to aver that defendant had promised to marry plaintiff, but averring a promise to marry defendant, and alleging that defendant not regarding the promise had married another person, is aided by verdict though bad on demurrer. Roper *v.* Clay, 18 Mo. 383, 59 Am. Dec. 314.

Amendment of petition.— Where defendant pleads infancy, an amendment alleging a new promise and a ratification of the original promise when defendant attained majority is permissible. Schreckengast *v.* Ealy, 16 Nebr. 510, 20 N. W. 853.

65. McCarville *v.* Boyle, 89 Wis. 651, 62 N. W. 517.

Time of breach.— A breach laid as taking place on or about November 11 is supported

in the action and are all that need be alleged in order to constitute a cause of action.[66]

b. Particular Averments — (i) *Offer and Willingness to Perform.* Where no time or place of marriage was fixed in the promise, or where the promise was to marry within a reasonable time or upon request, and defendant has not married another, plaintiff must aver an offer of marriage, since in such cases it may not be possible for plaintiff otherwise to show that defendant is in default.[67] An allegation of plaintiff's readiness to fulfil the promise at the proper time is also material,[68] unless defendant has clearly shown an intention not to perform the promise or incapacity so to do.[69]

(ii) *Request For Performance.* A request to perform need not be alleged where there was a clear intention on the part of defendant not to perform his promise,[70] or where the complaint, declaration, or petition alleges facts show-

by proof of a breach on November 15. Holloway *v.* Griffith, 32 Iowa 409, 7 Am. Rep. 208.

Failure to present a good cause of action is not cured by verdict where the answer sets up as a defense that plaintiff was an infant, that the guardian had refused his consent to the marriage, and that the marriage contract was rescinded by mutual consent. Such an answer admits only that there had been a marriage engagement between the parties, but does not admit, either in form or substance, expressly or by implication, that plaintiff had ever offered to perform it, or that upon such offer defendant had refused. Fible *v.* Caplinger, 13 B. Mon. (Ky.) 464.

66. McCarville *v.* Boyle, 89 Wis. 651, 62 N. W. 517.

Capacity or competency to contract.— It is not necessary to allege that the parties were of marriageable age (Glasscock *v.* Shell, 57 Tex. 215) or that the guardian of a minor plaintiff had consented to a marriage with defendant (Cannon *v.* Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709, holding that if it be necessary to show consent, it is sufficient so to do in evidence, and that the provisions of an act regulating the solemnization of a marriage do not change the rule), because where the promise is duly alleged there is an inference that the parties thereto were legally competent to contract to marry (Jones *v.* Layman, 123 Ind. 569, 24 N. E. 363; Blattmacher *v.* Saal, 29 Barb. (N. Y.) 22, 7 Abb. Pr. (N. Y.) 409).

Where the parties had previously been married and divorced an allegation that the parties while married agreed to procure divorce and afterward to remarry is immaterial. Bowman *v.* Bowman, 153 Ind. 498, 55 N. E. 422.

An allegation that defendant married another since the promise to marry plaintiff is unnecessary and redundant. McCarville *v.* Boyle, 89 Wis. 651, 62 N. W. 517. See also Ortiz *v.* Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581. Under an averment that defendant had married Hannah E. M., proof that he married Anna E. M. is not variant. Moritz *v.* Melhorn, 13 Pa. St. 331.

67. Burnham *v.* Cornwell, 16 B. Mon. (Ky.) 284, 63 Am. Dec. 529; Fible *v.* Caplinger, 13 B. Mon. (Ky.) 464; Martin *v.* Patton, 1 Litt. (Ky.) 233; Burks *v.* Shain, 2 Bibb (Ky.) 341, 5 Am. Dec. 616; Turner *v.* Baskin, 2 Ohio Dec. (Reprint) 224, 2 West. L. Month. 98; Kelley *v.* Brennan, 18 R. I. 41, 25 Atl. 346; Gough *v.* Farr, 2 C. & P. 631, 12 E. C. L. 774.

Sufficiency of averment.—Where defendant promised to marry plaintiff within a fortnight, an averment that the latter was always ready and offered herself, without saying "within the fortnight" was sufficient, there being no necessity to aver an offer when she was always ready. Holcroft *v.* Dickenson, 1 Freem. K. B. 347.

Facts rendering offer to perform unnecessary.— Where mutual promises to marry within a reasonable time were alleged, with an averment that plaintiff has been at all times since the promise ready to marry defendant, of which he had notice, and that a reasonable time had expired, but that defendant had not kept the promise, an offer to marry defendant was not necessary. Turner *v.* Baskin, 2 Ohio Dec. (Reprint) 224, 2 West. L. Month. 98.

68. Graham *v.* Martin, 64 Ind. 567; Fible *v.* Caplinger, 13 B. Mon. (Ky.) 464; Martin *v.* Patton, 1 Litt. (Ky.) 233.

Absence of averment — Aided by verdict.— The absence of an averment of continued readiness and willingness to marry defendant from the time the contract was made until its alleged breach is aided by verdict. Hunter *v.* Hatfield, 68 Ind. 416.

69. Cole *v.* Holliday, 4 Mo. App. 94; Wagenseller *v.* Simmers, 97 Pa. St. 465.

70. *Illinois.*— Greenup *v.* Stoker, 8 Ill. 202.

Indiana.— Graham *v.* Martin, 64 Ind. 567; Folz *v.* Wagner, 24 Ind. App. 694, 57 N. E. 564.

New Jersey.— Coil *v.* Wallace, 24 N. J. L. 291.

Rhode Island.— Kelley *v.* Brennan, 18 R. I. 41, 25 Atl. 346.

Virginia.— Burke *v.* Shaver, 92 Va. 345, 23 S. E. 749.

What constitutes refusal.— If, after an engagement to marry and a lapse of reasonable time or the time agreed upon between the parties, the man omits to offer to marry, it is generally considered a refusal to marry. Kelley *v.* Brennan, 18 R. I. 41, 25 Atl. 346; Seymour *v.* Gartside, 2 D. & R. 55, 16 E. C. L.

ing that performance of the alleged promise was rendered impossible before suit.[71]

(III) *DAMAGES.* Under a general allegation of damages plaintiff may recover not only an indemnity for pecuniary loss and the disappointment of reasonable expectations of an advantageous settlement in life, but also compensation for injury to feelings and affections, and mortification undergone.[72] Where, however, plaintiff desires to recover damages that are not the direct, natural, and necessary consequences of the breach of promise,[73] although they may be the proximate consequences,[74] facts showing such damages must be alleged;[75] thus, there should be special allegations of seduction under the promise,[76] loss of health,[77] or proper expenditures made in preparation for marriage.[78]

c. Joinder of Causes. A cause of action or count for breach of promise cannot be joined with one for defamation of character,[79] or with a count for nonpayment of an annuity for the support of a child.[80]

72, in which latter case the court said that it could hardly be expected that a lady should say to a gentleman "I am ready to marry you; pray marry me."

71. Hunter *v.* Hatfield, 68 Ind. 416; King *v.* Kersey, 2 Ind. 402; Short *v.* Stone, 8 Q. B. 358, 3 Dowl. & L. 580, 10 Jur. 245, 15 L. J. Q. B. 143, 55 E. C. L. 358. See also Caines *v.* Smith, 3 Dowl. & L. 580, 15 L. J. Exch. 106, 15 M. & W. 189.

An allegation that defendant had married another previous to suit is equivalent to an averment that plaintiff had offered to marry defendant and been refused. Clements *v.* Moore, 11 Ala. 35.

72. *California.*— Reed *v.* Clark, 47 Cal. 194.

Illinois.— Fidler *v.* McKinley, 21 Ill. 308.

Iowa.— Royal *v.* Smith, 40 Iowa 615.

Kansas.—Kennedy *v.* Rodgers, 2 Kan. App. 764, 44 Pac. 47.

Massachusetts.— Grant *v.* Willey, 101 Mass. 356.

Michigan.— Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442.

That plaintiff has suffered damage is sufficiently shown by allegations that, owing to the breach, plaintiff lost an advantageous marriage, defendant being wealthy and having a good social position, and that plaintiff's affections have been disregarded and blighted and plaintiff's feelings lacerated and spirits wounded. Daggett *v.* Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. Rep. 908.

73. Bedell *v.* Powell, 13 Barb. (N. Y.) 183.

74. Tyler *v.* Salley, 82 Me. 128, 19 Atl. 107.

75. Tyler *v.* Salley, 82 Me. 128, 19 Atl. 107. But see Tamke *v.* Vangsnes, 72 Minn. 236, 75 N. W. 217, where the court was divided on the point.

Nominal damages only are recoverable where specific facts are not alleged. Glasscock *v.* Shell, 57 Tex. 215.

Allegation of special damage as affecting survivorship.— As to whether an allegation of special damage will make an action for breach of promise survive against a personal representative of a decedent defendant see *supra*, II, F, 2; and 1 Cyc. 60, note 13.

76. *Indiana.*— Cates *v.* McKinney, 48 Ind. 562, 17 Am. Rep. 768.

Iowa.— Geiger *v.* Payne, 102 Iowa 581, 69 N. W. 554, 71 N. W. 571.

Kentucky.— Burks *v.* Shain, 2 Bibb (Ky.) 341, 5 Am. Dec. 616.

Maine.— Tyler *v.* Salley, 82 Me. 128, 19 Atl. 107.

Oregon.— Osmun *v.* Winters, 25 Oreg. 260, 35 Pac. 250.

Tennessee.— Spellings *v.* Parks, 104 Tenn. 352, 58 S. W. 126.

West Virginia.—Dent *v.* Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. Rep. 921.

Wisconsin.— Giese *v.* Schultz, 53 Wis. 462, 10 N. W. 598; Leavitt *v.* Cutler, 37 Wis. 46.

Contra, Lowden *v.* Morrison, 36 Ill. App. 495.

See 8 Cent. Dig. tit. "Breach of Marriage Promise," § 48.

A statutory right of action for seduction does not preclude an allegation of that fact as an element of damage. Osmun *v.* Winters, 25 Oreg. 260, 35 Pac. 250.

That the seduction alleged took place in another state is not material. Davis *v.* Pryor, (Indian Terr. 1900) 58 S. W. 660.

Seduction as proof of breach.— That defendant, after engaging himself to plaintiff, seduced her may be given in evidence to show violation of the engagement, whether specifically averred in the declaration or not. Dent *v.* Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. Rep. 921.

77. Tyler *v.* Salley, 82 Me. 128, 19 Atl. 107; Schmidt *v.* Durnham, 46 Minn. 227, 49 N. W. 126; Bedell *v.* Powell, 13 Barb. (N. Y.) 183.

78. Glasscock *v.* Shell, 57 Tex. 215.

79. Dunlap *v.* Clark, 25 Ill. App. 573.

80. Smith *v.* Braun, 37 La. Ann. 225; Frean *v.* Watley, 4 F. & F. 1038; Sherratt *v.* Webster, 9 Jur. N. S. 629, 8 L. T. Rep. N. S. 254, 11 Wkly. Rep. 598.

An allegation as to seduction made in aggravation of damages does not render the complaint objectionable on the ground of embracing two causes of action, since seduction is not actionable. Geiger *v.* Payne, 102 Iowa 581, 69 N. W. 554, 71 N. W. 571; Getzelson *v.* Bernstein, 15 Misc. (N. Y.) 627, 37

2. Answer or Plea — a. In General. The answer or plea must, in a proper manner,[81] state all facts essential to the defense,[82] and must not be irrelevant, redundant, or scandalous.[83]

b. Abandonment or Rescission. It has been held that under a general denial evidence of a mutual rescission of the contract prior to the alleged breach is admissible,[84] but where abandonment or rescission is specially pleaded it must be alleged that the contract was rescinded or abandoned under an agreement with plaintiff, and not with any other person.[85]

c. Disease or Physical Incapacity. A defense of disease or physical incapacity for marriage developing after the promise must be pleaded by way of confession and avoidance, and not in bar.[86]

N. Y. Suppl. 220, 72 N. Y. St. 799; Spellings *v.* Parks, 104 Tenn. 352, 58 S. W. 126.

Under statutes permitting a joinder of as many different causes of action as plaintiff may have against defendant, a count for breach of marriage contract is not affected by a count for seduction. That count may be disregarded; but where evidence is offered in support of the count for seduction, and that evidence increased the amount of damages, judgment will not be arrested, for the reason that the evidence was admissible under the first count. Roper *v.* Clay, 18 Mo. 383, 59 Am. Dec. 314.

81. Coble *v.* Eltzroth, 125 Ind. 429, 25 N. E. 544, holding that defendant cannot in one paragraph of the answer confess and deny the promise.

It must be definite and certain in its allegations. Mingst *v.* Bleck, 7 N. Y. Civ. Proc. 314, holding that an answer denying each and every allegation in the complaint, except so much as might thereinafter be admitted, and admitting an acquaintance with plaintiff, but denying seduction of plaintiff under promise of marriage, is sufficiently plain.

82. Mabin *v.* Webster, 129 Ind. 430, 28 N. E. 863, 28 Am. St. Rep. 199; Coble *v.* Eltzroth, 125 Ind. 429, 25 N. E. 544; Lehman *v.* Scott, 113 Ind. 76, 14 N. E. 914; Smith *v.* Braun, 37 La. Ann. 225; Kniffen *v.* McConnell, 30 N. Y. 285; Leavitt *v.* Cutter, 37 Wis. 46.

Answer setting up limitations.—An answer to a complaint alleging that plaintiff when nineteen years of age entered with defendant into a contract to marry and that plaintiff's cause of action did not accrue within two years prior to the commencement of suit is bad for not showing that the action was not brought within two years after plaintiff attained majority. Lehman *v.* Scott, 113 Ind. 76, 14 N. E. 914.

An objection that the promise alleged was in restraint of marriage is not supported by an allegation that defendant was unwell at the time of promise, and that performance was conditional upon defendant's recovery, there being no presumption that long delay was in contemplation. McConahey *v.* Griffey, 82 Iowa 564, 48 N. W. 983.

83. Keegan *v.* Sage, 25 N. Y. Suppl. 78, where an averment that plaintiff had led a profligate life was held not scandalous, irrelevant, or redundant, because plaintiff alleged in the complaint that "she was, and ever had been, chaste, and a virgin."

Traverse of immaterial averment.—In Bowman *v.* Bowman, 153 Ind. 498, 55 N. E. 422, it was held that where the complaint alleged an agreement of the parties, who had previously been married, to procure a divorce and afterward remarry, the fact so averred was wholly immaterial, even though the agreement was void, and that a traverse of such allegation was not sufficient.

84. Shellenbarger *v.* Blake, 67 Ind. 75.

85. A plea setting up rescission by the parent or guardian of an infant plaintiff is bad. Parks *v.* Maybee, 2 U. C. C. P. 257.

Plea of exoneration.— A plea that after the making of the promise and before any breach thereof by defendant, plaintiff wholly absolved, exonerated, and discharged defendant from his promise and performance of the same, is sufficient (King *v.* Gillett, 10 L. J. Exch. 164, 7 M. & W. 55 [*citing* Coniers *v.* Holland, 2 Leon. 214; Langden *v.* Stokes, Cro. Car. 383]; Parks *v.* Maybee, 2 U. C. C. P. 257 [*citing* Rogers *v.* Custance, 1 Q. B. 77, 1 Wms. Saund. 295*n*, 41 E. C. L. 444]), a plea of rescission not being necessary (King *v.* Gillett, 7 M. & W. 55, 10 L. J. Exch. 164).

86. Vierling *v.* Binder, 113 Iowa 337, 85 N. W. 621. But see Goddard *v.* Westcott, 82 Mich. 180, 46 N. W. 242, holding that under the general issue defendant may show through plaintiff that plaintiff was not capable of making or carrying out a contract to marry without fraud or injury to defendant.

Sufficiency of plea.— A plea that before breach and up to commencement of suit defendant was afflicted by a dangerous bodily disease and therefore "incapable of marriage" and "unfit for the married state," although not properly confessing any breach of the promise, is not good even though "incapable of marriage" may mean two things — either incapable of going through the ceremony of marriage, or incapable of performing the functions required in the married state, and though "unfit for the married state" may mean incompetency to perform duties which the marriage contract enjoins. Hall *v.* Wright, E. B. & E. 746, 6 Jur. N. S. 193, 29 L. J. Q. B. 43, 1 L. T. Rep. N. S. 230, 8 Wkly. Rep. 160, 96 E. C. L. 746.

Physical examination of plaintiff.— Where defendant pleads the physical condition of plaintiff as showing that no contract was

d. Infancy. While it has been held that infancy may be shown under the general issue,[87] it has also been held that the defense must be pleaded.[88]

e. Unchastity. Plaintiff's unchastity subsequently to the promise to marry must be specially pleaded,[89] and a plea of previous unchastity must aver that this fact was not known to defendant when the promise was made.[90]

f. Want of Consideration. Want of consideration may be shown under the general issue.[91]

3. Replication or Reply. A replication *de injuria* to a plea of discharge from the promise before breach denying any breach is bad, such a replication being good only when the plea admits a breach of the promise stated and excuses it; but to a plea of misconduct of plaintiff a replication *de injuria* is proper.[92]

I. Evidence — 1. Burden of Proof and Presumptions. Upon plaintiff is the burden of proving mutual promises to marry,[93] a breach of the contract,[94] and any alleged element of damage;[95] but it is not necessary for plaintiff to prove that defendant was of full age at the time of making the promise,[96] or, where the immoral character of plaintiff previous to the promise was well known to defendant, reformation on the plaintiff's part.[97] The burden of proving any facts relied upon by defendant as a defense is upon him;[98] but it is unnecessary for defendant to prove a justification of a failure to marry on the particular ground alleged by defendant.[99] There is a presumption that plaintiff was capacitated to enter into a marriage contract,[1] and that a general promise to marry was to have been performed within a reasonable time.[2]

2. Admissibility — a. In General — (i) *Admissions or Declarations.* To establish a promise by defendant his or her admissions or declarations are admissible,[3]

made, and not as involving plaintiff's fitness to marry, plaintiff should not be required to submit to a physical examination to discover whether his or her physical condition is such as to present an obstacle to marriage. Vierling *v.* Binder, 113 Iowa 337, 85 N. W. 621.

87. Morris *v.* Graves, 2 Ind. 354.

88. Rush *v.* Wick, 31 Ohio St. 521, 27 Am. Rep. 523.

89. Kniffen *v.* McConnell, 30 N. Y. 285.

Under the general issue unchastity of plaintiff may be shown as tending to disprove the promise, but not in order to justify a breach of the promise. Smith *v.* Braun, 37 La. Ann. 225.

90. Bowman *v.* Bowman, 153 Ind. 498, 55 N. E. 422, holding that under this plea defendant must prove that the contract was broken for that reason, and not for a ground undisclosed by the pleadings.

91. Morris *v.* Graves, 2 Ind. 354.

92. Parks *v.* Maybee, 2 U. C. C. P. 257 [*citing* Bench *v.* Merrick, 1 C. & K. 463, 47 E. C. L. 463].

93. Hook *v.* George, 108 Mass. 324; Ellis *v.* Guggenheim, 20 Pa. St. 287.

There is no presumption that there was a promise to marry because persons unlawfully cohabiting agree to go to another country and spend the balance of their days together (Dupont *v.* McAdow, 6 Mont. 226, 9 Pac. 925. See also Bleiler *v.* Koons, 132 Pa. St. 401, 19 Atl. 140), or because defendant fails to produce letters written by plaintiff to defendant after defendant's letters to plaintiff have been produced (Law *v.* Woodruff, 48 Ill. 399). See also Fowler *v.* Martin, 1 Thomps. & C. (N. Y.) 377 [*affirmed* in 56 N. Y. 676], holding that there is no presumption against plaintiff because of his or her destruction of letters written by him or her, and returned by defendant, unless it is shown that the letters contained matter prejudicial to plaintiff.

94. Hook *v.* George, 108 Mass. 324.

95. Kniffen *v.* McConnell, 30 N. Y. 285.

96. Simmons *v.* Simmons, 8 Mich. 318.

97. Johnson *v.* Travis, 33 Minn. 231, 22 N. W. 628.

98. Johnson *v.* Travis, 33 Minn. 231, 22 N. W. 628, holding that the unchastity of plaintiff subsequently to the promise must be shown by defendant. So a defendant relying on the immoral conduct of plaintiff as a defense must show that he renounced plaintiff upon discovering such conduct, and that the contract was broken on account thereof. Bowman *v.* Bowman, 153 Ind. 498, 55 N. E. 422.

99. Hook *v.* George, 108 Mass. 324, where defendant's answer admitted the engagement and averred an offer to fulfil the promise, but that plaintiff refused to carry out the agreement.

1. Tucker *v.* Hyatt, 144 Ind. 635, 41 N. E. 1047, 43 N. E. 872; Ortiz *v.* Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581.

2. Blackburn *v.* Mann, 85 Ill. 222; Wagenseller *v.* Simmers, 97 Pa. St. 465; Stevenson *v.* Pettis, 4 Wkly. Notes Cas. (Pa.) 151, 12 Phila. (Pa.) 468, 34 Leg. Int. (Pa.) 176.

3. Button *v.* McCauley, 1 Abb. Dec. (N. Y.) 282, 4 Transcr. App. (N. Y.) 447, 5 Abb. Pr. N. S. (N. Y.) 29 [*reversing* 28 Barb. (N. Y.) 413]; Southard *v.* Rexford, 6 Cow. (N. Y.) 254; Cooper *v.* West, 7 Ohio Dec. (Reprint) 470, 3 Cinc. L. Bul. 431.

A person requested by defendant to inform

and unless the admissions may as well refer to illicit intercourse as marriage;[4] but plaintiff's declarations made to persons not related to or interested in plaintiff are not admissible to prove a promise on the part of plaintiff.[5] So, to show a mutuality of contract, plaintiff's declarations, made before institution of suit, that he or she had promised to marry defendant are admissible.[6] Declarations made by plaintiff to a near relation on the occasion of a failure of defendant to appear at the time and place fixed for the wedding are admissible on plaintiff's behalf.[7] So, declarations of plaintiff made after breach, tending to show that plaintiff had no affection for defendant, are admissible for him.[8]

(II) *CONDUCT OF PARTIES.* Evidence of plaintiff's conduct is admissible to show a promise,[9] or the acceptance of a promise on plaintiff's part,[10] but not to show a mutual promise, unless the conduct took place in defendant's presence or was connected with him or her.[11] Evidence of plaintiff's feeling toward defendant after a breach is not admissible to show what his or her feelings were while the engagement lasted.[12] Evidence of defendant's conduct is admissible as tending to show a promise to marry[13] or an intention not to perform the promise,[14] where plaintiff was cognizant thereof.[15] So, too, the mutual conduct of the parties subsequently to the promise may be put in evidence as tending to show what took place at the time of the proposal,[16] or to prove the existence of a promise.[17]

(III) *DOCUMENTARY EVIDENCE.* Documentary evidence is admissible as in other actions.[18]

plaintiff of the former's matrimonial desires may show that such communication was made to plaintiff. Chellis *v.* Chapman, 7 N. Y. Suppl. 78, 26 N. Y. St. 953 [*affirmed* in 125 N. Y. 214, 26 N. E. 308, 35 N. Y. St. 17, 11 L. R. A. 784].

4. Weaver *v.* Bachert, 2 Pa. St. 80, 44 Am. Dec. 159.

5. Cates *v.* McKinney, 48 Ind. 562.

6. King *v.* Kersey, 2 Ind. 402; Peppinger *v.* Low, 6 N. J. L. 384. But see Leckey *v.* Bloser, 24 Pa. St. 401 (where declarations were admitted to prove assent on plaintiff's part, but not to prove a promise on defendant's part); Cates *v.* McKinney, 48 Ind. 562.

Plaintiff's answer to a person informing plaintiff of defendant's intention to marry plaintiff is admissible on his or her behalf as part of the *res gestæ*. Ellis *v.* Guggenheim, 20 Pa. St. 287.

7. Hughes *v.* Nolte, 7 Ind. App. 526, 34 N. E. 745 [*citing* Cates *v.* McKinney, 48 Ind. 562], holding that the fact that comparative strangers might have been present with the relatives would not necessarily exclude the declarations. See, however, Jones *v.* Layman, 123 Ind. 569, 24 N. E. 363, where a declaration made by plaintiff in defendant's absence, after receiving a letter from defendant breaking off the contract, and showing that plaintiff regarded the contract as broken, was not admitted.

8. Robinson *v.* Craver, 88 Iowa 381, 55 N. W. 492, holding, however, that such declarations must be shown to have related to plaintiff's feelings before the breach.

Plaintiff's declaration of intention to marry another.— A declaration made by plaintiff, pending suit, of his or her intention to be married to another person is admissible. Healey *v.* O'Sullivan, 6 Allen (Mass.) 114.

9. Espy *v.* Jones, 37 Ala. 379; Sprague *v.* Craig, 51 Ill. 288. *Contra*, Royal *v.* Smith, 40 Iowa 615, where plaintiff's subsequent conduct before breach was not admitted.

10. Thurston *v.* Cavenor, 8 Iowa 155; Wilcox *v.* Green, 23 Barb. (N. Y.) 639; Wetmore *v.* Mell, 1 Ohio St. 26, 59 Am. Dec. 607; McCormick *v.* Robb, 24 Pa. St. 44; Moritz *v.* Melhorn, 13 Pa. St. 331.

11. Dunlap *v.* Clark, 25 Ill. App. 573; Russell *v.* Cowles, 15 Gray (Mass.) 582, 77 Am. Dec. 391.

12. Edwards *v.* Edwards, 93 Iowa 127, 61 N. W. 413 [*citing* Robinson *v.* Craver, 88 Iowa 381, 55 N. W. 492; Miller *v.* Hayes, 34 Iowa 496, 11 Am. Rep. 154].

13. Clark *v.* Hodges, 65 Vt. 273, 26 Atl. 726; Whitcomb *v.* Wolcott, 21 Vt. 368.

Proof that defendant borrowed money of plaintiff is admissible. Simmons *v.* Simmons, 8 Mich. 318.

14. Chamness *v.* Cox, 131 Ind. 118, 30 N. E. 901.

Evidence tending to show flight of defendant after he is accused of the wrong is inadmissible. Wise *v.* Schloesser, 111 Iowa 16, 82 N. W. 439.

15. Crosier *v.* Craig, 47 Hun (N. Y.) 83 [*affirmed* in 130 N. Y. 661, 29 N. E. 1034, 41 N. Y. St. 951].

16. Rutter *v.* Collins, 96 Mich. 510, 56 N. W. 93.

17. Hoit *v.* Moulton, 21 N. H. 586; Kelley *v.* Highfield, 15 Oreg. 277, 14 Pac. 744; Wagenseller *v.* Simmers, 97 Pa. St. 465; Perkins *v.* Hersey, 1 R. I. 493.

Evidence of improper intimacy between the parties is not admissible to prove a promise, or for any purpose. Felger *v.* Etzell, 75 Ind. 417.

18. **A newspaper article** on the subject of love and marriage marked by defendant and sent to plaintiff before the time of promise is admissible. Richmond *v.* Roberts, 98 Ill. 472.

Decree of divorce.— The capacity to enter

(iv) *Opinion Evidence.* A witness living with plaintiff has been permitted to give an opinion as to the affection borne by plaintiff to defendant;[19] and the opinions of neighbors and friends have been admitted to show the amount of damages sustained by plaintiff.[20]

(v) *Reputation.* Defendant may show the general bad character of plaintiff, and particular instances of unchastity before the promise[21] where plaintiff's character was intentionally concealed from defendant;[22] and evidence of good character or reputation for chastity may be given by plaintiff where defendant has offered evidence showing particular acts of unchastity.[23]

b. As to Damages — (i) *In General — Defendant's Circumstances.* Evidence of defendant's financial and social condition is admissible for the purpose of affecting damages, as tending to show the advantage that would have accrued to plaintiff but for the breach.[24] The evidence should be confined, however, to the

into a marriage contract may be proved by a certified copy of a decree of divorce. Eve *v.* Rodgers, 12 Ind. App. 23, 40 N. E. 25.

Letters from defendant to plaintiff are admissible to prove the contract (Tefft *v.* Marsh, 1 W. Va. 38), if written prior thereto (Richmond *v.* Roberts, 98 Ill. 472), or before the promise was broken (Vanderpool *v.* Richardson, 52 Mich. 336, 17 N. W. 936); and where defendant admits that all plaintiff's letters are destroyed, plaintiff may introduce a copy of a letter sent in reply to one of defendant's stating that defendant knew that his proposal was accepted. Rutter *v.* Collins, 96 Mich. 510, 56 N. W. 93.

Plaintiff's own statement in writing to defendant respecting the promise made by defendant to plaintiff does not preclude plaintiff from resorting to other evidence. Baldy *v.* Stratton, 11 Pa. St. 316.

19. McKee *v.* Nelson, 4 Cow. (N. Y.) 355, 15 Am. Dec. 384.

20. Jones *v.* Fuller, 19 S. C. 66, 45 Am. Rep. 761.

21. Woodard *v.* Bellamy, 2 Root (Conn.) 354; Wills *v.* Myers, 4 Ky. L. Rep. 839; Stratton *v.* Dole, 45 Nebr. 472, 63 N. W. 875; Foulkes *v.* Sellway, 3 Esp. 236.

Declarations of deceased person to the effect that he had had intercourse with plaintiff are not admissible. Short *v.* Stotts, 58 Ind. 29.

Where there is no offer to prove that the intimacy was criminal, evidence that plaintiff had been intimate with several different men is not admissible. McCarty *v.* Coffin, 157 Mass. 478, 32 N. E. 649.

Knowledge of reputation acquired pending suit is not admissible to support a defense of bad reputation. Capehart *v.* Carradine, 4 Strobh. (S. C.) 42.

22. Woodard *v.* Bellamy, 2 Root (Conn.) 354.

23. Sprague *v.* Craig, 51 Ill. 288; Jones *v.* Layman, 123 Ind. 569, 24 N. E. 363; Haymond *v.* Saucer, 84 Ind. 3; Hughes *v.* Nolte, 7 Ind. App. 526, 34 N. E. 745; Wills *v.* Myers, 4 Ky. L. Rep. 839. *Contra*, Leckey *v.* Bloser, 24 Pa. St. 401; Jones *v.* James, 18 L. T. Rep. N. S. 243, 16 Wkly. Rep. 762.

24. *Arkansas.*— Collins *v.* Mack, 31 Ark. 684.

Indiana.— Hunter *v.* Hatfield, 68 Ind. 416.

Kansas.— Kennedy *v.* Rodgers, 2 Kan. App. 764, 44 Pac. 47.

Maine.— Lawrence *v.* Cooke, 56 Me. 187, 96 Am. Rep. 443.

Michigan.— McPherson *v.* Ryan, 59 Mich. 33, 26 N. W. 321; Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; Miller *v.* Rosier, 31 Mich. 475.

Missouri.— Casey *v.* Gill, 154 Mo. 181, 55 S. W. 219.

Nebraska.— Stratton *v.* Dole, 45 Nebr. 472, 63 N. W. 875.

New York.— Chellis *v.* Chapman, 125 N. Y. 214, 26 N. E. 308, 35 N. Y. St. 17, 11 L. R. A. 784 [*affirming* 7 N. Y. Suppl. 78, 26 N. Y. St. 953]; Crosier *v.* Craig, 47 Hun (N. Y.) 83 [*affirmed* in 130 N. Y. 661, 29 N. E. 1034, 41 N. Y. St. 951].

North Carolina.— Allen *v.* Baker, 86 N. C. 91, 41 Am. Rep. 444.

Ohio.— Jarvis *v.* Johnson, 2 Ohio Dec. (Reprint) 312, 2 West. L. Month. 389; Stribley *v.* Welz, 8 Ohio Cir. Ct. 571.

Texas.—Ortiz *v.* Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581.

Vermont.— Clark *v.* Hodges, 65 Vt. 273, 26 Atl. 726.

West Virginia.—Dent *v.* Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. Rep. 921.

Wisconsin.— Olson *v.* Solveson, 71 Wis. 663, 38 N. W. 329.

See 8 Cent. Dig. tit. "Breach of Marriage Promise," § 39.

A decree settling defendant's share in the estate of a parent who died before breach, although not rendered until after breach, is admissible as tending to show defendant's circumstances at time of breach. Clark *v.* Hodges, 65 Vt. 273, 26 Atl. 726.

Defendant's confessions of judgment in favor of relatives just before trial are not competent evidence. Leckey *v.* Bloser, 24 Pa. St. 401.

Hearsay evidence as to defendant's circumstances or defendant's own declarations of probable wealth are not admissible. Totten *v.* Read, 16 Daly (N. Y.) 282, 10 N. Y. Suppl. 318, 32 N. Y. St. 46.

Whether such evidence should be confined to general reputation is a moot point. In Kniffen *v.* McConnell, 30 N. Y. 285, and Kerfoot *v.* Marsden, 2 F. & F. 160, evidence was confined to general reputation, while in

time of the breach, or during such time as defendant might reasonably have been expected to perform the promise,[25] although evidence relating to defendant's pecuniary condition at the time of trial, and not when the promise was made, is admissible when the time to which the evidence relates is not too remote from that at which the promise is claimed to have been made.[26] Evidence as to the financial condition of defendant's relatives is generally inadmissible.[27]

(II) *In Aggravation*—(A) *In General.* Circumstances of contumely attending a breach of the promise are generally admissible in aggravation of damages;[28] and for that purpose plaintiff may, after proving the promise, show that the fact of the engagement was announced to friends invited to attend the wedding.[29] Plaintiff may not show that illicit intercourse took place between her or him and defendant,[30] that remarks were made by defendant derogatory to plaintiff's chastity,[31] or that defendant, pending suit, married another.[32]

(B) *Seduction.* The fact that plaintiff was seduced under promise of marriage[33] and that such seduction was followed by pregnancy[34] is admissible in aggravation of damages.

Vierling *v.* Binder, 113 Iowa 337, 85 N. W. 621, evidence as to specific pieces of real property owned by defendant and their value was admitted.

25. Dent *v.* Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. Rep. 921.

26. Vierling *v.* Binder, 113 Iowa 337, 85 N. W. 621 [*citing* Dent *v.* Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. Rep. 921], and defendant may then show that his property was acquired after making the promise.

27. Miller *v.* Rosier, 31 Mich. 475; Aldis *v.* Stewart, 4 Misc. (N. Y.) 389, 24 N. Y. Suppl. 329, 53 N. Y. St. 518. *Contra,* Stribley *v.* Welz, 8 Ohio Cir. Ct. 571.

28. Chamness *v.* Cox, 131 Ind. 118, 30 N. E. 901; Chesley *v.* Chesley, 10 N. H. 327; Kelley *v.* Highfield, 15 Oreg. 277, 14 Pac. 744; Wagenseller *v.* Simmers, 97 Pa. St. 465.

Where plaintiff's acquiescence to a postponement of the marriage is in issue, evidence that plaintiff sold part of his or her property at a sacrifice in order to be ready to marry defendant and that defendant had knowledge thereof is admissible. Clement *v.* Skinner, 72 Vt. 159, 47 Atl. 788.

29. Reed *v.* Clark, 47 Cal. 194.

Evidence that plaintiff told others of the contract is admissible, after *prima facie* evidence of the promise, to show humiliation and damage to plaintiff, but not as proof of the agreement to marry. Liebrandt *v.* Sorg, 133 Cal. 571, 65 Pac. 1098.

30. Felger *v.* Etzell, 75 Ind. 417; Johnson *v.* Smith, 3 Pittsb. (Pa.) 184.

31. Dunlap *v.* Clark, 25 Ill. App. 573. See also Greenleaf *v.* McColley, 14 N. H. 303.

32. Dent *v.* Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. Rep. 921.

33. *Connecticut.*— Hattin *v.* Chapman, 46 Conn. 607.

Illinois.— Fidler *v.* McKinley, 21 Ill. 308; Tubbs *v.* Van Kleek, 12 Ill. 446.

Indiana.— Haymond *v.* Saucer, 84 Ind. 3; King *v.* Kersey, 2 Ind. 402; Whalen *v.* Layman, 2 Blackf. (Ind.) 194, 18 Am. Dec. 157.

Louisiana.— Smith *v.* Braun, 37 La. Ann. 225.

Massachusetts.— Kelley *v.* Riley, 106 Mass. 339, 8 Am. Rep. 336; Paul *v.* Frazier, 3 Mass. 71, 3 Am. Dec. 95.

Michigan.—Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442.

Missouri.—Wilbur *v.* Johnson, 58 Mo. 600; Hill *v.* Maupin, 3 Mo. 323; Green *v.* Spencer, 3 Mo. 318, 26 Am. Dec. 672.

Nebraska.— Musselman *v.* Barker, 26 Nebr. 737, 42 N. W. 759.

New Jersey.—Coil *v.* Wallace, 24 N. J. L. 291.

New York.— Wells *v.* Padgett, 8 Barb. (N. Y.) 323.

Oregon.— Osmun *v.* Winters, 25 Oreg. 260, 35 Pac. 250.

Tennessee.— Williams *v.* Hollingsworth, 6 Baxt. (Tenn.) 12; Goodal *v.* Thurman, 1 Head (Tenn.) 208; Conn *v.* Wilson, 2 Overt. (Tenn.) 233, 5 Am. Dec. 663.

Texas.—Daggett *v.* Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. Rep. 908.

West Virginia.— McKinsey *v.* Squires, 32 W. Va. 41, 9 S. E. 55.

Wisconsin.— Giese *v.* Schultz, 69 Wis. 521, 34 N. W. 913.

Contra, Baldy *v.* Stratton, 11 Pa. St. 316; Weaver *v.* Bachert, 2 Pa. St. 80, 44 Am. Dec. 159; Perkins *v.* Hersey, 1 R. I. 493.

See 8 Cent. Dig. tit. "Breach of Marriage Promise," § 42.

An unsuccessful attempt to seduce may be shown. Kaufman *v.* Fye, 99 Tenn. 145, 42 S. W. 25.

Seduction before promise is not admissible to aggravate damages. Espy *v.* Jones, 37 Ala. 379.

Where the promise is expressly denied evidence of sexual intercourse between plaintiff and defendant, and the resulting motherhood of plaintiff, is competent, though not alleged in the complaint. Jennette *v.* Sullivan, 63 Hun (N. Y.) 361, 18 N. Y. Suppl. 266, 43 N. Y. St. 647.

34. *Illinois.*— Tubbs *v.* Van Kleek, 12 Ill. 446.

Indiana.— Wilds *v.* Bogan, 57 Ind. 453.

(III) *IN MITIGATION.* In mitigation of damages evidence is admissible which fairly tends to show plaintiff's loss or injury resulting from the breach to be less than claimed.[35] Thus defendant may show that at the time of breach either party had an incurable disease well known to plaintiff;[36] that plaintiff was wanting in virtue previously to or during the continuance of the engagement,[37] notwithstanding that defendant with a knowledge of the fact entered into the contract or continued it,[38] unless such want of virtue was caused by the act of defendant:[39]

Nebraska.— Musselman *v.* Barker, 26 Nebr. 737, 42 N. W. 759.

New York.— Hotchkins *v.* Hodge, 38 Barb. (N. Y.) 117.

Ohio.— Jarvis *v.* Johnson, 2 Ohio Dec. (Reprint) 312, 2 West. L. Month. 389; Logan *v.* Gray, Tapp. (Ohio) 69.

Wisconsin.— Giese *v.* Schultz, 53 Wis. 462, 10 N. W. 598 [*overruled* in 65 Wis. 487, 27 N. W. 353].

Contra, Tyler *v.* Salley, 82 Me. 128, 19 Atl. 107, so ruling on the principle that plaintiff is *particeps criminis.*

See 8 Cent. Dig. tit. "Breach of Marriage Promise," § 43.

Loss of time or the expenses of medical or other attendance by reason of pregnancy are not admissible. Giese *v.* Schultz, 53 Wis. 462, 10 N. W. 598.

35. Miller *v.* Rosier, 31 Mich. 475; Johnson *v.* Jenkins, 24 N. Y. 252.

Defendant's pecuniary circumstances cannot be shown in reduction of damages (Wilbur *v.* Johnson, 58 Mo. 600), unless in rebuttal of evidence of wealth (Sprague *v.* Craig, 51 Ill. 288; Wilbur *v.* Johnson, 58 Mo. 600; Smith *v.* Woodfine, 1 C. B. N. S. 660, 87 E. C. L. 660); but where plaintiff has alleged defendant to be worth a certain sum, and offered proof thereof, defendant can show his actual financial standing (Casey *v.* Gill, 154 Mo. 181, 55 S. W. 219).

General bad reputation of plaintiff's family, although not of individual members, is admissible. Spellings *v.* Parks, 104 Tenn. 352, 58 S. W. 126.

Recovery by plaintiff's father for seduction cannot be shown in mitigation where the seduction is alleged to enhance damages. Jarvis *v.* Johnson, 2 Ohio Dec. (Reprint) 312, 2 West. L. Month. 389. See also Schubkagel *v.* Dierstein, 131 Pa. St. 46, 18 Atl. 1059, 6 L. R. A. 481.

That plaintiff, subsequent to the breach, shot defendant is not admissible in mitigation. Schmidt *v.* Durnham, 46 Minn. 227, 49 N. W. 126.

36. Sprague *v.* Craig, 51 Ill. 288; Mabin *v.* Webster, 129 Ind. 430, 28 N. E. 863, 28 Am. St. Rep. 199; Walker *v.* Johnson, 6 Ind. App. 600, 33 N. E. 267.

Ill health of defendant must be pleaded or it cannot be shown in mitigation of damages. Edge *v.* Griffin, (Tex. Civ. App. 1901) 63 S. W. 148.

37. *Alabama.*— Espy *v.* Jones, 37 Ala. 379.

Illinois.—Burnett *v.* Simpkins, 24 Ill. 264; Fidler *v.* McKinley, 21 Ill. 308; Doubet *v.* Kirkman, 15 Ill. App. 622; Kantzler *v.* Grant, 2 Ill. App. 236.

Missouri.—Cole *v.* Holliday, 4 Mo. App. 94.

Montana.— Dupont *v.* McAdow, 6 Mont. 226, 9 Pac. 925.

New York.— Palmer *v.* Andrews, 7 Wend. (N. Y.) 142.

Oregon.— Kelley *v.* Highfield, 15 Oreg. 277, 14 Pac. 744.

Pennsylvania.— Van Storch *v.* Griffen, 71 Pa. St. 240.

South Carolina.— Capehart *v.* Carradine, 4 Strobh. (S. C.) 42.

Tennessee.— Williams *v.* Hollingsworth, 6 Baxt. (Tenn.) 12.

Canada.— McGregor *v.* McArthur, 5 U. C. C. P. 493.

Evidence of unchaste conduct after suit is not admissible. Duvall *v.* Fuhrman, 2 Ohio Cir. Dec. 174, 3 Ohio Cir. Ct. 305; Capehart *v.* Carradine, 4 Strobh. (S. C.) 42. But see Willard *v.* Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496, where it was held that, even after any intimacy between the parties was at an end, immodest conduct with others might be shown.

Conduct short of unchastity inconsistent with a pure-minded woman s action is admissible. Stratton *v.* Dole, 45 Nebr. 472, 63 N. W. 875; Button *v.* McCauley, 1 Abb. Dec. (N. Y.) 282, 4 Transcr. App. (N. Y.) 447, 5 Abb. Pr. N. S. (N. Y.) 29; Kelley *v.* Highfield, 15 Oreg. 277, 14 Pac. 744; Alberts *v.* Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584.

Plaintiff's general bad character between promise and breach is not admissible. Boynton *v.* Kellogg, 3 Mass. 189, 3 Am. Dec. 122.

The period within which licentious conduct may be shown has been held not to be limited (Johnson *v.* Caulkins, 1 Johns. Cas. (N. Y.) 116, 1 Am. Dec. 102), but other cases hold that the inquiry should be limited to such time as will enable a jury to determine the question (Tompkins *v.* Wadley, 3 Thomps. & C. (N. Y.) 424. See also Thorn *v.* Helmer, 4 Abb. Dec. (N. Y.) 408, 2 Keyes (N. Y.) 27; Rathbun *v.* Ross, 46 Barb. (N. Y.) 127).

Particular acts of plaintiff cannot be shown, unless they show, or tend to show, plaintiff to be unchaste. Thus it may not be shown that on one or more particular occasions plaintiff drank intoxicating liquors to excess, or exhibited on particular occasions any other of the numerous frailties of nature, such as gluttony, profanity, lying, and many others. Button *v.* McCauley, 38 Barb. (N. Y.) 413.

38. Burnett *v.* Simpkins, 24 Ill. 264; Denslow *v.* Van Horn, 16 Iowa 476. *Compare* Espy *v.* Jones, 37 Ala. 379.

39. Espy *v.* Jones, 37 Ala. 379; Burnett *v.* Simpkins, 24 Ill. 264; Butler *v.* Eschleman,

or that plaintiff showed an absence of affection toward defendant[40] during the engagement,[41] but defendant cannot show a lack of affection for plaintiff.[42] Whether the fact that subsequently to breach plaintiff received an offer of marriage from another is admissible is doubtful.[43]

3. Weight and Sufficiency — a. As to Promise. While a mutual promise must be proved,[44] it is not necessary to prove an express promise in direct terms,[45] at least on the part of the woman.[46] It is enough if circumstances are adduced from which a promise can with reason be inferred.[47]

b. As to Breach. There is sufficient evidence of a breach where defendant

18 Ill. 44; Conaway *v.* Shelton, 3 Ind. 334; Johnson *v.* Smith, 3 Pittsb. (Pa.) 184.

40. Robinson *v.* Craver, 88 Iowa 381, 55 N. W. 492; Hook *v.* George, 100 Mass. 331; Miller *v.* Rosier, 31 Mich. 475.

Evidence that another than defendant visited plaintiff with matrimonial intentions is inadmissible unless pleaded. Edge *v.* Griffin, (Tex. Civ. App. 1901) 63 S. W. 148.

41. Robinson *v.* Craver, 88 Iowa 381, 55 N. W. 492; Miller *v.* Hayes, 34 Iowa 496, 11 Am. Rep. 154; Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442.

42. Coolidge *v.* Neat, 129 Mass. 146; Piper *v.* Kingsbury, 48 Vt. 480.

43. Evidence not admissible.—Holloway *v.* Griffith, 32 Iowa 409, 7 Am. Rep. 208; Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; Dennis *v.* McKenzie, 24 L. T. Rep. N. S. 363.

Evidence admissible.— Kelly *v.* Renfro, 9 Ala. 325, 44 Am. Dec. 441; Kurtz *v.* Frank, 76 Ind. 594, 40 Am. Rep. 275.

44. Wightman *v.* Coates, 15 Mass. 1, 8 Am. Dec. 77.

45. Morgan *v.* Yarborough, 5 La. Ann. 316; Wightman *v.* Coates, 15 Mass. 1, 8 Am. Dec. 77 [*citing* Hutton *v.* Mansell, 3 Salk. 16]; Mount *v.* Bogert, 6 City Hall Rec. (N. Y.) 193.

46. Hutton *v.* Mansell, 6 Mod. 172.

The inference of a promise on the part of the man will not be as readily deduced from conduct alone as it will from the conduct of the woman. Daniel *v.* Bowles, 2 C. & P. 553, 12 E. C. L. 728.

Evidence of a promise by a woman must be such as would support an action against her by the man. Weaver *v.* Bochert, 2 Pa. St. 80, 44 Am. Dec. 159.

47. *Connecticut.*— Clark *v.* Pendleton, 20 Conn. 495.

Illinois.— Judy *v.* Sterrett, 52 Ill. App. 265.

Indiana.—Walker *v.* Johnson, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100.

Iowa.— McConahey *v.* Griffey, 82 Iowa 564, 48 N. W. 983.

Massachusetts.— Wightman *v.* Coates, 15 Mass. 1, 8 Am. Dec. 77 [*citing* Hutton *v.* Mansell, 3 Salk. 16].

New York.— Fowler *v.* Martin, 1 Thomps. & C. (N. Y.) 377 [*affirmed* in 56 N. Y. 676]; Mount *v.* Bogert, 6 City Hall Rec. (N. Y.) 193.

A promise to marry generally may be inferred from evidence of a promise to marry at a fixed future time. Clark *v.* Pendleton, 20 Conn. 495; Phillips *v.* Crutchley, 3 C. & P. 178, 1 M. & P. 239, 14 E. C. L. 513; Potter *v.* Deboos, 1 Stark. 82, 2 E. C. L. 40.

Attentions, declarations, and preparations for marriage.— Mere attentions, although exclusive and long continued (Espy *v.* Jones, 37 Ala. 379; Walmsley *v.* Robinson, 63 Ill. 41, 14 Am. Rep. 111; Burnham *v.* Cornwell, 16 B. Mon. (Ky.) 284, 63 Am. Dec. 529; Standiford *v.* Gentry, 32 Mo. 477; Yale *v.* Curtiss, 151 N. Y. 598, 45 N. E. 1125; Weaver *v.* Bachert, 2 Pa. St. 80, 44 Am. Dec. 159; Munson *v.* Hastings, 12 Vt. 346, 36 Am. Dec. 345; Vineall *v.* Veness, 4 F. & F. 344), visits of defendant to plaintiff, coupled with plaintiff's preparations for marriage and declarations made not in defendant's presence of an intention to marry defendant (Walmsley *v.* Robinson, 63 Ill. 41, 14 Am. Rep. 111), or the mere expression to a third person of an intention to marry plaintiff (Cole *v.* Cottingham, 8 C. & P. 75, 34 E. C. L. 618), are not enough; but a statement of plaintiff in the presence of defendant that plaintiff was ready to marry defendant, and that plaintiff had made preparations for the occasion, and was ready is evidence from which an offer to marry may be inferred (Green *v.* Spencer, 3 Mo. 318, 26 Am. Dec. 672), and a positive statement of plaintiff that there was a promise corroborated by evidence of defendant's statement recognizing the engagement is sufficient, notwithstanding an express denial of the promise (Musselman *v.* Barker, 26 Nebr. 737, 42 N. W. 759).

Letters expressing the impure desires of one toward his mistress rather than a desire for honorable marriage are not sufficient proof of a promise. Boyer *v.* Sherer, 28 Ill. App. 545.

Plaintiff's letters informing defendant that she was pregnant by him, and referring to frequent illicit intercourse between them, but not hinting of any promise of marriage or claiming, as a right, defendant's society and attention, are not sufficient proof of a promise. Roe *v.* Doe, 11 N. Y. Suppl. 236, 33 N. Y. St. 41.

Proof of circumstances usually attending an engagement is sufficient to draw an inference of a promise (Wightman *v.* Coates, 15 Mass. 1, 8 Am. Dec. 77 [*citing* Hutton *v.* Mansell, 3 Salk. 16]), but where the parties are permitted to testify in their own behalf they must state all that was said and done, so as to remove from the field of speculation

writes to plaintiff informing plaintiff of reports made respecting plaintiff, refuses to go to the house pending investigation, and refrains from so doing;[48] or where defendant makes no effort to carry out the promise, and does not reply to plaintiff's requests that a day for the marriage should be named.[49]

c. As to Release. Evidence in support of a release should show that the release was mutual.[50]

d. As to Reputation. Evidence in support of a defense of plaintiff's bad reputation must show that there was a basis for such defense, and that defendant was ignorant of such reputation before he promised to marry.[51]

J. Trial — 1. Questions of Law and Fact. Whether there was a promise to marry, where the evidence is conflicting,[52] and if so, whether it was express or conditional;[53] and whether there was a breach of a proved promise,[54] and, if so, the assessment of damages[55] are questions for the jury. Where there is no evidence sustaining the contract, the question is one of law,[56] and in like manner the admissibility of evidence is a question of law.[57]

facts which had theretofore been inferred (Yale *v.* Curtiss, 151 N. Y. 598, 45 N. E. 1125 [*citing* Homan *v.* Earle, 53 N. Y. 267]).

Corroboration of plaintiff.— In England some corroboration of plaintiff is necessary (Wiedemann *v.* Walpole, [1891] 2 Q. B. 534, 60 L. J. Q. B. 726, 40 Wkly. Rep. 114; Bessela *v.* Stern, 2 C. P. D. 265, 46 L. J. C. P. 467, 37 L. T. Rep. N. S. 88, 25 Wkly. Rep. 561; Hickey *v.* Champion, Ir. R. 6 C. L. 557, 20 Wkly. Rep. 752; Wilcox *v.* Gotfrey, 26 L. T. Rep. N. S. 481), but the rule is otherwise in the United States (Lowden *v.* Morrison, 36 Ill. App. 495; Giese *v.* Schultz, 65 Wis. 487, 27 N. W. 353. *Compare* Nearing *v.* Van Fleet, 71 Hun (N. Y.) 137, 24 N. Y. Suppl. 531, 54 N. Y. St. 308; Kelley *v.* Brennan, 18 R. I. 41, 25 Atl. 346).

48. Jones *v.* Layman, 123 Ind. 569, 24 N. E. 363.

49. Campbell *v.* Arbuckle, 4 N. Y. Suppl. 29, 21 N. Y. St. 412.

Where the promise was to marry on request, proof of request by plaintiff is not necessary. A request made by one authorized on her behalf so to do is sufficient. Prescott *v.* Guyler, 32 Ill. 312.

Proof of request to marry is sufficient, without proof of request to fix the day and a refusal thereof. Kelley *v.* Brennan, 18 R. I. 41, 25 Atl. 346; Ortiz *v.* Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581.

Positive proof of request and refusal is not necessary under a count to marry on request. The request may be inferred from circumstances. Prescott *v.* Guyler, 32 Ill. 312. But evidence of a mere refusal to marry on a particular day when marriage on that day is forbidden by the religion of the parties is not sufficient. Stone *v.* Appel, 12 Ill. App. 582.

50. **Sufficient evidence of release.**— A letter from plaintiff offering freedom from an engagement and action taken upon the offer by defendant is sufficient evidence of a mutual release. Kellett *v.* Robie, 99 Wis. 303, 74 N. W. 781. So, where defendant, after writing to plaintiff expressing a desire to terminate the engagement, returned plaintiff's letters, but plaintiff refused to return those of defendant and no correspondence took place between the parties for a period of two years, there was evidence from which the jury might infer that plaintiff had released defendant, Davis *v.* Bomford, 6 H. & N. 245, 30 L. J. Exch. 139, 3 L. T. Rep. N. S. 279.

Insufficient evidence of release.—Where defendant wrote plaintiff that he had proved false and was going to be married to another, and plaintiff replied that, although heart broken, defendant would be forgiven, hard though it was so to do after having waited for many years, and that, while plaintiff did not wish defendant any bad luck, defendant was to think if bad luck should befall, no release from the promise was shown. Folz *v.* Wagner, 24 Ind. App. 694, 57 N. E. 564.

51. Capehart *v.* Carradine, 4 Strobh. (S. C.) 42.

The alleged unchastity of plaintiff is supported by proof that plaintiff lived with a woman keeping a bad house. Hunter *v.* Hatfield, 68 Ind. 416.

52. Townsley *v.* Quinlan, 17 Ill. App. 610; Yale *v.* Curtiss, 151 N. Y. 598, 45 N. E. 1125; Southard *v.* Rexford, 6 Cow. (N. Y.) 254.

53. Olmstead *v.* Hoy, 112 Iowa 349, 83 N. W. 1056.

54. Grant *v.* Willey, 101 Mass. 356.

55. *Connecticut.*— Clark *v.* Pendleton, 20 Conn. 495.

Iowa.— Denslow *v.* Van Horn, 16 Iowa 476.

Massachusetts.— Grant *v.* Willey, 101 Mass. 356.

Nebraska.— Musselman *v.* Barker, 26 Nebr. 737, 42 N. W. 759.

New York.— Southard *v.* Rexford, 6 Cow. (N. Y.) 254.

56. Yale *v.* Curtiss, 151 N. Y. 598, 45 N. E. 1125 [*reversing* 71 Hun (N. Y.) 436, 24 N. Y. Suppl. 981, 54 N. Y. St. 538].

Where defendant was married at time of promise.— If the uncontradicted evidence shows that defendant was as a matter of fact a married man when the alleged promise was made the court should take the responsibility of declaring such conclusion, and not submit the question to the jury. Davis *v.* Pryor, 112 Fed. 274, 50 C. C. A. 579 [*reversing* (Indian Terr. 1900) 58 S. W. 660].

57. Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547, holding that where plaintiff had destroyed defendant's letters previous to

2. INSTRUCTIONS — a. In General. In its charge to the jury the court should properly state the law as to what constitutes a valid contract of marriage[58] under the pleadings[59] and proof[60] and as to the facts which constitute a justification of a breach.[61] So, the jury should be duly instructed respecting on whom lies the burden of proof.[62] It is not proper, however, to instruct upon the weight of evidence.[63]

b. As to Damages. The jury should also be duly instructed by the court as to matters which should be taken into consideration by them in estimating the amount of damage suffered by plaintiff,[64] such as the personal pain suffered by

trial, and offered secondary evidence of their contents, it was a question for the court whether the letters had been destroyed, and whether their destruction was for a fraudulent purpose.

58. Lowden *v.* Morrison, 36 Ill. App. 495.

As to statute of frauds.— It is sufficient to instruct a finding for defendant, unless there was a mutual agreement existing within a year of the commencement of the action, if defendant does not request an instruction that the promise must have been made to be performed within a year. Daggett *v.* Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. Rep. 908.

As to fraud of plaintiff.— It is erroneous to charge that if the engagement was brought about by false representations and concealment of matters inquired about which defendant had a right to know, the contract could not be enforced. Van Houten *v.* Morse, 162 Mass. 414, 38 N. E. 705, 44 Am. St. Rep. 373, 26 L. R. A. 430.

Assumption of a contract.— An instruction predicated upon the jury finding that "there was a valid, subsisting contract of marriage" between the parties, without informing the jury what is required to constitute such a contract, is not erroneous where the jury have been properly instructed on that point in another part of the charge. Judy *v.* Sterrett, 153 Ill. 94, 100, 38 N. E. 633.

It is a sufficient statement of the law to instruct that plaintiff must prove the contract as alleged by a preponderance of testimony, that if the evidence on this point is found by the jury to be evenly balanced there can be no recovery, and that plaintiff's case is entirely uncorroborated, but that the jury may, if convinced of the truth of plaintiff's statements, base their verdict upon such evidence. Giese *v.* Schultz, 69 Wis. 521, 34 N. W. 913.

Preparation for marriage.— In deciding whether a contract of marriage existed the jury should not be instructed to consider any preparation that plaintiff might have made for the marriage. Graham *v.* Martin, 64 Ind. 567.

59. Where the petition alleges a contract by correspondence it is erroneous to refuse an instruction that plaintiff cannot recover unless a contract by correspondence is shown. Barber *v.* Geer, (Tex. 1901) 63 S. W. 1007 [*reversing* (Tex. 1901) 63 S. W. 934].

As to time of contract.— Where the promise was alleged to have been made at a specified time and there is proof of several promises, an instruction that the verdict must be for defendant if the contract was not made at such time is properly refused. Nearing *v.* Van Fleet, 71 Hun (N. Y.) 137, 24 N. Y. Suppl. 531, 54 N. Y. St. 308.

As to time of performance.— Under an allegation of a marriage promise without an allegation that the promise was to marry within a reasonable time, or to marry generally, where defendant denies any promise whatever, the court need not, when instructing as to the running of a statute of limitations, define a reasonable time. Schroeder *v.* Michel, 98 Mo. 43, 11 S. W. 314.

60. Smith *v.* Henry, 46 Ill. App. 42; Chamness *v.* Cox, 131 Ind. 118, 30 N. E. 901; Thurston *v.* Cavenar, 8 Iowa 155.

As to corroboration of plaintiff.— A refusal to instruct that the uncorroborated testimony of plaintiff when contradicted by defendant will not make out a contract of marriage is proper. Lowden *v.* Morrison, 36 Ill. App. 495.

61. Espy *v.* Jones, 37 Ala. 379; Robinson *v.* Craver, 88 Iowa 381, 55 N. W. 492; Grant *v.* Willey, 101 Mass. 356; Campbell *v.* Arbuckle, 4 N. Y. Suppl. 29, 21 N. Y. St. 412.

Release from promise.— After assuming that plaintiff was induced by a third person to release defendant from the engagement and promise to marry, the court should direct a verdict for defendant because a release if not fraudulently obtained would constitute a valid defense. Allard *v.* Smith, 2 Metc. (Ky.) 297.

62. Where pregnancy of plaintiff is conceded, an instruction to find for defendant if the jury are satisfied that defendant was not the father of plaintiff's child is open to criticism, for the reason that plaintiff should prove that he was the father, and not defendant prove that he was not. Kniffen *v.* McConnell, 30 N. Y. 285.

63. Ortiz *v.* Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581.

64. Graham *v.* Martin, 64 Ind. 567; Stribley *v.* Welz, 8 Ohio Cir. Ct. 571; Glasscock *v.* Shell, 57 Tex. 215.

Instruction must not be complex.— An instruction that if the jury find for plaintiff they should award such damages as would place plaintiff in as good a condition pecuniarily as if the contract were fulfilled is too complicated and conjectural. Miller *v.* Rosier, 31 Mich. 475.

Where defendant had just cause to refuse to marry plaintiff the jury has nothing to find on the subject of damages. Guptill *v.* Verback, 58 Iowa 98, 12 N. W. 125.

plaintiff,[65] her seduction,[66] and any other evidence admissible in aggravation,[67] or in mitigation,[68] of damage. The jury may also be charged that they may allow punitive or exemplary damages, if they find that defendant was actuated by improper motives.[69] It is also proper to instruct that the jury must determine what plaintiff ought to recover, and not concern themselves with what defendant is able to pay.[70]

3. VERDICT. Where there is a finding that defendant is guilty and an assessment of damages the verdict is sufficient.[71]

K. Damages — 1. In General — a. Rule Stated. The damages recoverable for breach of a marriage promise are such as will compensate plaintiff for the benefits lost by the breach,[72] in addition to such sum as will be compensatory for

Erroneous instruction.— An instruction is erroneous that tells the jury that if plaintiff was engaged to a third person, and defendant induced plaintiff to break the engagement, and promise to marry defendant while not intending in good faith to marry plaintiff, such conduct was an aggravation of plaintiff's damages, because under the previous engagement plaintiff would be a wrong-doer if it was broken, and not entitled to recover damages growing out of the wrongful breach of the engagement. Trammell *v.* Vaughan, 158 Mo. 214, 59 S. W. 79, 81 Am. St. Rep. 302, 51 L. R. A. 854 [*citing* Hahn *v.* Bettingen, 81 Minn. 91, 83 N. W. 467, 50 L. R. A. 669].

Sufficient instruction.—A charge informing the jury that there is no rule for the measure of damages, but that they should consider the evidence, the situation of the parties and what occurred between them, their condition and surroundings, and then give such sum as the evidence would warrant is proper. Olson *v.* Solveson, 71 Wis. 663, 38 N. W. 329. See also Campbell *v.* Arbuckle, 4 N. Y. Suppl. 29, 21 N. Y. St. 412.

65. Robinson *v.* Craver, 88 Iowa 381, 55 N. W. 492; Rutter *v.* Collins, 103 Mich. 143, 61 N. W. 267; Bird *v.* Thompson, 96 Mo. 424, 9 S. W. 788.

66. Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; Goodal *v.* Thurman, 1 Head (Tenn.) 208.

An instruction that seduction cannot be considered in aggravation of damages, but commenting upon the rule and giving the judge's opinion that the rule is bad in such a way as to inflame the jury into disregarding the rule as stated is error. McFadden *v.* Reynolds, 20 Wkly. Notes Cas. (Pa.) 312, 11 Atl. 638.

67. The jury may be instructed to take into consideration a letter written by defendant that might be construed as a proposal that plaintiff should become defendant's mistress instead of his wife. Campbell *v.* Arbuckle, 4 N. Y. Suppl. 29, 21 N. Y. St. 412.

Attacks upon plaintiff's character.— The jury may be told that the injury is aggravated, and the claim to damages strengthened, if defendant attempted to prove plaintiff guilty of misconduct with other men, knowing of her innocence, or that her misconduct was committed with him, even if such misconduct is not set up as a defense in the answer. Kniffen *v.* McConnell, 30 N. Y. 285.

Expenditure of money.— An instruction that the jury must consider plaintiff's expenditures of money growing out of the engagement, without stating the purposes for which such expenditures might be made, is erroneous. Stribley *v.* Welz, 8 Ohio Cir. Ct. 571.

Financial circumstances of defendant.—After instructing that the jury may consider the circumstances of defendant, the court may refer to the admitted value of his property as a fact which the jury may consider in aggravation of damages. Johnson *v.* Travis, 33 Minn. 231, 22 N. W. 628.

68. Espy *v.* Jones, 37 Ala. 379; Hook *v.* George, 100 Mass. 331; White *v.* Thomas, 12 Ohio St. 312, 80 Am. Dec. 347.

69. Chellis *v.* Chapman, 7 N. Y. Suppl. 78, 26 N. Y. St. 953.

Where there is no evidence of the bad motives of defendant it is erroneous to submit that question to the jury. Moore *v.* Hopkins, 83 Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248; Dryden *v.* Knowles, 33 Ind. 148.

It is erroneous to charge that the jury are bound to give exemplary damages (Jacobs *v.* Sire, 4 Misc. (N. Y.) 398, 23 N. Y. Suppl. 1063, 53 N. Y. St. 515); or that if defendant, in order to excuse himself from breaking the promise, made false, slanderous statements regarding plaintiff such additional damages should be awarded as plaintiff suffered by reason of such statements, since it tends to lead the jury to understand that they may award damages for such slanders to the same extent as in an action for defamation. Roberts *v.* Druillard, 123 Mich. 286, 82 N. W. 49.

70. Goodal *v.* Thurman, 1 Head (Tenn.) 208.

71. Bird *v.* Thompson, 96 Mo. 424, 9 S. W. 788.

72. *Illinois.*— La Porte *v.* Wallace, 89 Ill. App. 517.

Iowa.— Royal *v.* Smith, 40 Iowa 615.

Massachusetts.— Coolidge *v.* Neat, 129 Mass. 146.

New York.—Chellis *v.* Chapman, 125 N. Y. 214, 26 N. E. 308, 35 N. Y. St. 17, 11 L. R. A. 784.

Ohio.— Cooper *v.* West, 7 Ohio Dec. (Reprint) 470, 3 Cinc. L. Bul. 431.

Compare Miller *v.* Rosier, 31 Mich. 475; Mainz *v.* Lederer, 21 R. I. 370, 43 Atl. 876; Walker *v.* Goldman, 16 Quebec Super. Ct. 466.

the mental suffering resulting from the breach;[73] and in assessing the damages all the circumstances of the case should be taken into consideration by the jury.[74]

b. Attacks Upon Plaintiff's Character. Where defendant maliciously, wantonly, or recklessly alleges as a defense plaintiff's want of chastity, and fails to prove his allegations, the fact should be considered to aggravate the damages,[75]

73. *Arkansas.*— Collins *v.* Mack, 31 Ark. 684.

Georgia.—Parker *v.* Forehand, 99 Ga. 743, 28 S. E. 400.

Iowa.— Robinson *v.* Craver, 88 Iowa 381, 55 N. W. 492.

Maine.— Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547.

Massachusetts.—Grant *v.* Willey, 101 Mass. 356; Harrison *v.* Swift, 13 Allen (Mass.) 144.

Michigan.— Vanderpool *v.* Richardson, 52 Mich. 336, 17 N. W. 936.

Minnesota.— Tamke *v.* Vangsnes, 72 Minn. 236, 75 N. W. 217.

Missouri.— Liese *v.* Meyer, 143 Mo. 547, 45 S. W. 282; Bird *v.* Thompson, 96 Mo. 424, 9 S. W. 788; Wilbur *v.* Johnson, 58 Mo. 600.

Montana.— Dupont *v.* McAdow, 6 Mont. 226, 9 Pac. 925.

New York.— Chellis *v.* Chapman, 125 N. Y. 214, 26 N. E. 308, 35 N. Y. St. 17, 11 L. R. A. 784.

North Carolina.— Allen *v.* Baker, 86 N. C. 91, 41 Am. Rep. 444.

Texas.— Ortiz *v.* Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581.

Wisconsin.— Giese *v.* Schultz, 65 Wis. 487, 27 N. W. 353.

Statutes relating to married women and their property do not affect the measure of damages in an action for breach of promise. Douglas *v.* Gausman, 68 Ill. 170.

74. *Arkansas.*— Collins *v.* Mack, 31 Ark. 684.

Massachusetts.— Harrison *v.* Swift, 13 Allen (Mass.) 144.

Michigan.— Vanderpool *v.* Richardson, 52 Mich. 336, 17 N. W. 936.

New Jersey.— Coryell *v.* Colbaugh, 1 N. J. L. 90, 1 Am. Dec. 192.

New York.— Southard *v.* Rexford, 6 Cow. (N. Y.) 254.

Ohio.— Stribley *v.* Welz, 8 Ohio Cir. Ct. 571.

England.— Smith *v.* Woodfine, 1 C. B. N. S. 660, 87 E. C. L. 660.

Among the circumstances which may be considered are anxiety of mind if produced by the breach of promise (Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547; Harrison *v.* Swift, 13 Allen (Mass.) 144; Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; Allen *v.* Baker, 86 N. C. 91, 41 Am. Rep. 444), loss of time and expenses incurred in preparation for marriage (Smith *v.* Sherman, 4 Cush. (Mass.) 408; Stribley *v.* Welz, 8 Ohio Cir. Ct. 571), the length of the engagement (Grant *v.* Willey, 101 Mass. 356; Vanderpool *v.* Richardson, 52 Mich. 336, 17 N. W. 936), the loss of a permanent home and advantageous establishment (Lawrence *v.* Cook, 56 Me. 187, 96 Am. Dec. 443; Harrison *v.* Swift, 13 Allen (Mass.) 144; Stribley *v.* Welz, 8 Ohio Cir. Ct. 571), and the pecuniary as well as social standing of defendant (Holloway *v.* Griffith, 32 Iowa 409, 7 Am. Rep. 208; Rutter *v.* Collins, 103 Mich. 143, 61 N. W. 267; Vanderpool *v.* Richardson, 52 Mich. 336, 17 N. W. 936; Hahn *v.* Bettingen, 84 Minn. 512, 88 N. W. 10; Smith *v.* Woodfine, 1 C. B. N. S. 660, 87 E. C. L. 660); but the question whether defendant will be able to pay the damages awarded should not be considered (Holloway *v.* Griffith, 32 Iowa 409, 7 Am. Rep. 208; Coryell *v.* Colbaugh, 1 N. J. L. 90, 1 Am. Dec. 192).

Matters which may be considered in mitigation are an offer of marriage subsequently to the breach (Kelly *v.* Renfro, 9 Ala. 325, 44 Am. Dec. 441; Kurtz *v.* Frank, 76 Ind. 594, 40 Am. Rep. 275. *Contra*, Holloway *v.* Griffith, 32 Iowa 409, 7 Am. Rep. 208), the fact that the failure to marry proceeded from no want of respect or attachment to plaintiff (Johnson *v.* Jenkins, 24 N. Y. 252), and unchaste conduct on the part of plaintiff (Conaway *v.* Shelton, 3 Ind. 334; Denslow *v.* Van Horn, 16 Iowa 476; Palmer *v.* Andrews, 7 Wend. (N. Y.) 142; Alberts *v.* Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584), even though such conduct was known to defendant at the time of promise (Denslow *v.* Van Horn, 16 Iowa 476).

75. *California.*— Reed *v.* Clark, 47 Cal. 194; Powers *v.* Wheatley, 45 Cal. 113.

Illinois.— Blackburn *v.* Mann, 85 Ill. 222; Fidler *v.* McKinley, 21 Ill. 308. But damages owing to reports circulated pending suit should not be considered. Greenup *v.* Stoker, 7 Ill. 688.

Indiana.— Haymond *v.* Saucer, 84 Ind. 3 [*overruling* Hunter *v.* Hatfield, 68 Ind. 416].

Iowa.— Denslow *v.* Van Horn, 16 Iowa 476.

Missouri.— Davis *v.* Slagle, 27 Mo. 600.

New York.—Thorn *v.* Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Southard *v.* Rexford, 6 Cow. (N. Y.) 254.

Oregon.— Kelley *v.* Highfield, 15 Oreg. 277, 14 Pac. 744.

Wisconsin.— Leavitt *v.* Cutler, 37 Wis. 46; Simpson *v.* Black, 27 Wis. 206.

An unsuccessful attempt to prove a defense of this character at the trial is an aggravation of the injury to the same extent as if the defense had been pleaded. Thorn *v.* Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Kniffen *v.* McConnell, 30 N. Y. 285; White *v.* Thomas, 12 Ohio St. 312, 80 Am. Dec. 347.

Bad faith on defendant's part may be inferred where he had no sufficient reason for believing his charges to be true; actual knowledge by defendant of their falsity not being necessary. Leavitt *v.* Cutler, 37 Wis. 46.

but where defendant makes the attempt to establish such facts in good faith and fails, the rule is otherwise.[76]

c. Seduction. It is generally held that the jury may take into consideration the fact of plaintiff's seduction by defendant, under promise of marriage.[77]

2. Exemplary Damages. An action for breach of promise is an exception to the rule that exemplary or punitive damages should not be allowed in actions on contract, and with regard to the measure of damages it has always been classed with actions of tort;[78] accordingly since the action embraces the injury to the feelings, affections, and wounded pride of plaintiff as well as the loss of marriage,[79] exemplary damages may be awarded where defendant was guilty of fraud or deceit in the making of the contract,[80] or in the breach thereof.[81]

3. Review. The question of the justice or adequacy of a verdict for plaintiff in an action for breach of marriage promise rests almost wholly in the judgment of the jury and the discretion of the trial judge.[82] Accordingly, however large the damages may be,[83] and although higher than the court would have

Slanderous statements cannot be the basis of a distinct award of damages, even though admissible in aggravation. Roberts *v.* Druillard, 123 Mich. 286, 82 N. W. 49.

76. *California.*— Powers *v.* Wheatley, 45 Cal. 113.

Illinois.— Fidler *v.* McKinley, 21 Ill. 308.

Indiana.— Haymond *v.* Saucer, 84 Ind. 3.

Iowa.— Denslow *v.* Van Horn, 16 Iowa 476.

Oregon.— Kelley *v.* Highfield, 15 Oreg. 277, 14 Pac. 744.

Wisconsin.— Alberts *v.* Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584; Leavitt *v.* Cutler, 37 Wis. 46.

77. *Illinois.*— Tubbs *v.* Van Kleek, 12 Ill. 446.

Indiana.— Haymond *v.* Saucer, 84 Ind. 3; Kurtz *v.* Frank, 76 Ind. 594, 40 Am. Rep. 275.

Iowa.— Geiger *v.* Payne, 102 Iowa 581, 69 N. W. 554, 71 N. W. 571.

Maryland.— Sauer *v.* Schulenberg, 33 Md. 288, 3 Am. Rep. 174.

Massachusetts.— Sherman *v.* Rawson, 102 Mass. 395.

Missouri.— Bird *v.* Thompson, 95 Mo. 424, 9 S. W. 788.

Nebraska.— Musselman *v.* Barker, 26 Nebr. 737, 42 N. W. 759.

New York.— Kniffen *v.* McConnell, 30 N. Y. 285; Wells *v.* Padgett, 8 Barb. (N. Y.) 323.

Ohio.— Matthews *v.* Cribbett, 11 Ohio St. 330.

Wisconsin.— Giese *v.* Schultz, 53 Wis. 462, 10 N. W. 598, 69 Wis. 521, 34 N. W. 913.

Contra, McFadden *v.* Reynolds, 20 Wkly. Notes Cas. (Pa.) 312, 11 Atl. 638; Perkins *v.* Hersey, 1 R. I. 493.

Admissibility of evidence as to seduction see *supra*, II, I, 2, b, (II), (B).

78. Thorn *v.* Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Johnson *v.* Jenkins, 24 N. Y. 252; Smith *v.* Woodfine, 1 C. B. N. S. 660, 87 E. C. L. 660.

79. Berry *v.* De Costa, L. R. 1 C. P. 331, 1 H. & R. 291, 12 Jur. N. S. 588, 35 L. J. C. P. 191, 14 Wkly. Rep. 279; Smith *v.* Woodfine, 1 C. B. N. S. 660, 87 E. C. L. 660.

80. Kurtz *v.* Frank, 76 Ind. 594, 40 Am. Rep. 275; Hughes *v.* Nolte, 7 Ind. App. 526, 34 N. E. 745; Johnson *v.* Travis, 33 Minn. 231, 22 N. W. 628; Jacobs *v.* Sire, 4 Misc. (N. Y.) 398, 23 N. Y. Suppl. 1063, 53 N. Y. St. 515; Goodal *v.* Thurman, 1 Head (Tenn.) 208.

Exemplary damages are not recoverable where there is proof that plaintiff's conduct throughout their intimacy was as bad as that of defendant. Clement *v.* Brown, 57 Minn. 314, 59 N. W. 198.

Punitive damages cannot be recovered except where defendant's conduct was wanton or malicious, or unless the feelings or reputation of plaintiff were unnecessarily wounded or injured. Dupont *v.* McAdow, 6 Mont. 226, 9 Pac. 925; Chellis *v.* Chapman, 125 N. Y. 214, 26 N. E. 308, 35 N. Y. St. 953, 11 L. R. A. 784 [*affirming* 7 N. Y. Suppl. 78, 26 N. Y. St. 953].

81. Hughes *v.* Nolte, 7 Ind. App. 526, 34 N. E. 745.

82. Hahn *v.* Bettingen, 84 Minn. 512, 88 N. W. 10.

83. *Connecticut.*— Clark *v.* Pendleton, 20 Conn. 495.

Illinois.—Richmond *v.* Roberts, 98 Ill. 472; Douglas *v.* Gausman, 68 Ill. 170; Sulzer *v.* Yott, 57 Ill. 164.

Indiana.— Haymond *v.* Saucer, 84 Ind. 3; Maybin *v.* Webster, 8 Ind. App. 547, 35 N. E. 194, 36 N. E. 373.

Iowa.— Geiger *v.* Payne, 102 Iowa 581, 69 N. W. 554, 71 N. W. 571.

Minnesota.—Hanson *v.* Elton, 38 Minn. 493, 38 N. W. 614; Johnson *v.* Travis, 33 Minn. 231, 22 N. W. 628.

Nebraska.— Musselman *v.* Barker, 26 Nebr. 737, 42 N. W. 759.

New York.— Kerns *v.* Hagenbuchle, 60 N. Y. Super. Ct. 222, 17 N. Y. Suppl. 367, 42 N. Y. St. 210; Chellis *v.* Chapman, 7 N. Y. Suppl. 78, 26 N. Y. St. 953 [*affirmed* in 125 N. Y. 214, 26 N. E. 308, 35 N. Y. St. 17, 11 L. R. A. 784].

Ohio.— Stribley *v.* Welz, 8 Ohio Cir. Ct. 571.

South Carolina.— Capehart *v.* Carradine, 4 Strobh. (S. C.) 42.

Tennessee.— Brown *v.* Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660; Goodal *v.* Thurman, 1 Head (Tenn.) 208.

Texas.— Daggett *v.* Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. Rep. 908.

awarded,[84] the verdict will not be disturbed unless the damages appear to be flagrantly excessive,[85] or disproportioned to the injury received by plaintiff,[86] even though there be newly discovered yet cumulative evidence in defendant's favor,[87] or unless it appears that the jury were influenced by passion and prejudice, and that the trial judge failed to exercise a sound discretion in reviewing that question.[88]

See 8 Cent. Dig. tit. "Breach of Marriage Promise," § 47.

84. Clark *v.* Pendleton, 20 Conn. 495.

85. Hahn *v.* Bettingen, 84 Minn. 512, 88 N. W. 10; Kolsch *v.* Jewell, 21 N. Y. App. Div. 581, 48 N. Y. Suppl. 527; Wolters *v.* Schultz, 1 Misc. (N. Y.) 196, 21 N. Y. Suppl. 768, 50 N. Y. St. 910; Kellett *v.* Robie, 99 Wis. 303, 74 N. W. 781.

The verdict may be reduced.— Hahn *v.* Bettingen, 84 Minn. 512, 88 N. W. 10.

86. Clark *v.* Pendleton, 20 Conn. 495.

87. Sulzer *v.* Yott, 57 Ill. 164.

88. Waters *v.* Bristol, 26 Conn. 398; Fidler *v.* McKinley, 21 Ill. 308; Schreckengast *v.* Ealy, 16 Nebr. 510, 20 N. W. 853; Kerns *v.* Hagenbuchle, 60 N. Y. Super. Ct. 222, 11 N. Y. Suppl. 367.

BREACH OF THE PEACE

EDITED BY WILLIAM A. JOHNSTON
Justice Supreme Court of Kansas

CROSS-REFERENCES

For Matters Relating to:

Arrests For Breaches of the Peace, see ARREST.

Particular Offenses Involving Breaches of the Peace, see AFFRAY; ASSAULT AND BATTERY; DISORDERLY CONDUCT; DISTURBANCE OF PUBLIC MEETINGS; DUELING; FORCIBLE ENTRY AND DETAINER; OBSTRUCTING JUSTICE; PRIZE-FIGHTING; RIOT; TRESPASS; UNLAWFUL ASSEMBLY; WEAPONS.

Security For Good Behavior, see CRIMINAL LAW.

For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. THE OFFENSE.

A. Definition. The term "breach of the peace" is generic and includes all violations of public peace or order,[1] or acts tending to the disturbance thereof.[2]

B. What Constitutes — 1. IN GENERAL. The offense may consist of acts of public turbulence or indecorum in violation of the common peace and quiet,[3] of an invasion of the security and protection which the law affords every citizen,[4] or

1. Davis *v.* Burgess, 54 Mich. 514, 20 N. W. 540, 52 Am. Rep. 828; State *v.* White, 18 R. I. 473, 28 Atl. 968; Abbott L. Dict.; Anderson L. Dict.

Commonly and more narrowly the term signifies any criminal act of a sort to disturb the public repose. 1 Bishop Crim. L. § 536.

"Peace," in this connection, means 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. Davis *v.* Burgess, 54 Mich. 514, 517, 20 N. W. 540, 52 Am. Rep. 828; State *v.* White, 18 R. I. 473, 28 Atl. 968.

"The public peace" is that invisible sense of security which every person feels, and which is necessary to his comfort and for which government is instituted. State *v.* Coffin, 64 Vt. 25, 23 Atl. 632; State *v.* Archibald, 59 Vt. 548, 9 Atl. 362, 59 Am. Rep. 755; State *v.* Benedict, 11 Vt. 236, 34 Am. Dec. 688.

2. Cochran L. Lex.

3. Galvin *v.* State, 6 Coldw. (Tenn.) 283; Stimson L. Gloss.

4. State *v.* Coffin, 64 Vt. 25, 23 Atl. 632; State *v.* Archibald, 59 Vt. 548, 9 Atl. 362, 59 Am. Rep. 755; State *v.* Benedict, 11 Vt. 236, 34 Am. Dec. 688. See also cases cited *supra*, note 1.

of acts such as tend to excite violent resentment.[5] Actual personal violence is not an element in the offense,[6] but where the incitement of terror or fear of personal violence is a necessary element, the conduct or language of the wrong-doer must be of a character to induce such condition[7] in a person of ordinary firmness.[8]

2. Abusive and Insulting Language. Unless so provided by statute, abusive and insulting language will not constitute a breach of the peace, where there is no threat of, or incitement to, immediate violence.[9] Where, however, it has a tendency to create a tumult and provoke a conflict, and especially when denounced by statute,[10] the use of such language may constitute an offense, although the other elements mentioned are absent.[11]

3. Cock-Fighting. By statute, witnessing or engaging in cock-fighting may constitute the offense,[12] but where cock-fighting or assisting thereat is prohibited only in certain specified places it is not an offense to participate in such fighting at some other place.[13]

4. Disturbing Inmates of Dwelling. There are holdings that at common law the offense may be committed by breaking into a dwelling-house or disturbing the inmates,[14] and by statute in many of the states the invasion of a dwelling-

5. People *v.* Smith, 5 Cow. (N. Y.) 258.

Anything which tends to provoke or excite others to break the peace is an offense of the same denomination. State *v.* White, 18 R. I. 473, 28 Atl. 968; 4 Bl. Comm. 150.

6. State *v.* White, 18 R. I. 473, 28 Atl. 968; 2 Bishop New Crim. L. § 3, subs. 2.

Every force and violence is, however, a breach of the peace. Rex *v.* Storr, 3 Burr. 1698.

7. Ware *v.* Loveridge, 75 Mich. 488, 42 N. W. 997; State *v.* Batchelder, 5 N. H. 549; Henderson *v.* Com., 8 Gratt. (Va.) 708, 56 Am. Dec. 160; State *v.* Coffin, 64 Vt. 25, 23 Atl. 632; State *v.* Riggs, 22 Vt. 321; 2 Bishop New Crim. L. § 3, subs. 2.

8. State *v.* Benedict, 11 Vt. 236, 34 Am. Dec. 688.

9. Ware *v.* Loveridge, 75 Mich. 488, 42 N. W. 997; State *v.* Schlottman, 52 Mo. 164; State *v.* Taylor, 3 Sneed (Tenn.) 661; *Ex p.* Marlborough, 5 Q. B. 955, D. & M. 720, 8 Jur. 664, 13 L. J. M. C. 105, 1 N. Sess. Cas. 19, 48 E. C. L. 955; *Ex p.* Chapman, 4 A. & E. 773, 31 E. C. L. 341; Reg. *v.* Langley, 2 Ld. Raym. 1029, 6 Mod. 124, Salk. 697; 4 Bl. Comm. 110, 17 note; 1 Hawkins P. C. c. 60.

False statement of death.— Tolling a church bell to have it believed that a living person was dead, falsely stating the fact of his death, and that he was to be buried on the next day, with intent to annoy, harass, and vex such person and his family is not indictable under the Vermont statute. State *v.* Riggs, 22 Vt. 321.

10. "Following or mocking."— The continuation of a controversy begun on the day previous by calling one a sheep thief, using other scurrilous and abusive language, and bleating like a sheep is a "following or mocking" within a statute denouncing it as an offense, to "disturb or break the peace, or stir up or provoke contention and strife by following or mocking any person with scurrilous or abusive or indecent language, or gestures, or noise." State *v.* Warner, 34 Conn. 276.

To call a man "a damn fool and a bastard" is the use of indecent language and a disturbance of the peace of a city within an ordinance making it an offense "to disturb the quiet of a city." Topeka *v.* Heitman, 47 Kan. 739, 28 Pac. 1096.

11. *Arkansas.*— State *v.* Moser, 33 Ark. 140.

Georgia.— Dyer *v.* State, 99 Ga. 20, 25 S. E. 609, 59 Am. St. Rep. 228.

Indiana.— Warwick *v.* State, 17 Ind. App. 334, 46 N. E. 650.

Pennsylvania.— Com. *v.* Redshaw, 12 Pa. Co. Ct. 91.

Texas.— Watkins *v.* State, (Tex. Crim. 1898) 44 S. W. 507; Christmas *v.* State, (Tex. Crim. 1898) 44 S. W. 175.

Vermont.— State *v.* S. S., 1 Tyler (Vt.) 180.

12. An assemblage of a great number of persons in a place hidden from the highway and quite distant therefrom, for the purpose of engaging in or witnessing cock-fighting, is an offense within a statute against fighting in a public place. Finnem *v.* State, 115 Ala. 106, 22 So. 593.

13. Budge *v.* Parsons, 3 B. & S. 379, 113 E. C. L. 379; Morley *v.* Greenhalgh, 3 B. & S. 374, 9 Jur. N. S. 745, 32 L. J. Q. B. 93, 7 L. T. Rep. N. S. 624, 11 Wkly. Rep. 263, 113 E. C. L. 374; Clark *v.* Hague, 8 Cox C. C. 324, 2 E. & E. 281, 6 Jur. N. S. 273, 29 L. J. M. C. 105, 2 L. T. Rep. N. S. 85, 8 Wkly. Rep. 363, 105 E. C. L. 281; Coyne *v.* Brady, 12 Ir. C. L. 577.

14. Com. *v.* Taylor, 5 Binn. (Pa.) 277; Com. *v.* Edwards, 1 Ashm. (Pa.) 46. See also State *v.* Caldwell, 47 N. C. 468. But see Ware *v.* Leveridge, 75 Mich. 488, 42 N. W. 997, holding that the use, in the presence of the occupants of a dwelling-house, of foul, abusive, and insulting language unaccompanied by threats, which excites no apprehension or fear of personal violence, is not a breach of the peace at common law.

Going to another's house and shooting his dogs, in the absence of the male members of the family, and to the terror and alarm of

house, and such conduct as has a tendency to disturb the peace and quiet of the occupants, is punishable.[15]

5. Reckless Driving. Driving a carriage through the streets of a populous city so as to endanger the safety of the inhabitants is indictable at common law as a breach of the peace.[16]

6. Threats. Threats, especially when accompanied by acts showing an intent to execute them and intended to put the person threatened in fear of bodily harm, while not an indictable offense at common law,[17] may be punishable by statute as an actual as well as a threatened breach of the peace.[18]

7. Trespass. It seems that under some circumstances an injury to realty, when accompanied with violence, or a trespass not amounting to a forcible entry and detainer, is indictable as a breach of the peace;[19] but a mere trespass on, or the dispossession of, property which is the subject of a civil action is not.[20]

8. Tumultuous and Offensive Carriage. In some states it is an offense to disturb or break the peace by tumultuous and offensive carriage or by threatening, quarreling, challenging, assaulting, beating, or striking any other person.[21]

C. Defenses — 1. In General. It is no defense that opprobrious words, the use of which tended to provoke a breach of the peace, were true;[22] that defendant's wife informed him that the person addressed had insulted her;[23] that prosecuting witness provoked the abusive language by abusing defendant,[24]

females in the house, is a misdemeanor. Henderson *v.* Com., 8 Gratt. (Va.) 708, 56 Am. Dec. 160.

Riotous entry into a house after the expiration of the term to enforce a forfeiture is a breach of the peace. Rex *v.* Stroude, 2 Show. 149. See also State *v.* Tolever, 27 N. C. 452.

15. Mullens *v.* State, 82 Ala. 42, 2 So. 481, 60 Am. Rep. 731; Weaver *v.* State, 79 Ala. 279; State *v.* Burns, 35 Kan. 387, 11 Pac. 161 (holding that the fact that such conduct was directed against some other person than the prosecutor or his family is immaterial); State *v.* Love, 19 N. C. 267.

Disturbance of family or neighborhood.— Under a statute imposing a fine upon any person who, at late or unusual hours in the night, maliciously or wilfully disturbs the peace or quiet of any neighborhood or family by loud or unusual noises or by tumultuous and offensive carriage, an indictment will lie for disturbing a woman occupying a dwelling-house alone. Noe *v.* People, 39 Ill. 96.

To break the locks of doors under such circumstances of force and violence as are calculated to provoke a further breach of the peace on the part of the occupant of premises is a breach of the peace. Taaffe *v.* Kyne, 9 Mo. App. 15.

16. U. S. *v.* Hart, Pet. C. C. (U. S.) 390, 26 Fed. Cas. No. 15,316, 3 Wheel. Crim. (N. Y.) 304.

17. State *v.* Benedict, 11 Vt. 236, 34 Am. Dec. 688.

Threats not constituting an assault see Assault and Battery, 3 Cyc. 1022, note 7.

18. Davis *v.* Burgess, 54 Mich. 514, 20 N. W. 540, 52 Am. Rep. 828; Galvin *v.* State, 6 Coldw. (Tenn.) 283; State *v.* Benedict, 11 Vt. 236, 34 Am. Dec. 688.

19. Attempting to remove an obstruction to a right of way, which is guarded by the person claiming the right to maintain it — the wrongful act being accompanied with profane and threatening language. State *v.* White, 18 R. I. 473, 28 Atl. 968.

Breaking windows of a dwelling in the night-time. State *v.* Batchelder, 5 N. H. 549.

Throwing down the roof and chimney of a house of which the occupants are in peaceable possession. State *v.* Morris, 3 Mo. 127; State *v.* Wilson, 3 Mo. 125. But see Rex *v.* Atkyns, 3 Burr. 1706, which holds that pulling a thatch from a dwelling is not an indictable breach of the peace.

20. State *v.* Love, 19 N. C. 267; State *v.* Watkins, 4 Humphr. (Tenn.) 256; State *v.* Farnsworth, 10 Yerg. (Tenn.) 260; Com. *v.* Israel, 4 Leigh (Va.) 675. See also Forcible Entry and Detainer; Trespass.

21. See State *v.* Farrall, 29 Conn. 72; Noe *v.* People, 39 Ill. 96.

Such statutes are declaratory of but one offense — breaking the public peace, and are construed as imposing a liability for an infraction thereof, in any or all of the modes prescribed (State *v.* Matthews, 42 Vt. 542) and contemplate tumultuous verbal abuse and personal outrage (State *v.* S. S., 1 Tyler (Vt.) 180), although not necessarily acts amounting to an assault and battery (State *v.* Farrall, 29 Conn. 72).

That such acts when done at night constitute a statutory offense does not prevent them from amounting to a breach of the peace if done in the day. State *v.* Coffin, 64 Vt. 25, 23 Atl. 632.

22. Dyer *v.* State, 99 Ga. 20, 25 S. E. 609, 59 Am. St. Rep. 228.

23. There being no evidence of such insult in fact. Newton *v.* State, 94 Ga. 593, 19 S. E. 895.

24. Watkins *v.* State, (Tex. Crim. 1898) 44 S. W. 507; Christmas *v.* State, (Tex. Crim. 1898) 44 S. W. 175.

although such abuse may be considered in mitigation;[25] or, the offense being charged to have been committed in a private house, that at the time the house was open to invited guests and hence became a public place.[26] Neither can defendant justify by showing that the prosecutor was in the wrong,[27] or on the ground of former punishment for the offense as a contempt of court.[28]

2. Former Conviction. A conviction on an indictment alleging the offense to have been committed by one or more of the modes prescribed by statute will be a bar to any subsequent indictment for the same offense, which alleges it to have been committed by one or more of the other modes named.[29]

D. Indictment, Information, or Complaint[30] **— 1. Charging Acts Constituting Offense — a. In General.** While in some jurisdictions it is sufficient to charge the offense in the language of the statute, or to aver the fact of its commission generally without specifying the words or describing the acts,[31] it is held in others that the particular language or conduct upon which the offense is predicated should be set forth, that the court may judge whether or not a breach of the peace has been committed.[32]

b. Charging Commission in Several Modes. Where several modes are named by which a breach of the peace may be committed, an indictment charging in one count several acts committed at the same time and as part of same transaction is not duplicitous,[33] nor is it objectionable to charge the offense to have been committed in any one of the modes denounced.[34]

2. Particular Averments — a. Force and Violence. If a complaint otherwise good shows the commission of the act charged with force and violence, the omission of the phrase *vi et armis* is immaterial.[35]

b. Intent. Unless required by statute no allegation of an intent to break the public peace is necessary.[36]

25. Moore *v.* State, 50 Ark. 25, 6 S. W. 17; Watkins *v.* State, (Tex. Crim. 1898) 44 S. W. 507; Christmas *v.* State (Tex. Crim. 1898) 44 S. W. 175.

26. Terry *v.* State, 22 Tex. App. 679, 3 S. W. 477.

27. One who commits a breach of the peace in attempting to abate a public nuisance cannot justify by showing that the person maintaining and defending the nuisance was in the wrong. State *v.* White, 18 R. I. 473, 28 Atl. 968.

28. Middlebrook *v.* State, 43 Conn. 257, 21 Am. Rep. 650.

29. State *v.* Matthews, 42 Vt. 542.

30. For forms of indictment or complaint see Moore *v.* State, 50 Ark. 25, 6 S. W. 17; State *v.* Moser, 33 Ark. 140; State *v.* Burns, 35 Kan. 387, 11 Pac. 161; State *v.* Matthews, 42 Vt. 542.

31. Moore *v.* State, 50 Ark. 25, 6 S. W. 17; State *v.* Hutson, 40 Ark. 361; State *v.* Moser, 33 Ark. 140; Marshall *v.* State, 123 Ind. 128, 23 N. E. 1141; Stuckmyer *v.* State, 29 Ind. 20; State *v.* Craddock, 44 Kan. 489, 24 Pac. 949; Bryson *v.* State, (Tex. Crim. 1897) 39 S. W. 365; Foreman *v.* State, 31 Tex. Crim. 477, 20 S. W. 1109.

Surplusage.— Where the offense is charged in statutory language, an additional charge of its commission "by other disorderly conduct" may be rejected as surplusage. Snell *v.* People, 29 Ill. App. 470.

32. State *v.* Coffin, 64 Vt. 25, 23 Atl. 632; State *v.* Matthews, 42 Vt. 542; Steuer *v.* State, 59 Wis. 472, 18 N. W. 433. And see State *v.* Archibald, 59 Vt. 548, 9 Atl. 362, 59 Am. Rep. 755.

Sufficient averment of means of commission.— A complaint alleging that respondent "did disturb and break the public peace by tumultuous and offensive carriage, . . . by threatening, quarreling with, challenging, assaulting, beating, and striking" sufficiently shows the means by which the offense was committed. State *v.* Hanley, 47 Vt. 290. But where the obvious intention of the statute is to prevent the disturbance of the peace of families an affidavit which charges the disturbance of a single person not constituting a family is insufficient to show the commission of the offense. Brooks *v.* State, 67 Miss. 577, 7 So. 494.

33. State *v.* Matthews, 42 Vt. 542.

As to charge that defendant did provoke and attempt to provoke a breach of the peace see Marshall *v.* State, 123 Ind. 128, 23 N. E. 1141.

34. State *v.* Archibald, 59 Vt. 548, 9 Atl. 362, 59 Am. Rep. 755.

35. State *v.* Hanley, 47 Vt. 290.

36. State *v.* Archibald, 59 Vt. 548, 9 Atl. 362, 59 Am. Rep. 755.

Inference of intent.— In the absence of evidence to the contrary, the necessary intent to commit either the offense of provoking or that of attempting to provoke an assault may be inferred from the fact that defendant used words reasonably calculated to provoke the party to whom they were addressed. Warwick *v.* State, 17 Ind. App. 334, 46 N. E. 650.

c. Naming Person Referred to or Addressed. When the offense consists of using certain language in reference to, and in the presence of, another, the name of the person referred to, and of the person in whose presence the words were uttered, should be stated, if known, and if unknown that fact should be alleged;[37] but where the objectionable language is addressed to, and intended to apply to, a number of persons, it may be charged to have been addressed to any or all of them.[38]

E. Trial — 1. Evidence — a. Admissibility. Evidence of defendant's custom of indulging in the use of immoderate and vituperative language,[39] or his previous conduct as a common disturber of the public peace,[40] is admissible.

b. Sufficiency. It is sufficient to prove the substance of the language charged,[41] and evidence of the use of opprobrious and offensive epithets will sustain an indictment for using insulting language which, in its common acceptation, is calculated to cause a breach of the peace.[42] Where the offense is charged to have been committed in the several modes denounced proof of its commission in any one of such modes will be sufficient,[43] but proof that the offense was committed in the county of the prosecution is indispensable.[44]

2. Instructions. An instruction that there may be a conviction if defendant cursed the prosecuting witness in his presence and hearing is proper where the latter's testimony to that effect is uncontradicted,[45] but an instruction to acquit if the evidence was consistent with a breach of the peace by another is properly refused where such other might also be guilty.[46]

F. Judgment and Punishment. In the absence of statute the offense is punishable by fine and imprisonment at the discretion of the jury; but where a punishment is prescribed by statute a judgment in excess thereof is erroneous, although good at common law.[47] A judgment that defendant is guilty of provocation as charged is sufficient.[48]

II. Security to Keep the Peace.

A. Nature of Proceedings. The requirement of surety of the peace is preventive justice and consists in obliging those persons of whom there is a probable ground to suspect future misbehavior,[49] to stipulate with and to give full assurance to the public that such offense as is apprehended shall not happen, by finding pledges or securities for keeping the peace.[50] It is, however, to be observed that, strictly speaking, such proceedings are not criminal[51] or even quasi-

37. State *v.* Clarke, 31 Minn. 207, 17 N. W. 344.

38. Hearn *v.* State, 34 Ark. 550.

39. Com. *v.* Foley, 99 Mass. 497.

40. State *v.* Burns, 35 Kan. 387, 11 Pac. 161.

41. Dyer *v.* State, 99 Ga. 20, 25 S. E. 609, 59 Am. St. Rep. 228; Topeka *v.* Heitman, 47 Kan. 739, 28 Pac. 1096.

42. Hearn *v.* State, 34 Ark. 550.

43. State *v.* Matthews, 42 Vt. 542.

44. Terry *v.* State, 22 Tex. App. 679, 3 S. W. 477.

45. Watkins *v.* State, (Tex. Crim. 1898) 44 S. W. 507; Christmas *v.* State, (Tex. Crim. 1898) 44 S. W. 175.

46. Spiars *v.* State, 40 Tex. Crim. 437, 50 S. W. 947.

47. White *v.* Com., 10 Bush (Ky.) 557.

48. Warwick *v.* State, 17 Ind. App. 334, 46 N. E. 650.

49. **The actual commission of a crime is not essential,** but a probable suspicion that some crime is intended or likely to happen will be enough. 4 Bl. Comm. 252.

Verification of suspicions.—While the prosecutor should use due diligence to ascertain the truth of his suspicions, he is not required to go to the person from whom he apprehends violence and inquire as to his intentions. Fisher *v.* Hamilton, 49 Ind. 341.

50. 4 Bl. Comm. 251. See also State *v.* Benedict, 11 Vt. 236, 34 Am. Dec. 688.

Surety for good behavior see Criminal Law.

51. *Indiana.*—Arnold *v.* State, 92 Ind. 187; State *v.* Cooper, 90 Ind. 575; State *v.* Carey, 66 Ind. 72; Fisher *v.* Hamilton, 49 Ind. 341; Deloohery *v.* State, 27 Ind. 521; State *v.* Vankirk, 27 Ind. 121; Murray *v.* State, 26 Ind. 141; State *v.* Abrams, 4 Blackf. (Ind.) 440. But see State *v.* Maners, 16 Ind. 175, to the effect that the practice in criminal cases will govern.

Kansas.— Matter of Mitchell, 39 Kan. 762, 19 Pac. 1.

Kentucky.—Adams *v.* Ashby, 2 Bibb (Ky.) 96.

Minnesota.— State *v.* Sargent, 74 Minn. 242, 76 N. W. 1129.

criminal in their character, and that the rules governing criminal proceedings are not applicable to them.[52]

B. When Demandable — **1. In General.** It may be stated generally that both at common law[53] and by statute surety of the peace may be required of any person who makes threats or menaces of such a character as to excite fear of actual harm or injury to person or estate.[54]

2. After Acquittal. After an acquittal upon an indictment and upon the evidence adduced at the trial defendant may be required to find sureties,[55] but should not be detained while articles of the peace against him are being prepared.[56]

C. Who May Demand. The general rule is that surety to keep the peace is demandable of right by any person who will make the necessary oath.[57]

D. Powers and Duties of Magistrates. Authority to exact surety of the

Missouri.— State *v.* Emnitz, 27 Mo. 521.

North Carolina.— State *v.* Lyon, 93 N. C. 575.

Ohio.— *Ex p.* Christmas, 1 Ohio Dec. (Reprint) 594, 10 West. L. J. 541.

Wisconsin.— Weisselman *v.* State, 95 Wis. 274, 70 N. W. 169.

England.— 4 Bl. Comm. 251.

52. Levar *v.* State, 103 Ga. 42, 29 S. E. 467.

53. At common law surety of the peace is demandable of persons who make an affray in the presence of a magistrate (4 Bl. Comm. 254); who threaten to do corporal injury by killing or beating another, or procure others to do so (4 Bl. Comm. 254, 255; Comyns Dig. tit. Justices of Peace, B, 5; 1 Hawkins P. C. c. 60, § 6); who cause another to be imprisoned (4 Bl. Comm. 255; Comyns Dig. tit. Justices of Peace, B, 5; 1 Hawkins P. C. c. 60, § 6); who contend together with hot and angry words (4 Bl. Comm. 254; 1 Hawkins P. C. c. 60); who threaten to burn the house of another (State *v.* Murphy, 40 La. Ann. 855, 6 So. 107; Aldermen & Justices, 2 Pars. Eq. Cas. (Pa.) 458; 4 Bl. Comm. 255; Comyns Dig. tit. Justices of Peace, B, 5; 1 Hawkins P. C. c. 60, § 6); who go about with unusual weapons or attendants to the terror of the people (4 Bl. Comm. 254); or such as are common barrators (4 Bl. Comm. 255. See Barratry). It cannot be required merely because one man is at variance or at suit with his neighbor, because he is afraid that the person against whom he prays it will do harm to his servants or cattle, or for a battery, trespass, or breach of the peace that is past. Comyns Dig. tit. Justices of Peace, B, 5.

54. *Alabama.*— Howard *v.* State, 121 Ala. 21, 25 So. 1000.

Indiana.— State *v.* Sayer, 35 Ind. 379.

Minnesota.— State *v.* Sargent, 74 Minn. 242, 76 N. W. 1129.

Pennsylvania.— Aldermen & Justices, 2 Pars. Eq. Cas. (Pa.) 458; Com. *v.* Edwards, 1 Ashm. (Pa.) 46.

England.— Reg. *v.* Mallinson, 16 Q. B. 367, 15 Jur. 746, 71 E. C. L. 367; Reg. *v.* Dunn, 12 A. & E. 599, 1 A. & H. 21, 5 Jur. 721, 4 P. & D. 415, 40 E. C. L. 299; 4 Bl. Comm. 255; 1 Hawkins P. C. c. 60, § 6.

Compare Ex p. Harfourd, 16 Fla. 283, holding that sureties of the peace against doing damage to property, except threats to burn a dwelling-house, are not authorized by the common law or by statute.

Requiring in addition to punishment.—Under a statute permitting it (Kan. Crim. Code, § 242), a court may, in addition to the punishment adjudged for the commission of an offense, require defendant to give security that he will keep the peace, or be of good behavior, or both, for a term of years, or to stand committed until such security is given. State *v.* Chandler, 31 Kan. 201, 1 Pac. 787.

A "striker" who attempts to intimidate persons taking the place of himself and others by the use of insulting language and threats may be bound over to keep the peace. Com. *v.* Silvers, 11 Pa. Co. Ct. 481.

Threatened injury to the members of one's family, or fear thereof, is said to furnish a ground for requiring the binding over of the wrong-doer. Rapalje & L. L. Dict.; Sweet L. Dict. See also Collins *v.* State, 11 Ind. 312; State *v.* Bridegroom, 10 Ind. 170; Conklin *v.* State, 8 Ind. 458 (in which cases both fear for self and for family was shown); Com. *v.* Edwards, 1 Ashm. (Pa.) 46 (where the court said that upon common-law principles surety of the peace might be required from one who made a frequent practice of going to the house of another, and grossly abusing his family, thereby rendering their lives uncomfortable, but that security could not be demanded under the statute).

Threats to resist intrusion on land.— One who attempts unlawfully to enter upon land of another cannot require the person in possession to give a bond to keep the peace, because he resists and threatens to shoot if such unlawful attempt is persisted in. Johnston *v.* Meaghr, 14 Utah 426, 47 Pac. 861.

55. Bamber *v.* Com., 10 Pa. St. 339; Respublica *v.* Donagan, 2 Yeates (Pa.) 437; *Ex p.* Davis, 24 L. T. Rep. N. S. 547.

56. Rex *v.* Holt, 7 C. & P. 518, 32 E. C. L. 737.

57. Com. *v.* Oldham, 1 Dana (Ky.) 466; Com. *v.* Duane, 1 Binn. (Pa.) 98, note *a*; Aldermen & Justices, 2 Pars. Eq. Cas. (Pa.) 458; State *v.* Tooley, 1 Head (Tenn.) 9; 1 Hawkins P. C. c. 60, §§ 2–4.

peace is derived from the common law, and from statutory enactments, and is generally confided in justices of the peace and all others who *ex officio* are conservators of the peace, and in such as have been particularly designated by statute.[58] At common law, if justices acted in pursuance of a writ of supplicavit they were bound by the direction of the writ,[59] but on a complaint made to them in the first instance, the number and sufficiency of the sureties, the sum[60] and the time[61] for which the party might be bound were entirely within their discretion.[62] The powers and duties of magistrates in these respects are now generally regulated by statutes, which require them to exact surety of the peace on the presentation of a prescribed state of facts.[63]

E. Defenses. The fact that the threats were made conditionally will not affect the right to demand security if the fulfilment of the threats may be reasonably apprehended.[64] Neither is it a defense that just prior to the menaces complained of defendant had been informed that complainant had slandered the former's wife;[65] nor that defendant had been convicted of an attempt to provoke an assault,[66] or had been once put in jeopardy by a mistrial.[67] In England matters set forth in the articles of peace may not be controverted, nor can matters said to have been suppressed be supplied therein.[68]

The proceeding should be instituted in the name of the state without a relator. State *v.* Carey, 66 Ind. 72.

58. Ware *v.* Loveridge, 75 Mich. 488, 42 N. W. 997; Respublica *v.* Cobbet, 3 Yeates (Pa.) 93; Com. *v.* Jeandelle, 3 Phila. (Pa.) 509, 16 Leg. Int. (Pa.) 364; Reg. *v.* Dunn, 12 A. & E. 599, 1 A. & H. 21, 5 Jur. 721, 4 P. & D. 415, 40 E. C. L. 299; 4 Bl. Comm. 253; Comyns Dig. tit. Justices of Peace, B, 5.

County courts possess the authority. Welling's Case, 6 Gratt. (Va.) 670.

Recorders of cities are vested with power. People *v.* Mitchell, 2 Thomps. & C. (N. Y.) 172.

Superior court may require security, though on the same complaint justices of the peace refused to do so. Reg. *v.* Mallinson, 16 Q. B. 367, 15 Jur. 746, 71 E. C. L. 367.

Articles of the peace ought to be exhibited in the neighborhood, that the security may be given there. Rex *v.* Waite, 2 Burr. 780, 2 Ld. Ken. 511.

59. 1 Hawkins P. C. c. 60, § 16.

60. The court cannot interfere to reduce the amount of security which the magistrates require a party to give for the preservation of the peace. Rex *v.* Holloway, 2 Dowl. P. C. 525.

61. The court may require bail for such a length of time as they think necessary for the preservation of the peace, and are not confined to a twelvemonth. Rex *v.* Bowes, 1 T. R. 696, 1 Rev. Rep. 363. A recognizance "for a Year, or for Life, or without expressing any certain Time, (in which Case it shall be intended to be for Life) . . . is good." 1 Hawkins P. C. c. 60, § 15. *Compare* O'Connell *v.* Reg., 11 Cl. & F. 155, 1 Cox C. C. 413, 9 Jur. 25, 8 Eng. Reprint 1061 (where it was questioned whether or not a recognizance to keep the peace for seven years next ensuing the acknowledgment thereof, which fixed no time for entering into it, was good); Prickett *v.* Gratrex, 8 Q. B. 1020, 10 Jur. 566, 15 L. J. M. C. 145, 2 N. Sess. Cas. 429, 55 E. C. L. 1020; Willes *v.* Bridger, 2 B. & Ald. 278 (which deny the right of justices to bind over for an unlimited time).

62. 1 Hawkins P. C. c. 60, § 16.

As to interference with the discretion of magistrates in taking security see Rex *v.* Tregarthen, 5 B. & Ad. 678, 2 N. & M. 379, 27 E. C. L. 287.

63. Reg. *v.* Dunn, 12 A. & E. 599, 1 A. & H. 21, 5 Jur. 721, 4 P. & D. 415, 40 E. C. L. 299; Lort *v.* Hutton, 45 L. J. M. C. 95, 34 L. T. Rep. N. S. 730. See also State *v.* Sargent, 74 Minn. 242, 76 N. W. 1129, holding that a constitutional provision limiting the jurisdiction in criminal causes had no application to proceedings to compel security to keep the peace.

Fixing amount.— Justices who make an order under Can. Crim. Code, § 959, must fix the amount of the recognizance to be given. *Re* Doe, 3 Can. Crim. Cas. 370.

The rule as to discretion does not obtain in Pennsylvania, in the quarter sessions, where "due cause" for binding defendant over must be shown. Com. *v.* Snyder, 13 Pa. Co. Ct. 660.

64. Ritchey *v.* Davis, 11 Iowa 124 (where a threat of bodily injury was made coupled with a condition of the performance of a professional duty by the threatened party); *Ex p.* Hulse, 21 L. J. M. C. 21; Reg. *v.* Tollemache, 2 L. M. & P. 401.

65. Arnold *v.* State, 92 Ind. 187.

66. Stone *v.* State, 97 Ind. 345.

67. State *v.* Vankirk, 27 Ind. 121.

68. Reg. *v.* Mallinson, 16 Q. B. 367, 15 Jur. 746, 71 E. C. L. 367; Reg. *v.* Dunn, 12 A. & E. 599, 1 A. & H. 21, 5 Jur. 721, 4 P. & D. 415, 40 E. C. L. 299; Lord Vane's Case, 13 East 172 note, 1 T. R. 697, 12 Rev. Rep. 317; Rex *v.* Doherty, 13 East, 171, 12 Rev. Rep. 315; Lort *v.* Hutton, 45 L. J. M. C. 95, 34 L. T. Rep. N. S. 730. *Compare* Rex *v.* Stanhope, 12 A. & E. 620 note, 40 E. C. L. 310; Rex *v.* Parnell, 2 Burr. 806 (where the articles appeared malicious and untrue, and the court stayed

F. Proceedings to Compel — 1. Affidavit, Articles, or Complaint[69] — a. Necessity For. A magistrate has no power to entertain a proceeding for security unless a proper complaint is first made.[70]

b. Particular Averments — (I) *Of Threats and Fear* — (A) *Generally.* The articles of peace must state in terms that the prosecutor was threatened, or must state facts from which threats may be inferred;[71] and must aver fear of the execution of the threats, stating the grounds upon which injury is apprehended.[72]

(B) *In Alternative.* An allegation of fear of defendant or of others acting at his instance is bad because in the alternative;[73] but an affidavit in the alternative as to the injuries apprehended,[74] or in which fear of injury to person, family, and property is stated disjunctively[75] is not objectionable.

(II) *Negativing Malice.* At common law[76] and sometimes by statute[77] complainant's affidavit is required to negative the idea that the proceeding is instituted maliciously or vexatiously.

c. Verification. The charge, which must be made upon oath,[78] may be sworn to before a notary public.[79]

2. Warrant.[80] The warrant should show that some threat was made, or should state circumstances from which the court can determine whether or not the fear expressed is well founded.[81]

3. The Security[82] **— a. In General.** At common law the parties to the recog-

process on them and committed the exhibitant for perjury).

69. For forms: Of affidavits see Davis *v.* State, 138 Ind. 11, 37 N. E. 397; Marshall *v.* State, 123 Ind. 128, 23 N. E. 1141; Beckwith *v.* State, 21 Ind. 225; Long *v.* State, 10 Ind. 353. Of articles of the peace see Reg. *v.* Mallinson, 16 Q. B. 367, 15 Jur. 746, 71 E. C. L. 367; Reg. *v.* Dunn, 12 A. & E. 599, 1 A. & H. 21, 5 Jur. 721, 4 P. & D. 415, 40 E. C. L. 299.

70. State *v.* Coughlin, 19 Kan. 537; Bradstreet *v.* Furgeson, 23 Wend. (N. Y.) 638; State *v.* Bass, 75 N. C. 139.

It is not enough that the complaint is embraced in the examination of the prosecutor and his witnesses. Bradstreet *v.* Furgeson, 23 Wend. (N. Y.) 638.

71. Rex *v.* Bringloe, 13 East 174 note.

The court will not draw the inference, but it must be drawn by the exhibitant himself. Reg. *v.* Dunn, 12 A. & E. 599, 1 A. & H. 21, 5 Jur. 721, 4 P. & D. 415, 40 E. C. L. 299.

72. Reg. *v.* Dunn, 12 A. & E. 599, 1 A. & H. 21, 5 Jur. 721, 4 P. & D. 415, 40 E. C. L. 299; Lord Vane's Case, 13 East 172 note, 1 T. R. 697, 12 Rev. Rep. 317.

Contents of letter.— Where the grounds of fear are stated to be expressions in a letter the whole letter must be set out. Reg. *v.* Dunn, 12 A. & E. 299, 1 A. & H. 21, 5 Jur. 721, 4 P. & D. 415, 40 E. C. L. 299.

Former proceeding.— The exhibitant may allege, as part of his ground for apprehension, misconduct which has been the subject of former articles; although the accused party was committed on those articles for want of sureties and discharged on habeas corpus. Reg. *v.* Dunn, 12 A. & E. 599, 1 A. & H. 21, 5 Jur. 721, 4 P. & D. 415, 40 E. C. L. 299.

It is sufficient to aver that prosecutor verily believes that he has just cause to fear violent injury to his person (Beckwith *v.* State, 21 Ind. 225); that affiant has just cause to fear, and does fear, that defendant "will kill and murder" him (Davis *v.* State, 138 Ind. 11, 37 N. E. 397); or that one defendant will do personal injury to complainant, and that the other will injure her property (State *v.* Bass, 75 N. C. 139).

73. Steele *v.* State, 4 Ind. 561.

74. State *v.* Bridegroom, 10 Ind. 170.

75. Collins *v.* State, 11 Ind. 312; Conklin *v.* State, 8 Ind. 458.

76. 4 Bl. Comm. 255; 1 Hawkins P. C. c. 255.

77. Stone *v.* State, 97 Ind. 345.

78. Bradstreet *v.* Furgeson, 23 Wend. (N. Y.) 638.

Where affidavits made by others than exhibitant are subjoined on the same sheet a jurat sworn to by the several deponents is sufficient to show that the articles were exhibited on oath. Reg. *v.* Dunn, 12 A. & E. 599, 1 A. & H. 21, 5 Jur. 721, 4 P. & D. 415, 40 E. C. L. 299.

79. Davis *v.* State, 138 Ind. 11, 37 N. E. 397.

80. For form of warrant see State *v.* Bass, 75 N. C. 139.

81. State *v.* Goram, 83 N. C. 664; State *v.* Cooley, 78 N. C. 538.

The ancient common form of the warrant directed the officer to cause the party complained of to come before some justice, and to find sufficient surety, and if he shall refuse to do so to convey him immediately to prison, and the officer could imprison him by force of the same warrant. If, however, the warrant specially directed that the party should be brought before the justices who issued it, he was required to be taken before that justice. If the warrant was general he might be taken before any justice. 1 Hawkins P. C. c. 60, §§ 12, 13.

82. For form of recognizance to keep the peace see State *v.* Rudowskey, 65 Ind. 389.

nizance bound themselves to the king, in a specified sum, to appear on a certain day[83] and in the meantime to keep the peace, either generally toward the latter and his liege people or particularly also with regard to the person demanding the security.[84] If the form of the bond or recognizance is prescribed by statute its failure to conform to the requirements,[85] or to the order of the court requiring its execution[86] will vitiate it, although if taken in substantial compliance with the statute mere errors of form will be disregarded.[87]

b. Return to Criminal Court. By an ancient English statute[88] the recognizance[89] was required to be returned to the next sessions that the party might be bound, and general provisions based on this statute and modifications thereof, to substantially the same effect, exist in some jurisdictions,[90] although it seems that in England justices may require sureties of the peace for a limited term according to their discretion and need not bind the party over to the next sessions.[91]

4. COMMITMENT[92] — a. In General. Both at common law and by statute, if the party complained of fails to give the required security,[93] he may be committed in default thereof and until he furnishes the recognizance directed.[94] The order for

83. A recognizance failing to fix any time or place for the party's appearance has been held good. 1 Hawkins P. C. c. 60, § 15.

84. 4 Bl. Comm. 252. But it need not be conditioned to keep the peace against all the king's people in general. 1 Hawkins P. C. c. 60, § 15.

In Pennsylvania a recognizance to keep the peace toward the commonwealth and all the liege people has been held good. Respublica *v.* Cobbet, 3 Yeates (Pa.) 93.

Security by infant or married woman.— If the surety is demanded against a *feme covert* she must find security by her friends, as she cannot bind herself. The same is true as to infants. State *v.* Tooley, 1 Head (Tenn.) 9.

85. Adams *v.* Ashby, 2 Bibb (Ky.) 96; Croy *v.* State, Wright (Ohio) 135.

86. Smith *v.* Com., 9 Ky. L. Rep. 720.

In Kansas superadded words of condition beyond what are authorized by statute and which constitute a substantial departure from the order of the court and the statute render the recognizance invalid. Durein *v.* State, 38 Kan. 485, 17 Pac. 49.

87. State *v.* Dismukes, 101 Tenn. 694, 49 S. W. 756; State *v.* San Miguel, 4 Tex. Civ. App. 182, 23 S. W. 389.

88. 3 Hen. VII, c. 1.

89. See Com. *v.* Snyder, 13 Pa. Co. Ct. 660; 4 Bl. Comm. 253; 1 Hawkins P. C. c. 60, § 16.

90. *Connecticut.*— Bill *v.* Scott, Kirby (Conn.) 62.

Indiana.— State *v.* Carey, 66 Ind. 72 (holding that defendant should be bound to appear in the criminal court of the county, and if there is none, in the civil court); State *v.* Rudowskey, 65 Ind. 389.

Massachusetts.— Com. *v.* Morey, 8 Mass. 78; Com. *v.* Ward, 4 Mass. 497.

Tennessee.— State *v.* Dismukes, 101 Tenn. 694, 49 S. W. 756.

Texas.— Lawton *v.* State, 5 Tex. 272.

Virginia.— Com. *v.* Bartlett, 1 Leigh (Va.) 586, holding that a justice of the peace has no authority to bind a party accused of a breach of the peace to appear before the circuit court instead of the county court to answer the charge.

Filing a recognizance in the clerk's office so that it becomes a matter of record is a sufficient certification to the clerk by the justice. Crump *v.* People, 2 Colo. 316.

Under the Missouri statute it is sufficient to return the recognizance without the affidavit and warrant. State *v.* Emnitz, 27 Mo. 521.

91. Willes *v.* Bridger, 2 B. & Ald. 278.

92. For form of commitment see Matter of Ashton, 7 Q. B. 169, 9 Jur. 727, 14 L. J. M. C. 99, 1 N. Sess. Cas. 581, 53 E. C. L. 169.

93. When commitment may be made.— The authority of a magistrate to commit in default of security to keep the peace from one threatening to kill or beat another in his presence, etc., is not limited to the time of the occurrence, but may be exercised a short time after its conclusion. Sands *v.* Benedict, 2 Hun (N. Y.) 479, 5 Thomps. & C. (N. Y.) 19. Or at common law, if the party be in the presence of the justice, he may be immediately committed unless he offer sureties; or he may be commanded by word of mouth to find sureties, and committed for his disobedience, but it is said that if he be absent he cannot be committed, in order to find sureties, without a warrant from some justice. Comyns Dig. tit. Justices of Peace, B, 5; 1 Hawkins P. C. c. 60, § 9.

94. Howard *v.* State, 121 Ala. 21, 25 So. 1000; State *v.* Murphy, 40 La. Ann. 855, 6 So. 107; State *v.* Sargent, 74 Minn. 242, 76 N. W. 1129; *In re* Aston, 8 Jur. 293, 13 L. J. M. C. 52, 12 M. & W. 456, 1 N. Sess. Cas. 73. See also State *v.* Garlington, 56 S. C. 413, 34 S. E. 689, holding that under a constitutional provision that magistrates may bind over for a time not to exceed twelve months, the party may be committed in default of a peace bond conditioned for a year and a day.

When not authorized.— Where, upon articles exhibited to it the sessions order defendant to find sureties but do not order imprisonment in case of default, magistrates out of sessions have no power to commit upon the refusal to find sureties. Reg. *v.* Huntingdon, 1 Cox C. C. 209. So, too, where the court to

the security must be sufficient to support the commitment,[95] but the warrant need not state the particular crime or offense, or the nature of the bodily harm which the party threatened,[96] when the threatening language was used,[97] or mention the sum in which the party and his sureties are to be bound.[98] It should, however, state that the facts presented justified the exaction of the security,[99] the refusal or neglect to furnish the required security,[1] and the time for which the party is committed.[2]

b. Taking Security After Commitment. If a person committed by a court for want of surety afterward becomes able to furnish it, he should be taken by habeas corpus before a judge for that purpose.[3]

5. Proceedings After Return to Court Above — a. In General. The powers and duties of the court to which the recognizance or the justice's proceedings are returned are a matter of statutory regulation.[4]

b. Evidence — (i) *Admissibility.* The evidence must, according to well-settled principles, be material to the issue,[5] but it is competent to prove threats

which articles are exhibited orders the party to enter into a recognizance to one or more justices, the latter cannot commit for the failure to obey the mandate, but are confined to obedience to it. Matter of Ashton, 7 Q. B. 169, 9 Jur. 727, 14 L. J. M. C. 99, 1 N. Sess. Cas. 581, 53 E. C. L. 169.

95. Under the Canada criminal code a justice's order that the accused give security to keep the peace for one year, but not fixing any amount or a term of imprisonment in default, will not support a commitment. *Re* Doe, 3 Can. Crim. Cas. 370.

96. Bradstreet *v.* Furgeson, 23 Wend. (N. Y.) 638; *In re* Aston, 8 Jur. 293, 13 L. J. M. C. 52, 12 M. & W. 456, 1 N. Sess. Cas. 73.

97. *In re* Aston, 8 Jur. 293, 13 L. J. M. C. 52, 12 M. & W. 456, 1 N. Sess. Cas. 73. But see *In re* Ross, 3 Ont. Pr. 301, holding that the commitment should show the date when the threats were made and to whom, and should also state an apprehension of bodily injury.

98. Prickett *v.* Gratrex, 8 Q. B. 1020, 10 Jur. 566, 15 L. J. M. C. 145, 2 N. Sess. Cas. 429, 55 E. C. L. 1020 [*citing* Willes *v.* Bridger, 2 B. & Ald. 278].

99. Dawson *v.* Fraser, 7 U. C. Q. B. 391. See also *Ex p.* Harfourd, 16 Fla. 283, holding it to be irregular to commit in default of security, for failure to furnish security for a cause in which security is demandable, and for a cause in which it is not.

1. *Re* Doe, 2 Quebec Q. B. 600, 3 Can. Crim. Cas. 370.

2. A commitment for no definite time, but until the party find sureties or is discharged by due process of law, is bad. Prickett *v.* Gratrex, 8 Q. B. 1020, 10 Jur. 566, 15 L. J. M. C. 145, 2 N. Sess. Cas. 429, 55 E. C. L. 1020.

The commitment need not be made to the jail but will be good if made to the house of correction. *In re* Aston, 8 Jur. 293, 13 L. J. M. C. 52, 12 M. & W. 456, 1 N. Sess. Cas. 73.

3. State *v.* Hill, 25 N. C. 398 [*following* State *v.* Mills, 13 N. C. 555], where it is said that the court usually and by consent of the prosecuting officer intrusts the power of taking the recognizance to a justice of the peace.

A sheriff to whom a person is committed for want of sureties cannot himself take a recognizance. State *v.* Hill, 25 N. C. 398 [*following* State *v.* Mills, 13 N. C. 555].

4. In Indiana the only issue to be tried is whether complainant had just cause for the fears stated in his affidavit (State *v.* Tow, 5 Ind. App. 261, 31 N. E. 1120), and if that fact be found affirmatively, surety must be required, though such cause may then have ceased (Stone *v.* State, 97 Ind. 345; State *v.* Steward, 48 Ind. 146; State *v.* Sawyer, 35 Ind. 379, the last case also holding that cessation of the fears may be considered in determining the recognizance to be given, but will not entitle defendant to an unconditional discharge).

In Iowa the fullest investigation may be had, and the inquiry is, whether any just reason to fear the commission of the offense still exists. The undertaking may be discharged or a new one required. If complainant appear and defendant do not a forfeiture may be declared. If defendant appear, or neither appear, the undertaking may be discharged, and costs awarded against defendant, although he demand a trial. State *v.* White, 47 Iowa 555; Gribble *v.* State, 3 Iowa 217.

In Missouri, under the statute of 1855, when the parties appear in the circuit court it is the duty of that court to examine the evidence, and the recognizance taken may be discharged or a new one taken as the circumstances may require. State *v.* Emnitz, 27 Mo. 521.

In Tennessee the bond taken by the justice is required to be returned to the circuit court, and all subsequent proceedings thereon are had in that court, whether or not an appeal has been taken. State *v.* Dismukes, 101 Tenn. 694, 49 S. W. 756.

5. McCullough *v.* State, (Tex. Crim. 1898) 44 S. W. 517, holding that it is error to permit the prosecutor to testify that she had supported defendant's family, and had ordered them from the house as a disgrace.

made against the complaining witness by defendant, and that such threats were communicated to the former.[6]

(II) *WEIGHT AND SUFFICIENCY.* In proceedings of this character the doctrine of reasonable doubt has no application, but the facts of the threats, and whether or not the prosecuting witness has just cause to entertain the fears expressed are to be determined by the preponderance of the evidence.[7]

c. Instructions. An instruction which permits the jury to take into consideration the apprehension of complainant as to fear not expressed in his affidavit or within the issues, while erroneous, will not require reversal where the jury are subsequently informed of the proper issue to be tried.[8]

d. Province of Jury. In these proceedings the jurors are not the judges of the law, as in prosecutions strictly criminal, but must take the law from the judge,[9] and they may consider the fact that defendant did not testify in his own behalf.[10] It is a question for them under all the circumstances whether or not the language used was calculated to arouse anger or provoke a breach of the peace.[11]

e. Verdict. If the fear which the prosecutor states as the reason of the prosecution is to himself or his family, a verdict which is not in the alternative is not responsive to the issue,[12] and where the issue is whether or not the complaining witness has just cause to entertain the fears expressed by him a simple verdict of guilty is insufficient for the like reason.[13]

f. Costs. The power to require the payment of costs rests with the tribunal on whom devolves the duty of determining whether or not the accusation is true or false and placing the burden on whom it should rest.[14]

6. APPEAL AND REVIEW. Unless provided by statute[15] it has been held that no appeal lies from an order of a justice requiring a recognizance,[16] or dismissing

6. Davis *v.* State, 138 Ind. 11, 37 N. E. 397.

7. Howard *v.* State, 121 Ala. 21, 25 So. 1000; Davis *v.* State, 138 Ind. 11, 37 N. E. 397; Arnold *v.* State, 92 Ind. 187; State *v.* Cooper, 90 Ind. 575; Murray *v.* State, 26 Ind. 141. See also Johnston *v.* Meaghr, 14 Utah 426, 47 Pac. 861.

Waiver of trial below is equivalent to a confession that the complaining witness had ground for the fears expressed. State *v.* Tow, 5 Ind. App. 261, 31 N. E. 1120.

8. Arnold *v.* State, 92 Ind. 187.

9. Davis *v.* State, 138 Ind. 11, 37 N. E. 397; Arnold *v.* State, 92 Ind. 187.

10. Davis *v.* State, 138 Ind. 11, 37 N. E. 397.

11. State *v.* Moser, 33 Ark. 140; Dyer *v.* State, 99 Ga. 20, 25 S. E. 609, 59 Am. St. Rep. 228; People *v.* Murray, 54 Hun (N. Y.) 406, 7 N. Y. Suppl. 548, 27 N. Y. St. 84.

12. Collins *v.* State, 11 Ind. 312.

13. Long *v.* State, 10 Ind. 353.

14. Levar *v.* State, 103 Ga. 42, 29 S. E. 497; Keith *v.* State, 27 Ga. 483; State *v.* Sargent, 74 Minn. 242, 76 N. W. 1129; Reg. *v.* Mallinson, 16 Q. B. 367, 15 Jur. 746, 71 E. C. L. 367.

In Iowa costs may be imposed on defendant if neither party appears, and also when defendant is discharged because of complainant's non-appearance. State *v.* White, 47 Iowa 555; Gribble *v.* State, 3 Iowa 217.

In Kansas the complaining witness is not liable for costs when defendant is discharged. State *v.* Dean, 24 Kan. 53; State *v.* Menhart, 9 Kan. 98. Payment of costs cannot be enforced by imprisonment in the absence of a statute authorizing it. Matter of Mitchell, 39 Kan. 762, 19 Pac. 1.

In Minnesota the party directed to give security may be required to pay the costs of the prosecution, and to stand committed until he does so. State *v.* Sargent, 74 Minn. 242, 76 N. W. 1129.

Costs will not be allowed on complaints for assault and battery and surety of the peace at the same time and at the same court, for the reason that the lesser crime merges into the greater (Com. *v.* Rice, 3 Pa. Dist. 259); or where the affidavit upon which a peace warrant was issued is insufficient (State *v.* Cooley, 78 N. C. 538); and where the only duty of the justice is to order a recognizance for the next term of the common pleas a recognizance to pay costs is illegal (Com. *v.* Morey, 8 Mass. 78).

15. By Wis. Rev. Stat. § 4827, an appeal lies to the circuit court and not to the county court. Weisselman *v.* State, 95 Wis. 274, 70 N. W. 169. It has been held that on appeal defendant may object before trial to the sufficiency of the complaint, though in the justice's court he pleaded not guilty and went to trial without objection. Steuer *v.* State, 59 Wis. 472, 18 N. W. 433.

16. State *v.* Walker, 94 N. C. 857; State *v.* Lyon, 93 N. C. 575, which hold that an appeal being unauthorized defendant should not be discharged but the appeal should be dismissed. See also State *v.* Locust, 63 N. C. 574.

the complaint;[17] but the action of the justice may be reviewed by certiorari or habeas corpus.[18] It has been held also that the judgments of magistrates in such proceedings simply furnish a *prima facie* presumption of probable cause,[19] and may be attacked collaterally and by parol evidence.[20]

G. Forfeiture — 1. Grounds. A special recognizance may be forfeited by actual violence or menace to the person upon whose complaint the party was held, and, if the recognizance is general, by any unlawful action whatsoever, which is either an actual breach of the peace or tends thereto;[21] but it seems there may not be a forfeiture for offenses which do not involve violence or injury to any individual,[22] for hurts done through negligence or mischance,[23] or for a breach of the peace committed without the state.[24] When two execute a joint bond, instead of separate bonds, a breach by one will work a forfeiture.[25]

2. Necessity of Previous Conviction. A judicial conviction of the principal is sometimes a prerequisite to a forfeiture;[26] but where the commission of a prescribed offense will itself work a forfeiture, which may be ascertained by a jury without a previous conviction, the court may determine the breach without waiting for a trial or conviction.[27]

3. Defenses. All defenses available to the principal are available to his sureties.[28] Mere errors in proceedings prior to the execution of the recognizance,[29]

From order adjudging costs.— In State *v.* Arnold, 56 Kan. 307, 43 Pac. 267, it was held that no appeal lies from an order adjudging the costs of the proceeding against defendant.

17. State *v.* Long, 18 Ind. 438.

18. State *v.* Lyon, 93 N. C. 575; Rex *v.* Stanhope, 12 A. & E. 620 note, 40 E. C. L. 310; Reg. *v.* Dunn, 12 A. & E. 599, 1 A. & H. 21, 5 Jur. 721, 4 P. & D. 415, 40 E. C. L. 299. See also *Ex p.* Harfourd, 16 Fla. 283; *Ex p.* Gifford, 1 N. Sess. Cas. 490, in which latter case the court refused an application for a certiorari by a peer, because he was not in custody and because, if necessary to enforce the recognizance taken, their validity could be tried in another way.

19. Johnston *v.* Meaghr, 14 Utah 426, 47 Pac. 861.

20. Smelzer *v.* Lockhart, 97 Ind. 315.

21. State *v.* Rudowskey, 65 Ind. 389; Com. *v.* Braynard, 6 Pick. (Mass.) 113; 4 Bl. Comm. 265; Comyns Dig. tit. Justices of Peace, B, 8; 1 Hawkins P. C. c. 60.

Libel has been held to be a ground of forfeiture. Respublica *v.* Cobbet, 3 Yeates (Pa.) 93.

There are some actual assaults on the person of another which do not amount to a forfeiture; as if an officer, having a warrant against one who will not suffer himself to be arrested, beat or wound him in the attempt to take him; or if a parent in a reasonable manner chastise his child, or a master his servant, being actually in his service at the time; or a schoolmaster his scholar, or a jailer his prisoner, or even a husband his wife, as some say; or if one confine a friend who is mad, and bind and beat him in such a manner as is proper in such circumstances, or if a man force a sword from one who offers to kill another therewith, or if a man gently lay his hands on another, and thereby stay him from inciting a dog against a third person; nor will a master forfeit his recognizance for beating another in defense of his servant, but it is said that a servant is liable to such forfeiture for beating another in defense of his master's son, though he were commanded by the master so to do, because he is not a servant to the son, and for the like reason it is said that a tenant will incur the like forfeiture for beating another in defense of his landlord. 1 Hawkins P. C. c. 60, § 24.

22. Rankin *v.* Com., 9 Bush (Ky.) 553; Com. *v.* Mahoney, 2 Ky. L. Rep. 314; 1 Hawkins P. C. c. 60, § 22.

A recognizance will not be forfeited by a bare trespass on lands or goods, unless accompanied with some violence to the person. 1 Hawkins P. C. c. 60, § 25.

23. 1 Hawkins P. C. c. 60, § 27.

24. Key *v.* Com., 3 Bibb (Ky.) 495.

25. State *v.* Dismukes, 101 Tenn. 694, 49 S. W. 756.

26. Rankin *v.* Com., 9 Bush (Ky.) 553. *Contra*, Respublica *v.* Cobbet, 3 Yeates (Pa.) 93.

Controverting record.— Where the conviction is for an offense which is insufficient to justify a forfeiture, and such conviction is made the basis of an action to forfeit, it cannot be shown by parol that the conviction was for an offense other than that shown by the record. Com. *v.* Mahoney, 2 Ky. L. Rep. 314.

Death of principal during breach.— The fact that the principal committed a breach of the peace and was killed while resisting arrest will not forfeit the security. Com. *v.* Williams, 20 Ky. L. Rep. 542, 47 S. W. 214.

27. State *v.* Dismukes, 101 Tenn. 694, 49 S. W. 756.

28. State *v.* Bugg, 6 Rob. (La.) 63, where a *nolle prosequi* was entered as to the principal.

29. State *v.* San Miguel, 4 Tex. Civ. App. 182, 23 S. W. 389.

or the fact that defendant was convicted and punished for the offense constituting the breach[30] are not available.

4. Enforcement — a. Jurisdiction. Jurisdiction to entertain actions to recover penalties or forfeitures will authorize the court to entertain proceedings on a peace bond.[31]

b. Proceedings — (i) *In General.* If a breach occurs before the term at which the recognizance is returnable it may be proceeded on prior to that term,[32] and where a bond is taken instead of a recognizance as required by statute it may be enforced as a common-law bond.[33] A complaint,[34] although informal and somewhat in the form of an information, is sufficient if it contains facts substantially sufficient to constitute a cause of action.[35]

(ii) *Scire Facias.* Where the proceedings are by scire facias, which is permissible in some jurisdictions,[36] its issue is regarded as a judicial act.[37] Such a writ must be sufficient in form,[38] but mere defects in the issue which do not go to the merits are waived by appearance and the interposition of other defenses.[39]

c. Right to Jury. Except a summary mode of procedure is prescribed it seems that defendant is entitled to a jury trial.[40]

d. Evidence. If the record fails to show the evidence on which the bond was exacted it will be presumed that it was sufficient to justify its requirement.[41]

e. Judgment.[42] Judgment may be entered for the penalty without impaneling a jury to compute the amount,[43] and it is not necessary to enter up a formal judgment reciting the parties' names and the amount of the recovery.[44]

BREACHY CATTLE. See Animals.

BREAD. See Food.

BREAKING. Forcibly separating, parting, disintegrating, or piercing any solid substance.[1] (Breaking: Bulk by Carrier, see Carriers. Doors in Serving or Levying Process, see Arrest; Attachment; Executions. In Burglary, see Burglary.)

BREAKWATER. See Navigable Waters.

BREEDING. See Animals.

BREHON LAW. The native system of law which prevailed in Ireland, before the conquest by Henry II.[2]

BREVE. A writ.[3]

30. Com. *v.* Braynard, 6 Pick. (Mass.) 113.

A recognizance taken by a magistrate who was without jurisdiction to require it is void, and the court to which defendant was recognized acquires no jurisdiction. State *v.* Coughlin, 19 Kan. 537.

31. State *v.* San Miguel, 4 Tex. Civ. App. 182, 23 S. W. 389.

32. Crump *v.* People, 2 Colo. 316.

33. Croy *v.* State, Wright (Ohio) 135.

34. For forms of complaint see Crump *v.* People, 2 Colo. 316; State *v.* Rudowskey, 65 Ind. 389.

35. State *v.* Rudowskey, 65 Ind. 389.

36. Respublica *v.* Cobbet, 3 Yeates (Pa.) 93.

37. It cannot be issued by the clerk without an order of the court, based on the suggestions of the district attorney-general, and entered on the minutes directing it. State *v.* Dismukes, 101 Tenn. 694, 49 S. W. 756.

38. It is sufficient, in a scire facias upon a recognizance to keep the peace, to lay the fact alleged for a breach thereof as having been done *contra pacem*, without using the words *vi et armis*. 1 Hawkins P. C. c. 60, § 19. A scire facias containing full recitals of all the papers up to the time of the summons, and that the bond had been breached, and the particulars thereof is not objectionable. State *v.* Dismukes, 101 Tenn. 694, 49 S. W. 756.

39. State *v.* Dismukes, 101 Tenn. 694, 49 S. W. 756.

40. State *v.* Dismukes, 101 Tenn. 694, 49 S. W. 756.

41. Rankin *v.* Com., 9 Bush (Ky.) 553.

42. For form of judgment see Crump *v.* People, 2 Colo. 316.

43. Crump *v.* People, 2 Colo. 316 (debt on recognizance); Lawton *v.* State, 5 Tex. 272 (judgment by default on a scire facias).

44. Lawton *v.* State, 5 Tex. 272, holding that recitals in a judgment which are not necessary to its validity may be rejected as surplusage.

1. Black L. Dict.

2. Burrill L. Dict.

3. Burrill L. Dict.

BREVE JUDICIALE DEBET SEQUI SUUM ORIGINALE, ET ACCESSORIUM SUUM PRINCIPALE. A maxim meaning "A judicial writ ought to follow its original, and an accessory its principal."[4]

BREVE JUDICIALE NON CADIT PRO DEFECTU FORMÆ. A maxim meaning "A judicial writ fails not through defect of form."[5]

BREVET. See Army and Navy.

BREWERS. See Internal Revenue.

BRIBE. A price, reward, gift, or favor bestowed or promised with a view to pervert the judgment or corrupt the conduct of a judge, witness, or other person; to give a bribe to a person; to pervert his judgment or corrupt his action by some gift or promise.[6] (See, generally, Bribery.)

4. Morgan Leg. Max.
5. Rapalje & L. L. Dict.
6. Randall *v.* Evening News Assoc., 97 Mich. 136, 143, 56 N. W. 361.

BRIBERY

By J. Breckinridge Robertson

CROSS-REFERENCES

For Matters Relating to:
Bribery of:
Jurors, see CONTEMPT; EMBRACERY.
Voters, see ELECTIONS.
Witnesses to Commit Perjury, see PERJURY.
Compelling Persons Concerned in Bribery to Testify, see WITNESSES.
Conspiracy to Bribe, see CONSPIRACY.
Contracts Involving Bribery, see CONTRACTS.
Extortion, see EXTORTION.
Immunity From Prosecution of Witness in Bribery, see CRIMINAL LAW; WITNESSES.
Impeachment For Bribery, see OFFICERS.
For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. DEFINITION.

Bribery is the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done.[1]

II. ELEMENTS OF OFFENSE.

A. In General — 1. THE GIVING OR RECEIVING. Any attempt to influence an officer in his official conduct by the offer of a reward or pecuniary consideration constitutes the offense of bribery, and the crime is complete without the tender or production of the money;[2] and personal participation is not necessary, the accomplishment of the act through the agency of others being sufficient.[3]

1. 2 Bishop New Crim. L. § 85 [*quoted* in State *v.* Pritchard, 107 N. C. 921, 929, 12 S. E. 50; Honaker *v.* Board of Education, 42 W. Va. 170, 175, 24 S. E. 544, 57 Am. St. Rep. 847, 32 L. R. A. 413].

Other definitions are: "The receiving or offering any undue reward by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and incline him to act contrary to the known rules of honesty and integrity." 1 Russell Crimes 154 [*quoted* in Watson *v.* State, 29 Ark. 299, 302]; State *v.* Davis, 2 Pennew. (Del.) 139, 141, 45 Atl. 394; Walsh *v.* People, 65 Ill. 58, 65, 16 Am. Rep. 569.

"The giving (and perhaps offering) to another, anything of value or any valuable service, intended to influence him in the discharge of a legal duty." Dishon *v.* Smith, 10 Iowa 212, 221.

"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." State *v.* Miles, 89 Me. 142, 149, 36 Atl. 70.

"Bribery . . . is where a judge or other person concerned in the administration of justice takes any undue reward to influence his behavior in office." 4 Bl. Comm. 139 [*quoted* in Watson *v.* State, 29 Ark. 299, 302].

"The distinction between bribery and extortion seems to be that the former offence consists in offering a present or receiving one, the latter in demanding a fee or present by color of office." State *v.* Pritchard, 107 N. C. 921, 929, 12 S. E. 50. See, generally, EXTORTION.

2. People *v.* Ah Fook, 62 Cal. 493; State *v.* Ellis, 33 N. J. L. 102, 97 Am. Dec. 707; U. S. *v.* Worrall, 2 Dall. (U. S.) 384, 1 L. ed. 426.

3. People *v.* Kerr, 6 N. Y. Suppl. 674.

The words "directly or indirectly to offer or promise," etc., as used in Pa. Const. art. 3, § 30, have the same effect. Whenever an

Neither is a mutual or reciprocal agreement to commit the crime of bribery necessary.[4]

2. THE THING GIVEN OR RECEIVED. In order to constitute the offense there must be the promise, gift, or acceptance of money or other thing of value.[5]

3. INTENT. It is essential to the offense that the offer, promise, or gift must have been made or accepted with the corrupt intent to influence the action of the officer in the discharge of his official duties.[6]

4. THE OFFICER — a. In General. It seems that at common law the offense of bribery could only be predicated of a reward given to a judge or other person concerned in the administration of public justice;[7] but the modern definitions of bribery clearly include as the subjects of it all persons whose official conduct is in any way connected with the administration of the government.[8] Such statutes

offer is made indirectly it is in law as if it had been directly made. Com. *v.* Petroff, 2 Pearson (Pa.) 534, 8 Wkly. Notes Cas. (Pa.) 212, 1 Ky. L. Rep. 132.

4. People *v.* Squires, 99 Cal. 327, 33 Pac. 1092; State *v.* Dudoussat, 47 La. Ann. 977, 17 So. 685; Com. *v.* Murray, 135 Mass. 530; Com. *v.* Dietrich, 7 Pa. Super. Ct. 515. But see Newman *v.* People, 23 Colo. 300, 47 Pac. 278, where it was held that to constitute bribery the act of at least two persons is essential; of him who gives, and him who receives. The minds of the two must concur, and it is immaterial whether the giver makes the first advance, or gives money to get some personal advantage to himself.

5. Com. *v.* Donovan, 170 Mass. 228, 49 N. E. 104; Randall *v.* Evening News Assoc., 97 Mich. 136, 56 N. W. 361; Com. *v.* Callaghan, 2 Va. Cas. 460. See also State *v.* McDonald, 106 Ind. 233, 6 N. E. 607.

Need not have present value.— To charge the jury in a trial for attempting to bribe a legislator 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 under Ohio Rev. Stat. § 6901, 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.

To give entertainments for the purpose of unduly influencing legislation is wholly bad in morals, but does not constitute the crime of bribery. Randall *v.* Evening News Assoc., 97 Mich. 136, 56 N. W. 361.

6. *Alabama.*— White *v.* State, 103 Ala. 72, 16 So. 63.

Delaware.—State *v.* Davis, 2 Pennew. (Del.) 139, 45 Atl. 394.

Iowa.— Dishon *v.* Smith, 10 Iowa 212.

Kentucky.— Johnson *v.* Com., 90 Ky. 53, 12 Ky. L. Rep. 20, 13 S. W. 520.

Maine.— State *v.* Miles, 89 Me. 142, 36 Atl. 70.

Texas.— Hutchinson *v.* State, 36 Tex. 293. See also O'Brien *v.* State, 6 Tex. App. 665, 7 Tex. App. 181, where it was held that Tex. Pen. Code, art. 307, defining the offense of an offer to bribe does not apply to any one who accedes to the officer's suggestion of willingness to accept a bribe, the criminal intent originating with the officer, but if defendant offered to bribe the officer, no subsequent conduct on the part of the latter would exculpate defendant.

Guilty knowledge of recipient.— Under Mass. Pub. Stat. c. 205, § 9, it is not necessary that the recipient of the bribe shall know the purpose for which it is given in order to consummate the guilt of the briber. Com. *v.* Murray, 135 Mass. 530.

Donations made in aid of public enterprises, such as the removal of county-seats, the location of public institutions, institutions of learning, and the like, are not bribery or official corruption. Ford *v.* North Des Moines, 80 Iowa 626, 45 N. W. 1031. See also Dishon *v.* Smith, 10 Iowa 212; State *v.* Orange, 54 N. J. L. 111, 22 Atl. 1004, 14 L. R. A. 62.

7. 4 Bl. Comm. 139; 3 Coke Inst. 145; 1 Hawkins P. C. c. 67. See also State *v.* Davis, 2 Pennew. (Del.) 139, 45 Atl. 394; State *v.* Ellis, 33 N. J. L. 102, 97 Am. Dec. 707.

8. *Alabama.*— Diggs *v.* State, 49 Ala. 311, where it was held that a county solicitor was a "ministerial officer" within the meaning of Ala. Code, § 3564.

California.— People *v.* Markham, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700, where it was held that 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. See also People *v.* Edson, 68 Cal. 549, 10 Pac. 192.

Delaware.— State *v.* Davis, 2 Pennew. (Del.) 139, 45 Atl. 394.

Indiana.— State *v.* Henning, 33 Ind. 189, where it was held that a prosecuting attorney is an officer intrusted with the administration of justice within the meaning of the statute.

Kansas.— Matter of Bozeman, 42 Kan. 451, 22 Pac. 628 (officers of school districts); State *v.* Pomeroy, 1 Centr. L. J. 414 (where it was held that a senator in the state legislature, although elected by a district which includes but a portion of the state, is an officer of the state within Kan. Gen. Stat. c. 31, § 193, and that the election of a United States senator about to be held is a "question, matter, cause, or proceeding . . . pending," within the meaning of statute).

Louisiana.— State *v.* Glaudi, 43 La. Ann.

do not, however, abrogate the common law but are more comprehensive in their character.[9]

b. De Facto Officers. A person exercising the functions of an office *de facto* is subject to the statutes denouncing the crime of bribery.[10]

5. The Act Done or to Be Done. If the bribe be offered or received it is not essential that the act for which it is given be actually accomplished,[11] but it seems that the act must be one capable of being done.[12] Whether to offer a bribe to an officer to influence his conduct in a matter not within the scope of his official duty constitutes the offense will depend upon the provisions of the various statutes. On the one hand, it has been held immaterial whether the officer had or had not jurisdiction;[13] while on the other, it has been held no offense to offer a bribe for an act entirely outside the officer's official function.[14]

B. Attempt to Bribe. An attempt to bribe is at common law a misdemeanor, and the person making the offer is liable to indictment and punishment.[15]

914, 9 So. 925; State *v.* McCrystol, 43 La. Ann. 907, 9 So. 922, which hold that La. Acts (1878), No. 59, is not confined to bribing or attempting to bribe jurors actually impaneled and sworn to try a particular case, but applies to all jurors who have been lawfully selected and summoned to act as such.

Michigan.— People *v.* Swift, 59 Mich. 529, 26 N. W. 694, where it was held that How. Anno. Stat. Mich. §§ 9241, 9242, applied as well to municipal as to state officers.

Nebraska.— Guthrie *v.* State, 16 Nebr. 667, 21 N. W. 455, where it was held that a state marshal may be prosecuted for accepting a bribe.

Ohio.— State *v.* Geyer, 5 Ohio S. & C. Pl. Dec. 646, 3 Ohio N. P. 242, 3 Ohio Leg. N. 431, where it was held that asking other members of the legislature to support bills, collecting and presenting facts and reasons to them, and making arguments to induce them to support the bills constitutes "official duty" and "action" within the statute making it a crime for a legislator to solicit from any person any valuable or beneficial thing, to influence him with respect to his official duty, or to influence his action in a matter pending before him.

Pennsylvania.— Com. *v.* Warren, 20 Wkly. Notes Cas. (Pa.) 378, where it was held that a police officer in the performance of his duty is an officer within the definition of bribery. *Compare* Com. *v.* Neely, 3 Pittsb. (Pa.) 527, where it was held that county commissioners were not included in the provisions of the Pa. Crim. Code (March 31, 1860), § 48.

Texas.— State *v.* Currie, 35 Tex. 17, where it was held that although the office of county attorney was not created until the year 1866, yet the incumbents were amenable to the provisions of the penal code enacted in 1858.

Washington.— State *v.* Womack, 4 Wash. 19, 29 Pac. 939, where it was held that a member of the board of education is an executive officer within the meaning of Wash. Pen. Code, § 174, article 3, section 1, of the constitution, not limiting the executive officers of the state to those therein mentioned.

United States.— U. S. *v.* Ingham, 97 Fed. 935 (where it was held that a secret-service agent employed by the secretary of the treasury was embraced within the provisions of U. S. Rev. Stat. (1872), § 5451); U. S. *v.* Van Leuven, 62 Fed. 62 (where it was held that a member of a board of examining surgeons is an officer acting on behalf of the United States in an official capacity within the meaning of U. S. Rev. Stat. (1872), § 5501); U. S. *v.* Kessel, 62 Fed. 57.

See 8 Cent. Dig. tit. "Bribery," § 3.

9. State *v.* Ellis, 33 N. J. L. 102, 97 Am. Dec. 707; State *v.* Womack, 4 Wash. 19, 29 Pac. 939.

The essence of the offense is the prostitution of a public trust, the betrayal of public interest, and the debauchment of public conscience. State *v.* Duncan, 153 Ind. 318, 54 N. E. 1066; Moseley *v.* State, 25 Tex. App. 515, 8 S. W. 652; Blachford *v.* Preston, 8 T. R. 89.

10. Diggs *v.* State, 49 Ala. 311; State *v.* Duncan, 153 Ind. 318, 54 N. E. 1066; State *v.* Wynne, 118 N. C. 1206, 24 S. E. 216; Florez *v.* State, 11 Tex. App. 102. *Compare* Messer *v.* State, 37 Tex. Crim. 635, 40 S. W. 488.

11. State *v.* Miles, 89 Me. 142, 36 Atl. 70.

12. **Existence of office to be filled.**— The offer of money to an officer to induce him to appoint or vote for a certain person to fill an office which does not in fact exist does not constitute bribery. Com. *v.* Scalley, 16 Ky. L. Rep. 494, 29 S. W. 352; Com. *v.* Reese, 16 Ky. L. Rep. 493, 29 S. W. 352.

Pendency of action.— An offer to bribe a judicial officer corruptly to decide a cause not legally pending before him is not punishable under the statutes, although an indictable offense at common law. Barefield *v.* State, 14 Ala. 603; Newman *v.* State, 97 Ga. 367, 23 S. E. 831.

13. Matter of Bozeman, 42 Kan. 451, 22 Pac. 628; State *v.* Ellis, 33 N. J. L. 102, 97 Am. Dec. 707.

14. U. S. *v.* Boyer, 85 Fed. 425; *In re* Yee Gee, 83 Fed. 145; U. S. *v.* Gibson, 47 Fed. 833.

15. Barefield *v.* State, 14 Ala. 603; Walsh *v.* People, 65 Ill. 58, 16 Am. Rep. 569; State *v.* Ellis, 33 N. J. L. 102, 97 Am. Dec. 707; Rex *v.* Vaughan, 4 Burr. 2494; Rex *v.* Plympton, 2 Ld. Raym. 1377; Wade *v.* Broughton, 3 Ves. & B. 172.

An offer to bribe is an attempt to bribe,

C. Soliciting Bribe. For a public officer to propose to receive a bribe is an indictable offense.[16]

III. JURISDICTION AND VENUE.

The offense of bribery is complete in the jurisdiction where the offer is made so as to give jurisdiction to the courts thereof, notwithstanding such offer is received in another jurisdiction.[17]

IV. INDICTMENT, INFORMATION, OR COMPLAINT.[18]

A. In General. An indictment or information for bribery should charge with certainty and precision all the facts and circumstances necessary to constitute the offense,[19] and when based on a statute must be framed in reference thereto, and conform to either its letter or its substance.[20] It must be unobjectionable on

and is punishable as such. Com. *v.* Harris, 1 Leg. Gaz. (Pa.) 455.

16. *California.*— People *v.* Squires, 99 Cal. 327, 33 Pac. 1092.

Illinois.— Busse *v.* People, 65 Ill. 66 note; Walsh *v.* People, 65 Ill. 58, 16 Am. Rep. 569.

Louisiana.—State *v.* Desforges, 48 La. Ann. 73, 18 So. 912, where it is held that the offense, although denounced by statute, was not punishable at common law.

Minnesota.— State *v.* Durnam, 73 Minn. 150, 75 N. W. 1127.

Ohio.— State *v.* Abbot, 5 Ohio S. & C. Pl. Dec. 650, 1 Ohio N. P. 447.

Contra, Hutchinson *v.* State, 36 Tex. 293.

While one who gives a bribe is an accomplice of the officer receiving it (Ruffin *v.* State, 36 Tex. Crim. 565, 38 S. W. 169), it has been held that one who gives or offers a bribe is not in law an accomplice of the one who asks for it (State *v.* Durnam, 73 Minn. 150, 75 N. W. 1127).

17. U. S. *v.* Worrall, 2 Dall. (Pa.) 384, 28 Fed. Cas. No. 16,766, Whart. St. Tr. 189, holding that the offense of attempting to bribe an officer of the United States is completed within the district of Pennsylvania, so as to be cognizable in the circuit court thereof, when the letter containing the corrupt offer is both written and delivered at a post-office in that state, although it is forwarded to and received by the officer in the state of New Jersey.

18. **For forms** of indictments, informations, or complaints, in whole or in part see the following cases:

Alabama.— White *v.* State, 103 Ala. 72, 16 So. 63; Caruthers *v.* State, 74 Ala. 406; Diggs *v.* State, 49 Ala. 311.

Arkansas.— Watson *v.* State, 29 Ark. 299.

California.— People *v.* Squires, 99 Cal. 327, 33 Pac. 1092; People *v.* Markham, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700.

Delaware.— State *v.* Davis, 2 Pennew. (Del.) 139, 45 Atl. 394.

Florida.— State *v.* Pearce, 14 Fla. 153.

Indiana.— Shircliff *v.* State, 96 Ind. 369; State *v.* Walls, 54 Ind. 561; State *v.* Henning, 33 Ind. 189.

Kansas.— Matter of Bozeman, 48 Kan. 451, 22 Pac. 628.

Louisiana.— State *v.* McCrystol, 43 La. Ann. 907, 9 So. 922.

Maine.— State *v.* Miles, 89 Me. 142, 36 Atl. 70.

Massachusetts.— Com. *v.* Lapham, 156 Mass. 480, 31 N. E. 638.

Minnesota.— State *v.* Howard, 66 Minn. 309, 68 N. W. 1096, 61 Am. St. Rep. 403, 34 L. R. A. 178.

Missouri.— State *v.* Graham, 96 Mo. 120, 8 S. W. 911.

North Carolina.— State *v.* Pritchard, 107 N. C. 921, 12 S. E. 50.

Texas.— Reed *v.* State, 43 Tex. 319.

Virginia.— Old *v.* Com., 18 Gratt. (Va.) 915; Newell *v.* Com., 2 Wash. (Va.) 88.

Washington.— State *v.* Womack, 4 Wash. 19, 29 Pac. 939.

West Virginia.— State *v.* Lusk, 16 W. Va. 767.

United States.—U. S. *v.* Boyer, 85 Fed. 425.

England.— Rex *v.* Cassano, 5 Esp. 231.

19. *Alabama.*—Rivers *v.* State, 97 Ala. 72, 12 So. 434.

California.— People *v.* Ward, 110 Cal. 369, 42 Pac. 894; People *v.* Turnbull, 93 Cal. 630, 29 Pac. 224.

Texas.— Hutchinson *v.* State, 36 Tex. 293.

Virginia.— Newell *v.* Com., 2 Wash. (Va.) 88.

Washington.— State *v.* Womack, 4 Wash. 19, 29 Pac. 939.

A general averment that defendant bribed a certain person to do a certain thing is the averment of a legal conclusion only, and is insufficient. People *v.* Ward, 110 Cal. 369, 42 Pac. 894.

20. *California.*— People *v.* Squires, 99 Cal. 327, 33 Pac. 1092; People *v.* Edson, 68 Cal. 549, 10 Pac. 192; People *v.* Markham, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700; People *ex rel.* Perley, 2 Cal. 564.

Indiana.— Higgins *v.* State, 157 Ind. 57, 60 N. E. 685; Glover *v.* State, 109 Ind. 391, 10 N. E. 282; State *v.* McDonald, 106 Ind. 233, 6 N. E. 607.

Kentucky.— Com. *v.* Hurt, 10 Ky. L. Rep. 773.

Louisiana.— State *v.* Glaudi, 43 La. Ann. 914, 9 So. 925; State *v.* McCrystol, 43 La. Ann. 907, 9 So. 922.

Massachusetts.— Com. *v.* Donovan, 170

the grounds of duplicity, repugnancy, or variance, as faults in these respects are fatal.[21]

B. Particular Averments — 1. Nature and Value of Bribe. It should be averred that defendant gave something of value or advantage, present or prospective, or some promise or undertaking, or did some act constituting the offense;[22] but the indictment need not allege the kind and value of the money,[23] or an offer of any specified sum.[24]

2. Intent. It must be alleged that the bribe was given or received with corrupt intent.[25]

3. Official Character of Officer. The official character of the officer to whom the bribe was offered or given, or by whom it was accepted or solicited, should be shown.[26]

4. Act Contemplated. Where the gravamen of the offense is the corrupt offer, solicitation, or acceptance of a bribe to influence the official conduct of the officer,[27]

Mass. 228, 49 N. E. 104; State *v.* Lapham, 156 Mass. 480, 31 N. E. 638.

Minnesota.— State *v.* Howard, 66 Minn. 309, 68 N. W. 1096, 61 Am. St. Rep. 403, 34 L. R. A. 178.

New York.— People *v.* Willis, 24 Misc. (N. Y.) 549, 54 N. Y. Suppl. 52; People *v.* Jaehne, 4 N. Y. Crim. 478.

North Carolina.— State *v.* Wynne, 118 N. C. 1206, 24 S. E. 216.

Virginia.— Old *v.* Com., 18 Gratt. (Va.) 915.

21. *Alabama.*— Diggs *v.* State, 49 Ala. 311.

Colorado.— Newman *v.* People, 23 Colo. 300, 47 Pac. 278.

Iowa.— State *v.* Potts, 78 Iowa 656, 43 N. W. 534, 5 L. R. A. 814.

Massachusetts.— Com. *v.* Donovan, 170 Mass. 228, 49 N. E. 104.

Nebraska.— Guthrie *v.* State, 16 Nebr. 667, 21 N. W. 455.

New York.— People *v.* Willis, 24 Misc. (N. Y.) 549, 54 N. Y. Suppl. 52.

Ohio.— Watson *v.* State, 39 Ohio St. 123.

South Carolina.— State *v.* Smalls, 11 S. C. 262.

Variance.— On an indictment charging defendant, a county commissioner, with accepting a bribe with the understanding that his opinion, judgment, acts, influence, and vote would be given in favor of securing the appointment of a person to an office to be filled by the commissioners' court, a conviction cannot be had on proof that he accepted the bribe with the understanding that he should bribe another commissioner with it. Ruffin *v.* State, 36 Tex. Crim. 565, 38 S. W. 169.

22. *California.*— People *v.* Ward, 110 Cal. 369, 42 Pac. 894.

Indiana.— State *v.* Stephenson, 83 Ind. 246; State *v.* Walls, 54 Ind. 561.

Massachusetts.— Com. *v.* Donovan, 170 Mass. 228, 49 N. E. 104.

Minnesota.— State *v.* Howard, 66 Minn. 309, 68 N. W. 1096, 61 Am. St. Rep. 403, 34 L. R. A. 178.

Ohio.— Watson *v.* State, 39 Ohio St. 123.

Texas.— Leeper *v.* State, 29 Tex. App. 154, 15 S. W. 411.

Virginia.— Com. *v.* Chapman, 1 Va. Cas. 138.

United States.— U. S. *v.* Kessel, 62 Fed. 57.

Promissory note.— An indictment against a public officer charging him with having received a promissory note for the payment to him of money by the maker, as a bribe to influence his action in the discharge of an official duty, does not charge the receiving by him of a thing of value, and is bad on a motion to quash. A note executed to a public officer to improperly influence his official conduct is not only without a valid consideration, but is against public policy, and hence utterly void. State *v.* Walls, 54 Ind. 561. But see *infra*, note 41.

23. Leeper *v.* State, 29 Tex. App. 154, 15 S. W. 411.

24. Watson *v.* State, 39 Ohio St. 123; Com. *v.* Chapman, 1 Va. Cas. 138.

25. State *v.* Pritchard, 107 N. C. 921, 12 S. E. 50; Collins *v.* State, 25 Tex. Suppl. 202. *Compare* Gunning *v.* People, 86 Ill. App. 676.

26. *Alabama.*— Caruthers *v.* State, 74 Ala. 406.

California.— People *v.* Markham, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700.

Florida.— State *v.* Pearce, 14 Fla. 153.

Indiana.— Banks *v.* State, 157 Ind. 190, 60 N. E. 1087.

Iowa.— See State *v.* Potts, 78 Iowa 656, 43 N. W. 534, 5 L. R. A. 814.

Massachusetts.— State *v.* Lapham, 156 Mass. 480, 31 N. E. 638; Com. *v.* Murray, 135 Mass. 530.

Texas.— State *v.* Currie, 35 Tex. 17.

West Virginia.— State *v.* Lusk, 16 W. Va. 767.

England.— Rex *v.* Plympton, 2 Ld. Raym. 1377.

Appointment of arbitrator.— An indictment under W. Va. Code, c. 147, § 7, for offering to bribe an arbitrator need not allege that the arbitrators were appointed by order of the court, or that the court had jurisdiction of the cause, for under the statute arbitrators may be appointed by the parties in a cause not pending. State *v.* Lusk, 16 W. Va. 767.

27. State *v.* Graham, 96 Mo. 120, 8 S. W. 911; State *v.* Smalls, 11 S. C. 262; Rath *v.* State, 35 Tex. Crim. 142, 33 S. W. 229.

the indictment need not allege that the contingency contemplated has arisen,[28] or the particular effect on the officer's conduct had in view;[29] or, in case of an offer or solicitation, that the officer was influenced thereby;[30] or that his action, if procured, would have had the desired result;[31] but under some statutes the indictment must allege that the officer had jurisdiction over the subject-matter in respect to which the bribe was offered, solicited, or given.[32]

5. SOLICITATION. An indictment against a public officer for soliciting a bribe need not set out the means of solicitation.[33]

V. DEFENSES.

A. Ignorance of Law Contracted Against. Ignorance of the existence of a specific statute against an offense is no defense to a prosecution against an officer for accepting a bribe not to perform his duty in the enforcement of the law against such offense.[34]

B. Instigation of Others. One who has actually accepted a bribe cannot excuse his act on the ground that it was instigated by others for the purpose of entrapping him.[35]

C. Lack of Authority. In a prosecution for offering a bribe to an officer who is acting as such under a statute, defendant cannot question the constitutionality of such statute,[36] nor can an officer *de facto*, prosecuted for accepting a bribe, raise the question as to his authority to act.[37]

D. Legality of Antecedent Proceedings. In a prosecution for bribery a defendant cannot impeach the legality of the proceedings in connection with which the bribe is offered, given, or accepted.[38]

E. Non-Enforceability of Contemplated Contract. In a prosecution

Eligibility for office.— An indictment under Mo. Rev. Stat. § 1470, for bribing an officer to appoint defendant to an office need not allege that defendant was eligible to said office, for the purpose of being appointed to which he gave the bribe. The gravamen of the offense interdicted by the statute is the intent to influence the official action of the officer by giving him a bribe. State *v.* Graham, 96 Mo. 120, 8 S. W. 911.

28. Shircliff *v.* State, 96 Ind. 369; State *v.* Pomeroy, 1 Centr. L. J. 414; Com. *v.* Lapham, 156 Mass. 480, 31 N. E. 638; Ruffin *v.* State, 36 Tex. Crim. 565, 38 S. W. 169.

29. State *v.* Walls, 54 Ind. 561; Reed *v.* State, 43 Tex. 319. See also Glover *v.* State, 109 Ind. 391, 10 N. E. 282. *Compare* Ruffin *v.* State, 36 Tex. Crim. 565, 38 S. W. 169.

30. Higgins *v.* State, 157 Ind. 57, 60 N. E. 685.

31. State *v.* Ellis, 33 N. J. L. 102, 97 Am. Dec. 707.

32. People *ex rel.* Perley, 2 Cal. 564; Gunning *v.* People, 189 Ill. 165, 59 N. E. 494, 82 Am. St. Rep. 433 [*reversing* 86 Ill. App. 676]; Shircliffe *v.* State, 96 Ind. 369; Collins *v.* State, 25 Tex. Suppl. 202. But see State *v.* Potts, 78 Iowa 656, 43 N. W. 534, 5 L. R. A. 814; State *v.* Ellis, 33 N. J. L. 102, 97 Am. Dec. 707.

33. State *v.* Bauer, 19 Ohio N. P. 103. See also Com. *v.* Root, 96 Ky. 533, 16 Ky. L. Rep. 491, 29 S. W. 351, where it was held that although the indictment did not allege that the reward offered to another than the voter was offered at the voter's instance, but alleged that it was offered to such other person with intent to influence the voter, and did influence and control the voter in his vote as councilman, in a certain election, it was sufficient.

It is sufficient to aver that the accused offered or was ready to make a corrupt agreement or understanding. People *v.* Squires, 99 Cal. 327, 33 Pac. 1092.

34. Newman *v.* People, 23 Colo. 300, 47 Pac. 278, law against gaming.

35. People *v.* Liphardt, 105 Mich. 80, 62 N. W. 1022. See also Rath *v.* State, 35 Tex. Crim. 142, 33 S. W. 229, where it was held that it is immaterial that the suggestion of the offer to bribe came from the officer, for the fact that the latter might have been willing to be bribed would be no justification or excuse in defendant's offering the bribe.

36. State *v.* Gardner, 54 Ohio St. 24, 42 N. E. 999, 31 L. R. A. 660.

37. State *v.* Duncan, 153 Ind. 318, 54 N. E. 1066.

38. Moseley *v.* State, 25 Tex. App. 515, 8 S. W. 652; Florez *v.* State, 11 Tex. App. 102.

Release of prisoner illegally held.— Where the alleged object of the bribe offered was to obtain the release of a prisoner who was in the custody of the officer as jailer, and it was contended by defendant that inasmuch as no mittimus to the officer was in proof, the prisoner was not legally in custody, it was held that the manner in which the officer became charged with the custody of the prisoner was a matter into which defendant was not entitled to inquire. Florez *v.* State, 11 Tex. App. 102.

against an officer for accepting a bribe to influence him in his official action, and for entering into a contract in pursuance of such bribe, it is no defense that such contract was void and non-enforceable.[39]

F. Reputation of Accused. That the accused has always borne a good reputation for integrity is in his favor during the trial, but is no defense to the crime of bribery, if actually committed.[40]

G. Worthlessness of Bribe. The worthlessness of the bribe given or received is no defense in a prosecution therefor.[41]

VI. COMPETENCY OF WITNESSES.

Where defendant contends that the prosecuting witness is an accomplice, it is admissible for such witness to testify upon such collateral issue, and to explain his conduct.[42]

VII. EVIDENCE.

A. Burden of Proof. As in other criminal cases, defendant is presumed to be innocent, and the burden of establishing his guilt by proving all the elements of the offense is upon the state.[43]

B. Admissibility — 1. In General — a. Acts and Declarations of Accused. It is permissible to show the various steps taken by the accused in committing the crime, including preliminary negotiations with the other parties,[44] and his acts subsequently to the offense charged, which tend to confirm that charge.[45] Other acts of bribery unconnected with the offense charged are inadmissible in evidence,[46] but where the prosecution is for offering to bribe an officer, subsequent offers made to the same officer, and with regard to the same subject-matter, are admissible.[47] It has been held that previous similar statements of the

39. Glover *v.* State, 109 Ind. 391, 10 N. E. 282.

40. *In re* Wellcome, 23 Mont. 450, 59 Pac. 445.

41. Com. *v.* Donovan, 170 Mass. 228, 49 N. E. 104.

Illegality of note.— It is no defense to a prosecution for bribery under N. Y. Pen. Code, § 72, providing that any officer who asks, receives, or agrees to receive a bribe, or any promise or agreement therefor, on the understanding that his official action will be thereby influenced, shall be punishable for bribery, that the notes which accused received were void because of the illegality of the transaction. People *v.* Willis, 24 Misc. (N. Y.) 549, 54 N. Y. Suppl. 52 [*distinguishing* State *v.* Walls, 54 Ind. 561 (see *supra*, IV, B, 1, note 22), on the ground that the statute under which defendant in that case was prosecuted was aimed only at any officer who should "take any money, gift, property or undue reward, to influence his behavior," etc. The statute did not provide for bribery by means of a promise or offer to give something of value, but only by means of an actual giving].

42. People *v.* Squires, 99 Cal. 327, 33 Pac. 1092; People *v.* Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129.

43. White *v.* State, 103 Ala. 72, 16 So. 63; State *v.* Graham, 96 Mo. 120, 8 S. W. 911; *In re* Yee Gee, 83 Fed. 145. See also Devlin *v.* New York, 4 Misc. (N. Y.) 106, 23 N. Y. Suppl. 888, 55 N. Y. St. 455.

44. State *v.* Durnam, 73 Minn. 150, 75 N. W. 1127; State *v.* Smith, 72 Vt. 366, 48 Atl. 647. See also Caruthers *v.* State, 74 Ala. 406.

45. People *v.* O'Neil, 109 N. Y. 251, 16 N. E. 68, 14 N. Y. St. 829 [*affirming* 48 Hun (N. Y.) 36, 17 N. Y. St. 956, 5 N. Y. Crim. 302]. See also People *v.* Kerr, 6 N. Y. Suppl. 674, where it was held that where the bribery was with the object of securing a street-railway franchise from the board of aldermen, evidence that those members who, by the testimony of an accomplice, were implicated in the conspiracy, voted against a resolution to sell the franchise at auction is competent in corroboration of the testimony of the accomplice.

46. People *v.* Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851 [*reversing* 45 Hun (N. Y.) 460]. *Compare* Guthrie *v.* State, 16 Nebr. 667, 21 N. W. 455, where it was held that under the allegations of an indictment alleging that defendant was paid a certain sum by one named "and others, whose names are to the jurors unknown," and under the peculiar circumstances of the case at issue, it was 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.

47. Rath *v.* State, 35 Tex. Crim. 142, 33 S. W. 229.

prosecuting witness were properly admitted in evidence in corroboration of his testimony.[48]

b. Documents and Records — (I) *In General.* Documents and records are admissible in evidence and may be read to the jury, in order to prove the alleged offense. Thus, the journal of a state senate has been admitted to prove the pendency of the matter with regard to which a senator was accused of bribery;[49] and the records of cases in which defendants were charged with attempted bribery of jurors, to show that the cause was pending[50] and that the jurors served therein.[51] Similarly it is permissible to introduce a previous indictment for the same offense, which has been quashed, in order to show that the pending prosecution is not barred by the statute of limitations.[52]

(II) *Letters.* A letter to the accused bearing upon the question of bribery is admissible in evidence, where a witness testifies that the accused showed it to him, and stated that the warrants therein listed were issued by him in consideration of money received from the person in whose favor they were issued.[53] Similarly in a prosecution for offering to receive a bribe, letters from an officer to his employer communicating the facts bearing upon the issue, being an incident of the business, and contemporaneous therewith, have been admitted as a part of the *res gestæ*.[54]

c. Opinions. Opinion evidence with respect to the advisability or non-advisability of the action with regard to which an officer is charged with accepting a bribe is inadmissible. The crime may be established as well by showing that the officer did his duty under the influence of a bribe as that he violated it.[55]

2. Business Condition of Parties. In a prosecution for accepting a bribe the business condition of the accused may be shown.[56] Similarly in a prosecution for giving a bribe, evidence is admissible to show that, at about the time of the alleged bribery, the corporation, in whose interest the bribe was given, raised the required amount of money, for which there was no apparent necessity for legitimate purposes and that the money did not appear to have been used for legitimate ends.[57]

3. Nature of Offense in Which Bribe Was Offered. It is competent, in a prosecution for attempted bribery of a witness, to show the general nature of the crime in connection with which the offer was made, in order to prove the materiality of the requested testimony.[58]

C. Weight and Sufficiency — 1. In General — a. Identity of Person Offering Bribe. On a charge of bribery the identity of the person offering the bribe need not be proved. It is sufficient if the agreement to accept a bribe is proved with some person, no matter whom.[59]

48. People *v.* Fong Ching, 78 Cal. 169, 20 Pac. 396.

Evidence of accused in other proceedings.— In New York it is provided by statute that a person connected with a case of bribery shall be a competent witness against others so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding, or investigation, but that such testimony shall not be used against such witness. People *v.* Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851 [*reversing* 45 Hun (N. Y.) 460], where it was held that testimony given before a legislative committee delegated to inquire generally into the truth of rumors, and charges of bribery in connection with the granting of street-railroad privileges was given in an "investigation" within the meaning of N. Y. Pen. Code, § 79.

49. State *v.* Smalls, 11 S. C. 262.

50. White *v.* State, 103 Ala. 72, 16 So. 63.

51. People *v.* Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129.

52. White *v.* State, 103 Ala. 72, 16 So. 63.

53. Glover *v.* State, 109 Ind. 391, 10 N. E. 282.

54. State *v.* Desforges, 48 La. Ann. 73, 18 So. 912.

55. People *v.* O'Neil, 109 N. Y. 251, 16 N. E. 68, 14 N. Y. St. 829 [*affirming* 48 Hun (N. Y.) 36, 17 N. Y. St. 956, 5 N. Y. Crim. 302].

56. People *v.* O'Neil, 48 Hun (N. Y.) 36, 17 N. Y. St. 956, 5 N. Y. Crim. 302 [*affirmed* in 109 N. Y. 251, 16 N. E. 68, 14 N. Y. St. 829]; State *v.* Smalls, 11 S. C. 262. *Compare* People *v.* Stephenson, 91 Hun (N. Y.) 613, 36 N. Y. Suppl. 595, 71 N. Y. St. 649.

57. People *v.* Kerr, 6 N. Y. Suppl. 674.

58. People *v.* Fong Ching, 78 Cal. 169, 20 Pac. 396.

59. People *v.* O'Neil, 48 Hun (N. Y.) 36, 17 N. Y. St. 956, 5 N. Y. Crim. 302 [*affirmed* in 109 N. Y. 251, 16 N. E. 68, 14 N. Y. St. 829].

b. Of Evidence of Decoy. The fact that the witness has acted as a detective or decoy apparently entering into the criminal plan, in order to detect and expose it, does not of itself render his evidence unworthy of belief,[60] but defendant may fully cross-examine him as to his connection with the case, and as to the names of all who were concerned in the alleged detection.[61]

c. Official Character of Officer. On a trial for bribery it is not necessary to introduce record evidence as to the election or appointment and qualification of the officer.[62]

d. Promise by Person Bribed. In a prosecution for giving a bribe, it is unnecessary to prove that the person bribed made any promise as to his future action.[63]

e. Value of Bribe. It is not necessary to prove the value of the bribe as laid in the indictment. It is sufficient merely to prove that it is of some value.[64]

2. In Prosecution For Soliciting Bribe. In a prosecution under a statute making it a crime to solicit a bribe it is not necessary to prove that anything was given to defendant, or that he solicited the bribe for his own use and intended to use it for his own purposes. The crime is complete when the solicitation is made.[65]

VIII. TRIAL.

A. Questions of Law and Fact. What constitutes bribery is a question of law for the court; whether under the evidence the crime has been committed is a question of fact for the jury.[66]

B. Instructions. It is the duty of the court to instruct the jury as to what constitutes the offense of bribery, and that, in order to a conviction, all the elements of the offense must be proved beyond a reasonable doubt.[67]

60. *In re* Wellcome, 23 Mont. 450, 59 Pac. 445.

61. People *v.* Liphardt, 105 Mich. 80, 62 N. W. 1022.

62. Rath *v.* State, 35 Tex. Crim. 142, 33 S. W. 229.

63. Com. *v.* Donovan, 170 Mass. 228, 49 N. E. 104.

64. Com. *v.* Donovan, 170 Mass. 228, 49 N. E. 104.

65. State *v.* Geyer, 5 Ohio S. & C. Pl. Dec. 646, 3 Ohio N. P. 242, 3 Ohio Leg. N. 431, where it was further held that the state need not prove that the thing solicited was the only consideration that was to influence defendant with respect to his official duty.

66. *California.*— People *v.* Fong Ching, 78 Cal. 169, 20 Pac. 396.

Massachusetts.— Com. *v.* Donovan, 170 Mass. 228, 49 N. E. 104.

Ohio.— State *v.* Geyer, 5 Ohio S. & C. Pl. Dec. 646, 3 Ohio N. P. 242, 3 Ohio Leg. N. 431.

Pennsylvania.— Com. *v.* Petroff, 2 Pearson (Pa.) 534, 8 Wkly. Notes Cas. (Pa.) 212, 1 Ky. L. Rep. 132.

Vermont.— State *v.* Smith, 72 Vt. 366, 48 Atl. 647.

When words of a doubtful meaning are used it is for the jury to say whether they constitute an offer or promise within the prohibition of the law. Com. *v.* Petroff, 2 Pearson (Pa.) 534, 8 Wkly. Notes Cas. (Pa.) 212, 1 Ky. L. Rep. 132.

67. State *v.* Smith, 72 Vt. 366, 48 Atl. 647.

Character, profession, and vocation of witnesses.— It is erroneous to instruct the jury that where the witnesses are shown to have been active parties to the transaction they may consider the character, profession, and vocation of such witnesses in judging of the probability of their participating in such transaction, and whether they would have been likely to offer a bribe to an officer; and that in determining that as a fact they might judge of the character of the party alleged to have made the offer. People *v.* Edson, 68 Cal. 549, 10 Pac. 192.

Conduct of accused.— Where the conduct of the accused when arrested is shown by the evidence, it is proper to charge the jury that his conduct bore on the question of his acceptance of the bribe. State *v.* Smith, 72 Vt. 366, 48 Atl. 647, where it was also held that where the evidence in a prosecution for bribery showed that defendant proposed to conceal the crime when he was arrested, it was proper to charge that such proposal was evidence to prove his guilt.

Official character of person bribed.—In a prosecution for bribing an officer to appoint defendant to an office it is error to refuse to instruct the jury that it devolves upon the state to prove affirmatively and by competent evidence that defendant, within three years prior to the finding of the indictment, offered to pay or did actually pay to the officer money, gratuity, reward, or some other valuable consideration with the intent to induce or procure the said officer to appoint defendant to the office; and that at the time of

IX. PUNISHMENT.

Independently of statute the crime of bribery is punishable at common law as a misdemeanor by fine and imprisonment.[68]

BRICK. An artificial substitute for stone, which has been extensively used for building in all ages.[1]

BRIDEWELL. A house of correction.[2]

paying such money, gratuity, reward, or other consideration the said officer was authorized to make such appointment. State *v.* Graham, 96 Mo. 120, 8 S. W. 911.

Weight of evidence.—On a trial for bribing a witness to testify falsely the defense being that money was paid to the witness to dissuade him from giving false testimony, a charge that it is not a recognized custom of the country to subsidize the personal integrity of citizens to prevent them from lapsing into falsehood and perjury is error as usurping the powers of the jury. People *v.* Fong Ching, 78 Cal. 169, 20 Pac. 396.

68. State *v.* Ellis, 33 N. J. L. 102, 97 Am. Dec. 707; 4 Bl. Comm. 140; 3 Coke Inst. 147. See also Barefield *v.* State, 14 Ala. 603, where it was held that an offer to bribe a justice of the peace corruptly to decide a cause not then pending, but afterward to be instituted before him, the bribe not being accepted or the suit instituted, although indictable at common law, is not punishable by confinement in the penitentiary under the statute of Alabama.

1. 2 Chamber Encycl. 337 [*quoted* in De Casse *v.* Spader, 7 Fed. Cas. No. 3,720, 3 Int. Rev. Rec. 163].

The word is derived from the Latin word *imbrex*, which was the name given to a hollowed tile for carrying off the rain. De Casse *v.* Spader, 7 Fed. Cas. No. 3,720, 3 Int. Rev. Rec. 163 [*citing* Richardson Dict.; Webster Dict.].

Size of brick.—"Among builders and mechanics a brick is understood to be eight inches in length, four inches in width and two inches in thickness." Peters *v.* Chicago, 192 Ill. 437, 438, 61 N. E. 438.

2. Wharton L. Lex.

BRIDGES

By Frank E. Jennings

CROSS-REFERENCES

For Matters Relating to:
Acceptance of Dedicated Bridge, see DEDICATION.
Bridges:
Obstruction of Navigation by, see NAVIGABLE WATERS.
Over and Under Railroads, see RAILROADS.
Over Canals, see CANALS.
Over Mill-Races, see WATERS.
Taxation of:
Generally, see TAXATION.
Between States, see COMMERCE.
Collisions Between Bridges and Vessels, see NAVIGABLE WATERS.
Condemnation of Land For Bridges and Approaches, see EMINENT DOMAIN.
Government Control of Bridges Over Navigable Streams, see COMMERCE.
Public Aid to Bridge Companies, see COUNTIES; MUNICIPAL CORPORATIONS; TOWNS.

I. Definition and Nature.

A bridge is a structure of wood, iron, brick, or stone, ordinarily erected over a river, creek, pond, or lake; or over a ravine, railroad, canal, or other obstruction in a highway,[1] so as to make a continuous roadway, and afford to travelers a convenient passageway from one bank to the other.[2] While a bridge is a part of the highway which passes over it,[3] no definite rule can be laid down as to where

1. Distinction between meaning at common law and under statute.— So far at least as the duty to repair is concerned, the word "bridge" at common law was held to mean a structure across a stream or watercourse: it should be a structure *super flumen vel cursum aquæ* (see *infra*, III, A, 1, a, (I), (A)), and while our legislatures in the use of the term may clearly imply that its meaning is to be restricted to its common-law signification (Carroll County *v.* Bailey, 122 Ind. 46, 23 N. E. 672; Clark County *v.* Brod, 3 Ind. App. 585, 29 N. E. 430), it has been held that unless the import of the term was clearly limited by statute, it would mean any structure by which a highway was carried over a place (Whitall *v.* Gloucester County, 40 N. J. L. 302. See also State *v.* Pierce County, 71 Wis. 321, 37 N. W. 231). In Bridge Proprietors *v.* Hoboken Land, etc., Co., 1 Wall. (U. S.) 116, 17 L. ed. 571, after commenting upon the fact that old terms with well-defined meaning have been applied often to things totally new, it was held that a railroad bridge, erected merely for the transfer of trains, and being entirely unfit for vehicles, and unsafe for pedestrians, was not a bridge within the meaning of the term as used in 1790. *Compare* Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716.

2. Carroll County *v.* Bailey, 122 Ind. 46, 48, 23 N. E. 672.

Other definitions are: "Any structure of wood, stone, brick or iron, raised over a river, pond, lake or across a valley." Madison County *v.* Brown, 89 Ind. 48, 52 [*citing* 3 American Cycl. art. Bridge; Webster Dict.].

"A building constructed over a river, creek or other stream, or over a ditch or other place, in order to facilitate the passage over the same." Whitall *v.* Gloucester County, 40 N. J. L. 302, 305 [*citing* Shearman & R. Negl. § 248].

"A structure for the purpose of connecting the opposite banks of a river, by means of certain materials, forming a road way from one side to the other." Brande Encycl. [*quoted* in Tolland *v.* Willington, 26 Conn. 578, 583].

"A structure, usually of wood, stone, brick, or iron, erected over a river or other watercourse, or over a chasm, railroad, etc., to make a passage-way from one bank to the other. Anything supported at the ends, which serves to keep some other thing from resting upon the object spanned, which forms a platform or staging over which something passes or is conveyed." Webster Dict. [*quoted* in Duncan *v.* State, 29 Fla. 439, 453, 10 So. 815].

It must afford a passageway for travelers and others over streams or other obstructions and a structure of stone or wood which spans the width of a stream, but is wholly inaccessible at either end, whatever it may be in architecture, is not a bridge either in law or common parlance. Sussex County *v.* Strader, 18 N. J. L. 108, 35 Am. Dec. 530. The term "bridge," however, is a comprehensive one, and embraces every structure in the nature of a bridge, over any obstruction to the highway, whether a river, ditch, or other passage for water (Rusch *v.* Davenport, 6 Iowa 443 [*citing* Angell Highways, §§ 35–37]) regardless of its material or form of structure (Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 56, 42 Am. Dec. 716, where the court said: "It is a structure of wood, iron, brick or stone, ordinarily erected over a river brook or lake, for the more convenient passage of persons and beasts, and the transportation of baggage; and whether it is a wide raft of logs floating upon the water, and bound together with withs, or whether it rests on piles of wood, or stone abutments, or arches, it is still a bridge." See also Bridge Proprietors *v.* Hoboken Land, etc., Co., 13 N. J. Eq. 503, 510).

Bridges are either public or private.— Public bridges are such as form a part of the highway, according to their character as foot, horse, or carriage bridges, for the accommodation of the public generally, with or without payment of toll; while a private bridge is one erected by one or more private persons for their own use and convenience. Black L. Dict. But whether a bridge is public or private depends more upon the use to which it is subjected than upon whom the builder was. When erected by a private individual for private purposes it will not become public merely by being used by the public, unless it is of public utility (Rex *v.* Yorkshire West Riding, 5 Burr. 2594, 2 East 342, Lofft. 238, 2 W. Bl. 685, 6 Rev. Rep. 439), but if the bridge is of public utility, and is subjected to public use, it then becomes public, and as such must be repaired by the public (Whitall *v.* Gloucester County, 40 N. J. L. 302; Rex *v.* Bucks County, 12 East 192, 11 Rev. Rep. 347; Rex *v.* Glamorgan County, 2 East 356, note *a*, 6 Rev. Rep. 450 note. And see Reg. *v.* Southampton County, 19 Q. B. D. 590, 16 Cox C. C. 271, 52 J. P. 52, 56 L. J. M. C. 112, 57 L. T. Rep. N. S. 261).

3. *Indiana.*— Goshen *v.* Myers, 119 Ind. 196, 21 N. E. 657, holding that an acceptance

one terminates and the other begins.[4] While both at common law and usually under our statutes,[5] a bridge includes the abutments and approaches necessary to make it accessible and convenient for public travel,[6] the determination of the question of how much of the embankment constitutes the approach, so as to be a part of the bridge, is for the jury.[7]

of the highway would be an acceptance of the bridge.

Louisiana.— Oliff *v.* Shreveport, 52 La. Ann. 1203, 27 So. 688, holding that while the bridge in question was but an extension of the highway and was a part thereof, yet there was a distinction in that instance between the terms "highway" and "public road," and that a bridge built over a navigable stream by a railroad was not necessarily open to the travel of the general public, although constructed in a manner to admit of such travel.

Massachusetts.— Com. *v.* Central Bridge Corp., 12 Cush. (Mass.) 242.

Nebraska.— People *v.* Buffalo County, 4 Nebr. 150.

Pennsylvania.— Pittsburg, etc., Pass. R. Co. *v.* Point Bridge Co., 165 Pa. St. 37, 30 Atl. 511, 26 L. R. A. 323; Penn Tp. *v.* Perry County, 78 Pa. St. 457; Rapho Tp. *v.* Moore, 68 Pa. St. 404, 8 Am. Rep. 202. And see Chamberlain *v.* Peoples' Bridge Co., 2 Dauph. Co. Rep. (Pa.) 344, where, under a statute authorizing the formation of companies for the operation of street railways on any street or "highway" for public use, it was held that a corporation owning such a bridge and authorized to charge toll thereon, might, by contract, give to such a company the exclusive privilege of using such bridge for their authorized purpose.

Texas.— Jones *v.* Keith, 37 Tex. 394, 14 Am. Rep. 382.

United States.— Washer *v.* Bullitt County, 110 U. S. 558, 4 S. Ct. 249, 28 L. ed. 249. And see Silliman *v.* Hudson River Bridge Co., 4 Blatchf. (U. S.) 74, 22 Fed. Cas. No. 12,851.

England.— Reg. *v.* Sainthill, 2 Ld. Raym. 1174 [*cited* in Westfield *v.* Tioga County, 150 Pa. St. 152, 24 Atl. 700].

See 8 Cent. Dig. tit. "Bridges," § 4.

Statutory exception.— The statute may, however, use the term "road" or "highway" in such sense that it is plainly not intended to include bridges. Union Drainage Dist. *v.* Highway Com'rs, 87 Ill. App. 93.

4. The question becomes one of importance where, as at common law, and as is sometimes the case in this country, the duty of maintaining highways and the duty of maintaining bridges is placed upon different bodies. See Whitall *v.* Gloucester County, 40 N. J. L. 302.

At common law the respective limits of each seems not to have been fixed with absolute certainty until the enactment of 22 Hen. VIII, c. 5, which was, however, held to be an affirmance of the common law, and which fixed the line at three hundred feet back from the bridge structure at each end. Yorkshire West Riding *v.* Rex, 7 East 588, 2 Dow 1, 3 Eng. Reprint 767, 3 Smith K. B. 437, 5 Taunt. 284, 8 Rev. Rep. 688, 1 E. C. L. 152.

5. Statutory meaning not fixed.— The meaning of the term "bridge" when used in the statute cannot, however, be said to have a certain, fixed, and definite scope; but as to whether or not the approaches, causeways, and abutments at the end of the bridge are included within the term must be determined by the intent which, in view of all the circumstances, it was likely the term was intended to include in each particular case: the scope of the term being evidenced by all the words used, and not simply by one word. New Haven County *v.* Milford, 64 Conn. 568, 30 Atl. 768; Phillips *v.* East Haven, 44 Conn. 25; New Haven *v.* New York, etc., R. Co., 39 Conn. 128; Powers *v.* Woodstock, 38 Vt. 44. See also Traversy *v.* Gloucester County, 15 Ont. 214.

6. *Connecticut.*—Burritt *v.* New Haven, 42 Conn. 174; Tolland *v.* Willington, 26 Conn. 578.

Georgia.— Daniels *v.* Athens, 55 Ga. 609.

Indiana.— Rush County *v.* Rushville, etc., Gravel Road Co., 87 Ind. 502; Driftwood Valley Turnpike Co. *v.* Bartholomew County, 72 Ind. 226.

Massachusetts.— Whitcher *v.* Somerville, 138 Mass. 454.

Michigan.— Shaw *v.* Saline Tp., 113 Mich. 342, 71 N. W. 642.

New Jersey.— Sussex County *v.* Strader, 18 N. J. L. 108, 35 Am. Dec. 530.

Pennsylvania.— Francis *v.* Franklin Tp., 179 Pa. St. 195, 36 Atl. 202; Westfield *v.* Tioga County, 150 Pa. St. 152, 24 Atl. 700; Penn Tp. *v.* Perry County, 78 Pa. St. 457.

Vermont.— Tinkham *v.* Stockbridge, 64 Vt. 480, 24 Atl. 761; Bardwell *v.* Jamaica, 15 Vt. 438. To same effect see Tyler *v.* Williston, 62 Vt. 269, 20 Atl. 304, 9 L. R. A. 338 [*distinguishing* Powers *v.* Woodstock, 38 Vt. 44].

England.— Rex *v.* York County West Riding, 7 East 588.

See 8 Cent. Dig. tit. "Bridges," § 3.

7. Tolland *v.* Willington, 26 Conn. 578; Daniels *v.* Athens, 55 Ga. 609, 54 Ga. 79; Huntington County *v.* Huffman, 134 Ind. 1, 31 N. E. 570; Eginoire *v.* Union County, 112 Iowa 558, 84 N. W. 758; Casey *v.* Tama County, 75 Iowa 655, 37 N. W. 138; Nims *v.* Boone County, 66 Iowa 272, 23 N. W. 663; Moreland *v.* Mitchell County, 40 Iowa 394. *Compare* Saunders *v.* Gun Plains Tp., 76 Mich. 182, 42 N. W. 1088, where an approach to a bridge was of dirt with a stone wall on each side, stringers were laid on the dirt, and a plank walk laid on the stringers for foot-passengers, and it was held that both in fact and in law such walk was a "sidewalk" and

II. ESTABLISHMENT AND ERECTION.

A. At Common Law. At common law bridges seem to have been built either by the liberality of individuals or under authority of special acts of parliament,[8] counties being bound only to their repair,[9] and not to their erection.[10]

B. Under Legislative Enactment — 1. In General. It will thus be seen that the erection of public bridges in this country[11] is a matter dependent almost exclusively upon statutory enactments,[12] the right of the legislature to provide for the building of such structures being limited only by the existence of some prior contract made by it,[13] the provisions of the federal constitution relative to commerce,[14] or by some constitutional inhibition.[15] The usual method of exercis-

no part of the bridge proper or of the approach to the bridge.

Such was the common-law rule before the passage of 22 Hen. VIII, c. 5, Lord Ellenborough observing in Rex *v.* York County West Riding, 7 East 588, that he considered it to have been laid down long ago by Lord Coke, that the three hundred feet of highway at the ends of the bridge were to be taken as parts of the bridge itself; but that as in some cases the limit was uncertain, the statute was designed to make it exact.

An instruction which affects to submit this issue to the jury, but only directs them to find whether the accident was upon an approach to the bridge without finding that such approach was part of the bridge is erroneous. Newcomb *v.* Montgomery County, 79 Iowa 487, 44 N. W. 715.

8. State *v.* Canterbury, 28 N. H. 195, 230 [*citing* Woolrich Ways, 963], where it is said: "No trace has been found of any indictment for neglect to build a new bridge by such description."

In England, by the Great Charter (9 Hen. III, c. 15) no town or freeman could be compelled to make new bridges, where none had before been, except by act of parliament. Under such act they may be erected and maintained by corporations chartered for the purpose, by counties, or in whatever other mode parliament may prescribe. Bouvier L. Dict.

9. See *infra*, III, A, 1, a, (I), (A).

10. Sussex County *v.* Strader, 18 N. J. L. 108, 116, 35 Am. Dec. 530 [*citing* Rex *v.* Devon County, 14 East 477, 13 Rev. Rep. 285; Roscoe Ev. § 246]. *Compare* Dennis *v.* Maynard, 15 Ill. 477.

11. "**Different nations,** according to their general frame of government, adopt different modes of providing roads and bridges. In modern France, for example, a highly centralized despotism, the State is everything. Their municipal institutions are without a democratic element, or the power of independent local self-government. The central power governs and regulates everything. It provides amusements, constructs roads and bridges, controls trade, inspects manufactures, &c.— the only agency of the people being the poor privilege of paying the expense. But under our decentralized system it is entirely different. Here each local constituency chooses its own officers, each town, city, road-district, school-district, and county administers its own affairs. This is the vital principle of American liberty, the distinguishing feature of our system of government, and is so regarded by political philosophers and distinguished jurists." Barrett *v.* Brooks, 21 Iowa 144, 151.

12. **Legislative permission is necessary when** the stream is navigable, when the state owns the bed of the stream, or when the right to take toll is desired (Allen *v.* Monmouth County, 13 N. J. Eq. 68; Ft. Plain Bridge Co. *v.* Smith, 30 N. Y. 44; Wright *v.* Nagle, 101 U. S. 791, 25 L. ed. 921), and the mere fact that an individual or company owns the land adjoining the stream does not of itself give the right to erect a bridge across the same (Enfield Toll Bridge *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716; Hudson *v.* Cuero Land, etc., Co., 47 Tex. 56, 26 Am. Rep. 289); but if the objection be that the bed of the stream belongs to the state, so long as the state officers make no objections, an individual or corporation will not be heard to complain on that ground (Ft. Plain Bridge Co. *v.* Smith, 30 N. Y. 44).

13. Pennsylvania R. Co. *v.* New York, etc., R. Co., 19 Fed. Cas. No. 10,953, 18 Int. Rev. Rec. 142, construing the state of New Jersey's contract with the Delaware & Raritan Canal Co., and holding that it did not preclude the former from afterward passing an act providing for the bridging of the Raritan river.

14. Dietrich *v.* Schremms, 117 Mich. 298, 302, 75 N. W. 618, where the court said: "Subject to this limitation [Mich. Const. art. 18, § 4, which forbids the bridging of a navigable stream without authority from the board of supervisors of the county where the bridge is located], and the limitation imposed by the Constitution and laws of the United States in relation to navigable streams, the legislature has the right to enact laws providing for the erection, maintenance, and ownership of bridges over the streams of this State." See, generally, COMMERCE; NAVIGABLE WATERS.

15. **Acts held constitutional.**— A law providing for the erection of a bridge within a city, at the cost of the county, with a provision that it should remain under the control of the county commissioners, who should appoint a superintendent of construction, has been held not to take from the city the control of its streets in contravention of Kan. Const. art. 12, §§ 1, 5, giving them such con-

ing this authority is to erect the bridge at the expense of the state,[16] by general law to impose the duty of erection upon counties, towns, or cities,[17] or by chartering companies for the purpose.[18]

2. By Municipal Authorities — a. In General — (1) *Counties.* The power of the governing board of counties with regard to the building of bridges, their right or duty to construct them within the limits of a city or other municipality,[19] and the amounts which they may expend therefor[20] are matters which must be

trol. State *v.* Shawnee County, 57 Kan. 267, 45 Pac. 616. So, too, an act requiring a county in which a bridge built and maintained for the public is situated, to pay to particular towns sums of money already paid by them, pursuant to law, for its construction, is a constitutional exercise of legislative power. Agawam *v.* Hampden, 130 Mass. 528. And a statutory regulation of the manner of constructing a bridge, and an apportionment of expenses to be borne by the several counties in whose territorial limits it lies, is not an infraction of a constitutional provision requiring all taxes to be equal and to be levied on a cash valuation; nor would it conflict with a provision declaring that counties shall have such powers of local taxation as may be prescribed by law. Guilder *v.* Dayton, 22 Minn. 366. For other cases where the constitutionality of legislative provisions regulating the construction of bridges has been questioned see Granby *v.* Thurston, 23 Conn. 416; Brayton *v.* Fall River, 124 Mass. 95; Atty.-Gen. *v.* Cambridge, 16 Gray (Mass.) 247; Mehling *v.* Cuyahoga County, 8 Ohio S. & C. Pl. Dec. 328, 6 Ohio N. P. 421.

Police power.— It may also be said that the legislative regulation of bridge building properly falls within the police power of the state, and, in the absence of any particular clause of the constitution, the right is undeniable. Plecker *v.* Rhodes, 30 Gratt. (Va.) 795.

16. Young *v.* Harrison, 6 Ga. 130.

17. Rapalje & L. L. Dict.

Establishment by municipal authorities see *infra*, II, B, 2.

A general statutory power to lay out highways includes the power to construct bridges necessary for the crossing of streams which intersect such highways (Brown *v.* Preston, 38 Conn. 219), unless complete and separate statutory provision is made for the building of the bridges apart, in which case the ruling would be otherwise (Wrought-Iron Bridge Co. *v.* Hendricks County, 19 Ind. App. 672, 48 N. E. 1050. See also Atty.-Gen. *v.* Delaware, etc., R. Co., 27 N. J. Eq. 631).

18. Rapalje & L. L. Dict.

Erection by virtue of franchise see *infra*, II, B, 3.

19. **Right to construct within city.**— The question as to whether county commissioners may construct or assist in the construction of a bridge within the corporate limits of a city is essentially a statutory one, and adjudged cases in one state afford little aid in another except to illustrate the principles which should be applied in the construction of the various statutes. Where a county and a city had been given full power and control over highways and over streets and bridges respectively, it has been held that the county could not construct a bridge within a city which was accessible over streets and highways controlled by such city. Nelson *v.* Garfield County, 6 Colo. App. 279, 40 Pac. 474. And see People *v.* La Salle County, 111 Ill. 527; Newark *v.* Jones, 16 Ohio Cir. Ct. 563, 9 Ohio Cir. Dec. 196. On the other hand it has been held that granting to a city council the power to supervise and control all of its public highways, bridges, etc., within the city does not oust the county of the right to erect free bridges across rivers on public highways within the limits of a city. Bell *v.* Foutch, 21 Iowa 119 [*followed* in Skinner *v.* Henderson, 26 Fla. 121, 7 So. 464, 8 L. R. A. 55; Oskaloosa Steam-Engine Works *v.* Pottawattamie County, 72 Iowa 134, 33 N. W. 605]. See also Whitall *v.* Gloucester County, 40 N. J. L. 302. The case of Greenman *v.* Mower County, 62 Minn. 397, 64 N. W. 1142, is not an authority for either of the above views, as it was expressly decided upon provisions of a special statute.

Right to construct within borough.— The construction by a county of a bridge within the limits of a borough, such borough to contribute a part of the expenses, is within the meaning of the statute relating to county bridges, although reference is made to townships only, and not to boroughs. *In re* Waverly Borough Bridge, 3 Pa. Dist. 559, 12 Pa. Co. Ct. 669.

20. Kansas City Bridge, etc., Co. *v.* Wyandotte County, 35 Kan. 557, 11 Pac. 360 (holding that while, under the laws of that state providing that the county commissioners could make no appropriation for the building of a bridge, the cost of which was to exceed two thousand dollars, until the question of making such appropriation had been submitted at a general election, a county could not evade a submission by building a bridge in separate sections, each at a cost less than two thousand dollars, they were not prevented from building, at an expense less than two thousand, a span of a bridge, the whole of which cost over two thousand, if the bridge was otherwise completed at the expense of another); Follmer *v.* Nuckolls County, 6 Nebr. 204 (holding that all contracts for the improvement of roads must be let to the lowest competent bidder, including contracts for the erection and repair of permanent bridges and culverts; and that county commissioners had no authority, either personally or by agent, to erect bridges on the credit of the county); Lehigh County *v.* Kleckner, 5 Watts & S. (Pa.) 181. See also Potter *v.* Davis, Lalor (N. Y.) 394, construing the New York act of

determined largely by the application of general principles of municipal law in conjunction with the respective legislative enactments from which the powers and duties of the county are derived.[21] It may be said, however, that the expediency of the construction rests largely in the administrative discretion of the county officials,[22] whose decision as to whether the public convenience demands the erection of a bridge is conclusive in the absence of a showing of fraud or bad faith on their part.[23]

(II) *Other Municipalities.* In some jurisdictions the building of public bridges is expressly intrusted to the towns, townships, or other municipalities within whose limits they are necessary;[24] while in others such matters have been

1840, by which a loan was made to the towns of Wilna and Champion to enable them to build a bridge, and holding that the act did not limit the expenditure to the amount loaned.

A rule, based on a county council, for the construction of a wooden bridge at a small expense, will not permit, without other orders, a construction of an iron bridge, costing a much greater amount. Mégantic Corp. *v.* Nelson Tp., 17 Quebec Super. Ct. 87.

Damages to the owners of land occasioned by the construction of a bridge and highway across a river are to be included within the statutory provision that the expense of the same shall not exceed a certain amount. Montague Paper Co. *v.* Burrows, 121 Mass. 88.

When authorized to purchase a bridge at its "true value" a board of county commissioners has no authority to pay the original cost of the construction, if the bridge has evidently deteriorated in value. State *v.* Pierce, 52 Kan. 521, 35 Pac. 19.

21. The power should be definitely expressed and will not be extended by unnecessary implication. Thus a special act of the legislature conferring upon a city authority to erect a bridge over a navigable stream does not by implication authorize the county commissioners to make such erection should the city refuse to do so. *In re* Belfast, 52 Me. 529. So, too, N. C. Code (1898), § 2014, which authorizes county commissioners to establish roads and ferries, does not give them authority to accept and maintain as a public charge a private bridge leading to a private road. Greenleaf *v.* Pasquotank County, 123 N. C. 30, 31 S. E. 264. Neither can the commissioners, under a statute authorizing them to levy a tax, provide for the building of bridges in a township, advertise for bids, let contracts for the work on behalf of the township, or delegate to the township the power to use the money to construct the bridge. Pleasant View Tp. *v.* Shawgo, 54 Kan. 742, 39 Pac. 704.

22. *Illinois.*— St. Clair County *v.* People, 85 Ill. 396.

New Jersey.— State *v.* Essex County, 23 N. J. L. 214.

North Carolina.— Smith *v.* Harkins, 38 N. C. 613, 44 Am. Dec. 83.

Ohio.— State *v.* Hamilton County, 49 Ohio St. 301, 30 N. E. 785.

Tennessee.— Colburn *v.* Chattanooga, etc., R. Co., 94 Tenn. 43, 28 S. W. 298.

See 8 Cent. Dig. tit. "Bridges," § 13.

Act authorizing confers a continuing power. —An act authorizing the board of freeholders of a certain county to build and maintain a bridge at a certain point, at their discretion, does not confer a temporary authority only, but a continuing power, which is not lost by failure of the then existing board to build such bridge. Tucker *v.* Burlington County, 1 N. J. Eq. 282.

23. Bingham *v.* Marion County, 55 Ind. 113; McKinley *v.* Union County, 29 N. J. Eq. 164. And see Daviess County *v.* State, 141 Ind. 187, 40 N. E. 686, construing Ind. Rev. Stat. (1894), § 3275, which provided that "whenever in the opinion of the county commissioners, the public convenience shall require that a bridge should be repaired or built over any water-course" they should direct the same to be done, in conjunction with the Indiana act of 1885, § 4, which provided that all bridges costing more than five hundred dollars "to be built within the corporate limits of any city or town" should be built by the county commissioners, and paid for out of the same funds as other bridges, and holding that mandamus would not issue at the suit of a city to compel county commissioners to construct a bridge within its limits, if its construction involved simply a question of public convenience and was not an absolute necessity.

The recommendations of two successive grand juries that a public bridge be built in a needed place does not render the building of it a matter of such absolute duty that mandamus will lie against the county officer whose duty it is to proceed with the construction, the code having invested him with a discretion in such premises. Patterson *v.* Taylor, 98 Ga. 646, 25 S. E. 771.

24. Whitcomb *v.* Reed, 24 Nebr. 50, 37 N. W. 684 (holding that prior to the Nebraska act of 1887, the respective towns of a county, under the township system of government, were invested with the management and construction of their bridges); Billman *v.* Carroll Tp., 1 Pa. Co. Ct. 129 (holding that under the Pennsylvania road act of 1836, § 31, which provided that it should be the duty of township supervisors in making and repairing public roads "also to make and maintain sufficient bridges over all small creeks and rivulets and deep gullies, when the same should be necessary for the ease and safety of travelers," the supervisors must, where the public highway crosses creeks or rivulets, provide for the ease and safety of

held to be within the general scope of their powers.[25] Generally speaking, however, the extent of the powers of such municipalities with regard to their bridges is dependent strictly upon the statute.[26]

b. Observance of Prescribed Procedure. There is no uniformity among the various states as to the prescribed procedure which must be adhered to by the officials of a county or other municipality to render their acts regarding the erection of bridges regular and binding.[27] The prescribed procedure should, how-

pedestrians when practicable, and if the expense be not too great, must erect and maintain foot-bridges for their accommodation).

25. Houfe *v.* Fulton, 34 Wis. 608, 17 Am. Rep. 463. See also Sheridan *v.* Palmyra Tp., 180 Pa. St. 439, 40 Wkly. Notes Cas. (Pa.) 245, 36 Atl. 868.

26. In the absence of statutory authority a city cannot erect and operate a toll-bridge. Nor would the provisions of its charter authorizing it to improve its sidewalks, alleys, and streets and to make by-laws necessary for safety and health give it such authority. Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423. But when a city had full statutory power to construct an intended bridge, a provision that if private persons contribute enough to build a more convenient one such a one shall be built does not render the acts of the council invalid. Kelley *v.* Kennard, 60 N. H. 1. And see Gordon *v.* Strong, 3 N. Y. App. Div. 395, 38 N. Y. Suppl. 922 [*reversing* 16 Misc. (N. Y.) 420, 38 N. Y. Suppl. 449, 74 N. Y. St. 72], holding that the commissioners appointed under N. Y. Laws (1895), c. 789, § 5, to build a bridge between the cities of New York and Brooklyn could agree, in the purchase of the rights of a bridge company, the location of whose bridge interfered with the location selected by the commissioners, to construct their bridge with tracks for the exclusive use of elevated railroads.

Giving county officials opportunity to be heard.— While highway commissioners may determine the necessity for, and the location of, a bridge and make arrangements for its construction, and may, in certain instances, compel the county board to aid in its construction, they have not authority to determine at all times the particular character and price of the bridge, without first giving the county officials an opportunity to be heard. Mercer County *v.* New Boston, 13 Ill. App. 274.

Implied authority to build.— The statutory power and duty of a highway commissioner to repair a highway may properly include the implied power to build a new bridge, where such bridge is merely a part of the highway of the town, and is absolutely necessary to render the highway at all times passable. Huggans *v.* Riley, 125 N. Y. 88, 25 N. E. 993, 34 N. Y. St. 458 [*affirming* 51 Hun (N. Y.) 501, 4 N. Y. Suppl. 282, 21 N. Y. St. 706].

Limited to existing highways.— The authority of the commissioner of highways to build bridges may be limited to those on existing highways. Mather *v.* Crawford, 36 Barb. (N. Y.) 564. See also Huggans *v.* Riley, 51 Hun (N. Y.) 501, 4 N. Y. Suppl. 282, 21 N. Y. St. 706 [*affirmed* in 125 N. Y. 88, 25 N. E. 993, 34 N. Y. St. 458], holding that although the commissioner exceeds his authority in making a contract for the erection of a bridge, before the highway of which the bridge will form a part has been laid out, yet after such highway has been located, he may cause the bridge to be constructed at the point of intersection with the stream, and thus carry out the former contract.

Repairing before building.— Under the Illinois law, the highway commissioners of a town have discretionary power to first repair roads or bridges before they can be compelled to construct new bridges. People *v.* McLean County, 118 Ill. 239, 8 N. E. 684.

27. In Minnesota Stat. (1894), §§ 1894–1902, have no application to county commissioners so far as to make it their duty to advertise for bids, or to let the contract to the lowest bidder. Gillette-Herzog Mfg. Co. *v.* Aitkin County, 69 Minn. 297, 72 N. W. 123. For construction of Minn. Spec. Laws (1870), c. 100, concerning the building of bridges see Guilder *v.* Dayton, 22 Minn. 366, holding that under that statute the commissioners are judges of their own inability to act, and their declination and appointment of substitutes is conclusive.

In New Jersey it has been held that, in the absence of statute, the county is not restricted to the erection of bridges on streams having a perennial source, but may bridge watercourses created by surface water. McKinley *v.* Union County, 29 N. J. Eq. 164.

In Pennsylvania the road law of 1836 (Brightly Purd. Dig. Pa. (1894), p. 1891), concerning the erection of bridges, has been continued up to the present time and has been the subject of no small amount of litigation. Under this act viewers are appointed who must report to the court, grand jury, and commissioners of the county, who consider the necessity and feasibility of the bridge's erection; and, if it appear that such bridge would be too expensive for the township or townships, it is entered on record as a county bridge. The act also provides that in all cases of views mentioned in the act the court shall, on the petition of any person interested, direct a second view or review for the same purpose, and it is held that such review is a matter of right. *In re* Bedford Bridge, 72 Pa. St. 42. The commissioners' approval of the bridge as a county bridge should be entered on the record in the quarter sessions (Pittsburg, etc., R. Co. *v.* Lawrence County, 198 Pa. St. 1, 47 Atl. 955); and it is said to be the better practice to permit the report of the viewers to lie over for one term, or that the court shall, by rule, provide that the report may be acted on at the first term sub-

ever, be pursued with reasonable diligence,[28] and in the manner prescribed by the statute.[29] A decision to construct a bridge and the appointment of a committee to contract therefor is not such a judicial act as cannot be reviewed at a subsequent meeting, no action having been taken by the committee which involved the rights of third parties.[30]

c. Fund For Construction — (i) *How Raised.* The necessary funds must be procured either by appropriation or by taxes or assessments for that purpose;[31] the legality of the proceeding depending in each case upon the existence of a statute authorizing the raising of funds for this purpose and a due compliance with such statute when the right so authorized is sought to be exercised.[32] It

ject until the next term to exceptions and review (*In re* Bedford Bridge, 72 Pa. St. 42). Inasmuch as the grand jury, the county commissioners, and the court may be properly considered as representatives of the taxpayers, exceptions to the confirmation of the report of a jury of review for a county bridge on the ground of expense will be dismissed (*In re* Shoemakerville Bridge, 2 Del. Co. (Pa.) 479); and where the regularity of the proceedings under this act by which a bridge is built is not questioned for fourteen years it is then too late to attack their validity (Myers *v.* Com., 110 Pa. St. 217, 1 Atl. 264). The court, grand jury, and commissioners are intended to act as a check on each other, and when either body disapproves the proceedings must end. *In re* Pequea Creek Bridge, 68 Pa. St. 427. Moreover, if it appear on the record of the court that the foreman of the grand jury which recommended the building of the county bridge was also one of the original petitioners the court will not approve the report. *In re* Nescopeck Bridge, 120 Pa. St. 288, 14 Atl. 419; *In re* County Bridge, 3 Kulp (Pa.) 196; *In re* Pottstown Bridge, 5 Pa. Co. Ct. 334. The act does not give the grand jury any authority to designate the kind of bridge to be built, or the material of which it shall be composed, and a direction that it be constructed of iron is not binding on the county commissioners. *In re* Rush Creek Bridge, 13 Pa. Co. Ct. 305. As the county commissioners are required to obtain in good faith an estimate as to the probable cost, which estimate they cannot exceed, if they let the contract for the construction of the bridge without such estimate and thereafter procure an estimate merely to meet the letter of the law and at once relet the contract to the same party at the same price the contract is not legal. Bradford County *v.* Horton, 6 Lack. Leg. N. (Pa.) 306. Where there is a change of the original plan there must be a new estimate. Lehigh County *v.* Kleckner, 5 Watts & S. (Pa.) 181. For further construction of this act see *In re* Youghiogheny River Bridge, 168 Pa. St. 454, 31 Atl. 1096; Hogsett's Appeal, 2 Pa. Super. Ct. 265; *In re* Rapho Bridge, 1 Lanc. Bar (Pa.) 27; *In re* Freemansburg Bridge, 19 Pa. Co. Ct. 588; *In re* Lehigh Tp. Bridge, 17 Pa. Co. Ct. 236. For construction of special act of 1870 in regard to the building of bridges in the county of Luzerne see *In re* Bridge Appropriations, 9 Kulp (Pa.) 427. For establishment of bridge under the act of 1802 see *In re* Wallenpaupac Bridge, 4 Yeates (Pa.) 434.

28. Pittsburg, etc., R. Co. *v.* Lawrence County, 198 Pa. St. 1, 47 Atl. 955, holding that the approval of the county commissioners seven and one-half years after the report of the viewers in favor of it was too late.

29. McCann *v.* Otoe County, 9 Nebr. 324, 2 N. W. 707; Barker *v.* Oswegatchie, 10 N. Y. Suppl. 834; State *v.* Williston, 31 Vt. 153; Sampson *v.* Goochland Justices, 5 Gratt. (Va.) 241. See also Kankakee County *v.* People, 24 Ill. App. 410; Rockwood *v.* Woodford, 25 Wis. 443.

Substantial compliance with statute.— A notice published by a board of county commissioners of their intention "to appropriate money to build the bridge" is a substantial compliance with a statute that "it shall be unlawful for any board of county commissioners to make an appropriation for building any bridge, unless notice of the intention to build such bridge has first been published." Kansas City Bridge, etc., Co. *v.* Wyandotte County, 35 Kan. 557, 11 Pac. 360. So, too, a vote by a town board to build a new bridge, followed by a subsequent vote to adjourn for one week, such resolution containing no intimation that the decision to rebuild was not final, amounts to a consent within the statute permitting the highway commissioners to rebuild the bridge only upon the consent of the town board. Basselin *v.* Pate, 30 Misc. (N. Y.) 368, 63 N. Y. Suppl. 653. And see Barker *v.* Oswegatchie, 16 N. Y. Suppl. 727, 41 N. Y. St. 827.

Under a statute providing that a board at any regular meeting should have power "to provide for the erection of all bridges," and also providing for special meetings, without prescribing the kind of business that might be thereat transacted, provisions for the erection of bridges may be made at such special meeting. Mitchell County *v.* Horton, 75 Iowa 271, 39 N. W. 394.

30. Mitchell County *v.* Horton, 75 Iowa 271, 39 N. W. 394; Crittenden County Ct. *v.* Shanks, 88 Ky. 475, 11 Ky. L. Rep. 8, 11 S. W. 468.

31. See, generally, Counties; Municipal Corporations; Towns.

32. *Illinois.*— Ottawa *v.* Walker, 21 Ill. 605, 74 Am. Dec. 121, holding that since the charter of the city gave it exclusive control over the streets within its limits, township authorities could not levy a tax upon the citi-

may be said, however, that an appropriation to aid in the construction of a free bridge is not foreign to the legitimate purpose and functions of a county;[33] but in determining the legality of taxes for this purpose the courts keep in view not only the probable intent of the legislature in authorizing them, but also the general corporate duties of a town or county.[34]

zens of that city for the purpose of erecting a bridge within it.

Indiana.— Houston *v.* Clay County, 18 Ind. 396.

Iowa.—Yant *v.* Brooks, 19 Iowa 87, holding that under the statutes the board of supervisors did not have power to submit a proposition to raise money by taxation, or to appropriate a sum for the construction of a bridge at a special election, but that such proposition could be submitted only at a general election. See also Bell *v.* Foutch, 21 Iowa 119.

Nebraska.— Burlington, etc., Rivers R. Co. *v.* Cass County, 16 Nebr. 136, 19 N. W. 700.

North Carolina.— McKethan *v.* Cumberland County, 92 N. C. 243.

Ohio.— See McVicker *v.* Noble County, 25 Ohio St. 608.

Tennessee.— Nashville, etc., R. Co. *v.* Hodges, 7 Lea (Tenn.) 663 [*overruling* in part, 5 Lea (Tenn.) 707], holding that Tenn. Code (1881), § 1270, authorized a special tax for the building of a bridge.

Wisconsin.— State *v.* Racine County, 70 Wis. 543, 36 N. W. 399, construing Wis. Rev. Stat. (1885), §§ 1320, 1321, and Wis. Laws (1886), c. 13, § 1, and holding that a county might appropriate a sum necessary to aid in the construction of a bridge without a vote of its electors. See also State *v.* Wood County, 72 Wis. 629, 40 N. W. 381, holding that under a statute providing that "any such board may annually levy on the taxable property of the county a county road tax, not exceeding eight thousand dollars, which shall be expended under their direction in making culverts, grading, graveling, ditching, or otherwise improving such highways," does not authorize the levy of a tax for the building of a bridge over a navigable river.

See 8 Cent. Dig. tit. "Bridges," § 24.

An appropriation is presumptively valid when made by a board of supervisors for the construction of a county bridge, although it does not appear on what road the bridge is located. Stockle *v.* Silsbee, 41 Mich. 615, 2 N. W. 900.

A clerical error, by which the amount of an assessment is increased beyond the estimated expense, does not vitiate it if it had been properly and legally made. People *v.* Rochester, 5 Lans. (N. Y.) 142.

What constitutes diversion from intended use.— Where a fund is raised under an act of the legislature for the future maintenance and repair of a certain bridge, it is not a diversion of the funds from their appointed uses for a subsequent session of the legislature to provide that such a part of the funds as are necessary shall be used for the construction of draws in the bridge. Dow *v.* Wakefield, 103 Mass. 267.

Time of making assessment.— Where the charter of a city prohibited the common council from taking lands, etc., until damages for such taking were paid, it was held that the common council might nevertheless make an assessment for the erection of a bridge before title was acquired to the land necessary therefor; the proceedings in making the assessment and proceedings to acquire title to lands being distinct and independent. People *v.* Rochester, 5 Lans. (N. Y.) 142. And see Baltimore *v.* Stoll, 52 Md. 435; State *v.* Hamilton County, 5 Ohio Dec. (Reprint) 471, 6 Am. L. Rec. 106, the latter case holding that, under the Ohio act of May 4, 1877, which directed a levy of a county tax for a bridge in a city, provided a certain railroad should bear such part of the expenses as might be agreed upon by it and the city, the act intended that only the cost above the amount estimated by the railroad should be paid by the county and that no obligation arose on the part of the county until the city and railroad reached an agreement.

33. Bell *v.* Foutch, 21 Iowa 119 [*followed* in Barrett *v.* Brooks, 21 Iowa 144].

The mere misnomer of an otherwise valid appropriation will not invalidate it. Hence, while the word "donate" generally means giving without any consideration and gratuitously, yet if the clear import and language of a resolution by a town board show that it was intended that the town should pay a consideration for the construction of a bridge for the public use, the use of the word "donate" will not avoid the resolution by indicating a "gift," which of course the town has no authority to make. Goodhue *v.* Beloit, 21 Wis. 636.

34. Thus where a county was authorized to levy a special tax only for the erection of "necessary bridges," a railroad bridge to be used by a corporation distinct from the county does not come within the meaning of such regulation, and any special tax for the erection of such a bridge is unlawful. Garland *v.* Montgomery County, 87 Ala. 223, 6 So. 402. See also Skinner *v.* Henderson, 26 Fla. 121, 7 So. 464, 8 L. R. A. 55, holding that the building of a bridge in a town, as a completion of one of its streets, which was not a county highway, and where such bridge will not be of benefit to the inhabitants of the county outside of the town, was not a "county purpose," for which alone such county was authorized by the constitution to assess and impose taxation. Nor would the power given to towns to raise money for "necessary charges" authorize them to levy a tax for the discharge of a contract entered into by them with a corporation of a toll-bridge for the free passage of the bridge by the citizens of such towns. Bussey *v.* Gilmore, 3 Me. 191.

(II) *Contribution to* — (A) *In General.* At common law the counties or towns benefited by the erection of a bridge were under no obligation to contribute to the expense of its construction.[35] The subject is, however, one clearly within the legislative control,[36] and the burden may be apportioned at its discretion;[37] it being no infringement on the right to local self-government to require towns or counties specially benefited by a bridge to contribute to the expense of its construction, although it be entirely without their territory.[38] Such

To same effect see Defiance County *v.* Croweg, 24 Ohio St. 492, holding that the building of a new bridge where one became dangerous by decay is not the "repairing" of a bridge within the meaning of the statute, and if the expense exceeds a certain amount the statute prescribing the procedure relative to the building of a bridge must be complied with.

35. Pomfret *v.* Hartford, 42 Vt. 134.

36. **Authority for such laws.**— In Brayton *v.* Fall River, 124 Mass. 95, 96, the court say: "It is said that such laws are authorized by those clauses of the Constitution which give to the Legislature the right to impose taxes, and the power to enact such wholesome and reasonable laws as they shall judge to be for the good and welfare of the Commonwealth. The manner in which this power shall be exercised, and the means and instrumentalities to be employed, are largely within the discretion of the Legislature."

37. *Connecticut.*— State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465; Granby *v.* Thurston, 23 Conn. 416.

Illinois.— Dennis *v.* Maynard, 15 Ill. 477.

Maine.— Waterville *v.* Kennebec County, 59 Me. 80.

Massachusetts.—Scituate *v.* Weymouth, 108 Mass. 128; Norwich *v.* Hampshire County, 13 Pick. (Mass.) 60.

Vermont.— Grand Isle *v.* Kinney, 70 Vt. 381, 41 Atl. 130, holding that the Vermont act of 1888, making an appropriation toward a bridge provided a like amount was raised by a certain town aided by other towns in the county and by individual appropriation, did not cast on the town the burden of constructing the bridge unaided.

See 8 Cent. Dig. tit. "Bridges," § 17.

Manner of making apportionment.— The usual procedure for the apportionment of the expense of erection among the towns or townships benefited by a bridge is to allow the commissioners either of the county, or those specially appointed for that purpose, to determine the relative proportion to be borne by such bodies. Under Vt. Acts (1882), No. 16, the report of such commissioner is subject to revision by the county court. Sharon *v.* Strafford, 56 Vt. 421. In Rockingham *v.* Westminster, 24 Vt. 288, it was held that commissioners appointed under the statute to apportion to towns the share each should bear in the construction of bridges or roads, where the expense would be too great for one town to bear, cannot make an apportionment in specific sums of money to be paid by each town, but should settle and define the ratio of expense to which each would be subjected; and where such commissioners found the expense of construction to be two thousand eight hundred and ninety dollars, and apportioned six hundred dollars to one town and one hundred and fifty dollars to another town the county court, in passing upon the report, regarded the amounts not to be what each was actually obliged to pay, but as settling the ratio under which they were liable in the apportionment, and apportioned the sum that six hundred dollars bears to one thousand eight hundred and ninety dollars in the one case, and the sum that one hundred and fifty dollars bears to one thousand eight hundred and ninety dollars in the other.

The "relative proportion" which, under Mass. Stat. (1868), c. 309, § 8, the county commissioners were empowered to determine should be "borne by the county, and any of the cities and towns lying near to, or contiguous to, said bridges, . . . as in their judgment, may be just and equitable," does not require an absolute mathematical ratio. But it is within the power of such commissioners to fix the proportion and assign to each town a specific part, if, in their judgment, that was just and equitable; and under this statute, it is not incumbent upon them to impose any expense upon the county, but they may assign it wholly to the towns or cities within which the bridge was situated. Com. *v.* Newburyport, 103 Mass. 129.

Contribution from township to county.— Under an Indiana statute which provides that if the probable cost of erecting a bridge shall be more than a certain sum the trustees of the township in which the bridge is to be located shall notify the county commissioners of the necessity of such bridge, and, if the commissioners proceed to construct it, the township shall be liable to a certain proportion of the cost, the county cannot build the bridge of its own motion, and then demand contribution of the township. It is only when the township takes the initiative that the contribution may be demanded. Martin County *v.* Mitcheltree Tp., 4 Ind. App. 424, 30 N. E. 937 [*following* Owen County *v.* Washington Tp., 121 Ind. 379, 23 N. E. 257]. See also Ritz *v.* Tannehill, 69 Iowa 476, 29 N. W. 424, holding that under the statutes which authorized "any township . . . to aid in the construction of county bridges, when the estimated cost of the same was not less than $10,000, as fixed by the board of supervisors; . . . the aggregate amount of the tax shall not exceed one-half of the estimated cost of the bridge," that it was necessary that such estimate be made by the county board before the vote of the electors to raise such tax.

38. State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465; Talbot County *v.* Queen Anne's County, 50 Md. 245. See Un-

statutes are prospective in their operation and should not be construed to include expenses incurred upon an improvement that has already been made.[39]

(B) *From County to Town or Township.* In providing for apportionment between different territorial subdivisions, statutes often provide that if the expense of construction be too great a burden upon a town or township, or is more than a certain per cent of its taxable value, the county shall pay a certain portion of the cost thereof.[40] Although under the Illinois statute, the township board may let the contract for erection of a bridge before their application to the county for aid,[41] yet if they proceed to build and pay for a bridge before applying for aid they can claim no appropriation.[42] Where, however, the statute is complied with,[43] mandamus will issue to compel the county

derhill *v.* Essex, 64 Vt. 28, 23 Atl. 617, holding that since the repeal of certain sections of the Vt. Acts (1884), No. 18, a town cannot be assessed for any portion of the expense of maintaining a bridge wholly within another town.

But it will be presumed, in the absence of a clear expression of the legislature to the contrary, that county commissioners whose duty it is to apportion the expense to be borne by the town or townships especially benefited by the construction of a bridge will act only in their regular jurisdiction, and cannot therefore assess a town in another county. Boston *v.* Middlesex County, 111 Mass. 313.

39. Pomfret *v.* Hartford, 42 Vt. 134.

40. *Illinois.*— Under the Illinois act of 1879, § 110, the county must pay half the expense incurred in building a bridge if it appear that its construction or repair would be an unreasonble burden on the township and the cost of the bridge exceed such sum as could be raised in one year by ordinary taxation for bridge purposes in the town. People *v.* Madison County, 125 Ill. 334, 17 N. E. 802.

Indiana.— By Ind. Rev. Stat. (1894), § 6833, the county must build or repair bridges where the probable cost would exceed seventy-five dollars, if notified by the township, and, in its opinion, such bridge or culvert should be built. See also Delaware Tp. *v.* Ripley County, 26 Ind. App. 97, 59 N. E. 189, construing this statute and determining what constitutes notice to render the township liable.

Massachusetts.— Norwich *v.* Hampshire County, 13 Pick. (Mass.) 60, holding that a special act making such apportionment was constitutional.

New York.— Under N. Y. Laws (1890), c. 560, § 130, where the expense of building a bridge wholly in one town shall exceed one sixth of one per cent of the assessed valuation of the taxable property of such town, the county in which the town is located must pay not less than one third part of such expense. People *v.* Steuben County, 146 N. Y. 107, 40 N. E. 738, 66 N. Y. St. 258 [*affirming* 81 Hun (N. Y.) 216, 30 N. Y. Suppl. 729, 62 N. Y. St. 691].

Pennsylvania.— The Pennsylvania act of June 13, 1836, § 35, provides that when a stream over which it may be necessary to erect a bridge crosses a public road or highway, and the expense of erection is greater than one of the townships should bear, it may be at the expense of the county. In *In re* Youghiogheny Bridge, 182 Pa. St. 618, 38 Atl. 478, this was held to apply only to a case where a highway such as a ferry or otherwise has existed across the stream, and not where a township's street terminates at a river bank and its extension has been merely projected.

Wisconsin.— Under Wis. Laws (1885), c. 187, § 1, a county must aid the town in building bridges where the cost exceeds one fourth of one per cent of all taxable property of the town "according to the last equalized valuation." In State *v.* Pierce County, 71 Wis. 327, 37 N. W. 233, this statute was construed to mean that the valuation of 1885 controlled as to bridges authorized at the annual town-meeting of 1886, although the county was not called on for aid until after the latter year. See also Johnson *v.* Buffalo County, 111 Wis. 265, 87 N. W. 240 (holding that the statute did not authorize the county board to act jointly with the town in contracting for the erection); State *v.* St. Croix County, 83 Wis. 340, 53 N. W. 698.

See 8 Cent. Dig. tit. "Bridges," § 18.

Repeal of statute before payment by county. — If a bridge is constructed under such conditions that the county is by statute liable to pay a certain part of the expense thereof, and after its completion such statute is amended, absolving the county from the necessity of assisting in the construction of bridges, the amendment not indicating that it is retroactive, the county must pay its *pro rata* of the expense of the bridge. Stone *v.* Broome County, 166 N. Y. 85, 59 N. E. 708 [*reversing* 52 N. Y. Suppl. 1150]; Thacher *v.* Steuben County, 21 Misc. (N. Y.) 271, 47 N. Y. Suppl. 124. See also People *v.* Hancock County, 21 Ill. App. 271.

41. Logan County *v.* People, 116 Ill. 466, 6 N. E. 475; New Boston *v.* Mercer County, 110 Ill. 197; Moultrie County *v.* People, 80 Ill. App. 682; People *v.* Moultrie County, 71 Ill. App. 348.

42. People *v.* McHenry County, 110 Ill. 93 [*affirming* 12 Ill. App. 204].

43. What constitutes compliance.— An arrangement by the board, to borrow money to pay one half of the cost of a bridge, not sanctioned by a vote of the town, is not a proper compliance. Stark County *v.* People, 110 Ill. 577. So, too, under the Illinois act of July 1, 1883, where an appropriation is made by the county, but the bridge contemplated is

appropriation,[44] the determination of the necessity of the bridge resting within the discretion of the county board.[45]

(c) *When Built Over Boundaries.* In the absence of statute or agreement one territorial subdivision of the state cannot compel another to assist it in erecting bridges over their common boundaries.[46] It is therefore a just and equitable exercise of legislative discretion to provide that when the necessity or convenience of travel renders advisable the erection of bridges over the boundaries between counties or townships, that each must contribute to the expense thereof.[47] Such statutes must be clear and explicit, and must be strictly complied

abandoned and a more costly structure erected in a different location, no attempt being made to comply with the statute as amended by the act of 1889, the appropriation cannot be applied to the new bridge. People *v.* Shelby County, 168 Ill. 351, 48 N. E. 100 [*affirming* 65 Ill. App. 410]. Nor can the township board include a number of bridges in a petition so that the total sum will be of sufficient amount to render the county liable for a part. Vermilion County *v.* Oakwood, 69 Ill. App. 464. Where, however, the statutes provide that county aid shall be conditional upon a levy of the road and bridge tax for the full amount of sixty cents on each hundred dollars, and the town has levied a tax for bridge purposes of forty cents, and a separate tax of twenty-five cents for road purposes, which the taxpayers are permitted to pay in money or labor, at their option, the tax to be paid in labor should be considered as a money tax in determining whether the town has fulfilled the condition. Champaign County *v.* Condit, 120 Ill. 301, 11 N. E. 394 [*affirming* 24 Ill. App. 560]. And see Donnelly *v.* Luzerne County, 9 Kulp (Pa.) 271.

Two bridges.— A petition by a town to a county to aid in the construction of a bridge may, under the Illinois statute, properly embrace two bridges, if it contain the necessary averments as to each. Mercer County *v.* Town of New Boston, 13 Ill. App. 274.

44. New Boston *v.* Mercer County, 110 Ill. 197; People *v.* Iroquois County, 100 Ill. 640; People *v.* Moultrie County, 71 Ill. App. 348; Kankakee County *v.* People, 24 Ill. App. 410; Kendall County *v.* People, 12 Ill. App. 210.

If the facts justified an appropriation of a part they will be compelled by law to furnish their full quota. Logan County *v.* People, 116 Ill. 466, 6 N. E. 475.

What petition for mandamus should allege. — A petition for mandamus to compel a county board to furnish aid to build a bridge should allege that the town had raised one half of the necessary funds. Kendall County *v.* People, 12 Ill. App. 210.

Defenses to action of mandamus.— The determination by the township commissioners that a necessity exists for the construction or repair of a bridge is the exercise of a corporate power vested in them, and can only be exercised at a meeting of such commissioners; and before the county board can be legally moved in the matter, the record of such meeting must show that the proceedings required by law were regularly had, and parol evidence is not admissible to aid the record. Where the county appropriates a certain sum without proof of the regularity of the proceeding it acts without authority and cannot be required to make further appropriation. People *v.* Madison County, 125 Ill. 334, 17 N. E. 802. But if the record, although insufficient at first, is subsequently amended to correspond with the facts, and the refusal of the county board was not based upon the failure of the township commissioners to determine and record the necessary facts, mandamus may properly be brought against them. Du Page County *v.* Winfield, 142 Ill. 607, 32 N. E. 269 [*affirming* 39 Ill. App. 298].

45. People *v.* Madison County, 125 Ill. 334, 17 N. E. 802; Macon County *v.* People, 121 Ill. 616, 13 N. E. 220 [*affirming* 19 Ill. App. 264]; Stark County *v.* People, 118 Ill. 459, 9 N. E. 192 [*affirming* 19 Ill. App. 495]; Kankakee County *v.* People, 24 Ill. App. 410; People *v.* Hancock County, 21 Ill. App. 271.

46. Dimmick *v.* Waltham, 100 Ill. 631; Union Drainage Dist. *v.* Highway Com'rs, 87 Ill. App. 93; Jefferson County *v.* St. Louis County, 113 Mo. 619, 21 S. W. 217; Brown *v.* Merrick County, 18 Nebr. 355, 25 N. W. 356.

47. Carter *v.* Cambridge, etc., Bridge Proprietors, 104 Mass. 236; Guilder *v.* Dayton, 22 Minn. 366; Guilder *v.* Otsego, 20 Minn. 74 (holding that the act apportioning the relative cost of a bridge between the towns of Dayton and Otsego, in the sum of three tenths of the cost to each of the towns, was not in conflict with Minn. Const. art. 9, §§ 1–4, art. 11, § 5).

This may be done by either private or general statute. Waterville *v.* Kennebec County, 59 Me. 80. And see Shoolbred *v.* Charlestown, 2 Bay (S. C.) 63.

In the absence of an express repealing clause such statute does not destroy an agreement between townships, lawfully made, existing at the date of its passage, and having been acted upon for years, whereby one is charged with the duty of erecting and maintaining a bridge so situated as to come within the general meaning of the statute. Stitt *v.* Casterline, 89 Mich. 239, 50 N. W. 847.

Necessity of apportionment as to wealth or population.— It is usually unnecessary, under the provisions of the statutes, that the amount paid by each county or town shall be in proportion to the taxable wealth or population of the other. Thus under Mass. Stat. (1870), c. 303, providing that commissioners should, in such manner and amount as they deemed just and equitable, apportion and as-

with[48] to enable one county or town to build a bridge at its own expense and recover a *pro rata* from the other;[49] but where there has been a due compliance,

sess the expenses incurred on boundary bridges, the apportionment may be made in equal parts, regardless of the population, area, or valuation of property within the two cities (Dow *v.* Wakefield, 103 Mass. 267); and under N. Y. Laws (1857), c. 639, providing that the expense of a bridge over a stream between two towns should be justly proportioned between them, and chapter 383, providing that a bridge for the maintenance of which two towns were liable, should be built and maintained at their joint expense, the cost should be divided equally between them, regardless of their relative wealth or population (Matter of Spier, 3 N. Y. Suppl. 438, 20 N. Y. St. 389). And see Haverhill *v.* Groveland, 152 Mass. 510, 25 N. E. 976.

A stream is the boundary between two towns or counties within the meaning of these statutes, not only when it literally so runs, but where one of the municipalities cannot erect a bridge over it without extending it into the other (Brookline *v.* Westminster, 4 Vt. 224); and under N. Y. Laws (1841), c. 225, requiring towns on different sides of a stream to contribute in equal proportions to the erection and maintenance of bridges over the stream, they are liable equally, without regard to where the line between the two towns runs in the stream (Corey *v.* Rice, 4 Lans. (N. Y.) 141. To a similar effect see Keiser *v.* Union County, 156 Pa. St. 315, 26 Atl. 1066 [*reversing In re* Milton Bridge, 12 Pa. Co. Ct. 17]). But a statute providing the manner in which bridges "across a stream which runs between two townships," shall be built, has been held to exclude a stream which runs between a township and a city or borough. Wilkes Barre *v.* Luzerne County, 3 Kulp (Pa.) 302. For further construction of this act see *In re* County Bridges, 4 Kulp (Pa.) 146; Luzerne County *v.* Plymouth Tp., 2 Kulp (Pa.) 199. For construction of the New Jersey act of April, 1889, p. 306, concerning the building of bridges between counties where the stream flows in several channels see State *v.* Hunterdon County, 52 N. J. L. 512, 19 Atl. 972.

48. Waiver of statutory compliance.— Where the commissioners of highways of a town absolutely refuse to render aid in the repair of a bridge, it being jointly liable with an adjoining town, the notice required to be given it under the law may be deemed to be waived. Day *v.* Day, 94 N. Y. 153.

49. *Georgia.*— Forsyth County *v.* Gwinnett County, 108 Ga. 510, 33 S. E. 892.

Illinois.— Rutland *v.* Dayton, 60 Ill. 58; Lancaster *v.* Baumgarten, 41 Ill. 254, the latter case construing the Illinois act of 1861, art. 7, § 18, and holding that where the liability which it imposed upon towns to build bridges over their boundaries had been transferred from one of the towns to a city the other town was also thereby exempted from liability.

Indiana.— Fountain County *v.* Warren County, 128 Ind. 295, 27 N. E. 133; Jackson County *v.* Washington County, 146 Ind. 138, 45 N. E. 60; Wrought-Iron Bridge Co. *v.* Hendricks County, 19 Ind. App. 672, 48 N. E. 1050.

Kentucky.— Under Ky. Rev. Stat. (1874), c. 84, §§ 30, 35, when two adjoining counties differ as to the expediency of building a bridge over a boundary stream between them, the county court of one can take no steps to compel the other to provide means to assist in the construction; the circuit court of the opposing county being constituted an arbitrator between them. Garrard County Ct. *v.* Boyle County Ct., 10 Bush (Ky.) 208. Under the latter statute of 1886, c. 94, § 36, where one county refuses to coöperate with another, the circuit court should hear such evidence as either county may produce touching the matter in controversy. This evidence need not be confined to the mere convenience or necessity of the bridge, but the financial condition of the counties may be fully shown as reason for their refusal; and if it appear that the bridge is not indispensable, and the finances of the county are such that its erection would impoverish the taxpayers, it will not be compelled to contribute. Grayson County *v.* Breckinridge County, 8 Ky. L. Rep. 135.

Maine.— See Waterville *v.* Barton, 64 Me. 321.

Missouri.— Jefferson County *v.* St. Louis County, 113 Mo. 619, 21 S. W. 217.

New Hampshire.— Pittsburg *v.* Clarksville, 58 N. H. 291, but holding that under N. H. Gen. Stat. (1878), c. 66, § 4, it was not necessary to enable one town to recover a part of the expense of rebuilding a bridge from another that it should have been made a party to any legal proceeding concerning the bridge before it was built.

New York.—Candor *v.* Tioga, 11 N. Y. App. Div. 502, 42 N. Y. Suppl. 911; Matter of Spier, 3 N. Y. Suppl. 438, 20 N. Y. St. 389.

Ohio.— Lake County *v.* Ashtabula County, 24 Ohio St. 393.

Pennsylvania.— Gouldsboro *v.* Coolbaugh Tp., 87 Pa. St. 48.

See 8 Cent. Dig. tit. "Bridges," §§ 20–22.

What structure is within operation of statute.— Under Va. Code (1887), §§ 989, 990, providing for the apportionment of the expense of the erection or maintenance of "a bridge and causeway, or either, . . . over a place between two counties," one county is not liable for any part of the expense incurred by the building of a causeway wholly in the adjacent county, although such causeway is necessary as an approach to the bridge. Gloucester County *v.* Middlesex County, 88 Va. 843, 14 S. E. 660. Nor under a similar statute would a town be liable for any part of the cost of the bridge built over a stream on its boundary, and across a strip of land within its limits, where neither end of the bridge is within the town, and the bridge is practically inaccessible therefrom (Candor *v.*

the liabilities of the respective towns or counties become absolute, and may be enforced like any other indebtedness.[50]

d. Location — (I) *In General.* The determination of the exact location at which it is most feasible to erect a bridge being a matter necessarily depending upon the facts of each particular case, the county or town officials are usually invested with a discretion in determining the site of a bridge.[51] The rights of adjoining landowners must, however, be kept in mind while exercising this discretion;[52] and it may be said that a county board having once located a bridge

Tioga, 11 N. Y. App. Div. 502, 42 N. Y. Suppl. 911); and the fact that a township has a particular and local interest in the construction of a bridge will not render it liable to contribution if no part of the bridge is situated therein (Frenchtown Tp. *v.* Monroe County, 89 Mich. 204, 50 N. W. 757). For an analogous construction of the Ill. Rev. Stat. (1880), c. 121, § 106, see Highway Com'rs *v.* Gibson, 7 Ill. App. 231. On the other hand, a bridge upon a town line road which is located partly in each of two towns is not to be considered as wholly within the town to which the road district including it has been allotted, under the provisions of N. Y. Rev. Stat. §§ 73, 75, but the towns are jointly liable concerning such bridge. Day *v.* Day, 94 N. Y. 153. And see Waupun *v.* Chester, 61 Wis. 401, 21 N. W. 251. So, too, under a statute providing that a town excessively burdened by rebuilding or repairing a highway may have contribution by a neighboring town greatly benefited thereby, a town which has to build at great expense its half of the bridge between it and an adjoining town may have contribution from that town to the expense of rebuilding the bridge. Hudson *v.* Nashua, 62 N. H. 591.

50. *Minnesota.*— Guilder *v.* Otsego, 20 Minn. 74.

New York.—Under N. Y. Rev. Laws (1885), c. 451, the board of supervisors of a county having within it two towns separated by a stream may, upon the application of one of the towns, authorize and compel the erection of a bridge over such stream, to connect the highways in the two towns, and impose a tax upon both towns to pay the necessary expense thereof; although the taxpayers, officers of one of the towns, be opposed thereto. Kirkwood *v.* Newbury, 122 N. Y. 571, 26 N. E. 10, 34 N. Y. St. 546 [*affirming* 45 Hun (N. Y.) 323]. And see Matter of Mt. Morris, 41 Hun (N. Y.) 29.

Pennsylvania.—Pottsville *v.* Norwegian Tp., 14 Pa. St. 543.

Vermont.—In an action by one town against another for its share of expenses in erecting a bridge the work of plaintiff town in such erection may be shown by parol. Brookline *v.* Westminster, 4 Vt. 224.

Wisconsin.— Waupun *v.* Chester, 61 Wis. 401, 21 N. W. 251.

Form of action.— If the expense should be borne by the townships in equitable proportions an action of debt will not lie against such township in the absence of a joint contract to build as authorized by the statute, since a recovery would be against both towns for a sum *in solido.* Union Drainage Dist. *v.* Highway Com'rs, 87 Ill. App. 93.

Parties.— Where two of three commissioners of highways to several towns have paid the indebtedness of the third for the construction of a bridge connecting their towns they should sue separately to recover their respective portions. Corey *v.* Rice, 4 Lans. (N. Y.) 141.

51. **"As they may think necessary."**— Under a statute authorizing commissioners of roads to build such bridges "as they may think necessary," the bridge need not be located on the precise line where the road crosses a stream, but may be erected at the nearest suitable location and the road altered to conform therewith. Maddox *v.* Ware, 2 Bailey (S. C.) 314.

At a designated line or point.— Under an act which authorizes the building of bridges over streams near county or town lines, the highway commissioners of the town or towns electing to build such bridge may determine its location within a mile of any reasonable distance of the town lines. Insley *v.* Shepard, 31 Fed. 869. On the other hand, commissioners invested with authority to rebuild "upon or near the site of the old bridge" cannot construct a bridge a quarter of a mile up the stream from the old site. People *v.* Finger, 24 Barb. (N. Y.) 341. And see Long *v.* Laufman, 2 Rawle (Pa.) 154.

At a town named.— Authority in a charter to erect a bridge "at the town of Clinton" is sufficiently complied with where a public ferry has existed at the point in question for more than thirty years, generally spoken of as the "ferry at the town of Clinton," although not within the limits of the town. Hudson *v.* Cuero Land, etc., Co., 47 Tex. 56, 26 Am. Rep. 289.

Over "streams."— Authorizing a town to build bridges over "streams" does not authorize the bridging of bays, lakes, or marshes. Matter of Irondequoit, 68 N. Y. 376.

Where the location is left to the entire discretion of the county commissioners, but the approval of the plan by the state board of public works is necessary before it can be constructed, such board cannot disapprove the plans because it objects to the location of the bridge, it having no power with respect thereto. Muskingum County *v.* Board Public Works, 39 Ohio St. 628.

52. Quinton *v.* Burton, 61 Iowa 471, 16 N. W. 569 [*approving* McCord *v.* High, 24 Iowa 336], holding that the road supervisors had no right to erect a bridge close to either side of a highway sixty feet in width,

at one of several specified points cannot afterward change the location of it.[53]

(II) *Right to Build Over Boundary Independently of Adjoining Municipality.* It has been held that a county authorized to build and keep in repair necessary public bridges may, if it chooses, bridge, at its own expense, its boundary streams;[54] but the authorities cannot be said to be uniform on this point,[55] and the right of a town to erect a bridge over a boundary stream between two states, in the absence of express statute, has been denied.[56]

e. Manner of Construction — (I) *In General.* While any provisions of the legislature prescribing the size of a bridge must be complied with,[57] the county or town officials are usually invested with a discretion as to the proper method of erection,[58] and the time which should be used in completing the

merely because it would cost more to place the bridge in the middle of the road; and especially where travel, diverted to the side of the road, would interfere with the shrubbery and otherwise injure the adjoining land.

53. Allen *v.* Monmouth County, 13 N. J. Eq. 68. See also Hague *v.* Philadelphia, 48 Pa. St. 527, where it was held that, under a statute authorizing the construction of a free bridge over a certain river and requiring the county commissioners to submit the site, plan, and specification to the county board for confirmation before advertising for proposals, they had no power after such confirmation to change the location; and if changed after such submission the county could not be held responsible for the expense of such change.

The lawful laying out of a highway by a township official practically constitutes a location of any bridge necessary to span an intersecting stream. Huggans *v.* Riley, 125 N. Y. 88, 25 N. E. 993, 34 N. Y. St. 706 [*affirming* 51 Hun (N. Y.) 501, 4 N. Y. Suppl. 282, 21 N. Y. St. 706].

54. Washer *v.* Bullitt County, 110 U. S. 558, 4 S. Ct. 249, 28 L. ed. 249 [*explaining* Nelson County Ct. *v.* Washington County Ct., 14 B. Mon. (Ky.) 74], holding that the provisions of the statute prescribing the procedure by which a county could compel another to coöperate in the erection did not supersede the power granted by the general statute. And see Gilman *v.* Contra Costa County, 5 Cal. 426, holding that where a creek was the dividing line between the city of Oakland and the remainder of Contra Costa county, either the city or county would have jurisdiction to build it.

55. See Browning *v.* Owen County, 44 Ind. 11; McPeeters *v.* Blankenship, 123 N. C. 651, 31 S. E. 876, the latter case holding that N. C. Code, § 2014, giving county commissioners power "to appoint where bridges shall be made" must be construed with subsequent sections providing for the construction of bridges over streams between counties, and that, under such statutes, a county could not build a bridge over a boundary stream without joining with another county.

56. Abendroth *v.* Greenwich, 29 Conn. 356, holding that any undertaking of the town with regard to such a structure is without consideration and beyond its power.

Such authority is clearly within the scope of legislative powers, and under N. H. Laws (1881), c. 67, §§ 11, 12, conferring upon the towns on the Connecticut river power to contract with the Vermont towns opposite as to the erection of bridges across the river, it is held that the authority is vested exclusively in the town, to be exercised at their option; the county commissioners having no interest therewith. Stearns *v.* Hinsdale, 61 N. H. 433.

57. Gould *v.* Schermer, 101 Iowa 582, 70 N. W. 697, holding that inasmuch as Iowa Code (1897), § 1001, expressly provides that public bridges must not be less than sixteen feet wide a road supervisor is not justified by the resolution of the town trustees in erecting a bridge under fourteen feet wide.

Sufficient compliance as to width.— Under a statute requiring that where a bridge is built across a stream upon a public road more than three feet above the level of the bank upon either side of such stream it shall be at least sixteen feet wide, the requirement with regard to width is sufficiently observed when it appears that between the trusses and the innermost projecting part of the superstructure the distance is sixteen feet, although it also appears that wheel-guards four inches wide and six inches high are laid upon the floor and encroach upon the sixteen feet. Gillette-Herzog Mfg. Co. *v.* Aitkin County, 69 Minn. 297, 72 N. W. 123.

58. Thornton *v.* Roll, 118 Ill. 350, 8 N. E. 145.

They are not divested of such discretion until the bridges are constructed; and it is not within the power of the courts to control their procedure. State *v.* Martin County, 125 Ind. 247, 25 N. E. 286.

Superintendence of construction.—The party whose duty it is to superintend the construction of a bridge must be determined by the statutes of each state. Under a statute which provides that county boards may authorize towns to build bridges and issue their bonds in payment therefor, the county board may, in its resolution, authorize the building of a bridge and appoint commissioners to supervise its construction, although such power of appointment is not expressly conferred by the act. Barker *v.* Oswegatchie, 10 N. Y. Suppl. 834. So, too, where a statute invests a commissioner of highways with the care, superintendence, repair, and improvements of highways and bridges within his town, and also charges him with the custody and disbursement of whatever money is raised by the

structure;[59] subject to the limitation that the bridge must be such as the convenience and safety of the public requires.[60]

(II) *Approaches.* Inasmuch as the approaches necessary to render a structure accessible are legitimately included by the term "bridge,"[61] it follows that a duty to build a bridge *prima facie* carries with it a duty to construct the approach,[62] although the term may be so used that the courts will construe it to mean only the bridge structure proper.[63]

f. Contracts For Building — (I) *In General* — (A) *Power to Make.* Where a town is under no legal obligation to build a bridge, a contract for its construction could not be considered necessary to the exercise of the town's corporate or administrative powers, and would not therefore be binding upon it;[64] but giving

town for those purposes, if the town raises a sum of money for the erection of a bridge, such commissioner is charged with the duty of superintending the erection of it, in the absence of any action placing the work in the hands of other agents. Berlin Iron Bridge Co. *v.* Wagner, 57 Hun (N. Y.) 346, 10 N. Y. Suppl. 840, 32 N. Y. St. 407. For superintendence and control of the erection of a bridge under the settled course of Kentucky decisions see Bullitt County *v.* Washer, 130 U. S. 142, 9 S. Ct. 499, 32 L. ed. 885. And see Deweese *v.* Hutton, 144 Ind. 114, 43 N. E. 13.

59. What constitutes abuse of discretion. — In the building of a bridge one hundred and forty feet in length, sixty feet in width, and costing fourteen thousand dollars, where the city authorities allowed a chasm in the street to remain unbridged for four months after the wooden bridge which spans the stream was removed, and consumed about the same length of time in having the new bridge put in its place, such delay cannot be considered as an abuse of discretion on the part of the municipal authorities. Tuggle *v.* Atlanta, 57 Ga. 114.

For authority of commissioner to enter upon land and take timber or other material for the construction of a bridge see Schmidt *v.* Densmore, 42 Mo. 225, construing Mo. Rev. Stat. (1865), c. 53.

60. State *v.* Williston, 31 Vt. 153.

It would be a good defense by a commissioner of highways against a claim for paying for the building of a bridge ordered by his predecessor to show that the bridge was not connected with the public highway or formed no part of it, and that the public could not use it for any purpose without the permission, expressed or implied, of the owner of the land. Mather *v.* Crawford, 36 Barb. (N. Y.) 564.

61. See *supra*, I.

62. Westfield *v.* Tioga County, 150 Pa. St. 152, 24 Atl. 700; Penn Tp. *v.* Perry County, 78 Pa. St. 457; Com. *v.* Swatara Tp., 4 Pa. Dist. 468, 16 Pa. Co. Ct. 490, 11 Montg. Co. Rep. (Pa.) 167; Com. *v.* Westfield, 11 Pa. Co. Ct. 369.

What not an approach. — A stretch of ground eight hundred and fifty feet over the private property of a citizen cannot be regarded as a mere approach to a bridge. Nor would the obligation of a county to build proper approaches impose upon it the duty to lay out, open, and construct public roads; and county commissioners cannot be compelled by mandamus to construct such an approach to a county bridge where the bridge does not connect with the public highway, since the commissioners have no power to appropriate private land or to lay out a highway to a bridge. Com. *v.* Loomis, 128 Pa. St. 174, 25 Wkly. Notes Cas. (Pa.) 55, 18 Atl. 335.

63. New Haven County *v.* Milford, 64 Conn. 568, 30 Atl. 768; Phillips *v.* East Haven, 44 Conn. 25; New Haven *v.* New York, etc., R. Co., 39 Conn. 128. *Compare* State *v.* Fairfield County, 68 Conn. 16, 35 Atl. 801, holding that Conn. Pub. Acts (1895), § 266, as amended by Conn. Pub. Acts (1899), c. 214, p. 129, was intended to provide that the towns which had conveyed their property and bridges to the county under the general statute should build approaches, if not already built, and convey them to the counties, and that then, and not till then, the counties should take charge of such bridges, including the approaches.

64. Donnelly *v.* Ossining, 18 Hun (N. Y.) 352. See also Uhl *v.* Douglass Tp., 27 Kan. 80.

County judge. — In Iowa the right of the county judge to contract for the construction of a bridge, the cost of which does not exceed five hundred dollars, is not dependent upon the raising of the special tax to meet the expense, since if no special tax is levied the expense may be paid from the ordinary county revenue; and such judge may contract for a bridge over a watercourse on a public road if water therein exists with sufficient frequency to render a bridge essential to a safe and convenient passage, although no constant stream of water passes through it. Long *v.* Boone County, 36 Iowa 60.

Power of supervisors to bind two counties. — Ind. Rev. Stat. (1894), § 3252, relating to the erection of a bridge by two counties jointly, provides that the boards of county commissioners while in joint session shall appoint one or more superintendents who shall have full control and supervision of the erection, "subject, however, to such regulations as such boards of county commissioners may determine upon." It was held that the superintendent thus appointed by two counties could bind them at least to the extent that a superintendent appointed by one county could bind it as provided by section 3278 of the statute. Carroll County *v.*

a county authority to build and repair bridges impliedly gives it the power to contract for their construction,[65] and a town, having by its charter the control of its streets may contract for the construction of free bridges connecting them.[66]

(B) *Validity.* It is essential to the validity of a contract for the erection of a bridge that the statutory provisions authorizing its construction be closely adhered to;[67] and that it be made with the parties designated by statute to act on behalf of the municipality.[68] In some jurisdictions no valid contract can be made by

O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16.

Township officials.— In Kansas it has been held that the statute does not absolutely forbid township officers to make contracts for the construction of a bridge, the cost of which is more than two hundred dollars, when they have funds obtained from road taxes or otherwise which may be so appropriated. Valley Tp. *v.* King Iron Bridge, etc., Co., 4 Kan. App. 622, 45 Pac. 660. See also Perry *v.* Ames, 26 Cal. 372.

65. Long *v.* Boone County, 32 Iowa 181.

66. Mullarky *v.* Cedar Falls, 19 Iowa 21, 24, where the court say: "The object itself being legitimate, it becomes a necessary means to an end, and to do so was not an undue exercise of authority." But such corporation has no right to erect a toll-bridge on its streets for pecuniary benefit. And see New Albany *v.* Iron Substructure Co., 141 Ind. 500, 40 N. E. 44, holding that although Ind. Rev. Stat. (1894), § 3283, provides that all bridges costing over five hundred dollars built within city limits shall be constructed by the county board, yet, inasmuch as a subsequent section of the statute gave cities authority over their streets and bridges and the construction of the latter, if a city, without consulting the county board, builds a bridge within its limits costing a greater amount than five hundred dollars it cannot defend an action for the contract price on the ground that the contract was *ultra vires.*

A committee chosen by a town to build a bridge has power to bind the town by contract for building, although it is only authorized by vote to borrow money for the purpose of rebuilding. Simond *v.* Heard, 23 Pick. (Mass.) 120, 34 Am. Dec. 41.

67. Driftwood Valley Turnpike Co. *v.* Bartholomew County, 72 Ind. 226; Mackey *v.* Columbus Tp., 71 Mich. 227, 38 N. W. 899; *In re* White Clay Creek Bridge, 5 Pa. Co. Ct. 366.

Acceptance by commissioners.— Under a statute providing that to build a bridge between adjoining counties "it shall be lawful for the commissioners of highways of such adjoining towns or counties to enter into contracts," etc., such contract is an essential prerequisite to a joint building and must be accepted by a majority of the commissioners of each town acting as a separate body; the majority of six at a joint meeting cannot bind the towns even though another commissioner signs the contract after completion of the work. Deer Park *v.* Wrought-Iron Bridge Co., 3 Ill. App. 570.

Signing.— If the statute does not require the signature of all the commissioners who are appointed to contract for the building of a bridge a contract by a majority of them is valid. Hooper *v.* Webb, 27 Minn. 485, 8 N. W. 589. So, too, where the name of one commissioner was signed by one of the other commissioners, and he, with knowledge of the fact, acted with the other commissioners without objection in the subsequent completion of the contract, it was held that the contract was valid as to all three. Boots *v.* Washburn, 79 N. Y. 207.

There was sufficient compliance in Croley *v.* California Pac. R. Co., 134 Cal. 557, 66 Pac. 860; Cleveland Cotton Mills *v.* Cleveland County, 108 N. C. 678, 13 S. E. 271; Bullitt County *v.* Washer, 130 U. S. 142, 9 S. Ct. 499, 32 L. ed. 885.

Fraud in execution of contract.— The construction of a bridge having been determined by the town board and authority given to highway commissioners to build the same, evidence that an agent of the bridge company to whom the contract was let and the commissioners spent the night of the day in which such action was taken at the same hotel and that they went together to secure legal advice as to the commissioners' power to contract, and that the contract bound the town to pay five hundred dollars more for the bridge than the price at which it was privately offered to certain of the town board, is not evidence of fraud in the making of the contract, if the commissioners did not know of the previous lesser price offered by the company, and the bridge contracted for was suitable and well worth the price to be paid for it, and the commissioners received no personal advantage from the contract. Basselin *v.* Pate, 30 Misc. (N. Y.) 368, 63 N. Y. Suppl. 653.

Construction of contract as to joint ownership.— Where a municipality entered into an agreement with a railroad, whereby, in consideration of its paying the increased cost of construction and obligating itself to pay a certain fixed appropriation for maintenance and reconstruction in the future if the railroad would construct the bridge in such manner as to adapt it as a roadway for vehicles and passengers, the parties to such an agreement did not thereby become joint owners of the bridge. The ownership remained in the railroad corporation, subject to a partial use by the municipality, under the terms and conditions of the contract between the parties. Oliff *v.* Shreveport, 52 La. Ann. 1203, 27 So. 688.

68. Wrought-Iron Bridge Co. *v.* Barnett, 1 N. Y. St. 600; McPhail *v.* Cumberland County, 119 N. C. 330, 25 S. E. 958; Mathewson *v.* Hawkins, 19 R. I. 16, 31 Atl. 430.

the county authorities until an appropriation has been made to pay for the same either in whole or in part,[69] or for the expenditure of more than double the amount of the bridge funds;[70] and a statute authorizing the commissioners of a county to contract for the construction of bridges and appoint persons to supervise the building of the same does not authorize them to appoint agents to make such contracts.[71] Failure of the contractor's bond to conform strictly to the statute will not absolve the county from payment after the bridge has been accepted by them.[72]

(c) *Ratification.* If a contract for the erection of a bridge is one which the county or township has no authority to make it cannot, by its subsequent acts, ratify it.[73]

(II) *Liability* — (A) *In General* — (1) Of County. If the contract sought to be enforced is a valid one a county is liable thereon the same as any other corporation;[74] but if the bridge is built without entering into any contract,[75] or if the contract is void[76] it has been held that no recovery can be had against the county, even upon a *quantum meruit.*

(2) Of Individual Commissioners. It has been held that if commissioners whose duty it is to contract for the construction of a bridge enter into a contract in excess of their power, or, having sufficient funds on hand to pay for the work, allow them to be used for other purposes, they will be individually liable, notwithstanding a clause in their contract exempting them from such liability.[77]

69. Fones Hardware Co. *v.* Erb, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353, construing Mansfield Dig. (Ark.), § 1451, and holding that the fact that an appropriation was made to pay for preliminary work in securing the bridge would not authorize the commissioners to let a contract for the building before the required appropriation had been made.

70. Clark *v.* Dayton, 6 Nebr. 192, holding that a statute which provides that county commissioners may let contracts to the lowest competent bidder for the improvement of such roads as may be a general necessity and pay for the same by orders on the county treasurer payable out of the county road funds, and that no contract shall be entered into for a greater sum than double the amount of money on hand in the county road fund, applies to contracts for the erection of bridges as well as to improvements of roads.

71. Potts *v.* Henderson, 2 Ind. 327. See also St. Louis County *v.* Cleland, 4 Mo. 84, holding that a county authorized by law to appoint a commissioner to build a bridge according to a plan and with materials directed by the county court cannot appoint a commissioner with authority to build a bridge upon any plan he may think proper, and that the acts of such an appointee are not binding upon the county.

72. Kansas City Bridge, etc., Co. *v.* Wyandotte County, 35 Kan. 557, 11 Pac. 360, where the bond did not upon its face show that it was "for the benefit of the bridge fund" as required by statute.

73. Wrought-Iron Bridge Co. *v.* Jasper Tp., 68 Mich. 441, 36 N. W. 213; Wrought Iron Bridge Co. *v.* Barrett, 12 N. Y. St. 194.

Ratification of change in contract.— Where a board of supervisors had in their individual capacity consented to a change in a contract for the construction of a bridge, the appointment of a committee to examine the same after its completion, with power to accept or reject it and a subsequent qualified acceptance by them (the supervisors) does not amount to a ratification of the change in the contract. Mallory *v.* Montgomery County, 48 Iowa 681.

74. **A county is liable for interest** on the contract price of a bridge from the time of its completion until the debt is paid. Morris *v.* Bell County, 20 Ky. L. Rep. 1912, 50 S. W. 531.

75. Epperson *v.* Shelby County, 7 Lea (Tenn.) 275.

76. Mackey *v.* Columbus Tp., 71 Mich. 227, 38 N. W. 899; Buchanan Bridge Co. *v.* Walters, 4 Ohio S. & C. Pl. Dec. 134.

Effect of general statute.— Mo. Rev. Stat. (1879), § 1218, which provides that if a claim against a county be for work done or materials furnished in good faith by the claimant under contract with the county authorities, the claimant shall be entitled to recover, although the authorities, in making the contract, may not have pursued the form prescribed by law, does not in any way modify the special statute in relation to bridges which confers special powers and prescribes a special method for their exercise and execution. Heidelberg *v.* St. Francois County, 100 Mo. 69, 12 S. W. 914. But if the original contract is valid, but is subsequently changed under an oral agreement, and the work as a whole is done in keeping with the spirit of the valid contract and is a substantial compliance with its terms the provisions of the general statute may be invoked, and the claimant permitted to recover for the work. Bryson *v.* Johnson County, 100 Mo. 76, 13 S. W. 239. *Contra,* McPhail *v.* Cumberland County, 119 N. C. 330, 25 S. E. 958.

77. Paulding *v.* Cooper, 10 Hun (N. Y.) 20. *Compare* Perry *v.* Hyde, 10 Conn. 329.

Void contract of predecessor.— A commis-

(B) *Enforcement of Liability.* Where the contract is in the name of an agent, it is necessary to a recovery against the county to show an adoption or ratification of it by the county;[78] or, if the action is brought in a jurisdiction where a recovery on a *quantum meruit* is allowed in the absence of an express contract, it must be shown that the county accepted and derived benefit from the work.[79]

g. Acceptance. While the commissioners may in certain cases be held to have waived their right to pass upon and condemn the workmanship or material used in a bridge,[80] its use by the public after its completion cannot be taken as an acceptance of it, where the commissioners alone are authorized to accept.[81] Acceptance and payment therefor by the county court does not amount to a waiver of any defect of which it was ignorant,[82] or when the approval was procured by fraud;[83] but in the absence of fraud or mistake, an acceptance by duly authorized parties is conclusive upon the towns or counties defraying the expenses of the work.[84]

3. By Private Capital — a. Power to Grant Franchise. The power to grant franchises to individuals or companies to construct and maintain public bridges rests primarily with the state legislature,[85] and may be granted to whomsoever it

sioner of highways is not liable for the contract price of a bridge entered into by his predecessor without authority. Wrought Iron Bridge Co. *v.* Barrett, 12 N. Y. St. 194.

78. Warrick County *v.* Butterworth, 17 Ind. 129.

79. Foy *v.* Craven County, 111 N. C. 129, 15 S. E. 944.

Parties.— If a bridge is built at the instance of two towns, one of which has paid its proportionate share of the expense, a recovery can be had against the other for a part of its proportion remaining unpaid, without joining the former in the action. Harris *v.* Houck, 57 Barb. (N. Y.) 619.

80. Thus where a contract required the county commissioners, if they had a superintendent and desired to exercise their privilege of inspection, to be present as material was furnished or labor expended and pass upon the same, it was held that where the superintendent was present, watching the progress of the work which was done pursuant to his orders and in substantial compliance with the plans, the commissioners waived their right to pass upon the workmanship and material and their right to redeem either, unless there was collusion between the contractor and the superintendent. Carroll County *v.* O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16.

81. Moore *v.* Caruthers, 17 B. Mon. (Ky.) 669; Taymouth Tp. *v.* Koehler, 35 Mich. 22; Dinsmore *v.* Livingston County, 60 Mo. 241, the last case holding that it does not amount to a waiver on the part of the county of a claim for damages against the builder for delay in finishing it.

Where the bridge was used by the public for five years without objection, and it is shown that it was approved by a jury of view appointed to inspect it, evidence of defects of a trivial character, involving small cost, is not sufficient proof to make out the defense of non-acceptance by the county. Smith *v.* Hubbard, 85 Tenn. 306, 2 S. W. 569.

82. Johnson County *v.* Lowe, 72 Mo. 637.

83. Johnson's Appeal, 1 Walk. (Pa.) 210.

Vacating orders on discovery of fraud.— It is no abuse of the power of the court when the fraud is discovered to set aside its orders concerning the inspectors' report, and to recommit the matter to the inspectors to make a final report, in order to let the county into whatever remedy it may have to recover money paid under the fraudulently procured decree. Naylor's Run Bridge, 34 Leg. Int. (Pa.) 169.

84. Guilder *v.* Dayton, 22 Minn. 366.

The acceptance by a committee on roads and bridges appointed by the board of county commissioners whose duty it was to accept the same is *prima facie* an acceptance by the commissioners, and proof of acceptance by a majority of such committee is proper in determining whether or not the bridge was in fact accepted by the county. Evans *v.* Stanton, 23 Minn. 368.

Where acceptance by the board is necessary to bind the county, and such board has the option to accept or reject, it must follow that they may make their acceptance subject to such conditions as they may see fit to impose. Hence, where they accepted the bridge upon the condition that the contractor would take a specified sum for his work, the limitation of his recovery to that amount cannot be made to depend upon his receiving it in full satisfaction. Mallory *v.* Montgomery County, 48 Iowa 681.

Statutory compliance is necessary to render the acceptance binding. *In re* Smithfield Creek Bridge, 6 Whart. (Pa.) 363. For construction of the Pennsylvania act of February, 1845, requiring three road and bridge viewers, and holding that such act does not repeal the general road law of 1836, § 39 see *In re* Nescopeck Creek Bridge, 64 Pa. St. 458. See also *In re* Thirteenth St. Bridge, 2 Mon. (Pa.) 58.

85. Fall *v.* Sutter County, 21 Cal. 237; Wright *v.* Nagle, 101 U. S. 791, 25 L. ed. 921. And see Young *v.* Buckingham, 5 Ohio 485.

chooses.[86] The power may, however, be delegated to municipalities,[87] and when this is clearly so, a franchise obtained from such authority is equally valid with one granted by the legislature.[88] The right to erect a toll-bridge over a river forming a coterminous boundary between two states can only be conferred by the concurrent legislation of both.[89]

b. Effect of Franchise and Rights Thereunder — (i) *In General.* The duties which a bridge company owes to the public,[90] the duration of its franchise,[91] and whether the company has sufficiently complied with the statute to claim the

The power is implied in authority for the prosecution of works of internal improvements generally. Mason *v.* Harper's Ferry Bridge Co., 17 W. Va. 396.

86. Disregard of ownership of soil.—Thus, although the franchise should, if practicable and consistent with the public welfare, be conferred on the owners of the soil rather than on strangers, yet the bridge may be established without regard to the ownership of the soil should the legislature so direct. Young *v.* Harrison, 6 Ga. 130.

87. Fall *v.* Sutter County, 21 Cal. 237; Waugh *v.* Chauncey, 13 Cal. 11 (where it was held that the statute had invested the board of supervisors with jurisdiction over roads, ferries, and bridges, and that their judgment in allowing a new toll-bridge within a mile of an old one was conclusive unless a clear abuse of discretion could be shown). And see McCartney *v.* Chicago, etc., R. Co., 112 Ill. 611.

If not clearly granted, the power will not be implied. Williams *v.* Davidson, 43 Tex. 1, holding that under its charter the city of Victoria did not have authority to authorize the erection of a toll-bridge and permit the company to charge tolls thereon.

Must be for public use.— Cities or municipalities hold the fee of their streets in trust for public uses only and cannot grant private parties the right to construct a bridge over a public alley for their own use. Field *v.* Barling, 149 Ill. 556, 37 N. E. 850, 41 Am. St. Rep. 311, 24 L. R. A. 406.

88. Fall *v.* Sutter County, 21 Cal. 237.

89. Delaware River Bridge Co. *v.* Trenton City Bridge Co., 13 N. J. Eq. 46.

90. Free transportation.— Under a charter allowing a party to erect a toll-bridge provided it should ever remain free and open to the citizens of the county, it was held that the proper construction of the provision was that the bridge should be free and open to the citizens of the county whether they crossed on foot or otherwise, and also for the passage of their carriages or any other means of transportation employed in their lawful business. Reed *v.* Hanger, 20 Ark. 625.

Duties attending transfer of franchise.— Where an act of the legislature assigns the right to build a toll-bridge, which right had been formerly conferred to another bridge company, the assignee will be held to take such franchise free from all liability to forfeiture for any previous act or omission of the former company. The reason being that it would not be the probable purpose of the legislature to give to a party a privilege for the mere purpose of taking it from him by a suit then pending, and without regard to any act of his. State *v.* Centreville Bridge Co., 18 Ala. 678. But a bridge company which is authorized to purchase the bridge and franchise of another company and under such authority does purchase such bridge and franchise will be held to have assumed the duties of the latter with regard to the maintenance and repair of a turnpike built by the latter corporation, although at the time of making the purchase they protest against the clause in the deed, expressing that it was the understanding of the parties that all the right, title, and interest in said road was to pass. Com. *v.* Hancock Free Bridge Corp., 2 Gray (Mass.) 58. And see Proprietors Charles River Bridge *v.* Proprietors Warren Bridge, 7 Pick. (Mass.) 344 [*affirmed* in 11 Pet. (U. S.) 420, 9 L. ed. 773], holding that the rights of Harvard college in the old ferry between Boston and Charlestown did not pass to the proprietors of the Charles river bridge, incorporated under the act of March, 1785.

91. Thus, where one is authorized by statute to take toll until an admitted indebtedness to him by the state is liquidated, his franchise does not expire when he is reimbursed to the amount admitted by the statute, but he is also entitled to interest thereon, although the act was silent as to that point. Adams *v.* Beach, 6 Hill (N. Y.) 271. See also Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.) 106, construing the Massachusetts statute of 1843 as amended by chapter 31 of the statute of 1845, and holding that the right of the bridge company was to take the tolls thereby fixed until the new tolls should be sufficient to reimburse the original capital and costs of building the bridge with nine per cent interest.

Waiver as to time of completion.— N. Y. Laws (1867), c. 399, incorporated the New York Bridge Company, and in 1869 the company was required to complete a bridge across the East river between New York and Brooklyn on or before June 1, 1874. The Brooklyn act of June 5, 1874, provided for the completion of the bridge and authorized the cities of New York and Brooklyn, by the issue of bonds, to pay money during the years of 1874 and 1875 toward that object. It was held that the latter act was not only an absolute and unconditional waiver of the limit of time previously declared but was an extension of the time within which the bridge should be finished. Matter of New York Bridge Co., 67 Barb. (N. Y.) 295.

benefits of the franchise [92] or any aid which the statute may authorize a municipality to give it [93] are matters determinable largely upon the statute by virtue of which the franchise is obtained; and it can claim only such benefits,[94] build only for the purpose,[95] and acquire and control only such property [96] as is contemplated or authorized by its charter.

(II) *Tolls* — (A) *Right to Take* — (1) In General. The right to demand toll of the public for the crossing of a public bridge exists only by virtue of statutory enactment,[97] and such toll cannot be lawfully exacted unless the charter and conditions of the statute as to the building and maintenance of the bridge are complied with.[98] No toll can be exacted after the expiration of the time for

92. A substantial compliance with the conditions imposed by an act granting the franchise of a toll-bridge is held to be sufficient to invest the grantee with the rights and privileges thereof. Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. (N. Y.) 625. But building a bridge a half mile below the point designated by the charter is not a compliance with the statute in the sense that the bridge company can claim the benefit of an act avoiding the charter of a new bridge company, provided the other would build at the designated point. State *v.* Old Town Bridge Corp., 85 Me. 17, 26 Atl. 947. And see Saugatuck Bridge Co. *v.* Westport, 39 Conn. 337.

93. Thus, under Iowa Gen. Laws (1896), c. 13, §§ 1–3, it is held that the aid authorized to be given by cities to any corporation organized under the laws of Iowa for the construction of bridges cannot be given to a foreign corporation, and that the taxpayers may sue to recover from a bridge company taxes paid by a city to such corporation. Smith *v.* Omaha, etc., R., etc., Co., 97 Iowa 545, 66 N. W. 1041.

94. Janesville Bridge Co. *v.* Stoughton, 1 Pinn. (Wis.) 667.

95. But a company authorized to construct a bridge for purposes of a public highway, if it is in good faith so doing, cannot be enjoined from proceeding with the work, merely because it is also to be used by a street railway, for which latter purpose alone the company would have no authority to build. Oliver *v.* Thompson's Run Bridge Co., 197 Pa. St. 344, 47 Atl. 230.

96. Approaches.— The right to build includes by implication the right to construct reasonable and proper approaches. Com. *v.* Pittston Ferry Bridge Co., 148 Pa. St. 621, 24 Atl. 87.

Interest in realty.— Under the charters granted to some bridge companies they acquire the fee in the land, and not merely an easement. Harlow *v.* Rogers, 12 Cush. (Mass.) 291. See also Covington, etc., Bridge Co. *v.* Magruder, 63 Ohio St. 455, 59 N. E. 216, holding that under Ohio Rev. Stat. (1900), § 3542, the bridge company could acquire any interest in realty, which, in the opinion of the directors, would be necessary and advisable for the site of the bridge, together with suitable avenues or approaches leading thereto. But see Thompson *v.* Proprietors Androscoggin Bridge, 5 Me. 62, where it was held that under the charter in question the company acquired no more than an easement in the land on which the bridge was built.

Terminus of highway upon river.— In the absence of expressed stipulation this would seem to include the right to use the whole terminus of a highway upon a river, but not as hostile or adverse to the rights of the public. Newark Lime, etc., Mfg. Co. *v.* Newark, 15 N. J. Eq. 64.

The power to build and rent wharves is not an incident to such business. New Haven Toll Bridge Co. *v.* Osborn, 35 Conn. 7.

Enlargement of franchise.— A statute authorizing the proprietors of a toll-bridge to build and maintain a turnpike at their own expense, leading toward their bridge and separated therefrom only by a public highway of less than a mile in length, and to take toll on such turnpike, does not create a new and distinct franchise, but only enlarges the franchise conferred by their charter. Com. *v.* Hancock Free Bridge Corp., 2 Gray (Mass.) 58.

97. Whelchel *v.* State, 76 Ga. 644.

The character of the tax by which a road or bridge is to be built and kept in repair is simply changed. Jones *v.* Keith, 37 Tex. 394, 14 Am. Rep. 382.

Enforcement of right.— Where the proprietors of a bridge are entitled to take tolls, there would seem to be no doubt that the right may be enforced by assumpsit as on an implied promise, although the traveler claim exemption and refuse to pay toll. Central Bridge Corp. *v.* Abbott, 4 Cush. (Mass.) 473. See also State *v.* Dearborn, 15 Me. 402. So, too, the proprietors may interpose a gate or bar which they may lawfully refuse to open unless their toll is paid, and if the party attempt to pass by force or violence, the statute renders him liable to a penalty. But it would seem that the law does not suffer the right to be enforced by violence, and the proprietor has no right to seize the traveler and enforce his right thereby. State *v.* Dearborn, 15 Me. 402.

98. Androscoggin Bridge *v.* Bragg, 16 N. H. 502; Bonham *v.* Taylor, 10 Ohio 108 (where the posting of the rates of toll at each end of the bridge is held to be a condition precedent to the right to take tolls). See also South Carolina R. Co. *v.* Jones, 4 Rich. Eq. (S. C.) 459, holding that the limitation in the charter of a bridge company that the railroad company or the community should not be subjected to the payment of double tolls precluded it from collecting tolls from

which the right to charge was authorized,[99] unless the travel is within the lawful limit of the franchise,[1] or, in some jurisdictions, unless the bridge is kept in a good state of repair;[2] but a company having the right to collect tolls on an old bridge will have the same right on a new one near the same place, the change being necessitated by the lawful appropriation of the old, by a railroad.[3]

(2) Exemptions, Commutations, Etc. In some instances statutes authorizing toll-bridges have specifically exempted from the payment of tolls persons engaged in certain employments or pursuits;[4] and as the purpose of the law in fixing the rates of toll is to prevent extortion,[5] it follows that unless forbidden by charter or statute, the company may, by vote or contract,[6] exempt certain parties from toll,[7]

the South Carolina side so long as such persons were required to pay again at the gate at the Georgia side.

Substantial compliance with the statute.— Where the statute required that the bridge company should construct its bridge at least twenty-four feet wide, with sufficient rails on each side, and the bridge was built twenty-four feet wide between the rails but with a framework in the center, the thickness of which being deducted the traveling pathway was a little less than twenty-four feet, it was held that the statute was substantially complied with, and that this reduction of the width did not impair the right to take tolls. Damariscotta Toll-Bridge *v.* Cotter, 31 Me. 357.

99. Grand Rapids Bridge Co. *v.* Prange, 35 Mich. 400, 24 Am. Rep. 585, holding that, under a statute making the assent of the supervisors of the county essential to the right to maintain a toll-bridge over a navigable stream, a company cannot charge toll after the expiration of the time for which the assent of the supervisors was obtained, although their corporate existence continues; and that a defense to an action to recover such toll that the period of assent by the supervisors had expired is not an attempt to collaterally attack the corporate existence of the company, and hence may be urged in defense by a party refusing to pay toll.

Purchase of the fee of the land on the sides of a stream on which the ends of a bridge rest does not give the purchaser any right to continue a franchise and exact toll beyond the term for which it had been granted. State *v.* Lake, 8 Nev. 276.

1. Middle Bridge Corp. *v.* Marks, 26 Me. 326, where the company, which was incorporated by the state of Maine, having extended its bridge across St. Croix river into the province of New Brunswick, it was held that, in the absence of any express promise, the company could not recover tolls or compensation from a party using the end of the bridge on the New Brunswick side.

Right of company to utilize free bridge.— In Proprietors Canal Bridge *v.* Gordon, 1 Pick. (Mass.) 297, 11 Am. Dec. 170, it appeared that a corporation was chartered to build a bridge and take tolls of persons passing over it, and that another corporation was empowered to build a dam near the bridge to be used as a road without the power of demanding tolls. The two corporations agreed that the bridge and dam should be connected so that a part of the bridge should become a part of the dam. It was held, in an action by the bridge corporation to recover tolls of persons passing over that part of the bridge which constituted a part of the dam, that the dam being built under a franchise which did not allow tolls the agreement of the two corporations did not affect the same, and that the bridge corporation could not recover tolls for passage over such parts.

2. Reg. *v.* Greaves, 46 U. C. Q. B. 200, where it appears that the court, upon a complaint of twelve freeholders that a toll-bridge is out of repair, may appoint an engineer to examine the same, and if the bridge is found to be defective, the company are allowed a certain time within which to make repairs, at the expiration of which time, should they fail so to do, the taking of toll would be illegal.

Conclusive evidence of proper repair.— The report of the bridge commissioners, whose duty it is to supervise and accept bridges, that a toll-bridge is completed and in good repair as required by the charter is conclusive between a party who has been sued for the non-payment of tolls and the bridge company; and such party cannot set up as a defense that the statute had not been complied with in the repair of the bridge. Strong *v.* Dunlap, 10 Humphr. (Tenn.) 423.

3. Matter of New York, etc., R. Co., 28 Hun (N. Y.) 472.

4. An exemption of "all persons drawing firewood for their own family use" extends to a person drawing his firewood at one time, with the assistance of his neighbors and others hired by him for that purpose, as well as if he himself was engaged in drawing the loads. Wooster *v.* Van Vechten, 10 Johns. (N. Y.) 467. See also Adams *v.* Ft. Gaines, 80 Ga. 85, 5 S. E. 241, holding that under the statute authorizing the bridge in question, persons bringing produce to the market of Fort Gaines had the right to pass free of tolls, without regard to the value of their produce.

5. Com. *v.* Allegheny Bridge Co., 20 Pa. St. 185.

6. Such contract does not preclude the company from enacting reasonable by-laws to regulate the manner of crossing its bridge. Holmes *v.* Pickering, 1 Ohio Dec. (Reprint) 179, 3 West. L. J. 222.

7. Stock-holders.— The right of stock-holders in a bridge corporation to pass the bridge free of toll, such right being derived

or commute or compound [8] the toll, or levy what they choose from each person,[9] so long as they keep within the prescribed maximum.[10]

(B) *Right to Evade.* In the absence of statute a party has the right to evade toll by crossing a stream near a bridge in another manner;[11] but in some jurisdictions it is provided that any person crossing otherwise than on the bridge but within a certain distance thereof shall be liable to the payment of the toll which he would have paid had he crossed the bridge,[12] and the avoidance of tolls may be prohibited by the infliction of a penalty.[13]

from a resolution exempting "all present proprietors of stock," does not become a concomitant part of the stock, and a subsequent purchaser of the same would not be entitled to such privilege. Central Bridge Corp. *v.* Abbott, 4 Cush. (Mass.) 473. But it is held that such exemption would extend to a wagon or carriage of the stock-holder. Salmon *v.* Mallett, 6 N. C. 372.

8. Construction of compounding contract. — Under a contract providing that, in consideration of certain sums of money, all persons owning certain land within a town, and all persons who might thereafter have their homes upon any of said lands, and all persons, carriages, vehicles, stages, animals, and conveyances going to or from said lands upon the proper business of any person owning or having his home thereon, should pass over the bridge of the corporation without paying any tolls, it was held that one who resided on the land might operate a line of stages over the bridge for the conveyance of passengers, without paying hire. Central Bridge Corp. *v.* Sleeper, 8 Cush. (Mass.) 324. See also Central Bridge Corp. *v.* Bailey, 8 Cush. (Mass.) 319.

9. It is no ground of forfeiture that the company have refused to let some other person pass at the commuted rates. Com. *v.* Allegheny Bridge Co., 20 Pa. St. 185.

10. Central Bridge Corp. *v.* Sleeper, 8 Cush. (Mass.) 324; Central Bridge Corp. *v.* Bailey, 8 Cush. (Mass.) 319; Saunders *v.* Hathaway, 25 N. C. 402, 404 (where it is said: "None of the reasons for laying such a toll apply to its collection. It is granted to the builder as his compensation. It is for his benefit and is his property; and, consequently, he may levy what he likes from each person, within the rates fixed by the court, or relinquish it altogether"); Hamilton, etc., Road Co. *v.* Binkley, 9 Ont. 621.

What constitutes discrimination.—A charge of two cents made by a bridge company for every person transported over its bridge by a street railway, instead of a charge of twenty cents per car, such charge being the toll for ordinary two-horse vehicles, is not an unlawful discrimination. It is clear that in regulating tolls no one would classify a street car with a family carriage or two-horse wagon; the car might be constructed so as to carry a hundred persons and thus materially decrease the profits of the bridge company. Covington, etc., Bridge Co. *v.* South Covington, etc., St. R. Co., 93 Ky. 136, 14 Ky. L. Rep. 52, 19 S. W. 403, 15 L. R. A. 828.

Evidence that a third person had been permitted to pass the bridge without paying toll, in going to certain lands to which defendant frequently went, and by virtue of an ownership or residence on which he claimed an exemption from toll, is admissible to show that such lands were included in the vote exempting the occupants thereof from toil; and where it is clear that persons residing on certain lands have been exempted the burden is on the bridge company to show that defendant is not one of those persons. Central Bridge Corp. *v.* Butler, 2 Gray (Mass.) 130.

11. Wright *v.* Morris, 43 Ark. 193.

12. Sprague *v.* Birdsall, 2 Cow. (N. Y.) 419, where the statute provided that any party crossing Cayuga lake within three miles of the bridge should be liable for tolls and it was held that a party embarking on one side of the lake six miles from the bridge and crossing it from such a direction as to leave the lake within sixty rods of the bridge on the other side would not constitute an evasion of the statute. This holding was approved in Cayuga Bridge Co. *v.* Stout, 7 Cow. (N. Y.) 33, which also criticized and departed from the holding of the principal case, that it was not the intention of the act to prohibit any one from crossing on the ice, even though they crossed within three miles.

Avoidance of toll by heavy load.— Equity will not interfere to restrain a party from hauling heavy loads across a toll-bridge and thereby to some extent avoiding a payment of tolls. If the load is heavier than the statute allows the bridge company would have an adequate remedy at law for an injury to its bridge, and if the load is not an unlawful one, the fact that they cannot charge more for it than for a lighter load is a matter for legislative notice, and not for a court of equity. Thompson *v.* Matthews, 2 Edw. (N. Y.) 212.

13. Middle Bridge Proprietors *v.* Brooks, 13 Me. 391, 29 Am. Dec. 510, holding that to enable a company to recover such penalty it is essential that it comply with those conditions of the charter which are for the particular benefit or accommodation of the traveling public. Hence, if by charter or statute they are required to keep the rates of tolls exposed to view, they could not recover if such conditions were not complied with. But if the regulation is not for the particular accommodation of individuals, as for instance the building of the bridge exactly twenty-five feet wide, a non-compliance with the condition could not be urged in defense

(III) *Exclusiveness of Privileges* — (A) *In General.* The right to erect bridges within certain limits and to take tolls may be made exclusive,[14] and the erection of another bridge within such limits is, as respects the franchise, a nuisance.[15] Such exclusive privileges are not, however, favored in law, and will not be recognized or enforced by the courts unless clearly expressed;[16] and the granting to county courts of jurisdiction to authorize the construction of bridges does not confer upon them the power to grant to any person the exclusive right of construction.[17]

(B) *Infringement of* — (1) What Constitutes. An individual cannot of his own authority establish a free bridge so as to impair the profits or interfere with the franchise of a party operating a toll-bridge;[18] but a provision of the legisla-

by the traveler. Nor can the traveler defend on the ground that the toll-gatherer had not been legally appointed, his acts having been adopted by the company. Proprietors South-West Bend Bridge *v.* Hahn, 28 Me. 300.

14. Proprietors Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35.

Prescribed distance — How measured. — A legislative provision that no other bridge shall be built within a certain distance of a designated bridge will be construed to mean the distance as measured along the course of the stream. McLeod *v.* Burroughs, 9 Ga. 213, where it was held that the expression in the bridge charter of "five miles, either above or below the said bridge," could not be taken to mean five miles in a straight line, but that the distance must be measured along the stream.

Election between two sites. — If a company having the exclusive privilege of building at either of two sites exercises its discretion by building at one, it thereby locates its grant, and cannot, by subsequently building another bridge at the other site, extend the scope of its franchise. Cayuga Bridge Co. *v.* Magee, 6 Wend. (N. Y.) 85, where it appeared that a company was authorized to erect a bridge across a lake or the outlet thereof, and to rebuild it if destroyed or carried away by ice; and all other persons were prohibited from erecting a bridge within three miles of the place where the bridge should be erected. The company built its bridge across the lake, and upon its subsequent destruction built another bridge across the outlet of the lake. It was held that the restricted limits were to be measured from the place where the bridge was first built, and not from the bridge which was subsequently built across the outlet. See also Henderson *v.* Maybin, 3 Rich. (S. C.) 153.

15. Chenango Bridge Co. *v.* Lewis, 63 Barb. (N. Y.) 111; Newburgh, etc., Turnpike Road *v.* Miller, 5 Johns. Ch. (N. Y.) 101, 9 Am. Dec. 274.

16. *California.* — Fall *v.* Sutter County, 21 Cal. 237.

New Hampshire. — Union Bridge Co. *v.* Spaulding, 63 N. H. 298.

New Jersey. — See Delaware River Bridge *v.* Trenton City Bridge Co., 13 N. J. Eq. 46, where it was held that an act by the legislature of New Jersey conferring the exclusive franchise on a bridge company to maintain their bridge over the Delaware river (the bridge having been built under a concurrent grant of the legislatures of Pennsylvania and Delaware), was not intended to go into effect until assented to by the legislature of Pennsylvania, even if the New Jersey legislature had the authority to make such exclusive grant without the consent of the Pennsylvania legislature.

New York. — Ft. Plain Bridge Co. *v.* Smith, 30 N. Y. 44; Chenango Bridge Co. *v.* Binghamton Bridge Co., 27 N. Y. 87; Oswego Falls Bridge Co. *v.* Fish, 1 Barb. Ch. (N. Y.) 547; Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. (N. Y.) 625.

Texas. — Compton *v.* Waco Bridge Co., 62 Tex. 715, 723, where the court say: "Such exclusive privileges as are conferred by appellee's charter approach very nearly the extreme limit of legislative power, and such legislation is so far antagonistic to the spirit of free and enlightened republican government that it is not entitled to any liberality of construction or special favor from the courts."

Wisconsin. — Janesville Bridge Co. *v.* Stoughton, 1 Pinn. (Wis.) 667.

United States. — Wright *v.* Nagle, 101 U. S. 791, 25 L. ed. 921; Charles River Bridge *v.* Warren Bridge Co., 11 Pet. (U. S.) 420, 9 L. ed. 773.

See 8 Cent. Dig. tit. "Bridges," § 28.

17. Dyer *v.* Tuskaloosa Bridge Co., 2 Port. (Ala.) 296, 27 Am. Dec. 655; Wright *v.* Nagle, 48 Ga. 367.

Grant construed as a license. — For construction of a grant by the county to a bridge company of the right to use the site and approaches of the public road for a term of ten years, and holding that such grant was a mere license and not a contract between the county and bridge company which would prevent the county from afterward establishing a free bridge at the same point with the same right of approach from the public road see Victoria County *v.* Victoria Bridge Co., 68 Tex. 62, 4 S. W. 140. See, generally, Constitutional Law.

18. *Alabama.* — Harrell *v.* Ellsworth, 17 Ala. 576.

California. — Norris *v.* Farmers', etc., Co., 6 Cal. 590, 65 Am. Dec. 535.

Mississippi. — Townsend *v.* Blewett, 5 How. (Miss.) 503.

North Carolina. — Smith *v.* Harkins, 38 N. C. 613, 44 Am. Dec. 83.

ture prohibiting the erection of other toll-bridges or toll-ferries within a certain distance of a bridge does not preclude the county from constructing a free bridge within such distance;[19] and the erection of a railroad bridge within the territorial limits in which a bridge company has the exclusive right to take toll is not an infringement of its franchise.[20]

(2) Damages For. Proof by plaintiff of the legislative act providing for the existence of the franchise, of a deed to plaintiff of the freehold upon which the bridge is situated, and of plaintiff's possession of the bridge is sufficient to entitle him to maintain an action for the recovery of damages for the infringement of his franchise, in which action plaintiff may prove the number of persons who have crossed the rival bridge.[21]

c. Public Acquisition of Toll-Bridge — (I) *How Accomplished* — (A) *In General.* In many instances the charters of toll-bridges, or the statutes under which they are established, prescribe the time or manner by which such bridges may be made free.[22] This may be done by requiring a city or county to purchase and assume control of a bridge within its limits,[23] although usually they are merely authorized to purchase or assume control of such bridges and operate them free of charge.[24] The making of such purchases may be considered a necessary

Canada.— See Galarneau *v.* Guilbault, 16 Can. Supreme Ct. 579.

See 8 Cent. Dig. tit. "Bridges," § 30.

If authorized to charge only such toll as is necessary for repairs, and the company neglects or refuses to repair, a party may build a free bridge, although its effect is to diminish travel over the toll-bridge. Free Bridge Co. *v.* Woodfin, 17 N. C. 113.

19. Victoria County *v.* Victoria Bridge Co., 68 Tex. 62, 4 S. W. 140. And see Satterthwaite *v.* Beaufort County, 76 N. C. 153, where the point was raised but not adjudicated, because the owner of the toll-bridge was not a party to the proceedings.

20. *Georgia.*— McLeod *v.* Savannah, etc., R. Co., 25 Ga. 445.

Nevada.— Lake *v.* Virginia, etc., R. Co., 7 Nev. 294.

New Jersey.— Atty.-Gen. *v.* Delaware, etc., R. Co., 27 N. J. Eq. 1; Bridge Proprietors Passaic River, etc. *v.* Hoboken Land, etc., Co., 13 N. J. Eq. 503.

New York.— Mohawk Bridge Co. *v.* Utica, etc., R. Co., 6 Paige (N. Y.) 554; Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. (N. Y.) 625, 660, in which latter case the court say: "If the complainants were to lay down a suitable railway track and strengthen their bridge so that the engines and trains of the defendants might cross it, there is nothing in their charter which would warrant them in exacting toll from the defendants. . . . This demonstrates that the franchise granted to the defendants is not the same as that vested in the complainants; nor is there such a similarity between them as renders the one an interference with the other, in the sense in which a new bridge or a ferry interferes with a prior one established at the same point."

North Carolina.— McRee *v.* Wilmington, etc., R. Co., 47 N. C. 186.

See 8 Cent. Dig. tit. "Bridges," § 31.

21. Townsend *v.* Blewett, 5 How. (Miss.) 503, holding that a receipt by plaintiff to defendant for a year's ferriage is not admissible to show that plaintiff had taken down his bridge and substituted a ferry and thereby abandoned his bridge and franchise, since the ferry may have been used while the bridge was being repaired or rebuilt.

22. Thus where a corporation builds a bridge under a charter granting it the exclusive privilege to collect toll for a designated number of years, providing that after the expiration of that time the bridge shall be abandoned to the parish, such bridge must, after the expiration of the franchise, be surrendered without compensation, inasmuch as the consideration for the building of the bridge was a franchise; the parish being the real owner of the bridge. Lafourche Police Jury *v.* Thibodaux Bridge Co., 44 La. Ann. 137, 10 So. 677. See also *In re* Royersford Bridge, 112 Pa. St. 627, 2 Montg. Co. Rep. (Pa.) 61, 4 Atl. 742, holding that the Pennsylvania special act of Feb. 27, 1839, under which the bridge in question was chartered, was not repealed by the subsequent statute of 1876, and that therefore the mode prescribed by the former act must be pursued in the changing of the bridge from a toll to a free bridge.

23. Pumphrey *v.* Baltimore, 47 Md. 145, 28 Am. Rep. 446. And see Haverhill Bridge Proprietors *v.* Essex County, 103 Mass. 120, 4 Am. Rep. 518, holding that the legislature might require county commissioners to change a bridge from a toll to a free one, and apportion the damages between the county and benefited towns.

24. **Authority to purchase** was held to exist in Rush County *v.* Rushville, etc., Gravel-Road Co., 87 Ind. 502; Multnomah County *v.* City R., etc., Co., 34 Oreg. 93, 55 Pac. 441; Bascom *v.* Oconee County, 48 S. C. 55, 25 S. E. 984. See also Scott *v.* Des Moines, 34 Iowa 552, holding that, where a toll-bridge and franchise relating thereto were conveyed for a consideration to a city "to be held in trust by said city for the use of the public," the acceptance of such conveyance and trust did not in itself impose upon the city the

expense of a county,[25] but a county not having authority to build a bridge across its boundary, without the concurrent action of the other county, cannot purchase a toll-bridge on its boundary without the concurrence of the adjoining county.[26]

(B) *By Eminent Domain.* A toll-bridge may also be changed to a free one, upon the payment of due compensation by the public under the exercise of its right of eminent domain.[27]

(C) *By Expiration of Franchise.* When the franchise to take tolls upon a permanent bridge on a public highway ceases, the right of the public to use the bridge as a free one attaches without any right on the part of the builders to remove the structure and destroy the highway.[28]

duty of keeping the bridge in repair as a free bridge, but that the city, in the exercise of its authority for the protection of the public, might properly remove it to construct in its place a new bridge and charge tolls for the use of the same. The fact that other corporations or persons contributed to the erection of the old bridge would not affect this right.

Nature of title required.— Under the Pennsylvania statutes, where a bridge is purchased by the county commissioners, the county acquires exclusive title thereto, to the exclusion of the commonwealth. Venango County *v.* Oil City St. R. Co., 3 Pa. Dist. 546.

Contract before completion of bridge.— Where the charter of a bridge company provided that a town should have the right, at a price agreed or at an appraisal, to purchase such bridge and the franchise at any time after the bridge was completed and open for travel, a contract by the town before the bridge was built to purchase it on its completion is valid. Saugatuck Bridge Co. *v.* Westport, 39 Conn. 337.

The stock is taken subject to the obligations of the bridge company arising under an agreement previously made by such company, and therefore a traction company which has furnished the bridge company with funds to reconstruct its bridge so as to allow the traction company to run its cars thereon, with a provision for a settlement of accounts at the end of forty years, cannot recover of the bridge company any of such amount advanced, because of the fact that the city has purchased the stock. Pittsburg, etc., Traction Co. *v.* Monongahela Bridge Co., 184 Pa. St. 180, 39 Atl. 56.

Repeal of statute by implication.— A statute authorizing a city to lay out as a town way a toll-bridge between it and a town is not by implication repealed by a subsequent act authorizing the city and town, or either of them, to maintain a bill in equity to ascertain the amount, on the payment of which they were authorized by the charter of the bridge to open it free of toll. The former act was intended to delegate to the city the right of eminent domain, while the latter was only intended to enable either of the municipalities to enforce the right of purchase. Central Bridge Corp. *v.* Lowell, 4 Gray (Mass.) 474.

Application of act to county of Philadelphia.— The Pennsylvania act of May 8, 1876, which authorizes the several counties in the state of Pennsylvania to acquire bridges and abolish tolls thereon, applies to the county of Philadelphia, although the city and county of Philadelphia are consolidated. *In re* City Ave., etc., Bridge, 164 Pa. St. 394, 35 Wkly. Notes Cas. (Pa.) 409, 30 Atl. 388. For construction of the Pennsylvania act of May 8, 1876, which authorizes the counties of Pennsylvania to acquire bridges and abolish tolls thereon see *In re* Bethlehem Toll Bridge, 2 Pa. Dist. 273, 12 Pa. Co. Ct. 311; *In re* Phœnixville Bridge, 2 Montg. Co. Rep. (Pa.) 157.

25. **It is not prohibited by** a provision of the state constitution which prohibits the county from pledging its credit "except for the necessary expenses thereof," unless authorized by a majority of the voters. Evans *v.* Cumberland, 89 N. C. 154.

26. Fountain County *v.* Thompson, 106 Ind. 534, 536, 7 N. E. 248, where the court say: "It may therefore be assumed that a board of commissioners has no power to purchase a toll-bridge which is not on a public highway, or at a place where they could not erect a bridge; nor can they purchase a bridge at any place where such purchase would seem to impose upon the county duties or obligations different from those provided by law."

27. *Connecticut.*— Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716, 17 Conn. 454, 44 Am. Dec. 556.

Massachusetts.— Central Bridge Corp. *v.* Lowell, 4 Gray (Mass.) 474.

Nebraska.— Blaine County *v.* Brewster, 32 Nebr. 264, 49 N. W. 183.

Pennsylvania.— *In re* Towanda Bridge Co., 91 Pa. St. 216.

Tennessee.— The building of a free bridge so near a toll-bridge as to render the franchise worthless is an appropriation of such bridge, calling for compensation. Red River Bridge Co. *v.* Clarksville, 1 Sneed (Tenn.) 175, 60 Am. Dec. 143.

Vermont.— West River Bridge Co. *v.* Dix, 16 Vt. 446 [*affirmed* in 6 How. (U. S.) 507, 12 L. ed. 535].

United States.— Milnor *v.* New Jersey R. Co., 3 Wall. (U. S.) 782, 16 L. ed. 799 [*affirming* 17 Fed. Cas. No. 9,620, 6 Am. L. Reg. 6].

See 8 Cent. Dig. tit. "Bridges," § 68.

28. State *v.* Lawrence Bridge Co., 22 Kan. 438; Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.) 106. See also State *v.* Lake, 8 Nev. 276.

(D) *By Forfeiture of Franchise.* What will be such a misuser of a franchise to build and maintain a bridge as will constitute a forfeiture thereof must be determined by the conditions in the charter and the facts of each particular case.[29]

(II) *DAMAGES.* The amount of damages due the owners of a toll-bridge when it is converted by the public into a free bridge depends upon the nature of the property and title of the proprietors,[30] and considerations peculiar to the particular case.[31] If the bridge is built under a charter or statute limiting the right to take tolls to a certain number of years, the damages would be the value of the right to receive such tolls until the expiration of that period, and the value of the bridge, as a structure, cannot be considered.[32] On the other hand, if the bridge

29. A continued neglect for ten years to comply with prescribed conditions was held, in People *v.* Thompson, 21 Wend. (N. Y.) 235, to constitute a misuser and a ground of forfeiture of the franchise. See also Chandler *v.* Montgomery County, 31 Ark. 25.

Borrowing of money.— If the charter of a bridge company does not prohibit its borrowing money, such borrowing will be no ground for forfeiture. Nor will the fact that the company, instead of acquiring a piece of ground for erecting an abutment of the bridge in the mode authorized by law, acquired it by contract, or that the company failed to render to the legislature the periodical accounts required by the charter, constitute grounds for its forfeiture. Com. *v.* Allegheny Bridge Co., 20 Pa. St. 185.

Failure of company to give bond.— Where a charter was granted a company to build a bridge and the incorporators were required to give bond for the completion thereof, the mere fact that the company did not give the bond required by such act will not invalidate the charter or cause its forfeiture. Enfield Toll Bridge Co. *v.* Connecticut River Co., 7 Conn. 28.

Failure to build in strict compliance with contract.— Where a charter was granted to A to build a bridge and collect tolls, which bridge was subsequently swept away by a freshet, and A, after rebuilding the bridge several times, filled in the place of passage with rocks and earth, excepting for a short distance where he built a bridge and collected tolls as before, the real object in view was obtained; the interest of the public was fully subserved, and the change in the original construction does not constitute a ground of forfeiture of the charter. Chandler *v.* State, 38 Ark. 197.

If a penalty for neglecting to raise the draw of a bridge is imposed by the charter under which it is constructed, such neglect will not work a forfeiture of the franchise. Com. *v.* Breed, 4 Pick. (Mass.) 460.

30. It must be a just and reasonable compensation and cannot be placed upon any fanciful or arbitrary basis. Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.) 106.

If the bridge has been abandoned by its proprietor no compensation need be awarded under the late statutes of California. Sears *v.* Tuolumne County, 132 Cal. 167, 64 Pac. 270.

31. Sunderland Bridge Case, 122 Mass. 459. Thus the charter of a bridge corporation allowed a specific toll for seventy years as a remuneration for the cost of building and maintaining the bridge, and by a subsequent act the corporation obtained a right to take tolls thereby fixed until the net amount of such tolls should be sufficient to reimburse a capital of ten thousand dollars and the cost of rebuilding the bridge with nine per cent interest, unless sooner redeemed by payment of such sum with the same interest. It was held that in ascertaining the value of the franchise under this charter computation should be so made as to give the stock-holders nine per cent interest when the net receipt of tolls fell short of that percentage of the capital, if there were any such years from the income of succeeding years which exceeded nine per cent, so that the average income of the stock-holders would be nine per cent per year. Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.) 106. See also Clarion Turnpike, etc., Co. *v.* Clarion County, 172 Pa. St. 243, 37 Wkly. Notes Cas. (Pa.) 503, 33 Atl. 580, construing the Pennsylvania act of April 10, 1862, under which the Clarion Turnpike & Bridge Company was chartered, and holding that the authority granted the company to maintain a turnpike was distinct from the power granted to it to erect a certain toll-bridge, and that therefore the county, in making the bridge public, need not consider the value of the turnpike franchise.

32. Sunderland Bridge Case, 122 Mass. 459; Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.) 106.

Certainty as to obligors.— A sum awarded for the franchise of a bridge in two towns "to be paid equally by both towns" is a sufficient award of the sum to be paid by each town. State *v.* Canterbury, 28 N. H. 195.

Destruction of bridge after award to proprietors.— If, after the damages which the proprietors of a toll-bridge should receive upon its being laid out as a public highway have been awarded by the commissioners, and accepted by the county and towns, the bridge is destroyed by wind or flood, the proprietors are not obliged to rebuild the bridge, before they became entitled to the compensation; inasmuch as their ownership ceased when the award was accepted. Besides, it cannot be said as a matter of law, that the foundation of the award has failed because the bridge is gone; the value of the bridge structure cannot be separately computed, and is not necessarily involved in the award which gives only

is erected under no limitations, it would seem that the value of the structure, as well as that of the franchise, must be considered in computing the damages.[33] In either case, however, the question in issue is the value of the property to the company, and not its value to the county or town taking it.[34]

III. MAINTENANCE AND REPAIR.

A. Upon Whom Duty Rests — 1. To Repair — a. In General — (i) *Municipalities* **— (A)** *In General.* At common law,[35] if it could not be shown that an individual or some corporate body was bound for this service,[36] the liabil-

compensation for the right to take tolls. Sunderland Bridge Case, 122 Mass. 459.

33. Clarion Turnpike, etc., Co. *v.* Clarion County, 172 Pa. St. 243, 37 Wkly. Notes Cas. (Pa.) 503, 33 Atl. 580; Montgomery County *v.* Schuylkill Bridge Co., 110 Pa. St. 54, 20 Atl. 407.

34. Sunderland Bridge Case, 122 Mass. 459; Montgomery County *v.* Schuylkill Bridge Co., 110 Pa. St. 54, 20 Atl. 407.

Market value.— In a proceeding to take a toll-bridge for public use the principle of market value does not apply in determining the measure of damages. There are no sales of such property by which it can be compared, and the property cannot be said to have, properly speaking, any market value. Montgomery County *v.* Schuylkill Bridge Co., 110 Pa. St. 54, 20 Atl. 407.

Value of toll-house as damages.— In Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.) 106, where a toll-bridge was taken by the public to be used as a free bridge, it was held that the toll-house was not within the limits of the town way, and not necessary or useful to it as a public way, and did not therefore pass by the taking, but still remained the property of the proprietors, and should not be included in the damages which the corporations should receive. But in Pennsylvania the opposite view was taken, and the value of the toll-house and also the canal bridge used as an approach to the main bridge were permitted to be included in the damages. Montgomery County *v.* Schuylkill Bridge Co., 110 Pa. St. 54, 20 Atl. 407.

Evidence of value of franchise.— As the point in issue is the value of the bridge to the company, evidence of the existence of a free bridge a short distance from the one taken is competent as affecting the earning value of the bridge (Lock Haven Bridge Co. *v.* Clinton County, 157 Pa. St. 379, 33 Wkly. Notes Cas. (Pa.) 168, 27 Atl. 726); but the fact that a bridge and turnpike as a whole yielded no net income, the income from the bridge being absorbed in maintaining the road, does not affect the amount of damages to be given for the taking of the bridge (Clarion Turnpike, etc., Co. *v.* Clarion County, 172 Pa. St. 243, 37 Wkly. Notes Cas. (Pa.) 503, 33 Atl. 580). While the earnings of the company in past years may be shown, it is not error to refuse to extend the inquiry back to a time so remote as to have no bearing on the value of the franchise at the time of the taking. Montgomery County *v.* Schuylkill Bridge Co., 110 Pa. St. 54, 20 Atl. 407. Evidence as to the cost of repairs made on the bridge (Mifflin Bridge Co. *v.* Juniata County, 144 Pa. St. 365, 28 Wkly. Notes Cas. (Pa.) 399, 22 Atl. 896, 13 L. R. A. 431) or evidence as to what it would cost the county to erect a new bridge at the same or some other point (Mifflin Bridge Co. *v.* Juniata County, 144 Pa. St. 365, 28 Wkly. Notes Cas. (Pa.) 399, 22 Atl. 896, 13 L. R. A. 431) is inadmissible; and evidence that the company had declared larger dividends than allowable by law is immaterial (Montgomery County *v.* Schuylkill Bridge Co., 110 Pa. St. 54, 20 Atl. 407).

35. By 43 Geo. III, c. 59, § 5, no bridge thereafter to be built in any county, by or at the expense of any individual or private person, body politic or corporate, should be deemed a county bridge unless erected in a substantial and commodious manner under the direction, or to the satisfaction of the public. This statute was held to apply only to newly built bridges, and not to those merely widened or repaired since its passage (Rex *v.* Lancashire, 2 B. & Ad. 813, 1 L. J. M. C. 1, 22 E. C. L. 342), and a bridge rebuilt where one had been washed away was not a new bridge within the meaning of the act, although the plan of structure or its location was to some extent changed (Reg. *v.* Southampton County, 18 Q. B. 841, 17 Jur. 254, 21 L. J. M. C. 201, 14 Eng. L. & Eq. 116, 83 E. C. L. 841; Rex *v.* Devon County, 5 B. & Ad. 383, 2 L. J. M. C. 74, 2 N. & M. 412, 27 E. C. L. 165. See also Reg. *v.* Somerset, 38 L. T. Rep. N. S. 452); but it was held that this statute did apply to the erection of a bridge by trustees, appointed by a legal turnpike act, and that therefore it was not the duty of a county to repair such bridge (Rex *v.* Derby County, 3 B. & Ad. 147, 1 L. J. M. C. 1, 23 E. C. L. 73).

36. **Effect of right to take tolls.**—The fact that turnpike trustees by whom a bridge was built were given authority to take tolls to a limited amount for the support of the roads would not relieve the county of this obligation in the absence of a specific direction that such tolls be applied in the repair of the bridges. Rex *v.* Oxfordshire, 4 B. & C. 194, 6 D. & R. 231, 3 L. J. K. B. O. S. 198, 10 E. C. L. 540; Rex *v.* Yorkshire West Riding, 5 Burr. 2594, 2 East 342, Lofft. 238, 2 W. Bl. 685, 6 Rev. Rep. 439.

The fact that a culvert might have been sufficient will not excuse the county of this duty on the ground that the bridge was not necessary. Rex *v.* Lancashire, 2 B. & Ad. 813, 1 L. J. M. C. 1, 22 E. C. L. 342.

ity to repair was on the county,[37] but this rule was not adopted in this country,[38] where the duty is one dependent upon statute, which may be changed or modified at the discretion of the legislature.[39] By some statutes the duty to repair still rests, either wholly or partly, upon the county.[40] Statutes in other

If the bridge is a private one not established by law and not on a public road there is no obligation of the public to repair. State *v.* Seawell, 10 N. C. 193.

37. *Illinois.*— Dennis *v.* Maynard, 15 Ill. 477.

Kansas.— Shawnee County *v.* Topeka, 39 Kan. 197, 18 Pac. 161.

Maine.— State *v.* Gorham, 37 Me. 451.

New York.— Hill *v.* Livingston County, 12 N. Y. 52.

Wisconsin.— State *v.* Wood County, 41 Wis. 28.

England.—Reg. *v.* Southampton County, 18 Q. B. 841, 17 Jur. 254, 21 L. J. M. C. 201, 14 Eng. L. & Eq. 116, 83 E. C. L. 841 (holding that all public bridges in the Isle of Wight which, before the passage of the act of 1842, were repairable by tithings from the parish or township in which they were situated should be repaired by the county, and that the previous agreement whereby such bridges were repaired by tithings from the parishes did not affect the legal liability of the county to see that such bridges were repaired); Rex *v.* Yorkshire West Riding, 5 Burr. 2594, 2 East 342, Lofft. 238, 2 W. Bl. 685, 6 Rev. Rep. 439; Rex *v.* Salop County, 13 East 95; Rex *v.* Oxfordshire, 5 L. J. M. C. O. S. 127; Reg. *v.* Wilts, 1 Salk. 359; 1 Hawkins P. C. c. 17, § 1. See also Rex *v.* Kent County, 13 East 220, 12 Rev. Rep. 330, where the county was exonerated by showing that a navigation company was, by its charter, liable to repair the bridge in question.

Bridge must be over waters flumen vel cursus aquæ.— To be a bridge which it is incumbent upon the county to repair at common law it must be erected over waters flowing in a channel between banks more or less defined, although such channel may be occasionally dry (Reg. *v.* Derbyshire, 2 Q. B. 745, 2 G. & D. 97, 6 Jur. 483, 11 L. J. M. C. 51, 42 E. C. L. 893; Rex *v.* Oxfordshire, 1 B. & Ad. 289, 8 L. J. K. B. O. S. 354, 20 E. C. L. 489), but it is a question of fact in each case whether an arch thrown over a stream is such a bridge or not (Rex *v.* Whitney, 3 A. & E. 69, 30 E. C. L. 53, 7 C. & P. 208, 32 E. C. L. 575, 1 Hurl. & W. 147, 4 L. J. M. C. 86, 4 N. & M. 594. And see Reg. *v.* Gloucestershire, C. & M. 506, 41 E. C. L. 277).

A short foot-bridge composed of a few plank nine or ten feet in length, and a hand-rail spanning a small stream which intersects a public foot-path is not repairable as a county bridge. Reg. *v.* Southampton County, 18 Q. B. 841, 17 Jur. 254, 21 L. J. M. C. 201, 14 Eng. L. & Eq. 116, 83 E. C. L. 841.

Bridge used in time of floods.— A bridge which is used only on occasion of floods and which lies out of and alongside the road commonly used is a public bridge, and it is the duty of the county to repair it. Rex *v.* Northampton County, 2 M. & S. 262, 15 Rev. Rep. 241; Rex *v.* Devon County, R. & M. 144, 21 E. C. L. 720.

Need not be built by the public.— It was not necessary to this liability that the bridge be constructed by the public. If it was built by a private individual and afterward was used by the public and became of public utility it was the duty of the county to repair it. Reg. *v.* Ely, 15 Q. B. 827, 14 Jur. 956, 19 L. J. M. C. 223, 4 N. Sess. Cas. 222, 69 E. C. L. 827; Rex *v.* Yorkshire West Riding, 5 Burr. 2594, 2 East 342, Lofft. 238, 2 W. Bl. 685, 6 Rev. Rep. 439; Rex *v.* Glamorgan County, 2 East 356 note, 6 Rev. Rep. 450 note; Rex *v.* Kent County, 2 M. & S. 513, 15 Rev. Rep. 330. But the fact that such bridge is of public utility and is used by the public is not necessarily conclusive against a county on the question of its liability to repair; user and utility being only elements upon which the jury may determine whether or not there has been a public acceptance. There need not, however, in addition to such evidence, be proof of an overt act of adoption by a body representing the county. Reg. *v.* Southampton County, 19 Q. B. D. 590, 57 L. T. Rep. N. S. 261, 16 Cox C. C. 271, 22 J. P. 52, 56 L. J. M. C. 112.

38. Shawnee County *v.* Topeka, 39 Kan. 197, 18 Pac. 161; Reardon *v.* St. Louis County, 36 Mo. 555; Whitall *v.* Gloucester County, 40 N. J. L. 302; State *v.* Hudson County, 30 N. J. L. 137; Hill *v.* Livingston County, 12 N. Y. 52.

The common-law idea of adoption exists in this country and therefore if a county or other municipality which, by the statutes, would be liable to repair a bridge built by the public, adopts a bridge built by an individual and uses it for public purposes it will be liable to repair the same. State *v.* Demaree, 80 Ind. 519; State *v.* Gibson County, 80 Ind. 478, 41 Am. Rep. 821; State *v.* Campton, 2 N. H. 513; Requa *v.* Rochester, 45 N. Y. 129, 6 Am. Rep. 52.

39. Dennis *v.* Maynard, 15 Ill. 477; Atty.-Gen. *v.* Cambridge, 16 Gray (Mass.) 247.

Legislative act not contractual.— The imposition upon the state by the legislature of a duty to repair a bridge has no element of a contract and does not prevent it from thereafter placing the duty on towns or municipalities specially benefited by the existence of the bridge. State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465.

Under the early laws of South Carolina it was the duty of every separate and distinct portion or division of the state to keep the bridges in repair within its own limits. Shoolbred *v.* Charleston, 2 Bay (S. C.) 63.

40. *Indiana.*— Deweese *v.* Hutton, 144 Ind. 114, 43 N. E. 13 (holding that a contract by county commissioners for the repair of a

jurisdictions place the duty of repairing bridges upon the towns [41] in which such

bridge, without any survey or estimate of the cost having been made, is void, since if the cost be not too great it is to be borne in whole or in part by the township); Bonebrake *v.* Huntington County, 141 Ind. 62, 40 N. E. 141 (holding that it was the duty of the county to repair a bridge over a stream that had been converted into a county ditch by a proceeding for the straightening of the stream, although such bridge was originally constructed by the township); Parke County *v.* Wagner, 138 Ind. 609, 38 N. E. 171 (holding that, under Ind. Rev. Stat. (1894), §§ 3275, 3282, a bridge erected over any stream confined in a channel, although not necessarily flowing all the time, must be repaired by the county); Sullivan County *v.* Arnett, 116 Ind. 438, 19 N. E. 299; Vaught *v.* Johnson County, 101 Ind. 123; Patton *v.* Montgomery County, 96 Ind. 131; Allen County *v.* Bacon, 96 Ind. 31; Sullivan County *v.* Sisson, 2 Ind. App. 311, 28 N. E. 374. And see Driftwood Valley Turnpike Co. *v.* Bartholomew County, 72 Ind. 226.

Iowa.— It is within the discretion of the county board to repair small bridges and culverts throughout the county. Denison *v.* Watts, 97 Iowa 633, 66 N. W. 886; Roby *v.* Appanoose County, 63 Iowa 113, 18 N. W. 711. But it is said that the only bridges which are required to be repaired by the county are those which require for their construction an extraordinary expenditure of money beyond the means at the disposition of the road districts, and those which have been constructed by the county. Chandler *v.* Fremont County, 42 Iowa 58. The fact, however, that a part of the cost of construction was defrayed by voluntary contributions does not relieve the county from its duty to keep the bridge in repair. Moreland *v.* Mitchell County, 40 Iowa 394.

Nebraska.— The fact that a precinct in the county issued bonds to aid in the construction of a county bridge does not relieve the county of its duty to repair. Dutton *v.* State, 42 Nebr. 804, 60 N. W. 1042.

New Jersey.— Beatty *v.* Titus, 47 N. J. L. 89, holding that where the expense of repairing did not exceed the sum of fifty dollars it was the duty, under the statute, of the overseer of the highways within whose jurisdiction the bridge was situated, and the chosen freeholders of the township, to superintend or contract for the work.

Pennsylvania.— Not only have the general statutes been several times changed, but they have also been modified by the passage of special statutes for certain counties. It may, however, be said that prior to the passage of the act of April 4, 1802, the duty to maintain bridges was exclusively the business of the county. From 1802 to 1843 this duty was either wholly or partly upon the township, but the act of 1843 again placed the duty primarily upon the county, and the act of 1876, it would seem, did not change this primary liability. Com. *v.* Northampton County, 14 Pa. Co. Ct. 299, where the course of statutory legislation in the state is fully traced. See also Dougherty *v.* Upper Allen Tp., 12 Pa. Co. Ct. 304. These general statutes would seem to apply only to bridges erected by the county, and not to those which had been built by a turnpike company and subsequently freed of toll. *In re* Bedford, etc., Turnpike Road Bridge, 14 Pa. Co. Ct. 296. *Compare* Whitmire *v.* Muncy Creek Tp., 17 Pa. Super. Ct. 399, where the statutes of 1843, 1859, 1860, relating to the repair of bridges are reviewed, and from which it would seem that the duty to repair is considered as resting on the township, unless the expense be too great, in which case the county should, when properly notified, repair the structure.

Virginia.— To render the county liable, the record of the court must show that the county court proceeded in compliance with the statute in the establishment of the bridge, and the county is not bound to repair or maintain a bridge not established or adopted by the court in conformity with statutory requirements, although the bridge was erected by an individual in a public place and dedicated to the public. Sampson *v.* Goochland Justices, 5 Gratt. (Va.) 241.

Wisconsin.— The fact that the landing or approach on one side of a county bridge is private property will not relieve it from its duty to repair so long as it is kept open for public travel. State *v.* Wood County, 41 Wis. 28.

See 8 Cent. Dig. tit. "Bridges," § 50.

What constitutes bridge within meaning of statute.— Under Ind. Stat. (1881), § 2892, a bridge, forty feet long, sixteen feet wide, and eight feet above the ground, constructed by a county across a ditch on a free gravel road, is clearly a bridge within the meaning and operation of such statute. Boone County *v.* Mitchler, 137 Ind. 140, 36 N. E. 534.

41. *Connecticut.*— Daly *v.* New Haven, 69 Conn. 644, 38 Atl. 397 (holding, however, that the duty to keep a bridge in repair should refer to the bridge when used as a highway, and that it did not necessarily follow that a party charged with the duty to repair a bridge was also charged with the duty to maintain and operate a draw in the bridge, to aid in navigation); Lewis *v.* Litchfield, 2 Root (Conn.) 436; Swift *v.* Berry, 1 Root (Conn.) 448; Eldredge *v.* Pomfret, 1 Root (Conn.) 270.

Maine.— State *v.* Madison, 63 Me. 546.

Massachusetts.— Lobdell *v.* New Bedford, 1 Mass. 153. But the obligation does not exist if the bridge has been built without authority. Com. *v.* Charlestown, 1 Pick. (Mass.) 180, 11 Am. Dec. 161.

New Hampshire.— State *v.* Campton, 2 N. H. 513. And no arrangement between the town and a railroad corporation concerning the repairing of a bridge can bar the right of a state to require of a town the performance of this duty. State *v.* Dover, 46 N. H. 452.

bridges are situated. Statutes in still other jurisdictions place such duty upon townships.[42]

(B) *When Located Within City or Village Limits.* If a bridge is situated within the corporate limits of a city or village, and was built by such municipality and is a part of its streets,[43] was purchased,[44] or accepted by it,[45] or in some legitimate way was brought within such limits,[46] such corporate body, by virtue

New York.— People *v.* Queens County, 142 N. Y. 271, 36 N. E. 1062, 38 N. Y. St. 580 [*reversing* 71 Hun (N. Y.) 97, 24 N. Y. Suppl. 563, 54 N. Y. St. 197]; People *v.* Smith, 83 Hun (N. Y.) 432, 31 N. Y. Suppl. 749, 64 N. Y. St. 419. But the imposition of this duty upon a commissioner of highways of a town does not require him to repair a bridge in his town wholly upon an Indian reservation. Bishop *v.* Barton, 2 Hun (N. Y.) 436. And see Hill *v.* Livingston County, 12 N. Y. 52, where the liability of the town as a general rule to repair its bridges was discussed and affirmed, and it was held that the special laws of 1833 authorizing a county board to levy fifteen hundred dollars to build a bridge over the Genesee river, and three hundred dollars on the town of York, two hundred dollars on the town of Avon, and the residue upon the whole county did not change the general law.

Rhode Island.— North Providence *v.* Dyerville Mfg. Co., 13 R. I. 45, holding that R. I. Gen. Stat. (1873), c. 60, § 22, did not apply to a manufacturing company, and that therefore the town being in duty bound to repair the bridge could not recover against the manufacturing company for an outlay for repairs.

Vermont.— Under a statute requiring the repairing to be done "as soon as may be" the town must proceed with as much dispatch as the importance of the road, the magnitude of the work, the opportunity of procuring the materials, and other circumstances necessarily connected with such a work will reasonably permit. Briggs *v.* Guilford, 8 Vt. 264. But a town, while proceeding with reasonable dispatch in the repair of a bridge, has a right to insist that an owner of a dam below the bridge desist from obstructing the flow of the waters of the stream and allow it to flow as it was accustomed to at the time they obtained their grant from the city. East Montpelier *v.* Wheelock, 70 Vt. 391, 41 Atl. 432.

See 8 Cent. Dig. tit. "Bridges," § 51.

Imposition on county by special acts.— Since the duty to repair is upon the towns in the state of New York, the imposition of such duty upon the county can only be done by a special act. For a judicial construction of the New York act of April, 1808, holding that under it a resolution of the board of supervisors directing a sum to be levied for repairing the bridges on certain towns was erroneous see People *v.* Dutchess County, 1 Hill (N. Y.) 50.

42. Brophy *v.* Schindler, 126 Mich. 341, 85 N. W. 1114; Dietrich *v.* Schremms, 117 Mich. 298, 75 N. W. 618, the latter case holding that a statute which authorizes a township to purchase a bridge and requires it to attend to the draw makes it the duty of such township to keep the bridge in repair and provide funds to operate the draw.

In North Carolina the duty to repair public bridges is primarily upon the township, but it is the duty of the county to concur and act with the township in the repairing when it cannot conveniently be borne by such municipalities, although it would seem that in such case the expense must be borne by the whole county. State *v.* Selby, 83 N. C. 617.

Effect of special act authorizing county to rebuild.— The fact that the legislature had, on two occasions, by special act, authorized the county to rebuild a certain bridge when destroyed by freshets will not relieve the township of its duty to repair. Delta Lumber Co. *v.* Wayne County, 71 Mich. 572, 40 N. W. 1.

43. Daniels *v.* Athens, 54 Ga. 79; Jordan *v.* Hannibal, 87 Mo. 673.

44. Marseilles *v.* Howland, 124 Ill. 547, 16 N. E. 883 [*affirming* 23 Ill. App. 101], holding that upon the purchase of a toll-bridge by a village the company's right to the street reverted to the village, and it therefore became the duty of the village to maintain and repair the bridge.

45. Hord *v.* Montgomery, 26 Ill. App. 41.

46. *Georgia.*— Polk County *v.* Cedartown, 110 Ga. 824, 36 S. E. 50 [*explaining* Daniels *v.* Athens, 54 Ga. 79], where, by an amendment of the charter of a city, a bridge was brought within its corporate limits, and it was held that the county authorities could relinquish their jurisdiction in such a case, either with or without the assent of the municipal authorities.

Indiana.— Goshen *v.* Myers, 119 Ind. 196, 21 N. E. 657. And this duty exists although the bridge may cost more than five hundred dollars, in which case it is made the duty of the boards of county commissioners to build all bridges within the corporate limits of any city, the estimated cost of which exceeds the above amount. Wabash *v.* Carver, 129 Ind. 552, 29 N. E. 25, 13 L. R. A. 851. But the mere fact that a bridge constructed by a county as a part of the public road leads up to and joins the street at the corporate limits of a village does not relieve the county of its duty to repair and impose it upon the village. Owen County *v.* Washington Tp., 121 Ind. 379, 23 N. E. 257.

Iowa.— See Tubbs *v.* Maquoketa, 32 Iowa 564.

Kansas.— Rosedale *v.* Golding, 55 Kan. 167, 40 Pac. 284. And the fact that the county concurred in the purchase of a bridge, and for some time exercised joint control of the same with the city, and contributed

of its control over its streets and thoroughfares generally conferred upon it by statute, is under obligation to repair. On the other hand, if a bridge is controlled by, and is the property of, a county, the fact that it is within the corporate limits of a city will not of itself impose upon the latter corporation the duty to repair.[47]

(c) *When Built Over Boundaries.* The obligation to repair a bridge built over the boundary between two counties or municipalities is, by statute, generally imposed upon them jointly;[48] and one may be compelled, at the suit of the other,

jointly to its maintenance does not of itself impose any duty on such county for the future, or change the duty resting upon the city. Shawnee County *v.* Topeka, 39 Kan. 197, 200, 18 Pac. 161 [*distinguishing* Wyandotte County *v.* Wyandotte, 29 Kan. 431], where the court say: "This duty appears to be imposed upon the city as a municipal corporation, and the duties devolving upon its officers having care of the streets, rest upon them as officers of the city. The power to repair and maintain the streets in a safe condition conferred upon the corporation, is implied by authority to levy taxes and impose local assessments for that purpose. In conformity with these general rules, the duty to repair streets is considered to exist without positive statutory provision."

Michigan.—Williams *v.* Petoskey, 108 Mich. 260, 66 N. W. 55, holding that under the facts of the case in question the statutory imposition of the duty upon the township at large did not relieve the village of its duty to repair the bridge constituting a part of its streets.

Missouri.— Walker *v.* Point Pleasant, 49 Mo. App. 244, holding that under Mo. Rev. Stat. (1889), § 1674, it is the duty of the town to repair bridges on its streets, although the streets were never established by ordinance.

Ohio.— Piqua *v.* Geist, 59 Ohio St. 163, 52 N. E. 124, holding that under Ohio Rev. Stat. § 860, as amended by the statute of 1894, a municipality must keep in repair the bridges on its streets, although it receives no part of the bridge fund levied on the property within its limits. See also State *v.* Cincinnati, 4 Ohio S. & C. Pl. Dec. 368, holding that by virtue of Ohio Rev. Stat. (1896), § 2640, a bridge extending from one street to another, built for the sole benefit of the city and accommodation of the public traveling over its streets, must be maintained by the city, although the county contributed to the expense of its construction; and the county is not such a party in interest that a writ of mandamus may issue on its behalf to compel the city to make such repairs.

Wisconsin.—State *v.* Wood County, 41 Wis. 28 [*citing* Kittredge *v.* Milwaukee, 26 Wis. 46]. See also Battles *v.* Doll, (Wis. 1902) 89 N. W. 187.

See 8 Cent. Dig. tit. "Bridges," § 52.

Optional repair by village.— Under N. Y. Laws (1870), c. 291, relating to villages, it is optional with the village to repair its bridges, and in the absence of an election so to do the duty continues upon the town. Washburn *v.* Mt. Kisco, 35 Hun (N. Y.) 329.

Under a special statute authorizing a city to erect and maintain a bridge, and requiring it after the construction to maintain it in good repair, the city cannot, after the construction of the bridge, evade the obligation to repair until the public way over it has been discontinued, although it is not as greatly benefited by the bridge as another city. Brunswick *v.* Bath, 90 Me. 479, 38 Atl. 532.

The imposition of a fine for wilful and negligent injury to such structures is a proper method of maintaining such repair. Korah *v.* Ottawa, 32 Ill. 121, 83 Am. Dec. 255.

47. Daniels *v.* Athens, 54 Ga. 79 (holding that the fact that the town authorities from time to time have voluntarily repaired such bridge and have kept in order the embankment leading to it does not change the title of the property or the legal duty devolving upon the county, nor does such voluntary repair and user make such a case of dedication by the county to the town as to change the title and legal duty to repair); Wyandotte County *v.* Wyandotte, 29 Kan. 431; State *v.* Wood County, 41 Wis. 28.

48. Dutton *v.* State, 42 Nebr. 804, 60 N. W. 1042 [but under the earlier statutes as amended by the act of 1881, the obligation of a county to repair a bridge over its boundary was restricted to such bridges as had been built by co-operation of the two counties. State *v.* Kearney County, 12 Nebr. 6, 10 N. W. 413]; People *v.* Queens County, 142 N. Y. 271, 36 N. E. 1062, 58 N. Y. St. 580 [*reversing* 71 Hun (N. Y.) 97, 24 N. Y. Suppl. 563, 54 N. Y. St. 197]; *In re* Cattaraugus County, 59 N. Y. 316 (holding that the special proceeding authorized by N. Y. Laws (1857), c. 639, could only be instituted in case a bridge was "over streams dividing towns," although under another section of the statute the two towns especially benefited by the bridge in question were obligated to repair it); Reg. *v.* Brecon County, 15 Q. B. 813, 19 L. J. M. C. 203, 4 N. Sess. Cas. 272, 69 E. C. L. 813; *In re* Staffordshire County, 54 J. P. 566; Reg. *v.* Carleton County, 1 Ont. 277.

Nature of interest which will render adjoining municipalities both liable.— After a thorough exposition of sections 107 and 108, of the Illinois road and bridge law of 1880, it was held that the word "interest" as used therein must be considered as meaning an interest arising from legal proprietorship, growing out of the concurrent acts of the two boards of commissioners of highways, and not an interest arising from the proximity of such bridge to the dividing line between the towns, or an interest arising from the beneficial use of the bridge by the inhabitants of

to contribute toward such expense.[49] Such obligation may also be assumed by contract or agreement, expressed or implied.[50]

(II) *PRIVATE PARTIES*— (A) *Bridge Companies.* The duty of repairing a public bridge constructed by a company for the purpose of taking tolls is usually imposed upon such company,[51] and in the absence of any special provision in the charter, this duty would seem to be the same in extent or degree as that of a town or other municipality in the control of its bridges.[52]

(B) *Individuals.* An individual liability to repair a public bridge may arise by express agreement,[53] by prescription,[54] or by the pursuit or assumption of a business necessitating the maintenance of a bridge in the public highway, which, aside from such individual interest, would be unnecessary.[55]

the two towns respectively. Highway Com'rs *v.* Gibson, 7 Ill. App. 231.

Necessity of being on actual boundary.— Inasmuch as it may often happen in the laying out of a highway and construction of a bridge that it would be unwise to place the bridge on the exact boundary between two municipalities, but that nevertheless both would be greatly, if not equally, benefited by such bridge, the statutes of some jurisdictions provide that a bridge built on a road "near" a town line must be jointly repaired by the municipalities the same as if on the exact boundary. Bigelow *v.* Brooks, 119 Mich. 208, 77 N. W. 810; Glover *v.* Carpenter, 70 Vt. 278, 40 Atl. 730.

Where townships have enlarged a footbridge which they were bound to repair *pro rata*, they will still be so bound for the repairs of the larger structure. Rex *v.* Yorkshire West Riding, 2 East 353 note, 6 Rev. Rep. 447 note.

49. Cass County *v.* Sarpy County, (Nebr. 1902) 89 N. W. 291; Maupun *v.* Chester, 61 Wis. 401, 21 N. W. 251.

50. People *v.* Dover, 158 Ill. 197, 41 N. E. 1105; Dayton *v.* Rutland, 84 Ill. 279, 25 Am. Rep. 457.

Such liability may be shown by the record of official acts, by acts of possession or control, by the recognition and use of the easement, or in any manner evincing a complete understanding to that effect. Rutland *v.* Dayton, 60 Ill. 58. And see Donnelly *v.* Luzerne County, 9 Kulp (Pa.) 271.

51. Stanton *v.* Proprietors Haverhill Bridge, 47 Vt. 172 (holding that such a company cannot excuse itself by impeaching its own title to maintain the bridge); Thrasher *v.* Postel, 79 Wis. 503, 48 N. W. 600; Nicholl *v.* Allen, 1 B. & S. 934, 31 L. J. Q. B. 283, 6 L. T. Rep. N. S. 699, 10 Wkly. Rep. 741, 101 E. C. L. 934.

Necessity of keeping bridge lighted.—Under a provision of a charter of a toll-bridge corporation that a bridge should "at all times be kept in good, safe, and passable repair" it is incumbent upon the company to light the bridge if a jury finds such lighting necessary to make it safe and convenient for passage at night. Com. *v.* Central Bridge Corp., 12 Cush. (Mass.) 242.

Where right to take toll has ceased.— Where it appeared that a part of a bridge had become a portion of the highway in another town, and that the company had no longer any right to exact toll, it should not be held liable to repair the same. State *v.* Norridgewock Falls Bridge, 65 Me. 514.

52. Orcutt *v.* Kittery Point Bridge Co., 53 Me. 500.

Duty limited to affording safe passageway. — Where the abutments of a bridge rested upon the dam of an adjoining mill-owner, the obligation of the bridge company to keep the dam in repair extended only to such repairs as were necessary to keep the bridge in a safe condition for passage, and not necessarily to maintaining the dam so that it would retain water. The duty of the bridge proprietors ceases when the bridge is kept in a safe condition for travel. Jernee *v.* Monmouth County, 52 N. J. L. 553, 21 Atl. 295, 11 L. R. A. 416 [*approving* Ripley *v.* Essex County, 40 N. J. L. 45].

53. Where the bridge is built by a contractor, he is generally required to give a bond, obligating himself to keep the bridge in repair for a certain period, and in such case it is held that the sureties thereon are liable if the bridge becomes unsafe within that time, although they were not notified of the repairs necessary to restore it. Buchanan County *v.* Kirtley, 42 Mo. 534. See also James *v.* Conecuh County, 79 Ala. 304, holding that the measure of damages in such an action would be the reasonable cost of making the necessary repairs during the period covered by the bond.

54. 1 Hawkins P. C. c. 77, § 2. The liability, when existing *ratione tenuræ* was, so far as the public was concerned, upon the occupier of the land (Baker *v.* Greenhill, 3 Q. B. 148, 2 G. & D. 435, 6 Jur. 710, 11 L. J. Q. B. 161, 43 E. C. L. 672; Reg. *v.* Bucknell, 7 Mod. 55); but as between the owner of the land and the tenant the obligation was primarily upon the owner, to whom the tenant could look for reimbursement (Baker *v.* Greenhill, 3 Q. B. 148, 2 G. & D. 435, 6 Jur. 710, 11 L. J. Q. B. 161, 43 E. C. L. 672).

Infant not liable ratione tenuræ.— An infant, seized of lands which are in the actual possession of his guardian in socage, is not indictable for the non-repair of the bridge *ratione tenuræ* if the guardian is in possession. The remedy is against the guardian and not against the infant. Rex *v.* Sutton, 3 A. & E. 597, 1 Hurl. & W. 428, 4 L. J. K. B. 215, 5 N. & M. 353, 30 E. C. L. 278.

55. *Maine.*— State *v.* Gorham, 37 Me. 451. *Massachusetts.*—Lowell *v.* Merrimack River

b. Approaches. Inasmuch as the approaches necessary to make a bridge accessible are properly included within the meaning of the term,[56] it follows that the duty to repair such approaches and abutments is upon the party whose duty it is to repair the bridge proper.[57] The difficult point is the determination of what constitutes an approach as distinguished from the highway generally,[58] which, in the absence of definite expression, must be determined by a consideration of what is reasonable under the circumstances of the particular case.[59]

2. To Rebuild. While in some jurisdictions the statutes specifically authorize or impose upon municipalities the power and duty to rebuild bridges after their destruction, as well as to repair them,[60] the law seems to be well settled that the

Lock, etc., 104 Mass. 18; Woburn *v.* Henshaw, 101 Mass. 193, 3 Am. Rep. 333; Perley *v.* Chandler, 6 Mass. 454, 4 Am. Dec. 159.

New York.—Clay *v.* Hart, 25 Misc. (N. Y.) 110, 55 N. Y. Suppl. 43; Dygert *v.* Schenck, 23 Wend. (N. Y.) 446, 35 Am. Dec. 575; Heacock *v.* Sherman, 14 Wend. (N. Y.) 58.

North Carolina.— Mulholland *v.* Brownrigg, 9 N. C. 349.

Pennsylvania.— Pennsylvania R. Co. *v.* Irwin, 85 Pa. St. 336; Pennsylvania R. Co. *v.* Duquesne, 46 Pa. St. 223; Phœnixville *v.* Phœnix Iron Co., 45 Pa. St. 135; Woodring *v.* Forks Tp., 28 Pa. St. 355, 70 Am. Dec. 134.

Wisconsin.— West Bend *v.* Mann, 59 Wis. 69, 17 N. W. 972.

England.— Rex *v.* Lindsey, 14 East 317, 12 Rev. Rep. 529.

56. See *supra*, I.

57. *Georgia.*—Augusta *v.* Hudson, 94 Ga. 135, 21 S. E. 289.

Indiana.— Huntington County *v.* Huffman, 134 Ind. 1, 31 N. E. 570; State *v.* Demaree, 80 Ind. 519; Driftwood Valley Turnpike Co. *v.* Bartholomew County, 72 Ind. 226; Johnson County *v.* Hemphill, (Ind. App. 1895) 41 N. E. 965; Shelby County *v.* Blair, 8 Ind. App. 574, 36 N. E. 216.

Massachusetts.— Com. *v.* Deerfield, 6 Allen (Mass.) 449.

Michigan.— People *v.* Bay County Bridge Commission, 115 Mich. 622, 73 N. W. 901.

New Jersey.— Sussex County *v.* Strader, 18 N. J. L. 108, 35 Am. Dec. 530.

New York.— Such duty extends as well to the surface of such approaches as to the foundation and substructure thereof. Hayes *v.* New York Cent., etc., R. Co., 9 Hun (N. Y.) 63.

Pennsylvania.— Dalton *v.* Upper Tyrone Tp., 137 Pa. St. 18, 26 Wkly. Notes Cas. (Pa.) 489, 20 Atl. 637 (built by a railroad but accepted by township as public bridge); Easton *v.* Northampton County, 3 Montg. Co. Rep. (Pa.) 164.

58. By the common law, a county was liable to repair the approaches leading to the public bridge for three hundred feet from the end of the structure proper. Yorkshire West Riding *v.* Rex, 2 Dow. 1, 7 East 588, 3 Smith K. B. 437, 5 Taunt. 284, 8 Rev. Rep. 688, 1 E. C. L. 152; Reg. *v.* Lincoln Corp., 8 A. & E. 65, 2 Jur. 615, 807, 7 L. J. Q. B. 161, 3 N. & P. 273, 1 W. W. & H. 260, 35 E. C. L. 483. The fact that the bridge was built within three hundred feet of an old bridge repairable by the inhabitants of another county, who were bound of course to maintain such three hundred feet of road, would not relieve the county building the latter bridge from its duty to repair, and subject the former county to this duty. Each was a substantive bridge in a different county, and the new one could not be considered as an appendage to the other. Rex *v.* Devon County, 14 East 477, 13 Rev. Rep. 285.

59. Com. *v.* Deerfield, 6 Allen (Mass.) 449. See also Swanzey *v.* Somerset, 132 Mass. 312, where it is held that the word "bridge" does not, within the meaning of a statute requiring two towns to keep it in repair, include an extensive causeway built from the ends thereof, there being no custom, usage, or agreement fixing such construction upon the word.

Where a stream was widened by a flood leaving a space of fifteen or twenty feet between the ends of a bridge and the bank, it was held that the obligation of the corporation having the franchise of the bridge to maintain and keep it in repair would require the extension of the bridge to the new bank thus created in the absence of other limitations in the franchise. Com. *v.* Deerfield, 6 Allen (Mass.) 449.

The abutments in question were a part of the bridges and therefore repairable by the municipality chargeable with the repair of the bridge proper in Daniels *v.* Athens, 55 Ga. 609; State *v.* Demaree, 80 Ind. 519; Williams *v.* Petoskey, 108 Mich. 260, 66 N. W. 55; Edwards *v.* Ford, 22 N. Y. App. Div. 277, 47 N. Y. Suppl. 995.

60. Saranac *v.* Groton Bridge, etc., Co., 55 N. Y. App. Div. 134, 67 N. Y. Suppl. 118 (holding that, under a statute authorizing a commissioner of highways "with the consent of the town board" to rebuild a bridge destroyed by the elements, a consent on condition that he build of certain material and in a certain way does not allow him to build of other material and in another way; and therefore, where a resolution of the town board authorized the commissioner to rebuild a bridge, provided he could do it by subscriptions for the labor, and out of the material owned by the town, except the iron needed, which the commissioner was to furnish, it does not authorize the construction of an iron bridge, the materials which the town had being for a wooden bridge); Wrought-Iron Bridge Co. *v.* Barrett, 12 N. Y. St. 194

duty to repair, whether imposed by statute or assumed by contract, includes the duty to rebuild when, for any reason, the bridge is destroyed during the continuance of such duty.[61]

B. Enforcement of Duty — 1. In General. No general statement can be laid down as to the proper action to be invoked in the enforcement of the duty

(holding that an act, providing that in case a bridge should be damaged or destroyed by the elements or otherwise, after any town-meeting shall have been held, the commissioner of highways, with the consent of the board of auditors, may cause the same to be immediately repaired or rebuilt, etc., did not authorize such commissioner to contract for the rebuilding of a bridge after the town-meeting, where it appeared that the old bridge continued to be used as before the meeting, and that no change had occurred in it except such as was produced by use); Taylor Tp. *v.* Lawrence County, 17 Pa. Co. Ct. 396, 26 Pittsb. Leg. J. N. S. 343 (holding that a causeway leading to a county bridge is within the purview of the Pennsylvania act of May 5, 1876, making it the duty of the county commissioners to rebuild bridges when blown down, destroyed, or partly destroyed by floods, freshets, etc., and must be rebuilt by the county); Riddle *v.* Delaware County, 3 Pa. Co. Ct. 600, 2 Del. Co. (Pa.) 232 (holding that the Pennsylvania act of Jan. 26, 1844, authorizing county commissioners to rebuild bridges destroyed by floods "or otherwise," referred only to sudden or accidental destruction of bridges, and did not authorize the commissioners to take down the county bridge and replace it with a new one, when, in their judgment, a more substantial and commodious one was necessary for the accommodation of the public travel).

For the proper procedure of the county commissioners in the rebuilding of a bridge under the early statutes of Pennsylvania see Com. *v.* Monroe County, 2 Watts & S. (Pa.) 495; *In re* Smithfield Creek Bridge, 6 Whart. (Pa.) 363.

Power to contract for reconstruction.—The imposition of the right and duty upon supervisors or commissioners to make and maintain sufficient bridges, and to repair or rebuild the same, carries with it the power to contract for the rebuilding of such bridges. Boots *v.* Washburn, 79 N. Y. 207; Oakland Tp. *v.* Martin, 104 Pa. St. 303. It has therefore been held that such supervisors had the right to borrow money for that purpose when the bridge had been washed away by a flood, rendering its rebuilding a necessity, and they not having the funds at hand (Maneval *v.* Jackson Tp., 9 Pa. Co. Ct. 28); and where such contract has been let, in compliance with the statute, the town board cannot, after the bridge has been constructed by the contractors, refuse to audit and allow to the full amount the claim for the contract price on the ground that there was no need for the bridge, and that the commissioners did not let the contract to the lowest bidder, in the absence of evidence that the commissioners acted corruptly and collusively with the contractor in accepting a higher bid (People *v.* Campbell, 92 Hun (N. Y.) 585, 36 N. Y. Suppl. 1062, 72 N. Y. St. 82).

61. *Alabama.*—An action will lie on a contractor's bond if he refuses to so rebuild. Meriwether *v.* Lowndes County, 89 Ala. 362, 7 So. 198.

Georgia.— Elliott *v.* Gammon, 76 Ga. 766.

Illinois.— People *v.* Dover, 158 Ill. 197, 41 N. E. 1105.

Indiana.— State *v.* Gibson County, 80 Ind. 478, 41 Am. Rep. 821.

Minnesota.— State *v.* Renville County, 83 Minn. 65, 85 N. W. 830.

Mississippi.— Cue *v.* Breeland, 78 Miss. 864, 29 So. 850.

Missouri.— A contractor's bond to keep the bridge in repair for a certain time binds him to rebuild, although the bridge is washed away by an extraordinary flood. Gathwright *v.* Callaway County, 10 Mo. 663. *Compare* Livingston County *v.* Graves, 32 Mo. 479, where, the bridge having been destroyed by fire, the court held that the contractors were not liable to rebuild the same under a bond obligating them to keep the bridge in repair.

New York.— People *v.* Hillsdale, etc., Turnpike Road, 23 Wend. (N. Y.) 254. And see People *v.* Smith, 83 Hun (N. Y.) 432, 31 N. Y. Suppl. 749, 64 N. Y. St. 419, holding that a resolution by a town board that the commissioner of highways "is hereby authorized to repair the bridges that may have gone down since the annual town meeting, to the best of his judgment," authorizes the commissioner to rebuild a bridge which has fallen by reason of the decay of its timbers.

Pennsylvania.— Howe *v.* Crawford County, 47 Pa. St. 361.

England.— Rex *v.* Yorkshire West Riding, 5 Burr. 2594, 2 East 342, Lofft. 238, 2 W. Bl. 685, 6 Rev. Rep. 439; Brecknock, etc., Canal Nav. *v.* Pritchard, 6 T. R. 750, 3 Rev. Rep. 335. But see Rex *v.* Devon County, 4 B. & C. 670, 7 D. & R. 147, 4 L. J. K. B. O. S. 34, 28 Rev. Rep. 440, 10 E. C. L. 751 [*overruling* Cumberland County *v.* Rex, 3 B. & P. 354, 6 T. R. 194, 3 Rev. Rep. 149], holding that the inhabitants of a county were not, by force of their obligation to repair a bridge, bound to make it of greater width.

Compare State *v.* White, 16 R. I. 591, 18 Atl. 179, 1038.

Effect of acceptance of bridge.— The acceptance of a bridge from a contractor, and the payment to him of the contract price does not, in the absence of a stipulation to that effect, relieve the contractor and his sureties from the obligation of his bond, and if the bridge falls on account of any deficiency in the work his sureties are liable. O'Loughlin *v.* Jefferson County, 56 Pa. St. 62.

to repair, the statutes with regard thereto being by no means uniform. The remedy may be by indictment,[62] by mandamus,[63] or by action for a penalty where the neglect is wilful and intentional;[64] but it has been held that failure to keep a public bridge in repair was not an obstruction of the public road within the meaning of a statute making such obstruction punishable as a misdemeanor.[65]

2. By Indictment or Information — a. In General. Generally speaking, the county, town, or person chargeable with the duty of repairing public bridges may be indicted for the wilful neglect of such duty,[66] although the statute prescribing the duty is silent as to the mode of punishment for its neglect.[67] To sustain such an indictment it should be shown that there was palpable omission of a duty imperatively required by law, or a wilful or palpable neglect of a discretionary duty.[68] Whether a bridge in a certain place would be of public utility, and

62. See *infra*, III, B, 2, a.

63. See *infra*, III, B, 3.

64. But under N. C. Code (1898), § 711, it is held that while official corruption is not necessary to the imposition of such penalty, yet there must be gross negligence, or intentional and wilful neglect to subject one thereto; and that under the facts appearing in the case at bar such wilful and intentional neglect or refusal was not shown. Staton *v.* Wimberly, 122 N. C. 107, 29 S. E. 63.

65. Malone *v.* State, 51 Ala. 55.

66. *Kentucky.*— Paintsville *v.* Com., 21 Ky. L. Rep. 1634, 55 S. W. 915.

Maine.— State *v.* Gorham, 37 Me. 451.

Michigan.— Niles Tp. *v.* Martin, 4 Mich. 557, 69 Am. Dec. 333.

New Hampshire.— State *v.* Canterbury, 28 N. H. 195; State *v.* Gilmanton, 14 N. H. 467, the latter case holding that a body of water lying below the outlet of a lake through which the waters from the lake pass, and in which there is a steady and uniform current, is a river in the sense that a town will be indictable for the failure to maintain a bridge across such water.

New Jersey.— Bergen County *v.* State, 42 N. J. L. 263, 274, where it is said: "The conclusion that the statute imposed on the board of freeholders the duty to repair the bridge in this case, and the fact that they wilfully neglected that duty, makes the conviction lawful. It is a principle of the common law which has been adopted in this state, that where either the common or statute law imposes upon public ministerial officers a duty, they are indictable for its neglect."

New York.— People *v.* Cooper, 6 Hill (N. Y.) 516 [*followed* in Follett *v.* People, 12 N. Y. 268 (*reversing* 17 Barb. (N. Y.) 193)].

North Carolina.— State *v.* Crowell, 4 N. C. 683, holding that a person who contracts with a county to keep a bridge in repair is indictable for a nuisance, if, by the non-performance of his agreement, he occasions an inconvenience to the public.

South Carolina.— State *v.* Chappell, 2 Hill (S. C.) 391, holding, however, that where the repairs required more than ordinary skill and labor and such as is not at the disposal of one commissioner, the whole board should be indicted, and not one commissioner alone.

Wisconsin.— Saukville *v.* State, 69 Wis. 178, 33 N. W. 88.

England.— Rex *v.* Hendon, 4 B. & Ad. 628, 2 L. J. M. C. 55, 24 E. C. L. 276; Rex *v.* Bucks County, 12 East 192, 11 Rev. Rep. 347.

Canada.— Reg. *v.* Carleton County, 1 Ont. 277.

See 8 Cent. Dig. tit. "Bridges," § 65.

Exception to rule.— Where the statute provides that the penalty for failure of a turnpike company to keep its bridges in repair shall be the forfeiture of its franchise and right to collect tolls, no indictment for a failure to rebuild a bridge which has been carried away by a flood will lie. To hold that it was liable to an indictment would be in fact to hold that it had not the right to forfeit its franchise, but must keep up the bridge forever. Matlock *v.* State, 48 Ind. 425.

67. State *v.* Adams County, 1 Walk. (Miss.) 368. And see Saukville *v.* State, 69 Wis. 178, 33 N. W. 88.

When right accrues.— Under a statute creating a corporation to build a bridge and allowing it three years therefor, and also providing that it should be built with a draw and piers, if the corporation completes the bridge and takes toll for several months, but neglects to build any piers, they are indictable, although the three years have not yet elapsed. Com. *v.* Proprietors Newburyport Bridge, 9 Pick. (Mass.) 142.

68. Eyman *v.* People, 6 Ill. 4.

Admissibility of evidence.— Under a plea of not guilty on an indictment against the inhabitants of a county for not repairing a public bridge, it is for defendant to give evidence of the bridge having been repaired by private individuals. Rex *v.* Northampton County, 2 M. & S. 262, 15 Rev. Rep. 241. So, too, it has been held that, under a plea that three persons were bound respectively to repair the three arches of a bridge *ratione tenuræ* a witness who, as well as his father and grandfather, had been employed in doing repairs on parts of the bridge, might testify as to having heard them say who was liable to repair such three arches. Such evidence was not necessarily evidence of reputation of a particular fact, but might proceed upon a distinct reputation prevailing in the neighborhood or upon an admission of the owners of the land in question that they were liable

therefore subject the town to an indictment for the non-building or repairing of it, is a question of fact for the jury.[69]

b. Form of Indictment or Information.[70] Although a bridge is part of the highway on which it is situated, an indictment for its non-repair should use the term "bridge,"[71] and contain an express allegation that a bridge had been built.[72] If the indictment is against an individual[73] it must be shown how he became subject to such duty[74] and if the possession of funds necessary for repairs is a condition precedent to defendant's liability the possession of such funds should be alleged;[75] but the practicability or necessity of the bridge need not be averred or proved.[76]

3. By Mandamus.[77] Upon the proper showing by a duly authorized peti-

respectively to repair that part of the bridge. Reg. *v.* Bedfordshire, 3 C. L. R. 442, 6 Cox C. C. 505, 4 E. & B. 535, 1 Jur. N. S. 208, 24 L. J. Q. B. 81, 3 Wkly. Rep. 205, 82 E. C. L. 535.

Sufficiency of evidence.— An indictment for non-repair of a bridge on the ground of liability *ratione tenuræ* cannot be sustained, where it appears that the tenement on which the liability is charged originated within the time of legal memory. Rex *v.* Hayman, M. & M. 401, 31 Rev. Rep. 742, 22 E. C. L. 550. See also Reg. *v.* Sutton, 8 A. & E. 516, 7 L. J. Q. B. 205, 3 N. & P. 569, 35 E. C. L. 709.

Defenses.— Upon an indictment against a town for neglecting to maintain a bridge, a defense that the town council had declared, under R. I. Rev. Stat. c. 43, § 26, that the road over such bridge was useless was insufficient unless it be shown that the bridge had in fact become so, the declaration of the council not being conclusive as to its uselessness. State *v.* Cumberland, 7 R. I. 75.

Since repairing involves the exercise of discretion, it is error to direct on the conviction of freeholders for the non-repair of a bridge, that the sheriff shall make such repairs, since the performance of such work is committed by statute, not to the sheriff, but to the freeholders alone, who should be compelled to discharge that duty. Bergen County *v.* State, 42 N. J. L. 263.

69. State *v.* Northumberland, 44 N. H. 628.

70. **For forms** of indictments and informations for failure to repair or rebuild, either in whole, in part, or in substance, see the following cases:

Maine.— State *v.* Milo, 32 Me. 57.

Massachusetts.— Com. *v.* Central Bridge Corp., 12 Cush. (Mass.) 242.

Vermont.— State *v.* Williston, 31 Vt. 153.

Wisconsin.—Saukville *v.* State, 69 Wis. 178, 33 N. W. 88.

England.— Reg. *v.* Ely, 15 Q. B. 827, 14 Jur. 956, 19 L. J. M. C. 223, 4 N. Sess. Cas. 222, 69 E. C. L. 827; Rex *v.* Hendon, 4 B. & Ad. 628, 2 L. J. M. C. 55, 24 E. C. L. 276; Rex *v.* Buckingham, 4 Campb. 189.

71. State *v.* Canterbury, 28 N. H. 195, holding that by ordinary rules the words "highway" and "bridge" are not equivalent or convertible.

Three hundred feet of highway not included by term.— Although the inhabitants of a county are in general liable to repair a highway within three hundred feet of the bridge as well as the bridge itself, an indictment which charges merely a non-repair of the "bridge" is not sufficient to charge them with the non-repair of the highway within that distance. Rex *v.* Gloucester, 8 L. J. K. B. O. S. 97, 8 L. J. M. C. 120.

72. Com. *v.* Proprietors Newburyport Bridge, 9 Pick. (Mass.) 142.

73. **If defendant is a duly organized town** which is bound by law to keep the bridge in repair this need not be alleged. Nor is it material that the information state that it is the duty of the inhabitants of the town to repair the bridge, instead of averring that the duty rests upon the town itself. Saukville *v.* State, 69 Wis. 178, 33 N. W. 88.

A parish may be indicted for the non-repair of a bridge without stating any other grounds of liability than that it had immemorially been in the habit of repairing the bridge. Rex *v.* Hendon, 4 B. & Ad. 628, 2 L. J. M. C. 55, 24 E. C. L. 276.

74. State *v.* King, 25 N. C. 411.

Allegation of duty to repair ratione tenuræ.— To charge an individual with the non-repair of a bridge by reason of his being owner and proprietor of a certain navigation is not equivalent to charging him *ratione tenuræ*. Rex *v.* Kerrison, 1 M. & S. 435, 14 Rev. Rep. 491. Likewise an indictment for non-repairing an ancient bridge which is described as being situated within the parish of M & P, without showing what part of it was situated in the township of M, and that the inhabitants thereof were liable to repair it, is bad, as no special or sufficient construction was shown to render the inhabitants of the township liable to repairs, and, since they could not hold land, they could not be liable *ratione tenuræ*. Rex *v.* Machynlleth, 2 B. & C. 166, 3 D. & R. 388, 26 Rev. Rep. 294, 9 E. C. L. 80.

75. People *v.* Adsit, 2 Hill (N. Y.) 619.

76. State *v.* Milo, 32 Me. 57.

Variance.— If an indictment charges that the king's subjects were free to pass upon the bridge "at their free will and pleasure," but the evidence shows that a bar had been kept across the bridge at certain times, and that the public could use it only during a time of flood, the variance is fatal. Rex *v.* Buckingham, 4 Campb. 189.

77. **For forms** of petitions for mandamus to compel repairing or rebuilding see the following cases:

tioner,[78] it is generally held that mandamus will issue to compel the repair or rebuilding of a bridge.[79] The courts will not interfere, however, unless the action of the local authorities seems to be governed by considerations other than the public interests;[80] and the writ will not issue where the rebuilding would greatly embarrass the county and delay or prevent more important repairs,[81] where the necessary outlay is too great, or no means of procuring a sufficient outlay exists,[82] where it appears that the commissioners have a discretion in the matter, either as to the necessity of rebuilding or of rebuilding at the particular site in question, unless such discretion be abused,[83] or if, under the statute governing and regu-

Illinois.— St. Clair County *v.* People, 85 Ill. 396; Willow Branch *v.* People, 69 Ill. App. 326; People *v.* Montgomery County, 32 Ill. App. 164.

Indiana.— Hamilton County *v.* State, 113 Ind. 179, 15 N. E. 258.

Iowa.— State *v.* Morris, 43 Iowa 192.

Michigan.— Brophy *v.* Schindler, 126 Mich. 341, 85 N. W. 1114; Travis *v.* Skinner, 72 Mich. 152, 40 N. W. 234.

Minnesota.— State *v.* Renville County, 83 Minn. 65, 85 N. W. 830.

New Jersey.— State *v.* Essex County, 23 N. J. L. 214.

Wisconsin.—State *v.* Wood County, 72 Wis. 629, 40 N. W. 381.

78. Who is proper petitioner.— It has been held that a board of county commissioners, as an administrative body, have not such interest in the repair of a bridge, the duty of which is upon a turnpike company, as to authorize them to petition for mandamus compelling such company to repair. State *v.* Zanesville, etc., Turnpike Road Co., 16 Ohio St. 308. And see, generally, MANDAMUS.

79. *Illinois.*—Willow Branch *v.* People, 69 Ill. App. 326 [*distinguishing* People *v.* Montgomery County, 32 Ill. App. 164], explaining and recognizing the difference between compelling action in some way to a particular end, and an action in a particular way to that end. In this case the object sought by the writ was to compel the commissioners to "repair" in some way an existing but defective structure, as distinguished from providing a structure not existing, and of a particular kind prescribed by the court, the latter not being within the legal scope of the writ.

Indiana.— Hamilton County *v.* State, 113 Ind. 179, 15 N. E. 258.

Michigan.— Brophy *v.* Schindler, 126 Mich. 341, 85 N. W. 1114, holding that the evidence of the case was sufficient to show that the duty of maintaining the bridge was upon the township of A, and that therefore mandamus would lie to compel them to rebuild the bridge.

Minnesota.— State *v.* Renville County, 83 Minn. 65, 85 N. W. 830.

Nebraska.— State *v.* Kearney County, 12 Nebr. 6, 10 N. W. 413.

New Jersey.— State *v.* Titus, 47 N. J. L. 89.

New York.— People *v.* Queens County, 142 N. Y. 271, 36 N. E. 1062, 58 N. Y. St. 580 [*reversing* 71 Hun (N. Y.) 97, 24 N. Y. Suppl. 563, 54 N. Y. St. 197].

Pennsylvania.— Howe *v.* Crawford County, 47 Pa. St. 361.

Virginia.—Brander *v.* Chesterfield Justices, 5 Call (Va.) 548, 2 Am. Dec. 606.

80. Matter of Glen, 3 N. Y. Suppl. 461, 20 N. Y. St. 394.

Ground of interference.— The right of the courts to compel the repairing or rebuilding of a bridge by mandates is placed upon the ground that the bridge was either essential to the use of the highway or would be of public utility. Hamilton County *v.* State, 113 Ind. 179, 15 N. E. 258.

81. Hamilton County *v.* State, 113 Ind. 179, 15 N. E. 258.

82. Travis *v.* Skinner, 72 Mich. 152, 40 N. W. 234; People *v.* Post, 30 Mich. 353; Matter of Glen, 3 N. Y. Suppl. 461, 20 N. Y. St. 394; People *v.* Hudson, 7 Wend. (N. Y.) 474; State *v.* Wood County, 72 Wis. 629, 40 N. W. 381.

If the statute provides for the raising of sufficient funds an answer that there was not sufficient money on hand is no defense. Berube *v.* Wheeler, (Mich. 1901) 87 N. W. 50.

Petition must show sufficient funds.— Where mandamus to the commissioners of a county is sought, it must be shown that the amount of the general revenue fund permitted to be expended for repairs of bridges has not been already exhausted. State *v.* Cloud County, 39 Kan. 700, 18 Pac. 952.

83. *Georgia.*— Dale *v.* Barnett, 105 Ga. 259, 31 S. E. 167.

Illinois.— People *v.* McLean County, 118 Ill. 239, 8 N. E. 684 [*affirming* 19 Ill. App. 253]; St. Clair County *v.* People, 85 Ill. 396; People *v.* Montgomery County, 32 Ill. App. 164.

Indiana.— State *v.* Greene County, 119 Ind. 444, 21 N. E. 1097; Hamilton County *v.* State, 113 Ind. 179, 15 N. E. 258.

Iowa.— State *v.* Morris, 43 Iowa 192.

Missouri.— State *v.* Coleman, 33 Mo. App. 470.

New Jersey.— State *v.* Essex County, 23 N. J. L. 214.

Pennsylvania.— Seabolt *v.* Northumberland County, 197 Pa. St. 110, 42 Wkly. Notes Cas. (Pa.) 468, 46 Atl. 928.

West Virginia.— State *v.* County Ct., 33 W. Va. 589, 11 S. E. 72.

Change of site.— Whether the site of a bridge has been changed sufficiently to call its location a new site may depend largely on the physical features of the neighborhood, or on the changes in the location of population and travel. The mere fact that it was

lating the matter, there is an adequate remedy at law at the instance of an interested party.[84]

IV. REGULATION OF USE.

A. In General. The power to regulate the use of bridges would seem to be a necessary incident to the power to build or repair them.[85] The manner of exercising this power, whether obtained by necessary implication or derived from charter or constitutional provisions, may, however, be prescribed or determined by the legislature.[86] Such provisions may allow the bridge authorities a discretion as to the manner of regulating the travel,[87] but if specific and mandatory must be observed to render the regulations binding.[88]

rebuilt with one pier one hundred and ninety-six feet north of the site of the old bridge, and the other four hundred and forty-four feet north thereof, is not, as a matter of law, proof that the site was changed. Seabolt *v.* Northumberland County, 187 Pa. St. 318, 42 Wkly. Notes Cas. (Pa.) 468, 41 Atl. 22.

Petitioner must show that bridge is public. — Where mandamus proceedings are instituted to compel the repair or rebuilding of a bridge, it must be shown that the bridge is a public one. Travis *v.* Skinner, 72 Mich. 152, 40 N. W. 234; Brander *v.* Chesterfield Justices, 5 Call (Va.) 548, 2 Am. Dec. 606.

84. Bembe *v.* Anne Arundel County, (Md. 1902) 51 Atl. 183.

85. Chicago *v.* McGinn, 51 Ill. 266, 2 Am. Rep. 295.

86. Paxton *v.* Baum, 59 Miss. 531; Jefferson County *v.* Arrighi, 54 Miss. 668; Canada Northern R. Co. *v.* International Bridge Co., 7 Fed. 653 (holding that the act of congress of June, 1870, which refers the question of the conditions upon which railway companies shall enjoy the use of an international bridge to the district court of the United States for decision was a proper exercise of legislative power, and that such decision should proceed upon settled principles of law and equity, and not upon arbitrary discretion). See also Hogan *v.* New York, 68 N. Y. 17, holding that under a proper construction of the New York Laws of 1867, c. 586, 1868, c. 853, 1869, c. 867, and 1870, c. 383, these acts gave the park commissioners entire control of all bridges over the Harlem river and Spuyten Duyvil creek, and that an intention to except Kingsbridge from the operation of such acts could not be inferred.

Construction of statute. — A statute which authorizes any company which maintains a bridge over a river connecting any city of more than one million inhabitants with any other city in the state, to lay tracks and operate a railway on its bridge, includes a corporation which is engaged in the construction of such a bridge, although at the time the company received its original charter there was no city at one terminus of the bridge in question. New York, etc., Bridge Co. *v.* Smith, 148 N. Y. 540, 42 N. E. 1088 [*affirming* 90 Hun (N. Y.) 312, 35 N. Y. Suppl. 920, 70 N. Y. St. 586].

87. **What constitutes abuse of discretion.** — Under New York Laws (1897), c. 66, §§ 3, 4, the trustees of the Brooklyn bridge were authorized to contract with certain railroad corporations to permit them to carry passengers over the bridge, and were directed to prepare plans regulating the operation of cars "as such trustees shall deem best adapted to promote the public comfort and convenience . . . and, except as otherwise provided by such plans and specifications, should be in substantial conformity with" certain designated plans. The original contract executed by these trustees followed the designated plans in providing for an elevated terminus at the New York city end of the bridge, with elevators, thus leaving a clear passageway for pedestrians. There being various objections to this plan, the contract was afterward modified so as to provide for a terminus at the end of the roadway with loops crossing the passageway for pedestrians and for gates to close such passageway whenever the cars were crossing it. It was held that the variance from the plans of the statute was within the trustees' discretion, and that therefore the work would not be enjoined. Hearst *v.* Shea, 156 N. Y. 169, 50 N. E. 788 [*affirming* 24 N. Y. App. Div. 73, 49 N. Y. Suppl. 49].

Forbidding the dragging of timbers, stone, etc., over a bridge, and requiring such articles to be raised on wheels or otherwise, is a reasonable, proper, and enforceable regulation. Holmes *v.* Pickering, 1 Ohio Dec. (Reprint) 179, 3 West. L. J. 222.

Power of trustees of Brooklyn bridge. — Prior to the consolidation of the cities of New York and Brooklyn, the trustees of the Brooklyn bridge had exclusive control and management thereof, and by virtue of this power it was proper for them, and was within the scope of their authority, to contract with the New York Mail & Newspaper Transportation Company, allowing them to construct and operate pneumatic mail-tubes along such bridge; and such contract was binding on the commissioner who succeeded them, subject, however, to his power to maintain the bridge for the greatest efficiency for the paramount purpose of its construction — that of public travel. New York Mail, etc., Transp. Co. *v.* Shea, 30 N. Y. App. Div. 266, 51 N. Y. Suppl. 563.

88. Thus a by-law by a bridge corporation imposing a penalty for riding or driving a horse over the bridge faster than a walk is

B. As to Tolls. Subject to the exception that the charter of a bridge company must not be impaired,[89] the regulation of tolls is subject to legislative action.[90] In some jurisdictions the legislature has subjected the company to the payment of a penalty [91] or to an indictment [92] for an overcharge. In other jurisdictions the right to so regulate has been delegated in whole or in part to the interested municipalities;[93] and when such is the case the courts will not interfere and define the limit of the amount which may be exacted.[94]

V. LIABILITY FOR INJURIES CAUSED BY DEFECTIVE BRIDGE.

A. General Nature of. As neither a municipality nor a bridge company is to be held as an insurer of the safety of its bridges,[95] it follows that they are liable only on the ground of misfeasance [96] or negligence either in the manner of construction or in the maintenance thereof,[97] whether the action be for an injury to

not binding upon a person who has no actual notice thereof, unless posted at the ends of the bridge as required by the statute. Worcester *v.* Essex Merrimac Bridge Corp., 7 Gray (Mass.) 457.

89. See, generally, CONSTITUTIONAL LAW.

90. Monongahela Bridge Co. *v.* Pittsburg, etc., R. Co., 114 Pa. St. 478, 8 Atl. 233, holding that, under the statutes and charter by virtue of which the bridge company was organized, the court of quarter sessions had jurisdiction to fix the tolls for a street car to cross such bridge, and from its decision no appeal would lie; the constitutional provision of the state giving a right of appeal and trial by jury from an assessment of damages arising from the exercise of the right of eminent domain having no application to the case. See also Canada Southern R. Co. *v.* International Bridge Co., 8 Fed. 190, holding that the act of congress of June, 1870, did not confer upon the district court of the United States jurisdiction over a controversy relating solely to the compensation which is due the corporation for the use of the bridge.

91. **One penalty only is incurred,** under the Pennsylvania act of 1874, § 31, which provides for a penalty against a bridge company for each overcharge of toll which it shall "collect or demand," if the payment is made at one time for tolls for use of the bridge at various times preceding the payment, although the account embraces various items of overcharge. Porter *v.* Dawson Bridge Co., 157 Pa. St. 367, 27 Atl. 730.

92. See Lewis *v.* State, 41 Ala. 414, holding that the indictment against a bridge-keeper for an overcharge must aver that the bridge was licensed by the commissioners' court of the county, and specify the prescribed rates of toll. An averment that defendant "being employed as the keeper of said bridge, did demand and collect from B. F. P. larger toll than is authorized by said charter," is not sufficient.

93. Stanislaus Bridge Co. *v.* Horsley, 46 Cal. 108 (holding that the power of the board of supervisors was not exhausted when they once fixed the tolls, but that they might change the same from time to time subject to supervisory control of the legislature); Macon *v.* Macon, etc., R. Co., 7 Ga. 221 (holding that the act of 1847 which vested in the corporate authority of the city of Macon the right to regulate the tolls of the Ocmulgee bridge repealed all laws which would militate against such acts).

Validity — When not police regulation. A city ordinance subjecting any officer or agent of a bridge company to a fine if he should refuse to sell packages of one hundred passage tickets for a dollar is not a police regulation, and is therefore invalid. While it was proper, in this case, for the municipality to insist that one hundred passage tickets be sold for a dollar it could not enforce such authority by a penalty. Newport *v.* Newport, etc., Bridge Co., 90 Ky. 193, 12 Ky. L. Rep. 39, 13 S. W. 720, 8 L. R. A. 484.

94. Particularly where, pending an action for this purpose, the general assembly has referred the question to a vote of the people of the locality for a decision. Oliff *v.* Shreveport, 52 La. Ann. 1203, 27 So. 688.

Municipal contract for reduction of tolls. A contract by a city, a parish, and a railroad, that the city and parish would reduce the tolls one tenth yearly does not confer upon the public any vested rights, and it cannot insist that such reduction shall be made. Oliff *v.* Shreveport, 52 La. Ann. 1203, 27 So. 688.

95. See *infra*, V, C, 1, c, (I).

96. Brunswick *v.* Braxton, 70 Ga. 193.

97. *Alabama.*— Cullman *v.* McMinn, 109 Ala. 614, 19 So. 981.

Connecticut.— Masters *v.* Warren, 27 Conn. 293.

Indiana.— Wabash County *v.* Pearson, 120 Ind. 426, 22 N. E. 134, 16 Am. St. Rep. 325.

Kentucky.— Covington *v.* Bramlege, 14 Ky. L. Rep. 395.

Maryland.—Washington, etc., Turnpike Co. *v.* Case, 80 Md. 36, 30 Atl. 571.

Massachusetts.— Butterfield *v.* Boston, 148 Mass. 544, 20 N. E. 113, 2 L. R. A. 447, holding that the city was not liable for the negligence of the draw-tender, and that inasmuch as no negligence in the construction or maintenance of the bridge was shown the city was not liable.

New York.— Evers *v.* Hudson River Bridge Co., 18 Hun (N. Y.) 144. And see Hannon *v.* Agnew, 1 N. Y. City Ct. 64.

What is not negligence. — It is not negli-

adjoining property[98] or to a traveler.[99] Such negligence must be the proximate cause of the injury,[1] and whether it exists, or, if shown to exist, whether it is the proximate cause, is a question of fact for the jury.[2]

B. To Adjoining Landowners — 1. Ground of Liability — a. In General. As a rule, any person or corporation having the right to construct a bridge will be liable for any undue damages it may cause to adjoining property, upon the broad principle that every man must conduct his business in such a manner as to do no unnecessary injury to others;[3] but the liability of a county for such injury has been denied, in the absence of a statute expressly giving a right of action.[4]

b. Injury to Business. In the absence of evidence of a gross abuse of discretion in the construction or repair of a bridge a municipality is not liable to the adjacent property owner for incidental injuries to his business or for a decrease in the rents of his property during such construction.[5]

c. Interference With Flow of Water. If a municipality construct a bridge in such a manner as to divert the stream from its natural course,[6] or cause it to set

gence to construct a bridge of the width of sixteen feet, one inch lower on one side than on the other. Nor, where there is a hill at one end of a bridge, is there any negligence in constructing a bridge twenty feet in length, one foot lower at one end than at the other, thus creating an incline toward the hill. Perkins *v.* Delaware Tp., 113 Mich. 377, 71 N. W. 643.

98. Harford County *v.* Wise, 75 Md. 38, 23 Atl. 65.

99. See *infra*, V, C.

1. White *v.* Riley Tp., 121 Mich. 413, 80 N. W. 124; Reiss *v.* Pelham, 53 N. Y. App. Div. 459, 65 N. Y. Suppl. 1033 [*affirming* 30 Misc. (N. Y.) 545, 62 N. Y. Suppl. 607].

2. *Georgia.*—Henley *v.* Griffin, 101 Ga. 140, 28 S. E. 610.

Illinois.— Chicago *v.* O'Malley, 95 Ill. App. 355; St. Louis, etc., R. Co. *v.* Winkelmann, 47 Ill. App. 276.

Missouri.— Pembroke *v.* Hannibal, etc., R. Co., 32 Mo. App. 61.

New York.—Fisher *v.* Cambridge, 133 N. Y. 527, 30 N. E. 663, 44 N. Y. St. 317; Kelly *v.* New York Cent., etc., R. Co., 9 N. Y. Suppl. 90, 29 N. Y. St. 646, the latter case holding that whether failure to bevel the edges of a plank with which a hole in a bridge is repaired would constitute negligence in repairing is for the jury.

Pennsylvania.— Ford *v.* Roulet Tp., 9 Pa. Super. Ct. 643; Cage *v.* Franklin Tp., 8 Pa. Super. Ct. 89.

Vermont.— Lazelle *v.* Newfane, 69 Vt. 306, 37 Atl. 1045.

Wisconsin.— Spaulding *v.* Sherman, 75 Wis. 77, 43 N. W. 558.

3. Mootry *v.* Danbury, 45 Conn. 550, 29 Am. Rep. 703 [*distinguishing* Chidsey *v.* Canton, 17 Conn. 475], upon this principle affirming the liability of a town.

Who is adjacent property owner.— A tenant of realty under a lease of four years is not an adjacent property owner within the meaning of a statute which provides that any person who has "real estate," and is injured by the change of grade made in erecting a certain bridge may recover damages for the same from the city. Ehrsam *v.* Utica, 37 N. Y. App. Div. 272, 55 N. Y. Suppl. 942.

4. Crowell *v.* Sonoma County, 25 Cal. 313; Livermore *v.* Camden County, 29 N. J. L. 245 (citing as analogies, cases holding that no action lies for an injury to a traveler caused by a defective bridge). See also Smith *v.* Wilkes County, 79 Ga. 125, 4 S. E. 20, holding not only that the action would not lie against a county in the absence of statute, but also that under the contract by which the bridge was built the doctrine of *respondeat superior* would not apply.

5. Tuggle *v.* Atlanta, 57 Ga. 114, 117, where the court say: "It is a mistake to suppose that a citizen can present a balance-sheet at the city treasury, and get his losses cashed whenever the improvements in his neighborhood do not go forward as rapidly as they might, or in the best possible manner. . . . People must submit to some temporary inconvenience for the sake of great works that are to stand as future monuments of the enterprise and public spirit of the age." See also Orth *v.* Milwaukee, 59 Wis. 336, 18 N. W. 10, where, although by reason of the insufficiency of the complaint the point was not necessarily decided, it was doubted whether the action would lie.

6. Tyler *v.* Tehama County, 109 Cal. 618, 42 Pac. 240 [*distinguishing* Crowell *v.* Sonoma County, 25 Cal. 313], in that the constitution of the state, when that case was decided, simply provided: "Nor shall private property be taken for public use without just compensation," etc., while in this case the constitution had been amended so as to read "taken or damaged," and holding that the county could not avoid its liability on the ground that instead of being erected on the line of the road, it was erected on property belonging to plaintiff, abutting the road, as long as it maintained the bridge, and failed to repudiate the action of its supervisors in so constructing it.

In the absence of statute, there is no obligation upon a city to keep up and maintain a dike in such manner as will prevent the overflow of adjoining landowners, it having erected the dike merely for the protection of its bridge. Collins *v.* Macon, 69 Ga. 542.

Proof of want of ordinary care on the part of the municipality in its construction is

back, or, in certain instances, overflow upon, an adjoining landowner,[7] it is liable in damages for the injuries thus sustained, unless the flood or freshet causing the injury be an extraordinary one, in which case the rule would be otherwise.[8] The same rules are applicable in determining the liability or non-liability of railroads or other quasi-municipal corporations for overflows alleged to be due to the improper construction of their bridges.[9] The same rules also apply where a bridge, by reason of its improper construction, unduly diminishes or increases the volume of water theretofore enjoyed by a mill-owner, it being held that the municipality or corporation must respond in damages for the injury.[10]

sufficient; proof that it was wantonly so constructed is not necessary to render the municipality liable. Stone *v.* Augusta, 46 Me. 127.

7. Mootry *v.* Danbury, 45 Conn. 550, 29 Am. Rep. 703; Lawrence *v.* Fairhaven, 5 Gray (Mass.) 110, the latter case applying the principle where a third person, with the permission of the town, so used the piers and abutments of its bridge as to cause an overflow on plaintiff's land.

8. Sprague *v.* Worcester, 13 Gray (Mass.) 193, 196 (where the court say: "By the exception of 'extraordinary freshets for unimportant periods of time' we consider was meant freshets not ordinarily occurring annually, but which come occasionally. . . . Bridges are not required to be so built as to secure all private proprietors of mills or lands from all possible damage from extraordinary causes; but to be so reasonably constructed as to secure private proprietors from damage from the ordinary action of the elements, including in such ordinary action water in its high and low annual stages, open or frozen, or carrying off floating ice"); Livezey *v.* Philadelphia, 64 Pa. St. 106, 3 Am. Rep. 578.

9. *Illinois.*— Kankakee, etc., R. Co. *v.* Horan, 131 Ill. 288, 23 N. E. 621 [*affirming* 30 Ill. App. 552]; St. Louis, etc., R. Co. *v.* Winkelmann, 47 Ill. App. 276; Peoria, etc., R. Co. *v.* Barton, 38 Ill. App. 469; Illinois Cent. R. Co. *v.* Bethel, 11 Ill. App. 17.

Indiana.— Sherlock *v.* Louisville, etc., R. Co., 115 Ind. 22, 17 N. E. 171.

Kansas.— Union Trust Co. *v.* Cuppy, 26 Kan. 754, holding that if the flood was one which could have been anticipated when the culvert was built the railroad would be liable.

Maryland.— Piedmont, etc., R. Co. *v.* McKenzie, 75 Md. 458, 24 Atl. 157, holding that if the bridge was carried away because of its negligent or unskilful construction, in an extraordinary high flood, the railroad company would be liable, but if it was properly constructed and was carried away only by reason of the unusual destructiveness of the flood the company was not liable.

Massachusetts.— Mellen *v.* Western R. Corp., 4 Gray (Mass.) 301; Rowe *v.* Granite Bridge Corp., 21 Pick. (Mass.) 344.

Missouri.—Abbott *v.* Kansas City, etc., R. Co., 83 Mo. 271, 53 Am. Rep. 581.

Nebraska.— Omaha, etc., R. Co. *v.* Brown, 16 Nebr. 161, 20 N. W. 202, adhering to the law as stated upon a former trial of the same case in 14 Nebr. 170, 15 N. W. 321, but holding that the bridge in question was not constructed according to the rules therein stated.

New York.— Conhocton Stone Road Co. *v.* Buffalo, etc., R. Co., 3 Hun (N. Y.) 523, 5 Thomps. & C. (N. Y.) 651.

Pennsylvania.— Pittsburg, etc., R. Co. *v.* Gilleland, 56 Pa. St. 445, 94 Am. Dec. 97.

Rhode Island.— Spencer *v.* Hartford, etc., R. Co., 10 R. I. 14.

Texas.— Houston, etc., R. Co. *v.* Parker, 50 Tex. 330 (holding that if the backwater was caused by an extraordinary rain which could not have been anticipated when the culvert was built the road would not be liable, but that the fact that the bridge was on a street and used by the public would not release it from its liability); St. Louis, etc., R. Co. *v.* Craigo, 10 Tex. Civ. App. 238, 31 S. W. 207.

West Virginia.— Taylor *v.* Baltimore, etc., R. Co., 33 W. Va. 39, 10 S. E. 29.

Contribution to cause of injury.—If a party over whose land a railroad bridge is built, by building dikes along the creek, fences the flow of the stream into a narrow channel, he will be held to have contributed in a degree to his own injury, where an ice-gorge is formed against the bridge, causing the overflow of his land and injury to his dikes. Peoria, etc., R. Co. *v.* Barton, 38 Ill. App. 469. But the rule is otherwise if the dikes or levees were constructed before the bridge was built. Chicago, etc., R. Co. *v.* Schaffer, 26 Ill. App. 280.

The compensation allowed by law to an individual for damages caused by the construction of a railroad through his premises does not preclude him from afterward suing the railroad for damages from an overflow caused by an insufficient culvert or bridge. Ohio, etc., R. Co. *v.* Wachter, 123 Ill. 440, 15 N. E. 279, 5 Am. St. Rep. 532 [*affirming* 23 Ill. App. 415]. But in the absence of evidence of neglect of duty on its part or of some excess of the powers conferred upon it incidental injuries must be held to have been included in what plaintiff agreed to receive when the road was constructed. Hodge *v.* Lehigh Valley R. Co., 39 Fed. 449.

10. Perry *v.* Worcester, 6 Gray (Mass.) 544, 66 Am. Dec. 431; Blood *v.* Nashua, etc., R. Corp., 2 Gray (Mass.) 137, 61 Am. Dec. 444; Riddle *v.* Delaware County, 156 Pa. St. 643, 33 Wkly. Notes Cas. (Pa.) 155, 27 Atl. 569; Houston, etc., R. Co. *v.* Parker, 50 Tex. 330 (holding that it is no defense to the action that the mill buildings injured by the backwater are partly located upon a public

2. Enforcement of Liability.[11] In the recovery of damages to adjoining property caused by the improper construction of a bridge,[12] plaintiff must show that he has sustained injury by reason of the defective construction,[13] and that defendant was guilty of negligence.[14] Whether the overflow was caused by the construction of the bridge is a question of fact for the jury.[15]

street, it not being shown that that fact in any way added to their injury); Taylor *v.* Baltimore, etc., R. Co., 33 W. Va. 39, 10 S. E. 29. *Compare* Ely *v.* Rochester, 26 Barb. (N. Y.) 133.

Contributory negligence.— A mill-owner whose property has been injured by the obstruction of the flow of water of a stream by the negligent construction of a county bridge is not guilty of contributory negligence because he had, previous to the construction of the bridge, raised his mill-dam, but for which the property might not have been flooded; it being the duty of the county in erecting the bridge to provide for the then existing conditions. Riddle *v.* Delaware County, 156 Pa. St. 643, 33 Wkly. Notes Cas. (Pa.) 155, 27 Atl. 569.

11. For forms of complaints, declarations, and petitions, either in part or in substance, see the following cases:

California.— Tyler *v.* Tehama County, 109 Cal. 618, 42 Pac. 240; Crowell *v.* Sonoma County, 25 Cal. 313.

Connecticut.—Mootry *v.* Danbury, 45 Conn. 550, 29 Am. Rep. 703.

Illinois.— Kankakee, etc., R. Co. *v.* Horan, 131 Ill. 288, 23 N. E. 621; Illinois Cent. R. Co. *v.* Bethel, 11 Ill. App. 17.

Maryland.— Piedmont, etc., R. Co. *v.* McKenzie, 75 Md. 458, 24 Atl. 157.

Missouri.—Abbott *v.* Kansas City, etc., R. Co., 83 Mo. 271, 53 Am. Rep. 581.

Nebraska.— Omaha, etc., R. Co. *v.* Standen, 22 Nebr. 343, 35 N. W. 183.

Pennsylvania.— Livezey *v.* Philadelphia, 64 Pa. St. 106, 3 Am. Rep. 578.

12. Form of remedy.— While the remedy of plaintiff in such a case is usually an action of trespass, it is held that the statute of Pennsylvania providing a special proceeding by view for the assessment of damages in such cases (act of May 24, 1878), excludes the common-law remedies. Power *v.* Ridgway, 149 Pa. St. 317, 24 Atl. 307. Where the construction of the bridge is clearly illegal, a party whose property would be injured thereby may maintain an action to restrain the building of the same. Potter *v.* Manasha, 30 Wis. 492.

13. Sherlock *v.* Louisville, etc., R. Co., 115 Ind. 22, 17 N. E. 171; Omaha, etc., R. Co. *v.* Standen, 22 Nebr. 343, 35 N. W. 183 [*followed* in Omaha, etc., R. Co. *v.* Brown, 22 Nebr. 355, 35 N. W. 188].

Showing of defendant's liability.— A complaint which alleges that the work of constructing a bridge was done under the direction of, and according to the plans and specifications furnished by a board of supervisors, and that it was accepted by them, is sufficient to fasten the liability upon the county, although the work may have been performed by a bridge company. Tyler *v.* Tehama County, 109 Cal. 618, 42 Pac. 240.

14. Harford County *v.* Wise, 75 Md. 38, 23 Atl. 65.

Admissibility and sufficiency of evidence.— In an action of this character evidence that the piers of the bridge were only twenty feet apart from center to center, that prior to the construction of the bridge floods had occurred in the river, that driftwood had frequently at such times floated down the river, and that in the breaking of ice in the spring, cakes of more than twenty feet square often floated down, is properly admissible in determining the question of negligence or inefficiency in the construction of the bridge (Omaha, etc., R. Co. *v.* Standen, 29 Nebr. 622, 46 N. W. 46; Omaha, etc., R. Co. *v.* Brown, 29 Nebr. 492, 46 N. W. 39); and a showing that by consequence of such construction an ice-gorge formed, throwing nearly all the water of the river upon the bottom lands, and thereby greatly injuring and destroying plaintiff's property, is sufficient to warrant a verdict in his favor (Omaha, etc., R. Co. *v.* Brown, 16 Nebr. 161, 20 N. W. 202). See also St. Louis, etc., R. Co. *v.* Winkelmann, 47 Ill. App. 276, holding that testimony that the flood occurred in 1887 or 1888 is admissible under an allegation that it occurred in 1887. But see Hodge *v.* Lehigh Valley R. Co., 39 Fed. 449, where the evidence failing to show clearly that the construction of the bridge caused the injury complained of, and the damages awarded being greatly in excess of the injury shown, the verdict was set aside.

Erroneous instruction.— An instruction to the jury that if the first flood was an extraordinary one it was for them to determine whether defendant ought after the first, or first and second floods, to have altered its culvert by enlarging its cavity, and whether it was negligence not to do so after such repeated instances, is erroneous, since the jury might infer that permission was given them to allow damages for extraordinary floods caused by their reoccurrence one after the other in so short a time. The fact that the floods occurred frequently could only be recognized in determining whether or not they were in fact extraordinary, and if extraordinary, damages should not be awarded for them. Pittsburg, etc., R. Co. *v.* Gilleland, 56 Pa. St. 445, 94 Am. Dec. 97.

15. St. Louis, etc., R. Co. *v.* Winkelmann, 47 Ill. App. 276. See also Omaha, etc., R. Co. *v.* Brown, 29 Nebr. 492, 46 N. W. 39; Van Duzer *v.* Elmira, etc., R. Co., 75 Hun (N. Y.) 487, 27 N. Y. Suppl. 474, 57 N. Y. St. 355, the latter case holding that if the bridge was built by the predecessor in title of defendant, it is a question for the jury whether the situation was such as to charge defendant

C. To Travelers — 1. In General — a. Rule Stated. Whenever the duty to repair a public bridge is imposed upon an individual or company, either by statute or charter, or where such duty is incurred either by contract or by the erection of the same across a highway for individual benefits, such company or individual is liable on common-law principles to respond civilly for injuries sustained by an individual, because of a neglect of this duty.[16]

b. Liability of Municipalities — (i) *In General* — (A) *Counties or Towns* — (1) At Common Law. The liability to respond civilly for the failure to maintain or repair a bridge does not necessarily accompany the duty to repair; and at common law a county was not liable in a civil action for injuries to travelers, resulting from its failure to maintain or repair a public bridge.[17] By the weight of authority in the United States such liability does not exist as to such subdivisions created by the sovereign authority for political and civil purposes as counties or

with the notice that the bridge was defective before its defective character was demonstrated by a flood; and that it is a question for the jury whether the flood was of such an extraordinary character that it should have been anticipated and provided against in the building of the bridge.

16. *Alabama.*— Watson *v.* Oxama Land Co., 92 Ala. 320, 8 So. 770.

Maine.— Watson *v.* Proprietors Lisbon Bridge, 14 Me. 201, 31 Am. Dec. 49.

Maryland.— Washington, etc., Turnpike, Co. *v.* Case, 80 Md. 36, 30 Atl. 571.

Massachusetts.— Carter *v.* Boston, etc., R. Corp., 139 Mass. 525, 2 N. E. 101; Woburn *v.* Henshaw, 101 Mass. 193, 3 Am. Rep. 333; Nowell *v.* Wright, 3 Allen (Mass.) 166, 80 Am. Dec. 62.

Michigan.— Niles Tp. *v.* Martin, 4 Mich. 557, 69 Am. Dec. 333.

New Jersey.— Ward *v.* Newark, etc., Turnpike Co., 20 N. J. L. 323 [*approving dicta* in Sussex County *v.* Strader, 18 N. J. L. 108, 122, where it is said that the corporations are quasi-common carriers; they receive a toll or compensation, and are therefore bound to furnish passengers with safe roads and bridges].

New York.— Cook *v.* Dean, 11 N. Y. App. Div. 123, 42 N. Y. Suppl. 1040; Dygert *v.* Schenck, 23 Wend. (N. Y.) 446, 35 Am. Dec. 575; Heacock *v.* Sherman, 14 Wend. (N. Y.) 58; Townsend *v.* Susquehannah Turnpike Road, 6 Johns. (N. Y.) 90.

North Carolina.— Campbell *v.* Boyd, 88 N. C. 129, 43 Am. Rep. 740; Nobles *v.* Langly, 66 N. C. 287; Mulholland *v.* Brownrigg, 9 N. C. 349.

Pennsylvania.— Gates *v.* Pennsylvania R. Co., 150 Pa. St. 50, 30 Wkly. Notes Cas. (Pa.) 329, 24 Atl. 638, 16 L. R. A. 554; Pennsylvania, etc., Canal Co. *v.* Graham, 63 Pa. St. 290, 3 Am. Rep. 549.

Virginia.— Chesapeake, etc., R. Co. *v.* Jennings, 98 Va. 70, 34 S. E. 986.

Wisconsin.— West Bend *v.* Mann, 59 Wis. 69, 17 N. W. 972, holding that the same liability existed against a subsequent grantee of the public who, by digging the raceway across a public highway and erecting a bridge thereon, became liable for its repair.

It is otherwise where the bridge is not across a public way, and the statute imposes upon the company no duty to repair (Cox *v.* East Tennessee, etc., R. Co., 68 Ga. 446); or where it is not shown that the company had made any agreement to keep the same in repair, although the company is cognizant of the fact that the bridge is used by the public (Louisville, etc., Canal Co. *v.* Murphy, 9 Bush (Ky.) 522). See also Cusick *v.* Adams, 115 N. Y. 55, 21 N. E. 673, 23 N. Y. St. 548, 12 Am. St. Rep. 772 [*distinguishing* Beck *v.* Carter, 68 N. Y. 283, 23 Am. Rep. 175].

17. *Georgia.*— Monroe County *v.* Flynt, 80 Ga. 489, 6 S. E. 173; Scales *v.* Ordinary, 41 Ga. 225.

Massachusetts.— Hill *v.* Boston, 122 Mass. 344, 23 Am. Rep. 332; Mower *v.* Leicester, 9 Mass. 247, 6 Am. Dec. 63. See also Doherty *v.* Braintree, 148 Mass. 495, 20 N. E. 106, holding that the liability for an injury sustained from negligence in the building of a bridge which the town was bound to construct did not fall within this general rule.

Michigan.— Niles Tp. *v.* Martin, 4 Mich. 557, 69 Am. Dec. 333.

Mississippi.— Brabham *v.* Hinds County, 54 Miss. 363, 28 Am. Rep. 352.

Nebraska.— Woods *v.* Colfax County, 10 Nebr. 552, 7 N. W. 269.

New Jersey.—Sussex County *v.* Strader, 18 N. J. L. 108.

New York.— Bartlett *v.* Crozier, 17 Johns. (N. Y.) 439, 8 Am. Dec. 428 [*reversing* 15 Johns. (N. Y.) 250].

North Carolina.— Kinsey *v.* Jones, 53 N. C. 186.

North Dakota.— Vail *v.* Amenia, 4 N. D. 239, 59 N. W. 1092.

Oregon.— Templeton *v.* Linn County, 22 Oreg. 313, 29 Pac. 795, 15 L. R. A. 730.

South Dakota.—Bailey *v.* Lawrence County, 5 S. D. 393, 59 N. W. 219, 49 Am. St. Rep. 881.

Tennessee.— Wood *v.* Tipton County, 7 Baxt. (Tenn.) 112, 32 Am. Rep. 561.

Texas.— Heigel *v.* Wichita County, 84 Tex. 392, 19 S. W. 562, 31 Am. Rep. 63.

England.— McKinnon *v.* Penson, 9 Exch. 609, 18 Jur. 513, 23 L. J. M. C. 97, 2 Wkly. Rep. 262; Russell *v.* Devon County, 2 T. R. 667, 1 Rev. Rep. 585.

See 8 Cent. Dig. tit. "Bridges," § 96.

towns, unless expressly given by statute,[18] and as the individual liability of the parties charged with the duty of repairing has been denied,[19] at least so long as they in good faith expend the means at their command,[20] a party may find him-

18. *Alabama.*— Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730; Covington County *v.* Kinney, 45 Ala. 176.

Arkansas.— Granger *v.* Pulaski County, 26 Ark. 37.

California.— Barnett *v.* Contra Costa County, 67 Cal. 77, 7 Pac. 177; Huffman *v.* San Joaquin County, 21 Cal. 426.

Colorado.— El Paso County *v.* Bish, 18 Colo. 474, 33 Pac. 184.

Georgia.— Scales *v.* Ordinary, 41 Ga. 225.

Illinois.— White *v.* Bond County, 58 Ill. 297, 11 Am. Rep. 65; Hedges *v.* Madison County, 6 Ill. 567, the latter case holding that the action must be against the agent of the county as an individual.

Indiana.— Jasper County *v.* Allman, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58 [*overruling* Howard County *v.* Legg, 93 Ind. 523, 47 Am. Rep. 390]; Morgan County *v.* Pritchett, 85 Ind. 68; Pritchett *v.* Morgan County, 62 Ind. 210; House *v.* Montgomery County, 60 Ind. 580, 28 Am. Rep. 657; Johnson County *v.* Hemphill, 14 Ind. App. 219, 42 N. E. 760.

Kansas.—Marion County *v.* Riggs, 24 Kan. 255.

Kentucky.— Wheatly *v.* Mercer, 9 Bush (Ky.) 704.

Louisiana.— King *v.* St. Landry Police Jury, 12 La. Ann. 858.

Massachusetts.— Mower *v.* Leicester, 9 Mass. 247, 6 Am. Dec. 63.

Michigan.— Niles Tp. *v.* Martin, 4 Mich. 557, 69 Am. Dec. 333.

Minnesota.— Altnow *v.* Sibley, 30 Minn. 186, 14 N. W. 877, 44 Am. Rep. 191.

Mississippi.— Brabham *v.* Hinds County, 54 Miss. 363, 28 Am. Rep. 352.

Missouri.—Pundmam *v.* St. Charles County 110 Mo. 594, 19 S. W. 733; Clark *v.* Adair County, 79 Mo. 536; Reardon *v.* St. Louis County, 36 Mo. 555.

Nebraska.— Woods *v.* Colfax County, 10 Nebr. 552, 7 N. W. 269.

New Jersey.— Sussex County *v.* Strader, 18 N. J. L. 108, 35 Am. Dec. 530 [*followed* in Cooley *v.* Essex County, 27 N. J. L. 415].

New York.— Ensign *v.* Livingston County, 25 Hun (N. Y.) 20; Bartlett *v.* Crozier, 17 Johns. (N. Y.) 439, 8 Am. Dec. 428 [*reversing* 15 Johns. (N. Y.) 250].

North Carolina.— White *v.* Chowan, 90 N. C. 437, 47 Am. Rep. 534.

North Dakota.— Vail *v.* Amenia, 4 N. D. 239, 59 N. W. 1092.

Oregon.— Templeton *v.* Linn County, 22 Oreg. 313, 29 Pac. 795, 15 L. R. A. 730 [*distinguishing* McCalla *v.* Multnomah County, 3 Oreg. 424, in that it was decided upon a statute which had been subsequently repealed].

South Dakota.—Bailey *v.* Lawrence County, 5 S. D. 393, 59 N. W. 219, 49 Am. St. Rep. 881.

Tennessee.— Wood *v.* Tipton County, 7 Baxt. (Tenn.) 112, 32 Am. Rep. 561.

Texas.— Heigel *v.* Wichita County, 84 Tex. 392, 19 S. W. 562, 31 Am. St. Rep. 63.

Compare Lewis *v.* Litchfield, 2 Root (Conn.) 436.

See 8 Cent. Dig. tit. "Bridges," § 96.

The better reason for exempting counties, and in some states towns or townships, from this liability would seem to be the fact that such political subdivisions are involuntary, so far as the inhabitants therein are concerned, are created for governmental purposes, without regard to the consent or dissent of the inhabitants, and are mere agencies of the state which should be privileged with all the immunities enjoyed by the state. El Paso County *v.* Bish, 18 Colo. 474, 33 Pac. 184; White *v.* Bond County, 58 Ill. 297, 11 Am. Rep. 65; Ensign *v.* Livingston County, 25 Hun (N. Y.) 20; Bailey *v.* Lawrence County, 5 S. D. 393, 59 N. W. 219, 49 Am. St. Rep. 881. Russell *v.* Devon County, 2 T. R. 667, 1 Rev. Rep. 585, has had much to do, however, in shaping the decisions of the early American cases upon the subject. But it has been pointed out that this case "so often cited as the source of the doctrine of nonliability of quasi-municipal corporations for injuries resulting from defective bridges or highways, never was intended to be authoritative further than that the inhabitants of a certain territory designated as a county, but not incorporated, and having no corporate purse, could not be held liable for such injuries, and that the case is not an authority for nonliability of counties in this country, where counties are incorporated and have a corporate purse." Vail *v.* Amenia, 4 N. D. 239, 245, 59 N. W. 1092. See also Dean *v.* New Milford Tp., 5 Watts & S. (Pa.) 545; and dissenting opinion of Lord, J., in Templeton *v.* Linn County, 22 Oreg. 313, 29 Pac. 795, 15 L. R. A. 730.

19. *Indiana.*— Lynn *v.* Adams, 2 Ind. 143.

Kentucky.— Wheatly *v.* Mercer, 9 Bush (Ky.) 704.

New York.— Bartlett *v.* Crozier, 17 Johns. (N. Y.) 439, 8 Am. Dec. 428 [*reversing* 5 Johns. (N. Y.) 250], holding that the only recourse of the injured party was an action for the statutory penalty.

Ohio.— Dunlap *v.* Knapp, 14 Ohio St. 64, 82 Am. Dec. 468, holding that the only action was against the supervisor for the statutory penalty.

South Carolina.— Young *v.* Road Com'rs, 2 Nott & M. (S. C.) 537.

20. Nagle *v.* Wakey, 161 Ill. 387, 43 N. E. 1079 [*affirming* 59 Ill. App. 198]; Pickerell *v.* Kunst, 15 Ill. App. 461; Garlinghouse *v.* Jacobs, 29 N. Y. 297; Smith *v.* Wright, 27 Barb. (N. Y.) 621.

The rule is otherwise when the highway commissioners have sufficient funds in their

self without a remedy for an injury which he has sustained. In a few jurisdictions, however, the reasons for the common-law holding have been held inapplicable to counties or towns in this country, and an implied obligation is affirmed.[21]

(2) Under Statute. In most of the New England states, statutes have been enacted rendering the towns liable, in certain instances, to a civil action for injuries occasioned by the non-repair of the bridges within their limits;[22] and in many other jurisdictions the common law has been wholly or partly changed as to the non-liability of counties or townships.[23] The general trend of these enactments

hands, or authority to secure such funds, and having notice of the defects neglect their duty to repair them, in which case they would be liable to an individual who sustained special damage. Hover *v.* Barkhoof, 44 N. Y. 113 [*distinguishing* Bartlett *v.* Crozier, 17 Johns. (N. Y.) 439, 8 Am. Dec. 428, in that it simply decided the non-liability of the overseers of the highway, and that much that was said with regard to the commissioners of highways is *obiter*].

21. Roby *v.* Appanoose County, 63 Iowa 113, 18 N. W. 711; Albee *v.* Floyd County, 46 Iowa 177; Krause *v.* Davis County, 44 Iowa 141; Huston *v.* Iowa County, 43 Iowa 456; Chandler *v.* Fremont County, 42 Iowa 58; Davis *v.* Allamakee County, 40 Iowa 217; Kendall *v.* Lucas County, 26 Iowa 395; Wilson *v.* Jefferson County, 13 Iowa 181; Baltimore County *v.* Baker, 44 Md. 1 [*following* Anne Arundel County *v.* Duckett, 20 Md. 468, 83 Am. Dec. 557, which is the leading case for the proposition laid down in the text, although it would seem that the injury complained of was occasioned by a defect in the road near the bridge, and not by the bridge itself]; Dean *v.* New Milford Tp., 5 Watts & S. (Pa.) 545; Eastman *v.* Clackamas County, 12 Sawy. (U. S.) 613, 32 Fed. 24. See also Jackson County *v.* Nichols, 139 Ind. 611, 38 N. E. 526; Gibson County *v.* Emmerson, 95 Ind. 579 (holding that Ind. Acts (1883), p. 62, did not relieve the county from its liability); Howard County *v.* Legg, 93 Ind. 523, 47 Am. Rep. 390; Morgan County *v.* Pritchett, 85 Ind. 68; Johnson County *v.* Hemphill, (Ind. App. 1895) 41 N. E. 965; Shelby County *v.* Blair, 8 Ind. App. 574, 36 N. E. 216; Parke County *v.* Sappenfield, 6 Ind. App. 577, 33 N. E. 1012; Hamilton County *v.* Noblesville Tp., 4 Ind. App. 145, 30 N. E. 155 (holding that the county could not recover contributions from the township) [but these cases were expressly overruled by Jasper County *v.* Allman, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58]; Harrold *v.* Simcoe County, 16 U. C. C. P. 43.

County must be bound to repair.— In jurisdictions where an implied liability upon the county to respond for injuries is upheld it is essential that the bridge be one commonly designated as "a county bridge," or, in other words, one upon which the statute imposes the duty to repair. If the bridge is one of such minor importance that the statute has placed the duty upon some other subdivision of the county, the county would not be liable for an injury happening by a defect in such bridge. Casey *v.* Tama County, 75 Iowa 655, 37 N. W. 138 (holding that the liability of the county did not necessarily depend upon the length of the bridge); Chandler *v.* Fremont County, 42 Iowa 58; Moreland *v.* Mitchell County, 40 Iowa 394; Taylor *v.* Davis County, 40 Iowa 295; Soper *v.* Henry County, 26 Iowa 264; Newlin Tp. *v.* Davis, 77 Pa. St. 317. See also Howard County *v.* Legg, 93 Ind. 523, 47 Am. Rep. 390; Madison County *v.* Brown, 89 Ind. 48; Reinhart *v.* Martin County, 9 Ind. App. 572, 37 N. E. 38.

22. *Connecticut.*— Chidsey *v.* Canton, 17 Conn. 475.

Maine.— Reid *v.* Belfast, 20 Me. 246.

Massachusetts.— Sawyer *v.* Northfield, 7 Cush. (Mass.) 490; Mower *v.* Leicester, 9 Mass. 247, 6 Am. Dec. 63. The erection and support of the bridge by a town and its use by the public for thirty-eight years is sufficient proof of its existence as a highway to render the town liable for an injury occasioned by its being out of repair. Williams *v.* Cummington, 18 Pick. (Mass.) 312.

New Hampshire.— Morrill *v.* Deering, 3 N. H. 53.

Vermont.— Crockett *v.* Barre, 66 Vt. 269, 29 Atl. 147, holding that if a statute provided that a village should assume all the responsibility of the town as to bridges within its limits, such village would, by virtue of the general statute, be liable for the defects of its bridges.

23. *Alabama.*— The statutory modification of the common law in Alabama has not subjected the county to a general liability, but only to a special one, where it has failed to take a guaranty from the contractor who built the bridge. Barks *v.* Jefferson County, 119 Ala. 600, 24 So. 505 (holding that, inasmuch as Ala. Code (1896), § 2498, invests a county with authority to establish free bridges without expressly confining them to public highways, a county is liable for injuries from a defective bridge erected on a private road, if no guaranty is required of the contractor); Lee County *v.* Yarbrough, 85 Ala. 590, 5 So. 341 (holding that where no guaranty is taken the liability of the county is the same as would be the liability of the contractor had the guaranty been exacted); Greene County *v.* Eubanks, 80 Ala. 204; Sims *v.* Butler County, 49 Ala. 110; Barbour County *v.* Horn, 48 Ala. 649; Barbour County *v.* Brunson, 36 Ala. 362 (holding that the statute gave a remedy for injuries arising from defects in free bridges as well as in toll-bridges).

Georgia.— The Georgia act of December,

and of the judicial construction put upon them is an affirmance of the principle that the liability to respond for the injury should accompany the duty to maintain and repair, and that it exists only when such duty exists,[24] unless the municipality

1888, made counties primarily liable for defects in bridges, but this act does not apply to bridges erected before its passage (Grays *v.* Bibb County, 94 Ga. 698, 19 S. E. 1021; Mappin *v.* Washington County, 92 Ga. 130, 17 S. E. 1009; Bibb County *v.* Dorsey, 90 Ga. 72, 15 S. E. 647); and previous to this statute the common-law liability had been only partly changed by the statute. If the county contracted for the construction of a bridge without requiring a bond of guarantee from the contractors as required by the code, they would then be liable for injuries occasioned by defects in the bridge (Cook *v.* De Kalb County, 95 Ga. 218, 22 S. E. 151 [*followed* in De Kalb County *v.* Cook, 97 Ga. 415, 24 S. E. 157]; Mackey *v.* Ordinaries, 59 Ga. 832), but if it did not appear that the bridge was one built by a contractor, and there had been no bond taken, or it was not a toll-bridge, no action against the county would lie (Gwinnett County *v.* Dunn, 74 Ga. 358; Scales *v.* Ordinary, 41 Ga. 225). It has also been held that the county is not liable after the expiration of the time within which the contractor would have been liable, although no bond was taken from him (Dougherty County *v.* Newsom, 107 Ga. 811, 33 S. E. 660; Monroe County *v.* Flynt, 80 Ga. 489, 6 S. E. 173); although if a contractor's bond had been taken and the time for which it was drawn had expired, and the county had undertaken to keep the bridge in repair, it has been held that it would be liable for the injury (Davis *v.* Horne, 64 Ga. 69). Where a structure which was built before the passage of the act of 1888 is, after the passage of that act, materially strengthened and repaired, the question whether a new bridge was constructed or the old one merely repaired becomes material in fixing the liability of the county, and is one of fact for the jury. Kelvingston *v.* Macon County, 103 Ga. 106, 29 S. E. 596. For sufficiency of contractor's bond to exempt the county from primary liability see Mappin *v.* Washington County, 92 Ga. 130, 17 S. E. 1009.

Kansas.—Vickers *v.* Cloud County, 59 Kan. 86, 52 Pac. 73.

Michigan.— Merkle *v.* Bennington Tp., 68 Mich. 133, 35 N. W. 846.

Nebraska.— Hollingsworth *v.* Saunders County, 36 Nebr. 141, 54 N. W. 79.

Washington.— Kirtley *v.* Spokane County, 20 Wash. 111, 54 Pac. 936.

Canada.— Colbeck *v.* Brantford Tp., 21 U. C. Q. B. 276.

Liability by implication.— It has been argued that a statute declaring a county to be a municipal corporation in effect changes the common-law rule and thereby impliedly renders them liable for injuries; but this contention is not sound, and is not recognized in jurisdictions where the common-law nonliability of counties is adhered to. Scales *v.* Ordinary, 41 Ga. 225; Ahern *v.* Kings County, 89 Hun (N. Y.) 148, 34 N. Y. Suppl. 1023, 69 N. Y. St. 104; Godfrey *v.* Queens County, 89 Hun (N. Y.) 18, 34 N. Y. Suppl. 1052, 69 N. Y. St. 24; Albrecht *v.* Queens County, 84 Hun (N. Y.) 399, 32 N. Y. Suppl. 473, 65 N. Y. St. 658.

Defects within the meaning of the statute.— The removing of the superstructure of a bridge is a defect within the meaning of a statute making the county liable for defects in its bridges (Atchison County *v.* Sullivan, 7 Kan. App. 152, 53 Pac. 142); but an injury occasioned by an animal taking fright at a placard placed on a bridge without the knowledge of the county commissioners, and which was taken down by them as soon as their attention was called to it, does not arise from any "defect" in the bridge, within the meaning of a statute making the county liable (Acker *v.* Anderson County, 20 S. C. 495).

Restriction of statutory liability to travelers only.— The Massachusetts statute allowing an action against a town for injuries received by reason of a defective bridge is restricted in its application to travelers only, and it is therefore held that a city would not be liable for injuries received by a member of a crew of a vessel, who, in loosening the ship's rigging, was injured by a defect in the draw of the bridge; he not being a traveler within the meaning of the statute (McDougall *v.* Salem, 110 Mass. 21); and under a statute providing for the accrual of liability when any "traveler or person" is injured, it is held that an injury to a stray horse which has broken from an inclosure and is running at large is not within the meaning of the law (Lee County *v.* Yarbrough, 85 Ala. 590, 5 So. 341). But under a statute relating to any person who "shall be without contributory negligence," etc., it is not necessary that the injured party be a traveler, and one who is lawfully under the bridge may recover. Vickers *v.* Cloud County, 59 Kan. 86, 52 Pac. 73.

Such laws are not unconstitutional as imposing an unlawful burden upon the taxpayers of a county. Mehling *v.* Cuyahoga County, 8 Ohio S. & C. Pl. Dec. 328, 6 Ohio N. P. 421.

24. *Connecticut.*— See Daly *v.* New Haven, 69 Conn. 644, 38 Atl. 397.

Kansas.— The statute simply declares, as to counties and townships, what has always been the law with respect to cities, private corporations, and individuals. Atchison County *v.* Sullivan, 7 Kan. App. 152, 53 Pac. 142.

Maine.— Willey *v.* Ellsworth, 64 Me. 57.

Massachusetts.— Rouse *v.* Somerville, 130 Mass. 361; Wilson *v.* Boston, 117 Mass. 509.

Michigan.— Quinlan *v.* Manistique, 85 Mich. 22, 48 N. W. 172.

New Jersey.— Spencer *v.* Hudson County, 66 N. J. L. 301, 49 Atl. 483, 485, where it is said: "It follows, therefore, that if some of

voluntarily assumes the duty of maintenance, in which case it would be liable for its negligence, regardless of statute.[25]

(B) *Cities or Villages.* When, however, the corporation is a purely municipal one, created at the request and for the local advantage and convenience of the inhabitants thereof, such as a city or village, and the duty to maintain or repair its bridges is voluntarily assumed by it, or is imposed by statute or charter, a corresponding liability rests upon it to respond in damages to those injured by neglect to perform such duties.[26]

(II) *Where Duty to Repair Is on Individual.* Where a municipality is charged with an absolute duty to maintain the bridges within its limits, the fact that a corporation or individual is also obligated, either by common law or by statute, to repair a particular bridge therein, does not absolve the municipality from its duty to the public to see that the bridge is in proper repair; and it is

the officers or agents of the board have neglected their duty, and have acted *ultra vires*, by erecting bridges for the erection of which no duty was cast upon the county board, then the county municipality cannot be held."

New York.— Ehle *v.* Minden, 74 N. Y. Suppl. 903, holding that under the statute the commissioner of highways had no authority to erect the bridge in question and that the town was not liable for its repair and was therefore not liable for an injury because of its defects. See also Splittorf *v.* State, 108 N. Y. 205, 15 N. E. 322.

Wisconsin.— Green *v.* Bridge Creek, 38 Wis. 449, 20 Am. Rep. 18. The liability rests upon the municipality upon which the law casts the duty of making repairs (Bishop *v.* Centralia, 49 Wis. 669, 6 N. W. 353); and the fact that a village has occasionally made slight repairs on a town bridge within its limits will not absolve the town from its liability (Spearbracker *v.* Larrabee, 64 Wis. 573, 25 N. W. 555). As to the sufficiency of adoption of a bridge to estop the town from claiming that it is not a lawful bridge see Houfe *v.* Fulton, 34 Wis. 608, 17 Am. Rep. 463.

25. Joliet *v.* Verley, 35 Ill. 58, 85 Am. Dec. 342; Greenwood *v.* Westport, 60 Fed. 560, 573 (where a town, having voluntarily assumed the maintenance of a draw in a bridge, was held liable for a negligence in the operation thereof; the court saying: "It is under the same obligations in reference to the performance of said undertaking, and is liable to the same extent for negligence therein, as a private person or corporation engaged in a similar undertaking for a purely private purpose"). *Compare* Albany *v.* Cunliff, 2 N. Y. 165 [*reversing* 2 Barb. (N. Y.) 190].

26. *Alabama.*— Smoot *v.* Wetumpka, 24 Ala. 112.

Colorado.— El Paso County *v.* Bish, 18 Colo. 474, 33 Pac. 184; Denver *v.* Dunsmore, 7 Colo. 328, 3 Pac. 705.

Illinois.— Marseilles *v.* Howland, 124 Ill. 547, 16 N. E. 883 [*affirming* 23 Ill. App. 101; and *followed* in Marseilles *v.* Kiner, 34 Ill. App. 355]; White *v.* Bond County, 58 Ill. 297, 11 Am. Rep. 65; Mechanicsburg *v.* Meredith, 54 Ill. 84.

Indiana.— Goshen *v.* Myers, 119 Ind. 196, 21 N. E. 657 (holding that proof that the city had taken charge of, and graded the highway upon which the bridge was built was sufficient to sustain the conclusion that it was liable for the defects of the bridge); Lowrey *v.* Delphi, 55 Ind. 250.

Iowa.— McCullom *v.* Black Hawk County, 21 Iowa 409; Rusch *v.* Davenport, 6 Iowa 443 (holding that the Iowa act of Jan. 22, 1855, did not create a road district as a corporation separate and distinct from the city, and that the city itself was liable for the injury).

Kansas.— Rosedale *v.* Golding, 55 Kan. 167, 40 Pac. 284; Eudora *v.* Miller, 30 Kan. 494, 2 Pac. 685.

Michigan.— Niles Tp. *v.* Martin, 4 Mich. 557, 69 Am. Dec. 333.

Minnesota.— Altnow *v.* Sibley, 30 Minn. 186, 14 N. W. 877, 44 Am. Rep. 191.

Missouri.— Jordan *v.* Hannibal, 87 Mo. 673.

New York.— Langlois City *v.* Cohoes, 58 Hun (N. Y.) 226, 11 N. Y. Suppl. 908, 34 N. Y. St. 288; Ensign *v.* Livingston County, 25 Hun (N. Y.) 20 (holding that where the city has declared a bridge open to public travel, it cannot claim that it had no right to maintain it and thereby escape liability); Schomer *v.* Rochester, 15 Abb. N. Cas. (N. Y.) 57.

North Carolina.— White *v.* Chowan, 90 N. C. 437, 47 Am. Rep. 534.

Pennsylvania.— Erie City *v.* Schwingle, 22 Pa. St. 384, 60 Am. Dec. 87, affirming the doctrine of the text, although the injury in the case arose from a defective street, and not from a bridge.

United States.— Nebraska City *v.* Campbell, 2 Black (U. S.) 590, 17 L. ed. 271; Weightman *v.* Washington Corp., 1 Black (U. S.) 39, 17 L. ed. 52.

Aliter where the bridge has never been accepted or controlled by the city, or where the city is under no obligation whatever to repair the same, although the bridge is within its corporate limits. Sandersville *v.* Hurst, 111 Ga. 453, 36 S. E. 757; Carpenter *v.* Cohoes, 81 N. Y. 21, 37 Am. Rep. 468 [*distinguishing* Sewell *v.* Cohoes, 75 N. Y. 45, 31 Am. Rep. 418]; Sullivan *v.* Newark, 5 Ohio S. & C. Pl. Dec. 388, 7 Ohio N. P. 556. See also Belton *v.* Vinton, 73 Ga. 99.

liable to an individual for injuries sustained by neglect of this duty.[27] If the duty of the municipality is qualified and not absolute the rule would seem to be otherwise.[28]

(III) *When Built Over Boundaries.* With regard to boundary bridges the same general principle governs: if the duty to maintain and repair exists jointly, the liability for the injury from a neglect of this duty, whether arising by virtue of statute or upon common-law principles, will be found to be a joint one;[29] and if one is compelled to so respond, contribution may be had against the other.[30]

c. Care Required — (I) *In General* — (A) *Of Municipalities.* It may be said as a general proposition that a municipality has discharged its duties to the public when it keeps the bridges intrusted to its care in a reasonably safe condition for travel.[31] This means that care must be used to prevent an accident which, from the general use of the bridge, might be likely to happen,[32] but does not mean that such care must be exercised that accidents thereon would be impossible;[33] although it would seem that the degree of care should be not less than prudent men may be expected to exercise in their own affairs.[34]

27. Fowler *v.* Strawberry Hill, 74 Iowa 644, 38 N. W. 521; Eyler *v.* Allegany County, 49 Md. 257, 33 Am. Rep. 249; Tierney *v.* Troy, 41 Hun (N. Y.) 120. And see Traversy *v.* Gloucester, 15 Ont. 214.

28. Wilson *v.* Boston, 117 Mass. 509; White *v.* Quincy, 97 Mass. 430; Sawyer *v.* Northfield, 7 Cush. (Mass.) 490 [*approved* in Rouse *v.* Somerville, 130 Mass. 361].

29. Tolland *v.* Willington, 26 Conn. 578; Lyman *v.* Hampshire County, 140 Mass. 311, 3 N. E. 211 (and the fact that the town had always made the repairs and charged one half of the expense to the county constitutes no defense in the action against the county); Ripley *v.* Essex County, 40 N. J. L. 45; Shaw *v.* Potsdam, 11 N. Y. App. Div. 508, 42 N. Y. Suppl. 779; Hawxhurst *v.* New York, 43 Hun (N. Y.) 588 (holding that under the special statutes on which the case depended, the duty of each municipality extended to a whole bridge, and therefore an action might be brought against either); Theall *v.* Yonkers, 21 Hun (N. Y.) 265 (holding that under the general statute the action must be brought jointly); Bryan *v.* Landon, 3 Hun (N. Y.) 500, 5 Thomps. & C. (N. Y.) 594.

When liability is several.— Where the duty to repair a boundary bridge is so apportioned that each town or township is required to repair a specified part of the bridge, each town or municipality would then be liable only if the injury occurred on the part which they were bound to repair, and the liability would be a several, and not a joint, one. Perkins *v.* Oxford, 66 Me. 545; Sheridan *v.* Palmyra Tp., 180 Pa. St. 439, 40 Wkly. Notes Cas. (Pa.) 245, 36 Atl. 868. See also Whitman *v.* Groveland, 131 Mass. 553.

30. The rule that contribution may not be had between wrongdoers not being applicable where both are innocent of the wrong. Armstrong County *v.* Clarion County, 66 Pa. St. 218, 5 Am. Rep. 368.

31. *Illinois.*— Gavin *v.* Chicago, 97 Ill. 66, 37 Am. Rep. 99 [*affirming* 1 Ill. App. 302]; Grayville *v.* Whitaker, 85 Ill. 439.

Indiana.— Howard County *v.* Legg, 93 Ind. 523, 47 Am. Rep. 390; Logansport *v.* Justice, 74 Ind. 378, 39 Am. Rep. 79.

Iowa.— Holmes *v.* Hamburg, 47 Iowa 348.

Kansas.— Murray *v.* Woodson County, 58 Kan. 1, 48 Pac. 554.

Kentucky.— Covington *v.* Bramlege, 14 Ky. L. Rep. 395.

Michigan.— Bettys *v.* Denver Tp., 115 Mich. 228, 73 N. W. 138.

New Jersey.— Morris County *v.* Hough, 55 N. J. L. 628, 28 Atl. 86.

Pennsylvania.— Kennedy *v.* Williamsport, 11 Pa. Super. Ct. 91; Ford *v.* Roulet Tp., 9 Pa. Super. Ct. 643.

Texas.— Marshall *v.* McAllister, 22 Tex. Civ. App. 214, 54 S. W. 1068.

See 8 Cent. Dig. tit. "Bridges," § 103.

32. Walker *v.* Kansas, 99 Mo. 647, 12 S. W. 894 [*modifying* Tritz *v.* Kansas, 84 Mo. 632]; Mooney *v.* St. Mary's, 15 Ohio Cir. Ct. 446, 8 Ohio Cir. Dec. 341.

The frightening of a horse, and its consequent backing of a vehicle off the bridge, is not such an unusual occurrence as to excuse the bridge authorities from providing reasonable precautions against such accidents. Faulk *v.* Iowa County, 103 Iowa 442, 72 N. W. 757; Cage *v.* Franklin Tp., 8 Pa. Super. Ct. 89. See also *infra*, V, C, 1, c, (II), (B), (2).

33. Gavin *v.* Chicago, 97 Ill. 66, 37 Am. Rep. 99 [*affirming* 1 Ill. App. 302]; Irvine *v.* Wagers, 9 Ky. L. Rep. 51. And see Lehigh County *v.* Hoffort, 116 Pa. St. 119, 9 Atl. 177, 2 Am. St. Rep. 587.

34. Cooper *v.* Mills County, 69 Iowa 350, 28 N. W. 633.

Degree must be in proportion to the magnitude of the injury likely to result from neglect. Porter County *v.* Dombke, 94 Ind. 72.

Absence of light.— Where it is the duty of a city to light a bridge within its limits, a neglect to provide adequate lights is such defect as will render the city liable. Chicago *v.* Powers, 42 Ill. 169, 89 Am. Dec. 418; Bly *v.* Haverhill, 110 Mass. 520.

(B) *Of Bridge Companies.* In a recent case it has been held that the degree of care required of a bridge company should be higher than that required of a municipality;[35] but in another jurisdiction this distinction, in the absence of statutory regulation, is denied.[36] Clearly, however, they are not insurers,[37] or chargeable with the same diligence as common carriers;[38] and from several well-considered cases it would seem that only ordinary care and diligence is required.[39]

(II) *As to Maintenance* — (A) *Inspection and Discovery of Defects.* The duty of keeping a bridge in reasonably safe condition for travel is not fully performed when the company or municipality chargeable with such duty have supplied obvious safeguards, but requires of them an anticipation of defects arising from natural causes, and that they make proper inspection to ascertain such defects,[40] especially after notification that the bridge is unsafe.[41]

(B) *Provision of Safeguards* — (1) Barriers or Warnings of Defect. The observance of due care also requires a party or municipality charged with

35. St. Louis Bridge Co. *v.* Miller, 138 Ill. 465, 474, 28 N. E. 1091, where it is said: "Clearly a bridge company authorized to construct and maintain a toll bridge and to collect and receive tolls of such persons as make use of it, should be held to a higher degree of diligence in caring for the safety of passengers crossing the bridge, than a corporation performing that service for the public gratuitously would be."

36. Orcutt *v.* Kittery Point Bridge Co., 53 Me. 500, 504, where it is said: "The rights and liabilities of travellers and toll bridge proprietors respectively, seems to depend, not upon the common law principles applicable to analogous contracts, but upon statute regulations, either in the charters of the corporations or in the general laws relating to the subject. And so far as any question arising in the case before us is concerned, there seems to be no essential difference between the obligations and liabilities resting upon the defendant corporation and those resting upon a town charged with the maintenance of a bridge."

37. Augusta *v.* Hudson, 94 Ga. 135, 21 S. E. 289; Stokes *v.* Tift, 64 Ga. 312, 37 Am. Rep. 75; Washington, etc., Turnpike *v.* Case, 80 Md. 36, 30 Atl. 571.

38. Frankfort Bridge Co. *v.* Williams, 9 Dana (Ky.) 403, 35 Am. Dec. 155; Orcutt *v.* Kittery Point Bridge Co., 53 Me. 500; Grigsby *v.* Chappell, 5 Rich. (S. C.) 443.

39. Tift *v.* Jones, 74 Ga. 469; Stokes *v.* Tift, 64 Ga. 312, 37 Am. Rep. 75; Tift *v.* Towns, 53 Ga. 47; Goodale *v.* Portage Lake Bridge Co., 55 Mich. 413, 21 N. W. 866; Townsend *v.* Susquehannah Turnpike Road, 6 Johns. (N. Y.) 90. And see Cooley *v.* Trustees New York, etc., Bridge, 46 N. Y. App. Div. 243, 61 N. Y. Suppl. 1. *Compare* Washington, etc., Turnpike Co. *v.* Case, 80 Md. 36, 48, 30 Atl. 571, where the court say: "The care and caution which a discreet and prudent individual would exercise if the risk were his own is not the care and caution required of a turnpike road or a bridge company which charges tolls for the use of its road or bridge. Such a corporation is held to a degree of care closer akin to that exacted of a carrier of passengers. The mere use of ordinary care in repairing the bridge would not exculpate the defendant if it had not by such care made the bridge safe."

40. *Illinois.*— La Salle *v.* Porterfield, 138 Ill. 114, 27 N. E. 937.

Indiana.— Allen County *v.* Creviston, 133 Ind. 39, 32 N. E. 735; Howard County *v.* Legg, 110 Ind. 479, 11 N. E. 612.

Iowa.—Morgan *v.* Fremont County, 92 Iowa 644, 61 N. W. 231; Huff *v.* Poweshiek County, 60 Iowa 529, 15 N. W. 418; Ferguson *v.* Davis County, 57 Iowa 601, 10 N. W. 906.

Michigan.—Medina Tp. *v.* Perkins, 48 Mich. 67, 11 N. W. 810.

Pennsylvania.— Rapho Tp. *v.* Moore, 68 Pa. St. 404, 8 Am. Rep. 202; Whitmire *v.* Muncy Creek Tp., 17 Pa. Super. Ct. 399.

Whether the official used sufficient diligence in the inspection of the bridge to ascertain the condition thereof may properly be submitted to the jury. Blank *v.* Livonia Tp., 95 Mich. 229, 54 N. W. 877; McKeller *v.* Monitor Tp., 78 Mich. 485, 44 N. W. 412.

41. Humphreys *v.* Armstrong County, 56 Pa. St. 204; Spaulding *v.* Sherman, 75 Wis. 77, 43 N. W. 558.

Necessity of employing skilled inspector.— Whether it is sufficient that the parties charged with the duty to repair should make a careful inspection of the bridge themselves, or whether it is incumbent upon them to employ a skilled inspector, does not seem to be fully settled. In Michigan (Medina Tp. *v.* Perkins, 48 Mich. 67, 11 N. W. 810) it is held that no higher duty is enjoined on the township to keep informed of the condition of its bridges than its own officers may discharge by the use of reasonable intelligence and ordinary care. This would also seem to be the view taken by the Illinois court in Neinsteil *v.* Smith, 21 Ill. App. 235. On the other hand, it is held in Pennsylvania (Rapho Tp. *v.* Moore, 68 Pa. St. 404, 8 Am. Rep. 202; Whitmire *v.* Muncy Creek Tp., 17 Pa. Super. Ct. 399) that it is the duty of the supervisors to call to their assistance those whose skill would enable them to ascertain the true state of a structure as to its safety. And in Iowa it is held that if the supervisors do not possess the requisite skill to inspect a bridge it is incumbent upon them to employ one who has such skill. Morgan *v.* Fremont County, 92 Iowa 644, 61 N. W. 231; Ferguson

the maintenance of a bridge to provide suitable barriers or warnings when, by reason of the operation of a draw therein, or of the disrepair or decay of a bridge, it is evident that travel thereon would be dangerous.[42] It is also essential that reasonable care and diligence be employed in maintaining such barriers,[43] but if by accident or malicious interference such barriers are rendered insufficient, the municipality would not be liable if, by the use of reasonable care, it would not have known of such interference.[44]

(2) GUARD-RAILS. Where guard-rails to a bridge or its approaches are clearly necessary for the safety of travelers,[45] a failure to erect or properly maintain them is negligence, for which the municipality or company charged with the duty to maintain the bridge is liable to a party who, in the observance of due care, is injured by reason of such neglect.[46] This is true, notwithstanding the shying,

v. Davis County, 57 Iowa 601, 10 N. W. 906. See also Frankfort Bridge Co. *v.* Williams, 9 Dana (Ky.) 403, 35 Am. Dec. 155.

42. *Connecticut.*— Thorp *v.* Brookfield, 36 Conn. 320.

Illinois.—Chicago *v.* McDonald, 57 Ill. App. 250.

Iowa.— Van Winter *v.* Henry County, 61 Iowa 684, 17 N. W. 94.

New Jersey.— Morris County *v.* Hough, 55 N. J. L. 628, 28 Atl. 86.

New York.— Hawxhurst *v.* New York, 43 Hun (N. Y.) 588. See also Clapp *v.* Ellington, 87 Hun (N. Y.) 542, 34 N. Y. Suppl. 283, 68 N. Y. St. 35.

Pennsylvania.— Humphreys *v.* Armstrong County, 3 Brewst. (Pa.) 49.

Wisconsin.— Stephani *v.* Manitowoc, 89 Wis. 467, 62 N. W. 176, 101 Wis. 59, 76 N. W. 1110.

See 8 Cent. Dig. tit. "Bridges," § 104.

Sufficiency of barrier.— A barrier erected to prevent travel across a bridge must be sufficient to warn any one using reasonable diligence that the bridge is unsafe for travel. It need not, however, be one of such shape or size that a traveler cannot climb over or crawl under or through it (Kane *v.* Yonkers, 169 N. Y. 392, 62 N. E. 428; Maginnis *v.* Brooklyn, 7 N. Y. Suppl. 194, 26 N. Y. St. 689, 1 N. Y. Suppl. 522, 16 N. Y. St. 760) or sufficient to stop a runaway horse (Lane *v.* Wheeler, 35 Hun (N. Y.) 606). See also Cornelius *v.* Appleton, 22 Wis. 635, where it was held that a plank a foot wide, placed about breast high across the end of a bridge, and eighteen feet from the open water, was such obstruction that a person of ordinary care could not fail to observe.

43. Thorp *v.* Brookfield, 36 Conn. 320; Brown *v.* Jefferson County, 16 Iowa 339 [*distinguished* in Weirs *v.* Jones County, 80 Iowa 351, 45 N. W. 883].

44. Weirs *v.* Jones County, 80 Iowa 351, 45 N. W. 883; Mullen *v.* Rutland, 55 Vt. 77.

45. Purpose for which railing may be used. — It is agreed that guard-rails on a bridge are simply for the safety of those who are in the legitimate use of the bridge or its approaches, and should be sufficient to meet all the incidental uses to which it would reasonably be put by travelers; but the courts in determining what constitutes an incidental use of the railing, do not seem to be in accord; in Orcutt *v.* Kittery Point Bridge Co., 53 Me. 500 [*citing* Stickney *v.* Salem, 3 Allen (Mass.) 374], where the captain of a military company having called a halt upon the bridge leaned his back against the railing to rest and wait for further orders; as he sprang forward to take his place in the ranks, the rotten railing of the bridge broke, and he fell off. It was held that his use of the rail was unauthorized, and that he could not recover. This case is commented upon in Langlois *v.* Cohoes, 58 Hun (N. Y.) 226, 11 N. Y. Suppl. 908, 34 N. Y. St. 288, and held not to be the law in that state, the court holding that a person who, in crossing a bridge, pauses for a moment to rest against the railing, does not lose his right against the negligence of the town in maintaining the bridge and could not be nonsuited in an action to recover for such injury.

46. *Arkansas.*— St. Louis, etc., R. Co. *v.* Aven, 61 Ark. 141, 32 S. W. 500.

Connecticut.— Bronson *v.* Southbury, 37 Conn. 199 (holding that the fact that with a railing the bridge would be in a greater danger of being swept away by ice would not excuse the town from negligence); Thorp *v.* Brookfield, 36 Conn. 320.

Georgia.— Georgia R., etc., Co. *v.* Mayo, 92 Ga. 223, 17 S. E. 1000.

Illinois.— St. Louis Bridge Co. *v.* Miller, 138 Ill. 465, 28 N. E. 1091 [*affirming* 39 Ill. App. 366]; Chicago *v.* Wright, 68 Ill. 586; Peoria Bridge Assoc. *v.* Loomis, 20 Ill. 235, 71 Am. Dec. 263.

Indiana.— Huntington County *v.* Huffman, 134 Ind. 1, 31 N. E. 570; Shelby County *v.* Deprez, 87 Ind. 509; Parke County *v.* Sappenfield, 6 Ind. App. 577, 33 N. E. 1012.

Kansas.— Topeka *v.* Hempstead, 58 Kan. 328, 49 Pac. 87; Rosedale *v.* Golding, 55 Kan. 167, 40 Pac. 284.

Kentucky.— See Hogan *v.* Kentucky Union R. Co., 14 Ky. L. Rep. 678, 21 S. W. 242.

Maryland.— Baltimore, etc., R. Co. *v.* Boteler, 38 Md. 568.

Massachusetts.— Palmer *v.* Andover, 2 Cush. (Mass.) 600.

Missouri.— Loewer *v.* Sedalia, 77 Mo. 431.

New Hampshire.— Norris *v.* Litchfield, 35 N. H. 271, 69 Am. Dec. 546.

New York.— See Bowen *v.* State, 108 N. Y. 166, 15 N. E. 56.

backing, or unruly and unmanageable conduct of the traveler's horse may have contributed to the accident;[47] the rule being that the liability accrues if the injury would not have happened had there been a proper and sufficient guard.[48] Whether a bridge is so situated or is such a structure that railings are necessary to make it reasonably safe for travel is usually a question of fact for the jury.[49]

Ohio.— Snowden *v.* Bader, 21 Ohio Cir. Ct. 787.

Pennsylvania.— Dalton *v.* Upper Tyrone Tp., 137 Pa. St. 18, 26 Wkly. Notes Cas. (Pa.) 489, 20 Atl. 637.

South Carolina.— Blakely *v.* Laurens County, 55 S. C. 422, 33 S. E. 503.

Utah.—Thomas *v.* Springville City, 9 Utah 426, 35 Pac. 503.

Vermont.— Holley *v.* Winooskie Turnpike Co., 1 Aik. (Vt.) 74.

Washington.— Einseidler *v.* Whitman County, 22 Wash. 388, 60 Pac. 1122.

Wisconsin.— Thrasher *v.* Postel, 79 Wis. 503, 48 N. W. 600; Houfe *v.* Fulton, 29 Wis. 296, 9 Am. Rep. 568.

See 8 Cent. Dig. tit. "Bridges," § 87.

The fact that similar bridges in the town had for many years been without guard-rails and no accident happened thereon does not justify a highway commissioner in neglecting to supply guard-rails if they are clearly needed. Pelkey *v.* Saranac, 67 N. Y. App. Div. 337, 73 N. Y. Suppl. 493.

47. *Georgia.*— Augusta *v.* Hudson, 94 Ga. 135, 21 S. E. 289.

Indiana.— Parke County *v.* Sappenfield, 6 Ind. App. 577, 33 N. E. 1012; Sullivan County *v.* Sisson, 2 Ind. App. 311, 28 N. E. 374 [*distinguishing* Fulton County *v.* Rickel, 106 Ind. 501, 7 N. E. 220].

Iowa.— Walrod *v.* Webster County, 110 Iowa 349, 81 N. W. 598, 47 L. R. A. 480; Miller *v.* Boone County, 95 Iowa 5, 63 N. W. 352.

Kansas.— Topeka *v.* Hempstead, 58 Kan. 328, 49 Pac. 87.

Massachusetts.— Titcomb *v.* Fitchburg R. Co., 12 Allen (Mass.) 254; Palmer *v.* Andover, 2 Cush. (Mass.) 600.

Michigan.— Shaw *v.* Saline Tp., 113 Mich. 342, 71 N W. 642; Gage *v.* Pontiac, etc., R. Co., 105 Mich. 335, 63 N. W. 318.

Texas.— Eads *v.* Marshall, (Tex. Civ. App. 1894) 29 S. W. 170.

Utah.—Thomas *v.* Springville City, 9 Utah 426, 35 Pac. 503.

Washington.— Einseidler *v.* Whitman County, 22 Wash. 388, 60 Pac. 1122.

West Virginia.— Rohrbough *v.* Barbour County Ct., 39 W. Va. 472, 20 S. E. 565, 45 Am. St. Rep. 925.

Wisconsin.— Houfe *v.* Fulton, 29 Wis. 296, 9 Am. Rep. 568.

Compare Mason *v.* Spartanburg County, 40 S. C. 390, 19 S. E. 15, 42 Am. St. Rep. 887.

Cause of horse's conduct.—It has been held in some cases that if, besides a defect in the bridge, there is another cause contributing directly to the result for which neither of the parties is in fault the town is not liable (Moulton *v.* Sanford, 51 Me. 127 [*approving* Moore *v.* Abbot, 32 Me. 46]; Minkley *v.* Springville Tp., 113 Mich. 347, 71 N. W. 649. And see Brown *v.* Laurens County, 38 S. C. 282, 17 S. E. 21), while in other jurisdictions it is held that where two causes combine to produce an injury, both of which are in their nature proximate, the one being a culpable defect in the bridge itself and the other an occurrence for which neither party is responsible, the county is liable, provided the injury would not have been sustained but for such defect (Parke County *v.* Sappenfield, 6 Ind. App. 577, 33 N. E. 1012; Sullivan County *v.* Sisson, 2 Ind. App. 311, 28 N. E. 374; Tucker *v.* Henniker, 41 N. H. 317; Clark *v.* Barrington, 41 N. H. 44; Eads *v.* Marshall, (Tex. Civ. App. 1894) 29 S. W. 170; Hunt *v.* Pownal, 9 Vt. 411; Houfe *v.* Fulton, 29 Wis. 296, 9 Am. Rep. 568. See also Palmer *v.* Andover, 2 Cush. (Mass.) 600, where the rule is laid down that a town is liable where the proximate cause of the injury is a pure accident; as for example, the failure of some part of the carriage or harness; provided the accident occurred without the fault of the party injured, and is one which common prudence and sagacity could have foreseen and provided against; if the injury would not have been sustained but for the defect in the highway. This case was distinguished in Marble *v.* Worcester, 4 Gray (Mass.) 395; Murdock *v.* Warwick, 4 Gray (Mass.) 178; and was the subject of discussion in Titus *v.* Northbridge, 97 Mass. 258, 93 Am. Dec. 91, where the only limitation upon the case was that the contributing cause must be "a pure accident").

48. **If it appear that suitable railings would not have prevented the accident** the rule is otherwise. Parke County *v.* Sappenfield, 6 Ind. App. 577, 33 N. E. 1012; Walrod *v.* Webster County, 110 Iowa 349, 81 N. W. 598, 47 L. R. A. 480. But see Holley *v.* Winooskie Turnpike Co., 1 Aik. (Vt.) 74.

Whether a vehicle was backed with force enough to have broken a sound railing is a question for the jury. Faulk *v.* Iowa County, 103 Iowa 442, 72 N. W. 757.

49. *Indiana.*— Huntington County *v.* Huffman, 134 Ind. 1, 31 N. E. 570.

Iowa.— Gould *v.* Schermer, 101 Iowa 582, 70 N. W. 697.

Michigan.— Lauder *v.* St. Clair Tp., 125 Mich. 479, 85 N. W. 4; Bratfisch *v.* Mason Tp., 120 Mich. 323, 79 N. W. 576; Perkins *v.* Delaware Tp., 113 Mich. 377, 71 N. W. 643; Minkley *v.* Springwells Tp., 113 Mich. 347, 71 N. W. 649; Shaw *v.* Saline Tp., 113 Mich. 342, 71 N. W. 642.

New York.— Pelkey *v.* Saranac, 67 N. Y. App. Div. 337, 73 N. Y. Suppl. 493; Fox *v.* Union Turnpike Co., 59 N. Y. App. Div. 363, 69 N. Y. Suppl. 551; Titus *v.* New Scotland, 11 N. Y. App. Div. 266, 42 N. Y. Suppl. 152.

(III) *As to Size and Stability of Structure.* With regard to the size and stability of the structure of a public bridge it may be said that it should be of sufficient width to accommodate the public travel,[50] and the passage of all vehicles or machinery usually drawn upon the highway;[51] and should be built and maintained of sufficient strength to sustain loads which, from the nature of the travel and the business of the road and occupations of the locality where it is situated, are likely to be imposed upon it; but not for unusual or extraordinary loads not reasonably anticipated.[52]

2. Defenses — a. In General. The ulterior purposes of a traveler,[53] or the fact that he has not paid his toll[54] does not affect his right to have a bridge in a reasonably safe condition, and cannot be urged as a defense by a party maintaining the bridge.[55]

b. Contributory Negligence — (I) *In General.* The failure of a municipality or company to perform its duty of repairing a bridge does not relieve persons passing thereon from the duty of exercising due care and diligence, and a showing that plaintiff's negligence proximately contributed to his injury would be a good defense.[56]

Pennsylvania.— Bitting *v.* Maxatawny Tp., 177 Pa. St. 213, 35 Atl. 715; Corbalis *v.* Newberry Tp., 132 Pa. St. 9, 25 Wkly. Notes Cas. (Pa.) 184, 19 Atl. 44, 19 Am. St. Rep. 588.

South Carolina.— Blakeley *v.* Laurens County, 55 S. C. 422, 33 S. E. 503.

Utah.— Thomas *v.* Springville City, 9 Utah 426, 35 Pac. 503.

The facts may be such that the court will say as a matter of law that the absence of railings was not negligence. Auberle *v.* McKeesport, 179 Pa. St. 321, 39 Wkly. Notes Cas. (Pa.) 423, 36 Atl. 212.

50. It may be required to be of greater width in a city than if it were in another part of the highway. Rusch *v.* Davenport, 6 Iowa 443.

51. Quinton *v.* Burton, 61 Iowa 471, 16 N. W. 569.

52. *Massachusetts.*— Gregory *v.* Adams, 14 Gray (Mass.) 242.

Michigan.— Moore *v.* Hazelton Tp., 118 Mich. 425, 76 N. W. 977; Stebbins *v.* Keene Tp., 55 Mich. 552, 22 N. W. 37.

Minnesota.— Anderson *v.* St. Cloud, 79 Minn. 88, 81 N. W. 746.

New York.— Clapp *v.* Ellington, 51 Hun (N. Y.) 58, 3 N. Y. Suppl. 516, 20 N. Y. St. 412, 22 Abb. N. Cas. (N. Y.) 387.

Ohio.— Hardin County *v.* Coffman, 60 Ohio St. 527, 54 N. E. 1054, 48 L. R. A. 455.

Pennsylvania.— Coulter *v.* Pine Tp., 164 Pa. St. 543, 35 Wkly. Notes Cas. (Pa.) 399, 30 Atl. 490; Clulow *v.* McClelland, 151 Pa. St. 583, 25 Atl. 47, 17 L. R. A. 650; Com. *v.* Allen, 148 Pa. St. 358, 23 Atl. 1115, 33 Am. St. Rep. 830, 16 L. R. A. 148; McCormick *v.* Washington Tp., 112 Pa. St. 185, 4 Atl. 164.

Vermont.— Richardson *v.* Royalton, etc., Turnpike Co., 6 Vt. 496.

53. Strong *v.* Stevens Point, 62 Wis. 255, 22 N. W. 425.

Violation of Sunday statute.— The fact that plaintiff was violating a statute prohibiting the pursuit of his work on Sunday has been held not a good defense, where it is not shown that the violation in any way contributed to the injury. Sutton *v.* Wauwatosa, 29 Wis. 21, 9 Am. Rep. 534.

54. Washington, etc., Turnpike Co. *v.* Case, 80 Md. 36, 30 Atl. 571. See also Pembroke *v.* Hannibal, etc., R. Co., 32 Mo. App. 61, holding that the fact that the traveler has been given a pass did not discharge the company from its duty toward him.

55. That the bridge was in another county is no defense where the statute provides for its construction in such place, and in the absence of a good site on the county line. Casey *v.* Tama County, 75 Iowa 655, 37 N. W. 138. But as the liability of a town exists only by virtue of statute, the fact that the injury occurred outside the state would constitute a good defense, although the town had been accustomed to share in the expense of maintaining the bridge. Brown *v.* Fairhaven, 47 Vt. 386.

56. *Alabama.*— Patterson *v.* South Alabama, etc., R. Co., 89 Ala. 318, 7 So. 437.

Georgia.— Macon County *v.* Chapman, 74 Ga. 107.

Illinois.— Earlville *v.* Carter, 2 Ill. App. 34, 6 Ill. App. 421.

Indiana.— Reist *v.* Goshen, 42 Ind. 339.

Iowa.— Rusch *v.* Davenport, 6 Iowa 443.

Maine.— Crumpton *v.* Solon, 11 Me. 335.

South Carolina.— Laney *v.* Chesterfield County, 29 S. C. 140, 7 S. E. 56.

Vermont.— Noyes *v.* Morristown, 1 Vt. 353.

Wisconsin.— Fisher *v.* Franklin, 89 Wis. 42, 61 N. W. 80.

See 8 Cent. Dig. tit. "Bridges," § 91.

A momentary failure to remember the condition of a bridge would not excuse a party for his failure to act upon his actual knowledge that the structure was a drawbridge, since such a state of mind would amount to inattention. Benedict *v.* Port Huron, 124 Mich. 600, 83 N. W. 614.

Vicious propensity of horse.— Ordinary care on the part of a traveler requires that he should drive a horse which, when exposed to ordinary objects or ordinary noises along

(II) *What Constitutes* — (A) *In General.* Whether plaintiff was guilty of contributory negligence is usually for the jury,[57] but the facts may be such that the court will say as a matter of law that such negligence did[58] or did not[59] exist. It may be said, however, that a traveler, in crossing a bridge, has a right to presume that the bridge is kept in a proper and safe condition, and is not chargeable with contributory negligence in acting on such assumption,[60] unless the

the highway, will not become unmanageable, by a driver of ordinary skill; and if the known vicious nature of the horse contributes to the injury, plaintiff cannot recover. Bliss *v.* Wilbraham, 8 Allen (Mass.) 564; Bitting *v.* Maxatawny Tp., 177 Pa. St. 213, 35 Atl. 715.

57. *Illinois.*— Chicago *v.* O'Malley, 95 Ill. App. 355, holding that, where a boy six or seven years of age was rightfully on a bridge and, upon being chased by an employee of the bridge-tender became frightened and ran off the bridge and was injured, the court will not say that the jury were wrong in holding that he was not guilty of contributory negligence.

Indiana.— Jackson County *v.* Nichols, 139 Ind. 611, 38 N. E. 526.

Iowa.—Morgan *v.* Dallas County, 103 Iowa 57, 72 N. W. 304.

Massachusetts.— Gulline *v.* Lowell, 144 Mass. 491, 11 N. E. 723, 59 Am. Rep. 102.

Michigan.— Lauder *v.* St. Clair Tp., 125 Mich. 479, 85 N. W. 4; Perkins *v.* Delaware Tp., 113 Mich. 377, 71 N. W. 643.

Mississippi.— Gibson *v.* Jackson, (Miss. 1898) 22 So. 891.

New Hampshire.— Ruland *v.* South Newmarket, 59 N. H. 291.

New Jersey.— Mahnken *v.* Monmouth County, 62 N. J. L. 404, 41 Atl. 921.

New York.— Bush *v.* Delaware, etc., R. Co., 166 N. Y. 210, 59 N. E. 838 [*affirming* Heib *v.* Big Flats, 66 N. Y. App. Div. 88, 73 N. Y. Suppl. 86]; Fisher *v.* Cambridge, 133 N. Y. 527, 30 N. E. 663, 44 N. Y. St. 317; Morrell *v.* Peck, 88 N. Y. 398 [*reversing* 24 Hun (N. Y.) 37]; Brennan *v.* Albany, etc., Bridge Co., 61 N. Y. App. Div. 279, 70 N. Y. Suppl. 344; Fox *v.* Union Turnpike Co., 59 N. Y. App. Div. 363, 69 N. Y. Suppl. 551; Rector *v.* Pierce, 3 Thomps. & C. (N. Y.) 416.

Oregon.— Hamerlynck *v.* Banfield, 36 Oreg. 436, 59 Pac. 712.

Texas.— Baldridge, etc., Bridge Co. *v.* Cartrett, 75 Tex. 628, 13 S. W. 8.

Vermont.— Swift *v.* Newbury, 36 Vt. 355.

58. *Illinois.*— La Salle *v.* Wright, 56 Ill. App. 294.

Iowa.— Dale *v.* Webster County, 76 Iowa 370, 41 N. W. 1.

Louisiana.— Peetz *v.* St. Charles St. R. Co., 42 La. Ann. 541, 7 So. 688, where a party, knowing that planks were nailed on other bridges in the neighborhood, failed to observe the one against which he stumbled, although the bridge was well lighted.

Michigan.— Abernethy *v.* Van Buren Tp., 52 Mich. 383, 18 N. W. 116.

Missouri.— Sindlinger *v.* Kansas City, 126 Mo. 315, 28 S. W. 857, 26 L. R. A. 723, where one ran a race across a foot-bridge and threw himself violently against a railing guarding the stairway at the end of the bridge, he being aware that the railing was there, and it being light enough for him to have seen the railing.

New York.— Kane *v.* Yonkers, 169 N. Y. 392, 62 N. E. 428 [*reversing* 43 N. Y. App. Div. 599, 60 N. Y. Suppl. 216, where the party knowing the condition of a bridge, forced himself through a barricade to get to such bridge and attempted to cross it]; Cummins *v.* Syracuse, 100 N. Y. 637, 3 N. E. 680; Ward *v.* New York, 19 N. Y. App. Div. 48, 45 N. Y. Suppl. 891 (where a boy remained standing on a draw about two feet from the end thereof, while it was being opened and closed, his leg having been caught between the end of the draw and the abutment when the draw closed); Titus *v.* New Scotland, 90 Hun (N. Y.) 468, 35 N. Y. Suppl. 971, 70 N. Y. St. 644; Muhr *v.* New York, 15 Daly (N. Y.) 12, 2 N. Y. Suppl. 59, 16 N. Y. St. 688.

Ohio.— Mooney *v.* St. Mary's, 15 Ohio Cir. Ct. 446, 8 Ohio Cir. Dec. 341.

Pennsylvania.—Auberle *v.* McKeesport, 179 Pa. St. 321, 39 Wkly. Notes Cas. (Pa.) 423, 36 Atl. 212; Haven *v.* Pittsburg, etc., Bridge Co., 151 Pa. St. 620, 31 Wkly. Notes Cas. (Pa.) 191, 25 Atl. 311; Oil City, etc., Bridge Co. *v.* Jackson, 114 Pa. St. 321, 6 Atl. 128 (where a party instead of walking on the roadway of the bridge was walking upon gas-pipes); Beer *v.* Clarion Tp., 17 Pa. Super. Ct. 537.

Wisconsin.— Stephani *v.* Manitowoc, 101 Wis. 59, 76 N. W. 1110; Fisher *v.* Franklin, 89 Wis. 42, 61 N. W. 80, in which latter case it appeared that plaintiff was hauling a load of hay on a sled and that the hayrack caught on a forked post negligently placed near the bridge. The hay was loaded very insecurely and had already tipped once; the attempt of plaintiff to start the sled while on the hay, whereby he was thrown into a ravine by reason of its upsetting, was, as a matter of law, contributory negligence.

That the driver was intoxicated is not of itself conclusive upon the question of his contributory negligence, but is only a circumstance which should be considered by the jury. Thorp *v.* Brookfield, 36 Conn. 320.

59. Faulk *v.* Iowa County, 103 Iowa 442, 72 N. W. 757; Worcester County *v.* Ryckman, 91 Md. 36, 46 Atl. 317; Boyce *v.* Shawangunk, 40 N. Y. App. Div. 593, 58 N. Y. Suppl. 26. See also Vance *v.* Franklin, 4 Ind. App. 515, 30 N. E. 149.

60. *Indiana.*— Allen County *v.* Creviston, 133 Ind. 39, 32 N. E. 735; Apple *v.* Marion County, 127 Ind. 553, 27 N. E. 166; Howard County *v.* Legg, 110 Ind. 479, 11 N. E. 612.

appearance of the bridge is such that it would suggest danger to a reasonably prudent person.[61]

(B) *Extraordinary Load.* As it is unnecessary that bridges be constructed to sustain unusual, extraordinary, or unexpected loads,[62] it follows that one who attempts to cross such a bridge with a load which is clearly of such nature and which would subject the bridge to an unusual strain is guilty of contributory negligence.[63] So, too, if a statute prescribe a maximum weight to which a bridge shall be subjected,[64] an injured party cannot recover if his load exceed such maximum,[65] but in the absence of such a statute the question of whether a load is an unusual or extraordinary one is ordinarily for the jury.[66]

New Jersey.— Mahnken *v.* Monmouth County, 62 N. J. L. 404, 41 Atl. 921.

Ohio.— Hardin County *v.* Coffman, 60 Ohio St. 527, 54 N. E. 1054, 48 L. R. A. 455.

Oregon.— Hamerlynck *v.* Banfield, 36 Oreg. 436, 59 Pac. 712; Ford *v.* Umatilla County, 15 Oreg. 313, 16 Pac. 33.

Pennsylvania.— Jones *v.* Pennsylvania Canal Co., 178 Pa. St. 123, 35 Atl. 925.

Wisconsin.— Walker *v.* Ontario, 111 Wis. 113, 86 N. W. 566.

This does not mean that a party has a right to ride rapidly toward a place of danger on a dark night with the expectation of being stopped by a chain which it is the duty of the city to maintain across the drawbridge. Benedict *v.* Port Huron, 124 Mich. 600, 83 N. W. 614.

61. Hardin County *v.* Coffman, 60 Ohio St. 527, 54 N. E. 1054, 48 L. R. A. 455.

62. See *supra*, V, C, 1, c, (III).

63. *Connecticut.*— Wilson *v.* Granby, 47 Conn. 59, 36 Am. Rep. 51.

Michigan.— Fulton Iron, etc., Works *v.* Kimball Tp., 52 Mich. 146, 17 N. W. 733.

Minnesota.— Anderson *v.* St. Cloud, 79 Minn. 88, 81 N. W. 746.

New York.— Clapp *v.* Ellington, 51 Hun (N. Y.) 58, 3 N. Y. Suppl. 516, 20 N. Y. St. 412, 22 Abb. N. Cas. (N. Y.) 387.

Ohio.— Hardin County *v.* Coffman, 60 Ohio St. 527, 54 N. E. 1054, 48 L. R. A. 455.

Vermont.— Richardson *v.* Royalton, etc., Turnpike Co., 5 Vt. 580.

See 8 Cent. Dig. tit. "Bridges," § 92.

64. **Weight — How determined.**— Under a statute providing that no recovery can be had for injuries sustained by the breaking down of a bridge where the weight of the load "exceeds forty-five hundred pounds, exclusive of the team and carriage," it is held that the weight of the driver seated upon the load must be taken into account in computing the actual weight. Dexter *v.* Canton Toll-Bridge Co., 79 Me. 563, 12 Atl. 547.

If the statute require a certain precaution, such as the giving of notice to the toll-gatherer that the load exceeds a certain weight (Pomeroy *v.* Fifth Massachusetts Turnpike Corp., 10 Pick. (Mass.) 35), or the spanning of the bridge with planks if the load be over a certain amount (Welch *v.* Geneva, 110 Wis. 388, 85 N. W. 970), an injured party cannot recover if he does not observe these requirements. But under a statute providing that no recovery can be had where the owner of a steam-engine neglects to span any culvert or bridge, before crossing, with hard-wood planks at least two inches thick and twelve inches wide, it is clear that this precaution is intended to protect the bridge from the calks on the engine wheels, and therefore the use of planks eight to ten inches wide with other planks besides them so as to accomplish the same purpose, would be a compliance with the spirit of the statute, and would not render the party guilty of contributory negligence. Walker *v.* Ontario, 111 Wis. 113, 86 N. W. 566. See also Toedtemeier *v.* Clackamas County, 34 Oreg. 66, 54 Pac. 954.

65. Dexter *v.* Canton Toll-Bridge Co., 79 Me. 563, 12 Atl. 547. But it would seem that the maintenance of a bridge known to be insufficient to bear the statutory maximum would be *prima facie* negligence (Heib *v.* Big Flats, 66 N. Y. App. Div. 88, 73 N. Y. Suppl. 86); and where a statute exempted the town from liability if the load exceeded four tons in weight, it has been held that, although an engine and thresher exceeded this in weight, yet, if the engine alone was less than four tons in weight, and the panel of the bridge thereunder gave way, a recovery could nevertheless be had, since there was less than four tons on the panel which broke (Bush *v.* Delaware, etc., R. Co., 166 N. Y. 210, 59 N. E. 838; Vandewater *v.* Wappinger, 74 N. Y. Suppl. 699; Lee *v.* Delaware, etc., R. Co., 71 N. Y. Suppl. 120. *Compare* Heib *v.* Big Flats, 66 N. Y. App. Div. 88, 73 N. Y. Suppl. 86).

This statute provides an immunity for towns only, and the defense that the load was above the statutory maximum cannot be urged if the bridge was one which a railroad was bound to repair and maintain. Bush *v.* Delaware, etc., R. Co., 166 N. Y. 210, 59 N. E. 838.

66. Yordy *v.* Marshall County, 80 Iowa 405, 45 N. W. 1042, 86 Iowa 340, 53 N. W. 298; Crumpton *v.* Solon, 11 Me. 335; Gregory *v.* Adams, 14 Gray (Mass.) 242; Sutton *v.* Wauwatosa, 29 Wis. 21, 9 Am. Rep. 534.

Traction engines and threshing outfits.— If traction engines and threshing outfits were not in use at the time that a bridge was built, it is clear that such loads are not those which should have been anticipated in the building of the bridge, and it may be alleged, with reason, to thus use it would be unusual and extraordinary. Vermillion County *v.* Chipps, 131 Ind. 56, 29 N. E. 1066, 16 L. R. A. 228. On the other hand, if such en-

(c) *Fast Driving.* While fast driving over a bridge may be clearly of such nature as to preclude a recovery,[67] the mere fact that plaintiff violates a statutory or municipal regulation by driving thereon faster than a walk is not negligence *per se*, and does not preclude a recovery for an injury alleged to be caused by a defect in the bridge, if the jury find that such violation did not contribute to the injury.[68]

(d) *Notice of Defects.* If a traveler has knowledge[69] of the existence in a bridge of defects of such nature that a reasonably prudent man would see that it was clearly unsafe and that prudent or cautious driving could not avert the danger, an attempt to cross the same would be negligence, as a matter of law.[70] On the other hand, although a party knows that a bridge is probably unsafe, or is not in all respects in a proper state of repair, still, if it is not clearly dangerous, it is not negligence *per se* to attempt its use, provided the traveler's business rendered its passage necessary, and he exercised care and diligence in keeping with

gines had been in use in the neighborhood before the construction of the bridge, it may fairly be presumed that the crossing by such machinery was anticipated in the construction. Bonebrake *v.* Huntington County, 141 Ind. 62, 40 N. E. 141. As a general proposition, it may be said that the courts will not judicially assume, or say, as a matter of law, that a party is negligent in attempting to cross a bridge with such machines (Clark County *v.* Brod, 3 Ind. App. 585, 29 N. E. 430; Coulter *v.* Pine Tp., 164 Pa. St. 543, 35 Wkly. Notes Cas. (Pa.) 399, 30 Atl. 490); and, while recognizing the fact that such machinery is coming into general use, and that it is transported along the highways, are inclined to assume the position that whether or not the load is one which the county or township should have anticipated in the building of the bridge or highway, or whether or not it is an unusual or extraordinary one, is a question of fact rather than of law, and should be submitted to the jury (Yordy *v.* Marshall County, 80 Iowa 405, 45 N. W. 1042; Moore *v.* Hazelton Tp., 118 Mich. 425, 76 N. W. 977; Clapp *v.* Ellington, 51 Hun (N. Y.) 58, 3 N. Y. Suppl. 516, 20 N. Y. St. 412, 22 Abb. N. Cas. (N. Y.) 387; Hardin County *v.* Coffman, 60 Ohio St. 527, 54 N. E. 1054, 48 L. R. A. 455. See also Wabash *v.* Carver, 129 Ind. 552, 29 N. E. 25, 13 L. R. A. 851; Laporte County *v.* Ellsworth, 9 Ind. App. 566, 37 N. E. 22; Heib *v.* Big Flats, 66 N. Y. App. Div. 88, 73 N. Y. Suppl. 86).

67. As, for instance, driving at a gallop over a bridge, the floor of which is unspiked. Zimmerman *v.* Conemaugh Tp., (Pa. 1886) 5 Atl. 45. But driving on a trot over a small bridge without knowledge of its defects and without violating any municipal ordinance is not such contributory negligence, as a matter of law, as will preclude a recovery for the loss of a horse and vehicle occasioned by the falling of the bridge. Jordan *v.* Hannibal, 87 Mo. 673.

68. Cullman *v.* McMinn, 109 Ala. 614, 19 So. 981; Marshal *v.* McAllister, 18 Tex. Civ. App. 159, 43 S. W. 1043; Abbott *v.* Wolcott, 38 Vt. 666 (holding, however, that if the illegal act of another in driving faster than a walk contributed to the injury of plaintiff he could not recover against the town, since the town could not be responsible for the illegal acts of a traveler); Chesapeake, etc., R. Co. *v.* Jennings, 98 Va. 70, 34 S. E. 986. See also Weeks *v.* Lyndon, 54 Vt. 638, where it was held that the statute concerning fast driving was not violated, as the accident had occurred on a trestlework and not on a bridge. *Compare* Heland *v.* Lowell, 3 Allen (Mass.) 407, 81 Am. Dec. 670.

69. **Constructive notice of defect.**— Where sign-boards bearing the inscription "bridge unsafe" are conspicuously placed at each end of a defective bridge, the fact that a traveler is unable to read English does not excuse his attempting to cross the bridge, and his so doing would be contributory negligence. Weirs *v.* Jones County, 86 Iowa 625, 53 N. W. 321, 17 L. R. A. 445.

70. *Georgia.*— Samples *v.* Atlanta, 95 Ga. 110, 22 S. E. 135; Tift *v.* Jones, 52 Ga. 538, 74 Ga. 469 (holding that the fact that the traveler has paid his return fare would not justify his crossing if the bridge was clearly dangerous). See also Cooper *v.* Floyd County, 112 Ga. 70, 37 S. E. 91.

Indiana.— Morrison *v.* Shelby County, 116 Ind. 431, 19 N. E. 316.

Iowa.—Homan *v.* Franklin County, 90 Iowa 185, 57 N. W. 703. See also Hughes *v.* Muscatine County, 44 Iowa 672.

Kansas.— Falls Tp. *v.* Stewart, 3 Kan. App. 403, 42 Pac. 926.

Maryland.—Prince George's County *v.* Burgess, 61 Md. 29, 48 Am. Rep. 88.

Michigan.— Bratfisch *v.* Mason Tp., 120 Mich. 323, 79 N. W. 576.

New York.— See Travis *v.* Carolton, 5 Silv. Supreme (N. Y.) 262, 7 N. Y. Suppl. 231, 26 N. Y. St. 821, where it appearing that plaintiff admitted that he thought the bridge unsafe, but decided to take the chances of trying to go over, it was held that he was guilty of contributory negligence, unless the accident did not result from the defect from which the danger was apprehended.

Pennsylvania.— See Whitehead *v.* Philadelphia, 2 Phila. (Pa.) 99, 13 Leg. Int. (Pa.) 124.

Vermont.—Folsom *v.* Underhill, 36 Vt. 580.

See 8 Cent. Dig. tit. "Bridges," § 94.

the increased danger,[71] but if there is another reasonably convenient way by which the defective bridge may be avoided the rule is otherwise.[72] It may also be said that one who has given notice of defects in a bridge to the parties whose duty it is to repair has a right to presume, after a reasonable time, that repairs have been made, and his subsequent use of the bridge would not be negligence *per se*.[73]

c. Lack of Funds. If the liability of a municipality for injuries caused by its defective bridges is absolute and unqualified, the lack of funds with which to make the needed repairs would not constitute a good defense to an action for an injury from such defects;[74] but if the liability is limited by statute the rule may be otherwise.[75] Such lack of funds must, however, be pleaded as a defense by defendant,[76] and it must be shown that it had no means of obtaining such funds.[77]

71. *Georgia.*— Nothing short of the care which a person of ordinary prudence would exercise with reference to the existing conditions should be held sufficient on the part of plaintiff. Samples *v.* Atlanta, 95 Ga. 110, 22 S. E. 135.

Illinois.— St. Louis Bridge Co. *v.* Miller, 138 Ill. 465, 28 N. E. 1091 [*affirming* 39 Ill. App. 366].

Indiana.— Boone County *v.* Mutchler, 137 Ind. 140, 36 N. E. 534; Porter County *v.* Dombke, 94 Ind. 72.

Kansas.— Such care and prudence must be commensurate with the necessities of the case, and maintain a constant level with the dangers of the situation. Falls Tp. *v.* Stewart, 3 Kan. App. 403, 42 Pac. 926.

Maryland.—Prince George's County *v.* Burgess, 61 Md. 29, 48 Am. Rep. 88.

Massachusetts.—Lyman *v.* Hampshire County, 140 Mass. 311, 3 N. E. 211.

Michigan.— Bratfisch *v.* Mason Tp., 120 Mich. 323, 79 N. W. 576.

Missouri.— Pembroke *v.* Hannibal, etc., R. Co., 32 Mo. App. 61.

New Hampshire.— Randall *v.* Proprietors Cheshire Turnpike, 6 N. H. 147, 25 Am. Dec. 453, holding that where the danger of crossing the bridge is not clearly imminent, a warning by the turnpike company that the bridge is unsafe does not exonerate them from liability so long as they take toll.

New York.— Taylor *v.* Constable, 15 N. Y. Suppl. 795, 40 N. Y. St. 60 [*affirmed* in 131 N. Y. 597, 30 N. E. 63, 42 N. Y. St. 949].

Pennsylvania.— Humphreys *v.* Armstrong County, 56 Pa. St. 204.

Texas.—A showing that many persons habitually used the bridge with safety proved that a mere attempt to cross it was not conclusive evidence of negligence. Gulf, etc., R. Co. *v.* Gasscamp, 69 Tex. 545, 7 S. W. 227.

Washington.—Einseidler *v.* Whitman County, 22 Wash. 388, 60 Pac. 1122.

Wisconsin.— Spearbracker *v.* Larrabee, 64 Wis. 573, 25 N. W. 555.

See 8 Cent. Dig. tit. "Bridges," § 94.

Care and diligence question for the jury.— Whether plaintiff has used that degree of care and diligence which the known dangers of the situation demand is a question for the jury. Waud *v.* Polk County, 88 Iowa 617, 55 N. W. 528; Lyman *v.* Hampshire County, 140 Mass. 311, 3 N. E. 211; Boyce *v.* Shawangunk, 40 N. Y. App. Div. 593, 58 N. Y. Suppl. 26; Taylor *v.* Constable, 15 N. Y. Suppl. 795, 40 N. Y. St. 60 [*affirmed* in 131 N. Y. 597, 30 N. E. 63, 42 N. Y. St. 949]; Gulf, etc., R. Co. *v.* Gasscamp, 69 Tex. 545, 7 S. W. 227.

72. Cohea *v.* Coffeeville, 69 Miss. 561, 13 So. 668; Spencer *v.* Sardinia, 42 N. Y. App. Div. 472, 59 N. Y. Suppl. 412; Wood *v.* Andes, 11 Hun (N. Y.) 543; Haven *v.* Pittsburg, etc., Bridge Co., 151 Pa. St. 620, 31 Wkly. Notes Cas. (Pa.) 191, 25 Atl. 311; Gulf, etc., R. Co. *v.* Gasscamp, 69 Tex. 545, 7 S. W. 227. *Compare* Walker *v.* Decatur County, 67 Iowa 307, 25 N. W. 256.

73. Moore *v.* Hazelton Tp., 118 Mich. 425, 76 N. W. 977; Boyce *v.* Shawangunk, 40 N. Y. App. Div. 593, 58 N. Y. Suppl. 26; Link *v.* Brunswick, 10 N. Y. St. 642. See also Monongahela Bridge Co. *v.* Bevard, (Pa. 1887) 11 Atl. 575.

If there is no evidence that the defect has been complained of, or that the county has indicated any intention to repair such defect, the mere fact that a party knowing of it has been absent several months would not justify him in assuming that the needed repairs have been made. Dale *v.* Webster County, 76 Iowa 370, 41 N. W. 1.

74. It being the duty of the municipality to close the bridge if it could not repair the defect. Carney *v.* Marseilles, 136 Ill. 401, 26 N. E. 491, 29 Am. St. Rep. 328.

75. Thus, by N. Y. Laws (1881), c. 700, towns of the state were made liable for damages to any person suffering the same by reason of defective highways or bridges within the town in those cases only where the commissioner of highways was liable at the time of the passage of that act (see Clapper *v.* Waterford, 43 N. Y. St. 316), and inasmuch as the lack of funds was a defense to an action against the highway commissioners (Garlinghouse *v.* Jacobs, 29 N. Y. 297; Smith *v.* Wright, 27 Barb. (N. Y.) 621) it follows that a lack of funds would be a good defense in an action against a town (Bullock *v.* Durham, 64 Hun (N. Y.) 380, 19 N. Y. Suppl. 635, 46 N. Y. St. 459).

76. Boyce *v.* Shawangunk, 40 N. Y. App. Div. 593, 58 N. Y. Suppl. 26; Bullock *v.* Durham, 64 Hun (N. Y.) 380, 19 N. Y. Suppl. 635, 46 N. Y. St. 459.

77. Quinn *v.* Sempronius, 33 N. Y. App. Div. 70, 53 N. Y. Suppl. 325; McMahon *v.* Salem, 25 N. Y. App. Div. 1, 49 N. Y. Suppl. 310.

Evidence of lack of funds.— Evidence that

d. Want of Notice of Defect — (i) *In General.* As the ground of liability in an action of this nature is either a misfeasance,[78] or negligence,[79] it follows that proof by a municipality or bridge company that it had no notice of the defect would exonerate it and constitute good defense to the action.[80]

(ii) *What Constitutes Notice.* It is not necessary, however, that the municipality or company have actual notice of the defective condition of the bridge, and if the defects are of such nature or have existed for such length of time that they could, by the exercise of ordinary diligence, have been discovered and repaired, notice may be inferred.[81] As a rule if notice of a defect is given to

plaintiff examined the bridge on which the accident occurred three weeks after the injury complained of and saw that it was covered with new plank is incompetent to show that the town had necessary funds for repairing at the time of the injury. Terwilliger *v.* Crawford, 40 N. Y. App. Div. 253, 59 N. Y. Suppl. 64. But the fact that before the occurrence of the accident the highway commissioners had procured material for the repair of the bridge and did repair it on the following day warrants the inference that they had funds or means to procure such funds to repair the bridge. Getty *v.* Hamlin, 8 N. Y. Suppl. 190, 30 N. Y. St. 295. See also Quinn *v.* Sempronius, 33 N. Y. App. Div. 70, 53 N. Y. Suppl. 325; Bullock *v.* Durham, 64 Hun (N. Y.) 380, 19 N. Y. Suppl. 635, 46 N. Y. St. 459.

78. In which case no notice to the municipality or bridge company of the acts of its agents or officers is necessary. Brunswick *v.* Braxton, 70 Ga. 193.

79. See *supra*, V, A.

80. *Illinois.*— Pickerell *v.* Kunst, 15 Ill. App. 461.

Indiana.— Howard County *v.* Legg, 93 Ind. 523, 47 Am. Rep. 390.

Kansas.—Jones *v.* Walnut Tp., (Kan. 1898) 52 Pac. 865.

Maryland.— Washington, etc., Turnpike Co. *v.* Case, 80 Md. 36, 30 Atl. 571.

Michigan.— Pearl *v.* Benton Tp., 123 Mich. 411, 82 N. W. 226; White *v.* Riley Tp., 121 Mich. 413, 80 N. W. 124; Blank *v.* Livonia Tp., 79 Mich. 1, 44 N. W. 157; Woodbury *v.* Owosso, 64 Mich. 239, 31 N. W. 130.

Mississippi.— Cohea *v.* Coffeeville, 69 Miss. 561, 13 So. 668.

Missouri.—Jordan *v.* Hannibal, 87 Mo. 673.

New York.— Wood *v.* Watertown, 58 Hun (N. Y.) 298, 11 N. Y. Suppl. 864, 34 N. Y. St. 808; Hicks *v.* Chaffee, 13 Hun (N. Y.) 293.

Oregon.— Ford *v.* Umatilla County, 15 Oreg. 313, 16 Pac. 33.

Vermont.— Bardwell *v.* Jamaica, 15 Vt. 438.

Compare Swift *v.* Berry, 1 Root (Conn.) 448 (where, under the early statutes of that state, it would seem that a person who was injured by means of a defect in a bridge might recover double damages therefor, although no notice was given; but if the party was killed the forfeiture of one hundred pounds might be claimed from the person or municipality whose duty it was to repair, only when notice of the defect had been given); Raasch *v.* Dodge County, 43 Nebr. 508, 61 N. W. 725 (decided upon a provision of the statute).

See 8 Cent. Dig. tit. "Bridges," § 88.

The rule does not apply where the defect is the lack of completion of the bridge for the use of which it was intended, and is obvious. In such case no notice is necessary. Stephani *v.* Manitowoc, 89 Wis. 467, 62 N. W. 176.

81. *Alabama.*— South Alabama, etc., R. Co. *v.* McLendon, 63 Ala. 266.

Georgia.— Augusta *v.* Hudson, 94 Ga. 135, 21 S. E. 289; Griffin *v.* Johnson, 84 Ga. 279, 10 S. E. 719.

Illinois.— Danville *v.* Vangundy, 29 Ill. App. 187.

Indiana.— Bonebrake *v.* Huntington County, 141 Ind. 62, 40 N. E. 141; Howard County *v.* Legg, 110 Ind. 479, 11 N. E. 612; Porter County *v.* Dombke, 94 Ind. 72; Howard County *v.* Legg, 93 Ind. 523, 47 Am. Rep. 390.

Iowa.— Waud *v.* Polk County, 88 Iowa 617, 55 N. W. 528; Ferguson *v.* Davis County, 57 Iowa 601, 10 N. W. 906.

Kentucky.— Muldraugh's Hill, etc., Turnpike Co. *v.* Maupin, 79 Ky. 101.

Massachusetts.— Lobdell *v.* New Bedford, 1 Mass. 153.

Michigan.— Blank *v.* Livonia Tp., 79 Mich. 1, 44 N. W. 157; Moore *v.* Kenockee Tp., 75 Mich. 332, 42 N. W. 944, 4 L. R. A. 555; Woodbury *v.* Owosso, 64 Mich. 239, 31 N. W. 130; Stebbins *v.* Keene Tp., 55 Mich. 552, 22 N. W. 37, 60 Mich. 214, 26 N. W. 885.

Missouri.— Jordan *v.* Hannibal, 87 Mo. 673; Walker *v.* Point Pleasant, 49 Mo. App. 244.

New Jersey.— Morris County *v.* Hough, 55 N. J. L. 628, 28 Atl. 86.

New York.— Boyce *v.* Shawangunk, 40 N. Y. App. Div. 593, 58 N. Y. Suppl. 26; Foels *v.* Tonawanda, 75 Hun (N. Y.) 363, 27 N. Y. Suppl. 113, 56 N. Y. St. 778; Bullock *v.* Durham, 64 Hun (N. Y.) 380, 19 N. Y. Suppl. 635, 46 N. Y. St. 459; Bostwick *v.* Barlow, 14 Hun (N. Y.) 177.

Oregon.— Ford *v.* Umatilla County, 15 Oreg. 313, 16 Pac. 33; Heilner *v.* Union County, 7 Oreg. 83, 33 Am. Rep. 703.

Texas.—Phillips *v.* Dallas, 3 Tex. App. Civ. Cas. § 294.

Wisconsin.— And to show that a city should have had notice of such defect, a witness acquainted with the bridge may testify as to its general condition. Shafer *v.* Eau Claire, 105 Wis. 239, 81 N. W. 409.

See 8 Cent. Dig. tit. "Bridges," § 89.

an officer whose duty it is to act on the matter, such notice will constitute notice to the municipality or company of which he is an officer;[82] but if the party to whom the notice is given is under no obligation to repair the defect, or take any action in the matter, the rule is otherwise.[83]

3. Action — a. Conditions Precedent — (i) *Notice of, and Claim For, Injury* — (a) *In General.* As a rule the statutes provide that no action shall be brought against a county or municipality charged with the duty of repairing a bridge, for an injury occasioned by a defect therein, until notice of the injury and demand of the claim shall have been presented to the proper authorities for payment;[84] but in some jurisdictions the action would not be premature, although brought before a town had an opportunity to pay the claim.[85]

Where the defect is latent it is obvious that the principle of constructive notice cannot be held to apply, at least to the same degree as where the defect is obvious; and if it is not shown that an examination of the bridge conducted with reasonable care and prudence would have discovered the defect, the municipality is not liable unless actual notice is shown. See Thomas *v.* Flint, 123 Mich. 10, 81 N. W. 936, 47 L. R. A. 499; Blank *v.* Livonia Tp., 79 Mich. 1, 44 N. W. 157; Abernathy *v.* Van Buren Tp., 52 Mich. 383, 18 N. W. 116; Childs *v.* Crawford County, 176 Pa. St. 139, 34 Atl. 1020.

Question for jury.— Whether the bridge was in such condition that the defects might be observed with reasonable diligence may be a question of fact for the jury. Lyman *v.* Hampshire County, 140 Mass. 311, 3 N. E. 211; Randall *v.* Southfield Tp., 116 Mich. 501, 74 N. W. 716; Aben *v.* Ecorse Tp., 113 Mich. 9, 71 N. W. 329; Grimm *v.* Washburn, 100 Wis. 229, 75 N. W. 984.

82. *Indiana.*— Logansport *v.* Justice, 74 Ind. 378, 39 Am. Rep. 79 [*cited* in Hancock County *v.* Leggett, 115 Ind. 544, 18 N. E. 53].

Iowa.— Morgan *v.* Fremont County, 92 Iowa 644, 61 N. W. 231.

Kentucky.— Muldraugh's Hill, etc., Turnpike Co. *v.* Maupin, 79 Ky. 101, holding that notice to the gate-keeper of a bridge company is notice to the company.

Michigan.— Under a statute declaring that highway commissioners are officers of the township in which they are elected, and also providing that the overseer shall report the condition of bridges to the commissioner, notice to the overseer is notice to the township. Moore *v.* Kenockee Tp., 75 Mich. 332, 42 N. W. 944, 4 L. R. A. 555. See also La Duke *v.* Exeter Tp., 97 Mich. 450, 56 N. W. 851, 37 Am. St. Rep. 357, holding that the proximity of the highway commissioner's residence to a defective bridge is a circumstance tending to show notice to the township.

New York.— This is true, although the notice was received by a commissioner of highways preceding the one in office at the time of the injury. Allen *v.* Allen, 33 N. Y. App. Div. 463, 53 N. Y. Suppl. 800.

Wisconsin.— Jaquish *v.* Ithaca, 36 Wis. 108.

See 8 Cent. Dig. tit. "Bridges," § 90.

83. Murray *v.* Woodson County, 58 Kan. 1, 48 Pac. 554 (where, the statute providing that notice of the defect must be brought home to the chairman of the county board, it was held that notice to another member of such board does not constitute notice to the chairman, and that there is no legal presumption that such other member has communicated his information to the chairman); Atchison County *v.* Sullivan, 7 Kan. App. 152, 53 Pac. 142 (holding that under the above statute the chairman of the board would be presumed to know what was done by the board's direction, and that an allegation that the superstructure of a bridge was removed by the direction of the board of commissioners, including its chairman, under a contract therefor signed by the chairman more than five days before the injury complained of, was sufficient); Moore *v.* Hazelton Tp., 118 Mich. 425, 76 N. W. 977 (holding that one who has contracted with the town to build a bridge is not an officer of the township, and that notice to him of defects will not be notice to the township. With this case *compare* Atlanta *v.* Buchanan, 76 Ga. 585); San Antonio *v.* Ball, (Tex. Civ. App. 1900) 66 S. W. 713; Austin *v.* Colgate, (Tex. Civ. App. 1894) 27 S. W. 896.

84. *Alabama.*—Schroeder *v.* Colbert County, 66 Ala. 137; Barbour County *v.* Horn, 41 Ala. 114.

Iowa.— Homan *v.* Franklin County, 98 Iowa 692, 68 N. W. 559.

Maine.— Bradbury *v.* Benton, 69 Me. 194.

Massachusetts.— Lyman *v.* Hampshire County, 138 Mass. 74; Dickie *v.* Boston, etc., R. Co., 131 Mass. 516.

New York.— Spencer *v.* Sardinia, 42 N. Y. App. Div. 472, 59 N. Y. Suppl. 412.

Wisconsin.— Spearbracker *v.* Larrabee, 64 Wis. 573, 25 N. W. 555, holding that, under the facts presented, the jury were warranted in finding that such notice was given within the time prescribed by statute.

Contra, Hollingsworth *v.* Saunders County, 36 Nebr. 141, 54 N. W. 79, holding that the statute providing for such notice does not apply to actions of tort.

85. Whitman *v.* Groveland, 131 Mass. 553, 556, where it is said: "The object of the statute is to enable prompt investigation by the town of its liability, which may be done after as well as before suit, and to prevent the bringing of actions on fictitious claims when evidence may be lost or inaccessible."

(B) *Sufficiency of.*[86] In some jurisdictions the demand[87] is sufficient if it informs the board of the amount of the claim, and, in a general way, of its nature;[88] but in others it must specify the nature of the injury,[89] and inform defendant of the nature of the defect with sufficient certainty, that it may investigate the question of its liability so far as the cause of the injury is concerned.[90]

(II) *Time of Bringing.* In some jurisdictions the statute has limited the time within which actions for this nature of injury must be brought.[91]

b. Parties — (I) *Plaintiff.* As a rule plaintiff must be a party who has sustained injury, either to his person or to his property.[92]

(II) *Defendant.* Generally speaking, the action should be brought against the company or municipality whose duty it is to repair the bridge;[93] and where

86. Constructive notice.— Under a statute providing that notice of the injury shall be given to the town or towns in which the bridge is situated, notice to two towns in which it is situated is constructive notice to all the towns which are liable for the repair of the bridge. Tyler *v.* Williston, 62 Vt. 269, 20 Atl. 304, 9 L. R. A. 338 [*distinguishing* Brown *v.* Fairhaven, 47 Vt. 386].

87. Use of word "demand."— The presentation of a claim to the county authorities, alleging injuries to claimant in a certain sum from the falling of a bridge, is sufficient if it appears that the payment of the claim is required, although the word "demand" is not used. Homan *v.* Franklin County, 98 Iowa 692, 68 N. W. 559. See also Spencer *v.* Sardinia, 42 N. Y. App. Div. 472, 59 N. Y. Suppl. 412.

88. Porter County *v.* Dombke, 94 Ind. 72 (holding that the claim is sufficient if it fully apprise the board of the nature of the claim, and is stated with such certainty that judgment upon it would bar another suit); Dale *v.* Webster County, 76 Iowa 370, 41 N. W. 1 (where it is said that the code does not require that the claimant shall produce his evidence, but it is enough if the board is informed of the amount of the claim, and the grounds on which it is made, with sufficient clearness to enable it to investigate the facts, and reach an intelligent decision").

89. Low *v.* Windham, 75 Me. 113 (holding that a notice to a town that "I shall claim damages for injuries which I received in going through" a certain bridge is not a sufficient specification of the nature of the injury); Bradbury *v.* Benton, 69 Me. 194 (holding that a notice describing the injury as "periosteum of the tibia" is sufficient, and not open to the objection that the notice was not in the English language); Lynds *v.* Plymouth, 73 Vt. 216, 50 Atl. 1083 (holding that under a notice that the "back of my head was injured . . . with resultant shock," it may be shown that, from the time of the accident, she has been subject to headaches).

90. Whitman *v.* Groveland, 131 Mass. 553, holding that the notice given therein was sufficient. But see Dickie *v.* Boston, etc., R. Co., 131 Mass. 516, where the notice that plaintiff was injured "by a defect in the bridge" was held insufficient, in that it did not inform defendant of the nature of the defect.

Place of injury.— A notice that "said injuries were caused by a defect in the planking of the said bridge, one of the plank being insufficient in length, which insufficiency caused a hole in the said bridge into which I fell" sufficiently indicates the place of the injury. Lyman *v.* Hampshire County, 138 Mass. 74.

91. Turner *v.* Brantford, 13 U. C. C. P. 109.

Statute runs from time of accident.— Under a Canadian statute which provides that an action for an injury from a defective bridge must be brought within three months, it is held that the statute contemplates the bringing of the action within three months after the accident has happened, and not three months after the death which may have resulted from the injury. Therefore, where plaintiff's horse fell through a bridge and died four months thereafter, it was held that the suit could not be instituted after the death of the horse. Miller *v.* North Fredericksburgh Tp., 25 U. C. Q. B. 31.

92. Hence, under Me. Stat. (1821), c. 118, § 17, the father's right to the custody and services of his minor son not being "property" within the meaning of the statute, it was held that he could not recover for personal injuries received by such son, by reason of a defect in a bridge. Reed *v.* Belfast, 20 Me. 246.

Right of surveyor to bring action.— Under the judicial construction of the early statutes of Massachusetts it was held that a surveyor was obligated by law to keep in repair the bridges of the town, and the fact that the town did not make provisions for such repairs did not excuse his performance of this duty, as, after making the repairs, he would have a remedy against the inhabitants; and that therefore he could not bring an action for injuries occasioned by defects in the bridge: since to do so would allow him to recover for his own negligence. Wood *v.* Waterville, 5 Mass. 294.

93. Hence, if the structure is a toll-bridge, the action should be brought against the owner of the franchise, notwithstanding the fact that he has contracted with a railroad company that the latter shall keep the bridge in repair; the party owing the duty to the

the liability to keep the bridge in repair is joint, the action may be brought against either.[94]

c. Complaint, Declaration, or Petition[95]— (i) *In General.* As the basis of the action is the negligence of defendant,[96] the complaint must allege the existence of such negligence[97] and that it caused the injury.[98] Where the statute

public being the holder of the franchise only. Tift *v.* Towns, 53 Ga. 47.

94. Thus under Ga. Code (1888), §§ 690, 691, it is held that an action may be brought either against the contractor who built the bridge, or the county, and that it is not necessary to sue the contractor to insolvency before suing the county. Arnold *v.* Henry County, 81 Ga. 730, 8 S. E. 606.

Where towns are jointly liable, either or both may be sued. Oakley *v.* Mamaroneck, 39 Hun (N. Y.) 448; Hawxhurst *v.* New York, 15 Abb. N. Cas. (N. Y.) 181; Peckham *v.* Burlington, Brayt. (Vt.) 134.

95. For forms of complaints, declarations, and petitions, in part or in substance see the following cases:

Alabama.— Barbour County *v.* Horn, 48 Ala. 649; Barbour County *v.* Brunson, 36 Ala. 362.

Illinois.— Peoria Bridge Assoc. *v.* Loomis, 20 Ill. 235, 71 Am. Dec. 263.

Indiana.— Boone County *v.* Mutchler, 137 Ind. 140, 36 N. E. 534; Vermillion County *v.* Chipps, 131 Ind. 56, 29 N. E. 1066, 16 L. R. A. 228; Shelby County *v.* Deprez, 87 Ind. 509.

Massachusetts.— Curley *v.* Harris, 11 Allen (Mass.) 112.

Missouri.—Rundman *v.* St. Charles County, 110 Mo. 594, 19 S. W. 733; Loewer *v.* Sedalia, 77 Mo. 431.

Ohio.— Mooney *v.* St. Mary's, 15 Ohio Cir. Ct. 446, 8 Ohio Cir. Dec. 341.

South Carolina.— Pearson *v.* Spartanburg County, 51 S. C. 480, 29 S. E. 193.

Vermont.— Cook *v.* Barton, 63 Vt. 566, 22 Atl. 663.

96. See *supra*, V, A.

97. Frankfort Bridge Co. *v.* Williams, 9 Dana (Ky.) 403, 35 Am. Dec. 155.

Facts constituting negligence.— In some jurisdictions it is necessary not only to allege a carelessness and negligence on the part of defendant, but also to aver the facts constituting the negligence. Heilner *v.* Union County, 7 Oreg. 83, 33 Am. Rep. 703.

Defendant's negligence was sufficiently pleaded in Huntington County *v.* Huffman, 134 Ind. 1, 31 N. E. 570; Vermillion County *v.* Chipps, 131 Ind. 56, 29 N. E. 1066, 16 L. R. A. 228; Wabash County *v.* Pearson, 120 Ind. 426, 22 N. E. 134, 16 Am. St. Rep. 325 (holding that an allegation in the complaint that the bridge was safely used for thirteen years did not overcome the statement that it was negligently constructed of unsafe and unsuitable material); Walker *v.* Point Pleasant, 49 Mo. App. 244.

98. Northern Alabama R. Co. *v.* Sides, 122 Ala. 594, 26 So. 116; Harris *v.* Vigo County, 121 Ind. 299, 23 N. E. 92; Williamsport *v.* Smith, 2 Ind. App. 360, 28 N. E. 156. *Compare* Taylor *v.* Constable, 131 N. Y. 597, 30 N. E. 63, 42 N. Y. St. 949 [*affirming* 15 N. Y. Suppl. 795, 40 N. Y. St. 60].

Sufficient allegation of proximate cause.— An allegation in a complaint that "by reason, entirely, of the insufficiency, want of repair, and defects aforesaid, of and in said bridge," said wagon and team fell therefrom is a sufficient averment that the defects in a bridge were the proximate cause of plaintiff's injuries. Kelly *v.* Darlington, 86 Wis. 432, 57 N. W. 51.

Necessity of alleging absence of contributory negligence.— The general rules of pleading with regard to contributory negligence apply in this action; and hence in a jurisdiction where plaintiff need not negative this fact it need not appear in his pleading. Smoot *v.* Wetumpka, 24 Ala. 112. See also Albee *v.* Floyd County, 46 Iowa 177.

Complaint not showing contributory negligence.— A complaint alleging that a bridge "became decayed, shaky, out of repair, timbers rotten and displaced, so that it was obviously defective and dangerous continuously for more than a year prior to the accident; that defendant could have readily discovered the defective and dangerous condition in ample time to have made repairs and prevented said accident" does not show of itself that plaintiff was guilty of contributory negligence in using the bridge. Homan *v.* Franklin County, 98 Iowa 692, 68 N. W. 559.

Averment that defect was in "highway."— Under a statute which provides that the word "highway" shall include bridges thereon, it has been held that a declaration states a cause of action when it alleges that the injury was caused by reason of certain defects in a certain described "highway" which it was the duty of defendant to keep in repair. Cook *v.* Barton, 63 Vt. 566, 22 Atl. 663.

Variance.— An allegation that an injury was caused by the insufficiency of a bridge is supported by proof that the defects were in the abutment. Augusta *v.* Hudson, 94 Ga. 135, 21 S. E. 289; Bardwell *v.* Jamaica, 15 Vt. 438. An allegation that plaintiff's fall was due to the faulty construction of a bridge is supported by proof that in relaying the floor of the bridge the planks were left loose and unfastened and so caused the injury complained of. Atlanta *v.* Buchanan, 76 Ga. 585. But an allegation that the construction of the bridge was faulty, in not sinking the mudsills below the bottom of the ditch, and bracing or piling them, to prevent the bridge slipping into the ditch, is not supported by evidence that the weakening of the bridge was caused by the undermining of the mudsills, occasioned by deepening the drain under the bridge after it was rebuilt. Pearl *v.* Benton Tp., 123 Mich. 411, 82 N. W. 226. A variance of from twelve to eight feet be-

gives the right of action only to certain persons, or imposes upon defendant only a special liability, plaintiff must plead the facts showing his right to the action,[99] or the existence of the special liability.[1]

(II) *Defendant's Notice of Defect.* Unless, by statute, notice to defendant is not essential to his liability,[2] the complaint must, as a rule, aver either that defendant had notice of the defect, or facts from which such notice may be imputed;[3] but this has been held unnecessary when the negligence charged relates to the original construction of the bridge.[4]

(III) *Plaintiff's Presentation of Claim.* Where the presentation of a notice of, and claim for, the injury is a prerequisite to the right of action,[5] if plaintiff fail to allege that such notice has been properly given his pleading is insufficient, and will be bad on demurrer.[6]

d. Evidence — (I) *Burden of Proof.* Inasmuch as the negligence of defendant in the maintenance of the bridge is not to be presumed, the burden of proving such negligence is upon plaintiff,[7] and, under some statutes,

tween the allegations and the proof as to the place where a horse backed off the abutment of a bridge is not fatal. Ross *v.* Ionia Tp., 104 Mich. 320, 62 N. W. 401.

99. Thus where, by statute, no person is entitled to maintain an action against a turnpike company for a defect in its bridge unless he is liable to pay toll, such liability of plaintiff must be alleged in his complaint. Williams *v.* Hingham, etc., Bridge, etc., Corp., 4 Pick. (Mass.) 341.

1. Barbour County *v.* Horn, 48 Ala. 649.

Failure to take bond from contractor.— Under a statute providing for the liability of a county only when it fails to take a bond from the contractor, a failure to take such bond should be alleged. Willingham *v.* Elbert County, 113 Ga. 15, 38 S. E. 348; Collins *v.* Hudson, 54 Ga. 25.

Duty of county to maintain.— If the bridge is within the corporate limits of a city, inasmuch as the duty to repair the same would *prima facie* be upon the city, the complaint, if the action is against the county, must affirmatively aver that it was the duty of the county to maintain the bridge. Spicer *v.* Elkhart County, 126 Ind. 369, 26 N. E. 58.

Defendant's possession of funds.— Where a lack of funds would constitute a defense to an action against highway commissioners, the complaint in an action against such commissioners must aver the possession by them of the requisite funds to make the necessary repairs. Smith *v.* Wright, 27 Barb. (N. Y.) 621. Where, however, the action is against the town such averment need not be made. Oakley *v.* Mamaroneck, 39 Hun (N. Y.) 448. *Compare* Eveleigh *v.* Hounsfield, 34 Hun (N. Y.) 140.

Location of bridge.— The location of the bridge must be averred with such certainty that it is clear that defendant is the party who, either by virtue of a statute or upon common-law principles, is liable for the injuries arising from its defects (Shelby County *v.* Deprez, 87 Ind. 509; Clark County *v.* Brod, 3 Ind. App. 585, 29 N. E. 430; Smith *v.* Wright, 27 Barb. (N. Y.) 621); but a complaint which states that the bridge spans a watercourse is not defective for omitting the name of the watercourse, and an allegation that the bridge formed a part of a highway leading into the city sufficiently shows that it was not within the city (Jackson County *v.* Nichols, 139 Ind. 611, 38 N. E. 526). For sufficient averments of location see Lowrey *v.* Delphi, 55 Ind. 250; Shelby County *v.* Castetter, 7 Ind. App. 309, 33 N. E. 986; Shartle *v.* Minneapolis, 17 Minn. 308.

2. Morrill *v.* Deering, 3 N. H. 53.

3. *Alabama.*— Cullman *v.* McMinn, 109 Ala. 614, 19 So. 981.

Indiana.— Posey County *v.* Stock, 11 Ind. App. 167, 36 N. E. 928, holding that it must also show that such notice was given in time to allow repairs to be made.

Massachusetts.— Worster *v.* Proprietors Canal Bridge, 16 Pick. (Mass.) 541.

Mississippi.— State *v.* Vaughn, 77 Miss. 681, 27 So. 999.

Oregon.— Heilner *v.* Union County, 7 Oreg. 83, 33 Am. Rep. 703.

4. Boone County *v.* Mutchler, 137 Ind. 140, 36 N. E. 534; Wabash County *v.* Pearson, 120 Ind. 426, 22 N. E. 134, 16 Am. St. Rep. 325; Allen County *v.* Bacon, 96 Ind. 31, where the rule is said to be that if the dangerous condition of the bridge arises from the act of the corporation itself, or from decay or rottenness of the structure it is sufficient in the complaint to charge generally the negligence of defendant in the act of omission complained of.

5. See *supra*, V, C, 3, a, (I), (A).

6. Schroeder *v.* Colbert County, 66 Ala. 137; Low *v.* Windham, 75 Me. 113; Dickie *v.* Boston, etc., R. Co., 131 Mass. 516; Wentworth *v.* Summit, 60 Wis. 281, 19 N. W. 97. *Compare* Jackson County *v.* Nichols, 139 Ind. 611, 38 N. E. 526; Sullivan County *v.* Arnett, 116 Ind. 438, 19 N. E. 299; Hancock County *v.* Leggett, 115 Ind. 544, 18 N. E. 53.

Complaint may allege greater damages than claim.— It is not fatal to the complaint that it demands greater damages than the claim which is presented before the board; but the court may properly limit the recovery to the amount which plaintiff demanded in his claim. Homan *v.* Franklin County, 98 Iowa 692, 68 N. W. 559.

7. Fulton Iron, etc., Works *v.* Kimball Tp., 52 Mich. 146, 17 N. W. 733.

he also has the burden of establishing his own freedom from contributory negligence.[8]

(II) *ADMISSIBILITY* — (A) *In General.* Evidence tending to show that defendant had assumed the control and repair of the bridge,[9] and defendant's negligence in the maintenance[10] thereof is admissible. Evidence tending to show contributory negligence on the part of plaintiff should not be excluded.[11]

Where a company fails to maintain a bridge as required by law, the burden of proof is upon it, in an action for an injury alleged to be caused by reason of such failure, to show that its failure to comply with the law was not negligence. Worster *v.* Proprietors Canal Bridge, 16 Pick. (Mass.) 541. See also Beecher *v.* Derby Bridge, etc., Co., 24 Conn. 132.

8. Independent Tp. *v.* Guldner, 7 Kan. App. 699, 51 Pac. 943, construing Kan. Gen. Stat. c. 42, § 48, but holding that where defendant pleads contributory negligence, sets out certain particular acts of plaintiff, and alleges that by reason of such acts plaintiff was injured, the burden of proving such facts is thrown upon defendant.

Presumption where injury results in death. — If a person of reasonable or mature discretion knowing of a defect in a bridge which, by the use of ordinary care could have been avoided, is found dead near the bridge, and it is evident that a fall therefrom has caused his death, it would seem that the fact of his knowledge of the defect, and that it was of such nature that it could have been avoided by reasonable care, would raise the presumption that his own negligence contributed to his death; and, in the absence of proof rebutting such presumption, no recovery could be had. Peaslee *v.* Chatham, 69 Hun (N. Y.) 389, 23 N. Y. Suppl. 628, 52 N. Y. St. 695; Achtenhagen *v.* Watertown, 18 Wis. 331, 86 Am. Dec. 769. But see Strong *v.* Stevens Point, 62 Wis. 255, 22 N. W. 425, holding that, where a boy eight years of age while crossing a bridge fell through a large hole therein and was drowned, it was for the jury to pass upon the question whether he was guilty of contributory negligence. See also Yuran *v.* Randolph, 6 Vt. 369.

9. Tolland *v.* Willington, 26 Conn. 578; Sherwood *v.* Weston, 18 Conn. 32; Jessup *v.* Osceola County, 92 Iowa 178, 60 N. W. 485, the last case holding that a copy of a resolution by the county board, which tended to show that the structure was one for the building of which the county had paid, is admissible. See also Knox County *v.* Montgomery, 109 Ind. 69, 9 N. E. 590.

10. Eginoire *v.* Union County, 112 Iowa 558, 84 N. W. 758; Whitman *v.* Groveland, 113 Mass. 553; Lay *v.* Adrian, 75 Mich. 438, 42 N. W. 959; Woodbury *v.* Owosso, 64 Mich. 239, 31 N. W. 130. See also Tomlinson *v.* Derby, 43 Conn. 562.

Other defects. — As the whole structure is usually to be considered by the jury, evidence of other defects than the one immediately causing the injury is admissible. Hughes *v.* Muscatine County, 44 Iowa 672; Snyder *v.* Albion, 113 Mich. 275, 71 N. W. 475; Woodbury *v.* Owosso, 64 Mich. 239, 31 N. W. 130. See also Pearson *v.* Spartanburg County, 51 S. C. 480, 29 S. E. 193.

Repairs after injury. — The fact that a bridge was repaired soon after the injury is not admissible to show negligence in its maintenance (Shelby County *v.* Blair, 8 Ind. App. 574, 36 N. E. 216; Woodbury *v.* Owosso, 64 Mich. 239, 31 N. W. 130; Fulton Iron, etc., Works *v.* Kimball Tp., 52 Mich. 146, 17 N. W. 733. And see Morrell *v.* Peck, 88 N. Y. 398 [*reversing* 24 Hun (N. Y.) 37]); but if the repairs are made soon after the accident, such evidence is admissible to show that defendant exercised control over the bridge, and should keep the same in repair (Shelby County *v.* Blair, 8 Ind. App. 574, 36 N. E. 216; Walker *v.* Point Pleasant, 49 Mo. App. 244; Morrell *v.* Peck, 88 N. Y. 398 [*reversing* 24 Hun (N. Y.) 37]; Folsom *v.* Underhill, 36 Vt. 580. *Compare* Titler *v.* Iowa County, 48 Iowa 90; Holmes *v.* Hamburg, 47 Iowa 348).

Subsequent defective condition.—While evidence of a defective condition of the bridge immediately after the accident would be admissible (Jessup *v.* Osceola County, 92 Iowa 178, 60 N. W. 485), such evidence would be irrelevant if relating to the condition at a period remote from the acident (Washington, etc., Turnpike Co. *v.* Case, 80 Md. 36, 30 Atl. 571).

Under an allegation of the incompetency of the keeper of a bridge, it may be shown that he had been, a short time previous to the accident, temporarily insane. Goodale *v.* Portage Lake Bridge Co., 55 Mich. 413, 21 N. W. 866.

11. Wilson *v.* Granby, 47 Conn. 59, 36 Am. Rep. 51; Parke County *v.* Sappenfield, 6 Ind. App. 577, 33 N. E. 1012 (holding that it was error to reject evidence of a conversation between plaintiff and his wife, on the eve of the accident, to the effect that she did not want to go home because it was dangerous on account of the team having acted badly on the way over); Walker *v.* Decatur County, 67 Iowa 307, 25 N. W. 256 (holding that it was error to exclude evidence that the injured party could have reached his destination by another road, equally convenient, over a good bridge).

Res gestæ. — Where the defense to an action was the contributory negligence of plaintiff in going upon the bridge at too great a speed, evidence of what was said and done by plaintiff and his assistant in regard to checking the speed of the engine before going upon the bridge is admissible on plaintiff's behalf as a part of the *res gestæ*. Stebbins *v.* Keene Tp., 55 Mich. 552, 22 N. W. 37. See also Baldridge, etc., Bridge Co. *v.* Cartrett, 75 Tex. 628, 13 S. W. 8, holding that plaintiff might

(B) *To Show Notice of Defect.* As tending to show that defendant had notice of the condition of the bridge, evidence is admissible that other horses were frightened at the defect,[12] or that other persons had at the same place been injured under similar circumstances;[13] and for the same purpose evidence of the general defective condition of the bridge is admissible.[14]

(III) *Weight and Sufficiency.* To sustain the action, it is essential that at least some evidence of negligence on the part of defendant be shown,[15] and a verdict in favor of defendant will not be disturbed where the evidence, instead of showing negligence, shows only a mistake of judgment in the selection of material for repairs.[16] On the other hand, it is held that where the only rebutting evidence to the direct testimony of plaintiff and her husband that they were free from negligence is that the husband had made certain conflicting statements concerning the accident, a verdict for plaintiff will not be disturbed.[17]

e. Instructions. The broad rule that in determining whether a court has properly presented the law applicable to the case in issue the instructions must be construed as an entirety applies to this action.[18] Words imputing liability or nonliability generally should be restricted to some definiteness of meaning,[19] and care

testify that while his mules were backing he looked around and saw the railing to the bridge, but thought that would stop them; this being a part of the *res gestæ*.

12. Smith *v.* Sherwood Tp., 62 Mich. 159, 28 N. W. 806; Thomas *v.* Springville City, 9 Utah 426, 35 Pac. 503.

13. Chicago *v.* Powers, 42 Ill. 169, 89 Am. Dec. 418, holding that a resolution passed by a city council reciting that, owing to insufficient lights and protection at the approaches of a bridge, several accidents had occurred, resulting in the injury or death of citizens, and referring the matter to the committee of harbors and bridges, is admissible to show that the city had notice of the defects.

Evidence that a party fell from a foot-bridge and was injured at the same place that a horse was injured, between the wagon-way and the foot-bridge, has no tendency to show that the wagon-way was unsafe for travel on horseback, and would consequently be inadmissible on the question of notice. Shelley *v.* Austin, 74 Tex. 608, 12 S. W. 753.

14. Spearbracker *v.* Larrabee, 64 Wis. 573, 25 N. W. 555.

A written report by the street commissioner that a bridge was decayed, which report was printed and circulated by the city, is admissible to show that the municipal officers had notice of the defect. Bond *v.* Biddeford, 75 Me. 538.

Declaration of the road commissioner made after the accident has happened has been held not to be admissible to charge the township with notice of the defect. O'Neil *v.* Deerfield Tp., 86 Mich. 610, 49 N. W. 596; Stebbins *v.* Keene Tp., 55 Mich. 552, 22 N. W. 37.

15. See Beecher *v.* Derby Bridge, etc., Co., 24 Conn. 132; O'Neil *v.* Deerfield Tp., 86 Mich. 610, 49 N. W. 596; Beckwith *v.* Van Buren Tp., 66 Mich. 89, 33 N. W. 29 [*following* Abernethy *v.* Van Buren Tp., 52 Mich. 383, 18 N. W. 116]; Caron *v.* Green Bay, 72 Wis. 118, 39 N. W. 134.

Gross or wilful negligence can only be shown by the fact that the bridge was essentially deficient in some respect, and that the defect was of such nature that the company must have known it, and wilfully and unreasonably neglected to repair the same (Shelby County *v.* Scearce, 2 Duv. (Ky.) 576); and the mere fact that the agents of a company might have discovered the defect by the exercise of ordinary care is not sufficient evidence of gross negligence upon their part (Muldraugh's Hill, etc., Turnpike Co. *v.* Maupin, 79 Ky. 101).

Ownership of a bridge is sufficiently shown by testimony of the mayor of a city, of the city engineer, and of a member of the city council, without including any ordinance authorizing the building of the same. Austin *v.* Emanuel, 74 Tex. 621, 12 S. W. 318.

A sufficient showing of notice to a county of a defect in a bridge is made by evidence that they directed it to be propped up so that it could be used for travel. Einseidler *v.* Whitman County, 22 Wash. 388, 60 Pac. 1122. See also Cloud County *v.* Vickers, 62 Kan. 25, 61 Pac. 391.

16. Loar *v.* Heinz, 28 Ill. App. 584.

17. Thrasher *v.* Postel, 79 Wis. 503, 48 N. W. 600. See also Sullivan County *v.* Sisson, 2 Ind. App. 311, 28 N. E. 374; Caldwell *v.* Vicksburg, etc., R. Co., 41 La. Ann. 624, 6 So. 217; Moore *v.* Kenockee Tp., 75 Mich. 332, 42 N. W. 944, 4 L. R. A. 555; Townsend *v.* Susquehannah Turnpike Road, 6 Johns. (N. Y.) 90, where the evidence was held sufficient to sustain a verdict for plaintiff.

18. *Connecticut.*— See Seger *v.* Barkhamsted, 22 Conn. 290.

Georgia.— Bibb County *v.* Ham, 110 Ga. 340, 35 S. E. 656.

Iowa.—Eginoire *v.* Union County, 112 Iowa 558, 84 N. W. 758; Homan *v.* Franklin County, 98 Iowa 692, 68 N. W. 559.

Michigan.—Bettys *v.* Denver Tp., 115 Mich. 228, 73 N. W. 138.

Pennsylvania.— Finnegan *v.* Foster Tp., 163 Pa. St. 135, 29 Atl. 780.

Texas.— Shelley *v.* Austin, 74 Tex. 608, 12 S. W. 753.

See 8 Cent. Dig. tit. "Bridges," § 121.

19. Koenig *v.* Arcadia, 75 Wis. 62, 43 N. W. 734, where the court having used the words "fault," "defect," and "unsafe," without ad-

should be taken that proof of defects not necessitated by plaintiff's pleadings are not required of him;[20] but defendant should not be made an insurer.[21] On the other hand, the instruction must not relieve plaintiff from the duty of exercising proper care in his use of the bridge.[22]

f. Damages. If defendants have been guilty of gross negligence in their maintenance of a bridge, exemplary damages may be awarded against them;[23] and where plaintiff's property is injured by reason of the occurrence, the fact that its use was valuable to him at that particular time may be considered in estimating the damages;[24] but under a statute providing for the recovery of actual damages, the right of plaintiff to recover the amount paid his employees for their loss of time necessitated by the injury has been denied.[25]

VI. LIABILITY FOR INJURY TO BRIDGE.

A. In General. Where an injury has been negligently or intentionally done a bridge, the wrong-doer may, in an appropriate action, be held accountable for the same,[26] and if the injury is intentional, he may, in some jurisdictions, be proceeded against by indictment.[27] If the wrong be a negligent

vising the jury as to whether such words were used in their full and unrestricted meaning or not, and without putting some limitation upon the words, it was held that the charge was erroneous.

20. Thus, where plaintiff alleges that he was injured in consequence of the absence of a guard-rail on one of the abutments of a bridge, the charge should not be given that he must show that there was no guard-rail connected with the bridge. Augusta *v.* Hudson, 88 Ga. 599, 15 S. E. 678.

21. Gulf, etc., R. Co. *v.* Taylor, (Tex. Civ. App. 1895) 31 S. W. 214. See also Coan *v.* Brownstown Tp., 126 Mich. 626, 86 N. W. 130.

22. Homan *v.* Franklin County, 90 Iowa 185, 57 N. W. 703; Benedict *v.* Port Huron, 124 Mich. 600, 83 N. W. 614; St. Clair Mineral Springs Co. *v.* St. Clair, 96 Mich. 463, 56 N. W. 18; Staples *v.* Canton, 69 Mo. 592; McFail *v.* Barnwell County, 57 S. C. 294, 35 S. E. 562 (holding that, under S. C. Rev. Stat. (1893), § 1169, which makes a county liable for an injury arising from a defective bridge, any degree of negligence on the part of plaintiff will preclude a recovery, and the instruction must so state).

Assumption as to location of bridge.— An instruction that "if the bridge in question, being within the city, was defective" is not erroneous as assuming that the bridge was in fact located within the limits of the city. Logansport *v.* Justice, 74 Ind. 378, 39 Am. Rep. 79.

Exclusion of res gestæ.— An instruction that "in considering this case you ought to lay out of your minds the fact that an accident happened upon it, and decide that question just as you would have decided it if you had been called, with the same evidence of the condition of the bridge, to decide it before an accident had happened at all; . . . so you will look at the bridge just as the evidence shows it to you before the accident happened" is erroneous as excluding from the jury the *res gestæ*. Koenig *v.* Arcadia, 75 Wis. 62, 66, 43 N. W. 734.

It is not error to define both artificial and natural watercourses if, under the law of the state, defendant is bound to maintain bridges over both of such courses. Jackson County *v.* Nichols, 139 Ind. 611, 38 N. E. 526.

23. Muldraugh's Hill, etc., Turnpike Co. *v.* Maupin, 79 Ky. 101; Whipple *v.* Walpole, 10 N. H. 130.

24. Foster *v.* Lyon County, 63 Kan. 43, 64 Pac. 1037; Woodbury *v.* Owosso, 64 Mich. 239, 31 N. W. 130. See also McKeller *v.* Monitor Tp., 78 Mich. 485, 44 N. W. 412.

25. Pearson *v.* Spartanburg County, 51 S. C. 480, 29 S. E. 193.

Loss of service, expense of nursing, etc.— Under the Connecticut statute giving a right of action against a town for an injury to a person or his property caused by a defective bridge, it is held that the loss of service of one's wife and daughter and the expense incurred in their sickness, while undoubtedly "property" was not that species of property which the statute awarding the action evidently contemplated. Chidsey *v.* Canton, 17 Conn. 475.

26. Wellington County *v.* Wilson, 16 U. C. C. P. 124.

Actions for injuries to highways and bridges in different districts cannot be joined in one action. Denver Tp. *v.* White River Log, etc., Co., 51 Mich. 472, 16 N. W. 817.

27. Owens *v.* State, 52 Ala. 400 (holding that an indictment, under Ala. Rev. Code, § 3737, charging the wilful destruction or injury, otherwise than by burning, of a certain public bridge, need not contain an averment of its ownership and value); O'Dea *v.* State, 16 Nebr. 241, 20 N. W. 299 (holding that where it was conclusively shown that defendant knew that the highway over the bridge had been established, he was not entitled to an instruction based upon his belief in the non-existence of the road and his right to destroy the bridge).

For form of indictment in substance for wilful injury to a bridge see Owens *v.* State, 52 Ala. 400.

one,[28] an action for damages may be maintained at the instance of the corporate owners, or of the party or town whose duty it is to repair the same;[29] but it has been held that a town cannot recover for such injury until it has incurred some expense in making repairs occasioned thereby.[30]

B. By Whom Action Brought. No general rule can be laid down as to the party in whose name an action for the injury to a bridge or for a penalty for its destruction must be brought; the statutes being by no means uniform in this regard.[31]

C. Defenses. The mere fact that a bridge does not in all respects comply with the requirements of the statute or franchise authorizing its construction is not a defense in an action to recover for an injury thereto, if the omission was not a real or proximate cause of the injury.[32]

28. Necessity of alleging negligence.— The action for damages inflicted to a bridge by a party navigating the stream is not one of trespass, but negligence must be proved. Chico Bridge Co. *v.* Sacramento Transp. Co., 123 Cal. 178, 55 Pac. 780.

Prima facie negligence.— Where, in an action for damages inflicted by a steamer, the evidence showed that for several years previous the river had been navigable at all stages, and that a slight injury to the bridge had occurred only once before the suit, and only a few slight injuries since the suit, and that the draw in the bridge in no way contributed to the accident, it was held that the facts showed a *prima facie* case of negligence on the part of the navigators. Chico Bridge Co. *v.* Sacramento Transp. Co., 123 Cal. 178, 55 Pac. 780.

29. Chico Bridge Co. *v.* Sacramento Transp. Co., 123 Cal. 178, 55 Pac. 780 (holding that the bridge company, being in duty bound to repair the bridge, had a right to maintain the action against the wrong-doer, notwithstanding the fact that the county could, under its agreement with the bridge company, resume control and possession of the bridge at any time); Cue *v.* Brelland, 78 Miss. 864, 29 So. 850 (where plaintiff, having built a bridge for the county and obligated himself to keep the same in repair for a period of five years, it was held that an injury to the bridge resulting from the negligent driving of logs against it was an injury to him, and he was therefore entitled to maintain a suit against defendant for the damages so sustained); Hooksett *v.* Amoskeag Mfg. Co., 44 N. H. 105; Troy *v.* Cheshire R. Co., 23 N. H. 83, 55 Am. Dec. 177; Bidelman *v.* State, 110 N. Y. 232, 18 N. E. 115, 18 N. Y. St. 107, 1 L. R. A. 258; Ft. Covington *v.* United States & C. R. Co., 8 N. Y. App. Div. 223, 40 N. Y. Suppl. 313 [*affirmed* in 156 N. Y. 702, 51 N. E. 1094]. See also Pierrepont *v.* Lovelass, 4 Hun (N. Y.) 696, where, it appearing that a town having lawfully acquired the right to maintain a bridge, it was held that it might maintain an action to recover damages for an injury thereto.

Evidence of ownership — Prescription.— Evidence that for more than ten years a county had the claim and control of a bridge and continuously used it as a public county structure, and that after such time the bridge was repaired at the expense of the county, is sufficient to show such prescriptive title to the ownership of the bridge as will entitle the county to sue for an injury thereto. Howard County *v.* Chicago, etc., R. Co., 130 Mo. 652, 32 S. W. 651.

30. Freedom *v.* Weed, 40 Me. 383, 63 Am. Dec. 670, the decision resting upon the theory that the town, in some instances, might neglect to repair the bridge, and never be called upon to restore it to its former state; and, being under no obligation by contract to make the repairs, it could not call for payment until there had been something in the nature of a disbursement.

31. *Illinois.*— McDonough County *v.* Markham, 19 Ill. 159, holding that an action to recover a penalty for the destruction of a bridge must be brought either in the name of the county commissioner or of the board of supervisors.

Michigan.— Denver Tp. *v.* White River Log & Booming Co., 51 Mich. 472, 16 N. W. 817, where it is held that actions for injuries to bridges must be brought by the overseer of highways, or, if he is disqualified from suing, then by the commissioner of highways.

New Jersey.— Suits for the protection of such property are properly brought in the name of the board of chosen freeholders. Monmouth County *v.* Red Bank, etc., Turnpike Co., 18 N. J. Eq. 91.

North Carolina.—Burke County *v.* Catawba Lumber Co., 115 N. C. 590, 20 S. E. 707, 847, where it is held that the county commissioners may sue in their own name to enjoin an injury and to recover damages for such injury.

Ohio.— The action must be brought by the county commissioners when it is their duty to keep the bridge in repair (Perry County *v.* Newark, etc., R. Co., 43 Ohio St. 451, 2 N. E. 854); but if the bridge is situated within the corporate limits of another city, which, under the statute, is bound to repair and control the same, and the county commissioners have no control thereover, they cannot maintain an action for damages in such case (Mahoning County *v.* Pittsburg, etc., R. Co., 45 Ohio St. 401, 15 N. E. 468). And see Gallia County *v.* Holcomb, 7 Ohio 232, holding that under the statutes at that time, the county commissioners could not maintain an action for an injury to public roads or bridges.

32. Cumberland County *v.* Central Wharf Steam Tow-Boat Co., 90 Me. 95, 37 Atl. 867, 60 Am. St. Rep. 246.

D. Damages. The measure of damages for injury to a bridge is usually the amount which must necessarily be expended in repairing or restoring it,[33] but in some jurisdictions the party is, by statute, liable to greater damages.[34]

BRIEF. A detailed statement of a party's case;[1] an abridgment of a plaintiff's or defendant's case, prepared by his attorney, for the instruction of counsel on a trial at law;[2] 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 defense, for the instruction of counsel at the trial or hearing;[3] a condensed statement of the propositions of law which the counsel desire to establish, indicating the reasons and authorities which sustain them.[4] (Brief: Of Evidence, see APPEAL AND ERROR. Of Title, see ABSTRACTS OF TITLE. On Appeal or Error, see APPEAL AND ERROR.)

BRIGADE. See ARMY AND NAVY.[5]

BRING IN. To import;[6] to introduce.[7]

BRITISH. See ALIENS; CITIZENS.

BROCAGE or BROKERAGE. The commission or percentage paid to brokers on the sale or purchase of goods, etc.[8] (See, generally, FACTORS AND BROKERS.)

BROKEN. Out of repair.[9]

BROKEN STOWAGE. That space in a ship which is not filled by her cargo.[10]

BROKERAGE. See BROCAGE.

A worthless and decayed condition of a public bridge will not consitute a defense to an indictment against one for its destruction. Owens *v.* State, 52 Ala. 400.

Hindrance to navigation.—Inasmuch as the state may, in the absence of restrictive legislation by congress, authorize an erection of bridges across navigable rivers, it is no defense in a prosecution for the destruction of a bridge that it prevented the accused from navigating the stream. State *v.* Leighton, 83 Me. 419, 22 Atl. 380. Nor where the injury is caused by a raft of logs allowed to carelessly drift against the bridge, can the defendants show that there was a large amount of timber at the head waters of the river, and that it could not be taken to market in any other mode than that pursued by them. Sewalls Falls Bridge *v.* Fisk, 23 N. H. 171.

Improper construction.— In an action to recover damages for an injury to a bridge, if there is no averment of an improper or faulty construction of the bridge, evidence that if certain protections to the bridge had been built the collision would not have happened is inadmissible. Chico Bridge Co. *v.* Sacramento Transp. Co., 123 Cal. 178, 55 Pac. 780.

The fact that one is under orders from a street railway company of which he is an employee will not exonerate him. Smith *v.* District of Columbia, 12 App. Cas. (D. C.) 33.

33. Ft. Covington *v.* U. S., etc., R. Co., 8 N. Y. App. Div. 223, 40 N. Y. Suppl. 313 [*affirmed* in 156 N. Y. 702, 51 N. E. 1094].

If a toll-bridge, the damages would be the value of the structure destroyed, and the loss of tolls during the time reasonably necessary to rebuild it. Sewalls Falls Bridge *v.* Fisk, 23 N. H. 171.

34. In the District of Columbia any one convicted of injuring any bridge therein may be fined not exceeding fifty dollars. Smith *v.* District of Columbia, 12 App. Cas. (D. C.) 33.

In Michigan, treble damages are allowed against any party found guilty of injuring any bridge maintained by the public. The damages contemplated in these statutes, however, must be computed from the injury to the structure and not to public travel, and evidence of the importance of the road to the people is inadmissible. Shepard *v.* Gates, 50 Mich. 495, 15 N. W. 878. Nor would he be liable to such penalty for mere negligent acts resulting in injury, but the injury complained of must be wilful. St. Ignace Tp. *v.* Pelton, (Mich. 1901) 87 N. W. 1029.

1. Bouvier L. Dict. [*quoted* in Gardner *v.* Stover, 43 Ind. 356, 357].
2. Burrill L. Dict. [*quoted* in Gardner *v.* Stover, 43 Ind. 356, 357].
3. Wharton L. Dict. [*quoted* in Parker *v.* Hastings, 12 Ind. 654, 656].
4. Duncan *v.* Kohler, 37 Minn. 379, 381, 34 N. W. 594.
5. 3 Cyc. 849, note 45.
6. U. S. *v.* Jordan, 2 Lowell (U. S.) 537, 539, 26 Fed. Cas. No. 15,498, 23 Int. Rev. Rec. 9; The Brig Wilson *v.* U. S., 1 Brock (U. S.) 423, 434, 30 Fed. Cas. No. 17,846.
7. U. S. *v.* Jordan, 2 Lowell (U. S.) 537, 539, 26 Fed. Cas. No. 15,498, 23 Int. Rev. Rec. 9.
8. Wharton L. Lex.
9. Reg. *v.* Southampton County, 16 Cox C. C. 117, 124, 55 L. T. Rep. N. S. 322.
10. Wharton L. Lex.

BROTHEL. A Bawdy House, *q. v.*[11]

BROTHER. A male person who has the same father and mother with another person, or who has one of them;[12] one born of the same mother and father.[13]

BROTHER-IN-LAW. The brother of one's husband or wife; also one's sister's husband.[14]

BROUGHT. Commenced;[15] instituted;[16] begun.[17]

BRUISE. A hurt with something blunt and heavy.[18]

BUBBLES. Projects started by dishonest individuals to cheat and rob the public.[19]

BUCKET-SHOP. See Gaming.

BUGGERY. See Sodomy.

BUGGY. A name given to several species of carriages or gigs.[20] (Buggy: Exemption From Execution, see Executions.)

BUILD. To erect or construct, as an edifice or fabric of any kind; to form by uniting materials into a regular structure; to fabricate; to make; to raise.[21]

11. Bouvier L. Dict.

12. Anderson *v.* Bell, 140 Ind. 375, 379, 39 N. E. 735, 29 L. R. A. 541 [*citing* Webster Dict.].

13. Johnson Dict. [*quoted* in Grieves *v.* Rawley, 10 Hare 63, 64, 22 L. J. Ch. 625, 44 Eng. Ch. 63]. See also State *v.* Schaunhurst, 34 Iowa 547; Bridgman *v.* London L. Assur. Co., 44 U. C. Q. B. 536, 540.

14. Farmers' L. & T. Co. *v.* Iowa Water Co., 80 Fed. 467, 469 [*citing* Century Dict.; Webster Dict.].

15. Society, etc. *v.* Whitcomb, 2 N. H. 227, 230; Hames *v.* Judd, 18 N. Y. Civ. Proc. 324, 325; Goldenberg *v.* Murphy, 108 U. S. 162, 163, 2 S. Ct. 388, 27 L. ed. 686; Kaeiser *v.* Illinois Cent. R. Co., 2 McCrary (U. S.) 187, 6 Fed. 1, 4; Berger *v.* Douglas County, 2 McCrary (U. S.) 483, 486, 5 Fed. 23; Rawle *v.* Phelps, 2 Flipp. (U. S.) 471, 473, 20 Fed. Cas. No. 11,588, 9 Centr. L. J. 46, 8 N. Y. Wkly. Dig. 551, 8 Reporter 356.

16. Berger *v.* Douglas County, 2 McCrary (U. S.) 483, 486, 5 Fed. 23.

17. Hames *v.* Judd, 18 N. Y. Civ. Proc. 324, 325.

18. State *v.* Owen, 5 N. C. 452, 455, 4 Am. Dec. 571.

19. Wharton L. Lex.

20. Century Dict.

21. Webster Dict [*quoted* in Little Rock, etc., R. Co. *v.* Spencer, 65 Ark. 183, 193, 47 S. W. 196, 42 L. R. A. 334; Morse *v.* West Port, 110 Mo. 502, 507, 19 S. W. 831].